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CRIMINAL LAW AND PROCEDURE

I. SUMMARY CONTEMPT: IMMEDIATE, COMPELLING NEED REQUIRED

A. INTRODUCTION

In *In re Gustafson*[1] the Ninth Citcuit held that there must be a compelling reason for immediate action before a court can use its summary contempt power.[2] During final argument, the defense counsel urged the jury to consider the effect of a conviction on the defendant's family. The prosecution objected and the court instructed the jury that sympathy was an impermissible basis for the verdict. Despite further warnings from the court, counsel continued his sympathy appeal, telling the jury that the bench and prosecution were "quashing and quelling this evidence of a defense counsel trying to do his level best for his client."[3] The court then recessed for the day, excused the jury, and summarily held the attorney in contempt.

The Ninth Circuit reversed, holding that summary contempt was inappropriate because there was no showing that the attorney's conduct caused a material obstruction to an ongoing trial.

B. BACKGROUND

Under Federal Rule of Criminal Procedure 42(a),[4] a judge

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1. 619 F.2d 1354 (9th Cir. 1980) (per Ferguson, J., the other panel members were Ely, J., and Wright, J., dissenting).

2. The criminal contempt power of the federal courts is contained in 18 U.S.C. § 401 (1976) which provides in pertinent part: "A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." Disposition of criminal contempts is contained in FED. R. CRIM. P. 42. Rule 42(a) provides for summary disposition, see note 4 *infra*, while rule 42(b) provides for disposition upon notice and hearing, see note 5 *infra*.

3. 619 F.2d at 1356.

4. FED. R. CRIM. P. 42(a) provides:

can summarily punish contemptuous conduct if committed in the court's presence and if the judge certifies that she or he witnessed the conduct. Otherwise, there must be disposition with notice and a hearing under rule 42(b).[5] Traditionally, the lack of notice and a hearing has been justified by (1) the need to maintain order in the courtroom;[6] (2) the availability of appellate review to safeguard the contemnor's rights;[7] and (3) the wastefulness of a second trial because the court itself witnessed the conduct.[8]

Increasing sensitivity to due process rights has put further limitations on the summary contempt power. The Supreme Court has limited incarceration to a maximum of six months,[9] has held that summary disposition is unavailable if there is judicial bias,[10] and has recognized the conflict between an attorney's roles as an advocate for his or her client and as an officer of the court.[11] The Supreme Court has required an actual obstruction of justice before summary contempt is appropriate.[12]

In *Harris v. United States*,[13] the Supreme Court limited the summary contempt power to circumstances in which time is of the essence. This limitation has been put into doubt by the

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> Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

5. Rule 42(b) requires that notice be given by the judge in open court or on an application of the U.S. attorney or of an attorney appointed for that purpose, on an order to show cause or an arrest order. The alleged contemnor is entitled to a reasonable amount of time to prepare his or her case and to a jury trial. If the contempt involved judicial disrespect, then that judge is disqualified from presiding at the hearing.

6. *Ex Parte* Terry, 128 U.S. 289, 303 (1888).

7. Sacher v. United States, 343 U.S. 1, 12 (1952).

8. Cooke v. United States, 267 U.S. 517, 534 (1925).

9. Codispoti v. Pennsylvania, 418 U.S. 506 (1974).

10. Johnson v. Mississippi, 403 U.S. 9 (1971) (no summary contempt if the judge has demonstrated an attitude and position clearly adverse to the alleged contemnor); Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (no summary contempt if judge so grossly insulted that prejudice may be presumed); Offbut v. United States, 348 U.S. 11 (1954) (no summary contempt if judge becomes personally embroiled with the alleged contemnor).

11. *In re* McConnel, 370 U.S. 30 (1962).

12. *Id.*

13. 382 U.S. 162 (1965).

Court's decision, nine years later, in *United States v. Wilson.*[14] Many commentators[15] believe *Wilson* limited *Harris* to its factual setting and re-established discretionary power in the trial court. Some courts, however,[16] including the Ninth Circuit in *Gustafson,* believe that *Wilson* reaffirmed the time of the essence requirement.

C. The Ninth Circuit Opinion

The Majority Holding

The majority found no compelling reasons for summary contempt in *Gustafson* because there was no material obstruction or frustration of the proceedings, and therefore, no need for immediate action. The court noted[17] that there was no disruption of the trial,[18] that summary contempt was not necessary as an incentive,[19] that the trial day ended normally,[20] and that the trial would not have been imperiled by a rule 42(b) hearing.[21] The majority relied upon *United States v. Wilson,*[22] in which the Supreme Court held that summary contempt was appropriate when a witness refused to testify at trial even after a grant of immunity because (1) the witness' refusal to testify frustrated an ongoing proceeding; (2) the threat of summary contempt provided an incentive for the witness to testify; and (3) a full hearing would have caused such a harmful delay as to imperil the trial.

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14. 421 U.S. 309 (1974).

15. Kuhns, *The Summary Contempt Power: A Critique and a New Perspective,* 88 Yale L.J. 39 (1978); Note, United States v. Wilson: *An Expansive Approach to the Power of the Federal Courts to Punish Contempts under rule 42(a) of the Federal Courts of Criminal Procedure,* 9 Sw. U.L. Rev. 747 (1977); Kuhns, *Limiting the Criminal Contempt Power: New Rules for the Prosecutor and Grand Jury,* 73 Mich. L. Rev. 483 (1975); United States v. Wilson, 421 U.S. 309 (1975) (summary contempt may properly be applied to the orderly refusal of witnesses to testify at trial after grant of immunity).

16. United States v. Brannon, 546 F.2d 1242 (5th Cir. 1979); Krueger v. State, 351 So. 2d 47 (Fla. Dist. Ct. App. 1977).

17. 619 F.2d at 1358.

18. A reference to the *Wilson* Court's examination of the disruptiveness of the contemnor's conduct. See 421 U.S. at 316.

19. A reference to the *Wilson* Court's finding that summary criminal contempt may be used as an incentive. *See id.*

20. Sacher v. United States, 267 U.S. 517, 534 (1925).

21. A reference to the *Harris* Court's consideration of whether the proceeding would be imperiled by a rule 42(b) hearing. *See* 382 U.S. at 164.

22. 421 U.S. 309 (1974).

The Supreme Court distinguished *Wilson* from *Harris,*[23] where summary contempt was held inappropriate for an orderly refusal to testify before a grand jury. While a grand jury has many inquires before it, and can easily suspend action on any one case while a 42(b) contempt hearing is held, a trial court "cannot be expected to dart from case to case."[24] The Supreme Court reasoned that a delay at trial not only adversely affects all individuals assembled for the trial, but has a rippling delay effect on all scheduled trials. The *Wilson* court concluded that "[w]here time is not of the essence, however, the provisions of Rule 42(b) may be more appropriate to deal with contemptuous conduct."[25]

The majority did not rule on whether the defense counsel's conduct was contemptuous because it reversed on the ground that summary disposition was inappropriate. They did, however, list factors to consider in determining whether an attorney's comments amount to a material obstruction sufficient to justify summary contempt. These factors are (1) the reasonably expected reactions of those in the courtroom, (2) the manner in which the remarks are delivered, (3) the delay to the proceedings caused by the disrespectful outburst, and (4) the failure to heed explicit directives of the court.[26]

The Dissent

Judge Wright, argued that summary contempt was appropriate because defense counsel's comments were per se contemptuous[27] and rule 42(a) requires only that the contempt be in the court's presence and certified by the judge. Judge Wright believed the majority rewrote rule 42(a) by adding requirements of a material obstruction and an immediate need for action. Summary contempt power, he argued, is necessary for immediate vindication of the court's dignity and authority, and the trial judge should be allowed discretion.[28] Judge Wright construed

23. 382 U.S. 162 (1965).
24. 421 U.S. at 318.
25. *Id.* at 319.
26. 619 F.2d at 1359.
27. Judge Wright stated that an attorney's comments which are disrespectful to the court are per se contemptuous. Specifically, he focused on the attorney's charge of collusion between the bench and the prosecutor. 619 F.2d at 1362-63.
28. 619 F.2d at 1365 (citing Cooke v. United States, 267 U.S. 517, 534 (1925)).

Wilson as a literal reading of rule 42(a) and as leaving discretion with the trial court. The dissent stressed[29] that the *Wilson* Court said "[w]here time is not of the essence . . . the provisions of rule 42(b) *may* be more appropriate," and that time be of the essence is not a requirement, but a discretionary factor left with the trial judge.

The dissent also stated that the majority departed from its own precedents by ignoring *MacInnis v. United States,*[30] where counsel's disrespectful comments were held per se contemptuous and therefore summarily punishable; and wrongly relied upon *Gordon v. United States*[31] where counsel was held liable to summary contempt for his disrespectful comments.

D. Analysis of the Court's Opinion

The crucial difference between the majority and dissenting opinions lies in their interpretations of *United States v. Wilson.* The majority's reading that there must be a breakdown of the trial and a compelling reason for immediate action by the court before the summary contempt power can be exercised is the better position for it recognizes that summary contempt is a drastic remedy whose application should be limited.

The dissent's position that disrespectful comments are per se contemptuous and therefore subject to immediate vindication of authority by the court, ignores Supreme Court decisions. *MacInnis v. United States,*[32] cited by the dissent, was decided in 1951, before the Supreme Court made a series of rulings regarding summary contempt and disrespect to the court.[33] While these cases focused on the problem of biased judges exercising the summary contempt power, they indicated that disrespectful comments are not per se subject to summary contempt, and may, because of the hostility the comments may engender in the trial court judge, require that the judge step down and a rule

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29. 619 F.2d at 1365-66.

30. 191 F.2d 157 (9th Cir. 1951), *cert. denied,* 342 U.S. 953 (1952). The circuit court stated, "The act of addressing the court in open session with the statements 'you should cite yourself for misconduct' and 'you ought to be ashamed of yourself', unmodified, are, per se, contemptuous." 191 F.2d 157, 161 (9th Cir. 1951).

31. 592 F.2d 1215 (1st Cir.), *cert. denied,* 441 U.S. 912 (1979).

32. 191 F.2d 157 (9th Cir. 1951), *cert. denied,* 342 U.S. 953 (1952).

33. See note 10 *supra* and accompanying text.

42(b) hearing be held.

The dissent also ignored the Supreme Court decision in *In re McConnel,*[34] where the Court held there must be an actual obstruction of justice before summary power is available for disrespectful comments made by an attorney. The more recent Ninth Circuit decisions regarding the appropriateness of summary contempt for disrespect shown by counsel toward the court require a showing of both contemptuous conduct and material obstruction.[35]

Neither is time of the essence a new requirement by the Ninth Circuit. In *United States v. Abascal*[36] the Ninth Circuit ruled on a similar fact pattern and examined whether time was of the essence. During the noon recess, the alleged contemnor in *Abascal* failed to step forward as ordered by the court. While the court of appeals found that the conduct was contemptuous, the court ruled summary contempt was inappropriate because there was no threat to an ongoing proceeding, nor would any proceeding be imperiled by a full contempt hearing under rule 42(b).

What the dissent failed to appreciate in this case was that, at the time of the contempt citation, the court was in recess. Counsel was not interrupting any proceeding at the time cited and the court could easily have, and should have, held a rule 42(b) proceeding.

The Effect of the Decision

It is possible that future Ninth Circuit decisions might uphold a summary contempt citation for the same behavior as displayed by Gustafson if the judge cited the attorney during trial.

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34. 370 U.S. 230 (1962).

35. Hawk v. Cardoza, 575 F.2d 732, 735 (9th Cir. 1978) ("The need for judicial order is not fixed but must be considered in the context of each case. The length of a trial, surrounding controversy, prior warnings from the trial judge and prior conduct of the contemnor are among factors which must be considered in assessing the validity of summary contempt citations."); United States v. Abascal, 509 F.2d 752 (9th Cir. 1975); Weiss v. Burr, 484 F.2d 973, 984 (9th Cir. 1973) ("Due process requires that contemnors, such as Weiss, who are not cited *and* simultaneously punished for the purpose of restoring courtroom decorum or protecting the safety of court officials are entitled to an opportunity for allocution". (Footnotes omitted)).

36. 509 F.2d 752 (9th Cir. 1975).

In a case cited with approval by the majority, *Gordon v. United States,*[37] a pro se publico defendant[38] was held in summary contempt for a speech attacking the court. The majority cited *Gordon* as requiring a material obstruction of justice before the utterer of disrespectful comments can be held contemptuous and liable to summary punishment. The majority distinguished *Gustafson* from *Gordon,* where summary contempt was upheld, because "the conduct at issue had caused 'not insubstantial' and 'entirely unnecessary' delays which substantially disrupted the trial."[39] While the *Gordon* court spoke of the hearing becoming as much of a contempt proceeding as a probation revocation,[40] thus indicating a substantial disruption, it is possible to imagine later courts focusing on the trial judge's comment that he could either hold Gordon in contempt or consider him a "harmless nut and forget it"[41] and conclude that there doesn't really have to be a compelling reason for immediate action.

Further evidence of the possibility that *Gustafson* may be limited to out-of-trial settings is the majority's reliance on *United States v. Brannon.*[42] *Brannon* held there must be a compelling reason for immediate action before summary contempt is permissible. In *Brannon,* a witness refused to testify at trial. The witness was not summarily held in contempt at that time but only after the trial was finished. The Fifth Circuit ruled the delay was fatal to the summary contempt citation, noting that a compelling reason for its use existed at the time of the witness' refusal, but not at the end of trial. Thus, future Ninth Circuit decisions could focus on the same distinction made in *Brannon,* concluding *Gustafson,* like *Brannon,* is meant to apply only to contemptuous acts outside of the actual trial.

On the other hand, the majority did focus on Gustafson's behavior at trial, and not on whether the summary contempt ci-

37. 592 F.2d 1215 (1st Cir.), *cert. denied,* 441 U.S. 912 (1979).

38. The court's opinion did not focus on the fact that Gustafson was an attorney, but rather upon the conduct he displayed. Therefore, the fact that Gordon was a pro se publico defendant does not seem an important distinction. It is important to note that because the *Gustafson* court did not appear to limit its holding to attorneys, it should apply to any contemnor.

39. 619 F.2d at 1360.

40. 592 F.2d at 1218.

41. *Id.* at 1218 n.2.

42. 546 F.2d 1242 (5th Cir. 1977).

tation actually was made during the trial or not. Additionally, the majority repeatedly stressed that summary contempt was a harsh remedy, that due process guarantees dictate that summary contempt be used sparingly, and that the power to punish for contempt should always be limited to "the best possible power adequate to the end proposed."[43]

E. Conclusion

The summary contempt power has been much critized as a denial of due process.[44] Several commentators have suggested that the threat of a criminal contempt conviction upon a later hearing is sufficient to allow the court to maintain its authority while safeguarding the contemnor's rights. The Ninth Circuit is taking a step in the right direction by recognizing that summary contempt is a drastic remedy and should be used only when there is a compelling reason for immediate action.

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II. THE NINTH CIRCUIT PROHIBITS RANDOM NIGHTTIME STOPS OF BOATS

A. Introduction

In *United States v. Piner*,[1] the Ninth Circuit held that random nighttime safety checks of boats violate the fourth amend-

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43. 619 F.2d at 1361.

44. Note, *Counsel and Contempt: A Suggestion that the Summary Power Be Eliminated*, 18 Duq. L. Rev. 289 (1980); Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 Yale L.J. 39 (1978); Sedler, *The Summary Contempt Power and the Constitution: the View from Within and Without*, 51 N.Y.U. L. Rev. 34 (1976), Note, *Direct Criminal Contempt: An Analysis of Due Process and Jury Trial Rights*, 11 New England L. Rev. 77 (1975); Note, Taylor v. Hayes—*a Case Study in the Use of Summary Contempt Against an Attorney*, 63 Ky. L.J. 945 (1975); N. Dorsen & L. Friedman, Disorder in the Court (1973); Note, *Attorneys and the Summary Contempt Sanction*, 25 Me. L. Rev. 89 (1973); Note, *Summary Punishment for Contempt: A Suggestion that Due Process Requires Notice and Hearing Before an Independent Tribunal*, 39 S. Cal. L. Rev. 463 (1966).

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1. 608 F.2d 358 (9th Cir. Sept., 1979) (per Merrill, J.; the other panel members were King, D. J., sitting by designation, and Kennedy, J., dissenting).

ment.[2] While on night patrol in the San Francisco Bay, United States Coast Guard officers saw defendants' forty-three-foot pleasure boat between Tiburon and Angel Island. Coast Guard officers boarded the sailboat to conduct "a routine safety inspection."[3] The officers had neither probable cause nor a reasonable suspicion that defendants were violating any law or regulation. Stepping on board, one of the officers observed what he thought were bags of marijuana in a cabin below deck. The officers immediately arrested the defendants. The Coast Guard seized and searched the boat, uncovering over two tons of marijuana. The defendants were indicted for importation of, possession with intent to distribute, and conspiracy to import and distribute marijuana.[4]

At trial, the defendants moved to suppress the evidence of the marijuana on the ground that the stop constituted an unreasonable seizure under the fourth amendment. The district court granted the motion.[5] The Ninth Circuit affirmed, relying predominantly on the recent Supreme Court decision in *Delaware v. Prouse*,[6] which held unconstitutional random stops of automobiles. The Ninth Circuit extended the *Prouse* decision to apply to random nighttime stops of boats. The *Piner* court held that without at least a "reasonable and articulable"[7] suspicion of noncompliance with safety regulations, the fourth amendment proscribes the random stop and boarding of a boat after dark for a safety and registration inspection.[8]

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2. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.

3. 608 F.2d at 359.

4. 21 U.S.C. § 952(a) (1976) proscribes the importation of marijuana; 21 U.S.C. § 963 (1976) proscribes the conspiracy to import marijuana; 21 U.S.C. § 841(a)(1) (1976) proscribes the possession of marijuana with intent to distribute; and 21 U.S.C. § 846 (1976) proscribes the conspiracy to possess marijuana with intent to distribute.

5. United States v. Piner, 452 F.Supp. 1335 (N.D.Cal. 1978).

6. 440 U.S. 648 (1979).

7. 608 F.2d at 361.

8. *Id.*

B. Two Fourth Amendment Exceptions

On their face, federal statutes[9] appear to give the Coast Guard plenary power to, at any time, stop and search any vessel subject to the jurisdiction of the United States. The Ninth Circuit has severely limited the scope of these statutes,[10] although other circuits have wholeheartedly accepted them.[11] This discord among the circuits revolves around the constitutionality of two fourth amendment exceptions: stops and searches at the border, and stops by administrative agencies.[12]

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9. 14 U.S.C. § 89(a) (1976) provides:

> The Coast Guard may make inquiries, examinations, inspections, searches, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detention, and suppression of violations of laws of the United States. For such purposes . . . officers may *at any time* go on board of *any vessel* subject to the jurisdiction . . . of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use *all necessary force* to compel compliance . . . . (Emphasis added).

