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Patricia A. Seitas

C. Elliot Kessler

Steven Booska

Mark F. Liscio

CRIMINAL LAW & PROCEDURE

I. SUMMARY CRIMINAL CONTEMPT: DEFERENCE TO THE TRIAL COURT

A. INTRODUCTION

In a 1980 decision, *In re Gustafson*,[1] the Ninth Circuit held that summary criminal contempt was justified only when the contemptuous conduct materially obstructed an ongoing proceeding. On rehearing,[2] a limited en banc panel repudiated the material obstruction requirement and substituted an abuse of discretion standard. Under the new standard, great deference will be accorded to the trial court judge.[3] An independent review of the record will be undertaken only when "the record demonstrates that the trial judge did not fully consider the relative appropriateness of summary and plenary adjudication of contempt."[4]

B. BACKGROUND

Under Federal Rule of Criminal Procedure 42(a), a judge may summarily sentence and convict a person for contempt of court[5] if the judge certifies hearing or seeing the contemptuous conduct in the actual presence of the court and signs a contempt order reciting the facts. Case law additionally requires an immediate need for summary disposition.[6]

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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). For a discussion of the original opinion, see 11 GOLDEN GATE U.L. REV. 153 (1980).

2. 650 F.2d 1017 (9th Cir. 1981) (per Farris, J., joined by Browning, Wright, Goodwin, Wallace and Sneed, J.J.; Bouchever, J., dissenting, joined by Hug, Schroeder, Fletcher and Norris, J.J.).

3. *Id.* at 1023.

4. *Id.*

5. 18 U.S.C. § 401 (1976) in pertinent part reads: "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. . . ."

6. United States v. Wilson, 421 U.S. 309, 319 (1974), Harris v. United States, 382 U.S. 162 (1965). These cases are discussed briefly in text accompanying notes 14-19,

The summary contempt power has been much criticized[7] because it deprives the alleged contemnor of normal due process rights. There is no notice requirement, no opportunity to be heard, no right to allocution, and no right to counsel. The judge assumes the role of prosecutor, judge and jury. Traditionally, this lack of procedural due process has been justified by (1) the need to maintain order in the courtroom,[8] (2) the wastefulness of a second trial, since the court actually heard or saw the contemptuous conduct,[9] and (3) the availability of appellate review to safeguard the contemnor's rights.[10]

C. Discussion

This section will examine the court's opinion in light of the three rationales listed above and adopted by the court.

The Need to Maintain Order

Recognizing that the summary contempt power can have an immediate coercive effect,[11] the majority concluded that the district court judge "must have the ability to quickly and authoritatively act to halt incipient disorder."[12] But the majority limited the application of the power to situations where a need for immediate action exists.[13] This immediate need requirement derives from the majority's reading of two Supreme Court cases: *Harris v. United States*[14] and *United States v. Wilson.*[15] In

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infra.

7. *See* N. Dorsen & L. Friedman, Disorder in the Court (1973); 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 Without and Within*, 51 N.Y.U.L. Rev. 34 (1976); Comment, *Counsel and Contempt: A Suggestion that the Summary Power be Eliminated*, 18 Duq. L. Rev. 289 (1980); Note, Taylor v. Hayes—*A Case Study in the Use of Summary Contempt Against an Attorney*, 63 Ky. L.J. 945 (1975); Note, *Attorneys and the Summary Contempt Sanction*, 25 Me. L. Rev. 89 (1973); Note, *Direct Criminal Contempt: An Analysis of Due Process and Jury Trial Rights*, 11 New England L. Rev. 77 (1975); 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).

8. *Ex parte* Terry, 128 U.S. 289, 303 (1888).

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

10. Sacher v. United States, 343 U.S. 1, 12-13 (1952).

11. 650 F.2d at 1021.

12. *Id.* at 1023.

13. *Id.*

14. 382 U.S. 162 (1965).

15. 421 U.S. 309 (1974).

both cases, witnesses refused to testify; the *Harris* witness before a grand jury, and the *Wilson* witness at trial. Although both witnesses were convicted summarily of contempt, the conviction in *Harris* was reversed while that in *Wilson* was upheld. In reconciling the two cases, the *Wilson* Court noted that a grand jury could easily move to other matters[16] while a 42(b) contempt hearing was held, but "[i]n an ongoing trial, with the judge, jurors, counsel, and witnesses all waiting, Rule 42(a) provides an appropriate remedial tool to discourage witnesses from contumacious refusals to comply with lawful orders essential to prevent a breakdown of the proceedings."[17]

The majority interpreted this distinction to mean that immediate need is a prerequisite to the exercise of summary contempt power. Stressing this view, the *Gustafson* majority, quoting *Harris,* stated that the summary contempt power is to be used only when there is "such an open, serious threat to orderly procedure that instant and summary punishment, as distinguished from due and deliberate procedures . . . [is] necessary."[18] Yet, this language appears to be mere dictum in light of the court's holding in *Gustafson.*

The record shows no need to coerce appropriate behavior through immediate punishment. Indeed, the trial court judge did not hold Gustafson in contempt at the time of the allegedly contemptuous conduct.[19] He acted after the conclusion of Gustafson's part in the trial, when the jury had been excused for the day. The majority did not find this delay fatal to summary disposition and cited cases to support its position. Of these cases, one was decided before *Harris* and *Wilson,*[20] while the others[21] dealt with the separate issue of whether the judge can delay sen-

16. *Id.* at 318.

17. *Id.* at 319.

18. 650 F.2d at 1022 (quoting Harris v. United States, 382 U.S. at 165).

19. *Id.* at 1018-19. Gustafson was an attorney for one of six co-defendants. During closing argument he spoke so quickly a tape recorder had to be used, made improper appeals for juror sympathy despite warnings from the court, and accused the prosecutor and the court of attempting to interfere with a vigorous defense.

20. MacInnis v. United States, 191 F.2d 157, 160-61 (9th Cir. 1951), *cert. denied,* 342 U.S. 953 (1952). The court did not require a need for immediate action as a prequisite to exercise of the summary contempt power.

21. Commonwealth of Pa. v. Local Union 542, 552 F.2d 498, 512-14 (3d Cir.), *cert. denied,* 434 U.S. 822 (1977); Hallinan v. United States, 182 F.2d 880 (9th Cir. 1950), *cert. denied,* 341 U.S. 952 (1951).

tencing. These last two cases fail to support the majority's position. The coercive power of summary contempt still exists if citing is immediate but sentencing is delayed. If both citing and sentencing are delayed, however, then no coercive effect remains.

Having overcome the hurdle of the judge's delay, the majority found summary disposition necessary[22] because a 42(b) hearing delay could further prejudice Gustafson's client, and because it was necessary to deter further contemptous conduct by Gustafson or other counsel. Both arguments are extremely weak. First, 42(b) hearings are relatively short and one could easily have been scheduled to avoid prejudicing Gustafson's client. Second, Gustafson's part in the trial was completed and nothing indicated that co-counsel were contemplating similar conduct. Indeed, several moved for mistrials based on Gustafson's conduct.

This weak reasoning can only be explained by the majority's interpreting *Wilson* as holding that an ongoing trial (as opposed to a grand jury proceeding) justifies immediate action. Several authorities agree with this interpretation.[23] However, a more stringent reading of *Wilson* is appropriate.

The *Wilson* court distinguished *Harris,* not on the basis of the trial setting of the contemptuous conduct, but on the effect of the conduct. The court noted that summary contempt was appropriate to prevent a "breakdown of the proceedings."[24] In *Wilson,* the key witness' refusal to testify would have caused a literal breakdown of the proceedings.

Furthermore, the Wilson court stated: "Where time is not of the essence, however, the provisions of Rule 42(b) may be more appropriate to deal with contemptuous conduct."[25] This statement implies that the appropriateness of applying Rule 42(a) or 42(b) should depend on whether time is of the essence, and not

22. 650 F.2d at 1023.

23. Kuhns, *supra* note 7; Kuhns, *Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury,* 73 MICH. L. REV. 483 (1975); 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 Rules of Criminal Procedure,* 9 SW. U.L. REV. 747 (1977).

24. 421 U.S. at 319.

25. *Id.*

the form of the proceedings.

Wastefulness of a Second Trial

The majority found that "[a]s contention begins to develop into disobedience or disorder, the trial court is in the best position to judge whether there exists a need for immediate penal vindication."[26] Accordingly, the majority gave "great deference"[27] to the trial court judge, largely on the trial judge's unsupported statement in the contempt order that he had "no alternative but to summarily punish."[28]

Whether such deference should be given is questionable. While it is true that the trial court judge may in some ways be in a better position to evaluate the contemptuous conduct, since the record does not reveal tone of voice, stance or attitude, it is also true that the trial court judge is quite likely to be emotionally involved due to the contemnor's difficult behavior.[29] Indeed, in extreme cases, if the contemnor can prove the judge became "personally embroiled," summary contempt is prohibited, and a 42(b) hearing must proceed before a different judge.[30] The fact that the trial court judge was so disturbed by the contemptous behavior that he held an individual in contempt, indicates some emotional involvement. "Great deference" should not be given in such circumstances.

Appellate Review

A fair review by an appellate court is particularly important for a summary contempt conviction because of the absence of due process protections at the trial level. Theoretically, a review by an appellate court will safeguard the alleged contemnor's right to a fair disposition. However, the standard, as delineated and applied in *Gustafson,* will safeguard an alleged contemnor from only the most flagrant abuses. Instead of automatically giving the contemnor an independent review of the record, the court defers to the trial judge unless "the record demonstrates

26. 650 F.2d at 1023.

27. *Id.*

28. *Id.* at 1031.

29. The judge's objectivity is especially in doubt in situations such as here where the alleged contemnor attacked the integrity of the court.

30. Offutt v. United States, 348 U.S. 17 (1954).

that the trial judge did not fully consider the relative appropriateness of summary and plenary adjudication of contempt."[31] Since the facts here indicate that this standard can be met by a judge's conclusionary statement in the contempt order that summary punishment is appropriate, it will be rare that a contemnor will be able to establish the lack of consideration necessary to earn an independent review.[32]

Nor can the alleged contemnor expect his rights to be safeguarded by a careful review of a detailed contempt order. Apparently, an appellate court will accept a conclusionary order and defer to the trial judge. The order here stated no facts, other than the presence of other counsel, to justify the summary disposition. This does not support the use of the summary contempt power because Rule 42(a) requires that the contemptuous conduct occur in the presence of the court which makes almost certain the presence of other counsel.

At the very minimum, an alleged contemnor should be entitled to a summary contempt order which states sufficient facts such that a conviction will not be affirmed merely on the basis of speculation by the reviewing court as to the reasons which might have supported a summary disposition.[33] Such a standard is but one step from denying review altogether. It is bad enough to allow a person to be convicted without notice or hearing, but even worse to affirm that conviction based upon mere speculation.

D. Conclusion

The dissent delineated a much fairer standard—a clearly erroneous standard. First, under this standard, real substance would be given to the majority's concern that the summary contempt power be limited to circumstances where there is "such an open, serious threat to orderly procedure that instant and summary punishment, as distinguished from due and deliberate procedures [is] necessary."[34] The dissent would require the trial

31. 650 F.2d at 1023.

32. The contemnor will probably have to show that the judge became so "personally embroiled" that his judgment was affected.

33. The appellate court speculated that the statement by the trial judge that other counsel were present might have meant there was a need to deter further contemptous conduct by the other counsel.

