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CRIMINAL PROCEDURE—DOUBLE JEOPARDY—RETRIAL AFTER MISTRIAL—WHEN MISTRIAL IS BASED ON INCONSISTENT JURY VERDICT, TRIAL COURT'S DECISION IS AFFORDED BROAD DEFERENCE IN DETERMINATION OF WHETHER GRANT OF MISTRIAL WAS RESULT OF "MANIFEST NECESSITY."

Crawford v. Fenton (1981)

On April 19, 1977, the petitioner, Rooks Edward Crawford, was indicted for conspiring to violate the narcotics laws of the state of New Jersey.[1] The trial judge provided the jury with special interrogatories contained in a verdict form,[2] and the jury returned a verdict finding petitioner guilty of conspiracy.[3] Believing that there was a possible inconsistency between the guilty verdict and the answers to the special interrogatories,[4] the trial judge ordered the jury to continue its deliberations.[5] After further deliberation, the jury asked to be released.[6] Over the defendant's objection, the trial judge declared a mistrial[7] stating that there was a "manifest necessity" to do so.[8]

While being held for retrial, the petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Dis-

1. Crawford v. Fenton, 490 F. Supp. 766 (D.N.J. 1980). Specifically, petitioner was charged with violating N.J. STAT. ANN. §§ 24:21-19, -21 & -24 (West 1980). 490 F. Supp. at 778. A jury trial of Crawford and seven codefendants began on March 13, 1978 in the New Jersey Superior Court. *Id.*

2. Crawford v. Fenton, 490 F. Supp. 766, 778, 787 (D.N.J. 1980).

3. *Id.* at 779. In addition, two other defendants were found guilty of conspiracy. *Id.* Four defendants were acquitted, and the jury was unable to reach a verdict as to the eighth defendant. *Id.*

4. 646 F.2d 810, 813 (3d Cir. 1981). This possibility was brought to the court's attention by one of the defense counsel. *Id.* at 813. The inconsistency lay in the fact that in answering the interrogatories, the jury found that the petitioner had conspired to distribute a controlled dangerous substance (CDS), and also found that he had not conspired either to possess, or to possess with the intent to distribute a CDS. 490 F. Supp. at 779.

5. Crawford v. Fenton, 490 F. Supp. 766, 799 (D.N.J. 1980). When the judge ordered the jury back to the courtroom, an additional inconsistency between the general verdict and the special interrogatories was found. *Id.* at 779. This was a result of the jury changing its original "yes" answer as to whether the scope of the conspiracy related to distribution of a CDS, to a "no" answer. *See id.*

6. 646 F.2d at 815.

7. *Id.* For the exact course of events leading up to the declaration of the mistrial by the trial judge, see *id.* at 813-15.

8. *Id.* at 815. By the time the mistrial was declared, the jury had sent 24 notes to the trial judge. *Id.* For a discussion of the "manifest necessity" test, see notes 17 & 20 *infra.*

trict of New Jersey.[9] The district court held that the double jeopardy clause of the fifth amendment prevented the petitioner's retrial,[10] and therefore issued the writ of habeas corpus.[11] On appeal, the United States Court of Appeals for the Third Circuit[12] reversed, *holding* that when a mistrial is based on an inconsistent jury verdict the trial court has broad discretion in determining whether a retrial violates the double jeopardy clause. *Crawford v. Fenton,* 646 F.2d 810 (3d Cir. 1981).

The double jeopardy clause of the fifth amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[13] However, the guarantees of the double

9. 646 F.2d at 815. Federal habeas corpus relief is available to a prisoner convicted in a state court. *See* 28 U.S.C. § 2254 (1976). Section 2254(a) provides in pertinent part:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Id. § 2254(a).

10. Crawford v. Fenton, 490 F. Supp. 766, 786 (D.N.J. 1980). The district court stated that alternatives to a mistrial had to be considered, and if "obvious and adequate alternatives to aborting the trial were disregarded, this suggests the trial judge acted unjustifiably." *Id.* at 785. Feeling that a "clear charge" to the jury may have dissipated the jury's confusion, the district court held that the trial judge abused his discretion in finding that "manifest necessity" existed for declaring a mistrial. *Id.*

11. *Id.*

12. The case was heard by Judges Adams, Garth and Sloviter. Judge Garth delivered the opinion of the court. Judge Sloviter filed a dissenting opinion.

13. U.S. CONST. amend. V. The Supreme Court has stated:

> The Fifth Amendment's prohibition against placing a defendant 'twice in jeopardy' represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. A power in government to subject an individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws.

United States v. Jorn, 400 U.S. 470, 479 (1971) (citation omitted). The Court has also noted that the policy underlying the double jeopardy provision is that the state, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense. Green v. United States, 355 U.S. 184, 187 (1957). The *Green* Court stated that allowing the state to do so would subject one to embarrassment and expense, and compel the accused to live in a continuing state of anxiety and insecurity. *Id.* In addition, the Court noted that repeated attempts to convict an individual will enhance the possibility that even though innocent, one may eventually, if subjected to repeated trials, be found guilty. *Id.* at 188. *See also* Wade v. Hunter, 336 U.S. 684 (1949).

For a history of double jeopardy, see M. FRIEDLAND, DOUBLE JEOPARDY 5-15 (1969); J. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL PHILOSOPHY 1-37 (1969).

jeopardy clause are by no means absolute,[14] and a defendant may be reprosecuted when any of a number of exceptions are found applicable.[15]

Of these exceptions, one of the most important and most troublesome, the permissibility of reprosecution after a mistrial,[16] was set forth more than 150 years ago in *United States v. Perez*.[17] In *Perez*, the defendant had been tried on a capital charge.[18] When the jurors were unable to reach a verdict, they were discharged and the defendant was held for a retrial.[19] The Court permitted a retrial, holding that a trial may be discontinued and the defendant reprosecuted for the same offense when there is a "manifest necessity" to abort the original trial.[20]

14. *See* Schulhafer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 454-57 (1977). *See* note 15 *infra*.

15. *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121 (1959) (acquittal by federal court will not provide immunity against state prosecution for same offense); Woodring v. United States, 337 F.2d 235 (9th Cir. 1964), *cert. denied*, 380 U.S. 933 (1965) (prior verdict no bar to later prosecution where the first court lacked jurisdiction); United States v. Sutton, 245 F. Supp. 357 (D. Md. 1965), *aff'd*, 363 F.2d 845 (4th Cir. 1966), *cert. denied*, 385 U.S. 1014 (1967) (acquittal on state charges no bar to federal prosecution for same offense). *Cf.* Gore v. United States, 357 U.S. 386 (1958) (when elements of prior prosecution differ from subsequent one, double jeopardy not implicated).

16. *See* notes 17-20 and accompanying text *infra*.

17. 22 U.S. (9 Wheat.) 579 (1824). At the time of the *Perez* decision, a majority of courts took the position that the trial court had the authority to discharge the jury before it reached a verdict and the defendant could be reprosecuted in cases of "evident or manifest necessity". *See, e.g.*, United States v. Coolidge, 25 F. Cas. 622, 623 (C.C.D. Mass. 1815) (No. 14,858); United States v. Workman, 28 F. Cas. 771, 773 (C.C.D. La. 1807) (No. 16,764); Nugent v. State, 4 Stew. & P. 72, 77 (Ala. 1833); Atkins v. State, 16 Ark. 568, 579 (1855); O'Brien v. Commonwealth, 69 Ky. (6 Bush) 563, 568 (1870); Hoffman v. State, 20 Md. 425, 435 (1863); Commonwealth v. Bowden, 9 Mass. 494, 495 (1813); Price v. State, 36 Miss. 531, 543-44 (1858); People v. Denton, 2 Johns. Cas. 275 (N.Y. Sup. Ct. 1801); Hurley v. State, 6 Ohio 399, 403 (1834); Commonwealth v. Cook, 6 Serg. & Rawl. 577, 585-86 (Pa. 1822); State v. M'Kee, 17 S.C.L. (1 Bail.) 651 (1830). *See also* Commonwealth v. Purchase, 19 Mass. (2 Pick.) 521, 524-25 (1824); People v. Goodwin, 18 Johns. Cas. 187, 205 (N.Y. Sup. Ct. 1801); *In re* Spier, 12 N.C. (1 Dev.) 491, 499 (1828); Stewart v. State, 15 Ohio St. 155, 161 (1864); Poage v. State, 3 Ohio St. 229, 239-40 (1854). For a general discussion of the manifest necessity test, see Note, *Double Jeopardy*, 24 MINN. L. REV. 522 (1940).

18. 22 U.S. (9 Wheat.) at 579.

19. *Id.*

20. *Id.* at 580. In an opinion authored by Mr. Justice Story, the Court held in effect that the discharge of a "hung" jury did not bar further proceedings:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with

Supreme Court cases after *Perez* gave very broad deference to the trial court's finding of a "manifest necessity" for the granting of a mistrial.[21] For example, in *Gori v. United States*,[22] the Court declined to "scrutinize with sharp surveillance," the exercise of a trial judge's discretion to declare a mistrial.[23] Courts thereafter considered the proposition settled that a mistrial followed by a retrial was the proper course to follow in the event of a hung jury.[24]

More recently, the Supreme Court altered mistrial jurisprudence by becoming more active in reviewing declarations of mistrials, and more apt to find reprosecutions violative of the double jeopardy clause. In the 1963 case of *Downum v. United States*,[25] the jury had been selected and sworn[26] when the prosecutor asked that the jury be dis-

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any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.

Id.

The Supreme Court has agreed with the trial courts finding of "manifest necessity" and allowed retrials on several occasions. *See* United States v. Sanford, 429 U.S. 14 (1976) (per curiam) (hung jury); Lovato v. New Mexico, 242 U.S. 199 (1916) (jury dismissed pending rearraignment of defendant and then reimpaneled); Dreyer v. Illinois, 187 U.S. 71 (1902) (hung jury); Thompson v. United States, 155 U.S. 271 (1894) (mistrial declared upon discovery that juror had been member of grand jury that indicted defendant); Logan v. United States, 144 U.S. 263 (1892) (hung jury); Simmons v. United States, 142 U.S. 148 (1891) (mistrial declared upon discovery of biased jurors). *But see* Downum v. United States, 372 U.S. 734 (1963) (double jeopardy clause violated by retrial when jury was discharged because of prosecution's failure to locate a key witness). For a discussion of the frequency of hung juries, *see* H. KELVIN & H. ZEISEL, THE AMERICAN JURY 757 & n.2 (1966). For a discussion of *Downum* see notes 25-34 and accompanying text *infra*.

21. *See* Comment, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1277 (1964). In fact, until the 1960's no Supreme Court decision held the grant of a mistrial to be improper under *Perez*. *See id.* at 1277 n.48. Downum v. United States, 372 U.S. 734 (1963), appears to be the first case in which the Supreme Court found that a mistrial barred further prosecution. *See id.*

22. 367 U.S. 364 (1961).

23. *Id.* at 368. Justice Frankfurter, writing for a majority of five, accepted the lower court's finding that the trial judge had displayed "overzealousness" and had acted "too hastily", but declined to examine the propriety of the mistrial ruling on the merits. *Id.* at 366. The Court stressed that it was not able to render an independent judgment upon events which occurred in the heat of the trial. *Id.* at 367.

24. *See, e.g.*, Gilmore v. United States, 264 F.2d 44 (5th Cir.), *cert. denied*, 359 U.S. 994 (1959). *See also* AMERICAN LAW INSTITUTE, ADMINISTRATION OF THE CRIMINAL LAW 79-87 (1935); Annot., 6 L. Ed. 2d 1510, 1517 (1961).

25. 372 U.S. 734 (1963). *Downum* involved a prosecution on eight counts of mail theft and forgery. *Id.* For a further discussion of *Downum* see C. WHITEBREAD, CRIMINAL PROCEDURE § 24.03, at 488-89.

26. 372 U.S. at 735. Prior to the selection of the jury, the prosecution and the defendant had announced to the trial court that they were ready to proceed. *Id.*

charged because his key witness [27] was not present.[28] The prosecution's motion was granted by the trial judge over the defendant's objection.[29] Two days later the case was called again, a second jury impaneled, and the defendant was tried and convicted.[30] On appeal, the Supreme Court held that the defendant had been subjected to double jeopardy and reversed the convictions.[31] Writing for the majority, Justice Douglas [32] recognized that trial courts have the discretion to discharge a jury before it has reached a verdict, but stressed that this discretion should be exercised "only in very extraordinary and striking circumstances." [33] In its closing passage, the Court set forth the premise of its new approach by noting, "we resolve any doubt in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion." [34]

In *United States v. Jorn*,[35] a plurality of the Court continued the type of active review of double jeopardy claims initiated in *Downum*.[36]

27. *Id.* The witness involved was "key" only as to two of the many counts in the indictment. *Id.*

28. *Id.*

29. *Id.* Prior to the granting of the prosecutor's motion by the trial court, the petitioner moved that the two counts for which the missing witness's testimony was important be dismissed for lack of prosecution, and that the trial continue on the other counts. *Id.* This motion was denied. *Id.*

30. *Id.* At this second trial, petitioner was convicted on all counts. *Id.*

31. *Id.* at 738.

32. *Id.* at 734. Justice Douglas wrote for a majority of five, consisting of the *Gori* dissenters (Chief Justice Warren, and Justices Black, Brennan and Douglas) and Mr. Justice Goldberg, who had replaced Mr. Justice Frankfurter on the Court.

33. *Id.* at 736 (citation omitted). Justice Douglas took this same position in his dissent in *Gori*. *See* 367 U.S. at 371-72 (Douglas, J., dissenting). Justice Douglas pointed out that the prohibition of the double jeopardy clause is " 'not against being twice punished, but against being twice put in jeopardy' ". 372 U.S. at 736, *quoting* United States v. Ball, 163 U.S. 662, 669 (1896).

34. 372 U.S. at 738, *quoting* United States *ex rel.* Rush v. Watson, 28 F. Cas. 499, 501 (S.D.N.Y. 1869) (No. 16,651). Noting that the prosecution had been careless in arranging for the presence of its "key" witness, and that this witness was only needed on two of many counts, the majority resolved the doubts as to the propriety of the mistrial "in favor of the liberty of the citizen." 372 U.S. at 734, 737-38. *See* Comment, *supra* note 21, at 1278 ("After *Downum*, the Court began to assume a more active role in controlling the hither to nearly unfettered broad discretion of trial judges to abort criminal proceedings").

35. 400 U.S. 470 (1971). Jorn was prosecuted for willfully assisting in the preparation of fraudulent tax returns. *Id.* at 472. After the jury was sworn, the government called one of the taxpayers whom the defendant allegedly aided as a witness. *Id.* Believing that this witness and several others had not been adequately informed of their rights, the trial judge, *sua sponte*, dismissed the jury and declared a mistrial in order to give the witnesses time to retain their own attorneys and to consult with them. *Id.* at 473.

36. The plurality opinion was authored by Justice Harlan and was joined by Chief Justice Burger and Justices Douglas and Marshall. *Id.* at 472. Justice Black and Justice Brennan took the view that the Supreme Court lacked jurisdiction over the government's appeal because the trial judge's action operated as an "acquittal" of Jorn. *Id.* at 488 (Black, J., concurring); *id.* (Brennan, J., concurring).

The plurality stated that a mistrial may not be declared unless a "scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." [37] Finding a complete absence of any consideration by the trial judge of alternatives to the declaration of a mistrial,[38] the plurality concluded that reprosecution violated the double jeopardy clause of the fifth amendment.[39]

However, in *Illinois v. Somerville*,[40] the Court appeared to retreat from the active review characterized by *Downum* [41] and *Jorn*.[42] In *Somerville*, the state was permitted to subject the defendant to a second trial after a mistrial due to a defect in the prosecutor's indictment.[43] Although the prosecutor was responsible for the error, the Supreme Court allowed a second trial under a cured indictment,[44] noting that the defect was a "jurisdictional" error which tainted the prosecutor's case from the outset, and hence, could not be manipulated to abort a

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37. *Id.* at 485, *citing* United States v. Perez, 22 U.S. (9 Wheat.) at 580. For a discussion of *Perez*, see notes 16-20 and the accompanying text *supra*. The Court commented that the "scrupulous exercise of discretion" standard is applicable to cases except where the defendant moves for a mistrial. 400 U.S. at 485.

38. 400 U.S. at 487. The Court placed great emphasis on the "negligent" manner in which the trial court acted in declaring the mistrial, stating:

> It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial.

Id.

39. *Id.* After *Jorn*, the lower courts began applying a more rigorous standard of review for double jeopardy claims after a mistrial, focusing on the actual "necessity" of declaring a mistrial in light of the alternatives available to the trial judge. For a discussion of these cases, see notes 54-61 and accompanying text *infra*. For a discussion of the old notion of deference to the trial judge in finding "manifest necessity" in mistrial cases, see note 21 *supra*.

40. 410 U.S. 458 (1973).

41. For a discussion of *Downum*, see notes 25-34 and accompanying text *supra*.

42. For a discussion of *Jorn*, see notes 35-39 and accompanying text *supra*.

43. 410 U.S. at 459. After the jury had been impaneled and sworn, the prosecutor became aware of a jurisdictional defect in the indictment that could not be cured by amendment, and which could be asserted to overturn a guilty verdict. *Id.* at 459-60. Accordingly, the prosecution moved for a mistrial, arguing that it should not have to proceed with a case that it could not win and might forever lose if the defendant were acquitted. *Id.*

44. *See id.* at 459.

trial simply because it is not proceeding favorably for the prosecution.[45] The Court concluded that a defendant's interest in proceeding to a final judgment is sometimes not sufficient to override "the public's interest in fair trials designed to end in just judgments," [46] even where the state itself is responsible for the defect in the first proceeding.[47]

The most recent Supreme Court decision examining the scope of a trial judge's discretion to declare a mistrial was *Arizona v. Washington*.[48] The *Washington* Court enunciated a two part test, which triggers either a strict scrutiny or a broad deference standard of review.[49] First, the Court stated that the degree of "deference" to be accorded the trial judge's decision to declare a mistrial depends on the particular circumstances giving rise to the mistrial.[50] If a mistrial has been granted in order to allow the state to achieve a tactical advantage over the accused, the Court stated that the strictest scrutiny of the trial judge's order is appropriate.[51] However, where a trial judge declares a mistrial because of the jury's inability to reach a verdict, then broad deference must be accorded the trial judge's order.[52]

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45. *Id.* at 469-71. The defendant relied on *Downum* for the proposition that because the prosecution itself was responsible for the defect in the first proceeding, the double jeopardy clause precluded the state from instituting the second proceeding. *See id.* at 464, 466. However, the Court found the two cases distinguishable because the defect that caused the mistrial in *Downum,* the failure of a prosecuting witness to appear, is the kind of error that "lend[s] itself to prosecutorial manipulation," whereas the defect in *Somerville* did not create a possibility for abuse. *Id.* at 464.

46. *Id.* at 470, *quoting* Wade v. Hunter, 336 U.S. 684, 689 (1949).

47. 410 U.S. at 471.

48. 434 U.S. 497 (1978). In *Washington,* the respondent's murder conviction was reversed because the prosecution had failed to disclose exculpatory information to the defense. *Id.* at 498. In his opening statement at the second trial, defense counsel stated that he would produce evidence of the prosecution's alleged misconduct at the first trial. *Id.* at 499. Upon the prosecution's motion and over the defendant's objection, the trial judge granted a mistrial. *Id.* at 501.

49. *Id.* at 508-09.

50. *Id.* at 506-07.

51. *Id.* at 508, *citing* Downum v. United States, 372 U.S. 734 (1953). For a discussion of *Downum,* see notes 25-34 and accompanying text *supra.* The Court stated that other situations where application of the strict scrutiny standard would be appropriate are where the basis of the mistrial is the unavailability of critical prosecution evidence, as in *Downum,* or where the state is using its superior resources to harass the accused. 434 U.S. at 508 & nn.24 & 25. The Court also commented that when the strict scrutiny standard is applied, the mistrial order must be accompanied by a "high degree of (manifest) necessity." *Id.* at 516.

52. 434 U.S. at 509. The Court stated:

> [I]n this situation [where the jury is unable to reach a verdict] there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not 'manifest necessity' justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a

The Third Circuit has also dealt with the issue of the proper standard to be used to determine if there was a "manifest necessity" for the trial judge to declare a mistrial over the defendant's objection.[53] In *United States v. McKoy*,[54] the Third Circuit adopted the *Jorn*[55] and *Washington*[56] test for determining the propriety of the trial judge's grant of a mistrial.[57] The court explained its role by stating that "in reviewing the decision of the trial court, our duty is to see that alternatives to declaring a mistrial were completely canvassed."[58] The court

> particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. If retrial of the defendant were barred whenever an appellate court views the "necessity" for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court.

Id. at 509-10 (footnotes omitted).

Finding that the case before it was a "broad deference" case, the Court noted that this was not the end of its inquiry. *Id.* at 510, 514. In order to ensure that the defendant's interest was adequately protected, the Court found that reviewing courts have an obligation to satisfy themselves that the trial judge exercised sound discretion in declaring a mistrial. *Id.* at 514. *See* notes 54-62 and accompanying text *infra*. Turning to the facts in *Washington*, the Court found that the trial judge's mistrial order was a result of manifest necessity. 434 U.S. at 514-15. The Court stated that the trial judge acted responsibly, that he accorded careful consideration to the defendant's interest in having his trial completed in a single proceeding, and that he exercised sound discretion in evaluating the possibility of juror bias. *Id.* at 516. In reaching this conclusion, the Court emphasized that the trial judge granted both parties the full opportunity to explain their respective positions on the propriety of a mistrial, since he was concerned about the double jeopardy possibilities of an erroneous ruling. *Id.* at 515. The Court also noted that a contrary ruling would encourage unscrupulous defense counsel to obtain mistrials by improper opening statements and other acts of professional misconduct. *Id.* at 513 & n.32.

A dissenting opinion by Justice Marshall, joined by Justice Brennan, asserted that the manifest necessity standard requires a clear showing on the record that the trial judge "scrupulously considered" less drastic available alternatives to a mistrial. *Id.* at 525 (Marshall, J., dissenting), *citing* Illinois v. Somerville, 410 U.S. at 478-79; United States v. Jorn, 400 U.S. at 485.

53. For a discussion of these Third Circuit cases, as well as the decisions of other circuits on this issue, see notes 54-61 and accompanying text *infra*.

54. 591 F.2d 218 (3d Cir. 1979).

55. For a discussion of *Jorn*, see notes 35-39 and accompanying text *supra*.

56. For a discussion of *Washington*, see notes 48-53 and accompanying text *supra*.

57. 591 F.2d at 221-23.

58. *Id.* at 222, *citing* Dunkerley v. Hogan, 579 F.2d 141, 146-47 (2d Cir. 1978) (it is the duty of the reviewing court to determine whether the trial judge's exercise of discretion was sound in view of the available alternatives to a mistrial); United States v. Grasso, 552 F.2d 46, 52 (2d Cir. 1977) ("before a trial judge declares a mistrial, he must make explicit findings, preferably after a hearing, that there are no reasonable alternatives to a mistrial").

opined that only by exhausting available alternatives to a mistrial[59] can the judge ensure that the defendant has received the full protection of the double jeopardy clause.[60] Other circuits have similarly recognized an alternatives test which is equivalent to the standard adopted by the Third Circuit in *McKoy*.[61]

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59. *Id.* Citing *Jorn* and *Washington,* the court formulated the test in another way, stating that the government must demonstrate that, "under the circumstances confronting the trial judge, he had no alternative to the declaration of a mistrial". *Id.*

In a second major Third Circuit case decided shortly after *Jorn,* the court stated that *Jorn* "teaches that . . . the trial judge should not foreclose a defendant's option to proceed to the jury without a 'scrupulous exercise of discretion' in determining whether a 'manifest necessity' warrants the declaration of a mistrial." United States v. Tinney, 473 F.2d 1085, 1089 (3d Cir. 1973), *citing* United States *ex rel.* Peetros v. Rundle, 342 F. Supp. 55, 60 (E.D. Pa. 1972). The *Tinney* court further stated that: "*Jorn* places on the trial judge a duty to exhaust all other reasonable possibilities before deciding to foreclose [a] defendant['s] option to proceed . . . . The scrupulous exercise of that discretion means that he must seek out and consider all avenues of cure to avoid trial abortion." 473 F.2d at 1089 (citation omitted).

Two weeks after *Tinney,* the Supreme Court decided *Illinois v. Somerville,* another double jeopardy mistrial case. For a discussion of *Somerville, see* notes 40-47 and accompanying text *supra.* The Third Circuit, in a case considering the impact of *Somerville* on double jeopardy standards, reaffirmed the alternatives test, and stated that a reviewing court "*must at least* look at the possibility of manipulation inherent in the procedure complained of, the alternatives available to the trial judge at the time, and the presence of 'some important countervailing interest of proper judicial administration.'" United States *ex rel.* Russo v. Superior Court, 483 F.2d 7, 14 (3d Cir. 1973) (emphasis added) *quoting* Illinois v. Somerville, 410 U.S. at 468.

60. 591 F.2d at 222. The *McKoy* court made it clear that under *Washington,* a "stiff test" has been established for determining whether a retrial can be had after a mistrial. *Id.* The court pointed out that under *Perez, Jorn,* and *Washington,* the prosecution must "shoulder the 'heavy burden' of demonstrating that there was 'manifest necessity' for a mistrial declared over a defendant's objection to avoid the double jeopardy bar." *Id.*

61. *See, e.g.,* Harris v. Young, 607 F.2d 1081, 1085 (4th Cir. 1979) ("in determining whether the trial judge exercised sound discretion in declaring a mistrial, we *must* consider if there were less drastic alternatives to ending the trial") (emphasis added); United States v. MacQueen, 596 F.2d 76, 83 (2d Cir. 1979) (the trial court "must consider simple and obvious alternatives" to the declaration of a mistrial when the defendant objects, and the basis of such alternatives must be demonstrated by statements of the court or by the record); United States v. Pierce, 593 F.2d 413, 417 (1st Cir. 1979) (in view of the Supreme Court's constant insistence that a mistrial is to be ordered only upon showing of "manifest necessity," our first inquiry must be whether the court gave "adequate consideration to any less drastic alternatives"); United States v. Sanders, 591 F.2d 1293, 1299 (9th Cir. 1979) (where trial judge failed to "adequately consider feasible alternatives" to a mistrial, that decision may be reversed by reviewing court notwithstanding the high degree of deference to be accorded conclusions of trial judge in such cases); United States v. Starling, 571 F.2d 934, 941 (5th Cir. 1978) (failure to consider alternatives indicates an inadequate concern for the severe consequences of ordering mistrial without accused's consent); United States v. Kin Ping Cheung, 485 F.2d 689, 691 (5th Cir. 1973) (no "manifest necessity" for declaring mistrial where judge failed to inquire into the "availability of less drastic techniques" for dealing with problems that arose during trial).

