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Ninth Circuit Survey—Criminal Law in the Ninth Circuit: Recent Developments, Parts I, II, & III

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CRIMINAL LAW IN THE NINTH CIRCUIT: RECENT DEVELOPMENTS

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I. ARREST, SEARCH AND SEIZURE

A. *Scope of the Fourth Amendment*

In *United States v. Salvucci*,¹ the United States Supreme Court held that a defendant may assert the exclusionary rule only when he demonstrates a reasonable expectation of privacy in the area searched.² Previously, a defendant convicted of a possessory crime could automatically claim that evidence seized had been confiscated illegally.³ The issues of standing and reasonable expectation of privacy have become virtually indistinguishable since *Salvucci*. Once a defendant has demonstrated a reasonable expectation of privacy in the area searched, the threshold for invocation of the exclusionary rule is met, and most courts apparently avoid a separate discussion of standing. Courts, however, still focus upon standing when a third party attempts to exclude evidence obtained through the violation of another's fourth amendment rights.⁴

1. 448 U.S. 83 (1980).

2. *Id.* at 85.

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

4. *See United States v. Payner*, 447 U.S. 727 (1980) (defendant lacked standing to exclude incriminating evidence indicating tax evasion involvement seized during search of third party's briefcase).

1. Reasonable expectation of privacy

a. containers

In *United States v. Anderson*,⁵ defendants charged with the possession of cocaine were given an opportunity on remand to establish their reasonable expectation of privacy in luggage that had been searched.⁶ DEA agents received a tip from a confidential informant that a chartered plane leaving Fort Lauderdale, Florida, would arrive in Orange County, California, with narcotics aboard. DEA computers revealed that one of the pilots (Rhodes) and the plane's charterer (Maestrales) were narcotics transporters.⁷

After their arrival in Orange County, defendants were met by DEA agents, escorted to a small room in the airport terminal and questioned. During the questioning, the defendants were asked to identify the luggage the agents had brought in from the plane. Though defendant Anderson claimed an attache case he was carrying, each defendant twice disclaimed ownership of two grey and two burgundy suitcases. Defendants were arrested after a narcotics detector dog alerted the agents that drugs were hidden inside the suitcases.⁸

The district court granted the defendants' motion to suppress the narcotics on the grounds of illegal stop and arrest.⁹ The Ninth Circuit, however, remanded the case, requiring that defendants establish their reasonable expectation of privacy in the luggage and that their words and acts did not constitute an abandonment of that privacy interest.¹⁰ Had a voluntary abandonment of the luggage taken place in the airport, the court indicated that defendants would be unable to exclude

5. 663 F.2d 934 (9th Cir. 1981).

6. *Id.* at 938. Defendants were charged with possession of cocaine, in violation of 21 U.S.C. § 841(a)(1) (1976) which provides: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

7. 663 F.2d at 936. One DEA agent was aware of previous narcotics activity at the Florida airport. DEA agents also knew that drugs were often transported by chartered plane because passengers could avoid baggage inspections which were not required by FAA security regulations. *Id.*

8. *Id.* at 937.

9. *Id.* The district court considered the informant's tip, the DEA agent's knowledge, and the computer information insufficient to provide reasonable suspicion for the initial detention. It also held that no probable cause existed at the time of the arrest. *Id.*

10. *Id.* at 938. The Supreme Court did not decide *Salvucci* until after the defendant's suppression hearing and the district court ruling. Relying on the "automatic standing" rule of *Jones*, defendants had no opportunity to demonstrate their reasonable expectation of privacy in the luggage. *Id.* at 937-38.

any seized evidence because they would have no standing to complain of its search or seizure.¹¹ If instead, defendants demonstrated the requisite expectation of privacy on remand, they would then be permitted to challenge the legality of the search and seizure.¹²

The Ninth Circuit directly addressed the abandonment issue in *United States v. Kendall*,¹³ where defendants voluntarily abandoned a suitcase containing cocaine. The court held that once the defendants abandoned the suitcase, they no longer had a reasonable expectation of privacy in its contents, and therefore, defendants' motions to suppress were properly denied.¹⁴

Defendants had flown from Florida to California and transported three pounds of cocaine in a suitcase identified by a fictitious name. Narcotics agents in San Diego were notified of the smuggling operation and were given descriptions of the defendants and their luggage.¹⁵

Upon arrival in San Diego, defendants were placed under surveillance. Defendant Kendall was stopped and questioned after he exited the baggage claim area with a suitcase that matched the description given to the agents. As he followed the agents back into the terminal for additional questioning, Kendall informed them that the suitcase he picked up had someone else's name on it, and that the baggage claim

11. *Id.* at 938 (quoting *United States v. Jackson*, 544 F.2d 407, 409 (9th Cir. 1976) (no abandonment where defendant simply dropped suitcase and began to walk away from approaching police officer)). See *United States v. Sledge*, 650 F.2d 1075, 1078 (9th Cir. 1981) (officers' warrantless search of defendant's leased premises was justified because objective facts indicated abandonment despite defendant's subjective intent to return).

12. 663 F.2d at 938. The court distinguished *Steagald v. United States*, 451 U.S. 204 (1981), where the Court refused to remand a case for a determination of whether defendant demonstrated a violation of his fourth amendment rights. Officers conducted a warrantless search of defendant's home based solely upon an arrest warrant issued for a third party. Defendant was arrested when the officers found cocaine on the premises.

Relying on the "automatic standing" rule of *Jones*, the Government never challenged defendant's reasonable expectation of privacy in the house searched. The Court held that based on its previous failure to raise the issue, even though *Salvucci* had not yet been decided, the Government could not now assert it. *Id.* at 208-09.

In *Anderson*, however, the Government had previously raised the privacy issue before the district court on two grounds: (1) defendants did not assert a proprietary interest in the luggage; and (2) they voluntarily abandoned the luggage, as well as any privacy interest in it. Therefore, the Government was permitted to raise the issue on appeal. The Government's failure to challenge defendant's privacy interests during submission of supplemental briefs prior to the district court's final ruling did not preclude its subsequent challenge. *Anderson*, 663 F.2d at 938-39 n.4.

13. 655 F.2d 199 (9th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982).

14. *Id.* at 202.

15. *Id.* at 200.

numbers did not match those on his ticket.¹⁶ One of the agents returned the suitcase to the baggage claim area and exchanged it for one with claim numbers matching Kendall's ticket.¹⁷

Kendall's partner, Akers, was stopped and questioned after DEA agents saw him observing and following Kendall.¹⁸ Both defendants permitted a search of their luggage, but no narcotics were found. After Kendall and Akers left the terminal, the agents conducted a warrantless search of the fictitiously marked suitcase and discovered three pounds of cocaine.¹⁹

On appeal, defendants contended that their scheme involving two identical suitcases indicated a subjective intent not to abandon the luggage.²⁰ In rejecting this argument, the court relied upon the objective standard suggested in *United States v. Jackson*.²¹ When one voluntarily abandons his property, he also relinquishes any right to challenge its search.²² Although the *Jackson* court did not expressly adopt an objective standard, it indicated that abandonment is primarily a question of intent which may be inferred from objective facts such as words or conduct.²³ Examining Kendall's conduct objectively, the court concluded that he abandoned the suitcase prior to the warrantless search.²⁴

16. *Id.* Kendall admitted at trial that he purposely disclaimed the suitcase to prove to agents that he had no interest in the bag. *Id.*

17. *Id.* The suitcase in question was marked with the name "Estrada" or "Estarta." A subsequent investigation indicated that no one by that name had been on the flight. *Id.*

18. *Id.* Akers had in his possession the claim tickets which matched those on the "Estrada" suitcase, but he was not questioned about the luggage at that time.

19. *Id.* Defendants were convicted of conspiracy and possession of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 846 and 841(a)(1) (1976). Section 846 provides: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." See *supra* note 6 which sets forth section 841(a)(1) in its entirety. The district court denied defendants' motion to suppress and affirmed the conviction. 655 F.2d at 200.

20. 655 F.2d at 200-01.

21. *Id.*; 544 F.2d 407 (9th Cir. 1976); see *supra* note 11 and accompanying text.

22. *Abel v. United States*, 362 U.S. 217, 240-41 (1960) (government lawfully appropriated abandoned property found in vacated hotel room).

23. 544 F.2d at 409 (citations omitted). See also *United States v. McLaughlin*, 525 F.2d 517 (9th Cir. 1975) (defendants held to have abandoned four kilos of marijuana which they threw out of a truck after narcotics agent attempted to stop it), *cert. denied*, 427 U.S. 904 (1976); *United States v. Pruitt*, 464 F.2d 494 (9th Cir. 1972) (under objective standard, defendants had no justifiable expectation of privacy in two large crates containing marijuana they hid near a campsite); *Lurie v. Oberhauser*, 431 F.2d 330 (9th Cir. 1970) (defendants permitted search of all but one suitcase which both defendants disclaimed and were held to have abandoned it). *Accord* *United States v. Williams*, 569 F.2d 823 (5th Cir. 1978) (defendant was held to have abandoned trailer containing marijuana which he disconnected from his truck when he realized he was being followed by narcotics agents).

24. 655 F.2d at 202.

The court found that Akers had also abandoned the suitcase, having observed his partner disclaim interest in it.²⁵

Therefore, defendants had no reasonable expectation of privacy in the suitcase, and the court held that the subsequent warrantless search did not violate any fourth amendment rights.²⁶ The court reasoned that a subjective standard would not deter unlawful searches and seizures, but would instead provide incentive for schemes such as the one executed by Kendall and Akers.²⁷

In *United States v. Brock*,²⁸ the electronic surveillance of defendant's drug manufacturing activity was considered a minimal intrusion and did not constitute a search.²⁹ Defendant Bernard placed an order at a chemical supply company for phenyl-2-propanone, methylamine and other precursor chemicals used to manufacture amphetamines.³⁰ Shortly thereafter, DEA agents were contacted by Boehm, who worked for the chemical supply company. He suspected that Bernard was involved in manufacturing narcotics.³¹ When Bernard placed a second order for more chemicals, DEA agents inserted an electronic beeper in one of the canisters Bernard was to purchase. The beeper monitored the canister's location, serving to keep defendants under surveillance.³² The beeper led DEA agents to a cabin in Meacham, Oregon, but they failed to execute their search warrant at that location.³³

On appeal, defendants argued that they had a subjective expecta-

25. *Id.* The court also relied on Aker's concealment of the claim check for the "Estrada" suitcase.

26. *Id.* Defendants' convictions were therefore affirmed.

27. *Id.*

28. 667 F.2d 1311 (9th Cir. 1982). Two previous Ninth Circuit opinions arise from the same set of facts. *See* *United States v. Bernard*, 607 F.2d 1257 (9th Cir. 1979), *revised*, 623 F.2d 551, 553-54 (9th Cir. 1980); and *United States v. Bernard*, 625 F.2d 854, 856 (9th Cir. 1980).

29. 667 F.2d at 1322.

30. *Id.* at 1314. Bernard claimed to have purchased these chemicals to manufacture fertilizer. *Id.*

31. *Id.* Upon being contacted by Boehm, the DEA decided to place Bernard under visual surveillance after he picked up the chemicals. The surveillance proved unsuccessful when Bernard discovered he was being followed. *Id.*

32. *Id.* at 1314. The installation was performed while the canister was in the lawful possession of DEA agents. *Id.* at 1319 n.4.

33. *Id.* at 1314-15. Defendants Brock, Bard, Bernard, Childress, and Cochran were charged by indictment with conspiracy to possess with intent to manufacture and distribute methamphetamine, in violation of 21 U.S.C. §§ 812, 841(a)(1), and 846 (Count I), manufacture of methamphetamine, in violation of 21 U.S.C. §§ 812 and 841(a)(1) (Count II), and possession with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 812 and 841(a)(1) (Count III). *Id.* at 1313. Section 812 identifies methamphetamine as a controlled substance. *See supra* note 6 which sets forth § 841(a)(1) in its entirety. Defendants Brock and Bard were convicted as to Counts I and II and acquitted as to Count III. *Id.*

tion of privacy in the canister of non-contraband chemicals when it was taken inside the private residence.³⁴ The court conceded that defendants' expectation of privacy was reasonable but held that it had not been invaded.³⁵

The Ninth Circuit's analysis began with a discussion of *Katz v. United States*,³⁶ in which the United States Supreme Court stressed that the fourth amendment protects people, not places, and held that an FBI wiretap of a public phone booth violated defendant's fourth amendment rights. The court also relied upon *Smith v. Maryland*,³⁷ which held that a defendant has no reasonable expectation of privacy in the numbers dialed from his telephone, which had been monitored with a pen register. These decisions were distinguishable because the pen register used in *Smith* was not capable of monitoring actual conversations as was the wiretapping in *Katz*, and was therefore less intrusive.³⁸ The Ninth Circuit reasoned that an electronic beeper, which merely identifies location, was also much less intrusive than a wiretap.³⁹ The court justified the beeper's dramatic sense enhancing capabilities by analogizing it to the use of drug detection dogs, which has not been treated as a search.⁴⁰ The court suggested, however, that its holding was not without limits. Use of an electronic beeper which could convey more information than just location might constitute an unreasonable search under the *Katz* analysis.⁴¹

b. premises

The Ninth Circuit refused to acknowledge a defendant's reason-

34. *Id.* at 1320.

35. *Id.* at 1322.

36. 389 U.S. 347 (1967).

37. 442 U.S. 735 (1979).

38. 667 F.2d at 1320 (relying on the Court's language in *Smith v. Maryland*, 442 U.S. at 741-42).

39. *Id.* at 1321-22. The court noted that its inquiry focused upon the degree of intrusiveness of eavesdropping devices. *See, e.g.*, *United States v. Allen*, 633 F.2d 1282 (9th Cir. 1981), *see infra* note 42 and accompanying text; *United States v. Michael*, 645 F.2d 252 (5th Cir. 1981) (en banc) (placement of electronic beeper on outside of defendants' car involved only minimal intrusion and did not violate fourth amendment); *United States v. Dubrofsky*, 581 F.2d 208 (9th Cir. 1978) (intrusion of an electronic beeper placed in a package of heroin too slight to amount to a search); *but see*, *United States v. Bailey*, 628 F.2d 938 (6th Cir. 1980) (use of beeper hidden in chemicals used for manufacturing PCP violated defendant's fourth amendment privacy interests).

40. 667 F.2d at 1321-22. *See* *United States v. Allen*, 633 F.2d 1282 (9th Cir. 1981); *United States v. Solis*, 536 F.2d 880, 881-83 (9th Cir. 1976); *United States v. Bronstein*, 521 F.2d 459, 461-463 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

41. 667 F.2d at 1322.

able expectation of privacy in the open fields of his two-hundred-acre ranch in *United States v. Allen*.⁴² Defendant Allen purchased secluded coastal property near Coos Bay, Oregon. The land was parallel to the ocean but separated from the beach by a narrow strip of federal property. The Allen Ranch, as it was known, became the target of extensive surveillance after complaints by local residents aroused the suspicions of U.S. Customs officials.⁴³

The surveillance began on December 5, 1977, with a helicopter flight by the Coast Guard over the Allen Ranch. During the flight, U.S. Customs officer Gano took photographs of the ranch using a 35 mm. camera with a 70-230 mm. zoom lens. The photos revealed extremely wide tire tracks leading to and from a new extension that had been built onto Allen's barn.

On December 6, Gano and two Bureau of Land Management (BLM) officials went to see Allen about acquiring a public easement across his property for local hunters and fishermen. Gano did not reveal his identity in order to avoid arousing Allen's suspicion. Gano observed that the ranch was not being farmed and that Allen's hands were uncalloused.

Additional surveillance included placement of seismic sensors at the ranch's entrance to monitor vehicular activity. Gano also set up a command post in the adjacent hills. By December 8, the ranch was under continuous surveillance. A second helicopter flight was made by Gano on December 21. Using binoculars, one of Gano's officers noticed a large van and a semi-trailer on Allen's property. A warrantless search of a parking lot on Allen's property was conducted on December 29, but nothing was found. This extensive surveillance culminated in the interdiction of a marijuana smuggling operation on December 31, 1977.⁴⁴

42. 633 F.2d 1282 (9th Cir. 1981).

43. *Id.* at 1286-87. The ranch's previous owner permitted local hunters and fishermen to cross his land to use the federal property. Unlike his predecessor, Allen posted his property with "No Trespassing" signs and refused the local residents access. *Id.* at 1286.

U.S. Customs officer Gano became aware of the residents' complaints, and after investigating Allen's background, he began to suspect that the ranch was being used for drug smuggling. *Id.*

44. *Id.* at 1287. Defendants Allen, Diffenderfer, Kerr, Kolander, D. Sherman, S. Sherman and Theriaque were convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (1976); *see supra* note 6.

With the exception of Kolander, defendants were also convicted of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. § 846 (1976); *see supra* note 19. Allen was also convicted of conspiracy to import marijuana, in violation of 21 U.S.C. § 963 (1976) which provides: "Any person who attempts or conspires to commit any offense

On appeal, the Ninth Circuit analyzed four specific types of surveillance which defendants claimed violated their fourth amendment rights: (1) helicopter surveillance; (2) seismic sensors; (3) binocular surveillance; and (4) physical intrusions.

The court determined that defendants had no reasonable expectation of privacy as to the objects and landscape modifications observed during the helicopter flights.⁴⁵ Although these observations could be made only from the air, the photographic equipment used was not considered more advanced than that available to the general public.⁴⁶ The court suggested that a property owner's expectation of privacy in unenclosed areas was virtually nonexistent due to advancements in electronic photographic equipment.⁴⁷

The Ninth Circuit also relied upon Officer Gano's initial suspicion of Allen's drug smuggling involvement in an attempt to justify such extensive surveillance.⁴⁸ In the absence of federal court precedent, the court sought additional justification for the Government's helicopter surveillance from two California Court of Appeal decisions.⁴⁹ Finally, the court assumed that the residents of the ranch would be aware of the Coast Guard's routine helicopter flights because of the ranch's proximity to the sea-coast border.⁵⁰ The expectation of privacy asserted by defendants was therefore considered unreasonable.⁵¹

The court avoided a direct discussion of the complex privacy is-

defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 633 F.2d at 1288.

45. 633 F.2d at 1290.

46. *Id.* at 1289.

47. *Id.*

48. *Id.* at 1290 (citing *United States v. Curtis*, 562 F.2d 1153 (9th Cir. 1977) (court order for installation of electronic beeper on rented airplane not required where officers had reliable information that defendant was involved in drug smuggling)).

49. 633 F.2d at 1290 (citing *People v. Superior Court*, 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (1974) (routine helicopter observation of stolen automobile parts in defendant's backyard not considered unlawful search); *Dean v. Superior Court*, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (1973) (defendant's three-quarter-acre tract of land, surrounded by forests, where he cultivated marijuana not entitled to reasonable expectation of privacy from overhead observation by airplanes)); *but see* *People v. Sneed*, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (1973) (sheriff's helicopter flying twenty feet above defendant's backyard to observe marijuana cultivation violated fourth amendment).

50. 633 F.2d at 1290 (citing *United States v. Stanley*, 545 F.2d 661, 666 n.6 (9th Cir. 1976) (en banc) (three mile limit from U.S. coast considered a border for fourth amendment purposes), *cert. denied*, 436 U.S. 917 (1978)).

The court also assumed that the ranch residents could expect the Coast Guard helicopters to be equipped with sense-enhancing devices. 633 F.2d at 1290.

51. 633 F.2d at 1290.

sues presented by placement of seismic sensors on Allen's property because defendants failed to introduce any evidence obtained from those devices that was not already known from other methods of surveillance.⁵² In dicta, however, it was suggested that the Government's trespass onto Allen's property for purposes of placing and maintaining such eavesdropping devices would present unusual fourth amendment problems.⁵³

The third type of surveillance challenged by defendants involved the use of binoculars from a command post set up on property adjacent to the ranch.⁵⁴ The court simply relied on previous Ninth Circuit decisions in which the use of sense-enhancing devices did not constitute a search. Thus, the use of binoculars was not considered objectionable.⁵⁵

Finally, defendants unsuccessfully argued that Officer Gano's concealment of his identity while accompanying BLM officers onto Allen's property violated their fourth amendment rights.⁵⁶ Similarly, because no evidence was obtained or apparently tainted as a result of the December 29th warrantless parking lot search, the court summarily dismissed this trespass issue.⁵⁷ Thus, the court concluded that the trespass did not constitute a fourth amendment violation.⁵⁸

52. *Id.* Any possible fourth amendment violations were dismissed as harmless error. *Id.*

53. *Id.* (citing *United States v. Dubrofsky*, 581 F.2d 208 (9th Cir. 1978) (placement of electronic beeper in package containing heroin intercepted at post office not considered impermissible search); *United States v. Basile*, 569 F.2d 1053 (9th Cir.) (defendants had no reasonable expectation of privacy in a truck containing marijuana located 100 yards from their house), *cert. denied*, 436 U.S. 920 (1978); *United States v. Hufford*, 539 F.2d 32 (9th Cir.) (use of electronic beeper on drum of caffeine did not violate fourth amendment), *cert. denied*, 429 U.S. 1002 (1976); *United States v. Capps*, 435 F.2d 637 (9th Cir. 1970) (civil trespass on open field area did not violate fourth amendment)).

It is puzzling that the court cites these decisions which seem to contradict its suggestion that government trespass and use of electronic surveillance may present complex fourth amendment problems.

54. 633 F.2d at 1290-91.

55. *Id.* (citing *United States v. Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978) (upholding the validity of a variety of sense-enhancing devices such as "[b]inoculars, dogs that track and sniff out contraband, searchlights, fluorescent powders, automobiles and airplanes, burglar alarms, radar devices, and bait money.")).

The court summarily concluded that *United States v. Curtis*, 562 F.2d 1153 (9th Cir. 1977), did not compel a different result. 633 F.2d at 1291 n.9.

56. 633 F.2d at 1291 (citing *Lewis v. United States*, 385 U.S. 206 (1966) (misrepresentation of identity by undercover narcotics agent not violative of defendant's fourth amendment rights); *United States v. Glassel*, 488 F.2d 143 (9th Cir. 1973), *cert. denied*, 416 U.S. 941 (1974)).

57. 633 F.2d at 1291.

58. *Id.* (citing *United States v. Basile*, 569 F.2d 1053, 1056 (9th Cir.), *cert. denied*, 436 U.S. 920 (1978); *United States v. Williams*, 569 F.2d 823, 826 (5th Cir. 1978) (defendant had no reasonable expectation of privacy in immobile trailer he disconnected from his car after

In *United States v. Gilman*,⁵⁹ unclaimed pornographic magazines found in a rented storage garage were considered voluntarily abandoned and thus were properly admitted into evidence.⁶⁰ Postal inspectors obtained information implicating defendants Gilman and Martin in a mail order scheme through which sexually explicit magazines were distributed. Pursuant to warrants, three locations were searched and incriminating evidence was seized.⁶¹

Police first searched a building (the Grove Street offices), believed to be Gilman's headquarters. The warrant failed to indicate that the building was also a residential dwelling. The trial court suppressed evidence seized from the residential portion of the building but admitted evidence seized from the Grove Street office.⁶² Evidence found in a nearby garage and in a rented storage space was also admitted.⁶³ Defendants were convicted of seven counts of mailing obscene material and one count of conspiracy.⁶⁴

On appeal, the Ninth Circuit upheld the trial court's admission of evidence seized from the Grove Street office, the garage, and the rented storage space.⁶⁵ Specifically, the court held that Gilman had no standing to challenge the search of the rented storage space because he had voluntarily abandoned the property. Gilman failed to respond after being notified by the storage company's management that additional rent payments were due. The unclaimed magazines in Gilman's storage space were turned over to the police twenty-seven days after notice of the delinquent rent was given.⁶⁶ On these facts, the court considered that "the officers acted reasonably in relying on the appearance of

noticing approaching police officers); *United States v. Capps*, 435 F.2d 637, 640 (9th Cir. 1970)).

59. 684 F.2d 616 (9th Cir. 1982).

60. *Id.* at 620.

61. *Id.* at 618.

62. *Id.*

63. *Id.*

64. *Id.* at 617. 18 U.S.C. § 1461 (1976) provides in pertinent part: "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier." 18 U.S.C. § 371 (1976) provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

65. 684 F.2d at 618-20.

66. *Id.* at 619-20 (citing *United States v. Jackson*, 544 F.2d 407, 409 (9th Cir. 1976) (defendant lacked standing to challenge a search where his dropping of a suitcase, and walking away from law enforcement officers constituted voluntary abandonment)). See also *United States v. Sledge*, 650 F.2d 1075, 1077-78 (9th Cir. 1981) (officers' reasonable belief

abandonment.'⁶⁷

The court rejected defendant's argument that abandonment of the magazines was the result of police misconduct.⁶⁸ Defendants failed to establish the requisite "nexus between the allegedly unlawful police conduct and abandonment of the property" that would be indicative of involuntary abandonment.⁶⁹ Thus, the seizure of the magazines was proper.⁷⁰

2. Third party standing

In *United States v. Crozier*,⁷¹ defendants were given the opportunity on remand to establish that each had a reasonable expectation of privacy in the residence of the other.⁷² On April 9, 1980, narcotics agents conducted a warrantless search of the Crozier-Wolke residence. The premises had been "effectively seized" before a warrant was obtained. The district court considered the search unjustified because the agents did not have probable cause to believe that any controlled substance would be found in the residence and no exigent circumstances

that defendants abandoned rented premises was sufficient to justify search despite defendant's subjective intent to return).

67. 684 F.2d at 620 (quoting *United States v. Sledge*, 650 F.2d at 1082). See also *United States v. Kendall*, 655 F.2d at 202; see *supra* notes 13-27 and accompanying text.

68. 684 F.2d at 620 (citing *United States v. Maryland*, 479 F.2d 566, 568 (5th Cir. 1973) (defendant had no standing to challenge search of police vehicle in which he voluntarily abandoned counterfeit currency; however, it was still necessary to determine whether the loss of standing was the result of unlawful police misconduct); *United States v. Humphrey*, 549 F.2d 650, 652 (9th Cir. 1977) (defendant's conduct indicative of abandonment is not to be considered by trial court if tainted by police misconduct)).

69. 684 F.2d at 620 (citing *United States v. Maryland*, 479 F.2d at 568; *United States v. Haddad*, 558 F.2d 968, 975 n.6 (9th Cir. 1977) (defendant, who was ejected from hotel room for good cause and who told the owner he did not want any items left behind, had no standing to challenge warrantless search of the room)). Cf. *United States v. Beck*, 602 F.2d 726, 729-30 (5th Cir. 1979) (evidence properly suppressed where defendant's abandonment of marijuana from an automobile was result of an illegal stop without reasonable suspicion).

70. 684 F.2d at 620. Police were unable to find the magazines specified in the affidavit in Gilman's storage facility and, as a result, they seized other materials that were subsequently shown to the magistrate who issued a second warrant. *Id.* at 620. Unless the materials seized for the procurement of the second warrant were in plain view, they may have been unlawfully obtained. The court disregarded any "possible impropriety," however, as being "too remote to have tainted seizure of the abandoned materials." *Id.* (citing *United States v. Haddad*, 558 F.2d at 975 n.6). That footnote suggested that even if two prior searches had been illegal, the incriminating evidence found in the third search was not the result of exploitation of the first two searches (citing *Wong Sun v. United States*, 371 U.S. 471, 478 (1963)). In *Gilman*, however, the first search was arguably exploited because the second search would not have occurred but for the initial search and seizure.

71. 674 F.2d 1293 (9th Cir. 1982).

72. *Id.* at 1299-1300.

justified the warrantless entry.⁷³

The district court held that the search warrant, which arrived six hours after the agents entered the residence, was not sufficiently specific.⁷⁴ The supporting affidavit was more specific, but the court felt the search went beyond the scope of the affidavit and gave the agents unlimited discretion.⁷⁵

Defendants Crozier, Pine, Stein, Wolke and seven others were charged with the manufacture and possession of methamphetamine with intent to distribute.⁷⁶ The district court suppressed all evidence seized during the warrantless searches of the Crozier-Wolke and Stein residences, not only as to the respective homeowners but as to all defendants.⁷⁷

Because they often spent time in each others' homes and left their belongings in both places, defendants contended that each had a legitimate expectation of privacy in the residence of the other.⁷⁸ Although the Government conceded that Wolke resided with Crozier, it argued that evidence should not have been suppressed as to those defendants not residing in the homes searched.⁷⁹

The Ninth Circuit affirmed the suppression of illegally seized evidence only as to those defendants whose homes had been searched.⁸⁰ The suppression issue as to the non-resident defendants was remanded in light of the Supreme Court's holding in *Salvucci*.⁸¹

In *Ellwest Stereo Theatres, Inc. v. Wenner*,⁸² a theater owner unsuccessfully attempted to assert his patrons' fourth amendment rights to be free from unreasonable searches and seizures while they watched

73. *Id.* at 1298.

74. *Id.* at 1299.

75. *Id.*

76. *Id.* at 1295. *See supra* note 6 for the full text of 21 U.S.C. § 841(a)(1) (1976). In addition, defendants were charged with conspiracy and tax evasion, in violation of 26 U.S.C. § 7201 (1976), which provides in pertinent part: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and . . . shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both." In a second count, Crozier was charged with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848 (1976), which provides in pertinent part: "Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than \$100,000." 674 F.2d at 1295.

77. *Id.* at 1296.

78. *Id.* at 1299.

79. *Id.*

80. *Id.* at 1299-1300.

81. *Id.* at 1299. *See supra* notes 1-3 and accompanying text.

82. 681 F.2d 1243 (9th Cir. 1982).

pornographic films in private viewing booths.⁸³ The Ninth Circuit relied upon *Rakas v. Illinois*,⁸⁴ in which the Supreme Court rejected a vicarious assertion of another's fourth amendment rights.⁸⁵

Ellwest appealed a district court decision upholding the constitutionality of a Phoenix, Arizona, ordinance which required that viewing booths in movie arcades be visible from a common aisle.⁸⁶ The ordinance was prompted by complaints of increased sex-related criminal activity in Phoenix.⁸⁷ In addition to its first and fourteenth amendment arguments,⁸⁸ Ellwest asserted the fourth amendment rights of its patrons to be free from unreasonable searches and seizures.⁸⁹ Ellwest argued that the requirement of open video booths was analogous to the use by police officers of peep holes in public restrooms.⁹⁰ Ellwest's primary concern was that the ordinance would have a "chilling effect" on its patrons' freedom to engage in unobserved masturbation while viewing the sexually explicit films.⁹¹

Ellwest failed to allege specifically that any unreasonable police surveillance or searches had occurred, and, as a result, the premature claim was not justiciable.⁹² Even with such allegations, Ellwest's claim would have failed because Ellwest had no standing to assert the fourth amendment rights of its patrons.⁹³ The Ninth Circuit quickly dispensed with Ellwest's fourth amendment claim, holding that such rights may only be personally asserted.⁹⁴

3. State action

Searches and seizures conducted by private parties do not nor-

83. *Id.* at 1248.

84. 439 U.S. 128 (1978).

85. *Id.* at 133-34.

86. 681 F.2d at 1244. Section 7-30(a)(6)(b) of the Phoenix City Code provides: "All viewing areas must be visible from a continuous main aisle and must not be obscured by any curtain, door, wall, or other enclosure." *Id.* at 1244-45.

87. *Id.* at 1245. There were 783 sex-related arrests in the two year period preceding Ellwest's lawsuit. *Id.*

88. *Id.* at 1247-48. Both arguments were rejected.

89. *Id.* at 1248. *See, e.g.*, *Katz v. United States*, 389 U.S. 347 (1967).

90. 681 F.2d at 1248. *See, e.g.*, *People v. Triggs*, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973) (policeman's clandestine observation of defendant in doorless stall of public restroom violated fourth amendment).

91. 681 F.2d at 1247.

92. *Id.* at 1248.

93. *Id.* (citing *Rakas v. Illinois*, 439 U.S. at 133-34 (such "rights are personal" and "may not be vicariously asserted.") (citations omitted)).

94. 681 F.2d at 1248. The court upheld the constitutionality of the ordinance and affirmed the judgment of the district court.

mally implicate the fourth amendment. An exception arises, however, when a private party has acted as an agent of the state.⁹⁵

In *United States v. Andrini*,⁹⁶ a motel clerk was not considered an agent of the state when he searched an unidentified piece of luggage in the presence of a law enforcement officer.⁹⁷ On May 7, 1980, an arsonist, using gasoline-filled water jugs and a pyrotechnic fuse, set fire to an office building which was under construction. Andrini was convicted for the malicious destruction of the building.⁹⁸

While staying at a motel shortly after the fire, Andrini misplaced his luggage. It was returned to the motel clerk by another guest. Pursuant to "routine motel procedure," and in the presence of a Bureau of Alcohol, Tobacco and Firearms officer, the clerk opened the unidentified suitcase and found a gun which was subsequently turned over to the police. No explanation was given for the officer's presence during the opening of the suitcase; however, Andrini's motel room had been under surveillance.⁹⁹ Andrini was arrested for illegal possession of a firearm, and the search incident to his arrest revealed twelve feet of pyrotechnic fuse resembling that used by the arsonist.¹⁰⁰

Andrini argued on appeal that the motel clerk became an agent of the state when the luggage was searched by the clerk in the presence of the officer.¹⁰¹ The court rejected this argument because the clerk searched the luggage under "routine motel procedure" and not under

95. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

96. 685 F.2d 1094 (9th Cir. 1982).

97. *Id.* at 1097-98.

98. *Id.* at 1095. 18 U.S.C. § 844(i) (1976) provides in pertinent part: "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, . . . shall be imprisoned for not more than ten years or fined not more than \$10,000, or both . . ." In addition, Andrini was sentenced to a term of forty months under 18 U.S.C. § 4205(b)(2) (1976) which provides: "[T]he court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine." 685 F.2d at 1095 & n.1.

99. *Id.* at 1097. The court suggested that Andrini's position as a union organizer may have provided him with a motive to commit arson. The company constructing the building that was destroyed refused to honor Andrini's union's labor dispute with another company. *Id.* at 1095. Knowledge of this apparent motive may have led to the surveillance of Andrini's hotel room and might explain the officer's presence during the search of Andrini's suitcase.

100. *Id.* at 1097.

101. *Id.* at 1097 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (private party may violate another's fourth amendment rights only when acting as agent of state); *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981) (airline employee considered agent of the government where he had previously been an informant and expected reward from DEA for discovering illegal narcotics in packages shipped on the airlines)).

instruction of the officer.¹⁰² The court further held that the clerk did not become the agent of the state simply because the officer failed to inform him that he believed the suitcase belonged to Andrini.¹⁰³

The Ninth Circuit refused to suppress evidence seized by a U.S. Customs officer unauthorized to conduct a search of a private residence in *United States v. Harrington*.¹⁰⁴ In 1973, enactment of an Executive Reorganization Plan (Plan) consolidated in the DEA all authority over federal narcotics law violations with the exception of fixed check point and border searches.¹⁰⁵ Pursuant to a warrant, but in violation of the DEA's exclusive authority, U.S. Customs officers searched defendant Harrington's residence and seized drugs, \$100,000 in cash, and drug paraphernalia implicating him in a drug smuggling conspiracy.¹⁰⁶ Reasoning that the investigation was a usurpation of the DEA's exclusive authority over federal drug law violations, the district court suppressed the evidence.¹⁰⁷ The district court relied upon *United States v. Soto-Soto*,¹⁰⁸ in which the Ninth Circuit affirmed the suppression of evidence seized during a warrantless border search by an unauthorized law enforcement agent.¹⁰⁹

On appeal, the Ninth Circuit stated that the use of the exclusionary rule in *Soto-Soto* was limited to border searches and therefore inapplicable to these facts.¹¹⁰ The *Harrington* court held that courts should not automatically suppress evidence seized by an officer who technically should not have conducted the search.¹¹¹ Thus, the court

102. 685 F.2d at 1097-98. The court noted that the officer stayed approximately ten feet away from the suitcase while the clerk conducted the search, and the officer did not look inside.

103. *Id.* at 1098 (citing *United States v. Walther*, 652 F.2d at 792).

104. 681 F.2d 612 (9th Cir. 1982).

105. Reorg. Plan No. 2 of 1973, 3A C.F.R. 263, 264 (1973), reprinted in 87 Stat. 1091 (1973), amended by Act of Mar. 16, 1974, Pub. L. No. 95-253, 88 Stat. 50. This concentration of authority in the DEA was motivated by a desire to make enforcement of federal narcotics laws more efficient. 681 F.2d at 613. However, the legislative history of the Plan did not suggest that the exclusionary rule was to be used as a deterrent to noncompliance with the DEA's exclusive authority over federal drug law violations.

106. 681 F.2d at 613.

107. *Id.*

108. 598 F.2d 545 (9th Cir. 1979).

109. *Id.* at 550 (19 U.S.C. § 482 did not authorize FBI agent to conduct warrantless search for general law enforcement purposes).

110. 681 F.2d at 614. The court found it unnecessary to address the Government's contention that *United States v. Payner*, 447 U.S. 727 (1980), in which the defendant lacked standing to challenge the warrantless search of a third party's briefcase which contained incriminating evidence of defendant's income tax evasion, overruled *Soto-Soto*, because the search in *Soto-Soto* was unreasonable and therefore unconstitutional. 681 F.2d at 614-15.

111. 681 F.2d at 615.

refused to suppress the evidence on the basis that Customs officers are prohibited from conducting federal drug law investigations.¹¹² The court suggested that an "exceptional reason," usually the protection of a constitutional right, must be at issue before the exclusionary rule may be invoked.¹¹³

B. Search Warrants

The fourth amendment mandates that no warrant will issue except upon a finding of probable cause, supported by an oath as set forth in an affidavit. The warrant must describe with particularity the place to be searched and the things to be seized. The Ninth Circuit has recently decided several cases which bear directly on these considerations.

1. Sufficiency of affidavit

The probable cause requirement of the fourth amendment is satisfied if the affidavit sets forth facts and circumstances such that a reasonably prudent person would be warranted in believing that an offense had been committed and that evidence of that offense would be found on the person or premises to be searched.¹¹⁴

In *United States v. Fogarty*,¹¹⁵ the court upheld the sufficiency of an affidavit supporting a warrant to search the defendant's apartment.¹¹⁶ Employees of a photographic film developing business notified the police department that the defendant had delivered film for developing that depicted nude minor females. During their investigation, the police discovered that the defendant had been previously convicted of indecent exposure and solicitation of lewd conduct and had failed to register as a sex offender as required by the California Penal Code.¹¹⁷

112. *Id.* at 615. 21 U.S.C. § 873(b) (1976); Exec. Order No. 11727, 38 Fed. Reg. § 18357 (1973), explains that other agencies may assist the Attorney General in the enforcement of federal drug laws. The Government argued that some of the DEA's authority was delegated to the U.S. Customs officers; however, the issue was unclear, and the Ninth Circuit was unable to resolve the dispute. 681 F.2d at 613 n.1.

113. 681 F.2d at 615. *See* *United States v. Pennington*, 635 F.2d 1387, 1390 (10th Cir. 1980) (execution of federal search warrant by state law enforcement officers was insufficient deviation from FED. R. CRIM. P. 41(c) to justify use of the exclusionary rule), *cert. denied*, 451 U.S. 938 (1981); *accord* *United States v. Burke*, 517 F.2d 377, 386-87 (2d Cir. 1975).

114. For a statement of the general rule see *United States v. Harris*, 403 U.S. 573, 584 (1971); *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949); *Carroll v. United States*, 267 U.S. 132, 161-62 (1925).

115. 663 F.2d 928 (9th Cir. 1981) (per curiam).

116. *Id.* at 930.

117. *Id.* at 929.

These facts were contained in two affidavits, one submitted in support of the search warrant and the other in support of an arrest warrant. On appeal from a conviction for three counts of mailing obscene matter¹¹⁸ and three counts of violating the Sexual Exploitation of Children Act,¹¹⁹ the defendant argued that the affidavit supporting the search warrant did not provide the probable cause necessary to support a search.¹²⁰ The defendant contended that some of the facts necessary to constitute probable cause were contained in the affidavit supporting the arrest warrant.¹²¹

The court held that each affidavit was independently sufficient to provide the degree of probable cause required to issue a warrant.¹²² The court further stated, in dicta, that it had not been presented with any legal authority that limits the warrant-issuing magistrate to the four corners of a single affidavit when facts supporting probable cause are presented simultaneously in related affidavits seeking two warrants.¹²³ The court believed that no fourth amendment considerations would be abridged by allowing a magistrate to find probable cause from two related affidavits.¹²⁴

In *United States v. Armstrong*,¹²⁵ the court upheld the sufficiency of an affidavit supporting a warrant to search the defendants' offices.¹²⁶ The defendants were engaged in a scheme to solicit advance fees for loan guarantee agreements. The affidavit submitted in support of the search warrant was a detailed fifteen page document setting forth infor-

118. 18 U.S.C. § 1461 (1976) provides in pertinent part: "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

119. 18 U.S.C. § 2252 (Supp. IV 1980) provides in pertinent part:

Any person who knowingly transports or ships in interstate . . . mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and such visual or print medium depicts such conduct . . . shall be punished

120. 663 F.2d at 929.

121. *Id.* at 930.

122. *Id.*, affirming the conviction.

123. *Id.* at 929-30.

124. *Id.* at 930 (citing *United States v. Dudek*, 560 F.2d 1288, 1292-93 (6th Cir. 1977) (two affidavits supporting search warrants for two warehouses co-owned by the defendant were considered together to determine probable cause as to each affidavit), *cert. denied*, 434 U.S. 1037 (1978)). See also *United States v. Nolan*, 413 F.2d 850, 853 (6th Cir. 1969) (no fourth amendment violation in considering an affidavit for a search warrant for defendant's car together with an affidavit for a search warrant for defendant's apartment to find probable cause).

125. 654 F.2d 1328 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982).

126. *Id.* at 1335.

mation from numerous victims of the loan scheme, as well as information establishing why the records sought were believed to be in the defendants' offices.

On appeal from convictions for mail fraud,¹²⁷ wire fraud,¹²⁸ inducement to travel interstate in order to defraud,¹²⁹ and giving false information in a loan application,¹³⁰ the defendants contended that the affidavit in support of the search warrant did not establish probable cause to believe a specific crime had been committed.¹³¹

The court held that the facts revealed by the affidavit suggested that it was probable that criminal activity was present,¹³² and thus there was a sufficient showing to support the issuance of the search warrant.¹³³ The court reasoned that a magistrate need only find that criminal activity is probably shown; a prima facie case of a crime is not necessary.¹³⁴ Hearsay statements from victims are to be considered reliable,¹³⁵ and therefore when the affidavit was realistically interpreted with common sense,¹³⁶ probable cause was shown.¹³⁷

127. 18 U.S.C. § 1341 (1976) provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined . . .

128. 18 U.S.C. § 1343 (1976) provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined . . .

129. 18 U.S.C. § 2314 (1976) provides in pertinent part: "Whoever, having devised or intending to devise any scheme or artifice to defraud . . . induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property . . . shall be fined . . ."

130. 18 U.S.C. § 1014 (1976) provides in pertinent part: "Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured . . . upon any application, advance . . . or loan . . . shall be fined . . ."

131. 654 F.2d at 1335.

132. *Id.*

133. *Id.* at 1335-36.

134. *Id.* at 1335 (citing *United States v. Fried*, 576 F.2d 787, 790 (9th Cir.) (affidavit need only provide that criminal activity is probably shown), *cert. denied*, 439 U.S. 895 (1978)). See also *Spinelli v. United States*, 393 U.S. 410, 419 (1969); *United States v. Traylor*, 656 F.2d 1326, 1330 (9th Cir. 1981).

135. 654 F.2d at 1335 (citing *United States v. Mahler*, 442 F.2d 1172, 1174-75 (9th Cir.) (statement of an extortion victim held reliable), *cert. denied*, 404 U.S. 993 (1971)).

136. 654 F.2d at 1335 (citing *United States v. Bowers*, 534 F.2d 186, 192 n.5 (9th Cir.) (affidavit read as a whole and language given a realistic and common sense interpretation), *cert. denied*, 429 U.S. 942 (1976)).

In *United States v. Traylor*,¹³⁸ the court upheld the sufficiency of an affidavit supporting a warrant to search the defendants' luggage.¹³⁹ Pursuant to an ongoing Drug Enforcement Administration (DEA) investigation, the defendants were suspected of the trafficking and distribution of cocaine. Agents were informed that the defendants had boarded a Princess Cruise ship and disembarked in Cartagena, Colombia, for several hours. Cartagena was known as a major source area of cocaine. The defendants then flew from San Juan, Puerto Rico, to Los Angeles en route to the Seattle-Tacoma airport. On arrival at the Los Angeles airport, a Los Angeles Police Department narcotics dog examined by smell the defendants' luggage and "alerted" on three of the six suitcases. A search warrant was obtained, and nine pounds of cocaine were found during a search of the luggage upon the defendants' subsequent arrival at the Seattle-Tacoma airport.

On appeal from convictions for conspiracy to import cocaine, conspiracy to possess and distribute cocaine, importing cocaine, and possessing cocaine with the intent to distribute, the defendants contended the affidavit lacked the requisite probable cause to justify a search of their luggage.¹⁴⁰

The court held that the affidavit was sufficient to support a finding of probable cause.¹⁴¹ The DEA agent submitted an affidavit outlining, among other things, information received from a confidential informant. The court rejected the informant's report, as no facts in the affidavit demonstrated that this informant was credible or that his information was reliable.¹⁴² However, the DEA investigation provided information which, when combined with the narcotics detection dog's scent examination, established probable cause to issue the search warrant.¹⁴³ The court reasoned that the DEA investigation indicated that the defendants had the opportunity to obtain cocaine.¹⁴⁴ The narcotics detection dog's reaction to the luggage was also considered reliable.¹⁴⁵ The affidavit set forth the dog's training record, as well as its past performance record, allowing the magistrate to properly evaluate the facts.

137. 654 F.2d at 1335, affirming the convictions.

138. 656 F.2d 1326 (9th Cir. 1981).

139. *Id.* at 1331.

140. *Id.* at 1329.

141. *Id.* at 1331.

142. *Id.* at 1330. *See, e.g.,* *Aguilar v. Texas*, 378 U.S. 108, 114 (1964) (when affidavit is based on hearsay information it must contain facts that show the informant is credible or the information reliable).

143. 656 F.2d at 1331.

144. *Id.*

145. *Id.*

Therefore, the dog's reactions and the DEA investigation established probable cause for the issuance of the search warrant.¹⁴⁶

The defendants also contended that the search of their handbags was not within the scope of the search warrant.¹⁴⁷ The search warrant authorized the search of "baggage and bags" belonging to the defendants. The court held that the search warrant must be read in a common sense and realistic fashion,¹⁴⁸ and as such the language of the warrant encompassed the defendants' handbags.¹⁴⁹ Therefore, the search was valid.¹⁵⁰

In *United States v. Anderson*,¹⁵¹ the Ninth Circuit reversed the district court's order to suppress evidence seized from five pieces of luggage.¹⁵² DEA agents received a tip from a confidential informant that a certain aircraft containing narcotics would be landing at Orange County airport. Upon the airplane's arrival at the airport, the agents detained the pilots and the passengers. The luggage was taken to an area where a narcotics detection dog examined them by smell, and alerted on four of the five pieces of luggage. The passengers were arrested, and a search warrant was obtained for the luggage. Varying amounts of cocaine were discovered in each of the five pieces of luggage.

The district court granted the motion to suppress the evidence on the ground that it was tainted by an illegal stop and arrest.¹⁵³ The Ninth Circuit reversed the order and remanded for further findings on that issue.¹⁵⁴ The court, however, did rule that probable cause existed for the issuance of the search warrant to search the defendants' suitcases.¹⁵⁵ The defendants contended there was no probable cause to search the one piece of luggage to which the dog did not alert.¹⁵⁶ The affidavit submitted in support of the search warrant detailed the facts

146. *Id.* (citing *United States v. Sullivan*, 625 F.2d 9, 13 (4th Cir. 1980) (response by narcotics detection dog coupled with other information set forth in affidavit provided sufficient probable cause to issue search warrant for luggage), *cert. denied*, 450 U.S. 923 (1981)).

147. 656 F.2d at 1331.

148. *Id.* For the general rule that affidavits are to be interpreted in a common sense and realistic fashion, see *United States v. Ventresca*, 380 U.S. 102, 108 (1965).

149. 656 F.2d at 1331. The court noted that to construe the search warrant to encompass only the suitcases would be to read it in a "hypertechnical" manner.

150. *Id.*, affirming the district court's denial of the motion to suppress and appellant's convictions.

151. 663 F.2d 934 (9th Cir. 1981), reversing suppression order.

152. *Id.* at 936.

153. *Id.* at 937.

154. *Id.* at 942. See *infra* sections on *Investigative Stops and Warrantless Arrests*.

155. 663 F.2d at 937 n.1.

156. *Id.*

that all the defendants had arrived together in the same taxicab at the point of departure, and that all the suitcases on board the airplane belonged to the defendants. The court held that the defendants' association with each other and with the four pieces of luggage to which the dog had alerted provided the magistrate with probable cause to issue a search warrant for the one piece of luggage to which the dog did not alert.¹⁵⁷ Therefore, the search warrant was properly issued as to all five pieces of luggage.¹⁵⁸

In *United States v. Cates*,¹⁵⁹ the defendant unsuccessfully challenged the sufficiency of a state search warrant issued to search his residence.¹⁶⁰ The defendant was convicted of receipt of firearms by a felon. On appeal, the defendant argued that the warrant did not meet the requirements for the use of informants as set forth in the *Aguilar-Spinelli* test.¹⁶¹

The Ninth Circuit held that the affidavit contained enough of the underlying circumstances to support a finding of probable cause.¹⁶² The informant related personally observed facts.¹⁶³ The court reasoned that it was not critical that the informant did not state *how* he knew that the contraband was a controlled substance.¹⁶⁴ An informant

157. *Id.* See *United States v. Traylor*, 656 F.2d 1326 (9th Cir. 1981) (dog alerted on three out of six suitcases); *United States v. Sullivan*, 625 F.2d 9 (4th Cir. 1980) (dog alerted on one out of four suitcases), *cert. denied*, 450 U.S. 923 (1981).

158. 663 F.2d at 937 n.1.

159. 663 F.2d 947 (9th Cir. 1981).

160. *Id.* at 948.

161. *Id.* (citing *Aguilar v. Texas*, 378 U.S. 108, 114 (1964); *Spinelli v. United States*, 393 U.S. 410, 416 (1969)). In *Aguilar*, police officers applied to a local magistrate for a warrant to search for narcotics in the defendant's home. The affidavit submitted in support of the warrant stated that the officers had received reliable information from a credible person. In overturning the conviction for illegal possession of heroin, the Supreme Court held that when an affidavit is based on hearsay information, the magistrate must be informed of some of the underlying circumstances from which the informant concluded the contraband was where it was claimed to be, and from which the affiant concluded that the informant was credible or his information reliable. In *Spinelli*, the affidavit in question merely stated that the affiant was informed by a reliable source that the defendant was engaged in bookmaking activity by means of two telephones. In reversing the conviction for travelling in interstate commerce with the intent to conduct illegal gambling activities, the Supreme Court elaborated on the *Aguilar* two-pronged test and stated: "[i]n the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail . . ." 393 U.S. at 416.

162. 663 F.2d at 948.

163. *Id.* See *United States v. Garrett*, 565 F.2d 1065, 1070 (9th Cir. 1977) (informant's personal observation of heroin in defendant's residence held to satisfy first prong of *Aguilar-Spinelli* test), *cert. denied*, 435 U.S. 974 (1978).

164. 663 F.2d at 948 (citing *United States v. Shipstead*, 433 F.2d 368, 372 (9th Cir. 1970) (affidavit that did not state how informant identified substance as methamphetamine held sufficient)). *But see* *United States v. Button*, 653 F.2d 319, 324 (8th Cir. 1981) (affidavit

is deemed credible when he relates in detail facts personally observed.¹⁶⁵ Therefore, the search warrant was valid.

In *United States v. Goff*,¹⁶⁶ the Ninth Circuit upheld the sufficiency of an affidavit supporting a warrant to search the defendants' person.¹⁶⁷ DEA agents received a tip from an informant that the defendants were planning a trip from Seattle to Miami to purchase a large quantity of cocaine. The informant then identified both defendants at the Seattle-Tacoma airport. The agents noticed that one of the defendants appeared to be wearing a money belt. Subsequent investigation disclosed that one of the defendants previously had been engaged in drug smuggling activities. While the defendants were in flight from Miami back to Seattle, a search warrant was issued. The search was conducted at the Seattle-Tacoma airport and cocaine was recovered from both defendants.

On appeal from a conviction for possession of cocaine, the defendants argued that the affidavit did not establish probable cause.¹⁶⁸ They contended that the affidavit was insufficient because it failed to establish the credibility of the confidential informant.¹⁶⁹

The court held that the informant's tip, corroborated by independent DEA investigation, was enough to create a reasonable suspicion that unlawful activity was under way.¹⁷⁰ Further, no statement of credibility was necessary because the details described by the informant were corroborated by the investigation.¹⁷¹

The defendants also argued that the warrant was invalid because the cocaine was not in Washington at the time the warrant was issued.¹⁷² The court disagreed, stating that the real issue was whether

insufficient to show probable cause when informant did not state how he knew a large quantity of white powder he had seen was angel dust).

165. 663 F.2d at 948 (citing *United States v. Garrett*, 565 F.2d 1065, 1070 (9th Cir. 1977) (informant personally observed heroin in defendant's residence), *cert. denied*, 435 U.S. 974 (1978); *United States v. Banks*, 539 F.2d 14, 17 (9th Cir.) (informant saw defendant with a zip-lock bag containing a fluffy white powder), *cert. denied*, 429 U.S. 1024 (1976)).

166. 681 F.2d 1238 (9th Cir. 1982).

167. *Id.* at 1240.

168. *Id.*

169. *Id.*

170. *Id.* (citing *United States v. Johnson*, 641 F.2d 652, 659 (9th Cir. 1980) (informant's information that several pounds of cocaine could be found inside a safe in defendant's home was corroborated by independent government observations)).

171. 681 F.2d at 1240 (citing *United States v. Johnson*, 641 F.2d at 658; *United States v. Lefkowitz*, 618 F.2d 1313, 1316 (9th Cir.) (information received from a confidential informant that defendant was falsifying books and records was independently corroborated by information already known to the IRS), *cert. denied*, 449 U.S. 824 (1980)).

172. 681 F.2d at 1240.

probable cause existed at the time of the search.¹⁷³ The facts indicated that the defendants would arrive in the state within a reasonable time after the issuance of the search warrant, and that the warrant could not be executed until such time.¹⁷⁴ Therefore, merely anticipating future events did not detract from probable cause at the time of such a search.¹⁷⁵ The warrant was held to be valid and the convictions were affirmed.¹⁷⁶

In *United States v. Gallo*,¹⁷⁷ the Ninth Circuit held that the magistrate had probable cause to issue a warrant to search the defendant's bookmaking office.¹⁷⁸ The defendant was suspected of bookmaking and failing to comply with the registration requirements and taxes imposed upon such activity. Gallo became the subject of an intense two-month investigation and surveillance, at the conclusion of which a search warrant was sought and issued. The warrant was based upon a forty-one page affidavit which set forth in great detail the extensive prior experience of the agent involved, the observations by the agent of the defendant accepting bets and payoffs and paying several individuals in cash, and the acceptance of bets from the undercover agent. The search uncovered substantial quantities of evidence indicating the defendant's bookmaking activity.

On appeal from a conviction for attempting to evade or defeat wagering excise taxes¹⁷⁹ and for failure to file return and pay wagering occupation tax,¹⁸⁰ the defendant attacked the sufficiency of the affidavit on the ground that it did not show probable cause to believe that he was engaged in criminal activity.¹⁸¹

The court summarily rejected the defendant's contention and held that the affidavit was more than adequate to establish probable cause to

173. *Id.* (citing *United States v. Nepstead*, 424 F.2d 269, 271 (9th Cir.) (search of defendant's house for drug manufacturing equipment occurred six days after the search warrant was issued; passage of time did not detract from probable cause due to continuous surveillance of the house), *cert. denied*, 400 U.S. 848 (1970)).

174. 681 F.2d at 1240.

175. *Id.* at 1240 n.1.

176. *Id.* at 1240.

177. 659 F.2d 110 (9th Cir. 1981).

178. *Id.* at 113. Bookmaking is legal in Nevada.

179. 26 U.S.C. § 7201 (1976) provides in pertinent part: "Any person who willfully attempts in any manner to evade or defeat any tax . . . or the payment thereof shall . . . be guilty of a felony"

180. 26 U.S.C. § 7203 (1976) provides in pertinent part: "Any person required . . . to pay any . . . tax, or . . . to make a return . . . who willfully fails to pay such estimated tax, make such return, . . . shall . . . be guilty of a misdemeanor"

181. 659 F.2d at 112.

believe that the defendant was participating in criminal activity.¹⁸² The magistrate was justified in issuing the search warrant.¹⁸³

In *United States v. Barnett*,¹⁸⁴ the court reversed the district court's order suppressing all items seized pursuant to a search warrant, and upheld the sufficiency of the affidavit supporting the warrant authorizing the search of the defendant's residence.¹⁸⁵ Drug enforcement agents executed a federal search warrant at the residence of a man suspected of phencyclidine production. Pursuant to the search, agents recovered brochures on drug synthesis distributed by the defendant. An investigation followed, culminating with the sale of drug synthesis documents to an undercover agent. Upon search of the defendant's apartment, numerous instruction pamphlets, business correspondence, order forms, and advertisements relating to drugs were recovered. The defendant was indicted for aiding and abetting in the attempted manufacture of phencyclidine and using the United States mails to cause and facilitate the commission of the crime of attempted manufacture of phencyclidine. At trial, the defendant successfully moved to have all evidence recovered pursuant to the search suppressed, on the ground that none of the items seized were contraband or evidence of criminal activity.¹⁸⁶

On appeal from the suppression order, the Ninth Circuit considered the issue of whether the affidavit for the warrant contained sufficient facts to establish probable cause.¹⁸⁷ The court held that the affidavit established the required probable cause.¹⁸⁸ The court stated that an affidavit for a search warrant must contain facts to establish probable cause to believe that evidence of the crime will be found at the premises to be searched.¹⁸⁹ The instant affidavit sufficiently did

182. *Id.* at 112-13, comparing this forty-one page affidavit to the insufficient affidavit in *Spinelli v. United States*, 393 U.S. 410, 414 (1969). In *Spinelli*, the affidavit detailed only the facts that Spinelli had been seen four times travelling to and from his apartment, and that his apartment contained two separate telephones.

183. 659 F.2d at 113 (citing *United States v. Besase*, 521 F.2d 1306, 1308 (6th Cir. 1975) (affidavits recite "in exhaustive detail" facts leading to conclusion that defendants were engaged in a numbers lottery); *United States v. McNally*, 473 F.2d 934, 941 (3d Cir. 1973) (affidavit detailed ten times in which defendant visited residence to be searched)). See also *United States v. Hirschhorn*, 649 F.2d 360, 362-63 (5th Cir. 1981) ("long and detailed" affidavit unquestionably showed probable cause to search for gambling paraphernalia).

184. 667 F.2d 835 (9th Cir. 1982), reversing suppression order.

185. *Id.* at 841.

186. *Id.* at 838.

187. *Id.* at 840.

188. *Id.*

189. *Id.* (citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 554 (1978) (valid warrants may

so.¹⁹⁰ It set forth in detail the conduct of the defendant in advertising for sale drug manufacturing instructions and reliable suppliers of chemicals. All correspondence was traceable to a post office box registered in the defendant's name.¹⁹¹ The defendant was observed receiving mail from this post office box. The court concluded that a magistrate could find probable cause to believe that evidence of the crime would be found in Barnett's apartment.¹⁹²

The court further held that evidence relevant to a prosecution of the party being searched may lawfully be seized if it tends to substantiate the suspect's intent regarding the criminally proscribed conduct described in the affidavit.¹⁹³ The presence of the manufacturing instructions in the defendant's apartment would be admissible to prove that the defendant acted with criminal intent.¹⁹⁴

In *United States v. Poland*,¹⁹⁵ the Ninth Circuit upheld the validity of warrants issued to search the defendants' residences.¹⁹⁶ The facts revealed an intricate and organized plan to commit robbery and murder. The defendants robbed a security van containing currency and murdered the drivers, disposing of the bodies and evidence in canvas sacks at the bottom of Lake Mead. The bodies were recovered and a detailed investigation led to the defendants. Search warrants were issued to search the defendants' homes, wherein incriminating evidence was seized.

On appeal from convictions for robbery¹⁹⁷ and kidnapping,¹⁹⁸ the

be issued to search any property at which there is probable cause to believe that evidence of a crime will be found)).

190. 667 F.2d at 840-41.

191. *Id.*

192. *Id.* at 841.

193. *Id.* at 843 (citing *Andresen v. Maryland*, 427 U.S. 463, 483-84 (1976) (records seized pertaining to another lot in subdivision could be used to show intent to defraud with respect to the lot 13T transaction)). See also *Warden v. Hayden*, 387 U.S. 294, 307 (1967) (upholding the seizure of "mere" evidence that will aid in a particular apprehension or conviction).

194. 667 F.2d at 843. The seizure of manufacturing instructions in defendant's apartment would establish at trial the fact that United News Service, the name appearing on the letter head of the instructions, was the fictitious alter ego of the defendant. This fact, together with proof that the defendant had mailed instructions to others, would prove criminal intent.

195. 659 F.2d 884 (9th Cir. 1981) (per curiam).

196. *Id.* at 897.

197. 18 U.S.C. § 2113(a) (1976) provides in pertinent part: "Whoever, by force and violence . . . takes . . . from the person or presence of another any property or money . . . in the care, custody . . . of, any bank . . . shall be fined . . ."

198. 18 U.S.C. § 2113(e) (1976) provides in pertinent part: "Whoever, in committing any offense . . . kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned . . ."

defendants contended that the search warrants were invalid,¹⁹⁹ and there was no sufficient indication why the items sought were expected to be at the residences to be searched.²⁰⁰

The Ninth Circuit held that although the affidavit did not contain any direct evidence to connect the items to be searched for to the defendants' residences, the existence of probable cause was not affected.²⁰¹ Direct observation is not necessary.²⁰² Normal inferences as to where criminals are likely to hide evidence will supply probable cause, taking into account the type of crime, the nature of the items sought, and the opportunity for concealment.²⁰³ The court found it very probable that the defendants would hide the stolen money in their homes.²⁰⁴

In *United States v. Gilman*,²⁰⁵ the Ninth Circuit upheld the validity of several search warrants issued for the defendants' offices and garages.²⁰⁶ The defendants were partners in a mail order business distributing sexually explicit magazines and brochures. Pursuant to an investigation begun by postal inspectors, the San Francisco police obtained warrants to search a building housing the defendants' offices, a nearby garage, and a public storage garage rented by the defendants. The items to be seized were certain magazines, a film, and business records. Upon execution of the warrants, it was discovered that the office building was also a residential dwelling. Materials described in

199. 659 F.2d at 896.

200. *Id.* at 897.

201. *Id.*

202. *Id.*

203. *Id.* (citing *United States v. Pheaster*, 544 F.2d 353, 372-73 (9th Cir. 1976) (items specified in warrant were types of things that a person who had participated in a kidnaping/extortion plot might possess), *cert. denied*, 429 U.S. 1099 (1977); *United States v. Spearman*, 532 F.2d 132, 133 (9th Cir. 1976) (reasonable to infer that a heroin dealer would keep heroin in his car)). See also *United States v. Minis*, 666 F.2d 134, 139-40 (5th Cir.) (property was a logical place to find a garden of marijuana), *cert. denied*, 456 U.S. 946 (1982); *Anthony v. United States*, 667 F.2d 870, 874-75 (10th Cir. 1981) (reasonable to assume evidence of assembled wire-tapping equipment would be found in defendant's home), *cert. denied*, 457 U.S. 1133 (1982); *United States v. Jackstadt*, 617 F.2d 12, 13-14 (2d Cir.) (infer defendant carried container of ether into his house), *cert. denied*, 445 U.S. 966 (1980); *United States v. Valenzuela*, 596 F.2d 824, 828-29 (9th Cir.) (inference that heroin would be found in residence), *cert. denied*, 441 U.S. 965 (1979); *United States v. Dubrofsky*, 581 F.2d 208, 213 (9th Cir. 1978) (inference that heroin would be found in home).

204. 659 F.2d at 897, affirming the convictions. The defendants had been unemployed and in debt for some time. It would have aroused suspicion if suddenly they began to make large bank deposits. Therefore, it was logical for them to hide the stolen money at home. *Id.*

205. 684 F.2d 616 (9th Cir. 1982).

206. *Id.* at 618-20.

the search warrant were seized from the offices. When the police entered the nearby garage, they observed in plain view three different magazines not described in the warrant. They took one copy of each magazine to a magistrate, obtained a second warrant, returned to the garage and seized the magazines.

The search of the public storage garage also did not uncover any of the magazines described in the warrant. Police obtained a second warrant after seizing copies of other materials and taking them to a magistrate. The magazines seized pursuant to this second search warrant, however, were not introduced at trial. Rather, abandoned magazines belonging to the defendants were turned over to the FBI by the owner of the public storage garage.

On appeal from a conviction for mailing obscene material²⁰⁷ and conspiracy,²⁰⁸ the defendants challenged the validity of each of the search warrants. They argued that the warrant for the office building described the entire building, dwelling areas included, yet showed probable cause only for a search of the offices.²⁰⁹ They contended that the warrant was overbroad and therefore invalid.²¹⁰

The Ninth Circuit rejected the defendants' argument.²¹¹ The court held that a warrant, which authorized the search of an entire building containing multiple units while providing probable cause to only a portion of the building, is not necessarily void if it falls within a recognized exception to the general rule voiding a warrant for an undisclosed multi-unit structure.²¹² The exceptions include a situation where the defendant was in control of the entire building or it was occupied in

207. 18 U.S.C. § 1461 (1976) provides in pertinent part: "Every obscene, lewd, lascivious, indecent, filthy or vile article . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails"

208. 18 U.S.C. § 371 (1976) provides in pertinent part: "If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined"

209. 684 F.2d at 618.

210. *Id.*

211. *Id.*

212. *Id.* (citing *United States v. Whitney*, 633 F.2d 902, 907-08 (9th Cir. 1980), *cert. denied*, 450 U.S. 1004 (1981), for this proposition). *Whitney* involved a search warrant issued for a residence described as a two-story, single-family dwelling. In actuality, the house had been converted into two apartments, one on each level. The defendant resided in the upper apartment. In holding the warrant sufficient, the court found that the defendant was in full control of the house; that the officers were unaware of the two separate apartments until they entered the house; and that the officers believed a search of the entire house was warranted. *Id.* at 907-08. For the general rule voiding a warrant for an undisclosed multi-unit structure, see *United States v. Hinton*, 219 F.2d 324 (7th Cir. 1955) (voiding a search warrant authorizing the search of an entire apartment building consisting of four apartments).

common rather than individually; where the entire building was under suspicion; or where the multi-unit character of the building was not known to the officers at the time they applied for and executed the search warrant.²¹³ The record showed that the police were not aware that the building contained separate living quarters.²¹⁴ Further, there was some indication that the defendants were in complete control of the entire building and that the entire building was suspect.²¹⁵ The court held that probable cause to search was stated for the offices, and therefore the overbreadth of the warrant did not require exclusion of the evidence seized therein.²¹⁶

The defendants also contested the validity of the second search warrant issued for the nearby garage, as it was based on samples of magazines taken from the garage by the police. They contended that the police were not allowed to take those samples.²¹⁷ The court held that the police took the samples to the magistrate for the express purpose of securing a second warrant.²¹⁸ They reasoned that issuance of a second warrant was the proper and preferred procedure, as compared to seizing the magazines under the plain view doctrine.²¹⁹ This allowed the magistrate to make a finding of probable cause based on direct evidence. Therefore, the warrant was valid.

Lastly, the court held that probable cause supported the issuance of the first search warrant for the public storage garage.²²⁰ The portion of the affidavit referring to the public storage garage, when read in conjunction with the entire affidavit, supplied probable cause to search.²²¹ Police then obtained a second warrant for other magazines found in the garage, in compliance with the procedure followed earlier for the garage adjoining the office building.²²² Therefore, no impropriety oc-

213. 684 F.2d at 618.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 619 (relying on *United States v. Sherwin*, 572 F.2d 196, 199 (9th Cir. 1977) (seizure of magazines not identified in the search warrant held improper; plain view exception does not apply when materials seized are protected by the first amendment), *cert. denied*, 437 U.S. 909 (1978)).

218. 684 F.2d at 619.

219. *Id.* The court distinguished *Sherwin* on the fact that the officers in that case seized the magazines directly and did not seek a second search warrant. The *Sherwin* court itself suggested that the preferable procedure was for the officers to seal the area while they obtained another warrant. 572 F.2d at 200. That is exactly what the San Francisco police did in this case.

220. 684 F.2d at 620.

221. *Id.*

222. *Id.*

curred. The court further stated that even if the second warrant was not valid, the abandoned magazines actually introduced into evidence at trial were sufficiently remote to remove any taint from an illegal search.²²³ The evidence was properly admitted and the convictions were affirmed.²²⁴

In *United States v. Flores*,²²⁵ the defendant unsuccessfully challenged the sufficiency and accuracy of an affidavit supporting a warrant to search his apartment.²²⁶ A police officer had arrested a third party, Douglas Bontempi, in the defendant's apartment on a murder conspiracy charge. During the arrest the officer had observed firearm paraphernalia and photographs depicting Bontempi and several other people holding rifles and other firearms. A week later the FBI received an anonymous phone call informing them that a box of guns had been observed in a storage area adjoining the defendant's apartment. Gunshots were heard in the neighborhood the next day. A warrant for the defendant's apartment was obtained, the purpose of which was to search for evidence that Bontempi was illegally possessing firearms. The search revealed several firearms, including a carbine weapon belonging to the defendant.

On appeal from a conviction for possessing a firearm as a convicted felon,²²⁷ the defendant argued that there was insufficient evidence to connect Bontempi with his apartment and with the firearms.²²⁸ The court first held that the affidavit contained sufficient evidence to enable the magistrate to conclude that it would be reasonable to suspect that weapons might be found in the defendant's apartment.²²⁹ The affidavit stated that the arresting officer had seen firearms and paraphernalia in plain view in the apartment, and the anonymous phone call tended to corroborate the suspected presence of firearms.²³⁰ The court then examined whether there were sufficient facts stated in the affidavit to determine that Bontempi's relationship with the defendant's apartment was significant enough to justify a belief that some of the firearms observed belonged to him.²³¹ The court held that a sus-

223. *Id.*

224. *Id.* at 618-20.

225. 679 F.2d 173 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 791 (1983).

226. *Id.* at 174.

227. 18 U.S.C. App. § 1202(a)(1) (1976) provides in pertinent part: "Any person who has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses . . . any firearm shall be fined . . ."

228. 679 F.2d at 174.

229. *Id.* at 175.

230. *Id.*

231. *Id.*

pect's mere presence in a residence was too insignificant a connection with the residence to establish the relationship.²³² In this case, however, the affidavit contained additional allegations of Bontempi's relationship with the defendant's apartment.²³³ The apartment contained photographs depicting Bontempi holding rifles and other firearms. The court found that any inference that was to be drawn from this fact was for the warrant-issuing magistrate to draw, and no error in having made this inference could be found.²³⁴ Therefore, the search warrant was properly issued.

The defendant also challenged the validity of the warrant on the ground that the police officer intentionally or recklessly omitted from the affidavit the facts that the adjoining storage area where the box of guns was observed belonged to the apartment superintendent, and that Bontempi was in jail at the time the gunshots were heard in the neighborhood.²³⁵ He contended that these facts would vitiate a finding of probable cause to search the apartment and that the district court erred in refusing to grant his request for an evidentiary hearing on the truthfulness of the affidavit.²³⁶ The Ninth Circuit held that even if it were demonstrated that the officer deliberately omitted this information from the affidavit, the omission must be *material* in order to invalidate the warrant.²³⁷ Upon review of the affidavit, the court found these omissions were not material.²³⁸ The affidavit stated that the apartment

232. *Id.* (relying on *United States v. Bailey*, 458 F.2d 408, 412 (9th Cir. 1972) (insufficient relationship between a house to be searched and two bank robbery suspects, where the affidavit stated only that one suspect was seen in the house and that the other was arrested there; no reason to believe that the suspects were anything other than casual social guests in the house)).

233. 679 F.2d at 175. The *Bailey* affidavit contained no additional information linking the suspects to the residence.

234. *Id.* at 176.

235. *Id.*

236. *Id.* The defendant's request for an evidentiary hearing stems from the Supreme Court's holding in *Franks v. Delaware*, 438 U.S. 154 (1978).

[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. at 155-56.

237. 679 F.2d at 176 (citing *United States v. Maher*, 645 F.2d 780, 782 (9th Cir. 1981) (affidavit omitted fact that police informant incorrectly named the motel at which a truck containing marijuana would be found; omission immaterial as affiant testified he easily located the truck by following street directions given by the informant); *United States v. Lefkowitz*, 618 F.2d 1313, 1317 (9th Cir.) (affidavit did not state that the confidential informant was the defendant's wife), *cert. denied*, 449 U.S. 824 (1980)).

238. 679 F.2d at 176.

superintendent had allowed the tenants to use "his" storage area. Further, that Bontempi was in custody at the time the shots were fired was not a controlling fact concerning his possession of the firearms, as possession can be either actual or constructive.²³⁹ Therefore, the defendant failed to establish a basis for an evidentiary hearing to challenge the accuracy of the affidavit.²⁴⁰

In *United States v. Kunkler*,²⁴¹ the Ninth Circuit upheld the accuracy of an affidavit supporting a warrant to search the defendant's home.²⁴² Pursuant to a DEA investigation into the higher levels of a cocaine dealing operation, suspicion focused on a dealer in the San Diego area. Surveillance of the dealer led the agent to the defendant's house. Each time the undercover agent would begin a transaction with the dealer, the dealer would drive to the defendant's house and meet with the defendant. Upon returning to the agent, the dealer would deliver one ounce of cocaine.

Subsequent trips by the dealer out to his van or to his apartment were necessary to deliver a second ounce of cocaine to the agent. During one such transaction the DEA agents decided to terminate the undercover operation, and arrested the dealer. Fearful that the defendant would become suspicious when the dealer did not return to the house, the agents entered the defendant's residence and secured the premises while a search warrant was obtained. A search of the defendant's house revealed drug paraphernalia and an ounce of cocaine.

On appeal from a conviction for conspiring²⁴³ to possess cocaine with intent to distribute²⁴⁴ and aiding and abetting the distribution of cocaine,²⁴⁵ the defendant contended that the affidavit was defective because it failed to identify the source and reliability of the affiant's information, and to include the fact that the dealer returned to his van before delivering the cocaine to the agent. The defendant contended that this omission prevented the inference that the cocaine was in the

239. *Id.* at 176-77.

240. *Id.* at 177, affirming the conviction.

241. 679 F.2d 187 (9th Cir. 1982).

242. *Id.* at 190-91.

243. 18 U.S.C. § 2 (1976) provides in pertinent part: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

244. 21 U.S.C. § 841(a)(1) (1976) provides in pertinent part: "It shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

245. 21 U.S.C. § 846 (1976) provides in pertinent part: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable"

van rather than the defendant's house.²⁴⁶

The Ninth Circuit summarily rejected the defendant's contentions.²⁴⁷ It held that it was "readily apparent" that the DEA undercover agents were the source of the information in the affidavit.²⁴⁸ Police officers are deemed *per se* reliable and therefore their reliability need not be proved.²⁴⁹ The court characterized the defendant's contention pertaining to the omission of the fact that the dealer returned to his van before delivering the cocaine as "frivolous."²⁵⁰ The court held that the omission was immaterial.²⁵¹ Even if this omitted information was considered together with the information set forth in the affidavit, probable cause to issue the search warrant still existed.²⁵²

The defendant also contended that the affidavit did not establish probable cause.²⁵³ The court held that the warrant was properly issued.²⁵⁴ The dealer's repeated trips to the defendant's home followed by the delivery of cocaine to the agent, combined with the dealer's statements implicating someone else as his "source" were sufficient to conclude that criminal activity was probably shown.²⁵⁵ Accordingly, the conviction was affirmed.²⁵⁶

246. 679 F.2d at 190-91.

247. *Id.*

248. *Id.*

249. *Id.* (citing *United States v. Ventresca*, 380 U.S. 102, 111 (1965) (observations made by investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service are a reliable basis for a warrant); *Brooks v. United States*, 416 F.2d 1044, 1049 (5th Cir. 1969) (county sheriff is reliable informant), *cert. denied*, 400 U.S. 840 (1970); *United States v. Desist*, 384 F.2d 889, 896-97 (2d Cir. 1967) (information provided by narcotics agents deemed reliable), *aff'd*, 394 U.S. 244 (1969); *Chin Kay v. United States*, 311 F.2d 317, 320 (9th Cir. 1962) (information provided by agent of the Federal Bureau of Narcotics held reliable)). *See also* *United States v. Flynn*, 664 F.2d 1296, 1303 (5th Cir.) (information provided by government officials engaged in investigatory or regulatory activities is deemed reliable), *cert. denied*, 456 U.S. 930 (1982).

250. 679 F.2d at 191.

251. *Id.*

252. *Id.* (citing *United States v. Lefkowitz*, 618 F.2d 1313, 1317 (9th Cir.) (even if informant's identity had been revealed, affidavit still would have supported a finding of probable cause), *cert. denied*, 449 U.S. 824 (1980); *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978) (if there remains sufficient content in the warrant affidavit to support a finding of probable cause, the inaccuracies are irrelevant)).

253. 679 F.2d at 191.

254. *Id.*

255. *Id.* (citing *United States v. Fried*, 576 F.2d 787, 790 (9th Cir.) (affidavit need only provide that criminal activity is probably shown), *cert. denied*, 439 U.S. 895 (1978); *Rocha v. United States*, 387 F.2d 1019, 1022-23 (9th Cir. 1967) (similar facts as in *Kunkler* held to supply probable cause for an arrest), *cert. denied*, 390 U.S. 1004 (1968)).

256. 679 F.2d at 192.

In *United States v. Chesher*,²⁵⁷ the Ninth Circuit upheld the sufficiency of an affidavit supporting an indicia warrant,²⁵⁸ but held the defendant was entitled to an evidentiary hearing on the accuracy of statements made in that affidavit.²⁵⁹ An indictment was filed charging the defendant with participating in the conduct of an enterprise through a pattern of racketeering activity.²⁶⁰ Specifically, that enterprise was the Hell's Angels Motorcycle Club. Pursuant to the indictment, officers obtained a warrant authorizing the seizure of any indicia of the defendant's membership in the Hell's Angels Club. During a search of the defendant's house, officers discovered in plain view a laboratory used in manufacturing of methamphetamine. A second warrant was obtained, and the laboratory was seized. The original racketeering indictment was dismissed, and the defendant was subsequently convicted of having manufactured methamphetamine.²⁶¹

On appeal, the defendant first contended that the seizure of the laboratory could not be justified under the plain view doctrine. The court, however, found a valid plain view seizure.²⁶² The defendant then contended that the affidavit in support of the indicia warrant failed to establish probable cause to believe that the evidence sought would be found.²⁶³ Specifically, Chesher argued that the affidavit failed to provide enough information to allow the magistrate to evaluate the reliability of the informant's information.²⁶⁴ While conceding that the defendant was correct in his statement of the requirements for verifying hearsay information, the court held that the affiant based his information on personal knowledge and not on hearsay information.²⁶⁵ Therefore, the affidavit was adequate to support a finding of probable

257. 678 F.2d 1353 (9th Cir. 1982).

258. *Id.* at 1360. The Ninth Circuit appears to be using the term "indicia warrant" to indicate a warrant which authorizes a search only for evidence which supports the existence of a specific fact. In this case, the warrant authorized only the seizure of evidence which indicated that the defendant was a member of the Hell's Angels Motorcycle Club. Other examples of indicia warrants might be those authorizing only seizure of evidence indicating ownership of a house, or of a car.

259. *Id.* at 1363-64.

260. The statute the defendant violated was Title IX of the Organized Crime Control Act of 1970, commonly known as The Racketeer Influenced and Corrupt Organizations Act (RICO) (currently codified at 18 U.S.C. § 1962(c) (1976)).

261. 21 U.S.C. § 841(a)(1); for statutory definition *see supra* note 244.

262. 678 F.2d at 1356-57. *See infra* section on *Warrantless Searches*.

263. 678 F.2d at 1359.

264. *Id.* The statement in question was: "as a result of my experience and conversations with CRI's (confidential and reliable informants) 1, 2, and 3, I know that LAWRENCE GILBERT CHESHER is a member of the HELLS ANGELS MOTORCYCLE CLUB." *Id.*

265. *Id.* The court stated that it was unclear from the face of the affidavit whether the

cause.²⁶⁶

The defendant also contended that he should have been granted an evidentiary hearing to determine whether the affidavit was based on an intentionally or recklessly false statement.²⁶⁷ The court stated that *Franks v. Delaware*²⁶⁸ permitted a defendant in certain circumstances to challenge the truthfulness of factual statements made in an affidavit supporting a warrant.²⁶⁹ However, a defendant must satisfy a two-pronged test to be entitled to an evidentiary hearing.²⁷⁰ First, the defendant must make a substantial preliminary showing that the affidavit contains actual falsity, and that this falsity is either deliberate or the result of reckless disregard for the truth.²⁷¹ These allegations must be accompanied by a detailed offer of proof.²⁷² Second, the court must determine that the challenged statement is necessary to the finding of probable cause.²⁷³ The excision of the statement would necessarily leave the affidavit with insufficient content to establish probable cause.²⁷⁴

The Ninth Circuit held that a substantial preliminary showing of actual falsity in the affidavit was satisfied by the Government's concession that the challenged statement in the affidavit was false.²⁷⁵ The court then found four items of evidence that the statement was intentionally or recklessly false.²⁷⁶ The first item of evidence was a sworn statement by the defendant that anyone with close knowledge of the Hell's Angels Club would have known that he had been expelled from

affiant was relying exclusively on hearsay information or on his own experience as well. Nevertheless, the court concluded that the statement was made from personal knowledge.

266. *Id.*

267. *Id.* at 1360, referring to the statement set forth in *supra* note 264.

268. 438 U.S. 154 (1978); *see supra* note 236.

269. 678 F.2d at 1360.

270. *Id.* The court in *Franks v. Delaware* was careful to avoid creating a rule which would make evidentiary hearings into an affiant's veracity commonplace and obtainable on a bare allegation of bad faith.

271. *Id.*

272. *Id.* (citing *Franks v. Delaware*, 438 U.S. at 171; *United States v. Young Buffalo*, 591 F.2d 506, 509 (9th Cir.) (affidavit reported incorrect height and weight descriptions of the robber; that defendant owned a Honda motorcycle similar to the one used in the robbery when in actuality defendant's motorcycle had been destroyed before the robberies; that defendant had rented a white over maroon 1976 AMC Pacer similar to one used by the robber when defendant's rented Pacer was actually maroon over white), *cert. denied*, 441 U.S. 950 (1979)).

273. 678 F.2d at 1360.

274. *Id.*

275. *Id.*

276. *Id.*

the club four years earlier.²⁷⁷ The second item of evidence was the fact that the affiant based his statement on stale information pertaining to the defendant's membership status between four and eight years ago.²⁷⁸ The court held that the use of information so out of date as a basis for a statement of the affiant's current belief tended to support a claim of recklessness.²⁷⁹ The third item of evidence was the failure of the affiant to discover a four-year-old report of the California Bureau of Narcotics (CBN)²⁸⁰ which would have informed him that the defendant's club membership had been terminated.²⁸¹ The last item of evidence was the allegation that the affiant had spoken on several occasions to the CBN agent who had filed the report on the defendant.²⁸² The court held that the evidence, taken together, constituted the required substantial preliminary showing of deliberate or reckless falsity.²⁸³

The court proceeded to determine whether probable cause existed independent of the affiant's statement in the affidavit that he knew the defendant to be a club member.²⁸⁴ The affidavit supporting the search warrant contained only two other statements relating to the defendant's relationship with the club. The first stated that a six-year-old investigative report identified the defendant as a club member.²⁸⁵ The second statement concerned the RICO indictment,²⁸⁶ which charged the defendant with being associated with the Hell's Angels Motorcycle Club.²⁸⁷

The Ninth Circuit held that a showing of probable cause required that the affidavit provide sufficient facts to permit a reasonable person to conclude that Hell's Angels indicia was likely to be found at the defendant's home.²⁸⁸ To do so, there must be probable cause to believe

277. *Id.* A California Bureau of Narcotics agent reported on Chesher's expulsion from the club within months after the occurrence. The court interpreted this fact to indicate that not only was such information about Chesher true, but it was also quickly available to investigative agents. *Id.* at 1361.

278. *Id.* at 1361.

279. *Id.*

280. *See supra* note 277.

281. 678 F.2d at 1361. The court stated that his unexplained failure also tended to support a claim of recklessness.

282. *Id.* The affiant claimed, however, that neither the defendant nor the agent's report were ever discussed during their conversations.

283. *Id.* at 1362.

284. *Id.*

285. *Id.*

286. *See supra* note 260 and accompanying text.

287. 678 F.2d at 1362.

288. *Id.* (citing *United States v. Moreno*, 569 F.2d 1049, 1052-53 (9th Cir.) (only the

that the defendant was still a member of the club.²⁸⁹ The court held that the six-year-old investigative report was too old to be of any real value to the magistrate.²⁹⁰ An affidavit "must speak as of the time of the issue" of the search warrant.²⁹¹ Nor could a finding of probable cause be grounded on the RICO indictment.²⁹² Probable cause to indict for RICO violations is quite different from the probable cause necessary to believe that indicia of club membership will be found in the indicted individual's home.²⁹³ A person may be indicted under RICO for having committed an act of racketeering within the last five years. Therefore, the affidavit contained no basis for concluding that there was any evidence of the defendant's current association with the club.²⁹⁴

The court held that once the critical allegation of the affiant's knowledge of the defendant's club membership was set aside, the remaining content of the affidavit was insufficient to support a finding of probable cause.²⁹⁵ Under *Franks* the defendant was therefore entitled to an evidentiary hearing on whether the affiant's statement pertaining to the defendant's club membership was deliberately or recklessly false.²⁹⁶ The conviction was reversed and the case was remanded to the district court with instructions to conduct such an evidentiary hearing.²⁹⁷

2. Specificity of things to be seized

In *United States v. Brock*,²⁹⁸ the Ninth Circuit upheld the specificity of a warrant authorizing the search of defendants' cabin.²⁹⁹ The defendants became the target of a Drug Enforcement Agency investigation when they placed an order for chemicals commonly used to manufacture amphetamines. Four months of surveillance resulted in the

probability of finding the described items at a particular location must be shown), *cert. denied*, 435 U.S. 972 (1978)).

289. 678 F.2d at 1362.

290. *Id.*

291. *Id.* at 1362-63 (citing *Sgro v. United States*, 287 U.S. 206, 211 (1932) (warrant authorizing the search of a hotel for intoxicating liquor issued three weeks after the affidavit was sworn out held invalid)).

292. 678 F.2d at 1363.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 1363-64 (citing *Franks v. Delaware*, 438 U.S. at 172).

297. 678 F.2d at 1364, expressing no opinion on whether the defendant will prevail at the hearing.

298. 667 F.2d 1311 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1271 (1983).

299. *Id.* at 1322-23.

discovery of a methamphetamine laboratory and the defendants' subsequent arrest.

On appeal from a conviction for conspiring to possess with intent to manufacture and distribute methamphetamine³⁰⁰ and the manufacture of methamphetamine,³⁰¹ the defendants unsuccessfully contended that the search warrant was invalid for lack of particularity because it did not list a canister of methylamine known to the agents to be in the cabin.³⁰²

The court held that the warrant at issue was sufficient to satisfy the requirement that a warrant describe with reasonable specificity the objects of the search.³⁰³ The law does not require that warrants list in detail every item the agents know are to be found at a certain location.³⁰⁴ The court held that the canister of methylamine was included within the scope of the warrant's language.³⁰⁵

The court further reasoned, in dicta, that even if the law did require that the warrant must specifically refer to the canister, this was accomplished through the affidavit.³⁰⁶ The affidavit described the canister and its location in the cabin and was incorporated by reference into the warrant. The court stated that when a warrant incorporates an affidavit, the warrant and affidavit together satisfy the specificity requirement if the affidavit specifically lists the items expected to be found.³⁰⁷

300. 21 U.S.C. § 812 (1976) provides in pertinent part that methamphetamine is a controlled substance for purposes of this chapter. 21 U.S.C. § 841(a)(1) (1976) provides in pertinent part: "it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 846 (1976) provides in pertinent part: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable . . ."

301. 21 U.S.C. §§ 812, 841(a)(1) (1976); *see supra* note 300.

302. 667 F.2d at 1322-23. The defendants incorrectly relied on *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), which established the inadvertency requirement for warrantless seizures under the plain view doctrine.

303. 667 F.2d at 1322 (citing *Andresen v. Maryland*, 427 U.S. 463, 479-82 (1976) (warrant upheld which authorized the seizure of "other fruits, instrumentalities and evidence of crime at this [time] unknown")).

304. 667 F.2d at 1323.

305. *Id.* The warrant authorized a search for "chemicals and glassware commonly utilized in the manufacture of methamphetamine." *Id.*

306. *Id.*

307. *Id.* (citing *United States v. Marques*, 600 F.2d 742, 752 (9th Cir. 1979) (affidavit incorporated in warrant made it clear that agents were to search for evidence of the manufacture of methamphetamine), *cert. denied*, 444 U.S. 1019 (1980)). *See also* *United States v. McCrea*, 583 F.2d 1083, 1085-86 (9th Cir. 1978) (search of basement within scope of warrant because affidavit established that contraband was stored there); *United States v. Roche*, 614 F.2d 6, 8 (1st Cir. 1980) (warrant could have been cured if affidavit had been incorporated).

Defendants also contended that no probable cause existed to search the cabin after the discovery of the methamphetamine laboratory in a motor home.³⁰⁸ The court summarily rejected this argument, holding that it was reasonable to believe that some paraphernalia would have remained behind in the cabin. Furthermore, a beeper that agents had placed in the canister of methylamine indicated that it was in the cabin.³⁰⁹ Therefore, the search warrant was held to be valid and the items seized within the scope of the warrant.³¹⁰

In *United States v. Hillyard*,³¹¹ the court upheld the specificity of warrants to search for stolen vehicles at two locations.³¹² The defendant was suspected of running a stolen vehicle operation. The affidavit submitted in support of two search warrants described in detail the affiant's observations of the defendant's acquisition of stolen vehicles and storage at one or the other of the places to be searched. The affidavit also detailed the defendant's method of concealing the thefts by altering the identification numbers on the vehicles. The defendant was known to have a box full of vehicle serial number plates, titles, documents, and keys to fit different kinds of machinery. The search warrants were executed at both locations, and two stolen vehicles were recovered.

In attacking his conviction for interstate transportation of stolen motor vehicles, concealment of stolen motor vehicles, and interstate transportation of stolen property, the defendant contended the search was a general one and beyond the scope of that which a warrant can properly authorize.³¹³ The Ninth Circuit disagreed.³¹⁴

The court held it was proper to direct a search of both of the locations identified in the affidavit because it was reasonable to conclude that stolen vehicles would be found at either or both of the premises.³¹⁵ When property to be seized is being moved from place to place, it may be reasonable to issue warrants directed to multiple locations.³¹⁶

The requirement that a warrant not be a general one is derived in

308. 667 F.2d at 1323.

309. *Id.*

310. *Id.* at 1322-23, affirming the conviction.

311. 677 F.2d 1336 (9th Cir. 1982).

312. *Id.* at 1339.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* (citing *United States v. Johnson*, 641 F.2d 652, 659 (9th Cir. 1981) (reasonable to search for cocaine at defendants' residence); *United States v. Hendershot*, 614 F.2d 648, 654 (9th Cir. 1980) (evidence could be sought either in car or house)).

substance from the particularity requirement of the fourth amendment,³¹⁷ and insures that nothing is left to the discretion of the officer executing the search warrant.³¹⁸ The court reasoned, though, that this does not preclude the use of generic language in special circumstances.³¹⁹ The court held that when probable cause exists to believe the premises to be searched contain a class of generic items, only some of which are contraband, a search warrant may direct inspection of all items if there are objective, well-defined criteria by which the executing officers can distinguish contraband from lawfully possessed property.³²⁰ The warrant itself or the affidavit must incorporate the standards to be used by the officers to avoid the seizure of protected property.³²¹ In the instant case, the executing officers used the guidelines set forth in the affidavit to distinguish stolen vehicles from those lawfully owned.³²² Therefore, the search was valid.³²³

In *United States v. Allen*,³²⁴ the Ninth Circuit upheld the specificity of a warrant issued to search the ranch of one of the defendants.³²⁵

317. The fourth amendment states "no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

318. 677 F.2d at 1339 (citing *Marron v. United States*, 275 U.S. 192, 196 (1927), for the proposition that the particularity requirement makes general searches impossible and therefore nothing is left to the discretion of the officer executing the warrant).

319. 677 F.2d at 1339-40 (citing *United States v. Cook*, 657 F.2d 730, 733 (5th Cir. 1981) (discussing cases upholding warrants with generic descriptions); *United States v. Federbush*, 625 F.2d 246, 251 (9th Cir. 1980) (warrant proper because it specified the crime and the enterprise to which the items listed were to pertain); *Andresen v. Maryland*, 427 U.S. 463, 479-82 (1976) (upholding search warrant listing in generic terms various types of documents and including catch-all phrase interpreted as authorizing search for other evidence relevant to criminal fraud involving certain real estate)).

320. 677 F.2d at 1340 (citing *United States v. Klein*, 565 F.2d 183, 188 (1st Cir. 1977) (warrant held to be invalid because the affidavit did not establish a method to differentiate contraband from the rest of the inventory); *Montilla Records of Puerto Rico, Inc. v. Morales*, 575 F.2d 324, 326-27 (1st Cir. 1978) (warrant was similarly invalid for lack of method of differentiation)). See also *United States v. Abrams*, 615 F.2d 541, 545 (1st Cir. 1980) (if the means of identification required some analysis and matching there would be sufficient guarantee of particularity).

321. 677 F.2d at 1340 (citing *In re Seizure of Property Belonging to Talk of the Town Bookstore, Inc.*, 644 F.2d 1317, 1319 (9th Cir. 1981) (warrant expressly limited the property subject to seizure to that described in detail in the attached affidavits); *United States v. Klein*, 565 F.2d 183, 186 n.3 (1st Cir. 1977) (warrant made no reference to affidavit and affidavit did not accompany the warrant)).

322. 677 F.2d at 1341. The affidavit explained that vehicle alterations could be discovered by comparing secret identification numbers with those openly displayed, that true numbers could be checked with police computerized lists, and that some engine serial numbers could be checked with lists provided by sellers of heavy equipment.

323. *Id.*, affirming the conviction.

324. 633 F.2d 1282 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981).

325. *Id.* at 1292.

The defendants were the subject of an intense investigation into an amphibious operation to import over eight tons of marijuana. Pursuant to the arrests on the night of the attempted offloading of the marijuana, a search warrant was issued to search the defendant's ranch for marijuana and any "papers and documents"³²⁶ relating to its distribution. Two small amounts of marijuana and a receipt identifying one of the defendants as the owner of a vehicle involved in the crime were seized.

