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Ninth Circuit Review—Developments in Criminal Law and Procedure in the Ninth Circuit, 1976: A Survey

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DEVELOPMENTS IN CRIMINAL LAW AND PROCEDURE IN THE NINTH CIRCUIT, 1976: A SURVEY

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INTRODUCTION

*by Michael J. Lightfoot**

Last year, this Law Review took on the formidable task of surveying many of the Ninth Circuit's significant 1975 rulings in the area of criminal law and procedure. Starting with this issue, that task has been continued in an even more ambitious fashion. As the reader will appreciate after reading the following pages, *all* criminal law and procedure developments resulting from 1976 Ninth Circuit opinions are surveyed and analyzed in this volume. It is the intention of the editors that this comprehensive survey will serve as the benchmark for issues to come in the years ahead.

One has only to contemplate recent federal legislation in areas such as speedy trials and the rules of evidence, in addition to expected statutory changes in fields like grand jury reform, to appreciate the need for a thorough analysis of the Ninth Circuit's expected interpretations in these areas. Fourth amendment concerns, long principal focal points of the criminal bar's daily practice and newly rekindled by Supreme Court decisions in the last few terms, are but other examples of a real need for the type of excellent, comprehensive treatment contained in this issue.

Too often, continuing surveys of court decisions, while originally setting a bold and ambitious goal, tend to fall short of the breadth and depth of analysis promised the reader. If this volume's survey is a fair indication of things to come, the impact of its wide-ranging analysis will become increasingly more valued among the ranks of the practicing defense lawyers and prosecutors in the federal system as its reputation spreads.

Hopefully, it will eventually become an indispensable part of the library of each member of this circuit's criminal bar.

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I. ARREST, SEARCH AND SEIZURE

A. Scope of the Fourth Amendment

The fourth amendment to the United States Constitution guarantees that the people will be protected from unreasonable governmental invasions of their reasonable expectations of privacy.[1] In *Katz v. United States*,[2] the Supreme Court rejected the idea that the fourth amendment prescribed "constitutionally protected areas."[3] The *Katz* Court enunciated a twofold requirement for determining when an individual has a reasonable expectation of privacy.[4] The test requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."[5] The Supreme Court[6] and the Ninth Circuit[7] have both held that the reasonableness or unreasonableness of a search is determined by examining the facts of each case.

The primary focus of fourth amendment protection is on people, not places.[8] In applying the two-pronged test for determining reasonable expectations of privacy, the Ninth Circuit has taken many situations out of the scope of fourth amendment protection by finding no reasonable expectation of privacy in specific fact situations.[9] The Ninth Circuit has tended to focus on the second prong, finding that a defendant must demonstrate that his subjective expectation of privacy in the given fact

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1. The fourth amendment reads:

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

U.S. CONST. amend. IV.

2. 389 U.S. 347 (1967).

3. *Id.* at 350 (the correct solution of fourth amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area.").

4. 389 U.S. at 361 (Harlan, J., concurring).

5. *Id.*

6. Cooper v. California, 386 U.S. 58 (1967).

7. United States v. Friesen, 545 F.2d 672 (9th Cir. 1976), holding that, "What appears clear from . . . *Cooper* . . . and *Preston* . . . is that searches are to be measured for their reasonableness on the factual context in which the trier of fact must apply Fourth Amendment protections." *Id.* at 673.

8. Katz v. United States, 389 U.S. at 351 ("[t]he fourth amendment protects people, not places.").

9. *See* notes 11-16 *infra* and accompanying text.

construct is reasonable as measured by whether *society* would assume a right of privacy in the same situation.[10] It has been held that a person has no reasonable expectation of privacy in the visible contents of an airplane on a public runway,[11] in the movements of a vehicle on a public road,[12] in articles of personal property properly subpoenaed from an attorney,[13] in boxes left near a fence on private land,[14] in his handwriting or his fingerprints,[15] or in the odors outside his trailer.[16]

The fourth amendment protects individuals against unreasonable searches by the *government*, not private parties.[17] In a recent Ninth Circuit case, *United States v. Sherwin*,[18] the court found that even though a trucking terminal manager had made an unreasonable search

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10. *Id.*

11. United States v. Coplen, 541 F.2d 211 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 810 (1977). The government agent discovered marijuana debris when he used his flashlight to look in the airplane windows.

12. United States v. Hufford, 539 F.2d 32 (9th Cir.), *cert. denied*, 97 S. Ct. 533 (1976). Government agents had attached a "beeper" to the defendant's pick-up truck so that the truck could be more efficiently followed. The court reasoned that since the agents could have followed the defendant's truck, it was no invasion of the defendant's privacy to follow him with the aid of a beeper.

13. United States v. Palmer, 536 F.2d 1278 (9th Cir. 1976). The defendant had given his attorney items purportedly purchased with proceeds from the robbery with which the defendant was charged. The court held, "We do not explore the issue of a reasonable expectation of privacy, however, because the use of a properly limited subpoena does not constitute an unreasonable search and seizure under the fourth amendment." *Id.* at 1281-82. *Cf.* United States v. Vixie, 532 F.2d 1277 (9th Cir. 1976) (affirming defendant's conviction for violating 18 U.S.C. § 1505 by submitting a false document in response to a subpoena issued by the Internal Revenue Service).

14. United States v. Freie, 545 F.2d 1217 (9th Cir. 1976). The court held that the "open fields" doctrine (*see* Hester v. United States, 265 U.S. 57 (1924)) is no longer viable: "[O]pen fields are not areas in which one traditionally might reasonably expect privacy." 545 F.2d at 1223. An earlier Ninth Circuit case, United States v. Pruitt, 464 F.2d 494 (9th Cir. 1972) handled the open fields doctrine in a similar manner. The defendants had cached boxes and duffel bags in the underbrush. The court reasoned that any casual passerby could have examined the boxes; defendants therefore had no reasonable expectation of privacy in their contents.

15. Whitnack v. United States, 544 F.2d 1245 (9th Cir. 1976). *See also* United States v. Mara, 410 U.S. 19 (1973) (handwriting exemplar); United States v. Dionisio, 410 U.S. 1 (1973) (voice exemplar).

16. United States v. Solis, 536 F.2d 880 (9th Cir. 1976) (police dogs' intrusion into area open to the public reasonably tolerable in our society).

17. *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921). The Ninth Circuit followed this rule in United States v. Ogden, 485 F.2d 536, 538-39 (9th Cir. 1973), *cert. denied*, 416 U.S. 987 (1974).

18. 539 F.2d 1 (9th Cir. 1976).

of the defendant's property, the defendant's fourth amendment rights were not violated because there was no *governmental* involvement in the search.[19]

Searches and seizures are "reasonable" only when the government's need to search and/or seize outweighs the inconvenience to the individual whose right to privacy is violated.[20] A particular search is constitutionally valid only if the degree of intrusion is no greater than necessary. The Ninth Circuit, in *United States v. Grummel*,[21] approved the actions of federal agents who, after arresting the suspect in his home, secured the premises by waiting in the house with the suspect's mother until a search warrant was obtained.[22] In *United States v. One 1970 Pontiac GTO, 2-Door Hardtop*,[23] the court sanctioned the forfeiture of an automobile in which a heroin sale occurred, reasoning that forfeiture is not limited solely to vehicles transporting contraband but includes all vehicles which facilitate the sale of contraband.[24]

Searches and seizures must be based on probable cause. An arrest (or a "seizure" of the person) may be made without a warrant when a misdemeanor is committed in the arresting officer's presence,[25] or when an officer has probable cause to believe a felony was committed in a public place.[26] The Ninth Circuit has held that warrantless arrests

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19. The court delineated the circumstances that would give rise to a fourth amendment violation in a private party search. The court stated:

> [E]vidence discovered in a private search is not subject to exclusion for failure to obtain a search warrant or otherwise comply with the requirements of the fourth amendment.
>
> . . . .
>
> . . . A private person cannot act unilaterally as an agent or instrumentality of the state; there must be some degree of governmental knowledge and acquiescence. In the absence of such official involvement, a search is not governmental.

Id. at 5-6. *See also* United States v. Goldstein, 532 F.2d 1305 (9th Cir. 1976) (no violation when telephone company employee turned over the results of electronic surveillance to F.B.I. agents).

20. *See* Terry v. Ohio, 392 U.S. 1, 20-21 (1968) (government's need to protect police officers outweighs the invasion of a "pat-down" search); Schmerber v. California, 384 U.S. 757, 766-72 (1966) (blood tests taken on suspected drunk drivers are reasonable to identify and deter drunk driving).

21. 542 F.2d 789 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 763 (1977).

22. *Id.* at 791.

23. 529 F.2d 65 (9th Cir. 1976).

24. *Id.* at 65-66.

25. Coverstone v. Davies, 38 Cal. 2d 315, 239 P.2d 876, *cert. denied*, 344 U.S. 840 (1952).

26. The circumstances of the arrest largely determine whether or not a warrant is required. *See* Gerstein v. Pugh, 420 U.S. 103 (1975). In *Pugh*, the Court summarized that it "has never invalidated an arrest supported by probable cause solely because the

are valid where (1) the arrest was made in the hallway of a defendant's apartment building,[27] (2) the officers had probable cause to arrest at least two hours before the arrest and did not obtain a warrant,[28] and (3) the defendant was arrested while traveling on a public highway.[29] A warrantless entry into a defendant's home was criticized by the court in *United States v. Grummel*,[30] but the court found the subsequent search valid on other grounds.[31]

The "probable cause" requirement for a valid arrest has been discussed by the Supreme Court in several contexts. Most of the decisions focus on the informant problem and related concerns.[32] The Ninth Circuit held in *United States v. Jackson*[33] that since the Supreme Court standards for probable cause were not entirely clear, the court could use a totality of the circumstances test in deciding whether an informant's tips were sufficient to supply probable cause.[34] The court also upheld a warrantless arrest where the officers' stop of a car was based on founded suspicion and corroborating evidence was discovered in a search subsequent to the defendant's arrest.[35] An arrest was invali-

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officers failed to secure a warrant." *Id.* at 113, *quoted with approval* in United States v. Watson, 423 U.S. 411, 417-18 (1976). *See also* Henry v. United States, 361 U.S. 98, 102 (1959) (recognizing propriety of warrantless arrest).

27. United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976). *See also* United States v. Fluker, 543 F.2d 709 (9th Cir. 1976).

28. United States v. Wysong, 528 F.2d 345 (9th Cir. 1976). In *Wysong*, the court did not consider the validity of the defendant's arrest on the merits because he failed to raise the issue at trial.

29. United States v. Edwards, 539 F.2d 689 (9th Cir. 1976).

30. 542 F.2d 789 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 763 (1977).

31. *Id.* at 791.

32. *See* Whitely v. Warden, 401 U.S. 560 (1971) (arrest invalid since bulletin broadcast to arresting officers was not corroborated by sufficient information on part of officer who issued the bulletin to constitute probable cause); Henry v. United States, 361 U.S. 98 (1959) (arrest invalid because all of defendant's activities observed by police were innocent on their face); Draper v. United States, 358 U.S. 307 (1959) (probable cause requirement satisfied when the informant gave information sufficiently detailed to indicate an aura of reliability).

33. 544 F.2d 407 (9th Cir. 1976).

34. The *Jackson* court wrote:

> The informant here was untested, so there was no previous experience to qualify her. Prior dealing is not the only basis for establishing reliability, however. We may consider the underlying circumstances, including those portions of the information verified by the police, and other factors supporting the informant's reliability and the probable truthfulness of the information given.

Id. at 410.

35. United States v. Bates, 533 F.2d 466, 469 (9th Cir. 1976) (probable cause established when experienced customs officers observed vehicle and suspected transportation of contraband). The court also noted that "whether the arrest preceded the search or vice versa is immaterial as the requirement for the existence of probable cause is man-

dated by the Ninth Circuit on the grounds that the inaccuracies in the affidavit alleging probable cause were substantial.[36] Even if probable cause exists, an arrest cannot be made as a pretext for a subsequent search.[37]

B. The Exclusionary Rule

The Supreme Court, in *Weeks v. United States*,[38] held that the fourth amendment required suppression of evidence in a federal prosecution obtained during an illegal search or seizure.[39] The Court extended this ruling to include evidence unlawfully procured in a state (or nonfederal) case in *Mapp v. Ohio*.[40] In *Mapp*, the Court enunciated its rationale for requiring suppression of illegally obtained evidence in both state and federal courts. First, the evidence cannot be used against a defendant whose constitutional rights were violated because allowance of such evidence will encourage violations of the fourth amendment.[41] Second, the *Mapp* Court recognized that the need for "judicial integrity" requires the application of the exclusionary rule.[42]

Chief Justice Warren Burger expressed his disenchantment with the exclusionary rule in *Coolidge v. New Hampshire*[43] and *Bivens v. Six Unknown Named Agents*.[44] Then, in 1975, the Court declined to apply the exclusionary rule and admitted evidence obtained in a warrantless search made by a border guard.[45] Justice Brennan, joined by Justice

dated to justify either." *Id.* at 468. *See also* United States v. Portillo-Reyes, 529 F.2d 844, 848 (9th Cir. 1975).

36. United States v. Esparza, 546 F.2d 841, 844 (9th Cir. 1976) (cumulative effect of inaccuracies was substantial).

37. McCusker v. Cupp, 541 F.2d 850 (9th Cir. 1976) (finding no pretext). *See* United States v. Lefkowitz, 285 U.S. 452, 467 (1932) ("an arrest may not be used as a pretext to search for evidence") and Taglavore v. United States, 291 F.2d 262, 265 (9th Cir. 1961) for an exposition of the rule in the Ninth Circuit.

38. 232 U.S. 383 (1914).

39. *Id.* at 398.

40. 367 U.S. 643 (1961).

41. *Id.* at 656.

42. *Id.* at 659.

43. 403 U.S. 443, 493 (1971) (Burger, C.J., dissenting).

44. 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting). The Chief Justice wrote:

> I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. . . . But the hope that this objective could be accomplished by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream. Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective.

Id. at 415.

45. United States v. Peltier, 422 U.S. 531 (1975).

Marshall, vigorously dissented, objecting to what he viewed as the beginning of the demise of the exclusionary rule.[46]

The Ninth Circuit discussed the rationale and limitations of the exclusionary rule in *United States v. Winsett*.[47] The *Winsett* court noted that "[t]he judicially created remedy was designed not to compensate for the unlawful invasion of one's privacy but to deter unlawful police conduct . . . ."[48] The *Winsett* rule was extended in 1976 so that the exclusionary rule will not bar the admission of unlawfully seized evidence in a defendant's trial for perjury allegedly committed during grand jury investigations.[49]

The Ninth Circuit decision in *United States v. Ryan*[50] further indicates reluctance to exclude relevant but "tainted" evidence. In *Ryan*, government agents had enlisted the aid of a Mr. Mizera, inducing him to act as a government informant in exchange for a promise that he would not be prosecuted. The defendants argued that their due process rights were violated by the manner in which government agents persuaded Mizera to act as an informant.[51] The court noted that in *United States v. Russell*,[52] Justice Rehnquist had stated: "[W]e may someday be presented with a situation in which the conduct of law enforcement officials is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[53] The *Ryan* court held: "On the basis of the applicable legal standards derived from *Russell*, . . . we find that this treatment of Mizera does not violate appellants' due process rights."[54]

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46. *Id.* at 551-52 (Brennan, J., dissenting).

47. 518 F.2d 51 (9th Cir. 1975).

48. *Id.* at 53 (citing Elkins v. United States, 364 U.S. 206, 217 (1969)).

49. United States v. Raftery, 534 F.2d 854 (9th Cir. 1976). The court explained: "The purpose of the rule would not be served by forbidding the Government from using the evidence to prove the entirely separate offense of perjury before a grand jury occurring after the illegal search and seizure and suppression of the evidence in the state court." *Id.* at 857. *See also* United States v. Turk, 526 F.2d 654, 667 (5th Cir. 1976).

50. 548 F.2d 782 (9th Cir. 1976), *cert. denied*, 430 U.S. 965 (1977).

51. The court found that the following statements had been made to Mizera by the Government agents:

> (1) Repeated assertions to Mizera that he *would* go to jail for 10 years if he refused to cooperate; . . . (2) Admonitions to Mizera not to get an attorney or his "usefulness" to state agents would be over; (3) Prophesies that his health would suffer irreparably if he went to jail; (4) Assurances that his friends, Wilson and Zeldin, would be kept "out of it"; and (5) Reminders that if he did not help obtain sufficient evidence against Ryan, he himself would be indicted.

Id. at 789.

52. 411 U.S. 423 (1973).

53. *Id.* at 431-32.

54. 548 F.2d at 789.

The Supreme Court, in a case[55] decided one year before the exclusionary rule was made applicable to the states,[56] held that evidence illegally seized by state police could not be used in a subsequent federal prosecution.[57] The demise of the so-called "silver platter" doctrine was halted somewhat by a 1976 case[58] in which evidence seized unconstitutionally by the Los Angeles police was held admissible in a federal *civil* case.[59] The Ninth Circuit has followed the Supreme Court's trend regarding the applicability of the silver platter doctrine. In *United States v. Hall*,[60] the district court had declined to exclude wiretap evidence, obtained legally by federal standards[61] but illegally by California state standards.[62] The Ninth Circuit affirmed, holding that "the federal court is not compelled to exclude the seized material merely because of a violation of state law."[63]

A court can avoid applying the exclusionary rule if it finds that the defendant does not have *standing* to litigate the legality of a search and seizure. Federal Rule of Criminal Procedure 41(e)[64] provides that a defendant must have been "aggrieved by the seizure"[65] in order to have standing. The Supreme Court defined the situations in which a litigant could be aggrieved in *Brown v. United States*.[66] In *Brown*, the Court held that

> there is no standing to contest a search and seizure where . . . the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as

55. Elkins v. United States, 364 U.S. 206 (1960).

56. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

57. 364 U.S. at 223.

58. United States v. Janis, 428 U.S. 433 (1976).

59. The Court reasoned that since the evidence was obtained in a search that while technically illegal was undertaken in good faith, there would be no deterrent value in excluding the evidence. *Id.* at 447-54.

60. 543 F.2d 1229 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 814 (1977).

61. *See* Crime Control Act, 18 U.S.C. §§ 2510-2520 (1970).

62. *See* CAL. PENAL CODE § 631 (West Supp. 1977).

63. 543 F.2d at 1232. The dissent criticized this holding:

> [I]t endorses a novel variation on the sort of illegal trade-off repudiated by the Supreme Court in *Elkins v. United States* . . . , while simultaneously submerging the "imperative of judicial integrity" keynoted in that decision. . . . More fundamentally, it unduly warps established legal principles, enabling it to ride roughshod over both state and federal law. *Id.* at 1237.

64. FED. R. CRIM. P. 41(e).

65. *Id.*

66. 411 U.S. 223 (1973). *See also* Jones v. United States, 362 U.S. 257 (1960).

an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.[67]

In *United States v. Young*,[68] the Ninth Circuit found that the defendants did have standing to challenge the admissibility of certain evidence because possession of a controlled substance was an element of two of the crimes charged.[69]

The Ninth Circuit applied the *Brown* test in two 1976 cases, finding in each that the defendants did not have standing to move to suppress evidence on fourth amendment grounds. In *United States v. Pretzinger*,[70] the court reviewed the test for standing and then concluded that the defendant did not fall into any of the three categories.[71]

In *United States v. Williams*,[72] the court held that the defendant's affidavit was not sufficient to establish standing.[73] The court explained, "Appellant's assertion that he had used or intended to use the hangar and van, possessed keys to both at some point, and had an expectation of privacy in them are vague and conclusory."[74]

The "fruit of the poisonous tree" doctrine[75] is a judicially-created extension of the exclusionary rule which excludes evidence obtained as a result of other evidence formerly seized in an illegal manner. Courts frequently avoid application of this doctrine by finding "attenuation." The Ninth Circuit, in *United States v. Caceres*,[76] rejected the defendant's argument that information obtained from a tape recorded face-to-face conversation with an IRS agent, a procedure called "monitoring," must be suppressed because the application for authorization was based on previous unauthorized monitorings. The court wrote, "[I]t is clear that the information in the application for authorization was based upon

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67. 411 U.S. at 229.

68. 535 F.2d 484 (9th Cir. 1976).

69. *Id.* at 487. The court likewise found that "Young does not have standing with respect to the importation count since possession was not an element of that offense." *Id.* at 487.

70. 542 F.2d 517 (9th Cir. 1976).

71. *Id.* at 520.

72. No. 75-1566 (9th Cir. Jan. 26, 1976).

73. *Id.*, slip op. at 5.

74. *Id.* The court added that "[t]he affidavit names neither the lessee nor the owner of the premises, from one of whom the appellant necessarily acquired whatever proprietary or possessory interest he asserted." *Id.*

75. *See* Wong Sun v. United States, 371 U.S. 471, 484-85 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

76. 545 F.2d 1182 (9th Cir. 1976).

the agent's independent recollection of the meetings . . . , not upon the recordings themselves."[77]

The trend is clear. Courts, including Ninth Circuit panels, are finding ways of limiting the scope of the exclusionary rule. Perhaps Justice Brennan was correct in his *Peltier* dissent,[78] suspecting that "when a suitable opportunity arises, today's revision of the exclusionary rule [evidence need be suppressed only when the officer knew the search was unconstitutional] will be pronounced applicable to all search-and-seizure cases."[79]

C. *Search Warrants and Probable Cause*

The fourth amendment sets forth the conditions under which a warrant can issue.[80] A valid search warrant is issued within the parameters of the fourth amendment if several requirements developed by the Supreme Court are met. First, the affidavit presented to the magistrate must allege facts sufficient to enable the magistrate to conclude that probable cause exists. Affidavits must satisfy the two-pronged test established in *Aguilar v. Texas*[81] and *Spinelli v. United States*.[82] The affidavit must first set forth facts which enable the magistrate to evaluate the reliability of the information; second, the affidavit must allege facts which permit the magistrate to evaluate the credibility of the informant.[83]

The Ninth Circuit, in 1972, explained the manner in which a previously untested informant's reliability could be established.[84] The court held that "[t]he magistrate is entitled to look to the underlying circumstances, including those portions of the information independently verified by police, and to other factors supporting the probable truthfulness of the information."[85] In *United States v. Jackson*,[86] the Ninth Circuit cited their holding from 1972 and reinforced the circuit's position that

77. *Id.* at 1188. *See also* United States v. Shuey, 541 F.2d 845 (9th Cir. 1976).
78. 422 U.S. at 551-52 (Brennan, J., dissenting).
79. *Id.* at 552.
80. U.S. CONST. amend. IV. "[N]o 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."
81. 378 U.S. 108 (1964).
82. 393 U.S. 410 (1969).
83. *Id.* at 413.
84. United States v. Wong, 470 F.2d 129 (9th Cir. 1972).
85. *Id.* at 131.
86. 544 F.2d 407 (9th Cir. 1976).

there are many ways in which a court can determine the reliability of the untested informant.[87]

The Supreme Court has held that affidavits must be interpreted in a commonsense manner.[88] This directive gives the court latitude in determining the reliability of an informant. The Ninth Circuit has recently held various affidavits sufficient where defendants had attempted to convince the courts that the warrants were issued without probable cause. For example, in *United States v. Toral*,[89] an affidavit giving no evidence of the underlying circumstances justifying the informant's conclusions and giving no corroboration was held sufficient to establish probable cause because it contained "sufficient detail."[90] In *United States v. Fluker*,[91] the court upheld a warrant based on an affidavit which gave no facts of previous police contact with the informant.[92] In *United States v. Prueitt*,[93] the court concluded that the "verification of the informer's story provided a 'substantial basis' for concluding that the informer was reliable."[94] In *United States v. Bowser*,[95] the court upheld a warrant based on a co-conspirator's statement against penal interest.[96] Finally, in *United States v. Wood*,[97] the affidavit met the second prong of the *Aguilar-Spinelli* test because the information was based on declarations against the informant's penal interest.[98] It

87. *Id.* at 410-11.

88. United States v. Ventresca, 380 U.S. 102, 109 (1965). The Court explained: "[W]here these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *Id.* at 109.

89. 536 F.2d 893 (9th Cir. 1976).

90. *Id.* at 895. The court reasoned that by containing details the affidavit would assure that the judge "is relying on something more substantial than a casual rumor." *Id. See also* Spinelli v. United States, 393 U.S. 410, 416 (1969) and Draper v. United States, 358 U.S. 307 (1959).

91. 543 F.2d 709 (9th Cir. 1976).

92. The affidavit did give corroborating evidence from which the magistrate could conclude the information was reliable. *Id.* at 714. *See also* Spinelli v. United States, 393 U.S. 410 (1969), holding that independent corroboration of facts given by an informant can provide sufficient probable cause for the magistrate if such corroboration is extensive.

93. 540 F.2d 995 (9th Cir. 1976).

94. *Id.* at 1005. *See also* United States v. Archuleta, 446 F.2d 518, 519-20 (9th Cir. 1971).

95. 532 F.2d 1318 (9th Cir. 1976).

96. The court in *Bowser* reasoned that the statement contained sufficient detail to establish probable cause. *Id.* at 1321.

97. 550 F.2d 435 (9th Cir. 1976).

98. The court stated, "Such statements against one's own penal interest are a sufficient indication of reliability by themselves." *Id.* at 438.

would appear that the Ninth Circuit perceives the *Aguilar-Spinelli* test as requiring verification of the informant's reliability in some manner. It would also appear that the circuit is willing to find verification in a variety of situations.

The Supreme Court has held that the degree of probable cause required for an "administrative inspection" is less than that required for a routine search and seizure with a warrant.[99] The Ninth Circuit, in *United States v. Goldfine*,[100] upheld an administrative warrant that was based on an affidavit which did not disclose that the defendants' activities were under investigation.[101] The probable cause requirement for administrative inspections is met simply by alleging a public interest in maintaining compliance with administrative regulations.[102]

A search warrant must be supported by substantial indication that evidence of criminal activity will be found at the place to be searched. In addition, the items to be seized and the place to be searched must be described with particularity.[103] In *United States v. Bowers*,[104] the defendant argued that the warrant was invalid because it was supported by an affidavit which failed to state that the items to be seized were in his home.[105] The court stated that the magistrate need only find "reasonable ground" to believe the items will be in the designated place.[106] In *United States v. Spearman*,[107] the Ninth Circuit upheld

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99. In Camara v. Municipal Court, 387 U.S. 523 (1967), the Court held, "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539. *See also* See v. Seattle, 387 U.S. 541 (1967).

100. 538 F.2d 815 (9th Cir. 1976).

101. *Id.* at 818. The defendants argued that the "search" was not an administrative inspection, but a search for evidence of criminal activity; therefore, a traditional showing of probable cause was required in the affidavit. The court rejected this view, stating, "We reject the proposition that pharmacies as to which there is probable cause to suppose a violation are by that fact rendered exempt from administrative inspection and subject only to search for evidence of crime."

102. *Id.* at 819.

103. *See* Roaden v. Kentucky, 413 U.S. 496, 504-05 (1973); Stanford v. Texas, 379 U.S. 476, 481 (1965); Marcus v. Search Warrant, 367 U.S. 717, 732 (1961); Trupiano v. United States, 334 U.S. 699, 710 (1948).

104. 534 F.2d 186 (9th Cir. 1976).

105. The court stated, "The magistrate is not required to determine whether *in fact* the items to be searched for are located at the premises to be searched, but only whether there is *reasonable ground* to believe they are there." *Id.* at 192. *See also* United States v. Damitz, 495 F.2d 50, 55 (9th Cir. 1974).

106. 534 F.2d at 192.

107. 532 F.2d 132 (9th Cir. 1976). *See also* United States v. Kalama, 549 F.2d 594 (9th Cir. 1976).

a warrant to search the defendant's car. The defendant argued that the informant's tip indicated there was cause to search the defendant's *apartment*, but that there was no probable cause to believe the defendant's car was involved.[108] Where defendants have challenged affidavits on the basis that they do not meet the "particularity" requirement of the fourth amendment, courts have consistently held that the affidavits must be tested in a commonsense and realistic fashion.[109]

The courts are also faced with an issue, in the area of particularity, of whether misrepresentations in the affidavit render it insufficient by fourth amendment standards.[110] In *United States v. Prewitt*,[111] the validity of a warrant was upheld in spite of four inaccuracies in the affidavit. The court found the misrepresentations to be neither material nor intentional.[112] In *United States v. Calhoun*,[113] the defendant, relying on *Prewitt*,[114] claimed that although the inaccuracies were not intentional, they were material when taken in concert. The court rejected Calhoun's contentions, stating that "[t]he lack of materiality of each inaccuracy does not disappear when they are combined."[115]

The third requirement for a valid warrant is that it must be issued by a neutral and detached judicial officer. In *Shadwick v. City of Tampa*,[116] the Supreme Court in a unanimous opinion held that "an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search."[117] The Ninth Circuit was

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108. The court reasoned that while "probable cause to believe a person is guilty of a crime does not always constitute probable cause to search any property belonging to him," 532 F.2d at 133, the court could uphold the search where there was a "nexus between the items to be seized and the place to be searched. . . ." *Id.*

109. *See, e.g.*, United States v. Ventresca, 380 U.S. 102, 108-09 (1965). A Ninth Circuit case following this rule is United States v. Wysong, 528 F.2d 345, 349 (9th Cir. 1976).

110. *See* United States v. Damitz, 495 F.2d 50, 55-56 (9th Cir. 1974).

111. 534 F.2d 200 (9th Cir. 1976).

112. *Id.* at 202.

113. 542 F.2d 1094 (9th Cir. 1976).

114. 534 F.2d 200 (9th Cir. 1976).

115. 542 F.2d at 1099. *But cf.* United States v. Esparza, 546 F.2d 841, 844 (9th Cir. 1976), in which an *arrest* warrant was invalidated by the Ninth Circuit because "[a]lthough each misrepresentation taken alone would not have been fatal to the warrant, the cumulative effect of the inaccuracies was substantial."

116. 407 U.S. 345 (1972).

117. *Id.* at 350. The Court upheld a city charter provision authorizing municipal court clerks to issue arrest warrants for municipal ordinance violations. *See also* Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971), a plurality opinion in which the Court discussed the need for a neutral and detached officer.

confronted with a similar situation in *United States v. Banks*.[118] The defendant had argued that the search warrant was deficient because it was issued by the commander of a military reservation. The court disagreed, finding the commander competent to issue a search warrant.[119]

Many courts are as reluctant to invalidate search warrants as they are to exclude relevant evidence.[120] Ninth Circuit panels are using the terms "commonsense interpretation"[121] and "totality of the circumstances"[122] to uphold the validity of challenged search warrants.

D. Electronic Surveillance

In *Katz v. United States*,[123] the Supreme Court stated that physical penetration into a constitutionally protected area was no longer necessary to invoke the protections of the fourth amendment. After *Katz*, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968.[124] Although the constitutionality of the Act has not yet been litigated before the Supreme Court, the United States Court of Appeals for the Third Circuit has rejected a challenge to the Act's constitutionality.[125] Recent Supreme Court cases have tacitly assumed that the Act is constitutional.[126] Title III of the Act defines the standards and regulations for authorized electronic surveillance by agents of the federal government.[127]

In *Alderman v. United States*,[128] the Court noted that only an "aggrieved person" has standing under the Act to object to an illegal electronic surveillance.[129] The Ninth Circuit interpreted the require-

118. 539 F.2d 14 (9th Cir. 1976).

119. The court wrote:

> The position of the commanding officer in the instant case, however, is unlike that of the attorney general in Coolidge . . . , who [was] actively in charge of the investigation[s] when [he] authorized the warrants. Nothing in the record suggests the base commander here participated in any way in the investigation or prosecution of Banks.

Id. at 16.

120. *See* notes 43-79 *supra* and accompanying text.

121. *See* notes 88-90 *supra* and accompanying text.

122. *See* notes 91-98 *supra* and accompanying text.

123. 389 U.S. 347 (1967) (electronic surveillance of telephone booth).

124. Crime Control Act, 18 U.S.C. §§ 2510-2520 (1970).

125. United States v. Cafero, 473 F.2d 489 (3d Cir. 1973).

126. *See* United States v. Chavez, 416 U.S. 562 (1974); United States v. Giordano, 416 U.S. 505 (1974).

127. Crime Control Act, 18 U.S.C. §§ 2510-2520 (1970).

128. 394 U.S. 165 (1969).

129. The Court noted:

> In its recent wiretapping and eavesdropping legislation, Congress has provided only

ments of *Alderman*[130] to mean that a defendant has standing "only if he was a party to the intercepted conversation or if it occurred on his premises."[131]

In 1973, the Ninth Circuit held that electronic surveillance is valid without prior judicial authorization if the consent of one party to the conversation is procured.[132] The circuit continues to adhere to this rule.[133]

Recent Supreme Court cases interpreting the Crime Control Act have indicated that failure to comply with the warrant requirements means that any evidence thereafter procured is "illegally intercepted" within the meaning of the Act. In *United States v. Giordano*,[134] the Court held that title III of the Act did not permit the Attorney General's Executive Assistant to authorize a wiretap because he is not an official authorized by Congress to make the probable cause determination for a warrant.[135] But in *United States v. Chavez*,[136] decided the same day, the Court held that a clerical error in the naming of the authorizer did not invalidate a wiretap where in fact the proper official had authorized the warrant.[137] Analogously, the Ninth Circuit reversed a district court order suppressing evidence obtained from electronic monitoring which was authorized by a *deputy assistant* attorney general.[138] In upholding the consensual monitoring of non-telephone conversations by IRS agents, the court noted that the IRS had failed to amend its own regulations to conform to new Justice Department rules allowing such monitoring with advance authorization of any deputy assistant attorney general.[139]

The conflict between the provisions of the federal Crime Control Act

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that an "aggrieved person" may move to suppress the contents of a wire or oral communication intercepted in violation of the Act. . . . The Act's legislative history indicates that "aggrieved person," the limiting phrase currently found in Federal Rule of Criminal Procedure 41(e), should be construed in accordance with existent standing rules.

Id. at 175-76 n.9.

130. 394 U.S. 165 (1969).

131. United States v. Calhoun, 542 F.2d 1094, 1098 (9th Cir. 1976). *See also* United States v. King, 478 F.2d 494 (9th Cir. 1973).

132. Holmes v. Burr, 486 F.2d 55 (9th Cir. 1973).

133. United States v. Ryan, 548 F.2d 782, 788 (9th Cir. 1976), *cert. denied*, 430 U.S. 965 (1977).

134. 416 U.S. 505 (1974).

135. *Id.* at 523. *See also* Crime Control Act, 18 U.S.C. § 2516(1) (1970).

136. 416 U.S. 562 (1974).

137. *Id.* at 571.

138. United States v. Caceres, 545 F.2d 1182 (9th Cir. 1976).

139. *Id.* at 1186.

and more restrictive *state* wiretap regulations was discussed by the Ninth Circuit in *United States v. Hall.*[140] The court did not believe that there was a constitutional violation since the electronic eavesdropping activity of federal officials complied with the provisions of the Federal Act, although not with section 631 of the California Penal Code.[141]

The extent to which non-governmental agencies' electronic surveillance is regulated by the Crime Control Act was examined in *United States v. Goldstein.*[142] An agent of General Telephone Company had placed a "peg-count" meter, a device used by the phone company in investigating "blue-box" frauds, on the defendant's office phone. The results of the telephone company's investigation were turned over to the FBI. The defendant argued that section 2511(2)(a) of the Federal Crime Control Act, which sanctioned such a procedure, was unconstitutional because it was "an impermissible delegation of authority by Congress to a quasi-governmental agency, granting it authority to violate telephone subscribers' Fourth Amendment rights."[143] The court rejected this argument, finding no governmental invasion of the defendant's fourth amendment rights.[144]

Defendants relying on the exclusionary provisions of the Federal Crime Control Act can make a "fruit of the poisonous tree" argument if they establish that subsequent evidence was obtained because of leads from an illegal wiretap.[145] In *Gelbard v. United States,*[146] the Supreme Court held that grand jury witnesses could refuse to testify

140. 543 F.2d 1229 (9th Cir. 1976), *cert. denied,* 97 S. Ct. 814 (1977).

141. *Id.* at 1231, 1235.

142. 532 F.2d 1305 (9th Cir. 1976).

143. *Id.* at 1310.

144. The court wrote, "Although communications carriers may sometimes give the appearance of governmental agencies, they in fact are private companies which possess none of the criteria which might make them responsible under the Fourth Amendment as government bodies." *Id.* at 1311.

145. *See* Wong Sun v. United States, 371 U.S. 471, 484-85 (1963) for an explanation of the "fruit of the poisonous tree" doctrine. *See also* Alderman v. United States, 394 U.S. 165, 177 (1969) for a summary of the Court's application of this doctrine to electronic surveillance cases.

146. 408 U.S. 1 (1972). The Court wrote:

> The purposes of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception. Moreover, § 2515 serves not only to protect the privacy of communications . . . , but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also "to protect the integrity of court and administrative proceedings."

Id. at 51 (footnote omitted).

where the substance of their testimony was discovered by illegal electronic surveillance. The Ninth Circuit, in *Whitnack v. United States*,[147] affirmed the contempt conviction of a grand jury witness who refused to give the grand jury fingerprint samples or a handwriting exemplar, distinguishing *Gelbard* as applying only to testimonial evidence.[148]

Ninth Circuit panels have followed the Supreme Court's lead in looking to provisions of the Crime Control Act rather than to traditional fourth amendment analyses to determine whether the fruits of the electronic surveillance are admissible against a defendant. There is little willingness by either the Supreme Court[149] or the Ninth Circuit[150] to invalidate electronic searches based on colorable compliance with the demands of the Crime Control Act.[151]

E. Warrantless Searches Based on Probable Cause

1. Search Incident to Arrest

Historically, the dual purpose for allowing a search incident to arrest has been to protect the police officer and preserve the evidence.[152] The modern rule establishes three basic elements. First, a court must consider whether the arrest was proper.[153] Second, a lawful search incident to arrest may extend only to a search of the person and the area

147. 544 F.2d 1245 (9th Cir. 1976).