Against this background, the *Crawford* court considered whether there was a "manifest necessity" [62] for the trial judge to declare a mistrial over the defendant's objection, thus avoiding the bar to a retrial on double jeopardy grounds.[63] The Third Circuit applied the strict scrutiny-broad discretion dichotomy of review [64] adopted in *Washington* [65] for determining whether "manifest necessity" existed.[66] The court concluded that the circumstances giving rise to the mistrial in *Crawford* [67] were more analogous to a hung jury situation [68] than to the cases where the state has sought to obtain a tactical advantage or has engaged in some form of misconduct.[69] The *Crawford* court, therefore, afforded "broad discretion" to the trial judge's decision in discharging the jury,[70] and concluded that he was justified in his declaration of a mistrial in this case.[71]

In reviewing the "available alternative" standard applied by the district court,[72] the majority noted that the authority cited by the district court did not establish the propriety of using this standard.[73]

62. 646 F.2d at 816. For a discussion of the "manifest necessity" test, see notes 17 & 20 and accompanying text *supra*.

63. 646 F.2d at 816, *citing* United States v. Perez, 22 U.S. (9 Wheat.) at 580. For a discussion of *Perez*, see notes 16-20 and accompanying text *supra*.

64. 646 F.2d at 817. For a discussion of this standard of review, see notes 49-52 and accompanying text *supra*.

65. *Id.* For a discussion of *Washington*, see notes 48-53 and accompanying text *supra*.

66. 646 F.2d at 817.

67. For a discussion of the circumstances giving rise to the mistrial in *Crawford*, see notes 4-8 and accompanying text *supra*.

68. 646 F.2d at 817. The court pointed out that in both the jury deadlock case and the *Crawford* case, the jury had been unable to reach a satisfactory verdict. *Id.* Even though a resolution could be reached through further deliberations in both situations, the court expressed concern over the "danger that inherent pressures of the particular situation rather than the jurors' individual judgments, may result in each of the juries reaching unanimous and consistent verdicts." *Id.* The court also noted that even if the jury verdict had been accepted, Crawford would at most be entitled to a new trial, not an acquittal. *Id.* at n.8, *citing* Pipefitters Local 562 v. United States, 407 U.S. 385, 401 n.11 (1972).

69. 646 F.2d at 817. The court noted that the prosecutor did not desire a mistrial to strengthen his case on retrial and in fact had never asked the court to declare a mistrial. *Id.* at 817 n.7.

70. *Id.* at 818.

71. *Id.* The majority found no abuse of discretion in the trial court's finding that a manifest necessity existed for a mistrial because of the "real possibility [that] existed that a consistent and unanimous verdict would be the product of the confusion and coercion inherent in the situation, rather than a product of the jurors' individual judgments." *Id.* at 819. According to the court, this "real possibility" was a result of the jurors becoming tired, restless, frustrated and confused after more than four days of deliberations. *Id.* at 818-19.

72. *Id.* at 818. For a discussion of the standard applied by the district court, see notes 64-71 and accompanying text *supra*.

73. 646 F.2d at 818. The majority contended that even though the cases cited by the district court—*McKoy, Russo* and *Tinney*—speak of alternatives, the

Further, the *Crawford* court was not "convinced" that the alternative to a mistrial articulated by the district court—a clear charge to the jury removing confusion [74]—was "obvious and adequate." [75] The court therefore reversed the district court's grant of a writ of habeas corpus.[76]

In a dissenting opinion, Judge Sloviter challenged the majority's application of the "broad deference" strand of *Washington*.[77] Citing *Jorn* for support,[78] Judge Sloviter maintained that the *Crawford* court incorrectly rejected the available alternatives test.[79] Third Circuit

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alternatives to which they refer are not independent measures of the district court's discretion, but, rather, are only factors to be considered in determining whether a manifest necessity for a mistrial exists. *Id.* For a discussion of the cases cited by the district court, see notes 58-61 and accompanying text *supra*.

74. 646 F.2d at 819. The district court held that the judge should have charged the jury that they should acquit the defendants if they could not determine which controlled substances were involved in the offense. *Id.* at 820. *See* note 10 *supra*.

75. 646 F.2d at 819. The court also pointed out that defense counsel had never requested that the alternative instruction be given by the trial court, even though the court had alerted counsel to the possibility. *Id.* at 820.

76. *Id.*

77. *Id.* at 821 (Sloviter, J., dissenting). For a discussion of the "broad deference" and "strict scrutiny" strands of *Washington*, see notes 49-52 and accompanying text *supra*.

78. 646 F.2d at 822 (Sloviter, J., dissenting).

79. *Id.* Judge Sloviter agreed with the majority that the circumstances giving rise to the mistrial in *Crawford* more closely resembled a jury deadlock situation, thereby requiring greater deference to the trial court, than one where the state has sought to obtain a tactical advantage, or has engaged in misconduct. *Id.* However, Judge Sloviter pointed out that even in the jury deadlock situation, the trial judge must determine whether there were any alternatives to the declaration of a mistrial. *Id.*

Further, Judge Sloviter opined that the *Jorn* available alternative test is not in conflict with the holding in *Washington* that the trial court's decision to grant a mistrial must be accorded great deference where the basis of the declaration stems from the trial proceedings themselves. *Id.* at 823 (Sloviter, J., dissenting). Judge Sloviter noted that in *Washington*, the trial court heard extensive argument on the prosecution's motion for a mistrial, including the prosecutor's contention that the prejudice to the jury caused by the defense counsel's improper opening statement could not be cured by cautionary instructions. *Id.* As a result of this fact, Judge Sloviter pointed out that even in the jury deadlock situation, the trial judge must determine whether there were any alternatives to the declaration of a mistrial. *Id.*

Further, Judge Sloviter opined that *Jorn's* available alternatives test is not in conflict with the holding in *Washington* that the trial court's decision to grant a mistrial must be accorded great deference where the basis of the declaration stems from the trial proceedings themselves. *Id.* Judge Sloviter noted that in *Washington*, the trial court heard extensive argument on the prosecution's motion for a mistrial, including the prosecutor's contention that the prejudice to the jury caused by the defense counsel's improper opening statement could not be cured by cautionary instructions. *Id.* As a result of this fact, Judge Sloviter pointed out that even though the trial court in *Washington* did not expressly state that it had considered and rejected as inadequate any available alternative to granting a mistrial, it may still be concluded that the court had determined that the alternative of cautionary instructions would not have protected the state's right to a "full and fair opportunity to present [its] evidence to an impartial jury." *Id.*

precedent, she argued, firmly established that test's continuing validity.[80]

Proceeding to an application of the available alternatives test to the facts in *Crawford,* Judge Sloviter stated that the trial court ignored the "simple and obvious" option of reinstructing the jury as to the possibility of acquitting the defendant.[81] Consequently, Judge Sloviter opined, the grant of the mistrial was not "manifestly necessary" and the petitioner's "valued right to have his trial completed by a particular tribunal" was violated.[82] Judge Sloviter concluded that she would affirm the judgment of the district court granting the petition for the writ of habeas corpus.[83]

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80. *Id.* at 822 (Sloviter, J., dissenting), *citing* United States v. Tinney, 473 F.2d 1085 (3d Cir.), *cert. denied,* 412 U.S. 928 (1973). For a brief discussion of *Tinney, see* note 59 *supra.* Judge Sloviter also pointed out that in *United States v. McKoy,* the Third Circuit emphasized the importance of considering available alternatives:

> Under the Court's analysis in *Jorn,* . . . the government generally must demonstrate that, under the circumstances confronting the trial judge, he had no alternative to the declaration of a mistrial. [O]nly by considering and exhausting all other possibilities can the judge ensure that the defendant has received the full protection of the Double Jeopardy Clause. In reviewing the decision of the trial court, our duty is to see that alternatives to declaring a mistrial are completely canvassed.

646 F.2d at 822 (Sloviter, J., dissenting), *quoting United States v. McKoy,* 591 F.2d at 222 (citations omitted). For a discussion of *McKoy, see* notes 54-60 and accompanying text *supra.* Noting that *McKoy* reaffirmed the Third Circuit's available alternative standard and was decided after *Washington,* Judge Sloviter argued that the *Crawford* case was governed by the rule, reaffirmed in *McKoy,* that "the trial judge's discretionary power to declare a mistrial over the defendant's objection can only be exercised when no reasonable alternatives . . . exist." 646 F.2d at 823 (Sloviter, J., dissenting).

81. 646 F.2d at 821 (Sloviter, J., dissenting), *citing* United States v. MacQueen, 506 F.2d 76, 83 (2d Cir. 1979). For a discussion of *MacQueen,* see note 61 *supra.* Judge Sloviter argued that a court's discretionary determination that manifest necessity existed for declaring a mistrial should not be upheld where a simple jury instruction might have produced an acceptable verdict. 646 F.2d at 822 (Sloviter, J., dissenting). The only indication given by the *Crawford* trial judge as to why he did not give a new instruction to the jury was that the new instruction had not been requested. Crawford v. Fenton, 490 F. Supp. 766, 780, 786-86 & n.12. *See* note 75 *supra.* Judge Sloviter contends that this was not a sufficient justification for the trial judge's failure to attempt to discover an alternative to the declaration of a mistrial. 646 F.2d at 823 (Sloviter, J., dissenting).

82. 646 F.2d at 822 (Sloviter, J., dissenting), *quoting* Arizona v. Washington, 434 U.S. at 503.

83. 646 F.2d at 823 (Sloviter, J., dissenting). Judge Sloviter stated that there were two factors on which the majority relied in concluding that the trial judge did not abuse his discretion in granting the mistrial: 1) the acquittal instruction might not have been proper under New Jersey law; and 2) the defendant never requested the instruction. *Id.* at 823-24 (Sloviter, J., dissenting). Judge Sloviter contended that the first factor could have easily been dealt with by a simple repetition of the general acquittal instruction which had nothing to do with New Jersey law. *Id.* at 824 (Sloviter, J., dissenting). As to the second factor, Judge Sloviter, relying on *Jorn* and *McKoy,* pointed out that the cases "repeatedly refer to the trial judge's responsibility to consider alternatives without restricting this consideration to alternatives specifically requested." *Id.*

The broad discretion approach adopted by the majority in *Crawford* does not provide adequate protection for a defendant's fifth amendment right against being placed twice in jeopardy.[84] It is submitted that the dissent properly recognized that the double jeopardy clause requires a trial court to consider alternatives less drastic than a mistrial in order for the double jeopardy clause not to preclude the retrial of the defendant.[85]

A careful reading of the dissenting opinion reveals that it reflects a thoughtful attempt to apply the long-standing "manifest necessity" [86] rule in a way which best serves its purpose of preventing unnecessary encroachment due to a mistrial on a defendant's fifth amendment right not to be faced with double jeopardy.[87]

Furthermore, the majority's approach in *Crawford* does not properly follow the *Washington* decision upon which it purportedly relies, since the analysis in *Washington* did not end with the court characterizing the factual situation with which it was dealing as more closely representing either a hung jury or a prosecutorial misconduct situation.[88]

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84. For an historical discussion of a defendant's protection against being placed twice in jeopardy, see notes 13-15 and accompanying text *supra*. For a criticism of the majority opinion in *Crawford,* see notes 88-95 and accompanying text *infra*.

85. For a discussion of the available alternatives cases, see notes 38-39 & 54-61 and accompanying text *supra*.

86. For a discussion of the "manifest necessity" rule, see notes 17 & 20 and accompanying text *supra*.

87. 646 F.2d at 817. For a discussion of a sampling of the great variety of circumstances that may trigged a mistrial, see Schulhofer, *supra* note 14, at 473-90.

88. or a discussion of *Washington,* see notes 48-53 and accompanying text *supra*. It is clear from *Washington* that "pigeonholing" the factual situation facing the court as a hung jury or a prosecutorial misconduct situation, and determining whether strict scrutiny or broad deference should be afforded the trial judge, is not the end of a reviewing court's task. The Court in *Washington* stated:

> Our conclusion that a trial judge's decision to declare a mistrial . . . is entitled to great deference does not, of course, end the inquiry. As noted earlier, a constitutionally protected interest is inevitably affected by any mistrial decision. The trial judge, therefore, "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." In order to ensure that this interest is adequately protected, reviewing courts have an *obligation to satisfy themselves* that, in the words of Mr. Justice Story, the trial judge exercised *"sound discretion"* in declaring a mistrial.

434 U.S. at 514 (emphasis added) (citation omitted). The *Crawford* majority has, in essence, completely ignored this important requirement in its analysis. It is suggested that the court's position in *Crawford* is tantamount to a complete nullification of the "sound discretion" requirement, which will not afford any protection to a defendant's constitutional right against being placed twice in jeopardy for the same offense.

Rather, under *Washington,* after a case is characterized as a hung jury-type case, an inquiry must then be made as to whether the trial judge exercised sound discretion in finding that it was manifestly necessary to declare a mistrial.[89]

An extremely important consideration in evaluating a court's decision to declare a mistrial in the Third Circuit, as well as other circuits,[90] is the availability of alternatives to a mistrial.[91] In *United States v. Jorn,*[92] a plurality of the Supreme Court concluded that reprosecution when there is a complete absence of any consideration by the trial judge of alternatives to a mistrial violates the double jeopardy clause since a mistrial may not be declared unless a "scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceeding."[93] The Third Circuit has now misinterpreted cases such as *United States v. McKoy*[94] and *United States v. Tinney,*[95] which flowed directly from *Jorn.* Since the majority in *Crawford* completely ignored any application of the second, and critical, step required by *Washington, Jorn,* and prior Third Circuit precedent, and disposed of the case by simply stating that the trial judge's decision is entitled to great deference, it is submitted that the majority misapplied the controlling precedent and severely curtailed a defendant's constitutionality protected right against being placed in jeopardy twice for the same offense.[96] In addition, the *Crawford* court seems to completely disregard the importance of a factor which it is suggested was determinative in both *Downum*[97] and *Jorn*[98]—

89. *Id.* For a discussion of the Court's analysis in *Washington,* see notes 48-52 and accompanying text *supra.*

90. For a discussion of the available alternatives standard in the Third Circuit as well as in other circuits, see notes 54-61 and accompanying text *supra.*

91. *Id. See also* Crawford v. Fenton, 490 F. Supp. 766, 785 (D.N.J. 1980).

92. For a discussion of *Jorn,* see notes 35-39 and accompanying text *supra.*

93. 400 U.S. at 485.

94. For a discussion of *McKoy,* see notes 54-60 and accompanying text *supra.*

95. For a brief discussion of *Tinney,* see note 59 *supra.*

96. For a discussion of the precedent within the Third Circuit, see notes 54-60 and accompanying text *supra.* It is also suggested that the approach suggested by the dissent aids in guaranteeing that the defendant is afforded his "valued right to have his trial completed by a particular tribunal." *See, e.g.,* Arizona v. Washington, 434 U.S. at 503; Illinois v. Somerville, 410 U.S. at 466; United States v. Jorn, 400 U.S. at 484. It is suggested that this right afforded to a defendant should have been recognized in the instant case. Having been subjected to an entire trial, and having had his case submitted to the jury for determination, it is suggested that in the interest of justice the trial judge should not have been able to abort the proceeding unless alternatives to the mistrial were at least considered. *See* 646 F.2d at 821-24 (Sloviter, J., dissenting). *See* also notes 102 & 103 and accompanying text *infra.*

97. For a discussion of *Downum,* see notes 25-34 and accompanying text *supra.*

98. For a discussion of *Jorn,* see notes 35-39 and accompanying text *supra.*

the accused's "valued right to have his trial completed by a particular tribunal." [99] Instead, the *Crawford* court adopted a vague "broad deference" standard which gives the trial judge practically unbridled discretion.[100]

It is submitted that the *Crawford* court has adopted a totally unstructured analysis of the application of the double jeopardy bar to mistrial cases which, if continued, will inevitably lead to unlimited, uncertain, and arbitrary discretion which had not previously existed in the Third Circuit.[101]

The failure of the *Crawford* majority to correctly follow existing precedent will leave the trial courts with little guidance, and more importantly, with virtually unbridled discretion in the determination of whether a mistrial should be granted.[102] In light of the enormous number of situations in which a mistrial can arise,[103] it is submitted

99. 400 U.S. at 484. It is submitted that this is not a factor which is excised from isolated passages of *Jorn;* but is in fact the core of that case, as even the most cursory reading will disclose. *See id.* at 479, 484-86. A fair reading of *Downum* and *Jorn* instructs that the first element to be considered in order to determine if a defendant has been afforded his "valued right" is the necessity for declaring a mistrial. *See, e.g., id.* at 484-86. This preliminary determination, it is suggested, means a consideration of the alternatives available to the judge confronted with a situation in the midst of trial that seems to require correction. *See* 646 F.2d at 822 (Sloviter, J., dissenting).

It is also contended that the *Crawford* court seems to ignore the Supreme Court's admonition in *Downum* that any doubt should be resolved in favor of the liberty of the individual in order to prevent the exercise of an "unlimited, uncertain and arbitrary judicial discretion." 372 U.S. at 738. Finally, under the *Perez* rule, the power to abort a trial should only be used with great caution, under urgent circumstances, and for very plain and obvious causes. 22 U.S. (9 Wheat) at 579-80. For a discussion of the analysis in *Perez,* see note 20 *supra.* On the facts of the instant case, it is submitted that the trial judge's failure to give a simple alternative instruction to the jury which could have possibly remedied the inconsistency (and thereby end the trial) was a complete abandonment of the *Perez* teaching. *See* 646 F.2d at 824 (Sloviter, J., dissenting).

100. 646 F.2d at 818. It is submitted that the court seems to be abandoning the standard that it adopted after the *Jorn* and *Washington* cases—a standard which leads to meaningful analysis and predictable results. For a discussion of these Third Circuit cases, *see* notes 59 & 60 *supra.* This abandonment, it is suggested, is most difficult to reconcile with the Third Circuit's past and explicit insistence on making certain that the trial court has considered alternatives less drastic than mistrials. *Id.* This point is of no small importance, since it is estimated that approximately five percent of the cases that go to trial end in a hung jury. *See* H. KALVEN & H. ZEISEL, *supra* note 20, at 57 & n.2.

101. For a discussion of the Third Circuit precedent, see notes 54-61 and accompanying text *supra.* It is submitted that this uncertainty and arbitrariness is exactly what the Supreme Court desired to eliminate as is evidenced by its decisions in *Downum* and *Jorn.* For a discussion of *Downum* and *Jorn,* see notes 25-39 and accompanying text *supra.*

102. For a discussion of the precedent which it is suggested the Third Circuit failed to follow, see notes 16-61 and accompanying text *supra.*

103. For a discussion of the many different circumstances that can trigger a mistrial and the frequency of mistrial declarations, see notes 87 & 100 *supra.*

that this unbridled discretion in the trial court affords little, if any, protection to a defendant's constitutional right against being placed twice in jeopardy for the same offense.

W. Gerald Flannery, Jr.

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CRIMINAL PROCEDURE—EVIDENCE—TRIAL COURT'S FAILURE TO SUSTAIN AN OBJECTION TO CROSS-EXAMINATION ON POST-ARREST SILENCE AND THE GOVERNMENT'S FAILURE TO OBEY THE COURT'S DIRECTION NOT TO MAKE FURTHER COMMENT ON THE SUBJECT VIOLATE THE HALE-DOYLE PROHIBITION AND, CUMULATIVELY, ARE MORE THAN HARMLESS ERROR.

United States v. Curtis (1981)

William Curtis III was tried and convicted on three counts of distributing methamphetamine and one count of possession of a firearm, each in violation of the United States Code.[1] The drug transactions were part of an undercover operation conducted by the Drug Enforcement Administration.[2] Prior to trial the defendant stipulated that each of the drug transactions had in fact occurred.[3] He claimed, however, that they were the result of "solicitations, demands, inducements, and threats by the government, amounting to entrapment." [4]

At trial, the defendant testified on his own behalf.[5] On cross-examination, he admitted that after his arrest he had talked with the police about the facts of the drug sale.[6] The prosecutor then asked the defendant why, at the time of his arrest, he failed to tell the police that he was "forced" into making the transactions.[7] Defense counsel objected but was overruled on the ground that the defendant never asserted his right to remain silent under the fifth amendment.[8] The court, however, subsequently directed the government to refrain from further comment on the defendant's post-arrest failure to assert that he had been entrapped.[9] Despite this specific instruction, the government, during its closing argument, again commented on the defendant's post-arrest

1. 644 F.2d 263, 264 (3d Cir. 1981). The defendant was convicted under 21 U.S.C. § 841(a)(1) (1976) (illegal distribution of methamphetamine) and 18 U.S.C. § 924 (c)(2) (1976) (illegal possession of a firearm during the commission of a felony). 644 F.2d at 264.

2. 644 F.2d at 264.

3. *Id.*

4. *Id.* at 265. This defense was asserted at trial in the defendant's opening statement. *Id.*

5. *Id.*

6. *Id.* at 272 (Weis, J., dissenting). The defendant admitted telling the police that "there was going to be $1,000 made [on the transaction]." *Id.*

7. *Id.* at 270. Specifically, the government asked the defendant: "And then in this hour and a half or two hours, you never said to those police officers, 'You got the wrong guy; I was forced to do it'?" *Id.*

8. *Id.*

9. *Id.*

silence.[10] Defense counsel's objection was sustained,[11] but a subsequent motion for a mistrial was denied.[12]

On appeal, the Third Circuit [13] reversed and remanded for a new trial,[14] *holding, inter alia,* that the trial court's failure to sustain the objection to cross-examination on post-arrest silence, and the government's failure to obey the court's direction not to make further comment on the subject, violated the *Hale-Doyle prohibition* [15] and, cumulatively, were more than harmless error. *United States v. Curtis,* 644 F.2d 263 (3d Cir. 1981).

The propriety of using a defendant's silence in the face of accusations as evidence in a criminal trial is an issue that has troubled the courts for many years.[16] At common law, a defendant's pretrial silence in situations where an innocent person would naturally speak could be

10. *Id.* The government stated in its closing argument:

> Well, ladies and gentlemen of the jury, you remember the direct examination of William Curtis and you remember the cross-examination of William Curtis and there was just one question that was asked of Mr. Curtis.
>
> And by that I ask the Court's leave to argue this, Your Honor.
>
> And that is, why didn't you tell the story [of entrapment] to anyone before?

Id.

11. *Id.*

12. *Id.* The trial court denied the defendant's motion for a mistrial on two grounds: 1) the comment was ambiguous and could have been a reference to pre-arrest silence; and 2) the court's prompt curative instructions effectively negated any prejudice resulting from the government's arguments as the comments were brief, isolated in context, and ambiguous. *Id.* at 271.

13. The case was heard by Circuit Judges Gibbons and Weis and District Judge Whipple of the United States District Court for the District of New Jersey, sitting by designation. Judge Gibbons wrote for the majority. Judge Weis dissented.

14. The court also ruled on an issue of alleged error concerning the government's cross-examination of the defendant's character witnesses. *Id.* at 269-70. At trial during the defendant's case-in-chief, the defendant called three character witnesses. *Id.* at 265-67. They testified on direct only as to the defendant's reputation in the community. *Id.* However, on cross-examination, the government questioned these witnesses with respect to their opinion of the defendant's character. *Id.* In an analysis to which the court devoted most of its opinion, the court concluded that this practice was erroneous but did not constitute reversible error. *Id.* at 269-70.

15. *See* Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1975). For a discussion of these two cases, see notes 23-43 and accompanying text *infra.*

16. C. MCCORMICK, EVIDENCE § 161 (2d ed. 1972). *Compare* State v. Picciotti, 12 N.J. 205, 96 A.2d 406 (1953) (testimony of silence in the face of accusation is admissible) *with* State v. Bates, 140 Conn. 326, 99 A.2d 133 (1953) (testimony of silence in the face of accusation is inadmissible). *See also* note 44 and accompanying text *infra;* Note, *Evidence—Doyle v. Ohio: Use of Defendant's Silence for Impeachment at Trial,* 8 LOY. U. CHI. L.J. 438 (1977).

used as evidence of his guilt.[17] However, the Supreme Court, in *Miranda v. Arizona*,[18] found that this practice involved "grave constitutional overtones" because it penalized an individual for exercising his fifth amendment right against self-incrimination.[19] The *Miranda* Court therefore

17. C. MCCORMICK, *supra* note 16, § 161. This rule is called the "adoptive" or "tacit" confession rule; it is still applicable in civil cases. *Id.* It requires an accusatory statement made in the presence and within the hearing of an accused and that the accused make a silent or equivocal response, i.e., one that does not challenge the accuracy of the statement. *Id.* Underlying this rule is the assumption that human nature prompts an innocent person to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation. *Id.*

In criminal cases, the "tacit confession" rule was received with caution and became subject to several exceptions. *Id.* When the accusation was made during a judicial proceeding, the accused's failure to deny was inadmissible. Pickens v. State, 111 Ga. App. 574, 142 S.E.2d 427 (1965); Commonwealth v. Zorambo, 205 Pa. 109, 54 A. 716 (1903). Most courts reached this result by reasoning that such accusations, in view of the circumstances, do not naturally call for denial and therefore the failure to deny lacks probative value. *See Pickens.* When the accusation and failure to deny occurred before trial in connection with a criminal investigation, the courts were divided on the applicability of the rule. C. MCCORMICK, EVIDENCE § 270 (2d ed. 1972). Some courts required scrutiny of the confession's probative value. *Id.* Others, however, adopted the "per se" or Massachusetts rule, under which the fact of arrest alone is sufficient to render any subsequent "tacit confession" inadmissible. State v. Bates, 140 Conn. 326, 99 A.2d 133 (1953); Commonwealth v. McDermott, 123 Mass. 440, 25 Am. Dec. 120 (1877). These decisions reflected not only doubt as to the probative value of the inference of guilt under such circumstances, but also fear of police abuse of the rule. New Jersey Supreme Court Committee on Evidence, Report 164 (1963). The Supreme Court has held that an expanded form of this per se rule is constitutionally required. *See* notes 18-20 and accompanying text *infra.*

18. 384 U.S. 436 (1966).

19. *Id.* at 468. In *Miranda,* the defendant was arrested for rape and identified by the victim. *Id.* at 491-92. He was then questioned without having been advised that he had a right to have an attorney present and a right to remain silent. *Id.* In reversing the subsequent conviction, the Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards to secure the privilege against self-incrimination." *Id.* at 444.

