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Ninth Circuit Review—Criminal Law in the Ninth Circuit: Recent Developments

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CRIMINAL LAW IN THE NINTH CIRCUIT: RECENT DEVELOPMENTS

I. ARREST, SEARCH & SEIZURE

A. Scope of the Fourth Amendment

1. Private searches

The language of the fourth amendment prohibits "unreasonable" search and seizure, without distinguishing between government and

private* activity.[1] However, courts have distinguished the two types of activity, applying the reasonableness and warrant requirements of the fourth amendment only to the government.[2]

The Ninth Circuit in *United States v. Gumerlock*[3] amplified an earlier holding in *United States v. Humphrey*,[4] where a search by Western Airlines personnel, motivated by private interests, was held not to be within the scope of the fourth amendment. In *Gumerlock*, the court confronted a private search motivated at least in part by a desire to aid in law enforcement. Airline employees, their suspicions aroused by the demeanor of a customer, searched the packages he presented for shipment and discovered heroin. The appellants argued that the airline employees were motivated by a desire to aid in law enforcement, thus

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* This survey covers decisions of the Ninth Circuit prior to January, 1980.

1. U.S. CONST. amend. IV states:

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

2. *E.g.*, United States v. Sherwin, 539 F.2d 1 (9th Cir. 1976) (en banc) (contraband removed during private search and before any police involvement not subject to exclusionary rule); United States v. Ogden, 485 F.2d 536 (9th Cir. 1973) (private search motivated by curiosity does not violate fourth amendment); Eisentrager v. Hocker, 450 F.2d 490 (9th Cir. 1971) (trespassory search by private individual does not render evidence inadmissible).

California case law regarding private searches has developed differently from federal law. *E.g.*, People v. Zelinski, 24 Cal. 3d 357, 594 P.2d 1000, 155 Cal. Rptr. 575 (1978). The California Supreme Court in *Zelinski* held that where store detectives, "fulfilling a public function in bringing violators of the law to public justice," detained a woman for criminal process, evidence confiscated by them was subject to fourth amendment standards and to the exclusionary rule. The *Zelinski* court recognized that the illegal conduct of private security personnel presents a "threat to privacy rights . . . that is comparable to that which may be posed by the unlawful conduct of police officers." *Id.* at 366, 594 P.2d at 1005, 155 Cal. Rptr. at 580.

3. 590 F.2d 794 (9th Cir. 1979) (en banc) (reversing United States v. Fannon, 556 F.2d 961 (9th Cir. 1977)). For a discussion of *Fannon*, see Note, *Airport Search and Seizure*, 44 J. AIR L. & COM. 862 (1979) (urging that the Ninth Circuit reverse its decision on rehearing, since excluding the evidence would not serve the exclusionary rule's purpose of deterring illegal government conduct).

4. 549 F.2d 650 (9th Cir. 1977). In *Humphrey*, the defendant's suspicious behavior while picking up a package had led airline personnel to request that he open it. The package revealed only crumpled paper. The defendant began to leave with one of the papers, which an airline agent confiscated. The agent and an airport policeman, who had watched this activity through a convex mirror, discovered contraband in the paper after the defendant had left. Although the court observed that *Humphrey* presented problems not confronted in earlier cases, where government officials had not been involved in any way, the court nevertheless held that the evidence was admissible. Because the airline employee had been motivated by his own private interest—protecting his company against spurious loss claims—his acts could not be ascribed to the government. Thus, the seizure of the contraband did not violate the fourth amendment.

making their search governmental in nature and subject to fourth amendment restrictions. However, the court held that

> the airline employees acted officiously and not at the behest of the government. A private search in which the government is in no respect involved—either directly as a participant or indirectly as an encourager—is not subject to the Fourth Amendment because the private actor is motivated in whole or in part by a unilateral desire to aid in the enforcement of the law.[5]

In a lengthy footnote,[6] the *Gumerlock* court distinguished previous cases[7] where there had been "prior or contemporaneous governmental involvement."[8]

But nowhere in its opinion did the court confront the problems which may ensue when it becomes acceptable for private individuals to search, discover, and then turn over to the government that which the government is constitutionally prevented from seizing itself. Although civil remedies are available against private trespass, once a criminal prosecution is begun, the civil remedy is small compensation. Future courts may have to deal with undesirable situations resulting from these decisions which give substantially more leeway to private entities than to government.[9]

2. Reasonable expectation of privacy

Katz v. United States[10] established the fundamental rule that a citizen's reasonable expectation of privacy is a criterion for determining

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5. 590 F.2d at 800.

6. *Id.* at 800 n.19.

7. The court distinguished Gambin v. United States, 275 U.S. 310 (1927) (state troopers aided in the enforcement of federal law under an established policy which constituted ratification), Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) (opening of package by agent only because of request by government officials held to be direct government involvement), and United States v. Krell, 388 F. Supp. 1372 (D. Alaska 1975) (airlines agents had been alerted by law enforcement personnel to the possible presence of heroin in package they opened). In those cases, unlike in *Gumerlock*, there was some sort of governmental involvement.

8. United States v. Gumerlock, 590 F.2d at 800 n.19.

9. In United States v. Stevens, 601 F.2d 1075 (9th Cir. 1979), the Ninth Circuit held that the government need not honor promises of immunity given by a private investigator. Ironically, the Government *could* legally accept the information he gave. In contrast, in United States v. Perez-Castro, 606 F.2d 251, 253 (9th Cir. 1979), the Ninth Circuit held that illegally gathered evidence by state and local officials was inadmissible. This decision restated the holding of Elkins v. United States, 364 U.S. 206, 223-24 (1960), where the court had rejected the "silver platter" doctrine. This doctrine had allowed evidence obtained illegally by state or local officials to be used in a federal prosecution.

10. 389 U.S. 347, 351-52 (1967). Law enforcement officers had recorded Katz's calls

whether there has been a violation of the fourth amendment's prohibition against unreasonable searches.

This criterion was applied in the 1979 United States Supreme Court case of *Smith v. Maryland*.[11] Considering the warrantless installation of a pen register,[12] the *Smith* Court looked to Justice Harlan's concurring opinion in *Katz* for the two aspects of the test for reasonable expectation of privacy: whether the individual has an actual, subjective expectation of privacy, and whether that expectation is one that society is prepared to recognize as reasonable.[13]

In *Smith*, a woman had been robbed and was receiving threatening telephone calls from a man identifying himself as the robber. After tracing the license number of a suspicious vehicle, the telephone company, at police request, but without a warrant, installed a pen register at its offices to record numbers dialed on Smith's telephone. The defendant sought to have his conviction overturned on the ground that the warrantless installation of a pen register violated his fourth amendment rights.

The Court found that Smith had no reasonable expectation of privacy in dialing his telephone because telephone users know that phone companies record and use the numbers dialed for a variety of legitimate purposes. The majority remarked that "it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret."[14] The Court added that even if the petitioner did entertain some subjective expectation of privacy, the expectation would fail under the second prong of Justice Harlan's test, because it is not an expectation that society is prepared to recognize as reasonable.[15]

Justices Stewart, Brennan, and Marshall dissented. Justice

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from a public booth. Because Katz had a reasonable expectation of privacy while in the booth, the Court held that the wiretap violated his fourth amendment rights.

Recently, the United States Supreme Court, in Rakas v. Illinois, 439 U.S. 128 (1978), applied the *Katz* doctrine and held that petitioners, passengers in a car, had no reasonable expectation of privacy in the glove compartment or in the area under the seat. The Court reasoned that the petitioners claimed no possessory interest in the car or in its contents.

For a general discussion of the development of the doctrine of a reasonable expectation of privacy, see O'Brien, *Reasonable Expectations of Privacy: Principles and Policies of Fourth Amendment-Protected Privacy*, 13 NEW ENG. L. REV. 662 (1978).

11. 442 U.S. 735 (1979).

12. "A pen register is a mechanical device that records the numbers dialed on a telephone . . . ." United States v. New York Tel. Co., 434 U.S. 159, 161 n.1 (1977).

13. 442 U.S. at 740 (citing Katz v. United States, 389 U.S. 347, 361 (1967) (concurring opinion)).

14. *Id.* at 743.

15. *Id.* at 743-46.

Stewart, joined by Justice Brennan, simply disagreed with the majority: "information obtained by pen register surveillance of a private telephone is information in which the telephone subscriber has a legitimate expectation of privacy."[16] Justice Marshall, joined by Justice Brennan, doubted whether the public has the general knowledge of telephone company methods that the majority assumes. Noting that "as a practical matter, individuals have no realistic alternative" to accepting telephone company service, Marshall added that "[i]n my view, whether privacy expectations are legitimate within the meaning of *Katz* depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society."[17]

As the dissenting opinions in *Smith* illustrate, the law can set forth the guideline of "reasonable expectation of privacy," yet the ultimate decision turns on a question of "fact" which is based on subjective intent: whether or not individuals have expectations of privacy with regard to the telephone numbers they dial.

In *Lo-Ji Sales, Inc. v. New York*,[18] which concerned seizure of obscene books and materials, the state government contended that its search of the bookstore was valid under the fourth amendment because a shopkeeper, by opening his premises to the general public, has no legitimate expectation of privacy in the goods he displays. But the Court noted that the Town Justice viewed the material not as a member of the paying public, but as a judicial officer with the help of an employee in a coercive situation. Thus, the state's argument did not fit the facts of the case. The Court went on to declare that "there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees."[19]

In 1979 the Ninth Circuit addressed the problem of reasonable expectation of privacy in *United States v. Humphries*,[20] which concerned an agent's entry into a private driveway. Suspecting defendant Humphries of dealing in drugs, an agent of the Arizona Department of Public Safety, Narcotics Enforcement Division, drove to Humphries' home.

16. *Id.* at 747.

17. *Id.* at 750.

18. 442 U.S. 319 (1979).

19. *Id.* at 329. *Cf.* Marshall v. Barlow's, Inc., 436 U.S. 307, 314-15 (1978) (even though employees are not prohibited from reporting OSHA violations they observe in their daily functions, employer still has reasonable expectation of privacy with respect to non-employees).

20. 600 F.2d 1238 (9th Cir. 1979).

He noticed a car in the driveway and drove up the drive to read the license plates, from which he was able to positively identify the car as one which had previously been stopped in connection with the crime.[21]

Applying the *Katz* doctrine of reasonable expectation of privacy, the court said that "[a]lthough a driveway may be private under common law notions of property, it may not be for purposes of the fourth amendment."[22] The court cited *United States v. Santana*[23] which held that the doorway to a home is not a private place subject to fourth amendment protection. The Humphries automobile was visible from the street, unenclosed by a fence or other barrier. The agent had not moved bushes or other objects to read the license plate, and the license plates were affixed to the automobile for the very purpose of aiding in identification therefore the court held that the agent's actions did not violate any reasonable expectations of privacy, and thus did not "constitute a search subject to fourth amendment limitations."[24]

3. Warrantless searches: dwellings

Since *Agnello v. United States*,[25] it has been settled that, even where there is probable cause to believe a dwelling contains articles subject to seizure, a warrantless seizure, absent a recognized exception,[26] is contrary to the fourth amendment.[27] That position was re-

21. There were other issues in the case stemming from an earlier illegal arrest of Humphries. The admissibility of an identification of Humphries, and of information gained from the questioning of his accomplice was also at issue. 600 F.2d at 1243-47.

22. 600 F.2d at 1245. Compare this statement with that in Rakas v. Illinois, 439 U.S. 128, 143 (1978): "[A]rcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control [in determining reasonable expectations of privacy]."

23. 427 U.S. 38 (1976).

24. 600 F.2d at 1246. The court emphasized that it was not holding that automobile license numbers are never protected by the fourth amendment, but rather that the purpose of license plates—identification—affects the reasonable expectation of privacy concerning them. *Id.* at 1245-46 n.12.

25. 269 U.S. 20 (1925).

26. These exceptions are, in addition to the "plain view" exception, 1) consent, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); 2) search incident to lawful arrest, Draper v. United States, 358 U.S. 307 (1959); 3) hot pursuit, Warden v. Hayden, 387 U.S. 294 (1967); 4) the "automobile exception," Coolidge v. New Hampshire, 403 U.S. 443 (1971); 5) stop and frisk, Terry v. Ohio, 392 U.S. 1 (1968); and 6) inventory, South Dakota v. Opperman, 428 U.S. 364 (1976). The automobile and border exceptions are covered beginning at note 158 *infra* and accompanying text. The stop and frisk exception is discussed beginning with note 291 *infra* and accompanying text. For this list as it fits into an overall outline of search and seizure law, see Bloodworth, *Where Search and Seizure Is Today*, 39 ALA. LAW. 444 (1978). A recently developed exception to the warrant requirement is the "emergency exception." Michigan v. Tyler, 436 U.S. 499 (1978).

27. Agnello v. United States, 269 U.S. at 34.

stated by the Ninth Circuit in *United States v. Allard*,[28] where Drug Enforcement Administration agents entered the defendant's hotel room without valid consent. The court held that even though there was probable cause to believe the hotel room contained contraband, this did not justify an illegal entry, and that a later valid warrant could not retroactively validate the entry.

4. The plain view exception

The "plain view" doctrine, articulated in *Coolidge v. New Hampshire*,[29] has been established as an exception to the warrant requirement. If, in the course of a search supported by a warrant or by a recognized exception to the warrant requirement, an officer inadvertently comes across an article in plain view, its seizure does not violate the fourth amendment.[30]

In *United States v. Cornejo*,[31] a search was consented to by the lessee of an apartment. The lessee was not a suspect, but legitimately consented to the search of her apartment where weapons incriminating the suspects were ultimately found. These weapons, found in plain view in drawers opened with consent, were held to be legitimately seized.[32]

A more delicate problem concerned the search of the purse of one

28. 600 F.2d 1301 (9th Cir. 1979).

29. 403 U.S. 443 (1971).

30. *Id.* at 465.

31. 598 F.2d 554 (9th Cir. 1979).

32. *Id.* at 556. Compare this holding with that in United States v. Blalock, 578 F.2d 245 (9th Cir. 1978). In *Blalock*, an agent saw a brown bag in plain view and reasonably believed that the bag contained heroin. The court held that the evidence was admissible:

> The fact that the heroin per se was not visible because of the opaqueness of the brown bag does not preclude the application of the plain view rationale. The inescapable nexus between the brown bag and the purpose of the Agents' entry and arrest of Blalock is too obvious to play riddle games.

Id. at 249.

Other circuits have recently indicated agreement with the Ninth Circuit. *E.g.*, United States v. Roach, 590 F.2d 181 (5th Cir. 1979) (where initial intrusion by police is lawful, seizure of evidence in plain view does not violate fourth amendment); United States v. Hare, 589 F.2d 1291 (6th Cir. 1979) (officers in valid search discover contraband in plain view); United States v. Miller, 589 F.2d 1117 (1st Cir. 1978), *cert. denied*, 440 U.S. 598 (1979) (search limited in scope to noncriminal purpose reveals chart of marijuana location in plain view); United States v. Bomengo, 580 F.2d 173 (5th Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979) (police view subsequent to private search did not violate fourth amendment because the view was confined to the scope of the original search); United States v. Oakes, 564 F.2d 384 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978) (agent entered at defendant's invitation and seized firearms freely offered); United States v. Stums, 549 F.2d 831 (8th Cir. 1977) (per curiam) (prisoner's typewriter, left in plain view, legally seized from his cell without warrant because he had no reasonable expectation of privacy.)

of the appellants. While the purse itself had been in plain view, its contents were not, and the court stated that the warrantless search may have been illegal under *United States v. Chadwick*.[33] However, *Chadwick* had been decided after the questionable search in *Cornejo*, and the court chose not to apply it retroactively.[34] The search of the purse was upheld under Ninth Circuit law as it existed at the time because "the property was immediately associated with and in the possession of the arrestee."[35]

Extending the "plain view" doctrine, the court in *Cuevas-Ortega v. I.N.S.*[36] found that officers may listen to what is freely told. In *Cuevas-Ortega*, government agents were conducting an investigation of illegal aliens. They went to petitioners' apartment where they asked one petitioner, Del Toro, if she were an illegal alien, and she admitted she was. Since Del Toro's comments were freely given, the *Cuevas-Ortega* court said that "[j]ust as there is no 'search' involved when an officer observes that which is clearly and plainly to be seen, . . . there is no 'search' or 'seizure' when an officer listens to what he is freely told."[37]

In *United States v. Ortiz*,[38] an officer approached a service station where he had reason to believe a drug transaction was taking place. It was undisputed that he was lawfully in the station and that he would have been entitled to seize the jar of heroin which was in plain view. However, when he announced himself, the suspects ran from the room, one of them taking the jar with him, removing it from the officer's view. The court held that this did not invalidate the officers' ultimate confiscation of the jar under the plain view doctrine.[39]

In *United States v. Hoffman*,[40] firemen, who were legitimately present in the defendant's trailer, discovered a sawed-off shotgun in the

33. 433 U.S. 1 (1977). The *Chadwick* Court held that a warrantless search of a footlocker was not justified under the "automobile exception," because "a person's expectations of privacy in personal luggage are substantially greater than in an automobile." *Id.* at 13.

In Arkansas v. Sanders, 442 U.S. 753 (1979), the Supreme Court reaffirmed the holding in *Chadwick*. The Court decided that even though there was probable cause to search luggage taken from an automobile, the search should have been delayed until a warrant was obtained. For a fuller discussion of the *Chadwick* case, see *notes* 164-184 *infra* and accompanying text.

34. 598 F.2d at 556. The court said that "[u]nder the law in this Circuit prior to *Chadwick*, the search of appellant Reyes's purse was lawful as a search of property associated with and in the possession of the arrestee." *Id.* at 557.

35. *Id.* at 557.

36. 588 F.2d 1274 (9th Cir. 1979).

37. *Id.* at 1277.

38. 603 F.2d 76 (9th Cir. 1979).

39. *Id.* at 80.

40. 607 F.2d 280 (9th Cir. 1979).

course of fighting the fire. While they were still going in and out of the trailer, but apparently after the fire was out, they told an arriving police officer about the gun. The officer entered the trailer with the intention of seizing the weapon, seized it, and left the trailer without assisting the firemen in any way. Defendant, convicted of possessing a sawed-off shotgun and of being a convicted felon in possession of a firearm, appealed on the ground that the seizure was not justified under the plain view doctrine. The court agreed, finding that while the firemen had legitimately seen the weapon in the course of their duties, the policeman was not justified in entering the trailer solely to seize the weapon, and thus could not invoke the plain view doctrine.[41] No exigent circumstances justified the seizure: the weapon was known not to be loaded, and thus not a fire hazard, and there was no necessity to seize it to protect it from destruction.[42]

5. The "exigent circumstances" exception

United States v. Robertson[43] defines "exigent circumstances" as "those in which a substantial risk of harm to the person involved or to the law enforcement process would arise if the police were to delay a search until a warrant could be obtained."[44] The need for the search must be "so strong as to outweigh the protection of individual rights provided by the warrant requirement," and there must be "no practical way to avoid these risks" and apply for a warrant.[45] In *Robertson*, after a robbery of a savings & loan, police observed the suspects entering a house. It was feared the defendant would escape and evidence would be destroyed, but the officers were willing to await the arrival of an F.B.I. agent before entering. Had they entered the house immediately, the court would undoubtedly have found sufficient "exigent circumstances" to uphold the subsequent warrantless search. But the ensuing

41. *Id.* at 284-85. *Accord*, Michigan v. Tyler, 436 U.S. 499 (1978) (after extinguishing fire, officials could remain in building to try to determine its cause, but any additional entries to investigate were subject to the warrant requirement.) For a discussion of *Tyler*, see Note, Michigan v. Tyler: *The Arson Investigation—Its Dual Nature and Fourth Amendment Search Requirements*, 1979 DET. C.L. REV. 329.

42. *Cf.* United States v. Guidry, 534 F.2d 1220, 1222-23 (6th Cir. 1976) (police officer's warrantless entry excused by need to protect counterfeit bills from destruction).

But see United States v. Brand, 556 F.2d 1312 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978) (officers could legally enter house even though exigent circumstances no longer existed, but, absent a warrant or a recognized exception to the warrant requirement, had to confine their intrusion to scope of original search).

43. 606 F.2d 853 (9th Cir. 1979).

44. *Id.* at 859.

45. *Id.*

delay before entering of two hours led the court to question whether the officers passed up a "reasonable opportunity" to obtain a warrant.[46] Lacking sufficient knowledge of the facts, the court remanded the issue of exigent circumstances for a close analysis in light of the above principles.[47]

In *United States v. Dugger*,[48] the Government argued that the emergency exception to the warrant requirement justified officers' following a trail of blood to Dugger's apartment, turning the key, and entering when the doorbell went unanswered. Inside the officers identified themselves and shortly thereafter Dugger signalled that he would be out shortly after he put on his shoes. The officers then conducted a search of the apartment and discovered marijuana on the floor of the living room. Based on these plain view observations, the officers obtained a telephone warrant and discovered more marijuana and a sawed-off shotgun. Dugger was later convicted of unlawful possession of a firearm.

The Ninth Circuit reversed Dugger's conviction because there had not been sufficient showing of emergency at the trial. Not only had the Government pointed to no specific facts which would justify the warrantless entry, but even assuming that the entry was lawful, the fact that Dugger had shouted that he would be out as soon as he put on his clothes had dissipated the emergency.[49] Thus, evidence obtained from any subsequent search either by way of a later warrant or because of plain view observation was illegally obtained.

6. Consent to search

Consent by a suspect to a search obviates the necessity for a warrant under the fourth amendment. The leading United States Supreme Court case on consent, *Schneckloth v. Bustamonte*,[50] held that whether a consent is voluntary is a "question of fact to be determined from the totality of all the circumstances."[51]

In *Lo-Ji Sales Inc. v. New York*,[52] the Supreme Court considered whether the consent to search was valid. Police, in searching for obscene materials in a shop pursuant to a warrant later held inadequate for the scope of their search, placed a clerk under arrest and advised

46. *Id.*
47. *Id.*
48. 603 F.2d 97 (9th Cir. 1979).
49. *Id.* at 99-100.
50. 412 U.S. 218 (1973).
51. *Id.* at 227.
52. 442 U.S. 319 (1979).

him of the warrant. They later contended that he had consented to their search. The Court disagreed and held that "[a]ny 'consent' given in the face of a 'colorably lawful coercion' cannot validate the illegal acts shown here."[53]

In *United States v. Patacchia*,[54] officers at a Border Patrol checkpoint asked Patacchia if he would open his car trunk. He seemed willing to do so, but stated that he could not because the release switch was not working and he had no key. Police pried the trunk open and discovered marijuana. The court found that the defendant's reply on being asked to open the trunk did not constitute consent: " 'I would but I can't' is not the equivalent of 'Yes, you may open it if you can.' "[55]

In *United States v. Allard*,[56] when police knocked at Allard's hotel room and asked if they could come in, Berg, who also occupied the room, replied, "I suppose I don't have any choice."[57] The court upheld the trial court's finding that Berg's statement did not constitute a consent to the search.[58]

7. Standing to challenge an alleged illegal search

Jones v. United States[59] established that to have standing to object to a search or seizure, one must have been a victim of the activity "as distinguished from one who claims prejudice only through the use of evidence as a consequence of a search or seizure directed at someone else."[60]

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53. *Id.* at 329 (citing Bumper v. North Carolina, 391 U.S. 543, 549-50 (1968)).
54. 602 F.2d 218 (9th Cir. 1979).
55. *Id.* at 219.
56. 600 F.2d 1301 (9th Cir. 1979).
57. *Id.* at 1303.
58. *Id.* at 1304.
59. 362 U.S. 257 (1960).
60. *Id.* at 261. The *Jones* Court cited FED. R. CRIM. P. 41(e) as support for this statement.

In 1978, the United States Supreme Court held that a warrant could be issued to search the premises of one who is not even suspected of a crime. Zurcher v. Stanford Daily, 436 U.S. 547 (1978). The third party searched in *Zurcher* was a newspaper which had negatives, films, and pictures of demonstrators who had assaulted police officers. The decision, which overruled a Ninth Circuit holding, Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1977), has generated extensive controversy. For critiques of *Zurcher*, see Mathias, Zurcher: *Judicial Dangers and Legislative Action*, 15 TRIAL 40 (January 1979) (calling for legislative modification of *Zurcher's* position); Note, *The Past and Future of Non-Suspects' Privacy Interests*, 16 AM. CRIM. L. REV. 505 (1979) (urging the Court to find it unreasonable to allow invasion of a person's premises to secure evidence of another person's crime); Note, Zurcher v. Stanford Daily: *Newsroom Searches Held Valid*, 15 IDAHO L. REV. 167 (1978) (criticizing the opinion on first amendment grounds); Comment, Zurcher v. Stanford Daily: *The News-Room and Third Party Search and Seizure*, 5 OHIO N. U. L. REV. 739 (1978) (arguing that

The Ninth Circuit confronted the question of standing in *United States v. Mazzelli*.[61] Mazzelli and his co-conspirator Conway were suspected of smuggling drugs. Giving the appearance of traveling separately, they arrived at the San Francisco airport where Mazzelli's suitcase was searched and cocaine was discovered. Mazzelli was indicted for possession and conspiracy, and Conway for conspiracy. The case against Mazzelli was dropped when the Government conceded, after an adverse ruling at a hearing, that the search of his suitcase had been illegal. But the Government pressed appeal as to Conway, contending that he lacked standing to move to suppress, since it was Mazzelli's, not Conway's, suitcase that had been searched.[62] Both sides stipulated that Conway did have a possessory interest in the suitcase.[63] The *Mazzelli* court cited *Rakas v. Illinois*[64] as having reaffirmed the *Jones* position that "a possessory interest in that which is seized confers standing,"[65] and held that the stipulated possessory interest gave Conway standing to challenge the legality of the search.[66]

Both *Mazzelli* and *Rakas* involved the "casual visitor."[67] *United States v. Robertson*[68] took up the question of a visitor who was more than casual. Visiting his cousin overnight, the defendant had stored his belongings in the room in which he was found. He argued that the entry of the FBI into his cousin's home and his arrest violated the fourth amendment probable cause and warrant requirements. Both parties and the court agreed that defendant "[appeared] to have had a reasonable expectation of privacy in the area searched," and thus had standing to object.[69]

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one not criminally involved should be safe from intrusion); Comment, *The Theory of Probable Cause and Searches of Innocent Persons: The Fourth Amendment and* Stanford Daily, 25 U.C.L.A. L. REV. 1445 (1978) (outlining three views of probable cause, and declaring the *Zurcher* decision wrong under all of them). One writer, counsel for the Stanford Daily, raises the question of whether law offices can be invaded under *Zurcher*. Falk, *Are Law Offices Safe*? 6 BARRISTER 17 (Spring 1979).

61. 595 F.2d 1157 (9th Cir. 1979), *appeal pending*.

62. Conway would have had automatic standing if the crime with which he was charged had been one where possession was an essential element. *See* Brown v. United States, 411 U.S. 223, 229 (1973). However, possession is not an essential element of conspiracy, the crime with which Conway was charged in *Mazzelli*.

63. 595 F.2d at 1158.

64. 439 U.S. 128 (1978). For a summary of the facts in *Rakas*, see note 10 *supra*.

65. 595 F.2d at 1160.

66. *Cf.* Brown v. United States, 411 U.S. 223, 229 (1973) (defendants had sold the stolen goods before they were seized and having no remaining possessory interest in the goods, had no standing to object to their seizure).

67. United States v. Mazzelli, 595 F.2d at 1160; Rakas v. Illinois, 439 U.S. at 128.

68. 606 F.2d 853 (9th Cir. 1979).

69. *Id.* at 858 n.2.

B. Warrants

1. Entitlement to hearing on sufficiency of warrant

When a search or seizure has been conducted under a warrant, and the defendant wishes to challenge the warrant's sufficiency, the court will apply a two-pronged test to determine whether the defendant is entitled to a hearing. This test was articulated in *Franks v. Delaware*,[70] a 1978 Supreme Court case in which the defendant asserted that the search warrant, which had led to the discovery of incriminating items of clothing, had been based on an affidavit containing misstatements made in bad faith. The Court held that the test for determining whether the defendant was entitled to a hearing on the sufficiency of the warrant was twofold: 1) the challenger must allege deliberate falsehood or reckless disregard for the truth, supporting his allegations with facts, and 2) the allegedly false information must be necessary to a showing of probable cause.[71]

The Ninth Circuit applied this test in *United States v. Young Buffalo*,[72] a bank robbery case where the challenged warrant was allegedly based on intentional misstatements. The affiant allegedly failed intentionally to include the full range of characteristics given by witnesses in order to conform the description to that of the appellant, whom one witness had identified. The affiant was also accused of reckless misrepresentation of the defendant's ownership of a motorcycle and of the color of his car.[73] The trial court had relied on precedent establishing that any intentional misrepresentation invalidates a warrant,[74] and convicted Young Buffalo, asserting that any misrepresentations were unintentional. The Ninth Circuit affirmed the conviction but stated that the *Franks* test had established new criteria.[75]

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70. 438 U.S. 154 (1978). For a discussion of *Franks*, see Note, Franks v. Delaware: *Granting the Right to Challenge the Veracity of Search Warrant Affidavits*, 45 BROOKLYN L. REV. 391 (1979).

71. 438 U.S. at 171-72. California law as recently set forth in People v. Cook, 22 Cal. 3d 67, 583 P.2d 130, 148 Cal. Rptr. 605 (1978), has established that where there is an intentional misstatement in an affidavit for a search warrant, the warrant must be quashed and the products of the search excluded, regardless of the effect of the false information on the showing of probable cause. *Id.* at 87, 583 P.2d at 141, 148 Cal. Rptr. at 616. In addition, any negligent misstatements must be excised from the affidavit. *Id.* at 84, 583 P.2d at 139, 148 Cal. Rptr. at 614.

72. 591 F.2d 506 (9th Cir.), *cert. denied*, 99 S. Ct. 2178 (1979).

73. *Id.* at 508-09.

74. *E.g.*, United States v. Thomas, 489 F.2d 664 (5th Cir. 1973), *cert. denied*, 423 U.S. 844 (1975) (intentional misrepresentations would invalidate search warrant regardless of effect on probable cause).

75. 591 F.2d at 512.

Emphasizing the *Franks* determination "that '[a]llegations of negligence or innocent mistake are insufficient' to meet the first leg of the test to determine whether a hearing is required,"[76] the court found that the "misstatements [regarding the motorcycle and the car] do not reach the level of recklessness necessary to establish a constitutional violation."[77] Regarding the alleged intentional misstatement, the court held that the trial judge's determination that the misstatements were unintentional may have depended on " 'nuances of testimony and demeanor of witnesses', . . . [w]e cannot say that his finding that the misstatements were unintentional was clearly erroneous . . . ."[78] Applying the materiality prong of the *Franks* test, the court agreed with the trial judge that the affidavit contained sufficient facts to establish probable cause without the challenged material.[79]

In reaching its conclusions, the *Young Buffalo* court reiterated the settled position that, in evaluating the sufficiency of warrants, "great deference" must be given to the decision of the magistrate.[80]

2. Affidavits based on hearsay

Two United States Supreme Court cases set forth what has now become known as the *Aguilar-Spinelli* test for affidavits based on hearsay.[81] The Ninth Circuit applied this test in *United States v. Beusch*,[82] restating the test in the following manner: "First, the affidavit must show some underlying circumstances as to why the informant believed his information was reliable. Second, the affidavit must show some underlying circumstances that would allow the affiant to conclude that the informant was credible."[83]

The *Beusch* court applied this test in a case where a foreign cur-

76. *Id.* at 510.

77. *Id.*

78. *Id.* at 511 (quoting Campbell v. United States, 373 U.S. 487, 493 (1963)). *Cf.* United States v. Rettig, 589 F.2d 418 (9th Cir. 1978) (because police had failed to disclose to magistrate full purpose and extent of proposed search, evidence thus seized ordered suppressed).

79. 591 F.2d at 512.

80. *Id.* at 511. The court cited United States v. Fried, 576 F.2d 787, 791 (9th Cir. 1978) (great deference must be given to the decision by the magistrate). *See also* Spinelli v. United States, 393 U.S. 410, 419 (1969) (in spite of deference to magistrate's judgment, court did not sustain warrant) and United States v. Solario, 577 F.2d 554, 555 (9th Cir. 1978).

81. The two cases from which the test derives its name are Spinelli v. United States, 393 U.S. 410, 416 (1969), and Aguilar v. Texas, 378 U.S. 108, 114 (1964). Those cases established that there must be some underlying circumstances showing: (1) how the informant reached his or her conclusion and (2) that there are reasonable grounds for believing the informant is a credible person.

82. 596 F.2d 871 (9th Cir. 1979).

83. *Id.* at 874.

rency company and its officers were accused of violations of the Bank Secrecy Act. The defendants argued that the affidavit submitted by suspicious customs agents, who had noticed a number of packages going to the same address, did not reveal enough to allow the magistrate to assess the reliability of the information as required under the first prong of the *Aguilar-Spinelli* test.[84] Most of the information was based on hearsay. The parties conceded that the second prong—reliability of the informant—was met in this case.

Distinguishing the facts in *Beusch* from those in *Spinelli*, the court found the reference to "certain documents" in *Beusch*, when flushed out by a summary in the affidavit of the contents of the documents, was sufficient to meet the first *Aguilar-Spinelli* requirement. This contrasts with *Spinelli*, where the FBI mentioned only a "confidential informant," not substantiating the claim in "any acceptable way."[85] The *Beusch* court added that it was apparent from the affidavit that the "documents" in question were postal and customs records, and that, had this been stated outright, there would be no question that the *Aguilar-Spinelli* test was met.[86]

The Ninth Circuit last year applied the *Aguilar-Spinelli* test to a warrantless detention which had been based on an informer's tip. Because the detention so resembled an arrest, the court held that probable cause was necessary to justify it, and looked to *Aguilar-Spinelli* to assess the reliability of the tip upon which the detention had been based. Finding that the tip had not described the criminal activity with sufficient detail, the court in *United States v. Perez-Esparza*[87] held that the test was not met.

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84. *Id.* at 875. The affidavit stated that the sources of the affiant's information were "certain documents," but those documents were not identified.

85. *Id.*

86. *Id.* Recent cases on hearsay-based warrants include United States v. Harrick, 582 F.2d 329, 332 (4th Cir. 1978) (personal observations of a reliable third party working directly for an affiant are sufficient explanation of the underlying circumstances to satisfy the *Aguilar* test); United States v. Sclamo, 578 F.2d 888 (1st Cir. 1978) (evidence corroborating information, where informant had been reliable in the past, sufficient for probable cause); United States v. Louderman, 576 F.2d 1383, 1389 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978) (affidavit demonstrating reliability of informants and indicating that the information was corroborated through independent investigation sufficient to uphold finding of probable cause).

On the factual basis for warrants, *see generally* United States v. Bush, 582 F.2d 1016 (5th Cir. 1978) (factual showing necessary in obscenity case); United States v. Dubrofsky, 581 F.2d 208, 212-13 (9th Cir. 1978) (affidavit must disclose some supporting facts, must be tested in common sense fashion, and need only reveal sufficient underlying circumstances to allow magistrate to make determination with a degree of detachment).

87. 609 F.2d 1284 (9th Cir. 1979).

3. Power to seal affidavits

A 1979 case examined the issue of whether the district courts have the power to seal affidavits. In *In re Sealed Affidavits to Search Warrants*,[88] a Nevada district court had sealed an affidavit in order to avoid disrupting a nationwide investigation, but then relying on rule 41(c) of the Federal Rules of Criminal Procedure[89] ordered it unsealed because "federal courts have no power to seal affidavits upon which warrants are based."[90]

The Ninth Circuit stated that the district court had erred in focusing on rule 41(c), for "the courts have inherent power, as an incident of their constitutional function, to control papers filed with the courts within certain constitutional limitations."[91]

Deciding that courts do sometimes have the power to seal affidavits, the court remanded the case for determination consistent with the facts.

4. Use of warrants

In *Lo-Ji Sales, Inc. v. New York*,[92] the warrant for seizure of obscene materials mentioned only two copies of films. It contained a space to list items, but that portion was left blank. Later, after a sweeping search, a long list of items was added to the warrant.[93] The Court condemned this use of a warrant as "reminiscent of the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect."[94]

The Court also reiterated the settled position that a warrant must be issued by a detached magistrate.[95] The *Lo-Ji* Court found it objectionable that the justice who issued the warrant had participated in the search. "[H]e was not acting as a judicial officer but as an adjunct law-enforcement officer."[96]

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88. 600 F.2d 1256 (9th Cir. 1979) (per curiam).

89. *Id.* at 1257.

90. Rule 41 is entitled "Search and Seizure." Subsection c deals with the issuance and contents of search warrants. The district court in *In re Sealed Affidavits* said "nowhere in rule 41(c) is the power of a judge or magistrate to seal such an affidavit even suggested." 600 F.2d at 1257.

91. 600 F.2d at 1257.

92. 442 U.S. 319 (1979).

93. *Id.* at 324.

94. *Id.* at 325.

95. *Id.* at 326. (citing Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971)).

96. *Id.* at 327.

C. *Electronic Surveillance*

Perhaps in response to an increasing clamor for law and order, three United States Supreme Court cases last year,[97] two reversing the Ninth Circuit, held that the government's use of electronic surveillance devices had not violated the fourth amendment.

1. Covert entry to install eavesdropping equipment

The Omnibus Crime Control and Safe Streets Act of 1968[98] placed restrictions on the interception of wire and oral communications, allowing prosecutors to apply to a federal judge for authorization to wiretap where certain offenses are suspected.[99]

In 1978 the Ninth Circuit held, in *United States v. Santora*,[100] that the Crime Control Act did not allow courts to authorize break-ins to install legally warranted bugging devices and that any evidence gathered as a result of such a break-in must be excluded.[101] In 1979 this Ninth Circuit interpretation was reversed.[102] On remand, the Ninth Circuit returned an opinion consistent with another 1979 United States Supreme Court case, *Dalia v. United States*,[103] and held that break-ins for the purpose of installing bugging devices are permitted by the Crime Control Act.[104]

The *Dalia* Court concluded that "[t]he Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment."[105]

The telephone calls and office conversations of Dalia, suspected of receiving stolen goods, were monitored pursuant to court authorization. He challenged his conviction, moving to suppress evidence obtained under the bugging order since FBI agents had secretly entered his office to install bugging devices. Dalia contended that the bugging statutes, since they do not explicitly mention covert entry, meant to prohibit it; and that, even if such entry could be legal under the statutes, the applicant for the warrant would need specific authorization for covert entry.

Justice Powell, speaking for the Court, stated that "[a]bsent covert

97. Smith v. Maryland, 442 U.S. 735 (1979); Dalia v. United States, 441 U.S. 238 (1979); United States v. Caceres, 440 U.S. 741 (1979).

98. 18 U.S.C. §§ 2510-2520 (1976).

99. *Id.* at § 2516.

100. 583 F.2d 453 (9th Cir. 1978), *vacated*, 99 S. Ct. 2155, *rev'd*, 600 F.2d 1317 (1979).

101. 583 F.2d at 456-66.

102. Dalia v. United States, 441 U.S. at 238.

103. 441 U.S. 238 (1979).

104. 600 F.2d at 1321.

105. 441 U.S. at 248.

entry . . ., almost all electronic bugging would be impossible."[106] Reviewing the legislative history of the Crime Control Act, the Court concluded that Congress must have recognized this. To suggest that Congress then meant to exclude covert entry by its omission would be to impute to Congress "a self-defeating, if not disingenuous purpose."[107] The fourth amendment, the Court said, generally leaves it to "the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant."[108]

The *Dalia* majority also concluded that "the Fourth Amendment does not require that a Title III electronic surveillance order include a specific authorization to enter the premises described in the order."[109] The provision in Title III requiring notice upon completion of surveillance[110] was deemed to be sufficient by the court.

Justice Brennan, dissenting, agreed that the fourth amendment does not prohibit covert entry *per se*, but did not believe that Congress implicitly authorized such entry, nor that a warrant which does not mention such entry is sufficient to authorize it. Justices Stevens and Marshall also dissented, contending that the Court should not read in a Congressional authorization where none has been given.[111]

The Court's opinion in *Dalia* should at least temporarily calm contentiousness among the lower courts on the question of covert entry.[112] The Ninth Circuit had held in *Santora* that the courts had no power to authorize break-ins;[113] the District of Columbia had required warrants

106. *Id.* at 253. In support of this contention, the Court cited to McNamara, *The Problem of Surreptitious Entry to Effectuate Electronic Eavesdrops: How Do You Proceed After the Court Says "Yes"?* 15 AM. CRIM. L. REV. 1 (1977), which traced the recent history of federal cases on covert entry, suggested that all eavesdrop orders should contain entry provisions, and proposed a system of reporting to the authorizing judge as a check against abuse.

107. 441 U.S. at 254 (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)).

108. *Id.* at 257.

109. *Id.* at 258-59.

110. 18 U.S.C. § 2518(8)(d) (1976).

111. 441 U.S. at 262-80 (Stevens, J., dissenting).

112. For recent discussions of covert entry prior to the *Dalia* decision, see Comment, *Covert Entry in Electronic Surveillance: The Fourth Amendment Requirements*, 47 FORDHAM L. REV. 203 (1978) (comparing the circuits at 204 n.7); Comment, *The Illegality of Eavesdrop-Related Break-ins*: United States v. Finazzo and United States v. Santora, 94 HARV. L. REV. 919 (1979); Note, United States v. Finazzo, 48 U. CIN. L. REV. 158 (1979) (comparing the circuits at 160-61); Comment, *Constitutional Law—Criminal Procedure—Courts Split on the Necessity of Separate Authorization for Covert Entry Under Title III of the Omnibus Crime Control and Safe Streets Act of* 1968, 31 VAND. L. REV. 1055 (1978) (discussing United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977)).

113. 583 F.2d at 464.

for covert entry;[114] but the Second, Fourth, and Eighth Circuits had held that covert entry without specific authorization was acceptable, at least in some circumstances.[115] After *Dalia* another Ninth Circuit case, *United States v. Licavoli*,[116] followed suit and held that orders authorizing electronic surveillance were not invalid merely because they authorized surreptitious entry.[117]

2. Naming conversants in warrant

Under the Omnibus Crime Control Act, officials must obtain a warrant before installing eavesdropping equipment.[118] Three cases have recently dealt with alleged deficiencies in such warrants.

In *United States v. Martin*,[119] a case involving conspiracy to distribute heroin and cocaine, numerous issues regarding the sufficiency of the warrant were raised. The initial order to wiretap named some, but not all, of those who were ultimately indicted as a result of the surveillance. The court held the following: 1) that an innocent misstatement (here attributing a drug-related call to the wrong person, but one also involved in the conspiracy) does not invalidate the warrant;[120] 2) that unintentional withholding of the names of some of the suspects from the application does not require suppression of evidence incriminating them;[121] 3) that the fourth amendment does not require that the reasons for naming all probable conversers be shown in the application;[122] 4) that some suspects for whom no probable cause exists may be named and the evidence may later be used against them;[123] 5) that while it is mandatory to send notice, following the wiretap, to those persons

114. *E.g.*, United States v. Ford, 553 F.2d 146, 165 (D.C. Cir. 1977) (covert entry must be accompanied by a warrant).

115. *E.g.*, United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977) (warrant to install electronic surveillance must, to be effective, carry implicit authorization of covert entry); *In re* United States, 563 F.2d 637 (4th Cir. 1977) (to effectuate legislators' purpose in allowing some electronic surveillance, covert entry should be allowed where the judge knows of the planned entry); United States v. Agrusa, 541 F.2d 690, 697 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977) (covert entry to business premises acceptable partly because less reasonable expectation of privacy in a place of business, especially one unoccupied at the time of entry).

116. 604 F.2d 613 (9th Cir. 1979).

117. *Id.* at 619 (quoting Dalia v. United States, 441 U.S. 238, 248 (1979)).

118. 18 U.S.C. § 2516 (1976).

119. 599 F.2d 880 (9th Cir. 1979).

120. *Id.* at 886.

121. *Id.* at 885-86.

122. *Id.* at 884-85. The Court quoted United States v. Donovan, 429 U.S. 413, 427 n.15 (1977), as establishing that only the line to be tapped and the conversations to be seized must be named.

123. 599 F.2d at 885.

named in the application, notice to those not named is discretionary;[124] and 6) that the investigative agency may establish necessity for the wiretap without showing that it has exhausted all other possible investigative techniques.[125]

In *United States v. Baker*,[126] the defendant was not named in the wiretap affidavit. The court held that the defendant could not complain about alleged defects in the warrant, because before the wiretap the government had had no probable cause to believe that he was involved in the gambling operation.[127] Similarly, he could not object on the grounds that the government had failed to show that traditional investigative techniques had been tried and had failed.[128]

In *United States v. Kail*,[129] the Ninth Circuit held that a nonmaterial misrepresentation regarding the showing that other procedures were attempted did not invalidate the warrant. And although the defendant attacked the affidavit as lacking sufficient particularity about other procedures attempted, the court found that the "considerable detail" in the affidavit was adequate.[130]

3. Necessity for wiretap

In *United States v. Bailey*,[131] a narcotics case, the court rejected the defendants' contention that Title III of the Omnibus Crime Control and Safe Streets Act was unconstitutional.[132] The defendants also contended that there had not been an adequate showing of necessity for the wiretap, arguing that because the government had already accumulated evidence against some of the suspects, normal investigative techniques would have uncovered the desired additional evidence. According to the defendants, "the statute should not be construed to permit narcotics agents to evade the normal investigative technique requirements simply because there remain some unknown details or unprosecutable associates."[133]

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124. *Id.*
125. *Id.* at 887.
126. 589 F.2d 1008 (9th Cir. 1979).
127. *Id.* at 1011.
128. *Id.*
129. 612 F.2d 443, 447 (9th Cir. 1979).
130. *Id.*
131. 607 F.2d 237 (9th Cir. 1979).
132. *Id.* at 240-41. The court relied on United States v. Turner, 528 F.2d 143, 158-159 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975), *cert. denied*, 429 U.S. 837 (1976), in which the court "squarely held Title III to be constitutional under the Fourth Amendment." United States v. Bailey, 607 F.2d at 241.
133. 607 F.2d at 242.

Acknowledging that "[w]iretaps are not to be used routinely as the first step in criminal investigations," the court nevertheless stated that "the necessity requirement is also to be interpreted in a practical and commonsense fashion, and need not therefore be used only as a last resort."[134] Quoting *United States v. Baker*,[135] the *Bailey* court said that the statute[136] does not require the " 'indiscriminate pursuit to the bitter end of every nonelectronic device.' "[137] The court held that the trial court had properly denied the motion to suppress evidence gained through the wiretap.[138]

4. Pen registers

Smith v. Maryland[139] raised fundamental questions regarding the use of pen registers. In *Smith*, the Court cited an earlier decision, *United States v. New York Telephone Co.*,[140] where the respondent telephone company had been instructed by the district court to furnish the FBI with assistance in installing pen registers in a gambling case. The company refused to give the requested aid, stating that it would do so only pursuant to a wiretap order meeting the requirements of Title III of the Crime Control Act of 1968. The Court reasoned that Title III applied to "interception" of a wire or oral communication, and therefore, not to the installation of pen registers.[141] In addition, the Court noted that the district court could authorize installation and that it had the power to order the telephone company to aid the FBI. "Without the assistance of the Company in circumstances such as those presented here . . . these devices simply cannot be effectively employed."[142]

The *Smith* Court emphasized the unique position pen registers occupy. "A pen register differs significantly from the listening device employed in *Katz*, for pen registers do not acquire the *contents* of communications."[143] The Court found that there is no reasonable ex-

134. *Id.* at 241-42.

135. 589 F.2d 1008, 1013 (9th Cir. 1979).

136. 18 U.S.C. § 2518(1)(c) (1976).

137. 607 F.2d at 242.

138. *Id.* at 242-43.

139. 442 U.S. 735 (1979). For a full discussion of *Smith*, see notes 11-17 *supra* and accompanying text.

140. 434 U.S. 159 (1977).

141. *Id.* at 167-68.

142. *Id.* at 176.

143. 442 U.S. at 741. The listening device in *Katz* was installed outside a phone booth to intercept the conversations inside. Even though the government had not actually invaded the booth, and even though the booth was public, the Court found for the defendant, proclaiming that the fourth amendment "protects people, not places." 389 U.S. at 351.

Pen registers present a unique problem because these devices do not actually permit

pectation of privacy with regard to the phone numbers which one dials, and that therefore, the installation of pen registers was legal.

This holding reinforces two recent Ninth Circuit cases. *United States v. Louderman*[144] relied on the opinion in *Hodge v. Mountain States Telephone and Telegraph Co.*[145] In *Hodge*, the telephone company had installed, without a warrant, a pen register on Hodge's telephone to investigate his suspected obscene telephone calls. Employing reasoning similar to that used by the *Smith* Court, the *Hodge* court had held that the fourth amendment protects the contents of one's conversations, but that there is no reasonable expectation of privacy in telephone numbers dialed.[146]

5. Failure to follow agency regulations

In *United States v. Caceres*,[147] an agent failed to observe the preliminary requirements of the Internal Revenue Service regulations[148] before taping his conversation with a taxpayer and the taxpayer's wife. The defendants offered a bribe to the agents, and were prosecuted. Reversing the Ninth Circuit,[149] the *Caceres* Court held that the agent's failure to follow the IRS regulations did not require suppression of the tape recordings. Although courts must enforce agency regulations when they are mandated by the Constitution or by federal law, the Court found that the IRS had not been constitutionally required to adopt the regulations in question. The Court concluded that "we cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures."[150]

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eavesdropping. Rather, they simply record the numbers dialed from the telephone lines on which they are installed.

144. 576 F.2d 1383, 1389 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978).

145. 555 F.2d 254 (9th Cir. 1977).

146. *Id.* at 256 n.3. The court questioned whether this could be termed a government "search," even though there was cooperation with the police, but did not decide this issue because it found that this particular installation of a pen register did not violate the fourth amendment.

147. 440 U.S. 741 (1979).

148. IRS regulations require Justice Department approval for electronic surveillance. The Court cited Lopez v. United States, 373 U.S. 429 (1962), for the proposition that no such approval is mandated either by the Constitution or by federal law.

149. United States v. Caceres, 545 F.2d 1182 (9th Cir. 1976), *rev'd*, 440 U.S. 741 (1979) (the unauthorized recordings must be suppressed).

150. 440 U.S. at 755-56.

