Golden Gate University Law Review

Volume 10
Issue 1 *Ninth Circuit Survey*

Article 8

January 1980

# Criminal Law and Procedure

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# CRIMINAL LAW AND PROCEDURE

## I. NEW EFFECTIVE ASSISTANCE OF COUNSEL STANDARD—PREJUDICE REQUIRED

### A. INTRODUCTION

The Ninth Circuit Court of Appeals in *Cooper v. Fitzharris,*[1] expressly adopted the standard of "reasonably competent and effective representation" of counsel, thus joining the majority of other circuits in abandoning the "farce and mockery of justice" standard.[2] The standard is derived from modern notions of the sixth amendment right to effective assistance of counsel. The court further held that once defendant has shown that counsel was ineffective, relief will be granted only when defendant was prejudiced by counsel's conduct.[3] By requiring prejudice, the court places a heavy burden on a defendant who first must prove ineffective counsel, and then must prove prejudice.

Troy Cooper, a state prisoner convicted of burglary, assault, robbery and rape, filed a habeas corpus petition. He alleged that he had not been afforded effective assistance of counsel at trial. Cooper cited counsel's failure to object to admission of certain evidence that was gathered as a result of an allegedly unlawful search of his home and person, failure to move to supress his statements to the police, failure to object to testimony regarding his identification at the pre-indictment lineup, and failure to inform him of his right to appeal.[4] Cooper also criticized his attorney's failure to stipulate to his prior burglary conviction.[5]

The district court dismissed the petition on the grounds that the challenged acts and omissions of counsel were neither prejudicial nor did they reduce Cooper's trial to a "farce and mockery" of justice. The court of appeals reversed and remanded to the district court for a factual determination as to whether

1. 586 F.2d 1325 (9th Cir., Dec. 1978) (per Browning, J.) (en banc), *cert. denied*, 440 U.S. 974 (1979).
2. *See* cases cited at note 29 *infra*.
3. 586 F.2d at 1328.
4. *Id.*
5. *Id.*

Cooper was deprived of his sixth amendment right to reasonably effective assistance of counsel during his state trial.[6]

On rehearing en banc, the Ninth Circuit traced the development of the doctrine of effective assistance of counsel and held: (1) the sixth amendment requires that persons accused of crimes be afforded "reasonably competent and effective representation"; and (2) the accused must establish that counsel's errors prejudiced the defense.[7]

## B. Development of the Doctrine of Effective Assistance of Counsel

In 1932, the Supreme Court in *Powell v. Alabama*,[8] first recognized the right to effective assistance of counsel. Without directly addressing the question of what constitutes ineffective representation, *Powell* nonetheless became the foundation for defendants to challenge their convictions on the grounds of defense counsel's incompetence.[9] In *Powell*, the Court recognized that the duty to provide counsel "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of *effective* aid in the preparation and trial of the case."[10] The Court indicated the right to counsel was a fundamental right, protected also in state courts by virtue of the fourteenth amendment due process clause.[11]

Thirty years after the *Powell* decision, the Supreme Court articulated the right to effective counsel in *Gideon v. Wainwright*.[12] *Gideon* represents the first step by the Supreme Court

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6. 551 F.2d 1162 (9th Cir. 1977).

7. 586 F.2d at 1327.

8. 287 U.S. 45 (1932).

9. *See generally* Bazelon, *The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 1 (1973); Simpson, *Standards of Attorney Competency in the Fifth Circuit*, 54 Tex. L. Rev. 1801 (1976); Comment, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 Colum. J. L. Soc. Prob. 1 (1977) [hereinafter cited as *Ineffective Representation*]; Comment, *The Right to Competent Defense Counsel: Emergence of a Sixth Amendment Standard of Review on Appeal and the Persistence of the "Sham and Farce" Rule in California*, 15 Santa Clara L. Rev. 355 (1975); Comment, *Defects in Ineffective Assistance Standards Used by State Courts*, 50 U. of Colo. L. Rev. 389 (1979) [hereinafter cited as *Defects*]; Comment, *Criminal Law: Effective Assistance of Kansas Counsel*, 18 Washburn L.J. 635 (1979) [hereinafter cited as *Criminal Law*].

10. 287 U.S. at 71 (emphasis added).

11. *Id. See also* Note, *Effective Assistance of Counsel: A Constitutional Right in Transition*, 10 Val. U. L. Rev. 509 (1976) [hereinafter cited as *Effective Assistance*].

12. 372 U.S. 335 (1963).

toward a stricter demand that appointed counsel render effective representation.[13] The Court stated that the source of the right to assistance of counsel was the sixth amendment, which is made obligatory on the states by the due process clause of the fourteenth amendment.[14] In *Gideon,* the Court recognized the importance of the right to counsel and held that assistance of counsel in criminal cases is a necessity rather than a luxury.[15] When *Gideon* made the sixth amendment directly applicable to the states, the circuit courts were forced to re-evaluate their due process standards for ineffective counsel claims in light of the stricter sixth amendment requirements.[16] *Gideon* clarified the *Powell* principles; the sixth amendment right to counsel was deemed a fundamental right and not just a necessary aspect of due process.[17]

A problem that resulted from *Gideon* was that, although *Gideon* emphasized the importance of the right to counsel as a sixth amendment right, it did not have immediate impact on cases alleging ineffective assistance of counsel.[18] Courts continued to apply general due process concepts either directly through the fifth and fourteenth amendments or indirectly through the sixth amendment.[19]

*Powell* and *Gideon* were instrumental in establishing the right of a criminal defendant to effective assistance of counsel. The decisions, however, offered little guidance on the quality of the assistance that makes that right meaningful.[20] *Gideon* was also the precursor of the Supreme Court's decision in *McMann v. Richardson.*[21] *McMann* extended the sixth amendment guarantees of effective assistance of counsel by specifically stating that the right to counsel means "effective assistance of counsel."[22] While the Court rejected defendant's claim of ineffective assistance of counsel,[23] the Court nevertheless recognized the inherent

13. *See Effective Assistance, supra* note 11, at 510.
14. 372 U.S. at 343.
15. *Id.* at 344-45.
16. *See Effective Assistance, supra* note 11, at 515.
17. Gideon v. Wainwright, 372 U.S. at 342.
18. *See Effective Assistance, supra* note 11, at 510-15.
19. *Id.*
20. *See Ineffective Representation, supra* note 9, at 6.
21. 397 U.S. 759 (1970). *See generally Criminal Law, supra* note 9, at 636.
22. 397 U.S. at 771. *See also* Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60, 69-70 (1942); Avery v. Alabama, 308 U.S. 444, 446 (1940).
23. 397 U.S. at 773-74. In *McMann,* the prisoner alleged counsel's ineffectiveness

risk that the good faith evaluations of a *reasonably competent attorney* will turn out to be mistaken either as to the facts or as to what a court's judgment might be on a given set of facts.[24] The Court concluded that counsel's advice should be within the range of competence demanded by attorneys in criminal cases.[25] Thus, the *McMann* Court alluded to minimum levels of competency.

An issue unresolved by the *McMann* Court was an explanation of the duties which defense counsel must perform in order to be considered competent. No subsequent Supreme Court case has resolved this issue, thereby leading to the inevitable result that lower courts have developed their own standards for determining the minimum degree of competency necessary for effective assistance of counsel.

### *The "Farce and Mockery of Justice" Standard: The Due Process Right to Counsel*

Based on the Court's ruling in *Powell,* a standard developed based on the fourteenth amendment due process clause.[26] This standard holds that representation is ineffective only where it reduces the trial to a "farce and mockery of justice" such that it shocks the conscience of the court.[27] The defendant bears the burden of showing that defense counsel's conduct reduced the entire trial to a "farce and mockery of justice" so as to deprive the defendant of his or her day in court.[28]

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because counsel suggested that the prisoner enter a guilty plea based on the erroneous belief that the prisoner's confession was admissible.

24. *Id.* at 770-71.

25. *Id.* The "reasonably competent" attorney standards appear to have been derived from *McMann* when it stated that counsel's advice be "within the range of competence" of other criminal attorneys. *Id.* The Court, however, left to the state and lower federal courts the responsibility to establish specific standards.

26. *See generally Effective Assistance, supra* note 11, at 516. For a general discussion tracing the development of the farce and mockery standard see Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus,* 59 VA. L. REV. 927 (1973); Finer, *Ineffective Assistance of Counsel,* 58 CORNELL L. REV. 1077 (1973); Simpson, *supra* note 9; Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems,* 19 ARIZ. L. REV. 443 (1977); *Ineffective Representation, supra* note 9; *Effective Assistance, supra* note 11.

27. 586 F.2d at 1328. One of the first cases to articulate the "farce and mockery" standard was Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir.), *cert. denied,* 325 U.S. 889 (1945); *see also* Avery v. Alabama, 308 U.S. 444, 445 (1940).

28. Judge Bazelon has stated that "the mockery test requires such a minimal level of performance from counsel that it is itself a mockery of the sixth amendment."

Several problems are created by linking effective assistance of counsel to the due process clause. A finding of unfairness in the conduct of the trial due to ineffective representation would require a reversal on the ground that defendant was deprived of due process. On the other hand, if the result of the trial was otherwise fair to the defendant, the conviction would be upheld, despite the lack of effective assistance of counsel. Furthermore, the underlying determination of whether an attorney had been effective is entirely subjective, thus providing no clear guidance by which to measure an attorney's representation. It is, therefore, not surprising that the Ninth Circuit in *Cooper* has joined the other circuits in rejecting the "farce and mockery of justice" standard and adopting the "reasonably competent and effective representation" standard based on the sixth amendment.[29]

*The "Reasonably Competent" and "Effective Representation" Standards*

Since the *McMann* decision, which directly linked the right to effective assistance of counsel to the sixth amendment, lower courts have developed their own standards based on the sixth amendment.[30] Although no one sixth amendment standard has been consistently applied, two types of standards have emerged.[31]

"Reasonably effective assistance under the circumstances of

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Bazelon, *supra* note 9, at 28-29; *see also Ineffective Representation, supra* note 9, at 26; *Defects, supra* note 9, at 400.

29. *See* cases cited at note 39 *infra*; currently the First, Second and Tenth Circuits still follow the "farce and mockery of justice" standard. *See, e.g.*, United States v. Wright, 573 F.2d 681, 683-84 (1st Cir. 1978); United States v. Burbar, 567 F.2d 192, 202 (2d Cir.), *cert. denied*, 434 U.S. 872 (1977); United States v. Riebold, 557 F.2d 697, 702-03 (10th Cir. 1977). The First and Second Circuits have begun to waver. The First Circuit left open the possibility of adopting a more lenient standard used by the Fifth and Sixth Circuits which looks to "reasonably effective assistance." *Compare* United States v. Wright, 573 F.2d at 684 *with* United States v. Yelardy, 567 F.2d 863, 886 (6th Cir.), *cert. denied*, 439 U.S. 842 (1978) *and* United States v. Carter, 566 F.2d 1265, 1272 (5th Cir.), *cert. denied*, 436 U.S. 956 (1978). The Second Circuit has refrained from specifically adopting, but has made reference to the District of Columbia's more stringent standard of "reasonably competent assistance of an attorney acting as his diligent conscientious advocate." *Compare* United States v. Williams, 575 F.2d 388, 393 (2d Cir. 1978) *and* United States v. Tolliver, 569 F.2d 724, 731 (2d Cir. 1978) *with* United States v. DeCoster, 487 F. 1197, 1202 (D.C. Cir. 1973).

30. Cooper v. Fitzharris, 586 F.2d at 1329. *See also* Moore v. United States, 432 F.2d 730 (3d Cir. 1970); *see generally Effective Assistance, supra* note 11, at 530-37.

31. Although courts have characterized their standards by different names, generally the standards fall into two categories.

the case" is the first standard.[32] Courts which have adopted this standard determine reasonableness by hindsight rather than by considering defense counsel's conduct at the time legal services were rendered.[33] If subsequent events at trial minimize the unreasonableness of defense counsel's actions, counsel's representation is found to be effective.[34] Defendant is required to show a causal relationship between defense counsel's unreasonable conduct and the resulting unfair trial.[35]

This standard also presents problems. The hindsight approach of the standard limits the examination of counsel's actions to the cold record which does not contain a complete catalog of counsel's actions. In addition, a case by case analysis of the standard may cause unfair and uneven results. Finally, the standard places a heavy burden on the defendant to prove the causal connection between the attorney's actions and the unfair trial.[36]

"Reasonably competent assistance" is the second standard. Courts that use the "reasonably competent" standard describe minimum duties and guidelines that a defense attorney must perform.[37] By creating duties and guidelines, these courts do not have to determine whether counsel was reasonable in each case as they do with the "reasonably effective assistance under the circumstances of the case" test. Rather, defendant must only show that the attorney violated a guideline or failed to perform a duty in order to show inadequate representation.[38]

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32. *See generally, Defects, supra* note 9, at 402.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 403.

37. Several courts have adopted the ABA Standards as guidelines. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 4.1 (Approved draft 1971) reads as follows:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of the facts constituting guilt or his stated desired to plead guilty.

*See* McQueen v. Swenson, 498 F.2d 207, 216-17 (8th Cir. 1974); United States v. DeCoster, 487 F.2d 1197, 1203-04 (D.C. Cir. 1973).

38. *See Ineffective Representation, supra* note 9, at 53; *Defects, supra* note 9, at 404.

The problems that arise from applying the "reasonably competent assistance" standard are (1) the inflexibility of a minimal list of specific duties may serve only to create more elaborate rituals to satisfy sixth amendments requirements, and (2) there is a danger that the guidelines will be viewed as the maximum performance an attorney has to give rather than the minimum performance.[39]

### C. THE *Cooper* ANALYSIS AND ADOPTION OF REASONABLY EFFECTIVE AND COMPETENT DEFENSE STANDARD

In *Cooper*, the Ninth Circuit traced the development of the "farce and mockery of justice" standard and noted that there has been a gradual shift toward the "reasonably effective assistance of counsel" standard.[40] The court also observed that there has been confusion in the use of the term.[41] Finally, the court stated: "[W]e believe the differences are of sufficient importance . . . to justify deliberate rejection of the 'farce and mockery' verbiage in favor of a statement of the test in terms of reasonably effective and competent defense representation."[42] The court's adoption of the "reasonably effective and competent defense representation" standard was based on the following: (1) the standard links both the sixth amendment guarantee of effective assistance of counsel and general requirements of due process; (2) the standard focuses inquiry on the subject matter of the sixth amendment guarantee, *i.e.*, counsel's performance; and (3) the standard avoids the misleading implication that all that is relevant to a determination of counsel's performance is what occurred at trial and is in the record.[43]

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39. *See* Bazelon, *supra* note 9, at 33.

40. 586 F.2d at 1329 & n.6. The "farce and mockery" standard has been abandoned by most of the circuits. Marzullo v. Maryland, 561 F.2d 540, 543-44 (4th Cir. 1977); United States v. Easter, 539 F.2d 663, 665-66 (8th Cir. 1976); United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975); Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973)*opinion after remand*, No. 72-1283 (D.C. Cir. Oct. 19, 1976), *rehearing en banc granted*, No 72-1293 (D.C. Cir. Mar. 17, 1977); Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970) (en banc).

41. 586 F.2d at 1329. *See, e.g.*, de Kaplany v. Enomoto, 540 F.2d 975, 987 (9th Cir. 1976) (en banc) (interchangeable use of the terms "farce and mockery of justice" and "reasonably effective assistance"); United States v. Miramon, 470 F.2d 1362, 1363 (9th Cir. 1972) (synonymous use of the two standards); Leano v. United States, 457 F.2d 1208, 1209 (9th Cir. 1972) (synonymous use of the two standards); Kruchten v. Eyman, 406 F.2d 304, 312 (9th Cir. 1969) (interchangeable use of the two terms).

42. 586 F.2d at 1329.

43. *Id.* The court further stated that the "reasonably effective and competent defense representation" test is an objective standard as opposed to the "farce and mockery

The Ninth Circuit's adoption of the "reasonably effective and competent defense representation" standard is, in effect, a combination of the two general tests that circuit courts have developed under the sixth amendment analysis of the right to counsel. But, in combining the standards, *i.e.*, "reasonably effective assistance under the circumstances of the case" and "reasonably competent assistance," the Ninth Circuit failed to identify what the necessary elements are to assert ineffective assistance of counsel.

The "reasonably effective assistance under the circumstances of the case" standard generally requires an examination of the trial by hindsight.[44] In *Cooper*, however, the court explicitly stated that its standard was designed to avoid the misleading implication that all that is relevant is what occurred at trial and appears on the face of the record.[45] Whatever else is necessary, in addition to the events at trial and what appears on the record, is left undefined by the *Cooper* court.

The "reasonably competent assistance" standard generally delineates specific duties and guidelines.[46] In *Cooper*, the court recognized that some courts have "particularized elements of minimal performance."[47] While acknowledging that such a checklist might enhance the objectivity of the general standard,[48] the court opted for a less rigid approach. In so doing, the *Cooper* court adopted the *McMann* rule that the determination of counsel's competency should be "left to the good sense and discretion the trial courts."[49] However, the Ninth Circuit's failure to suggest guidelines in *Cooper* has the potential of confusing lower courts. For example, a court may combine elements of both standards, decide to favor one standard over another, or fashion its own test, unrelated to the precedents established in other circuits.

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of justice" standard which is "peculiarly subjective." *Id. See also* Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir. 1977).

44. *See Defects, supra* note 9, at 403.

45. 586 F.2d at 1329.

46. *See* text accompanying notes 37 & 38 *supra.*

47. 586 F.2d at 1330. *See also* United States v. DeCoster, 487 F.2d 1197, 1203-04 (D.C. Cir. 1973), *opinion after remand*, No. 72-1283 (D.C. Cir. Oct. 19, 1976), *rehearing en banc granted*, No. 72-1293 (D.C. Cir. Mar. 17, 1977). Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

48. 586 F.2d at 1330.

49. *Id., quoting* McMann v. Richardson, 397 U.S. at 771.

Finally, the court proceeded to define the constitutional standard of "reasonably effective and competent defense representation," holding that the "fact that counsel erred is not alone enough to establish a denial of the constitutional right."[50] Since, infallible representation is not guaranteed by the Constitution,[51] the accused "assumes the risk of ordinary error in . . . his attorney's assessment of the law and facts . . .."[52] To rise to the level of a constitutional violation "[d]efense counsel's errors or omissions must reflect a failure to exercise the skill, judgment, or diligence of a reasonably competent criminal defense attorney—they must be errors a reasonably competent attorney acting as a diligent conscientious advocate would not have made, . . . ."[53]

## D. THE *Cooper* COURT'S REQUIREMENT OF PREJUDICE

The requirement of prejudice based on claims of ineffective assistance of counsel was the major area of controversy confronted by the *Cooper* court. Other circuit courts have disagreed on whether a separate showing of prejudice is required.[54] This precise issue has not been addressed by the Supreme Court. The Ninth Circuit's majority opinion in *Cooper* held that a showing of prejudice is required where a claim of ineffective counsel is based on an attorney's specific acts and omissions.[55] However, where counsel is not present or has been prevented from carrying out a vital function, automatic reversal is required.[56]

The dissenting opinion rejects the majority's distinction and bases its theory on procedural fairness.[57] Once a defendant has made a prima facie showing of ineffective assistance, the dissent

50. 586 F.2d at 1330.

51. *Id. See also* Rivera v. United States, 318 F.2d 606, 608 (9th Cir. 1963).

52. 586 F.2d at 1330 *quoting* McMann v. Richardson, 397 U.S. at 774. The *Cooper* court, in developing the constitutional standard further discussed the importance of counsel's ability to reasonably foresee that prejudice might arise as a result of his or her actions. *Id.* at 1330-31 n. 10. *See generally Effective Assistance, supra* note 11, at 542-44.

53. 586 F.2d at 1330.

54. *See, e.g.*, McQueen v. Swensen, 498 F.2d 207 (8th Cir. 1974) (prejudice required); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) (automatic reversal—no showing of prejudice); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973), *opinion after remand,* No. 72-1283 (D.C. Cir. Oct. 19, 1976), *rehearing en banc granted,* No. 72-1293 (D.C. Cir. Mar. 17, 1977) (counsel must conform with ABA standards quoted at note 37 *supra).*

55. 586 F.2d at 1331.

56. *Id.* at 1332.

57. *Id.* at 1334.

asserts that automatic reversal should be required.[58] The remainder of this Note will focus on the reasoning of both opinions, analyzing their merits and weaknesses.

*The Majority Opinion*

The majority held that a showing of prejudice is required when claims of ineffective assistance of counsel rest on specific acts and omissions of counsel at trial.[59] The court distinguished cases like *Cooper,* based on specific acts and omissions, from cases where no counsel is present or where counsel has been prevented from carrying out vital functions. Based on several Supreme Court cases where counsel's effective assistance was prevented, the court would not require a showing of prejudice.

The Ninth Circuit began its analysis with *Chambers v. Maroney,*[60] in which the defense counsel met with the defendant only a few minutes before trial. As a result of the belated appearance, counsel failed to object to certain adverse evidence. The defendant petitioned for habeas corpus relief asserting ineffective assistance of counsel. The petition was dismissed on the ground that the defendant had not been prejudiced. The Supreme Court affirmed, stating, "we are not disposed to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel in all cases."[61]

This particular language in the *Chambers* opinion has been criticized as being ambiguous,[62] and therefore, subject to various interpretations.[63] Specifically, in *Cooper,* the majority interprets

58. *Id.*

59. *Id.* at 1331.

60. 399 U.S. 42 (1970).

61. *Id.* at 53-54.

62. *See generally Ineffective Representations, supra* note 9, at 76.

63. The majority and the dissent cite the following circuit court cases for differing propositions. United States *ex rel.* Green v. Rundle, 434 F.2d 1112 (3d Cir. 1970) (the Third Circuit considered the impact of counsel's failure to investigate an alibi defense); United States v. Crowley, 529 F.2d 1066 (3d Cir. 1966) (the Court held that the absence of counsel on the motion to withdraw the guilty plea was harmless beyond a reasonable doubt.) *See also* McQueen v. Swenson, 560 F.2d 959 (8th Cir. 1977); Cheely v. United States, 535 F.2d 934 (5th Cir. 1976); Loftis v. Estelle, 515 F.2d 872 (5th Cir. 1975).

The majority cites *Rundle* and *Crowley* as holding, in line with *Chambers,* that reversal is not required where the defendant suffered no prejudice from that error. 580 F.2d at 1331 n.11. The dissent, on the other hand, stated that the Third Circuit in *Rundle* and *Crowley* expressly adopted the automatic reversal rule for constitutionally ineffective counsel cases. *Id.* at 1337 n.6. According to the dissent, *Rundle* held that where an attor-

the *Chambers* rejection of a per se automatic reversal rule in all tardy appointment cases as standing for the proposition that, where counsel's specific acts and omissions have not prejudiced the defense, counsel's performance will be viewed as harmless error.[64] Thus, the *Cooper* court rejects a per se rule of automatic reversal and embraces the harmless error doctrine, which measures the prejudicial effect of trial court error, assuming that some trial errors are too insignificant to require reversal of the trial judgment.[65]

The *Cooper* court distinguished *Gideon v. Wainwright*[66] where no defense counsel was present. In *Gideon,* the defendant was charged with a non-capital felony. He appeared in state court with neither funds nor counsel and therefore, asked the court to appoint an attorney. Since state law only required the appointment of counsel on charges of capital offenses, the court denied his request. Upon exhaustion of defendant's state court remedies, the United States Supreme Court held that the right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right, made obligatory upon the states by the due process clause of the fourteenth amendment.[67]

Next, the *Cooper* court distinguished a series of Supreme Court cases which warranted automatic reversal. In these cases, the court pointed out that counsel was prevented from carrying out a vital function. In *Powell v. Alabama,*[68] the trial court judge generously appointed "all the members of the bar" to represent the defendants.[69] The Supreme Court found that since no lawyer was designated to represent the defendants from their arraignment until trial, the period when vital consultation, investigation and preparation occur, defendants were not afforded the

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ney's failure cannot be determined, ineffective assistance is presumed and reversal is required. *Id.* The dissent further counters the majority's interpretation of *Crowley*, stating that the Third Circuit limited the consideration of harmless error to the particular fact situation where counsel is absent for a motion to withdraw a guilty plea. *Id.*

64. 586 F.2d at 1331-32.

65. 3 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 851 (1969). *See generally* Mause, *Harmless Constitutional Error: The Implications of* Chapman v. California, 53 MINN. L. REV. 519 (1969); Comment, *Ineffective Assistance of Counsel and the Harmless Error Rule: The Eighth Circuit Abandons* Chapman, 43 GEO. WASH. L. REV. 1384 (1975).

66. 372 U.S. 335 (1942).

67. *Id.* at 339.

68. 287 U.S. 45 (1932).

69. *Id.* at 49.

right to counsel "in any real sense."[70]

In *Geders v. United States,*[71] a court order prevented counsel from conferring with the defendant during an overnight recess. The Supreme Court examined the seventeen hour recess and held that the court order deprived the defendant of his right to counsel.[72] Central to the court's holding was the fact that it is common practice for an accused to confer with counsel during such extended recesses to discuss the events of the day's trial.

In *Herring v. New York,*[73] a state statute granted the judge in a non-jury criminal trial the power to deny counsel the opportunity to make a final summation. The Supreme Court found that "no aspect of [our adversary fact-finding process] could be more important than" the right of the defense to make a closing argument.[74] Thus, the Court held that a total denial of the opportunity to make a closing argument, in a jury or non-jury criminal trial, contravenes the right to the assistance of counsel that the sixth amendment guarantees.[75]

In *Glasser v. United States*[76] and *Holloway v. Arkansas,*[77] defense counsel represented multiple defendants who allegedly had conflicting interests. In *Glasser,* the Supreme Court held that a defendant is entitled to the undivided assistance of counsel.[78] Since counsel's representation "was not as effective as it might have been if the appointment had not been made," the Court held that defendant was denied his sixth amendment right to the effective assistance of counsel.[79] In *Holloway,* the Supreme Court affirmed *Glasser,* holding that a court's failure to appoint separate counsel upon timely motions by defense counsel, deprives a

70. *Id.* at 57.
71. 425 U.S. 80 (1976).
72. *Id.*. at 91.
73. 422 U.S. 853 (1975).
74. *Id.* at 862.
75. *Id.* at 857-59.
76. 315 U.S. 60 (1942).
77. 435 U.S. 475 (1978).
78. 315 U.S. at 75.
79. *Id.* at 76. The *Glasser* Court held that "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests." *Id.* at 70.

defendant of the sixth amendment right to assistance of counsel.[80]

In all of the above cases, reversal was automatic because the harm resulted from what the attorney was prevented from doing. Such harm could not be determined from the record since it either occurred before there was a record or because it was not reflected in the record.[81] The *Cooper* court, quoting *Holloway*, stated: "[T]hus an inquiry into a claim of harmless error would require . . . unguided speculation."[82] However, the harmless error rule should apply when specific acts and omissions occur at trial and their scope is readily identifiable from the record.[83] Since the reviewing court can determine with some confidence, and without mere speculation, if the error prejudiced the outcome of the trial.[84]

The *Cooper* court asserted another reason for granting relief only upon a showing of prejudice. The type of trial errors asserted by Cooper *i.e.*, counsel's failure to object to the admission of evidence obtained in violation of the Constitution, were of the type that could have been reviewed on direct appeal, as plain error,[85] or in the alternative, could have justified collateral attack.[86] Both situations would have required a showing of prejudice.[87] Therefore, the court reasoned that if these errors could escape a showing of prejudice by attacking them solely

80. 435 U.S. at 484-85. For a general discussion of the *Holloway* decision, see Note, *The Sixth Amendment and the Right to Separate Counsel*, 16 HOUS. L. REV. 209 (1978); Comment, *Multiple Criminal Representation Examined:* Holloway v. Arkansas, 40 OHIO ST. L. REV. 251 (1979).

81. 586 F.2d at 1332.

82. *Id.*

83. *Id.* In *Cooper*, the court examined the defendant's specific allegations and found that 1) all of the alleged errors were readily identifiable from the record, and 2) the allegation of counsel's failure to stipulate to a prior conviction was Cooper's only meritorious allegation and was not prejudicial enough to warrant reversal. *See* text accompanying notes 90 to 93.

84. *Id.*

85. *Id.* at 1333. For general background material on the plain error doctrine, see 10 J. MOORE FEDERAL PRACTICE § 103.41 (2d ed. 1976). *See* text accompanying notes 126-128 *infra*.

86. 586 F.2d at 1333. For general background material on the collateral attack doctrine, see 2 C. WRIGHT, *supra* note 65, at § 593. *See also* Friendly, *Is Innocence Irrelevant? Collateral Attack in Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

87. 586 F.2d at 1333. For a discussion of the prejudice requirement under the plain doctrine, see 10 J. MOORE, *supra* note 85. For a discussion of the prejudice requirement under the collateral attack doctrine, see Wainwright v. Sykes, 423 U.S. 72 (1977).

under a claim of ineffective assistance of counsel, the doctrines of plain error or collateral attack would be undermined.

Finally, the court added two cautionary comments: 1) prejudice may result from the cumulative effect of multiple deficiencies; and 2) the requirement of prejudice does *not* mean that relief is only available if defendants would have been acquitted *but for* counsel's mistakes.[88]

Having defined the new Ninth Circuit standard and the requirement of prejudice where ineffective assistance claims are based on specific act and omissions, the court applied the standard to the *Cooper* facts.[89] Cooper alleged counsel's failure to object to the admission of the fruits of the warrantless searches of his home and person. The court found no merit to Cooper's allegation claiming counsel's failure to suppress the fruits of a warantless arrest, since the court found probable cause for the arrest and consent to the search.[90] Cooper further alleged counsel's failure to move to supress his statements made to the police and failure to object to testimony regarding defendant's identification at the pre-indictment lineup. Because the confession and line-up occurred prior to the *Escobedo* and *Wade* decisions, the court again found no merit to Cooper's claims: the interrogation was proper under pre-*Escobedo* standards, which existed at the time of trial; the pre-indictment lineup was proper under pre-*United States v. Wade* standards.

Cooper also claimed counsel's failure to inform him of his right to appeal. The court determined however, that Cooper knew of his right to appeal independent of counsel.[91] Lastly, Cooper criticized his attorney's failure to stipulate to his prior burglary conviction. The court found that the only additional fact to come before the jury because of counsel's failure to stipulate was that probation on the earlier conviction had been revoked and that the prejudice from this additional information was slight.[92] Therefore, the court held that even if counsel was negligent in this respect, the error was not prejudicial.[93] The

88. 586 F.2d at 1333.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*

court concluded that none of the Cooper allegations were prejudicial and therefore, affirmed the judgment dismissing Cooper's habeas petition.

*The Dissenting Opinion*

Judge Hufstedler, writing for the dissent,[94] concurred with the majority's new standard requiring "reasonably competent and effective representation," but vigorously dissented on the requirement of prejudice. The dissent argued that the right to assistance of counsel is so fundamental that failure to provide constitutionally adequate counsel at trial demands automatic reversal.[95] The dissent launched three major attacks against the majority opinion: (1) circuit courts have not denied relief based on failure to show prejudice; (2) there is no viable distinction between situations where counsel is denied, or prevented from carrying out a vital function and where counsel's alleged ineffectiveness is based on specific acts and omissions; and (3) the requirement of prejudice underlying the plain error and collateral attack doctrines would not be undermined by requiring automatic reversal.

The dissent's theory, underlying its automatic reversal rule, proposed that the sixth amendment not only embraces the right to counsel,[96] but also the right to effective assistance of counsel.[97] The dissent stated: "The Sixth Amendment right to counsel proscribes with equal force denials of reasonably competent and effective counsel, for '[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.' "[98] The overriding concern in the right to counsel cases[99] was enunciated in *Chapman v. California,*[100] where the Supreme Court stated that the right to counsel was among the "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. . . . "[101] Therefore, the dissent rea-

94. Judges Ely and Hug joined Judge Hufstedler's dissenting opinion.

95. *Id.* at 1334.

96. *Id.*

97. *Id.* at 1335. *See* McMann v. Richardson, 397 U.S. 759 (1970); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Beasley v. United States, 491, F.2d 687 (6th Cir. 1974).

98. 586 F.2d at 1338, *quoting* McMann v. Richardson, 397 U.S. at 771 n.14.

99. *E.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

100. 386 U.S. 18 (1967).

101. *Id.* at 23.

soned, a sixth amendment violation, such as a violation of the right to effective assistance of counsel, always requires automatic reversal.[102]

The dissent cited recent Supreme Court cases[103] which reaffirmed the *Chapman* automatic reversal rule.[104] However, these are the same cases the majority opinion in *Cooper* used to support its analysis. Where the majority characterized *Herring, Geders* and *Holloway* as warranting automatic reversal,[105] since counsel was prevented from carrying out a vital function, the dissent characterized these same cases as holding that automatic reversal applies regardless of any absence or presence of prejudice.[106] The dissent found further support in *Holloway,* which reaffirmed the "general rule" of automatic reversal for violations of the right to effective assistance of counsel. Therefore, the dissent argued: "The right to effective assistance of counsel is more than a right to be free from prejudicial trial errors. The right to competent counsel is also based on considerations of procedural fairness that apply regardless of the strength of the case against the accused."[107]

The dissent recognized that refusal to grant automatic reversal would impair defendants' right to the very presence of counsel because defendants, faced with overwhelming evidence of guilt, might never be able to demonstrate prejudice from the absence of counsel. Since this type of situation goes to the very heart of fundamental fairness of criminal proceedings, courts should not look to whether prejudice resulted or was shown.[108]

The dissent contended that the Supreme Court's decision in *Chambers v. Maroney*[109] does not undermine the automatic reversal rule. According to the dissent, *Chambers* dealt only with the issue of what constitutes constitutionally ineffective counsel;

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102. 586 F.2d at 1335.

103. Holloway v. Arkansas, 435 U.S. 475 (1978); Geders v. United States, 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1976).

104. The *Chapman* automatic reversal rule holds that certain constitutional rights, such as the right to counsel, are so basic to a fair trial, that a denial of those rights can never be treated as harmless error. Chapman v. California, 380 U.S. 18, 23 n.8 (1967).

105. *See* text accompanying notes 71 to 84 *supra.*

106. 586 F.2d at 1335.

107. *Id.*

108. *Id.*

109. 399 U.S. 42 (1970).

it did not determine whether or not a defendant need show prejudice. Furthermore, the dissent finds misleading the majority's analysis of appellate decisions in line with *Chambers*, as not requiring reversal where prejudice is not shown.[110] The dissent states that neither *Chambers* nor the circuit court decisions require a separate showing of prejudice[111] apart from the overall demonstration that trial counsel did not conform to the constitutional standard of competency. The dissent states that, "[o]nce trial counsel has been held to have been constitutionally ineffective, no circuit has denied relief because the error was harmless."[112]

The dissent rejected the majority's application of the automatic reversal rule to only those situations where there is no counsel or where counsel is prevented from carrying out vital functions. The dissent found no reason to distinguish between situations where there is no counsel or counsel is prevented from carrying out vital functions, from situations where counsel is incompetent.[113] Despite the fact that automatic reversal is premised, in part, on the difficulty of assessing the prejudicial impact, this should not justify restricting the rule to situations where counsel is prevented from performing. In all situations, assessing the prejudicial impact of the situations is difficult and results in speculation. The dissent argued that there will always be cases of specific acts or omissions where the cold record will not truly reflect counsel's performance or the effect of counsel's errors.

The dissent also found no merit in the majority's argument

110. The dissent argued that since the circuit court cases did not *expressly* require a separate showing of prejudice, these cases did not support the majority's holding. 586 F.2d at 1336-37.

111. *Id.* at 1336 & 1337 n.6.

112. *Id.* at 1338.

113. The dissent stated:

> Defendants represented by incompetent attorneys surely are at least as bad off as defendants with competent counsel who are barred from presenting closing argument at a bench trial. A holding that pro forma appointment of counsel is sufficient to remove Sixth Amendment violations from the automatic reversal rule would undermine the purpose of *Gideon*.