The most important aspects of the *Miranda* decision are the set of warnings it requires to be given, and the waiver it mandates before a confession by an accused can be considered admissible: under *Miranda,* a person subjected to custodial interrogation must be warned that he has a right to remain silent, that any statement he does make may be used in evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. *Id.* at 471-79. A defendant may waive these rights, but only if the waiver is made voluntarily, knowingly and intelligently will it render subsequent confessions admissible. *Id. Miranda* also provides that, under certain circumstances, a defendant may withdraw a valid waiver. *Id.* at 473-74; *see also* Mincey v. Arizona, 437 U.S. 385 (1978). *But see* Oregon v. Hass, 420 U.S. 714 (1975). For further discussion of *Miranda,* see generally Edwards, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona,* 35 FORDHAM L. REV. 169 (1966); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test,* 35 MICH. L. REV. 59 (1966); Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel,* 84 HARV. L. REV. 1 (1970).

banned the use of a defendant's silence as substantive evidence of his guilt.[20]

Since *Miranda,* prosecutors have attempted to circumvent this restriction by seeking to admit evidence of the defendant's silence for the limited purpose of impeaching his credibility.[21] After disparate responses by the lower courts regarding the propriety of this limited use,[22] the Supreme Court considered the issue in 1975 in *United States v. Hale.*[23] In *Hale,* the defendant was arrested for robbery, advised of his right to remain silent, and questioned about a sum of money which the police had found on his person.[24] Hale made no response.[25] At trial, he offered an alibi which the government attempted to discredit by asserting that his testimony was inconsistent with his post-arrest silence.[26] The Supreme Court reversed Hale's conviction, holding that use of a defendant's silence for purposes of impeachment is precluded as a matter of federal evidentiary law where its probative value is outweighed by its prejudice to the defendant.[27] The Court concluded that

20. 384 U.S. at 468 n.37. The Court stated:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege [against self-incrimination] 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.

Id.

21. *See* Note, *supra* note 16, at 440.

22. Between the Supreme Court's decisions in *Miranda* and *Doyle* no constitutional standard for the limited, impeachment use of post-arrest silence existed. *See* Doyle v. Ohio, 426 U.S. 610, 616 (1976) (question of constitutionality of impeachment use of a defendant's post-arrest silence had been left open); United States v. Ramirez, 441 F.2d 950, 954 (5th Cir.), *cert. denied,* 404 U.S. 869, *reh. denied,* 404 U.S. 987 (1971), *citing* Harris v. New York, 401 U.S. 222 (1971) (construing *Harris* as undercutting any prohibition in *Miranda* against impeachment use of a defendant's post-arrest silence). There also was no consensus among the courts as to how to balance the need to protect a defendant's right to silence against the need to prevent perjury. *Compare* People v. Bennett, 413 Ill. 601, 110 N.E.2d 175 (1953) (admission of defendant's silence as impeachment evidence would promote police misconduct) *with* Harris v. New York, 401 U.S. 222 (1971) (danger of police misconduct from impeachment use of silence is merely speculative).

23. 422 U.S. 171 (1975).

24. *Id.* at 174.

25. *Id.*

26. *Id.* Hale testified that at the time of the crime he had been elsewhere, and that the money found on his person had been given to him by his estranged wife. *Id.*

27. *Id.* The Court discussed at length the "probative value" component of its holding. *Id.* at 176-80. It explained that although a basic rule of evidence permits the use of prior inconsistent statements to impeach the credibility of a witness, the court must first be persuaded that the statements are indeed probative of inconsistency. *Id.* at 176, *citing* 2A J. WIGMORE, EVIDENCE § 1040 (J. Chadbourn rev. ed. 1970). Moreover, in determining probative value, the Court explained that *silence* must be treated differently than *statements.*

on the facts before it, such an imbalance was present.[28] *Hale,* however, did not resolve all the problems arising from the impeachment use of a defendant's post-arrest silence, as its holding must necessarily be applied on a case-by-case basis[29] and is limited to federal trials.[30]

The Court addressed these problems in *Doyle v. Ohio*[31] by ruling on the constitutionality of using a defendant's post-arrest silence for impeachment.[32] In *Doyle,* the two defendants were arrested for selling marijuana to a police informant.[33] The defendants were given their *Miranda* warnings and were questioned by the police.[34] Except for the statement by Doyle that, "I don't know what you are talking about," the defendants remained silent.[35] As in *Hale,*[36] the defendants subse-

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422 U.S. at 176. Under most circumstances silence is so ambiguous that it is impossible to establish the necessary "threshold inconsistency" between "silence at the police station and later exculpatory testimony." *Id.* The Court, however, recognized that silence gains more probative value when it persists in the face of accusations. *Id., citing* 3A J. WIGMORE, *supra,* § 1042. It also emphasized, however, that the situation of an arrestee is very special—he is under no duty to speak and has been advised by the government that he has the right to remain silent. 422 U.S. at 176. The Court discussed various factors to be considered in determining the probative value of an arrestee's silence. *See id.* at 177-80.

The Court also discussed the "prejudice" component of its holding, explaining that an arrestee's silence has a significant potential for prejudice. *Id.* at 180-81. It noted that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. *Id.* Moreover, permitting the defendant to explain his reasons for his silence is unlikely to overcome the existing strong negative inference. *Id.*

28. 422 U.S. at 178-79. The Court considered the following factors: 1) Hale made repeated assertions of innocence during the proceedings; 2) he was questioned in a secretive forum which lacked such minimal safeguards as the presence of public arbiters and a reporter; and 3) he was clearly a potential defendant when he was questioned. *Id.*

29. *See* notes 27 & 28 and accompanying text *supra.* In each case, the court must "weigh" the probative value of the defendant's silence against the prejudice to the defendant of admitting it into evidence. *See* 422 U.S. at 174.

30. 422 U.S. at 181. The Court used its supervisory power over the lower federal courts as the authority for its holding in *Hale. Id.* It was merely a suggestion for state courts. *See, e.g.,* State v. Moore, 112 Ariz. 271, 540 P.2d 1252 (1975); Shy v. State, 234 Ga. 816, 218 S.E.2d 599 (1975). It has been suggested that the evidentiary basis of *Hale* has permitted results contrary to the Court's intended conclusion. *See, e.g.,* United States v. Impson, 531 F.2d 274 (5th Cir. 1976). For a full discussion of *Hale,* see Comment, *Impeachment of a Criminal Defendant by Evidence of Post-Arrest Silence: A Conflict Partially Resolved,* 61 IOWA L. REV. 641 (1975).

31. 426 U.S. 610 (1976).

32. *See* text accompanying note 40 *infra.*

33. 426 U.S. at 611.

34. *Id.*

35. *Id.* at 623 n.4 (Stevens, J., dissenting). However, the Court analyzed the due process question as if both defendants had remained silent. *See* United States v. Mireles, 570 F.2d 1287, 1291 n.7 (5th Cir. 1978).

quently offered an exculpatory "story" at trial.[37] Having no evidence to refute this story, the government cross-examined the defendants regarding their post-arrest silence,[38] and the defendants were convicted.[39]

On appeal, the Supreme Court reversed, holding that "the use for impeachment purposes of [an arrestee's] silence, . . . after receiving *Miranda* warnings, violates the Due Process Clause of the Fourteenth Amendment." [40] The *Doyle* Court stated that although

> *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 an arrested person's silence to be used to impeach an explanation subsequently offered at trial.[41]

Because the Court addressed the constitutional issue, *Doyle* bound state as well as federal courts [42] and put an end to the unpredictable case-by-case analysis which had existed in the wake of *Hale*.[43]

Since *Doyle,* most federal appellate litigation in this area has addressed two questions: 1) what constitutes "impeachment use of an arrestee's silence" under *Doyle*; and 2) what transgressions of the *Doyle* rule rise to the level of reversible error? [44] The first question has

36. For a brief discussion of the facts of *Hale,* see notes 24-26 and accompanying text *supra.*

37. 426 U.S. at 613. The defendants claimed that the informant was actually the seller and that he had "framed" them. *Id.* They explained that they had agreed to *buy* only two pounds of marijuana, and that when the informant learned of this, he angrily threw the money at the defendants and took the marijuana, after which the defendants gave chase to find out why the money was given to them. *Id.*

38. *Id.* Over objection by defense counsel, the prosecutor asked each defendant at his trial why he had not told the "frameup story" to the arresting agent after the arrest. *Id.* The state courts upheld this questioning on the basis that it went only to the credibility of testimony. *Id.* at 615-16.

39. *Id.* at 611.

40. *Id.*

41. *Id.* at 618.

42. *See* U.S. CONST. art. VI (the supremacy clause). Prior law under *Hale* bound only the federal courts. *See* note 30 and accompanying text *supra.*

43. Federal circuit decisions under *Hale* which have held that evidence of post-arrest silence is inadmissible for impeachment include: United States v. Impson, 531 F.2d 274 (5th Cir. 1976); Minor v. Black, 527 F.2d 1 (6th Cir. 1975). *Contra,* United States v. Rose, 525 F.2d 1026 (2d Cir. 1975), *cert. denied,* 424 U.S. 956 (1976). Under *Doyle,* impeachment use of a defendant's post-arrest silence, after *Miranda* warnings, is generally prohibited. 426 U.S. at 618.

44. *See, e.g.,* Grieco v. Hall, 641 F.2d 1029 (1st Cir. 1981) (reversible error); Lofton v. Wainwright, 620 F.2d 74 (5th Cir. 1980) (silence); United States *Ex Rel.* Smith v. Rowe, 618 F.2d 1204 (7th Cir. 1980) (silence; reversible error); United States v. Allston, 613 F.2d 609 (5th Cir. 1980) (reversible error);

proved more problematical than would appear; it has typically involved the problem of whether *Doyle*'s bar against impeachment use of an arrestee's silence is applicable where the arrestee was silent only in part.[45]

The Supreme Court addressed the issue in *Anderson v. Charles*.[46] In *Charles*, the defendant was arrested for murder after being found with the victim's stolen automobile.[47] After receiving his *Miranda* warnings, he told the police that he had stolen the automobile from a city street.[48] However, on direct examination at trial, he stated that he had taken the automobile from a tire store parking lot.[49] The government then asked the defendant why he had failed to tell the police, at the time of his arrest, the same story that he now was telling the jury.[50] The defendant was convicted and he appealed, claiming that the government's questions at trial regarding his post-arrest silence violated *Doyle*.[51]

United States v. Serrano, 607 F.2d 1145 (5th Cir. 1979), *cert. denied*, 445 U.S. 965 (1980) (silence); United States v. Muscarella, 585 F.2d 242 (7th Cir. 1978) (silence; reversible error); United States v. Warren, 578 F.2d 1058 (5th Cir. 1978), *cert. denied*, 446 U.S. 956 (1980) (silence). *But see, e.g.*, United States v. Giese, 597 F.2d 1170 (9th Cir. 1979), *cert. denied*, 444 U.S. 979 (1979) (*Doyle* does not extend to precustodial, pre-indictment situation); United States v. Vega, 589 F.2d 1147 (2d Cir. 1978) (*Doyle* does not extend to pre-*Miranda* warning situation).

As for Supreme Court decisions, only two cases have thus far distinguished *Doyle*. *See* Anderson v. Charles, 447 U.S. 404 (1980) (*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements); Jenkins v. Anderson, 447 U.S. 231 (1980) (impeachment use of pre-arrest silence does not violate due process). For a discussion of *Charles*, see notes 46-59 and accompanying text *infra*. For a discussion of *Jenkins*, see notes 60-62 and accompanying text *infra*.

45. *See* notes 46-66 and accompanying text *infra*.

46. 447 U.S. 404 (1980).

47. *Id.* at 404.

48. *Id.* at 405.

49. *Id.*

50. *Id.* at 405-06. The Court stated that on cross-examination the following colloquy occurred:

> Q. Don't you think it's rather odd that if it were the truth that you didn't come forward and tell anybody at the time you were arrested, where you got the car?
>
> A. No, I don't.
>
> Q. You don't think that's odd?
>
> A. I wasn't charged with auto theft, I was charged with murder.
>
> Q. Didn't you think at the time you were arrested that possibly the car would have something to do with the charge of murder?
>
> A. When I tried to talk to my attorney they wouldn't let me see him and after that he just said to keep quiet.
>
> Q. This is a rather recent fabrication of yours isn't [sic] it not?
>
> A. No, it isn't.
>
> Q. Well, you told Detective LeVanseler back when you were first arrested, you stole the car back on Washtenaw and Hill Street?
>
> A. Never spoke with Detective LeVanseler.
>
> Q. Never did?

Id.

51. *Id.* at 406-07.

Citing several courts of appeals decisions for support,[52] the Supreme Court affirmed the conviction, holding that "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent state-

52. The Supreme Court cited: United States v. Agee, 597 F.2d 350 (3d Cir.) *(en banc), cert. denied,* 422 U.S. 944 (1979); United States v. Mireles, 570 F.2d 1287 (5th Cir. 1978); United States v. Goldman, 563 F.2d 501 (1st Cir. 1977), *cert. denied,* 434 U.S. 1067 (1978).

In *Agee,* the defendant, while driving his taxi with a passenger, was pulled over by the police, whereupon he immediately concealed a packet of heroin under his seat. 597 F.2d at 352. When asked by the police if he had any dope, Agee responded, "No, I don't have no dope on me." *Id.* Agee was arrested for possession of narcotics. *Id.* At trial, he testified that although he had attempted to conceal the packet of heroin from the police, the packet actually belonged to his passenger who had tossed it to him when they were pulled over. *Id.* On cross-examination, the government asked him why he hadn't mentioned this story to the police at the time of his arrest. *Id.* at 353. *See generally* note 75 *infra.* Agee was convicted. 597 F.2d 351.

The Third Circuit, sitting *en banc,* affirmed, holding that no *Doyle* violation had occurred "because Agee simply did not remain silent regarding the facts of the crime with which he was charged." *Id.* at 356. In support of this holding, the court emphasized that "Agee did not exercise his right to remain silent. . . ." *Id.* The court also held that no *Hale* violation had occurred because Agee's "testimony regarding what he chose to do and say when he approached the police officers provided a context which emphasized the probative value of what he chose *not* to say to the police." *Id.* at 357 (emphasis supplied by the court). The court added that "[w]hatever prejudice Agee may have suffered from the revelation that he had chosen to conceal an ongoing crime occurred first during his own testimony on direct examination." *Id.*

In *Mireles,* the defendant was arrested for concealing approximately a ton of marijuana in a van which he was driving. 570 F.2d at 1289. According to an agent's testimony, after Mireles had been given the *Miranda* warnings, he stated that he had borrowed the truck from his uncle to move his own furniture and denied any knowledge of the contraband. *Id.* However, at trial, Mireles testified that he was merely moving furniture for another individual named Rivas. *Id.* On cross-examination, the government asked Mireles the following two questions: "And you didn't say anything about Mr. Rivas to [agent] Edwards, did you? . . . You didn't say anything about Mr. Rivas to [agent] Havens here, either, did you?" *Id.* at 1292. To both questions, Mireles answered, "No, sir." *Id.* Mireles was convicted. *Id.* at 1289. He appealed, claiming that the government's questions had violated *Doyle. Id.* The Fifth Circuit disagreed, holding that because "Mireles *waived his right to remain silent,* and denied knowledge of the presence of the contraband after his arrest," *Doyle* was not applicable. *Id.* at 1293 (emphasis added). The court added that "*Doyle*'s protection of the right to remain silent does not apply to cross-examination and argument concerning a defendant's exculpatory explanation given after the *Miranda* warnings." *Id.*

Goldman dealt with a *Hale,* rather than a *Doyle*-type objection. 563 F.2d at 504. Goldman was arrested for transporting a forged check in interstate commerce. *Id.* at 502. After being read his *Miranda* rights, he told the arresting agent that the check was not forged, but rather was the genuine signature of a business associate. *Id.* at 503. In probing Goldman's story, the agent asked him for the names and addresses of certain relatives of the business associate. *Id.* Goldman did not respond. *Id.* At trial, the agent testified regarding this failure to respond. *Id.* Goldman was convicted and he appealed, claiming that the agent's testimony had violated *Hale. Id.* at 504. The First Circuit affirmed, holding that *Hale* was not controlling because "[w]hat [Goldman] said provided a context that enhanced the probative value of his silence in response to a particular question." *Id.*

ments." [53] The Court explained that "[s]uch questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings *has not been induced to remain silent.* As to the subject matter of his statements, the defendant has not remained silent at all." [54]

The reasoning in *Charles* is consistent with that employed by the decisions which it cited for support.[55] However, the holding in *Charles* contains a requirement not found in those other decisions—that as a condition to impeachment use of a defendant's post-arrest silence, the defendant's post-arrest statements must be inconsistent with his later trial story.[56] Although this requirement is not found in the prior courts of appeals decisions,[57] it is expressly contained in a later one.[58]

In the same year that *Charles* was decided,[59] the Supreme Court ruled in *Jenkins v. Anderson* [60] that use of a defendant's *pre-arrest* silence for impeachment purposes does not violate due process.[61] In *Jenkins,* as in *Charles,* the Court reasoned that the use of the defendant's silence was permissible because "no governmental action induced [the defendant] to remain silent . . . ." [62]

One federal court of appeals has already had occasion to apply the *Charles* rule. In *Grieco v. Hall,*[63] the First Circuit stated that *Charles* "does not mean that any time a defendant makes any post-arrest statement the door is open to full cross-examination about the defendant's failure to recount the exculpatory trial story earlier." [64] The court implied that *any* post-arrest statement is not sufficient, and emphasized in this regard the importance of the *Charles* Court's requirement of incon-

53. 447 U.S. at 408.

54. *Id.* (citations omitted) (emphasis added).

55. *Compare* note 52 *with* text accompanying note 54 *supra.*

56. *Compare* note 52 *with* text accompanying note 53 *supra.* It should be noted that this requirement calls for more than mere inconsistency between the defendant's post-arrest *silence* and later trial testimony.

57. For an earlier decision, not cited in *Charles,* which expressly permitted impeachment use of a defendant's silence where it was consistent with his later exculpatory trial testimony, see United States v. Beechum, 582 F.2d 898 (5th Cir. 1978), *cert. denied,* 440 U.S. 920 (1979).

58. *See* notes 63-66 and accompanying text *infra.*

59. *See* note 44 *supra.*

60. 447 U.S. 231 (1980).

61. *Id.* at 240.

62. *Id.* For the Court's reasoning in *Charles,* see text accompanying note 54 *supra.*

63. 641 F.2d 1029 (1st Cir. 1981).

64. *Id.* at 1034.

sistency between the defendant's post-arrest and trial statements.[65] The *Grieco* court, however, held that on its facts, *Charles* was applicable.[66]

The question of what prosecutorial conduct constitutes reversible error was not addressed by the Court in either *Hale* or *Doyle*.[67] Nor has the Court subsequently addressed the issue.[68] However, it has received extensive treatment by the federal courts of appeals.[69] Generally, the practice has been to rule on a case-by-case basis using very generalized criteria.[70] The Third Circuit's decision in *United States v. Agee* [71] is illustrative of these cases.

In *Agee,* the defendant made statements to the police denying that he had committed the crime for which he was arrested.[72] At trial, he testified to an exculpatory story.[73] The alleged error [74] was that in his cross-examination and summation the prosecutor asked why Agee had not mentioned the exculpatory story to the police.[75] The Third Circuit

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65. *Id.* In addition to pointing to the importance of inconsistency in closing the door to full cross-examination, the court also stated that it changes the nature of the inquiry. *Id.* The court explained that "once a defendant makes post-arrest statements that may arguably be inconsistent with the trial story, inquiry into what was not said at arrest may be designed not 'to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement. . . .'" *Id., quoting* Anderson v. Charles, 447 U.S. at 409.

66. 641 F.2d at 1036. The court found the defendant's exculpatory trial story to be clearly inconsistent with his post-arrest statement. *Id.*

67. *See* United States v. Agee, 597 F.2d 350, 359 n.29 (3d Cir. 1979).

68. *See* note 44 *supra.*

69. *Id.*

70. *See, e.g.,* United States v. Bridwell, 583 F.2d 1135, 1139 (10th Cir. 1978) (brief and isolated comments on defendant's post-arrest silence are harmless error); United States v. Davis, 546 F.2d 583, 594-95 (5th Cir.) *cert. denied,* 431 U.S. 906 (1977) (brief and isolated comments on defendant's post-arrest silence are harmless error); United States v. Harp, 536 F.2d 601, 603 (5th Cir. 1976) (prosecutor's comments that strike at the "jugular" of the defendant's story are reversible error.) Moreover, before a constitutional error can be held to be harmless, the court must be able to declare that it was harmless beyond a reasonable doubt. Chapman *et al.* v. California, 386 U.S. 18, 21-24 (1967).

71. 597 F.2d 350 (3d Cir. 1979) *(en banc).*

72. For a more detailed description of the factual background of *Agee,* see note 52 *supra.*

73. *Id.*

74. The court's holding was actually based on the ruling that no error had occurred. 597 F.2d at 359.

75. *Id.* at 353. The government asked Agee: "But it wasn't in your mind to say to the police, 'That man in my car has dope. Arrest him?'" *Id.* In its summation, the government stated:

> Did he not, when he, intentionally knowing that these were narcotics, hide the narcotics from the police, went back to the police car and attempted to diver [sic] the police from finding the narcotics instead of saying to the police, "Hey, that guy has dope. Arrest him," when he conceals the narcotics from the police with the intention of giving them back to Smith, knowing that in all probability Smith is going to sell them?

Id.

found that these questions did not constitute reversible error, and listed the following factors in support of its conclusion: 1) no repetitive questioning had occurred which could have focused the jury's attention on the defendant's silence; 2) the questions may or may not have referred to pre-arrest silence; and 3) the questions did not directly link the defendant's purported silence with his exculpatory testimony.[76] Under these circumstances, the court concluded, there was "no reasonable possibility" that the government's questions in any way contributed to Agee's conviction.[77]

Against this background, the Third Circuit decided *Curtis*. The court held that the government's cross-examination and summation reference to the defendant's silence violated the *Hale-Doyle* prohibition.[78] Stating that the "silence" referred to by the government was post-arrest, rather than pre-arrest silence, the *Curtis* court concluded that the *Jenkins* exception to *Doyle* was inapplicable.[79] Further, in response to an extensive attack by the dissent,[80] the court concluded that the *Charles* exception to *Doyle* was also inapplicable.[81] This conclusion, which, together with its reasoning, is entirely contained in a three sentence footnote, was based on the court's observation that the government's cross-examination was directed at the defendant's post-arrest *silence* rather than at his post-arrest *statements*.[82]

The court also held that the government's *Hale-Doyle* violations were not harmless.[83] The holding was based on the conclusion that the government's comments, although brief, were neither isolated nor ambiguous.[84] The court also suggested that notwithstanding the prejudice,

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76. *Id.*

77. *Id.*

78. 644 F.2d at 271. For a discussion of the *Hale-Doyle* prohibition, see notes 23-43 and accompanying text *supra*.

79. 644 F.2d at 271. For a discussion of the *Jenkins* exception to *Doyle*, see text accompanying notes 60-62 *supra*.

80. *See* 644 F.2d at 272 (Weis, J., dissenting).

81. *Id.* at 271 n.4. For a discussion of the *Charles* exception to *Doyle*, see notes 46-58 and accompanying text *supra*.

82. *See* 644 F.2d at 271 n.4. Form as well as brevity make the court's reasoning difficult to discern—the footnote is in the form of a reply to an argument raised by the dissent. *Id.* The footnote states:

> The dissent relies on *Anderson v. Charles* for the proposition that cross-examination about a statement can include cross examination about omissions from the statement. That reliance is misplaced, for the district court made perfectly clear its understanding, which the record fully supports, that the cross-examination was not directed to any prior statement, but solely to post-arrest silence. The dissent attempts to affirm a ruling which was not made on an issue which was not presented.

Id. (citation omitted).

83. *Id.* at 271.

84. *Id.*

and perhaps notwithstanding even the alleged *Hale-Doyle* violations, a new trial should be granted as a means of deterring the prosecution's disregard of express warnings from the bench.[85]

In dissent, Judge Weis contended that because the defendant "did not maintain silence about the facts of the crime" for which he was arrested, and because the defendant's statement was "arguably inconsistent" with his trial story, *Charles,* rather than *Hale* or *Doyle* controlled the outcome of the case.[86] Because *Charles* was applicable, Judge Weis concluded that no *Hale* or *Doyle* violation could exist, and, therefore, no error, prejudicial or otherwise, had occurred.[87]

It is submitted that in light of recent, albeit problem-ridden [88] case law, Judge Weis' dissent [89] rests upon a sounder legal basis than does the position of the majority.[90] The first and foremost reason for this conclusion is the majority's interpretation of *Charles.*[91] The *Curtis* court concluded that the *Charles* exception to *Doyle* was not applicable because the government commented *solely* on the defendant's post-arrest statements.[92] The court thus interpreted *Charles* as permitting comment on a defendant's post-arrest silence *only* if there is also comment on the defendant's post-arrest statements.[93] In making this interpretation, the court seemingly adopted what might be referred to as the "inconsistent statement" rationale.[94] That rationale is one of two sepa-

85. *Id.* at 271 n.6. In a footnote, the court stated:

> Institutional considerations also weigh heavily in favor of a new trial. We have had too many occasions to comment on the all too prevalent practice of unfair argument by government attorneys. When it is presented in the face of an express advance warning to avoid it, the dignity and integrity of the judicial process demands an effective remedy. None short of the grant of a new trial has to date provided effective deterrence against such misconduct. Thus even if we could agree that the conduct was not significantly prejudicial, which we cannot, a reversal still would be in order.

Id.