148. *Id.* at 1246. The Ninth Circuit held that "when the grand jury asks for fingerprints or handwriting samples that are not otherwise precluded by some rule of law, the consequences of contempt cannot be avoided simply because the recalcitrant witness believes that somebody's telephone may have been the object of illegal electronic surveillance." *Id.* at 1247.

149. *See* United States v. Donovan, 97 S. Ct. 658 (1977), where the Supreme Court used a restrictive reading of statutory exclusionary provisions in the Crime Control Act to hold that the government's violation of the Act in not complying with the notice requirements did not require suppression of the evidence.

150. *See* notes 138-44, 147-48 *supra* and accompanying text.

151. *See* note 124 *supra.*

152. *See* Chimel v. California, 395 U.S. 752, 755-56 (1969). *See generally* Note, *Searches of the Person Incident to Lawful Arrest,* 69 COLUM. L. REV. 886 (1969).

153. Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973). *See* United States v. Magana, 512 F.2d 1169 (9th Cir. 1975) (lawful arrest makes body search valid); United States v. Heiden, 508 F.2d 898, 902 (9th Cir. 1974) (search of sock which disclosed evidence valid after proper arrest); United States v. See, 505 F.2d 845 (9th Cir. 1974) (search of wallet valid). If the arrest was improper or the court finds that the search of the defendant was not incident to arrest, evidence discovered during the search will be suppressed. *See* United States v. Easley, 505 F.2d 184 (9th Cir. 1974) (per curiam) (arrest pursuant to invalid warrant but independent probable cause justified arrest and subsequent search).

within his immediate control.[154] Third, a full body search is considered reasonable even in cases involving crimes, such as traffic violations, where there is no further evidence of the illegal conduct.[155] Although much of the current controversy in this field has focused on the scope of a suspect's area of immediate control,[156] the issue has not received great attention in recent Ninth Circuit decisions. In *United States v. Flores*,[157] federal agents, during the course of making an arrest, chased a heroin suspect into his home, seized a packet of heroin in the kitchen where the suspect was handcuffed, but refrained from seizing further evidence until they returned the following day with a search warrant. In *United States v. Masterson*,[158] the police arrested a bank robbery suspect in his home, searched his bedroom and closet, seized clothes which resembled those in a bank surveillance photo, and then allowed the suspect to enter and get dressed. The validity of the search incident to arrest was questioned in neither of these cases. Instead, the focus was on the hot pursuit doctrine.[159]

2. Warrantless Vehicle Searches

The traditional rule authorizes warrantless vehicle searches where there is probable cause to believe the car contains contraband or other instrumentalities of crime and exigent circumstances justify the search.[160] The rationale for finding exigency is provided by the vehicle's mobility and the ease with which it can be moved out of the jurisdiction.[161] Probable cause is the more difficult requirement to

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154. Chimel v. California, 395 U.S. 752, 763 (1969).

155. United States v. Robinson, 414 U.S. 218, 234-36 (1973).

156. For a discussion of various theories and tests developed by the lower courts in applying the *Chimel* standard, *see* Comment, *The Permissible Scope of a Premises Search Incident to Arrest under Chimel v. California: Divergent Definitions of "Immediate Control" Plague the Lower Courts*, 9 LOY. L.A.L. REV. 350 (1976).

157. 540 F.2d 432 (9th Cir. 1976).

158. 529 F.2d 30 (9th Cir.), *cert. denied*, 96 S. Ct. 2231 (1976).

159. *See* text accompanying notes 172-89 *infra*.

160. Chambers v. Maroney, 399 U.S. 42, 48 (1970); Carroll v. United States, 267 U.S. 132, 158-59 (1925).

161. 267 U.S. at 151. Warrantless searches of vehicles have been upheld in a wide variety of circumstances. *See* United States v. Lovenguth, 514 F.2d 96 (9th Cir. 1975) (per curiam) (odor of marijuana and view of plastic bags in camper); United States v. Westover, 511 F.2d 1154 (9th Cir. 1975) (attempted flight from customs agent); United States v. Anderson, 509 F.2d 724 (9th Cir.), *cert. denied*, 420 U.S. 910 (1975) (suspects got in car and drove away). But warrantless vehicle searches may also be justified without a showing of probable cause or exigent circumstances on a number of theories. *See* South Dakota v. Opperman, 428 U.S. 364 (1976) (search of vehicle up-

prove. In *United States v. Valenzuela*,[162] informants had advised police and federal agents that appellant and two other suspects were trafficking in marijuana. Police surveillance of the house revealed that there was a continuous stream of people entering and leaving. In a subsequent stop and search of one party's car, the officers discovered marijuana. Shortly thereafter, when appellant Valenzuela emerged from the same house and loaded his trunk with boxes, police searched the car and arrested him. The Ninth Circuit affirmed his narcotics conviction. In so holding, the court reiterated that, individually, an informant's information or police surveillance does not constitute probable cause. However, in combination, "the total effect was to produce a reasonable belief that a crime was being committed."[163]

3. Emergency or Exigent Circumstances

The Supreme Court made reference long ago to the possibility that a warrantless dwelling search might be upheld upon a showing that there was a need for immediate action.[164] Traditionally, however, the Court has been more protective of homes[165] than of moving vehicles, to which a general exigency rule is applied.[166] Lower courts have justified various warrantless searches upon a finding of probable cause, where immediate action is necessary to prevent removal[167] or destruction[168] of evidence or to protect the safety of officers.[169] In *United States v. Valenzuela*,[170] for example, the following exigent circumstances were found to validate a warrantless vehicle search: (1) surveil-

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held in non-criminal setting where car seized for parking violation and routine police inventory of impounded automobile disclosed marijuana in glove compartment); Cady v. Dombrowsky, 413 U.S. 433 (1973) (warrantless search which disclosed murder weapon in trunk of car justified because rural police had to leave car unguarded when it was towed after accident); Cooper v. California, 386 U.S. 58 (1967) (car seized at time of arrest and kept in police custody pending forfeiture proceedings).

162. 546 F.2d 273 (9th Cir. 1976).

163. *Id.* at 275.

164. Chapman v. United States, 365 U.S. 610, 614-15 (1961); Johnson v. United States, 333 U.S. 10, 14-15 (1948).

165. *See, e.g.*, Vale v. Louisiana, 399 U.S. 30 (1970).

166. Chambers v. Maroney, 399 U.S. 42 (1970). *See also* Carroll v. United States, 267 U.S. 132 (1925).

167. United States v. Smith, 503 F.2d 1037 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975) (suspects believed to possess contraband about to board flight).

168. United States v. Weaklem, 517 F.2d 70 (9th Cir. 1975) (defendant possibly returning to destroy evidence and officers in danger).

169. *Id.* at 72.

170. 546 F.2d 273 (9th Cir. 1976).

lance had revealed movable items being transported; (2) the arrest occurred in broad daylight and accomplices could have been in the area; and (3) delay could have resulted in loss of the evidence.[171]

4. Hot Pursuit

Police may enter premises to arrest and search without a warrant when they are in hot pursuit of a suspect. This rule is rationalized on the grounds that any delay might result in the destruction of evidence or added danger to the lives of officers and others.[172] These reasons are recognized as the exigent circumstances which justify warrantless entry,[173] but they deserve special mention because a recent Supreme Court expansion of the hot pursuit doctrine has far-reaching implications.

In *United States v. Santana*,[174] a heroin suspect was standing on her front porch when the police arrived to arrest her. The defendant ran into her house and the police followed in hot pursuit. The Court decided that a "porch" is a public place, and therefore the defendant had no reasonable expectation of privacy. In addition, the police reasonably expected that the suspect ran into her house to destroy evidence. The Court had recently held that the warrantless arrest of a person on probable cause in a public place does not violate the fourth amendment.[175] Thus, the Court reasoned, the defendant's act of running into her home could not thwart an otherwise proper arrest. Once the suspect was arrested, a search incident thereto, which produced narcotics, was clearly justified under *Robinson*[176] and *Chimel*.[177]

This opinion may render superfluous the rationale of two Ninth Circuit cases, *United States v. Flores*[178] and *United States v. Masterson*.[179] *Flores* and *Masterson* applied the hot pursuit doctrine to facts previously described.[180] However, the reasoning exhibited in these cases differs from that applied in *Santana*. For example, the *Flores* defendant argued that the arresting officer could not be in hot pursuit because

171. *Id.* at 274.
172. Warden v. Hayden, 387 U.S. 294, 298 (1967).
173. *Id.*
174. 427 U.S. 38 (1976).
175. United States v. Watson, 423 U.S. 411 (1976).
176. 414 U.S. 218 (1973).
177. 395 U.S. 752 (1969). *See* notes 152-55 and accompanying text.
178. 540 F.2d 432 (9th Cir. 1976).
179. 529 F.2d 30 (9th Cir.), *cert. denied*, 96 S. Ct. 2231 (1976).
180. *See* text accompanying notes 158-59 *supra*.

he stopped to comply with requirements of the knock and announce statute.[181] It is obvious that the seizure of evidence was permissible if the officer's warrantless entry was justified.[182] The officer's presence was permissible because he did "knock and announce."[183] After *Santana*, it seems unnecessary to apply this multistep analysis.[184] If the officer is in hot pursuit, he may enter the premises to make an arrest and conduct a search incident thereto.[185]

5. Seizure of Items in Plain View

Police may seize evidence in plain view without a warrant where there is prior justification for the intrusion such as hot pursuit or search incident to arrest, and the discovery of the evidence is inadvertent.[186] This concept is usually applied summarily, and any dispute which arises typically involves the inadvertence of the discovery of evidence or the justification for the officer's presence.[187] The federal agents in *Flores*[188] chased a suspect into the kitchen of a home to arrest him, where they seized heroin in plain view. In *Masterson*[189] the police officers, in hot pursuit of a bank robbery suspect, entered the suspect's bedroom. Since the officers' presence was legal, they were justified in the seizure of incriminating clothing which was in plain view.

6. Investigative Detention

A police officer may conduct a carefully limited search of a suspect's

181. 18 U.S.C. § 3109 (1970) provides:

> The officer may break open any outer or inner door or window of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

182. 529 F.2d at 31. As noted, hot pursuit and exigent circumstances can justify an exception to the search warrant requirement.

183. 540 F.2d at 435.

184. Instead, if for any reason the entry is legal, the search incident to arrest or seizure in plain view is valid.

185. 427 U.S. 38 (1976).

186. Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971); Harris v. United States, 390 U.S. 234, 236 (1968).

187. The warrantless search of a car under the plain view doctrine was held unlawful in United States v. McCormick, 502 F.2d 281 (9th Cir. 1974) because the car was subject to forfeiture two months before its seizure, when police had probable cause to believe it contained contraband. On the other hand, in United States v. Nunez-Villalobos, 500 F.2d 1023 (9th Cir.), *cert. denied*, 419 U.S. 1690 (1974), the warrantless search of a truck was justified when the officer saw marijuana in plain view after a lawful stop. *Id.* at 1024.

188. 540 F.2d 432 (9th Cir. 1976).

189. 529 F.2d 30 (9th Cir.), *cert. denied*, 96 S. Ct. 2231 (1976).

outer clothing, although probable cause does not exist, if the officer reasonably concludes in light of his experience that the suspect may be armed and dangerous.[190] Until recently the Supreme Court had not specifically enunciated the constitutional basis of a permissible stop. It is now clear that an officer's "reasonable suspicion" will justify the stop.[191] The belief required for a stop-and-frisk need not be based on the officer's personal observation. Instead, an informant's tip may be sufficient if it carries some indicia of reliability, even though the unverifed tip is not sufficiently reliable to constitute probable cause for an arrest or search warrant.[192]

The Ninth Circuit, during the past decade, has developed the doctrine of "founded suspicion."[193] This doctrine has merged with and been acknowledged as identical to the Supreme Court's "reasonable suspicion" standard.[194] As a result of its decisions in this area, the Ninth Circuit has established a number of tests and factors which should facilitate application of the new Supreme Court rule.

In its seminal case on founded suspicion, the Ninth Circuit held that the police activity will be upheld if the detention was not arbitrary or harassing.[195] The validity of a stop, Judge Hufstedler wrote in 1973, is tested against two criteria: whether the stop was justified in its inception and whether the scope of the action is reasonably related to its initial justification.[196]

United States v. Hill[197] provides a straightforward example. There, a police officer was summoned to the scene of a bank robbery. The appellant Hill, who was walking near the bank, was stopped and asked if he had seen anyone matching the robber's description. While they were talking, the officer noticed a large bulge at Hill's waist. He suspected it might be a gun. Therefore, the officer lifted the shirt and discovered rolls of currency stuffed into Hill's waistband. The appellant claimed that the officer had insufficient reason to believe he was

190. Terry v. Ohio, 392 U.S. 1, 30 (1968). *See also* LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond,* 67 MICH. L. REV. 39 (1968).

191. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

192. Adams v. Williams, 407 U.S. 143 (1972).

193. *See generally* Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion,* 9 U.S.F.L. REV. 219 (1974) and cases cited therein.

194. "[T]here is no substantial difference between the doctrine of 'founded suspicion' used by this court, and the 'reasonable suspicion' test announced in Brignoni-Ponce." United States v. Rocha-Lopez, 527 F.2d 476, 477 (9th Cir. 1975).

195. Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966).

196. United States v. Mallides, 473 F.2d 859 (9th Cir. 1973).

197. 545 F.2d 1191 (9th Cir. 1976).

armed or dangerous and that raising the shirt was overly intrusive. The court concluded, however, that an officer at the scene of an armed bank robbery had reasonable grounds for suspicion that persons nearby, shortly after the crime occurred, could present a threat. A bulge in one's clothing is consistent with the presence of a weapon, and a limited intrusion solely to discover if the weapon exists is clearly justified under the circumstances.[198]

United States v. Casimiro-Benitez[199] is typical of the situation where reasonable suspicion will "blossom into"[200] probable cause for arrest and search. Border patrol agents found appellant within a mile of the Mexican border at 4:30 a.m., crouching in the bushes in a place well known for concealing illegal aliens. In accordance with an established line of cases,[201] the court noted that experienced officers could conclude that such behavior is inconsistent with innocent activity. The officers are entitled to consider all the circumstances and the reasonable inferences that could be drawn therefrom.[202]

A more difficult issue is presented in *United States v. Robinson*,[203] which reversed a conviction for interstate transportation of a stolen car on the grounds that founded suspicion cannot be based solely on the officer's receipt of a radio dispatch ordering him to stop the described vehicle. This case is distinguishable, however, in that the government failed to call the police radio dispatcher or his source[204] to testify.[205] Otherwise, the result might have been different.[206]

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198. *Id.* at 1192-93.

199. 533 F.2d 1121 (9th Cir. 1976).

200. United States v. Blackstock, 451 F.2d 908, 911 (9th Cir. 1971).

201. United States v. Martin, 509 F.2d 1211 (9th Cir.), *cert. denied*, 421 U.S. 967 (1975) (innocent series of acts which could arouse suspicion of experienced agents); United States v. Patterson, 492 F.2d 995 (9th Cir. 1974) (superficially innocuous events indicated to prudent person that an innocent course of conduct was substantially less likely than a criminal one); Hernandez v. United States, 353 F.2d 624 (9th Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966) (immaterial that a circumstance taken by itself appears innocent).

202. 533 F.2d at 1123-24.

203. 536 F.2d 1298 (9th Cir. 1976).

204. The source was an inspector at the state border who saw the car.

205. As Judge Hufstedler's majority opinion stated:

> The fact that an officer does not have to have personal knowledge of the evidence supplying good cause for a stop before he can obey a direction to detain a person or a vehicle does not mean that the Government need not produce evidence at trial showing good cause to legitimate the detention when the legality of the stop is challenged.

536 F.2d at 1299-330.

206. *See* United States v. Lovenguth, 514 F.2d 96, 97-98 (9th Cir. 1975) (per curiam), where the court upheld an officer's founded suspicion for stopping a vehicle in

7. Consent Searches

Law enforcement officers do not need probable cause to conduct a search where the search is consented to.[207] The prosecution bears the burden of proving, however, that consent was freely and voluntarily given[208] and not the result of duress or coercion, whether express or implied.[209] The voluntariness of the consent is determined from the totality of the circumstances.[210] The Ninth Circuit has therefore concluded that the trial courts are obligated to make specific findings of fact regarding the circumstances.[211] In a 1976 decision, *Tremayne v. Nelson*,[212] the circuit held that state courts are capable of protecting constitutional rights and that the state method of testing voluntariness was sufficient. Federal district courts are thereby freed from the obligation of making independent findings in considering habeas corpus petitions.

The Supreme Court held in *Schneckloth v. Bustamonte*[213] that an individual who was not in custody did not have to be informed of his right to refuse consent, and that his knowledge of that right was only one factor in determining voluntariness.[214] Also, no *Miranda* warning need be given as a prerequisite to voluntary consent.[215]

8. Border Searches

The federal government, pursuant to its authority to exclude aliens

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response to a radio dispatch that described the vehicle less accurately than the call which promoted the stop of the car driven by Robinson. 536 F.2d at 1299.

207. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

208. Bumper v. North Carolina, 391 U.S. 543, 548 (1960).

209. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

210. *Id.* at 229. *See, e.g.*, United States v. Agosto, 502 F.2d 612, 614 (9th Cir. 1974) (per curiam) (police threat to obtain search warrant does not preclude a finding of voluntariness; remanded for determination of voluntariness).

211. *See* United States v. Heimforth, 493 F.2d 970, 972 (9th Cir.), *cert. denied*, 416 U.S. 908 (1974).

212. 537 F.2d 359 (9th Cir. 1976).

213. 412 U.S. 218 (1973).

214. *Id.* at 248-49. The Ninth Circuit has also gone along with several other circuits in extending the *Schneckloth* "totality of the circumstances" test to include custodial arrest situations, regardless of whether the defendant has been informed of his right to refuse consent. *See, e.g.*, United States v. Townsend, 510 F.2d 1145, 1146 (9th Cir. 1975); United States v. Watson, 504 F.2d 849, 853 (9th Cir. 1974), *rev'd*, 423 U.S. 411 (1976).

215. Tremayne v. Nelson, 537 F.2d 359, 360 (9th Cir. 1976). This is consistent with the view of other circuits. *See, e.g.*, Weeks v. Estelle, 509 F.2d 760, 766 (5th Cir. 1975); United States v. Faruolo, 506 F.2d 490, 495 (2d Cir. 1974).

and conveyances crossing United States borders,[216] can conduct full searches[217] based upon little or no suspicion.[218] It is clear, however, that the permissible scope of any such search must be reasonable under the fourth amendment.[219] For instance, searches involving serious invasions of personal privacy and dignity, such as body cavity searches, must be based upon a clear indication or plain suggestion that contraband is located in the cavity to be searched.[220] Furthermore, once that determination is made, the fourth amendment still requires that government officials use reasonable means to retrieve concealed contraband.[221] In *United States v. Cameron*,[222] the Ninth Circuit continued to insure the vitality of the requirement that reasonable means be used in conducting body cavity searches. In that case, the court invalidated a search in which the defendant was subjected to two digital probes of his rectum, two enemas, and was forced to ingest a liquid laxative.[223] These procedures were conducted without procuring a warrant, despite the fact that the defendant was legally in custody for violation of bond and therefore no emergency required instant seizure of the evidence.

In response to attempts by Congress and the executive branch to increase the physical boundaries within which border searches may be conducted,[224] the Supreme Court has ruled that searches unsupported by probable cause are permissible only at a border[225] or its functional

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216. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973). This authority finds its basis in the need for national self-protection. Carroll v. United States, 267 U.S. 132, 154 (1925) (dictum).

217. *See* Carroll v. United States, 267 U.S. 132, 154 (1925) (dictum) (search of vehicle); United States v. Barclift, 514 F.2d 1073, 1074-75 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 842 (1975) (search of mail entering United States from foreign country).

218. Klein v. United States, 472 F.2d 847, 849 (9th Cir. 1973).

219. *Id.*

220. Rivas v. United States, 368 F.2d 703, 710 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967). *See also* United States v. Mastberg, 503 F.2d 465, 471 (9th Cir. 1974) (clear indication of heroin in vagina). *Cf.* Henderson v. United States, 390 F.2d 805, 809 (9th Cir. 1967) (no clear indication of contraband in vagina; search violated fourth amendment).

221. *See* United States v. Guadalupe-Garza, 421 F.2d 876, 878 (9th Cir. 1970).

222. 538 F.2d 254, 257 (9th Cir. 1976).

223. *Id.* at 256-57.

224. *See* Immigration and Nationality Act § 287(a)(3), 8 U.S.C. § 1357(a)(3) (1970) (provides for warrantless searches of automobiles or other conveyances for aliens within reasonable distance of United States boundaries); 8 C.F.R. § 287.1(a) (1977) (provides for reasonable border search anywhere within 100 miles of border).

225. *See* United States v. Tutwiller, 505 F.2d 759, 760-61 (9th Cir. 1974) (search near border permissible when supported by probable cause).

equivalent.[226] In *United States v. Homburg*,[227] the Ninth Circuit clarified previous opinions[228] dealing with the revocation of consent to a search in airport boarding areas. The court held that a passenger who has gone through an initial screening and is in the airport's secured boarding area may still revoke consent to additional searches and leave the boarding area.[229]

The Ninth Circuit had previously held that the search of a vessel, pursuant to 19 U.S.C. § 1581(a),[230] may be conducted at a domestic port without probable cause as the functional equivalent of a border search.[231] In 1976, the Ninth Circuit clarified its previous evidentiary requirements. The court indicated that "where there are articulable facts to support a reasonably certain conclusion by the customs officers that a vessel has crossed the border and entered territorial waters" it is not necessary for the evidence to support a finding that the vessel actually came from international or foreign waters.[232]

In *United States v. Stanley*,[233] a case of first impression,[234] the Ninth Circuit ruled that a vessel leaving the United States by sea is analogous to a car crossing the border. Therefore, the validity of the stop and search of a vessel is not predicated on the existence of probable cause.

The Supreme Court, in *United States v. Ortiz*,[235] adopted the Ninth Circuit's view[236] that searches at fixed checkpoints removed from the

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226. Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973). *See also* United States v. Solmes, 527 F.2d 1370, 1373 (9th Cir. 1975) (area where a vessel is anchored in a domestic port is functional equivalent of the border). *But cf.* United States v. Morgan, 501 F.2d 1351 (9th Cir. 1974) (per curiam) (checkpoint 65 miles north of the Mexican border on interstate highway not functional equivalent of border).

227. 546 F.2d 1350 (9th Cir. 1976).

228. *See* United States v. Miner, 484 F.2d 1075 (9th Cir. 1973); United States v. Moore, 483 F.2d 1361 (9th Cir. 1973); United States v. Davis, 482 F.2d 893 (9th Cir. 1973).

229. 546 F.2d at 1352.

230. 19 U.S.C. § 1581(a) (1970) provides in relevant part that "[a]ny officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters . . . and examine the manifest and other documents and papers and examine, inspect and search the vessel or vehicle . . . ."

231. United States v. Solmes, 527 F.2d 1370, 1372 (9th Cir. 1975).

232. United States v. Tilton, 534 F.2d 1363, 1366 (9th Cir. 1976).

233. 545 F.2d 661 (9th Cir. 1976).

234. Prior cases involved defendants crossing the border while entering the United States. *See, e.g.*, United States v. Tilton, 534 F.2d 1363 (9th Cir. 1976); United States v. Solmes, 527 F.2d 1370 (9th Cir. 1975); Klein v. United States, 472 F.2d 847 (9th Cir. 1973).

235. 422 U.S. 891 (1975).

236. *See* United States v. Bowen, 500 F.2d 960, 965 (9th Cir. 1974) (en banc), *aff'd*

border were sufficiently analogous to roving patrol searches to warrant the application of *Almeida-Sanchez*[237] requirements. In 1976, the Ninth Circuit determined that *Ortiz* did not require retroactive application,[238] thereby avoiding the invalidation of searches conducted from the date *Almeida-Sanchez* was decided until the time the Ninth Circuit applied the *Almeida-Sanchez* formulations to fixed checkpoint searches.[239]

In 1975, the Supreme Court held in *United States v. Peltier*[240] that *Almeida-Sanchez* was to be given only prospective application, thus overruling the Ninth Circuit's retroactive application.[241] The Supreme Court felt that federal agents had reasonably relied upon pre-*Almeida-Sanchez* cases which construed a statute that was validly enacted. Retroactive application would not serve the deterrent effect sought to be achieved through use of the exclusionary rule.[242] Last year in *United States v. Torres-Rios*,[243] the Ninth Circuit adopted the same approach used by the Supreme Court in *Peltier* and denied retroactivity[244] to the rationale of *United States v. Brignoni-Ponce*.[245] The Supreme Court in *Brignoni-Ponce* held that "officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."[246]

The Ninth Circuit has also clarified two questions left unanswered in *Brignoni-Ponce*. In *United States v. Gonzalez-Diaz*,[247] the court reaffirmed its previous position[248] that the "reasonable suspicion" standard is not substantially different than the doctrine of "founded suspi-

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on other grounds, 422 U.S. 916 (1975) (search at fixed checkpoint 49 miles from Mexican border held invalid).

237. 413 U.S. 266, 273 (1973). *See* text accompanying notes 225-26 *supra*.

238. United States v. Juarez-Rodriguez, No. 74-1118 (9th Cir. Nov. 16, 1976) (en banc).

239. The Ninth Circuit invalidated fixed checkpoint searches not based on probable cause in United States v. Bowen, 500 F.2d 960, 965 (9th Cir. 1974) (en banc), *aff'd on other grounds*, 422 U.S. 916 (1975).

240. 422 U.S. 531 (1975).

241. United States v. Peltier, 500 F.2d 985, 989 (9th Cir.) (en banc), *cert. granted*, 419 U.S. 993 (1974).

242. 422 U.S. at 542.

243. 534 F.2d 865 (9th Cir. 1976).

244. *Id.* at 867.

245. 499 F.2d 1109 (9th Cir. 1974) (en banc), *aff'd*, 422 U.S. 873 (1975).

246. 422 U.S. at 884.

247. 528 F.2d 925 (9th Cir. 1976).

248. United States v. Rocha-Lopez, 527 F.2d 476, 477 (9th Cir. 1975).

cion" as applied in the Ninth Circuit. The court also indicated in *United States v. Hernandez-Lopez*,[249] by way of dictum, that a lesser degree of suspicion may be permissible to allow questioning of occupants of a vehicle that has been stopped for some other legitimate purpose.[250]

The Ninth Circuit has determined that the discrepancy between land monuments and parallel 31°20′ north, designated by the Gladsden Treaty of 1853 as the established boundary between Mexico and the United States, is governed by the monuments. Therefore, the petitioner, who had plead guilty to an offense committed in the area of disparity, was deemed within the territorial jurisdiction of the United States.[251]

F. Identifications

The Supreme Court held in *United States v. Wade*[252] that an accused has a right to the presence of counsel at a post-indictment lineup.[253] The Court has refused, however, to extend this right to a photographic identification procedure.[254] The basis given for this distinction is that a photo spread, unlike a lineup, is not a confrontation-type setting. The need for counsel to prevent overreaching by the prosecution and to facilitate an accurate reconstruction of the identification procedure at trial can be satisfied at the trial itself through confrontation of the witnesses and a recreation of the photo spread.[255] The Ninth Circuit, in *United States v. Higginbotham*,[256] held that the defendant was not denied his right to counsel although the photo display was lost, making reconstruction at trial impossible.[257] In reaching its conclusion, the court emphasized that such a safeguard is insured not by counsel's

249. 538 F.2d 284 (9th Cir. 1976).

250. *Id.* at 285. The court did not feel compelled to address this specific question, however, since in the court's opinion the standards of *Brignoni-Ponce* had been met.

251. Alkins v. United States, No. 74-2619 (9th Cir. Nov. 16, 1976).

252. 388 U.S. 218 (1967).

253. *Id.* at 236-37.

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

255. *Id.* at 315-16. The Ninth Circuit took this position even before *Ash*. *See* United States v. Fowler, 439 F.2d 133, 134 (9th Cir. 1971) and United States v. Williams, 436 F.2d 1166, 1169 (9th Cir. 1970).

256. 539 F.2d 17 (9th Cir. 1976).

257. The Court stated in *Ash* that if accurate reconstruction of the identification procedure is possible, then the opportunity to cure its defects at trial renders the identification confrontation no longer "critical" for purposes of the right to counsel. 413 U.S. at 315-16.

presence but by the ethical conduct of the prosecution.[258]

The due process clauses of the fifth and fourteenth amendments also provide a basis for challenging a pre-trial identification session where the procedure is "unnecessarily suggestive."[259] The test for resolving such a challenge requires the court to look to the "totality of the circumstances" and determine whether the procedure was conducive to "irreparable mistaken identification"[260] or created a "very substantial likelihood of irreparable misidentification."[261] In making this determination, the court pays special attention to the necessity for using the particular identification procedure,[262] the ability of the witness to observe the defendant at the scene of the crime, the witness' degree of attention, prior description and level of certainty, and the length of time between the crime and identification.[263] The court in *Higginbotham*

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258. 539 F.2d at 21. The court's decision was facilitated by the fact that the photo display was lost by state authorities, not the federal prosecutor, and that the witness testified that his in-court identification of the defendant was based on his observation of the defendant at the scene of the crime. *Id.*

259. Stovall v. Denno, 388 U.S. 293, 301-02 (1967) (defendant was not deprived of due process in being brought to hospital to be identified by critically injured victim).

260. *Id.* at 302.

261. Simmons v. United States, 390 U.S. 377, 384-86 (1968) (photo display was acceptable since there was little suggestiveness in photographs shown, need for their use was great, and all witnesses positively identified suspect).

262. Stovall v. Denno, 388 U.S. at 302; McNeary v. Stone, 482 F.2d 804, 806 (9th Cir.), *cert. denied*, 414 U.S. 1071 (1973).

263. Neil v. Biggers, 409 U.S. 188, 199-200 (1972) (rapist identified by victim in single showup seven months after crime). *Biggers* suggests that the analysis should focus on the unreliability of the witness' in-court identification and the prejudice at trial, rather than on the suggestiveness or reliability of the identification procedure used. *Id.* at 198-99. *See* Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1116 (1974). The Ninth Circuit employs this same analysis, placing increased emphasis on the necessity for employing the particular identification method. United States v. Baxter, 492 F.2d 150, 172 (9th Cir.), *cert. denied*, 414 U.S. 801 (1973) (immediate action needed to locate suspect and witnesses' adequate opportunity to observe suspect, followed soon after by photo display in which they were shown numerous photos before and after single photo of suspect, resulted in proper identification).

The court in *Higginbotham* did not apply this due process analysis in assessing the validity of the photo display. It focused instead on the prosecutor's lack of culpability and the sufficiency of the evidence to convict the defendant. 539 F.2d at 21-22. Although the court may have been correct in concluding that the defendant's constitutional rights were not violated, its analysis confuses the issue. As noted above, *Ash* holds that the defendant's attack on a photo display may be adequately presented by reconstruction of the display at trial. 413 U.S. at 324. It would seem that if the photographs are unavailable at trial the defendant can only challenge the identification session through the cross examination of the witnesses, as was done in *Higginbotham*. This

followed this approach in holding that the identification procedure employed therein was not impermissibly suggestive.[264]

In *United States v. Pheaster*,[265] the circuit ruled that due process standards for visual identifications apply to auditory identifications as well.[266] The court further held that even an "undeniably suggestive" exposure to a tape recording would not render the subsequent identification at trial defective, since the necessity for the particular procedure was great and the reliability of the subsequent identification was clear.[267] Such an approach appears to weaken the previous Ninth Circuit rule regarding per se exclusions of testimony resulting from a suggestive procedure.[268]

An accused may also be identified by comparing handwritten items used in connection with the crime with a handwriting exemplar taken from him after he is in police custody. This procedure does not necessarily violate the privilege against compulsory self-incrimination since that privilege protects only testimonial or communicative matter.[269]

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in itself might constitute a violation of due process. *See Supreme Court Review 1973*, 64 J. CRIM. L. & C. 428, 433 (1974).

More disturbing, however, is the court's reliance on the ethical responsibility and good faith of the prosecution in determining whether a due process violation occurred. The court relied on a District of Columbia Circuit discovery case, United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971), to support its holding and ignored the Supreme Court line of discovery cases which has uniformly held that whether suppression of evidence by the prosecution constitutes a violation of due process depends not on the good or bad faith of the prosecution but on whether the suppression results in an unfair trial for the defendant. United States v. Agurs, 96 S. Ct. 2392, 2397 (1976); Brady v. Maryland, 373 U.S. 83, 87 (1963); Napue v. Illinois, 360 U.S. 264, 269-70 (1959).

264. 539 F.2d at 23 (showing of photo displays twice with arguably suggestive comments after defendant had already been arrested, followed by trial testimony that showed independent basis for the in-court identification, was not violative of defendant's rights).

265. 544 F.2d 353 (9th Cir. 1976).

266. *Id.* at 369.

267. *Id.* at 370-71. An officer who testified at trial that he had known the accused for fifteen years and that his in-court identification was not based on the pre-trial identification session was asked if the voice on a tape recorded ransom request was that of the accused.

268. *See* United States v. Fowler, 439 F.2d 133, 134 (9th Cir. 1971). The court in *Pheaster* stated that *Fowler* was not persuasive authority since the opinion suggested that a per se rule of exclusion would not apply where the facts demonstrated an independent basis for the courtroom identification, not tainted by the pre-trial identification session. 544 F.2d at 371 n.10. It then held that the officer's identification was independent, despite the fact that the pre-trial identification method was undeniably suggestive. *Cf.* United States v. Wade, 388 U.S. 218, 240 (1967) (if counsel was denied at lineup, subsequent in-court identification would have to have independent basis and prosecution would have to establish such basis by clear and convincing evidence).

269. Gilbert v. California, 388 U.S. 263, 266-67 (1967). A handwriting exemplar

II. PRELIMINARY PROCEEDINGS

A. Grand Jury

For the most part, cases presented to the grand jury are initiated and prepared by the Justice Department.[270] The individual who conducts the proceedings need not be a United States Attorney. Instead, he may be specially appointed by the Attorney General.[271]

While the fifth amendment's proscription against compulsory self-incrimination is applicable in a grand jury setting[272] and compelled production of documents is within the ambit of the privilege,[273] one's ability to invoke the privilege in refusing to produce subpoenaed documents is limited by the Supreme Court's opinion in *Fisher v. United States*[274] and the Ninth Circuit's decision in *In re Fred R. Witte Center Glass No. 3*.[275] In the context of enforcing a documentary summons, *Fisher* emphasized the fifth amendment's limited application to a situation in which the accused is compelled to make testimonial communications of an incriminating nature.[276] Thus, if subpoenaed papers of the defendant's accountant are supplied, their production need not violate the fifth amendment if the defendant is not compelled to affirm the truth of their contents.[277]

In *In re Witte*, the Ninth Circuit held that even when a party is the legal owner of subpoenaed papers, the broad principle of *Fisher* applies and no fifth amendment privilege attaches when the party is not other-

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is a device used to isolate and identify particular physical characteristics, like a person's voice or some bodily feature. *Id.* In United States v. Pheaster, the court stated that even though an exemplar was used to show spelling mistakes (instead of written characters) similar to those in the ransom note, thereby identifying the accused as the author of the note, the exemplar was still not of a communicative nature for purposes of the protection against self incrimination. 544 F.2d at 372.

270. 8 MOORE'S FEDERAL PRACTICE ¶ 6.02, at 9-10 (2d ed. 1976).

271. 28 U.S.C. § 515(a) (1970) (permits special appointment of attorneys to conduct any kind of legal proceeding which a United States Attorney may conduct). *See* United States v. Alessio, 528 F.2d 1079, 1083 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976) (government prosecutors properly before the grand jury); United States v. Zuber, 528 F.2d 981, 982 (9th Cir. 1976) (per curiam) (a "strike force" prosecutor appointed under § 515(a) is an "attorney for the government" within the meaning of FED. R. CRIM. P. 6(d), which dictates who may appear before the grand jury).

272. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

273. Boyd v. United States, 116 U.S. 616, 632-34 (1886); United States v. Cohen, 388 F.2d 464, 466 (9th Cir. 1967).

274. 425 U.S. 391 (1976).

275. 544 F.2d 1026 (9th Cir. 1976).

276. 425 U.S. at 394-96.

277. *Id.* at 409-10.

wise compelled to authenticate the incriminating information.[278] This ruling represents a reversal of the previous law of this circuit which established as a general rule that the privilege permits a person in possession of potentially incriminating papers to decline to produce them in response to a subpoena.[279] The privilege has never been successfully employed to avoid compliance with a subpoena directed towards corporate records.[280]

The Supreme Court's decision in *United States v. Mandujano*[281] seemingly foreclosed argument on the issue of whether a putative defendant, appearing before the grand jury is entitled to full *Miranda* warnings. In *Mandujano*, the defendant's perjury conviction was based upon testimony given before a grand jury. He had been informed of the self-incrimination privilege, the consequences of lying, and his limited right to consult with counsel outside the grand jury room.[282] The plurality held that the rationale of *Miranda* in protecting an accused from the intimidating circumstances of custodial interrogation by the police was not applicable to the judicial setting of the grand jury.[283] Moreover, the plurality reasoned that a witness before the grand jury has no absolute right to silence but only a limited ability to decline to answer those questions which invoke the privilege against self-incrimination.[284] No absolute right to counsel attaches at the grand jury stage of the criminal proceedings.[285]

All of the justices agreed in *Mandujano* that the fifth amendment

278. 544 F.2d at 1028.

279. *See* United States v. Cohen, 388 F.2d 464, 471-72 (9th Cir. 1967), where the court stated that documents which the defendant rightfully obtained from his accountant were protected by the privilege against self-incrimination from compelled production in response to an IRS summons. *Id.* at 472. The court in *In re Witte* overruled *Cohen* to the extent that it is contrary to *Fisher*. 544 F.2d at 1028.