On appeal from convictions for possession of marijuana with intent to distribute,³²⁷ conspiracy to possess marijuana with intent to distribute,³²⁸ and conspiracy to import marijuana,³²⁹ the defendants contended that the warrant was defectively overbroad.³³⁰

The court rejected the defendants' argument.³³¹ While noting the United States Supreme Court's concern for warrants that authorize the seizure of "papers and documents,"³³² the court reasoned that warrants with language similar to that as in the instant warrant have been upheld on appeal in other cases.³³³ The court stated that in any event, the items seized were cumulative evidence of facts established primarily through other evidence.³³⁴

In *United States v. Crozier*,³³⁵ the court held that the warrants which authorized the search of defendants' residences were overbroad and therefore invalid.³³⁶ The defendants were charged with the manufacture and possession of methamphetamine with intent to distribute,³³⁷ conspiracy and tax evasion.³³⁸ In the district court, the

326. *Id.* at 1291.

327. 21 U.S.C. § 841(a)(1) (1976); for statutory definition *see supra* note 300.

328. 21 U.S.C. § 846 (1976); for statutory definition *see supra* note 300.

329. 21 U.S.C. § 963 (1976) provides in pertinent part: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable"

330. 633 F.2d at 1292.

331. *Id.*, affirming the convictions.

332. *Id.* (citing *Andresen v. Maryland*, 427 U.S. 463, 480-83 (1976) (there are grave dangers inherent in executing a warrant authorizing a search and seizure of personal paper)).

333. 633 F.2d at 1292 (citing *United States v. Dubrofsky*, 581 F.2d 208, 213 (9th Cir. 1978) (evidence of residency and narcotics); *United States v. Prewitt*, 553 F.2d 1082, 1086 (7th Cir.) (correspondence addressed to the defendant), *cert. denied*, 434 U.S. 840 (1977); *United States v. Johnson*, 541 F.2d 1311, 1313-15 (8th Cir. 1976) (marijuana and paraphernalia)). *See also* *United States v. Coppage*, 635 F.2d 683, 686-87 (8th Cir. 1980) (papers relating to manufacture and distribution of methamphetamine); *United States v. Brock*, 667 F.2d 1311, 1322 (9th Cir. 1982) (notes used in manufacture of methamphetamine). *But see* *United States v. Crozier*, 674 F.2d 1293, 1298 (9th Cir. 1982) (warrant authorizing seizure of papers indicating ownership and control of premises was defectively overbroad).

334. 633 F.2d at 1292.

335. 674 F.2d 1293 (9th Cir. 1982).

336. *Id.* at 1298-99.

337. 21 U.S.C. § 841(a)(1) (1976); for statutory definition *see supra* note 300.

defendants successfully moved to suppress physical evidence recovered from their residences pursuant to the search warrants.³³⁹ The search warrant for one of the residences authorized the seizure of amphetamines, notes, formulas, and any indicia of ownership and control of the premises. The other search warrant did not describe any particular property but rather authorized the seizure of any material evidence relating to the aforementioned crimes.³⁴⁰

On appeal, the Government contended that the search warrant was sufficiently specific because it enabled the searching officers to reasonably ascertain the objects to be seized.³⁴¹ The Ninth Circuit disagreed, however, holding that the warrants allowed the agents wide discretion in their search, as evidenced by the many irrelevant papers seized.³⁴² The court reasoned that the fourth amendment prohibits general searches, and therefore nothing could be left to the discretion of the officer executing the search warrant.³⁴³ Distinguishing the cases cited by the Government as involving narrowly drawn warrants,³⁴⁴ the court found the warrants in the instant case to be overbroad.³⁴⁵

In *United States v. Cardwell*,³⁴⁶ the defendants successfully challenged the specificity of a search warrant issued for their offices.³⁴⁷ One

338. 26 U.S.C. § 7201 (1976) provides in pertinent part: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony"

339. 674 F.2d at 1296.

340. *Id.* at 1298-99.

341. *Id.* at 1298 (citing *United States v. Coppage*, 635 F.2d 683, 686-87 (8th Cir. 1980) (search warrant authorizing the seizure of any and all books, records, chemical equipment and personal papers relating to the manufacture and distribution of methamphetamine held to describe the things to be seized with sufficient particularity so as to protect the defendant's right to be free from general searches)). *See also* *United States v. Brock*, 667 F.2d 1311, 1322 (9th Cir. 1982) (search warrant for chemicals, glassware, notes, instructions and formulas utilized in the manufacture of methamphetamine upheld as it described with great specificity the objects of the search), *cert. denied*, 103 S. Ct. 1271 (1983).

342. 674 F.2d at 1298.

343. *Id.* at 1299 (citing *Andresen v. Maryland*, 427 U.S. 463, 480 (1976)). *See also supra* notes 317 & 318 and accompanying text.

344. 674 F.2d at 1298 (citing *United States v. Federbush*, 625 F.2d 246, 251 (9th Cir. 1980) (warrant which authorized the seizure of all documents, papers, and mechanical instruments associated with issuing documents pertaining to the Windward International Bank of Kingston, St. Vincent, in the West Indies upheld as sufficiently specific); *United States v. Louderman*, 576 F.2d 1383, 1389 (9th Cir.) (held that a warrant which authorized the seizure of materials pertaining to the efforts of the defendants to obtain confidential telephone company information about certain individuals was not general and therefore was valid), *cert. denied*, 439 U.S. 896 (1978)).

345. 674 F.2d at 1298-99, affirming order suppressing evidence.

346. 680 F.2d 75 (9th Cir. 1982).

347. *Id.* at 78.

of the defendants' employees notified the Internal Revenue Service (IRS) that the defendants were incorrectly reporting income on the corporate tax returns. Company income had been diverted to the defendants and they had caused checks to be issued for nonexistent services, which were then deducted as business expenses. IRS agents conducted an audit, finding indications of fraud. A search warrant was obtained for the defendants' offices. The warrant authorized the seizure of corporate books and records which were the fruits and instrumentalities of violations of the general tax evasion statute.³⁴⁸ IRS agents seized 160 boxes of corporate records containing over 100,000 documents dating back nine years. Defendants were convicted of aiding in the preparation of a false corporate tax return, willfully subscribing to a false corporate tax return, and conspiracy.

On appeal, the Ninth Circuit addressed the question of whether the search warrant described the items to be seized with sufficient particularity.³⁴⁹ The Government contended that the United States Supreme Court decision in *Andresen v. Maryland*³⁵⁰ compelled a similar result in this case.³⁵¹ The court, however, found *Andresen* distinguishable.³⁵² The warrant in this case contained no preambulatory statement limiting the search to evidence of particular criminal episodes.³⁵³ The only limitation on the search and seizure of the defendants' business records was the requirement that the records be evidence of tax evasion.³⁵⁴ The court held that limiting a search to only records that are evidence of the violation of a certain statute is generally not enough.³⁵⁵ The warrant must contain some guidelines to aid in the de-

348. 26 U.S.C. § 7201 (1976) provides in pertinent part: "Any person who willfully attempts in any manner to evade or defeat any tax . . . or the payment thereof shall . . . be guilty of a felony . . ."

349. 680 F.2d at 77.

350. 427 U.S. 463 (1976); *see supra* notes 303 & 319.

351. 680 F.2d at 77.

352. *Id.* The defendant in *Andresen* was suspected of fraud in connection with the sale of Lot 13T and other land transactions. The warrant authorized the seizure of only evidence of the crime of false pretenses with respect to the sale of Lot 13T. As so limited, the warrant was deemed sufficiently particularized.

353. *Id.*

354. *Id.*

355. *Id.* at 77-78. The court relied on *Alioto v. United States*, 216 F. Supp. 48 (E.D. Wis. 1963) (warrant to seize books and records which were instrumentalities of crime involving provisions of 18 U.S.C. § 1621 held to be impermissibly general); *United States v. Cook*, 657 F.2d 730 (5th Cir. 1981) (warrant authorizing the seizure of cassettes onto which copyrighted films had been transferred and recorded held to be invalid since it did not specify methods by which the items to be seized could be determined); *United States v. Abrams*, 615 F.2d 541 (1st Cir. 1980) (warrant authorizing the seizure of certain business and billing and medical records that evidenced a violation of 18 U.S.C. § 1001 held invalid for lack of description as

termination of what may or may not be seized.³⁵⁶ The warrant at issue contained no such guidelines.³⁵⁷ Therefore, the warrant was invalid.³⁵⁸

3. Execution of the warrant

In *United States v. Wright*,³⁵⁹ the Ninth Circuit upheld the propriety of utilizing the assistance of other law enforcement officers in the execution of a search warrant.³⁶⁰ Agents of the Federal Bureau of Alcohol, Tobacco and Firearms (ATF) executed a federal search warrant authorizing the seizure of a California driver's license. An agent from the California Bureau of Narcotics Enforcement (BNE) assisted in the search. A small black ledger containing narcotics notations, a drum of mannitol and \$7000 cash were also seized.³⁶¹

The defendant unsuccessfully contended that no independent justification existed for the presence of the BNE agent who discovered and seized the mannitol.³⁶² The court held that an officer executing a search warrant clearly may utilize the assistance of other law enforcement officers.³⁶³ The ATF agents' execution of the warrant required the assistance of the BNE agent.³⁶⁴ Thus, the presence of the BNE

to what specific records were to be seized); *United States v. Roche*, 614 F.2d 6 (1st Cir. 1980) (warrant authorizing seizure of books, records, and documents which were evidence of violation of the mail fraud statute held impermissibly broad); *In re Lafayette Academy, Inc.*, 610 F.2d 1 (1st Cir. 1979) (warrant authorizing seizure of books and papers that evidenced violations of a number of listed statutory provisions held invalid); and *United States v. Drebin*, 557 F.2d 1316 (9th Cir. 1977) (warrant authorizing the seizure of illegally reproduced and stolen copies of copyrighted films and documents relating to the manufacture and sale of such films in violation of 18 U.S.C. § 371 held invalid for lack of description as to how the items to be seized could be determined), *cert. denied*, 436 U.S. 904 (1978).

356. 680 F.2d at 78 (citing *United States v. Drebin*, 557 F.2d at 1322-23).

357. 680 F.2d at 78. The IRS had conducted a lengthy investigation before seeking the warrant. In conducting the audit particular attention was paid to those items indicated by the employee. The results of this investigation, however, were not used to refine the scope of the warrant.

358. *Id.*, suppressing all materials seized under the warrant and reversing the convictions.

359. 667 F.2d 793 (9th Cir. 1982).

360. *Id.* at 797.

361. *Id.* at 795. The defendant was convicted of tax evasion in violation of 26 U.S.C. § 7201 (1976), in connection with his sale of narcotics. 26 U.S.C. § 7201 (1976) provides in pertinent part: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony . . ."

362. 667 F.2d at 796.

363. *Id.* at 797 (citing 18 U.S.C. § 3105 (1976)). Section 3105 provides:

A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

364. 667 F.2d at 797.

agent was justified.³⁶⁵ Further, the court stated that the fact that the BNE agent was a state, rather than a federal, drug enforcement agent made no material difference.³⁶⁶

In *United States v. Johnson*,³⁶⁷ the court upheld the validity of a search warrant³⁶⁸ although it was not obtained in the manner prescribed by Rule 41 of the Federal Rules of Criminal Procedure.³⁶⁹ Pursuant to information received from a Drug Enforcement Agency agent, officers of the San Diego County Narcotics Task Force (NTF) began surveillance of the defendants. After observing a narcotics transaction taking place, the NTF agents entered the house and arrested the defendants.

To obtain a search warrant, an agent participated in a conference call with a municipal judge and a deputy district attorney. The search revealed, among other things, eleven pounds of cocaine and \$75,000 in cash.

On appeal from a conviction for conspiring to possess a controlled substance with intent to distribute³⁷⁰ and possession of a controlled substance with intent to distribute,³⁷¹ the defendants contended that the evidence should be suppressed because the warrant was issued by a state, and not a federal, magistrate.³⁷²

The court held that only a fundamental violation of Rule 41 required automatic suppression of evidence,³⁷³ and the defendants did

365. *Id.* (citing *United States v. Hare*, 589 F.2d 1291, 1296-98 (6th Cir. 1979) (upholding the seizure of narcotics by agents of the Drug Enforcement Agency participating in the execution of a search warrant which authorized ATF agents to search defendant's home for firearms and ammunition)).

366. 667 F.2d at 797 (citing *United States v. Cox*, 462 F.2d 1293, 1306 (8th Cir. 1972) (upholding a search conducted by Federal Bureau of Narcotics agents with the assistance of two city policemen), *cert. denied*, 417 U.S. 918 (1974)).

367. 660 F.2d 749 (9th Cir. 1981), *cert. denied*, 455 U.S. 912 (1982).

368. *Id.* at 753.

369. FED. R. CRIM. P. 41(c)(2)(A) provides: "If the circumstances make it reasonable to dispense with a written affidavit, a Federal Magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means."

370. 21 U.S.C. § 846 (1976) provides in pertinent part: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable"

371. 21 U.S.C. § 841(a)(1) (1976) provides in pertinent part: "it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"

372. 660 F.2d at 753.

373. *Id.* (citing *United States v. Vasser*, 648 F.2d 507, 510 (9th Cir. 1980) (only a fundamental violation of Rule 41 requires automatic suppression and a violation is fundamental only where it renders the search unconstitutional; tape-recorded affidavit cannot be classified as a fundamental violation), *cert. denied*, 450 U.S. 928 (1981)).

not argue that such a violation had taken place.³⁷⁴ The test to be applied in such a case, then, is whether there was prejudice in the sense that the search would not have occurred or would not have been so abrasive if Rule 41 had been followed, or whether there was evidence that Rule 41 was intentionally and deliberately disregarded.³⁷⁵ The court noted that the defendants did not argue that the search would not have occurred nor would have been less offensive if Rule 41 had been technically observed.³⁷⁶ Further, there was no evidence that the NTF agents deliberately and intentionally violated the rule.³⁷⁷ Rather, the record indicated that the warrant was proper under state procedure and that the only infirmity was that a federal magistrate had not issued the warrant.³⁷⁸ The agents discussed whether a federal warrant was necessary and decided it was not.³⁷⁹ After the search was completed, agents discovered that one of the suspects was a Colombian citizen and turned the case over to federal authorities.³⁸⁰ The court held that the agents acted in good faith, and thus the search warrant was valid.³⁸¹

The defendants also contested the validity of a second search warrant issued to search the residence of two of the defendants.³⁸² The court summarily rejected the notion that probable cause did not exist for the issuance of the search warrant.³⁸³ The affiant stated that additional evidence was likely to be found in the suspects' home.³⁸⁴ The court held that the information was sufficient to support the issuance of

374. 660 F.2d at 753.

375. *Id.* (citing *United States v. Vasser*, 648 F.2d at 510, (quoting *United States v. Burke*, 517 F.2d 377 (2d Cir. 1975):

[V]iolations of Rule 41 alone should not lead to exclusion unless (1) there was "prejudice" in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule.

Id. at 386-87)). For cases following the *Burke* rule, *see also* *United States v. Marx*, 635 F.2d 436, 441 (5th Cir. 1981); *United States v. Pennington*, 635 F.2d 1387, 1389-90 (10th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981); *United States v. Gitcho*, 601 F.2d 369, 372 (8th Cir.), *cert. denied*, 444 U.S. 871 (1979); *United States v. Searp*, 586 F.2d 1117, 1125 (6th Cir. 1978), *cert. denied*, 440 U.S. 921 (1979); *United States v. Radlick*, 581 F.2d 225, 228-29 (9th Cir. 1978); *United States v. Mendel*, 578 F.2d 668, 673 (7th Cir.), *cert. denied*, 439 U.S. 964 (1978); and *United States v. Turner*, 558 F.2d 46, 52-53 (2d Cir. 1977).

376. 660 F.2d at 753.

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.* at 752.

381. *Id.* at 753.

382. *Id.*

383. *Id.*, affirming the convictions.

384. *Id.*

a search warrant.³⁸⁵

In *United States v. Crawford*,³⁸⁶ the Ninth Circuit again upheld the validity of a search warrant that technically violated the requirements of Rule 41 of the Federal Rules of Criminal Procedure.³⁸⁷ The defendant was arrested in his home pursuant to a federal arrest warrant. During the execution of the arrest warrant, the officers lawfully observed several firearms, drug paraphernalia, drugs, and a single fifty dollar bill scattered throughout the house. The officers discussed obtaining a search warrant and decided against a federal warrant, believing that the federal government would not prosecute this type of case.³⁸⁸ A state warrant authorizing a search for counterfeit money was procured from a municipal court judge. A photograph of Crawford and \$150,000 in counterfeit money was seized.

On appeal from a conviction for uttering and possessing counterfeit Federal Reserve Notes,³⁸⁹ the defendant contended that compliance with Rule 41 of the Federal Rules of Criminal Procedure is mandatory, and that the state search warrant did not comply with that rule.³⁹⁰ The defendant further argued that the officers deliberately violated the provisions of the rule.³⁹¹ Therefore, according to the defendant, the warrant was invalid, and the evidence should have been suppressed.³⁹²

The court held that violations of Rule 41, if not of constitutional magnitude, should not lead to mandatory exclusion of evidence.³⁹³ Evidence should be excluded only if it can be shown that there was "prejudice" in the sense that the search would not have occurred or have been as offensive if Rule 41 were followed, or if there is evidence of an intentional and deliberate disregard for the provisions of the rule.³⁹⁴

385. *Id.* (citing *United States v. Dubrofsky*, 581 F.2d 208, 213 (9th Cir. 1978) (heroin, paraphernalia, passport, and alien registration card probably found at his home)).

386. 657 F.2d 1041 (9th Cir. 1981).

387. *Id.* at 1048. *See supra* note 369.

388. 657 F.2d at 1046. It was the United States Attorney's office policy not to authorize prosecution on the basis of one counterfeit note and it was Secret Service policy not to obtain search warrants for drugs, guns and stolen property.

389. 18 U.S.C. § 472 (1976) provides in pertinent part: "Whoever, with intent to defraud, passes, utters . . . or attempts to pass, utter . . . or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined . . ."

390. 657 F.2d at 1045.

391. *Id.*

392. *Id.* at 1046.

393. *Id.* at 1047.

394. *Id.* (citing *United States v. Burke*, 517 F.2d 377, 386-87 (2d Cir. 1975); *United States*

The defendant did not, in the court's view, produce any evidence to indicate that he had been prejudiced by the officer's failure to comply with the technical provisions of Rule 41.³⁹⁵ Further, the record indicated that the decision to seek a state, rather than federal, warrant was made in good faith.³⁹⁶ The court therefore held that the technical violations of Rule 41 under the facts as established did not require the application of the exclusionary rule.³⁹⁷

4. Administrative

In *Bunker Hill Co. Lead & Zinc Smelter v. United States Environmental Protection Agency*,³⁹⁸ the court upheld the Environmental Protection Agency's (EPA) authority to obtain an inspection warrant *ex parte*.³⁹⁹ The EPA, pursuant to the Clean Air Act,⁴⁰⁰ attempted to inspect the Bunker Hill Company's lead and zinc smelter complex in Idaho. After one inspector was denied entry into the plant because he was not an EPA employee,⁴⁰¹ the EPA obtained an inspection warrant from a federal magistrate authorizing that inspector's entry into the plant. Nonetheless, the inspection was refused.

On appeal from a judgment holding the warrant valid, the plaintiffs argued that the warrant should not have been issued *ex parte*.⁴⁰² In essence, they argued that because there was no need for surprise, the *ex parte* procedure should not have been employed.⁴⁰³ The Ninth Circuit held to the contrary.⁴⁰⁴ Relying on a previous decision⁴⁰⁵ in which the Ninth Circuit held that the Secretary of Labor had the authority to

v. Radlick, 581 F.2d 225, 228-29 (9th Cir. 1978)). See *supra* note 375 for a statement of the *Burke* rule.

395. 657 F.2d at 1047.

396. *Id.* at 1047-48. The court did not want to preclude cooperation between state and federal law enforcement officials.

397. *Id.* at 1048, affirming the conviction.

398. 658 F.2d 1280 (9th Cir. 1981).

399. *Id.* at 1285.

400. 42 U.S.C. §§ 7401-7642 (Supp. V 1981).

401. The primary issue in this case was whether a non-EPA employee may be allowed to conduct inspections under the authority of the Clean Air Act. The court held that independent contractors employed by the EPA were authorized to carry out inspections on the EPA's behalf. Bunker Hill's real concern was to protect its trade secrets. They were willing to allow a non-EPA employee to inspect the plant if he agreed to sign a hold harmless and secrecy agreement. The EPA refused to permit the hold harmless and secrecy agreement to be signed. The court rejected Bunker Hill's fear of dissemination of trade secrets as speculative and unwarranted. 658 F.2d at 1284.

402. 658 F.2d at 1282.

403. *Id.*

404. *Id.*

405. *Stoddard Lumber Co. v. Marshall*, 627 F.2d 984 (9th Cir. 1980).

obtain ex parte warrants to conduct Occupational Safety and Health Administration inspections, the court reasoned that surprise was not a necessary factor to an ex parte application.⁴⁰⁶ The agency simply had the authority to obtain its warrants ex parte.⁴⁰⁷

C. Warrantless Searches

1. The plain view doctrine

The "plain view" exception to the fourth amendment warrant requirement was given a detailed analysis by the United States Supreme Court in *Coolidge v. New Hampshire*.⁴⁰⁸ As with other fourth amendment exceptions, however, new fact situations consistently create new "gray areas" which escape easy application of the Supreme Court's somewhat extensive guidelines.⁴⁰⁹

The plain view doctrine dictates that incriminating evidence in the plain view of a law enforcement officer may be seized without a warrant if: (1) the intrusion immediately preceding the plain view observation is legitimized by one of the "jealously and carefully drawn"⁴¹⁰ fourth amendment exceptions,⁴¹¹ (2) the discovery is inadvertent,⁴¹² and (3) the evidence is obviously incriminating in nature.⁴¹³ The doc-

406. 658 F.2d at 1282.

407. *Id.*

408. 403 U.S. 443 (1970).

409. "The problem with the 'plain view' doctrine has been to identify the circumstances in which plain view has legal significance rather than simply the normal concomitant of any search, legal or illegal." *Id.* at 465.

410. *Jones v. United States*, 357 U.S. 493, 499 (1958). Due to the recent expansion of exceptions to the warrant requirements both in number and manner of application, it appears that reliance on language such as "a few specifically established and well-delineated exceptions," *Katz v. United States*, 389 U.S. 347, 357 (1967), is no longer justified. *See also United States v. Ross*, 456 U.S. 798, 825 (1982).

411. In *Coolidge v. New Hampshire*, 403 U.S. 443 (1970), the Court stated: "In each case, [the] initial intrusion is justified by a warrant or by an exception such as 'hot pursuit' or search incident to a lawful arrest, or by an extraneous valid reason for the officer's presence." *Id.* at 467. Later, the Court stated: "[P]lain view *alone* is never enough to justify the warrantless seizure of evidence." *Id.* at 468 (emphasis in original).

412. *Id.* at 469.

413. The Court in *Coolidge* makes several references to what constitutes "incriminating" evidence: "An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of *incriminating* character." *Id.* at 465 (citations omitted) (emphasis added). "[T]he 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an *incriminating* object." *Id.* at 466 (citations omitted) (emphasis added). "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence *incriminating the accused*." *Id.* (emphasis added). "The extension of the

trine rests on the proposition that if an officer sees incriminating evidence in plain view from a lawful vantage point, a warrant is unnecessary.⁴¹⁴

Basing its decision on the plain view doctrine, the court in *United States v. Astorga-Torres*,⁴¹⁵ summarily upheld the warrantless seizure of documents from a toilet bowl.⁴¹⁶ Federal agents arranged to buy heroin from co-defendant Ambriz at a motel designated as a meeting place. Defendants traveled by car with Ambriz to the motel where, upon arrival, Ambriz was assigned to cabin 7 and defendants to cabin 4.⁴¹⁷ After consummating the sale with Ambriz and arresting him outside of cabin 7, the agents proceeded to cabin 4 where they knocked, identified themselves, and demanded entrance. When no one responded, one of the agents kicked in the door after hearing a clicking sound which he thought was the cocking of a firearm. A shooting ensued and the other defendants surrendered after tear gas was fired into the cabin. While conducting a protective sweep search of the cabin to check for other occupants,⁴¹⁸ the agent discovered and seized documents from the toilet bowl.⁴¹⁹ Defendants' motion to suppress the documents as the products of an unlawful warrantless search was denied by the trial court.⁴²⁰

The Ninth Circuit concluded that the agents' demand and subsequent forcible entry into defendants' cabin without a warrant was lawful.⁴²¹ Citing *Coolidge v. New Hampshire*,⁴²² the court's entire analysis of the plain view issue consisted of this conclusion: "Once lawfully inside the cabin, it was proper for the agent to seize any evidence which

original justification is legitimate only where it is *immediately apparent* to the police that they have evidence before them." *Id.* (emphasis added). *See also id.* at 468, 471. The lower courts, however, have not uniformly adhered to this requirement.

414. "Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it." *Coolidge v. New Hampshire*, 403 U.S. at 467-68.

415. 682 F.2d 1331 (9th Cir.), *cert. denied*, 103 S. Ct. 455 (1982).

416. *Id.* at 1334-35.

417. *Id.* at 1333.

418. *Id.*

419. *Id.* at 1333-34. During the search, the agent removed "debris" including a wallet and papers from the toilet bowl, and placed them on top of the tank to dry. The cabin was sealed and later that night the "debris" was retrieved by the DEA.

420. *Id.* at 1335.

421. For discussion of the lawfulness of the officer's demand and subsequent entry into the cabin, see *infra* discussion of *Astorga-Torres* in Exigent circumstances.

422. 403 U.S. at 465-66.

he observed in plain view."⁴²³ Thus, the legality of the seizure of documents under the plain view doctrine was predicated upon the legality of the officer's initial intrusion.

The opinion failed to discuss the "inadvertence" requirement of whether the scope of the search was proper.⁴²⁴ Moreover, the court did not discuss the requirement that objects in plain view must be obviously incriminating before their seizure is lawful.⁴²⁵ Although the defendants moved to suppress the seized documents, no facts were given as to why the documents were incriminating or why the agent believed they were incriminating at the time of seizure.⁴²⁶ Because the facts given in the decision were scant and analysis was relatively brief, it can only be pointed out that the "incriminating" requirement seems to be fairly well-entrenched, at least in theory, in other circuits,⁴²⁷ but was

423. 682 F.2d at 1335.

424. If the agent was securing the premises for safety reasons, it was certainly reasonable for him to check the bathroom. Nevertheless, it is left to the reader to assume that when the agent entered the bathroom, the toilet seat was up and the documents were plainly visible in the bowl.

While the court's main justification for the agent's entry into the cabin was that of a protective search, it did not seem convinced that the agent was in any danger from accomplices remaining in the cabin. "While the presence of anyone else in the cabin was most unlikely, officers who have been subjected to pistol fire . . . can hardly be said to be acting unreasonably when they take steps to make sure of their safety." *Id.* at 1334-35. Additionally, while the agent may have been justified in lifting the toilet seat and checking the bowl for evidence (the toilet bowl is a standard and common depository used by holders of contraband when presented with startling circumstances) under a different exception, i.e., search incident to arrest to prevent destruction of evidence (*cf.* *Michigan v. Tyler*, 436 U.S. 499, 510 (1978) (cited in *Astorga-Torres* at 1335)), such a lifting of the lid could not have constituted an inadvertent discovery for purposes of the plain view doctrine. *See Coolidge v. New Hampshire*, 403 U.S. 443, 469-70 (1970).

425. *Coolidge v. New Hampshire*, 403 U.S. at 466. The Supreme Court, however, may be softening its requirement that the evidence be "obviously incriminating." In the more recent case of *Payton v. New York*, 445 U.S. 573 (1980), the Court stated that there must be "probable cause to associate the property with criminal activity." *Id.* at 587.

426. The recovery of the documents may have been justified to prevent the destruction of evidence. *See supra* note 424. This is suggested by the *Astorga-Torres* court: "[H]ad the material in the toilet bowl not been removed, any indication that the bowl had once contained heroin might well have been lost." 682 F.2d at 1335.

427. *See, e.g.*, *United States v. Wilson*, 524 F.2d 595 (8th Cir. 1975) (incriminating nature of evidence seized must be immediately apparent; observation of gun barrel protruding from duffel bag led to seizure of gun under plain view doctrine), *cert. denied*, 424 U.S. 945 (1976); *United States v. Anderson*, 552 F.2d 1296 (8th Cir. 1977) (incriminating nature of evidence seized must be obvious; defendant did not dispute incriminating nature of quantity of television sets); *United States v. Berenguer*, 562 F.2d 206 (2d Cir. 1977) (incriminating nature of article observed must be immediately apparent; billfold on top of bureau was not immediately inculpatory); *United States v. Nelson*, 448 F.2d 1304 (10th Cir. 1971) (sawed-off shotgun observed in officer's plain view was properly seized because it was an incriminating object); *United States v. Bills*, 555 F.2d 1250 (5th Cir. 1977) (sixty-five weapons were prop-

not addressed by the Ninth Circuit in this case.⁴²⁸

In *United States v. Wright*,⁴²⁹ however, the Ninth Circuit reversed defendants' conviction for tax evasion, holding that the seizure and perusal of a ledger could not be justified by the plain view exception because the evidence seized was not obviously incriminating. Agent Kelly of the Federal Bureau of Alcohol, Tobacco and Firearms, and other federal agents conducted a search of Wright's apartment pursuant to a valid search warrant which authorized the seizure of the driver's license of one Deborah Luckie.⁴³⁰ Investigator Frantzman of the California Bureau of Narcotics Enforcement also helped conduct the search.⁴³¹

During the search for the driver's license, Frantzman discovered a

erly seized because of sufficiently incriminating character, and officer was not required to know weapons were unregistered before seizure).

Other decisions recognize and have attempted to define the obviously incriminating requirement. *See, e.g.*, *United States v. Ross*, 527 F.2d 984 (4th Cir. 1975) ("For an object to be 'incriminating' for constitutional purposes, the seizing authority need only have reasonable or probable cause to believe that the object is evidence of a crime." *Id.* at 985 (citations omitted). In *Ross*, the seizure of two handguns in plain view was upheld.), *cert. denied*, 424 U.S. 945 (1976); *United States v. Shye*, 473 F.2d 1061 (6th Cir. 1973) (article must "constitute evidence, a fruit or an instrumentality of the crime." *Id.* at 1066. In *Shye*, the seizure of money found in a plain brown bag was held unlawful.); *United States v. Rollins*, 522 F.2d 160 (2d Cir. 1975) (court recognized that articles must be incriminating, but stated that "[s]eizure of mere evidence, as well as instrumentalities or contraband, is justified." *Id.* at 166 (citations omitted). In *Rollins*, seizure of passports evidencing intent to quickly leave the jurisdiction was upheld.), *cert. denied*, 424 U.S. 918 (1976); *United States v. Teller*, 412 F.2d 374 (7th Cir. 1969) (fact that index cards were evidence as opposed to fruits or instrumentalities of a crime did not preclude seizure under plain view doctrine), *cert. denied*, 402 U.S. 949 (1971).

Only the D.C. Circuit has consistently ignored the obviously incriminating requirement. *See, e.g.*, *United States v. Thweatt*, 433 F.2d 1226 (D.C. Cir. 1970) (plain view doctrine justifies seizure of items which police "recognize to be of importance to the prosecution of the arrestee . . ." *Id.* at 1232. In *Thweatt*, seizure of jackets hanging in closet upheld.); *United States v. Wheeler*, 459 F.2d 1228 (D.C. Cir. 1972) (seizure of closed brown envelope from ashtray upheld because officer suspected it contained narcotics); *United States v. Mason*, 523 F.2d 1122 (D.C. Cir. 1975) (officer's seizure of car keys from arrestee's apartment upheld).

428. In *United States v. Finnegan*, 568 F.2d 637 (9th Cir. 1977), the Ninth Circuit summarily concluded that the seizure of a gun and a large amount of money in plain view in an automobile was lawful because they "reasonably appear[ed] to be the instrumentalit[ies] of a crime." *Id.* at 640.

429. 667 F.2d 793 (9th Cir. 1982).

430. *Id.* at 795. Luckie was believed to be sharing Wright's residence with him. *Id.*

431. *Id.* After the warrant was issued, Kelly asked Frantzman to participate in the search because: (1) Frantzman was assisting federal agents in another investigation of narcotics conspiracy involving Wright, (2) Wright had a reputation as a narcotics dealer, and (3) Frantzman's knowledge of narcotics was extensive. *Id.*

drum of mannitol,⁴³² and Kelly found a small black ledger.⁴³³ Kelly then gave the ledger to Frantzman, who examined it and concluded that the notations involved drug trafficking.⁴³⁴ The ledger was seized and introduced into evidence at trial.⁴³⁵ Wright was convicted of tax evasion in violation of 26 U.S.C. section 7201,⁴³⁶ based on the inference that the source of his income was the sale of narcotics.⁴³⁷

On appeal, Wright contended that the plain view seizure of the mannitol was unlawful because Frantzman's participation in the search was unjustified.⁴³⁸ The court recognized that the plain view exception requires "the seizing officer [to] have a prior independent justification for being present at the point of observation,"⁴³⁹ but held that Kelly's good faith utilization of Frantzman was clearly lawful.⁴⁴⁰

The court discussed the requirements of the plain view doctrine as set forth by the Supreme Court in *Coolidge v. New Hampshire*,⁴⁴¹ and then specifically addressed Wright's contention that the ledger was not obviously incriminating evidence of a crime.⁴⁴² The court recognized that the incriminating nature of an item in plain view must be "immediately apparent" to the seizing officer to prevent "exploratory rummaging."⁴⁴³ The court then stated, however, that a "closer inspection" of the item may be necessary to discover its "immediately apparent" incriminating nature.⁴⁴⁴ The *Wright* court then stated the issue as be-

432. Although mannitol is a nutrient that has a number of legal uses, it is also used as a cutting agent for cocaine and heroin. *Id.* at 795 n.2.

433. Cash in the amount of \$7,000, a .38 caliber revolver, and Ms. Luckie's driver's license were also found during the search. *Id.* at 795.

434. *Id.*

435. *Id.* at 795-96. The drum of mannitol and the \$7,000 in cash were also introduced into evidence. *Id.*

436. 26 U.S.C. § 7201 (1976) states:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

437. 667 F.2d at 796. The Government used a complex net worth method of calculating taxable income in its case against Wright. *Id.* at 795.

438. *Id.* at 796.

439. *Id.* (citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); see *supra* note 4 and accompanying text).

440. 667 F.2d at 797. The court also held that it made no difference that Frantzman was a state, rather than federal, officer. For a full discussion of the issue of Frantzman's participation in the search, see *Search Warrants*.

441. 403 U.S. 443 (1970). See *supra* notes 408-414 and accompanying text.

442. 667 F.2d at 795.

443. *Id.* at 797.

444. *Id.*

ing not *whether* an officer may conduct a closer examination of an item seized in his plain view, but *when* he may do so.⁴⁴⁵ Quoting Professor LaFave⁴⁴⁶ and citing a number of federal and state decisions in a footnote,⁴⁴⁷ the court held that a closer inspection of a "plain view" item

445. *Id.* The only authority for the "closer inspection" theory was stated by the court in a footnote: "In *United States v. Chesher*, 654 F.2d 1285, 1292-93 n.7 (9th Cir. 1981), we recognized that it is occasionally necessary to peruse an item to determine whether an item is evidence of a crime." 667 F.2d at 798 n.4. The *Chesher* opinion cited by the court, however, has been withdrawn from the bound Federal Reporter volume at the request of the court.

446. 667 F.2d at 798.

[E]ven "mere inspection" of items seen but not named in the warrant must be reasonable, and for such a minimal intrusion to be reasonable the officers must first be aware of some facts and circumstances which justify a reasonable suspicion (not probable cause) that the items are the fruits, instrumentalities, or evidence of a crime.

Id. (citing 2 W. LAFAVE, SEARCH AND SEIZURE § 4.11 at 174 (1978)).

447. 667 F.2d at 798 n.5. The court cited the following cases: *United States v. Chesher*, 654 F.2d 1285, 1292-93 (9th Cir. 1981) (of which the *Wright* court stated: "[W]e upheld the plain view seizure of a drug laboratory not described in the search warrant because the police had probable cause to believe it to be evidence of a crime."); *United States v. Ochs*, 595 F.2d 1247, 1258 (2d Cir.) (*Wright* court stated that the decision in *Ochs*, "discuss[ed] the 'highly suspicious' nature of two bankbooks and two notebooks as justifying their perusal." 667 F.2d at 798 n.5. The *Ochs* court stated, however, that "[e]ven under the plain view doctrine in [sic] the incriminating nature of an object is generally deemed "immediately apparent" where police have *probable cause* [not a reasonable suspicion] to believe it is evidence of crime." 595 F.2d at 1258. (emphasis added)), *cert. denied*, 444 U.S. 995 (1979); *United States v. Duckett*, 583 F.2d 1309 (5th Cir. 1978) (*Wright* court stated that in *Duckett* the "officer knew 'that something was amiss' when he seized envelopes found in Duckett's car while searching for the vehicle identification number." 667 F.2d 798 n.5. The court in *Duckett* found that the officer had probable cause to believe an offense was being committed in his presence without stating that probable cause was required before conducting a closer examination of an item.); *United States v. Hamilton*, 328 F. Supp. 1219 (D. Del. 1971) (Of *Hamilton*, the *Wright* court stated that the "officer knew gun was evidence of a crime upon seeing that it was without a serial number." 667 F.2d at 798 n.5. In *Hamilton*, officers, while conducting a search with a warrant, opened an unlocked attache case, observed a sawed-off shotgun and examined it further. While the court held that the discovery of the gun was "inadvertent," there was no discussion of the "obviously incriminating evidence" requirement, and no recital that the officer had either a "reasonable suspicion" or "probable cause" to believe that the gun was evidence of a crime. Although the decision did not state whether it was unlawful to possess a sawed-off shotgun, it seems that if the presence of the gun was unlawful, the officer's search for a serial number was justifiable. Moreover, if possession of the gun was lawful, it was not obviously incriminating and the officers were not justified in picking it up and examining it more closely.); *People v. De La Fuente*, 92 Ill. App. 3d 525, 529-30, 414 N.E.2d 1355, 1359 (1981) (The *Wright* court said of the decision in *De La Fuente*: "[The] officer had [a] 'reasonable belief' that [the] wallet contained evidence of criminal activity." 667 F.2d at 798 n.5. At least two distinguishing aspects of *De La Fuente* should be noted, however. First, the standard actually used by the court to judge the legality of the plain view seizure of the wallet was not "reasonable suspicion," but "probable cause." Second, the court concluded that, prior to closer examination of the wallet (during which the officer discovered that the wallet contained identification belonging to a mugging victim), the officer had probable cause to believe that the wallet was evidence of a crime and was therefore justified in seizing it without conducting a closer perusal.).

may be conducted if a "reasonable suspicion" exists that the item is evidence of a crime.⁴⁴⁸ The court admonished the use of the plain view exception to justify "exploratory rummaging" and discussed cases in support of this limitation of the doctrine.⁴⁴⁹

448. 667 F.2d at 798. It is not clear why the court felt it necessary to discuss the "reasonable suspicion" issue. Wright's conviction was reversed on the basis that the examination of the ledger was not properly within the scope of the plain view exception. The court merely could have recited the "obviously incriminating evidence" requirement and held that any perusal of the ledger other than to look for the driver's license was unlawful. Instead, it held that no "reasonable suspicion" existed to merit a closer inspection. *Id.* at 799.

It is possible that this approach was taken to clarify language set forth by the Ninth Circuit in *United States v. Damitz*, 495 F.2d 50 (9th Cir. 1974). The *Wright* court distinguished *Damitz* stating:

In *United States v. Damitz*, 495 F.2d 50, 56 (9th Cir. 1974), we upheld the seizure of a small notebook lying next to small scales and found after the discovery of marijuana bricks during a warranted search for "marijuana together with paraphernalia for packaging marijuana." In doing so, we applied the plain view doctrine even though the officer ascertained the incriminating nature of the notebook only upon examining the notations it contained. The *Damitz* warrant was for drugs and the notebook was found on the counter next to scales commonly used in connection with drug sales. Arguably there was probable cause to believe the notebook contained criminal evidence because of its location Moreover, the notebook was related to the general purpose of the authorized search. The case before us is clearly distinguishable. First, the *Wright* ledger was not found in close proximity to other incriminating evidence. Second, the *Wright* warrant authorized a search for a driver's license, not for evidence of narcotics activity.

667 F.2d at 799 n.7.

However, in *Damitz*, there was no recognition of the "obviously incriminating evidence" requirement. The *Damitz* court, citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), merely concluded that the search was lawful under the plain view exception because it was conducted pursuant to a valid search warrant and because the evidence was discovered inadvertently. *United States v. Damitz*, 495 F.2d at 56.

449. 667 F.2d at 799 & n.6. The court cited the following cases in the text of its decision: *Stanley v. Georgia*, 394 U.S. 557, 569-72 (1969) (Stewart, J., concurring) (During a warranted search for bookmaking material, agents discovered films which they viewed through the appellant's projector and determined to be obscene. The Court reversed the conviction on first amendment grounds. Justice Stewart, however, took the position that the films were the product of an illegal search and, because of the officers' examination, the seizure could not be justified by the plain view doctrine.); *Anderson v. State*, 555 P.2d 251 (Alaska 1976) (photographic slides viewed by officers by holding them up to a light held not a plain view search); *State v. Shinault*, 120 Ariz. 213, 584 P.2d 1204 (Ariz. App. 1978) (officers' perusal of entries in closed pad of paper not within plain view exception because evidentiary value not immediately apparent); *Commonwealth v. Bowers*, 217 Pa. Super. 317, 274 A.2d 546 (1970) (serial number inside television set not in plain view when officer located number by removing back of set).

The *Wright* court also cited the following cases in a footnote: *State v. Turkal*, 93 N.M. 248, 599 P.2d 1045 (1979) (recording tapes seized during a warranted search for marijuana and photographs should have been suppressed because plain view doctrine did not give officers a right to listen to the tapes); *State v. Murray*, 84 Wash. 2d 527, 527 P.2d 1303 (1974) (seizure of serial number from television set obtained by tilting the set not justified by plain view exception because officers could not have reasonably concluded that the set was incriminating evidence). The Ninth Circuit also compared *State v. Stagner*, 12 Or. App. 459, 506

In concluding that the examination of the ledger by Frantzman was illegal, the court observed that searching the ledger for the driver's license did not require examination of the ledger's written contents.⁴⁵⁰ The court stated that "nothing about the ledger, its whereabouts or contents immediately indicated to Kelly that the ledger contained evidence of a crime."⁴⁵¹ Because none of the facts gave rise to a "reasonable suspicion" that the ledger constituted evidence of a crime, the court held that the seizure and delivery of the ledger to Frantzman by Kelly and the inspection of its contents by Frantzman were unlawful.⁴⁵²

In *United States v. Hillyard*,⁴⁵³ the Ninth Circuit again considered the "obviously incriminating evidence" requirement of the plain view exception. In *Hillyard*, however, the examinations by officers of a logbook, a notebook, and a map were upheld by the court as falling squarely within the "plain view" exception.

A magistrate issued search warrants which "'commanded' the executing officers 'to search all motor vehicles and heavy equipment found on the premises to determine if said vehicles [were] stolen and to seize those vehicles which possess[ed] altered or defaced identification numbers or which [were] otherwise determined to be stolen.'"⁴⁵⁴ While searching one truck, the officers found a driver's logbook, a spiral notebook, and inside the notebook, a hand-drawn map. These were seized by the searching officers when they realized that the contents placed Hillyard in a certain locale at the time and place of various thefts.⁴⁵⁵

The court cited its decision in *Wright* for the proposition that an officer may inspect an item seized in plain view if there exists a "reasonable suspicion" that it constitutes evidence of a crime.⁴⁵⁶ Here, the perusal of the items was upheld because it was reasonable for the of-

P.2d 510 (1973) (officer's inadvertant observation that television set serial number had been scratched off gave him probable cause to believe set was stolen). 667 F.2d at 799 n.6.

450. 667 F.2d at 799.

451. *Id.* (footnotes omitted). See *United States v. Damitz*, 495 F.2d at 56.

452. 667 F.2d at 799.

453. 677 F.2d 1336 (9th Cir. 1982).

454. *Id.* at 1339. The court held the warrants valid and determined that the scope of the officers' search was permissible. For a full discussion of this aspect of *Hillyard*, see *supra* *Search Warrants*.

455. *Id.*

456. *Id.* at 1342. As in *Wright*, the court cited *United States v. Ochs*, 595 F.2d 1247 (2d Cir. 1979), stating that "other courts have validated searches of suspicious documents under the plain view exception even though a perusal, generally brief, of the documents was necessary to perceive their relevance." 677 F.2d at 1342.

ficers to believe that the items were connected with Hillyard's alleged stolen automobile scheme. The court distinguished *Wright*, stating that neither the ledger seized in *Wright* nor its location suggested any involvement in criminal activity. "Its incriminating nature was revealed only after a close examination and minute inspection."⁴⁵⁷

The Ninth Circuit noted that the facts presented in *Hillyard*, however, closely resembled those in *United States v. Damitz*.⁴⁵⁸ In *Damitz*, the Ninth Circuit "upheld the warrantless seizure of a notebook that was shown, after examination, to contain evidence of drug sales, when the notebook was found during a valid search for drugs and drug paraphernalia, in plain view next to the drug paraphernalia."⁴⁵⁹ The examination in *Hillyard* was therefore upheld because the map, notebook, and logbook were found not only close to, but inside, a stolen vehicle and because the items were " 'related to the general purpose of the authorized search.' "⁴⁶⁰

The only other guidance the court offered as to whether the plain view items may be more closely examined is a determination of their proximity in relation to other incriminating evidence.⁴⁶¹ The court did not set forth other criteria as to what might give rise to a "reasonable suspicion" of criminal activity, and it took no further steps to develop its new principle.

In *United States v. Chesher*,⁴⁶² the Ninth Circuit again addressed the "obviously incriminating evidence" requirement of the plain view exception. Federal agents conducted a sweep search of Chesher's home pursuant to arrest and search warrants,⁴⁶³ and one agent discovered

457. *Id.* (citing *United States v. Wright*, 667 F.2d 793, 799 (9th Cir. 1982)).

458. 495 F.2d 50 (9th Cir. 1974).

459. 677 F.2d at 1342.

460. *Id.* The court's statement, however, that the evidence seized was related to the purpose of the search is an *ex post facto* rationalization. The officers could not have realized that the items seized were related to the purpose of the search until after they had examined them.

461. *Id.* The basic flaw in the court's discussion of *Damitz*, *Wright*, and *Hillyard* stems directly from its apparent conclusion that a closer examination is sometimes necessary to determine whether the incriminating nature of an item seized in plain view is "immediately apparent." See *supra* note 444 and accompanying text.

462. 678 F.2d 1353 (9th Cir. 1982).

463. *Id.* at 1355. The arrest warrant was issued pursuant to an indictment filed against Chesher and others in the Hells Angels Motorcycle Club for violations of 18 U.S.C. § 1962(c) (1976), commonly known as the Racketeer Influenced and Corrupt Organizations Act (RICO). *Id.* 18 U.S.C. § 1962(c) states in pertinent part:

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.

laboratory apparatus in one of the back rooms of the home.⁴⁶⁴

One of the federal agents was summoned and testified that on his way into the room, he smelled acetone, which he knew was used in the manufacture of methamphetamine.⁴⁶⁵ The agent turned on the light and observed an exhaust fan in the doorway, plastic covered walls, and laboratory glassware.⁴⁶⁶ The agent then sent another agent to obtain a supplemental warrant authorizing the search of the room, and gave orders not to conduct a search until the warrant arrived.⁴⁶⁷ The supplemental warrant arrived during the course of the initial warrant search, and the laboratory apparatus and a quantity of methamphetamine were then seized.⁴⁶⁸

The district court denied Chesher's motion to suppress the laboratory apparatus, holding that it was in plain view. Chesher was subsequently convicted of manufacturing a controlled substance in violation of 21 U.S.C. section 841(a)(1).⁴⁶⁹

Chesher argued that acetone has legal uses and that the agents' examination did not indicate that the laboratory was being used for illegal purposes. Therefore, the incriminating nature of the evidence could not have been apparent to the officers, and the seizure could not be justified by the plain view exception.⁴⁷⁰

The RICO charge against Chesher was later dropped pursuant to a motion made by the Government. 678 F.2d at 1355. The officers also obtained a *Prescott* warrant, which authorizes the search of a home for a person named in an accompanying arrest warrant. *Id.* at 1335 n.1 (citing *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978)). Also issued were "indicia warrants" authorizing a search of Chesher's residence and seizure of any indicia of association with the Hells Angels Motorcycle Club. 678 F.2d at 1355.

464. 678 F.2d at 1355.

465. *Id.* at 1355-56.

466. *Id.* at 1356.

467. *Id.*

468. *Id.*

469. *Id.* at 1355. 21 U.S.C. § 841(a)(1) (1976) states in pertinent part: "[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture . . . or possess with intent to manufacture . . . a controlled substance."

470. 678 F.2d at 1356. Chesher also contended that because the agents obtained a supplemental warrant before examining the laboratory, they could not have believed that the seizure was justified by the plain view exception. The court rejected this contention, stating that cautious police behavior should not be penalized. "Neither the delay in time between the initial discovery of the laboratory and its ultimate seizure, nor the obtaining of the warrant in the interim, nor the agent's belief that the eventual seizure was pursuant to the supplemental warrant, weighs against finding a valid plain view seizure. . . ." *Id.* at 1356 n.2.

Citing *United States v. Hood*, 493 F.2d 677, 680 (9th Cir.), *cert. denied*, 419 U.S. 852 (1974), and *United States v. Walling*, 486 F.2d 229, 236 (9th Cir. 1973), the court also stated that "the need for artificial illumination of an area or object does not preclude a valid plain view seizure." 678 F.2d at 1356 n.2. Therefore, the fact that the agent turned on the light in the back room was not legally significant. (In both *Hood* and *Walling*, articles in

The court observed that the Supreme Court had given almost no guidance about its "obviously incriminating evidence" requirement as set forth in *Coolidge v. New Hampshire*,⁴⁷¹ but concluded that it is not necessary that an object be "conclusively incriminating."⁴⁷² Quoting the decision in *United States v. Ochs*,⁴⁷³ the court specifically adopted the Second Circuit's rule that the "immediately apparent" requirement is met if the searching officers have probable cause to believe the item observed is evidence of a crime.⁴⁷⁴

The court asserted that this principle was legitimate because of the plain view exception's rationale: "If the benefit of permitting warrantless seizure . . . is avoidance of the inconvenience of obtaining a warrant for inadvertently discovered evidence, . . . it follows that an object's possible relevance as evidence need not be shown to any greater degree than would be sufficient to obtain a warrant were one sought."⁴⁷⁵ The court recited its new test: "[I]f facts sufficient to provide probable cause to believe an object is incriminating are immediately apparent to the officer, the third *Coolidge* requirement is met."⁴⁷⁶ The *Chesher* court held that the smell of acetone, the appearance of the room which housed the laboratory and the presence of the laboratory

automobiles were held to be in plain view even though officers used flashlights to illuminate the inside of the automobiles. See *Hood*, 493 F.2d at 680; *Walling*, 486 F.2d at 236.)

471. 403 U.S. 443 (1971).

472. 678 F.2d at 1356-57. In a footnote, the court cited three Supreme Court decisions other than *Coolidge* that have alluded to the obviously incriminating requirement: *Stanley v. Georgia*, 394 U.S. 557, 569-72 (1969) (Stewart, J., concurring) (would have held unlawful the seizure of films which were discovered inadvertently, but which officers had to view through defendant's projector in order to discover their obscene nature); *Sedillo v. United States*, 419 U.S. 947 (1974) (Douglas, J., dissenting from denial of writ of certiorari, disputed whether a forged check was in plain view when forgery was not discovered until after envelope containing check was seized from suspect's pocket and check removed from the envelope.); *Gentile v. United States*, 419 U.S. 979, 980 n.1 (1974) (Douglas, J., dissenting from denial of writ of certiorari, queried whether the plain view exception was properly invoked when officers examined a stolen check almost entirely hidden from view by wadded clothing.) 678 F.2d at 1356 n.2.

473. 595 F.2d 1247 (2d Cir. 1979). In *Ochs*, officers read and examined a variety of documents found in a briefcase seized from Ochs' possession. The court found that officers were justified in examining the documents by the plain view doctrine because they had probable cause to believe the items constituted evidence of a crime. The Second Circuit stated: "Even under the plain view doctrine in [sic] the incriminating nature of an object is generally deemed 'immediately apparent' where police have probable cause to believe it is evidence of a crime." *Id.* at 1258. See *Chesher*, 678 F.2d at 1357.

474. 678 F.2d at 1357.

475. *Id.*

476. *Id.* Although the Ninth Circuit has now conclusively established that the "immediately apparent" requirement is met if probable cause exists to believe an object is evidence of a crime, it is not clear whether any initial examination of an object, however brief, may supply the probable cause necessary to conduct a closer examination.

equipment presented the officers with probable cause to believe the laboratory was evidence of a crime. Therefore, its examination and subsequent seizure were justified by the plain view exception to the fourth amendment.⁴⁷⁷

In *United States v. Glenn*,⁴⁷⁸ defendant Glenn moved to suppress marijuana found in his car after being lawfully stopped for erratic driving. The motion was denied on the basis of the plain view doctrine. The arresting officer testified that he saw baggies of a leafy substance protruding from a jacket pocket on the front seat of the car. Under the jacket, he noticed a plastic bag also containing a leafy substance, protruding from a toolbox. The officer seized and opened the toolbox, discovering that it contained a number of plastic bags filled with marijuana.

Glenn conceded that the plain view doctrine was applicable if the officer's view of the facts was accepted, but testified at trial that the toolbox was covered with a blanket. Upholding the district court's denial of Glenn's motion to suppress, the court stated: "the court explicitly adopted [the officer's] version of the facts, and found that the search was authorized under the 'plain view' exception to the fourth amendment's warrant requirement."⁴⁷⁹

After Glenn's concession that the plain view doctrine was applicable if the officer's version of the facts was accepted, his only argument was that the trial court should have chosen his version instead of that of the officer.⁴⁸⁰ The court held that the trial court's finding of fact as to the officer's credibility was not clearly erroneous and should not be dis-

477. *Id.* Chesher's conviction was reversed on other grounds and remanded to the district court. *Id.* at 1364.

478. 667 F.2d 1269 (9th Cir. 1982).

479. *Id.* at 1271. See also *United States v. Coletta*, 682 F.2d 820 (9th Cir. 1982). In *Coletta*, a Drug Enforcement Agency informant was scheduled to buy a quantity of cocaine from the defendant in a car. The cocaine was in a zipped travel bag. After entering the car, the informant unzipped the defendant's bag and prepared to transfer the drugs to his own empty bag. The informant did not make this transfer because of defendant's insistence, but instead left both bags unzipped. The informant then signaled arresting agents. Defendant was arrested and both bags were seized from the car. *Id.* at 822. The agents testified that the contents of defendant's bag were plainly visible. The trial court denied defendant's motion to suppress the cocaine on the basis of the plain view doctrine. Defendant had testified at trial that his bag was zipped and on the car's rear floor, and that its contents were covered with a towel. He contended on appeal, therefore, that the trial court's "plain view" ruling was erroneous. The Ninth Circuit rejected this contention stating that the trial court had believed the agents' testimony, rather than that of defendant, and that such a credibility determination will not be disturbed on appeal. *Id.* at 825 (citing *United States v. Harrington*, 636 F.2d 1182, 1185 (9th Cir. 1980)).

480. 667 F.2d at 1271.

turbed on appeal.⁴⁸¹

2. Exigent circumstances

The Supreme Court has ruled that searches and seizures conducted without a warrant are "*per se* unreasonable" under the fourth amendment, unless the search or seizure can be justified under an exception to the warrant requirement.⁴⁸² These exceptions are "carefully drawn"⁴⁸³ and narrowly interpreted. The burden is on the Government⁴⁸⁴ to prove that the required warrant procedure would have been impossible or impracticable⁴⁸⁵ based on the facts and circumstances of each case.⁴⁸⁶ The "exigent circumstances" exception is generally used to justify official action in emergencies.⁴⁸⁷ The Ninth Circuit will overturn a district court's ruling regarding exigent circumstances only if it was "clearly erroneous."⁴⁸⁸

In *United States v. Brock*,⁴⁸⁹ the Ninth Circuit held that Drug Enforcement Agency (DEA) agents were justified in conducting a warrantless search of a motor home that was secreted in a remote area of a state park.⁴⁹⁰ Defendants Brock and Bard were convicted of conspiring to possess with intent to manufacture and distribute methamphetamine,⁴⁹¹ manufacturing methamphetamine,⁴⁹² and possessing with intent to distribute methamphetamine.⁴⁹³ Defendants argued that their fourth amendment rights had been violated because no

481. *Id.* (citing *United States v. Vargas*, 643 F.2d 296, 297 (5th Cir. 1981); *United States v. Wysong*, 528 F.2d 345, 349 (9th Cir. 1976)).

482. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

483. 403 U.S. at 455 (quoting *Jones v. United States*, 357 U.S. 493, 499 (1957)).

484. 403 U.S. at 455; *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

485. 403 U.S. at 455; *McDonald v. United States*, 335 U.S. 451, 456 (1948).

486. *United States v. Flickinger*, 573 F.2d 1349, 1354 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978).

487. *Id.* at 1354-55. Standard exigencies are: (1) evidence in imminent danger of being destroyed; (2) risk of danger to officers or third persons; and (3) risk of escape. *Id.*

488. *Id.* at 1357 (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948): "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

489. 667 F.2d 1311 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1271-72 (1983).

490. *Id.* at 1317-18. During an ongoing drug investigation, DEA agents followed a convoy of vehicles, including the motor home, to a secluded area of a state park. On the afternoon of the arrest, the agents smelled chemicals "cooking" and observed one defendant rush out of the motor home, choking. *Id.* at 1314-15, 1318.

491. *Id.* at 1313. 21 U.S.C. §§ 812, 841(a)(1), and 846 (1976).

492. 667 F.2d at 1313. 21 U.S.C. §§ 812, 841(a)(1) (1976).

493. 667 F.2d at 1313. 21 U.S.C. §§ 812, 841(a)(1) (1976).

exigent circumstances existed to justify the search.⁴⁹⁴ Preliminarily, the Ninth Circuit stated that if the Government does not comply with the warrant requirement, it must show that exigent circumstances existed which justified the search.⁴⁹⁵ The existence of exigent circumstances is a factual issue,⁴⁹⁶ and the appellate court applies the "clearly erroneous" standard of review to the district court's findings.⁴⁹⁷

The *Brock* court noted that a warrant to search the motor home could not have been obtained earlier, as probable cause to arrest did not exist until shortly before the search.⁴⁹⁸ The court pointed out that

494. 667 F.2d at 1317.

495. *Id.* at 1317-18. See *United States v. Gardner*, 627 F.2d 906, 909 (9th Cir. 1980) (Government presented specific, articulable facts indicating the officers reasonably believed other persons present in residence during arrests might endanger them; exigent circumstances justified cursory, warrantless, protective search); *United States v. Hoffman*, 607 F.2d 280, 282-84 (9th Cir. 1979) (Government's burden not met by conjecture or speculation; officer's entry into trailer after fire was extinguished, with probable cause, but without warrant, not justified because no immediate emergency existed); *United States v. Robertson*, 606 F.2d 853, 859 (9th Cir. 1979); *United States v. Dugger*, 603 F.2d 97, 99 (9th Cir. 1979) (district court erroneously placed burden on defendant to invalidate warrantless entry into apartment by police who followed trail of blood from fight to defendant's door). The *Robertson* court articulated the exception as follows:

Exigent circumstances are those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search until a warrant could be obtained. The need for an immediate search must be apparent to the police, and so strong as to outweigh the important protection of individual rights provided by the warrant requirement.

United States v. Robertson, 606 F.2d at 859.

496. 667 F.2d at 1318. See also *United States v. Williams*, 630 F.2d 1322, 1327 (9th Cir.) (no findings of fact were made or requested; denial of motion to suppress upheld because trial court had weighed inferences from officers' decisions and could have found that manufacture of controlled substances created special dangers), *cert. denied*, 449 U.S. 865 (1980); *United States v. Flickinger*, 573 F.2d 1349, 1356 (9th Cir.) (exigent circumstances question is based on factfinder's experience with human conduct), *cert. denied*, 439 U.S. 836 (1978).

497. 667 F.2d at 1318. FED. R. CRIM. P. 12(e) provides:

A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

See also *United States v. Williams*, 630 F.2d 1322, 1327 (9th Cir.) (upholding finding of exigent circumstances because reasonable view of evidence sustained it), *cert. denied*, 449 U.S. 865 (1980); *United States v. Gardner*, 627 F.2d at 909, 911 (court not convinced of mistake); *United States v. Dugger*, 603 F.2d at 99 (mistake committed because district court erroneously placed burden on defendant to disprove any emergency; Ninth Circuit set aside findings of exigency); *United States v. Flickinger*, 573 F.2d at 1356-57 (appellate court's function is not to decide factual issues de novo, but to defer to the trier of fact; Ninth Circuit found that, although a close question of exigent circumstances existed, factors as a whole supported findings).

498. 667 F.2d at 1318. The issue of probable cause was addressed in a related case, *United States v. Bernard*, 623 F.2d 551, 558-61 (1979).

DEA agents knew that the defendants were engaging in illegal chemical manufacturing in the motor home, and that they were using highly explosive chemicals. The agents observed one man run from the motor home, choking, and they were unsure whether anyone remained inside. The court stated that these facts justified the agents' belief that the motor home had to be searched immediately to prevent an explosion.⁴⁹⁹ The Ninth Circuit found that the district court's finding of exigency was not clearly erroneous and allowed the search.⁵⁰⁰

In *United States v. Crozier*,⁵⁰¹ the Ninth Circuit held that no exigent circumstances justified the warrantless entry into defendants' residences.⁵⁰² DEA agents had remained on the premises to secure them while other agents obtained a warrant. Every room of the residence was searched during the six hours before the warrant arrived.

The Government argued the danger that evidence would be destroyed justified entry before the search warrant was issued.⁵⁰³ The Ninth Circuit rejected this argument, stating that even if there was evidence of drug trafficking at the Crozier residence,⁵⁰⁴ a "search cannot be justified solely because an agent knows that there is contraband on

499. 667 F.2d at 1318. The district court relied on *United States v. Williams*, 630 F.2d 1322 (9th Cir. 1980), and decided that the search did not have to be delayed for a warrant. In *Williams*, the court upheld the warrantless search of a motor home five hours after the arrest of the occupants because the volatility of half-manufactured PCP created special dangers. *Id.* at 1327. In the present case, the court found that "the [agents'] need to check was even more urgent" than in *Williams*. *United States v. Brock*, 667 F.2d at 1318.

500. 667 F.2d at 1318. See *United States v. United States Gypsum Co.*, 333 U.S. at 395; *United States v. Gardner*, 627 F.2d at 911.

501. 674 F.2d 1293 (9th Cir. 1982). Crozier, Stein, and nine other defendants were charged with manufacturing and possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (1976), and with conspiracy and tax evasion, in violation of 26 U.S.C. § 7201 (1976). 674 F.2d at 1295. Crozier was further charged with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848 (1976). 674 F.2d at 1295. After a hearing on defendants' motions, the district court suppressed certain items of physical evidence seized following warrantless entries into the residences of Crozier and Stein. *Id.* at 1290. The Ninth Circuit recognized jurisdiction to hear the interlocutory appeal by the Government. *Id.* at 1296-97.

502. *Id.* at 1298-99.

503. *Id.* at 1298.

504. *Id.* at 1298-99. The Ninth Circuit noted the district court's holding that the agents had no probable cause to believe that any controlled substance would be located in the residence. See *United States v. Allard*, 600 F.2d 1301, 1304 (9th Cir. 1979) ("*Allard I*"). In *Allard I*, the Ninth Circuit held that DEA agents' warrantless entry into Allard's hotel room was not supported by probable cause to believe the room contained contraband. *Id.* at 1303. The court also held that the entry and search were not justified solely by the agents' knowledge of the presence of contraband, because the agents had no knowledge of the presence of Allard's accomplice in the room, no facts to suspect the destruction of evidence, and no belief that exigent circumstances existed. *Id.* at 1304.

the premises.’”⁵⁰⁵ Moreover, upon entry, the agents did not know whether anyone was inside the residence who was capable of destroying evidence.⁵⁰⁶ The court thus upheld the district court’s finding that no exigent circumstances justified entry into the Crozier residence.⁵⁰⁷

The court further found that the agents were less justified in entering the unoccupied Stein residence.⁵⁰⁸ Agents entered and secured Stein’s residence for six hours while others obtained a search warrant. Agents photographed jewelry within the residence, and then obtained a warrant to seize the jewelry two days later.⁵⁰⁹ The court stated that the district court’s finding that no exigent circumstances existed with regard to the searches of either residence was not clearly erroneous.⁵¹⁰ It therefore affirmed the orders to suppress the seized evidence.⁵¹¹

In *United States v. Mayes*,⁵¹² the Ninth Circuit upheld as reasonable the warrantless search of defendant’s apartment and seizure of an object that had been lodged in the throat of defendant’s infant daughter.⁵¹³ The court acknowledged the fourth amendment’s protection of individuals’ privacy and security interests against arbitrary invasions by government officials.⁵¹⁴ It stated, however, that if a government official reasonably believes a life-threatening emergency necessitates a

505. *United States v. Crozier*, 674 F.2d at 1299 (quoting *Allard I*, 600 F.2d at 1304).

506. 674 F.2d at 1299. Upon entry of the residence, the agents discovered that the residence was occupied. The agents, however, made no arrests until the warrant arrived.

507. *Id.* (citing *Allard I*, 600 F.2d at 1304). For a discussion of the sufficiency of the warrants eventually obtained for the searches of the Crozier and Stein residences, see *Search Warrants*, *supra* section B.

508. 674 F.2d at 1299.

509. *Id.*

510. *Id.* (citing *United States v. Flickinger*, 573 F.2d at 1357 (proper standard of review for exigent circumstances is “clearly erroneous”).

511. 674 F.2d at 1299. The district court relied on *United States v. Allard*, 634 F.2d 1182 (9th Cir. 1980) (“*Allard II*”). In *Allard II*, the Ninth Circuit ruled that an ongoing illegal seizure of a hotel room was neither justified by exigent circumstances, *Allard I*, 600 F.2d at 1304, nor cured by subsequently procured warrant. 634 F.2d at 1183. The court observed that the agents’ “dilemma . . . could have been avoided by not seizing the room,” and by using other “nonintrusive means . . . while police seek a search warrant.” *Allard II*, 634 F.2d at 1187. In *Crozier*, the evidence seized in both residences was not suppressed for non-resident defendants. The Ninth Circuit remanded to the trial court the issue of what evidence may be admitted against non-resident defendants. 674 F.2d at 1300.

512. 670 F.2d 126 (9th Cir. 1982). Defendant’s conviction on one count of involuntary manslaughter under 18 U.S.C. § 1111 was affirmed on appeal. Defendant Mayes reported that his ten-month-old daughter was not breathing. A fireman and a hospital corpsman responded to the emergency call. In Mayes’ apartment, they removed a wad of paper from the infant’s throat and tried to revive her. They then rushed her to the hospital emergency room. After stabilizing the infant’s condition, the attending chief pediatrician wanted to examine the object that caused the injury. *Id.* at 127.

513. *Id.* at 128.

514. *Id.* (citing *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)).

warrantless search or seizure, the fourth amendment does not prevent him from conducting it.⁵¹⁵

Mayes argued that a hospital corpsman had conducted an unreasonable warrantless search when, following doctor's orders, he obtained a key from Mayes, returned to the apartment, and retrieved the wad of paper on which Mayes' infant daughter had choked.⁵¹⁶ The court stated that requiring the doctor to apply for a search warrant under such circumstances would be unreasonable, considering the "extremely critical" condition of the child and the doctor's "imperative" need to examine the object that had caused the injury.⁵¹⁷ The court held that the warrantless entry of Mayes' apartment was reasonable under the fourth amendment because the critical condition of the infant constituted an exigency.⁵¹⁸

In *United States v. Johnson*,⁵¹⁹ the Ninth Circuit considered a magistrate's conclusion⁵²⁰ that exigent circumstances justified the warrantless entry by Narcotics Task Force (NTF) agents into a home where a narcotics transaction was taking place.⁵²¹ The court applied

515. 670 F.2d at 128 (citing *Mincey v. Arizona*, 437 U.S. 385, 393 (1978)). The *Mincey* Court recognized the right of police to respond to emergency situations, and stated that the fourth amendment does not bar police from "warrantless entries and searches when they reasonably believe a person within is in need of immediate aid." 437 U.S. at 392. The Court then found the four-day warrantless search of Mincey's apartment unreasonable because it was not justified by any emergency threatening life or limb. The Court stated that a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." *Id.* at 393 (quoting *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968)).

The *Mayes* court relied on *Mincey* without discussing the possible difference between a warrantless entry because a *person* inside needs immediate aid, and a warrantless entry because an *object* inside is needed to aid a person who has been taken elsewhere. 670 F.2d at 128.

516. *Id.* at 127.

517. *Id.* at 128. The doctor wanted to examine the wad of paper to determine: (1) whether fragments could have entered the lungs, requiring immediate surgery; and (2) whether the child had been abused. The court commented that the doctor's suspicions of criminal child abuse did not detract from the emergency. *Id.*

518. *Id.* The court found it unnecessary to consider the Government's alternative arguments: (1) that the search was by a private party and not subject to the fourth amendment; and (2) that the defendant had vacated his apartment and no longer had any expectation of privacy in it. *Id.*

519. 660 F.2d 749 (9th Cir. 1981), *cert. denied*, 455 U.S. 912 (1982).

520. *Id.* at 752. Defendants contended that the magistrate, rather than the district court, had erred.

521. *Id.* at 752-53. NTF agents were observing the narcotics transaction in the house through an open window while standing on public property. Neighborhood residents became aware of unusual activities. One resident telephoned a man living across from the suspects' house. That man called the police about "prowlers" and stood on his porch to intimidate the agents. An NTF agent requested support from the local police. A television news team arrived before the additional police support. *Id.* at 751.

well-established Ninth Circuit law that the existence of exigent circumstances is a question of fact and that "the proper standard of review of a finding regarding exigent circumstances is whether the finding was clearly erroneous."⁵²² The court found that the magistrate's conclusion was not clearly erroneous,⁵²³ rejecting the defendants' claim that "the exigent circumstances were the product of the officers' misfeasance."⁵²⁴ The Ninth Circuit concluded that exigent circumstances existed and that the officers were justified in first entering and securing the residence, evidence, and suspects, and then seeking a telephonic warrant.⁵²⁵

In *United States v. Allen*,⁵²⁶ the court held that exigent circumstances justified Customs Bureau agents' search of a ranch house for additional suspects in a massive arrest of drug smugglers.⁵²⁷ The court noted that the information that the agents gathered from conducting extensive surveillance of activities on and around defendants' ranch, and the agents' observation of suspects unloading cargo from an unlighted vessel in the middle of the night, gave them probable cause to arrest defendants without a warrant.⁵²⁸ When one arrestee told officers that more unarmed men were in the ranch house,⁵²⁹ the officers were

522. *Id.* at 752 (citing *United States v. Flickinger*, 573 F.2d 1349, 1356-57 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978)).

523. 660 F.2d at 753. The federal magistrate's conclusion of exigent circumstances was based on his personal investigation of the surveillance site. He found: (1) five agents were inadequate to properly surveil the residence's four exits or five known suspects if suspects decided to leave; (2) at least one suspect had a history of violence; (3) not all exits were visible from public areas; (4) a large narcotics transaction had occurred; (5) narcotics traffickers usually leave shortly after a transaction; (6) evidence would have been lost if suspects left; (7) unknown suspects were likely to escape if they decided to leave; (8) securing the residence avoided safety problems for the agents and the community; (9) a search warrant could not be obtained for two hours; (10) neighbors were aware of unusual police activity; and (11) a television news crew had arrived. *Id.* at 752. The Ninth Circuit concluded that the defendants had not shown that these findings were clearly erroneous. *Id.* at 753.

524. *Id.* Defendants argued that the agents could have requested additional agents to surveil adequately and then waited for a warrant. *Id.* The *Johnson* court emphasized that the risk of discovery was increasing and stated that the residence had to be secured to prevent detection of the surveillance and escape by the suspects. The additional officers that NTF agents had requested did not arrive until after the news team. *Id.*

525. *Id.* at 752-53. Defendants' convictions, on stipulated facts, for violations of 21 U.S.C. § 846 (1976) (conspiring to possess a controlled substance with intent to distribute) and 21 U.S.C. § 841(a)(1) (1976) (possessing a controlled substance with intent to distribute) were affirmed. 660 F.2d at 754.

526. 675 F.2d 1373 (9th Cir. 1980).

527. *Id.* at 1382.

528. *Id.*

529. 675 F.2d at 1373. The court commented that "[t]he agents were not obliged to believe the arrestee's statement that the men in the house were unarmed." *Id.*

justified in making a brief search of the house for additional suspects who might be armed, who might destroy evidence, or who might escape.⁵³⁰

In *United States v. Astorga-Torres*,⁵³¹ the Ninth Circuit held that Drug Enforcement Agency (DEA) agents' warrantless entry and search of a motel cabin following a shoot-out with drug conspirators was proper.⁵³² The agents entered the cabin to check for other occupants, to survey property damage, and to halt destruction of evidence.⁵³³ The court approved the agents' actions,⁵³⁴ relying on traditional grounds for

530. *Id.* These possibilities commonly constitute exigent circumstances sufficient to justify a warrantless search. The *Allen* court supported its conclusion by citing without discussion a familiar Ninth Circuit exigent circumstances case, *United States v. Flickinger*, 573 F.2d 1349, 1355-56 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978) (probable cause plus exigent circumstances validates a warrantless entry into a private place to arrest or search), and a Fifth Circuit case, *United States v. Gaultney*, 581 F.2d 1137, 1146-48 (5th Cir. 1978), *cert. denied*, 446 U.S. 907 (1980).

In *Gaultney*, officers entered the defendant's apartment to arrest persons suspected of cocaine trafficking. The court characterized the apartment as a "beehive of activity" with several unknown and unrelated people going in and out. Agents had probable cause to believe that a felony had been committed inside, that the offender was still inside committing another felony, and that the recent arrest of a co-conspirator might alarm the occupants, causing them to either shoot their way out or flee with contraband. The court upheld the officers' warrantless entry of the apartment, stating that such a "powder keg" situation demanded immediate officer action. 581 F.2d at 1147-48. The situation in *Allen* similarly was a "powder keg."

531. 682 F.2d 1331 (9th Cir.), *cert. denied*, 103 S. Ct. 455 (1982). In *Astorga-Torres*, defendants were convicted of conspiring to distribute heroin, possessing with intent to distribute heroin, assault with deadly weapons upon special agents of the DEA, and carrying a firearm during commission of a federal narcotics felony. *Id.* at 1333. The Ninth Circuit affirmed all the convictions except possession with intent to distribute heroin, a violation of 21 U.S.C. § 841(a)(1) (1976). 682 F.2d at 1337.

532. 682 F.2d at 1334. DEA agents arrested co-defendant Ambriz in his motel room upon completion of a heroin sale to an undercover agent. During the course of the surveillance, agents had seen defendants meet Ambriz and travel to the motel with him, carrying similar paper bags. When the total amount of heroin offered for sale was not found in the Ambriz cabin, agents had probable cause to believe that defendants possessed the balance in their cabin. The agents knocked, identified themselves, and demanded entry. Defendants responded with gunfire. Agents fired shots in exchange and then fired a tear gas cannister into the cabin. *Id.* at 1333.

533. *Id.* at 1333-34.

534. *Id.* at 1334-35. The court concluded that the agents' entry was "reasonable to guard against any threat of fire created by the tear gas cannister." *Id.* The court compared its conclusion with the Supreme Court's in *Michigan v. Tyler*, 436 U.S. 499 (1978). The *Tyler* Court held that a fire official was justified in entering a burned building without a warrant to discover continuing dangers and to preserve arson evidence from destruction. *Id.* at 509-10. The Court recognized the necessity of the exigent circumstances exception to justify warrantless entries by regulatory officials as well as criminal law enforcement officials. The *Tyler* Court then found that *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971), allowed the official to seize arson evidence in plain view. 436 U.S. at 509.

exigent circumstances,⁵³⁵ but without explicitly mentioning the doctrine.

The Ninth Circuit rejected defendants' contention that an agent had improperly returned to the cabin without a warrant to retrieve documents that the agent had laid out to dry.⁵³⁶ In its discussion of the agent's reentry, the court avoided any citation to authority, including *Michigan v. Tyler*,⁵³⁷ where the Supreme Court granted a fire official a limited right of reentry within a reasonable time when physical conditions frustrated the purposes of the original lawful entry.⁵³⁸ The *Astorga-Torres* court simply described the reentry as retrieving abandoned material already properly seized.⁵³⁹

In *United States v. Kunkler*,⁵⁴⁰ the Ninth Circuit held that Drug Enforcement Agency (DEA) agents' warrantless seizure of defendant's house was justified under the exigent circumstances exception to the warrant requirement.⁵⁴¹ Kunkler was suspected of being the supplier to a dealer, Jacobs, with whom DEA agents had arranged to obtain a steady, substantial supply of cocaine.⁵⁴² During one transaction with

535. 682 F.2d at 1334-35. Traditional grounds for exigent circumstances as applied to this case are: (1) to ensure officers' safety (*see United States v. Gardner*, 627 F.2d 906, 911 (9th Cir. 1980) (protective search permissible when officers reasonably believe dangerous persons present); *United States v. Coates*, 495 F.2d 160, 165 (D.C. Cir. 1974) (court's hindsight should not limit ability of police to protect themselves because they routinely face danger)); (2) to prevent destruction of evidence (*cf. Michigan v. Tyler*, 436 U.S. at 510 (immediate investigation by fire official necessary to preserve evidence of arson from intentional or accidental destruction)); and (3) to note the extent of property damage that agents may later be asked to justify. 682 F.2d at 1334-35.

536. 682 F.2d at 1335. During the first entry, one agent discovered "debris" in the toilet bowl, removed it, and spread it out to dry. All occupants were arrested. The cabin was sealed and placed under police control. Later that night, the agents returned to collect the dried "debris." *Id.* For a discussion of the plain view issues in *Astorga-Torres*, see The plain view doctrine.

537. 436 U.S. 499 (1978).

538. *Id.* at 511.

539. 682 F.2d at 1335. The court stated that the defendants' privacy rights were not further prejudiced, because the evidence had already been properly seized by the agent and clearly abandoned by the defendants. *Id.*

540. 679 F.2d 187 (9th Cir. 1982).

541. *Id.* at 192. The court rejected defendant's argument that evidence was not in the process of destruction because agents had found cocaine laid out in "lines" on a table, ready to be ingested. *Id.* at 192 n.5.

542. *Id.* at 189-90. The principal DEA agent completed several transactions with lower level intermediaries and then met with Jacobs, a middle level dealer, to discuss a regular supply. *Id.* at 189. Other agents observed a pattern emerge during the meetings: Jacobs lived in apartment "D" in a complex in Carlsbad, told the agent to meet him in apartment "A," drove a van to Kunkler's house, and then returned to apartment "D." Jacobs subsequently delivered cocaine to the agent in apartment "A;" the agent left, and Jacobs returned to Kunkler's house. *Id.* at 189-90.

Jacobs, the agents decided to terminate the purchase because they were afraid that Jacobs had discovered the undercover investigation. Jacobs was immediately arrested, and the agents then proceeded to Kunkler's home. The agents were afraid that Kunkler would be suspicious because Jacobs had not returned. They knocked, announced themselves, and entered when no one answered. Kunkler was arrested, and his home was secured for four hours while a warrant was obtained.⁵⁴³ Kunkler appealed his conviction for conspiring to possess with intent to distribute⁵⁴⁴ and aiding and abetting the distribution of cocaine,⁵⁴⁵ claiming that the warrantless seizure of his residence was unlawful, and the evidence seized as a result should be suppressed.⁵⁴⁶

The Ninth Circuit initially stated that the protections of the fourth amendment apply with equal force to the seizure as well as the search of a residence.⁵⁴⁷ The court then conducted a *de novo* review of the record⁵⁴⁸ to determine whether the agents, acting on probable cause⁵⁴⁹ and in good faith,⁵⁵⁰ could have reasonably believed from the totality of the circumstances that evidence would be destroyed, or that the nature of the crime or the character of the suspects posed a risk of danger to the arresting officer or to third persons.⁵⁵¹

543. *Id.* at 190.

544. 18 U.S.C. § 2 (1976).

545. 21 U.S.C. §§ 841(a)(1), 846 (1976).

546. 679 F.2d at 191.

547. *Id.* at 189 n.1 (citing *United States v. Allard*, 634 F.2d 1182, 1185 (9th Cir. 1980) (*Allard II*) ("Fourth Amendment . . . prohibits both unlawful searches and unlawful seizures.") (emphasis in original)).

548. 679 F.2d at 192 n.6. *See* *United States v. Bates*, 533 F.2d 466, 468 (9th Cir. 1976) (court "will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—*i.e.*, constitutional—criteria established by this Court have been respected.").

The *Kunkler* court did not consider whether "clearly erroneous" was the proper standard of review for determinations of exigent circumstances. 679 F.2d at 191. *Cf.* *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981) (district court's findings of fact in suppression hearing are subject to "clearly erroneous" standard).

549. 679 F.2d at 191. The court paid "substantial deference" to the judicial determination of probable cause and found that the search warrant was properly issued. *Id.*

550. *Id.* The court defined the good faith standard as "not acting with the intent improperly to circumvent the warrant requirement by purposefully precipitating a situation, 'through illegal conduct,' in which the destruction of evidence or contraband is likely." *Id.* at 191 n.3 (citing *United States v. Allard*, 634 F.2d at 1187 (*Allard II*) ("police may not . . . create their own exigencies through illegal conduct and then 'secure' the premises"); *United States v. Allard*, 600 F.2d at 1304 n.2 (*Allard I*) ("[i]f exigent circumstances were created, they resulted from the agents' own conduct")).

551. 679 F.2d at 191-92. *See* *United States v. Gardner*, 627 F.2d 906, 910-12 (9th Cir. 1980) (possibility that dangerous suspects might enter house undetected by surveillance team justified cursory warrantless search); *United States v. Spanier*, 597 F.2d 139, 140 (9th Cir.

The court held that exigent circumstances justified the warrantless seizure of the premises,⁵⁵² concluding that the agents' reasonable inferences justified their warrantless seizure of defendant's house pending issuance of a search warrant. The court found that the agents had reasonably inferred from their undercover observations of the cocaine dealing operation that: (1) defendant was the main supplier of cocaine; (2) defendant was extremely wary and cautious in his dealings; (3) defendant was expecting his dealer to arrive at the house shortly; and (4) defendant's conduct indicated he was suspicious that something had gone wrong when the dealer did not return.⁵⁵³ Therefore, Kunkler's motion to suppress the seized evidence was properly denied.⁵⁵⁴

In *Washington v. Chrisman*,⁵⁵⁵ the United States Supreme Court overturned a Washington Supreme Court ruling⁵⁵⁶ by upholding the seizure of contraband found in plain view by a police officer who was monitoring an arrestee's actions pursuant to a lawful arrest.⁵⁵⁷ According to the Court, such a seizure was proper even in the absence of exigent circumstances which suggested a need for further arrestee monitoring.⁵⁵⁸

Defendant Chrisman's roommate, Overdahl, was arrested for pos-

1977) (prudent for officers to check house for additional confederates after two known bank robbers emerged and surrendered); *United States v. Fulton*, 549 F.2d 1325, 1327 (9th Cir. 1977) (definite possibility of destruction of incriminating evidence due to agent's belief that person might still be in motel room); *United States v. Grummel*, 542 F.2d 789, 791 (9th Cir. 1976) (per curiam) (suspect arrested, home secured to prevent destruction of evidence pending warrant), *cert. denied*, 429 U.S. 1051 (1977); *United States v. Guidry*, 534 F.2d 1220, 1222-23 (6th Cir. 1976) (agent's cover blown; fire indicated efforts to destroy evidence of counterfeiting were underway and likely to be completed unless agents entered promptly); *United States v. McLaughlin*, 525 F.2d 517, 520-21 (9th Cir. 1975) ("exigent circumstances justify an entry to arrest and to secure the premises to the extent necessary to prevent the destruction or removal of the evidence. . . . Nothing else is justified."), *cert. denied*, 427 U.S. 904 (1976); *United States v. Curran*, 498 F.2d 30, 35-36 (9th Cir. 1974) (actual removal of evidence and potential for discovery justified "an immediate raid"); *Theobald v. United States*, 371 F.2d 769, 771 (9th Cir. 1967) (contraband present and threatened with imminent destruction).

552. 679 F.2d at 192.

553. *Id.*

554. *Id.*

555. 455 U.S. 1 (1982).

556. *Id.* at 10. At trial, defendant Chrisman was convicted of possessing more than 40 grams of marijuana and LSD, both felonies under WASH. REV. CODE § 69.50.401(d) (Supp. 1983). The Washington Court of Appeals upheld his convictions and the validity of the search. The Washington Supreme Court reversed. 94 Wash. 2d 711, 718 (1980) (en banc), holding that although a police officer can accompany an arrestee to his room, he has no right to enter the room or to examine or seize contraband without a warrant, absent exigent circumstances.

557. 455 U.S. at 9-10.

558. *Id.* at 6-7.

sessing alcohol,⁵⁵⁹ and asked by state police officer Daugherty for his identification. When Overdahl requested permission to retrieve the identification from his dormitory room, Daugherty insisted on accompanying him. Chrisman was in the room when they arrived. From a doorway, Daugherty observed Chrisman nervously putting a small box into the medicine cabinet and noticed a pipe and some seeds lying on a desk. Daugherty entered the room and examined the pipe and seeds, confirming his suspicions that the seeds were marijuana and that the pipe had been used to smoke it. Daugherty advised both individuals of their *Miranda* rights.⁵⁶⁰

Under the plain view exception to the fourth amendment warrant requirement, a law enforcement officer may seize clearly incriminating evidence or contraband when it is discovered in a location where the officer has a right to be.⁵⁶¹ In determining whether Officer Daugherty had a right to be in the dormitory room where the evidence was seized, the Court initially considered whether the fourth amendment allows a police officer to monitor an arrestee's movements after an arrest.⁵⁶² Noting that the absence of any indication of an available weapon or an escape attempt and the nature of the offense have no effect on the arresting officer's authority to maintain custody and surveillance over the arrestee,⁵⁶³ the Court held that a police officer may reasonably monitor

559. *Id.* at 3. Officer Daugherty had seen Overdahl leave a student dormitory carrying a bottle of gin. WASH. REV. CODE § 66.44.270 forbids possession of alcoholic beverages by anyone under 21 years. WASH. REV. CODE § 66.44.270 (1981).

560. 455 U.S. at 4. Chrisman and Overdahl both acknowledged and waived their rights. When asked whether they had any other drugs in the room, Chrisman handed Daugherty a small box from the medicine cabinet which contained three small bags of marijuana and \$112 in cash. Daugherty told Chrisman and Overdahl that a search of the room was necessary and explained that they had an absolute right to insist upon a search warrant, but that they could voluntarily consent. Chrisman and Overdahl conferred and consented to the search which yielded more marijuana and LSD. *Id.*

561. *Id.* at 5-6 (citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)). The *Coolidge* Court identified the following situations in which the plain view doctrine may be applied:

- (1) police have a warrant to search for specific objects and discover other incriminating articles (citations omitted);
- (2) the initial police intrusion is justified by a recognized exception to the warrant requirement, such as hot pursuit, *Warden v. Hayden*, 387 U.S. 294 (1967);
- (3) police discover an object during a search incident to arrest, properly limited in scope, *Chimel v. California*, 395 U.S. 752 (1969); and
- (4) police are not searching for evidence against the accused but inadvertently discover an incriminating object, *Harris v. United States*, 390 U.S. 234 (1968).

403 U.S. at 465-66.

562. 455 U.S. at 6-7.

563. *Id.* at 6. See *Pennsylvania v. Mimms*, 434 U.S. 106, 109-10 (1977) (officer's regular practice of ordering drivers out of stopped vehicles held reasonable as precautionary measure to protect officer despite lack of suspicious behavior); *United States v. Robinson*, 414

an arrestee's movements as a matter of routine.⁵⁶⁴

The Court, therefore, concluded that: (1) the officer's presence in the doorway or in the room was lawful;⁵⁶⁵ and (2) his observations of contraband were a "classic instance" of incriminating evidence found in plain view, as Daugherty had, for unrelated but entirely legitimate reasons, obtained lawful access to defendant's area of privacy.⁵⁶⁶ Consequently, the Court held that the lawfully seized evidence was properly admitted at trial.⁵⁶⁷

The dissent⁵⁶⁸ acknowledged that Daugherty was entitled to keep Overdahl in sight, but only to protect himself or to prevent an escape attempt. The plain view doctrine did not, in their opinion, justify the

U.S. 218, 234-36 (1973) (officer's search incident to full-custody arrest of suspect, pursuant to prescribed police department procedures, held reasonable to protect officer before transporting arrestee). *Cf.* *United States v. Robinson*, 414 U.S. 218, 234 n.5 ("The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest.").

The Court thus rejected the premise of the Washington Supreme Court that the officer was not entitled to accompany Overdahl from the hallway absent exigent circumstances. The Court noted that an officer cannot reliably predict how any particular person will react to arrest or the degree of potential danger. 455 U.S. at 7.

The Court also rejected the Washington court's finding that Overdahl had little chance of escaping from his room, noting that the officer's authority over an arrestee does not depend upon a court's hindsight review of the particular arrest situation. *Cf.* *New York v. Belton*, 453 U.S. 454, 459-60 (1981) (scope of authority to search incident to a lawful arrest extended to search of vehicle passenger compartment); *United States v. Robinson*, 414 U.S. 218, 235 (1973) (search incident to a lawful arrest held an exception to the warrant requirement and "reasonable" under the fourth amendment, thereby permitting a full search of the individual in custody).

564. 455 U.S. at 7. The Court commented that this monitoring does not impermissibly invade the privacy or personal liberty of an arrestee, reasoning that a contrary rule would operate to prohibit an arrestee from returning to his residence in all circumstances. *Id.* at n.4.

565. *Id.* "It is of no legal significance whether the officer was in the room, on the threshold, or in the hallway, since he had a right to be in any of these places as an incident of a valid arrest." *Id.* at 8. The Court thus rejected defendant's argument that the officer lacked the authority to seize the contraband because he was outside the room when he made the observations.

Defendant's argument that the officer's 30 to 45 second hesitation in seizing the pipe and seeds was fatal to the legality of the seizure was similarly rejected by the Court as having the "perverse effect of penalizing the officer for exercising more restraint than was required under the circumstances." *Id.* at 8. The Court stated that the officer had the right to act as soon as he observed the seeds and pipe. *Id.* at 9.

566. *Id.* The Court did not consider whether the possible destruction of contraband could independently justify the officer's entry under the exigent circumstances exception. *Id.* at n.6.

567. *Id.* at 9. Other drugs seized with defendant's valid consent were also properly admitted. *Id.* at 9-10.

568. Justice White, joined by Justices Brennan and Marshall, dissented.

warrantless seizure of contraband observed from outside a dwelling.⁵⁶⁹ Noting that the record did not demonstrate any exigent circumstances necessitating Daugherty's entrance into Chrisman's room, the dissent recommended that the case be vacated and remanded.⁵⁷⁰

3. Search incident to an arrest

In *United States v. Torres*,⁵⁷¹ the Ninth Circuit upheld the warrantless search and seizure of objects from two automobiles after the arrest of four defendants for counterfeiting.⁵⁷² The court agreed with the district court's⁵⁷³ careful analysis of the facts⁵⁷⁴ and incorporated its reasoning by reference.⁵⁷⁵

Defendants Torres, Montes, and Buenrostro challenged the legality of their arrests and the incidental search and seizure of a paper bag from the console of their car. Local secret service agents, conducting surveillance of a suspected counterfeiting operation in a garage, observed the three defendants leaving the scene by car. One of the defendants carried a package suspected of containing counterfeit bills. Agents stopped the car, arrested the defendants, and seized a paper bag from the console located between the defendants.⁵⁷⁶ The Ninth Circuit upheld the district court's decision that the agents had probable cause

569. 455 U.S. at 11 (White, J., dissenting). The dissent quoted *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971), for the proposition that:

[P]lain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle . . . that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.

Id. at 11-12 (White, J., dissenting) (citations omitted).

570. 455 U.S. at 15. The dissent acknowledged the usefulness of bright line rules in appropriate circumstances but cautioned that great care should be taken when the home or living quarters are involved. *Id.* (White, J., dissenting). "[I]t is the physical entry of the home that is the chief evil against which the [fourth] Amendment is directed." *Id.* at 13-14 (White, J., dissenting). See *Payton v. New York*, 445 U.S. 573, 585-86 (1980); *United States v. United States District Court*, 407 U.S. 297, 313 (1972).

571. 659 F.2d 1012 (9th Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 926 (1982).

572. *Id.* at 1013.

573. *United States v. Torres*, 504 F. Supp. 864 (E.D. Cal. 1980).

574. *Id.* at 868-70.

575. 659 F.2d at 1013 (citing *United States v. Torres*, 504 F. Supp. at 870-72). The Ninth Circuit held that the district court's findings were not clearly erroneous. See *United States v. Hart*, 546 F.2d 798, 801 (9th Cir. 1976) (en banc) ("clearly erroneous" rule applied to question of fact raised on appeal in criminal case; trial court's finding sustained unless clearly erroneous), *cert. denied*, 429 U.S. 1120 (1977).

576. *United States v. Torres*, 504 F. Supp. at 869.

to arrest the defendants and seize the bag, ruling that the trial court's findings were not clearly erroneous.⁵⁷⁷ The *Torres* court therefore affirmed the district court's denial of defendants' motion to suppress, and upheld their convictions for manufacturing, possessing, and concealing counterfeit federal reserve notes.⁵⁷⁸

Defendant Salsedo, who was arrested as he approached his locked car, contended that the search of his car and the seizure from the car of a receipt for printing supplies was also unlawful.⁵⁷⁹ The Ninth Circuit held that even if the admission of the receipt into evidence was erroneous, it constituted harmless error in light of the other evidence of Salsedo's guilt.⁵⁸⁰

4. Pat-down search

In *United States v. Corona*,⁵⁸¹ the Ninth Circuit held that the stop and pat-down search of the defendant were unlawful because they were "not based on the requisite founded suspicion, drawn from articulable facts."⁵⁸² Although the court viewed the evidence in a light most favorable to the Government⁵⁸³ and applied the clearly erroneous standard of review,⁵⁸⁴ it concluded that the district court's findings were in error.⁵⁸⁵

A police officer observed the defendant standing and later hitchhiking around midnight, in the rain, in an area of recent thefts

577. 659 F.2d at 1013. In upholding the seizure, the district court ruled that it was bound by the majority opinion in *United States v. Mackey*, 626 F.2d 684, 687-88 (9th Cir. 1980) (defendant did not show expectation of privacy in paper bag; bag may be searched as part of car under automobile exception to warrant requirement). *United States v. Torres*, 504 F. Supp. at 871. The district court added, however, that it was persuaded by the dissent. *United States v. Torres*, 504 F. Supp. at 871 (citing *Mackey*, 626 F.2d at 688 (Tang, J., dissenting) (burden on government to show an exception to the warrant requirement, not on defendant to show he is entitled to its protection)). See 14 LOY. L.A.L. REV. 469, 500-04 (1981) for a critical analysis of *United States v. Mackey*.

578. 659 F.2d at 1012. The defendants were convicted of 18 U.S.C. § 471 (1976) (manufacturing counterfeit federal reserve notes), and 18 U.S.C. § 472 (1976) (possessing and concealing of counterfeit federal reserve notes).