34. Harris v. United States, 382 U.S. at 165, *quoted in In re* Gustafson, 650 F.2d at

judge to make specific findings of fact that the contemnor threatened further disruptions of the proceedings. Moreover, the trial judge would be obliged to give "full consideration" to the necessity of summary disposition. Second, the trial court would be afforded sufficient deference—in light of its need to maintain order, and its superior position to observe the contemptous behavior—because the trial court's decision would be upheld unless clearly erroneous. Third, the contemnor's right to a fair disposition would be protected since the reviewing court would be "carefully scrutiniz[ing] the factual record for clear error."[35]

Patricia A. Seitas

II. PROSECUTORIAL MISCONDUCT—NO DOUBLE JEOPARDY ABSENT AN INTENT TO PROVOKE A MISTRIAL

A. INTRODUCTION

In *United States v. Roberts*,[1] the Ninth Circuit held that double jeopardy does not bar retrial when necessitated by prosecutorial misconduct unless the prosecutor intentionally provokes the mistrial. The defendants were convicted of attempting to blow up a federal building in Arizona.[2] During closing argument at trial, the prosecutor made remarks intended to bolster the credibility of his key witness[3] with evidence outside the record. Specifically, the prosecutor called attention to the presence of a detective seated in the courtroom and suggested that he had monitored the veracity of the witness' testimony.[4]

1022 (citation omitted).

35. 650 F.2d at 1030.

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1. 640 F.2d 225 (9th Cir. 1981) (per Skopil, J.; the other panel members were Poole, J. and Norris, J., dissenting).

2. An earlier trial ended in a mistrial due to a hung jury. The double jeopardy clause has long been held not to bar retrial following a hung jury. *See* United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

3. The witness was originally indicted with the defendants. He agreed to testify against the defendants in exchange for immunity from prosecution. United States v. Roberts, 618 F.2d 530, 532 (9th Cir. 1980).

4. *Id.* at 533. The pertinent portions of the interchange between the prosecutor, defense counsel and the court went as follows:

[Prosecutor]: Detective Sellers has been pointed out through-

The prosecutor continued to reiterate this point even after the judge admonished him to stay with the record.[5] The court of appeals reversed the convictions,[6] holding, *inter alia*, that the prosecutor's remarks constituted improper vouching which both harmed and prejudiced the defendants.[7] After a retrial had been scheduled, the defendants filed a joint motion to dismiss their indictment on double jeopardy grounds. The trial court denied this motion and the defendants appealed.[8]

B. Background

The double jeopardy clause states that a person shall not be twice put in jeopardy of life or limb for the same offense.[9] The language of this clause has proven to be "deceptively plain"[10] and have created problems resulting from the balancing of two inherently competing interests: protection of society on the one hand, and protection of the rights of the accused on the other.

The double jeopardy clause protects a number of distinct interests of a defendant. It serves to avoid the "embarrassment, expense and ordeal"[11] of being retried, reduces the possibility

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> out the trial as sitting in the courtroom during the testimony, particularly of John Harvey Adamson. I would suggest to you that Detective Sellers is not here on vacation. He had a mission to serve and that mission was to sit and listen to the testimony of John Harvey Adamson.
> [Defense Counsel]: If the Court please, there is no evidence of this, and I don't know if Mr. Sellers is here on vacation or not.
> The Court: Yes, let's stay with the record.
> [Prosecutor]: I submit to you, ladies and gentlemen, that he was here to listen to that testimony and make sure that—
> [Defense Counsel]: Object on the same grounds. It's the same. It's not in evidence.
> [Prosecutor]: If Adamson lied, ladies and gentlemen, the plea agreement is called off.

Id.

5. *Id.*

6. *Id.* at 532.

7. *Id.* at 534. The court found that "[t]he jury could naturally believe that [detective] Sellers had personal knowledge of relevant facts and was satisfied that these facts were accurately stated by [the witness] Adamson. In effect, the prosecutor was telling the jury that another witness could have been called to support Adamson's testimony." *Id.*

8. 640 F.2d at 226. Denial of a motion to dismiss on double jeopardy grounds is a "final decision" within the meaning of 28 U.S.C. § 1291 (1976) and thus immediately appealable. Abney v. United States, 431 U.S. 651 (1977).

9. U.S. Const. amend V.

10. Crist v. Bretz, 437 U.S. 28, 32 (1978).

11. In Justice Black's frequently quoted words:

that an innocent defendant may be found guilty,[12] and protects a defendant's right to have his confrontation resolved in a single trial.[13] Balanced against these interests are "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws"[14] and "society's interest in the punishment of crime."[15]

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957).

Justice Douglas suggested that the double jeopardy clause "is designed to help equalize the position of government and the individual, to discourage abusive use of the awesome power of society." Gori v. United States, 367 U.S. 364, 372 (1961) (Douglas, J., dissenting).

12. The double jeopardy protection is necessary because the prosecution's case becomes stronger through rehearsal and witnesses become better at relating their stories and fending off cross-examination. United States v. Green, 636 F.2d 925, 932 (4th Cir. 1980) (Winter, J., dissenting), *cert. denied*, 101 S. Ct. 2005 (1981). *See also* Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 506 (1977):

> The government may be aided upon retrial merely by having observed defense counsel's tactics on cross-examination or by having learned the nature of any substantive defense. The possibilities are particularly important because, despite recent trends toward the liberalization of discovery in criminal cases, the prosecution generally lacks the opportunity to learn much prior to trial about the defense tactics or the witnesses the accused will present. An aborted first trial therefore provides the prosecution with general insight into defense strategy that may be useful in preparing for retrial, an advantage frequently not offset in practice by the reciprocal revelation of prosecution strategy to the defense.

(Footnotes omitted).

13. Known as defendant's "valued right to have his trial completed by a particular tribunal," Wade v. Hunter, 336 U.S. 684, 689 (1949), this right represents the defendant's interest in getting the trial over with "once and for all." United States v. Jorn, 400 U.S. 470 (1971) (Harlan, J., concurring). However, the importance of this right may have been restricted by Illinois v. Summerville, 410 U.S. 458 (1973), holding that this right sometimes is insufficient to overcome the public's interest in full and accurate prosecution, even if the state itself caused the defect in the initial proceeding. *Id.* at 463 (citing Wade v. Hunter, 336 U.S. at 689). *See* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, in THE SUPREME COURT REVIEW 81 (P. Kurland & G. Casper eds. 1978).

14. Arizona v. Washington, 434 U.S. 497, 509 (1978).

15. United States v. Jorn, 400 U.S. 470, 492 (1971) (Stewart, J., dissenting). The Supreme Court has stated: "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." United States v. Tateo, 377 U.S. 463, 466 (1963).

One of the troublesome issues of double jeopardy is under what circumstances a retrial will be permitted following a mistrial.[16] Traditionally, courts have approached this question by distinguishing mistrials declared on the court's own initiative (*sua sponte*) from those declared upon the defendant's request.[17] In the former instance, retrial will be allowed only where there was a "manifest necessity" for the mistrial, or where "the ends of public justice would otherwise be defeated."[18] Although these phrases have received varying interpretations,[19] they have generally prevented judges from abusing their discretion in declaring a mistrial without the defendant's consent.[20]

A different issue is presented where the mistrial is requested by the defendant. Unlike a court-declared mistrial, the defendant has not been deprived of his " 'valued right to have his trial completed by a particular tribunal' "[21] because he has elected to relinquish this right. In addition, a defendant retains the option of continuing with his first jury with the chance of ending the trial with an acquittal.[22] Therefore, as a general rule, a mistrial motion by the defendant removes any barrier to reprosecution, even if prosecutorial or judicial error necessitated the motion.[23]

The one exception to this rule is when the defendant's mistrial request is attributable to judicial or prosecutorial overreaching.[24] In this situation, the considerations underlying the

16. Although *Roberts* involved a conviction reversed on appeal, this situation is analogous to that where a defendant has moved for a mistrial due to prejudicial misconduct. *See* text accompanying notes 48-54 *infra*.

17. United States v. Dinitz, 424 U.S. 600, 607 (1976).

18. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

19. For example, manifest necessity exists when the judge declares a mistrial because of the possibility of prejudicial remarks by the prosecutor, Gori v. United States, 367 U.S. 364 (1961), but has been held not to exist when the prosecutor asked for a mistrial because his key witness was missing, Downum v. United States, 372 U.S. 734 (1963), or when the judge declares a mistrial to insure that potential witnesses are properly advised of their right against self-incrimination, United States v. Jorn, 400 U.S. 470 (1971). More recently, retrial has been permitted when the judge declares a mistrial because the prosecutor's indictment was defective on the grounds that it would serve the ends of public justice. Illinois v. Summerville, 410 U.S. 458 (1973).

20. United States v. Jorn, 400 U.S. 470, 481-82 (1971).

21. *Id.* at 484 (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

22. 400 U.S. at 484.

23. *Id.*

24. The *Jorn* Court carefully limited the general rule to "circumstances . . . not

general rule are inapplicable because the defendant's opportunity to end his trial with an acquittal has been prejudiced.[25] In essence, a defense motion for mistrial necessitated by judicial or prosecutorial overreaching is not truly voluntary, but is instead the result of a "Hobson's choice" between giving up his first jury and continuing a trial tainted by judicial or prosecutorial misconduct.[26]

In *United States v. Dinitz*,[27] the Supreme Court first attempted to elucidate a standard by which to determine when overreaching would bar a retrial. Faced with an unusual set of facts,[28] the Court advanced several possible standards without actually applying any particular one.[29] As a result, lower courts

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attributable to prosecutorial or judicial overreaching," *id.* at 485, and hinted that "where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred," *id.* n.12. The term "overreaching" has never actually been defined. In general, however, it denotes misconduct marked by willfulness and bad faith rather than prosecutorial or judicial error, or negligence. *See* Lee v. United States, 432 U.S. 23 (1977).

25. In United States v. Dinitz, 424 U.S. 600 (1976), the Court stated:

> [The defendant] may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial motion has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions.

Id. at 608.

26. *Id.* at 609.

27. 424 U.S. 600 (1976).

28. The defense attorney made an improper opening statement. On four occasions the judge reminded him of the purpose of the opening statement, but the attorney persisted in his improper remarks. The judge finally excluded the attorney from the trial and ordered him to leave the courthouse. The judge appointed another attorney to represent the defendant who then moved for, and was granted, a mistrial in order to gain more time to properly conduct his defense. *Id.* at 601-05.

It is difficult to draw a parallel between these facts and those of cases such as *Roberts*. Unlike *Roberts*, the misconduct in *Dinitz* stemmed from the defendant's own attorney. While the steps taken by the judge were open to question, there is little doubt that the judge had in mind prejudicing the interests of the defendant when he took the action. Such conduct can hardly be compared to the type of prosecutorial misconduct in *Roberts* where the prosecutor deliberately attempted to prejudice the defendants' chance for acquittal.

29. At one point, the Court suggested that the misconduct must be designed to obtain a more favorable opportunity to convict the defendant. At another point, the Court indicated that the misconduct must be intended to "goad the respondent into requesting a mistrial or to prejudice his prospects for an acquittal." And finally, the Court suggested

have applied *Dinitz* to support divergent standards under which retrial will be barred.[30]

C. The Court's Reasoning

The Majority Opinion

In *Roberts*, the Ninth Circuit recognized that the prosecutor's remarks appeared to have been intentional and to have prejudiced the defendants.[31] The court held, however, that double jeopardy does not bar retrial unless the prosecutor's comments are "deliberately made to provoke a mistrial."[32] Any conduct falling short of this standard, including gross negligence,[33] is insufficient to bar retrial.[34] In so holding, the court limited *Dinitz* to those cases where the prosecutor intends to provoke a mistrial.[35] The court reasoned that "the double jeopardy clause must be reserved for instances in which 'there has been an "abuse" of the trial process . . . such as to outweigh society's interest in the punishment of crime.' "[36]

The Dissent

Judge Norris, dissenting, criticized the court's distinction between prosecutorial overreaching intended to provoke a mistrial and overreaching intended to prejudice the defendant.[37] *Dinitz*, he argued, did not contemplate such a narrow protection of a defendant's double jeopardy interests. Rather, *Dinitz* should apply not only where the prosecutor goads the defendant into requesting a mistrial, but also where the misconduct inten-

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that the misconduct must be "motivated by bad faith or undertaken to harass or prejudice the respondent." *Id.* at 611.