280. Bellis v. United States, 417 U.S. 85, 94 (1974); United States v. Lococo, 450 F.2d 1196, 1199 (9th Cir. 1971); *accord*, Coson v. United States, 533 F.2d 1119, 1120 (9th Cir. 1976) (order holding party in contempt for refusal to produce corporate documents in response to a grand jury subpoena affirmed). In *Coson* the court also rejected the claim that service of the subpoena by IRS agents resulted in service by a real party in interest. *Id.* at 1120.

281. 425 U.S. 564 (1976).

282. *Id.* at 580-81.

283. *Id.* at 580.

284. *Id.* at 580-81.

285. *Id.* at 581. Mr. Justice Brennan, concurring in the judgment, felt that some guidance of counsel is required at the grand jury stage. *Id.* at 605-06. However, the present rule in the Ninth Circuit is that a witness is not entitled to the presence of counsel while testifying before the grand jury. Gollaher v. United States, 419 F.2d 520, 523-24 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969).

cannot be used to shield a witness against perjury committed during testimony given before the grand jury.[286] The Ninth Circuit, in *United States v. Raftery*,[287] was similarly unwilling to permit constitutional barriers to stand in the way of a prosecution for perjury. In *Raftery*, the court held that drug manufacturing equipment, which was inadmissible at a state trial, could be used in the perjury trial of a defendant who had falsely testified before a grand jury after the illegal seizure of the equipment.[288]

A defendant is not precluded from demonstrating that the indictment and investigation processes of the grand jury have been abused. However, in order to avoid the delay caused by a frivolous claim, the alleged victim is required to make a preliminary showing of impropriety.[289] Similarly, a fear that material presented to the grand jury might be used by government agencies in other investigations and legal actions is not sufficient to support a protective order precluding the Internal Revenue Service from access to subpoenaed documents.[290]

B. Indictments

1. When Required

An indictment by the grand jury is constitutionally mandated for all

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286. 425 U.S. 583; *id.* at 584 (Brennan & Marshall, JJ., concurring); *id.* at 609 (Stewart & Blackmun, JJ., concurring).

287. 534 F.2d 854 (9th Cir.), *cert. denied*, 429 U.S. 862 (1976).

288. *Id.* at 856. The defendant was granted use immunity as a grand jury witness and he perjured himself when questioned about his involvement with drug manufacturing. The court emphasized the exclusionary rule's well recognized limitations and its previous rejection as a license to commit perjury. *Id.* at 857.

289. United States v. Dixon, 538 F.2d 812, 814 (9th Cir.), *cert. denied*, 97 S. Ct. 383 (1976) (defendant's claim of past IRS abuses of grand jury process was not sufficient to establish abuse in the present inquiry).

The aversion to delay in grand jury proceedings also supports the rule that a recalcitrant witness may not delay the proceedings to litigate the question of the validity of governmental electronic surveillance, United States v. Canon, 534 F.2d 139, 140 (9th Cir.) (per curiam), *cert. denied*, 425 U.S. 991 (1976), where the surveillance was conducted without a court order, the government concedes a failure to conform to statutory requirements, or the surveillance was held to be unlawful in a prior judicial hearing. *In re* Gordon, 534 F.2d 197, 198-99 (9th Cir. 1976) (witness' contention that techniques other than electronic surveillance were available for use by the government not a proper objection to permit witness to litigate the issue). The Ninth Circuit specifically follows the approach which was outlined by the Second Circuit in *In re* Persico, 491 F.2d 1156, 1162 (2d Cir. 1974).

290. Coson v. United States, 533 F.2d 1119, 1120-21 (9th Cir. 1976) and *In re* Fred R. Witte Center Glass No. 3, 544 F.2d 1026, 1029 (9th Cir. 1976) (IRS agents' special

capital offenses or infamous crimes.[291] Rule 7 of the Federal Rules of Criminal Procedure further defines an infamous crime as one punishable by imprisonment for a term exceeding one year or at hard labor.[292] In *United States v. Ramirez*,[293] the Ninth Circuit concluded that a youthful offender who faces a possible six-year confinement under section 5010 of the Federal Youth Corrections Act[294] is entitled to have the prosecutor proceed by indictment.[295] The court noted, after engaging in an historical analysis of the fifth amendment's indictment clause, that infamous crime is presently defined in terms of, and equated with, infamous punishment.[296] In today's society, subjecting a youthful offender to confinement for more than one year constitutes infamous punishment.[297] It is of no consequence that the offender was to receive "treatment" in lieu of imprisonment and that the substantive offense was a misdemeanor.[298] The court specifically refused to adopt the rationale and rule of the District of Columbia Circuit which does not demand an indictment for proceedings conducted pursuant to the Youth Corrections Act.[299]

2. Statute of Limitations

When an indictment is required it must be issued within the requisite statute of limitations,[300] unless the person named in the indictment is a fugitive fleeing from justice.[301] In *United States v. Wazney*,[302] the Ninth Circuit adopted a view held by the First, Second and Fifth Circuits that in order to establish an accused was fleeing from justice, for purposes of

knowledge in examining corporate records held to be a legitimate resource in aiding the United States Attorney's grand jury investigation and an order denying them access to the subpoenaed documents was properly denied).

291. U.S. CONST. amend. V.

292. FED. R. CRIM. P. 7(a).

293. No. 75-1395 (9th Cir. Sept. 16, 1976).

294. 18 U.S.C. §§ 5005-5026 (1970).

295. [1976-1977 Transfer Binder] CRIM. L. REP. (BNA) at 2088.

296. *Id.* at 2087 (citing *Ex parte* Wilson, 114 U.S. 417 (1885)).

297. *Id.* at 2088.

298. *Id.* The defendant was charged with a violation of 21 U.S.C. § 844 (1970) (possession of a controlled substance) and the maximum punishment for an adult is one year imprisonment and a $5,000 fine. In addition, if the offender was an adult, he would not be entitled to be proceeded against by indictment.

299. *See* note 295 *supra*; Harvin v. United States, 445 F.2d 675 (D.C. Cir.) (en banc), *cert. denied*, 404 U.S. 943 (1971), where the court refused to focus on the defendant's status or to consider the ultimate length of confinement in determining the infamy of the crime. *Id.* at 678-82.

300. 18 U.S.C. § 3282 (1970).

301. *Id.* § 3290.

302. 529 F.2d 1287 (9th Cir. 1976).

tolling the statute of limitations, the prosecution must affirmatively prove the accused concealed himself with the intent to avoid arrest and prosecution.[303]

If an indictment filed within the prescribed time period is dismissed after the statute has been tolled, the prosecutor may refile within six months.[304] In *United States v. Charney*,[305] the court stated that a second indictment may be filed after the statute has run so long as the same facts are alleged and an almost identical offense is charged.[306] Even if the original dismissal was based on the legal defectiveness of the indictment and not on irregularities in the grand jury proceedings, a second indictment could still properly be returned.[307]

3. Sufficiency

An indictment should consist of a plain, concise and definitive statement of the essential facts constituting the offense charged.[308] It should not mislead the defendant, but should inform him of the nature of the charges which he must be prepared to meet.[309] An indictment is sufficient if it sets forth the essential facts constituting a crime in the language of the statutory offense, or if the indictment refers directly or by implication to the essential elements.[310] In determining whether

303. *Id.* at 1288-89 (evidence established that defendant concealed himself to avoid prosecution). The District of Columbia Circuit and eight other circuits hold that the mere absence from the jurisdiction in which the offense occurred is sufficient to toll the statute of limitations. *Id.*

304. 18 U.S.C. § 3288 (1970).

305. 537 F.2d 341 (9th Cir.), *cert. denied*, 97 S. Ct. 528 (1976).

306. *Id.* at 354 (citing Mende v. United States, 282 F.2d 881, 883-84 (9th Cir. 1960)).

307. 537 F.2d at 355 (second indictment proper where it omits related charge that was determined to be faulty).

308. Hamling v. United States, 481 F.2d 307, 312 (9th Cir. 1973), *aff'd*, 418 U.S. 87 (1974); FED. R. CRIM. P. 7(c).

309. *See* Russel v. United States, 369 U.S. 749, 763 (1962); United States v. Anderson, 532 F.2d 1218, 1222 (9th Cir.), *cert. denied*, 97 S. Ct. 111 (1976) (wording which closely follows the language of the statute sufficiently informative); United States v. Camacho, 528 F.2d 464, 469 (9th Cir.), *cert. denied*, 426 U.S. 995 (1976) (indictment which stated that the conspiracy's object was for one or more of the conspirators to sell firearms was not insufficient for failing to state that defendant was supposed to sell). *Cf.* United States v. Love, 535 F.2d 1152, 1158 (9th Cir.), *cert. denied*, 97 S. Ct. 130 (1976) (surplus language in indictment regarding state of mind necessary for mail fraud was not misleading or prejudicial to the defendant since he was represented by counsel who was chargeable with knowledge of the state of mind necessary to prove fraud under the statute).

310. United States v. Anderson, 532 F.2d 1218, 1222 (9th Cir.), *cert. denied*, 97 S. Ct. 111 (1976). *See also* United States v. Charnay, 537 F.2d 341, 351-52 (9th Cir.), *cert. denied*, 97 S. Ct. 528 (1976) (material misrepresentation adequately alleged where

certain elements of an offense are essential, the court's construction of the relevant statute and the allegations contained in the indictment are determinative.[311] If the court concludes that a certain element is a required component of the crime, then the failure to plead that element results in an indictment which must be dismissed.[312]

In *United States v. Charney*,[313] a challenge to an indictment's failure to state a securities law violation gave the Ninth Circuit an opportunity to broadly interpret the substantive offense. In so doing, the court concluded that the activities alleged by the Government were actually within the penumbra of the statute.

When a party delays in objecting to an indictment, the Ninth Circuit has stated that the reviewing court will liberally construe the indictment in favor of its validity and will imply all necessary allegations from the language of the indictment.[314] In *United States v. Pheaster*,[315] the Ninth Circuit reaffirmed its position that an indictment charging a conspiracy is to be very liberally construed. Therefore, even failure to allege a necessary element of the substantive offense will not necessarily result in dismissal for insufficiency.[316]

The substantial rights of a defendant are affected by variance between the charge in the indictment and the proof offered at trial,

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the indictment described defendants' activities and omissions; failure in another count to allege specific intent to defraud was not fatal since the intent could be inferred from an allegation that defendants knowingly operated a scheme in a deceitful manner); United States v. Bunker, 532 F.2d 1262, 1264 (9th Cir. 1976) (language in indictment alleging knowledgeable and intentional importation of aliens could be read to apply to their illegal status; therefore, there were sufficient allegations of the federal offense).

311. *See* United States v. Hamel, 534 F.2d 1354 (9th Cir. 1976) in which the defendant was convicted of violating the Migratory Bird Treaty Act, 16 U.S.C. §§ 703, 707 (Supp. V 1975) by selling a species after it became "protected" by the Act. Even though the indictment failed to allege that the bird was taken after the effective date, and a number of older decisions held this to be error, the court stated that the failure to make such an allegation does not warrant the dismissal of the indictment. *Id.* at 1355-56. *See* United States v. Crum, 529 F.2d 1380, 1382 (9th Cir. 1976) (statute directed at those preparing false tax returns encompassed more than just those who do the physical preparation and, as such, the indictment charged an offense against the defendants); United States v. McNulty, 528 F.2d 1223, 1225 (9th Cir.), *cert. denied*, 425 U.S. 972 (1976) (indictment for felony tax avoidance properly alleged intent and therefore did not constitute a misdemeanor charge).

312. *See* United States v. Morrison, 536 F.2d 286, 289 (9th Cir. 1976) (indictment alleging conversion was defective since it failed to allege a mens rea, an essential element of the offense charged).

313. 537 F.2d 341 (9th Cir.), *cert. denied*, 97 S. Ct. 528 (1976).

314. United States v. Pheaster, 544 F.2d 353, 361-62 (9th Cir. 1976).

315. 544 F.2d 353 (9th Cir. 1976).

316. *Id.* at 360-61 (citing Stein v. United States, 313 F.2d 518, 520-21 (9th Cir. 1962),

if the variance operates to hamper his efforts to prepare a defense, causes surprise or exposes him to double jeopardy.[317] A variance which has none of these effects is considered harmless.[318]

C. *Guilty Pleas*

A defendant's plea of guilty operates as a waiver of various constitutional rights and results in a conviction.[319] Such a plea also constitutes a break in the chain of criminal procedure, cutting off the defendant's ability to successfully challenge constitutional violations which occurred prior to entering the plea and which are unrelated to it.[320] To ensure that the accused makes the plea knowingly and voluntarily, with an understanding of the consequences and the rights waived, and that, by the plea, factual and legal guilt is established, certain inquiries must be made and satisfied.[321]

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which held that an indictment alleging conspiracy to traffic in illegally imported narcotics was not fatally defective when there was no allegation that defendant knew the narcotics were illegally imported). In *Pheaster*, the indictment stated that the defendants conspired to kidnap and hold the victim for ransom, their *having wilfully transported him in interstate commerce following the kidnaping*. The court stated that a common sense interpretation of the charge indicated that the object of the actual conspiracy was to kidnap *and* transport the victim in interstate commerce, and therefore it properly alleged a federal offense. 544 F.2d at 359-63.

317. United States v. Anderson, 532 F.2d 1218, 1227 (9th Cir.), *cert. denied*, 97 S. Ct. 111 (1976). This same statement of the law was first made in Berger v. United States, 295 U.S. 78, 82 (1935).

318. *See* FED. R. CRIM. P. 52(a); United States v. Love, 535 F.2d 1152, 1158 (9th Cir. 1976); United States v. Anderson, 532 F.2d at 1227-28. In *Anderson* the court ruled that jury instructions stating that the amount of the subject stolen securities must have had an aggregate value of $5,000 did not operate to amend the indictment. The indictment had alleged a value of $401,000. Allegations of any amount over the statutory requirement of $5,000 were mere surplusage. *Id.* at 1228.

319. Boykin v. Alabama, 395 U.S. 238, 242-43 (1969).

320. *See* Tollett v. Henderson, 411 U.S. 258, 267 (1973) (constitutional challenge to jury selection barred after guilty plea); United States v. O'Donnell, 539 F.2d 1233, 1237 (9th Cir.), *cert. denied*, 97 S. Ct. 386 (1976) (claim that pre-indictment and post-indictment delays violated defendant's right to speedy trial and due process of law improperly raised after entering plea); Mayes v. Pickett, 537 F.2d 1080, 1081-82 (9th Cir. 1976), *cert. denied*, 98 S. Ct. 27 (1977) (phrasing the argument that plea was involuntary since it was the result of an unconstitutionally obtained confession does not circumvent rule barring constitutional challenges after entering guilty plea).

321. The requirements for determining a valid guilty plea are set forth in FED. R. CRIM. P. 11. The rule was recently amended, effective December 1, 1975. Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, § 3, 89 Stat. 374 (1975). The former rule and the amended rule will be designated as such both in the text and footnotes, with all citations to the amended rule.

1. Constitutional Inquiries

In *Boykin v. Alabama*[322] and *McCarthy v. United States*,[323] the Supreme Court suggested that a plea could not be accepted as voluntary if the record did not reveal that the defendant relinquished his privilege against self-incrimination, right to a jury trial and right to confront his accusers.[324] But the Ninth Circuit has held that no particular ritual is required under either the federal rules[325] or state procedures[326] in explaining to the accused the rights he waives by pleading guilty, so long as the record demonstrates that he voluntarily and knowingly pled. As amended, however, federal rule 11 now requires that the judge specifically inform the accused of the rights he waives prior to accepting the plea.[327]

In *United States v. Pricepaul*,[328] the defendant argued that a prior conviction could not be used to establish the violation of a federal statute which prohibits the possession of a firearm by a convicted felon.[329] In *Pricepaul*, the Ninth Circuit held that a conviction which was obtained in violation of the defendant's constitutional rights and which necessarily affected the guilt-determination process could not be used to prove a violation which included a prior felony conviction as one of its elements.[330] While adhering to its position that the accused need not

322. 395 U.S. 238 (1969).

323. 394 U.S. 459 (1969).

324. 395 U.S. at 243-44; 394 U.S. at 467. *McCarthy*, interpreting former rule 11, stated that a waiver of these rights was a "consequence of the plea" of which the accused must be advised before the judge could accept it.

325. Fruchtman v. Kenton, 531 F.2d 946, 948 (9th Cir.), *cert. denied*, 97 S. Ct. 256 (1976) (failure to specifically advise accused of fact that his plea waives his rights to confrontation and compulsory process not in violation of rule 11). *Cf.* United States v. Nixon, 545 F.2d 1190, 1191 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1148 (1977) (where defendant pled not guilty and with counsel filed statement of constitutional rights together with stipulation of facts, judge need not specifically advise him of his rights to cross examination and confrontation before accepting stipulation); United States v. Sherman, 474 F.2d 303, 305 (9th Cir. 1973) (accused entering guilty plea under rule 11 need not be advised *eo nomine* of his right against self-incrimination).

326. Wilkins v. Erickson, 505 F.2d 761, 763 (9th Cir. 1974) (*Boykin* does not require specific articulation of these rights in state proceeding).

327. FED. R. CRIM. P. 11(c). *McCarthy* required strict compliance with former rule 11, 394 U.S. at 426-27, as had the Ninth Circuit after Heiden v. United States, 353 F.2d 53, 55 (9th Cir. 1965).

328. 540 F.2d 417 (9th Cir. 1976).

329. *Id.* at 421-22. Defendant was convicted under 18 U.S.C. § 922(a)(6) (1970) (furnishing false statements to obtain firearm) and 18 U.S.C. app. § 1202(a) (effective June 19, 1968) (possession of firearm by convicted felon).

330. 540 F.2d at 420-22. The court distinguished United States v. Liles, 432 F.2d 18, 21 (9th Cir. 1970) in which a firearm violation was upheld even though the defend-

be specifically informed of the rights which are waived by his plea, the court established a new rule for the circuit by holding that a record which does not affirmatively indicate the waiver of those rights articulated in *Boykin* shifts the burden to the Government to prove that the plea was voluntary and intelligent.[331] However, the court stated that the Government need only show that the plea complied with Ninth Circuit standards, despite the fact that under the state law governing the prior conviction the plea might be invalid.[332]

2. Consequences

Rule 11 formerly required that the accused have an understanding of the "consequences of the plea."[333] The Ninth Circuit has long given a narrow reading to this requirement and requires disclosure of consequences only where it can be objectively concluded that the accused must possess the knowledge in question to make an intelligent plea. The court has mainly addressed itself to factors which necessarily affect the term of imprisonment.[334] In *Fruchtman v. Kenton*,[335] the circuit held that an alien need not be advised that his conviction subjects him to deportation proceedings on the grounds that this consequence is merely collateral to the plea and constitutes something over which the

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ant's prior conviction was subsequently reversed on the grounds of insufficient evidence. 540 F.2d at 420-21. It did not, however, reach the issue of whether all prior convictions which were constitutionally defective were barred from supporting subsequent violations. *Id.* The rationale of the decision, though, would appear to support such a rule. *See* Burgett v. Texas, 389 U.S. 109, 114-15 (1969), *cited in Pricepaul*, 540 F.2d at 421-22.

331. 540 F.2d at 423-24.

332. *Id.* at 424. The defendant's prior plea was made in a California court and was clearly invalid under *In re* Tahl, 1 Cal. 3d 122, 130, 460 P.2d 449, 455, 81 Cal. Rptr. 577, 583 (1969) (record must contain direct evidence that accused was expressly made aware of the three federal rights and that he voluntarily waived them).

The Ninth Circuit has refused to overrule or distinguish *Pricepaul*. United States v. O'Neil, 545 F.2d 85, 86 (9th Cir. 1976) (defendant's uncontradicted testimony that at time of his 1948 plea he was not advised of his right to counsel, informed of the charges or the consequences of his plea, invalidates conviction for purposes of establishing federal firearms violation).

333. *See* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 173 (1969).

334. United States v. Myers, 451 F.2d 402, 404-05 (9th Cir. 1972) (defendant in state custody pleading to federal offense should have been told sentence would not begin to run until he was received in federal custody); McClure v. United States, 389 F.2d 279, 280 (9th Cir. 1968) (failure to advise defendant he could be sentenced as a youth offender was error, although harmless in this case); Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964) (one who pleads without understanding that he will not be eligible for parole or probation does not plead guilty with understanding of the consequences).

335. 531 F.2d 946 (9th Cir.), *cert. denied*, 97 S. Ct. 256 (1976).

judge has no control.[336] In *United States v. Harris*,[337] the court did, however, find that the accused must be informed of a special mandatory parole term appended to his sentence.[338] Still, the judge need not explain in detail the nature and consequences of this particular sanction.[339]

Rule 11 as amended requires only that the judge specifically inform the accused of the mandatory minimum and possible maximum penalty for the offense before accepting his plea of guilty.[340] The Ninth Circuit applies its own standards in assessing the challenge to a plea made in state court. Thus, where the state judge fails to inform the accused of the maximum potential sentence, the plea is not "intelligently given" and hence it is improper.[341] However, since this is merely a prophylactic device to aid a reviewing court in making the ultimate determination of the voluntariness of the plea, the rule is not given retroactive effect.[342]

3. Voluntariness

Rule 11 continues to require that the court ascertain that the plea is voluntary.[343] The Supreme Court has recognized that the normal pressures present in the context of acceptable plea bargaining do not

336. *Id.* at 948-49. The court adopted the Second Circuit approach of excluding deportation as a "consequence." *See* Michel v. United States, 507 F.2d 461, 464-65 (2d Cir. 1974). The defendant would presumably be deportable under 8 U.S.C. § 1251(a)(11) (1970) (Attorney General can order alien convicted of violating drug control statutes deported). *But see* Judge Browning's contention that a failure to advise an accused that his plea subjects him to deportation "would drain the substance from the requirement that a guilty plea may be accepted only if made 'with full understanding of the consequences.'" Vizcarra-Delgadillo v. United States, 395 F.2d 70, 74 (9th Cir.) (dissenting opinion), *cert. dismissed*, 393 U.S. 957 (1968).

337. 534 F.2d 141 (9th Cir. 1976).

338. *Id.* at 141-42. The Fourth Circuit suggested a somewhat different approach in Bell v. United States, 521 F.2d 713, 715-16 (4th Cir. 1975), *cert. denied*, 424 U.S. 918 (1976) (failure to explain mandatory parole term is harmless error when final sentence imposed does not exceed maximum sentence specified at arraignment).

339. Johnson v. United States, 539 F.2d 1241, 1243-44 (9th Cir. 1976) (sufficient for judge to simply state that special parole was mandatory for two years).

340. FED. R. CRIM. P. 11(c)(1).

341. Pebworth v. Conte, 489 F.2d 266, 267-68 (9th Cir. 1974). *Cf.* Bellew v. Gunn, 532 F.2d 1288, 1291 (9th Cir.), *cert. denied*, 426 U.S. 953 (1976) (failure of court to explicitly inform defendant of potential sentence prior to 1943 plea not improper in light of explanations given by defendant's counsel).

342. Yellowwolf v. Morris, 536 F.2d 813, 816-17 (9th Cir. 1976) (case remanded to determine if under totality of circumstances, including failure to inform defendant of the maximum sentence, plea was freely and knowingly given).

343. FED. R. CRIM. P. 11(d).

necessarily produce an involuntary guilty plea.[344] Hence, misinformation by counsel as to the maximum sentence does not make a plea bargain induced thereby coerced or involuntary.[345] Nor does the fact that the accused was unaware of a potential fourth amendment defense render the plea involuntary.[346] The cases indicate that it is very difficult to establish that the plea was not knowingly or freely given where the accused was represented by counsel.[347]

4. Other Rule 11 Requirements

Rule 11 also requires that the court be satisfied there is a factual basis for the plea[348] and that the accused be informed of and understand the nature of the charges.[349] As amended, rule 11 now sets forth a more formal procedure for negotiating, accepting and rejecting plea bargains.[350]

5. Competency to Plea

A plea cannot be accepted as a binding determination of guilt if the

344. *See* Brady v. United States, 397 U.S. 742, 755-57 (1970).

345. Micklus v. United States, 537 F.2d 381, 382 (9th Cir. 1976). The court reasoned that if *Brady* upheld a plea induced by fear of the death penalty, which penalty was subsequently held to be invalid, then, a fortiori, pleading guilty in reliance upon incorrect advice from defense counsel as to the maximum length of sentence does not render such a plea involuntary. *Id.* However, the court did grant the defendant a hearing on his claim that he was induced to plead by promises from the Assistant United States Attorney which he alleged were not fulfilled. *Id.* at 382-83.

346. Johnson v. United States, 539 F.2d 1241, 1243 (9th Cir. 1976) (failure of defendant's counsel to disclose facts which would have revealed potential fourth amendment defense did not produce an involuntary plea absent showing of incompetency of counsel).

347. Tollett v. Henderson, 411 U.S. 258, 266-68 (1973) (when defendant pleads guilty on advice of counsel, voluntariness looked at in reference to competence of counsel). *See also* Johnson v. United States, 539 F.2d at 1243; Micklus v. United States, 537 F.2d at 383; Bellew v. Gunn, 532 F.2d at 1291. *But see* Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1976), in which the author suggests that the Court has placed too much emphasis on the defense attorney's presence and advice in determining that a plea is in fact voluntary.

348. FED. R. CRIM. P. 11(f). *See* United States v. Neel, 547 F.2d 95, 96 (9th Cir. 1976) (per curiam) (requirement established since defendant admitted essential facts of charge); United States v. Zuber, 528 F.2d 981, 983 (9th Cir. 1976) (per curiam) (co-conspirator's guilty plea was without factual basis since he adamantly denied being part of the "junket"—primary element of the conspiracy prosecution—and only admitted loaning group money knowing they were equipped with false identifications).

349. FED. R. CRIM. P. 11(c)(1). The Supreme Court, in Henderson v. Morgan, 426 U.S. 637 (1976), applied this requirement to the states, holding that a failure to advise the defendant that intent to cause death was an element of the offense of second degree murder resulted in an involuntary plea and a denial of due process. *Id.* at 645-47.

350. FED. R. CRIM. P. 11(e).

person entering the plea is not mentally competent.[351] A person is not competent if he is under the influence of drugs, and the court must establish that drugs are not affecting his competency before accepting the plea.[352]

The Ninth Circuit requires a higher standard of competency for a guilty plea than that necessary to stand trial.[353] The test is whether a mental illness has substantially impaired the ability of the accused to rationally choose between the alternatives available to him, and to understand the consequences of his plea and the gravity of the decision with which he is faced.[354]

This rule was both affirmed and clarified in *De Kaplany v. Enomoto*,[355] in which the court tempered the rule's effect by holding it is not error if a court taking the plea fails to specifically determine the defendant's competency to plead guilty.[356] A retroactive hearing on the competency to enter the plea is an appropriate method of granting relief.[357] In *Makal v. Arizona*,[358] the court on appeal applied retroactive review of the defendant's competency to plead guilty to murder and affirmed the conviction despite the fact no specific competency determination was made at the time the plea was entered or at a subsequent hearing.[359] The court inferred competency from the record, emphasizing such factors as the nature of the judge's general inquiry of the defendant, the fact that the plea was entered with the support of counsel, a report from two psychiatrists finding the defendant competent to stand trial, and the fairness of the bargain which possibly induced the plea.[360]

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351. 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 172, at 359-60 (1969).

352. *See* Mayes v. Pickett, 537 F.2d 1082 (9th Cir. 1976), *cert. denied*, 98 S. Ct. 27 (1977) (heroin addict's admission he had not taken drugs for one month prior to entering guilty plea coupled with court's observation that defendant did not appear to be under influence rendered plea competent).

353. Sieling v. Eyman, 478 F.2d 211, 214-15 (9th Cir. 1973). The higher standard was imposed in recognition of the fact that a guilty plea operates as a waiver of a number of significant constitutional rights. *Id.*

354. *See* Makal v. Arizona, 544 F.2d 1030, 1033 (9th Cir. 1976).

355. 540 F.2d 975 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 815 (1977) (defendant pled guilty after commencement of trial and interposed insanity defense).

356. *Id.* at 985.

357. *Id.* at 985-86. A hearing was held on the habeas corpus petition and the court of appeals affirmed the district court's decision that defendant was competent. *Id.* at 986.

358. 544 F.2d 1030 (9th Cir. 1976).

359. *Id.* at 1034.

360. *Id.* at 1034-35. The defendant was being retried after a reversal of his previous conviction in which he had been sentenced to death. The court felt that his present

6. Challenging the Plea

A guilty plea is usually challenged in federal court by a motion attacking the sentence[361] or a rule 32 motion to withdraw the plea.[362] A motion made under rule 32 before sentencing is freely allowed in the interests of justice, subject to the court's discretion.[363] After sentencing, however, only a showing that withdrawal is necessary to correct manifest injustice will compel the court to grant the motion.[364]

D. Discovery

In accordance with the Jencks Act,[365] the defendant in a federal case is not permitted pretrial discovery of statements made by prospective government witnesses.[366] The prosecution is, however, required to disclose the statement once the witness has testified at trial.[367] Disclosure at this point is important if there is to be effective cross-examination of the declarant.[368]

The Ninth Circuit has held that the Jencks Act is violated when law enforcement agents destroy notes taken during interviews with potential witnesses.[369] In two separate cases, *United States v. Robinson*[370]

plea to one instead of the original three counts of murder was calculated, competent and a good bargain. *Id.*

361. 28 U.S.C. § 2255 (1970).

362. FED. R. CRIM. P. 32(d).

363. *Id.* *See* United States v. Read, 534 F.2d 858, 859 (9th Cir. 1976) (per curiam) (no abuse of discretion to deny motion).

364. *See* United States v. Kay, 537 F.2d 1077 (9th Cir. 1976) (per curiam) in which the court construed this provision to apply to a defendant who sought to revoke his plea prior to actual sentencing, but after he became aware of the sentences meted out to his co-defendants. *Id.* at 1078. *See* United States v. Harris, 534 F.2d 141, 141-42 (9th Cir. 1976) (failure to advise defendant of special parole term entitled him to withdraw plea; court treated it as § 2255 motion).

365. 18 U.S.C. § 3500 (1970).

366. *Id.* § 3500(a).

367. *Id.* § 3500(b).

368. United States v. Harris, 543 F.2d 1247, 1249 (9th Cir. 1976).

369. *Id.* at 1253; United States v. Robinson, 546 F.2d 309, 312 (9th Cir. 1976). Several circuits have ruled that notes taken by a government agent during an interview with the defendant and written summaries of an accused's oral statements are discoverable under FED. R. CRIM. P. 16. *See* United States v. Johnson, 525 F.2d 999, 1003-04 (2d Cir. 1975), *cert. denied*, 424 U.S. 920 (1976); United States v. Fallen, 498 F.2d 172, 174-75 (8th Cir. 1974); United States v. Krilich, 470 F.2d 341, 351 (7th Cir. 1972), *cert. denied*, 411 U.S. 938 (1973); Kaplan v. United States, 375 F.2d 895, 900 (9th Cir.), *cert. denied*, 389 U.S. 839 (1967). Consistent with this holding, the Ninth Circuit has held that rule 16 requires the preservation of notes taken by the police during the course of an interview with a potential witness. United States v. Robinson, 546 F.2d at 312; United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976).

370. 546 F.2d 309 (9th Cir. 1976).

and *United States v. Harris*,[371] the Government had argued that destruction of the notes was proper because the agents had incorporated the contents thereof into a formal report. The Ninth Circuit held that these notes and reports, taken during the course of an investigation, are subject to production at trial if the agent testifies.[372] The practice of destroying notes is not justified even though the police are acting in good faith and according to routine department practice.[373]

The Ninth Circuit has also ruled that the police may not destroy notes given to them by government informants in situations where the notes constitute a "statement" pursuant to the Jencks Act.[374] In a recent case,[375] the court had to decide whether an informant's diary was a "statement." The informant had made entries in the diary regarding certain illegal activity and had then turned the diary over to law enforcement agents. An agent had incorporated the contents of the diary into his report and then had shredded the diary. The Ninth Circuit held that the diary was a "statement" within the meaning of the Jencks Act and that the destruction thereof, although arguably in good faith,[376] was improper.[377]

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371. 543 F.2d 1247 (9th Cir. 1976).

372. *Id.* at 1248-49. *See also* United States v. Johnson, 521 F.2d 1318, 1319 (9th Cir. 1975); United States v. McSweaney, 507 F.2d 298, 300 (9th Cir. 1975). Handwritten notes taken by the police during a criminal investigation are "statements" under the Jencks Act, 18 U.S.C. § 3500(e) (1970). United States v. Harris, 543 F.2d 1247, 1248, 1250 (9th Cir. 1976); United States v. Harrison, 524 F.2d 421, 430-31 n.25 (D.C. Cir. 1975).

373. United States v. Robinson, 546 F.2d 309, 312 (9th Cir. 1976); United States v. Harris, 543 F.2d 1247, 1250-51 (9th Cir. 1976). Although some decisions have criticized the police practice of destroying notes, *see, e.g.*, United States v. Johnson, 337 F.2d 180, 201-02 (4th Cir. 1964), *aff'd*, 383 U.S. 169 (1966); United States v. Thomas, 282 F.2d 191, 194 (2d Cir. 1960), several circuits, including the Ninth Circuit, have approved the practice. United States v. Pacheco, 489 F.2d 554, 565-66 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975); Wilke v. United States, 422 F.2d 1298, 1299 (9th Cir. 1970). For this reason, the rule that police notes must be preserved will not be applied retroactively. United States v. Robinson, 546 F.2d at 312.

374. United States v. Carrasco, 537 F.2d 372, 376 (9th Cir. 1976).

375. *Id.*

376. In *Carrasco*, the court stated that whether or not the agent's conduct in destroying the diary was routine, "it was manifestly unreasonable in light of the expressed Congressional intent, and is no less a violation of the Jencks Act because it was pursued in good faith." 537 F.2d at 376. *See* United States v. Harrison, 524 F.2d 421, 431-32 (D.C. Cir. 1975); United States v. Perry, 471 F.2d 1057, 1062-66 (D.C. Cir. 1972). In Ogden v. United States, 323 F.2d 818 (9th Cir. 1963), *cert. denied*, 376 U.S. 973 (1964), the Ninth Circuit had expressly left open the question of whether sanctions are to be imposed if a statement which is producible is destroyed in good faith. *Id.* at 820-21.

377. 537 F.2d at 375-76. *Cf.* Goldberg v. United States, 425 U.S. 94, 101-03 (1976)

When a defendant seeks disclosure of the name and whereabouts of a government informant, the court must perform the difficult task of balancing the defendant's ability to prepare his defense against the public interest in protecting the undisturbed flow of information.[378] In *Roviaro v. United States*,[379] the Supreme Court held that the Government can be compelled to disclose the identity of an informant only if the informant's testimony would be sufficiently "relevant and helpful."[380] The Ninth Circuit adheres to the *Roviaro* rule.[381]

The Ninth Circuit does, however, endorse the use of in camera proceedings to determine the relevancy and helpfulness of the informant's testimony.[382] The judge may interview the informant during the hearing to determine the significance of his testimony.[383] Mere speculation that the informant's testimony might help the defendant's case is insufficient to overcome the public interest in protecting informants.[384] The burden of proof is on the defendant to show the need for disclosure.[385]

(Jencks Act only applies to discovery of "statements" as defined by 18 U.S.C. § 3500 (e)).

The Ninth Circuit also held in 1976 that a "tape recording" is a statement "made by the defendant" within the meaning of FED. R. CRIM. P. 16(a)(1). United States v. Walker, 538 F.2d 266, 268 (9th Cir. 1976). In so holding, the court accepted the precedent established by other circuits. *See, e.g.*, United States v. James, 495 F.2d 434, 435-36 (5th Cir.), *cert. denied*, 419 U.S. 899 (1974); United States v. Bryant, 439 F.2d 642, 647 (D.C. Cir. 1971); Davis v. United States, 413 F.2d 1226, 1231 (5th Cir. 1969); United States v. Isa, 413 F.2d 244, 248-49 (7th Cir. 1969).

378. United States v. Bigelow, No. 75-3845, slip op. at 4 (9th Cir. Oct. 20, 1976).

379. 353 U.S. 53 (1957).

380. *Id.* at 60.

381. United States v. Bigelow, No. 75-3845, slip op. at 2 (9th Cir. Oct. 20, 1976); United States v. Marshall, 532 F.2d 1279, 1282 (9th Cir. 1976); United States v. Kelly, 449 F.2d 329, 330 (9th Cir. 1971).

382. United States v. Bigelow, No. 75-3845, slip op. at 4 (9th Cir. Oct. 20, 1976); United States v. Rawlinson, 487 F.2d 5, 7 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

383. United States v. Bigelow, No. 75-3845, slip op. at 4 (9th Cir. Oct. 20, 1976). In *Bigelow*, the defendant had offered facts which tended to show that the informant was present during the alleged criminal event. The court held that if the Government could not demonstrate a legitimate interest in keeping the informant's identity confidential, then the defendant's showing amounted to a prima facie case, and the informant's identity would have to be disclosed. *Id.* at 5. The *Bigelow* court distinguished United States v. Marshall, 526 F.2d 1349, 1359 (9th Cir. 1975), *cert. denied*, 426 U.S. 923 (1976) and United States v. Alvarez, 472 F.2d 111, 113 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973), on the grounds that these earlier cases had concerned informants whose testimony was relevant only to motions to suppress, not to the determination of guilt.