579. 659 F.2d at 1013.

580. *Id.* See *Chapman v. California*, 386 U.S. 18, 24 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

581. 661 F.2d 805 (9th Cir. 1981).

582. *Id.* at 808.

583. *Id.* at 806. See *United States v. Henry*, 615 F.2d 1223, 1230 (9th Cir. 1980) ("Upon review of a denial of a motion to suppress after conviction, we view the evidence in the light most favorable to the government.").

584. *Corona*, 661 F.2d at 806.

585. *Id.* at 806, 808.

from vehicles. Defendant, who had arrived in the area only ten days earlier, was uncertain of his address and had no identification. After questioning him, the officer conducted a pat-down search of the defendant, which revealed that he had a sawed-off shotgun concealed on his person.⁵⁸⁶ The defendant was convicted of possessing an unregistered firearm.⁵⁸⁷

The court applied the rule that a police officer must be entitled to stop the person before conducting a pat-down search⁵⁸⁸ and analyzed first the stop,⁵⁸⁹ and then the pat-down. Although the court stated that the defendant's actions may have been "unusual,"⁵⁹⁰ the court did not find that such actions indicated a crime had been or would be committed.⁵⁹¹

The court stated that in order to uphold the search, the police officer must have "a founded suspicion, based upon articulable facts, that [the defendant] was armed and presently dangerous."⁵⁹² The court found that the "mere circumstance" of defendant's wearing a long coat on a cold, rainy night was not sufficiently suspicious, even when com-

586. *Id.* at 806-07.

587. 26 U.S.C. § 5861(d) (1980), 26 U.S.C. § 5871 (1980).

588. *Corona*, 661 F.2d at 807, citing *Adams v. Williams*, 407 U.S. 143, 146 (1972) (brief investigatory stop of suspicious individual held reasonable to determine identity or obtain additional information).

589. See *infra* discussion of *Corona* under *Investigative Stops*.

590. *Corona*, 661 F.2d at 807.

591. *Id.* The court stated that the totality of circumstances failed to furnish the articulable facts necessary to determine that the defendant committed or was about to commit a crime, citing three border-search cases. *Id.* See *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (roving patrol officers may stop vehicles only if aware of specific articulable facts, with rational inferences that warrant suspicion that persons are illegal aliens); *United States v. Cortez*, 449 U.S. 411, 418 (1981) (founded suspicion reached by: (1) considering all circumstances, including objective observations, information from police reports, patterns of operation of lawbreakers, and officer's inferences; and (2) suspecting that the particular person being stopped is engaged in wrongdoing); *United States v. Rocha-Lopez*, 527 F.2d 476, 477 (9th Cir. 1975) (no substantial difference between Supreme Court's "reasonable suspicion" and Ninth Circuit's "founded suspicion" test which requires police officer to have reasonable belief, under all circumstances, that person to be detained briefly was involved in criminal activity), *cert. denied*, 425 U.S. 977 (1976).

The court compared defendant's actions with: *Brown v. Texas*, 443 U.S. 47 (1979) (two defendants in alley walked away from each other in high drug traffic area; no reasonable suspicion); *United States v. Collum*, 614 F.2d 624 (9th Cir. 1979) (in area plagued by auto thefts, defendants stooped down suspiciously at rear of car, quickly walked away when they saw police officer; founded suspicion existed), *cert. denied*, 446 U.S. 923 (1980); *United States v. Orozco*, 590 F.2d 7789, 791 (9th Cir.) (at 4:45 A.M., deputies observed defendant in car in high-crime area; defendant got out of car, threw object over wall when he saw patrol car; founded suspicion existed), *cert. denied*, 442 U.S. 920 (1979).

592. *Corona*, 661 F.2d at 807 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

bined with the other factors.⁵⁹³ Thus, the Ninth Circuit agreed with defendant's claim that the district court had erred in not suppressing the sawed-off shotgun found during the pat-down search, and reversed his conviction.⁵⁹⁴

The dissent⁵⁹⁵ objected to the majority's conclusion, stating that the application of specific "verbal formulas"⁵⁹⁶ and invocation of the exclusionary rule was insufficient.⁵⁹⁷ The dissent stated that the officer's pat-down search was reasonable, and further reasoned that application of the exclusionary rule was inappropriate because it would not deter police behavior from future intrusions under similar circumstances.⁵⁹⁸

5. Protective sweep search

In *United States v. Wiga*,⁵⁹⁹ the Ninth Circuit, under the protective sweep search doctrine, upheld the cursory inspection of a mobile home which was undertaken incident to the driver's arrest for parole violations.⁶⁰⁰ The Government sought to justify its warrantless entry under the automobile exception, plain view doctrine, protective sweep doctrine, and as a search incident to an arrest.⁶⁰¹

Wiga was under investigation for parole violations. He was stopped by FBI agents while driving his mobile home and was arrested. The agents had observed someone in the mobile home before it was stopped, although Wiga denied that anyone was inside. The agents

593. *Corona*, 661 F.2d at 808. See *Ybarra v. Illinois*, 444 U.S. 85 (1979) (unlawful pat-down search; defendant wearing coat suited to weather, no criminal history known, no indication that he carried weapon, no threatening gestures); *United States v. Mireles*, 583 F.2d 1115 (10th Cir.) (lawful pat-down search; defendants, overdressed for weather in long trench coats and stocking caps, had noticeable and suspicious bulge under coats), *cert. denied*, 439 U.S. 936 (1978); *United States v. Bull*, 565 F.2d 869, 871 (4th Cir. 1977) (lawful pat-down search; defendant wore jacket on warm night, wore hat from beneath which pantyhose protruded, and reacted suspiciously to patrol car), *cert. denied*, 435 U.S. 946 (1978).

594. *Corona*, 661 F.2d at 806.

595. *Id.* at 808 (Sneed, J., dissenting).

596. *Id.* The dissent stated that the majority's specific verbal formulas detracted from the "central inquiry" under the fourth amendment as to the reasonableness of the Government's intrusion under all the circumstances (citing *Terry v. Ohio*, 392 U.S. 1, 19 (1968)). The dissent found that the officer's limited intrusion was reasonable, considering the incidence of crime in the area, the vagueness of defendant's direction, out-of-the-way spot where defendant left the patrol car, hour of night, and absence of any identification on defendant. *Id.* at 808.

597. *Id.* at 809.

598. *Id.*

599. 662 F.2d 1325 (9th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982).

600. *Id.* at 1333.

601. *Id.* at 1328-29.

subsequently ordered the person, Moody, out of the vehicle, and then entered it to make sure no one else was present. They immediately noticed two weapons in the mobile home.⁶⁰² The defendant was convicted of two counts of being a felon in transportation of a firearm,⁶⁰³ and two counts of being a felon in possession of a firearm.⁶⁰⁴

Declining to uphold the search under the automobile exception,⁶⁰⁵ the court then discussed whether possible exigencies exist in stops of motor homes which are not present in stops of ordinary automobiles.⁶⁰⁶ The court applied the protective sweep doctrine, articulated in *United States v. Gardner*,⁶⁰⁷ because of characteristics common to motor

602. *Id.* at 1328.

603. 18 U.S.C. § 922(g)(1) (1976).

604. 18 U.S.C. app. § 1202(a)(1) (1976). The district court sentenced the defendant on a single count of possession under § 1202(a)(1) and vacated the other three convictions. 662 F.2d at 1327. The Ninth Circuit affirmed the conviction and denial of the motion to suppress and reversed the dismissal of the separate violation of § 1202(a)(1). *Id.*

605. 662 F.2d at 1329. The court followed *United States v. Williams*, 630 F.2d 1322 (9th Cir.), *cert. denied sub nom. Murchison v. United States*, 449 U.S. 865 (1980), which held that greater expectations of privacy make the automobile exception inapplicable to a motor home. *See infra* discussion of *Wiga* under Automobile exception.

606. 662 F.2d at 1329. "A motor home may shield from the view of officers unknown occupants who could either present a threat to the officers' safety or destroy or secrete contraband while the driver is being interrogated." *Id.*

607. 627 F.2d 906, 909-10 (9th Cir. 1980). The *Gardner* court held that the exigent circumstances exception permitted arresting officers to make a protective search of a residence when the officers had reasonable cause to suspect the presence of other potentially dangerous occupants. 662 F.2d at 1329-30.

The *Wiga* court cited pre-*Gardner* cases which upheld warrantless premises searches to assure officer safety based on more than the "mere physical capacity of a structure to harbor unseen occupants." *Id.* at 1330. *See United States v. Blalock*, 578 F.2d 245, 248 (9th Cir. 1978) (quick search behind shop counter for accomplices); *United States v. Hobson*, 519 F.2d 765, 776 (9th Cir.) (quick search of each room in house for additional persons and weapons where house known to contain "small arsenal"), *cert. denied*, 423 U.S. 931 (1975); *cf. United States v. Mulligan*, 488 F.2d 732, 734 (9th Cir. 1973) (brief inspection of open closet where officer suspected person might be hiding with a weapon), *cert. denied*, 417 U.S. 930 (1974).

The *Wiga* court also cited cases which "upheld the right of officers to check for individuals who might destroy evidence." 662 F.2d at 1330. *See United States v. Spanier*, 597 F.2d 139, 140 (9th Cir. 1977) (prudent for officers to check house for additional confederates after two known bank robbers emerged and surrendered); *United States v. Fulton*, 549 F.2d 1325, 1327 (9th Cir. 1977) (definite possibility of destruction of incriminating evidence existed where agent believed that person might still be in motel room); *United States v. McLaughlin*, 525 F.2d 517, 521 (9th Cir. 1975) (warrantless entry to arrest and to secure premises to extent necessary to prevent destruction or removal of evidence; nothing else justified), *cert. denied*, 427 U.S. 904 (1976); *United States v. Curran*, 498 F.2d 30, 35-36 (9th Cir. 1974) (actual removal of evidence and potential for discovery justified immediate raid).

The court contrasted the above cases with *United States v. Basurto*, 497 F.2d 781, 789 (9th Cir. 1974) (protective search held unreasonable where only justification was that arrestee turned toward his house and yelled: "It's the police."). 662 F.2d at 1330.

homes and residences.⁶⁰⁸ The court examined the facts⁶⁰⁹ which led to the officers' reasonable suspicions⁶¹⁰ and found that the search was a lawful protective sweep incident to an arrest.⁶¹¹ Since the arrest and search were upheld,⁶¹² the court also ruled that the officer's discovery of weapons in plain view was lawful.⁶¹³ Thus, the Ninth Circuit affirmed the district court's denial of defendant's motion to suppress.⁶¹⁴

6. Automobile exception

For more than fifty years, the United States Supreme Court has recognized that police may conduct warrantless searches of automobiles,⁶¹⁵ provided that objective circumstances support an officer's conclusion that probable cause exists that would otherwise jus-

608. 662 F.2d at 1329. *See supra* note 606.

609. *Id.* at 1328, 1331. The court considered that: (1) agents had seen a woman enter Wiga's motor home in a shopping center and then had been unable to see her inside the vehicle; (2) Wiga lied about the woman's presence; (3) agents could not be sure that no one else was inside; (4) the vehicle was licensed to a handicapped person, yet Wiga was not handicapped; (5) agents conducted a cursory search for the limited purpose of searching for other occupants. *Id.* at 1331. The court expressly declined to address the constitutional validity of a broader sweep search. *Id.* at 1331 n.5.

610. *Id.* at 1330-31. The court noted that although most of the other circuits endorse protective searches, they disagree over the necessary degree of reasonable suspicion to justify a sweep. *See, e.g.*, *United States v. Bowdach*, 561 F.2d 1160, 1168-69 (5th Cir. 1977) (security check of residence to check for persons, not things, justified only when police officers reasonably believe other persons might cause violence; court sympathetic to officer's suspicions); *United States v. Carter*, 522 F.2d 666, 675 (D.C. Cir. 1975) (officer's hypothesizing presence of armed felons and snipers not sufficient justification for protective search of entire house; court required detailed showing of reasonable suspicion); *United States v. Gamble*, 473 F.2d 1274 (7th Cir. 1973) (arrestee's reputation for violence and "rustling" noises within house not legitimate justification for intrusion beyond room of arrest).

The *Wiga* court stated that the Supreme Court has not yet addressed the "protective sweep" doctrine. 662 F.2d at 1330-31.

611. 662 F.2d at 1331. The court proceeds on a case-by-case basis to avoid "[a]n overly-restrictive view . . . [which] might expose arresting officers to unnecessary dangers . . . [or] [a]n overly-deferential attitude toward officers' suspicions . . . [which] could seriously infringe upon the right to be free from unreasonable searches." *Id.*

612. *Id.*

613. *Id.* (citing *Harris v. United States*, 390 U.S. 234, 236 (1968) (per curiam) ("[O]bjects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.")).

614. 662 F.2d at 1333. The Ninth Circuit did not disapprove of the district court's reliance on *United States v. Berryhill*, 445 F.2d 1189, 1192 (9th Cir. 1971) (arresting officer may search vehicle incident to lawful arrest of driver because vehicle is a thing "under the accused's immediate control"). The court stated that reliance on *Berryhill* is permissible as long as the search is properly limited to the passenger compartment by the rule of *New York v. Belton*, 453 U.S. 454, 460 (1981) (police officer may search the passenger compartment and any containers incident to lawful arrest of occupant of vehicle). 662 F.2d at 1332.

615. *Carroll v. United States*, 267 U.S. 132 (1925).

tify the issuance of a search warrant by a neutral magistrate.⁶¹⁶ This significant exception to the fourth amendment's warrant requirement is recognized "where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate."⁶¹⁷ The automobile exception is based on the rationale that automobiles are very mobile, and therefore may be quickly moved out of a jurisdiction.⁶¹⁸

*United States v. Sears*⁶¹⁹ presents a recent example of the application of this exception to the fourth amendment warrant requirement. Police officers observed defendants Werner and Sears looking through binoculars at a bank across the street while sitting in a vehicle bearing out-of-state license plates. As defendants pulled the car away from the curb it was stopped by police officers.⁶²⁰ When asked by the officers to produce the car's registration, Werner told them that a gun, as well as the registration, was in the glove compartment.⁶²¹ Sears informed the officers of another gun in the back seat.⁶²² Werner and Sears were then arrested for carrying a concealed weapon.⁶²³ The court held that the facts giving rise to the initial stop and Werner's admission of the presence of the guns supplied the officer with probable cause sufficient to justify a warrantless search of the automobile.⁶²⁴

In *United States v. Wiga*,⁶²⁵ the Ninth Circuit upheld a warrantless

616. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

617. *Arkansas v. Sanders*, 442 U.S. 753, 759 (1979).

618. *Carroll*, 267 U.S. at 153.

619. 663 F.2d 896 (9th Cir.), *cert. denied*, 455 U.S. 1027 (1981).

620. *Id.* at 902.

621. *Id.*

622. *Id.* at 902-03.

623. *Id.* at 903. This arrest occurred in May 1979. The FBI later used Werner's booking photographs from this arrest to form the basis of a warrant of her arrest for bank robbery. On the basis of information in this arrest warrant, Werner was arrested for bank robbery in January 1980. On appeal from her conviction, Werner contended that the May 1979 arrest was unlawful and therefore her booking photographs could not be used as the probable cause basis for the subsequent arrest warrant. Thus, although Werner was not appealing a conviction directly linked to the May 1979 arrest, it was nevertheless necessary for the court to determine its legality. *Id.* at 902-04.

Citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968), the court held that the officers were justified in their suspicion that criminal activity was afoot, and therefore upheld the warrantless investigatory stop. *Sears*, 663 F.2d at 903.

624. *Sears*, 663 F.2d at 903 (citing *Chambers v. Maroney*, 399 U.S. 42, 51 (1970); *Carroll v. United States*, 267 U.S. 132, 153 (1925)).

625. 662 F.2d 1325 (9th Cir.), *cert. denied*, 456 U.S. 918 (1981).

search of a motor home as a search incident to arrest,⁶²⁶ but expressly noted that it could not be justified “merely on the basis of the ‘automobile exception’” to the fourth amendment warrant requirement.⁶²⁷ Wiga was stopped in his motor home and arrested for violation of parole.⁶²⁸ The federal agents who executed the stop knew that Wiga’s traveling companion, Moody, was inside the motor home. Wiga, however, told them no one else was inside.⁶²⁹ Moody emerged from the vehicle when requested to do so.⁶³⁰ An agent then entered and searched the motor home for other occupants.⁶³¹ Two guns were visible, both of which were seized by the agent and later introduced into evidence by the Government at trial.⁶³² Wiga was convicted of being an ex-felon in possession of a firearm.⁶³³

On appeal, the court rejected the Government’s argument that the automobile exception justified the warrantless search, holding that “[w]hatever expectations of privacy those travelling in an ordinary car have, those travelling in a motor home have expectations that are significantly greater.”⁶³⁴ Relying on its prior decision in *United States v. Williams*,⁶³⁵ the court stated that “[p]eople typically do not remain in an auto unless it is going somewhere. The same is not true of a motor

626. *Id.* at 1333. The court found that the agents involved entertained a “legitimate concern that other occupants may have been concealed within the motor home.” *Id.*

627. *Id.* at 1329.

628. *Id.* at 1328.

629. *Id.*

630. *Id.*

631. *Id.*

632. *Id.*

633. *Id.* at 1327. Wiga was convicted on two counts of violating 18 U.S.C. § 922(g)(1) and two counts of violating 18 U.S.C. app. § 1202(a)(1).

18 U.S.C. § 922(g)(1) states in pertinent part: “It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . transport any firearm or ammunition in interstate commerce”

18 U.S.C. app. § 1202(a)(1) states in pertinent part:

Any person who . . . has been convicted by a court of the United States or of a State or any political subdivision thereof a felony . . . and who . . . receives, possesses, or transports in commerce or affecting commerce, . . . any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

The district court vacated convictions on three of the four counts and sentenced Wiga to two years imprisonment on a single count of violation of 18 U.S.C. app. § 1202(a)(1). On appeal, the Ninth Circuit reinstated Wiga’s conviction under the additional count of violation of section 1202(a)(1). *Id.*

634. 662 F.2d at 1329 (quoting *United States v. Williams*, 630 F.2d 1322, 1326 (9th Cir. 1980), *cert. denied*, 449 U.S. 865 (1981)).

635. 630 F.2d 1322 (9th Cir. 1980), *cert. denied*, 449 U.S. 865 (1981). In *Williams*, the Ninth Circuit first confronted the question of whether a motor home qualified as an automobile for purposes of the “automobile exception.”

home, in which people can actually live . . . [and which] in some senses [is] more akin to a house than a car.'⁶³⁶

Instead of concluding that the auto exception did not apply in *Wiga* simply because the vehicle in question was a motor home, the court considered the facts in light of Wiga's expectation of privacy.⁶³⁷ Thus, in future cases, it is likely that the Ninth Circuit will determine whether the automobile exception applies in a particular case based on whether there existed a heightened expectation of privacy in the vehicle in question.

In *United States v. Ross*,⁶³⁸ the United States Supreme Court held that the automobile exception as defined in *Carroll v. United States*⁶³⁹ allows police to search a car as thoroughly as if they possess a warrant issued by a magistrate once they determine that probable cause exists.⁶⁴⁰

An informant told police that a man later identified as the defendant, Albert Ross, was selling drugs out of the trunk of his car.⁶⁴¹ After identifying Ross and his car, officers pulled him over and ordered him out. The officers searched Ross and the interior of his car.⁶⁴² Ross was arrested after officers found a bullet on the front seat and a pistol in the glove compartment.⁶⁴³ Then, using Ross' keys, one of the officers opened the trunk. Inside was a "lunch-type" brown paper bag" which held a number of glassine bags containing heroin.⁶⁴⁴ Ross was convicted of possessing heroin with intent to distribute.⁶⁴⁵

The court of appeals reversed Ross' conviction, holding that

636. *Wiga*, 662 F.2d at 1329 (quoting *United States v. Williams*, 630 F.2d at 1326).

637. *Wiga*, 662 F.2d at 1329. Factors deemed by the court to be of significant importance were: (1) Wiga's vehicle was similar to the one under scrutiny in *Williams*; (2) Moody was shielded from the officers' view until she stepped out of the motor home; (3) the motor home had a bathroom and a closet; and (4) Wiga pulled down a sunscreen which hid his face from the agents' view before being pulled over. *Id.*

638. 456 U.S. 798 (1982).

639. 267 U.S. 132 (1925).

640. 456 U.S. at 799-800.

641. *Id.* at 800. Information given to police was quite detailed, adequately describing Ross, his car and the neighborhood in which the drug transactions were taking place.

642. *Id.* at 801.

643. *Id.*

644. *Id.* The bag and its contents were returned to the trunk and the car was impounded. During a more thorough search at the station, police also found a zipped leather pouch which contained \$3,200. *Id.*

645. *United States v. Ross*, 655 F.2d 1159, 1162 (D.C. Cir. 1981), *rev'd*, 456 U.S. 798 (1982). Ross was convicted of violation of 21 U.S.C. § 841(a) which states in pertinent part: "[i]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"

while police had probable cause to search the car, the search of the paper bag was impermissible because Ross had a reasonable expectation of privacy in its contents.⁶⁴⁶ The Supreme Court, citing the need for feasible and workable rules in the area of automobile searches,⁶⁴⁷ set out to balance the conflicting interests between privacy rights and effective law enforcement.⁶⁴⁸

The issue before the *Ross* Court was “the extent to which police officers—who have legitimately stopped an automobile [without a warrant] and who have probable cause to believe that contraband is concealed somewhere within it—may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view.”⁶⁴⁹ In holding that police may carry out a search that is as thorough as one otherwise authorized by a magistrate,⁶⁵⁰ the Court stressed that the exception to the warrant requirement “applies only to searches of vehicles that are supported by probable cause.”⁶⁵¹ The Court reasoned that if probable cause exists for a search, “absurd results inconsistent with” previous holdings in automobile search cases could be produced if the opening of containers discovered during the search was prohibited.⁶⁵² In its holding, the majority specifically stated that “practical considerations that justify a warrantless search . . . apply until the entire search of the automobile *and its contents* has been completed.”⁶⁵³

The reasoning which led the majority to this conclusion was simply expressed. “[T]he privacy interests in a car’s trunk or glove compartment may be no less than those in a movable container.”⁶⁵⁴ A trunk or a glove compartment is allowed to be searched without a warrant as long as probable cause exists.⁶⁵⁵ Therefore, a container in the automobile also may be searched provided that “probable cause is

646. 655 F.2d at 1171. See also *United States v. Ross*, 456 U.S. at 801-02.

647. 456 U.S. at 803-04. See also *id.* at 825 (Blackmun, J., concurring).

648. *Id.* at 804.

649. *Id.* at 800.

650. *Id.*

651. *Id.* at 809 (citing *Carroll v. United States*, 267 U.S. 132 (1925)).

652. 456 U.S. at 818. The Court specifically referred to the holdings in *Carroll*, 267 U.S. at 153 (Court permitted the warrantless search of an automobile, during which agents tore open a seat cushion in the car to uncover 68 bottles of gin and whiskey, because “it [was] not practicable to secure a warrant”) and *Chambers v. Maroney*, 399 U.S. 42, 52 (1970) (Court permitted a warrantless search of an automobile at a police station, long after the automobile containing the contraband had been immobilized).

653. 46 U.S. at 821 n.28 (emphasis added).

654. *Id.* at 823.

655. *Id.* at 821 & n.28. “[W]hen a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between . . . glove compart-

given to believe that the vehicle is transporting contraband."⁶⁵⁶ This rationale compelled the conclusion that "an individual's expectation of privacy in a vehicle and its contents may not survive" where probable cause exists for the search.⁶⁵⁷ In this regard, the majority found automobile searches to be similar to border searches, searches incident to arrest, and searches conducted pursuant to a warrant. The Court noted that, with respect to those three searches, an individual's reasonable expectation of privacy could not prevent an immediate search. Thus, neither should the same expectation of privacy prevent a warrantless search of an automobile.⁶⁵⁸ The only apparent limitation placed on a search authorized by *Ross* was that it should be limited to those places in the automobile in question where there is probable cause to believe that the object of the search may be found.⁶⁵⁹ This "limitation," however, permits a search of an entire trunk⁶⁶⁰ and not just a particular suspicious container, as was the case in *Ross*.⁶⁶¹

In his concurrence,⁶⁶² Justice Powell stated that "in many situations one's reasonable expectation of privacy may be a decisive factor in a search case."⁶⁶³ He also noted that *Ross* represented an application of the "bright line" rule, consistent with the approach taken in *New York v. Belton*.⁶⁶⁴

Justice Marshall, writing for the dissent in *Ross*,⁶⁶⁵ expressly articulated the primary reasons that justify warrantless searches of

ments, upholstered seats, trunks, and wrapped packages . . . must give away to the . . . prompt and efficient completion of the task at hand." *Id.* at 821.

656. *Id.* at 823.

657. *Id.*

658. *Id.*

659. *Id.* at 823-25.

660. The majority clearly overruled *Robbins v. California*, 453 U.S. 420 (1981) (plurality opinion) (warrantless search of two opaque containers seized after being retrieved from a recessed portion of a luggage compartment held impermissible in spite of the fact that probable cause existed to search the interior of the car) and the portion of the opinion in *Arkansas v. Sanders*, 442 U.S. 753 (1979) on which the plurality in *Robbins* relied. 456 U.S. at 824. In *Sanders*, police officers had probable cause to believe that contraband was being transported in a container prior to the time the container was placed in the vehicle, and the *Sanders* holding is limited to that factual situation. Thus, in *Ross*, the majority overruled that portion of the *Sanders* opinion in which it had stated that police with probable cause as to the container could search only the container and not the rest of the vehicle. *Id.* at 814.

661. *United States v. Ross*, 655 F.2d at 1168.

662. Justice Blackmun also concurred. 456 U.S. at 825 (Blackmun, J., concurring).

663. *Id.* at 826 (Powell, J., concurring).

664. 453 U.S. 454 (1981). The "bright line" rule for automobile searches, which permitted the search of the passenger compartment and containers found therein incident to a lawful custodial arrest of a passenger or driver, was created to "establish the workable rule this category of cases requires . . ." *Id.* at 460.

665. 456 U.S. at 827 (Marshall, J., dissenting). He was joined by Justice Brennan.

automobiles: the exigency created by the mobility of the automobile⁶⁶⁶ and the diminished expectation of privacy associated with automobiles.⁶⁶⁷ He disagreed that these reasons could justifiably be applied to containers because containers may "easily be . . . brought to the magistrate"⁶⁶⁸ and do not "reflect diminished privacy interests."⁶⁶⁹ He criticized the majority "not only [for] repeal[ing] all realistic limits on warrantless automobile searches, [but for] repeal[ing] the Fourth Amendment warrant requirement itself."⁶⁷⁰ Justice Marshall concluded that expediency was the only explanation for the broad rule enunciated by the majority.⁶⁷¹ In so doing he emphasized the notion that "'the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.'"⁶⁷²

7. Seizures made pursuant to inventory search

In *United States v. Scott*,⁶⁷³ the Ninth Circuit upheld the inventory search of defendant's car. Scott was pulled over by Officer Elms of the Los Angeles Police Department (LAPD), who noticed that the car Scott was driving did not have current registration tags. Scott showed the officer identification bearing Scott's picture and the name of Cornelious Green. Identifying himself as Cornelious Green, Scott told the officer that the car was registered to his brother, Robert Green. While Scott rummaged in the car for the registration, Elms noticed what appeared to be a treasury check in an envelope on the floor of the car. The officer then radioed the station and found that there was a warrant outstanding for Cornelious Green's arrest. He informed Scott that he was under arrest and asked him whether the car should be impounded or left at the scene. Scott stated that he preferred the car to be left at the scene and that he would arrange to have it picked up. The officer informed Scott that he would roll up the windows and lock the doors before leaving the car. After Scott was taken away in a patrol car, the officer discovered that he could not lock all the doors and that the electric windows were inoperable.⁶⁷⁴

The officer then conducted an inventory of the contents in plain

666. *Id.* at 830.

667. *Id.*

668. *Id.* at 832.

669. *Id.*

670. *Id.* at 827.

671. *Id.* at 841.

672. *Id.* at 842 (quoting *Mincey v. Arizona*, 437 U.S. 385, 393 (1978)).

673. 665 F.2d 874 (9th Cir. 1981).

674. *Id.* at 875.

view inside the car, including the treasury check, which was made out to Cornelious Green. He took the check and other valuables to the police station for safekeeping. At the police station, Scott admitted his true name. After subsequent questioning by postal inspectors, Scott also made incriminating statements about his intention to cash the check.⁶⁷⁵ Scott's motion to suppress the treasury check was denied by the trial court, and he was convicted of receiving stolen property belonging to the United States.⁶⁷⁶ At trial it was established that the officer had complied with pertinent LAPD regulations when he removed the treasury check from the car.⁶⁷⁷

The Ninth Circuit recognized that warrantless searches under the fourth amendment are per se unreasonable, and that such searches must be justified by one of the exceptions to the warrant requirement.⁶⁷⁸ The *Scott* court found that exception in the Supreme Court's decision in *South Dakota v. Opperman*,⁶⁷⁹ which upheld the inventory search of an impounded vehicle.⁶⁸⁰ The court cited *Opperman* for the proposition that the usual probable cause analysis for conducting a search or seizure does not apply to administrative searches because they are noncriminal in nature. An administrative inventory search, therefore, even if conducted without a warrant, may be adjudged reasonable, and thus, lawful under the fourth amendment.⁶⁸¹ The Ninth Circuit declared that an inventory search is reasonable if "it respond[s] to three legitimate needs: 'the protection of the owner's property while

675. *Id.* at 875-76.

676. *Id.* at 875. Scott was convicted of violating 18 U.S.C. § 641 (1976), which states:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both

677. 665 F.2d at 875. The court cited the regulation as follows:

Property In a Vehicle To Be Impounded or Left Parked.

When a vehicle is impounded or left legally parked at the scene of a police investigation, the following items shall be removed and booked in accordance with established procedures:

. . . .

All monies found, whether in plain sight or as a result of a legal search.
Manual of the Los Angeles Police Department, ¶ 222.60 (February 1980).

665 F.2d at 875.

678. *Id.* at 876 (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)).

679. 428 U.S. 364 (1976).

680. 665 F.2d at 876.

681. *Id.*

it remains in police custody . . . the protection of the police against claims or disputes over lost or stolen property . . . and the protection of the police from potential danger.'"⁶⁸² Moreover, the scope of an inventory search is properly limited if "standard police procedures"⁶⁸³ are followed.⁶⁸⁴

The court found that the officer's inventory of Scott's car was non-criminal in nature⁶⁸⁵ and was conducted in accordance with "standard" LAPD procedures.⁶⁸⁶ The search was not, therefore, subject to the requirements of probable cause and was proper in scope. Finally, the court found that the search was reasonable because the officer's only objective was to secure and protect Scott's belongings. This furthered legitimate police caretaking functions.⁶⁸⁷ Thus, in accordance with *Opperman*, the court held that the inventory search did not violate the fourth amendment.⁶⁸⁸

8. Warrantless detention of personal luggage

The United States Supreme Court has held that law enforcement officers may detain an individual temporarily for investigatory pur-

682. *Id.* at 877 (quoting *South Dakota v. Opperman*, 428 U.S. at 369).

683. 665 F.2d at 877 (quoting *South Dakota v. Opperman*, 428 U.S. at 376).

684. 665 F.2d at 877.

685. *Id.* at 876. The court held that the search was not a pretense to a criminal investigation because "[the officer] had no reason to believe that Scott was not the named payee on the check when he removed it from the automobile." *Id.* at 877.

686. *Id.*

687. *Id.* The court cited *United States v. Prazak*, 500 F.2d 1216 (9th Cir. 1974) as authority for its holding. In *Prazak*, the Ninth Circuit ruled that, after the defendant was arrested for drunk driving and requested that his car be secured at the scene in place of impoundment, it was lawful for an officer to open the trunk to place defendant's coat inside. *Id.* at 1217.

688. 665 F.2d at 877.

In another inventory search case, *United States v. Daniel*, 667 F.2d 783 (9th Cir. 1982) (per curiam), the Ninth Circuit held that neither Rule 41(d) of the Federal Rules of Criminal Procedure nor the fourth amendment require the owner of the premises searched to be present during an inventory. 667 F.2d at 785. Daniel's home was searched pursuant to a warrant, and certain items were seized when officers conducted an inventory out of Daniel's presence after the search. The defendant sought to suppress the items. Rule 41(d) provides that inventories "shall be made in the presence of . . . the person from whose possession or premises the property was taken, *if they are present.*" FED. R. CRIM. P. 41(d) (emphasis added).

The court upheld the inventory, citing a Third Circuit decision, *United States v. Gervato*, 474 F.2d 40 (3d Cir.), cert. denied, 414 U.S. 864 (1973), without discussion. 667 F.2d at 785. In *Gervato*, the Third Circuit examined the history and purposes of Rule 41(d) and the fourth amendment, and found that searches based on probable cause, and accompanying inventories, need not be conducted in the owner's presence in order to be valid. *Gervato*, 474 F.2d at 43-45.

poses if they have a reasonable and well-founded suspicion that criminal activity is afoot.⁶⁸⁹ The warrantless detention of personal luggage, however, presents a troublesome fourth amendment issue. Controversy over whether the warrantless seizure and detention of inanimate objects such as luggage and other personal containers requires probable cause or only reasonable suspicion has been enhanced by the Supreme Court's decision in *United States v. Van Leeuwen*.⁶⁹⁰

In *Van Leeuwen*, a postal clerk's suspicions were aroused when the defendant mailed two packages which he said contained coins. After investigation by authorities, it was determined that the addressee of one package was being investigated for illegal coin trafficking. The packages were detained while a search warrant was obtained. Two and one-half hours later the packages were searched, rewrapped and mailed. The Court held that the detention of the packages was permissible under the fourth amendment.⁶⁹¹

The Court relied on *Terry v. Ohio*⁶⁹² for its holding.⁶⁹³ It stated that the packages were detained under a suspicion, and that the suspicion later matured into probable cause.⁶⁹⁴ However, the Court did not indicate which standard is to be used in future situations. At the point the packages were detained, it was held that no fourth amendment interest had been invaded.⁶⁹⁵ However, it was also stated that such a detention could at some point become unreasonable.⁶⁹⁶ This language, taken in isolation, is open to an interpretation that the detention of inanimate objects is to be judged by a standard of "reasonableness" as opposed to probable cause.

In *United States v. O'Connor*,⁶⁹⁷ the Ninth Circuit held that the warrantless seizure and detention of a briefcase was lawful where agents had probable cause to believe that it contained evidence of bookmaking.⁶⁹⁸ O'Connor was under surveillance in his hotel room where Internal Revenue agents suspected he was conducting illegal bookmaking activity.⁶⁹⁹ Agents observed two men leave the room. One of them, whom the agents thought was O'Connor, got into a cab

689. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

690. 397 U.S. 249 (1970).

691. *Id.* at 252.

692. 392 U.S. 1 (1968).

693. 397 U.S. at 252.

694. *Id.*

695. *Id.*

696. *Id.*

697. 658 F.2d 688 (9th Cir. 1981).

698. *Id.* at 693.

699. *Id.* at 689.

which was followed by Agent Kindt. The cab drove evasively but eventually Kindt pulled it over. Kindt discovered that the cab's passenger was not O'Connor, but a man named Davis with whom Kindt was not familiar.⁷⁰⁰ Davis admitted that he had come from O'Connor's room but refused to allow Kindt to search the briefcase he was carrying. The briefcase was detained in custody overnight and searched the next day pursuant to a search warrant. Cocaine was found inside, which was later ordered suppressed at a pretrial hearing.⁷⁰¹ The trial judge ruled that because it was not O'Connor in the cab, Agent Kindt lacked probable cause to seize the briefcase.⁷⁰²

On appeal, the Government argued that probable cause is not necessary to justify the warrantless seizure of an object, pending application for a search warrant. The Ninth Circuit rejected this argument.⁷⁰³ The court stated that not only is probable cause a prerequisite to both searches and seizures, but that a warrantless search or seizure must also be justified by the existence of exigent circumstances.⁷⁰⁴ The possibility of the briefcase being spirited away in the cab, it was held, presented the exigent circumstances necessary to justify Kindt's warrantless seizure.⁷⁰⁵

The court stated that the Supreme Court's decision in *Van Leeuwen* was distinguishable, and therefore not controlling, because in that case the police merely removed items from the flow of the mail, whereas the briefcase was taken directly from Davis' physical possession.⁷⁰⁶ The court nevertheless held that the seizure of the briefcase from Davis was in fact supported by probable cause.⁷⁰⁷ The finding was based on agents' observations of the activity in and around O'Connor's hotel room and the evasive driving of the cab.⁷⁰⁸ The court

700. *Id.* at 689-90.

701. *Id.* at 690.

702. *Id.*

703. *Id.* at 692 n.6.

704. *Id.*

705. *Id.*

706. *Id.* In support of this proposition, the court cited *United States v. Hunt*, 496 F.2d 888, 893 (5th Cir. 1974), which made a similar distinction. Neither the *O'Connor* court nor the *Hunt* court cited any direct authority from *Van Leeuwen* as a basis for the distinction. The opinion in *Van Leeuwen* does not contain any language which either directly supports or contradicts the holding. However, the distinction suggests that neither the *Hunt* court nor the *O'Connor* court was willing to hold that *Van Leeuwen* is limited to its facts, or to those situations involving the mail. By the same token, neither court appears willing to apply the *Van Leeuwen* exception to all cases involving detention of items pending application for a search warrant.

707. 658 F.2d at 692-93.

708. *Id.* at 693.

also noted that the agents would have been justified in searching the briefcase if it had been present when they were conducting the search of O'Connor's hotel room.⁷⁰⁹ Thus, it was held that the trial court's finding that Kindt lacked probable cause to seize the briefcase was clearly erroneous.⁷¹⁰ Finally, the court held that retention of the briefcase pending issuance of the search warrant was lawful because probable cause existed to seize it initially.⁷¹¹

In *United States v. Martell*,⁷¹² the Ninth Circuit held that the detention of suitcases for twenty minutes, without probable cause, but upon a well-founded suspicion, does not violate the fourth amendment.⁷¹³ In *Martell*, Agent Kenerson of the Drug Enforcement Agency (DEA) was informed by another DEA agent that Martell, a known drug trafficker, and Minneci were to fly into San Diego from Alaska on two separate flights. Agents watching the airport first observed Minneci arrive carrying two suitcases. Minneci made two phone calls and then took a cab to a hotel. Martell arrived the next morning, called Minneci's hotel,⁷¹⁴ proceeded there and checked into a different room. At 11:30 a.m. that same day, both men went back to the airport and bought tickets for a flight to Alaska. When they checked their baggage at the airport, the agents sent for a narcotics detector dog. Ten minutes before departure, the agents arrested both men⁷¹⁵ and asked for and were refused permission to search their suitcases.

Twenty minutes later, with both men and their suitcases still in custody, the narcotics detector dog signalled the presence of narcotics in the luggage. The trial court held that probable cause first arose at the time of this alert.⁷¹⁶ Martell and Minneci were detained for four hours until a search warrant arrived. Inside the luggage the agents found a large quantity of cocaine. Both men were convicted of posses-

709. *Id.* (citing *United States v. Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970) (affidavit describing materials that one would expect to be hidden at a suspect's residence justified a warrant to search the subject's home)).

710. 658 F.2d at 693. The court held that a determination of probable cause by a trial judge is reviewed under the "clearly erroneous" standard. *Id.* at 691.

711. *Id.* (citing *Arkansas v. Sanders*, 442 U.S. 753, 761-62 (1979)). The Ninth Circuit reversed the district court's motion to dismiss and remanded the cases for further proceedings. 658 F.2d at 691.

712. 654 F.2d 1356 (9th Cir. 1981).

713. *Id.* at 1363.

714. *Id.* at 1358. The court's recitation of facts does not explain how the agents discovered the destination of Martell's phone call.

715. *Id.* While the defendants were not formally arrested, agents testified that the two men were intentionally detained and were not free to leave. *Id.*

716. *Id.*

sion of cocaine⁷¹⁷ and conspiracy to possess cocaine with intent to distribute.⁷¹⁸

On appeal, Martell and Minneci contended that their detention constituted an illegal arrest⁷¹⁹ and that the seizure of the narcotics was tainted by that arrest. The court disagreed,⁷²⁰ and focused instead on whether the seizure and detention of the suitcases was lawful.⁷²¹

The Ninth Circuit held that the standard of reasonableness, as required by the fourth amendment, was to be applied to the detention and seizure of inanimate objects.⁷²² It relied on *United States v. Van Leeuwen*⁷²³ for the proposition that detaining an inanimate object without probable cause, but with a reasonable suspicion that the object was included in the scheme of criminal activity, is proper and not "per se unreasonable."⁷²⁴

The court stated that the length of time the defendant's luggage was detained is a relevant factor to be considered in determining the reasonableness of the detention.⁷²⁵ In the instant case, the suitcases were only detained for twenty minutes before the reasonable suspicion ripened into probable cause.⁷²⁶ A narcotics detector dog arrived and alerted the agents to the presence of a narcotic within the suitcases.⁷²⁷ It was the dog's alert which provided the probable cause for the warrantless seizure of the suitcases, pending the issuance of a search war-

717. *Id.* at 1357. 21 U.S.C. § 841(a)(1) (1976) states in pertinent part: "[I]t shall be unlawful for any person knowingly or intentionally . . . to . . . possess with intent to . . . distribute, or dispense, a controlled substance."

718. 654 F.2d at 1357. 21 U.S.C. § 846 (1976) states: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

719. 654 F.2d at 1358. The appellants cited *Dunaway v. New York*, 442 U.S. 200 (1979) (progeny of *Terry v. Ohio*) do not support the application of a balancing test so as to justify taking a defendant into custody on the basis of mere "reasonable suspicion") in support of their argument.

720. 654 F.2d at 1358-59. The court dismissed appellants' detention argument stating that their initial momentary detention was justified under *Terry v. Ohio*, 392 U.S. 1 (1968). 654 F.2d at 1358-59. The court specifically refused to address whether that initial "momentary" detention later became an unlawful arrest under *Dunaway*. *Id.* at 1361 n.4. No explanation of this refusal was given. The court merely held that even if the detention was unlawful, it did not taint the seizure and detention of appellant's suitcases. *Id.* at 1361.

721. *Id.* at 1358.

722. *Id.* at 1359.

723. 397 U.S. 249, 252 (1970).

724. 654 F.2d at 1360.

725. *Id.* The court acknowledged the fact that there was no case law which established the permissible outer time limit for the detention of impersonal objects. *Id.*

726. *Id.*

727. *Id.* at 1358.

rant.⁷²⁸ The court thus held that this detention did not violate constitutional standards.⁷²⁹

9. Warrantless searches of personal luggage

In *United States v. Monclavo-Cruz*,⁷³⁰ the court reversed the defendant's conviction for using a false alien registration receipt in violation of 18 U.S.C. section 1426(b).⁷³¹ After being informed that Monclavo-Cruz was selling false immigration documents, Immigration Investigator Cluff followed her in her car.⁷³² Cluff stopped the car and asked Monclavo-Cruz where she was from. After Monclavo-Cruz admitted that she was in the country illegally, Cluff arrested her and seized her purse from the car. Cluff testified at trial that he did not search the purse immediately, because to do so would have been a security risk.

After arriving at the police station, Cluff searched Monclavo-Cruz' purse in her presence without a search warrant. Inside a closed purse found in the large purse, Cluff found a false alien registration number. Monclavo-Cruz then confessed that she had used the number on a false registration card.⁷³³

The Ninth Circuit first rejected the Government's argument that Monclavo-Cruz had no reasonable expectation of privacy in her purse, stating that its decision in *United States v. Cleary*⁷³⁴ negated any such contention.⁷³⁵ The court stated that "society recognizes that an expectation of privacy in purses is reasonable."⁷³⁶

After rejecting the argument that the search of the purse was justified as incident to an arrest,⁷³⁷ the court addressed the Government's

728. *Id.* at 1360.

729. *Id.*

730. 662 F.2d 1285 (9th Cir. 1981).

731. 18 U.S.C. § 1426(b) (1976) states in part:

Whoever utters, sells, disposes of or uses as true or genuine, any false, forged, altered, antedated or counterfeited . . . documentary evidence of naturalization or citizenship, . . . knowing the same to be false, forged, altered, antedated or counterfeited

[s]hall be fined not more than \$5,000 or imprisoned not more than five years, or both.

732. 662 F.2d at 1286. Monclavo-Cruz had a male companion with her who was arrested after he admitted that he was an illegal alien. *Id.*

733. *Id.*

734. 656 F.2d 1302 (9th Cir. 1981), *vacated*, 102 S. Ct. 2919 (1982).

735. 662 F.2d at 1287. Note that *Cleary* has been vacated in light of *United States v. Ross*, 456 U.S. 798 (1982).

736. 662 F.2d at 1287. *See supra* notes 734-35.

737. *Id.*

contention that Cluff's actions constituted an inventory search.⁷³⁸ The Government argued that the Supreme Court's decision in *South Dakota v. Opperman*⁷³⁹ justified the search of Monclavo-Cruz' purse. In *Opperman*, police acting without a search warrant found marijuana while conducting an inventory of the contents of the defendant's car after it had been impounded. The Court upheld the search.⁷⁴⁰ The *Monclavo-Cruz* court reasoned, however, that the basis for upholding the search in *Opperman* had little or nothing to do with the search of Monclavo-Cruz' purse. First, the Ninth Circuit pointed out that the police in *Opperman* were following standard procedures which were designed to protect the police from immediate danger and subsequent claims of stolen or lost property.⁷⁴¹ Second, the expectation of privacy in one's car is significantly less than that in one's personal luggage.⁷⁴² Third, there was no evidence in *Opperman* which suggested that the police had any investigatory motive when they inventoried the contents of the car.⁷⁴³

The Ninth Circuit then noted significant aspects of *United States v. Chadwick*⁷⁴⁴ which further undercut the Government's assertion that *Opperman* was controlling.⁷⁴⁵ In *Chadwick*, both the defendant and his footlocker were in custody when the footlocker was searched. The searching officers had no reason to believe that the footlocker's contents presented any danger to them. The court further noted that in *Arkansas v. Sanders*,⁷⁴⁶ the Supreme Court had extended the *Chadwick* rule to all personal luggage.⁷⁴⁷

The court then noted the pertinent facts which foreclosed any characterization of the search of Monclavo-Cruz' purse as an inventory: (1) the officer's purpose in searching the purse was clearly investigatory; (2) there was no evidence offered by the Government that the purse could not have been secured in the police facility until a warrant was obtained; (3) it was unnecessary to empty the purse in order to secure its contents, and the officer's search merely increased the chances of a claim of lost or stolen property; and (4) there was no rea-

738. *Id.* at 1288.

739. 428 U.S. 364 (1976).

740. *Id.* at 376.

741. 662 F.2d at 1288.

742. *Id.* (citing *United States v. Chadwick*, 433 U.S. 1, 13 (1977)).

743. 662 F.2d at 1288.

744. 433 U.S. 1 (1977).

745. 662 F.2d at 1288.

746. 442 U.S. 753 (1979).

747. 662 F.2d at 1289.

son to suspect that the purse's contents included any inherently dangerous items. Finally, in concluding that the search of Monclavo-Cruz' purse was not justified as an inventory search, the court adopted the Eighth Circuit's view that "the community caretaking functions of the police are usually well served by simply [taking inventory of] personal baggage as a unit without searching it."⁷⁴⁸ The Ninth Circuit therefore reversed the defendant's conviction, suppressing the evidence derived from the unlawful search of her purse.⁷⁴⁹

10. Consent searches

Police may conduct a warrantless search if the defendant voluntarily consents to the search.⁷⁵⁰ The issue of voluntariness is determined from the totality of the circumstances.⁷⁵¹ Courts will consider the circumstances surrounding the search and the characteristics of the individual.⁷⁵² In *United States v. Fleishman*,⁷⁵³ the Ninth Circuit upheld the admission of a piece of paper seized in Drug Enforcement Administration (DEA) agents' warrantless search of a hotel room, based on the defendant's voluntary consent to the search.⁷⁵⁴ Defendant Combs was convicted⁷⁵⁵ of conspiring to distribute,⁷⁵⁶ aiding and abetting and possession with intent to distribute,⁷⁵⁷ and the distribution of cocaine.⁷⁵⁸ DEA agents went to Combs' hotel room following an undercover drug investigation that resulted in the purchase of cocaine by a

748. *Id.* (citing *United States v. Bloomfield*, 594 F.2d 1200, 1202-03 (8th Cir. 1979) (tightly sealed knapsack which presented no danger to police should not have been searched, but rather inventoried as a single unit); *United States v. Schleis*, 582 F.2d 1166, 1173 (8th Cir. 1978) (en banc) (briefcase, which presented no danger to police, was securely in police custody and away from arrestee, and could have been easily stored, should not have been internally searched)).

749. 662 F.2d at 1291.

750. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

751. *Id.* at 227.

752. *Id.* at 226-27.

753. 684 F.2d 1329 (9th Cir.), *cert. denied*, 103 S. Ct. 464 (1982).

754. *Id.* at 1334.

755. *Id.* at 1332.

756. 21 U.S.C. § 846 (1976) provides: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

757. 21 U.S.C. § 841(a) (1976) provides: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(i) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"

758. 18 U.S.C. § 2(a) (1976) provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

DEA agent from one of Combs' co-conspirators.⁷⁵⁹ After the agents identified themselves and stated that they were conducting a drug investigation, Combs allegedly invited them into the room and consented to a search. The agents discovered a piece of paper on a table which linked Combs to the drug transaction.⁷⁶⁰ On a pretrial motion, Combs sought to suppress the paper and any statements he had made before, during and after the warrantless search, arguing that they had been illegally obtained.⁷⁶¹ The trial court denied the motion.⁷⁶²

On appeal, the Ninth Circuit stated that the determination of voluntary consent to a search is a question of fact,⁷⁶³ and the trial court's ruling on the issue will be overturned only if clearly erroneous.⁷⁶⁴ The court then examined the record and found that defendant Combs had freely consented to the entry and search of the hotel room.⁷⁶⁵

The court then applied the reasonable person test⁷⁶⁶ to determine whether Combs understood that he was free to leave during the search and questioning. Relying on testimony given at the pretrial hearing that the agents expressly told Combs he was free to leave during the search and questioning, the Ninth Circuit found that the district court could have concluded that the statements were voluntary.⁷⁶⁷ Thus, the district court's findings were not clearly erroneous.⁷⁶⁸

11. Border searches

In *United States v. Ek*,⁷⁶⁹ the Ninth Circuit delineated the special rules which apply to border searches. After disembarking from a flight from Lima, Peru, Ek and a cohort were detained at 7:30 a.m. by cus-

759. 684 F.2d at 1332-34.

760. *Id.* at 1334.

761. *Id.*

762. *Id.*

763. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. at 227 ("[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.")).

764. 684 F.2d at 1334 (citing *United States v. Tavelman*, 650 F.2d 1133, 1138 (9th Cir. 1981) (where defendant gave "indicia of consent" to DEA agents' entry into his hotel room and to their search, court placed burden on defendant to show that finding of consent was clearly erroneous), *cert. denied*, 455 U.S. 939 (1982).

765. 684 F.2d at 1334.

766. *Id.* (citing *United States v. Booth*, 669 F.2d 1231, 1235-36 (9th Cir. 1981) ("Based upon a review of all the pertinent facts, the court must determine whether a reasonable innocent person in such circumstances would conclude that . . . he or she would not be free to leave.")).

767. 684 F.2d at 1334-35.

768. *Id.* at 1335.

769. 676 F.2d 379 (9th Cir. 1982).

toms agents at Los Angeles International Airport. The detention was based on an informant's tip that the two men would be smuggling cocaine hidden in swallowed capsules. A search of the men's bags proved fruitless. At 4:00 p.m. a court order authorizing an X-ray search arrived, and the suspects were X-rayed at a hospital at about 7:00 p.m.⁷⁷⁰ The X-rays revealed objects in both men's intestines. Ek was arrested and advised of his constitutional rights. He signed a full confession at 4:30 a.m., some twenty-one hours after his initial detention.⁷⁷¹ Ek was convicted of importing and possessing a controlled substance with intent to distribute.⁷⁷²

On appeal, Ek first contended that, according to *Dunaway v. New York*,⁷⁷³ his detention constituted a formal arrest and was therefore unlawful because it was not supported by probable cause.⁷⁷⁴ The Ninth Circuit rejected this contention, holding that "[n]either a warrant nor probable cause is needed to detain persons for a search at the border, so long as the period of detention does not exceed what is reasonably necessary to conduct a valid search."⁷⁷⁵ In a footnote, the court carefully pointed out that it was addressing the applicability of *Dunaway* to Ek's detention, and not to statements made during such a detention.⁷⁷⁶

Ek next contended that the detention was unreasonable because he

770. *Id.* at 381. Both suspects had refused to submit voluntarily to an X-ray examination.

771. *Id.* Ek was given his *Miranda* rights immediately after his arrest. He then admitted to swallowing capsules containing cocaine. At 2:00 a.m. he was again read his rights and then made a full confession. A statement was signed at 4:30 a.m., and Ek signed another typed statement the next day. *Id.*

772. *Id.* at 380.

773. 442 U.S. 200 (1979).

774. 676 F.2d at 381. In *Dunaway*, the United States Supreme Court held that a custodial interrogation which is in essence indistinguishable from a formal arrest must be supported by probable cause. *Dunaway*, 442 U.S. at 216.

775. 676 F.2d at 381 (footnote omitted) (citing *United States v. Erwin*, 625 F.2d 838, 841 (9th Cir. 1980) (detentions not exceeding what is necessary to conduct legal border search are proper since border officials are given broad powers to conduct searches); *United States v. Moore*, 638 F.2d 1171, 1173 (9th Cir. 1980) (no warrant or probable cause required for border searches), *cert. denied*, 449 U.S. 1113 (1981); *United States v. Espericueta-Reyes*, 631 F.2d 616, 621 (9th Cir. 1980) ("Detentions during routine searches and questioning at the border are considered 'reasonable' within the meaning of the Fourth Amendment." (citations omitted))).

In a footnote, the court distinguished *United States v. Perez-Esparza*, 609 F.2d 1284, 1286-87 (9th Cir. 1979), and *United States v. Medina-Verdugo*, 637 F.2d 649, 652 (9th Cir. 1980). In *Perez-Esparza*, the court used *Dunaway* to analyze a search at the San Clemente border checkpoint. The *Ek* court pointed out that the San Clemente border checkpoint is not a border and thus border search principles were not applicable. *Medina-Verdugo* was distinguished because there it was determined that the brief detention did not constitute a *Dunaway*-type arrest. 676 F.2d at 381 n.2.

776. 676 F.2d at 381 n.1.

was held longer than reasonably necessary to conduct a search. He also argued that the process of obtaining the court order was purposely delayed in order to pressure him to confess or submit voluntarily to the X-ray search.⁷⁷⁷ The court held, however, that detention while waiting for a court order is reasonable,⁷⁷⁸ and that the agents acted as quickly as possible.⁷⁷⁹

Ek then contended that the Government's suspicion that he was carrying contraband was not strong enough to justify an X-ray search. The court noted that although regular border searches need not be supported by probable cause, the legality of a more intrusive search must be judged by whether a proper level of suspicion justified its initiation.⁷⁸⁰ Thus, if the government suspects someone of carrying contraband, it must have a "real suspicion" to justify a strip search,⁷⁸¹ and a "clear indication" to justify a body cavity search.⁷⁸²

The court noted that the Ninth Circuit had not decided which standard of suspicion applies to an X-ray search.⁷⁸³ The *Ek* court held, however, that the government must have a clear indication that someone is involved in body cavity smuggling before performing an X-ray search.⁷⁸⁴ The court stated: "An X-ray search, although perhaps not so humiliating as a strip search, nevertheless is more intrusive since [it] is potentially harmful to the health of the suspect."⁷⁸⁵ The court found that the informant's tip gave the agents a clear indication before Ek

777. *Id.* at 382.

778. *Id.* (citing *United States v. Erwin*, 625 F.2d 838, 841 (9th Cir. 1980) (reasonable detention while warrant is being obtained is valid); *United States v. Cameron*, 538 F.2d 254, 258-59 & n.7 (9th Cir. 1976) (warrant, although not necessary for border search, defines the scope of the search and assures that it will be conducted in a reasonable manner)).

779. 676 F.2d at 382. The court noted that the Ninth Circuit's standard of review for the reasonableness of detentions is "less than clear." *Id.* at 382 n.3. Whether de novo review or the clearly erroneous standard is the proper standard was not decided because Ek's detention was determined to be reasonable under both. *Id.* at 382.

780. *Id.* (citing *United States v. Aman*, 624 F.2d 911, 912-13 (9th Cir. 1980)).

781. 676 F.2d at 382. A "real suspicion" was defined by the court as a "'subjective suspicion supported by objective, articulable facts.'" *Id.* (quoting *United States v. Aman*, 624 F.2d at 912).

782. 676 F.2d at 382 (citing *United States v. Aman*, 624 F.2d at 912-13).

783. 676 F.2d at 382.

784. *Id.*

785. *Id.* The court reasoned that such medical procedures should be used only if there is a clear indication that the suspect is concealing contraband inside his body. *Id.*

Judge Schnacke, in a special concurring opinion, took issue with this holding. He felt an X-ray search was less intrusive than a strip search. He conceded that his belief was not based in fact, but he felt that because the majority had no factual basis for its conclusions, this case was inappropriate to make such a finding. *Id.* at 383.

was detained that he was carrying contraband in his body.⁷⁸⁶ The conviction was therefore affirmed.⁷⁸⁷

D. Arrest Warrants

1. Sufficiency of affidavit

In *United States v. Sears*,⁷⁸⁸ the court upheld the sufficiency of an affidavit submitted in support of an arrest warrant.⁷⁸⁹ One of the defendants moved to suppress the weapons, dynamite, handcuffs, and other items seized from her person at the time of her arrest for bank robbery. The defendant argued that the arrest warrant affidavit did not provide sufficient probable cause, as it relied on the bank robbery witnesses' identification of an allegedly unlawfully obtained photograph.⁷⁹⁰ The trial court denied the motion.⁷⁹¹

On appeal from a conviction for bank robbery⁷⁹² and kidnapping,⁷⁹³ the defendant renewed the argument.⁷⁹⁴ The Ninth Circuit held, after examining the pertinent facts, that the photograph was lawfully obtained.⁷⁹⁵ The court further stated that the affidavit provided sufficient facts to establish probable cause for the arrest warrant.⁷⁹⁶

786. *Id.* at 382. Judge Schnacke's concurring opinion stated that the court's adoption of the "clear indication" standard was dicta because it was not necessary to the disposition of the case. Judge Schnacke felt that because it was clear under any standard that Ek was smuggling contraband in a body cavity, and because a court order was obtained, the adoption of the standard was unnecessary under the facts of the case. *Id.* at 383.

In a footnote, the court assured its readers that its holding was not dictum, stating that the required level of suspicion was set forth to enable the court to measure the agents' actions against it. *Id.* at 382 n.4.

787. *Id.* at 383. The court also rejected Ek's contentions that his confession was involuntary. For a full discussion of this aspect of the case, see *infra* discussion of *Ek* under *The Right Against Self-Incrimination*.

788. 663 F.2d 896 (9th Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982).

789. *Id.* at 904.

790. *Id.* at 902-03.

791. *Id.* at 903.

792. 18 U.S.C. § 2113(a) (1976) provides in pertinent part: "Whoever, by force and violence . . . takes, or attempts to take, from the person or presence of another any property or money . . . in the care, custody . . . of, any bank . . . [s]hall be fined . . . or imprisoned . . ." 18 U.S.C. § 2113(d) (1976) provides in pertinent part: "Whoever, in committing, or in attempting to commit, any offense defined in [subsection] (a) . . . assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined . . . or imprisoned . . ."

793. 18 U.S.C. § 2113(e) (1976) provides in pertinent part: "Whoever, in committing any offense defined in this section . . . kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned . . ."

794. 663 F.2d at 902.

795. *Id.* at 902-03.

796. *Id.* at 903-04.

The standard to be applied in evaluating probable cause to arrest is whether, given the facts as established in the affidavit, a prudent person would believe that the defendant had committed an offense.⁷⁹⁷ The court reasoned that the evidence presented in the affidavit, that the defendant was with a co-defendant both before and after the robbery, that she fit the description of one of the robbers provided by several witnesses, and that both she and one of the other robbers had abnormal eyes and a hearing problem, was more than ample to warrant a prudent person in believing that she had participated in the robbery.⁷⁹⁸ Therefore, the arrest warrant was valid.⁷⁹⁹

2. Execution of the warrant

In *United States v. Crawford*,⁸⁰⁰ the court upheld the manner in which state and federal officers executed an arrest warrant, pursuant to the 'knock and notice' requirements of 18 U.S.C. section 3109.⁸⁰¹ The defendant was under investigation for possessing and uttering counterfeit Federal Reserve Notes.⁸⁰² A warrant was issued to arrest the defendant at his home. At five-thirty in the morning, the officers knocked on the front door and identified themselves and their purpose. After receiving no response, they broke down the front door and entered the house, immediately observing a .22 caliber rifle. Without knocking and announcing their authority or purpose, the officers opened a bedroom door on the ground floor of the residence, finding the defendant in bed. He was immediately arrested.⁸⁰³

Appealing his conviction, the defendant contended that the forced entry at the bedroom door, without notice of authority and purpose, violated the requirements imposed by 18 U.S.C. section 3109, thereby

797. *Id.* at 903 (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (enunciating the standard for probable cause to make an arrest; defendant had been stopped and arrested by police based only upon a previous record of arrests); *United States v. Portillo-Reyes*, 529 F.2d 844, 851 (9th Cir. 1975) (none of the agents had probable cause to make an arrest within the mandated definition in *Beck*), *cert. denied*, 429 U.S. 899 (1976)).

798. 663 F.2d at 904.

799. *Id.*, affirming the district court's denial of the motion to suppress, and defendant's convictions.

800. 657 F.2d 1041 (9th Cir. 1981).

801. *Id.* at 1045. 18 U.S.C. § 3109 (1976) provides in pertinent part: "The officer may break open any outer or inner door or window of a house . . . to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance . . ."

802. 18 U.S.C. § 472 (1976) provides in pertinent part: "Whoever, with intent to defraud, passes, utters . . . any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined . . ."

803. 657 F.2d at 1043-44.

making the arrest unlawful.⁸⁰⁴

The court initially considered whether 18 U.S.C. section 3109, which governs the execution of a search warrant, even applied to this situation.⁸⁰⁵ The Ninth Circuit has held that section 3109 applies to the execution, by federal officers for federal offenses, of arrest warrants as well as search warrants.⁸⁰⁶ In this case, the arrest was by federal officers, pursuant to a federal arrest warrant issued by a federal magistrate. Therefore, the court held section 3109 applicable.⁸⁰⁷

The court rejected the defendant's contention that the officers were required to knock at the bedroom door, after complying with the requirements of section 3109 when they entered the front door.⁸⁰⁸ The court noted that the Ninth Circuit has consistently held that when the first or contemporaneous entry is lawful under section 3109, subsequent entries are lawful.⁸⁰⁹ The court further reasoned that the officers' entry preserved the purposes behind section 3109.⁸¹⁰ The notice at the front door was given loudly, with the proper interval of time observed before entry, thereby preserving the defendant's privacy interests.⁸¹¹ Additionally, there was no needless destruction of private property because the bedroom door was not broken down.⁸¹² Lastly, the officers' actions could be interpreted as an attempt to reduce the potential for violence, as the defendant had exhibited violence in the past and a rifle was discovered immediately upon entering the house.⁸¹³

The court held, therefore, that the announcement of authority and

804. *Id.* at 1043.

805. *Id.* at 1044.

806. *Id.* (citing *Vanella v. United States*, 371 F.2d 50, 58 (9th Cir. 1966) (in execution of an arrest warrant, knock and notice of authority and purpose took place at front door, followed a few minutes later by entry at the back door without knock or notice; 18 U.S.C. § 3109 held applicable), *cert. denied*, 386 U.S. 920 (1967)).

807. 657 F.2d at 1044.

808. *Id.* at 1045.

809. *Id.* at 1044-45 (citing *Cognetta v. United States*, 313 F.2d 870, 871-72 (9th Cir. 1963) (entrance through the front door after announcement of authority and purpose prior to unannounced rear door entry); *Vanella v. United States*, 371 F.2d 50, 58 (9th Cir. 1966) (lawful entry through the rear door before or contemporaneous to a forced, but announced entry through the front door), *cert. denied*, 386 U.S. 920 (1967); *Russo v. United States*, 391 F.2d 1004, 1006 (9th Cir.) (lawful front door entry contemporaneous with a forced entry through a rear door), *cert. denied*, 393 U.S. 885 (1968); *United States v. Bustamante-Gamez*, 488 F.2d 4, 12 (9th Cir. 1973) (announcement of authority and purpose at the front door simultaneous with forced entry of garage door), *cert. denied*, 416 U.S. 970 (1974)).

810. 657 F.2d at 1045.

811. *Id.*

812. *Id.*

813. *Id.* The court noted that the defendant's privacy interests must be weighed against the state's interest in securing the safety of its agents and citizens.

purpose at the front door was sufficient to satisfy the notice requirements of 18 U.S.C. section 3109, thereby vitiating any obligation to repeat the announcement at the bedroom door.⁸¹⁴ The Ninth Circuit upheld the district court's determination that the arrest was lawful.⁸¹⁵

E. Warrantless Arrests

With the exception of *Payton v. New York*,⁸¹⁶ Supreme Court precedent has not required that felony arrests be accompanied by warrants.⁸¹⁷ The validity of such warrantless arrests is instead determined by probable cause.⁸¹⁸ Probable cause has been considered the best compromise between the frequently opposing interests of the fourth amendment⁸¹⁹ and the facilitation of law enforcement.⁸²⁰ It affords law enforcement officers the opportunity to make on-the-spot arrests without a warrant, provided that its requirements are met.⁸²¹

In *United States v. Hammond*,⁸²² the Ninth Circuit held that a suspect's description on a police radio report which coincided with police officers' subsequent personal observations of the suspect satisfied the probable cause requirement.⁸²³ Police had been called to investigate a robbery suspect seen outside a bank which had been robbed a week earlier by a black male who walked with a limp.⁸²⁴ They arrived about fifteen minutes later and saw defendant Hammond sitting in the only car in the bank parking lot. He was ordered to get out of the car. The officers noticed that Hammond limped when he exited the car. The subsequent pat-down search revealed no weapons; however, one of the officers saw a ski mask in plain view inside the car.⁸²⁵ Hammond was

814. *Id.*

815. *Id.*, affirming the conviction.

816. 445 U.S. 573 (1980) (warrantless nonconsensual entry into a suspect's home for a routine felony arrest prohibited absent exigent circumstances).

817. *United States v. Watson*, 423 U.S. 411, 417 (1976).

818. "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed [by the person to be arrested]." *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

819. "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

820. *Dunaway v. New York*, 442 U.S. 200, 208 (1979).

821. *Id.* at 208.

822. 666 F.2d 435 (9th Cir. 1982).

823. *Id.* at 439.

824. The police radio report was initiated by a bank supervisor, who communicated the observations of a bank teller who had witnessed the robbery. *Id.* at 437.

825. *Id.* at 437. The ski mask apparently aroused the officer's suspicion because it was an August day. *Id.* at 439.

arrested and subsequently convicted of bank robbery.⁸²⁶

On appeal, Hammond argued that his warrantless arrest was unlawful because the officers lacked probable cause.⁸²⁷ Implicit in Hammond's argument was his belief that he was under arrest when initially ordered from the car.⁸²⁸ However, the Ninth Circuit characterized this initial confrontation as nothing more than an investigative stop.⁸²⁹ The court concluded that the arrest did not take place until after the officers observed Hammond walk to the rear of the car.⁸³⁰

In affirming his conviction, the Ninth Circuit rejected Hammond's contention that the arresting officers lacked probable cause to arrest.⁸³¹ The court found that cumulative information originating from two independent sources, the officers' personal observations of Hammond,⁸³² and the bank teller's information obtained from the police radio report,⁸³³ satisfied the probable cause requirement.⁸³⁴

826. *Id.* at 437. 18 U.S.C. § 2113(a) (1976) provides in pertinent part:

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association . . . with intent to commit in such bank . . . any felony affecting such bank . . . and in violation of any statute in the United States, or any larceny—

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

827. 666 F.2d at 439.

828. *Id.*

829. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). The Ninth Circuit further stated that "brief investigative stops lasting for a minute or so do not necessarily constitute arrests." 666 F.2d at 439 (citing *Dunaway v. New York*, 442 U.S. at 210-11).

830. 666 F.2d at 439. *But see* *Gomez v. Turner*, 672 F.2d 134, 141 (D.C. Cir. 1982) (question of whether suspect is seized depends upon whether "such conduct constitutes a *show of authority* that would lead a reasonable person to conclude that he is not free to go") (emphasis in original).

831. 666 F.2d at 439.

832. The officers saw that Hammond walked with a limp, as did the bank robber during the robbery. They also observed a ski mask in Hammond's car on an August day, although there was no evidence that a ski mask had been worn by the robber. *Id.* at 439.

833. *See supra* note 824.

834. 666 F.2d at 439. The Ninth Circuit reiterated the principle that information supplied by an eyewitness to a crime may be presumed to be reliable, provided that the witness is reasonably certain of the identification. *Id.* (citing *United States v. Mahler*, 442 F.2d 1172, 1174-75 (9th Cir.) (unnecessary to show that an eyewitness, the victim of defendant's extortion scheme, was a reliable informant), *cert. denied*, 404 U.S. 993 (1971)).

The court conceded that this was a close case because the teller was not certain that the man she observed outside the bank was the robber. This information, along with the officers' personal observations of Hammond, nevertheless constituted probable cause for the arrest. 666 F.2d at 439. *See* *Colorado v. Bannister*, 449 U.S. 1 (1980) (probable cause existed when officers observed suspects who matched police radio dispatch description and where description of stolen articles matched those found in suspect's car). *Accord* *United States v. Torres*, 663 F.2d 1019 (10th Cir.) (probable cause existed where police radio report corroborated officers' personal observations of suspected bank robbers, their weapons, and their pick-up truck), *cert. denied*, 456 U.S. 973 (1981).

In *United States v. Sears*,⁸³⁵ an investigative stop of defendants Sears and Werner ripened into probable cause justifying their warrantless arrests when they indicated to the arresting officers the presence of concealed weapons in their car.⁸³⁶ Police officers observed Sears and Werner sitting in a parked car which had out-of-state license plates. The defendants had been looking through binoculars at a bank across the street for about ten minutes. When the couple attempted to drive away, the officers stopped them and asked to see their automobile registration. The Ninth Circuit considered the initial confrontation a permissible investigative stop.⁸³⁷

The defendants voluntarily offered incriminating information which gave rise to the officers' reasonable belief that concealed weapons were located in the car.⁸³⁸ The Ninth Circuit affirmed the convictions, holding that the officers "clearly had probable cause to arrest" after finding the concealed weapons in the car.⁸³⁹

In *United States v. Allen*,⁸⁴⁰ three of four defendants argued unsuccessfully that their warrantless arrests for involvement in drug smug-

835. 663 F.2d 896 (9th Cir. 1981).

836. *Id.* at 903. Defendants Sears, Werner, and Strozyk were convicted of bank robbery and kidnapping, in violation of 18 U.S.C. §§ 2113(a), (d) and (e) (1976). *See supra* note 826 for § 2113(a). 18 U.S.C. § 2113(d) provides:

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

Subsection (e) provides:

Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense . . . Kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

837. 663 F.2d at 903. *See supra* note 829.

838. *Id.* After the officers asked for the automobile registration, Werner told them a gun was inside the glove compartment. Sears also mentioned that a second gun could be found in the back seat.

839. *Id.* Werner moved to suppress certain evidence obtained from this arrest in her subsequent conviction for bank robbery and kidnapping, but the court denied the motion, holding that the arrest was lawful. *Id.* at 902-03 (citing *Beck v. Ohio*, 379 U.S. 89 (1964) (defendant moved to suppress evidence obtained after his warrantless arrest for illegal possession of clearing house slips; when defendant was arrested, no objective facts existed that would lead officers to believe he was engaged in criminal activity); *United States v. Portillo-Reyes*, 529 F.2d 844 (9th Cir. 1975) (border patrol agents had no probable cause to arrest defendant found lying in front seat of Volkswagen at 4:30 a.m. near a known illegal entry point; only information the agents had was that four aliens had recently entered the country illegally and that one had keys for three cars, one of which was a Volkswagen), *cert. denied*, 429 U.S. 899 (1976)).

840. 633 F.2d 1282 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981).

gling were unlawful.⁸⁴¹ The Allen ranch, situated along the Oregon coast, had been under extensive surveillance by United States Customs officers, the Coast Guard, and other law enforcement agents. Twenty-four days of surveillance culminated in the interception of a marijuana smuggling operation during an early morning beach raid.⁸⁴² Kolander, Kerr, Sherman and Allen were arrested at various locations near the Allen ranch within thirty-seven hours after the raid.⁸⁴³ On appeal, the Ninth Circuit upheld the validity of each arrest except that of Allen.⁸⁴⁴ After analyzing the facts and circumstances surrounding the arrests of the four defendants, the court determined that only three were supported by probable cause.⁸⁴⁵

The arresting officers received notification of the drug raid through a police bulletin. Law enforcement officers were ordered to investigate anyone found near the ranch who was wet or cold and did not possess identification.⁸⁴⁶

Kolander was found near the ranch wearing wet clothes. He also had something protruding from his pocket, which provided the officers with reasonable suspicion to conduct a frisk for weapons.⁸⁴⁷ The frisk

841. *Id.* at 1292. Defendants Allen, Diffenderfer, Kerr, Kolander, D. Sherman, S. Sherman, and Theriaque were convicted of possessing marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (1976), which provides in pertinent part: "[I]t shall be unlawful for any person knowingly or intentionally . . . (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"

All defendants except Kolander were also convicted of conspiring to possess marijuana with intent to distribute, in violation of 21 U.S.C. § 846 (1976), which provides: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Allen was also convicted of conspiring to import marijuana in violation of 21 U.S.C. § 963 (1976), which contains the exact language used in 21 U.S.C. § 846 (1976).

842. For a detailed factual analysis, see *supra* discussion of *Allen* under *Scope of the Fourth Amendment*.

843. 633 F.2d at 1287-88. Kolander was arrested seven hours after the beach confrontation in a field just a few miles from the beach. Kerr was apprehended approximately thirteen hours after the initial raid, after he was seen walking on a highway wearing a wetsuit. Sherman was found wearing wet clothes, hitchhiking on a local highway about sixteen hours after the beach arrests. Allen was arrested after a span of thirty-seven hours when he was observed walking out of the bushes onto a road near his ranch. *Id.*

844. *Id.* at 1292.

845. *Id.*

846. *Id.* at 1287.

847. *Id.* at 1292 (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12 (1977) (frisk for weapons when officers noticed a bulge in defendant's clothing during a routine traffic violation stop upheld)).

revealed a pair of pliers similar to the type used at the ranch.⁸⁴⁸ These facts satisfied the court that Kolander's arrest was supported by probable cause.⁸⁴⁹ Kerr's presence near the ranch wearing a wetsuit provided probable cause for his arrest.⁸⁵⁰ Sherman was seen hitchhiking on a highway where hitchhiking was "rare,"⁸⁵¹ wearing wet and sandy clothes. He could not explain his presence near the ranch, nor his appearance. These facts satisfied the court that his warrantless arrest was lawful.⁸⁵² Allen's arrest would have been supported by probable cause; however, the court considered it illegal because the arresting officers "did not know that the man they arrested was Allen until after the arrest occurred."⁸⁵³

In *United States v. Bautista*,⁸⁵⁴ the Ninth Circuit upheld the validity of two bank robbery suspects' warrantless arrests. The defendants' demeanor, location, possession of large sums of cash, and inconsistent answers during police interrogation provided the requisite probable cause.⁸⁵⁵

Approximately fifteen minutes after they heard a police radio report of the robbery,⁸⁵⁶ Officers Powers and Gaspar observed defendants Bautista and Martinez walking in a residential area one-half mile from the bank and three and one-half blocks from the suspected getaway car. The suspects' appearances matched the descriptions in the police report.⁸⁵⁷ When the officers stopped their patrol car, Bautista approached and explained that he had gone to a house to ask someone to call a cab. With apparently no other exchange of communication, the suspects were frisked and handcuffed.⁸⁵⁸

848. 633 F.2d at 1292. The court refused to amplify its theory as to how a pair of pliers could be considered incriminating evidence of involvement in drug smuggling.

849. *Id.*

850. *Id.*

851. No analysis was offered in support of the statement that this highway was rarely frequented by hitchhikers.

852. *Id.* See *United States v. Seni*, 662 F.2d 277 (4th Cir. 1981) (law enforcement officers found fifteen tons of marijuana on a boat docked at a marina; court upheld validity of arrests where officers set up a roadblock five miles away from the boat and apprehended any suspects who approached the roadblock), *cert. denied*, 455 U.S. 950 (1982).

853. 633 F.2d at 1292.

854. 684 F.2d 1286 (9th Cir. 1982).

855. *Id.* at 1291.

856. The report described the suspects as being of either Mexican or Iranian descent. A subsequent report revealed that a suspected getaway car was seen parked in a residential area one-half mile from the bank. *Id.* at 1287.

857. *Id.*

858. The frisk revealed no weapons. *Id.* Officer Powers explained that the handcuffing was a precaution for officer safety because tracks on the suspects' arms suggested possible narcotics use, and Bautista appeared anxious to attempt an escape. Powers also went to the

After Powers verified Bautista's story with the neighbor, he returned to question the suspects. Bautista and Martinez were questioned separately, and their answers were inconsistent and suspicious.⁸⁵⁹ The suspects were formally placed under arrest after the officers completed the interrogations and compared their inconsistent answers.⁸⁶⁰

Defendants argued unsuccessfully on appeal that they were formally arrested when handcuffed.⁸⁶¹ The Ninth Circuit rejected this argument, relying on its decision in *United States v. Patterson*.⁸⁶² Although the handcuffing of the defendants in *Bautista* was arguably more indicative of an arrest than the blocking of a suspect's car in *Patterson*, the *Bautista* court pointed out that a brief but complete restriction of liberty, if not excessive under the circumstances, does not necessarily convert a stop into an arrest. The court found the handcuffing of defendants here neither excessive nor unreasonable under the circumstances.⁸⁶³

The court also rejected the defendants' argument that probable cause was lacking at the time of the actual arrest.⁸⁶⁴ The defendants

neighbor's house to verify Bautista's story, and he stated that it was safer to handcuff the suspects while Officer Gaspar stood guard. *Id.* at 1288. See *infra* discussion of *Bautista* under *Investigative Stops*.

859. *Id.* The neighbor, with whom Officer Powers verified Bautista's story, explained that Bautista requested that she call a cab because his car had broken down. When questioned, however, Bautista denied having a car, and neither suspect knew the other's name. Both were unaware of the street names in the area. Martinez said the car which dropped them off was green, while Bautista said it was blue. Martinez gave the officer a name which he was unable to spell. Bautista later altered his story, explaining that the \$250 in cash he possessed was for a narcotics purchase. Martinez also had \$250 in cash with him. *Id.*

860. *Id.* After a subsequent search of the defendants at the police station uncovered "bait bills" taken from the bank, Bautista and Martinez confessed to the robbery. Both were convicted of unarmed robbery. *Id.* at 1287-88.

861. *Id.* at 1289. Implicit in defendants' argument was the contention that such an abrupt arrest before any formal interrogation was made without probable cause.

862. 648 F.2d 625, 632-34 (9th Cir. 1981) (DEA agents attempted to stop and question defendant by blocking his car; the Ninth Circuit held that a valid investigatory stop does not become an arrest simply because a suspect's freedom of movement is temporarily restricted). *But see* *United States v. Marin*, 669 F.2d 73, 81 (2d Cir. 1982) (in determining whether a restraint is an arrest, courts look to the amount of force used, and the extent of intrusion and restraint on the individual's freedom of movement; here, four or five DEA cars blocked the defendant's car, agents approached with guns drawn, and two occupants of the car were physically removed; the court held this was tantamount to a warrantless arrest).

863. 684 F.2d at 1289. The use of handcuffs was also justified in *United States v. Thompson*, 597 F.2d 187, 190 (9th Cir. 1979) (suspect repeatedly reached for his coat pocket despite police officer's warnings). *See also* *United States v. Purry*, 545 F.2d 217, 219-20 (D.C. Cir. 1976) (handcuffing appropriate where suspect resisted after police officer placed his arm on suspect).

864. 684 F.2d at 1291.

were found within one-half mile of the bank and a few blocks from the suspected getaway car shortly after the robbery. They matched the descriptions on the police report and were carrying large sums of cash. They gave inconsistent and suspicious answers during routine questioning by police. The Ninth Circuit was satisfied that the warrantless arrests were supported by probable cause.⁸⁶⁵

In *United States v. Torres*,⁸⁶⁶ the defendants argued that because their actions were susceptible to innocent as well as guilty interpretations, the officers had no probable cause to arrest them for counterfeiting activity without a warrant. The Ninth Circuit upheld the convictions, affirming the district court's decision that the defendants' suspicious activities constituted probable cause.⁸⁶⁷

Defendant Torres and three associates, Salsedo, Montes, and Buenrostro, were involved in the printing business. Over a period of several months, the defendants purchased various printer's supplies which are often used in counterfeiting schemes.⁸⁶⁸ On June 15, 1979, a local printing supplier in Stockton, California alerted Secret Service Agent Hamilton of the suspicious nature of Torres' purchases, and an investigation began immediately.⁸⁶⁹

On July 2, while the Buenrostro residence was under surveillance, agents observed three men leave the premises with a package and drive away. After being informed of this incident, Agent Hamilton ordered that the vehicle be stopped. Buenrostro and Torres were in the car and were subsequently arrested. The package found in the car was opened and found to contain incriminating evidence.⁸⁷⁰ The defendants were convicted of counterfeiting⁸⁷¹ and Salsedo was also convicted of possessing and concealing counterfeit currency.⁸⁷²

865. *Id.*

866. 659 F.2d 1012 (9th Cir. 1981) (per curiam).

867. *Id.* at 1013. In this brief opinion, the Ninth Circuit primarily relied upon the district court's rationale in *United States v. Torres*, 504 F. Supp. 864, 870 (E.D. Cal. 1980).

868. *United States v. Torres*, 504 F. Supp. at 868-69. Among the supplies purchased were an A.B. Dick 360 printing press, offset printing plates and supplies to develop the plates, numerical printing attachments, gothic numerals similar to those used as serial numbers on United States currency, various inks often used for counterfeiting, and high rag content paper. *Id.*

869. *Id.* at 868.

870. *Id.* at 869. The searches that followed produced additional evidence which incriminated defendant Salsedo. *Id.*

871. 659 F.2d at 1012-13. 18 U.S.C. § 471 (1976) provides: "Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both."

872. 659 F.2d at 1012-13. 18 U.S.C. § 472 (1976) provides: "Whoever, with intent to

On appeal, the defendants contended that their arrests and the subsequent searches and seizures were unlawful because their printing activities were "as consistent with innocent as guilty conduct" and, therefore, no probable cause existed.⁸⁷³ The Ninth Circuit upheld the convictions, affirming the district court's finding that the accumulated evidence constituted probable cause.⁸⁷⁴ The district court reasoned that where the defendant's conduct is susceptible to both innocent and guilty interpretations, the prosecution must show that "a prudent person could say that an innocent course of conduct was substantially less likely than a criminal one."⁸⁷⁵ The Ninth Circuit agreed with the district court's findings, concluding that they were not clearly erroneous.⁸⁷⁶

F. Retroactivity of Payton

Although new constitutional rules were generally applied retroactively before 1965,⁸⁷⁷ the United States Supreme Court concluded in *Linkletter v. Walker*⁸⁷⁸ that retroactivity was neither required nor prohibited by the Constitution.⁸⁷⁹ In that case, the Court held that the exclusionary rule of *Mapp v. Ohio*⁸⁸⁰ should not be applied retroactively to convictions that had become final before the *Mapp* decision, even though it was already being applied to cases pending review at the time *Mapp* was decided.⁸⁸¹ Post-*Linkletter* decisions, however, departed

defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell . . . any falsely made, forged, counterfeited, or altered obligation . . . shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both."

873. *United States v. Torres*, 504 F. Supp. at 869-70.

874. 659 F.2d at 1013. *See United States v. Torres*, 504 F. Supp. at 870.

875. *United States v. Torres*, 504 F. Supp. at 870 (quoting *United States v. Patacchia*, 602 F.2d 218, 220 (9th Cir. 1979) (search of defendant's car by border patrol yielded marijuana; Ninth Circuit held that the defendant's nervousness, the car's similarity to others used in smuggling illegal aliens, the absence of a front license plate, the car's low ride and heavy duty shocks, defendant's statement that he had no trunk key, and his sudden change of demeanor after continued questioning taken together was insufficient "to make an innocent course of conduct substantially less likely than a criminal one"). *See also United States v. Patterson*, 492 F.2d 995, 997 (9th Cir.) (Ninth Circuit first adopted the "substantially more likely to be guilty conduct" test), *cert. denied*, 419 U.S. 846 (1974).

876. 659 F.2d at 1013 (citing *United States v. Hart*, 546 F.2d 798, 801 (9th Cir. 1976) (en banc) (upholding clearly erroneous standard)).

877. *Robinson v. Neil*, 409 U.S. 505, 507 (1973) (citing *Norton v. Shelby County*, 118 U.S. 425, 442 (1886)). *See also Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374-75 (1940).

878. 381 U.S. 618 (1965).

879. *Id.* at 629.

880. 367 U.S. 643 (1961).

881. 381 U.S. at 622. "By final [the Court] mean[s] where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had

from the newly established rule⁸⁸² in favor of a balancing test which resulted in inconsistent retroactive application of new rules of law.⁸⁸³

The Court adopted a uniform doctrine of retroactivity last term in *United States v. Johnson*.⁸⁸⁴ A divided Supreme Court held that, with the exception of cases clearly controlled by existing retroactivity precedent, decisions that construe the fourth amendment are to be applied retroactively to all convictions pending on direct appeal at the time the new decision is rendered.⁸⁸⁵

Defendants Johnson and Dodd were suspected of attempting to cash a misdelivered United States Treasury Check.⁸⁸⁶ Special Agents Hemenway and Pickering arrived at Johnson's residence without a warrant and knocked on the door, disguising their identities. Johnson opened the door and was met by the officers, who had drawn their guns and displayed their badges. Johnson allowed the men to enter, and after being questioned, admitted his involvement in the check cashing scheme. The district court denied Johnson's motion to suppress his confession, and he was convicted of aiding and abetting the obstruction of correspondence.⁸⁸⁷

elapsed [or a petition for certiorari finally denied] . . ." *Id.* at 622 n.5. *See also* *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 409 n.3 (1966) (fifth amendment rule of *Griffin v. California*, 380 U.S. 609 (1965), which barred comment on state defendant's failure to testify, was applied retroactively to cases pending on direct review when *Griffin* was decided, but not to convictions made final before that decision).

882. *Linkletter* directed courts to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U.S. at 629.

883. *See, e.g.*, *Johnson v. New Jersey*, 384 U.S. 719 (1966) (Court refused to apply retroactively *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966) (custodial interrogation)); *Stovall v. Denno*, 388 U.S. 293 (1967) (Court refused to apply retroactively *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967) (line-ups)).

884. 457 U.S. 537 (1982). Justice Blackmun wrote the opinion of the Court in which Justices Marshall, Powell and Stevens joined. Justice Brennan filed a concurring opinion. Justice White filed a dissenting opinion in which Chief Justice Burger and Justices Rehnquist and O'Connor joined.

885. *Id.* at 562-63.

886. *Id.* at 539. The check was accidentally delivered to Lena Kearney who subsequently solicited the help of Dodd and Johnson in cashing it. Kearney later described the events to Special Agent Hemenway, who obtained an arrest warrant for Dodd, but not Johnson. *Id.* at 539 n.2.

887. *Id.* at 540. 18 U.S.C. § 2 (1976) provides:

- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
- (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 1702 (1976) provides in pertinent part:

The Ninth Circuit initially affirmed Johnson's conviction, concluding that the absence of a warrant was not determinative because the agents had probable cause.⁸⁸⁸ While Johnson's petition for rehearing was pending, however, an analogous warrantless arrest decision, *Payton v. New York*,⁸⁸⁹ was rendered by the United States Supreme Court. In *Payton*, the Court held that, absent a warrant and exigent circumstances, the fourth amendment prohibits nonconsensual entry into a suspect's home for the purpose of making a routine felony arrest.⁸⁹⁰ After granting Johnson's rehearing petition, the Ninth Circuit reversed his conviction, applying *Payton*.⁸⁹¹

In *Payton*, the Court's inquiry into the retroactivity issue began with an analysis of the holdings in *Johnson v. New Jersey*,⁸⁹² and *Stovall v. Denno*,⁸⁹³ in which the *Linkletter* rule was abandoned in favor of a three-part balancing test.⁸⁹⁴ This balancing test, however, gave rise to varying degrees of retroactivity.⁸⁹⁵ In numerous decisions since *Linkletter*, the Court has expressed dissatisfaction with this variance and suggested that such "law-changing decision[s]" should apply retroactively to all convictions pending on direct appeal at the time the decision is rendered.⁸⁹⁶

In holding that *Payton*, as well as all new fourth amendment is-

Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter . . . with design to obstruct the correspondence . . . or opens, secretes, embezzles, or destroys the same, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

888. 457 U.S. at 540 (citing an unreported opinion filed Dec. 19, 1978).

889. 445 U.S. 573 (1980).

890. *Id.* at 590.

891. *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *rev'd*, 457 U.S. 537 (1982). The Ninth Circuit adopted the Supreme Court's rationale emphasizing the special protection afforded individuals in their homes and rejected the Government's argument that because Johnson was arrested prior to the *Payton* decision, he should not benefit from the decision.

892. 384 U.S. 719 (1966). *See supra* note 883.

893. 388 U.S. 293 (1967). *See supra* note 883.

894. *United States v. Johnson*, 457 U.S. at 543-44. The three factors to be balanced are: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Id.* *See Stovall v. Denno*, 388 U.S. at 297; *Johnson v. New Jersey*, 384 U.S. at 728.

895. 457 U.S. at 544-45. The varying degrees of retroactivity were: (1) complete retroactive effect to new constitutional rules that attempt to circumvent obstacles which create doubts as to the veracity of prior guilty verdicts; (2) complete prospective application of new constitutional rules, but retroactive application only to those parties at bar; and (3) denial of the rule's benefit to the parties at bar, but complete prospective application. *Id.* (citations omitted).

896. *Id.* at 545 (citations omitted). *See id.* at 545-46.

sues, should be applied retroactively, the Court relied upon Justice Harlan's separate opinion in *Mackey v. United States*⁸⁹⁷ and his dissent in *Desist v. United States*.⁸⁹⁸ In these opinions, Justice Harlan expressed his concern over the "incompatible rules and inconsistent principles" created by the case-by-case balancing approach.⁸⁹⁹ He was also troubled by the Court's exclusively prospective application of new rules, which denied retroactive benefit to defendants other than the litigant at bar.⁹⁰⁰ He felt that all similarly situated defendants should be granted the same relief unless the Court could "give a principled reason for acting differently."⁹⁰¹ Justice Harlan suggested a re-adoption of the *Linkletter* analysis, applying new constitutional decisions retroactively to all convictions not yet final when the decision is rendered.⁹⁰²

After determining that the question of applying *Payton* retroactively was not "clearly controlled" by Supreme Court precedents,⁹⁰³ the *Johnson* Court found that applying the *Payton* rule to all cases still pending when *Payton* was decided would satisfy all three concerns espoused by Justice Harlan: first, the inconsistency resulting from the case-by-case balancing approach would be alleviated;⁹⁰⁴ second, every litigant, with the exception of those whose convictions were final, would receive the benefit of the new constitutional rule;⁹⁰⁵ and finally,

897. 401 U.S. 667, 676 (1971) (refusal to retroactively apply the fifth amendment issues raised in *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968), to petitioner's conviction which had become final prior to those decisions).

898. 394 U.S. 244, 256 (1969) (refusal to retroactively apply the fourth amendment rule of *Katz v. United States*, 389 U.S. 347 (1967) to petitioner's conviction which had not become final); *United States v. Johnson*, 457 U.S. at 546-48.

899. 457 U.S. at 546-48 (quoting *Desist v. United States*, 394 U.S. at 258 (Harlan, J., dissenting)).

900. 457 U.S. at 546-47.

901. *Id.* at 547 (quoting *Desist v. United States*, 394 U.S. at 258-59) (Harlan, J., dissenting)).

902. 457 U.S. at 548 (citing *Desist v. United States*, 394 U.S. at 258).

903. 457 U.S. at 552-54. The Court identified three categories of cases in which the issue of retroactivity is effectively determined. First, if settled principles of law are applied to a novel factual situation, the question whether the later decision should apply retroactively does not arise because the rule has not been materially altered. Second, if a new rule of criminal procedure constitutes a "clear break with the past," there is no retroactive application because law enforcement officials have relied on the old standards and because of the effect on the administration of justice. Third, if the trial court had no authority to render a conviction or punish a defendant, there is complete retroactivity. *Id.* at 549-50 (citations omitted).

The Court subsequently concluded that *Payton* fell within none of these categories, and, therefore, it followed Justice Harlan's suggestion and re-adopted *Linkletter*. *Id.* at 562.

904. *Id.* at 554-55.

905. *Id.* at 555. "If a 'new' constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very

all defendants in similar situations would be afforded equal treatment under the newly adopted rule.⁹⁰⁶

The Court rejected the Government's argument that *United States v. Peltier*⁹⁰⁷ required a different result.⁹⁰⁸ Unlike *Johnson*, *Peltier* was specifically controlled by precedent. *Peltier* involved the retroactivity of *Almeida-Sanchez v. United States*,⁹⁰⁹ which invalidated a long-standing, judicially approved statute, resulting in a clear break with existing law.⁹¹⁰ In the past, this type of new constitutional rule received no retroactive application, not because all fourth amendment decisions were to be applied prospectively, "but because the particular decisions being applied 'so change[d] the law that prospectivity [was] arguably the proper course.'" ⁹¹¹

The Government interpreted *Peltier* as denying retroactive effect to all cases in which police officers acted in good faith compliance with

arguments we have embraced.'" *Id.* at 555 (quoting *Desist v. United States*, 394 U.S. at 259 (Harlan, J., dissenting)).

906. 457 U.S. at 555. The Court thus flatly rejected the Government's argument that *Johnson* could not rely on *Payton* because he was arrested before *Payton* was decided. *Payton* received the benefit of the new rule in his case, yet he too was arrested prior to the Court's decision. *Id.* at 555-56.

907. 422 U.S. 531 (1975) (refusing to retroactively apply the decision in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), which held that a warrantless automobile search without probable cause conducted by border patrol agents twenty-five air miles from the Mexican border violated the fourth amendment).

Peltier was arrested seventy miles from the border after roving border patrol agents found narcotics in his automobile. The Court held that retroactive application of *Almeida-Sanchez* was unjustified because the agents relied upon a longstanding federal statute which permitted such searches. *United States v. Peltier*, 422 U.S. at 539-42.

908. 457 U.S. at 557-60.

909. 413 U.S. 266 (1973).

910. 457 U.S. at 558 (citing *United States v. Peltier*, 422 U.S. at 541). *See supra* note 903.