D. Fruit of the Poisonous Tree

When a defendant seeks to have evidence disallowed under the exclusionary rule,[151] the court must determine whether the challenged evidence is sufficiently related to some illegal government act to make it the "fruit of the poisonous tree." This doctrine, articulated in *Wong Sun v. United States*,[152] looks beyond a "but for" analysis. Evidence is not excluded just because it would not have come to light but for illegal police activity. Rather, the courts ask whether the evidence was obtained by exploitation of that illegality, or whether it has been obtained "by means sufficiently distinguishable to be purged of the primary taint."[153]

In *United States v. Jones*,[154] the defendant was arrested illegally for a Los Angeles burglary. In the course of a search incident to that arrest, police discovered a motel key. Later, without taking the key, police went to that motel room and were admitted by Bennett, Jones' roommate, who consented to a search. Bennett told police that there was a gun in his travel bag; its serial number was later matched to that of a gun stolen in an unrelated San Francisco burglary. Bennett also said that he had cases of jewelry in his car, and he consented to a request to search them. Some of the jewelry was identified as having been stolen in the same San Francisco burglary. Later, after Jones had been convicted of the Los Angeles burglary, and after being shown the gun, he confessed to having committed the San Francisco burglary.

Jones challenged the admissibility of the gun, the jewelry, and the two confessions, claiming that they were the fruit of the original illegal arrest. Reiterating the *Wong Sun* principle that a "but for" link is not sufficient to require exclusion, the *Jones* court found three factors to be

151. For a recent analysis of the exclusionary rule, see a debate between Yale Kamisar and Malcolm Richard Wilkey culminating in 1979 with Kamisar, *The Exclusionary Rule in Historical Perspective: the Struggle to Make the Fourth Amendment More than 'an Empty Blessing,'* 62 JUDICATURE 337 (1979) (defending the exclusionary rule and arguing that we must not abandon it until we have meaningful alternatives), and Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351 (1979) (contending that excluding the evidence entirely is an illogical penalty for government excesses). The same issue of JUDICATURE carries two other articles on the subject: Canon, *The Exclusionary Rule: Have Critics Proven that it Doesn't Deter Police*? 62 JUDICATURE 398 (1979) (arguing that the evidence is inconclusive, since the exclusionary rule seems to deter police in some cities, and not in others), and Schlesinger, *The Exclusionary Rule: Have Proponents Proven that it Is a Deterrent to Police*? 62 JUDICATURE 404 (1979) (the rule's proponents have the burden of proving that it is effective—and they have not yet done so).

152. 371 U.S. 471, 487-88 (1963).

153. *Id.* at 488.

154. 608 F.2d 386 (9th Cir. 1979).

of primary importance in determining whether the gun and the jewelry should be suppressed: "First, how directly did the arrest lead to the discovery of the evidence? Second, were there other events, independent of the arrest, which also contributed to the police's discovery? Finally, to what extent would suppression of the evidence further the exclusionary rule's purpose of deterring police misconduct?"[155]

Noting that discovery of the key gave the police no reason to search for items stolen in the San Francisco burglary, the court stated that an "illegally acquired lead may be so general and indirect" that the evidence gathered after it will still be admissible.[156] In addition, although the court said that consent alone would not dissipate the taint, the consent of Jones' roommate further lessened it "when considered in the light of the weakness of the initial connection . . .".[157]

E. Warrantless Vehicle Searches

Warrantless searches of premises for fruits, instrumentalities or evidence of a crime have been held to be constitutional only under a few exceptional circumstances.[158] However, warrantless vehicle searches have been liberally upheld. Over the years, the Supreme Court has upheld such searches under the "automobile exception" or the *Carroll-Chambers* doctrine.[159] The Court's rationalization for the divergent treatment it has afforded vehicle searches focuses upon two factors: (1)

155. *Id.* at 391.

156. *Id.*

157. *Id.* Other cases in which allegedly tainted evidence was an issue include United States v. Perez-Esparza, 609 F.2d 1284 (9th Cir. 1980) (where defendant was illegally detained for three hours, and no intervening circumstances broke the causal connection, voluntary consent and inculpatory statements were tainted); United States v. Perez-Castro, 606 F.2d 251 (9th Cir. 1979) (see note 9 *supra*) (statements made to border patrol agent the morning following illegal arrest not sufficiently removed to purge taint); United States v. Hauser, 603 F.2d 94 (9th Cir. 1979) (evidence seized pursuant to lawful search warrant following possibly illegal arrest is not fruit of that arrest); United States v. Allard, 600 F.2d 1301 (9th Cir. 1979) (see note 28 *supra* and accompanying text) (court need not find evidence tainted if information gained illegally merely intensified an investigation); United States v. Humphries, 600 F.2d 1238 (9th Cir. 1979) (see notes 20-24 *supra* and accompanying text) (where road from illegal actions to evidence is short and straight, balancing of fourth amendment rights against concern for truth requires suppression).

158. In Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971), the Court noted that the warrant requirement is "a valued part of our constitutional law" and exceptions should be properly limited in scope.

159. The first case dealing with the warrantless search of a vehicle was Carroll v. United States, 267 U.S. 132 (1925), in which the warrantless search of a bootlegger's vehicle was conducted at the arrest scene. In upholding the search the Court stated:

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehi-

the inherent mobility of vehicles, making it impractical to obtain a search warrant prior to a search[160] and (2) the lesser expectation of privacy in an automobile than in a dwelling.[161]

Although the automobile exception is firmly entrenched in constitutional law,[162] the permissible scope of these warrantless searches, particulary as it relates to searches of suitcases or containers found within a car, has remained uncertain. After *Chambers*, some lower courts, including the Ninth Circuit, upheld luggage searches pursuant to the automobile exception.[163]

The first Supreme Court case confronting the issue of the permissibility of searching luggage found during an automboile search was *United States v. Chadwick*,[164] in which the Court held that the warrantless search of luggage after it was taken from a parked vehicle violated

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cle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

Id. at 149.

Carroll has been cited, in a subsequent Supreme Court case, as holding that a search warrant is unnecessary when there is probable cause to search an automobile stopped on the highway, the automobile is moveable, the occupants are alerted, and the car's contents may never be found again if a warrant is obtained first. Chambers v. Maroney, 399 U.S. 42, 51 (1970). In *Chambers*, the Court held that when there is probable cause to search an automobile, there is no fourth amendment difference between searching a vehicle on the spot or towing it to the police station for a warrantless search. *Id.* at 51-52.

160. United States v. Chadwick, 433 U.S. 1, 12 (1977); Chambers v. Maroney, 399 U.S. 42, 49-50 (1970); Carroll v. United States, 267 U.S. 132, 149-50 (1925).

161. Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Chadwick, 433 U.S. 1, 12 (1977); South Dakota v. Opperman, 428 U.S. 364, 368 (1976); Cardwell v. Lewis, 417 U.S. 583, 590 (1974); Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973); Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973).

162. There are five major Supreme Court cases which have developed this doctrine: Texas v. White, 423 U.S. 67 (1975); Cardwell v. Lewis, 417 U.S. 583 (1974); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

163. *See, e.g.*, United States v. Finnegan, 568 F.2d 637, 641-42 (9th Cir. 1977) (upholding search of a suitcase found within defendants' automobile where probable cause and exigent circumstances were present); United States v. Soriano, 497 F.2d 147, 149 (5th Cir. 1974) (en banc) (removal of suitcase from trunk and subsequent search did not dissipate nexus between automobile and container); United States v. Evans, 481 F.2d 990, 994-95 (9th Cir. 1973) (reversing motion to suppress a shotgun discovered during the warrantless search of a footlocker confiscated from the trunk of an automobile).

164. 433 U.S. 1 (1977). In *Chadwick*, federal agents in Boston were alerted that defendants Machado and Leary were traveling on a train from San Diego to Boston and were transporting a footlocker containing drugs. The agents' suspicions were based on their observations that the trunk was unusually heavy for its size and was leaking talcum powder (which is often used to disguise the odor of marijuana), and that Machado matched a drug dealer's profile. When the train arrived in Boston, federal agents were waiting with dogs trained to detect marijuana. The dogs reacted positively, indicating the presence of drugs. The defendants were met at the Boston train station by Chadwick and loaded the locked footlocker into the trunk of Chadwick's car. Before the car was moved, the officers arrested

the fourth amendment.[165] The Court concluded that the *Carroll-Chambers* rationale for warrantless automobile searches should not be extended to luggage, because luggage is distinguishable from an automobile in terms of both mobility and a reasonable expectation of privacy.[166]

While the Court in *Chadwick* refused to create a luggage search exception analogous to the vehicle search exception,[167] it left unsettled the question of whether luggage found inside a car may properly be searched within the scope of an otherwise lawful warrantless vehicle search.[168] The Ninth Circuit in *United States v. Finnegan*[169] appeared to recognize this distinction in *Chadwick* and, thus, relied on the pre-existing law of automobile searches for the proposition that luggage found in a movable automobile could be searched.[170] But more recently, in *United States v. Stewart*,[171] the Ninth Circuit concluded that such a construction of *Finnegan* was inaccurate.[172] Rather, the *Stewart* court reasoned that *Chadwick* actually stands for the broader position that, absent exigent circumstances, luggage could not legitimately be searched merely because it was properly seized pursuant to the *Carroll-Chambers* automobile exception.[173] Nevertheless, the court in *Stewart*

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all three defendants and, without a warrant, removed the footlocker from the trunk and brought it to the federal building where it was subsequently searched. *Id.* at 3-5.

165. *Id.* at 15. Recognizing that the relationship between the footlocker and the vehicle was sufficiently attenuated, the Government chose not to justify the warrantless search of the footlocker on the basis of the automobile exception. *Id.* at 11. Rather, they argued that luggage could be analogized to an automobile, and that therefore, the rationale underlying the *Carroll-Chambers* doctrine was equally applicable to luggage searches. *Id.* at 11-12.

166. *Id.* at 11-13. In distinguishing luggage from an automobile the Court stated:

> The factors which diminish the privacy aspects of an automobile do not apply to respondent's footlocker. Luggage contents are not open to public view . . . . Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.
>
> Nor does the footlocker's mobility justify dispensing with the added protections of the Warrant Clause . . . . With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.

Id. at 13.

167. *Id.*

168. While the contents of the car could have been searched pursuant to the automobile exception, it is by no means clear that the contents of locked containers found inside a car are subject to search under this exception, any more than they would be if the police found them in any other place.

Id. at 17 n.1 (Brennan, J., concurring).

169. 568 F.2d 637 (9th Cir. 1977).

170. *Id.* at 641.

171. 595 F.2d 500 (9th Cir. 1979).

172. *Id.* at 504 n.6.

173. *Id.* at 503-04.

decided that this *Chadwick* rule was not to be applied retroactively, and thus held the search of the defendant's attache case proper under pre-*Chadwick* Ninth Circuit law.[174]

The rule attributed to *Chadwick* by the *Stewart* court was finally set forth by the Supreme Court in the 1979 case of *Arkansas v. Sanders*.[175] In *Sanders*, police officers were alerted by an informant to the fact that defendant Adkisson would be arriving at Little Rock's airport on a particular flight and would be transporting marijuana in a green suitcase. As predicted, Adkisson arrived at the specified time and place. The police observed Adkisson go to the baggage claim area, pick up a suitcase, and bring it to a waiting taxi. He then returned to the baggage area where he met a man named Rambo. They both waited until Adkisson retrieved the green suitcase described by the informant. Adkisson gave the suitcase to Rambo and then waited in the taxi. A few minutes later, Rambo came to the taxi and put the suitcase in the trunk. The taxi cab drove off with Rambo, Adkisson, and the green suitcase. The police pursued the taxi and stopped it a few blocks away from the airport. They removed the green suitcase from the trunk and, without the permission of either defendant, opened the unlocked suitcase and discoverd 9.3 pounds of marijuana packaged in ten plastic bags.[176]

In invalidating the search of the suitcase, the *Sanders* Court expressly held that, absent exigent circumstances, police must obtain a warrant before searching luggage found inside an automobile which has been properly stopped and searched for contraband.[177] The Court refused to justify the warrantless search of the suitcase under *Carroll* or any other case applying the automobile exception.[178] Relying on the reasoning in *Chadwick*, the Court held that due to the inherent differences in the expectation of privacy and mobility, luggage and automobiles do not deserve the same degree of fourth amendment protection.[179] The Court stated:

[A]s we noted in *Chadwick*, the exigency of mobility must be

174. *Id.* at 503.
175. 442 U.S. 753 (1979).
176. *Id.* at 755.
177. *Id.* at 763-64.
178. *Id.* at 765.
179. *Id.* at 762. In comparing this case to *Chadwick*, the Court explicitly stated that once the luggage was seized, there was no longer a danger that the luggage or its contents would be removed before a valid search warrant could be obtained. *Id.* Furthermore, the fact that the defendant failed to lock the suitcase, and that the suitcase was smaller than the footlocker in *Chadwick*, was irrelevant in evaluating the defendant's expectation of privacy. *Id.* at 762 n.9.

> assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control. . . . Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken. Accordingly as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places.
>
> Similarly, a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser exception of privacy than is associated with luggage taken from other locations.[180]

The *Sanders* holding will undoubtedly be narrowly applied. First, it is limited to luggage and does not articulate a clear-cut standard for other types of containers.[181] Second, the decision does not affect the government's ability to search luggage if exigent circumstances exist,[182] or if the luggage is subject to a border search.[183] *Sanders* neither enlarges nor diminishes the scope of the traditional *Carroll-Chambers* automobile exception;[184] it nevertheless helps to delineate the scope of the exception more precisely.

F. Vehicle Regulation Inspections

The operation of motor vehicles on public highways has been the object of extensive statutory regulation for some time. Ordinarily, this legislation requires motorists to have in their immediate possession valid driver's licenses and vehicle registrations.[185] In order to seek compliance with these regulations, many states either in practice or by express statute permit police officers to stop vehicles for the sole pur-

180. *Id.* at 763-64 (citations omitted).

181. *Id.* at 766 n.13. Protection will not be afforded to the contents of a package in plain view, nor to such containers as a kit of burglary, tools or a gun case, because by their very nature, these items cannot support a reasonable expectation of privacy inasmuch as "their contents can be inferred from their outward appearance." *Id.*

182. *Id.* at 763 n.11. The exigencies will depend on the probable contents of the container. *E.g.*, Cady v. Dombrowski, 413 U.S. 443, 447 (1973) (warrantless police inventory search of an automobile trunk suspected of containing a weapon held valid). Additionally, *Sanders* does not interfere with a police officer's ability to conduct searches incident to arrest. 442 U.S. at 763 n.11.

183. 442 U.S. at 764 n.12.

184. *Id.* at 765 n.14.

185. For examples of representative statutes see CAL. VEH. CODE §§ 1250(a), 12951 (West 1971); CAL. VEH. CODE §§ 4000(a), 4454 (West Supp. 1980).

pose of examining these documents.[186] The lower courts have been in disagreement as to whether such procedures are lawful when conducted without even a reasonable suspicion that drivers are not in compliance with the law.[187] In 1979 the Supreme Court resolved this dispute in *Delaware v. Prouse*.[188] In *Prouse*, a Delaware policeman randomly selected and stopped the automobile driven by the defendant for the sole purpose of checking the defendant's driver's license and car registration. The policeman testified that he had not observed any traffic violations or suspicious activity. When the policeman approached the stopped vehicle, he smelled marijuana and subsequently seized the marijuana which was in plain view on the floor of the car. The trial court

186. The investigative stop is accomplished by different methods. Some states set up a fixed roadblock checking all vehicles that pass through a specific point. In other instances, officers in a roving patrol arbitrarily pull over vehicles to check the registration or driver's license, without requiring probable cause or a reasonable suspicion. *See* Delaware v. Prouse, 440 U.S. 648, 658 (1979).

187. The Ninth Circuit had orginally held in Lipton v. United States, 348 F.2d 591 (9th Cir. 1965), that the stopping of a motorist for the sole purpose of examining the validity of his driver's license was not unreasonable under the fourth amendment. *Id.* at 593. However, this ruling was somewhat limited in *United States v. Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975), in which the court stated that "[t]he rationale in *Lipton* is that laws requiring possession of drivers' licenses while driving could not otherwise be effectively enforced. . . . We have limited *Lipton* to that rationale; it permits stops without founded suspicion only to enforce laws susceptible of no other means of effective enforcement." *Id.* at 241 (citations omitted).

In addition to the Ninth Circuit, a significant number of jurisdictions have held that the fourth amendment does not prohibit the type of automobile stop based solely on the officer's discretion. *E.g.*, United States v. Jenkins, 528 F.2d 713 (10th Cir. 1975); Myricks v. United States, 370 F.2d 901 (5th Cir.), *cert. denied*, 386 U.S. 1015 (1967); State v. Holmberg, 194 Neb. 337, 231 N.W.2d 672 (1975); State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973); Palmore v. United States, 290 A.2d 573 (D.C. App. 1972), *aff'd on other grounds*, 411 U.S. 389 (1973); Leonard v. State, 496 S.W.2d 576 (Tex. Crim. App. 1973).

On the other hand, five jurisdictions have held these arbitrary practices to be unlawful. United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971); United States v. Montgomery, 561 F.2d 875 (D.C. Cir. 1977); People v. Ingle, 36 N.Y.2d 413, 369 N.Y.S.2d 67, 330 N.E.2d 39 (1975); State v. Ochoa, 23 Ariz. App. 510, 534 P.2d 441 (1975), *rev'd on other grounds*, 112 Ariz. 582, 544 P.2d 1097 (1976) (en banc); Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973).

This jurisdictional conflict may be attributed to the fact that prior Supreme Court decisions had suggested that such practices may be lawful. For example, in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), while upholding the legality of stops made by a roving border patrol absent a reasonable suspicion, the Court maintained that its decision "does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters." *Id.* at 883 n.8. For similar discussions see United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Ortiz, 442 U.S. 891 (1975). Although Delaware v. Prouse, 440 U.S. 648 (1979), expressly settled this conflict, the prior law will continue to be important if *Prouse* is not given retroactive effect.

188. 440 U.S. 648 (1979).

granted the defendant's motion to suppress the evidence and the Delaware Supreme Court affirmed.[189]

The Supreme Court held that the evidence should be suppressed, and stated that

> except in those situations in which there is at least *articulable* and *reasonable suspicion* that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.[190]

In reaching this conclusion, the Court rationalized that the privacy of persons traveling in automobiles should not be subject to the unbridled discretion of police officers.[191] It recognized no appreciable difference for fourth amendment purposes between stops made by a roving border patrol and random stops such as in the instant case and adopted the standard that it had previously applied in invalidating the roving border patrol unit searches.[192] Under this standard the reasonableness of a particular law enforcement practice is judged by balancing its intrusion on the individual's fourth amendment rights against its promotion of governmental interests.[193]

While acknowledging a strong state interest in promoting public safety on its roads,[194] the *Prouse* Court recognized that less intrusive methods of enforcement were available to state officials.[195] As one pos-

189. *Id.* at 651.

190. *Id.* at 663 (emphasis added).

191. *Id.*

192. United States v. Brignoni-Ponce, 422 U.S. 873 (1975). In *Brignoni-Ponce*, the Court held that a roving border patrol unit could not randomly stop vehicles near the border unless there existed a reasonable suspicion based on articulable facts that the vehicle contained illegal aliens. *Id.* at 884. In rejecting the Government's argument that *Brignoni-Ponce* and *Prouse* were fundamentally different, the *Prouse* Court stated that "[w]e cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol." 440 U.S. at 657.

193. This test has also been used to judge the constitutionality of other situations. Delaware v. Prouse, 440 U.S. at 658-59 (vehicle stops); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1975) (border check points); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (roving border patrols); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (extended border searches); Terry v. Ohio, 392 U.S. 1, 25-27 (1968) (stop and frisk).

194. 440 U.S. at 658.

195. *Id.* at 659-60, 663. Unlike *Martinez-Fuerte*, 428 U.S. 543 (1946), where a strong government interest permitted vehicle stops at fixed border checkpoints without a warrant, probable cause or reasonable suspicion, there is no comparable overwhelming state interest with respect to vehicle stops for registration inspections. In *Prouse*, the marginal contribu-

sible alternative, the Court expressly endorsed the stopping of all vehicles at roadblock-type checkpoints.[196]

Prouse is significant because it may invalidate a variety of statutes or law enforcement practices which permit a stop, detention, or investigative search under circumstances that do not satisfy the reasonable suspicion standard.[197] *Prouse's* impact was immediately apparent in the 1979 Ninth Circuit case of *United States v. Piner*.[198]

In *Piner*, Coast Guard personnel spotted defendants' boat after sunset, which was underway, and went aboard for a routine safety inspection.[199] Such investigations are conducted on a random basis absent suspicious circumstances pursuant to 14 U.S.C. § 89(a).[200] Upon boarding the defendants' boat, the Coast Guard officers observed bags of marijuana in plain view in a lighted cabin below deck. The defendants were put under arrest and a thorough search of the vessel uncovered two tons of marijuana.[201]

The court held that the random stop and boarding of a vessel by the Coast Guard *after dark*, absent a warrant, probable cause, or a reasonable and articulable suspicion, violated the fourth amendment.[202] A stop and boarding *after dark* must be conducted for cause or under

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tion to public safety from discretionary vehicle stops was not, the Court concluded, "a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which [such] stops entail." 440 U.S. at 659.

196. *Id.* at 663. The Court's suggestion is in line with its decision in United States v. Martinez-Fuerte, 428 U.S. 543 (1976), in which the Court held that routine traffic stops of vehicles at fixed checkpoints near the border for brief questioning need not be based upon reasonable suspicion, probable cause, or a warrant. *Id.* at 556-64.

197. *E.g.*, United States v. Piner, 608 F.2d 358, 361 (9th Cir. 1979) (court invalidated Coast Guard search of boat at night relying on *Prouse*); United States v. Soto-Soto, 598 F.2d 545, 547-48, 550 (9th Cir. 1979) (*Prouse* relied on to invalidate search at border).

198. 608 F.2d 358 (9th Cir. 1979).

199. *Id.* at 359.

200. 14 U.S.C. § 89(a) (1976) provides in pertinent part:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

Safety inspections conducted pursuant to the statute usually consisted of:

(1) Stopping and boarding the boat.
(2) Checking the boat registration papers and personal identification.
(3) Checking the boat for fire extinguishers and life jackets;
(4) Checking various pieces of the machinery for possible fire hazards.

201. 608 F.2d at 359.

202. *Id.* at 361.

administrative standards so that the decision is not left to the sole discretion of the Coast Guard officer.[203] In applying the balancing test used in *Delaware v. Prouse*,[204] the court held that even assuming *arguendo* that during an "ordinary" boarding the government's interest outweighs the intrusion into the privacy of a boat owner, the boarding of isolated boats after dark created such "subjective intrusion" that the government had a far greater burden to demonstrate the urgency of its practices,[205] particularly in light of the less intrusive alternative of daytime searches tacitly approved by the majority in dicta.[206]

In *United States v. Soto-Soto*,[207] decided in 1979, an FBI agent searching for stolen vehicles focused his investigation upon automobiles entering the United States from Mexico through a commercial gate. The agent selected for inspection late model Ford and Chevrolet pick-up trucks. The defendant was subsequently stopped solely because he was driving a 1976 Chevrolet pick-up. In order to complete his stolen vehicle investigation, the agent lifted the car hood in an effort to check the serial number stamped on the truck frame. At that point he discovered, in plain view, numerous packages of mari-

203. *Id.* The administrative standards the court referred to were formulated by the following line of cases: Camara v. Municipal Court, 387 U.S. 523 (1967) (fourth amendment requires inspectors to obtain a search warrant before making housing inspections); See v. City of Seattle, 387 U.S. 541 (1967) (fourth amendment requires a suitable warrant procedure in order to effect the unconsented administrative entry and inspection of private commercial premises). The *Piner* court rejected the Government's contention that a warrant should be excused under the authority of United States v. Biswell, 406 U.S. 311 (1972), in which the Court upheld the warrantless search of the storeroom of a dealer federally licensed to sell sporting weapons because of the necessity of unannounced inspections. 608 F.2d at 360, 361.

204. 440 U.S. at 658-59. The test provides for balancing the governmental interests in a particular law enforcement practice against the intrusion resulting from the practice. See cases cited in note 193 *supra*.

205. 608 F.2d at 361. The court noted that the Government had forcefully demonstrated an interest in random stops to effectuate the safety regulations and that the Coast Guard's usual practice was to inspect pleasure craft only when underway. Dockside inspection would be impractical and ineffective, since while a ship is docked the life jackets and other safety equipment may be stored at home. *Id.* at 360. Unlike the situation in *Prouse*, the Government provided statistical data that this method of inspection was successful in exposing offenders. In 1977, forty percent of the vessels boarded and inspected were found to be in violation. *Id.* at 361 n.2.

206. *Id.* at 361. In dissent, Judge Kennedy criticized the *Piner* decision because it invalidated two hundred years of accepted authority and put the Ninth Circuit at odds with the Fifth Circuit's decisions in United States v. Postal, 589 F.2d 862, 889 (5th Cir. 1979), and United States v. Warren, 578 F.2d 1058, 1064-65 (5th Cir. 1978) (en banc). 608 F.2d at 361 (Kennedy, J., dissenting). In addition, Judge Kennedy rejected the majority's reliance on *Prouse*, stating that "*Prouse* does not establish a rule against all random stops; it concerns automobiles only." *Id.* at 362 (Kennedy, J., dissenting).

207. 598 F.2d 545 (9th Cir. 1979).

juana beneath the hood.[208] In holding that the FBI's conduct violated the fourth amendment, the court rejected the government's argument that California Vehicle Code section 2805[209] authorized this stop and search of vehicles. In the past, the Ninth Circuit had limited the authority under section 2805 to situations in which a "founded suspicion" existed.[210]

Although the opinion cited *Delaware v. Prouse*,[211] *Soto-Soto* was in accord with a previous Ninth Circuit decision which refused to authorize stops solely because the automobile stopped matched a certain broad profile of vehicles commonly stolen.[212] Car profiles generally have been held to be insufficient to satisfy the founded suspicion requirement because they lack "some reasonable ground for singling out the person stopped as one who was involved or was about to be involved in criminal activity."[213]

G. Border Searches

1. Scope

It is well-established that routine searches conducted at the border upon entry into the United States need not be supported by probable cause or a founded suspicion.[214] Justification for border searches is

208. *Id.* at 546.

209. At the time of the search, CAL. VEH. CODE § 2805 (West 1971) provided that:

> A member of the California Highway Patrol may inspect any vehicle of a type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, used car lot, automobile dismantler's lot, or other similar establishment, for the purpose of locating stolen vehicles, investigating the title and registration of vehicles, or inspection of vehicles wrecked or dismantled.

The FBI agent claimed he could qualify under this section beause he was working in conjunction with the California Highway Patrol. 598 F.2d at 547.

210. 598 F.2d at 547.

211. *Id.*

212. For example, in United States v. Carrizoza-Gaxiola, 523 F.2d 239 (9th Cir. 1975), federal and state law enforcement officers were looking for stolen cars by randomly stopping vehicles that satisfied a profile of cars commonly stolen. The Government justified its search under Arizona law which required the owner to display vehicle registration in the vehicle, have a driver's license in his immediate possession, and to produce these documents for inspection to any highway patrol or police officers. *Id.* at 240-41. The court held the stop to be unlawful and stated that at least either a "founded suspicion" was required in order to justify such stops or a showing that no less intrusive means were available to enforce the regulation. *Id.* at 241.

213. *Id.* at 241.

214. The first case to *expressly* so hold was United States v. Ramsey, 431 U.S. 606 (1977). The Court stated that "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border. . . ." *Id.* at 616. *Accord,* Carrol v. United States, 267 U.S. 132, 154 (1925); United States v. Lin-

founded in the sovereign's right to protect itself.[215] Whenever a person enters the United States after being in a foreign country a search may automatically be conducted.[216] However, this term, the Supreme Court in *Torres v. Puerto Rico*[217] refused to uphold the warrantless search of an individual's luggage upon entering Puerto Rico from the United States.[218] The search was conducted pursuant to a Puerto Rican statute which eliminated the need for probable cause.[219] The Court expressly held that the fourth amendment and all its protections, including the right to privacy, apply to the Commonwealth of Puerto Rico. Thus, the statute was held to be unconstitutional.[220]

Bound by the search warrant requirement, Puerto Rico argued alternatively that an "intermediate border," analogous to the international border, exists between Puerto Rico and the rest of the United States. Thus, its warrantless search was justified under the border search line of cases.[221] In rejecting this argument, the Court reasoned that Puerto Rico has no sovereign authority to prohibit entry into its territory as that authority is delegated to United States federal officers.[222]

The permissible scope of border searches includes a search of an automobile which has crossed the border,[223] as well as baggage and packages.[224] In addition, a person may be required to submit to a search of his or her outer clothing, which may include an examination

coln, 494 F.2d 833, 837 (9th Cir. 1974). *Cf.* Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (search of defendant's car by roving patrol, twenty miles from border was not a border search and thus required probable cause).

215. United States v. Ramsey, 413 U.S. 606, 616 (1977).

216. *Id.*

217. 440 U.S. 465 (1979).

218. *Id.* at 474.

219. Public Law 22, § 1, P.R. LAWS ANN., tit. 25, § 1051 (Supp. 1977). The Puerto Rican statute was enacted in 1975, and authorized Puerto Rican police to search the luggage of any person arriving in Puerto Rico from the United States.

220. 442 U.S. at 471.

221. *Id.* at 472. In support of this argument, Puerto Rico pointed to the serious problems it is experiencing with smuggling of drugs and weapons into its land. Furthermore, Puerto Rico's unique political status and its geographical location should enable it to "have the same freedom to search persons crossing its 'intermediate border' as does the United States with respect to incoming international travellers." *Id.*

222. *Id.* at 473.

223. *E.g.*, Klein v. United States, 472 F.2d 847, 849 (9th Cir. 1973).

224. *E.g.*, United States v. Grayson, 597 F.2d 1225, 1228-29 (9th Cir. 1979) (pockets); United States v. Palmer, 575 F.2d 721, 723 (9th Cir. 1978) (undergarments); Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967) (baggage and body cavities).

of the contents of his or her purse, wallet, pockets or undergarments.[225] However, the scope of the search is not without qualification and is subject to the limitation that it be reasonable.[226] The courts require more stringent standards as the degree of intrusiveness of the search increases.[227] As stated in *United States v. Palmer*,[228]

> for examination of vehicle[s], luggage, contents of pockets or purse[s], no suspicion at all is required; for a strip search, real suspicion, directed specifically to that person is required . . . . But between a search of pockets and a strip there can be a wide variety of types of intrusions, with varying degrees of intrusiveness . . . .[229]

The Ninth Circuit said that no suspicion is required to examine the contents of pockets. Yet the court in *United States v. Carter*[230] previously had held that a "mere suspicion" was required to justify a pat down on the border.[231]

In the 1979 case of *United States v. Grayson*,[232] the court was again faced with deciding the validity of a pat down search conducted at the border. The defendant's luggage was searched and subsequently, a second examination, including a pat down, was ordered because the defendant was evasive about having been in South America, appeared bulky around the midriff, was unusually cooperative, and appeared to be in a hurry.[233] During the second examination, he hesitantly removed from his pocket pieces of paper which ultimately led officers to cocaine that defendant was transporting.

The Ninth Circuit upheld the pat down searches, deeming them to be proper under either the "no suspicion" pocket rule or the "mere suspicion" pat down standard,[234] thereby avoiding the necessity of choosing between the *Palmer* and *Carter* standards. The totality of circumstances presented in *Grayson* were sufficient to satisfy either re-

225. United States v. Grayson, 597 F.2d 1225, 1228 (9th Cir. 1979); United States v. Palmer, 575 F.2d 721, 723 (9th Cir. 1978).

226. If suspicion is based upon facts specifically relating to the searched person and if the search is no more intrusive than necessary, then the search is reasonable. United States v. Palmer, 575 F.2d 721, 723 (9th Cir. 1978).

227. United States v. Grayson, 597 F.2d at 1228.

228. 575 F.2d 721 (9th Cir. 1978).

229. *Id.* at 723.

230. 563 F.2d 1360 (9th Cir. 1977) (holding valid a pat down search conducted by a customs agent because defendant was nervous and evasive about his occupation and the purpose of his overseas trip).

231. *Id.* at 1361.

232. 597 F.2d 1225 (9th Cir. 1979).

233. *Id.* at 1227.

234. *Id.* at 1228.

quirement.[235]

2. Use of unauthorized agents

Another problem regarding border searches arises in determining which persons have the authority to conduct them. Since July of 1789, when Congress passed the first customs statute, this authority has been delegated to customs officials.[236] In addition, 19 U.S.C. § 482,[237] which sets forth the requirements for a valid border search, limits the persons who may legally conduct a border search to "any of the officers or persons authorized to board or search vessels."[238] The Fifth Circuit has extended the authority under section 482 to include border patrol officers of the Immigration and Naturalization Service,[239] and the Second Circuit has similarly held section 482 to include Coast Guard officers.[240]

In 1979, in *United States v. Soto-Soto*,[241] the Ninth Circuit refused to extend the authority granted under section 482 to an FBI agent who stopped and searched an automobile at the border which he suspected was stolen.[242] The court held that absent probable cause the search may not be upheld merely because it was conducted at the border.[243] The court focused on the fact that the FBI agent was acting solely for general law enforcement purposes and not for the enforcement of customs or immigration laws.[244] Furthermore, the FBI agent had not been delegated customs authority or authority to board or search vessels within the meaning of section 482.[245]

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235. *Id.*

236. Act of July 31, 1789, ch. 5, § 5, 1 Stat. 29, 36 (1789).

237. 19 U.S.C. § 482 (1976) provides

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise . . . .

238. *Id.*

239. United States v. Thompson, 475 F.2d 1359, 1362-63 (5th Cir. 1973) (border patrol officers of the Immigration and Naturalization Service had express and proper delegation of Customs authority under the supervision of the Treasury Department of the Border Patrol).

240. Olson v. United States, 68 F.2d 8, 9-10 (2d Cir. 1933) (Coast Guard officers have authority to board and search vessels, and thus come within the meaning of 19 U.S.C. § 482).

241. 598 F.2d 545 (9th Cir. 1979).

242. *Id.* at 549. The automobile was stopped solely because it fit a stolen-car profile formulated by the agent. *Id.* at 546.

243. *Id.* at 548.

244. *Id.* at 549.

245. *Id.* The court noted that if this search had been conducted by the FBI at any other

The Ninth Circuit, however, declined to invalidate an otherwise proper border search merely because the search was conducted by customs officials at the request of Drug Enforcement Administration (DEA) officials. In *United States v. Schoor*,[246] customs agents were informed in advance that the defendants, suspects in a heroin smuggling conspiracy, would be arriving in the United States. The agents were told that evidence of the defendants' criminal involvement would be found in their possession in the form of cargo bills relating to an earlier shipment of radios found to contain heroin.[247] Upon their arrival in the United States, the defendants were searched by customs agents and the cargo bills were discovered. Defendants were then released by customs officers and arrested by DEA officers who seized the evidence.[248]

In upholding the search, the *Schoor* court stated that the mere fact that the search was made at the request of the DEA officers did not detract from its legitimacy, as the source of the suspicion was irrelevant.[249] Furthermore, the court rejected the argument that the search for the cargo bills by customs agents exceeded the scope of a proper border search.[250] Customs agents are authorized to search for material which is subject to duty or for illegal substances. If during such a search they discover instrumentalities of crimes, they may also seize those items.[251] Thus, the search and seizure of cargo bills in *Schoor* was the product of a proper border search, and was legitimate in scope.[252]

H. Roving Patrols and Fixed Checkpoints

The number of illegal aliens entering into the United States each year has increased by staggering proportions.[253] In an effort to combat this serious problem, investigative stops by border patrol officers have been authorized at locations other than the immediate border. One method utilized is the roving patrol,[254] which is however subject to re-

place away from the border, there would be no question that the search would have been illegal.

246. 597 F.2d 1303 (9th Cir. 1979).

247. *Id.* at 1305.

248. *Id.*

249. *Id.* at 1306.

250. *Id.*

251. *Id.*

252. *Id.* The DEA agents could also properly seize the documents uncovered by the search as an arrest. *Id.* at 1306-07.

253. *See generally*, Fogel, *Illegal Aliens: Economic Aspects and Public Policy Alternatives*, 15 SAN DIEGO L. REV. 63 (1977).

254. Officers assigned to the roving patrol police areas close to the border and look for

strictions. The roving patrol was initially limited by the Supreme Court in *Almeida-Sanchez v. United States*,[255] in which the Court held that the fourth amendment was violated when a vehicle was stopped and searched solely because it was traveling twenty miles from the border.[256] A few years later in *United States v. Brignoni-Ponce*,[257] the Court was faced with a similar issue of whether a vehicle traveling close to the border may be stopped and questioned by a roving patrol when the only ground for suspicion was that its occupants appeared to be of Mexican ancestry.[258] The Court held that such a stop was improper. However, it recognized that in view of the strong public interest in controlling the entry of illegal aliens, detention and questioning would be permissible as long as there exist articulable facts that warrant a reasonable suspicion that the vehicle contains illegal aliens.[259] The Court cautioned that the scope of the questioning must be limited to an inquiry of citizenship and immigration status.[260] *Brignoni-Ponce* remains the standard to be applied when determining the constitutionality of activities by roving patrols.

In 1979, relying on *Brignoni-Ponce*, the Ninth Circuit held in *United States v. Hernandez-Gonzalez*,[261] that border patrol officers had a "reasonable suspicion" to stop the defendants' vehicles under the facts presented. The officers' suspicions first arose when they observed two cars traveling very close together sixty miles away from the Mexi-

illegal aliens. Initially, the government tried to justify the random stopping of vehicles for questioning by the roving patrol as border searches, thus exempting its actions from fourth amendment protections. *See* Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

255. *Id.*

256. *Id.* at 273. The Court also refused to justify the stop and search by the rules applicable to automobile searches or administrative searches. *Id.* at 269-72.

257. 422 U.S. 873 (1975).

258. *Id.* at 876.

259. *Id.* at 883-85. In formulating this standard, the Court struck a balance between two conflicting interests: the government interests in curtailing both the flow of illegal aliens and drug trafficking, and the constitutional interest of the defendant in being protected from unreasonable search and seizure under the fourth amendment. This balancing approach is used repeatedly by the Court when dealing with a variety of fourth amendment issues.

260. *Id.* at 881, 882. In determining whether the *Brignoni-Ponce* standard had been satisfied, the Court set forth a number of factors which may be taken into account in deciding whether there is reasonable suspicion to stop an automobile. These include: (1) characteristics of the area; (2) proximity to the border; (3) usual patterns of traffic on the particular road; (4) officer's previous experience with alien traffic; (5) information regarding recent illegal border crossings in the area; (6) driver's behavior (e.g. erratic driving or obvious attempts to evade officers); (7) aspects of the vehicle itself, such as the load of the vehicle, large compartments for folddown seats or spare tires, an extraordinary number of passengers, or passengers trying to hide; and (8) appearance of the occupants, such as the mode of dress or style of haircut, which might indicate they reside in Mexico. *Id.* at 884-85.

261. 608 F.2d 1240 (9th Cir. 1979).

can border.[262] The vehicles were driving on a road which bypassed a fixed checkpoint station and was often used by persons transporting illegal aliens.[263] While under surveillance, the occupants of each vehicle were observed to be of Latin descent, and one of their vehicles was "riding heavy."[264] It also appeared that the vehicles separated when they spotted the roving patrol officers.[265] The court held that the factors presented satisfied *Brignoni-Ponce* as there were a sufficient number of specific articulable facts warranting a reasonable inference that the vehicle contained illegal aliens.[266]

However, the Ninth Circuit invalidated a stop and search of a vehicle by border patrol officers in *United States v. Cortez*.[267] The facts surrounding the case reveal that the border patrol officers suspected that illegal aliens were being transported across the border at night and on weekends.[268] Tracks discovered indicated that the aliens walked some twenty-five miles to a highway where they were picked up by a van. The tracks discovered by the police indicated that the leader of the group wore shoes with a chevron pattern on the soles.[269] On the Sunday night of the defendants' arrest, the officers parked their car out of sight, near the highway where they watched for vehicles. The officers testified that they would have stopped all vans, campers and pick-up trucks which passed them traveling westward and then returned approximately ninety minutes later traveling eastward.[270] The border patrol officers stopped and searched the defendants' van solely because it fit the profile which the officers had formulated. The majority held the procedure to be illegal, as it was not supported by a founded suspicion, which requires some reasonable ground for singling out the person stopped as one who was involved in criminal activity.[271]

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262. *Id.* at 1242.

263. *Id.*

264. *Id.* When a vehicle appears to be "riding heavy," it is reasonable for an officer to suspect that it may contain illegal aliens hidden in the trunk.

265. *Id.*

266. *Id.* at 1243.

267. 595 F.2d 505 (9th Cir. 1979).

268. *Id.* at 506.

269. *Id.*

270. *Id.* at 507. Only two vehicles meeting the officers' profile passed by their patrol car, the defendants' camper and another vehicle. Only the defendants' camper returned traveling eastward. Moreover, it returned within the alloted time the officers presumed it would take to reach the pick up area for the illegals, load them and then return. *Id.* at 509-10 (Chambers, J., dissenting). Thus, it is arguable that the officers had the requisite particularized suspicion necessary for a stop.

271. *Id.* at 508. It may be difficult to reconcile *Cortez* with *Hernandez-Gonzales*. But a key difference between the two may lie in the fact that in *Hernandez-Gonzales*, the officers'

An additional method of enforcement is the fixed checkpoint station.[272] The leading Supreme Court decision dealing with this procedure is *United States v. Martinez-Fuerte*,[273] in which the Supreme Court upheld stops for brief questioning when routinely conducted at permanent checkpoints, absent any individualized suspicion that the vehicles contained illegal aliens.[274] Any further detention must be supported by either probable cause or a founded suspicion.[275] However, a search of vehicles may not be conducted at a checkpoint station unless it is based on probable cause or consent.[276]

This rule regarding checkpoint searches was reaffirmed by the Ninth Circuit in *United States v. Patacchia*,[277] in which the court invalidated a search of defendants' car conducted by border patrol agents at the San Clemente Border Patrol checkpoint station.[278] After a preliminary determination by the border patrol officer, defendants were referred to a secondary inspection area where inquiries into their nationality and identification were made.[279] During this inspection an agent observed several factors which he felt were highly suspicious.[280]

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suspicions were focused specifically on the defendant, whereas in *Cortez* the suspicions were focused on a class of activities that fit a particular profile. As the testimony of the officers in *Cortez* revealed, the officers had no reason to believe that those particular defendants were involved in criminal activity. But the validity of this distinction is questionable. In a rather strong dissent, Judge Chambers concluded that the founded suspicion test had clearly been satisfied. In support of that conclusion, he criticized the majority's failure to take into account the officers' vast experience in detecting illegal aliens (one officer had been on this patrol for nine years), in assessing whether or not a founded suspicion existed. Experience is a factor that was expressly considered by the Court in *Brignoni-Ponce*. See note 260 *supra*. Looking at the totality of circumstances and viewing them in light of the officers' experience, the dissent stated: "I fail to see that suspicion, based on this sort of skillful police analysis can be called 'unfounded' within the test of *Brignoni-Ponce*." *Id.* at 511 (Chambers, J., dissenting).

272. Stopping vehicles at permanent traffic checkpoints near the border has been held to be permissible absent probable cause or a reasonable suspicion. Furthermore, the occupants may be referred to a secondary area for brief questioning as to their immigration status. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

273. *Id.*

274. *Id.* at 563. In distinguishing the checkpoint method from the roving patrol the Court focused upon the fact that a stop at the checkpoint station was subjectively less intrusive. The Court concluded: "Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped . . . [thus] he is much less likely to be frightened or annoyed by the intrusion." *Id.* at 558 (quoting United States v. Ortiz, 422 U.S. 891, 894-95 (1975)).

275. 428 U.S. at 567.

276. *Id.*

277. 602 F.2d 218 (9th Cir. 1979).

278. *Id.* at 219.

279. *Id.*

280. The factors relied upon by the agent included: (1) defendants' nervousness; (2) de-

Based upon those observations the occupants were removed from the car, the car was searched, and marijuana was uncovered.[281] The court stated that even though the issue was close, "[w]hat is lacking is the fact or two necessary to convert a strong hunch into probable cause."[282] Absent probable cause, *Martinez-Fuerte* will not sanction searches at checkpoint stations.[283]

In *United States v. Perez-Esparza*[284] the Ninth Circuit invalidated the search of an automobile after the driver was referred to a secondary checkpoint station. In *Perez-Esparza*, DEA agents relying upon an informant's tip were alerted to the fact that a specifically identified vehicle was being used to smuggle drugs illegally into the United States from Mexico.[285] Due to a computer failure, the described vehicle passed through the border crossing undetected. However, the next morning the vehicle was stopped at the San Clemente checkpoint and was referred to a secondary inspection area where the defendant was detained approximately two and one-half hours until DEA agents arrived.[286] After being given a *Miranda* warning, the defendant consented to a search of his vehicle. The agents found cocaine hidden in a headlight.[287]

The Ninth Circuit found that the initial detention by the border agents was proper, as it was supported by a reasonable suspicion.[288] However, relying on *Dunaway v. New York*,[289] the court held that the three hour delay between the initial stop and the search amounted to an arrest for which probable cause was required. In examining the facts, the court concluded that probable cause was absent as the informant's tip did not satisfy the *Aguilar-Spinelli* test.[290]

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fendants' automobile which was similar to those often used to smuggle illegal aliens; (3) the vehicle had no front license plates; (4) the vehicle had heavy duty shocks; (5) the car was riding low in the rear; (6) one defendant claimed that he did not have a key to the trunk when he was asked to open the trunk; and (7) defendants' impatience after the detention was prolonged. *Id.* at 220.

281. *Id.* at 219.

282. *Id.* at 220.

283. *Id.* at 218-19 n.1.

284. 609 F.2d 1284 (9th Cir. 1979).

285. *Id.* at 1285.

286. *Id.*

287. *Id.*

288. *Id.* at 1285, 1286.

289. 442 U.S. 200 (1979). For discussion of this case see notes 334-42 *infra* and accompanying text.

290. For a discussion of the *Aguilar-Spinelli* test, see notes 81-87 *supra* and accompanying text.

I. Stop of the Person with Less Than Probable Cause

Although the United States Constitution requires probable cause to justify an arrest, it demands less to validate a "stop and frisk."[291] The United States Supreme Court in *Terry v. Ohio*[292] recognized that "law enforcement officers [need] to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest,"[293] and held that officers may conduct a protective search for weapons when "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[294] To satisfy this standard, suspicion must be based on specific articulable facts suggesting impending or recent criminal violence.[295] Given this limited purpose, the search is restricted to actions which are necessary to discover weapons on the suspect.[296]

1. The United States Supreme Court

In *Terry*, the Supreme Court restricted its focus to the frisk and declined to establish constitutional prerequisites for an investigative stop based on less than probable cause.[297] Paradoxically, it had formulated a constitutional standard for a pat-down but not for the initial stop. The Supreme Court filled this gap in *United States v. Brignoni-Ponce*[298] when it adopted a reasonable suspicion standard for vehicle stops made by the Federal Border Patrol: "Officers on roving patrol

291. "Stop and frisk" as used here denotes a pre-investigative stop made by a peace officer usually on a public street where the officer conducts a cursory search for weapons by "patting down" the suspect's outer clothing.

292. 392 U.S. 1 (1968).

293. *Id.* at 24. While much of law enforcement work is reactive, officer initiated activity such as pedestrian questioning and vehicle stopping is a regular feature of police efforts. Because "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded," the Court sought to recognize constitutional protection of police officers while engaged in these activities. *Id.* at 23.

294. *Id.* at 27.

295. The Court declared that reasonableness is not supported by the officer's "inchoate and unparticularized suspicion or 'hunch,' but . . . [by] the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.*

296. The Court stated that "[t]he sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* at 29.

297. The standard formulated in the *Terry* opinion relates to the frisk component of the "stop and frisk." The limits of other pre-arrest investigations, *e.g.*, detention and interrogation, were not considered. The stop, of course, may or may not be accompanied by a frisk. *Id.* at 19 n.16.

298. 422 U.S. 873 (1975).

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."[299] Although *Brignoni-Ponce* concerned the Border Patrol and undocumented aliens, the Court extended the standard, originally applied to frisks in *Terry*, to detentions for brief investigative questioning. To make a valid stop, the investigating officer must have a reasonable suspicion that the suspect was recently, presently, or soon to be involved in a crime. A subsequent frisk may be made only for weapons and only if the investigating officer has a reasonable suspicion that the suspect threatens the officer's safety or that of others by carrying a weapon.

The Court in *Brown v. Texas*,[300] decided in June 1979, unanimously applied the *Brignoni-Ponce* standard to find the detention of a pedestrian unconstitutional. The Court reaffirmed the narrowness of the exception to the probable cause requirement. It held that presence in an area characterized by frequent criminal activity is not sufficient to meet the reasonable suspicion standard for detention of a suspect for the purpose of requiring him to identify himself.[301]

Petitioner had been convicted of violating a statute which made it a crime to refuse to identify oneself when requested to do so by a policeman. Prior to this request, officers "observed appellant and another man walking in opposite directions away from one another in an alley,"[302] apparently after sighting the patrol car. It appeared to the officers that the two men were about to meet until they saw the car. One officer approached and asked appellant to identify himself and explain his presence. The officer testified that the stop was made because the situation "looked suspicious and we had never seen that subject in the area before."[303] The area was characterized by a "high incidence of drug traffic."[304] After appellant refused to identify himself, the officer frisked and arrested him.[305]

The Supreme Court reversed petitioner's conviction, noting that the "Fourth Amendment requires that a seizure must be based on specific, objective facts" differentiating the suspect from the typical pedestrian, or it "must be carried out pursuant to a plan embodying explicit,

299. *Id.* at 884.
300. 443 U.S. 47 (1979).
301. *Id.* at 52.
302. *Id.* at 48.
303. *Id.* at 49.
304. *Id.*
305. *Id.*

neutral limitations on the individual officers."[306] Thus, in *Brown*, the Court more clearly defined the character of activity necessary to meet the *Brignoni-Ponce* reasonable suspicion standard. Neither the fact that a person "looks suspicious" nor that a person is observed in a high crime area is sufficient.[307]

2. The Ninth Circuit

In *United States v. Cortez*,[308] decided nearly three months prior to *Brown*, the Ninth Circuit reversed convictions for knowing transportation of undocumented aliens because the stop was made on less than a reasonable suspicion. Immigration officers had developed a suspect profile which included a specific class of vehicles traveling west past an observation point and returning within a certain time. After determining that appellant matched the profile, the officers stopped him. The court concluded that the general basis of the stop did not fulfill the reasonable suspicion requirement.[309]

While articulable facts were assembled to generate a suspect profile, none pointed specifically to the detained suspects. By not showing particular individual suspicion, the officers failed to meet the essential requirement of the reasonable suspicion test developed in *Terry* and *Brignoni-Ponce*. That requirement had been emphasized by the Ninth Circuit in 1975, when it noted that "[f]ounded suspicion requires some reasonable ground for singling out the person stopped as one who was involved . . . in criminal activity."[310] The Ninth Circuit's formulation and application of the reasonable suspicion standard in *Cortez* comport with the Supreme Court and prior Ninth Circuit cases.