*Id.* at 1338. The dissent further quotes from the original Cooper panel that "the purpose of *Gideon* was not merely to supply criminal defendants with warm bodies, but rather to guarantee reasonable competent representation." *Id.* at n.11, *quoting* Cooper v. Fitzharris, 551 F.2d 1162, 1164 (9th Cir. 1977).

that automatic reversal would undermine the requirement of prejudice, included in the plain error and collateral attack doctrines. The dissent's interpretation is that the requirement of prejudice included in both doctrines is permissible when counsel is competent, since then the defendant could have knowingly waived his rights and thus a requirement of prejudice may be justifiable. However, when counsel is incompetent, the underlying "waiver" may not have been knowing.[114] To protect the defendant from unknowingly waiving his right to appeal because of incompetent counsel, automatic reversal should be adopted.

Lastly, the dissent notes that the majority did not determine who should bear the burden of proving prejudice. If a harmless error approach is taken, the dissent advocates that, under *Chapman v. California,*[115] someone other than the preson prejudiced must show beyond a reasonable doubt that the error was harmless.

## E. CRITIQUE

Portions of each opinion in *Cooper* make important and meritorious legal arguments.[116] Both opinions, however, also have significant gaps within their reasonings and thus create analytical problems. The remainder of the Note will examine the major areas of conflict and the weaknesses of each opinion. These areas include: (1) the distinction between vital function and claims and specific act and omission claims; (2) the effect of automatic reversal on the plain error and collateral attack doctrines; (3) the interpretation of precedent; and (4) the procedural fairness theory.

### *Vital Functions as Distinguished From Specific Acts and Omissions*

The essence of the majority's argument is that automatic re-

114. 586 F.2d at 1339.

115. 386 U.S. 18 (1967). In *Chapman,* the Supreme Court stated: "[c]onstitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless." *Id.* at 24. The Court further stated that the prosecution bears the burden of proving that the constitutional error was "harmless beyond a reasonable doubt." *Id. See also* United States v. Crowley, 529 F.2d 224 (4th Cir. 1968).

116. The majority opinion discusses the vital function/specific acts and omissions distinction, 586 F.2d at 1332; and the possibility of circumventing the prejudice requirement included within the plain error/collateral attack doctrines, *id.* at 1333. The dissent argues against the majority's plain error/collateral attack position, *id.* at 1339; then interpretes precedent, *id.* at 1335-38 and discusses procedural fairness, *id.* at 1335.

versal is required only when no counsel appears or where counsel is prevented from performing vital functions. While the majority does not expressly define the distinction, it cites cases it considers are properly within the automatic reversal rule.[117] The majority seems to view specific acts and omissions as errors that occur in the course of the trial that will appear in the record.[118] The rationale for the vital functions/specific acts distinction is that "when no counsel is provided, or counsel is prevented from discharging his normal functions, the evil lies in what the attorney does not do, and is either not readily apparent in the record, or occurs at a time when no record is made."[119] Where there is a claim relating to a specific act and omission "the error occurs at trial and its scope is readily identifiable."[120]

The majority's distinction makes sense especially where claims of ineffectiveness of counsel are based on facts similar to those in *Cooper*.[121] Practically speaking, there is an obvious difference in magnitude between counsel being prevented from making a closing argument or conferring with the client, and counsel making a tactical error, such as failing to stipulate to a prior conviction.

The dissent, however, raises the issue that the line between failure to perform vital functions and failure to perform specific acts and omissions is not clear.[122] There are situations that could conceivably fall into both categories. For instance, a court might prevent the attorney from making a clear objection, thereby preserving the defendant's right to appeal. Likewise, a court might deny a request to make an offer of proof. A judge might deny a continuance so that pre-trial investigation or additional client conference could not be conducted. These situations could be viewed as either specific errors by the attorney or as a court

117. For a discussion of the cases cited by the majority, *see* text accompanying notes 66 to 80 *supra*.

118. *See* Holloway v. Arkansas, 435 U.S. 475 (1978); Geders v. United States, 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1975); Gideon v. Wainwright, 372 U.S. 335 (1963); Glasser v. United States, 315 U.S. 60 (1942); Powell v. Alabama, 287 U.S. 45 (1932).

119. 586 F.2d at 1332, *quoting* Holloway v. Arkansas, 435 U.S. at 490.

120. *Id.*

121. *See* text accompanying notes 4 & 5 *supra*.

122. 586 F.2d at 1338. The dissent states: "It makes little sense to distinguish between cases where counsel is denied and cases where counsel is incompetent because representation by incompetent counsel may be little or no better than no representation at all." *Id.*

preventing an attorney from performing vital functions. Since under *Cooper* this distinction makes the difference between having to show prejudice or being automatically reversed without such a showing, clarity is needed for uniform application in the trial courts. While the extreme cases may clearly fall in one category or the other, the closer cases will undoubtedly create problems of interpretation. To this extent, the automatic reversal rule is preferable since it would ensure consistency in trial court treatment of the basic procedural right to a fair trial.[123]

*Plain Error and Collateral Attack*

The majority is concerned that if prejudice is not required the criminal defendant will be encouraged to make claims of ineffective assistance in order to skirt traditional review processes where prejudice is required.[124] The majority asserts that if prejudice is not required the doctrines of plain error and collateral attack would be undermined.[125]

Plain errors are errors or defects affecting substantial rights that were not brought to the attention of the court by objection at trial.[126] Where no objection is made, an appellate court will reverse a trial judgment only where the errors are obvious,[127] or if they affect the fairness, integrity or public reputation of the judicial proceeding.[128] The error must be shown to prejudice the defendant's case. Thus, if the error was "harmless," even if it is obvious, the result will not be reversed.

Collateral attack,[129] which the *Cooper* dissent refers to as the *Wainwright v. Sykes* doctrine,[130] originates with a habeas corpus petition. A state prisoner claims that state remedies have been exhausted without a decision on the merits of a federal constitutional claim because of his failure to comply with the state pro-

123. *See* text accompanying notes 96 to 102 *supra*, and notes 157 to 166 *infra*.
124. 586 F.2d at 1333.
125. *Id.*
126. 10 J. MOORE, *supra* note 85, at § 103.41.
127. *Id.; see also* United States v. Atkinson, 297 U.S. 157, 160 (1936).
128. 10 J. MOORE, *supra* note 85, at § 103.41.
129. *See generally* Goodman & Sollett, Wainwright v. Sykes: *The Lower Federal Courts Respond*, 30 HASTINGS L.J. 1683 (1979); Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Has Work to Do*, 31 STAN. L. REV. 1 (1978); Note, *Federal Habeas Corpus: Further Erosion of Its Efficacy as a Remedy for State Incarceration*, 24 LOY. L. REV. 251 (1978).
130. 586 F.2d at 1339.

cedural rules on how the claim must be raised, *i.e.*, where state law requires a trial objection and counsel failed to make one.[131] In order to assert this type of collateral attack, the defendant must show cause for the failure to object at the time and actual prejudice.[132]

The majority basically argues that if prejudice is not required for specific act and omission claims, defendants will overwhelmingly choose to assert ineffective assistance claims to avoid the extra showing of prejudice required on direct[133] appeal or collateral attack on the underlying constitutional violation. Thus, the court will be faced with large numbers of ineffective assistance petitions which *would have been* subject to a prejudice test on appeal. The court will have to rule on those cases where errors below could have been held harmless on the merits of the underlying claim.

The dissent disagrees, contending that both these theories are based on defendant knowingly waiving his or her rights and then later raising a claim for relief.[134] However, if counsel was inadequate, defendant may not have been aware of his rights and therefore could not be said to have knowingly waived them.[135] Waiver depends on personal participation and proceeds on the premise that the law should strive to guard against the individual's inadvertent or uninformed loss of a valuable right.[136] To protect the defendant from unknowingly waiving such important rights because of incompetent counsel, automatic reversal should be applied upon prima facie showing of ineffectiveness.[137]

Furthermore, the dissent points out that trial courts will be able to distinguish between true ineffective assistance cases and claims that are in reality underlying substantive assertions that should go up on direct appeal or collateral attack.[138] The dissent

131. *See* note 129 *supra*.

132. *See* Wainwright v. Sykes, 433 U.S. 72 (1977).

133. 586 F.2d at 1333.

134. *Id.* at 1339. *See generally* Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473 (1978).

135. United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973).

136. *See* Spritzer, *supra* note 134, at 513, 514.

137. 586 F.2d at 1337.

138. *Id.* at 1340 n.16. The dissent stated:

> The majority's fear that collateral attack rules will be undermined must rest on a distrust of the ability of courts to distinguish genuine claims of inadequate counsel and disguised col-

points out that for ineffective assistance claims, the defendant must show why the attorney was incompetent.[139] Such a showing is not required on appeal of the underlying claim. Thus trial courts will be able to identify those claims which are brought merely to circumvent the prejudice requirement because a prima facie showing of ineffectiveness will not be made out.

With rulings on this prejudice issue being so recent, it is difficult to assess whether the majority's concerns will manifest themselves in practice. Additionally, there is no way to assess the dissent's conclusion that even if defendants do increasingly rely on habeas ineffective assistance claims, trial courts will be able to separate the real from the contrived claims. Perhaps the experience of the circuit courts who have ruled on this issue could be utilized to resolve this conflict.

*Interpretation of Precedent*

Throughout the opinion the majority and the dissent rely on the same cases[140] for differing propositions.[141] It is this difference in interpretation that determines the ultimate result in the majority's and dissent's positions on the requirement of prejudice. Generally speaking, the majority reads the sixth amendment precedent narrowly, while the dissenting judges read the same cases much more broadly.

The majority claims that courts of appeals have regularly held that "reversal is not required where the defendant suffered prejudice as a result of the asserted trial errors. . . . "[142] The dissent responded that "once trial counsel has been held to have been constitutionally ineffective, no circuit has denied relief be-

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lateral attack. Since the majority presumes courts to be capable of determining the more subjective issue of prejudice, it is curious that they would distrust the ability of judges to apply the objective standard of attorney competence.

*Id.*

139. *Id.*

140. Geders v. United States, 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1975); Chambers v. Maroney, 399 U.S. 42 (1970); Gideon v. Wainwright, 372 U.S. 335 (1963); Glasser v. United States, 315 U.S. 60 (1942); Powell v. Alabama, 287 U.S. 45 (1932).

141. *Compare* the majority's use of the cases cited in note 141 *supra*, 586 F.2d at 1331-32 *with* the dissent's use of the same cases, *id.* at 1336-38.

142. *Id.* at 1331.

cause the error was harmless."[143] Both of these positions are overstated.

The majority failed to recognize or refute the analysis of the Third and Sixth Circuits which have adopted the automatic reversal doctrine. The Third Circuit in *Moore v. United States,*[144] indicates that prejudice is one relevant factor, but is not a prerequisite to prevail on ineffective assistance claims. The Sixth Circuit in *Beasley v. United States*[145] stated that "[h]armless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel."

The dissent is incorrect to state that no circuit has denied relief because the error was harmless. First, the dissent failed to address the Third Circuit's holding in *United States ex rel. Chambers v. Maroney*[146] which denied defendant's habeas corpus petition on the ground that "the sum and substance of the case is that [defendant] was not prejudiced by the late appointment of counsel." *Chambers* was subsequently affirmed by the United States Supreme Court.[147] Second, the dissent ignored the cases from the Eighth Circuit which has had a requirement of prejudice since 1975.[148]

The dissent also states that "neither *Chambers* nor the circuit court decisions require any showing of prejudice apart from the demonstration that trial counsel did not conform to the constitutional standard of competency."[149] This blanket statement is

143. *Id.* at 1338.

144. 432 F.2d 730 (3d Cir. 1970).

145. 491 F.2d 687, 696 (6th Cir. 1974).

146. 408 F.2d 1186, 1196 (3d Cir. 1969), *aff'd,* 399 U.S. 42 (1970). The Third Circuit in *Chambers* interpreted its previous decision, United States *ex rel.* Mathis v. Rundle, 394 F.2d 748 (3d Cir. 1968) which held that denial of effective assistance of counsel could be presumed from a showing of belated appointment unless the prosecution proved that the defense had not been prejudiced by the tardy appointment. 408 F.2d at 1186. The Third Circuit, in *Chambers* construed this to mean the *inherent* prejudice due to late appointment of counsel may be properly overcome either 1) by evidence produced by the state in an evidentiary hearing showing that there was no prejudice, or 2) by adequate affirmative proof otherwise appearing in the record demonstrating that the appellant was not prejudiced. *Id.* at 1190. *Mathis* has since been overruled by Moore v. United States, 432 F.2d 730, 73 (3d Cir. 1970). *See* note 152 *infra.*

147. Chambers v. Maroney, 399 U.S. 42 (1970).

148. 510 F.2d 356, 358 (8th Cir. 1975). *See also* McQueen v. Swenson, 560 F.2d 959, 960 (8th Cir. 1977), *rev'g* 425 F. Supp. 373 (E.D. Mo. 1976); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976); Thomas v. Wyrick, 535 F.2d 407, 414 (8th Cir. 1976).

149. 586 F.2d at 1336-37. The majority and dissent clearly use the Supreme Court's

not supported by the cases cited.[150] The dissent correctly notes that the whole issue of prejudice may be a factor to be considered in weighing whether the defendant has sufficiently shown ineffectiveness.[151]

The first series of cases that the dissent relies on for this proposition are from the Third and Sixth Circuit, both of which have adopted the automatic reversal rule.[152] Further, all of these cases involve absence of any counsel or failure of counsel to perform a vital function, situations which the majority agrees would warrant automatic reversal.[153]

The dissent does cite two Fourth Circuit cases that are concerned with the first, bad advice concerning entering of a guilty plea and second, an attorney's errors during jury selection.[154]

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decision in *Chamber's* for differing propositions. The majority interprets the *Chamber's* rejection of a per se automatic reversal rule as holding that where counsel's performance has not prejudiced the defense, counsel's alleged errors will be harmless. *See* text accompanying note 60-65 *supra*. The dissent, on the other hand, finds the sole issue in *Chambers* not whether a separate showing is required, but rather what constitutes ineffective assistance of counsel. *Id.* at 1336; *see* text accompanying notes 109-112 *supra*. Judge Hufstedler's view is strengthened by the fact that Chambers is not cited in any of the circuit court decisions that the majority interprets as requiring a separate showing of prejudice. *Id.* at 1337.

150. *See* note 148 *supra*.

151. 586 F.2d at 1337-38.

152. *E.g.*, Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) and text accompanying note 145 *supra;* Moore v. United States, 432 F.2d 730,737 (3d Cir. 1970). *Moore* expressly overruled United States *ex rel.* Mathis v. Rundle, 394 F.2d 748 (3d Cir. 1968). The dissent states that the Third Circuit in *Moore* expressly adopts the automatic reversal rule. 586 F.2d at 1336 n.5. However, the relevant language in *Moore* states the following: "[T]he ultimate issue is not whether a defendant was prejudiced by his counsel's act or omission, but whether counsel's performance was at the level of normal competency. That the client was prejudiced by a failure in performance is of course evidentiary on the issue." 432 F.2d at 737. Although the language impliedly adopts the automatic reversal rule, there is nothing in the opinion that *expressly* adopts the rule. Because it overruled *Mathis, Moore* stands for the proposition that prejudice is no longer presumed, but rather may be one of the factors in determining if counsel was ineffective. 432 F.2d at 735.

For other cases in the Third and Sixth Circuits, *see, e.g.*, United States v. Sumlin, 567 F.2d 684, 689 (6th Cir. 1977) (ineffective assistance of counsel during FBI interrogation was "of a different type altogether than those that deal with errors at trial or in trial preparation."); United States v. Crowley, 529 F.2d 1066 (3d Cir. 1976) (limits application of harmless error on denial of counsel at a hearing on a motion to withdraw a guilty plea); United States *ex rel.* Green v. Rundle, 434 F.2d 1112 (3d Cir. 1970) (failure to investigate an alibi—ineffectiveness presumed and reversal required).

153. *See* text accompanying note 57 *supra*.

154. Tolliver v. United States, 563 F.2d 1117, 1121 (4th Cir. 1977) (flagrant misadvice resulting from "neglect or ignorance rather than from informed, professional deliberation" deprived defendant of effective assistance of counsel); Marzullo v. Maryland, 561 F.2d 540, 547 (4th Cir. 1977) (representation during jury selection was "outside the range

Both of these cases do deal with specific acts and omissions and there was no inquiry into prejudice. The dissent, however, neglects to point out the other circuits that do have prejudice requirements.[155] Thus, in their respective zeal, neither majority nor dissent honestly portrays the present state of the law. In reality, the circuit courts are split not two, but three ways on this very difficult issue, with cogent arguments being made on all sides.[156] Ultimately, the resolution of the question depends on social policy considerations and on an analysis of the sixth amendment.

*Procedural Fairness*

The sixth amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense."[157] The right to the assistance of counsel has been described as "necessary to insure fundamental human rights to life and liberty."[158] There can be no question that the right to counsel is at the very core of the right to a fair trial. In *Chapman,* the high court acknowledged that a violation of this fundamental right could never be harmless; therefore, a showing of prejudice is not required.[159]

The *Cooper* dissent's strongest argument, that procedural fairness requires automatic reversal, is entirely ignored by the *Cooper* majority.[160] This policy argument relies heavily on *Chapman* for the proposition that sixth amendment right to counsel violations cannot be harmless. When *Chapman*'s holding is combined with the rule of *McMann* which equates the right to counsel with the right to *effective* counsel,[161] the resultant constitu-

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of competence expected of attorneys in criminal cases" and therefore deprived defendant of effective representation).

155. *See* note 148 *supra.*

156. *See* note 54 *supra.*

157. U.S. CONST. amend. VI.

158. Johnson v. Zerbst, 304 U.S. 458, 462 (1938); *see also* Avery v. Alabama, 308 U.S. 444 (1940).

159. 386 U.S. 18, 23 (1967).

160. The majority deals with procedural fairness as an afterthought in one line near the end of their opinion. They acknowledge, "[t]he guilty as well as the innocent are entitled to a fair trial, and '[t]he assistance of trial counsel is often a requisite to the very existence of a fair trial.'" 586 F.2d at 1333, *quoting* Argersinger v. Hamlin, 407 U.S. 25, 31 (1972).

161. In McMann v. Richardson, 397 U.S. 759 (1970), the Supreme Court held that the right to counsel is the right to *effective* assistance of counsel. *Id.* at 771. In *McMann,* the defendants entered guilty pleas which they claimed were the result of coerced confessions.

tional imperative points strongly towards automatic reversal for *all* ineffective assistance cases.[162]

Additionally, since the sixth amendment protects procedural fairness, its provisions apply equally to innocent and guilty defendants.[163] If, as *McMann* suggests, effective assistance is a foundational element of a fair trial, then effective assistance should be available to innocent and guilty alike. The *Cooper* dissent correctly notes that a showing of prejudice will be an insurmountable barrier to remedying a constitutional violation of this right for defendants whose guilt is clear.[164] It will also be a difficult burden for defendants whose innocence is unclear. The prejudice showing required by the majority in *Cooper* thus makes obtaining a remedy for ineffective counsel more difficult for those whose guilt is clear or whose innocence is unclear, when procedural fairness should be equally available to all who are accused of crime. The standard of review of ineffectiveness claims should enable all defendants on an equal basis to remedy their constitutional deprivation of competent counsel.

In *Gideon,* Justice Black eloquently wrote:

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.[165]

Since *McMann* held that criminal defendants are constitutionally entitled to the "effective assistance of competent counsel,"[166] perhaps the procedural safeguards Justice Black discussed necessitate automatic reversal for ineffective assistance violations despite the precedent to the contrary.

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162. The majority agrees that automatic reversal is constitutionally required where no counsel appears or where counsel is prevented from performing a vital funtion. 586 F.2d at 1332. Thus, the dissent is only arguing for extension of this rule to specific acts and omissions cases.

163. *See* note 160 *supra*. *See also* Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963).

164. 586 F.2d at 1335.

165. 372 U.S. at 344.

166. 397 U.S. at 771.

### F. CONCLUSION

The significance of *Cooper* lies in its rejection of the "farce and mockery of justice" standard and its endorsement of the "reasonably competent and effective assistance of counsel" standard. Adoption of the standard should lead to a more objective view of what constitutes effective assistance of counsel. The court, however, by combining both the "reasonably effective assistance of counsel" standard and the "reasonably competent assistance" standard has left room for confusion among the lower courts since no guidelines were established as to what the level of attorney ineffectiveness should be.

The more controversial portion of the *Cooper* opinion is its adoption of the prejudice requirement. Using a two-step analysis, a defendant must first prove ineffective assistance of counsel and second, must prove that the outcome of his or her trial was prejudiced by the ineffectiveness of counsel. The dissent makes a persuasive policy argument for automatic reversal based on the need to assure *all* criminal defendants a fair trial. Since the circuit courts are split in several directions, the ultimate resolution of this conflict awaits Supreme Court review.

*Catherine A. Yanni*

## II. "RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS": THE NINTH CIRCUIT ENDORSEMENT OF POPULAR DECISION

### A. INTRODUCTION

In 1970, Congress passed the Organized Crime Control Act (OCCA-70), aimed at "the eradication of organized crime in the United States."[1] Title IX of this Act, "Racketeer Influenced and Corrupt Organizations" [RICO],[2] provides stiff penalties for

1. Statement of Findings and Purpose of the Organized Crime Control Act, 84 Stat. 923 (1970). *See also* McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 141 (1970) (Written by Senator McClellan who, in conjunction with Senator Hruska, introduced legislation later incorporated into RICO).

2. 18 U.S.C. §§ 1961-1968 (1976). OCCA-70 also includes Title I, Special Grand Jury, 18 U.S.C. §§ 3331-3334; Title II, General Immunity, *id.* at §§ 6001-6005; Title III, Recalcitrant Witnesses, 28 U.S.C. § 1826; Title IV, False Declarations, 18 U.S.C. § 1623; Title V, Protected Facilities for Housing Government Witnesses, *id.* at § 3481; Title VI, Deposi-

those who participate in the affairs of an "enterprise"[3] through a "pattern of racketeering activity"[4] or collection of unlawful debt.[5]

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tions, 18 U.S.C. § 3503; Title VII, Litigation Concerning Sources of Evidence, 18 U.S.C. § 3504; Title VIII, Syndicated Gambling, 18 U.S.C. § 1511; Title X, Dangerous Special Offender Sentencing, *id.* at §§ 3575-78; Title XI, Regulation of Explosives, *id.* at §§ 841-848; Title XII, National Commission on Individual Rights, *id.* at § 3331 note, 84 Stat. 960.

3. 18 U.S.C. § 1961(4) (1976) defines "enterprise" as: "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

4. 18 U.S.C. § 1961(5) (1976) defines "pattern of racketeering activity" as: "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(1) (1976) defines "racketeering activity" as follows:

> (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of Title 18, United States Code: section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), section 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-46 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations), or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

5. "Unlawful debt" is defined in 18 U.S.C. § 1961(6) (1976) as:

> [A] debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States . . . and (B) which was incurred in connection with the business of gambling . . . or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usu-

Sanctions for RICO violations are often much harsher than the sanctions provided by state and federal law for the numerous predicate offenses defining "racketeering activity."[6] Because the definitional language in section 1961 of the Act is subject to varying interpretations, questions have arisen as to the proper application of the statute, and in fact, the constitutionality of RICO has been challenged on a number of grounds.[7]

In *United States v. Rone*,[8] a Ninth Circuit panel dealt with the issue of whether two criminal conspirators, acting in concert to commit various offenses, could be termed a RICO "enterprise" and thus fall within the ambit of the statute. Defendant Rone and co-defendant Little associated together for purposes of committing several acts of murder and extortion, and ultimately were convicted of the substantive RICO offense and the concomitant

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rious rate is at least twice the enforceable rate.

These definitions are utilized in the substantive offense section of RICO, 18 U.S.C. § 1962 (1976):

> (a) It shall be unlawful for any person who has received any income derived . . . from a pattern of racketeering activity or through collection of an unlawful debt . . . to use . . . any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce . . . . (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

6. For instance, two acts of mail fraud are punishable by a $2,000 fine and ten years imprisonment, with no forfeiture. 18 U.S.C. § 1341 (1976). For comparable punishment under RICO, *see* note 41 *infra* and accompanying text.

7. RICO has been subject to five constitutional challenges: vagueness, lack of authority under the commerce clause, violation of the prohibition against *ex post facto* laws, violation of the protection against double jeopardy, and violation of the eighth amendment proscription against cruel and unusual punishment. None have been upheld. *See* Atkinson, *"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes*, 69 J. OF CRIM. L. AND CRIM. 1, 4-9 (1978). Although the Supreme Court has yet to hear a RICO case, the court, in a footnote to Iannelli v. United States, 420 U.S. 770 (1975), commented on RICO and the rationale behind the statute. 420 U.S. at 787 n.19.

8. 598 F.2d 564 (9th Cir. June 1979) (per Foley, D.J., sitting by designation; the other panel members were Ely and Wallace, JJ.).

conspiracy.[9] On appeal, defendants urged that their convictions should be reversed, arguing that only legitimate businesses conducted through a pattern of racketeering activity fall within the meaning of "enterprise," and here the prosecution failed to show that defendants associated with such a business.[10] The majority of the panel disagreed, holding that a RICO "enterprise" could indeed include purely illicit organizations.[11]

## B. "ENTERPRISE" UNDER RICO

Four sister circuits have agreed that the broad sword of RICO is aimed at those who participate in the affairs of unlawful organizations through a pattern of racketeering activity.[12] Central to this position is the idea that if Congress intended to limit "enterprise" to lawful business, it could have "inserted a single word of restriction,"[13] and that the use of "any" in modifying "enterprise" mandates a broad reading of the statutory requirement.[14] Additionally, unlike the typical penal statute which is strictly construed,[15] RICO explicitly provides that "provisions of this title shall be liberally construed to effectuate its remedial purpose."[16] "Enterprise" has been held to include a state governmental unit,[17] a foreign business,[18] a police department,[19] and the

9. Both defendants were also convicted of two counts of extortion (18 U.S.C. § 894); defendant Rone alone was convicted of possession of an unregistered firearm (18 U.S.C. § 5861(d)) and possession of a firearm which was not identified by a serial number (18 U.S.C. § 5861(i)).

10. 598 F.2d at 568.

11. *Id.*

12. United States v. Aleman, No. 78-1782, slip op. at 8-10 (7th Cir. Oct. 30, 1979); United States v. Swiderski, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); United States v. Elliott, 571 F.2d 880, 897-98 (5th Cir.), *cert. denied*, 434 U.S. 1021 (1978); United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977); United States v. Altese, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); United States v. Morris, 532 F.2d 436 (5th Cir. 1976); United States v. Hawes, 529 F.2d 472 (5th Cir. 1976); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). *Contra*, United States v. Sutton, 605 F.2d 260, 263 (6th Cir. 1979); United States v. Moeller, 402 F. Supp. 49, 58-59 (D. Conn. 1975). *Moeller* was subsequently overruled by United States v. Altese, 542 F.2d at 107 n.6.

13. United States v. Altese, 542 F.2d at 106.

14. United States v. Elliott, 571 F.2d at 898. *But see* United States v. Rone, 598 F.2d 564, 574 (9th Cir. 1979) (Ely, J., dissenting).

15. United States v. Enmons, 410 U.S. 396, 411 (1973); *see also* Rewis v. United States, 401 U.S. 808, 812 (1971).

16. Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970).

17. United States v. Frumento, 405 F. Supp. 23 (E.D. Pa. 1975).

18. United States v. Parness, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

19. United States v. Brown, 555 F.2d 407 (5th Cir. 1977).

narcotics bureau of a police department;[20] the majority rationale sees no reason to exclude criminal associations from this category. All the cases cited by the *Rone* court assert that this broad reading of "enterprise" comports with the legislative intent underlying Title IX.[21] Thus the de facto association of the defendants in *Rone* constituted a RICO "enterprise," the affairs of which were conducted through racketeering activity; indeed, the primary purpose of the "enterprise" was to commit such unlawful acts. The requisite nexus of the "enterprise" to interstate commerce would exist if the jury found any of three assertions to be true.[22]

The dissenting opinion in *Rone,* written by Judge Ely, relies heavily on the reasoning of Judge Van Graafeiland in his dissenting opinion to *United States v. Altese.*[23] That is, absent clear Congressional intent, federal criminal jurisdiction should not extend to every illicit venture which, in some minimal fashion, affects interstate commerce.[24] While such action may be constitutionally permissible, the intent of the lawmakers in drafting RICO was quite the opposite, as an examination of relevant legislative history demonstrates.[25] RICO was intended to operate as a business regulatory statute, but this function is not served if the "enterprise" being "protected" is an illegitimate organization, possibly even an individual bandit.[26]

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20. United States v. Ohlson, 552 F.2d 1347 (9th Cir. 1977).

21. *See, e.g.,* 84 Stat. 923 (1970) (stating the desire to "seek the eradication of organized crime"). *See* note 12 *supra.*

22. To constitute a violation of § 1962, the enterprise in question must affect interstate or foreign commerce. 18 U.S.C. § 1962(c) (1976). The jury in *Rone* could have found this nexus by concluding either: (1) the company operated by a murder victim bought steel manufactured outside Caifornia; or (2) defendants received and cashed another murder victim's Social Security checks issued in Alabama; or (3) defendants engaged in extortionate collection of debts. 598 F.2d at 573. *See* Perez v. United States, 402 U.S. 146 (1971); United States v. Phillips, 577 F.2d 495, 501 (9th Cir. 1978); United States v. Campanale, 518 F.2d 352, 364 (9th Cir.), *cert. denied,* 423 U.S. 1050 (1976).

23. 542 F.2d 104 (2d Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977).

24. 542 F.2d at 107. *Cf.* Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) (if the commerce clause reached all enterprises having merely an "indirect" effect upon interstate commerce, the "authority of the state over its domesitc concerns would exist only by sufferance of the federal government"). *See also* United States v. Sutton, 605 F.2d 260, 270 (6th Cir. 1979).

25. *See* S. REP. No. 91-617, 91st Cong., 1st Sess. (1969); H.R. REP. No. 91-1549, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007, 4032-36; United States v. Moeller, 402 F. Supp. 49, 59 (D. Conn. 1975). *See generally* Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity",* 124 U. PA. L. REV. 124, 204-206 (1975).

26. *See* United States v. Stofsky, 409 F. Supp. 609, 612-14 (S.D.N.Y. 1973), *aff'd,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976); Comment, *Title IX of the*

This line of reasoning has not impressed the majority view, which has admitted that, although the infiltration of legitimate business was a major concern, "Congress also intended to prohibit any pattern of racketeering activity in or affecting commerce."[27] This sweeping rationale ignores the doctrine of *ejusdem generis*, a rule of statutory interpretation which "warns against expansively interpreting broad language which immediately follows narrow and specific terms."[28] Applied to RICO, the broad language "any . . . group of individuals associated in fact although not a legal entity"[29] interpreted in light of the preceding specific terms yields the result that all RICO "enterprises" must be, by definition, legitimate. And it is true that the specific terms "partnership, corporation, [and] association"[30] connote legitimate organizations.

There is also a doctrine of statutory interpretation which resolves ambiguities in penal statutes to the benefit of the defendant,[31] although this canon of lenity should not be used to violate the clear intent of the legislature in enacting the statute.[32] The minority view argues for the application of the canon of lenity in RICO: the doctrine would not run counter to legislative intent,[33] thus given the ambiguity of "enterprise" all doubts should be resolved in favor of a potential defendant, and the narrow construction of the word should be favored. However, the weight of authority protests that such a reading of the statute "leaves a

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*Organized Crime Control Act of 1970: An Analysis of Issues Arising in its Interpretation*, 27 DEPAUL L. REV. 89, 98-99 (1977). Since by definition an individual can be an "enterprise", it follows that if "enterprise" includes criminal ventures as well as legitimate businesses, RICO can conceivably be stretched to punish lone criminals having no connection with any organization. 18 U.S.C. § 1961(4) (1976).

27. United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974). The *Cappetto* court also asserts that, while § 1962(a) deals with infiltration of legitimate businesses, subsections (b) and (c) are aimed at illegal organizations. But there seems to be no rational basis for the distinction, since the same definition of "enterprise" applies in all three subsections. *See* 542 F.2d at 110 n.5; *see also* note 5 *supra*.

28. United States v. Altese, 542 F.2d at 107 (Van Graafeiland, J., dissenting); United States v. Insco, 496 F.2d 204, 206 (5th Cir. 1974). *See also* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.17, at 103 (C. Sands 4th ed. 1973).

29. 18 U.S.C. § 1961(4) (1976). *See* note 3 *supra*.

30. *Id.*

31. United States v. Bass, 404 U.S. 336, 348 (1971); United States v. Campos-Serrano, 404 U.S. 293, 297 (1971); Rewis v. United States, 401 U.S. 808, 812 (1971); United States v. Archer, 486 F.2d 670, 680 (2d Cir. 1973).

32. United States v. Brown, 333 U.S. 18, 26 (1948); United States v. Gaskin, 320 U.S. 527, 530 (1944). *See also* 2A J. SUTHERLAND, *supra* note 28, § 47.22 at 118.

33. *See* note 25 *supra* and accompanying text.

loophole for illegitimate business to escape its coverage."[34]

## C. "Pattern of Racketeering Activity" under RICO

To establish a RICO violation the prosecution must show participation in an enterprise through a "pattern of racketeering activity," which is defined as "two acts of racketeering activity, one of which occurred after the effective date of [the statute (*i.e.*, 1970)], and the last of which occurred within ten years . . . after the commission of a prior act."[35] The question is raised whether there must be a relationship between the two acts of racketeering activity. Since the "target of Title IX is . . . not sporadic activity,"[36] and that it is "this factor of continuity, plus relationship, which combine to produce a pattern,"[37] the requirement of a relationship between the predicate acts seems plausible enough. One line of cases holds that the "acts must have been connected with each other by some common scheme, plan or motive so as to constitute a pattern,"[38] but more recent authority only requires that both predicate crimes be related to the affairs of the enterprise.[39] In *Rone,* the three murders and two acts of extortion forming the pattern of racketeering activity flowed naturally from the existence of the RICO "enterprise," *i.e.*, the defendants themselves, thus the prosecution had no problem in establishing such an obvious nexus.[40]

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34. United States v. Altese, 542 F.2d at 106-07.

35. 18 U.S.C. § 1961(5) (1976). *See* note 4 *supra.*

36. S. Rep. No. 91-617, 91st Cong., 1st Sess. at 158 (1969).

37. *Id.*

38. United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973), *aff'd,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976); United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974). *See also* United States v. Kaye, 556 F.2d 855, 860-61 (7th Cir. 1977); United States v. Field, 432 F. Supp. 55, 60 (S.D.N.Y. 1977).

39. United States v. Mandel, 591 F.2d 1347, 1375 (2d Cir. 1979); United States v. Elliott, 571 F.2d 880, 889 (5th Cir.), *cert denied,* 434 U.S. 1021 (1978); United States v. Nerone, 563 F.2d 836, 852 (7th Cir. 1977); United States v. DePalma, 461 F. Supp. 778, 783 (S.D.N.Y. 1978).

*Nerone* involved a casino gambling operation conducted upon the premises of a mobile home park (the corrupted "enterprise" as alleged by the government), but conviction under § 1962 (c) were reversed because the government failed to prove that the proceeds of the casino operation were invested in the mobile home park corporation. However, the court indicated that the prosecution could have chosen the gambling association itself as the "enterprise." 563 F.2d at 851-52. *Compare with* United States v. Sutton, 605 F.2d 260, 264 n.1 (6th Cir. 1979).

40. 598 F.2d at 566-67.

## D. Criminal Forfeiture Penalties under RICO

Violations of RICO are punishable by a fine of not more than $25,000, imprisonment for not more than twenty years and forfeiture of any interest acquired or maintained in violation of the statute.[41] The latter sanction is unique in modern federal criminal law, because forfeiture is imposed directly on an individual defendant rather than through a separate *in rem* proceeding.[42] To provide procedural mechanisms for implementing the forfeiture provision of RICO, three additions to the Federal Rules of Criminal Procedure were made in 1972.[43] The statute also allows district courts to enter restraining orders and prohibitions to prevent the transfer of property or other interest subject to forfeiture.[44] In one recent case, the Second Circuit affirmed an order imposing conditional forfeiture upon the defendant's property; the defendant was offered the option of redeeming his seized corporation within six months of judgment, by payment of cash or other property satisfactory to the Attorney General having a value of $100,000.[45]

The language in section 1963 is subject to varied interpretations, causing one court to remark that "[t]he scope of the statute is indeed without precise boundaries."[46] Several courts, however, have upheld the constitutionality of the forfeiture provision,[47] even though it is not clear what interests or property rights are subject to forfeiture. The Fifth Circuit has held that a union

41. 18 U.S.C. § 1963(a) (1976). *Cf.* 21 U.S.C. § 848(a)(2) (1976) (providing for the forfeiture of interests acquired through participation in a narcotics enterprise). RICO also provides for discovery and civil remedies, including private treble damage actions by persons injured by racketeering activity. *See* 18 U.S.C. § 1964 (1976).

