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CRIMINAL LAW AND PROCEDURE

USE OF DRUG-TRAINED CANINES AS A SEARCH: INCREASED PROTECTION UNDER THE FOURTH AMENDMENT OR A FURTHER EROSION OF CONSTITUTIONAL GUARANTEES?

A. INTRODUCTION

In *United States v. Beale*,[1] the Ninth Circuit held that the use of a canine's sense of smell to detect the presence of contraband in personal luggage is a limited fourth amendment intrusion which may be conducted without a warrant and which may be based on an officer's "founded" or "articulable" suspicion rather than on probable cause.[2]

The defendant was convicted of possession with intent to distribute and conspiring to possess with intent to distribute a controlled substance.[3] He and a companion had entered the Fort Lauderdale Airport terminal together. At the security checkpoint, they separated and obtained their seating assignments independently. They both purchased tickets to San Diego, with a change of planes in Houston. After separately departing from the ticket counter, the defendant and his companion entered the boarding area and sat down together.[4] Observing this behavior, a sheriff's detective suspected that they were drug couriers.[5] After

1. 674 F.2d 1327 (9th Cir. 1982) (per Ely, J.; the other panel members were Fletcher and Reinhardt, JJ.) (as amended July 21, 1982; rehearing and rehearing en banc denied Aug. 5, 1982), *petition for cert. filed*, 51 U.S.L.W. 3321 (U.S. October 18, 1982) (No. 82-674).

2. 674 F.2d at 1335.

3. This was a violation of 21 U.S.C. §§ 841(a)(1), 846 (1976). Section 841(a)(1) provides in part: "it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense a controlled substance." Section 846 provides that "[a]ny person who attempts or conspires any offense defined in this subchapter is punishable by imprisonment or fine or both . . . ."

4. 674 F.2d at 1328.

5. The detective had 2 years of experience working on airport related narcotics

briefly questioning them, the detective went to the baggage area accompanied by a deputy and a trained canine, "Nick". "Nick", an experienced and reliable drug detector, sniffed the vicinity of the suspects' bags. The dog "alerted" to defendant's suitcase indicating the presence of narcotics.[6]

A computer check on the suspects revealed that the defendant's companion was recently convicted of possessing cocaine. In Houston, police officers kept the suspects and their luggage under surveillance while the suspects changed planes. They appeared as though they were not travelling together, deplaning separately.[7]

Agents in San Diego were notified about the suspects' arrival. An officer had a trained canine, "Duster", sniff the suspects' luggage. "Duster", an experienced and reliable drug detector, "alerted" to the defendant's suitcase and shoulder bag.[8] The San Diego officers obtained a search warrant for the defendant's luggage based upon a sworn affidavit detailing the facts above. Cocaine and marijuana were discovered therein.[9]

At trial and on appeal from his conviction, defendant contended that the use of the trained canines to sniff his luggage in the baggage area of the Fort Lauderdale Airport constituted an illegal search.[10] He argued, further, that this illegal search tainted the evidence found during the search of his luggage in San Diego which led to his arrest.[11] The Ninth Circuit Court of Appeals vacated the judgment and remanded the case to the district court to make a legal and factual determination of whether

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cases. He believed that the suspects behavior and their destination, which was "a known center of drug traffic," indicated that they may have been drug couriers. *Id.* at 1328 n.1 For a drug courier profile, *see generally* United States v. Mendenhall, 446 U.S. 544, 563-65 (1980) (Powell, J., concurring); Reid v. Georgia, 448 U.S. 438, 440-41 (1980).

6. 674 F.2d at 1329. "A dog can alert to the drug in a variety of ways; the dog can snarl, bark, whine or paw at a container." *Comment*, United States v. Solis: *Have the Government's Super-sniffers Come Down with a Case of Nasal Congestion?*, 13 SAN DIEGO L. REV. 410, 415 (1976) [hereinafter cited as *Supersniffers*].

7. 674 F.2d at 1329.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 1330. *See* Wong Sun v. United States, 371 U.S. 471, 484-88 (1963) for an explanation of how the "fruit of the poisonous tree" doctrine may render evidence obtained after the initial illegality "tainted".

the Fort Lauderdale detective's quantum of suspicion rose to a level of articulable suspicion.[12]

B. BACKGROUND

The Katz *Test*

Under traditional analysis, for constitutional protections to attach, a police intrusion must initially be held to be a search or seizure.[13] To invoke the fourth amendment[14] two questions must be answered affirmatively: First, has a search or seizure occurred; and second, was the search or seizure unreasonable?[15]

The Supreme Court in *Katz v. United States*[16] held that a search occurs when the government has "violated the privacy upon which [the defendant] justifiably relied."[17] Justice Harlan's concurrence announced a two-part test under which (1) the person must show an "actual (subjective) expectation of privacy," and (2) that expectation must "be one that society is prepared to recognize as reasonable."[18] Where a search has occurred, it

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12. 674 F.2d at 1336.

13. *See* United States v. Lara, 517 F.2d 209, 211 (5th Cir. 1975); United States v. Johnson, 506 F.2d 674, 675 (8th Cir. 1974), *cert. denied*, 421 U.S. 917 (1975); Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime*, 44 FORDHAM L. REV. 973 (1976) [hereinafter cited as *Constitutional Limitations*].

14. The fourth amendment states:

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

U.S. CONST. amend. IV.

15. *Constitutional Limitations, supra* note 13, at 973.

16. 389 U.S. 347 (1967).

17. *Id.* at 353. the Court declared that:

> The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. at 351-52 (citations omitted).

The defendant in *Katz* was convicted of transmitting wagers across state lines in violation of federal law. The evidence used to convict him was gathered by means of an electronic surveillance device placed on top of a telephone booth. The Court held that the use of the electronic device to intercept conversations in a public telephone booth "constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* at 353.

18. *Id.* at 361. For further explanation of *Katz*, *see generally* Note, *Katz and the*

must take place under authority of warrant to be considered reasonable,[19] although there are a number of well defined exceptions.[20]

Terry *and Limited Intrusions*

While the Supreme Court in *Katz* broadly defined the protections of the fourth amendment, the Court in *Terry v. Ohio*[21] recognized the necessity of sanctioning a limited warrantless intrusion—a stop followed by a pat-down search for weapons based upon a reasonable suspicion[22] that an individual may be armed and dangerous.[23] *Terry* had two results; it established another exception to the warrant requirement, and, more significantly, it recognized an exception to the probable cause requirement. No probable cause to arrest is needed to conduct a valid stop and frisk.[24] Rather, the less stringent requirement of "rea-

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Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home is His Fort, 23 CLEV. ST. L. REV. 63, 65-66 (1974); *Supersniffers*, *supra* note 6, at 424.

19. *Constitutional Limitations*, *supra* note 13, at 973.

20. *Katz*, 389 U.S. 347, 357; Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971). There are six major categories of exceptions. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (consent); United States v. Robinson, 414 U.S. 218, 224 (1973) (search incident to arrest); Chambers v. Maroney, 399 U.S. 42, 51 (1970) (movable vehicle); Harris v. United States, 390 U.S. 234, 236 (1968) (plain view); Terry v. Ohio, 392 U.S. 1, 27 (1968) (stop and frisk); Warden v. Hayden, 387 U.S. 294, 298 (1967) (exigent circumstances).

21. 392 U.S. 1 (1968).

22. Reasonable suspicion justifying a particular intrusion requires that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21.

23. *Id.* at 27. The Court held:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Id. at 30-31.

24. In United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975), the Court noted that the probable cause exception established in *Terry* can be applied to both seizures

sonable suspicion" that the suspect is armed and dangerous is sufficient.[25]

The Court clearly stated that this limited intrusion was still a search for fourth amendment purposes,[26] and rejected the idea that "the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search'."[27] A balancing test was adopted to assess the reasonableness of a protective pat-down search: the need to search must be balanced against the invasion which the search entails.[28]

Luggage Searches

In *United States v. Chadwick*,[29] the Supreme Court addressed the question of whether a person has a legitimate expectation of privacy in his luggage.[30] In answering the question affirmatively, the Court recognized that the primary function of luggage is "as a repository of personal effects."[31] The Court extended this notion in *Arkansas v. Sanders*,[32] stating, that as "a common repository for one's personal effects," luggage is "inevitably associated with the expectation of privacy."[33] In the absence of exigent circumstances,[34] a warrant must be obtained

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and searches in appropriate circumstances. *See also* Adams v. Williams, 407 U.S. 143 (1972).

25. 392 U.S. at 27; *See* Note, *Fourth Amendment—Detention of Occupants During a Premises Search: The Winter of Discontent for Probable Cause*, 72 J. CRIM. L. CRIMINOLOGY 1246, 1253 n.57 (1981) [hereinafter cited as *Winter of Discontent*]. Following *Terry*, the Supreme Court recognized two other limited exceptions to the probable cause requirement. *See* United States v. Brignoni-Ponce, 442 U.S. 873, 878-87 (1975) (officers on roving patrol may stop vehicles at international borders based upon reasonable suspicion that the vehicles contain aliens illegally in the country); Michigan v. Summers, 452 U.S. 692, 700-02 (1981) (valid search warrant implicitly authorizes police to detain an occupant who has left the premises, without probable cause for the seizure).

26. 392 U.S. at 16.

27. *Id.* at 19. *See* Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs*, 11 GA. L. REV. 75, 94 (1976) [hereinafter cited as *Canine Nose*].

28. 392 U.S. 1, 21, citing Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

29. 433 U.S. 1 (1977).

30. *Id.* at 13. The specific issue was whether a search warrant was required before federal agents opened the suspect's locked footlocker which had been lawfully seized from the trunk of a parked car. *Id.* at 3.

31. *Id.* at 13.

32. 442 U.S. 753 (1979).

33. *Id.* at 762.

34. Exigent circumstances justifying a warrantless search exist where there is the

before a suspect's luggage may be searched.[35]

The Use of Canines in Drug Detection

The circuit courts have been struggling with the problem of how to apply the fourth amendment to the use of police-trained canines which detect contraband. The initial question is whether the use of such dogs constitutes a search. If the court determines there has been a search, the question is then whether the person whose privacy interest is invaded enjoys full fourth amendment protection—including the requirements of probable cause and a warrant as the basis for a legal search. Alternatively, if the use of canines in drug detection is not a search, are such persons entirely without constitutional protection from the unreasonable employment of these dogs?

The circuit courts have reached varied results. In *United States v. Burns,*[36] the Tenth Circuit stated that "the olfactory activities of a trained police dog legitimately on the premises do not constitute a search."[37] The court did not perceive any constitutionally significant difference between a police officer and a dog sniffing the piece of luggage, and therefore found that neither constitutes a search.[38]

The Fourth Circuit, in *United States v. Sullivan,*[39] held

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danger that the suspect "might gain access to the property to seize a weapon or destroy evidence." 433 U.S. at 15.

35. *Id.* at 15; 442 U.S. at 766. In light of the recent decision in United States v. Ross, 102 S. Ct. 2157 (1982), this requirement of a warrant is applicable only to non-automobile situations. The *Ross* Court held that if a police officer has probable cause to search a lawfully stopped automobile for contraband, then he may also search every part of that vehicle, including containers which "may conceal the object of the search." *Id.* at 2172. The Court in *Sanders* had imposed the warrant requirement upon luggage found in an automobile. 442 U.S. at 766. While *Ross* declined to follow this portion of the *Sanders* opinion, it appears to have upheld the notion of luggage inevitably being associated with the reasonable expectation of privacy—in situations other than where the automobile exception comes into effect. *Id.* at 2165-67.

36. 624 F.2d 95 (10th Cir.), *cert. denied,* 449 U.S. 954 (1980).

37. 624 F.2d at 101. *See also* United States v. Venema, 563 F.2d 1003 (10th Cir. 1977). The suspects in *Burns* were arrested in the entrance way of their motel room for possession of cocaine with intent to distribute. A limited warrantless search of the room incident to the arrest of its occupants was permitted. Thus, the presence of the dog was justified. 624 F.2d at 101.

38. 624 F.2d at 101, citing United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975), *cert. denied,* 424 U.S. 918 (1976).

39. 625 F.2d 9 (4th Cir. 1980), *cert. denied,* 450 U.S. 923 (1981).

that it is not a search for a trained dog to sniff luggage handled by an airline. The court reasoned that "[t]here can be no reasonable expectation of privacy when any passenger's bags may be subjected to close scrutiny for the protection of public safety."[40] The Fifth Circuit, in *United States v. Goldstein*,[41] also held that the use of drug-trained canines is not a search. The court, however, did not examine the nature of the privacy interest associated with the luggage. Rather, it reasoned that since there was no legitimate expectation of privacy in the airspace surrounding the passenger's luggage, the use of a canine's nose to sniff that area did not constitute a search.[42]

While these cases place little limitation upon the employment of canines by police officers for contraband detection, other circuits have required a finding that the officer possess a *reasonable suspicion*[43] regarding the presence of contraband in the area to be searched prior to using the dog.

In *United States v. Fulero*,[44] the District of Columbia Circuit dismissed as "frivolous" the defendant's contention that the sniffing of the air around his footlockers was an unconstitutional intrusion.[45] Giving only brief attention to the search issue, the

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40. *Id.* at 13. *See Bronstein*, 521 F.2d at 461-62.

41. 635 F.2d 356 (5th Cir.), *cert. denied*, 452 U.S. 962 (1981).

42. 635 F.2d at 361. In *Goldstein*, DEA agents became suspicious of the defendants, who arrived at an airline ticket counter separately and, although not speaking, cast side glances toward each other. They departed the counter separately, then engaged in a short conversation. The agents learned that one defendant purchased a ticket and checked two bags while the other attempted, but was unable to get, two tickets and decided to wait for stand-by. They returned to the ticket counter and purchased tickets. A DEA agent standing behind them noted the names on the suitcases. The name on the larger suitcase did not match the names under which the tickets were purchased. Defendants checked the bags and DEA agents then brought in a drug-trained dog which "alerted" to all the pieces of luggage. *Id.* at 358-59.

43. For an explanation of what constitutes reasonable suspicion, see note 22, *supra*.

44. 498 F.2d 748 (D.C. Cir. 1974) (per curiam).

45. *Id.* at 745. In *Fulero*, a greyhound employee alerted police after "three hippies" had brought in footlockers to be shipped to Washington, D.C. The police thought the situation appeared suspicious because it was "normal practice" in Yuma to ship marijuana through Greyhound, and depot employees had in the past detected packages containing marijuana. The name on the footlockers was of a man suspected of narcotics traffic. The police officer noticed the smell of mothballs, frequently used to mask the odor of marijuana, emanating from the footlockers. The officer then obtained a marijuana-sniffing dog which had been consistently reliable over a period of two years. After placing the footlockers among twelve other packages, the dog handler ran the dog through the packages. The dog alerted to one of the footlockers three consecutive times. *Id.* at 748-49.

court instead based its decision upon whether the conduct of the police was reasonable. Applying this test, the court found the police officers' conduct to be the "model of intelligent and responsible procedure," and thus the use of the dogs was constitutional.[46]

In *United States v. Bronstein*,[47] the Second Circuit ruled that the use of canines does not constitute a search, stating that no reasonable expectation of privacy exists in luggage transported by plane.[48] While the Supreme Court in *Chadwick* seems to have rejected this reasoning,[49] the *Bronstein* opinion may be significant because of the emphasis that the concurrence placed upon the existence of reasonable suspicion prior to the use of the canines.[50]

The Seventh Circuit, in *United States v. Klein*,[51] stated that the use of canines to sniff "inanimate objects" to detect contraband is not an unlawful search under the fourth amendment.[52] That court, as did the *Bronstein* court, limited the use

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46. *Id.* at 749.

47. 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976). Airline ticket agents noticed two men, the defendants, each carrying two similar large new suitcases with combination locks. The men purchased tickets separately and acted like strangers, but were later seen to be talking "like old friends." The DEA was informed and a drug-trained dog sniffed the luggage upon defendant's arrival. These facts, the court held, constituted reasonable suspicion of the presence of contraband. *Id.* at 460-61.

48. 521 F.2d at 462. The court reasoned: "There can be no reasonable expectation of privacy when one transports baggage by plane, particularly today when the menace to public safety by the skyjacker and the passage of dangerous or hazardous freight compels continuing scrutiny of passengers and their impedimenta." *Id.*

49. *See supra* text accompanying notes 29-33; *Beale*, 674 F.2d at 1331.

50. 521 F.2d at 465 (Mansfield, J. concurring). The concurrence "would strictly limit [the use of dogs] to cases where there are grounds for [reasonable] suspicion, similar to or stronger than that present here, and would not permit a wholesale examination of all baggage in the hope that a crime may be detected." *Id.*

The Second Circuit, in United States v. Waltzer, 682 F.2d 370 (2d Cir. 1982), reaffirmed its ruling in *Bronstein* that "canine sniffing is neither a search nor seizure for purposes of the Fourth Amendment." *Id.* at 373. The court specifically held that where a dog with a record of accuracy designates luggage as containing contraband, probable cause has been established for the arrest of the person possessing the luggage. *Id.* at 372-73. Further, the *Waltzer* court responded to the Ninth Circuit's assertion in *Beale* that the Supreme Court in *Sanders* and *Chadwick* had rejected the Second Circuit's reasoning in *Bronstein*. The *Waltzer* court stated that the issue is not whether a privacy interest in personal luggage exists, "but whether canine sniffing intrudes on that interest. We again hold it does not." *Id.* at 373.

51. 626 F.2d 22 (7th Cir. 1980).

52. *Id.* at 26. *See, e.g.*, United States v. Solis, 536 F.2d 880 (9th Cir. 1976); United

of canines to situations where there was a reasonable suspicion that luggage contained contraband.[53] The court further held that the dog must be shown to be a reliable detector.[54]

The Ninth Circuit first addressed the use of canines in contraband detection in *United States v. Solis*.[55] The court broadly framed the inquiry as the need to determine "the kind of intrusion a free society is willing to tolerate."[56] The court determined that dog sniffing is a tolerable intrusion and held that "the use of the dogs was not unreasonable under the circumstances and therefore was not a prohibited search under the fourth amendment."[57]

To determine whether the use of the dogs was reasonable, the *Solis* court applied *Katz'* "reasonable expectation of privacy" test[58] to the facts of the case,[59] finding that the officers' use of the dogs was a reasonable response to the situation.[60] Following the reasoning of the District of Columbia Circuit in *Fulero* and the Second Circuit in *Bronstein*,[61] the Ninth Circuit did not specifically determine whether the dogs' sniffing consti-

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States v. Race, 529 F.2d 12, 14 n.2 (1st Cir. 1976); United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975).

53. 626 F.2d at 26-27. Agents were reasonably suspicious that defendant's suitcases contained contraband where suspicious circumstances (i.e., one defendant was travelling under an assumed name, both men said they left their tickets on the plane and denied having keys to their suitcases) were coupled with the agent's previous observation of defendants and information received from the Florida deputy sheriff. *Id.*

54. *Id.* at 27.

55. 536 F.2d 880 (9th Cir. 1976).

56. *Id.* at 881.

57. *Id.* at 882-83.