911. 457 U.S. at 559 (quoting *Williams v. United States*, 401 U.S. 646, 659 (1971) (plurality opinion) (defendant's conviction for dealing heroin affirmed where Court refused to apply retroactively new rule enunciated in *Chimel v. California*, 395 U.S. 752 (1969), narrowing scope of permissible searches incident to arrest)). *Chimel* overruled *United States v. Rabinowitz*, 339 U.S. 56 (1950) (warrantless search of defendant's one-room office, including his desk, safe, and file cabinets, incident to his arrest for possession of counterfeit stamps did not violate the fourth amendment), and *Harris v. United States*, 331 U.S. 145 (1947) (extensive five-hour warrantless search of defendant's apartment incident to his arrest for mail fraud did not violate fourth amendment).

See also *Desist v. United States*, 394 U.S. at 254 (refusal to retroactively apply the new rule enunciated in *Katz v. United States*, 389 U.S. 347, 353 (1967), which held that the scope of the fourth amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure"). *Katz* overruled *Goldman v. United States*, 316 U.S. 129 (1942) (upholding use of a "detectaphone" affixed to a wall adjoining defendant's office whereby phone conversations were overheard), and *Olmstead v. United States*, 277 U.S. 438 (1928) (upholding use of wiretap of defendant's telephone conversations where no trespass was committed).

the Constitution.⁹¹² Such a reading, the *Johnson* Court suggested, would create an absurd "retroactivity test" in which a police officer would have to violate a clearly established precedent before a new decision would apply retroactively.⁹¹³ The Court declared: "[l]iterally read, the Government's theory would automatically eliminate *all* Fourth Amendment rulings from consideration for retroactive application."⁹¹⁴

The Government further interpreted *Peltier* as suggesting that all fourth amendment retroactivity contravened the underlying policies of the exclusionary rule.⁹¹⁵ The *Johnson* Court responded, however, that *Peltier* merely suggested that retroactive application of new fourth amendment rulings which involved a "sharp break" with the past would rarely deter practices which law enforcement officers "never expected [would] be invalidated."⁹¹⁶ Unlike the judicially approved statute in *Peltier*, the warrantless home arrest issue in *Payton* was unsettled, and the possibility that such police procedures could be invalidated at any time does create a deterrent effect.⁹¹⁷

The Government's final argument, that such retroactive application would serve only to release wrongdoers, was also rejected by the *Johnson* Court.⁹¹⁸ Although it expressed reluctance to release convicted criminals, the Court reasoned that upholding constitutional principles was paramount and that similarly situated defendants should be afforded the same relief.⁹¹⁹

Thus, the Court held that its decisions construing the fourth amendment are to be applied retroactively to all convictions not yet final at the time the decision is rendered.⁹²⁰ The Court further held that this decision did not affect those cases clearly controlled by ex-

912. 457 U.S. at 559. The language in *Peltier* which the Government referred to suggested that because the purpose of the exclusionary rule is to deter police misconduct, evidence should be suppressed only when the officer knowingly violated a constitutional provision due to his reliance upon longstanding practice. *Id.*

913. *Id.* at 560.

914. *Id.* (emphasis in original).

915. *Id.*

916. *Id.* (citing *United States v. Peltier*, 422 U.S. at 541-42).

917. 457 U.S. at 560. The Court noted that the Government's interpretation of *Peltier*, that no unsettled fourth amendment rules should be retroactively applied, actually provides incentive for police misconduct. It also encourages a disregard of Supreme Court decisions as well as a wait-and-see approach. *Id.* (citing *Desist v. United States*, 394 U.S. at 277 (Fortas, J., dissenting)).

918. 457 U.S. at 561.

919. *Id.* (citing *Desist v. United States*, 394 U.S. at 277 (Harlan, J., dissenting)).

920. 457 U.S. at 562.

isting retroactivity precedent.⁹²¹ In stating that its holding was limited to the issue of fourth amendment retroactivity, the *Johnson* Court refused to discuss fourth amendment retroactivity issues raised on collateral attack.⁹²² In addition, the Court affirmed the civil standard enunciated in *Chevron Oil Co. v. Huson*.⁹²³ Accordingly, the Court affirmed the Ninth Circuit's retroactive application of *Payton*.⁹²⁴

Justice Brennan concurred in the majority's opinion based on the understanding that it left undisturbed retroactivity precedents as applied to convictions final at the time of decision.⁹²⁵ In a dissenting opinion joined by Chief Justice Burger and Justices Rehnquist and O'Connor, Justice White relied, as did the Government, on *Peltier*.⁹²⁶ He explained that neither "judicial integrity" nor deterrence of police misconduct would be served by applying *Payton* retroactively.⁹²⁷ Justice White reasoned that judicial integrity is not offended when evidence is introduced at trial which the officer reasonably believed to be admissible.⁹²⁸ He stated further that deterrence of officer misconduct occurs only when the officers knowingly violate the fourth amendment.⁹²⁹ Finally, he also de-emphasized the apparent inequity of nonretroactivity.⁹³⁰

G. Investigative Stops

A brief detention of a suspicious person without probable cause for either a search or an arrest is generally considered an investigative stop. It is unclear, however, how long the suspect may be detained before the investigative stop turns into a full-scale arrest requiring full

921. *Id.*

922. *Id.*

923. *Id.* (citing *Chevron*, 404 U.S. 97, 106-07 (1971) (using the "clear break" principle as determinative of retroactivity in a civil context)).

924. 457 U.S. at 563.

925. *Id.* at 563-64 (Brennan, J., concurring). See, e.g., *Stovall v. Denno*, 388 U.S. 293 (1967) (*Wade-Gilbert* rule to be applied to those convictions final at the time of the decisions).

926. *Id.* at 564 (White, J., dissenting).

927. *Id.*

928. *Id.* at 565 (citing *United States v. Peltier*, 422 U.S. at 537).

929. 457 U.S. at 565 (citing *United States v. Peltier*, 422 U.S. at 542).

930. 457 U.S. at 566. Justice White stated: "I had thought that we long ago resolved the problem of the appearance of inequity that arises whenever we limit the retroactive reach of a new principle of law."

The majority noted, however, that while the Court cannot "speed up or slow down the appellate process" to ensure that similarly situated defendants be treated similarly, it can eliminate the inherent inequity of exclusively prospective application of new rules of law. 457 U.S. at 557 n.17.

fourth amendment protection.⁹³¹ The propriety of an investigative stop is determined by several factors: the scope and duration of the stop; the intrusiveness of the questioning; and the existence of specific and articulable facts which reasonably indicate either present or future criminal activity.⁹³²

In *United States v. Martell*,⁹³³ the Ninth Circuit stated that Drug Enforcement Agency (DEA) agents' well-founded suspicion that defendants were engaged in drug trafficking justified a twenty minute detention of defendants and their suitcases for investigative purposes.⁹³⁴ The court refrained from deciding whether the detention of the defendants exceeded limits established in *Terry v. Ohio*⁹³⁵ and *Dunaway v. New York*,⁹³⁶ stating that "the real issue" was whether the twenty minute detention of the defendants' luggage upon a well-founded suspicion, but without probable cause, constituted a fourth amendment violation.⁹³⁷ The court conceded that the length of time during which the defendants' luggage was detained is relevant in determining whether the intrusion is permissible under fourth amendment standards.⁹³⁸ The court stated that it was unaware, however, of any case which placed an outer time limit on the detention of objects.⁹³⁹ The

931. The detention must not be longer than justified by the circumstances. *United States v. Lockett*, 484 F.2d 89 (9th Cir. 1973) (detention of a jaywalker held unreasonable where police detained him longer than necessary to write citation, so that they could call headquarters on an unsubstantiated hunch that there was a warrant for his arrest). The MODEL PENAL CODE § 110.2(1) (1980) provides that the length of the detention must be no longer than reasonably necessary to learn the suspect's identity and determine the existence of any criminal activity, and in no event longer than twenty minutes.

932. See generally *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

933. 654 F.2d 1356 (9th Cir. 1981) (appeal pending).

934. *Id.* at 1358-59.

935. 392 U.S. 1 (1968).

936. 442 U.S. 200 (1979).

937. 654 F.2d at 1358. The DEA agents' well-founded suspicion was based on information that Martell, a known drug trafficker, had made travel arrangements under an alias. In San Diego, agents observed Martell leave his hotel room with co-defendant Minneci. They drove in an erratic manner, known to the agents as a method of detecting and avoiding surveillance. They returned to the hotel within five minutes, and ten minutes later, agents observed Minneci making telephone calls. A few hours later, Minneci and Martell went to the airport and purchased airline tickets to Alaska. At the airport, they refused to grant the agents permission to search their suitcases. They were subsequently taken to a police office in the airport where a canine detected drugs in the luggage. The agents did not search the defendants' bags, however, until a valid search warrant was obtained. *Id.* at 1357-58.

938. *Id.* at 1360 (citing *United States v. Van Leeuwen*, 397 U.S. 249, 252 (1970) (detention of mail for one and one-half hours, without probable cause, held proper where there was reasonable suspicion that it was included in a criminal scheme)).

939. 654 F.2d at 1360. The Ninth Circuit noted that there is a conceptual difference between the detention of the defendants and the detention of their suitcases, but the court did

court concluded that the twenty minute detention of the defendants' luggage was reasonable and did not violate the fourth amendment.⁹⁴⁰

In *United States v. Anderson*,⁹⁴¹ the Ninth Circuit applied the test for a seizure articulated in *United States v. Mendenhall*⁹⁴² and held that government agents' encounter with the defendants clearly constituted a "seizure."⁹⁴³ The defendants had chartered a plane from Fort Lauderdale, Florida, to Orange County, California. Upon arrival they were met by DEA agents who had received information⁹⁴⁴ that the plane would be carrying narcotics. At the agents' request, the defendants went to the aviation building with their luggage. Once inside the building, they were questioned about their identity and purposes for travel. When asked to identify their luggage, however, all of the defendants disclaimed ownership except defendant Anderson, who claimed an attache case. Varying amounts of cocaine were found pursuant to a search warrant in all the cases.⁹⁴⁵

The court rejected the Government's argument that this was not an investigative stop,⁹⁴⁶ but agreed with the Government that the en-

not state why the legality of the luggage detention was the real issue in this case. *Id.* at 1359.

The court distinguished *Terry, Dunaway*, and their progeny because they involved the "detention of persons and not inanimate objects." *Id.* The court believed the rationale relied upon by the Supreme Court in *Terry, Dunaway*, and other similar cases was "inappropriate as applied to 'things,' a seizure of which constitutes a substantially less serious intrusion upon rights of the individual." *Id.*

940. *United States v. Martell*, 654 F.2d at 1363. See *infra Martell* discussion under *Warrantless Searches and Fruits of the Poisonous Tree*. Ultimately, the defendants' convictions for violation of 21 U.S.C. §§ 841(a)(1) and 846 were affirmed. 654 F.2d at 1363.

941. 663 F.2d 934 (9th Cir. 1981).

942. 446 U.S. 544 (1980). In *Mendenhall*, a majority of the Court assumed that the stop of *Mendenhall* constituted a seizure. Justice Stewart articulated the test as follows:

[A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Id. at 554.

943. 663 F.2d at 939 (citations and footnote omitted).

944. The information was supplied by a government informant. Unlike the district court, the Ninth Circuit found the informant to be reliable. *Id.* at 940. In particular, the court found the following facts to constitute sufficient indicia of reliability: (1) the informant's previously accurate tips; (2) the precision of the tip as to the plane, pilots, time of departure, and destination of the flight; and (3) the informant's belief that narcotics were on board was not based merely on observation, but also on his personal knowledge of the pilots and owner. *Id.*

945. *Id.* at 936-37.

946. *Id.* at 939-40. The court distinguished *Mendenhall* from the instant case by noting the following five factors, which indicated to the court that the defendants were reasonable

counter was based on reasonable suspicion.⁹⁴⁷ The court held that the district court erred in finding that the initial stop was not based on reasonable suspicion, stating that the assessment of adequate cause to make the stop must be based on all the circumstances.⁹⁴⁸ The Ninth Circuit held that the agents were justified in drawing the inference that the aircraft was probably carrying narcotics, and that, based on that deduction, they were justified in stopping the occupants for questioning.⁹⁴⁹

The court also addressed the issue of whether the length of the detention was lawful, and thus either added to or detracted from the reasonableness of the agents' actions under the circumstances. The Ninth Circuit stated, however, that it was unable to evaluate the legality of the length of the detention, because the district court failed to make factual determinations as to its length and at what point it actually began.⁹⁵⁰

in believing that they were not free to walk away: (1) the presence of the five DEA agents, one LAPD officer, and four uniformed Orange County deputy sheriffs; (2) defendants' testimony that they were ordered, rather than requested, to leave the plane; (3) the agents' act of escorting the defendants about 150 feet in a rainstorm, at night, to a terminal closed to the public; (4) placement in a room measuring ten feet by twenty feet; and (5) the presence of at least one agent or officer, even for trips to the restroom or telephone. *Id.* at 940. The court analogized the agents' approach to the plane to that of a vehicle stop which, according to Justice Stewart in *Mendenhall*, constituted a search. *Id.*

947. *Id.* at 940. The Ninth Circuit concluded that reasonable suspicion existed in part, because the informant was reliable. *See supra* note 944.

948. 663 F.2d at 940. The court was enlightened by *United States v. Cortez*, 449 U.S. 411, 418 (1981) (all the surrounding circumstances, including an officer's knowledge and expertise, must be considered in determining the propriety of an investigatory stop). The *Anderson* court believed that in light of all the surrounding circumstances, there was adequate cause for the initial stop. *See supra* note 944. Furthermore, the DEA agents knew that the airport from which the plane departed had been the site of previous narcotics activity, the pilot and owner were drug transporters, and chartered planes are frequently employed to transport narcotics to avoid luggage inspections which are required by FAA regulations. 663 F.2d at 940-41.

949. *Id.* at 941.

950. *Id.* The court did not apply or distinguish *United States v. Richards*, 500 F.2d 1025 (9th Cir. 1974) (detention found reasonable where defendants stopped while on board private plane and, due to weather conditions, taken inside airport terminal building, questioned and detained for over an hour).

The Ninth Circuit remanded the case to the district court for findings as to how long the detention lasted before the first canine search of the luggage, and when the detention ripened into an unlawful arrest, if at all. 663 F.2d at 941. The court further suggested that, on remand, the district court should evaluate these matters in the light of *United States v. Martell*, 654 F.2d 1356 (9th Cir. 1981) (twenty minute detention upheld as reasonable). The *Anderson* court also ordered that if the district court determined on remand that defendants' denials of ownership occurred during the initial lawful detention, and that the denials constituted an abandonment of the defendants' privacy interests, then the motions to suppress must be denied. 663 F.2d at 941-42.

In *International Ladies' Garment Workers' Union v. Sureck*,⁹⁵¹ the Ninth Circuit held that Immigration and Naturalization Service (INS) investigators may not seize or detain workers to question them about their citizenship status⁹⁵² without a reasonable suspicion, based on articulable objective facts, that the person questioned and detained is an illegal alien.⁹⁵³

In *Sureck*, three particular surveys conducted by the INS were challenged by the plaintiffs on fourth amendment grounds.⁹⁵⁴ Search warrants were issued for two surveys,⁹⁵⁵ and the third survey occurred at a workplace with the owner's consent. The workers, all legally in this country, were subjected to INS questioning at their workplaces. Not all of the workers were questioned, however,⁹⁵⁶ those chosen were selected by the agents' use of certain objective and subjective factors.⁹⁵⁷

The court noted that one of the threshold issues was the applicability of the fourth amendment to the INS questioning of workers during factory surveys. The court reiterated the well-established principle that the fourth amendment applies to law enforcement activities involving

951. 681 F.2d 624 (9th Cir. 1982), *cert. granted sub nom.* Immigration & Naturalization Serv. v. Delgado, 103 S. Ct. 1872 (1983).

952. *Id.* at 638. 8 U.S.C. § 1357(a)(1) (1976) is the statutory enactment under which an INS agent may question a person regarding his right to be or remain in the United States without forcible detention, if the agent has a reasonable belief that the questioned person is an alien.

953. 681 F.2d at 638.

954. *Id.* at 627. The challenged surveys, or sweeps through factories for the purpose of locating illegal aliens, occurred at the Southern California Davis Pleating Co. on January 4, 1977, and on September 27, 1977, and at Mr. Pleat on October 3, 1977.

The plaintiff also challenged the INS practice on fifth amendment grounds; however, the Ninth Circuit stated that in light of its disposition, it did not need to address fifth amendment issues. *Id.* at 628 n.7. Plaintiffs challenged the INS Area Control operation, which is designed to locate and apprehend illegal aliens. *Id.* at 626 n.2. These INS surveys are generally conducted in workplaces because of the INS success in apprehending large numbers of illegal aliens who work in factories, most notably in the garment industry. Generally, factory surveys begin when the INS gets a tip that a particular workplace may be employing illegal aliens. The INS then puts the suspected workplace under surveillance in order to verify the information. Upon verification, the INS agents seek the workplace owner's or management's permission to enter and question suspected illegal aliens, with the ultimate goal of arresting and deporting them. If permission to enter is not granted, then the INS obtains search warrants to enter the workplace. *Id.* at 626-27.

955. These search warrants were issued under FED. R. CRIM. P. 41, but did not state with particularity the names of the individual illegal aliens sought as objects of the search. 681 F.2d at 627.

956. 681 F.2d at 627. Policy usually dictates that all the workers be surveyed; however, manpower limitations made this impractical.

957. *Id.* The process used by the agents employed factors such as the persons' clothing, facial appearance, hair color and styling, demeanor, language and accent, and other subjective factors which might indicate alienage. *Id.* at 627 n.6.

seizure of persons, including brief detentions short of a traditional arrest.⁹⁵⁸ The INS argued that neither a detention nor a seizure was present which would implicate objective fourth amendment standards.⁹⁵⁹ The plaintiffs argued alternatively: (1) that the INS surveys were a seizure comparable to a custodial detention requiring probable cause for arrest⁹⁶⁰ as in *Dunaway v. New York*;⁹⁶¹ and (2) that the factory surveys at least rose to the level of a seizure short of a traditional arrest.⁹⁶²

The Ninth Circuit failed to find a *Dunaway* custodial detention, because the workers in *Sureck* were not handcuffed or placed in custody until the investigators had probable cause to suspect that those questioned were in this country without proper documentation.⁹⁶³ The court, however, found that the INS procedure involved "more than mere questioning or casual conversation as argued by the INS."⁹⁶⁴ The Ninth Circuit applied the test enunciated in *United States v. Anderson*⁹⁶⁵ to determine whether the factual circumstances of law enforcement activity in *Sureck* rose to the level of a fourth amendment seizure.⁹⁶⁶ The court found that the INS factory survey was sufficiently intrusive upon the workers' privacy and security interests to amount to

958. 681 F.2d at 629 (citing *Michigan v. Summers*, 452 U.S. 692 (1981); *United States v. Cortez*, 449 U.S. 411 (1981); *Reid v. Georgia*, 448 U.S. 438 (1980); *Brown v. Texas*, 443 U.S. 47 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968)).

959. 681 F.2d at 629. The INS relied primarily on statements made in *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Mendenhall*, 446 U.S. 544 (1980); *Cuevas-Ortega v. INS*, 588 F.2d 1274 (9th Cir. 1979); and *Cordon de Ruano v. INS*, 554 F.2d 944 (9th Cir. 1977), to support its argument that the test for a seizure is "whether a reasonable, innocent person in the position of the plaintiffs would feel free to leave." The INS argued that there was no fourth amendment seizure because the four named plaintiffs circulated throughout the factories and could not have reasonably felt detained by the presence of the INS investigators. *Id.* at 629-30.

960. *Id.* at 630. The plaintiffs maintained that the factory surveys are executed with physical force and a show of authority restraining the workers' liberty. The workers' awareness that the factory's exits are sealed, the large number of agents present, and the immediate arrests of those attempting to flee increase the coercive impact of the operation. *Id.*

961. 442 U.S. 200 (1979) (detention rising to level of arrest requiring probable cause found where defendant was escorted to police headquarters in a police car and placed in interrogation room, but not informed that he was under arrest).

962. 681 F.2d at 630.

963. *Id.*

964. *Id.*

965. 663 F.2d 934 (9th Cir. 1981).

966. 681 F.2d at 630-31. Before applying the test, however, the court found the district court's reasoning in *Illinois Migrant Council v. Pilliod*, 531 F. Supp. 1011 (N.D. Ill. 1982), *aff'd*, 540 F.2d 1062 (7th Cir. 1976) persuasive. The *Pilliod* court found the INS practice of sealing workplace exits to be a fourth amendment seizure. *Id.* at 1018.

a fourth amendment seizure.⁹⁶⁷ The court also observed that the number of INS investigators present, coupled with the "method of survey execution represented a threatening presence of INS agents to the reasonable worker."⁹⁶⁸

After concluding that the factory surveys constituted a seizure of the workforce, the court proceeded to determine the constitutional standards applicable to the INS conduct. The INS contended that even if a fourth amendment seizure existed, the intrusion upon the privacy and security interests of the workers was so slight that it did not constitute a fourth amendment violation.⁹⁶⁹ The plaintiffs, however, maintained that the agents must determine that an element of illegality and an element of individualized suspicion exist, in order to sufficiently protect the workers' fourth amendment rights.⁹⁷⁰ The court agreed with the plaintiffs, holding that the fourth amendment requires the INS investigators to articulate facts providing them with a reasonable suspi-

967. 681 F.2d at 634. The INS further argued that under *Mendenhall*, 446 U.S. 544 (1980), the present detention, if any, that existed during the surveys did not rise to the level of a seizure contemplated by the fourth amendment. The court, however, failed to find *Mendenhall* dispositive because: (1) only two justices in *Mendenhall* determined that there was no seizure, while three others did not even reach the issue, and although the Ninth Circuit has adopted Justice Stewart's test for a seizure, that test has never been adopted by a majority of the Supreme Court; and (2) unlike *Mendenhall*, this case was afflicted with far more intrusive aspects, such as the detentive environment created in the surveyed factories. 681 F.2d at 632-33.

968. *Id.* at 634. The court noted that the verbal announcement of the agents' authority, the display of badges, the stationing of agents at exits, the carrying of handcuffs by some agents, the element of surprise, and the agents' procession down the rows of workers could reasonably be viewed as a threatening presence. *Id.* The court concluded that even before individual questioning began, a reasonable worker "would have believed that he was not free to leave." *Id.* (quoting *Anderson*, 663 F.2d at 939).

969. 681 F.2d at 634. The INS relied on *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (border patrol practice at permanent checkpoints of referring some vehicles to secondary inspection area for additional questioning of passengers' citizenship status, on less than particularized or individualized suspicion as to each passenger subjected to the referral, upheld because intrusion on motorists minimal and outweighed by substantial law enforcement interest involved). The court, however, found *Martinez-Fuerte* inapplicable and the INS position a concession that the fourth amendment requires agents to articulate a reasonable suspicion of illegal alienage for detentive questioning. The INS handbook on searches and seizures provides that to stop a person, an agent must have reasonable suspicion, based on specific articulable facts, that the suspect is an alien. To detain the suspect, the agent must have a reasonable suspicion that he is an alien illegally in the United States. 681 F.2d at 634 n.12.

970. 681 F.2d at 635. The plaintiffs argued that *Dunaway v. New York*, 442 U.S. 200 (1979), requires the INS to limit its questioning to those it may have probable cause to arrest during the factory surveys and, alternatively, for the application of a standard comparable to that applied to automobile stops in *United States v. Brignoni-Ponce*, 442 U.S. 873 (1975). 681 F.2d at 634-35.

cion that each person questioned and detained is an illegal alien.⁹⁷¹

The court stated that the Government may not rely on 8 U.S.C. section 1357(a)(1)⁹⁷² to justify the detention and questioning of an entire workforce. The court stated that “[r]andom detentive questioning of all who may appear to be aliens without objective facts giving rise to a suspicion of illegal alienage would grant the INS impermissible discretion to detain and question at whim.”⁹⁷³

The INS further argued that, under the Supreme Court’s decision in *United States v. Martinez-Fuerte*,⁹⁷⁴ an individualized suspicion was not required because even if there was a seizure, it was minimal, and the Government’s interest in apprehending illegal aliens outweighed any interest of the questioned workers to be free from this minimal intrusion.⁹⁷⁵ The plaintiffs argued that *Martinez-Fuerte* was inapplicable because the Court’s holding was limited to permanent check points, and the facts here were more comparable to a roving border patrol stop.⁹⁷⁶ Although the court recognized the weighty law enforcement interests involved, it found that the *Martinez-Fuerte* decision supported the plaintiffs’ position more strongly than that of the INS. The *Sureck* court thus rejected the notion that *Martinez-Fuerte* allows factory survey questioning of individual workers on less than a particularized or individualized suspicion that each worker questioned is an illegal alien.⁹⁷⁷

971. *Id.* at 635. The court relied on *United States v. Cortez*, 449 U.S. 411 (1981), for the proposition that law enforcement officials must have a reasonable, individualized suspicion that the particular person detained is engaged in wrongdoing. The court also relied on *Michigan v. Summers*, 452 U.S. 692 (1981), for the element of illegality contained in the standard. 681 F.2d at 635. The court felt that the standard’s element of illegality was necessary to minimize the effects of enforcement procedures on innocent workers. *Id.* at 638-39.

972. 8 U.S.C. § 1357(a)(1) (1970) provides: “Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have the power without warrant . . . (1) to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States”

973. 681 F.2d at 639. The court reasoned that relying on § 1357(a)(1) to justify the detention and questioning of an entire workforce “simply ignores the truism that innocent citizens and aliens legally employed at surveyed factories enjoy the same right to be free of the indignity of arbitrary government intrusions which the Fourth Amendment guarantees all individuals.” *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979)). The court acknowledged that its holding limited § 1357(a)(1) questioning in the context of factory surveys like those in *Sureck*. To support its decision, the court noted that “‘no Act of Congress can authorize a violation of the Constitution.’” 681 F.2d at 639 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973)).

974. 428 U.S. 543 (1976). See *supra* note 969.

975. 681 F.2d at 640.

976. *Id.*

977. *Id.* at 641. The court pointed out the *Martinez-Fuerte* Court’s holding that the subjective intrusion (concern or fright on the part of the lawful travelers) in a roving stop is

Finally, the Ninth Circuit determined that the constitutional standards, as applied to the facts of *Sureck*, were not met.⁹⁷⁸ The INS argued that there was a sufficient basis for the questioning that occurred at the two factories,⁹⁷⁹ based on the following facts: the factories where the surveys were conducted were garment factories, which are known to employ large numbers of illegal aliens; before the Davis surveys, INS investigators had arrested several illegal alien employees outside the factory premises who stated that other illegal aliens worked in the factory; when the INS agents entered the plants, many employees shouted "La Migra"⁹⁸⁰ and a number of employees fled or hid; and, by the time of the second Davis survey, the INS agents knew they had apprehended seventy-eight illegal aliens from the first survey.⁹⁸¹ The court stated, however, that these factors, alone or together, could not justify the detention and questioning that occurred because the factory surveys, by the way in which they were conducted,⁹⁸² constituted a seizure, thus implicating fourth amendment standards.⁹⁸³ The court concluded: "[t]o find the factory survey procedures evidenced by the record before us constitutional would be . . . straining the Fourth Amendment requirements in order to accommodate an intrusive and objectionable method of immigration law enforcement. The Constitution, as we interpret it, cannot be so accommodating."⁹⁸⁴

much greater than at a permanent checkpoint because at the permanent checkpoint, motorists are not taken by surprise. The record in *Sureck* indicated that the surveys frightened the workers. Unlike the three or four minute routine detention at the permanent checkpoint in *Martinez-Fuerte*, there was a relatively greater degree of disruption in *Sureck* because of the surprise entry of the workplace for the typical hour and one-half of questioning. Moreover, the procedures employed in the factory surveys suggested more random enforcement. *Id.* at 640-41.

The Ninth Circuit also rejected the Third Circuit's holding in *Babula v. INS*, 665 F.2d 293 (3d Cir. 1981) (INS questioning found constitutionally permissible on less than particularized suspicion). 681 F.2d at 641.

978. 681 F.2d at 644.

979. 681 F.2d at 643. The INS relied on *United States v. Cortez*, 449 U.S. 411, 417-18 (1981), in which the Supreme Court defined reasonable suspicion to include an assessment of the totality of the circumstances surrounding a seizure in light of a law enforcement officer's experience.

980. Slang expression which means "the INS."

981. 681 F.2d at 643.

982. The Ninth Circuit noted that even if a factory survey could be performed in a non-detentive atmosphere, it would be inappropriate for the court to provide the INS with a list of justifying factors for such a hypothetical survey. The constitutionality of such a survey must be judged on the specific facts giving rise to each instance of interrogation. *Id.* at 643 n.23.

983. *Id.* at 643.

984. *Id.* at 644. In light of the applicable fourth amendment standard, the circumstances that the INS cited failed to aid the court in its analysis of whether the INS had a reasonable

Although the Ninth Circuit has held that race or color alone is insufficient to support the propriety of an investigative stop,⁹⁸⁵ the court held in *United States v. Bautista*⁹⁸⁶ that race can be a *relevant* factor in making an investigative stop.⁹⁸⁷ In *Bautista*, police, patrolling the vicinity of a bank robbery, received a description of the robbers which indicated that they were armed and of Iranian or Mexican descent.⁹⁸⁸ Police officers familiar with the area surmised in which direction the suspects might flee⁹⁸⁹ and spotted defendants Bautista and Martinez shortly after the robbery. The officers decided to stop the defendants, after observing that they fit the description of the robbers and noting that they were dressed inappropriately for the weather.⁹⁹⁰ Bautista approached the officers, and said that he had just been at a nearby house where he had asked a woman to call a cab for him because his car had broken down. Officer Powers frisked Bautista and Martinez, finding no weapons. They were then handcuffed, and Powers proceeded to the house to check Bautista's story. Powers verified the story, but when he asked Bautista where the car was, Bautista replied that there was no car. The officers separated the two men and questioned them, obtaining inconsistent and suspicious answers.⁹⁹¹ Af-

individualized suspicion of the illegal alienage of each detained worker before the execution of the surveys. The court stated that these circumstances failed to provide "a particularized and objective basis prior to the execution of the surveys for suspecting any of the questioned workers" to be illegal aliens working in this country. *Id.* The court was concerned that the fourth amendment rights of workers would be impermissibly diminished if the court sanctioned the unconstrained use of warrantless, detentive questioning like that used in *Sureck*. *Id.* at 643-44.

The court acknowledged that its decision might hinder INS efforts to seek out illegal aliens in workplaces. The court also acknowledged that *Sureck* illustrated Justice White's comment on the irony of the costly and burdensome struggle of the INS to restrict the influx of illegal aliens into the United States in light of the fact that American employers lawfully employ illegal aliens. *Id.* at 644 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 914-15 (1975) (White and Blackmun, J.J., concurring)). The court reversed the summary judgment in favor of the INS on the issue of worker questioning and remanded the case for proceedings consistent with the opinion. 681 F.2d at 644.

985. See discussion of *International Ladies' Garment Workers' Union v. Sureck*, *supra* at notes 951-984 and accompanying text. See also *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Davis v. Mississippi*, 394 U.S. 721 (1969); and *United States v. Malides*, 473 F.2d 859 (9th Cir. 1973).

986. 684 F.2d 1286 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1206 (1983).

987. *Id.* at 1289.

988. *Id.* at 1287.

989. *Id.* The police were also informed that the suspected getaway car was parked on a side street in an affluent neighborhood about one-half mile from the bank. *Id.*

990. The defendants had on short sleeve shirts and appeared relatively dry although it had been raining throughout the day. *Id.*

991. *Id.* at 1287-88. The defendants did not know each other's names, the neighborhood streets, who had dropped them off, or who they were meeting. Martinez gave a false name,

ter questioning, the defendants were arrested, taken to police headquarters, searched, and given their *Miranda* warnings. Bautista and Martinez subsequently confessed to committing the bank robbery.⁹⁹²

On appeal, the defendants argued that the initial stop was not supported by the necessary founded suspicion of criminal conduct, but rather was based on their race. In discarding this argument, the court noted that race can be a relevant factor,⁹⁹³ and observed that the defendants' race was not the sole basis for the stop.⁹⁹⁴ Thus, treating racial appearance as a factor contributing to the necessary founded suspicion of criminal activity was not inappropriate.⁹⁹⁵

Defendants also argued that the use of handcuffs constituted an arrest because once they were handcuffed they were "not free to leave."⁹⁹⁶ Rejecting this argument, the court determined that the use of handcuffs during the investigative stop did not amount to an arrest, because the police may take precautions during on-the-scene investigations involving potentially dangerous suspects.⁹⁹⁷ The court reasoned that the use of handcuffs was reasonable as a measure to protect Officer

but could not spell it. Bautista changed his story and said that he was supposed to make a \$250 narcotics purchase. *Id.* at 1288.

992. *Id.* The defendants were convicted for unarmed bank robbery in federal district court. The Ninth Circuit affirmed the district court's decision. *Id.* at 1287.

993. *Id.* at 1289. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (border patrol stop can be based partly upon an alien's characteristic appearance). See also *United States v. Harrington*, 636 F.2d 1182, 1185 (9th Cir. 1980) (founded suspicion based in part on aliens' characteristic appearance upheld in making border patrol stop).

994. 684 F.2d at 1289. The court noted that some of the facts and circumstances which justified the officers' decision to make an investigatory stop of the defendants included: their presence on a likely escape route one-half mile from the bank and a few blocks from the suspected getaway car; their unique resemblance to the description of the robbers; their inappropriate dress considering the weather; and their relatively dry appearance, despite the rain, which indicated that they had just left a car. *Id.*

995. *Id.*

996. *Id.* at 1288. The defendants relied on *United States v. Beck*, 598 F.2d 497, 500-01 (9th Cir. 1979) (critical consideration in determining existence of arrest is degree and manner of force used in stop and detention); and *United States v. Strickler*, 490 F.2d 378, 380 (9th Cir. 1974) (arrest found where police cars surrounded vehicle occupied by defendant, officers approached vehicle with weapons drawn and ordered occupants to raise their hands).

997. 684 F.2d at 1289. The court reasoned that the purpose of a *Terry* frisk is to permit the officer to investigate without fear of violence. *Id.* (citing *Adams v. Williams*, 407 U.S. 143, 146 (1972)). Although the court conceded that handcuffing aggravates the "intrusiveness of an otherwise routine investigatory detention and is not part of a typical *Terry* stop," the court relied on *United States v. Patterson*, 648 F.2d 625, 632-34 (9th Cir. 1981) (handcuffing of suspects does not automatically rise to the level of an arrest) for the rule that a "brief but complete restriction of liberty, if not excessive under the circumstances, is permissible during a *Terry* stop and does not necessarily convert the stop into an arrest." 684 F.2d at 1289.

Gaspar while Officer Powers checked the defendants' story.⁹⁹⁸

Bautista and Martinez further argued that their separate questioning exceeded the duration and the scope of inquiry permitted by a *Terry* stop, and the separate questioning was illegal because the officers lacked probable cause.⁹⁹⁹ The court, however, rejected these arguments, reasoning that investigative stops need not be limited to a couple of questions, within a couple of minutes, provided the questions asked are reasonably related to the circumstances which precipitated the stop.¹⁰⁰⁰ The court further stated that a greater period of time is sometimes needed to investigate possible criminal activity.¹⁰⁰¹

998. 684 F.2d at 1289. The court felt that Officer Gaspar needed protection because the suspects were involved in an armed robbery with a third robber who might still have been in the vicinity. Thus, in light of the type of criminal activity involved (citing *United States v. Oates*, 560 F.2d 45, 62 (2d Cir. 1977)), and viewing the evidence at the suppression hearing in the manner most favorable to the Government (citing *United States v. Vital-Padilla*, 500 F.2d 641, 642-43 (9th Cir. 1974)), the court held that the district court was not clearly in error in finding the use of handcuffs reasonable under the circumstances. 684 F.2d at 1289-90.

999. 684 F.2d at 1290. For the proposition that investigative stops are brief in duration and scope of inquiry, the defendants relied principally on *Dunaway v. New York*, 442 U.S. 200, 210-11 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (investigative stops usually take less than a minute and only involve a question or two); and *United States v. Chamberlin*, 644 F.2d 1262, 1266 (9th Cir. 1980) (reasonable suspicion justified brief stop accompanied by a few brief questions), *cert. denied*, 453 U.S. 914 (1981). 684 F.2d at 1290.

1000. 684 F.2d at 1290.

1001. *Id.* The court reasoned that investigative stops are not limited to one or two questions if the questions are reasonably related in scope to the stop itself. *Id.* (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975)). The court explained that the investigation need not terminate within a couple of minutes. 684 F.2d at 1290 (citing *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981) (holding that under certain circumstances police must be able to detain suspects longer than brief time periods involved in *Terry* and *Adams* to accomplish the underlying purpose of a *Terry* stop, the investigation of criminal activity)). The court then noted that it had previously upheld investigative stops which took longer than a minute or two and involved more than just a couple of questions. 684 F.2d at 1290-91 (citing *United States v. Anderson*, 663 F.2d 934 (9th Cir. 1981) (upholding the questioning of airplane passengers regarding their relationship with pilots and their knowledge of whether narcotics were aboard where police reasonably suspected that aircraft transported narcotics)). See also *Anderson* discussion *supra*; *United States v. Collom*, 614 F.2d 624 (9th Cir. 1979) (initial stop based on founded suspicion ripened into probable cause for arrest), *cert. denied*, 446 U.S. 923 (1980); *United States v. Kennedy*, 573 F.2d 657 (9th Cir. 1978) (scope of inquiry limited to circumstances justifying the initial intrusion); and *United States v. Richards*, 500 F.2d 1025 (9th Cir. 1974) (*Terry* stop lasting more than an hour not violative of fourth amendment where extended detention justified by police officers' attempts to check suspects' unsatisfactory and evasive answers to routine questions, but where scope of inquiry did not exceed justification for stop), *cert. denied*, 420 U.S. 924 (1975). Moreover, the court determined that the questions were reasonably related in scope to the justification for the stop. Therefore, even if the questioning lasted the claimed ten to twelve minutes, "there [was] nothing in the record to suggest that the stop was for a longer period than was reasonably necessary." 684 F.2d at 1291.

In *United States v. Corona*,¹⁰⁰² the Ninth Circuit determined that a police officer did not have a founded suspicion, based upon articulable facts, that the defendant was armed and presently dangerous.¹⁰⁰³ The court focused its analysis on the suspicion necessary for a stop and pat-down search. A prerequisite for a pat-down is that a police officer must be entitled to stop the suspect.¹⁰⁰⁴ The totality of the circumstances must furnish the officer with articulable facts suggesting present or future criminal activity by the suspect.¹⁰⁰⁵ The court found that no such facts existed here; thus, the stop was illegal.¹⁰⁰⁶

To justify the search, the police officer had to have a founded suspicion, based on articulable facts, that Corona was armed and presently dangerous.¹⁰⁰⁷ The court, however, found nothing in the facts known to Officer Wolfe which justified such a belief.¹⁰⁰⁸ The *Corona* court con-

1002. 661 F.2d 805 (9th Cir. 1981).

1003. *Id.* at 807-08. Late one night Deputy Sheriff Wolfe observed Corona standing across the street from a closed grocery store where workers were stocking shelves. Wolfe later found Corona hitchhiking and gave him a ride, but Corona was disoriented and was able to give only vague directions to his destination. When Wolfe let Corona out of the car, Wolfe asked for identification, but Corona had none. Wolfe then patted down Corona and found a loaded, sawed-off shotgun under Corona's coat. *Id.* at 806-07.

1004. *Id.* at 807 (citing *Adams v. Williams*, 407 U.S. 143 (1972) (brief stop of suspicious individual may be reasonable in light of facts known to the officer)).

1005. 661 F.2d at 807 (citing *United States v. Cortez*, 449 U.S. 411 (1981) (investigative stop must be justified by objective manifestation of present or future criminal activity); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (officer's belief that suspects are armed and might be dangerous provided reasonable grounds for stop); *United States v. Rocha-Lopez*, 527 F.2d 476 (9th Cir. 1975) (conviction of marijuana smuggling upheld where stop based on reasonable suspicion of alien smuggling), *cert. denied*, 425 U.S. 977 (1976)).

1006. 661 F.2d at 807. Although the court conceded that Corona's behavior may have been unusual, the facts did not indicate criminal activity, especially in the manner displayed in the two cases relied upon by the prosecution, *United States v. Orozco*, 590 F.2d 789 (9th Cir.), *cert. denied*, 442 U.S. 920 (1979) (one of two persons seated in car in high crime area ran to nearby wall and apparently dropped an object over it after seeing patrol car) and *United States v. Collom*, 614 F.2d 624 (9th Cir. 1979) (two persons stooping behind rear of car ran away from approaching police officers investigating a suspected car burglary), *cert. denied*, 446 U.S. 923 (1980). The court stated that *Corona* was factually similar to *Brown v. Texas*, 443 U.S. 47 (1979) (fourth amendment violated where police officers stopped two persons walking away from each other in high drug traffic area because activity of persons stopped furnished no objective basis for reasonable suspicion that they were engaged in criminal conduct).

1007. *Id.* at 807-08 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). The Ninth Circuit disagreed with the district court's holding that the pat-down was constitutional because it was only after the pat-down revealed a hard object that the further intrusion of reaching into Corona's coat occurred. The Ninth Circuit instead held that "[a] pat-down may not be initiated . . . in the absence of a founded suspicion that the subject is armed and presently dangerous." 661 F.2d at 807-08 n.2 (citing *Ybarra v. Illinois*, 444 U.S. 85, 92-93 (1979)).

1008. 661 F.2d at 807-08. The court felt that Corona's wearing a long coat on a rainy night

sidered the instant case analogous to *Ybarra v. Illinois*,¹⁰⁰⁹ in which a pat-down search was held unlawful under similar circumstances.¹⁰¹⁰ The court therefore concluded that the district court's findings that the officer's stop and pat-down search of Corona were based on the requisite founded suspicion were clearly erroneous.¹⁰¹¹

In *United States v. Sears*,¹⁰¹² by comparison, the Ninth Circuit applied the standards articulated in *Terry v. Ohio*¹⁰¹³ to uphold the propriety of an investigative stop of the defendants. The defendants were observed sitting in a vehicle with out-of-state license plates and looking through binoculars at a bank across the street. The Ninth Circuit held that these facts were sufficient to justify the stop.¹⁰¹⁴

In *United States v. O'Connor*,¹⁰¹⁵ the Ninth Circuit, based on the relaxed standard of *Terry v. Ohio*,¹⁰¹⁶ upheld the propriety of a vehicle stop and the questioning of its passenger, where the agents had a mistaken but good faith belief that the passenger was a suspect sought under a search warrant.¹⁰¹⁷

did not give rise to a suspicion that Corona was armed and dangerous. The court distinguished this case from *United States v. Bull*, 565 F.2d 869 (4th Cir. 1977) (person wearing a coat unsuited to the weather), *cert. denied*, 435 U.S. 946 (1978), and *United States v. Mireles*, 583 F.2d 1115 (10th Cir.) (coat not only unsuited, but contained a suspicious and conspicuous bulge), *cert. denied*, 439 U.S. 936 (1978). 661 F.2d at 808.

1009. 444 U.S. 85, 93 (1979) (pat-down search held unlawful where person searched was wearing coat appropriate for the weather, was not recognized as someone with a criminal history, and made neither threatening overtures nor gave indications that he carried a weapon).

1010. 661 F.2d at 808.

1011. *Id.* Defendant Corona's conviction of possessing an unregistered firearm in violation of 26 U.S.C. §§ 5861(d) and 5871 was reversed. 661 F.2d at 806.

In his dissenting opinion, Judge Sneed argued that the officer's pat-down search was reasonable and that he did what a competent police officer would have done under the circumstances. *Id.* at 808 (Sneed, J., dissenting). Judge Sneed believed that Officer Wolfe's conduct was reasonable because he had reason to be anxious about his own safety. The area's incidence of crime, Corona's vague directions, the remote spot where Corona asked to be dropped off, the hour of the night, and Corona's lack of identification tipped the scale in favor of Wolfe's security interest and against the intrusion on Corona's personal security. *Id.* Judge Sneed reasoned that the exclusionary rule should not be invoked if its purpose, to deter illegal police behavior, will not be served. *Id.* at 809.

1012. 663 F.2d 896, *cert. denied*, 455 U.S. 1027 (1982).

1013. 392 U.S. 1 (1968). In order for police to conduct an investigative stop, *Terry* requires only an objectively reasonable suspicion that a crime is either occurring or will occur. The police officer must be able to provide articulable facts which, together with rational inferences from those facts, reasonably warrant the intrusion. *Id.* at 21. This standard is much less stringent than the probable cause showing necessary for an arrest.

1014. 663 F.2d at 903.

1015. 658 F.2d 688 (9th Cir. 1981).

1016. *See supra* note 1013.

1017. 658 F.2d at 691.

The Internal Revenue Service (IRS), suspicious that a Mr. Cutter and the defendant O'Connor were involved in illegal bookmaking activities, placed O'Connor's hotel room under surveillance.¹⁰¹⁸ The agents observed other bookmaking suspects leaving the room and investigated the room's telephone records.¹⁰¹⁹ After concluding that bookmaking operations were being conducted in the room, the agents sought warrants to search the room and arrest O'Connor and Cutter. While waiting for the warrants to be issued, an agent observed two men, whom he believed to be O'Connor and Cutter, leave the vicinity of O'Connor's room. The two men drove off separately, one in a cab and the other in a private car. The agents, fearing detection of their surveillance and removal of evidence, followed the cab.¹⁰²⁰ Upon learning that the search warrants had been issued, Agent Kindt stopped the cab. To his surprise, Kindt discovered that the passenger was not O'Connor, but Davis. Suspicious that Davis was also involved in bookmaking, Kindt questioned him about his reasons for leaving O'Connor's room.¹⁰²¹ Davis, who refused to claim ownership of the briefcase in the back of the cab, simultaneously refused to consent to a search of the briefcase. Kindt then informed Davis that he was taking the briefcase back to the hotel room. Davis accompanied Kindt at his request. The next day, the briefcase was opened and searched pursuant to a warrant. The search revealed fifty-four ounces of cocaine.¹⁰²²

The Ninth Circuit upheld the validity of the stop, notwithstanding the agents' mistaken belief that the passenger in the cab was O'Connor.¹⁰²³ The *O'Connor* court observed that the agents possessed a search warrant for O'Connor at the time of the stop.¹⁰²⁴ The court rejected the defendants' contention that Kindt was not justified in questioning Davis, after discovering that he was not O'Connor.¹⁰²⁵ The

1018. *Id.* at 689.

1019. *Id.* This information was used to obtain warrants to search the room as well as O'Connor and Cutter. *Id.*

1020. *Id.* The agents also followed the private car but lost it. The cab, which was followed for thirty-five minutes, was driven evasively. *Id.*

1021. *Id.* at 690. Meanwhile Agent Stewart, who had arrived at the scene, questioned the cab driver. The cab driver apparently gave permission to search the back of the cab but not the briefcase. *Id.*

1022. *Id.* Following an evidentiary hearing, however, the district court ordered the suppression of the cocaine. The Ninth Circuit subsequently reversed the district court's order. *Id.* at 693.

1023. *Id.* at 691 (citing *Hill v. California*, 401 U.S. 797, 803-05 (1971) (mistake does not invalidate stop if officers had good faith belief)).

1024. 658 F.2d at 691. The court stated that in executing the warrant, the agents could stop the vehicle in which they reasonably believed O'Connor was a passenger. *Id.*

1025. *Id.* The Government contended that the limited questioning was permissible under

Ninth Circuit held that Kindt was clearly justified in asking Davis whether he had come from O'Connor's room, if only to determine whether Kindt had followed the wrong person. After learning that Davis had come from O'Connor's room, Kindt was justified in asking more questions, particularly in view of the cab's evasive route.¹⁰²⁶

In *United States v. Allen*,¹⁰²⁷ the Ninth Circuit sustained the propriety of the stop of an offshore vessel, the *Cigale*, involved in a nighttime drug smuggling operation.¹⁰²⁸ The court concluded that probable cause to stop the ship and arrest the crew existed on either of two grounds: (1) the Coast Guard had maintained radar contact with the ship, the helicopter crew that stopped the ship was in radio contact with

Terry v. Ohio, 392 U.S. 1 (1968). The *O'Connor* court stated that a *Terry* stop may be grounded on a reasonable suspicion that illegal activity is either occurring or contemplated. Furthermore, the court noted that such a detention requires a "lesser quantum of evidence than the probable cause [showing] necessary for an arrest." *Id.* (citing *United States v. Orozco*, 590 F.2d 789, 792 (9th Cir. 1979) (sheriffs lawfully in area while investigating defendant's suspicious behavior, not conducting a search when they looked through window of car parked on public street where defendant had been sitting before patrol car approached), *cert. denied*, 439 U.S. 1049 (1978)).

1026. 658 F.2d at 691.

1027. 633 F.2d 1282 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981). Appellants were convicted in federal district court of possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (1976), and conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. § 846 (1976). Allen was also convicted of conspiracy to import marijuana in violation of 21 U.S.C. § 963 (1976). The Ninth Circuit affirmed. *Id.* at 1286.

1028. *Id.* at 1291-92. Defendant Allen purchased a ranch on the coast near Coos Bay, Oregon. Customs Bureau Officer Gano soon received complaints from local residents who had been denied access to the ocean across the Allen ranch. Allen's predecessor had always granted access to the ocean. Gano checked Allen's background and suspected that the ranch might be a drug smuggling base. After Gano observed that the ranch was not being used for farming and that Allen's hands were not calloused, Gano's suspicions were aroused, and the ranch was put under surveillance. *Id.* at 1286-87. The surveillance revealed a significant increase in vehicular traffic on the ranch. Gano strongly suspected that a conspiracy to import marijuana was underway and set up a contingency plan for hindering the operation. *Id.* The surveillance team observed light signals transmitted between the beach and the vessel offshore. An amphibious vehicle was seen headed to the ship, and the government moved to foil the operation. Soon the beach and ranch were swarming with government personnel, and the Coast Guard ordered the *Cigale*, the offshore vessel, to stop and identify itself. Boxes were thrown overboard, and the *Cigale's* crew abandoned ship. The Coast Guard seized documents from the ship and retrieved 174 boxes from the water, two of which had burst, revealing marijuana. *Id.* at 1287. Police on shore stopped defendant Kollander, who was sitting in a field a few miles from the beach, and noticed that he was wet and had a bulge in his pocket. An officer frisked Kollander, found a pair of pliers similar to ones seen at the ranch, and arrested him. *Id.* at 1288. Shortly after the unloading of boxes from the *Cigale* in amphibious vehicles, defendant Kerr was arrested while walking on the highway and wearing a full skindiver's wetsuit. Allen was arrested when seen emerging from some bushes approximately 37 hours after the suspects fled from the beach. *Id.* Allen was frisked, handcuffed, and arrested solely on the suspicion engendered by his presence in the area. *Id.*

the beach units, the ship had been unloaded, and there was activity on the beach, including flight of the suspects;¹⁰²⁹ and (2) even without the three-way contact with the ship, the ship's furtive nighttime unloading had already been established.¹⁰³⁰ The *Cigale's* presence in the area justified the Coast Guard stopping it for questioning.¹⁰³¹ When the crew of the *Cigale* failed to respond to Coast Guard communications, and was observed throwing boxes overboard, the reasonable suspicion to stop the ship ripened into probable cause to search and arrest.¹⁰³²

H. *Fruits of the Poisonous Tree*

To effectuate the fundamental constitutional guarantees embodied in the fourth amendment, evidence seized during an unlawful search is generally inadmissible against the victim of the search. This exclusionary prohibition applies equally to the indirect as well as the direct fruits of such intrusions. An exception to the rule is created when the connection between the illegal conduct of the officers and the evidence sought to be suppressed has become so attenuated as to dissipate the taint.¹⁰³³

The United States Supreme Court addressed the issue of attenuation in *Taylor v. Alabama*,¹⁰³⁴ and held that the defendant's confession should have been suppressed as the fruit of an illegal arrest.¹⁰³⁵ The

1029. *Id.* at 1292.

1030. *Id.*

1031. *Id.* (citing *United States v. Piner*, 608 F.2d 358, 361 (9th Cir. 1979) (stop and boarding of vessel after dark must be for cause or conducted pursuant to administrative standards which do not leave the decision to search solely at the discretion of the Coast Guard officer); *United States v. Williams*, 589 F.2d 210, 214 (5th Cir. 1979) (Coast Guard justified in stopping vessel off coast of Colombia with support boats nearby, where crew members beckoned Coast Guard cutter for over six hours, one crew member jumped overboard and swam to cutter and merchant vessel remained dead in water and rejected offers of assistance); *United States v. Odneal*, 565 F.2d 598, 601 (9th Cir. 1977) (brief detention of yacht upheld where vessel not documented and had lines dragging in water which constituted a safety hazard), *cert. denied*, 435 U.S. 952 (1978)).

1032. 633 F.2d at 1292. The court also found that the officers had probable cause to arrest defendants Kollander and Kerr because of their appearance in light of the circumstances. *Id.* The court observed that Kerr was apprehended wearing a wet suit shortly after the *Cigale* had been unloaded. Kollander's wet clothes and noticeable bulge in his pocket provided reasonable suspicion for the frisk. *Id.* (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12 (1977) (upholding propriety of search after officer observed bulge in defendant's jacket); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968), *see supra* note 1027)). The court, however, found Allen's arrest illegal even though there was probable cause to arrest him, because the police did not know the suspect they had arrested was Allen until after the arrest occurred. 633 F.2d at 1292.

1033. *Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963).

1034. 457 U.S. 687 (1982).

1035. *Id.* at 694.

police had received a tip that the defendant was involved in a grocery store robbery, but the tip was insufficient to give the police probable cause to obtain a warrant or to arrest the defendant. Nevertheless, the defendant was arrested without a warrant in connection with the robbery and advised of his rights as required by *Miranda v. Arizona*.¹⁰³⁶ At the police station he was questioned, fingerprinted, advised again of his *Miranda* rights, and placed in a line-up. Although the robbery victims were unable to identify him, the defendant was told that his fingerprints matched those on some of the items involved in the robbery. Thereafter, an arrest warrant was filed. The defendant was allowed to visit with his girlfriend and a male companion for approximately ten minutes. He then signed a waiver-of-rights form and executed a written confession. This occurred approximately six hours after his arrest.

On trial for robbery, the defendant moved to have the waiver form and the confession suppressed. He argued that his warrantless arrest was not supported by probable cause, that he had been involuntarily transported to the police station, and therefore the confession was tainted and must be suppressed as the fruit of an illegal arrest.¹⁰³⁷ The trial court admitted the waiver and confession into evidence, and the defendant was convicted. The defendant's conviction was reversed on appeal to the Alabama Court of Criminal Appeals. That court held that the evidence should not have been admitted. The Alabama Supreme Court reversed that decision. On writ of certiorari, the United States Supreme Court, in a five-to-four decision, reversed the Alabama Supreme Court and remanded the case.

The Court found the instant case to be a "virtual replica" of two earlier Supreme Court decisions, *Brown v. Illinois*¹⁰³⁸ and *Dunaway v. New York*.¹⁰³⁹ Both cases held that a confession obtained after an illegal arrest was inadmissible as evidence unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is "sufficiently an act of free will to purge the pri-

1036. 384 U.S. 436 (1966).

1037. 457 U.S. at 689.

1038. 422 U.S. 590 (1975). In *Brown*, the defendant was unlawfully arrested without a warrant or probable cause in connection with a murder investigation. Two hours later, while in custody, he made two inculpatory statements. The Court held that the statements were to be excluded as the fruit of an illegal arrest. *Id.* at 605.

1039. 442 U.S. 200 (1979). In *Dunaway*, the defendant was unlawfully arrested without a warrant or probable cause in connection with an attempted robbery and homicide. The defendant made statements and drew sketches incriminating himself. The Court held that the statements and sketches were to be suppressed. *Id.* at 219.

mary taint.'¹⁰⁴⁰ Several factors to be considered in determining whether a confession has been purged of the primary taint of the illegal arrest are: the temporal proximity of the confession to the arrest, the presence of any intervening circumstances, and the purpose and flagrancy of the official misconduct.¹⁰⁴¹

Initially, the Court held that although the confession was voluntary for purposes of the fifth amendment because the *Miranda* warnings were given and understood, that by itself was not sufficient to purge the taint of the illegal arrest.¹⁰⁴² The Court found the State's contentions regarding the temporal proximity of the confession to the arrest unpersuasive.¹⁰⁴³ The State argued that the time between the arrest and the confession was six hours, whereas in *Brown* and *Dunaway* the confessions were obtained within two hours.¹⁰⁴⁴ The Court held that the difference of a few hours was insignificant, since during that time the defendant was in police custody without counsel and was being interrogated, fingerprinted, and subjected to a line-up.¹⁰⁴⁵ The elapsed time, by itself, was not proof that the confession was an act of free will sufficient to purge the taint.¹⁰⁴⁶

The State also pointed to several intervening events that it contended were sufficient to break the causal connection between the confession and the unlawful arrest.¹⁰⁴⁷ The defendant was given *Miranda* warnings three times while in custody. The Court reiterated that even though the confession was voluntary, in the sense that the *Miranda* warnings were given and understood, that did not purge the taint of the illegal arrest.¹⁰⁴⁸ The defendant was also permitted to visit briefly with his girlfriend and a neighbor before he confessed. Immediately after the visit, the defendant recanted prior statements that he knew nothing of the robbery, but signed a confession. The defendant testified that his girlfriend was very upset during the visit. The Court held that the State

1040. 457 U.S. at 690 (quoting *Brown v. Illinois*, 422 U.S. at 602 (quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)); citing *Dunaway v. New York*, 442 U.S. at 217).

1041. 457 U.S. at 690 (citing *Brown v. Illinois*, 422 U.S. at 603-04; *Dunaway v. New York*, 442 U.S. at 218).

1042. 457 U.S. at 690. See *Brown v. Illinois*, 422 U.S. at 603; *Dunaway v. New York*, 442 U.S. at 217. The Court stated that fifth amendment voluntariness was merely a threshold requirement for a fourth amendment analysis. *Miranda* warnings do not cure all fourth amendment violations, because this would reduce the constitutional guarantee against unlawful searches and seizures to a mere form of words. 457 U.S. at 690.

1043. 457 U.S. at 691.

1044. *Id.*

1045. *Id.*

1046. *Id.*

1047. *Id.*

1048. *Id.*

did not demonstrate how this visit served to assist the defendant to "consider carefully and objectively his options and to exercise his free will."¹⁰⁴⁹

The State also argued that the filing of the arrest warrant after the defendant had been arrested and while he was being interrogated was another significant intervening act.¹⁰⁵⁰ The Court rejected this argument, however, stating that the filing of the arrest warrant was irrelevant to whether the confession was the fruit of the illegal arrest.¹⁰⁵¹ The fingerprint exemplar, which was itself a tainted fruit of the illegal arrest,¹⁰⁵² was used to extract the confession from the defendant.¹⁰⁵³ The Court found that the fingerprints did not constitute sufficient attenuation to break the causal connection between the illegal arrest and the confession merely because they also formed the basis for the arrest warrant.¹⁰⁵⁴

Lastly, the State argued that *Brown* and *Dunaway* should not be followed because the lack of flagrant or purposeful police misconduct rendered those cases inapposite.¹⁰⁵⁵ The Court rejected that contention, holding that the unlawfulness of the initial arrest was not cured by the fact that the police did not physically abuse or threaten the defendant, or because the confession may have been voluntary for purposes of the fifth amendment.¹⁰⁵⁶ The Court refused to adopt a "good faith" exception to the exclusionary rule¹⁰⁵⁷ and determined that the defendant's confession should have been suppressed as the tainted fruit of the illegal arrest.¹⁰⁵⁸

The dissenting justices felt that although the majority correctly

1049. *Id.*

1050. *Id.* at 692. The arrest warrant was filed on the basis of a match between the defendant's fingerprints and those found on some grocery items handled during the robbery.

1051. *Id.*, distinguishing *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972), where the act of bringing the defendant before a committing magistrate, with counsel, to advise him of his rights and set bail, was held to be a sufficient intervening act to purge the primary taint of the unlawful arrest from a subsequent line-up identification. In contrast, the arrest warrant in *Taylor* was filed *ex parte*, and the informal nature of that proceeding proved insufficient to purge the taint of the illegal arrest.

1052. 457 U.S. at 693 (citing *Davis v. Mississippi*, 394 U.S. 721 (1969) (fingerprints excluded as the product of an unlawful detention)).

1053. 457 U.S. at 693.

1054. *Id.*

1055. *Id.*

1056. *Id.*

1057. *Id.* The good faith exception, where it has been explicitly recognized, provides that evidence is not to be suppressed under the exclusionary rule where that evidence was discovered by the officers acting in good faith and in a reasonable, though mistaken, belief that they were authorized to take those actions.

1058. *Id.* at 694.

stated the controlling law, it misinterpreted the facts of the case.¹⁰⁵⁹ The dissent's analysis focused on several factors which they felt collectively broke the connection between the confession and the illegal arrest so as to overcome the taint.¹⁰⁶⁰ The first significant factor was that subsequent to the arrest, the defendant received and acknowledged three separate *Miranda* warnings.¹⁰⁶¹ Secondly, the police conduct did not involve any abuse or intimidation calculated to cause fright or confusion.¹⁰⁶² Most importantly, the defendant's visit with his girlfriend and neighbor "plainly" constituted an intervening event, followed immediately by his confession.¹⁰⁶³ Finally, the defendant spent most of the time between his arrest and confession by himself. The dissent concluded that the defendant's confession was not proximately caused by his arrest, but rather followed from a knowledgeable decision freely made after discussion with his friends.¹⁰⁶⁴ Therefore, the dissent found it "obvious" that there was no sufficient basis on which to overturn the trial court's finding that the confession was purged of the taint of the illegal arrest.¹⁰⁶⁵

The Ninth Circuit dealt with the issue of attenuation in *United States v. Hooton*.¹⁰⁶⁶ In *Hooton*, the court held there was sufficient attenuation between the police misconduct and the live-witness testimony to purge the taint of an illegal search.¹⁰⁶⁷ Police officers searched Hooton's apartment pursuant to a state search warrant¹⁰⁶⁸ and seized index cards listing gun transactions. These were forwarded to agents of the Bureau of Alcohol, Tobacco and Firearms (ATF), who began an investigation of Hooton for possible firearms violations. They interviewed several of the people whose names were listed on the index cards. The agents did not show the witnesses any of the records seized during the search, nor did they refer to the information contained therein. The defendant unsuccessfully moved at trial to suppress the

1059. *Id.* at 697. *See id.* at 695 and n.2.

1060. *Id.* at 699-700. "The Court's failure to consider the circumstances of this case as a whole may have contributed to its erroneous conclusion." *Id.* at 700 n.7.

1061. *Id.* at 699.

1062. *Id.* at 699-700.

1063. *Id.* at 700.

1064. *Id.* at 701.

1065. *Id.* at 700. Chief Justice Burger and Justices Powell and Rehnquist joined in Justice O'Connor's dissenting opinion.

1066. 662 F.2d 628 (9th Cir. 1981), *cert. denied*, 455 U.S. 1004 (1982).

1067. *Id.* at 632-33.

1068. The search was conducted at night, in direct violation of a warrant authorizing only a daytime search.

witnesses' testimony.¹⁰⁶⁹

On appeal from a conviction for engaging in the business of dealing in firearms without a federal license,¹⁰⁷⁰ the defendant argued that the precedent relied on by the trial court, *United States v. Ceccolini*,¹⁰⁷¹ was inapplicable to his case.¹⁰⁷² *Ceccolini* set forth three factors to be considered when applying the exclusionary rule to live-witness testimony: (1) the length of the chain connecting the fourth amendment violation to the testimony of the witness; (2) the amount of free will the witness exercised in testifying; and (3) whether exclusion of the challenged testimony would prevent the witness from testifying about any relevant and material facts.¹⁰⁷³

The defendant first contended that the officers who searched his apartment were looking for the documents ultimately seized, and therefore suppression of the witnesses' testimony would have a significant deterrent effect upon that type of conduct.¹⁰⁷⁴ The Ninth Circuit disagreed, holding that the officers did not conduct the search with the intent of finding evidence of a federal firearms offense, and that the search warrant did not authorize them to conduct such a search.¹⁰⁷⁵ Therefore, as in *Ceccolini*, suppression of the testimony would not serve an appreciable deterrent effect.¹⁰⁷⁶

The defendant also contended that the path from the unlawful search to the witnesses was uninterrupted, and that the witnesses did not testify voluntarily.¹⁰⁷⁷ The court stated that to determine whether a significant attenuation between an illegal search and the testimony of a witness exists, the effect of the search on the witness' free will must be assessed.¹⁰⁷⁸ If the illegal search did not induce the witness' coopera-

1069. *Id.* at 630-31.

1070. 18 U.S.C. § 922(a)(1) (1976) provides in pertinent part: "It shall be unlawful for any person, except a . . . licensed dealer, to engage in the business of importing . . . or dealing in firearms . . ."

1071. 435 U.S. 268 (1978). In *Ceccolini*, the illegal search of an envelope in the defendant's flower shop led to the discovery of a key witness in the defendant's perjury trial. The witness was not interviewed until four months after the illegal search occurred, and willingly testified at trial. The Court held that the degree of attenuation between the illegal search and the witness' testimony was sufficient to dissipate the taint. *Id.* at 279-80.

1072. 662 F.2d at 632.

1073. 435 U.S. at 275-77.

1074. 662 F.2d at 632.

1075. *Id.*

1076. *Id.*

1077. *Id.* Hooton contended that the illegally seized material prompted the federal investigation and identified potential witnesses. Further, he argued that the witnesses' appearance at trial was compelled by subpoena.

1078. *Id.*

tion, the testimony will not be suppressed even though the search was one step in a series of events that led to the witness testifying.¹⁰⁷⁹ The factors the court considered were the stated willingness of the witness to testify, the role the illegally-seized evidence played in gaining the witness' cooperation, the proximity between the unlawful conduct, the witness' decision to cooperate and the actual testimony at trial, and the police motive in conducting the search.¹⁰⁸⁰ The court held that the tainted index cards were not used to coerce or induce the witnesses to testify at trial.¹⁰⁸¹ The witnesses had time to think over their responses and voluntarily chose to make statements to the agents. At no time before they testified were they aware of the contents of the index cards. Therefore, the illegally-seized evidence played no part in securing the witnesses' cooperation.¹⁰⁸² Further, the initial interviews with the witnesses took place several months after the search and the testimony at trial occurred almost three years later.¹⁰⁸³ Lastly, the police conducted the search to obtain stolen firearms and documents that would indicate who controlled the areas searched, not evidence of federal firearms offenses.¹⁰⁸⁴ The court held there was a sufficient attenuation between the illegal nighttime search and the live-witnesses' testimony, and therefore the testimony was properly admitted.¹⁰⁸⁵

In *United States v. Martell*,¹⁰⁸⁶ the Ninth Circuit held that the seized evidence was not the fruit of an unlawful arrest and was therefore not tainted.¹⁰⁸⁷ Defendants were detained in the San Diego airport for twenty minutes while agents sent for a narcotics detector dog to inspect defendants' luggage. The dog alerted to the defendants' suit-

1079. *Id.* (citing *United States v. Leonardi*, 623 F.2d 746, 752 (2d Cir.) (connection between the illegal search of a motel room, leading to the discovery of the identity of a witness, and the witness' testimony at trial sufficiently attenuated to dissipate the taint), *cert. denied*, 447 U.S. 928 (1980)).

1080. 662 F.2d at 632 (citing *United States v. Leonardi*, 623 F.2d at 752).

1081. 662 F.2d at 632.

1082. *Id.*

1083. *Id.* at 633.

1084. *Id.*

1085. *Id.* The court summarily rejected Hooton's contention that *Ceccolini* applied only to "good citizen" witnesses who were acting out of civic duty, citing *United States v. Leonardi*, 623 F.2d 746, 750-52 (2d Cir.) (unindicted co-conspirator testifying pursuant to a plea bargain), *cert. denied*, 447 U.S. 928 (1980); *United States v. Brookins*, 614 F.2d 1037, 1043 (5th Cir. 1980) (testifying pursuant to a grant of immunity); and *United States v. Stevens*, 612 F.2d 1226, 1229 (10th Cir. 1979) (co-conspirator testifying pursuant to a plea bargain), *cert. denied*, 447 U.S. 921 (1980). Hooton's conviction was affirmed.

1086. 654 F.2d 1356 (9th Cir. 1981).

1087. *Id.* at 1361.

cases and a search warrant was issued. The search revealed a large quantity of cocaine, and the defendants were arrested.

On appeal from their conviction for conspiring¹⁰⁸⁸ to possess cocaine with intent to distribute,¹⁰⁸⁹ the defendants contended that the twenty-minute detention constituted an illegal arrest and therefore the cocaine seized should have been suppressed as the fruit of the illegal arrest.¹⁰⁹⁰ The court rejected defendants' argument, holding that the detention of the defendants' suitcases was lawful¹⁰⁹¹ and that therefore the evidence seized from the suitcases was not tainted.¹⁰⁹²

The court reasoned that even if the detention of the defendants was an unlawful arrest, it would have no effect on the admissibility of the evidence seized from the suitcases.¹⁰⁹³ The detention of the defendants did not contribute in any way to the search and seizure of the narcotics. Because the agents did not interrogate the defendants during the detention, they gained nothing that they had not already known from the outset.¹⁰⁹⁴ The Ninth Circuit stated that evidence is to be evaluated depending upon whether it was obtained before or after the detention became unlawful.¹⁰⁹⁵ Therefore, this evidence was not tainted

1088. 21 U.S.C. § 846 (1976) provides in pertinent part: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable"

1089. 21 U.S.C. § 841(a)(1) (1976) provides in pertinent part: "[I]t shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

1090. 654 F.2d at 1358.

1091. *Id.* at 1360. The court initially noted the conceptual difference between the detention of the defendants personally and the detention of their suitcases. The court focused upon the seizure of the suitcases, and held that detaining the suitcases for twenty minutes based upon a reasonable suspicion was lawful. Probable cause arose when the detector dog alerted to the suitcases, and the warrant was then issued. "In our view such a detention under these facts does not offend constitutional standards." *Id.* at 1358-60.

1092. *Id.* at 1358. The court relied on two factually similar cases: *United States v. Klein*, 626 F.2d 22 (7th Cir. 1980) and *United States v. Viegas*, 639 F.2d 42 (1st Cir.), *cert. denied*, 451 U.S. 970 (1981). In both cases reasonable suspicion as to the suitcases existed from the beginning of the detention, and the suspects were not interrogated during the detention of the suitcases. Detector dogs alerted to the suitcases, and in neither *Klein* nor *Viegas* were the suitcases opened or searched until after search warrants had been obtained. Both circuits affirmed the trial court's denial of a motion to suppress. *United States v. Klein*, 626 F.2d at 27; *United States v. Viegas*, 639 F.2d at 46.

1093. 654 F.2d at 1361.

1094. *Id.*

1095. *Id.* at 1362 (citing *United States v. Chamberlin*, 644 F.2d 1262 (9th Cir. 1980) (statements made by defendant before detention ripened into an unlawful arrest held admissible, while those made afterwards were excluded), *cert. denied*, 453 U.S. 914 (1981); *United States v. Mayes*, 524 F.2d 803 (9th Cir. 1975) (contraband seized pursuant to information given to an officer before detention turned into an illegal arrest held admissible); *United States v. Klein*, 626 F.2d at 22 (7th Cir. 1980)).

and was properly admitted by the trial court.¹⁰⁹⁶

In *United States v. Hammond*,¹⁰⁹⁷ evidence sought to be suppressed was also held to be untainted.¹⁰⁹⁸ The defendant was arrested in connection with a bank robbery. He was identified by two of the bank tellers involved in the robbery and subsequently confessed to having robbed the bank.¹⁰⁹⁹

On appeal from his conviction for bank robbery,¹¹⁰⁰ the defendant contended that his confession and the identification testimony of the two tellers should have been suppressed as fruits of an illegal arrest and an unconstitutional show-up identification.¹¹⁰¹ The court rejected the defendant's contentions, holding that probable cause existed for the arrest, thereby rendering it lawful.¹¹⁰² Additionally, the show-up identifications were reliable, and therefore admissible as evidence.¹¹⁰³ Thus, the court held that the admission of the confession and the identification testimony of both witnesses was proper, as none were fruits of any unlawful activity.¹¹⁰⁴

II. PROCEDURAL RIGHTS OF THE ACCUSED

A. *The Right Against Self-Incrimination*

1. Custodial interrogation within the meaning of *Miranda*

Miranda warnings are required in cases of custodial interroga-

1096. 654 F.2d at 1363, affirming the convictions.

1097. 666 F.2d 435 (9th Cir. 1982).

1098. *Id.* at 440.

1099. *Id.* at 437.

1100. 18 U.S.C. § 2113(a) (1976) provides in pertinent part: "Whoever, by force and violence . . . takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to . . . any bank . . . Shall be fined . . ."

1101. 666 F.2d at 438-39.

1102. *Id.* at 439. See *supra* section on *Investigative Stops*.

1103. *Id.* at 439-40. The reliability of a witness' identification is determined based on: "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation." *Id.* at 440 (citing *Manson v. Brathwaite*, 432 U.S. 98, 114-16 (1977)). The defendant spent several minutes in the bank, looking around and generally acting in a suspicious manner. One of the tellers noticed the defendant and activated the bank's surveillance cameras. Both tellers had an opportunity to observe the robber from a distance of only a few feet. Although the tellers had not given prior descriptions of the robbers, the identification of the defendant occurred only one week after the robbery, with a sufficiently high level of certainty to provide reasonable assurances of reliability. 666 F.2d at 440.

1104. *Id.*

tion.¹¹⁰⁵ For the purposes of *Miranda*, a custodial interrogation occurs when a person is interrogated by the police while in custody at a station house, or otherwise deprived of freedom in any significant way.¹¹⁰⁶

The Ninth Circuit examined the meaning of custody in *United States v. Leyva*.¹¹⁰⁷ Two Secret Service agents went to the defendant's home, identified themselves, and asked her questions about a check forgery. The agents told her that she was not under arrest, was not going to be arrested, and that any interview given would be purely voluntary. The defendant allowed them to enter her kitchen. Upon questioning, she admitted her guilt and signed a sworn statement written out by the agents.¹¹⁰⁸ No *Miranda* warnings were given to the defendant because the agents did not believe she was in custody. At trial, the defendant moved to suppress her confession on the grounds that she was entitled to but did not receive a *Miranda* warning. The district court denied her motion and held that she was not in custody at the time of her confession.¹¹⁰⁹

The Ninth Circuit noted the trial court's application of the objective reasonable person standard in determining whether a defendant was in custody at the time of making incriminating statements,¹¹¹⁰ the sufficiency of which was the substance of the defendant's appeal.¹¹¹¹ The defendant claimed that the trial court acted in error by not considering her lack of familiarity with the English language, or her lack of

1105. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

1106. *Id.* See also *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). In *Mathiason*, the defendant voluntarily came to the police station at the request of an officer. The police assured him that he was not under arrest and, after police made false statements linking him to the crime, he confessed. The Supreme Court held that the defendant was not in custody and therefore *Miranda* warnings were not necessary.

1107. 659 F.2d 118 (9th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

1108. Defendant contended that she was forced to forge the checks by her ex-husband. *Id.* at 119.

1109. *Id.*

1110. *Id.* at 119-20. The Ninth Circuit first established the use of the objective reasonable person standard in *Lowe v. United States*, 407 F.2d 1391 (9th Cir. 1969). The court held that if a reasonable person under the circumstances would believe that he or she was not free to leave, or to insist that the officers leave, then that person is in custody and entitled to a *Miranda* warning. *Id.* at 1397. *Lowe* articulated factors to be considered in applying this standard: the language used by the officers in summoning the person; the physical surroundings; the extent to which the person is confronted with evidence of his guilt; and the extent of pressure exerted to detain the person. *Id.* See also *United States v. Luther*, 521 F.2d 408, 410 (9th Cir. 1975) (per curiam); *United States v. Curtis*, 568 F.2d 643, 646 (9th Cir. 1978).

1111. 659 F.2d at 119-20.

formal education,¹¹¹² when it determined that she was not in custody.¹¹¹³ Because the record amply supported a finding that the defendant had no difficulty understanding the English language, the Ninth Circuit ruled that the basis for the defendant's claim was irrelevant to the district court's application of the objective reasonable person standard.¹¹¹⁴

In *United States v. Booth*,¹¹¹⁵ the Ninth Circuit examined whether the defendant was in custody at the time of his incriminating statements, and whether the questioning itself constituted interrogation. A police officer stopped the defendant because he matched a broadcast description of a bankrobber. The officer conducted a pat-down search for weapons and told the defendant there had been a hold-up and that he fit the description of the suspect. Although the pat-down revealed no weapons, the officer put the defendant in handcuffs and called for a back-up unit. Without giving any *Miranda* warnings, the officer, while waiting for the back-up, asked the defendant his name, address, age, if he had any identification, if he had been arrested before, and what he was doing in the area. At trial, the district court excluded the defendant's statements to the officer concerning why he was in the area and if he had been arrested before, and ordered the indictment dismissed without prejudice.¹¹¹⁶

On appeal, the Ninth Circuit held that custody is determined by reviewing the totality of the facts involved at the time of the alleged restraint, and reiterated the factors to be considered when applying the objective reasonable person standard.¹¹¹⁷ It upheld the district court's finding that the defendant had been in custody, based on its conclusion that the district judge had not committed clear error in finding there to be a custodial situation.¹¹¹⁸ The court stressed that handcuffing a suspect does not necessarily indicate custody, since "[s]trong but reason-

1112. The defendant, a 36 year old Spanish-American woman, had lived all but four years of her life in the United States, but attended school only through the fifth grade. *Id.* at 119.

1113. The trial court believed that to consider these factors would be inconsistent with the objective standard established by the Ninth Circuit. *Id.* at 120.

1114. *Id.* The court stated that in a proper case, educational background and an ability to understand English may be relevant factors in determining whether a person was in custody. *Id.*

1115. 669 F.2d 1231 (9th Cir. 1981).

1116. *Id.* at 1234-35.

1117. *See supra* note 1110.

1118. The court stated that "testing the reaction of a reasonable person is nearly identical to the standard applied to the issue of negligence, which is reviewable pursuant to the clearly erroneous standard in almost all the circuits." 669 F.2d at 1236 (citing *Miller v. United States*, 587 F.2d 991, 994 (9th Cir. 1978)). Therefore, the court held that their review of this issue should be by the clearly erroneous standard.

able measures to insure the safety of the officers or the public can be taken without necessarily compelling a finding that the suspect was in custody."¹¹¹⁹ In this case, however, the defendant was told he fit the description, was searched for weapons, handcuffed, and heard the officer request a back-up unit. A reasonable person in this situation could have concluded that he was not free to leave after brief questioning.¹¹²⁰

Having decided that the defendant was in custody, the court next addressed the issue of whether the police questioning rose to the level of interrogation. As with custody, the Ninth Circuit insisted that this determination be made on a case by case basis using an objective reasonable person standard.¹¹²¹ The court noted that interrogation does not occur if the question asked is "objective" or if it was not asked in an attempt to elicit evidence of a crime. Questions are often asked which do not relate to the crime or the person's participation in it. Thus, the routine gathering of background biographical data ordinarily will not constitute interrogation.¹¹²²

However, the *Booth* court also recognized that such an objective standard presents the potential for abuse by law enforcement officials. Even a facially neutral question might provoke an incriminating response. Accordingly, the court held that the ultimate test is "whether, in light of all the circumstances, the police should have known that a question was reasonably likely to elicit an incriminating response from the suspect."¹¹²³ Thus, the court determined that questions pertaining to Booth's identity, age, and residence were not likely to elicit an incriminating response, while questions relating to his prior arrest record and his reason for being in the area clearly constituted interrogation, and could not be asked absent the safeguards provided by *Miranda*.¹¹²⁴

1119. 669 F.2d at 1236.

1120. *Id.* The court recognized that the scope of justifiable questioning during a custodial interrogation and an investigative stop are similar issues, but stated that a *Miranda* warning is necessary to protect a suspect in custody against inherent psychological pressures. *Id.* at 1237. However, voluntary or spontaneous statements by a suspect in custody are admissible even without a prior *Miranda* warning. *Id.* (citing *Miranda v. Arizona*, 384 U.S. at 478).

1121. 669 F.2d at 1237-38. The court stated that because the test is an objective one, the subjective intent of an officer's action is relevant, but not conclusive. *Id.* at 1238 (citing *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

1122. 669 F.2d at 1238.

1123. *Id.*

1124. *Id.* at 1238-39. The court stated that questions concerning Booth's prior arrests clearly sought an incriminating response. As to questions regarding Booth's presence in the area, the court stated that a reasonable police officer should have realized that the response would be either a denial, an admission, or an alibi, any of which might later be used against the suspect. *Id.* at 1238.

In *United States v. Bautista*,¹¹²⁵ the Ninth Circuit held that because the defendants were not in custody during police questioning, the failure to give them *Miranda* warnings did not require suppression of the defendants' statements.¹¹²⁶ Based on police radio descriptions of two bank robbers, two officers stopped the defendants, frisked and handcuffed them.¹¹²⁷ The officers separated the defendants by about 30 feet for questioning about their identity, their reason for being in the neighborhood, and who they knew in the neighborhood. The defendants gave inconsistent and suspicious answers. The officers arrested them after comparing the contradictory responses. The defendants were then taken to the police station, searched, and given *Miranda* warnings. During the search, police found several bills taken from the bank, and the defendants later confessed to the crime.¹¹²⁸ The defendants claimed that they had been in full custody during the questioning on the street, and that all statements made during the stop or later at the station should be suppressed because the officers did not advise them of their *Miranda* rights.¹¹²⁹

The Ninth Circuit stated that *Miranda* warnings must be given when a suspect has been taken into custody or when the questioning is done in a "police dominated or compelling atmosphere."¹¹³⁰ However, the court continued to hold that *Terry* stops, while inherently somewhat coercive, usually do not involve the compelling atmosphere that necessitates the giving of *Miranda* warnings.¹¹³¹ Therefore, the court insisted that it is necessary to look to several factors to determine if a

1125. 684 F.2d 1286 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1206 (1983).

1126. *Id.* at 1292.

1127. The officers later stated during the suppression hearing that the defendants were handcuffed because: (1) they were believed to be the suspects; (2) tracks were noticed on their arms that indicated narcotics use; and (3) they seemed extremely nervous and one of them looked as if he was thinking of running. *Id.* at 1288.

1128. *Id.* at 1288.

1129. *Id.* at 1291.

1130. *Id.* at 1291 (citing *United States v. Wilson*, 666 F.2d 1241, 1247 (9th Cir.), *vacated*, 681 F.2d 587 (9th Cir.), *resubmitted and decided*, 690 F.2d 1267 (9th Cir. 1982); *United States v. Hickman*, 523 F.2d 323, 327 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976)).

1131. 684 F.2d at 1291. *See generally* *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977):

Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question [W]arnings are required only where there has been such a restriction on a person's freedom to render him 'in custody.'

See also *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966): "Our decision is not intended to hamper the traditional function of police officers in investigating crime General on-the-scene questioning . . . is not affected by our holding."

suspect has been placed in such a compelling atmosphere as to amount to custody.¹¹³² Using the objective reasonable person test,¹¹³³ the *Bautista* court found that the lower court's determination that defendants were not placed in custody at the time of the separate questioning was not clearly erroneous.¹¹³⁴ The officers did not confront the defendants with evidence of their guilt, nor could their language towards the defendants, the physical surroundings during the questioning, or the length of the stop be considered coercive within the meaning of *Miranda*.¹¹³⁵ However, unlike a routine *Terry* stop, the defendants in this case were handcuffed. The court held that this factor did not dictate a finding of custody. "Strong but reasonable measures to insure the safety of the officer or the public can be taken without necessarily compelling a finding that the suspect was in custody."¹¹³⁶ Because the defendants were not in custody during the separate questioning, their *Miranda* claim failed. The court, therefore, held that the police conducted a valid investigatory stop followed by a valid arrest.¹¹³⁷

In *United States v. Thierman*,¹¹³⁸ the Ninth Circuit held that police conduct after Thierman's arrest did not constitute interrogation in violation of *Miranda*, because it was not reasonably likely to elicit an incriminating response.¹¹³⁹ Police stopped Thierman, handcuffed him, and after giving him *Miranda* warnings, questioned him about a credit-card fraud and several post office burglaries. Thierman agreed to answer only certain questions. A search of his apartment pursuant to a warrant turned up incriminating evidence, but police could not find over \$100,000 in money orders taken from the burglarized post offices. A police detective told Thierman that they would talk to his family and friends, including his girl friend, if he did not help locate the stolen money orders. Thierman replied, "Can we talk about it tomorrow?"

1132. The *Bautista* court cited several factors enumerated in *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981), to be used in determining whether a suspect had been placed in custody: "the language used by the officer to summon the individual, the extent to which he or she is confronted with evidence of guilt, the physical surroundings of the interrogation, the duration of the detention and the degree of pressure applied to detain the individual." 684 F.2d at 1292.

1133. The *Bautista* court used the "reasonable person" standard set out in *Booth*, 669 F.2d at 1235: "Based upon a review of all the pertinent facts, the court must determine whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave." 684 F.2d at 1292.

1134. 684 F.2d at 1292.

1135. *Id.*

1136. *Id.* (citing *United States v. Booth*, 669 F.2d 1231, 1236 (9th Cir. 1981)).

1137. 684 F.2d at 1292.

1138. 678 F.2d 1331 (9th Cir. 1982).

1139. *Id.* at 1336-37.

He then asked to speak to his attorney. The detective immediately stopped questioning him and said to another officer, "That's it . . . let's go to the girl."¹¹⁴⁰ At that point, Thierman unsuccessfully attempted to negotiate a deal,¹¹⁴¹ and then called his attorney who advised Thierman to remain silent until their meeting the next morning. Thierman told the police he would say no more that night, and one detective then left to question the girlfriend. The remaining officers discussed, in Thierman's presence, the necessity of contacting Thierman's family and friends and added that it was too bad that the girlfriend had to become involved. Shortly thereafter, Thierman indicated that he did not want to get anybody into trouble, especially his girlfriend, and told the police the location of the money orders. He was taken to the station where he made a taped confession.¹¹⁴² Later, however, Thierman testified that his statement was coerced by police threats to interrogate his girlfriend. The trial court refused to suppress the confession, stating that the police officers' comments after Thierman invoked the fifth amendment were less evocative than those in *Rhode Island v. Innis*,¹¹⁴³ and thus did not constitute interrogation.¹¹⁴⁴

On appeal, Thierman claimed that his *Miranda* rights were violated because he was interrogated after he invoked his right to counsel, as well as after he asserted his right to remain silent.¹¹⁴⁵ The Ninth

1140. *Id.* at 1332.

1141. *Id.* at 1332-33. Thierman offered to turn the money orders over in the morning if his girlfriend was left alone, and if police promised not to prosecute the person who had them. When informed that a United States Attorney would only consider a recommendation by the police that the person not be prosecuted, Thierman said he wanted to call his attorney. *Id.*

1142. *Id.* at 1333.

1143. 446 U.S. 291 (1979). In *Innis*, a murder suspect was arrested, given *Miranda* warnings, and put into a police car. Having been told not to question the defendant, the officers commented on the dangerousness of the missing murder weapon. They said it would be awful if a little handicapped girl from a nearby school should find it and hurt or kill herself. The defendant immediately interrupted the conversation and showed the officers where the murder weapon, a gun, was hidden. *Id.* at 294-95. The Supreme Court defined interrogation to include not only express questioning but its functional equivalent, *i.e.*, "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. While this definition of interrogation focuses on the perception of the defendant, the intent of the police is not irrelevant. *Thierman*, 678 F.2d at 1335 (citing *United States v. Booth*, 669 F.2d 1231, 1237 (9th Cir. 1981)). The *Thierman* court cautioned that since the Supreme Court in *Innis* decided that police statements that acted as "subtle compulsion" did not amount to interrogation, the Court meant that the functional equivalent of "interrogation" be narrowly defined. 678 F.2d at 1335.

1144. *Id.* at 1333-34.

1145. *Id.* at 1335.

Circuit held that the trial court's decision was not clearly erroneous and upheld the finding that Thierman's confession was the result of an exchange initiated by him within the meaning of *Edwards v. Arizona*.¹¹⁴⁶ In determining whether a question was reasonably likely to elicit an incriminating response, the court focused on two areas which it felt the Supreme Court in *Innis* placed particular emphasis: the suspect's "peculiar susceptibility" to a police appeal, and whether the police knew the suspect was "unusually disoriented or upset."¹¹⁴⁷

The court held that the record supported the trial court's conclusion that Thierman knowingly and voluntarily waived his right to remain silent.¹¹⁴⁸ Twice Thierman was advised of his rights and each time he responded to certain questions while refusing to answer others. The court found nothing in the record to indicate that the police did not respect the subject matter limitations established by the defendant.¹¹⁴⁹ Thierman then claimed that he had invoked his right to remain silent when he asked, "Can we talk about it tomorrow?" The court noted that such a statement was not necessarily an invocation of Thierman's fifth amendment rights. "The question is more easily construed as a mere request to postpone interrogation on a single subject than an outright refusal to answer any more questions."¹¹⁵⁰

The court next considered whether the officers' conversation in

1146. 451 U.S. 477 (1981). In *Edwards*, the Court determined that "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85. In *Thierman*, the court agreed that while Thierman invoked his right to counsel, he had reinitiated the conversation when he asked to speak to the detective again about a possible deal. Therefore, "any subsequent interrogation that led to Thierman's confession fell outside the reach of *Edwards*." 678 F.2d at 1334 n.2.

1147. *Id.* at 1335 (citing *Innis*, 446 U.S. at 302-03). While cautioning that these are just two factors to be used to determine the perception of the suspect, the *Thierman* court held them, along with the general circumstances in which the statement was made, sufficient to dispose of the appeal. 678 F.2d at 1335.

1148. Under *Miranda*, once a person indicates that he wishes to remain silent, all interrogation must cease. 384 U.S. at 473-74. However, the Supreme Court has rejected a literal interpretation of *Miranda*, holding in later cases that the exercise of the right to remain silent does not preclude all further questions. *United States v. Lopez-Diaz*, 630 F.2d 661, 664 (9th Cir. 1980) (citing *Michigan v. Mosley*, 423 U.S. 96, 101-04, 107 (1975) (statements obtained after the suspect decides to remain silent are admissible where "the individual's 'right to cut off questioning' has been 'scrupulously honored.'")).

1149. 678 F.2d at 1335. A person in custody may selectively waive his right to remain silent by indicating that he will respond to some questions, but not to others. *Id.* (citing *Lopez-Diaz*, 630 F.2d 661, 664 n.2 (9th Cir. 1980)). By simply ending the questioning, the suspect can "control the subjects discussed, the time at which questioning occurs, and the duration of the interrogation." *Id.* (citing *Michigan v. Mosley*, 423 U.S. 96, 103 (1975)).

1150. 678 F.2d at 1336.

front of Thierman amounted to an interrogation.¹¹⁵¹ Thierman argued that his situation was analogous to *Edwards* in that the police intended that he incriminate himself.¹¹⁵² The court, however, distinguished *Edwards*¹¹⁵³ and found nothing in the record to indicate that the police conduct in Thierman's case was any more evocative than that at issue in *Innis*.¹¹⁵⁴ Thierman then claimed that his concern for his family and friends made him "peculiarly susceptible" to the officers' conversation.¹¹⁵⁵ The court admitted that when dealing with the police, Thierman continually tried to keep his friends and family out of the investigation, and that the police did try to use that concern to get Thierman to tell the truth. However, this was found to be a normal concern, not one that created a "peculiar susceptibility" to psychological pressures.¹¹⁵⁶

Finally, the court rejected Thierman's claim that the police knew him to be particularly upset or disoriented as a result of the investigation. He was twice advised of his *Miranda* rights, allowed free movement in his apartment while in custody, and had his roommate present during most of the time. The court also placed strong emphasis on the fact that Thierman agreed to answer certain questions while declining to answer others. This selectivity and ability to use his *Miranda* rights to negotiate with police was felt to be a strong indication that Thierman

1151. *Id.* Thierman claimed that since a police officer stated at the suppression hearing that he was trying to get Thierman to incriminate himself by discussing the investigation in front of him, the police were interrogating him in violation of *Miranda*. *Id.*

1152. *Id.* at 1336 n.6. In *Edwards*, 451 U.S. 477 (1981), defendant was arrested and taken to the police station where he was given his *Miranda* rights. After police telephoned the county prosecutor, defendant informed them that he wanted an attorney before "making a deal." The police immediately stopped their questioning. The next day, two detectives approached the defendant and told him that he "had" to talk to them. Defendant thereafter confessed to the crime. The Supreme Court held that this interrogation violated Edwards' right to have counsel present during custodial interrogation. *Id.* at 484-85.

1153. 678 F.2d at 1236 n.6. Unlike *Edwards*, the police did not reinitiate Thierman's interrogation and no one told him that he "had" to talk. Rather, the court held that *Thierman* reopened the dialogue after "he had carefully reflected upon the options available to him, to discuss once again the terms of the proposed deal." Further, *Edwards*, unlike Thierman, had been held in jail over night, a situation which would make custody even more coercive. *Id.*

1154. *Id.* at 1336. The court felt Thierman's case to be more similar to *Innis* than to *Edwards*. See *supra* note 1143. Because conversations were brief and only concerned the probable course of investigation and the consequences of Thierman not cooperating with police, the *Thierman* court declined to reverse the lower court's ruling.

1155. *Id.* at 1336-37.

1156. *Id.* at 1337. In reaching this conclusion, the court noted that Thierman was both well educated and "quite shrewd." He was majoring in engineering and understood the complicated post office alarm systems. Finally, he also recognized the importance of consulting an attorney and of attempting to negotiate a favorable deal. *Id.*

was not particularly upset.¹¹⁵⁷ Furthermore, the court held that Thierman's actions belied his claim that he was upset beyond that which is normally incident to an arrest. He did not confess immediately after hearing the conversation but continued to explore the possibility of negotiating a deal, telling the officers that he would lead them to the money orders if they would do it his way. He also stated that he would go against his attorney's advice and talk to the police.¹¹⁵⁸ These actions were determined not to be the actions of a person "peculiarly upset or disoriented," and the court held that it was not clearly erroneous for the trial court to have found that the conversation did not constitute the functional equivalent of interrogation.¹¹⁵⁹

2. Confession after request for counsel

In *Miranda v. Arizona*,¹¹⁶⁰ the Supreme Court not only established safeguards for individuals in custody but also indicated the procedures to be followed subsequent to giving the *Miranda* warnings. If the defendant decides he will remain silent, "the interrogations must cease."¹¹⁶¹ If he requests counsel, "the interrogations must cease until an attorney is present."¹¹⁶² In *Edwards v. Arizona*,¹¹⁶³ the Court reaffirmed the importance of these safeguards when it held that after a defendant has expressed his desire to deal with the police only through counsel, the accused cannot be subjected to further interrogation until counsel had been made available.¹¹⁶⁴

1157. *Id.* The only circumstances that the court felt could have indicated stress beyond what was normally incident to arrest was the fact that Thierman had been in custody for almost five hours when he decided to confess. However, Thierman's cooperation with police up to this point was believed to negate any possibility of coercion. *Id.*

1158. *Id.*

1159. *Id.* The dissent argued that despite the officers' good faith actions in attempting to uncover the truth, there simply was not a principled ground upon which to distinguish *Edwards*. *Id.* at 1340 (Wallace, J., dissenting). Judge Wallace came to the conclusion that the officers' conversation in front of Thierman was of the type "that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 1338 (citing *Rhode Island v. Innis*, 446 U.S. at 301). Accordingly, the dissent rejected the majority's position that Thierman had reinitiated the conversation with the detective which ultimately led to his confession. It distinguished *Innis* as involving only a conversation between officers which was not meant to elicit a response from the suspect. *Id.* at 1339-40.