Relying primarily on *Terry*, the Ninth Circuit also applied the reasonable suspicion standard to a vehicle stop in *United States v. Cla-*

306. *Id.* at 51.

307. *Id.* at 51-52.

308. 595 F.2d 505 (9th Cir. 1979), *cert. granted*, 100 S. Ct. 2983 (1980).

309. *Id.* at 508. The Ninth Circuit had defined "founded suspicion" as "some basis from which the court can determine that the detention was not arbitrary or harassing" before *Terry* and *Brignoni-Ponce* in Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966). Later, it had found no substantial difference between the "founded suspicion" standard and the "reasonable suspicion" test. United States v. Rocha-Lopez, 527 F.2d 476 (9th Cir.), *cert. denied*, 425 U.S. 977 (1976).

310. 595 F.2d at 508 (quoting United States v. Carrizoza-Gaxiola, 523 F.2d 239, 241 (1975)). The court elaborated, stating that "there must be something at least in the activities *of the person* being observed or in his surroundings that affirmatively suggests a particular criminal activity." 595 F.2d at 508 (quoting Sibron v. New York, 392 U.S. 40, 73 (1968) (Harlan, J., concurring)) (emphasis in original).

baugh,[311] decided in 1979. There, the court used the same test developed in *Brignoni-Ponce* and *Brown v. Texas* but derived it independently from *Terry*.

In *Clabaugh*, police officers spotted a known narcotics user-burglar and three companions cruising a motel district. They briefly followed the vehicle but terminated the surveillance when they were recognized. On the following day, the officers again observed the four suspects and surveilled them while they appeared to "case" several motels. When appellant entered a motel office while his companions sat in the car, the officers flashed their spotlight and approached the vehicle. They subsequently spotted a gun in the car which led to the convictions of appellant and his companions for two prior bank robberies.[312] The Ninth Circuit affirmed the trial court's ruling that the stop was justified by the officers' observations.[313]

The factual context of *Clabaugh* is somewhat analogous to that of *Terry*. In *Terry*, an experienced officer observed three men apparently casing a store in preparation to rob it. In *Clabaugh* the officers surveilled a known burglar-narcotics user and his companions for two days and stopped their vehicle after observing them case several motels. The intrusiveness of the stop was minimal. The intrusion in *Clabaugh* was simply the shining of a spotlight on the suspects' vehicle and approaching it to briefly detain the suspects for questioning. In *Terry*, the pre-frisk intrusion was halting the walking suspect and momentarily detaining him for questioning. Since the stop in *Cortez* was characterized easily as a *Terry*-type intrusion, the crucial issue was reasonable suspicion.

As in *Terry*, the specific facts identified by the officers were sufficient to justify their suspicion. They included 1) the "casing" behavior of the suspects; 2) the criminal record of one of the suspects; and 3) the fact that the suspects were observed in a high crime area. The court did not specify how significant each fact was to the finding of reasonable suspicion. The significant fact, however, in the context of *Terry* and *Brown* seems to be the "casing" behavior of the suspects.[314] Such be-

311. 589 F.2d 1019 (9th Cir. 1979).

312. *Id.* at 1021.

313. *Id.* at 1022.

314. The court was less than explicit in specifying which observations were determinative. It merely noted that on the first day "Officer Birney recognized the fourth man, Coughlin, whom he had previously arrested twice and knew as a narcotics user and convicted burglar." *Id.* at 1021. The Court later noted that the suspects appeared to case the motels, and that "[t]he officers knew that Coughlin lived in the 'Saugas, Newhall area' and that San Fernando Road was an area of frequent burglaries and narcotics trafficking." *Id.* at 1021-22.

havior is discrete, associated with a particular crime and is alone sufficient to raise reasonable suspicion.[315]

On the other hand, neither the suspect's prior criminality nor his presence in an area characterized by a high crime rate was determinative. Past criminality is a status, not specific behavior portending criminal activity, and, while presence in a particular area is activity, the Supreme Court expressly discounted its significance in *Brown v. Texas*.[316] At most, the suspect's background and his appearance in the high crime area reasonably reinforced the suspicions initially evoked by the officers' observations of "casing" behavior.

The Ninth Circuit found reasonable suspicion to stop a vehicle suspected of carrying undocumented aliens based on considerably fewer facts in *United States v. Munoz*.[317] In *Munoz* the court held that two vehicles "traveling in tandem on a hot summer day, one with a child in the front between two adults in bucket seats" does not justify a vehicle stop.[318] The apparent Latin heritage of the occupants and "[t]he failure of the occupants to look at the agents [add] little to the case."[319] After the illegal status of the occupants of the first vehicle was discovered, however, the officers had reasonable suspicion that the second vehicle also carried illegal aliens, "given the fair inference that they were traveling in tandem."[320] Because, under the United States Constitution, one may not vicariously assert a third person's fourth amendment rights in this context, the court's conclusion is sound.[321]

In *United States v. Post*[322] the Ninth Circuit reiterated the reasonable suspicion test and found adequate grounds for a stop based on the following observations: 1) one suspect "paced the length of the airport, tightly holding a brief case"; 2) he met a second suspect, appellant, who purchased two one-way tickets to Los Angeles; 3) appellant's first initial

The court subsequently concluded that "[s]pecific, articulable facts were shown below." *Id.* at 1022. The court also noted that just prior to observing the suspects on the second day the officers were apprised of a robbery by three men five miles away. This fact was significant because the suspects were subsequently convicted of that robbery. It did not, however, contribute to the officers' suspicion: "Although the appellants proved to be the same robbers, the stop was based on the officers' suspicion that a motel robbery was occurring." *Id.* at 1021.

315. *See* Terry v. Ohio, 392 U.S. at 28.

316. 99 S.Ct. at 2641.

317. 604 F.2d 1160 (9th Cir. 1979).

318. *Id.* at 1161.

319. *Id.*

320. *Id.*

321. Rakas v. Illinois, 439 U.S. 128, 141-42, 148, 150 (1978) (one who has no expectation of privacy in an object or area cannot vicariously assert another's fourth amendment rights).

322. 607 F.2d 847 (9th Cir. 1979).

and last name corresponded to those of a known narcotics trafficker from the area; and 4) the behavior matched a judicially recognized profile of the activity of narcotics traffickers.[323] That this array of facts amounts to reasonable suspicion is readily apparent. Thus, discrete observations of generally typical behavior associated with criminal activity combined to form an adequate basis for a stop.

In *United States v. Perez-Esparza*,[324] the Ninth Circuit upheld as not clearly erroneous the lower court's finding that a tip from a reliable informant identifying a vehicle, which was being used to smuggle narcotics across the border, by description and license plate, justified stopping the vehicle at an interior Border Patrol checkpoint.[325] The informant was reliable, having given accurate information to Drug Enforcement Administration agents "on 20 to 25 separate occasions."[326] Reports from such an informant are enough to raise reasonable suspicion if the reported activity is criminal.[327] Like the decision in *Cortez*, the court's holding in *Perez-Esparza* was a routine application of the "specific articulable facts" test and is consistent with previous authority.

In *United States v. Chamberlin*,[328] the Ninth Circuit routinely applied the reasonable suspicion standard to uphold the stopping of a pedestrian on a public street. A police officer had observed appellant and his companion, who were known by the officer as persons "with extensive criminal records for narcotics violations, receipt of stolen property, forgery and burglary."[329] As he drove by, the officer noticed both suspects quicken their pace, and when he returned about a minute later, they attempted to flee. The court found that when the suspects fled, the officer had reasonable suspicion to detain them.[330]

Although the Supreme Court has not specifically considered the significance of flight as a suspicious factor, it is clear that in the context

323. *Id.* at 849, 850 n.3.

324. 609 F.2d 1284 (9th Cir. 1979).

325. *Id.* at 1285-86.

326. *Id.* at 1285.

327. *Id.* at 1285. *E.g.*, Adams v. Williams, 407 U.S. 143, 145-47 (1972) (police officer's removal of a gun from petitioner's waistband after a reliable informant related at the scene that petitioner was carrying narcotics and had a gun at his waist was constitutionally permissible); United States v. Avalos-Ochoa, 557 F.2d 1299, 1301 (9th Cir.), *cert. denied*, 434 U.S. 974 (1977) (Border Patrol agent validly stopped suspected illegal alien based upon information provided by a local resident).

328. 609 F.2d 1318 (9th Cir. 1979).

329. *Id.* at 1320.

330. *Id.* The court noted that "the flight of both men is a crucial fact which justified the stop." *Id.* at 1321. *Accord*, United States v. Pope, 561 F.2d 663 (6th Cir. 1977).

of *Chamberlin*, a reasonable person would interpret such a response as indicative of criminal activity, at least to the extent that further inquiry is warranted. This is all that the fourth amendment requires.

J. Detention of the Person With Less Than Probable Cause

1. The United States Supreme Court

In *Terry* and *Brignoni-Ponce* the Supreme Court identified the circumstances which are necessary before a stop and/or frisk may be initiated. Although the permissible scope of a frisk was delimited in *Terry*, the permissible scope of the detention based on reasonable suspicion remained an open question.[331] The Ninth Circuit considered this issue in *United States v. Chatman*[332] in 1977 where it held that founded suspicion that appellant was engaged in illegal narcotics transportation justified an order requiring appellant to walk to a private interrogation room.[333] The Supreme Court broke its silence on this question in June 1979. Raising doubts about the validity of *Chatman*, the Court held in *Dunaway v. New York*[334] that a detention for interrogation with less than probable cause was unconstitutional.

In *Dunaway*, officers took petitioner into custody without probable cause. They requested that he accompany them to the police station

331. In *Terry*, the scope of the seizure was confined to a pat-down. The Court decided "nothing . . . concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." 392 U.S. at 19 n.16. In Adams v. Williams, 407 U.S. 143, 145-46 (1972), the Supreme Court stated that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."

332. 573 F.2d 565 (9th Cir. 1977) (per curiam).

333. *Id.* at 567. A DEA officer approached appellant in a public airport, directed him to an "interview" room, and ordered him to remove his trousers (appellant had tried to conceal a bulge in his pocket on the way to the room). The bulge turned out to be narcotics. The court predicated its justification of the search on probable cause and consequently did not consider the permissible extent of an interrogation based on reasonable suspicion. For a discussion of the court's poor analysis leading to this determination of probable cause, see *id.* at 568-72 (Takasugi, J., dissenting). The *Chatman* court permitted a much greater intrusion than that seemingly allowed by the Supreme Court in Dunaway v. New York, 99 S.Ct. 2248 (1979) (see discussion at notes 334-42 *infra* and accompanying text). Because the issue was clouded with the analytically confusing probable cause determination, it is unclear how far beyond *Dunaway* the *Chatman* decision went. *Chatman*'s significance lies in the fact that the court without any precedential justification read into the *Terry* exception an intrusion much greater than a frisk (direction to go to a private room for interrogation). *Cf.* United States v. Salter, 521 F.2d 1326, 1328-29 (6th Cir. 1975) ("We . . . see nothing wrong in . . . asking [a suspect] to step into the baggage room, a place more convenient for interrogation than an open platform . . . .").

334. 99 S.Ct. 2248 (1979).

but did not tell him he was under arrest. Had petitioner attempted to leave, however, the officers would have physically restrained him. During subsequent interrogation, he incriminated himself.[335] The Court held that taking petitioner into custody and transporting him to the police station constituted an arrest and required probable cause.[336]

The state had argued that petitioner had voluntarily accompanied the officers to the station and therefore had not been seized.[337] If, however, petitioner had been seized, the state contended that the seizure was constitutionally permissible "because the police had a 'reasonable suspicion' that petitioner possessed 'intimate knowledge about a serious and unsolved crime.' "[338]

The Court's rejection of the first contention is unassailable. The request by police that petitioner accompany them to the station was backed by an implicit but persuasive threat of coercion. The imposing presence of uniformed police officers precluded consideration of the "request" as anything but an order.[339]

The Court's further classification of the seizure as an arrest follows given the transportation and interrogation of petitioner. It differed from a formal arrest only in that officers did not verbally declare what was apparent: that petitioner was under arrest.[340]

The Court's conclusion is also analytically sound in terms of the *Terry* frisk exception to the probable cause requirement. That exception is designed to meet the exigent need for officer safety and allows only a momentary intrusion. In *Dunaway* petitioner was detained for criminal investigation for an extended period.

Thus, *Dunaway* answered in large part the question remaining after *Terry* and *Brignoni-Ponce*. Seizures for custodial questioning must be supported with probable cause.[341] Two factors emerge which

335. *Id.* at 2251.

336. *Id.* at 2258.

337. *Id.* at 2253 n.6. The county court had found that petitioner had been taken into custody and transported involuntarily. *Id.* at 2252.

338. *Id.* at 2254 (quoting Brief for Respondent at 10).

339. The Court observed that petitioner had been "taken involuntarily to the police station." Dunaway v. New York, 99 S. Ct. 2248, 2253 (1979). In so doing, the Court recognized that police authority asserted in the request created for the suspect a perceived legal obligation to comply (the detaining officers had also testified that they would have forced petitioner to accompany them to the police station if he had refused). *Id.* n.6.

340. 99 S. Ct. at 2256.

341. *Id.* at 2256. The *Dunaway* Court relied on the following language: "The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, *but any further detention or search must be based on consent or probable cause.*" *Id.* (quoting United States v. Brignoni-Ponce, 422 U.S. at 881-82) (emphasis in original). *Accord*, Davis v. Mississippi, 394 U.S. 721 (1969) (finger-

appear to render an investigative detention an arrest: 1) a request by officers that the suspect submit to restrictions of his liberty which are greater than those incurred during on-the-street questioning or a frisk (*i.e.* custodial interrogation); 2) a reasonably perceived legal obligation to comply with the police officers' request. Compliance with this request is involuntary and triggers fourth amendment protection.[342]

2. The Ninth Circuit

In *United States v. Post*,[343] decided four months after *Dunaway*, the Ninth Circuit ostensibly distinguished the *Dunaway* decision and held that a request by an identified DEA agent that appellant accompany investigators to an interrogation room was permissible when based upon reasonable suspicion.[344] The agent confronted appellant at the airport after eighteen hours of surveillance yielded several observations which created reasonable suspicion that appellant was smuggling narcotics into the country. After asking appellant to accompany him to an interrogation room, the agent escorted appellant and his companion into an elevator and down a hall to the police station.[345] He then took appellant to an interview room and searched and questioned him there. During the search, the agent found bags of cocaine on each of appel-

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prints suppressed as unconstitutionally seized when petitioner was one of a group of suspects questioned and fingerprinted on the basis of a general description of the assailant). The *Davis* Court acknowledged that fingerprinting may take place on less than probable cause, but that "no attempt [was] made . . . to employ procedures which might comply with the requirements of the Fourth Amendment . . . and petitioner was not merely fingerprinted . . . *but also [interrogated]*." *Id.* at 727-28.

342. In *Dunaway*, petitioner's compliance with the officers' request was constructively involuntary. 99 S.Ct. at 2253 n.6 (petitioner's experience did not appreciably differ from that of an arrestee). The Court also quoted A.L.I. Model Code of Pre-Arraingment Procedure § 2.01(3) and commentary, at 91 (Tentative Draft No. 1 1966): "request to come to police station 'may easily carry an implication of obligation, while the appearance itself, *unless clearly stated to be voluntary*, may be an awesome experience for the ordinary citizen.' " *Id.* (emphasis added). To consider compliance with an officer's request as voluntary is a denial of common experience. The ordinary citizen typically defers to police authority. This is implicit in *Terry* and subsequent cases. Under these cases, fourth amendment protection is triggered by "intrusion[s] upon the sanctity of the person." *Terry*, 392 U.S. at 17. This requires involuntariness; if citizen response to police requests in *Terry* situations were voluntary, there conceptually is no intrusion. That the request escalates to require the citizen to submit to much more than a *Terry* frisk, as it did in *Dunaway*, eliminates neither the involuntariness of the response nor fourth amendment protection. In *Dunaway*, the Court equated the arrest of petitioner with that of petitioner in Brown v. Illinois, 422 U.S. 590 (1975), who was handcuffed after officers had drawn their guns and informed him that he was under arrest. 99 S.Ct. at 2258 & n.17.

343. 607 F.2d 847 (9th Cir. 1979).

344. *Id.* at 851.

345. *Id.* at 848-49.

lant's legs.[346]

The Ninth Circuit noted that *Dunaway* held "that custodial questioning must be supported by probable cause . . . [but] [t]he holding that the detention was unlawful was based on the determination by two lower courts, that Dunaway went involuntarily to the police station."[347] Since the lower court made no specific finding of involuntariness and the record disclosed conflicting evidence on the issue, the court found for the state, which had prevailed below.[348] The Ninth Circuit thus concluded that the interview was voluntary and therefore not incident to a seizure. The court relied on the uncertain authority of *United States v. Chatman*[349] and represented that decision as holding that "if an officer is justified in stopping a person for questioning the stop does not become an arrest, if, without coercion, the officer directs that the questioning occur in a less public place."[350]

In basing its conclusion on the absence of a finding of coercion by the trial court, the Ninth Circuit completely ignored the discussion in *Dunaway* concerning the involuntariness inherent in confrontations between law enforcement officers and suspects of criminal activity.[351] Furthermore, although the Ninth Circuit concluded that appellant's response was voluntary, it attempted to justify the scope of the stop after the "consent" occurred.[352] If appellant's response was indeed consensual, there was no further intrusion to justify. The court appeared to treat the entire encounter as a seizure and justified isolation of appellant for questioning by citing the state's interest in protecting the public from the consequences of surprise encounters between officers and suspects of crime.[353]

The factual similarity between *Post* and *Dunaway* is apparent.[354]

346. *Id.* at 849. Appellant claimed he had been constructively arrested "when they seized him and took him to the interrogation room." *Id.* at 850. *Dunaway* supports this contention, but the *Post* court ignored the Supreme Court's extensive discussion of involuntariness.

347. *Id.* at 851.

348. *Id.*

349. 573 F.2d 565 (9th Cir. 1977). See note 333 *supra*. To the extent that *Chatman* permits transporting a suspect for subsequent interrogation based on reasonable suspicion, it is out of line with *Dunaway*. See note 341 *supra*.

350. 609 F.2d at 851.

351. *See* 99 S.Ct. at 2253 n.6.

352. 609 F.2d at 851 n.5.

353. *Id.*

354. The circumstances in *Dunaway* and *Post* do differ, however, in some respects. Petitioner in *Dunaway* was contacted at a residence and transported by automobile to the police station. Appellant in *Post* was approached in a public airport and escorted to a private room. The issue is whether the intrusiveness of appellant's seizure in *Post* is minimal, as in *Terry* and *Brignoni-Ponce*, or substantial, as in *Dunaway*.

In *Post*, as in *Dunaway*, a law enforcement officer briefly questioned the suspect where he was first encountered and asked him to accompany the officer to another location for further questioning. Analogous to petitioners' in *Dunaway*, appellant in *Post* was under an apparent compulsion to comply. This is precisely the type of situation referred to by the Supreme Court when it recognized that a detention need not be accompanied by all of the formalities of a conventional arrest to require probable cause.[355] That appellant in *Post* was escorted to an interrogation room in the same building where he was contacted does not seem to reduce the stop to a *Terry*-type seizure. A *Terry*-type stop involves only momentary delay and brief inquiry.[356] In *Post*, appellant was requested to leave the airport area and submit to a search and questioning in private.

A closer reading of *Dunaway* by the Ninth Circuit might have led to a different result in *Post*. Appellant was seized when the agent asked him to go to the interrogation room and he complied. The question then became whether such a seizure was an investigative stop or a custodial arrest. According to *Dunaway*, transporting a defendant to another location for interrogation requires probable cause.[357] In *Post*, however, the court found that the agent had only reasonable suspicion.[358] There is no authority for the proposition that the interest in protecting the public from surprise encounters between law enforcement agents and suspects of crime eliminates this requirement of probable cause. Accordingly, the detention of appellant should have been held unconstitutional.

In addition, the decision in *Post* conflicts with three recent Ninth Circuit decisions which comport with *Dunaway*.[359] In *United States v. Beck*,[360] the court classified a detention an arrest when a vehicle was forcibly stopped and its occupants, including appellant, were questioned and searched at the scene. The court applied a reasonable person standard, observing that "the dimensions of an encounter between

355. The Supreme Court granted certiorari on a Sixth Circuit case in which one of the issues was constructive involuntariness. United States v. Mendenhall, 596 F.2d 706 (6th Cir.) (en banc), *cert. granted*, 100 S.Ct. 42 (1979) (invalidated airport searches of suspects who are stopped and asked to go to a private room).

356. *See, e.g.*, Davis v. Mississippi, 394 U.S. 721 (1969) (detention for investigatory purposes absent probable cause is unreasonable).

357. 99 S.Ct. at 2258.

358. 607 F.2d at 850.

359. United States v. Chamberlin, No. 79-1076 (9th Cir. Dec. 26, 1979) (post-*Dunaway*); United States v. Perez-Esparza, 609 F.2d 1284 (9th Cir. 1979); United States v. Beck, 598 F.2d 497 (9th Cir. 1979) (pre-*Dunaway*).

360. 598 F.2d 497 (9th Cir. 1979).

the individual and officer may be sufficiently constrictive to cause the average person, innocent of crime, to reasonably think that he was being arrested."[361]

In *Beck*, four government vehicles boxed appellant's taxi to a stop and several agents escorted appellant and his companions from their vehicle and interrogated them in isolation. The agents subsequently searched appellant and arrested him for possession of cocaine and heroin, and with intent to distribute the heroin.[362]

The court rejected the contention that the stop of the taxi was a mere "stop" governed by the reasonable suspicion standard. It concluded that the excessive force used would have induced the ordinary citizen, innocent of criminal activity, to conclude that he was being arrested.[363] In so concluding, the court's primary consideration was "the extent that freedom of movement is curtailed."[364] This is clearly consistent with the delineation in *Dunaway* between a brief stop and a more intrusive investigative detention.[365]

The Ninth Circuit applied *Dunaway* in *United States v. Perez-Esparza* to reverse the conviction of appellant for possession of cocaine with intent to distribute.[366] After Border Patrol agents stopped petitioner at the border checkpoint, they detained him for two and one-half hours to await the arrival of DEA agents who were to interrogate him.[367] When the agents arrived, they advised appellant of his *Miranda* rights, explained "he was being detained because the agents suspected narcotics were being transported in his car, and told that the agents were in the process of obtaining a search warrant."[368] Appellant subsequently consented to a search which led to the discovery of the cocaine.

The court's application of *Dunaway* in *Perez-Esparza* contrasts

361. *Id.* at 500. The Ninth Circuit adopted a reasonable person standard for defining an arrest in Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969). This test was applied generally in analyzing seizures of the person. *E.g.*, United States v. Richards, 500 F.2d 1025, 1029 (9th Cir. 1974), *cert. denied*, 420 U.S. 924 (1975) and *Taylor v. Arizona*, 471 F.2d 848, 851-52 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973).

362. 598 F.2d at 499-500.

363. *Id.* at 502.

364. *Id.* at 500.

365. The purpose of the stop is also given weight by the court in *Beck*: "Utilization of force in making a stop will not convert the stop into an arrest if it occurs under circumstances justifying fears for personal safety." *Id.* at 501 (citing United States v. Russell, 546 F.2d 839, 840 (9th Cir. 1976) (Wright, J., concurring)). This is consistent with the approach in *Terry* of balancing the intrusiveness of the action against protection of the police officer.

366. 609 F.2d at 1285.

367. *Id.* at 1291.

368. *Id.* at 1285.

with the restrictive view of *Dunaway* taken in *Post*. The factual context of *Perez-Esparza* is similar to that of *Post* and its language suggests that had the same panel heard *Post*, the case would have been decided differently.

In *Perez-Esparza*, as in *Post*, appellant was being investigated for narcotics trafficking. And like *Post*, he was detained and taken to an office for interrogation. However, there were differences. In *Post*, the appellant's person was searched for weapons and narcotics were found. In *Perez-Esparza*, appellant's vehicle was searched after he "voluntarily" permitted agents to do so. That appellant in *Post* was not detained as long as appellant in *Perez-Esparza* (two and one-half hours) is arguably determinative of the different results in the two cases. However the court's language in *Perez-Esparza* does not indicate this. The court noted that

> [t]he Court held in *Dunaway* that 'detention for custodial interrogation . . . intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. . . .' The detention in this case, like that in *Dunaway*, was for the purpose of custodial interrogation . . . [and] clearly falls within the broad *Dunaway* language and is valid only if supported by probable cause.[369]

In *United States v. Chamberlin*,[370] the Ninth Circuit applied the rule of *Dunaway*, and reached a result inconsistent with that in *Post*. On the basis of reasonable suspicion, an officer stopped and questioned appellant. He then required appellant to get in the back of the patrol car while he searched for appellant's companion who had fled upon the officer's arrival. During his search, the officer obtained a check payable to a third party that had been found in the area in which the suspects were initially sighted. The officer returned to the patrol car and drove

369. *Id.* at 1286-87. Despite the court's conclusion that *Dunaway* required probable cause to support the detention in *Perez-Esparza*, it identified several "open questions:"

> The fundamental issue here is the line of demarcation between a *Terry* "stop" requiring only reasonable suspicion, and the "custodial interrogation" of *Dunaway*, requiring probable cause. How many questions may a police officer ask a suspect before the reach of *Terry* is exceeded? Can the police officer detain the suspect pending a radio check with headquarters for confirmation of the suspect's identity and determination whether arrest warrants are outstanding? If these detentions are permissible, does *Dunaway* automatically govern as soon as the suspect is transported to the station? Or, may the police substitute station-house questioning for that permissible on the scene, when the sole purpose is to facilitate questioning by specialized and experienced personnel . . . or for other substantial reasons.

Id. at 359 n.2. It seems that the question in *Post* is included in these "open questions."

370. No. 79-1076, slip op. at 1347 (9th Cir. Dec. 26, 1979).

appellant to the furniture store from which appellant had walked just before being stopped. There the officer discovered that appellant had attempted to cash the check earlier that day. He then arrested appellant who was subsequently convicted of possession of a check stolen from the mail.[371]

In reversing appellant's subsequent conviction for possession of a check stolen from the mail, the Ninth Circuit correctly differentiated between a stop, which must be supported by reasonable suspicion, and a detention, which, under *Dunaway*, requires probable cause.[372] Noting that "[t]he Court in *Dunaway* drew a firm line between the limited *Terry* stop, involving a very brief detention of a minute or so, and any more extensive detention," the court concluded that "the twenty minute detention of appellant constituted a 'detention for custodial interrogation' within the meaning of *Dunaway* . . . ."[373]

The Ninth Circuit's emphatic adherence in *Chamberlin* to the Supreme Court's insistence that a stop and frisk is a narrowly defined exception to the probable cause requirement contrasts with the expansive approach taken by the court in *Post*. In *Chamberlin*, the court recognized the inherent coerciveness of an officer's request in an investigative context and focused on the real issue—the degree of the intrusion. "It is true," the court noted, "that the fact situation in *Dunaway* constituted a more flagrant unlawful detention . . . . [The detention in *Chamberlin*,] [h]owever, . . . is a significantly greater intrusion than the brief *Terry* stop and the opinion in *Dunaway* makes it very clear that [this seizure] . . . must be justified by probable cause."[374]

K. Scope of the Frisk

A frisk based on reasonable suspicion must be limited to actions which are necessary to discover weapons.[375] In *United States v. Thompson*,[376] the Ninth Circuit emphasized the narrow purpose for which a

371. *Id.* at 1348-49.
372. *Id.* at 1351.
373. *Id.* at 1352.
374. *Id.* As in *Dunaway* "[petitioner] was not questioned briefly where he was found . . ., [h]e was never informed that he was free to leave the car," and he was detained for investigation. *Id.* The court's conclusion in *Chamberlin* clearly follows from *Dunaway*. Taken together, *Dunaway* and *Chamberlin* show that *Post* is an unreasoned aberration. The confusion in the Ninth Circuit is magnified by the *Post* court's reference to *Chatman* as sound case law. See notes 343-53 *supra* and accompanying text.
375. Terry v. Ohio, 392 U.S. at 29.
376. 597 F.2d 187 (9th Cir. 1979).

pat-down frisk is authorized and disallowed a search that continued after the searching officer was satisfied that appellant was unarmed.

In *Thompson*, patrolling officers stopped appellant who had been speeding, had rolled through a stop sign and whose vehicle had a broken taillight lens. Appellant was unable to produce a driver's license but presented an envelope with his name on it. An officer routinely[377] frisked him while awaiting the outcome of a check for outstanding warrants. During the frisk, appellant kept reaching for his inside coat pocket. After he ignored a command to cease reaching for his pocket, the officer handcuffed him, checked the pocket, and discovered an envelope. The officer admitted that at this point he was not concerned that the envelope *might contain a weapon*.[378] Without appellant's permission, he then removed the contents of the envelope and determined that they were stolen checks. Appellant was convicted of possession of items stolen from the mail after his motion to suppress the checks was denied.

In reversing appellant's conviction, the Ninth Circuit found that the stop was justified by appellant's vehicle code violations[379] and that the routine frisk[380] and pocket search[381] were reasonable. Nevertheless, the court held that the further search of the envelope was unconstitutional.[382]

While there is authority for the court's conclusion that the request to exit the vehicle was reasonable following the valid stop,[383] the validity of the routine frisk is questionable. In *Terry*, the court characterized a frisk as "a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."[384] Consequently, specific facts must indicate that officer safety is jeopardized before a frisk is allowed.[385] Here there appeared to be none. The court stated that appellant's "in-

377. The officers testified that their actions were pursuant to standard departmental procedure which involved requesting the suspect to get out of his automobile, submit to a pat-down for weapons, and sit in the police car during the "wants and warrants" check. *Id.* at 189.

378. *Id.*

379. *Id.* at 189-90.

380. *Id.* at 190.

381. *Id.* at 191.

382. *Id.*

383. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam).

384. 392 U.S. at 24-25. *Accord*, Brown v. Texas, 443 U.S. 47, 50-55 (1979) ("Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.").

385. See notes 294-95 *supra* and accompanying text.

ability to produce adequate identification justified the request that he get out of his car and sit in the police car."[386] The United States Supreme Court opinion in *Pennsylvania v. Mimms*[387] is authority for upholding the request that appellant get out of his car but not for the subsequent frisk.[388] In *Thompson*, the court mistakenly read into *Mimms* authority for a routine pat-down incident to a valid stop during which the suspect fails to produce identification and appears to be violating a law requiring that drivers possess an operator's license while driving.[389]

Having determined the frisk was permissible, the court then considered the scope of the search. It concluded that the pocket search was a limited intrusion designed to discover weapons and therefore constitutional.[390] This comports with the rule in *Terry* because appellant's jacket was so bulky that it limited the effectiveness of a conventional pat-down and since appellant "repeatedly tried to reach into his pocket despite the officer's warning not to."[391]

The court then held that the examination of the contents of the envelope exceeded the scope of the frisk permitted under the fourth amendment.[392] Because the frisk was conducted to insure that the suspect was unarmed, once the officer established that fact, he should have stopped searching.[393]

This recognition of the narrow scope of a search conducted with less than probable cause is well supported. Nevertheless, the fourth

386. 597 F.2d at 190.

387. 434 U.S. 106 (1977) (per curiam).

388. In *Mimms*, the Court held that "the incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped" need not be independently justified. *Id.* at 109, 111. A search followed the vehicle stop but was predicated on the appearance of a bulge in petitioner's jacket which warranted reasonable suspicion that he was armed. *Id.* at 111-12.

389. It is unclear what weight, if any, the court accorded the fact that appellant's inability to produce an operator's license indicated that he was violating an Oregon law. In any event, it alone certainly did not create reasonable suspicion that appellant was armed. There is no "frisk incident to non-custodial detention" analogous to "search incident to arrest" and absent reasonable suspicion, the frisk should have been held invalid. *See* United States v. Robinson, 414 U.S. 218, 227-28, 234 (1973) (frisks are designed to insure officer safety whereas the purpose of the search incident-to-arrest is to prevent the loss of evidence. Therefore different standards apply).

390. 597 F.2d at 191.

391. *Id.* at 191. *See also* United States v. Hill, 545 F.2d 1191, 1193 (9th Cir. 1976) (per curiam) (officer's lifting up the shirt of a suspect who was stopped in the immediate vicinity of a recent armed robbery to ascertain whether a bulge at suspect's waistband was a weapon held constitutional).

392. 597 F.2d at 191.

393. *Id.*

amendment arguably prohibited even the removal of the envelope from appellant's pocket.

In *United States v. Gallop*,[394] the Ninth Circuit upheld a police inventory of the personal effects of appellant and his companion who were detained for detoxification under a noncriminal, protective custody statute.[395] Prior to placing them in a holding cell, officers inventoried the contents of a "basket-type" bag carried by appellant's companion and discovered syringes, pills and prescription bottles.[396] The officers arrested appellant and his companion for violation of state narcotics laws and in a subsequent search found stolen money orders in the bag and in appellant's wallet. The Ninth Circuit reversed the trial court which had ruled that the money orders taken from appellant's wallet were inadmissible products of an illegal arrest because the initial inventory of the bag was unreasonable.[397] With questionable logic, the court held that the constitutional justification for inventories of suspects arrested for crime was equally applicable "to property taken under police protection when the owner of the property is 'detained' under police custody but not 'arrested'."[398] That justification involved "three distinct needs: the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger."[399] The court concluded that these needs are incident to custody regardless of the pretext for such custody and held that inventory of the bag was valid. To reach its conclusion, the court applied the rule of *South Dakota v. Opperman*[400] in which the United States Supreme Court upheld the warrantless inventory search of an impounded vehicle. Notwithstanding the dubiousness of the "three distinct needs"[401] as applied to a vehicle inventory, the holding in *Gallop* is generally unsupported. Since *Opperman* is an exception based on the unique characteristics of automobiles and the relatively lower expectation of privacy with respect to one's automobile,[402] it is difficult to ac-

394. 606 F.2d 836 (9th Cir. 1979).
395. *Id.* at 837.
396. *Id.* at 838.
397. *Id.*
398. *Id.* at 839.
399. *Id.* at 838-39 (citing South Dakota v. Opperman, 428 U.S. 364, 369 (1976) (routine police inventory searches of impounded vehicles are permissible without a warrant)).
400. 428 U.S. 364 (1976). *See generally* Note, *The Final Word on Inventory Searches? South Dakota v. Opperman*, 26 DE PAUL L. REV. 834 (1977).
401. 428 U.S. 378-79 (1976) (Powell, J., concurring); *id.* at 389-92 (Marshall, J., dissenting).
402. *Id.* at 368.

cept the court's unelaborated conclusion in *Gallop*. Surely one's expectation of privacy with respect to one's wallet or handbag is substantial.

It is important to distinguish between a frisk based on reasonable suspicion and a more extensive search based on probable cause developed during an initial investigation. In *United States v. Orozco*,[403] decided by the Ninth Circuit in February, 1979, the court considered such a distinction.

In *Orozco*, appellants contested convictions for possession of cocaine and heroin with intent to distribute. The arrest occurred in the early morning hours when sheriff's deputies observed one appellant exit his car and throw an object over a retaining wall, apparently in response to the approach of their patrol car. After the deputies stopped to investigate, a second suspect exited another parked car and approached. One deputy retrieved a semi-automatic pistol from behind the retaining wall. Another observed unusually large rolls of cash in the second suspect's purse when she opened it to produce identification. The deputies then noticed in plain view several packages labeled "coc" or "coca" inside the first suspect's car. A search of the car revealed that the packages contained heroin and cocaine. The deputies then arrested appellants and conducted a thorough search of the vehicle, finding additional heroin in a hidden compartment. The appellants contended that the evidence seized from the vehicle was obtained in violation of the fourth amendment and that their motion to suppress should have been granted.[404]

The court recognized that the initial investigative stop by the deputies was supported by specific articulable facts arousing legitimate suspicion that illegal activity was occurring or contemplated.[405] Under this principle of founded suspicion, the observations made by the deputies after the stop justified continued investigation, but not a search. Further investigation led to probable cause which justified the subsequent warrantless search.[406]

The decision in *Orozco* is not a true stop and frisk case. The exception recognized in *Terry* involved a pat-down search for one specific reason—to check for weapons. The validating state interest was the safety of police officers. In *Orozco* there was in fact no search until probable cause had been established. The suspicious circumstances

403. 590 F.2d 789 (9th Cir. 1979).
404. *Id.* at 791.
405. *Id.* at 792-93.
406. *Id.* at 793.

which led to the investigatory stop were confirmed by subsequent observations made by the deputies. Retrieval of the pistol, observations of the rolls of money, and discovery of the contraband in public view in the car were all the results of observations made by the officers during the course of routine questioning.

L. Search Incident to Arrest

In *United States v. Spanier*,[407] decided in January 1977, the Ninth Circuit recognized the validity of a search of a residence for additional suspects, following an arrest outside of the house. Two suspects were located at a residence after officers found a vehicle in front of the house matching the description of one used in a recent robbery. As officers approached the house, they observed a ski mask resembling one used in the same robbery. After the officers surrounded the house, the suspects exited and surrendered. Several officers went to obtain a search warrant while others remained to guard the house. Prior to obtaining the warrant, several officers entered the residence to look for additional suspects. They observed smoking paper in the fire place but seized nothing until the others returned with the warrant. Among the evidence seized after the warrant was obtained were papers which the officers noticed during their pre-warrant check.[408] Defendants contended that the initial check for additional suspects was illegal because it was not authorized by a warrant. The court rejected this argument and recognized the right of the officers to insure the safety of those involved by accounting for all of the occupants of the residence.[409]

In reaching its conclusion, the court relied on *United States v. McLaughlin*,[410] which allows officers to preserve evidence by searching a house to make sure that the premises are empty.[411] In the *McLaughlin* case, law enforcement officers entered a residence with probable cause, but without a warrant, to arrest several suspects inside who were "scuffling" and possibly destroying evidence.[412] The court noted that "to delay the entry until the warrant was obtained involved a substantial risk that evidence would be removed or destroyed and increased the likelihood that innocent persons would be harmed or significantly inconvenienced."[413]

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407. 597 F.2d 139 (9th Cir. 1977).
408. *Id.* at 139.
409. *Id.* at 140.
410. 525 F.2d 517, 521 (9th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976).
411. 597 F.2d at 140.
412. 525 F.2d at 519.
413. *Id.* at 521. *Cf.* Chimel v. California, 395 U.S. 752 (1969) (an officer may search,

In applying *McLaughlin*, the *Spanier* court noted that the officers "had no reason to believe that the robbers were acting alone, or that everyone connected with the crime had left the house."[414] In addition, they had reason to believe evidence was being destroyed since smoke and sparks were rising from the chimney.

Authority for the result in *Spanier* may be found in *Vale v. Louisiana*[415] where the Supreme Court invalidated a warrantless search of a residence when the suspect was arrested on the front porch. Prior to a full search and immediately after the arrest, the officers conducted a cursory search of the house for anyone present. Invalidating the full search, the Court rejected the state's argument that exigent circumstances justified the search. It noted that "by their own account the arresting officers satisfied themselves that no one else was in the house when they first entered the premises [and conducted the cursory search]."[416] One may read implicit approval of the initial cursory search, however, since *Vale* was reversed on a different issue, and the authority of *Vale* for the result in *Spanier* is uncertain.

The United States Supreme Court recently invalidated a search of a bar pursuant to a warrant by applying the *Terry* standard to the search of patrons not named in the warrant.[417] Officers obtained a warrant to search a tavern and the bartender for heroin. During the subsequent search they frisked petitioner, a patron, pursuant to an Illinois statute authorizing "law enforcement officers to detain and search any person found on premises being searched pursuant to a search warrant."[418] The frisking officer "felt what he described as 'a cigarette pack with objects in it.' "[419] He frisked the other patrons, returned to petitioner, and removed the pack from his pocket. Subsequent examination revealed that the pack contained heroin.[420]

The trial court denied petitioner's motion to suppress the heroin and the Illinois Appellate Court affirmed and held the statute constitutional as applied because petitioner was no "innocent stranger having no connection whatever with the premises," because the location was a

without a warrant, an arrested suspect and the area within his immediate control, for self-protection and preservation of evidence). The result in *Spanier* reflects this purpose but allows a warrantless entry of the residence and a "cursory" search throughout the house.

414. 597 F.2d at 140.
415. 399 U.S. 30 (1970).
416. *Id.* at 34.
417. Ybarra v. Illinois, 100 S.Ct. 338 (1979).
418. *Id.* at 341.
419. *Id.*
420. *Id.*

one room bar, and because the heroin described in the warrant easily could have been concealed.[421]

On appeal the Supreme Court reversed petitioner's conviction. The Court noted that "the agents knew nothing in particular about [petitioner], except that he was present, along with several other customers, in a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale." Thus, the Court held that there was no probable cause for the initial frisk.[422] Nor was the search justified by a reasonable belief that petitioner was armed and dangerous.[423] In rejecting the state's argument that its interest in halting drug traffic and the ease with which narcotics may be concealed or transferred from person to person justified the frisk, the Court returned to the "narrow scope" of the *Terry* exception:

> Nothing in *Terry* can be understood to allow a generalized "cursory search for weapons" or indeed, any search whatever for anything but weapons. The "narrow scope" of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place.[424]

When considered with the decisions in *Dunaway, Brown v. Texas*, and *Delaware v. Prouse*,[425] the Court's conclusion in *Ybarra* signals continued jealous regard for the probable cause requirement. Thus, the *Terry* pat-down rule remains a narrow exception to the fourth amendment probable cause requirement which the Court appears to be justifiably reluctant to expand.

II. PROCEDURAL RIGHTS OF THE ACCUSED

A. The Right Against Self-incrimination

The right against self-incrimination[426] does not attach solely to

421. *Id.*

422. *Id.* at 342.

423. *Id.* "The initial frisk of [petitioner] was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a pat-down of a person for weapons." *Id.*

424. *Id.* at 343-44.

425. 440 U.S. 648 (1979) (reasonable suspicion required for valid stop of an automobile in order to check the driver's license or vehicle registration).

426. The fifth amendment provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put

suspects under arrest on a criminal charge. Rather, it protects anyone under interrogation in a custodial setting whose words may be used as evidence in court.[427] It has been enforced by means of such procedural devices as *Miranda* warnings[428] and the Federal Rules of Criminal Procedure[429] both of which are designed to insure that all answers made in response to formal questioning are made voluntarily and without physical or psychological coercion.[430]

Recent Ninth Circuit decisions have examined the right against self-incrimination in terms of its applicability to voluntary statements, its waiver, and its applicability in various judicial proceedings.

1. Voluntary statements made prior to *Miranda* warnings

In the decisions of *United States v. Cornejo*[431] and *Phillips v. Attorney General*,[432] the Ninth Circuit considered extending the privilege against self-incrimination to statements which have been made voluntarily to police or other legal authorities as opposed to those given in response to interrogation. *Cornejo* involved the search of an apartment

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in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

427. *E.g.* Miranda v. Arizona, 384 U.S. 436, 467 (1965) ("the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves").

428. *Id.* at 467-68.

[T]he Court [in *Miranda*] spelled out in detail the advice police must give suspects in custody. The police must make known to the poor and the ignorant what is more commonly known to the affluent and the informed. Suspects must be told of their right to a lawyer and their right not to answer questions. And counsel must be provided for the poor at the questioning stage. The suspect is entitled to counsel from the time he is put in restraint—at the police station.

M. MELTZER, THE RIGHT TO REMAIN SILENT 94 (1972).

429. *E.g.*, FED. R. CRIM. PROC. 11(d), which directs a trial judge to determine that a defendant's guilty plea is voluntarily made before it is accepted.

430. Even before *Miranda*, the Supreme Court reversed convictions where confessions or evidence was obtained from a suspect by means of physical violence. *E.g.*, Rochin v. California, 342 U.S. 165 (1952); Brown v. Mississippi, 297 U.S. 278 (1936). However, Escobedo v. Illinois, 378 U.S. 478 (1964), the precursor to *Miranda*, was perhaps the first modern case in which the Court recognized that psychological coercion could be as effective a tool for extracting confessions as physical torture. Quoting Bram v. United States, 168 U.S. 532, 562 (1897), the *Escobedo* Court noted: "It cannot be doubted that, placed in the position in which the accused was when the statement was made to him . . . , the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt . . . ." 378 U.S. at 485.

431. 598 F.2d 554 (9th Cir. 1979) (per curiam).

432. 594 F.2d 1288 (9th Cir. 1979).

in the course of a robbery investigation during which defendant Cornejo was discovered hiding inside. Before he was taken to the police station, Cornejo voluntarily made statements to his captors which were later used against him at trial. Cornejo later contested the admissibility of his comments because he had not been issued *Miranda* warnings. The Ninth Circuit reasoned that Cornejo's statements were not the products of coercion or interrogation and therefore were not entitled to fifth amendment protection.[433]

Courts have consistently held that it is not necessary to give *Miranda* warnings to those who volunteer statements.[434] Therefore, *Cornejo* merely demonstrates that the Ninth Circuit is in accord with the prevailing view.[435] Because Cornejo's statements were not made in response to interrogation but were volunteered, he could not claim fifth amendment protections. Even if the statements had preceded the issuance of *Miranda* warnings,[436] they still would have been admissible as evidence. The mere fact that statements were made to police does not necessarily bring such statements under the purview of the fifth amendment.[437]

2. *Miranda* warnings

Even if proper *Miranda* warnings have been issued, a defendant may still successfully challenge the admissibility of his statements if he

433. 598 F.2d at 557.

434. As the majority remarked in *Miranda*: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." 384 U.S. at 478.

435. *E.g.*, Pavao v. Cardwell, 583 F.2d 1075, 1077 (9th Cir. 1978) (appellant's statement made following a high speed chase which implicated him, but exonerated his wife in the crime, was voluntary and did not require *Miranda* warnings); United States v. LaMonica, 472 F.2d 580, 581 (9th Cir. 1972) (since officer was asking routine questions regarding inventory of defendant's personal effects, his response which revealed advanced planning of a drug smuggling operation was a voluntary statement and did not require *Miranda* warnings).

436. *E.g.*, Pavao v. Cardwell, 583 F.2d 1075, 1077 (9th Cir. 1978) (appellant's statement, made immediately after he exited his car, was voluntary and did not require *Miranda* warnings).

437. Had Cornejo contended that the presence of the police was particularly coercive or confusing, he could have perhaps classified his otherwise voluntary statements as the involuntary products of psychological pressure. However, he challenged the admissibility of his statements merely because they were made to police, not because he felt particularly intimidated by their presence. 598 F.2d at 557. *Cf.* Phillips v. Attorney General, 594 F.2d 1288, 1290-91 (9th Cir. 1979) (appellant's statement "[y]ou guys guess pretty good" which was made after officers told him they suspected marijuana was inside his airplane was voluntary and prior issuance of *Miranda* warnings was not required).

can show that they were not made voluntarily.[438] In addition, if a defendant declines to talk after *Miranda* warnings have been issued and his request is not honored, statements made in response to further interrogation may be suppressed.[439]

This contention was raised in the Ninth Circuit case of *United States v. Boyce*[440] in which FBI agents arrested a defendant at his residence in Riverside, California. Boyce initially declined to sign a written waiver of his *Miranda* rights, but talked freely to the agents about personal matters during the one and one-half hour drive to Los Angeles. When he arrived at the FBI office, Boyce expressed his desire to discontinue any further conversation. This request was immediately honored. Later that day, Boyce was informed that his co-defendant had been captured in Mexico. At this point he volunteered the statement, "Let's talk."[441]

On appeal of his conviction for espionage, Boyce claimed that the FBI agents had violated his *Miranda* rights by continuing to converse with him and ask questions after he had refused to sign the written waiver.[442] Had the agents failed to "scrupulously honor" Boyce's request to discontinue the conversation or his refusal to sign a waiver, this would undoubtedly have been the case.[443] But until the time Boyce had exclaimed "Let's talk," no direct interrogation had occurred.[444] The questions that were asked dealt with collateral personal matters.[445] In addition, Boyce's initial refusal to sign a waiver did not mean that he had to maintain absolute silence or that interrogation could never resume.[446] Therefore, the Ninth Circuit properly affirmed the district court's finding that the agents had scrupulously honored Boyce's request prior to the time of his waiver at the FBI office.[447]

438. Davis v. North Carolina, 384 U.S. 737, 740 (1966); Greenwald v. Wisconsin, 390 U.S. 519, 521 (1968) (per curiam).

439. Michigan v. Mosley, 423 U.S. 96, 103-04 (1975).

440. 594 F.2d 1246, 1250 (9th Cir.), *cert. denied*, 444 U.S. 855 (1979).

441. *Id.*

442. *Id.*

443. Michigan v. Mosley, 423 U.S. 96, 103-04 (1975) (citing Miranda v. Arizona, 384 U.S. 436, 479 (1965)).

444. 594 F.2d at 1250.

445. *Id.*

446. Michigan v. Mosley, 423 U.S. 96, 102-03 (1975).

447. 594 F.2d at 1249, 1250. The situation in *Boyce* should be distinguished from one where a suspect initially requests an attorney. In the latter case, interrogation cannot commence until an attorney is present. Michigan v. Mosley, 423 U.S. 96, 104 n.10 (1975); United States v. Rodriguez-Gastelum, 569 F.2d 482, 489 (9th Cir.) (en banc) (Hufstedler, J., dissenting), *cert. denied*, 436 U.S. 919 (1978).

3. Waiver

The fifth amendment right against self-incrimination may be waived under certain circumstances. Three Ninth Circuit decisions dealt with this issue in 1979. In *United States v. Boyce*, defendant Boyce contested the voluntariness of his waiver of *Miranda* rights because of "psychological pressure."[448] In making this claim Boyce attempted to drawn an analogy to *Brewer v. Williams*,[449] where defendant had been subjected to the famous "Christian Burial Speech" while riding in an automobile with two law enforcement officers.[450]

The Ninth Circuit found Boyce's comparison unpersuasive for a number of reasons. *Brewer* involved a sixth amendment waiver of counsel, whereas Boyce's waiver involved his fifth amendment rights. Evidently, the court viewed the interrogation of a suspect without the requested representation of counsel with more suspicion than interrogation of a witness in violation of fifth amendment rights.

The court also noted that although the agents may have subjected Boyce to emotional pressure by appealing to patriotic and family considerations, the degree was minor compared to that exerted in *Brewer*.[451] In reaching this conclusion, the court focused on Boyce's high level of intelligence and the fact that he selectively chose which questions to answer.[452] These factors were noticeably absent in *Brewer* where defendant had a history of mental illness.[453] Perhaps the decisive fact was that "[n]othing in the record suggest[ed] that [Boyce's] will was in any respect overborne."[454]

It is well settled that a waiver of *Miranda* rights must be "knowingly and intelligently" made.[455] The degree of "intelligence" required

448. 594 F.2d at 1250.
449. 430 U.S. 387, 392-93 (1977).
450. 594 F.2d at 1250.
451. *Id.* at 1251.
452. *Id.*
453. 430 U.S. at 392.
454. 594 F.2d at 1251.
455. The guidelines for determining whether a valid waiver has occurred were established by the Supreme Court in Johnson v. Zerbst, 304 U.S. 458, 464 (1937), which involved waiver of counsel. There the Court held that "[t]he determination of whether there has been an intelligent waiver . . . must depend, in each case, [on various factors] including the background, experience, and conduct of the accused."