58. *Id.* at 882. For a discussion of the reasonable expectation of privacy test, see *supra* text accompanying notes 18-20.

59. An informant told a government drug agent of a white semi-trailer with a paper license plate and white powder at the rear doors parked in a designated gas station which was open to the public. The drug agent, because of his training and experience, knew that marijuana was often smuggled in the floor of semi-trailers and that talcum powder was frequently used to mask its odor. The drug agent told this to customs officers who brought in specially trained marijuana sniffing dogs. There was public access to the trailer. The dogs alerted to marijuana in the trailer. *Id.* at 881.

60. Specifically, the agents had founded suspicion based upon the partial corroboration of the informant's statements by confirming the location and description of the trailer. The dogs provided further corroboration by detecting the odor of marijuana outside the trailer. This served as a basis for the application for a warrant to enter the vehicle. *Id.* at 882.

61. *See supra* text accompanying notes 44-50.

tuted a search.[62] Rather, the court merely stated that if it was a search, it was reasonable under the circumstances.[63]

C. The Court's Reasoning

In *Beale,* the Ninth Circuit reviewed *Katz* and its progeny to establish that one has a reasonable expectation of privacy in personal luggage.[64] The court then framed its inquiry as "whether the use of independent monitoring devices, such as drug-trained canines, to detect the presence of contraband within personal luggage is an invasion of the owner's 'inevitable' and 'inherent' privacy interest in the contents therein."[65]

In answering this question, the court first examined conventional detection devices. These fall into two broad categories: (1) mechanical sense-enhancers, such as flashlights and binoculars, and, (2) independent detection devices, such as electronic surveillance equipment.[66] The court reasoned that since the dog does not amplify its handler's perception, but rather replaces it, it is more like an independent detection device than a sense enhancer.[67] The significance of this categorization is that the use of canines constitutes a search subject to the full requirements of the fourth amendment.[68]

However, having established the similarity between the use of the dogs and independent detection devices, the court then found the use of trained dogs to be "sufficiently distinct and less intrusive" than usual independent devices—thus warranting a different treatment.[69] Following its reasoning in *Solis,* the Ninth Circuit stated that drug-detecting dogs can be used with a "minimal invasion of privacy."[70] The canine's sense of smell is highly

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62. 536 F.2d at 882.

63. *Id.*

64. 674 F.2d at 1331. *See supra* text accompanying notes 13-20, 29-35.

65. 674 F.2d at 1331.

66. *Id.* at 1333.

67. *Id.*

68. *Id.* at 1333 n.12. The use of independent detection devices (e.g., magnometers and x-ray scans) has been uniformly held to be a search. *See, e.g.,* United States v. Henry, 615 F.2d 1223, 1227-28 (9th Cir. 1980) (x-ray scan); United States v. Albarado, 495 F.2d 799 (2d Cir. 1974) (magnometer).

69. 674 F.2d at 1334.

70. *Id.*, citing *Solis,* 536 F.2d at 882.

discriminate, detecting only the presence of contraband.[71] Therefore, an innocent person's privacy is subject to no intrusion.[72] Additionally, the only errors that properly trained canines make are ones of omission.[73] These reasons led the court to hold that the use of drug-trained dogs is a limited fourth amendment intrusion.[74]

The court found that classifying the actions of the dog as a limited intrusion allows the police to use them without a warrant and without a showing of probable cause.[75] However, the court established a standard of "founded" or "articulable" suspicion to replace the probable cause requirement.[76] This standard was derived from the condition, as imposed by the courts in *Solis, Klein, Bronstein* and *Fulero,* that the officers harbor a *reasonable suspicion* of the presence of contraband in luggage before using the dogs.[77] The Ninth Circuit's finding was expressly premised on the concept of canine reliability, a fact which the government must establish.[78] Should either the canine prove unreliable or the government fail to establish the dog's reliability, then the prerequisites of an ordinary search must be complied with.[79]

Finally, the court would limit the use of drug-detecting dogs in two areas. First, the dogs should not be used to sniff luggage in close proximity to people.[80] Second, the court suggested that a reexamination of the "intrusion issue" may be in order if the

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71. 674 F.2d at 1334.

72. *Id. See Constitutional Limitations, supra* note 13, at 987.

73. 674 F.2d at 1334. One wonders whether the court's holding extends to improperly trained canines.

74. *Id.* at 1335.

75. *Id.*

76. *Id.*

77. *Id. See supra* notes 42, 47, 53, 59 and 60 for examples of facts constituting "specific" or "articulable" suspicion. The Ninth Circuit stated that its holding in *Beale* was "consistent with the unarticulated reasoning" of *Solis, Klein, Goldstein* and *Fulero.* 674 F.2d at 1335. Further, to the extent that *Burns, Sullivan,* and *Bronstein* (*see* text accompanying notes 36-42, *supra*) depart from this "unstated rationale," the Ninth Circuit declined to follow them. 674 F.2d at 1335 n.20. An interpretation of these statements may be that since these courts required a finding of reasonable—or founded or articulable—suspicion, they were tacitly acknowledging that the use of the dogs is a limited intrusion. However, precisely what the court meant is unclear.

78. 674 F.2d at 1335 n.14.

79. *Id.*

80. *Id.* at 1335 n.20.

dogs are to be used in situations "less pervasively regulated than airports."[81]

D. CRITIQUE

The Ninth Circuit in *Beale* is the first circuit to expressly recognize that the use of drug-trained canines falls within the ambit of the fourth amendment. The court nevertheless asserted that those cases it relied on had *impliedly* recognized this.[82] However, this assertion is questionable as to its accuracy and its wisdom.

To begin with, both the *Fulero* and *Bronstein* courts explicitly stated that the use of canines is not a constitutional intrusion.[83] Second, the courts in *Klein* and *Solis* held that the use of the dogs was *not a prohibited or an unlawful search* under the fourth amendment.[84] The phrase "not an unlawful search," however, does not necessarily imply that the use of the dogs *is* some type of lawful constitutional intrusion. For the Ninth Circuit to state that it based its holding in *Beale* on the "unarticulated reasoning" of the foregoing cases[85] indicates that the court may have drawn unreasonable inferences from those opinions.

Although the Ninth Circuit found that the use of drug-detecting canines comes within the purview of the fourth amendment, much ambiguity attended this finding. The court identified the use of independent detection devices as "searches" subject to "full" fourth amendment requirements.[86] Such specificity did not accompany its findings as to the use of canines. The court identified the use of the dogs as "sufficiently distinct

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81. *Id.* at 1336 n.20.

82. The court stated:

> We hold—consistent with the *unarticulated reasoning* of [*Solis, Klein, Bronstein* and *Fulero*]—that the use of a canine's keen sense of smell to detect the presence of contraband within personal luggage *is* a Fourth Amendment intrusion, albeit a limited one that may be conducted without a warrant and which may be based on an officer's 'founded' or 'articulable' suspicion rather than probable cause.

674 F.2d at 1335 (emphasis added).

83. *See supra* text accompanying notes 44-48.

84. *See supra* text accompanying notes 51-57.

85. *See supra* note 82.

86. *Beale*, 674 F.2d at 1334. *See supra* text accompanying notes 66-74.

and less intrusive" so as "to warrant a different treatment"[87] than that given independent detection devices, studiously avoiding using the term "search". It employed the term "intrusion" or some variation thereon.[88] The court thus appeared to be establishing a category of intrusions that is something less than a search. This seemingly the case, two criticisms merit mentioning. At a basic level, if the use of the dogs is not a *search,* then it is unclear how the fourth amendment applies to this situation.[89] The fourth amendment addresses "searches" not "intrusions".[90] Although this may appear to be a mere quibbling with semantics, all fourth amendment cases involving potential searches turn upon the designation of the action as a search.[91] By using the word "intrusion" the court injected unnecessary ambiguity into its opinion. One possible interpretation is that the court is attempting to establish a new category of actions subject to fourth amendment constraints—i.e., "limited intrusions".

At first glance, *Beale* appears to grant increased constitutional protection from police intrusions. And in the narrow area of police dog usage, it accomplishes this purpose; it brings the use of these dogs under a system of regulation which affords protection from unrestrained "sniff" searches. But upon further reflection, this decision has a stronger, more detrimental impact upon the broad constitutional guarantees of the fourth amendment. It introduces another exception to the warrant clause and, perhaps more significantly, to the probable cause requirement.

The Supreme Court has sanctioned only three exceptions to the probable cause requirement.[92] These exceptions substitute the less stringent standard of "reasonable suspicion" in place of probable cause in strictly delineated circumstances.[93] By citing *Terry* in reference to the standard for founded or articulable suspicion[94] (i.e., reasonable suspicion), the *Beale* court indicated it is tacitly following the *Terry* precedent regarding its exception

87. 674 F.2d at 1334.

88. *Id.* at 1334-36.

89. *See supra* text accompanying notes 13-15.

90. *See supra* note 14.

91. *See supra* note 13 and accompanying text.

92. *See supra* notes 24-25 and text accompanying notes 21-25.

93. *See supra* notes 23-25.

94. *Beale,* 674 F.2d at 1328 n.1. *See supra* note 22 for the *Terry* test of reasonable suspicion.

to the probable cause requirement. It is analogizing to a rule which the Supreme Court, in *Terry, Brignoni-Ponce,* and *Summers* strictly limited to the facts of those cases. As one commentator has recently pointed out, "[b]y expanding the scope of exceptions to the probable cause requirement," its further deterioration is harkened.[95] The Ninth Circuit has added to this portentous expansion with *Beale.*

Since the Ninth Circuit in *Beale* adopted a result analogous to that of *Terry,* the court would have done better to have drawn a parallel between canine-sniffing and pat-down searches.[96] In both instances, courts have limited police activity which stops short of the traditional concepts of a search or seizure. While *Beale* identified the facts which make the use of dogs a *limited* Fourth Amendment intrusion,[97] it did not discuss the underlying tension between law enforcement needs and protecting individual privacy—as the Supreme Court had done in *Terry.* Acknowledging this tension would have lent a greater degree of cohesiveness between the result in *Beale* and fourth amendment principles.

Although this limited fourth amendment intrusion is premised upon an officer's "founded" or "articulable" suspicion, the *Beale* court declined to find whether the officer in *Beale* possessed the requisite suspicion. The court's refusal to make this determination may lessen *Beale*'s practical impact on this area of search and seizure law. Police officers and lower courts need guidelines to correctly implement and interpret appellate court decisions. If they do not receive such direction, then the *Beale* decision has done little to effectuate the change in police procedures which were the object of the court's attention.

*Cheryl C. Rouse**

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95. *Winter of Discontent,* supra note 25, at 1247. For a thorough analysis of fourth amendment principles and the threat to their internal integrity, see Amsterdam, *Perspectives of the Fourth Amendment,* 58 MINN. L. REV. 349, 393-95 (1974).

96. *See supra* text accompanying notes 21-27.

97. *See supra* text accompanying notes 69-74.

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ELECTRONIC DETECTION DEVICES: A SEARCH BY ANY OTHER NAME . . .

A. INTRODUCTION

In *United States v. Brock*,[1] a divided Ninth Circuit panel[2] held that the installation and monitoring of an electronic surveillance device located in a residence did not constitute a search.[3]

In January, 1978, a chemical company contacted the Drug Enforcement Agency (DEA) after the defendants placed a large order for certain chemicals used in manufacturing amphetamines.[4] When the chemicals were delivered to the company in March, DEA agents placed them in a container with a false bottom containing an electronic tracking device (a beeper).[5] After the defendants picked up the chemicals in Lewiston, Idaho, they were visually and electronically monitored by the DEA agents. The agents tracked the chemicals to a house in Clarkston, Washington, and then found the signal a few days later in Meacham, Oregon.[6] Surveillance was maintained in Meacham, and a search warrant was obtained but never executed. The defendants were finally arrested in a mobile home in Hermiston,

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1. 667 F.2d 1311 (9th Cir. 1982) (per Sneed, J.; the other panel members were Fletcher, J., concurring, and Adams, J., sitting by designation, concurring) (as amended March 15, 1982; rehearing and rehearing en banc denied, June 3, 1982), *cert. denied*, 103 S. Ct. 1271 (1983). For previous cases involving the same defendants, see United States v. Bernard, 607 F.2d 1257 (9th Cir. 1979), and United States v. Bernard, 623 F.2d 551 (9th Cir. 1979).

2. Although no members of the panel dissented from the holding in *Brock*, both Judges Adams and Fletcher disagreed with Judge Sneed's reasoning. The concurring judges would have dissented from the court's holding had there been no binding Ninth Circuit precedent on the issue. *See infra* text accompanying notes 16-20. Thus, in terms of the court's reasoning, the majority opinion is that of Judge Adams' since Judge Fletcher "concur[red] fully in Judge Adams' opinion . . . . " 667 F.2d at 1325. Future Ninth Circuit decisions will have to clarify exactly what the opinion in *Brock* stands for.

3. The defendants also contested the introduction of a co-conspirator's out of court statement, the variance between the evidence at trial and the conspiracy charged, the failure to suppress co-conspirator's statements, the warrantless search of the motor home where the chemicals were found, 667 F.2d at 1315-18, and the particularity and probable cause for the search warrant. *Id.* at 1322-23.

4. The chemicals, phenyl-2-propanone and methylamine, are not illegal to possess, but are necessary ingredients to manufacture Methamphetamine, a controlled substance under 21 U.S.C. § 812(c) (1976).

5. 667 F.2d at 1314.

6. Contact was lost twice during the surveillance, and was reestablished only through the beeper. 667 F.2d at 1314.

Oregon, after they had picked up a third order for the chemicals and attempted to manufacture amphetamines in the mobile home.[7]

B. Background

Prior to 1967, use of an electronic device was not considered a search unless there was an actual trespass upon the defendant's property.[8] If there was no physical intrusion onto the individual's premise or property, there was no fourth amendment violation.

In *Katz v. United States*,[9] the Supreme Court held that an electronic listening device attached to the outside of a public telephone booth constitutes a search under the fourth amendment. That the telephone was in a public phone booth, and that there was no actual physical penetration into the walls of the booth was not controlling because, as determined by the Court, the "Fourth Amendment protects people, not places."[10] No physical intrusion is necessary, for "it becomes clear that the reach of [the fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[11] Thus, the Court recognized the necessity of a doctrine which would protect the individual from violations of protected rights in an age of increased electronic sophistication.

Though the Court in *Katz* had finally reconsidered the property notions formerly relied upon to determine whether there was a fourth amendment intrusion, it was the concurring opinion of Justice Harlan that proposed a standard for the lower courts to follow. This two prong test first examines whether "a person . . . exhibited an actual (subjective) expectation of pri-

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7. The DEA arrested the defendants and then searched the mobile home which apparently was the defendants' laboratory. *Id.* at 1314-15.

8. Silverman v. United States, 365 U.S. 505 (1961). In *Silverman*, the Court held that the use of a device inserted into the outer wall of the defendant's house was a search. The concurring opinion by Justice Douglas seemed to foreshadow the *Katz* decision by noting that an invasion of privacy occurs regardless of the means used. He stated: "Our concern should not be with the trivialities of the local law of trespass . . . . [T]he Fourth Amendment [should not] be limited by nice distinctions turning on the kind of electronic equipment employed." 365 U.S. at 513.

9. 389 U.S. 347 (1967).

10. *Id.* at 351.

11. *Id.* at 353.

vacy and, second, [whether] the expectation [is] one that society is prepared to recognize as 'reasonable'."[12] The first aspect of the test deals with the particular individual's conduct and expectations; the second with society's expectations and whether the individual's conduct was reasonable in light of such expectations.[13]

The *Katz* test was applied by the Supreme Court in *Smith v. Maryland,*[14] where the use of a pen register, a device which records the phone numbers dialed from a phone but not the contents of the conversation, was held not to constitute a search. The Court noted that the defendant's conduct, the dialing of the phone, lessened his expectation of privacy by revealing information to the phone company. Even though he dialed from a private phone located in his home, the pen register did not violate the defendant's fourth amendment rights since he voluntarily exposed the numbers he dialed to a third party.[15]

Ninth Circuit Precedent

The Supreme Court has not directly addressed the issue of the installation and use of beepers, and the lower courts have struggled to apply the *Katz* test in this area. In its major decision dealing with beepers, *United States v. Dubrofsky,*[16] the Ninth Circuit held that the use of such devices does not constitute a search. The court stated that the constitutionality of the use of an electronic device must be analyzed in a two step test; it must first be determined whether the installation of the device violated the fourth amendment, and then whether the act of

12. *Id.* at 361.

13. The first prong pertains to the subjective expectations which are manifested to the outside world. For example, if a person closes the door to a public phone booth, as in *Katz,* he exhibits an objective showing of his subjective expectations of privacy from the uninvited ear. Yet, if that person leaves up the window shades in his home, he manifests a lesser expectation of privacy. Most courts have attempted to stay away from a test which would analyze the actual expectations of the individual. *See* United States v. Sledge, 650 F.2d 1075, 1077 n.2 (9th Cir. 1981); United States v. Taborda, 635 F.2d 131 (2d Cir. 1980).

14. 442 U.S. 735 (1979).

15. The Court in *Smith* noted that defendant's conduct of dialing from his private phone was calculated to keep the contents of his conversation private. However, the act of dialing lessened his expectation of privacy as to the number he dialed. *Id.* at 742-43.

16. 581 F.2d 208 (9th Cir. 1978). A beeper was placed in a package of heroin after a lawful customs search revealed the drug in the defendant's mail. The device was able to track the location of the heroin as well as to signal when the package was opened. *Id.* at 210.

monitoring, using the beeper, violated the fourth amendment. In formulating this two tiered approach, the Ninth Circuit relied upon two prior decisions. In *United States v. Pretzinger*,[17] the circuit court noted that "no warrant is needed to justify installation of an electronic beeper unless fourth amendment rights necessarily would have to be violated in order to initially install the device."[18] With respect to surveillance, *Dubrofsky* relied upon *United States v. Hufford*,[19] which held that there is no constitutional difference between normal visual surveillance and the use of a beeper as the surveillance device. Based on these two decisions, the court in *Dubrofsky* held that neither the installation of a beeper in a package of heroin discovered in a lawful customs search, nor the subsequent surveillance of defendant's return trip to his home after picking up the package constituted a search.[20]

Division in the Circuit Courts

The other circuits are divided on the constitutionality of the installation and usage of beepers. The majority of circuits have held that there is no search, or if there is a search, there is proper justification to exclude the search from the necessity of a warrant. There are primarily four categories in which the decisions can be placed.

First, some courts have held that when the initial placement is made with the consent of a third party, there is no fourth amendment violation in the installation.[21] This reasoning has

17. 542 F.2d 517 (9th Cir. 1976). The court upheld the warrantless attachment of an electronic tracking device to an airplane. Since the court held there was no search, there was no necessity for obtaining a warrant.

18. *Id.* at 520.

19. 539 F.2d 32, 34 (9th Cir.), *cert. denied*, 429 U.S. 1002 (1976). The court upheld the warrantless installation of a beeper in a container holding caffeine and the subsequent surveillance by the government, noting that there was no reasonable expectation of privacy while the defendant drove on public roads. 539 F.2d at 33-34.