384. United States v. Marshall, 532 F.2d 1279, 1282 (9th Cir. 1976).

385. *Id.* *See also* United States v. Marshall, 526 F.2d 1349, 1359 (9th Cir. 1975),

The discovery by a defendant of the names and addresses of percipient government witnesses is governed by rule 16.[386] Discovery under rule 16 is within the judge's discretion and his decision will not be disturbed without showing clear abuse of discretion.[387] The defendant must make a showing that the information requested is "material" to the preparation of his defense and that the request is "reasonable."[388] "Materiality" means that the evidence would permit the accused to substantially alter the quantum of proof in his favor.[389] "Reasonableness" means that the request is not burdensome to the Government and that it is framed in specific language, stating precisely what information is needed.[390]

In *United States v. Miller*,[391] the defendant was convicted of preparing false income tax statements for his clients. Although the defense attorney had made a request for all "*Brady* materials,"[392] the prosecution had suppressed a statement by a Mr. Mills, an employee of the defendant, that he (Mills) had prepared some of the tax returns. The Government did disclose the statement just prior to the end of defendant's case. The court stated that the issue was not non-disclosure under *Brady*,[393] but the appropriateness of the timing of the disclosure.[394] The Ninth Circuit held that, although disclosure should have

cert. denied, 426 U.S. 923 (1976); United States v. Alvarez, 472 F.2d 111, 113 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973); United States v. Estrada, 441 F.2d 873, 879 (9th Cir. 1971); Gaylor v. United States, 426 F.2d 233, 234-35 (9th Cir. 1970).

386. FED. R. CRIM. P. 16.

387. United States v. Marshall, 532 F.2d 1279, 1284 (9th Cir. 1976). *See also* United States v. Calhoun, 510 F.2d 861, 870 (7th Cir.), *cert. denied*, 421 U.S. 950 (1975); United States v. Baxter, 492 F.2d 150, 175 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); Mullins v. United States, 487 F.2d 581, 589 (8th Cir. 1973); Holt v. United States, 272 F.2d 272, 276-77 (9th Cir. 1959).

388. United States v. Marshall, 532 F.2d 1279, 1284 (9th Cir. 1976); United States v. Clardy, 540 F.2d 439, 442 (9th Cir.), *cert. denied*, 97 S. Ct. 391 (1976).

389. United States v. Marshall, 532 F.2d 1279, 1285 (9th Cir. 1976).

390. *Id. Accord*, United States v. Ross, 511 F.2d 757, 763 (5th Cir. 1975).

391. 529 F.2d 1125 (9th Cir.), *cert. denied*, 426 U.S. 924 (1976).

392. In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that suppression by the Government of evidence favorable to an accused upon his 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. *See also* United States v. Valdivia, 492 F.2d 199, 205 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

393. In *Brady*, there was complete suppression by the prosecution of exculpatory evidence.

394. The *Miller* court stated that the issue was "whether the lateness of the disclosure so prejudiced appellant's preparation or preservation of his defense that he was prevented from receiving his constitutionally-guaranteed fair trial." 529 F.2d 1125, 1128 (9th Cir.), *cert. denied*, 426 U.S. 924 (1976). *See also* United States v. Hibler, 463 F.2d 455, 459 (9th Cir. 1972).

been made earlier, there was no prejudice to the defendant under the facts of the case.[395]

E. Right to Jury Trial

The United States Constitution guarantees trial by jury in criminal cases.[396] While defendants accused of serious crimes must have the opportunity to elect a jury trial, defendants accused of "petty offenses" do not have this right.[397] Defining the scope of this right thus requires a determination of what constitutes a serious as opposed to a petty offense.[398]

In *United States v. Sanchez-Meza*,[399] petitioner had been convicted of conspiracy to elude examination by immigration officers by making false and misleading representations, an offense with a maximum potential sentence of six months.[400] The district court judge had denied defendant's motion for a jury trial, relying upon the legislative determination that the crime charged was subject only to a six month maximum potential sentence and therefore should properly be classified as a "petty offense."[401] The Ninth Circuit reversed, holding that conspiracy was an indictable and serious offense at common law,[402] and therefore the trial court's denial of petitioner's motion for a jury trial was improper and required reversal of defendant's conviction.[403]

III. PROCEDURAL RIGHTS OF THE ACCUSED

A. Right to Counsel

1. The Right to Appointed Counsel

When a person is charged with a crime and is financially unable to

395. 529 F.2d at 1128-29. *See also* United States v. Diaz-Rodriquez, 478 F.2d 1005, 1008 (9th Cir.), *cert. denied*, 412 U.S. 964 (1973).

396. U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.

397. *See, e.g.*, Baldwin v. New York, 399 U.S. 66, 68 (1970); Frank v. United States, 395 U.S. 147, 148 (1968); Dyke v. Taylor Implement Co., 391 U.S. 216, 219-20 (1968); Cheff v. Schnackenberg, 384 U.S. 373, 379 (1966); Callan v. Wilson, 127 U.S. 540, 557 (1888).

398. *See, e.g.*, Baldwin v. New York, 399 U.S. at 69 n.6 (court will look both to nature of offense and maximum potential sentence); District of Columbia v. Colts, 282 U.S. 63, 73-74 (1930) (malum in se offense gives rise to right to jury trial).

399. 547 F.2d 461 (9th Cir. 1976).

400. *Id.* at 462. *See* 8 U.S.C. § 1325 (1970) (object of conspiracy a misdemeanor); 18 U.S.C. § 371 (1970) (if object of conspiracy is misdemeanor, punishment for such conspiracy shall not exceed maximum punishment provided for the objective).

401. *See* United States v. Sanchez-Meza, 547 F.2d 461, 465 (9th Cir. 1976) (by implication) (Carter, J., dissenting).

402. *Id.* at 464. To resolve the "petty" versus "serious" offense issue, the court must look to see whether conspiracy was triable without a jury at common law or at the time the Constitution was adopted. Conspiracy at common law was not a "petty offense."

403. *Id.*

retain an attorney, the court must appoint one to act in his behalf.[404] The problem is for a court to determine which defendants are financially disabled.[405] In *United States v. Ellsworth*,[406] the Ninth Circuit concluded that in order to be entitled to a court-appointed attorney, a defendant must fully complete the court's Financial Affidavit form, CJA 23. A conclusory allegation of poverty will not suffice. One must prove his indigency with specificity.[407]

The indigent defendant is not free to choose the particular attorney who will undertake his defense.[408] A corollary of this rule is that, absent a compelling reason for substitution of counsel, a motion for a continuance so that a new attorney may be appointed will be denied.[409]

Once incarcerated, an indigent prisoner may have a statutory right to appointed counsel in order to bring a civil action against the police for alleged wrongful activities leading to his arrest, conviction and incarceration.[410] The court may deny the prisoner's request only upon a finding that the action is either "frivolous" or "malicious."[411] A district court cannot refuse to exercise jurisdiction over the indigent prisoner's request.[412] It must make a factual finding with regard to the legitimacy of that request. If it fails to do so, the appellate court will remand

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404. Gideon v. Wainwright, 372 U.S. 335 (1963).

Although *Gideon* relied upon the sixth amendment right to counsel, as applied to the states through the due process clause of the fourteenth amendment, the Supreme Court has also invoked the equal protection clause to guarantee an indigent's right to counsel on a non-discretionary appeal of right. *See* Douglas v. California, 372 U.S. 353 (1963). *Cf.* Ross v. Moffit, 417 U.S. 600, 609-10 (1974) (holding *Douglas* inapplicable to a discretionary appeal).

405. *See* Von Moltke v. Gillies, 332 U.S. 708, 720 (1948) (sixth amendment guarantees appointed counsel to one unable to hire a lawyer). 18 U.S.C. § 3006A (1970) provides for each United States District Court to promulgate rules to determine who is "financially unable to obtain adequate representation."

406. 547 F.2d 1096 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2636 (1977).

407. *Id.* at 1098. *See also* United States v. Schmitz, 525 F.2d 793, 795 (9th Cir. 1975) (conclusory affidavit of poverty does not fulfill burden of proof necessary to obtain free trial transcript under Criminal Justice Act).

408. *See* People v. Hughes, 57 Cal. 2d 89, 367 P.2d 33, 17 Cal. Rptr. 617 (1961) (court not obliged to appoint private attorney requested by accused in place of the public defender).

409. *See* United States v. Shuey, 541 F.2d 845, 847 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1103 (1977). *Cf.* Lofton v. Procunier, 487 F.2d 434, 436 (9th Cir. 1973) (defendant cannot be coerced into accepting attorney who cannot serve effectively).

410. *See* 28 U.S.C. § 1915(d) (1970).

411. *Id.*

412. Cancino v. Sanchez, 379 F.2d 808, 809 (9th Cir. 1967).

the case back to the trial court with instructions to make such a finding.[413]

2. Critical Stages—The Scope of the Right to Counsel

The Supreme Court has interpreted the sixth amendment's guarantee of the assistance of counsel for an accused to apply to any critical stage of the criminal proceedings against him.[414] A problem area has been the determination of what constitutes the initiation of an adversary proceeding as opposed to mere investigation.[415] In *United States v. DeVaughn*,[416] the Ninth Circuit held that a defendant who was baited into making incriminating statements by a government informant after charges against him had been dropped did not have a right to receive "right to counsel" warnings.[417] The court reasoned that the defendant was not under indictment at the time of the conversation and that sufficient evidence might never have been obtained to indict him after his first dismissal.[418]

The Supreme Court has held that the constitutional right to counsel applies to misdemeanor prosecutions.[419] Prior to the enactment of the

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413. *See* Alexander v. Ramsey, 539 F.2d 25 (9th Cir. 1976) (per curiam); United States v. Madden, 352 F.2d 792, 794 (9th Cir. 1965).

414. *See* Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (preliminary hearing a critical stage); Mempa v. Rhay, 389 U.S. 128, 135-37 (1968) (sentencing a critical stage) White v. Maryland, 373 U.S. 59, 60 (1963) (initial appearance before magistrate a critical stage since non-binding plea could subsequently be used as evidence at defendant's trial). *Cf.* Gerstein v. Pugh, 420 U.S. 103, 119-20 (1975) (judicial determination of probable cause following arrest may be made without adversary hearing or participation by defense counsel).

415. *See* United States v. Wade, 388 U.S. 218, 226-27 (1967) (post-indictment line-up entails right to counsel); Hoffa v. United States, 385 U.S. 293, 309-10 (1966) (defendant has right to counsel after taken into custody and charged); Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (suspect who is focus of investigation, and who has been taken into custody, has sixth amendment right to counsel); Massiah v. United States, 377 U.S. 201, 206 (1964) (right to counsel applies after defendant federally indicted). *Cf.* Kirby v. Illinois, 406 U.S. 682, 690 (1972) (pre-indictment line-up may not constitute initiation of adversary proceeding).

416. 541 F.2d 808 (9th Cir.) (per curiam), *cert. denied*, 97 S. Ct. 501 (1976).

417. *Id.* at 809. *See* Hoffa v. United States, 385 U.S. 293, 309-10 (1966) (law enforcement officers have no duty to halt investigation when they have minimum evidence to establish probable cause); United States v. King, 472 F.2d 1, 5 (9th Cir.), *cert. denied*, 414 U.S. 864 (1973) (defendants did not have to be warned of their right to counsel before talking to federal informant since they had not been indicted or taken into custody).

418. 541 F.2d at 810.

419. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (no person may be imprisoned for any offense, no matter how classified, unless represented by counsel).

Indian Civil Rights Act of 1968 this right did not extend to American Indians appearing before a tribal court.[420] While an Indian now has the right to the assistance of counsel if retained at his own expense,[421] in *Tom v. Sutton*[422] the Ninth Circuit found that the "due process" clause of the Act[423] did not give the defendant a right to appointed counsel in criminal proceedings before the tribal court.[424]

3. Effective Assistance of Counsel

The constitutional right to counsel implies some degree of competency on the part of defense counsel. The Supreme Court has rarely had occasion to examine this question, but has generally stated that a defendant has a right to "effective assistance of counsel."[425] It has left the test for assessing the effectiveness of counsel primarily to the lower courts.[426]

The different judicial circuits are divided on the proper test.[427] The Ninth Circuit has for the most part taken the position that a court should not "reverse a judgment of conviction unless a defendant's representation has been so inadequate as to make his trial a *farce, sham, or mockery of justice.*"[428] Occasionally the court has stated the test in

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420. 25 U.S.C. § 1302 (1970). *See* Settler v. Tamur, 507 F.2d 231, 241 (9th Cir. 1974) (Indian did not have right to counsel prior to Act when appearing before tribal court). *Accord,* Talton v. Mayes, 163 U.S. 376, 384 (1896) (fifth amendment inapplicable to Cherokee Nation).

421. 25 U.S.C. § 1302(6) (1970).

422. 533 F.2d 1101 (9th Cir. 1976).

423. 25 U.S.C. § 1302(8) (1970).

424. 533 F.2d at 1105-06.

425. McMann v. Richardson, 397 U.S. 759, 771 (1970); Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60, 76 (1942); Avery v. Alabama, 308 U.S. 444, 446 (1940); Powell v. Alabama, 287 U.S. 45, 53 (1932).

426. [D]efendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we think the matter, for most part, should be left to the good sense and discretion of the trial courts with the admonition that [they] should strive to maintain proper standards of performance by attorneys . . . representing defendants in criminal cases . . . .

McMann v. Richardson, 397 U.S. 759, 771 (1970).

427. *See* Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) (extensive discussion of other cases in various circuits). *See also* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post Conviction Relief in Criminal Cases,* 59 NW. U.L. REV. 289 (1964); Beaney, *The Right to Counsel: Past, Present and Future,* 49 VA. L. REV. 1150 (1963).

428. United States v. Stern, 519 F.2d 521, 524 (9th Cir.), *cert. denied,* 423 U.S. 1033 (1975) (emphasis added). *See also* United States v. Martin, 489 F.2d 674, 677 (9th Cir. 1973), *cert. denied,* 417 U.S. 948 (1974); United States v. Ortiz, 488 F.2d 175, 177 (9th Cir. 1973); Rivera v. United States, 318 F.2d 606, 608 (9th Cir. 1963); Stanley v. United States, 239 F.2d 765, 766 (9th Cir. 1956).

terms of whether counsel has rendered "reasonably effective" assistance.[429] The difference, however, appears to be more one of label than of substance inasmuch as the court has sometimes cited both lines of cases at the same time.[430]

Applying the aforementioned test(s), the Ninth Circuit rejected all attempts last year to overturn convictions on the ground of ineffective assistance of counsel.[431] It appears that for such an objection to succeed there must be a total failure of the defense attorney to present critical defenses.[432] It is difficult to carry this burden of proof.

A tangential problem arises where a defendant is represented by the same attorney as his alleged co-conspirator, and subsequently tries to overturn the conviction by charging that the conflict of interest between himself and the co-conspirator rendered the attorney's assistance ineffective.[433] In *United States v. Kutas*,[434] defendant failed in such an attempt since she could not show that a conflict actually existed which

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429. United States v. Elksnis, 528 F.2d 236, 238 (9th Cir. 1975); United States v. Smith, 446 F.2d 1117, 1119 (9th Cir. 1971), *cert. denied*, 417 U.S. 915 (1974); Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963).

Another line of cases phrases the test as whether the circumstances show a denial of fundamental fairness. *See* United States v. Stern, 519 F.2d 521, 525 (9th Cir.), *cert. denied*, 423 U.S. 1033 (1975); Mengarelli v. United States, 476 F.2d 617, 619 (9th Cir. 1973).

430. *See* Gardner v. Griggs, 541 F.2d 851, 853 (9th Cir. 1976); United States v. Martin, 489 F.2d 674, 677-78 (9th Cir. 1973), *cert. denied*, 417 U.S. 948 (1974) (uses the mockery test, but cites Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963)). *But cf.* DeKaplany v. Enomoto, 540 F.2d 975, 987 (9th Cir. 1976) (en banc) (acknowledges there are different standards being used within circuit).

431. Corum v. Gunn, 545 F.2d 645 (9th Cir. 1976) (per curiam); Gardner v. Griggs, 541 F.2d 851, 853 (9th Cir. 1976); United States v. Shuey, 541 F.2d 845, 848-49 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1103 (1977) (using fundamental fairness test court found failure to raise defense of duress did not constitute ineffective assistance of counsel given facts presented in trial transcript); DeKaplany v. Enomoto, 540 F.2d 975, 986-87 (9th Cir. 1976) (en banc) (trial tactic of going straight to insanity phase of the trial so jury would not be exposed to photographs of torture inflicted upon the victim by defendant was valid tactical measure to avoid jury prejudice); Founts v. Pogue, 532 F.2d 1232, 1234-35 (9th Cir.), *cert. denied*, 426 U.S. 925 (1976) (appellant's alibi defense shown to be properly handled by trial counsel).

432. *See* Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1973). *Cf.* Lofton v. Procunier, 487 F.2d 434, 435-36 (9th Cir. 1973) (held: a defendant cannot be coerced into accepting designated counsel when that counsel cannot serve effectively in case where new public defender appointed ten minutes before trial).

433. *See* United States v. Nystrom, 447 F.2d 1350, 1351 (9th Cir.), *cert. denied*, 404 U.S. 993 (1971).

434. 542 F.2d 527 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 810 (1977).

prejudiced her rights.[435] Defendants who insist on joint representation before trial, and fail to object to the supposed conflict of interest at the time of that trial will have a difficult time sustaining this objection on appeal.[436]

4. The Right to Proceed Pro Se

Recently the Supreme Court held that a defendant in a state criminal action has an independent constitutional right of self-representation and can thereby elect to conduct his or her own defense.[437] In *United States v. Kelley*,[438] the Ninth Circuit reaffirmed its position that the right to proceed pro se does not include the right to be represented by a non-lawyer.[439]

B. Bail

In *Magisano v. Focke*,[440] the defendant argued that he should be released on bail pending his appeal of the denial of a writ of habeas corpus.[441] The Ninth Circuit held that the district court did not err in refusing to permit release on bail, given "the indication . . . that the appellant . . . would undertake to flee from reapprehension if given the opportunity . . . ."[442]

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435. *Id.* at 529. *See also* United States v. Nystrom, 447 F.2d 1350, 1351 (9th Cir.), *cert. denied*, 404 U.S. 993 (1971); Davidson v. Cupp, 446 F.2d 642, 643 (9th Cir. 1971); Carlson v. Welson, 443 F.2d 21, 22 (9th Cir. 1971).

436. *See* United States v. Kutas, 542 F.2d 527, 529 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 810 (1977); Davidson v. Cupp, 446 F.2d 642, 643 (9th Cir. 1971) (burden lies with petitioner).

437. Faretta v. California, 422 U.S. 806, 807 (1975).

438. 539 F.2d 1199 (9th Cir.), *cert. denied*, 97 S. Ct. 393 (1976).

439. *Id.* at 1203. *See also* United States v. Scott, 521 F.2d 1188, 1191-92 (9th Cir. 1975).

440. 545 F.2d 1228 (9th Cir. 1976).

441. Defendant sought a writ of habeas corpus to prevent his extradition to Canada.

442. 545 F.2d at 1230. The district judge is given great discretion in this area. The following provisions illustrate the scope of that discretion:

> Pending review of a decision failing or refusing to release a prisoner in [a habeas corpus] proceeding, the prisoner *may be* detained in the custody from which release is sought . . . *as may appear fitting* to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

FED. R. APP. P. 23(b) (emphasis added).

> A person . . . who has been convicted of an offense [who] . . . has filed an appeal should be treated in accordance with the provision of section 3146 *unless* the court . . . has reason to believe that no one or more conditions of release will reasonably assure that the person *will not flee* . . . . If such a wish of flight . . . is believed to exist . . . the person may be ordered detained.

18 U.S.C. § 3148 (1970) (emphasis added). *Cf.* 18 U.S.C. § 3146(a)(1)-(5) (1970) (all-inclusive list of conditions that judge may employ when he releases defendant in non-capital case *prior to trial*).

C. *Right to Speedy Trial*

1. Pre-accusatorial Delay

a. *When Does the Speedy Trial Right Vest?*

The right to a speedy trial is not violated by delay between offense and indictment, although it may be violated by an inordinate delay in the return of the indictment after the arrest is made.[443] The statute of limitations is a device which affords protection to the defendant against prosecutorial delay.[444] In *United States v. Clardy*,[445] the court held that two prisoners who had attacked a fellow inmate had not been arrested when they were placed in segregated confinement.[446] Thus, the defendants right to a speedy trial had not been violated.

"Ordinarily the right to speedy trial means speedy trial on an existing charge, so successive prosecutions, as such, do not violate it."[447] In *United States v. Poll*,[448] the Ninth Circuit applied this rule where the initial conviction of a defendant was reversed[449] and the Government, instead of pursuing the remand, secured a new indictment on a different charge. The court held that the substantial passage of time between the original and subsequent indictments did not violate the speedy trial provision of the Constitution.[450]

The Ninth Circuit was faced with a similar problem in *United States v. Cordova*.[451] In *Cordova*, fourteen months had elapsed between de-

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443. *See* United States v. Marion, 404 U.S. 307, 313 (1971) (putative defendant must become an accused for speedy trial right to vest); United States v. Andros, 484 F.2d 531, 533 (9th Cir. 1973) (right vests after defendant is indicted or held to answer); United States v. Erickson, 472 F.2d 505, 507 (9th Cir. 1973) (right to speedy trial comes into play when formal complaint is lodged); United States v. Griffin, 464 F.2d 1352, 1354 (9th Cir.), *cert. denied*, 409 U.S. 1009 (1972) (post-indictment delay before arrest not shown to be prejudicial).

444. *See* United States v. Marion, 404 U.S. 307, 323 (1971); United States v. Poll, 538 F.2d 845, 848 (9th Cir.), *cert. denied*, 97 S. Ct. 486 (1976).

445. 540 F.2d 439 (9th Cir. 1976).

446. *Id.* at 441 (segregated confinement not de facto arrest). *Cf.* Dillingham v. United States, 423 U.S. 64, 65 (1975) (sixth amendment right to speedy trial vests when one is arrested). Generally, prisoners in jail for the conviction of another offense have standing to allege a speedy trial violation. *See* Strunk v. United States, 412 U.S. 434 (1973).

447. 21 AM. JUR. 2D *Criminal Law* § 245 (1965) (footnote omitted). *Cf.* 18 U.S.C. § 3161(e) (Supp. V 1975) (retrial must commence sixty days from date of mistrial).

448. 538 F.2d 845 (9th Cir.), *cert. denied*, 97 S. Ct. 486 (1976).

449. United States v. Poll, 521 F.2d 329 (9th Cir. 1975).

450. 538 F.2d at 848.

451. 537 F.2d 1073 (9th Cir.), *cert. denied*, 97 S. Ct. 385 (1976).

fendant's arrest on a state charge and his subsequent indictment by a federal grand jury on charges stemming from the same transaction. The court ruled that the sixth amendment right to a speedy trial on the federal charge was not activated until the indictment was returned.[452]

b. *Due Process*

Undue delay in the filing of charges, after a case has been fully investigated, may interfere with a defendant's ability to defend himself and thereby constitute a denial of due process under the fifth amendment.[453] Pre-accusatorial delay may be viewed as a violation of due process if the defendant can show either that he suffered substantial prejudice on account of the delay or that the government deliberately delayed to gain a tactical advantage.[454] Therefore, the defendant must show a specific example of prejudice or tactical advantage, or the objection will fail.[455] Reflecting the difficulty in carrying this burden of proof, the Ninth Circuit refused to overturn several convictions attacked on this ground in 1976.[456]

In a related area, the Ninth Circuit held that a defendant waives all due process objections to pre-accusatorial delay when he enters a valid guilty plea.[457]

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452. *Id.* at 1075. Dillingham v. United States, 423 U.S. 64 (1975) is not applicable to the state arrest because this was a different charge brought by a different sovereignty; an application of the general rule that a substantial interval between successive prosecutions does not per se violate one's right to a speedy trial.

453. *See* United States v. Marion, 404 U.S. 307, 324 (1971). The Court held that, absent a showing of actual prejudice, the defendant's "due process claims . . . [were] speculative and premature." *Id.* at 326.

454. *See* United States v. Manning, 509 F.2d 1230, 1234 (9th Cir. 1974); United States v. Andros, 484 F.2d 531, 533 (9th Cir. 1973); United States v. Erickson, 472 F.2d 505, 507 (9th Cir. 1973).

455. United States v. Griffin, 464 F.2d 1352, 1354-55 (9th Cir.), *cert. denied*, 409 U.S. 1009 (1972).

456. *See* United States v. Sand, 541 F.2d 1370, 1373-74 (9th Cir. 1976) (three year delay between commission of narcotics offense and commencement of prosecution held not to violate defendants' due process rights despite death of witnesses and subsequent loss of physical evidence); United States v. Clardy, 540 F.2d 439, 442 (9th Cir. 1976) (given good reasons for delay, witnesses' lack of memory will not constitute actual prejudice); United States v. Poll, 538 F.2d 845, 848 (9th Cir.), *cert. denied*, 97 S. Ct. 486 (1976) (no allegation of prejudice or tactical advantage).

457. United States v. O'Donnell, 539 F.2d 1233, 1236-37 (9th Cir. 1976) (waiver of right to speedy trial). *See* Lefkowitz v. Newsome, 420 U.S. 283, 288 (1975) (free and intelligent guilty plea bars all later constitutional challenges to pre-trial proceedings). *But cf.* Menna v. New York, 423 U.S. 61, 62 (1975) (guilty plea does not waive double jeopardy protection of fifth amendment).

2. Post-accusatorial Delay

a. Sixth Amendment Protection

The right to a speedy trial guaranteed by the sixth amendment is relative, and each case must be judged on an ad hoc basis.[458] In *Barker v. Wingo*,[459] the Supreme Court formulated a balancing test which should be used in determining whether a defendant's speedy trial rights have been violated. The trial court should consider four factors: (1) the length of delay; (2) the Government's justification for the delay; (3) whether the defendant made an assertion of his right; and (4) any prejudice incurred by defendant as a result of the delay.[460] These factors are interrelated and "must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must . . . engage in [this] difficult . . . balancing process . . . with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution."[461]

The Ninth Circuit, in reliance upon the Supreme Court's language in *Barker*,[462] has analyzed the length of delay factor as the mechanism that triggers the initial inquiry into alleged violations of the petitioner's right to a speedy trial.[463] In *United States v. Simmons*,[464] the court held that a six-month delay between indictment and trial raised a presumption of prejudice and triggered inquiry into the other factors in the balancing process.[465] It is important to note that consideration of the length of the delay is only used to determine whether further judi-

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458. *See* Barker v. Wingo, 407 U.S. 514, 530 (1972); Beavers v. Haubert, 198 U.S. 77, 87 (1905); Stuart v. Craven, 456 F.2d 913, 915 (9th Cir. 1972).

459. 407 U.S. 514, 530 (1972).

460. *Id.* at 530-32. *See also* Paine v. McCarthy, 527 F.2d 173, 176 (9th Cir. 1975), *cert. denied*, 424 U.S. 957 (1976); Stuart v. Craven, 456 F.2d 913, 915 (9th Cir. 1972).

Prejudice to a defendant is assessed according to the three interests which the right to speedy trial is designed to protect: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused; and (3) limiting of the possibility that the defendant's defense is impaired. 407 U.S. at 532.

461. Moore v. Arizona, 414 U.S. 25, 26 (1973) (per curiam) (quoting Barker v. Wingo, 407 U.S. 514, 533 (1972)).

462. 407 U.S. at 530.

463. *See* United States v. Geelan, 520 F.2d 585, 587 (9th Cir. 1975).

464. 536 F.2d 827 (9th Cir. 1976).

465. *Id.* at 831. *Accord*, United States v. Graham, 538 F.2d 261, 263 (9th Cir. 1976) (delay of twelve months between indictment and trial warranted further inquiry); Paine v. McCarthy, 527 F.2d 173, 176 (9th Cir. 1976) (ten month delay sufficient to trigger judicial scrutiny); United States v. Geelan, 520 F.2d 585, 587 (9th Cir. 1975) (six year delay sufficient to trigger inquiry).

cial scrutiny is justified. The length of the delay is not dispositive of the speedy trial issue.[466]

In *Simmons*, the district court found a violation of the defendant's speedy trial rights and dismissed the indictment with prejudice. The court of appeals reversed, holding that the district court had abused its discretion in dismissing the action.[467] Applying the *Barker* balancing test, the court stated that although the delay was occasioned by the Government's own negligence, this deficiency was counterbalanced by the defendant's failure to assert his right to speedy trial. More importantly, the delay did not result in serious prejudice.[468] Consequently, the case was reversed and remanded for trial.[469]

In *United States v. Graham*,[470] it was decided that a twelve-and-one-half month delay occasioned by the Government's negligence did not violate the petitioner's right to a speedy trial.[471] The court emphasized that it was relying heavily upon the absence of any showing that there was impairment of the petitioner's defense.[472] Although the test is not solely one of prejudice,[473] the court clearly indicated that it considers this factor "by far the most important variable" when applying the *Barker* balancing test.[474]

b. Statutory Protection

In *United States v. Carpenter*,[475] the defendant was arrested and

466. *See* United States v. Ewell, 383 U.S. 116, 120 (1966) (passage of nineteen months between arrest and hearings not violative per se of one's right to speedy trial); Stuart v. Craven, 456 F.2d 913, 915 (9th Cir. 1972) (thirteen-month delay not per se violation of right to speedy trial).

In *Barker v. Wingo*, the length of the delay was greater than five years. This particular delay was held not sufficient to constitute a speedy trial violation since it appeared from the trial court record that Barker did not really want a speedy trial. 407 U.S. at 536.

467. 536 F.2d at 832.

468. *Id.*

469. *Id.* at 838.

470. 538 F.2d 261 (9th Cir. 1976).

471. *Id.* at 266.

472. *Id.* at 265. *See* note 460 *supra*, describing those interests which the right to a speedy trial is designed to protect.

473. *See* Moore v. Arizona, 414 U.S. 25 (1973) (per curiam) (state court ruled that showing of prejudice is *necessary* to establish speedy trial claim; Supreme Court reversed and remanded case to lower court to consider other factors).

474. 538 F.2d at 266. *See* Note, *The United States Courts of Appeals: 1974-1975 Term Criminal Law and Procedure*, 64 GEO. L.J. 167, 571 n.2610 (1975) (reference to other circuits emphasizing prejudice as most important factor in applying balancing test).

475. 542 F.2d 1132 (9th Cir. 1976).

charged with a federal offense. He was released on bail and placed in state custody to await parole revocation proceedings initiated because of his arrest on the federal charge. The federal trial was scheduled for February 17, 1976 but a delay until April 6 was necessitated by the crowded court calendar. The defendant had been arrested on October 23, 1975. The district court dismissed the case in reliance upon the Speedy Trial Act.[476] The Ninth Circuit, finding the Speedy Trial Act inapplicable, reversed and remanded the case for trial.[477]

Rule 48(b) of the Federal Rules of Criminal Procedure was utilized to support the dismissal with prejudice of an indictment by the district court in *United States v. Simmons*.[478] The Ninth Circuit stated that "under Rule 48(b) it is within the court's inherent power to dismiss a case with prejudice for want of prosecution, whether or not there has been a Sixth Amendment violation."[479] The court decided that such a dismissal "should be utilized with caution, and only after a forewarning to prosecutors of the consequences."[480] The court held that since

476. 18 U.S.C. §§ 3161-3174 (Supp. V 1975).

477. 542 F.2d at 1134.

The Speedy Trial Act, which took effect ninety days from July 1, 1975, provides some protection to persons who are being detained *solely* because they are awaiting trial. The Act provides that if such person is not brought to trial within ninety days, that person must immediately be released from confinement for the entire remaining period pending that trial. *See* United States v. Tirasso, 532 F.2d 1298 (9th Cir. 1976). The reason for the delay is irrelevant, so long as it is not caused by the accused or his counsel. *Id.* at 1299. The statute is clear and unambiguous; the defendant must be released in spite of the likelihood that he will flee the jurisdiction. *Id.* at 1300-01. *See also* United States v. Masko, 415 F. Supp. 1317 (W.D. Wis. 1976). *Cf.* Moore v. United States, 525 F.2d 328 (9th Cir. 1975) (in determining the ninety day limit, judge may exclude time consumed in determining defendant's mental competency to stand trial; during that period defendant is not being held *solely* because he is awaiting trial).

It is now clear that the period of delay excluded by 18 U.S.C. § 3161(h) (Supp. V 1975) also applies in computing the ninety day imprisonment-to-trial period mandated by section 3164. *See* United States v. Masko, 415 F. Supp. 1317, 1323 (W.D. Wis. 1976).

Section 3164 of the Speedy Trial Act was not applicable in *Carpenter* since the defendant was released from custody and charges against him were dismissed. 542 F.2d at 1134. Dismissal of charges is not one of the sanctions that may be imposed under the section. 18 U.S.C. § 3164(c) (Supp. V 1975). The only other section of the Act that could have applied is section 3161(g). However, the relevant part of this section will not go into effect until July 1, 1979. *See* 18 U.S.C. §§ 3161(g), (c), 3162(a)(2), 3163(c) (Supp. V 1975).

478. 536 F.2d 827, 832 (9th Cir. 1976). "[I]f there is unnecessary delay in bringing a defendant [who has been held to answer in district court] to trial, the court may dismiss the indictment . . . ." FED. R. CRIM. P. 48(b).

479. 536 F.2d at 833-34.

480. *Id.* at 836.

"the United States Attorney was not forewarned that dismissal with prejudice might result,"[481] the district court had abused its discretion in dismissing the action with prejudice, and the case was remanded for trial.[482]

IV. CONFESSIONS

The Supreme Court's landmark decision in *Miranda v. Arizona*[483] requires the government to warn all suspects of certain rights prior to any custodial interrogation.[484] The suspect must be informed of his right to remain silent, of his right to the assistance of counsel, and he must be told that any statement he makes may be used against him.[485] It is not necessarily an error if the warning fails to inform the suspect of his right to have an attorney actually present during the interrogation.[486] While statements obtained in violation of the *Miranda* warnings may not be used against a suspect at his subsequent trial,[487] compliance will not assure admissibility if under the totality of circumstances the confession was involuntary.[488]

Miranda places the burden on the government of proving that the warnings were given and that a knowing waiver of these rights was obtained.[489] This burden is not carried by mere repetition of the warnings; neither is it met by waivers given at distant times.[490] However,

481. *Id.* at 837-38. Defendant argued that the "Western District of Washington Plan for the Prompt Disposition of Criminal Cases" fulfilled the necessary warning requirement to the United States Attorney. *Id.* at 836. The argument failed since § 4 of the Plan *did not* properly inform the prosecution that a violation of the Plan would result in a dismissal of the action with prejudice. *Id.* at 837 & n.51.

482. *Id.* at 837-38.

483. 384 U.S. 436 (1966).

484. *Id.* at 467-73.

485. *Id.*

486. United States v. Pheaster, 544 F.2d 353, 365-66 (9th Cir. 1976) (such an omission is not fatal in that defendant interrupted the warnings to state he was aware of his rights). *But see* Smith v. Rhay, 419 F.2d 160, 163 (9th Cir. 1969) (warnings held inadequate because defendant was not informed he had right to presence of an attorney and that an attorney could be appointed to represent him prior to any questioning).

487. 384 U.S. at 479.

488. Boulden v. Holman, 394 U.S. 478 (1969). 18 U.S.C. § 3501 (1970) lists some of the factors to be considered in determining a confession's voluntary character. Confessions were held not to have violated the voluntariness test in United States v. Edwards, 539 F.2d 689, 691 (9th Cir. 1976) (defendant who had been arrested 125 miles from nearest magistrate confessed after six hours of confinement) and United States v. O'Looney, 544 F.2d 385, 389 (9th Cir. 1976) (district court's finding that statement was voluntary will not be reversed in absence of clear error).

489. 384 U.S. at 479.

490. United States v. Womack, 542 F.2d 1047, 1050-51 (9th Cir. 1976).

a waiver may be implied from the circumstances and may occur despite an earlier demand to speak with an attorney.[491] While the question of whether a confession is involuntary must initially be decided by the trial court,[492] the Supreme Court has not established whether such a preliminary determination is required to demonstrate compliance with *Miranda*. The Ninth Circuit in *United States v. McDaniel*[493] held that before the jury can decide whether a defendant received proper warnings, a preliminary determination of that fact must be made by the trial judge.[494]

A. When Miranda Warnings are Required

Under the *Miranda* decision, a suspect is required to be advised of his rights "when [he] is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way."[495] The Supreme Court, in *Beckwith v. United States*,[496] clarified this requirement by holding that the warnings do not attach in a setting of non-coercive questioning by agents of the Internal Revenue Service, even though the suspect may be the "focus" of the government's investigation.[497] The compulsiveness of the situation (generally judged by the nature of the custody) is the triggering device for the warnings.[498] Although the Supreme Court has not yet provided a clear standard for determining at what point general questioning is considered custodial questioning,[499] the Ninth Circuit has reaffirmed its

491. United States v. Pheaster, 544 F.2d 353, 367-68 (9th Cir. 1976).

492. Jackson v. Denno, 378 U.S. 368, 395-96 (1969).

493. 545 F.2d 642 (9th Cir. 1976).

494. *Id.* at 644. The case was reversed and remanded so that the government agent who claimed to have given the warnings could be sufficiently cross-examined. After the cross-examination the trial judge must rule on whether adequate warnings were given.

495. 384 U.S. at 477.

496. 425 U.S. 341 (1976).

497. *Id.* at 345. In *Beckwith* the defendant was being questioned by IRS agents in his home regarding his federal tax liability. The Ninth Circuit had already taken the position that "*Miranda* clearly abandoned 'focus of investigation' as a test to determine when rights attach in confession cases." Lowe v. United States, 407 F.2d 1391, 1396 (9th Cir. 1969).

498. Beckwith v. United States, 425 U.S. 341, 345 (1976). *See* United States v. Walker, 538 F.2d 266, 269 (9th Cir. 1976) (per curiam) (*Miranda* warnings not required because defendant, who was free on bail, was not in custody when he voluntarily met with government agents in United States Attorney's office).