However, the Supreme Court recently accepted the "implied waiver" of *Miranda* rights in North Carolina v. Butler, 441 U.S. 369 (1979). This theory had been adopted by the Ninth Circuit and nine of the remaining ten circuits. *Id.* at 1758 n.5. *E.g.*, United States v. Hilliker, 436 F.2d 101 (9th Cir. 1970), *cert. denied*, 401 U.S. 958 (1971).

The Court's decision would seem to fly in the face of the general idea that waivers must be knowingly made, since an implied waiver by definition may be determined subjectively

to validly waive such rights was at issue in the 1979 Ninth Circuit case of *United States v. Glover*.[456] Glover was arrested in connection with a diamond theft. FBI agents presented Glover with a written waiver of rights form which he allegedly understood and which he signed.[457] On the appeal of his conviction, Glover argued that he was incapable of making a knowing and intelligent waiver of his rights because of his substandard intelligence level. Evidence presented at a suppression hearing revealed that he scored sixty-seven on an adult intelligence test, was in the bottom one percentile, and had a first or second grade reading comprehension level.[458] Further testimony by the defense indicated that Glover had a limited attention span and did not understand a number of the terms on the waiver form.[459]

Although the Ninth Circuit acknowledged Glover's low mental capacity, it found that an intelligent waiver had been made primarily on the strength of the defendant's previous experience with legal and criminal procedures.[460] The court was also influenced by the fact that the evidence in support of Glover's substandard intelligence was not uncontroverted.[461]

The court's factual and legal conclusions appear to be questionable. Evidence was offered which indicated that a fifth or sixth grade

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by the interrogator irrespective of the intent of the interrogatee. The dangers of such subjective analysis were enumerated by Justice Brennan in the *Butler* dissent: "Faced with 'actions and words' of uncertain meaning, some judges may find waiver where none occurred. Others may fail to find them where they did. In the former case, the defendant's rights will have been violated; in the latter, society's interest in effective law enforcement will have been frustrated." 441 U.S. at 378-79.

The *Butler* decision has already been explicitly refuted in a decision by the majority of the Pennsylvania Supreme Court in Commonwealth v. Bussey, 404 A.2d 1309 (1979). That court, relying on its supervisory power and the state constitution, refused to follow *Butler* and held that a waiver of *Miranda* rights must be explicit. *Id.* at 1314.

456. 596 F.2d 857 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 124 (1980).

457. *Id.* at 866.

458. *Id.* at 864-65. Glover's low intelligence apparently resulted from brain injuries suffered during childhood. *Id.* at 865.

459. *Id.* at 865.

460. *Id.* at 866.

461. *Id.* In reaching this conclusion the court attempted to distinguish a Fifth Circuit case, Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972), which found that two retarded teenagers were incapable of giving an intelligent waiver. The *Glover* court noted that neither teenager had previous criminal records and that the evidence offered as to their substandard intelligence was uncontested. 596 F.2d at 866.

The court placed its principal reliance on United States v. Young, 355 F. Supp. 103 (E.D. Pa. 1973), where a defendant with an intelligence level slightly lower than that of Glover's was found to have made a valid waiver. The *Glover* court cited with approval *Young's* similar reliance on the defendant's extensive criminal background. 596 F.2d at 866 (citing 355 F. Supp. at 111).

reading level was necessary for proper comprehension of the waiver form.[462] Glover's first or second grade capacity would thus seem to be clearly inadequate. It is also doubtful whether long term exposure to the workings of the criminal process because of prior offenses can compensate for a very limited ability to understand written English.

If *Glover's* standard of *uncontested* evidence is followed, it is probable that few, if any, defendants, however marginal their intelligence, will be able to establish that their waiver was ineffective because of the lack of an "intelligent" waiver. In most cases it would appear that the Government, as it did in *Glover*, would be able to produce expert testimony to the contrary.

In addition to requiring that waivers be made knowingly and intelligently, the federal courts also have imposed the requirement that separate waivers must be expressed at each level of the criminal proceeding.[463] The Ninth Circuit applied this rule in *United States v. Licavoli*, where a Government witness had waived his right against self-incrimination while testifying before the grand jury, but later invoked it during the trial.[464] The defendant contended that the witness' waiver before the grand jury precluded him from invoking his fifth amendment right during the subsequent trial. However, the court found no merit to this position especially in view of the fact that the defendant had been able to introduce the grand jury testimony of the witness at trial.[465]

4. Special judicial proceedings

a. deportation hearings

In the decision of *Cuevas-Ortega v. Immigration & Naturalization Service*,[466] the Ninth Circuit addressed the issue of whether the right

462. 596 F.2d at 865.

463. *E.g.*, United States v. Trejo-Zambrano, 582 F.2d 460, 464 (9th Cir.), *cert. denied*, 439 U.S. 1005 (1978); United States v. Cain, 544 F.2d 1113 (1st Cir. 1976); United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973); Jeffries v. United States, 215 F.2d 225 (9th Cir. 1954). *Contra*, Ellis v. United States, 416 F.2d 791 (D.C. Cir. 1969) (waiver of right against self-incrimination by witness before grand jury barred assertion of that right at trial as to those issues that had been covered in the grand jury proceedings).

464. 604 F.2d 613, 617 (9th Cir. 1979).

465. *Id.* at 623-24. The *Licavoli* decision also touched upon another issue in the area of self-incrimination that is not encompassed by any subheadings in this article. Licavoli had desired to call various witnesses to the stand whom he knew would invoke their fifth amendment privileges and refuse to testify. The Ninth Circuit, as did the trial court, would not allow this tactical maneuvering. Witnesses cannot be called for the sole purpose of forcing them to invoke their fifth amendment privileges in front of the jury. *Id.* at 623.

466. 588 F.2d 1274 (9th Cir. 1979).

against self-incrimination can be asserted by illegal aliens in deportation proceedings. During an Immigration and Naturalization Service (INS) investigation into a number of fraudulent home birth registrations, INS investigators conversed with Ms. Del Toro, who, without apparent coercion, freely admitted that she was illegally present in the United States. Her statement was used as incriminating evidence at her and Cuevas-Ortega's subsequent deportation hearing. Both were deported despite Del Toro's claims that her statement was obtained in violation of her fifth amendment rights.[467] The Ninth Circuit upheld the action of the INS.[468]

In previous cases, the Ninth Circuit had held that *Miranda* warnings need not be given to defendants in deportation hearings, primarily because of the difference between criminal trials and deportation proceedings.[469] Thus, it would appear that the only constitutional protection afforded a potential deportee in such situations would be the due process clause of the fourteenth amendment.[470] This position appears somewhat overly restricted in view of prior Supreme Court holdings which have allowed the privilege against self-incrimination to "be asserted in any proceeding, civil or criminal, administrative or judicial, investigative or adjudicatory."[471]

b. grand jury proceedings

In *United States v. Lemieux*,[472] the Ninth Circuit reaffirmed the notion that grand jury witnesses who receive a grant of immunity are

467. *Id.* at 1277-78.

468. *Id.* at 1276, 1278.

469. Trias-Hernandez v. INS, 528 F.2d 366, 368 (9th Cir. 1975). The Ninth Circuit has chosen to follow the Seventh Circuit's reasoning on this issue, as indicated by the court's reliance on language from Chavez-Raya v. INS, 519 F.2d 397, 402 (7th Cir. 1975):

> A principal purpose of the *Miranda* warnings is to permit the suspect to make an intelligent decision as to whether to answer the government agent's questions. In deportation proceedings, however—in light of the alien's burden of proof, the requirement that the alien answer nonincriminating questions, the potential adverse consequences to the alien of remaining silent, and the fact that an alien's statement is admissible in the deportation hearing despite his lack of counsel at the preliminary interrogation—*Miranda* warnings would be not only inappropriate but could also serve to mislead the alien.

(citations omitted). *See* Ben Huie v. INS, 349 F.2d 1014, 1017 (9th Cir. 1965) (deportation hearings are not criminal in nature and are hence without the protections given in criminal procedures).

470. *See* Choy v. Barber, 279 F.2d 642, 646 (9th Cir. 1960) ("[d]eportation proceedings must conform 'to traditional standards of fairness encompassed in due process of law' ") (citing Shaughnessy v. United States, 345 U.S. 206, 212 (1953)).

471. Kastigar v. United States, 406 U.S. 441, 444 (1972).

472. 597 F.2d 1166 (9th Cir. 1979) (per curiam).

not shielded from testifying under the fifth amendment even though a possibility of another prosecution might exist in a foreign country. Lemieux was convicted of civil contempt because he refused to testify under a grant of immunity before a federal grand jury. He feared that a prosecution in Mexico would result if he testified concerning his alleged involvement in a marijuana smuggling conspiracy. He consequently claimed that the fifth amendment shielded him from making statements that would incriminate him in a foreign prosecution.[473] But the Ninth Circuit found that rule 6(e) of the Federal Rules of Criminal Procedure, which requires a limited form of secrecy for grand jury proceedings, provided adequate protection for Lemieux.[474]

The weight of established authority appears to support this position. To date, federal courts have not required the issuance of *Miranda* warnings in similar situations.[475]

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473. *Id.* at 1167.

474. *Id.* The text of rule 6(e) on its face would not appear to cloak grand jury witnesses with the protection granted by the federal courts. It provides in part:

> (1) General Rule.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.
>
> (2) Exceptions.—
>
> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—
>
> (i) an attorney for the government for use in the performance of such attorney's duty; and
>
> (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.
>
> (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.
>
> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or
>
> (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

FED. R. CRIM. P. 6(e).

According to the very words of the rule, another judicial proceeding could require the statements made by a grand jury witness. *Id.* § (2)(C)(i).

475. *E.g.*, Zicarelli v. New Jersey State Investigation Comm'n, 406 U.S. 472 (1972) (un-

However, in a concurring opinion that reads more like a dissent, Judge Hufstedler pointed out the weaknesses in the holding.[476] She noted that rule 6(e) does not provide the protection for witnesses that the majority assumed it did.[477] Judge Hufstedler found support for her conclusion in *In re Cardassi*,[478] a 1972 federal district court decision. The *Cardassi* court recognized the illusory nature of the protection afforded by rule 6(e). It noted:

> While there is no reason to believe that any enforcement officials . . . would not honor the rule, the constitutional protection of the witness must rest on more than faith. If in fact a law enforcement official wanted to make the witness's answers known to the foreign prosecuting officials, it is unlikely that he would apply . . . for disclosure of the grand jury minutes.

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less grand jury witness demonstrates substantial possibility that he would be subject to foreign prosecution, he is without self-incrimination protection). *See, e.g.*, United States v. Yanagita, 552 F.2d 940, 946 (2d Cir. 1977) ("*Zicarelli* makes it clear that one invoking the Fifth Amendment privilege has the burden of establishing, first, that the subject of the government's questions raises 'a real danger of being compelled to disclose information that might incriminate him under foreign law,' and second, that there is a 'real and substantial' fear that prosecution by the foreign government might ensue."); *In re* Parker, 411 F.2d 1067, 1070 (10th Cir. 1969), *vacated as moot sub nom.* Parker v. United States, 397 U.S. 96 (1970) (grand jury witness cannot refuse to answer questions under grant of immunity without reasonable cause to fear danger of incrimination from a direct answer); *In re* Tierney, 465 F.2d 806, 811 (5th Cir. 1972), *cert. denied*, 410 U.S. 914 (1973) ("Our view then and now is that because of the secrecy of the grand jury proceedings no substantial risk of foreign prosecution is posed. Rule 6(e), F.R. Crim. P., provides for this secrecy.").

The Ninth Circuit had previously relied upon *Zicarelli* to decide *In re* Weir, 495 F.2d 879 (9th Cir.), *cert. denied*, 419 U.S. 1038 (1974). *Weir* was a case similar to *Lemieux* in that it involved a witness who feared prosecution in Mexico. The court held that Weir was not entitled to fifth amendment protections because the possibility of prosecution in Mexico was too remote. *Id.* at 881. In reaching this conclusion, the court assumed that rule 6(e) would provide the witness with sufficient protection. *Id.* A majority of the *Lemieux* court found *Weir* to be directly controlling. 597 F.2d at 1167.

476. Judge Hufstedler is not alone in the realization that a grand jury witness is not automatically immune from foreign prosecution. Wigmore gives some spurious support to the victimized witness in noting:

> No one suggests . . . that the privilege [against self-incrimination] should apply because a *mere possibility* exists that disclosure might conceivably incriminate the witness under the law of some remote jurisdiction. A suggestion appears, however, in what might be called the Michigan view, that the privilege should apply where there is a *substantial risk* of prosecution by the foreign sovereignty under whose law the testimony is incriminating.

J. WIGMORE, EVIDENCE § 2258 (3rd rev. ed. 1961) (citations omitted).

477. Judge Hufstedler interpreted rule 6(e)(2)(A)(ii) to permit a cooperative exchange of grand jury testimony with foreign officials for the purpose of stopping international drug traffic. If this information is later used to prosecute a defendant under foreign laws, it would be a violation of rule 6(e) but beyond the reach of the United States courts. 597 F.2d at 1168 (Hufstedler, J., concurring).

478. 597 F.2d at 1169 (citing *In re* Cardassi, 351 F. Supp. 1080 (D. Conn. 1972)).

> He would simply send the transcript. It may well be that such conduct would render the official subject to the disciplinary powers of [the] court if the conduct and the identity of the person responsible ever became known, but such an after-the-fact sanction would provide no protection for the witness.[479]

In another case involving grand jury testimony, *United States v. Lawson*,[480] an attorney was subpoenaed to reveal to a grand jury client names and activities arising out of his firm's defense of two individuals charged with narcotics violations. The attorney attempted to vicariously assert the "Fifth Amendment right against self-incrimination [belonging to] his unnamed clients."[481] However, the Ninth Circuit viewed the controversy as a question of the validity of the attorney-client privilege and avoided the fifth amendment implications.[482] In *United States v. Scheufler*,[483] the court dismissed appellant's claim that his fifth amendment rights were violated because a grand jury witness had commented on his failure to testify. Prior Supreme Court cases have held that such comments do not taint an otherwise valid indictment.[484]

c. juvenile court proceedings

The extent of the right against self-incrimination which was extended to juveniles by the Supreme Court in *In re Gault*,[485] has been subject to widely divergent interpretations by the lower courts. Both state and federal systems have deemed a juvenile request for counsel

479. 351 F. Supp. at 1082. Arguably Lemieux's fear of prosecution was substantial because of the proximity of Mexico. But the court held that when there was no real and substantial danger of such prosecution, this fear was an insufficient basis upon which to assert fifth amendment rights. 597 F.2d at 1167. There appears to be no other reason for the court's holding other than adherence to precedent.

480. 600 F.2d 215 (9th Cir. 1979).

481. *Id.* at 217.

482. *Id.*

483. 599 F.2d 893 (9th Cir. 1979).

484. The Court, as early as 1958, had in Lawn v. United States, 355 U.S. 339, 348-50 (1958), allowed the admission of evidence impinging on fifth amendment protections in a grand jury proceeding. *See* Costello v. United States, 350 U.S. 359, 363 (1956) ("An indictment returned by a legally constituted and unbiased grand jury . . . is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."). *See also* United States v. Calandra, 414 U.S. 338 (1974). In United States v. Blue, 384 U.S. 251 (1966), the defendant protested the use of incriminating evidence in a criminal tax evasion case that he himself had been compelled to produce a year before in jeopardy assessment proceedings. The Court remarked that even if it is assumed that the prosecution does acquire incriminating evidence in violation of the fifth amendment, the defendant could always have the evidence suppressed at trial. *Id.* at 255.

485. 387 U.S. 1 (1967).

during interrogation as a *per se* invocation of the right to remain silent. State courts have also concluded that a juvenile's request to see his parents or other responsible adult automatically invokes *Miranda* rights.[486] Federal courts, on the other hand, have limited this right to situations where an attorney is requested.[487] The Supreme Court followed this practice in the 1979 decision of *Fare v. Michael C.*[488] In that case, a sixteen-year-old murder suspect had argued in the California state courts that his voiced desire to talk with his probation officer constituted an invocation of *Miranda* protections. The Court, focusing on the prosecutorial role that a probation officer may take in the proceedings against a juvenile offender, declined to equate Michael C.'s request with a wish to see an attorney.[489]

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486. *E.g.*, People v. Burton, 6 Cal. 3d 375, 382, 491 P.2d 793, 797-99, 99 Cal. Rptr. 1, 5 (1971) (juvenile's request to see his parents constituted a per se invocation of his *Miranda* rights: "Any words or conduct which 'reasonably appears inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with the police *at that time* . . . must be held to amount to an invocation of the Fifth Amendment privilege") *Id.* at 797. (emphasis in original); *In re* Dino, 359 So. 2d 586, 594 (La. 1978) (a juvenile cannot waive his *Miranda* rights until he has consulted with an attorney, parent, or other adult interested in his welfare).

487. *E.g.*, Chaney v. Wainwright, 561 F.2d 1129 (5th Cir. 1977). The defendant, a "streetwise" juvenile offender, asked to see his mother before making statements to the police, but his request was denied. The Fifth Circuit ruled that the request for parental support was not a per se invocation of *Miranda* rights since, due to repeated offenses, the defendant knew well how to voice those rights; "[h]e knew he could have had an attorney but did not want one." *Id.* at 1132.

488. 442 U.S. 707 (1979).

489. *Id.* at 724-25. The Court used a *totality of circumstances test* to determine whether Michael C. had in fact invoked his rights by requesting to see his probation officer or had waived them in failing to ask for an attorney. *Id.* at 725-26. The *totality of the circumstances test* includes an examination of such factors as:

> 1) age of the accused; 2) education of the accused; 3) knowledge of the accused as to both the substance of the charge, if any has been filed, and the nature of his rights to consult with an attorney and remain silent; 4) whether the accused is held incommunicado or allowed to consult with relatives, friends, or attorney; 5) whether the accused was interrogated before or after formal charges had been filed; 6) methods used in interrogation; 7) length of interrogations; 8) whether *vel non* the accused refused to voluntarily give statements on prior occasions; and 9) whether the accused has repudiated an extrajudicial statement at a later date.

Id. at 725-27. West v. United States, 399 F.2d 467, 469 (5th Cir. 1968). *Accord*, United States v. Miller, 453 F.2d 634 (4th Cir. 1972), *discussed in* 1 JUV. COURT DIG. 6 (Feb. 1973).

Only the dissent in *Fare* considered yet another circumstance that could have been dispositive of the entire issue: Michael C.'s unwillingness to talk, as indicated by his desire to consult with *some* adult before confessing to police. Justice Marshall asserted that "*Miranda* requires that interrogation cease whenever a juvenile requests an adult who is obligated to represent his interests." 442 U.S. at 729-30. Such a request is "surely inconsistent with a present desire to speak freely." *Id.*

The Court's refusal to recognize unwillingness to talk as a determinative factor in discovering whether fifth amendment rights had been violated in a juvenile interrogation is anomalous when compared with the holding in Haynes v. Washington, 373 U.S. 503 (1963).

Fare does little more than affirm the position taken by the Ninth Circuit in juvenile proceedings. In *United States v. Indian Boy X*, the court noted that while it was "mindful of the rights of juveniles at the adjudicative stage of a proceeding to those essentials of due process and fair treatment afforded adults," it was "not aware of any law to the effect that juveniles are entitled to any *greater* rights than adults."[490] There is no precedent to suggest that the request for a probation officer constitutes an assertion of fifth amendment protections in adult jurisprudence.

B. The Right to Counsel

1. Court appointed counsel

The right to the assistance of counsel for an accused is guaranteed by the sixth amendment of the Constitution.[491] Although a literal reading of the sixth amendment does not confer a right upon the accused to representation by court appointed counsel,[492] this right has evolved through judicial interpretations of the amendment.

In 1932, the United States Supreme Court held in *Powell v. Alabama*[493] that the due process clause of the fourteenth amendment requires the observance of certain fundamental rights associated with a hearing, among them the right to the assistance of counsel. This right, however, was held only to be present in cases involving capital offenses. *Johnson v. Zerbst* expanded this right to cover defendants in federal courts.[494] Four years later in *Betts v. Brady* the Supreme Court held that the sixth amendment did not require the appointment of counsel in every state proceeding because the assistance of counsel was not deemed a fundamental right.[495] *Betts* established the use of a case-by-case analysis through which it was determined whether, in a particular case, the denial of the assistance of counsel was also the denial of fundamental fairness.

Betts was overruled by *Gideon v. Wainwright* in which the Court held that the right to counsel was fundamental and thus applicable to

Haynes' confession was considered involuntary because he had been denied permission to call his wife until he confessed. It seems readily apparent that Haynes' spouse could not have rendered him any more legal assistance than Michael C's probation officer.

490. 565 F.2d 585, 591 (9th Cir. 1977) (emphasis in original).

491. U.S. CONST. amend. VI.

492. The language in question reads as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." *Id.*

493. 287 U.S. 45, 71 (1932).

494. 304 U.S. 458, 467 (1938).

495. 316 U.S. 455, 471 (1942).

the states through the fourteenth amendment.[496] This right, however, was extended only to state and federal felony cases. The question of whether it applied to state defendants charged with misdemeanors was left unanswered.

In 1972, *Argersinger v. Hamlin* expanded the right to counsel, holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[497] However, the Court specifically reserved the question of whether the right to appointment of counsel attaches where no loss of liberty is involved.[498] In 1979, this issue came before the United States Supreme Court in *Scott v. Illinois*.[499] Scott, an indigent, was charged with shoplifting, a crime punishable under Illinois state law by up to one year in jail, a five hundred dollar fine, or both.[500] He was unrepresented by counsel at trial, convicted and ordered to pay a fifty dollar fine.[501] The Supreme Court in a five to four ruling upheld his conviction. Justice Rehnquist, writing for the majority, concluded that in a trial involving a crime for which a loss of liberty is authorized but where none is actually imposed, an indigent defendant, unrepresented by counsel, is not deprived of his sixth amendment rights.[502] In reaching this conclusion, Justice Rehnquist interpreted the *Argersinger* actual imprisonment standard as representing the outer limit of cases where a state was required to appoint counsel for indigents.[503]

Justice Rehnquist's reading of *Argersinger* is flawed. *Argersinger* at a minimum, required counsel when actual imprisonment was involved.[504] The question of whether an indigent had a right to state appointed counsel in crimes where imprisonment was authorized, but not actually imposed, was not addressed by the majority. Justice Douglas, who authored the majority opinion, noted that "we need not consider the requirements of the sixth amendment as regards the right to counsel where loss of liberty is not involved."[505]

In spite of this language, the majority in *Scott* did "conclude . . .

496. 372 U.S. 335, 342-45 (1963).
497. 407 U.S. 24, 37 (1972).
498. *Id.* In *Argersinger*, the defendant had been sentenced to a prison term.
499. 440 U.S. 367 (1979).
500. *Id.* at 368.
501. *Id.*
502. *Id.* at 373-74.
503. *Id.* at 373.
504. 407 U.S. at 37.
505. *Id.*

that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings."[506] However, nothing was offered in support of this statement. This conclusion is even more questionable in light of the majority's own language that "the intentions of the *Argersinger* Court are not unmistakably clear."[507]

The majority in *Scott* perhaps could have avoided some of these difficulties by using an approach closer to that espoused by Justice Powell in his *Argersinger* concurring opinion. Instead of distinct, inflexible line-drawing, Justice Powell advocated the use of counsel where necessary to insure a fair trial.[508] He expressly rejected an "actual confinement" standard.[509] This flexible approach would avoid the anomaly presented by both *Scott* and *Argersinger* of requiring counsel in relatively minor actual imprisonment cases while dispensing with it in more complex trials where loss of property is at stake.[510]

2. Effective assistance of counsel

The United States Supreme Court has required not only that counsel be present in most criminal trials, but also that such counsel be reasonably effective.[511] Once counsel is found to be ineffective, the question arises whether such ineffectiveness requires automatic reversal of the defendant's conviction.

The Ninth Circuit confronted this issue in the 1979 case of *Ewing v. Williams*. There a defendant challenged the validity of his conviction on the ground that his counsel had been "totally unprepared."[512] The

506. 440 U.S. at 373.

507. *Id.* Justice Rehnquist failed to address the holding of the Court in Gideon v. Wainwright, 372 U.S. at 341-44, and other right to counsel cases that the right to appointed counsel is fundamental and essential to a fair trial. The *Gideon* approach tends to weaken any arguments for definitive line drawing based on the severity of punishment imposed.

508. 407 U.S. at 47 (Powell, J., concurring).

509. *Id.* at 52. In *Scott*, however, Justice Powell's concurring opinion suggested an "actual confinement" standard rather than the more flexible case-by-case analysis which he had advocated in *Argersinger*. The reason for his inconsistent opinions is unclear. In *Scott*, Justice Powell did acknowledge his "continuing reservations about the *Argersinger* rule" but stated that he joined the majority to "provide clear guidance" to courts confronting the issue and to reach a result consistent with *Argersinger* for reasons of stare decisis. 440 U.S. at 374-75 (Powell, J., concurring).

510. See Justice Powell's argument in Argersinger v. Hamlin, 407 U.S. at 48 (Powell, J., concurring).

511. *E.g.*, Tollett v. Henderson, 411 U.S. 258, 267-68 (1973); McMann v. Richardson, 397 U.S. 759, 771 (1970); Glasser v. United States, 315 U.S. 60, 76 (1942); Powell v. Alabama, 287 U.S. 45, 56 (1932).

512. 596 F.2d 391, 393 (9th Cir. 1979). The district court had found that Ewing's counsel had proceeded to trial totally unprepared to defend Ewing on one of the charges against him.

majority in *Ewing* reaffirmed the Ninth Circuit rule which requires that once a determination has been made that a defendant was denied the effective assistance of counsel,[513] an additional showing of specific prejudice must be made before his conviction can be overturned.[514]

The rule requiring an additional showing of prejudice was established in the 1978 Ninth Circuit en banc decision of *Cooper v. Fitzharris*.[515] In *Cooper*, the defendant alleged that specific acts by his attorney had denied him the effective assistance of counsel. In *Ewing*, the defendant did not allege affirmative acts but rather an omission claiming that his counsel proceeded to trial unprepared. Due to the above distinction, the district court in *Ewing* found the *Cooper* prejudice requirement inapplicable[516] and granted the defendant relief. The Ninth Circuit reversed, holding that a showing of prejudice was required whether ineffectiveness of counsel was premised upon counsel's specific acts or upon his omissions at trial.[517] The case was remanded for further consideration because the trial court had failed to determine whether the defendant had actually been prejudiced.[518]

In *Chapman v. California*, the Supreme Court first instituted the harmless error standard for certain constitutional violations in criminal

513. The determination of whether defense counsel's performance fell below an established standard of competence depends upon whether counsel's errors or omissions were those that a "reasonably competent attorney acting as a diligent conscientious advocate would not have made." Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc) *cert. denied*, 440 U.S. 974 (1979). *Accord*, United States v. Boniface, 601 F.2d 390, 394 (9th Cir. 1979).

The Ninth Circuit had formerly employed the "farce and mockery" standard which required a showing that ineffective assistance of counsel pervaded the entire proceedings resulting in a farce and mockery of justice. However, in *Cooper*, the Ninth Circuit held that the former standard had become outmoded and that "reasonably competent and effective representation" is a more accurate test for the quality of legal assistance required under the sixth amendment. 586 F.2d at 1328.

Other circuits which have abandoned the "farce and mockery" standard include the Third, Fourth, Fifth, Sixth, Seventh and Eighth Circuits as well as the District of Columbia. For the standards employed by each circuit see ANNOT. 26 A.L.R. Fed. 218 (1976).

514. 596 F.2d at 394. *Accord*, United States v. Moore, 599 F.2d 310 (9th Cir. 1979). The *Ewing* court held that the finding of prejudice to the defendant may be found from the cumulative impact of multiple acts or omissions made by counsel at trial. Thus, even where a petitioner is unable to show prejudice as a result of any single act or omission, prejudice may still be found through the cumulative impact rule. 596 F.2d at 396.

515. 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979).

516. 596 F.2d at 394. The district court stated that because the facts supported the defendant's allegations of counsel's total unpreparedness it "would be anomalous" to require the defendant to make a showing of specific instances of prejudice. *Id.*

517. 596 F.2d at 396-97.

518. *Id.* at 397.

proceedings.[519] The Court held that some types of errors did not require a reversal unless the defendant could establish that actual harm or prejudice had resulted from the error in question.[520] However, in virtually the same breath the Court excluded right to counsel violations because the right is "so basic that [its] infraction can *never* be treated as harmless error."[521] The *Cooper* and *Ewing* courts failed to make a convincing distinction between these two cases and the *Chapman* line of authority, leaving both *Cooper* and *Ewing* at odds with the *Chapman* standard.

The Supreme Court was more explicit concerning violations of the right to counsel in *Glasser v. United States*.[522] In *Glasser* the Court stated, "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[523] In addition, as recently as 1978, Chief Justice Burger, in *Holloway v. Arkansas*, reiterated the Supreme Court's automatic reversal rule for violations of the right to counsel.[524]

However, the majorities in both *Cooper* and *Ewing* distinguished this line of cases, noting that they applied only where there had been a complete absence of counsel or where counsel had been "prevented from discharging his normal functions."[525] In making this distinction, both Ninth Circuit majorities ignored language of the Supreme Court that "it has long been recognized that the right to counsel is the right to effective assistance of counsel."[526] From the defendant's perspective, if

519. 386 U.S. 18, 21-22 (1967).

520. *Id.* at 24.

521. *Id.* at 23 & n.8 (emphasis added).

522. 315 U.S. 60 (1942).

523. *Id.* at 76.

524. 435 U.S. 475, 489 (1978). The Ninth Circuit is in a distinct minority among the circuits in its insistence on additional prejudice in right to counsel violations. *E.g.*, United States v. Burton, 584 F.2d 485, 491 n.19 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) ("The Supreme Court has indicated that a Sixth Amendment violation, as it implicates a substantial right of a party, cannot be harmless . . . and this proposition was forcefully affirmed in *Holloway v. Arkansas*." (Citations omitted)); Moore v. United States, 432 F.2d 730, 737 (3rd Cir. 1970) (en banc) (automatic reversal where counsel was constitutionally ineffective); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1101 (1979) (court did not inquire into the degree of prejudice suffered by defendant after a right to counsel violation); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) (did not apply harmless error standard when defendant found to have been deprived of right to effective assistance of counsel). *Contra*, Monteer v. Benson, 574 F.2d 447, 451 (8th Cir. 1978) (in dictum court noted that had there been a right to counsel violation, reversal of conviction would not have occurred unless defendant was prejudiced).

525. Ewing v. Williams, 596 F.2d at 359 (quoting Cooper v. Fitzharris, 586 F.2d at 1332).

526. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

he has been denied the effective assistance of counsel it makes little difference whether the defendant's counsel was "prevented from discharging his normal functions" or whether counsel was plainly incompetent.[527]

The distinction made by the *Cooper* majority also ignored the sweeping language of *Holloway*, *Glasser*, and *Chapman* which was clearly intended to apply to all violations of the right to counsel. This was made evident by Chief Justice Burger's reference in *Holloway* to the "general rule" of automatic reversal which has its origins in *Chapman* and *Gideon*.[528]

Even more disturbing was the *Ewing* majority's requirement of a showing of prejudice under the facts of the case. The Ninth Circuit accepted the findings of the district court that Ewing's counsel was "totally unprepared" for trial.[529] But apparently the court felt that there were some types of "unpreparedness" which could be condoned while others could not.[530] According to the court, unpreparedness because of "sloth" is unacceptable while unpreparedness for "tactical considerations" is permitted.[531]

Where counsel's ineffectiveness is premised upon omissions, as in *Ewing*, as opposed to specific acts easily identifiable from the record, the requisite showing of prejudice is very difficult to make. Judge Ely noted in his dissent in *Ewing* that "the District Court . . . faced with counsel's complete lack of preparation throughout the entire proceedings, could only 'speculate' as to what might have been."[532]

3. Joint representation

A defendant's right to effective counsel can also be jeopardized if he and one or more co-defendants are represented at trial by the same counsel. Often two or more defendants will have conflicting interests. The exoneration of one may tend to establish the guilt of the other. For this reason courts have been sensitive to the possibility of conflict existing in joint representation.

In 1978, the Supreme Court addressed this question in *Holloway v. Arkansas*.[533] There, defense counsel, representing multiple co-defend-

527. 586 F.2d at 1338 (Hufstedler, J., concurring and dissenting).
528. 435 U.S. at 489.
529. 596 F.2d at 393.
530. *Id.* at 396-97.
531. *Id.* at 396 n.5.
532. *Id.* at 398 (Ely, J., dissenting).
533. 435 U.S. 475 (1978).

ants, moved to have separate counsel appointed for each defendant due to the possibility of conflict. The trial court denied this motion.[534] The Supreme Court overturned the subsequent convictions. In so doing, the Court established a narrow rule requiring automatic reversal when a trial judge refuses either to conduct an adequate hearing concerning the potential of conflict or to appoint separate counsel after defense counsel has raised this issue.[535]

The Court in *Holloway* was not presented with the issue of how strong a showing of conflict is required to deprive a defendant of effective counsel.[536] This issue, however, was addressed by the Ninth Circuit in *Willis v. United States*.[537]

Willis was charged with possession of marijuana after contraband was found in the cabin of a boat owned by co-defendant Evanoff. At their trial, Willis and Evanoff were represented by joint counsel.[538] A customs officer testified that the key to the locked cabin containing the contraband was secured from Willis. Both Willis and Evanoff testified that Willis did not produce the key.[539] Willis asserted that the key was the only evidence linking him to the contraband.[540] He contended that his attorney failed to effectively protect his interests by not developing a separate defense of lack of knowledge or lack of constructive possession because he wanted to avoid putting the entire blame on co-defendant Evanoff.[541] The Ninth Circuit rejected Willis' claim finding no "objective evidence that a conflict existed."[542]

Willis is at odds with the Supreme Court's mandate which requires separate counsel whenever any possibility of conflict exists.[543] The

534. A motion for substitution of counsel must be made in a timely manner. When the request comes during trial or on the eve of trial, the court has discretion to reject the request. United States v. Price, 474 F.2d 1223, 1226 (9th Cir. 1973); Good v. United States, 378 F.2d 934, 935-36 (9th Cir. 1967). Mid-trial motions may be appropriate, however, where the conflict is unknown or does not become apparent prior to trial. 435 U.S. 475, 495 n.4 (Powell, J., dissenting).

535. 435 U.S. at 484.

536. *Id.* at 483-84.

537. 614 F.2d 1200 (9th Cir. 1979).

538. The court notes that it makes no difference whether Willis and his co-defendant were represented by members of the same law firm or by a single attorney for purposes of a conflict of interest analysis. *Id.* at 1202 n.1.

539. *Id.* at 1204.

540. *Id.* at 1205.

541. *Id.* The attorneys for Willis and Evanoff instead moved to suppress the contraband and, when their motion failed, stipulated to the facts developed at the hearing on their motion to suppress. The court assumed that this was done to move on to an appeal of the suppression ruling. *Id.*

542. *Id.*

543. In Glasser v. United States, 315 U.S. 60, 76 (1941), the Supreme Court overturned a

court stated that the assertions made by Willis could only lead to "speculation" that a conflict existed[544] even though that is precisely the type of situation which "any possibility of conflict" would appear to encompass.

The court then proceeded to indulge in speculation as to why a conflict may *not* have existed.[545] It reasoned that even if a defense of lack of constructive knowledge or possession had been entered on behalf of Willis there might have been no conflict because "Evanoff had no separate defense."[546] This reasoning is unsound. Whether or not Evanoff had a separate defense is immaterial. In either case, a defense by Willis that he lacked constructive knowledge or possession would have been damaging to Evanoff and this situation would raise a potential or "possible" conflict between the two co-defendants. *Willis*, then, would seem to stand for the proposition that no right-to-counsel violations based on conflicting representation will be found unless an appellate court can find a plausible reason to justify an attorney's conduct (perhaps similar to a minimum rationality test).[547]

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conviction where the trial court had been advised "of the possibility that conflicting interests might arise." *Accord*, Kaplan v. United States, 375 F.2d 895, 897 (9th Cir.), *cert. denied*, 389 U.S. 839 (1967).

544. 614 F.2d at 1205.

545. *Id.* at 1206.

546. *Id.*

547. The *Willis* court distinguished an earlier Ninth Circuit case, United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973). In that case an attorney representing two co-defendants failed to develop a line of defense for one of them because of their mutually conflicting interests. Since the defendant in *Marshall* had no other "possible defense," the *Willis* court noted that he had what amounted to "no defense at all." 614 F.2d at 1206. Thus, according to the court, the *Marshall* defendant's lack of adequate representation "could *only* have stemmed from a conflict of interest." (emphasis added). Willis, on the other hand, had other options that could be explained on the basis of trial tactics. *Id.* at 1206. By making this type of distinction, the *Willis* court is in effect saying that as long as the defendant has an alternative to his optimum defense, no convictions will be reversed for reasons of possible conflicting representation regardless of how inferior the alternative might have been. This hardly comports with the principles of a defendant's right to *effective* counsel developed by the Supreme Court.

As might be expected, there is considerable divergence among the circuits on the degree of conflict, resulting from multiple representation, that will require a reversal of conviction. *E.g.*, Lollar v. United States, 376 F.2d 243, 246 (D.C. Cir. 1967) (some conflict of interest or prejudice must exist before denial of effective assistance of counsel will be found); United States v. Foster, 469 F.2d 1, 4 (1st Cir. 1972) (petitioner failed to prove the existence of a conflict because it appeared from the record that there was no divergence of interest between two co-defendants); United States v. Lovano, 420 F.2d 769, 774 (2d Cir. 1970) (no conflict was found when it was shown that positions each defendant claimed should have been raised at trial were found not to be damaging to co-defendants); Hart v. Davenport, 478 F.2d 203, 209-10 (3rd Cir. 1973) (petitioner was deprived of effective assistance of counsel where it was shown that defense strategies used were not always in his best interest); Miller v. Cox,

Had the Ninth Circuit ordered the trial court to conduct an evidentiary hearing as in *Holloway*, perhaps it could have spared itself the task of speculating on what *might* have occurred during the trial.[548] The *Willis* court concurrently relied on a unique interpretation of *Glasser v. United States*,[549] the leading case on multiple representation. *Glasser* held that defendants are entitled to representation without *any* possibility of conflict. But, the *Willis* court in a footnote, commented that the *Glasser* language "should be read with care."[550] The court continued, "[t]here are many degrees of 'possibility', but it is clear that the court in *Glasser* meant something like 'significant possibility' as distinguished from absolute certainty."[551]

4. Irreconcilable conflict with counsel

The denial of a motion for substitution of counsel may constitute a denial of the right to the effective assistance of counsel where the defendant and his attorney are embroiled in an irreconcilable conflict.[552] Although the trial judge has the discretion to deny the motion, such

457 F.2d 700, 701-02 (4th Cir.), *cert. denied*, 409 U.S. 1007 (1972) (petitioner failed to establish conflict because his interests were in harmony with other co-defendants and neither attempted to shift blame to any of the others); Foxworth v. Wainwright, 516 F.2d 1072, 1077 (5th Cir. 1975) (substantial possibility of conflict existed when one attorney represented four boys all of whom were accused of murdering a fifth boy in a jail cell and there were no outside witnesses); United States v. Steele, 576 F.2d 111, 112 (6th Cir.) (per curiam), *cert. denied*, 439 U.S. 928 (1978) (since defendants had not presented any specific allegation regarding a potential conflict of interest, court did not feel compelled to conduct an evidenciary hearing on the matter); United States v. Jeffers, 520 F.2d 1256, 1263 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976) (no conflict found when it was demonstrated that counsel had faithfully fulfilled his obligations with respect to all his clients); Zurita v. United States, 410 F.2d 477, 480 (7th Cir. 1969) (conflict will occur when attorney represents "two masters" who have opposing interests and he is unable to give his undivided support to either client); United States v. Valenzuela, 521 F.2d 414, 416 (8th Cir. 1975) (since co-defendants relied on alibi defenses, there was no indication that their defenses were inconsistent; thus no conflict was found); Lugo v. United States, 350 F.2d 858, 859 (9th Cir. 1965) (cannot create a conflict of interest from "mere conjecture"); Fryar v. United States, 404 F.2d 1071, 1074 (10th Cir. 1968), *cert. denied*, 395 U.S. 964 (1964) (existence of mere speculation regarding divergent interests was insufficient to establish conflict).

548. Willis contended that the trial judge had erred in his failure to obtain from Willis a waiver of his right to independent representation. 614 F.2d at 1206. Although the court approved of the trial judge's inquiry and use of warnings to the defendant of his constitutional right, the court held that the trial judge had not violated a duty through his failure to conduct such an inquiry in *Willis*.

549. 315 U.S. 60, 76 (1942). *Accord*, Kaplan v. United States, 375 F.2d 895, 897 (9th Cir.) *cert. denied*, 389 U.S. 839 (1967); Lugo v. United States, 350 F.2d 858, 859 (9th Cir. 1965) (where a conflict of interests exists a conviction cannot stand).

550. 614 F.2d at 1207 n.5.

551. *Id.*

552. Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970).

discretion is limited.[553] The factors to be considered include (1) the timeliness of the motion, (2) the adequacy of the inquiry into the defendant's basis for the motion, and (3) whether the conflict has resulted in a total lack of communication between the defendant and his attorney.[554]

In *United States v. Mills*,[555] the Ninth Circuit found that the trial court did not abuse its discretion in denying appellant's motion for substitution of counsel. The motion was made one week prior to trial although counsel had been appointed two months earlier. Delay would have ensued if the motion had been granted. In addition, the breakdown in communication between defense counsel and his client was not total. It involved a disagreement over an issue of trial strategy.[556]

However, in *United States v. Williams*,[557] the Ninth Circuit found that the denial of a motion for substitution effectively denied defendant a right to effective assistance of counsel. Unlike Mills, William's motions for substitution of counsel were made in a timely manner[558] and, if granted, would not have delayed the date of trial.[559] The court also found that the appellant had made a prima facie showing of an irreconcilable conflict replete with quarrels, bad language, threats and counter-threats.

5. Interference with the attorney-client relationship

In *United States v. Glover*,[560] the Ninth Circuit held that an interview of the defendant conducted by an FBI agent, without the permission of the defendant's appointed counsel was not violative of defendant's right to counsel. The *Glover* court permitted reprehensible and abusive government conduct.

Glover, a person of limited intelligence,[561] was arrested on charges of attempting to sell stolen gems to an undercover agent. While in cus-

553. United States v. Mills, 597 F.2d 693, 700 (9th Cir. 1979).

554. *Id.*

555. *Id.*

556. *Id.* The disagreement concerned an alibi defense. The court found that Mills' counsel prepared and presented an adequate defense despite the conflict. Additionally, the court observed that Mills' chief complaint involved the infrequency of his meetings with his counsel and not their difficulty in communication. *Id.*

557. 594 F.2d 1258 (9th Cir. 1979).

558. *Id.* at 1259-60. Two separate motions were made, the first approximately one month prior to trial. This motion was renewed one month later and one week prior to the ultimate commencement of trial.

559. *Id.* at 1260.

560. 596 F.2d 857 (9th Cir. 1979).

561. *Id.* at 859.

tody and in the absence of his counsel, Glover was interviewed by two government agents who attempted to discover the location of the missing gems and to secure his testimony against the co-defendants in the case. In response to Glover's inquiry concerning the absence of his counsel, the agents falsely assured him that his counsel had given her consent for the interview.[562] Shortly after the interview commenced, Glover's counsel discovered the interview in progress and promptly terminated it, denying that she had given her permission.

The Ninth Circuit affirmed Glover's subsequent conviction concluding that "[w]e simply are unable to say that [the agent's] attempt to interfere with the attorney-client relationship, as reprehensible as it was, amounted to a constitutional violation of the right to counsel."[563] The court found that no information was gained by the governmental interference. Thus, the court concluded that defendant had not been prejudiced by the government's conduct and, as a result, no sixth amendment violation had occurred.[564]

The court cited the Supreme Court case of *Weatherford v. Bursey*[565] for support, noting that even though there had been some improprieties on the part of the government agents no right to counsel violation was found.[566] In *Weatherford*, like *Glover*, the fact that the defendant was not prejudiced went to the determination of whether there had been a right to counsel violation.[567] Despite the government's egregious conduct, the *Glover* court, in accordance with *Weatherford*, improperly restricted Glover's remedy to the exclusionary rule which was inapplicable in this case because no prejudicial information resulted from the interview which could have been suppressed.[568] Thus, under *Glover*, unless a defendant can show "prejudice," he will be without a remedy.

In addition, the *Glover* court referred to language in *Chapman v. California*,[569] calling for automatic reversal and application of a non-

562. *Id.*
563. *Id.* at 864.
564. *Id.*
565. 429 U.S. 545 (1977).
566. 596 F.2d at 963-64.
567. 429 U.S. at 558.
568. *Weatherford* was factually different from *Glover* in that it involved a government undercover agent who participated in pre-trial meetings between a defendant and his counsel. None of the information learned by the agent during the meetings was introduced at trial. At no time, however, was the defendant, as was Glover, confronted with government agents in a pre-trial interview *without* the presence of counsel.
569. 386 U.S. 18, 23 (1967).

harmless error standard in sixth amendment cases as "dictum."[570] But in the 1979 Supreme Court case of *Holloway v. Arkansas*, the *Chapman* non-harmless error standard for right to counsel violations was termed a "general rule."[571] Thus, it is unclear to what extent the harmless error rule applies to right to counsel cases.[572]

The *Glover* court also distinguished the factually similar cases of *Brewer v. Williams*[573] and *Massiah v. United States*[574] in which the Supreme Court found that the government's interference had violated

570. 596 F.2d at 962 n.7.

571. 435 U.S. 475, 489 (1979).

572. The *Glover* court's confusion over the two different uses of the term "prejudice" was repeated by the Ninth Circuit in both *Ewing v. Williams* and *Cooper v. Fitzharris*. In *Cooper*, Judge Hufstedler noted,

> Courts have considered the prejudicial impact of attorney behavior only to determine whether counsel measured up to the constitutional standard of competency. Thus, cases that the majority reads as holding that "reversal is not required where the defendant suffered no prejudice" actually are based on holdings that the reasonable competency standard had not been violated. They do not hold that violations of the reasonable competency standard may be harmless error. Once trial counsel has been held to have been constitutionally ineffective, no circuit has denied relief because the error was harmless.

586 F.2d at 1337-38 (Hufstedler, J., dissenting). *See also* United States v. Moore, 554 F.2d 1086, 1092 (D.C. Cir. 1976) (counsel had not been proven constitutionally ineffective because his errors were not shown to be substantial enough to impair the defense); United States v. DiCarlo, 575 F.2d 952, 957 (1st Cir. 1978) (a "relatively slight showing of actual prejudice is required to establish ineffective assistance of counsel"); United States v. Steele, 576 F.2d 111, 112 (6th Cir. 1978) ("showing of prejudice is necessary"); Note, *Multiple Criminal Representation Examined*: Holloway v. Arkansas, 40 OHIO ST. L.J. 251, 269-70 (1979).

573. 430 U.S. 387 (1977).

574. 377 U.S. 201 (1964). The *Glover* court also attempted to distinguish two prior state cases which involved similar factual circumstances. The first of these cases, Commonwealth v. Manning, 367 N.E.2d 635 (Mass. 1977), involved a DEA agent who telephoned the defendant in an attempt to secure his cooperation in undercover investigations. The defendant's attorney had not approved of the conversation. During the conversation the agent disparaged the defendant's counsel and warned him that his counsel's tactics may be injurious to his defense. The *Glover* court found the facts to be "clearly distinguishable" because the agents in *Glover* had not disparaged Glover's counsel. 596 F.2d at 861. Similarly, in the second state court case, People v. Moore, 57 Cal. App. 3d 437, 129 Cal. Rptr. 279 (1976), investigators from the district attorney's office, in an attempt to secure the defendant's assistance, had made disparaging remarks regarding the competence of defendant's counsel and falsely stated to the defendant that his counsel had been disbarred. Again, the *Glover* court distinguished *Moore* on its facts. 596 F.2d at 861. If this rule had been followed by the Supreme Court, both *Brewer* and *Massiah* would have to be reversed because neither case involved "disparaging remarks." Ironically, the Massachusetts Supreme Court in *Manning* was faced with the question of whether Manning's conviction should be overturned and whether the same additional prejudice test used by the Ninth Circuit should be used. It noted that "the application of the harmless error rule [is] singularly inapposite here." 367 N.E.2d at 638. It went on to hold that "[p]rophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights." *Id.* at 639.

defendants' sixth amendment rights. These cases, according to the Ninth Circuit were unlike *Glover* not only because they involved government conduct which was prejudicial to the defendant but also because incriminating statements were sought and used against the defendants.[575] The court's distinction on the basis of these facts ignores the plain language of the Supreme Court in both cases. In *Massiah*, the Court had ruled that "[a]ny secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."[576] In *Brewer* the rule was expressed as follows: "[T]he clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."[577]

Under *Brewer* and *Massiah*, Glover's sixth amendment right to counsel appears to have been violated. However, unlike *Brewer* and *Massiah*, no evidence was gained in *Glover* which was used against the defendant, thus subjecting it to exclusion. As a result, Glover was left without a remedy.

6. Waiver

The accused may waive his right to the assistance of counsel and elect to represent himself pro se.[578] It is well settled, however, that before the accused may assert his right to self-representation, a knowing, competent and intelligent waiver of the right to counsel must be made.[579]

Recently in *United States v. Crowhurst*,[580] the Ninth Circuit overturned a conviction upon finding that the requirements for waiver had not been met. The defendant in *Crowhurst* was not represented by counsel at trial and subsequently appealed his conviction arguing that he had not waived his right to counsel before electing to represent himself.

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575. The *Glover* court found that the interview had not been conducted in an effort to elicit from the defendant statements that could be used against him at trial. 596 F.2d at 862.

576. 377 U.S. at 205 (citing People v. Waterman, 9 N.Y.2d 561, 565, 175 N.E.2d 445, 448 (1961)).

577. 430 U.S. at 401.

578. United States v. Dujanovic, 486 F.2d 182 (9th Cir. 1973).

579. *Id.* at 186. An indigent's right to representation by appointed counsel continues on appeal. This right may be denied on appeal only upon finding that the appellant waived such representation or his financial situation has changed, rendering him no longer eligible for appointed counsel. United States v. Dangdee, 608 F.2d 807 (9th Cir. 1979).

580. 596 F.2d 389 (9th Cir. 1979) (per curiam).