20. 581 F.2d 208, 211.

21. United States v. Knotts, 662 F.2d 515 (8th Cir. 1981), *rev'd*, 103 S. Ct. 1081 (1983) (consent of seller to install beeper in can of chloroform binding on purchaser); United States v. Bruneau, 594 F.2d 1190 (8th Cir.), *cert. denied*, 444 U.S. 847 (1979) (consent of lessor of airplane to install beeper); United States v. Lewis, 621 F.2d 1382 (5th Cir. 1980), *cert. denied*, 450 U.S. 935 (1981) (no search where chemical company agreed to switch drug from original container to container with beeper); United States v. Abel, 548 F.2d 591 (5th Cir.), *cert. denied*, 431 U.S. 956 (1977); United States v. Cheshire, 569 F.2d 887 (5th Cir.), *cert. denied*, 437 U.S. 907 (1978) (consent of seller to

been applied when the defendant is a renter,[22] or has become the new owner of the premises or objects in question.[23] A minority of circuits has rejected third party consent as applied to a change in ownership of the article which contains the beeper.[24]

Many courts have upheld the installation and subsequent surveillance as constitutional when the owner of the item to which the beeper is attached has no reasonable expectation of privacy in that item. In these cases, the container is usually holding contraband, and thus there is no objectively justifiable expectation of privacy in its ownership.[25] This doctrine has been applied when the item containing the beeper is exchanged for contraband.[26] In order for the installation of the beeper to be upheld as constitutional, the agents must not violate the defendant's fourth amendment rights in some manner unrelated to its installation.[27]

A third line of reasoning states that there is no search when the object monitored has a lessened expectation of privacy surrounding its usage.[28] Relying on Supreme Court decisions noting the lessened expectation of privacy associated with automobiles, many lower courts have upheld the placement of electronic

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install beeper in drum of chemicals binding on purchaser).

22. In United States v. Cheshire, 569 F.2d 887 (5th Cir.), *cert. denied*, 437 U.S. 907 (1978), the court held that the consent of the owner of a plane rented to the defendant came within the third party consent exception to the warrant requirement.

23. In United States v. Bruneau, 594 F.2d 1190 (8th Cir.), *cert. denied*, 444 U.S. 847 (1979), the court held that the consent of the prior owner is sufficient for consent involving beepers.

24. *See* United States v. Bailey, 628 F.2d 938 (6th Cir. 1980), where the court held that the consent of the prior owner (the government) was ineffectual when there is a transfer of ownership. *See also* United States v. One 1967 Cessna Aircraft, 454 F. Supp. 1352 (C.D. Cal. 1978).

25. United States v. Pringle, 576 F.2d 1114 (5th Cir. 1978) (heroin found in legal customs search); United States v. Washington, 586 F.2d 1147 (7th Cir. 1978) (cocaine discovered in legal customs search); United States v. Emery, 541 F.2d 887 (1st Cir. 1978) (cocaine discovered at customs inspection).

26. United States v. Perez, 526 F.2d 859 (5th Cir.), *cert. denied*, 429 U.S. 846 (1976) (no search where beeper inserted in television set later exchanged for heroin).

27. Therefore, illegally opening the defendant's mail may constitute a search, regardless of whether it contains contraband, and the subsequent installation of the beeper may be a "fruit of the poisonous tree."

28. *See* Cardwell v. Lewis, 417 U.S. 583 (1974); Carroll v. United States, 267 U.S. 132 (1924). In *Cardwell*, the Supreme Court noted the lessened expectation of privacy surrounding an automobile, because "it travels on public thoroughfares where both its occupants and its contents are in plain view." 417 U.S. at 590.

beepers on automobiles and the subsequent surveillance.[29] These courts assume, without deciding, that there is a search, but that the automobile exception provides the justification for the warrantless use of the beeper.[30]

Finally, some courts have held that the usage and surveillance of beepers constitute a search. These decisions have either rejected the other catagorizations or have found that none of the categories apply.[31] In *United States v. Bailey*,[32] the Sixth Circuit specifically rejected the holding in *Dubrofsky*, and held that probable cause and a warrant are necessary when an electronic device is used. The court in *Bailey* rejected the notion that the prior owner could consent to the insertion of the beeper in the container, noting that "electronic surveillance has such a potential for abuse that the government must be held accountable for its use."[33] Since the warrant obtained for the beeper for the noncontraband item was defective, the court held inadmissable the evidence seized.[34]

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29. *See* United States v. Frazier, 538 F.2d 1322 (8th Cir. 1976), *cert. denied*, 429 U.S. 1046 (1977) (beeper attached to a car bumper is a minimal intrusion, therefore probable cause to search suffices); United States v. Moore, 562 F.2d 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978) (probable cause sufficient when beeper placed on automobile).

30. *See, e.g.*, United States v. Michael, 645 F.2d 252 (5th Cir. 1981). In *Michael*, the court assumed there was a search when the agents placed a beeper on the defendant's van, but considered the agents' reasonable suspicion sufficient justification for the placement of a beeper on the van. *See also* United States v. Moore, 562 F.2d 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978).

31. United States v. Bailey, 628 F.2d 938 (6th Cir. 1980); United States v. Moore, 562 F.2d 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), *aff'd en banc*, 537 F.2d 227 (1976).

32. 628 F.2d 938 (6th Cir. 1980).

33. *Id.* at 947.

34. The court in *Bailey* sharply critized the Ninth Circuit's reasoning in *Dubrofsky*. The *Bailey* court stated that the "fourth amendment does not overlook de minimis intrusions. An intrusion is not de minimis if it violates an individual's legitimate expectation of privacy." 628 F.2d at 940. The court also considered erroneous the comparison between sense enhancement devices and beepers made in *Dubrofsky:* "Such sense enhancement ordinarily would not constitute a search under our analysis because an individual does not have a justifiable expectation of privacy in information a Government agent could acquire lawfully under conditions more favorable to sensory reception." 628 F.2d at 940 n.9.

The Ninth Circuit replied to this criticism in the *Brock* decision. First, Judge Sneed noted that the court in *Bailey* relied on a mistaken notion that there is a distinction between the insertion of a beeper in contraband and noncontraband. The court noted that in *Dubrofsky*, "[w]e did not make any such distinction with regard to whether a person's expectation of privacy was 'legitimate'," and went on to state that *"Dubrofsky* simply did not address the effect that the nature of the item had on a person's 'reasona-

C. THE COURT'S ANALYSIS

In *Brock*, the court dealt only with whether the monitoring of the beeper in the defendants' private residence violated the defendants' reasonable expectation of privacy. The court stated that the installation was not, nor could not, be challenged since the beeper was placed in the container while it was in the lawful possession of the DEA.[35] Nor was there any fourth amendment violation during the surveillance of the defendants' automobile which held the container.[36] The inquiry was limited to whether the monitoring of the beeper while in the defendants' residence from March 27th to March 28th was a search.[37]

Judge Sneed's Opinion

Judge Sneed utilized Justice Harlan's two prong analysis to determine whether the two day monitoring was a search. He agreed that the "appellant's expectation of privacy was reasonable," but stated "[t]he question before us is whether such a reasonable expectation has been invaded."[38] Comparing the fact situation in *Brock* to *Dubrofsky*,[39] Judge Sneed pointed out that since the intrusion of one's privacy by the beeper is "very slight," and the device is similar "to other enhancement devices that aid the five senses,"[40] there was no search. He noted that the *Katz* holding had made property concepts obsolete with re-

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ble' expectations of privacy." 667 F.2d at 1320 n.9.

Judge Sneed also noted *Bailey*'s criticism of the intrusiveness doctrine in *Dubrofsky* and stated: "We disagree with the Sixth Circuit's criticism." 667 F.2d at 1321 n.11. Judge Sneed pointed out that the Supreme Court uses a similar doctrine, and that "unless there is an 'invasion' of the defendant's interest, the fact that the defendant had a reasonable expectation of privacy, is immaterial. In order to determine if it is 'reasonable' for society to recognize the defendant's expectation of privacy, one must determine the degree of intrusiveness." *Id.*

35. The decision in United States v. Hufford, 539 F.2d 32 (9th Cir.), *cert. denied*, 429 U.S. 1002 (1976), may have precluded any challenge to the installation by the DEA.

36. The holdings in *Hufford* and United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976) would have defeated a challenge to beeper surveillance of an automobile driven on public highways. The court in *Hufford* stated: "We see no distinction between visual surveillance and the use of an electronic beeper to aid the agents in following the movements of an automobile along public roads . . . . " 539 F.2d at 34.

37. The defendants did not have standing to challenge the initial installation of the beeper into the container and the surveillance of the automobile because they lacked ownership of the items at the time of "entry". Brief for Appellant at 22, United States v. Brock, 667 F.2d 1311 (9th Cir. 1982).

38. 667 F.2d at 1320.

39. *See supra* note 16.

40. 667 F.2d at 1321.

spect to electronic devices and the fourth amendment.

Judge Sneed considered the use of the beeper as a form of sense enhancement similar to a helicopter search[41] and the use of a trained dog.[42] He summarized his position by stating that "the minimal intrusion occasioned by the use of the location beeper lawfully installed in a noncontraband item that was taken into a private residence is not a search."[43] Even though there may have been a technical trespass committed when the beeper was carried into the defendants' residence unknowingly, "[t]he slight physical intrusion, by reason of the beeper itself, was insignificant."[44]

The opinion also noted that there was a limitation to the warrantless usage of electronic devices: "At some point the amount and specificity of the information revealed and the duration of the monitoring would require the use of the particular sense-enhancement device to be characterized as a search."[45] Because in *Brock* the monitoring occurred for only two days before a warrant was sought, there was no search.[46]

Judge Adams' Concurrence

The concurring opinion by Judge Adams noted that the issues presented in *Brock* were more complex than indicated by Judge Sneed's opinion. There is division among the circuits on the issue of beeper surveillance, and other circuits would have

41. *See* United States v. Allen, 633 F.2d at 1282 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981). In *Allen*, the court held that the use of a helicopter and a telephoto lens to observe activity occurring on defendant's property did not constitute a search.

42. *See* United States v. Solis, 536 F.2d 880 (9th Cir. 1976). In *Solis*, the court held that no search was committed by using a trained canine to detect drugs in defendant's mobile home. The canine smelled the drugs from a road which had a public access. *But see* United States v. Beale, 674 F.2d 1327 (9th Cir. 1982), in which the Ninth Circuit limited the holdings of *Allen* and *Solis*. In *Beale*, the court stated that "Our decision in *Allen* was premised on the necessarily reduced expectation of privacy held by the defendant because of the location of the area searched." 674 F.2d at 1333 n.11. Of *Solis*, the court noted that the lower court in *Beale* had "misconstrued *Solis* as holding that canine sniffing is not a fourth amendment intrusion *at all* . . . . " *Id.* at 1336 (emphasis in original).

43. 667 F.2d at 1322.

44. *Id.* at 1321.

45. *Id.* at 1322.

46. *Id.* It is interesting to note that the warrant obtained later was a search warrant to search the house, not a warrant to continue the use of the beeper.

held differently given the facts of *Brock*.[47] However, Judge Adams, sitting by designation from the Third Circuit, considered himself bound by Ninth Circuit precedent, and reluctantly agreed with the court's holding.[48] He pointed out that the Ninth Circuit has made no distinction "between beepers placed in non-contraband material and those planted in contraband material, or between beepers monitored in private areas and those attached to moving vehicles."[49]

Finally, Judge Adams expressed his belief that considering the division among the circuits, a warrant should still be obtained whenever possible. Though the holding of the court stands for the proposition that a warrant is not necessary in the Ninth Circuit, he warned that law enforcement officials should obtain warrants because when the Supreme Court decides this issue, it may invalidate convictions based on the warrantless use of beepers.[50]

Judge Fletcher's Concurrence

While Judge Fletcher's concurring opinion strongly disagreed with the reasoning of Judge Sneed's opinion, she, like Judge Adams, considered herself bound by Ninth Circuit precedent. Judge Fletcher's primary disagreement with Judge Sneed's analysis was whether *Katz* abandoned notions of property concepts. Judge Fletcher argued that property concepts are still essential in determining whether there is a reasonable expectation of privacy. In any such inquiry, the "physical surroundings of necessity form part of what is reasonable," and it is necessary to consider "the context of the immediate physical surroundings . . . . "[51] Judge Fletcher noted that Judge Sneed's opinion did not correctly distinguish between "surveillance of a suspect on the street and monitoring him inside his home."[52] Instead of noting the importance of this distinction, Judge Sneed chose "to

47. *See* United States v. Knotts, 662 F.2d 515 (8th Cir. 1981), *rev'd*, 103 S. Ct. 1081 (1983); United States v. Bailey, 628 F.2d 938 (6th Cir. 1980); United States v. Moore, 562 F.2d 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978).

48. *Brock*, 667 F.2d at 1324, citing United States v. Bernard, 625 F.2d 854 (9th Cir. 1980); United States v. Dubrofsky, 581 F.2d 208 (9th Cir. 1978); United States v. Hufford, 539 F.2d 32 (9th Cir.), *cert. denied*, 429 U.S. 1002 (1976).

49. 667 F.2d at 1324.

50. *Id.* at 1324-25.

51. *Id.* at 1325.

52. *Id.* at 1326.

balance the rights of the people to be secure in their homes against the needs of law enforcement."[53] Yet, such balancing is inappropriate since "[f]ourth amendment protections should not be eroded, however, merely because the government has a strong suspicion as to the identification of the perpetrator of a serious crime."[54] Finally, Judge Fletcher noted that because of *Dubrofsky*, she found herself "in the difficult position of acquiescing in the government's conduct in this case . . . . "[55]

D. CRITIQUE

The major problem with the *Brock* decision is that the divergence in the court's reasoning will lead to confusion in applying the court's rule, thereby leaving future courts without a clear standard to follow. As a result, the holding in *Brock* may have the effect of greatly expanding the unrestrained use of beepers. Under the Ninth Circuit's holding, once a device has been legally installed, almost any degree of subsequent monitoring is legal.[56] As long as the device used does not convey the contents of a conversation, there is no search. The court in *Dubrofsky* made clear that to be considered a search, the device would have to be equivalent to a wiretap.[57] *Brock* seems to have extended this equivalency formula to include attachment to noncontraband items taken into the home. In reaching this result, the court erroneously relied on *Smith v. Maryland*,[58] and misapplied the holding in *Katz*.

The court did not have to deal with the issue of the DEA's installation of the beeper into the container. The installation violated no fourth amendment rights since the container was "lawfully in the possession of the DEA"[59] when the beeper was

53. *Id.*

54. *Id.*

55. *Id.*

56. The court enunciated no standard which would limit its holding, short of the warning that there will be fourth amendment protections "[a]t some point . . . . " 667 F.2d at 1322. This leaves no workable standard for the lower courts and the police to follow.

57. The court in *Dubrofsky* stated that "The issue before us is whether the mere presence of the beeper, it having been attached without violating the Fourth Amendment, sufficiently resembles a wiretap to require the 'antecedent justification' that a warrant would provide." 581 F.2d at 211.

58. 442 U.S. 735 (1979).

59. 667 F.2d at 1319 n.4.

originally installed.[60] Nor did the court deal with the issue that a change in ownership of the container might have raised. According to *Brock*, though there is a later change in ownership when the defendants picked up the chemicals, the prior owner's consent (i.e., the drug company) is sufficient to bind the new owners.[61] Judge Sneed did not state any Supreme Court precedent for this proposition, and indeed the Supreme Court has indicated a contrary conclusion.[62] The fact that the DEA may have been in lawful possession of the container at one time, and thus had the legal ability to install the beeper at that time, does not create a continual right to search.[63] The container held a non-controlled substance, consequently the defendants may have had a reasonable objective expectation of privacy in the container. That the chemicals might have been used to manufacture an illegal drug should not affect whether the defendants had an expectation of privacy at the time the chemicals were legal to possess.[64]

The *Brock* decision is distinguishable from decisions upholding the installation of a beeper on an automobile or airplane,[65] because the mobility of those vehicles requires a differ-

60. In *Dubrofsky*, there was a lawful customs search which revealed the heroin in the defendant's package. The agents could have lawfully seized the heroin at that time, but instead placed a beeper inside the parcel. 581 F.2d at 210. In *Brock*, on the other hand, the DEA could not have legally seized the chemicals at the time they had possession since the chemicals were not illegal to possess at that time.

61. Concerning consent, the court in *Hufford* stated that the chemical company could legally consent to the installation of the beeper since the defendant "did not have any reasonable expectation of privacy under the Fourth Amendment . . . . " 539 F.2d at 34.

62. *See* Matlock v. United States, 415 U.S. 164 (1964), which held that the consent by a third party requires a 'common authority' or 'joint access' over the object consented to. It would seem that the consent of the chemical company could not be considered within this rule since once it hands over the container, it no longer has any access or 'common authority' over the container. *See also* United States v. Bailey, 628 F.2d 938, 943 (6th Cir. 1980), where the court rejected the consent to the installation by the prior owner as binding on the new owner.

63. *See* Stoner v. California, 376 U.S. 483 (1964), in which the Supreme Court held that the consent of the hotel clerk to search the defendant's rented room violated the defendant's rights under the fourth amendment. The clerk had no authority to waive the defendant's rights, even though the defendant was only a renter. *Id.* at 489.

64. The contention that since the drug in the container was to be used to manufacture an illegal drug, it should be treated as contraband, is without merit. *See* United States v. Bailey, 628 F.2d 938 (6th Cir. 1980). As *Bailey* points out, if the item can later be used for illegal purposes, then it is that much easier to obtain a warrant. *Id.* at 944.

65. *See* United States v. Dubrofsky, 581 F.2d 208 (9th Cir. 1978); United States v. Hufford, 539 F.2d 32 (9th Cir. 1976), *cert. denied*, 429 U.S. 1002 (1976).

ent treatment than that afforded homes and personal containers.[66] Installing the beeper on an object which is in an area accessable to the public, or which travels on public space such as a highway, does not offend the *Katz* principles. However, to hold that a container in which a beeper is installed enjoys no higher expectation of privacy than does an automobile obliterates the different degrees of protection accorded these objects.[67]

A basic error in Judge Sneed's opinion was the faulty reasoning of the monitoring issue. He stated that property concepts have been abandoned by the Supreme Court in the search and seizure area.[68] Judge Sneed then noted that a beeper attached to a container lacks sufficient physical contact with a defendant's personal items to be considered an encroachment upon the defendant's privacy.[69] However, one of the foundations of *Katz* is that the concept of privacy supplemented the traditional property concepts rather than replacing it.[70] *Katz* was a necessary answer to the increasing use of sophisticated electronic devices, and the ability to invade an individual's privacy without the

66. The Supreme Court has held that warrantless searches of automobiles do not constitute a violation of the fourth amendment. *See* Cardwell v. Lewis, 417 U.S. 583 (1974); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 207 U.S. 132 (1924). The Court has, on the other hand, recognized the difference between containers and automobiles, even though containers may be found in automobiles. *See* United States v. Chadwick, 433 U.S. 1 (1977), where the Court held that the warrantless search of defendant's footlocker seized from an automobile violated defendant's fourth amendment rights. The Court stated that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile." 433 U.S. at 13. *But see* United States v. Ross, 50 U.S.L.W. 4580 (U.S. June 1, 1982), which limits the fourth amendment protections of containers found in automobiles during an automobile search.