19 U.S.C. § 1581(a) (1976) provides:

> Any officer of the customs may *at any time* go on board of *any vessel* . . . *at any place* in the United States or within the customs waters or . . . within a customs-enforcement area . . . or at any other authorized place, without as well as within his district . . . and examine, inspect, and search the vessel . . . and every part thereof and any person, trunk, package, or cargo on board . . . . (Emphasis added).

19 U.S.C. § 1401(i) (1976) defines "customs waters" as extending four leagues (about 12 nautical miles) from the coast.

10. United States v. Odneal, 565 F.2d 598 (9th Cir.), *cert. denied,* 435 U.S. 952 (1977) (Coast Guard is subject to the limitations imposed by the fourth amendment); United States v. Stanley, 545 F.2d 661 (9th Cir. 1976) (a stop under 19 U.S.C. § 1581(a) (1976) requires probable cause or a search warrant unless a border stop); United States v. Jones, 528 F.2d 303 (9th Cir.), *cert. denied,* 425 U.S. 960 (1975) (dictum) (land search allowed under § 1581(a) of a boat being transported via a trailer would violate the fourth amendment).

11. United States v. Whitaker, 592 F.2d 826 (5th Cir.) (the fourth amendment does not prohibit document inspections in the absence of any suspicion in customs waters), *cert. denied,* 444 U.S. 950 (1979); United States v. Freeman, 579 F.2d 942 (5th Cir. 1978) (upheld a stop under § 1581(a)); United States v. Warren, 578 F.2d 1058 (5th Cir.) (upheld a stop and search under § 89(a)), *rev'd on other grounds,* 612 F.2d 887 (1980). United States v. Glaziou, 402 F.2d 8 (2d Cir.) (upholding border search under § 1581(a)), *cert. denied,* 393 U.S. 1121 (1969).

12. A third exception, exigent circumstances, is also used to bypass the Fourth Amendment requirements. The scope of this Note, however, is limited to random stops where exigent circumstances do no exist. *See* Note, *High on the Seas: Drug Smuggling, The Fourth Amendment, and Warrantless Searches at Sea,* 93 Harv. L. Rev. 725 (1980) [hereinafter cited as *High on the Seas*].

The Border Stop and Search Exception

A warrantless stop and search at a border or its functional equivalents need not be based on consent or probable cause of an existing violation. The border search exception is based on an interest in "national self preservation [which] reasonably require[s] one entering the country to identify himself to come in, and his belongings as effects which may be lawfully brought in."[13] Although the Supreme Court has never considered cases challenging the constitutionality of a border stop and search of a vessel,[14] in recent decisions, the Court limited the scope of border searches of automobiles.[15]

In *Almeida-Sanchez v. United States,*[16] a roving border patrol stopped defendant about twenty-five air miles from the Mexican border to search for illegal aliens. The government justified the warrantless search on section 287(a)(3) of the Immigration and Nationality Act,[17] which grants the border patrol power to search without a warrant any vehicle within a "reasonable distance"[18] from the border. The search unveiled marijuana instead of illegal aliens. The Court held that the search violated the fourth amendment because it was based on neither consent nor probable cause to believe a violation had occurred.[19] The Court also found that routine border searches are only permissi-

13. Carroll v. United States, 267 U.S. 132, 154 (1924) (dictum).

14. The Supreme Court has denied certiorari in the following cases involving border stops and searches of vessels: United States v. Serrano, 607 F.2d 1145 (5th Cir. 1979), *cert. denied,* 100 S. Ct. 1838 (1980); United States v. Whitaker, 592 F.2d 826 (5th Cir.), *cert. denied,* 100 S. Ct. 422 (1979); United States v. Warren, 578 F.2d 1058 (5th Cir.), *cert. denied,* 434 U.S. 1016 (1978); United States v. Odneal, 565 F.2d 598 (9th Cir.), *cert. denied,* 435 U.S. 952 (1977); United States v. Jones, 528 F.2d 303 (9th Cir.), *cert. denied,* 425 U.S. 960 (1975); United States v. Glaziou, 402 F.2d 8 (2d Cir.), *cert. denied,* 393 U.S. 1121 (1968).

15. United States v. Martinez-Fuerte, 428 U.S. 543 (1975), *see* text accompanying note 23 *infra*; United States v. Ortiz, 422 U.S. 891 (1975), *see* text accompanying notes 21 & 22 *infra*; United States v. Brignono-Pounce, 422 U.S. 873 (1975) (upheld a roving border patrol stop based on "specific articulable facts"); Almeida-Sanchez v. United States, 413 U.S. 266 (1973), *see* text accompanying notes 16-20 *infra.*

16. 413 U.S. 266 (1973).

17. 8 U.S.C. § 1357(a)(3) (1976) provides that "if [a]ny officer or employee of the Service authorized under regulations proscribed by the Attorney General shall have power without warrant . . . within a reasonable distance from any external boundary of the United States, to board and search for aliens . . . . "

18. A "reasonable distance" is usually defined as 100 air miles from any external boundary of the United States. 8 C.F.R. § 287.1 (1980).

19. 413 U.S. at 274-75.

ble at the border or at the "functional equivalent."[20] The Court gave two examples of a "functional equivalent" of a border: a station near the border where two roads from the border join, and an airport terminal where flights from other countries are received.

In *United States v. Ortiz*,[21] the Supreme Court extended *Almeida-Sanchez* to hold unconstitutional random, warrantless searches conducted at established border stops. In *Ortiz*, the defendant was stopped at a border checkpoint sixty-two miles north of the Mexican border. Although the Border Patrol officer had no reason to believe defendant was transporting illegal aliens, he instructed defendant to open the trunk of his car. In the trunk were three illegal aliens. The Supreme Court held that without either consent or probable cause, a warrantless search by border patrol officers at traffic checkpoints removed from the border or its functional equivalent violated the fourth amendment.[22] In a subsequent case, however, the Supreme Court upheld brief questioning at permanent traffic checkpoints even though the *Almeida-Sanchez* requirements were not met.[23]

The Administrative Stop and Search Exception

A warrantless stop and search by an administrative agency, based on neither consent nor probable cause, can only be conducted of industries under strict federal control. The administrative search was created to deter violations of regulations by subjecting certain industries to random inspection. In *Camara v. Municipal Court*[24] the Supreme Court addressed the conflict between the fourth amendment and administrative searches. In *Camara*, a city housing inspector was making a routine annual inspection of an apartment building[25] when defendant refused to

20. *Id.* at 272-73.
21. 422 U.S. 891 (1975).
22. *Id.* at 896-97.
23. United States v. Martinez-Fuerte, 428 U.S. 543 (1975).
24. 387 U.S. 523 (1967).
25. Section 503 of the San Francisco Housing Code provides:

> Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.

allow the inspector access to his apartment without a search warrant. The Supreme Court held that under the fourth amendment the defendant had a constitutional right to insist that the inspector obtain a search warrant before allowing him entry into his residence.[26] In *See v. City of Seattle,*[27] the Court extended the *Camara* rule to apply to businesses, holding that the defendant in *See* had a constitutional right to insist that a fire inspector obtain a warrant prior to entry.[28]

In *Colonnade Catering Corp. v. United States,*[29] the Supreme Court again considered the constitutionality of warrantless administrative searches. Defendant, a retail liquor dealer, refused federal agents entry into a locked storeroom. Without a search warrant or probable cause, the agents broke the lock, found illegal liquor inside and seized it as evidence. The Supreme Court found the *See* rule inapplicable in *Colonnade* because a person in the liquor industry knew at the time he received his license that the industry was under strick federal regulation and that Congress had established sanctions for obstructing warrantless searches.[30] In *United States v. Biswell,*[31] the Supreme Court extended the *Colonnade* rationale to the firearms industry. More recently, in *Marshall v. Barlow's, Inc.,*[32] the Supreme Court reaffirmed the *Biswell-Colonnade* exception to the *See* rule.[33]

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11 SAN FRANCISCO, CAL., HOUSING CODE § 503 (1964), *reprinted in* Camara v. Municipal Court, 387 U.S. 523 (1967).

26. 387 U.S. at 539.

27. 387 U.S. at 541.

28. The Seattle Fire Code § 8.01.050, *reprinted in* See v. City of Seattle, 387 U.S. 541 (1967), allows warrantless inspections of all buildings, except the interior of premises, to correct any conditions which may cause fires.

29. 397 U.S. 72 (1970).

30. *Id.* at 77.

31. 406 U.S. 311 (1972), *construed in* Almeida-Sanchez v. United States, 413 U.S. at 266 (1973).

32. 436 U.S. 307 (1978).

33. In *Marshall,* the Supreme Court held warrantless searches under the Occupational Safety and Health Act of 1970 (OSHA) unconstitutional unless fourth amendment requirements were met. Section 8(a) of OSHA allows the Secretary to enter and inspect any work area and to inspect all machinery to look for violations of regulations. Speaking to the Secretary's efforts to apply inspections under OSHA to the *Biswell-Colonnade* exception, the Court said that "[c]ertain industries have . . . a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such enterprise." 436 U.S. at 313 (citation omitted). Both the liquor (Colonnade) and firearm (Biswell) industries are within this delineation because a person engaging in either "has voluntarily chosen to subject himself to a full arsenal of governmental regula-

Although the Supreme Court has not decided the constitutionality of administrative stops of vessels, in its recent decision of *Delaware v. Prouse*,[34] the Court held an administrative automobile stop unconstitutional. In *Prouse*, a highway patrolman stopped defendant to check his driver's license and automobile registration. The patrolman had no probable cause to stop because he did not observe, and had no suspicion of, any traffic violation. The patrolman, however, smelled, and subsequently saw, marijuana in plain view.[35]

The trial court held that the random stop, being wholly capricious, violated the fourth amendment and granted defendant's motion to suppress the evidence of the marijuana. The Supreme Court affirmed.[36] Noting that the purpose of the fourth amendment is to maintain a standard of "reasonableness"[37] upon the discretionary power of government officials, the Court adopted a two-part balancing test:[38] first, the intrusion of a particular law-enforcement practice on an individual's fourth amendment interests is balanced against its promotion of a legitimate governmental interest, second, the facts on which the intrusion is based must be measured against an objective standard.[39] The *Prouse* Court went on to endorse checkpoint stops as an alternative to random ones.[40]

C. The Court's Analysis

The Majority

Relying predominantly on *Prouse*, the *Piner* court upheld

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tions." *Id.*

34. 440 U.S. 648 (1979).

35. For an admissible plain view seizure, the officer must have a right to be where he is when he sees the item, the item must be in plain view, the item must have a nexus to criminality and the discovery must be inadvertant. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

36. 440 U.S. at 663.

37. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

38. 440 U.S. at 654.

39. In Terry v. Ohio, 392 U.S. 1, 30 (1968), the objective standard was whether an officer had probable cause to believe that defendant was engaged in criminal activity. The *Prouse* Court also adopted as an alternative to the probable cause requirement the determination by a neutral and detached magistrate that the standard has been met. 440 U.S. at 654 (citing Mincey v. Arizona, 437 U.S. 385 (1978)).

40. 440 U.S. at 656-57 (citing United States v. Ortiz, 422 U.S. 891 (1975); United States v. Martinez-Fuerte, 428 U.S. 543 (1975)). *See* text accompanying notes 15 & 21-23 *supra*.

the motion to suppress the marijuana as evidence.[41] The *Piner* court extended the *Prouse* rationale to hold random nighttime stops of boats unconstitutional. Adopting the *Prouse* balancing test, the *Piner* court determined that the governmental need for random boat stops does not outweigh the concern, annoyance, and fright an individual experiences when subject to such stops at night.[42] Reasoning that the purpose of random stops is to discourage noncompliance with safety regulations, the *Piner* court found random daytime stops sufficient to deter safety regulation violations while creating less annoyance and fright in the average boat owner. The court further held that nighttime stops should be allowed only where there is cause to suspect noncompliance with safety regulations.

The *Piner* court acknowledged the statutory authority for random boat stops,[43] but distinguished commercial boats from pleasure crafts.[44] The *Piner* court also recognized statutory authority for customs inspections parallel to that for random boat stops,[45] and cited Fifth Circuit cases which relied on these statutes to hold random boat stops constitutional.[46] Yet, the *Piner* court chose not to follow either the statutory authority allowing random boat stops or the Fifth Circuit cases supporting them. Instead, the *Piner* court relied on *Prouse*[47] in finding random nighttime stops unconstitutional.[48]

The Dissent

Judge Kennedy dissented on several grounds. First, he distinguished *Prouse* from *Piner* on the ground that the *Prouse* decision was limited to random stops of automobiles. The dissent noted that the *Prouse* decision was based on the limited produc-

41. 608 F.2d at 361.

42. *Id.*

43. 14 U.S.C. § 89(a) (1976). The statutory language is set forth in *supra* note 9.

44. Under 33 C.F.R. §§ 175.1 & 177.01 (1980), safety equipment are required on pleasure boats only when the boat is in use. Commercial boats are required to comply with safety regulations at all times, even when the boat is not in use.

45. 19 U.S.C. § 1581(a) (1976). The statutory language is set forth in *supra* note 9.

46. United States v. Freeman, 579 F.2d 942 (5th Cir. 1978); United States v. Warren, 578 F.2d 1058 (5th Cir.), *cert. denied,* 434 U.S. 1016 (1978).

47. 608 F.2d at 360-61.

48. The district court found Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), See v. City of Seattle, 387 U.S. 541 (1967), and Camara v. Municipal Court, 387 U.S. 523 (1967) controlling in holding random boat stops unconstitutional. *See* text accompanying notes 24-33 *supra.*

tivity of random automobile stops,[49] a limitation not present in random stops of boats.[50]

The dissent argued that the less intrusive alternatives the *Prouse* Court suggested for insuring that automobile drivers complied with safety regulations[51] were unavailable to random boat stops.[52] The dissent also criticized the majority's alternative of limiting random stops to the daytime as going against the basic purpose of random stops. The dissent argued that random stops were created to promote safety, and to allow nighttime violators to go undetected would be more dangerous than to allow daytime violators to go unchecked.

The dissent also argued that random stops by the Coast Guard are allowed by statute.[53] The dissent traced the powers vested in the Coast Guard back to their origin.[54] Section thirty-one of the Revenue Cutter Act of 1790, the dissent observed, placed no limitations on boat inspectors and, more importantly,

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49. Although no statistics were given, the *Prouse* Court noted that "the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed." 440 U.S. at 660.

50. In his dissent, Judge Kennedy observed that approximately 40% of the boats stopped in 1977 were not in compliance with safety regulations. 608 F.2d at 362.

51. The dissent suggested three alternatives: 1) stopping observed violators. Once stopped, license and registration papers could be checked to see what, if any, other regulations have been violated; 2) requiring an annual safety inspection would prevent violators from eluding the law. Upon passing this inspection, a sticker is issued and must be displayed; 3) establishing road block stops. 608 F.2d at 362.

52. The first alternative, stopping visible violators, is unavailable because many, if not all, boat safety violations can only be discovered by boarding and taking inventory of required items. Such items are normally kept below deck unless needed. The second alternative, annual inspections, is unavailable to boats because safety equipment is normally kept at home until the boat is used. The third alternative, road block stops, is impractical unless particular throughfares are established on which road blocks can be put. 608 F.2d at 362.

53. 14 U.S.C. § 89(a) (1976); 19 U.S.C. § 1581(a) (1976). The language of both statutes are set forth in note 9 *supra*.

54. The dissent argued that the Coast Guard's authority to board vessels originated in § 31 of the Revenue Cutter Service Act of 1790 which provided:

> That it shall be lawful for all collectors, naval officers, surveyors, inspectors, and the officers of the revenue cutters . . . to go on board of ships or vessels in any part of the United States, or within four leagues of the coast thereof, if bound to the United States, whether in or out of their respective districts, for the purpose of demanding the manifests aforesaid, and of examining and searching the said ships or vessels; and the said officers respectively shall have free access to the cabin, and every other part of the ship or vessel . . . .

was created by the same Congress that proposed the fourth amendment. In addition, this statute left the right to randomly stop and search a vessel unqualified while limiting such a stop and search of a "vehicle, beast or person" to those based on a "reasonable cause to suspect" a violation.[55] The dissent found further support for distinguishing stops of boats from stops of automobiles in *Maul v. United States*.[56] Justices Brandeis and Holmes, concurring in that case, argued that there was "no limitation" on a warrantless seizure of a vessel while the seizure of "persons, papers and effects" was limited by the Constitution.[57]

The dissent argued that *Piner* should come within the *Biswell-Colonnade* exception for activities under strict federal regulation. The dissent maintained that the governmental interest in insuring safety coupled with 200 years of federal regulation more than qualified random boat stops under this limited exception.

Finally, the dissent argued that the defendants had no legitimate expectation of privacy because the marijuana was in plain view. The dissent argued that the Coast Guard officers only stepped onto the exposed deck of the defendants' boat and violated no legitimate expectation of privacy. Once there, the marijuana was subject to seizure under the plain view doctrine. This argument assumes that the Coast Guard had a right to be on the exposed deck of the boat.

D. The *Piner* Decision Criticized

Factually, *Piner* and *Prouse* are similar in many ways. Both cases involved a stop based on neither probable cause nor reasonable suspicion of a safety violation,[58] both stops occurred in the early evening,[59] and both involved seized marijuana in plain view.[60] The major factual difference between the two cases is that *Piner* involved a boat and *Prouse* an automobile. The courts, however, came to different results. Although the *Prouse* Court held random automobile stops unreasonable under the fourth amendment, the *Piner* court only found random *night-*

55. *Id.* § 3.
56. 274 U.S. 501 (1927).
57. *Id.* at 524.
58. 440 U.S. at 650; 608 F.2d at 359.
59. *Id.*
60. *Id.*

time boat stops unreasonable. Following the holding in *Prouse*, the *Piner* court should have ruled all random boat stops unconstitutional. Had the *Piner* court so held, the Ninth Circuit could have suggested, as a less intrusive alternative, a system of annual safety inspections for boats similar to that presently used in most states for annual safety inspections of automobiles.[61]

Less burdensome alternatives to random boat stops were suggested in a recent law review article.[62] One alternative was to establish inspection stations, either temporary or permanent, at centrally located ports along the coast.[63] Following a successful inspection, decals would be issued for display near the boat's name. The color of the decals could be changed each year to insure each boat was inspected annually. Boats without valid decals could be stopped and inspected, because inspectors would have probable cause to believe that these boats either failed the first inspection or had never been inspected.