42. United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979).

43. Fed. R. Crim. P. 7(c)(2) provides that "the indictment or the information shall allege the extent of the interest or property subject to forfeiture"; Rule 31(e) provides for a special verdict to be returned as to the extent of the interest or property subject to forfeiture; Rule 32(b)(2) authorizes the "Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper." *See also* United States v. Hall, 521 F.2d 406 (9th Cir. 1975)(indictment quashed because of government's failure to allege the extent of the interest subject to forfeiture pursuant to Rule 7(c)(2)).

44. 18 U.S.C. § 1963(b) (1976). In United States v. Scalzitti, 408 F. Supp. 1014 (W.D. Pa. 1975), the court ruled that an injunction prohibiting the defendant from transferring his business assets did not deprive him of his presumption of innocence, but only served to maintain the "status quo." *Id.* at 1015.

45. United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979).

46. United States v. Rubin, 559 F.2d 975, 992 (5th Cir. 1977).

47. United States v. Parness, 503 F.2d 430 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975); United States v. Scalzitti, 408 F. Supp. 1014 (W.D. Pa. 1975); United States v. Amato, 367 F. Supp. 547, 549 (S.D.N.Y. 1973).

officer's position is an "interest" subject to forfeiture, although the defendant was not barred from holding future positions in the management of the union.[48] Similarly, if funds derived from racketeering activity are mixed with "clean" money and both bankrolls are used to operate a legitimate business, what part, if any, of the business is subject to forfeiture? In recognizing this problem the Second Circuit rejected the appellant's claim that the forfeiture provision violated the eighth amendment's ban on cruel and unusual punishment, holding that section 1963 permitted the trial court sufficient flexibility in avoiding "draconian (and perhaps potentially unconstitutional) applications of the forfeiture provision," and that "where the provision for forfeiture is keyed to the magnitude of a defendant's criminal enterprise, as it is in RICO, the punishment is at least in some rough way proportional to the crime."[49]

### E. The Analysis in *United States v. Rone*

In *Rone,* the government proved that the defendants committed three brutal murders and two acts of extortion; from this standpoint, the long prison terms were a just result. It is doubtful, however, that the defendants should have been prosecuted under the RICO statute, because to prosecute this case under that statute, the government had to stretch the term "enterprise" to encompass virtually all patterns of racketeering activity; if this be the meaning of the key word, "enterprise" becomes a redundancy, and one wonders why Congress did not simply prohibit "patterns of racketeering activity."[50] The fact that "enterprise" is separately defined and separately integrated into the statute indicates that the word was meant to have meaning independent of "pattern of racketeering activity," hence its definition is most likely to include only legitimate organizations.

Aside from considerations of common-sense statutory construction, the *Rone* majority exhibits poor analysis and faulty application of precedent. Three examples will suffice to illustrate this point.

*Rone* cites *United States v. Cappetto*[51] to bolster its conten-

48. United States v. Rubin, 559 F.2d at 990-92.
49. United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979).
50. United States v. Sutton, 605 F.2d 260, 265-66 (6th Cir. 1979).
51. 502 F.2d 1351 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975).

tion that "enterprise" includes purely illegal associations. In *Cappetto,* the Seventh Circuit rejected the argument advanced by appellants that their illegal gambling association was not an "enterprise" under RICO, citing *United States v. Parness*[52] for the proposition that the key word was to be interpreted broadly. Yet in *Parness* the question before the court was whether the infiltration of a legitimate foreign business by Americans through acts committed in the United States fell within the ambit of RICO; the fact that the court answered this question in the affirmative does not stretch the meaning of "enterprise" to include illegal associations. Thus in *Cappetto* the court's reliance upon the holding in *Parness* is misplaced; in *Rone,* a fortiori, the court's reliance upon *Cappetto* is misplaced.

This reliance upon *Cappetto* is faulty for another reason. In support of its holding that an illegal gambling operation was a RICO "enterprise," the court in *Cappetto* cited a Senate Committee Report which noted that "the Federal Government must . . . prohibit directly substantial business enterprises of gambling."[53] Thus, the court reasoned, Congress must view illegal gambling as "enterprises" within the meaning of RICO.[54] Yet the cited Committee Report actually referred to Title VIII of OCCA-70, not Title IX. Title VIII was meant to deal specifically with illegal gambling operations; the fact that it is part of the same omnibus act as Title IX does not necessarily mean that the two titles were enacted with the same congressional intent.[55]

The majority in *Rone* also cites *United States v. Altese*[56] to support the view that a RICO "enterprise" can be an illegitimate business. The court in *Altese* held that the large scale gambling operation conducted by defendants was a RICO "enterprise" citing a recent Ninth Circuit case, *United States v. Campanale,*[57] as authority for this proposition. But in *Campanale* the court held only that section 1962 applied to small businesses as well as to larger concerns; thus the legitimate business involved, Pronto Loading and Unloading Company, could not escape RICO'S net merely because it was not a large corporation.[58] Nowhere in the

52. 503 F.2d 430 (2d Cir. 1974), *cert denied,* 419 U.S. 1105 (1975).
53. 502 F.2d at 1358, *quoting* S. REP. No. 617, 91st Cong., 1st Sess. 72-73 (1969).
54. 502 F.2d at 1358.
55. *See* United States v. Moeller, 402 F. Supp. 49, 60 (D. Conn. 1975).
56. 542 F.2d 104 (2d Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977).
57. 518 F.2d 352 (9th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976).
58. 518 F.2d at 364.

opinion is it suggested that the result would have been the same if an illegal organization had been the "enterprise" at issue.

The third leg in the *Rone* court's tripod of authority, *United States v. Elliott,*[59] similarly fails to bear the weight of close scrutiny. In *Elliott,* the RICO "enterprise" consisted of five criminals associated together for purposes of committing various acts of murder, arson, and theft; the court took great pains to compare this gang of ruffians to a large business conglomerate.[60] The *Elliott* court cites *United States v. Hawes*[61] as stating that "Congress gave the term 'enterprise' a very broad meaning,"[62] yet the court in *Hawes* supported this assertion by citing *United States v. Parness,*[63] *United States v. Cappetto,*[64] and *United States v. Campanale.*[65] Furthermore, the "enterprise" at issue in *Hawes,* Peach State Distributing Company, was a legitimate business dealing in jukeboxes and penny arcade amusements; this business acted as a front for illegal gambling operations. Arguably, then, *Hawes* falls within the ambit of the very activities Congress was attempting to deal with in enacting Title IX, namely, the infiltration of legitimate business through racketeering activity.

## F. Conclusion

Certainly the panel in *Rone* was faced with two very dangerous defendants. Yet in blindly following erroneous application of precedent, contrary to clear legislative intent, and against common-sense statutory interpretation, the Ninth Circuit created authority for far-ranging future RICO prosecutions. Because the key word "enterprise" has such an expansive meaning in this circuit, the statute is capable of reaching even the smallest petty crook, provided the pattern of racketeering activity in some small way affects interstate or foreign commerce. Here the discretion of the prosecutor is all-important. Hopefully the prosecutors in the Ninth Circuit will heed the warning of a recent decision in the Second Circuit: "[T]he potentially broad reach of RICO poses

59. 571 F.2d 880 (5th Cir.), *cert. denied,* 434 U.S. 1021 (1978).

60. 571 F.2d at 898. *See generally* Note, Elliott v. United States: *Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO,* 65 Va. L. Rev. 109 (1979).

61. 529 F.2d 472 (5th Cir. 1976).

62. 571 F.2d at 897, *quoting* United States v. Hawes, 529 F.2d at 479 (5th Cir. 1976).

63. 503 F.2d 430 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975).

64. 502 F.2d 1351 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975).

65. 518 F.2d 352 (9th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976).

a danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended. Therefore, we caution against undue prosecutorial zeal in invoking RICO."[66]

*Lee R. Roper*

## III. "PROFILE" STOPS AND THE FOURTH AMENDMENT: REASONABLE SUSPICION OR INARTICULATE HUNCHES?

### A. INTRODUCTION

In *United States v. Cortez*,[1] officers of the United States border patrol set up an observation post adjacent to a highway in the desert of southern Arizona, in the belief that a certain suspected alien smuggler would be operating in the area that night. The officers decided that in watching for the smuggler's vehicle they would concentrate only on a certain class of vehicles, including vans, campers and pickup trucks; within that class only vehicles which passed the post travelling westward and returned approximately ninety minutes later travelling eastward would be targeted for investigation.[2] During the period of observation the officers spotted two vehicles in the "profile" class, both campers, one of which returned a short time later, heading east. This camper was stopped and six illegal aliens were found inside; the owner/driver of the camper and the smuggler were convicted of knowingly transporting illegal aliens. A Ninth Circuit panel reversed, holding that the border patrol officers did not have reasonable suspicion to stop defendants, and that the intrusion violated the defendants' rights under the fourth amendment.

Clearly law enforcement agencies are sifting through past experience and constructing criminal "profiles" to be used in detecting anti-social conduct. The central question is whether such a behavioral model can be utilized to make an investigative stop of a citizen absent other indicia of criminal activity. The seminal case of *Terry v. Ohio*[3] and the "founded suspicion" doc-

66. United States v. Huber, 603 F.2d 387, 395-96 (2d Cir. 1979).

1. 595 F.2d 505 (9th Cir. Apr., 1979) (per Hug, J.; the other panel members were Chambers and Ferguson, JJ.).

2. *Id.* at 506.

3. 392 U.S. 1 (1968). In *Terry*, a Cleveland plainclothes detective became suspicious

trine of the Ninth Circuit will be discussed, followed by an analysis of particular "profiles" considered in light of case law and applicable fourth amendment standards.

## B. THE FRAMEWORK OF *Terry v. Ohio*

All seizures of the person, including those involving only a brief detention short of arrest, fall within the protection of the fourth amendment,[4] and plainly such seizures must at least meet the requirement of "reasonableness."[5] What is reasonable in any particular case involves a balance between the public interest at stake and the individual's right to personal liberty free from governmental intrusion.[6] Although the *Terry* court disclaimed ruling on the constitutionality of a stop based on less than probable cause and instead focused upon the propriety of the subsequent frisk,[7] the concurring opinion of Justice Harlan made the sensible observation that the right to frisk a suspect is dependent upon the reasonableness of the forcible stop,[8] and that in this connection there was little difference for practical purposes between the holding and dictum.[9]

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of two men loitering on a street corner and peering into a store window at frequent intervals; eventually the pair were joined by a third man. Thinking that the suspects were planning a stickup and probably armed, the detective confronted the trio, identified himself and asked for their names. When the men only mumbled something the officer spun Terry around and patted his breast pocket. He felt a pistol, which he removed. A frisk of the second man also uncovered a pistol; the third man was unarmed. Terry was charged with carrying a concealed weapon, and he moved to suppress the gun as evidence. The trial judge denied the motion, and all the higher courts, including the United States Supreme Court, affirmed.

4. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 16-19 (1968). Note that fourth amendment protection extends only to seizures executed pursuant to government authority. *See* United States v. Davis, 482 F.2d 893, 903-04 (9th Cir. 1973).

5. "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 . . . ." U.S. CONST. amend. IV. Subject to certain exceptions, warrantless searches are per se unreasonable. Katz v. United States, 389 U.S. 347, 357 (1967). *Accord,* Vale v. Louisiana, 399 U.S. 30, 34 (1970); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). The California Supreme Court has stated that the issue in evaluating possible fourth amendment violations "is not simply whether the conduct of [the police] might have been 'reasonable' under all the circumstances, but whether [the intrusion] falls within one of the 'few specifically established and well delineated exceptions' to the warrant requirement." People v. Smith, 7 Cal. 3d 282, 286, 496 P.2d 1261, 1263, 101 Cal. Rptr. 893, 895 (1972).

6. Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (per curiam); Terry v. Ohio, 392 U.S. 1, 20-21 (1968); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

7. 392 U.S. at 19 n.16.

8. *Id.* at 32-33.

9. Note, *Reasonable Suspicion for Border Patrol Stops:* United States v. Brignoni-

*Terry* firmly rejects the monolithic model of the fourth amendment which recognizes two polarities: either the officer effectively restrains the liberty of a citizen, in which case a fourth amendment seizure has taken place and its validity depends upon the existence of probable cause to arrest, or else no restraint has taken place and therefore there is no seizure and the resultant conversation between officer and citizen is strictly voluntary.[10] Instead *Terry* chooses a sliding-scale model of the fourth amendment, providing police with an "escalating set of flexible responses,"[11] in which "increasing degrees of intrusiveness require increasing degrees of justification and increasingly stringent procedures for the establishment of that justification."[12] To justify a stop, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts,"[13] warrant the intrusion. The test is objective: could an officer reasonably conclude, in light of experience, "that criminal activity may be afoot"?[14] The initial stop must be justified, and the resultant inquiry must be "reasonably related in scope"[15] to the justification for its initiation.

### C. THE "FOUNDED SUSPICION" DOCTRINE OF THE NINTH CIRCUIT

Prior to *Terry*, the Ninth Circuit addressed the propriety of an investigative stop based on less than probable cause to arrest in *Wilson v. Porter*.[16] Although the defendant in *Wilson* had not violated any traffic laws at the time of the forcible stop, the police

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Ponce, 15 COLUM. J. TRANSNAT'L L. 277, 289 (1976). *See also* Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U.S.F. L. REV. 219, 229 (1974).

10. J. Caracappa, *Criminal Law & Procedure: Some Current Issues*, 16 DUQ. L. REV. 499, 502 (1978).

11. 392 U.S. at 10.

12. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 390 (1974). *See also* Davis v. Mississippi, 394 U.S. 721, 727-28 (1969).

13. 392 U.S. at 21. A close scrutiny of facts and probabilities is mandated by *Terry* and its progeny: only conduct that "affirmatively suggests particular criminal activity, completed, current, or intended" can validate an investigative seizure. Sibron v. New York, 392 U.S. 40, 73 (1968) (Harlan, J., concurring).

14. 392 U.S. at 30. The nature of the suspected criminal activity is relevant in determining the propriety of an investigative stop. Thus in *Terry* the suspected crime was robbery, and the detective reasonably believed the suspects were armed; the Court approved the stop and frisk even though the period of observation was only several minutes. In contrast, the suspected crime in *Sibron* was possession of narcotics; the Court held the stop and frisk impermissible though the period of observation was several hours. La Fave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters *and Beyond*, 67 MICH. L. REV. 40, 65 (1968). *See* J. Caracappa, *supra* note 10, at 510.

15. 392 U.S. at 20, 29.

16. 361 F.2d 412 (9th Cir. 1966).

officers executing the stop apparently felt that a motorist cruising the streets at three a.m. presented suspicious circumstances requiring further investigation. While looking into the car, one of the officers saw a gun barrel protruding from beneath the passenger front seat and subsequently arrested defendant. The court upheld this intrusion, arguing that although probable cause to arrest did not exist at the time of the stop, only a "founded suspicion" was necessary to authorize a brief investigative stop; all that was required was "some bases from which the court can determine that the detention was not arbitrary or harassing."[17] The test is subjective and grants the officer wide latitude to act in light of experience; the court stated that it "need not look for a reconstructed, after-the-fact explanation of what may have been nothing more at the time . . . than the instinctive reaction of one trained in the prevention of crime."[18]

Yet instinctive reactions (hunches) are exactly what the Court in *Terry* warned should not be used to justify a seizure of the person, absent other reliable indicia of criminal activity. This conflict has led one commentator to conclude that *Terry* effectively overrules *Wilson*.[19] However, recent Ninth Circuit "founded suspicion" cases have cited *Wilson* as controlling authority,[20] while other factually similar cases have ignored the subjective test of *Wilson* and have chosen to follow the principles of *Terry*.[21]

In *United States v. Brignoni-Ponce*,[22] the United States Supreme Court applied the criteria of *Terry* in affirming an en banc Ninth Circuit decision, holding that "[e]xcept at the border and

17. *Id.* at 415.

18. *Id.*

19. Weisgall, *supra* note 9, at 244.

20. *See, e.g.*, United States v. Gonzalez-Diaz, 528 F.2d 925 (9th Cir. 1976) (per curiam); United States v. Rocha-Lopez, 527 F.2d 476 (9th Cir. 1975), *cert. denied*, 425 U.S. 977 (1976); United States v. Holland, 510 F.2d 453 (9th Cir.), *cert. denied*, 422 U.S. 1010 (1975); United States v. Rodriguez-Alvarado, 510 F.2d 1063 (9th Cir. 1975) (en banc); United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975); United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973); United States v. Davis, 459 F.2d 458 (9th Cir. 1972).

21. United States v. Brignoni-Ponce, 422 U.S. 873 (1975), *aff'g* 499 F.2d 1109 (9th Cir. 1974); United States v. Carrizoza-Gaxiola, 523 F.2d 239 (9th Cir. 1975); United States v. Torres-Urena, 513 F.2d 540 (9th Cir. 1975); United States v. Ward, 488 F.2d 162 (9th Cir. 1973) (en banc); United States v. Mallides, 473 F.2d 859 (9th Cir. 1973). *See generally* Note, *Criminal Law & Procedure, The Doctrine of Founded Suspicion*, 6 GOLDEN GATE U. L. REV. 509 (1976).

22. 422 U.S. 873 (1975), *aff'g* 499 F.2d 1109 (9th Cir. 1974).

its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."[23] Though the governmental interest in guarding against the smuggling of illegal aliens is legitimate, the border patrol should not be allowed to stop motorists at random on less than reasonable suspicion, since such power tends to abrogate the fourth amendment rights of citizens mistaken for illegal aliens.[24] The *Brignoni-Ponce* decision should clarify Ninth Circuit case law regarding the proper standard of the doctrine of "founded suspicion."

Assuming that the objective test of *Terry* and *Brignoni-Ponce* is proper in assessing the existence of reasonable suspicion justifying an investigative stop, a nagging question remains: what are "specific, articulable facts," and which inferences derived therefrom are rational? Must the activity of the suspect affirmatively point to particular criminal conduct, as suggested by the concurring opinion of Justice Harlan in *Sibron v. New York,*[25] or is it sufficient that the behavioral characteristics of the suspect in a particular environment tend to place that suspect in a class which in the past has demonstrated a high probability of criminal conduct? This is the problem posed by the use of criminal profiles, exacerbated by the fact that under *Terry* the officer is allowed to draw upon experience in determining whether reasonable suspicion exists. In this connection, is the officer limited to personal experience, or is the utilization of the collective experiences of others similarly situated permissible?[26] In any event one

23. *Id.* at 884. *Cf.* Delaware v. Prouse, 99 S.Ct. 1391 (1979) (police made random stop of car to check licensing and registration without a reasonable suspicion that either vehicle or driver were subject to seizure for violation of law; the stop was unreasonable under the fourth amendment). Random stops should be distinguished from roadblock or checkpoint stops, since in these situations all cars are halted; motorists can see others in similar circumstances, and thus are "less likely to be frightened or annoyed by the intrusion." United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976), *quoting* United States v. Ortiz, 422 U.S. 891, 894-95 (1975). These concerns are relevant because a seizure may not be reasonable under the fourth amendment if the methods of police investigation used are harassing or offensive. *See* Terry v. Ohio, 392 U.S. at 16-17; note 82 *infra*.

24. 422 U.S. at 884.

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

26. Clearly a policeman can rely upon an uncorroborated tip furnished by a reliable informant to justify a stop and frisk. Adams v. Williams, 407 U.S. 143, 146-48 (1972). *But see* United States v. Brignoni-Ponce, 422 U.S. 873, 890 (1975) (Douglas, J., concurring)

point is clear: as the public interest at stake in a particular situation diminishes, and as the behavioral characteristics of a suspect fall away from the ideal profile model, the seizure of the suspect approaches conduct that could be termed "arbitrary or harassing."[27]

## D. Utilization of Particular Criminal Profiles

Criminal profiles are specialized behavioral models based upon empirical data gathered by law enforcement agencies and applied to specific factual situations. The usefulness of a profile is therefore limited by the nature of the data used in the initial formulation, and here the officers may be tempted to substitute personal hunches for objective scientific data. *Cortez* is an excellent example of this process at work: the border patrol officers knew from investigation that the smuggler usually operated on weekends, yet they had no rational basis for believing he would operate that night, and further, they admitted "that they had no reason to know that the vehicle assisting [the smuggler] would approach from, and return to, the east rather than the west."[28] Moreover, the officers deliberately excluded commercial looking trucks, station wagons and sedans from the profile class, though they were aware such vehicles had in the past been used to transport illegal aliens.[29]

The Court in *Brignoni-Ponce* listed several factors to be considered in assessing the existence of reasonable suspicion to stop a vehicle in the border area; together these factors form the basis of the alien smuggling profile.[30] The apparent Mexican ancestry of the driver and occupants is relevant, but an investigatory stop

(arguing that in *Adams* the informant was not credible and that the information upon which the officer acted was not shown to be based upon first-hand knowledge). This raises the interesting question of whether a criminal profile and the uncorroborated tip of an informant are equally reliable for purposes of justifying a stop and frisk.

27. Wilson v. Porter, 361 F.2d at 415.

28. 595 F.2d at 507.

29. *Id.* at 506. The dissent in *Cortez* emphasized the desolate terrain and the early morning hour in finding reasonable suspicion to stop the vehicle. *Id.* at 510 (Chambers, J., dissenting). *See also* United States v. Torres-Urena, 513 F.2d 540, 545 (9th Cir. 1975) (Wright, J., dissenting); United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir. 1974).

30. The profile elements are as follows: (1) travelling near the border; (2) on a lightly travelled road; (3) in a notorious smuggling area; (4) in a car that appears to be heavily loaded or has an extraordinary number of passengers, or has large compartments suitable for storing aliens; (5) driven by someone of Mexican ancestry; (6) who takes evasive action or drives erratically; and (7) who is carrying passengers exhibiting characteristics of Mexican residents who appear to be trying to hide. 422 U.S. at 884-85.

cannot be based solely upon this factor.[31] Proximity of the vehicle to the border, the typical traffic pattern of the road, and the reputation of the locale as a "high crime" area are all relevant factors,[32] although such circumstantial evidence standing alone cannot justify a stop.[33] The critical profile characteristic in these cases is usually a suspicious aspect of the vehicle itself or its movements,[34] as well as aberrant behavior of the driver.[35]

These latter profile ingredients are critical because they more closely resemble the "specific, articulable facts" required for a valid stop in *Terry*; the ethnic and circumstantial factors take on significance only in conjunction with the more reliable indicia of criminal activity. This is in keeping with the statement in *Terry* that the officer must observe "unusual conduct" which "in light of his experience" reasonably leads him to conclude that criminal activity may be afoot.[36] Thus a group of Mexicans driving in a

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31. *Id.* at 885-86; United States v. Rocha-Lopez, 527 F.2d 476, 478 (9th Cir. 1975), *cert. denied*, 425 U.S. 977 (1976). *But see* United States v. Bugarin-Casas, 484 F.2d 853, 856 (9th Cir. 1973) (ethnic background of the driver as a "neutral fact").

32. United States v. Brignoni-Ponce, 422 U.S. at 884-85; United States v. Avalos-Ochoa, 557 F.2d 1299 (9th Cir. 1977); United States v. Rocha-Lopez, 527 F.2d 476 (9th Cir. 1975), *cert. denied*, 425 U.S. 977 (1976); United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir. 1974); United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973). *Cf.* United States v. Magda, 547 F.2d 756, 758-59 (2d Cir. 1976) (suspect stopped and frisked in narcotics-prone location in New York City). *But see* United States v. Mallides, 473 F.2d 859, 861 n.3 (9th Cir. 1973). Giving the "high crime area" factor too much weight could easily lead to harassment of poor inner city residents. *See* Note, *Investigative Stops in Urban Centers: Upholding the Constable's Whim*, 44 BROOKLYN L. REV. 963, 973 (1978).

33. *See* United States v. Martinez-Tapia, 499 F.2d 1244 (9th Cir. 1974) (car proceeding slowly on road one mile from border in sparsely populated area not sufficient basis for stop). However, the presence of a vehicle in a notorious smuggling area combined with suspicious movements or appearance of vehicle can be enough to support a finding of founded suspicion. *See* United States v. Rocha-Lopez, 527 F.2d 476 (9th Cir. 1975), *cert. denied*, 425 U.S. 977 (1976); United States v. Nunez-Villalobos, 500 F.2d 1023 (9th Cir. 1974); United States v. Roberts, 470 F.2d 858 (9th Cir. 1972), *cert. denied*, 413 U.S. 920 (1973).

34. United States v. Brignoni-Ponce, 422 U.S. at 885; United States v. Madueno-Astorga, 503 F.2d 820 (9th Cir. 1974) (per curiam) (car equipped with large trunk and heavy duty suspension system on the rear axle appeared to "drift" on a curve in the road); United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975) (two cars travelling in tandem, rear car appeared overloaded and riding low to the ground, observed as it skidded around a corner); United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973) (station wagon with large rear compartment riding low in the rear).

35. United States v. Rocha-Lopez, 527 F.2d 476 (9th Cir. 1975), *cert. denied*, 425 U.S. 977 (1976) (car braking unnecessarily at intersection, as if uncertain of the area); United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975) (car skidding around corner). *But see* United States v. Ogilvie, 527 F.2d 330 (9th Cir. 1975) (fact that driver turned off highway and reversed direction before reaching checkpoint does not justify stop).

36. 392 U.S. at 29-30.

notorious smuggling area should not be labeled "suspicious" and stopped for investigation absent some affirmative behavior suggesting the possibility of criminal conduct. The officer, of course, has the option of maintaining surveillance and making appropriate inquiries at a later time, after the occupants of the car have given objective reasons to believe illegal aliens are being transported.

Though the experience of the officer in similar situations is not strictly speaking part of the profile, both *Terry* and *Brignoni-Ponce* clearly indicate that this factor is relevant in determining the existence of reasonable suspicion.[37] Certainly the record of past arrests on similar charges has a bearing on the officer's utilization of the profile vis-a-vis available facts.[38] Thus the "batting average" of the officer is relevant in assessing the strength of prior experience, but it may not be enough that a considerable number of prior arrests were made. Clearly in close cases the proven expertise of the officer in executing judicially valid stops will be crucial in determining the existence of reasonable suspicion.

Closely related to the alien smuggling profile is the stolen car profile utilized by a team of federal and Arizona law enforcement officers in *United States v. Carrizoza-Gaxiola.*[39] There, officers stopped southbound cars matching a profile of vehicles commonly stolen in Phoenix and Tucson and driven into Mexico. The government claimed reasonable suspicion existed to stop defendant-driver because (1) he was Mexican; (2) he was driving toward Mexico in a car with Mexican license plates; and (3) he was driving a late model Ford LTD, a vehicle included in the profile. The defendant was violating no traffic laws, and there was nothing otherwise suspicious about his behavior; the forcible stop was grounded solely upon the profile match.

The court disagreed with the government's position, finding

37. *Id.* at 27-28; United States v. Brignoni-Ponce, 422 U.S. at 885.

38. Note, however, where an officer testified that he had made twenty to thirty arrests of illegal aliens in the Oceanside area during the two years preceding the stop in dispute, the court gave no weight to such testimony because of the officer's failure to testify as to the number of people he had detained who subsequently proved not to be illegal aliens. United States v. Mallides, 473 F.2d 859, 861-62 (9th Cir. 1973); *Accord,* United States v. Magda, 547 F.2d 756, 759-60 (2d Cir. 1976) (Motley, J., dissenting). *See also* Weisgall, *supra* note 9, at 250-51; Bogomolny, *Street Patrol: The Decision to Stop a Citizen,* 12 CRIM. L. BULL. 544, 573 (1976).

39. 523 F.2d 239 (9th Cir. 1975).

that "[f]ounded suspicion requires some reasonable ground for singling out the person stopped as one who was involved or is about to be involved in criminal activity."[40] Although a profile is constructed from specific, articulable facts, the "founded suspicion" test requires "some additional fact or facts which focus suspicion on the individual or vehicle stopped."[41] This view decisively rejects the lenient, subjective approach of *Wilson* and, consistent with *Terry*, stands for the principle that a profile match alone does not permit an investigatory stop.

Because the public interest at stake in detecting stolen cars does not approach the widespread economic concern generated by the presence of hundreds of thousands of illegal aliens on American soil,[42] the results of the *Terry* balancing test[43] will reflect this difference when identical degrees of intrusiveness are considered. Both profiles, however, are vulnerable to use by over-zealous officers as scientific excuses for "fishing expeditions" conducted mainly against members of the Mexican-American community who are unfortunate enough to be in the wrong place at the wrong time.

The development of the Federal Aviation Administration (FAA) hijacker profile was predicated upon the strong governmental interest in protecting airline passengers from hijackings.[44] This profile was developed in October, 1968, through the combined efforts of the FAA, the Department of Justice and the Department of Commerce.[45] Based on a statistical study of previous hijackers who, as a group, tended to exhibit behavior different from the ordinary airline passenger,[46] the profile consisted of

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40. *Id.* at 241. *See* United States v. Soto-Soto, 598 F.2d 545, 547 (9th Cir. 1979) (stolen truck profile).

41. United States v. Cortez, 595 F.2d 505, 508 (9th Cir. 1979). *But see* State v. Ochos, 112 Ariz. 582, 544 P.2d 1097 (1976) (use of stolen truck profile adequate for lawful stop).

42. United States v. Ortiz, 422 U.S. 891, 900-14 (appendix to opinion of Burger, C.J., concurring).

43. *See* note 6 *supra* and accompanying text.

44. One jurist has suggested that the danger to life and property posed by hijackings alone justifies searching all prospective passengers. United States v. Bell, 464 F.2d 667, 675 (2d Cir. 1972) (Friendly, C.J., concurring). In the same case, however, another member of the court rightly pointed out the "serious abuse of individual rights" that could flow from such a sweeping rationale. *Id.* at 675-76 (Mansfield, J., concurring). *See also* United States v. Lopez, 328 F. Supp. 1077, 1097-98 (E.D.N.Y. 1971).

45. *See* Ingram, *Are Airport Searches Still Reasonable?*, 44 J. OF AIR L. & COM. 131, 133 (1978); McGinley and Downs, *Airport Searches and Seizures—a Reasonable Approach*, 41 FORDHAM L. REV. 293, 302 (1972).

46. *See* United States v. Lopez, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971); Ingram,

twenty-five to thirty behavioral characteristics, only a small number of which were used at any one time to screen passengers going through the boarding process.[47] Studies asserted that application of the profile would clear 99.5% of air travellers, but would clear no potential hijackers.[48] As of February 6, 1972, all passengers on all reservation flights in the United States were subjected to the profile screening system.[49]

At the outset it should be recognized that, unlike the alien smuggling profile, the hijacker profile was meant to be used as part of a larger detection system. As originally conceived, a suspect matching the hijacker profile (a "selectee") was required to submit to examination by a magnetometer and asked to present proper identification. If the selectee did not activate the magnetometer and produced adequate identification boarding was allowed, otherwise a United States marshal was summoned and further investigation ensued. If necessary, a frisk or pat-down of the selectee's outer clothing was conducted,[50] but this action was to be taken only as a last resort. According to statistics cited by one court only about one-tenth of 1% of passengers screened were actually frisked, but within this group there was a 6% probability that someone had a weapon.[51] This probability was deemed high

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*supra* note 45, at 133; J. Dailey, *Development of a Behavioral Profile for Air Pirates*, 18 VILL. L. REV. 1004, 1008 (1973).

47. *See* United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972); United States v. Bell, 335 F. Supp. 797 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 667, 670 (2d Cir. 1972), *cert. denied*, 409 U.S. 991 (1972). The profile characteristics are kept confidential to protect the effectiveness of the system. *But see* Note, *Searching for Hijackers, Constitutionality, Costs, and Alternatives*, 40 U. CHI. L. REV. 383, 396 n.106 (1973).

48. United States v. Lopez, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971). *But see* Note, *The Antiskyjack System: A Matter of Search—or Seizure*, 48 NOTRE DAME LAW. 1261, 1265 n.35 (1973).

49. Ingram, *supra* note 45, at 136.

50. United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); McGinley and Downs, *supra* note 45, at 304. Note that by January, 1973, Federal Aviation Administration regulations required that all carry-on baggage must be searched and that all passengers must be screened by the magnetometer. See 37 Fed. Reg. 25, 934 (1972); United States v. Davis, 482 F.2d 893, 900 (9th Cir. 1973); Gora, *The Fourth Amendment at the Airport: Arriving, Departing or Cancelled?*, 18 VILL. L. REV. 1036, 1046 (1973). Thus the profile "should be relegated to a supplementary role," in part because this procedure does not effectively deter the hijacking of shuttle flights. United States v. Edwards, 498 F.2d 496, 497-98 (9th Cir. 1974). In fact, under modern screening procedure, it is doubtful that the profile is used at all. *See* note 72 *infra* and accompanying text.

51. United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971). *Lopez* was the first case to consider the constitutionality of airport screening procedures. The court found that "[t]he profile is a highly effective procedure for isolating potential hijackers." *Id.* at 1086. The case was dismissed, however, because the airline had modified the profile by inserting an ethnic characteristic and other criteria calling for the personal judgment of an airline

enough to justify a *Terry*-type frisk of that small percentage of persons remaining after the vast majority of the passengers had been winnowed out by the screening process and permitted to board the aircraft.[52]

Courts following the approach of *United States v. Lopez*[53] agree that the airport search is analogous to the *Terry*-type stop and frisk, but differ as to the weight the hijacker profile should be accorded in determining the existence of reasonable suspicion.[54] As a threshold consideration, the profile is relevant in determining which passengers should be subjected to further scrutiny, but the profile without more should not be used to justify a stop and frisk. As one commentator stated,

> [m]ere statistical information that a person demonstrates certain normal and innocuous characteristics, which may have been coincidentally exhibited by [other criminals], can scarcely be considered sufficiently suspicious to justify an intrusion into the right of privacy. Otherwise, it is

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employee. *Id.* at 1101. Though the decision makes use of statistical probabilities, the court refuses to use figures alone to justify a *Terry*-type frisk. *Id.* at 1097.

52. *Id.* In one sample of 500,000 passengers only 20 were denied boarding for any reason. Note, *Skyjacking: Constitutional Problems Raised by Anti-Hijacking Systems*, 63 J. CRIM. L.C. & P.S. 356, 356 n.2 (1972). *See* Terry v. Ohio, 392 U.S. at 26-30 (1968) (permitting warrantless search without probable cause or consent when the officer has a reasonable belief that the suspect is armed and dangerous). *But cf.* United States v. Meulener, 351 F. Supp. 1284, 1292 (C.D. Cal. 1972) (defendant fit the profile and activated the magnetometer, marshal erred in searching suitcase before making initial pat-down of defendant's outer clothing). *But see* People v. Hyde, 12 Cal. 3d 158, 164, 524 P.2d 830, 833, 115 Cal. Rptr. 358, 361 (1974) (questioning the validity of using the statistics quoted in *Lopez* to justify a *Terry*-type search).

53. 328 F. Supp. 1077 (E.D.N.Y. 1971).

54. *See, e.g.*, United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973) (defendant met the profile and had marginally confusing identification but did not activate the magnetometer and did not otherwise act suspiciously; no reasonable suspicion existed to justify detention and search of shopping bag); United States v. Riggs, 474 F.2d 699 (2d Cir. 1973) (defendant met profile and aroused suspicion by purchasing one-way ticket to New York with cash produced from a paper bag; reasonable suspicion existed to investigate defendant further and ultimately detain her when she attempted to board return flight for Detroit); United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972) (defendant met profile, had ticket made out to another name, and had another person's identification; warrantless search of defendant's person and luggage not justified); United States v. Bell, 335 F. Supp. 797 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972) (defendant met profile, activated the magnetometer and could produce no identification; reasonable suspicion existed to stop and frisk defendant). *Contra*, United States v. Fern, 484 F.2d 666 (7th Cir. 1973) (defendant met profile and displayed contradictory forms of identification; warrantless search of defendant's flight bag justified). *But see* United States v. Skipwith, 482 F.2d 1272, 1274-75 (5th Cir. 1973) (dictum) (profile alone may be enough to justify stop and frisk).