1160. 384 U.S. 436 (1966).

1161. *Id.* at 473-74.

1162. *Id.* at 474.

1163. 451 U.S. 477 (1981).

1164. *Id.* at 481. In *Edwards*, the defendant was arrested on January 19, 1976. When the defendant was questioned by police officers on the same day, he asserted his fifth amendment right to counsel and right to remain silent. Without providing counsel, the police returned the next morning to interrogate the defendant and told him that he had to talk with

In *United States v. Skinner*,¹¹⁶⁵ the Ninth Circuit considered whether the defendant's post-arrest confessions should be suppressed because he had requested counsel during pre-arrest questioning. In finding Skinner's confession admissible, the Ninth Circuit held that *Edwards v. Arizona* could be distinguished,¹¹⁶⁶ and that Skinner had voluntarily waived his right to counsel.¹¹⁶⁷

Skinner was questioned once on July 9 and twice on July 10 concerning a murder. Before the second interview on July 10, Skinner voluntarily accompanied the FBI agents to the police station where he signed a waiver of his *Miranda* rights and a statement that his presence was voluntary. During the questioning, Skinner requested an attorney before answering further questions. The agents immediately stopped the interrogation and Skinner left the station. The next day Skinner was arrested. On the way to the police station, Skinner confessed after being advised of his rights and indicating that he understood them. At the station, he was again advised of his *Miranda* rights, signed a waiver form, and then confessed once again to the murder. At no time during the post-arrest interrogation did Skinner request an attorney or request that questioning be stopped.¹¹⁶⁸ On appeal, Skinner argued that *Edwards v. Arizona* required his confessions to be suppressed because he had requested counsel during the questioning on the day before his arrest.¹¹⁶⁹

In addressing the issue of suppression, the Ninth Circuit distinguished *Edwards*. The court noted that Skinner, unlike *Edwards*, had a chance to contact a lawyer, friends, or family for advice.¹¹⁷⁰ Therefore,

them. The defendant stated that he would talk to them and, after being advised of his rights, he made several incriminating statements which were used against him at trial. *Id.* at 478-79. The Supreme Court held that: (1) waiver of counsel must not only be voluntary but also be a knowing and intelligent "relinquishment or abandonment of a known right or privilege"; and (2) when a defendant has exercised his right to counsel during a custodial interrogation, a valid waiver cannot be established by showing only that the defendant responded to police-initiated questioning, even if he has been advised of his rights. *Id.* at 483-84. A defendant can be subjected to further interrogation only when he initiates the communication. *Id.* at 484-85.

1165. 667 F.2d 1306 (9th Cir. 1982).

1166. *Id.* at 1309. The court distinguished *Edwards* on the grounds that in *Edwards*, the defendant had been held in continuous custody from the time he requested an attorney until the next day when he was told that "he had to" talk. Skinner, on the other hand, voluntarily went to the police station, left the station after saying that he wanted to talk to a lawyer and therefore had the opportunity to speak to counsel or obtain advice from family or friends if he so chose. *Id.*

1167. *Id.*

1168. *Id.* at 1308.

1169. *Id.*

1170. *Id.* at 1309. See *supra* note 1166.

the post-arrest questioning and resulting confessions did not violate the *Edwards* requirement that a suspect, upon expressing a desire to deal with police solely through counsel, may not be interrogated until counsel has been made available.¹¹⁷¹

The Ninth Circuit also addressed the issue of whether Skinner waived his fifth amendment rights prior to his confession. A waiver of fifth amendment rights must be made voluntarily, knowingly and intelligently.¹¹⁷² In each case, determination of waiver depends "upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."¹¹⁷³ The *Skinner* court stated that Skinner knew that he could end the post-arrest interrogation at any time by asking to meet with an attorney since he had done so the day before.¹¹⁷⁴ Skinner also had the equivalent of a high school diploma and spoke English fluently.¹¹⁷⁵ The court also noted that the agents did not coerce Skinner's confession¹¹⁷⁶ and that he confessed *immediately* after questioning began.¹¹⁷⁷ These factors were "strong evidence" that Skinner executed a valid waiver of his fifth amendment rights.¹¹⁷⁸

3. Voluntariness of statements

Miranda established procedural devices to protect a suspect's right against self-incrimination, but did not prohibit the use of *all* pre-trial statements. Any statement given freely and voluntarily without any coercive influences is admissible into evidence.¹¹⁷⁹

In *United States v. Leyva*,¹¹⁸⁰ the Ninth Circuit determined that the defendant's pre-arrest confession without a *Miranda* warning was voluntary. The defendant, a 36 year old Spanish-American with a fifth grade education, was under investigation for check forgery. During

1171. 667 F.2d at 1309.

1172. *Edwards v. Arizona*, 451 U.S. 477, 481 (1981).

1173. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1932).

1174. 667 F.2d at 1309.

1175. *Id.*

1176. *Id.*

1177. *Id.* The court's decision was also influenced by Skinner having signed a waiver form, which it considered to be additional evidence of a valid waiver.

1178. *Id.*

1179. *Miranda v. Arizona*, 384 U.S. 436 (1966). When determining whether a statement is voluntary, courts: (1) examine the totality of the circumstances surrounding the admission of the statements; and (2) determine whether the defendant's will was overborne or whether the statement at issue is the product of a rational intellect and free will. *See* *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973); *United States v. Harden*, 480 F.2d 649, 650-51 (8th Cir. 1973).

1180. 659 F.2d 118, 121 (9th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982).

questioning in her home by two Secret Service agents, the defendant confessed to the forgeries. The agents then prepared a written statement and the defendant signed and swore to it. At no time did the agents give the defendant *Miranda* warnings. The defendant contended on appeal that her statement was involuntary.

The Ninth Circuit found that the lower court considered all the factors enumerated in 18 U.S.C. section 3501(b) for determining voluntariness.¹¹⁸¹ Therefore, the finding of voluntariness was not an abuse of discretion.¹¹⁸² The low-key tone of the agents' interview, the fact that the defendant felt sufficiently independent and uncoerced to tell the agents that a question was "none of [their] business," as well as her apparent understanding of the nature of her offense, "tipped the scale in favor of voluntariness."¹¹⁸³

The Ninth Circuit in *United States v. Miller*¹¹⁸⁴ determined that defendant Miller's post-arrest statements incriminating his co-defendants were "the product of a rational intellect and a free will,"¹¹⁸⁵ and

1181. 18 U.S.C. § 3501(b) provides in full:

The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

1182. 659 F.2d at 121.

1183. *Id.* at 120-21. While refusing to decide specifically whether lack of formal education and unfamiliarity with the English language should be formally enumerated factors in determining existence of custody and voluntariness of a confession, the district court clearly considered these factors as part of the totality of the circumstances that compelled it to find that Leyva understood the nature of the agents' visit. Many courts consider the defendant's substantive characteristics. See *United States v. Lehman*, 468 F.2d 93, 100-01 (7th Cir.) (court considered defendant's intelligence, education, maturity, and knowledge of the implications of a tax investigation), *cert. denied*, 409 U.S. 967 (1972); *Young v. Warden, Maryland Penitentiary*, 383 F. Supp. 986, 1007-08 (D. Md. 1974) (court considered defendant's youth and lack of experience); *United States ex rel. Castro v. LaVallee*, 282 F. Supp. 718, 723 (S.D.N.Y. 1968) (court considered defendant's age, education, mental capacity, background and experience). However, illiteracy alone is not sufficient to render a confession involuntary. See *United States v. Hensley*, 374 F.2d 341, 350 (6th Cir. 1967) (confession found voluntary even though defendant plainly illiterate).

1184. 676 F.2d 359 (9th Cir.), *cert. denied*, 103 S. Ct. 126 (1982).

1185. *Id.* at 363 (citing *Mincey v. Arizona*, 437 U.S. 385 (1978)).

thus, admissible for impeachment purposes.¹¹⁸⁶ The defendants were convicted of conspiring to commit mail fraud and making false statements to federally insured savings and loan associations, as well as on fourteen other counts. Before trial, Miller moved to suppress statements he had made to an F.B.I. agent incriminating the other defendants. The district court held that the statements were obtained in violation of *Miranda* and excluded them from the Government's case. However, the Government used some of the statements to impeach Miller on cross-examination.

On appeal, Miller claimed that the statements were inadmissible for all purposes because they were given involuntarily.¹¹⁸⁷ The Ninth Circuit stated that the evidence did not show that "Miller's will was overborne, or that his statements were coerced."¹¹⁸⁸ Furthermore, the agent's statements to Miller that he would be facing a long prison term and that the agent was thinking about employing Miller in a new business if he exonerated himself did not render the statements involuntary.¹¹⁸⁹

1186. 676 F.2d at 364. The court noted that a statement obtained in violation of *Miranda* may still be used to impeach a defendant who takes the stand to testify in his own behalf. *Harris v. New York*, 401 U.S. 222 (1971).

1187. 676 F.2d at 363. Appellants also contended that even if the statements were voluntary, they had been used improperly for impeachment on issues not raised on direct examination. *Id.* The court rejected this contention, stating that Miller's direct testimony reasonably suggested the government's inquiry. Therefore Miller's testimony led to the introduction of evidence obtained in violation of *Miranda*. *Id.* at 364.

1188. *Id.* It is important to note the distinction the court drew between an item suppressed due to a *Miranda* violation and one suppressed due to its involuntary nature. The latter is not admissible for any purpose. See *infra* note 1189. Cf. *supra* note 1186.

1189. 676 F.2d at 364. The *Miller* court compared this case with *United States v. Boyce*, 594 F.2d 1246, 1249-51 (9th Cir.), cert. denied, 444 U.S. 855 (1979), to illustrate that Miller's statements were uncoerced. Boyce was arrested for conspiring to sell information to the Soviet Union. While in custody, Boyce was advised of his rights, and subsequently gave written consent to a search of his car and home. He refused to sign a form waiving his rights, yet he spoke freely about his personal background. Upon being told that his co-conspirator had been charged and was in custody, Boyce said, "Let's talk," and signed a waiver of rights form; he then confessed. On appeal, Boyce claimed that his confession was involuntary because agents had subjected him to psychological pressures. The agents asked Boyce many personal questions, and attempted to appeal to his loyalty to country and family, but the *Miranda* warnings were repeated periodically. The Ninth Circuit held that while the agents may have attempted to create an atmosphere in which it would be easier to get information, nothing suggested that Boyce's will was overborne in any way. The court pointed to Boyce's intelligence and his selectivity in answering questions to show that Boyce answered voluntarily. *Id.* at 1251.

Miller also relied, unsuccessfully, on *Mincey v. Arizona*, 437 U.S. 385, 398 (1978) in which the Supreme Court held that the defendant's incriminating statements were not "the product of a rational intellect and a free will." *Mincey* was injured in a shootout with police and was brought to a hospital in serious condition. That evening, after being given *Miranda*

In *United States v. Hooton*,¹¹⁹⁰ the Ninth Circuit held that the trial court's denial of the defendant's motion to suppress his allegedly involuntary confession was not clearly erroneous. While under investigation by the Bureau of Alcohol, Tobacco and Firearms (ATF) for unlicensed dealing in firearms, Hooton sought immunity by identifying the source of his illegal purchases. He and his attorney met with an ATF agent, and they allegedly entered into an immunity agreement. After the agent discovered that Hooton was under investigation, he arranged an interview. At the interview, Hooton was given *Miranda* warnings and both he and his attorney signed a waiver which included a "declaration that Hooton was answering questions 'freely and voluntarily . . . without any promise of reward or immunity.'"¹¹⁹¹

At his subsequent trial for dealing in firearms without a license, Hooton's motion to suppress his statements made during the interview was denied.¹¹⁹² Hooton claimed that his statements were involuntary because he believed that they were made under a promise of immunity.¹¹⁹³

The Ninth Circuit held that Hooton had orally waived his constitutional rights. Further, Hooton had signed a statement reiterating this waiver and explicitly stating, directly above his signature, that he was answering questions without any promise of immunity. Finally, Hooton had signed this statement in the presence of his attorney, who also had signed the waiver form.¹¹⁹⁴ Based upon these facts, the Ninth Circuit held that denial of Hooton's motion to suppress was not clearly erroneous.

warnings, Mincey was interrogated by a detective for four hours. Despite Mincey's repeated attempts to refuse to answer, the detective stopped only when Mincey became unconscious.

In *Mincey*, the Supreme Court discussed again whether a statement is voluntary within the meaning of *Miranda*. Because Mincey explicitly did not want to answer the detective, and because he was weakened by pain and shock, isolated from family and legal counsel, and barely conscious, the Supreme Court held that Mincey's statements were not a product of free will. Because due process requires that involuntary statements be excluded at trial, the Court reversed and remanded.

1190. 662 F.2d 628 (9th Cir.), *cert. denied*, 455 U.S. 1004 (1981).

1191. *Id.* at 630-31.

1192. *Id.* at 631.

1193. *Id.* Hooton also urged the Ninth Circuit to assess the voluntariness of his statements by making an independent examination of the record. It determined that the trial court did not let the fact that the defendant received *Miranda* warnings predetermine its ruling on defendant's motion to suppress. Rather, "[t]he trial court denied the motion only after listening to and evaluating the testimony of Hooton, [his attorney, and the ATF agent]." *Id.* The court then subjected the trial court's ruling on voluntariness to the "clearly erroneous" standard of review and affirmed its denial of the motion. *Id.*

1194. *Id.*

In *United States v. Ek*,¹¹⁹⁵ the Ninth Circuit considered whether prolonged confinement without food and sleep rendered the defendant's post-arrest confessions involuntary.¹¹⁹⁶ Ek had attempted to smuggle drugs into the United States by swallowing them in capsule form. After he went through customs at 9:00 a.m., Ek was asked to submit to an x-ray examination. When he refused, he was informed of his *Miranda* rights and taken to the Drug Enforcement Administration's airport office to wait for a court order authorizing the x-ray search. The warrant was not issued until 4:00 p.m., and when he was finally x-rayed at 7:00 p.m., the capsules were found. Ek was then arrested and again advised of his rights. He confessed to swallowing balloons containing cocaine and at 8:30 p.m. was taken to the county jail for booking. At 2:00 a.m. after again being advised of his rights, Ek made a full confession and the next day reviewed and signed a typed version of his confession.¹¹⁹⁷

On appeal, Ek claimed that his post-arrest statements were involuntary because he had been detained for a long period without food or sleep.¹¹⁹⁸ While acknowledging that Ek's condition could have made him susceptible to coercion, the Ninth Circuit held that he was not in any way coerced to confess, and therefore affirmed the trial court's decision not to suppress Ek's confession.¹¹⁹⁹

In *Fritchie v. McCarthy*,¹²⁰⁰ the Ninth Circuit considered whether

1195. 676 F.2d 379 (9th Cir. 1982) (amended opinion).

1196. In fact, Ek was not deprived of food or drink but had refused offers of food or drink, other than accepting a sip of water. *Id.* at 382-83.

1197. *Id.* at 381.

1198. *See supra* note 1196.

1199. 676 F.2d at 383. In the absence of evidence that the defendant was intimidated by police or that force or promises were used to elicit a confession, courts have held that being tired and hungry does not invalidate a confession given after *Miranda* warnings. *See United States v. Collins*, 462 F.2d 792, 796-97 (2nd Cir.) (twenty-one hour time span between defendant's arrest and his confession will not make confession involuntary where no stratagems were used to take advantage of him), *cert. denied*, 409 U.S. 988 (1972); *United States v. Ritter*, 456 F.2d 178, 179 (10th Cir. 1972) (being tired and hungry when apprehended will not make defendant's confession, given after *Miranda* warnings, involuntary if no evidence of force, threats or promises). However, courts will examine closely the specific facts of each case and will not hesitate to exclude confessions made under duress induced by long confinement and lack of food and rest. *See Pavkovich v. Brierley*, 360 F. Supp. 275 (W.D. Pa. 1973) (defendant's confession inadmissible because he had been kept up from 8:30 a.m. to 4:30 a.m. without food or drink and was prohibited by police from calling his family or an attorney); *Pugh v. North Carolina*, 238 F. Supp. 721, 724 (E.D.N.C. 1965) (confession found involuntary where defendant held in custody for almost 10 days without obtaining counsel, questioned intermittently during the entire period, denied sleep, and moved from place to place).

1200. 664 F.2d 108 (9th Cir. 1981).

the defendant's mental health precluded his confession from being the product of rational intellect and free will.¹²⁰¹ Fritchie had a long history of mental illness and had been committed at least ten times to state mental hospitals. In 1970, Fritchie committed a brutal murder in Florida in a manner strikingly similar to that which led to the California conviction at issue here. Although he had confessed to the Florida murder, he was found not guilty by reason of insanity. In the present case, the California trial court found that Fritchie's confession to the Florida murder was voluntary; thus, the confession was admissible as character evidence to prove the common identity of the two murders.¹²⁰²

Fritchie petitioned for habeas corpus relief, alleging that the California trial court erred in admitting the 1970 Florida murder confession.¹²⁰³ Fritchie claimed that his Florida confession was involuntary because it was made while he was insane. The Ninth Circuit held that the California trial court had sufficiently explored Fritchie's mental state at the time of his Florida confession.¹²⁰⁴ Fritchie had taken the Florida police to the victim's body and readily admitted guilt. He had signed a waiver form and had written the confession in longhand. Additionally, Fritchie wrote that he had been advised of his rights, understood them, and that any statement would be made freely and

1201. *Id.* at 213. With or without *Miranda*, the totality of the circumstances must show that a confession was obtained freely, voluntarily, and with due regard to fundamental concepts of fairness and due process, not just that the defendant was free from coercion or threatening conduct. *Eubanks v. Warden, Louisiana State Penitentiary*, 228 F. Supp. 888, 895 (E.D. La. 1964). In determining voluntariness, courts consistently have placed great emphasis on the defendant's state of mind at the time the confession was made. *See United States v. Brown*, 557 F.2d 541, 554 (6th Cir. 1977) (incriminating statements made by a crying, screaming, nineteen-year old, thrashing about in the back seat of a patrol car held not product of free and rational choice); *McHenry v. United States*, 308 F.2d 700, 703 (10th Cir. 1962) (determining if defendant, at time statement made, was in possession of "mental freedom" to confess or deny participation in crime held to be the test for voluntariness); *United States v. Stegmaier*, 397 F. Supp. 611, 616-17 (E.D. Pa. 1975) (court examined effects of valium and other medication on defendant when determining voluntariness); *Eubanks v. Warden, Louisiana State Penitentiary*, 228 F. Supp. 888, 889-96 (E.D. La. 1964) (obtaining defendant's confession held denial of due process where defendant, a fifteen-year-old with a mental age of between four and seven years, had been arrested, interrogated, and treated as an adult, and denied the protection of counsel or family).

1202. 664 F.2d at 212.

1203. *Id.* 28 U.S.C. § 2254(d) defines the standard of review for habeas corpus petitions and requires that the state trial court's factual determination be presumed correct unless the federal reviewing court concludes that "the 'record in the state court proceeding, considered as a whole, does not fairly support such factual determination.'" 664 F.2d at 213. If so, then the "burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous." 664 F.2d at 213.

1204. 664 F.2d at 213-14.

voluntarily. The Ninth Circuit recognized that a different trial court might disagree with the California trial court's finding of voluntariness. However, because the California trial court's finding of voluntariness was fairly supported by the record, the Ninth Circuit denied habeas corpus relief.¹²⁰⁵

4. Scope of the privilege

In *United States v. Moore*,¹²⁰⁶ the Ninth Circuit determined that co-defendant Lembric Moore was not entitled to assert a "blanket refusal" when asked to be a witness in defendant Nathaniel Moore's trial.¹²⁰⁷ When sheriffs came to search the defendants' home for stolen mail, they discovered Nathaniel and Lembric burning it in the backyard. After being arrested, Nathaniel denied burning the mail and Lembric pleaded guilty. At the conclusion of Lembric's guilty plea hearing, Nathaniel's attorney informed the court that he wanted to call Lembric as a witness at Nathaniel's trial. Lembric stated under oath that if called as a witness, he would assert his fifth amendment right against self-incrimination. The trial court upheld this blanket refusal, finding that because of the potential for further prosecution, Lembric could not be compelled to testify as a witness in Nathaniel's trial. Nathaniel was subsequently tried before a jury and convicted of illegal receipt of mail.¹²⁰⁸

The Ninth Circuit held that the district court erred when it accepted Lembric's blanket refusal to testify.¹²⁰⁹ If an answer to a question or an explanation as to why it cannot be answered would result in "injurious disclosure," the witness may invoke his right against self-

1205. *Id.* at 214. The foundation for objecting to the admission of a confession on the grounds of insanity was laid down in *Blackburn v. Alabama*, 361 U.S. 199 (1960). There, the defendant had been discharged from the Army as permanently disabled by psychosis, placed in an institution, and given medical treatment over extended periods. However, the defendant continually escaped from the institution and committed several crimes, one of which he confessed to when apprehended by police. The Supreme Court found that the defendant was insane and incompetent at the time he allegedly confessed and held his confession therefore to be involuntary. The *Blackburn* Court stated:

Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being on the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion.

361 U.S. at 207.

1206. 682 F.2d 853 (9th Cir. 1982).

1207. *Id.* at 857.

1208. *Id.* at 855.

1209. *Id.* at 857.

incrimination and refuse to testify.¹²¹⁰ However, the claim must be raised in response to specific questions, not as a blanket refusal to answer any question.¹²¹¹ In *Moore*, the court held that Lembric could not broadly assert his fifth amendment rights because nothing in the record indicated that he could have claimed the privilege to essentially all relevant questions.¹²¹²

A trial court may allow a blanket refusal if it determines that any response to all possible questions would tend to incriminate the witness.¹²¹³ In *Moore*, the Ninth Circuit held that the district court had done nothing more than accept a statement from Lembric admitting guilt to one count of his indictment, giving the court no special knowledge of either Lembric's susceptibility to further prosecution or to the nature of the testimony requested.¹²¹⁴ However, although the district court erroneously allowed the blanket assertion, the error was held to be harmless and therefore did not warrant reversal of Nathaniel's conviction.¹²¹⁵

1210. In *Hoffman v. United States*, 341 U.S. 479 (1951), the Supreme Court enunciated the standard to be used when determining if a witness can claim a right against self-incrimination and refuse to respond to questioning:

To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.

Id. at 486-87. Even when the court is satisfied that the witness has a valid fifth amendment claim, "the court must permit questioning to establish the scope of the witness' claim and to determine whether there are other issues as to which the witness would not be able to assert the privilege." *United States v. Tsui*, 646 F.2d 365, 367 (9th Cir. 1981), *cert. denied*, 455 U.S. 991 (1982) (citing *United States v. Pierce*, 561 F.2d 735, 741 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978)). Only in the unusual situation where a trial judge's knowledge of the case allows evaluation of the blanket assertion of fifth amendment rights will the blanket assertion be allowed to stand. See *infra* text accompanying note 1213.

1211. 682 F.2d at 856 (citing *United States v. Pierce*, 561 F.2d at 741).

1212. 682 F.2d at 856-57. See also *United States v. Tsui*, 646 F.2d at 367, and *infra* note 1213.

1213. 682 F.2d at 856-57. The court contrasted the situation in *Moore* with that in *Tsui*. In *Tsui*, the court knew from the Government's case-in-chief that the potential defense witness "was up to his neck in criminal investigations" and that further questioning would certainly require incriminating responses. Only in this type of situation may a witness "legitimately refuse to answer essentially all relevant questions." *Tsui*, 646 F.2d at 368 (quoting *United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980)).

1214. 682 F.2d at 856-57.

1215. *Id.* at 857-58. A court only affirms when it finds that an error committed by the lower court was "harmless beyond a reasonable doubt." *Id.* Here, however, the court found that because clear evidence of guilt could be found in the testimony of two sheriffs, who saw Nathaniel burying the mail, and in the inconsistencies of Nathaniel's testimony, the trial

5. Assertion of the privilege in federal tax returns

The privilege against self-incrimination is an absolute defense to federal prosecution for failure to file income tax returns only in those limited circumstances where it is validly exercised.¹²¹⁶ It does not justify an outright refusal to file a tax return. The privilege must be raised at the time of filing, and only in response to *specific* questions asked, not to the return as a whole.¹²¹⁷

In *United States v. Wolters*,¹²¹⁸ the Ninth Circuit examined whether the defendant's failure to file a tax return was justified by any fifth amendment privilege.¹²¹⁹ The defendant had failed to file income tax returns for three years, claiming that to do so would have violated

judge's allowance of the blanket assertion was harmless beyond a reasonable doubt. *Id.* at 858.

1216. *United States v. Neff*, 615 F.2d 1235, 1238 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980).

1217. *United States v. Sullivan*, 274 U.S. 259, 263 (1927). In *Sullivan*, the defendant refused to file income tax returns accounting for profits made from bootlegging operations. In upholding his conviction, the Supreme Court held that because profits gained from illegal traffic in liquor were subject to income tax, filing a tax return was required. The Court stated that if defendant wanted to test the constitutional validity of any part of the IRS form, then he must object to specific questions on the return. The fifth amendment privilege against self-incrimination does not justify a refusal to file a return altogether. *Id.* at 264.

In two 1980 decisions, the Ninth Circuit examined the effect of asserting the fifth amendment right against self-incrimination on federal tax returns. In *United States v. Neff*, 615 F.2d 1235 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980), the defendant had responded "object: self-incrimination" to more than twenty-five questions concerning his financial status. The Ninth Circuit held that the fifth amendment was not a valid defense because the questions did not, in and of themselves, suggest that the responses would be incriminating and because neither the setting nor the peculiarities of the defendant's case were such as to make the questions incriminating. *Id.* at 1238.

In *United States v. Carlson*, 617 F.2d 518 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980), the defendant was a tax protestor who, for two years, sent in false forms to avoid having federal income taxes taken out of his wages. The Ninth Circuit considered whether the fifth amendment was a defense to an I.R.C. § 7203 prosecution when asserted to avoid incrimination for a past violation of the income tax laws. The *Carlson* court balanced the defendant's right against self-incrimination against the public's need for efficient revenue collection and concluded that the purposes of the fifth amendment privilege did not require protection of the defendant's actions, and that public interest required prosecution of the defendant. *See also* *Garner v. United States*, 424 U.S. 648 (1976), where the Supreme Court held that a fifth amendment claim may be made in relation to a tax return, but only when "justified by a fear of self-incrimination other than under the tax laws." *Id.* at 650-51 n.3.

Finally, the *Carlson* court considered the purpose of filing yearly tax returns. Because the method of reporting used by IRS was developed to facilitate revenue collection and not criminal prosecution, refusal to file a return has never been protected by the taxpayer's fifth amendment rights. *Id.* at 522.

1218. 656 F.2d 523 (9th Cir. 1981).

1219. *Id.* at 524.

his first and fifth amendment rights. He was convicted of failure to file an income tax return for the 1973 tax year.

On appeal, the Ninth Circuit stated that generally taxpayers cannot rely on the fifth amendment as an excuse for not filing an income tax return.¹²²⁰ While acknowledging that under certain circumstances a taxpayer may be justified in relying on the fifth amendment to avoid filing a return, the court held that no such circumstances had been shown in Wolter's case.¹²²¹

In *Edwards v. Commissioner*,¹²²² the Ninth Circuit held that dismissal of a tax court petition for failure to produce business records did not violate the petitioners' fifth amendment right against self-incrimination because there was no indication that producing the records would subject the petitioners to criminal prosecution.¹²²³ From 1971 through 1976, the Wolters failed to report any income from their family business. Instead, they filed "protest type" returns, claiming fifth amendment rights on most of the relevant entries. After a notice of deficiency was filed and penalties assessed, they petitioned the Tax Court for a redetermination of their tax deficiencies. The Tax Court dismissed the case because the Wolters refused to produce the books and records of the business. On appeal, petitioners claimed that dismissal for failure to produce records violated their fifth amendment right against self-incrimination.¹²²⁴

The Ninth Circuit noted that to invoke the fifth amendment as a

1220. *Id.* See also *United States v. Sullivan*, 274 U.S. 259 (1927), and *supra* note 1217.

1221. 656 F.2d at 525 (citing *United States v. Carlson*, 617 F.2d 518, 522 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980), and *United States v. Neff*, 615 F.2d 1235, 1235-39 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980)). For a case in which the circumstances were held sufficient to justify failure to file a return based upon a fifth amendment privilege, see *Garner v. United States*, 424 U.S. 648 (1976) (defendant reported his occupation on income tax returns as "professional gambler," and reported substantial income from "wagering").

The Ninth Circuit also addressed the defendant's claim that the probation condition requiring that he file all past and future tax returns violated his fifth amendment rights. However, the court found this contention to be both "fundamentally unsound" and "groundless" because probation conditions "which impinge upon constitutional freedoms" do not impinge upon constitutional rights. 656 F.2d at 525. See *United States v. Pierce*, 561 F.2d 735, 740-41 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978) (when defendant has pled guilty, information may be required to be disclosed upon probation conditions unless defendant raises a fifth amendment claim that disclosure could lead to prosecution of other crimes.)

1222. 680 F.2d 1268 (9th Cir. 1982).

1223. *Id.* at 1270.

1224. *Id.* Defendants also made a fourth amendment claim that dismissal of their petition for failure to produce documents constituted both an invasion of privacy and an unlawful search or seizure. The Ninth Circuit found this claim to be "without foundation and utterly devoid of merit." *Id.*

defense to filing tax returns, "the taxpayer must be faced with substantial hazards of self-incrimination that are real and appreciable," not based upon a generalized fear.¹²²⁵ Because there was no indication that the business records would reveal criminal actions, the Ninth Circuit rejected the defendants' fifth amendment claim as frivolous.¹²²⁶

6. Use of post-arrest silence

If a defendant elects to remain silent after receiving *Miranda* warnings at the time of his arrest, use of this silence to impeach him at trial violates the due process clause of the fifth amendment.¹²²⁷ In *Doyle v. Ohio*,¹²²⁸ the Supreme Court explained that post-arrest silence following *Miranda* warnings is "insolubly ambiguous."¹²²⁹ Moreover, it would be fundamentally unfair and a denial of due process to use a defendant's silence to impeach trial testimony after implicitly guaranteeing that silence would carry no penalty.¹²³⁰

In *United States v. Muniz*,¹²³¹ the Ninth Circuit affirmed the defendant's conviction despite an improper question during cross-examination concerning the defendant's post-arrest silence. After the stabbing of a fellow prison inmate, Muniz was put in the segregation unit, given his *Miranda* warnings, and received an incident report. After receiving the report, Muniz refused to say anything about the as-

1225. *Id.* The Ninth Circuit determined that the petitioners' claim rested upon a generalized fear that if required to turn over their records, they would more likely be criminally prosecuted for tax evasion. *Id.*

1226. *Id.* The *Edwards* court reiterated the importance of not allowing individuals to use the fifth amendment to evade taxes. To do so would "severely impair the Government's ability to determine tax liability" and to raise revenue. *United States v. Carlson*, 617 F.2d 518, 523 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980).

1227. *Doyle v. Ohio*, 426 U.S. 610 (1976).

1228. *Id.* In *Doyle*, the defendants remained silent after receiving their *Miranda* warnings following their arrest. During trial, the defendants claimed they were "framed." The prosecutor cross-examined them about their failure to make this claim when originally arrested. The Court held that use of the defendants' post-arrest silence in this matter violated their due process rights. *Id.* at 618. *See also* *United States v. Hale*, 422 U.S. 171 (1975). After receiving *Miranda* warnings, Hale refused to answer questions about money found in his possession. On cross-examination, the prosecutor caused the defendant to admit that he did not offer the exculpatory information at the time he was arrested. The Court held that defendant's failure to offer an explanation at the time of his arrest could easily indicate a wish to remain silent, as opposed to supporting an inference that the explanatory testimony was a later fabrication. Because the silence lacked any significant probative value, it was excluded and the defendant given a new trial. *Id.* at 177-80.

1229. 426 U.S. at 617. The very nature of the required warnings causes every post-arrest silence to be ambiguous as the silence could be no more than the individual's exercise of his *Miranda* rights. *Id.*

1230. *Id.* at 618.

1231. 684 F.2d 634 (9th Cir. 1982).

sault. During cross-examination at trial, Muniz was asked about this silence.¹²³² Before any response was given, Muniz's attorney objected to the question, and the court recessed for lunch. After the recess the judge instructed the jury, at the Government's request, to disregard everything that occurred five minutes before the lunch recess. Muniz was convicted, and on appeal claimed that the Government's question about his post-arrest silence had violated his fifth amendment right to remain silent.¹²³³

The Ninth Circuit held that the Government's question was improper because Muniz was in custody and had received his *Miranda* warnings.¹²³⁴ However, because the trial judge had instructed the jury to disregard the Government's line of questioning, the Ninth Circuit held that the improper question was harmless beyond a reasonable doubt.¹²³⁵ Muniz also argued that the Government's questions concerning his silence during two other incidents prior to being placed in the segregation unit violated his fifth amendment rights. The court held, however, that the questioning was proper because Muniz's counsel had referred to these incidents during his opening statement as well

1232. *Id.* at 637. During the trial, the Government had established that when an inmate receives an incident report, he can call witnesses on his behalf. The Government then asked the following question: "With respect to the incident report that you got for the assault on Frank Zaroite, isn't it a fact that you refused to say anything about it?" Muniz's attorney immediately objected, and Muniz did not answer the question. The jury was then dismissed. *Id.*

1233. *Id.* The *Muniz* court cited *Doyle v. Ohio*, 426 U.S. 610 (1976), in which the Court stated that silence in the wake of *Miranda* warnings "may be nothing more than the arrestee's exercise of these *Miranda* rights." Therefore, every post-arrest silence is ambiguous and cannot be admitted into evidence at trial. *Id.* at 617. The *Doyle* court further stated that:

[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. at 618.

1234. 684 F.2d at 637.

1235. *Id.* at 637-38. The Ninth Circuit stated that "the trial judge did not highlight the question, but merely instructed the jury to disregard the entire five minutes preceding the recess." *Id.*

The court also noted that Muniz's reliance on *United States v. Hale*, 422 U.S. 171 (1975), was misplaced. In *Hale*, the defendant was arrested for robbery. After being given *Miranda* warnings, he refused to disclose where he had gotten the money found in his possession. At trial, the Government forced the defendant to admit to cross-examination that he refused to tell police about the money at the time of his arrest. *Id.* at 174. Unlike the defendant in *Hale*, Muniz's attorney raised a timely objection, and Muniz was not required to comment on his post-arrest silence. 684 F.2d at 638.

as on direct examination.¹²³⁶

In *United States v. Ochoa-Sanchez*,¹²³⁷ the Ninth Circuit determined that the Government's cross-examination of the defendant was not intended to impeach him based upon his post-arrest silence, but rather inquired into his inconsistent post-arrest statement. The defendant was convicted of smuggling heroin into the United States from Mexico. After the drugs had been discovered and the defendant arrested and advised of his *Miranda* rights, a Drug Enforcement Administration (DEA) agent questioned him about his activities in Mexico and the identity and whereabouts of the car's owner. The responses given by defendant turned out to be inconsistent with his trial testimony. On cross-examination, the Government questioned the defendant about details of his direct testimony that the defendant did not reveal to the DEA agent upon his arrest. On appeal, the defendant contended that his due process rights were violated by the Government's use of his allegedly "post-arrest silence" to impeach his testimony.¹²³⁸

The Ninth Circuit first determined that the defendant did not invoke his right to remain silent after being arrested and receiving *Miranda* warnings.¹²³⁹ Instead, the defendant made post-arrest statements to the DEA agent which were inconsistent with the defendant's trial testimony. Relying on the Supreme Court decision of *Ander-son v. Charles*,¹²⁴⁰ the Ninth Circuit ruled that when the defendant's

1236. *Id.* Muniz additionally argued that the Government, in its closing argument, referred to his decision to remain silent. The Ninth Circuit determined that since the cross-examination regarding his silence was not error, any reference to these incidents during closing argument was also not erroneous. *Id.* at 639.

1237. 676 F.2d 1283 (9th Cir.), *cert. denied*, 103 S. Ct. 219 (1982).

1238. *Id.* at 1284.

1239. *Id.* at 1286.

1240. 447 U.S. 404 (1980) (per curiam). Following his arrest for murder, defendant Charles was given his *Miranda* warnings and questioned about his possession of a stolen car. At trial, however, Charles gave a conflicting version, and on cross-examination the prosecutor questioned Charles about his inconsistent statement. The Supreme Court held that there was no ambiguity in the cross-examination because the questioning included an explicit reference to the statement made by the arresting officer who had testified only a few hours earlier. The cross-examination was meant only to obtain an explanation for the inconsistent statement, not to refer to Charles' exercise of his right to remain silent or to construe meaning from his silence. Thus, Charles' due process rights were not violated.

The Court distinguished *Doyle v. Ohio*, 426 U.S. 610 (1976), stating that "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements." 447 U.S. at 408. If a defendant voluntarily speaks after receiving his *Miranda* warnings, then he has not been induced to remain silent. Thus, questions on cross-examination do not make unfair use of post-arrest silence when a defendant has elected not to remain silent but to reply to questioning. *Id.* In *Ochoa-Sanchez*, the Ninth Circuit pointed approvingly to this

post-arrest statements differ from his trial testimony, an issue of credibility is raised.¹²⁴¹ In such cases, the Government "may probe all post-arrest statements and the surrounding circumstances under which they were made, including defendant's failure to provide critical details."¹²⁴²

The court held that the Government's cross-examination of the defendant was proper because the questioning was not intended to impeach the defendant by use of his post-arrest silence.¹²⁴³ Rather, the questioning related to details that the defendant testified to at trial but which were inconsistent with his statements to the DEA agent after his arrest.¹²⁴⁴

7. Use of immunized testimony

In *Murphy v. Waterfront Commission*,¹²⁴⁵ the Supreme Court held that as a matter of constitutional law, evidence obtained pursuant to a state grant of immunity could not be used in a subsequent federal prosecution.¹²⁴⁶ The Court went on to say, in dictum, that it is irrelevant whether the testimony is compelled by a state and used by the federal government, or vice versa. The basic issue of the fifth amendment priv-

distinction and held that *Doyle* and its progeny did not apply to the instant case. *Ochoa-Sanchez*, 676 F.2d at 1286-87.

In interpreting *Anderson*, the Ninth Circuit also cited *Grieco v. Hall*, 641 F.2d 1029 (1st Cir. 1981) (cross-examination of defendant at trial about his failure to tell his exculpatory story at the time of his arrest was justified as an inquiry into a prior inconsistent statement and thus not violative of due process under *Doyle*).

1241. 676 F.2d at 1286.

1242. *Id.*

1243. *Id.* at 1287.

1244. *Id.* The dissent, however, felt that the majority was losing sight "of the general rule that post-arrest silence may not be used against a defendant and improperly seek[ing] to bring the facts of this case within the limited exception to that rule set forth in *Anderson v. Charles*." *Id.* at 1289 (Fletcher, J., dissenting). Judge Fletcher maintained that the instant case did not exactly fit within the pattern of *Doyle* or *Anderson*. *Id.* at 1290. In *Doyle*, the defendant stayed completely silent while in *Charles*, the defendant made clearly inconsistent statements. Here, however, *Ochoa-Sanchez* did not stay strictly silent. Thus, the focus of the cross-examination should have been to focus upon the inconsistencies as authorized by *Anderson*. Instead, the dissent felt that the examination of the arresting officer, the cross-examination of the defendant, and the Government's closing argument focused only on the defendant's silence. *Id.* The result reached by the majority was felt to reward the defendant's "voluntary offering of some information, by permitting his impeachment at trial by improper use of his partial silence." *Id.* at 1291.

1245. 378 U.S. 52 (1964).

1246. *Id.* at 78-79. "This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." *Id.* at 79.

ilege remains the same.¹²⁴⁷

In *In re Grand Jury Proceedings*,¹²⁴⁸ the Ninth Circuit specifically held that testimony obtained under a federal grant of immunity may not be used in a subsequent state prosecution.¹²⁴⁹ Victor Mena was convicted on several counts of conspiracy, bribery, and making false statements to a government agency. The district court then granted Mena "use" immunity for his testimony before a federal grand jury.¹²⁵⁰ When he appeared before the grand jury, however, Mena claimed his fifth amendment right against self-incrimination and refused to testify. At the contempt hearing, the district court rejected his defense of "just cause" and held him in contempt.¹²⁵¹

On appeal, Mena claimed that there was no controlling authority guaranteeing that a federal grant of immunity would protect him against subsequent state prosecution; thus he had just cause to refuse to testify.¹²⁵² The Ninth Circuit rejected this contention, stating that sufficient case authority existed for Mena to realize that evidence obtained through federal immunity may not be used in a later state prosecution. Accordingly, the court held that Mena did not have "just cause" to refuse to testify.¹²⁵³ It also stated that *Murphy v. Waterfront Commission*¹²⁵⁴ was not intended to be so narrowly construed, and therefore, controlled the instant case.¹²⁵⁵

1247. *Id.* at 53 n.1.

1248. 662 F.2d 532 (9th Cir. 1981).

1249. *Id.* at 534.

1250. Pursuant to 18 U.S.C. § 6002 (1976), "use testimony" prohibits witness' compelled testimony and its fruits from being used in any manner in connection with criminal prosecution of the witness. *See In re Kilgo*, 484 F.2d 1215, 1220 (4th Cir. 1973). Protection provided by § 6002 and "use testimony" is coextensive with the fifth amendment prohibition against self-incrimination. *United States v. Martinez-Navarro*, 604 F.2d 1184, 1186-87 (9th Cir. 1979), *cert. denied*, 444 U.S. 1084 (1980).

1251. 662 F.2d at 533. Under 28 U.S.C. § 1826 (1976), a witness called before a grand jury may be held in contempt if he refuses "without good cause" to testify.

1252. 662 F.2d at 533.

1253. *Id.* The Ninth Circuit also held that "[i]nsofar as this circuit has not expressly held that a state may not use testimony and its fruits obtained pursuant to a federal grant of immunity, we do so now . . ." *Id.* at 534.

The Ninth Circuit also found support for its holding in other circuits (*see, e.g.*, *In re Bianchi*, 542 F.2d 98, 101 (1st Cir. 1976); *In re Disclosure of Testimony Before the Grand Jury*, 580 F.2d 281, 288 (8th Cir. 1978)) (both these cases applied *Murphy* to situations factually similar to Mena's), and in superior court opinions subsequent to *Murphy* (*see Kastigar v. United States*, 406 U.S. 441, 456-57 (1972) (indicating that *Murphy* applied equally to state and federal grants of immunity)).

1254. 378 U.S. 52 (1964).

1255. 662 F.2d at 534. The Ninth Circuit found further support for this position in Mena's failure to produce any reasonable arguments as to why *Murphy* should not apply in this case. While admitting that *Murphy* did not address the exact issue presented in Mena's case,

B. *The Right to Counsel*

1. Attachment of the right

The right to the assistance of counsel flows from two sources: the fifth amendment¹²⁵⁶ right against self-incrimination and the sixth amendment¹²⁵⁷ right to counsel.¹²⁵⁸ While the fifth amendment right attaches when a suspect is held for "custodial interrogation,"¹²⁵⁹ the sixth amendment right attaches only with the institution of adversary judicial proceedings.¹²⁶⁰

In *United States v. Cates*,¹²⁶¹ the Ninth Circuit held that the sixth amendment right to counsel does not attach until a person has been arrested, arraigned, or indicted.¹²⁶² In *Cates*, the defendant claimed that admissions made by telephone during execution of a federal search warrant should have been suppressed. The Ninth Circuit disagreed, holding that the sixth amendment right to counsel had not attached at the time of the admissions because *Cates* had not been arrested, arraigned, or indicted on the federal charges.¹²⁶³ The conclusion was not altered by the fact that adversary proceedings had already begun against *Cates* on state charges.¹²⁶⁴ *Cates* was not in custody when the officer questioned him without first obtaining a clear and knowing waiver of the right to counsel. Although the officer knew that *Cates*

the Ninth Circuit held that its underlying rationale supported the court's conclusion that evidence obtained by a grant of immunity, whether federal or state, may not be admitted in a subsequent proceeding by either the federal government or a state, without violating an individual's fifth amendment right against self-incrimination. 662 F.2d at 533-34.

1256. U.S. CONST. amend. V provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

1257. U.S. CONST. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

1258. See *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980); *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972); *United States v. Zazzara*, 626 F.2d 135, 137-38 (9th Cir. 1980); *Jett v. Castaneda*, 578 F.2d 842, 844 (9th Cir. 1978).

1259. *Miranda v. Arizona*, 384 U.S. 436, 469-73 (1966).

1260. *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977); *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972) (pre-indictment confrontation *not* a critical stage of prosecution); *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970) (preliminary hearing a critical stage of prosecution).

1261. 663 F.2d 947 (9th Cir. 1981).

1262. *Id.* at 948; see, e.g., *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977); *Massiah v. United States*, 377 U.S. 201, 205 (1964); *United States v. Zazzara*, 626 F.2d 135, 138 (9th Cir. 1980) (sixth amendment right to counsel attaches upon a person being arrested, arraigned or indicted and not during pre-arrest FBI investigation).

1263. 663 F.2d at 948.

1264. *Id.* Compare *Hoffa v. United States*, 385 U.S. 293, 307-08 (1966), *United States v. Missler*, 414 F.2d 1293, 1302-03 (4th Cir. 1969), *cert. denied*, 397 U.S. 913 (1970), and *United States v. Diamond*, 492 F. Supp. 583, 586 (D. Md. 1980), in which the defendants were questioned about a different offense being concurrently prosecuted in state court.

was represented by counsel, federal adversary proceedings against him had not been initiated.¹²⁶⁵ Therefore, the Ninth Circuit held that the questioning did not violate Cates' sixth amendment right to counsel.

2. Effective assistance of counsel

The sixth amendment guarantees a defendant the right to effective assistance of counsel. The Ninth Circuit, in *Cooper v. Fitzharris*,¹²⁶⁶ articulated the standard for determining ineffective assistance of counsel: when the defense counsel's errors or omissions reflect a failure to exercise the skill, judgment or diligence of a reasonable, competent criminal defense attorney and when the defendant is prejudiced by such representation.¹²⁶⁷

In *United States v. Sanford*,¹²⁶⁸ the Ninth Circuit determined that a question asked by defense counsel during cross-examination did not constitute ineffective assistance of counsel.¹²⁶⁹ Sanford was convicted of possession and transfer of counterfeit Federal Reserve Notes. At trial Sanford's counsel had asked the prosecution's key witness from whom he had received the counterfeit notes. The witness responded that he received the notes from Sanford.¹²⁷⁰

The Ninth Circuit held that the defense counsel's error was not sufficient to support an ineffective assistance of counsel claim.¹²⁷¹ The court stated that mere error is not enough; there must be a serious dere-

1265. 663 F.2d at 949.

1266. 586 F.2d 1325 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979). In *Cooper*, the Ninth Circuit stated that whether defense counsel's performance fell below an established standard of competence depends on whether counsel's errors or omissions were those that a "reasonably competent attorney acting as a diligent conscientious advocate would not have made." *Id.* at 1330. In *McMann v. Richardson*, 397 U.S. 759, 771 (1970), the Supreme Court set forth a standard for effective assistance of counsel. The assistance must be "within the range of competence demanded of attorneys in criminal cases." *Id.*

1267. *Cooper v. Fitzharris*, 586 F.2d at 1330-31. See *United States v. Winston*, 613 F.2d 221, 223 (9th Cir. 1980) ("in order for an act or omission of counsel to rise to the level of constitutional error, the accused must demonstrate that he was prejudiced thereby").

In *United States v. Wilder*, 680 F.2d 59 (9th Cir. 1982), the defendant, an admitted tax protester, refused to either obtain or accept counsel. He subsequently claimed he was denied effective assistance of counsel when he was refused a continuance upon his finally obtaining counsel. The Ninth Circuit found the entire appeal frivolous and found that Wilder had not suffered any prejudice due to the late entrance of the attorney to his case. It held that the defendant "may not urge his own recalcitrance in obtaining counsel as a grounds for reversal." *Id.* at 60.

1268. 673 F.2d 1070 (9th Cir. 1982).

1269. *Id.* at 1073.

1270. *Id.*

1271. *Id.*

liction.¹²⁷² In addition, the Ninth Circuit required that Sanford show that he was prejudiced by his counsel's question.¹²⁷³ The court found neither sufficient prejudice nor serious dereliction to support Sanford's ineffective assistance claim.

Similarly, in *United States v. DeRosa*,¹²⁷⁴ the Ninth Circuit ruled that the defendant was not denied effective assistance of counsel because of his attorney's alleged inadequate cross-examination of Government witnesses and his failure to call any defense witnesses.¹²⁷⁵ The court held that the defense counsel did not violate the *Cooper v. Fitzharris* standard¹²⁷⁶ because nothing in the defendant's brief indicated a deficiency in cross-examination or suggested any specific witnesses who defendant's counsel could have called on defendant's behalf.¹²⁷⁷

In *United States v. Donn*,¹²⁷⁸ the defendant had pleaded guilty to unarmed bank robbery and was sentenced to eight years imprisonment. Donn filed a pro se motion under 28 U.S.C. section 2255 to vacate his sentence,¹²⁷⁹ one claim being ineffective assistance of counsel. In particular, Donn alleged that his counsel did not fully discuss the merits of the case, did not investigate the case, did not inform Donn that intoxication might be a defense and did not show Donn a copy of the presentence report containing false information.¹²⁸⁰

The Ninth Circuit stated that a defense counsel's failure to show the presentence report to his client may violate the reasonably competent representation standard.¹²⁸¹ In addition, such nondisclosure would be clearly prejudicial to the client when the presentence report contains false information and is relied on in sentencing.¹²⁸² The court noted that whether Donn's specific allegations supported his ineffective assistance of counsel claim was a factual determination.¹²⁸³ The court therefore remanded Donn's claim for an evidentiary hearing on its merits.¹²⁸⁴

1272. *Id.* See *Cooper v. Fitzharris*, 586 F.2d at 1330.

1273. *Id.* See *United States v. Winston*, 613 F.2d at 223.

1274. 670 F.2d 889 (9th Cir.), *cert. denied*, 103 S. Ct. 353 (1982).

1275. *Id.* at 896.

1276. See *supra* note 1266.

1277. 670 F.2d at 896.

1278. 661 F.2d 820 (9th Cir. 1981).

1279. *Id.* at 822-23. Donn filed two pro se motions. The first was dismissed. This appeal deals with the second motion.

1280. *Id.* at 824.

1281. *Id.*

1282. *Id.* at 825.

1283. *Id.*

1284. *Id.* The Ninth Circuit discussed the specific factual allegations supporting Donn's

In *Cooks v. Spalding*,¹²⁸⁵ Cooks claimed that he was denied effective assistance of counsel when his attorney waived the right to a twelve person jury. The court held that because a smaller jury presents both potential advantages¹²⁸⁶ and disadvantages, the defense counsel's decision to request a six person jury was tactical and, thus, did not constitute ineffective assistance of counsel.¹²⁸⁷

In *Hines v. Enomoto*,¹²⁸⁸ defendant Hines, who had been convicted of kidnapping, assault with a deadly weapon, and attempted robbery, sought habeas corpus relief based on numerous grounds, including ineffective assistance of counsel. Hines based his ineffective assistance argument on three separate claims. Hines first contended that the defense counsel's failure to object to the state court's curtailment of peremptory challenges constituted ineffective assistance of counsel. The Ninth Circuit refused to consider whether this conduct denied Hines his sixth amendment right;¹²⁸⁹ however, it remanded the case to determine if counsel's failure to object satisfied the "cause and prejudice" standard required for habeas corpus review.¹²⁹⁰

Second, Hines claimed that his trial attorney's failure both to object to a lineup and to investigate or challenge the fairness of a photographic identification each provided the basis for an ineffective assistance of counsel claim. The Ninth Circuit found that the attorney's actions as to the photographic identification did not prejudice

ineffective assistance of counsel claim. With regard to Donn's allegation that the presentence report contained false information, the court noted that Donn provided documentation purporting to refute particular statements in the presentence report. The court then considered the Government's assertion that Donn's documentation failed to conclusively prove that the presentence report was false, and that Donn's § 2255 motion should therefore be denied without an evidentiary hearing on whether the presentence report was false. However, the court stated that it must determine whether the factual allegations supporting the claim are reasonably plausible before granting an evidentiary hearing pursuant to a § 2255 motion. *Id.*

1285. 660 F.2d 738 (9th Cir. 1981) (per curiam).

1286. *Id.* at 740. See *Ballew v. Georgia*, 435 U.S. 223, 229-30 (1978).

1287. 660 F.2d at 740. See *Gustave v. United States*, 627 F.2d 901, 904 (9th Cir. 1980) ("Mere criticism of a tactic or strategy is not in itself sufficient to support a charge of inadequate representation.").

1288. 685 F.2d 667 (9th Cir. 1981).

1289. *Id.* at 675.

1290. *Id.* See *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). FED. R. CRIM. P. 12(b)(2) provides that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial," and that failure to do so "constitutes a waiver thereof, but the court for cause may grant relief from the waiver." The court in *Hines* expanded the rule to require not only sufficient cause to gain relief from the waiver but also a showing of "actual prejudice" to his case should the court fail to grant relief. 658 F.2d at 675.

Hines.¹²⁹¹ The court noted that Hines' attorney did object to the identification and that a pretrial suppression hearing resulted in a finding that the photographic identification was not suggestive.¹²⁹²

The court also determined that Hines suffered no prejudice from his counsel's failure to object to the lineup identification made by the victim before Hines' preliminary hearing.¹²⁹³ After reviewing the victim's testimony as to his ability to identify Hines independently, the Ninth Circuit concluded that "the lineup identification was merely cumulative to an overwhelmingly positive identification" by the victim.¹²⁹⁴ Thus, the defense counsel's failure to object to the lineup did not prejudice Hines.

Finally, Hines claimed that his trial counsel's failure to call or interview two potential witnesses amounted to ineffective assistance of counsel. The court noted that "failure to interview prospective witnesses can constitute ineffective assistance."¹²⁹⁵ However, the court did not find that Hines' counsel negligently investigated the case.¹²⁹⁶ One potential witness was the police officer who conducted the photographic identification. Since the court already had determined that Hines was not prejudiced by the identification, failure to call the officer as a witness likewise did not prejudice Hines.¹²⁹⁷ The other potential witness was the alleged owner of the car in which Hines was arrested. The court noted that a letter in the record demonstrated that the attorney relied on Hines' assurance that he would arrange for the person to contact the attorney. The court concluded that the defense counsel's failure to contact this individual did not constitute ineffective assistance of counsel.¹²⁹⁸

In *Fritchie v. McCarthy*,¹²⁹⁹ defendant Fritchie, who had been convicted of first degree murder and armed robbery, claimed that he was deprived of his sixth amendment right to the effective assistance of counsel because the public defender failed to present a diminished capacity defense.¹³⁰⁰ Fritchie contended that he had told his attorney on numerous occasions that he wanted to present a diminished capacity

1291. 658 F.2d at 675.

1292. *Id.*

1293. *Id.*

1294. *Id.*

1295. *Id.* at 676. *Cf.* *Cody v. Morris*, 623 F.2d 101, 103 (9th Cir. 1980) (counsel's failure to call certain witnesses did not deny the defendant effective representation of counsel).

1296. 658 F.2d at 676.

1297. *Id.*

1298. *Id.*

1299. 664 F.2d 208 (9th Cir. 1981).

1300. *Id.* at 214.

defense, but counsel refused. Fritchie's defense would have been based on a psychiatrist's report which stated that Fritchie did not have the requisite mental state required for conviction. However, the Ninth Circuit held that the public defender's decision not to assert the diminished capacity defense was a tactical decision, because such a defense would have undermined the chosen trial strategy.¹³⁰¹ The Ninth Circuit concluded that the defense counsel's action was within the *Cooper v. Fitzharris* standard,¹³⁰² and thus did not constitute a denial of effective assistance of counsel.¹³⁰³

3. Governmental interference with attorney-client relationship

It is well settled that the sixth and fourteenth amendments bar the use at a subsequent trial of incriminating statements which the government has deliberately elicited from the defendant after indictment and in the absence of counsel.¹³⁰⁴ In *United States v. Hollingshead*,¹³⁰⁵ the Ninth Circuit considered whether the defendant's statements made to a government informant before he was arrested violated his sixth amendment right to counsel. The court concluded that the Government's action in obtaining Hollingshead's pre-arrest statements did not violate the sixth amendment because the right to counsel had not attached; thus the statements were admissible.¹³⁰⁶

Hollingshead's sixth amendment claim was based on the Supreme Court's ruling in *United States v. Henry*.¹³⁰⁷ The Ninth Circuit, however, distinguished *Henry* on the basis that Hollingshead was not in custody nor had charges been filed at the time he made the incriminat-

1301. *Id.* at 215.

1302. *See supra* note 1266.

1303. 664 F.2d at 215. *See also* *United States v. Stern*, 519 F.2d 521, 524 (9th Cir.), *cert. denied*, 423 U.S. 1033 (1975); *United States v. Wilkes*, 449 F.2d 163 (9th Cir. 1971) (*per curiam*); *Smith v. United States*, 446 F.2d 1117, 1119 (9th Cir. 1971) (all cases holding that although a tactical choice may seem unwise in hindsight, it was not so unreasonable as to constitute denial of constitutional right to effective assistance of counsel).

1304. *United States v. Henry*, 447 U.S. 264, 274 (1980); *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980); *Brewer v. Williams*, 430 U.S. 387, 401 (1977); *Massiah v. United States*, 377 U.S. 201, 207 (1964).

1305. 672 F.2d 751 (9th Cir. 1982).

1306. *Id.* at 755.

1307. 447 U.S. 264 (1980). In *Henry*, the issue was whether the government agent deliberately elicited incriminating post-indictment statements while defendant was in custody. The Court found three factors important in suppressing the incriminating statements: (1) the informant was paid by the government and was acting under its instructions; (2) the informant seemed to be no more than a fellow inmate; and (3) "Henry was in custody and under indictment at the time he was engaged in conversation." *Id.* at 270.

ing statements to the government informant.¹³⁰⁸ In refusing to suppress Hollingshead's statements, the Ninth Circuit agreed with the *Henry* Court when it recognized that "[i]t is quite a different matter when the Government uses undercover agents to obtain incriminating statements from persons not in custody but suspected of criminal activity prior to the time charges are filed."¹³⁰⁹

A similar result was reached in *United States v. Jones*,¹³¹⁰ where the defendant sought to have pretrial statements that had been made to jail inmates suppressed. The Ninth Circuit refused to suppress the statements because the evidence failed to show that the inmates were acting as government informants within the meaning of *United States v. Henry*.¹³¹¹

In *United States v. Shapiro*,¹³¹² the Ninth Circuit confirmed that post-arrest actions that interfere with the right to counsel are not per se violations of the sixth amendment.¹³¹³ Only where the actions produce, directly or indirectly, evidence offered against defendant at trial is there a deprivation of the right to counsel.¹³¹⁴ The two defendants, Shapiro and Howard, were convicted of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute.¹³¹⁵ The defendants argued for reversal of their convictions because the trial court refused to allow their counsel an opportunity to question a government witness who had post-arrest conversations with Howard.¹³¹⁶ No determination could be made of whether the post-arrest conversations violated the rule established in *Massiah v. United States*,¹³¹⁷ according to Shapiro and Howard, absent examination of that witness.

The court determined that defendant Shapiro could not claim a *Massiah* violation since none of the conversations in question involved him. Defendant Howard's sixth amendment right to counsel, as protected by *Massiah*, was noted to be personal and could not be asserted

1308. 672 F.2d at 755.

1309. 447 U.S. at 272.

1310. 678 F.2d 102 (9th Cir. 1982).

1311. *Id.* at 106; *see* 447 U.S. 264, 270 (1980).

1312. 669 F.2d 593 (9th Cir. 1982).

1313. *Id.* at 598 (citing *Weatherford v. Bursey*, 429 U.S. 545 (1977)).

1314. 429 U.S. at 552.

1315. 669 F.2d at 595.

1316. *Id.* at 598.

1317. 377 U.S. 201 (1964) (information elicited by a government agent from a defendant after arrest is inadmissible evidence unless the defendant had counsel present when the information was obtained).

by a third person.¹³¹⁸ In considering Howard's claim, the Ninth Circuit noted that there is no sixth amendment violation unless the government actions produce evidence offered against a defendant at trial. The Ninth Circuit concluded that there was no violation because Howard failed to show that any information obtained through the post-arrest conversation was offered as evidence in her trial.¹³¹⁹

In *Cahill v. Rushen*,¹³²⁰ the Ninth Circuit determined that after defendant Cahill's right to counsel had attached, the confession he made must be excluded at any subsequent trial if it was deliberately elicited by the prosecutor, after conviction and sentencing, without affording Cahill an opportunity to consult with counsel.¹³²¹ The day after Cahill was initially convicted of murder, he was brought to the sheriff's office and questioned without being given either *Miranda* warnings or being provided any opportunity to consult with his attorney.¹³²² In response to this questioning, Cahill confessed to the crime, believing that a confession could have no adverse consequences. It was this confession which later was admitted into evidence at the second trial, resulting in another conviction of Cahill.¹³²³

The Ninth Circuit found that there was no question that the right to counsel had attached since at the time of the confession Cahill had been arrested, arraigned, and indicted.¹³²⁴ However, the prosecutor claimed that "the right to counsel which had attached at the time of indictment was cut off by the first conviction and sentencing, and was not resurrected until Cahill had been rearraigned."¹³²⁵

The Ninth Circuit rejected this argument, holding that there is no justification for the creation of a "temporal hiatus" in the right to counsel, especially since at the time of the confession, Cahill's conviction

1318. 669 F.2d at 598. See *United States v. Partin*, 601 F.2d 1000, 1006 (9th Cir. 1979), cert. denied, 446 U.S. 964 (1980).

1319. 669 F.2d at 598.

1320. 678 F.2d 791 (9th Cir. 1982).

1321. *Id.* at 795-96. The dissent, however, argued that the sixth amendment has no application to events which take place outside the courtroom after sentencing. It felt that the majority extended without reason the sixth amendment's reach to a situation where it had never before been applied. The dissent would not apply the sixth amendment to the situation in *Cahill*; it would have remanded for a determination of whether Cahill's fifth amendment *Miranda* rights were violated. *Id.* at 796 (Wallace, J., dissenting).

1322. *Id.* at 793.

1323. *Id.*

1324. *Id.* (citing *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)).

1325. 678 F.2d at 794. The court also noted that Cahill's promise to confess had been evoked by Captain Carter at the time of indictment, so the police conduct in eliciting the confession actually began well before the first trial. *Id.* at 795.

was not yet final.¹³²⁶ The evidence was therefore determined to be inadmissible since the confession was elicited in violation of Cahill's right to counsel and the prosecutor failed to meet its burden of establishing an intentional waiver of his sixth amendment rights.¹³²⁷

4. Waiver

The sixth amendment provides an accused the right to assistance of counsel for his defense, but the accused may waive that right and elect to represent himself.¹³²⁸ Before a defendant can proceed pro se, however, a knowing and intelligent waiver of the right to counsel must be made.¹³²⁹

In *Fritchie v. McCarthy*,¹³³⁰ the Ninth Circuit distinguished the fifth and sixth amendment rights to counsel and held that the claimed sixth amendment violation was unfounded since adversary criminal proceedings had not been initiated against defendant Fritchie.¹³³¹ The issue of possible waiver of the right arose due to a confession given in a 1970 Florida murder case. Before confessing to that murder, Fritchie signed a police form waiving his right to counsel. This confession was allowed as identity evidence in Fritchie's California murder trial. Fritchie claimed that the use of his 1970 Florida murder confession violated his sixth amendment right to counsel because the waiver was not made knowingly and intelligently.¹³³²

In denying this claim, the Ninth Circuit pointed out that the sixth amendment right to counsel "attaches only upon the initiation of the adversary judicial criminal procedures."¹³³³ Because Fritchie's waiver was given in response to police custody and interrogation, Fritchie should have claimed¹³³⁴ violation of the fifth amendment right to counsel under *Miranda v. Arizona*.¹³³⁵ The court also noted that if Fritchie

1326. *Id.* at 795. See also *Estelle v. Smith*, 451 U.S. 454, 461-63 (1981) (express rejection of the argument that fifth amendment rights cease at time of conviction).

1327. 678 F.2d at 796.

1328. *United States v. Dujanovic*, 486 F.2d 182, 185 (9th Cir. 1973).

1329. *Id.* at 186.

1330. 664 F.2d 208 (9th Cir. 1981).

1331. *Id.* at 214.

1332. *Id.*

1333. *Id.* See *Moore v. Illinois*, 434 U.S. 220, 226-27 (1977); *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972).

1334. 664 F.2d at 214. See *Edwards v. Arizona*, 451 U.S. 477 (1981).

The fifth amendment right to counsel is derived from the fifth amendment right against self-incrimination. This right attaches only upon the initiation of adversary judicial proceedings. 664 F.2d at 214.

1335. 384 U.S. 436 (1966).

had invoked his fifth amendment right to counsel prior to signing the waiver, then the validity of the waiver would be determined by the knowing and intelligent standard.¹³³⁶ However, because Fritchie never invoked his right to counsel prior to his confession, the Ninth Circuit found no reason to inquire into the effectiveness of the waiver as required by *Edwards v. Arizona*.¹³³⁷

In a 1981 case, *United States v. Doe*,¹³³⁸ the Ninth Circuit determined that defendant Doe effectively waived his right to counsel during an investigation by the Drug Enforcement Administration (DEA) and during a subsequent appearance before a federal magistrate.¹³³⁹ Both Roe and Doe were arrested while attempting to smuggle heroin into the United States. DEA agents testified that when Doe requested an attorney, no questioning took place. Subsequent to a conversation with Roe, Doe decided to cooperate with the DEA's investigation. He then waived his right to an attorney and answered the agent's questions.¹³⁴⁰

Doe contended that he was deprived of his sixth amendment right to counsel when the government elicited admissions from him after he had repeatedly requested an attorney.¹³⁴¹ After recognizing that the Supreme Court has not adopted a per se rule,¹³⁴² the Ninth Circuit stated that the validity of a waiver is a question of fact.¹³⁴³ Based on the district court's record, the Ninth Circuit determined that Doe had knowingly and intelligently waived his right to counsel during the DEA investigation.¹³⁴⁴

Doe also argued that waiver of his right to counsel when he ap-

1336. 664 F.2d at 214. See *Edwards v. Arizona*, 451 U.S. at 483-85.

1337. 664 F.2d at 214. In *Edwards*, the Supreme Court held that when an accused requests counsel, all questioning must cease until counsel is present or until the accused himself initiates further communications or conversations with the police. 451 U.S. at 484-85. The accused may waive his right to counsel only when the waiver is a voluntary, knowing, and intelligent relinquishment of a known right or privilege. *Id.* at 484.

1338. 665 F.2d 920 (9th Cir. 1981), as corrected, 656 F.2d 411 (9th Cir. 1981) (per curiam).

1339. 655 F.2d at 926.

1340. *Id.* at 923.

1341. *Id.* at 925.

1342. *Id.* at 925. In *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir.) (en banc), cert. denied, 436 U.S. 919 (1978), the Ninth Circuit recognized that the Supreme Court has not mandated a per se rule that would eliminate any possibility of a waiver of the right to counsel after an accused has requested the assistance of an attorney. The court found that such a per se rule "would serve only to handcuff our law enforcement officers in the performance of their duties and to imprison the suspect in his alleged constitutional privileges." *Id.* at 488.

1343. 655 F.2d at 925. See *Brewer v. Williams*, 430 U.S. 387, 402 (1977); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

1344. 655 F.2d at 925.

peared before the magistrate was not voluntary because Doe had believed that he had reached a plea bargain with the United States Attorney.¹³⁴⁵ The Ninth Circuit found that the record supported the district court's conclusion that there was no plea agreement.¹³⁴⁶ The Ninth Circuit relied on the lower court's determinations regarding the witnesses' credibility since the trial court had the opportunity to observe and assess the testimony of each witness.¹³⁴⁷

In *United States v. Kimmel*,¹³⁴⁸ the Ninth Circuit determined that the record did not show a knowing and intelligent waiver of the right to counsel even though the defendant, charged for distributing drugs, was assisted by a court-appointed advisor.¹³⁴⁹ The *Kimmel* court nevertheless remanded to allow the district court to supplement the record.¹³⁵⁰

The Government argued that Kimmel had received the benefit of his sixth amendment right to legal representation upon receiving assistance from a court-appointed advisor.¹³⁵¹ Rejecting that argument, the Ninth Circuit reasoned that whenever an accused undertakes functions traditionally performed by a lawyer, he must knowingly and intelligently waive his right to counsel.¹³⁵²

The court then considered the adequacy of Kimmel's waiver. It stated the general rule that a waiver is knowing and intelligent only when the accused appreciates the possible consequences of mishandling the presentation of a defense as well as an attorney's superior ability to make a persuasive and proper presentation.¹³⁵³ The Ninth Circuit indicated that the risks of self-representation are best understood when explained by the trial judge.¹³⁵⁴ However, absent such an explanation in the record, the particular facts and circumstances which

1345. *Id.* at 925-26.

1346. *Id.* at 926.

1347. *Id.*

1348. 672 F.2d 720 (9th Cir. 1982).

1349. *Id.* at 721.

1350. *Id.* at 722-23.

1351. *Id.* at 721.

1352. *Id.* In *United States v. Dujanovic*, 486 F.2d 182 (9th Cir. 1973), the Ninth Circuit stated that when an accused wants to waive counsel and proceed pro se, the trial court is essentially faced with a two-pronged problem: first, "ascertaining whether a demand to waive the constitutional right to the assistance of competent counsel is competently, voluntarily and intelligently made, and [second,] meeting its obligation to assure both the accused and the government a fair trial conducted in a judicious, orderly fashion which is always threatened and endangered with the gathering signs of disruptive actions or attitudes." *Id.* at 186.

1353. 672 F.2d at 721. See *Faretta v. California*, 422 U.S. 806, 835 (1975).

1354. 672 F.2d at 722. See *Cooley v. United States*, 501 F.2d 1249, 1252 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975).

surround the case must be considered, including the background, experience, and conduct of the accused, to determine whether the defendant understood the consequences of his waiver.¹³⁵⁵ The court found that Kimmel was educated and had previously represented himself, but nonetheless determined that the existing record contained insufficient evidence to conclude that the waiver was knowing and intelligent.¹³⁵⁶

Generally, in cases where the record does not show a knowing and intelligent waiver, the appellate court will reverse and remand for a new trial.¹³⁵⁷ The *Kimmel* court, however, remanded the case to the district court for the purpose of supplementing the record even though the record showed no indication of an intelligent waiver.¹³⁵⁸ The court stated that it used such a procedure because the existing record suggested that additional evidence was available to determine the validity of Kimmel's waiver.¹³⁵⁹

The dissent noted that the majority failed to follow established Ninth Circuit precedent¹³⁶⁰ in deciding to remand the case in order to supplement the record. In addition, it proposed that a per se rule be adopted to provide that when a defendant seeks to waive his right to counsel, the court must formally advise him on the record of the risks of self-representation.¹³⁶¹ A court's failure to give such a warning would necessitate a reversal of the defendant's conviction.¹³⁶² Accordingly, the dissent would have reversed Kimmel's conviction and remanded for a new trial because the record failed to establish a knowing and intelligent waiver.¹³⁶³

The Ninth Circuit addressed a situation very similar to *Kimmel* in

1355. 672 F.2d at 722 (citing *Cooley v. United States*, 501 F.2d at 1252).

1356. 672 F.2d at 722.

1357. *Id.*

1358. *Id.* See *Rhinehart v. Gunn*, 661 F.2d 738, 739-40 (9th Cir. 1981) (remanded for supplementation of the record because the record itself suggested additional evidence available about waiver adequacy).

1359. 672 F.2d at 722. On remand, the district court held a hearing at which the Government attempted to show that Kimmel made a knowing and intelligent waiver. However, the Government subsequently decided not to pursue the issue and no relevant information was added to the record. The Ninth Circuit then reversed Kimmel's conviction and remanded the case for a new trial. 672 F.2d at 732 (subsequent per curiam opinion).

1360. *Id.* at 724 (Reinhardt, J., dissenting). *E.g.*, *United States v. Crowhurst*, 596 F.2d 389, 391 (9th Cir. 1979), *cert. denied*, 449 U.S. 1021 (1980); *United States v. Aponte*, 591 F.2d 1247, 1250 (9th Cir. 1978); *United States v. Dujanovic*, 486 F.2d 182, 188 (9th Cir. 1973) (procedure was to reverse the conviction and remand for new trial where record on appeal failed to show that defendant made a knowing and intelligent waiver of counsel).

1361. 672 F.2d at 723 (Reinhardt, J., dissenting).

1362. *Id.*

1363. *Id.* at 727.

United States v. Harris.¹³⁶⁴ In *Harris*, the court reversed and remanded, holding that the record failed to establish that the defendant's waiver of his right to counsel was knowing and voluntary; it was unclear whether the defendant was aware of the risks involved in representing himself.¹³⁶⁵

Harris, a physician, was convicted for failure to file federal tax returns. Despite being informed at his first arraignment of the right to be represented by counsel, Harris chose to represent himself. At the arraignment, the magistrate appointed advisory counsel but did not question Harris as to his understanding of the charges and penalties involved, or as to the dangers of self-representation. The advisory counsel appeared with Harris at the second arraignment but the record did not indicate whether counsel was present with Harris at trial or the extent to which Harris and counsel conferred, if at all. The record also failed to indicate whether at trial Harris was questioned about his awareness of potential risks involved with self-representation.¹³⁶⁶

The court stressed the importance of a defendant's understanding of the potential dangers involved with self-representation before there may be a knowing and voluntary waiver of one's sixth amendment rights.¹³⁶⁷ The Government argued that Harris was an intelligent and informed man, and that since his pretrial motion contained a quotation from the charging statute, he must have been familiar with the charges and the penalties.¹³⁶⁸ This argument was inconclusive since the record did not show that Harris prepared the motion himself or understood the import of the statute.¹³⁶⁹ After reviewing the record, the Ninth Cir-

1364. 683 F.2d 322 (9th Cir. 1982).

1365. *Id.* at 325-26. The Ninth Circuit, in remanding for a new trial, did not use the limited remand as it had in *Kimmel*. The court found that, unlike the *Kimmel* situation, there were no other facts which could be used to supplement the record to show that Harris was aware of the risks involved with self-representation. *Id.*

1366. *Id.* at 325.

1367. *Id.* at 324. In *United States v. Dujanovic*, 486 F.2d 182, 188 (9th Cir. 1973), the court indicated that a district court should not grant a defendant's request to waive representation of counsel and serve as his own counsel without discussing with the defendant, in open court, whether the waiver was knowingly and intelligently made, with an understanding of the charges, the possible penalties, and the dangers of self-representation. *See also* *Cooley v. United States*, 501 F.2d 1249 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975) (omission of the colloquy between the defendant and the court was not per se reversible error, when the record reveals a knowing and intelligent waiver; case seen as a limited exception because it involved an unusual fact situation in which the background and experience of the defendant in legal matters was apparent from the record).

1368. 683 F.2d at 325.

1369. *Id.* The court noted that because Harris' motion asserted nonexistent jurisdictional defects and constitutional defects in the wording of the statute, it revealed lack of understanding. *Id.*

cuit remanded for a new trial, finding that the record failed to reveal whether Harris understood the charges filed against him or was fully aware of the risks of acting as his own attorney.¹³⁷⁰

5. Right to self-representation

A criminal defendant has both a statutory¹³⁷¹ and a constitutional right¹³⁷² to represent himself by voluntarily and intelligently waiving his right to counsel. The demand to proceed pro se must be unequivocal¹³⁷³ and made in a timely manner.¹³⁷⁴

In *United States v. Wilson*,¹³⁷⁵ the Ninth Circuit refused to extend the right to self-representation to include a right of access to materials, facilities, or investigative and educational resources.¹³⁷⁶ At Wilson's arraignment, the magistrate denied his request to proceed pro se and appointed counsel to represent him. After receiving notice of Wilson's intention to appeal the denial, the magistrate conducted a hearing and recommended that Wilson not be allowed to proceed pro se because he lacked a proper educational background. On the day of trial, Wilson declined the judge's unexpected offer that Wilson represent himself, stating he was unfamiliar with trial procedure and had been denied access to a law library to prepare his defense. It was agreed, however, that Wilson could ask witnesses questions during the trial.¹³⁷⁷

The Ninth Circuit determined that Wilson was not denied his right to self-representation since he had access to court-appointed counsel before trial, but had rejected the assistance, and also because he was allowed to participate during the trial.¹³⁷⁸ Wilson argued that the denial of pretrial access to a law library violated his sixth amendment right to self-representation.¹³⁷⁹ In declining to interpret the sixth

1370. *Id.* at 326. The court speculated that the risks, penalties, and nature of the charges may have been explained to Harris by the appointed advisory counsel; however, there was nothing in the record which convinced the Ninth Circuit that Harris was actually aware of the potential danger inherent in his decision to proceed pro se. *Id.* at 325.

1371. 28 U.S.C. § 1654 (1976) provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

1372. *Faretta v. California*, 422 U.S. 806 (1975).

1373. *United States v. Dujanovic*, 486 F.2d 182, 186 (9th Cir. 1973); *Meeks v. Craven*, 482 F.2d 465 (9th Cir. 1973).

1374. *Id.*; *United States v. Pike*, 439 F.2d 695 (9th Cir. 1971) (per curiam).

1375. 690 F.2d 1267 (9th Cir. 1982).

1376. *Id.* at 1271.

1377. *Id.* at 1270.

1378. *Id.* at 1272. However, Wilson's participation was limited to the opportunity to question witnesses himself. *Id.* at 1277.

1379. *Id.* at 1270.

amendment to include a right to conduct one's own research, the Ninth Circuit held that a defendant's election to represent himself includes relinquishing many of the benefits associated with representation by counsel.¹³⁸⁰

The Ninth Circuit followed other circuits in rejecting Wilson's argument that the fifth amendment due process requirement of "meaningful access" to the courts together with the sixth amendment right to self-representation should be interpreted to allow him access to a law library.¹³⁸¹ The United States Supreme Court has held that the access required by the fifth amendment can be accomplished by various means, including access to a law library.¹³⁸² The government, however, has the option of selecting the means of access in a particular case. Here, although it was unclear whether Wilson was ever offered the research services of appointed counsel or simply rejected those services until the day of trial, the "availability" of legal assistance was a constitutionally permissible means of access.¹³⁸³ Because adequate access was provided, Wilson could not object to the means provided and insist on library privileges or any alternative means of access.

The dissent in *Wilson* asserted that Wilson was denied his sixth amendment right to self-representation.¹³⁸⁴ Judge Fletcher found that the magistrate's failure to allow Wilson to proceed pro se because he lacked a proper educational background was a violation of Wilson's constitutional right to self-representation.¹³⁸⁵

In *Maxwell v. Sumner*,¹³⁸⁶ the district court granted Maxwell's petition for writ of habeas corpus, ruling that the state court erred in denying Maxwell's motion to proceed in propria persona.¹³⁸⁷ The State first argued that Maxwell did not have a right to self-representation

1380. *Id.* at 1271.

1381. *Id.* See, e.g., *Spates v. Manson*, 644 F.2d 80 (2d Cir. 1981); *United States v. Chatman*, 584 F.2d 1358 (4th Cir. 1978); *United States v. West*, 557 F.2d 151 (8th Cir. 1977). These cases involve findings that the defendant's right to self-representation does not include a right of access to a law library when the state has provided an alternative.

1382. *Bounds v. Smith*, 430 U.S. 817, 830-32 (1977). The Ninth Circuit recently reiterated this rule in *Storseth v. Spellman*, 654 F.2d 1349 (9th Cir. 1981), where it found that legal assistance offers a meaningful avenue of access to an indigent inmate. *Id.* When adequate access is provided and an inmate does not take advantage of it, he may not insist on another means of access as it is the State's option to choose the type of access used to satisfy the constitutional obligation. *Id.* at 1353.

1383. *Storseth v. Spellman*, 654 F.2d at 1353.

1384. 666 F.2d at 1250 (Fletcher, J., dissenting).

1385. *Id.*

1386. 673 F.2d 1031 (9th Cir.), cert. denied, 103 S. Ct. 313 (1982).

1387. *Id.* at 1033.

because his trial occurred before *Faretta v. California*¹³⁸⁸ was decided.¹³⁸⁹ The *Maxwell* court held that Maxwell had a right to represent himself because prior Ninth Circuit law recognized a defendant's right to self-representation equal to that subsequently granted by the Supreme Court in *Faretta*.¹³⁹⁰

The State then contended that denial of Maxwell's motion to proceed in propria persona was proper because Maxwell's behavior was disruptive, and his motion was both untimely and made for the purpose of delay.¹³⁹¹ The Ninth Circuit affirmed the district court's findings that Maxwell's trial behavior was not outlandish and that his motion to represent himself was timely.¹³⁹² Accordingly, it held that Maxwell did not forfeit his right to self-representation.

In *Hines v. Enomoto*,¹³⁹³ the Ninth Circuit determined that defendant Hines was not denied his right to self-representation when he was given appointed counsel during an appeal in state court.¹³⁹⁴ Hines was convicted in a California state court of kidnapping for the purpose of robbery, assault with a deadly weapon, and attempted robbery in connection with the hijacking of a delivery truck. Hines appealed the district court's dismissal of his habeas corpus petition on several grounds, including the argument that the state appellate court's appointment of an attorney over Hines' objection was a denial of his right to self-representation.¹³⁹⁵

The Ninth Circuit noted that the state appellate court had allowed Hines to file a supplemental brief on his own behalf. The court recognized the constitutionality of "involuntary 'hybrid representation'" during trial, and thus held that Hines' right to self-representation was

1388. 422 U.S. 806 (1975).

1389. 673 F.2d at 1035.

1390. *Id.* See *Bittaker v. Enomoto*, 587 F.2d 400, 401-02 (9th Cir. 1978), *cert. denied*, 441 U.S. 913 (1979).

1391. 673 F.2d at 1035. See *United States v. Dujanovic*, 486 F.2d 182, 187 (1973) (outlandish and disruptive behavior can stand as a voluntary relinquishment or forfeiture of the limited constitutional right to proceed pro se).

1392. 673 F.2d at 1036. The *Maxwell* court found that since the request to proceed pro se was made prior to jury selection, it was timely and should have been granted. The court relied on *United States v. Price*, 474 F.2d 1223, 1227 (9th Cir. 1973), which held that because the record contained no hint that Price's co-defendant, Coffey, had made a motion to represent himself for the purpose of delay, or that any delay would result from granting the motion, it was timely made. Although Coffey's motion was made subsequent to jury selection, it was made before the jury was sworn.

1393. 658 F.2d 667 (9th Cir. 1981).

1394. *Id.* at 677.

1395. *Id.* at 670.

not violated during the state appeal.¹³⁹⁶

In *Fritz v. Spalding*,¹³⁹⁷ the Ninth Circuit remanded for a determination of whether defendant Fritz' assertion of his right to proceed pro se on the morning of his trial was a tactic to delay the start of trial.¹³⁹⁸ The constitutional right of self-representation must be timely asserted.¹³⁹⁹ The Ninth Circuit held that Fritz' motion to proceed pro se was timely since it was made before the jury was impaneled.¹⁴⁰⁰

The Ninth Circuit noted that delay is not itself a sufficient ground for denying a defendant's constitutional right of self-representation.¹⁴⁰¹ Any motion to proceed pro se on the morning of trial is likely to cause delay; however, the defendant may be deprived of this right only upon an affirmative showing that the motion is made for the *purpose* of securing delay.¹⁴⁰² The *Fritz* court stated that in determining whether the motion is a tactic to secure delay, the court may consider the effect of the delay.¹⁴⁰³ Here, Fritz' pretrial conduct¹⁴⁰⁴ had already caused substantial delay. However, the inquiry into whether Fritz' motion was for the purpose of delay must consider all of the facts preceding the motion to determine whether they are consistent with a good faith assertion of the *Faretta*¹⁴⁰⁵ right and whether Fritz could reasonably be expected to have made the motion at an earlier time.¹⁴⁰⁶

1396. *Id.* at 677. See *United States v. Kelley*, 539 F.2d 1199 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976). The court in *Hines* cited *Kelley* as sanctioning involuntary "hybrid representation" in the trial context. Unlike *Hines*, however, *Kelley* refused a court-appointed attorney, and represented himself at trial and on appeal to the Ninth Circuit. The court in *Hines* apparently found an involuntary hybrid representation in *Kelley* based upon the district court's directing an attorney to serve *Kelley* in an advisory capacity.

1397. 682 F.2d 782 (9th Cir. 1982).

1398. *Id.* at 786.

1399. *United States v. Kizer*, 569 F.2d 504, 507 (9th Cir.), *cert. denied*, 435 U.S. 976 (1978); *Chapman v. United States*, 553 F.2d 886, 895 (5th Cir. 1977) ("A defendant must have a last clear chance to assert his constitutional right. . . . [T]hat point should not come before meaningful trial proceedings have commenced.").

1400. 682 F.2d at 784. See *United States v. Chapman*, 553 F.2d at 893-95.

1401. 682 F.2d at 784.

1402. *Id.*

1403. *Id.* "A showing that a continuance would be required and that the resulting delay would prejudice the prosecution may be evidence of a defendant's dilatory intent." *Id.*

1404. In April, 1975, after being charged with armed robbery in Washington, Fritz jumped bail. He was re-arrested in Florida in October, 1976. Four days before trial was to begin, Fritz' attorney moved to withdraw as counsel, complaining that he and Fritz could not decide on a defense strategy. The court granted the motion, rescheduled the trial, and appointed a public defender. Other motions occurred prior to the second trial date, culminating with Fritz' motion to proceed pro se on the morning of trial. *Id.* at 783.

1405. *Faretta v. California*, 422 U.S. 806 (1975) (recognizing a person's constitutional right of self-representation).

1406. 682 F.2d at 784-85.

C. *The Sixth Amendment Right to Present a Defense*

1. The right to confrontation

The confrontation clause of the sixth amendment of the United States Constitution guarantees the criminally accused the right "to be confronted with the witnesses against him."¹⁴⁰⁷ The clause restricts the admissibility of hearsay evidence¹⁴⁰⁸ by (1) providing a defendant the right to cross-examine witnesses unless they are unavailable,¹⁴⁰⁹ and (2) limiting the admissibility of hearsay evidence to that which has "indicia of reliability"¹⁴¹⁰ bearing on trustworthiness.

a. *hearsay*

In *United States v. Regner*,¹⁴¹¹ the Ninth Circuit upheld the district court's admission into evidence of certain foreign documents over the defendant's objection that it violated his sixth amendment right to confrontation.¹⁴¹² Regner had submitted a claim on his health insurance policy for an injury which he allegedly sustained in a taxicab accident while visiting his native Hungary. At Regner's trial for mail fraud, the court admitted foreign documents¹⁴¹³ which revealed that neither the Hungarian taxicab company, a state agency, nor the hospital, had any record of any automobile accident or hospitalization involving Regner. On appeal, Regner argued for the first time¹⁴¹⁴ that the documents were inherently unreliable because the Communist Hungarian officials may have been motivated to influence a former Hungarian citizen's rights by fabricating documents.¹⁴¹⁵ The Ninth Circuit rejected his argument; the record contained no evidence of improper motives which would lead the court to conclude that the evidence was fabricated.¹⁴¹⁶

1407. U.S. CONST. amend. VI.

1408. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

1409. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

1410. *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972).

1411. 667 F.2d 754 (9th Cir.), *cert. denied*, 103 S. Ct. 220 (1982).

1412. *Id.* at 758.

1413. The documents were prepared by and accompanied by the declarations of the certified custodian of records of each of the Hungarian agencies involved, authorized under Hungarian law to attest to the genuineness of the records provided. An American Embassy official also had certified the records. *Id.* at 758-59.

1414. The dissent argued that Regner had raised the foundational issue below. *Id.* at 760 (Ferguson, J., dissenting).

1415. *Id.* at 759.

1416. *Id.* Regner's conviction of 18 U.S.C. § 1341 (1976) which makes mail fraud a crime, was affirmed because, even if the confrontation clause had been violated, no clear prejudice resulted from the admission of the documents. Other sufficient evidence had been presented at trial to support the jury's guilty verdict. 667 F.2d at 759.

In dissent, Judge Ferguson admonished the majority for affirming the admission of an authenticated foreign document, which although labeled as a public record by Hungary, would otherwise be a private business record in this country. He argued that the majority's approach made such documents admissible without the proper business record¹⁴¹⁷ foundation and, therefore, resulted in a violation of the sixth amendment.¹⁴¹⁸ Judge Ferguson was particularly concerned that the taxi company record was not trustworthy since the recordkeeping procedures of that agency were unknown to the court. He stated that Regner should have been permitted to ascertain and challenge the procedures followed by the taxi company.¹⁴¹⁹

The Ninth Circuit appears to be breaking new ground in *Regner*. Case authority exists to support the admission of foreign business documents¹⁴²⁰ and official foreign government documents,¹⁴²¹ but there is no case law on the applicability of Federal Rule of Evidence 803(10)¹⁴²² to documents which would not be "official" if prepared here.¹⁴²³

In *United States v. Traylor*¹⁴²⁴ the Ninth Circuit examined the relationship between the confrontation clause and the co-conspirator exception to the hearsay rule in the Federal Rules of Evidence.¹⁴²⁵ Hearsay under the co-conspirator exception must meet certain requirements. To overcome sixth amendment limitations the proffered statements must have been made in furtherance of and during the

1417. *Id.*

1418. *Id.* at 766. Judge Ferguson noted that in a country such as Hungary, where the state controls numerous activities that would be characterized as private in the United States, essentially all documents assume a public label. *Id.* at 760.

1419. *Id.* at 766.

1420. *See, e.g.*, *United States v. Sand*, 541 F.2d 1370 (9th Cir. 1976) (admission of Swiss bank records under FED. R. EVID. 803(6) against criminal defendants), *cert. denied*, 429 U.S. 1103 (1977).

1421. *See, e.g.*, *United States v. Pacheco-Lovio*, 463 F.2d 232 (9th Cir. 1972) (admission of Mexican birth certificate under FED. R. EVID. 803(8)).

1422. FED. R. EVID. 803(10) provides:

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

1423. *Regner*, 677 F.2d at 763.

1424. 656 F.2d 1326 (9th Cir. 1981).

1425. FED. R. EVID. 801(d)(2)(E) provides that "[a] statement is not hearsay if the statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." These statements are non-hearsay admissions.

conspiracy, and there must be independent proof of the existence of the conspiracy and of the defendant's involvement therein.¹⁴²⁶ In particular, the *Traylor* court confronted the problem of applying the "in furtherance of" requirement;¹⁴²⁷ it sustained the defendant's contention that the admission of testimony under Federal Rule of Evidence 801(d)(2)(E) violated his sixth amendment right of confrontation.¹⁴²⁸ The defendants were convicted of conspiring to import, possess, and distribute cocaine.¹⁴²⁹ The trial court admitted under the co-conspirator exception the testimony of a Government witness, which contained certain statements by one of the defendants but not the other. The testimony was challenged as hearsay inadmissible under Federal Rule of Evidence 801(d)(2)(E).¹⁴³⁰ The Ninth Circuit rejected the argument of the defendant who made the statements as without merit because statements made by a party and offered against him are not hearsay under Federal Rule of Evidence 801(d)(2)(A).¹⁴³¹ The *Traylor* court agreed with the other defendant that some statements to the government witness were inadmissible against him.¹⁴³² The Ninth Circuit found those statements either to be conversations of casual admissions to someone trusted¹⁴³³ or descriptions of activities, rather than statements in fur-

1426. *Id.*

1427. *See, e.g.*, *United States v. Fielding*, 645 F.2d 719, 726 (9th Cir. 1981) (per curiam) (statements made to impress a third party to facilitate a new conspiracy not including the appellant are not considered "in furtherance of" appellant's already alleged conspiracy).

1428. 656 F.2d at 1332.

1429. They also were indicted on two counts each of the substantive offenses of importing cocaine and possessing cocaine with the intent to distribute. *Id.* at 1329.

1430. *Id.* at 1331-32. *See supra* note 1425. The defendant who made the statement argued that the conversations with the government witness were mere conversations which did not relate to furthering the alleged conspiracy. 656 F.2d at 1332. The other defendant contended that admission of the testimony violated his sixth amendment right to confrontation. *Id.* at 1333. The witness testified that she was the personal friend of the defendant with whom she spoke, that she was in his house trailer where she was shown seven bags of alleged cocaine, and that he described to her his cocaine smuggling operations. She said that the other defendant also arrived at the trailer, that they had her get utensils which were used to dilute the cocaine with mannite, and that the other defendant took a larger share of the cocaine. *Id.* at 1332.

1431. *Id.* (citing *United States v. Eubanks*, 591 F.2d 513, 519 (9th Cir. 1979) (appellants' inculpatory statements related by prosecution's star witness admissible as party admissions only against the individual declarants)). FED. R. EVID. 801(d)(2)(A) provides that a statement is not hearsay if it is offered against a party and is "his own statement, in either his individual or representative capacity"

1432. 656 F.2d at 1332.

1433. *Id.* at 1332-33 (citing *United States v. Moore*, 522 F.2d 1068, 1077 (9th Cir.) (co-conspirator's casual admission of culpability to third party whom he individually decided to trust held inadmissible because not made in furtherance of the conspiracy), *cert. denied*, 423 U.S. 1049 (1976); *United States v. Fielding*, 645 F.2d 719, 726 (9th Cir. 1981) (per curiam) (*see supra* note 1428)).

therance of the conspiracy.¹⁴³⁴ The court, however, found the error as to that defendant harmless and reversal unwarranted.¹⁴³⁵ The other defendant additionally argued that admission of those statements violated his right of confrontation. Because the Ninth Circuit found that this objection had not been preserved at trial it reviewed this argument under the plain error doctrine.¹⁴³⁶ The inadmissible statements created little, if any, prejudice to the defendant and the court rejected the appeal on this ground also.¹⁴³⁷

Although a court may infer reliability from statements that fall within a firmly established hearsay exception,¹⁴³⁸ the Ninth Circuit in *United States v. Fleishman*,¹⁴³⁹ looked at additional factors to test the reliability of statements which fall within the co-conspirator exception. The *Fleishman* court, however, failed to find any right to confrontation violation.¹⁴⁴⁰ The defendants' arrest and conviction¹⁴⁴¹ resulted from a government sting operation. At trial, agents testified as to various statements that Fleishman made regarding the existence, location and activities of his alleged cohorts.¹⁴⁴² On appeal, co-conspirators Combs and Green argued that the district court erred in admitting these statements after it determined during a pretrial suppression hearing that the statements were sufficiently reliable to preclude any confrontation problems under *Dutton v. Evans*.¹⁴⁴³

Dutton requires more than the mere satisfaction of elements of the

1434. 656 F.2d at 1333. These statements "'did not assist the conspirators in achieving their objectives.'" *Id.* (citing *United States v. Fielding*, 645 F.2d at 726-27; *United States v. Eubanks*, 591 F.2d 513, 520 (9th Cir. 1979) (*see supra* note 1431)).

1435. 656 F.2d at 1333.

1436. *Id.*

1437. *Id.*

1438. *Ohio v. Roberts*, 448 U.S. 56 (1980).

1439. 684 F.2d 1329 (9th Cir.), *cert. denied*, 103 S. Ct. 464 (1982).

1440. *Id.* at 1340.