The burdens imposed by the annual safety check alternative on the average boat owner would be minimal compared to those of a random stop system since the owner would have the choice of when, within certain time limitations, the inspection would be conducted. Such a system may take several years to implement, but once established, the intrusiveness on the individual boat owner would be no more than that which the average automobile owner faces today. Annual safety checks would also be more efficacious than random stops because all boats would be subject to annual inspections, not just those chosen at random.

E. The Practical Effect of *Piner*

As a practical matter, nighttime boat stops and searches are still permissible. Since *Almeida-Sanchez*, in which the Supreme Court upheld searches at borders and their functional equivalents, the Ninth Circuit has held that a bay is the "func-

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61. Thirty states require periodic safety inspections. For example, New York law provides that all vehicles must be inspected annually and must bear a certificate of a successful inspection. N.Y. Veh. & Traf. Law §§ 301 - 305 (McKinney 1970).

62. *See* High on the Seas, *supra* note 12, at 744-50.

63. Other suggested alternatives include dockside safety checks to motivate the purchase of safety equipment and random lottery of certain characteristics of the boat, such as last three numbers of the boat identification number or certain types of boats.

tional equivalents" of a border.[64] This interpretation, however, applies only to vessels which have crossed an international border.[65] In cases similar to *Piner*, a stop and search of a boat in a bay could be conducted as a border search if the Coast Guard learns that the boat to be searched had recently crossed an international border.[66] Such knowledge could be obtained either directly through inquiry to the boat owner or indirectly via a radio call to a central Coast Guard station. In *Piner*, neither was attempted. Such inquiries should be made in the future. If it were learned that the boat had recently sailed in foreign waters, a warrantless search could be conducted, at day or at night, as a border search even if neither probable cause nor reasonable suspicion of a violation existed.[67]

*Robinson R. Ng**

III. NINTH CIRCUIT ADOPTS *BERRY* STANDARD FOR NEW TRIALS BASED UPON PERJURED TESTIMONY

In *United States v. Krasny*,[1] a case of first impression, the Ninth Circuit Court of Appeals adopted the traditional standard[2] for new trial motions based upon perjured testimony by a material government witness. Rejecting a more liberal standard applied by a majority of the circuits in cases involving perjured or recanted testimony, the court chose not to distinguish between perjured testimony and other types of newly discovered evidence.

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64. United States v. Solmes, 527 F.2d 1370 (9th Cir. 1975).

65. *Id.* at 1372.

66. In United States v. Stanley, 545 F.2d 661 (9th Cir. 1976), the Ninth Circuit held that border searches apply to boats leaving the United States as well as those coming in.

67. *See* notes 16-23 *supra* and accompanying text.

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1. 607 F.2d 840 (9th Cir. 1979) (per Wallace, J.; the other panel members were Chambers, J., and Ely, J., dissenting), *cert. denied*, 445 U.S. 942 (1980).

2. The traditional standard was first set forth in Berry v. Georgia, 10 Ga. 511, 527 (1851). *See* note 23 *infra* and accompanying text. The Ninth Circuit never explicitly referred to *Berry*, but did rely on United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 902 (1976), which cited *Berry*.

A. Facts of the Case

Defendant, Krasny, was convicted on charges of conspiracy to import heroin into the United States and to possess heroin with intent to distribute.[3] He subsequently filed a motion for new trial pursuant to Federal Rule of Criminal Procedure 33 (rule 33).[4] The defendant based his motion upon the discovery of evidence subsequent to the trial allegedly showing perjury by a material government witness. The witness, one of Krasny's accomplices, according to information proffered by the government, lied at trial regarding the extent of her prior criminal activity. During the trial, the witness offered testimony stressing Krasny's role as principal in the conspiracy, playing down her own part. Krasny's defense of duress at trial was rebutted largely by this witness' testimony and her cooperation with government agents in producing tapes of incriminating conversations with Krasny. Krasny argued that his duress defense was more credible in light of the new evidence.[5]

The district court denied the motion for new trial on the sole ground that the new evidence was cumulative and would not have changed the jury's verdict.[6]

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3. 607 F.2d at 841. Defendant's conviction was based on violations of 21 U.S.C. §§ 841(a)(1), 846, 952, 963 (1970).

4. Fed. R. Crim. P. 33. The rule was promulgated by the United States Supreme Court as Rule II of the Criminal Appeals Rules of 1933, 292 U.S. 661 (1934), and amended by Congress in accordance with its statutory authority in 1966. In relevant part the rule provides:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Some commentators have suggested that there should be no time limit for motions based on newly discovered evidence. *See generally* 2 C. Wright, Federal Practice and Procedure § 557 (1969). The Uniform Rules of Criminal Procedure, approved by the American Bar Association, have discontinued the 2-year limit for motions for new trial based upon newly discovered evidence. Instead, rule 552 of the Uniform Rules provides that the motion must be made with reasonable diligence. *See* D. Epstein & D. Austern, Uniform Rules of Criminal Procedure: Comparison and Analysis, ABA Criminal Justice Section 156 (1975).

5. 607 F.2d at 842.

6. *Id.* The district judge's one sentence opinion stated as follows: "I find that the

The court of appeals found the lower court record insufficient to determine whether the district judge had abused his discretion in applying the standard for the motion for new trial. As a result, the appellate court vacated and remanded the judgment to the district court for a factual determination of the basis for the denial.[7] The Ninth Circuit held that district courts must apply the following standard to determine whether perjured testimony requires a new trial: (1) the evidence must be discovered after the trial; (2) the discovery after trial must not have been caused by a lack of diligence by the defendant's attorney; (3) the evidence must be material to the issues and not merely cumulative or impeaching; and, (4) the evidence at a new trial would probably result in acquittal.

B. Background

Rule 33 confers upon district courts the power to grant a new trial if it is "in the interest of justice" to do so.[8] Most new trial motions are predicated upon violations of constitutional guarantees.[9] However, motions for new trial based upon newly discovered evidence are not. Motions based on this ground are considered checks on the fallibility of the criminal justice system, insuring "the integrity of the factfinding process and a fair trial for the accused . . . ."[10]

District judges may exercise broad discretion in ruling upon motions for new trial.[11] If granted, the prosecution can make no appeal of the order.[12] District judges are accorded such latitude in ruling upon motions for new trial because their personal observation at the trial facilitates the decision-making process.[13]

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suggested new evidence is at best cumulative and would not be of sufficient import to alter the jury's determination in this matter in terms of guilt or innocence." The government argued, apparently successfully, that the taped conversations sufficiently showed the defendant's guilt, and that in comparison, the credibility of the witness was insignificant.

7. *Id.* at 846.

8. Fed. R. Crim. P. 33.

9. There are many grounds for motions for new trial. For example, jury misconduct, misconduct of the prosecuting attorney, violation of the right to counsel, improper rulings on evidence. 8A Moore's Federal Practice ¶ 33.03[4], at 33-16 to 33-17 (2d ed. 1980).

10. *Id.* ¶ 33.06[1], at 33-52.

11. 5 L. Orfield, Criminal Procedure Under the Federal Rules 295 (1967).

12. *Id.*

13. Note, 39 Minn. L. Rev. 316 (1955).

This is especially true in the case of motions for new trial based upon newly discovered evidence, in which the district judge must determine the effect of the newly discovered evidence on the jury's verdict.[14] The scope of appellate review is limited to a determination of whether the district judge abused his or her discretion in ruling upon the motion.[15]

Courts seldom grant motions for new trial[16] because, in the interest of finality, district judges avoid granting costly retrials unlikely to result in a different verdict.[17] This is especially true if the newly discovered evidence consists of perjured or recanted testimony.[18] The typical case involves a recantation of testimony by a material government witness who was the defendant's accomplice.[19] District judges are reluctant to believe recantations by accomplices because of the disincentives for accomplices to admit testifying falsely and the likelihood of bribery and collusion between the accomplice and the defendant.[20] Thus, judges are persuaded only by overwhelming evidence that the testimony at trial was false. Even if persuaded, judges hesitate to grant new trials on the basis of recanted or perjured testimony presented by defendants' accomplices. This is because the testimony may have been accorded little weight at trial since juries may properly consider the credibility of an accomplice's testimony.

District courts apply different standards for evaluating motions for new trial depending upon the grounds for the motion. In general, the severity of the standard varies inversely with the

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14. *Id.*

15. *Id.* at 317.

16. 8A J. MOORE, FEDERAL PRACTICE ¶ 33.06 (2d ed. 1980). For historical support, see L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 510, 511 (1947), which discusses the history of the motion, and notes that new trials were unknown at common law until the 17th century.

17. Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961), *cert. denied*, 377 U.S. 909 (1964).

18. Perjured and recanted testimony cases present substantially similar issues, and the courts regard these cases as being of one type. One commentator has suggested that the only difference between perjured and recanted testimony is the practical consideration of proof. 8A J. MOORE, FEDERAL PRACTICE ¶ 33.05 (2d ed. 1980).

19. *See, e.g.*, United States v. Smith, 433 F.2d 149, 150 (5th Cir. 1970), in which the defendant's accomplice recanted his testimony by telling "a pack of lies" in the hopes of helping his friend get parole.

20. 58 AM. JUR. 2D *New Trial* § 175 (1971).

gravity of the misconduct at the trial.[21]

The Berry *Standard*

In *Berry v. Georgia*,[22] the Georgia Supreme Court set forth a standard for new trial motions based upon newly discovered evidence. The *Berry* standard requires that the defendant satisfy the court:

> 1st. That the evidence has come to his knowledge since the trial. 2nd. That it was not owing to want of due diligence that it did not come sooner. 3d. That it is so material that it would *probably* produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only—viz.; speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted if the *only* object of the testimony is to impeach the character or credit of a witness.[23]

The Larrison *Standard*

Many courts apply the *Berry* standard to motions for new trial based on newly discovered evidence.[24] A majority of the circuit courts, however, have applied a more liberal standard when the newly discovered evidence involves perjured or recanted testimony. In *Larrison v. United States*,[25] the standard was first applied in a case involving recanted testimony. The *Larrison* standard requires that a new trial be granted when:

> (a) the court is reasonably well satisfied that the testimony given by a material witness is false,

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21. Kyle v. United States, 297 F.2d at 514.

22. 10 Ga. 511 (1851). In *Berry*, the defendant alleged that the prosecutor had unsuccessfully attempted to elicit an admission of guilt by means of deceit. The court denied the motion for new trial holding that the evidence did not meet the standard set forth above, because it most likely would have been inadmissible at trial and "it established nothing." *Id.* at 528.

23. *Id.* at 527. (emphasis added).

24. *E.g.*, United States v. Frye, 548 F.2d 765 (8th Cir. 1977) (failure of government to locate witness, later available to testify); United States v. Curran, 465 F.2d 260 (7th Cir. 1972) (new evidence that witness previously unwilling to testify was now willing).

25. 24 F.2d 82 (7th Cir. 1928). In *Larrison* the material government witness recanted his entire testimony. The witness subsequently repudiated his recantation. The court refused to believe that the trial testimony was false and consequently denied the motion. *But see* United States v. De Sapio, 435 F.2d 272 (2d Cir. 1970).

> (b) that without it, the jury *might* have reached a different conclusion,
> (c) that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.[26]

The *Larrison* court rejected the *Berry* requirement that motions for new trial be denied when the evidence is merely cumulative, or only supports the same points raised at trial.[27] The *Larrison* standard differs from the *Berry* standard in that the *Larrison* standard requires the district judge to determine whether the jury *might* have reached a different conclusion if it had not heard the false testimony.[28] The *Berry* standard, on the other hand, requires the district judge to determine whether the jury would *probably* reach a different conclusion, if the jury heard the new testimony.[29] The essential differences between the two standards are: (1) the degree of certainty which the trial judge must attach to the likelihood of a different verdict from the jury; that is, that the jury *might* or would *probably* reach a different verdict; and, (2) the knowledge of the evidence which the judge must impute to the jury. That is, under *Larrison*, the judge does not impute knowledge of the false testimony, while under *Berry*, the judge does impute knowledge of the testimony and the knowledge that the prior testimony was perjured.[30]

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26. *Id.* at 87-88. The Seventh Circuit subsequently limited the scope of the *Larrison* standard in United States v. Johnson, 142 F.2d 588 (7th Cir. 1944), *rev'd on other grounds*, 327 U.S. 106 (1946), to apply in cases in which the testimony was proven false or recanted. A majority of the circuit courts today apply the *Larrison* standard as modified by *Johnson*. *See* United States v. Mackin, 561 F.2d 958 (D.C. Cir.), *cert. denied*, 434 U.S. 959 (1977); United States v. Wallace, 528 F.2d 863 (4th Cir. 1976) (recantation of testimony by a material government witness); United States v. Meyers, 484 F.2d 113 (3d Cir. 1973) (perjured testimony by a material government witness); United States v. Briola, 465 F.2d 1018 (10th Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973); United States v. Smith, 433 F.2d 149 (5th Cir. 1970) (recantation not believed); Newman v. United States, 238 F.2d 861 (5th Cir. 1956) (recantation of testimony); Gordon v. United States, 178 F.2d 896 (6th Cir. 1949) (recantation of testimony), *cert. denied*, 339 U.S. 935 (1950).

27. 24 F.2d at 87.

28. *Id.*

29. 10 Ga. at 527.

30. Several courts have noted a third difference between the two standards. *See, e.g.*, United States v. Johnson, 149 F.2d 31, 44 (7th Cir. 1944), *rev'd on other grounds*, 327 U.S. 106 (1946). The *Larrison* standard refers to the original trial jury, while the *Berry* standard refers to the future jury at the new trial. Both the *Larrison* and *Berry* standards require the district judge to evaluate the impact of the new evidence on the jury's verdict. Whether the judge considers the original or a future jury is of no practical significance. The judge can only evaluate the hypothetical outcome by integrating his or

These differences have only recently been addressed by the federal courts.[31] Two trends have emerged—one limiting, and the other expanding, the scope of the *Larrison* standard.

Several courts have criticized the *Larrison* standard in recent years.[32] In *United States v. Stofsky*,[33] the Second Circuit rejected the *Larrison* standard in favor of the *Berry* standard. The *Stofsky* court noted that the *Larrison* standard is too "seculative,"[34] and if literally applied, would always result in a new trial.[35] The *Stofsky* court, however, limited its holding to cases in which defendants do not allege government culpability or knowledge in the use of the false testimony.[36] Noting previous uncertainty regarding the application of the *Berry* standard, the

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her observations of the original jury. The Ninth Circuit similarly took this position in *Krasny*.

31. *See* notes 32 & 38 *infra*.

32. The *Larrison* standard has been criticized as lacking sufficient precedent. *See* Note, 39 MINN. L. REV. 316 (1955). The courts have expressed their disfavor with the *Larrison* standard by limiting the scope of the standard. This has been done in a number of ways. Some courts apply the standard only in cases in which the government has knowingly or negligently used the false testimony. *E.g.*, United States v. Curran, 465 F.2d 260 (7th Cir. 1972). Other courts apply the standard only in cases in which the testimony relates to an essential element of the crime. *E.g.*, United States v. Wallace, 528 F.2d 863 (4th Cir. 1976). One court has held that the *Larrison* standard should be applied only when the motion for new trial is brought within seven days of the final judgment. *See* United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

33. 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). In *Stofsky*, a factually interesting case, a leading government witness, defendant's accomplice, lied at trial to avoid revealing the source of personal assets subject to tax liability. The government was excused from culpability for negligent use of the perjured testimony because the witness had transactional immunity, and it was not foreseeable by the government that the witness would lie under the circumstances. The court denied the motion because the new evidence was not exculpatory, and could have supported defendant's conviction.

34. *Id.* at 245. The court referred to the *Larrison* standard as too speculative, without explaining what this criticism meant. This commentator believes that the *Stofsky* court meant that the standard allows district judges to exercise excessive discretion in ruling upon motions for new trial.

35. *Id.* at 245-46 ("[T]he test, if literally applied, should require reversal in cases of perjury with respect to even minor matters, especially in light of the standard jury instruction that upon finding that a witness had deliberately proferred false testimony in part, the jury may disregard his entire testimony.").

36. *Id.* at 243. The court cited two lines of cases in which the *Berry* standard has been modified in favor of the lesser *Larrison* standard: (1) government culpability in the suppression of evidence cases, and (2) perjured testimony cases. The *Stofsky* court rejected the modification for perjured testimony cases but not government suppression cases. The court did not state the basis for this distinction. Nor did the court state in which category it would consider cases involving government culpability or negligence in the use of perjured testimony by a government witness.

court clarified the proper procedure. The district judge is to appraise the factual impact of the new testimony on the jury's determination as well as the impeaching aspects of the tesimony.[37] The *Larrison* standard does not permit the judge to consider the impact of the new testimony on the credibility of the witness.

Other courts have expanded the scope of the *Larrison* standard.[38] Most recently, in *United States v. Willis*,[39] a Pennsylvania district court modified the *Larrison* standard to its most liberal version yet. The *Willis* court changed the element of the *Larrison* standard that requires the judge to appraise the impact on the jury's verdict as if it had not heard the false testimony.[40] Under *Willis*, the judge must appraise the impact of the new testimony on the jury's verdict as well as the effect of the new testimony on the credibility of the witness.

C. The Court's Analysis: Adoption of the *Berry* Standard

Because the case was one of first impression,[41] the *Krasny* court reviewed the other circuits' standards for motions for new trials based on perjured testimony. Following the Second Cir-

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37. *Id.* at 246. The Second Circuit stated that this aspect of the *Berry* standard has not been the subject of "explicit judicial reported consideration." *Id.* However, this aspect is addressed by the *Berry* standard itself. The last element of the standard provides that a "new trial will not be granted, if the *only* object of the testimony is to impeach the character or credit of a witness." 10 Ga. at 527 (emphasis added). A fortiori, because the standard states that the evidence may not be used for impeachment, the *Berry* court obviously contemplated that the new evidence could be used for impeachment.

38. *E.g.*, United States v. Johnson, 487 F.2d 1278 (4th Cir. 1973) (district court could properly look at all circumstances surrounding a recantation when ruling upon motions for new trial based on perjured testimony); United States v. Mitchell, 29 F.R.D. 157 (D.N.J. 1962) (the function of the trial judge is not to decide what the verdict should finally be, but rather to determine whether the newly discovered evidence should be submitted to the jury).

39. 467 F. Supp. 1111 (W.D. Pa. 1978), *vacated and indictment dismissed on request of U.S. Attorney's Office*, 606 F.2d 391 (3d Cir. 1979) (a government agent falsified a surveillance report and gave perjured testimony regarding the report at trial).