499. *Miranda* did not criticize the common police practice of general "on-the-scene" inquiries; *Miranda* warnings are necessary once the suspect is placed in formal custody. United States v. Casimiro-Benitez, 533 F.2d 1121, 1124 (9th Cir. 1976) (Government conceded that once suspect was placed in police car he was in custody for purposes of *Miranda*).

position that, at least in international border encounters, *Miranda* warnings need not be given an individual entering the United States until customs agents have probable cause to believe the person to be questioned committed an offense.[500]

A further narrowing of what is to be regarded as a custodial interrogation was created by the Supreme Court's decision in *United States v. Mandujano*,[501] in which the Court refused to apply *Miranda* to a "putative defendant" who was testifying as a witness before a grand jury and who was subsequently convicted for the false statements made while so testifying.[502] The Court reasoned that a grand jury setting provided adequate safeguards not present during a police custodial interrogation, and that since the witness had been advised of his fifth amendment privilege against self-incrimination and of his limited sixth amendment privilege to consult with counsel, the witness' rights had been protected.[503]

B. Compliance with Miranda and the Right to Consultation

Once a suspect invokes his right to silence or counsel, "the interrogation must cease."[504] But as the Supreme Court's recent decision in *Michigan v. Mosley*[505] illustrated, such an action on the part of the suspect will not automatically prevent a subsequent interrogation.[506] In

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500. United States v. Golden, 532 F.2d 1244, 1246 (9th Cir. 1976) (per curiam). This subjective approach is contrary to the objective test for determining if an individual is in custody, which has been stated as follows:

> [W]hether or not the police have probable cause for arresting the suspect, has no relevance as to when the person's right to receive warnings attaches.
>
> . . . .
>
> . . . Whether a person is in custody should not be determined by what the officer or the person being questioned thinks; there should be an objective standard. . . . It is the officer's statements and acts, the surrounding circumstances, gauged by a "reasonable man" test, which are determinative.

Lowe v. United States, 407 F.2d 1391, 1396-97 (9th Cir. 1964). Perhaps the unique situation encountered at border crossings explains these different approaches taken by the Ninth Circuit, although a purportedly objective standard was employed in United States v. Luther, 521 F.2d 408, 410 (9th Cir. 1975) (per curiam) in holding that questioning at the secondary inspection office in San Ysidro need not be prefaced with a *Miranda* warning.

501. 425 U.S. 564 (1976).

502. *Id.* at 578-79. *Accord*, United States v. Kelly, 540 F.2d 990, 992-93 (9th Cir. 1976) (defendant, having been advised of his fifth amendment rights, was not required to have been given complete *Miranda* warning before testifying in front of grand jury).

503. 425 U.S. at 579-80. The Court did not pass on whether any warnings should have been given. *Id.* at 582 n.7.

504. Miranda v. Arizona, 384 U.S. 473-74 (1966).

505. 423 U.S. 96 (1975).

506. *Id.* at 103-06.

Mosley, the defendant, after asserting his right to silence, was later questioned by a different police officer about a completely different crime. The Court upheld the admissions made at the subsequent interrogation session, choosing to construe *Miranda* as only requiring that a suspect's " 'right to cut off questioning' [be] 'scrupulously honored,' "[507] and finding that the circumstances of the case indicated compliance with this standard.[508]

In two significant footnotes[509] the *Mosley* Court distinguished the defendant's situation from a situation in which a defendant is asserting his right to counsel. The Court suggested that when a suspect requests the presence of counsel, all interrogation must cease until counsel is present.[510] The Ninth Circuit has also recognized this distinction. In *United States v. Womack*,[511] the court held that incriminating statements elicited after the defendant twice requested counsel were obtained in violation of *Miranda*, citing the *Mosley* decision.[512] In *United States v. Flores-Calvillo*,[513] a different panel concluded that *Mosley* required the adoption of a per se rule requiring the exclusion of incriminating statements obtained in a renewed interrogation after the suspect requested the presence of counsel.[514] The fact that *Miranda* warnings were given before the subsequent interrogation session will not be sufficient to remedy the violation.[515] A later opinion in *United States v.*

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507. *Id.* at 104.

508. *Id.* at 104-07. The Court relied on the fact that after the defendant chose to remain silent the interrogation immediately ceased; the suspect was not questioned until two hours later on another matter, at which time he was again given *Miranda* warnings; and that it was not an attempt to wear down the defendant by repeated interrogation sessions.

509. 423 U.S. at 101 n.7, 104 n.10.

510. "[T]he Court in *Miranda* . . . distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney.' " *Id.* at 104 n.10 (citations omitted).

511. 542 F.2d 1047 (9th Cir. 1976).

512. *Id.* at 1050-51. The defendant at his hearing for suppression stated that he did not repeat his request for counsel a third time because " 'every time I asked for one, I never got one, so I gave up on the fact.' " *Id.* at 1051.

513. No. 75-3785 (9th Cir. July 14, 1976).

514. This same approach was followed in United States v. Kinsman, 540 F.2d 1017, 1018-19 (9th Cir. 1976) (confession suppressed after defendant testified that he requested and was denied presence of counsel three times, citing United States v. Womack, 542 F.2d 1047 (9th Cir. 1976)).

515. *See, e.g.*, United States v. Flores-Calvillo, No. 75-3785 (9th Cir. July 14, 1976); United States v. Womack, 542 F.2d 1047, 1050-51 (9th Cir. 1976); United States v. Kinsman, 540 F.2d 1017, 1018-19 (9th Cir. 1976).

Pheaster[516] obfuscated the distinction by relying on *Mosley*'s flexible standard to admit the defendant's statements even though the statements had been made after the defendant had twice requested counsel.[517] The court held that the defendant had impliedly waived his *Miranda* rights by choosing to speak to the government agents after he was told of the extensive evidence against him.[518] The court did not discuss the earlier Ninth Circuit cases or the per se rule used in the past.[519] Whether a defendant has a constitutional right to consult with counsel of his own choice was a question the Ninth Circuit declined to decide.[520]

C. *Use of Invalid Confessions*

While *Miranda* purported to establish the rule that unless the requisite warnings are given, no evidence obtained as a result of an interrogation is admissible,[521] failure to give proper *Miranda* warnings does not automatically exclude all statements for all purposes. In *Chapman v. California*,[522] the Supreme Court held that even constitutional errors might be considered harmless if they did not contribute to defendant's conviction or substantially affect his rights.[523] This same

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516. 544 F.2d 353 (9th Cir. 1976).

517. *Id.* at 367.

518. *Id.* at 368. The court stated that a "key distinction" in the case was the fact that the defendant was not questioned, but rather he was informed of the available evidence against him. *Id.* at 366. But the same opinion also states that the defendant was asked several times about the whereabouts of the kidnap victim. *Id.* at 365, 368 n.9. Whether measured by an objective or subjective standard, the defendant was the subject of a custodial interrogation, and the agents did elicit the incriminating responses from him.

519. *See* notes 511-514 *supra* and accompanying text. One underlying reason for the relaxation of *Miranda* in this decision was related to the justifiable concern on the part of the government agents for the kidnap victim whose location and condition were unknown at the time of the defendant's arrest. 544 F.2d at 368 n.9. *Cf.* People v. Dean, 39 Cal. App. 3d 875, 114 Cal. Rptr. 555 (1974) (failure to give kidnapping suspect *Miranda* warnings prior to questioning him about condition and location of victim does not render responsive statements inadmissible in that basic concern for victim's safety overrides warning requirement).

520. United States v. Kinsman, 540 F.2d 1017, 1018 (9th Cir. 1976). The district court had ruled that the Government's refusal to allow the defendant to see the attorney he requested rendered the defendant's subsequent confession invalid. The court of appeals affirmed.

521. 384 U.S. at 479.

522. 386 U.S. 18 (1967).

523. *Id.* at 24-26. *See also* 28 U.S.C. § 2111 (1970); FED. R. CRIM. P. 52. In *Chapman*, the prosecution's comments on the defendant's failure to testify were determined not to be harmless error. 386 U.S. at 24-26.

standard has been applied to uphold a conviction even though incriminating statements obtained during an interrogation not preceded by *Miranda* warnings were used at trial.[524]

It is well-established that under certain circumstances voluntary statements obtained in violation of *Miranda* are admissible to impeach the maker even though they would not be admissible in the prosecutor's case-in-chief.[525] It is clear after the Supreme Court's decision in *Doyle v. Ohio*[526] that the requirements of due process prevent the use of the defendant's silence after receiving *Miranda* warnings for impeachment purposes.[527] The Court reasoned that such silence is ambiguous and that its use after the defendant is informed of his constitutional right to be silent would be fundamentally unfair.[528]

The Government is generally not permitted to use a defendant's admissions obtained because of an illegal arrest or detention unless the circumstances demonstrate that the admissions were the result of circumstances "sufficiently distinguishable to be purged of the primary taint."[529] In *Brown v. Illinois*,[530] the Supreme Court concluded that the mere recitation of *Miranda* warnings following an illegal arrest is not sufficient to make subsequent incriminating statements admissible.[531] While purporting to follow *Brown*, the Ninth

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524. United States v. Casimiro-Benitez, 533 F.2d 1121, 1124-25 (9th Cir. 1976) (overwhelming evidence of defendant's guilt sufficient to conclude that *Miranda* error was harmless).

525. Oregon v. Hass, 420 U.S. 714, 723-24 (1975) (statement obtained after defendant was given full warnings but after he had requested counsel properly used for impeachment since statements were trustworthy); Harris v. New York, 401 U.S. 222, 225-26 (1971) (statements made by defendant who was given no warnings were admissible to attack credibility of defendant's trial testimony). *Accord*, United States v. Cervantes, 542 F.2d 773, 777 (9th Cir. 1976) (admissions obtained after non-compliance with *Miranda* properly used to impeach defendant because no objection was made as to statements' involuntary character).

526. 426 U.S. 610 (1976).

527. *Id.* at 619. In *Doyle* the defendant, after testifying to an exculpatory story, was asked on cross-examination why he had not told the story at the time of his arrest. *Id.* at 614.

528. *Id.* at 617-18. *But see* United States v. Haro-Portillo, 531 F.2d 962, 963-64 (9th Cir. 1976), decided prior to *Doyle*, in which the court permitted a government agent to testify as to his conversation with the defendant (after the defendant had been given *Miranda* warnings), which included the explanation that the defendant had terminated the conversation by refusing to answer any more questions.

529. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). *Accord*, United States v. Strickler, 490 F.2d 378 (9th Cir. 1974) (arrest without sufficient probable cause rendered subsequent inculpatory statements invalid).

530. 422 U.S. 590 (1975).

531. *Id.* at 603. Other factors to evaluate before deciding if a confession was ob-

Circuit in *United States v. O'Looney*[532] speculated that even if there were an illegal detention in the defendant's case, the statements obtained from the defendant while being questioned at a police station could be admissible. The court stressed the facts that the flagrancy of the violation was minimal and that the statement followed proper *Miranda* warnings.[533]

V. TRIALS

A. Elements of Crimes

1. In General: Criminal Intent

Criminal intent is an essential element of virtually every crime.[534] The level of intent necessary may vary according to the crime and determination of the requisite intent requires that "each material element of the offense must be examined and the determination made what level of intent Congress intended the government to prove, taking into account constitutional considerations . . . as well as the common-law background, if any, of the crime involved."[535]

Traditionally, criminal intent has been of two types: general and specific. General intent crimes require the prosecution to prove that the defendant knowingly performed the illegal act. Intent is established where the prosecution shows that the defendant acted voluntarily and consciously and that his illegal conduct was not inadvertent or accidental.[536] A specific intent crime, on the other hand, requires more than general intent to do an act. It requires that the defendant have a particular mental set or purpose in performing that act.[537] In other words,

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tained by the exploitation of an illegal arrest include the proximity of the arrest and the confession and the purpose and flagrancy of the official misconduct. *Id.* at 603-04. *Cf.* Michigan v. Tucker, 417 U.S. 433, 447 (1974) (if official action was pursued in good faith, the deterrence objective of excluding the evidence loses much of its force).

532. 544 F.2d 385 (9th Cir. 1976).

533. *Id.* at 390-91.

534. Dennis v. United States, 341 U.S. 494, 500 (1951) (requirement of intent is the rule rather than the exception); United States v. Lester, 363 F.2d 68, 73 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967) (intent is an essential element of every felony). Failure to allege the requisite intent in an indictment will result in dismissal of the complaint. United States v. Morrison, 536 F.2d 286, 289 (9th Cir. 1976); United States v. Pollack, 503 F.2d 87, 91 (9th Cir. 1974).

535. United States v. Freed, 401 U.S. 601, 613-14 (1971) (Brennan, J., concurring).

536. United States v. McDaniel, 545 F.2d 642, 644 (9th Cir. 1976). In this case, conviction of defendant for aiding and abetting the illegal transportation of firearms was reversed because the trial court did not adequately instruct the jury that the prosecution had to prove the defendant knew she was doing the illegal act.

537. Attempted definitions of "specific intent" have generally been confusing and

his specific mental intent while performing the act is an element of the crime. Perhaps the best example of a specific intent crime is assault with the intent to commit murder. To convict a person of this crime, it must not only be shown that he knowingly did the act of assaulting, but that he so acted with the specific intent to kill his victim.

As was noted above, the requisite intent which is an element of a crime may be determined by examining the intent of Congress.[538] In *United States v. Lizarraga-Lizarraga*,[539] the Ninth Circuit interpreted the term "willfulness," when used in a federal statute, to require that the prosecution prove that the defendant committed the prohibited act with the specific knowledge that his action was illegal. Citing the Supreme Court decision of *United States v. Bishop*,[540] the court stated that the term "wilfully" "connotes a voluntary, intentional violation of a known legal duty."[541] Since the prosecution did not prove the element of specific intent, the court reversed the appellant's conviction.[542]

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vague. *See, e.g.*, United States v. Porter, 431 F.2d 7, 9 (9th Cir. 1970) ("A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with bad purpose either to disobey or disregard the law, may be found to act with specific intent."). *Accord*, United States v. Thornton, 498 F.2d 749, 751 (D.C. Cir. 1974).

Dissatisfaction with such standards has led the American Law Institute to abandon the traditional two-level approach to criminal intent and propose in its place four levels of culpability from which to evaluate criminal conduct: purposely, knowingly, recklessly and negligently. MODEL PENAL CODE § 2.02 (Proposed Off'l Draft, 1962).

538. *See* text accompanying note 535 *supra*.

539. 541 F.2d 826, 828 (9th Cir. 1976).

540. 412 U.S. 346 (1973).

541. 541 F.2d at 828 (quoting *Bishop*, 412 U.S. at 360).

542. *Id.* at 829. *Lizarraga* seemingly conflicts with United States v. Thomas, 531 F. 2d 419 (9th Cir.), *cert. denied*, 425 U.S. 996 (1976). These decisions, just six months apart and both written by Judge Barnes, can, however, be distinguished. In *Lizarraga*, the defendant attempted to enter Mexico in a truck concealing ammunition which was prohibited from exportation by regulations passed pursuant to 22 U.S.C. § 1934 (1970). *See* 22 C.F.R. pt. 121 (1977). Since these regulations also prohibited the export of seemingly innocuous items which could be innocently exported, the court reasoned that Congress must have intended that violation of the regulation required knowledge of the specific prohibition. In *Thomas*, the court held that knowledge of the specific prohibition against possessing unregistered firearms was not required. 26 U.S.C. § 5861(d)-(e). Since a firearm is a "dangerous and deleterious" material, the "probability of regulation is so great that *anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulations.*" 531 F.2d at 421 (quoting United States v. International Mineral & Chem. Corp., 402 U.S. 558, 565 (1971)). The rationale of *Thomas* providing for a presumption of knowledge of the regulation of dangerous materials would seem to apply to the ammunition in *Lizarraga*. The difference between the two is that the prohibition against the ammunition included innocuous items. To require general intent for purposes of exporting ammunition would require general intent for the other items regulated. For those items the dangerous-

Elsewhere the Ninth Circuit reaffirmed its position that while a robbery which is used as the basis for a felony murder charge requires specific intent, simple robbery is a general intent crime.[543] The significance of this distinction is that voluntary intoxication, because it destroys the defendant's capacity to form specific intent, will be a defense to a robbery resulting in a felony murder, but it will not be a valid defense to the underlying crime of robbery.[544]

As noted, general intent crimes require only that the prosecution prove that the defendant knowingly committed the prohibited act.[545] The requisite intent may be proven by circumstantial evidence.[546] However, even if it can be shown that the defendant did not knowingly commit the act, he may still be criminally liable if it can be shown that he consciously avoided learning the truth. In *United States v. Jewell*,[547] Judge Browning, writing for the court en banc, held that to act "knowingly" does not necessarily require actual knowledge, but can be satisfied by a showing that the defendant had "an awareness of the high probability of the fact in question. When such awareness is present, 'positive' knowledge is not required."[548] *Jewell* involved a defendant who was paid $100 to drive a car from Mexico to Los Angeles. Defendant was aware of a secret compartment in the car but claimed that he did not know what, if anything, it contained.[549] He asserted that since he did not know what was in the compartment, he did not

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deleterious rationale does not apply. Another difference is that the statute in *Thomas* did not have a "wilfulness" requirement and, in fact, § 5861(d) has been interpreted as a general intent statute. United States v. Freed, 401 U.S. 601, 607 (1971) (prohibition against receiving and possessing non-registered firearms does not require specific intent); Warren v. United States, 447 F.2d 259, 263 (9th Cir. 1971) (specific intent not required by 26 U.S.C. § 5861(d)). Therefore, *Thomas'* discussion of "presumption of knowledge" is misleading since knowledge of the statute is not required.

543. United States v. Klare, 545 F.2d 93, 94 (9th Cir. 1976).

544. This distinction is justified on the ground that robbery comes under 18 U.S.C. § 2113(a) (1970) and that Congress did not intend for the prosecution to prove specific intent under this statute. *See* United States v. DeLeo, 422 F.2d 487, 490-91 (1st Cir.), *cert. denied*, 397 U.S. 1037 (1970). Robbery as the basis for felony murder, however, falls under 18 U.S.C. § 1111 (1970) and Congress requires specific intent because the specific intent for the robbery is also the basis for the intent to commit the murder. United States v. Lilly, 512 F.2d 1259, 1261 (9th Cir. 1975).

545. *See* note 536 *supra* and accompanying text.

546. United States v. Camacho, 528 F.2d 464, 469 (9th Cir. 1976) (agreement constituting conspiracy may be inferred from acts of parties); United States v. Kelly, 527 F.2d 961, 965 (9th Cir. 1976) (intent to distribute hashish inferred from quantity).

547. 532 F.2d 697 (9th Cir. 1976).

548. *Id.* at 700.

549. *Id.* at 699. The compartment contained 110 pounds of marijuana. *Id.* at 698.

have the requisite intent to "possess" its contents.[550] The court rejected his contention, holding that the defendant who avoids the obvious truth will be held to have actual knowledge.[551] However, it did temper its decision by stating that such "willful blindness" will be recognized only in situations where the defendant's awareness approaches actual knowledge.[552] For this reason, the doctrine is likely to have its greatest application in the areas of smuggling and possession of controlled substances.

2. Conspiracy

Criminal conspiracy is an inchoate offense which consists of (1) an agreement between two or more parties to commit an unlawful act and (2) an overt act towards fulfilling that agreement.[553] As such, the agreement to commit the offense is a separate and distinct crime.[554] To sustain a conviction of conspiracy, the government must prove that the defendant was actually a party to the agreement; mere association with a person or knowledge of the conspiracy is not enough.[555]

"[T]he crime of conspiracy is complete upon the agreement to violate the law, as implemented by one or more overt acts (however innocent such may be), and is not at all dependent upon the ultimate success or failure of the planned scheme."[556] Thus, in *United States v. Sanford*,[557] the Ninth Circuit upheld the convictions of conspiracy to transport illegally killed animals in interstate commerce[558] even though

550. *Id.* at 699.

551. *Id.* at 703-04. *See* Turner v. United States, 396 U.S. 398, 417 (1970) (heroin dealers not entitled to "practice a studied ignorance"); Greigo v. United States, 298 F.2d 845, 849 (10th Cir. 1962) (where negligence will not suffice for knowledge, willful ignorance will). *See also* MODEL PENAL CODE §§ 129-130 Comment 9 (Tent. Draft No. 4, 1955), *quoted in* United States v. Jewell, 532 F.2d at 701 n.9.

552. 532 F.2d at 704.

553. United States v. Thompson, 493 F.2d 305, 310 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974). It is not necessary for each defendant to participate in each overt act in furtherance of the conspiracy in order to find him a member. Even if a particular member has dissimilar motives for being in the conspiracy, a single conspiracy may be found. United States v. Camacho, 528 F.2d 464, 470 (9th Cir. 1976).

554. Iannelli v. United States, 420 U.S. 770, 777-90 (1974).

555. United States v. Basurto, 497 F.2d 781, 793 (9th Cir. 1974). Note, however, that once a conspiracy is established, only slight evidence is required to connect a defendant to it. United States v. Carpio, 547 F.2d 490, 492 (9th Cir. 1976); United States v. Cruz, 536 F.2d 1264, 1266 (9th Cir. 1976).

556. United States v. Thompson, 493 F.2d 305, 310 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974).

557. 547 F.2d 1085 (9th Cir. 1976).

558. *See* 18 U.S.C. § 43 (1970).

the completion of defendant's scheme did not result in a crime.[559] The court focused on the circumstances as defendants believed them to be. Since this would have resulted in a crime, the defendants were treated as if their scheme had failed and were found guilty of conspiracy.[560]

In *United States v. Rodriguez*,[561] the Ninth Circuit approached a different question concerning conspiracies. Since a conspiracy is an "agreement" which requires an overt act in furtherance thereof to constitute a crime, it may be considered an "act . . . constituting a felony" under 21 U.S.C. § 843(b). Section 843(b) makes it illegal to intentionally use a communication facility to facilitate the commission of any act constituting a felony.[562] The court held that a conspiracy was such an act within the meaning of the statute.[563] Thus, in *Rodriguez*, it was held that even though government agents initiated the phone calls, defendant's willing participation in the conversations was enough to constitute a violation of 843(b), while at the same time, the use of the phone constituted an overt act making the conspiracy a crime.[564]

3. Crimes Involving Federal Regulation of Firearms

Congress has broad regulatory powers in the area of firearms[565] and

559. 547 F.2d at 1091-92. Defendants acted as guides for two federal agents who were posing as hunters. Since the agents were authorized to do whatever was necessary to complete their investigation, the animals that they shot were not illegally killed. Defendants, themselves, did no shooting. *Id.* at 1086-87.

560. *Id.* at 1092. *See also* United States v. Croxton, 482 F.2d 231, 233 (9th Cir. 1973) (conviction of conspiracy to import marijuana does not require importation be accomplished).

561. 546 F.2d 302 (9th Cir. 1976).

562. 21 U.S.C. § 843(b) (1970) provides:

> It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any *act or acts constituting a felony* under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

Id. (emphasis added).

563. 546 F.2d at 307. In so doing, the Ninth Circuit expressly adopted the analysis of the Second Circuit in United States v. Steinberg, 525 F.2d 1126, 1132-33 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). 546 F.2d at 307-08.

564. 546 F.2d at 307.

565. *See* United States v. King, 532 F.2d 505, 510 (5th Cir.), *cert. denied*, 97 S. Ct. 384 (1976) (Congress may regulate dealings in firearms even in absence of interstate nexus); Vartomos v. United States, 404 F.2d 1030, 1032 n.4 (1st Cir. 1968), *cert. denied*, 395 U.S. 976 (1969) (Congress has power to prohibit transfer of firearms alto-

may make simple possession of an unregistered firearm a federal offense.[566] In *United States v. Akers*,[567] the Ninth Circuit focused on the congressional intent behind the statute making it a felony to carry "a firearm unlawfully during the commission of any felony."[568] The court joined the Second,[569] Fifth,[570] Eighth,[571] and Tenth[572] Circuits in holding that a violation of this statute required that the act of carrying the firearm be independently unlawful.[573] Since the Government did not prove that the defendants unlawfully carried firearms during the commission of the felony, their convictions were reversed.

The Ninth Circuit reversed another conviction based on federal regulation of firearms in *United States v. Isaacs*.[574] There, a defendant who had been charged by *information* with a felony was found to have violated 18 U.S.C. § 922(a) (1970) making it illegal to make a false statement in acquiring a firearm. Defendant had answered the question of whether he was under an *indictment* at the time of purchase in the negative. Although Congress defined "indictment" to include "information," the court found that that was not the common usage of the word:

> We hold that, if a word has two meanings and if the answer to a question is literally true under one meaning of a word, the answer cannot be said to be false because, by some process of interpretation, *including the determination of congressional purpose*, a second meaning might be given to the word.[575]

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gether); United States v. Davis, 314 F. Supp. 1161, 1166 (N.D. Miss. 1970) (Congress can constitutionally prohibit felons from possessing firearms).

566. 26 U.S.C. § 5861(d) (1970). For elements of this crime see United States v. Thomas, 531 F.2d 419, 421 (9th Cir.), *cert. denied*, 425 U.S. 996 (1976). In United States v. Lathan, 531 F.2d 955, 956 (9th Cir. 1976), the Ninth Circuit distinguished between *possession* of a firearm in interstate commerce and *receipt* of a firearm in interstate commerce. *See* United States v. Bass, 404 U.S. 336, 350 (1971) ("receiving" broader than "possessing").

567. 542 F.2d 770 (9th Cir. 1976).

568. 18 U.S.C. § 924(c)(2) (1970).

569. United States v. Ramirez, 482 F.2d 807, 813-14 (2d Cir.), *cert. denied*, 414 U.S. 1070 (1973) (plain meaning and congressional intent support such construction).

570. United States v. Rojas, 502 F.2d 1042, 1045 (5th Cir. 1974) (jury instruction which does not include unlawful requirement not reversible error in absence of proper objection).

571. United States v. Howard, 504 F.2d 1281, 1285 (8th Cir. 1974) ("unlawfully" refers to any prohibition, be it federal, state, or municipal).

572. United States v. Sudduth, 457 F.2d 1198, 1199-200 (10th Cir. 1972) (legislative history supports this construction).

573. 542 F.2d at 772.

574. 539 F.2d 686 (9th Cir. 1976).

575. *Id.* at 688. In so holding, the Ninth Circuit expressly rejected the Eighth Cir-

The court again turned to statutory interpretation to strike down a conviction in *United States v. Durcan*.[576] Pursuant to 18 U.S.C. § 921(a)(15) (1970) it is illegal for fugitives from justice to transport firearms. The court held that to be a "fugitive from justice" within the meaning of the statute, the defendant had to flee from the state in which he was wanted with the intent of avoiding prosecution. Since defendant had left the state more than a month before the warrant for his arrest was issued, he did not fall under the statute's definition of "fugitive."[577]

4. Securities Violations

The major Ninth Circuit decision in the area of securities violations in 1976 was *United States v. Charnay*.[578] In that case, the Ninth Circuit reversed a lower court dismissal of an indictment and held that section 10(b) of the Securities Exchange Act of 1934[579] and Securities and Exchange Commission rule 10b-5[580] applied to attempts to manipulate the market for purposes of corporate takeovers. Although there had been very little litigation concerning this particular problem, the court found that legislative history[581] and judicial interpretation[582] justified this activity coming within the purview of the rule.[583] The court reasoned that rule 10b-5 must be interpreted broadly[584] and cannot be restricted to the actions of "insiders." Both section 10(b) and rule 10b-5 were designed to prohibit *all* deceitful practices and market

cuit's approach in Schook v. United States, 337 F.2d 563, 567 (8th Cir. 1964), holding that congressional purpose governs. 539 F.2d at 688-89.

576. 539 F.2d 29 (9th Cir. 1976).

577. *Id.* at 31-32. This is true even if the defendant later learns that he is wanted in a state and refuses to surrender. *Id.*

578. 537 F.2d 341 (9th Cir.), *cert. denied*, 97 S. Ct. 528 (1976). *But see*, Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926 (1977) holding a competing tender-offeror lacks standing to bring a *civil* damages action for § 10(b) violations.

579. 15 U.S.C. § 78j(b) (1970).

580. 17 C.F.R. § 240.10b-5 (1977).

581. 537 F.2d at 347.

582. *Id.* at 348. *See* Superintendent of Ins. of New York v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971) (Section 10(b) must be read flexibly giving the S.E.C. broad discretionary powers in passing regulations); Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 378-81 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975) (market manipulation to obtain greater exchange ratio prohibited by rule 10b-5); Herpich v. Wallace, 430 F.2d 792, 802 (5th Cir. 1970) (Section 10(b) and rule 10b-5 designed to prohibit deceptive practices in sale of securities even where such activities do not constitute common law fraud).

583. In holding that section 10(b) and rule 10b-5 apply to criminally offensive tender offers, the Ninth Circuit has rejected the approach taken in a civil case by the First Circuit in H.K. Porter Co. v. Nicholson File Co., 482 F.2d 421, 425-26 (1st Cir. 1973) holding that tender offerors are not "purchasers" or "sellers" and therefore are not within the purview of section 10(b) and rule 10b-5. 537 F.2d at 349 n.11. *See* Piper v. Chris Craft Indus., Inc., 97 S. Ct. 926 (1977).

584. *Id.* at 349-50.

manipulations.[585] Therefore, when defendants purposely sought to depress the market in order to deceive shareholders into selling their shares, rule 10b-5 provided for criminal actions to be brought against them.[586]

5. Income Tax Evasion

In *United States v. Miller*,[587] the Ninth Circuit was confronted with the issue of whether payments to the sole owner of a close corporation constituted taxable income.[588] Defendant asserted that under the Internal Revenue Code[589] and under judicial decisions,[590] these payments must be considered constructive corporate distributions and not part of his salary. Since the corporation had not made a profit, these payments could not constitute "dividends" and must be a return of capital.[591] Returns of capital are not taxable as income.[592] Since he "owed" no taxes, he could not be found guilty of tax evasion.

The court rejected the defendant's contention and affirmed his conviction. There is a significant difference between *criminal* and *civil* tax proceedings. In a criminal proceeding the issue is not how much the taxpayer owes, but whether he has "wilfully" attempted to evade payment or assessment of a tax.[593] If he has, he has violated the tax evasion statutes even if the amount "could have somehow been made non-taxable if the taxpayer had proceeded on a different course."[594] Therefore, in a criminal tax proceeding where the owner has diverted

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585. *Id.*

586. *Id.* at 350. The requirements of rule 10b-5 for purposes of criminal violations are the same as for civil violations. United States v. Clark, 359 F. Supp. 128, 130 (S.D. N.Y. 1973). The only difference may be in terms of burden of proof. As a consequence, precedents set in civil litigation are equally viable in criminal actions. 537 F.2d at 348.

587. 545 F.2d 1204 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1549 (1977).

588. All shares of the corporation were held in the names of defendant's four children and wife. However, defendant asserted that he was the real owner and operator of the corporation. *Id.* at 1209 & n.2.

589. *Id.* at 1210. *See* I.R.C. §§ 301(c) and 316(a).

590. 545 F.2d at 1212. *See* Noble v. Commissioner, 368 F.2d 439, 442 (9th Cir. 1966); Clark v. Commissioner, 266 F.2d 698, 707 (9th Cir. 1959).

591. 545 F.2d at 1210 & n.5.

592. *Id.* at n.6.

593. *Id.* at 1214.

594. *Id.* Had defendant originally reported this diversion of funds as a return of capital, a portion of it may not have been taxable. However, since he did not report the income at all, he had already violated the law and could not attempt to justify it later. *Id.*

corporate funds for his own purposes, such income is taxable regardless of whether the corporation has sufficient profit to issue a dividend.[595]

6. Crimes Involving the Illegal Entry of Aliens

a. Introduction

Congress, in the Immigration and Nationality Act,[596] has provided a comprehensive scheme for the admission and deportation of persons who are neither citizens nor nationals of the United States. A portion of the Act is devoted to providing criminal penalties for actions which subvert the goals of Congress.[597] In 1976, the Ninth Circuit decided several cases involving 8 U.S.C. § 1324[598] which makes illegal the bringing in or harboring of aliens who are not duly admitted to the United States. The court was primarily concerned with defining "not duly admitted" and "harboring" and establishing whether actions which took place outside of the United States violated this section.

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595. *Id.* In coming to this conclusion, the Ninth Circuit adopted the rationale of the Sixth Circuit in Davis v. United States, 226 F.2d 331, 334-35 (6th Cir. 1955), *cert. denied*, 350 U.S. 965 (1956). 545 F.2d at 1212-13. *See also* Hartman v. United States, 245 F.2d 349, 352-53 (8th Cir. 1957). This approach has been expressly rejected in civil proceedings in the Second and Eighth Circuits. Di Zenzo v. Commissioner, 348 F.2d 122, 126 (2d Cir. 1965); Simon v. Commissioner, 248 F.2d 869, 876 (8th Cir. 1957).

596. 8 U.S.C. §§ 1101-1503 (1970).

597. *Id.* §§ 1321-1330.

598. Section 1324 reads:

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however*, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

b. *Not Duly Admitted*

In *United States v. Bunker*,[599] the Ninth Circuit affirmed the conviction of the defendant for aiding the entry of aliens "not duly admitted" into the United States in violation of 8 U.S.C. § 1324(a)(1). The court rejected defendant's contention that this statute only prohibited the "surreptitious" entry of aliens.[600] Since the aliens that defendant brought into the country had valid three-day entry permits, they had *entered* the country legally. The court held that 8 U.S.C. § 1182 (a)(19),[601] which prohibits entry through fraud, is encompassed within the "not duly admitted" requirement of section 1324.[602] Inasmuch as the aliens had lied about their intent to return when they obtained the permits, they entered the country by way of fraud and were "not duly admitted."[603] Section 1324 was designed to cover the more sophisticated forms of smuggling as well as the surreptitious type.[604]

c. *Locus of the Crime*

For purposes of section 1324(a)(4), a defendant may be prosecuted in the United States for violations which occur outside its territorial boundaries.[605] To determine this, the court focuses on the intent of Congress and the nature of the crime involved.[606] Since the *effect* of aiding the illegal entry of aliens takes place in the United States, acts which are done outside of the country for that purpose are illegal and punishable under section 1324.

d. *Harboring*

In another case involving interpretation of section 1324(a)(3),[607] the primary question before the Ninth Circuit was the meaning of the statute's use of the term "harbor." The court held that the defendant did

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599. 532 F.2d 1262 (9th Cir. 1976).

600. *Id.* at 1265.

601. 8 U.S.C. § 1182(a)(19) (1970) reads:

Except as otherwise provided in this chapter, the following classes of aliens shall be . . . excluded from admission into the United States: . . . (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States by fraud, or by willfully misrepresenting a material fact.

602. 532 F.2d at 1266.

603. *Id.*

604. *Id.*

605. United States v. Castillo-Felix, 539 F.2d 9, 13 (9th Cir. 1976).

606. United States v. Bowman, 260 U.S. 94, 98 (1922).

607. United States v. Acosta de Evans, 531 F.2d 428 (9th Cir. 1976).

not have to attempt to hide or conceal the alien in order to come within the statute.[608] All that was required for criminal liability was for the defendant to give shelter to the alien, no matter how humanitarian the motive.[609]

B. Severance

Rule 14 of the Federal Rules of Criminal Procedure permit the trial court to sever a joint trial to prevent prejudice to one or more defendants.[610] A severance motion may be granted although charges against the defendants arose out of the same act or series of acts. Therefore, although joinder is proper under rule 8,[611] severance is permitted where the facts of a given case make it unlikely that the jury will reach a proper verdict.[612]

There is substantial public interest in the economic effect of jointly trying persons accused of crimes arising out of the same series of acts.[613] The burden is accordingly on the defendant to show that joinder has resulted in undue prejudice.[614] To meet this burden, a defendant must show that under the particular circumstances of his case, it was not "within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct;"[615] and, that the trial court in refusing

608. *Id.* at 430.

609. *Id.* The court recognized the injustice of punishing gratuitous and humane sheltering while at the same time exempting employers who act with knowledge. However, the court stated that this type of injustice was to be cured at the legislative level and was not a proper question for the court. *Id.*

610. FED. R. CRIM. P. 14 reads as follows:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

611. FED. R. CRIM. P. 8(b) provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

612. United States v. Roselli, 432 F.2d 879, 898 (9th Cir. 1970).

613. United States v. Camacho, 528 F.2d 464, 470 (9th Cir. 1975).

614. United States v. Campanale, 518 F.2d 352, 359 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

615. *Id.* *See* United States v. Thomas, No. 75-2679 (9th Cir. June 16, 1976) (jury

to grant the motion, abused its discretion.[616] As a consequence of this heavy burden, defendants are rarely successful in having the trial court's decision overturned.[617] However, if joinder will violate the defendant's sixth amendment confrontation or fourteenth amendment due process rights, denial of severance is reversible error.[618]

Bruton v. United States[619] is the leading case illustrating when a defendant's constitutional rights are violated by the trial court's denial of a severance motion. Prior to trial, Bruton's codefendant made a confession which implicated Bruton. The confession was admitted into evidence with clear instructions to the jury that it was to be considered only in deciding the guilt or innocence of the codefendant.[620] The Supreme Court reversed Bruton's conviction on the ground that the trial court's refusal to sever the trial had violated his constitutional rights.[621] It was unrealistic to assume that the jury could apply the confession against the codefendant and ignore its implication of Bruton.[622] As such, the confession unduly prejudiced Bruton and subjected him to a conviction based upon incompetent evidence. In addition, Bruton could not cross-examine his codefendant to test the truthfulness of the confession since the latter chose not to testify. The Court held that, under the circumstances, Bruton's sixth amendment confrontation rights were violated.[623]

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competent to give each defendant fair and impartial consideration as to each count); United States v. Roselli, 432 F.2d 879 (9th Cir. 1970) (where few defendants are joined and few factual issues are involved, jurors are competent to give impartial consideration).

616. United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976) (court's discretion abused only if joinder is so clearly prejudicial that it outweighs public concern for judicial economy); United States v. Thomas, No. 75-2679 (9th Cir. June 16, 1976) (where court made every attempt to avoid prejudice in conduct of trial, there was no abuse of discretion in denying the motion); United States v. Cruz, 536 F.2d 1264, 1268 (9th Cir. 1976) (absent showing that codefendant would testify at separate trial, there was no abuse of discretion).