86. *Id.* at 272 (Weis, J., dissenting). With respect to the "inconsistency" requirement, Judge Weis explained that "[a]lthough it was possible to reconcile [the defendant's post-arrest statement that 'there was going to be $1,000 made' on the transaction] with the defendant's testimony that he was going to give the $1,000 to the person who allegedly had threatened him, that argument would be for the jury." *Id.*

87. *Id.*

88. For a discussion of these problems, see note 146 *infra.*

89. For a discussion of Judge Weis' dissent, see notes 86 & 87 and accompanying text *supra.*

90. For a discussion of the position taken by the majority, see notes 78-85 and accompanying text *supra.*

91. For a discussion of the majority's interpretation of *Charles,* see notes 80-82 and accompanying text *supra.*

92. *See* note 82 and accompanying text *supra.*

93. *Id.*

94. For a discussion of this rationale, see notes 102-06 and accompanying text *infra.* Use of this rationale is implicit in the court's reasoning. *Compare*

rate and distinct rationales for permitting impeachment comment on a defendant's post-arrest silence.[95] The other rationale, which might be referred to as the "non-reliance" rationale,[96] was relied upon implicitly by Judge Weis in his dissent.[97] Each rationale is supported by language in *Charles* and other recent decisions.[98]

An explanation of these two rationales must begin with an understanding of *Doyle*.[99] In *Doyle,* the Supreme Court made a "constitutional inference" that where, after receiving *Miranda* warnings, a defendant remains silent about the facts of the crime for which he is charged, his silence is the result of reliance on the *Miranda* warnings.[100] Consequently, the Court concluded that where that silence is used against the defendant for purposes of impeachment at trial, the fundamental fairness guaranteed by due process is violated.[101]

The inconsistent statement rationale would justify comment on the defendant's post-arrest silence on the basis that such comment is used merely to illuminate the inconsistency between the defendant's post-arrest statement and his later trial testimony.[102] Because in effect the defendant's statements rather than his silence are used for impeachment, the unfair use of silence which *Doyle* seeks to prevent does not occur.[103]

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text accompanying notes 92 & 93 *supra with* text accompanying notes 102-06 *infra.*

95. *See* notes 102-06 and accompanying text *infra.*

96. For a discussion of this rationale, see notes 107-09 and accompanying text *infra.*

97. *Compare* text accompanying note 86 *supra with* notes 107-09 and accompanying text *infra.*

98. For a discussion of the support for these rationales in other decisions, see notes 105 & 106, 112-14 and accompanying text *infra.*

99. For a discussion of the facts and holding of *Doyle,* see notes 31-43 and accompanying text *supra.*

100. *See* Note, *supra* note 16, at 453-54. The *Doyle* Court stated that although the *Miranda* warnings contain no express assurance that silence will not be used against an arrestee, such assurance is implicit in the warning itself. 426 U.S. at 618. The key sentence in the Court's analysis is "[s]ilence in the wake of these warnings *may* be nothing more than the arrestee's exercise of these *Miranda* rights." *Id.* at 617 (emphasis added). *See* Note, *supra* note 16, at 455. Because in truth this is not always the case, the Court decided that it must be assumed that the defendant was relying on *Miranda,* and any resulting disadvantage must be borne by the government. *Id.*

101. 426 U.S. at 620. It should be noted that the fifth amendment right against self-incrimination extends only to substantive and not to impeachment use of a defendant's silence. *See* note 22 *supra. Doyle* is based on a fourteenth amendment due process rather than a fifth amendment right against self-incrimination analysis. *See* text accompanying note 40 *supra.*

102. *See, e.g.,* Grieco v. Hall, 641 F.2d 1029, 1035 (1st Cir. 1981), *quoting* United States v. Beechum, 582 F.2d 898, 906 (5th Cir. 1978) (the prosecutor's statement is not a comment upon the defendant's silence, but rather an appraisal of what the defendant said); text accompanying note 105 *infra.*

103. *See* notes 99-101 and accompanying text *supra.*

A necessary implication of this rationale is that there must actually be comment on the defendant's post-arrest statements.[104] This rationale is suggested by language in *Charles* which states "[t]he questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." [105] The rationale is also suggested by language in several lower court decisions.[106]

Under the non-reliance rationale, comment on the defendant's post-arrest silence is permitted because when the defendant makes post-arrest statements regarding the facts of the crime, he has not relied on his right to remain silent.[107] As a consequence, the fundamental unfairness which *Doyle* seeks to preclude is avoided.[108] Because under this rationale the key is whether the defendant relied on his right to remain silent, the only important consideration is whether the defendant spoke after being warned of the possible consequences of his speech. Comment on what the defendant said after his arrest is unnecessary.[109] It is suggested that this rationale, the non-reliance rationale, is the better interpretation of *Charles*.[110]

The non-reliance rationale has substantially more support in the case law than the inconsistent statement rationale.[111] For example, the *Charles* Court made specific reference to the defendant's lack of reliance as justification for permitting comment on the defendant's silence: "Such

104. *See* text accompanying note 93 *supra*. Since the purpose of the comment on the defendant's silence is merely to bring out the inconsistency between the defendant's statements, the government must, of course, bring to the attention of the jury the existence of those inconsistent statements.

105. 447 U.S. at 408.

106. *See, e.g.*, Grieco v. Hall, 641 F.2d 1029, 1034-36 (1st Cir. 1981); United States v. Mireles, 570 F.2d 1287, 1293 (5th Cir. 1978). For a description of the language of these cases, see generally notes 52 & 65 *supra*.

107. The effect of the defendant's post-arrest statements is to negate the inference that the silence was induced by reliance on deceptive advice. *See* notes 99-101 and accompanying text *supra*. In turn, an opposite inference is apparently made: where the defendant makes post-arrest statements about the facts of the crime, he has not relied on his right to remain silent. *See* United States v. Agee, 597 F.2d 350, 356 (3d Cir. 1979); United States v. Mireles, 570 F.2d 1287, 1293 (5th Cir. 1978); text accompanying note 112 *infra*. The decisions which support this rationale do not indicate whether this inference is absolute or rebuttable. *See* Anderson v. Charles, 447 U.S. 404; United States v. Agee, 597 F.2d 350; United States v. Mireles, 570 F.2d 1287. The case law which has applied *Charles* is not helpful. *See* Grieco v. Hall, 641 F.2d 1029 (5th Cir. 1981). Furthermore, the applicability of *Miranda*-based waiver rules to this issue is unclear. *See* notes 19 & 101 *supra*.

The purpose of the *Charles* requirement that the defendant's post-arrest statements be inconsistent with his later trial testimony, under this rationale, is to assure that not all post-arrest statements are sufficient to permit comment on the defendant's silence. *See* text accompanying notes 56-58 & 65 *supra*.

108. *See* notes 99-101 and accompanying text *supra*.

109. This is true as long, of course, as the government's use of the defendant's post-arrest silence is for impeachment purposes. If not, *Miranda* protections may apply. *See* note 101 *supra*.

110. It is also submitted that therefore, the majority is incorrect.

111. *See* notes 112-114 and accompanying text *infra*.

questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings *has not been induced to remain silent.*" [112] Moreover, of the three courts of appeals decisions expressly relied on in *Charles,* one explicitly and exclusively adopted the non-reliance rationale.[113] And another could not, on its facts, have employed the inconsistent statement rationale.[114] The remaining decision relied on in *Charles* did not involve a *Doyle* question.[115]

Moreover, of the two rationales, the non-reliance rationale is conceptually more responsive to the concerns of *Doyle.*[116] It provides that the defendant's reliance on his right to remain silent is not unfairly used against him because where he makes post-arrest statements about the facts of the crime, he has not relied on his right to remain silent.[117] Although it may be somewhat overinclusive,[118] the logic of this rationale is relatively simple and straightforward.[119]

In contrast, the logic of the inconsistent statement rationale is strained and confusing. In focusing on the defendant's silence, rather than his reliance, and providing that comment on silence is in effect merely comment on the defendant's inconsistent statements, the rationale requires unusual reasoning.[120] Moreover, assuming that the defendant has relied on his right to remain silent, this rationale presents several real problems. One problem is that any comment on the defendant's silence incurs the risk of penalizing the defendant's reliance on his right to remain silent [121]—the very danger which *Doyle* and *Charles* seek to prevent.[122] Another problem is that the extent to which the government

112. 447 U.S. at 408 (emphasis added).

113. *See* United States v. Agee, 597 F.2d at 356 (no *Doyle* violation occurred because the defendant simply did not remain silent and therefore did not exercise his right to remain silent); *see generally* note 52 *supra.*

114. *See* United States v. Mireles, 570 F.2d 1287, 1292 (5th Cir. 1978) (the government made no reference to the defendant's post-arrest statements, yet the court held that the *Charles* exception to *Doyle* was applicable); *see generally* note 52 *supra.*

115. *See* United States v. Goldman, 563 F.2d 501 (1st Cir. 1977).

116. For a comparison of response of the two rationales to the concerns of *Doyle,* see notes 117-124 and accompanying text *infra.*

117. For a discussion of this rationale, see notes 107-109 and accompanying text *supra.*

118. *See* note 107 *supra* (this rationale apparently infers non-reliance, whether actual or not).

119. *But see* note 107 *supra* (it is not clear whether the inference of reliance is absolute or rebuttable).

120. The gist of this rationale is that comment on a defendant's silence is not comment on a defendant's silence. *See* notes 102-106 and accompanying text *supra.*

121. For example, there is no guarantee that the comment will highlight the inconsistency between the defendant's post-arrest statement and his later trial story. Conversely, there is no guarantee that the comment will merely bring to the attention of the jury the unexplained silence of the defendant.

122. *See* notes 31-43, 54 & 99-101 and accompanying text *supra.*

must comment on the defendant's post-arrest statements before it may comment on his post-arrest silence is unclear.[123] Finally, it is also unclear as to what order the government's comments must follow. Is it error if the government's comment on the defendant's post-arrest silence precedes its comments on his post-arrest statements?[124] If we assume, on the other hand, that the defendant has not relied on his right to remain silent, this rationale is unnecessary.

It is submitted that the court also erred in holding that *Hale* had been violated. Based on federal evidentiary law, *Hale* bars impeachment use of a defendant's silence where its probative value is outweighed by its prejudicial impact.[125] Unlike *Doyle, Hale*'s restrictions on the impeachment use of a defendant's post-arrest silence have not necessarily been affected by *Charles*.[126] However, several federal courts of appeals have distinguished, if not modified *Hale*.[127] They have ruled that *Hale* does not bar impeachment use of a defendant's post-arrest silence where the defendant also makes statements at the time of his arrest concerning the facts of the crime for which he is charged.[128] The rationale provided is that the defendant's statements concerning the crime "provide a context that enhance[s] the probative value of his silence in response to a particular question."[129] It is not clear whether this is a per se rule or whether a balancing of prejudicial impact with probative value is required in each case.[130] If the former is the rule, no *Hale* violation could have occurred given the facts of *Curtis*.[131] If the latter is the rule,

123. For example, is a trivial reference or a mere intimation sufficient? What if the substance of the defendant's post-arrest statements is already known by the jury through other means? It would appear that the less the government comments on the defendant's post-arrest statement, the more the jury will focus on the defendant's post-arrest silence.

124. It would seem that unless the comment on the defendant's post-arrest statement is made in close proximity to the comment on his post-arrest silence, the danger would exist that the government would simply call the attention of the jury to the defendant's silence as silence.

125. *See* notes 23-30 and accompanying text *supra*.

126. 447 U.S. 404.

127. *See, e.g.*, United States v. Agee, 597 F.2d 350, 357 (3d Cir. 1979); United States v. Goldman, 563 F.2d 501, 504 (1st Cir. 1977). For a discussion of these cases, see note 52 *supra*.

128. United States v. Agee, 597 F.2d 350, 357 (3d Cir. 1979); United States v. Goldman, 563 F.2d 501, 504 (1st Cir. 1977).

129. *See* United States v. Agee, 597 F.2d 350, 357 (3d Cir. 1979); United States v. Goldman, 563 F.2d 501, 504 (1st Cir. 1977). The courts implied that silence alone may be too "ambiguous" to be probative of any inconsistency between that silence and the defendant's subsequent exculpatory testimony. 597 F.2d at 357, 563 F.2d at 504. The defendant's post-arrest statements, however, could show the threshold inconsistency. *Id. See generally* note 27 *supra*.

130. *See* United States v. Goldman, 563 F.2d 501, 504 (1st Cir. 1977). A fact in support of a per se rule is that it would make the scope of *Hale* coextensive with the post *Charles* scope of *Doyle*. *See* notes 107-109 and accompanying text *supra*.

131. *See* note 6 *supra*.

a case can be made that Curtis' post-arrest statements sufficiently enhanced the probative value of his silence so as to outweigh any concomitant prejudicial impact.[132]

Even assuming, arguendo, that a *Hale-Doyle* violation did occur, the court's conclusion that harmful error resulted does not withstand scrutiny. First, an application of the factors relied on in *Agee* to the facts of *Curtis* suggests that no harmful error occurred.[133] Second, a comparison of the records of *Agee* and *Curtis* reveals that in each case, the government's questions and comments on the defendant's post-arrest silence were nearly identical in number and degree.[134] Yet in *Agee,* unlike *Curtis,* the court found no harmful error.[135] Admittedly, the practice has been to make findings of harmless constitutional error using the beyond a reasonable doubt standard and on a case-by-case basis.[136] However, when, in the same court, two cases occur with nearly identical operative facts and issues, the principle of stare decisis requires that they be similarly treated,[137] especially when the prior decision is *en banc.*[138]

The actual basis for the court's decision may well have been to deter the government's disregard of express warnings from the bench.[139] The court has described this disregard as an "all too prevalent practice." [140] By penalizing the government's misconduct in this case, the court may

132. In *Curtis,* the defendant was apparently alone with the police officers for one and a half to two hours after his arrest. 644 F.2d at 270. During this time he said nothing with respect to his claim of entrapment. *Id.* However, the defendant did talk to the police about the crime—that "there was going to be $1,000 made [on the transaction]." *Id.* at 272 (Weis, J., dissenting). In light of that statement, it seems that the defendant had no reason for failing to tell the police that he was entrapped other than that he was not in fact entrapped.

133. *Compare* notes 7 & 10 *with* text accompanying note 76 *supra.* In *Curtis,* the government's questions to the defendant regarding his post-arrest silence were not "repetitive"; in fact, the government only asked one such question. *Id.* Moreover, the government's question and comment may or may not have referred to the defendant's pre-arrest silence. *Id.* In fact the trial court used this reason as a basis for denying the defendant's motion for a mistrial. *See* note 12 *supra.* Moreover, the question and comment did not *directly* link the defendant's purported silence with his exculpatory story. *See* notes 7 & 10 *supra.*

134. *Compare* notes 7 & 10 *with* note 75 *supra.* Both cases involved one brief question and summation comment by the government on the defendant's post-arrest silence for the purpose of impeaching his subsequent and arguably inconsistent alibi. *See id.*

135. 597 F.2d at 359.

136. *See* note 70 and accompanying text *supra.*

137. *See* Hall v. United States, 171 F.2d 347 (D.C. Cir. 1948). Moreover, the trial court apparently had already found that any error was harmless beyond a reasonable doubt. *See* note 12 *supra.*

138. *See* 597 F.2d at 351. *Agee* was decided by a nine judge panel of the Third Circuit. *Id.*

139. *See* note 85 and accompanying text *supra.*

140. *Id.*

be attempting to signal the government that such practice will no longer be tolerated. Such a motive is understandable; however, the court's inveiling its ruling in dubious findings of *Hale* and *Doyle* violations only serves to undermine its underlying purpose.

The immediate effect of *Curtis* is that it overrules the prior precedent in the Third Circuit—*Agee* [141]—and provides at best a questionable interpretation of *Charles*.[142] This interpretation, given its problems, especially its brevity,[143] is likely to cause confusion in the lower courts and to be ignored in the other circuits. On a more practical level, the decision adds another procedural burden on prosecutors which, in turn, gives defendants another procedural basis upon which to gain a new trial.[144] However, little additional protection is actually provided the right to remain silent.[145] The case also, unfortunately, leaves unresolved a host of issues in this area of law which could have been addressed by the court.[146] In view of these problems, it is possible that *Curtis* will cause even further Supreme Court review of this subject. Thus, the court's decision may represent only an ineffectual halt to even further erosion of the protections once provided by *Miranda, Hale,* and *Doyle.*

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141. *See* notes 52, 94 & 102-109 *supra. Agee* clearly had adopted the non-reliance rational. *Id. Curtis* was implicitly based on the inconsistent statement theory. *Id.*

142. *See* notes 110-124 and accompanying text *supra.*

143. *See* note 82 and accompanying text *supra.*

144. *See* note 104 and accompanying text *supra.*

145. *See* notes 121-124 and accompanying text *supra.*

146. For example, the following issues were, in varying degrees, related to the case but not discussed: First, to what extent may the defendant speak before he is no longer "silent?" *See* note 35 and accompanying text *supra* (in *Doyle* one defendant made a post-arrest statement, yet the case was treated as if both defendants had remained completely silent). Second, how directly must the defendant's post-arrest statements relate to the facts of the crime? Third, does *Charles* apply to pre-*Miranda* warning custodial interrogation? *See* United States v. Curtis, 644 F.2d at 272 n.1 (Weis, J., dissenting) (the record in *Curtis* does not show whether *Miranda* warnings were given). Fourth, who is to determine whether the defendant's post-arrest statements are sufficiently inconsistent with the defendant's later trial story? *See* note 86 *supra.* (Judge Weis implied that the trial judge should make the threshold determination and, if affirmative, then refer it to the jury). Fifth, may the government make impeachment use of a defendant's silence regardless of how long after the arrest the particular silence occurred? *See* United States v. Mireles, 570 F.2d 1287, 1292 n.8 (5th Cir. 1978), *quoting* Doyle v. Ohio, 426 U.S. 610, 616 n.6 (1976) (silence at times subsequent to the immediate post-arrest may present different considerations). Sixth, what other remedies, short of ordering a new trial, could the court employ to deter future disregard of express warnings from the bench? *See* note 85 *supra.*

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CRIMINAL LAW—EVIDENCE—EXPERT TESTIMONY REGARDING A DEFENDANT'S SUSCEPTIBILITY TO ENTRAPMENT IS ADMISSIBLE WHEN BASED UPON THE EXPERT'S EXAMINATION OF THE DEFENDANT AND DATA PRESENTED TO THE EXPERT EXTRAJUDICIALLY.

United States v. Hill (1981)

In February, 1979, an FBI informant approached Paul Hill[1] and inquired about locating a source for the purchase of heroin.[2] Hill, an individual of alleged subnormal intelligence, ignored the informant's initial requests, but was eventually persuaded to arrange a sale.[3] Over a four month period, Hill arranged five additional sales to government agents[4] and was subsequently indicted on one count of conspiracy and six counts of distribution of heroin.[5]

At trial, Hill's only defense was that he had been entrapped because the informant had induced him to arrange the sales.[6] To support the entrapment defense, Hill's attorney called a clinical psychologist to testify to Hill's subnormal intelligence and his susceptibility to persuasion.[7] The district court excluded the proffered evidence primarily

1. 655 F.2d 512, 514 (3d Cir. 1981). Hill was employed by Krass Bros. Inc., in Philadelphia as a clothing salesman. *Id.* at 514.

2. *Id.*

3. *Id.* Despite Hill's initial refusal to participate in the drug sales, the informant continued to make contacts and requests. *Id.* On March 13, 1979, the informant and a federal agent made a heroin purchase from an acquaintance of Hill. *Id.* Hill had arranged and was present at the sale. *Id.*

4. *Id.* Additional sales of narcotics took place on March 14 and 29, April 23, and June 12 and 18, 1979. *Id.* The largest of these was for $24,000. United States v. Hill, 481 F. Supp. 558, 559 (E.D. Pa. 1979). The informant was not present for the transactions on April 23, June 12 and June 18, 1979, but other government agents participated in these sales. *Id.* at 559. Hill admitted that he told an agent not to include the informant in later transactions. *Id.*

5. 655 F.2d at 514.

6. United States v. Hill, 481 F. Supp. 558, 559 (E.D. Pa. 1979). Hill testified that he had smoked marijuana and used cocaine, but that he had never sold heroin. *Id.* at 559. He also stated that he arranged the sales because he was impressed by the informant's need for heroin. *Id.* Hill admitted knowing that the seller dealt in marijuana and cocaine and having visited the seller's apartment on several occasions. *Id.* He claimed to have arranged the sales as a favor to the agent. *Id.*

7. 655 F.2d at 515. Defense counsel attempted to call a psychologist, Dr. Brutten, to testify just prior to the conclusion of the government's case and represented that Dr. Brutten would be unavailable at any other time. United States v. Hill, 481 F. Supp. 558, 561 (E.D. Pa. 1979). The offer of proof concerned Hill's capacity to resist pressure applied by the skilled government informant. *Id.* at 561. Despite the earlier representation by defense counsel concerning Dr. Brutten's availability, the trial judge was informed that Dr.

for lack of foundation for the opinion testimony which the psychologist might offer to prove Hill's susceptibility to police inducement to engage in criminal activity.[8] In addition, the district court concluded that the defense had failed to give adequate notice of the psychologist's expert testimony as required by Rule 12.2(b) of the Federal Rules of Criminal Procedure.[9] The court ruled that such testimony might be admissible if preceded by testimony of the defendant establishing "some sort of minimal foundation for the psychologist's opinion." [10] As the psychol-

Brutten could return the following day and his testimony was postponed. *Id.* Shortly thereafter the government rested its case and the defense called four witnesses other than the psychologist. *Id.* The following day, Dr. Brutten's opinion was offered with respect to three matters: a complete psychological profile of Hill compiled from records and tests; Hill's susceptibility to influence; and the effect of the informant's "skill and cunning upon [the] defendant's susceptibility." 655 F.2d at 515. The defense additionally offered Dr. Brutten's response to a hypothetical question concerning Hill's ability to resist the requests of a skilled and communicative informant or policeman. 481 F. Supp. at 561. The government's objections to the psychologist's testimony were based on three grounds: lack of relevancy; lack of foundation; and failure of the defense to give notice of a psychiatric defense as required by Rule 12.2(b) of the Federal Rules of Criminal Procedure. 655 F.2d at 515.

8. United States v. Hill, 481 F. Supp. 558, 561 (E.D. Pa. 1979). District Judge Ditter noted that the exclusion of Dr. Brutten's testimony was primarily based "on the complete absence of any foundation for the testimony" as Dr. Brutten had not been present in the courtroom to hear the informant's testimony or Hill's response to cross-examination. *Id.* at 561. Judge Ditter supported his ruling by stating to defense counsel that he was uncertain whether a jury would find the informant skilled and cunning and that Dr. Brutten had no knowledge concerning the substance and duration of Hill's conversations with the informant. 655 F.2d at 519. Judge Ditter also refused to allow the psychologist to respond to a hypothetical question "which in effect would have asked the doctor to give his opinion as to whether the defendant could have resisted the persuasion of a skillful and cunning man like [the informant]." 481 F. Supp. at 561-62.

9. United States v. Hill, 481 F. Supp. 558, 562 (E.D. Pa. 1979). Rule 12.2(b) of the Federal Rules of Criminal Procedure provides:

> If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

FED. R. CRIM. P. 12.2(b). District Judge Ditter noted that the government learned of Hill's intention to present expert testimony on the day of trial. 481 F. Supp. at 562. Because Dr. Brutten had not heard either the testimony of the government informant or that of Hill and because any expert called by the government to rebut Dr. Brutten's testimony would also be deprived of the opportunity to hear that testimony, Judge Ditter concluded that Rule 12.2(b) mandated exclusion of Dr. Brutten's testimony. *Id.* Judge Ditter further emphasized that he was not asked to admit the testimony later in the trial, but only at the time it was offered. *Id.*

10. United States v. Hill, 481 F. Supp. 558, 561-62 (E.D. Pa. 1979). The district court proposed a method by which a foundation for Dr. Brutten's

ogist was unable to remain in court long enough for the defendant to first testify,[11] the district court refused to permit his testimony and Hill was subsequently convicted.[12]

On appeal, the United States Court of Appeals for the Third Circuit [13] reversed the conviction and remanded the case for a new trial, *holding* that the district court erred in excluding expert testimony concerning the defendant's susceptibility to entrapment and that the failure to comply with Rule 12.2(b) of the Federal Rules of Criminal Procedure provided an insufficient basis for the exclusion of such testimony. *United States v. Hill,* 655 F.2d 512 (3d Cir. 1981).

A defendant's claim of entrapment, which requires a showing that the defendant was not predisposed to commit the crime,[14] may be sup-

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testimony could be laid. *Id.* at 561-62. Since the court found that Dr. Brutten was unable to shed any light on the nature of what had transpired between Hill and the informant, the court suggested that he listen to Hill's testimony concerning what had occurred. *Id.* at 562.

11. 655 F.2d at 515. Dr. Brutten had been in court for two days and was unable to remain any longer. *Id.*

12. *Id.* at 514. The jury returned a verdict of not guilty on the conspiracy count and one of the distribution of narcotics counts, but returned a guilty verdict on the remaining five counts. *Id.*

13. The case was heard by Circuit Judges Gibbons and Rosenn and Judge Gerald J. Weber, Chief United States District Judge for the Western District of Pennsylvania, sitting by designation. Judge Weber delivered the opinion of the court and Judge Rosenn dissented. The case was before the original panel of the court on a grant of rehearing from its decision of November 25, 1980.

14. Two approaches to the defense of entrapment have developed. A majority of the Supreme Court has adopted the "subjective" view as opposed to the "objective" view, which is supported by a minority of the Court. *Compare* Hampton v. United States, 425 U.S. 484 (1976) (plurality opinion); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932) *with* Hampton v. United States, 425 U.S. at 495 (Brennan, J., dissenting); United States v. Russell, 411 U.S. at 436 (Douglas, J., dissenting); Sherman v. United States, 356 U.S. at 378 (Frankfurter, J., concurring); Sorrells v. United States, 287 U.S. at 453 (Roberts, J., concurring). For commentary concerning the dual approach to entrapment, *see* Campen, *California Adopts the Unproven Federal Minority View of Entrapment,* 7 PEPPERDINE L. REV. 401 (1980); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provacateurs,* 60 YALE L.J. 1091 (1951); Klar, *The Need for a Dual Approach to Entrapment,* 59 WASH. U.L.Q. 199 (1981); Rotenberg, *The Police Detection Practice of Encouragement,* 49 VA. L. REV. 871 (1963); Note, *Entrapment in the Federal Courts: Sixty Years of Frustration,* 10 NEW ENG. L. REV. 179 (1974). *See generally* W. LA FAVE & A. SCOTT, CRIMINAL LAW 369-75 (1972). Under the majority or subjective approach, the focus is on the character or predisposition of the defendant. *See id.* at 371. If it is determined that the defendant would not have engaged in the criminal activity but for the government inducement, that is, he was not "predisposed" to engage in the criminal activity for which he is charged, he will be absolved of all guilt. *Id.* at 372. Under the objective view, the court focuses on the conduct of the government agents and if it falls below tolerable standards, the defendant will be acquitted, regardless of his predisposition to engage in criminal conduct. Hampton v. United States, 425 U.S. at 495 (Brennan, J., dissenting); Sorrells v. United States, 287 U.S. at 453 (Roberts, J., concurring).

ported by expert psychological testimony.[15] In *United States v. Benveniste*,[16] the Ninth Circuit upheld the trial court's exclusion of a psychiatrist's testimony that the defendant was not predisposed to trafficking in narcotics[17] on the basis of the court's finding that the expert's testimony would tend to confuse the jury.[18] The *Benveniste* court recognized that there was authority to support the admissibility of expert testimony on the issue of predisposition,[19] but noted that the admission

The rationale for the subjective view of the defense as articulated by the Court in *Sorrells* is that Congress, when it enacts a penal statute, does not intend to punish persons who are "otherwise innocent" except for the government's actions. 287 U.S. at 447-48. The rationale for the objective view rests instead on the need to protect the purity of the courts and law enforcement agencies, and prevent them from becoming instruments of abuse and manufacturers of crime. *Id.* at 482-87 (Roberts, J., concurring) (citations omitted).