40. "That without it, the jury *might* have reached a different conclusion." 24 F.2d at 87. The *Willis* court noted that this change was made in light of the jury instruction to the effect that upon finding that a witness testified falsely in part, it may choose to disregard his or her entire testimony. It should be noted that the *Willis* holding may be limited to cases involving government culpability because the witness was a government agent.

41. The court distinguished two prior Ninth Circuit cases as involving different legal issues: Mejia v. United States, 291 F.2d 198 (9th Cir. 1961) (defendant recanted confession of guilt), and Strangway v. United States, 312 F.2d 283 (9th Cir.), *cert. denied*, 373 U.S. 903 (1963) (testimony of the witness was held not be perjured, even though it was inconsistent with her tax returns and established a basis for a perjury prosecution).

cuit's decision in *United States v. Stofsky*,[42] the court adopted the *Berry* standard, rejecting the application of the *Larrison* standard in cases involving perjured or recanted testimony if the government did not knowingly or negligently use the false testimony.[43]

The *Krasny* court based its criticism of the *Larrison* standard on the reasoning in *Stofsky*. The court argued that the *Larrison* standard is speculative,[44] and that applying the *Larrison* standard would necessarily require a new trial.[45] Unconvinced that all cases involving perjured testimony require new trials, the Ninth Circuit rejected the *Larrison* standard.[46] The court also disapproved of those cases in which courts have applied both the *Larrison* and *Berry* standards.[47]

The *Krasny* court stated that it saw no reason to distinguish perjured or recanted testimony from other types of newly discovered evidence.[48] The court stated that "[t]he focus of the inquiry [should be] on what difference the evidence would have made to the trial regardless of its source."[49]

The Ninth Circuit distinguished *Krasny* from several other types of cases involving perjured testimony. The court first distinguished *Krasny* from cases in which defendants alleged government culpability or negligence,[50] although the court cited no basis for this distinction. The *Krasny* court next distinguished the Supreme Court case of *Mesarosh v. United States*,[51] an in-

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42. 527 F.2d 237 (2nd Cir. 1975) *cert. denied*, 429 U.S. 819 (1976). See notes 33-35 *supra* and accompanying text.

43. 607 F.2d at 844-45.

44. *See* note 34 *supra*.

45. *See* note 35 *supra*.

46. 607 F.2d at 844.

47. *Id.* at 843 (citing United States v. Hamilton, 559 F.2d 1370 (5th Cir. 1977)); United States v. Meyers, 484 F.2d 113 (3d Cir. 1973). *See also* United States v. Jackson, 579 F.2d 553 (10th Cir.), *cert. denied*, 439 U.S. 981 (1978); United States v. Mackin, 561 F.2d 958 (D.C. Cir.), *cert. denied*, 434 U.S. 959 (1977).

48. 607 F.2d at 844.

49. *Id.*

50. *Id.* at 844-45. In *Krasny*, no allegation of government knowledge or negligent use was made, because the government "with commendable candor" advised the defendant's attorney of the possible perjury by its witness, only six months after the final judgment (well within the two year limit for new trial motions based upon newly discovered evidence). *Id.* at 842.

51. 352 U.S. 1 (1956). *Compare Mesarosh with* Communist Party of the United

veterate perjurer case. In *Mesarosh*, the Supreme Court held that a conviction based on perjured testimony required a new trial.[52] The *Krasny* court distinguished *Mesarosh* on the ground that the motion for new trial was not a rule 33 motion, but rather a motion by the Solicitor General.[53]

The Dissent

In his dissenting opinion, Judge Ely rejected the majority's adoption of the stricter *Berry* standard, arguing that *Mesarosh* required the application of the more liberal "time-honored"[54] *Larrison* standard. Quoting Chief Justice Warren:

> [The chief prosecution witness], by his [tainted] testimony, has poisoned the water in the reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. . . . [The court must] see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest possible opportunity.[55]

Judge Ely stated that in light of the witness' perjury, the jury might well have believed the defendant's defense of duress and acquitted the defendant. Judge Ely thus concluded that the conviction should have been vacated and the case remanded for new trial.[56]

D. Critique of the Court's Analysis

The Ninth Circuit's opinion in *Krasny* typifies an emergent trend by a growing minority of the circuits which reject the *Larrison* standard.[57] The *Krasny* court's criticism of the *Larrison* standard is well taken. The *Larrison* standard has been viewed

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States v. Subversive Activities Control Bd., 351 U.S. 115 (1956). These cases involved testimony by a material government witness which was entirely discredited by previous trial perjury involving similar matters.

52. In *Mesarosh*, the false testimony was presented by a paid informer in the employ of the government.

53. *Mesarosh* can be distinguished from *Krasny* on other grounds: (1) the witness in *Krasny* was not a paid government informer, but rather an accomplice; (2) the testimony of the witness was discredited only in part, and did not directly relate to the defendant's conduct.

54. 607 F.2d at 846-47.

55. *Id.* at 847 (quoting Mesarosh v. United States, 352 U.S. at 14).

56. 607 F.2d at 847.

57. *See* note 32 *supra*.

as being the more liberal standard for motions for new trial, but its practical effect is just the reverse. Although the *Krasny* court argued that a literal application of the *Larrison* standard would necessarily result in a new trial,[58] application of the *Larrison* standard results in fewer successful motions for new trial.

Motions for new trial based on perjured or recanted testimony are seldom granted, regardless of the standard employed.[59] Orders denying motions for new trial based on the *Larrison* standard are less likely to be reversed on appeal, however, than those based on the *Berry* standard. Appellate courts may review district judges' orders only for an abuse of discretion in applying the proper standard. Appellate courts rarely decide whether the district judge has abused his or her discretion in circuits applying the *Larrison* standard. Appellate courts are precluded from making this decision by two factors: (1) the failure of district judges to state explicit factual determinations for their decisions on motions for new trials; and, (2) the nonappealable element of the *Larrison* standard requiring proof of the false testimony before application of the other elements.[60] Because district judges rarely state the factual basis for their determinations on motions for new trial, reversal is unlikely unless a blatant error has been made. Nearly every motion for new trial is denied in circuit courts that apply the *Larrison* standard because the trial testimony is found not perjured or the recantation of the testimony is not believed.[61] A finding that the testimony was not perjured is not reviewable unless wholly unsupported by the evidence.[62] Thus, the *Larrison* standard effectively enables a dis-

58. *See* note 34 & 35 *supra.*

59. Only six motions for new trial based on perjured testimony have been successful: United States v. Willis, 467 F. Supp. 1111 (D.C. Pa.), *vacated and indictment dismissed on request of U.S. Attorney's Office*, 606 F.2d 391 (3d Cir. 1979), and see note 39 *supra* and acccompanying text; United States v. Wallace, 528 F.2d 863 (4th Cir. 1976), and see note 38 *supra*; United States v. Meyers, 484 F.2d 113 (3d Cir. 1973) (applying both *Berry* and *Larrison* standards); Newsome v. United States, 311 F.2d 74 (5th Cir. 1962) (applying a hybrid *Berry-Larrison* standard requiring new trial if the new testimony raised a reasonable doubt as to the defendant's guilt); United States v. Mitchell, 29 F.R.D. 157 (D.N.J. 1962) (*Larrison* standard applied); Pettine v. New Mexico, 201 F. 489 (8th Cir. 1912).

60. *See* note 26 *supra.*

61. *See, e.g.*, United States v. Smith, 433 F.2d 149 (5th Cir. 1970); Newman v. United States, 238 F.2d 861 (5th Cir. 1956). Even *Larrison* turned on this issue. *See* note 25 *supra.*

62. United States v. Johnson, 327 U.S. 106 (1946).

trict judge to deny motions for new trial with little chance of appellate reversal.

The *Krasny* court properly rejected the *Larrison* standard, but for unpersuasive reasons. The court cited *Stofsky*'s reasoning that the standard is too speculative, but failed to explain what this criticism means.[63]

The *Krasny* court's rejection of the *Larrison* standard only in cases in which government culpability or negligence is not alleged is inconsistent with the court's criticisms of the *Larrison* standard. Following the reasoning in *Krasny* to its logical extreme, all cases alleging government culpability or negligence would necessarily require new trials. This dictum indicates a departure from prior Ninth Circuit cases involving government culpability.[64]

The Ninth Circuit failed to state the reason for distinguishing between perjured testimony cases which allege government culpability from other perjured testimony cases. The effect of the perjured testimony on the accused is the same regardless of government knowledge of the false testimony. Nor did the Ninth Circuit state why it preferred the *Berry* standard over the *Larrison* standard, except that it saw no difference between perjured testimony and other types of newly discovered evidence.[65]

The *Berry* standard does not present the problems on appeal that the *Larrison* standard presents. It is a workable standard capable of individual application in factually varying cases.[66] The *Berry* standard, however, is similar to the *Larrison* standard in that district judges frequently fail to apply the elements of the standard to the facts of the case.[67] The factual determinations of district judges are usually mere conclusionary statements. The *Krasny* court correctly remanded the case to the district judge for an explicit factual determination of the ba-

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63. *See* note 34 *supra*.

64. *See* United States v. Butler, 567 F.2d 885 (9th Cir. 1978); United States v. Chisum, 436 F.2d 645 (9th Cir. 1971).

65. 607 F.2d at 844.

66. See note 24 *supra* for a variety of fact situations in which the *Berry* standard has been applied.

67. *See* note 6 *supra*. The lower court opinion in *Krasny* is typical of the way district judges have ruled upon motions for new trial.

sis for the denial of the motion for new trial.[68] The Ninth Circuit also gave recommendations to the district court relating to the issues to be considered by the district judge.[69] This will be helpful to district judges in future perjured or recanted testimony cases.

The dissenting opinion supporting the *Larrison* standard was as unpersuasive as the majority opinion. Judge Ely incorrectly relied on the reasoning of *Mesarosh* as support for the *Larrison* standard, ignoring the practical results of the standard which indicate that *Larrison* is not the more liberal standard.

E. Conclusion

The Ninth Circuit was correct in adopting a more workable standard than the *Larrison* standard. The reasoning supporting the decision in *Krasny*, however, was weak. The court did not explain why the *Berry* standard was superior to the *Larrison* standard, nor did it clarify the difference between *Krasny* and other cases involving perjured testimony which allege government culpability.

The *Krasny* decision will have the practical effect of allowing the defendant to choose which standard he or she desires to be applied. If the perjured testimony can be readily shown, the defendant will allege government misconduct—thereby obtaining a greater chance of success on the motion with the application of the *Larrison* standard. If, however, the perjured testimony cannot be readily shown, the defendant will stand a greater chance of success if he or she fails to allege government misconduct with the application of the *Berry* standard. When this happens, the Ninth Circuit will have to address this dichot-

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68. 607 F.2d at 846.

69. [The district court] will need to consider, among other things, the importance of [the witness'] testimony to the government's case, the extent to which the apparently perjured testimony concerned material issues in the case, and the extent to which her credibility, as a whole would be affected by the relevation to the jury of this apparent perjury.

Id.

omy and the substantive differences between these types of cases.

*Jill A. Schwendinger**

IV. NO EXTENSION OF JENCKS ACT TO SUPPRESSION HEARING OR SURVEILLANCE NOTES, BUT EXPANDED BASIS FOR PROBABLE CAUSE

A. INTRODUCTION

In *United States v. Bernard*[1] the Ninth Circuit held that the Jencks Act[2] does not apply to pre-trial suppression hearings

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1. 623 F.2d 551 (9th Cir. 1980) (per Jameson, D.J., sitting by designation; the other panel members were Kilkenny, J. and Anderson, J., *revising*, 607 F.2d 1257 (9th Cir. 1979)).

2. 18 U.S.C. § 3500 (1976) provides:

> Demands for production of statements and reports of witnesses
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> . . . .
>
> (d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.
>
> (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by

and that probable cause may be based on the collective knowledge of officers working in close concert. The court revised its prior position that the Jencks Act requires exclusion of a government agent's trial testimony because the agent destroyed rough surveillance notes after he wrote a final report.

The Drug Enforcement Agency (DEA) learned through an informant that defendant Bernard and two others would be purchasing chemicals to manufacture methamphetamine. This information was supported by Bernard's subsequent purchases of chemicals on four occasions.

DEA agents, on the day of the arrest, followed one of the defendants to a camper in a mobile home park where the defendant met with other people who were in separate vehicles. The agents then followed the vehicles to a state park. The camper parked while the other vehicles criss-crossed the park in an anti-surveillance move. From the air, agents observed boxes being moved into the camper.

A DEA agent testified that he saw two people leave the camper and drive away from the state park. About ten minutes later they returned and the agents overheard them report to the others in the camper that the park was staked out. The agent testified that he thought he smelled something "cooking," but didn't make the connection between the smell and the methamphetamine. About the same time, the agent observed a person rush out of the camper "gasping, breathing deep" and "shaking his head,"[3] in what the agent thought was an attempt to get fresh air.

About ten mintues later, the agent reported these observa-

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the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

3. 623 F.2d at 554.

tions to another agent. The agents concluded the camper was being used to manufacture drugs. The principal investigating agent arrived about an hour later. He was told about the observations made during the day including the conclusion that the camper was being used to manufacture drugs, but not about the choking incident, the smell, or the conversation about the park being staked out. Based on that information and information from a prior investigation, the principal agent ordered a warrantless arrest. A subsequent search of the camper produced evidence of drugs.

Defendants moved to suppress the evidence as fruits of an arrest unsupported by probable cause. The district court ruled that under the Jencks Act, the DEA agent's testimony regarding the choking incident, the overheard conversation, and the smell had to be stricken both at the suppression hearing and at trial because rough surveillance notes had been destroyed after the final report was made. Without the agent's testimony, there was insufficient information for probable cause.[4]

The Ninth Circuit reversed, finding (1) that the agent's testimony was admissable at the pre-trial suppression hearing because the Jencks Act applies only to the trial; (2) that rough surveillance notes are distinguishable from rough interview notes and are not required for production under the Jencks Act; (3) that probable cause need not rest solely on the arresting officer's personal knowledge; and (4) that the "collective knowledge" of all the officers was sufficient to constitute probable cause and need not have been communicated.

The court focused on two major issues: (1) the scope of the Jencks Act both as to its application to the pre-trial suppression hearing and as to the meaning of "statements" under the Act; and (2) "collective knowledge" as a basis for probable cause.

B. Background

The Jencks Act

The Jencks Act regulates the production of prior witness statements in the government's possession during a federal crim-

4. *Id.* at 560.

inal prosecution. The Act was passed in reaction to *Jencks v. United States*,[5] which held that a defendant is entitled to statements within the government's possession if the defendant's request was for fairly specific statements made by the witness. Congress narrowed the scope of the *Jencks* decision through a time requirement[6] and a rigorous definition of "statements."[7]

The Act provides that at trial after a witness' direct testimony, the defendant may demand production of the witness' prior statements and reports if they are material to the witness' testimony. If the government claims all or part of the statement is immaterial to the witness' testimony, the court may either order production, or grant the government an *in camera* inspection. The court may excise the immaterial portions and order the rest delivered to the defendant. If the defendant objects to the withholding of the statements, the court may order the excised portion preserved for appeal. If the government "elects not to comply"[8] with the court order, the court may apply sanctions against the government either by striking the witness' testimony, or by declaring a mistrial. Sanctions have been applied when the government has lost or destroyed statements, even if the loss or destruction was in good faith or negligent.[9]

Only certain staements are producible under the Jencks Act. The Supreme Court has held that the producible statements are limited to those listed in the Act.[10] Under the Jencks Act a "statement" is: (1) a written statement "signed or otherwise adopted or approved" by the witness,[11] (2) a recording "which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously,"[12] or (3) a statement made by the witness to a grand jury.[13]

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5. 353 U.S. 657 (1957).

6. 18 U.S.C. § 3500(a) (1976).

7. *Id.* § 3500(e).

8. *Id.* § 3500(d).

9. United States v. Harris, 543 F.2d 1247 (9th Cir. 1976); United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975).

10. Palermo v. United States, 360 U.S. 343 (1959).

11. 18 U.S.C. § 3500(e)(1) (1976).

12. *Id.* § 3500(e)(2).

13. *Id.* § 3500(e)(3).

Collective Knowledge Probable Cause

"Collective knowledge" probable cause, or "the fellow officer rule," allows an arrest to be valid even though the arresting officer did not personally acquire or is not personally possessed of all the underlying facts and circumstances amounting to probable cause. There seem to be two sources of "collective knowledge" probable cause: *United States v. Romero,*[14] and *Whiteley v. Warden.*[15]

In *Romero,*[16] the court held that officers working together could pool their knowledge to arrive at probable cause. The officers were working as a team and were allowed to rely upon each other's communicated information.

In *Whiteley,*[17] the court stated in dicta that police may arrest in reliance upon radio bulletins of valid warrants. The case has come to stand for allowing arrests to be made without communication of the underlying facts and circumstances constituting probable cause if the arrest is made under a directive or request.

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14. 249 F.2d 371 (2d Cir. 1957).

15. 401 U.S. 560 (1971).

16. In *Romero,* several officers were working together on the investigation. One officer met with the defendant to arrange for the sale of cocaine while two officers observed from a building across the street. All the officers met at another officer's car parked down the street when the bag of cocaine was delivered in exchange for marked currency. The officers conducted a field test to see if the bag contained an opium derivative. It did. Four of the defendants were arrested immediately. Two others were arrested after further observation. The court held that "where the agents were working together and in cooperation were observing the activities of the various participants and informing each other of the progress of the conspiracy, the knowledge of each was the knowledge of all." 249 F.2d at 374.

17. In *Whiteley,* the Sheriff of Carbon County, Wyoming received a tip about Whiteley and Dailey and a breaking and entering crime. The Sheriff signed a compulsory complaint upon which a justice of the peace issued a warrant. The warrant was then broadcast across the state along with a description of the two men and their car. A policeman in Laramie heard the broadcast and arrested the two described persons. The court concluded that the arrest warrant was invalid because it was based on a conclusionary complaint, and that there was an insufficient showing that the Sheriff or the Laramie police had enough information to reasonably believe the defendants were connected with the crime.