> only a short step to suggest that a profile . . . of the typical mugger or narcotics addict be prepared for distribution to the police for use in high crime areas.[55]

This accords with the result reached in connection with the alien smuggling profile.[56]

Courts, recognizing the marginal value of the profile concept, have tended to uphold airport seizures on other grounds. In one Third Circuit decision, the court acknowledged that the marshal and possibly the ticket agent had utilized the behavior pattern profile, and stated that "[s]ubstantial issues concerning such usage are posed," but that "we need not reach them because the justifiable bases for the search were largely independent of the Profile."[57] In a Second Circuit case, a search was deemed lawful even though the defendant was erroneously designated a selectee, because the magnetometer had been activated and the defendant was using a ticket issued in another name and otherwise acting suspiciously.[58] These decisions seem correct under *Terry* because of the presence of specific, articulable facts suggesting the possibility of criminal activity, and, by implication, the profile becomes irrelevant.

If the valid utilization of the hijacker profile is not required for a lawful stop and frisk, the inquiry narrows to a determination of exactly what affirmative conduct does provide reasonable suspicion in the context of an airport search. In one Fourth Circuit case, the defendant did not match the profile but did activate the magnetometer, and this provided the sole basis for the resultant search which turned up a loaded pistol on the defendant's per-

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55. McGinley and Downs, *supra* note 45, at 314 (footnotes omitted).

56. *See* notes 30 to 38 *supra* and accompanying text.

57. United States v. Lindsey, 451 F.2d 701, 704 (3d Cir. 1971), *cert. denied*, 405 U.S. 995 (1972). In *Lindsey* the prospective boarder exhibited extremely anxious behavior, and airline personnel indicated he should be watched. When approached by a U.S. marshal and asked to identify himself, the defendant produced contradictory forms of identification. The marshal then noticed two large bulges in defendant's coat pocket. Fearing the bulges were weapons, defendant was asked to come outside the boarding area and submit to a pat-down search. The bulges felt "very solid," so the marshal extracted aluminum wrapped packages containing heroin. *Id.* at 703. *See also* United States v. Moreno, 475 F.2d 44 (5th Cir. 1973).

58. United States v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972), *aff'd*, 486 F.2d 1397 (2d Cir. 1973). This result was obtained on the theory that airports are special areas, like borders, where people have a lesser expectation of privacy. *See also* United States v. Legato, 480 F.2d 408 (5th Cir. 1973).

son.[59] The court held that the use of the magnetometer constituted a search, but that the search was reasonable under the fourth amendment because of the strong governmental interest involved and the minimal nature of the intrusion.[60] Relying on *Terry*, the court reasoned that since the activation of the device gave the marshal reason to fear for the safety of the other passengers, the personal frisk of the defendant was justified.[61] This conclusion is questionable in light of the fact that because the magnetometer reacts to coins, keys and other innocent objects, 50% of all those who pass through the device register a positive reading.[62] Thus the search of the defendant was based solely upon the marshal's inarticulable hunch that the defendant posed a danger to other passengers, other indicia of criminal activity being absent. In this case, the *Terry* doctrine was stretched to its outer limits.

Recognizing the problems associated with applying *Terry* to airport screening procedures, the Fifth Circuit has applied less protective fourth amendment standards by analogizing airport searches to border searches,[63] while the Seventh Circuit reached a similar result by asserting that airports were "critical zones" where special fourth amendment standards applied.[64] In this latter case, the defendant fit the profile and produced conflicting identification; though the magnetometer had not been activated the court accepted the government's argument that sufficient specific and articulable facts existed to justify the warrantless search of defendant's flight bag which was found to contain heroin.[65] Through the juxtaposition of the traditional *Terry* analysis

59. United States v. Epperson, 454 F.2d 769, 770 (4th Cir. 1972), *cert. denied*, 406 U.S. 947 (1972).

60. *Id.* at 771.

61. *Id.* at 772. *See also* Unied States v. Slocum, 464 F.2d 1180, 1181-83 (3d Cir. 1972).

62. United States v. Bell, 335 F. Supp. at 802 (E.D.N.Y. 1971); United States v. Lopez, 328 F. Supp. at 1086 (E.D.N.Y. 1971). *See also* Gora, *supra* note 50, at 1040; McGinley and Downs, *supra* note 45, at 303, 314. The latter commentator has criticized the profile on grounds of inexactness, since the profile is merely a means of classifying a person, upon presentation for boarding, as "somebody who should be looked at further," and does not purport to identify potential hijackers. *Id.* at 305, 314. By extension, the combination of profile match and magnetometer activation is only a sum of hunches not rising to the level of specific, articulable facts needed for a *Terry* frisk.

63. United States v. Cyzewski, 484 F.2d 509 (5th Cir. 1973); United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973); United States v. Moreno, 475 F.2d 44 (5th Cir. 1973). *See also* United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

64. United States v. Fern, 484 F.2d 666, 669 (7th Cir. 1973). *See also* note 58 *supra.*

65. 484 F.2d at 668-69.

with the "critical zone" argument, the Seventh Circuit severely reduced the level of probability needed for a lawful stop and frisk, while extending the concept of frisk to include a full search of carry-on luggage regardless of whether the entire screening procedure had been utilized.[66] Thus the scales are tipped in favor of the government as fourth amendment rights at the airport are overshadowed by the interest in preventing air piracy.

In *United States v. Davis*,[67] the Ninth Circuit concluded that the *Terry* analysis is inapposite to airport searches because the search is directed "not against appellant or any other person as such, but rather against the general introduction of weapons or explosives into a restricted area."[68] Thus the appropriate analogy is to the administrative search cases, where the search is conducted "as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime . . . ."[69] This approach comports with the deterrence rationale of the airport screening system only if the search is reasonable. To meet the test of reasonableness the administrative screening search "must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it."[70] Since the administrative purpose of the search is to prevent air piracy, the need for such a search disappears if the prospective passenger elects not to board the aircraft; hence, airport searches are valid only if the right to avoid search by declining to board is recognized.[71]

The right to decline boarding and avoid search attains increased significance when the nature of modern airport screening

66. *Id.*

67. 482 F.2d 893 (9th Cir. 1973).

68. *Id.* at 907. *See* United States v. Mitchell, 352 F. Supp. 38, 43 (E.D.N.Y. 1972), *aff'd*, 486 F.2d 1397 (2d Cir. 1973). Several commentators have agreed with the *Davis* court that the *Terry* doctrine could not be used to uphold the new screening process. *See, e.g.*, Gora, *supra* note 50, at 1047-48; Wright, *Hijacking Risks and Airport Frisks: Reconciling Airline Security with the Fourth Amendment*, 9 CRIM. L. BULL. 491, 502-06 (1973).

69. 482 F.2d at 908. *See also* United States v. Biswell, 406 U.S. 311 (1972); Camara v. Municipal Court, 387 U.S. 523 (1967); United States v. Schafer, 461 F.2d 856 (9th Cir. 1972). *But see* Comment, *Constitutionality of the 1973 Airport Searches: A Factual Analysis*, 8 U.S.F. L. REV. 172, 188, 193-94 (1973); Note, *The Constitutionality of Airport Searches*, 72 MICH. L. REV. 128, 144 (1973).

70. 482 F.2d at 910. *See* Chimel v. California, 395 U.S. 752, 762-64 (1969); Sibron v. New York, 392 U.S. 40, 65 (1968); Terry v. Ohio, 392 U.S. 1, 19 (1968).

71. 482 F.2d at 910-11; United States v. Meulener, 351 F. Supp. 1284, 1288-91 (C.D. Cal. 1972); United States v. Allen, 349 F. Supp. 749, 752 (N.D. Cal. 1972). *Contra*, United States v. Skipwith, 482 F.2d 1272, 1276-81 (5th Cir. 1973).

procedure is examined. The three-prong profile-magnetometer-identification process has been abandoned in favor of a new system in which electronic screening of all passengers and inspection of all carry-on luggage is mandatory.[72] The potential for abuse is apparent when one considers that even before the advent of the new system over 33% of arrests stemming from the screening system have been for possession of illegal drugs.[73] Contrary to the optimism expressed by the *Davis* court, it is clear that airport searches are being used as a subterfuge to conduct general searches of persons and property;[74] such abuse can only worsen under the new wholesale screening system. Application of the exclusionary rule to non-weapon evidence seized during an airport search is a proper remedy if the dangers of official abuse are to be avoided.[75]

The airport is also the locus of the drug courier profile. Developed and used by Detroit Drug Enforcement Administration (DEA) agents,[76] this profile purports to list a number of deviant characteristics that persons not transporting narcotics would not be expected to exhibit.[77] Although the number or combination of

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72. *See* note 50 *supra*.

73. United States v. Davis, 482 F.2d 893, 909 n.43 (9th Cir. 1973). *See, e.g.*, United States v. Fern, 484 F.2d 666 (7th Cir. 1973); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Bell, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); United States v. Lindsey, 451 F.2d 701 (3d Cir. 1971), *cert. denied*, 405 U.S. 995 (1972). *Cf.* La Fave, *supra* note 14, at 65 n.126 (discussing temptation for officer to look for contraband rather than dangerous weapons).

74. United States v. Davis, 482 F.2d at 909.

75. Gora, *supra* note 50, at 1050-55. Contrary to the fear expressed by the *Lopez* court, the marshal need not return the narcotics to the defendant; he could simply confiscate the contraband. United States v. Lopez, 328 F. Supp. at 1098-99. The point is that official overreaching will be curtailed if the contraband cannot serve as the basis for a subsequent prosecution. For a progressive approach to this problem, see United States v. Kroll, 351 F. Supp. 148 (W.D. Mo. 1972).

76. Although the drug courier profile has mainly been utilized in connection with Detroit International Airport, DEA agents in New Orleans and New York have also used the profile. *See* United States v. Ballard, 573 F.2d 913 (5th Cir. 1978); United States v. Westerbann-Martinez, 435 F. Supp. 690 (E.D.N.Y. 1977).

77. Among the elements of the profile are the following: (1) nervousness in the terminal; (2) travel to and from drug "source" cities, usually for short periods of time; (3) little or no luggage, or the use of empty suitcases; (4) use of small denomination currency for ticket purchases; (5) use of an alias; (6) making of phone call immediately upon arrival; (7) use of one-way tickets; (8) furnishing false identification to airline personnel; (9) attempt to conceal presence of travelling companion; (10) an unusual or circuitous itinerary. *See* United States v. Ballard, 573 F.2d 913 (5th Cir. 1978); United States v. Floyd, 418 F. Supp. 724 (E.D. Mich. 1976); United States v. Van Lewis, 409 F. Supp. 535 (E.D. Mich. 1976), *rev'd sub nom.*, United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977). This list is not exhaustive since new elements of the profile appear as the factual situation

characteristics needed for a profile match is uncertain, the government usually contends that the presence of these characteristics in the behavior of a suspect furnishes the DEA agent probable cause to arrest, or at least a reasonable suspicion justifying a *Terry* stop.[78] The DEA and some jurists[79] view the drug courier profile as a valuable weapon in the fight against narcotics trafficking; one federal district court cited statistics in support of the effectiveness of the profile.[80]

The drug courier and air piracy situations are distinguishable in one important respect: in the drug cases there is no "fundamental public interest at stake in routine enforcement of the drug laws."[81] Hence, a seizure considered reasonable in the context of either a border stop or a hijacker screening stop may well be unreasonable where the object of the stop is to detect the transportation of illegal drugs. An average citizen stopped at the Mexican border or as part of the hijacker detection system will most likely tolerate the brief detention because of the strong public policies involved, but the same traveller may become quite indignant when told that the purpose of the stop is to intercept narcotics. This subjective reaction stems from the nature of the stop: unlike the former situations, the traveller stopped by a DEA agent knows that the detention is "part of a criminal investigation to secure evidence of crime."[82] The comfort in seeing others in similar circumstances likewise stopped is missing.[83] The ad-

changes. United States v. Westerbann-Martinez, 435 F. Supp. 609, 698 (E.D.N.Y. 1977).

78. United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977). *See also* Kadish and Brofman, *Drug Courier Characteristics—A Defense Profile,* 15 TRIAL 47-50 (May 1979).

79. See United States v. Mendenhall, 596 F.2d 706, 708 n.1 (6th Cir. 1979), *cert. granted,* No. 78-1821 (September, 1979) (en banc) (per curiam) (Weick, J., dissenting).

80. Since the profile went into effect, agents have searched 141 persons in 96 airport encounters. Agents found contraband in 77/96 encounters (80%), and arrested 122 persons for narcotics violations. 26 of the 77 "positive" searches were consent searches; illegal drugs were seized in all cases where consent was not given and a search was made. In 15-25 consent searches no drugs were found. United States v. Van Lewis, 409 F. Supp. 535, 539 (E.D. Mich. 1976), *rev'd sub nom.,* United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977).

81. 409 F. Supp. at 542. *See also* Amsterdam, *supra* note 12, at 390-92.

82. 482 F.2d at 908. *See* note 69 *supra* and accompanying text.

83. *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Ortiz, 422 U.S. 891, 894-95 (1975); United States v. Montgomery, 561 F.2d 875 (D.C. Cir. 1977); note 23 *supra. See also* Note, *Criminal Procedure—Search and Seizure—Fourth Amendment Precludes Drivers' License Inspection Vehicle Stops Not Based on Reasonable Suspicion or Made Pursuant to Random Selection Scheme,* 24 WAYNE L. REV. 1123, 1134 (1978). Note that an investigatory stop based on reasonable suspicion may turn into an illegal arrest without probable cause if the manner and degree of force used in the stop

ministrative search rationale, therefore, is inapposite, and the propriety of the stop must be measured against the standards of *Terry*, keeping in mind that because the public interest at stake is relatively diminished, the fourth amendment rights of the individual loom correspondingly larger.

Courts have unanimously agreed that the use of the drug courier profile by itself is insufficient to establish probable cause to arrest a suspect.[84] The question then becomes whether the profile alone furnishes the DEA agent with "specific and articulable facts," pointing to the conclusion that in light of past experience "criminal activity may be afoot."[85] Because the profile is only as strong, for *Terry* purposes, as its component characteristics, the elements of the profile must be examined in light of the objective standard of *Terry*.[86]

Arrival from a major drug source city is a crucial part of the profile, yet how a particular place becomes classified as a source city remains a mystery.[87] Assuming arguendo the viability of this profile component, its usefulness is reduced when the flight in question stops over in a non-source city prior to arrival at its ultimate destination, because the DEA agent cannot tell where the suspect boarded the plane without executing a stop.[88]

Nervousness is also part of the profile, but it is difficult to understand how an agent can distinguish between a passenger

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would lead a reasonable, innocent person to conclude an arrest had been executed. United States v. Beck, 598 F.2d 497, 502 (9th Cir. 1979). *See also* United States v. Scheiblauer, 472 F.2d 297, 301 (9th Cir. 1973).

84. United States v. Mendenhall, 596 F.2d 706, 707 (6th Cir. 1979), *cert. granted*, No. 78-1821 (September, 1979) (en banc) (per curiam); United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977); United States v. Floyd, 418 F. Supp. 724, 729 (E.D. Mich. 1976); United States v. Van Lewis, 409 F. Supp. 535, 543 (E.D. Mich. 1976). *See also* Beck v. Ohio, 379 U.S. 89, 91 (1964).

85. *See* notes 13 and 14 *supra* and accompanying text.

86. Note that this examination was not possible where the hijacker profile was concerned, because the characteristics of this profile were kept confidential. *See* note 47 *supra*. This is another indication of the lesser governmental interest involved in the case of the drug courier profile.

87. Chicago is a source city, but according to one case "no evidence was introduced in support of that classification," and notwithstanding this claim "[i]t appears safe to assume that the overwhelming percentage of travelers from Chicago are not in any way connected with the heroin trade." United States v. Westerbann-Martinez, 435 F. Supp. 690, 698 (E.D.N.Y. 1977). *Cf.* United States v. Brignoni-Ponce, 422 U.S. at 882 (1975) (most drivers near the border have nothing to do with illegal alien smuggling).

88. 435 F. Supp. at 699. *See also* Kadish and Brofman, *supra* note 78, at 50.

glancing about nervously to escape detection, and one who is merely disoriented from air travel, the strangeness of the airport, fatigue and so forth.[89] The use of this element of the profile in assessing a person's psychological attitude involves great potential for abuse and the concomitant erosion of the objective underpinnings of *Terry*.

Nor is the failure to claim baggage necessarily indicative of criminal conduct. The fact that a suspect arrived on a morning flight carrying only an overnight bag suggests nothing more than a short stay in the arrival city.[90] Similarly, even assuming that an agent reasonably believes that a pair of disembarking passengers are travelling together, there is nothing particularly suspicious about the fact that the pair decline to speak to one another while walking through the terminal.[91] Subjective hunches of the DEA agent do not amount to reasonable suspicion.

Other elements of the profile such as the use of small denomination currency to buy tickets, the making of a phone call immediately upon arrival, an unusual itinerary, and the use of one-way tickets are consistent with innocent conduct, and the airline passenger behaving in such a manner should not be subjected to official interrogation absent reliable indicia of possible criminal conduct.[92] Even when the more suspicious aspects of the profile are considered, such as the use of an alias and the furnishing of false identification to airline personnel, these acts cannot be said to affirmatively point to the actor as a drug courier. In short, as one court aptly put it, "nothing plus nothing equals nothing."[93]

89. United States v. Westerbann-Martinez, 435 F. Supp. 690, 699 (E.D.N.Y. 1977); United States v. Mico Rachelle Rogers, 436 F. Supp. 1, 7 (E.D. Mich. 1976); United States v. Floyd, 418 F. Supp. 724, 728 (E.D. Mich. 1976). Where, however, the agent is aware of other facts pointing to criminal activity, nervousness can be used in connection with these more reliable indicia. *See, e.g.*, United States v. Oates, 560 F.2d 45, 59-62 (2d Cir. 1977) (agent recognized defendant as major narcotics dealer, other profile characteristics present); United States v. Allen, 421 F. Supp. 1372, 1375 (E.D. Mich. 1976) (defendant carrying suitcase embossed with name of known large scale heroin dealer, other profile characteristics present).

90. United States v. Westerbann-Martinez, 435 F. Supp. at 700.

91. *Id.*

92. *See, e.g.*, United States v. Dewberry, 425 F. Supp. 1336 (E.D. Mich. 1977) (defendant arrived direct from Los Angeles, met by persons agents believed to be known drug traffickers, agents observed and overheard the group arranging for the pickup of a suitcase in a suspicious and covert manner. Held reasonable suspicion to detain the group existed).

93. United States v. Westerbann-Martinez, 435 F. Supp. at 700-01.

Although the drug courier profile may well be a "perfectly valid law enforcement device,"[94] the proper approach seems to be that its existence is not "a talisman that obviates the need for traditional analysis."[95] This is sound advice in view of the fact that here the talisman is mutable: in one case an agent admitted that "the profile in a particular case consists of anything that arouses . . . suspicions."[96] This approach echoes the lenient subjectivity of *Wilson*[97] and is to be avoided if personal liberty is to retain any meaning, for if one DEA agent can testify that being Hispanic is part of the drug courier profile,[98] there is no reason to believe that the fourth amendment rights of any person will be adequately safeguarded in the pursuit of crime.

## E. Conclusion

This survey of criminal profiles demonstrates that the line between objective fact and subjective hunch can be extremely thin; yet, the existence of the line is necessary if rights guaranteed under the fourth amendment are to be preserved against arbitrary governmental intrusions. The use of criminal profiles tends to blur this line by replacing specific facts about particular suspects with generalities about classes of people that are susceptible to abuse by law enforcement officers. The danger lies in the fact that profiles are generated from empirical data that relies on limited human experience; however, the variety of street encounters an average officer may face is endless, and when confronted

94. United States v. Mendenhall, 596 F.2d 706, 707 (6th Cir. 1979), *cert. granted*, No. 78-1821 (September, 1979).

95. United States v. Chamblis, 425 F. Supp. 1330, 1333 (E.D. Mich. 1977). *Accord*, United States v. Floyd, 418 F. Supp. 724, 728 (E.D. Mich. 1976). *But see* United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977) (dictum) (in which the court states that "a set of facts may arise in which the existence of certain profile characteristics constitutes reasonable suspicion . . . .").

96. United States v. Chamblis, 425 F. Supp. at 1333. The court in *Westerbann-Martinez* concluded that "either the 'Drug Courier Profile' is too amorphous and unreliable to be of any help, or . . . there is a tremendous lack of communication within the Drug Enforcement Administration as to the factors in the profile." 435 F. Supp. at 698.

As of this writing, DEA agents stationed in San Francisco International Airport have been using the drug courier profile for the past four to five months. Although the profile is usually not used alone to make an investigative stop, one agent working the airport conceded that the elements of the profile varied with the situation at hand. Interestingly enough, two of the prime behavioral factors relied upon are in apparent conflict: calmness displayed in the baggage area and nervousness exhibited while walking through the terminal. Telephone interview with Bill Gellerman, special agent with the DEA airport patrol, San Francisco International Airport (Nov. 26, 1979).

97. *See* notes 16 to 21 *supra* and accompanying text.

98. United States v. Westerbann-Martinez, 435 F. Supp. at 698.

by a borderline situation in which reasonable suspicion to execute a *Terry* stop is uncertain, this average officer may well rely upon the talisman of the profile instead of looking to objective facts in light of personal experience. And in relying on the profile the officer will most likely "fill in the gaps" through dependence upon subjective hunches, justifying the resultant seizure as a product of "good police work." This scattershot approach to crime detection circumvents the clear mandate of *Terry* and is repugnant to American concepts of fairness and liberty.

*Lee R. Roper*

## IV. PRIVATE AIR FREIGHT SEARCHES AND THE FOURTH AMENDMENT

### A. INTRODUCTION

In *United States v. Gumerlock*,[1] the Ninth Circuit, en banc, upheld convictions for heroin possession over the defendants' fourth amendment challenge to the search of air freight by United Airlines employees. In so doing, the Ninth Circuit reversed the opinion of one of its panels[2] which had set aside the convictions on the ground that the search was unlawful. The *Gumerlock* court, after examining a federal statutory scheme designed to enlist the aid of private airlines to inspect packages to prevent skyjacking, found that there was insufficient government involvement to require applying fourth amendment standards to air freight searches by private airlines.[3]

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1. 590 F.2d 794 (9th Cir. Feb., 1979) (en banc) (per Browning, J.; Ely and Hufstedler, JJ. filed separate dissenting opinions).

2. United States v. Fannon, 556 F.2d 961 (9th Cir. 1977) (per Koelsch, J.; the other panel members were Chambers and Hufstedler, JJ.).

3. U.S. CONST. amend. IV. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no 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.

For background material on searches and seizures in the airport context, *see generally* Brodsky, Terry *and the Pirates: Constitutionality of Airport Searches and Seizures*, 62 KY. L.J. 623 (1974); McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORDHAM L. REV. 293 (1972); Comment, *Are Airport Searches Still Reasonable?*, 44 J. AIR L. & COM. 131 (1978); Comment, *The Airport Search and the Fourth Amendment: Reconciling the Theories and Practices*, 7 U.C.L.A.—ALASKA L. REV. 307 (1978).

In *Gumerlock*, the defendants delivered packages to United Airlines for shipment.[4] As a result of the defendants' nervous behavior and other circumstances, the United Airlines freight agents suspected that the packages contained something other than what the defendants had declared.[5] The agents sought permission from their supervisor to open the package and inspect its contents pursuant to a tariff provision which they understood to authorize inspection under the circumstances.[6] The agents found heroin in the packages and defendants Gumerlock and Fannon were subsequently convicted of possession of and conspiracy to possess heroin.[7] No law enforcement personnel were involved at any time during the search of the packages.

A Ninth Circuit panel in *United States v. Fannon*[8] reversed the convictions and held that an air freight search by an airline employee was sufficient state action in light of recent federal anti-skyjacking legislation to warrant application of fourth amendment standards.[9] However, in *Gumerlock*, the Ninth Circuit reached the opposite result and held that the fourth amendment does not apply since there was no government involvement.[10] The court construed the identical legislation that the panel had considered in *Fannon* but concluded: (1) the provisions of the Air Transportation Safety Act of 1974 (ATSA)[11] and subsequent Fed-

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4. 590 F.2d at 795.

5. The court did not specify what these "circumstances" were, nor what the defendants declared. *Id.* at 799.

6. *Id.* Air freight searches conducted pursuant to tariff regulations have been consistently held "non-governmental" for purposes of the fourth amendment. *Id.* at 799 n.17 *citing* United States v. Ford, 525 F.2d 1308, 1311 (10th Cir. 1975); United States v. Issod, 508 F.2d 990, 994 (7th Cir. 1974); United States v. Pryba, 502 F.2d 391, 399-401 & n.61 (D.C. Cir. 1974); United States v. DeBerry, 487 F.2d 448, 450 (2d Cir. 1973); United States v. Ogden, 485 F.2d 536, 538-39 (9th Cir. 1973); United States v. Cangiano, 464 F.2d 320, 324-25 (2d Cir. 1972); Gold v. United States, 378 F.2d 588 (9th Cir. 1967).

7. 590 F.2d at 795. 21 U.S.C. §§ 841(a)(1), 846 (1979).

8. 556 F.2d 961 (9th Cir. 1977).

9. *Id.* at 964. The *Fannon* court found that 49 U.S.C. § 1511(b) authorizes air carriers to condition transportation on the consent of the passenger or shipper to a search and confers on the carrier a governmental function sufficient to subject its conduct to constitutional limitations. For the text of § 1511(b), *see* note 11 *infra*. The *Fannon* court set forth the facts of the case far more fully than the *Gumerlock* court and reveals that the purpose of the United Airlines search was to look for narcotics. 556 F.2d at 962.

10. 590 F.2d at 795.

11. The defendants relied on § 204 of the Air Transportation Safety Act of 1974 (ATSA) (codified at 49 U.S.C. § 1511 (Supp. V 1975)) which provides:

> (a) The Administrator shall, by regulation, require any air carrier, intrastate air carrier, or foreign air carrier to refuse to transport

eral Aeronautics Administration (FAA) regulations[12] do not mandate the search of air freight; (2) the defendants failed to carry their burden of proof that the agents acted pursuant to ATSA or FAA regulations; and (3) a search in which the government is not involved directly as a participant or indirectly as an encourager is not protected by the fourth amendment.[13]

## B. Issues Presented

The issues presented in *Gumerlock*, although not expressly stated, were: (1) whether the provisions of the ATSA or subsequent FAA regulations mandating air freight searches constitute state action warranting the application of fourth amendment standards; (2) if the ATSA and FAA provisions are not mandatory, does an airline's voluntary compliance with these provisions imply state action and therefore bring the search within the protections of the fourth amendment; and (3) whether an airline employee search of air freight must meet fourth amendment standards when performed without government involvement but solely to aid law enforcement.

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(1) any person who does not consent to a search of his person, as prescribed in section 1356(a) of this title, to determine whether he is unlawfully carrying a dangerous weapon, explosive, or other destructive substance, or

(2) any property of any person who does not consent to a search or inspection of such property to determine whether it unlawfully contains a dangerous weapon, explosive, or other destructive substance.

Subject to reasonable rules and regulations prescribed by the Administrator, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.

(b) Any agreement for the carriage of persons or property in air transportation or intrastate air transportation by an air carrier, intrastate air carrier, or foreign air carrier for compensation or hire shall be deemed to include an agreement that such carriage shall be refused when consent to search such persons or inspect such property for the purposes enumerated in subsection (a) of this section is not given.

12. 14 C.F.R. § 121.538(c) (1976). For the text of § 121.538, *see* note 19 *infra*.

13. 590 F.2d at 800.

## C. THE NINTH CIRCUIT OPINION

### *Does the Anti-Skyjacking Legislation Mandate Air Freight Searches?*

In 1974, Congress passed the ATSA with the intent to "provide security against acts of criminal violence against air transportation through the imposition at airports in the United States of such measures as the screening of passengers."[14] In *Gumerlock*, the defendants relied on a prior Ninth Circuit case, *United States v. Davis*,[15] which stated that any search conducted pursuant to the ATSA scheme to strengthen the security of air transportation is subject to the fourth amendment.[16] *Davis* involved a search of carry-on baggage rather than air freight and, although the court examined many anti-skyjacking provisions, its inquiry was directed to whether the defendant had waived fourth amendment protections by consenting to the search. In *Gumerlock*, however, the court found *Davis* to support their holding that the regulations were concerned only with airline passengers and their carry-on baggage, and *not* air freight.[17] The defendants submitted the ATSA legislation and FAA regulation in their attempt to show that air freight searches by airline employees are required by law. The ATSA section[18] provides that any carriage of persons or property for compensation shall be refused by the carrier, if the shipper refuses to consent to the search of such person or property. The court concluded that "[s]ection 204 does not in terms authorize or require searches by air carriers" but rather provides the remedy of exclusion from the aircraft if the passenger refuses the search of his person or carry-on baggage in compliance with FAA regulations.[19]

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14. Both the Senate and House bills require "all passengers and property in air transportation . . . be screened by weapon detecting devices." *See* S. REP. No. 13, 93d Cong., 1st Sess. 1-2, 8, 10 (1973) and H.R. REP. No. 885, 93d Cong., 2d Sess. 10 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS, 3996, 4003-04.

15. 482 F.2d 893 (9th Cir. 1973). In *Davis*, the appellant had been convicted of attempting to board an aircraft while carrying a concealed weapon. The *Davis* court examined the anti-hijacking provisions under federal law, as well as their legislative history, at great length and found that "the government's participation in the development and implementation of the aircraft search program [had] been of such significance as to bring any search conducted pursuant to that program within the reach of the Fourth Amendment." *Id.* at 904. The court ruled that the defendant should have been afforded an opportunity not to board the plane and thereby eliminate the need for an inspection of his belongings. *Id.* at 911.

16. Id. at 904.

17. 590 F.2d at 796-97.

18. For the text of § 204 of the ATSA, *see* note 19 *infra*.

19. 590 F.2d at 797-98. The FAA regulations state in part:

The court found that there was no need for Congress to grant air carriers the right to refuse to transport freight without consent because that right had long been established through carrier tariffs and by common law.[20] The *Gumerlock* court reasoned that this section of the ATSA, for purposes of applying the fourth amendment, did not supplant a carrier's common law or tariff right to search shipped goods. It concluded that Congress would not have worked such a fundamental change in the law without expressly saying so.[21]

The FAA regulation[22] submitted by the defendants requires airlines to submit a written program for a security system for screening cargo to the FAA Administrator for approval. Defendants argued that this section amounted to a federal mandate for air freight searches. The *Gumerlock* court found that this section does not require "carriers to adopt any particular security procedures with respect to cargo, [and] specifically it does not require inspection of cargo."[23] In so finding that Congress did not intend to include air freight shipment within the administrative scheme, the court further decided that the search involved in this case was

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> (b) Each certificate holder shall . . . adopt and put into use a screening system, acceptable to the Administrator, that is designed to prevent or deter the carriage aboard its aircraft of any explosive or incendiary device or weapon in carryon baggage or on or about the person of passengers . . . .
>
> (c) Each certificate holder shall prepare in writing and submit for approval by the Administrator its security program including the screening system prescribed in paragraph (b) of this section, and showing the procedures, facilities, or a combination thereof, that it uses to support that program and that are designed to —
>
> . . . .
>
> (3) Prevent cargo and checked baggage from being loaded aboard its aircraft unless handled in accordance with the certificate holder's security procedures . . . .

14 C.F.R. § 121.538 (1976). The court acknowledged the mention of cargo in § 121.538(c)(3) but noted that the inclusion of checked baggage within the section which did not require screening implied that cargo also need not be mandatorily screened. 590 F.2d at 799 n.15, *citing* 41 Fed. Reg. 10911 (1976). Legislation subsequent to *Fannon* had, however, extended screening procedures to checked baggage. *Id.* at 798.

20. *See* 590 F.2d 799 n.17. Tariffs refer to the carrier's responsibility to charge a particular fee in transporting goods depending on what they were, and the carrier's need to know what is being shipped. The common law rights arise from the carrier's duty not to transport dangerous cargo. *See* United States v. Pryba, 502 F.2d 391, 398-99 (4th Cir. 1974).

21. 590 F.2d at 798 n.9.

22. 14 C.F.R. § 121.538(c) (1976). For the text of this section, *see* note 19 *supra*.

23. 590 F.2d at 799.

without government involvement.[24] The search of these packages by the airline was private and not subject to fourth amendment requirements.[25]

*State Action Through Voluntary Compliance With Legislation*

After finding that the legislative provisions submitted by the defendants did not require carriers to search air freight, the *Gumerlock* court merely touched upon the issue of whether fourth amendment protections would apply if carriers voluntarily complied with the FAA regulation on air freight. After noting that defendants had failed at trial to carry their burden by proving that United Airlines had submitted the mandatory screening program for air freight to the FAA, the court assumed that the airline had not adopted such a system.[26] Had United Airlines adopted a security screening program under the FAA regulations and conducted the *Gumerlock* search pursuant to that screening program, the implication is that the court might have found that fourth amendment protection would apply. Judge Ely, in his dissent, makes this issue explicit: "[I]f the challenged inspection in this case were conducted pursuant to such a security program, then I believe that the inspection fell within 'the government's administrative scheme to strengthen the security of air transportation.' As such, it would be subject to the Fourth Amendment."[27] The inference from the majority opinion is that the fourth amendment would apply to a search conducted under the voluntary provisions of the FAA regulation.

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24. *Id.*

25. *Id.* The *Gumerlock* court noted that "the two packages involved in this case were not examined as part of a government mandated security program. On the contrary, the search of these packages was a private one, conducted by the air carrier's employers without government intervention, and is therefore not subject to the fourth amendment." *Id.* at 796.

26. *Id.* at 799. The court stated:

> There is nothing in the record to indicate whether United Airlines in fact adopted any security procedures with respect to cargo, or, if it did, whether the procedures include inspection approved by the administrator. Since the burden of establishing government involvement in the search rests upon appellants, we must assume that United Airlines has not adopted such a system in response to section 121.538(c)(3) which subjects air freight to security searches.

*Id.* (footnote omitted).

27. *Id.* at 801.

*Search To Aid Law Enforcement*

Finally, the defendants contended that fourth amendment protection should apply to the United Airlines search because the agents searched the packages for contraband in aid of law enforcement[28] rather than to vindicate any private interest of the airline.[29] The court found that United Airlines employees acted "officiously and not at the behest of the government,"[30] and that the search was not subject to the fourth amendment "because the [agents were motivated] . . . by a unilateral desire to aid in the enforcement of the law."[31]

## D. CRITIQUE

As Judge, later Justice, Cardozo once remarked about the fourth amendment exclusionary rule, "the criminal is to go free because the constable has blundered."[32] The threshold question in *Gumerlock* is whether the United Airlines agents acted as constables or private persons. Searches by private persons without government involvement are not protected by the fourth amendment.[33] However, where the government is even remotely involved, the court will hold the fruits of such a search inadmissible on fourth amendment grounds.[34]

The Ninth Circuit articulated this position in *United States v. Davis,*[35] stating that the fourth amendment should not be undercut by the government actively encouraging conduct by private persons which is prohibited to the government. Thus, the

28. *Id.* at 800.

29. *Id.*

30. *Id.*

31. *Id.*

32. People v. Defore, 242 N.Y. 13, 21; 150 N.E. 585, 587 (1926). *See generally,* Kamisar, *Is The Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment,* 62 JUDICATURE 66 (1978); Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle,* 69 J. CRIM. L.C. & P.S. 141 (1978); Comment, *Fourth Amendment in the Balance—the Exclusionary Rule After* Stone v. Powell, 28 BAYLOR L. REV. 611 (1976).

33. Lustig v. United States, 338 U.S. 74 (1949); Burdeau v. McDowell, 256 U.S. 465 (1921).

34. *See, e.g.,* Corngold v. United States, 367 F.2d 1 (9th Cir. 1976) (private search conducted because of a police request found in violation of the fourth amendment); United States v. Canada, 527 F.2d 1374, 1378 (9th Cir. 1975) (private search conducted in the presence of police officers found in violation of fourth amendment); United States v. Davis, 482 F.2d 893 (9th Cir. 1973) (private search conducted solely in the aid of enforcing a federal statute found in violation of the fourth amendment).

35. 482 F.2d at 904.