30. *See* United States v. Martin, 561 F.2d 135 (8th Cir. 1977) (retrial barred when prosecutor's conduct is undertaken to harass or prejudice the defendant); United States v. Nelson, 582 F.2d 1246 (10th Cir. 1978) (question is whether the conduct was the product of a scheme intentionally calculated to trigger the declaration of a mistrial), *cert. denied*, 439 U.S. 1079 (1979); Drayton v. Hayes, 589 F.2d 117 (2d Cir. 1979) (retrial barred where the conduct is prejudicial and motivated by bad faith).

31. 640 F.2d at 228.

32. *Id.*

33. Two circuits have adopted a gross negligence standard as a bar to retrial. *See* United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976) (quoting United States v. Beasley, 479 F.2d 1124 (5th Cir.), *cert. denied*, 414 U.S. 924, *reh. denied*, 414 U.S. 1052 (1973)); United States v. Martin, 561 F.2d 135 (8th Cir. 1977).

34. 640 F.2d at 228.

35. *Id.*

36. *Id.* (quoting United States v. Jorn, 400 U.S. 470, 492 (1971)).

37. 640 F.2d at 228 (Norris, J., dissenting).

tionally " *'prejudice[s] his prospects for an acquittal.'* "[38]

The dissent reasoned that the defendant's double jeopardy concerns are implicated in either instance. First, in both cases the prosecutor threatens defendant's " 'valued right . . . to have his trial completed by a particular tribunal.' "[39] Second, whatever the prosecutor's motive, the effect of such conduct is to enhance the possibility than an innocent defendant may be found guilty.[40]

Finally, the dissent contended that distinguishing between a prosecutor's intent to prejudice the defendant and the intent to provoke a mistrial is problematical at best. The two are "inextricably intertwined" because "the intention to provoke a mistrial includes the intention to prejudice the defendant while the intention to prejudice the defendant includes a willingness to risk a mistrial."[41]

The dissent concluded that given this difficulty of proving the prosecutor's actual intent, the likely result of the court's decision will be that "courts will rarely find that prosecutorial overreaching was intended to provoke a mistrial because there will be insufficient evidence that the prosecutor did not 'merely' intend to prejudice the jury and so gain a guilty verdict."[42]

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38. *Id.* at 229 (quoting United States v. Dinitz, 424 U.S. 600, 611 (1976)) (emphasis in *Dinitz*).

Justice Marshall, dissenting to the denial of certiorari in Green v. United States, 101 S. Ct. 2005 (1981), supported the dissent's position, stating that the defendant's double jeopardy interest "is implicated whenever intentional governmental misconduct results in a mistrial." *Id.* at 2007.

39. 640 F.2d at 229 (quoting Downum v. United States, 372 U.S. 734, 736 (1963)).

40. 640 F.2d at 229. *See* note 12 *supra*.

41. 640 F.2d at 229.

42. *Id.* at 230. In his dissent to the granting of certiorari in *Green*, Justice Marshall stated:

> I question the validity of the lower court's assumption that the Government in such cases tailors its misconduct to achieve one improper result as opposed to another. It is far more likely that in cases such as this, where the prosecution is concerned that the trial may result in an acquittal, that the government engages in misconduct with the general purpose of prejudicing the defendant. . . . Moreover, even if such subtle differences in motivation do exist, I suspect that a defendant seeking to prevent a retrial will seldom be able to prove the Government's actual motivation.

101 S. Ct. at 2006-07 n.2.

A second issue presented in *Roberts* was whether retrial is permissible after a conviction is reversed on appeal due to prosecutorial misconduct. Although the majority did not address this issue, it implied by its reliance solely on mistrial cases that identical standards will be applied regardless of the procedural context involved. Noting that this issue has not yet been settled,[43] the dissent recognized the possibility that a future court, given a case with similar procedural facts, could avoid the double jeopardy issue by declaring it inapplicable when a conviction is reversed on appeal.[44]

The general rule is that reversal of a conviction on procedural grounds does not bar retrial on double jeopardy grounds.[45] The dissent cited two recent Supreme Court cases which suggested that prosecutorial misconduct falls under the purview of this rule.[46] However, the dissent questioned whether the Court intended to include under this rule the type of bad faith prosecutorial overreaching outlined in *Dinitz*.[47]

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43. 640 F.2d at 230.

44. *Id.* at 230-31. The latest court to address this issue held that identical standards apply to either situation. United States v. Rios, 637 F.2d 728 (10th Cir. 1980).

45. United States v. Ball, 163 U.S. 662 (1896).

46. Burks v. United States, 437 U.S. 1 (1978); United States v. Scott, 437 U.S. 82 (1978). In *Burks*, the Court held that reversal due to insufficiency of the evidence prevents a retrial. In distinguishing reversal on evidentiary grounds from reversal due to trial error, the Court reasoned:

> [R]eversal for trial error . . . implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or *prosecutorial misconduct*. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Id. at 15 (emphasis added).

47. 640 F.2d at 230. *See* United States v. Opager, 616 F.2d 231, 236 n.13 (5th Cir. 1980), where the court suggested that:

> While research has revealed no case directly distinguishing 'misconduct' from 'bad faith prosecutorial overreaching', it seems clear that the latter phrase is the more demanding one
>
> . . . .
>
> . . . Misconduct, while it connotes some level of willfulness, does not require bad motive necessarily.
>
> 'Bad faith prosecutorial overreaching' allows no doubt, however, about the intent and purposefulness of the actor.

The dissent contended that traditional double jeopardy concerns support the finding of an exception to the general rule where intentional prosecutorial overreaching is involved. Although a conviction which is reversed does not prejudice defendant's "valued right to have his trial completed by a particular tribunal," this right is not the only protection afforded by the double jeopardy clause.[48] The dissent noted other double jeopardy interests of a defendant implicated by retrial after reversal on appeal. First, intentional misconduct by the prosecutor increases the likelihood of an erroneous conviction whenever a second trial is needed.[49] Second, the "expense, embarrassment, and ordeal" a defendant suffers by being subjected to an additional trial is equally present in either situation. For these reasons, the dissent opined that "it may be necessary to bar retrial after reversal for intentional prosecutorial misconduct to protect the defendant's other double jeopardy concerns" and to deter such misconduct.[50]

The dissent drew further support from *Burks v. United States*,[51] where the Supreme Court held that double jeopardy barred defendant's retrial after the appellate court reversed the trial court's denial of defendant's motion for an acquittal.[52] The Court reasoned that since no retrial would have occurred had the court properly granted the motion, to allow a retrial where the trial court incorrectly denied defendant's motion would be arbitrary.[53] Applying this reasoning to mistrial motions caused by bad faith prosecutorial misconduct, the dissent argued that whether or not the trial court granted the defendant's meritorious motion, the defendant should not be retried.[54]

D. Significance

The unresolved question remaining after *Roberts* is: Under what factual circumstances will prosecutorial overreaching prevent a retrial of a defendant? *Roberts* indicates that even in cases involving a high degree of prosecutorial abuse, double

48. 616 F.2d at 235 n.11.
49. *See* note 12 *supra*.
50. 640 F.2d at 231.
51. 437 U.S. 1 (1978).
52. *Id.* at 18.
53. *Id.* at 11.
54. 640 F.2d at 230-31.

jeopardy may not bar retrial.[55]

Under the *Roberts* standard, a defendant must, solely on the basis of the trial record, convince a reviewing court of the prosecutor's subjective intent to provoke a mistrial.[56] While the trial record may even reveal malicious conduct, evidence of what the prosecutor was thinking will not be apparent.[57] Thus, unless the prosecutor makes a statement that he intends to provoke a mistrial, the evidence a defendant can present will be circumstantial at best.[58] In this regard, the best evidence a defendant can offer is to demonstrate the weakness of the prosecution's case, since the weaker the case, the stronger the inference that the prosecutor intended to provoke a mistrial.

Roberts demonstrates well the difficulties in convincing a reviewing court of the requisite prosecutorial intent. First, there was strong evidence that the prosecutor acted intentionally to prejudice the defendants. As the record indicated, the prosecutor continued his improper argument, even after being admonished by the court to stop.[59] The Ninth Circuit panel conceded that the prosecutor's remarks "appear to have been intentional."[60]

Second, there was strong evidence of the highly prejudicial

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55. For example, in United States v. Nelson, 582 F.2d 1246 (10th Cir. 1978), *cert. denied*, 439 U.S. 1079 (1979), the prosecutor insinuated that the charges brought against the defendants were not brought against others because his main objective was to prosecute the "major traffickers." The judge struck this testimony calling it the most reprehensible he had ever heard. Because the defendants could not prove that this remark was designed to provoke a mistrial, the court permitted a retrial.

56. In these circumstances, a reviewing court may yield to the findings of the trial judge unless those findings were "clearly erroneous." *See* Moroyoqui v. United States, 570 F.2d 862 (9th Cir. 1977), *cert. denied*, 435 U.S. 997 (1978). However, in United States v. Medina-Herrera, 606 F.2d 770, 774 (7th Cir. 1979), *cert. denied*, 446 U.S. 964 (1980), the trial judge stated on record to the prosecutor: "I think you deliberately tried to prejudice the jury by bringing this out." The reviewing court found that this statement alone did not show intent to provoke a mistrial motion. *Id.* at 775.

57. United States v. Green, 636 F.2d at 933.

58. In Mitchell v. Smith, 633 F.2d 1009 (2d Cir. 1980), it was not clear whether the prosecutor's conduct was intentional or inadvertent. After reviewing the record, the court concluded that given the ease with which the prosecutor impeached a witness' testimony at a second trial, it was "unlikely that the prosecutor would resort to bad faith efforts to impeach." *Id.* at 1012.

59. 640 F.2d at 226-27. *See* note 4 *supra* for the dialogue between the prosecutor, defense counsel and court.

60. 640 F.2d at 228.

nature of the prosecutor's comments. The witness had turned state's evidence. His testimony was the heart of the prosecution's case so that establishing the witness' credibility was essential to a conviction.

Finally, in reversing the convictions, the court of appeals stated that the prosecutor had a weak case against the defendants.[61] That the defendants' first trial ended in a hung jury further evidences the weakness of the prosecutor's case.

These circumstances indicate that a very strong case of prosecutorial overreaching existed. It thus remains to be seen whether, under the *Roberts* standard, circumstantial evidence alone will ever be strong enough to bar retrial on double jeopardy grounds.

The future trend of double jeopardy cases, involving both issues of retrial following a mistrial and after reversal of a conviction, depends on the relative weight given to the competing interests that protect the defendant and society. From the defendant's point of view, intentional prosecutorial overreaching, regardless of its underlying motivation, presents the clearest example of the state abusing its superior resources against the accused.[62] From society's point of view, barring retrial on double jeopardy grounds necessarily precludes a determination as to the defendant's guilt or innocence. The *Roberts* court, however, has tipped the balance too far toward permitting retrials by adopting a standard that may effectively preclude successful double jeopardy challenges based on intentional prosecutorial misconduct.

C. Elliot Kessler

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61. United States v. Roberts, 618 F.2d at 535.

62. The Supreme Court has said that the state's superior resources should not be used to make repeated attempts to convict the same individual. "The strictest scrutiny is appropriate when the basis for the mistrial . . . [is the belief] that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." Arizona v. Washington, 434 U.S. 497, 508 (1978).