The Supreme Court has remained silent with respect to the procedural requirements of the defense. *See* Note, *Entrapment—State v. Ford*, 6 WM. MITCHELL L. REV. 201, 205 n.44 (1980). Typically, the defendant raises the issue of entrapment in his case-in-chief, and to be entitled to a jury instruction, must sustain an initial burden of going forward with some evidence of government conduct which induced the illegal acts. Klar, *supra*, at 201. *See* United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979); United States v. Burkley, 591 F.2d 903 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979); United States v.Timberlake, 559 F.2d 1375 (5th Cir. 1977); United States v. Glaeser, 550 F.2d 483 (9th Cir. 1977); United States v. Bailey, 503 F.2d 969 (5th Cir. 1974). Thereafter the prosecution must rebut the issue of entrapment with proof beyond a reasonable doubt of the defendant's predisposition. Klar, *supra*, at 201 n.17.

15. *See* note 19 and accompanying text *infra*.

16. 564 F.2d 335 (9th Cir. 1977). In *Benveniste*, the defendant was convicted of conspiracy to distribute cocaine. *Id.* at 336. He did not deny possession of the cocaine or his intention to distribute it to the government agents, but he claimed that he had no predisposition to traffic in narcotics and that the idea to do so had been implanted by a government agent. *Id.* at 337.

17. *Id.* at 339, *citing* United States v. Barnard, 490 F.2d 907, 912-13 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); United States v. Amarol, 488 F.2d 1148, 1152 (9th Cir. 1973). The trial court in *Benveniste* had heard the psychiatrist's testimony out of the presence of the jury and determined that it would tend to confuse the jury without shedding light on the issue of predisposition. 564 F.2d at 339.

18. 564 F.2d at 338-39. The psychiatrist would have testified that Benveniste was not predisposed to deal in narcotics when he met with certain government agents and narcotics dealers. *Id.* at 338. His testimony, however, would have followed that of two other principals at the meeting, neither of whom actually testified. *Id.* One was physically unavailable; the other asserted her fifth amendment right to remain silent. *Id.* In view of the fact that the lower court had heard the doctor's testimony out of the jury's presence and had found it confusing, the Ninth Circuit found no abuse of discretion in the exclusion of the psychiatrist's testimony. *Id.* at 339.

19. *Id., citing* United States v. Mosely, 496 F.2d 1012, 1017 (5th Cir. 1974). In *Mosely*, the defendant was charged with distribution of heroine and possession of heroin with intent to distribute. 496 F.2d at 1014. He asserted at trial that the drugs which he sold were given to him by a female government agent with whom he had had an intimate relationship. *Id.* He also sought to introduce evidence that he had sustained a head injury and that subsequent brain surgery allegedly changed his personality and resulted in his being more easily swayed by others. *Id.* at 1017. The trial court excluded evidence of the injury on the basis that the defendant had waived his defense of insanity at a pretrial hearing. *Id.* Additionally, the trial court apparently found the

of such testimony lies within the discretion of the trial court.[20]

Rules 702 and 703 of the Federal Rules of Evidence set forth guidelines for the admission of expert testimony.[21] Rule 702 provides for the admission of testimony that "will assist the trier of fact to understand the evidence or to determine a fact in issue" in the form of "an opinion or otherwise."[22] Rule 703 addresses the foundation requirements for

evidence of the defendant's head injury and the resulting change in his personality irrelevant to the issue of predisposition. *Id.* On appeal, the defendant's conviction was reversed and the case was remanded for a new trial. *Id.* at 1016. The Fifth Circuit held that there was a dual basis for a jury instruction on the issue of entrapment: 1) even if the defendant were predisposed he might have been acquitted if the contraband were found to have been supplied by the government; and 2) "[e]vidence relevant to the issue of appellant's predisposition, one way or the other, should go to the jury for resolution with proper instructions." *Id.* at 1016-17. The court noted that waiver of an insanity defense did not affect the relevance of evidence of mental competence as it related to predisposition and an entrapment defense. *Id.* The court concluded that the evidence was relevant to the issue of predisposition. *Id.* at 1017.

20. 564 F.2d at 339, *citing* United States v. Barnard, 490 F.2d 907 (9th Cir. 1973), *cert. denied,* 416 U.S. 959 (1974); United States v. Amarol, 488 F.2d 1148, 1152 (9th Cir. 1973). The *Benveniste* court noted that Rule 702 of the Federal Rules of Evidence provides for the admission of expert testimony when it will "asist the trier of fact to understand or to determine a fact in issue." 564 F.2d at 339.

21. *See* FED. R. EVID. 702, 703. Rule 702 allows testimony of experts from any field of knowledge when an intelligent evaluation of facts is difficult without special training or experience in the relevant field. FED. R. EVID. 702 advisory committee note. For examples of appropriate utilization of expert testimony under Rule 702, *see* Biegler v. Kleppe, 633 F.2d 531 (9th Cir. 1980) (accident reconstruction expert's affidavit showing him to be properly qualified together with his statement as to the cause of the accident was sufficient under Rules 702-705 to withstand the defendant's motion for summary judgment); United States v. Scavo, 593 F.2d 837 (8th Cir. 1979) (expert testimony by an FBI agent admissible to prove the meaning of certain gambling terminology).

22. FED. R. EVID. 702. Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.* Rule 702 expresses a helpfulness criterion which expert testimony must meet in order to be admissible. United States v. Scavo, 593 F.2d 837, 844 (8th Cir. 1979). *See also* United States v. Webb, 625 F.2d 709 (5th Cir. 1980); United States v. Pacelli, 521 F.2d 135 (2d Cir. 1975), *cert. denied,* 424 U.S. 911 (1976).

In *Webb* the Fifth Circuit noted that even though expert testimony meets the foundation requirements of Rule 703, it does not meet the requirement of helpfulness to the trier of fact set forth in Rule 702 when such opinion serves only to inform the trier of fact of affairs within the understanding of the average man. 625 F.2d at 711. Thus, expert psychiatric testimony that the defendant was a peaceful nonviolent person was properly excluded as within the scope of the understanding of lay persons. *Id.* In *Pacelli,* a psychiatrist's opinion was offered to prove that the prosecution's major witness was psychopathic and incapable of telling the truth. 521 F.2d at 136. The Second Circuit held that the expert's testimony should be excluded as not helpful to the trier of fact under Rule 702. *Id.* at 137. The court held that the jury was aware of the witness' bizarre behavior and was thus capable, without the aid of the expert, of recognizing that the witness' testimony must be carefully scrutinized. *Id.*

the admission of expert testimony and provides that the opinion of an expert may be based on facts or data "perceived by or made known to him at or before the hearing." [23] The rule thus envisions three possible bases for an expert's opinion: firsthand observation: presentation of facts at trial; or extrajudicial presentation of facts or data.[24]

Because the Federal Rules of Evidence have only been in effect since 1975,[25] there have been few interpretations of the foundation requirements of Rule 703 with respect to the issue of predisposition in entrap-

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Even though expert testimony may meet the helpfulness criterion, it is "subject to exclusion under Rule 403 if its probative value is substantially outweighed by risks of unfair prejudice, confusion or waste of time." United States v. Scavo, 593 F.2d at 844, *citing* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 704[01] (1978). For a discussion of the Benveniste court's exclusion of expert testimony due to its confusing nature, see notes 16-18 & 20 *supra*.

23. FED. R. EVID. 703. Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Id.

24. FED. R. EVID. 703 advisory committee note. The advisory committee's note sets forth examples of each of the three bases of expert testimony. *Id.* A treating physician's observation of a patient provides an example of the first source. *Id., citing* Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 489 (1962). The second source is illustrated by the situations where an expert attends the trial and hears the testimony which establishes the facts or offers his opinion in response to a hypothetical question. FED. R. EVID. 703 advisory committee note. The third source brings "judicial practice into line with the practice of the experts themselves when not in court." *Id.* For example, a physician often bases his diagnosis on information from numerous sources other than his own observations. *Id. See also* C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 15 (2d ed. 1972).

For a discussion of expert testimony under the federal rules as contrasted with practice under the common law, see McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463 (1977). *See generally* 3 J. WEINSTEIN & M. BERGER, *supra* note 22, ¶¶ 703[01]-[06] (1981).

25. *See* J. MOORE, MOORE'S FEDERAL PRACTICE, §§ 5[2]-45 (2d ed. 1982). Prior to the 1975 effective date of the Federal Rules of Evidence, evidentiary rules in actions at law in the federal courts were governed by three statutes: The Conformity Act; The Competency of Witnesses Act; and The Rules of Decision Act. *Id.* § 5[2]. Some courts applied state law under the Conformity Act and others looked to the Rules of Decision Act. *Id.* In many decisions, the courts followed neither view and applied general law. *Id.* Thus, commentators urged that uniform rules be promulgated by the Supreme Court. *Id.* §§ 11-40[1]. In 1961, Chief Justice Warren appointed an advisory committee to formulate uniform rules of evidence and seven years later, the Court promulgated the final draft. *Id.* Congress eventually enacted an amended version of the Federal Rules of Evidence and they were signed into law by the President on Jan. 2, 1975, to be effective July 1, 1975. *Id.* § 45. It should be noted that Congress made no changes in the existing rules with respect to expert testimony. *See* FED. R. EVID. 702, 703 comments.

ment cases.[26] However, there is discussion of these requirements in cases involving expert testimony regarding a defendant's sanity.[27] Since Rule 703 was partially inspired by the need to "broaden the basis for expert opinions beyond that current in many jurisdictions," [28] courts have frequently adopted a liberal construction of the rule with respect to extrajudicial bases for expert testimony.[29]

Notwithstanding the broad bases for laying a foundation for expert testimony set forth in Rule 703, such evidence may be excluded when it exceeds the bounds of the facts of which the expert has knowledge.[30] This limitation was thoroughly explored by the Court of

26. *See, e.g.,* United States v. Benveniste, 564 F.2d at 335. For a discussion of *Benveniste,* see notes 16-20 and accompanying text *supra. Cf.* United States v. Curtis, 644 F.2d 263 (3d Cir. 1981) (hypothetically positing an instance in which a defendant might offer expert psychiatric testimony on the issue of his unusual susceptibility to suggestion in the context of a discussion of Federal Rule of Evidence 405). For a discussion of *Curtis,* see notes 38-41 and accompanying text *infra. See also* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313 (E.D. Pa. 1981) (noting that the case law addressing Rule 703 is extremely limited).

27. *See* United States v. Kossa, 562 F.2d 959 (5th Cir. 1977) (expert opinion evidence offered on the issue of insanity may be rebutted by a showing of the inadequacy of the factual assumptions on which the opinion is based); United States v. Sims, 514 F.2d 147 (9th Cir.), *cert. denied,* 423 U.S. 845 (1975) (Rule 703 is consistent with the view that expert testimony may be based on inadmissible hearsay and that the expert himself is capable of determining what constitutes a reliable basis for his opinion).

28. FED. R. EVID. 703 advisory committee note. For a discussion of the broadened bases of expert testimony under Rule 703, as enunciated by the advisory committee, see note 24 and accompanying text *supra.*

29. *See, e.g.,* American Universal Ins. Co. v. Falzone, 644 F.2d 65 (1st Cir. 1981) (under Rule 703, a fire marshall who testified that arson caused residential fire was entitled to base his opinion on observations and conclusions of other marshalls presented to him extrajudicially); United States v. Sims, 514 F.2d 147 (9th Cir.), *cert. denied,* 423 U.S. 845 (1975). In *Sims,* the Ninth Circuit upheld the admission of a psychiatrist's opinion regarding the defendant's sanity. 514 F.2d at 149. The defendant had offered an insanity defense based on religious fanaticism and was convicted of six counts of issuing forged United States Treasury checks. *Id.* at 147-48. Testifying for the prosecution, the psychiatrist indicated that in forming his opinion he had taken into account information learned from government sources out of court. *Id.* at 148. In upholding the admissibility of his opinion based on hearsay, the Ninth Circuit noted that "the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion." *Id.* at 149. In addition, the Ninth Circuit noted: "In a sense, the expert synthesizes the primary source material—be it hearsay or not—into properly admissible evidence in opinion form. The trier of fact is then capable of judging the credibility of the witness as it would that of anyone giving expert testimony." *Id.* The court stated that its view was fully consistent with the approach to expert testimony under Rule 703 which had not yet become effective at the time of its decision. *Id.*

30. *See, e.g.,* United States v. Various Slot Machs. on Guam, 658 F.2d 697 (9th Cir. 1981) (when the expert's opinion without supporting facts is offered under Rules 702 & 703 in opposition to a motion for summary judgment, such speculative opinion will not defeat the granting of the motion); Merit Motors v. Chrysler Corp., 569 F.2d 666 (D.C. Cir. 1977) (an expert's opinion was speculative and could not defeat a motion for summary judgment, as it was based on a constructed statistical model which was never produced).

Appeals for the District of Columbia Circuit in *United States v. Caldwell*.[31] In *Caldwell*, the defendant pleaded not guilty by reason of insanity and offered expert testimony that his codefendant's influence rendered him susceptible to suggestion and caused his participation in the crime.[32] In upholding the exclusion of the expert's opinion, the

See also Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313 (E.D. Pa. 1981). *Zenith Radio* was an antitrust action in which the government's expert sought to base his opinion on portions of documents which had been excluded as advocatory and unreliable. *Id.* at 1320. While noting the expanded basis for the admission of expert testimony under Rule 703, the district court maintained that there was no clear indication that the rule permitted an expert to base his opinion upon materials which have been independently excluded from evidence by the court due to irrelevance, hearsay, untrustworthiness or some other ground. *Id.* Cognizant of the liberal interpretation of Rule 703 by some courts, the district court stressed that other courts "routinely make the decision whether a particular expert has reasonably based his opinions upon trustworthy underpinnings." *Id.* at 1325, *citing* Punnett v. Carter, 621 F.2d 578 (3d Cir. 1980); United States v. Genser, 582 F.2d 292 (2d Cir. 1978), *cert. denied*, 444 U.S. 928 (1979); Pittsburgh Press Club v. United States, 579 F.2d 571 (3d Cir. 1978). The *Zenith Radio* court further stated that the advisory committee contemplated that courts should make an inquiry into the trustworthiness of the underlying data as well as an assessment of the expert's reliance thereon to determine admissibility. 505 F. Supp. at 1325. The court indicated that Rule 702 and its helpfulness criterion was not to be ignored in an assessment of the foundation for expert testimony. *Id.* at 1331. Finally, the court acknowledged that the case law with respect to Rule 703 was extremely limited and that it "adds little beyond examples to the Advisory Committee Note and the Rule itself . . . ." *Id.* at 1346. The court found that it was not clear whether its inquiry into the admissibility of expert testimony was to proceed on the basis of Rules 702, 703 or 403. *Id.* However, the court noted that each expert opinion offered and its underlying data and assumptions must be carefully scrutinized before its admissibility can be determined:

> [I]t is clear that the court may—indeed must—carefully scrutinize the underlying assumptions, inferences drawn and conclusions reached by the experts before reaching a decision on admissibility of the expert's opinion. Opinions which contain inferences which cannot be logically drawn are no more helpful to the jury than are opinions based upon unreliable information.

Id. at 1346-47. In applying these guidelines, the court determined that the expert opinion which had been offered by the government and which was founded on conclusory and unsubstantiated economic information was inadmissible. *Id.*

31. 543 F.2d 1333 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1975).

32. 543 F.2d at 1353. In *Caldwell*, the defendants were convicted on numerous charges stemming from two armed robberies. *Id.* at 1338. Defendant Timm raised an insanity defense. *Id.* at 1353. The trial court admitted testimony by a psychologist, Dr. Bauer, as to the defendant's mental condition "as deduced from a battery of psychological tests administered by him." *Id.* Counsel then sought a ruling as to whether Dr. Bauer could testify that in his opinion, the co-defendant's influence led to the defendant's participation in the crime. *Id.* The trial court excluded the proffered testimony on the grounds that such questions were psychiatric ones and could not be answered by a psychologist. *Id.* at 1354. On appeal, the Court of Appeals for the District of Columbia Circuit noted that were this the only basis for exclusion the trial court's ruling would be vulnerable. *Id.* However, an examination of the record revealed an independent basis which was held to adequately support the exclusion of the expert's testimony. *Id.*

court noted that without knowledge of the influence exerted by one defendant over the other in the commission of the crimes charged, the psychologist had no factual basis for his testimony.[33] Exclusion of similar testimony from two other experts was upheld on the same grounds.[34] The court stated: "This court has previously held that a psychiatric opinion offered in evidence must have a factual predicate. Thus the fundamental question here is how much either expert actually knew about the relationship between the [defendants]." [35]

While Rules 702 and 703 provide the basic framework for the admission of expert testimony, two circuits have indicated that Rules 404 and 405 of the Federal Rules of Evidence [36] may also provide a basis for the admission of expert testimony.[37] In *United States v. Curtis*,[38] the Third Circuit indicated that Rule 405(a) permits testimony by expert witnesses regarding character traits which are substantively relevant.[39] This proposition was set forth in the court's discussion of the distinction between the reputation and opinion methods of proving character under the rule.[40] In illustrating the distinction, the court

33. *Id.* The court stated:

> Phrased most simply, Dr. Bauer had already testified to the outer limit of the factual basis for any opinion he might express. He could not properly have been permitted to proceed beyond the parameters of what he actually knew about Timm. Nowhere in the record is there to be found any suggestion that Dr. Bauer had examined Timm in regard to his relationship with [the co-defendant]. Never was there any claim that Dr. Bauer had been informed that, in point of fact, Timm was influenced by someone else to participate in the crimes charged. The proffer at the bench was far too generalized to allow the judge to draw the conclusion that the witness possessed any such information.

Id.

34. *Id.* at 1357. Defense counsel had planned for two other doctors to testify that the criminal acts of the defendant were due in part to the influence of the co-defendant. *Id.* at 1356. However, the trial judge refused to allow either expert to refer to the co-defendant. *Id.*

35. *Id.* at 1357. The court concluded as a matter of law that there was not a sufficient factual basis for the opinion. *Id.*

36. Rule 405 provides:

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific instances of conduct. In cases in which character or trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

FED. R. EVID. 405. For the pertinent provisions of Rule 404, see note 43 *infra*.

37. *See* United States v. Curtis, 644 F.2d 263 (3d Cir. 1981); United States v. Staggs, 553 F.2d 1073 (7th Cir. 1977).

38. 644 F.2d 263 (3d Cir. 1981).

39. *Id.* at 268.

40. *See id.* at 265-68. In raising the defense of entrapment, the defendant stipulated that each of the narcotics transactions which led to his indictment

posited the hypothetical that an expert who gives his opinion of a defendant's susceptibility to entrapment may not be cross-examined on the defendant's reputation in the community.[41] Similarly, in *United States v. Staggs*,[42] the Seventh Circuit concluded that expert testimony of a pertinent character trait offered to prove that the defendant acted in conformity therewith was admissible under Rule 404 of the Federal Rules of Evidence.[43]

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had occurred and that he was carrying a gun during the last transaction. *Id.* at 264. The sole issue before the jury was whether to believe the government agent or the defendant who insisted "that the transactions were the result of solicitations, demands, inducements and threats by the government." *Id.* at 264-65. On direct examination, each of four character witnesses testified to the defendant's good reputation in the community. *Id.* at 265. On cross-examination, however, the witnesses were asked to express their *opinions* of the defendant and how each would be changed if they were told that the defendant admitted performing the acts charged, but defended himself by saying "that someone put the idea in [my] mind." *Id.* In its discussion of the requirement that opinion and reputation testimony be kept separate and distinct under Federal Rule of Evidence 405, the court explained:

> If, as here, their direct testimony is addressed to community reputation, inquiry may be made about conduct, and even about charges, which may have come to the attention of the relevant community. If, on the other hand, opinion evidence is offered in proof of character, relevant cross-examination is only that which bears on the fact or factual basis for formation of the opinion.

Id. at 268, *citing* Michaelson v. United States, 335 U.S. 469 (1948).

41. 644 F.2d at 268. The court stated:

> An example will serve to illustrate the necessity for keeping separate the two different types of character evidence now permitted under Rule 405(a). The rule now allows testimony by expert witnesses on traits of character which may be substantively relevant. Let us suppose that in an entrapment case the defendant produced an examining psychiatrist's opinion evidence of unusual susceptibility to suggestion. It could hardly be contended that in cross-examination of such a witness it would be relevant to inquire into those factors bearing on his reputation in the community among lay persons. Even when evidence of general good character as a law abiding citizen is offered, the analytical distinction between the two types of evidence remains.

Id., citing 2 J. WEINSTEIN & M. BERGER, *supra* note 22, ¶ 405[03].

42. 553 F.2d 1073 (7th Cir. 1977). In *Staggs*, the defendant was charged with assault with a deadly weapon upon an officer. *Id.* at 1074. In an effort to negate specific intent, he offered testimony of a psychiatrist to prove that he was "more likely to hurt himself than to direct his aggressions toward others." *Id.* at 1075. The district court excluded the expert testimony as not relevant to the issue of assault. *Id.*

43. *Id.* On appeal, the court held that the expert testimony was evidence of a character trait offered to prove that the defendant acted in conformity therewith on the occasion in question. *Id.* As such, the court reasoned it would be admissible under Federal Rule of Evidence 404(a) so long as the character trait in question was relevant. *Id.* Finding that the evidence was relevant under Federal Rule of Evidence 401, the court concluded that it had been improperly excluded. *Id.* at 1076.

Rule 404(a) provides in pertinent part:

> (a) Character evidence generally.—Evidence of a person's character or a trait of his character is not admissible for the purpose of

Before an accused may introduce expert testimony relating to a defense based on his mental state, he must comply with Federal Rule of Criminal Procedure 12.2(b),[44] which requires that written notice be given to the government of his intention to offer expert testimony.[45] Rule 12.2(b) is specifically addressed to a defense based on "mental disease, defect, or other condition," [46] and its applicability to an entrapment defense has not been conclusively determined.[47] Compliance with the rule's notice provision has been required in cases involving expert testimony with regard to a defendant's mental condition.[48] However, a

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proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused—Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same:

FED. R. EVID. 404(a).

44. FED. R. CRIM. P. 12.2(b). For the text of Rule 12.2(b), see note 9 *supra.*

45. FED. R. CRIM. P. 12.2(b). *See generally* H. R. REP. NO. 94-247, 94th Cong., 1st Sess. 9-10, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 674-82. [hereinafter cited as H. R. REP. NO. 94-247.] Rule 12 was amended to include § 12.2 in 1975. *See* Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, § 2, 89 Stat. 370 (1975). The purpose of Rule 12.2 was to secure a defendant's fifth amendment right against self-incrimination when raising an insanity defense. H. R. REP. NO. 94-247, *supra,* at 10. To that end, the rule precludes use of an accused's statements made to a court-appointed psychiatrist before an initial determination of his guilt has been concluded. *Id.* at 9. Subsection (b), despite its broader caption referring to "defense based on mental condition," appears to have been proposed by the Supreme Court for the purpose of denying an accused an insanity defense when he fails to give the prosecution notice of his intention to raise the defense. *See id.* The House Report indicates that the committee substantially agreed with the proposed rule, but added a provision protecting the accused from the use of his statements. *Id.*

46. FED. R. CRIM. P. 12.2(b). For the text of Rule 12.2(b), see note 9 *supra.*

47. *See* United States v. Perl, 584 F.2d 1316 (4th Cir.), *cert. denied,* 439 U.S. 1130 (1978); United States v. Alberico, 453 F. Supp. 178 (D. Colo. 1977), *aff'd,* 604 F.2d 1315 (10th Cir. 1979). These are the only reported cases in which Rule 12.2(b) was mentioned in the context of an entrapment defense.

In *Perl,* the trial court excluded the expert's testimony regarding an entrapment defense for failure to comply with the notice provision. 584 F.2d at 1324. On appeal, however, it was not necessary for the court to reach the 12.2(b) issue as it was determined that the entrapment defense was untenable on other grounds. *Id.* at 1321 & n.80.

In *Alberico,* notice of an intention to introduce expert psychiatric testimony in support of an entrapment defense was filed many months after the expiration of the extended pretrial filing period, and only four days prior to trial. 453 F. Supp. at 180. The court did not rule on whether such notice was required by the rule, but instead "resolved the serious doubts which [it] had as to the admissibility in defendant's favor" and admitted the testimony into evidence. *Id.*

48. *See* United States v. Olsen, 576 F.2d 1267 (8th Cir.), *cert. denied,* 439 U.S. 896 (1978); United States v. Hearst, 412 F. Supp. 863 (N.D. Cal. 1975).

failure to comply with Rule 12.2(b) has not led automatically to the exclusion of the expert testimony.[49] For example, in *United States v. Staggs,* the Seventh Circuit stated that exclusion would be a drastic sanction,[50] and speculated that when the evidence is found to be rel-

In *Olsen,* the Eighth Circuit held that notice was required for expert testimony concerning the defendant's alcoholism, which was offered to negate proof of his intent to commit the crime. 576 F.2d at 1273. On appeal, the defendant argued that his pro se defense ought to excuse his failure to comply with the notice requirement. *Id.* Rejecting his argument, the court relied on the language of Federal Rule of Criminal Procedure 12.2(d) which provides for the exclusion of evidence for failure to comply with the provisions of subsection (b). *Id.*

In *Hearst,* the district court expressly relied on Rule 12.2(b) in requiring defense counsel to provide timely notice of his intention to rely upon a "brainwashing" defense. 412 F. Supp. at 870.