Although the defendant had been advised of his right to counsel as well as the general disadvantages of self-representation, the Ninth Circuit court reversed his conviction because of the district court's failure to advise him of the nature of the charges and the possible penalties involved.[581] Prior cases in both the Ninth Circuit and from the Supreme Court have held that the type of information omitted in *Crowhurst* is critical to a defendant's ability to make an intelligent waiver.[582]

In *United States v. Conrad*,[583] defendant's counsel withdrew prior to a hearing at which the defendant moved to withdraw his plea of guilty and prior to his sentencing. The defendant chose to represent himself on these two occasions and relied on the advice of an attorney who was not admitted to practice in federal courts. In finding that the defendant had knowingly and voluntarily waived his right to counsel, the Ninth Circuit focused on the fact that the defendant had been advised of his right to counsel and had been represented by counsel at every prior hearing. In addition, he failed to object to his former counsel's withdrawal and was aware that a new counsel could have been appointed.[584]

Both *Crowhurst* and *Conrad* involved waiver of counsel at trial and at sentencing, after the suspect had been formally charged with a crime. Waiver of the right by a criminal suspect once the right has been invoked, but prior to the time the suspect has actually spoken with an attorney, presents a slightly different issue.

Prior to the 1978 decision of *United States v. Rodriguez-Gastelum*,[585] the Ninth Circuit had rendered a series of inconsistent decisions on the issue of waiver. *Rodriguez-Gastelum* rejected a per se prohibition against waiver and held that a suspect may waive his rights to counsel after asserting the right but before speaking with an attorney.[586]

Recently, in *United States v. Nick*,[587] the Ninth Circuit addressed

581. *Id.* at 390. The court noted that the district court's omissions would not constitute reversible error if the record revealed that the defendant was apprised of this information by some other means. *Id.* at 390-91.

582. Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942); United States v. Aponte, 591 F.2d 1247, 1249-50 (9th Cir. 1978); United States v. Gillings, 568 F.2d 1307 (9th Cir. 1978); Cooley v. United States, 501 F.2d 1249 (9th Cir. 1974); Hodge v. United States, 414 F.2d 1040 (9th Cir. 1969) (en banc).

583. 598 F.2d 506 (9th Cir. 1979).

584. *Id.* at 510.

585. 569 F.2d 482 (9th Cir.) (en banc), *cert. denied*, 436 U.S. 919 (1978).

586. *Id.* at 486-88.

587. 604 F.2d 1199 (9th Cir. 1979) (per curiam).

the same issue and found *Rodriguez-Gastelum* to be controlling. In *Nick*, the defendant was arrested by a tribal police officer on an Indian reservation. The officer gave Nick his *Miranda* warnings[588] and Nick requested that the officer look in his bedroom for a piece of paper containing the name and telephone number of his attorney. The officer did not locate the paper at that time. Nick was subsequently interviewed by an FBI agent who again advised Nick of his *Miranda* rights. Nick signed a waiver form and, during the subsequent interrogation, confessed to committing the crime. Thereafter, Nick again requested the paper with his attorney's name on it.[589] Although Nick denied that he understood the meaning of the waiver form, the Ninth Circuit acknowledged that an "express written waiver . . . is strong evidence" of a valid waiver and held that "fidelity to *Rodriguez-Gastelum* requires us to support the district court on the waiver point."[590]

Although the prohibition of a per se rule against waiver is not unreasonable, it is difficult to see how either Nick or the defendant in *Rodriguez-Gastelum* made a "knowing, competent and intelligent" waiver of their right. In both cases, the defendants were not furnished with counsel at the time of their request and therefore did not have the opportunity to speak with a lawyer.[591] In addition, Nick testified that he was not aware of the meaning of the waiver form and signed it believing it would help him. The court also noted that Nick was "mildly retarded" with "limited verbal skills."[592]

In her dissent, Judge Hufstedler noted that *Rodriguez-Gastelum* ignores the clear language of the Supreme Court in *Miranda*.[593] Therein the Court stated, "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning."[594] *Nick* and *Rodriguez-Gastelum* have clearly narrowed the application of this rule within the Ninth Circuit.

588. Miranda v. Arizona, 384 U.S. 436 (1966), requires that before a suspect may be questioned in a custodial setting he must be advised of his right to remain silent, that anything he may say may be used against him, of his right to consult with an attorney prior to any interrogation and of his right to court appointed counsel if he is unable to afford counsel.

589. 604 F.2d at 1201. The tribal officer, although present during the FBI agent's interrogation and the signing of the waiver form, failed to inform the agent of Nick's request for the "piece of paper" before or during the interrogation. *Id.*

590. *Id.*

591. United States v. Rodriguez-Gastelum, 569 F.2d at 491 (Hufstedler, J., dissenting).

592. 604 F.2d at 1201.

593. 569 F.2d at 489 (Hufstedler, J., dissenting).

594. 384 U.S. at 474.

7. The right to self-representation

Once the accused has made an intelligent waiver of his right to counsel the correlative constitutional right to self-representation may be asserted.[595] The demand to proceed pro se must be unequivocal[596] and made in a timely manner.[597]

Recently, in *Walker v. Loggins*,[598] a state prisoner appealed denial of habeas corpus relief asserting that he had been denied his constitutional right to self-representation in a state court proceeding. At the time of the appellant's trial, the Supreme Court had not yet decided *Faretta v. California* which recognized that defendants in state prosecutions have a constitutional right to self-representation.[599] Prior to *Faretta*, however, the Ninth Circuit had recognized a federal constitutional right to self-representation.[600]

The state contended in *Loggins* that it was under no obligation to allow self-representation because *Faretta* was not in effect at the time of the initial trial. The Ninth Circuit, however, found its prior decision in *Bittaker v. Enomoto*[601] to be controlling. *Bittaker* involved a California petitioner who had been convicted four years prior to the Court's decision in *Faretta*.[602] The court applied the law of the circuit holding that in federal cases there is a constitutional right to self-representation.[603] In *Bittaker*, the court held that although they had not had the occasion to apply the federal constitutional right to state habeas petitioners "if . . . faced with the issue, we would have applied the right to self-representation to a state habeas petitioner."[604]

The Ninth Circuit in *Loggins*, relying upon the court's dictum in *Bittaker*, extended this right to a state habeas petitioner holding that at the time of appellant's trial he had a constitutional right to self-repre-

595. United States v. Dujanovic, 486 F.2d 182, 185 (9th Cir. 1973).

596. *Id.* at 186; Meeks v. Craven, 482 F.2d 465, 467 (9th Cir. 1973); United States ex rel. Anderson v. Fay, 394 F.2d 109 (2d Cir. 1968); United States ex rel. Maldonado v. Denno, 384 F.2d 12, 16 n.2 (2d Cir. 1965), *cert. denied sub nom.* DiBlasi v. McMann, 384 U.S. 1007 (1966).

597. United States v. Dujanovic, 486 F.2d at 186; United States v. Pike, 439 F.2d 695, 695 (9th Cir. 1971).

598. 608 F.2d 731 (9th Cir. 1979).

599. 422 U.S. 806 (1975).

600. 608 F.2d at 734; Arnold v. United States, 414 F.2d 1056, 1058 (9th Cir. 1969), *cert. denied*, 396 U.S. 1021 (1970); Bayless v. United States, 381 F.2d 67, 71 (9th Cir. 1971).

601. 587 F.2d 400 (9th Cir. 1978).

602. The court in *Bittaker* held that federal courts must apply federal constitutional law in cases before them under the federal habeas statute. *Id.* at 402 n.1.

603. The court in *Bittaker* held that where a denial of the right to self-representation is found, the defendant need not make a specific showing of prejudice. *Id.* at 402.

604. *Id.*

sentation. The court vacated the judgment of the district court denying the appellant's petition for habeas relief. Finding that the record was unclear as to whether the appellant's request to proceed pro se was unequivocal or whether his constitutional right was in fact denied, the court remanded the case to the district court for full consideration of the claim.[605]

C. The Sixth Amendment Right to Present a Defense

The sixth amendment of the Constitution states in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."[606] The United States Supreme Court summarized the constitutional significance of these rights when it declared that they guarantee that a criminal charge may be answered in a manner

> now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.[607]

These rights comprise the elements of a defense guaranteed the criminally accused.

1. The right of confrontation

The first of these rights, contained in the confrontation clause, has been the subject of numerous interpretative decisions within the federal judicial system. The United States Supreme Court has held that its "primary object" is

> to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . compelling him to stand face to face with a jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[608]

At a minimum the clause guarantees the right of the defendant to ques-

605. 608 F.2d at 734.
606. U.S. CONST. amend. VI.
607. Faretta v. California, 422 U.S. 806, 818 (1975).
608. Mattox v. United States, 156 U.S. 237, 242-43 (1895).

tion those persons brought to testify against him. In this context, a court may not limit cross-examination so that the right to confrontation is completely frustrated although other considerations may compel the limitation.[609]

a. the right to cross-examine

The right to pursue effective cross-examination was strongly affirmed by the Supreme Court in *Davis v. Alaska*.[610] The *Davis* Court felt that a defendant should not be totally prohibited from asking questions of a hostile witness as to his possible biases. Chief Justice Burger writing for the majority held that without sufficient cross-examination the witness's testimony went untested to the jury and, hence, constituted a violation of the confrontation clause. The Court, in reversing the lower court decision, declared that

> [w]hile counsel was permitted to ask [the witness] *whether* he was biased, counsel was unable to make a record from which to argue *why* [the witness] might have been biased or lacked that degree of impartiality expected of a witness at trial. . . . [D]efense counsel should have been permitted to expose to the jury the facts from which the jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.[611]

This right to cross-examine a witness was at issue in the 1979 Ninth Circuit opinion of *United States v. Bleckner*[612] in which the jury had learned during direct examination the results of a plea bargaining agreement with the star prosecution witness who had been charged in the same indictment with Bleckner. However, the jury had not been informed of the specific terms.[613] The Ninth Circuit, emphasizing that the witness provided "crucial" testimony for the Government's case, held that the jury did not have "sufficient information to appraise [his] biases and motivations."[614] The court further held that cross-examination into the complete picture of the witness's bargain with the prosecu-

609. *E.g.*, Davis v. Alaska, 415 U.S. 308, 320 (1974) (a defendant's right to adequately expose through cross-examination the bias of a prosecution witness was more important than the state's law protecting juveniles from having their criminal records divulged); Alford v. United States, 282 U.S. 687, 693 (1931) (reasonable cross-examination necessary to develop potential witness bias); FED. R. EVID. 611.

610. 415 U.S. 308 (1974).

611. *Id.* at 318.

612. 601 F.2d 382 (9th Cir. 1979).

613. *Id.* at 384.

614. *Id.* at 385.

tor was essential and, contrary to the trial court's ruling, would not lead to a discussion of "collateral" matters.[615]

Bleckner represents a specific application of the rule developed by *Davis v. Alaska*.[616] But a different result was arrived at in the 1979 case of *United States v. Cook*.[617] Defendant Cook attempted to challenge the credibility of a key prosecution witness by introducing evidence regarding his 1959 assault conviction.[618] Cook also had wanted to cross-

615. *Id.* at 384. The collateral matters doctrine generally limits a cross-examiner's ability to impeach a witness's testimony when the impeachment involves the "production of additional evidence on factual propositions that have no direct or circumstantial bearing on any element of a claim or defense." C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 306 (1978) (footnote omitted). However, this rule does not apply to an attempt to show bias, which may otherwise be proved by extrinsic evidence. *Id.* at 298.

616. 415 U.S. 308 (1974). However, another Ninth Circuit opinion, Skinner v. Cardwell, 564 F.2d 1381 (9th Cir. 1977), *cert. denied*, 435 U.S. 1009 (1978), was decided differently. The defense attempted to cross-examine a police detective about prior releases of another prosecution witness from jail. The releases were given in return for the witness's testimony in other unrelated proceedings. The court concluded that those prior releases, over a year old, were "only marginally relevant." In addition, the witness had already testified as to those releases although he was somewhat confused about the details. 564 F.2d at 1389.

Other courts have generally followed a standard similar to that used in *Bleckner*. *E.g.*, United States v. Summers, 598 F.2d 450, 461 (5th Cir. 1979) (jury was sufficiently apprised of the fact that star Government witness had been given grant of immunity in return for his testimony and that he had been involved in the same type of criminal activities as was defendant); United States v. Williams, 592 F.2d 1277, 1281 (5th Cir. 1979) (trial court erred when it prohibited defendant from cross-examining Government witness concerning the fact that his testimony may have been given in return for the Government's promise to help his brother and girlfriend); Flowers v. Ohio, 564 F.2d 748, 750 (6th Cir. 1977) (trial court should have permitted cross-examination of Government eyewitnesses who identified defendant in court about their pre-trial visual identifications); United States v. Alvarez-Lopez, 559 F.2d 1155, 1160 (9th Cir. 1977) (defense should have been allowed to cross-examine witness about his prior narcotics dealings because such transactions may reveal any biases or prejudices of the witness); United States v. Bastone, 526 F.2d 971, 981 (7th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976) (in view of the fact that previous cross-examination had revealed that witness had much to gain from testifying, it was within the discretion of the trial court to find that further questioning into his subjective state of mind would not be meaningful); Thergood v. Tedford, 473 F. Supp. 339, 344 (D. Conn. 1978) (state judge was overly restrictive in prohibiting cross-examination regarding ulterior motive of witness in testifying); United States v. Manson, 425 F. Supp. 1272, 1276-77 (D. Conn.), *aff'd sub nom.* Annunziato v. Manson, 566 F.2d 410 (2d Cir. 1977) (defendant should have been allowed to cross-examine Government witness concerning pending charges because this could have demonstrated an agreement by police to treat these charges with greater leniency in return for witness's testimony); Moynahan v. Manson, 419 F. Supp. 1139, 1143 (D. Conn. 1976), *aff'd mem.*, 559 F.2d 1204 (2d Cir.), *cert. denied*, 434 U.S. 939 (1977) (defense should have been allowed to cross-examine Government witness about his involvement in same criminal scheme for the purpose of showing possible bias).

617. 608 F.2d 1175, 1182 (9th Cir. 1979).

618. *Id.* FED. R. EVID. 609(a) allows the admission of prior crimes to attack the credibility of a witness if such evidence was

> [e]licited from [the witness] or established by public record during cross-examina-

examine the witness about his prior drug use. Both of these tactics were prohibited by the trial judge. Under Federal Rule of Evidence 609(b), evidence of prior convictions, such as assault, which are used to attack a witness's credibility can only be introduced if the conviction occurred within the last ten years.[619] Cook's attorney, however, argued that the ten year restriction applied only to *defense* witnesses and should not have been so limited when government witnesses were involved. This argument has appeal because in the criminal trial context any discussion of "prejudicial effect" normally refers to the defendant.[620] In rejecting this argument, the court cited the past practice in the Ninth Circuit of applying rule 609(b) to both prosecution and defense witnesses.[621] In following this past practice, the court did not go

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tion but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

619. FED. R. EVID. 609(b) provides in part:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of 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 value.

While the use of prior convictions to attack a witness's veracity is governed by FED. R. EVID. 609, the type of evidence permissible to show a bias is governed by the general Rule 611, which sets out the control a court has over the presentation of evidence. The only other formal restraint under Rule 611 would be the Constitution, specifically the sixth amendment. *See* Alford v. United States, 282 U.S. 687, 694 (1931).

For a discussion of the different consequences when these methods of impeachment are used, see United States v. Alvarez-Lopez, 559 F.2d 1155, 1158-59 (9th Cir. 1977); Moynahan v. Manson, 419 F. Supp. 1139, 1142-43 (D. Conn. 1976), *aff'd mem.*, 559 F.2d 1204 (2d Cir.), *cert. denied*, 434 U.S. 939 (1977). *See* 3 WEINSTEIN'S EVIDENCE 609[03b] at 609-80.4 to 80.5 (1978) ("Rule 609(b) extends the balancing approach in a very limited way to timeliness . . . . In the case of a *prosecution* witness, the pressure of the confrontation clause may, at times, require admission.") (emphasis added) (citing Davis v. Alaska, 415 U.S. 308 (1974)). *Cf.* California v. Green, 399 U.S. 149 (1970). Speaking in terms of a state's hearsay rules, the Court in *Green* rejected the notion that "the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law." *Id.* at 155. The witness had been secluded by the government before trial through the Federal Witness Protection Program. 608 F.2d at 1179-80. Cook also questioned this seclusion in his appeal. *See* notes 727-33 and accompanying text *infra*.

620. See the language of FED. R. EVID. 609 (a), note 616 *supra*.

621. 608 F.2d at 1182 (citing United States v. Carpio, 547 F.2d 490, 493 (9th Cir. 1976) (per curiam)). *Accord*, United States v. Nevitt, 563 F.2d 406, 408 (9th Cir. 1977). *Cf., e.g.*, United States v. Garger, 471 F.2d 212, 214 (5th Cir. 1972) ("credibility of any witness may be impeached by evidence"); Bendelow v. United States, 418 F.2d 41, 48 (5th Cir. 1969), *cert. denied*, 400 U.S. 967 (1970) (prior convictions can be used to impeach any witness, including defendant).

The *Cook* court also cited United States v. Dixon, 547 F.2d 1079 (9th Cir. 1976). How-

beyond its analysis of rule 609(b) to a discussion of the sixth amendment.[622] Unfortunately, the principal case cited, *United States v. Carpio*, applied the ten year limitation to a prosecution witness in a perfunctory manner and never addressed the defense-prosecution distinction.[623]

Secondly, the *Cook* court affirmed the lower court's decision to restrict the cross-examination of the witness's prior drug use because the district court had allowed "considerable latitude" in the cross-examination. The result was that the jury "became well aware" that the witness was a "regular heroin user" as well as that he had "[o]ther character defects."[624]

In *Cook* the Ninth Circuit also found that the limitations on cross-examination were not excessive and did not violate the sixth amendment. Unlike *Bleckner*, an extensive record exposing the witness's character defects was before the jury. Therefore, the limitations imposed were not an abuse of the trial court's discretion.

Cook also differed from *Bleckner* because specific rules of evidence were applied in *Cook* while *Bleckner* was decided under the confrontation clause.[625] Although rule 609(b) was complied with in *Cook*, a constitutional challenge under this clause to the limited cross-examination might still be argued,[626] especially since the government witness

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ever, *Dixon* deals with the inverse situation in which defendant wishes to introduce a conviction *less* than ten years old. 608 F.2d at 1083.

622. 608 F.2d at 1182.

623. 547 F.2d 490, 493 (9th Cir. 1976). *See also* United States v. Bynum, 566 F.2d 914 (5th Cir. 1978). In *Bynum*, the trial court had disallowed defense counsel's inquiry into a Government witness's convictions of using worthless checks and of obtaining property under false pretenses, which were sixteen and twenty years old respectively. The Fifth Circuit affirmed without much discussion. The court noted that the defendant had been allowed to inquire into a more recent conviction and that nothing else was offered to show an abuse of discretion by the trial judge. 566 F.2d at 923.

624. 608 F.2d at 1182.

625. While the use of prior convictions to attack a witness's veracity is governed by FED. R. EVID. 609, the type of evidence permissible to show a bias is governed by the general Rule 611, which sets out the control a court has over the presentation of evidence.

For a discussion of the different consequences when these methods of impeachment are used, see United States v. Alvarez-Lopez, 559 F.2d 1155, 1158-59 (9th Cir. 1977), Moynahan v. Manson, 419 F. Supp. 1139, 1142-43 (D. Conn. 1976), *aff'd mem.*, 559 F.2d 1204 (2d Cir.) 434 U.S. 939 (1977).

626. 3 WEINSTEIN'S EVIDENCE 609[03b] at 609-80.4 to 80.5 (1978) ("Rule 609(b) extends the balancing approach in a very limited way to timeliness. . . . In the case of a *prosecution* witness, the pressure of the confrontation clause may, at times, require admission.") (emphasis added) (citing Davis v. Alaska, 415 U.S. 308 (1974)). *Cf.* California v. Green, 399 U.S. 149 (1970). Speaking in terms of a state's hearsay rules, the Court in *Green* rejected the notion that "the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law." 399 U.S. at 155.

appeared to play such a key role.[627]

In another 1979 decision, *United States v. Angelini*,[628] the Ninth Circuit reviewed a defendant's challenge that he had been "unfairly surprised and denied his rights to effective cross-examination" when the Government had called a surprise witness.[629] Defendant Angelini was charged and found guilty of dealing in firearms without a license. The prosecution introduced evidence which showed that the defendant had been twice warned concerning his operating without a license before he was arrested with nineteen price-marked firearms in his possession.[630] Angelini contended that he was a "collector who occasionally sold off pieces that no longer fit into his evolving collection."[631] The surprise witness testified that the gun sold to ATF (Alcohol, Tobacco, and Firearms) agents immediately prior to defendant's arrest in December, 1977, had been sold to Angelini in the preceding month. Thus, the witness's testimony tended to rebut Angelini's claim that he was merely a gun collector.[632]

The Ninth Circuit rejected defendant's claims of unfair surprise for four reasons.[633] First, the court seriously questioned whether the issue had been preserved for appellate review because defense counsel had not objected or asked for a continuance. Then, substantively, the court pointed out that in non-capital cases, the Federal Rules of Criminal Procedure do not require the prosecutor to provide a list of witness names.[634] Although the rule itself is silent regarding witness lists, the federal courts have generally required their production in capital cases. This rule was obviously not applicable to Angelini since he was in-

627. The witness had been secluded by the government before trial through the Federal Witness Protection Program. 608 F.2d at 1179-80. Cook also questioned this seclusion in his appeal. *See* notes 727-33 *infra*, and accompanying text.

628. 607 F.2d 1305 (9th Cir. 1979).

629. *Id.* at 1308.

630. *Id.* at 1307.

631. *Id.* at 1309.

632. *Id.*

633. *Id.* at 1308-09.

634. *Id.* at 1309. The court cited FED. R. CRIM. P. 16 for this proposition. The rule is actually derived from 18 U.S.C. 3432 (1976) which requires production of a list of witnesses in capital cases three days before trial. The House attempted to revise rule 16 to require mandatory production of witness lists in both capital and non-capital cases, but this provision was rejected by the full conference committee. H.R. REP. No. 414, 94th Cong., 1st Sess. 12, reprinted in [1975] U.S. CODE CONG. AD. NEWS 713, 716. Thus, the decision as to whether to require production of such lists lies within the discretion of the trial court. *E.g.*, United States v. Clardy, 540 F.2d 439, 442 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976) (in view of potential danger which might have arisen to inmates who were scheduled to testify against defendant, trial court decision to deny discovery of witness list was not an abuse of discretion).

volved in a non-capital offense.[635] Next, noting that the surprise witness gave testimony in rebuttal, the court of appeals declared that, in any case, such a list would extend only to those witnesses of the prosecution's case-in-chief and not to those rendered necessary for rebuttal purposes.[636] Finally, the Ninth Circuit relied on the Supreme Court decision of *Weatherford v. Bursey*[637] for the proposition that neither "a defendant's due process [nor his] Sixth Amendment rights are denied when a witness is called contrary to the government's previous representations."[638]

Alternatively, one could argue that the Supreme Court, by not requiring a witness list in a misrepresentation case, such as *Weatherford*, would, a fortiori, not require one in *Angelini* where no misrepresentation had occurred. The critical element in both cases appears to be that of surprise rather than misrepresentation. In *Weatherford*, the majority downplayed the misrepresentation element partially because it was not deliberate.[639] *Angelini* appears to be a better case for not requiring a witness list because, unlike *Weatherford*, it involved a witness used in rebuttal, rather than one involved in the Government's case-in-chief.

In another 1979 Ninth Circuit case, *United States v. Hernandez*,[640] defendants wanted the address of a principal Government witness and informer in order to investigate his background.[641] The district court denied their pretrial motion because of a Government affidavit that detailed the existence of threats against the informant and his family. Although no evidentiary hearing was allowed before trial, one was held after the witness had given his direct testimony. As a result of the hearing, the defendants learned the address of the witness but were unable to obtain a continuance in order to perform an investigation of the witness. The defendants appealed, claiming that their right to prepare an adequate defense was hampered.

The Ninth Circuit, acknowledging that the witness's role in the events made his testimony critical to the prosecution, agreed that the

635. *Accord*, United States v. Pelton, 578 F.2d 701, 708 (8th Cir.), *cert. denied*, 439 U.S. 964 (1978) (discovery of prospective witnesses is not required); United States v. Thompson, 493 F.2d 305, 309 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974) (in non-capital cases no requirement to disclose). *See generally* 8 MOORE'S FEDERAL PRACTICE 16.03[3] (2d ed. 1979).

636. 607 F.2d at 1308-09. *Accord*, Goldsby v. United States, 160 U.S. 70, 76 (1895); United States v. Windham, 489 F.2d 1389, 1392 (5th Cir. 1974).

637. 429 U.S. 545, 550 (1977).

638. 607 F.2d at 1309.

639. 429 U.S. at 560.

640. 608 F.2d 741 (9th Cir. 1979).

641. *Id.* at 744.

address was an "integral element of identity."[642] Defendants urged that on the basis of *Smith v. Illinois*,[643] the witness's address should have been disclosed before the cross-examination. However, as the court pointed out, *Smith* allows only the disclosure of the address on cross-examination.[644] *Smith* did not involve pre-trial disclosure. Since the defendant in *Hernandez* was given the address on cross-examination, no error occurred under *Smith*.

Assuming that *Smith* could be expanded to cover pre-trial disclosure, the Ninth Circuit in *Hernandez* held that the affidavit provided sufficient information for the judge to decide whether the address had to be divulged. In dictum, the court suggested that an evidentiary hearing would have been the better procedure but did not find reversible error because the district court relied on the sworn affidavit.[645]

b. hearsay evidence

The confrontation clause is also at issue when hearsay is admitted through an evidence exception.[646] Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[647] The United States Supreme Court has formulated an approach to be used in testing hearsay evidence under the confrontation clause.[648] These factors include the trustworthiness of the statement, its spontaneity, its relative importance in the eyes of the jury, and the availability of corroborating evidence.

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642. *Id.* at 745.

643. 390 U.S. 129 (1968).

644. *Id.* at 131. The *Hernandez* court also distinguished a former Ninth Circuit case, United States v. Harris, 501 F.2d 1 (9th Cir. 1974). In *Harris* the trial court's decision preventing disclosure of a key Government witness's address on cross-examination was overturned. Unlike *Hernandez*, the Government in *Harris* made no showing as to why this information should not have been disclosed. 501 F.2d at 9.

645. 608 F.2d at 746. *Cf.* United States v. Harris, 501 F.2d 1, 9 (9th Cir. 1974) (nondisclosure may be justified if "answer may subject the witness to harassment, humiliation, or danger," and reasons are specified by either Government or witness.).

646. *See, e.g.*, Dutton v. Evans, 400 U.S. 74, 86 (1970)(plurality opinion)("Confrontation Clause and the evidentiary hearsay rule stem from the same roots."); Pointer v. Texas, 380 U.S. 400, 406-07 (1965) (major reason for confrontation clause is to allow defendant an opportunity to cross-examine). *But see* California v. Green, 399 U.S. 149, 155-56 (1970) (confrontation clause and the hearsay rule are not co-extensive because violation of one can occur independently of the other). The Court in *Green*, however, did state that creation of new exceptions in a state's hearsay rule "will often raise confrontation issues." 399 U.S. at 156.

647. FED. R. EVID. 801(c).

648. Dutton v. Evans, 400 U.S. 74, 88-89 (1970)(plurality opinion).

The 1979 Ninth Circuit decision of *United States v. Nick*[649] presented a situation in which admissible hearsay statements were tested against similar factors to see if they satisfied the confrontation clause. The hearsay statements in question were made by a three year old boy to his mother and physician following an alleged sexual assault upon the child by the defendant.[650] These statements were held admissible under Federal Rule of Evidence 803(2), the excited utterance exception,[651] and rule 803(4), the medical description exception.[652]

Notwithstanding their admissibility under the federal rules, the court was still faced with the troublesome issue of the confrontation clause.[653] The court noted the crucial problem was that the three-year-old declarant was not subjected to cross-examination and could not have been cross-examined even if called as a witness by reason of his tender years.

First, the court rejected the argument that the confrontation clause was only satisfied by cross-examination of the hearsay declarant.[654] Instead, citing the later Court decision of *Dutton v. Evans*,[655] the Ninth Circuit stated the test is "whether the admissible hearsay, under all of the circumstances, has a very high degree of reliability and trustworthiness and there is a demonstrated need for the evidence."[656] Using the language of rule 803(24) as a guide,[657] the court held that the child's

649. 604 F.2d 1199 (9th Cir. 1979)(per curiam).

650. *Id.* at 1201.

651. FED. R. EVID. 803(2) allows admission of "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

652. 604 F.2d at 1201-02. FED. R. EVID. 803(4) allows admission of "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

653. 604 F.2d at 1202.

654. *Id.* at 1202-03. The Supreme Court in California v. Green, 399 U.S. 149, 162-63 (1970) (plurality opinion), declined to measure the validity of all hearsay exceptions against the confrontation clause. The Court noted that the validity of a hearsay exception is usually based on "indicia of 'reliability' " other than being subject to cross-examination. 399 U.S. at 161. Although the Court has looked at hearsay exceptions with "careful scrutiny," it noted that it had "no occasion . . . to map out a theory of the Confrontation Clause that would determine the validity of all such hearsay 'exceptions' permitting the introduction of an absent declarant's statements." 399 U.S. at 162.

655. 400 U.S. 74 (1970).

656. 604 F.2d at 1203.

657. FED. R. EVID. 803 (24) allows admission of

> [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which

statements were reliable because they were "directly responsive" to the mother's questioning, had the "ring of verity" because of the child's terminology, and were corroborated by physical evidence.[658] Since the child knew his assailant well prior to the incident, the identification of the defendant was considered "inherently trustworthy."[659] In addition, the witness, his mother, had been subjected to "rigorous cross-examination."[660]

The *Nick* decision comports with the approach taken in *Dutton v. Evans* as far as it balances the reliability of the hearsay statement. In addition, as in *Dutton*,[661] the hearsay statements in *Nick* were not "devastating" because Nick's out-of-court inculpating remarks were also admitted into evidence.[662] However, the child's statements were perhaps more crucial than the one in *Dutton* because the statements came from a minor victim and clearly identified the defendant as the perpetrator. In *Dutton* one somewhat ambiguous statement by a co-conspirator was admitted along with the testimony of nineteen other prosecution witnesses. *Nick* represents a clear example of the balancing involved in evaluating arguable violations of the right to confrontation.

In two other 1979 cases, the Ninth Circuit considered the *Dutton* reliability factors. In *United States v. Rosales*,[663] it quickly dismissed a defendant's claim that a co-conspirator's statement introduced through a government agent's testimony was hearsay and was violative of his right to confrontation. The alleged co-conspirator had named and described the defendant as his "source."[664] The court concluded that the statement met at least three out of the four tests of reliability enumerated in *Dutton*.[665] Specifically it found that (1) the statement was made by a declarant who " 'had personal knowledge of the identity and role of the participants' " (the declarant's description of his source fit the

the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

658. 604 F.2d at 1204.

659. *Id.*

660. *Id.*

661. 400 U.S. at 87.

662. 604 F.2d at 1201.

663. 606 F.2d 888 (9th Cir. 1979)(per curiam).

664. *Id.* at 888-89.

665. *Id.* The following factors were set out in *Dutton*: (1) does the statement contain an express assertion about past fact, (2) did the declarant have personal knowledge of the subject of the statement, (3) was the possibility that the declarant's statement was founded on faulty recollection remote, and (4) the circumstances under which the statement was made give reason to believe that the declarant was telling the truth at that time. 400 U.S. at 88-89.

defendant), (2) " 'the possibility that the declarant was relying upon faulty recollection was remote' " (no evidence otherwise), and (3) "the surrounding circumstances strongly reinforce[d] [the declarant's] identification of appellant" (the declarant was speaking to an undercover agent who had purchased cocaine from him in his own bar).[666] The first *Dutton* factor, whether the declaration contained an assertion of a past fact, was deemed by the *Rosales* court not to be determinative, even if applicable.[667]

As in *Dutton* and *Nick*, evidence corroborative of the statements was present in *Rosales*. The declarant was present during one of the sales, and at the other he had apparently retrieved the cocaine from the defendant's car. Thus, the "devastating" effect of the hearsay statements was diminished.[668]

In the second 1979 case, *United States v. Lee*,[669] the Ninth Circuit upheld the federal hearsay exception which permits the showing of the absence of a public record or entry. Defendant Lee was charged with delivering defense secrets to the Russians in Mexico City. Lee claimed he was working for the Central Intelligence Agency (CIA) by selling misinformation to the Russian agents.[670] In order to refute this defense, the Government, following the recognized hearsay exception for the absence of information in records under Federal Rules of Evidence 803(7) and 803(10),[671] introduced the affidavits of three top CIA offi-

666. 606 F.2d at 889.

667. *Id.* at 889 & n.1. *See also* United States v. Snow, 521 F.2d 730 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976); United States v. Adams, 445 F.2d 681 (9th Cir.), *cert. denied*, 404 U.S. 943 (1971).

668. However, in United States v. Snow the defendant's own statements corroborated the hearsay remarks. 521 F.2d at 735. *See also* United States v. Adams, 446 F.2d at 684 ("overwhelming and undisputed evidence of defendant's guilt"). *Cf.* United States v. Rosales, 606 F.2d at 889 (only defendant's presence at the scene of one of the cocaine sales and declarant's delivery of cocaine in connection with defendant's car were independent evidence affirming the hearsay statement). Yet, in *Snow* the court relied on just two of the four factors of *Dutton*; whereas in *Rosales* three of the four were found to be present. In sum, some trade-off has been allowed when evaluating the *Dutton* reliability factors and when there is other evidence lessening the devastating effects.

669. 589 F.2d 980 (9th Cir. 1979).

670. *Id.* at 984.

671. FED. R. EVID. 803(7) establishes a hearsay exception for

> Evidence that a matter is not included in the memoranda reports, records, or data compilation, in any form, . . . to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED. R. EVID. 803(10) establishes a hearsay exception for

> To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report,

cials who swore that their department records did not disclose the entry of Lee's name or his aliases.[672] The defendant contended that the use of these affidavits was a violation of his right to confrontation.

After finding that the affidavits satisfied the hearsay exception,[673] the Ninth Circuit went on to hold that the affidavits were compatible with the sixth amendment. The court found the same three of the four *Dutton* factors were satisfied as it had in *Rosales*. First, the three declarants were in a position to have personal knowledge of the records, because one official had personally examined the records, and the other two had supervised the searches in their departments.[674] Second, because the statements were made by "public officials in the discharge of their duties," they are considered generally trustworthy, thus bolstering the court's position that the statements were not based on faulty recollection.[675] Finally, the court noted that since the statements were made during trial, there was an increased probability that they were truthful because the officials were aware of the "consequences" of making them under oath.[676]

c. statements of co-defendants

Confrontation and hearsay issues also frequently arise when two or more co-defendants undergo a joint trial. In the Supreme Court case of *Bruton v. United States*,[677] two defendants were jointly tried, and one's out-of-court confession was correctly admitted against him under a hearsay exception. The defendant-declarant did not take the stand. However, the statement also incriminated his co-defendant.[678] In addition, the confession was hearsay as to the second defendant, and was, thus, inadmissible against him. The inadmissibility weighed heavily in defendant's favor when the Court decided to reverse the conviction.[679]

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statement, or data compilation, in any form was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902 or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

672. 589 F.2d at 986-87.

673. *Id.* at 987. Written statements regarding a search are acceptable according to rule 27 of the Federal Rules of Criminal Procedure and rule 44 of the Federal Rules of Civil Procedure. The Federal Rules of Evidence permit the incorporation of other federal rules in rule 802.

674. 589 F.2d at 988.

675. *Id.*

676. *Id.*

677. 391 U.S. 123 (1968).

678. *Id.* at 123-26.

679. *Id.* at 128 n.3, 136 n.12. The Court stressed that the evidence was presumptively unreliable.

The *Bruton* court saw three problems involved in the use of a non-testifying co-defendant's confession. First, the lack of cross-examination allowed the statement to go to the jury untested. Since the confession added "substantial, perhaps even critical, weight to the Government's case, in a form not subject to cross-examination," the defendant's right to confrontation had been violated.[680] Next, the Court decided that juries would not be able to follow the trial judge's instructions "where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial."[681] The *Bruton* court noted the initially prejudicial atmosphere in which a defendant enters a joint trial, where the advantages in judicial economy may be gained at the expense of constitutional rights.[682]

The Court in *Bruton*, after first acknowledging that an evidentiary rule had been violated, concluded that a constitutional right was also violated.[683] Consequently, the *Bruton* rule recognized the error in admitting a non-testifying co-defendant's confession which implicates another joined defendant.

For a *Bruton* error to occur, a co-defendant's statement must inculpate himself and his co-defendant and then be admitted in such form at their joint trial.[684] *United States v. Hernandez*[685] dealt with the use of a co-defendant's inculpatory remarks which were admitted into evidence but from which all references of the other alleged co-conspirators had been deleted. In order to avoid any *Bruton* error, the district court had also prohibited any inquiry into the deleted material. However, attorneys for the co-defendants argued that inquiry was necessary to demonstrate that each of their clients did not have knowledge of the charged conspiracy to distribute heroin.[686] Citing almost exclusively Fifth Circuit decisions, the Ninth Circuit concluded that the deletions had eliminated any potential *Bruton* problem.[687] The record indicated

680. *Id.* at 128.

681. *Id.* at 135-36.

682. *Id.* at 130-36.

683. *Id.* at 136 n.12. "The reason for excluding this evidence as an *evidentiary* matter also requires its exclusion as a *constitutional* matter." *Id.* (emphasis in original).

684. *Cf.* United States v. Davis, 418 F.2d 59, 63 (9th Cir. 1969) (*Bruton* distinguishable when statement itself is not incriminating).

685. 608 F.2d 741 (9th Cir. 1979).

686. *Id.* at 749.

687. *Id.* The cases cited included United States v. Roach, 590 F.2d 181, 185 (5th Cir. 1979)(defendant's right to confrontation is not violated when co-defendant's statement does not allude to him); United States v. Gray, 462 F.2d 164, 165 (5th Cir.), *cert. denied*, 409 U.S. 1009 (1972)(right of confrontation not abridged when reference to defendant deleted); White

that the "redacted post-arrest statement . . . successfully eliminated any suggestion of involvement of other co-defendants in the acts described therein."[688]

Since the *Bruton* rule stems from the right to confrontation, or to challenge the evidence brought against a defendant, this conclusion seems logical. The deletion eliminates any evidence which might be impermissibly used against one defendant although it is ostensibly admitted against his co-defendant. Thus, the defendant who is not challenged by any evidence has no reason to confront the statement-maker.[689]

Further, the court of appeals in *Hernandez* upheld the district court's prohibition against inquiries into the deleted materials. The court criticized defense proposals as asking for the best of two worlds: arguing for the deletion of references under *Bruton*, while still using the deleted portions to cast the blame on the other conspirators. As a result, the court held that the district court acted properly because the "procedure would unjustly prejudice the nonconfessing co-defendants" in the setting of a joint trial.[690] More importantly, the Ninth Circuit was not directed to any "explanatory or exculpatory" material in the deletions which the defense could have used.[691] Instead, the statement was generally corroborative of the prosecution's evidence. Thus, no particular prejudice was found.

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v. United States, 415 F.2d 292, 294 (5th Cir. 1969), *cert. denied*, 397 U.S. 993 (1970)(co-defendant's confession was admissible because it did not implicate or inculpate defendant). *Accord*, United States v. Belle, 593 F.2d 487, 494 (3rd Cir. 1979), *cert. denied*, 921 U.S. 911 (1980) (statements of co-defendant were admissible because they alone were not clearly inculpatory); United States v. Mulligan, 488 F.2d 732, 737 (9th Cir. 1973), *cert. denied*, 417 U.S. 930 (1974) (since jury would have no problem distinguishing an admission made concerning one defendant's activities from that of another and, therefore, would not misconstrue such statements against the wrong defendant, admissibility was found not to violate the *Bruton* rule).

688. 608 F.2d at 749. *See also* Williams v. Nelson, 457 F.2d 376, 377-78 (9th Cir. 1972)(deletion left nothing in the confession to identify defendant and *Bruton* requirements were met); United States v. Kershner, 432 F.2d 1066, 1071 (5th Cir. 1970)("unless such a procedure [of deletion] distorts a confession, it may be used because it does not violate any constitutional right of the defendant to be confronted with the witnesses against him"); Posey v. United States, 416 F.2d 545, 551 (5th Cir. 1969), *cert. denied*, 397 U.S. 946 (1970)("evidence supplied through the statement did not give substantial or critical support to the government's case as to the co-defendants in a form not subject to cross-examination").

689. 608 F.2d at 749.

690. *Id.*

691. *Id.*

d. Bruton *and harmless error*

The application of *Bruton* has been further tempered by the "harmless error" rule which reflects the Supreme Court's judgment that "not all 'trial errors which violate the Constitution automatically call for reversal.' "[692] In *Harrington v. California*,[693] the United States Supreme Court held that a violation of the right of confrontation as guaranteed in *Bruton* could be harmless if the weight of other evidence was overwhelming.

Two 1979 Ninth Circuit opinions came to different conclusions about *Bruton* and the harmless error rule. In the first case, *United States v. Longee*,[694] the court of appeals found a plain *Bruton* error which required the reversal of one defendant's conviction but the court affirmed his co-defendant's conviction because the *Bruton* error was deemed harmless.[695]

Longee involved the killing of a man by his first cousin, Chaser, and by Chaser's half-brother, Longee. The murder was the result of an argument which erupted during a drinking party. Allegedly Longee fired into a car windshield at the victim, and then Longee forced Chaser to do the same.[696] Defendant Chaser's two statements which implicated both himself and Longee, his co-defendant, were introduced into evidence.[697] Chaser depicted Longee as the inducer of the crime. In addition, his account was circumstantially corroborated by other evidence.[698] First, the events leading up to the shooting had been observed by a witness who, however, had fled the scene before the actual shots were fired. Second, defendant Longee also made statements while in custody which placed him in close proximity to the murder, but he shifted the entire blame to his co-defendant Chaser. Since each non-testifying defendant had made out-of-court statements that incriminated the other, both defendants' confrontation rights were violated under *Bruton* when the statements were admitted at trial.

The two were tried before a judge. Yet, at trial, defense counsel did not raise the confrontation issue, and neither did the judge sua sponte recognize any error in the proceedings. In spite of the other evidence introduced against Longee, the court of appeals held that

692. Harrington v. California, 395 U.S. 250, 252 (1969)(quoting Chapman v. California, 386 U.S. 18, 23 (1967)).

693. 395 U.S. 250 (1969). *Accord*, Schneble v. Florida, 405 U.S. 427, 430 (1972).

694. 603 F.2d 1342 (9th Cir. 1979).

695. *Id.* at 1345.

696. *Id.* at 1343.

697. *Id.* at 1344.

698. *Id.* at 1343-44.

plain error had been committed in Longee's case, and, thus, reversal was in order.[699] The Ninth Circuit especially noted that in finding the defendants guilty the district court judge had "substantially adopted Chaser's account of the incident" and credited an accusatory statement made by Chaser to Longee.[700] In addition, neither the eye witness account nor Longee's own statement actually established that he was present while the shooting took place. Moreover, Longee gave a primarily exculpatory rendition of the events. The opinion also demonstrates that *Bruton* is applicable even if the case is tried before a judge instead of a jury. Here the judge had obviously not disregarded the statements in finding Longee guilty; he referred to them in his conclusion.[701]

The same court reached an opposite conclusion in defendant Chaser's case. The court held that the admission of Longee's statements implicating Chaser was harmless error. The Ninth Circuit noted that the district court had not relied on Longee's statement in coming to its conclusion; therefore, the independent evidence was sufficient to render any error harmless.[702]

In the second decision, *United States v. Cornejo*,[703] the Ninth Circuit held that the alleged *Bruton* error had been harmless. In *Cornejo* one co-defendant, upon arrest for bank robbery by the police, blurted out statements which implicated the other two defendants.[704] However, the court found that the error in admitting these statements was harmless in the face of other evidence. The three defendants had been seen leaving and returning to the apartment where they were later arrested. More importantly, immediately following the robbery the three were discovered hiding in a bedroom inside the apartment in which the bait money and an identifying piece of clothing were also found.[705] This evidence rendered the confrontation clause error constitutionally harmless.

Besides pairing the harmless error rule with the *Bruton* rule, the United States Supreme Court this past term further narrowed the *Bruton* holding in *Parker v. Randolph*.[706] *Randolph* involved three de-

699. *Id.* Plain error can be noticed on appeal even though the issue was not raised by defendant at trial. FED. R. CRIM. P. 52(b).
700. 603 F.2d at 1344.
701. *Id.* at 1345.
702. *Id.*
703. 598 F.2d 554, 557 (9th Cir. 1979).
704. *Id.*
705. *Id.*
706. 442 U.S. 62 (1979).

fendants—Randolph, Pickens, and Hamilton—who were hired by Joe Wood to aid in the staged robbery of William Douglas, a professional gambler.[707] Douglas had won a great deal of money from Wood's brother Robert by cheating at poker. Before Joe Wood led the three respondents to the gambling scene, Robert Wood had killed Douglas with a derringer his brother Joe had given him. The lack of positive identification resulted in the state's reliance on the out-of-court confessions of the three respondents in their prosecution for murder under Tennessee's felony-murder rule. The confessions were determined to have been given freely and voluntarily.

The Supreme Court did not recognize any confrontation clause error because both defendants' confessions were introduced.[708] Thus, according to the reasoning in *Randolph*, if confessions "interlock" no constitutional violation has occurred. While the opinion did not indicate why the Court concluded that the *Randolph* confessions interlocked,[709] apparently the word was used to signify out-of-court statements which corroborate each other.

Justice Rehnquist writing for the majority posited one main reason for not finding any error in *Randolph*: once the defendant has given his own confession, the admission by a co-defendant "will seldom, if ever, be of the 'devastating' character referred to in *Bruton*."[710] Therefore, the *Bruton* right "has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence."[711] Once the defendant's confession is before the jury, his inability to cross-examine a co-defendant whose confession is admitted against him will be a small disadvantage. Although recognizing that prejudice may flow from the introduction of a co-defendant's confession even though limiting instructions are given to the jury (as they were in *Bruton*), the Court decided in *Randolph* that the prejudice was so greatly reduced when the defendant also had confessed that admission of the evidence with the requisite instructions was sufficient.[712] Notably, the Court did not contend that juries will better be able to

707. *Id.* at 65.

708. *Id.* at 72-74.

709. *Id.* at 80 (Blackmun, J., concurring). Certiorari was granted in part to clear up the conflict among the circuits. *E.g.*, United States v. Marcusi, 404 F.2d 296 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970) (rejecting the *Bruton* rule where confessions interlock). *Contra* Ignacio v. Guam, 413 F.2d 513 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1969) (assuming *Bruton* applies but finding harmless error).

710. 442 U.S. at 73.

711. *Id.*

712. *Id.* at 74. Justice Rehnquist argued that the "possible prejudice resulting from the failure of the jury to follow the trial court's instructions is not so 'devastating' or 'vital' to the

follow the jury instructions[713] when the defendant's own confession is introduced, but rather that the co-defendant's statement will not cause significant damage. Thus, any additional prejudice which arises from the introduction of the confession of his co-defendant will probably not affect the outcome of the jury's decision.

The *Randolph* opinion ignores the resulting harm which the *Bruton* rule was designed to prevent. First, the statements admitted into evidence are not admissible against the defendant under any hearsay exception. Second, a defendant is still unable to cross-examine his co-defendant. Additionally, Justice Rehnquist seems to acknowledge that the jurors may not be able to follow the jury instructions. The defendants still stand side by side in the prejudicial setting of a joint trial. If the jury does not follow the instructions, then an error in the trial has occurred, and *Bruton* should apply.[714] In limiting *Bruton*, the Court did not cite any other high court opinion which presented arguments in favor of the position taken in *Randolph*.[715]

More than denying the applicability of the *Bruton* factors in *Randolph*, the Court's rule is at odds with previous applications of *Bruton*.[716] The wording of the rule previously had not been limited to non-confessing defendants.[717] Consequently, Justice Blackmun's concurrence rejected the approach of the majority opinion and instead would have recognized the error but declared it harmless.[718]

The decision additionally leaves open the definition of "interlocking confessions." Both the concurring and dissenting opinions see this question as a future area of contention.[719] The majority opinion may mean that any statement corroborative of a co-defendant's confession cures the violation of the sixth amendment. What kind of a statement and how corroborative it must be are questions that were not answered by this opinion.

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confessing defendant to require departure from the general rule allowing admission of evidence with limiting instructions." *Id.*

713. *See* note 681 and accompanying text *supra*.

714. Bruton v. United States, 391 U.S. at 136-37.

715. 442 U.S. at 73.

716. In both Harrington v. California, 395 U.S. 250 (1969), and Brown v. United States, 411 U.S. 223 (1973), the confessions of joint defendants were introduced, and the Supreme Court held *Bruton* applicable although the error was deemed harmless. *But see* Schneble v. Florida, 405 U.S. 427 (1972) (*Bruton* error *presumed* but found harmless).

717. Bruton v. United States, 391 U.S. at 127-28; Harrington v. California, 395 U.S. 250, 252 (1969).

718. 442 U.S. at 77 (concurring opinion).

719. *Id.* Justice Blackmun points out that the principal opinion simply assumes the confessions interlock although respondents argued that they did not. *Id.* at 80. Justice Stevens dissents and refers to the concurring opinion on this point. *Id.* at 82 n.2.

The Ninth Circuit case of *United States v. Longee*,[720] decided after *Randolph*,[721] may provide some insight. In *Longee*, defendant's statement did place him at the scene of the crime but was basically exculpatory, blaming his co-defendant Chaser for the commission of the crime.[722] However, Chaser implicated both himself and Longee (depicted as the inducer) in his out-of-court statements.[723] Thus, while Longee's statements may have "interlocked" with Chaser's to the degree that they both placed him at or near the scene of the crime, overall they were contradictory. Nor did the *Longee* court hold that Chaser's remarks (admitting his part in the crime) interlocked with Longee's statement implicating Chaser. Instead, the court, not citing *Randolph* at all, held that *Bruton* was violated but that the error was harmless as to Chaser.[724] Since the statements were corroborative of each other, under *Randolph* Longee's statement could have been admitted against Chaser. At any rate, the result would have been the same because of the harmless error rule.

2. The right to compulsory process

The Supreme Court has stated,

> [t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[725]

This right is found expressly in the sixth amendment right to compulsory process.[726] Several Ninth Circuit opinions in 1979 dealt with particular aspects of this right.

First, in *United States v. Cook*,[727] the Ninth Circuit Court of Appeals denounced the cat-and-mouse tactics of the Government, which

720. 603 F.2d 1342 (9th Cir. 1979). *See* notes 694-702 and accompanying text *supra*.