67. As the Supreme Court in *Chadwick* noted: "The factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker." 433 U.S. at 13. The Court in *Cardwell* upheld the warrantless scraping of paint samples from the defendant's automobile. The Court noted the degree of difference between an automobile and one's personal effects or home, and stated: "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." 417 U.S. at 590.

68. 667 F.2d 1311, 1321.

69. *Id.* This statement implies that the size of the beeper is to be a factor in determining whether or not there has been a search.

70. *Katz* did not overrule *Silverman*, *supra* note 8, which involved eavesdropping accomplished through the use of a device which physically penetrated the defendant's premise, though it did overrule Goldman v. United States, 316 U.S. 129 (1941), which held that if there is no physical trespass of the defendant's property, then there is no search.

user actually committing any form of trespass.[71] The Court in *Katz* considered the older property concepts necessary, but not sufficient, to protect individual rights against increasingly sophisticated electronic devices.[72] In *Brock,* a technical trespass was committed when the defendants bought the chemicals and unknowingly carried the beeper into their private residence. Because *Katz* expanded individual protections, while retaining property concepts, the court should have held that the trespass by the DEA constituted a search.

Judge Sneed compared the monitoring of the beeper in *Brock* while it was in the defendants' house, to *Dubrofsky,* in which the surveillance occurred while the defendant was on public roads. This comparison is misplaced for two reasons. First, in *Dubrofsky,* the beeper was placed in a package of heroin after a lawful customs search revealed the heroin. Since possession of heroin is illegal, there is no "reasonable" expectation of privacy, and the installation of a monitoring device and surveillance of the person holding the drug violates no protected rights. In *Brock* by contrast, the beeper was placed in a drug which was not illegal to possess. The contents of this container, like any other container without contraband, did not decrease the expectation of privacy in its ownership. Thus, one of the predicates of *Dubrofsky* was not present in *Brock.*

Second, the surveillance in *Dubrofsky* occurred while the automobile with the beeper was on a public highway. In *Brock,* the surveillance occurred while the beeper was inside a private residence. The Supreme Court has held that an automobile has a lesser expectation of privacy compared with that of a container or a home.[73] Many lower courts have therefore inferred that a beeper placed on an automobile which is followed on public

71. The *Katz* decision, above all else, necessarily supplied the courts with a standard for dealing with electronic devices which were capable of invading an individual's privacy without actually trespassing on the person's property. *Katz* was not intended to substitute the Court's own belief concerning the expectation of the individual when the device actually trespasses upon the individual's property.

72. *See* Rakas v. Illinois, 439 U.S. 128 (1978). In dealing with the issue of standing, the Court in *Rakas* stated that "by focusing on the legitimate expectation of privacy in Fourth Amendment jurisprudence, the court has not altogether abandoned use of property concepts in determining the presence or absence of privacy interests protected by that Amendment." 439 U.S. at 144 n.12. *See generally* Note, Katz: *Beepers, Privacy and the Fourth Amendment,* 86 YALE L.J. 1461 (1976).

73. *See supra* notes 66, 67.

roads does not constitute a search.[74] Yet, it does not follow that the analysis applicable to automobiles can be applied to all forms of electronic monitoring. Tracking an automobile on public roads and monitoring the location of a personal item are two different constitutionally protected categories, especially since the latter usually ends up in a home. Thus, the Ninth Circuit should have afforded defendants the degree of privacy expectation associated with personal articles and homes once the container was taken inside the defendants' residence.[75]

Also unsound was the court's comparison of a beeper with an ordinary sense-enhanced device. Though this comparison may be valid in certain situations, such as when the government is tracking an automobile on public roads, it is not reasonable when the beeper is located in a container carried into the home. The use of a trained dog, which relies on its senses to detect certain odors, is not comparable with a sophisticated electronic device which accompanies a person into his home.[76] The court considered a device which conveys any amount of information less than a wiretap as only a sense-enhancement device, and as such deserving of no fourth amendment protection surrounding its use.[77]

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74. United States v. Moore, 562 F.2d 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); United States v. Frazier, 538 F.2d at 1322 (8th Cir. 1976), *cert. denied*, 429 U.S. 1046 (1977). *But see* United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), *aff'd en banc*, 537 F.2d 227 (1976).

75. The significance of this distinction cannot be stressed enough. Would a beeper attached to an individual's clothing be considered a search? If so, then would not attaching a beeper on an item which an individual is likely to carry around with her be the same as direct attachment to her clothing?

76. Ironically, the court in United States v. Beale, 674 F.2d 1327 (9th Cir. 1982), stated: "Generally, we have limited our exemption of the use of sense-enhancing devices . . . to cases in which ordinary, commercially available devices, which citizens might expect members of the general public as well as the law enforcement community to possess, are employed and their use occurs in a location from which the ordinary citizens might otherwise observe the property or activity. Clearly, the use of some sense-enhancing devices may constitute a search." *Id.* at 1333 n.12. It is difficult to reconcile this statement with the court's holding in *Brock*.

77. The court mistakenly relied on two Ninth Circuit cases. In *Allen*, a helicopter which flew over the defendant's house and used a telephoto lens was found not to be a search. The court noted that helicopters and airplanes repeatedly flew over the defendant's house, that the telephoto lens only enhanced viewing of outdoor activity, and that the defendant's ranch was near the border. The court stated: "We are not presented with an attempt to reduce . . . the privacy expectations associated with interiors of residences or other structures." 633 F.2d 1282, 1289 (9th Cir. 1976). In United States v. Solis, 536 F.2d 880 (9th Cir. 1976), a police dog legitimately on a road with public access smelled

Finally, the conclusion reached by the court undermines the two pronged analysis of *Katz*. The first prong of the test, the subjective aspect of the expectation of privacy, focuses on the person's objective actions manifesting an increased expectation of privacy. With the beeper however, its undetectability renders this aspect of the test unnecessary since the person being monitored is usually unaware of the beeper's presence. Unlike the pen register in *Smith v. Maryland*,[78] when a beeper is attached to an individual or his personal articles, that person is unable to manifest his increased expectation of privacy. Unless the individual discovers and destroys the beeper, he cannot otherwise exhibit any subjective expectation of privacy even though he may be in the privacy of his home. The individual is unable to take steps to protect his privacy, and the infringement caused by the installation and monitoring of a beeper is not, under *Brock*, one which society is prepared to recognize as reasonable. This comes close to a determination that the use of beepers is per se reasonable. As electronic devices become more sophisticated, thus less detectable, and play a greater role in police practice, the threat to individual privacy grows. Accordingly, it is necessary for the judiciary to assert a more aggressive role in protecting individuals against such invasions.

E. Conclusion

Classification of the use of a beeper as a search would not outlaw its use, nor would it curtail its effectiveness. When wiretaps were classified as a search under *Katz*, law enforcement agencies used the judicial process to secure a warrant. This placed control on the unrestrained usage of an electronic device which had the potential to seriously invade the privacy of individuals in society. Likewise, as electronic devices become even more sophisticated and intrusive, there is an increased necessity

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drugs from the road and thereby tipped off the police of the location of drugs inside the defendant's trailer. The court stated that the use of the dog was not a search under the plain view doctrine. Ironically, the court noted that "[n]o sophisticated mechanical or electronic devices were used." 536 F.2d at 882. In both these cases, the court made no attempt to draw a comparison between the facts presented and the usage of any form of an electronic device. If anything, these decisions seem to back away from such an idea and rely on the plain view doctrine. It is illogical that the court in *Brock* would rely on these two holdings in order to associate the beeper with an ordinary sense enhancement device.

78. 442 U.S. 347 (1979).

for some restraint on their use.[79] Classification of the use of beepers as a search would not hamper their usage; it would only curtail their abuse.

*William M. Audet**

NINTH CIRCUIT ADOPTS PRESUMPTION OF PREJUDICE STANDARD FOR INTERNALLY TAINTED JURY

A. INTRODUCTION

In *United States v. Shapiro*,[1] the Ninth Circuit held that a strong presumption of prejudice arises whenever a taint originates within the jury itself. This presumption is rebuttable and no mistrial required if the government shows that the defendant was not prejudiced. In this case, the court ruled that a mistrial should have been granted because the government had not met its burden of proof.[2] A concurring opinion advocated adopting a narrower rule focusing on whether the defendant received a fair trial without invoking the presumption of prejudice.[3]

The defendants were convicted of possession of and conspiracy to possess cocaine, with intent to distribute.[4] During the trial, the defendant's husband, himself a co-defendant, and her mother-in-law received several phone calls from a man offering

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79. *See* Burrows v. Superior Court, 13 Cal. 3d 241, 529 P.2d 590, 118 Cal. Rptr. 166 (1975). The California Supreme Court recognized that:

> Development of . . . sophisticated instruments have accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently, judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by these new devices.

13 Cal. 3d at 248, 529 P.2d at 596, 118 Cal. Rptr. at 172.

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1. 669 F.2d 593 (9th Cir. 1982) (per Norris, J., the other panel members were Nelson, J. and Skopil, J., concurring).

2. *Id.* at 602-03.

3. *Id.* at 603-05.

4. 21 U.S.C. §§ 841(a)(1), 846 (1976).

an acquittal in exchange for 15,000 dollars. An investigation revealed one of the jurors to be the extortionist.[5] The juror was immediately removed from the trial, without explanation to the other jurors. The defendants unsuccessfully moved for a mistrial on the ground that the jury had been tainted. The court denied the motion, and over objections from defense counsel, conducted a voir dire to determine whether the other jurors had been tainted.[6] As a result of the juror's unexplained removal, followed by the voir dire, several of the jurors began to suspect that the dismissal was the product of misconduct by one of the parties.[7]

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5. Two Drug Enforcement Agency agents posed as messenger service employees to deliver the money. When the juror arrived to pick up the money he was arrested. 669 F.2d at 599.

6. Each juror was asked: (1) if he or his family had been contacted by anyone about the case; (2) if another juror had discussed the case with him; (3) if he had discussed the case with him; (4) if he had discussed the case with any other juror; (5) if anything had happened to influence his impartiality; (6) if he had heard other jurors discussing the case; (7) if he thought that the voir dire was occasioned by out-of-court misconduct by defense or prosecution; and, (8) if anything had occurred which might cause an unfair verdict. *Id.*

7. The voir dire questions and responses included the following:

> THE COURT: Do you think this questioning has been occasioned by any out-of-court misconduct by the prosecution or any of the defendants?
> JUROR CHUMLEY: Now this is what I should have been—normally would have been thinking about during lunch and everything, but we had a large lunch and we have been playing cards and I really had not thought about it.
> THE COURT: I am just planting thoughts in your mind, huh?
> JUROR CHUMLEY: In a sense, yes.
> . . . .
> THE COURT: Do you have any idea or suspicion about the reason for this questioning?
> JUROR MALONEY: No, I have to admit it seemed—I was curious in my own mind as to why, because it is probably not the normal. It probably does not happen in most cases.
> . . . .
> THE COURT: Do you have any idea or suspicion about the reason for this questioning of you?
> JUROR PATTERSON: No. I was alarmed about it yesterday because I could tell you were upset and it apparently was one of the jurors, and I didn't know what was behind all that.
> THE COURT: Which juror would that have been that you thought I might have been upset about?
> JUROR PATTERSON: That would have been Joe, the tall man. [Joe Leoni was the juror removed for attempted extortion].
> THE COURT: Do you think this questioning has been occasioned by any out-of-court misconduct by the prosecution or any of the defendants?

The trial court concluded that the voir dire did not show evidence of any prejudice to the defendants, and denied the second motion for mistrial. The subsequent convictions were appealed on the grounds, *inter alia,* that a mistrial should have been declared.[8]

B. Background

While there is no precedent for dealing with a juror's attempted extortion of funds from a defendant, many cases have dealt with juries tainted by outside influences. From these cases, two standards have emerged to determine when a mistrial is required. The first standard was espoused by the Supreme Court in *Mattox v. United States,*[9] the second by the Ninth Circuit in *Cavness v. United States.*[10]

In *Mattox,* during a trial for murder, a court official told the deliberating jury that this trial was the defendant's second trial for murder. The defendant was subsequently convicted. The Supreme Court reversed, stating that "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to

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> JUROR PATTERSON: I can't say, Judge, one way or the other on that.
> . . . .
> THE COURT: Do you think this questioning has been occasioned by any out-of-court misconduct by the prosecution or any of the defendants?
> JUROR MATT: I wouldn't know about that.
> . . . .
> THE COURT: Do you think this questioning has been occasioned by any out-of-court misconduct by the prosecution or any of the defendants?
> JUROR ANDERSON: Now repeat that over again.
> THE COURT: (Repeats question)
> JUROR ANDERSON: Yes, I think there is.

Id. at 601-02.

8. The other grounds for appeal were that: (1) the evidence was insufficient to convict; (2) the defendant was under duress; (3) the evidence to show predisposition of a co-defendant was improper; (4) the jury should have been instructed on entrapment; and, (5) defense counsel should have been allowed to question a government witness in camera to determine if there was a *Massiah* violation. The Ninth Circuit rejected all of these arguments. *Id.* at 595-98.

9. 146 U.S. 140 (1892).

10. 187 F.2d 719 (9th Cir. 1951).

appear."[11] Any unauthorized contact with the jury necessitates a mistrial unless the prosecution can show that the contact did not induce any prejudice.

The Supreme Court broadened its reading of *Mattox* in *Remmer v. United States*[12] by recognizing that indirect influences could also seriously prejudice a jury. The Court held that any improper contact, direct or indirect, would raise a presumption of prejudice, placing a heavy burden of rebuttal upon the government.[13] In *Remmer*, the fact that the FBI investigated a juror during the trial was held sufficient to raise a presumption of prejudice.[14]

Both the Fifth and Sixth Circuits have adopted this line of reasoning. In *Stone v. United States*,[15] the voir dire of only eleven of the twelve jurors was held sufficient to raise a presumption of prejudice, requiring a hearing where the affected juror was the one not questioned.[16] In *United States v. Ferguson*,[17] a juror was dismissed for having discussed the case with friends of the defendant. No explanation for this dismissal was given to the other jurors. The Sixth Circuit held that removal of the tainted juror before deliberations did not eliminate the pre-

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11. 146 U.S. at 150.

12. 347 U.S. 227 (1954). During defendant's trial for federal income tax evasion, an unidentified person attempted to bribe one of the jurors. The judge and prosecution were notified of the attempt. The FBI investigated the jurors during the trial, and issued a report which the judge and prosecutor considered in concluding that there was no evidence of bribery. None of the jurors were dismissed. The defendant learned of the attempt only after his conviction. *Id.* at 228.

13. *Id.* at 229.

14. The Court stated:

> The sending of an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder.

Id.

15. 113 F.2d 70 (6th Cir. 1940). During defendant's trial for securities fraud, a third party attempted to bribe a juror. The trial court conducted a voir dire of the other jurors, asking if anything had occurred which had prejudiced them. The contacted juror was neither questioned nor dismissed. *Id.* at 76.

16. *Id.* at 77. The Sixth Circuit reasoned that the other jurors might suspect that the twelfth juror was tainted when he alone was not subjected to voir dire.

17. 486 F.2d 968 (6th Cir. 1973). The defendant was tried for using the United States mail to defraud certain banks.

sumption of prejudice.[18]

The Fifth Circuit has adopted the American Bar Association's proposed guidelines for conducting a hearing to determine the presence of taint in the jury.[19] The guidelines require that the trial judge question each juror separately in the presence of counsel. This inquiry is aimed at revealing how much contact each juror had with the outside influence, and how much prejudice resulted.[20]

A second approach, adopted by the Ninth Circuit in *Cavness*,[21] relies on the trial judge's discretion to insure a fair trial instead of analyzing the taint in terms of a rebuttable presumption of prejudice. This approach is based on the belief that the trial court is better able to judge whether defendant's trial was prejudiced by direct observation of the jury. It is then for the court to decide what action, if any, is necessary to protect the defendant's right to a fair trial. Consequently, the trial court is reversed only for abusing its discretion.

Several Ninth Circuit cases demonstrate the application of this approach. In *United States v. Klee*,[22] eleven of the fourteen jurors and alternates discussed the defendant's guilt before deliberation. The defendant was convicted, and his motion for mistrial denied. In upholding the conviction, the Ninth Circuit stated that not all incidents of juror misconduct require a mistrial; the ultimate question is whether or not the trial was fair.[23] In *United States v. Hendrix*,[24] the Ninth Circuit found that the

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18. *Id.* at 972. Two possibilities for prejudice existed. First, the contacted juror may have influenced the rest of the jury before he was removed. Alternatively, the jury might have suspected that the unexplained dismissal was occasioned by out-of-court misconduct by the defendant. *Id.* at 971-72.

19. United States v. Herring, 568 F.2d 1099 (5th Cir. 1978); United States v. Forrest, 620 F.2d 446 (5th Cir. 1980). In *Herring*, defendant was convicted of supplying illegal drugs. The Fifth Circuit reversed because the jurors had read newspaper articles stating that a witness's life had been threatened. *Id.* at 1100.

20. 568 F.2d at 1106. *See* ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.6(f) (1980).

21. 187 F.2d 719 (9th Cir. 1951). Defendant was on trial for purchasing cocaine and heroin. During deliberation, a juror left and made two phone calls, accompanied by a federal marshall. Defendant's motion for mistrial was denied, and he was subsequently convicted. *Id.* at 723.

22. 494 F.2d 394 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974).

23. 494 F.2d at 396.

24. 549 F.2d 1225 (9th Cir.), *cert. denied*, 434 U.S. 818, *reh'g denied*, 434 U.S. 960

trial court's procedure of accepting affidavits in lieu of a hearing was less than "ideal," but affirmed because that procedure came within the trial court's discretion.[25]

The Ninth Circuit attempted to reconcile its position with the *Remmer* and *Mattox* standards in the case of *United States v. Armstrong*.[26] The court compared the two approaches and then concluded that the same result is obtained regardless of which standard is employed, since both are designed to insure the fairness of the trial.[27]

In the recent case of *Smith v. Phillips*,[28] the Supreme Court rejected the defendant's argument for an "implied bias" or "conclusive presumption" of prejudice. The Court stated that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."[29] This approach is not consistent with *Remmer*, which placed the bur-

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(1977). Defendant was indicted for transporting illegal aliens and conspiracy to transport illegal aliens. Before trial, one of the jurors made statements showing a predisposition to convict. Defendant's wife and her mother witnessed these statements, and informed defense counsel. Defense counsel informed the court and requested an investigation. The request was denied. The court accepted affidavits from the defendant's wife and her mother, both of which quoted the juror as saying

> [W]e just had a case where a policewoman was tried for selling narcotics and the damn Judge let her go. And she was absolutely guilty. And I am here to see that they put some of these people away. These Judges are absolutely too lenient and they are letting too many people run around.

549 F.2d at 1227.

25. *Id.* at 1229.