1441. *Id.* at 1332-34. Fleishman was convicted of possession with intent to distribute and distribution of cocaine in violation of 21 U.S.C. § 841(a)(1) (1976) and of conspiring to commit the same in violation of U.S.C. § 846 (1976). Fleishman's co-defendants, Combs and Green, were convicted as co-conspirators and for having aided and abetted in violation of 21 U.S.C. §§ 846, 841(a)(1) & 18 U.S.C. § 2(a) (1976).

1442. 694 F.2d at 1337. The particular statements contested are those which Fleishman supposedly made to undercover agents which referred to "his [Fleishman's] people" who would deliver the cocaine. *Id.*

1443. *Id.* at 1338 (citing *Dutton v. Evans*, 400 U.S. 74, 88-91 (1970) (plurality) (no right to confrontation violation where hearsay statement contained no express assertion about past fact, witness' personal knowledge is abundantly established by other testimony, possibility that witness' statement was based on faulty recollection is remote in the extreme, and witness' statements made under circumstances which give no reason to suppose that there is any misrepresentation)).

co-conspirator exception to meet all possible confrontation clause problems.¹⁴⁴⁴ In particular, the Ninth Circuit evaluated the following reliability factors:

- (1) whether the declaration contained assertions of past fact;
- (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) whether it was possible that the declarant was relying upon faulty recollection; and (4) whether the circumstances under which the statements were made provided reason to believe that the declarant had misrepresented the defendant's involvement in the crime.¹⁴⁴⁵

The court noted that these factors are not exhaustive; consideration of whether the co-conspirator's testimony was "crucial" or "devastating" may be determinative.¹⁴⁴⁶

Green argued that Fleishman was motivated to lie and that Fleishman's statements were crucial and devastating to Green's defense. The Ninth Circuit concluded that Fleishman's statements were not fabrications, that his statements about his confederates were corroborated, and that the statements were not crucial and devastating because there was substantial evidence supporting the co-defendant's involvement in the conspiracy.¹⁴⁴⁷ Thus, under the *Dutton* analysis, Fleishman's statements contained sufficient indicia of reliability to sustain their admission.¹⁴⁴⁸

In *United States v. Brock*¹⁴⁴⁹ the appellants argued that their convictions¹⁴⁵⁰ should be reversed because the district court improperly ad-

1444. 684 F.2d at 1339 (citing *United States v. Perez*, 658 F.2d 654, 660 (9th Cir. 1981) (admission under co-conspirator exception does not automatically comply with the confrontation clause)).

1445. 684 F.2d at 1339 (citing *Dutton*, 400 U.S. at 88-91; *Perez*, 658 F.2d at 661)).

1446. 684 F.2d at 1339 (citing *Perez*, 658 F.2d at 661; *United States v. King*, 552 F.2d 833, 846 n.16 (admission of "crucial" or "devastating" evidence that is below certain threshold is harmless error), *cert. denied*, 430 U.S. 966 (1977); *United States v. Snow*, 521 F.2d 730, 735 (9th Cir. 1975) (witness' testimony regarding co-conspirator's extrajudicial statements, although comprising a significant portion of the testimony at trial, not considered so "crucial" to the prosecution or "devastating" to the defense to require reversal of defendant's conviction), *cert. denied*, 423 U.S. 1090 (1976)).

1447. 684 F.2d at 1340.

1448. *Id.*

1449. 667 F.2d 1311 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1271 (1983).

1450. Defendants Brock, Bard, Childress, Bernard, and Cochran were charged with conspiracy to possess with intent to manufacture and distribute methamphetamine, a controlled substance, in violation of 21 U.S.C. §§ 812, 841(a)(1), 846 (9176) (Count I); manufacture of methamphetamine, in violation of 21 U.S.C. §§ 812, 841(a)(1) (1976) (Count II); and possession with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 812, 841(a)(1)

mitted co-defendant Cochran's testimony. The district court had reversed its initial decision to take Cochran's testimony outside the presence of a jury; and it admitted Cochran's testimony although it was not in furtherance of the conspiracy. The appellants contended that this was error which violated their sixth amendment confrontation rights¹⁴⁵¹ in violation of *Bruton v. United States*.¹⁴⁵²

In dismissing the appellants' contentions as meritless, the Ninth Circuit first determined that the appellants had waived their objections to the lower court's treatment of Cochran's testimony.¹⁴⁵³ The court then distinguished *Bruton*, which it noted stood for the proposition that the confrontation clause precludes the introduction of post-arrest statements that implicate other defendants when the declarant will not testify at trial.¹⁴⁵⁴ In *Brock*, however, the appellants confronted Cochran,¹⁴⁵⁵ and thus could not complain of being denied confrontation.¹⁴⁵⁶

In *United States v. Kaiser*,¹⁴⁵⁷ the Ninth Circuit found that the district court had abused its discretion in admitting the Government's exhibits as adequately identified and authenticated under Federal Rule of Evidence 901(a) without the Government agent's testimony,¹⁴⁵⁸ the necessary foundation for the Government's exhibits.

The defendants were charged with narcotics violations and conspiracy.¹⁴⁵⁹ At trial, a tape recorded conversation between Agent Tay-

(1976) (Count III). Brock and Bard were convicted of Counts I and II, but acquitted of Count III. The circuit court affirmed the convictions. 667 F.2d at 1313 & n.1.

1451. *Id.* at 1317.

1452. 391 U.S. 123, 126 (1968) (defendant's confrontation rights violated where co-defendant's confession implicated the defendant and was admitted at a joint trial during which co-defendant did not testify).

1453. 667 F.2d at 1313. In its analysis, the court noted that the appellants' objections to Cochran's proposed testimony stemmed from a fear that the Government would employ leading questions to elicit Cochran's testimony. The defendants did not object to the content of the testimony, the district court's reversal of its decision to take the testimony preliminarily in the jury's absence, or to the offering of Cochran's testimony to the jury. *Id.*

1454. *Id.* (citing *United States v. Bruton*, 391 U.S. 123, 126 (1968)).

1455. 667 F.2d at 1317. Cochran testified and was cross-examined at trial by the defendants.

1456. *Id.*

1457. 660 F.2d 724 (9th Cir. 1981), *cert. denied*, 457 U.S. 1121 (1983).

1458. *Id.* at 731. FED. R. EVID. 901 provides in pertinent part: "(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

1459. 660 F.2d at 728. Defendants were convicted of various counts of a thirteen count indictment which charged conspiracy to distribute heroin, 21 U.S.C. § 846, six counts of distribution of heroin, 21 U.S.C. § 841(a)(1) and four counts of interstate travel to promote an unlawful activity, 18 U.S.C. § 1952(a)(2) & (3).

lor and one of the defendants was identified only by Taylor's testimony.¹⁴⁶⁰ The district court found a Jencks Act¹⁴⁶¹ violation and struck Taylor's testimony from the record; however, the Government's exhibits were admitted into evidence.¹⁴⁶²

The Ninth Circuit reversed, finding no Jencks Act violation, and held (1) that the district court should not have stricken Agent Taylor's testimony,¹⁴⁶³ and (2) that the district court abused its discretion in refusing to strike the tape recorded conversation.¹⁴⁶⁴ Nevertheless, the Ninth Circuit rejected the Government's argument that the testimony should have been considered in evaluating the adequacy of the identifications of the exhibits. It noted that once Agent Taylor's testimony was stricken, his cross-examination also ceased.¹⁴⁶⁵ The *Kaiser* court, reasoning that the defendants would be denied an opportunity to cross-examine Agent Taylor, refused to permit his testimony to provide the necessary foundations for the exhibits.¹⁴⁶⁶

In *United States v. Muniz*,¹⁴⁶⁷ the Ninth Circuit affirmed the admission into evidence of the defendant's silence at the scene of a stabbing.¹⁴⁶⁸ Muniz was convicted of assault with intent to commit murder¹⁴⁶⁹ and conveyance of a weapon within a federal correctional institution.¹⁴⁷⁰ Muniz's conviction resulted from circumstances surrounding the stabbing of fellow inmate Zarate.¹⁴⁷¹

On appeal, Muniz argued that questions asked at trial about his silence after the stabbing violated constitutional and federal eviden-

1460. 660 F.2d at 731.

1461. 18 U.S.C. § 3500 (1976). The Jencks Act provides for government production of any statement made by a government witness that has been approved or adopted by the witness and which relates to the witness' trial testimony.

1462. 660 F.2d at 731. The exhibits admitted were the recorded conversation and two small bundles of heroin.

1463. *Id.* at 731-32.

1464. *Id.* at 731 (citing *United States v. Hearst*, 563 F.2d 1331, 1349 (9th Cir. 1977) (no abuse of discretion when trial court excluded 45 minute tape recording of interview with defendant shortly after her arrest, where recording was offered to facilitate psychiatrist's analysis of defendant's condition at time of arrest and four months later), *cert. denied*, 435 U.S. 1000 (1978)).

1465. 660 F.2d at 731.

1466. *Id.* (citing *Davis v. Alaska*, 415 U.S. 308 (1974) (the sixth amendment right of confrontation encompasses the right of cross-examination)).

1467. 684 F.2d 634 (9th Cir. 1982).

1468. *Id.* at 639.

1469. 18 U.S.C. § 113(a) (1948).

1470. 18 U.S.C. § 1792 (1948).

1471. 684 F.2d at 636. Muniz defended not on the lack of intent to commit murder, but rather on the ground that he was not the assailant. *Id.*

tiary standards.¹⁴⁷² The Government's cross-examination of Muniz centered on his failure to deny the stabbing when accused by Officer Schoolcraft immediately following the incident.¹⁴⁷³ The Ninth Circuit affirmed the Government's position that Muniz's counsel had opened the door to cross-examination on this subject by statements made during the opening argument¹⁴⁷⁴ and on direct examination,¹⁴⁷⁵ precluding Muniz from contesting the admission of testimony concerning his silence. The court determined that Muniz's responses warranted full development of the subject.¹⁴⁷⁶ The court also failed to find error in the Government's reference to Muniz's silence during both closing arguments and cross-examination.¹⁴⁷⁷

Muniz further argued that the trial court erred in excluding, as hearsay, testimony that would have shown that prison officials failed to make an adequate investigation of the incident. Such an investigation, Muniz contended, would have revealed that someone other than Muniz stabbed Zarate.¹⁴⁷⁸ The Ninth Circuit held that the trial court acted within its discretion in disallowing that testimony and in ruling that the scope of the prison investigation could be pursued through other

1472. *Id.* at 638. The cross-examination concerned the incident shortly after the Zarate stabbing. Officer Schoolcraft heard screams from Zarate's cell, and as Schoolcraft went to Zarate's cell, he saw Muniz place something in his back pocket and flee from the cell. Schoolcraft grabbed Muniz, but when Schoolcraft saw Muniz reach into his back pocket for what appeared to be a knife, Schoolcraft released Muniz who ran to another area of the prison without saying anything to Schoolcraft. *Id.* After Muniz fled, he threw off his shirt and allegedly struck the knife down a shower drain. When Muniz returned to the scene of the stabbing, Schoolcraft was telling the other guards that Muniz "definitely" had been involved in the stabbing. Muniz was then taken to the detention unit. *Id.*

1473. *Id.* The Government's cross-examination of Muniz follows:

"Q. When Schoolcraft grabbed you, did you say anything to him?

A. No, I said nothing to him.

Q. You remained silent, didn't you?

A. Yes, I remained silent."

Id.

1474. *Id.* at 638-39. The defense's opening statement was that Muniz merely had come to an inmate's aid. *Id.*

1475. *Id.* Direct examination concerned Muniz's silence when he returned to the scene of the stabbing where the officers were gathered. *Id.*

1476. *Id.* (citing *United States v. Allston*, 613 F.2d 609, 611 (5th Cir. 1980) (use of defendant's post-arrest silence allowed to impeach the defendant where he tried to give the impression that he fully cooperated with the government)).

1477. 684 F.2d at 639. The court stated that because it found no error in the cross-examination concerning Muniz's silence, the Government's reference to the silence during closing argument was likewise not error. *Id.*

1478. *Id.* Muniz argued that Officer Hume would have testified that other inmates told Hume that Muniz was the wrong man. *Id.*

questions.¹⁴⁷⁹

b. scope and limitations of cross-examination

The right to confrontation has been interpreted to be neither absolute¹⁴⁸⁰ nor unrestricted.¹⁴⁸¹ In particular, where a witness' credibility is at issue during cross-examination, the court must allow the attorney to provide the jury with sufficient information to appraise the witness' reliability.¹⁴⁸²

In *United States v. Cutler*,¹⁴⁸³ the appellant argued that the trial court abused its discretion by restricting the cross-examination of Levoff, a key Government witness.¹⁴⁸⁴ The trial court had deferred, but did not prohibit, further questioning of the witness until after the defendant's testimony. The Ninth Circuit held that no abuse of discretion occurred because the deferred cross-examination simply delayed, but did not restrict, the testing of the witness' credibility.¹⁴⁸⁵ Ultimately, defense counsel had full opportunity to test Levoff's testimony.¹⁴⁸⁶ The court determined that the test for abuse of a trial court's discretion—whether the jury had sufficient information to appraise the biases and motives of the witnesses¹⁴⁸⁷—had been met.¹⁴⁸⁸

1479. *Id.* at 639. Concluding that Muniz's arguments were without merit, the Ninth Circuit affirmed Muniz's convictions. *Id.* at 640.

1480. *See Douglas v. Alabama*, 380 U.S. 415 (1965).

1481. *See Skinner v. Cardwell*, 564 F.2d 1381, 1388 (9th Cir. 1977), *cert. denied*, 435 U.S. 1009 (1978).

1482. *See generally Davis v. Alaska*, 415 U.S. 300, 318 (1974); *United States v. Bleckner*, 601 F.2d 382, 385 (9th Cir. 1979); *accord United States v. Kelley*, 545 F.2d 619, 623 (8th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977); *United States v. Turcotte*, 515 F.2d 145, 151 (2d Cir.), *cert. denied*, 423 U.S. 1032 (1975); *United States v. Baker*, 494 F.2d 1262, 1267 (6th Cir. 1974).

1483. 676 F.2d 1245 (9th Cir. 1982).

1484. *Id.* at 1248. Cutler was convicted of conspiring to commit mail fraud and arson in violation of 18 U.S.C. § 844(i), and mail fraud in violation of 18 U.S.C. § 1341. The conspiracy and mail fraud charge was affirmed, but Cutler's conviction for using explosives to destroy a building was reversed. Cutler paid his employee, Levoff, the key Government witness, to hire an arsonist to burn Cutler's warehouse. During cross-examination, defense counsel attempted to question Levoff about other fires that had occurred in other businesses in which he had been involved, but upon the Government's objection, the court deferred questioning of Levoff on this matter until after Cutler's testimony. *Id.* at 1247.

1485. *Id.* at 1248.

1486. *Id.* Levoff later was questioned regarding the earlier fires—upon which Cutler based his claim of improper restriction of Levoff's testimony, his plea agreement, prior filing conviction, false testimony, prison parole violation and motive to testify against Cutler. *Id.* at 1248-49.

1487. *Id.* at 1249 (citing *Skinner v. Cardwell*, 564 F.2d 1381, 1389 (9th Cir. 1977) (no denial of effective cross-examination where the jury has sufficient information to appraise the bias and motives of the witness), *cert. denied*, 435 U.S. 1009 (1978); *United States v.*

In *United States v. Ochoa-Sanchez*,¹⁴⁸⁹ the Ninth Circuit held that no sixth amendment violation resulted from the trial court's denial of a subpoena request by the defendant for all information on all past cases where an informant acting as a prosecution witness had provided information to the police.¹⁴⁹⁰ Ochoa-Sanchez was convicted of narcotics violations.¹⁴⁹¹ The Government offered testimony that its informant was not paid for the information he provided about the defendant approximately a month after the defendant's arrest.¹⁴⁹² A witness, however, revealed that the Government's informant had worked as an informant for a year and had received \$500 for his services.¹⁴⁹³ The Ninth Circuit, relying on *United States v. MacKey*¹⁴⁹⁴ and the Eighth Circuit's holding in *United States v. McGrady*,¹⁴⁹⁵ rejected defendant's argument and determined that the subpoena was properly quashed because the files were irrelevant and there was no need for disclosure which could compromise their confidentiality.¹⁴⁹⁶ In particular, the court noted that Ochoa-Sanchez's argument was flawed because, unlike the situation in the cases upon which he relied, Ochoa-Sanchez was able to conduct a meaningful cross-examination "using impeaching information that the witness was an informant and had assisted the gov-

Bleckner, 601 F.2d 382, 385 (9th Cir. 1975) (test for abuse of discretion by trial court is whether the jury had sufficient information to appraise the biases and motive of the witness)).

1488. 676 F.2d at 1249.

1489. 676 F.2d 1283 (9th Cir. 1982).

1490. *Id.* at 1288. The trial court refused to allow an in camera inspection and refused to seal the records for appellate review, but this was not error. *Id.* (citing *United States v. Lyons*, 567 F.2d 777, 783 (8th Cir. 1977) (defendant's absence at in camera proceedings not violative of sixth amendment right to confrontation where nothing occurring at the in camera proceedings was used against the defendant), *cert. denied*, 435 U.S. 918 (1978)). The trial court also refused to instruct the jury concerning its evaluation of testimony of an informant-addict, but this was not error because defense counsel adequately cross-examined him about the drug use. 676 F.2d at 1289.

1491. *Id.* at 1284. Defendant was convicted of illegal importation and possession of a controlled substance with intent to distribute. *Id.*

1492. *Id.* at 1288.

1493. *Id.*

1494. 647 F.2d 898 (9th Cir. 1981) (issuance of subpoena by district court upheld where Government sufficiently demonstrated the relevancy of the sequestered documents).

1495. 508 F.2d 13, 18 (8th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975) (trial court cannot withhold subpoenaed material in a criminal case solely on grounds of sensitivity).

1496. 676 F.2d at 1288. The court also stated that the subpoena was overbroad because it requested all information in all cases. *Id.* (citing *United States v. Wencke*, 604 F.2d 607, 612 (9th Cir. 1979) (subpoena seeking all files, records, correspondence, writings, interoffice communications, interagency communications, and reports relating to the investigation of the defendant properly quashed as overbroad in scope)).

ernment in other cases."¹⁴⁹⁷

In *United States v. Williams*,¹⁴⁹⁸ the Ninth Circuit held that the trial court committed reversible error in disallowing defense counsel's motion on cross-examination to introduce into evidence witness Marcheselli's prior inconsistent statement following Marcheselli's opportunity to explain or deny the statement.¹⁴⁹⁹ Williams was convicted of conspiracy, attempt to collect and collection of a debt by extortionate means.¹⁵⁰⁰ At trial, the evidence against him consisted primarily of tape recorded conversations between Farmer—the individual who received the loan—and the defendants, as well as the testimony of Farmer and Marcheselli. Williams' defense was essentially that he did not have the requisite intent to commit the crime of loansharking.¹⁵⁰¹ The Government objected to the admission of Marcheselli's prior inconsistent statement on the basis that it was an unsigned statement.¹⁵⁰² The trial judge reserved ruling on the objection. Defense counsel properly authenticated the document under Federal Rule of Evidence 901(b)(1) using testimony of Marcheselli, who admitted that he had made the statement and that it was true, and by calling a witness who testified that Marcheselli had read the statement and concurred in its

1497. 676 F.2d at 1288. The cases cited by the defendant were inappropriate because they related to situations where, without the requested information, the defendant was completely unable to cross-examine a Government witness about potentially impeaching events and circumstances. *Id.* (citing *Davis v. Alaska*, 415 U.S. 308 (1974) (*see supra* note 1466); *United States v. Alvarez-Lopez*, 559 F.2d 1155 (9th Cir. 1977) (constitutional error where witness in drug prosecution testified that he had never been involved in illegal drug transactions, but defense counsel on cross-examination not allowed to inquire into witness' prior arrest on drug charges); *Smith v. Illinois*, 390 U.S. 129 (1968) (denial of right to cross-examination where defendant was denied the right to ask principal witness his name and address)). Defendant's convictions were affirmed. 676 F.2d at 1289.

1498. 668 F.2d 1064 (9th Cir. 1982).

1499. *Id.* at 1069.

1500. 18 U.S.C. §§ 2, 894 (1976).

Williams introduced Farmer to Marcheselli and co-defendant Jenkins to arrange a \$5,000 loan. After introductions were made, Williams left and Farmer secured the loan from Marcheselli and Jenkins on the condition that Farmer repay \$8,000 within ninety days. Before the loan was due, however, Farmer began receiving threats concerning repayment. Farmer went to the FBI, who undertook an investigation. At the instigation of the FBI, Farmer wore a body recorder to tape subsequent conversations with the defendants. Portions of the resulting tape recordings were introduced at trial against Jenkins and Williams; Marcheselli pleaded guilty before the trial and testified for the Government. 668 F.2d at 1066.

1501. 668 F.2d at 1067. Williams tried to persuade the jury that he was not part of the extortion scheme, that his only purpose in introducing Marcheselli to Farmer was that Farmer needed money but had exhausted conventional financing sources, and that once the loan had been arranged, he was merely acting as Farmer's friend, passing on information to Farmer concerning the seriousness of the situation.

1502. *Id.* The Government cited no authority to support the objection.

veracity.¹⁵⁰³ The statement, however, was never admitted into evidence.

On appeal, Williams contended that his sixth amendment right to cross-examination had been violated because the trial judge's refusal to admit Marcheselli's prior inconsistent statement into evidence severely curtailed his ability to establish a defense.¹⁵⁰⁴ The *Williams* court noted that the statement was admissible under Federal Rule of Evidence 613¹⁵⁰⁵ because Williams properly attempted to introduce evidence of Marcheselli's prior inconsistent statement only after Marcheselli had the opportunity to explain or deny the statement. The Ninth Circuit sustained Williams' argument on the grounds that (1) the evidence introduced to prove Williams' guilt was subject to more than one interpretation,¹⁵⁰⁶ and (2) even assuming that the prosecution's evidence demonstrated that Williams acted with the necessary criminal intent, a review of the entire record indicated that at worst, his involvement was minimal.¹⁵⁰⁷ The court reasoned that under those circumstances, the exclusion of Marcheselli's prior inconsistent statement took

1503. *Id.* Marcheselli testified that he may have talked to Williams about pressuring Farmer to make payment. This testimony tended to prove that Williams acted with criminal intent in that he attempted to frighten Farmer into complying with Marcheselli's demands in furtherance of the conspiracy. On cross-examination, however, Marcheselli denied telling Williams that Farmer was going to be hurt if Farmer did not pay. Moreover, the disputed document in *Williams* was a statement by Marcheselli, made the night before he testified, which provided in part that at no time did he try to use Williams to scare Farmer, that Williams had nothing to do with that, and that Williams had no part in collecting the money at all. *Id.* at 1068.

1504. *Id.* at 1067.

1505. FED. R. EVID. 613 provides:

(a) Examining witness concerning prior statement. For examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

1506. 688 F.2d at 1069. The evidence could support the finding of guilty as well as a finding of not guilty. The taped conversations between Williams and Farmer contained threats by Williams that could have reasonably been construed as a friend's concern about the seriousness of Farmer's situation. Moreover, the taped conversations occurred when the participants had been drinking heavily.

1507. *Id.* Williams was not involved in setting the repayment terms of the loan. After the loan negotiations were completed, Williams had little contact with Farmer concerning the loan. There was no evidence that Williams ever attempted to collect the money from Farmer. Out of sixteen taped conversations involving discussions about the loan, Williams was involved in only three, and of these none was instigated by Williams.

on greater significance.¹⁵⁰⁸ Marcheselli was a principal actor in the extortion scheme. His testimony concerning Williams' actual role may well have been decisive in the jury's determination that Williams was part of the extortion of Farmer.¹⁵⁰⁹ Moreover, Marcheselli's credibility was crucial, and the jury was entitled to consider the impeachment evidence.¹⁵¹⁰ The Ninth Circuit, accordingly, failed to find the restriction of the defense's impeachment of Marcheselli to be harmless error and therefore reversed Williams' conviction.¹⁵¹¹

c. waiving the right to confrontation

A defendant may forfeit his right to cross-examine witnesses testifying against him by failing to attend trial or to act when he is on notice that a witness will not be available after a certain date. In *United States v. DeRosa*,¹⁵¹² the Ninth Circuit rejected appellant Ponticelli's argument that he had been denied the sixth amendment right to cross-examination when the district court denied his request to call a government agent back from Hawaii for further cross-examination.¹⁵¹³ Ponticelli and some of the other defendants were convicted of racketeering and various narcotics violations.¹⁵¹⁴ Discarding Ponticelli's contention, the court, relying on *Batsell v. United States*,¹⁵¹⁵ observed that during the two days in which Agent Bareng of the Drug Enforcement Agency was on the witness stand Ponticelli's attorney took full advantage of the opportunity to cross-examine him.¹⁵¹⁶ The cross-examination questions covered a wide area of subjects, including areas in

1508. *Id.* at 1070.

1509. *Id.* (citing *Burr v. Sullivan*, 618 F.2d 583, 587 (9th Cir. 1980) (not only must defense counsel be given maximum opportunity to impeach the credibility of key government witnesses, but testing a witness' credibility is especially important when the witness is the accused's accomplice)).

1510. 668 F.2d at 1070 (citing *Patterson v. McCarthy*, 581 F.2d 220, 221 (9th Cir. 1978) (jury entitled to consider the impeachment evidence of witness whose credibility is crucial)).

1511. 668 F.2d at 1070.

1512. 670 F.2d 889 (9th Cir.), *cert. denied sub nom. Bertman v. United States*, 103 S. Ct. 353 (1982); *DeSantis v. United States*, 103 S. Ct. 372 (1982).

1513. *Id.* at 896.

1514. *Id.* at 892. Defendants Ponticelli and DeRosa were convicted of racketeering under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1976) and with distributing and conspiring to distribute cocaine in violation of 21 U.S.C. §§ 2, 846 (1976). Defendants Bertman and DeSantis were convicted only of distributing and conspiring to distribute cocaine. The Ninth Circuit affirmed the convictions. *Id.*

1515. 403 F.2d 395, 401-02 (8th Cir. 1968) (no error where trial court failed to recall witness when defense counsel had full opportunity to cross-examine), *cert. denied*, 393 U.S. 1094 (1969).

1516. 670 F.2d at 896.

which, on appeal, Ponticelli claimed he was limited.¹⁵¹⁷ Although Ponticelli's counsel knew that Bareng was going to Hawaii, he did not request that Bareng be retained as a witness at the time Bareng was excused.¹⁵¹⁸

In *Brewer v. Raines*,¹⁵¹⁹ the Ninth Circuit upheld Brewer's in absentia conviction and ruled that a defendant who voluntarily absents himself from any proceeding, after sufficient notice, waives his right to be present at that proceeding.¹⁵²⁰ Brewer was arraigned in Arizona on charges of armed robbery and wearing a mask while committing a public offense.¹⁵²¹ At Brewer's arraignment he was informed that he could be tried in absentia if he voluntarily failed to appear.¹⁵²² After his release on bond, Brewer disappeared without attempting to contact his attorney or to inform the court of his whereabouts.¹⁵²³ During this absence, Brewer was convicted and sentenced pursuant to Arizona Rule of Criminal Procedure 9.1.¹⁵²⁴ When Brewer reappeared, the trial court rejected Brewer's excuse that he fled because his life had been threatened.¹⁵²⁵

After exhausting his available state remedies, Brewer petitioned the federal district court for a writ of habeas corpus. Brewer based his constitutional claim on the sixth amendment confrontation clause¹⁵²⁶ which guarantees the accused a basic constitutional right to be present at every stage of his trial.¹⁵²⁷ The Ninth Circuit, stating that the ac-

1517. *Id.*

1518. *Id.*

1519. 670 F.2d 117 (9th Cir. 1982).

1520. *Id.* at 119.

1521. *Id.* at 117.

1522. *Id.*

1523. *Id.*

1524. *Id.* at 118. At Brewer's conviction and sentencing in absentia, the court found his absence to be voluntary, and defense counsel never objected to a sentencing order. *Id.* Arizona Rule of Criminal Procedure 9.1 provides:

Except as otherwise provided in these rules, a defendant may waive his right to be present at any proceeding by voluntarily absents himself from it. The court may infer that an absence is voluntary if the defendant had personal notice to the time of the proceeding, his right to be present at it, and a warning that the proceeding would go forward in his absence should he fail to appear.

ARIZ. REV. STAT. ANN. R. 9.1 (1973).

1525. 670 F.2d at 118. Brewer claimed that the person who posted his bond threatened to kill him if he did not produce \$5,000. The trial court rejected Brewer's excuse, stating that he could have informed the trial court or the officers of the threats. *Id.*

1526. *Id.* The sixth amendment confrontation clause has been extended to the states through the due process clause of the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400 (1965).

1527. 670 F.2d at 118-19 (citing *Lewis v. United States*, 146 U.S. 370 (1892)).

cused can waive this right,¹⁵²⁸ vacated the district court's order granting relief.¹⁵²⁹ Brewer had waived his sixth amendment right to confrontation because he had sufficient notice to evoke a knowledgeable waiver.¹⁵³⁰ The notion that a trial may never proceed in the defendant's absence has been expressly rejected.¹⁵³¹ The *Brewer* court reasoned that an accused who flees should not be permitted to disrupt a trial in progress until he is gracious enough to return. "This would be a travesty of justice which could not be tolerated; and it is not required or justified by a record for the right of personal liberty."¹⁵³²

The court determined that Brewer had received sufficient notice and that his ignorance of the proceedings was attributable to his failure to communicate with his attorney and the court.¹⁵³³ The court also upheld the constitutionality of Arizona Rule of Criminal Procedure 9.1¹⁵³⁴ because it meets the requirement of a waiver of the defendant's constitutional rights, provided that the defendant is heard to determine whether his absence was voluntary.¹⁵³⁵

In *United States v. Peeper*,¹⁵³⁶ the Ninth Circuit held that a calculated failure to object to the admission of recorded conversations in the absence of a co-conspirator did not violate Peeper's right to confrontation.¹⁵³⁷ Peeper was convicted by overwhelming evidence of conspiring

1528. *Id.* at 119.

1529. *Id.* at 118. A district court magistrate recommended that Brewer be released unless the state should retry him or, in the alternative, that his sentences be vacated and the case remanded for his new sentencing. The district court ordered relief unless the state afforded Brewer a new trial within 60 days; this order was stayed pending the outcome of Brewer's appeal. *Id.*

1530. *Id.* at 119.

1531. *Id.* (citing *Illinois v. Allen*, 397 U.S. 337 (1970); *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Diaz v. United States*, 223 U.S. 442 (1912)).

1532. 670 F.2d at 119 (citing *Diaz v. United States*, 223 U.S. 442, 457-58 (1912) (trial may proceed in defendant's absence) (quoting *Falk v. United States*, 15 App. D.C. 446) (conviction stemming from trial that proceeded in absence of defendant who fled the jurisdiction upheld), *appeal dismissed*, 180 U.S. 636 (1901)).

1533. 670 F.2d at 119.

1534. *See supra* note 1524. The rule provides for a voluntary waiver because it requires that the defendant have notice of his trial date, and it provides for a knowing and intelligent waiver because the defendant must have been told of his right to be present and warned that the trial would proceed in his absence.

1535. 670 F.2d at 120. The court found that Rule 9.1 had been complied with and that Brewer was afforded a hearing once apprehended. The trial court rejected his explanation and found that his absence was voluntary; therefore, Brewer had waived his right to be present at trial and sentencing. The Ninth Circuit concluded that the district court erred in granting Brewer's petition for habeas corpus relief. *Id.* The case was remanded with instructions to dismiss the petition. *Id.*

1536. 685 F.2d 328 (9th Cir. 1982).

1537. *Id.* at 329.

to possess cocaine with intent to distribute.¹⁵³⁸ On appeal, Peeper relied on *Ohio v. Roberts*¹⁵³⁹ for the contention that the admission of taped telephone conversations¹⁵⁴⁰ with neither the co-conspirator's presence nor a showing by the Government as to why the co-conspirator was unavailable violated Peeper's sixth amendment right to confrontation.¹⁵⁴¹

The Ninth Circuit, however, found Peeper's reliance on *Ohio v. Roberts* misplaced because Peeper's own attorney wished to utilize portions of the tapes to exculpate Peeper. Thus, the Government's use of other portions of the tapes was not objectionable.¹⁵⁴² The court was convinced the defense attorney's failure to object to the admission of the tapes was purely tactical. Peeper's claim of a violation of the confrontation clause was, therefore, meritless.¹⁵⁴³

d. the right to notice of the accusation

The sixth amendment provides the accused with the right "to be informed of the nature and cause of the accusation."¹⁵⁴⁴ In *Gray v. Raines*,¹⁵⁴⁵ the Ninth Circuit determined a violation of this right to be per se reversible error.¹⁵⁴⁶ Gray was charged with first-degree, or forcible, rape and lewd and lascivious acts.¹⁵⁴⁷ At an in-chambers jury instruction conference near the close of the evidence, however, Gray was notified that the state also was seeking a second-degree rape conviction.¹⁵⁴⁸ Gray's counsel immediately objected to the instruction on second-degree rape on the ground that it is not a lesser included offense of first-degree rape.¹⁵⁴⁹

1538. *Id.* at 328. Peeper's conviction was for violation of 21 U.S.C. § 846 (1976).

1539. 448 U.S. 56 (1980).

1540. 685 F.2d at 328. The conversations were made with a co-conspirator's knowledge.

1541. *Id.*

1542. *Id.* at 329. Peeper's attorney did not object to the introduction of the tapes into evidence. Hence, the issues of co-conspirator hearsay and the co-conspirator's unavailability never arose. *Id.*

1543. *Id.* The court also was convinced that the attorney's presentation met the test of *Cooper v. Fitzharris*, 586 F.2d 1325, 1330 (9th Cir. 1978) (sixth amendment requirement that defense counsel be competent and effective is met where counsel's errors or omissions do not reflect failure to exercise skill, judgment, diligence of reasonably competent criminal defense attorney, and the errors are not those that a reasonably competent attorney acting as diligent conscientious advocate would make).

1544. U.S. CONST. amend. VI.

1545. 662 F.2d 569 (9th Cir. 1981).

1546. *Id.* at 572.

1547. *Id.* at 570. Gray was convicted in Arizona state court of second degree or "statutory" rape. *id.*

1548. *Id.*

1549. *Id.*

On appeal, the Ninth Circuit sustained Gray's argument that his statutory rape conviction, when the information charged only forcible rape, was a sixth amendment violation.¹⁵⁵⁰ The court first established that the sixth amendment's notice provision is fully applicable to state, as well as federal, courts because it is incorporated within the due process clause of the fourteenth amendment.¹⁵⁵¹ Thus, the state may not organize its criminal laws in a manner which circumvents the constitutional notice requirement imposed on the state when charging a defendant with a crime.¹⁵⁵² The court determined that first- and second-degree rape are separate offenses, and that second-degree rape is not an included offense.¹⁵⁵³ Thus, the state's failure to follow the sixth amendment's notice requirement constituted per se reversible error.¹⁵⁵⁴ Moreover, the notice requirement was not satisfied by mere notice of the age of the prosecuting witness, resulting in presumptive notice to Gray that he could have been charged with second-degree rape.¹⁵⁵⁵

2. The right to compulsory process

a. *the Mendez-Rodriguez doctrine*

The compulsory process clause was recognized by the Supreme Court not only to enable the accused to produce witnesses but also to have them testify at trial. Before *United States v. Valenzuela-*

1550. *Id.* at 572.

1551. *Id.* at 571. See *Cole v. Arkansas*, 333 U.S. 196 (1948); *In re Oliver*, 333 U.S. 257 (1948) (a person has a constitutional right to reasonable notice of the charge against him).

1552. 662 F.2d at 571 (citing *In re Hess*, 45 Cal. 2d 171, 288 P.2d 5 (1955)). The *Hess* court rejected the contention that the charge of forcible rape automatically included statutory rape and the lesser included offense of contributing to the delinquency of a minor. 45 Cal. 2d at 173, 288 P.2d at 6.

1553. 662 F.2d at 572. The court reasoned that first- and second-degree rape are separate offenses because each requires different elements of proof. The use of force is an element of first-degree rape, while the victim's age is an element of second-degree rape, but neither element is common to both. *Id.*

1554. *Id.* The court reasoned that because it had previously held that a violation of the fifth amendment by convicting a defendant of a crime not charged in an indictment constitutes per se reversible error (citing *United States v. Stewart Clinical Laboratory, Inc.*, 652 F.2d 804, 807 (9th Cir. 1981)), a sixth amendment violation must also be per se error because the purposes of both amendments—to apprise the defendant of the charge he must defend and to protect the defendant against double jeopardy—are identical. 662 F.2d at 572.

The court stated that the procedure under which Gray was convicted was "repugnant to the concept of due process and fundamental fairness." Gray's consent defense to the first-degree charge effectively convicted him of the second-degree offense. *Id.* at 573.

1555. *Id.* at 574. The Ninth Circuit granted Gray's writ of habeas corpus and remanded the case to the district court. Gray's conviction of lewd and lascivious acts was not disturbed on appeal. *Id.*

Bernal,¹⁵⁵⁶ the Ninth Circuit criterion for determining the existence of a compulsory process clause violation was the "conceivable benefit" test of *United States v. Mendez-Rodriguez*,¹⁵⁵⁷ which provided that a constitutional violation had occurred when the testimony of an absent witness could conceivably have benefited the defendant.¹⁵⁵⁸

In *United States v. Trinidad*,¹⁵⁵⁹ the Ninth Circuit did not find any fifth and sixth amendment violations under the *Mendez-Rodriguez* test even though the Government deported material witnesses.¹⁵⁶⁰ Trinidad was convicted of conspiring to transport aliens illegally.¹⁵⁶¹ Twenty-one of the twenty-three illegal aliens caught were deported to Mexico, and the remaining two were retained as material witnesses.¹⁵⁶² Trinidad never had the opportunity to interview the missing witnesses in preparation for his defense.¹⁵⁶³ In its analysis, the court stated that under Ninth Circuit law, the determinative issue was whether Trinidad conceivably could have benefited from the missing witnesses' testimony.¹⁵⁶⁴ The court rejected Trinidad's contentions that the witnesses might have provided exculpatory information,¹⁵⁶⁵ reasoning that the aliens' testimony would relate only to the substantive charge of transporting illegal aliens, while other evidence sufficiently proved that Trinidad was guilty of conspiracy. The court stated that even if the testimony could exculpate Trinidad on the substantive crime, it would not affect his conspiracy conviction because it would not impeach testimony that implicated Trinidad in the smuggling operation.¹⁵⁶⁶

In *United States v. Vasquez-Gonzalez*,¹⁵⁶⁷ the Ninth Circuit found

1556. 647 F.2d 72 (9th Cir. 1981), *rev'd*, 102 S. Ct. 3440 (1982).

1557. 450 F.2d 1 (9th Cir. 1971).

1558. *Id.* at 4-5.

1559. 660 F.2d 387 (9th Cir. 1981).

1560. *Id.* at 387-88.

1561. 8 U.S.C. § 1324(a)(2) (1976); 18 U.S.C. § 371 (1976).

1562. 660 F.2d at 387.

1563. *Id.*

1564. *Id.* at 387-88 (citing *United States v. Martinez-Morales*, 632 F.2d 112, 115 (9th Cir. 1980) (no sixth amendment violation under *Mendez-Rodriguez* where co-defendant deported before defendant could interview him because missing witness had no connection with one of the underlying charges and Government had no way of knowing witness was connected with the other underlying charge); *United States v. Orozco-Rico*, 589 F.2d 433, 435 (9th Cir. 1978) (no compulsory process violation where deported witness' testimony could not have benefited the defendant), *cert. denied*, 440 U.S. 967 (1979)).

1565. 660 F.2d at 388. Trinidad argued that the witnesses may have testified (1) that they had not been kept in a shed; (2) that they never saw or heard of Trinidad; and (3) that they may have overheard conversations with the transporting drivers that Trinidad was not involved in smuggling. *Id.*

1566. *Id.* The Ninth Circuit affirmed Trinidad's conviction.

1567. 654 F.2d 628 (9th Cir. 1981), *cert. denied*, 455 U.S. 923 (1982).

error in the application of the *Mendez-Rodriguez* rule where the district court dismissed appellee's indictment based on the deportation of aliens later determined by the Ninth Circuit to clearly not be potential material witnesses.¹⁵⁶⁸ Border Patrol agents arrested eight illegal immigrants in a motel room in Douglas, Arizona.¹⁵⁶⁹ As the agents were leaving, a taxi driver told them that on the previous day he had transported another group of aliens from the motel in Douglas to a motel in Tucson.¹⁵⁷⁰ After questioning, the agents released to Mexico the eight aliens arrested in Douglas.¹⁵⁷¹ In Tucson, agents observed the motel identified by the taxi driver and, two days after the Douglas arrest, arrested Vasquez-Gonzalez and Ponce-Figueroa at the Tucson International Airport as they were seeing off six illegal aliens.¹⁵⁷² Vasquez and Ponce were indicted for transporting illegal aliens at or near Tucson.¹⁵⁷³

Ponce and Vasquez filed a pretrial motion to dismiss the indictment on the grounds that the aliens arrested in Douglas, but later released to Mexico, were material witnesses whose absence violated the defendants' fifth and sixth amendment rights.¹⁵⁷⁴ The district court granted their motion, reasoning that when the aliens were released, the Government was on notice that the aliens arrested in Douglas might be part of the Tucson group. It would not have been an unreasonable burden, in the district court's view, for the Government to hold the eight aliens until the likelihood and imminence of an arrest were assessed.¹⁵⁷⁵ The Ninth Circuit, applying the clearly erroneous standard of review,¹⁵⁷⁶ reversed the district court, reasoning that aliens released in one city could not have been eyewitnesses to an offense committed in

1568. *Id.* at 631.

1569. *Id.* at 629.

1570. *Id.*

1571. *Id.*

1572. *Id.*

1573. *Id.* 8 U.S.C. § 1324(a)(2) (Supp. 1978).

1574. 654 F.2d at 629.

1575. *Id.* at 630.

1576. *Id.* The Ninth Circuit has repeatedly applied this standard under analogous situations. *Id.* at 630 n.3 (citing *United States v. Allen*, 644 F.2d 749 (9th Cir. 1980) (probable cause for warrantless seizure of a briefcase); *United States v. Thompson*, 558 F.2d 522 (9th Cir. 1977) (probable cause to search), *cert. denied sub nom. Reeve v. United States*, 435 U.S. 914 (1978); *United States v. Hart*, 546 F.2d 798, 801-03 (9th Cir. 1976) (en banc) (whether government used reasonable efforts to produce an informant), *cert. denied sub nom. Robles v. United States*, 429 U.S. 1120 (1977); *United States v. Trice*, 476 F.2d 89 (9th Cir.) (finding corroboration of informant's testimony sufficient), *cert. denied sub nom. Clayton v. United States*, 414 U.S. 843 (1973); *McKinney v. United States*, 487 F.2d 948 (9th Cir. 1973) (defendant's incompetency to stand trial)).

another city the next day and thus were not potential material witnesses.¹⁵⁷⁷

b. the demise of the Mendez-Rodriguez doctrine

To establish a compulsory process clause violation under the Ninth Circuit's "conceivable benefit" test, a defendant need only show that the absent witnesses were eyewitnesses to the crime.¹⁵⁷⁸ The United States Supreme Court, however, in *United States v. Valenzuela-Bernal*,¹⁵⁷⁹ discarded the Ninth Circuit's "conceivable benefit" test¹⁵⁸⁰ in favor of a "materiality" test whereby the defendant must persuade the court that the absent testimony would have been both helpful and material to his defense.¹⁵⁸¹

Valenzuela-Bernal¹⁵⁸² entered the United States illegally and, in exchange for not having to pay those who smuggled him across the border, agreed to drive himself and five others to Los Angeles.¹⁵⁸³ Valenzuela-Bernal and three of the passengers were apprehended by Border Patrol agents.¹⁵⁸⁴ An Assistant United States Attorney released two of the passengers to Mexico because he determined that they possessed no evidence material to the prosecution or defense. A third passenger, Romero-Morales, was detained to provide non-hearsay evidence against Valenzuela-Bernal. Valenzuela-Bernal moved for dismissal in the district court, claiming violations of his fifth amendment right to due process and his sixth amendment right to compulsory process for obtaining favorable witnesses.¹⁵⁸⁵ The district court denied the motion and convicted the respondent on stipulated evidence.¹⁵⁸⁶ The Ninth Circuit reversed, applying the conceivable benefit test of *Mendez-Rodriguez*.¹⁵⁸⁷

1577. 654 F.2d at 631.

1578. *United States v. Valenzuela-Bernal*, 647 F.2d 72, 74 (9th Cir. 1981), *rev'd*, 102 S. Ct. 3440 (1982).

1579. 102 S. Ct. 3440 (1982) (Rehnquist, J., delivered the opinion of the Court; Brennan & Marshall, J.J., dissenting).

1580. *Id.* at 3446-47.

1581. *Id.*

1582. Respondent was convicted in the district court for knowingly transporting an illegal alien in violation of 8 U.S.C. § 1324(a)(2) (1976), but the conviction was overturned by the Ninth Circuit Court of Appeals because of a compulsory process violation under the *Mendez-Rodriguez* doctrine and a due process violation under the fifth amendment. 102 S. Ct. at 3443.

1583. *Id.*

1584. *Id.*

1585. *Id.*

1586. *Id.* at 3444.

1587. *Id.*

The Supreme Court, however, rejected the Ninth Circuit's "conceivable benefit" test.¹⁵⁸⁸ The Court discussed the conflict between the government's duties to execute Congress' immigration policies by deporting illegal aliens and to prosecute persons, such as the respondent, who have violated criminal statutes of the United States.¹⁵⁸⁹ Budget constraints and the unavailability of adequate detention facilities require the government's conduct to be judged by standards other than those which might be appropriate if the government's only duty were to prosecute criminals.¹⁵⁹⁰ The Court concluded that the Government had good reason to deport respondent's passengers once it had determined that they possessed no evidence relevant to the prosecution or the defense of respondent's criminal charge.¹⁵⁹¹

The Court criticized the Ninth Circuit's "conceivable benefit" test as "a virtual 'per se' rule which requires little if any showing on the part of the accused defendant that the testimony of the absent witness would have been either favorable or material."¹⁵⁹² Furthermore, the Court observed that "the [sixth] [a]mendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him 'compulsory process for obtaining witnesses in his favor.'"¹⁵⁹³

The Court relied on *Washington v. Texas*¹⁵⁹⁴ for the rule that a sixth amendment violation exists when the defendant is arbitrarily deprived of "testimony [that] would have been *relevant* and *material*, and . . . *vital* to the defense."¹⁵⁹⁵ Much of the Court's reasoning came from cases it described as pertaining to "the area of constitutionally guaranteed access to evidence,"¹⁵⁹⁶ noting that materiality is required for a

1588. *Id.* at 3444-45.

1589. *Id.* at 3445.

1590. *Id.* at 3445-46. The Court indicated the factors affecting the government's prosecutorial discretion by quoting from the petitioner's brief:

Because of budget limitations and the unavailability of adequate detention facilities, it is simply impossible as a practical matter to prosecute many cases involving the transportation or harboring of large numbers of illegal aliens, where all aliens must be incarcerated for a substantial period of time to avoid dismissal of the charges, even though the prosecution's case may be overwhelming. As a consequence, many valid and appropriate prosecutions are foregone.

Id. at 3446.

1591. *Id.*

1592. *Id.*

1593. *Id.* (quoting U.S. CONST. amend. VI).

1594. 388 U.S. 14 (1967) (mere absence of testimony is not sufficient to establish a violation of the right to compulsory process).

1595. 102 S. Ct. at 3446 (quoting *Washington v. Texas*, 388 U.S. at 17 (emphasis added by the Supreme Court)).

1596. *Id.* at 3447.

finding of a constitutional violation.¹⁵⁹⁷ In addition, the Court noted that other interests protected by the sixth amendment look to the degree of prejudice incurred by the defendant resulting from governmental action or inaction.¹⁵⁹⁸

The Court noted that the respondent had no access to the witnesses who were deported after the respondent was indicted.¹⁵⁹⁹ The Court stated, however, that lack of access does not mean that the defendant is excused from making a showing of materiality.¹⁶⁰⁰ Lack of access, however, could support a relaxation of the specificity required in demonstrating materiality. A defendant may demonstrate the required materiality by looking to the events to which an absent witness might testify and the relevance of those events to the crime charged.¹⁶⁰¹ Thus, because Valenzuela-Bernal failed to explain what material, favorable evidence the deported passengers would have provided for his defense, he failed to establish a fifth or sixth amendment violation.¹⁶⁰² In some cases sanctions may be warranted¹⁶⁰³ for deporting

1597. *Id.* (citing *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution's suppression of favorable evidence violates due process where the evidence is material to either guilt or punishment); *Moore v. Illinois*, 403 U.S. 953 (1972) (*Brady* claim will prevail where the evidence is both favorable and material to either guilt or punishment); *United States v. Agurs*, 427 U.S. 97 (1976) (standard is whether the suppressed evidence might have affected the trial outcome)).

1598. 102 S. Ct. at 3447-48 (citing *United States v. Marion*, 404 U.S. 307 (1972) (pre-indictment delay claims held governed by the fifth amendment's due process clause, rather than by the sixth amendment's speedy trial guarantee); *United States v. Lovasco*, 431 U.S. 783 (1977) (due process requires that consideration be given to the reasons for the delay as well as the prejudice to the accused); *Barker v. Wingo*, 407 U.S. 514 (1972) (a factor to be considered in determining whether the government's pretrial delay has violated the sixth amendment's speedy trial guarantee is the prejudice suffered by the defendant as a result of the delay); *United States v. MacDonald*, 435 U.S. 850 (1978) (impairment of the defendant's ability to mount a defense is the most serious consideration in analyzing the prejudice to the defendant from the delay)).

1599. 102 S. Ct. at 3448.

1600. *Id.* Valenzuela-Bernal argued that a materiality showing was unreasonable because neither he nor his attorney had the opportunity to question the witnesses and determine what favorable information they possessed. *Id.*

1601. *Id.* The Court relied on *Roviaro v. United States*, 353 U.S. 53 (1957), for the conclusion that although a defendant who has not had an opportunity to interview a witness may face a difficult task in making a show of materiality, the task is not impossible. 102 S. Ct. at 3448. In *Roviaro*, a government informant was the sole participant, other than the accused, in the crime charged, and the only one able to augment or contradict the testimony of other government witnesses, one of whom had testified that the informer had denied ever knowing or seeing *Roviaro*. The *Roviaro* Court concluded that it was error to permit the government to withhold its informer's identity in the face of repeated demands by the accused for his disclosure. 353 U.S. at 64-65.

1602. 102 S. Ct. at 3449. The Court noted that because Valenzuela-Bernal was present when the crime was committed, he knew what the deported witnesses said in his presence relating to whether he knew that Romero-Morales, the illegally transported person, was an

material witnesses, but only if there is a reasonable likelihood that the deported witnesses' testimony could have affected the judgment of the trier of fact.¹⁶⁰⁴

Justices Blackmun and O'Connor concurred separately in the judgment. In his short concurrence, Justice Blackmun advocated that "[a]t least a 'plausible theory' of how the testimony of the deported witnesses would be helpful to the defense must be offered."¹⁶⁰⁵ Because no such evidence was offered here, he concluded the district court properly denied the motion to dismiss the indictment.¹⁶⁰⁶

Justice O'Connor advocated an accommodation of the Government's and defendant's competing interests by requiring "that deportation of potential alien witnesses be delayed for a very brief interval to allow defense counsel, as well as the Government, to interview them."¹⁶⁰⁷ Under this approach, potential witnesses would be detained

illegal alien who had entered the country within the past three years. It was only Romero-Morales who was relevant to the crime charged, and he remained fully available for examination by the defendant and his attorney. *Id.*

Although prompt deportation of witnesses deprives the defendant of an opportunity to interview them to determine precisely what favorable evidence they possess, the defendant cannot be expected to render a detailed description of their lost testimony; however, the defendant is not relieved of his duty to make some showing of materiality. The materiality showing must indicate "that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." *Id.* at 3449-50. In some cases the showing may be based upon agreed facts and will be in the nature of legal argument rather than a submission of additional facts. The defendant may also advance additional facts, consistent with the existing facts or reasonably explainable as to their inconsistency with the existing facts, so as to persuade the court that the deported witness would have been material and favorable to his defense. Additional facts that are advanced should be verified by oath or affirmation of either the defendant or his attorney. *Id.* at 3450.

1603. *Id.*

1604. *Id.* In determining whether sanctions are warranted, the courts should afford some leeway for the fact that the defendant can proffer only a description of the material evidence rather than the actual evidence, and the courts may wish to defer determination of materiality until after the presentation of all the evidence.

United States v. Agurs, 427 U.S. 97 (1976) is instructive of how the trial court should analyze the omitted evidence:

[T]he omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Id. at 112-13.

1605. 102 S. Ct. at 3450.

1606. *Id.*

1607. *Id.* at 3452. Justice O'Connor's approach is an amalgam of the approaches of the Ninth and Fifth Circuits in *United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971) and *United States v. Avila-Dominguez*, 610 F.2d 1266 (5th Cir.), *cert. denied sub nom. Perez*

for a brief period to allow the Government and defense counsel an opportunity to interview them.¹⁶⁰⁸ If, during that period, the defendant requests that certain aliens not be deported, a federal magistrate would hold a hearing to determine whether deportation of any witness should be deferred until after trial.¹⁶⁰⁹ When the Government deports an alien witness without affording the defendant any opportunity to interview him, automatic dismissal of the indictment would not follow. Instead, sanctions would "be available against the Government if the defendant sets forth some plausible theory explaining how the deported witnesses would have provided material evidence that was not simply cumulative of evidence readily available to the defendant."¹⁶¹⁰ Because Valenzuela-Bernal made no plausible showing that the deported witnesses possessed any material evidence that was not merely cumulative, Justice O'Connor concluded that the district court properly denied the respondent's motion to dismiss the indictment.¹⁶¹¹

In his dissenting opinion, Justice Brennan, joined by Justice Marshall, criticized the Court's decision as a mockery of a criminal defendant's constitutional right to interview eyewitnesses to his alleged crime before his prosecutor deports them.¹⁶¹² The majority, in Justice Brennan's view, created an illusory "dilemma," repudiated by Supreme Court precedents and common sense.¹⁶¹³ He argued that, the Executive Branch's myriad of responsibilities notwithstanding, "when the Executive Branch chooses to prosecute a violation of federal law, it incurs a constitutional responsibility . . . to ensure that the accused receives the due process of law."¹⁶¹⁴ The dissent concluded that the *Mendez-*

v. United States, 449 U.S. 887 (1980), respectively. In *Mendez-Rodriguez*, the illegal alien witnesses were held for an average period of five days, during which time defense counsel had an opportunity to interview them and determine the materiality of their testimony. After the interviews a federal magistrate held a hearing and ordered deportation of those whose testimony would not be material. When the government deported witnesses considered material under the "conceivable benefit" test, the court dismissed the indictment. In *Avila-Dominguez*, the Fifth Circuit followed the Ninth Circuit rationale that a constitutional violation exists if the government deports an alien witness before the defendant has had an opportunity to interview him. The court nevertheless affirmed the defendant's conviction because he failed to offer a "plausible theory" explaining how the witness' testimony would have helped the defense. This approach would be imposed on the federal courts through the Supreme Court's supervisory powers. 102 S. Ct. at 3452 n.2.

1608. 102 S. Ct. at 3452.

1609. *Id.*

1610. *Id.* at 3453.

1611. *Id.*

1612. *Id.* (Brennan, J., dissenting).

1613. *Id.*

1614. *Id.* The dissent refused to accept the Government's argument that it is permissible to infringe a criminal defendant's rights given the Executive Branch's "other responsibilities."

Rodriguez doctrine was "a practical and sensitive accommodation between a criminal defendant's constitutional rights under the [c]ompulsory [p]rocess [c]lause and the [g]overnment's policy of prompt deportation of illegal aliens."¹⁶¹⁵ Ultimately, it should have been the respondent, not the government, who was entitled to determine whether or not the illegal alien eyewitnesses could give testimonies material and relevant to the defense.¹⁶¹⁶

In *United States v. Marquez-Amaya*,¹⁶¹⁷ the Ninth Circuit, following the Supreme Court's abrogation of the rule in *Mendez-Rodriguez*, set aside the dismissal of the indictments and affirmed the defendant's conviction.¹⁶¹⁸ Marquez-Amaya was charged with distributing heroin¹⁶¹⁹ and conspiring to distribute heroin.¹⁶²⁰ The district court dismissed the charges and the Ninth Circuit affirmed basing its decision on *Mendez-Rodriguez*.¹⁶²¹ The Supreme Court, however, vacated and remanded the decision¹⁶²² to the Ninth Circuit for further consideration in light of *United States v. Valenzuela-Bernal*. The Ninth Circuit, after "carefully" reviewing the record on appeal, found its affirmance to be in error.¹⁶²³ Like Valenzuela-Bernal, Marquez-Amaya had "made no 'plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses.'" ¹⁶²⁴

Id. at 3453-54 (citing *Jencks v. United States*, 353 U.S. 657 (1957) (in criminal proceedings the Government can invoke its evidentiary privilege of not disclosing documents concerning vital national interests only at the price of freeing the defendant)).

1615. 102 S. Ct. at 3454.

1616. *Id.* at 3455. The dissent argued that *Roviaro v. United States*, 353 U.S. 53 (1957) rejected the Court's suggestion that a criminal defendant should be able to "demonstrate either the presence or absence of the required materiality" even without having had an opportunity to interview the deported witnesses. 102 S. Ct. at 3455. In *Roviaro*, the Government refused to release the identity of its informer "John Doe" to *Roviaro*. *Roviaro*, as in the instant case, was present throughout the commission of the crime. The *Roviaro* Court required disclosure because John Doe's testimony might have benefited the defense. Because the deported witnesses in the instant case, like Doe in *Roviaro*, played a prominent part in Valenzuela-Bernal's alleged offense, they, like Doe, might have testified to respondent's possible ignorance respecting essential elements of the crime charged. *Id.*

1617. 686 F.2d 747 (9th Cir. 1982) (per curiam).

1618. *Id.* at 748.

1619. 21 U.S.C. § 841(a)(1), (b) (1976).

1620. 21 U.S.C. § 846 (1976).

1621. 686 F.2d at 748.

1622. 102 S. Ct. 3504 (1982).

1623. 686 F.2d at 748.

1624. *Id.* (quoting *United States v. Valenzuela-Bernal*, 102 S. Ct. at 3449)).

c. compulsory process and the right against self-incrimination

A defendant's right to secure witnesses in his favor may be restricted where a co-defendant's testimony might be self-incriminating and the co-defendant faces the possibility of prosecution for other charges.¹⁶²⁵ In *United States v. Moore*,¹⁶²⁶ the Ninth Circuit failed to uphold a co-defendant's blanket refusal to testify.¹⁶²⁷ Appellant Moore was convicted of unlawful possession of mail.¹⁶²⁸ Moore and his brother were arrested at their house by police acting on a mail theft report.¹⁶²⁹ At the conclusion of the Rule 11 guilty plea hearing, at which Moore's brother pleaded guilty to one count of unlawful receipt of mail, Moore's counsel informed the court that he wanted the brother as a witness at trial. However, the brother stated under oath that if he were called as a witness at the trial, he would refuse to testify, asserting his fifth amendment privilege against self-incrimination.¹⁶³⁰ The trial judge honored the brother's fifth amendment claim because he could be prosecuted on other charges.¹⁶³¹

The Ninth Circuit rejected, as overly broad, Moore's contention that his brother had waived his fifth amendment privilege against self-incrimination by testifying at his Rule 11 hearing and was thus subject to Moore's right to secure witnesses in his defense.¹⁶³² The *Moore* court's analysis focused on the fact that the right to compulsory process to secure a witness does not encompass compulsion of the witness to waive his fifth amendment right.¹⁶³³ The brother's voluntary guilty plea waived his fifth amendment privilege only as to the crime admitted, not as to any other crimes.¹⁶³⁴ A co-defendant who pleads guilty cannot be forced to testify by another defendant if there is still a chance

1625. See generally *United States v. Roberts*, 503 F.2d 598, 600 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975); *United States v. Yurasovich*, 580 F.2d 1212, 1218 (3d Cir. 1978); *United States v. Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973)).

1626. 682 F.2d 853 (9th Cir. 1982).

1627. *Id.* at 857.

1628. 18 U.S.C. § 1708 (1976).

1629. 682 F.2d at 855.

1630. *Id.*

1631. *Id.*

1632. *Id.*

1633. *Id.* at 856 (citing *United States v. Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir.), *cert. denied sub nom. Fierro-Soza v. United States*, 439 U.S. 1005 (1978)).

1634. 682 F.2d at 856 (citing *United States v. Pierce*, 561 F.2d 735, 738 (9th Cir. 1977) (voluntary guilty plea waives privilege against self-incrimination only with respect to the crime which is admitted), *cert. denied*, 435 U.S. 923 (1978); *United States v. Roberts*, 503 F.2d 598, 600 (9th Cir. 1974) (privilege against self-incrimination assertable by a witness questioned on a particular count of an indictment if his testimony will implicate him on another count to which he is still vulnerable), *cert. denied*, 419 U.S. 1113 (1975)).

that the pleading co-defendant could be prosecuted for other charges either under the original indictment or in a subsequent proceeding.¹⁶³⁵

The court looked to *Hoffman v. United States*¹⁶³⁶ to determine the scope of the brother's privilege against self-incrimination¹⁶³⁷ and to *United States v. Pierce*¹⁶³⁸ for the rule that the application of *Hoffman* requires a fifth amendment claim in response to specific questions.¹⁶³⁹ A general refusal to answer any question is unacceptable.¹⁶⁴⁰ The Ninth Circuit found that the record was devoid of any indications that (1) the brother could have claimed privilege to essentially all relevant questions,¹⁶⁴¹ or (2) the trial judge possessed any special knowledge that would have allowed him to make such a determination.¹⁶⁴² The district court therefore erred in accepting the brother's blanket refusal to testify.¹⁶⁴³ Nevertheless, the error did not warrant reversal of appellant's conviction.¹⁶⁴⁴

D. The Right to a Speedy Trial

The sixth amendment¹⁶⁴⁵ guarantee of an accused's right to a

1635. 682 F.2d at 856 (citing *Roberts*, 503 F.2d at 600 (co-defendant who has asserted his privilege against self-incrimination may not be called as a witness by defendant); *United States v. Yurasovich*, 580 F.2d 1212, 1218 (3d Cir. 1978) (privilege against self-incrimination remains where the witness is subject to prosecution for other crimes which his testimony might tend to reveal); *United States v. Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973) (privilege against self-incrimination upheld where witness remains vulnerable to other charges)).

1636. 341 U.S. 479 (1951). *Hoffman* holds that to sustain a fifth amendment privilege claim it need only be evident from the questioning that an explanation of failure to respond could be dangerous because injurious disclosure could result. *Id.* at 486-87.

1637. 682 F.2d at 856.

1638. 561 F.2d 735, 741 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978).

1639. 682 F.2d at 856.

1640. *Id.* (citing *Pierce*, 561 F.2d at 741). The *Moore* court noted only one exception to the rule announced in *Pierce*: when the trial court has extensive knowledge of the case that allows evaluation of the claimed fifth amendment privilege, it can conclude, without specific questions to the witness, that the witness could legitimately refuse to answer essentially all relevant questions. 682 F.2d at 856 (citing *United States v. Tsui*, 646 F.2d 365, 367-68 (9th Cir. 1981), *cert. denied*, 455 U.S. 991 (1982) (quoting *United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980)).

The *Moore* court found, however, that this exception did not apply in this case. The trial court merely accepted a Rule 11 statement from Lembric admitting guilt to one count of a two count indictment. This statement gave the district court no special knowledge of either Lembric's susceptibility to further criminal prosecution or the nature of Lembric's unprivileged testimony favorable to Nathaniel. 682 F.2d at 857.

1641. 682 F.2d at 857.

1642. *Id.*

1643. *Id.*

1644. *Id.* at 858.

1645. U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial"

speedy trial is primarily designed to prevent long-term incarceration before trial and to protect the defendant's rights before the resolution of criminal charges.¹⁶⁴⁶ A defendant's assertion of a sixth amendment infringement is often accompanied by an alleged violation of the Speedy Trial Act (the Act),¹⁶⁴⁷ which requires that an accused be brought to trial within seventy days of his first appearance with counsel. Recent trends evident in both Supreme Court and Ninth Circuit decisions, however, indicate an acceptance of extensive delays in trial commencement.

Difficulties arise when criminal charges are dismissed and subsequently reinstated after a lengthy delay. In *United States v. MacDonald*,¹⁶⁴⁸ a divided Supreme Court held that a delay between dismissal of criminal charges by the United States Army and a subsequent civilian grand jury indictment five years later could not be considered in determining whether the defendant's sixth amendment right to a speedy trial had been violated.

On May 1, 1970, MacDonald, a captain in the Army Medical Corps, was formally charged by the Army with the murders of his pregnant wife and two children.¹⁶⁴⁹ After almost six months of investigation, the charges were dismissed, and MacDonald was honorably discharged based on hardship.¹⁶⁵⁰ Despite dismissal of all criminal charges, the Army Criminal Investigation Division (CID) continued its investigation. By June 1972, the CID amassed a thirteen-volume report which was submitted to the Justice Department with a recommendation for continued investigation.¹⁶⁵¹ On January 24, 1975, MacDonald was indicted by a grand jury for all three murders.¹⁶⁵²

1646. *United States v. MacDonald*, 456 U.S. 1, 8 (1982). See also *United States v. Marion*, 404 U.S. 307, 320 (1971) (government's knowledge of defendants' identities and criminal activities for three-year period *prior to indictment* not determinative of sixth amendment violation); *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972) (five-year delay between defendant's arrest and trial did not violate sixth amendment right to a speedy trial where record disclosed that defendant did not oppose a lengthy delay in trial).

1647. 18 U.S.C. §§ 3161-3174 (1976 and Supp. V 1982).

1648. 456 U.S. 1 (1982).

1649. *Id.* at 4. The facts of the case were not at issue. For a detailed account, see *id.* at nn.1 & 2 and accompanying text.

1650. *Id.* at 5.

1651. *Id.*

1652. *Id.* The district court denied MacDonald's motion to dismiss the indictment based in part on a sixth amendment speedy trial violation. The Fourth Circuit allowed MacDonald's interlocutory appeal in *MacDonald v. United States*, 531 F.2d 196 (4th Cir. 1976), and reversed, holding that the delay between the 1972 submission of the CID report and the 1975 indictment violated MacDonald's right to a speedy trial. The United States Supreme Court held that the Fourth Circuit erred in allowing the interlocutory appeal in *United States v.*

The time period between arrest and indictment must be taken into account in determining whether a defendant's sixth amendment right to a speedy trial has been violated.¹⁶⁵³ The period before a defendant is arrested, indicted, or formally accused, however, is not to be considered.¹⁶⁵⁴ Likewise, the speedy trial clause does not apply after the Government formally dismisses charges in good faith.¹⁶⁵⁵

The interests to be served by the speedy trial clause of the sixth amendment were addressed in *United States v. Marion*.¹⁶⁵⁶ An accused's right to a speedy trial is primarily designed to protect his rights, to prevent long-term incarceration before trial, whether released on

MacDonald, 435 U.S. 850 (1978). On remand, the district court convicted MacDonald on one count of first degree murder and two counts of second degree murder. In *MacDonald v. United States*, 632 F.2d 258 (4th Cir. 1980), the Fourth Circuit again held that the delay violated MacDonald's sixth amendment rights, reversed the conviction and remanded to the district court with instructions to dismiss the indictment. The Supreme Court again granted certiorari. 456 U.S. at 5-6.

1653. 456 U.S. at 7 (citing *Dillingham v. United States*, 423 U.S. 64 (1975) (twenty-two month delay between defendant's arrest and indictment must be considered in determining whether sixth amendment rights have been violated)).

1654. 456 U.S. at 6 (citing *United States v. Marion*, 404 U.S. 307, 313 (1971)).

1655. The Court noted that this delay was to be scrutinized under the due process clause. 456 U.S. at 7.

The Court relied on the legislative history of the Speedy Trial Act to support its holding that the delay between the dismissal of charges and subsequent reinstatement was not determinative of a sixth amendment violation. *Id.* at n.7. The Act provides that a delay between dismissal and reinstatement of criminal charges is not to be used in a computation of the 70-day limitation period. 18 U.S.C. §§ 3161(d), 3161(h)(6) (1976 and Supp. V 1982). *See supra* note 1647 and accompanying text. Due to the interrelation of the sixth amendment and the Act (*see* S. REP. NO. 1021, 93d Cong., 2d Sess. 1 (1974)), the Court reasoned that such a delay should also be excluded from a determination of MacDonald's alleged speedy trial violation. The Court cited several circuits which are in accord. *See e.g.*, *United States v. Hillegas*, 578 F.2d 453, 457-58 (2d Cir. 1978) (no sixth amendment violation where indictment was issued three years after defendant was formally charged); *Arnold v. McCarthy*, 566 F.2d 1377, 1383 (9th Cir. 1978) (nine-month delay after initial charges dismissed and subsequent charges filed did not violate speedy trial clause of the sixth amendment); *United States v. Martin*, 543 F.2d 577, 579 (6th Cir. 1976) (defendant's charges of possessing and passing counterfeit currency were dismissed; his indictment and conviction for the same offenses three years later did not violate the sixth amendment), *cert. denied*, 429 U.S. 1050 (1977)); *United States v. Bishton*, 463 F.2d 887, 891-92 (D.C. Cir. 1972) (no speedy trial violation where charges were dismissed and a subsequent indictment was issued for the same bribery offense resulting in a 20-month delay). *But see* *United States v. Avalos*, 541 F.2d 1100, 1112 (5th Cir. 1976) (Fifth Circuit condemned government's dismissal of charges in one state and subsequent indictment in another state, in which prosecutors agreed to sponsor a government witness) (dictum), *cert. denied*, 430 U.S. 970 (1977); *see also* 456 U.S. at 17 n.2 (Marshall, J., dissenting).

Chief Justice Burger noted that the decisions cited in the dissent failed to address the specific issue involved in *MacDonald*; for example, whether the delay after dismissal of initial charges is determinative of a sixth amendment speedy trial violation. *Id.* at 7 n.7.

1656. 404 U.S. 320 (1971). *See supra* note 1646.

bail or not, and to minimize the disruptions of life that result while criminal charges are pending.¹⁶⁵⁷ Prejudice to the defendant caused by the mere passage of time *prior* to his indictment may be analyzed under the due process clause or statutes of limitations.¹⁶⁵⁸

The *MacDonald* Court disagreed with the Fourth Circuit's holding that criminal charges were pending against MacDonald throughout the five-year period.¹⁶⁵⁹ During that time between dismissal of charges and reindictment, MacDonald was not under arrest, incarcerated, or subject to any criminal prosecution.¹⁶⁶⁰ The Court indicated that MacDonald was neither entitled to nor in need of sixth amendment protection during that time as he was "free to go about his affairs, to practice his profession, and to continue with his life."¹⁶⁶¹ The Fourth Circuit's decision was reversed and the case remanded for further proceedings.¹⁶⁶²

The Speedy Trial Act provides various exclusions used in the computation of its seventy-day limitation period. Several of these exclusions were the subject of controversy in *United States v. Nance*.¹⁶⁶³ In affirming the defendants' convictions of theft from interstate shipments,¹⁶⁶⁴ the Ninth Circuit held that unanticipated delays in an inter-

1657. *Id.* at 320. Although "[i]nordinate delay between arrest, indictment, and trial may impair" presentation of an effective defense, the sixth amendment primarily provides an arrestee protection, whether free on bail or not, from disruption of employment, drain on financial resources, curtailment of associations, public obloquy, and anxiety. *Id.* See also *Barker v. Wingo*, 407 U.S. at 532-33, *supra* note 1646.

1658. 456 U.S. at 8.

1659. *Id.* at 9.

1660. *Id.* at 10.

1661. *Id.* Although the Court conceded that the prolonged investigation prior to the Army's dismissal of charges created some of the undesirable consequences the sixth amendment was designed to prevent, it focused instead upon MacDonald's freedom from incarceration. *Id.* at 8. Justice Marshall, joined by Justices Brennan and Blackmun, dissented. 456 U.S. at 15. Justice Marshall interpreted the sixth amendment to provide a continuous speedy trial guarantee to anyone accused of a crime despite dismissal and reindictment for the same offense. "Nothing in the language suggests that a defendant must be continuously under indictment in order to obtain the benefits of the speedy trial right." *Id.* (Marshall, J., dissenting). The dissent considered *Marion*, upon which the majority relied, consistent with the concept of a speedy trial guarantee which provides continuous protection once an official accusation has been made. *Id.* at 16. The dissent concluded that the delay was not justified by the Government's "vague, unexplained references to internal disagreement about [MacDonald's] prosecution." *Id.* at 23-24.

1662. *Id.* at 11. In his brief concurrence, Justice Stevens conceded that the five-year delay did not suspend MacDonald's right to a speedy trial. He believed, however, that the Government was justified in "cautiously and deliberately" proceeding before finally deciding to prosecute MacDonald. *Id.* at 11 (Stevens J., concurring).

1663. 666 F.2d 353 (9th Cir.), *cert. denied*, 456 U.S. 918 (1982).

1664. Nance was convicted of two counts, and defendants Stelly and Lee of one count, of theft from interstate shipments in violation of 18 U.S.C. § 659 (1976). *Id.* at 355.

vening trial which was scheduled for judicial economy were properly excluded under the Speedy Trial Act.¹⁶⁶⁵ An additional delay due to illness of the trial judge was also properly excluded.¹⁶⁶⁶ A delay which resulted from previously scheduled custody cases, however, was improperly excluded.¹⁶⁶⁷

On appeal, defendants argued that the Government's failure to adhere to the seventy-day limitation period under the Act required dismissal of their indictments.¹⁶⁶⁸ Defendants were brought to trial eighty-two days after their indictments.¹⁶⁶⁹ The district court denied defendants' January 13th motions to dismiss, relying on section 3161(h)(8)(B)(iv) of the Act.¹⁶⁷⁰ That section allows exclusion of continuances from the seventy-day limitation when the "ends of justice" outweigh the interests of the public and the defendant.¹⁶⁷¹

While conceding that part of the twenty-nine day continuance from January 6 through February 4 was improperly excluded, the Ninth Circuit held that the seventy-day limitation was met.¹⁶⁷² As with the uncontested exclusion of the original November 4th continuance, the period from January 6 through the 12th, involving defense counsel's conflicts, was properly excluded to ensure continuity of counsel.¹⁶⁷³

1665. 666 F.2d at 354.

1666. *Id.* at 358 n.11.

1667. *Id.* at 359. The following chronology describes the continuous delays in the commencement of the *Nance* trial. The indictment was issued on September 12, 1980, and trial was scheduled to begin on November 4, 1980. Due to a death in the family of defendant Lee's attorney, however, trial was continued until January 6, 1981, the earliest date counsel could appear. Trial was then continued until January 13th because Lee's attorney was involved in a custody case on January 6th. In place of the *Nance* trial on January 6th, the district scheduled another criminal trial (*Lawton*). *Nance* was rescheduled for February 10, 1981. Due to the trial judge's illness, the *Lawton* trial began late and ran two days longer than expected. *Lawton* ended on a Friday, and because Mondays were reserved exclusively for sentencing and law and motions, the *Nance* trial was delayed until January 20th. The trial was again postponed because the judge had to attend a judges' meeting on January 22nd. In addition, three custody cases scheduled for the week of January 27th were expected to run into the first week of February. The *Nance* trial finally began on February 4, 1981. *Id.* at 356-57.

1668. *Id.* at 355.

1669. *Id.* at 357.

1670. *Id.*

1671. *Id.* at 356-57. The district court's exclusion of the delay from November 4, 1980 through January 6, 1981 to ensure continuity of counsel pursuant to 18 U.S.C. § 3161(h)(8)(B)(iv) (Supp. III 1979) was unchallenged by the defendants. They did challenge, however, exclusion of the subsequent delays. 666 F.2d at 356-57.

1672. *Id.* at 357.

1673. *Id.* at 357-58. See 18 U.S.C. § 3161(h)(8)(B)(iv) (Supp. V 1982). The court reasoned that because Lee's attorney was unavailable through Friday, January 9th, the *Nance* trial

Scheduling an intervening trial to make use of the courtroom vacancy created by the January 6th *Nance* continuance was also proper.¹⁶⁷⁴ Despite unanticipated delays in the commencement and conclusion of the intervening trial,¹⁶⁷⁵ the court held that the period from January 6th through the 20th was properly excluded,¹⁶⁷⁶ relying upon the "ends of justice" exclusion under section 3161(h)(8)(B)(iv).¹⁶⁷⁷

The court held that the remaining period from January 27th through February 4th, however, was improperly excluded.¹⁶⁷⁸ Without explanation, the Ninth Circuit refused to consider whether the judge's absence because of the Judicial Conference on January 22nd and 23rd was properly excluded.¹⁶⁷⁹ The *Nance* trial was pre-empted by the scheduling of three custody cases during the week of January 27th. Such scheduling merely contributes to the court calendar's "general congestion," which, under section 3161(h)(8)(C) of the Act, is not excludable based on the "ends of justice" rationale.¹⁶⁸⁰ The court suggested that such delays should have been anticipated and alleviated by reassignment to another judge.¹⁶⁸¹

could not have begun until Tuesday, January 13th, regardless of an intervening trial. 666 F.2d at 357 n.9; *see supra* note 1667.

In support of this proposition the court cited *United States v. Edwards*, 627 F.2d 460, 461 (D.C. Cir.) (continuance resulting from defense attorney's illness and prosecutor's conflicting trial schedule was properly excluded), *cert. denied*, 449 U.S. 872 (1980); and *United States v. Howard*, 590 F.2d 564, 568-69 (4th Cir.) (continuance requested by defense attorney to accommodate his schedule was properly excluded even though he was partially at fault for the delay), *cert. denied*, 440 U.S. 976 (1979).

1674. 666 F.2d at 358. The time estimated for the intervening trial may not extend the 70-day limitation of the continued trial. *Id.* When initially scheduled, the *Lawton* trial was expected to last only four days. *Id.* at 357.

1675. *See supra* note 1667.

1676. 666 F.2d at 358.

1677. *Id.* In making use of the vacant courtroom, the district court attempted to take advantage of judicial resources and sufficiently manage its own docket. The Ninth Circuit considered this "consistent with the speedy trial interests of the public and the defendants." *Id.*

1678. *Id.* at 359.

1679. *Id.*

1680. *Id.* Section 3161(h)(8)(C) specifically precludes such exclusions because they would undermine the rationale of the Act, which is to prevent such general court congestion. *Id.* *See United States v. Buffalo Amusement Corp.*, 600 F.2d 368, 376 (2d Cir. 1979) (judge's commitment to other trials which contributed to a delay in defendant's trial was not excludable); *United States v. Didier*, 542 F.2d 1182, 1188 (2d Cir. 1976) (court's crowded docket insufficient reason to exclude delay); *United States v. Drummond*, 511 F.2d 1049, 1054 (2d Cir.) (Second Circuit issued strong admonition that cases should be reassigned quickly when a judge's schedule becomes burdensome), *cert. denied*, 423 U.S. 844 (1975).

1681. 666 F.2d at 359-60. *See United States District Court, Central District of California, General Order No. 209, Plan for Achieving Prompt Disposition of Criminal Cases*, § 4(g) (1980) (Speedy Trial Plan). *Accord, Hodges v. United States*, 408 F.2d 543, 551-52 (8th Cir.

After final computation, the court found that the *Nance* trial had actually begun within sixty-eight days of the initial indictments, in compliance with the Act.¹⁶⁸² Fifty-three days elapsed between indictment and the original November 4, 1980 trial date, and fifteen days elapsed between January 19th and the commencement of the trial on February 4, 1981. Accordingly, the Ninth Circuit held that dismissal of the defendants' indictment was unwarranted.¹⁶⁸³

Co-defendant Stelly also claimed that his sixth amendment right to a speedy trial, as implemented by Federal Rule of Criminal Procedure 48(b), was violated.¹⁶⁸⁴ The court explained that the Speedy Trial Act was enacted to strengthen the sixth amendment speedy trial guarantee.¹⁶⁸⁵ In rejecting Stelly's claim, the Ninth Circuit reasoned that when the requirements of the Act have been met, there is usually no additional sixth amendment violation.¹⁶⁸⁶ The court relied on *Barker v. Wingo*¹⁶⁸⁷ to explain that the delay in the *Nance* trial, which was less than five months, was not "presumptively prejudicial."¹⁶⁸⁸ Stelly also failed to specifically allege that the delay resulted in any prejudice to him, as required by *Barker*.¹⁶⁸⁹ Finally, the court refused to concede that Stelly's speedy trial rights under Rule 48(b) had been violated.¹⁶⁹⁰

1669) (judges required to work together by reassigning cases if necessary to ensure protection of the defendants' sixth amendment rights). 666 F.2d at 360.

1682. 666 F.2d at 360.

1683. *Id.*

1684. *Id.* "If there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint." FED. R. CRIM. P. 48(b).

1685. 666 F.2d at 360 (citing *United States v. Mehrmanesh*, 652 F.2d 766, 769 (9th Cir. 1980)).

1686. 666 F.2d at 360.

1687. 407 U.S. 514, 531-33 (1972). In *Barker*, the Court identified four factors to be used in the determination of a sixth amendment violation: (1) length of delay; (2) reason for delay; (3) defendant's assertion of his sixth amendment right; and (4) resulting prejudice to the defendant. Unless the delay is presumptively prejudicial, however, the Court does not analyze the remaining three factors. *Id.* at 530-31. See *United States v. Mackay*, 491 F.2d 616, 620-21 (10th Cir. 1973) (eighteen-month delay not presumptively prejudicial), *cert. denied*, 416 U.S. 972 (1974); *United States v. Diaz-Alvarado*, 587 F.2d 1002, 1005 (9th Cir. 1978) (five month delay), *cert. denied*, 440 U.S. 927 (1979).

Had the *Nance* court analyzed the other three *Barker* factors, Stelly's claim still would have been unsuccessful because the delay was primarily caused by the court's desire to ensure continuity of counsel. 666 F.2d at 361.

1688. 666 F.2d at 360.

1689. *Id.* at 361. See *United States v. Saunders*, 641 F.2d 659, 665 (9th Cir. 1980) (district court's refusal to dismiss indictment due to delay not error where defendant failed to show actual prejudice caused by post-indictment delay), *cert. denied*, 452 U.S. 918 (1981).

1690. 666 F.2d at 361. Compare *United States v. Pilla*, 550 F.2d 1085, 1092-93 (8th Cir.) (trial court's determination that defendant's rights were not violated under FED. R. CRIM. P. 48(b) will be reversed only for abuse of discretion), *cert. denied*, 432 U.S. 907 (1977) with

In *United States v. Arkus*,¹⁶⁹¹ the defendant challenged his conviction of mail fraud,¹⁶⁹² contending that his sixth amendment rights had been violated and that he was not tried within the requisite seventy-day limitation period under the Act. Despite the lapse of 186 days between the original indictment and trial, the Ninth Circuit affirmed Arkus' conviction, holding that neither the sixth amendment nor the Act had been violated.¹⁶⁹³

Arkus and three associates were indicted on July 31, 1980, and their trial was scheduled for October 7, 1980. After the death of a critical prosecution witness,¹⁶⁹⁴ the Government moved on October 3, 1980 to dismiss the indictments pursuant to Federal Rule of Criminal Procedure 48(a).¹⁶⁹⁵ Arkus was reindicted for the same offenses on December 23, 1980, arraigned on the 29th, and was scheduled for trial on February 3, 1981.¹⁶⁹⁶ The district court computed the thirty-six day delay between arraignment and trial by adding the six days that remained in the seventy-day period after the first indictment to the thirty-day hiatus required after any arraignment under 18 U.S.C. section 3161(c)(2).¹⁶⁹⁷ Arkus moved to dismiss his indictment on January 13, 1981, but the motion was denied.¹⁶⁹⁸

In affirming the conviction, the Ninth Circuit held that exclusion

United States v. Dooling, 406 F.2d 192, 196 (2d Cir.) (defendant must demonstrate that the delay prejudiced him before rule 48(b) is applicable), *cert. denied*, 395 U.S. 911 (1969).

1691. 675 F.2d 245 (9th Cir. 1982).

1692. *Id.* at 246. Arkus and three other defendants were convicted on eight counts of mail fraud in violation of 18 U.S.C. § 1341 (1976), which provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

1693. *Arkus*, 675 F.2d at 249.

1694. *Id.* at 246. The witness died on September 11th; however, the Government learned of the death on September 25th and did not confirm it until September 30, 1980. *Id.*

1695. *Id.* FED. R. CRIM. P. 48(a) provides that "[t]he Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

Only six days remained before the expiration of the 70-day period when the indictment was dismissed. 675 F.2d at 246.

1696. 675 F.2d at 246.

1697. *Id.* at 248. Section 3161(c)(2) provides that absent an express waiver, a defendant cannot be tried within less than 30 days of his first appearance through counsel.

1698. *Id.* at 247. The district court ordered exclusion of the 23-day period from September 11th to October 3, 1980 because of the death of the Government's critical witness. It relied upon § 3161(h)(3)(A) of the Act which requires the exclusion of "[a]ny period of delay resulting from the absence or unavailability of the defendant or an essential witness." *Id.* It

of the period during which Arkus' motion was pending was proper.¹⁶⁹⁹ In addition, the court excluded eighty-one days which lapsed between dismissal of the first indictment on October 3 and reindictment on December 23, 1980.¹⁷⁰⁰ Relying on congressional intent, the court also held that the thirty-day hiatus requirement of section 3161(c)(2) was applicable to reindictments as well as indictments, despite a contrary provision in the Central District's Plan for Prompt Disposition of Criminal Cases (PPD).¹⁷⁰¹ The Ninth Circuit considered the Speedy Trial Act controlling when it conflicted with the PPD.¹⁷⁰²

The district court correctly applied the thirty-day requirement to the reindictment, but it erroneously added the six days which remained in the seventy-day period after dismissal of the first indictment.¹⁷⁰³ Had the six days been included in the thirty-day period, Arkus would have been tried at the earliest possible date and afforded enough time to prepare a defense.¹⁷⁰⁴

Section 3161(h)(1), requiring exclusion of the period during which a pre-trial motion is pending, applies to both the seventy-day limitation and the thirty-day hiatus.¹⁷⁰⁵ Because Arkus moved to dismiss the indictment before the thirty-day period lapsed, and because the period during which his motion was pending was excludable, the trial began within the thirty-day period and the Act was not violated.¹⁷⁰⁶ In rejecting Arkus' sixth amendment claim, the court held that the six-

also relied upon the "ends of justice" exclusion provided in 18 U.S.C. § 3161(h)(8)(A) (1976). 675 F.2d at 247.

The 20-day period from January 13th to February 2, 1981, during which time Arkus' motion to dismiss was under consideration, was also excluded. Section 3161(h)(1)(F) requires the exclusion of any period during which a pretrial motion is pending. 18 U.S.C. § 3161(h)(1)(F) (Supp. V 1982).

1699. 675 F.2d at 247. The period which elapsed between the initial indictment and the dismissal is included in the computation of the 70-day limitation. *See* S. REP. NO. 1021, 93d Cong., 2d Sess. 38 (1974). *See also* *United States v. Dennis*, 625 F.2d 782, 793 (8th Cir. 1980) (seventy-day limitation period begins to run when defendant is first indicted).

1700. 675 F.2d at 247. The court relied upon § 3161(h)(6) of the Act which provides that the period between the Government's dismissal of an indictment or information and reindictment for the same offense or "any offense required to be joined with that offense . . ." be excluded. *Id.*; 18 U.S.C. § 3161(h)(6) (1976).

1701. 675 F.2d at 248. Section 5 of the PPD provides that the 30-day period is to be applied exclusively to the initial indictment. *Id.*

1702. *Id.*

1703. *Id.*

1704. *Id.*

1705. *Id.* n.4. The court relied upon "The Senate Committee Report accompanying the amendments adding the 30 day provision . . ." *Id.* (citing A. Partridge, LEGISLATIVE HISTORY OF TITLE I OF SPEEDY TRIAL ACT OF 1974 at 73-4 (1980)).

1706. 675 F.2d at 248.

month delay was not presumptively prejudicial.¹⁷⁰⁷ In addition, there was no indication that Arkus suffered any actual prejudice as a result of the delay.¹⁷⁰⁸

In *United States v. Saavedra*,¹⁷⁰⁹ the court held that a twenty-nine day lapse between impaneling the jury and commencement of trial, primarily due to the assistant United States Attorney's request for the district judge's voluntary recusal, did not violate defendant's sixth amendment right to a speedy trial.¹⁷¹⁰ Saavedra was arrested for her involvement in a credit card misappropriation scheme and convicted of wire fraud¹⁷¹¹ and conspiracy to commit wire fraud.¹⁷¹²

Saavedra's trial was scheduled for September 18, 1980 and continued at her request to September 30th, at which time the jury was impaneled and sworn in. Suppression motions were heard through October 3rd, and during that time the district judge expressed his displeasure with the assistant United States Attorney's conduct. The court then continued the case until October 9th for a determination of possible guilty pleas. At that time, the assistant United States Attorney's request for the judge's voluntary recusal due to their prior confrontations was denied. Instead the judge again continued the case, this time to determine whether it could be voluntarily sent back for reassignment after the jury had been impaneled and sworn. The trial was to be continued until October 21st. Due to a conflict with defense counsel's schedule, however, the case was continued until October 27th. On October 27th, the judge denied the Government's request for a mistrial and reassignment and its formal motion for recusal.¹⁷¹³ The four-day

1707. *Id.* (citing *Barker v. Wingo*, 407 U.S. at 531). See *supra* note 1686 and accompanying text.

1708. 675 F.2d at 248 (citing *United States v. Nance*, 666 F.2d at 361). See *supra* notes 1685-87 and accompanying text.

1709. 684 F.2d 1293 (9th Cir. 1982).

1710. *Id.* at 1296-97.

1711. 18 U.S.C. § 1343 (1976) provides in pertinent part:

[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, . . . transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, . . . shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

1712. 684 F.2d at 1295. 18 U.S.C. § 371 (1976) provides in pertinent part:

[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

1713. In addition, Saavedra's request to determine whether the delay in trial prejudiced the jury was denied. 684 F.2d at 1296.

trial finally commenced on October 28, 1980.

Saavedra claimed that her sixth amendment right to a speedy trial was violated because of the delay precipitated by the assistant United States Attorney's dispute with the judge.¹⁷¹⁴ She argued that the Government's failure to make a formal motion for disqualification after the district court's refusal to voluntarily reassign the case, and after a continuance was granted to permit such a motion, indicated an inadequate reason for requesting voluntary recusal.¹⁷¹⁵

The Ninth Circuit found no sixth amendment violation, balancing the four factors set forth in *Barker v. Wingo*:¹⁷¹⁶ (1) the length of delay, (2) the reasons for delay, (3) whether defendant asserted his right to a speedy trial, and (4) whether prejudice resulted from the delay.¹⁷¹⁷ Because Saavedra was not incarcerated during the three and one-half week period, one week of which was at defense counsel's request, the court considered the length of the delay relatively minor.¹⁷¹⁸ There was also no claim that the delay caused loss of memory or unavailability of any witnesses.¹⁷¹⁹

In rejecting Saavedra's claim as to the inadequate reason for the delay, the court held that the Government's request for voluntary recusal was appropriate.¹⁷²⁰ The court recognized the Government's concern with bias arising from the ongoing dispute with the district judge.¹⁷²¹ Despite its failure to make a formal motion for disqualification as anticipated, the Government reasonably believed the court would voluntarily transfer the case, provided the procedural concerns were met.¹⁷²²

Saavedra also contended that the delay and publicity resulting from the ongoing courtroom dispute may have prejudiced the jury.¹⁷²³ The Ninth Circuit disagreed, relying on the fact that the jurors were present only on October 3rd when they were impaneled, on October

1714. *Id.*

1715. *Id.*

1716. 407 U.S. 514, 530-32 (1972) (citations omitted). *See supra* note 1687 and accompanying text.

1717. 684 F.2d at 1296-97.

1718. *Id.* at 1296.

1719. *Id.*

1720. *Id.* at 1297.

1721. *Id.* at 1296.

1722. *Id.* at 1296-97. The court was concerned about the "propriety" of reassignment of the case without declaration of a mistrial, to which Saavedra refused to consent. The court also wanted to avoid any possible double jeopardy implications. *Id.* at 1296.

1723. *Id.* The district court denied Saavedra's request to poll the jury to determine whether such prejudice existed. *Id.*

9th when they were to report to court, and on October 28th when the trial began.¹⁷²⁴ The district court did not implicate Saavedra with responsibility for the delay. Instead, the district judge explained to the jury that the delay was caused by administrative burdens resulting from his recent appointment as Chief District Judge¹⁷²⁵ and certain legal problems in the case.¹⁷²⁶ Despite the district court's denial of Saavedra's request to poll the jury, the Ninth Circuit found no indication of jury prejudice.¹⁷²⁷ The court also dismissed the claim of "prejudicial publicity" because it had not been raised at trial.¹⁷²⁸

Additionally, Saavedra argued that pursuant to Federal Rule of Criminal Procedure 48(b), which provides for dismissal due to unnecessary delay in the commencement of trial, the district court's failure to dismiss her indictment was an abuse of discretion.¹⁷²⁹ Generally, dismissal of an indictment, information, or complaint under Rule 48(b) is discretionary, unless the defendant has successfully demonstrated a sixth amendment violation.¹⁷³⁰ The court, however, did not need to decide if Rule 48(b) was applicable to these facts because the jury had already been impaneled.¹⁷³¹ Even if the rule had been applicable, failure to dismiss the indictment did not amount to abuse of the district court's discretion.¹⁷³²

Finally, the Ninth Circuit dismissed Saavedra's Speedy Trial Act claim,¹⁷³³ which was raised for the first time on appeal during oral argument. Failure to address the Speedy Trial Act claim until appeal was not "plain error"¹⁷³⁴ and therefore not reviewable under Federal

1724. *Id.*

1725. *Id.*

1726. *Id.* Though the record is unclear, these "legal problems" apparently involved the voluntary reassignment issue presented by the conflict between the judge and the assistant United States Attorney.

1727. *Id.*

1728. *Id.* at 1297. The court dismissed Saavedra's fifth amendment due process claim. The court found that the action complained of did not violate " 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' . . . and which define 'the community's sense of fair play and decency.'" *Id.* (citing *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (citations omitted)).

1729. 684 F.2d at 1297.

1730. *Id.* (citing *United States v. Edwards*, 577 F.2d 883, 887 n.1 (5th Cir.) (dismissal on speedy trial grounds not mandatory unless defendant demonstrates violation of constitutional rights), *cert. denied*, 439 U.S. 968 (1978)).

1731. 684 F.2d at 1297.

1732. *Id.*

1733. *See supra* note 1647 and accompanying text.

1734. 684 F.2d at 1297 (citing *United States v. Wysong*, 528 F.2d 345, 348 (9th Cir. 1976) (defendant not permitted to argue for the first time on appeal that police had probable cause

Rule of Criminal Procedure 52(b).¹⁷³⁵ Because the issue was not reviewable, the court refused to address Saavedra's argument that the trial did not begin until the evidentiary phase of the trial began and thus the seventy-day period had expired. Even if the seventy-day period had expired, Saavedra's failure to move for dismissal under the Act prior to trial, pursuant to section 3162(a)(2), precluded her from doing so on appeal.¹⁷³⁶

E. *The Right to a Public Trial*

One of the guarantees which the sixth amendment provides a person charged with the commission of a crime is the "right to a speedy and public trial."¹⁷³⁷ The Constitution, however, does not explicitly give the public a right of access to a criminal trial. The criminal trial, though, has historically been open to the press and general public. The right of access to criminal trials plays a particularly significant role in the functioning of the judicial process. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, thereby heightening public respect for the judicial process.¹⁷³⁸

The United States Supreme Court, in *Richmond Newspapers, Inc. v. Virginia*,¹⁷³⁹ acknowledged that certain unarticulated constitutional rights are implicit in the enumerated guarantees, and held that the public's right to attend criminal trials is implicit in the guarantees of the first amendment.¹⁷⁴⁰ The Ninth Circuit recently applied this rule in *United States v. Brooklier*.¹⁷⁴¹

In *Brooklier*, an indictment had been returned charging the defendants with violations of the Racketeer Influenced and Corrupt Organizations Act.¹⁷⁴² The indictment alleged that the defendants were members of "La Cosa Nostra." Three years elapsed between the return

for her arrest two hours prior to warrantless entry thereby demonstrating absence of exigent circumstances)).