617. United States v. Campanale, 518 F.2d 352, 359 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

618. Bruton v. United States, 391 U.S. 123, 126 (1968).

619. 391 U.S. 123 (1968).

620. The codefendant's statement was not admissible against Bruton because it was hearsay and did not fall within an exception. *Id.* at 127.

621. *Id.* at 126.

622. *Id.* at 129.

623. *Id.* at 126. In United States v. King, 552 F.2d 833 (9th Cir. 1976), the Ninth Circuit found that the trial court did not abuse its discretion in refusing to sever a trial in which one defendant made a statement incriminating the other. Unlike the situation in *Bruton*, this statement was admissible against *both* defendants under the co-conspirator exception to the hearsay rule. Therefore, the appellant was not unduly prejudiced

Applying the *Bruton* rationale, the Ninth Circuit reversed the conviction of a defendant who had neither objected to joinder nor made a motion for severance.[624] In *United States v. Sanchez*,[625] defendants Ruiz and Sanchez were jointly tried as co-conspirators in a scheme to sell heroin. The evidence against Ruiz was thin but there was a strong case against Sanchez. Sanchez, through his attorney, admitted the conspiracy charge in front of the jury but he pleaded entrapment as a defense. Sanchez never testified in his own behalf so Ruiz could not cross-examine. The jury was never cautioned that the confession was admissible only against Sanchez.[626] The combination of a damaging admission, the lack of appropriate limiting instructions and the defendant's inability to cross-examine Sanchez worked to violate Ruiz's constitutional right to confront the witnesses against him and to have a fair trial.[627] Although a proper motion was never made, the court held that failure to order a severance under these circumstances constituted "plain error" justifying reversal.[628]

C. Conduct of the Trial

An essential aspect of a fair trial is that its participants conduct themselves in a manner befitting the fair administration of justice.

1. Conduct of the Trial Judge

The trial judge has a duty to preside over his court "in such a way as to promote a fair and expeditious development of the facts unencumbered by irrelevancies."[629] In fulfilling this duty, he is afforded a great deal of discretion.[630] Matters such as the reception of evidence,[631] the

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by the admission of the statement because it was competent evidence as to both defendants.

624. United States v. Sanchez, 529 F.2d 65 (9th Cir. 1976).

625. 529 F.2d 65 (9th Cir. 1976).

626. Ruiz's counsel did not object to joinder although the evidence showed that the codefendants did not know each other prior to their arrest. He also failed to object to the trial court's instruction regarding the jury's use of the admission and he did not submit any special instructions on behalf of Ruiz. Normally, these oversights will not preserve the issue for appeal. FED. R. CRIM. P. 30.

627. 529 F.2d at 65.

628. FED. R. CRIM. P. 52(b) states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

629. Smith v. United States, 305 F.2d 197, 205 (9th Cir. 1962).

630. Robinson v. United States, 401 F.2d 248, 252 (9th Cir. 1968).

631. United States v. Anderson, 532 F.2d 1218 (9th Cir. 1976).

length[632] and content[633] of closing arguments, and limitations of voir dire[634] and cross-examination,[635] fall within the court's discretionary powers. The trial judge may even actively participate in the questioning of witnesses provided he does not upset his position of neutrality.[636] Appellate courts rarely interfere with the exercise of this discretion. A 1962 Ninth Circuit panel explained: "[U]nless [the trial judge's] misadventures so persistently pervade the trial or, considered individually or together, are of such magnitude that a courtroom climate unfair to the defendant is discernible from the cold record, the defendant is not sufficiently aggrieved to warrant a new trial."[637]

2. Conduct of the Prosecutor

The United States Supreme Court left no doubt that the prosecutor is held to a high standard of conduct when the Court wrote:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[638]

A conviction obtained by a prosecutor who violates his duty as an officer of justice infringes upon the defendant's due process rights and requires reversal.[639] The prosecutor, as a member of the executive branch of the government, has absolute discretion in the determination of whether or not to prosecute a case.[640] As a result, his purpose in

632. United States v. Jones, 534 F.2d 1344 (9th Cir. 1976).

633. United States v. Masterson, 529 F.2d 30 (9th Cir. 1976).

634. United States v. McGregor, 529 F.2d 928 (9th Cir. 1976).

635. *Id.*

636. United States v. Larson, 507 F.2d 385 (9th Cir. 1974).

637. Smith v. United States, 305 F.2d 197, 205 (9th Cir. 1962). *See* United States v. Pena-Garcia, 505 F.2d 964 (9th Cir. 1974) (judge's repeated interruption of defense's cross-examination, intimidation of witnesses and improper threatening of defense counsel with contempt denied defendant a fair trial because of judge's obvious pro-government position); United States v. Harris, 501 F.2d 1 (9th Cir. 1974) (trial court's excessive participation in examining witnesses on behalf of the prosecution while imposing strict restraints upon defense counsel's scope of cross-examination was abuse of discretion).

638. Berger v. United States, 295 U.S. 78, 88 (1935).

639. *Id.*

640. United States v. Nixon, 418 U.S. 683, 693 (1974). It was primarily this concept of absolute discretion which compelled the Ninth Circuit to hold that courts cannot force the prosecution to grant immunity to defense witnesses. United States v. Alessio, 528

bringing a particular action is not subject to review in the courts.[641] If, however, he uses his constitutionally mandated discretion as a device to deprive the defendant of his constitutional rights, the courts may grant appropriate relief.[642]

Charges against prosecutors are generally articulated in one of two ways: (1) that the prosecutor was unconstitutionally selective in bringing the charge against the defendant;[643] or (2) that the prosecutor exercised his discretion in a vindictive manner against a defendant who had successfully asserted his constitutional or statutory rights.[644]

Selective prosecution involves the bringing of a charge against a defendant for purposes other than the good faith enforcement of the law. In order to sustain this "defense," *the accused* must establish a *prima facie* case[645] that "others similarly situated generally have not been prosecuted for conduct similar to that for which he was prosecuted . . . [and] that his selection was based on an impermissible ground such as race, religion or his exercise of his first amendment right to free speech."[646] As a result of this heavy burden on the defendant, the selective prosecution defense is rarely successful.

A much more successful doctrine for attacking prosecutorial abuse is that of "vindictive prosecution."[647] Vindictive prosecution normally involves a defendant who has successfully challenged his indictment or conviction and is subsequently reindicted either for a higher crime or for additional crimes arising out of the same set of facts. As a consequence of the reindictment, the defendant is subjected to the possibility

F.2d 1079 (9th Cir. 1976). The court stated: "To interpret the Fifth and Sixth Amendments as conferring on the defendant the power to demand immunity for co-defendants, potential co-defendants, or others whom the government might in its discretion wish to prosecute would unacceptably alter the historic role of the Executive Branch in criminal prosecutions." *Id.* at 1082.

641. Spillman v. United States, 413 F.2d 527, 530 (9th Cir.), *cert. denied*, 396 U.S. 930 (1969).

642. Blackledge v. Perry, 417 U.S. 21, 27 (1974).

643. United States v. Oaks, 527 F.2d 937 (9th Cir. 1975).

644. United States v. Gerard, 491 F.2d 1300, 1305 (9th Cir. 1974).

645. United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975).

646. United States v. Gardiner, 531 F.2d 953, 954 (9th Cir. 1976) (citing United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975)). *Gardiner* involved a member of "The Tax Rebellion Committee" who refused to file an income tax return on fifth amendment-self-incrimination grounds as well as asserting that he had received no income because he had not received any "constitutional" dollars (dollars redeemable in gold or silver). As a defense, he asserted that he was being prosecuted for his vocal opposition to the income tax laws.

647. North Carolina v. Pearce, 395 U.S. 711 (1969) (made applicable to prosecutors in Blackledge v. Perry, 417 U.S. 21 (1974)).

of receiving a greater sentence than he would have received had he not contested the original proceeding. Since such a practice punishes those who assert their rights, it violates due process.[648]

While increasing a defendant's punishment upon retrial does not, per se, violate due process,[649] any attempt to seek a heavier penalty arising out of the same series of acts is "inherently suspect."[650] The Supreme Court has held that whenever a prosecutor seeks a heavier penalty on retrial, he must affirmatively set forth his reasons for doing so;[651] he must either point to some particular conduct of the defendant since the time of the original proceeding justifying such action,[652] or to some "other circumstances affirmatively appearing that might be an *adequate substitute*."[653]

Applying this rationale, the Ninth Circuit, in 1976, affirmed one conviction and reversed another in cases involving vindictive prosecution. In *United States v. Preciado-Gomez*,[654] the Ninth Circuit found that the prosecutor was not acting vindictively when, upon reindictment, he added two extra counts arising out of the same set of facts. Although the prosecutor could not point to any particular conduct of the defendant since the time of the original proceeding, the court found an "adequate substitute" in that new evidence justifying the new counts had been discovered in the interim.[655]

In *United States v. Ruesga-Martinez*,[656] defendant's conviction was overturned because the prosecutor could not meet his "heavy burden of proving that [the] increase in the severity of the alleged charges was not motivated by a vindictive motive."[657] In that case, the prosecutor could point neither to specific conduct nor to an adequate substitute justifying the attempted increase.

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648. North Carolina v. Pearce, 395 U.S. 711, 724 (1969).

649. Chaffin v. Stynchcombe, 412 U.S. 17 (1973).

650. United States v. Preciado-Gomez, 529 F.2d 935, 939 (9th Cir.), *cert. denied*, 96 S. Ct. 1730 (1976).

651. *See* note 647 *supra*.

652. *Id.*

653. United States v. Preciado-Gomez, 529 F.2d 935, 940 (9th Cir. 1976) (emphasis added) (citations omitted).

654. 529 F.2d 935 (9th Cir. 1976).

655. *Id.* at 940-41.

656. 534 F.2d 1367 (9th Cir. 1976).

657. *Id.* at 1369. Note, however, that the prosecutor has a *right* to bring a heavier charge on reindictment if the defendant has reneged on a plea bargain. *Id.* at 1370. *Accord*, United States v. Preciado-Gomez, 529 F.2d at 939-41; United States v. Gerard, 491 F.2d 1300, 1305-06 (9th Cir. 1974).

The conduct of the prosecutor at trial is an essential aspect of the defendant's due process rights. Consequently, the prosecutor must refrain from conduct which might unduly prejudice the defendant's case.[658] Asking improper questions[659] or making comments about facts or instances not properly before the trier of fact[660] would constitute misconduct on the part of the prosecutor. Whether or not such conduct will result in a reversal of a conviction depends upon: (1) whether the prejudice can be cured by a cautionary jury instruction,[661] or (2) whether the error is properly deemed "harmless."[662]

If the prosecutor's misconduct involves a constitutional error, the Government must prove that it was "harmless beyond a reasonable doubt" for the conviction to stand.[663] Thus, in *United States v. Wycoff*,[664] the Ninth Circuit sustained the defendant's conviction even though the prosecutor had unconstitutionally made reference to the defendant's exercise of his right to remain silent.[665] The evidence against Wycoff was overwhelming and curative instructions were promptly given. Nevertheless, the Ninth Circuit took this opportunity to express its alarm and concern about "the increasing attempts by government counsel in this Circuit to make reference to or elicit testimony regarding an accused's silence at the time of arrest."[666] The court then issued this admonishment: "In future cases government counsel must scrupulously avoid all reference to or use of an accused's assertion of his right to remain silent or his right to counsel except where permitted by established rules of law."[667]

Passive conduct on the part of the prosecutor may also result in a denial of due process. A conviction which is based upon false evidence, whether offered by the prosecutor or whether remaining on the

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658. *See* notes 638 & 639 *supra* and accompanying text.

659. Corley v. Cardwell, 544 F.2d 349 (9th Cir. 1976) (prosecutors asking single improper question did not deny defendants their right to a fair trial).

660. Arizona v. Washington, 546 F.2d 829 (9th Cir. 1976), *cert. granted*, 97 S. Ct. 1643 (1977) (prosecutor's reference to defendant's "two prior proceedings" during *voir dire* was not reversible error).

661. United States v. Pratt, 531 F.2d 395 (9th Cir. 1976) (prejudice created by prosecutor's reference to evidence not properly admitted cured by judge's charge to the jury).

662. FED. R. CRIM. P. 52(a) states: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

663. Chapman v. California, 386 U.S. 18, 24 (1967).

664. 545 F.2d 679 (9th Cir. 1976).

665. *See* Doyle v. Ohio, 426 U.S. 610 (1976).

666. 545 F.2d at 682.

667. *Id.*

record with the prosecutor's knowledge of its falsity, is unconstitutional.[668] Therefore, when the prosecutor becomes aware of such evidence, he is under an affirmative duty to inform the court as to its illegal nature.[669] At trial, this situation is most likely to occur when a government witness, without prior warning, commits perjury.[670] It is not enough for the prosecutor to attempt to elicit the truth from such a witness;[671] the prosecutor must immediately inform the judge as to the true nature of his witness' testimony.[672]

3. Conduct of a Juror

In a criminal case, a private communication between a juror and a party to the action is presumptively prejudicial.[673] In such circumstances, the burden is on the Government to show that such contact was harmless.[674] Where the contact was public and obviously innocent, there is no requirement for the Government to prove its harmlessness.[675]

D. Evidence[676]

As a general principle, all relevant evidence is admissible.[677] A vast bulk of the law of evidence, therefore, is comprised of exceptions to this rule. "Relevant evidence" has been defined as "evidence having any tendency to make the existence of any fact . . . more probable or less

668. Napue v. Illinois, 360 U.S. 264 (1959); United States v. Cervantes, 542 F.2d 773, 776 (9th Cir. 1976) (improper for prosecutor to present evidence known by him to be false or unduly prejudicial).

669. United States v. Basurto, 497 F.2d 781 (9th Cir. 1974) (prosecutor has affirmative duty to inform the court that his witness has committed perjury).

670. *Id.*

671. United States v. Pope, 529 F.2d 112 (9th Cir. 1976).

672. *Id.*

673. United States v. Love, 535 F.2d 1152 (9th Cir. 1976).

674. Remmer v. United States, 347 U.S. 227 (1954).

675. United States v. Love, 535 F.2d 1152, 1156 (9th Cir. 1976).

676. The Federal Rules of Evidence for United States Courts and Magistrates became effective on July 1, 1975. The rules were enacted to bring uniformity to the conflicting practices of the various circuits. Most of the cases discussed in this section were litigated prior to the effective date of the rules; therefore, they were decided according to Ninth Circuit precedent. However, the holdings of these cases are not necessarily invalid. Rule 102 states: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined." Any Ninth Circuit precedent which furthers these goals should still be viable provided it does not conflict with a specific rule.

677. FED. R. EVID. 402.

probable than it would be without the evidence."[678] The test is whether a reasonable person might find the probability of the fact in question to be different if he had knowledge of the offered evidence.[679] Once it is determined that the evidence is relevant, the focus shifts to whether the Constitution, federal statute, the Federal Rules of Evidence, or some other recognized authority prohibits its admissibility.[680]

1. Privilege

The law of evidence recognizes that certain persons are exempt from testifying about information they obtained by virtue of a "privileged" communication.[681] Although the law affords great protection to privileged communications, no absolute privilege exists, absent specific statutory designation.[682] That this is true of even constitutionally protected privileges is evidenced in the Ninth Circuit by *Caesar v. Mountanous*.[683] *Caesar*, in upholding the constitutionality of California Evidence Code section 1016,[684] agreed with the California Supreme Court[685] that the psychotherapist-patient privilege is not afforded absolute protection. The defendant in *Caesar* was a psychiatrist who refused to answer questions regarding his treatment of a patient who had filed a tort action. The patient alleged that she suffered personal injury and pain and suffering as a result of an automobile accident. However, she waived the privilege against disclosure of her communications to the defendant when she made her mental condition an issue in the case.

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678. FED. R. EVID. 401.

679. United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976). *See* United States v. Navarro-Varelas, 541 F.2d 1331 (9th Cir. 1976) (unidentifiable fingerprint does not have any tendency to prove or disprove any substantial element of a crime); United States v. Durcan, 539 F.2d 29 (9th Cir. 1976) (fact that smuggled items were obtained during a burglary was not relevant to the crime of smuggling); United States v. Albuquerque, 538 F.2d 277 (9th Cir. 1976) (hotwiring tools not relevant to prove defendant knew car was stolen).

680. FED. R. EVID. 402. *See* United States v. Navarro-Varelas, 541 F.2d 1331 (9th Cir. 1976) (admissibility of expert testimony requires that the jury receive appreciable help from such testimony); *accord,* United States v. Pratt, 531 F.2d 395 (9th Cir. 1976). *See also* United States v. Flores, 540 F.2d 432 (9th Cir. 1976) (admissibility of polygraph results requires that proponent lay proper foundation of reliability).

681. FED. R. EVID. 501.

682. *Id.*

683. 542 F.2d 1064 (9th Cir. 1976).

684. Section 1016 provides that "[t]here is no [psychotherapist-patient] privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by: (a) the patient." CAL. EVID. CODE § 1016 (West 1970).

685. *In re* Lifschultz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

The Ninth Circuit has recognized that the psychotherapist-patient privilege is protected by the United States Constitution as a fundamental aspect of the right of privacy.[686] However, interference with this privilege is justified where a compelling state interest exists.[687] The state has a compelling interest in insuring that "truth is ascertained in legal proceedings in its courts of law."[688] Since Evidence Code section 1016 has been interpreted as allowing *only* the disclosure of information which is directly pertinent to issues *raised by the patient*,[689] the *Caesar* court found that the state statute did not impermissibly invade that area of privacy protected by the Constitution.[690]

2. Admissibility of Prior Acts

a. Impeaching the Credibility of the Witness

Normally, the credibility of a witness may not be impeached by extrinsic proof of specific past conduct.[691] A general exception to this rule is recognized where the conduct consists of prior criminal convictions. Prior to July 1, 1975,[692] the law in the Ninth Circuit was that "*any* prior felony conviction [could] be given by the adversary to impeach *any* witness . . . ."[693] This practice has been changed by rules 609(a) and (b), which set forth detailed instructions regarding the admissibility of convictions.[694]

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686. Caesar v. Mountanous, 542 F.2d 1064, 1068 (9th Cir. 1976). The court felt that this holding was required by Griswold v. Connecticut, 381 U.S. 479 (1965) (doctor-patient relationships fall within the zone of privacy existing as a penumbra of the Bill of Rights).

687. Roe v. Wade, 410 U.S. 113, 163 (1973).

688. Caesar v. Mountanous, 542 F.2d 1064, 1069 (9th Cir. 1976).

689. *In re* Lifschultz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

690. 542 F.2d at 1070. The court also rejected the defendant's contention that the statute violated equal protection because of an absolute clergyman-patient privilege created by CAL. EVID. CODE § 1034 (West 1966). The court stated that the difference between the services rendered by the two professions when coupled with the necessity of the state's noninterference with the religious tenets of a large portion of the community justified the legislature's treating the two differently.

691. FED. R. EVID. 608(b).

692. The Federal Rules of Evidence became effective on this date.

693. United States v. Villegas, 487 F.2d 882, 883 (9th Cir. 1973) (emphasis added); *accord*, Burg v. United States, 406 F.2d 235, 235-36 (9th Cir. 1969). This rule is still in effect for cases tried before July 1, 1975. United States v. Marshall, 532 F.2d 1279, 1283 n.1 (9th Cir. 1976).

694. FED. R. EVID. 609(a) and (b) provide:

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under

Rule 609(b) prohibits the use of any conviction for impeachment purposes if more than ten years has passed since conviction or release from confinement unless the trial court determines that the probative value of the conviction substantially outweighs any prejudicial effect.[695] If the witness' crime did not involve "dishonesty or false statement,"[696] then evidence of that conviction is only admissible if "the probative value . . . outweighs its prejudicial effect to the defendant."[697] Therefore, felony convictions of witnesses hostile to the defendant *must* be admitted.[698] Convictions of witnesses favorable to the defendant, on the other hand, are admissible only if the trial court determines that their admissibility will not too greatly prejudice the defendant.[699]

If the prior conviction was for a crime involving dishonesty or false statement, rule 609(a)(2) compels its admission regardless of whether it was a felony or misdemeanor.[700] The admissibility of such evidence is not subject to the trial judge's discretion because it is especially probative of the witness' credibility.[701]

A crime involving dishonesty or false statement is one which contains "some element of untruthfulness, deceit, or falsification bearing on the

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which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elasped since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

695. FED. R. EVID. 609(b).

696. *Id.* 609(a)(2).

697. *Id.* 609(a)(1). This section codifies the "*Luck* doctrine" which makes the admissibility of prior convictions dependent upon the judge's discretion. In determining whether or not to admit the evidence, the trial judge is to weigh the nature of the prior crime, its ripeness, and the circumstances surrounding its commission against any undue prejudice or possible chilling effect on fifth amendment rights. Luck v. United States, 348 F.2d 763, 769 (D.C. Cir. 1965).

698. United States v. Dixon, 547 F.2d 1079 (9th Cir. 1976) (reversing a conviction for failure to admit evidence of past convictions of government witness).

699. *Id.*

700. *See* note 694 *supra.*

701. United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976). In United States v. Dixon, 547 F.2d 1079 (9th Cir. 1976), the Ninth Circuit refused to decide whether the trial court had any discretion in admitting such convictions. However, it did state that "we doubt that the trial court can ever exclude Rule 609(a)(2) convictions as remote." *Id.* at 1083.

accused's propensity to testify truthfully."[702] Using this guideline, the Ninth Circuit has found that convictions for conspiracy to issue unauthorized securities,[703] forgery,[704] and bribery[705] must be admitted regardless of the prejudicial impact to the defendant.[706]

b. *Proof of Criminal Intent*

Evidence of prior acts is usually inadmissible to show general criminal disposition.[707] It is admissible, however, for the purpose of showing an accused's criminal intent if: (1) the prior act is similar and close enough in time to be relevant, (2) the evidence of the prior act is clear and convincing, and (3) the trial court determines that the probative value of the evidence outweighs any potential prejudice.[708] The Ninth Circuit has employed these factors in determining that rule 404(b) of the Federal Rules of Evidence admits "all evidence of other crimes relevant to an issue in a trial, except that which tends to prove *only* criminal disposition."[709] Thus, evidence of certain convictions, although inadmissible to impeach the defendant's credibility,[710] may properly be admitted to show criminal intent.[711]

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702. FED. R. EVID. 609(a)(2), Notes of Advisory Comm. on Proposed Rules.

703. United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976).

704. United States v. Dixon, 547 F.2d 1079 (9th Cir. 1976).

705. United States v. Bryan, 534 F.2d 205 (9th Cir. 1976).

706. This is, of course, subject to the ten-year limitation imposed by FED. R. EVID. 609(b).

707. *Id.* 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

708. United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976). *See* FED. R. EVID. 404(b), read in conjunction with *Id.* 403, which provides for the exclusion of relevant evidence when its probative value is substantially outweighed by one of several factors.

709. United States v. Riggins, 539 F.2d 682, 683 (9th Cir. 1976). In so holding, the Ninth Circuit expressly rejected the Fifth Circuit rationale outlined in United States v. Broadway, 477 F.2d 991 (5th Cir. 1973). *Broadway* held that similar offenses may be offered to show intent only when the prior offense includes all of the essential physical elements of the offense charged. *Id.* at 995. The Ninth Circuit considered this language to be overly restrictive.

710. *See* notes 690-706 *supra* and accompanying text.

711. United States v. Hamel, 534 F.2d 1354, 1355-56 (9th Cir. 1976); *accord*, United States v. Grammer, 513 F.2d 673, 678 (9th Cir. 1975); Parker v. United States, 400 F.2d 248, 252 (9th Cir. 1968), *cert. denied*, 393 U.S. 1097 (1969). There are cases which discuss the use of prior acts under the "common scheme" concept as evidence that the accused actually committed the crime for which he is charged. *See* United States v. Oliphant, 525 F.2d 505, 507 (9th Cir. 1975), *cert. denied*, 424 U.S. 972 (1976); United States v. Webb, 466 F.2d 1352, 1353 (9th Cir. 1972).

3. Hearsay

A hearsay statement[712] is a statement which was made out of court and which is being offered to prove the truth of the matter asserted.[713] As the Supreme Court has stated:

> Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.[714]

In criminal litigation, exceptions to the hearsay rule are closely scrutinized because of the accused's sixth amendment right to confront the witnesses against him.[715] The right to cross-examine a hostile witness is implicit within the meaning of the confrontation clause[716] and fundamental to a fair trial.[717] Since most hearsay statements are not subject to cross-examination, an otherwise valid exception to the hearsay rule in a civil trial will not be admissible in a criminal case if it violates the confrontation clause.[718] However, the right to cross-examine is not absolute[719] and the confrontation clause does not exclude all hearsay statements.[720]

Hearsay statements are admissible in criminal trials if they were made "under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination."[721] The requirements of the confrontation clause are satisfied if there is sufficient "indicia of reliability" surrounding the

712. FED. R. EVID. 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."

713. *Id.* 801(c). If the statement is offered only as proof that it was made, then it is not hearsay and it is admissible if relevant. United States v. Kutas, 542 F.2d 527 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 810 (1977); *accord*, United States v. Anfield, 539 F.2d 674, 678 (9th Cir. 1976). This exception to the hearsay rule is referred to as the "verbal conduct" doctrine.

714. Chambers v. Mississippi, 410 U.S. 284, 298 (1973). *See* FED. R. EVID. 802.

715. The sixth amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

716. Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

717. Dutton v. Evans, 400 U.S. 74, 89 (1970); Pointer v. Texas, 380 U.S. 400, 405 (1965).

718. U.S. CONST. art. VI, cl. 2 (the confrontation clause).

719. Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

720. Dutton v. Evans, 400 U.S. 74, 80 (1970).

721. Chambers v. Mississippi, 410 U.S. 284, 298 (1973).

statement to afford a proper basis for the jury to evaluate its truthfulness.[722]

a. Prior Testimony

One recognized exception to the hearsay rule which has survived constitutional attack is the admissibility of prior testimony given by witnesses not available at trial.[723] The Ninth Circuit reaffirmed the vitality of this exception in *United States v. King*[724] by sustaining the constitutionality of depositions taken to preserve testimony. In *King*, the Government's case was predicated almost entirely on the testimony of two unindicted co-conspirators who were unavailable to testify at trial because they were imprisoned in Japan. The defendants and counsel were transported to Japan where a video-taped deposition of the incarcerated witnesses was conducted. However, at one point, the Japanese government interfered with the depositions[725] and the defendants refused to continue. The Government finished deposing the witnesses and offered the testimony at trial. The Ninth Circuit found that because the depositions had fulfilled the requirements of the confrontation clause, admission of the prior testimony into evidence did not violate the defendants' rights.[726] The deponents were under oath and the defendants could have conducted cross-examination had they remained in Japan. In addition, the use of video-tape afforded the jury an opportunity to observe the demeanor of the witnesses and thereby assess their credibility. The circumstances surrounding these depositions, although imperfect, were sufficient to satisfy the requirements of the confrontation clause.[727] The court also held that the Japanese gov-

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722. Mancusi v. Stubbs, 408 U.S. 204, 213 (1972); Dutton v. Evans, 400 U.S. 74, 89 (1970). It is interesting to note that the co-conspirator exception can only be invoked by an adversary. The defendant may not use this exception to admit exculpatory statements made by another conspirator. United States v. Sand, 541 F.2d 1370 (9th Cir. 1976); *accord,* Wolcher v. United States, 233 F.2d 748, 750 (9th Cir. 1956).

723. Anderson v. United States, 417 U.S. 211, 220 n.11 (1974); FED. R. EVID. 804(b)(1).

724. 552 F.2d 833 (9th Cir. 1976), *cert. denied,* 97 S. Ct. 1646 (1977).

725. The Japanese government would not permit the defendants to leave their hotel rooms, except to attend the depositions. Their rooms were searched and their access to private consultation with counsel was restricted. The American consular officials attempted to have the restrictions relaxed, but they were unsuccessful. *Id.* at 838.

726. *Id.* at 840-41.

727. *Id.* In so holding, the Ninth Circuit joined the Seventh and Second Circuits in upholding the constitutional validity of 18 U.S.C. § 3503 (1970). United States v. Ricketson, 498 F.2d 367, 374 (7th Cir.), *cert. denied,* 419 U.S. 965 (1974); United

ernment did not interfere with the deposition proceedings to such an extent that the defendants' constitutional rights were abridged. The defendants' act of leaving the deposition constituted a "valid waiver" of their right to cross-examine and, therefore, the issue was not subject to judicial review.[728]

b. *Recorded Recollection*

The Ninth Circuit has upheld the use of "recorded recollection,"[729] although this exception to the hearsay rule[730] is difficult to justify on constitutional grounds. Recorded recollection is not subject to the traditional indicia of reliability,[731] but its use is favored in both federal and state courts.[732] The doctrine allows a witness to submit a writing as a substitute for his testimony if he cannot recall the relevant events at the time of trial. The doctrine applies where: (1) the writing offered pertains to facts about which the witness once had personal knowledge; (2) the witness can no longer remember those facts; and (3) the document is shown to have been made by the witness while the facts were still fresh in his mind.[733] Meaningful cross-examination is precluded by the witness' lack of memory. However, it is felt that satisfaction of these three criteria insures that recorded recollections are as reliable as "dying declarations"[734] and those other hearsay exceptions which apply when the declarant is not available.[735]

c. *Statements of Co-conspirators*

Rule 801(d)(2)(E) treats the statements of co-conspirators not as

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States v. Singleton, 460 F.2d 1148, 1153-54 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973).

728. 552 F.2d at 844. The definition of a valid waiver was established in Johnson v. Zerbst, 304 U.S. 458 (1938). In that case, the Supreme Court held that a "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 464.

729. United States v. Marshall, 532 F.2d 1279, 1285 (9th Cir. 1976).

730. FED. R. EVID. 803(5).

731. The "oath" and the ability to cross-examine help insure that evidence is reliable.

732. United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965), *cert. denied*, 348 U.S. 947 (1966).

733. United States v. Edwards, No. 76-1483, slip op. at 6 (9th Cir. Aug. 5, 1976) (interpreting the requirements of FED. R. EVID. 803(5)).

734. United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965), *cert. denied*, 348 U.S. 947 (1966). *See* FED. R. EVID. 804(b)(2).

735. *See* FED. R. EVID. 804.

hearsay, but as admissions by a party-opponent.[736] As such, they are admissible as evidence of the truth of the matter they assert. The justification for the admissibility of these statements is founded upon concepts of agency. The law treats co-conspirators as "partners in crime" and considers each member of the conspiracy an agent of the others. Each "agent" binds his "principal" by his statements or the actions in which he engages.[737]

For the statements to be admissible, the defendants need not be charged with conspiracy provided there is evidence that the parties involved were working in concert.[738] Essentially, the requirements of the exception are met if there is substantial non-hearsay evidence that a conspiracy existed (sufficient concert of action);[739] that the statement being offered was made during the course of the conspiracy;[740] and that

736. *Id.* 801(d)(2)(E). *Accord,* United States v. Robinson, 546 F.2d 309, 311 (9th Cir. 1976).

737. Anderson v. United States, 417 U.S. 211, 218 n.6 (1974).

738. United States v. Snow, 521 F.2d 730, 736 (9th Cir. 1975), *cert. denied,* 423 U.S. 1090 (1976); *accord,* United States v. Williams, 435 F.2d 642, 645 (9th Cir. 1970), *cert. denied,* 401 U.S. 995 (1971).

739. United States v. Cruz, 536 F.2d 1264, 1267 (9th Cir. 1976); United States v. Snow, 521 F.2d 730, 733 (9th Cir. 1975), *cert. denied,* 423 U.S. 1090 (1976).

740. Anderson v. United States, 417 U.S. 211, 218 (1974); United States v. Cruz, 536 F.2d 1264, 1267 (9th Cir. 1976); United States v. Snow, 521 F.2d 730, 733 (9th Cir. 1975), *cert. denied,* 423 U.S. 1090 (1976). *See also* FED. R. EVID. 801(d)(2)(E), Notes of Advisory Comm. on Proposed Rules. In United States v. Anderson, 532 F.2d 1218 (9th Cir. 1976), the Ninth Circuit asserted with virtually no explanation, that "[s]tatements of a co-conspirator are not hearsay even if made prior to the entry of the conspiracy by the party against whom it is used." *Id.* at 1230. The support for this rule is found in United States v. United States Gypsum Co., 333 U.S. 364 (1947). *Gypsum* involved a civil suit in which the defendants were alleged to have violated the Sherman Act by conspiring to fix prices on gypsum products. Although not all of the defendants had joined the conspiracy at one time, those who joined later had knowledge of the actions of the earlier conspirators. *Id.* at 388-93. Once the Government established a *prima facie* case of conspiracy, "the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, [became] admissible against all . . . ." *Id.* at 393. This rule is justified on principles of agency law, that when a person joins a conspiracy, he ratifies all prior actions and statements made by his co-conspirators. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(2)(E)[01], at 801-152 (1976) [hereinafter cited as WEINSTEIN]. However, the Advisory Committee has openly stated that "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." FED. R. EVID. 801(d)(2)(E), Notes of Advisory Comm. on Proposed Rules. Therefore, this rule should not be mechanically applied. Weinstein suggests that the rule should not be applied at all unless, as in *Gypsum,* there is some basis for believing that the defendant was aware of the general nature of actions and statements made by the conspirators before his entry. WEINSTEIN, *supra* at 801-153. While it would be too much to ask the Government to prove that the defendant was aware of a specific

the statement was made in furtherance of the conspiracy.[741] However, in the Ninth Circuit, "[t]he fact that evidence is admissible under the co-conspirator exception does not automatically demonstrate compliance with the Confrontation Clause."[742] The use by a declarant of his fifth amendment protections against self-incrimination will deny the other conspirators their right of cross-examination.[743] The test of admissibility under the confrontation clause is whether the defendant's inability to cross-examine the declarant has deprived the jury of a proper basis on which to ascertain the truth of the out-of-court statement.[744] A proper basis is established if:

> (1) the declaration contained no assertion of a past fact, and subsequently carried a warning to the jury against giving it undue weight; (2) the declarant had personal knowledge of the identity and role of participants in the crime; (3) the possibility that the declarant was relying upon faulty recollection was remote; and (4) the circumstances under which the statements were made did not provide reason to believe that the declarant had misrepresented the defendant's involvement in the crime.[745]

Although the Ninth Circuit has questioned what effect the new Federal Rules of Evidence will have upon the seemingly more restrictive requirements of Ninth Circuit precedent,[746] the case interpretation is based upon constitutional requirements and such requirements cannot be superseded by federal statute.[747]

d. The Hillmon Doctrine

Hearsay statements are admissible to prove the declarant's then-existing mental, emotional, or physical condition.[748] The *Hillmon* doc-

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statement made by a conspirator prior to his entry, he should not be held responsible for previous statements which were outside of his reasonable expectations. *Id.*

741. *See* authorities cited note 740 *supra.*

742. United States v. Snow, 521 F.2d 730, 734 (9th Cir. 1975), *cert. denied,* 423 U.S. 1090 (1976).

743. *See* United States v. King, 552 F.2d 833, 845 (9th Cir. 1976).

744. United States v. Snow, 521 F.2d 730, 734 (9th Cir. 1975), *cert. denied,* 423 U.S. 1090 (1976).

745. *Id.* (interpreting the requirements set forth in Dutton v. Evans, 400 U.S. 74, 88-89 (1970)).

746. United States v. Cruz, 536 F.2d 1264, 1267 (9th Cir. 1976).

747. The fact that FED. R. EVID. 801(d)(2)(E) classifies co-conspirator statements as "non-hearsay" does not affect the outcome. If the substance of a statute violates the Constitution, its terminology will make no difference.

748. FED. R. EVID. 803(3).

trine[749] is one type of "state of mind" exception. The Ninth Circuit has observed:

> [U]nder the *Hillmon* doctrine the state of mind of the declarant is used inferentially to prove other matters which are in issue. Stated simply, the doctrine provided that when the performance of a particular act by an individual is an issue in the case, his intention [state of mind] to perform that act may be shown. From that intention, the trier of fact may draw the inference that the person carried out his intention and performed the act.[750]

In *Mutual Life Insurance Co. v. Hillmon*,[751] a civil suit was filed to contest an insurance company's refusal to pay the benefits of a life insurance policy to the wife of the "deceased." The insurance company contended that the insured was still alive and that the body which was discovered was really that of a party named Walters. The company attempted to introduce letters written by Walters, shortly before his disappearance, which stated that he was going with a man named Hillmon to look for a site upon which to build a sheep ranch. The body was found near the area where Walters' letters said he would be. The Supreme Court held that the letters were admissible "as evidence that . . . [Walters] had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention."[752]

In *United States v. Pheaster*,[753] the Ninth Circuit was presented with a factual setting analogous to that in *Hillmon*. On the night of his disappearance, a Larry Adell told friends that he was going to meet "Angelo" (later identified as the defendant) in a parking lot, and that the latter was going to give him a pound of marijuana. The defendant was charged with kidnapping. The prosecution introduced Adell's statements as evidence that he did in fact meet the defendant at the parking lot. In other words, Adell's statement of intent to do a future act was admitted as proof of *the defendant's conduct*.[754] This situation is distinguishable from *Hillmon* because in *Hillmon*, the defendant's statements were admissible on the issue of his own whereabouts. In *Pheaster* the declarant's statement was used to prove that a third party,

749. The *Hillmon* doctrine is derived from the Supreme Court's decision in Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892).

750. United States v. Pheaster, 544 F.2d 353, 376 (9th Cir. 1976).

751. 145 U.S. 285 (1892).

752. *Id.* at 296.

753. 544 F.2d 353 (9th Cir. 1976).