III. THE SHIELD OF JUDICIAL DEFERENCE AND THE JURY DELIBERATION CRITERIA FOR MANIFEST NECESSITY—A DE MINIMIS STANDARD OF APPELLATE REVIEW

A. INTRODUCTION

In *United States v. Cawley*,[1] the Ninth Circuit applied the mistrial exception to the fifth amendment guarantee of freedom from double jeopardy in a capital case. The court's application continued shifts in policies and analyses which may increase the trial judge's authority to declare mistrials.

On December 22, 1978, police arrested the defendant after they discovered heroin in his van. The defendant's first trial lasted two-and-one-half days. After three-and-one-half hours of jury deliberation, the jury foreman informed the judge that the jury could not agree. Without consulting counsel, questioning the jury or motivating the jury with an *Allen* charge,[2] the trial judge declared a mistrial *sua sponte*. The defendant failed to object to the declaration, was tried again and convicted. Following this second trial, the defendant appealed contending, *inter alia*, that the trial court's mistrial declaration subjected him to double jeopardy.

B. BACKGROUND—THE MISTRIAL EXCEPTION

A trial judge properly exercises his or her discretion to declare a mistrial when a jury cannot reach a verdict.[3] If the judge declares a mistrial, the defendant may be subjected to a second trial before a new jury.[4]

The mistrial exception to the fifth amendment's double jeopardy clause is well-founded.[5] The fountainhead case is

1. 630 F.2d 1345 (9th Cir. 1980) (per Farris, J.; the other panel members were Pregerson, J., and Skelton, S.J., sitting by designation).

2. The *Allen* charge, initially approved in Allen v. United States, 164 U.S. 492 (1896), is an instruction advising jurors to give deference to each other's views, and to listen with a disposition to be convinced of each other's argument. Its popularity as a motivational tool has been declining as it is sometimes deemed coercive. Sullivan v. United States, 414 F.2d 714, 716-17 (9th Cir. 1969). For a general discussion of the current trend in *Allen* charge use see annot., 44 A.L.R. Fed. 468 (1979).

3. Illinois v. Sommerville, 410 U.S. 458, 464 (1973).

4. *Id.* at 462.

5. *Id.* at 461-66.

United States v. Perez,[6] where the Supreme Court considered a classical mistrial[7] in which the defendant had not consented to the declaration. Writing for the Court, Justice Story found no legal bar to a new trial. Justice Story opined that in classical mistrials, courts have the discretion to discharge a jury from giving any verdict "whenever, in [the court's] opinion, taking all the circumstances into consideration, there is *manifest necessity* for the act, or the ends of public justice would otherwise be defeated."[8] Justice Story added, however, that the judge's discretionary power should be used "with the greatest caution, under urgent circumstances, and for very plain and obvious causes."[9]

The discretionary power set forth by Justice Story allows the trial judge to balance society's interests in fair judgments and conserving judicial resources against a defendant's valued right to have his or her trial completed by a particular tribunal.[10] This "valued right" upholds the purposes of the fifth amendment double jeopardy clause to protect the defendant from continued embarrassment, anxiety, expense, and restrictions on his liberty.[11] Society's interests, on the other hand, are protected by the declaration of a mistrial when either manifest necessity for the discharge exists, or the ends of public justice would otherwise be defeated.[12] The principal example of manifest necessity for a mistrial is the failure of the jury to agree.[13] Although the courts have repeatedly admonished against a precise test,[14] they have consistently relied on several factors to determine what constitutes manifest necessity. These factors include the probability that the jury can reach a verdict within a

6. 22 U.S. (9 Wheat.) 579 (1824). *Perez* is the fountainhead case considering appellate review of classical mistrials. Illinois v. Sommerville, 410 U.S. at 461.

7. Classical mistrials result from the jury's failure to agree. Downum v. United States, 372 U.S. 734, 736 (1963).

8. 22 U.S. (9 Wheat.) at 580 (emphasis added).

9. *Id.*

10. United States v. See, 505 F.2d 845, 851 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

11. *E.g.*, United States v. Jorn, 400 U.S. 470, 479 (1971).

12. Illinois v. Sommerville, 410 U.S. 458, 461 (1973) (quoting United States v. Perez, 22 U.S. (9 Wheat.) 579, 579 (1824)); Arnold v. McCarthy, 566 F.2d 1377, 1386 (9th Cir. 1978).

13. Downum v. United States, 372 U.S. 734, 736 (1963); Arnold v. McCarthy, 566 F.2d 1377, 1386 (9th Cir. 1978). See United States v. See, 505 F.2d 845, 851 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975); Forsberg v. United States, 351 F.2d 242 (9th Cir.), *cert. denied*, 383 U.S. 950 (1966).

14. *E.g.*, Arnold v. McCarthy, 566 F.2d 1377, 1386 (9th Cir. 1978).

reasonable time,[15] length of time the jury has deliberated,[16] length of the trial,[17] complexity of the issues,[18] effects of exhaustion or coercion on the jury,[19] presence of an *Allen* charge,[20] the jury's statement that it cannot agree,[21] and the way this statement is communicated to the judge.[22]

Although appellate courts often mention these criteria, they usually defer to the trial judge's discretion.[23] In *Cawley*, two factors have special significance: the correlation between the length of the trial and the length of deliberation, and the trial judge's failure to question the jury.

Correlation Between the Length of Trial and the Length of Deliberation

In those rare instances where appellate review has found a declaration of mistrial an abuse of judicial discretion, courts have focused their attention on the objective factors of manifest necessity: length of trial, length of deliberation, source of the jury's statement, and presence of an *Allen* charge.[24] Some or all

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15. Illinois v. Sommerville, 410 U.S. 458, 462 (1973); Gori v. United States, 367 U.S. 364, 368 (1960); United States v. See, 505 F.2d 845, 851 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

16. Rogers v. United States, 609 F.2d 1315, 1317 (9th Cir. 1979).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. The most critical factor is the jury's own statement that it is unable to reach a verdict. United States v. See, 505 F.2d 845, 851 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

22. See notes 36-43 *infra*, and accompanying text for a discussion of the judge-jury communication factor.

23. Arizona v. Washington, 434 U.S. 497, 509-10, 510 n.28 (1978). In United States v. See, 505 F.2d 845 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975), the court, after diligent research, found no case declaring that a mistrial was prematurely declared once the jury communicated to the district judge that it was deadlocked. *Id.* at 854.

24. *See, e.g.*, United States v. Gordy, 526 F.2d 631 (5th Cir. 1976) (no manifest necessity based on inconclusive communications between the judge and jurors, and five-and-one-half hours deliberation following a six-day trial); United States *ex rel.* Webb v. Court of Common Pleas, 516 F.2d 1034 (3d Cir. 1975) (no manifest necessity where the trial judge communicated only with the jury foreman, and the jury had deliberated for only six-and-one-half hours after a six-day trial. Retrial barred on double jeopardy grounds since this was defendant's second mistrial on the same charges); United States *ex rel.* Russo v. Superior Court of New Jersey, 483 F.2d 7 (3d Cir.) (no manifest necessity because of the lack of communication between judge and jury, and only 15 hours of jury deliberation following a nine-day trial), *cert. denied*, 414 U.S. 1023 (1973); United States v. Lansdown, 460 F.2d 164 (4th Cir. 1972) (mistrial declaration held an abuse of discre-

of these factors are weighed in an ad hoc equation—*i.e.*, the greater the length of trial, the greater should be the length of deliberation, with additional time required when the jury's statement is communicated only by the foreman.[25] Qualitative factors, including the presence of an *Allen* charge, may also influence this equation.[26]

The Arizona district court recently applied such an equation in *Brown v. Hughes*.[27] The *Brown* trial lasted twenty-two days, the jury deliberated two days, and the jury foreman conducted all communications to the judge.[28] From these factors, the court of appeals found the mistrial declaration an abuse of judicial discretion.[29]

The correlation between the length of trial and the duration of jury deliberation has been widely considered. Time for deliberation should be "long enough to warrant a conclusion that agreement is not fairly possible,"[30] and that the jury had a "reasonble opportunity to deliberate."[31] In *United States v. See*,[32] the Ninth Circuit demonstrated the value of the trial/deliberation correlation when it found ten hours of deliberation following a three-and-a-half day trial sufficient for a classical mistrial.[33] In *Arnold v. McCarthy*,[34] the Ninth Circuit found twelve hours of deliberation sufficient for a short trial of ordinary complexity. In both cases, the most critical factor was the jury's own statement that it could not agree.[35]

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tion, considering the absence of any judge-jury communication and the jury's deliberation of only 11 hours on a close question of credibility).

Recently, the Tenth Circuit found no manifest necessity when it focused its inquiry on the lack of any recorded communication between the judge and jury after the judge had given an *Allen* charge. United States v. Horn, 583 F.2d 1124 (10th Cir. 1978).

25. *See generally* cases cited note 24 *supra*.

26. *See generally* Rogers v. United States, 609 F.2d 1315, 1317 (9th Cir. 1979), where a three-and-a-half-day jury deliberation, which included an *Allen* charge, following a three-and-a-half-day trial was sufficient even though the judge had not inquired directly of the jurors immediately prior to the mistrial declaration.

27. 483 F. Supp. 793 (D. Ariz. 1980).

28. *Id.* at 795, 797.

29. *Id.* at 798.

30. United States v. Hotz, 620 F.2d 5, 7 (1st Cir. 1980).

31. Nelson v. District Court, 543 F.2d 631, 632 (8th Cir. 1976).

32. 505 F.2d 845 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

33. *Id.* at 852.

34. 566 F.2d 1377, 1387 (9th Cir. 1978).

35. Arnold v. McCarthy, 566 F.2d 1377, 1387 (9th Cir. 1978); United States v. See,

Judge-Jury Communication

Trial judges question the jury to determine independently whether there is a reasonable prospect of the jury agreeing.[36] Questioning can be done either through the jurors—individually or as a group—or through the jury foreman.[37] The preferred approach is a poll of the jury.[38] In addition to providing the judge with greater insight,[39] this method may also motivate the jury to reach a verdict.[40] However, polling individual jurors is not required and, in this circuit, questioning the jury as a group is an acceptable alternative.[41]

Cawley was the first time the Ninth Circuit reviewed a classical mistrial in which the jury was not questioned. In *Brown*, the Arizona district court considered a mistrial where the judge questioned only the jury foreman. The court held that "one juror's opinion of a deadlock, even if it is the foreman's, is [not] a sufficient basis for the Court to conclude that the jury is deadlocked."[42] The *Brown* court, however, relied heavily on *Arnold* and *See*, cases which do not support that holding. Both *Arnold* and *See* support only the proposition that a poll of the jury is the preferred method.[43]

C. Decision and Rationale of the Court

In *Cawley*, the Ninth Circuit panel reiterated the two *Perez* criteria for finding a mistrial: "A mistrial may be declared . . . without violating the Fifth Amendment's provision against double jeopardy when 'there is either (1) "manifest necessity" [such as a jury deadlock] for the discharge of the original pro-

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505 F.2d 845, 851 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975). *See also* Rogers v. United States, 609 F.2d 1315, 1317 (9th Cir. 1979).

36. ABA Projects on Minimum Standards for Criminal Justice, Trial by Jury § 5.4(c), at 156-57 (approved draft 1968) [hereinafter cited as ABA Projects], *cited with approval in* United States v. See, 505 F.2d 845, 852 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

37. Arnold v. McCarthy, 566 F.2d 1377, 1387 (9th Cir. 1978).

38. "Merely questioning the jury foreman may not be sufficient." *Id.* at 1387.

39. ABA Projects, *supra* note 36, at § 5.4(c), at 156-57.

40. Brown v. Hughes, 483 F. Supp. 793, 797 (D. Ariz. 1980).

41. United States v. See, 505 F.2d 845, 851-52 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

42. 483 F. Supp. at 796.