26. 654 F.2d 1328 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 1032 (1982). While defendant was on trial for fraud, one of the jurors told the court that her husband had received two phone calls which said, "Tell your wife to stop hassling my brother-in-law at court." The court took no action, and the defendant was convicted. 654 F.2d at 1331.

27. The court stated: "[H]aving been presented with facts establishing a jury irregularity, whether or not we speak in terms of the rebuttable presumption of prejudice or of the fairness of the defendant's trial, we reach the same result." *Id.* at 1332.

28. 102 S. Ct. 940 (1982). During defendant's trial for murder, one of the jurors applied for a job with the district attorney. The defense was not informed of this until after the defendant's conviction. The trial court conducted a post-conviction hearing and concluded that the juror's application had no effect on the verdict. The appellate division affirmed without opinion, and the court of appeals denied leave to appeal. The district court reviewed the case on habeas corpus and found insufficient evidence to show that the juror was biased, but held that bias should be implied under the circumstances. The Second Circuit affirmed on the grounds that the prosecutorial misconduct had denied the defendant due process. The Supreme Court rejected both arguments, and held that it was error for the district court to order a new trial. *Id.* at 943-44.

29. *Id.* at 943-44.

den of rebutting the existence of prejudice on the prosecution. Thus, *Smith* indicates the Court's willingness to cut back on *Remmer*.[30]

C. The Court's Reasoning

The Majority

The *Shapiro* court first rejected the government's argument that *Remmer* was inapplicable because, unlike *Remmer,* the tainted juror was removed. Instead, the court adopted the broader reading of *Remmer* as applied in *Ferguson,* that the removal of the tainted juror does not conclusively remove the presumption of prejudice.[31] The *Shapiro* court also recognized that the juror might have influenced other jurors before his removal.[32] The court found that this was highly probable, as the juror had promised an acquittal rather than just a hung jury, and had a list of the other jurors' names and their cities of residence when he was arrested. During voir dire, several jurors indicated that there had been casual conversations about the defendant.[33] For these reasons, the court refused to take at face value the jurors' statements that these conversations had been innocuous.[34]

The court also reasoned that the juror's unexplained dismissal followed by questioning concerning misconduct by the parties,[35] might have led the jury to suspect that the defendant was guilty of some out-of-court misconduct.[36] After examining the trial record, the Ninth Circuit concluded that the government failed to rebut the presumption of prejudice, particularly in light of one of the juror's statement that she felt the voir dire was occasioned by misconduct by one of the parties.[37] As a trial is unfair if even a single juror is improperly influenced, the court

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30. The concurrence and dissent in *Smith* stated that this case should not be read as foreclosing any future use of implied bias. *Id.* at 948, 955.

31. 669 F.2d at 599.

32. *Id.* at 600.

33. See responses of Jurors Chumley, Maloney, Hutchins and Patterson, *id.* at 600-01.

34. *Id. See* Irvin v. Dowd, 366 U.S. 717, 727-28 (1961); United States v. Brown, 571 F.2d 980, 991 (6th Cir. 1978).

35. 669 F.2d at 600.

36. *Id. See supra* note 8.

37. *See* statement of Juror Anderson, *supra* note 7.

held that a mistrial should have been granted.

The court emphasized that it was not propounding a per se rule. Rather, as a general proposition, the prosecution should have the opportunity to prove lack of prejudice. In this case however, the evidence of prejudice was incontrovertable.[38]

The Concurrence

Judge Skopil asserted that the abuse of discretion standard should have been applied in this case. Relying on *Armstrong*, the concurrence argued that the key inquiry in jury taint cases is whether the fairness of defendant's trial has been prejudiced. The trial judge is in the best position to make this determination, therefore deference should be given to that decision.[39]

The concurrence also argued that this view is supported by recent Fifth and Sixth Circuit cases,[40] and concluded that in this case a mistrial was required because the voir dire responses revealed that defendant did not receive a fair trial.[41]

D. SIGNIFICANCE

The sixth amendment right to a fair trial is the defendant's "most priceless" right.[42] When juror taint is alleged, the problem presented is how best to protect that right. A per se rule requiring a mistrial each time a defendant had grounds to suspect juror bias would be the strongest safeguard since there would be little chance of receiving a prejudiced trial. However, such a rule is overinclusive, because it requires a mistrial even when lack of prejudice can be shown.

The abuse of discretion approach avoids the overinclusiveness of the per se rule, but is fraught with other difficulties. The

38. 669 F.2d at 603. The court also stated that its research uncovered no other cases where a juror attempted to extort money for a favorable verdict. "Happily, it should be extremely rare for a trial court to again be confronted with a motion for mistrial based on such unusual circumstances as occurred in this case." *Id.*

39. *Id. See* United States v. Armstrong, 654 F.2d 1328, 1332 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 1032 (1982).

40. *See* United States v. Forrest, 620 F.2d 446 (5th Cir. 1980), *aff'd after remand*, 649 F.2d 355 (5th Cir. 1981); United States v. Brown, 571 F.2d 980 (6th Cir. 1978); United States v. Ferguson, 486 F.2d 968 (6th Cir. 1981).

41. 669 F.2d at 605.

42. Irvin v. Dowd, 366 U.S. 717, 721.

Supreme Court has recognized that juror bias can be extremely difficult or impossible to prove.[43] A juror may strenuously and in good faith deny being biased, yet still be unconsciously influenced.[44] If the juror has acted with conscious bias, he may be subject to criminal penalties if he cannot conceal his motives.[45]

In addition to this problem of proof, the defendant faces the difficulty of convincing the trial judge who is aware of the cost involved in retrying the case, and who may be predisposed to rule in the interests of judicial economy. The judge may also be reluctant to grant a mistrial, as the need for a mistrial reflects upon her ability to conduct a fair trial. Ideally, no judge should consider judicial economy or her own reputation above the defendant's constitutional right to a fair trial, but the possibility nevertheless exists.

If the defendant cannot obtain a mistrial from the trial court, he is confronted with an appellate court that will reverse only for a "clear abuse of discretion."[46] Appellate courts are reluctant to reverse under this standard and as a result, the defendant may be denied even a hearing.[47] Far from guaranteeing the defendant a fair trial, this approach places an almost insurmountable burden on the defendant to protect his constitutionally guaranteed right to a fair trial.

The *Remmer* approach, as adopted by the *Shapiro* court, reflects a middle ground between the overly inclusive per se rule and the "fair trial" approach. By raising a rebuttable presumption of prejudice when there is evidence of possible jury taint, the court lifts from the defendant the onerous burden of proof required under the abuse of discretion standard. If taint can neither be proven nor disproven, a mistrial is declared, thus protecting the defendant's rights. In this respect, this rule affords as much protection as the per se rule. However, the *Remmer* approach is less wasteful than the per se rule because it does not require a mistrial when the government can show that there was no actual prejudice. While the *Remmer* approach may result in

43. Crawford v. United States, 212 U.S. 183, 196 (1909).
44. *Smith*, 102 S. Ct. at 953.
45. *Id.* at 952.
46. 669 F.2d at 605.
47. *See, e.g.*, United States v. Hendrix, *supra* note 24.

more mistrials than the "fair trial" approach, it more fully protects the defendant's right to trial by an impartial jury by eliminating from consideration any question of judicial economy.

A major fault of the *Shapiro* decision is that *Remmer* is not applied more broadly. The court specified that the *Remmer* procedure would be applied only in cases when the taint originates from within the jury.[48] Therefore, the Ninth Circuit now has two standards; the *Remmer* approach if the alleged taint originates within the jury, and the "fair trial" standard for cases in which the taint originates outside the jury. In *Shapiro,* there was both internal taint from the extortionist, and external taint from the trial court's voir dire. The court could therefore have used this situation to apply *Remmer* to all cases of jury taint. *Shapiro* may serve as precedent for such an extension in the future.

*Grant D. Green**

BROADENING THE SHIELD OF *MASSIAH* TO POST-TRIAL CONFESSIONS

A. INTRODUCTION

In *Cahill v. Rushen*,[1] the Ninth Circuit was presented with an issue of first impression: whether the *Massiah* doctrine applies to a confession given after conviction and sentencing in a first trial, which is then admitted at a retrial. The court concluded that if the defendant was not afforded an opportunity to consult with his attorney, such incriminating statements are to be excluded at a subsequent trial on charges for which the defendant was originally indicted.[2]

Petitioner Cahill was arrested in 1972 for suspicion of mur-

48. The court stated that "we do not adopt a *per se* rule requiring that a mistrial be declared whenever jury taint *originates from within the jury itself.*" 669 F.2d at 603 (emphasis added).

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1. 678 F.2d 791 (9th Cir. 1982) (per Schroeder, J.; the other panel members were Henderson, D. J., sitting by designation, and Wallace, J., dissenting).

2. *Id.* at 795.

der in connection with the death of an accomplice in a bank forgery scheme. Prior to his first trial, he was interviewed four times by Captain Carter, a county sheriff.[3] The fourth interview took place on the day Cahill was indicted and, unlike the prior meetings, he was not apprised of his *Miranda*[4] rights.[5] During this interview, Cahill agreed to tell Carter, at the conclusion of his trial, what had transpired at the scene of the homicide.[6]

Cahill was tried and convicted of murder. The day after his conviction, Captain Carter had Cahill brought to his office from out of custody at the nearby jail.[7] Thereupon Cahill made a complete confession.[8] Carter did not allow Cahill to consult with an attorney, did not read him his *Miranda* rights, and did not inform Cahill's attorney that the meeting was to take place.[9] Since he had already been convicted, Cahill believed that his confession could have no adverse consequences.[10]

The conviction was subsequently reversed on grounds unrelated to the confession.[11] Cahill was retried under the original indictment, and upon retrial, the confession was admitted into evidence. The second trial also resulted in a conviction, and af-

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3. *Id.* at 792.

4. Miranda v. Arizona, 384 U.S. 436 (1966).

5. 678 F.2d at 792. Prior to the fourth meeting, petitioner expressed a desire to be represented by counsel, but was not so provided. At the last meeting "[Cahill] again informed Carter that he was not represented by counsel and desired at least one, possibly two attorneys, to handle his case but, as was the case during all of the interviews, he did not request the presence of an attorney." Cahill v. Rushen, 501 F. Supp. 1219, 1221 (E.D. Cal. 1980).

6. Judge Wallace related the grisly details of the murder: "The victim was stabbed fifteen times in the body and struck in the head eighteen times with a blunt instrument. According to the testimony of [an] eyewitness . . . these wounds were inflicted by Cahill with a butcher knife and claw hammer." 678 F.2d at 796 n.1.

7. *Id.* at 796-97. Cahill had waived preparation of a presentence report and was sentenced immediately after conviction. *Id.* at 796.

8. *Id.* at 796.

9. *Id.* at 793.

10. "According to Carter, Cahill indicated during the conversation that he was willing to talk because his statements 'probably would not be admissible in a later trial.'" *Id.* at 797.

11. The reversal was based on an erroneous omission of a jury instruction. People v. Cahill, 3 Crim. 6850 (Oct. 29, 1974) (unpublished opinion). The appellate court relied on People v. Gordon, 10 Cal. 3d 460, 516 P.2d 298, 110 Cal. Rptr. 906 (1973), in which the California Supreme Court ruled that when the evidence indicates that a crime might have been committed by either the witness or the defendant, although not necessarily by both parties, the jury must be given an accomplice instruction. 10 Cal. 3d at 468-69, 516 P.2d at 307, 110 Cal. Rptr. at 915.

ter exhausting state remedies,[12] Cahill petitioned for a federal writ of habeas corpus,[13] alleging violations of his rights under the fifth and sixth amendments.[14] The district court granted the petition, finding that Cahill's sixth amendment right to counsel had been violated and that the confession to Captain Carter should have been excluded at the second trial.[15]

B. Background

The sixth amendment right to counsel[16] is recognized as one of the most important procedural rights available to a criminal defendant.[17] It affords him critical support when confronted with the prosecutorial power of the state[18] and prevents him from having to stand alone against this power without aid in his defense.[19] While initially the right guaranteed representation by counsel only at trial itself,[20] it has since been expanded to encompass certain pretrial events.[21] The purpose of this expansion

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12. The California courts, relying on Brewer v. Williams, 430 U.S. 387 (1977) held that Cahill's confession was not "deliberately elicited" because there had been no "interrogation". *But see* United States v. Henry, 477 U.S. 264, 271 (1980) (interrogation not necessary to satisfy the "deliberately elicted" test). *See also* Kamisar, Brewer v. Williams, Massiah *and* Miranda: *What is "Interrogation"? When Does It Matter?*, 67 Geo. L.J. (1978) [hereinafter cited as *Interrogation*].

13. The petition was filed pursuant to 28 U.S.C. § 2254 (1976).

14. Cahill also raised the issue of improper comment by the prosecution in violation of Doyle v. Ohio, 426 U.S. 610 (1976). The issue was never addressed because of the sixth amendment findings. 501 F. Supp. at 1231.

15. 501 F. Supp. at 1232.

16. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence" U.S. Const. amend. VI.

17. The dissent in *Cahill* stated:

> It does not belittle the other constitutional rights enjoyed by criminal defendants to state that this right to counsel is perhaps the most important of all. Otherwise, the basic integrity of our criminal justice system would be suspect. Were the state able to marshal its formidable resources against those accused of committing crimes and force them to stand alone while their life and liberty is in jeopardy, there could be no assurance that those sent to prison were indeed guilty of the offenses charged.

678 F.2d at 799.

18. Coleman v. Alabama, 399 U.S. 1, 7 (1970).

19. United States v. Wade, 388 U.S. 218, 225 (1967).

20. United States v. Ash, 413 U.S. 300, 309 (1973).

21. *See* Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary examinations); United States v. Wade, 388 U.S. 218 (1967) (post-indictment lineups); White v. Maryland, 373 U.S. 59 (1963) (preliminary hearings); Hamilton v. Alabama, 368 U.S. 52 (1961) (certain arraignments). *See also infra* note 26.

has been to guarantee representation in those "pretrial events that might appropriately be considered to be parts of the trial itself."[22]

The Supreme Court has determined that the right to counsel attaches once formal adversarial proceedings have begun,[23] which is generally at the time of arraignment or indictment,[24] once the formal "prosecution"[25] of the defendant has commenced. After this "attachment", the right is applicable to "any and all subsequent 'critical stages' of the prosecution where the presence of counsel is necessary to protect the fairness of the trial itself."[26] However, defining those events which should be considered "parts of the trial," and therefore a "critical stage" in the prosecution, has been a controversial task.[27]

The Supreme Court in *United States v. Ash*[28] found that to constitute a "critical stage" the lawyer's pretrial role must be essentially the same as his function at trial.[29] The three criteria necessary to make this determination are: (1) whether the absence of counsel creates the possibility of unfairness in the sub-

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22. *Ash*, 413 U.S. at 310.

23. *Brewer*, 430 U.S. at 401. *See* Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657, 673 (1966).

24. 430 U.S. at 401.

25. Kirby v. Illinois, 406 U.S. 682, 688-89 (1972).

26. 678 F.2d at 800. A retrospective analysis is necessary to determine whether the confrontation was in fact "critical." *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing is a critical stage because it could have a prejudicial effect on the trial); United States v. Wade, 388 U.S. 218 (1967) (line-up is a critical stage so as to insure that the trial will be fair); White v. Maryland, 373 U.S. 59 (1963) (preliminary hearing is a critical stage to insure intelligent pleading by the defendant); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment is a critical stage because what happens there could have effect on trial); Crooker v. California, 357 U.S. 433 (1958) (if a pretrial proceeding without counsel would substantially prejudice the defendant at trial, then the right to counsel attaches at that proceeding); Powell v. Alabama, 287 U.S. 45 (1932) (some pretrial stages are as critical as the trial itself). *But see* United States v. Ash, 413 U.S. 300 (1973) (photo display is not a critical stage); Kirby v. Illinois, 406 U.S. 682 (1972) (preindictment showup is not a critical stage because formal proceedings against the defendant have not been initiated); United States v. Wade, 388 U.S. 218 (1967) (taking of blood and fingerprints are not critical stages); Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplar is not a critical stage because there is only a minimal chance that it will make the trial unfair).

27. *See, e.g.*, Snead v. Stringer, 454 U.S. 988, 989 (1981) (Rehnquist, J., dissenting from denial of certiorari); Brewer v. Williams, 430 U.S. 387, 398 (1977).

28. 413 U.S. 300 (1973).

29. *Id.* at 309.

sequent trial,[30] (2) whether the court has an opportunity at trial to cure any defect created by the absence of counsel in the post-indictment confrontation,[31] and (3) whether the nature of the confrontation is such that the attorney would be functioning as a legal assistant, helping the defendant with his legal problems.[32]

The Massiah *Doctrine*

Certain pretrial dialogues between government agents and defendants against whom formal adversarial proceedings have been initiated are considered "critical stages" in the prosecution of a defendant, and therefore within the purview of the sixth amendment right to counsel. In *Massiah v. United States*,[33] the defendant, after his indictment and release on bail, made incriminating statements to an alleged co-conspirator, who was acting as a government agent. The defendant's statements were surreptitiously recorded by the police.[34] The Supreme Court held that the defendant "was denied the basic protections of [the sixth amendment] guarantee [of right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."[35] The rule in *Massiah* was subsequently interpreted to require three elements: (1) deliberate elicitation of statements by government agents; (2) after indictment or the initiation of

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30. United States v. Ash, 413 U.S. 300, 315-16 (1973); United States v. Wade, 388 U.S. 218, 227 (1967); Escobedo v. Illinois, 378 U.S. 478, 486 (1964); Hamilton v. Alabama, 368 U.S. 52, 54 (1961).

31. United States v. Ash, 413 U.S. 300, 315-16 (1973); Coleman v. Alabama, 399 U.S. 1, 9-11 (1970); United States v. Wade, 388 U.S. 218, 227 (1967).

32. United States v. Ash, 413 U.S. 300, 313 (1973); United States v. Wade, 388 U.S. 218, 226 (1967).

33. 377 U.S. 201 (1964). It was not until *Massiah* that the courts began relying directly on the sixth amendment in right to counsel cases. All previous decisions had relied on the due process clause of the fourteenth amendment. *See* P. LEWIS & K. PEOPLES, CONSTITUTIONAL RIGHTS OF THE ACCUSED 420 (1979).

34. The defendant, a merchant seaman, and his confederate, were arrested and indicted for possession of narcotics after government agents found three and a half pounds of cocaine aboard their vessel. After both were released on bail, the confederate agreed to cooperate with the government agents and assist them in their investigation. Equipped with a radio transmitter in his car, the confederate engaged in a conversation with the defendant during the course of which he elicited incriminating information. 377 U.S. at 203. Subsequently, the Court noted that the fact that the statements were surreptitiously recorded was "constitutionally irrelevant." Brewer v. Williams, 430 U.S. 387, 400 (1977).