See generally COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE 34 (1981) [hereinafter cited as COMMITTEE ON RULES. The advisory committee recommended expansion of Rule 12.2(b) to include expert testimony regarding a defendant's mental condition in a wider variety of circumstances than is presently encompassed by the rule. The proposed rule provides:

> (b) If a defendant intends to introduce expert testimony, relating to a mental disease, or defect, or *any* other *mental* condition *of the defendant* bearing upon the issue of *his guilt or innocence,* he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

Id. at 34 (emphasis in original). The Committee acknowledged that in all circumstances where expert testimony regarding a defendant's mental condition may be offered, advance notice to the government serves "to permit adequate pretrial preparation, to prevent surprise at trial, and to avoid the necessity of delays during trial." *Id., citing* United States v. Hill, 655 F.2d 512 (3d Cir. 1981). Concerning the purpose of the proposed expansion of Rule 12.2(b), the Committee stated:

> Thus, while the district court in *United States v. Hill,* . . . incorrectly concluded that present rule 12.2(b) covers testimony by a psychologist bearing on the defense of entrapment, the court quite properly concluded that the government would be seriously disadvantaged by lack of notice. This would have meant that the government would not have been equipped to cross-examine the expert, that any expert called by the government would not have had an opportunity to hear the defense expert testify, and that the government would not have had an opportunity to conduct the kind of investigation needed to acquire rebuttal testimony on defendant's claim that he was especially susceptible to inducement.

COMMITTEE ON RULES, *supra,* at 36 (citation omitted).

49. United States v. Staggs, 553 F.2d 1073, 1077 (7th Cir. 1977). Subsection (d) of Rule 12.2 provides as follows: "If there is a failure to give notice when required by subdivision (b) of this rule . . . the court *may* exclude the testimony of any expert witness offered by the defendant on the issue of his mental state." FED. R. CRIM. PROC. 12.2(d) (emphasis added).

50. 553 F.2d at 1077. For a discussion of the facts of *Staggs,* see notes 42 & 43 and accompanying text *supra.*

evant, a trial judge might not exclude it, even though the required notice had not been given.[51]

Against this background, the *Hill* court considered whether the psychologist's testimony, offered to prove the defendant's susceptibility to government inducement, was improperly excluded, and whether the defendant's failure to give the government written notice of the expert testimony provided an adequate basis for its exclusion.[52] Judge Weber began his analysis with the observation that the lower court ruling on the admissibility of the psychologist's opinion testimony constituted both a bar to its immediate admission and a requirement that "the defendant waive his constitutional right not to testify" if he desired to have the expert testimony admitted.[53]

The *Hill* court then proceeded to analyze the admissibility of the evidence under Rules 702 and 703 of the Federal Rules of Evidence.[54] In examining the proffered testimony, the court focused on: 1) the offer of the psychologist's profile of Hill drawn from various records and tests; and 2) the offer of the psychologist's opinion as to Hill's susceptibility to police inducement.[55] The court reasoned that as the first

51. 553 F.2d at 1077. For the standard for the exclusion of evidence upon a failure to comply with the notice provision of Federal Rule of Criminal Procedure 12.2(b), see note 50 *supra*. The *Staggs* court noted that the trial court might have been reluctant to exclude the proffered testimony for failure to comply with the rule's provisions had it been relevant. 553 F.2d at 1077. The Seventh Circuit stated:

> We do not know what the district judge would have done if he had found the testimony relevant. The record indicates that he was reluctant to exclude the testimony because of the defendant's failure to comply with Rule 12.2(b). We are convinced that if possible he would have delayed the trial to allow the Government to obtain its own expert rather than imposing the drastic sanction of exclusion. Accordingly, we remand the case for a new trial. On remand the district judge will not face the procedural knot with which he was presented during the first trial. The Government will have the opportunity to secure an expert to rebut [the defendant's expert], and the jury will have the opportunity to hear all the relevant evidence.

Id. *See also* Rule 611(a) of the Federal Rules of Evidence, which provides:

> (a) Control by court.—The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

FED. R. EVID. 611(a).

52. 655 F.2d at 515-18.

53. *Id.* at 515.

54. *Id.* at 515-18. For the texts and a discussion of Rules 702 and 703, see notes 21-35 and accompanying text *supra*.

55. 655 F.2d at 515. The majority noted that the proffered testimony included a third matter; the psychologist's opinion regarding the effect of the informant's skill and cunning upon the defendant's susceptibility. *Id.* The third item was found to have been properly excluded, as the expert had had

matter was relevant to the defendant's predisposition and consisted of facts derived from firsthand knowledge compiled by the psychologist in his personal examination of the defendant,[56] the testimony was admissible under Rules 702 and 703 "without the imposition of the condition imposed by the trial judge." [57] With regard to the second matter, the *Hill* court noted that the psychologist was prepared to give testimony based on both firsthand observation and data compiled by others, which was presented to him extrajudicially.[58] As Rule 703 imposes no requirement that the facts underlying an opinion be those adduced at trial, the court found that the exclusion of testimony regarding the defendant's susceptibility to entrapment was also improper.[59]

The *Hill* court further noted that the proffered testimony was admissible under Federal Rule of Evidence 405(a).[60] The court stated that Rule 405 allows expert testimony as to character traits in all cases where such a trait is substantively relevant.[61] Consequently, Judge

no opportunity to observe or evaluate the informant either prior to or during the trial. *Id.* The majority commented that, in defense counsel's offer, this third item of evidence was not clearly distinguished from the psychologist's opinion as to the defendant's characteristics of susceptibility, and that this lack of clarity may have led to the trial court's "misapprehension of the nature of the offer." *Id.*

56. *Id.* at 516.

57. *Id.* The court noted that the profile of Hill was relevant to the issue of predisposition. *Id.* In addition, the court indicated that the expert could testify as to Hill's profile without giving an opinion, "leaving the inference to be drawn by the trier of fact." *Id., citing* FED. R. EVID. 702 advisory committee note.

58. 655 F.2d at 516. The court noted that Rule 703 allows opinion testimony on facts or data perceived or made known to the witness at or before the hearing. *Id.*

59. *Id. See* note 24 and accompanying text *supra.* In analyzing the admissibility of the psychologist's opinion as to Hill's susceptibility to influence, the court initially noted that such testimony by an expert may be relevant to an entrapment defense. 655 F.2d at 516, *citing* United States v. Benveniste, 564 F.2d at 339. According to the *Hill* court, an expert's opinion may help the jury in its resolution of the crucial issues of inducement and predisposition, which is in keeping with the requirements of Rule 702. 655 F.2d at 516. The court further stated that a jury may not be able to adequately assess the effect of "subnormal intelligence and psychological characteristics on the existence of inducement or predisposition without the considered opinion of an expert." *Id.* Finally, the court stated:

> Accordingly, if the expert can reach a conclusion, based on an adequate factual foundation, that the appellant, because of his alleged subnormal intelligence and psychological profile, is more susceptible and easily influenced by the urgings and inducements of other persons, such testimony must be admitted as relevant to the issues of inducement and predisposition.

Id.

60. 655 F.2d at 517. For the text of Federal Rule of Evidence 405(a), see note 36 *supra.*

61. 655 F.2d at 516, *citing* United States v. Curtis, 644 F.2d 263 (3d Cir. 1981). For a discussion of *Curtis,* see notes 38-41 and accompanying text *supra.*

Weber concluded that "the exclusion of expert opinion testimony in an entrapment defense of defendant's unusual susceptibility to suggestion was improper." [62]

Turning to the issue of whether the psychologist's testimony was properly excluded due to the defendant's failure to comply with Federal Rule of Criminal Procedure 12.2(b), the *Hill* court noted that the question of the specific application of Rule 12.2(b) to an entrapment defense had never been squarely ruled upon.[63] Following a discussion of the provisions of the rule itself [64] and a review of the cases which had peripherally noted the rule's applicability to an entrapment defense,[65] the court determined that there was "no clear application of Rule 12.2(b) to an entrapment defense" and that, therefore, Rule 12.2(b) provided an insufficient basis for the exclusion of the proffered testimony.[66] In addition, the court emphasized that due to the particular facts of *Hill* [67] "the rigid application of the sanction of exclusion" was

62. 655 F.2d at 517. The court noted that the character trait of susceptibility to inducement was an element of Hill's defense and that the government had the burden of negating this trait. *Id.* at 516-17. In reaching this conclusion the Third Circuit relied on *Staggs*. *Id.* at 517. For a discussion of *Staggs*, see notes 42 & 43 and accompanying text *supra*.

63. 655 F.2d at 517.

64. *Id.* The court quoted Rule 12.2(b), as well as subsection (d) governing sanctions, and noted that the rule does not specifically address expert testimony with respect to an entrapment defense. *Id.* The court further stated that although the language of the rule is fairly broad, the legislative history and Advisory Committee notes shed no light on whether the rule applies to expert testimony on entrapment. *Id.*

65. *Id., citing* United States v. Perl, 584 F.2d 1316 (4th Cir. 1978); United States v. Alberico, 453 F. Supp. 178 (D. Colo. 1977), *aff'd*, 604 F.2d 1315 (10th Cir. 1979). For a discussion of *Perl* and *Alberico*, see note 47 *supra*. The *Hill* court also reviewed cases in which courts had applied Rule 12.2(b) to defenses relating to a defendant's mental state, other than the defense of entrapment, and had required notice of the defense. 655 F.2d at 517, *citing* United States v. Olsen, 576 F.2d 1267 (8th Cir. 1978); United States v. Staggs, 553 F.2d 1073 (7th Cir. 1977); United States v. Hearst, 412 F. Supp. 863 (N.D. Cal. 1975). For a discussion of *Hearst* and *Olsen*, see note 48 *supra*. For a discussion of the *Staggs* court's interpretation of Rule 12.2(b), see notes 49-51 and accompanying text *supra*.

66. 655 F.2d at 518. The court considered whether Rule 12.2(b) gives a litigant notice that it applies to expert testimony of a defendant's characteristic of susceptibility to entrapment. *Id.* In this regard, Judge Weber noted that an entrapment defense is distinguishable from a defense based on insanity in that "a waiver of an insanity defense does not constitute a waiver of an entrapment defense." *Id., citing* United States v. Mosely, 496 F.2d 1012 (5th Cir. 1974). For a discussion of *Mosely*, see note 19 *supra*.

67. 655 F.2d at 518. Judge Weber summarized the circumstances surrounding defense counsel's attempt to utilize expert testimony as follows:

> Appointed counsel for this indigent defendant learned of this evidence during the course of trial. He took immediate steps to procure an expert to conduct an examination and notified the United States Attorney of his identity. There was no way in which he could have complied fully with the rule before the offer of testimony. He had the witness available in court for two days. Under the court's ruling he could not present the testimony until after defendant had testified.

not required under Rule 12.2(b).[68]

In a dissenting opinion, Judge Rosenn initially noted that contrary to the majority's assertion, the district court had not imposed a waiver of the defendant's constitutional right not to testify as a condition to the admission of the proffered testimony.[69] In addition, Judge Rosenn stated that although Federal Rule of Evidence 703 does not require disclosure of the facts and data underlying expert opinion testimony,[70] there still must be a foundation for such testimony.[71] Although Judge Rosenn implicitly indicated that the expert's opinion regarding the defendant's mental condition may have been admissible,[72] he concluded that testimony regarding the defendant's "capacity to respond to the manipulation of a skillful and perhaps even cunning informant" lacked a solid foundation.[73] Judge Rosenn maintained that the trial judge acted within his authority "in insisting that a proper foundation be laid for [the expert's] testimony, especially in light of the surprise that testimony presented to the prosecution." [74]

He could not do it then because the witness had departed.

Id.

68. *Id.*

69. *Id.* at 518 (Rosenn, J., dissenting).

70. *Id., citing* FED. R. EVID. 703.

71. 655 F.2d at 519 (Rosenn, J., dissenting).

72. *Id.* Judge Rosenn did not specifically state whether he found testimony regarding the defendant's mental condition properly admissible. *Id.* He did, however, summarize the proffer as "not merely offering an opinion on (1) the mental condition of the defendant, but also (2) on his capacity to respond to the manipulations" of an informant. *Id.* It was this second part of the proffer which Judge Rosenn clearly found inadmissible. *See* note 73 and accompanying text *infra.*

73. 655 F.2d at 519 (Rosenn, J., dissenting). Judge Rosenn's conclusion was based on the lack of foundation for the testimony. Judge Rosenn noted that the psychologist had no knowledge of the substance and duration of the conversations between Hill and the informant and that the trial court could not be certain that the jury would find the informant skillful and cunning. *Id.*

74. *Id.* at 520 (Rosenn, J., dissenting) *citing* J. WEINSTEIN & M. BERGER, *supra* note 22, § 705[01]; FED. R. EVID. 703. The dissent agreed that the proffer of evidence had been confusing. 655 F.2d at 519 (Rosenn, J., dissenting). Maintaining that the terms of the actual proffer of evidence govern its admissibility, the dissent rejected any notion of a court's responsibility to dissect a confusing proffer of evidence to determine whether, if presented more clearly, it would be admissible. *Id.* The dissent further noted that the trial judge's decision to admit or exclude evidence, particularly in the case of expert testimony, should not be overruled unless manifestly erroneous. *Id., citing* Salem v. United States Lines Co., 370 U.S. 31 (1962); Fuentes v. Reilly, 590 F.2d 509 (3d Cir. 1978). The dissent finally noted that due to defense counsel's failure to lay a proper foundation for the expert testimony and in view of Federal Rule of Evidence 611(a) which requires that the trial judge exercise reasonable control over the order of witnesses, it was not manifestly erroneous for the trial court to exclude the expert testimony. 655 F.2d at 519 (Rosenn, J., dissenting). *Id.* For the text of Federal Rule of Evidence 611(a), see note 51 *supra.*

Judge Rosenn also disagreed with the majority's conclusion that Federal Rule of Criminal Procedure 12.2(b) was an insufficient basis on which to exclude the proffered testimony.[75] Noting that the rule specifically refers to expert testimony relating to a defendant's mental condition,[76] and that the government should be given the required notice to prepare for such a defense,[77] Judge Rosenn concluded that expert testimony concerning a defendant's susceptibility to inducement in an entrapment defense falls within the notice requirement of Rule 12.2(b).[78]

It is submitted that the Third Circuit's conclusion with respect to the admissibility of the second item of proof was in error.[79] No attempt was made by the court to examine the breadth of the proffered opinion as to Hill's characteristics of susceptibility [80] and only a cursory treatment of the foundation requirements of Rules 702 and 703 was undertaken.[81]

The first item of evidence appears to have been admissible.[82] A psychological profile based on records and tests of the defendant of which the expert had firsthand knowledge provides an adequate factual predicate to satisfy the requirements of Rule 703.[83] This testimony

75. 655 F.2d at 520 (Rosenn, J., dissenting). Judge Rosenn characterized Rule 12.2(b) as "an expression of a modern trend in the law to enhance the search for truth in a criminal proceeding and reduce the element of strategic surprise, at the same time avoiding a possible need for continuance and mid-trial recesses." *Id.* The dissent further stated that Hill's counsel "plainly disregarded" the notice requirements of the rule. *Id.*

76. *Id.* Judge Rosenn relied on the portion of the rule which requires written notice to the government when a defendant intends to introduce expert testimony relating to a "mental disease, defect, or other condition bearing upon whether he had the mental state required for the offense charged." *Id., quoting* FED. R. CRIM. P. 12.2(b).

77. 655 F.2d at 520 (Rosenn, J., dissenting). In reaching this conclusion, Judge Rosenn relied on the Advisory Committee note to Rule 12.2(b) which states that the rule's purpose is to avoid mid-trial continuances and unnecessary delay when expert testimony related to a mental state defense is offered without prior notice. *Id.* Judge Rosenn noted that the caption to the rule reads "Defense Based Upon Mental Condition" and thus gives notice that the rule is applicable when the proffer involves the defendant's state of mind. *Id.* He further mentioned that the necessity for providing notice to the government in an entrapment defense is as compelling as in an insanity defense, for in either case the government must prepare for a psychiatric defense. *Id.*

78. *Id.* at 521 (Rosenn, J., dissenting).

79. *See* notes 86-98 and accompanying text *infra.*

80. *See* 655 F.2d at 515-17.

81. *See id.* at 516. The Third Circuit merely noted that Rule 703 does not require that the expert's opinion be founded on evidence presented at trial. *Id.* The court failed to note how the expert's opinion would have been supported by other acceptable bases with respect to the facts concerning the transaction between Hill and the agent. *Id. See also* FED. R. EVID. 702 advisory committee note.

82. *See* note 83 and accompanying text *infra.*

83. For a discussion of the permissible bases of expert opinion under Rule 703, see note 24 and accompanying text *supra.*

would have aided the jury in determining the defendant's intellectual capacity and general character traits.[84] In addition, the psychological profile was relevant in view of the fact that under accepted entrapment theory the predominant focus is on the predisposition of the defendant.[85]

However, the Third Circuit's analysis of the second item of proof, the opinion testimony concerning Hill's characteristics of susceptibility, was marred by a failure to ascertain whether the expert had a sufficient factual foundation to formulate an opinion.[86] If the proffered opinion had been limited to the defendant's character alone, there would have been an adequate factual predicate in that Hill had been examined by the psychologist.[87] As characterized by the *Hill* court, however, the testimony was offered to aid in evaluating the effects of inducement on Hill's psychological characteristics and subnormal intelligence.[88] It is suggested that the court did not adequately consider the basis for the expert's opinion regarding Hill's capacity to resist the inducement or urgings of the informant.[89] Apparently, the expert's opinion rested primarily on the psychological profile of Hill. However, the expert had no knowledge concerning the actual transaction between Hill and the informant and, thus, his opinion lacked foundation as to the contested second item of proof.[90]

In addition, the Third Circuit did not give adequate deference to the wide discretion that a trial judge enjoys in determining the admissibility of expert testimony.[91] Even though the first item of proof can be viewed as admissible, the Third Circuit acknowledged that the trial judge was confronted with a poorly categorized, confusing offer of proof, which could well have led him to conclude that most of the opinion lacked foundation.[92] In the absence of a clearly formulated

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84. For a discussion of the relevance of expert opinion to the issue of predisposition, see note 19 and accompanying text *supra*.

85. For a discussion of the prevailing, or "subjective" theory of entrapment, see note 14 and accompanying text *supra*.

86. *See* note 81 *supra;* notes 88-91 and accompanying text *infra*.

87. For a discussion of the permissible bases of expert opinion under Rule 703, see note 24 and accompanying text *supra*.

88. *See* 655 F.2d at 516; note 59 *supra*. One might conclude that proof of the existence of inducement is tantamount to proof of overreaching acts by the government agent and, therefore, this testimony could be viewed as subsumed under the third item of proof. For a discussion of the third item of proof, see note 55 *supra*. The *Hill* court conceded that the third item was properly excluded due to the psychologist's complete lack of knowledge with respect to the government agent in question. *Id.*

89. *See* 655 F.2d at 515-16; note 81 *supra*.

90. *See* 655 F.2d at 515-16. *See also* the discussion of *United States v. Caldwell* at notes 31-35 and accompanying text *supra*.

91. For a discussion of the trial court's discretion to admit or exclude expert opinion, see note 74 and accompanying text *supra*.

92. For a discussion of the confusing nature of the offer as presented to the district court, see note 55 and accompanying text *supra*.

offer of proof, due regard ought to have been accorded Judge Ditter's discretion to admit or exclude evidence.[93] In view of defense counsel's failure to distinguish clearly the various items of proof, it is submitted that the Third Circuit should not have found exclusion of the testimony to have been manifestly erroneous and a ground for reversal.

In addition, the *Hill* court improperly characterized the district court's ruling as a total exclusion of the testimony, as the essence of the ruling was simply a requirement that the proffered opinion meet the factual predicate mandated by the Federal Rules of Evidence.[94] The trial court's proposal that the defendant cure an evidentiary defect by his own testimony was not an unconstitutional condition imposed on the admission of the evidence, but rather a well-reasoned suggestion by the trial judge based on his desire to afford the defendant an opportunity to present reliable evidence to the jury.[95] In view of the foregoing analysis, it is submitted that Judge Rosenn correctly concluded that the district court's ruling did not constitute error.[96]

The Third Circuit did, however, correctly conclude that Federal Rule of Criminal Procedure 12.2(b) provided insufficient grounds for the exclusion of the expert's opinion.[97] In view of the fact that neither the language of the rule, its legislative history, nor the cases which had treated it gave "clear indication that [it would] apply to an entrapment defense," defense counsel clearly had no notice that the rule would be so applied.[98]

In conclusion, the *Hill* decision will have a significant and adverse impact on the prosecution of cases in the Third Circuit in which the entrapment defense is raised.[99] Two rules have, in effect, been enunciated which could disrupt the effective administration of criminal trials.[100] First, the *Hill* court's decision supports the proposition that when a foundation for a defense expert's opinion can best be laid through the testimony of the defendant himself, such expert testimony must be admitted whenever presented, even though it lacks an adequate foundation.[101] Such a rule operates in derogation of Federal Rules of Evidence 702 and 703 and strips the trial court of discretion to exercise

93. *See* note 74 and accompanying text *supra.*

94. *See* text accompanying note 69 *supra.*

95. *Id.*

96. *See* notes 69 & 82-95 and accompanying text *supra.*

97. *See* note 98 and accompanying text *infra.*

98. For a discussion of Rule 12.2(b) and the cases interpreting it, see notes 44-51 and accompanying text *supra.*

99. *See* notes 100-02 and accompanying text *infra.* The impact will be especially great in the prosecution of narcotics offenses.

100. *See* notes 101 & 103 and accompanying text *infra.*

101. *See* notes 79-89 and accompanying text *supra.*

reasonable control over the presentation of witnesses.[102] Second, it is suggested that the *Hill* court's failure to find Rule 12.2(b) applicable to an entrapment defense can be read as an instruction to the district courts that whenever the defendant has failed to give the required notice, he may nevertheless introduce expert opinion testimony related to a mental state defense, so long as he has asserted an entrapment defense.[103]

Marie L. Levy

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102. For a discussion of the foundation requirements of Rules 702 and 703, see notes 21-35 and accompanying text *supra*. *See also* FED. R. EVID. 611(a); note 51 *supra*.

103. *See* note 66 and accompanying text *supra*.

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CRIMINAL LAW—FEDERAL BANK ROBBERY ACT—A WITHDRAWAL OF FUNDS WHICH HAVE BEEN CREDITED TO A BANK ACCOUNT DUE TO THE UNILATERAL MISTAKE OF A BANK IS A FRAUD-TYPE OFFENSE AND NOT LARCENY.

United States v. Pinto (1981)

On June 5, 1974, Nissin Unyu Soko, a Japanese firm, instructed the Sanwa Bank Ltd., to remit $193.51 in payment of a business debt to Pinto Trucking Service, Inc. (PTS).[1] In compliance with these instructions, the Sanwa Bank sent a telex communication to its correspondent bank, the Philadelphia National Bank (PNB).[2] PNB received the telex on June 6, 1974 and erroneously interpreted the communication to direct a transmission of $193,511.[3] PNB deposited this amount in the PTS corporate account in another bank [4] and Biagio Pinto, President of PTS,[5] subsequently drew checks on the account until it was depleted.[6] PNB did not recognize its error until September of 1974.[7] When PNB first demanded reimbursement of the overpayment, Pinto maintained that PTS was entitled to the money as it had invoiced Nissin for the full amount received.[8] Subsequently however, PTS conceded that the pay-

1. United States v. Pinto, 646 F.2d 833, 834 (3d Cir.), *cert. denied,* 102 S. Ct. 94 (1981). The business debt arose from a contract between the two corporations which was operative from 1971 through 1974. 646 F.2d at 834 n.2. Approximately $15,000 of business developed from this agreement between Nissin and PTS. *Id.*

2. 646 F.2d at 834-35.

3. *Id.* at 835.

4. *Id.* Originally, PNB notified PTS of the upcoming transaction and sought instructions regarding how the funds should be handled. *Id.* In response, the comptroller for PTS suggested that PNB deposit the funds in the firm's account at First Pennsylvania Banking and Trust Company. *Id.*

5. *Id.* Pinto had full control of PTS' daily operations and made all major corporate decisions. *Id.* at 835 n.3. Thus, the appropriateness of holding Pinto responsible for drawing on the erroneous deposit and for the later misrepresentations concerning the legitimacy of the payment was undisputed. *Id.* For a discussion of these misrepresentations, see note 8 and accompanying text *infra.*

6. 646 F.2d at 835. By July of 1974, the PTS account was exhausted. *Id.*

7. *Id.* On July 31, 1974, Sanwa Bank informed PNB by form letter that it could not identify the $193,511 charge to its account. *Id.* PNB's routine response provided the Sanwa Bank with the information needed to trace the transaction. *Id.* PNB received an "urgent" letter from the Sanwa Bank on September 23, 1974. *Id.* This letter stated that the June 6, 1974 transfer to the PTS account was supposed to have been $193.51, rather than $193,511. *Id.* PNB finally recognized its own error after reviewing the original telex communication. *Id.*

8. *Id.* The comptroller for PTS answered PNB's first call and stated that he would investigate the situation. *Id.* Four days later, an independent auditor at PTS called PNB and related Pinto's assurances that Nissin had indeed been invoiced for $193,511. *Id.* PNB reverified the telex error with the Sanwa Bank,

ment was erroneous and by mid-October 1974, began negotiations to repay the funds to PNB.[9]

Biagio Pinto was indicted in the United States District Court for the Eastern District of Pennsylvania[10] for three offenses: 1) bank larceny;[11] 2) making false statements to a bank;[12] and 3) wire fraud.[13] The jury returned a guilty verdict on counts one and two[14] and not guilty on count three.[15] On appeal, the United States Court of Appeals

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sent copies of this verification to the attorney for PTS, and again demanded return of the overpayment. *Id.* On October 2, 1974, the attorney for PTS replied that PTS still claimed the entire amount. *Id.*

9. *Id.* PTS reimbursed the bank for the overpayment by the end of 1978. *Id.*

10. *Id.* at 834.

11. *Id.* Pinto was charged with the violation of 18 U.S.C. § 2113(b) (1976). This section of the Federal Bank Robbery Act provides:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both . . . .

Id.

12. 646 F.2d at 834. Pinto was also charged with the violation of 18 U.S.C. § 1014 (1976). This section provides:

> Whoever knowingly makes any false statement . . . for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any . . . advance . . . , by . . . deferment of action or otherwise, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Id.

13. 646 F.2d at 834. Pinto was also indicted under 18 U.S.C. § 1343 (1976). This section provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Id.

14. 646 F.2d at 834. Two jury trials took place in this case. *Id.* at 834 n.1. In the first trial, the jury found the defendant guilty on all three counts. *Id.* However, the jury had improperly considered hearsay documents which were not part of the trial record and which suggested that Pinto had engaged in repayment negotiations. United States v. Pinto, 486 F. Supp. 578, 579-80 (E.D. Pa. 1980). Since the documents prejudiced Pinto's defense, the trial judge set aside the verdict and granted a new trial. *Id.* at 578, 580-82. Following the second trial, Pinto received a sentence of five years' imprisonment on the bank larceny charge and five years' probation on the false statements charge. 646 F.2d at 834.