754. *Id.* at 376.

the defendant, was at a particular location at a certain time. Nevertheless, the Ninth Circuit upheld the admissibility of Adell's statements as evidence of the defendant's actions.[755] The court felt that its holding was mandated by *Hillmon* and state court interpretations of that case.[756]

Although *Pheaster* was litigated before the Federal Rules of Evidence took effect, the court indicated that the decision would be the same under the new rules. Rule 803(3) does not expressly recognize the *Hillmon* doctrine. However, the court inferred from the Advisory Committee notes that the *Hillmon* doctrine should be fully incorporated.[757]

e. Hearsay Statements Made to Informants

In *United States v. McClain*,[758] the accused made a hearsay statement which showed his predisposition to commit the offense for which he was charged. The statement was made to an informant. The Ninth Circuit held that the statement was inadmissible where the informant was unavailable at trial, his identity was unknown, and his reliability had not been proven.[759] The holding of *McClain* is inapplicable where: (1) the source of the hearsay is identified; (2) the source testifies at the trial and is subject to cross-examination; and (3) the matter of the hearsay is first placed in issue by the defendant's counsel.[760]

E. Defenses

1. Entrapment

a. In General

The defense of entrapment requires proof that: (1) government

755. The court recognized some conceptual difficulties with this holding. For example, had Adell simply said that the defendant "is going to be in the parking lot tonight," his statement would be hearsay and inadmissible to show that the defendant did, in fact, go to the parking lot. *Id.* at 377. However, since defendant's conduct was inextricably tied up with Adell's intended conduct, Adell's statement was admissible as proof of defendant's conduct.

756. *See, e.g.*, People v. Alcalde, 24 Cal. 2d 177, 148 P.2d 627 (1944).

757. 544 F.2d at 379-80. The Advisory Committee on the Proposed Rules states that "[t]he rule of Mutual Life Ins. Co. v. Hillmon, (citations omitted) allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed." FED. R. EVID. 803(3).

758. 531 F.2d 431 (1976).

759. *Id.* at 435-36. In so holding, the Ninth Circuit expressly rejected the Fifth Circuit's rationale in allowing such statements. *See* United States v. Fink, 502 F.2d 1, 4-5 (5th Cir. 1974); *accord*, Washington v. United States, 275 F.2d 687, 690 (5th Cir. 1960).

760. United States v. Rangel, 534 F.2d 147, 149 (9th Cir.), *cert. denied*, 97 S. Ct. 147 (1976).

agents induced the defendant to commit the particular acts charged in the indictment, and (2) the defendant's predisposition was such that he was not otherwise ready and willing to commit the offense on any propitious opportunity.[761] "Once these two elements are in issue, the government has the burden of showing beyond a reasonable doubt that the entrapment does not exist."[762] In *United States v. Rueter*,[763] the Ninth Circuit found without merit defendants' entrapment defense to charges of possession of contraband with intent to distribute, given that one of the co-conspirators had initiated contact with the Drug Enforcement Administration (DEA) informant.[764]

In *United States v. Hermosillo-Nanez*,[765] the circuit held that "[e]ntrapment is an affirmative defense. . . . [in which] [t]he defendant must come forward with evidence of his nonpredisposition and of government inducement."[766] The conviction was affirmed on grounds

761. United States v. Glassel, 488 F.2d 143, 146 (9th Cir. 1973), *cert. denied*, 416 U.S. 941 (1974). *See, e.g.*, Hampton v. United States, 425 U.S. 484, 490 (1976) (defense of entrapment not available to defendant who sold narcotics supplied by government informer to other government agents where defendant was predisposed to commit the crime); United States v. Russell, 411 U.S. 423, 435-36 (1973) (entrapment is limited defense that only comes into play when government agent "implant[s] the criminal design in the mind of the defendant"); Sorrells v. United States, 287 U.S. 435, 452 (1932) (defense available, not in sense that accused though guilty may go free, but that Government not permitted to contend accused guilty of crime where government officials are instigators of his conduct).

762. United States v. Glassel, 488 F.2d 143, 146 (9th Cir. 1973), *cert. denied*, 416 U.S. 941 (1974). *See also* Notaro v. United States, 363 F.2d 169, 174 n.6 (9th Cir. 1966) (issue of entrapment presented no matter how incredible evidence which raises it appears to trial court). *Cf.* United States v. Rangel, 534 F.2d 147, 149 (9th Cir.), *cert. denied*, 97 S. Ct. 147 (1976) (entrapment exists as a matter of law only when undisputed testimony makes clear otherwise innocent person was tricked, defrauded or persuaded into committing criminal act by government agent); United States v. Gibson, 446 F.2d 719, 721 (10th Cir. 1971) (must be "*patently clear* that an otherwise innocent person was induced to commit the act complained of by trickery, persuasion or fraud of a government agent" to find entrapment as matter of law) (emphasis added).

763. 536 F.2d 296 (9th Cir. 1976).

764. *Id.* at 298. In United States v. One 1974 Jeep, 536 F.2d 1285 (9th Cir. 1976) (per curiam), the court held that the conduct of DEA agents in sending a pickup notice to the addressee of a package which custom agents had found to contain cocaine and the subsequent arrest of the addressee after he took delivery of the package at the post office was lawful, and did not provide any basis for an entrapment defense. *Id.* at 1286. *Cf.* Sherman v. United States, 356 U.S. 369 (1958) (entrapment shown as matter of law when undisputed facts indicated government informer had met petitioner at doctor's office where both were being treated to cure narcotics addiction, and informer continually sought to persuade petitioner to obtain narcotics for him until the petitioner finally submitted, supplying narcotics to informer and returning to the habit himself).

765. 545 F.2d 1230 (9th Cir. 1976) (per curiam), *cert. denied*, 97 S. Ct. 763 (1977).

766. *Id.* at 1232.

that the evidence before the jury was sufficient to support a finding of predisposition to commit the crime.[767]

b. *Confession and Avoidance*

In 1975 the Ninth Circuit reversed its former rule that entrapment constitutes a confession and avoidance defense which requires the defendant to admit to all elements of the crime charged.[768] With the decision of *United States v. Demma*[769] a defendant may now claim entrapment without conceding that he committed the crime or any of its elements.[770] The circuit reaffirmed this position in 1976.[771] However, it remains to be seen whether it will apply the new rule retroactively in habeas corpus proceedings in which a prisoner asserts error in his pre-*Demma* trial.[772]

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767. *Id.* at 1233. *See also* United States v. Gonzales-Benitez, 537 F.2d 1051, 1054 n.3 (9th Cir.), *cert. denied*, 97 S. Ct. 323 (1976) (proper to instruct jury that entrapment not available should they find defendant predisposed to commit the crime); United States v. Pena-Ozuna, 511 F.2d 1106, 1107-08 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 850 (1975) (proper to instruct jury that lack of predisposition and government inducement must be shown beyond reasonable doubt to sustain defense).

768. *See* Eastman v. United States, 212 F.2d 320, 322 (9th Cir. 1954). *Accord*, United States v. Gibson, 446 F.2d 719, 722 (10th Cir. 1971) ("entrapment is an affirmative defense in the nature of confession and avoidance; as such the defendant must admit to the acts constituting commission of the crime charged but, in avoidance, seek relief from guilt on the ground that the criminal intent or design was not his, but rather that of the government agent . . . .").

769. 523 F.2d 981 (9th Cir. 1975) (en banc).

770. *Id.* at 982 (court expressly overrules *Eastman* and its progeny).

771. *See* United States v. Hart, 546 F.2d 798, 803 (9th Cir. 1976) (en banc), *cert. denied*, 97 S. Ct. 1155 (1977); United States v. Stagg, 540 F.2d 1010, 1011 (9th Cir. 1976) (per curiam); United States v. Mejia, 529 F.2d 995, 996 (9th Cir. 1976) (per curiam).

772. United States v. Hart, 546 F.2d 798, 803 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1155 (1977) (retroactive application of *Demma* to appellant's new trial, even though appellant had not asserted error at original trial); United States v. Demma, 523 F.2d at 988 (Wallace, J., dissenting) (one of defendants was allowed to assert absence of entrapment instructions on appeal though he did not assert the defense at trial since he did not wish to admit elements of alleged crime).

In a habeas corpus proceeding there are four possible categories of prisoners applying for relief on the basis of *Demma*: (1) those who requested an entrapment instruction, which request was denied because they refused to admit the elements of the alleged crime; (2) those who admitted the elements of the crime and received the entrapment instruction, but objected to the required admission at trial; (3) those who admitted the crime and made admission at trial; (3) those who admitted the crime and received the entrapment instruction, but failed to object to the required admission at trial; and (4) those who contested the elements of the crime at trial, but now assert that they should have a retrial on the entrapment issue despite the fact that they failed to request the instruction. There is language in *Hart* indicating that relief may be in order for prisoners falling within categories one and two. 546 F.2d at 803.

c. *Due Process*

In *United States v. Russell*,[773] the Supreme Court indicated that there is a possibility that the conduct of law enforcement agents could reach a level that is "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[774] However, a plurality of the Court in *Hampton v. United States*,[775] appeared to take the position "that the concept of fundamental fairness inherent in the guarantee of due process *would never* prevent the conviction of a predisposed defendant, *regardless of the outrageousness of police behavior* . . . ."[776] The Ninth Circuit in *United States v. Gonzales*[777] interpreted *Hampton* as leaving open the possibility of a due process violation given outrageous government conduct.[778] But the court held that the involvement of government agents in printing similitudes of United States currency fell short of the outrageous standard, and therefore found no violation of due process.[779]

773. 411 U.S. 423 (1973).

774. *Id.* at 431-32. *See* Rochin v. California, 342 U.S. 165 (1952) (conduct of government agents in extracting evidence by force from defendant's stomach with emetic solution held to violate fourteenth amendment due process clause).

In Kinsella v. Singleton, 361 U.S. 234 (1960), the Supreme Court stated that due process "has to do . . . with the denial of that 'fundamental fairness, shocking to the universal sense of justice.'" *Id.* at 246 (quoting Betts v. Brady, 316 U.S. 455, 462 (1942)). The Ninth Circuit's statement of the rule can be found in United States v. Lue, 498 F.2d 531 (9th Cir.), *cert. denied*, 419 U.S. 1031 (1974). The court there indicated that the due process defense was "not an exception to entrapment law which focuses on a defendant's predisposition," but rather an independent protection afforded defendants by the due process clause of the fourteenth or fifth amendments. *Id.* at 534.

775. 96 S. Ct. 1649 (1976).

776. *Id.* at 1651 (emphasis added) (Powell & Blackmun, JJ., concurring).

777. 539 F.2d 1238 (9th Cir. 1976) (per curiam).

778. *Id.* at 1239 (relying upon Justice Powell's concurring opinion and Justice Brennan's dissenting opinion in *Hampton*). In *Hampton*, Justices Rehnquist and White, together with Chief Justice Burger seemed to indicate that the predisposition of the defendant is the sole issue. Justice Rehnquist stated that the remedy for outrageous police conduct "lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." 96 S. Ct. at 1650 (plurality opinion, Stevens, J., taking no part in decision).

779. 539 F.2d at 1238. *See also* United States v. Smith, 538 F.2d 1359, 1361-62 (9th Cir. 1976) (government's conduct could not be characterized as so outrageous as to constitute due process violation); United States v. Gonzales-Benitez, 537 F.2d 1051, 1055 (9th Cir.), *cert. denied*, 97 S. Ct. 323 (1976) (providing contraband to defendants does not result in per se violation of due process). *Cf.* Greene v. United States, 454 F.2d 783, 786-87 (9th Cir. 1971) (where special investigators established contact with defendants shortly after their arrest on former bootlegging charges, offered to supply still to defendants, supplied sugar to be used, urged bootleggers to resume production, and finally acted as defendants' only customers. It was held that the government was

2. Insanity

In *United States v. Sullivan*,[780] the defendant, who had been convicted by a jury of using false identification documents in connection with firearms purchases, attempted to defend himself on the ground that he was legally insane at the time of the purchases.[781] The test for legal insanity in the Ninth Circuit is as follows: "A person is not responsible for criminal conduct if at the time of such conduct as a *result of mental disease* or defect he lacks substantial capacity either to *appreciate* the . . . [*wrongfulness*] of his conduct or conform his conduct to the requirements of law."[782] The defendant's expert witness had testified that while the defendant did have the *intellectual ability* to appreciate the criminality of his actions, he did not have the capacity to appreciate their *moral* wrongfulness.[783] The trial judge had refused to give a clarifying instruction suggested by defense counsel that "[f]or purposes of the insanity defense, wrongfulness means *moral* wrongfulness rather than *criminal* wrongfulness."[784] The Ninth Circuit reversed the trial judge and remanded the case for retrial, holding that since it

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enmeshed in the criminal activity taking place so as to be barred from prosecuting defendants). *Greene* is cited with approval in *Hampton*. 96 S. Ct. at 1651 n.3 (Powell, J., concurring).

780. 544 F.2d 1052 (9th Cir. 1976).

781. *Id.* at 1053-54 (citation omitted).

782. MODEL PENAL CODE § 4.01(1) (Final Draft 1962) (emphasis added). *See, e.g.*, Wade v. United States, 426 F.2d 64, 71-74 (9th Cir. 1970) (en banc) in which the Ninth Circuit adopted the ALI formulation of the test for legal insanity, substituting the word "wrongfulness" for "criminality," and rejecting § 4.01(2) as a restriction upon what constitutes a mental disease or defect.

783. 544 F.2d at 1054.

784. *Id.* at 1055 (emphasis added). "The trial court refused to issue . . . [the clarifying instruction] on grounds that there was no evidence presented upon which to submit the factual issue to the jury that the defendant had suffered from a *delusion* that his activities were morally justified." *Id.* In United States v. McGraw, 515 F.2d 758 (9th Cir. 1975), the court had stated: "[A] defendant lacks substantial capacity to appreciate the wrongfulness of his conduct if he knows his act to be criminal but commits it because of a *delusion* that it is morally justified." *Id.* at 760 (emphasis added). *See also*, Wade v. United States, 426 F.2d 64, 71-72 (9th Cir. 1970). In *Sullivan*, the Ninth Circuit disclaimed any "talismanic focus on the word 'delusion,'" holding that "it is a word of clarification, not of limitation." 544 F.2d at 1055 (footnote omitted). Under *Wade* the test for legal insanity requires that when "Someone . . . commits a criminal act under a false belief, *the result of mental disease or defect*, that such act is morally justified, [such person] does indeed lack substantial capacity to appreciate the wrongfulness of his conduct, irrespective of whether he can be correctly diagnosed, medically, as 'delusional.'" *Id.* at 1056. The trial judge was therefore in error for attaching legal significance to the word "delusion" announced in the *Wade* and *McGraw* decisions. *Id.* at 1055 (holding that the word "delusion" adds no additional element to sustain an insanity defense).

appeared from the record that the jury had been exposed to differing views of the proper legal meaning of "wrongfulness," a clarifying instruction was necessary in this instance.[785]

VI. Post-Conviction Proceedings

A. Sentencing

The matter of sentencing has traditionally been left to the discretion of the trial court and is not reviewable where the sentence falls within the bounds prescribed by statute.[786] The Supreme Court has addressed the problems inherent in the sentencing process with less frequency than might be expected,[787] the result of a conscious decision to leave the trial judge's ruling undisturbed and his discretion unchallenged whenever possible. Nonetheless, because the decision to deprive a member of society of his or her freedom is a serious one, the circuit courts of appeals are often faced with the task of balancing the judge's exercise of discretion against the possible deprivation of a defendant's equal protection and due process rights.[788]

An obvious requirement of due process is that the trial judge must impose a sentence which is worded with clarity and precision.[789] The terms of the sentence must be clear as to the defendant's length of imprisonment, his chances for parole and probation and the revocations thereof, and the effect that non-payment of a fine will have on concurrent sentences.[790]

In *Tate v. Short*,[791] the Supreme Court held that a sentence is invalid

785. 544 F.2d at 1054-56.

786. United States v. Thompson, 541 F.2d 794, 795 (9th Cir. 1976); United States v. Ramirez-Aguilar, 455 F.2d 486, 488 (9th Cir. 1972); United States v. James, 443 F.2d 348, 349 (9th Cir. 1971).

787. Although the Supreme Court seems to avoid reviewing issues involving the sentencing procedure, the Ninth Circuit Court of Appeals must take the case when the defendant exercises his appeal of right. In the absence of Supreme Court guidance there is more room for discrepancy between the circuits.

788. The due process issue generally arises when the defendant is sentenced according to misinformation in the presentence report which the defendant had no opportunity to rebut. *See* United States v. Perri, 513 F.2d 572 (9th Cir. 1975). The equal protection question frequently arises where two defendants accused of the same conduct receive substantially different sentences. *See, e.g.*, United States v. Stockwell, 472 F.2d 1186 (9th Cir.), *cert. denied*, 411 U.S. 948 (1973).

789. United States v. Dixon, 538 F.2d 812 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 383 (1976).

790. *Id.* at 814.

791. 401 U.S. 395 (1971).

if, under the terms imposed, the defendant's financial inability to pay a fine will result in a longer imprisonment than that given to someone who has the ability to pay the fine. The reliance upon a prisoner's financial status as justification for an enhanced jail term is invidious discrimination barred by the equal protection provisions of the fifth and fourteenth amendments.[792] The Ninth Circuit follows the view expressed by the Supreme Court in *Tate*.[793] In addition, the Ninth Circuit has decided that equal protection rights are violated "whether the result of longer imprisonment is brought about by the operation of 18 U.S.C. § 3569[794] or by the fact that the nonpayment of a committed fine would adversely affect the defendant's parole status."[795] The federal court judge still retains discretion whether or not to initially impose the committed fine.[796]

When the defendant is convicted of more than one type of criminal act, the judge must analyze the nature of the crimes and the various statutes involved in order to determine if the sentence is within the purview of the law. A problem arises when a conviction is obtained for lesser included offenses. In *United States v. Pulawa*,[797] petitioner had been convicted of three counts of tax evasion and three counts of perjury in the preparation of his income tax returns.[798] The district court had imposed consecutive three-year sentences for each count of perjury and consecutive five-year sentences for each count of tax evasion. On appeal, the Ninth Circuit recognized that perjury is a lesser included offense of tax evasion,[799] and that the sentences given for the lesser included crimes should have been merged into the greater offense.

792. *Id.* at 399. *Accord*, Williams v. Illinois, 399 U.S. 235, 244 (1970). For a perspective of how indigence affects the defendant's right to an appeal, *see* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). *But cf.* Ross v. Moffit, 417 U.S. 600 (1974) (indigent defendant has no right to counsel for preparation of petition for discretionary review).

793. United States v. Estrada de Castillo, 539 F.2d 583, 584 (9th Cir. 1976).

794. "Under 18 U.S.C. § 3569 an indigent unable to pay a fine may serve his release from a committed fine only after he has served thirty days solely for the nonpayment of the fine." *Id.* at 584 n.2.

795. *Id.*

796. *Id.* at 585 (Hufstedler, J., concurring). *See, e.g.*, Hill v. Wampler, 298 U.S. 460, 463 (1936); *Ex parte* Jackson, 96 U.S. 727, 737 (1877); United States v. Callahan, 371 F.2d 658, 661 (9th Cir. 1967).

797. 532 F.2d 1301 (9th Cir. 1976).

798. Violations of I.R.C. §§ 7201 and 7206(1), respectively.

799. 532 F.2d at 1302. *See* Sansone v. United States, 380 U.S. 343, 349 (1965); United States v. White, 417 F.2d 89, 93 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970).

The Ninth Circuit held that the maximum sentence prescribed by law is that imposed by the statute governing tax evasion.[800]

When a sentence is attacked as being in excess of the maximum period of time applicable under a given statute, the record should be scrutinized to see if the prisoner's claim is meritorious. In order to facilitate this task, the trial judge is required to state which penalty is attached to which count.[801] It is not reversible error when the penalty given is clearly within the maximum available for one of several crimes for which the defendant is convicted, and the sentences imposed on all counts are concurrent.[802]

The standards applicable to a hearing at which sentence is imposed are enumerated in federal rule 32.[803] It is often difficult to comply with rule 32(c)(3), the provision requiring disclosure to the defendant of the contents of the presentence report.[804] This rule gives the defendant and his attorney an opportunity to read the report subject to the court's discretion to disallow this right under certain conditions. The Ninth Circuit has held that, at a minimum, the rule requires disclosure of the defendant's criminal record contained in the presentence report; moreover, the defendant must have an opportunity to " 'refute or explain any record disparagement of his earlier deportment.' "[805]

800. 532 F.2d at 1302. Section 7201 of the Internal Revenue Code provides a maximum penalty for tax evasion of "not more than $10,000 or imprisonment of not more than five years, or both." Therefore, the maximum sentence the petitioner in *Pulawa* could receive was three consecutive five-year sentences for a total of fifteen years.

801. United States v. Wilson, 535 F.2d 521, 523 (9th Cir.) (by implication), *cert. denied*, 429 U.S. 850 (1976).

802. *Id.* at 523. Thus, in *Wilson*, defendant was charged in a five count indictment. In count one, it was alleged that he conspired to commit a felony and a misdemeanor. The defendant was convicted of the charges on several counts, including count one. The sentence prescribed for count one was in excess of the maximum allowable if the conviction was for conspiracy to commit a misdemeanor. The judge's failure to distinguish whether the count one conviction was for a felony or a misdemeanor was not reversible error, since the sentence imposed was within the allowable term for conviction on one of the other counts, and the sentences imposed were concurrent.

803. FED. R. CRIM. P. 32.

804. *Id.* 32(c)(3) provides as follows:

> Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

805. United States v. Read, 534 F.2d 858, 859 (9th Cir. 1976). This view conforms

This interpretation of the rule is applicable to both oral and written presentence reports.[806]

Many sentencing appeals arise from a defendant's attempt to withdraw his guilty plea after receiving a sentence which is harsher than the one he expected to receive. The general rule is that a plea may only be withdrawn before sentence is imposed.[807] However, when "manifest injustice" is evident, courts may allow withdrawal at a later date.[808] Thus, the manner in which a court chooses to define "manifest injustice" becomes the critical issue. In *United States v. Harris*,[809] while the trial judge had attempted to explain the consequences of the plea to the defendant in compliance with rule 11,[810] the judge had neglected to disclose that a special six-year parole term would be appended to the sentence. The Ninth Circuit concluded that the federal rule had been violated and that it would be manifestly unjust to disallow withdrawal of the plea after sentencing.[811]

The prisoner's due process rights are violated when his sentence is based on material misinformation which he has had no opportunity to refute.[812] The Ninth Circuit has held, nonetheless, that the judge need not state in open court the factors he considered in making his determination.[813] This practice indicates a deference to the wide discretion afforded the trial judge in matters involving the sentencing process.

There are times when a hearing should be held to determine whether the court considered improper information. The Ninth Circuit has held that the court may consider a prior conviction which was ob-

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with the position taken by the Fourth Circuit Court of Appeals. *See* United States v. Powell, 487 F.2d 325, 328 (4th Cir. 1973) (quoting Baker v. United States, 388 F.2d 931, 933 (4th Cir. 1968)).

806. United States v. Read, 534 F.2d at 859.

807. FED. R. CRIM. P. 32(d).

808. *Id.*; United States v. Harris, 534 F.2d 141 (9th Cir. 1976).

809. 534 F.2d 141 (9th Cir. 1976).

810. FED. R. CRIM. P. 11.

811. 534 F.2d at 142. The Ninth Circuit has consistently held that the imposition of a special parole term should be explained to the defendant when his plea is accepted. *See* Fruchtman v. Kenton, 531 F.2d 946 (9th Cir. 1976); United States v. Myers, 451 F.2d 402, 404-05 (9th Cir. 1972); Combs v. United States, 391 F.2d 1017 (9th Cir. 1968); Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964).

812. United States v. Perri, 513 F.2d 572, 573 (9th Cir. 1975).

813. United States v. Thompson, 541 F.2d at 795. *Accord*, United States v. Horsley, 519 F.2d 1264, 1266 (9th Cir. 1975), *cert. denied*, 424 U.S. 944 (1976); United States v. Brown, 479 F.2d 1170, 1173 (2d Cir. 1973). *But cf.* United States v. Carden, 428 F.2d 1116 (8th Cir. 1970) (always advisable for trial judge to state factors on which he relied in sentencing defendant).

tained despite an alleged fourth amendment violation,[814] reasoning that this type of prior conviction is probative of past criminal conduct. In fact, this holding has been used to justify the elimination of federal habeas corpus review of an alleged state violation of the defendant's fourth amendment rights.[815] If, however, the prior conviction is constitutionally invalid because the petitioner was denied right to counsel under *Gideon v. Wainwright*,[816] the procedure followed is of a vastly different nature.

In *Farrow v. United States*,[817] the court agreed on a comprehensive procedure to assure that constitutionally invalid priors were not considered by the sentencing judge. In *Farrow*, the petitioner had filed a section 2255 *Tucker*-type motion.[818] The district court, adopting a procedure followed by the Fifth Circuit,[819] had disposed of the claim by declaring that "even if all challenged priors are disregarded the sen-

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814. Tisnado v. United States, 547 F.2d 452 (9th Cir. 1976). In *Tisnado*, the court stated:

> Accordingly, it now appears that it may be an unwarranted extension of *Tucker*'s holding—which concerned a prior conviction that had been declared invalid due to a denial of the sixth amendment right to counsel—to suggest that prior convictions which are invalidated on fourth amendment grounds are also to be excluded from the consideration of the sentencing court.

Id. at 458. *See also* United States v. Vandermark, 522 F.2d 1019, 1021-25 (9th Cir. 1975); United States v. Schipani, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971); Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968), *cert. denied*, 402 U.S. 961 (1971).

815. *See* Stone v. Powell, 429 U.S. 465 (1976).

816. 372 U.S. 335 (1963).

817. No. 74-2429 (9th Cir. Sept. 24, 1976).

818. The *Tucker*-type petition derives its name from United States v. Tucker, 404 U.S. 443 (1972). The petition is filed under 28 U.S.C. § 2255 (1970) and seeks relief from a sentence imposed under conditions whereby the trial judge considered a prior conviction which was invalid since the defendant was not afforded his right to counsel under *Gideon*.

819. From Lipscomb v. Clar, 468 F.2d 1321 (5th Cir. 1972), it can be implied that a sentencing judge may end the inquiry into whether a prior illegal conviction enhanced the present sentence by merely disclaiming that he did not rely on the priors. Most circuits in the United States accept a mere disclaimer. *See, e.g.*, United States v. Sawaya, 486 F.2d 890, 893 (1st Cir. 1973); Wilsey v. United States, 496 F.2d 619 (2d Cir. 1974); United States v. Janiec, 464 F.2d 126 (3d Cir. 1972); Stepheney v. United States, 516 F.2d 7 (4th Cir. 1976); United States v. Trice, 412 F.2d 209 (6th Cir. 1969); Crovedi v. United States, 517 F.2d 541 (7th Cir. 1975); McAnulty v. United States, 469 F.2d 254 (8th Cir. 1972), *cert. denied*, 411 U.S. 949 (1973); United States v. Green, 483 F.2d 469 (10th Cir.), *cert. denied*, 414 U.S. 469 (1973). However, in the Fifth Circuit, where *Lipscomb* was decided, the court has begun to question the "disclaimer" approach. *See, e.g.*, United States v. Rollerson, 491 F.2d 1209, 1213 (5th Cir. 1974); Thomas v. United States, 460 F.2d 1222 (5th Cir. 1972).

tence would be the same in this case."[820] The Ninth Circuit ruled that a judge's informal disclaimer is dispositive only where the files and records "conclusively" show non-reliance on the invalid prior convictions.[821] If the records are not conclusive, the defendant is entitled to an evidentiary hearing which, whenever practicable, should be held in front of a judge other than the one who originally imposed the sentence.[822] Where a hearing is required, there is a rebuttable presumption that the invalid priors were considered.[823]

In *Farrow* and in a companion case,[824] the Ninth Circuit held that the procedure for determining the merits of a *Tucker*-type petition should be applied when the defendant alleges that his sentence was made longer on account of materially untrue information in the presentence report.[825] In so holding, the court had to distinguish *Williams v. New York*.[826] In *Williams*, it was held that a sentencing judge may consider extra-judicially obtained evidence.[827] The apparent justification for the *Williams* holding was the belief that once the defendant was convicted, the judge had to consider all relevant information in order to prescribe the correct penalty. The Ninth Circuit, however, held that *Williams* is determinative only when the evidence being considered is uncontested. When the prisoner casts doubt on the validity of facts material to fixing sentence, it would become "incumbent on the district court either explicitly to disregard the potentially false information, or, if the court wishes to rely on it, to adopt some procedure to reconcile the factual dispute."[828]

As a general rule, it is not error for two people convicted of the same offense to receive different sentences.[829] It has been the accepted practice in at least one circuit that a judge may consider varying degrees of guilt in prescribing different sentences to co-defendants.[830] There is a fine line between an acceptable exercise of discretion and a viola-

820. Farrow v. United States, No. 74-2429, slip op. at 2 (9th Cir. Sept. 24, 1976).
821. *Id.* at 5.
822. *Id.* at 11.
823. *Id.* at 8.
824. Leano v. United States, No. 74-2640 (9th Cir. Sept. 24, 1976).
825. Farrow v. United States, No. 74-2429, slip op. at 4 (9th Cir. Sept. 24, 1976). In Townsend v. Burke, 344 U.S. 736, 740-41 (1948), it was held that it is a violation of due process to increase a prison term on the basis of materially untrue information.
826. 337 U.S. 241 (1949).
827. *Id.* at 250-51.
828. Farrow v. United States, No. 74-2429 (9th Cir. Sept. 24, 1976).
829. Williams v. Illinois, 299 U.S. 235, 243 (1970).
830. United States v. Brick, 502 F.2d 219, 225-26 (8th Cir. 1974).

tion of the defendant's equal protection rights. For example, a sentencing judge may not lengthen a sentence solely because the defendant chose to exercise his constitutional right to a jury trial.[831] The Ninth Circuit has ruled that judicial integrity requires the sentencing judge to explain his reasons orally or in writing[832] when the disparity between sentences given co-defendants is substantial.[833]

If a defendant is convicted and sentenced to a term less than life imprisonment, it is not unusual for the person convicted to attempt to have the time spent in jail awaiting trial applied to his sentence. There is no absolute right to have the waiting time so credited unless the sentence, plus the waiting time, amount to a greater punishment than that prescribed by law.[834] In *Makal v. Arizona*,[835] a case in which the defendant had been committed to a mental institution for a length of time before trial, the court held that such commitment is not the equivalent of confinement in prison, and therefore there was no need to credit this time against the term of the sentence.[836]

B. Revocation of Parole Status

In *Morrissey v. Brewer*,[837] the Supreme Court established guidelines to safeguard the rights of any convicted criminal whose status as a parolee is threatened by revocation proceedings.[838] Subsequent decisions have made it clear that a prisoner must actually be on parole to take advantage of the enumerated rights set forth in *Morrissey*.[839] The

831. United States v. Harlin, 539 F.2d 679, 681-82 (9th Cir.), *cert. denied*, 97 S. Ct. 362 (1976); United States v. Capriola, 537 F.2d 319, 320 (9th Cir. 1976); United States v. Stockwell, 472 F.2d 1186 (9th Cir.), *cert. denied*, 411 U.S. 948 (1973).

832. United States v. Capriola, 537 F.2d 319, 321 (9th Cir. 1976).

833. *Id.* *See* United States v. Flores, 540 F.2d 432, 438 (9th Cir. 1976); United States v. Maples, 501 F.2d 985, 986-87 (4th Cir. 1974). In *Flores*, the defendants, husband and wife, were found guilty of the same criminal conduct. The judge gave the wife a substantially lighter sentence because, as he admitted, she had one child at home and she was pregnant. The Ninth Circuit affirmed. In *Maples*, the defendants, one male and one female, were both found guilty of one count of bank robbery. The judge gave the woman defendant a lighter sentence because of her "age and sex." 501 F.2d at 986. On appeal, the Fourth Circuit remanded, holding that the portion of the male's sentence given him solely because of his sex should be reduced.

834. Hook v. Arizona, 496 F.2d 1172, 1173-74 (9th Cir. 1974). *See also* Corley v. Cardwell, 544 F.2d 349 (9th Cir. 1976).

835. 544 F.2d 1030 (9th Cir. 1976).

836. *Id.* at 1035.

837. 408 U.S. 471 (1972).

838. *Id.* at 488-89.

839. *See, e.g.*, Bailleaux v. Cupp, 535 F.2d 543, 545 (9th Cir. 1976) (defendant not on parole when offer of parole revoked). *See also* Bean v. Nevada, 535 F.2d 542 (9th

Ninth Circuit considers parole as the functional equivalent of imprisonment;[840] therefore, the granting of a parole term must comply with the provisions of any statute under which the defendant is sentenced. For example, where a defendant is sentenced under the Federal Youth Corrections Act,[841] the simultaneous imposition of a special ten-year parole term is void on its face.[842]

In *Atwood v. Nelson*,[843] defendant was charged with drunk driving[844] while still on parole for the commission of a prior offense. His parole officer used his guilty plea to the drunk driving charge as grounds for revoking the defendant's parole.[845] The prisoner claimed that, under *Morrissey*, he was entitled to a prerevocation hearing.[846] The Adult Authority denied his request. The defendant also claimed error in the denial of his right to produce witnesses in his behalf at the revocation hearing. The Ninth Circuit agreed with the defendant on both counts.[847] The court held that, although a guilty plea constitutes prob-

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Cir. 1976) (no *Morrissey* rights when defendant's death sentence commuted to life imprisonment without possibility of parole).

840. United States v. Myers, 543 F.2d 721, 722 (9th Cir. 1976).

841. 18 U.S.C. §§ 5005-5026 (1970).

842. Section 5017(c) of title 18 provides as follows: "A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be *discharged unconditionally on or before six years from the date of his conviction.*" (emphasis added). In United States v. Myers, 543 F.2d 721 (9th Cir. 1976), the district court tried to augment a sentence under the Youth Act with a special ten-year parole term. Since section 5017(c) provides that the youth must be unconditionally released before six years from the date of his conviction, the parole term was held to be invalid.

843. No. 74-2260 (9th Cir. May 14, 1976).

844. CAL. VEH. CODE § 23102 (West Supp. 1977).

845. In *Atwood* one of the terms of defendant's release on parole was that he not consume alcoholic beverages. The parole officer also charged the prisoner with possessing firearms and failing to obey state laws, both in contravention of the conditions of his parole. Atwood v. Nelson, No. 74-2260, slip op. at 2 (9th Cir. May 14, 1976).

846. Under *Morrissey*, the defendant is entitled to a prerevocation hearing, the purpose of which is to ascertain the existence of probable cause to revoke parole. 408 U.S. at 485-87.

847. Under *Morrissey*, the defendant is entitled to the following rights:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board . . . ; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489. The court in *Atwood* concluded that the prisoner was afforded each of these rights with the exception of those enumerated in (c). Therefore, the revocation hearing was held to be invalid.

able cause for a revocation hearing under the *Morrissey* test, the prisoner was entitled to a prerevocation hearing to determine whether the plea was taken under circumstances in which his procedural due process rights had been safeguarded.[848] The court invalidated the revocation hearing on the grounds that the defendant should have been permitted to call witnesses in his behalf.[849]

C. *Revocation of Probationary Status*

Many of the procedural standards applicable to parole revocations are also applicable to revocation of probationary status.[850] For example, the exclusionary rule has been held inapplicable to both probation and parole revocation hearings.[851] The trial judge has wide discretion to impose any condition upon a grant of probation which he feels will aid the defendant's process of rehabilitation.[852] In exercising his discretion, the judge is not bound by the recommendation of the probation officer.[853]

In *Nicholas v. United States*,[854] the Ninth Circuit held that a judge may impose a new term of probation upon the successful revocation of the defendant's prior probationary status. In *Nicholas*, the prisoner had received a suspended sentence and had been placed on five years probation pursuant to 18 U.S.C. § 3651 (1970). He moved to Nevada during this five-year period without informing his probation

848. Ordinarily, a guilty plea would constitute probable cause to revoke parole. However, the Adult Authority should have permitted a prerevocation hearing to determine if the plea in this case was accepted in violation of the defendant's due process rights. The defendant was not informed at the time of the plea as to the "dual" purpose for which it would be used. The California Supreme Court has held that a drunk driving conviction upon a plea of guilty in a California municipal court, in a proceeding that was not intended to serve a dual purpose, does not meet *Morrissey*'s due process standards where there is neither notice to the parolee nor agreement between the parties. *In re* Lo Croix, 12 Cal. 3d 146, 151 n.1, 524 P.2d 816, 820 n.1, 115 Cal. Rptr. 344, 348 n.1 (1974), *cert. denied*, 420 U.S. 972 (1975).

849. Atwood v. Nelson, No. 74-2260 (9th Cir. May 14, 1976). The defendant was not entitled to an attorney's presence at his revocation hearing because Gagnon v. Scarpelli, 411 U.S. 788 (1973) is not to be applied retroactively. *See* Sloan v. Nelson, 512 F.2d 596, 598 (9th Cir. 1975); Gardner v. McCarthy, 503 F.2d 733 (9th Cir. 1974).

850. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

851. Sperling v. Fitzpatrick, 426 F.2d 1161, 1163 (2d Cir. 1970).

852. United States v. Miller, 549 F.2d 105, 107 (9th Cir. 1976); United States v. Conseuelo-Gonzalez, 521 F.2d 259, 264 (9th Cir. 1975).

853. United States v. Miller, 549 F.2d 105, 107 (9th Cir. 1976) (by implication).

854. No. 75-2411 (9th Cir. Jan. 9, 1976).

officer as to his whereabouts. Defendant's probation term was revoked and he was given a five-year jail sentence. The district court was willing to reinstate a new probation period but ruled that it lacked jurisdiction to do so.[855] The Ninth Circuit disagreed, and held that the district court judge had the authority to decide what penalty is appropriate upon revocation of probation. Where, as in *Nicholas*, the warrant for arrest was issued within the initial probationary period and a hearing was held within a reasonable time after the warrant was executed, the court could execute the remainder of a sentence even if the probationary period had expired.[856] The probationary period imposed under 18 U.S.C. § 3651 is tolled during the period in which a probationer has voluntarily left the jurisdiction or has concealed himself to avoid service of process.[857] In revoking the original probation term, the court can reinstate any sentence which might have originally been imposed.[858]

D. Appeals

The federal circuit courts have jurisdiction "of appeals from all final decisions of the district courts of the United States."[859] While the "final judgment" rule is not a difficult one to state, the practical difficulties encountered in applying the rule are varied.[860] For example, if a trial judge refuses to grant a defendant's pretrial motion to dismiss the indictment, such denial is generally not a final judgment within the meaning of the statute.[861] Several circuits have found an exception to this rule where the motion is framed in the setting of a double jeopardy

855. The district court relied on the following words of 18 U.S.C. § 3651 (1970) to reach its conclusion: "The period of probation, together with any extension thereof, shall not exceed five years."