C. THE COURT'S ANALYSIS

The Jencks Act and the Pre-trial Suppression Hearing

The Ninth Circuit held that the Jencks Act does not apply to suppression hearings because the Act limits production of statements and reports to when the witness has testified on direct examination in "the trial of the case."[18] The court also held that "trial of the case" means the actual trial and noted that other circuits are in accord.[19] The court rejected the defendants' argument that Congress would have considered the pre-trial suppression hearing to be a trial or an integral part of the trial had they thought about it.[20] The court stated it was not within its function "to engraft on a statute additions which we think the legislature logically might or should have made."[21]

The court also rejected the defendants' argument that restricting the operation of the Jencks Act to trial only subverts the decision of *Brady v. Maryland.*[22] In *Brady,* the Supreme Court held that the refusal of the prosecution to hand over evidence which might exonerate the defendant or lessen his punishment was a denial of due process. *Brady* applies only to certain types of evidence: that which goes to guilt or innocence, or to punishment. The *Bernard* court reasoned that *Brady* is an independent foundation for the production of documents and was not meant to overrule the Jencks Act. The court stated that *Brady* may apply to some pre-trial hearings;[23] but not to the

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18. *See* 18 U.S.C. § 3500(a) (1976).

19. 623 F.2d at 556 n.15 (citing United States v. Sebastian, 497 F.2d 1267 (2d Cir. 1974); United States v. Montos, 421 F.2d 215 (5th Cir.), *cert. denied,* 397 U.S. 1022 (1970)).

20. Defendants relied upon the dissent in United States v. Spagnuolo, 515 F.2d 818 (9th Cir. 1975).

21. 623 F.2d at 556 (quoting United States v. Cooper Corp., 312 U.S. 600, 605 (1941).

22. 373 U.S. 83 (1963). In *Brady,* the defendant admitted at trial that he participated in the robbery charged, but claimed his companion committed the murder. He sought a verdict without capital punishment. Brady and his companion, in separate trials, were both found guilty of first degree murder and sentenced to death. Prior to trial, Brady's counsel asked the prosecution to see the companion's extrajudicial statements. The prosecution offered some statements but withheld one where the companion confessed doing the actual killing. This statement did not surface until Brady had been tried, convicted, sentenced, and his conviction affirmed. The court held that Brady was denied due process by the prosecution's withholding of the confession and that he was entitled to a new trial on the issue of punishment.

23. 623 F.2d at 557 n.19.

pre-trial suppression hearings because such hearings focus on the issue of probable cause, not on guilt or punishment.[24]

Rough Surveillance Notes as Jencks Act Statements

In its original opinion,[25] the court held that surveillance notes were potentially producible statements under the Jencks Act, but in the revised opinion, the court held that surveillance notes were not statements and no sanctions need be applied for their destruction. The court felt that the *Harris-Robinson*[26] rule, which holds that the destruction of rough interview notes amounts to a usurpation of judicial discretion in determining which statements need to be produced, should not be extended to rough surveillance notes. The court decided that it would be too broad a reading of the Jencks Act to say that surveillance notes were "adopted or approved"[27] by the witness or "substantially verbatim recordings."[28]

In distinguishing between the two kinds of notes, the court found that rough interview notes tend to be factual only and are completed during the interview, while surveillance notes tend to be impressionistic and conclusionary as well as "sketchy and incomplete" and may not have been written contemporaneously.[29] The court agreed with the government's argument that "[s]uch cursory notes can not accurately be described as being 'adopted or approved' by the agent since they are incomplete and not in context."[30]

The court also held that there were policy reasons for not allowing surveillance notes to be Jencks Act statements. The court looked to the legislative history of the Jencks Act as detailed in *Palermo v. United States*.[31] The Supreme Court stated

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24. *Id.* at 556-57 (citing McCray v. Illinois, 386 U.S. 300, 311 (1967)).

25. 607 F.2d 1257 (9th Cir. 1979).

26. United States v. Harris, 543 F.2d 1247 (9th Cir. 1976); United States v. Robinson, 546 F.2d 309 (9th Cir. 1976).

27. 623 F.2d at 557-58 (construing 18 U.S.C. § 3500(e)(1) (1976)).

28. *Id.* (construing 18 U.S.C. § 3500(e)(2) (1976)).

29. 623 F.2d at 557-58.

30. *Id.* at 557.

31. 360 U.S. 343 (1959). The day after the *Jencks* decision, the House of Representatives was told by the Attorney General that the decision posed serious national security problems and that legislation should be introduced. On the same day the first of eleven bills dealing with the problem was introduced. The Jencks Act was passed three months

that one of the prime motivating forces behind passage of the Act was a fear that an expansive reading of the recent decision in *Jencks v. United States*[32] would result in the disclosure of "the investigative agent's interpretations and impressions."[33] The court reasoned that the disclosure of the statements would be harmful to the national interest because the "inner workings of the investigative process"[34] would be revealed. The statements would also be used unfairly against the agent for impeachment. The *Bernard* court reasoned that surveillance notes were the type of interpretive and impressionary memoranda that Congress intended to protect from discovery.[35]

Collective Knowledge Probable Cause

Although the court found that the arresting officer did not have sufficient specific knowledge for probable cause, the court reasoned that there was sufficient "collective knowledge" among the agents to constitute probable cause. The court found that the decision to arrest was, in effect, a joint decision. The arresting officer had "relied 'to a great degree' "[36] on the opinion of the other agents and it was not necessary that the substance of the information be communicated to him.

To support this position, the court cited *Whiteley v. Warden.*[37] The Ninth Circuit reasoned that the DEA agent acted like the officer who acts on a police bulletin. In both cases probable cause is based on a lack of specific knowledge, reliance on uncommunicated observations and knowledge of other officers.

D. CRITIQUE

The Jencks Act and the Pre-trial Suppression Hearing

The holding of the Ninth Circuit to not compel production of Jencks Act statements at the suppression hearing is in accord

later. Congress was concerned that the *Jencks* decision not be interpreted to allow fishing expeditions by defendants through government files, that the statements should not be given to the defendant until the witness had testified, and that the Jencks Act should not be used as a discovery device.

32. 353 U.S. 657 (1957).
33. 360 U.S. at 350.
34. *Id.*
35. 623 F.2d at 558.
36. *Id.* at 560.
37. 401 U.S. 560 (1971).

with current judicial thought. There is, however, some dicta suggesting that a judge should be allowed discretion in compelling production of Jencks Act statements at pre-trial hearings under certain circumstances.[38] The majority of cases have limited production to the actual trial.[39] This limitation is based upon: (1) the statutory language limiting production until "after the witness has testified on direct examination in the trial of the case";[40] (2) legislative history where Congress expressed a concern about pre-trial disclosure of government files;[41] and (3) case law interpreting the statutory language to mean the actual trial.[42]

The construction of the statutory language "trial of the case" to mean the actual trial, follows from the designation of certain proceedings as "pre-trial,"[43] and therefore, not the trial. Case law supports this strict construction of "trial."[44] The suppression hearing is generally considered to be pre-trial.

Congressional intent has also been generally interpreted to mean the actual trial, but language in the legislative history is ambiguous. "[I]t is the specific intent of the bill to provide for the production of statements, reports, transcriptions or record-

38. United States v. Covello, 410 F.2d 596 (2d Cir.), *cert. denied* 396 U.S. 879 (1969) (affirming denial of disclosure at pre-trial suppression hearing as a function of judicial discretion rather than as a matter of law); United States v. Narcisco, 446 F. Supp. 252 (D.C. Mich. 1976) (due to complexity of the case and the number of witnesses, strict adherence to schedule imposed by Jencks Act for disclosure would unreasonably delay the trial; therefore, disclosure was compelled pre-trial).

39. In the following cases production was denied at pre-trial hearings: United States v. Murphy, 569 F.2d 771 (3d Cir.) (suppression hearing), *cert. denied,* 453 U.S. 955 (1978); United States v. Spanguola, 515 F.2d 818 (9th Cir. 1975) (suppression hearing); United States v. Sebastian, 497 F.2d 1267 (2d Cir. 1974) (suppression hearing); United States v. Polesti, 489 F.2d 822 (7th Cir. 1973) (suppression hearing), *cert. denied,* 420 U.S. 990 (1975); Robbins v. United States, 476 F.2d 26 (10th Cir. 1973) (preliminary hearing); United States v. Montos, 421 F.2d 215 (5th Cir.) (suppression hearing), *cert. denied,* 397 U.S. 1022 (1970).

40. 18 U.S.C. § 3500(a) (1976).

41. S. REP. No. 981, 85th Cong., 1st Sess. 1, *reprinted in* [1957] U.S. CODE CONG. & AD. NEWS 1861, 1861.

42. United States v. Sebastian, 497 F.2d 1267 (2d Cir. 1974); United States v. Montos, 421 F.2d 215 (5th Cir.), *cert. denied,* 397 U.S. 1022 (1970).

43. FED. R. CRIM. P. 12(b) (2), for example, provides that: "Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion *before trial.*" (Emphasis added.)

44. *See* note 19 *supra* and accompanying text.

ings, as described in the bill after the Government witness has testified against the defendant on direct examination *in open court,* and to prevent disclosure before such witness has testified."[45] This language leaves open the possibility that "trial of the case" could be interpreted as the "court proceedings of the case" which would include the suppression hearing. Other trial rights have been accorded the criminal defendant at the suppression hearing such as the right to counsel and the right to cross examination.

Because the statements are not producible until the witness' cross examination, their primary use is for impeachment.[46] This impeachment use is as relevant to the suppression hearing as to the actual trial. It has been argued that failure to require production of the prior statements at the suppression hearing unduly interferes with the defendant's ability to cross-examine and impeach the government's witnesses.[47] The government's interests in limiting disclosure to the trial only, fail to consider whether the defendant's rights will be fully protected. Furthermore, there may be no benefits gained by the government by limiting disclosure (such as speeding up the criminal justice system)[48] because: (1) suppression issues are rarely relitigated; (2) some of the witnesses who testify at the suppression hearing do not testify at the trial; and (3) there may be no trial at all because defendants often choose to plead guilty once evidence is found admissible against them.[49]

Under *Brady v. Maryland,*[50] the defense is entitled to statements in the government's possession which go to the defendant's guilt or punishment. The use of such statements is primarily for substantive use. The Ninth Circuit has required a showing of prejudice before allowing *Brady* to override the Jencks Act.[51] This strict application of the Jencks Act is logical given Congress' statement that "[t]he purpose of this proposed

45. S. REP. No. 981, 85th Cong., 1st Sess. 1, 2, *reprinted in* [1957] 2 U.S. CODE CONG. & AD. NEWS 1861, 1863 (emphasis added).

46. Palermo v. United States, 360 U.S. 343, 349 (1959).

47. Onley, *Expanding Defendant's Discovery: The Jencks Act at Pretrial Hearings,* 24 BUFFALO L. REV. 419, 428-29 (1975).

48. *Id.* at 427.

49. *Id.* at 429.

50. 373 U.S. 83 (1963).

51. Thomas v. Cardwell, 626 F.2d 1375, 1381 (9th Cir. 1980).

legislation is . . . to provide for the *exclusive procedure* for handling demands for the production of statements and reports of witnesses."[52] The exclusivity of the Jencks Act was affirmed in *Palermo v. United States.*[53]

A change in policy is desirable, but unlikely to come through the judiciary. The Supreme Court set the tone for Jencks Act interpretation:

> In almost every enactment there are gaps to be filled in and ambiguities to be resolved by judicial construction. This statute is not free from them. Here, however, the detailed particularity with which Congress has spoken has narrowed the scope for needful interpretation to an unusual degree. The statute clearly defines procedure and plainly indicates the circumstances for their application.[54]

The courts of appeals, following the Supreme Court's lead, have strictly construed the Act.

The Second Circuit has both criticized the Jencks Act production limitation[55] and encouraged voluntary cooperation[56] by the government in the same cases where it has strictly construed the Act. Change will, therefore, come from Congress, and not the judiciary.

Rough Surveillance Notes as Jencks Act Statements

On the basis that Jencks Act statements are primarily useful for impeachment, the Ninth,[57] D.C.,[58] and Third[59] Circuits have required the preservation of rough interview notes in addi-

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52. S. REP. No. 981, 85th Cong., 1st Sess. 1, 4, *reprinted in* [1957] 2 U.S. CODE CONG. & AD. NEWS 1861, 1861 (emphasis added).

53. 360 U.S. 343 (1959).

54. Palermo v. United States, 360 U.S. 343, 349 (1959).

55. United States v. Sebastian, 497 F.2d 1267, 1270 (2d Cir. 1970). The court stated it might prefer, as a matter of policy, to uphold production at the suppression hearing, but believed it could not ignore the weight of authority to the contrary.

56. United States v. Percevault, 490 F.2d 126, 132 (2d Cir. 1974). The court encouraged Jencks Act problems to be worked out in pre-trial conferences, but held statement need not have been produced at the pre-trial hearing.

57. United States v. Robinson, 546 F.2d 309 (9th Cir. 1976); United States v. Harris, 543 F.2d 1247 (9th Cir. 1976).

58. United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975).

59. United States v. Vella, 562 F.2d 275 (3d Cir.), *cert. denied,* 434 U.S. 1074 (1977).

tion to the final interview report. These Circuits have held that the routine destruction of such notes denies the court the opportunity to review the material and to decide whether or not they are statements to be compelled for production, that it is a Jencks Act violation not to produce them, and that sanctions may be imposed for failure to produce.[60]

The impeachment use of rough notes is based upon the possibility "that the agent who adopts a final report from preliminary memoranda will tailor his observations to fit his conclusion."[61] The possibility of distortion is also present in the making of a final report from rough surveillance notes. Indeed, distortion may be more likely to occur under those circumstances.[62]

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60. The following cases held that there is no Jencks Act violation if rough interview notes are destroyed in good faith: United States v. Martin, 565 F.2d 362, 363 (5th Cir. 1978); United States v. Anzalone, 555 F.2d 317, 321 (2d Cir.), *cert. denied,* 434 U.S. 1015 (1977); United States v. McCallie, 554 F.2d 770, 773 (6th Cir. 1977); United States v. Smaldone, 544 F.2d 456, 461 (10th Cir.), *cert. denied,* 430 U.S. 967 (1976); United States v. Harris, 542 F.2d 1283, 1292 (7th Cir. 1976); Hayes v. United States, 329 F.2d 209, 220 (8th Cir.), *cert. denied,* 377 U.S. 980 (1964) (defendant must show notes are inconsistent with report); United States v. Johnson, 337 F.2d 180, 202 (4th Cir.), *aff'd,* 383 U.S. 169 (1964).

61. 543 F.2d at 1251 (quoting United States v. Carrasco, 537 F.2d 372, 377 (9th Cir. 1976)).

62. The following quotation from *Harrison* seems applicable to rough surveillance notes:

> It is obvious, however, that even the most conscientious agent can err, despite careful training and despite his rechecking the the report against the notes before destroying the latter. Moreover there are certain factors peculiarly conducive to error where as in this case, the notes contain key identifying data provided by eyewitness. As we stated in Bundy [472 F.2d 1266, 1267 (D.C. Cir. 1972)]:
> ["]The initial description of an assailant by the victim or other eyewitness is crucial evidence, and the notes taken of that description should be kept and produced. The formal written police report of the crime, does, of course, contain a description of the offender, but that report is often prepared after a suspect is arrested and the danger that the description in the formal report may be subconsciously influenced by the viewing of the suspect by the author of the report is very great.["]
> And certainly we cannot consider it beyond the bounds of possibility that a report be distorted because of overzealousness on the part of the agent preparing . . . since preparation of the report and the decision whether or not to preserve the notes are entirely within the discretion of a single agent acting alone.

524 F.2d at 429-30 (citation omitted).

The distinction made by the Ninth Circuit between rough interview notes and rough surveillance notes is weak. The court based its distinction on the time and opportunity for recording as well as the content. Because this was a case of first impression, the court looked to other circuits, and found *United States v. Lane,*[63] where the Tenth Circuit found surveillance notes not to be Jencks Act statements. This finding was based largely on the fact that the notes were not written contemporaneously with the observations and were rather sketchy. Although the *Lane* decision is not clear, the court appears to have analyzed the surveillance notes under 18 U.S.C. section 3500(e)(2), which requires a recording to be a "substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously." This analysis is appropriate for interview notes, but not for surveillance notes which should be analyzed under 18 U.S.C. section 3500(e)(1)'s "adopted or approved" standard. It is also worth noting that the Tenth Circuit does not recognize the need to apply sanctions for the destruction of rough interview notes.[64]

The Ninth Circuit also looked to *Palermo v. United States*[65] for a definition of "statement." The *Palermo* court discussed the congressional intent to not permit disclosure of an agent's impression summary. The Ninth Circuit appears to have recognized that rough interview notes may contain impressionary matter and the court is prepared to excise portion. The court seems to presume tha surveillance notes will consist entirely of impressionary material and, therefore, should not be required for production. This logic is weak.

The *Palermo* Court also considered how statements should be used if they "reflect fully and without distortion what was said to the government agent."[66] This passage focuses on Congress' emphasis on a "substantially verbatim recital" and "continuous narrative statements"[67] which reflects an analysis under

63. 574 F.2d 1019 (10th Cir. 1978); *but see* United States v. Deleon, 498 F.2d 1327 (7th Cir. 1974) (surveillance notes found to be producible statements).

64. United States v. Smaldone, 544 F.2d 456 (10th Cir. 1973), *cert. denied,* 416 U.S. 936 (1976).

65. 360 U.S. 343 (1959).

66. *Id.* at 352.

67. *Id.*

18 U.S.C. section 3500(e)(2), which seems inappropriate for an analysis of surveillance notes. It is not clear why the Ninth Circuit cited this language. It appears that the court is requiring that a Jencks Act statement must meet both the "adopted and approved" and the "substantially verbatim recital" standards, even though the Act is clear that these standards apply to two different types of statements.

In its original opinion, the Ninth Circuit analyzed surveillance notes uner 18 U.S.C. section 3500(e)(1)'s "adopted or approved" standard and held that the surveillance notes were statements under the Jencks Act. The court reasoned that the notes are the agent's own words and he "adopts" them when he incorporates them into his final report.[68]

The court noted that it had given notice through its decisions in *United States v. Harris*[69] and *United States v. Robinson*[70] that the production of rough notes would be required. The court rejected the government's contention that application of the *Harris-Robinson* rule to surveillance notes would be retroactive because those cases applied only to rough interview notes. "[T]here is nothing in either decision to indicate that the same rule would not be applicable to rough notes in surveillance operations."[71] The reasoning in the original opinion seems much sounder than that of the revised opinion which held that surveillance notes are never Jencks Act statements.

Collective Knowledge Probable Cause

The Ninth Circuit has gone beyond either the *Romero* type of probable cause or the *Whiteley* type of probable cause. The arrest in *Bernard* was based neither on communicated knowledge nor on an order to arrest.

The court resorted to "collective knowledge" because it ad-

68. 607 F.2d at 1264 ("We conclude that a government agent's truncated personal observation notes made at a surveillance site for incorporation in a later report falls within this statutory definition. The notes are the agent's own words. They are "adopted" by him in completing his report, and they constitute potentially discoverable material that the defendants might use for impeachment purposes if the agent later testifies at trial.").