43. Arnold v. McCarthy, 566 F.2d 1377, 1387 (9th Cir. 1978); United States v. See, 505 F.2d 845, 851 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

ceedings, or (2) "the ends of public justice" would otherwise be defeated.' "[44]

The panel reviewed the relevant factors supporting the trial court's declaration. The panel endorsed great deference to the trial judge, reasoning that he was in the best position to assess the relevant factors: "the jury's collective opinion that it cannot agree, the length of the trial and complexity of the issues, the length of time the jury has deliberated, whether the defendant has made a timely objection to the mistrial, and the effects of exhaustion and coercion on the jury."[45]

The court found the jury's own statement the most critical factor[46] and that the statement must be followed by questioning the jury or jury foreman.[47] If the judge is satisfied that the jury cannot agree, the judge may declare a mistrial without further questioning the jury or consulting with counsel.[48]

After briefly reviewing the length of the trial, the jury deliberation, the relatively simple nature of the issues, and the probability that the jury was not exhausted, the court shifted its focus to the defendant's failure to object, since a timely objection would have allowed the judge the opportunity to reconsider whether the jury had become vulnerable to coercion.[49] Questioning the relatively short length of deliberation, the court minimized the importance of the defendant's failure to object, and withdrew from the question of jury coercion. The court hypothesized that "some factor in [the trial judge's] discussion with the jury foreman may have convinced the judge that further deliberation would be futile."[50] Finally, the court implied that by virtue of the defendant's failure to object, the prosecution's burden shifted to the defendant to show that the mistrial declaration was an abuse of judicial discretion.[51] The Ninth Circuit found no

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44. 630 F.2d at 1348 (quoting Arnold v. McCarthy, 566 F.2d 1377, 1380 (9th Cir. 1978)). *See also* Illinois v. Sommerville, 410 U.S. 458 (1973).

45. 630 F.2d at 1348-49 (quoting Rogers v. United States, 609 F.2d 1315, 1317 (9th Cir. 1979)).

46. 630 F.2d at 1349.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

abuse of judicial discretion. Manifest necessity was present, and the mistrial declaration was proper.[52]

Judge Pregerson dissented. First, after reviewing the facts, he was unable to conclude that the trial court exercised the sound discretion required by *Arizona v. Washington*.[53] Moreover, he was "unable to say that 'manifest necessity' for the mistrial existed or that 'careful consideration [was accorded the defendant's] interest in having the trial concluded in a single proceeding.' "[54]

D. Analysis

Appellate review of cases involving the double jeopardy mistrial exception should consider all factors relevant to a finding of manifest necessity.[55] Normally, consideration of subjective factors, such as the state of mind of the jury, will be left to the trial judge who is in the best position to observe them.[56] Objective factors, however, lend themselves more readily to appellate review.[57]

In *Cawley*, two objective factors stand out. First, the trial court failed to poll the jury members as recommended by *Arnold* and *See*.[58] The Ninth Circuit attempted to find support in *Rogers v. United States*[59] for the trial court's reliance on the questioning of the jury foreman alone.[60] *Rogers*, however, merely illustrates an instance where the offsetting factors of lengthy jury deliberations and prior collective questioning made reliance

52. *Id.*

53. 434 U.S. 497, 516 (1978). In *Arizona*, the Court considered a case where the trial judge had, after much deliberation and after granting the defense and prosecution a full hearing, declared a mistrial pursuant to the defense counsel's airing of improper and highly prejudicial evidence before the jury. The Court held that the trial judge's deliberation and hearing demonstrated that sound discretion had been exercised, and the mistrial declaration was in order. *See also* text accompanying notes 8-10 *supra*.

54. 630 F.2d at 1351 (quoting Arizona v. Washington, 434 U.S. 497, 516-17 (1978)).

55. Arnold v. McCarthy, 566 F.2d 1377, 1387 (9th Cir. 1978).

56. The complexity of the case and the amount of time required by the jury is best determined by the trial judge. *Id. See also* United States v. Goldstein, 479 F.2d 1061, 1069 (2d Cir. 1973).

57. For a discussion of objective factors, see text accompanying note 24 *supra*.

58. For a discussion of the importance of polling the jury, see notes 36-43 *supra* and accompanying text.

59. 609 F.2d 1315 (9th Cir. 1979).

60. 630 F.2d at 1349.

on the responses of the jury foreman acceptable.[61] Consequently, even if the absence of jury questioning is not a per se judicial abuse, it certainly places a great burden on the other factors to support the judge's decision. In *Cawley*, the other factors do not support the trial judge's conclusion that the jury could not agree.[62]

Second, the court avoided analyzing the trial-deliberation correlation. The court attempted to excuse this analysis by alluding to a vague shift of the burden from the prosecution to the defendant.[63] The court's authority for this shift, *Arizona v. Washington*,[64] does not reasonably support this proposition.[65]

Clearly, the *Cawley* majority should have used a more thorough analysis, as set forth by Judge Pregerson in his dissent, and considered the factors of the trial-deliberation correlation, the lack of direct questioning of the individual members of the jury, and the lack of an *Allen* charge.[66]

Apparently, *Cawley* presents the only Ninth Circuit case upholding a declaration of mistrial after a jury deliberation of only three hours, regardless of the brevity of the trial. Admittedly, the trial-deliberation correlation in the instant case is not dispositive, since both trial and deliberation were brief. However, the trial judge's aversion to an *Allen* charge, or any other form of jury motivation, more clearly shows the insufficiency of

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61. In *Rogers*, the jurors deliberated four days following a three-day trial. After they reported their inability to agree, the judge gave an *Allen* charge, and the jury resumed deliberation. One hour later, the jury sent a note via the foreman indicating that they were deadlocked and, without further inquiry, the judge declared a mistrial. The appellate court held that "under these circumstances there was no need for the judge to inquire further of the jurors" and there was manifest necessity to support a mistrial declaration. 609 F.2d at 1317.

62. See text accompanying note 2 *supra*.

63. 630 F.2d at 1349.

64. 434 U.S. 497 (1978).

65. In *Arizona*, the Court considered a case where the defendant had objected to a mistrial declaration. The Court stated only that where the defendant had objected to the declaration, the burden of proof on judicial discretion lay with the government. The Court did not consider the burden of proof where the defendant fails to object. 434 U.S. at 505. The *Cawley* court failed to distinguish between a *proposal* by the judge for a mistrial declaration, where the defendant's consent is implied if he fails to object, and a *sua sponte* declaration, where he may have no opportunity to object. *See* United States v. Phillips, 431 F.2d 944 (3d Cir. 1970).

66. 630 F.2d at 1351.

the majority's analysis.[67]

Finally, the Ninth Circuit's failure is crystallized by the fact that the trial judge found manifest necessity for a mistrial solely from questioning the jury foreman. Thus, the defendant's right to conclude his trial before the first jury was subrogated, not to the public's interest in fair trials ending in just judgments, but to the lay powers of observation of a jury foreman.

E. Conclusion

In *Cawley*, the Ninth Circuit set a de minimis standard of appellate review of classical mistrials. This standard cannot be justified as conducive to fair trials or impartial jury verdicts. It can only act to subvert the defendant's right to conclude his trial before a particular tribunal.

Steven Booska

IV. SIXTH AMENDMENT RIGHT TO COUNSEL—NO *MASSIAH* VIOLATION ABSENT A SHOWING OF PREJUDICE

A. Introduction

In *United States v. Bagley*,[1] the Ninth Circuit held that placing an informant in a defendant's cell alone does not warrant an automatic *Massiah* violation: The defendant must prove apparent prejudice before the court will recognize a violation. The defendant was indicted and charged with being a felon in possession of firearms, a felon in receipt of firearms, dealing in firearms and obstruction of justice.[2] Shortly thereafter, the government placed a paid informant in his cell.[3] One prosecutor testified that the government instructed the informant to obtain information concerning the firearm violation;[4] a second testified

67. *See* note 2 *supra* and accompanying text.

1. 641 F.2d 1235 (9th Cir. 1981) (per Sneed, J.; the other panel members were Fletcher, J. and Jameson, D.J., sitting by designation).

2. *Id.* at 1236-37.

3. Brief for Appellant at 3.

4. *Id.*

that the informant was to obtain evidence concerning unrelated homicides.[5] The informant testified at neither the pretrial evidentiary hearing nor the trial.[6]

The defendant argued that the use of an informant violated his constitutional rights. The Ninth Circuit panel disagreed. This Note explores the alleged *Massiah* violation, and the significance of the court's decision not to recognize it as such.

B. Background

Prior to 1964, a defendant awaiting trial could only raise fourteenth amendment due process challenges to police or prosecutorial overreaching.[7] In 1964, the Supreme Court in *Massiah v. United States*,[8] excluded evidence police obtained in a surreptitious manner based on sixth amendment right to counsel grounds. The defendant in *Massiah*, already indicted, had made damaging admissions to a co-defendant and informant[9] while government agents listened through a radio transmitter.[10] The defendant was convicted based upon the recorded admissions to the informant.

On appeal, the Court held that absent the presence of defendant's counsel any police attempt to elicit information through an informant violated the sixth amendment.[11] The Court extended its holding to surreptitious interrogations as well as those conducted in a jailhouse. The Court reasoned that the *Massiah* interrogation occurred during a crucial stage of criminal proceedings, regardless of the location.[12]

The import of *Massiah* lies in its current interpretation.[13] The case was upstaged two years later by the landmark *Miranda v. Arizona* decision.[14] In *Miranda*, the Court ignored defendant's

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5. Brief for Appellee at 8-10.
6. 641 F.2d at 1239.
7. Spano v. New York, 360 U.S. 315 (1959).
8. 377 U.S. 201 (1964).
9. *Id.* at 203.
10. *Id.* at 201.
11. *Id.* at 205-06.
12. *Id.*
13. *See* Kamisar, Brewer v. Williams, Massiah *and* Miranda: *What is "Interrogation"? When Does It Matter?*, Geo. L.J. 1, 24 (1978).
14. 384 U.S. 436 (1966). *See* Elsen & Rosett, *Protections for the Suspect Under*

sixth amendment rights during interrogation, and focused on fifth amendment protections against self-incrimination.[15] As a result, self-incrimination became the theory used to protect defendants subject to interrogation. It was not until *Brewer v. Williams*,[16] however, that the Supreme Court rejuvenated the *Massiah* sixth amendment approach.

Police suspected Brewer of murder and transported him to another city after his indictment.[17] During the ride, the police and defendant engaged in seemingly innocuous conversation,[18] causing the defendant to reveal to the police the location of the victim's body.[19] This evidence was used to convict him.[20] The Court reversed, primarily because the police interrogated defendant in the absence of his counsel:[21] "[T]hat the incriminating statements were elicited surreptitiously in *Massiah*, and otherwise here, is constitutionally irrelevant. Rather, the clear rule of *Massiah* is that once adversary proceedings have commenced against the individual, he has a right to legal representation when the government interrogates him."[22]

The importance of *Brewer* is twofold: It resurrected *Massiah* into a working doctrine, and defined that doctrine so lower courts could apply its principles.[23] The Court established a specific time-frame for sixth amendment violations during which the defendant has a right to counsel if interrogated.[24] Second, it

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Miranda v. Arizona, 67 COLUM. L. REV. 645 (1967).

15. The fifth amendment provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

16. 430 U.S. 387 (1977).

17. *Id.* at 391-92.

18. *Id.* at 393. During the ride, the interrogating officer addressed the defendant: "[S]ince we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered." *Id.* at 392-93.

19. *Id.* at 393.

20. *Id.* at 391-92.

21. *Id.* at 397-98.

22. *Id.* at 401.

23. Brewer v. Williams, 430 U.S. at 401. "[O]nce adversary proceedings have commenced against an individual, he has the right to legal representation when the government interrogates him. It thus requires no wooden or technical application of the *Massiah* doctrine to conclude that [the defendant] was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments." *Id.* (footnote omitted).