721. *Randolph* was decided on May 29, 1979 and *Longee* on June 25, 1979.

722. 603 F.2d at 1344.

723. *Id.*

724. *Id.* at 1345.

725. Washington v. Texas, 388 U.S. 14, 19 (1967).

726. U.S. CONST. amend. VI states that a criminal defendant has the right "to have compulsory process for obtaining witnesses in his favor."

727. 608 F.2d 1125 (9th Cir. 1979).

secluded two witnesses and evasively answered in a motion before the court that no wrongdoing was involved. However, the Ninth Circuit refused to reverse defendant's convictions even though the prosecutor's actions had effectively prevented any pre-trial interviews of the secluded witnesses. Defense counsel had not continued to demand defendant's right to interview,[728] but instead sought only the drastic recourse of dismissal.

Further, a week before trial the Government released summaries of the witnesses's expected testimony in compliance with the Jencks Act[729] and the requirements of *Brady v. Maryland*.[730] In light of the combination of curative acts by the prosecution and the failure by the defense lawyer to diligently pursue the defendant's right, the Ninth Circuit refused to reverse.[731]

Cook demonstrates that in order to preserve a defendant's right to interview witnesses or to gain access to them, defense counsel must consistently pursue those rights. Since the Ninth Circuit has held that the Government's seclusion of Government witnesses is by itself not violative of a defendant's rights,[732] defense counsel must seek a "subpoena or court order for the taking of a deposition under proper safeguards."[733]

Once a witness has been located by the defense and is willing to testify, the actions of neither the judge nor the prosecutor may interfere with the defendant's right to have his witness give favorable evidence. The United States Supreme Court in *Webb v. Texas*[734] concluded in 1972 that a defendant was denied due process because the trial judge singled out the defense's only witness for a lengthy admonition about the dangers of perjury. After the stern warning, the witness refused to testify.

728. *But see* Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966), *cert. denied*, 396 U.S. 865 (1969). The circuit court held that the government could not interfere with defense counsel access to witnesses. "Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them." *Id.* at 188.

729. 18 U.S.C.A. 3500(a) (West 1969 & Supp. 1979), which allows a defendant to gain recorded out-of-court statements of a Government witness once the witness has testified on direct examination.

730. 373 U.S. 83 (1963). *Brady* forbids the Government to suppress evidence favorable to an accused where the evidence is "material either to guilt or to punishment," irrespective of the good or bad faith of the prosecutor. *Id.* at 87.

731. 608 F.2d at 1171-82.

732. United States v. Thompson, 493 F.2d 305, 309 (9th Cir.), *cert. denied*, 419 U.S. 837 (1974).

733. 608 F.2d at 1181.

734. 409 U.S. 95 (1972).

A Third Circuit Court of Appeals opinion, *United States v. Morrison*, extended the holding of *Webb* to prosecutorial interference with a defense witness.[735] In *Morrison*, before trial, the prosecutor sent messages through the defense counsel to a defense witness, who was threatened with perjury and other charges (related to defendants' case). In addition, the witness was subpoenaed to meet with the prosecutor, who, then, in the midst of the three undercover agents used in the case, warned her again of possible perjury problems. The *Morrison* court found the prosecutor's actions as reprehensible as those of the judge in *Webb*. The court of appeals held that the actions contravened both due process notions and the compulsory process right of the sixth amendment.[736]

Relying on the doctrine of *Morrison*, the defendant in *United States v. Vargas-Rios*,[737] a 1979 Ninth Circuit case, argued that the prosecutor had violated his rights to a fair trial. The defendant was convicted of distribution of heroin and conspiracy to distribute heroin.[738] During his guilty plea, a co-conspirator, Pena, made statements incriminating another alleged co-conspirator, Barajas, but exonerating defendant, Vargas-Rios. Counsel for defendant alleged that a condition of Pena's plea was a requirement not to testify against the government. Subsequently, Pena changed his plea, and the prosecutor denied defendant's accusation. During an examination on the question of Pena's alleged conditional plea, the prosecutor admitted she had told Pena's counsel, " 'I might not be very happy if [Pena] took the stand and perjured himself.' "[739] Pena's counsel asserted that his client feared a longer sentence would be recommended if he testified and was not believed. He then indicated that although subpoenaed he would invoke his fifth amendment right if called to the stand.[740]

In affirming the lower court's decision, the Ninth Circuit distinguished the facts of *Morrison* from those of *Vargas-Rios*. The court discovered "[n]o concerted effort on the part of the prosecutor to suppress the testimony of a possibly exculpatory witness."[741] Certainly the prosecutor's actions in *Vargas-Rios* were not as coercive as those in *Morrison*. Additionally, since the government is not required to grant

735. 535 F.2d 223 (3d Cir. 1976).
736. *Id.* at 226-28.
737. 607 F.2d 831 (9th Cir. 1979).
738. *Id.* at 833.
739. *Id.* at 837.
740. *Id.*
741. *Id.* at 838.

immunity to witnesses,[742] the defendant has "no absolute right to elicit testimony from any witness whom he may desire."[743] In sum, the case demonstrates that in order to prove prosecutorial misconduct more than just one comment from a prosecutor is necessary to show the defendant's right to a defense was violated.

Four 1979 cases dealt with protecting a defendant's right of access to witnesses who were non-resident aliens. Defendants are assured of this right because they have the right to compel a witness's attendance at trial, and, hence, they are given constitutional aid in formulating a defense.[744] However, once a witness is outside the jurisdiction of the United States, the compulsory process provision has no effect. Consequently, the Ninth Circuit has refused to allow the government to deliberately and routinely return deportable witnesses to their country of origin (generally Mexico) before defense counsel has interviewed them to determine if their testimony would be favorable.[745] In the principal case, *United States v. Mendez-Rodriguez*, the Ninth Circuit based this right on the fifth (due process) and sixth (compulsory process) amendments.[746]

However, subsequent to *Mendez-Rodriguez*, the Ninth Circuit has distinguished the rule in two instances: (1) when the unavailability of the witnesses is not the result of unilateral action by the prosecution[747] and (2) when the unavailability is not prejudicial to the defendant.[748] Two 1979 Ninth Circuit opinions affirmed the lower courts on the basis of those exceptions to the *Mendez-Rodriguez* rule.

In the first case, *United States v. Hernandez-Gonzalez*,[749] the unavailability of the witnesses was not the result of unilateral government action. Instead, the potential witness, an illegal alien, had escaped government detention by impersonating another alien ready to be properly

742. United States v. Bautista, 509 F.2d 675 (9th Cir. 1975), *cert. denied*, 421 U.S. 976 (1976); Cerda v. United States, 488 F.2d 720 (9th Cir. 1973); United States v. Jenkins, 470 F.2d 1061 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973).

743. 607 F.2d at 836 (citing United States v. Carman 577 F.2d 556 (9th Cir. 1978)).

744. U.S. CONST. amend. VI provides in part that the criminally accused shall enjoy the right "to have compulsory process for obtaining witnesses in his favor."

745. United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971).

746. *Id.* at 5-6 (9th Cir. 1971). *Accord*, United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974).

747. *E.g.*, United States v. Carrillo-Frausto, 500 F.2d 234, 235 (9th Cir. 1979) (over prosecution objection, the court determined that the two juveniles of the nine aliens should not be detained because of the inadequate detention facilities for minors).

748. *E.g.*, United States v. McQuillan, 507 F.2d 30 (9th Cir. 1974) (no prejudice because nothing indicated that the aliens found in border dragnet to discover suspect marijuana smugglers were connected with the commission of the crime).

749. 608 F.2d 1240 (9th Cir. 1979).

released.[750] Thus, there was no "deliberate nor even negligent selective retaining and returning of material witnesses."[751]

Further, in dictum, the court went on to find that any prejudice was remote because the other Mexican nationals were not cross-examined by the defense. It was unlikely that the missing alien would rebut the first four's testimony since all five aliens were discovered together in a car being used for smuggling Mexicans into this country. Yet, according to the strict holding of *Mendez-Rodriguez*, a defendant is not required to show that the missing person would have been a favorable witness because, being unavailable, the witness could not be questioned by the defendant.[752] Such a strict interpretation of *Mendez-Rodriguez* has not, however, been followed in other decisions.[753] Where prejudice is "remote," reversal under *Mendez-Rodriguez* has not been granted.

In the other 1979 Ninth Circuit opinion, *United States v. Valdez*,[754] the court did not reverse when the Government allowed the witness to return to Mexico because the missing person was present at trial and neither side called him to the stand. Further, the *Valdez* court required a showing that the witness's testimony could have benefited the defendant.[755] Such a showing is normally not required when the witness is absent from the proceedings.[756] Where the witness is available, as in *Valdez*, the defendant has the opportunity and is required to find out if the witness's testimony would be beneficial.

The *Valdez* court also found support for its conclusion based on the Government's apparent lack of active involvement in the witness's movements.[757] From this opinion, it is difficult to determine what kind of action or nonaction by the government triggers a violation. The court recites that the witness was "questioned" by an immigration of-

750. *Id.* at 1242.

751. *Id.* at 1246. The *Hernandez-Gonzalez* court also labelled the system used for identifying and retaining or releasing witnesses "clearly reasonable even if not totally failsafe." *Id.*

752. 450 F.2d at 5.

753. *E.g.*, United States v. Orozco-Rico, 589 F.2d 433, 435 (9th Cir. 1978), *cert. denied*, 440 U.S. 967 (1979) (*Mendez-Rodriguez* inapplicable because the aliens in question could have offered no testimony as to guilt or innocence of defendant); United States v. McQuillan, 507 F.2d at 32-33 (court did not follow *Mendez-Rodriguez* because there was "nothing to indicate that the aliens were witnesses to the crime . . . or that their testimony could have been of any benefit to the accused").

754. 594 F.2d 726 (9th Cir. 1979).

755. *Id.* at 728.

756. *See* note 747 and accompanying text *supra*.

757. 594 F.2d at 728.

ficer and then "allowed to return" to Mexico.[758] These scanty facts fail to fully demonstrate why the witness was questioned. However, if the question dealt with the charges brought against defendant Valdez, the policy of *Mendez-Rodriguez* would seem to require reversal.

A third 1979 case, *United States v. Winnie Mae Manufacturing Co.*,[759] is a startling decision because the Ninth Circuit seems to have added a difficult burden to defendants who wish to argue a *Mendez-Rodriguez* error. *Winnie Mae* arose out of Immigration and Naturalization Service raids on the defendant factory, at which 453 aliens were arrested. Nearly all of the Mexican nationals were deported to Mexico. As a result, the district court dismissed the three count indictment.

However, while affirming the lower court's decision as to two of the counts, the Ninth Circuit reversed on the third count. Of the forty-eight aliens allegedly arrested in connection with this count, thirty-five, all women, were deported. The court of appeals reversed because it believed that the women had returned to the Los Angeles area and were available for any defense purposes. The court noted that ten of the women were subsequently arrested in Los Angeles. Defendants did interview these returnees. In addition, the manufacturing company issued termination checks payable to all thirty-five women. The court especially noted that "[a]lmost every check was endorsed by its payee and cashed in the Los Angeles area."[760]

The court's conclusion that all thirty-five women were available is startling because the court assumes that since the checks were cashed in Los Angeles with the payee's name, the aliens were actually "available" as *Mendez-Rodriguez* requires. Technically the Mexican nationals may have been reachable by the subpoena power of the district court (assuming they were actually in Los Angeles when the checks were cashed). However, as far as defendants were concerned, the aliens had been sent back to Mexico. Requiring defendants to show that each alien is unavailable is a "near impossible task."[761] Such an added defense burden reduces the chances of proving that a *Mendez-Rodriguez* error has occurred.

Finally, according to the 1979 Ninth Circuit decision in *United States v. Lujan-Castro*,[762] legal assistance is not required for a person to waive his right to demand that the government retain deportable aliens.

758. *Id.*
759. No. 78-2101 (9th Cir. June 13, 1979).
760. *Id.* slip op. at 2125.
761. *Id.* at 2127 (Tang, J., dissenting).
762. 602 F.2d 877 (9th Cir. 1979).

Under circumstances which show that waiver was "knowingly and intelligently made" the court was "unwilling to exalt that right above other equally important rights of constitutional derivation."[763] The court failed to see any distinctions between such rights as the right to remain silent[764] or to be brought promptly before a magistrate[765] and the right guaranteed under *Mendez-Rodriguez*, which has been described as part of the "right to formulate his defense uninhibited by government conduct."[766]

D. The Right to a Speedy Trial

1. Pre-accusatorial delay

Inherent in delays occurring between the commission of a crime and the return of an indictment is the danger of prejudice to the defense. Prejudice may result from the loss of witnesses, the loss of evidence, or the dimming of memories. In the leading case of *United States v. Marion*,[767] the Supreme Court considered whether the sixth amendment right to a speedy trial[768] or the fifth amendment right to due process[769] was violated by a three-year delay between the end of an alleged criminal scheme and the return of the indictment.[770] The Court declined to extend the protection of the sixth amendment to delays occuring before arrest, indictment, or other formal charge.[771] However, the Court acknowledged:

[T]he Due Process Clause of the Fifth Amendment would re-

763. *Id.* at 879.

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

765. United States v. Indian Boy X, 565 F.2d 585 (9th Cir. 1977), *cert. denied*, 439 U.S. 841 (1978).

766. United States v. Tsutagawa, 500 F.2d 420, 423 (9th Cir. 1974). United States v. Lujan-Castro, 602 F.2d at 878-79.

767. 404 U.S. 307 (1971).

768. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI.

769. "No person . . . shall be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V.

770. 404 U.S. at 313.

771. On its face, the sixth amendment applies only to "prosecutions" and the "accused." *Id.* The history of the adoption of the amendment and prior cases do not support the conclusion that the amendment is triggered before accusation. *Id.* at 313-15. Most importantly, the major evils guarded against by the guarantee of a speedy trial occur after arrest or formal charge: "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Id.* at 320. Prejudice to a fair trial can result from delays before or after arrest, but that does not justify removing the sixth amendment from its proper context. *Id.* at 321-24.

> quire dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellee's rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.[772]

The *Marion* Court adopted an ad hoc approach that required a "delicate judgment based on the circumstances of each case."[773]

In *United States v. Mays*,[774] the Ninth Circuit interpreted *Marion* as requiring a balancing of three factors: actual prejudice to the defense, length of the delay, and reasons for the delay.[775] The *Mays* court decided that the initial burden was on the defense to establish actual prejudice by definite proof.[776] If the defense meets this burden, the government is obligated to provide reasons for the delay.[777]

The difficulty of establishing actual prejudice is illustrated by recent Ninth Circuit decisions. In *United States v. West*,[778] the indictment was filed against the defendants some five months after an abortive prison escape attempt.[779] The defendants claimed that their defense was prejudiced by the delay because many witnesses were not available, memories had faded, and the defense's ability to gather evidence and contact witnesses was frustrated.[780] However, offers of proof as to what the missing witnesses would testify to were speculative and largely irrelevant.[781] The *West* court concluded that the trial court's finding that there was insufficient evidence to establish actual prejudice was not clearly erroneous.[782]

In *United States v. Kail*,[783] two years passed between authorization to intercept telephone conversations and the return of an indictment for

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772. *Id.* at 324.

773. *Id.* The *Marion* defendants had not alleged or proven prejudice nor had they shown that the delay was intentional by the government to gain tactical advantage. Thus, the case was reversed and remanded for trial. *Id.* at 326.

774. 549 F.2d 670 (9th Cir. 1977).

775. *Id.* at 678.

776. *Id.* at 677. Statutes of limitation guard against the *possibility* of prejudice. *See* United States v. Ewell, 383 U.S. 116, 122 (1966) (such statutes designed to prevent "bringing overly stale criminal charges").

777. 549 F.2d at 678.

778. 607 F.2d 300 (9th Cir. 1979) (per curiam).

779. *Id.* at 302-03.

780. *Id.* at 304.

781. *Id.* at 305. Proof that some witnesses would not be available for trial is not sufficient to establish actual prejudice. The courts require a demonstration of how the loss of the witness is prejudicial. United States v. Mays, 549 F.2d 670, 677 (9th Cir. 1977).

782. 607 F.2d at 305.

783. 612 F.2d 443 (9th Cir. 1979).

conducting a gambling business.[784] The defendants alleged that they were actually prejudiced by the delay because of their loss of memory and the loss of possible witnesses.[785] However, the defendants did not specify what may have been forgotten or what possible witnesses might be unavailable.[786] The *Kail* court concluded that the due process claim was unsubstantial.[787]

2. Post-accusatorial delay

The sixth amendment right to a speedy trial[788] is triggered by formal charge or arrest.[789] Courts are more willing to find that a delay is impermissible after this right has attached than before.[790] The Supreme Court adopted an ad hoc test in *Barker v. Wingo*[791] to determine whether a speedy trial has been denied. The test weighs the length of the delay,[792] the reasons for the delay,[793] the defendant's assertion of his right,[794] and prejudice to the defendant.[795] The *Barker* Court rejected proposals that it adopt a more definitive test such as a strict time limit[796] or the "demand-waiver doctrine."[797] In the *Barker*

784. *Id.* at 446.

785. *Id.*

786. *Id.*

787. *Id.*

788. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI.

789. United States v. Marion, 404 U.S. 307, 313 (1971); *see* note 771 *supra*.

790. Arnold v. McCarthy, 566 F.2d 1377, 1382 (9th Cir. 1978) ("[T]he courts have been more willing to find [post-accusatorial] delay to be constitutionally impermissible.").

791. 407 U.S. 514, 530 (1971).

792. The length of the delay is a triggering mechanism. Whether the delay is presumptively prejudicial depends upon the circumstances of the case. *Id.* at 530-31.

793. Reasons for the delay weigh differently against the government: (1) intentional delay to gain advantage over the defense weighs heavily against the government, (2) negligent delay such as crowded courts, has some weight against the government, and (3) innocent or valid delay, such as an unavailable witness, justifies an appropriate delay. *Id.* at 531.

794. The assertion of the right to a speedy trial can be used as a factor but cannot be determinative. *Id.* at 525. *See* note 805 *infra*.

795. Prejudice to the defendant includes oppressive pretrial incarceration, anxiety and concern of the accused, and the impairment of the defense. 407 U.S. at 532. The most serious prejudice is the impairment of the defense. *Id.*

796. Although setting a definite time limit would provide a definitive test, it would constitute rule-making which is the province of Congress and the states. *Id.* at 523.

797. The "demand-waiver doctrine" deemed the right to a speedy trial waived unless asserted. The Court decided that this doctrine was inconsistent with pronouncements that inaction is not enough to waive a constitutional right. *Id.* at 525. There must be an intentional relinquishment or abandonment of a known right or privilege before there can be a waiver. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1935). However, the failure of the defendant to assert his right to a speedy trial is a factor to be considered when denial to a speedy trial is claimed. 407 U.S. at 528.

case, the Court decided that a delay in excess of five years did not deny the defendant his right to a speedy trial.[798]

The *Barker* test was employed in several recent Ninth Circuit decisions. In *United States v. Young*,[799] the court concluded that a speedy trial claim was without merit. The court noted that the defendant had conceded that the length of the delay was too short to raise a suspicion that a speedy trial had been denied.[800] Furthermore, substantial portions of the delay had resulted from the defendant's requests to change counsel.[801] In *United States v. Santos*,[802] there was a post-indictment delay of fifteen months and the defendant had asserted his right to a speedy trial by filing a motion to dismiss. Furthermore, the government's excuse for the delay, a "disastrous typhoon," did not impress the court.[803] However, the *Santos* court concluded that the defendant was not unduly prejudiced and therefore not denied a speedy trial.[804]

An unusual situation was encountered by the Ninth Circuit in *United States v. Hooker*.[805] The defendant was indicted for a narcotics violation while serving time in a Peruvian prison for a violation of that country's narcotics laws.[806] The defendant could not be extradited,[807] and the government made no diplomatic effort to obtain his return.[808] The trial court granted the defendant's motion to dismiss because it concluded that the Government's failure to make a good faith effort to obtain his release resulted in a delay which adversely affected his right to a speedy trial.[809] The Ninth Circuit reversed, deciding that the gov-

798. The defendant and an accomplice were charged with murder. The prosecution needed the testimony of the accomplice against the defendant, but could not obtain it until the accomplice was convicted. The accomplice was tried six times before he was convicted and thus available to testify against the defendant. 407 U.S. at 515-19.

799. 593 F.2d 891 (9th Cir. 1979).

800. *Id.* at 892.

801. *Id.* When delay is attributable to the defendant, the right to a speedy trial is waived. Barker v. Wingo, 407 U.S. 514, 529 (1971).

802. 588 F.2d 1300, 1302 (9th Cir.) (per curiam), *cert. denied*, 441 U.S. 906 (1979).

803. *Id.* at 1307.

804. The witness who died was the alleged victim of the defendant's beating and undoubtedly would have been hostile. *Id.* There were photographs of the evidence that were lost. *Id.* Assertion that defendant was prejudiced by absence of witnesses who had testified before the grand jury was countered by the fact that the defense had access to all the prior statements of these witnesses and was unable to point out inconsistencies between those statements and testimony at trial. *Id.*

805. 607 F.2d 286 (9th Cir. 1979).

806. *Id.* at 287.

807. The United States had an extradition treaty with Peru, but the treaty did not include the offense with which the defendant was charged. *Id.*

808. *Id.* at 289.

809. *Id.* at 287. The trial court relied upon United States v. McConahy, 505 F.2d 770 (7th

ernment was under no duty to make a good faith effort to effect the release of an accused from a foreign prison so that he could be brought back for trial.[810] The *Hooker* court reasoned that the chance of effecting the release was remote because there was no history of international cooperation in these matters.[811] Furthermore, the court concluded, courts should not interfere in the exclusive province of the President and the Senate.[812]

E. The Use of the Exclusionary Rule

The fourth amendment guarantees:

> 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.[813]

However, neither the fourth amendment nor the rest of the Constitution provide any remedies when these rights are violated.

In *Weeks v. United States*,[814] the United States Supreme Court first fashioned a remedy, known as the exclusionary rule. The unanimous Court held the courts as well as law enforcement officers responsible for acting in accordance with the fourth amendment. Evidence gained without compliance with the amendment could not be used to prosecute a criminal defendant. Otherwise, the Court felt that the rights guaranteed would be valueless.[815] Although applicable only to federal prosecutions at that time, the exclusionary rule was later held to apply to the states as well.[816]

The exclusionary rule has been justified in order that (1) individuals can be secure from unreasonable searches and seizures, (2) "fair" trials, involving the integrity of the judicial system, can be maintained, and (3) overzealous police officers will be deterred from trampling the

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Cir. 1974), which required that the government make an effort to obtain an accused incarcerated in foreign countries for trial. The Seventh Circuit had relied upon Smith v. Hooey, 393 U.S. 374 (1969), which held that a charging state must make a good faith effort to obtain for trial an accused incarcerated in a federal penitentiary.

810. 607 F.2d at 286, 289.

811. *Id.* at 289. In contrast, there is a history of cooperation among the states and between the states and federal government. *See* Smith v. Hooey, 393 U.S. 374 (1969).

812. 607 F.2d at 289.

813. U.S. CONST. amend IV.

814. 232 U.S. 383 (1914).

815. *Id.* at 393.

816. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

rights of citizens.[817] A marked divergence has emerged in Supreme Court opinions dealing with the exclusionary rule. The current trend of the Burger Court has been to narrow its application. The Court has stressed that the rationale for the rule is the deterrence of police misconduct.[818] Therefore, the application of the exclusionary rule in noncriminal proceedings[819] or to situations where the police have acted in "good faith"[820] has been questioned. These issues arose in a 1979 United States Supreme Court decision, *United States v. Caceres*.[821]

In *Caceres*, evidence obtained in violation of certain Internal Revenue Service (IRS) administrative regulations was admitted in the criminal trial of a taxpayer accused of bribing an IRS agent. The IRS regulations in question prohibited the electronic surveillance of taxpayers and IRS agents unless approved through normal channels.

Respondent Caceres was being audited when he allegedly offered a bribe to an IRS agent wearing a secret monitoring device.[822] The lower federal courts ruled that the IRS had violated its regulations because its agent had not gone through proper channels in securing approval for the device. Although "emergency approval" had been received, the courts determined that an emergency did not in fact exist because it had been created by governmental action. Thus, the courts excluded any evidence obtained by the IRS concerning the conversa-

817. *Id.* at 656. The Court seemed to stress that future police conduct was the object of deterrence " 'to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it' " (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

818. *E.g.*, Stone v. Powell, 428 U.S. 465 (1976). The Court wrote:

> While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence. . . .
>
> The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. . . . It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.' "

Id. at 485-86 (quoting Linkletter v. Walker, 381 U.S. 618, 637 (1965)). *Accord*, United States v. Janis, 428 U.S. 433, 446 (1976).

819. *E.g.*, United States v. Janis, 428 U.S. 433, 454 (1976) (exclusion in a federal civil (tax) proceeding of evidence gained illegally by state police for a criminal (bookmaking) investigation would not be likely to deter police misconduct).

820. *See, e.g.*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 417-18 (1971) (Burger, C.J., dissenting) (good faith police errors should not be punished by use of exclusionary rule). *Accord*, Brewer v. Williams, 430 U.S. 387, 421-22 (1977) (Burger, C.J., dissenting); *cf.* United States v. Peltier, 422 U.S. 531 (1975) (no retroactive application of previous decision, United States v. Almeida-Sanchez, 413 U.S. 266 (1973), because of good faith reliance by law enforcement on pre-*Almeida-Sanchez* rulings).

821. 440 U.S. 741 (1979).

822. *Id.* at 747-48.

tions in question. The Government did not challenge the lower court's conclusion regarding the violation of administrative regulations, but urged that the exclusionary rule should not be applied.

The Supreme Court agreed and reversed. First, because the recording of face-to-face conversations is not protected by the fourth amendment,[823] the Court found that the IRS infraction was non-constitutional in nature. Thus, the IRS was not required by the Constitution or by statute to adopt the regulations. Further, the Court treated the government action as a good faith error of misconstruing the situation as an emergency.

The Court also found no due process violation because the defendant did not prove actual reliance on the IRS regulations prior to the meetings with the IRS agent. Presumably the defendant would have suffered the same prejudice even if the regulations had been followed. Finally, the Court distinguished the application of the Administrative Procedure Act,[824] which authorizes judicial review and invalidation of agency action "that is arbitrary, capricious, an abuse of discretion or not in accordance with law."[825] Since the remedy sought was not invalidation of agency action, the *Caceres* Court reasoned that use of the exclusionary rule to enforce agency regulations in a criminal proceeding was not correct.

In dictum which indicates a less than overwhelming approval of the exclusionary rule, Justice Stevens, writing for the majority, stated that "we cannot ignore the possibility that a rigid application of the rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures."[826] On the other hand, without any attempt to enforce these regulations, the protection at which they are aimed will not be achieved. In creating the exclusionary rule the Supreme Court in the past has emphasized that self-regulation by law enforcement bodies and civil actions brought by search and seizure "victims" have not proven to be effective remedies.[827] Unfortunately, *Caceres* did not present an especially strong case for the exclusionary rule's use because no recognized right under the fourth amendment was at stake. Thus, the opinion still raises questions whether law enforcement activity in

823. United States v. White, 401 U.S. 745, 753-54 (1971) (plurality opinion); Lopez v. United States, 373 U.S. 427, 438-40 (1963).

824. 5 U.S.C. §§ 551-576 and 701-706 (1976).

825. 440 U.S. 753-54 & n.17.

826. *Id.* at 755-56.

827. Mapp v. Ohio, 367 U.S. 643, 651-53 (1961).

violation of its own self-regulation should be allowed to continue unchecked.

One effect of the *Caceres* decision has already been felt. In *United States v. Soto-Soto*,[828] the Ninth Circuit had to distinguish between the violation of an agency regulation and the violation of a federal statute. The Ninth Circuit affirmed the district court's suppression of marijuana found in defendant's truck in the course of a Federal Bureau of Investigation (FBI) border inspection for stolen vehicles.[829] The FBI agents stopped the defendant's car only because it was a late-model pickup. In doing so, the agents acted in excess of the authority granted by both California and federal statutes. First, since there was no "founded suspicion" that defendant was violating any vehicular law, the agents could not have been properly working with the California Highway Patrol.[830] Second, not being customs or immigration officers, the FBI agents were not authorized to make a border search of the pickup.[831]

The Government, however, argued that under the rule of *Caceres* the marijuana could be introduced even though an infraction had occured. The Ninth Circuit held that *Caceres* did not apply because, in that case, only an agency regulation had been transgressed, whereas in *Soto* the FBI agents had violated statutory law.[832] The court also addressed the question raised in *Caceres* that use of the exclusionary rule might deter the affected administrative agency from creating its own remedies to counter such violations. It noted that in the case of a violation of federal statutes, it was unlikely that the use of the exclusionary rule would similarly deter Congress from defining the powers of the respective federal law enforcement branches. "Rather, exclusion will deter individual officers from ignoring these definitions."[833] This assumption is similar to that asserted by the dissent in *Caceres*, which found no evidence to indicate that application of the exclusionary rule would induce the agency to discontinue adoption of such regulations.[834]

In contrast to *Caceres*, the Ninth Circuit also stated:

828. 598 F.2d 545 (9th Cir. 1979).

829. *Id.* at 546.

830. *Id.* at 547.

831. *Id.* at 546.

832. *Id.* at 550. The *Soto* court cited Miller v. United States, 357 U.S. 301, 305-06 (1958) as authority for its holding. In *Miller* the Supreme Court reversed a conviction because law enforcement personnel had failed to comply with statutory law in conducting a search of an apartment. *Miller* was also distinguished by the *Caceres* Court because it involved a statutory violation which was lacking in the latter case. 440 U.S. at 755 n.21.

833. 598 F.2d at 550.

834. 440 U.S. at 768 (Marshall, J., dissenting).

> Whether the defendant was injured in any way or his constitutional rights were violated is not an essential issue. Statutory law was disregarded. Exclusion of the evidence seized is the only available effective deterrent of such disregard. . . . [T]he evidence obtained here was solely for purposes of prosecution in state or federal court and exclusion by this court will directly deter illegal conduct in future searches at the border. FBI agents and other general law enforcement officers will know that they will not succeed in any attempt to expand their authority by searching at a border.[835]

The emphasis is on deterrence of future conduct. As noted in the dissent of *Caceres*, the exclusionary rule may be the only way to enforce such regulations and laws.[836] Unlike the *Caceres* majority, the Ninth Circuit focused on the fact that a law was broken and not whether that infraction violated a constitutional right.

While the current trend of the Court has been to narrow the application of the exclusionary rule in *Caceres*, a more liberal approach was taken in the 1979 case of *Dunaway v. New York*.[837] There, the Court relied on *Brown v. Illinois*[838] and held that a seizure, in the fourth amendment sense, had taken place when a defendant in response to a request accompanied police officers to their station house and was interrogated there, at which time he made inculpatory statements.[839] In asking the defendant to accompany them, the officers had acted on less than probable cause, had intended to restrain the defendant if he did not cooperate, and had not told the defendant that he was free to go.[840]

The Supreme Court, in an opinion written by Justice Brennan, held that the inculpatory statements made during the custodial interrogation should have been suppressed because they were not "sufficiently attenuated" from the initial illegal seizure. Concluding that the exclusionary rule should have been used, the Court re-affirmed the factors listed in *Brown v. Illinois* which measure the degree of attenuation: (1) the temporal proximity of the arrest and the confession, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct.[841] Although the police in *Dunaway* did not

835. 598 F.2d at 550.
836. 440 U.S. at 766-68 & n.10 (Marshall, J., dissenting).
837. 442 U.S. 200 (1979).
838. 422 U.S. 590 (1975).
839. 442 U.S. at 203.
840. *Id.* at 212.
841. *Id.* at 218.

threaten or abuse the defendant as had occurred in *Brown*,[842] the Court felt that the statement should have been suppressed because a sufficient "causal connection" existed between the illegal arrest and the inculpatory statements.[843] Thus, Justice Brennan concluded that when such a connection exists, "not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts."[844] This statement seems to be an attempt to bolster the rationale for the exclusionary rule which has been challenged by other high Court decisions.[845]

Four other Ninth Circuit cases decided in 1979 also illustrate a marked divergence of thought concerning this rule.

In *United States v. Jones*,[846] the Ninth Circuit was faced with the difficult question of whether the exclusionary rule should be applied to the fortuitous discovery of evidence. The defendant Jones had been arrested for burglary by the Los Angeles Police Department, but the arrest was later held to have been made without probable cause.[847] Incident to the arrest, the police found a motel key. Leaving the key behind, the police went to the motel and discovered that the room was registered to a man named Bennett. Bennett consented to a search of the room and his car after he was told that the police were investigating a Los Angeles burglary of which Jones was suspected. The police then found evidence which was subsequently connected with a San Francisco burglary committed on federal property and which had occurred about a month prior to Jones' Los Angeles crime. In his federal prosecution, Jones argued that this latter evidence was tainted by the illegal arrest and should have been suppressed.

On appeal, the Ninth Circuit rejected this contention and refused to apply the exclusionary rule because the discovery of the San Francisco burglary evidence was deemed fortuitous.[848] In reaching this conclusion the court focused on the fact that the police were initially investigating with the intent of uncovering evidence in connection with the Los Angeles burglary, not the one in San Francisco.

842. In *Brown*, the police had broken into defendant's apartment, searched it, and then "arrested" the defendant at gun point without probable cause (with the purpose of investigating a murder). The defendant was escorted to police station, where he made inculpatory statements. 422 U.S. at 592-95.

843. 442 U.S. at 218.

844. *Id.*

845. *See* notes 818-27 *supra* and accompanying text.

846. 608 F.2d 386 (9th Cir. 1979).

847. *Id.* at 388.

848. *Id.* at 391.

Implicit in this decision is the thought that the "deterrence" rationale of the exclusionary rule is best fulfilled when the evidence suppressed directly relates to the initial illegality.[849] Where the connection is close, the exclusionary rule has greater impact. The connection is not close in the case of a fortuitous discovery, because it cannot be said that evidence so obtained has been achieved by the exploitation of [the] illegality."[850]

By focusing on the deterrence aspect, the *Jones* opinion ignores other reasons for applying the exclusionary rule such as maintenance of judicial integrity and the preservation of the individual's fourth amendment rights.

Another 1979 Ninth Circuit case, *United States v. Humphries*,[851] in deciding that certain evidence had to be excluded, relied on the United States Supreme Court decision of *Stone v. Powell*.[852] In *Stone*, the Supreme Court focused on the deterrence rationale of the exclusionary rule and struck a balance between the purpose of the rule and its cost to society in terms of lost convictions.[853] Although such balancing was not a part of the original adoption of the exclusionary rule,[854] the Ninth Circuit seems to have followed the current approach adopted by the Supreme Court. The *Humphries* court thus held that evidence had to be suppressed in spite of the public's interest in convictions because the information gathered in an illegal arrest led *directly* to a stakeout order which produced further evidence.[855]

Taken together, both *Humphries* and *Jones* follow the Supreme Court's present concern that the exclusionary rule should not be applied indiscriminately. Both look for a direct connection between the initial illegality and the subsequent recovery of evidence.

Although the Ninth Circuit, in *Humphries* and *Jones*, focused on the deterrence rationale of the exclusonary rule, in *United States v. Perez-Esparza*,[856] the court turned its attention to the judicial integrity

849. *See, e.g.*, United States v. Bacall, 443 F.2d 1050, 1057 (9th Cir.), *cert. denied*, 404 U.S. 1004 (1971); Allen v. Cupp, 426 F.2d 756, 759 (9th Cir. 1970) ("Deterrence can have its effect only when it can be said that an object of the illegal conduct was the securing of the evidence sought to be suppressed.").

850. Wong Sun v. United States, 371 U.S. 471, 488 (1963).

851. 600 F.2d 1238 (9th Cir. 1979).

852. *Id.* at 1246 (quoting Stone v. Powell, 428 U.S. 465, 490-91 (1976)).

853. The exclusionary rule suppresses relevant evidence which is gathered in contravention to the fourth amendment. Thus, it "often frees the guilty." 428 U.S. at 490.

854. *See* Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961).

855. 600 F.2d at 1246 (excludable under the fruit of the poisonous tree doctrine of Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

856. 609 F.2d 1284 (9th Cir. 1979).

rationale.[857] The case arose from the stop of a narcotics smuggler at a border patrol checkpoint in San Clemente, California. The defendant was detained for two and one-half hours until Drug Enforcement Administration agents arrived to question him. After receiving his consent to search the car, the agents discovered cocaine in the car's headlight. In addition, the defendant made a confession after being advised of his *Miranda* rights.

After deciding that the detention was illegal under the rule of *Dunaway v. New York*,[858] the court held that the evidence discovered was the fruit of the poisonous tree and reversed the defendant's conviction. In applying the exclusionary rule, the Ninth Circuit discussed two reasons for its existence: deterrence of illegal police conduct and maintenance of judicial integrity. The court noted the "conflicting signals" given by the Supreme Court regarding the rationale of the exclusionary rule,[859] but adhered to the twin justifications used in the *Dunaway* analysis.[860] In relying on *Dunaway*, the court stressed that no intervening circumstances broke the chain of events from detention to the search and that both events were close in time.[861] Thus, the court held that "the deterrence rationale was not vitiated" by a lengthy period away from police influences, and that the defendant's decision to speak was not "so independent of police pressures as to absolve the judicial system from the charge of savoring the forbidden fruits of unconstitutional conduct."[862]

In determining whether the exclusionary rule should apply, the Ninth Circuit followed the Supreme Court's approach in *Dunaway*, which did not emphasize the "flagrancy" of police activity. Police conduct in *Dunaway* was less susceptible to this type of criticism than it had been in *Dunaway*'s predecessor, *Brown v. Illinois*.[863] As noted by the Ninth Circuit, the *Dunaway* Court "gave short shrift to the 'purpose

857. *Id.* at 1288-89.

858. 442 U.S. 200 (1979). The two-and-one-half-hour custodial detention in *Perez-Esparza* was similar enough to the *Dunaway* seizure to require probable cause, which was ultimately found to be lacking. 609 F.2d at 1286-88.

859. 609 F.2d at 1288.

860. *Id.* at 1289.

861. 609 F.2d at 1290. The court began its analysis with the three-pronged test of *Brown v. Illinois*, 422 U.S. 590 (1975), but concentrated on the two factors mentioned in text. Following the analysis in *Dunaway*, the *Perez-Esparza* court "gave short shrift" to the purpose and flagrancy of police conduct, the third factor in *Brown*. *See* notes 837-41 *supra* and accompanying text.

862. 609 F.2d at 1290.

863. 422 U.S. 590 (1975). *See* notes 842-43 *supra* and accompanying text.

and flagrancy' factor emphasized in *Brown*."[864] However, the *Perez-Esparza* court did not overlook this factor but gave the other two more weight in light of "*Dunaway*'s sweeping language."[865]

Another reversal based on the exclusionary rule was ordered by the Ninth Circuit in the 1979 decision of *United States v. Perez-Castro*.[866] In this case, the defendant had been mysteriously awakened and taken by the Tucson police at night from his friend's home. Without an arrest warrant, the police transported him to the United States Border Patrol Sector Headquarters in Tucson. After a night in a detention facility, the defendant made incriminating statements which he later sought to suppress. At the suppression hearing, the Government was "unable to give any details or explanation of the events surrounding [defendant's] arrest."[867]

Although the district court denied the defendant's motion to suppress, the Ninth Circuit reversed, finding no attenuation between the statements and the illegal arrest. No intervening circumstances lessened the taint of the initial illegal arrest and not much time had elapsed between it and the confession. The most important reason for applying the exclusionary rule (although not specifically mentioned) may have been the "purpose and flagrancy" of the police conduct. Without explanation, Tucson police had roused the defendant and taken him to the border patrol. This conduct appears to be the most appropriate candidate for application of the exclusionary rule.

F. The Right to a Public Trial

One of the rights enumerated in the sixth amendment of the United States Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[868] The public trial right has its roots in the development of the jury system in England and by the seventeenth century had become a fairly well-recognized common law tradition.[869] English and American commentators have justified open proceedings on several grounds, which include: (1) deterring witnesses from committing perjury;[870] (2) bringing

864. 609 F.2d at 1291.
865. *Id.* at 1291.
866. 606 F.2d 251 (9th Cir. 1979).
867. *Id.* at 253-54.
868. U.S. CONST. amend. VI.
869. Madsen, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308, 1322 (1978) [hereinafter cited as *Right to Attend*].
870. M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 343, 345 (6th ed. 1820) ("That it is openly, and not in private before a commissioner or two, and a couple of clerks;

forth persons, unknown to the parties or their counsel, with knowledge of the facts;[871] (3) educating the public;[872] and (4) promoting fair and ethical work by the participants in the action.[873] The United States Supreme Court, in *In re Oliver*,[874] focused on what it perceived to be the principal safeguard of the public trial guarantee:

> Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.[875]

Thus, at the core of this sixth amendment right are the interests of all criminal defendants who are benefitted by proceedings which do not hide prosecutorial misconduct.[876]

However, to implement this right most members of the public must rely on the press to communicate and discuss courtroom proceedings. Consequently, public trials often include an audience far larger than the few spectators actually in the courtroom. As a result, two constitutional guarantees—freedom of the press[877] and due process[878]—sometimes are at loggerheads. On the one hand, no prior restraint on the dissemination of information from criminal proceedings is permitted because of the first amendment.[879] On the other hand, massive, pervasive, and prejudicial publicity creating a circus-like atmosphere may lead to a denial of a defendant's life, liberty, or property without due process of law.[880] Consequently, the ramifications of open pro-

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where, oftentimes witnesses will deliver that which they will be ashamed to testify publickly [*sic*].").

871. Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944).

872. Sheppard v. Maxwell, 384 U.S. 333, 349 (1966) ("justice cannot survive behind the walls of silence"); *In re* Oliver, 333 U.S. 257, 270 n.24 (1948).

873. 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 522-24 (1827).

874. 333 U.S. 257 (1948).

875. *Id.* at 270.

876. *Right to Attend*, *supra* note 869, at 1325 ("Ultimately, the goal is fairness for *all* defendants, and its attainment depends upon public awareness, discussion, and criticism of the criminal process.").

877. U.S. CONST. amend. I provides in part that the "Congress shall make no law . . . abridging the freedom of speech, or of the press."

878. U.S. CONST. amend. XIV provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law." These rights are protected against federal action by the fifth amendment.

879. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

880. Sheppard v. Maxwell, 384 U.S. 333, 351 (1966) (Jury's verdict must be based on

ceedings extend beyond those defendants to whom the right has been given.

The effect of a public trial on a participant other than a defendant was at issue in the 1979 Ninth Circuit case of *United States v. Hernandez*.[881] In *Hernandez*, the Government asked the district court to exclude all spectators during the testimony of its lead witness, an informant, who was "in fear of his own personal safety."[882] On the basis of an affidavit of a government agent, the court imposed the exclusionary order.

The court of appeals first rejected the contention that a criminal defendant has an absolute right to a public trial.[883] Instead, the court stressed that "[a]n accomodation must be made of the individual's right to a public trial and those societal interests that might justify closing the courtroom to the public."[884] The Ninth Circuit found that the exclusionary order was "reasonably limited" and necessary to protect the witness and his family from "harrassment and physical harm."[885]

Although the right to a public trial is by its own terms without limitation, there seems to be a consensus among the courts of appeal[886] and the Supreme Court[887] that narrow exceptions or limitations are constitutionally permissible. Therefore, the *Hernandez* court, in decid-

"evidence received in open court, not from outside sources."); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963).

881. 608 F.2d 741 (9th Cir. 1979).

882. *Id.* at 746.

883. *Id.* at 747.

884. *Id.*

885. *Id.* at 748.

886. The reason for excluding some or all of the public include retaining courtroom decorum, protecting witnesses, and protecting the confidentiality of certain testimony. *See* Lloyd v. Vincent, 520 F.2d 1272 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975) (spectators removed in order to protect confidentiality of government agents); United States v. Bell, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972) (public excluded during discussion of skyjacker profile); Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966) (all spectators except press removed to protect witnesses and preserve order); Geise v. United States, 262 F.2d 151 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959) (most spectators excluded in rape case where prosecutrix and two other witnesses were of tender years and a large audience would inhibit testimony); Reagan v. United States, 202 F. 488 (9th Cir. 1913) (trial judge's action in excluding certain spectators did not prejudice defendant's right to a public trial when it appeared that their morbid curiosity might cause embarrassment to a victim in a rape case).

887. *See* Sheppard v. Maxwell, 384 U.S. 333, 358-63 (1966) (holding that the carnival atmosphere denied defendant due process rights and authorizing limitations of the press to protect defendant); Gannett Co. v. De Pasquale, 443 U.S. 368, 378 (1979) ("Because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary."). *See generally* Radin, *The Right to a Public Trial*, 6 TEMP. L. Q. 381 (1932).

ing against an absolute right to a public trial, appears to be in accord with the weight of authority.

As for the procedural aspects of the trial, the Ninth Circuit affirmed the district court's reliance on the affidavit instead of the evidentiary hearing.[888] The defense counsel had claimed that the affidavit made no mention of the witness-informant's fears. However, the affidavit did recount mysterious telephone calls and numerous threats, thus giving a reasonable basis for the district court's conclusion.[889] The court of appeals found the affidavit sufficient, although it agreed that an evidentiary hearing might have been the better approach.[890]

Hernandez demonstrates that, while a public trial is guaranteed to the criminally accused, the ramifications of public exposure may extend far beyond the individual interests of the defendant. This was readily apparent in the 1979 Supreme Court case of *Gannett Co. v. De Pasquale*, where a newspaper owner brought a suit challenging a trial court order which had excluded the public and the press from a pretrial suppression hearing.[891] The criminal case itself involved two young men, aged sixteen and twenty, who were suspected of murdering a forty-two year old man. Throughout the search, capture, and arraignment of the defendants, several newspaper accounts of the murder and the police procedures utilized were reported.[892] During the next ninety days until defendants' suppression hearing, no reporting occurred. At the suppression hearing, the defense attorneys moved to close the hearing to the public because of "unabated buildup of adverse publicity," which, it was claimed, would jeopardize defendants' right to a fair trial.[893] The prosecutor acquiesced, the judge agreed, and Gannett's reporter covering the hearing made no objection. Later, in response to a written demand of the reporter, the court conducted a hearing and concluded that, although the press was guaranteed a constitutional right of access, "the interest of the press and the public was outweighed in this case by the defendant's right to a fair trial."[894]

In affirming the New York state court decision,[895] the United

888. 608 F.2d at 748.

889. *Id.* at 744 n.2.

890. *Id.* at 748. *Cf.* Lloyd v. Vincent, 520 F.2d 1272, 1275 (no affidavit presented, only prosecution's asserted need to maintain confidentiality of government undercover agents).

891. 443 U.S. 368 (1979).

892. *Id.* at 370-76.

893. *Id.* at 374.

894. *Id* at 375.

895. The trial court's action was affirmed by the New York Court of Appeals. 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977).

States Supreme Court adhered to a literal interpretation of the sixth amendment. First, the Court found that the "Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused."[896] This conclusion is consistent with language in other Supreme Court decisions[897] and has been uniformly arrived at by commentators, even by those rationalizing a right of access on other grounds.[898] Thus, while a defendant had no right to unilaterally compel a closed proceeding, the Court held that the public interest is adequately protected by the other participants in the trial—the prosecutor and judge.[899]

Second, the Supreme Court refused to elevate the traditional common law rule of open courtrooms to a constitutional right held by the public. The Court held that the framers of the Constitution did not "create a constitutional right in strangers to attend," but only conferred upon the accused "an explicit right to demand a public trial."[900] In addition, the common law rule applies to both *civil and criminal* actions,[901] whereas the sixth amendment specifically applies to "criminal prosecutions."[902]

While the *Gannett* dissenters were convinced that strong public interests demanded recognition under the amendment,[903] the majority rejected this expansive view and stuck to the principle interests at the core of the right.[904]

Two questions remain open after *Gannett*: (1) the role of the first amendment and (2) the type of proceedings affected by this holding. In

896. 443 U.S. at 379-80 (citing Faretta v. California, 422 U.S. 806 (1975)).

897. Faretta v. California, 422 U.S. 806, 818-21 (specifically right to counsel is enjoyed personally by the defendant); Estes v. Texas, 381 U.S. 532, 538-39 (1965) (public trial guaranteed accused so that he "would be fairly dealt with and not unjustly condemned"); *In re* Oliver, 333 U.S. 257, 270 (1948) ("the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution").

898. *The Right to Attend*, *supra* note 869, at 1321 (specifically dealing with the lower court treatment in *Gannett*); Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 392 (1932); Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899, 1902 (1978); Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U.L. REV. 1138, 1156 (1966) (public interest does not equal a public right).

899. 443 U.S. at 383-84. *Cf.* Singer v. United States, 380 U.S. 24, 36 (1965) ("no constitutional impediment to conditioning a waiver of this right [to be tried by an impartial jury—sixth amendment] on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to . . . the very thing that the Constitution guarantees him").

900. 443 U.S. at 383-84.

901. *Id.* at 386 n.15.

902. U.S. CONST. amend. VI.

903. 443 U.S. at 405-48 (Blackmun, J., concurring and dissenting in part).

904. *See* notes 875-76 *supra* and accompanying text.

regard to the first question, Justice Rehnquist, in his concurring opinion, rejected the notion that any right of access emanated from the first amendment.[905] The dissenters, although claiming never to have reached the issue, seem also to reject the argument.[906] The majority, while citing the same cases as the dissent and Justice Rehnquist, assumed the point *arguendo*, but found that "all appropriate deference" to the amendment had been given.[907] Finally, although Justice Powell forcefully argued that Gannett had an interest protected by the first amendment, he agreed with the majority that due deference had been given.[908]

The second open question is whether the case is restricted to suppression hearings or extends to full trials. At several places in the plurality opinion the holding is limited to pre-trial suppression hearings. Justice Stewart first notes the "special risks of unfairness" which result from publicity of suppression hearings.[909] Secondly, the Court assumes *arguendo* that while the common law tradition of public attendance at *trials* is a constitutional right, no common law rule is associated with public *hearings*.[910] Concurring, Justice Burger specifically limited the holding to pre-trial hearings—partially due to his dislike for the exclusionary rule.[911] This question, however, may be answered shortly. Recently, the Supreme Court granted certiorari to a case dealing with closure of an entire trial as permitted under a state statute.[912] How this future decision may modify or expand *Gannett* remains to be seen.