35. 377 U.S. at 206.

adversarial proceedings; (3) in the absence of counsel.[36]

The import of *Massiah* was overshadowed by the decision in *Miranda* two years later and the latter case's focus on the privilege against self-incrimination. However in 1978, the Supreme Court, in *Brewer v. Williams*,[37] demonstrated the vitality of the *Massiah* doctrine. In *Brewer*, the Court held that because adversarial proceedings had begun, the defendant had a right to legal representation when the government interrogated him.[38] Although the fifth amendment potentially applied, the Court chose to exclude defendant's confession under the sixth amendment, thereby affirming the principle set forth in *Massiah*.

Recent Supreme Court cases have verified the endurance of *Massiah* both as doctrine distinct from the fifth amendment *Miranda* principles and as a major protection afforded the accused.[39] In *Rhode Island v. Innis*,[40] the Court noted that while *Miranda* is concerned with "custodial interrogation," *Massiah* focuses on "deliberate elicitation" once formal adversarial proceedings have begun.[41] The Court explained that the policies underlying the two constitutional protections are "quite distinct."[42] Though *Innis* was decided on *Miranda* grounds,[43] the Court reaffirmed *Massiah* by clarifying that separate analyses are necessary under the fifth and sixth amendments.[44]

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36. *Brewer*, 430 U.S. 387, 401.

37. 430 U.S. 387 (1978).

38. In *Brewer*, the defendant was transported to another city by two officers in a police car after being indicted for murder. During the trip, he was subjected to what has become known as the "Christian Burial speech" by one of the officers. The "interrogation" caused the defendant to reveal the location of the victim's body. Defendant's subsequent conviction was reversed by the Supreme Court because his right to counsel had been violated. 430 U.S. at 400-01. That the Court analyzed *Brewer* in terms of the sixth amendment, and did not deem *Miranda* applicable, demonstrated the revitalization of the *Massiah* rule. For comment on the Court's use of the term "interrogation," see *Interrogation, supra* note 12.

39. *See* Note, *Sixth Amendment*—Massiah *Revitalized*, 71 J. CRIM. L. & CRIMINOLOGY 601 (1980) [hereinafter cited as Massiah *Revitalized*].

40. 446 U.S. 291 (1980).

41. 446 U.S. at 300 n.4. *See* White, Rhode Island v. Innis: *The Significance of a Suspect's Assertion of his Right to Counsel*, 17 AM. CRIM. L. REV. 53 (1980).

42. 446 U.S. at 300 n.4. The *Miranda* rule applies only where the defendant is in "custody" and is subject to "interrogation". Both elements have proven difficult to define.

43. *Id.* at 298.

44. *See* Rhode Island v. Innis: *A Fifth Amendment Case With Sixth Amendment Implications*, 4 AM. J. TRIAL ADVOC. 339, 345 (1980-81).

In *United States v. Henry*,[45] incriminating statements obtained through a jailhouse informant paid on a contingency fee by the government were used to convict the defendant.[46] By intentionally creating a situation "likely to induce" the indicted defendant to make incriminating statements in the absence of counsel, the government elicited the confession in violation of the defendant's rights guaranteed under *Massiah*.[47] The "likely to induce" test thus established a new standard for determining whether incriminating statements have been "deliberately elicited."[48] The *Henry* decision attests to the viability of *Massiah* and, in addition, to the Court's commitment to further define the elements of *Massiah* in order that it can be effectively applied.[49]

C. THE COURT'S ANALYSIS

The broad issue facing the *Cahill* court was whether the petitioner's sixth amendment right to counsel had been violated during his post-trial conversation to Captain Carter.[50] Though the members of the panel agreed that all of the elements of *Massiah* were present,[51] they disagreed on whether the sixth

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45. 447 U.S. 264 (1980).

46. A fellow inmate of the defendant was told to pay attention to statements made by the defendant or any other prisoners but not to initiate any of the conversations. After his release the informant reported that the defendant had made incriminating statements regarding a bank robbery. These statements were admitted into evidence at the defendant's trial. *Id.* at 266-67.

47. *Id.* at 273-74. The Court cited three factors to determine whether a sixth amendment violation had 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. *Id.*

48. *See* Note, United States v. Henry: *The Further Expansion of the Criminal Defendant's Right to Counsel During Interrogations*, 8 PEPPERDINE L. REV. 451 (1981).

49. *See* Massiah *Revitalized*, *supra* note 39, at 604. The author expresses the view that case by case applications in the lower courts would be necessary to establish guidelines to determine when particular governmental conduct violates a defendant's sixth amendment right to counsel. The creation of the objective "likely to induce" test indicates a willingness on the part of the Court to find a violation of *Massiah* rather than a violation of *Miranda* utilizing a similar test. *Id.*

50. 678 F.2d at 793.

51. The court stated:

> At the time of the confession Cahill had been arrested, arraigned, and indicted; thus, the right to counsel clearly had attached . . . . The confession was 'deliberately elicited' by Captain Carter, as the state properly conceded at oral argument. Finally, it is undisputed that Cahill's counsel was not only absent, but completely unaware that the meeting was to

amendment was applicable to a confession obtained after both conviction and sentencing.

The Majority

In the majority's view, the single issue presented by *Cahill* was whether the timing of the confession affected its admissibility.[52] The petitioner's right to counsel had clearly attached since he had originally been arrested, arraigned, and indicted, and all of the elements of *Massiah* were met.[53] The majority noted that though his confession occurred before his first appeal, the petitioner was not asserting any right to counsel in connection with an appeal from his first trial.[54] Rather, petitioner was complaining of the admission of his confession at the second trial. The majority thus concluded that his right to counsel was to be analyzed with respect to the second trial, i.e., that the interaction with Captain Carter, even though occurring after the first trial ended, constituted a *pretrial confrontation* in relation to the second trial, precisely within the scope of *Massiah*.[55] Because the right to counsel had clearly attached, the time frame of the confession was constitutionally irrelevant.[56]

The majority attributed its decision to "the need to preserve the protections of the sixth amendment in any trial in which conviction might result."[57] As authority for that proposition, the majority relied on those cases which emphasize the accused's right to a fair trial and preparation of a meaningful defense.[58] The majority cited the holding of *United States v. Wade* that "*in addition to counsel's presence at trial,* the ac-

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take place.

Id. at 793. The dissent agreed with the majority's conclusion. *Id.* at 798.

52. *Id.* at 793.

53. *See supra* note 51. The district court's reasoning that Cahill's confession was in fact "deliberately elicited" may have been influential in the State of California's concession at oral argument before the Ninth Circuit that the "deliberately elicited" element of *Massiah* had been met. 501 F. Supp. at 1224.

54. 678 F.2d at 793.

55. *Id. Massiah* had, prior to *Cahill*, been applied only to pretrial events. *See supra* note 26.

56. *Id.* at 795. The majority pointed out that the state had cited no authority for the proposition that "conduct constitutionally impermissible prior to a first trial is somehow rendered constitutionally permissible when it occurs prior to a retrial." *Id.*

57. *Id.* at 793.

58. Brewer v. Williams, 430 U.S. 387 (1978); Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218 (1967).

cused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or not, where counsel's absence might derogate from the accused's right to a fair trial."[59] The remaining question therefore was whether the petitioner's rights had been substantially prejudiced in the particular confrontation, i.e., the "critical stage" test.[60]

The majority decided that the Cahill-Carter conversation did constitute a "critical stage" of the proceeding because the facts in *Cahill* were directly comparable to those in *Massiah*. *United States v. Ash*, relied on by the dissent, was deemed inapplicable to the facts in *Cahill*.[61] *Ash* held that a post-indictment photographic display for purposes of identification was not a "critical stage" because the role of the attorney was not "trial-like" in terms of the sixth amendment.[62] The *Cahill* court found *Ash* distinguishable, reasoning that an interview between the sheriff and the accused *did* involve the requisite sixth amendment functional role of an attorney; as in *Massiah*, an attorney could have advised the petitioner that a confession at that time could have adverse consequences.[63]

The majority next addressed the government's argument that petitioner's right to counsel had been cut off by his original conviction and sentencing, and was not resurrected until arraignment for his retrial.[64] The panel found no sound basis for the mechanical view that there were in effect two separate prosecutions. Creating a "temporal hiatus"[65] in the right to counsel was unjustified. To support its position, the majority analogized

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59. 678 F.2d at 794, quoting *Wade*, 388 U.S. at 266-67 (emphasis in *Cahill*).

60. 678 F.2d at 794.

61. *Id.*

62. 413 U.S. 300, 312.

63. 678 F.2d at 794. The majority alluded specifically to a passage in *Ash* in which the Supreme Court stated: "Counsel could have advised his client on the benefits of the Fifth Amendment and could have sheltered him from the overreaching of the prosecution." 678 F.2d at 794, quoting *Ash*, 413 U.S. 300, 312. The "counseling function" of the attorney, recognized as a doctrinal underpinning of *Massiah*, was relied on by the district court in holding that the petitioner was protected by the sixth amendment. 501 F. Supp. 1219, 1223.

64. 678 F.2d at 794. The majority pointed out that in Estelle v. Smith, 451 U.S. 454, 461-63 (1981), the Supreme Court expressly rejected the argument that fifth amendment rights cease at the time of conviction. 678 F.2d at 794 n.3.

65. 678 F.2d at 795.

to principles of double jeopardy, under which a retrial is "viewed as a continuation of the original proceeding."[66] Because petitioner's conviction was not yet final, as the admission of his confession at the second trial demonstrated, and because he had been indicted and continued to be in custody, he was still protected by the sixth amendment.[67]

Finally, the majority pointed to the inherent danger of a contrary holding: the danger of overreaching by the government.[68] The majority recognized that "if the right to the assistance of counsel evaporates upon conviction or sentencing, police behavior of this sort would make it pointless to pursue an appeal, a major objective of which is 'a second trial uncontaminated by constitutional or other reversible error.' "[69] Because the petitioner's situation "show[ed] the very need for counsel that *Massiah* seeks to protect,"[70] the majority affirmed the decision granting the writ of habeas corpus.[71]

The Dissent

The dissent framed the issue as whether *Massiah* should be extended beyond its origins of pretrial confrontations to confrontations occurring after trial.[72] Only when pretrial confrontations had been trial-like, "presenting the same dangers that gave birth initially to the right itself," had the Supreme Court found a "critical stage" in the proceedings, requiring that a defendant have a right to counsel's presence.[73] The dissent argued that

66. *Id. See* Note, *Constitutional Law*—United States v. DiFrancesco: *"Continuing Jeopardy"—An Old Concept Gains New Life*, 60 N.C.L. REV. 425 (1982).

67. 678 F.2d at 795.

68. *Id.* The majority found that one of the principal aims of the sixth amendment is to protect the accused from the overreaching of the government. There were dangers in allowing a police department to adopt practices similar to those used in this particular case. The practice could "greatly prejudice a defendant who could otherwise gain an acquittal upon retrial, [and] confessions extracted immediately upon conviction would effectively obviate the necessity for retrials should defendants succeed in obtaining reversals of their initial convictions." *Id.* at 794 n.2.

69. *Id.* at 795, quoting Cahill v. Rushen, 501 F. Supp. 1219, 1223.

70. 678 F.2d at 795, quoting Cahill v. Rushen, 501 F. Supp. at 1230.

71. 678 F.2d at 796. The court also dispensed with two collateral issues: (1) the defendant had not waived his sixth amendment rights because the State of California had not proved a knowing and intentional relinquishment or abandonment; and, (2) the admission of the confession at the retrial was in fact prejudicial. *Id.* at 795.

72. *Id.* at 799.

73. *Id.* at 800, quoting United States v. Ash, 413 U.S. 300, 311.

once the trial ends and appellate stages begin, the role of counsel changes. Protecting the *trial* rights of the defendant, the central purpose of the sixth amendment, is no longer necessary. Similarly, after a trial, the presence of an attorney is no longer necessary to ensure its fairness. A post-trial confrontation thus does not constitute a "critical stage" in the proceedings, automatically invoking the right to counsel.[74]

The dissent's conclusion that *Massiah* was inapplicable was based largely on the "significant differences between the trial and appellate stages of a criminal proceeding."[75] The appellate role of an attorney does not affect the integrity of the trial itself.[76] Introducing evidence and protecting the defendant from the overreaching of the government, historically *trial* functions, are not part of counsel's functional role on appeal.[77] The "prosecution" of a case on appeal is based on a documentary record, and the function of an attorney is that of a "sword to upset the prior determination of guilt."[78] The dissent further noted that although there are concerns that after trial, counsel acts as a buffer between the government and the legally untutored defendant, arguably implicating the same dangers that the trial itself

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74. 678 F.2d at 800-01.

75. *Id.* at 801, quoting Ross v. Moffitt, 417 U.S. 600, 610 (1974) (per curiam).

76. 678 F.2d at 801. Although the dissent found that the district court judge had discounted the significance of the functional distinction between the role of trial and appellate counsel, the lower court judge had aptly noted the distinctions involved:

> *Massiah* seeks to protect the right of a defendant to the advice of counsel as it relates to the gathering and introduction of evidence at trial. Once judgment and sentence have been imposed, the function of the attorney changes even if a continuing legal relationship between the defendant and his attorney exists. This function includes marshalling an adequate record on appeal and arguing the prejudicial effect of alleged errors at the first trial. Permitting law enforcement to gather information from the defendant would not interfere with *this* relationship and thus *Massiah* should not apply.

Cahill v. Rushen, 501 F. Supp. 1219, 1223 (emphasis in original). In discounting its significance, the district court judge stated: "Since the argument originated with me I found it initially persuasive; now, however, I do not believe it correct." *Id.* He justified his position largely on the arguments set forth by the majority in *Cahill.*

77. 678 F.2d at 801-02.

78. *Id.* at 802, quoting Ross v. Moffitt, 417 U.S. at 611. The dissent was influenced by the proposition from *Ross* that "The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant . . . ." *Id.* at 610-11.

may present, the subsidiary *Massiah* rights are not necessarily included.[79] The shield of *Massiah*, assuring the defendant the presence of counsel during government attempts to deliberately elicit incriminating statements, is not guaranteed with the sword of appellate counsel. The dissent therefore would have held that the right to counsel, specifically that protection afforded a criminal defendant by the *Massiah* doctrine, ends at least when sentence is imposed.[80] Since the *trial* had ended, there could be no confrontations between the state and the defendant constituting a "critical stage" of the prosecution essential to the fairness of the trial.[81]

The dissent was both unpersuaded by the majority's reasoning and critical of its inability to phrase the issue presented.[82] The dissent viewed the majority's application of *Massiah* as expanding the sixth amendment "past its historical and conceptual anchors, extending the right to counsel into an area unrelated to the concerns that prompted the initial enactment of this fundamental safeguard."[83] On its face the sixth amendment applies only to trials; there existed no authority for the majority's "extension" of the rule to post-trial events.[84] Considering Cahill's confession to be pre-second trial, as the majority had concluded, was a "fundamentally flawed" approach, the dissent argued, because it avoids the issue of the fairness of the first trial, the "gravamen of the sixth amendment."[85] Further, the majority's scant analytical focus on the "critical stage" doctrine relied on a

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79. 678 F.2d at 802, citing United States v. Ash, 413 U.S. 300, 309 (1973). "The Court . . . has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself." *Id.* at 316.

80. 678 F.2d at 802.

81. *Id.*

82. *Id.* at 798. The dissent pointed out that the majority first determined that Cahill's confession was to be analyzed as pre-second trial but then stated the issue was whether the interview proved to be a "critical stage" of the aggregate proceedings, analyzing the second trial as a continuation of the first trial. "This inability to phrase the issue presented in any consistent manner simply illustrates the strained and groping analysis the majority applies in an attempt to fit *Massiah* to the facts of this case." *Id.* at 798-99.

83. *Id.* at 804. "It is unmistakable that when a court applies a pretrial rule to a post-trial case, it is 'extending' the rule. And when the extension occurs, as it does here, without anything more than naked statements unsupported by rational analysis, one wonders whether this extension can be considered anything less than result-oriented decision-making." *Id.* at 805.

84. *See supra* note 83.

85. 678 F.2d at 804-05.

single clause from the *Ash* opinion, ignoring the import of *Ash* as requiring an historical analysis, especially for such a broad "extension."[86]

The dissent argued that the petitioner's post-trial confrontation could have been adequately protected by the fifth amendment and the concomitant procedural safeguards of *Miranda*.[87] By their very nature, the rights guaranteed by *Miranda* could not have ended while the petitioner remained in "custody."[88] Because the most his lawyer could have done would have been to advise the petitioner not to speak, the *Miranda* right to remain silent, derived from the privilege against self-incrimination, would have been the more appropriate analytical focus.[89] The dissent did not condone the actions of the police in *Cahill*, but reasoned that the majority's application of constitutional protections through the sixth rather than the fifth amendment was not dictated by "reason, consistency, or prudence."[90]

D. CRITIQUE

Neither the majority nor the dissent had direct authority

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86. *Id.* at 801-02. The dissent stated:

> The majority, to my dismay, isolates one clause from the *Ash* opinion and completely ignores the central import of the Court's painstaking analysis. While *Massiah*, a pretrial case, may well fit within the historical evolution outlined in *Ash*, the instant post-trial case clearly does not. The historical focus in *Ash*, concerned primarily with whether the attorney's role is essentially the same as his function at trial, supports only reversal here.

Id. at 805.

87. *Id.* at 796.

88. *Id.* at 802-03.

89. *Id.* The dissent asserted that since *Massiah* is unrelated to the concept of compulsion, the touchstone concern of the fifth amendment, and because there was no indication of coercion or prosecutorial misconduct (the confession resulting instead from an "intense sense of curiosity" on the part of Captain Carter), *Massiah* was inapplicable. What was at stake in *Cahill* was "a defendant's interest in a trial free from his own inculpatory statements absent a knowing and voluntary waiver of his privilege against self-incrimination," the realm of the fifth amendment. *Id.* at 803.

The dissent further argued that there was no realistic need for the police to act "unconstitutionally" at least until a notice of appeal was filed. Before this time a retrial was almost an impossibility and the purposes of the sixth amendment protections against prosecutorial conduct and improperly gained evidence would not be furthered by imposing the *Massiah* protections between the time of sentencing and the initiation of an appeal. *Id.* at 802.

90. *Id.* at 806.

for their ultimate conclusions,[91] and the results are due to differing interpretations of what the underlying policies of the sixth amendment right to counsel should be. The majority's broad perspective is a more sound interpretation of the doctrinal underpinning of the sixth amendment, though its opinion is oversimplified and vaguely reasoned. The dissent's view, while well reasoned, is overly narrow, especially in light of recent Supreme Court cases broadly construing the right to counsel.

The significance of the timing of the petitioner's confession was the major issue in *Cahill*. The traditional focus of analysis in sixth amendment cases is on the "trial",[92] and the conflicting conclusions reached in *Cahill* reflect different operational viewpoints as to the application of the *Massiah* doctrine. The majority focused on the nature of the confrontation and its effect on any subsequent "trial", while the dissent viewed the *Massiah* protections as applying *only* to stages leading up to and through the "trial".[93]

The interview between Captain Carter and the petitioner clearly constituted a "trial-like confrontation" in its most literal adversarial sense. The direct character of the confrontation led to the majority's rather abrupt conclusion that the interview was a "critical stage."[94] Because the first trial had ended, the real danger to the petitioner was in terms of a possible second trial. The majority therefore analyzed the post-conviction interview as a pretrial confrontation, believing the touchstone of the *Massiah* doctrine to be the admission of illegally obtained evidence in

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91. Both the majority and the dissent declared that the other had no authority for the conclusions reached. *Id.* at 795, 802. Each side relied on predominantly the same cases, but interpreted them differently.