24. 430 U.S. 388 (1977).

avoided applying *Miranda*.[25] The notable absence of the once premier case for protecting defendants' rights illustrates the Court's intent to switch from a fifth to a sixth amendment approach.[26] Furthermore, the disuse of *Miranda* conformed with the restrictions the Burger Court had imposed upon the initial gains made by defendants after *Miranda*.[27]

The *Brewer* Court recognized the need for the sixth amendment right to counsel as a safeguard for a criminal defendant's rights[28] and the fundamental purpose of the sixth amendment in insuring the fairness of trial and the integrity of the fact-finding process.[29] Though the *Brewer* Court established no set requirement for a showing of prejudice, it adhered to the exclusionary principle that evidence obtained improperly will be excluded.[30]

The Supreme Court most recently addressed the subject of sixth amendment-informant cases in *United States v. Henry*.[31] In *Henry*, the Court endorsed the *Brewer* approach of protecting a defendant's rights during the critical stages of prosecution.[32] The *Henry* Court also affirmed *Massiah* by stating that "[t]he *Massiah* holding rests squarely on interference with [defendant's] right to counsel."[33]

In *Henry*, the prosecution placed an informant in the defendant's cell, with instructions to be a passive listener.[34] The informant conducted a surreptitious interrogation for which he was compensated.[35] The Court held that "[b]y intentionally creating a situation likely to induce [defendant] to make incrimi-

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25. The Court stated that "there is no need to review in this case the doctrine of *Miranda v. Arizona*." *Id.* at 397.

26. *See* Kamisar, *supra* note 13, at 33-34. *See also* Saltzburg, *Forward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 208 (1980).

27. *See* Michigan v. Mosley, 423 U.S. 96 (1975). In *Mosley*, the Supreme Court ruled that a defendant who has been issued *Miranda* warnings, but declines to discuss the crime, can be questioned again, after a significant time lapse and if a new set of *Miranda* warnings is issued.

28. 430 U.S. at 398.

29. *Id.*

30. *Id.* at 406. *But see* Chief Justice Burger's dissent at 416-17.

31. 447 U.S. 264 (1980).

32. *Id.* at 270.

33. *Id.*

34. *Id.* at 266.

35. *Id.*

nating statements without the assistance of counsel, the Government violated [defendant's] Sixth Amendment right to counsel."[36]

In effect, *Henry* affirmed both *Massiah* and *Brewer*: Once the right to counsel attaches, the sixth amendment protects a defendant in an interrogation where counsel is absent. Furthermore, *Henry* extended the sixth amendment approach beyond *Brewer*. In *Brewer*, the Court criticized police interrogations which deliberately elicit information in a surreptitious manner.[37] In *Henry*, however, the Court expounded that the defendant need only prove that the police actions were "likely to induce the defendant to make incriminating statements."[38] The *Henry* Court cited three important factors to determine whether a sixth amendment violation has occurred: (1) whether the government paid and instructed the informant, (2) whether the informant was a fellow inmate, and (3) whether the defendant was indicted.[39]

Justice Powell concurred and stated that he "could not join the Court's opinion if it held that the mere presence or incidental conversation of an informant in a jail cell would violate *Massiah*."[40] For him to find a sixth amendment violation, "defendant must show that the government engaged in conduct that, considering all of the circumstances, is the functional equivalent of interrogation."[41] The concurrence focused on the actions of the police, rather than those of the defendant and concluded that if the police deliberately attempt to elicit information from defendant in the absence of counsel, they violate the sixth amendment.[42]

In *United States v. Glover*,[43] the Ninth Circuit, in a case

36. *Id.* at 274 (footnote omitted).

37. 430 U.S. at 399-400.

38. 447 U.S. at 274.

39. "Each of these factors was important. The first established that government action was involved. The second factor demonstrated that no knowing waiver had occurred and the third, that Henry was entitled to counsel." Cahill v. Rushen, 501 F. Supp. 1219, 1225 (E.D. Cal. 1980).

40. 447 U.S. at 277.

41. *Id.*

42. *Id.*

43. 596 F.2d 857 (9th Cir. 1979).

concerning improper interference by prosecutorial agents with the defendant's attorney-client relationship, held that because a federal agent obtained no incriminating evidence, the defendant suffered no prejudice and did not have an adequate sixth amendment claim.[44] In *Glover*, a federal agent interviewed the defendant without the permission of the defendant's attorney but obtained no evidence. The *Glover* court distinguished *Brewer* and *Massiah* by determining that the purpose of the interview in *Glover* was to make an offer to the defendant to gather information in exchange for dismissal of some of the charges,[45] whereas the government in both *Brewer* and *Massiah* intended to obtain incriminating evidence.[46] The *Glover* court, in affirming defendant's conviction, stated that "had the interviewing agents obtained any evidence that could have been used against the defendant, this would be a different case."[47]

More recently, in *United States v. Irwin*,[48] the Ninth Circuit stated: "The right is only violated when the intrusion substantially prejudices the defendant. Prejudice can manifest itself several ways. It results when evidence gained through the interference is used against the defendant at trial . . . and from other actions designed to give the prosecution an unfair advantage at trial."[49]

In *United States v. Kilrain*,[50] the Fifth Circuit required a showing of prejudice to exclude evidence. The defendant was incarcerated for various felony narcotic violations.[51] After indictment and before trial, the defendant met with an informant and discussed his approaching trial. The defendant's attorney was not present. The Fifth Circuit recognized that although the defendant's counsel was absent during the meeting, both *Massiah* and *Brewer* were distinguishable. The court found that the

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44. *Id.* at 864.
45. *Id.* at 862.
46. *Id.*
47. *Id.* at 864.
48. 612 F.2d 1182 (9th Cir. 1979). In *Irwin*, government agents petitioned defendant to continue to act as an informant while under new indictments. Defendant's counsel was not aware of the government's efforts. The district court found the government's actions improper, although they did not prejudice the defendant.
49. *Id.* at 1187.
50. 566 F.2d 979 (5th Cir. 1978).
51. *Id.* at 981.

agent did not testify at the trial as to the content of the meeting, and that the defendant failed to demonstrate that the prosecution obtained any evidence through the meeting. The court reasoned that the defendant suffered no prejudice and therefore affirmed his conviction.[52]

C. Court's Analysis

In *United States v. Bagley*, the Ninth Circuit reviewed *Massiah, Brewer* and *Henry* before concluding that no *Massiah* violation had occurred.[53] The court based its conclusion upon the requirements established by the previous Ninth Circuit cases. *Glover* established that the defendant must prove that he was prejudiced at trial by evidence obtained from defendant's interrogation conducted without the presence of defense counsel.[54] The *Bagley* court observed that the informant in this case did not testify at trial and, indeed, "[the government] received no evidence from the informant that it did not already possess."[55] The latter finding was further supported "by a comparison of the trial record and the record of probation revocation proceedings."[56] Applying these facts to the *Glover* test, the *Bagley* court concluded that no *Massiah* violation had occurred.[57]

Next, the *Bagley* panel addressed whether the Supreme Court, in *Henry*,[58] limited the *Glover* test to require a showing of prejudice at trial.[59] In concluding that the Court did not,[60] the *Bagley* court found that the Supreme Court has never established a rule that requires a showing of prejudice at trial.[61] The *Bagley* court, however, assumed that the Supreme Court impliedly intended that prejudice at trial be apparent to establish a *Massiah* violation.[62]

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52. *Id.* at 982.

53. 641 F.2d at 1239.

54. 596 F.2d at 864.

55. 641 F.2d at 1239.

56. *Id.* The prosecution relied on testimony of several witnesses who had transacted firearms deals with the defendant. The witnesses and their testimony remained the same in both proceedings.

57. *Id.*

58. For a discussion of *Henry*, see text accompanying notes 31-42 *supra*.

59. 641 F.2d at 1239.

60. *Id.*

61. *Id.*

62. There is no language in *Massiah, Brewer* and *Henry* to support the *Bagley* court's assumption that the defendant must show prejudice at trial to establish a *Mas-*

The court next dealt with the informant's unavailability to testify.[63] Unavailability differs from not being called by the prosecution to tesify: If an informant is not called, it might appear that the testimony is not useful. Because the informant later became available, the *Bagley* court's refusal to remand[64] and allow his testimony seems contradictory. The court steadfastly required apparent prejudice,[65] but denied the defendant the opportunity to prove he suffered prejudice through use of the informant's testimony. Although the informant was available, the court denied the remand because it concluded that the informant's testimony would provide no additional information.[66]

This conclusion tacitly reveals the *Bagley* court's position on jailhouse informant cases. In regard to the informant's unavailability, the court believed it "reasonable to conclude that the informant's testimony could not affect the determination by the trial court that the government was in possession of all material evidence against appellant before the informant ever proposed to provide information."[67] The court was interested not in protecting the defendant from any sixth amendment violations, but rather in proving that the prosecution committed no wrong.[68] The court failed to address the possibility that any testimony by the informant could give a complete description of the transactions between himself and the defendant. The court declined to determine if any of these transactions prejudiced the defendant, even though this was the basis of his appeal.[69]

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siah violation. Justice Powell's concurrence in *Henry* required that the governmental action be the functional equivalent to an interrogation for a sixth amendment violation. *See* text accompanying note 41 *supra*.

63. 641 F.2d at 1239.

64. *Id.*

65. *Id.* at 1239-40.

66. *Id.* at 1241. Judge Fletcher, dissenting in part and concurring in part, found the case was properly within guidelines established by *Glover* and that the majority had extended *Glover* too far. *Id.* at 1242. Judge Fletcher argued that a defendant faced with *Massiah* violations at trial should not have to prove apparent prejudice. In the case where no evidence is presented at trial, however, Judge Fletcher would support the idea that the defendant must prove prejudice. *Id.*

67. *Id.* at 1240.

68. *Id.* at 1239.

69. *Id.* at 1237.

D. CRITIQUE

The *Bagley* court could simply have rendered a narrow decision upon the merits and affirmed the conviction. The court did decide against the defendant, but in the process attempted to reinterpret Supreme Court case law in sixth amendment right to counsel situations.

The majority opinion begins by citing controlling passages from *Massiah* and *Henry*.[70] The court then cited with approval its own *Glover* decision and distinguished *Henry*.[71] Unfortunately, the two cases deal with different aspects of the sixth amendment right to counsel issue. A careful reading of this section will show that the *Henry-Glover* comparison is ineffective. The *Glover* court concerned itself with government agents' interference with the relationship between defendant and his counsel.[72] In *Henry*, on the other hand, the Supreme Court examined a defendant's interrogation without his counsel present.[73]

The *Bagley* court was still faced with its objective of instituting prejudice requirements in sixth amendment right to counsel cases. With *Henry* summarily distinguished and dismissed, the *Bagley* court decided the case under the prejudice guidelines established in *Glover*. The *Bagley* court again grouped interference with the attorney-client relationship with interrogation in the absence of counsel.[74]

The Supreme Court has not made such a distinction, as evidenced by the different results in *Weatherford v. Bursey*[75] and the litany of *Massiah, Brewer* and *Henry*. In *Weatherford*, an agent interfered with the trial strategies of the defendant and his counsel.[76] The Supreme Court established a prejudice requirement in order to prove a sixth amendment violation.[77] In *Massiah, Brewer* and *Henry*, no such requirement was ever

70. *Id.* at 1238.
71. *Id.* at 1239-40.
72. *See* text accompanying notes 43-47 *supra*.
73. 447 U.S. at 274.
74. *See* 641 F.2d at 1238.
75. 429 U.S. 545 (1977).
76. *Id.* at 548.
77. *Id.* at 558.

enunciated. Instead, the Court expanded the protections afforded defendants who are subjected to surreptitious interrogation.[78] In *Henry*, the burden of proof placed upon the defendant had been eased from showing that information was deliberately elicited[79] to creating a situation "likely to induce" giving information.[80]

In *Bagley*, all the evidence pointed to defendant's guilt. Yet, there was evidence of government misconduct. The Supreme Court unequivocably stated in *Henry* that when the government interrogates a prisoner after indictment, he or she is entitled to have a lawyer present.[81] Consequently, the interrogation of the defendant in *Bagley*, in the absence of his counsel, should have called for a *Henry* analysis.