III. PRE-TRIAL PROCEEDINGS

A. Bail

1. Relief from forfeiture of bail

Bail forfeiture is mandatory when a condition of bail is breached.[913] The purpose of bail forfeiture is to discourage violations of bail covenants and to discourage defaults that create unnecessary

905. 443 U.S. at 403-06 (Rehnquist, J., concurring).
906. *Id.* at 411 and 446-47 (Blackmun, J., dissenting).
907. *Id.* at 391-92.
908. *Id.* at 397-403 (Powell, J., concurring).
909. *Id.* at 378.
910. *Id.* at 387-91.
911. *Id.* at 394-97 (Burger, C.J., concurring).
912. Richmond Newspapers, Inc. v. Virginia (Va. July 9, 1979), *cert. granted*, 444 U.S. 896 (Oct. 9, 1979).
913. FED. R. CRIM. P. 46(e)(1) states that "[i]f there is a breach of a condition of a bond, the district court shall declare a forfeiture of the bail."

delay and expense to the government.[914] Forfeiture may be set aside, however, if it appears that justice does not require the enforcement of the forfeiture.[915] The factors to be considered with respect to motions to set aside bail forfeiture are the willfulness of the breach, the prejudice to the government, and any explanation or mitigating factors presented by the defendant.[916]

In *United States v. Stanley*,[917] the defendant violated the travel restrictions of his personal appearance bond, and the government successfully filed an ex parte motion to revoke the defendant's bail. Finding that his breach was intentional[918] and that he could provide no justifiable explanation or factors mitigating the breach,[919] the Ninth Circuit refused to grant the defendant relief from forfeiture of bail,[920] even though there was no showing of prejudice or inconvenience to the government.[921]

In *Stanley*, the Ninth Circuit also made it clear that it will not overturn a district court's decision to refuse to remit all or part of forfeited bail, absent an abuse of discretion.[922] This indicates a greater reluctance to set aside forfeitures in the Ninth Circuit than in other circuits, which have allowed less than total forfeiture when there is no evidence that the government suffered any delay or expense from the defendant's breach.[923] Here, the refusal to set aside part of the forfeiture seems unduly harsh in light of the fact that Stanley made all required court appearances and that no showing was made by the

914. Smith v. United States, 357 F.2d 468, 490 (5th Cir. 1966).

915. FED. R. CRIM. P. 46(e)(2) provides that "[t]he court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture."

916. United States v. Nolan, 564 F.2d 376, 378 (10th Cir. 1977) (per curiam); United States v. Foster, 417 F.2d 1254, 1257 (7th Cir. 1969).

917. 601 F.2d 380 (9th Cir. 1979) (per curiam).

918. A condition of bail was that Stanley not leave the Northern District of California. Stanley was arrested in Maine on suspicion of smuggling. *Id.* at 381-82.

919. *Id.* at 382.

920. The court stated that "[w]e do not believe that the district court abused its discretion in refusing to remit all or part of the forfeited bail." *Id.*

921. Apparently, Stanley made all court appearances and the government made no showing of any prejudice. *Id.*

922. *Id.* *See also* United States v. Bass, 573 F.2d 258, 259-60 (5th Cir. 1978) (though trial judge has wide discretion whether to remit a forfeiture, the forfeiture must not be arbitrary or capricious); United States v. Foster, 417 F.2d 1254, 1258 (7th Cir. 1969) (trial court's judgment may be reversed only if decision was arbitrary and capricious).

923. *See* United States v. Bass, 573 F.2d 258, 259 (5th Cir. 1978) (forfeiture of $25,000 of $100,000 appeared excessive when no evidence that the government suffered any delay or expense).

government of prejudice by the breach.[924] A partial forfeiture of Stanley's bail may have been an adequate penalty.[925] Thus, the Ninth Circuit has taken a more inflexible stand on this question than other circuits.

2. Bail jumping

Under the Bail Reform Act of 1966,[926] the five elements of the crime of bail jumping are that the defendant "(1) was released pursuant to . . . 18 U.S.C. § 3146; (2) was required to appear in court; (3) was aware of this required appearance; (4) failed to appear as required; and (5) was willful in his or her failure to appear."[927] These elements were considered by the Ninth Circuit in *United States v. McGill*.[928] In *McGill*, the defendant appealed a conviction of bail jumping, asserting that the district court erred in taking from the jury the first element of the crime, when he decided that the defendant's release was pursuant to the Act as a matter of law.[929]

In 1975, McGill was indicted for violating the Controlled Substance Act[930] and was released on bond. Subsequently, a superseding indictment was filed against him under which he was tried and convicted. McGill then failed to appear for sentencing and was tried and convicted by a jury of bail jumping. At trial, he conceded that he was released pursuant to the Act under the original indictment, but argued that his failure to appear was in connection with the superseding indictment, to which his bond did not relate. On appeal, he argued that the court erred in deciding, as a matter of law, that the release was pursuant to the Act, asserting that the jury should have been allowed to determine whether that element of the crime had been proved.[931]

The Ninth Circuit acknowledged that criminal defendants are entitled to trial by jury of every element of the offense charged, but held that "in most cases, the question whether a release was pursuant to the Act will be one on which the trial judge should instruct the jury as a matter of law."[932] The court conceded that the question may involve

924. 601 F.2d at 382.

925. *See*, United States v. Bass, 573 F.2d 258, 260 (5th Cir. 1978) ("The purpose of bail is not punitive; it is to secure the presence of the defendant.").

926. 18 U.S.C. § 3150 (1976). Hereinafter referred to as the "Act."

927. United States v. McGill, 604 F.2d 1252, 1254 (9th Cir. 1979).

928. 604 F.2d 1252 (9th Cir. 1979).

929. *Id.* at 1254.

930. 21 U.S.C. §§ 841(a), 846 (1976).

931. 604 F.2d at 1254.

932. *Id.*

issues of law and issues of fact, but in such cases as the present one, where the principal issue was the authority by which a judge released a defendant, the question is one of law.[933]

In reaching its decision, the court relied on section 3146(e) of the Act, which provides broad discretionary power to a judge to impose additional or different conditions on a defendant's release.[934] The Ninth Circuit found that the trial judge acted within his discretion when he applied the original bond to the superseding indictment, thus making the release in question pursuant to the Act.[935]

The *McGill* decision is significant in that a contrary holding would have allowed juries to question a judge's discretion on procedural matters. It is clear that the Act was intended to grant broad discretion to the judge.[936] Thus, it would be unreasonable to permit a jury to rule on the propriety of a judge's discretionary decisions. As the Ninth Circuit pointed out, issues of fact may be present in cases involving the release element of the crime of bail jumping.[937] If such a showing is made by a defendant, then the issue should go to the jury. However, where no showing is made that factual issues are involved, as in *McGill*, there is no basis to attack the trial judge's decision.

B. Compliance with Discovery

In *Flavorland Industries, Inc. v. United States*,[938] the Ninth Circuit indicated that corporations must take affirmative steps to comply with grand jury subpoenas. Flavorland Industries was served with a grand jury subpoena requesting certain depositions that were taken of its employees as part of a state court antitrust action between private parties. Flavorland refused to comply, arguing that the materials sought were subject to a protective order issued in the state court action.[939] The

933. *Id.*

934. *Id.* at 1255. Section 3146(e) provides that "[a] judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release . . . ."

935. The court pointed out that the trial judge noted during the subsequent proceedings that the defendant was present on bond. In addition, it was undisputed that McGill understood the order to appear. 604 F.2d at 1255.

936. The court stated that "[w]e believe this broad grant of discretionary power to change the terms of release reflects a congressional decision that the trial judge should resolve in favor of release most questions that arise in connection with a defendant's bail." *Id.*

937. *Id.* at 1254.

938. 591 F.2d 524 (9th Cir. 1979) (order).

939. Flavorland also argued that the grand jury exceeded its authority in issuing the subpoena and that it was against the company's interest to produce the requested material. *Id.* at 525.

Ninth Circuit refused to allow Flavorland to hide behind the cloak of the state court's protective order, stating that Flavorland "had not done all it might to remove any impediment to its ability to comply with the subpoena that was created by the State court protective order. . . ."[940] The court directed Flavorland to petition the state court judge for a modification of the protective order.[941]

Flavorland is significant in that it establishes a rule in the Ninth Circuit that civil discovery orders cannot be used to subvert discovery in criminal cases.[942] When subpoenaed, a criminal defendant can be required to seek a determination whether the information sought by the subpoena is unobtainable or if the civil proceeding's order can be modified so as to enable compliance with the criminal discovery request.

Rather than allow Flavorland to stand passively behind the state protective order, the Ninth Circuit ordered it to petition for a modification so that the state judge could indicate whether it was his intention to shield the particular information from the federal grand jury.[943] This allowed the state judge to consider the possibility of a more narrowly framed protective order[944] and promoted a fair and reasonable attempt to provide relevant information to the grand jury while protecting the rights of the defendant in the civil action.[945]

C. Competency to Stand Trial

A guilty plea in a criminal case functions as a waiver of important constitutional rights.[946] Thus, great care must be taken to insure that an individual is competent to plead guilty.[947] It is well settled that "failure to observe procedures adequate to protect a defendant's right

940. *Id.*

941. *Id.*

942. *Cf.* McSurely v. McClellan, 426 F.2d 664, 671-72 (D.C. Cir. 1970) (civil discovery may not be used to subvert limitations on criminal cases).

943. The court stated that it perceived "no intention or purpose on his [state court judge's] part to prevent the documents coming to the federal Grand Jury which is investigating a possible indictment of Flavorland." 591 F.2d at 525.

944. *E.g.*, McSurely v. McClellan, 426 F.2d at 672 (case remanded where there was no indication that the District Court considered the possibility of a more narrowly framed protective order).

945. The court stated that it had "no desire to issue an order which would have the effect of contravening any purpose of Judge Elston [state court judge] in preserving the orderly process of the private litigation . . . ." 591 F.2d at 525.

946. A defendant who enters such a plea waives his privilege against self incrimination, his right to trial by jury and his right to confrontation of his accusers. McCarthy v. United States, 394 U.S. 459, 466 (1969).

947. *See* Rinehart v. Brewer, 561 F.2d 126, 131 (8th Cir. 1977) (in view of the totality of the circumstances, defendant's guilty plea was not entered voluntarily).

not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial."[948]

In *Darrow v. Gunn*,[949] the defendant contended that a state court erred in failing to hold a competency hearing when a good faith doubt arose as to his competency to stand trial.[950] The defendant also contended that the district court's retrospective hearing was not sufficient to compensate for this error. In *Darrow*, the defendant originally pleaded not guilty by reason of insanity to charges of first degree murder, kidnapping and use of a firearm in the commission of the alleged crimes.[951] Over the objection of his attorney, Darrow withdrew his plea of not guilty by reason of insanity and entered a plea of guilty. After two court-appointed psychiatrists determined Darrow to be sane,[952] the judge accepted Darrow's guilty plea.

Darrow subsequently filed a motion to set aside his guilty plea, alleging that he was mentally incompetent at the time the plea was entered.[953] In support of his motion, Darrow cited a report of a forensic psychiatrist hired by his appointed counsel which concluded that Darrow was a paranoid schizophrenic living in a delusional world and was legally insane at the time of the crimes charged.[954] The trial court denied the motion to set aside the guilty plea, and the district court refused Darrow's writ of habeus corpus. On appeal, the Ninth Circuit remanded for reconsideration.[955] On remand, the district court, unable to determine if Darrow was competent, remanded to the state trial court for the determination. After an evidentiary hearing,[956] that court concluded that Darrow was competent at the time his plea was accepted. The district court affirmed the state court's findings and Dar-

948. Drope v. Missouri, 420 U.S. 162, 172 (1975).

949. 594 F.2d 767 (9th Cir. 1979).

950. *Id.* at 769.

951. *Id.*

952. *Id.*

953. *Id.* at 770.

954. The report also stated that Darrow was aware of the nature of the charges against him and could cooperate and collaborate with the public defender's office unless the paranoid system within which he operates was enlarged to include the public defender's office. *Id.* at 769.

955. The Ninth Circuit cited an absence of the transcripts in which Darrow's plea was accepted and the district court's failure to apply the standards set forth in Sieling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973), which provide that "[a] defendant is not competent to plead guilty if a mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the consequences of his plea."

956. At the time of the hearing, the state court interviewed all psychiatrists involved in the case. 594 F.2d at 770 n.5.

row appealed to the Ninth Circuit, alleging that the trial court erred in not holding a competency hearing and questioning the propriety of the retrospective hearing.[957]

Although the United States Supreme Court has not prescribed a standard which dictates the quantum of evidence necessary to require a competency hearing,[958] the Ninth Circuit has held that

> a due process evidentiary hearing is constitutionally compelled *at any time* that there is "substantial evidence" that the defendant may be incompetent to stand trial . . . . Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial . . . . *At any time that such evidence appears*, the trial court *sua sponte* must order an evidentiary hearing on the competency issue.[959]

Clearly, the rule in the Ninth Circuit is that the duty to hold a competency hearing on the court's own motion is not limited to any particular part of a criminal proceeding.

After careful review,[960] the Ninth Circuit refused to overturn Darrow's conviction. The court stated that "[a] reasonable judge . . . should not have entertained a good faith doubt concerning Darrow's competence to stand trial or to plead guilty."[961] The court cited an absence of factors that would have indicated a good faith doubt as to Darrow's competency: 1) a long history of irrational behavior and mental illness, 2) a psychiatric report throwing doubt on the defendant's competency, and 3) irrational behavior in the courtroom.[962]

Without question, the trial court was not faced with the above factors prior to the acceptance of Darrow's guilty plea. The introduction of the psychiatrist's report that concluded that Darrow was a "paranoid schizophrenic," however, should have raised a reasonable doubt in the judge's mind concerning Darrow's competency. At that time, a competency hearing was compelled.

957. The court felt that in most cases, a retrospective hearing is not sufficiently reliable to be constitutionally proper. *Id.* at 770.

958. *See* Drope v. Missouri, 420 U.S. 162, 172 (1975) (the Court noted that in previous decisions it did not "prescribe a general standard with respect to the nature or guarantee of evidence necessary to require resort to an adequate procedure").

959. Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972) (emphasis added). *See also* United States v. Mills, 597 F.2d 693, 699 (9th Cir. 1979) ("Bare assertions by defendant's counsel that defendant is not competent to stand trial generally are not sufficient to raise the requisite doubt.").

960. The court stated "recognizing that our review of a failure to provide a competency hearing must be 'comprehensive' we conclude that the court did not err." 594 F.2d at 771.

961. *Id.*

962. *Id.*

In affirming the trial court's decision, the Ninth Circuit ignored its own rule that "any time such evidence appears, the trial court *sua sponte* must order an evidentiary hearing on the competency issue."[963] Although the evidence before the court was not conclusive,[964] the psychiatrist's report should have presented a good faith doubt about the defendant's competence. In view of the seriousness of the charges Darrow faced and the conflicting evidence, he should have been granted a competency hearing when the trial court considered his motion to set aside the guilty plea.

A ruling in Darrow's favor would have established a sturdy rule that courts in the Ninth Circuit carefully consider a defendant's competency to stand trial and his waiver of important constitutional rights. The Ninth Circuit's ruling eroded those concerns, however, allowing a retrospective hearing on competency to remedy prior due process violations. The inherent difficulties in holding a retrospective competency hearing make it a highly questionable remedy.[965]

D. Identifications

In 1967, the Supreme Court recognized that "[a] major factor . . . contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pre-trial identifications."[966] The Court established that the sixth amendment right to counsel[967] and the fifth and fourteenth amendments' due process clauses[968] can be used to challenge unnecessarily suggestive[969] pre-trial identification procedures. Further, if the totality of the circumstances shows that a lineup was unnecessarily suggestive and conducive to irreparable mistaken identification, then the exclusionary rule applies and the identification will not be allowed into evidence.[970]

963. Moore v. United States, 464 F.2d at 666.

964. Two court-appointed psychiatrists felt that Darrow was sane. 594 F.2d at 769 n.1. One psychiatrist hired by defense counsel felt that he was legally insane. *Id.* at 769.

965. *Id.* at 770.

966. United States v. Wade, 388 U.S. 218, 228 (1967).

967. Gilbert v. California, 388 U.S. 263, 272-73 (1967).

968. Stovall v. Denno, 388 U.S. 293, 302 (1967).

969. Pre-trial identification procedures are "unnecessarily suggestive" if they create a suggestion that the accused committed the crime. Such a suggestion must be so unnecessary or impermissible as to create a substantial likelihood of irreparable misidentification under the totality of the circumstances. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

970. Foster v. California, 394 U.S. 440 (1969).

In *United States v. Williams*,[971] the defendant claimed that the requirement that he don a wig at a lineup violated the limits set forth in two Supreme Court cases, *Simmons v. United States*[972] and *Neil v. Biggers*.[973] Citing *Manson v. Brathwaite*,[974] the Ninth Circuit side-stepped the issue of suggestive identification by holding that even if the use of the wig were considered suggestive, "based on the 'totality of the circumstances', the out-of-court identification was sufficiently reliable to go to the jury for ultimate determination of weight and reliability."[975] The witness, a bank teller, was approached by the defendant during a robbery. She was face to face with him and heard his voice when he threatened her.[976] The court stated that the witness had an excellent opportunity to view the defendant during the robbery and that her subsequent unequivocal identification of him outweighed any suggestive-identification argument put forth by the defendant.[977]

The Ninth Circuit's decision was clearly in line with the general rule in the federal courts. Under the "totality of circumstances" test, the pre-trial identification procedure used in *Williams* was not unduly suggestive. Investigative reports on the robbery concluded that the robber wore a wig during the commission of the crime.[978] Each participant in the lineup was required to wear the wig. Had Williams been the only person required to wear the wig, a clear constitutional violation would have occurred. The procedure used in this lineup, however, was evenly and fairly applied. Attention was not focused on the defendant. "[A] reasonable effort to harmonize the lineup is all that is normally required."[979]

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971. 594 F.2d 1258 (9th Cir. 1979) (per curiam).

972. 390 U.S. 377, 384 (1968) ("[P]retrial identification by photograph will be set aside if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.").

973. 409 U.S. 188, 198 (1972) ("primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' ") (quoting Simmons v. United States, 390 U.S. at 384).

974. 432 U.S. 98, 114 (1977) ("reliability [of a witness] is the linchpin in determining the admissibility of identification testimony").

975. 594 F.2d at 1259. Factors to be weighed "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation and the time between the crime and the confrontation." Manson v. Braithwaite, 432 U.S. at 114.

976. In *Williams*, the witness was a bank teller who was approached during a robbery. She was face to face with the robber and heard his voice when he threatened injury to her family if she did not comply with his demands. 594 F.2d at 1259.

977. *Id.*

978. *Id.*

979. United States v. Lewis, 547 F.2d 1030, 1035 (8th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977).

Other circuits are in accord and have upheld requirements that participants in pre-trial identifications wear certain items of clothing if relevant to the identification.[980] Lineups have been invalidated as constitutionally impermissible only when the procedures were "unnecessarily suggestive."[981]

In *United States v. Cook*,[982] the Ninth Circuit upheld a pre-trial identification procedure, even though the identification procedure directed a witness' attention to the defendant. In *Cook*, Jack Stockham and Douglas Fluaitte witnessed a gun battle between police and four bank robbers. Each witness viewed the "get-away" man for a few seconds from a fairly long distance.[983] Each was unable to make a positive identification when shown six photographs, one of which was of the defendant. Stockham positively identified Cook at a subsequent lineup, but admitted that he recognized Cook as one of the men in the photo-spread. Both witnesses later identified Cook as the get-away man at trial.[984]

Although, as the court pointed out, lineups conducted after a photo-spread are not unusual,[985] the circumstances surrounding Stockham's selection of Cook cast serious doubts as to the reliability of his lineup and in-court identifications. First, Stockham was a retired police officer. He returned to the robbery scene for the specific purpose of identifying the get-away man. Thus, it must be presumed that he had a stronger interest in identifying the robber than an ordinary witness. Even with this second look, he was unable to pick Cook's photograph out of a six photograph display, concluding that three out of the six

980. United States v. Gaines, 450 F.2d 186, 195-96 (3rd Cir. 1971) (no error in requiring defendant to appear before witness with scarf around face when bank teller testified that robber wore a scarf during robbery); United States v. Wilkerson, 453 F.2d 657, 660 (8th Cir. 1971) (lineup not unduly suggestive even though all participants required to put on hat and glasses).

981. United States v. Smith, 527 F.2d 702, 705 (2d Cir. 1975) (lineup impermissibly suggestive where rape victim testified that assailant wore green shirt and defendant required to wear green shirt at lineup, but not all participants so required); Israel v. Odom, 521 F.2d 1370, 1374 (7th Cir. 1975) (accused only person in lineup to wear glasses, which was integral part of assailant's description; lineup held suggestive).

982. 608 F.2d 1175 (9th Cir. 1979).

983. "Stockham viewed the 'get-away' man for two five-second intervals at a distance of 30 to 40 yards. Fluaitte viewed the same man for a few seconds at a distance of 30 to 35 feet and 'got a really fast look' from about a 'foot away' as the man sped by in his car." *Id.* at 1178.

984. However, on cross examination, Fluaitte could not positively identify Cook. Because the probative value of Fluaitte's identification was slight, the reliability of his identification will not be discussed. *Id.*

985. *Id.* at 1178-79.

photographs may have been the man he saw.[986] Second, as a former police officer, Stockham was undoubtedly familiar with police identification procedures and could be expected to give greater attention to the procedures than an ordinary witness. Because of his training, there was a substantial likelihood that the selection process impermissibly narrowed his choices so that the final selection of Cook at the lineup was obvious. When presented with the six photographs, Stockham would reasonably infer that one of the six was the person who the police suspected as the get-away man. Stockham felt that three of those might have been the man he saw. When Cook was the only one of the three to appear in a subsequent lineup, the choice was obvious.

The Ninth Circuit indicated that Stockham's identification was reliable because he was a former police officer, inferring that less scrutiny of the identification procedure was required.[987] Because Stockham was a retired police officer, familiar with identification procedures and because he actively sought to identify the get-away man, a higher degree of scrutiny should have been applied.

The facts of this case are unique, and the likelihood of misidentification was high. When an identifying witness has a higher than normal understanding of lineup procedures and has taken affirmative steps to assist in the identification, a higher degree of scrutiny should be applied to the pre-trial identification procedure.

E. Grand Jury Prejudice

An accused facing indictment is entitled to have that indictment delivered by an impartial grand jury.[988] In determining whether a grand jury has been impartial, the courts are reluctant to circumscribe a prosecutor's power to argue before the grand jury, even when his conduct might cause prejudice to the defendant. In the Ninth Circuit, for example, as long as there is sufficient evidence to indict an accused, the problem that the evidence itself might be presented in such a way as to prejudice the grand jury is one considered to be easily resolved within the court system.[989] Consequently, a defendant who asserts undue grand jury prejudice because of prosecutor misbehavior bears a heavy burden of proof.[990]

986. Stockham indicated that Cook's photograph "most closely resembled the man he had seen." *Id.*

987. *Id.* at 1179.

988. United States v. Gallo, 394 F. Supp. 310, 314 (D. Conn. 1975).

989. Silverthorne v. United States, 400 F.2d 627, 634 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971).

990. The Ninth Circuit has declared that it will not interfere with prosecutorial discretion

In *United States v. Samango*, the Ninth Circuit considered a defendant's claim that he had been denied his right to an unbiased grand jury.[991] Alfred Samango, charged with "continuing criminal enterprise," alleged before the court that the conduct of an overzealous prosecutor had caused the grand jury to be prejudiced against him. The district court agreed with Samango and the Ninth Circuit affirmed.[992]

In particular, the record indicated that the prosecutor had engaged in irrelevant questioning of Samango and had criticized him before the grand jury for his failure to perform properly under a nonprosecution agreement.[993] He elicited conclusory evidence from an unknowledgeable witness.[994] Lengthy transcripts were presented by the prosecution to the grand jury without giving the jurors ample time to read them.[995] The most flagrant abuse was the prosecutor's use of perjured testimony as persuasive evidence.[996] The court, however, did not condemn the prosecutor's motives for his over-enthusiastic prosecution, but rather his conduct itself for "[exceeding] the limits of acceptability."[997]

F. Pre-indictment Delay

Federal courts have traditionally allowed the government great leeway in its decisions as to the proper time to arrest a suspect.[998] Although pre-indictment delay may violate a federal defendant's fifth amendment due process guarantee to a fair trial,[999] the government has

"unless it is abused to such an extent as to be arbitrary and capricious and violative of due process." United States v. Welch, 572 F.2d 1359, 1360 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 842 (1978).

991. 607 F.2d 877 (9th Cir. 1979).

992. *Id.* at 878.

993. *Id.* at 878-79.

994. *Id.* at 879.

995. The prosecutor indicated to the grand jury, as he turned over some 1000 pages of transcripts on December 12, 1977, that he had "a December 20 deadline." *Id.* When the grand jury handed down its indictment on December 19, there was no indication as to "how much time the jurors spent with the transcripts nor whether they read them at all. Indeed, there [were] indications in the record of their proceedings that some of the jurors were not familiar with the contents of those transcripts." *Id.* at 881.

996. *Id.* at 882.

997. *Id.* at 884. The court also noted that it was within its supervisory powers to determine the limits of such acceptable conduct. *Id.* (citing United States v. Basurto, 497 F.2d 781, 793 (9th Cir. 1974) (Hufstedler, J., concurring)).

998. United States v. Cowsen, 530 F.2d 734, 737 (7th Cir.), *cert. denied*, 426 U.S. 906 (1976) (ongoing investigation justified delay); United States v. Medina-Arellano, 569 F.2d 349, 352 (5th Cir. 1978) (four year delay between crime and arraignment not violative of fifth amendment due process).

999. The sixth amendment guarantee of a speedy trial does not extend to the period before arrest, but unreasonable and prejudicial delay prior to arrest may violate due process

not been required to file charges as soon as the requisite amount of proof for an indictment has been developed against an individual.[1000] Further, actual prejudice to a defendant resulting from pre-indictment delay may not by itself warrant dismissal of a criminal prosecution, unless the delay was caused by the government's intentional misconduct or negligence.[1001] A due process inquiry must balance the reasons for the delay against the prejudice to the accused. Thus the reasonableness and necessity for the delay must outweigh the length of the delay and the prejudice to the defendant.[1002]

In *United States v. Valenzuela*,[1003] the defendant contended that the government's delay in prosecuting him substantially prejudiced his defense because the delay forced him to stand trial with his brother.[1004] The government conceded that it delayed prosecution, but argued that the delay was justified so that evidence could be accumulated against the defendant's co-conspirators.[1005] The Ninth Circuit, following the Supreme Court's ruling in *United States v. Lovasco*,[1006] held that despite the delay, Valenzuela was not deprived of due process, even if his defense was somewhat prejudiced by the lapse of time.[1007] The court stated that forcing the prosecutor "to file charges as soon as the requisite amount of proof has been developed . . . would cause numerous problems in those cases in which a criminal transaction involves more than one person . . . ."[1008]

Balancing the reason for the delay against the actual prejudice to Valenzuela shows that Valenzuela experienced no deprivation of due process. The government delayed prosecution against him until evidence against his co-conspirators could be obtained. Prosecutorial de-

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of law. United States v. Kail, No. 78-1633 (9th Cir. Nov. 21, 1979); *see* Barker v. Wingo, 407 U.S. 514 (1972); Gable v. Massey, 566 F.2d 459 (5th Cir.), *cert. denied*, 435 U.S. 975 (1978).

1000. United States v. Lovasco, 431 U.S. 783, 792-93 (1977).

1001. United States v. Mays, 549 F.2d 670, 678 (9th Cir. 1977) ("[D]espite the degree of actual prejudice, for a judgment in favor of dismissal, there must be some culpability on the government's part either in the form of intentional misconduct or negligence.").

1002. United States v. Lovasco, 431 U.S. at 790.

1003. 596 F.2d 824 (9th Cir.), *cert. denied*, 441 U.S. 965 (1979).

1004. Valenzuela's argument was that, because the evidence pertaining to him related to 1971-1973, the delay in indictment prejudiced him because the delay forced him to stand trial with his brother. 596 F.2d at 826.

1005. *Id.*

1006. 431 U.S. 783 (1977).

1007. 596 F.2d at 826. Further, defendants are protected from undue delay by the applicable statute of limitations. United States v. West, 607 F.2d 300, 304 (9th Cir. 1979).

1008. Problems cited by the court were 1) the impairment of investigations, and 2) the burdening of courts with multiple trials involving the same facts. 596 F.2d at 826 (quoting United States v. Lovasco, 431 U.S. at 796).

lay for the purpose of developing evidence is not necessarily violative of a defendant's due process guarantee.[1009] Obviously, had the government been required to arrest Valenzuela the instant the evidence pertaining to him was acquired, the government's ability to obtain evidence against his co-conspirators would have been diminished. Adopting this rationale, the Supreme Court has ruled that pre-indictment delay is warranted if the reason for the delay is to develop proof in criminal prosecutions against additional parties or for additional crimes.[1010]

The prejudice claimed by Valenzuela might have been grounds for a severance motion due to prejudicial joinder,[1011] but it was insufficient to demand dismissal due to pre-indictment delay. Had Valenzuela been able to show actual prejudice in combination with improper prosecutorial motive or prosecutorial negligence,[1012] he may have been able to assert a plausible due process argument. Since no such showing was offered, the Ninth Circuit could not provide Valenzuela with relief from his conviction.[1013]

In *United States v. Walker*,[1014] the defendants contended that a thirteen-month delay between the commission of an arson offense and the return of an indictment constituted prejudicial delay and was a violation of their due process rights. The Ninth Circuit disagreed, holding that the thirteen-month delay was due to a justifiable investigative delay and did not substantially prejudice the defendants.[1015]

On May 16, 1977, a fire broke out in a federal correctional institution. A two-month FBI investigation indicated that the cause of the fire

1009. "[T]o prosecute a defendant following investigative delay does not deprive [the defendant] of due process." United States v. Lovasco, 431 U.S. at 796. *Cf.* United States v. Evers, 552 F.2d 1119 (5th Cir. 1977), *cert. denied*, 434 U.S. 926 (1978) (prosecutorial delay for purpose of ensuring most fully developed view of the law is not a denial of due process of law).

1010. United States v. Lovasco, 431 U.S. at 792-93.

1011. The government pointed out, and the Ninth Circuit agreed, that Valenzuela's argument that the delay forced him to stand trial with his brother was essentially a claim of improper or prejudicial joinder. 596 F.2d at 826 n.1. Severance due to prejudicial joinder is covered by rule 14 of the Federal Rules of Criminal Procedure which states in relevant part that if "it appears that a defendant . . . is prejudiced by a joinder . . . of defendants . . . the court may . . . grant a severance."

1012. Had the delay been caused by the prosecution's desire to obtain a tactical edge, then pre-indictment delay would have been improper. United States v. Gaddis, 418 F. Supp. 869 (W.D. Okla. 1976) (delay is denial of due process if used to gain a tactical edge).

1013. *See* United States v. Mays, 549 F.2d 670, 678 (9th Cir. 1978) (there must be some culpability on the government's part).

1014. 601 F.2d 1051 (9th Cir. 1979).

1015. *Id.* at 1053.

was arson but failed to identify the responsible parties. No further investigation was conducted until December 17, 1977, when a witness revealed for the first time that the defendants had set the fire.[1016] Less than one month later, the case was assigned to the U.S. Attorney's Office. On May 14, 1978, the matter was presented to the grand jury, which returned an indictment in June of that year.

As in *Valenzuela*, the *Walker* court cited *United States v. Lovasco*, stating that " 'the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.' "[1017] Here, the longest period of delay was caused by the unavailability of evidence from which a prosecution could proceed. Once it was obtained, prosecution did not commence until the prosecutor had an opportunity to evaluate the strength of his case.[1018] As the Supreme Court noted in *Lovasco*, such a delay is a proper exercise of the prosecutorial function.[1019] Balancing the reason for the delay against the prejudice to the defendants, the Ninth Circuit found no constitutional violations.[1020]

As indicated by *Valenzuela* and *Walker*, the Ninth Circuit is in accord with the Supreme Court's holding that the due process clause plays a limited role in protecting against oppressive delay.[1021] Absent a showing that the prosecutor delayed prosecution to obtain a tactical advantage, the Ninth Circuit will not condemn a prosecutor's judgment as to when to seek an indictment.

G. Defendant's Right to Discovery

A federal defendant's right to discovery of prosecutorial evidence helpful to his defense has been well established ever since the United States Supreme Court decision of *Brady v. Maryland*.[1022] Non-disclosure of such information violates the due process clause "irrespective of

1016. From June 1977 to December 1977, the witness was a fugitive. Shortly after her capture, she indicated in an interview that the defendants caused the fire. *Id.* at 1054.

1017. 601 F.2d at 1055 (quoting United States v. Lovasco, 431 U.S. at 790).

1018. The prosecution wanted to hear the grand jury testimony of the key witnesses in order to assess their credibility and the expected impact of their testimony in a jury trial. 601 F.2d at 1057.

1019. 431 U.S. at 792.

1020. 601 F.2d at 1057.

1021. 431 U.S. at 789. The *Walker* court stated that "insisting . . . on immediate prosecution once sufficient evidence is developed to obtain a conviction would pressure prosecutors into resolving doubtful cases in favor of early—and possibly unwarranted—prosecutions." 601 F.2d at 1055 (quoting United States v. Lovasco, 431 U.S. at 793).

1022. 373 U.S. 83 (1963); *see, e.g.*, Giglio v. United States, 405 U.S. 150 (1972) (co-conspirator promised that he would not be prosecuted if he testified for the government; held that non-disclosure of that information violated due process).

the good faith or bad faith of the prosecution."[1023] Thus, the prosecution is under a strong obligation to produce for each defendant any material which may prove to be exculpatory.

Although the specific contours of a prosecutor's duty to disclose have not been fully delineated, the Ninth Circuit has established that the prosecution is required to produce evidence in its possession that is favorable to the defense. Furthermore, a new trial is warranted if the "non-disclosure might reasonably have affected the jury's judgment on some material point."[1024]

In recent cases, the Ninth Circuit has considered the government's duty to disclose classified documents, the effect of abandoning a motion to produce discovery materials, the applicability of the *Harris* rule to non-FBI agents, and the government's duty to timely disclose requested documents.

1. Failure to request *Brady* material

Although the *Brady* rule requires the government to provide exculpatory information to an accused, it does not require disclosure absent a request for the exculpatory information.[1025]

In *United States v. Haro-Espinosa*,[1026] one of the defendants contended that he should be granted a new trial because the government failed to disclose that a codefendant had stated in an interview that the defendant was not involved in the crime. No request for the information was ever made, however, even though the defendant was aware that the codefendant could have provided exculpatory testimony.[1027]

The Ninth Circuit denied the defendant's motion for a new trial holding that "an important element in the *Brady* rule is that the defendant make a request for the exculpatory material."[1028] The court ruled that in light of the circumstances, "the failure to make a request or at least an independent inquiry cannot be ignored."[1029]

The ultimate issue in cases like *Haro-Espinosa* is whether the suppression of information by a prosecutor denied the accused his constitutional right to a fair trial.[1030] If the information is available to the

1023. 373 U.S. at 87.

1024. United States v. Butler, 567 F.2d 885, 890 (9th Cir. 1978).

1025. Moore v. Illinois, 408 U.S. 786, 794 (1972) ("The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request . . . .").

1026. 608 F.2d 796 (9th Cir. 1979).

1027. *Id.* at 801.

1028. *Id.* at 800.

1029. *Id.* at 801.

1030. Garrison v. Maggio, 540 F.2d 1271, 1274 (5th Cir. 1976).

accused from a source other than the government and if he was aware of that alternate source, he cannot be harmed by the nondisclosure.[1031] Here, the defendant was aware of the alternate source and failed to inquire into that source. Further, he neglected to request the information from the government. Under these circumstances, the defendant had no basis for his claim.[1032]

2. Discovery of classified Government documents

United States v. Lee[1033] and *United States v. Boyce*[1034] involved an espionage prosecution which resulted in the conviction of both defendants for selling defense secrets to Russian agents.[1035] Both defendants appealed their convictions, asserting *inter alia* that they were denied their right to discovery. Although the government did not disclose certain documents to the defendants, the Ninth Circuit determined that neither defendant's rights were violated.[1036]

In *Lee*, the defendant moved for a production of thirty-five documents relating to a classified government project.[1037] The trial court ordered production of only eight of those documents. Lee contended that the trial court's denial of his motion to produce all of the documents was prejudicial error. The Ninth Circuit disagreed, stating:

> First, Lee completely fails to show how the eight documents . . . were inadequate to substantiate his claim . . . . Secondly, . . . the government did stipulate that a representative of Lee's . . . would be permitted to view the documents . . . . Third, Lee had the opportunity to fully cross-examine Leslie Dirks, the C.I.A. Deputy Director . . . who authorized the Pyramider project . . . .[1038]

Boyce argued that his discovery rights were violated because the

1031. United States v. Weidman, 572 F.2d 1199, 1206 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978).

1032. *But see* United States v. Anderson, 574 F.2d 1347, 1354 (5th Cir. 1978) (absent specific request, failure to disclose information violates due process if the non-disclosed evidence could create a reasonable doubt which did not otherwise exist).

1033. 589 F.2d 980 (9th Cir. 1979).

1034. 594 F.2d 1246 (9th Cir. 1979).

1035. Both defendants were convicted of violating 18 U.S.C. § 793 and § 794, which protect information relating to "national defense."

1036. In *Lee*, twenty-seven classified documents were not disclosed. In *Boyce*, classified documents, although not produced, were subject to an in camera inspection by the trial judge to determine discoverability.

1037. The government possessed thirty-five documents relating to the "Pyramider" project, a top secret study. Documents from the project were allegedly passed to the Russians. 589 F.2d at 983, 989.

1038. 589 F.2d at 989.

government required that some of the requested documents remain in its possession. Boyce's counsel was allowed to view the documents but was not allowed to have copies of them. In addition, some documents were sealed and not disclosed. The court, however, examined those documents in camera and concluded that they were not discoverable under *Brady v. Maryland*.[1039] The Ninth Circuit held that although Boyce's counsel may have been inconvenienced, the requirement that he inspect the documents while they were in the government's possession did not amount to prejudicial error.[1040]

Thus, *Lee* and *Boyce* stand for the proposition that if requests for classified information are presented to the government, the government may not be required actually to produce the materials as requested, if it can provide the defendant with an adequate substitute in lieu of actual production. Although the documents were not made available to the satisfaction of Lee and Boyce, it is apparent that each defendant was offered an adequate opportunity, prior to trial, to inspect some or all of the documents they requested. Those documents that were not produced were submitted to the judge for a determination of their discoverability. Each defendant was to some degree inconvenienced, but when balanced with the government's interest in protecting classified documents, the inconvenience was minimal and clearly did not amount to prejudicial error. Absent a showing that the government's substitute discovery procedure was insufficient or prejudicial to the defendant's case, the Ninth Circuit will not require exact compliance with *Brady* when the requested materials are classified.

3. Abandonment of discovery rights

In *United States v. Lyman*,[1041] the prosecutor stated in his closing argument that "Bradshaw [a key government witness] was a good witness because he had kept notes in a diary to 'refresh his recollection' . . . ."[1042] The defendant's counsel timely moved for a mistrial and also for discovery of the diary, arguing that the defense had no knowledge of the diary's existence.[1043] The trial judge deferred his ruling on the issue. The next day, after the jury had returned its verdict, the judge asked counsel if he had anything else for the record. Counsel replied that he did not. At that time, it was incumbent upon the de-

1039. 594 F.2d at 1252.
1040. *Id.*
1041. 592 F.2d 496 (9th Cir. 1978), *cert. denied*, 442 U.S. 931 (1979).
1042. *Id.* at 498.
1043. *Id.*

fendant's counsel to raise the discovery issue again. Since he did not, the court could only conclude that he had abandoned the matter. There was no indication that the motion was substantively discussed at trial nor that the judge was obviously disposed against the motion. In fact, when the defense raised the issue, it was clear that the judge would consider the motion, but at a later time. Thus, counsel did not preserve the issue for appeal by merely objecting in court.

On appeal, the defense argued that a remand was justified so that a determination could be made of the discoverability of the diary. In rejecting that argument, the Ninth Circuit ruled that the defendant's counsel had abandoned the issue because he did not pursue the question and obtain a decision.[1044]

The Ninth Circuit followed the general rule that motions for discovery of documents made after conviction are too late.[1045] Thus, a mere objection at trial is insufficient to preserve an issue on appeal.

4. Discovery of investigative agent's notes

In *United States v. Marques*,[1046] the defendant asserted that a Drug Enforcement Administration investigator's destruction of notes concerning a telephone conversation with Marques violated the *Harris* rule, which requires that FBI agents keep all notes of conversations with persons suspected of criminal conduct.[1047] *Harris* was decided by the Ninth Circuit in 1976 after the passage of the Jencks Act and the enactment of rule 16 of the Federal Rules of Criminal Procedure.[1048]

1044. *Id.* at 499.

1045. United States v. Gibson, 513 F.2d 978, 980 (6th Cir. 1975) (per curiam) (no error in refusing motion for discovery when made after verdict); *accord*, Farnell v. Solicitor-General, 429 F.2d 1318 (5th Cir. 1970) (per curiam).

1046. 600 F.2d 742 (9th Cir. 1979).

1047. United States v. Harris, 543 F.2d 1247 (9th Cir. 1976). In *Harris*, an FBI agent destroyed the notes he made of an interview with the defendant after incorporating them into a formal report.

1048. *Id.* at 1249. The Jencks Act, Pub. L. No. 85-269, 71 Stat. 595 (codified at 18 U.S.C. § 3500 (1976)) provides in part:

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

FED. R. CRIM. P. 16(a)(1)(A) provides in part:

> Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral state-

The Jencks Act requires discovery of written or recorded statements made by a government witness if he or she later testifies at trial.[1049]

In *Harris*, as in *Marques*, government agents testified at trial concerning statements made by the defendant at an earlier interview. But prior to trial, the agents, following routine administrative procedures, had destroyed the interview notes.[1050] The Ninth Circuit held that the destruction of the notes violated the Jencks Act even though it was done in good faith.[1051] It refused to reverse defendant's conviction, however, because it found that he had not been prejudiced by the agent's actions.[1052] The court did give notice that, in the future, interview notes must be retained regardless of whether their loss would prejudice defendant.[1053]

The *Marques* court, unfortunately, did not apply *Harris* correctly. It did note that the minor factual differences that existed between *Marques* and *Harris* would not preclude the possibility of a *Harris* violation.[1054]

The court ignored the *Harris* rule and applied the pre-*Harris* prejudice rule. The court stated: "We choose instead to assume with-

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ment which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged.

1049. 18 U.S.C. § 3500(b) (1976).

1050. 543 F.2d at 1249.

1051. *Id.* at 1252-53. The *Harris* court followed the rule established by the D.C. Circuit in United States v. Harrison, 524 F.2d 421, 431-32 (D.C. Cir. 1975), which expressly disapproved of the destruction of notes by government agents even though done in good faith.

The *Harris* court concluded that handwritten interview notes were "statements" under the meaning of the Jencks Act. 543 F.2d at 1250, 1252. *Accord*, United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975). *Contra*, United States v. Batchelder, 581 F.2d 626 (7th Cir. 1978), *rev'd on other grounds*, 442 U.S. 114 (1979) (but critical of Seventh Circuit's role); United States v. Martin, 565 F.2d 362, 363-64 (5th Cir. 1978); United States v. Smaldone, 544 F.2d 456, 460-61 (10th Cir.), *cert. denied*, 430 U.S. 967 (1976); United States v. Hurst, 510 F.2d 1035, 1036 (6th Cir. 1976).

The court in *Harris* also found independent support for its holding requiring discovery of the interview notes in rule 16 of the Federal Rules of Criminal Procedure. Several circuits have held that under the broader scope of rule 16 and Brady v. Maryland, 373 U.S. 83 (1963), a court has the discretionary power to order the production of such statements. United States v. Harris, 543 F.2d at 1252. *Accord*, United States v. Harrison, 524 F.2d 421, 433 (D.C. Cir. 1975) (relied on *Brady* as well as the Jencks Act).

1052. 543 F.2d at 1253.

1053. *Id. Accord*, United States v. Shields, 571 F.2d 1115, 1119 (9th Cir. 1978) (*Harris* rule requiring preservation of notes should not be applied retroactively without a showing of prejudice); United States v. Robinson, 546 F.2d 309, 313 (9th Cir. 1976) (*Harris* requirement of retaining rough interview notes can only be applied prospectively in the absence of prejudice).

1054. 600 F.2d at 748.

out deciding that the *Harris* rule was violated when the notes were destroyed, but we reject appellants' request for reversal because the destruction constituted harmless error."[1055] *Marques*, then, appears to stand for the principle that when a court does not want to follow existing precedent, it can declare that a defendant was not prejudiced by a violation of that very precedent.

Four months later in *United States v. Bernard*,[1056] the Ninth Circuit held that a Drug Enforcement Administration agent could be precluded from testifying at a criminal trial if he destroyed rough notes taken during surveillance of a defendant.[1057] Citing *United States v. Wells*,[1058] the court held that "[i]f the government fails to produce such statements, the court is required to strike the testimony of the witness."[1059]

In *Bernard*, the government contended that the *Harris* rule only applied to interviews of prospective witnesses and not to rough notes made by an agent during surveillance activities.[1060] But, the Ninth Circuit rejected the government's narrow interpretation.[1061] Thus, *Ber-*

1055. *Id.* The cases cited by the *Marques* court in support of its prejudice rule are inapposite. United States v. Shields, 571 F.2d 1115, 1119 (9th Cir. 1978), United States v. Parker, 549 F.2d 1217, 1224 (9th Cir.), *cert. denied*, 430 U.S. 971 (1977), and United States v. Wood, 550 F.2d 435, 440 (9th Cir. 1976), all involved trials that occurred prior to the *Harris* no-prejudice rule. In each case, the Ninth Circuit held that *Harris* could not be applied retroactively.

The Ninth and D.C. Circuits appear to be the only ones that follow this rule. *See, e.g.*, United States v. Principe, 499 F.2d 1135, 1139 (1st Cir. 1974) (not every failure of the government to disclose under the Jencks Act will require excluding the testimony of the witness in question); United States v. Cirillo, 499 F.2d 872, 882-83 (2d Cir. 1974) (no real prejudice was shown from government's failure to produce transcripts of conversations prior to trial); United States v. Fioravanti, 412 F.2d 407, 410 (3rd Cir.), *cert. denied*, 396 U.S. 837 (1969) (appellant required to show actual prejudice from lack of discovery); United States v. Crowell, 586 F.2d 1020, 1028 (4th Cir. 1978) (Jencks Act violations can be excused when there is a showing of no prejudice to defendant); United States v. Bullock, 451 F.2d 884, 890 (5th Cir. 1971) (courts will find error resulting from Jencks Act violations when prejudice to defendant is shown); United States v. Ball, 428 F.2d 26, 30-31 (6th Cir. 1970) (government's destruction of handwritten interview notes was not prejudicial to defendant); United States v. Cleveland, 507 F.2d 731, 741 (7th Cir. 1974) (new trial will not be ordered when Jencks Act violation does not result in prejudice); United States v. Mechanic, 454 F.2d 849, 856-57 (8th Cir. 1971) (good faith destruction of interview notes was not considered prejudicial); United States v. Smaldone, 484 F.2d 311, 318 (10th Cir. 1973) (in finding no Jencks Act violation had occurred, the court also noted that there was no prejudice to defendant because of the government's failure to produce certain material).

1056. 607 F.2d 1257 (9th Cir. 1979).

1057. *Id.* at 1263-65.

1058. 573 F.2d 1383 (9th Cir. 1978).

1059. 607 F.2d at 1264-65.

1060. *Id.* at 1264.

1061. *Id.*

nard appears to insure that defendants in criminal trials will be afforded broad protection under the Jencks Act.

5. Government's untimely production of requested materials

In *United States v. Knowles*,[1062] the Ninth Circuit held that the government violated the defendant's discovery rights because the government failed to timely produce a grand jury transcript of a key governmental witness' testimony. In *Knowles*, the defendant attempted to obtain the transcript pursuant to the Jencks Act.[1063] The requested transcript, which did not arrive until after the trial, disclosed that the witness had previously lied under oath and revealed several inconsistencies between the testimony at trial and the testimony before the grand jury.

The Ninth Circuit ruled that in failing to produce the transcript, the government not only violated its obligation under the Jencks Act, but also the rule in *United States v. Butler* which provides that a new trial is warranted if the non-disclosure might have reasonably affected the jury's judgment on some material point.[1064] The court held that under the *Butler* standard, the government's failure to produce was reversible error.[1065] Since the non-disclosed evidence in this case clearly would have had an effect on the jury, the Ninth Circuit was correct in refusing to condone the government's untimely production.

By contrast, in *United States v. Smith*,[1066] the defendant argued that his due process rights were violated when the government delayed production of a Drug Enforcement Administration Report which concerned an investigation of a key government witness, until after the witness began testifying. The defendant argued that the delay precluded his counsel from using the report to impeach the witness.[1067] The Ninth Circuit found that suppression had not been complete and refused to grant the defendant's motion for a new trial.

In *Smith*, the delay in production may have been detrimental to the defendant, but the trial judge adequately protected the defendant's rights when he gave the defense the opportunity to recall the witness and cross-examine her on anything contained in the tardily disclosed

1062. 594 F.2d 753 (9th Cir. 1979).
1063. 18 U.S.C. § 3500 (1976).
1064. 594 F.2d at 755 (citing United States v. Butler, 567 F.2d 885, 890 (9th Cir. 1978) (per curiam)).
1065. 594 F.2d at 756.
1066. 609 F.2d 1294 (9th Cir. 1979).
1067. *Id.* at 1302-03.

report.[1068] Since the suppression was not complete—the prosecution produced the information at trial—the defendant was not precluded from receiving a fair trial as was the defendant in *Knowles*.[1069]

The *Knowles* and *Smith* decisions are significant in that they allow the judge to fashion appropriate remedies.[1070] Clearly, if the information were produced after trial as in *Knowles*, or if the government delayed production to gain a tactical edge, then the defendant would be irreparably prejudiced and a new trial should be granted. If the information is provided early enough so that the prejudice can be remedied, such as in *Smith*, however, then ordering a new trial would be wasteful. Further, in *Smith*, there was no showing that the information would have created a reasonable doubt that did not otherwise exist[1071] or that it caused the defendant to materially alter his defense. If such a showing is made, then the remedy fashioned in *Smith* would be inappropriate.[1072]

6. Discovery of sealed affidavits

In *United States v. Agosto*,[1073] the defendants sought discovery of a sealed "master affidavit" which described an on-going federal investigation. The government opposed unsealing the affidavit because it concerned a nationwide investigation of which the defendants were a part.[1074] The district court ordered that the affidavit be unsealed, because "federal courts have no power to seal affidavits upon which search warrants are based."[1075] The court based its decision on rule 41(c) of the Federal Rules of Criminal Procedure,[1076] noting that "nowhere in rule 41(c) is the power of a judge or magistrate to seal such an

1068. *Id.* at 1303. *See also* United States v. Miller, 529 F.2d 1125, 1128 (9th Cir.), *cert. denied*, 426 U.S. 924 (1976).