15. 646 F.2d at 834.

for the Third Circuit[16] reversed the defendant's conviction for bank larceny,[17] *holding* that the withdrawal of funds credited to a bank account solely because of another bank's unilateral mistake is a fraud-type offense not punishable under the Federal Bank Robbery Act (FBRA or Act). *United States v. Pinto,* 646 F.2d 833 (3d Cir.), *cert. denied,* 102 S. Ct. 94 (1981).

In 1934, the United States Attorney General recommended legislation to enable the Federal Government to deal effectively with interstate bank robberies.[18] The Senate version of the bill[19] contained sections which addressed larceny, false pretenses, burglary, and robbery.[20]

16. The case was heard by Circuit Judges Gibbons and Van Dusen and District Judge Harold A. Ackerman of the United States District Court for the District of New Jersey, sitting by designation. Judge Van Dusen delivered the opinion of the court.

17. 646 F.2d at 834. The Third Circuit affirmed the conviction on the false statements charge and remanded the case with respect to the sentence on that count so that the prosecution could apply to the district court for resentencing in light of the reversal on the larceny count. *Id.* The defendant subsequently filed a petition for a writ of certiorari. 49 U.S.L.W. 3956 (U.S. June 13, 1981) (No. 80-2110). The questions for consideration included: whether the Third Circuit had the authority to invite the reopening of the final sentence on count two; whether the court violated the double jeopardy clause by so doing; whether the term "advance" under 18 U.S.C. § 1014 was limited to a loan situation or whether it encompassed a mistaken deposit; and whether there was evidence to sustain the charge in the indictment that an "advance" had been made to the defendant. 50 U.S.L.W. 3033 (U.S. Aug. 11, 1981) (summary of case docketed). For the text of 18 U.S.C. § 1014, see note 12 *supra.* The government did not cross-petition on the larceny issue. Certiorari was denied on October 6, 1981. 102 S. Ct. 94 (1981).

18. *See* S. REP. No. 537, 73d Cong., 2d Sess. 1 (1934); H.R. REP. No. 1461, 73d Cong., 2d Sess. 2 (1934). In the words of the Attorney General, "[t]his bill is directed at one of the most serious forms of crime committed by gangsters who operate habitually from one State to another in robbing banks." S. REP. No. 537, 73d Cong., 2d Sess. 1 (1934).

19. *See* S. 2841, 73d Cong., 2d Sess., 78 CONG. REC. 5738 (1934). The bill provided punishment for certain offenses committed against federally chartered banks or banks which were members of the Federal Reserve System. *See* S. REP. No. 537, 73d Cong., 2d Sess. 1 (1934); H.R. REP. No. 1461, 73d Cong., 2d Sess. 1 (1934). For a discussion of the bill, see notes 20-22 and accompanying text *infra.*

20. S. 2841, 73d Cong., 2d Sess., 78 CONG. REC. 5738 (1934). Section 2 of the bill provided:

> Whoever, not being entitled to the possession of property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, takes and carries away, or attempts to take and carry away, such property or money or an [sic] other thing of value from any place (1) without the consent of such bank, or (2) with the consent of such bank obtained by the offender by any trick, artifice, fraud, or false or fraudulent representation, with intent to convert such property or money or any other thing of value to his use or to the use of any individual, association, partnership, or corporation, other than such bank, shall be punished by a fine of not more than $5,000 or imprisonment for not more than 10 years, or both.

S. 2841, 73d Cong., 2d Sess., 78 CONG. REC. 5738 (1934). Thus, §§ 2(1) and 2(2) covered the crimes of larceny and false pretenses, respectively. S. 2841, 73d

However, the House Judiciary Committee drastically curtailed its provisions,[21] so that the statute as finally enacted encompassed only bank robbery.[22] In 1937, some of the provisions which had previously been stricken from the Act were resubmitted and, with scant discussion, the "Act to Amend the Bank-Robbery Statute to Include Burglary and Larceny" passed both Houses of Congress.[23]

Cong., 2d Sess., 78 CONG. REC. 5738 (1934). Section 3 proscribed the breaking and entering of a bank with intent to commit other prohibited activities (burglary). S. 2841, 73d Cong., 2d Sess., 78 CONG. REC. 5738 (1934).

Section 4 made a taking of money or property of a bank by force and violence, or by putting one in fear, a criminal offense (robbery). S. 2841, 73d Cong., 2d Sess., 78 CONG. REC. 5738 (1934). Section 5 provided for a longer sentence or death where the crimes, stipulated in all but § 4, occurred under certain aggravating circumstances and § 6 made federal jurisdiction nonexclusive. S. 2841, 73d Cong., 2d Sess., 78 CONG. REC. 5738 (1934).

21. *See* H.R. REP. NO. 1461, 73d Cong., 2d Sess. 1 (1934). Under the committee amendments the offenses of burglary, false pretenses, and larceny found in §§ 2 and 3 were deleted and the other provisions were renumbered. *Id.*

22. *See* Federal Bank Robbery Act, Pub. L. No. 73-235, §§ 1-3, 48 Stat. 783 (1934) (current version at 18 U.S.C. § 2113 (1976)). On May 8, 1934 Senator Ashurst of Arizona, the original sponsor of the bill, moved that the Senate not adopt the House amendments to S. 2841 but instead request a conference with the House to discuss the two chambers' differences. 78 CONG. REC. 8264 (1934). The motion was accepted and a House-Senate conference committee was appointed to resolve the disagreement. *Id.* 8264, 8322. The conference committee recommended that the Senate agree to the bill as passed by the House. *Id.* 8767, 8776. The conference report was assented to and the House amended bill was passed by the Senate. *Id.* 8856, 9006. The bill was presented to the President of the United States on May 17, 1934 and was signed into law the next day. *Id.* 9071, 9146.

23. An Act to Amend the Bank-Robbery Statute to Include Burglary and Larceny, Pub. L. No. 75-349, 50 Stat. 749 (1937) (amending 48 Stat. 783 (1934)) (current version at 18 U.S.C. § 2113 (1976)). For the legislative history of the original act, see notes 18-22 and accompanying text *supra*.

On March 24, 1937, Representative Sumners of Texas introduced H.R. 5900 which was referred to the House Judiciary Committee. H.R. 5900, 75th Cong., 1st Sess., 81 CONG. REC. 2731 (1937). The Committee Report noted that Homer S. Cummings, the United States Attorney General, drafted and recommended the proposed legislation to enlarge the scope of the Federal Bank Robbery Act to cover the crimes of burglary and larceny. H.R. REP. No. 732, 75th Cong., 1st Sess. 1 (1937). The House Report incorporated a letter from the Attorney General which stressed the need for this legislation:

> The fact that the statute is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago, when a man was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting anyone in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute.

Id. at 1-2.

The sole objection to the bill was voiced by Representative Wolcott of Michigan. 81 CONG. REC. 4656, 5376-77 (1937). His concern was that the bill placed larceny on the same plane as robbery and burglary. *Id.* Mr. Wolcott thought that some distinction should be made in their penalties. *Id.* 4656,

The larceny section of the amendment[24] prohibits the "tak[ing] and carr[ying] away, with intent to steal or purloin" of any property of a bank,[25] a definition similar to that of common law larceny.[26] Larceny, as it originally developed at common law, encompassed only a trespassory taking and carrying away of personal property with a felonious intent.[27] Since "steal" and "purloin" were not part of the common law definition of larceny,[28] the courts of appeals have disagreed as to whether Congress,

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5376. The House Committee offered an amendment which differentiated between the crimes by setting the maximum penalties for each offense as follows: 1) Robbery, $5,000 fine and/or 20 years' imprisonment; 2) Burglary, $5,000 fine and/or 20 years' imprisonment; 3) Larceny of value exceeding $50, $5,000 fine and/or 10 years' imprisonment; 4) Larceny of value not exceeding $50, $1,000 fine and/or 1 year's imprisonment. *Id.* 5376. This amendment was agreed to and the House passed the amended bill immediately thereafter. *Id.* 5377. The bill was then referred to the Senate Judiciary Committee on June 8, 1937. *Id.* 5409. On August 18th, the Senate Committee Report, which was submitted by Senator Ashurst, the sponsor of the 1934 act, in essence adopted the House Committee's Report and also incorporated the Attorney General's remarks and letter. S. REP. No. 1259, 75th Cong., 1st Sess. 1-2 (1937). The Senate passed the bill the following day. 81 CONG. REC. 9331 (1937). The President of the United States signed the bill into law in late August of 1937. *Id.* 9676, 9679.

24. 18 U.S.C. § 2113(b) (1976). *See* note 23 *supra.*

25. 18 U.S.C. § 2113(b) (1976). For the full text of § 2113(b), see note 11 *supra.*

26. For the definition of common law larceny, see note 27 and accompanying text *infra.*

27. At common law, larceny was described as a "felonious taking and carrying away of the personal goods of another." 4 W. BLACKSTONE, COMMENTARIES *230. *See also* 2 J. BISHOP, NEW CRIMINAL LAW § 758 (1892); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW §§ 85-88, at 622-44 (1972); R. PERKINS, PERKINS ON CRIMINAL LAW 234-79 (2d ed. 1969). Blackstone determined that the crime included four elements. W. BLACKSTONE, *supra,* at *230-32. First, there must have been a *taking. Id.* at *230 (emphasis in original). According to Blackstone, this implied "the consent of the owner to be wanting." *Id.* Second, there must have been a *carrying away. Id.* at *231 (emphasis in original). Third, the taking and carrying away must have been *felonious. Id.* at *232 (emphasis in original). Finally, the felonious taking and carrying away must have been *of the personal goods of another. Id.* at *232 (emphasis in original). Personal goods included money. *Id.* at *234.

28. *See* LeMasters v. United States, 378 F.2d 262, 267 (9th Cir. 1967) ("steal" and "purloin" are ambiguous). The United States Supreme Court recognized that "stolen" or "stealing" has no accepted common law meaning when it was confronted with the construction of these terms as used in the National Motor Vehicle Theft Act. *See* United States v. Turley, 352 U.S. 407, 411 (1957). In addition, the Supreme Court stated that "while 'stolen' is constantly identified with larceny, the term was never at common law equated or exclusively dedicated to larceny." *Id.* at 411-12, *quoting* Boone v. United States, 235 F.2d 939, 940 (4th Cir. 1956).

The Supreme Court also noted that:

> In defining "theft" Webster's New International Dictionary . . . says: "*Stealing* and *theft,* esp. in popular use, are broader terms than *larceny,* and may include *swindling* as well as *embezzlement.*"
>
> "The term 'theft,' sometimes used as a synonym of larceny, is in reality a broader term, applying to all cases of depriving another of his property whether by removing or withholding it, and includes larceny, robbery, cheating, embezzlement, breach of trust, etc."

in enacting section 2113(b), intended to punish a broader crime or to reach only conduct which was larcenous at common law.[29] The Second, Fifth, and Seventh Circuits have adopted a broad interpretation of the statute to include embezzlement and other theft crimes,[30] while the Fourth and Ninth Circuits have limited section 2113(b) strictly to common law larceny.[31]

Interpretation of the statute is further complicated by the fact that there are differing views as to the scope of common law larceny.[32]

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352 U.S. at 412 n.8, *quoting* WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed., 1953); 13 ENCYCLOPEDIA BRITANNICA, Larceny, 720 (1953) (emphasis in original). For further discussion of *Turley*, see notes 35-40 and accompanying text *infra*.

Embezzlement may be defined in general as: "(1) the fraudulent (2) conversion of (3) the property (4) of another (5) by one who is already in lawful possession of it." W. LAFAVE & A. SCOTT, *supra* note 27, § 89, at 644. False pretenses generally consists of five elements: "(1) a false representation of a material present or past fact (2) which causes the victim (3) to pass title to (4) his property to the wrongdoer, (5) who (a) knows his representation to be false and (b) intends thereby to defraud the victim." *Id.* § 90, at 655. Robbery has been characterized as larceny plus two added elements: "(a) the taking of the property must be from the person of the victim or in his presence, and (b) the taking must be accomplished by means of violence or intimidation." *Id.* § 94, at 692. The crime of burglary at common law consisted of a "(1) breaking and (2) entering of (3) a dwelling house (4) of another (5) in the nighttime (6) with the intent to commit a felony therein." *Id.* § 96, at 708. For the definition of larceny, see note 27 and accompanying text *supra*.

29. *See, e.g.*, United States v. Guiffre, 576 F.2d 126, 128 (7th Cir.), *cert. denied*, 439 U.S. 833 (1978) (§ 2113(b) is not limited to offenses amounting to common law larceny); United States v. Fistel, 460 F.2d 157, 163 (2d Cir. 1972) (§ 2113(b) includes embezzlement and other unlawful takings from a bank); LeMasters v. United States, 378 F.2d 262, 267 (9th Cir. 1967) (§ 2113(b) does not cover the obtaining of money by false pretenses); Thaggard v. United States, 354 F.2d 735, 736 (5th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966) (§ 2113(b) encompasses more than common law larceny); United States v. Rogers, 289 F.2d 433, 437 (4th Cir. 1961) (§ 2113(b) reaches only common law larceny and does not encompass embezzlement from a bank or obtaining goods by false pretenses). *See also* Annot., 46 A.L.R. FED. 841 (1980).

30. *See* United States v. Guiffre, 576 F.2d 126, 128 (7th Cir.), *cert. denied*, 439 U.S. 833 (1978); United States v. Fistel, 460 F.2d 157, 163 (2d Cir. 1972); Thaggard v. United States, 354 F.2d 735, 736 (5th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966).

31. *See* LeMasters v. United States, 378 F.2d 262, 267 (9th Cir. 1967); United States v. Rogers, 289 F.2d 433, 437 (4th Cir. 1961).

32. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 469-530 (1976) [hereinafter cited as Fletcher, *Metamorphosis*]. Two authors have recently discussed the judicial expansion of common law larceny. *See* G. FLETCHER, RETHINKING CRIMINAL LAW 107-10 (1978); Fletcher, *Manifest Criminality, Criminal Intent, and the Metamorphosis of Lloyd Weinreb*, 90 YALE L.J. 319, 335 (1980) [hereinafter cited as Fletcher, *Manifest Criminality*]; Fletcher, *Metamorphosis, supra*; Paterson, *Consent in the Law of Theft*, 29 U. TORONTO L.J. 366, 373 377 (1979). Fletcher proposed that the crime of larceny has gone through a transition from a concern with manifest criminality to subjective criminality. G. FLETCHER, *supra*, at 115. Where emphasis was once placed upon an act being objectively discernible as criminal with the issue of intent having only a secondary impact, Fletcher contended that there was an evolution towards emphasis on the actor's intent with a corresponding decreased emphasis

Under the traditional view, if the owner voluntarily gave up possession and title to the property, the crime of larceny could not be committed.[33] Nevertheless, some courts have adopted an expansive view of larceny which includes the situation where an owner erroneously delivered more property than was appropriate to another who was aware of the owner's error and accepted the property with the intent to convert it to his own use.[34]

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on the act that occurred. *Id.* at 115-19. *See also* J. HALL, THEFT, LAW AND SOCIETY (2d ed. 1952); Allen, *Offenses Against Property,* 339 ANNALS 57 (1972). One commentator has vehemently disagreed with Professor Fletcher's theory. *See* Weinreb, *Manifest Criminality, Criminal Intent, and the "Metamorphosis of Larceny,"* 90 YALE L.J. 294 (1980). For Professor Fletcher's reply to Professor Weinreb, see Fletcher, *Manifest Criminality, supra.*

Paterson also commented on the judicial emphasis of the mens rea element of larceny in the context of a mistake case. Paterson, *supra,* at 373, 377. For a further discussion of Paterson's commentary, see note 34 *infra.*

33. *See* note 27 and accompanying text *supra.* Where the owner voluntarily parted with possession and title to personal property, the accused could not be found guilty of larceny as the crucial element of a "trespassory taking" was absent. Paterson, *supra* note 32, at 366, 368, 371. If the victim intended a transfer of title in the goods, "the accused could not be guilty of theft—because he was now the owner of the goods." *Id.* at 368.

34. *See, e.g.,* Wolfstein v. People, 13 N.Y. Sup. Ct. 121 (1875). The landmark English case addressing the liability of a person receiving goods by mistake was The Queen v. Middleton, 2 L.R.—Cr. Cas. Res. 38 (1873). In *Middleton,* the accused was found guilty of common law larceny since he knew of a clerk's mistaken overpayment and accepted it with the intent to apply it to his own use. *Id.* at 43. George Middleton had a small savings account in a Post Office Savings Bank. *Id.* at 39. In anticipation of a withdrawal of ten shillings, a letter of advice authorizing such a withdrawal was sent to his branch post office. *Id.* When Middleton presented himself for the transaction, the postal clerk erroneously referred to the wrong letter of advice and paid him over eight pounds. *Id.* Although Middleton immediately recognized the mistake in his favor, he accepted the whole sum. *Id.* at 39-40. On appeal, eleven of fifteen judges voted to affirm the conviction. *Id.* at 40-41. There was some disagreement as to what type of mistake was involved—mistake as to identity or mistake in the amount of George Middleton's claim. *Id.* at 42, 73 (Cleasby, B., dissenting).

Paterson has suggested that the *Middleton* court failed to adequately examine the requisite actus reus element and instead stressed the defendant's mental state. Paterson, *supra* note 32, at 373, 377. Paterson stated that the accused's only act in *Middleton* was the retention of property mistakenly delivered to him. *Id.* at 373. Perhaps this was dishonest for the accused to do, but the only issue the court was supposed to examine, according to Paterson, was whether he had committed larceny. *Id.* Paterson questioned the propriety of the *Middleton* court's determination that title to the cash did not pass to the accused because of the clerk's mistake. *Id.* at 383-85. He suggested that this was an inappropriate application of the civil law to the criminal law. *Id.*

Two years after the *Middleton* decision, a New York court reached the same result on similar facts. *See* Wolfstein v. People, 13 N.Y. Sup. Ct. at 121. In *Wolfstein,* the defendant presented a draft written in French for $74 and a teller, who was unable to read French, gave him $742. *Id.* at 122. The court held that the defendant committed larceny despite the teller's "consent." *Id.*

Since the end of the nineteenth century, American courts have agreed that an outwardly innocent taking can be felonious if the intent at the time of the taking is prohibited by statute. G. FLETCHER, *supra* note 32, at 110. *See* Cooper v. Commonwealth, 110 Ky. 123, 60 S.W. 938, 939 (1901) (where defendants mis-

Although the United States Supreme Court has not addressed the scope of section 2113(b) directly, its decision in *United States v. Turley* [35] has strongly influenced the circuits that have adopted a broad interpretation of the Federal Bank Robbery Act.[36] *Turley* involved the construction of the term "stolen" in the National Motor Vehicle Theft Act (NMVTA).[37] Relying upon the legislative history of the NMVTA [38]

takenly received twenty $5 gold coins instead of twenty nickels, the court concluded that the defendants had to have the felonious intent at the time of receipt of the coins in order to be convicted of larceny); Mitchell v. State, 78 Tex. Crim. 79, 180 S.W. 115 (1915) (if the recipient discovers the mistake after he physically received a mistakenly drawn check, there is no larceny.) For commentary on the trend towards extension of common law larceny, see G. FLETCHER, *supra* note 32, at 59-122; Fletcher, *Manifest Criminality, supra* note 32, at 319-48; Fletcher, *Metamorphosis, supra* note 32, at 469-530; Paterson, *supra* note 32, at 366-89. *But see* Weinreb, *supra* note 32, at 294-318.

35. 352 U.S. 407 (1957).

36. *See* note 41 and accompanying text *infra.*

37. 352 U.S. at 408. The National Motor Vehicle Theft Act provides in pertinent part: "[w]hoever transports in interstate . . . commerce a motor vehicle . . . , knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C. § 2312 (1976). Representative Dyer of Missouri sponsored the original act which became law in 1919 and is commonly referred to as the Dyer Act. *See* 352 U.S. at 408. *See also* National Motor Vehicle Theft Act, Pub. L. No. 66-70, 41 Stat. 324 (1919) (current version at 18 U.S.C. § 2312 (1976)).

In *Turley,* the defendant had lawfully borrowed an automobile from its owner in South Carolina in order to drive mutual friends to their homes. 352 U.S. at 408, 409 n.2. However, after seeing his passengers home, Turley drove on to Baltimore, Maryland without the owner's permission. *Id.* The next day, he sold the car. *Id.* at 409 & n.2. Turley was charged with "transporting the automobile in interstate commerce knowing it to have been obtained by embezzlement rather than by common-law larceny." *Id.* at 409. Turley moved to have the information dismissed on the ground that the facts as alleged did not constitute a violation of § 2312, which he claimed prohibited only the crime of common law larceny. *Id.* The United States District Court for the District of Maryland granted the motion and dismissed the information. United States v. Turley, 141 F. Supp. 527, 537 (D. Md. 1956), *rev'd,* 352 U.S. 407 (1957).

On appeal, the government conceded that the alleged facts did not constitute common law larceny, but successfully contended that "stolen," as used in § 2312, encompassed embezzlement of a motor vehicle. 352 U.S. at 409. The United States Supreme Court acknowledged that a split had developed among the circuits in interpreting § 2312—the Fifth, Eighth, and Tenth Circuits had accepted a narrow definition of "stolen", and the Fourth, Sixth, and Ninth Circuits had adopted a broader one. *Id.* at 410-11. The Supreme Court recognized that "where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." *Id.* at 411 (footnote omitted). But the Court noted that " 'stolen' has no accepted common-law meaning." *Id.* For a discussion of the ambiguity of "stolen" and for the differences between the terms "theft," "stealing," and "larceny," see note 28 and accompanying text *supra.*

38. 352 U.S. at 413-17.

Representative Dyer sponsored the bill, and wrote the House Committee on the Judiciary's Report, entitled "Theft of Automobiles." H.R. 9203, 66th Cong., 1st Sess., 58 CONG. REC. 5284, 5470-72 (1919); H.R. REP. No. 312, 66th Cong., 1st Sess. 1-4 (1919). This report furnished statistics on the increasing number of automobile thefts and the consequent financial losses and rising cost of automobile theft insurance. H.R. REP. No. 312, *supra,* at 1-4. The report

the Court stated that Congress' primary purpose was to eliminate interstate traffic in unlawfully obtained motor vehicles.[39] Therefore, the Supreme Court held that "stolen," as used in the NMVTA, "includes all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." [40]

Those circuits which have construed section 2113(b) to prohibit conduct beyond that of common law larceny have relied extensively on the Supreme Court's decision in the *Turley* case.[41] These courts have not distinguished between the wording or history of the NMVTA and

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stated that the purpose of the proposed law was to provide "severe punishment [for] those guilty of the stealing of automobiles in interstate or foreign commerce," and "to suppress crime in interstate commerce." *Id.* at 1, 4. Representative Dyer asserted that the Federal Government could ameliorate the problem by exercising its power under the commerce clause, as state laws had proved inadequate. *Id.* at 1, 3-4. Throughout this report and the debates in the House and the Senate, the terms "larceny," "stealing" (or "stolen"), and "theft" were used interchangeably. *See id.* at 1-4; 58 CONG. REC. 5470-78, 6433-35.

39. 352 U.S. at 417. The Court found that this Congressional purpose could be best served by an unrestrictive construction of the NMVTA. *Id.*

40. *Id.* Writing for the Court, Justice Burton noted that nothing in the legislative history indicated that there was reason to differentiate between the various forms of theft. *Id.* at 414-15. He stated that "an automobile is no less 'stolen' because it is rented, transported interstate, and sold without the permission of the owner (embezzlement) . . . [or] where an automobile is purchased with a worthless check, transported interstate, and sold (false pretenses)." *Id.* at 416 (footnotes omitted). Finally, the Supreme Court concluded that the Dyer Act should not be limited to incidents of common law larceny, for to do so would render the legislation ineffective by creating loopholes for wholesale evasion. *Id.* at 416-17. Thus, the Court held that the National Motor Vehicle Theft Act was applicable to all felonious takings of motor vehicles. *Id.* at 417.

Justice Frankfurter filed a brief dissenting opinion joined by Justices Black and Douglas. *Id.* at 417-18 (Frankfurter, J., dissenting). Justice Frankfurter advocated leniency in the construction of a criminal statute and judicial restraint in the absence of explicit or unequivocal congressional direction. *Id.* at 418 (Frankfurter, J., dissenting).

41. *See* United States v. Guiffre, 576 F.2d 126, 127-28 (7th Cir.), *cert. denied,* 439 U.S. 833 (1978); United States v. Fistel, 460 F.2d 157, 162 (2d Cir. 1972); Thaggard v. United States, 354 F.2d 735, 736-37 (5th Cir. 1965), *cert. denied,* 383 U.S. 958 (1966). In *Guiffre,* the Seventh Circuit upheld the conviction of a defendant under § 2113(b) who deposited stolen checks with forged endorsements into three separate accounts and later withdrew the money. 576 F.2d at 127-28. The *Guiffre* court relied upon decisions of the Second and Fifth Circuits which were based directly upon the Supreme Court's analysis in *Turley. Id.* In *Fistel,* the Second Circuit upheld the conviction of a defendant under § 2113 (b) who had unlawful possession of U.S. Treasury bills by relying jointly upon the *Turley* decision and its own prior holding in construing the words "with intent to steal or purloin" as used in the National Stolen Property Act. 460 F.2d at 162-63, *citing* United States v. Handler, 142 F.2d 351 (2d Cir.), *cert. denied,* 323 U.S. 741 (1944). In *Thaggard,* the Fifth Circuit upheld the conviction under § 2113(b) of a defendant who had taken advantage of a bank error in his favor. 354 F.2d at 736. The *Thaggard* court focused only upon the words "steal" and "purloin" and relied exclusively upon the *Turley* opinion. 354 F.2d at 736-37. For a more extensive discussion of *Thaggard,* see notes 43-49 and accompanying text *infra.*

the FBRA and have utilized the Supreme Court's interpretation of "stolen" in the NMVTA in interpreting "steal or purloin" under section 2113(b).[42]

For example, in *Thaggard v. United States*,[43] the Fifth Circuit upheld the defendant's conviction under section 2113(b) for withdrawing funds which he knew the bank had mistakenly credited to his account.[44] The bank had erroneously deposited approximately $43,000 in Thaggard's account as a result of a bookkeeping mistake.[45] After receiving a bank statement that reflected this error, the defendant cashed a check from his account for $43,000.[46] The Fifth Circuit noted that section 2113(b) does not refer to "larceny," but to "steal" and "purloin."[47] Focusing only upon these two words and drawing extensively upon *Turley*, the court stressed that although the word "stolen" had been constantly identified with larceny, the term was never exclusively equated with common law larceny.[48] Hence, the court concluded that paragraph (b) of the Federal Bank Robbery Act had a broader scope than mere common law larceny.[49]

In contrast, in *United States v. Rogers*,[50] a case factually similar to *Thaggard*, the Fourth Circuit concluded that section 2113(b) was co-

42. *See* note 41 *supra*. For a discussion of the Supreme Court's construction of "stolen" in *Turley*, see notes 37-40 and accompanying text *supra*. For the legislative history of 18 U.S.C. § 2113(b), see notes 18-23 and accompanying text *supra*. *But see* LeMasters v. United States, 378 F.2d 262 (9th Cir. 1967) (finding that the language and purposes of the two statutes are significantly different). For a discussion of *LeMasters*, see notes 64-66 *infra*.