Ninth Circuit in *Davis* has joined other courts who have implicitly stated that the fourth amendment applies when the government encourages a search or is a participant in a search.[36] While the *Davis* court had little trouble finding that a search of carry-on baggage was made in aid of the enforcement of a federal statute, the *Gumerlock* court simply found that air freight did not come under the same federal ambit.

The fault of the *Gumerlock* opinion is that while the court undertakes a scholarly discussion of the history of anti-skyjacking legislation, the conclusion that the legislation does not encourage the security search of air freight is questionable. The wording of the FAA regulation[37] requires airlines to submit cargo screening programs to the FAA for approval and requires that such a screening program be designed to prevent an explosive or incendiary device from being brought aboard the plane. The majority, however, does not read the regulation as requiring inspection of air freight.[38] As Judge Hufstedler notes in her dissent, the federal legislation is designed to prevent explosive devices or firearms from being loaded on aircraft, regardless of the manner by which the prohibited devices are boarded.[39]

*Gumerlock*, in overruling *Fannon* found that air freight shipments were "not within the reach of an administrative scheme to enhance the security of air transportation from acts of criminal violence," and that the scheme certainly "did not involve *searches* of air freight."[40] The inference is that air freight does not pose a sufficient threat in skyjack attempts to warrant legislation mandating its search. The court interprets the legislation as not considering the use of air freight in skyjacking, even though air freight is mentioned, because carriers have a common law right to search air freight packages.[41]

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36. *E.g.*, the Ninth Circuit has stated: "[I]n light of all the circumstances of the case, [the "private party"] must be regarded as having acted as 'instrument' or agent of the state." United States v. Sherwin, 539 F.2d 1, 6 (9th Cir. 1976), *quoting* Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971). While the *Sherwin* court was looking at a more direct governmental participation than the "encouragement" referred to in *Davis*, the *Gumerlock* court found neither direct or indirect participation by government. 590 F.2d at 800.

37. 14 C.F.R. § 121.538(c)(3) (1976). For text of the FAA regulation, *see* note 19 *supra*.

38. 590 F.2d at 799.

39. *Id.* at 802 (Hufstedler, J., dissenting).

40. *Id.* at 799.

41. Id. at 798 n.9.

*Narrowing the Fourth Amendment*

Judge Chambers' concurrence in the vacated *Fannon* opinion expresses a fear of judicial expansion of the fourth amendment and advocates restraint.[42] The *Gumerlock* opinion, by initially limiting situations when the fourth amendment applies at all, accomplishes this goal in two ways. First, the court finds no government involvement through legislation even though the statutory language strongly suggests that air freight should be screened and searched. Second, it affirms that an airline employee may act unilaterially to aid law enforcement without complying with constitutional safeguards.

Airlines, through FAA and legislative licensing and restrictions are inextricably linked with the government.[43] The United Airlines employees in *Gumerlock*, if acting solely to find narcotics, were performing a government function.[44] Since *Gumerlock* affirms this conduct, it appears that the government may "undercut" the fourth amendment through encouraging airline employees to search.

*Future Implications*

The *Gumerlock* court left the door open for future attempts by defendants to assert that the FAA regulation constitutes government involvement for fourth amendment purposes. The court stated that the defendants failed to meet their burden of establishing government involvement and that there was nothing in the record to show that United Airlines had voluntarily complied with the FAA regulation.[45] The implication is that if a defendant can prove that an air carrier voluntarily complies with the FAA regulation, such a search would be protected by the fourth amendment. We will have to wait for such a case.[46]

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42. 556 F.2d at 964-65. *See also* a brief opinion by Judge Chambers in which he states his reasons for changing his concurrence to a dissent and for opposing an en banc review. United States v. Fannon, 569 F.2d 1106 (9th Cir. 1978).

43. 14 C.F.R. §§ 1-399 (1979).

44. *See* United States v. Krell, 338 F. Supp. 1372, 1375 (D. Alaska 1977), where the court, on facts similar to those reported in *Fannon* stated: "Since the only purpose of the search was to turn drugs over to the police it is within the fourth amendment." *Cf.* United States v. Pryba, 502 F.2d 391, 399-401 (9th Cir. 1976) (holding *contra*); Gold v. United States, 378 F.2d 588 (9th Cir. 1967) (holding *contra*); United States v. Corngold, 367 F.2d 1, 7 (9th Cir. 1966) (holding *contra*).

45. 590 F.2d at 799.

46. Two cases support the *Gumerlock* decision: United States v. Edwards, 443 F.

The extent to which courts will allow private parties to aid law enforcement without fourth amendment standards needs to be clarified by the Supreme Court. In his memorandum to the vacated *Fannon* opinion, Judge Chambers reached this conclusion as well, stating that cases with facts such as those found in *Gumerlock* are of extraordinary importance and must inevitably be resolved by the High Court.[47] The outcome will be of critical importance in determining how far the government may go in relying on private persons to effect law enforcement.

### E. Conclusion

The Ninth Circuit in *Gumerlock* held that the ATSA and subsequent FAA regulations do not require carriers to search air freight and consequently that state involvement is not present to invoke the fourth amendment in a search of air freight. With the constitutional stakes so high, one would hope that more insight and explanation had been given in the court's opinion.

*John Douglas Moore*

## V. *TUCKER* MOTIONS: THE NINTH CIRCUIT PROCEDURE

### A. Introduction

*Farrow v. United States*

The Ninth Circuit Court of Appeals, sitting en banc,[1] deline-

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Supp. 192, 199 (D. Mass. 1977) (disagreeing with *Fannon*); State v. Pohle, 166 N.J. Super. 504; 400 A.2d 111, 113-14 (1979) ("*Gumerlock* is directly apposite and it constitutes persuasive authority for the fourth amendment immunity of the inspection and search procedures undertaken in the instant case.").

47. 569 F.2d at 1108, *citing* Judge Kaufman in Eisen v. Carlisle & Jaquelin, 479 F.2d 1005, 1020 (2d Cir. 1973):

> I vote against en banc; not because I believe this case is unimportant, but because this case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction . . . [e]n banc consideration by this court however would merely serve as an instrument of delay . . . .

1. The en banc procedure may be obtained at the initial hearing or on petition for rehearing. The determination to hear the case en banc is made if a majority of the judges feel that the case presents important questions or that full-court consideration is necessary to establish uniformity of that circuit's decisions. Note, *Practitioner's Guide for Appeals to the United States Court of Appeals for the Ninth Circuit, Ninth Circuit Survey*, 7 Golden Gate U. L. Rev. 465-466 (1976).

ated the proper procedures to be followed when a prisoner files a section 2255 motion[2] challenging a sentence on the ground that the sentence was based on invalid prior convictions.[3] In *Farrow v. United States*,[4] the defendant moved to vacate his sentence.[5] He argued that the district court had improperly considered four prior convictions[6] at his sentencing which he alleged were ob-

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2. 28 U.S.C. § 2255 provides that a prisoner in custody may move the court to vacate, set aside, or correct a sentence that is in violation of the Constitution or otherwise subject to collateral attack. The section further provides that the prisoner is entitled to a hearing to determine the issues in dispute unless the motion and case records "conclusively show the prisoner is entitled to no relief." Section 2255 provides, in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate . . . .

28 U.S.C. § 2255 (1970).

3. The invalid prior convictions addressed in this opinion are those rendered invalid because they were obtained in violation of Gideon v. Wainwright, 372 U.S. 335 (1963). *Gideon* established the right of an indigent defendant to have the benefit of court-appointed counsel at his trial. *Gideon* was made retroactive in Pickelsimer v. Wainwright, 375 U.S. 2 (1963). Burgett v. Texas, 389 U.S. 109, 115 (1967) established that such invalid convictions could not be used "against a person either to support guilt or enhance punishment for another offense."

4. 580 F.2d 1339 (9th Cir. Aug., 1978) (per Choy, J.) (en banc).

5. Farrow was sentenced to five years for failing to pay a special tax on marijuana in violation of 26 U.S.C. §§ 4755(a)(1), 7202, and three years for jumping bail in violation of 18 U.S.C. § 3150. *Id.*

6. The four prior convictions claimed to be improperly considered were a 1949 Washington state conviction for first degree forgery; a 1950 California conviction for forgery, grand theft auto, and escape; a 1952 California conviction for two counts of burglary and forgery; and a 1956 California conviction for burglary. It is not indicated how many years

tained in violation of *Gideon v. Wainwright.*[7] The district court denied his motion without an evidentiary hearing.[8] The Ninth Circuit affirmed the district court's ruling in an opinion that establishes the proper procedure to be followed by this circuit in all future cases.

### *United States v. Tucker*

In 1972, the Supreme Court applied the statute in the seminal case of *United States v. Tucker.*[9] The Court established that a petitioner is entitled to relief when he shows that his sentence was based on invalid prior convictions. Of Tucker's three previous convictions,[10] two were constitutionally invalid. The invalidity was established in collateral proceedings[11] prior to the section 2255 motion. The record of the sentencing proceeding showed that the judge had given explicit consideration to defendant's previous convictions.[12]

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in prison Farrow served for these convictions. The sentences ranged from 30 days to 15 years in prison. Farrow did not contest the validity of two additional convictions, one in California in 1959 for burglary and one in 1964, also in California, for second degree robbery. Sentences for these convictions ranged from six months to life. All six prior convictions were included in the Probation Department presentence report. *Id.* at 1357 n. 31. That the sentencing judge was aware of the challenged convictions at sentencing was not disputed.

7. 372 U.S. 335. In his brief, Farrow asserted that these convictions had been found unconstitutional in a California superior court. This assertion was never dealt with by the court and throughout the opinion Farrow was treated as though he were merely alleging invalidity.

8. In a three-judge panel decision, Farrow v. United States, No. 74-2429 (9th Cir. Sept. 24, 1976), Judge Koelsch, writing for the majority, reversed the district court's ruling and remanded the case for application of procedures laid out in its lengthy decision. *See* note 74 *infra.* Judge Choy dissented from the panel opinion. Upon petition by the government, the court granted a rehearing en banc. The panel decision was withdrawn and explicitly overruled in the later opinion by Judge Choy, now writing for the majority. 580 F.2d at 1344 n. 1.

9. 404 U.S. 443 (1972) (Blackmun, J., dissenting). Section 2255 motions filed when the prisoner is challenging his sentence on the basis of proven or allegedly invalid convictions have since become known as "*Tucker* motions" and will be referred to as such in this note.

10. Tucker was convicted for a felony in 1938 in Florida, while he was a juvenile, and served seven and a half years. In 1946, he was convicted in Louisiana on a felony charge and was sentenced to four years. He was convicted for burglary in Florida in 1951 and served one year before escaping. In the challenged sentencing proceeding, Tucker received the maximum sentence of 25 years for bank robbery.

11. Some years after the challenged sentence was imposed the constitutional invalidity of the 1938 and 1946 convictions was established in the California Superior Court of Alameda County. 404 U.S. at 444.

12. The record showed that the sentencing proceeding began by an FBI agent, present at the hearing, enumerating Tucker's prior convictions in response to the judge's request. *Id.*

But the Court's ambiguous ruling in *Tucker* has led to much confusion in the lower courts.[13] Many questions remain unanswered regarding the applicability and extent of *Tucker*'s holding. Exactly what relief does *Tucker* afford? That is, must the defendant's sentence be vacated or simply reconsidered? Does *Tucker* apply when invalidity is only alleged? The Fifth Circuit addressed this last question in 1972 in *Lipscomb v. Clark.*[14]

*Lipscomb v. Clark*

The defendant in *Lipscomb* was given the maximum sentence for his conviction.[15] He alleged that three of his four previous convictions were invalid. The court held that the fact that the defendant merely *alleged* the invalidity of his previous convictions did not place the case beyond the scope of *Tucker.*[16]

The court remanded the case to the district court for further proceedings which it assumed were in compliance with *Tucker.* First, the district court should determine if the allegedly invalid priors actually enhanced the sentence. Enhancement is to be determined by removing the challenged convictions from defendant's conviction record and deciding if the sentence is still "appropriate"[17] in light of remaining prior convictions. If the court finds that the sentence is still appropriate this finding ends the process. If the court finds that the sentence is not appropriate, it must hold an evidentiary hearing to determine whether the challenged priors are in fact invalid. If the court finds that the prior convictions are invalid, the petitioner must be resentenced.[18]

## B. THE *Farrow* PROCEDURE

According to the *Farrow* court, a movant in a *Tucker* challenge must show three elements to establish a prima facie case: (1) a prior conviction obtained in violation of *Gideon v. Wainwright*; (2) the sentencing judge's mistaken belief that the

13. 580 F.2d at 1345. *See also* Wilson v. United States, 534 F.2d 130, 135 (9th Cir. 1976) (Hufstedler, J., dissenting).

14. 468 F.2d 1321 (5th Cir. 1972).

15. Lipscomb was sentenced to five years for violating 18 U.S.C. §§ 10, 2311-2313 (1970).

16. 468 F.2d at 1323.

17. *See* notes 62 to 71 *infra* and accompanying text.

18. 468 F.2d at 1323.

prior conviction was valid; and (3) enhancement of the challenged sentence based on the invalid prior convictions.[19] If all of these elements are shown, the remedy is a resentencing without consideration of the invalid prior convictions.[20]

In *Tucker*, the first element had been established in collateral proceedings.[21] The second element was clear from the record, as is ordinarily the case, and thus not in issue. The only element to be determined was whether Tucker's sentence had been improperly enhanced by the prior invalid convictions.[22]

In *Farrow*, the court was faced with a different situation. Unlike Tucker, Farrow had not determined the invalidity of the challenged convictions prior to the *Tucker* motion. Farrow's position was thus identical to that of the movant in *Lipscomb v. Clark*. The court in *Farrow* held that in situations like this, where the movant is only alleging invalid prior convictions, the procedure outlined in *Lipscomb* is to be followed.[23] This means that instead of determining enhancement last, as in *Tucker*, enhancement is determined first. And unless the movant can show improper enhancement, he will never have an opportunity to show that the prior convictions were in fact invalid.

### *Judge Recollection*

The court in *Farrow* endorses *Lipscomb*'s procedure for determining enhancement. In this procedure, the sentencing judge reviews the movant's conviction record, after excising the chal-

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19. 580 F.2d at 1345, 1354.

20. *Id.* at 1348, 1353.

21. *See* note 11 *supra*.

22. The defendant's prior convictions are normally brought to the judge's attention in the presentence report. In federal proceedings, FED. R. CRIM. P. 32(c)(2) mandates the presence of prior convictions in the presentence report.

23. 580 F.2d at 1354. It is not entirely clear whether the court intends to limit the use of *Lipscomb* procedures to cases where the invalidity of the prior convictions is only alleged. The movants in both *Farrow* and *Lipscomb* had not previously established invalidity. The court begins its analysis by identifying the issue to be addressed as the proper "procedure to be followed in disposing of the motion . . . where the invalidity of the defendant's prior convictions is only alleged," *id.* at 1345, and focuses on that problem throughout the opinion. Yet the court at the same time states that "[w]e have taken this case en banc to delineate the procedure for district courts to follow when a convict files a § 2255 motion claiming a *Tucker* violation," *id.* at 1344, without specifying that the procedure only applies when the movant is alleging invalidity. There seems nothing in the court's opinion to prevent applying these procedures to a movant who has established invalidity.

lenged convictions, to determine if the sentence is still appropriate. But *Farrow* adds an alternate procedure. The judge may make a finding of no enhancement simply by recollecting that he did not rely on the challenged convictions at sentencing. This finding is sufficient to dismiss the *Tucker* motion without a hearing.[24]

The court's authority for this procedure is not *Lipscomb*, since *Lipscomb* never mentions the judge's informal disclaimer of reliance as a way to determine enhancement. The court relies primarily on its own previous decisions[25] in *United States v. Eidum*,[26] *Dukes v. United States*,[27] and *Wilson v. United States*.[28] In *Eidum* the trial judge based his denial of the *Tucker* motion on his own disclaimer of reliance. On appeal, the court held that it would "not refute the judge's own estimation of the deleterious impact of the prior convictions on his determination of sentence"[29] and therefore affirmed. *Dukes* presented an identical situation. Relying on *Eidum*, the court affirmed the lower court's dismissal of the motion. In *Wilson* the court approved both *Eidum* and *Dukes* but added a caveat:

> In affirming [the lower court's denial of the motion] we do not hereby adopt a rule that the trial court's statement that it did not rely on the invalid prior conviction *always* constitutes sufficient reconsideration to satisfy *Tucker* . . . . Rather, we hold that where, as here, there is a *substantial basis* in the record on its face to support the court's statement of non-reliance, then the reconsideration mandated by *Tucker* has been performed.[30]

The court in *Farrow* adopts and extends the *Wilson* rule,[31] holding that a dismissal of the motion based on the judge's disclaimer of reliance will not be overturned on appeal unless the disclaimer is contradicted by the record.[32] There are three major

24. 580 F.2d at 1353.
25. *Id.* at 1346-1348.
26. 474 F.2d 581 (9th Cir. 1973).
27. 492 F.2d 1187 (9th Cir. 1974).
28. 534 F.2d 130 (9th Cir. 1976).
29. United States v. Eidum, 474 F.2d at 582.
30. Wilson v. United States, 534 F.2d at 133. (emphasis in original).
31. *See* notes 50 and 53 *infra* and accompanying text.
32. 580 F.2d at 1348.

problems with this procedure: (1) the chain of authority on which it is based is weak; (2) it gives the appearance of injustice; and (3) it is difficult to review effectively.

1. *Inadequate Authority.* The court is correct in suggesting that the official adoption of the judge-disclaimer procedure in *Farrow* simply affirms earlier Ninth Circuit cases. This procedure was approved in *Eidum, Dukes* and *Wilson.* But, as Judge Hufstedler notes in her dissent to *Wilson*,[33] neither *Eidum* nor *Dukes* give any real authority for the procedure. "The decisions of our circuit in *Eidum* . . . and *Dukes* . . . are opaque, very brief opinions. The language of *Eidum*, repeated in *Dukes* and quoted by the majority in this case, is conclusory, unsupported by any authority, or any reasoning. No effort whatever is made to square the conclusion with *Tucker.*"[34]

The court in *Farrow* attempts to meet Hufstedler's criticism; it is only partially successful. The *Farrow* court quotes the Supreme Court in *Blackledge v. Allison*[35] for the proposition that a judge's own recollection may suffice to summarily dismiss a section 2255 motion "even though he could not similarly dispose of a habeas corpus petition challenging a state conviction."[36] However, the authority the court relied upon is dicta. The petitioner in *Blackledge* was a state prisoner and was not attacking his sentence under 2255. Moreover, the dispositive issue in *Blackledge* was not improper enhancement of sentence but the voluntariness of the petitioner's guilty plea.[37]

The *Farrow* court continues by reasoning that the rationale

33. 534 F.2d at 134-39 (Hufstedler, J., dissenting). *Wilson* was a panel decision in which the majority affirmed the lower court's denial of the motion without a hearing. A petition for rehearing en banc was denied. Judge Hufstedler dissented from both decisions and was joined by Circuit Judges Koelsch, Browning, Duniway, and Ely from the denial of the rehearing en banc.

34. *Id.* at 137.

35. 431 U.S. 63 (1977).

36. 580 F.2d at 1352.

37. The defendant in *Blackledge* was a prisoner in a North Carolina state penitentiary who petitioned for a writ of habeas corpus. He was attacking his sentence of 17-21 years for attempted safe robbery. He alleged that his plea of guilty to this offense was not voluntary because it was based on a promise by his attorney, presumably after consultation with the judge, that he would receive a sentence of only 10 years. At the sentencing proceeding, the petitioner stated on the record that his plea was voluntary. The Court held that the record of the proceeding for taking the petitioner's guilty plea did not on its face defeat his allegations. 431 U.S. at 78.

supporting the rules[38] governing section 2255 compels the conclusion that a judge may dismiss the motion based on his own recollection. Rule 4 provides that whenever feasible the motion should be presented to the same judge who imposed the sentence.[39] The court reasons that the rule encourages the judge to use his own familiarity with the case and with the sentencing proceeding to decide the motion.[40]

This reasoning is persuasive—but inadequate. It does not explain how the procedure complies with *Tucker*.[41] In her dissent to *Wilson*, Judge Hufstedler noted that the Court in *Tucker* remanded the case even though the judge in the lower court had disclaimed reliance.[42] In her dissent to *Farrow*, Hufstedler denies outright[43] the validity of the judge's disclaimer of reliance because it does not comply with section 2255. The judge simply makes a finding, rather than testifying about his state of mind at sentencing. Thus the disclaimer is not a part of the record. Section 2255 mandates that a hearing must be had "[u]nless the motion and *the files and records of the case* conclusively show that the prisoner is entitled to no relief."[44]

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38. Rules Governing § 2255 Proceedings for the United States District Courts (1977), *reprinted in* 8B MOORE'S FEDERAL PRACTICE, at § 14.30 app. (2d rev. ed. 1979).

39. *Id.* Rule 4 (a) provides:

> (a) Reference to Judge; Dismissal or Order To Answer. The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.

40. 580 F.2d at 1352.

41. *See, e.g.*, Note, *Sentencing, Due Process, and Invalid Prior Convictions: The Aftermath of* United States v. Tucker, 77 COLUM. L. REV. 1099, 1108 (1977), arguing against reading the rules in such a way as to sanction denying hearings:

> [T]he rules are plainly intended to implement section 2255, not thwart it. The statutory language is the ultimate source of authority and must guide the interpretation of the new rules. The statute states that the "court *shall* . . . grant a prompt hearing" unless the papers "*conclusively show* that the prisoner is entitled to no relief." This language argues against a reading of the rules as encouraging summary dismissal.

(footnote omitted)(emphasis in original).

42. 534 F.2d at 134 (Hufstedler, J., dissenting).

43. 580 F.2d at 1364. Judge Ely joined Judge Hufstedler in the dissent.

44. 28 U.S.C. § 2255 (1976) (emphasis added). *See* Halliday v. United States, 380

The majority in *Farrow* answer this criticism by declaring that "such an interpretation is both too literal and misapprehensive of the *Lipscomb* procedure."[45] The majority may be correct, but they nonetheless do not show how the judge's finding is based on "the motion and the files and records of the case" as required by the language of section 2255.

2. *Appearance of Injustice.* A second problem with this procedure is that it simply looks unfair. The judge merely makes a finding of no reliance based on his own recollection; there is no formal hearing; the movant has no opportunity to argue his case or to question the accuracy of the judge's recollection. Moreover, as Judge Hufstedler points out in her *Wilson* dissent, the judge is called upon to recollect his state of mind at a sentencing proceeding that in many cases took place years before the current *Tucker* motion.[46] "Even if we could assume that judges, unlike other mortals, are capable of such feats of total recall and edited ex post facto judgment, the process is unfair and will be perceived as unfair."[47]

The *Farrow* disclaimer procedure gives the appearance of injustice because it gives the judge wide discretion and denies the movant a hearing on this issue. The *Farrow* dissent recognizes that this procedure reflects the court's desire to avoid hearings on any issue.[48]

It is not difficult to imagine that a judge will be influenced by a desire to avoid the "time and expense that a hearing would entail"[49] when he recollects his previous state of mind. Suppose, for example, that a movant challenges three of six prior convic-

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F.2d 270, 273 (1st Cir. 1967) ("In spite of some remarks in certain cases about the judge's personal recollections we cannot believe that, unless acquiesced in, they are part of the record in a § 2255 proceeding.").

45. 580 F.2d at 1352.

46. 534 F.2d at 138. In *Wilson*, for example, the judge was recollecting a sentencing proceeding that occurred eight years earlier. *Id.* at 132-33, 138.

47. *Id.* at 138.

48. 580 F.2d at 1364 (Hufstedler and Ely, JJ., dissenting). The fact that the issue of enhancement is decided before that of the invalidity of the challenged convictions increases the likelihood that no hearing on invalidity will be necessary. Furthermore, by holding that the question of enhancement will be determined through the judge's own recollection or review of the records, the court attempts to avoid a hearing on this element as well.

49. *Id.* at 1353.

tions. Under the *Farrow* disclaimer procedure, it is relatively easy for a judge to dismiss the motion simply by finding that it was not the three *challenged* convictions that he relied upon. The majority feel that apprehension of such "psychological barriers to [the judge] deciding objectively"[50] is mistaken. They feel confident that "judges will rise above such influences—just as . . . they do in cases of racial or personal bias, or public or private pressure—subject, of course, to review by this court under appropriate standards."[51] Quite aside from one's doubts about the ability of judges to rise above such biases, the review process advocated by the court is wholly inadequate to the task.

3. *Inadequate Standards of Review.* The *Farrow* court subtly alters the rule in *Wilson.* The effect is to deny relief on review in all but the most extreme cases. *Wilson* held that a judge's disclaimer would be upheld when there was a "substantial basis in the record to support"[52] it. In a display of tortuous logic, the *Farrow* court asserts that this "substantial basis" need not be independent of the disclaimer nor "clear on the face of the record, since . . . the judge's finding based on his own recollection may itself provide this 'substantial basis.'"[53] In circular fashion, the disclaimer supports itself. Having in effect destroyed *Wilson*'s substantial basis test, the court also destroys the possibility of adequate review on this issue, for there remains nothing against which to measure the judge's disclaimer of reliance.[54]

The court holds that the judge's dismissal of the motion based on his own recollection will be reversed on appeal only when his disclaimer is clearly contradicted by the record.[55] This situation is exemplified for the court by a recent Ninth Circuit case, *Leano v. United States.*[56] The defendant in *Leano* was given

50. *Id.* at 1350.

51. *Id.*

52. 534 F.2d at 133. *See* notes 29 to 31 *supra* and accompanying text.

53. 580 F.2d at 1355-56 n.27.

54. The only other possible way to review the judge's disclaimer is to hold a hearing on this determination. The judge would be the chief witness at such a hearing. As Judge Hufstedler notes in the dissent, it is understandable that courts have sought to avoid hearings in which the mental processes of judges are the subject of factual inquiry. *Id.* at 1364 (Hufstedler and Ely, JJ., dissenting). But the answer to this dilemma is not to declare such a disclaimer non-reviewable but to avoid a procedure whereby a judge's disclaimer of reliance is sufficient in and of itself to dismiss a *Tucker* motion.

55. 580 F.2d at 1355.

56. 494 F.2d 361 (9th Cir. 1974) (*Leano I*) (reversing district court's dismissal of *Tucker* motion on the basis of disclaimer); 592 F.2d 557 (9th Cir. 1979) (per curiam)

the minimum sentence for a second offender on the mistaken assumption that a prior conviction for a related offense was valid.[57] When Leano brought a *Tucker* motion attacking the sentence and alleging that the prior conviction was invalid, the judge disclaimed reliance on the prior and dismissed the motion without a hearing. The Ninth Circuit reversed because the record clearly contradicted the disclaimer: the record showed that the judge considered the minimum sentence to be that of a second offender, which could not have been the case unless the judge had relied on the prior conviction. On remand the judge reiterated his disclaimer and again dismissed the motion. Leano appealed, and the Ninth Circuit reversed and remanded the case to a different judge for resentencing.

Thus, it is clear that a judge's disclaimer of reliance on challenged prior convictions will be overturned on appeal only in the rare case where the record shows that he *must* have relied on those convictions to impose the sentence he did.[58] Such cases will normally occur only where the judge imposes a sentence based on the mistaken notion that the defendant is a second offender, as in *Leano*, or where the judge states his reliance on the challenged conviction at the sentencing proceeding and later disclaims reliance on that conviction. But where the judge bases the sentence in part on the challenged conviction, does not so state at the sentencing proceeding, and later disclaims reliance—either because his memory is faulty or because he considers the sentence still appropriate for other reasons—no review is possible. Yet this non-reviewable disclaimer is sufficient to dismiss a *Tucker* motion without a hearing. Given the importance of this procedure, and the fact that what is at issue is "misinformation of constitutional magnitude,"[59] it is difficult to share the court's confidence that "judges will rise above bias . . . subject, of course, to review by this court."[60]

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(*Leano II*) (reversing judge's second dismissal and remanding to a different judge for resentencing).

57. Leano pleaded guilty to two counts of concealing and transporting imported marijuana in violation of 21 U.S.C. § 176a (since repealed). He was sentenced to 10 years for each count, to be served consecutively. Ten years was the mandatory minimum sentence for a second drug offender. 592 F.2d at 558.

58. According to the *Farrow* court, a case will be assigned to a different judge on remand only where the judge reiterates his disclaimer after the contradiction between his disclaimer and the record are brought to the judge's attention. 580 F.2d at 1351-52 n. 20.

59. *Id.* at 1345, *quoting from* United States v. Tucker, 404 U.S. 443.

60. *Id.* at 1350.

*The Endorsement of* Lipscomb*'s Appropriateness Standard*

According to the *Farrow* court, enhancement may be determined using two procedures. The first and easiest to apply is the judge's recollection of reliance.[61] The second procedure is taken from *Lipscomb*.[62] In the *Lipscomb* procedure the judge reconsiders the movant's sentence in light of the allegations of invalidity. The judge then excises the challenged convictions from the movant's conviction record to determine whether the sentence is still appropriate. If it is, the challenged convictions are deemed not to have enhanced the movant's sentence, and the motion may be dismissed without a hearing.[63]

All of the circuits that have addressed the issue have endorsed some form of the *Lipscomb* procedure.[64] But the unanimity dissipates over the issue of what is the proper standard to be employed.[65] The biggest problem with the *Lipscomb* procedure is

61. *See* text accompanying notes 24 to 32 *supra*. The court appears to make the enhancement determination a two-step process. If the judge does not affirmatively recollect that he relied on the challenged convictions at sentencing, he moves on to the *Lipscomb* procedure: "Where the judge does not have an affirmative recollection of his previous mental state, he must reconsider the appropriateness of the original sentence from reconstruction of the record, assuming the invalidity of the challenged priors." *Id.* at 1354.

62. 468 F.2d at 1323.

63. *See* notes 17 and 18 *supra* and accompanying text.

64. *See* Reynolds v. United States, 528 F.2d 461 (6th Cir. 1976) (explicitly approving *Lipscomb*); Crovedi v. United States, 517 F.2d 541 (7th Cir. 1975) (explicitly approving *Lipscomb*); Wilsey v. United States, 496 F.2d 619 (2d Cir. 1974) (using similar procedure without citing *Lipscomb*); United States v. Radowitz, 507 F.2d 109 (3d Cir. 1974) (explicitly endorsing *Lipscomb*); United States v. Sawaya, 486 F.2d 890 (1st Cir. 1973) (explicitly endorsing *Lipscomb*); Brown v. United States, 483 F.2d 116 (4th Cir. 1973) (explicitly approving *Lipscomb*); United States v. Green, 483 F.2d 469 (10th Cir.), *cert. denied*, 414 U.S. 1071 (1973) (using similar procedure without citing *Lipscomb*); McAnulty v. United States, 469 F.2d 254 (8th Cir. 1972) (using similar procedure without citing *Lipscomb*). For Ninth Circuit cases, *see* notes 25 to 28 *supra*. *But see* Mitchell v. United States, 482 F.2d 289 (5th Cir. 1973) (rejecting *Lipscomb* procedure without citing *Lipscomb*).

65. Not every circuit adopting *Lipscomb* or *Lipscomb*-like procedures has had occasion to enunciate whether it also adopts the *Lipscomb* "appropriateness" standard. The First Circuit in United States v. Sawaya, 486 F.2d 890 (1st Cir. 1973), the Third Circuit in Del Piano v. United States, 575 F.2d 1066 (3d Cir. 1978), the Fifth Circuit in Smith v. United States, 565 F.2d 378 (5th Cir. 1978), the Sixth Circuit in Reynolds v. United States, 528 F.2d 461 (6th Cir. 1976), the Seventh Circuit in Crovedi v. United States, 517 F.2d 541 (7th Cir. 1975), and the Eighth Circuit in McAnulty v. United States, 469 F.2d 254 (8th Cir. 1972), have all adopted the "appropriateness standard. The Second Circuit in Wilsey v. United States, 496 F.2d 619 (2d Cir. 1974) uses the "same sentence" standard employed in *Tucker*. The Fourth Circuit used the "appropriateness" standard in Brown v. United States, 483 F.2d 116 (4th Cir. 1973), but rejected it in Stepheney v. United States, 516 F.2d 7 (1975) (en banc) (remanding to the district court to determine if the sentence would have been the same) and in Strader v. Troy, 571 F.2d 1263 (1978) (following *Stepheney*).

that it appears to depart from *Tucker* in the standard to be employed in reconsidering the sentence. The enhancement test in *Tucker*[66] is whether the judge, in reconsidering the sentence, can assert that he would have given the *same* sentence if he had known that the prior convictions were invalid.[67] The *Lipscomb* test, which the court in *Farrow* endorses, is whether the judge, after removing the challenged convictions from the record (and his consideration), now considers the sentence to be *appropriate*.[68]

The *Tucker* "same sentence" standard is very precise, narrow, and difficult to meet: the movant must be resentenced unless the judge finds that he would have given precisely the same sentence had he based the sentence on correct information. The "appropriate sentence" standard is broader and, accordingly, easier to meet. A judge's finding that the sentence is still appropriate may mean simply that the original sentence is not unreasonable or that it falls within the wide range of permissible punishments. The Fourth Circuit interpreted the "appropriate sentence" standard in *Stepheny v. United States*[69] and correctly found that it did not comply with *Tucker*. The court held that a judge's finding that the sentence was appropriate

> does not clearly say that the District Court found that the length of sentence was unaffected by the invalid prior convictions, that the sentence would have been the same with or without them . . . . [Under *Tucker*] [t]he fact of seeming general

66. It is not universally agreed that *Tucker* requires a finding of enhancement to make a prima facie case. *See, e.g.*, Mitchell v. United States, 482 F.2d 289 (5th Cir. 1973), decided a year after *Lipscomb*, in which the Fifth Circuit found no enhancement requirement in *Tucker*: "To prevail below (the movant) was not required to secure an affirmative finding that reliance on prior invalid convictions enhanced his sentence. He needed only to show that the sentencing judge considered constitutionally invalid convictions." *Id.* at 291.

67. Although the *Farrow* court does not follow the *Tucker* test, it states the test accurately: "[t]he 'real question' in *Tucker* cases [is] whether the original sentence might have been different if [the judge] had known that the prior convictions were invalid under *Gideon*." 580 F.2d at 1353.

68. 580 F.2d at 1354. The *Tucker* procedure does not ask the judge to perform the difficult (perhaps impossible) task of reconsidering the movant's sentence as if the judge had never looked at the challenged priors. Instead, the Court in *Tucker* asked the judge specifically to consider the unconstitutionality of the prior convictions, and found the earlier unconstitutional imprisonment of the movant a compelling reason to resentence. 404 U.S. at 447 n. 8. *See also*, Note, *supra* note 41, at 1101 n. 16 (1977). Under the *Farrow* procedure the judge need never consider the fact of previous unconstitutional imprisonment at all and certainly need not balance it against the unchallenged priors in reconsidering the sentence.

69. 516 F.2d 7 (4th Cir. 1975).

> appropriateness now is not enough if the sentencing judge cannot say he would not have imposed a lesser sentence had he been unaware of the prior conviction or had assumed its invalidity at the time of sentencing.[70]

The dissent in *Farrow* makes a similar objection to the use of the *Lipscomb* "appropriateness" standard. The dissent correctly asserts that this procedure does not comply with *Tucker* or with section 2255 because "[t]he question is not whether the sentence would have been 'appropriate' . . . . [but] whether, at the time of the sentencing, the judge would have given the same sentence."[71]

Since under the *Farrow* formula a finding of enhancement is a prerequisite to resentencing, the effect of the court's endorsement of the broader *Lipscomb* standard is to make it more difficult for a movant to prevail in a *Tucker* proceeding. This effect can be seen by reiterating an earlier example: if a movant challenges three of six prior convictions, it is easier for a judge to find that the sentence, originally based on six convictions, is still appropriate in light of three valid convictions than to find that he could have given the same sentence if he had known of the invalidity of the three challenged convictions.

*The Hearing on Invalidity*

If the sentencing judge finds that the sentence *was* enhanced by the allegedly invalid prior convictions, the movant will be granted a hearing on the validity of those convictions. Three elements must be established to successfully demonstrate the *Gideon* violation: (1) that the movant was indigent at the time of the challenged proceeding; (2) that he was not represented by counsel in that proceeding; and (3) that there was no effective waiver of the right to counsel in that proceeding.[72] If the movant

70. *Id.* at 9.