In *United States v. Sampol*,[82] a case decided at about the same time as *Bagley*, the District of Columbia Circuit enunciated three reasons in finding sixth amendment violations. In *Sampol*, a paid informant received a suspended sentence in exchange for information concerning the defendant obtained after indictment but before trial. The informant provided no new evidence but corroborated the prosecution's evidence and testified at trial.[83] The *Sampol* court reasoned: (1) the situation satisfied the three part test of *Henry*;[84] (2) the situation satisfied the "deliberately" elicited test of *Brewer*;[85] (3) the fact that the informant's testimony was not used directly by the prosecution was irrelevant—the court could not conclude that the informant's testimony would have resulted in harmless error.[86]

E. Effect

The short term effect of *Bagley* is justifiable. A convicted

78. *See* text accompanying notes 37-38 *supra*.
79. *E.g.* Brewer v. Williams, 430 U.S. at 399.
80. United States v. Henry, 447 U.S. at 274.
81. *Id.*
82. 636 F.2d 621 (D.C. Cir. 1980).
83. *Id.* at 630.
84. 447 U.S. at 270. *See* note 39 *supra*, and accompanying text. In *Sampol*, the government placed the informant in the defendant's cell. The defendant never waived his right to have his attorney present during interrogation. Finally, the defendant was entitled to an attorney because the adversarial process had already commenced.
85. 430 U.S. at 399.
86. 636 F.2d at 638.

felon is returned to prison, and justice is served. The methods used to derive that result, however, are not justifiable. Looking beyond the specifics of this case, its effect upon the Ninth Circuit may be far reaching. By using *Glover* as a springboard, the Ninth Circuit established a new requirement for defendants subjected to jailhouse interrogation. A defendant must now demonstrate that he incurred prejudice, thereby drastically increasing defendant's burden of proof, contrary to the direction taken by the Supreme Court.[87] If *Bagley* is followed, incarcerated prisoners will be subject to the strategies and ploys of prosecution teams and police who can seize the opportunity to gain unfair advantage. If the informant or agent does not testify at trial, the defendant will be hard pressed to show any prejudice.

*Mark F. Liscio**

V. OTHER DEVELOPMENTS IN CRIMINAL LAW & PROCEDURE

In other cases concerning criminal law and procedure, the Ninth Circuit validated a warrantless search of an automobile trunk as incident to a vehicle inspection, applied the *Blockburger* "same elements" test to successive prosecutions, refuted an interlocutory appeal of a motion to dismiss an indictment for an alleged Speedy Trial Act violation, and denied a defendant's claims to two court-appointed attorneys where the prosecution was not for a capital offense.

A. WARRANTLESS SEARCH OF A PAPER BAG IS VALID IF INCIDENT TO A VEHICLE INSPECTION

In *United States v. Portillo*,[1] the Ninth Circuit validated the warrantless search of a paper bag found in the trunk of a car because it was incident to a vehicle inspection.[2] Defendants Portillo (the passenger) and Montellano (the driver) were stopped

87. *See* Saltzburg, *supra* note 26, at 208.

* Second year student, Pace University School of Law.

1. 633 F.2d 1313 (9th Cir. 1980) (per Alarcon, J.; the other panel members were Sneed and Schroeder, J.J.), *cert. denied*, 101 S. Ct. 1764 (1981).

2. *Id.* at 1315.

on the freeway by a deputy sheriff for various traffic violations. Prior to the stop, the deputy sheriff was informed that two known felons were driving in the area, and received a description of their vehicle. He also learned that other officers had observed the men placing a paper bag in the trunk of the car.

After stopping the defendants, the officer opened the trunk to inspect a malfunctioning rear brake light. In examining the fixture, the officer supported his weight by placing a hand on top of a paper bag in the center of the spare tire hub. He felt a hard object in the bag, opened it and found a loaded revolver along with other items. The officer also opened a second paper bag in the trunk and found another loaded handgun. Based upon the evidence found in the trunk, the defendants were convicted of armed bank robbery.[3]

Defendants challenged the constitutional propriety of the warrantless search. The Ninth Circuit, relying upon *Rakas v. Illinois*,[4] ruled that passenger Portillo had no standing to raise the alleged illegality of the search because he possessed no protectable expectation of privacy in the automobile. The court held that Montellano, on the other hand, possessed a legitimate expectation of privacy in the vehicle because he had both permission to use the car and the keys to the ignition and trunk.[5]

The Ninth Circuit panel found that California Vehicle Code section 2806[6] authorizes an officer to conduct a reasonable inspection of a vehicle to determine the nature and extent of a

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3. Defendants were found guilty of armed bank robbery in violation of 18 U.S.C. § 2113 (Supp. III 1979).

4. 439 U.S. 128 (1978). In *Rakas*, the Court stated that, "a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy [in particular areas of the automobile searched]." *Id.* at 149. In the instant case, Portillo did not assert a property or possessory interest in the automobile, or in the seized property. Consequently, the court held he did not possess a protectable expectation of privacy. 633 F.2d at 1317.

5. *See* Jones v. United States, 362 U.S. 257 (1960).

6. CAL. VEH. CODE § 2806 (West 1971) provides in pertinent part:

> Any regularly employed . . . deputy sheriff having reasonable cause to believe that any vehicle . . . is not equipped as required by this code or is in such unsafe condition as to endanger any persons, may require the driver to stop and submit the vehicle . . . to an inspection and such tests as may be appropriate to determine the safety to persons and compliance with the code.

violation. The court noted that the reasonable cause necessary for an inspection under section 2806 differs from the probable cause requirement for nonconsensual searches in the criminal context.[7] The court concluded that the malfunctioning taillight represented a threat to the safety of persons on the highway, warranting "an inspection more intrusive than the causal observation of the exterior of the vehicle."[8]

The court also found the search of the paper bags constitutional. Recounting the decision in *United States v. Mackey*,[9] the Ninth Circuit suggested that a paper bag deserves less than full fourth amendment protection.[10] The court noted further that there is no expectation of privacy in containers whose contents are readily identifiable from their outward appearance.[11] Because the officer could identify the contents of the paper bag from an "outward feel," the court ruled that Montellano did not possess a reasonable expectation of privacy in the bags.[12] In addition, the court asserted that exigent circumstances confronting the officer entitled him, for his own safety, to determine immediately whether the bags contained a loaded weapon.[13] Thus, the nature of the container, the officer's allegedly inadvertent touching of it pursuant to a vehicle safety inspection, and exigent circumstances, persuaded the court in this case that a warrantless search was justified.[14]

The Ninth Circuit's decision may be questioned on two

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7. *See* People v. May, 76 Cal. App. 3d 543, 143 Cal. Rptr. 45 (1977).

8. 633 F.2d at 1319.

9. 626 F.2d 684 (9th Cir. 1980). In *Mackey*, the court stated that "[a] paper bag is among the least private of containers. It is easily torn, it cannot be latched, and, to a greater extent than most containers, its contents can frequently be discerned merely by holding or feeling the container." *Id.* at 687.

10. 633 F.2d at 1319-20.

11. *See* Robbins v. California, 101 S. Ct. 2841 (1981); Arkansas v. Sanders, 442 U.S. 753 (1979).

12. 633 F.2d at 1320.

13. *Id.*

14. *Id.* The court ruled, however, that the defendants were entitled to challenge on appeal the district court's ruling on the admissibility of prior convictions even though they did not take the stand. *Id.* at 1321. The court, therefore, extended to defendants the holding in United States v. Cook, 608 F.2d 1175 (9th Cir. 1979), *cert. denied*, 444 U.S. 1034 (1980). The defendants were not held to the requirement of making the record contemplated in Rule 103 of the Federal Rules of Evidence, as articulated in *Cook*, because that opinion had not been published at the time of defendant's trial. 633 F.2d at 1321.

counts. First, the nature and scope of the vehicle safety inspection is particularly suspect here. This case is readily distinguishable from the reasonable inspection of a trunk conducted in *People v. May*,[15] in which the car's mechanical condition was seriously in question.[16] The malfunctioning of one brake light does not ordinarily establish a serious condition, nor does it create a compelling need to inspect a closed or locked trunk. It is doubtful, therefore, that the officer had reasonable cause to make any inspection of the trunk.

Second, the Supreme Court recently ruled in *Robbins v. California*[17] that closed containers found in the trunk of an automobile are protected by the fourth amendment against warrantless searches. Moreover, the court specifically declared that closed, opaque containers of any type may not be opened without a warrant, unless "by its distinctive configuration, its transparency or otherwise . . . its contents are obvious to an observer."[18]

The appearance, and not the "outward feel" of the container's contents, therefore, appears to be the crucial element in justifying a warrantless search. In light of *Robbins*, the Ninth Circuit's explication of the privacy interest in a paper bag or any closed, opaque container found in the trunk of an automobile will have to be re-evaluated.

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15. 76 Cal. App. 3d 543, 143 Cal. Rptr. 45 (1977).

16. In *May*, the officer observed that the A-arm suspension had been cut. Based on prior experience, the deputy believed that the suspension system represented a dangerous fire hazard, and that equipment necessary for the system protruded into the trunk. *Id.* at 545, 143 Cal. Rptr. at 45-46. Furthermore, the officer in *May* had no prior knowledge tht the trunk might contain contraband. *Id.*

17. 101 S. Ct. 2842 (1981). In *Robbins*, the Court stated:

> What one person may put into a suitcase, another may put into a paper bag. . . . [A]nd as the disparate results in the decided cases indicate, no court, no constable, no citizen, can sensibly be asked to distinguish the relative 'privacy interests' in a closed suitcase, briefcase, portfolio, duffle bag, or box.

Id. at 2846 (citations omitted). *See also* New York v. Belton, 101 S. Ct. 2860 (1981), in which the Court outlined the constitutionality of a warrantless search of a closed container found in the passenger compartment of the automobile.

18. 101 S. Ct. at 2847.

B. Analyzing the Breadth of the *Blockburger* Test

In *United States v. Brooklier*,[19] a Ninth Circuit panel held that the *Blockburger* "same elements" test determines whether double jeopardy bars post-conviction prosecutions. In 1974, the defendants pled guilty to a charge of conspiracy to extort money from a bookie.[20] In 1979, they were indicted for the actual extortion.[21] Defendants moved to dismiss the actual extortion charge on double jeopardy grounds because they had already been convicted of the conspiracy.[22]

In *Illinois v. Vitale*,[23] the Supreme Court extended the *Blockburger* same elements test[24] to post-conviction prosecutions. Since defendants in *Brooklier* could have been prosecuted in 1974 on both charges under this test,[25] the Ninth Circuit reasoned that successive prosecution was likewise permissible. However, the court's reluctant holding noted the lack of clarity in this area of law. The *Brooklier* court explained why it might have reached a different result had it not deemed itself bound by Supreme Court precedent.

The double jeopardy clause protects against both successive prosecutions and multiple punishment for the same offense.[26] The court carefully pointed out that this case involved successive prosecution, not multiple punishment. The distinction is that the policies underlying the former protection are broader than those underlying the latter. Prosecution after conviction not only implicates a defendant's interest in not facing multiple

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19. 637 F.2d 620 (9th Cir. 1980) (per Fletcher; the other panel members were Alarcon and Canby, J.J.), *cert. denied*, 101 S. Ct. 1514 (1981).