69. 543 F.2d 1247 (9th Cir. 1976).

70. 546 F.2d 309 (9th Cir. 1976).

71. 607 F.2d at 1264.

mitted that the agent authorizing the arrest lacked probable cause.[72] The court's finding that the decision to arrest was a collective one seems to be stretching the facts of the case. The arrest was not authorized until over an hour after the crucial observations were made. The principle investigating agent authorized the arrest largely upon conclusionary information. Probable cause should be founded on facts, not conclusions.

For support of its finding that collective knowledge can justify an arrest, the court cited *United States v. Stratton.*[73] In *Stratton* the court stated that the arresting officer himself need not possess all the available information, but could rely upon the collective knowledge of the investigative team. The court concluded that "[t]he officers involved were working in close concert with each other and the knowledge of one of them was the knowledge of all." This language of the "knowledge of one officer is the knowledge of all" is found in many of the cases the court cited. It is originally from *Romero v. United States.*[74] As used in the cases cited, the phrase was meant literally because the officers actually communicated their knowledge. Those courts held that the officers were entitled to rely upon that communicated information in determining probable cause.[75]

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72. 623 F.2d at 558.

73. 453 F.2d 36, 37 (8th Cir.), *cert. denied,* 405 U.S. 1069 (1972). Secret service agents were working at the request of the United States Attorney's office who had informed the agents that a warrant would be issued on November 27, 1970, the day of the arrest, but due to the unavailability of the magistrate over the weekend, the warrant was not issued until November 30th. The arrest then had to be analyzed as warrantless. This situation is analogous to that in *Whiteley.*

74. 249 F.2d 371, 374 (2d Cir. 1957).

75. United States v. Caraballo, 571 F.2d 975, 977 (5th Cir. 1978) (custom agents observed a boat carrying burlap bags thought to be marijuana, communicated this information to other custom agents who continued the surveillance and eventually made arrest); United States v. Rose, 541 F.2d 750, 756 (8th Cir. 1976), *cert. denied,* 430 U.S. 908 (1977) (sheriff conferred with prosecuting attorney about bank robbery to acquire enough facts for probable cause to arrest defendants); United States v. Heisman, 503 F.2d 1284, 1290 n.5 (8th Cir. 1974) (secret service agents conducted surveillance of office where they had, pursuant to search warrant, found evidence of printing of counterfeit money including counterfeit money stored in a box with an apple on the top. When defendant went into the office and came out with the box with an apple on it, he was arrested. The arresting officer had not personally seen the box or its contents before, but the information had been communicated to him and he was entitled to rely upon it); Moreno-Vallejo v. United States, 414 F.2d 901, 904 (5th Cir. 1969), *cert. denied,* 400 U.S. 841 (1970) (customs agent had tip from informant that defendant was involved in smuggling. This agent and another, to whom the information had been communicated, followed defendant, and eventually one of them arrested defendant at border patrol station

The *Bernard* court recognized that in at least some of the cases it cited, the substance of the information had been communicated to the other officers, but went on to state "[w]e do not find, however, that this is required, particularly where, as here, the agents were working in close concert."[76] The "close concert" language has been used in several prior cases, but, in those cases it was used only when the information was actually communicated or when the officers involved were acting under directives. The Ninth Circuit has extended the meaning of this language when it interprets it to not require communication.

To strengthen its argument that the information need not be communicated, the court cited *Whiteley v. Warden,*[77] where in dictum the court said that police officers could base an arrest upon a radio bulletin that an arrest warrant had been issued. The *Bernard* panel analogized the reliance by officers upon a radio bulletin to the reliance of the principal investigating agent on the other DEA agents' statements. But the *Bernard* court did not decide whether the other DEA agents' conclusions were based on probable cause. If not, then this situation is like that in *Whiteley,* where the court invalidated the arrest because the arrest warrant bulletin was not based on probable cause.[78]

In his treatise on the fourth amendment,[79] Professor LaFave addressed the *Bernard*-type situation:

> The *Whiteley* type of case, in which there has been a directive or request from another officer or agency, must be distinguished from the situation

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while the other agent was parked close by and in continual radio contact) ("[K]nowledge in one sector of a police system can be availed of in another assuming some degree of communication."); Strassi v. United States, 410 F.2d 946, 952 n.7 (5th Cir. 1969) (customs agents were working together to break up drug ring. One agent followed courier from the border to a hotel where arrest took place. Actual arresting officer was working under the direction of the customs agent) *(Whiteley* situation); United States v. Pitt, 382 F.2d 322, 324-25 (4th Cir. 1962) (police officer had a tip that the defendants were involved in distributing drugs. He communicated information about the tip as well as defendants' description to the officer who eventually arrested the defendant).

76. 623 F.2d 551, 561.

77. 401 U.S. 560, 568 (1971). Also cited was United States v. Gaither, 527 F.2d 456 (4th Cir. 1975), *cert. denied,* 425 U.S. 952 (1976), where an arrest upon a radio bulletin of a warrant was held valid because the warrant was supported by probable cause.

78. 401 U.S. at 568-69.

79. 1 W. La Fave, Search and Seizure: A Treatise of the Fourth Amendment 631 (1978).

> in which there has been no such directive or request but the arresting or searching officer attempts to justify his action on the ground the officers were in possession of the underlying facts which would justify his action.

The arrest in *Bernard* was not based upon a directive or request. Indeed, the arresting agent was the one who did the directing and requesting. It is illogical to suggest that his reliance on uncommunicated information is like that of officers upon a warrant bulletin. The directing or requesting approach of *Whiteley* was based on the assumption that the person or agency doing the directing or requesting had probable cause. The authorizing agent in *Bernard* did not have probable cause.

The court has misused the "collective knowledge" concept. The concept was intended as a means of passing along personal knowledge or as a means of acting under the authority of those who are possessed of probable cause. As used in this case, "collective knowledge" would allow an agency to make an arrest, and then, after the fact, gather information to see if collectively there was enough knowledge for probable cause. Probable cause should be a safeguard against unreasonable seizure, a determination made prior to the seizure, not an after-the-fact justification.

E. Conclusion

The Ninth Circuit in *United States v. Bernard* has declined to grant the criminal defendant any additional discovery rights under the Jencks Act while exposing the defendant to an expanded basis for finding probable cause to arrest.

*Patricia A. Seitas**

V. THE EFFECT OF A GUILTY PLEA UNDER FEDERAL FIREARMS LAW

In *United States v. Benson,*[1] the defendant was convicted

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1. 605 F.2d 1093 (9th Cir. 1979) (per Wright; the other panel members were Tuttle,

for violating a federal statute[2] prohibiting the receipt of a firearm by a convicted felon. Benson, the defendant, did not dispute that he had received a firearm,[3] but argued on appeal that he had never been convicted of a felony.

Satisfaction of the prior conviction element of the offense was based on defendant's guilty plea in 1974 to a charge of violating an Illinois controlled substance statute[4] and his subsequent sentence to thirty months of probation. The record of the Illinois court did not indicate whether sentence was imposed persuant to a judgment of conviction or in accordance with an Illinois deferred prosecution statute.[5] The federal district court believed Benson was prosecuted under the deferred prosecution statute and that a judgment of conviction was never actually entered on the record.[6] Nevertheless, it held that, for purposes of federal law, Benson had been "convicted."

On appeal the issue was whether Benson's prior "conviction" was within the purview of the federal statute.[7] In affirming the district court's decision, the Ninth Circuit held that federal law controls in the determination of "conviction" for purposes of this federal statute, and under federal law, a state court's acceptance of a guilty plea and a subsequent imposition of sentence constitute a "conviction." The prior conviction element of

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D.J., sitting by designation, and Ely, J., concurring).

2. 18 U.S.C. § 922(h) (1970) provides:

> It shall be unlawful for any person—
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year
> . . . .
> . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

3. Benson, employed as a security guard, was required to carry a gun as part of his work uniform. He borrowed a gun from a co-worker and returned it to a locker each day at the end of his work shift. 605 F.2d at 1095 n.1.

4. Illinois Controlled Substance Act, ILL. REV. STAT. ch. 56½, § 1402 (Smith-Hurd Supp. 1979).

5. *Id.* § 1410. *See also, id.* ch. 38, § 1005-6-3(c).

6. 605 F.2d at 1094 n.2.

7. Benson had previously entered a "conditional guilty plea" in the district court, thereby reserving the right to appeal this issue. The Ninth Circuit held that conditional guilty pleas were not recognized in this circuit. The court of appeals, however, vacated Benson's conviction and allowed him to plead anew. 579 F.2d 508 (9th Cir. 1978). *See also,* Note, *Appellate Review of Non-Jurisdictional Constitutional Infirmities After a Plea of Guilty,* 9 GOLDEN GATE U. L. REV. 235 (1979).

the offense was satisfied; whether Benson was considered a convicted felon under Illinois law was irrelevant.

In a separate concurrence, Judge Ely explained that he felt bound by precedent in the Ninth Circuit to concur, but denounced the result as a usurpation of the federal-state balance.[8]

B. BACKGROUND

Originally enacted as part of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968,[9] 18 U.S.C. section 922(h)(1) was signed into law as part of the Gun Control Act of 1968.[10] The statute was designed to keep firearms out of the hands of felons.[11] Although the statute explicitly defines a felon as a a person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year," the statute does not define the word "convicted."[12] Courts have wrestled with the question of what constitutes a conviction for purposes of this statute,[13] and the scant legislative history reveals little that is helpful in determining what meaning Con-

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8. *See* notes 61-69 *infra* and accompanying text.

9. Passed the Senate, May 24, 1968, 114 CONG. REC. 14889 (1968); passed the House of Representatives, June 6, 1968, 144 CONG. REC. 16300 (1968). The bill was passed by Congress on June 6, 1968, the day after the assassination of Robert Kennedy. Pub. L. No. 90-351 (1968). The assassinations of John and Robert Kennedy and Martin Luther King have been seen as a strong force motivating the legislature to enact the measure. *See* Zimmring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133 (1975).

10. The Gun Control Act of 1968, Pub. L. No. 90-618, became effective October 22, 1968, when signed into law by President Johnson. 18 U.S.C. app. §§ 1201-1203 (1976), a last minute floor amendment to the Omnibus Crime Control and Safe Streets Act, was enacted simultaneously with Title IV as part of the Gun Control Act. The provisions of the two titles are substantially the same.

11. The Senate Report of the Judiciary Committee stated:

> The principal purposes of Title VII are to aid in making it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the states . . . in combatting the increasing prevalence of crime in the United States.

S. REP. No. 1097, 90th Cong., 2d Sess. 1, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2113.

12. The ambiguity makes the statute susceptible to different interpretations. One common definition of "conviction" is simply a finding of guilt based upon a plea or verdict. Another definition requires the entry of a final judgment of conviction and sentence. *See* Holland, *Conviction Defined*, 40 J. ST. B. CAL. 36 (1965).

13. Note, *Prior Convictions and the Gun Control Act of 1968*, 76 COLUM. L. REV. 326 (1976).

tress intended the term to have. However, the provisions of the Act have been expansively applied by the courts persuant to the sweeping legislative goal of keeping firearms away from those with criminal backgrounds.[14]

Generally, Congress intends its law to be uniformly interpretted and applied, and unless Congress clearly indicates a contrary intention, the presumption is that federal law will be governed by a federal standard to achieve uniformity.[15] However, where a federal law incorporates state law by reference the question raised is which law Congress intended to control.[16] Title IV is governed by 18 U.S.C. section 927, which indicates that Congress intended the federal statute to be interpretted harmoniously with state law, preempting state law only if there is a clear conflict.[17] Because section 922(h)(1) is dependent upon the individual states to define the predicate offense, prosecute the offender, and determine a sentence, it has been asserted that the congressional intent was to leave the determination of the exis-

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14. The Supreme Court has declared that the Act should be given a broad application. Scarborough v. United States, 431 U.S. 563, 572 (1977) (prior possession of firearm sufficient for nexus between possession and commerce). *See* Barrett v. United States, 423 U.S. 212 (1976); Huddleston v. United States, 415 U.S. 814 (1974). A broad interpretation of the term "convicted" was specifically applied in United States v. Cody, 529 F.2d 564, 566 (8th Cir. 1976).

The broad reading of the statute conflicts with a general principle of statutory construction which mandates that "ambiguities concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971) (citing Bell v. United States, 349 U.S. 81, 83 (1955)). *See also* United States v. Bass, 404 U.S. 336, 347 (1971). However, the Supreme Court in Barrett v. United States, 423 U.S. 212 (1976), held that because the purpose of Congress was clear, there was no ambiguity in § 922(h)(1). As a result, there was no need to resort to the rule that penal statutes are to be strictly construed. *Id.* at 216.

15. Jerome v. United States, 318 U.S. 101, 104 (1943).

16. This question was addressed by the Supreme Court in the context of a federal tax law which was dependent upon a state definition of "real property" in Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204 (1946). Looking to the congressional purpose, the Court determined it could "best be accomplished by application of settled state rules . . . so long as . . . [they] do not patently run counter to the terms of the Act." *Id.* at 210.

17. 18 U.S.C. § 927 (1970) provides:

> No provision of this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

tence of a prior conviction to the states.[18] However, in the Ninth Circuit the question has been settled in favor of federal law.[19]

United States v. Potts[20] was the first of a series of decisions which ultimately led to this conclusion. *Potts* held that a prior conviction which had been expunged may be proved for the federal firearms control statute.[21] The *Potts* court determined that the defendant's prior conviction, expunged under a Washington statute,[22] had only been "partially erased."[23] The majority did not conclude whether state or federal law controlled. Instead, the case turned on the precise wording of the state statute which limited the scope of the expunction where there is a subsequent prosecution.[24] Judge Sneed concurred in the result in

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18. This is the current interpretation in the Tenth Circuit. *See* United States v. Stober, 604 F.2d 1274 (10th Cir. 1979), and notes 44-47 *infra* and accompanying text. *See* United States v. Matassini, 565 F.2d 1297, 1309-10 n.26 (5th Cir. 1978) ("in Title IV, by identifying those subject to the proscription of § 922(h)(1) as 'any person . . . who has been convicted in any court . . .,' Congress chose to rely, at least in part, on state criminal law. We see no reason, in either the language or legislative history of Title IV, to doubt that Congress adopted the state's own definition of conviction, including the effects of a pardon thereon."). *But see,* United States v. Lehman, 613 F.2d 130 (5th Cir. 1980) (citing United States v. Padia, 584 F.2d 85 (5th Cir. 1978).

19. *See* notes 20-38 *infra* and accompanying text.

20. 528 F.2d 883 (9th Cir. 1975) (en banc).

21. Potts was prosecuted for a violation of § 1202(a) of Title VII of the Act.

22. WASH. REV. CODE § 9.95.240 (1977).

23. *Potts* overruled United States v. Hoctor, 487 F.2d 270 (9th Cir. 1973), which, according to *Potts,* erroneously concluded that the former conviction "was absolutely erased" and the defendant was "no longer a person that had been convicted of a felony." 528 F.2d at 884. *See* note 24 *infra.*

24. A more careful reading of the statute in *Potts* reveals the statutory limitation overlooked by the court in *Hoctor: "Provided,* That in any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed." WASH. REV. CODE § 9.995.240 (1977).

In *Potts* the court declined to apply their decision retroactively to the defendant. Judge Koelsch, writing for majority, explained,

> Our decision today, overruling *Hoctor,* undoubtedly expands the scope of potential criminal liability under § 1202(a)(1). While *Hoctor* stood as the law of this circuit, a person such as Potts whose sole prior felony conviction had been expunged persuant to the Washington statute, could not reasonably have suspected that his possession of a firearm . . . would constitute a § 1202(a)(1) violation. As Potts lacked notice of our subsequently revised view of the statute, "due process fairness bars the retroactive judgment of his conduct using the expanded definition." Accordingly, the rule we announce today must be applied prospectively only today.

528 F.2d at 886 (citations omitted).

Potts, but not on the basis of the construction of the state expunction statute. He argued that the court should look only to the fact that the defendant had been convicted of a felony because state expunction statutes can only remove state disabilities and are ineffective under federal law.[25]

Concurring in *Potts,* Judge Wright voiced his concern for those similarly situated "whose Washington state convictions have been expunged, those presently on probation under deferred or suspended sentences, and those who are about to bargain for deferment under Washington law. *Id.* at 887.

Because Benson could similarly not "reasonably have suspected" that his receipt of a firearm would constitute a violation of the federal firearms law, one wonders why the court did not apply their decision prospectively only in *Benson,* as was done in *Potts.* The answer lies in footnote one of the majority opinion. "Benson's attack on the constitutionality of § 922(h)(1) 'is expressly foreclosed by our prior opinion in *United States v. Haddad,* 558 F.2d 968, 972-74 (9th Cir. 1977).' " In *Haddad,* the defendant argued that § 922(h)(1) was unconstitutionally vague because the wording of the statute did not clearly state whether knowledge of receipt was an element. The court rejected this argument, noting that other portions of § 922, for example 18 U.S.C. § 922(k) (1976), make knowledge an element. The *Haddad* court held that "knowledge is not an element of the crime, mere receipt is enough."

Haddad relied on an earlier case, United States v. Crow, 439 F.2d 1193 (9th Cir. 1971), *vacated sub nom.* Crow v. United States, 404 U.S. 1009 (1972), which held that the knowing possession of a firearm was unlawful without regard to whether the defendant knew such possession was unlawful. In *Crow,* the defendant argued that he could not be convicted for a violation of the law if he did not know it was unlawful to possess the gun. 439 F.2d at 1195. The court rejected the argument because nowhere in the section does it say "knowingly" or "intentionally." It also rejected Crow's argument that his conviction was foreclosed by Lambert v. California, 355 U.S. 225 (1957). *Lambert* involved a Los Angeles ordinance which required sex offenders to register within five days after entering Los Angeles. Lack of knowledge in *Lambert* was found to be a valid defense because the challenged ordinance required affirmative action. Conviction for noncompliance was held to be a violation of due process. The court distinguished *Crow* from *Lambert*:

> First, merely passive conduct is not involved. To violate the law, one must acquire knowing possession of a firearm; second, when one is a convicted felon, one should in our opinion be alert to the possible consequences. Thus the rule that is "deep in our law" that ignorance of the law will not excuse is applicable here.