71. 580 F.2d at 1363. Regarding the requirements of *Tucker*, the dissent notes that "[i]f a *Tucker* error could be cured simply by the district judge's reviewing the initial sentencing record, deleting the invalid priors, and deciding whether the sentence was still 'appropriate,' the Supreme Court's rejection of the Government's argument would be incomprehensible." *Id. See also* Comment, *Due Process at Sentencing: Implementing the Rule of* United States v. Tucker, 125 U. PA. L. REV. 1111, 1126 (1977).

72. 580 F.2d at 1354. The movant has the burden to show indigency; it is met where he alleges indigency and the government does not deny it, or if the government does deny

establishes all three elements at the hearing, he will be resentenced without consideration of the invalid prior convictions.

### C. The Dissent: An Alternative Procedure

It is ironic that in attempting to preserve judicial efficiency the court creates procedures that in many cases will prove more time-consuming than if the issue of invalidity were determined in the first instance. The need for a full-scale hearing to determine invalidity may not arise as often as the court seems to fear nor will the hearings themselves necessarily consume as much time as the court seems to think. In her dissent, Judge Hufstedler explains that the issue of invalidity can be resolved easily and efficiently:

> Ordinarily, the face of the record of the prior conviction will reveal either the presence or the absence of counsel. If the record clearly shows that counsel was present, an evidentiary hearing will not be required unless the petitioner claims that the record does not truly reflect the proceedings. If the record is silent concerning the presence of counsel, or if the record is equivocal, the absence of counsel is presumed . . . . In absence of proof from the record that the petitioner knowingly and intelligently waived his right to counsel, the prior conviction is constitutionally infirm. Waiver of counsel cannot be presumed from a silent record . . . . In almost all cases, the *Gideon* issue will be resolved by the combination of the record of the prior proceedings together with the allocations of the respective burdens of proof. Because the burdens are very difficult to overcome, there will be few occasions in which any kind of evidentiary hearing will be necessary.[73]

To avoid the somewhat labyrinthic procedures advocated by the majority, Hufstedler suggests a simpler procedure. She would

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it, where the movant so testifies and the government offers no evidence to rebut. The burden is on the government to show representation where the record is silent or shows that the movant was not represented; the burden is on the movant to impeach the record where it shows he was represented. The burden is on the government to prove waiver when lack of representation is determined and the record is silent or shows no waiver; the burden is on the movant to show waiver not knowingly and intelligently made where the record shows he was offered counsel and declined. Proof of each factor must meet the preponderance-of-the-evidence standard. *Id.* at 1355.

73. *Id.* at 1364-1365 (Hufstedler and Ely, JJ., dissenting).

require a *Tucker* movant to make a prima facie case by showing four elements: (1) that the movant neither had counsel nor made an effective waiver in the challenged proceedings, shown from the records of those proceedings; (2) that the judge considered the challenged convictions at sentencing; (3) that the judge did not place a disclaimer of reliance on the challenged priors on the record at the time of sentencing, and (4) that the challenged sentence exceeded the minimum for the offense for which the movant was convicted. If the movant makes this showing, he must be resentenced.

This procedure has the advantages of saving the court's time, weeding out frivolous motions by requiring a substantial showing of invalidity at the time of the motion, and giving the appearance of justice by weighting the procedure in favor of the movant, rather than against him.

## D. Conclusion

By rejecting Judge Hufstedler's proposal, and a similar proposal made by the majority in the withdrawn panel opinion,[74] the Ninth Circuit joins the other circuits in a near-unanimous endorsement of the *Lipscomb* procedure. In so doing, and in establishing the validity of its own judge disclaimer procedure, the

74. The panel opinion sets out a six-point procedure: (1) where practical, the *Tucker* motion should be assigned to a judge other than the sentencing judge; (2) if it is clear from the motions, files, and records of the case that the sentencing judge did not consider the challenged convictions, the original sentence stands; (3) if non-consideration of the challenged convictions does not appear from the motions, files, and records, the sentencing judge's consideration of these convictions is presumed; (4) where improper consideration is presumed, a hearing must be conducted to determine the validity of the challenged convictions, unless this issue can be determined from the motions, files, and records of the challenged proceedings; (5) if the challenged convictions are found to be valid, the original sentence stands; (6) if the challenged convictions are found to be invalid, the sentence is vacated and the movant is resentenced by the *Tucker* proceeding judge without consideration of the invalid prior convictions. Farrow v. United States, No. 74-2429, slip op. at 18 (9th Cir. Sept. 24, 1976). The panel majority considered the third step in the procedure to be a "prophylactic rule." This rule was designed both to avoid a hearing "in which the sentencing judge, pitted against the petitioner, is placed on the witness stand" and to ensure the appearance of fairness. *Id.* The panel majority also suggested the possibility that the judge in resentencing might consider the prior unconstitutional imprisonment of the movant as a mitigating factor. *Id.*, n. 11. The panel's suggestion that a different judge should hear the *Tucker* motion has since been overruled by the Rules Governing § 2255 Proceedings, note 38 and 39 *supra; see* Rule 4 (a). For an extensive criticism of the panel opinion before it was withdrawn, *see* Elliot v. United States, 434 F. Supp. 774 (N.D. Cal. 1977). For a discussion and endorsement of the panel opinion approach, *see* Note, *supra* note 41, at 1106-11 (1977).

Ninth Circuit may have closed the door on movants who seek a fair hearing on challenges of constitutional magnitude.

Paige L. Wickland

## VI. YOU CAN TELL A CRIMINAL BY HIS LIBRARY

### A. INTRODUCTION

In an age of relative enlightenment with respect to the procedural rights of criminal defendants, it is somewhat surprising that an accused can be subjected to criminal liability based, at least in part, on his admission of having read a particular book. Yet, in *United States v. Giese*[1] the Government was not only allowed to require the defendant to read aloud inflammatory passages from a revolutionary anthology, in the guise of character and veracity impeachment, but was allowed to argue to the jury in closing argument that the defendant acted in conformity with the radical ideas expressed therein. The defendant asserted six grounds for reversal of his conspiracy conviction,[2] and while the majority of the Ninth Circuit expressly recognized the first amendment implications, they found an implied waiver of the rights involved. Thus the constitutional issues were shrouded in mundane evidentiary concerns as the first amendment faded in importance.

### B. FACTUAL BACKGROUND

Frank Stearns Giese, a professor of French at Portland State University, became associated with his co-conspirators through the Radical Education Project (REP) bookstore which he founded in 1971. As an adjunct to the enterprise, he sent books to inmates

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1. 597 F.2d 1170 (9th Cir. May, 1979) (per Trask, J.; Sweigert, D.J., sitting by designation concurred in a separate opinion, Hufstedler, J., dissented in a separate opinion), *cert. denied*, 100 S.Ct. 480 (1979).

2. The grounds asserted were as follows:

(1) Count X of the indictment was legally insufficient.
(2) The district court erred in denying Giese's motions for bills of particulars.
(3) The voir dire examination was inadequate.
(4) The district court erred in admitting certain evidence.
(5) The court's instructions to the jury were erroneous.
(6) The Government committed reversible acts of prosecutorial misconduct.

*Id.* at 1177. This casenote will primarily address the fourth contention due to its constitutional significance.

at the Oregon State Correctional Institution and led group discussion sessions at the prison. According to two of the co-conspirators who became witnesses for the prosecution, several participants eventually coalesced into a group for the purpose of discussing their vehement opposition to the Vietnam War. Eventually, the group succumbed to the futility of their passive efforts to end the war, and vowed to take direct action in order to stop, or at least disrupt the war.

Two acts of violence, attributed to this coalition and allegedly including Giese, formed the basis for the Government's prosecution: the January 2, 1973 bombing of a Portland Navy recruiting center; and the January 4, 1973 bombing of a Portland Army recruiting center. Giese allegedly agreed to take part in the latter bombing, helped plan the details of the operation, and drove the getaway car during its commission.

A federal grand jury for the District of Oregon returned a joint ten-count indictment charging Giese and four other persons with a variety of offenses. Giese was named in six of the counts charged,[3] including a general conspiracy count. The jury acquitted Giese of all of the substantive crimes, but found him guilty of criminal conspiracy.

At trial, the prosecution introduced in its case-in-chief numerous revolutionary books and pamphlets seized pursuant to a search of an apartment belonging to one of the co-conspirators.[4]

3. Giese was charged in Count IV with misprison of a felony (the January 2, 1973 Navy recruiting center bombing), in Counts V through VIII with committing various offenses in connection with the January 4, 1973 Army recruiting center bombing, and in Count X with criminal conspiracy to commit the substantive offenses charged. *Id.* at 1176.

4. A total of 27 seized literary items were introduced into evidence, including: " 'The Underground Bombing Manual,' 'Firearms and Self-Defense,' 'Department of Army Manual, Electronic Blasting Equipment,' 'Technical Training and Tips: Mine Warfare,' '[From the Movement Toward] Revolution,' 'Communist Guerilla Warfare in the U.S.A.,' 'The Paper Trip,' 'The Anarchist's Cookbook,' and 'Protect Yourself from Investigation.' " *Id.* at 1204 (Hufstedler, J., dissenting).

In his opening statement, the prosecutor described "The Blaster's Handbook" as "one of the 'more significant pieces of evidence in this case. It is the ABC's of bombing, the how-to-do-it, how to use explosive devices, . . .' " *Id.* at 1202 (Hufstedler, J., dissenting).

According to Judge Hufstedler, while several of the pamphlets were identified only by name, the Government's lead-off witness, co-conspirator McSherry, was asked to identify several pamphlets and to describe their subject matter. For example, "McSherry identified 'Special Forces Handbook,' which he said dealt with 'explosive devices, mines, and different kinds of explosives and how to detonate them.' " *Id.* at 1203 (Hufstedler, J., dissenting.)

Meyer, another co-conspirator, testified for the prosecution that during discussions with prisoners, Giese offered to send them free "Communist or Socialist literature." Meyer further testified that Giese engaged in discourse on such varied topics as "revolution, radicalism, black liberation, Hitler, and the war in Vietnam," and that Giese at one point advocated George Jackson's *Blood In My Eye*—a book dealing with "urban warfare in American cities."[5] The Government's theory was that certain materials contained fingerprints of the co-defendants which tended to corroborate witness' testimony that the conspirators associated with one another.

Giese's fingerprints were found on only one of the books, *From the Movement Toward Revolution (Revolution).*[6] His lawyer objected to the introduction of the fingerprints into evidence on, at least, the grounds that the Government had laid an inadequate foundation.[7] Nonetheless, *Revolution* was admitted into evidence as a physical object containing the fingerprints of Giese and several of his alleged co-conspirators.

Giese took the stand in his defense and was questioned by his counsel regarding each and every Government exhibit. He testified that he did not sell, nor did he carry, in his bookstore any of the books and pamphlets in evidence.[8] Thereafter, Giese's lawyer had him produce eighteen books which he termed a "representa-

5. *Id.* at 1194.

6. Three of Giese's fingerprints were found on page 146, three were found on page 166, one was found on page 167, and two were found on page 168. The testimony of the Government's expert witness did not definitely establish when the fingerprints were placed upon the book. He stated that, in general, fingerprints can remain identifiable for a period of up to seven years. Consequently, it appeared that the fingerprints on REVOLUTION were made sometime between the book's publication in mid-1971 and its seizure by Government officials in mid-1973. *Id.* at 1186 n.17.

7. The precise nature of the objection made by defense counsel is controverted. The book apparently came into evidence as a part of a stipulation concerning all 27 items, and the majority claimed that Giese's lawyer made only one objection during the Government's case-in-chief which "did not challenge the book's probative value as circumstantial evidence of association, but merely alleged that the government had laid an inadequate foundation." *Id.*, n.18. Judge Hufstedler contended, on the other hand, that upon his discovery regarding the age of the fingerprints, defense counsel promptly interposed an objection "on the ground that no proper foundation had been laid and *on the further ground that the evidence was irrelevant to any issue in the case.*" *Id.* at 1203 (Hufstedler, J., dissenting) (emphasis added). The factual schism is not insignificant in that the majority rested its application of only the plain error standard of review on counsel's alleged failure to object on relevance grounds.

8. *Id.* at 1188.

tive sample" of the type of books Giese did sell in his REP bookstore, and he proceeded to identify, and briefly describe some of them for the jury.[9] According to the majority, Giese had "prefaced" his testimony regarding the sample with an account of his involvement in various social and political causes, and described how he participated in sit-ins and marches to manifest his concern until 1969, when he received a "sizeable inheritance," and decided that "the best way to propagate his political views was to establish" the REP bookstore.[10]

On cross-examination, Giese testified that he had read portions of *Revolution* and that he owned his own copy of the book, but he denied ever having sold it or having otherwise provided it to his co-conspirators. The prosecutor then requested that Giese read aloud certain pre-selected and inflammatory passages of *Revolution.*[11] Giese was required by the court to comply with the

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9. The majority portrayed Giese's production of the representative sample as follows:

> [H]e offered a rather detailed exegesis of Frederick Engel's *Dialectics of Nature;* he discussed Camus's background; and he explained the theses of Pierre Jalle's *Pillage of the Third World* and Andre Gorz's *Strategy for Labor, A Radical Proposal.* He gave brief descriptions of the contents of *Soul On Ice* by Eldridge Cleaver, *Away With All Pests: An English Surgeon in People's China, 1954-1969* by Joshua Horn, *Capitalism and Underdevelopment in Latin America* by Andre Gunder Frank, and *Soledad Brother* by George Jackson, *Black Elk Speaks* by John G. Niehardt, *Viet Nam in Photographs and Text* by Felix Greene, *Limits to Growth* (a report for the Club of Rome), and *American Radicals: Some Problems and Personalities.* Giese also mentioned *Sisterhood Is Powerful, An Anthology of Writings From the Women's Liberation Movement* by Robin Morgan, *Readings in U.S. Imperialism* by K.T. Fann and Donald C. Hodges, and *Monopoly Capital, An Essay On the American Economic and Social Order* by Paul A. Baran and Paul M. Sweezy. The three works Giese had written were *Artus Desire, Priest and Pamphleteer of the Sixteenth Century, French Lyric Poetry,* and an article on Camus and Algeria which was published in the *Colorado Quarterly.*

*Id.* at 1188-89.

10. *Id.* at 1189.

11. *Id.* at 1192-93 n.26. The following exchange between the prosecutor and Mr. Giese occurred:

> Q. Mr. Giese, would you look at Page 166, the last paragraph on the lower right-hand side. I have got a little check mark there?
> A. Yes.
> Q. Do you see that, sir?
> A. Yes, I do.
> Q. Could you read that particular paragraph for us and con-

request over the objection of defense counsel on grounds of relevance and first amendment concerns.[12] In his closing argument, the prosecutor himself read out loud to the jury some additional violent passages from *Revolution*, and argued that "throughout the book are references to the very thing that these people did."[13]

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tinue on?
A. 'We are sorry to'—
. . .
Mr. Paulson: May I have an objection?
The Court: You may have a continuing objection. Please proceed.
A. You want to read it aloud? 'We are sorry to hear that the townhouse forever destroyed your belief that army [sic] struggle is the only real struggle. That places us in a unique position because, as Che stated, "armed struggle is the only solution for people who fight to free themselves" and we have lost dearly-loved comrades.' Do you want me to go on?
Q. Yes sir.
A. 'Also probably every experienced revolutionary has, but we realize that risks must be taken, some will die, others will replace them or us.'
Q. Will you continue to the end of the paragraph.
A. I am trying to make sense out of the sentence. All right. 'Others will replace them or us like people rapping about ending racism, colonialism, sexism and all of the other pigisms, exploitation and all that but these things can only be ended by revolution and revolution is in the final analysis armed struggle, revolution is violence, revolution is war, revolution is bloodshed. How long have different successful national liberation fronts fought before they have won large popular support.'

The passage came from pages 166 and 167 which bore Giese's fingerprints. *Id.*

12. The objection interposed was as follows:
Mr. Paulson [Giese's lawyer]: Objection. It's hearsay and to my knowledge, he has not been charged with having read books but with acts in this case of—
The Court: Overruled.

Thereafter, the court gave Giese's counsel a "continuing objection," *see* note 11, *supra*. 597 F.2d at 1192 n.26.

13. The closing argument was, in pertinent part, as follows:
In California as regards to Mr. Giese, we have *From the Movement Toward Revolution*, Mr. Giese has fingerprints on this particular book. He told you that he had one of these books himself, possibly, at home. He could not recall how or if at all his fingerprints got on this particular book which came out of the Debra Sue Apartments in California. This is an architectural manual, basically, of urban warfare. Between this book and this book, you have the makings for any sort of urban warfare that you would like to participate in.
This is basically a conspiracy action, and I would like to just very briefly take excerpts from pages which contain Mr. Giese's fingerprints. 'A revolutionist sees death as a national phenomenon, must be ready to kill to change conditions. Revolution is

On appeal to the Ninth Circuit, Giese claimed that the trial court violated a number of the rules of evidence with respect to *Revolution:* (1) it was error to admit *Revolution* in the Government's case-in-chief as its prejudicial effect outweighed its probative value as evidence of association; (2) it was error to admit the book's contents on cross-examination because they were hearsay and irrelevant to the offense charged; and (3) in any case, it was improper for the trial court to permit the prosecutor to make Giese read the inflammatory passage in front of the jury.[14] Giese also claimed that admission of *Revolution* infringed upon his first amendment liberties, specifically, freedom of expression and the right to receive information.[15]

In rejecting Giese's arguments, the Ninth Circuit emphasized that they were not establishing a "general rule" that the Government may use a person's reading habits or literary tastes against him in a criminal prosecution. Their decision rested firmly upon the "peculiar circumstances" of the case; "reflecting [their] concern for the sensitive nature of first amendment values, it rest[ed] on very narrow grounds."[16] The court held that the admission of *Revolution* in the Government's case-in-chief

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> armed struggle, violence, war, bloodshed and the duty of a revolutionary is to make revolution.
>
> Let's all try to pick targets with more care and planning. The object is to destroy the economy like bombing sites which will affect the economy the most, rip off weapons and money, sniping attacks. Remember, in a revolution, one wins or dies. The stakes are very high.
>
> Do you recall the old words, "Ask what you can do for your country," destroy it, mentally, morally, psychologically and physically destroy it. And whatever you do do it good.
>
> Now those are just two pages from this book but these are two pages which contain the fingerprints of Frank Giese. If you have an opportunity, you may want to leaf through the rest of the book, because, as I indicated, this tells you—this is another how to do it for urban warfare.
>
> . . .
>
> Did we make up Frank Giese's fingerprints on the book *From the Movement Toward Revolution*? . . . You read those pages where Frank Giese's fingerprints were. You read those pages. It talks about bombing, sniper attacks. You read that book. You read other pages throughout there. Look at Page 51, for instance, look at the preface. Throughout that book are references to the very thing that these people did.

*Id.* at 1206 (Hufstedler, J., dissenting).

14. *Id.* at 1184.
15. *Id.* at 1184-85.
16. *Id.* at 1185.

was proper because the book, as a physical object, bore Giese's fingerprints and those of other co-conspirators and therefore tended to corroborate the witness' testimony that they were associated with one another.[17] Further, the court held that it was proper for the prosecutor to request Giese to read out loud extracts from the book on cross-examination because Giese had "opened the door to that line of inquiry" by introducing the eighteen books sold in his bookstore as evidence of his peaceable character.[18] In more simple terms, the majority held that *Revolution* was admissible to prove association, to rebut character evidence, and to impeach the defendant's credibility as a witness.[19]

## C. The Court's Reasoning

The majority reasoned that Giese's counsel failed to object to *Revolution* as fingerprint evidence on grounds of relevance and therefore the trial judge would only be reversed for plain error.[20] The court recognized that book titles alone can "sometimes have a tendency to prejudice a defendant," relying on *United States v. McCrea*;[21] however, in the instant case, the court concluded, the exhibit's probative value "clearly outweighed" the title's "slightly prejudicial effect."[22] The majority "readily" distinguished *McCrea* on the basis that the books introduced by the prosecution in that case totally lacked probative value, either as works of literature or as physical embodiments of evidence linking co-conspirators.[23]

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17. *Id.*

18. *Id.*

19. *Id.*, n.15.

20. *Id.* at 1186-87.

21. 583 F.2d 1083 (9th Cir. 1978). McCrea was convicted of possession of an unregistered firearm (destructive device) in violation of 26 U.S.C. § 5861(d). The prosecution introduced two books seized from McCrea's possession into evidence: "Improvised Munitions Handbook" and "OSS Sabotage & Demolition Manual." The Ninth Circuit held that admission of the books was error, but held the error to be harmless in light of the otherwise overwhelming evidence of McCrea's guilt, coupled with the fact that the Government made no mention of the books during its opening statement, nor attempted to capitalize on them during trial.

Judge Trask, writing for the majority in *Giese*, distinguished *McCrea* on the basis that knowing possession was all the government had to prove and thus the defendant's intent was immaterial. Since one cannot logically infer possession of firearms from mere possession of books concerning them, the books contributed "nothing to the truth finding process." Judge Trask further noted that although the *McCrea* opinion gave no indication as to whether the books bore the fingerprints of the defendant, or anyone else, even if they had, the books still would have been immaterial since McCrea was not charged with criminal conspiracy. 597 F.2d at 1187.

22. *Id.*

23. *Id.* at 1188. *See* note 21 *supra.*

Next, the majority concluded, the prosecution gained the right to cross-examine Giese on *Revolution*'s contents when he took the stand and produced the eighteen samples, testifying to the contents of many of them, and "suggesting" that they were indicative of his peaceable character.[24] "Giese implied," claimed the majority, "that the 18 books exemplified the kind of literature he *sold, owned, or read,*[25] *and that the literature, in turn, reflected his left-wing but nonrevolutionary political views.*"[26] By "juxtaposing" an account of his political activities with an explanation of his motivation for founding REP bookstore, and a description of the kinds of books he "sold, owned or read,"[27] Giese, the majority concluded, sought to portray himself as a "scholarly, humane, peace-loving political activist who possessed a decidedly non-violent character."[28]

The Supreme Court set forth the basic principles governing use of character evidence by a defendant-witness in *Michelson v. United States,*[29] concluding that "the price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." The majority applied this principle and concluded that "Giese threw open the subject of his literary tastes and reading habits when he testified about the specific acts of selling, reading, and owning the eighteen books."[30] At that point, the trial judge was vested with " 'broad discretion to admit extrinsic evidence tending to contradict the specific statement, even if such statement concern[ed] a collateral matter in the case.' "[31] The majority noted that a trial judge had broad discretion in determining what lines of questioning are *reasonably related* to the subject matter of direct exami-

24. 597 F.2d at 1188.

25. *Id.* at 1188-89 (emphasis added). *See* note 9 *supra.* The majority noted that the books Giese had personally authored were his personal property and kept at home rather than in the bookstore. Hence, Giese "owned" some of them. The majority also noted that while Giese claimed that he had not necessarily read the 18 books he was introducing into evidence, "he left no doubt that he had read many of them," by virtue of his discussion. Hence, Giese "read" some of them. *Id.*

26. *Id.* at 1189 (emphasis added).

27. *Id.*

28. *Id.*

29. 335 U.S. 469, 475-76 (1948).

30. 597 F.2d at 1190.

31. *Id., quoting* United States v. Benedetto, 571 F.2d 1246, 1250 (2d Cir. 1978).

32. *See* United States v. Higginbotham, 539 F.2d 17, 24 (9th Cir. 1976); United States v. Palmer, 536 F.2d 1278, 1282 (9th Cir. 1976); McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 191, at 59 (2d ed. Supp. Cleary *et al.*, eds. 1978).

nation,[32] and, in the case of character evidence in particular, its admissibility " 'depend[s] on numerous and subtle considerations difficult to detect or appraise from a cold record, and therefore, rarely and only on a clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts . . . .' "[33] In light of the foregoing principles, and given Giese's "fairly extensive contacts with the book" the court could not conclude that the trial judge had abused his discretion. The majority explained:

> Justice would not have been served had the jurors been left with . . . the one-sided impressions created by Giese's 18 innocuous books. To show the opposite side of the coin, as it were, it was fair for the government to cross-examine Giese on other books had had sold, owned, or read. From the *Movement Toward Revolution* was such a book. It is true that Giese did not keep *From the Movement Toward Revolution* in stock at the book-store, but he did not sell all of the 18 books there either. However, there is no doubt that Giese read and owed *From the Movement Toward Revolution*.[34]

The court reasoned that the trial judge correctly overruled defense counsel's objections on grounds of hearsay and irrelevance because *Revolution* was relevant for the "dual rebuttal" purposes of impeaching Giese's character and his veracity as a witness. The contents were not hearsay because they were not introduced to prove the truth of the matter asserted therein.[35]

The court likewise rejected Giese's claim that he was "forced" by the prosecutor to read out loud from *Revolution* in front of the jury, noting that Giese himself did not wage a protest,

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33. 597 F.2d at 1191, *citing* Michelson v. United States, 335 U.S. 469, 480 (1948).

34. 597 F.2d at 1191. The majority added that because defendants are traditionally afforded "considerable latitude" when they testify regarding their personal histories, they "[s]ometimes commit tactical blunders." The court explained:

> We are cognizant of the limitations inherent in the use of literature as proof of character, and we do not applaud the strategy employed by Giese and his attorney. Nor do we bestow our imprimatur on the concept of trial by books. Nevertheless, the question before this court is not whether we think books are a persuasive form of character evidence; the issue is whether the government had a right to respond once the defendant had, of his own volition, chosen that method of proving he was a peaceable, law-abiding individual.

*Id.* at 1190-91.

35. *Id.* at 1191-92.

nor did his lawyer object to "the act of reading as such."[36] "Giese was no more 'forced' to read from the book than is a witness who is asked to read a prior inconsistent statement to the jury," the court noted.[37] Again, the trial judge is accorded considerable discretion, the majority reasoned, in deciding "how" evidence is to be presented because of his "superior position" to evaluate the proceedings, and his exercise of discretion will be upheld unless he has acted "arbitrarily or irrationally."[38]

The majority adopted a "useful test" from the Sixth Circuit for determining whether a defendant is unjustly prejudiced by having to perform a particular act on the witness stand,[39] and determined that Giese suffered no degradation such as to warrant reversal of his conviction.[40] Whatever damage did occur, the majority determined, could easily have been mitigated by defense counsel "simply asking his client on redirect whether he agreed with what the book said."[41] Besides, the court concluded, even if Giese was slightly injured by his performance, "the probative value of enabling the jury to observe his demeanor while he was being impeached outweighed the prejudicial effect."[42] In light of

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36. *Id.* at 1192. *See* note 12 *supra.*

37. 597 F.2d at 1192.

38. *Id.* at 1192-93. The majority relied on a recent Second Circuit opinion, United States v. Robinson, 560 F.2d 507, 515 (2d Cir. 1977) (en banc), *cert. denied,* 435 U.S. 905 (1978) which held that " 'the preferable rule' in reviewing a district court's decision on the question of unfair prejudice 'is to uphold the trial judge's exercise of discretion unless he acts arbitrarily or irrationally.' " *Id.*

39. United States v. Doremus, 414 F.2d 252, 254 (6th Cir. 1969). In *Doremus,* the Sixth Circuit held that impermissible prejudice results when "the requested performance or demonstration would unjustly humiliate or degrade the defendant" or "such performance would be damaging to the defendant's image and irrelevant to the issue on trial."

40. 597 F.2d at 1193.

41. *Id.* While no such rehabilitative effort was in fact made, it could have been made. Therefore, the situation differed from, for example, the "forced reenactment of an especially shocking crime" which is capable of degrading a defendant "beyond repair," according to the majority. *Id.*

42. *Id.* The court elaborated as follows:

> It is axiomatic that jurors are entitled to see how the witness reacts when the cross-examiner catches him in a contradiction or exposes one of his falsehoods. "*The demeanor of the witness on the stand* may always be considered by the jury in their estimation of his credibility." IIIA *Wigmore on Evidence* § 946, at 783 (Chadbourn rev. 1974) (emphasis in original). Evidence is normally taken by means of *viva voce* testimony of witnesses rather than by written depositions because it is considered crucial for the judge and jury "to obtain the elusive and incommunicable evidence of a *witness' deportment while testifying.*"

*Id. quoting* J. WIGMORE, WIGMORE ON EVIDENCE § 1395, at 153 (emphasis in original).

these factors, the court reasoned, the trial judge did not act irrationally or arbitrarily in failing to rule sua sponte that the act of reading unfairly prejudiced Giese.[43]

The majority concluded its analysis regarding the prosecution's use of *Revolution* by stating that Giese's first amendment argument "is without merit."[44] The majority noted that Giese did not assert his constitutional argument "by way of a timely objection or request for instructions at trial;" moreover, he impliedly waived it, according to the majority, by opening up the subject of his literary tastes.[45] At that point, "Giese was not entitled to be selective in describing the contents of his books any more than the defendant in *United States v. Hearst*[46] . . . was entitled to be selective in describing what she did between the time she was kidnapped and her arrest."[47] The court concluded that "one who raises the issue of the kind of books he sells, reads, or owns should not be able to invoke the First Amendment as a bar to cross-examination [on matters reasonably related to the subject matter of direct examination]."[48]

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43. *Id.*

44. *Id.*

45. *Id.* at 1193-94.

46. 563 F.2d 1331 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978).

47. 597 F.2d at 1194.

48. *Id.* at 1194. The court analogized Giese's waiver of his first amendment rights to a waiver of fifth amendment rights, quoting McGautha v. California, 402 U.S. 183, 215 (1971). *See also* Brown v. United States, 356 U.S. 148, 155 (1958); United States v. Lustig, 555 F.2d 737, 750 (9th Cir.), *cert. denied*, 434 U.S. 926 (1977). Giese's first amendment argument regarding Meyer's testimony in the Government's case-in-chief about his participation in political discussions at the prison and recommendation of certain books to the inmates met a similar fate. The majority reasoned that:

> Evidence relating to Giese's statements about books and politics was relevant because it provided the jury with information about his relationship with many of the people who subsequently became his co-conspirators. Like the fingerprints on *From the Movement Toward Revolution*, Meyer's testimony shed light on the conspirators' association with each other. It also tended to show that Giese exercised a leadership role vis-a-vis the other conspirators. By conducting discussions on a topic of mutual interest—radical politics—and by furnishing or recommending books on that subject, Giese attracted Meyer (and perhaps his fellow prisoners Severin and Wallace) to the group at the bookstore which eventually formed the conspiracy. Meyer's testimony was not unfairly prejudicial. In fact, the government took steps to ensure that the jury did not draw improper inferences from evidence relating to books and political beliefs. In his summation, the assistant United States attorney reminded the jurors that Giese and his co-defendants were

In reviewing the several instances of prosecutorial misconduct, the court admitted that the prosecution had used "some slightly overblown rhetoric in describing *From the Movement Toward Revolution*" in its summation to the jury.[49] Due to the lack of an appropriate objection, and request for a corrective instruction, the majority again applied only the plain error standard of review.[50] The court concluded that there was no plain

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> not on trial for reading or possessing certain types of literature or for subscribing to a particular political philosophy. Our scrutiny of the record convinces us that the government used Meyer's testimony solely for permissible purposes and not to prove that Giese had a violent character or to induce the jury to punish him for reading and recommending radical literature. Accordingly, we hold that Giese's First Amendment rights were not violated.

597 F.2d at 1194-95.

49. *Id.* at 1199. *See* note 13 *supra*. The majority stated that although they "wish[ed]" the prosecutors had exercised greater restraint in their characterization of REVOLUTION in closing argument, in light of the circumstances, their remarks did not compel reversal of the conviction:

> Since the book was in evidence, the government attorneys were entitled to comment on it to a certain extent. However, they should have confined their remarks to stressing the *sharp contrast between the kinds of books Giese said he read and the kinds he actually read,* thereby reminding the jurors that *From the Movement Toward Revolution* had been used to contradict Giese's character evidence and to impeach his credibility as a witness. Having considered all of the circumstances, we conclude that the prosecutors' failure to so limit their remarks was not so improper and damaging as to compel reversal. We note that although Giese's attorney had registered his "continuing objection" to the admissibility of the book's contents . . . he did not voice an objection or request a curative instruction in response to the government's comments in closing argument. We further note that the defense attorneys made extensive use of the book in their own summations. Co-defendant Cronin's counsel sarcastically characterized *From the Movement Toward Revolution* as a "song book" . . .. Co-defendant Wallace's lawyer told the jury that the book was one of the weakest links in the government's case . . .. The defense attorneys repeatedly urged the jurors to peruse various parts of the book . . ., and the lawyers for Giese and Cronin even went so far as to read extracts from pages of *From the Movement Toward Revolution* on which no conspirator's fingerprints were found . . .. The defense attorneys' behavior at trial belies Giese's appellate argument that the prosecutors' references to *From the Movement Toward Revolution* in summation so inflamed the jury as to deprive him of a fair adjudication of guilt or innocence. (emphasis added).

597 F.2d at 1200 n.30.

50. *Id.* at 1199. *See* note 49 *supra*; United States v. Perez, 491 F.2d 167, 173 (9th Cir.), *cert. denied,* 419 U.S. 858 (1974).

error committed because the case against Giese was "strong" and therefore, absent the Government's improper remarks the jury still would have found him guilty of criminal conspiracy.[51] Further, the court noted, the defense attorneys' "extensive use" of *Revolution* in their own summations and urgings that the jurors peruse portions of the book belied Giese's argument that the prosecutors' conduct in summation so inflamed the jury as to deprive him of a fair trial.[52]

## D. Criticism

There is little one can add to the criticisms set forth convincingly by Judge Hufstedler in her dissenting opinion. However, since the Supreme Court has recently denied petition for certiorari in this case, this Note will briefly review some of the major pitfalls in the majority's analysis, and then summarize the major implications of this very important case.

The prosecution clearly utilized the contents of *Revolution* to convince the jury that the revolutionary ideas expressed therein were held by Giese himself, and that, moreover, Giese acted upon those concepts to form a conspiracy to bomb military recruiting centers in order to halt the Vietnam War.[53] Based upon her reading of the record, Judge Hufstedler concluded that "Giese was . . . convicted of conspiracy by book association in egregious violation of the guarantees of the First Amendment."[54] She further concluded that the "record flatly contradict[ed] the majority's waiver and invited error theories."[55]

From a purely evidentiary standpoint, *Revolution* probably should have been excluded by the trial judge on a number of distinct grounds. Under Rule 403 of the Federal Rules of Evi-

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51. 597 F.2d at 1199-1200. *See* United States v. Greenbank, 491 F.2d 184, 188-89 (9th Cir.), *cert. denied*, 417 U.S. 931 (1974); Corley v. United States, 365 F.2d 884, 885 (D.C. Cir. 1966).

52. 597 F.2d at 1200 n.30. *See* note 49 *supra*.

As Judge Hufstedler noted in her dissent, the critical inquiry is whether the remarks were so prejudicial in light of the circumstances as a whole as to make it likely that they adversely influenced the jury so as to deprive the defendant of a fair trial. *See, e.g.*, Lawn v. United States, 355 U.S. 339, 359-60 n.15 (1957); United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 237-43 (1940); Berger v. United States, 295 U.S. 78, 84-89 (1935); United States v. Greenback, 491 F.2d 184 (9th Cir. 1974). 597 F.2d at 1210 n.7 (Hufstedler, J., dissenting).

53. *Id.* at 1201 (Hufstedler, J., dissenting).

54. *Id.*

55. *Id.* at 1202 (Hufstedler, J., dissenting).

dence, the book was particularly excludable as evidence of association in view of its highly cumulative nature.[56] While the erroneous admission of the book as a tangible embodiment of other evidence was most likely harmless error given the abundant evidence of the co-conspirators' association with one another, the difficulty is that proper exclusion at that point might have obviated the subsequent sequence of rather odd events which provided for its further misuse.

Judge Hufstedler determined that Judge Trask's "novel" impeachment theory of admissibility was not only forbidden by the first amendment, it was contradicted by the record. She lamented the majority's "escape" from the reality of the book's use by the prosecution to convince the jury that it should attribute the ideas expressed therein to Giese, who thereafter acted upon them to form the conspiracy to commit the underlying substantive offenses.[57] Moreover, she surmised, the contents were not properly admissible to impeach Giese, "even if the Government had made that attempt."[58] For one thing, the contents of books one reads are not probative as to the reader's peaceable or nonpeaceable character because "[n]o inference of any kind can be drawn about a person's character from the kinds of books that he reads."[59]

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56. Rule 403 of the Federal Rules of Evidence provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by, *inter alia*, the "needless presentation of cumulative evidence." As the Advisory Committee Notes explain, certain circumstances "call for the exclusion of evidence which is of unquestioned relevance" when unfairly prejudicial, *i.e.*, having "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. . . ."