20. *Id.* at 621. Section 1962(d) of the Racketeer Influenced and Corrupt Organization Act (RICO) makes conspiracy to extort money a crime. 18 U.S.C. § 1962(d) (1976).

21. Section 1962(c) of RICO makes actual extortion a crime. 18 U.S.C. § 1962(c) (1976).

22. 637 F.2d at 621.

23. 447 U.S. 410 (1980).

24. The *Blockburger* test states that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932).

25. In Ianelli v. United States, 420 U.S. 770 (1975), the Supreme Court held that under the *Blockburger* test a defendant can be charged in a single indictment with both conspiracy and the underlying substantive offense.

26. North Carolina v. Pearce, 395 U.S. 711, 717 (1969); United States v. Brooklier, 637 F.2d at 621.

punishment, but also brings into play other policies, such as "assuring finality, sparing defendants the financial and psychological burdens of repeated trials, preserving judicial resources, and preventing prosecutorial misuse of the indictment process."[27] Thus, the court suggested that had it not been for *Vitale*, it might have adopted the "same transaction" test[28] which requires all charges arising from the same transaction to be joined in a single prosecution.[29]

The *Brooklier* court questioned the reasoning of other circuit court decisions, as well as two Ninth Circuit cases,[30] which, under the authority of *Brown v. Ohio*,[31] extended the *Blockburger* test to successive prosecutions.[32] In *Brown*, the Supreme Court held that double jeopardy barred indictment for a greater offense after conviction for a lesser included offense.[33] The *Brooklier* court argued that *Brown* was merely a logical extention of the *Blockburger* ban on multiple punishments. Since concurrent prosecution for both offenses was precluded under *Blockburger*, successive prosecution was likewise barred. Therefore, the court reasoned that *Brown* did not clarify the standard to be applied to successive prosecutions.[34]

However, in *Vitale*, the Supreme Court relied on *Brown* for the proposition that the *Blockburger* test applies in "determining whether two offenses are the same for purposes of barring successive prosecutions."[35] Although recognizing that *Vitale* "did not discuss the difficult questions raised by post-conviction prosecutions,"[36] the court nevertheless deemed itself bound to

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27. 637 F.2d at 622.

28. This position was advocated in Abbate v. United States, 359 U.S. 187, 200 (1959) (Brennan, J., concurring), and in Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Brennan, J., concurring).

29. 637 F.2d at 623-24.

30. United States v. Solano, 605 F.2d 1141 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980); United States v. Snell, 592 F.2d 1083 (9th Cir.), *cert. denied*, 442 U.S. 944 (1979).

31. 432 U.S. 161 (1977).

32. *See* Brown v. Alabama, 619 F.2d 376 (5th Cir. 1980); United States v. Clark, 613 F.2d 391 (2d Cir. 1979), *cert. denied*, 449 U.S. 820 (1980); United States v. Brown, 604 F.2d 557 (8th Cir. 1979).

33. 432 U.S. at 169.

34. 637 F.2d at 623.

35. *Id.* at 624 (quoting Illinois v. Vitale, 447 U.S. 410, 416 (1980)).

36. 637 F.2d at 624.

"follow the Supreme Court's dictates however they are expressed."[37] Concluding, the court expressed its opinion that "[i]f the law of successive prosecutions is to be modified or clarified in this or some other more appropriate case, it will have to be by the Supreme Court and not by this panel."[38]

This decision is the unfortunate result of the Supreme Court's confused analysis in this area of double jeopardy. The Ninth Circuit panel deemed itself bound by Supreme Court interpretation, but indicated in clear terms that it would rather have adopted the same transaction approach toward successive prosecutions.

In *Vitale*, the Supreme Court failed to recognized that the double jeopardy ban on further prosecution for the same offense subsequent to conviction is distinct from that against multiple punishment for the same offense. This distinction is significant for policy reasons: Retrial is barred in the latter case because a defendant should not be punished twice for the same crime; retrial is barred in the former because a defendant should not have to face the burden of being prosecuted for an offense that could have been brought earlier. Perhaps because the term "same offense" appears in both contexts, courts have tended to confuse the two distinct protections by disregarding the separate underlying policies. Thus, courts have relied on *Brown*—a case conceptually limited to the multiple punishment context—as precedent for applying the *Blockburger* test to successive prosecutions. If the *Blockburger* test continues to be applied in the successive prosecution context, the protection against successive convictions will effectively be emasculated.

The *Blockburger* test makes sense with respect to multiple punishment. By comparing the elements of the offenses to determine whether the proof requirements for one also satisfy those for the other, the possibility of double punishment for a single wrong is avoided. However, the *Blockburger* test is inappropriate with respect to subsequent prosecutions. In this context, the concern is not only with multiple punishment, but also with the possibility the prosecutor may withhold the charge to bring it

37. *Id.*
38. *Id.*

under more favorable circumstances. By focusing merely on the nature of the offense, the inquiry is shifted away from the prosecutor's conduct, the burden of retrial on defendant, and the other policies underlying this double jeopardy protection.

Brooklier aptly illustrates why applying the *Blockburger* test in this context fails to protect the double jeopardy policies involved. The prosecutor could have joined the two charges at defendant's trial in 1974. There was no possibility that proof of one charge would necessarily mean conviction of the other. Therefore, conviction on both charges would not have resulted in unfair multiple punishment. However, the prosecutor chose not to bring the second charge until 1979. To decide the case on the basis that the charges involved different elements avoids the real issue of whether the prosecutor was justified in waiting five years to bring the charge.

The holding in *Brooklier* indicates that the *Blockburger* test will expand in the Ninth Circuit to include successive prosecutions. The court explained that its position would remain unchanged until the Supreme Court further clarifies this issue. As for now, *Brooklier* indicates that given changed circumstances, the Ninth Circuit stands ready to adopt the same transaction standard for evaluating successive prosecution double jeopardy claims. Consequently, the *Brooklier* court's reasoning will influence subsequent decisions.

C. No Right to Interlocutory Appeal of an Alleged Violation of the Speedy Trial Act

In *United States v. Mehrmanesh*,[39] the Ninth Circuit found an interlocutory appeal of a motion to dismiss an indictment for an alleged Speedy Trial Act[40] violation improper. The court reasoned that the appeal failed to meet the three-part test for interlocutory appeals established in *Abney v. United States*.[41] The *Mermanesh* court found that, under *Abney*, an order before final judgment may be appealed if: "(1) it completely disposes of the issue in question, (2) it is totally unrelated to the merits of the

39. 652 F.2d 766 (9th Cir. 1980) (per Canby, J.; the other panel members were Fletcher and Alarcon, J.J.).

40. 18 U.S.C. §§ 3161-3174 (1976).

41. 431 U.S. 651 (1977).

case; and (3) the right asserted would be irreparably lost if the appeal were delayed until after final judgment."[42]

In applying *Abney*, the Ninth Circuit looked to *United States v. MacDonald*[43] in which the Supreme Court denied an appeal of a constitutional speedy trial claim before final judgment. The *MacDonald* court reasoned the claim failed all three parts of *Abney* since it would neither dispose of the issue completely nor be unrelated to the merits of the case because the constitutional claim requires a showing of prejudice which cannot be measured accurately until after the trial. The *Mehrmanesh* panel was most impressed by the third point—that the speedy trial claim failed because the right to a speedy trial is offended by the delay before trial and not by the trial itself.[44] Thus, proceeding with a trial after a denial of a speedy trial would not compound the harm.

The *Mehrmanesh* court found that the statutory speedy trial claim, unlike the constitutional claim, met the first two parts of *Abney*, since the statute requires no showing of prejudice, but that it failed the third part for the same reason that a constitutional speedy trial claim fails—the right may be vindicated on appeal after final judgment.[45]

The court noted that a petition for mandamus relief might be appropriate where clear error was present, for example, "an indisputable mathematical error or a truly egregious delay."[46] Mandamus relief was not appropriate here even though other reasonable interpretations of the statutory language were possible, because the district court's interpretation was not unreasonable, especially in light of the lack of precedent.[47] Therefore, there was no clear error requiring mandamus relief.

Judge Fletcher dissented. He believed the statutory speedy trial claim met all three parts of *Abney*. He found congressional concern that a nonspeedy trial might prejudice a defendant at

42. 652 F.2d at 768.
43. 435 U.S. 850 (1978).
44. 652 F.2d at 769.
45. *Id.*
46. *Id.* at 770.
47. *Id.*

trial, increase the defendant's anxiety, subject him or her to public hostility, result in the loss of liberty and strain the defendant's financial resources.[48] The dissent concluded:

> If denial of a Speedy Trial Act claim may only be reviewed on appeal from a conviction, then a remedy is not available to those who are ultimately acquitted (but who nonetheless suffer all the disadvantages which concerned Congress), nor to those who, perhaps worn down by a lengthy pretrial delay, ultimately plead guilty.[49]

The dissent also believed that the majority misinterpreted the clear error standard in denying mandamus relief,[50] reasoning that in the interpretation of new law where no discretion is involved, the court of appeals should independently determine statutory meaning and thereby decide whether the district court's interpretation was clearly erroneous.

D. No Right to Two Court-Appointed Attorneys

In *United States v. Dufur*,[51] the Ninth Circuit held that invalidation of the death penalty provisions of a federal murder statute eliminated a defendant's right to two court-appointed attorneys in a prosecution for "capital crimes."[52] The defendant was convicted of first-degree murder. Under federal law, persons indicted for "capital crimes" are entitled to two attorneys.[53] However, since the death penalty provision of the federal murder statute[54] was rendered unconstitutional by *Furman v. Georgia*,[55] the district court concluded that first-degree murder under the statute did not constitute a "capital crime."[56] The Ninth

48. *Id.* at 772.
49. *Id.* at 773.
50. *Id.*
51. 648 F.2d 512 (9th Cir. 1980) (per Farris, J.; the other panel members were Trask and Goodwin, J.J.).
52. *Id.* at 515. The panel also held that there was no showing of prejudice from the cumulative effect of the district court's denial of motions concerning publicity; the district court's determination on the issue of waiver and voluntariness was supported by the record and not clearly erroneous; the indictment was sufficiently specific; and nothing in the prosecutor's closing argument warranted a mistrial. *Id.* at 513-14. This summary, however, is limited to a discussion of defendant's right to two attorneys.
53. 18 U.S.C. § 3005 (1976).
54. 18 U.S.C. § 1111 (1976).
55. 408 U.S. 238 (1972).
56. 648 F.2d at 514.

Circuit affirmed.[57] The issue was not previously addressed in the Ninth Circuit, although other circuits have settled the question.[58] The court agreed with the analysis and reasoning of the other circuits.[59] The panel explained: "Since the statute's purpose, in our opinion, derives from the severity of the punishment rather than the nature of the offense, the elimination of the death penalty eliminates Dufur's right [under section 3005][60] to a second court-appointed attorney."[61]

57. *Id.* at 515.

58. *See* United States v. Shepherd, 576 F.2d 719 (7th Cir.), *cert. denied*, 439 U.S. 852 (1978); United States v. Weddell, 567 F.2d 767 (8th Cir. 1977); United States v. Watson, 496 F.2d 1125 (4th Cir. 1973). In *Shepherd*, the Seventh Circuit stated that the purpose of the two-attorney right is "to reduce the chance that an innocent defendant would be put to death because of inadvertance or errors in judgment of his counsel." 576 F.2d at 729. In *Weddell*, the Eighth Circuit reached the same conclusion. 567 F.2d at 770. In *Watson*, the court upheld defendants' right to two attorneys even though the death penalty was invalid. 496 F.2d at 1129.

59. 648 F.2d at 514-15.

60. 18 U.S.C. § 3005 (1976).

61. 648 F.2d at 515.