1735. 684 F.2d at 1297. FED. R. CRIM. P. 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

1736. *Id.* at 1297 n.2. The defendant waives the right to dismiss under 18 U.S.C. § 3162(a)(2) (1976) unless a motion for dismissal is made prior to trial.

1737. U.S. CONST. amend. VI.

1738. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). *See also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

1739. 448 U.S. 555 (1980) (murder trial closed to the public).

1740. *Id.* at 580. The underlying purpose behind the first amendment was to protect the free discussion of governmental affairs. *Id.* at 575.

1741. 685 F.2d 1162 (9th Cir. 1982).

1742. 18 U.S.C. §§ 1961-68 (1976) prohibit participation in a criminal enterprise that engages in racketeering activity.

of the original indictment and the initiation of jury selection. Public interest was considerable. After questioning the potential jurors as a group in open court, the trial judge closed the voir dire to the press and the public. The remaining voir dire was conducted in camera over the next two weeks.¹⁷⁴³ Although the record reveals no contemporaneous objection, motions were made over the next several days to open the voir dire to the press, to which both counsel for defense and the government objected.¹⁷⁴⁴ In denying the motions, the district court stated that the defendants' sixth amendment rights required closure.¹⁷⁴⁵ The district court had rejected sequestering the jury as a more extreme measure than simply excluding the press and public from voir dire.¹⁷⁴⁶ Daily transcripts of the voir dire were being prepared for later release.

An in camera hearing was set for a motion to suppress evidence of an oral statement allegedly made by one of the defendants to FBI agents.¹⁷⁴⁷ An oral motion was made by attorneys representing Times Mirror Corporation, a newspaper publisher, requesting the hearing on the motion to suppress be held in open court. The motion was denied. The trial court incorporated by reference its earlier general findings made in denying the motion to open the voir dire, and stated that the defendants' sixth amendment rights required closed proceedings.¹⁷⁴⁸

Three days later, before the beginning of the afternoon session, the press and public were asked to leave the courtroom. A closed hearing was held to consider whether portions of a taped interview, conducted between an author planning to write a book and a government witness, were relevant to the credibility of the witness and could therefore be admitted into evidence.¹⁷⁴⁹ Apparently, the proceedings were held in camera to protect the author's proprietary interest in the tape.¹⁷⁵⁰

While the trial was still in progress, a motion was made by Times Mirror Corporation seeking an order releasing the transcripts of the three closed hearings, and requiring that no further hearings be closed until the press had been given notice and an opportunity to be

1743. 685 F.2d at 1166.

1744. *Id.*

1745. *Id.*

1746. *Id.* The only specific reason given by the court for excluding the public was that potential jurors would answer more freely if questioned alone. The record also disclosed that the court was concerned with the possibility of prejudice resulting from excessive publicity. *Id.* at 1166-67.

1747. *Id.* at 1169.

1748. *Id.* at 1170.

1749. *Id.* at 1171.

1750. *Id.*

heard.¹⁷⁵¹ The district court ruled that the transcripts of the closed hearings would not be released until the trial was completed.¹⁷⁵² The district court went on to state that although the media had no legal right to notice and an opportunity to be heard, those present in the courtroom when it was announced that the room would be cleared would be given a chance to object and to be heard by the court.¹⁷⁵³

Times Mirror Corporation and Gene Blake, a Times Mirror reporter, filed an emergency petition for writ of mandamus or prohibition and a notice of appeal with the Ninth Circuit Court of Appeals while the trial was still in progress. On the same day that argument was heard on the petition, the jury returned a verdict convicting the defendants, and the district court released the transcripts of the three closed proceedings.¹⁷⁵⁴ The Ninth Circuit, in *United States v. Brooklier*, declined to issue an emergency writ,¹⁷⁵⁵ dismissed the appeal,¹⁷⁵⁶ and denied the petition for a writ of mandamus.¹⁷⁵⁷

The Ninth Circuit held, however, that the district court had not satisfied the procedural prerequisites to entry of a closure order.¹⁷⁵⁸ The court held that the public's first amendment right of access to criminal proceedings applied to voir dire, as it is generally considered part of a trial.¹⁷⁵⁹ Moreover, the court acknowledged the important relationship between the public scrutiny of the jury selection process and the effective functioning of the judicial system.¹⁷⁶⁰

1751. *Id.* at 1172.

1752. *Id.*

1753. *Id.*

1754. *Id.* at 1165.

1755. *Id.*

1756. *Id.* The appeal was dismissed because the Ninth Circuit has not recognized standing to appeal in persons not parties to the case. *United States v. Sherman*, 581 F.2d 1358, 1360 (9th Cir. 1978).

1757. 685 F.2d at 1173. The court held that the case was not moot because closure orders of the kind involved here were capable of repetition yet evading review. *Id.* at 1165 (citing *Globe Newspaper*, 457 U.S. at 603; *Richmond Newspapers*, 448 U.S. at 563; *Gannet Co., Inc. v. DePasquale*, 443 U.S. 368 (1979); *Sacramento Bee v. United States District Court*, 656 F.2d 477, 480 (9th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982)). The court then denied the petition for writ of mandamus, finding not only that all of the transcripts had already been released but that the controlling law was unclear at the time the district court ruled. The court expressed confidence that the district court would act in accordance with the stated guidelines, making the writ unnecessary. 685 F.2d at 1173.

1758. 685 F.2d at 1166.

1759. *Id.* at 1167 (citing *Commercial Printing Co. v. Lee*, 262 Ark. 87, 553 S.W.2d 270, 271 (1977)); *Great Falls Tribune v. District Court*, 608 P.2d 116, 120-21 (Mont. 1980)). The *Brooklier* court rejected the Government's argument that the first amendment right of access applied only to trials and therefore the public had no right of access to voir dire as it was a pretrial procedure.

1760. 685 F.2d at 1167 (citing *Globe Newspaper*, 457 U.S. at 606).

The court established the guidelines for when a criminal proceeding may be closed to the public. The proponent seeking closure must establish that the closure is necessary in order to guarantee a fair trial.¹⁷⁶¹ This is accomplished by demonstrating a substantial probability that: (1) the right to a fair trial will be irreparably damaged from conducting the proceeding in public; (2) no alternative to closure will adequately protect the right to a fair trial; and (3) closure will be effective in protecting against the danger.¹⁷⁶²

Before these substantive guidelines need be examined, however, two procedural prerequisites to entry of an order closing a criminal proceeding to the public must be satisfied: "(1) those excluded from the proceeding must be afforded a reasonable opportunity to state their objections; and (2) the reasons supporting closure must be articulated in findings."¹⁷⁶³

The Ninth Circuit found it questionable whether in closing voir dire the district court satisfied the first procedural prerequisite; it was clear, however, that the district court did not satisfy the second prerequisite.¹⁷⁶⁴ The court stated that when a closure motion is not filed of record or made in open court, and members of the public wish to be present at the proceeding, reasonable steps should be taken to provide those persons with an opportunity to be heard before exclusion is accomplished.¹⁷⁶⁵ In the instant case, the record did not demonstrate that any steps were taken to provide notice to the public before they were excluded from voir dire.¹⁷⁶⁶

To enable the appellate court to determine whether the closure order was properly entered, the trial court should state on the record its findings regarding the need for closure and should do so with sufficient specificity so as to show that the three substantive prerequisites to closure have been satisfied.¹⁷⁶⁷ The court held that the district court failed to make specific findings to indicate that the three substantive prerequi-

1761. 685 F.2d at 1167 (citing *Gannett*, 443 U.S. at 440-42 (Blackmun, J., concurring in part and dissenting in part) (public excluded from a pretrial hearing on a motion to suppress evidence to be used in a murder trial)).

1762. 685 F.2d at 1167 (citing *Gannett*, 443 U.S. at 440-42 (Blackmun, J., concurring in part and dissenting in part)).

1763. 685 F.2d at 1167-68.

1764. *Id.* at 1168.

1765. *Id.* In determining what steps are reasonable, the district court should avoid any steps that would result in a material delay in the trial. *Id.* (citing *Gannett*, 443 U.S. at 401 (Powell, J., concurring); *id.* at 446 (Blackmun, J., concurring in part and dissenting in part)).

1766. 685 F.2d at 1168.

1767. *Id.* at 1168-69.

sites to closure had been satisfied.¹⁷⁶⁸ The court stated that a general finding that a balancing of first and sixth amendment rights dictated the closure of voir dire to the public did not afford a basis for determining whether the district court correctly concluded that public proceedings would result in irreparable damage to the defendants' right to a fair trial.¹⁷⁶⁹ The record also failed to disclose whether the district court found that no available alternatives to closure would have adequately protected the defendants' rights.¹⁷⁷⁰ The record indicated that the only alternative considered by the district court was sequestration of the jury, an admittedly extreme measure.¹⁷⁷¹ Therefore, the court concluded that the district court improperly entered the order closing voir dire of the prospective jurors.¹⁷⁷²

The court similarly analyzed the order closing the hearing on the motion to suppress. The court held that the public's right of access to a criminal trial under the first amendment was equally applicable to pre-trial hearings on motions to suppress evidence.¹⁷⁷³ The court found that the district court satisfied the first procedural prerequisite in that Blake and Times Mirror Corporation had a full opportunity to be heard in opposition to the closure order.¹⁷⁷⁴ However, the district court's findings supporting the closure suffered from the same deficiencies as the finding entered in closing the voir dire. The record did not disclose the reasons why a public hearing on the motion would have prejudiced the defendants' right to a fair trial.¹⁷⁷⁵ Additionally, no reason was given why alternatives other than total closure would not have adequately protected that right.¹⁷⁷⁶

The Ninth Circuit held that the third order, closing the hearing on a motion by a non-party to exclude from evidence certain tapes, must satisfy the same procedural prerequisites and substantive standards as the other two orders.¹⁷⁷⁷ In this instance, no opportunity was provided

1768. *Id.* at 1169.

1769. *Id.*

1770. *Id.* Such findings are required. *Id.* (citing *Sacramento Bee*, 656 F.2d at 482; *United States v. Criden*, 675 F.2d 550, 560-62 (3d Cir. 1982)).

1771. 685 F.2d at 1169 (citing *Mastrian v. McManus*, 554 F.2d 813, 819 (8th Cir. 1977)).

1772. 685 F.2d at 1169.

1773. *Id.* at 1170 (citing *Gannett*, 443 U.S. at 397 (Powell, J., concurring); *id.* at 434-36 (Blackmun, J., concurring in part and dissenting in part)).

1774. 685 F.2d at 1171.

1775. *Id.*

1776. *Id.*

1777. *Id.* (citing *Fenner & Koley, Access to Judicial Proceedings*, 16 HARV. C.R.-C.L. L. REV. 415, 443-44 (1981)). The court noted that a narrow closure might have been appropriate if the procedural and substantive prerequisites could have been satisfied. 685 F.2d at 1171-72.

to object to the closure, and no findings whatsoever were entered justifying the closure.¹⁷⁷⁸

Lastly, the court held that transcripts of properly closed proceedings must be released when the danger of prejudice has passed.¹⁷⁷⁹ The denial of a motion to release the transcripts must be tested by the same procedural prerequisites and substantive standards as the initial closure order.¹⁷⁸⁰ The district court's findings in denying the motion to release the transcripts of the three in camera proceedings immediately, rather than at the close of trial, were not sufficient to demonstrate that the court had made the determinations necessary to justify denial of the public's first amendment right of access.¹⁷⁸¹

III. PRETRIAL PROCEEDINGS

A. *Grand Jury Proceedings*

1. Grand juror selection

The fifth amendment to the United States Constitution requires that before a defendant may be tried on felony criminal charges an indictment must be returned by a grand jury.¹⁷⁸² Typically, the grand jury receives the prosecution's evidence and accedes to its recommendation to go forward with the prosecution. If the grand jury finds that prima facie grounds for criminal prosecution are lacking, however, the case is dismissed.¹⁷⁸³

Grand jurors are selected randomly, usually from voter registration lists or lists of actual voters.¹⁷⁸⁴ When the jury is selected and impaneled, the court appoints one member as foreman and another as deputy.¹⁷⁸⁵ The ultimate goal in selection and impaneling of grand jurors is to assure a fair cross-section of the community on the jury.¹⁷⁸⁶ An indictment may be set aside upon a proper showing that the system-

1778. 685 F.2d at 1172.

1779. *Id.* (citing *Gannett*, 443 U.S. at 393 (Powell, J., concurring)). The court stated that denial of access, even when appropriate, must be no greater than necessary to protect the interest justifying it. 685 F.2d at 1172 (citing *Globe Newspaper*, 457 U.S. at 609; *Sacramento Bee*, 656 F.2d at 482-83).

1780. 685 F.2d at 1172.

1781. *Id.* at 1172-73.

1782. *Russell v. United States*, 369 U.S. 749, 760-61 (1961).

1783. 9 FEDERAL PROCEDURE, LAWYER'S EDITION § 22:421.

1784. *United States v. Brady*, 579 F.2d 1121, 1131 (9th Cir. 1978) (citing 28 U.S.C. § 1863(b)(2) (1976)).

1785. FED. R. CRIM. PROC. 6(c) provides that "[t]he court shall appoint one of the jurors to be foreman and another to be deputy foreman"

1786. *United States v. Brady*, 579 F.2d 1121, 1131 (9th Cir. 1978) (citing 28 U.S.C. § 1861 (1976)).

atic exclusion of a cognizable class of citizens or a substantive deviation between identifiable groups has resulted in the failure of the juror pool to represent a fair cross-section of the community.¹⁷⁸⁷ The Ninth Circuit has recently considered a case where the defendants challenged the procedure employed to appoint grand jury forepersons.

In *United States v. Coletta*,¹⁷⁸⁸ the defendants sought dismissal of their indictment because of alleged irregularities in the selection of grand jury forepersons. They contended that the procedure used in the Northern District of California to appoint grand jury forepersons did not require random selection, but allowed discretion in the choice of these forepersons.¹⁷⁸⁹ They claimed, therefore, that the disproportionate number of Caucasian males appointed as forepersons was an abuse of discretion and a violation of their constitutional rights.¹⁷⁹⁰ The district court held that the defendants, all Caucasian males, lacked standing to assert such a claim of discrimination against women and minorities.¹⁷⁹¹

The defendants based their challenge of the procedures employed to select grand juror forepersons on *Rose v. Mitchell*,¹⁷⁹² and claimed they had standing to raise this challenge based upon the authority of *Peters v. Kiff*.¹⁷⁹³ In *Rose*, the Supreme Court held that the black defendants who alleged systematic exclusion of blacks from appointment as forepersons of state grand juries could state a claim under the equal protection clause.¹⁷⁹⁴ In *Peters*, the Court held that a white defendant had standing to challenge the system used to select his grand or petit jury on the ground that it arbitrarily excluded blacks from service.¹⁷⁹⁵

The Ninth Circuit accepted the district court's position that the defendants lacked standing to challenge the selection procedures for grand jury forepersons.¹⁷⁹⁶ The court stated that the defendants' theory that *Peters* granted them standing to seek dismissal of their indictment based on *Rose* failed to distinguish the constitutional bases of the two cases.¹⁷⁹⁷ It first explained that the defendant in *Peters* had alleged a due process violation, and thus under *Peters*, the defendants did have

1787. 579 F.2d at 1133.

1788. 682 F.2d 820 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1187 (1983).

1789. *Id.* at 822-23.

1790. *Id.* at 823.

1791. *Id.*

1792. 443 U.S. 545 (1979).

1793. 407 U.S. 493 (1972).

1794. 443 U.S. at 556.

1795. 407 U.S. at 504.

1796. 682 F.2d at 822-24.

1797. *Id.* at 823.

standing to challenge the selection procedures as due process violations.¹⁷⁹⁸ The court held, however, that the defendants' allegations were insufficient to state a claim under the due process clause.¹⁷⁹⁹ It noted that while there might be some circumstances under which systematic discrimination in the choice of forepersons would so imperil the integrity of the jury system that the resulting indictments and convictions would be fundamentally unfair, the defendants had failed to show such prejudice. The court held the defendants' arguments "failed to suggest how the selection of one person, serving on a correctly constituted panel, could have a significant impact on the basic fairness of the process."¹⁸⁰⁰

The court also held that the defendants had no standing under *Rose* to challenge the selection of forepersons as an equal protection violation.¹⁸⁰¹ It held that, because the defendants were not members of any group excluded from the foreperson selection process, they had experienced "no injury to their personal rights to equal protection" and therefore lacked standing to assert the equal protection rights of those who may have been excluded.¹⁸⁰²

2. Number of grand jurors in attendance

Relying on the fifth amendment and the Federal Rules of Criminal Procedure,¹⁸⁰³ the Ninth Circuit held in *United States v. Leverage Funding Systems, Inc.*¹⁸⁰⁴ that an indictment is valid if: (1) the grand jury returning the indictment consisted of between sixteen and twenty-three jurors; (2) every grand jury session was attended by at least sixteen jurors; and (3) at least twelve jurors voted to indict.¹⁸⁰⁵ It is not mandated that every juror voting to indict attend every session.¹⁸⁰⁶

1798. *Id.* at 823-24.

1799. *Id.* at 824.

1800. *Id.*

1801. *Id.* In *Rose*, the Court stated that for a defendant to challenge a grand juror selection procedure, he must "show that the procedure employed resulted in substantial underrepresentation of *his* race or of the identifiable group to which *he* belongs." 443 U.S. at 565 (quoting *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) (emphasis added)).

1802. 682 F.2d at 824 (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1974); *Halet v. Wend Investment Co.*, 672 F.2d 1305, 1308 (9th Cir. 1982)).

1803. FED. R. CRIM. P. 6(a) provides: "(a) The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement." FED. R. CRIM. P. 6(f) provides in pertinent part: "(f) An indictment may be found only upon the concurrence of 12 or more jurors"

1804. 637 F.2d 645 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).

1805. *Id.* at 648, 649.

1806. *Id.*

These requirements were at issue in several recent Ninth Circuit cases.

In *United States v. Godoy*,¹⁸⁰⁷ only ten of the seventeen grand jurors voting to return the indictment attended all the evidentiary sessions. Relying on the district court's decision in *Leverage Funding*,¹⁸⁰⁸ Godoy contended that the remaining seven grand jurors were not "legally qualified" to vote the return of the indictment because they were not fully informed. He argued therefore, that his indictment was invalid because it was not returned "upon the concurrence of 12 or more jurors," as required by Federal Rule of Criminal Procedure 6(f).¹⁸⁰⁹ The Ninth Circuit, noting it had reversed the district court in *Leverage Funding*, simply held that the indictment satisfied the criteria set forth in *Leverage Funding* and was therefore valid.¹⁸¹⁰

In *United States v. Barker*,¹⁸¹¹ the defendant was convicted of assault on a federal officer, deprivation of civil rights, making false statements to the Immigration and Naturalization Service, and perjury before a grand jury. Barker moved to dismiss the indictment on the ground that only eighteen grand jurors voting the indictment had attended all the evidentiary sessions. Barker acknowledged the holding in *Leverage Funding*,¹⁸¹² but asserted that a different result is warranted when the grand jury considers a charge of perjury. He contended a perjury charge rests on the grand jurors' determination of the credibility of other witnesses; therefore each grand juror must observe the demeanor of those witnesses to weigh the evidence properly.¹⁸¹³

The Ninth Circuit stated that *Leverage Funding* requires a presumption that a grand juror who votes to indict has heard sufficient evidence.¹⁸¹⁴ The court thus presumed "in the absence of contrary evidence, that the grand jurors voting to indict here heard all the evidence on the perjury counts they were required to hear in order to perform their duties properly."¹⁸¹⁵ The court thus did not decide whether a different rule, requiring that each grand juror voting to indict hear spe-

1807. 678 F.2d 84 (9th Cir. 1981).

1808. 478 F. Supp. 799 (C.D. Cal. 1979), *rev'd*, 637 F.2d 645 (9th Cir. 1980).

1809. 678 F.2d at 86. *See supra* note 1803.

1810. 678 F.2d at 86. Similarly, in *United States v. Mayes*, 670 F.2d 126 (9th Cir. 1982), the defendant moved to dismiss his indictment because only eleven grand jurors voting the indictment attended every session. The Ninth Circuit stated that the resolution of this issue was controlled by *Leverage Funding* and held the indictment valid. *Id.* at 129.

1811. 675 F.2d 1055 (9th Cir. 1982).

1812. *See supra* notes 1804-05 and accompanying text.

1813. 675 F.2d at 1057-58.

1814. *Id.* at 1058 (citing *United States v. Leverage Funding Systems, Inc.*, 637 F.2d 645, 649 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981)).

1815. 675 F.2d at 1058.

cific witnesses, is necessary in cases involving allegations of perjury before the grand jury.

These decisions demonstrate the absence of a requirement in the Ninth Circuit that the twelve or more jurors voting the indictment comprise part of the sixteen jurors at every evidentiary session. It is possible, therefore, that even in perjury cases, where witness credibility is at issue, some of the jurors voting to indict did not observe important witness demeanor evidence. However, because imposing rigid guidelines on grand jury procedure would impede its ability to "ferret out and charge wrongdoers,"¹⁸¹⁶ and because the defendant has an opportunity to test the government's evidence at trial, the Ninth Circuit logically accords more weight to the importance of the grand jury's function than to the minimal harm to the defendant in these types of cases.

3. Grand jury instructions

Before the grand jury decides whether to return an indictment on the evidence presented, the prosecuting attorney may direct the grand jury in matters of procedure, or read the statutes upon which the indictment is to be founded.¹⁸¹⁷ The prosecuting attorney may not advise the grand jury as to questions of law affecting the rights of the accused, or as to the weight and sufficiency of the evidence.¹⁸¹⁸ However, because "an indictment . . . valid on its face . . . is enough to call for trial on the charge on the merits,"¹⁸¹⁹ an indictment may stand even though the grand jury has been given allegedly improper instructions.¹⁸²⁰ The Ninth Circuit has recently reaffirmed this rule.

In *United States v. Wright*,¹⁸²¹ the defendant challenged his conviction for tax evasion, contending that the indictment was returned by a grand jury which had been erroneously instructed on a material aspect of the law by the prosecuting attorney.¹⁸²² The Ninth Circuit first

1816. *United States v. Trass*, 644 F.2d 791, 795-96 (1981). See also *United States v. Calandra*, 414 U.S. 338, 343-46 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 687-88 (1972).

1817. 1 L. ORFIELD, *CRIMINAL PROCEDURE UNDER THE FEDERAL RULES* § 6.21 at 384 (1966) [hereinafter cited as ORFIELD, *CRIMINAL PROCEDURE*].

1818. *Id.*

1819. *Costello v. United States*, 350 U.S. 359, 363 (1956).

1820. ORFIELD, *CRIMINAL PROCEDURE* § 6.21 at 384.

1821. 667 F.2d 793 (9th Cir. 1982).

1822. *Id.* at 796. Wright had been charged with income tax evasion. The grand jury was instructed by the prosecutor that it could infer that an increase in net worth was attributable to taxable income which should have been reported. Wright, relying on *Holland v. United States*, 348 U.S. 121 (1954), argued that the instruction was improper because the government must prove that an increase in net worth was attributable to a likely source of taxable income. He conceded that the grand jury was correctly instructed by an expert witness, but

noted that an indictment is not subject to dismissal unless the prosecutor's conduct was flagrant to the point of deceiving the grand jury, significantly infringing on its ability to exercise independent judgment.¹⁸²³ The court noted that the grand jury in this case was completely informed on the permissible presumptions and inferences that it could draw from the evidence, and on all the elements of the case that the Government had to prove.¹⁸²⁴ The court therefore concluded that the prosecutor's conduct neither significantly infringed on the grand jury's ability to exercise its independent judgment,¹⁸²⁵ nor significantly deceived the grand jury.¹⁸²⁶ Therefore, it held that the trial court did not err in refusing to dismiss the indictment.¹⁸²⁷

4. Grand jury secrecy

Federal Rule of Criminal Procedure 6(e) generally imposes a cloak of secrecy upon grand jury proceedings, forbidding disclosure of matters occurring before the grand jury for any purpose other than to assist the prosecuting attorney.¹⁸²⁸ The reasons for grand jury secrecy are:

- (1) To prevent the escape of those whose indictment may be contemplated;
- (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
- (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it;
- (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
- (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of

contended that there is a significant distinction between instructions by the prosecutor and testimony by a government witness. 667 F.2d at 796.

1823. *Id.* (citing *United States v. Cederquist*, 641 F.2d 1347, 1352-53 (9th Cir. 1981)).

1824. 667 F.2d at 796. The grand jury had also been thoroughly informed about the effects of non-taxable income. *Id.*

1825. *Id.* (citing *United States v. Cederquist*, 641 F.2d at 1353).

1826. 667 F.2d at 796 (citing *United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978)).

1827. 667 F.2d at 796.

1828. FED. R. CRIM. P. 6(e)(3)(B) provides that "[a]ny person to whom matters are disclosed . . . shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law"

standing trial where there was no probability of guilt.¹⁸²⁹

The Ninth Circuit has recently considered the need for grand jury secrecy in a situation involving the examination of secret grand jury materials by an expert witness. In *United States v. Mayes*,¹⁸³⁰ the defendant was convicted of involuntary manslaughter for the asphyxiation death of his ten month old daughter. Mayes contended that the indictment against him should have been dismissed because Dr. Chadwick, an expert witness, examined secret grand jury materials before testifying to the grand jury on the cause of death.¹⁸³¹

The Ninth Circuit determined that allowing Dr. Chadwick to examine transcripts of witness testimony and other evidence was far more "expeditious and reliable" than requiring the Government to use the facts surrounding the child's death to pose a complex hypothetical question. The court concluded that because Dr. Chadwick examined these secret materials under court supervision, sufficient safeguards had existed to prevent abuse of the procedure.¹⁸³² It therefore held that the district court did not abuse its discretion by authorizing disclosure of these materials under Federal Rule of Criminal Procedure 6(e)(3)(C)(i),¹⁸³³ which provides that a court may order disclosure of grand jury materials "preliminarily to or in connection with a judicial proceeding."¹⁸³⁴

The Ninth Circuit again demonstrated in *Mayes* the higher priority it places on expediency and reliability rather than on procedures which may encumber the grand jury process.

B. Indictments

1. Challenges to the face of the indictment

Every defendant in a criminal prosecution has an inalienable right "to be informed of the nature and cause of the accusation"¹⁸³⁵ against

1829. *United States v. Proctor & Gamble*, 356 U.S. 677, 681-82 n.6 (1958) (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)).

1830. 670 F.2d 126 (9th Cir. 1982).

1831. *Id.* at 128-29.

1832. *Id.* at 129.

1833. FED. R. CRIM. P. 6(e)(3)(C)(i) provides that "[d]isclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made . . . when so directed by a court preliminarily to or in connection with a judicial proceeding"

1834. 670 F.2d at 129. The court stated that it was unnecessary to decide whether a grand jury proceeding is a "judicial proceeding" under Rule 6(e), as grand jury proceedings are clearly at least preliminary to a judicial proceeding. *Id.* (citing *United States v. Stanford*, 589 F.2d 285, 292 (7th Cir. 1978)).

1835. U.S. CONST. amend. VI.

him. A primary function of the indictment is to fulfill this notice requirement.¹⁸³⁶ In *Russell v. United States*,¹⁸³⁷ the Supreme Court formulated the test by which the adequacy of an indictment is to be measured. First, the indictment must contain the elements of the offense to be charged and must sufficiently apprise the defendant of what he must be prepared to meet at trial.¹⁸³⁸ Second, the indictment must allow the defendant to plead a bar to future prosecution for the same offense.¹⁸³⁹ The Ninth Circuit recently considered challenges to the faces of indictments, both on their content and on their form.

For instance, in *United States v. Gilman*,¹⁸⁴⁰ the defendants challenged the content of their indictment for the inclusion of certain factual allegations. The *Gilman* defendants were convicted of mailing obscene material and of conspiracy. They contended that certain overt acts listed in the conspiracy count of the indictment contained prejudicial information which should have been stricken.¹⁸⁴¹

The Ninth Circuit held that the overt acts listed were relevant and properly included in the indictment because they were necessary elements of the crime of conspiracy.¹⁸⁴² Further, the Government was entitled to prove the conspiracy by introduction of probative evidence, regardless of the defendants' willingness to stipulate.¹⁸⁴³

In *Douglas v. Long*,¹⁸⁴⁴ the defendant was convicted in an Arizona court of unlawfully offering to sell narcotic drugs. On appeal after denial of a petition for habeas corpus, Douglas challenged the form of the indictment against him. The indictment charged him with one count of offering to sell narcotic drugs, or, in the alternative, with one count of obtaining money by false or fraudulent pretenses. Douglas contended that the grand jury should have charged him with one count *and* an-

1836. *Russell v. United States*, 369 U.S. 749, 763, 765 (1962).

1837. *Id.* at 763-64.

1838. *Id.* at 763, 765.

1839. *Id.* at 764.

1840. 684 F.2d 616 (9th Cir. 1982).

1841. *Id.* at 622. The acts listed were that: (1) one of the defendants used the San Francisco Redevelopment Agency facilities at least once to print order forms for obscene magazines; and that (2) the defendants offered for sale obscene magazines containing photographs taken at one defendant's home. *Id.*

1842. *Id.* (citing *United States v. Kalama*, 549 F.2d 594, 595-96 (9th Cir. 1976), *cert. denied*, 429 U.S. 1110 (1977); *United States v. Satterfield*, 548 F.2d 1341, 1346 (9th Cir. 1977), *cert. denied*, 439 U.S. 840 (1978)). The essential elements of conspiracy are: (1) an agreement to accomplish an illegal objective coupled with one or more overt acts in furtherance of that objective; and (2) the requisite intent to commit the underlying substantive offense or offenses. *United States v. Melchor-Lopez*, 627 F.2d 886, 890 (9th Cir. 1980).

1843. 684 F.2d at 622. *Cf.* *United States v. Durcan*, 539 F.2d 29, 30-31 (9th Cir. 1976).

1844. 661 F.2d 747 (9th Cir.) (per curiam), *cert. denied*, 456 U.S. 932 (1982).

other, not with one count *or* another.¹⁸⁴⁵ He further contended that the indictment was improper because it stated that the charges in the two counts were mutually exclusive alternatives.¹⁸⁴⁶

The Ninth Circuit acknowledged the usual rule forbidding alternative or inconsistent charges within a single count.¹⁸⁴⁷ It explained that if a jury returns a single verdict on a count charging mutually exclusive offenses, it becomes impossible to determine which charge the jury sustained. Review, therefore, is difficult or impossible.¹⁸⁴⁸ The court then held that the usual rule does not extend to cases where the inconsistent charges are made in separate counts.¹⁸⁴⁹ The court reasoned that the indictment gave Douglas adequate notice of the charges against him,¹⁸⁵⁰ since the two charges merely covered two plausible interpretations of his actions.¹⁸⁵¹ The court stated that Douglas was further protected because he could not have been convicted of both offenses.¹⁸⁵² Finally, the court noted that Douglas could not have been prejudiced by the two counts being connected by the word "or," since use of this connective could only have "emphasize[d] to the jury that [Douglas] could not be found guilty on both counts."¹⁸⁵³

1845. *Id.* at 748. Douglas argued that his case was distinguishable from *Fuller v. United States*, 407 F.2d 1199, 1222 (D.C. Cir. 1968) (en banc), *cert. denied*, 393 U.S. 1120 (1969). In *Fuller*, according to Douglas, the prosecutor charged the defendant with premeditated murder and felony murder in separate counts of an indictment; however, Douglas continued, the *Fuller* court did not permit the defendant to be charged with having committed one crime *or* another. 661 F.2d at 748.

1846. *Id.* at 749. The court noted that Douglas apparently accepted the propriety of charging alternate offenses to allow for contingencies in proof. *Id.* at 748 (citing *Sutton v. United States*, 434 F.2d 462, 473 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971)).

1847. 661 F.2d at 749 (citing *United States v. Donovan*, 339 F.2d 404, 406-07 (7th Cir. 1964), *cert. denied*, 380 U.S. 975 (1965); *State v. Fowler*, 174 Ohio St. 362, 189 N.E.2d 133 (1963)).

1848. 661 F.2d at 749 (citing *In re Bell*, 19 Cal. 2d 488, 499-500, 122 P.2d 22, 29 (1942); 2 WHARTON'S CRIMINAL PROCEDURE § 291 & n.19).

1849. 661 F.2d at 749.

1850. *Id.* (citing U.S. CONST. amend. VI).

1851. 661 F.2d at 749. The court stated that such an indictment gives "no less notice than one that appends a lesser included offense, where intent is at issue and a conviction may not be had for both crimes." *Id.* *Cf.* *United States v. Gaddis*, 424 U.S. 544, 547-50 (1976).

1852. 661 F.2d at 749. The court noted that this case was similar to the Supreme Court's hypothetical in *United States v. Gaddis*, 424 U.S. 544, 550 (1976). The *Gaddis* Court explained that if a person participated in a bank robbery and then received proceeds from the robbery, it is obviously appropriate for a grand jury to return an indictment charging both robbery and receiving. If the trial judge is satisfied that sufficient evidence is presented to go to the jury on both counts, the judge must instruct the jurors that they may not convict the defendant on both counts. 424 U.S. at 550 (citing *Heffin v. United States*, 358 U.S. 415 (1959); *Milanovich v. United States*, 365 U.S. 551 (1961)).

1853. 661 F.2d at 749. Judge Hoffman, in a special concurrence, stated that he concurred in the opinion because the case involved a matter of state procedure, approved by the Ari-

In *United States v. Williams*,¹⁸⁵⁴ the defendant was convicted on seven counts of making false statements in the acquisition of firearms. Williams had purchased seven guns on five separate occasions and had made a false statement on the form that he filled out for each gun. He contended that, because there were fewer than seven offenses, certain of the seven counts in the indictment should have been dismissed.¹⁸⁵⁵

The Ninth Circuit upheld the district court's refusal to dismiss any of the counts. The court stated that successive acts, no matter how close in time, are separate offenses.¹⁸⁵⁶ The court concluded that since Williams made a false statement in connection with each gun, he was correctly indicted on seven counts.¹⁸⁵⁷

In *United States v. Mehrmanesh*,¹⁸⁵⁸ the defendant was convicted of two counts of distribution of heroin in violation of 21 U.S.C. section 841(a)(1).¹⁸⁵⁹ The first count arose from the delivery of a heroin sample by Mehrmanesh's associates to a Government informant; the second count was based on a later delivery of the balance of the heroin. Mehrmanesh was sentenced to a separate prison term on each count.

On appeal, Mehrmanesh argued that he should have been sentenced on only one count. The court rejected this argument and held that the double jeopardy clause of the Constitution was inapplicable, reasoning that the clause applies only where the same act gives rise to two offenses and not where, as in *Mehrmanesh*, two different acts are alleged.¹⁸⁶⁰

Mehrmanesh also argued that the distribution of the sample to the informant was part of a single transaction whereby all the heroin was distributed, and that the first count was therefore multiplicitous and

zона state courts, which did not raise a federal constitutional question. He stressed, however, that alternative counts in an indictment are not necessarily entitled to the "same consideration in a federal criminal action," and repeated the majority's statement that "inconsistent charges with a count have long since been condemned." *Id.* at 750 (Hoffman, J., concurring). Noting that alternative relief is not provided for in the Federal Rules of Criminal Procedure, although it is under Rule 8(a) of the Federal Rules of Civil Procedure, he concluded that, unless modified by statute or the Federal Rules of Criminal Procedure, he would not "sanction alternative charges in an indictment under the federal system." *Id.*

1854. 685 F.2d 319, 320 (9th Cir. 1982).

1855. *Id.* at 320.

1856. *Id.* at 321 (citing *Blockburger v. United States*, 284 U.S. 299 (1932)).

1857. 685 F.2d at 321.

1858. 682 F.2d 1303 (9th Cir. 1982).

1859. 21 U.S.C. § 841(a)(1) (1976) provides that "(a) . . . [i]t shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . ."

1860. 682 F.2d at 1305 (distinguishing *Gore v. United States*, 357 U.S. 386 (1958), and *Blockburger v. United States*, 284 U.S. 299 (1932)).

should have been dismissed.¹⁸⁶¹ He relied on *United States v. Ferguson*,¹⁸⁶² where the court construed 26 U.S.C. section 4705(a), a predecessor to the Act under which Mehrmanesh was convicted, to require conviction on a per-sale or per-purchase basis.¹⁸⁶³ The *Mehrmanesh* court held that the two deliveries constituted separate offenses under section 841(a)(1),¹⁸⁶⁴ relying in part on the statutory definition of a "distribution" as a delivery of a controlled substance.¹⁸⁶⁵ The court further noted that the Act reaches not only buyers and sellers, but all participants in the chain of distribution,¹⁸⁶⁶ and reasoned that to limit offenses under the Act to discrete purchases or sales would be unreasonable in view of the broad scope of possible defendants.¹⁸⁶⁷

2. Adequacy and competency of evidence

The Supreme Court has held that when a duly constituted grand jury returns an indictment valid on its face, no independent inquiry may be made into the nature of the evidence supporting the indictment.¹⁸⁶⁸ The Ninth Circuit therefore accords substantial deference to the judgment of grand juries as to the adequacy and competency of the evidence presented to them.¹⁸⁶⁹ Thus, dismissal of indictments is required only in "extreme situations"¹⁸⁷⁰ or "flagrant cases."¹⁸⁷¹ The

1861. 682 F.2d at 1305.

1862. 498 F.2d 1001 (D.C. Cir.), cert. denied, 419 U.S. 900 (1974).

1863. *Id.* at 1009.

1864. *Mehrmanesh*, 682 F.2d at 1307.

1865. *Id.* See 21 U.S.C. § 802(11) (1976) (defining "distribution") and 21 U.S.C. § 802(8) (1976) (defining "delivery" as a transfer of a controlled substance).

1866. 682 F.2d at 1306 (citing *United States v. Pruitt*, 487 F.2d 1241, 1245 (8th Cir. 1973)).

1867. *Id.*

1868. *Costello v. United States*, 350 U.S. 359, 364 (1956). In *Costello*, the Court held as valid an indictment based exclusively on hearsay evidence. The Court stated:

If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury . . . is enough to call for trial of the charges on the merits.

Id. at 363.

1869. *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974) (citing *Costello v. United States*, 350 U.S. 359 (1956)). In *Basurto*, the defendant was convicted of conspiring to import and distribute marijuana. The Ninth Circuit acknowledged the general rule that, when a duly constituted grand jury returns an indictment that is valid on its face, no independent inquiry may be made to determine the kind of evidence considered by the grand jury in making its decision. The *Basurto* court, however, reversed the defendant's conviction because the indictment was based on perjured testimony which was both material to the case and known to the Government as being perjured. *Id.* at 787.

1870. *United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978).

Ninth Circuit recently considered cases in which indictments were challenged on grounds that the evidence supporting them was inadequate and incompetent.

In *United States v. Tham*,¹⁸⁷² the defendant argued that the indictment charging him with embezzlement of union funds and with false entries on union records should have been dismissed by the district court because the Government failed to provide the grand jury with certain information. The Government had alleged that Tham spent union funds entertaining various friends, including Aladana (Jimmy) Fratianno, for purposes unrelated to union business.¹⁸⁷³ Tham contended that his expenditures were permitted by the union's bylaws, and that the Government therefore should have read the bylaws to the grand jury. Tham further argued that the Government should have presented evidence of Fratianno's lack of credibility, and should have presented Fratianno's testimony live, rather than by means of a transcript of earlier grand jury testimony.¹⁸⁷⁴

The Ninth Circuit reiterated that ordinarily, there will be no independent inquiry into the kind of evidence presented to the grand jury.¹⁸⁷⁵ The court concluded that Tham's contentions were meritless.¹⁸⁷⁶ This was not an extreme situation, such as when a prosecutor knowingly presents perjured testimony; therefore, the grand jury need not be advised of all matters concerning a witness's credibility.¹⁸⁷⁷

Similarly, in *United States v. Eden*,¹⁸⁷⁸ the defendant contended that the trial court erred in refusing to compel the Government to present exculpatory evidence to the grand jury. Eden was indicted and convicted of embezzlement and conversion of government funds and concealing material facts from the Department of Health, Education

1871. *Id.* In *Thompson*, the defendant appealed his conviction for forging the name of a payee on a United States treasury check. He contended that the indictment against him should have been dismissed because the grand jury was never told of the payee's affidavit, which conceivably might have borne on the payee's credibility. The court stated:

The contention is without merit. The grand jury need not be advised of all matters bearing on the credibility of potential witnesses. Dismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way, as where perjured testimony has knowingly been presented. There is nothing shocking to the conscience in the circumstances here.

Id. at 786.

1872. 665 F.2d 855 (9th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982).

1873. *Id.* at 857.

1874. *Id.* at 862-63.

1875. *Id.* at 863 (citing *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974)).

1876. 665 F.2d at 863.

1877. *Id.* (citing *United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978)).

1878. 659 F.2d 1376 (9th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982).

and Welfare.¹⁸⁷⁹ Prior to trial, he voluntarily submitted to a polygraph examination. The trial court, according to Eden's argument, should have required that the results be presented to the grand jury; Eden argued that such a procedure would have been a proper exercise of the court's supervisory power to prevent Government impropriety in grand jury investigations.¹⁸⁸⁰

The Ninth Circuit upheld the exclusion, relying on the *Thompson* rule¹⁸⁸¹ that a grand jury need not be provided with all information bearing on the credibility of potential witnesses.¹⁸⁸² Therefore, under the *Thompson* "flagrant case" standard, the trial court did not abuse its discretion in refusing to compel the Government to present evidence which was later determined to be inadmissible anyway.¹⁸⁸³

In *United States v. Garner*,¹⁸⁸⁴ the defendant challenged the indictment charging her with wire fraud on the ground that the trial court had denied her motion to inspect certain grand jury attendance records. She contended that the disclosure was necessary to show that a quorum of the grand jurors voting to return the indictment had not directly heard the evidence supporting the indictment.¹⁸⁸⁵

The Ninth Circuit held that the district court did not abuse its discretion in denying Garner's motion.¹⁸⁸⁶ Examination of the record showed that the jurors who voted to indict were provided a complete transcript of all testimony previously taken, as well as testimony summarizing the transcripts. The court noted that the prosecution need not present live testimony if it provides complete transcripts.¹⁸⁸⁷ Thus, since Garner had not shown any impropriety in the indictment,¹⁸⁸⁸ and since the trial court had ordered disclosure of all testimony taken by the grand jury, Garner's motion was properly denied.

In *United States v. Traylor*,¹⁸⁸⁹ the defendants contended that the

1879. *Id.* at 1377.

1880. *Id.* at 1382.

1881. *See supra* notes 1870-71.

1882. *Id.* (citing *United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978)).

1883. 659 F.2d at 1382.

1884. 663 F.2d 834 (9th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982).

1885. *Id.* at 840.

1886. *Id.*

1887. *Id.* (citing *United States v. Chanen*, 549 F.2d 1306, 1311 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977)).

1888. 663 F.2d at 840. The court noted that an indictment will be upheld if "(1) the grand jury returning the indictment consisted of between 16 and 23 jurors, (2) every grand jury session was attended by at least 16 jurors, and (3) at least 12 jurors vote to indict." *Id.* (quoting *United States v. Leverage Funding Systems, Inc.*, 637 F.2d 645, 649 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981)).

1889. 656 F.2d 1326 (9th Cir. 1981).

indictment charging them with various drug-related offenses, including conspiracy, was supported by the perjured testimony of a key Government witness.¹⁸⁹⁰ The Ninth Circuit let the indictment stand, although the witness admitted at trial that he had made certain false statements before the grand jury, because the statements were immaterial.¹⁸⁹¹ The discrepancies between the witness's grand jury and trial testimony did not alter the defendants' alleged involvement in the conspiracy, and therefore did not require dismissal of the indictment.¹⁸⁹²

These Ninth Circuit decisions demonstrate the deference accorded a grand jury indictment in even the most extreme cases. There exist, however, countervailing policies. For example, no person should be made to stand trial on the basis of unfounded accusations. But the necessity of bringing wrongdoers to trial, and the assurance that the trial jury will examine the indictment and explore the credibility of witnesses, appear to outweigh these policies.

3. Time delays

a. pre-indictment delay

Section 3282 of title 18, United States Code, provides that a person shall not be prosecuted for any non-capital offense unless an indictment is instituted within five years after the offense is committed.¹⁸⁹³ This five year statute of limitations represents a balance of the government's need for sufficient time to discover and investigate crime and the defendant's right to avoid perpetual liability for past offenses.¹⁸⁹⁴ However, Congress also provided in section 3290 of title 18 that no statute of limitations shall extend to any person fleeing from justice.¹⁸⁹⁵

In *United States v. Gonsalves*,¹⁸⁹⁶ the Ninth Circuit considered whether the five year statute of limitations tolled on a federal indictment during a period of the defendant's flight from justice on an unrelated federal indictment in another jurisdiction. In 1980 Gonsalves was indicted in San Diego for his involvement, five years and fifty-six days

1890. *Id.* at 1334.

1891. *Id.* (citing *United States v. Bracy*, 566 F.2d 649, 654 (9th Cir. 1977), *cert. denied*, 439 U.S. 818 (1978); *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974)).

1892. 656 F.2d at 1334.

1893. 18 U.S.C. § 3282 (1976) provides: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

1894. *United States v. DiSantillo*, 615 F.2d 128, 135 (3d Cir. 1980).

1895. 18 U.S.C. § 3290 (1976).

1896. 675 F.2d 1050 (9th Cir.), *cert. denied*, 103 S. Ct. 83 (1982).

earlier, in an aborted scheme to import hashish from Lebanon. The district court rejected the Government's contention that the statute of limitations tolled on the San Diego indictment because Gonsalves was fleeing from an unrelated 1976 indictment in Las Vegas, and dismissed the San Diego indictment.¹⁸⁹⁷

The Ninth Circuit reversed and remanded, stating that it was "unable to reconcile the district court's restrictive reading of [section] 3290 with the statute's unqualified language that 'no' statute of limitations shall extend to 'any' person fleeing from justice."¹⁸⁹⁸ Noting that when an accused flees from justice, he thwarts all federal law enforcement authorities from uncovering facts essential to any prosecution impending against him,¹⁸⁹⁹ the court construed section 3290 to deny the benefits of all statutes of limitations to a person fleeing from justice in any federal jurisdiction.¹⁹⁰⁰

Gonsalves also argued that the Government had not proved that he fled from prosecution under the Las Vegas indictment so as to toll the statute of limitations on the San Diego indictment.¹⁹⁰¹ Since the statute of limitations is an affirmative defense, he reasoned, the Government's burden under section 3290 was to prove every element beyond a reasonable doubt.¹⁹⁰² Gonsalves also argued that the statute of limitations tolled because he had made a good faith effort to surrender to the Las Vegas authorities and, thus, as a matter of law could not be found to have "fled from justice" on the Las Vegas indictment.¹⁹⁰³

Because the Ninth Circuit determined that the statute of limitations defense was unrelated to the issue of guilt, it held that the proper burden under the tolling statute was a preponderance of the evidence.¹⁹⁰⁴ The court noted that where a defendant raises an affirmative defense relevant to the issue of guilt, the prosecution must disprove each element beyond a reasonable doubt. The rationale for this rule is to avoid factual errors and unreliable verdicts.¹⁹⁰⁵ However, a lower standard of proof on a statute of limitations issue would not affect a

1897. *Id.* at 1052.

1898. *Id.*

1899. *Id.* at 1053 (citing *United States v. Wazney*, 529 F.2d 1287, 1289 n.1 (9th Cir. 1976)).

1900. 675 F.2d at 1052.

1901. *Id.* at 1053. In order to take advantage of § 3290, the Government must prove that the defendant knew he was wanted and failed to submit to arrest. *United States v. Ballesteros-Cordova*, 586 F.2d 1321, 1323 (9th Cir. 1978).

1902. 675 F.2d at 1053.

1903. *Id.* at 1054-55.

1904. *Id.* at 1054.

1905. *Id.*

verdict's reliability.¹⁹⁰⁶ In this regard, the court noted that the defense would be able to argue that the evidence relating to the statute of limitations issue was too old to be probative, and that the trial court should exclude stale evidence.¹⁹⁰⁷ The court determined that in Gonsalves' case a finding should be made based on the preponderance of the evidence on the issue of whether Gonsalves had fled from the Las Vegas charges for more than 56 days, thereby tolling the statute of limitations.¹⁹⁰⁸

The court, however, agreed in part with Gonsalves' second argument, holding that the statute would not be tolled if a defendant who has notice of an arrest warrant outstanding against him makes a good faith effort to surrender. The court reasoned that the requisite intent to flee from justice is absent in such a situation.¹⁹⁰⁹ The court determined, however, that Gonsalves' record did not, as a matter of law, show a good faith effort to surrender, and therefore remanded the case to the district court for the necessary findings of fact.¹⁹¹⁰

b. post-indictment delay

Federal Rule of Criminal Procedure 48(b) provides that a court may dismiss an indictment, information, or complaint for unnecessary delay in bringing a defendant to trial.¹⁹¹¹ This rule grants district courts much discretion, however, and dismissal of an indictment is not mandatory unless the defendant's constitutional speedy trial rights are violated by the delay.¹⁹¹² The Ninth Circuit recently examined whether a post-indictment delay resulting from a Government appeal warranted dismissal of an indictment.

1906. *Id.*

1907. *Id.*

1908. *Id.*

1909. *Id.* at 1055.

1910. *Id.* This issue can be raised even if the Government has filed the indictment within the statute of limitations. In *United States v. Wilder*, 680 F.2d 59 (9th Cir. 1982) (*per curiam*), the defendant was convicted of tax evasion. He appealed on a number of grounds, including error by the district court in denying his motion to dismiss the indictment for unreasonable delay between the time of his offense and the indictment. The Ninth Circuit held that Wilder's arguments were frivolous because he had neither shown that the Government deliberately delayed his prosecution, nor that he had been prejudiced by the delay. *Id.* at 60 (citing *United States v. Marion*, 404 U.S. 307, 325 (1971); *United States v. Cederquist*, 641 F.2d 1347, 1351 (9th Cir. 1981); *United States v. Mills*, 641 F.2d 785, 788 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981); *United States v. Nixon*, 634 F.2d 306, 310 (5th Cir.), *cert. denied*, 454 U.S. 828 (1981)).

1911. FED. R. CRIM. P. 48(b).

1912. *United States v. Edwards*, 577 F.2d 883, 887 n.1 (5th Cir.), *cert. denied*, 439 U.S. 968 (1978).

In *United States v. Booth*,¹⁹¹³ the district court dismissed a robbery indictment against the defendant pursuant to Federal Rule of Criminal Procedure 48(b). The Government had appealed the district court's pretrial order suppressing certain evidence. Because the Government failed to show that the evidence suppressed by the district court was substantial proof of a material fact, the district court ruled that the Government's appeal unnecessarily delayed the trial.¹⁹¹⁴

On appeal, the Ninth Circuit stated that the Government's appeal of a suppression order is proper under 18 U.S.C. section 3731 if it meets three conditions: (1) the defendant has not been placed in jeopardy; (2) the appeal has not been taken for purposes of delay; and (3) the evidence suppressed is substantial proof of a fact material in the proceeding.¹⁹¹⁵ The court determined that Booth had not been placed in jeopardy, that the delay of trial was necessary to permit the Government to exercise its section 3731 appeal, and that some of the suppressed evidence was substantial proof of the Government's case.¹⁹¹⁶ It therefore held that the district court had erred in dismissing the indictment, especially in light of the broad construction to be given to the Government's right to appeal under section 3731.¹⁹¹⁷

Indictments may also be dismissed pursuant to the Speedy Trial Act,¹⁹¹⁸ which requires that trial be commenced within seventy days (1) after the filing of an indictment or (2) after the defendant appears

1913. 669 F.2d 1231 (9th Cir. 1981).

1914. *Id.* at 1241.

1915. *Id.* (citing *United States v. Loud Hawk*, 628 F.2d 1139, 1150 (9th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980)). *Loud Hawk* involved a multi-count indictment charging the defendants with possessing firearms and dynamite. The trial court suppressed the dynamite, and the Government appealed under § 3731. The trial court then dismissed the entire indictment with prejudice. The Ninth Circuit reversed and remanded to the district court the counts of the indictment related to dynamite possession. The court found that the defendants had not yet been placed in jeopardy, and that the delay was necessary to permit the Government to exercise its right to appeal under § 3731. The court concluded that the delay caused by the appeal was not "unnecessary" under Rule 48(b) because the suppressed dynamite was necessary evidence for the Government's case. *Id.* at 1150.

1916. 669 F.2d at 1241. Some of the suppressed evidence was identification testimony necessary to identify Booth as one of the robbers. *Id.*

1917. *Id.* (citing *United States v. Humphries*, 636 F.2d 1172, 1175 (9th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981)). In *United States v. Saavedra*, 684 F.2d 1293 (9th Cir. 1982), the defendant contended that the court should have dismissed her indictment pursuant to Federal Rule of Criminal Procedure 48(b) due to a three and one half week delay between the impaneling of the jury and the beginning of the trial. The Ninth Circuit, however, held that the court's refusal to dismiss the indictment was not an abuse of discretion because Saavedra's constitutional speedy trial rights had not been violated. *Id.* at 1297.

1918. 18 U.S.C. §§ 3161-3174 (1976 & Supp. V 1981).

before a judicial officer, whichever is later.¹⁹¹⁹ The Speedy Trial Act also provides that, in cases where the defendant is to be retried after an appeal or a collateral attack, the trial shall commence within seventy days after the action resulting in retrial becomes final.¹⁹²⁰ The Ninth Circuit recently considered the application of both provisions to defendants' argument for dismissal of their indictments.¹⁹²¹

In *United States v. Ross*,¹⁹²² the defendants were convicted of attempted extortion. They earlier had been convicted of attempted bank robbery and conspiracy to commit bank robbery, but those convictions had been reversed because they had been improperly charged. The superseding indictment charging the defendants with attempted extortion was delivered shortly after the reversal of the bank robbery convictions, but just one week before the filing of the mandate in the vacated convictions. The defendants contended that their indictments should have been dismissed because the Government violated the Speedy Trial Act.¹⁹²³

The Ninth Circuit stated that it was unclear which section of the Speedy Trial Act applied to the defendants' case. The defendants argued that their extortion trial was untimely under the "new case" provision¹⁹²⁴ because it occurred more than seventy days after their first appearance before a judicial officer on the bank robbery charges, and that their extortion trial was untimely under the "retrial" provisions¹⁹²⁵

1919. 18 U.S.C. § 3161(c)(1) (Supp. V 1981). Section 3161(c)(1) provides in part:

In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

1920. 18 U.S.C. § 3161(e) (Supp. V 1981). Section 3161(e) provides in part:

If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical.

1921. See *Saavedra*, 684 F.2d at 1297. In *Saavedra*, the Ninth Circuit deemed it unnecessary to determine whether the delay in Saavedra's trial exceeded the time limits prescribed by the Speedy Trial Act since Saavedra did not make any claims based on the Act at trial; her motion to dismiss was based solely on her constitutional speedy rights. When an issue is not raised at trial, it cannot be raised on appeal except in very exceptional situations, not present in Saavedra's case, "wherein it appears to be necessary in order to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process." *Id.* (quoting *United States v. Wysong*, 528 F.2d 345, 348 (9th Cir. 1976)).

1922. 654 F.2d 612 (9th Cir. 1981), cert. denied, 455 U.S. 926 (1982).

1923. *Id.* at 614-15.

1924. 18 U.S.C. § 3161(c)(1) (Supp. V 1981). See *supra* note 1919.

1925. 18 U.S.C. § 3161(e) (Supp. V 1981). See *supra* note 1920.

because it occurred more than seventy days after the date of the filing of the decision reversing their bank robbery convictions. The court rejected these arguments. It stated that if the extortion trial was treated as a new case, it was only necessary that the trial occur less than seventy days after the defendant's appearance on the extortion charges.¹⁹²⁶ It further stated that if the extortion trial was treated as a retrial, it was necessary only that the trial occur less than seventy days after the date the mandate was issued.¹⁹²⁷ The court therefore held that there was no violation of the Speedy Trial Act, and that the trial court did not err in its refusal to dismiss the defendants' indictments.¹⁹²⁸

These decisions reflect the Ninth Circuit's general reluctance to dismiss indictments due to post-indictment delays. In fact, unless factors such as the three conditions articulated in *Booth* are present, or there is a substantial delay in the commencement of trial such that the defendant's constitutional rights to a speedy trial are violated, the court will not dismiss an indictment or reverse a conviction.

4. Variances

Variances between an indictment and the proof occur when the evidence offered at trial proves facts varying from the acts charged in the indictment. A variance will not require reversal of a conviction unless it affects the substantial rights of the parties.¹⁹²⁹ The Ninth Circuit recently decided several cases in which the defendants claimed that the proof offered at trial fatally varied from the crimes charged in the indictments.

In *United States v. Kaiser*,¹⁹³⁰ the defendants were convicted of conspiracy to distribute heroin, possessing heroin with intent to dis-

1926. 654 F.2d at 615.

1927. *Id.* at 616 (citing *Sethy v. Alameda County Water Dist.*, 602 F.2d 894, 897 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980); FED. R. APP. P. 40 & 41).

1928. 654 F.2d at 616. The defendants also challenged their convictions on the basis that the grand jury and the district court lacked jurisdiction over either the extortion indictment or the trial. They argued that the district court lost jurisdiction when the appeal on the bank robbery conviction was filed and did not regain it until the mandate was issued. According to their argument, the district court did not have jurisdiction of the second action because the second indictment was issued before the mandate. The Ninth Circuit rejected this argument, stating that the two indictments and trials involved completely different offenses, and that the Government was therefore free to pursue an indictment for attempted extortion. The court stressed that although the extortion indictment was labeled "superseding," it actually was a new indictment. The grand jury and district court therefore had jurisdiction. *Id.* at 615.

1929. *United States v. Durades*, 607 F.2d 818, 819 (9th Cir. 1979) (citing *United States v. Friedman*, 593 F.2d 109, 116 (9th Cir. 1979)).

1930. 660 F.2d 724 (9th Cir. 1981), *cert. denied*, 455 U.S. 956 (1982).

tribute, distributing heroin, and violating the Travel Act.¹⁹³¹ Defendants Remsing and Schafer challenged their conspiracy convictions on grounds that the evidence offered at trial was insufficient to support their convictions and that the facts proved fatally varied from the crimes charged in the indictment.¹⁹³² They asserted that the Government (1) failed to prove that they were part of any conspiracy, or failed to connect the other defendants to the conspiracy, if one existed, (2) failed to prove a conspiracy lasting five years, and (3) proved multiple conspiracies rather than the single conspiracy for which they were indicted.¹⁹³³ The defendants also challenged their convictions under the Travel Act on the ground that the evidence showed only isolated instances of proscribed interstate travel, rather than the continuous course of criminal conduct required for a conviction under that statute.¹⁹³⁴

Although the Ninth Circuit reversed the conspiracy convictions of these defendants on other grounds,¹⁹³⁵ it nonetheless addressed the claims of variance because those claims were framed within allegations of insufficient evidence which, if true, might invoke double jeopardy protections against retrial.¹⁹³⁶ With respect to the conspiracy challenges, the court held that the evidence was sufficient to convict Remsing and Schafer.¹⁹³⁷ The court then found that the other variances alleged by the defendants were not fatal, as they did not affect the defendants' substantial rights.¹⁹³⁸ Prejudice is not shown every time the government fails to connect one or more of the defendants to a conspiracy; and, in fact, convictions of multiple conspirators have been upheld where the convictions of some co-conspirators have been reversed.¹⁹³⁹

1931. 660 F.2d at 728; 18 U.S.C. § 1952(a)(2) and § 1952(a)(3) (1976).

1932. 660 F.2d at 730.

1933. *Id.*

1934. *Id.* at 731. The Travel Act, 18 U.S.C. § 1952, forbids interstate travel to further unlawful "business enterprises" involving narcotics or controlled substances. Conviction requires a continuous course of criminal conduct rather than sporadic or casual involvement in a proscribed activity. *Id.* (citing *United States v. Donaway*, 447 F.2d 940, 944 (9th Cir. 1971) (placing one bet for a co-defendant did not constitute a continuous course of criminal conduct)).

1935. 660 F.2d at 731. The reversal was based on certain evidentiary errors.

1936. 660 F.2d at 730.

1937. *Id.* (citing *United States v. Melchor-Lopez*, 627 F.2d 886, 890 (9th Cir. 1980)). The court stated that the standard of review is whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 660 F.2d at 730 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)).

1938. 660 F.2d at 730.

1939. *Id.* (citing *United States v. Peterson*, 549 F.2d 654, 657 (9th Cir. 1977)).

The court concluded that, because the testimony pertaining to three other defendants who were acquitted on the conspiracy count did not relate to or implicate Remsing and Schafer, there was no reason to assume that their rights had been prejudiced by the possibility of guilt transference.¹⁹⁴⁰ The court also noted that the alleged variance between the duration of the conspiracy charged and that proven was unfounded; the indictment merely charged that the conspiracy began "within the last five years."¹⁹⁴¹ Finally, the court found that because there was no evidence of multiple conspiracies, there was no variance between the number of conspiracies charged and proven.¹⁹⁴²

With respect to the Travel Act challenges, the Ninth Circuit held that the evidence was sufficient to prove that Remsing and Schafer had violated the Act.¹⁹⁴³ It stated that the Act requires only that the business enterprise promoted by the defendants during their interstate travel be continuous, not that the travel itself be continuous.¹⁹⁴⁴ The evidence of the defendants' repeated sales of heroin and of their travels on four occasions across state lines to pursue these activities was enough to compel the conclusion that Remsing and Schafer had engaged in a continuous course of criminal conduct in violation of the statute.¹⁹⁴⁵

In *United States v. Brock*,¹⁹⁴⁶ the defendants were convicted of manufacturing methamphetamine and of conspiring to possess with intent to manufacture and distribute methamphetamine.¹⁹⁴⁷ The defendants had been arrested after DEA agents observed on three occasions the defendants' co-conspirator picking up the chemicals used in manufacturing methamphetamine. The defendants contended that the indictment only charged them with a conspiracy relating to one of the chemical pickups, while testimony at trial revealed that the different chemical pickups involved at least two distinct conspiracies.¹⁹⁴⁸ They

1940. 660 F.2d at 730 (citing *Kotteakos v. United States*, 328 U.S. 750 (1946); *United States v. Kenny*, 645 F.2d 1323 (9th Cir. 1981), *cert. denied*, 454 U.S. 828 (1982)).

1941. 660 F.2d at 730.

1942. *Id.*

1943. *Id.* at 731.

1944. *Id.*

1945. *Id.*

1946. 667 F.2d 1311 (9th Cir. 1982) (amended opinion), *cert. denied*, 103 S. Ct. 2012 (1983).

1947. *Id.* at 1313.

1948. *Id.* at 1313-16. After the first drug pickup surveillance was terminated. Surveillance following the second pickup revealed that drugs were delivered to defendants' cabin. Defendants argued that this series of events constituted one conspiracy. Surveillance after the third drug pickup showed that drugs were delivered to a group of motor homes in a state park. After that delivery, defendants as well as those individuals who had picked up the

therefore argued that they were prejudiced by the transfer of guilt from the conspiracy not charged to the one that was charged.¹⁹⁴⁹

The Ninth Circuit held that both chemical pickups were within the scope of the conspiracy charged in the indictment,¹⁹⁵⁰ and concluded that the jury easily could have inferred that the activities in question were all part of a continuing conspiracy. The court stated that the existence of potential subgroups to a conspiracy does not negate the existence of a single conspiracy.¹⁹⁵¹ Finally, the court emphasized that the defendants had not even asked for a multiple conspiracy instruction at trial since it had not been a theory of their defense.¹⁹⁵²

In *United States v. Hazeem*,¹⁹⁵³ the defendant was convicted of conspiracy and aiding and abetting the purloining and misapplication of bank funds. Hazeem contended on appeal that he was prejudiced by a variance between the amounts of money charged in the indictment as having been purloined and the amounts proved at trial.¹⁹⁵⁴ Hazeem claimed that the trial court had limited a co-conspirator's crime to the purloining of the money she actually received, rather than to the purloining of the full amount shared by Hazeem and his two co-conspirators; therefore, Hazeem's crime also should have been limited to the amount he actually received.¹⁹⁵⁵

The Ninth Circuit held that the trial court had not made the determination alleged by Hazeem and that the jury had not been instructed to limit his co-conspirator's crime; therefore, there was no variance.¹⁹⁵⁶ It further held that any variance, if it occurred, would have constituted

drugs were arrested. Defendants argued that this latter event constituted the second conspiracy.

1949. *Id.* The defendants relied for their argument on *Kotteakos v. United States*, 328 U.S. 750, 773-74 (1946) ("failure to demonstrate the existence of a rim [in a multiple wheel-type conspiracy] made obvious the prejudice to the defendant which results from proof of criminal acts committed by those not a party to the defendant's illegal activity") and *United States v. Durades*, 607 F.2d 818, 820 (9th Cir. 1979) ("proof of multiple conspiracies when single conspiracy charged requires reversal where prejudice is obvious").

1950. 667 F.2d at 1316-17. The court stated that although the only acts alleged in the indictment related to the last chemical pickup before the defendants' arrest on April 7, 1978, the conspiracy was alleged to have begun "on or about January 1, 1978." *Id.* at 1316. Therefore, the other chemical pickup in question, which occurred on March 27, was clearly within the scope of the indictment. *Id.* at 1317.

1951. *Id.* at 1317 (citing *United States v. Zemek*, 634 F.2d 1159, 1167 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981)).

1952. 667 F.2d at 1317 (citing *United States v. Kenny*, 645 F.2d 1323, 1337 (9th Cir. 1981), *cert. denied*, 454 U.S. 828 (1982)).

1953. 679 F.2d 770 (9th Cir.), *cert. denied*, 103 S. Ct. 106 (1982).

1954. *Id.* at 772.

1955. *Id.* at 773.

1956. *Id.*

harmless error because the indictment was sufficiently explicit to notify Hazeem of the charges against him and to protect him from double jeopardy.¹⁹⁵⁷

In *United States v. Coleman*,¹⁹⁵⁸ the defendant was convicted of robbing a savings and loan association in violation of section 2113(a).¹⁹⁵⁹ Thereafter, Coleman filed a motion for a judgment of acquittal, contending that the indictment charged her with robbing a federally chartered institution while the proof at trial showed that the institution was federally insured.¹⁹⁶⁰

The Ninth Circuit stated that the indictment should be liberally construed because Coleman did not object until after trial.¹⁹⁶¹ It then held that because section 2113(a) provides for federal jurisdiction if the savings and loan institution is either federally chartered *or* federally insured, the indictment was adequate.¹⁹⁶² The court stated that the reference to the statute in the indictment sufficiently clarified the indictment so as to enable Coleman to prepare her defense and to plead a former conviction to a subsequent indictment for the same offense.¹⁹⁶³

1957. *Id.* at 773-74 (citing FED. R. CRIM. P. 52(a); *United States v. Anton*, 547 F.2d 493, 496 (9th Cir. 1976)).

1958. 656 F.2d 509 (9th Cir. 1981).

1959. *Id.* at 510. 18 U.S.C. § 2113(a) proscribes the robbery of a "savings and loan association," which is defined in 18 U.S.C. § 2113(g) as any "Federal savings and loan association" and any "insured institution" as defined in § 401 of the National Housing Act, as amended." The National Housing Act definition includes institutions insured by the Federal Savings and Loan Insurance Corporation (FSLIC).

1960. 656 F.2d at 510. The indictment charged Coleman with robbing the Pacific First Federal Savings and Loan Association, in violation of 18 U.S.C. § 2113(a). The trial court determined that the word "Federal" in the name of the savings and loan association was enough to allege that the institution was federally chartered, but not federally insured. The Government, however, introduced evidence that this savings and loan association was insured by the FSLIC. *Id.*

1961. *Id.* (citing *United States v. Pheaster*, 544 F.2d 353, 360-61 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977)).

1962. 656 F.2d at 511. The court analogized the case to *Head v. United States*, 364 F. Supp. 29, 31 (W.D. Wash. 1973). The court there rejected the defendant's challenge that his sentence should be set aside because the indictment to which he had pled guilty provided adequate notice even though it failed to allege that the deposits of a bank were insured by the FDIC. It held that the defendant had been apprised of the essential elements of the offense and was not prejudiced by the wording of the indictment. 364 F. Supp. at 31.

The *Coleman* court also cited *Gearing v. United States*, 432 F.2d 1038, 1041 (5th Cir. 1970), *cert. denied*, 401 U.S. 980 (1971), for the general principle that "[w]hile it is often true that the choice of language controls the validity of the indictment . . . , inclusion in it of the statutory citation provides a means by which a defendant can inform himself of the elements of the offense." 656 F.2d at 511 (citing *United States v. Roberts*, 296 F.2d 198 (4th Cir. 1961)).

1963. 656 F.2d at 512.

In *United States v. Adkins*,¹⁹⁶⁴ the defendants were convicted of receiving kickbacks for Medicaid referrals, in violation of 42 U.S.C. section 1396h(b)(1)(A).¹⁹⁶⁵ Although the indictment charged the defendants with receiving kickbacks from a clinical laboratory in return for referring patients to that laboratory, the evidence showed that none of Adkins' patients traveled from his office to the laboratory; instead, Adkins himself sent blood and urine specimens to the laboratory.¹⁹⁶⁶

The Ninth Circuit, relying on *United States v. Stewart Clinical Laboratory, Inc.*,¹⁹⁶⁷ held that there was insufficient evidence to support the defendants' convictions.¹⁹⁶⁸ In *Stewart*, the court held that an indictment charging the *payment* of kickbacks in return for referring patients to a laboratory could not support a conviction based on the referral of laboratory work to that laboratory.¹⁹⁶⁹ The *Adkins* court stated that because the only difference between *Stewart* and this case was that between the *payment* of kickbacks and the *receipt* of kickbacks, it was bound in this case by the decision in *Stewart*.¹⁹⁷⁰

In all of the above cases, except *Adkins*, the Ninth Circuit liberally construed the indictments in question and found that the evidence of the defendants' activities fell within the parameters set forth in the indictments and the statutes violated. Minor or technical deficiencies in the indictments did not prejudice the defendants. The variances therefore were "harmless errors" and did not affect "substantial rights."

In *Adkins*, however, the Ninth Circuit summarily reversed the defendants' convictions, relying heavily on *Stewart*. In so doing, the court neglected to address the issue of whether the variance affected the defendants' substantial rights. Accordingly, the court focused on the distinction between referring medical patients and referring medical services, an approach that incorporates a more narrow construction of the relevant statute than that applied in *Kaiser*, *Brock*, *Hazeem*, and *Coleman*. *Adkins* would have been more consistent with general Ninth Circuit law if the majority had adopted Judge Schroeder's dissenting

1964. 683 F.2d 1289 (9th Cir. 1982) (per curiam).

1965. *Id.* at 1289. 42 U.S.C. § 1396h(b)(1)(A) (Supp. III 1979) provides in part:

Whoever . . . solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind —

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this subchapter . . . shall be guilty of a felony

1966. 683 F.2d at 1289.

1967. 652 F.2d 804 (9th Cir. 1981).

1968. 683 F.2d at 1289-90.

1969. 652 F.2d at 807.

1970. 683 F.2d at 1290.

opinion in *Stewart*, where he stated: "It should make no difference whether the substance to be analyzed arrives at the defendants' premises in the bladder or in the bottle."¹⁹⁷¹

In large part these cases demonstrate the Ninth Circuit's rule that because a grand jury's purpose is to expeditiously ferret out and charge criminals, there is little room in the indictment process for grappling with minute details or technicalities in the way the indictment is framed. As long as the indictment fulfills its two-fold purpose, to give notice to the accused and to protect the accused from double jeopardy, a grand jury's indictment will invariably be upheld.

5. Vindictive prosecution

a. *pre-United States v. Goodwin*

A defendant has a fundamental right to exercise constitutional or statutory rights during criminal proceedings without suffering retaliatory or vindictive increases in the severity of the charges by the government.¹⁹⁷² Before the United States Supreme Court's recent decision in *United States v. Goodwin*,¹⁹⁷³ the Ninth Circuit applied a single standard of evaluation to appeals based on vindictive prosecution, regardless of whether the allegedly vindictive governmental actions occurred before or after trial.¹⁹⁷⁴ In either case, if the defendant showed an "appearance of vindictiveness" on the part of the prosecutor, usually in the form of a re-indictment with increased charges following the defendant's assertion of a constitutional or statutory right, the burden shifted to the prosecution to prove that it had no vindictive motive.¹⁹⁷⁵ To sustain the re-indictment, the prosecutor was required to show that his actions were "justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness."¹⁹⁷⁶ There were two reasons for placing this burden on the prosecution. The first was to protect the defendant in the present case, and the second, and perhaps more important, was to prevent a "chilling" of the exercise of rights by

1971. 652 F.2d at 808.

1972. *United States v. Burt*, 619 F.2d 831, 836 (9th Cir. 1980) (citing *United States v. Rosales-Lopez*, 617 F.2d 1349, 1357 (9th Cir. 1980), *aff'd*, 451 U.S. 182 (1981); *United States v. DeMarco*, 550 F.2d 1224, 1227 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977)).

1973. 457 U.S. 368 (1982).

1974. *United States v. Burt*, 619 F.2d at 836.

1975. *Id.*

1976. *Id.* (quoting *United States v. Griffin*, 617 F.2d 1342, 1347 (9th Cir.), *cert. denied*, 449 U.S. 863 (1980)).

future defendants.¹⁹⁷⁷

For example, in *United States v. Motley*,¹⁹⁷⁸ two defendants claimed that they were the victims of vindictive prosecution when, following a mistrial on their motion, the Government re-indicted them on different charges. Defendant Motley was originally charged with one count of violating the RICO Act, one count of conspiring to violate the RICO Act, and one count of using a firearm to commit a felony.¹⁹⁷⁹ Following the trial court's dismissal of the firearm count, Motley's possible penalty was forty years in prison and \$50,000 in fines.¹⁹⁸⁰ After Motley's mistrial motion was granted, the Government sought a superseding indictment charging four counts of possession and distribution of methamphetamine and heroin.¹⁹⁸¹ Motley's possible penalty under the new charges amounted to forty years in prison, plus a ten year enhancement for a prior conviction and \$80,000 in fines.¹⁹⁸²

Motley claimed that the possibility of ten additional years in prison and the \$30,000 additional fine created the appearance of vindictiveness which, if not dispelled by the Government, was a due process violation. The Government claimed that it would not utilize the ten-year enhancement provision unless some of the other charges against Motley were dropped, and therefore Motley was not subject to a longer prison term.¹⁹⁸³

The Ninth Circuit stated that the effect of an enhancement provision on the determination of whether a superseding indictment increases the severity of the charges was a question of first impression in the circuit. It rejected the Government's claim, stating that the enhancement provision raised the "same dangers of vindictiveness and a chilling effect on future defendants as does an indictment that is more severe on its face."¹⁹⁸⁴ The prosecutor's assertion not to use the enhancement provision was not persuasive since the Government "cannot by its own later self-restraint cure the chilling effect of its original action."¹⁹⁸⁵

1977. *United States v. DeMarco*, 550 F.2d 1224, 1227 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977).

1978. 655 F.2d 186 (9th Cir. 1981).

1979. *Id.* at 187.

1980. *Id.*

1981. *Id.*

1982. *Id.* at 188.

1983. *Id.*

1984. *Id.* at 189.

1985. *Id.* at 189 (citing *United States v. Hollywood Motor Car Co.*, 646 F.2d 384, 386-89 (9th Cir. 1981) (government's voluntary dismissal of some counts in second indictment so as

The court also noted that the enhancement provision makes it more likely that the defendant will receive the maximum sentence since the prosecutor can keep it in reserve if difficulties force the dismissal of one of the other charges.¹⁹⁸⁶ Therefore, it concluded that Motley succeeded in establishing an appearance of vindictiveness, and the Government thus bore the burden of justifying the more severe indictment.¹⁹⁸⁷ Since the Government failed to adequately justify the increased severity of the charges,¹⁹⁸⁸ the court dismissed the superseding indictment against Motley.¹⁹⁸⁹

The superseding indictment against the second defendant, Musick, did not expose him to a longer prison term, yet he also made a claim of vindictive prosecution.¹⁹⁹⁰ The original charges against him were the same as against Motley except for an additional firearm count, exposing Musick to a total possible penalty of sixty years in prison and \$50,000 in fines.¹⁹⁹¹ After the mistrial, the Government simplified its case and brought a superseding indictment on various substantive drug and firearm charges, exposing him to a penalty of thirty seven years in prison and \$55,000 in fines.¹⁹⁹² Musick did not claim that he was faced with increased penalties, but rather claimed that the simplification of the charges against him enhanced the possibility of his conviction and thus gave rise to the appearance of vindictiveness.¹⁹⁹³

to lower possible penalties to less than those in the original indictment did not cure appearance of vindictiveness), *rev'd on other grounds*, 102 S. Ct. 3081 (1982)).

1986. 655 F.2d at 189.

1987. *Id.* Because the court found an appearance of vindictiveness from the inclusion of the enhancement provision in the superseding indictment, it did not address the issue of whether the increased fine created an appearance of vindictiveness. *Id.* at n.3.

1988. *Id.* at 190. The Government claimed that the superseding indictment was justified because the trial judge had recommended that the Government simplify its case for the second trial. The Government did so by dropping the RICO and conspiracy charges, and replacing them with the substantive drug charges albeit with more severe penalties. The Ninth Circuit did not accept this justification, stating that the Government was required to justify not the change in the nature of the charges, but rather the increase in the severity of the charges. *Id.* at 189. The Government also claimed that the prosecutor who drew up the superseding indictment did not realize the possibility of a more severe penalty. The court stated that carelessness was not an acceptable justification, *id.* at 190 (citing *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1370 (9th Cir. 1976)), and that the Government must show objective factors, not merely subjective good faith. 655 F.2d at 190 (citing *United States v. Andrews*, 633 F.2d 449, 456 (6th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 927 (1981)).

1989. 655 F.2d at 190. The court declined to dismiss any of the different counts or to bar the enhancement provision, preferring to let the Government seek a new indictment which would not carry an appearance of vindictiveness. *Id.*

1990. *Id.*

1991. *Id.* at 188.

1992. *Id.*

1993. *Id.* at 190. Musick did not argue that the increased possible fine made the charges

The Ninth Circuit did not find an appearance of vindictiveness.¹⁹⁹⁴ The court stated that the simplification of charges, even if it increased the likelihood of conviction, was merely the risk a defendant faced when he moved for a mistrial.¹⁹⁹⁵ The court carefully distinguished between a case where the prosecutor reformulates the charges, increasing the chance of conviction, and a case where the prosecutor increases the severity of charges. Only the latter can create an appearance of vindictiveness.¹⁹⁹⁶

In *United States v. Bendis*,¹⁹⁹⁷ the defendants were indicted in Hawaii on various charges related to the unlawful transport of a money order. The defendants had previously been convicted in Kansas on charges arising from a similar scheme.¹⁹⁹⁸ The defendants claimed that the Hawaii indictments were filed only after their Kansas sentences were reduced upon their motions, and hence gave rise to the appearance of vindictiveness.¹⁹⁹⁹

The Ninth Circuit did not decide whether the defendants made a prima facie showing of vindictiveness, but it did determine that the Government adequately established that the reduction of sentences in Kansas played no role in initiating the Hawaii indictments.²⁰⁰⁰ In fact, because the Hawaii proceedings began before the sentences were reduced in Kansas, the court held that any appearance of vindictiveness

more severe. *Id.* at 191 n.7. Musick relied solely on *United States v. D'Alo*, 486 F. Supp. 954 (D.R.I. 1980). In *D'Alo*, the district court ruled that the reformulation of charges based on knowledge gained at a first trial which was declared a mistrial on the defendants' motion was a violation of the constitutional guarantee of due process if it increased the potential for conviction. *Id.* at 960. The *D'Alo* court relied on the holding in *Blackledge v. Perry*, 417 U.S. 21 (1974), where the Court held that a defendant was denied due process when he was charged with a felony after requesting a trial de novo, as authorized by state law, following a misdemeanor conviction.

1994. 655 F.2d at 191.

1995. *Id.* The court declined to follow the *D'Alo* court's extension of *Blackledge*, implying that a reformulation of charges after a defendant's exercise of his right gives rise to an appearance of vindictiveness only if the *severity of penalty* is increased and not the *chance of conviction*. The court, however, noted that a constitutional double jeopardy problem might arise if the prosecutor used a first trial to "test" his case and discover defense strategy, and then provoked the defendant into requesting a mistrial in order to have a better chance of conviction at a second trial. *Id.* at 191 n.6 (citing *United States v. Dinitz*, 424 U.S. 600, 611 (1976)).

1996. 655 F.2d at 191.

1997. 681 F.2d 561 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 306 (1982).

1998. *Id.* at 563.

1999. *Id.* at 568. Vindictive prosecution can arise where there are two independent prosecutor's offices involved. See *United States v. Hollywood Motor Car Co.*, 646 F.2d 384, 387 (9th Cir. 1981), *rev'd on other grounds*, 102 S. Ct. 3081 (1982).

2000. 681 F.2d at 569.

was successfully dispelled and did not dismiss the indictments.²⁰⁰¹

The *Motley* and *Bendis* cases demonstrate the two key points of a vindictive prosecution appeal as handled in the Ninth Circuit before *Goodwin*. In *Motley*, defendant Musick failed to convince the court that the simplification of charges in a superseding indictment amounted to an "appearance of vindictiveness," and his claim was rejected. The *Bendis* defendants' indictment in one state on the same charges for which they received a reduced sentence in another state might have cleared the first hurdle of an "appearance of vindictiveness," but the Government successfully dispelled the appearance, and thus the claim was also rejected. Defendant *Motley*, on the other hand, succeeded in showing an "appearance of vindictiveness" in the Government's inclusion of an enhancement provision in a superseding indictment, and the Government was unable to dispel this appearance; thus his claim was upheld.

b. *United States v. Goodwin*

In *United States v. Goodwin*,²⁰⁰² the Supreme Court ruled that no presumption of vindictiveness arose when a prosecutor reformulated charges so as to carry a more severe penalty after the defendant exercised his constitutional rights in a pretrial setting. Defendant *Goodwin* had been charged with various misdemeanor offenses, including assault, after allegedly trying to run down a federal officer with his car.²⁰⁰³ He did not appear for his scheduled trial before a magistrate and was found in custody in another state three years later.²⁰⁰⁴ On his return, he elected a jury trial in the district court.²⁰⁰⁵ Six weeks later, the prosecutor obtained an indictment charging *Goodwin* with two felony counts, including assaulting a federal officer, and two misdemeanor counts.²⁰⁰⁶ *Goodwin* was convicted on the felony count and on one related misdemeanor charge.²⁰⁰⁷

The district court denied *Goodwin*'s motion to set aside the verdict on the ground of vindictive prosecution, finding that "the prosecutor . . . [had] dispelled adequately any appearance of retaliatory intent."²⁰⁰⁸ The Fourth Circuit reversed, holding that a presumption of

2001. *Id.* (citing *United States v. Burt*, 619 F.2d 831, 837 (9th Cir. 1980)).

2002. 457 U.S. 368 (1982).

2003. *Id.* at 370.

2004. *Id.*

2005. *Id.* at 370-71.

2006. *Id.* at 371.

2007. *Id.*

2008. *Id.* The prosecutor stated that he had sought the felony indictment because:

vindictive prosecution had arisen because the circumstances surrounding the felony indictment gave rise to a genuine risk of retaliation.²⁰⁰⁹ It stated that the government is prohibited from bringing more severe charges after a defendant exercises his right to a jury trial unless it can show that those charges could not have been brought before the defendant exercised that right.²⁰¹⁰

The Supreme Court reversed the Fourth Circuit, holding that, in a pretrial setting, "a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule."²⁰¹¹ The Court first noted that in cases where action detrimental to the defendant has been taken after the exercise of a legal right, a presumption of vindictiveness has been applied only if there was a reasonable likelihood that vindictiveness existed.²⁰¹² In *North Carolina v. Pearce*,²⁰¹³ for example, the Court applied a presumption of vindictiveness because the judge had imposed a harsher sentence on retrial after the defendant successfully overturned his conviction in an initial trial.²⁰¹⁴ Similarly, in *Blackledge v. Perry*,²⁰¹⁵ the Court applied a presumption of vindictiveness because the defendant, after being convicted of a misdemeanor and exercising his statutory right to a trial de novo, was indicted and convicted on

(1) Goodwin's conduct had been such a serious violation of law; (2) Goodwin had a lengthy history of violent crime; (3) Goodwin's conduct had possibly been related to major narcotics transactions; (4) Goodwin might have committed perjury at his preliminary hearing; and (5) Goodwin had failed to appear for his original trial. *Id.*

2009. *United States v. Goodwin*, 637 F.2d 250, 253 (4th Cir. 1981).

2010. *Id.* at 254. The court noted that the Fifth and Sixth Circuits had adopted a balancing test, weighing the chilling of the defendant's rights against the exercise of prosecutorial discretion. *Id.* The key difference between the Fourth Circuit and the Fifth and Sixth Circuits was that the Fifth and Sixth Circuits allowed an investigation of the prosecutor's actual motives while the Fourth Circuit limited its inquiry to whether the charges could have been brought initially. *Id.* The Ninth Circuit's requirement that the prosecutor's actions be "justified by independent reasons or intervening circumstances," see *supra* notes 1973-77 and accompanying text, is closer to the Fifth and Sixth Circuit's balancing test than to the rather mechanical analysis of the Fourth Circuit.

2011. 457 U.S. at 384.

2012. *Id.* at 373.

2013. 395 U.S. 711 (1969).

2014. *Id.* at 726. In *Pearce*, combining cases from North Carolina and Alabama, the Court upheld the reversals of two defendants' convictions because the States had made no explanation of the reason for their increased sentences. "[T]he conclusion is inescapable that the State . . . is punishing petitioner . . . for his having exercised his post-conviction right of review . . ." *Id.* (quoting *Rice v. Simpson*, 274 F. Supp. 116, 122 (M.D. Ala. 1967), *aff'd*, 396 F.2d 499 (5th Cir. 1968), *aff'd*, 395 U.S. 711 (1969)). The Court noted that the increased sentences might have been acceptable had the record reflected "objective information concerning identifiable conduct on the part of the defendant[s] occurring after the time of the original sentence proceeding." 395 U.S. at 726.

2015. 417 U.S. 21 (1974).

felony charges.²⁰¹⁶ In *Bordenkircher v. Hayes*,²⁰¹⁷ however, the Court declined to apply a presumption of vindictiveness because the defendant, although threatened by the prosecutor during plea bargaining with the prospect of additional charges if he did not plead guilty to the initial charges, was aware of the consequences of his refusal to plead guilty and was plainly subject to prosecution on the additional charges.²⁰¹⁸

The *Goodwin* Court stated that the case at bar was similar to *Bordenkircher* in that both arose from a pretrial decision to modify charges.²⁰¹⁹ The Court then considered several reasons why the adoption of a presumption of vindictive prosecution in a pretrial setting required more caution than it did in a posttrial setting such as *Pearce* or *Blackledge*.²⁰²⁰ First, during the time period before trial but after the filing of initial charges, the prosecutor is still developing the case and may find justifiable reasons for changing the charges.²⁰²¹ In addition,

2016. *Id.* at 28-29. As in *Pearce*, there was no showing in the *Blackledge* record which justified the increased charges. *Id.* at 29 n.7. Again the Court implied that to overcome the presumption the Government would have to “[have] shown that it was impossible to proceed on the more serious charge at the outset . . .” *Id.*

2017. 434 U.S. 357 (1978).

2018. *Id.* at 364-65. *Bordenkircher*, unlike *Pearce* and *Blackledge*, involved pretrial maneuvering by the prosecutor. The Court distinguished the “‘give-and-take negotiation common in plea bargaining’” from the “unilateral imposition of a penalty upon a defendant who [has] chosen to exercise a legal right to attack his original conviction.” *Id.* at 362. The Court held that in the “give-and-take” plea negotiation atmosphere where a defendant is free to accept or reject an offer by the prosecutor, a threat to file additional charges does not constitute a due process violation. *Id.* at 365.

2019. 457 U.S. at 380. *Goodwin* attempted to distinguish *Bordenkircher* on the ground that he was not engaged in plea bargaining when the prosecutor obtained the felony indictment. He had, in fact, refused to plead guilty. *Id.* at 382 n.15. The Court, in response, stated that the basis for the defendant’s claim of vindictiveness in *Bordenkircher* was that while involved in plea negotiations the threatened increased charge was “an unjustified response to his legal right to stand trial.” *Id.* The Court implied that *Goodwin*’s position was weaker than the defendant’s in *Bordenkircher* because the only support for *Goodwin*’s allegation of vindictiveness was that the felony indictment was obtained after his request for a jury trial. *Id.*

2020. *Id.* at 380-81.

2021. *Id.* at 381. The Court recognized that the prosecutor should have broad discretion before trial to protect the “societal interest” in the prosecution. *Id.* at 382. It noted that due to limited resources prosecutorial investigations might not be complete when the initial charges are filed. *Id.* at n.14. Newly discovered information should not be rendered useless because of the prosecutor’s initial charging decision. The Court also stated that even when a prosecutor could charge all the offenses initially, that might be detrimental to defendants who “‘would bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea.’” *Id.* at 379 n.10 (quoting *Bordenkircher v. Hayes*, 434 U.S. at 368 (Blackmun, J., dissenting)). Furthermore, where a defendant accepted a plea bargain, the additional dismissed charges on the record might unnecessarily damage his reputation. 457 U.S. at 379 n.10. Thus, a prosecutor’s ini-

defendants routinely file pretrial motions during this period, and it would be unrealistic to assume that the prosecutor's actions during the same period are retaliatory or vindictively motivated.²⁰²² After trial, however, it is more likely that any changes the prosecutor makes in the charges might be "improperly motivated."²⁰²³ This improper motivation might result from the duplicative expenditures of prosecutorial resources that a second trial would entail,²⁰²⁴ or from the reluctance of the prosecutor or the judge "to do over what it thought it had already done correctly,"²⁰²⁵ or from a bias against the retrial of decided questions.²⁰²⁶

The Court also considered the nature of the right asserted by Goodwin to determine whether an increase in charges after its exercise required a presumption of vindictiveness.²⁰²⁷ Again relying on *Bordenkircher*, the Court first noted that an increase in charges after a defendant refuses to accept a plea agreement, thus in effect exercising his right to trial, does not give rise to a presumption of vindictiveness.²⁰²⁸ Goodwin, however, claimed that his request for a *jury* trial did justify the presumption that subsequent prosecutorial actions were vindictively motivated.²⁰²⁹ The Court allowed that a jury trial is more of a burden on the prosecution and judiciary than a bench trial. The jury must be selected, and testimony and argument must be more carefully prepared and controlled to avoid mistrial. However, the Court emphasized that the most important aspect of the trial, the presentation of the case by the prosecutor and the defense by the defendant, is the same whether before a judge or jury.²⁰³⁰

The Court therefore held that, considering the pretrial setting and the nature of the right asserted by the defendant, the possibility that the prosecutor's increased charges were punitive and in response to Goodwin's request for a jury trial was "so *unlikely* that a presumption of vindictiveness certainly is not warranted."²⁰³¹ The Court thus left in-

tial charging decision is dependent on a number of circumstances and "should not freeze future conduct." *Id.* at 381.

2022. *Id.* at 381.

2023. *Id.*

2024. *Id.* at 383.

2025. *Id.* (citing *Colten v. Kentucky*, 407 U.S. 104, 117 (1971)).

2026. 457 U.S. at 383.

2027. *Id.* at 382.

2028. *Id.* at 382-83. See *supra* notes 2017-18 and accompanying text.

2029. 457 U.S. at 383.

2030. *Id.*

2031. *Id.* at 384. The Court noted that it did not foreclose the possibility that a defendant could prove objectively that the prosecutor's decision was motivated by a desire to punish

tact its presumption of vindictiveness rule in a posttrial setting, but now requires, in a pretrial setting, that the defendant prove objectively the prosecutor's punitive motive.

In a concurring opinion, Justice Blackmun disagreed with the majority's distinction between pretrial and posttrial settings in a determination of a presumption of vindictiveness.²⁰³² He argued that the rule of *Blackledge*²⁰³³ and *Pearce*²⁰³⁴ applied equally to this case because the prosecutor had unilaterally added the felony charges after Goodwin's exercise of a legal right. Justice Blackmun restated from his dissenting opinion in *Bordenkircher*²⁰³⁵ that "[p]rosecutorial vindictiveness in any context is still prosecutorial vindictiveness."²⁰³⁶ Justice Blackmun thus felt that a realistic likelihood of vindictiveness had arisen, entitling Goodwin to the presumption. However, he noted that a prosecutor may add charges in a pretrial setting if the addition is based on objective information concerning the defendant's conduct after the initial charging decision or on objective information that the prosecutor could not reasonably have been aware of at the time of the initial charging decision.²⁰³⁷ He concluded that in this case the Government had set forth such information, thus dispelling the appearance of vindictiveness.²⁰³⁸

In dissent, Justice Brennan, joined by Justice Marshall, was unpersuaded by the majority's attempt to distinguish *Blackledge* from the *Goodwin* facts.²⁰³⁹ He argued that the case was not merely one of "presumptions," but rather whether the prosecutor's increase in charges presented a "realistic likelihood of vindictiveness."²⁰⁴⁰ Justice Brennan relied on the underlying policy of *Blackledge* that a defendant must be

him for exercising a legal right; however, in this case the record clearly indicated that the prosecutor had no vindictive motive. *Id.*; see *supra* note 2008.

2032. 457 U.S. at 385 (Blackmun, J., concurring).

2033. See *supra* notes 2015-16 and accompanying text.

2034. See *supra* notes 2013-14 and accompanying text.

2035. See *supra* notes 2017-18 and accompanying text.

2036. 457 U.S. at 385 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 368 (1978) (Blackmun, J., dissenting)).

2037. 457 U.S. at 386 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969)).

2038. 457 U.S. at 386. Justice Blackmun seems to advocate the adoption of a less rigorous test alluded to in *Pearce* and *Blackledge*, by which the Government can rebut a presumption of vindictiveness. See *supra* notes 2014 & 2016. In those cases, the Court implied that the appearance of vindictiveness could only be overcome if the increased charges *could not have been brought* at the time of the initial filing decision. Justice Blackmun's approach, however, is more similar to that adopted by the Fifth, Sixth, and Ninth Circuits. See *supra* notes 1973-77 & 2010 and accompanying text.

2039. 457 U.S. at 386-87 (Brennan, J., dissenting).