92. *See supra* text accompanying notes 16-22.

93. The district court in *Cahill* also discussed the practical definition of "trial" counsel, stating that the notion that the function of "trial" counsel ended with conviction and sentencing was too narrow a view: "[T]he trial attorney has an affirmative duty to protect his client's right to appeal by filing a notice of appeal, or by telling his client how the client can proceed on his own behalf." Cahill v. Rushen, 501 F. Supp. at 1222, quoting Gairson v. Cupp, 415 F.2d 352, 353 (9th Cir. 1969). The district court then stated that since the "trial" duties of the attorney do not end upon sentencing but continue until a notice of appeal was filed, petitioner was protected by the sixth amendment until the filing of a notice of appeal. 501 F. Supp. at 1222-23. The Ninth Circuit dissent maintained that the so-called trial-duty of filing notice of appeal simply constituted an appellate function of an attorney. 678 F.2d at 803-04.

94. 678 F.2d at 794.

any subsequent trial where conviction might result. Thus the timing of the confession was deemed "constitutionally irrelevant" because of the majority's focus on the nature of the confrontation and the danger to the defendant.

While the majority's logic is attractive, it is not wholly consistent. After determining that the confession was to be considered pre-second trial, the majority found there was no sound basis for the view that there were two "prosecutions" in *Cahill*, relying on double jeopardy principles which view the second trial as a continuation of the original proceeding.[95] The majority thus placed itself in the position of treating the interview with Captain Carter as pre-second trial, *separate* from the first trial, and then to the contrary, as part of a *continuous* process. Although there may be an explanation for this inconsistency,[96] because it was confronting the sixth amendment implications of a post-trial confession for the first time, the majority should have more clearly set forth the reasons for its conclusion.

The dissent's inquiry focused on the literal meaning of "trial" rather than on "trial-like confrontation." Because the interview took place after the petitioner's first trial, it was not a "critical stage" of the proceedings because of the distinctive roles of trial and appellate counsel. Thus, the timing, not the nature, of the confrontation was of primary concern for the purposes of the sixth amendment analysis, at least until the petitioner was arraigned for his second trial.

The problem with the dissent's conclusion is that it adopts too rigid and literal a reading of the sixth amendment. The dissent reasonably argued that the "critical stage" test was affected

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95. *See supra* text accompanying notes 64-67.

96. The explanation may be that there are both separate and continuous elements to the sixth amendment right to counsel, especially when applied to a post-conviction and sentencing context. For instance, both the dissent and the majority agreed that the petitioner's right to counsel had attached, and neither argued that it had detached in any way (though the dissent argued that the right had significantly changed). Thus, it was a continuous process. Further, the petitioner was retried on the same outstanding indictment, *continued* over after the reversal of his first conviction. In terms of a separate element, the majority rightfully pointed out that the *danger* to the petitioner was in the second trial. His confession could not affect his first conviction and thus they were quite separate processes. The majority, however, never explained its reasoning for using the two opposing analyses. *See also supra* note 93 for the district court's reasoning as to how the first trial *continues* after sentencing.

by the differing roles of trial and appellate counsel, considering the sixth amendment's focus on the "trial". However, the dissent pointed out that after trial, there are legitimate concerns that counsel act as a buffer between the government and the legally untutored defendant which arguably implicates the sixth amendment function of neutralizing the dangers of the trial itself. Even if such concerns were implicated, the dissent maintained, only the sword of appellate counsel was thereby guaranteed and not the shield of *Massiah*.[97] The weakness of this argument is that there is no authority for the conclusion that the *Massiah* protections were not invoked by the post-trial dangers. The cases dealing with the appellate role of counsel are concerned with the actual ability to retain a lawyer or to have one provided,[98] in effect giving the defendant a sword, and not with confrontations between the government and the accused. Until *Cahill*, the issue had never been presented as to whether the shield of *Massiah* accompanied the sword of appellate counsel. The majority took a broader view of the sixth amendment by realizing the importance of the "assistance of counsel" in situations of governmental confrontation, and by holding that petitioner was in this case protected.

The majority and dissent also differed in their interpretations of *United States v. Ash*.[99] The majority found *Ash* supportive of its decision because *Ash* focused on the functional role of the attorney, and the attorney in *Cahill* as in *Massiah* could have *advised* the defendant of his constitutional rights.[100] The dissent argued that *Ash* stands for an historical focus as to whether the attorney's role is the same as his function at "trial",[101] supporting the distinction between trial and appellate functions. While *Ash* did examine the historical evolution of the sixth amendment right to counsel, it did not draw a distinction between the appellate and trial functions of an attorney. Rather, *Ash* stands for the proposition that the nature of the confrontation between the government and the accused must be analyzed

97. *See supra* text accompanying notes 75-81.

98. Ross v. Moffitt, 417 U.S. 600 (1974) (per curiam); Gideon v. Wainwright, 372 U.S. 355 (1963); Griffin v. Illinois, 351 U.S. 12, 18 (1956). *See also* Gairson v. Cupp, *supra* note 93.

99. 413 U.S. 300 (1973).

100. *See supra* text accompanying notes 61-64.

101. *See supra* note 82.

to determine whether a "trial-like" situation is involved. One of the implicit questions is therefore whether the assistance of an attorney is needed to counsel, advise, or shelter the accused.[102] In *Cahill* the petitioner needed that assistance in order to overcome his misconceptions regarding the effect of his confession,[103] and therefore the majority correctly interpreted *Ash* as supporting its position.

The dissent conceded the impropriety of the confrontation between Captain Carter and the petitioner, but maintained that *Miranda* and the fifth amendment should have been applied rather than *Massiah* and the sixth amendment. This argument overlooks the sixth amendment's focus on the assistance of an attorney to counsel and advise the criminal defendant. An attorney could have *advised* the petitioner not to incriminate himself. While the interaction between Captain Carter and the petitioner may have constituted "custodial interrogation" in terms of *Miranda*, it does not follow that the sixth amendment was therefore inapplicable.[104] The Supreme Court has expressed a preference for the sixth amendment protections,[105] and the Ninth Circuit in *Cahill* recognized this trend by attempting to define the policy boundaries of this important constitutional protection.

E. Significance

The *Cahill* majority unexplainedly emphasized the narrowness of its holding.[106] While *Cahill* presented a peculiar fact situation and may be narrow in that regard, interpreting the *Massiah* doctrine to apply to "any subsequent trial for which defendant is then under indictment"[107] cannot be considered a narrow holding. The potential effect of the decision is that a criminal defendant is protected by the shield of the sixth

102. 413 U.S. 300, 312.

103. The majority pointed out that the "sixth amendment requires that counsel 'be provided to prevent the defendant himself from falling into traps'," 678 F.2d at 794, quoting United States v. Bennett, 409 F.2d 888, 899-90 (2d Cir. 1969). The dissent conceded that while the majority was rightfully concerned about the petitioner falling into a trap, it had no authority to apply *Massiah* pursuant to *Ash*. *Id.* at 805.

104. *See supra* note 63.

105. *See generally Interrogation, supra* note 12; Massiah *Revitalized, supra* note 39.

106. 678 F.2d at 795.

107. *Id.*

amendment until the appellate process has ended, or where a retrial becomes an impossibility. Although attempts to elicit incriminating statements within that period may be rare, a reversal of a first conviction is not a rare occurrence, and for that reason, the decision has a potentially broad impact. A consequence of *Cahill* may be to impose restrictions on post-trial governmental behavior so as to prevent overreaching or attempts to elicit incriminating evidence.[108] Once the right to counsel attaches, it now protects the defendant through the criminal process to the point where an adversarial relationship with the government no longer exists. Such a broad proposition is by no means "narrow."

The majority held that the defendant must be at least "afforded an *opportunity to consult* with counsel" or deliberately elicited incriminating statements would be excluded at a subsequent trial.[109] The majority however, neglected to define what is meant by "an opportunity to consult," and what is needed to satisfy that standard. Historically, decisions interpreting *Massiah* have been based on the presence or absence of counsel rather than on any opportunity to consult. The absence of counsel is the dispositive element of the *Massiah* doctrine. In its policy oriented interpretation of the sixth amendment, the majority seems to have created a diminished right to counsel. If the petitioner had been told that he could call his attorney, would that have been a sufficient "opportunity to consult" under the court's definition? The majority created significant problems by straying from the traditional *Massiah* analysis.[110] By so doing, it may

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108. Both the majority and the dissent addressed the dangers which could arise if the sixth amendment were not to apply to post-trial confrontations. The majority feared that if the convicted defendant were unprotected the government would attempt to elicit incriminating evidence so as to insure the futility of a retrial. *See supra* note 68. The dissent argued that there was no realistic need to act "unconstitutionally" after a conviction until a second trial at least became a possibility, i.e., until a notice of appeal was filed. *See supra* note 89.

109. 678 F.2d at 795 (emphasis added). The majority had previously noted that if the petitioner had been allowed a brief *consultation* with his attorney, it would have corrected his uninformed notion that a confession at that time could have no adverse consequences. *Id.* at 794.

110. The district court in *Cahill* had been much more definitive. It held that up until the filing of a notice of appeal, the defendant has a "right to the advice and counsel of an attorney regarding any statements he makes to law enforcement or its agents," and if such statements were elicited "in the absence of counsel and without a waiver of counsel's presence," they must be excluded. 501 F. Supp. at 1224. By straying from the traditional *Massiah* analysis, the majority undercut its holding that the confrontation in *Ca-*

have undercut its own newly-interpreted application of *Massiah*. Perhaps that is what the majority meant in terming its decision "narrow." It now remains for future courts to either interpret the *Cahill* decision or restate the sixth amendment protections which continue after a defendant's conviction and sentencing. At a minimum however, *Cahill* does signal the Ninth Circuit's recognition of *Massiah*'s emphasis on the advisory function of the attorney in the criminal context.

*Robert F. Waggener**

OTHER DEVELOPMENTS IN CRIMINAL LAW & PROCEDURE

A. Detention of Inanimate Objects to be Judged under Reasonable Suspicion Test

In *United States v. Martell*,[1] the Ninth Circuit held that no fourth amendment right was invaded where suitcases were detained for twenty minutes upon a well-founded suspicion that they contained narcotics.[2]

A DEA agent in San Diego received a tip that the defendants were to fly from Anchorage to San Diego.[3] The San Diego airport was placed under surveillance. One defendant arrived that night with two suitcases and checked into a nearby hotel; the second arrived the next morning, checking into the same hotel. Later that morning, both returned to the San Diego Airport and purchased tickets back to Anchorage. The defendants were detained by DEA agents as they approached the boarding area. Twenty minutes later the suspects and their luggage were taken

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hill could be regarded as pre-second trial, suitable for traditional sixth amendment analysis. Clearly the fact that the confession was post-trial was important to the court, contrary to its assertion.

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1. 654 F.2d 1356 (9th Cir. 1981) (per Curtis, D.J.; sitting by designation; the other panel members were Farris, J. and Nelson, J., dissenting) (as amended, Nov. 6, 1981).

2. *Id.* at 1363. *But see* United States v. Belcher, 685 F.2d 289 (9th Cir. 1982), where the Ninth Circuit appeared to limit *Martell* by holding the *Martell* reasonable suspicion standard inapplicable where an individual's luggage is not left unattended. *Id.* at 290.

3. 654 F.2d at 1357. This information, although given in good faith, was erroneous.

to the police office where the luggage was sniffed by a narcotics detector dog. The dog gave a positive alert for narcotics in the suitcases. The alert provided probable cause for obtaining a search warrant. After procuring the warrant, the suitcases were searched and a large quantity of cocaine was discovered inside. Based upon this evidence, defendants were convicted of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute.[4] The defendants' primary contention was that their twenty minute detention by DEA agents constituted an illegal seizure unsupported by probable cause.[5]

The court began its analysis by asserting that there existed a "conceptual difference" between the detention of the suspects and the detention of their suitcases.[6] The panel first concluded that the detention of the defendants was justified as the agents had a well-founded suspicion that the suspects were engaged in drug trafficking.[7] The court then distinguished the seizure of the suspects from the detention of their luggage: "*Terry* and *Dunaway* and their progeny relate to detention of persons and not inanimate objects . . . [the] seizure of which constitute a substantially less serious intrusion upon the rights of the individual."[8]

Making this distinction, the court then focused upon what it termed the "real issue": "whether the government agents can detain the appellants' suitcases without probable cause, but upon a well founded suspicion, for twenty minutes without running afoul of the fourth amendment."[9]

Relying upon the Supreme Court decision in *United States v. Van Leeuwen*,[10] where first-class mail was detained for more than a day, the court concluded that the detention of the suitcases was reasonable.[11] The court stated that *Van Leeuwen* sanctions the detention of inanimate objects without probable cause where there is reasonable suspicion that they are involved

4. Defendants were convicted of violating 21 U.S.C. §§ 841(a)(1), 846 (1976).
5. 654 F.2d at 1358.
6. *Id.*
7. *Id.* at 1358-59.
8. *Id.* at 1359.
9. *Id.* at 1358.
10. 397 U.S. 249 (1970).
11. 654 F.2d at 1361.

in criminal activity.[12] Further, the court noted that it knew of no cases which placed a time limit on the detention of inanimate objects, and, in any event, the detention in this case was well within the time allowed in *Van Leeuwen*.[13]

The court pointed out that the fourth amendment applies only to unreasonable searches and seizures and that there are many instances where warrantless searches without probable cause have been held to be reasonable.[14] The panel noted that these decisions are "bottomed upon the concept that in the light of all the circumstances the searches are not unreasonable by constitutional standards."[15] The court interpreted this to mean that warrantless intrusions on less than probable cause are reasonable as long as the officer has an "articulable basis" for suspecting criminal activity.[16] The court found that at the time the bags were seized such a basis existed.[17]

Judge Nelson, dissenting, disagreed with the majority's approach of separating the issue of the seizure of the luggage from the issue of the seizure of the suspects. The dissent first noted that the seizure of the luggage was clearly ancillary to the unlawful arrest and therefore should not have been subjected to a separate analysis.[18] The cases upon which the majority relied did

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12. *Id.* at 1359-60. In *Van Leeuwen*, two 12-pound packages of coins, suspected by government agents of being part of an illegal coin importation system, sent by first class mail, were stopped and delayed for more than a day while an investigation was conducted. 397 U.S. at 249-50.

13. 654 F.2d at 1360.

14. *Id.* at 1360. As examples, the court pointed to border searches, administrative searches and regulatory searches. *Id.* at 1360-61.

15. *Id.* at 1361.

16. *Id.* at 1361 n.3.

17. *Id.* at 1361. The court then held that even assuming the arrest was unlawful, it did not taint the search and seizure of the suitcases since such evidence is evaluated by whether it was obtained before or after the detention becomes lawful. *Id.* at 1362. The court noted that this concept has been recognized in the Ninth Circuit as well as in other circuits. *See* United States v. Viegas, 639 F.2d 42 (1st Cir.), *cert. denied*, 451 U.S. 970 (1981) (luggage seized simultaneously with detention of suspects; motion to suppress contraband found therein was denied); United States v. Klein, 626 F.2d 22 (7th Cir. 1980) (luggage seized prior to unlawful arrest was upheld as reasonable); United States v. Chamberlin, 644 F.2d 1262 (9th Cir. 1979) (court admitted statements made in the early stages of an arrest before its illegality occurred); United States v. Mayes, 524 F.2d 803 (9th Cir. 1975) (contraband seized as a result of evidence gathered during a legal border search was not tainted by later illegal detention).

18. 654 F.2d at 1370.

not support separating the analysis.[19] In addition, the seizures of the defendants and their suitcases were part of a single, unified police action.[20] The dissent disapproved of what it termed "the judicial technique of winnowing a fortuitous 'lawful' facet out of an otherwise unlawful incident."[21]

The dissent also challenged the majority's analysis of the seizure of the luggage. First, the majority abandoned the premise that searches and seizures executed without a warrant are presumed to be unreasonable, and articulated no exception to the warrant requirement applicable to this case.[22] Further, the dissent contended that *Van Leeuwen* applies only to the nature and extent of fourth amendment rights *in mail* and that a broader application misconstrued the Supreme Court's holding in that case. The Court in *Van Leeuwen* gave no indication that its ruling extended beyond the application to mail.[23] Further, the Court did not conclude that the mail had been "seized" since mail is necessarily voluntarily placed in the government's possession. Under the majority's interpretation of *Van Leeuwen*, an object could lawfully be held for nearly a day without probable cause. "Such a result cannot seriously be argued, which only illustrates how limited the applicability of *Van Leeuwen* must truly be."[24]

Finally, the dissent contended that the court's holding that warrantless seizures of objects are to be examined in terms of reasonableness under the circumstances is "impossible to square with the repeated statements by the Supreme Court on the subject of the warrant requirement."[25] In addition, the cases relied on by the majority did not actually support the "reasonableness in light of all the circumstances rationale."[26] Border searches,

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19. *Id.* at 1369. The majority relied on United States v. Chamberlin, 664 F.2d 1262 (9th Cir. 1980) and United States v. Mayes, 524 F.2d 803 (9th Cir. 1975) for support of the separation of the arrest from the seizure of luggage. However, in *Chamberlin*, statements made during a *Terry* stop were not suppressed when that stop later became an unlawful arrest. In *Mayes*, defendant made statements while initially detained which led to discovery of marijuana which provided probable cause for his arrest.

20. 654 F.2d at 1370.

21. *Id.*

22. *Id.* at 1364-66.

23. *Id.* at 1367.

24. *Id.* at 1368.

25. *Id.* at 1364.

26. *Id. See* United States v. Ramsey, 431 U.S. 606, 621 (1977) (border search excep-

regulatory searches and administrative searches are relatively unique circumstances which are exceptions to the warrant requirement.[27] The dissent warned that courts "cannot ignore the doctrinal framework of decided fourth amendment law in search of a particular result."[28]

B. New Trial Orders not Appealable by the Government Before Retrial

In *United States v. Dior*,[29] the Ninth Circuit held that new trial orders in criminal cases are not appealable before retrial either under 28 U.S.C. section 1291[30] or under section 3731 of the Criminal Appeals Act.[31] The court found that jurisdiction was lacking under section 1291 because new trial orders resolve

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tion is a long-standing, historically recognized exception to the fourth amendment's warrant requirement); United States v. Biswell, 406 U.S. 311 (1972) (exception to search warrant requirement for closely regulated industries subject to close inspection and supervision); Wyman v. James, 400 U.S. 309 (1971) (home visit required for AFDC eligibility not a search).

27. 654 F.2d at 1365.

28. *Id.* at 1363.

29. 671 F.2d 351 (9th Cir. 1982) (per Pregerson, J.; the other panel members were Poole, J. and Karlton, D.J., sitting by designation) (rehearing denied, June 1, 1982).