856. Nicholas v. United States, No. 75-2411, slip op. at 2 (9th Cir. Jan. 9, 1976).

857. *Id.* at 3. The five-year limitation is tolled during the time that the probationer is imprisoned for another offense. Ashworth v. United States, 391 F.2d 245, 246 (6th Cir. 1968); United States v. Gelb, 269 F.2d 675 (2d Cir. 1959).

858. Nicholas v. United States, No. 75-2411 (9th Cir. Jan. 9, 1976). This would include imposing a new probation term.

859. 28 U.S.C. § 1291 (1970).

860. *See, e.g.*, DiBella v. United States, 369 U.S. 121, 131-32 (1962) (pretrial ruling on motion to suppress is not final judgment); Cobbledick v. United States, 309 U.S. 323, 330 (1940) (denial of motion to quash subpoena duces tecum is not final judgment); United States v. Carey, 475 F.2d 1019, 1021 (9th Cir. 1973) (denial of motion for acquittal is not final order).

861. Guam v. Lefever, 454 F.2d 270, 270 (9th Cir. 1972); Kyle v. United States, 211 F.2d 912, 914 (9th Cir. 1954). *See also* Young v. United States, 544 F.2d 415, 418 (9th Cir.), *cert. denied*, 97 S. Ct. 643 (1976).

appeal.[862] The Ninth Circuit, in a case of first impression,[863] held that a claim of double jeopardy does not transform the ruling on a pretrial motion into a final judgment.[864] Therefore, the ruling on the motion to dismiss is not immediately appealable. The court noted that "delays and disruptions caused by intermediate appeals are especially detrimental to the effective administration of the criminal law."[865]

The defendant is required to voice objection to the introduction of all improper evidence at the trial level.[866] Failure to make the objection deprives the defendant of an appeal unless the introduction of such evidence rises to the level of "plain error."[867] There are certain rules followed in the Ninth Circuit that demonstrate a marked preference for preserving the trial judge's ruling whenever possible. In *United States v. Houston*,[868] the court reiterated its position that it will not notice error in the judge's charge to the jury unless the charge "may have resulted in a miscarriage of justice or in the denial to appellant of a fair trial."[869] The Ninth Circuit, in another 1976 case, also decided that where the correct ruling is made during the trial but for an erroneous reason, the case will not be reversed unless the defendant can demonstrate prejudice.[870]

The United States Supreme Court has held that judicial review of an administrative ruling should not be precluded unless clear and con-

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862. United States v. Lansdown, 460 F.2d 164, 172 (4th Cir. 1972). The *Lansdown* decision has been adopted in three other circuits. *See* United States v. DiSilvio, 520 F.2d 247, 248 n.2a (3d Cir. 1975); United States v. Beckerman, 516 F.2d 905, 907 (2d Cir. 1975); United States v. Barket, 503 F.2d 181, 185-86 (8th Cir. 1975). The Second Circuit questioned its earlier acceptance of the *Lansdown* rule in United States v. Alessi, 544 F.2d 1139 (2d Cir. 1976). The *Lansdown* rationale is derived from the Supreme Court decision in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

863. Young v. United States, 544 F.2d 415, 416 (9th Cir.), *cert. denied*, 97 S. Ct. 643 (1976).

864. *Id.* at 418.

865. *Id.* at 419. To prevent disruption of the trial, the United States Supreme Court has adopted a rule that "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." Berman v. United States, 302 U.S. 211, 212 (1937).

866. FED. R. CRIM. P. 30.

867. *Id.* 52(b). *See also* United States v. Hood, 493 F.2d 677, 682 (9th Cir.), *cert. denied*, 419 U.S. 852 (1974).

868. 547 F.2d 104 (9th Cir. 1976).

869. *Id.* at 108 (citations omitted).

870. United States v. Castillo-Felix, 539 F.2d 9, 13 (9th Cir. 1976); Egan v. Teets, 251 F.2d 571, 576 (9th Cir. 1957). The Ninth Circuit also follows the rule that, when a defendant escapes while his appeal is pending, the court does not have to consider the merits of the appeal. United States v. Villegas-Codallos, 543 F.2d 1124, 1125 (9th Cir. 1976). *See also* Molinaro v. New Jersey, 396 U.S. 365, 366 (1970).

vincing evidence discloses that Congress both considered and prohibited judicial review of the agency action in question.[871] The Ninth Circuit elaborated further on this test in *Kitchens v. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms.*[872] In *Kitchens*, the defendant pleaded *nolo contendre* to a charge of possessing a machine gun.[873] Upon successful completion of a probation term, he applied to the Treasury Department for relief from federal disabilities.[874] The director denied petitioner any relief. The Ninth Circuit held that a director's decision is reviewable but is limited to consideration of the purported reasons for the denial.[875] The director's statement need only list the grounds for his decision and give essential facts in support thereof.[876]

In all appeals, the defendant is required to file a notice of appeal within ten days after the entry of judgment.[877] Compliance with the ten-day deadline is mandatory. Failure to satisfy this requirement deprives the appellate court of jurisdiction to hear the appeal.[878] There are, however, a few exceptions to this rule. For example, if the defendant makes a motion for a new trial, his ten-day period does not begin to run until the judge has ruled on the motion. In *United States v. Stolarz*,[879] the petitioner had filed a notice of appeal within ten days after his motion for a new trial was denied.[880] The petitioner had failed, however, to file his first motion, the motion for a new trial, within the statutory period. The earlier failure to file a timely motion made petitioner's subsequent notice of appeal ineffective and untimely.[881]

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871. Dunlop v. Bachowski, 421 U.S. 560, 567 (1975).

872. 535 F.2d 1197 (9th Cir. 1976).

873. *Id.* at 1198. Possession of a machine gun is a violation of CAL. PENAL CODE § 12220 (West Supp. 1977).

874. 535 F.2d at 1198. Pursuant to 18 U.S.C. § 925(c) (1970), the defendant made his application to the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms.

875. 535 F.2d at 1199-200. *See also* Dunlop v. Bachowski, 421 U.S. 560, 572 (1975).

876. 535 F.2d at 1199-200.

877. *See* FED. R. APP. P. 4(b), which reads as follows:

Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. . . . A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. . . .

878. Smith v. United States, 425 F.2d 173, 194 (9th Cir. 1970).

879. 547 F.2d 108 (9th Cir. 1976).

880. *Id.* This exception is sanctioned by FED. R. APP. P. 4(b).

881. 547 F.2d at 112. Rule 4(b) of the FED. R. APP. P. states, in pertinent part,

The petitioner may circumvent the ten-day time limit by asking the district court to grant a thirty-day extension. The extension is available only upon the showing of "excusable neglect."[882] Mere acceptance by members of the clerk's staff at the district court does not amount to an acceptance by the court of petitioner's application for an extension. The district court must specifically rule on the application.[883]

In 1976 the Ninth Circuit affirmed its earlier determination that the trial court has wide discretion in granting or denying a defendant's motion for a new trial.[884] The court made it clear that its scope of review in this instance is narrow and that, absent demonstration of several factors,[885] the trial court ruling will be upheld.

E. Habeas Corpus

Ordinarily, constitutional claims are subject to federal habeas corpus review even though they were fully litigated in a prior state proceeding.[886] However, in *Stone v. Powell*,[887] the United States Supreme Court held that an exception to this rule exists when the alleged illegality involves petitioner's fourth amendment rights. Where a state has provided full and fair litigation of a fourth amendment claim, a state

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as follows: "If a *timely* motion . . . for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion . . . ." (Emphasis added).

882. FED. R. APP. P. 4(b). *See* Felix v. Cardwell, 545 F.2d 92 (9th Cir. 1976); United States v. Nichols, 534 F.2d 202, (9th Cir. 1976).

883. United States v. Stolarz, 547 F.2d 108, 111 (9th Cir. 1976). The Eighth Circuit has adopted a rule that the district court's acceptance of a notice of appeal filed after the tenth and up to the fortieth day after judgment is construed as a grant of additional time to file the notice under rule 4(b). United States v. Williams, 508 F.2d 410, 410 (8th Cir. 1974); United States v. Mills, 430 F.2d 526, 528 (8th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971). The Ninth Circuit rejects this rule in *Stolarz*, 547 F.2d at 111.

884. United States v. Harris, 534 F.2d 1371, 1373 (9th Cir. 1976); Lindsey v. United States, 368 F.2d 633, 636 (9th Cir. 1966), *cert. denied*, 386 U.S. 1025 (1967).

885. The Ninth Circuit has listed the following elements as necessary to show an abuse of the judge's discretion in denying a motion for a new trial:

> (1) The evidence must have been discovered since the trial; (2) it must be material to the factual issues at the trial, and not merely cumulative nor impeaching the character or credit of a witness; (3) it must be of such a nature that it would probably produce a different verdict in the event of a retrial.

United States v. Diaz-Rodriguez, 478 F.2d 1005, 1007 (9th Cir.), *petition for cert. dismissed*, 412 U.S. 964 (1973) (citations omitted). *See also* United States v. Durgin, 444 F.2d 308, 309 (9th Cir.), *cert. denied*, 404 U.S. 945 (1971).

886. Townsend v. Sain, 372 U.S. 293 (1963); Brown v. Allen, 344 U.S. 443 (1953).

887. 428 U.S. 465 (1976).

prisoner is precluded from seeking federal habeas corpus review under 28 U.S.C. § 2254 (1970).[888] In *Stone*, the defendant argued that judicial integrity and the deterrence effect of federal review require the court to consider the search and seizure issue.[889] The Court rejected this argument. The Ninth Circuit, demonstrating that it is prepared to follow the new rule, has declined to review fourth amendment claims.[890] In addition, the rule has been given retroactive effect[891] and it has been expanded to include those petitions filed under 28 U.S.C. § 2255.[892]

Where the state provides alternative methods of judicial review, federal habeas corpus is proper even though the defendant has not exhausted both alternatives.[893] Moreover, the state can require the petitioner to pursue one method or the other, "so long as the right to review is not foreclosed or unduly limited."[894] It is sometimes difficult, however, to determine at what point the defendant has satisfactorily dealt with state remedies. The state court must have ruled on the merits, and it will be presumed that the State did reach the merits if the record is silent.[895]

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888. *Id.* at 481-82. To the extent that Kaufman v. United States, 394 U.S. 217 (1969) purports to hold contra on constitutional grounds, it has been overruled. 428 U.S. at 481 & n.16.

889. Even before *Stone v. Powell*, at least one source noted that these grounds are not persuasive when fourth amendment rights are involved. Schneckloth v. Bustamonte, 412 U.S. 218, 259-66 (1973) (Powell, J., concurring).

890. Tisnado v. United States, 547 F.2d 452 (9th Cir. 1976); Corley v. Cardwell, 544 F.2d 349 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 757 (1977); Bracco v. Reed, 540 F.2d 1019 (9th Cir. 1976).

891. Bracco v. Reed, 540 F.2d 1019, 1020 (9th Cir. 1976).

892. Tisnado v. United States, 547 F.2d 452, 456-59 (9th Cir. 1976). Under 28 U.S.C. § 2254 (1970) a state prisoner may petition the district court for federal habeas corpus relief. Section 2255 is employed by a criminal defendant convicted in federal court. Under this latter section the defendant claims that the sentence given him by the district court is invalid. 28 U.S.C. § 2255 (1970). The "*Tucker*-type motion" under section 2255 is a charge that the sentence was enhanced by consideration of a prior conviction obtained in violation of the defendant's sixth amendment right to counsel. *See* United States v. Tucker, 404 U.S. 443 (1972).

893. Thompson v. Procunier, 539 F.2d 26 (9th Cir. 1976). *See also* Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953). This rule is in conformity with the practices of the Fourth and Fifth Circuits. Leftwich v. Coiner, 424 F.2d 157 (4th Cir. 1970); Buchanan v. United States, 379 F.2d 612 (5th Cir. 1967). Therefore, if the petitioner exercises his right to direct appeal in state court, he is not required to initiate a state collateral attack even if the state would provide the opportunity.

894. Thompson v. Procunier, 539 F.2d 26, 28 (9th Cir. 1976). The state has a legitimate interest in maintaining a uniform and orderly procedure for review.

895. *Id. See also* Gardner v. Griggs, 541 F.2d 851, 852 (9th Cir. 1976).

Federal courts will refuse to consider applications for habeas corpus relief unless the prisoner can be said to have exhausted available state remedies.[896] This rule is predicated upon notions of comity rather than the notion of inherent limitations upon federal power.[897] The Ninth Circuit has held that a federal court must decline to decide any of the petition's issues until the available state remedy for every issue is exhausted.[898] Thus, in *Gonzales v. Stone*,[899] defendant's petition alleged false imprisonment, ineffective assistance of counsel and lack of substantial evidence to support his conviction. Only the last two issues were raised and exhausted in state court. Therefore, the court held that the petition could not be considered.[900] Moreover, if the defendant has failed to exhaust his state administrative remedies, the district court may not consider the merits of the petition.[901]

Once the defendant has exhausted the available state remedies, he may petition the federal court in the district of incarceration[902] for habeas corpus relief. Once the district court has considered the petition and has ruled on the merits, the defendant can appeal the ruling

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896. Fay v. Noia, 372 U.S. 391, 419 (1963).

897. *Id.* at 420. There is a general trend towards denial of federal habeas corpus review in the interest of preserving federal/state comity. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976); Francis v. Henderson, 425 U.S. 536 (1976).

898. Gonzales v. Stone, 546 F.2d 807, 810 (9th Cir. 1976). *See also* James v. Reese, 546 F.2d 325, 327 (9th Cir. 1976); Seawell v. Rauch, 536 F.2d 1283, 1285 (9th Cir. 1976). This rule is in conformity with the practice of the Fifth Circuit. West v. Louisiana, 478 F.2d 1026, 1034 (1973), *aff'd on rehearing*, 510 F.2d 363 (5th Cir. 1975).

Several other circuits have considered the issue and have adopted a different view: unless the exhausted and unexhausted claims are interrelated, a federal court will decide the exhausted issues even though the petition contains several grounds for relief that have not been exhausted in state court. *See* Johnson v. United States Dist. Court, 519 F.2d 738, 740 (8th Cir. 1975); Hewitt v. North Carolina, 415 F.2d 1316, 1320 (4th Cir. 1969); Levy v. McMann, 394 F.2d 402, 404-05 (2d Cir. 1968); United States v. Myers, 372 F.2d 111, 112-13 (3d Cir. 1967). The position of the Ninth Circuit on this issue was uncertain. *See* Blair v. California, 340 F.2d 741 (9th Cir. 1965) (court dismissed habeas petition containing exhausted and unexhausted claims). *But cf.* Phillips v. Pitchess, 451 F.2d 913 (9th Cir. 1971), *cert. denied*, 409 U.S. 854 (1972) (petitioner seeking habeas corpus relief must exhaust available state remedies). *See generally* Davis v. Dunbar, 394 F.2d 754, 755 (9th Cir. 1968); Schiers v. California, 333 F.2d 173, 174 (9th Cir. 1964).

899. 546 F.2d 807 (9th Cir. 1976).

900. *Id.* at 810.

901. Seawell v. Rauch, 536 F.2d 1283, 1285 (9th Cir. 1976).

902. Pursuant to a petition for habeas corpus under 28 U.S.C. § 2254 (1970), the post-conviction review is accomplished by the federal court in the district of incarceration. In a petition under 28 U.S.C. § 2255 (1970), the court which originally imposed the sentence conducts the review.

but cannot file another petition with the district court.[903] The complex case is one in which it is difficult to ascertain if the first ruling was on the merits. In *Sanders v. United States*,[904] the Supreme Court announced a general rule that a denial is on the merits only if the files and records conclusively show that the prisoner is entitled to no relief.[905] In *Mayes v. Pickett*,[906] the district court had dismissed without a hearing two prior petitions filed by the defendant. However, the Ninth Circuit concluded that the records and files did not "conclusively show that [the prisoner was] entitled to no relief."[907] Therefore, the court reluctantly vacated the judgment below and remanded "for what is obviously a meaningless waste of time hearing."[908]

An awkward problem arises when a case is originally tried in federal court, since a petition for habeas corpus requires the trial court to consider issues which it has already fully litigated. In *Polizzi v. United States*,[909] it was held that a court may exercise discretion in refusing to reconsider an issue based on the "identical grounds" already litigated.[910] The court adopted an expansive view of what constitutes

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903. Tucker v. Gunn, 541 F.2d 1368 (9th Cir. 1976); Mayes v. Pickett, 537 F.2d 1080 (9th Cir. 1976).

904. 373 U.S. 1 (1963).

905. *Id.* at 16. It should be noted that, under certain circumstances, the district court is required to at least hold an evidentiary hearing to settle unresolved issues of fact. The following elements must be present:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Founts v. Pogue, 532 F.2d 1232, 1234 (9th Cir.), *cert. denied*, 426 U.S. 925 (1976) (quoting Townsend v. Sain, 372 U.S. 293, 313 (1963)).

906. 537 F.2d 1080 (9th Cir. 1976).

907. *Id.* at 1083. The court indicated a desire to follow the Fourth Circuit rule announced in Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975). In *Crawford* it was stated that, where a plea is accepted in compliance with FED. R. CRIM. P. 11, the desire for uniformity and finality renders habeas corpus inapplicable although the record is not "conclusive." The Fifth Circuit follows the *Crawford* rule. Johnson v. Massey, 516 F.2d 1001 (5th Cir. 1975). However, in *Mayes*, the Ninth Circuit felt compelled to follow its own precedent. *See also* Fontaine v. United States, 411 U.S. 213 (1973); Reed v. United States, 441 F.2d 569, 572-73 (9th Cir. 1971); Lopez v. United States 439 F.2d 997, 1000 (9th Cir. 1971); Diamond v. United States, 432 F.2d 35 (9th Cir. 1970); Jones v. United States, 384 F.2d 916, 917 (9th Cir. 1967).

908. 537 F.2d at 1084-85.

909. 550 F.2d 1133 (9th Cir. 1976).

910. *Id.* at 1136 (quoting Sanders v. United States, 373 U.S. 1, 16 (1963)). The Supreme Court has announced that a district court may refuse to entertain a repetitive

"identical grounds."[911] It is clear that identical grounds may be proved by different factual allegations and supported by different legal arguments.[912] However, all doubts should be resolved in favor of the applicant.[913]

In 1976 the Ninth Circuit was forced to decide the delicate question of whether, in reviewing a state prisoner's petition for relief, the district court is bound to apply the state procedural rule or the corresponding federal law.[914] The case arose in a setting where the defendant admitted at his arraignment that he had three prior convictions. The prosecutor used this admission to convict the petitioner under the California "habitual criminal" statute.[915] The California Supreme Court had ruled prior to this time that the prosecutor did not have to inform the prisoner of the significance of admitting his prior convictions at the arraignment.[916] The federal rule was contra.[917] In reversing a district court determination,[918] the Ninth Circuit held that federal constitutional law must be interpreted in accordance with the federal habeas corpus statute.[919] Therefore, the federal rule should have been applied in this case and the defendant should have been informed as to the significance of admitting his prior convictions.

F. Prisoners' Rights

The Supreme Court has never defined the scope of a prisoner's first amendment right to send letters from jail without government interference.[920] The Ninth Circuit, however, has indicated in at least two re-

petition absent a showing of manifest injustice or a change in law. Kaufman v. United States, 394 U.S. 217, 226-27 & n.8 (1969); Clayton v. United States, 447 F.2d 476 (9th Cir. 1971).

911. Polizzi v. United States, 550 F.2d at 1136.

912. *Id.*

913. *Id.*

914. Sesser v. Gunn, 529 F.2d 832 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1150 (1977).

915. CAL. PENAL CODE § 644 (West 1970) (repealed 1976).

916. This rule was changed by the state supreme court in *In re* Yurko, 10 Cal. 3d 857, 519 P.2d 561, 112 Cal. Rptr. 513 (1974). However, *Yurko* could not be applied in *Sesser v. Gunn* since the California court refused to give the rule retroactive effect.

917. Wright v. Craven, 461 F.2d 1109 (9th Cir. 1972). The Ninth Circuit decided to apply the rule prospectively only. The facts in *Sesser v. Gunn* arose nine months after *Wright*. *See also* Bernath v. Craven, 506 F.2d 1244 (9th Cir. 1974).

918. The district court in *Sesser v. Gunn* ruled that the California Supreme Court is "clearly the final expositor of state law." 529 F.2d at 934.

919. *See* Townsend v. Sain, 372 U.S. 293, 318 (1963); Brown v. Allen, 344 U.S. 443, 459 (1953).

920. The Court did affirm a lower court decision on point in Procunier v. Martinez,

cent decisions that a prisoner retains his constitutional right to free expression.[921] Therefore, prison officials do not have absolute authority to censor letters or to deny an inmate the privilege of corresponding with the outside world.[922]

In *Navarette v. Enomoto*,[923] the petitioner complained that his right of free access to the courts was denied by prison officials on unconstitutional grounds.[924] He alleged that his employment as prison librarian and his enrollment in a law school visitation program were terminated solely to punish him or to hamper his legal activities. The Ninth Circuit acknowledged that while it has "traditionally been reluctant to interfere in matters of state prison administration,"[925] such interference was justified when necessary to protect a prisoner's rights. The court held that if the petitioner's contentions were true, then his constitutional rights had been violated.[926]

The Ninth Circuit, in a 1976 case,[927] established procedural guidelines for prisoners who desire judicial review of the government's decision to take away accumulated "good time." The Circuit recognized that forfeiture of good time is not "the same immediate disaster that the revocation of parole is for the parolee,"[928] and therefore established

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416 U.S. 396 (1974). The district court found that the prisoner retained a substantial first amendment right which forbids prison officials from censoring mail. However, on appeal, the Supreme Court affirmed on a narrower basis, holding that the censorship of an inmate's letters is violative of the non-prisoner recipient's first amendment rights. *Id.* at 408-09.

921. McKinney v. DeBord, 507 F.2d 501, 505 (9th Cir. 1974); Seattle-Tacoma Newspaper Guild, Local 82 v. Parker, 480 F.2d 1062, 1065 (9th Cir. 1973).

922. Navarette v. Enomoto, 536 F.2d 277 (9th Cir. 1976), *cert. granted*, 97 S. Ct. 783 (1977).

923. 536 F.2d 277 (9th Cir. 1976), *cert. granted*, 97 S. Ct. 783 (1977).

924. *See* Hatfield v. Bailleaux, 290 F.2d 632, 637 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961). In *Hatfield*, it was decided that right of access to the court means:

> the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters.

Id. at 637. The prisoner has a right to the assistance of knowledgeable inmates (Johnson v. Avery, 393 U.S. 483, 488-89 (1969)), and the right of access to a reasonably good set of lawbooks (Gilmore v. Lynch, 319 F. Supp. 105, 111 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971)).

925. Navarette v. Enomoto, 536 F.2d 277, 281 (9th Cir. 1976), *cert. granted*, 97 S. Ct. 793 (1977) (quoting Williams v. Field, 416 F.2d 483, 485 (9th Cir. 1969), *cert. denied*, 397 U.S. 1016 (1970)).

926. *Id.*

927. Seawell v. Rauch, 536 F.2d 1283 (9th Cir. 1976).

928. *Id.* at 1284 (quoting Wolff v. McDonnell, 418 U.S. 539, 560-61 (1974)).

a specific procedure. First, the inmate must apply to the Director of the Bureau of Prisons for a recommendation that any forfeited good time be restored. Then, if the Director offers such a recommendation, the Attorney General can reinstate the good time.[929] The prisoner may petition for judicial review only if the Director has been given an opportunity to act on the prisoner's behalf but has refused to do so.[930]

G. Double Jeopardy

The double jeopardy prohibition of the fifth amendment is made applicable to the states through the due process clause of the fourteenth amendment.[931] A problem arises where, for purposes of ascertaining the point at which jeopardy attaches, a state court applies a standard different than the one enunciated by the United States Supreme Court. The need for a uniform test applicable to both state and federal proceedings is especially acute in areas such as double jeopardy, since the violation of this provision requires that the accused automatically be set free.[932] The Ninth Circuit has decided that federal and state courts should apply the same test[933] and that the appropriate standard is the Supreme Court's "interpretations of the fifth amendment double jeopardy provision."[934]

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929. 18 U.S.C. § 4166 (1970).

930. Seawell v. Rauch, 536 F.2d at 1285. *See also* Williams v. United States, 431 F.2d 873, 874 (5th Cir. 1970); Smoake v. Willingham, 359 F.2d 386, 387 (10th Cir. 1966).

931. Benton v. Maryland, 395 U.S. 784, 794 (1969).

932. The violation occurs when, after the defendant is expressly or impliedly acquitted, the prosecutor attempts to try the defendant again for the same offense. *See* United States v. Jenkins, 420 U.S. 358 (1975); Green v. United States, 355 U.S. 184 (1957). However, where the first trial ends in conviction, retrial will not be barred upon reversal. United States v. Tateo, 377 U.S. 463 (1964). The Ninth Circuit has also acknowledged that, where the case is reversed, the prosecutor may file wholly different charges. United States v. Poll, 538 F.2d 845 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 486 (1977).

933. Bretz v. Crist, 546 F.2d 1336 (9th Cir. 1976), *appeal filed sub nom.* Crist v. Cline, 97 S. Ct. 1676 (1977). The Supreme Court has repeatedly stated that the same constitutional norms are to be employed in assessing conduct in state and federal cases. *See* Pointer v. Texas, 380 U.S. 400, 406 (1965) (sixth amendment confrontation clause applied to states under same test which protects against federal encroachment); Malloy v. Hogan, 378 U.S. 1, 11 (1964) (same standards must determine whether accused's silence in either federal or state proceeding is justified); Ker v. California, 374 U.S. 23, 33 (1963) (standard of reasonableness same under fourth and fourteenth amendments).

934. Bretz v. Crist, 546 F.2d 1336, 1341 (9th Cir. 1976) (citing Benton v. Maryland, 395 U.S. 784, 796 (1969)). The circuit courts have adhered strictly to this rule. *See, e.g.*, Gibson v. Ziegele, 479 F.2d 773, 776 (3d Cir.), *cert. denied*, 414 U.S. 1008 (1973); Smith v. Mississippi, 478 F.2d 88, 93 (5th Cir.), *cert. denied*, 414 U.S. 1113 (1973);

In *United States v. Finch*[935] the Ninth Circuit held that, although jeopardy attached when the district judge received an agreed statement of facts while considering defendant's motion to dismiss the information,[936] appeal by the prosecution was not barred because no additional facts were required to be found. The only determination to be made was a legal one.[937] In reaching its decision the court distinguished *United States v. Jenkins*,[938] where the Supreme Court held appeal was barred since it was unclear whether the district court action turned on an issue of fact rather than law.

The Supreme Court, however, granted certiorari and reversed.[939] The Court stated that since dismissal was ordered without any declaration of guilt or innocence by the district court, there was no basis to simply reinstate a general finding of guilt should the prosecution's appeal prove successful.[940] The appeal was therefore barred by the double jeopardy clause.

If a defendant exercises his right to a jury trial, jeopardy attaches when the jury is sworn and impaneled.[941] Therefore, if an indictment is dismissed before the case reaches the trial stage, the prosecutor is not prohibited from filing a subsequent indictment on the same charge.[942] Once the case has reached the trial stage, however, the judge must exercise caution in employing his authority to declare a mistrial. The traditional rule is that a mistrial will bar retrial of the defendant unless motivated by "manifest necessity,"[943] or when the "ends of public justice would otherwise be defeated."[944] The deter-

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Somerville v. Illinois, 447 F.2d 733, 735 (7th Cir. 1971), *rev'd on other grounds*, 410 U.S. 458 (1973).

935. 548 F.2d 822 (9th Cir. 1976), *rev'd*, 97 S. Ct. 2909 (1977) (per curiam).

936. *Id.* at 824-25.

937. *Id.* at 826-27.

938. 420 U.S. 358 (1975).

939. 97 S. Ct. 2909 (1977) (per curiam).

940. *Id.* at 2910.

941. Serfass v. United States, 420 U.S. 377, 388 (1975); Illinois v. Somerville, 410 U.S. 458, 467-68 (1973); United States v. Jorn, 400 U.S. 470, 480 (1971); Downum v. United States, 372 U.S. 734, 735-36 (1963). *See also* United States v. Olson, 504 F.2d 1222, 1224 (9th Cir. 1974); Alexander v. Fogliani, 375 F.2d 733, 734 (9th Cir. 1967).

942. United States v. Castillo-Felix, 539 F.2d 9 (9th Cir. 1976).

943. United States v. Perez, 22 U.S. 579, 580 (1824). *See also*, United States v. Dinitz, 424 U.S. 600, 607 (1976); Illinois v. Somerville, 410 U.S. 458, 461 (1973); United States v. Jorn, 400 U.S. 470, 485 (1971).

944. United States v. Perez, 22 U.S. 579, 580 (1824).

minative issue is always, given the facts of a particular case, was there a "manifest necessity" to declare a mistrial?

In *Bretz v. Crist*,[945] trial by jury had commenced when it was discovered that the indictment contained a typographical error. The judge declared a mistrial to enable the prosecutor to correct the mistake. On appeal, it was held that there was no manifest necessity for a mistrial under these circumstances, since the judge could have permitted an amendment to the indictment and allowed the trial to continue.[946] Therefore, retrial of the defendant was barred by the double jeopardy clause.

When a mistrial is declared because the jury is unable to reach a decision, the Supreme Court has ruled that retrial is not barred by a claim of double jeopardy.[947] However, there are differing views as to how long the judge must wait before he concludes that the jury cannot reach a decision and declares a mistrial.[948] The Ninth Circuit decided last year that the trial judge has broad discretion in choosing how long the court must wait for a jury to reach its decision.[949] The judge's decision will be reversed only upon a clear abuse of discretion.[950]

It is clear that the trial judge must consider alternatives before he can declare a mistrial.[951] In *Arizona v. Washington*,[952] the court demonstrated the harsh consequences of failure to consider the options. Defendant's murder conviction had been reversed as a result of prosecutorial impropriety.[953] During the retrial, the defense attorney informed the jury as to the prosecutor's actions at the first trial. The judge declared a mistrial. On appeal, the Ninth Circuit ruled that there

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945. 546 F.2d 1336 (9th Cir. 1976), *appeal filed sub nom.* Crist v. Cline, 97 S. Ct. 1676 (1977).

946. *Id.* at 1349.

947. United States v. Perez, 22 U.S. 579, 580 (1824). *See also* Wade v. Hunter, 336 U.S. 684, 688-89 (1948).

948. *See* United States v. See, 505 F.2d 845, 851 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975) (mistrial proper when jury deadlocked after ten hours of deliberation).

949. Corley v. Cardwell, 544 F.2d 349 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 757 (1977).

950. *Id.* at 351. *See also* Tisnado v. United States, 547 F.2d 452 (9th Cir. 1976). This ruling is in conformity with Oelke v. United States, 389 F.2d 668 (9th Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968).

951. United States v. Jorn, 400 U.S. 470, 480 (1971). This certainly accounts for the result in Bretz v. Crist, 546 F.2d 1336 (9th Cir. 1976), *appeal filed sub nom.* Crist v. Cline 97 S. Ct. 1676 (1977).

952. 546 F.2d 829 (9th Cir. 1976), *cert. granted*, 97 S. Ct. 1643 (1977).

953. *Id.* at 830. The prosecutor had failed to disclose "*Brady* materials" upon request by the defense attorney.

was no "manifest necessity" for a declaration of mistrial since the trial court did not indicate and the record did not reflect that the judge considered any alternatives.[954] Reprosecution of the defendant was barred.

Assuming that a trial is properly terminated because of manifest necessity, there arises an issue as to when jeopardy attaches in the event of future disposition ending in the defendant's favor. In *United States v. Sanford*,[955] the district court dismissed an indictment prior to retrial. The Ninth Circuit considered the case on two occasions. The first time, it was held that jeopardy had attached when the indictment was dismissed before retrial. The Supreme Court remanded "for consideration in light of *Serfass v. United States*."[956] On remand, the trial court and the Ninth Circuit rejected the notion that *Serfass* altered the prior ruling and, once again, ruled that reprosecution was barred. The Supreme Court reversed, holding that jeopardy has not attached when, after the first trial results in a hung jury, an indictment before retrial is dismissed.[957]

The double jeopardy clause does not prohibit a second trial in a different court on the identical charge where the respective courts are not of the same "sovereign."[958] The Ninth Circuit has declared that an Indian tribal court and a federal district court constitute parts of the same sovereign.[959] Thus, once the defendant is tried before an Indian Tribal Court on the charge of contributing to the delinquency of a minor, a district court is barred from bringing charges amounting to a lesser included offense stemming from the same incident.[960]

It is manifest that a juvenile court is considered part of the same sovereign as that to which a state court belongs, since double jeopardy pre-

954. *Id.* at 832. The court specifically suggested that the judge should have considered cautioning the jury to disregard the defense attorney's statements.

955. 429 U.S. 14 (1976).

956. 420 U.S. 377 (1975).

957. 429 U.S. 14 (1976), *rev'g* United States v. Sanford, 536 F.2d 871 (1976).

958. Abbate v. United States, 359 U.S. 187 (1959) (no violation when state guilty plea followed by federal charge stemming from same incident); Bartkus v. Illinois, 359 U.S. 121 (1959) (no violation when federal acquittal followed by state conviction). *Cf.* Waller v. Florida, 397 U.S. 387 (1970) (local and state prosecutions for same offense is violation of double jeopardy prohibition).

959. United States v. Wheeler, 545 F.2d 1225, 1258 (9th Cir. 1976), *cert. granted*, 98 S. Ct. 53 (1977).

960. *Id.* at 1258. *See also* Blockburger v. United States, 284 U.S. 299, 304 (1932); Gavieres v. United States, 220 U.S. 338, 342 (1911); Henry v. United States, 215 F.2d 639, 641 (9th Cir. 1954).

vents a minor defendant first subjected to an adjudicatory hearing in juvenile court from being subsequently tried as an adult.[961] This is the case whenever the juvenile ruling is on the merits. However, where a hearing in juvenile court is solely to determine whether to try the minor as an adult, there is no ruling on the merits.[962] Double jeopardy does not prevent the state from bringing charges subsequent to a decision to transfer the case from juvenile court.

VII. JUVENILE OFFENDERS

A state court hearing to determine whether a juvenile offender should stand trial as an adult does not constitute a proceeding on the merits.[963] The double jeopardy provision of the fifth amendment, therefore, does not bar prosecution of the case in federal district court after a transfer.[964]

Even if the youth offender is tried as an adult, the district court may still impose sentence pursuant to the provisions of the Youth Corrections Act.[965] Under that act a minor defendant convicted of a criminal offense may be sentenced to the custody of the Attorney General rather than to imprisonment;[966] and the requirement that such a sentence be "in lieu of imprisonment" prevents the judge from adding any term of prison, parole or probation.[967] However, the fact that an accused may be sentenced as a youth offender does not alter the constitutional requirement that the Government proceed by indictment and not by information if the case is tried in federal court.[968]

In *United States v. Martin-Plascencia*,[969] the defendant appealed from an adjudication of juvenile delinquency on the grounds that he was

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961. Breed v. Jones, 421 U.S. 519 (1975). The "dual sovereignty" status of juvenile courts and federal courts has been abolished by statute. 18 U.S.C. § 5032 (1970).

962. United States v. Martinez, 536 F.2d 886, 891 (9th Cir.), *cert. denied*, 429 U.S. 907 (1976).

963. *Id.* If the juvenile court proceeding had been a hearing on the merits of the case, then reprosecution would be barred. Breed v. Jones, 421 U.S. 519, 541 (1975).

964. United States v. Martinez, 536 F.2d 886, 891 (9th Cir.), *cert. denied*, 429 U.S. 907 (1976).

965. *See* 18 U.S.C.A. §§ 5006, 5010(b) (West Supp. 1977).

966. *Id.* § 5010(b).

967. *See* United States v. Myers, 543 F.2d 721, 722-23 (9th Cir. 1976) (parole is functional equivalent of imprisonment for purpose of sentencing under Youth Corrections Act).

968. United States v. Ramirez, No. 75-1395 (9th Cir. Sept. 16, 1976).

969. 532 F.2d 1316 (9th Cir. 1976).

denied his constitutional right to a jury trial.[970] While the Supreme Court has held that a minor is entitled to representation by counsel in any juvenile delinquency proceeding which may result in commitment to an institution,[971] juveniles have never been afforded the right to a jury trial. In *Martin-Plascencia*, the Ninth Circuit rejected defendant's claim to such a right, holding that neither the Constitution nor recent amendments to the Federal Juvenile Delinquency Act afforded him the right to a jury trial.[972]

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970. *See* Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5032, 5033 (Supp. V 1975). The Ninth Circuit has consistently denied the defendant a right to a jury trial when charged under this act. *See, e.g.*, United States v. Salcido-Medina, 483 F.2d 162 (9th Cir. 1973); United States v. James, 464 F.2d 1228 (9th Cir. 1972).

971. *In re* Gault, 387 U.S. 1 (1967).

972. 532 F.2d at 1318. Note that sections 5032 and 5033 were amended in 1974. *Martin-Plascencia*, therefore, is an interpretation by the Ninth Circuit that the amendments have not changed the prior rule with respect to a juvenile's right to a jury trial.