2040. *Id.* at 389.

protected against the fear or apprehension of retaliatory or vindictive prosecution because such fear “‘may unconstitutionally deter a defendant’s exercise’ of his rights.”²⁰⁴¹ He suggested that defendants in Goodwin’s position might be deterred from exercising their rights if faced with a possible increase in charges, and thus, there was a reasonable likelihood of vindictiveness in these circumstances.²⁰⁴²

Justice Brennan also disagreed with the majority’s characterization that the burden imposed by a defendant’s request for a jury trial is minor compared to the burden of a complete retrial.²⁰⁴³ Selection of the jury, evidentiary proceedings out of the hearing of the jury, careful preparation of witnesses and instructions, statements to avoid mistrial or reversible error, and the possibility of an “irrational” acquittal all drive the prosecutor to prefer a bench trial. Because of this prosecutorial preference, Justice Brennan concluded that an increased charge following a defendant’s request for a jury trial poses a realistic likelihood of vindictiveness.²⁰⁴⁴

Finally, Justice Brennan found the analogy between *Goodwin* and *Bordenkircher*²⁰⁴⁵ inappropriate.²⁰⁴⁶ He thought that the rule of *Bordenkircher* applied only to the narrow context of plea bargaining and that the facts in *Goodwin* plainly fit within the pattern of *Pearce*²⁰⁴⁷ and *Blackledge*²⁰⁴⁸ rather than *Bordenkircher*.

The majority’s rule that a presumption of vindictiveness should not arise from certain types of pretrial maneuvering is an attempt to strike an appropriate balance between a defendant’s constitutional rights and prosecutorial discretion and efficiency. It bears too heavily, however, on defendants’ rights. Refusing to apply a presumption of vindictiveness forces defendants to prove objectively that prosecutorial actions were improperly motivated. It might well be difficult or impossible for defense counsel to get sufficient information to raise the issue and prove the existence of such a retaliatory or vindictive motive. In fact, the Government admitted in its *Goodwin* brief that “only in a rare case would a defendant be able to overcome the presumptive validity of the prosecutor’s actions through such a demonstration.”²⁰⁴⁹

2041. *Id.* (quoting *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969)).

2042. 457 U.S. at 389-90.

2043. *Id.* at 390. See *supra* note 2021 and accompanying text.

2044. *Id.*

2045. See *supra* notes 2017-18 and accompanying text.

2046. 457 U.S. at 391.

2047. See *supra* notes 2013-14 and accompanying text.

2048. See *supra* notes 2015-16 and accompanying text.

2049. 457 U.S. at 384 n.19.

In contrast, allowing the defendant such a presumption when there is even the appearance of vindictiveness forces the prosecution to rebut by justifying its actions. When combined with a reasonably flexible standard of justification, such as the "actual motives" analysis of the Fifth and Sixth Circuits or the "justified by independent reasons or intervening circumstances" analysis of the Ninth Circuit,²⁰⁵⁰ this is not an unreasonable burden for the prosecution.

While the new rule of *Goodwin* might slightly ease the prosecutor's job and prevent some frivolous appeals, it does so at the expense of possibly allowing improperly motivated retaliatory or vindictive prosecutorial decisions to go undeterred, with the resultant chilling of defendants' rights. The Court could have accomplished much the same goal without the same sacrifice of defendants' rights simply by redefining, in a more flexible way, the burden the government must carry to rebut a presumption of vindictiveness.

c. post-United States v. Goodwin

After the Supreme Court's decision in *Goodwin*, the Ninth Circuit decided four cases which raised the issue of vindictive prosecution. In *United States v. Barker*,²⁰⁵¹ the defendant was indicted for first degree murder. Subject to a plea agreement, Barker pleaded guilty to second degree murder, but then moved to set aside her plea and conviction.²⁰⁵² The district judge set aside the conviction and vacated his order dismissing the original indictment.²⁰⁵³ Barker then pleaded not guilty to the reinstated indictment for first degree murder, and moved to dismiss the indictment, claiming vindictive prosecution.²⁰⁵⁴

The Ninth Circuit briefly dismissed Barker's contention, stating that the reinstatement of the indictment was simply the result of the court's vacating the dismissal of the indictment following Barker's first guilty plea and not due to any action of the prosecutor.²⁰⁵⁵ It noted that the reinstated indictment did not expose her to increased punishment and thus could not imply a vindictive or retaliatory motive on the

2050. See *supra* notes 1973-77 & 2010 and accompanying text.

2051. 681 F.2d 589 (9th Cir. 1982).

2052. *Id.* at 590. Barker contended that because of her limited ability in the English language, she was not adequately informed of the nature of the second degree murder charge. *Id.*

2053. *Id.*

2054. *Id.* at 592.

2055. *Id.* (citing *United States v. Johnson*, 537 F.2d 1170, 1175 (4th Cir. 1976); *United States v. Anderson*, 514 F.2d 583, 588 (7th Cir. 1975)).

part of the prosecutor.²⁰⁵⁶

In *United States v. Gallegos-Curiel*,²⁰⁵⁷ the defendant was initially charged with misdemeanor illegal entry by the Immigration and Naturalization Service (INS), which has authority to file such misdemeanor complaints for later prosecution by the United States Attorney. Gallegos-Curiel pleaded not guilty at his initial appearance.²⁰⁵⁸ After reviewing the defendant's past record, which had not been available to the INS, the Assistant United States Attorney sought and received a felony illegal entry indictment from the grand jury.²⁰⁵⁹ Gallegos-Curiel successfully moved in district court to dismiss the indictment as the product of vindictive prosecution.²⁰⁶⁰

In reversing the district court's dismissal of the indictment, the Ninth Circuit relied heavily on *Goodwin* and its predecessors.²⁰⁶¹ The court noted that the not guilty plea was entered on the same day the misdemeanor complaint was filed and the subsequent felony indictment was sought only a few days later.²⁰⁶² Thus, at such an early stage of the proceedings, the prosecutor could certainly have discovered additional facts justifying a more severe charge.²⁰⁶³ In fact, the Assistant United States Attorney did have access to Gallegos-Curiel's complete record while the INS agent who filed the initial misdemeanor charge did not.²⁰⁶⁴

The court also noted that not guilty pleas early in proceedings are routine actions much like the pretrial motions discussed by the Court in *Goodwin*.²⁰⁶⁵ Such pleas and motions are "expected as part of the adversary process,"²⁰⁶⁶ and it would not be realistic to assume that the prosecution's pretrial actions were vindictive responses.²⁰⁶⁷ The court further stated that because the entering of a plea does not in every case absolutely commit a defendant to a certain course of confrontation, and because the entering of a plea *before* trial does not require "dupli-

2056. 681 F.2d at 593. The court noted the holding in *Goodwin*, stating that even if the reinstated indictment carried more severe penalties, that alone would not give rise to a presumption of vindictiveness. *Id.* (citing *United States v. Goodwin*, 457 U.S. 368 (1982)).

2057. 681 F.2d 1164 (9th Cir. 1982).

2058. *Id.* at 1166.

2059. *Id.* at 1166-67.

2060. *Id.* at 1167. The district court acted before the Supreme Court's ruling in *Goodwin*.

2061. *Id.* at 1167-68.

2062. *Id.* at 1169.

2063. *Id.* (citing *United States v. Goodwin*, 457 U.S. at 381).

2064. 681 F.2d at 1170.

2065. *Id.*

2066. *Id.*

2067. *Id.*

cative expenditures of prosecutorial resources,"²⁰⁶⁸ there was little likelihood of vindictiveness.²⁰⁶⁹ The court ruled that, "[i]n every case alleging inferred vindictive prosecution, there must be a threshold showing of vindictiveness or the likelihood of it before the court is justified in inquiring into the prosecutor's actual motives."²⁰⁷⁰

In *United States v. Banks*,²⁰⁷¹ the Ninth Circuit also reversed a pre-*Goodwin* district court dismissal of an indictment based on allegations of vindictive prosecution. Defendant Banks was originally indicted in 1975 on five counts relating to the possession and transportation of firearms and explosives.²⁰⁷² Between 1975 and 1980, Banks challenged the indictment on evidentiary and procedural grounds until, as a result of a Ninth Circuit decision,²⁰⁷³ the Government was allowed to seek a new indictment.²⁰⁷⁴ The new indictment charged Banks with an additional count of receiving firearms while under indictment for a felony.²⁰⁷⁵ Banks challenged the new indictment on the basis of vindictive prosecution, and the district court dismissed all six counts, finding that the additional count in the new indictment gave rise to an undisputed appearance of vindictiveness.²⁰⁷⁶

On appeal, the Government contended that the dismissal of all six counts was an incorrect remedy and asked the Ninth Circuit to reinstate the first five counts.²⁰⁷⁷ The Ninth Circuit acknowledged the remedy issue raised by the Government but concluded that in light of the Supreme Court's holding in *Goodwin*, no presumption of vindictiveness was warranted.²⁰⁷⁸ After reciting the rationale from *Goodwin* for not applying a presumption of vindictiveness in a pretrial setting, the court determined that not only did the prosecutor here "clearly [have] a legitimate reason to reconsider the scope and content of the new pretrial

2068. *Id.*

2069. *Id.* Gallegos-Curiel argued that the United States Attorney would not have reviewed his record and filed the felony indictment except for his plea of not guilty. The court responded to this argument that it is the likelihood of retaliation that is crucial, not the particular sequence of events. *Id.* at 1171.

2070. *Id.* at 1169.

2071. 682 F.2d 841 (9th Cir. 1982).

2072. *Id.* at 843.

2073. *United States v. Loud Hawk*, 628 F.2d 1139 (9th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 917 (1980).

2074. 682 F.2d at 844.

2075. *Id.*

2076. *Id.*

2077. *Id.*

2078. *Id.* at 845 (citing *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1169 (9th Cir. 1982)).

indictment,"²⁰⁷⁹ but that the prosecutor had been compelled by court order to obtain a new indictment from a new grand jury.²⁰⁸⁰ The court also noted the district court's finding that "there is no evidence that the Government's action was vindictive *in fact* . . . nor did I find that the Government acted with a malicious or retaliatory motive."²⁰⁸¹ The court therefore held that the dismissal of all six counts was erroneous; however, since the Government did not contest the sixth count, it reinstated only the first five.²⁰⁸²

In *United States v. Currie*,²⁰⁸³ the Ninth Circuit re-examined and reversed its earlier decision in the same case²⁰⁸⁴ as a result of *Goodwin*. Defendant Currie was charged, by information, with a misdemeanor conversion of a stolen United States Treasury check having a value not in excess of \$100.00. After arraignment, about three weeks before the date set for trial, Currie's attorney informed the prosecution that Currie intended to go to trial. Soon thereafter, the Assistant United States Attorney informed Currie's counsel that the Government intended to seek a felony indictment for the same act under the same statute as the misdemeanor charge.²⁰⁸⁵ The Government indicated, however, that it would abandon its attempt to obtain a felony indictment if Currie were to plead guilty to the original misdemeanor charge within one week.²⁰⁸⁶ Currie refused to plead guilty, and at a pretrial hearing the district court judge dismissed the felony indictment on the ground of vindictive prosecution.²⁰⁸⁷

On appeal, the Government argued that *Bordenkircher v. Hayes*²⁰⁸⁸ allowed the "use of threatened reindictment as a bargaining chip in plea negotiations."²⁰⁸⁹ In its first ruling in this case, the Ninth

2079. 682 F.2d at 841.

2080. *Id.* at 846.

2081. *Id.*

2082. *Id.*

2083. 682 F.2d 846 (9th Cir. 1982) (per curiam).

2084. 667 F.2d 1251 (9th Cir. 1981), *vacated*, 457 U.S. 1128 (1982).

2085. *Id.* at 1252.

2086. *Id.*

2087. *Id.*

2088. 434 U.S. 357 (1978).

2089. 667 F.2d at 1252. In *Bordenkircher*, the prosecutor threatened, during plea bargaining conferences, to re-indict the defendant under a more severe habitual criminal statute if he did not plead guilty to an existent felony charge of uttering a forged instrument. The defendant did not so plead and was ultimately re-indicted and convicted on the more severe charges. 434 U.S. at 359. The Supreme Court held that due process rights were not violated if the prosecutor threatened increased charges during plea negotiations, so long as the bargaining was plainly presented, and the defendant was clearly subject to the increased charges. *Id.* at 364-65.

Circuit distinguished *Bordenkircher*, stating that there had been no plea negotiations before Currie's not guilty plea, and thus Currie had not been "fully informed of the true terms of the offer when he made his decision to plead not guilty."²⁰⁹⁰ The court noted that Currie had had no notice of the prosecutor's intent to indict him until after he had communicated to the prosecutor his intent to stand trial on the misdemeanor charge. It also noted that in *Bordenkircher* the prosecution had to prove additional facts to convict under the superseding indictment while in Currie's case essentially the same facts could sustain a conviction on either the original misdemeanor charge or the superseding felony charge.²⁰⁹¹ The court concluded that this case was within the holding of *United States v. Alvarado-Sandoval*²⁰⁹² and affirmed the district court's dismissal of the indictment on the basis of vindictive prosecution.²⁰⁹³

After this decision, Currie petitioned the Supreme Court for a writ of certiorari, which the Supreme Court granted. The Supreme Court then vacated the Ninth Circuit's judgment and remanded the case for further consideration in light of *Goodwin*.²⁰⁹⁴

On remand, the Ninth Circuit reversed and remanded the case to the district court for reinstatement of the indictment.²⁰⁹⁵ The court did note that the district court could take further evidence on the question of actual vindictiveness to determine if Currie's claim could be sustained under the more restrictive rule of *Goodwin*.²⁰⁹⁶

The holdings in the above cases clearly indicate the effect the Supreme Court's decision in *Goodwin* will have in the Ninth Circuit on a defendant's claim of vindictive prosecution in a pretrial setting. Before *Goodwin*, the events spoke for themselves; a defendant's assertion of a constitutional or statutory right, followed by a reindictment carrying more severe penalties, created the appearance of vindictiveness. This appearance of vindictiveness could only be dispelled by the prosecution showing that its actions were "justified by independent rea-

2090. 667 F.2d at 1253 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 360 (1978)).

2091. 667 F.2d at 1253.

2092. 557 F.2d 645 (9th Cir. 1977) (per curiam). In *Alvarado-Sandoval*, the defendant was arraigned on a misdemeanor, and after no guilty plea was entered, the Government sought a felony indictment. Following conviction on the felony charges, the defendant appealed on the ground of vindictive prosecution. *Id.* at 645. The court held that only the appearance of vindictiveness was required and that the defendant had met that burden. The actual motives for the Government's seeking of a felony charge were held immaterial. *Id.* at 645-46.

2093. 667 F.2d at 1253.

2094. *United States v. Currie*, 457 U.S. 1128 (1982).

2095. *United States v. Currie*, 682 F.2d at 847.

2096. *Id.*

sons or intervening circumstances."²⁰⁹⁷ This was not always an easy task as shown by the facts in *Motley*,²⁰⁹⁸ *Gallegos-Curiel*, *Banks*, and *Currie*. Now, the burden lies with the defendant to make at least a threshold showing of vindictiveness or the likelihood of it before the court will inquire into the prosecutor's actual motive.²⁰⁹⁹

d. vindictive prosecution versus selective enforcement

In *United States v. Hooton*,²¹⁰⁰ the Ninth Circuit briefly considered the applicability of a claim of vindictive prosecution in a different factual context. Defendant Hooton was convicted of engaging in the business of dealing in firearms without a federal license.²¹⁰¹ He claimed that his indictment was in retaliation for his filing civil actions against the government and a government agent, and for charges made by him against a friend of the government agent.²¹⁰²

The Ninth Circuit cogently reviewed its past holdings and repeated the pre-*Goodwin* rule that the defendant need only show the appearance of vindictiveness to shift the burden to the prosecution.²¹⁰³ It also stated that vindictive prosecution usually arises from instances of increases in the severity of charges in retaliation for a defendant's assertion of rights in an existent criminal proceeding.²¹⁰⁴

The Government claimed that the rule on vindictive prosecution should not be applied since Hooton was challenging his initial indictment rather than an increase in charges.²¹⁰⁵ It claimed that the proper rule to apply was that of selective or discriminatory enforcement, where the defendant must show "(1) that others similarly situated generally have not been prosecuted for similar conduct and (2) that his selection for prosecution was based on an impermissible ground such as race,

2097. See *supra* notes 1975-1977 and accompanying text.

2098. See *supra* notes 1978-1996 and accompanying text.

2099. See *supra* notes 2090-2096 and accompanying text.

2100. 662 F.2d 628 (9th Cir. 1981), *cert. denied*, 455 U.S. 1004 (1982).

2101. *Id.* at 630.

2102. *Id.* at 633. The Government agent was allegedly angered by these charges. *Id.*

2103. *Id.*

2104. *Id.* at 633-34 (citing *United States v. Motley*, 655 F.2d 186 (9th Cir. 1981); *United States v. Burt*, 619 F.2d 831 (9th Cir. 1980); *United States v. Griffin*, 617 F.2d 1342 (9th Cir.), *cert. denied*, 449 U.S. 863 (1980); *United States v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976)). The court noted that these cases stemmed from *North Carolina v. Pearce*, 395 U.S. 711 (1969) (trial court's reasons for imposing heavier sentence upon retrial must affirmatively appear), and *Blackledge v. Perry*, 417 U.S. 21 (1974) (indictment on increased charges following defendant's exercise of right violates due process when circumstances "pose a realistic likelihood of 'vindictiveness'"). See *supra* notes 2013-2016 and accompanying text.

2105. 662 F.2d at 634.

religion or his exercise of his right to free speech."²¹⁰⁶

The Ninth Circuit, however, determined that "the mere filing of an indictment can support a charge of vindictive prosecution."²¹⁰⁷ Nevertheless, it upheld Hooton's conviction, stating that Hooton had not shown the requisite appearance of vindictiveness.²¹⁰⁸

The Ninth Circuit in this case has blurred the previously clear line between vindictive prosecution and selective or discriminatory enforcement. The burden on the defendant was much less under the rule for vindictive prosecution, and application of that rule to a wider set of facts, such as those in *Hooton*, would have resulted in greater burdens for the prosecution. However, since the Supreme Court's holding in *Goodwin* has eliminated the presumption arising from an appearance of vindictiveness in pretrial settings, the defendant is now faced with about equal burdens in showing either vindictive prosecution or selective or discriminatory enforcement. Thus, the Ninth Circuit's holding in *Hooton* that "the mere filing of an indictment can support a charge of vindictive prosecution" will have little practical effect.

C. Identifications

In determining whether an out-of-court identification is admissible, the Ninth Circuit applies the standard set forth by the United States Supreme Court in *Simmons v. United States*.²¹⁰⁹ If an identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification,"²¹¹⁰ the identification testimony will be excluded as violative of the defendant's right to due process. However, because "reliability is the linchpin in determining the admissibility of identification testimony,"²¹¹¹ a suggestive identification procedure will not be held to violate due process if there are sufficient indicia of reliability.²¹¹²

A two step analysis is used to decide if admission of the identification testimony will result in "irreparable misidentification." First, the reliability of the identification must be determined by considering five factors set forth by the United States Supreme Court: (1) the witness'

2106. *Id.* (citing *United States v. Erne*, 576 F.2d 212 (9th Cir. 1978); *United States v. Scott*, 521 F.2d 1188 (9th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976)).

2107. 662 F.2d at 634.

2108. *Id.* The only animus Hooton had shown was that of the agent, and the agent had had no charging authority. *Id.*

2109. 390 U.S. 377, 384 (1968).

2110. *Id.* at 384.

2111. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

2112. *Id.* at 106.

opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of the witness' certainty at the confrontation; and (5) the length of time between the crime and the confrontation.²¹¹³ Second, the degree of the identification's reliability must be weighed against the "corrupting effect of the suggestive identification itself."²¹¹⁴ The Ninth Circuit has recently applied this totality of the circumstances approach to cases involving both pretrial photographic identifications and pretrial show-up identifications.

In *United States v. Hanigan*,²¹¹⁵ the defendant was convicted of aiding and abetting a robbery. Before trial, the victims had identified Hanigan from his picture in a high school yearbook as one of the persons who robbed and tortured them.²¹¹⁶ Hanigan argued that this pretrial photographic identification procedure was impermissibly suggestive because his name, which appeared under his picture in the yearbook, was the same as the name posted in front of the ranch where the victims were taken during the crime.²¹¹⁷

In applying the Supreme Court's five factors, the Ninth Circuit found sufficient indicia that the photographic identifications were reliable.²¹¹⁸ Not only were the victims held by their assailants during the daytime, the identifications were made the following day and two of the victims were positive in their identifications. The court then weighed the reliability of the identifications against the corruptive effect of any suggestiveness, and held that the identifications were admissible because they were the result of observations made at the time of the crime rather than impressions received during a suggestive procedure.²¹¹⁹

In *United States v. Booth*,²¹²⁰ the defendant was charged with bank robbery. Booth had been picked up by an officer because he appeared to match the description of one of the alleged bank robbers. He was later handcuffed and transported to the bank for a show-up identification.²¹²¹ The district court suppressed the identification testimony of

2113. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

2114. *United States v. Field*, 625 F.2d 862, 866 (9th Cir. 1980) (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)).

2115. 681 F.2d 1127 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1189 (1983).

2116. *Id.* at 1132-33.

2117. *Id.* at 1133.

2118. *Id.* (citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *Green v. Loggins*, 614 F.2d 219, 223 (9th Cir. 1980)).

2119. 681 F.2d at 1133 (citing *United States v. Field*, 625 F.2d 862, 866 (9th Cir. 1980)).

2120. 669 F.2d 1231 (9th Cir. 1981).

2121. *Id.* at 1234.

three eyewitnesses who viewed Booth at the show-up because it found the procedure highly suggestive. There were no exigent circumstances requiring Booth to be handcuffed and taken back to the bank for the show-up.²¹²²

The Ninth Circuit stated that a show-up is a permissible means of identification, regardless of a showing of exigency.²¹²³ It also determined that the district court had applied the wrong standard because the test was not whether there was a likelihood of misidentification or whether the overall circumstances resulted in a fair identification. Rather, the correct analysis was whether, under the totality of the circumstances, the show-up procedure was so impermissibly suggestive as to give rise to the strong probability of an irreparable misidentification.²¹²⁴ Therefore, the court remanded the case to the district court for application of the appropriate standard.²¹²⁵

In *United States v. Hammond*,²¹²⁶ the defendant was convicted of bank robbery. Hammond had been arrested after a bank teller observed him in the bank's parking lot and reported that he looked like the man who had robbed the bank the previous week. Two of the tellers who witnessed the robbery identified Hammond as the bank robber at a show-up identification in which Hammond stood outside the bank and the tellers observed him through the bank's window. On appeal, Hammond argued that the identification testimony resulting from the show-up procedure should have been suppressed because it was the product of an unconstitutional show-up identification.²¹²⁷

The Ninth Circuit held that, in light of the Supreme Court's five factors, the identifications were reliable.²¹²⁸ The court stated that the two tellers' identifications were particularly reliable because of the opportunity and length of time they had to observe the robber at the time of the crime, and their degree of attention.²¹²⁹ It acknowledged that

2122. *Id.* at 1239.

2123. *Id.* (citing *United States v. Williams*, 626 F.2d 697, 703 (9th Cir.), *cert. denied*, 449 U.S. 1020 (1980); *United States v. Coades*, 549 F.2d 1303, 1305 (9th Cir. 1977)).

2124. 669 F.2d at 1239 (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968); *United States v. Field*, 625 F.2d 862, 865 (9th Cir. 1980)).

2125. 669 F.2d at 1239.

2126. 666 F.2d 435 (9th Cir. 1982).

2127. *Id.* at 437.

2128. *Id.* at 439-40 (citing *Manson v. Brathwaite*, 432 U.S. 98, 114-16 (1977)). The Court reiterated in *Manson* the factors it established in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

2129. 666 F.2d at 440. It was the robber's suspicious manner which caused one of the tellers to activate the bank's surveillance cameras. When the robber entered the bank for the first time, he remained several minutes, left, and then returned five to fifteen minutes later.

there was little evidence that the tellers had provided prior descriptions of the robber,²¹³⁰ but stated that this did not preclude a determination of reliability.²¹³¹ Finally, the court stated that the tellers' levels of certainty were high enough to be reasonably reliable,²¹³² and that a time lapse of one week between the robbery and identification was not long enough to indicate unreliability.²¹³³

These decisions demonstrate that the Ninth Circuit determines the reliability of identification testimony on a case-by-case basis, because of the need to apply the Supreme Court's five factors to the particular facts of each case. Even though these factors were formulated for cases involving suggestive photographic identifications, the Ninth Circuit applies them in cases involving suggestive show-up identifications and line-up identifications,²¹³⁴ as well as to cases involving photographic identifications.

D. Bail

A defendant in a federal criminal case may be released from custody before trial, during trial, before sentencing or pending appeal, on his personal recognizance or by the execution of an appearance bond. Such release is governed by Federal Rule of Criminal Procedure 46 and Federal Rule of Appellate Procedure 9, in accordance with the Bail Reform Act of 1966, and is subject to the eighth amendment prohibition on excessive bail.²¹³⁵

At this time, he looked around the bank as though he were trying to determine how many employees were on duty. *Id.*

2130. *Id.* In an attempt to bolster its reliability argument, the Government introduced the descriptions of the robber given by the witnesses at trial. However, these descriptions were clearly irrelevant to the determination of reliability because they may have been based on the witnesses' observations of Hammond at the show-up, rather than on their observations of the robber at the time of the commission of the crime. *Id.* at 440 n.2.

2131. *Id.* at 440.

2132. *Id.* One teller testified that she had positively identified Hammond at the show-up, while the other teller stated that she thought she knew Hammond was the perpetrator. *Id.* at 440 n.3.

2133. *Id.* at 440 (citing *United States v. Williams*, 596 F.2d 44, 49 (2d Cir.), *cert. denied*, 442 U.S. 946 (1979)).

2134. *See Foster v. California*, 394 U.S. 440 (1969).

2135. U.S. CONST. amend. VIII states that "[e]xcessive bail shall not be required." The Ninth Circuit briefly addressed this issue in *United States v. Wilder*, 680 F.2d 59 (9th Cir. 1982) (*per curiam*). Wilder appealed his tax offense conviction on numerous grounds which the Ninth Circuit characterized as frivolous, unreasonable and vexatious. *Id.* at 60-61. One of Wilder's claims was that the trial court abused its discretion by imposing a \$10,000 cash bond pending appeal. The Ninth Circuit dismissed his claim, stating, without authority, that Wilder waived his right to such an appeal by not raising it in a motion to modify the bond conditions, but rather waiting to raise it on appeal. *Id.* at 61.

1. "Bail jumping"

A defendant who willfully fails to appear after being released on bail may be subject to forfeiture of the bail and prosecution for "bail jumping" under 18 U.S.C. section 3150.²¹³⁶

In *United States v. Burns*,²¹³⁷ the Government appealed the district court's dismissal of Burns' indictment for "bail jumping," brought when Burns failed to appear for sentencing following his conviction of a tax offense. Burns was initially indicted for the tax offense and was issued a summons under Federal Rule of Criminal Procedure 4(a).²¹³⁸ He was present in court "on summons," after arraignment, and again after conviction, when he was allowed "to leave based on the summons and to return" for sentencing. When he did not appear for sentencing, a bench warrant was issued. He later surrendered and was indicted for violation of 18 U.S.C. section 3150.²¹³⁹

Burns contended in the district court that he had not been released pursuant to 18 U.S.C. section 3146;²¹⁴⁰ therefore, he could not be indicted under section 3150. The district court dismissed the indictment,

2136. 18 U.S.C. § 3150 (1976) provides:

Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required, shall subject to the provisions of the Federal Rules of Criminal Procedure, incur a forfeiture of any security which was given or pledged for his release, and, in addition, shall, (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal or certiorari after conviction of any offense, be fined not more than \$5,000 or imprisoned not more than five years, or both, or (2) if he was released in connection with a charge of misdemeanor, be fined not more than the maximum provided for such misdemeanor or imprisoned for not more than one year, or both, or (3) if he was released for appearance as a material witness, shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

2137. 667 F.2d 781 (9th Cir.) (per curiam), *cert. denied*, 456 U.S. 1010 (1982).

2138. *Id.* at 782. FED. R. CRIM. P. 4(a) provides:

If it appears from the complaint, or from the affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

2139. 667 F.2d at 782.

2140. 18 U.S.C. § 3146(a) (1976) provides in pertinent part:

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose . . . conditions of release which will reasonably assure the appearance of the person for trial

holding that at the time Burns failed to appear, his status was that of a fugitive rather than a person released under section 3146.²¹⁴¹

The Ninth Circuit reversed, stating that while it was true that Burns became a fugitive after the bench warrant was issued, the section 3150 indictment was for a failure to appear before the bench warrant was issued.²¹⁴² The court reasoned that although the district court did not explicitly cite section 3146 in allowing Burns' release before sentencing, it must have been pursuant to that section because after conviction the court could only have released him pursuant to section 3146 or have detained him.²¹⁴³ Since Burns was informed of the terms of his release and the consequences of a failure to reappear at the appointed time, the court concluded that Burns was released on personal recognizance under section 3146.²¹⁴⁴

2. Bond forfeiture

A defendant in a noncapital case may be released from custody before trial on his personal recognizance, or by the execution of an appearance bond in an amount specified by a judicial officer accompanied by certain conditions of release.²¹⁴⁵ If a defendant breaches a condition of his bond, the district court must declare a forfeiture of the bail.²¹⁴⁶ However, the court has discretion to either set aside²¹⁴⁷ or remit²¹⁴⁸ the forfeiture.²¹⁴⁹ In determining whether to set aside or remit a

2141. 667 F.2d at 782. The district court relied on the Ninth Circuit's earlier ruling in *United States v. Castaldo*, 636 F.2d 1169 (9th Cir. 1980). In *Castaldo*, the defendant was initially released pursuant to 18 U.S.C. § 3146, then failed to appear at a hearing, and forfeited bond. After *Castaldo* failed to appear at a second hearing, he was indicted for violating 18 U.S.C. § 3150. In dismissing the indictment, the Ninth Circuit held that at the time of nonappearance at the second hearing, *Castaldo* was a fugitive and therefore no longer released pursuant to § 3146. *Id.* at 1172.

2142. 667 F.2d at 782. This distinguished Burns from *Castaldo*, who was indicted for failure to appear *after* the bench warrant was issued and hence was a fugitive not released under § 3146.

2143. *Id.* at 783. The Ninth Circuit noted that the only statutory authority for post-conviction release is 18 U.S.C. § 3148, which provides in part that "[a] person . . . who has been convicted of an offense . . . shall be treated in accordance with the provisions of section 3146."

2144. 667 F.2d at 783.

2145. 18 U.S.C. § 3146(a). *See supra* note 2140.

2146. FED. R. CRIM. P. 46(e)(1) states that "[i]f there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail."

2147. FED. R. CRIM. P. 46(e)(2) states that "[t]he court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture."

2148. FED. R. CRIM. P. 46(e)(4) states that "[a]fter entry of such judgment [of default on the bond], the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision."

forfeiture, the trial court may consider: the willfulness of the breach; the participation of the bondsman in the arrest; the cost, inconvenience, and prejudice to the government; explanations or mitigating factors presented by the defendant;²¹⁵⁰ the appropriateness of the amount of the bond; and whether the sureties were professionals, or family or friends.²¹⁵¹ The trial court's determination will be reversed only upon a showing of abuse of discretion, with the burden of proof on the defendant.²¹⁵² The Ninth Circuit recently reviewed two cases where sureties were denied a setting aside or remission of a forfeiture following the defendants' breach of bond conditions.

In *United States v. Castaldo*,²¹⁵³ bonding companies who were sureties for the defendant contended that the trial court abused its discretion by not setting aside or remitting a bond forfeiture after the defendant failed to appear at a post-conviction hearing, and not holding an evidentiary hearing on the motion to set aside or remit the forfeiture.²¹⁵⁴ They further contended that the forfeiture would have a chilling effect on bond companies, which would inhibit them from assisting defendants in exercising their constitutional right to bail.²¹⁵⁵

In upholding the trial court's rulings, the Ninth Circuit noted that the defendant's breach was willful, that the sureties took no part in apprehending the defendant, and that the Government incurred considerable expense during its 170-day search for the defendant.²¹⁵⁶ It further noted that there were no mitigating factors present, and that the bonding companies were experienced professionals aware of the risks involved in bonding the defendant. The court rejected the argument concerning an evidentiary hearing, noting that the sureties never requested an evidentiary hearing and that the affidavits submitted to the trial court contained sufficient evidence for its decision.²¹⁵⁷ Finally, the

2149. *United States v. Stanley*, 601 F.2d 380, 382 (9th Cir. 1979) (per curiam).

2150. *Id.* at 382. In *Stanley*, the defendant was denied remission of forfeited bail because he willfully breached the travel restrictions of his bond. The Ninth Circuit held that the district court did not abuse its discretion, notwithstanding that there was no showing of cost, prejudice, or inconvenience to the government caused by the defendant's breach. *Id.*

2151. *United States v. Bass*, 573 F.2d 258, 260 (5th Cir. 1978) (forfeiture of \$25,000 excessive where defendant violated travel restrictions of his bond but did not injure or delay the government's prosecution of his case, and equity of forfeiture dependent on whether bondsman is professional or merely a friend or relative of defendant). *Cf. United States v. Stanley*, *supra* note 2150.

2152. *United States v. Nolan*, 564 F.2d 376, 378 (10th Cir. 1977).

2153. 667 F.2d 20 (9th Cir.), *cert. denied*, 456 U.S. 978 (1981).

2154. *Id.* at 21-22.

2155. *Id.* at 22.

2156. *Id.* at 21.

2157. *Id.* at 22.

court rejected the sureties' policy argument, stating that the forfeiture would encourage bonding companies to be more careful in dealing with their clients and to cooperate more fully in efforts to apprehend defendants who fail to appear.²¹⁵⁸

In *United States v. Frias-Ramirez*,²¹⁵⁹ sureties of a defendant who did not appear as required at a pretrial hearing appealed both the forfeiture of the bond and the trial court's denial of their motion to set aside or remit the forfeiture. As their first challenge to the forfeiture, the sureties contended that the defendant had died in a boat fire ten days before the scheduled appearance date, therefore relieving them of liability.²¹⁶⁰ However, since the defendant's body was never recovered and there was no proof that he was on the boat during the fire, the Ninth Circuit upheld the trial court's finding that the suggestion of the defendant's death was the "wildest speculation."²¹⁶¹ As their second challenge to the forfeiture, the sureties asserted that the magistrate failed to fully inform them of the risks and responsibilities of signing the bail bond.²¹⁶² The Ninth Circuit rejected this argument, noting that the magistrate, who had spoken through an interpreter because the sureties were Spanish-speaking with a limited understanding of English, had told them "you are obligating yourself to pay the United States \$250,000 if he [defendant] doesn't appear. In addition to that, you'll be losing your property in all possibility if he doesn't appear."²¹⁶³

The sureties also contended that the trial court abused its discretion by failing to set aside or remit the forfeiture on their motion.²¹⁶⁴ After reviewing the factors to be considered in determining whether an abuse of discretion occurred,²¹⁶⁵ the Ninth Circuit failed to find such abuse. Although sympathetic to the plight of the sureties,²¹⁶⁶ the court

2158. *Id.*

2159. 670 F.2d 849 (9th Cir.), *cert. denied*, 103 S. Ct. 94 (1982).

2160. 670 F.2d at 851. Death of the defendant exonerates sureties from liability on a bond. *Taylor v. Taintor*, 83 U.S. 366, 369 (1872).

2161. 670 F.2d at 851.

2162. *Id.* at 851-52. The Ninth Circuit noted that this argument raised the issue of whether a judicial officer has a duty to communicate to the sureties, as opposed to the defendant, the full extent of their liability if the defendant breaches a bond condition. The court did not decide this issue, however, because in this case the sureties were fully informed of their liability. *Id.* at 852 n.3.

2163. *Id.* at 852.

2164. *Id.* at 852-53.

2165. *See supra* notes 2137-38 and accompanying text.

2166. 670 F.2d at 852. The sureties, who were relatives and friends of the defendants, conveyed trust deeds to the government for their residences, representing a combined equity of approximately \$185,000. In addition, they were personally liable for the remainder of the \$250,000 bond not satisfied by foreclosure of their property. *Id.* at 851.

noted that the defendant's failure to appear was willful, absent convincing evidence of his death in the boat fire; that the Government was inconvenienced by his nonappearance; that the amount of bail was appropriate; and that the sureties were aware of the risks involved.²¹⁶⁷ The court thus concluded that the trial court's decision was neither arbitrary nor capricious and was therefore not an abuse of discretion.²¹⁶⁸

Although the decision in *Frias-Ramirez* appears harsh, it is simply a reflection of the great deference the Ninth Circuit gives the trial court in evaluating bail forfeitures and remissions. The cold record on appeal cannot possibly convey all of the factors that the trial judge considered in making his decision, and thus the Ninth Circuit is reluctant to reverse absent clear signs of abuse of discretion.

E. Defendant's Right to Discovery

Some discovery rights for defendants have developed as constitutional mandate in case law, but most have their bases in statutory law or the Federal Rules of Criminal Procedure.²¹⁶⁹ Trial judges are generally given broad discretion in applying sanctions for noncompliance with discovery requirements.²¹⁷⁰ Recent Ninth Circuit cases have discussed defendants' rights under all three types of discovery.

The Jencks Act²¹⁷¹ prohibits the pretrial discovery of statements

2167. *Id.* at 852-53. The court noted that while the Ninth Circuit had not yet held that a trial court abused its discretion in refusing to set aside or remit bail forfeitures, other circuits had found such abuse. *Id.* at 853 n.4 (citing *United States v. Parr*, 594 F.2d 440, 444 (5th Cir. 1979) (forfeiture of \$40,000 unreasonable where defendant appeared at all proceedings but had inconvenienced the court and prosecutors for fourteen and one-half hours until his body was found after his suicide); *United States v. Kirkman*, 426 F.2d 747, 752 (4th Cir. 1970) (forfeiture of \$25,000 excessive where the defendant's willful nonappearance caused only minimal injury to the government, and \$2,500 was a reasonable forfeiture); *United States v. D'Argento*, 339 F.2d 925, 928-29 (7th Cir. 1964) (forfeiture of \$15,000 reversed where the defendant unknowingly violated travel restrictions which did not prejudice the government)). See also *United States v. Bass*, 573 F.2d 258, 260 (5th Cir. 1978), *supra* note 2151.

2168. 670 F.2d at 853.

2169. F. MILLER, R. DAWSON, G. DIX AND R. PARNAS, PROSECUTION AND ADJUDICATION 719 (2d ed. 1982).

2170. *Id.* at 723.

2171. 18 U.S.C. § 3500 (1976) provides in pertinent part:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United

made by a prospective government witness.²¹⁷² After such an individual has actually testified at trial, however, the Act requires that the government produce upon demand those statements made which relate to the subject matter of the testimony given.²¹⁷³ The Act narrowly defines "statement" as (1) a writing made by the witness and "signed or otherwise adopted or approved," or (2) an account which is "a substantially verbatim recital" of the witness' oral statement "recorded contemporaneously with the making of such oral statement; or (3) a statement made by a witness to a grand jury."²¹⁷⁴

The Ninth Circuit, in *United States v. Harris*,²¹⁷⁵ held that a witness' statements, as defined under the Jencks Act, may also implicate the rule of *Brady v. Maryland*.²¹⁷⁶ In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."²¹⁷⁷

Written or recorded statements made by a defendant which are in the government's possession may also be inspected or obtained under Federal Rule of Criminal Procedure 16(a)(1)(A).²¹⁷⁸ Similarly, the pre-trial production of any documents may be compelled by the issuance of a subpoena duces tecum under Federal Rule of Criminal Procedure 17(c).²¹⁷⁹

States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statements relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

2172. *Id.* § 3500(a).

2173. *Id.* § 3500(b).

2174. *Id.* § 3500(e).

2175. 543 F.2d 1247, 1252-53 (9th Cir. 1976) (FBI must preserve original notes taken by agents during prospective witness interviews so that court can determine what evidence must be produced pursuant to Jencks Act).

2176. 373 U.S. 83 (1963).

2177. *Id.* at 87.

2178. FED. R. CRIM. P. 16(a)(1)(A) provides, in part, that

[u]pon request of a defendant the government shall permit the defendant to inspect and copy . . . any relevant written or recorded statements made by the defendant [which are] within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

The Rule further provides that the government shall disclose the substance of any oral statement it intends to offer in evidence at the trial which was made by the defendant in response to interrogation by a person then known to the defendant to be a government agent.

2179. FED. R. CRIM. P. 17(c) provides that "[a] subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated

1. Investigator's rough notes

The Ninth Circuit recently considered several cases in which the above discovery rights were asserted with respect to an investigator's rough notes. In *United States v. Griffin*,²¹⁸⁰ the defendant was indicted by a grand jury for embezzlement of union funds and embezzlement from an employee benefit plan.²¹⁸¹ This indictment was the result of two and one-half years of investigation, during which time civil compliance officers from the Department of Labor conducted thirty-seven interviews of twenty-four persons.²¹⁸² During these interviews, the officers had taken rough handwritten notes which they later used to prepare formal interview reports. Some of these rough notes were then destroyed, including those taken during Griffin's interviews and the interviews of five potential Government witnesses.²¹⁸³

After discovering the existence of the handwritten notes, Griffin filed a motion seeking their production. In response, the Government provided a list of all persons interviewed, the dates of the interviews, and whether rough notes had been retained. Relying on the Jencks Act, *United States v. Harris*, and Rule 16 of the Federal Rules of Criminal Procedure, Griffin then filed a motion to dismiss the indictment, or, in the alternative, to strike the testimony of those witnesses for whom rough interview notes had not been retained.²¹⁸⁴ The trial court chose to dismiss with prejudice the indictment against Griffin, stating that while the Jencks Act problem could be eliminated by merely striking the testimony of each of the Government witnesses, the *Brady* problem would remain absent an outright dismissal.²¹⁸⁵

Following the Government's appeal, the Ninth Circuit held that the district court had erred in dismissing the indictment and ordered the case remanded for further proceedings.²¹⁸⁶ According to the court,

therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."

2180. 659 F.2d 932 (9th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982).

2181. *Id.* at 934. The defendant was charged with embezzlement from union funds under 29 U.S.C. § 501(c) and with embezzlement from an employee benefit plan under 18 U.S.C. § 664.

2182. *Id.* at 934-35.

2183. *Id.* at 935. At a pretrial hearing, a compliance officer testified that her rough notes were completely incorporated into her formal reports, and that she neither had shown nor read the notes to the interviewees. *Id.*

2184. *Id.* at 936. See *supra* notes 2171, 2175 & 2178 and accompanying text.

2185. *Id.* The *Brady* problem was the suppression of evidence possibly favorable to the defendant by the Government, which could not be determined since the evidence had been destroyed.

2186. *Id.* at 941.

any dismissal under *Brady* was improper where, as here, the defendant failed to raise "at least a colorable claim that the investigator's discarded rough notes contained evidence favorable to defendant and material to his claim of innocence or to the applicable punishment."²¹⁸⁷ The impropriety of this sanction, the court explained, stemmed from the fact that absent such a claim, no constitutional violation of due process was established.²¹⁸⁸

The circuit court also considered producibility of the rough interview notes under the Jencks Act, noting in dicta that two factors must be affirmatively established before sanctions can be imposed under that Act: (1) that the notes constituted "statements" of either the interviewee or the Government interviewing agent, and (2) that the notes "relate[d] to the subject matter" of the testimony offered.²¹⁸⁹ The court determined that unless the testimony of the compliance officer was disputed, the rough notes could not be characterized as Jencks Act "statements" because they were neither verbatim recitals of the interviewee's oral statements, nor were they "signed or otherwise approved" by the interviewees.²¹⁹⁰ The court further observed that the cryptic and incomplete nature of rough notes probably precluded the finding that they constituted an agent's statement as envisioned by the Jencks Act.²¹⁹¹ The court concluded its discussion of this issue by admonish-

2187. *Id.* at 939. The court stated that unless there is some indication that the rough notes were destroyed in bad faith or that they met the *Brady* requirements of materiality, dismissal was not the proper sanction. *Id.* at 939 n.7. It also noted that reading *Brady* as broadly as Griffin requested would require the Government to preserve all material even arguably related to the criminal transaction. Such a broad view conflicts with the restrictive rules for disclosure established by Congress in the Jencks Act. Furthermore, the Supreme Court rejected this argument in *United States v. Augenblick*, 393 U.S. 348, 354-55 (1969), in which it stated that because the precise nature of an agent's lost interview notes could not be determined from the record, the court would not presume that they were a sufficient transcript of a witness' remarks to be a Jencks Act "statement." *See also* *Palermo v. United States*, 360 U.S. 343, 347, 350 (1959).

The *Griffin* court concluded that a constitutional error would be committed only if the nondisclosed evidence would have created a reasonable doubt, and its omission must be evaluated in the context of the entire record. 659 F.2d at 939 (citing *United States v. Agurs*, 427 U.S. 97, 112-13 (1976)). In *Agurs*, the Supreme Court stated that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.* at 109-10.

2188. 659 F.2d at 939.

2189. *Id.* at 937-38.

2190. *Id.* at 937 (citing *United States v. Bernard*, 623 F.2d 551, 558 n.21 (9th Cir. 1980); 18 U.S.C. § 3500(e)(1) & (2)). The court stated that if the district court finds that the notes are Jencks Act "statements," the proper sanction is to strike only that witness' testimony. 659 F.2d at 937 n.3.

2191. 659 F.2d at 937 (citing *United States v. Spencer*, 618 F.2d 605 (9th Cir. 1980)). In

ing the district court to permit the Government witnesses to testify on remand if, consistent with the evidence presented, it determined that the compliance officers' rough notes did not constitute "statements" under the Jencks Act.²¹⁹²

Finally, the Ninth Circuit considered whether the destruction of those portions of the rough notes containing statements made by Griffin violated his Rule 16(a)(1)(A) rights.²¹⁹³ Three formal interview reports were prepared on Griffin—a seventeen page report, which he reviewed, corrected and signed, a one-half page report and a ten line report.²¹⁹⁴ The court stated that with respect to the seventeen page report, no error could arise from the failure to produce rough notes because Griffin had adopted the final report.²¹⁹⁵ With respect to the notes utilized to prepare the remaining reports, the court observed that Griffin had made no showing that the Ninth Circuit compels sanctions for the destruction of these kinds of notes. The court also suggested that Griffin's Rule 16 argument was further weakened by the fact that he had not established that the Government intended to offer statements made in those reports into evidence at trial.²¹⁹⁶ The Ninth Circuit thus

Spencer, the court found that since the congressional policy behind the Jencks Act was to protect witnesses from being impeached with words which were not their own, or were an incomplete version of their testimony, an agent's rough notes will not be construed as "statements" under the Act when they "are not complete, are truncated in nature, or have become an unsiftable mix of witness testimony, investigators' selections, interpretations, and interpolations." *Id.* at 606 (citing *United States v. Augenblick*, 393 U.S. 348, 354-56 (1969); *Palermo v. United States*, 360 U.S. 343, 352-53 (1959); *Wilke v. United States*, 422 F.2d 1298, 1299 (9th Cir. 1970)).

However, the *Griffin* court indicated that portions of the final report may become Jencks Act "statements" of the agent, if the portion which records the agent's thoughts and observations is adopted and approved by the agent. 659 F.2d at 937-38. The court also stated that the portion of the agent's rough interview notes which simply records the interviewee's remarks cannot be a "statement" for Jencks Act purposes when the agent testifies as a witness because it is not the agent's own words. *Id.* at 938. The Supreme Court reviewed the legislative history of the Jencks Act, in *Palermo v. United States*, 360 U.S. 343 (1959), and concluded that "[i]t is clear that Congress was concerned that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment." *Id.* at 352 (footnote omitted).

2192. 659 F.2d at 938.

2193. *Id.* at 939.

2194. *Id.* at 939-40.

2195. *Id.* at 940.

2196. *Id.* at 941. See *Kaplan v. United States*, 375 F.2d 895 (9th Cir.), *cert. denied*, 389 U.S. 839 (1967). In *Kaplan*, the Ninth Circuit held:

We find no error in the denial of [defendants'] motion to have government summaries of defendants' statements given before trial produced for [defendants'] use. No such statements were offered in evidence against defendants, or used at the trial against them in any way. [Defendants] demanded in . . . their motion the production of written memoranda made by government agents of oral statements made by

concluded that the district court was free on remand to bar the introduction of these statements or to enter any order it deemed just under the circumstances of the case.²¹⁹⁷

In *United States v. Kaiser*,²¹⁹⁸ an undercover Drug Enforcement Administration agent made a handwritten rough draft of a report pertaining to his purchase of heroin from one of the defendants. At trial the agent could only produce a typed transcript of the notes.²¹⁹⁹ The district court held that this constituted a violation of the Jencks Act, and the agent's testimony was ordered stricken.²²⁰⁰

The Ninth Circuit reversed, ruling that destruction of the handwritten draft did not result in a Jencks Act violation.²²⁰¹ According to the court, the draft was not intended as a final report, nor was it similar to witness interview notes which are intended to be factual accounts of what a witness said.²²⁰² Consequently, it was not "adopted or approved" by the agent within the meaning of the Jencks Act, and was not producible under that statute.²²⁰³

In *United States v. Bagnariol*,²²⁰⁴ an undercover FBI agent met

defendants not shown to nor signed by defendants. They were not records "belonging" to [defendants]. Rule 16, Fed. R. Crim. P.

Id. at 900 (citations and footnote omitted) (emphasis in original).

The circuits are split on the issue of whether the written summary of an oral statement made by the defendant to a government agent is discoverable under Rule 16. Several circuits have held that such a summary is not a "written or recorded statement made by the defendant" subject to discovery. 659 F.2d at 940 (quoting *United States v. Krilich*, 470 F.2d 341, 351 (7th Cir. 1972), *cert. denied*, 411 U.S. 938 (1973)). Other circuits have held that such a written summary is discoverable at the discretion of the trial court. 659 F.2d at 940 (citing *United States v. Johnson*, 525 F.2d 999, 1003-04 (2d Cir. 1975), *cert. denied*, 424 U.S. 920 (1976)). The *Griffin* court found that Griffin's reliance on *United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976) was misplaced because *Harris* failed to address the issue of whether Rule 16 requires the preservation and production of an agent's rough notes. 659 F.2d at 940. 2197. 659 F.2d at 941. FED. R. CRIM. P. 16(d)(2) provides:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

(emphasis added).

2198. 660 F.2d 724 (9th Cir. 1981), *cert. denied*, 457 U.S. 1121 (1982).

2199. *Id.* at 731.

2200. *Id.*

2201. *Id.* at 731-32.

2202. *Id.* at 732 (citing *United States v. Harris*, 543 F.2d 1247, 1252 (9th Cir. 1976)). The court also found that the draft differed from surveillance notes, which are not producible "statements." 660 F.2d at 732 (citing *United States v. Bernard*, 623 F.2d 551, 557-58 (9th Cir. 1979) (Jencks Act not intended to cover rough surveillance notes; *Harris* rule should not be extended to rough surveillance notes)).

2203. 660 F.2d at 732 (citing 18 U.S.C. § 3500(e)(1) (1976)).

2204. 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982).

several times with the defendants to establish their participation in a scheme to legalize gambling in the State of Washington. After each of these meetings he prepared a report in longhand. He then sent these drafts to a typing pool, and after correcting typographical errors he discarded the handwritten drafts.²²⁰⁵

Reaffirming its decision in *United States v. Kaiser*,²²⁰⁶ the Ninth Circuit held that the destruction of the agent's handwritten drafts did not violate the Jencks Act or the *Harris* preservation rule.²²⁰⁷ The court found that although *Harris* required the preservation of notes that may be potentially producible under the Jencks Act, the rationale of *Harris* was inapposite to the facts as presented.²²⁰⁸ The court noted that the *Harris* court relied principally on *United States v. Harrison*,²²⁰⁹ wherein it was held that disclosure of an agent's final report was not an adequate substitute for disclosure of the rough interview notes. The *Harris* ruling was based on (1) a characterization that information contained in rough notes of a witness interview may be more favorable to a defendant's position, and (2) a corresponding desire to reduce the possibility of misunderstanding or error in the transfer process.²²¹⁰ The *Bagnoriol* court, however, concluded that the typing of a handwritten draft and the correction of the typed version did not entail the same risk of distortion that would be inherent in the compilation of a report from rough notes.²²¹¹ Furthermore, the court expressed doubt as to the applicability of *Harris* based on the fact that its use in the past had been confined to instances in which there had been some basis for believing that the destroyed material may have contained a more accurate account than the material disclosed.²²¹²

2205. *Id.* at 889.

2206. 660 F.2d 724 (9th Cir. 1981). *See supra* notes 2198-2203 and accompanying text.

2207. 665 F.2d at 889-90. In asserting the existence of a Jencks Act violation, the defendants relied on *United States v. Walden*, 578 F.2d 966 (3d Cir. 1978). In *Walden*, the Third Circuit suggested that handwritten drafts of a final report by a government agent might be deemed "adopted or approved" because the drafts were sent to the agent's superior for review *before* they were typed in final form. 578 F.2d at 970. Since the agent in *Bagnoriol* had not sent his reports to his superiors until *after* he had reviewed and corrected the typed version, the Ninth Circuit determined that any reliance on *Walden* was misplaced. 665 F.2d at 889-90.

2208. 665 F.2d at 890.

2209. 524 F.2d 421 (D.C. Cir. 1975).

2210. 665 F.2d at 890 (citing *United States v. Harrison*, 524 F.2d at 428-30).

2211. 665 F.2d at 890. The court reasoned that the copying and correcting of the typed copy presented little chance for inadvertent input from the agent. If that agent's account was, in fact, fabricated, he would have tailored his observations to fit his conclusions in writing the original drafts. Thus, there was no basis for suggesting a substantial difference between the handwritten and typed reports. *Id.*

2212. *Id.* (citing *United States v. Marques*, 600 F.2d 742, 748 (9th Cir. 1979), *cert. denied*,

In *United States v. Traylor*,²²¹³ the district court denied a request for the production of notes taken by a prosecuting attorney during the interview of a Government witness.²²¹⁴ This denial was based on a finding that the notes constituted attorney work product.²²¹⁵

The Ninth Circuit rejected the district court's analysis, noting that in *Goldberg v. United States*,²²¹⁶ the Supreme Court had conclusively established the absence of a "work product" exception to the production of material pursuant to the Jencks Act.²²¹⁷ The court observed, however, that notes prepared by a Government attorney are producible "statements" under that Act only when they relate to the subject matter of the testimony and have been signed or adopted by the witness.²²¹⁸ Satisfaction of this latter requirement, in turn, depends on whether the lawyer read back or the witness herself read what the lawyer had written.²²¹⁹ Applying the *Goldberg* principles to the facts as presented, the court determined that because the Government witness had neither seen the interview notes nor reviewed them with the attorney, the notes did not constitute "statements" under the Jencks Act.²²²⁰ Accordingly, the court also determined that the district court had not erred in denying the defendant's request for production of these notes.²²²¹

These cases show that the Ninth Circuit applies a strict interpretation of the Jencks Act when determining whether to impose sanctions for the destruction of an investigator's rough notes. In order for such notes to be classified as Jencks Act material, they must fall within the narrow definition of "statement," and they must be related to the subject matter of the testimony offered. The destruction of a handwritten investigative report, from which a typed final copy was made, for example, will not constitute a violation of the Jencks Act. In addition, notes taken during witness interviews by a government attorney are not

444 U.S. 1019 (1980); *United States v. Well*, 572 F.2d 1383, 1384 (9th Cir. 1978); *United States v. Finnegan*, 568 F.2d 637, 642 (9th Cir. 1977); *United States v. Parker*, 549 F.2d 1217, 1223 (9th Cir.), *cert. denied*, 430 U.S. 971 (1977); *United States v. Robinson*, 546 F.2d 309, 312 (9th Cir. 1976), *cert. denied*, 430 U.S. 918 (1977)).

2213. 656 F.2d 1326 (9th Cir. 1981).

2214. *Id.* at 1335.

2215. *Id.*

2216. 425 U.S. 94 (1976).

2217. *Id.* at 98.

2218. 656 F.2d at 1336 (citing *Goldberg v. United States*, 425 U.S. at 98).

2219. 656 F.2d at 1336 (citing *Goldberg v. United States*, 425 U.S. at 110-11 n.19).

2220. 656 F.2d at 1336 (citing *United States v. Goldberg*, 582 F.2d 483, 487 (9th Cir. 1978), *cert. denied*, 440 U.S. 973 (1979)).

2221. 656 F.2d at 1336.

producing pursuant to the Act, unless statements contained therein are signed or adopted by the witness.

The Ninth Circuit also appears to be narrowing the application of *Harris*, which absolutely required law enforcement agents to preserve their original notes from interviews with prospective government witnesses.²²²² Now district courts must determine through secondary evidence if the destroyed notes contained Jencks Act "statements" before they can apply sanctions by striking the witness' testimony.²²²³

Finally, the Ninth Circuit has not hesitated in placing a heavy burden on the defendant before it will apply the *Brady* rule. Specifically, the defendant must show that discarded notes, unless destroyed in bad faith, contained evidence which was both favorable *and* material.²²²⁴ Even under Rule 16 of the Federal Rules of Criminal Procedure, sanctions are not applied when investigators destroy rough notes from interviews with the defendant, unless those statements will be introduced at trial.²²²⁵

2. Tape recorded statements

In *United States v. Bailleaux*,²²²⁶ the Ninth Circuit considered whether the Government's use of an undisclosed tape recording violated the defendant's right to discovery. Bailleaux was charged with conspiring to interfere with commerce by threats or violence and attempted extortion. During cross-examination, the Government introduced into evidence a taped telephone conversation that Bailleaux had with his business associate. The prosecution used this evidence in an attempt to impeach Bailleaux's testimony that he had traveled to San

2222. The *Griffin* court reaffirmed its holding in *United States v. Harris*, 543 F.2d 1247, 1253 (9th Cir. 1976), to the extent that it requires law enforcement agents to preserve their original notes taken during interviews with prospective government witnesses or with an accused in order to permit the courts to determine whether evidence must be produced under the Jencks Act. However, it also stated that the imposition of sanctions is not justified where the rough interview notes of an agent are destroyed in good faith, and those notes can be determined not to be Jencks Act "statements" by secondary evidence. 659 F.2d at 938 n.5; see *United States v. Augenblick*, 393 U.S. 348, 355 (1969); *Ogden v. United States*, 323 F.2d 818, 820-21 (9th Cir. 1963), *cert. denied*, 376 U.S. 973 (1964).

The *Griffin* court added that routine sanctions *are* appropriate where it appears that rough interview notes have been destroyed in bad faith. 659 F.2d at 938 n.5; see also *United States v. DeLeon*, 498 F.2d 1327, 1334 (7th Cir. 1974); *United States v. Lonardo*, 350 F.2d 523, 529 (6th Cir. 1965).

2223. 659 F.2d at 938; see *supra* note 2187 and accompanying text.

2224. *Id.* at 939 n.7; see *supra* note 2187 and accompanying text.

2225. See *supra* note 2196 and accompanying text.

2226. 685 F.2d 1105 (9th Cir. 1982).

Diego on business at the prompting of this associate.²²²⁷ Despite his repeated requests for discovery of any "tapes made of conversations," Bailleaux was not informed of the existence of this tape until he was being cross-examined.²²²⁸ As a result, Bailleaux claimed on appeal that: (1) the tape should have been turned over to him under either Rule 16(a)(1)(A)²²²⁹ or *Brady v. Maryland*,²²³⁰ and (2) he was prejudiced when he elected to testify in his own defense without knowledge of the tape recording.²²³¹

The Ninth Circuit first noted that "while the decision in *Brady* requires disclosure of all exculpatory material, Rule 16 requires the Government to turn over all *relevant* written or recorded statements by the defendants."²²³² The court then held that because the taped conversation was not exculpatory, it was not subject to disclosure under *Brady*.²²³³ The court also determined, however, that the tape was relevant within the meaning of Rule 16(a)(1)(A) and should have been disclosed to Bailleaux.²²³⁴

In reaching this latter conclusion, the Ninth Circuit specifically rejected the Government's argument that it had no obligation to disclose the tape under Rule 16 because the Assistant United States Attorney received the tape only the night before it was used.²²³⁵ The court stated that Rule 16 requires disclosure if the statement "is in the custody or control of the Government" and "its existence is known or by the exercise of due diligence could have become known to the attorney for the Government."²²³⁶ The court found that it was sufficient for purposes of the custody requirement that the tape was in the possession of the

2227. *Id.* at 1112. Prior to the introduction of the tape, Bailleaux testified on direct examination that he arranged to meet his associate in San Diego, and had waited there for three days and then left. Bailleaux admitted on both direct and cross-examination that he had never received an explanation from his associate about his failure to appear in San Diego. The tape contained the first conversation between defendant and his business associate after the alleged business trip, and defendant did not question his associate about his failure to appear. *Id.* This had a tendency to show that Bailleaux was not disturbed by his associate's failure to appear and that his trip to San Diego may have been for another purpose.

2228. *Id.* at 1112-13.

2229. *See supra* note 2178 and accompanying text.

2230. 373 U.S. 83 (1963). *See supra* notes 2176 & 2177 and accompanying text.

2231. 685 F.2d at 1113.

2232. *Id.* (emphasis in original).

2233. *Id.* (citing *United States v. Eddy*, 549 F.2d 108, 113 (9th Cir. 1976)).

2234. 685 F.2d at 1115.

2235. *Id.* at 1113.

2236. *Id.*

FBI,²²³⁷ and it assumed that the attorney could have discovered the existence of the tape through due diligence.²²³⁸ The circuit court also rejected the Government's second argument that the relevance of the tape for impeachment purposes was not known until Bailleaux testified on direct examination.²²³⁹ According to the court, "the Government should disclose any statement made by the defendant that may be relevant to any possible defense or contention that the defendant might assert."²²⁴⁰ If there is any doubt, then the statement should be disclosed if the proper request is made. The court ultimately found it erroneous to admit into evidence a statement which was not provided to the defendant in violation of Rule 16 and where the defendant was not otherwise granted the opportunity to review the proffered evidence.²²⁴¹ It concluded, however, that the error in this case was not of sufficient magnitude to require reversal.²²⁴²

3. Subpoenas

Rule 17 of the Federal Rules of Criminal Procedure governs the use of subpoenas in criminal cases. Subsection (c) of that rule pertains to subpoenas of documentary evidence.²²⁴³ The fundamental purpose of these subpoenas is to expedite the trial process by providing a time and place before trial for the inspection of subpoenaed materials.²²⁴⁴ Rule 17(c) was not intended to provide a general means of discovery for criminal cases,²²⁴⁵ and subpoenas *duces tecum* "may be quashed if

2237. *Id.* (citing *United States v. Scruggs*, 583 F.2d 238, 242 (5th Cir. 1978) (government not excused from obligation under Rule 16 when documents were in possession of FBI)).

2238. 685 F.2d at 1114.

2239. *Id.* The Government contended that it had "no duty to anticipate the nature of the defendant's testimony to determine if the statement may have some impeachment value." *Id.* See *United States v. Gleason*, 616 F.2d 2 (2d Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980).

2240. 685 F.2d at 1114. The court also found that this tape was relevant not only because of Bailleaux's failure to mention the San Diego trip to his business associate, but because there was another tape of the extortionist's voice which had been identified by four witnesses. The jury could thus compare Bailleaux's voice on the tape to that of the extortionist. *Id.*

2241. 685 F.2d at 1115 (citing *United States v. Walker*, 538 F.2d 266, 268-69 (9th Cir. 1976) (Government's nondisclosure of tape's existence until middle of trial constituted Rule 16 violation)).

2242. 685 F.2d at 1115-16 (citing *United States v. Valle-Valdez*, 554 F.2d 911, 916 (9th Cir. 1977); *United States v. Walker*, 538 F.2d 266, 268-69 (9th Cir. 1976)).

2243. See *supra* note 2179 and accompanying text.

2244. *United States v. Nixon*, 418 U.S. 683, 698-99 (1974) (citing *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951)).

2245. 418 U.S. at 698. In *United States v. Cuthbertson*, 651 F.2d 189, 195 (3d Cir.), *cert. denied*, 454 U.S. 1056 (1981), the Third Circuit discussed the difference between exculpatory

their production would be 'unreasonable or oppressive.'²²⁴⁶

The Supreme Court, in *United States v. Nixon*,²²⁴⁷ set forth the tests the moving party must meet to justify the production of documents prior to trial. According to the Court, the moving party must show that: (1) the documents are evidentiary and relevant; (2) the documents cannot reasonably be procured in advance of trial by the exercise of due diligence; (3) such production and inspection in advance of trial is essential to the moving party's proper preparation for trial, and the failure to obtain such inspection may unreasonably delay the trial; and (4) the application is made in good faith.²²⁴⁸ The Ninth Circuit has recently considered the validity of certain subpoenas duces tecum in light of the above requirements.

In *United States v. Fields*,²²⁴⁹ the Ninth Circuit reversed the district court's denial of a non-party witness' motion to quash a subpoena duces tecum for pretrial production of documents.²²⁵⁰ The defendants argued that the documents could be used for impeachment purposes.²²⁵¹ The court concluded that the need for evidence to impeach witnesses is generally insufficient to justify the pretrial production of documents,²²⁵² even where production was sought from a third party rather than from the United States.²²⁵³ Consequently, the court ruled that the trial court had abused its discretion by denying the motion to

material which the prosecution possesses and exculpatory evidence which third parties possess. "Only the latter is retrievable under a rule 17(c) subpoena; naked exculpatory material held by third parties that does not rise to the dignity of admissible evidence simply is not within the rule. That is the teaching of *Bowman Dairy* and *Nixon* . . ." *Id.*

2246. *United States v. Nixon*, 418 U.S. at 698 (quoting FED. R. CRIM. P. 17(c)).

2247. 418 U.S. 683 (1974).

2248. *Id.* at 699-700 (footnote omitted) (citing *United States v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952)).

2249. 663 F.2d 880 (9th Cir. 1981).

2250. *Id.* at 881. The defendants had subpoenaed Wells Fargo Bank, a nonparty witness, to produce the statements and transcribed interviews of its employees who would be called as witnesses at the criminal trial. *Id.*

2251. *Id.*

2252. *Id.* (citing *United States v. Nixon*, 418 U.S. at 701). In *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981), the court found that verbatim statements of government witnesses, held by CBS, Inc. for their 60 Minutes program, would be relevant to those witnesses' credibility. It also noted, however, that "because such statements ripen into evidentiary material for purposes of impeachment only if and when the witness testifies at trial, impeachment statements, although subject to subpoena under rule 17(c), generally are not subject to production and inspection by the moving party prior to trial." *Id.* at 144 (citing *United States v. Nixon*, 418 U.S. at 701; *United States v. Rothman*, 179 F. Supp. 935, 938 (W.D. Pa. 1959)).

2253. 663 F.2d at 881 (citing *United States v. Cuthbertson*, 651 F.2d 186, 195 (3d Cir.), *cert. denied*, 454 U.S. 1056 (1981)).

quash.²²⁵⁴

In *United States v. Eden*,²²⁵⁵ the Ninth Circuit held that the trial court had not abused its discretion in quashing the defendant's subpoena to the Secretary of Education for the production of documents prior to trial.²²⁵⁶ The trial court determined that much of the material subpoenaed could have been reasonably procured prior to trial, or that the documents were not so voluminous that pretrial production was required.²²⁵⁷ The Ninth Circuit affirmed, observing that Eden also failed to meet his burden of showing relevancy by anything other than conclusory statements.²²⁵⁸ In addition, the court found that the documents provided to Eden by the Government were adequate for Eden's contention on appeal.²²⁵⁹

The *Fields* and *Eden* decisions demonstrate that it is difficult for criminal defendants in the Ninth Circuit to obtain documents by subpoena prior to trial. This accentuates the difference between the uses of subpoenas duces tecum in criminal and civil trials. Rule 17(c) is broadly written, but the courts consistently restrict the use of subpoenas in criminal trials to avoid "fishing expeditions"²²⁶⁰ and general discovery. The courts apply the same criteria to subpoenas issued to non-

2254. 663 F.2d at 881. Because the trial court was found to have abused its discretion, the Ninth Circuit was compelled to reverse without: (1) considering whether the defendants had met the required factors needed to warrant an in camera production, or (2) determining whether the documents sought were protected by the attorney-client privilege. *Id.* (citing *United States v. Cuthbertson*, 630 F.2d 139, 145 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

The *Fields* court suggested, however, that because there was a strong showing by Wells Fargo Bank of similarity between the statements and transcribed interviews of its employees and the situation in *Upjohn*, 449 U.S. at 386-91, 393 (communications between corporation's employees and its general counsel held protected by the attorney-client privilege, and could not be compelled by an IRS summons when these communications were made to secure legal advice from the general counsel), the issuance of the subpoena was questionable even apart from its insufficiency under Rule 17(c). 663 F.2d at 881.

2255. 659 F.2d 1376 (9th Cir. 1981).

2256. *Id.* at 1381. The defendant, a college president, was convicted of embezzlement, conversion of federal student loan funds, and concealment of material facts from the Department of Health, Education and Welfare. *Id.* at 1377. His subpoena duces tecum to the Department of Education requested, in part, all documents which related to: (1) the student financial aid fund paid to California Business College for 1974-76; (2) accreditation and/or loss of accreditation of California Business College; (3) the payment of \$100,000 to Associated Colleges of California, by Treasury Check No. 83,760,968 dated September 15, 1975; and (4) the allocation and/or payment of student financial aid to unaccredited institutions in 1974-76. *Id.* at 1381.

2257. *Id.*

2258. *Id.*

2259. *Id.*

2260. *Nixon*, 418 U.S. at 700.

party witnesses, and a lesser evidentiary standard is used only in cases where the courts require an in camera inspection of the documents.²²⁶¹

4. Non-disclosure of informant's identity

The informer's "privilege" is actually the government's privilege "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law."²²⁶² This privilege must give way if the informant's identity or the contents of his or her communication is relevant or helpful to the defense or essential to a fair trial.²²⁶³ The scope of the privilege is within the discretion of the district judge, who must balance the government's interest in non-disclosure with the defendant's interest in obtaining evidence.²²⁶⁴ The defendant, on the other hand, bears the burden of showing a need for disclosure.²²⁶⁵

In *United States v. Tham*,²²⁶⁶ the Ninth Circuit considered whether the district court erred either in failing to order the Government to disclose the identity of a confidential informant or in failing to require an in camera examination of the informant.²²⁶⁷ Tham claimed it was crucial to his defense to have an opportunity to interview the informant, identified as Source Four, who stated in an affidavit information which might have exculpated Tham.²²⁶⁸ Rather than agree to disclosure or an in camera hearing, the Government offered to stipulate to the truth of the statement made by Source Four in the affidavit.²²⁶⁹ Based on this stipulation, the district court denied Tham's motions for

2261. *See* *United States v. Cuthbertson*, 630 F.2d 139, 145 (3d Cir. 1980) (second and third elements of *Nixon* test do not apply when production is only for in camera viewing, and not for moving party), *cert. denied*, 449 U.S. 1126 (1981).

2262. *Roviaro v. United States*, 353 U.S. 53, 59 (1957).

2263. *Id.* at 60-61.

2264. *United States v. Anderson*, 509 F.2d 724, 729 (9th Cir.), *cert. denied*, 429 U.S. 1063 (1975).

2265. *United States v. Prueitt*, 540 F.2d 995, 1003-04 (9th Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

2266. 665 F.2d 855 (9th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982).

2267. *Id.* at 859-60. For a discussion of what is necessary to require an in camera hearing, see *United States v. Kim*, 577 F.2d 473, 478-79 (9th Cir. 1978).

2268. 665 F.2d at 859. Tham was convicted of embezzlement of union assets and of false entry in union records. *Id.* at 855. Source Four's affidavit stated that while attending a concert in New York, he overheard Tham and two other persons, Fratianno and Marson, discussing an eye care plan that they were promoting for unions on the West Coast. Tham's travel and entertainment expenses for this concert and the trip to New York were the basis of one of the counts in the indictment. Tham contended that if he was discussing the eye care plan, he was spending union funds to benefit the union. *Id.* at 859.

2269. 665 F.2d at 859.

disclosure.²²⁷⁰

The Ninth Circuit held that the district court judge had not abused his discretion in ruling that Tham failed to meet his burden of showing a need for disclosure.²²⁷¹ The court stated that the stipulation was the most favorable evidence Tham could have secured concerning the exculpatory information contained in the affidavit,²²⁷² and that Tham had not shown how the disclosure of Source Four's identity would have better assisted him in his defense.²²⁷³ The court found that Tham's claim that Source Four may have provided useful information was mere speculation and, therefore, insufficient to require disclosure or an in camera hearing.²²⁷⁴

F. Right to Inmate Assistance

The due process clause of the fourteenth amendment²²⁷⁵ gives inmates the right of access to the courts, including a right to assistance in the preparation and filing of legal papers.²²⁷⁶ Constitutionally proper

2270. *Id.*

2271. *Id.* at 859-60.

2272. *Id.* at 859.

2273. *Id.* at 860. Despite the stipulation, Fratianno, as a government witness, continued to deny that there was any discussion at the concert about an eye care plan for the union, but contended that there may have been a discussion concerning the creation of a private contact lens enterprise. The prosecution argued that the stipulation could be interpreted to mean that the parties discussed the contact lens venture, rather than a union eye care plan. The district court instructed the jury that the stipulation must be accepted as proven fact. *Id.* at 859. The Ninth Circuit found that Fratianno's testimony could only benefit Tham because it was contrary to facts the Government had already conceded, and the trial judge adequately instructed the jury concerning the proper treatment of the stipulation. *Id.* at 860.

2274. 665 F.2d at 860 (citing *United States v. Kim*, 577 F.2d 473, 478-79 (9th Cir. 1978)). The *Kim* court stated that the accused's burden of proving that the informant's identity is relevant and helpful to the defense or essential for a fair trial is not met by merely raising a suspicion that the informant might aid in the preparation of a defense. 577 F.2d at 478 (citing *United States v. Marshall*, 526 F.2d 1349, 1359 (9th Cir. 1975), *cert. denied*, 426 U.S. 923 (1976)).

2275. U.S. CONST. amend. XIV, § 1 states that no state shall "deprive any person of life, liberty, or property, without due process of law"

2276. *Bounds v. Smith*, 430 U.S. 817 (1977). In *Bounds*, inmates complained that they were denied access to the courts due to the state's failure to provide legal research facilities. After the state adopted a plan for establishing several libraries throughout the state, the inmates appealed, contending that the state must provide prisoners with legal assistance as well as law libraries. In rejecting the inmates' argument, the Supreme Court stated that the due process clause only required that prisoners be provided with law libraries or legal assistance from trained people. *Id.* at 828. The Court conceded that, although providing law libraries for prisoners often avoids discipline problems involved with writ writers and usually leads to the efficient handling of the prisoner's case, states may provide other means of access to the courts such as providing inmates with an organization of volunteer attorneys or with full-time staff attorneys. *Id.* at 830-31.

means of access include providing prisoners with adequate law libraries and assistance from people trained in the law.²²⁷⁷ When an inmate has no access to a law library or a trained legal assistant, a state cannot deny him the use of an inmate writ writer.²²⁷⁸ In *Storseth v. Spellman*,²²⁷⁹ the Ninth Circuit held that a prisoner does not have the right to the service of an inmate writ writer when an adequate means of access to the court has already been provided.²²⁸⁰

In 1977, an inmate writ writer, Riddell, prepared and filed a civil rights action for Storseth, who was a prisoner in a Washington state penitentiary.²²⁸¹ After transferring Storseth to another prison, the state prohibited any correspondence between Riddell and Storseth. In 1978, upon Riddell's request, the court appointed an attorney for Storseth and authorized only necessary communication between Riddell and Storseth.²²⁸² Riddell, however, continued to file pleadings on Storseth's behalf, which caused the court-appointed attorney to withdraw from the case and the state to bar all communication between Storseth and Riddell. In 1979, the district court ordered the court clerk to no longer accept pleadings from Riddell and informed Storseth that he would be appointed counsel only if he agreed to engage in an attorney-client relationship without interference from third parties.²²⁸³ The district judge also refused to reverse the state's ruling that prohibited any correspondence between Storseth and Riddell.²²⁸⁴

In affirming the district court order, the Ninth Circuit stated that Storseth had been provided constitutionally adequate access to the courts because he had the opportunity to receive court appointed counsel.²²⁸⁵ The court held that since the state, not the inmate, has the right

2277. *Id.* at 830-31. The state also has the burden of proving the adequacy of the method chosen. *Buise v. Hudkins*, 584 F.2d 223, 228 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979).

2278. *Johnson v. Avery*, 393 U.S. 483 (1969). The Supreme Court in *Johnson* held that if the state has failed to provide an inmate with meaningful access to the courts, a state cannot deny a prisoner assistance from an inmate writ writer. In *Johnson*, a writ writer was disciplined for violating a prison regulation which prohibited inmate writ writers. The defendant appealed, claiming the regulation was invalid because it barred prisoners' right of access to courts. The Supreme Court agreed, stating that when no alternative exists, prisoners must be allowed the help of an inmate writ writer, or else an inmate's potentially valid constitutional claims will never be heard in court. *Id.* at 487.

2279. 654 F.2d 1349 (9th Cir. 1981).

2280. *Id.* at 1351.

2281. *Id.*

2282. *Id.*

2283. *Id.* at 1352.

2284. *Id.*

2285. *Id.* at 1353. The *Storseth* court also noted that court appointed counsel is probably

to choose the proper access to the courts,²²⁸⁶ an inmate who does not take advantage of an adequate means of access, does not have the right to insist upon an alternative method of access.²²⁸⁷ Thus, an inmate has no right to request the services of a particular writ writer when alternative means of access are adequate.²²⁸⁸ The court also noted that once an attorney is appointed to represent an inmate, the attorney should be free to develop the inmate's case without interference from an inmate writ writer whom he does not represent.²²⁸⁹

The Ninth Circuit also noted that even if court appointed counsel is not an adequate means of access to court, Storseth still had no right to an inmate writ writer because the state had provided him with the opportunity to use a prison law library and the Institutional Legal Services.²²⁹⁰ Therefore, the court held that Storseth's access to the court was constitutionally adequate and that both the state and district courts were justified in refusing to allow Riddell to assist Storseth.²²⁹¹

the best means of access to the courts because attorneys are able to handle an inmate's case more skillfully and do not have the discipline problems often involved with an inmate writ writer. 654 F.2d at 1353. The Ninth Circuit, therefore, refused to declare that court appointed counsel is not a constitutionally permissible method of access. *Id.*

2286. *Id.* (citing *Bounds v. Smith*, 430 U.S. at 828).

2287. 654 F.2d at 1353 (citing *Ramos v. Lamm*, 639 F.2d 559, 583 (10th Cir. 1980) (inadequate access to court due to defective law library; no reason to allow inmates to choose among alternative avenues of access to courts), *cert. denied*, 450 U.S. 1041 (1981)). See *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978) (under *Bounds*, no absolute right to any particular legal assistance), *cert. denied*, 442 U.S. 911 (1979).

2288. 654 F.2d at 1353 (citing *Fair v. Givan*, 509 F. Supp. 1086, 1090 (N.D. Ind. 1981)). In *Fair*, the prisoner refused the services of a court appointed counsel yet requested the assistance of another inmate to assist him in court. The district court held that a criminal defendant has no constitutional right to have an unlicensed attorney or a layman represent him, adding that once an inmate has been provided with a proper means of access to the courts, the prisoner has no right to request another alternative. 509 F. Supp. at 1090.

2289. 654 F.2d at 1353.

2290. *Id.* at 1353-54. The court stated that throughout Storseth's lawsuit, the prison provided him with law libraries satisfying the American Association of Law Libraries' recommended minimum standards for prison law libraries. *Id.* at 1354. The Institutional Legal Services also provided all indigent inmates with civil legal assistance through state contracts with various legal service organizations. *Id.*

2291. *Id.* at 1354. The Ninth Circuit stated that the difficulty and delay involved with inter-institutional communication could seriously jeopardize Storseth's ability to meet court deadlines. The court also questioned the value of Riddell's assistance since Riddell had no access to a law library.

Regarding the disciplining of writ writers, the Ninth Circuit stated that if courts have the power to discipline and disbar attorneys, the courts should certainly be able to discipline unethical inmates. *Id.* (quoting *In re Green*, 586 F.2d 1247, 1251 (8th Cir. 1978) (courts not powerless to discipline inmate who violated court order enjoining him from writ writing activities on behalf of other inmates), *cert. denied sub nom.* *Green v. Wyrick*, 440 U.S. 922 (1979)).

In considering the legal authority of inmate writ writers, the court stated that although

In addition to claiming that he was denied proper access to the courts, Storseth also argued that his first amendment right to correspond²²⁹² was violated by the district court's order prohibiting communication with Riddell.²²⁹³ The Ninth Circuit agreed, stating that inmates retain their first amendment rights while in prison, subject to the penological objectives of the correctional system.²²⁹⁴ The court stated that the Government must be able to justify its reasons for restricting a prisoner's first amendment rights.²²⁹⁵ Since there was no evidence explaining the Government's interest in prohibiting communication between Storseth and Riddell, the court reversed the district judge's order denying the inter-institutional correspondence.²²⁹⁶

G. Destruction of Evidence

The principal concern of the court when criminal evidence has been lost or destroyed is whether the defendant can nevertheless receive a fair trial.²²⁹⁷ In making this determination, the court balances the government's conduct in connection with the loss or destruction of the evidence against the degree of prejudice to the defendant.²²⁹⁸ The government bears the burden of justifying its conduct concerning the evidence, while the defendant bears the burden of proving prejudice.²²⁹⁹ The more important determination to be made by the court, however, is whether the evidence adduced at trial was sufficient to sustain the defendant's conviction.²³⁰⁰

an inmate may assist in the preparation of another prisoner's petition for post-conviction relief, a writ writer cannot file papers with the court as the inmate's legal representative. 654 F.2d at 1355 (citing *Johnson v. Avery*, 393 U.S. at 490).

2292. U.S. CONST. amend. I provides in part: "Congress shall make no law . . . abridging the freedom of speech . . ."

2293. 654 F.2d at 1355.

2294. *Id.* Penological objectives include the preservation of internal order and discipline, maintenance of institutional security, and rehabilitation of prisoners. *Id.* (citing *Procunier v. Martinez*, 416 U.S. 396, 412 (1974)).

2295. 654 F.2d at 1355 (citing *Rudolph v. Locke*, 594 F.2d 1076, 1077 (5th Cir. 1979) (per curiam) (prison regulation barring all communication between inmates in segregation units invalid since no showing that regulation furthered penological objectives or was preferable to less severe alternatives); *Buise v. Hudkins*, 584 F.2d 223, 230 (7th Cir. 1978) (court's review of prison policy ineffective unless state has burden of proving valid reason for violating inmates' first amendment rights), *cert. denied*, 440 U.S. 916 (1979)).

2296. 654 F.2d at 1355-56.

2297. *United States v. Loud Hawk*, 628 F.2d 1139, 1151 (9th Cir. 1979) (en banc) (Kennedy, J., concurring), *cert. denied*, 445 U.S. 917 (1980).

2298. *Id.* at 1152.

2299. *Id.* See *United States v. Mays*, 549 F.2d 670, 677-78 (9th Cir. 1977).

2300. *United States v. Traylor*, 656 F.2d 1326, 1334-35 (9th Cir. 1981) (citing *United States v. Loud Hawk*, 628 F.2d at 1151-56 (Kennedy, J., concurring)).

In *United States v. Traylor*,²³⁰¹ defendant Andrews was convicted on charges stemming from his involvement in a conspiracy to import and distribute cocaine. The Government had seized the cocaine from Andrews' co-conspirator, then sent it for testing to a chemist in the Los Angeles Sheriff's Department. The cocaine was destroyed shortly after the co-conspirator pleaded guilty. Andrews argued that the chemist's testimony verifying the substance seized as cocaine was inadmissible because Andrews had been unable to test the substance himself.²³⁰²

The Ninth Circuit held that the destruction of the cocaine did not deny Andrews a fair trial. It noted that the decision to destroy the evidence was made by the state, not the federal authorities,²³⁰³ and that at the time of its destruction, there was no evidence linking the co-conspirator with Andrews. The court further determined that any prejudice to Andrews was decreased by the probity and reliability of the chemist's testimony as secondary evidence, and by defense counsel's extensive cross-examination of the chemist regarding the testing of the substance in question.²³⁰⁴

In *United States v. Cates*,²³⁰⁵ the defendant was convicted of receipt of firearms by a felon. On appeal, Cates contended that the handling of the seized firearms by government officials, which resulted in fingerprints not being preserved, required either dismissal or suppression of the evidence.²³⁰⁶ The Ninth Circuit rejected the defendant's argument and found the government's actions were neither unreasonable nor materially prejudicial to Cates' case.²³⁰⁷

In *United States v. Astorga-Torres*,²³⁰⁸ the defendants were convicted of various charges stemming from a conspiracy to distribute heroin. The defendants had packaged the heroin in condoms. After their arrest, Drug Enforcement Agency agents retrieved twelve condoms from the septic tank servicing the defendants' motel room. Three of these condoms were retained as evidence against the defendants, and the others were discarded.²³⁰⁹ The Ninth Circuit held that this destruc-

2301. 656 F.2d 1326 (9th Cir. 1981).

2302. *Id.* at 1334.

2303. *Id.* at 1335. Initially, the cocaine was seized by United States Customs, but the matter was turned over to local officials for prosecution. *Id.*

2304. *Id.*

2305. 663 F.2d 947 (9th Cir. 1981).

2306. *Id.* at 949.

2307. *Id.* (citing *United States v. Tercero*, 640 F.2d 190, 192-93 (9th Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981); *United States v. Loud Hawk*, 628 F.2d 1139 (9th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 917 (1980)).

2308. 682 F.2d 1331 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 455 (1983).

2309. *Id.* at 1333-34.

tion did not result in the requisite prejudice to the defendants.²³¹⁰

These decisions indicate that the Ninth Circuit rarely finds that the destruction of evidence renders a trial so unfair as to require reversal. Although it purports to use a balancing approach in evaluating the effect of the destruction on the defendant's trial, it appears that the defendant's burden in showing prejudice may be heavier than the government's burden of justification. So long as the government's actions were made in good faith, were reasonable, and did not materially prejudice the defendant, the Ninth Circuit never reaches the "more important determination" of whether the evidence presented at trial was sufficient to sustain the defendant's conviction.

H. Forfeiture Proceedings

All actions involving the deprivation of a defendant's property, including temporary deprivation, must conform with the due process requirements of the Constitution.²³¹¹ Due process requires that the defendant be given reasonable notice and an opportunity to be heard before the deprivation.²³¹² Only "extraordinary situations" may justify failure to provide notice and pre-deprivation hearings.²³¹³ In such situations, due process requires that a hearing be provided at the earliest possible time after the deprivation.²³¹⁴

In *United States v. Spilotro*,²³¹⁵ the Ninth Circuit considered whether the defendant's due process rights were violated when the dis-

2310. *Id.* at 1337. See *United States v. Heiden*, 508 F.2d 898, 902 (9th Cir. 1974).

2311. *Fuentes v. Shevin*, 407 U.S. 67, 84-86 (1972).

2312. *Id.* at 80-82.

2313. *Id.* at 90-91. Three conditions must be met to justify a failure to provide notice and a pre-deprivation hearing. First, the seizure must be necessary to preserve an important governmental or public (rather than private) interest. Second, there must be a need for very prompt action. Third, the seizure must be initiated by a government official who is responsible for determining under a narrowly drawn statute that the seizure was in fact necessary. *Id.*

The Supreme Court applied this three-fold test in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), and upheld the constitutionality of a Puerto Rican statute which provided for the *ex parte* seizure and ultimate forfeiture of vessels used for the transport of illegal substances. *Id.* at 676-80.

2314. *United States v. Crozier*, 674 F.2d 1293, 1298 (9th Cir. 1982). In *Crozier*, the defendants were charged with manufacturing methamphetamine, and their house and personal property were subjected to a restraining order under 21 U.S.C. § 848(d) (Comprehensive Drug Abuse Prevention and Control Act of 1970). The defendants appealed the restraining order after more than a year pending trial, and the Ninth Circuit held that in the absence of specific statutory language to the contrary, the district court must grant hearings on motions for preliminary injunctions at the earliest possible time after a temporary restraining order is granted without notice. *Id.* at 1297 (citing *FED. R. CIV. P.* 65).

2315. 680 F.2d 612 (9th Cir. 1982).

strict court issued an order restraining him as officer, director, and sole shareholder of Gold Rush, Ltd. from selling, transferring, encumbering, or otherwise disposing of any of Gold Rush's property during the pendency of proceedings under a RICO²³¹⁶ indictment. Spilotro was indicted under the RICO Act for using Gold Rush, Ltd. to deal in stolen jewelry, to commit wire fraud, and to conspire to do both.²³¹⁷ On the same day of the indictment's return and pursuant to section 1963(b) of the RICO Act,²³¹⁸ the court granted an ex parte motion for an order restraining Spilotro from disposing of any assets or interest in Gold Rush, Ltd. It also set a hearing date approximately one month later for a Government motion requiring Spilotro to post bond pending trial.²³¹⁹ At this hearing, the Government asserted that substantial physical evidence was available which made conviction likely. It did not, however, introduce this evidence at the hearing. The district court granted the Government's motion and required Spilotro to post a \$180,000 bond pending trial, the liquidation value of Gold Rush's assets.²³²⁰ On appeal,²³²¹ Spilotro argued that his due process rights had been violated because he had not been given notice of the action against him prior to the issuance of the restraining order, and because the Government failed to present sufficient evidence to allow the district court to continue the restraining order.²³²²

The Ninth Circuit first found that Spilotro's due process rights had not been violated for lack of notice because: (1) there was a governmental interest in preventing continued illegal use of the premises and in enforcing criminal sanctions; (2) prompt action was necessary to prevent Spilotro from destroying, concealing, or removing the stolen jewelry to another jurisdiction; and (3) the seizure was initiated by

2316. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1976).

2317. 680 F.2d at 614.

2318. 18 U.S.C. § 1963(b) (1976) provides:

In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, at it shall deem proper.

2319. 680 F.2d at 614-15.

2320. *Id.* at 615.

2321. The court permitted an interlocutory appeal because a significant interest of the defendant was involved which required immediate review, and the appeal was separable enough from the primary proceeding that neither proceeding would impede the other. *Id.* at 615 (citing *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949); *United States v. Crozier*, 674 F.2d 1293, 1297 (9th Cir. 1982)).

2322. 680 F.2d at 616.

Government officials rather than by private parties.²³²³ The court then found, however, that the Government did fail to meet its burden of proof at the post-deprivation hearing. It held that the Government's burden of proof in a RICO prosecution is similar to that in a continuing criminal enterprise prosecution.²³²⁴ Therefore, the Government must show that it is likely to convince a jury beyond a reasonable doubt that the defendant is guilty of violating the RICO Act, and that the profits or properties at issue are subject to forfeiture under the RICO Act.²³²⁵ The court stated that this showing must be sufficient to allow the district court to independently assess whether the burden has been met; the Government cannot rely upon an indictment alone.²³²⁶

The court concluded that because the Government had presented none of the evidence of Spilotro's guilt at the hearing, the district court could not have independently determined whether the Government's assertions were merely expressions of prosecutorial optimism or whether the evidence was indeed probative, admissible, and likely to establish Spilotro's guilt.²³²⁷ It therefore remanded Spilotro's case to the district court for a full evidentiary hearing to be commenced without unreasonable delay.²³²⁸

2323. *Id.* at 617 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678 (1974), *see supra* note 2313; *Ivers v. United States*, 581 F.2d 1362, 1368 (9th Cir. 1978)).

2324. 680 F.2d at 681. *See* 21 U.S.C. § 848 (1976).

2325. 680 F.2d at 617-18 (citing *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981)). To meet his burden of proof, Spilotro relied on a standard set forth in *United States v. Mandel*, 408 F. Supp. 679 (D. Md. 1976). In *Mandel*, the court stated that for an injunction in a civil proceeding the petitioner must show that: (1) he or she is likely to prevail on the merits at trial; (2) irreparable harm will result in the absence of relief; (3) issuance of the injunction will not substantially harm other parties interested in the proceedings; and (4) public interest supports the issuance of the injunction. 408 F. Supp. at 682. It noted, however, that in a criminal proceeding the first requirement would involve the government's showing that it was likely to convince a jury of guilt beyond a reasonable doubt, and that this was incompatible with a defendant's presumption of innocence. *Id.* at 682-83.

The *Spilotro* court, however, adopted the contra rule in *United States v. Long*, 654 F.2d 911 (3d Cir. 1981), where the Third Circuit stated that the purpose of the presumption of innocence doctrine is to allocate the burden of proof at trial and has no application to a determination of the rights of a pre-trial detainee. 654 F.2d at 916 n.8 (quoting *Bell v. Wolfish*, 441 U.S. 520, 533 (1979)).

Spilotro also argued that the government must show a likelihood that the property would be transferred if the restraining order were not issued. The Ninth Circuit found that in a case involving jewelry, which by its very nature poses the threat that it will be disposed of before trial, an independent showing regarding its likely transfer is not required. The court left open whether a showing of transfer is required with other types of property. 680 F.2d at 618 n.3.

2326. *Id.* at 618.

2327. *Id.* at 618-19.

2328. *Id.* at 619. Spilotro also argued that 18 U.S.C. § 1963(b) does not grant the district court jurisdiction to enter restraining orders and set performance bonds until the defendant

I. ARREST, SEARCH AND SEIZURE

A. *Steven R. Cerveris*B. *Patricia A. Schmiede*

C.

1. *James M. Patronite, Jr.*2. *Barbara P. Wright*3. *Barbara P. Wright*4. *Barbara P. Wright*5. *Barbara P. Wright*6. *James M. Patronite, Jr.*7. *James M. Patronite, Jr.*8. *James M. Patronite, Jr.*9. *James M. Patronite, Jr.*10. *Barbara P. Wright*11. *James M. Patronite, Jr.*D. *Patricia A. Schmiede*E. *Steven R. Cerveris*F. *Steven R. Cerveris*G. *Paul Alvarez*H. *Patricia A. Schmiede*

II. PROCEDURAL RIGHTS OF THE ACCUSED

A. *Rebecca J. Winthrop*B. *Kenneth B. Grossfeld*C. *Paul Alvarez*D. *Steven R. Cerveris*E. *Patricia A. Schmiede*

III. PRETRIAL PROCEEDINGS

A. *Angelina W. Wong*

is convicted. *Id.* at 616. The Ninth Circuit, however, did not agree with such a narrow reading of the statute. It cited statements in the House Report that the purpose of § 1963(b)'s provisions for orders and performance bonds is to prevent *pre-conviction* transfers of property. *Id.* (citing H.R. REP. No. 1549, 91st Cong., 2d Sess. 57, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 4007, 4033). It also noted that § 1963(c) authorizes the court to act only "upon conviction" of the defendant, while § 1963(b) authorizes the issuance of a restraining order "in any action." 680 F.2d at 616. *See supra* note 2318.

Spilotro then contended that RICO provisions apply only against a defendant's "interest" in an enterprise rather than against the enterprise itself; that since Gold Rush, Ltd. is not a party to the proceedings, it is not subject to a restraining order; that his wife's 50% community property interest in Gold Rush, Ltd. stock is not subject to a restraining order; that the \$180,000 performance bond was prohibitively high; and that the appraisal of and demand for records of his property were in violation of his fourth and fifth amendment rights. The Ninth Circuit declined to decide these issues because of the possibility of mootness should the Government fail to meet its burden at the full evidentiary hearing upon remand. *Id.* at 619.

B.

1. *Angelina W. Wong*
2. *Angelina W. Wong*
3. *Angelina W. Wong*
4. *Angelina W. Wong*
5. *Lawrence B. Cohn*

C. Pamela A. Kuehn

D. Lawrence B. Cohn

E. Diana L. Summerhayes

F. Charles G. Smith

G. Pamela A. Kuehn

H. William W. Koepcke

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