30. 28 U.S.C. § 1291 (1976) provides: "The court of appeals shall have jurisdiction of appeals of all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

31. 18 U.S.C. § 3731 (1982) provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court's suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States Attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

no questions of guilt or innocence, nor do they determine a sentence.[32] However, the government argued that the legislative history of section 3731 and the Supreme Court decision of *United States v. Wilson*[33] authorized government appeals from new trial orders in criminal prosecutions.[34] In denying the government's contention, the court first pointed out that even though section 3731 should be construed liberally, it was not intended to abolish the final judgment rule of section 1291 for criminal appeals prosecuted by the government. Thus while section 3731 may have authorized such appeals, it did not enlarge the court of appeal's power to accept an appeal under section 1291.[35] The jurisdictional requirements of both section 3731 and section 1291 must be met before the court can recognize the government's right to appeal.[36]

The government also argued that since section 3731, as amended in 1970, permits the government to appeal from suppression orders even though they are not final judgments, this exception should be extended to include orders granting new trials. The court noted that Congress' purpose for allowing immediate appeals of suppression orders stems from the high number of inconsistent rulings at the trial level in the area of search and seizure law.[37] No such concerns would be addressed by allowing immediate appeals of new trial orders. In addition, the limited circumstances under which the government may appeal a suppression order[38] demonstrate Congress' intent to minimize appellate interference in the trial process.[39]

Finally, the Ninth Circuit suggested a number of policy rea-

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32. 671 F.2d at 354. The government did not argue that an order granting a new trial falls within the "collateral order" exception established by Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). 671 F.2d at 354 n.6.

33. 420 U.S. 332 (1975). In *Wilson*, the Court stated that by amending section 3731, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *Id.* at 337.

34. 671 F.2d at 355.

35. *Id.*

36. *Id. See* United States v. Hetrick, 644 F.2d 752 (9th Cir. 1981) (review of sentencing order final decision under section 1291 and authorized under section 3731).

37. 671 F.2d at 356.

38. To appeal a suppression order, the United States Attorney must certify that the appeal is not taken for purposes of delay and that the evidence is substantial proof of a fact material to the proceedings. *Id. See supra* note 31.

39. 671 F.2d at 356.

sons that strongly support the non-appealability of new trial orders prior to retrial. First, there is a firm congressional policy against piecemeal appeals, and while this policy is important in civil cases, it has even more force in criminal cases where delay might seriously disrupt the functioning of the criminal justice system.[40] Delays in criminal cases are particularly critical since the defendant's guilt or innocence has not yet been determined. Second, piecemeal review is inefficient since the appeal of new trial orders may be unnecessary after retrial. The court also expressed concern that appellate intervention prior to retrial will interfere with the effective operation of the district courts by undermining the district court's autonomy, its unique expertise in determining important legal and factual issues, and its ability to correct its own mistakes.[41]

While it is well settled in civil cases that new trial orders are not immediately appealable, the federal courts have only recently considered the issue in criminal cases. The Ninth Circuit's holding is consistent with the other circuits that have decided this question.[42] Given Congress' strong policy against allowing interlocutory appeals, it is doubtful that Congress, in amending section 3731, intended to impliedly amend section 1291 to permit appeals from otherwise non-appealable orders. If Congress did in fact so intend, it is up to Congress to express its intent explicitly, rather than for the courts to alter their jurisdictional powers under section 1291.

C. Denial of Full Number of Peremptory Challenges Grounds for Habeas Corpus Relief

In *Hines v. Enomoto*,[43] the Ninth Circuit held that denial of a defendant's right to exercise the full number of peremptory

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40. *Id.*

41. *Id.* After denying the appealability of the order, the court declined to issue a writ of mandamus under 28 U.S.C. § 1651 (1976).

42. *See* United States v. Hitchmon, 602 F.2d 689 (5th Cir. 1979); *In re* United States, 565 F.2d 173 (1st Cir. 1977); United States v. Alberti, 568 F.2d 617 (2d Cir. 1977).

In the recent case of United States v. Atwell, 681 F.2d 593 (9th Cir. 1982), the Ninth Circuit, relying on *Dior*, held that the government could not appeal the granting of a motion to dismiss by a magistrate on the ground of lack of subject matter jurisdiction because there had been no sentencing or determination of guilt or innocence. *Id.* at 594.

43. 658 F.2d 667 (9th Cir. 1981) (per Anderson, J.; the other panel members were Takasugi, D.J., sitting by designation, and Norris, J., dissenting) (rehearing en banc denied, Nov. 30, 1981).

challenges provided by state law is grounds for federal habeas corpus relief.

Petitioner was convicted of murder in a California state court. California law grants to defendants facing a possible sentence of death or life imprisonment twenty-six peremptory challenges.[44] After exercising his twelfth challenge, the court clerk erroneously informed petitioner's counsel that he had only one remaining challenge. A thirteenth challenge was exercised and thereafter petitioner's counsel made no objection to the denial of his client's full allotment of challenges.[45] Petitioner was therefore barred from litigating the issue on appeal by California's contemporaneous objection rule.[46]

The Ninth Circuit panel conceded that the constitution does not expressly guarantee the right to exercise peremptory challenges. However, the Supreme Court has characterized the peremptory challenge as "a necessary part of trial by jury."[47] Additionally, in the Ninth Circuit, denial of the challenge constitutes reversible error on direct appeal.[48] The panel emphasized that the peremptory challenge "represents an important, perhaps even vital safeguard of the right to an impartial trial, a right guaranteed by the sixth amendment, and one which lies at the heart of the right to due process."[49] Thus, the abridgement of peremptory challenges is equivalent to those grounds for habeas corpus relief which, although not based upon a violation of a constitutional guarantee, are nevertheless necessary components of a defendant's right to due process.[50] The majority then

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44. CAL. PENAL CODE § 1070(a) (West Supp. 1982).

45. 658 F.2d at 671.

46. *See* Jackson v. Superior Court in and for San Diego County, 10 Cal. 2d 350, 74 P.2d 243 (1957).

47. *See* Swain v. Alabama, 388 U.S. 202, 219 (1965). *See also* Pointer v. United States, 151 U.S. 396, 408 (1894).

48. *See* United States v. Allsup, 566 F.2d 68 (9th Cir. 1977) (error for trial court to improperly refuse to dismiss two jurors for cause as the defendant was thereby forced to exercise two of his alloted peremptory challenges); United States v. Turner, 558 F.2d 535 (9th Cir. 1977) (error for trial court not to clearly explain the procedure for exercising peremptory challenges).

49. 658 F.2d at 672.

50. *See, e.g.*, Quigg v. Crist, 616 F.2d 1107 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980). The court in *Hines* declined to follow the only case it had found dealing directly with the issue before it. *See* Workman v. Caldwell, 338 F. Supp. 893 (N.D. Ohio), *aff'd*, 471 F.2d 909 (6th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973) (limitations on the exercise of peremptory challenges are a matter of state law, and therefore not grounds for

held that petitioner stated a claim for federal habeas corpus relief "[b]ecause an outright denial of half the number of allotted peremptories may vitally affect the integrity of the jury selection process and, by implication, the fairness of the trial itself."[51] The court remanded the case for a factual determination of whether under the facts of the case, the "cause" and "prejudice" requirement of *Wainwright v. Sykes*[52] was satisfied.[53]

Judge Norris, dissenting, argued that however important the peremptory challenge is, it is not constitutionally guaranteed, and thus no habeas corpus relief was available. In *Stilson v. United States*,[54] the Supreme Court had specifically held that peremptory challenges are not constitutionally secured, and therefore a state can limit the number of challenges it provides by statute.[55] In addition, it was inconceivable that petitioner's right to a fair trial had been violated since he had received thirteen peremptory challenges, the amount California provides in non-capital prosecutions. The majority did not contend that a state providing, for example, only ten peremptory challenges would thereby violate the constitution. Therefore, petitioner's right to an impartial jury was not violated in this case.[56]

Finally, the dissent contended that habeas corpus relief could not be justified on the ground that the state, having granted the right to exercise peremptory challenges, violates the constitution by denying that right at trial.[57] In *Hines*, there was no evidence that the denial of additional peremptories was intentional, and defense counsel had made no objection. Under the majority's approach, "the denial of any state procedural right which—although not constitutionally required—can be deemed important might be held to violate to the Due Process Clause," a result which "sets the stage for the wholesale constitutionaliza-

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federal habeas corpus relief).

51. 658 F.2d at 672.

52. 433 U.S. 72 (1977).

53. For the Ninth Circuit's interpretation of the "cause" prong of this standard, see Garrison v. McCarthy, 653 F.2d 373, 377 (9th Cir. 1981).

54. 250 U.S. 583 (1919).

55. *Id.* at 586. The majority responded that *Stilson* was inapposite because in *Hines*, the state had not sought to limit the number of challenges available under state law. Therefore, "*Stilson* simply does not address the proposition we are forced to face in this case." 658 F.2d at 673 n.1.

56. 658 F.2d at 679.

57. *Id.*

tion of the myriad state rules of criminal procedure."[58] The dissent feared that this would likely "impair rather than strengthen the federal court's role in protecting the constitutional right of state defendants' to a fair trial."[59]

D. THE *Allen* DOCTRINE IN THE NINTH CIRCUIT

In two recent decisions dealing with *Allen* charges,[60] the Ninth Circuit seemingly formulated inconsistent holdings. However, these decisions are reconcilable in light of the specific facts of each case, and the underlying philosophies of the two decisions.

In *United States v. Armstrong*,[61] the court held that the use of *Allen* charges in the initial instructions, and later repeated in a supplementary instruction given as a result of a jury deadlock, did not violate the rule prohibiting *Allen* charges from being read twice. The court also held that it was not error to instruct the majority of the jurors to reexamine its position in light of the minority's views without also instructing the minority to reexamine its views in light of the majority's views.

In his initial instructions the trial judge stated, "If, therefore, it looks at some point that you may have difficulty in reaching a unanimous verdict and if a substantially greater number of you are agreed on a verdict, the other jurors may want to ask themselves about the basis for their feelings when a substantial number have reached a different conclusion."[62] The trial judge also instructed the jury to "attempt to reach a verdict but,

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58. *Id.*

59. *Id.*

60. The *Allen* charge is named after the jury instructions approved by the Supreme Court in Allen v. United States, 164 U.S. 492 (1896). There, the Court approved of supplementary instructions given when the jurors are deadlocked. *Allen* charges are used as a reminder to the individual juror to reconsider the reasonableness of his views, yet to maintain those views which are "conciously and honestly" held. As noted in United States v. Mason, 658 F.2d 1263 (9th Cir. 1981), "The charge has also been called the . . . 'shotgun instruction' " as a result of the coercive force upon the individual jurors, especially those in the minority. *Id.* at 1265 n.1. *See* Marcus, *The* Allen *Instruction in Criminal Cases: Is the Dynamite Charge About to be Permanently Defused?* 43 MO. L. REV. 613 (1978).

61. 654 F.2d 1328 (9th Cir. 1981) (per East, D.J.; the other panel members were Wright, J. and Merrill, J., concurring) (rehearing and rehearing en banc denied, Oct. 16, 1981), *cert. denied*, 102 S. Ct. 1032 (1982).

62. 654 F.2d at 1333-34.

of course, only if each of you can do so after having made his or her own conscientious determination. Do not surrender an honest conviction as to the weight and effect of the evidence simply to arrive at a verdict."[63]

After seven days of deliberations, the trial judge gave a second set of jury instructions:[64]

> At the beginning of the case, I gave you instructions concerning your sworn duty to return a verdict . . . without surrendering an honest belief and conviction that you held, and, of course, in a manner consistent with the evidence [, and] to return a verdict if your could do so without surrendering an honest conviction. You may consult those instructions again.[65]

Later that afternoon, the jury returned guilty verdicts on some counts and no verdict on other counts.

As to the exclusion of a statement of the first set of instructions that the majority should reexamine its views in light of those held by the minority, the court stated that the "absence of such reciprocal language [did] not render the instructions impermissibly coercive."[66] Classifying the instructions as only a "mild form" of the regular *Allen* charges, the court pointed out that the instructions did not include the normal "cost analysis" usually given in a jury deadlock. They were also less coercive than normal *Allen* charges since they were given in the initial instructions, and not after the jury had reached a deadlock. Although it is "better practice" to include reciprocal language, excluding this language did not render the instructions impermissibly coercive.[67]

In relation to the second set of instructions, the court noted that there is a "per se rule against repeating an *Allen* charge to a

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63. *Id.* at 1334.

64. This was prompted by a note sent by a juror concerning her wish to be excused. Throughout the deliberations, the jurors repeatedly sent notes to the court. There were enough notes from the jury that the circuit court noted that "This was a jury of prolific writers. Notes flowed to the court like rainwater in the rain forests." 654 F.2d at 1331.

65. *Id.* at 1334.

66. *Id.*

67. *Id.*

jury."[68] However, the court found that this rule did not apply given the facts at hand. Classifying the second instructions as a 'pseudo-*Allen* charge',[69] the court pointed out that the per se rule only prohibits repeating an *Allen* charge twice after a jury has reached a deadlock. Here, by contrast, the mild *Allen* charge was given in the opening instructions, and the second reminder of the original instruction was given only after the jury had deadlocked. The second instruction was "no more than a reminder of the first, and was milder still."[70] Although again the court should have given the instruction only once, the second instruction did not constitute reversible error.

In *United States v. Mason*[71] the court held that a deviation from the normal supplementary jury instructions approved in *Allen* must be counterbalanced by an instruction to the minority not to surrender its conscientiously held views merely to secure a verdict.

After the jury informed the judge it was "having problems" reaching a verdict, the trial judge, without giving notice to either counsel of his intent, gave the following modified *Allen* charge to the jury: "The trial has been expensive in three areas: In time, in effort, and in money . . . ."[72] "There appears to be no reason to believe that another trial would not be costly to both sides, nor does it appear to be any reason to believe that the case can be tried again by either side better or more exhaustively that has been tried by you."[73] Finally, the judge read the specific instructions approved by the Supreme Court in *Allen*.

The court first noted the utility of the *Allen* charge in general, and the Ninth Circuit's approval of *Allen* charges given in

68. *Id. See* United States v. Seawell, 550 F.2d 1159, 1162-63 (9th Cir. 1977), *cert. denied*, 439 U.S. 991 (1978) (reversible error to twice issue *Allen* charges in response to jury deadlock).

69. 654 F.2d at 1335.

70. *Id.* Judge Merrill, concurring, stated that the danger presented by the *Allen* charge exists not when they are issued before deliberations, but rather after a deadlock. In this context, "coercion exists . . . not in the fact that the jury was directed to continue to deliberate, but in the language used in so directing it." *Id.* at 1337.

71. 658 F.2d 1263 (9th Cir. 1981) (per Kennedy, J.; the other panel members were Browning, J. and Hoffman, D.J., sitting by designation) (rehearing denied, Dec. 16, 1981).

72. *Id.* at 1271.

73. *Id.*

either the initial instructions or as a supplementary charge.[74] However, the court pointed out that earlier holdings have noted that the *Allen* charge "stands at the brink of impermissible coercion,"[75] and "even in the most acceptable form, approaches the ultimate permissible limits to which a court may go . . . ."[76] Thus, when an appeal is based upon an improper *Allen* charge, the court will "give close scrutiny to the actual charge and circumstances in which it was given," and will uphold the charge "only if in a form not more coercive than approved in *Allen v. United States* . . . ."[77] Also, the court will look to other factors, such as deliberation time after the charges are read, difficulty of the case in relation to the time of deliberation, and other "evidence of undue pressure on the jury."[78]

Applying this standard, the court found that the trial judge's additional comments concerning the "injection of fiscal concerns into jury deliberations . . . ," and the "comment that the Supreme Court had approved the instructions"[79] resulted in a more coercive charge than was approved in *Allen*. More importantly, the trial judge made no "attempt to counterbalance his excesses by further instructing the minority not to abandon its conscientiously held views merely to secure a verdict."[80] The court pointed out that some excesses or additions to the supplementary charge approved in *Allen* have been upheld as long as the jurors are reminded of their "obligation to follow [their] conscientiously held opinion."[81] Since, however, this important reminder was not included in the supplementary charge, and because the comments by the trial judge went beyond that approved in *Allen*, the charge given was "impermissibly coercive."[82]

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74. The *Allen* charge has been disapproved in three circuits. *See* United States v. Silvern, 484 F.2d 879, 883 (7th Cir. 1973); United States v. Thomas, 449 F.2d 1177, 1187 (D.C. Cir. 1971); United States v. Fioravanti, 412 F.2d 407, 420 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969).

75. United States v. Seawell, 550 F.2d 1159, 1163 (9th Cir. 1977), *cert. denied*, 439 U.S. 991 (1978).

76. Sullivan v. United States, 414 F.2d 714, 716 (9th Cir. 1969).

77. 658 F.2d at 1266.

78. *Id.*

79. *Id.* at 1267.

80. *Id.*

81. *Id.* at 1268. *See* United States v. Beattie, 613 F.2d 762, 764 (9th Cir.), *cert. denied*, 446 U.S. 982 (1980); Sullivan v. United States, 414 U.S. 714, 716 (9th Cir. 1969).

82. 658 F.2d at 1268.

Although *Mason* and *Armstrong* may, at first blush, appear inconsistent, the two opinions are reconcilable. First, the court in *Mason* explicitly left open the possibility of *Allen* charges given in the original and in supplementary instructions without violation of the per se rule.[83] Second, both courts weighed various factors, explicitly and implicitly, in reaching their decisions, such as the total deliberation time, the practical impact of the charges (how long after the charges did the jury deliberate), the harshness of the charge (references to time and money), the effect the charges would have on the minority, and when the charges were given (in the initial instructions or after deadlock), against the strength of the statement that each individual juror should retain his or her own honest and conscientiously held beliefs. Both courts attempted to find whether the charge was coercive without a subjective inquiry into the impact the charges had on each jury member. Most likely, a statement to the effect that the jurors should retain their conscientiously held views will mitigate against any coercion which results from the *Allen* charge.

There was no such fatal flaw in the *Armstrong* instructions. The lack of reciprocal language was only one factor in deciding whether the charges were valid, and unlike the absence of a statement that the jury members should retain their honestly held beliefs, was not coercion per se. The absence of reciprocal language did not increase the pressure felt by the minority members of the jury to such a degree that the conviction should be reversed. The absence of such language, by itself, was not enough for the court to conclude that a juror would be coerced into rendering a vote in which he or she did not believe.

In the future, trial courts may want to withhold giving *Allen* charges until necessary, such as when the jury is in deadlock. The court should also include a statement that the jury members should retain their conscientiously held beliefs in light of pressure inherent in the court's instructions. Although *Armstrong* implies that an *Allen* charge may be given as both an original and supplementary instruction, the court distinctly noted that the judge's charge was only a 'pseudo-*Allen*' charge. Future supplementary *Allen* charges that do more than remind

83. *Id.* at 1266 n.5.

the jury of the original instructions may still be deemed to violate the per se rule. Thus, the trial court should be wary of adding more than a reminder to the jury of the earlier *Allen* charge.