43. 354 F.2d 735 (5th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966).

44. 354 F.2d at 738.

45. *Id.* at 736. The bank confused the account of the Alabama Power Company with that of the Alabama Motors Company, which was owned by Thaggard, the defendant. *Id.*

46. *Id.* at 735-36. On March 6, 1963, the defendant received his February, 1963 bank statement from the Union Bank & Trust Company, which reported a balance in excess of $43,000. *Id.* On the same day, he went to the bank and withdrew the funds after verifying the amount of his balance three times, twice with the statement teller and once with a paying teller. *Id.* at 736. Ten minutes after the transaction, the bank discovered the error and Thaggard was taken to police headquarters that same night. *Id.* He admitted that he could not explain the $43,000 deposit and that he was not entitled to the money. *Id.* After he was indicted under the Federal Bank Robbery Act and found guilty in a jury trial, Thaggard appealed to the Fifth Circuit, questioning the construction of § 2113(b) and its applicability to the facts of his case. *Id.*

47. *Id.* at 736.

48. *Id.* at 737, *citing* United States v. Turley, 352 U.S. at 411-12, 417. The *Thaggard* court also noted that in *Turley*, the Supreme Court expressly disapproved of the Fifth Circuit's previous strict construction of "stolen" in Murphy v. United States, 206 F.2d 571 (5th Cir. 1953). 354 F.2d at 737, *citing* United States v. Turley, 352 U.S. at 410 n.5 & 416 n.17; Murphy v. United States, 206 F.2d 571 (5th Cir. 1953).

49. 354 F.2d at 736, 738.

50. 289 F.2d 433 (4th Cir. 1961).

extensive with common law larceny.[51] In *Rogers,* an inexperienced bank teller misread a check's date as the amount payable[52] and overpaid the defendant by more than a thousand dollars.[53] The Fourth Circuit held that Congress had intended to prohibit only common law larceny and based its decision[54] on several grounds: 1) the source of the language of section 2113(b);[55] 2) the title of the amendment which indicated that

51. *Id.* at 437. The court stated that § 2113(b) "reaches only the offense of larceny as that crime has been defined by the common law" and does not "encompass the crimes of embezzlement from a bank, . . . or obtaining goods by false pretense." *Id.*

52. *Id.* at 434. The defendant gave the teller a check for $97.92, seeking to have $80 deposited to his brother's account to carry out his brother's request and to cash the remainder of the check. *Id.* The teller first asked another bank employee if it would be possible to split the check in this manner and, after receiving assurances that this was a satisfactory procedure, she mistook the date (12 06 59) for the face amount of the check ($1,206.59). *Ia.*

53. *Id.* After deducting the $80 deposit, the teller gave the defendant two bundles of $500 each and $126.59 in assorted currency and the defendant accepted this amount. *Id.* When the teller's accounts were found to be short $1,108.67 at the end of the day, the bank's inquiry revealed that this sum represented the difference between the $1,206.59 paid to the defendant and $97.92, the correct amount payable. *Id.* The defendant was charged with violation of 18 U.S.C. § 2113(b) and convicted in a jury trial. *Id.* at 433-34. He appealed on the grounds that his actions were not prohibited by § 2113(b) and that the charge to the jury was defective on other grounds. *Id.*

54. *Id.* at 437-39. Although the court had already decided to grant a new trial on other grounds, it felt compelled to reach the § 2113(b) issue to provide guidance to the lower court upon retrial. *Id.* at 437.

55. *Id.* at 437 & n.11. The court posited that the language of § 2113(b) was borrowed from another statute. *Id., citing* Act of April 30, 1790, ch. 9, § 16, 1 Stat. 116 (current version at 18 U.S.C. § 661 (1976)). This act provides in pertinent part: "Whoever, within the special maritime and territorial jurisdiction of the United States, *takes and carries away, with intent to steal or purloin,* any personal property of another shall be punished . . . ." 18 U.S.C. § 661 (1976) (emphasis added). The language describing the criminal conduct is exactly the same as that of § 2113(b). For the text of § 2113(b), see note 11 *supra.* The Fourth Circuit noted that § 661 had been construed as a larceny statute. 289 F.2d at 437, *citing* Dunaway v. United States, 170 F.2d 11 (10th Cir. 1948); United States v. Davis, 25 F. Cas. 781 (C.C.D. Mass. 1829) (No. 14,930).

However, decisions subsequent to *Rogers* have relied on *Turley* and have interpreted the phrase "takes and carries away, with intent to steal or purloin" in § 661 broadly. *See* United States v. Maloney, 607 F.2d 222, 229-30 (9th Cir. 1979), *cert. denied,* 445 U.S. 918 (1980) (the mere use of the phrase "takes and carries away" in § 661 does not indicate that statute is *per se* limited to common law crime of larceny); United States v. Henry, 447 F.2d 283, 284-85 (3d Cir. 1971) (purpose of § 661 was not codification of common law crime of larceny but to broaden that offense by using the words "steal" and "purloin"); United States v. Armata, 193 F. Supp. 624, 626 (D. Mass. 1961) ("steal" is a word of broadest generic nature encompassing all types of wrongful handling of property and § 661 encompasses embezzlement).

For the proposition that the words "with intent to steal or purloin" in § 661 were intended to broaden the offense of larceny to include related theft offenses in order to avoid complicated pleading and practice, see United States v. Handler, 142 F.2d 351 (2d Cir.), *cert. denied,* 323 U.S. 741 (1944); Crabb v. Zerbst, 99 F.2d 562 (5th Cir. 1938); United States v. Stone, 8 F. 232 (C.C.W.D. Tenn. 1881). *See also* Mitchell v. United States, 394 F.2d 767 (D.C. Cir. 1968)

larceny was to be added to the Federal Bank Robbery Act; [56] and 3) the legislative history of the amending act.[57] The opinion contained no reference or comparison to the Supreme Court's decision in *Turley*.[58] The Fourth Circuit did, however, adopt an expanded concept of common law larceny.[59] The court indicated that upon retrial, Rogers could be found guilty of larceny, if he knew of the transferor's mistake and took the property with the intention of converting it.[60]

In *LeMasters v. United States*,[61] the Ninth Circuit also endorsed a narrow interpretation of section 2113(b), holding that the section did not cover the obtaining of money from a bank under false pretenses.[62]

(same result under similar statute). For further discussion of what constitutes an offense under 18 U.S.C. § 661, see Annot., 25 A.L.R. FED. 815 (1975).

56. 289 F.2d at 437 & n.13. The court noted that the Act's title was: "To Amend the Bank-Robbery Statute to Include Burglary and Larceny." *Id.* at 437 n.13. For a discussion of the 1934 Act and its legislative history, see notes 18-22 and accompanying text *supra*. For a discussion of the 1937 Act and its legislative history, see note 23 and accompanying text *supra*.

57. 289 F.2d at 437 & n.14. The court considered the purpose of the Act as announced in the Attorney General's recommendation in the House Report. *Id.* *See* note 23 *supra*. The court also stressed that broader wording, addressing larceny, false pretenses, and burglary, had been rejected in 1934 and that no efforts were made to expand the Act beyond larceny and burglary in 1937. 289 F.2d at 437-38 & n.14. For a summary of the provisions which were submitted and partially deleted in 1934, see notes 20-22 and accompanying text *supra*. For the legislative history of the amending act, see note 23 *supra*.

58. *See* 289 F.2d at 433-39.

59. *Id.* at 438, 439. The court indicated that if the defendant had knowledge of the teller's mistake and took the money with the intention of converting it, then the teller's delivery was ineffective to transfer title to the money, and hence, the defendant's taking was trespassory and sufficient to constitute common law larceny. *Id.* at 439. *Compare Rogers'* definition of common law larceny *with* that of W. BLACKSTONE, *supra* note 27, at *230-34.

60. 289 F.2d at 438, 439. *See also* United States v. Posner, 408 F. Supp. 1145, 1151 (D. Md. 1976), *aff'd mem.*, 551 F.2d 310 (4th Cir.), *cert. denied*, 434 U.S. 837 (1977). In *Posner*, bank employees used deposit tickets that were mistakenly pre-encoded with the defendant's account number and erroneously credited the defendant's account with over $180,000. 408 F. Supp. at 1148. The defendant subsequently made withdrawals of over $180,000 and was charged with violating § 2113(b). *Id.* at 1147. The district court employed an expansive view of common law larcency, reasoning that if a taker, prior to acquiring lawful possession, discovers that the giver is acting under a unilateral mistake, there is duty to disclose the error and if he fails to do so, the taking is a "constructive" trespass which is sufficient for larceny. *Id.* at 1151, *citing* 2 F. WHARTON, CRIMINAL LAW AND PROCEDURE 478 (Anderson ed.); 50 AM. JUR. *Larceny* § 26 (1970). Since the court interpreted *Rogers* as equating § 2113(b) with common law larceny, the court found that the defendant's conduct was a violation of § 2113(b). 408 F. Supp. at 1153. *See also* Wolfstein v. People, 13 N.Y. Sup. Ct. 121, 123 (1875) (bound to return the financial overpayment to the owner). For a discussion of *Wolfstein*, see note 34 *supra*.

61. 378 F.2d 262 (9th Cir. 1967).

62. *Id.* at 267. LeMasters had been successful in procuring a total of $6,700 by falsely and fraudulently representing himself to be the owner of a certain savings account from which he made withdrawals. *Id.* at 263. The defendant was charged with larceny, but the evidence at trial proved the crime of obtaining money by false pretenses. *Id.* Therefore, the Ninth Circuit had

Judge Madden observed that the terms "steal" and "purloin" were used *in conjunction with* the words "takes and carries away" [63] and that this phraseology approximated scholarly defintions of larceny.[64] He perceived that the background and legislative history of section 2113(b) supplied a strong basis for distinguishing the *Turley* Court's broad construction of the word "stolen" in the NMVTA.[65] Attempting to give the words of the statute a "meaning consistent with the context in which [they] appear," [66] Judge Madden noted that the statute was enacted to combat bank robberies by gangsters and this rendered a broad construction of the statute unnecessary.[67] Finally, the Ninth Circuit justified its holding based on the policy of not construing a federal statute broadly when counterpart state laws exist,[68] as urged by the Supreme Court in *Jerome v. United States.*[69]

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to determine whether the crime of false pretenses was prohibited by § 2113(b). *Id.*

63. 378 F.2d at 267 (emphasis added).

64. *Id.* at 264. The court noted that the classic definition of larceny was "the trespassory taking and carrying away of the personal property of another with intent to steal the same." *Id., quoting* R. PERKINS, CRIMINAL LAW 190 (1957). The court also relied on Blackstone's definition of larceny as "the felonious taking and carrying away of the personal goods of another." 378 F.2d at 264, *quoting* W. BLACKSTONE, *supra* note 27, at *229 [sic]. Judge Madden further remarked that at the time Congress selected the term "steal," it could not have relied upon any settled interpretation of its meaning because *Turley* was not decided until twenty years later. 378 F.2d at 266-67.

65. 378 F.2d at 267-68. The court found the purposes of the FBRA to be "wholly different from . . . the 1919 stolen motor vehicle act." *Id.* at 267.

66. *Id.* at 267, *quoting* United States v. Turley, 352 U.S. at 413.

67. 378 F.2d at 264, 267. Judge Madden reached this conclusion after meticulously reviewing the legislative history of § 2113(b). *Id.* at 264-66, 267-68. For the legislative history of the 1934 act, see notes 18-22 and accompanying text *supra.* For the legislative history of the 1937 act, see note 23 and accompanying text *supra.*

68. 378 F.2d at 268. In addition, the court hypothesized that in 1937 Congress did not intend to include these broader offenses because they were adequately monitored by the states and were not an integral aspect of interstate gangster operations. *Id.* at 266, 268.

69. 318 U.S. 101 (1943). In *Jerome,* the Supreme Court narrowly construed the word "felony" as used in § 2113. *Id.* at 107. As a guideline for the interpretation of federal criminal statutes, Justice Douglas stated:

> Since there is no common law offense against the United States . . . , the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law . . . . [The] consideration [that the bar of double jeopardy is not applicable] gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute.

Id. at 104-05 (citations omitted). For a brief discussion of the inapplicability of the double jeopardy clause of the fifth amendment in this situation, see 17 ST. JOHN'S L. REV. 131-33 (1943). As to the function of the courts when there are overlapping state and federal criminal statutes, see Justice Frankfurter's

Against this background, the Third Circuit analyzed the district court's conclusion that Biagio Pinto's conduct was proscribed by the Federal Bank Robbery Act.[70] Judge Van Dusen initially noted that when a federal offense is also prohibited by state law, the terms of the federal statute should be narrowly construed.[71] The court also recognized that "[t]he Supreme Court has consistently resolved any ambiguity in 18 U.S.C. § 2113 'in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act.' "[72] Further, the Third Circuit stated that the language of section 2113(b), the title of the 1937 amending act, and its legislative history all support a restrictive interpretation of the larceny provision.[73]

Relying on *Rogers* and *LeMasters,* the court determined that since Pinto did not engage in any trespassory "taking away" of funds from either bank, his actions were not prohibited by the statutory language.[74] Specifically, the court viewed Pinto's actions as fraud-type offenses.[75] The *Pinto* court emphasized that Congress included section 2113 in a chapter of Title 18 entitled "Robbery and Burglary," whereas the section that covered the false statements charge was included in a chapter entitled "Fraud and False Statements."[76] The court found that the latter title most accurately described the substance of the defendant's offense.[77] Moreover, the court noted that the NMVTA, the statute at

dissent in *Turley,* 352 U.S. at 417-18 (Frankfurter, J., dissenting). *See* note 40 *supra. See also* Morissette v. United States, 342 U.S. 246 (1951) (Congressional use of common law terms in a statute directs judicial interpretation in accordance with the common law meaning unless contrary direction appears in statute).

The Ninth Circuit also supported a restrictive interpretation of § 2113(b) in a later decision holding that false pretenses were not prohibited by the statute. *See* Bennett v. United States, 399 F.2d 740, 744 (1968). This holding was based upon the statute's legislative history, the Ninth Circuit's prior holding in *LeMasters,* and the Supreme Court ruling enunciated by Justice Douglas in *Jerome. Id.* at 744.

70. 646 F.2d at 836-37.

71. *Id.* at 836, *citing* Jerome v. United States, 318 U.S. at 105. For a discussion of the policy considerations involved in *Jerome,* see note 69 and accompanying text *supra.*

72. 646 F.2d at 836, *quoting* Heflin v. United States, 358 U.S. 415, 419 (1959) (citation omitted).

The court also distinguished two Third Circuit decisions which the prosecution proffered to support its argument, on the grounds that the cases were dependent upon different statutory sections or subsections from the one presently involved. 646 F.2d at 836-37, *citing* United States v. Bryan, 483 F.2d 88 (3d Cir. 1973) (interpretation of 18 U.S.C. § 659 (1976)); United States v. Patton, 120 F.2d 73 (3d Cir. 1941) (interpretation of 18 U.S.C. § 2113(a) (1976)).

73. 646 F.2d at 836.

74. *Id., citing* LeMasters v. United States, 378 F.2d 262, 264 (9th Cir. 1967); United States v. Rogers, 289 F.2d 433, 437-38 (4th Cir. 1961). For a discussion of *Rogers,* see notes 50-60 and accompanying text *supra.* For a discussion of *LeMasters,* see notes 61-69 and accompanying text *supra.*

75. 646 F.2d at 836.

76. *Id.*

77. *Id.*

issue in *Turley*,[78] was not included in the chapter entitled "Robbery and Burglary," but rather was placed in the chapter entitled "Stolen Property." [79] Hence, the court implicitly distinguished *Turley* from the *Pinto* case.[80]

Finally, the Third Circuit factually distinguished the cases which have embraced an expansive interpretation of section 2113(b).[81] The court noted that none of those cases involved a credit as a consequence of the unilateral mistake of another bank to an established account which the defendant thereafter used fraudulently.[82] In reversing the bank larceny conviction, Judge Van Dusen concluded that the "defendant's dissipation of funds credited to his bank account wholly because of another bank's unilateral error is not conduct punishable under 18 U.S.C. § 2113(b)." [83]

Although the Third Circuit correctly concluded that Pinto's conduct did not fall within section 2113(b),[84] the court's treatment of this issue was perfunctory and unpersuasive,[85] particularly in view of the split among the circuits as to the proper interpretation of this section.[86] Since courts which will be confronted with section 2113(b) cases in the future will seek guidance from the *Pinto* decision, it is suggested that the Third Circuit should have entertained a thorough analysis of *Turley* [87] and the rationales supporting both the broad and narrow readings of section 2113(b).[88]

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78. *See* 18 U.S.C. § 2312 (1976); text accompanying note 37 *supra*.

79. 646 F.2d at 836 n.6. For another court's utilization of Congress' placement of statutory sections in different chapters of Title 18 as a distinguishing factor, *see* United States v. Maloney, 607 F.2d 222, 230 (9th Cir. 1979) (statutory construction of 18 U.S.C. § 661 (1976)).

80. *See* 646 F.2d at 836 n.6. The court's reference to *Turley* was limited to a citation in a footnote. *See id.*

81. *Id.* at 837. The court noted that the fraudulent scheme in *Guiffre* consisted of "the use of stolen checks deposited in bank accounts of the thief's wife and under an assumed name used by the thief." *Id., citing* United States v. Guiffre, 576 F.2d 126 (7th Cir.), *cert. denied,* 439 U.S. 833 (1978). The Third Circuit stated that the fraudulent scheme in *Fistel* was "the sale of bearer bonds, stolen from a bank vault, at discount prices to investigators working for that bank." 646 F.2d at 837, *citing* United States v. Fistel, 460 F.2d 157 (2d Cir. 1972). The Third Circuit also noted that the fraudulent scheme in *Thaggard* involved "drawing money in cash from the thief's bank account when he knew the bank had mistakenly inflated the amount in that account." 646 F.2d at 837, *citing* Thaggard v. United States, 354 F.2d at 735. For a discussion of *Guiffre* and *Fistel,* see note 41 *supra*. For a discussion of *Thaggard, see* notes 43-49 and accompanying text *supra*.

82. 646 F.2d at 837.

83. *Id.*

84. *See* text accompanying notes 89 & 91-95 and note 99 *infra*.

85. *See* notes 74-75 & 80-82 and accompanying text *supra*.

86. *See* text accompanying note 29 *supra*.

87. *See* note 80 and accompanying text *supra*.

88. *See* notes 47-49 & 63-68 and accompanying text *supra*.

Although the *Pinto* court properly recognized the applicability of the policy considerations enunciated by the Supreme Court in *Jerome*,[89] the court failed to analyze and consequently distinguish *Turley*[90] by identifying the wholly different purposes, origins, and backgrounds of the National Motor Vehicle Theft Act and the Federal Bank Robbery Act.[91] A broad construction of "stolen" was required in *Turley* in order to fully implement the policy behind the NMVTA, whereas a narrow interpretation of "takes and carries away, with intent to steal or purloin"[92] satisfies the purposes of the Federal Bank Robbery Act.[93] Furthermore, the legislative history demonstrates that while Congress had originally considered including fraud-type offenses in the Act in 1934,[94] these provisions were explicitly withdrawn.[95] This suggests that fraud-type offenses were not intended to be prohibited by the FBRA.

Turning to the *Pinto* court's treatment of other courts of appeals' decisions, it is noted that Judge Van Dusen distinguished the decisions of the Second, Fifth, and Seventh Circuits solely upon the facts of those cases.[96] However, it is submitted that the factual distinction of *Thaggard* is not persuasive.[97] For all relevant purposes, the factual contexts of *Pinto* and *Thaggard* are identical.[98] Moreover, *Thaggard,* as well as the Second and Seventh Circuit decisions, should have been distinguished on analytical grounds rather than upon a factual basis.[99]

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89. *See* 318 U.S. at 105; notes 68-69 & 71 and accompanying text *supra.*

90. In view of *Turley*'s profound impact on other circuit court's interpretations of § 2113(b), it is suggested that footnote treatment of *Turley* by the *Pinto* court was inadequate. *See* note 41 and accompanying text *supra.*

91. This was the approach of the Ninth Circuit in *LeMasters. See* 378 F.2d at 267. For a discussion of this approach, as employed by the *LeMasters* court, see notes 65-67 and accompanying text *supra.*

92. 18 U.S.C. § 2113(b) (1976).

93. *See* LeMasters v. United States, 378 F.2d at 267; notes 65-67 and accompanying text *supra.* Pinto's conduct was in no way related to "interstate gangster activity." *See* notes 5-8 and accompanying text *supra.* The purpose of the 1937 amending act, as reflected in the title of the act, is also satisfied by a narrow interpretation. *See* notes 56 & 67 *supra.*

94. *See* note 20 *supra.*

95. *See* notes 21-22 and accompanying text *supra.*

96. *See* 646 F.2d at 837; notes 81-82 and accompanying text *supra.*

97. *See* 646 F.2d at 837; note 98 and accompanying text *infra.*

98. Both cases involved a defendant's withdrawal of funds erroneously credited to his bank account. *Compare* notes 1-8 and accompanying text *supra with* notes 44-46 and accompanying text *supra.*

99. Ample grounds exist for the panel's restrictive posture in *Pinto.* First, the narrow interpretation is supported by policy considerations enunciated by the Supreme Court. *See* Heflin v. United States, 358 U.S. 415, 419 (1959); Jerome v. United States, 318 U.S. 101, 105 (1943). *See also* notes 71-72 and accompanying text *supra.* Second, an examination of the *complete* statutory phrase also supports a narrow construction, in that the phrase contains expressions which approximate the classic definitions of larceny. *See* notes 63-64 and accompanying text *supra.* Third, the purpose of the act, as evidenced by the title of the 1937 amending act and the legislative history of both the 1934 and

Finally, the Third Circuit misread *Rogers*,[100] another case which is factually indistinguishable from *Pinto*.[101] Although Judge Van Dusen cited *Rogers* for support,[102] the court failed to recognize that the Fourth Circuit, given the facts of *Pinto*, would have reached a result contrary to the Third Circuit's holding.[103] Under the *Rogers* analysis, if Biagio Pinto had knowledge of the bank's blunder and withdrew the money with the intention of converting it to his own use, the requisite trespassory taking would be present and sufficient for both common law larceny and a conviction under section 2113(b).[104] Although the Fourth Circuit construed paragraph (b) narrowly,[105] it accepted a broad definition of what constitutes common law larceny in a mistake case.[106] However, the *Pinto* court failed to consider that the scope of section 2113(b) also hinges upon a judicial interpretation of common law larceny.[107] The *Pinto* court never explicitly equated the scope of section 2113(b) with that of common law larceny, but one might conclude that its limitation of the section to a "trespassory taking away" [108] and to "non-fraud-type offenses" [109] is tantamount to a construction of the statute as equivalent to strict common law larceny.[110] In any event, it is

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1937 acts, indicates that the *Pinto* court correctly adopted a restrictive interpretation. *See* notes 56-57, 67 & 91 and accompanying text *supra*. Fourth, the deletion of broader terms in 1934 without their specific inclusion in 1937 further buttresses the *Pinto* court's conclusion. *See* notes 57 & 67 and accompanying text *supra*. Finally, the chapter placement of § 2113(b) in comparison with other criminal sections serves to distinguish the statute and sustain a narrow construction. *See* notes 76 & 79 and accompanying text *supra*.

Also, the *Thaggard* court and other courts which advocate an expansive interpretation of § 2113(b) may not have properly construed the whole phrase, "takes and carries away, with intent to steal or purloin," in that these courts focused upon the word "steal" exclusively. *See* notes 37, 42 & 47-48 and accompanying text *supra*. Under this approach, a significant portion of the statutory language is rendered nugatory. The Ninth Circuit considered the entire phrase in *LeMasters* and adopted the narrow construction of § 2113(b). *See* notes 63-64 and accompanying text *supra*.

100. *See* 646 F.2d at 836. For a discussion of *Rogers*, see notes 50-60 and accompanying text *supra*.

101. *Compare* notes 1-8 and accompanying text *supra with* notes 52-53 and accompanying text *supra*. Both *Pinto* and *Rogers* are cases wherein a bank mistakenly gave the defendant more than he was entitled to. *Id.* It is submitted that whether this occurs by an error in an account statement or by overpayment on a check is immaterial.

102. *See* 646 F.2d at 836.

103. *See* notes 59 & 60 and accompanying text *supra*.

104. *Id.*

105. *See* note 51 *supra*.

106. *See* notes 59 & 60 and accompanying text *supra*.

107. *See* notes 51, 59 & 60 and accompanying text *supra*.

108. 646 F.2d at 836.

109. *Id.*

110. For a discussion of strict common law larceny, see note 27 and accompanying text *supra*.

suggested that the court should have clearly articulated its stance on this matter in order to clarify the scope of 2113(b).

Under *Pinto*, an individual's withdrawal of funds, which he knows were erroneously credited to his bank account and which were credited solely as the result of another bank's unilateral mistake, is not a federal criminal offense under section 2113(b).[111] Due to this narrow holding and the court's reticence to delineate a general standard for the interpretation of the statute's scope, it is not clear whether a future defendant's knowing exploitation of a different sort of bank error is proscribed by section 2113(b) in the Third Circuit. With the advent of electronic banking, the expansion of computerization in financial institutions, and a greater number of banking transactions annually,[112] the probability of another *Pinto*-type situation arising increases. Until the Supreme Court provides a definitive answer, the courts of appeals will remain divided on the interpretation of the scope of section 2113(b).[113]

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111. 646 F.2d at 837.

112. The Federal Reserve System alone handled approximately 35,000,000 interbank transfers in 1979. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, 66th ANNUAL REPORT 300, 323, table 9 (1980).

113. *See* notes 29-31 and accompanying text *supra*.