439 F.2d at 1196.

As to whether this holding also mean that knowledge is not an element where one accused of a violation of the federal firearms law has no knowledge that he is a convicted felon, see note 41 *infra.*

25. Judge Sneed reasoned that

> state law must be examined to determine whether the defendant has been convicted of a felony. The relevant state law to be examined in this determination does not include the expunction statutes. Such statutes do not rewrite history; they merely provide that previous history is immaterial for certain purposes under state law. It is not within the power of a state to make such history immaterial to the administration of the

The conflict between the majority opinion and Judge Sneed's concurrence in *Potts* has resulted in confusion in subsequent cases. In *United States v. Bergeman*,[26] the court announced the conflict had "been resolved in favor of both viewpoints."[27] The dissent charged that this meant only that the issue had been given inconsistent treatment and the court had "invoked both theories in later cases."[28] However, the *Bergeman* court recognized that in the Ninth Circuit an individual remains subject to the federal restriction placed upon anyone convicted of a felony, regardless of subsequent state procedures provided to remove the disability. The *Bergeman* court concluded that federal law controls. This determination was based upon an analysis of *Potts*, as well as legislative history supporting a broad interpretation of the term "convicted."[29] Finally the opinion expressed the concern that a contrary holding would result in a "patchwork" application of federal law resulting from variations in state expunction statutes.[30]

Whether state or federal law controls was addressed in two earlier Ninth Circuit cases, *United States v. Pricepaul*,[31] and *United States v. Locke*.[32] In *Pricepaul* the defendant argued

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> federal criminal law or the interpretation of federal criminal statutes. Only Congress can do that.

528 F.2d at 887.

26. 592 F.2d 533 (9th Cir. 1979). *Bergeman* held that expunction of a state conviction under an Idaho statute did not change the defendant's status as a convicted felon for purposes of § 922(h)(1).

27. *Id.* at 535.

28. *Id.* at 538. In United States v. Herrell, 588 F.2d 711 (9th Cir. 1978), the court applied the *Potts* majority analysis to determine the effect of an expunction statute. Hyland v. Fukuda, 580 F.2d 977 (9th Cir. 1978) followed the Sneed analysis in *Potts*. The *Bergeman* majority asserted that the conflict had been put to rest in *Hyland*, where "the question of whether state or federal law would control a convicted felon's right to carry a firearm was resolved in favor of federal law." 592 F.2d at 536. This statement seems to contradict the earlier assertion that the conflict had been resolved "in favor of both viewpoints." Resolution of these inconsistencies may be possible if the court follows the *Potts* majority decision, by referring to state law to determine the existence of a conviction, and following the Sneed concurrence only as to the irrelevance of state post-conviction provisions. Judge Sneed's opinion admittedly relied on the intitial conviction under applicable state law.

29. 592 F.2d at 537 n.9 (citing Hyland v. Fukuda, 580 F.2d 977, 980 (9th Cir. 1978)) ("The federal gun laws at issue here are intended to have, and should be given the broadest permissable application.").

30. *Id.* at 537.

31. 540 F.2d 417 (9th Cir. 1976).

32. 542 F. 2d 800 (9th Cir. 1976), *aff'g* 409 F. Supp. 600 (D. Idaho 1976).

that his predicate conviction was invalid under California law and could not satisfy the prior conviction element of the federal firearms statute.[33] The court held that the validity of the state conviction did not depend upon compliance with a strict state standard, as long as the conviction was valid under federal law.[34] The *Pricepaul* court relied on *Reconstruction Finance Corp. v. Beaver County*[35] and the Sneed analysis in *Potts*[36] for its determination that the federal standard should be applied.[37]

In *Locke*,[38] the issue on appeal was whether the prior conviction element of the federal firearms statute had been satisfied. Defendant Locke entered a guilty plea to a burglary charge and sentence was withheld for a three-year probationary period. The district court rejected defendant's contention that because judgment was withheld there had been no conviction. The district court explained, "A withheld judgment is a judgment subject to a condition. Unless defendant complies with the conditions, the judgment will not be erased. In short, defendant's prior conviction stands."[39]

The court of appeals in *Locke* did not reach a conclusion concerning whether the prior conviction element was to be determined by state or federal law. The court avoided the issue on appeal, stating that the district court "correctly applied the applicable state and federal law . . . ."[40] In *Locke* it was not essen-

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33. Pricepaul claimed his guilty plea was not made in accordance with the California reading of Boykin v. Alabama, 395 U.S. 238 (1969), as announced in *In re* Tahl, 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969). For a discussion of *Boykin*, see notes 46-49 *infra* and accompanying text.

34. According to the *Pricepaul* court,

> The construction of a federal statute is a matter solely of federal law, and the degree to which a federal statute incorporates or refers to state law is a question of federal statutory interpretation . . . . Since the California interpretation of Boykin is not . . . required by the federal constitution, the district court should apply the federal view of *Boykin*.

540 F.2d at 424-25.

35. 328 U.S. at 208. *See* note 16 *supra*.

36. 528 F.2d at 887. *See* note 25 *supra* and accompanying text.

37. 540 F.2d at 424.

38. 409 F. Supp. 600 (D. Idaho 1976), *aff'd*, 542 F.2d 800 (9th Cir. 1976).

39. 409 F. Supp. at 604.

40. 542 F.2d at 801. The district court stated the definition of "conviction" it adopted: "[A] 'conviction' is the stage of a criminal proceeding where the issue of guilt is determined and a 'sentence' is the second stage in a criminal procedure whereupon the Court decrees by judgment the sentence the defendant is to receive." 409 F. Supp. at

tial to come to a resolution of the issue because the court found Locke had been convicted under state law.[41]

Just weeks after the Ninth Circuit decision in *Benson,* the Tenth Circuit ruled on a closely parallel case. In *United States v. Stober,*[42] the defendant was charged with a violation of section 922(h)(1). He was found guilty and appealed, claiming the prior conviction element was not satisfied by his guilty plea under an Oklahoma deferred judgment procedure. The court held that Stober had not been convicted under Oklahoma law and that the federal statute's requirement that a felon be "convicted in any court" must be met by a conviction in "the court which tried the accused. That court was really the only court which could convict; if he was not guilty there, he was not guilty for the purpose of making his act here concerned a crime . . . ."[43] The Tenth Circuit's reasoning, in contrast to that adopted by the Ninth Circuit, requires "conviction in the Oklahoma Court by the Oklahoma Court. There is not issue of comity and no issue of preemption."[44] The *Stober* analysis establishes that at least in the Tenth Circuit, "[t]he defendant is entitled to, and must, rely on the jurisdiction in which he was charged. The federal courts must rely on the state to determine whether there was a conviction. . . . [T]he states can decide how to punish violations of their laws, not the federal courts."[45]

Having established in the Ninth Circuit that federal law governs the determination of a prior conviction under section 922(h)(1), what is the effect of a guilty plea under federal law?

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603. The district court relied on the Supreme Court's definition of "conviction" in this determination. *See* notes 46-49 *infra* and accompanying text.

41. Locke was told by a public defender that under the deferred prosecution statute his conviction would not be entered on his criminal record. Although Locke thought that he was not a convicted felon under Idaho law, and had no knowledge that he would be subject to federal disabilities because of his prior state violation, his conviction was upheld on appeal. The fact that he was erroneously counselled had no significance in the court's analysis, because intent was not considered a factor. 592 F.2d at 801. See note 24 *supra.*

42. 604 F.2d 1274 (10th Cir. 1979).

43. *Id.* at 1276, 1277. The court also referred to the general full faith and credit statute, 28 U.S.C. § 1738 (1970), which requires courts to give full faith and credit to state legislative acts and judicial records and proceedings.

44. 604 F.2d at 1277.

45. *Id.* at 1278.

In *Boykin v. Alabama*,[46] the Supreme Court declared, "A plea of guilty is more than a confession that the accused did various acts; it is itself a conviction."[47] By entering a guilty plea, an accused waives important constitutional rights: the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers.[48] The Supreme Court held that a state trial court's acceptance of a guilty plea, without an affirmative showing that the plea was voluntary and intelligent, is obtained in violation of due process.[49]

C. The Court's Analysis

The brief majority opinion noted that whether Benson had been "convicted" under Illinois law was unclear,[50] but flatly stated that "[w]hether he was convicted for purposes of § 922(h)(1), however, is ultimately a question of federal law."[51] The panel cited, without discussion, several cases in support of this unequivocal determination. *United States v. Bergeman*[52] and *United States v. Princepaul*[53] are two cases in which the Ninth Circuit held that federal law controls in the determination of a prior conviction under the federal firearms law. The majority in *Benson* also referred to *Reconstruction Finance Corp. v. Beaver County*,[54] a Supreme Court case concerning the extent state law should be applied when incorporated by reference in a federal law. The opinion also listed several other Ninth Circuit cases which lend support to the conclusion, but which are not dispositive on the issue.[55]

Turning to the question of whether under applicable federal law Benson had been previously "convicted," the majority considered the legal effect of Benson's guilty plea. They relied on

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46. 395 U.S. 238 (1969).

47. *Id.* at 242 (citing Kercheval v. United States, 274 U.S. 220, 223 (1926).

48. *Id.* at 243 (citing Duncan v. Louisiana, 391 U.S. 145 (1967); Pointer v. Texas, 380 U.S. 400 (1963); Malloy v. Hogan, 378 U.S. 1 (1963).

49. 395 U.S. at 243 n.5.

50. 605 F.2d at 1094.

51. *Id.*

52. *See* notes 26-31 *supra* and accompanying text.

53. *See* notes 32-38 *supra* and accompanying text.

54. 328 U.S. 204 (1946). *See* note 16 *supra*.

55. 605 F.2d at 1094 (citing United States v. Herrell, 588 F.2d 711 (9th Cir. 1978); Hyland v. Fukuda, 580 F.2d 977, 980-81 (9th Cir. 1978); United States v. Locke, 542 F.2d 800, 801 (9th Cir. 1976); United States v. Potts, 528 F.2d 883, 887 (9th Cir. 1975).

the Supreme Court's declaration in *Boykin v. Alabama* that a guilty plea "is itself a conviction; nothing remains but to give judgment and determine punishment."[56] The *Benson* Court pointed out that the Illinois court explained the consequences of pleading guilty to the charge of possession of a controlled substance before accepting Benson's guilty plea. The majority concluded that the Illinois court's acceptance of the plea and subsequent sentencing constituted a "conviction" under section 922(h)(1).[57] Furthermore, when faced with a "similar" issue in *United States v. Locke,* the court held that under "controlling federal law" the defendant had been "convicted." In *Locke* the defendant was given a three-year probationary period persuant to a deferred judgment statute. Benson's sentence to probation was under a deferred prosecution statute. The opinion did not consider this distinction. Briefly mentioned in a footnote was the fact that Locke was convicted under applicable state law.[58] Ignoring these differences, the majority found that *Locke* controlled Benson's claim.[59]

Judge Ely "reluctantly" concurred, solely because he believed the precedent in the Ninth Circuit was compelling. He nevertheless expressed his opposition to the court's conclusion on the ground that a state should have the "right to define and determine when an individual has been convicted under the state's law."[60] Accordingly, he believed the majority's holding had "unnecessarily and unjustifiably intruded upon a sovereign right that . . . appropriately belongs to the states."[61] Judge Ely's contention was that because section 922(h)(1) does not define the term "conviction," the determination should be left to the states.[62] Resolving the ambiguity in the federal statute in this manner would, according to Judge Ely, protect the states from federal intrusion.

Judge Ely cited *United States v. Bass,* in which the Su-

56. 395 U.S. at 242.

57. See 605 F.2d at 1095, suggesting that the plea was properly made in accordance with *Boykin*. However, in 1974, when Benson entered his plea, *Hoctor* was still the law in the Ninth Circuit. *See* United States v. Potts, 528 F.2d at 886 (Wright J., concurring).

58. 605 F.2d at 1095 & n.3.

59. *Id.* at 1095.

60. *Id.*

61. *Id.*

62. *Id.* at 1096.

preme Court held that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."[63] In addition, section 922(h)(1) is governed by section 927,[64] which indicates that Congress intended not to intrude into "areas traditionally reserved to the states."

Judge Ely distinguished cases arising under deferred prosecution statutes, such as *Benson*, where no judgment of conviction is entered, from those arising under expunction statutes. However, he maintained that in either circumstance he would hold there was no conviction.[65] In Judge Ely's opinion, "[t]he states enact these laws to deter recidivism and to promote the full rehabilitation of their citizens. In each case, the state has chosen to allow an individual familiar with the specific circumstances—the trial judge—to determine what criminal and civil sanction should attach."[66] He argued that federal intrusion in this area impinges on the states' power to institute effective rehabilitation programs and significantly changes the federal-state balance.[67]

The majority did not refer to the concern for national uniformity in the application of the federal statute, but this is an issue given a great deal of weight in the cases upon which the majority relied. Judge Ely argued that the unstated goal of uniform application of the law would be unaided by the court's decision. He pointed out that a felon, as defined by section 922(h)(1), must have been convicted of a crime punishable by a term exceeding one year, and that penalties for crimes vary considerably from state to state. Consequently, a person convicted of a crime in one state may be a felon within the meaning of the statute, although a person convicted of the same crime in another state would not fall within its ambit. This situation makes the uniform application of the federal statute impossible, even if federal law determines whether or not there has been a conviction.[68]

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63. 404 U.S. 336, 349 (1971).
64. *See* note 18 *supra.*
65. 605 F.2d at 1096.
66. *Id.*
67. *Id.*
68. *Id.*

D. SIGNIFICANCE

Benson establishes that in the Ninth Circuit a guilty plea constitutes a conviction for purposes of section 922(h)(1). The court did not acknowledge that its holding significantly expands the application of the measure. No precedent was cited for finding the existence of a predicate "conviction" under federal law where the defendant was never "convicted" under applicable state law. Finding Benson's claim of error to be controlled by their earlier decision in *Locke,* the court avoided addressing constitutional questions and policy concerns.

The majority opinion did not differentiate between the effect of deferred prosecutions, where no judgment of conviction is ever entered, and post-conviction measures, such as pardons and expunction statutes which attempt to "erase" convictions. The underlying policy which motivates states to enact these measures is the same, and in many cases only the label differs.[69] A system which allows persons to believe that criminal sanctions will be removed upon successful completion of their probationary term, only to be told later that the federal law does not recognize the relief provided by the states, undercuts the credibility of government.

Whether Benson could reasonably be expected to realize that he was a convicted felon within the scope of the federal statute is an issue which merited examination by the court. Had Benson been tried in the Tenth Circuit rather than the Ninth, following the *Stober* court's reasoning his conviction would have been reversed. Conflict among the circuits makes the statutory ambiguity fundamentally unfair. The status of the defendant as a convicted felon is one that should not be subject to conjecture, nor should it change as he moves from one jurisdiction to another. One subject to disabilities under the federal law is entitled to notice of that disability.[70]

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69. Note, *A State Pardon Does Not Inherently Remove Federal Disabilities, and Congress Did Not Intend State Pardons to Remove Licensing Disabilities Under the Gun Control Act of 1968,* 53 TEX. L. REV. 1332, 1339 (1975) [hereinafter cited as *State Pardon*].

70. A criminal statute is constitutionally infirm if it "fails to give a person of ordinary intelligence fair notice that his comtemplated conduct is forbidden by Statute." United States v. Harriss, 347 U.S. 612, 617 (1954). *See* United States v. Batchelder, 442 U.S. 114 (1979).

In the recent case of *Lewis v. United States*,[71] the Supreme Court recognized this conflict among the circuits in their interpretation of the federal firearms law. In *Lewis* the Court held that an underlying conviction subject to constitutional attack would satisfy the prior conviction element of the federal firearms offense. The majority relied on the sweeping intent of the legislature in enacting the measure.[72] The *Lewis* Court did not address the question of the effect of a guilty plea under the federal statute.

It has been argued that Congress linked federal disabilities to "conviction," and not guilt.[73] However, the adoption of the Supreme Court's definition of "conviction" in *Boykin* makes this distinction moot. The argument raises the question, however, whether this is the definition Congress intended for the courts to apply. In *Boykin,* the Supreme Court held that a guilty plea constituted a conviction in order to guarantee a criminal defendant would not be deprived of fundamental rights. Does the application of the *Boykin* definition in *Benson* controvert the intent of the Supreme Court or of Congress? Because of the conflict in the circuits as to the construction of the statute, the issue should be resolved by the Supreme Court.

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71. 100 S. Ct. 915 (1980).

72. The majority stated, "we view the language Congress chose as consistent with the common-sense notion that a disability based upon one's status as a convicted felon should cease only when the conviction upon which the status depends has been vacated." *Id.* at 918 n.5.

The dissent argued that the statutory language was ambiguous, since it clearly does not reach "any person who has been convicted" because those whose convictions have been reversed on appeal or vacated must not be included. The dissent concluded that "the principle of lenity requires us to resolve any doubts against the harsher alternative and to read the statute to prohibit the possession of firearms only by those who have been *constitutionally* convicted of a felony. *Id.* at 923.

73. *State Pardons, supra* note 69 at 1340-41.

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VI. OTHER DEVELOPMENTS IN CRIMINAL LAW & PROCEDURE

In *United States v. Perez-Esparza,* 609 F.2d 1285 (9th Cir. 1979), a reliable informant advised DEA agents that a particular car was being used to smuggle narcotics into the United States. The car was stopped at a Border Patrol checkpoint and defendant, the driver of the car, was taken to an office to wait for the arrival of the DEA agents. Two and one-half hours later the agents arrived, and after another thirty minutes, defendant was informed of his *Miranda* rights, and the defendant gave permission to the agents to search the car. Cocaine was discovered in a headlamp. Defendant was again given a *Miranda* warning, and he admitted he was paid to drive the car and that he knew the cocaine was hidden in the car. On appeal, the Ninth Circuit held that the evidence of the cocaine should have been excluded.

Holding that the tip by the reliable informant provided a reasonable suspicion justifying the stop, 609 F.2d at 1286 (citing *Adams v. Williams,* 407 U.S. 143, 146-47 (1977)), and that defendant's statement and consent to the search were voluntary, *id.* (citing *United States v. Dubrovsky,* 581 F.2d 208, 212 (9th Cir. 1978)), the court ruled that the evidence of the cocaine was inadmissable because of the delay between the initial stop and the consent to the search. Relying on *Dunaway v. New York,* 442 U.S. 200 (1979), the court ruled that because the detention was so similar to an arrest, probable cause to arrest the defendant was required. In *Dunaway,* the Supreme Court ruled that where a person is detained for the purpose of custodial interrogation, fourth amendment safeguards are required.

Having found that probable cause was required for the detention, the Ninth Circuit applied the test of *Spinelli v. United States,* 393 U.S. 410, 416 (1969), and *Aguilar v. Texas,* 378 U.S. 108, 114 (1964), and held that the information provided by the informant was not sufficiently detailed to support probable cause. The court also ruled that the government had failed to meet its burden of proving that the "taint" was sufficiently attenuated to allow the evidence to be admitted.