Moreover, as is noted by Judge Hufstedler, whether the fingerprints were probative at all is subject to question—all they really proved was that "the persons who handled the book had been associated with the book." As she reasoned: "[n]o inference a[rose] that the persons who handled the book were even casually acquainted in absence of proof that the fingerprints were made at or about the same time." The Government expert could not pinpoint the temporal proximity of the prints on REVOLUTION, so that it was imminently possible that they were made in succession, as the book changed hands between 1971 and 1973. 597 F.2d at 1206-07. (Hufstedler, J., dissenting). *See* note 6 *supra*.

57. 597 F.2d at 1209 (Hufstedler, J., dissenting).

58. *Id.* at 1207 (Hufstedler, J., dissenting).

59. *Id.* Even if Giese had misguidedly attempted to imply that the 18 pieces of literature somehow reflected his left-wing but non-revolutionary political views, the Government should have been precluded from responding with the contents of a book which Giese had read, in part, for as Judge Hufstedler noted: "We have no basis in human experience to assume that persons of 'good' character confine their reading matter to 'good' books, or that persons who read peaceful books are peaceful people, or that persons who read books involving violence are violent people." *Id.* at 1207.

Secondly, as Judge Hufstedler perceived, since Giese did not purport to put forth a representative sample of the kinds of books that he read, but merely had incidentally read some of the books he sold, "there was no evidence on this score to contradict."[60] In addition, there was no "sharp contrast" between the eighteen books introduced by Giese and *Revolution*, as a number of Giese's exhibits ranged from liberal to far left to radical as did the spectrum of the writings inclusive in *Revolution*, a political anthology.[61] Giese's veracity as a witness was in no manner impeached by the contents of *Revolution*.[62]

Moreover, as a practical matter, it is fairly clear that Giese, and not the Government, was placed in a rebuttal posture regarding the use of association or implication by literature. Giese's lawyer had him introduce the "representative sample" of the sorts of books he carried in his bookstore in an attempt, albeit ill-conceived, to rebut the prosecution's evidence that REP bookstore carried how-to-do-it books and pamphlets on explosives and violent revolution. The majority's assertion that Giese "put" his character into issue through literary means, thus mandating in "fairness" that the prosecution be allowed to rebut in kind, in actuality turns the situation on its head.[63]

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60. *Id.* at 1208 (Hufstedler, J., dissenting).

61. *Id.*, at 1208 n.4.

62. The use of a commercially published book as the prior inconsistent statement of a witness is unprecedented. And, as Judge Hufstedler noted, "Professor Wigmore would have been astonished to discover that he supported a view that any inferences whatever could be drawn about a witness' veracity from the manner in which a witness read aloud from a book." *Id.* at 1208. Besides, the majority's interpretation of Giese's act of reading patently ignores the "prosecutor's transparent purpose" in making the request—*i.e.*, "to convey to the jury that the words of the author were the words of Giese." *Id.*

63. The Ninth Circuit recently disposed of a similar argument in United States v. Hearst, 563 F.2d 1331, 1339 (9th Cir. 1977). Hearst likewise claimed that her waiver of her privilege against self-incrimination was involuntary because she was compelled to testify by the admission of highly prejudicial evidence. Caught between the "rock and the whirlpool," she argued that she had to testify in order to set the record straight. The Ninth Circuit distinguished her case, however, from Harrison v. United States, 392 U.S. 219 (1968), in which testimony given to overcome the impact of an illegally obtained confession was held to be involuntary, on the basis that the prosecution in *Hearst* did not introduce any illegal or otherwise inadmissible evidence. The court held that a defendant's "subjective impressions" of what he is "forced" to do during trial are insufficient to render his testimony involuntary. *Id.* Since the majority in *Giese* specifically held that the prosecution's use of pamphlets in its case-in-chief was perfectly proper, Giese's "subjective impressions" of what he was forced to do in order to put on a defense could not save him from inadvertently putting his character into issue and impliedly waiving his first amendment rights.

The significance of the case, however, clearly derives from the majority's landmark finding of an implied waiver of first amendment rights. Giese's alleged waiver of his constitutionally protected right not to have ideas contained in books he has read attributed to him is legally unprecedented. In view of the dearth of authority on the subject, the court analogized his case to that of the criminal defendant who takes the stand and then attempts to invoke the fifth amendment to bar cross-examination on reasonably related matters. As a factual matter, Giese did not testify regarding the kinds of books he read, although, admittedly, he was not totally unfamiliar with the subject matter of several books introduced in the "representative sample" he sold in the REP bookstore. Even if the record "left no doubt" that Giese had in fact read "many" of them, as the majority surmised, the Government's detailed examination regarding the contents of *Revolution*—a book he had read but did not stock in his bookstore—would not appear to have been reasonably related to the subject matter of his direct examination.

*United States v. Hearst,*[64] relied upon by the majority, is somewhat distinguishable. Hearst attempted to take the stand and testify regarding her captive existence from the moment of her kidnapping to the time of her arrest, and then invoke the fifth amendment regarding an *identical line of questioning* by the prosecutor directed, particularly to the "lost year" she failed to cover on direct examination.

Even Giese "prefaced" his exhibits with a claim that he founded the bookstore in order to "propagate" his political point of view, as the majority claimed, it is still unreasonable to assume that he automatically subscribed to the social, economic or political messages contained in each and every of the varied literary works he saw fit to carry. Moreover, if such were a reasonable assumption, the fact that Giese chose *not* to carry *Revolution,* a book with which he was admittedly familiar, suggested that it did *not* sufficiently mirror his political predelictions, contrary to the Government's assertion.

Therefore, assuming for the moment that first amendment rights are subject to waiver, and even if an implied waiver of some degree was inferrable based on the facts—that Dr. Giese waived

64. 563 F.2d 1331 (9th Cir. 1977).

his constitutional right to have the Government refrain from introducing samples of the books he chose to sell in his bookstore—the cross-examination which ensued surely exceeded the *scope* of the implied waiver. A properly circumscribed cross-examination, *i.e.*, one to the effect that the books he produced were not in fact representative of those he carried, would have been reasonably related to the scope of his direct examination and thus arguably permissible.[65]

The court's unhesitating analogy, however, to waiver of the fifth amendment privilege against self-incrimination is also suspect from the standpoint of the constitutional rights hierarchy. It is generally accepted that the first amendment freedoms of speech, press and association occupy a preferred position in the hierarchy of constitutional freedoms due to the explicit protection accorded them *and* to their importance to a democratic society.[66] A civilized society should not allow a waiver of the individual's fundamental right to his "individual freedom of mind,"[67] for the same reason that the society protects a criminal defendant against waiving all fundamental due process rights. At the very least, given the preeminence of first amendment protections, more precise standards for waiver should have been elucidated by the court.

Generally, in instances of waiver, the act which constitutes the waiver must clearly indicate an intentional relinquishment of

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65. As Judge Hufstedler noted: "The Government introduced no evidence to show that, contrary to his testimony, the books that he introduced were not representative samples of the books he carried in his bookstore, [nor did it offer any] evidence that the book *Revolution* was carried in his bookstore." 597 F.2d at 1208 (Hufstedler, J., dissenting).

66. Wooley v. Maynard, 430 U.S. 705 (1977). *See also* Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967) ("Free speech is the matrix, the indispensable condition, of nearly every other form of freedom, . . ."); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("This right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society."); Baker, *Scope of the First Amendment-Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1974); Barnum, *Constitutional Status of Public Protest Activity in Britain and in the United States*, 1977 PUB. L. 310; Be Vier, *First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1977-78); Schauer, *Fear, Risk and the First Amendment: Unravelling the Chilling Effect*, 58 B.U.L. REV. 685 (1978); Note, *First Amendment Limitations in Punishing Political Threats*, 9 CONN. L. REV. 304 (1977); Note, *Freedom of Speech: Evolution of the Enlightenment Function*, 29 MERCER L. REV. 811 (1977-78); Anastaplo, Book Review, 9 SW. U.L. REV. 273 (1977) (D. MURPHY, THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR).

67. Wooley v. Maynard, 430 U.S. at 714.

a known right or privilege in order to counteract the strong presumption against waiver of fundamental rights.[68] With respect to simultaneous waiver by an accused of several constitutional rights, for example, the trial judge must assume a protective posture and carry a weighty responsibility in determining whether the defendant has in fact made a voluntary, intelligent and competent waiver. Given the dominant position of the first amendment protections in the constitutional constellation, the presumption against waiver should be particularly strong, and any inadvertent or accidental waiver should be procedurally safeguarded. In Giese's case, not only were both he and his counsel clearly ignorant of the implications of his testimony, but also there is no indication that the trial court gave any consideration to the existence of an implied waiver of constitutional rights. On appeal the finding of an intentional and voluntary relinquishment by Giese of a known constitutional right seems inconsistent with the objections of his counsel, which included a continuing objection on first amendment grounds to the introduction of *Revolution's* contents.[69]

As Judge Hufstedler pointed out, the *actual* use made of the book by the Government was completely aberrant to the Constitution,[70] and the admission of *Revolution* was "no more constitutionally permissible" had it been utilized for impeachment purposes as was argued by the majority. "No inferences can constitutionally be drawn about the character of book readers on the basis

68. *See, e.g.*, Brookhart v. Jains, 384 U.S. 1, 4 (1966); Glasser v. United States, 315 U.S. 60, 70-71 (1942); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Mone v. Robinson, 430 F. Supp. 481, 484 (D. Conn. 1977). *See also* Dix, *Waiver as an Independent Aspect of Criminal Procedure: Some Comments on Professor Westen's Suggestion*, ARIZ. ST. L.J. 67 (1979); Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977); Spritzer, *Criminal Waiver, Procedural Default, and the Burger Court*, 126 U. PA. L. REV. 473 (1978).

69. *See* note 12 *supra*.

70. 597 F.2d at 1209 (Hufstedler, J., dissenting). Judge Hufstedler explained:

> The Government's theory, which it argued to the jury, was that the ideas of an author of a book may properly be attributed to the reader of the book and then used against him to prove disposition to commit a crime, motive to undertake criminal action, or proof that he did the acts charged. None of these uses is constitutionally permissible. Freedom of speech would be totally destroyed if the shadow of the prosecutor fell across the pages of the books we read. Even during the evil thralldom of McCarthyism, we did not embrace the concept of guilt by book association.

*Id. See* Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting).

of the books they read, [inasmuch as the] [a]bstract advocacy of violence is constitutionally protected."[71] She noted that since the "corollary of the right to utter or to print advocacy of violence is the right to listen or to read violent exhortations," the use of "book reading, . . . to impeach a person's character is utterly incompatible with constitutional protections afforded free speech."[72]

The Supreme Court has recognized, on numerous occasions, the existence of the constitutional right to receive information, either as an indispensable corollary to the right to disseminate information,[73] or as elemental to the freedom of thought.[74] In

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71. 597 F.2d at 1209.

72. *Id.* In 1971, Justice Harlan had occasion to speak eloquently regarding the fundamental ideals of democratic society which depend for their livelihood upon the first amendment:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests (citations omitted).
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance . . . . That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength . . . . That is why "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons . . .," and why "so long as the means are peaceful, the communication need not meet standards of acceptability."

Cohen v. California, 403 U.S. 15, 24-25 (1971) (citations omitted).

73. *See* Bantam Books v. Sullivan, 372 U.S. 58, 65 n.6 (1963); Winters v. New York, 333 U.S. 507, 509-10 (1948); Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

74. In Griswold v. Connecticut, 381 U.S. 479, 482 (1965), the Supreme Court proclaimed that:

> [T]he State may not, consistently with the spirit of the first amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter and print, but the right to distribute, the right to receive, the right to read (Martin v. Struthers, 319 U.S. 141, 143) and freedom in inquiry, freedom of thought, and freedom to teach . . ..

Justice Stewart later expanded on this notion in Ginsberg v. New York, 390 U.S. 629, 649 (1968):

> The first amendment guarantees liberty of human expression

*Stanley v. Georgia,*[75] for example, the Court declared unconstitutional a statute making it unlawful to possess obscene materials in the home, because it offended the "right to receive ideas, regardless of their social worth," and violated the "right to be free, except in very limited circumstances, from the unwanted governmental intrusions into one's privacy."[76]

The Court perceived that the "test" of the freedom's

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> in order to preserve in our Nation what Justice Holmes called a "free trade in ideas." . . . To that end, the Constitution protects more than just man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice.

75. 394 U.S. 557 (1969).

76. *Id.* at 564. Intellectual freedoms have been championed by philosophers since ideas were first committed to paper. Early, Spinoza spoke out against

> laws which decree what everyone must believe, and forbid utterance against this or that opinion, [which] have too often been enacted to confirm or enlarge the power of those who dared not suffer free inquiry to be made, and have by a perversion of authority turned the superstition of the mob into violence against opponents.

B. SPINOZA, TRACTUS THEOLOGICO-POLITICUS 349 (London 1862). Montesquieu pursued a similar theme in his discourse on the law entitled *L'Esprit des Lois*, published in 1748. As a reknowned thinker of the times, he proclaimed against punishing thoughts or words:

> There was a law passed in England under Henry VIII, by which whoever predicted the king's death was declared guilty of high treason. This law was extremely vague; the terror of despotic power is so great that it recoils upon those who exercise it. In the king's last illness, the physicians would not venture to say he was in danger; and surely they acted very right . . . . Marsyas dreamed that he had cut Dionysius' throat. Dionysius put him to death, pretending that he would never have dreamed of such a thing by night if he had not thought of it by day. This was a most tyrannical action: for though it had been the subject of his thoughts, yet he had made no attempt towards it. *The laws do not take upon them to punish any other than overt acts. . . . Words do not constitute an overt act; they remain only an idea.*
> *idea.*

1 MONTESQUIEU, THE SPIRIT OF LAWS 192-93 (1949) (emphasis added).

Thomas Irwin Emerson might have had United States v. Giese in mind when he warned that "expression may be seriously inhibited when the speaker knows what he says can be used against him at a later time if some unforeseen action ensues, and can be taken into account by a jury in determining his state of mind in performing a subsequent act, *or perhaps be the decisive factor in a jury's general verdict against him.* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 405 (1970) (emphasis added). Judge Ely apparently agreed and voted to grant the petition for a rehearing *en banc* in *Giese*, "believing that the original majority [o]pinion constituted an impediment to the intellectual growth of our citizenry." 597 F.2d at 1213.

"substance is the right to differ as to things that touch the heart of the existing order."[77] The Court noted that:

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the state as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be the mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
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> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force its citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[78]

Moreover, the attribution to the reader of thoughts expressed by an author whom he has merely read plainly violates the first amendment's proscription against "guilt by association." In *Schneiderman v. United States,*[79] for example, the Supreme Court recognized, the Government having conceded, that it was unsound to impute to the members of an organization the views espoused in organizational documents. Indeed, in *Aptheker v. Secretary of State,*[80] the Court rejected a rule imputing the beliefs of an organized political party to its members, even though the complainants in that case were in fact the party chairman and its chief theoretician. Recently, the First Circuit, in *United States*

77. Board of Education v. Barnette, 319 U.S. 624, 641-42 (1943). Americans also struggled to rid the republic of the spectre of "thought crime" and to punish our citizens only for overt acts against the state. *See* Stanley v. Georgia, 394 U.S. 557 (1969); Cramer v. United States, 325 U.S. 1, 28-30 (1944).

78. 319 U.S. at 641-42. Giese's conviction stands in sharp contrast to time-honored, fundamental maxims regarding first amendment liberties. We are newly faced with the dismal prospect that a lighthearted comment once made by Mark Twain has become, ironically, a sad truism. Twain wrote: "It is by the goodness of God that in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them." M. TWAIN, FOLLOWING THE EQUATOR 198 (1903).

79. 320 U.S. 118, 147, 154 (1942). *See also* Healy v. James, 408 U.S. 169, 186 (1972); Elfbrandt v. Russell, 384 U.S. 11 (1966); Noto v. United States, 367 U.S. 290, 299-300 (1961); Bridges v. Wixon, 326 U.S. 135, 147 (1945).

80. 378 U.S. 500 (1964).

*v. Spock,*[81] declined to hold that a drafter of a document necessarily adhered to, and intended to act upon, its illegal aspects. These cases surely prohibit the imputation of the views of an author of a commercial literary work to his readers.

Giese's conviction might have been reversed on the basis of *Stromberg v. California,*[82] in which the Supreme Court held that a conviction, based upon a record and statute which did not substantially exclude the possibility that it occurred in contravention of constitutional rights, must be reversed. In *Street v. New York,*[83] the Supreme Court applied the *Stromberg* rule and reversed Street's conviction by general verdict, since it left open the possibility that he was convicted based on pure speech alone, even though the uncontroverted proof of Street's act of flag burning provided a fully sufficient and constitutionally permissible basis for the conviction. Giese, on the other hand, was acquitted of the substantive counts in connection with the bombings, which tended to suggest that there was at least some question as to the existence of a fully sufficient and constitutionally permissible basis for his conspiracy conviction.

Notwithstanding the prosecutor's flagrant misuse of the contents of *Revolution,* the trial court's failure to give the jury special instructions cautioning it not to convict on the basis of first amendment activities, and the fact that the record did not indicate that the jury did not base its verdict on safeguarded conduct, the Ninth Circuit held that the trial court's general conspiracy instructions "sufficiently warned the jury."[84] The court maintained that "[a]lthough these instructions did not explicitly prohibit the jury's consideration of First Amendment activities, they did, by their very terms and logic, negate the relevance to the verdict of Giese's protected speech, association, and assembly."[85]

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81. 416 F.2d 165, 178 (1st Cir. 1969).

82. 283 U.S. 359 (1931). *See also* Bachellar v. Maryland, 397 U.S. 564, 571 (1970); Gregory v. City of Chicago, 394 U.S. 111, 113 (1969); Cox v. Louisiana, 379 U.S. 6, 31-2 (1965).

83. 394 U.S. 576 (1969).

84. 597 F.2d at 1198.

85. *Id.* The majority explained:

> The jury could have convicted Giese only after finding that he "willfully and knowingly" joined a conspiracy formed "to commit and cause to be committed, certain offenses against the United States and other persons and institutions by means of or acts of violence, terrorism and destruction." Nothing could

## E. SIGNIFICANCE

The obvious significance of *United States v. Giese* is that, in the Ninth Circuit, criminal defendants can waive at least one of their first amendment protections. The Ninth Circuit has virtually invited Government ingenuity to devise new theories of relevance upon which the introduction of first amendment material may be sustained.

Potentially far-reaching aspects of the case derive from what transpired during the Government's case-in-chief. Apparently, the prosecution may demonstrate the associational coalescence and hierarchical structure of an allegedly conspiratorial group by enlisting the aid of constitutionally protected activity. The activist defendant is especially vulnerable because his political activity may be used against him. His associates can turn state's evidence and testify as to his abstract advocacy of violence. In fact, the Government may rest its conspiracy case almost entirely on evidence concerning the activist's discussions, literary habits, and advocacy to others.

The implications of the Government's misuse of *Revolution* are equally frightening. Defendants and their counsel are strongly influenced to refrain from attempting to rebut the prosecution's literary evidence with other literature, lest an implied waiver of constitutional rights be found. At the moment, however, this aspect of the case is strictly limited to the somewhat bizarre facts. The majority recognized the first amendment implications inherent in the use of *Revolution,* and, absent some affirmative conduct by an accused which can be construed as "throwing open the door" to his literary tastes, the Government should not be able to compel him to read from the most unpopular treatise found in his library.

Lastly, the books one reads, while not the most effective method of proving or disproving a particular character trait, are now at least probative and thus competent evidence on this issue in the Ninth Circuit.

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> be clearer, or less threatening to First Amendment values. After hearing these instructions, no reasonable juror could have found that Giese joined the conspiracy solely by expressing opposition to the Vietnam War. A more direct and purposeful manifestation of intent was required to find that he joined the conspiracy "willfully and knowingly."

*Id.*

## VII. NON-TESTIFYING DEFENDANT'S RIGHT TO APPEAL: *UNITED STATES V. COOK*

### A. INTRODUCTION

During the past Survey term, a panel of the Ninth Circuit in *United States v. Cook*[1] decided issues relating to pre-trial identification, access to witnesses and the right to confrontation in a criminal action. The court also considered "whether a defendant, who elected not to testify during his trial, could preserve on appeal his challenge to the trial judge's [preliminary] ruling on a motion for an order excluding evidence of his former robbery convictions."[2]

In this case, the trial court preliminarily ruled that if defendant testified, the prosecution could present evidence of defendant's past robbery convictions for impeachment purposes. The defendant did not testify at trial, and based his appeal, *inter alia,* on the argument that the lower court ruling effectively denied him a chance to testify. The court, in an en banc opinion held that a defendant is not barred from appellate review of a trial judge's ruling admitting evidence of prior convictions, even if defendant does not testify as long as the defense: (1) establishes that he would testify if evidence of his priors is excluded, and (2) "sufficiently outline[s] the nature of his testimony so that the trial court, and the reviewing court, can do the necessary balancing contemplated in Rule 609 [of the Federal Rules of Evidence]."[3]

The focus of this Note will be to clarify the issues posed by the *Cook* en banc opinion concerning Rule 609 and to examine the problem posed by the requirement of the testimonial record.

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1. 608 F.2d 1175 (9th Cir. June, 1979) (partially decided en banc per Goodwin, J.) (partially decided in panel per Goodwin, J.; the other panel members were Trask, J. and Kellaher, D.J. sitting by designation) (filing separate opinions to the en banc opinion were Wallace, J., concurring; Kennedy, J., dissenting in part and concurring in part, joined by Wright, Choy and Hug, JJ.; Sneed, J., dissenting in part and concurring in part; Hufstedler, J., dissenting, joined by Ely, J.), *cert denied,* 100 S. Ct. 706 (1980).

2. *Id.* at 1183. Traditionally, the admissibility of prior convictions of the witness has been entirely within the discretion of the trial court. However, in 1975, the Federal Rules of Evidence codified the standard against which admissibility is to be measured. FED. R. EVID. 609; *see* note 4 *infra.*

3. 608 F.2d at 1186.

## B. BACKGROUND

### *The Admissibility of Evidence of Prior Convictions*

Federal Rule of Evidence 609[4] presently governs the admissibility of evidence of prior convictions in federal court. This rule replaced the common law rule that anyone convicted of various crimes was incompetent to testify.[5] Rule 609 was the subject of extensive and heated legislative debate.[6] Although an in-depth examination of this debate is beyond the scope of this Note, a brief mention should be made of the four major phases through which the law passed, which may be simply characterized[7] as fol-

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4. FED. R. EVID. Rule 609 provides in pertinent part:

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
>
> (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

5. For a discussion of the common law rule that any person convicted of various crimes was incompetent to testify, see generally, 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 372 (16th ed. 1899); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 43 (2d ed. 1972); 3A J. WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW § 980 (Chadbourne rev. 1970); Boehm, *Limiting the Use of Prior Felony Convictions to Impeach a Defendant-Witness in California Criminal Proceedings,* 5 PEPPERDINE L. REV. 135 (1977). This common law rule was abrogated by Rule 609.

6. In United States v. Smith, 551 F.2d 348, 359-63, 366-69 (D.C. Cir. 1976), Judge McGowan set forth a detailed study of Rule 609, including its legislative history. *See also* United States v. Jackson, 405 F. Supp. 938 (E.D. N.Y. 1975) for further comment on the legislative history of Rule 609.

For a critique and commentary on the statute, a selection of the legislative debate and an extensive bibliography, see 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE (1975).

7. These characterizations are simplified but not distorted. The word, "felony," for

lows: (1) evidence of any felony or any offense involving dishonesty or false statement is automatically admitted;[8] (2) evidence of any felony is admitted unless the court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction, and any offense involving dishonesty or false statement is automatically admitted;[9] (3) only evidence of a conviction for an offense involving dishonesty or false statement is automatically admitted;[10] (4) evidence of a conviction of a crime involving dishonesty or false statement is automatically admitted; a felony is only admitted if the court determines that the probative value of evidence outweighs the danger of unfair prejudice.[11]

It should be noted that the legislature has tended to limit rather than to expand the use of prior convictions to impeach defendants. For example, under formulation number four, a felony conviction was presumed *inadmissible* unless the government met the burden of showing that the probative value of the conviction outweighed the danger of unfair prejudice;[12] under formulation number two, however, a conviction was pre-

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instance, is used in place of "crime punishable by death or imprisonment in excess of one year." FED. R. EVID. Rule 609 (a)(1).

8. This is basically the form of the rule as promulgated by the Supreme Court and transmitted to Congress. This formulation met stiff oppostion. *Proposed Rules of Evidence: Hearings before the Special Subcommittee on the Judiciary, House of Representatives, 93rd Cong., 1st. Sess. Serial No. 2, 29-30, 68-69, 105-14, 251-52 120* CONG. REC. 2001 (1973). The full text of this draft of the rule was:

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime, (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or, (2) involved dishonesty or false statement regardless of the punishment.

*Id.* (remarks of Congressman Hogan).

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year, unless the court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement.

H.R. REP. No. 650, 93d Cong., 1st Sess. 11 (1973).

10. This is, the version as further amended by the House Judiciary Committee. The full text of the rule is: "(a) General rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime involved dishonesty or false statement." *Proposed Rules of Evidence, supra* note 8.

11. This is the formulation that was ultimately accepted by Congress. For the text of Rule 609, see note 4 *supra*.

12. United States v. Hawley, 554 F.2d 50,52 (2d Cir. 1977) (few crimes, other than those involving dishonesty or false statement, are likely to be probative of a witness'

sumed *admissible* unless the prejudice outweighed its probative value. More than a mere semantic shift, this change underscores the legislature's intent to limit the introduction of prior convictions. One reason for this is the often severe and sometimes unjust consequences of introducing evidence of prior convictions.[13]

*Problems Facing A Defendant With a Prior Criminal Record*

The defendant with a criminal record faces several problems: (1) if the record is introduced at trial, the jury may well use the evidence of prior crimes for propensity purposes,[14] rather than for the purpose of assessing the defendant's credibility; (2) if the defendant chooses not to take the stand, his silence may be construed as an admission of guilt; and (3) the defendant must comply with certain procedures in order to maintain his right to appeal an improper evidentiary ruling under which evidence of the priors were admitted.

In *Gordon v. United States,*[15] Chief Justice Burger, then sitting as a district court judge, discussed the purposes of impeachment with prior convictions. Judge Burger commented:

> [W]e must look to the legitimate purpose of impeachment which is, of course, not to show that the accused who takes the stand is a "bad" person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses. In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A "rule of thumb" thus should be that convictions which rest on dishonest conduct relate to credibility

veracity). *See also* United States v. Smith, 551 F.2d 348, 359 (D.C. Cir., 1976) (Rule 609 had effect of shifting the burden of persuasion to the government).

13. *See generally* Boehm, *supra* note 5.

14. That is the jury may infer that if the defendant committed such crimes in the past, it is more likely that he also committed the crime with which he is presently charged.

15. 383 F.2d 936 (D.C. Cir.), *cert. denied,* 390 U.S. 1029 (1967).

> whereas those of violent or assaultive crimes generally do not; . . . [16]

The use of prior convictions to impeach a defenant-witness is restricted in an attempt to avoid the possibility of a conviction simply because the jury thinks the defendant is a "bad man."[17] Prior convictions are supposed to be used by the jury for the sole purpose of assessing the defendant's credibility and not for any propensity purposes. While the defendant is entitled to a standard limiting instruction,[18] when impeachment by prior conviction is allowed, as Justice Jackson stated, it would be "naive" to assume that such an instruction can overcome the prejudicial effect of such evidence.[19] Judge Learned Hand characterized limited instructions as requiring a "a mental gymnastic" of which a jury is incapable of performing.[20]

The idea that juries tend to attach undue weight to a defendant's prior record is substantiated by a study by Professors Kalven and Zeisel which showed that the jury acquittal rate declined from forty-two to twenty-five percent in those trials where the defendant had been shown to have a criminal record.[21] Sensitive to this problem, some jurisdictions have gone so far as to limit the admissiblity of prior convictions to those situations in

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16. *Id.* at 940.

17. United States v. Martinez, 555 F.2d 1273, 1276 (5th Cir. 1977); *Boehm, supra* note 5, at 136.

18. A limiting instruction is a charge to the jury to "consider the evidence only for the allowable purpose." C. McCormick, *supra* note 5, at § 59. For example, one such limiting instruction reads as follows:

> Certain evidence was admitted for a limited purpose.
> At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.
> You are again instructed that you must not consider such evidence for any purpose except the limited purpose for which it was admitted.

CALJIC No. 2.09 (4th ed. 1979).

19. Krulewitch v. United States, 336 U.S. 440, 453 (1949).

20. Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

21. H. Kalven & H. Zeisel, The American Jury (1966); *see also* McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, [1970] Law & the Soc. Ord. 1, 2 (relating how Judge McGowan, after being questioned about the American rule by English judges, was moved to remand a conviction of a defendant whose credibility had been impeached by use of prior conviction in Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965)); Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crimes*, 78 Harv. L. Rev. 426 (1964).

which the accused attempts to establish his own good character.[22]

The alternative of not taking the stand at all poses severe problems to the defendant: most jurors view defendant's failure to testify as an indication of guilt.[23] Thus, a defendant with admissible prior convictions is faced with a very difficult choice: either to take the stand and risk being convicted because the jury believes he is a "bad man," or not to take the stand and risk being convicted because the jury construes defendant's silence as an admission of guilt.

A further problem area concerning the use of prior convictions is the preservation of defendant's right to appeal an improper evidentiary ruling admitting the priors. This was the problem focused on by the *Cook* en banc decision. In *United States v. Murray,*[24] a pre-Rule 609 decision, the Ninth Circuit held that the defendant was required to take the stand in order to preserve his right to appeal an improper evidentiary ruling. Under *Murray,* then, the defendant was in the very difficult position of either taking the stand, having the prior convictions (improperly) introduced against him, and suffering the harmful prejudice caused by the priors; or not taking the stand and losing his right to appeal.

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22. For example, HAWAII REV. STAT. §§ 621-622 (Supp. 1975) states in pertinent part:

> [I]n a criminal case where the defendant takes the stand, the defendant may not be questioned or evidence introduced as to whether he has been convicted of any indictable or other offense unless the defendant has himself introduced testimony for the sole purpose of establishing his credibility as a witness.

In State v. Santiago, 53 Hawaii 254, 260, 492 P.2d 657, 661 (1971), the court held that the use of prior convictions to impeach a testifying defendant was unconstitutional.

23. Statistics gathered by the American Institute of Public Opinion showed that 71% of the persons questioned believed that the accused's refusal to take the stand in reliance on the privilege was an indication of guilt. H. MEYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 29 (1959). As the Supreme Court suggested in Wilson v. United States, 149 U.S. 60 (1893), other factors may influence the defendant's choice to forego the opportunity to testify: "Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him will often confuse and embarrass (the defendant-witness) to such a degree as to increase rather than remove prejudices against him." *Id.* at 66. One author states that of 300 defendants prosecuted by him, 23 elected not to take the stand and only one was acquitted. A. TRAIN, TRUE STORIES OF CRIME FROM THE DISTRICT ATTORNEY'S OFFICE 98 (1939); *see also* Dunmore, *Comment on Failure of Accused to Testify,* 26 YALE L.J. 464 (1916).

24. 492 F.2d 178 (9th Cir. 1973), *cert. denied,* 419 U.S. 854 (1974).

## C. THE NINTH CIRCUIT'S REASONING

The Ninth Circuit identified two conflicting lines of cases within the circuit that have ruled on the question of whether a non-testifying defendant has the right to appellate review. In the first line of cases, the court has held that if a defendant refuses to testify at trial he thereby waives his right to appeal on the ground that, had he testified, his testimony would have been impeached by improperly admitted evidence of his past convictions.[25] There exists another class of cases, however, in which the court has considered the facts of a given case in order to decide whether a lower court made an improper ruling on whether evidence of prior convictions should have been admitted.[26] The court noted that those cases denying judicial review were based on the common law rule that evidence of a felony conviction was always admissible for the purpose of impeaching a witness, and that Federal Rule of Evidence 609 abrogated that common law rule. Since that line of cases was based on an overturned rule of law, the *Cook* court specifically overruled those cases.

Having decided the narrow issue of whether a defendant has the right to appeal an *in limine* ruling on the admissibility of prior conviction evidence, the court went on to state, in dictum, the requirements for the exclusion of evidence of post convictions in future cases: (1) that a defendant establish that he will testify at trial if the challenged evidence is excluded, and (2) that the defense outline the nature of defendant's testimony so that the balancing test required by Rule 609 can be carried out.[27] In this

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25. United States v. Murray, 492 F.2d 178 (9th Cir. 1973), *cert. denied*, 419 U.S. 854 (1974). *See* United States v. Fulton, 549 F.2d 1323, 1326 (9th Cir. 1977); United States v. Walters, 477 F.2d 386 (9th Cir.), *cert. denied*, 414 U.S. 1007 (1973).

26. United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977) (evidence of non-testifying defendant's past convictions held admissible); United States v. Villegras, 487 F.2d 882 (9th Cir. 1973) (motion to exclude evidence of past convictions held admissible because irrelevant to issue of defendant's veracity).

27. 608 F.2d at 1186-87. The *Cook* majority's testimonial record requirement may pose serious problems. In essence, the requirement serves as a broad discovery device for the prosecution. If the defendant fails to make such a record, he is penalized by waiving his right to appeal.

The first serious problem is whether the defendant is acting under compulsion in "choosing" to make a testimonial record. The cost of the privilege not to make the testimonial record is the loss of the right to appeal. A second problem of constitutional dimension is whether the testimonial record requirement encroaches upon the defendant's fifth amendment right, "[not to be] . . . compelled in any criminal case to be a witness against himself . . . . " U.S. CONST. amend. V. *See generally* Westerfield, *The Conundrum of Criminal Discovery: Constitutional Arguments, ABA Standards, Federal Rules, and Kentucky Law*, 64 KY. L.J. 801, 810-19 (1976).

way, the lower court can state the basis for its *in limine* ruling, and a full record will be available for appellate review. Failure to establish such a record would constitute abandonment of the contention, and waiver of the right to appeal a ruling on the admissibility of the impeachment evidence.

On the facts, the court upheld the lower court's finding that the probative value of the challenged evidence outweighed its prejudicial effect. The court limited that finding to the present case, adding that not all past convictions for violent crimes would be admissible in every case. Approving a District of Columbia Circuit case,[28] the court held that allowing in all past convictions of violent crimes would be impermissible under Federal Rule 609(a). Indeed, the court stated that only in "rare" cases would the facts justify an *in limine* ruling permitting the introduction of such evidence.[29]

## D. Criticism: The Ninth Circuit Misapplies the Balancing Test

In deciding *Cook,* the Ninth Circuit addressed two basic questions regarding the lower court ruling: (1) whether the preliminary ruling to admit the priors was proper; and (2) if not, whether the improper ruling was harmless or prejudicial error.

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28. United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976).

29. 608 F.2d at 1187.

Rule 609 contains both mandatory and discretionary sections. Subsection (a)(2), the mandatory portion of Rule 609, provides that all crimes of dishonesty or false statements will be admitted. The rationale is that these crimes have a bearing on the defendant's credibility. Robbery, and crimes of a similar nature are admissible under this subsection. *E.g.,* United States v. Fearwell, 595 F.2d 771, 777 (D.C. Cir. 1978) (petit larceny); United States v. Dorsey, 591 F.2d 922, 933 (D.C. Cir. 1978) (shoplifting); United States v. Hastings, 577 F.2d 38, 41 (8th Cir. 1978) (narcotics); United States v. Ashley, 569 F.2d 975, 978 (5th Cir. 1978) (shoplifting); United States v. Seamster, 568 F.2d 188 (10th Cir. 1978) (burglary); United States v. Ortega, 561 F.2d 803 (9th Cir. 1977) (shoplifting); United States v. Hayes, 553 F.2d 824 (2d Cir. 1977) (importing cocaine); United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976) (armed robbery and assault); Virgin Islands v. Testamark, 528 F.2d 742, 743 (3d Cir. 1976) (petit larceny).