In *United States v. Ocheltree,* 622 F.2d 992 (9th Cir. 1980), a DEA agent asked defendant, a traveller waiting at an airport, if he could search the defendant's briefcase for narcotics. The DEA agent told defendant that he need not consent to the search, but if he did not, that a search warrant would be ob-

tained. Defendant consented, and narcotics paraphernalia were discovered. The agent detained defendant, obtained a search warrant, and found narcotics in defendant's suitcase, which defendant had checked as baggage.

The court of appeals held that the consent to the search was involuntary because in telling defendant that a warrant would be sought if defendant refused to consent to the search, the DEA agent implied that defendant would be kept in custody until the warrant was obtained. Because the DEA agent did not have probable cause until the briefcase was searched, retaining defendant in custody would have been an unlawful arrest under *Dunaway v. New* York, 442 U.S. 200 (1979), and consent under such circumstances was involuntarily given.

In *United States v. Allen,* No. 79-1721 (9th Cir. 1980), DEA officials received a tip from an airline ticket salesperson that defendant, who fit the DEA's "airport drug courier profile," had just purchased a roundtrip ticket from Seattle to San Francisco. The profile lists several characteristics believed to be commonly exhibited by those carrying narcotics by airplane. DEA agents stopped defendant when he returned to Seattle, and informed him that they believed he was carrying drugs. Defendant later consented to a body search. When no drugs were found on his person, the agents asked defendant if they could search the briefcase he was carrying. Defendant refused, and the agents seized the briefcase. Following the seizure, defendant made self-incriminating statements, and in an application for a search warrant, the DEA agents cited these statements as supporting probable cause. The search warrant was obtained several days after the stop, and LSD was found in the briefcase.

The court of appeals held that the search was unjustified because it was unsupported by probable cause. The court found that the facts that defendant matched the profile and he appeared nervous when approached by the agents would not lead a reasonable person to believe defendant had committed a crime. The court noted that an innocent traveller might become nervous when accused of carrying drugs. Similarly, the fact that the search of defendant's person revealed no contraband did not support an inference that defendant carried drugs in his briefcase. Therefore, the seizure of defendant's briefcase was unjustified, and the fruits of that seizure must be excluded.

In *Higdon v. United States,* 627 F.2d 893 (9th Cir. 1980) appellant had earlier been found guilty of a crime and was sentenced to a term of five years. The sentence was suspended on the condition that appellant forfeit all his assets to the government and the he work for charity without pay. Appellant argued that these conditions constituted cruel and unusual punishment.

Relying on *United States v. Consuelo-Gonzalez,* 521 F.2d 259 (9th Cir. 1975), the court stated that the validity of probation conditions depends on 1) the purpose of the conditions; and 2) whether the conditions are reasonably related to the purpose. Noting that rehabilitation of the criminal and protection of society are the primary purposes of probation conditions, the court stated that neither punishment of the convicted nor circumvention of statutory sentencing limits is a proper primary purpose of probation. The court held that the cumulative effect of the probation conditions in this case constituted a much harsher restriction than necessary to rehabilitate the appellant, and the conditions were therefore impermissible.

In *United States v. Kennedy,* 618 F.2d 557 (9th Cir. 1980), the Ninth Circuit held that special treatment of bail conditions for those charged with capital offenses derive from the nature of the offense charged and not from the fact that the potential penalty is death.

The district court found defendant, a Federal Protective Officer, guilty of the rape and murder of a young female alien. The district court also found that defendant regularly wore firearms while at home and that he once left a note saying that he was going across the border. The trial court concluded that defendant was a flight risk who posed a threat to other people, and applied 18 U.S.C. § 3148 (1976), which controls the granting of bail in cases where the defendant "is charged with an offense punishable by death," and denied bail.

On appeal, the defendant claimed that the trial court failed to follow *Furman v. Georgia,* 408 U.S. 238 (1972), in which the Court proscribed the imposition of the death penalty under such statutes. Had the trial court properly followed *Furman,* defendant argued, § 3146, which governs release on charges not punishable by death, would have applied.

The Ninth Circuit rejected defendant's argument, and refused to apply *Furman* to render unconstitutional all statutes

that were tied to capital offenses. Instead, the court looked to the purpose of the rule to determine if it derived from the potential severity of the punishment. In this case, the court found that the purpose of § 3148 was to impose different bail conditions for those capital crimes where the offense — and not the penalty — differed. Consequently, the court held that § 3148 survived *Furman* and was valid.

In *United States v. Beattie,* 613 F.2d 762 (9th Cir. 1980), the Ninth Circuit rejected defendant's challenge that the trial court erroneously submitted an *Allen* charge to the jury. The defendant was charged with five counts of mail fraud. After the trial, the jury deliberated for over eight hours without reaching a verdict. The judge then instructed the jury that those jurors in the minority should reappraise their doubts to determine if those doubts were reasonable. The jury deliberated three and one-half hours more before returning a guilty verdict.

On appeal, defendant argued that the judge's instruction constituted an *Allen* charge. Courts disfavor an *Allen* charge because it has a potentially coercive effect on the minority jury members to alter their views based on the perceived opinion of the court or the opinion of the majority, and not on the evidence and law.

The Ninth Circuit held that an *Allen* charge exists only if the charge was both premature and had a coercive effect on the jury. The court of appeals found no evidence of a coercive effect in this case. Furthermore, the court distinguished *United States v. Contretas,* 463 F.2d 773 (9th Cir. 1972), where coercive effect was found. In *Contretas,* following the alleged *Allen* charge, the jury deliberated and decided on a verdict in thirty-five minutes. In the present case, the jury deliberated an additional three and one-half hours, a sufficient time to reach a "reasoned decision."

In *United States v. Erwin,* 625 F.2d 838 (9th Cir. 1980), the court of appeals held that defendant's attorney had no right to be present at a hearing in which customs agents sought a court order requiring defendant to submit to a strip search; that the magistrate had legal authority to issue an order compelling defendant to submit to a strip search and x-ray; that, even though defendant's attorney was not present during a body cavity

search, the search did not exceed the Fourth Amendment reasonableness standard; that defendant's seven hour detention was legal; and that the evidence supported the giving of the *Jewell* instruction. *See United States v. Jewell,* 532 F.2d 693 (9th Cir. 1976).

Customs officials searched defendant's baggage upon her arrival at the San Francisco International Airport from Bangkok, Thailand. The agents found items which, when coupled with defendant's awkwardness in walking and sitting, led them to suspect that the defendant was carrying something in a body cavity. The officials asked defendant to submit to a strip search, and she refused. The officials then obtained a court order requiring defendant to submit to a strip search and x-ray. The x-ray revealed a foreign body in defendant's vagina, which defendant voluntarily removed. The foreign body was a plastic container which held packets of heroin. This series of events lasted about seven hours, part of which time defendant's attorney was present. The trial court denied a motion to suppress the evidence of the heroin.

Defendant appealed on five grounds. First, defendant argued that because her attorney sought and was refused access to contest the search order, the government violated her due process rights of notice and opportunity to be heard. The court equated the government's request for a court order to a request for a search warrant, traditionally, an *ex parte* proceeding. The court then held that defendant's due process rights were not violated.

Second, defendant contested the magistrate's legal authority to issue the order for a strip search and x-ray. The court found that the order was based on probable cause and held that the magistrate had the power to issue the order pursuant to Rule of Criminal Procedure 41.

Third, the defendant argued that the body cavity search exceeded the fourth amendment reasonableness standard because her attorney was excluded. The Ninth Circuit examined the precautionary steps the customs agents took to minimize the intrusiveness of the search. The court found that the presence of counsel may have been of some emotional support, but in this stituation, depriving defendant of this support was insufficient to make the search unreasonable.

Fourth, defendant challenged the legality of the detention. The court stated that the legality of the detention must be de-

termined according to what was necessary for the officials to conduct a legal border search. The court held that, under the circumstances, seven hours was not an improper length of detention.

Finally, the defendant argued that an instruction regarding defendant's deliberate ignorance of certain facts should not have been given. The court compared the facts in *Jewel* with those in the present case and found sufficient basis to conclude that defendant was deliberately ignorant of the contents of the plastic container. The court concluded that the instruction was proper.

In *United States v. Bronstein,* 623 F.2d 1327 (9th Cir. 1980), the Ninth Circuit held that where a plea bargain provided that the government waive its right of allocution and would remain silent at the time of sentencing except to correct factual misrepresentations, the government's comments concerning defendant's alleged and unrelated conduct constituted a breach of the plea bargain and required a remand for resentencing.

Defendant was charged with subscribing false individual and corporate tax returns and with conspiracy related to these tax offenses. On the sixth day of trial, defendant and the government entered into a written plea bargain in which the government waived its right of allocution and agreed to remain silent at the time of sentencing except to correct any factual misrepresentations. The court accepted the plea bargain and set a sentencing date. On that date, the trial judge asked for additional information regarding the Internal Revenue Service's policy on voluntary disclosure. Both sides presented witnesses to testify on this matter. The prosecution stated that they would stay within the limits of the plea bargain. At the conclusion of the trial, however, the government raised several of its arguments, including that the defendant had committed other wrongful acts. After sentencing, defendant moved to correct the sentence, arguing that it was imposed illegally. The motion was denied.

On appeal, the court of appeals vacated the sentence and remanded the case for resentencing. The court first looked at its recent decision in *United States v. Arnett,* No. 79-1243 (9th Cir., Nov. 26, 1979), in which the court determined that ambiguities of plea bargains must be resolved by looking at the facts to establish the intent of the parties. The court found *Arnett* inapplicable in this case, however, because the government argued

that it was staying within the limits of the agreement, and because the agreement was clear as to the intent of the parties. The court went on the examine the parties' conduct at the hearing and found that the government's comments regarding defendant's alleged and unrelated criminal activities constituted a breach of the agreement. The court thus remanded the decision to the district court for resentencing.

In *United States v. Glickman,* 604 F.2d 625 (9th Cir. 1980), the court held, *inter alia,* that the government need only make reasonable efforts to produce an informant, and that the failure to produce the informant did not violate the defendant's sixth amendment right to confront his accusers. Goldman, an inmate at the Los Angeles County Jail, agreed with a Los Angeles police officer that he would implicate defendant in exchange for a recommendation that he be released on his own recognizance. About a month later, defendant asked Goldman to learn if a certain United States district judge would grant probation to Phil Izsak, who was awaiting sentencing, in exchange for $75,000.

Goldman then informed the police officer and two investigators of the proposed bribe. Eagan, one of the investigators, agreed to pose as the judge's girlfriend. Goldman then called defendant and told him that the bribe could be arranged through the judge's "girlfriend." They agreed to meet.

At the meeting, both Goldman and Eagen were equipped with transmitters. After Eagan's early departure from the meeting, at which the possible bribe was discussed, defendant expressed concern that she might be an undercover agent. Goldman assured him that she was not. In the district court, defendant was convicted of conspiracy and of corrupt endeavoring to influence an officer of the court.

On appeal, defendant challenged the absence of Goldman from the trial as a deprivation of his sixth amendment right to confront accusers. The Ninth Circuit relied on *United States v. Hart,* 546 F.2d 798 (9th Cir. 1976), *cert. denied,* 429 U.S. 1120 (1977), in which the court held that the government need only use reasonable efforts to produce an informant. In this case, the government attempted to locate Goldman by interviewing his acquaintances and relatives, by issuing a warrant for his arrest for unlawful flight, and by inquiring at the County Coroner's Office. The court concluded that the government had expended

reasonable efforts to locate Goldman, and the defendant's claims were therefore without merit.

In *United States v. Post,* 607 F.2d 847 (9th Cir. 1979), a person paced the length of the Seattle airport, tightly holding a briefcase. Subsequently, he met with defendant and both purchased one-way tickets to Los Angeles with cash. Narcotics agents who had observed the two became suspicious and called in to a narcotics computer. They learned that defendant was a known drug trafficker. The agents contacted Los Angeles narcotics agents and advised them to watch for the two.

The Los Angeles agents followed the two men to a building near a beach, and the next morning, when the two men returned to Seattle, four agents were waiting for them at the airport. One agent followed them into a rest room and observed defendant go into a stall, lift one leg, and then the other. The agents stopped the men as they walked through the airport. According to the agents, both men agreed to accompany the agents to an interviewing room.

One agent took defendant into an interview room, gave him a *Miranda* warning, and conducted a weapons search. On defendant's leg the agent felt bulges, which the agent subsequently determined to be bags of cocaine. The trial court found the stop and seizure reasonable and well founded. The Ninth Circuit agreed.

The court of appeals first decided that the initial investigative stop was justified. An investigative stop must be based on a reasonable suspicion that a person has committed or is about to commit a criminal act. Here, the court found that because the agents were trained to spot drug dealers, and defendant's actions (a nervous manner, purchase of tickets with cash to a major drug center, virtually immediate return flight, and travelling without luggage) fit the profile of a drug trafficker, the initial stop was reasonable.

The court then addressed defendant's challenge that the initial stop became a constructive arrest when the agents brought him to an interview room. The court held that a justified stop does not become unjustified when the investigating officer moves the stop to a more congenial place.

Finally, defendant argued that the pat-down search was improper because the agents had no reasonable belief that defen-

dant was armed. The Ninth Circuit rejected this argument, holding that the very nature of the crime defendant was suspected of gave rise to a reasonable suspicion that defendant may be armed. Rejecting defendant's arguments that because the agents did not search him at the initial stop they had no reasonable suspicion that he was armed and that the search in the room was not based on any reasonable suspicion, the court held that a single agent in a closed room need not be certain that defendant is armed before a limited pat-down search is justified.

In *United States v. Gomez,* 614 F.2d 643 (9th Cir. 1979), a narcotics agent saw an unidentified suitcase which had apparently fallen from a conveyor belt in an airport. The detective informed an airline employee, who could not find anyone who could identify the suitcase. The detective then accompanied the employee to a private area where the employee attempted to open the suitcase to determine its owner. The detective then tapped or kicked the suitcase, and its lock opened. A revolver and twenty-three pounds of cocaine were inside the suitcase. In Los Angeles, defendant reported a lost suitcase which matched the description of the suitcase found by the detective. The suitcase was delivered to defendant, and she was subsequently arrested.

The Ninth Circuit found that the evidence supported the lower court's finding that the search was a private one initiated by the airline employee. The defendant claimed that the presence and assistance of the detective rendered the search a governmental one, and that constitutional safeguards were required. The court disagreed, and found the detective's "slight" participation insufficient to convert the private search into a governmental one.

Judge Hug dissented and argued that the detective's extreme interest in the suitcase was motivated by a desire to search the suitcase for contraband under the guise of an authorized private search.

In *United States v. Mackey,* 626 F.2d 684 (9th Cir. 1980), defendant waited in a car while the co-defendant robbed a bank. Police apprehended both men shortly thereafter. Immediately following the arrest, the police searched the car and discovered a

paper bag containing all the stolen money and a hand gun. The police then impounded the car for further inspection.

On appeal, defendant argued that the police were not justified in searching the car without a warrant at the place of apprehension. The Ninth Circuit relied on *Chambers v. Mississippi,* 399 U.S. 42 (1970) in which the Supreme Court upheld a warrantless search because there was probable cause and there was a danger that the car would be moved. The court decided that *Chambers* was indistinguishable from the present case. The court found that the police did not intend to impound the car until a time after they discovered the bag. Consequently, at the time of the search the automobile was not, as the defendant had claimed, within the police's "complete and exclusive possession."

Defendant also argued that the warrantless search of the bag found in the automobile violated his fourth amendment rights. The defendant cited *Arkansas v. Sanders,* 422 U.S. 753 (1979), where the Court upheld a constitutional attack on a warrantless search of a suitcase. The Ninth Circuit rejected defendant's claim, finding a substantial difference between the privacy interest in a suitcase and that in a paper bag.

Dissenting, Judge Tang saw the majority's analysis of the warrantless bag search as "inverted." He argued that the burden of proof should have been on the government to justify the warrantless search. Instead, the majority had placed the burden on defendant to prove a warrant should have been required. The dissent added than an attempt to justify the search of the bag under the automobile exception would be erroneous. In any event, the dissent argued that the government had failed in meeting its burden.

In *United States v. Samango,* 607 F.2d 877 (9th Cir. 1979), one Ferrer was indicted for conspiracy to smuggle cocaine. Defendant testified at the grand jury hearing. The prosecutor, however, focused on defendant's conversation with a narcotics agent, and not on his own acquaintance with several of the defendants in the hearing.

Two years later, a second grand jury reviewed defendant's testimony in the first grand jury hearing. Several witnesses also testified. One witness' testimony consisted almost exclusively of responses to the prosecutor's leading questions. The prosecutor even responded to several of his own questions. The second

grand jury indicted the defendant and defendant moved to dismiss the indictment.

Nine days prior to the hearing on the motion to dismiss the indictment, the prosecutor attempted to "sanitize" defendant's indictment by leaving one thousand pages of transcript with a third grand jury. He told this grand jury, off the record, to return a decision in eight days. One live witness testified and in seven days the third grand jury indicted the defendant.

The district court orally granted defendant's motion to dismiss in March 1978. The court, however, did not give a written decision until two months later. The government filed its notice of appeal in June.

The Ninth Circuit was first faced with the question whether the government filed its notice of appeal "within thirty days after the entry of judgment" as required by Federal Rule of Appellate Procedure 4(b). The court looked at the lower court's intent that its order not be final until it issued a written order. The court recognized the potential for an oral order to be final if intended as such. In this case, however, the district court's intent was clear. Consequently, the government's notice of appeal was held timely filed.

In addressing the more complicated issue of grand jury bias, the Ninth Circuit first distinguished its earlier decision in *United States v. Chanen,* 549 F.2d 1306 (9th Cir.), *cert. denied,* 434 U.S. 825 (1977). The *Chanen* court reversed a dismissal of an indictment where, like *Samango,* there were three grand jury hearings and two indictments. In *Chanen,* however, the transcripts from earlier hearings were read aloud, the prosecutor advised the jurors of inconsistent testimony, and the transcripts contained witness confessions of giving false affidavits.

In the instant case, none of the above safeguards was given. Consequently, the court did not know if the lengthy transcript had been examined at all. Furthermore, the jurors of the later jury could not weigh the credibility of the various witnesses with nothing more than the one thousand page transcript. The Ninth Circuit also considered other factors, such as the improtance of a fair grand jury hearing, the lack of time for "thorough, thoughtful, and independent evaluation of the evidence" by the jurors, and the prejudicial impact of the one live witness. Taking into consideration all of these factors, the Ninth Circuit held that the district court properly invoked its supervisory power to dismiss the indictment.