If a prior conviction for robbery is to be admitted, it must be done so under subsection (a)(1), the discretionary portion of Rule 609. In order to admit a prior conviction under 609 (a)(1), the court must balance the probative value of the conviction as it bears on the defendant's credibility, against the possible prejudicial effect it will have on the jury. Though the trial court did not do this, the Ninth Circuit rule that, "[t]he ruling did not constitute an abuse of discretion, as appropriate reasons could be given for it." 608 F.2d at 1187. The logic behind the court's ruling is that, although the lower court did not properly perform the balancing test, had it done so, the prior convictions would have been admissible.

To determine the admissibility of defendant's criminal record, the Ninth Circuit independently performed the balancing as required in Rule 609(a)(1). That is, the court weighed the probative value of the challenged evidence against the possible prejudice to the defendant. In performing the 609 balancing test, the court looked to (1) the type of crime involved;[30] (2) the age of the past conviction;[31] and (3) the similarity between the prior conviction and the crime with which the defendant is presently charged.[32]

It would appear upon an application of the above factors that the probative value of the prior convictions would be outweighed by their prejudicial effect. Cook's prior conviction was for robbery, a crime that does not bear much relevance to his credibility.[33] Furthermore, the prior conviction for robbery was in 1967, ten years prior to the instant case. This long time gap between the two crimes cast further doubt on the probative value of the prior conviction.[34] Finally, since the prior conviction was for robbery, the same crime with which defendant was currently charged, there was a great danger of undue prejudice.

The Ninth Circuit, however, held that upon such a balance, the decision to admit the prior convictions was within the trial court's discretion. This is contrary to the legislative intent of Rule 609. The *Cook* rule seems to stand for the proposition that almost any prior felony conviction is admissible. Yet, this broad reading of admissibility of prior convictions is precisely the practice Congress intended to abrogate.[35]

An alternative basis for the *Cook* decision could have been a finding that the ruling, though erroneous, constituted harmless

30. United States v. Hayes, 553 F.2d 824, 828 (2d Cir.), *cert. denied*, 434 U.S. 867 (1977) (smuggling rates higher on the "scale of veracity-related crimes" than a conviction of a violent crime).

31. *Id.*

32. United States v. Seamster, 565 F.2d 479, 481 (7th Cir. 1977) (the more similar the past conviction, the greater the danger of prejudice).

33. United States v. Hayes, 553 F.2d at 828; United States v. Smith, 551 F.2d 348, 362 (D.C. Cir. 1976); *see also* United States v. Hickey, 596 F.2d 1083, 1087 (1st Cir.), *cert. denied*, 100 S. Ct. 107 (1979); United States v. Langston, 576 F.2d 1138, 1139 (5th Cir. 1978), *cert. denied*, 439 U.S. 932 (1979); United States v. Fearwell, 595 F.2d 771, 777 (D.C. Cir. 1978); United States v. Smith, 551 F.2d 348, 357 (D.C. Cir. 1976); United States v. Hayes, 553 F.2d 824, 826 (2d Cir.), *cert. denied*, 434 U.S. 867 (1977).

34. For the relevant statutory language of Rule 609(b), see note 10 *supra*.

35. *See* notes 5 to 13 *supra* and accompanying text.

error. In her dissent, Judge Hufstedler accused the majority of blurring the issues of the erroneous nature of the ruling and the possible prejudicial effect of the ruling.[36] Thus, in Judge Hufstedler's view, at least, the basis for the *Cook* decision is unclear. For this reason, an alternative basis for the ruling will be examined.

If the Ninth Circuit had found the lower court's ruling improper, they would have concluded that the improper lower court ruling constituted "harmless error," even though the appellate court did not have the benefit of a testimonial record. As mentioned above, the testimonial record is required by the *Cook* majority for the preservation of all future defendant's right to appeal an improper ruling to admit prior convictions. The majority states that the purpose of the testimonial record is "so that the trial court, and the reviewing court, can do the necessary balancing contemplated in Rule 609."[37]

The testimonial record, however, is relevant for *two* purposes: first, to do the necessary balancing contemplated in Rule 609, and second, to determine whether or not the lower court's erroneous ruling constituted harless error. This second purpose was explicitly stated in *United States v. Fearwell.*[38]

In *Fearwell,* the appellate court found that the lower court had improperly ruled defendant's prior attempted petit larceny convictions admissible. The defendant did not make a testimonial record. The court held that "not knowing what Fearwell's testimony would have been leaves us unable to apply [the] test for harmless error."[39] The court went on to say that though a testimonial record was not required to secure a ruling of harmless error from the court, it would be helpful.[40]

Not having such a testimonial record, the *Fearwell* court's solution was to "remand the record to the District Court for the limited purpose of taking the defendant's testimony (subject to

36. 608 F.2d at 1192 (Hufstedler, J., dissenting). "The majority does not directly address the question of Rule 609 error because it blends the two distinct issues of the existence of error with the existence of prejudice."

37. *Id.* at 1186.

38. 595 F.2d 771 (D.C. Cir. 1978).

39. *Id.* at 779.

40. *Id.* at 779 n.2.

the government's cross examination) so that the trial judge can in the first instance decide whether the error was harmless."[41] Thus, *Fearwell* stands for the proposition that to determine whether or not an improper ruling (which caused the defendant not to testify) was harmless error, the defendant's testimony must be elicited. The lower court may then determine if the defendant's testimony would more probably than not[42] have altered the verdict.

### E. Conclusion

Under the *Cook* rule, the result as reached in *Fearwell* could never occur. Either the defendant will have made a testimonial record, or he will have lost his right to appeal the ruling. The procedure required by *Cook* seems ultimately to be less cumbersome than that of the District of Columbia Circuit.[43] Because of the harsh result that inures from the defendant's failure to make a testimonial record, however, it seems less just. Under *Cook*, even a blatant abuse of discretion by the lower court judge would be unappealable unless the defendant had made a testimonial record, either in the presence of the jury or not. Whether or not to make a testimonial record, and preserve a non-testifying defendant's right to appeal will thus be one more factor to be weighed in the defense strategy.

In holding that the lower court's ruling was not an abuse of discretion, the *Cook* court has effectively lowered the standard for the admissibility of prior convictions. Under *Cook*, it now appears that a prior felony conviction may be admitted, whether or not the trial court goes through a charade of balancing the requisite *609* factors. This is a return to the earlier version of Rule 609 which allowed the admission of any felony conviction. Given the legislative history of Rule 609, as well as the severe ramifications of the admission of prior convictions, the *Cook* decision will ultimately have to be re-examined.

*Charles Ferrera*

41. *Id.* at 779.
42. United States v. Valle-Valdez, 554 F.2d 911, 916 (9th Cir. 1977).
43. United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976).

## VIII. HEARSAY AND THE MARITAL PRIVILEGE

### A. INTRODUCTION

In *United States v. Tsinnijinnie,*[1] the Ninth Circuit Court of Appeals addressed the issue of whether or not the marital privilege may be invoked to prevent the introduction of a spouse's out-of-court statement through the testimony of a third party.

Norman Tsinnijinnie was indicted for the second degree murder of his mother-in-law.[2] The Government alleged that defendant had driven his truck into his mother-in-law's hogan with the intention of running her down and struck and killed her with his truck as she attempted to flee from him. His defense was that she had fallen down while fleeing from him and that he had run her over accidentally.

At trial, defendant invoked the "anti-marital facts privilege"[3] to prevent his wife from testifying against him. Another witness, however, testified that moments after the truck ran over the victim, he heard the defendant's wife scream, "He [defendant] ran over my mother."[4] The defendant claimed that the admission of the witness's statement violated the marital privilege. On appeal, however, the Ninth Circuit allowed the introduction of this statement into evidence since it fell within the excited utterance exception to the hearsay rule, holding that the "marital privilege should not be extended to bar a witness from relating an excited utterance by a spouse."[5]

### B. BACKGROUND

In 1975, all privileges were subsumed under Rule 501 of the Federal Rules of Evidence.[6] Privileges, with respect to federal issues "shall be governed by the principles of the common law . . . as interpreted . . . in the light of reason and experience . . . ."[7] The Supreme Court has recognized two marital privi-

1. 601 F.2d 1035 (9th Cir. June, 1979) (per Nielsen, D.J., sitting by designation; the other panel members were Trask and Goodwin, JJ.), *cert. denied*, 100 S.Ct. 706 (1980).

2. *Id.* at 1036.

3. *Id. See* text accompanying notes 18-24 *infra.*

4. 601 F.2d at 1037.

5. *Id.* at 1039.

6. FED. R. EVID. 501. *See generally* 10 MOORE'S FEDERAL PRACTICE §§ 500.03-500.21 (2d ed. 1976 & Supp. 1979-80).

7. FED. R. EVID. 501 provides as follows:

> Except as otherwise required by the Constitution of the United .011

leges: confidential communications[8] and the testimonial privilege.[9]

The confidential communications privilege relates to private communications between a husband and wife which are presumed confidential[10] and are, therefore, privileged. In *Wolfe v. United States,*[11] the Supreme Court recognized the confidential communication privilege. The Court qualified that privilege, however, by noting that "[t]he privilege suppresses relevant testimony and should be allowed only when it is plain that marital confidence cannot otherwise reasonably be preserved."[12]

In assessing the propriety of the invocation of the confidential marital communications privilege, several factors are considered. The marriage must be a valid one,[13] a common law marriage may suffice, if recognized by that state.[14] The communication must have been made during the marriage,[15] but the privilege continues after death.[16] Finally, despite some disagreement it

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States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be *interpreted by the courts of the United States in the light of reason and experience.* However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. (Emphasis added).

8. *See* Blau v. United States, 340 U.S. 332 (1951).

9. *See* Hawkins v. United States, 358 U.S. 74 (1958).

10. Pereira v. United States, 347 U.S. 1, 6 (1954); Blau v. United States, 340 U.S. 332 (1951). *See generally* 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 219 (1978); Borden, *In Defense of the Privilege for Confidential Marital Communications,* 39 ALA. LAW. 575 (1978).

11. 291 U.S. 7 (1934).

12. *Id.* at 17.

13. United States v. Lustig, 555 F.2d 737, 747-48 (9th Cir. 1977); United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975); United States v. Neeley, 475 F.2d 1136, 1137 (4th Cir. 1973). *See generally* O'Brien, *The Husband-Wife Evidentiary Privileges: Is Marriage Really Necessary?* 1977 ARIZ. ST. L.J. 411.

14. *See* United States v. Lustig, 555 F.2d at 748; United States v. White, 545 F.2d 1129, 1130 (8th Cir. 1976); United States v. Boatwright, 446 F.2d 913, 915 (5th Cir. 1971); United States v. McElrath, 377 F.2d 508, 510 (6th Cir. 1967).

15. United States v. Mitchell, 137 F.2d 1006, 1009 (2d Cir. 1943); Yoder v. United States, 80 F.2d 665, 668 (10th Cir. 1935).

16. *See generally* 2 J. WIGMORE, WIGMORE ON EVIDENCE § 488 (rev. McNaughton 1961).

seems that only communications and not acts are privileged.[17]

The testimonial privilege, commonly referred to as the "anti-marital facts" privilege, prevents one spouse from testifying against the other, absent waiver.[18] In *Hawkins v. United States,*[19] the Supreme Court addressed the testimonial privilege. In *Hawkins,* the Government asked that the court grant the privilege to witness who was not the accused.[20] The Government argued that voluntary testimony was a strong indication that the marriage was already gone, and thus, the policy of fostering marital harmony would not be undermined.[21] The Court rejected the Government's argument and stated that since "not all marital flare-ups are permanent,"[22] the justification for protecting martial harmony continues to exist. Therefore, "the testimony of one spouse [is generally barred] against the other unless both consent."[23]

The issue before the Ninth Circuit in *United States v. Tsinnijinnie* was whether the "anti-marital facts" privilege prevents a third party's statement relating an out-of-court statement made by a spouse to be introduced as evidence. In reaching its decision, the court balanced the considerations protecting marital harmony and confidential communications on the one hand and the need for disclosure of facts on the other.[24]

## C. The Court's Reasoning

The *Tsinnijinnie* court first considered whether to follow dictum from a prior Ninth Circuit case[25] which stated that the marital privilege precludes the introduction of a third person's testi-

17. United States v. Mitchell, 137 F.2d at 1009 (2d Cir. 1943); *see generally* 8 J. Wigmore, *supra* note 16, §§ 657, 658, 2337.

18. 601 F.2d at 1037 *citing* Hawkins v. United States, 358 U.S. 74 (1958).

19. 358 U.S. 74 (1958).

20. *Id.* at 77.

21. *Id.*

22. *Id.*

23. *Id.* at 78. Recently, the Supreme Court in Trammel v. United States, No. 78-5705 (Sup. Ct. Feb. 27, 1980) re-examined the *Hawkins* rule to determine whether an accused may invoke the privilege against adverse spousal testimony to prevent the introduction of a spouse's voluntary testimony. The Court left in tact the confidential communications privilege (*see* notes 10-12 *supra*) but modified *Hawkins* so that the privilege to testify vests in the witness-spouse.

24. 601 F.2d at 1037-39.

25. Peek v. United States, 321 F.2d 934 (9th Cir. 1963), *cert. denied,* 376 U.S. 954 (1964). In *Peek,* the court stated that a third person could not relate a statement by one

mony relating a statement made by a spouse.[26] Although this dictum had previously been followed in the Ninth Circuit,[27] and was adopted by the Fifth Circuit,[28] the *Tsinnijinnie* court did not feel it was "bound by dicta from prior cases."[29]

The court then examined the application of the privilege "in the light of reason and experience,"[30] focusing on "whether there are sound reasons for applying the spousal [marital] privilege to bar testimony of third persons."[31] On the one hand, the court acknowledged that "privileges are inherently barriers to the fact finding mission of trial courts."[32] The court noted that the marital privilege has been the subject of harsh criticisms.[33] These criticisms are directed towards the rule's failure to serve any purpose, and the fact that it is increasingly being used as "mechanisms for conceal[ing] the relevant facts."[34]

The *Tsinnijinnie* court next turned to an examination of the justifications for the marital privilege outlined in *Hawkins v. United States*[35]: to preserve marital harmony, and to avoid pitting one spouse against the other. The court noted that where, however, the privilege is asserted because a third person relates

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spouse against another where defendant spouse could have invoked the marital privilege to preclude the admission of the original statement. However, this was dictum as the privilege had been waived.

26. *Id.* at 943.

27. United States v. Price, 577 F.2d 1356 (9th Cir. 1978) (spouse's statements admitted as admissions of a co-conspirator); Olender v. United States, 210 F.2d 795 (9th Cir. 1954), *cert. denied,* 352 U.S. 982 (1957) (*Peek*-type language was dictum because the privilege had been waived).

28. United States v. Williams, 447 F.2d 894 (5th Cir. 1971); Ivey v. United States, 344 F.2d 770 (5th Cir. 1965).

29. 601 F.2d at 1058 *quoting* Kastigar v. United States, 406 U.S. 441 (1972).

30. *See* note 7 *supra* and accompanying text.

31. 601 F.2d at 1038.

32. *Id. See generally* C. McCORMICK, LAW OF EVIDENCE § 86 at 173 (2d ed. Cleary ed. 1972); Borden, *supra* note 10; Fawal, *Questioning the Marital Privilege: A Medieval Philosophy In a Modern World,* 7 CUM. L. REV. 307 (1976).

33. 601 F.2d at 1038. *See* 8 J. WIGMORE, *supra* note 16 at § 2232; 2 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 405, at 87 (1969).

34. 601 F.2d at 1038 *quoting* C. McCORMICK, EVIDENCE § 79, at 165 (2d ed. Cleary ed. 1972). The author continues:

> The policy . . . of maintaining the (marital) privilege . . . is a matter of emotion and sentiment. All of us have a feeling of indelicacy and want of decorum in prying into the secrets of husband and wife. We (should) realize . . . that this motive of delicacy, while worthy and desirable, will not stand in the balance with the need for disclosure in court of the facts upon which a man's life, liberty, or estate may depend.

*Id.* § 86, at 173.

35. 358 U.S. at 77, 78 (1958).

a spouse's out-of-court statement, it is highly unlikely that either goal is served.[36] The court reasoned that a third person offers a "convenient buffer" which eliminates the chance of marital friction being engendered through the introduction of the spouse's statement.[37] Furthermore, a spouse would not make damaging statements about the other spouse unless the marriage had deteriorated to the point that a dissolution was inevitable.[38]

### D. Criticism: The Illusion of the "Buffer" and "Deteriorated Marriage" Rationale

The court's statement that a third person presents a convenient buffer which eliminates any possibility of marital friction is illusory. When a third person testifies, that party simply conveys the other spouse's statement. The fact that the words are spoken in court by a third party does nothing to reduce marital friction.

The Fifth Circuit, in *Ivey v. United States*,[39] disregarded any "buffer" rationale. *Ivey* commented directly upon the type of hearsay problem encountered by the *Tsinnijinnie* court, stating: "She might as well be permitted to testify against her husband in open court as to permit the introduction of a statement she had made against him out of court."[40]

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36. 601 F.2d at 1038.

37. *Id.*, *quoting* United States v. Mackiewicz, 401 F.2d 219 (2d Cir. 1968). In *Mackiewicz*, the Second Circuit admitted hearsay statements made by one spouse implicating the other, reasoning that since the testimony was one step removed from actual testimony, marital frictions would not be aggravated. *Accord*, United States v. Cleveland, 477 F.2d 310, 313 (7th Cir. 1973); United States v. Doughty, 460 F.2d 1360, 1364 n.3 (7th Cir. 1972). Commentators have suggested that *Mackiewicz* is the better rule.

> A person holds no privilege to prevent his or her spouse from making adverse statements abroad in the world, and if this occurs and is revealed in court, it is the fact of the out-of-court conduct of the spouse, not the advent of the trial, which is the source of any strain upon the marriage.

2 D. Louisell & C. Mueller, *supra* note 9, § 218 at 624.

This reasoning seems puzzling. If it is "the fact of the out-of-court conduct and not of the spouse and not the advent of the trial, which is the source of any strain," then the third person would not insulate the marriage from friction. The friction is generated from the out-of-court conduct and its ensuing legal ramifications. It appears that the only way to avoid marital strain in this situation is to exclude the statements under the privilege. What seems to pervade this issue is an attempt to reconcile the admission of the hearsay statements with the policy of fostering marital harmony. The truth of the matter is that admitting hearsay statements does cause marital friction; however, marital friction will not "stand in the balance with the need for disclosure." *See* note 34 *supra*.

38. 601 F.2d at 1039.

39. 344 F.2d 770 (5th Cir. 1965).

40. *Id.* at 772.

The Ninth Circuit asserted that a spouse would not make damaging statements unless the marriage were in a severely deteriorated state. A spouse may make a damaging statement with no malicious intent whatsoever. The statement could be made inadvertently, or blurted out as an excited utterance, as it was in the present case, or it could be made innocently, without any knowledge whatsoever of its potentially damaging effect. At any rate, *Hawkins* expressly rejects the argument that voluntary adverse testimony is a strong indication that a marriage is already gone.[41]

### E. Conclusion

Based on the facts in *Tsinnijinnie,* the result reached by the Ninth Circuit is correct. It was apparent that the Tsinnijinnie's marriage had deteriorated and therefore, the third party testimony could have little detrimental impact on their marriage. However, this decision might be interpreted more broadly, as holding that third party testimony relating extrajudicial spousal statements, will always be admitted. This should not be the rule.

Rule 501 of the Federal Rules of Evidence grants a federal court wide discretion in interpreting the rules of privileges. In determining whether or not a privilege applies, a court should balance the conflicting interests. In favor of applying the privilege is the interest of preserving harmonious marriages, while on the other hand, admitting relevant and probative evidence from which a trier of fact can reach a just decision, serves to counterbalance that interest. While the result in *Tsinnijinnie* may have justified withholding the privilege, a lower court should not be precluded from balancing the conflicting interests presented by a different and compelling set of facts.

*Charles Ferrera*

## IX. OTHER DEVELOPMENTS IN CRIMINAL LAW & PROCEDURE

In *United States v. Buffalo,* 591 F.2d 506 (9th Cir. Jan., 1979), defendant sought a reversal of his conviction on the ground that the evidence used to convict him was a result of a search conducted on the basis of an affidavit containing material misstatement by the government affiant. The Ninth Circuit, relying on the two-prong test enunciated by the Supreme Court in *Franks v. Delaware,* 438 U.S. 154 (1978) affirmed the judgment

41. 358 U.S. at 77.

of conviction finding (1) the information in the affidavit did not constitute intentional misstatements, and (2) even with the challenged material excised, the affidavit contained other material which would support a showing of probable cause.

In *United States v. Smith,* 595 F.2d 1176 (9th Cir. Dec., 1978), the court examined whether a false statement by a government affiant will invalidate a search warrant. Once again relying on *Franks v. Delaware,* 438 U.S. 154 (1978), the court, reluctant to extend the rule of exclusion to negligent omissions or good faith mistakes held that erroneous assumptions made by a federal agent on the basis of information he received, does not amount to reckless inclusion of false statements.

In *United States v. Prescott,* 581 F.2d 1343 (9th Cir. Sept., 1978), federal agents investigating a mail fraud scheme entered defendant's apartment without a warrant or probable cause to believe that a person who had committed a felony was hiding in defendant's apartment. Defendant was convicted of being an accessory after the fact. On appeal, the court noted that the issue of whether, absent exigent circumstances, police officers who have probable cause to arrest a person whom they reasonably believe to be in a particular dwelling may enter without a warrant in order to carry out the arrest, has never been resolved by either the Supreme Court or within the Ninth Circuit. Joining the District of Columbia Circuit and the Second Circuit, the *Prescott* court held that the police must obtain a warrant before entry to carry out the arrest.

In *United States v. Radlick,* 581 F.2d 225 (9th Cir. Aug., 1978), the court found it necessary to remand a case for determination of whether there was a reasonable explanation for federal officers proceeding without obtaining a federal search warrant. In *Radlick,* a state search warrant was issued, but the participation of the federal officers in the case left no doubt that the investigation was so pervasive that it was sufficiently "federal" as to require compliance under Rule 41 of the Federal Rules of Criminal Procedure or an explanation for non-compliance. The court adopted the Second Circuit's test for suppression of evidence which looks to whether there is evidence of intentional and deliberate disregard of a provision in the Rule, and remanded the case for a determination on this issue.

In *United States v. Romero,* 585 F.2d 391 (9th Cir. Aug.,

1978), the Ninth Circuit held a federal search warrant to be valid based on information obtained independently and prior to the illegal state warrant and seizure of incriminating evidence. The state warrant was invalidated on the basis that the items to be seized were described too broadly. The court found that the evidence seized under the federal warrant was not the fruit of the invalid state search and the evidence was not required to be suppressed on the ground that the federal warrant had been merely an attempt to cure a prior illegal search. The court further held that the government's failure to inform the United States magistrate in its search warrant that evidence sought under federal warrant had been previously suppressed by state court was not a basis for invalidating federal warrants.

Judge Merrill filed a dissenting opinion arguing that when a state is under a suppression order, it has a duty to return the seized evidence to the defendant. Until the state has returned the evidence, the evidence is immune from federal seizure. Judge Merrill found it improper on the part of state and federal officials to have refrained from returning the evidence until federal seizure had been accomplished, and therefore would have reversed.

In *United States v. Dubrofsky,* 581 F.2d 208 (9th Cir. Aug., 1978), a lawful customs search of a package mailed from Thailand to an address in the United States revealed ten plastic bags of heroin in the hollowed out walls of the package. Agents of the Drug Enforcement Administration removed the bags and substituted bags of white powder and two bags of heroin. Additionally, electronic devices were placed inside the parcel which emitted beeping signals allowing the agents to follow the parcel. The Ninth Circuit, applying a two step analysis required in situations involving the use of electronic surveillance devices found (1) the initial customs search of the package and insertion of the device was lawful, and (2) the continued surveillance, i.e., transmitting the location of the package by electronic signal is merely an aid to what could be accomplished by other permissible techniques of surveillance. Thus, the Ninth Circuit held that the placement in a package of such a device did not constitute an unlawful search in violation of the fourth amendment. The court reasoned that since there was "reasonable cause to suspect" contraband, the initial opening of the package was lawful and because the transmitting of the package's location by electronic signal was

seen to be merely an aid to what could be accomplished by visual surveillance, there was no fourth amendment violation.

In *United States v. Beusch*, 596 F.2d 871 (9th Cir. May, 1979), the Ninth Circuit addressed the issues involving the scope of corporate searches and the application of the felony provision in the Bank Secrecy Act. In *Beusch,* the government seized certain items that were allegedly unrelated to the offending transaction and which served as the basis for misdemeanor convictions. The court, however, held that where ledgers and files all contained incriminating evidence regarding transactions, failure to separate the ledgers and files and take only those portions dealing specifically with the transactions did not constitute an impermissible general search. The court reasoned that a general rule requiring ledgers and files to be separated would substantially increase the amount of time required to conduct a search. In addition, this type of search would require the use of auditors, bookkeepers and accountants, thereby aggravating the intrusiveness of the search.

Regarding the scope of the Bank Secrecy Act, the court held that a series of currency transfers which, by themselves, constitute misdemeanors, may also constitue felonious activity if they show a pattern of illegal activity and exceed $100,000 over a twelve month period. Judge Bright, concurring and dissenting in part, did not agree with the majority's expansive reading of the felony provision under the Bank Secrecy Act, and would not have elevated the several misdemeanor convictions to felonies when the violations were unrelated to any other type of activity that might be considered illegal.

The court in *United States v. Glover,* 596 F.2d 857 (9th Cir. Mar., 1979), held that an FBI agent's conduct in interviewing a defendant without permission of counsel could not be construed as a violation of the right to counsel requiring dismissal of the indictment on the theory that it interfered with the attorney-client relationship. The court based its holding on the fact that the interview was terminated shortly after it had begun and that the interview was not undertaken to obtain incriminating statements but to offer a dismissal of charges in exchange for information. Further, the court found that although the FBI agents should not have spoken to the defendant, there was no indication that defendant suffered any prejudice because of the agent's remark.

In *United States v. Newell,* 578 F.2d 827 (9th Cir. July, 1978), the court held that although a serviceman had been appointed counsel in connection with changes of unauthorized absence, the failure of military investigators to determine whether the serviceman was represented by counsel when interviewed as an arson suspect did not violate any rights under military law of effective assistance of counsel. The court also ruled that the right to counsel of a serviceman prosecuted in federal court, and the remedies for violation of that right, are controlled by federal civilian law rather than the Uniform Code of Military Justice.

In *United States v. Williams,* 594 F.2d 1258 (9th Cir. Apr., 1979) (per curiam), defendant argued that the denial of his Motion for Substitution of Appointed Counsel deprived him of effective assistance of counsel at trial. Defendant and his court-appointed counsel appeared before the judge about one month before trial to make the motion on ground that defendant and his counsel were totally incompatible. Defendant renewed his motion three weeks later. The motion was denied although both defendant and his attorney confirmed that the relationship between the two was bad. When faced with the choice of going to trial with the original attorney or defending himself pro se, defendant went to trial with his court-appointed counsel. Relying on *Brown v. Cravens,* 424 F.2d 1166 (9th Cir. 1970), the court held that in so denying the motion, the lower court had deprived defendant of effective assistance of counsel.

In *United States v. Rosales,* 584 F.2d 870 (9th Cir. Aug., 1978), the court ruled that in order for a party's co-conspirator's statements made in furtherance of the conspiracy to be admissable, there must exist independent evidence, sufficient to make it a prima facie case of conspiracy. The court ruled that sufficient evidence existed in the present case to admit the testimony of an undercover agent. The evidence of the conspiracy need not be sufficient to compel a conviction. All that is required is that the evidence *support* a conviction.

In *United States v. Eubanks,* 591 F.2d 513 (9th Cir. Feb., 1978) (per curiam), the court held that a juror who had two sons who were imprisoned for murder and robbery in connection with an attempt to acquire heroin was not impartial in a trial for conspiracy to possess heroin. The court also ruled that only statements of a co-conspirator made in furtherance of the conspiracy were admissable as an exception to the hearsay rule. Thus, mere

conversations between conspirators are not admissable as declarations in furtherance of the conspiracy.

In *United States v. Orozco*, 590 F.2d 789 (9th Cir. Feb., 1979) the court held that in the absence of any indication of a lack of trustworthiness in the procedure of recording license plate numbers of cars passing through the Mexican border, that that date could be admitted under the "public records" exception to the hearsay rule in a narcotics case. The court also ruled that where the lower court admitted data cards containing those lists of license numbers under the "business records" rather than the "public records" exception, no error was committed.

In *Cervantes v. Walker*, 589 F.2d 424 (9th Cir. Nov., 1978) the Ninth Circuit rejected a per se rule that any investigatory questioning during prison confinement constitutes custodial interrogation requiring *Miranda* warnings. The court recognized the unique prison setting where the questioning took place, and applied both the reasonable person standard and free to leave standard concluding that this situation amounted to no more than on-the-scene questioning. Therefore, no *Miranda* warnings were required. Judge Anderson filed a dissenting opinion contending that the majority's enunciated test is both unrealistic and unworkable.

In *United States v. Nick*, 604 F.2d 1199 (9th Cir. Oct., 1979), the Ninth Circuit considered whether statements made by a victim and reported in the testimony of victim's mother and physician violated the hearsay rule or the confrontation clause. The court also considered whether the defendant's confession was taken in violation of the *Miranda* ruling.

Defendant was arrested for sexually assaulting a three-year-old boy, picked up and driven to jail. At that time, the defendant was advised of his *Miranda* rights, whereupon defendant asked the policemen to look in defendant's bedroom for a paper with defendant's lawyer's name and address on it. The policeman was unable to find the paper until after defendant had signed a waiver form, confessed and had been appointed counsel. Relying on *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir. 1978)(en banc), the court of appeal held that although defendant had effectively asserted his right to counsel, he had later waived those rights by signing the waiver form. The physician's retelling of the defendant's statements were admitted

under the exception to the hearsay rule admitting statements made to a physician for diagnostic purposes. FED. R. EVID. § 803(4). Testimony of the victim's mother retelling the victim's out of court statements was admitted under the "excited utterances" exception to the hearsay rule. FED. R. EVID. § 803(2).

Finding that the victim-declarant had not been subjected to cross-examination, the court of appeals considered whether the victim's out of court statement should have been admitted over an objection on the ground that defendant was not given the opportunity to confront his accuser. Ruling that the availability of cross-examination was not the sole criterion for testing the admissibility of hearsay evidence, the court held that in view of the fact that the evidence had high probative value, was highly reliable, was unquestionably material, and was the best evidence available, the statement was properly admitted over the confrontation clause objection.

In *United States v. Pantohan,* 602 F.2d 855 (9th Cir. May, 1979), the court of appeal affirmed the conviction for the unlawful possession of a sawed-off shotgun (26 U.S.C. § 5861(d)). Defendant claimed that: (1) because certain of his self-incriminating statements were made during plea-bargaining, that these statements were improperly admitted; (2) because those statements were inadmissible but were heard by the grand jury, the indictment should have been quashed; and (3) the lower court improperly failed to give a specific intent instruction for the crime charged.

Relying on *United States v. Robertson,* 582 F.2d 1356, 1366 (5th Cir. Nov., 1978) (en banc), the court held that in order to determine whether plea bargaining has taken place, a court should determine whether the accused subjectively believed plea negotiation was taking place at the time, and whether that belief was reasonable under the circumstances. The court ruled that although defendant may have subjectively believed plea bargaining was taking place, his belief was unreasonable under the circumstances. Therefore, the statements were properly admitted. Because the statements were admissible, they were properly before the grand jury, and the indictment was valid. Defendant's claim that the lower court improperly failed to give a specific intent instruction was rejected on the ground that § 5861(d) is not a specific intent crime.

In *Jett v. Castaneda,* 578 F.2d 842 (9th Cir. July, 1978), the court held that although no charges had been brought against a prison inmate who was the prime suspect in a prison stabbling, the district court properly appointed counsel for him. The court also ruled that because no charges had been brought against the suspect, nor was there a grand jury investigation pending, the lower court lacked jurisdiction to enter a discovery order.

In *United States v. Guido,* 597 F.2d 194 (9th Cir. May, 1979), defendants were convicted in both Arizona and California district courts on charges of conspiracy to possess marijuana with intent to distribute. Although the convictions covered different periods of time, defendants argued that they were identical and therefore should not be considered as separate conspiracies. The Ninth Circuit found that the conspiracies involved the same objectives, the same key participants, the same source, the same distribution and coverted one period of time and therefore held the conspiracies to be one single continuing conspiracy.

In *United States v. Peterson,* 592 F.2d 1035 (9th Cir. Jan., 1979), the court held that a criminal defendant who fails to report to the marshal's office after having been ordered by the court that the sentence was to commence immediately, is "in custody" and guilty of escape under 18 U.S.C. § 751(a). Judge Chambers filed a dissenting opinion arguing for acquittal on the basis of the government's failure to sufficiently prove escape from custody in its indictment.

In *United States v. Anguloa,* 598 F.2d 1182 (9th Cir. June, 1979), the issue concerned problems which arose with regard to translations of defendant's testimony by two interpreters appointed by the court. The first translator who misinterpreted portions of the defendant's testimony was replaced by the court clerk at the prosecutor's request alone. The replacement interpreter, also misinterpreted portions of the defendant's testimony and, further, made disparaging remarks about the defendant. As a result of the prosecutor's action and resulting further confusion in the translations, the defendant contended he had been denied due process. The court held that the prosecutor's ex parte actions in substituting interpreters was improper; however, defendant was not prejudiced. The prosecutor did not attempt to obtain any tactical advantage and was apparently motivated by a desire to obtain a more accurate interpreter.

Further, prompt and forceful instructions to the jury by the court to disregard any disparaging comments about the defendant made by the second interpreter cured any prejudice which might have arisen.

In *United States v. Hayes,* 590 F.2d 309 (9th Cir. Jan., 1979), the court dealt with the issue of whether under § 5032 of the Federal Juvenile Delinquency Act, the district court has discretion to reject the tendered admission of the juvenile delinquency information before a transfer motion has been filed. The court held that, based on analogy to the adult criminal prosecution process, the district court impliedly had the discretion to accept or reject admission of juvenile delinquency information. The court also held that the district court did not abuse its discretion in refusing to accept the plea where the court knew that a request for authority to move to transfer the juvenile for adult prosecution was pending.

In *Heinz v. McNutt,* 582 F.2d 1190 (9th Cir. Sept., 1978), the court held that a Washington statute permitting automatic parole revocation for parolees convicted of crimes while on parole is an unconstitutional denial of due process. The court based its holding on *Morissey v. Brewer,* 408 U.S. 471 (1972), where the Supreme Court enunciated standards and procedures to be followed when parole is revoked.

In *United States v. Edick,* 597 F.2d 672 (9th Cir. May, 1979), the defendant was convicted on a two-count indictment of possession of an unregistered sawed-off shotgun. The defendant was first sentenced to three years on count one; his sentence of five years on count two was suspended. Subsequently, he was found to be in violation of his probation under count two. The district court revoked his probation and imposed a new sentence of three years imprisonment. The issue before the court of appeals was whether these consecutive sentences could be imposed on the multiple counts where the firearms violations arose from a single transaction. The court held they could not be so imposed and, as a result, the illegal sentences had to be vacated and the case remanded for rehearing.

In *United States v. Knowles,* 594 F.2d 753 (9th Cir. Apr., 1979), the court dealt with the issue of government failure to comply with the Jencks Act. The Jencks Act (18 U.S.C. § 3500)

requires that the government produce any statement by a witness which relates to the subject matter to which the witness has testified. The Ninth Circuit held that a transcript of a witness's testimony before a grand jury must be produced under the Act. The court further held that failure to comply with the Jencks Act does not per se require a new trial, but does call for a strict application of the harmless error standard.

In *United States v. Bergeman,* 592 F.2d 533 (9th Cir. Jan., 1979), the court held that although defendant's prior conviction for receiving stolen property had been expunged by statute, defendant was still a "convicted felon" for purposes of the federal statute. Section 922(h)(1) of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. § 921 *et seq.*) makes it unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce. Although acknowledging a conflict within the Ninth Circuit on the issue of whether federal or state law governs a person's status as a convicted felon, the majority resolved the issue in favor of federal law. District Judge Takasugi, sitting by designation, filed a dissenting opinion, arguing that this conflict has not yet been resolved. Judge Takasugi would adopt the views expressed by the Fifth Circuit and resolve the conflict in favor of the state's own definition.