1069. *Id. See also* United States v. Hibler, 463 F.2d 455, 459 (9th Cir. 1972) ("The test is whether the undisclosed evidence was so important that its absence prevented the accused from receiving his constitutionally-guaranteed fair trial.")

1070. Other circuits are in accord. *See, e.g.*, Gorham v. Wainwright, 588 F.2d 178, 179-80 (5th Cir. 1979) (per curiam) (failure to produce lab reports pursuant to discovery order remedied when judge offered recess so that defense counsel could evaluate reports); United States v. Pope, 574 F.2d 320, 325-26 (6th Cir.), *cert. denied*, 436 U.S. 429 (1978) (failure to produce information until after witness testified remedied by allowing defense to recall witness).

1071. United States v. Robinson, 585 F.2d 274, 281 (7th Cir. 1978).

1072. Sanctions will normally follow when the government has deliberately destroyed discoverable material. United States v. Bufalino, 576 F.2d 446, 449 (2d Cir. 1978).

1073. 600 F.2d 1256 (9th Cir. 1979) (per curiam).

1074. *Id.* at 1257.

1075. *Id.*

1076. Rule 41(c) provides for the issuance and contents of a search warrant and affidavit.

affidavit even suggested."[1077]

The Ninth Circuit ruled that the trial court erred in narrowly focusing on rule 41(c), stating that "the courts have inherent power to control papers filed with the courts within certain constitutional and other limitations."[1078] The Ninth Circuit then remanded the case to the district court to determine if sealing the affidavit was within the court's inherent powers.

Although the defendant's right to discovery was not at issue, it is clear that the court's sealing of affidavits could potentially conflict with this or other constitutional rights.[1079] The government contended that the affidavit should remain sealed "in order to avoid disrupting the nationwide investigation. . . ."[1080] Presumably, the government would not object to disclosure if the matter proceeded closer to the trial stage. If it did, then the defendants could resort to various protective measures to compel disclosure.[1081]

7. Disclosure of informant's identity

The government's privilege to withhold disclosure of an informant's identity has long been established.[1082] This privilege not only protects the informant, but encourages others to furnish vital information to law enforcement officers.[1083] Disclosure is required, however, if the informant was a principal actor in the crime[1084] or if the informant's identity was relevant and helpful to the defense.[1085] "The problem is one that calls for balancing the public interest in protecting the

1077. 600 F.2d at 1257.

1078. *Id.*

1079. Depending on the circumstances of the case, the fourth amendment might prevent sealing an affidavit. *Id.* at 1258 n.3.

1080. *Id.* at 1257.

1081. For example, the defendant could request an *in camera* inspection to determine if disclosure is warranted. United States v. Lee, 589 F.2d 980, 989 (9th Cir. 1979).

1082. *See, e.g.*, Roviaro v. United States, 353 U.S. 53, 59 (1957) ("[T]he informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law. . . . The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes . . . and by preserving their anonymity, encourages them to perform that obligation."); In re Quarles and Butler, 158 U.S. 532, 535 (1894) (disclosure of informant's identity cannot be compelled without the assent of the government).

1083. See 8 WIGMORE ON EVIDENCE § 2374 at 762 (McNaughton rev. 1961).

1084. Sorrentino v. United States, 163 F.2d 627, 629 (9th Cir. 1947) (identity allowed when informant was person to whom accused sold opium).

1085. United States v. Roviaro, 353 U.S. 53, 60-61 (1957) ("where the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way").

flow of information against the individual's right to prepare his defense."[1086] In any event, the burden of proof is on the defendant to show a need for disclosure of an informant's identity.[1087]

In *United States v. Smith*,[1088] the defendant claimed that the trial court's refusal to order disclosure of an informant's identity was error. The government had agreed prior to trial that it would disclose the informant's name if it could locate him, but was unable to do so.[1089] The defendant contended that "had his identity been revealed, that the defense could have found the informer and 'had the possibility' of securing his testimony for the defense."[1090]

Citing *Lannom v. United States*,[1091] the Ninth Circuit held that " '[m]ere speculation that the informer might possibly be of some assistance is not sufficient to overcome the public interest in the protection of the informer.' "[1092] The *Smith* decision is consistent with precedent in the Ninth Circuit[1093] and with the Supreme Court's decision in *Roviaro*.[1094] Since there was no showing that the informer was an actual participant in the crime, the court did not abuse its discretion in denying disclosure.[1095]

H. Interlocutory Appeals

Generally, piecemeal review of district court decisions in on-going actions is disfavored.[1096] In *Fendler v. United States*,[1097] a citizen under

1086. *Id.* at 62.

1087. United States v. Pantohan, 602 F.2d 855, 858 (9th Cir. 1979) (error for magistrate to require government to make showing that disclosure of informant's identity would result in physical injury or intimidation).

1088. 595 F.2d 1176 (9th Cir. 1979).

1089. *Id.* at 1180. At an earlier hearing, the government said that it intended to call the informer as a witness at trial but was having difficulty locating him. Subsequently, the government did not find him and, therefore, the informer did not testify at trial.

1090. *Id.*

1091. 381 F.2d 858 (9th Cir. 1967), *cert. denied*, 389 U.S. 1041 (1968).

1092. 595 F.2d at 1180 (quoting Lannom v. United States, 381 F.2d 858, 861 (9th Cir. 1967), *cert. denied*, 389 U.S. 1041 (1968)).

1093. United States v. Marshall, 526 F.2d 1349, 1359 (9th Cir. 1975), *cert. denied*, 426 U.S. 923 (1976) ("mere suspicion that the informer may be helpful to the defense is not sufficient to overcome the public interest in protecting the informer's identity").

1094. *See* note 1085 *supra* and accompanying text.

1095. *See* United States v. Edwards, 503 F.2d 838, 840-44 (9th Cir. 1974), *cert. denied*, 420 U.S. 977 (1975); McLawhorn v. North Carolina, 484 F.2d 1, 5 (4th Cir. 1973) ("where the informant is an actual participant, . . . fundamental fairness dictates that the accused have access to him as a potential witness").

1096. Abney v. United States, 431 U.S. 651, 656 (1977) ("[s]ince appeals of right have been authorized by Congress in criminal cases . . . there has been a firm congressional policy against interlocutory or 'piecemeal appeals' . . .").

1097. 597 F.2d 1314 (9th Cir. 1979).

investigation by a federal grand jury appealed an interlocutory order that denied his petition to conduct a voir dire of the grand jurors. The Ninth Circuit held that "[t]here is no reason to depart from the policy against piecemeal appeals in his case."[1098] The court noted that the appellant's rights could be adequately protected in subsequent proceedings, and that since such a motion is reviewable on direct appeal from a criminal conviction, denial of the appellant's appeal would not render review impossible.[1099]

The Ninth Circuit's decision is directly in line with the Supreme Court's ruling in *DiBella v. United States*,[1100] which held that the final judgment rule is the dominant rule in federal appellate practice, especially in criminal prosecutions.[1101] The Ninth Circuit and other circuits have held that a "final judgment" in a criminal case means the order sentencing the defendant.[1102] Absent a showing that the interlocutory appeal raises claims of right separable from rights asserted in the action that are too important to be denied review, the prerequisite of finality will be upheld.[1103]

IV. TRIAL PROCEEDINGS

A. Joinder and Severance

Joinder, according to rule 8 of the Federal Rules of Criminal Procedure, focuses on the procedure of connecting two or more counts or two or more defendants in the same indictment.[1104] Severance, how-

1098. *Id.* at 1315.

1099. *Id.*

1100. 369 U.S. 121 (1962).

1101. *Id.* at 126.

1102. United States v. Young, 544 F.2d 415 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976); In Re Special March 1974 Grand Jury Possible Violations of Title 18 and 26, 541 F.2d 166 (7th Cir. 1977) ("As a general rule, an interlocutory decision in a criminal case stemming from an action taken by a grand jury is not a proper subject for review by a court of appeals.").

1103. United States v. Dolan, 570 F.2d 1177, 1180 n.3 (3rd Cir. 1978) (although order denying motion to disqualify counsel is not final judgment, such order held appealable because it was not an ingredient of the cause of action and did not require consideration with it); United States v. Neumann, 556 F.2d 1218, 1219 (6th Cir. 1977); United States v. Cavin, 553 F.2d 871, 873 (4th Cir. 1977) (double jeopardy clause intended to erect constitutional bar to hardship of undergoing second trial).

1104. FED. R. CRIM. P. 8(a) provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

FED. R. CRIM. P. 8(b) sets out:

ever, focuses on the prejudice that results from an initially proper joinder. Under Federal Rule of Criminal Procedure 14,[1105] a court has discretion to grant a severance which separates counts or defendants.

Rule 8 sets out different standards for joining the offenses of a single defendant and for joining multiple defendants in a single action. In the case of a single defendant, rule 8(a) applies, and joinder of offenses is correct if the offenses are based on the same acts or series of acts, or are "of the same or similar character."[1106] Yet, with multiple defendants, under rule 8(b), similarity of inculpatory acts is not determinative. Suspects may be joined as defendants only by virtue of joint participation in the same series of acts or transactions constituting an offense or offenses.[1107]

Of the eight 1979 Ninth Circuit cases dealing with joinder and severance, the only one in which severance and new trial were ordered involved a single defendant who had been charged with similar crimes.[1108] That the other seven were not reversed reflects in part the court's continued belief that connecting counts or defendants is necessary to insure that trials, always growing more costly, are run in the most efficient manner.

While joinder may reduce court time and costs, it also increases the possibility that a defendant will be prejudiced. Included in the problems which result are guilt by association, confusion by the jury of the evidence, and the inability to present an effective defense.[1109] If prejudice results, a court may order severance of counts or defendants under rule 14. On appeal, motions for severance are reviewed to see if

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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.

1105. FED. R. CRIM. P. 14 provides:

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.

1106. FED. R. CRIM. P. 8(a).

1107. FED. R. CRIM. P. 8(b).

1108. United States v. Bronco, 597 F.2d 1300 (9th Cir. 1979) (counts were of similar character but resulted from two unconnected acts).

1109. 8 MOORE'S FEDERAL PRACTICE §§ 14.03[2], .04[1] (2d ed. 1976). For cases typifying these problems, see Bruton v. United States, 391 U.S. 123, 131-35 (1968) (joint defendants); United States v. Ragghianti, 527 F.2d 586, 587 (9th Cir. 1975) (joint counts).

the trial court judge abused his discretion in denying severance.[1110] Generally, a defendant must show some articulable facts beyond just the inherent prejudicial circumstances of the joinder which would require severance.[1111] He must meet a two pronged test which requires: (1) that "prejudice" be clearly evident and (2) that the prejudice outweighs the need for judicial economy.[1112] In the past, the Ninth Circuit has been reluctant to overturn a trial court's refusal to sever.[1113]

In *United States v. Valenzuela*,[1114] several defendants were convicted of counts arising from the possession and sale of heroin. Joinder of the defendants pursuant to rule 8(b) was accomplished by use of a conspiracy count. On appeal, one defendant argued that misjoinder had occurred because the conspiracy count was improper. Alternatively, the defendant alleged that the failure to grant severance was an abuse of discretion.[1115]

The *Valenzuela* court noted that "[o]rdinarily, the mere charging of a conspiracy count linking together substantive counts against various defendants fully satisfies the rule 8(b) requirement of relatedness and makes joinder proper under that rule."[1116] The court further noted that joinder would be proper even if the conspiracy count was later dismissed due to insufficient evidence.[1117] However, the *Valenzuela* court recognized that misjoinder would occur if the prosecution made the conspiracy charge in bad faith to "sidestep the requirements of Rule 8(b)."[1118] The court concluded that the defendant's mere allega-

1110. United States v. Brashier, 548 F.2d 1315, 1323 (9th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977) (the test is whether the joinder is so prejudicial that it outweighs the concern for judicial economy and compels the exercise of the court's discretion to sever).

1111. United States v. Kennedy, 564 F.2d 1329, 1334 (9th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978) (burden is on defendant to demonstrate actual prejudice); United States v. Campanale, 518 F.2d 352, 359 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976) ("The defendant must show more than the fact that a separate trial might offer him a better chance of acquittal."); *accord*, United States v. Adams, 581 F.2d 193, 197-98 (9th Cir. 1978).

1112. United States v. Brashier, 548 F.2d 1315, 1323-24 (9th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977).

1113. *See e.g.* United States v. Kennedy, 564 F.2d 1329, 1334 (9th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978) ("the ruling of the trial court will seldom be overturned on appeal"); United States v. Campanale, 518 F.2d 352, 359 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976) ("The burden of demonstrating prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed on review.").

1114. 596 F.2d 824 (9th Cir. 1979).

1115. *Id.* at 826.

1116. *Id.* at 829.

1117. *Id.* The court relied on Schaffer v. United States, 362 U.S. 511, 513-14 (1960); United States v. Adams, 581 F.2d 193, 197 (9th Cir. 1978).

1118. 596 F.2d at 829.

tion of bad faith was insufficient to meet his burden.[1119]

The defendant's alternative argument was also rejected by the court. Severance would be granted only if joinder would result in prejudice to the defendant. On appeal, the burden is on the defendant to show prejudice resulting from the joinder. The *Valenzuela* court concluded that the defendant had not met this burden.[1120]

Interestingly, the *Valenzuela* court did not review the sufficiency of the evidence relating to the conspiracy count. The court noted that the defendant had been sentenced concurrently for the conspiracy and substantive convictions. The defendant had not appealed the substantive conviction for which the evidence was described as "strong."[1121] It is important to note that the court's failure to decide whether there was sufficient evidence to support the conspiracy count did not affect the defendant's misjoinder claim. That claim could only be supported by a showing of bad faith.

The Ninth Circuit also failed to find prejudice in *United States v. Martin*.[1122] In *Martin*, five defendants were joined in a trial for heroin and cocaine dealing. All five were charged in one count with conspiracy to distribute, and to possess with the intent to distribute, heroin and cocaine. In addition, they were charged with various counts of using a telephone to facilitate a conspiracy. Three of the defendants were tried separately before a judge. The other two, Lewis Dixon and Stephan Davenport, were tried together before a jury, which acquitted only Davenport (apparently a buyer for his own use) of the conspiracy to distribute.[1123] Yet, the jury convicted the two as charged on the remaining counts.[1124]

On appeal, defendant Dixon challenged the trial court's refusal to

1119. *Id.*

1120. *Id. Accord*, Schaffer v. United States, 362 U.S. 511, 516 (1960); United States v. Cozzetti, 441 F.2d 344, 349 (9th Cir. 1971); Fernandez v. United States, 329 F.2d 899, 906 (9th Cir.), *cert. denied*, 379 U.S. 832 (1964). In *Cozzetti*, one of three defendants was acquitted (by judgment of acquittal) of the conspiracy charge. The other two defendants argued prejudice because evidence admitted against the acquitted defendant involved "illegal and immoral conduct with which they had no established connection and that even the limiting instructions left the jury hopelessly confused." 441 F.2d at 349. Still the court of appeals found no abuse of discretion.

Cf. United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971) (severance granted because conspiracy charge dismissed; of 2,300 pages of transcript less than fifty pages were relevant to defendant, defendant had no apparent connection with the acts of the other defendants, and the trial judge was replaced mid-trial).

1121. 596 F.2d at 829.

1122. 599 F.2d 880 (9th Cir. 1979). Improper joinder was not raised on appeal.

1123. *Id.* at 882.

1124. *Id.* Davenport's conviction on the facilitation charge was reversed because the

grant his request for severance from defendant Davenport. The Ninth Circuit summarily dismissed finding that neither had Dixon been "entitled to a severance nor [had] he ultimately suffered any prejudice from the joint trial."[1125]

The different conclusions arrived at by the jury in the trial of Dixon and Davenport may have been instrumental in the Ninth Circuit's denial of Dixon's motion for severance. Evidence that the jury arrived at different verdicts has validated the argument used in other Ninth Circuit opinions that juries are able to "compartmentalize" the evidence according to each defendant.[1126] The evidence used against Dixon, a co-conspirator of the drug deal, was significantly different from that used against Davenport, a purchaser of drugs. Thus, because of the difference in the nature of the two crimes involved, it would appear that the jury would have had little difficulty in compartmentalizing the evidence introduced against both defendants.

As a general rule, appellate courts have maintained their faith in the jury's ability to perceive all the evidence and follow their instructions. In *Opper v. United States*,[1127] the United States Supreme Court

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Ninth Circuit concluded that since the jury had found him to be a personal buyer, he could not have taken part in the distribution conspiracy.

1125. *Id.* at 889.

1126. *See* United States v. Campanale, 518 F.2d at 359. The court supplied the following standard:

> The ultimate question is whether under all the circumstances of the particular case, as a practical matter, it is 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. . . .
>
> . . . .
>
> The jury did in fact distinguish among the defendants, finding some not guilty, others not guilty of one or more offenses but guilty of others.

See, e.g., United States v. Hobson, 519 F.2d 765, 772 (9th Cir.), *cert. denied*, 423 U.S. 931 (1975) (assessment of jury's ability to compartmentalize evidence against joined defendants determines whether severance should be granted); United States v. Kennedy, 564 F.2d 1329, 1334-35 (9th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978) (jury's varied decisions to convict or acquit the five defendants on the different counts showed that jury members are able to "understand and separate the evidence as to each defendant and to individually determine the issues presented"); *Accord*, United States v. Adams, 581 F.2d 193, 197 (9th Cir. 1978), *cert. denied*, 439 U.S. 1006 (1979); United States v. Nace, 561 F.2d 763, 769-70 (9th Cir. 1977) (mere fact that evidence only admissible against one of joined defendants does not warrant finding prejudice to others); United States v. Brashier, 548 F.2d 1315, 1325 (9th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1979); United States v. Roselli, 432 F.2d 879, 901-02 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971).

1127. 348 U.S. 84 (1954) (each defendant received a fair and impartial consideration where there were careful instructions, few critical factual issues, and an exhaustive presentation by both sides). However, this presumption has been rebutted in situations where the potential prejudice to joined defendants appears substantially great. For example, where a confession by a non-testifying co-defendant implicates another defendant, the defendant's right to con-

expressed confidence in the capabilities of jurors when Justice Reed wrote, "To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict."[1128] When the jury demonstrates it can limit the evidence to a particular defendant and not consider it in regard to another, the appellate courts have reason to hold that a particular defendant was not prejudiced. The Ninth Circuit acknowledged this principle in the 1977 case of *United States v. Nace*[1129] where it noted that "[t]he fact that evidence may be admissible against only one of two defendants does not constitute such prejudice as to require separate trials."[1130] The holdings of *Opper* and *Nace* as well as other Ninth Circuit opinions[1131] lead to the conclusion that Dixon did not suffer any prejudice.

The Ninth Circuit also affirmed the jury's ability to compartmentalize the evidence against a joined defendant in the 1979 decision of *United States v. Mills*.[1132] In *Mills*, three defendants were charged and convicted of armed bank robbery and the fourth defendant, Bryan, was convicted of being an accessory after the fact. Bryan was apprehended with a co-defendant as they were attempting to flee to Canada after the bank robbery.[1133]

First, the Ninth Circuit concluded that rule 8(b) was satisfied because Bryan had participated " 'in the same series of acts or transactions constituting the offenses charged.' "[1134] Although the joinder of an accessory with three perpetrators reflects a somewhat broad view of the "same series of acts" under rule 8(b), it is not an unusual approach.[1135] Where a large area of overlapping proof is involved, joinder under rule 8(b) is permissible to encourage trial economy and convenience.[1136] Much overlapping proof would undoubtedly occur if Bryan had been tried separately from the perpetrators of the robbery.

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frontation will be violated. Bruton v. United States, 391 U.S. 123, 137 (1968). The decision rested on what the Court perceived as the jury's inability to limit the confession to the co-defendant against which it was introduced. *Id.* at 135.

1128. Opper v. United States, 348 U.S. at 95.

1129. 561 F.2d 763 (9th Cir. 1977).

1130. *Id.* at 769-70.

1131. *See* note 1111 *supra*.

1132. 597 F.2d 693 (9th Cir. 1979).

1133. *Id.* at 695.

1134. *Id.*

1135. 8 MOORE'S FEDERAL PRACTICE ¶ 8.06 [2] at 8-36 (2d ed. 1979): "Where separate offenses arise out of a transaction of this nature, proof of the entire transaction is ordinarily necessary, whether or not there is a joint trial. Thus, a conviction for possessing or receiving stolen property requires proof of the theft and of the defendants' knowledge of the same."

1136. *See* United States v. Roselli, 432 F.2d 879, 899 (9th Cir. 1970). *Accord*, Parker v.

Evidence of both the robbery and of Bryan's knowledge of it were necessary elements in her trial.

After finding that Bryan had been properly joined to her co-defendants, the Ninth Circuit denied her severance motion raised under rule 14.[1137] Bryan failed to show the requisite level of prejudice. Like the defendant's acts in *United States v. Martin*,[1138] Bryan's participation was recognizably different and, therefore, enabled the jury to compartmentalize the evidence between her and her co-defendants.

Mills illustrates the inherent tension that exists between rule 8(b) and rule 14 of the Federal Rules of Criminal Procedure. On the one hand, the circuit courts generally employ a broad view of "same series of acts" so that defendants may be joined more easily.[1139] On the other hand, where the acts seem to be sufficiently distinct, jurors are assumed to be able to sort out and weigh the evidence with greater ease.[1140] However, if the acts are apparently distinct, they should not be included under the scope of rule 8(b).

The application of rules 8(b) and 14 was also questioned in *United States v. Ortiz*,[1141] in which the defendant claimed that his minimal involvement with the other defendants mandated severance.[1142] Defendant Ortiz was charged with nineteen others and was convicted of conspiracy and of possessing heroin with intent to distribute.

Ortiz's connection with the conspiracy was developed by the testimony of two witnesses.[1143] A police officer testified that he had observed Ortiz participating in a drug transaction. The officer's testimony was corroborated by an unindicted co-conspirator and participant in the drug deal.

Defendant first argued that the evidence did not link him with most of the other defendants and, hence, joinder was improper.[1144] However, since a conspiracy charge has been held sufficient for such purposes,[1145] the initial joinder was found to be proper. Moreover, the

United States, 404 F.2d 1193 (9th Cir. 1968) (where proof of charges dependent upon the same evidence, then no severance).

1137. 597 F.2d at 696. A motion for severance will be denied unless the lower court abused its discretion. The test is whether the joint trial was so prejudicial that the judge could exercise his discretion in only one way. *Id.*

1138. 599 F.2d 880 (9th Cir. 1979). *See* notes 1122-30 *supra* and accompanying text.

1139. *See* notes 1135-36 *supra* and accompanying text.

1140. United States v. Mills, 597 F.2d 693, 696 (9th Cir. 1979).

1141. 603 F.2d 76 (9th Cir. 1979).

1142. *Id.* at 78.

1143. *Id.* at 79.

1144. *Id.* at 78.

1145. *See* notes 1116-19 *supra* and accompanying text.

court denied his motion for severance.[1146] Sufficient evidence supported his conviction.

In another decision, *United States v. Smith*,[1147] the Ninth Circuit also looked at the sufficiency of conspiracy evidence to determine if severance was required. In *Smith*, three of eighteen defendants were tried together and convicted of conspiracy to possess heroin and cocaine with intent to distribute.[1148] Two of the participants in the alleged conspiracy were also the principal government witnesses in each proceeding. One defendant, Lama, was the supplier. The Government witnesses, Smith and Herrin, were his distributors and acted as intermediaries between Lama and the retailers, Crayton, Pedote, and Jones.[1149]

Defendant Jones asserted that while the indictment might have properly joined defendants by charging them with a single conspiracy,[1150] the evidence showed that three separate conspiracies had existed between Lama and Jones, Lama and Crayton, and Lama and Pedote. Jones contended that the evidence of the latter two conspiracies was prejudicial and that his trial should have been severed.[1151]

The Ninth Circuit held that sufficient evidence existed to convict Jones of participating in one overall conspiracy.[1152] The court noted that Smith and Herrin were part of an operation in which they obtained drugs from Lama and then passed them on to distributors.[1153] Also Jones had been informed that the intermediaries, Smith and Herrin, were the distributors of the narcotics. This evidence established beyond a reasonable doubt that Jones had at least a "slight connection" with the conspiracy.[1154] Finally, the general nature of narcotics traffic and the continued large sales enabled the court to affirm the jury's factual conclusion that Jones was aware of his participation in a grand scheme, even though he never met the other retailers.[1155] Because there

1146. 603 F.2d at 79-80.
1147. 609 F.2d 1294 (9th Cir. 1979).
1148. *Id.* at 1296-97. A fourth defendant, Weaver, also was tried but he was not a defendant in this proceeding.
1149. Crayton, Jones, and Pedote were joint defendants with Lama. In addition, Pedote's conviction was not appealed in this case. *Id.* at 1297 n.1.
1150. *See* United States v. Valenzuela, 596 F.2d 824, 829 (9th Cir. 1979); *see also* notes 1114-21 *supra* and accompanying text.
1151. 609 F.2d at 1297.
1152. *Id.* at 1299.
1153. *Id.* at 1299-1300.
1154. *Id.* at 1299. *See* United States v. Kearney, 560 F.2d 1358, 1362 (9th Cir. 1977).
1155. 609 F.2d at 1300.

was sufficient evidence to convict Jones on a conspiracy charge, the court denied the severance motion.

Jones also argued that his trial should have been severed because the jury could not compartmentalize the evidence as to each defendant and therefore he suffered guilt by association.[1156] The Ninth Circuit rejected this contention and found no error in references made concerning his participation as part of a team. The court was also satisfied that the jury instructions protected him from "guilt by association."[1157]

A different kind of prejudice was claimed in *United States v. Moreno-Nunez*.[1158] One defendant, Badilla-Yescas, was unable to call a co-defendant to the stand and also could not comment on the failure of the co-defendant to testify.[1159] Thus, his ability to present a complete defense was restricted. However, the Ninth Circuit has traditionally refused automatic severance to a defendant who is unable to comment on a co-defendant's refusal to testify.[1160] A defendant moving for severance must demonstrate that he probably will benefit "from commenting on a co-defendant's refusal to testify."[1161] Because Badilla-Yescas did not show this type of benefit, severance was denied.[1162] As a result, the Ninth Circuit affirmed the conviction.[1163]

In *United States v. Haro-Espinosa*,[1164] three of four joint defendants contended that they were prejudiced by joinder because the fourth defendant, Gonzales, would have provided exculpatory testimony for them had he not been tried simultaneously.[1165] However, Gonzales stated that he would testify only if tried first or if the Government agreed that his testimony would not be used against him at his subsequent trial. The trial judge agreed to sever only if the three defendants were tried first. Since the three were in custody, but Gonzales was not, this action would have been necessitated by the Speedy Trial Act.[1166] Counsel for Gonzales objected to this order of the trials claiming that his client would then receive no benefit from severance because

1156. *Id.*
1157. *Id.* at 1301. *See also* notes 1126-30 *supra* and accompanying text.
1158. 595 F.2d 1186 (9th Cir. 1979).
1159. *Id.* at 1188.
1160. United States v. De La Cruz Bellinger, 422 F.2d 723, 727 (9th Cir.), *cert. denied*, 398 U.S. 942 (1970). *Accord*, United States v. King, 552 F.2d 833 (9th Cir. 1976); United States v. Cruz, 536 F.2d 1264, 1268 (9th Cir. 1976).
1161. *Id.*
1162. 595 F.2d at 1188.
1163. *Id.* at 1189.
1164. 619 F.2d 789 (9th Cir. 1979).
1165. *Id.* at 792.
1166. 18 U.S.C. §§ 3161-74 (1976).

he would have to forfeit his fifth amendment privileges. After further deliberations, the motion for severance was denied.

The Ninth Circuit affirmed the lower court's denial of the motion, noting that when a defendant makes only a conditional offer to testify based on the order of the trials rather than an outright commitment, a denial of the severance is proper.[1167] This holding falls within the purview of *United States v. Gay*.[1168] In *Gay*, the Ninth Circuit upheld a district court's denial of a motion for severance when one defendant similarly offered his exculpatory testimony but conditioned it upon the order of the trials. The district court in that case had labelled such conditions as game playing.[1169] This characterization resulted from defendant's attempt to testify at his co-defendant's trial but at the same time preserve his fifth amendment privileges by preventing such testimony from being used against him at his own trial.[1170] While similar considerations were present in *Haro-Espinosa*, the Ninth Circuit did not have to resort to such labelism in order to find a valid reason for the trial court's denial of severance. The fact that defendant's conditional demand conflicted with the overriding need to try the other three defendants first was sufficient in itself to justify the trial court's denial of severance.[1171]

Severance, however, was granted in *United States v. Bronco*.[1172] Defendant Bronco was charged with conspiracy to sell three million dollars in counterfeit money and possession and passing of a counterfeit $100 bill on a later date.

The United States Attorney was unable to prove that the bills came from the same source. Thus, the charges were not factually related. Bronco first argued improper joinder. However, since the crimes were of a "similar character," the Ninth Circuit first held that the initial joinder was proper.[1173] Bronco then contended that the conspiracy count should have been severed from the other two counts because he could not testify about one set of events without being cross-examined about the other. In addition, Bronco claimed that "little or no overlap in proof would be avoided by a joint trial."[1174]

As to Bronco's first contention, the Ninth Circuit disagreed, hold-

1167. 619 F.2d at 793.
1168. 567 F.2d 916 (9th Cir.), *cert. denied*, 435 U.S. 999 (1978).
1169. *Id.* at 920.
1170. *Id.*
1171. 619 F.2d at 793.
1172. 597 F.2d 1300 (9th Cir. 1979).
1173. *Id.* at 1301.
1174. *Id.* at 1302.

ing that the defendant had not had his specific reasons for testifying as to one offense and not the other.[1175] However, the court did grant Bronco's severance motion based on his second contention.[1176]

The Ninth Circuit held that Bronco was prejudiced in presenting his defense on the possession and passing charges because of the extensive evidence of the conspiracy admitted at the joint trial.[1177] Part of the evidence included a defense witness' comments about Bronco's violent propensities in response to prosecution questioning. The court held that some evidence of the conspiracy conviction would have been admissible to establish Bronco's knowledge and intent[1178] at a separate trial on the possession and passing counts. However, the extensive evidence introduced along with the questionable testimony relating to Bronco's violent conduct significantly prejudiced him. Thus, severance was ordered.

B. Guilty Pleas

1. Rule 11 violations

In *Boykin v. Alabama*, the United States Supreme Court characterized the guilty plea as "more than a confession which admits the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment."[1179] Because of its finality, a guilty plea must face strict judicial scrutiny to insure that it has been made voluntarily[1180] and not in violation of constitutional safeguards. To give some guidelines to that scrutiny, rule 11 of the Federal Rules of Criminal Procedure establishes a procedural checklist a trial judge

1175. *Id.* at 1302-03.

1176. *Id.* at 1303. *Cf.* notes 1158-63 *supra* and accompanying text.

1177. 597 F.2d at 1302-03.

1178. FED. R. EVID. 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 when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

1179. 395 U.S. 238, 242 (1968) (citing Kercheval v. United States, 274 U.S. 220, 223 (1927)). *Accord*, United States v. Benson, 605 F.2d 1093, 1095 (9th Cir. 1979) (plea of guilty in state court was considered the equivalent of a conviction for determining whether defendant was a convicted felon for the purpose of a federal firearms statute); Larios-Mendez v. Immigration & Naturalization Serv., 597 F.2d 144, 146 (9th Cir. 1979) (per curiam) (because defendant had pleaded guilty, he could not contest the admissibility of certain evidence on fourth amendment grounds; a plea of guilty in effect admits all material facts on which the conviction is based).

1180. Schneckloth v. Bustamonte, 412 U.S. 218, 238 (1973).

must follow before accepting a guilty plea.[1181]

The Supreme Court first ruled on a trial judge's failure to comply with rule 11 in the decision of *McCarthy v. United States*[1182] and held that non-compliance with the rule resulted in automatic prejudice to a defendant and required that he be given another opportunity to plead.[1183] *McCarthy*'s "per se" approach was applied by all the circuits whenever a defendant contested the validity of his guilty plea on direct appeal.[1184]

1181. FED. R. CRIM. P. 11(c), which governs the procedural steps involved in acceptance of a guilty plea, provides that:

> [b]efore accepting a plea of guilty or nolo contendre, the court must address the defendant personally in open court and inform him of, and determine that he understands the following:
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
> (4) that if he pleads guilty or nolo contendre there will not be a further trial of any kind, so that by pleading guilty or nolo contendre he waives the right to a trial; and
> (5) that if he pleads guilty or nolo contendre, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

1182. 394 U.S. 459 (1969). The pre-1975 version of rule 11 under review in *McCarthy* provided, in part, that:

> The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.

Id. at 462-63 n.4.

Under this rule most courts applied a "totality of the circumstances" test to determine if defendant's guilty plea was made voluntarily and with sufficient awareness of the consequences thereof. *E.g.*, Kloner v. United States, 535 F.2d 730, 733-34 (2d Cir.), *cert. denied*, 429 U.S. 942 (1976). The purpose of the 1975 amendment was to codify the consequences of a guilty plea listed in Boykin v. Alabama, 395 U.S. 238, 242 (1969) so that a trial judge would be required to fully inform a defendant regarding the consequences of his plea. United States v. Journet, 544 F.2d 633, 635 (2d Cir. 1976).

1183. 394 U.S. at 471-72.

1184. *E.g.*, United States v. Journet, 544 F.2d 633, 636 (2d Cir. 1976) (court rejected harmless error standard with regard to violations of rule 11(c)); United States v. Keller, 594 F.2d 939, 942 (3d Cir. 1979); Woodward v. United States, 426 F.2d 959, 962-63 (3d Cir. 1970) (strict compliance required); United States v. Boone, 543 F.2d 1090, 1091 (4th Cir. 1976) (followed *McCarthy's* per se rule); United States v. Boatright, 588 F.2d 471, 475 (5th Cir. 1979) (in accord with *McCarthy*; no showing of prejudice required); Government of Canal

However, different considerations came into play when a defendant attacked his guilty plea collaterally by means of a section 2255 habeas corpus petition.[1185] In *Davis v. United States*, the Supreme Court held that collateral relief should not be granted under a section 2255 motion unless there was " 'a fundamental defect which inherently results in a complete miscarriage of justice.' "[1186] Subsequently, a number of circuits, in deciding rule 11 violations raised by defendants in section 2255 motions, followed *Davis* and required that mere formal infractions of the rule would not result in retrial absent a showing of prejudice of "manifest injustice."[1187] Other circuits, however, granted

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Zone v. Tobar T., 565 F.2d 1321, 1321 (5th Cir. 1978) (omission of rule 11(c)(1) advice required reversal of conviction); United States v. Del Prete, 567 F.2d 928, 929 (9th Cir. 1978) (non-compliance with rule 11 in failing to advise defendant of special parole term requires setting aside his conviction); Bunker v. Wise, 550 F.2d 1155, 1157 (9th Cir. 1977) ("*McCarthy* . . . held that no guilty plea is proper without strict adherence to the procedures and language of rule 11"). *See, e.g.*, United States v. Yazbeck, 524 F.2d 641, 643 (1st Cir. 1975) (since court was not "disposed to find . . . error harmless" in rule 11 violation on collateral habeas corpus motion, it would *a fortiori* have used the same approach on direct appeal); Timmreck v. United States, 577 F.2d 372, 374-75 (6th Cir. 1978), *rev'd*, 441 U.S. 780 (1979) (prejudice to defendant results from failure of trial judge to strictly comply with requirements of rule 11); Richardson v. United States, 577 F.2d 447, 451-52 (8th Cir. 1978) (trial judge required to conform to rule 11(c), but since defendant's attack was collateral rather than by way of direct appeal, he was required to show more than formal violations of the rule); United States v. Hamilton, 553 F.2d 63, 65 (10th Cir. 1977) (although the court noted that other circuits had decided a rule 11 violation based on the *McCarthy* rule, since defendant was attacking his guilty plea collaterally, he was required to show that a miscarriage of justice had occurred). *But see, e.g.*, United States v. Fels, 599 F.2d 142, 148 (7th Cir. 1979) (defendants' convictions were vacated because there was no "substantial compliance" with rule 11); Keel v. United States, 585 F.2d 110, 113 (5th Cir. 1978) (en banc) (court "expresse[d] no opinion . . . on those panel decisions which impose a *per se* rule on direct appeal").

1185. 28 U.S.C. § 2255 (1976) allows a federal prisoner to collaterally challenge his custody on the grounds that his sentence was in violation of the Constitution or laws or treaties of the United States.

1186. 417 U.S. 333, 346 (1974) (quoting Hill v. United States, 368 U.S. 424, 429 (1962)).

1187. *E.g.*, Del Vecchio v. United States, 556 F.2d 106, 110-11 (2d Cir. 1977) ("without in any way detracting from the force of . . . *United States v. Journet*, . . . on direct appeal, we believe that . . . there must be flexibility in the collateral review of a Rule 11 claim"); United States v. Watson, 548 F.2d 1058, 1062-63 (D.C. Cir. 1977) (court rejected the *McCarthy* per se rule for collateral attacks and instead adopted the standard of FED. R. CRIM. P. 32(d) which requires a defendant to show that guilty plea may be set aside only "to correct manifest injustice"); United States v. White, 572 F.2d 1007, 1009 (4th Cir. 1978) (no collateral relief available unless defendant can show he or she was prejudiced by rule 11 violations); Keel v. United States, 585 F.2d 110, 113 (5th Cir. 1978) (en banc) (court rejected per se rule of *McCarthy* with respect to § 2255 relief); Bachner v. United States, 517 F.2d 589, 591-93 (7th Cir. 1975) (after *Davis*, court should examine a rule 11 violation to determine if there has been an error which results in a "complete miscarriage of justice"); McRae v. United States, 540 F.2d 943, 945 (8th Cir. 1976) (after *Davis*, rule 11 errors should be examined to see if they are prejudicial or result in a complete miscarriage of justice); United States v. Eaton, 579 F.2d 1181, 1183 (10th Cir. 1978) (followed *Davis* for § 2255 motions

habeas relief solely on the basis of even a "formal" rule 11 violation irrespective of whether the defendant had been prejudiced.[1188]

The Supreme Court ended this double standard in 1979. Its holding in *United States v. Timmreck* foreclosed collateral relief for rule 11 violations " 'when all that is shown is a failure to comply with the formal requirements of the Rule.' "[1189] The Ninth Circuit followed *Timmreck* in *United States v. Salas* in which defendants Betty and Alfred Salas were convicted of assorted narcotics violations.[1190] The trial judge informed the Salases that their punishment would include a mandatory special parole term of at least three years in length. Betty Salas received the three year term, but Alfred was given special parole of ten years.[1191] The Salases filed a rule 32(d) motion which allows for withdrawal of guilty pleas after sentencing has occurred if "manifest injustice" would result.[1192] In their motion, they claimed that rule 11 had been violated because the trial judge failed to inform them of the specifics of the special parole term before accepting their pleas.[1193]

The Ninth Circuit did not reach the issue of the rule 11 violation because the court found that even if one had occurred, it would only have been a "technical" violation which, according to *Timmreck*, would not entitle defendants to any post conviction relief.[1194] But the

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attacking validity of guilty pleas). *But see* Carreon v. United States, 578 F.2d 176, 179 (7th Cir. 1978). There, defendant's guilty plea was invalidated on § 2255 motion after one judge refused to accept his guilty pleas because there was a factual question regarding his guilt, but a second judge, who was aware of this refusal, still accepted the plea on the basis of counsel's recommendation that defendant had been fully advised of the consequences. The court relied on *McCarthy* even though it acknowledged that *McCarthy* "involved a direct appeal." *Id.* The appeals panel also used its opinion to strongly admonish district judges concerning their attention to the procedures found in rule 11. *Id.* at 179-80.

1188. *E.g.*, Timmreck v. United States, 577 F.2d 372, 376-77 (6th Cir. 1978), *rev'd*, 441 U.S. 780 (1979); Yothers v. United States, 572 F.2d 1326, 1328 (9th Cir. 1978). *See, e.g.*, Horsley v. United States, 583 F.2d 670, 673-74 (3d Cir. 1978) (although the court agreed with *Davis* that prejudice had to be shown by a defendant in a § 2255 proceeding, it found that entering a guilty plea without the understanding required by rule 11 was "inherently prejudicial"). *See also* United States v. Yazbeck, 524 F.2d 641, 643-44 (1st Cir. 1975) (the court, using broad language, followed *McCarthy*).

1189. 441 U.S. 780, 785 (1979) (quoting Hill v. United States, 368 U.S. 424, 429 (1962)). The Ninth Circuit followed *Timmreck* in denying a § 2255 motion when all that could be shown was a "technical" violation. Wacht v. Cardwell, 604 F.2d 1245, 1247 (9th Cir. 1979).

1190. 602 F.2d 215, 216 (9th Cir. 1979).

1191. *Id.*

1192. *Id.* FED. R. CRIM. P. 32(d) provides that "[a] motion to withdraw a plea of guilty or *nolo contendre* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

1193. 602 F.2d at 216.

1194. *Id.* at 217.

court acknowledged that *Timmreck* involved a collateral attack under section 2255 while the Salases motion was raised under rule 32(d).[1195] Nevertheless, the court ruled that the "manifest injustice" required by rule 32(d) was essentially equivalent to "a complete miscarriage of justice" needed for section 2255 habeas corpus relief.[1196]

There are, however, problems with equating these two standards. It is conceivable that a sentence could be manifestly unjust and still not have resulted from procedures which were a complete miscarriage of justice. In addition, the term "manifest injustice" was expressly singled out in the federal rules to be applied in connection with post conviction challenges to guilty pleas. Thus, it appears that the *Salas* court, in substituting the standard of review normally used for habeas corpus relief, at least partially frustrated the clear intent of the framers of rule 32(d).[1197]

Rule 11 violations were also at issue in the 1979 case of *United States v. Conrad*, but unlike *Salas*, involved a direct appeal which was made prior to sentencing.[1198] Conrad claimed and the government conceded that the trial judge erred when he failed to inform Conrad that any answers Conrad gave in conjunction with his guilty plea could later be used against him in a perjury trial.[1199] As such, the automatic prejudice rule of *McCarthy* which required withdrawal of guilty pleas when rule 11 violations occur was directly applicable.[1200]

1195. *Id.* at 217 n.3.

1196. *Id.* (citing United States v. Harris, 534 F.2d 141, 141 n.1 (9th Cir. 1976)).

1197. *Cf.* United States v. Watson, 548 F.2d 1058, 1063-64 (D.C. Cir. 1977) (rule 32(d) is a special form of collateral attack which should govern a challenge to a guilty plea after sentencing, and it provides a more certain standard of review than is often available under the rather "opaque judicial formulations" surrounding § 2255 motions); United States v. Guy, 466 F. Supp. 1001, 1004 (E.D. Pa. 1978) (post conviction guilty plea challenge should be evaluated under the standard of rule 32(d) rather than the more general standard of § 2255 because of the "specific remedy" provided by the rule and because Congress, by so providing, indicated a desire that this standard be employed).

1198. 598 F.2d 506, 507-08 (9th Cir. 1979).

1199. *Id.* at 508. FED. R. CRIM. P. 11(c)(5) requires the court to inform the defendant in open court that:

> if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

1200. *See* 394 U.S. at 471-72. The Court stated that:

> We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty

But the Ninth Circuit decided the *McCarthy* standard was inapplicable. This decision was based primarily on the assumption that 11(c)(5) was unlike the other provisions of rule 11 and thus did not require the same standard of review.[1201] Relying on a footnote in a Fourth Circuit case, the court noted that " '[f]airness, not voluntariness, is the concept underlying Rule 11(c)(5).' "[1202] Implicit in this reading is the concept that once voluntariness is no longer required, then a court is not bound by the literal requirements of the rule. A reading of the passage in question reveals that the "fairness versus voluntariness" statement of the Fourth Circuit was used to explain the legislative intent for the inclusion of section 11(c)(5) in the rule.[1203] The quoted passage which discussed "fairness" had nothing to do with establishing or changing the standard used by appeals courts to evaluate rule 11 violations.

The *Conrad* court looked for additional support in Second Circuit cases which have not allowed defendants to withdraw guilty pleas in the face of 11(c)(5) violations.[1204] The Second Circuit position appears

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plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate.

Id.

1201. *See* 598 F.2d at 509. The court noted that "[o]ther parts of rule 11 are intended to insure that pleas are voluntary; subsection (c)(5) is intended to insure that perjury prosecutions are fair."

1202. *Id.* (citing United States v. White, 572 F.2d 1007, 1009 n.4 (4th Cir. 1978)).

1203. The Fourth Circuit explained that:

> As originally proposed, Rule 11(e)(6) contained a broad prohibition against the use in later proceedings of defendant's statements made at the Rule 11 hearing. The Committee amended this to make statements made by the defendant under oath, on the record, and in the presence of counsel admissible in a subsequent criminal proceeding for perjury or false statement. Since this exception created a potential risk to defendants, subsection (5) was added to Rule 11(c) to insure that defendants have notice of this risk. Fairness, not voluntariness, is the concept underlying Rule 11(c)(5).

United States v. White, 572 F.2d 1007, 1009 n.4 (4th Cir. 1978).

It is at least arguable that rule 11(c)(5) violations raise constitutional issues. The House Judiciary Committee in commenting on the addition of this provision noted that it was following Boykin v. Alabama, 395 U.S. 238 (1969). H.R. REP. No. 247, 94th Cong., 1st Sess. 7 (1975). In *Boykin*, the Supreme Court noted that a defendant who pleads guilty waives his constitutional right against self-incrimination. *Id.* at 243. A subsequent trial in which the defendant's own statements are used to establish a perjury conviction would be one form of self-incrimination.

1204. In United States v. Journet, 554 F.2d 633, 637 n.6 (2d Cir. 1976) the Second Circuit, while requiring strict compliance with the provisions of rule 11, apparently allowed some leeway in the enforcement of 11(c)(5), noting that "the district courts in this circuit do not follow the custom of placing the defendant under oath before questioning him in connection with the acceptance of his guilty plea. However, since the court has the right to do so and

to be a minority interpretation of rule 11.[1205] In addition, the Second Circuit follows a practice of never placing a pleading defendant under oath.[1206] Therefore, Second Circuit courts have held that the failure of a trial judge to warn a defendant that his answers might be used in a subsequent perjury trial amounts to an "inconsequential error."[1207] Conrad, however, was placed under oath.[1208] Consequently, the court's reliance on the Second Circuit cases is misplaced.[1209]

The Ninth Circuit's further attempt to distinguish *United States v. Boone*,[1210] a Fourth Circuit case, was equally in error. *Boone* involved a rule 11(c)(5) violation which the Fourth Circuit found required automatic reversal.[1211] The *Boone* court, although acknowledging that the chance of a subsequent perjury prosecution was remote,[1212] made no attempt, as did the *Conrad* court, to distinguish that type of violation

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Rule 11(c)(5) is phrased in mandatory terms, it is *advisable* to give the warning to the defendant." *Id.* at 637 n.6 (emphasis added).

The Second Circuit in United States v. Michaelson, 552 F.2d 472, 477 (2d Cir. 1977), relied on the phrase "it is advisable" to find that strict compliance with 11(c)(5) was not required. And in United States v. Saft, 558 F.2d 1073, 1079 (2d Cir. 1977), the court found that 11(c)(5) violations were "inconsequential" in the absence of an oath.

1205. United States v. Dayton, 604 F.2d 931, 948 (5th Cir. 1979) (en banc) (Clark and Rubin, JJ., dissenting). For cases upholding strict compliance with rule 11, see, *e.g.*, United States v. Cammisano, 599 F.2d 851, 855 (8th Cir. 1979); United States v. Fels, 599 F.2d 142, 149 & n.5 (7th Cir. 1979); United States v. Boatright, 588 F.2d 471, 475 (5th Cir. 1979); United States v. Boone, 453 F.2d 1091, 1092 (4th Cir. 1976); United States v. O'Donnell, 539 F.2d 1233, 1235 (9th Cir.), *cert. denied*, 429 U.S. 960 (1976). *See, e.g.*, United States v. Del Prete, 567 F.2d 928, 929 (9th Cir. 1978) (per curiam) (defendant pleading guilty must be advised of special parole term in compliance with rule 11); Bunker v. Wise, 550 F.2d 1155, 1157 (9th Cir. 1977) (in holding that rule 11 required that defendant be advised of mandatory parole term, court cited *McCarthy* for proposition that rule 11 requires strict compliance). *Contra*, United States v. Scharf, 551 F.2d 1124, 1130 (8th Cir. 1977) ("not every failure of a district court to comply with the Rule entails the setting aside of a conviction with leave to withdraw a plea of guilty").

1206. United States v. Journet, 544 F.2d 633, 637 n.6 (2d Cir. 1976).

1207. United States v. Saft, 558 F.2d 1072, 1079 (2d Cir. 1977).

1208. 598 F.2d at 507.

1209. In addition, other courts have found that violations of rule 11(c)(5) mandate withdrawals of guilty pleas in line with the *McCarthy* rule. *E.g.*, United States v. Boone, 543 F.2d 1090, 1092 (4th Cir. 1976).

The *Conrad* court further compounded its interpretive errors by citing United States v. White, 572 F.2d 1007 (4th Cir. 1978), for support. There, defendant was not allowed to withdraw a guilty plea after a 11(c)(5) violation. But *White* involved a § 2255 habeas motion, whereas *Conrad* was on direct appeal. Because of this difference, defendant in *White* had a far greater burden and, unlike *Conrad*, had to show not just a technical violation of the rule, but a violation which resulted in a fundamental defect causing "a complete miscarriage of justice." *Id.* at 1009.

1210. 543 F.2d 1090 (4th Cir. 1976).

1211. *Id.* at 1092.

1212. *Id.* at 1092 n.2.

from other rule 11 violations. Instead, the court noted that "we think the thrust of *McCarthy* has continuing vitality and that we should not anticipate its erosion, or undertake to separate inquiries that may be thought more essential from others contained in the command of the rule."[1213]

However, the *Conrad* decision received independent, albeit belated, support from the en banc case of *United States v. Dayton*, decided some four months later.[1214] There, the Fifth Circuit classified rule 11 violations into a "core" group requiring automatic withdrawal and a peripheral group which would require a showing of actual prejudice.[1215] The rationale for the *Dayton* holding was that rule 11, as it existed when *McCarthy* was decided, did not contain the lengthy list of specific warnings which a trial judge is now required to give.[1216] It also appears that the *Conrad* court independently adopted this same rationale. The court noted that "*McCarthy* was based on an earlier form of Rule 11 . . . ."[1217]

This "two-tier" approach is not without its difficulties. In *United States v. Timmreck*, decided in 1979, the Supreme Court implicitly acknowledged the continuing vitality of *McCarthy's* per se rule which requires withdrawal of guilty pleas based on technical violations of rule 11 asserted on direct appeal.[1218] Further, the structure of rule 11 does not admit to a two-tier level of violations.[1219] Nor does there appear to be any legislative intent to require a lesser standard of compliance with provisions such as 11(c)(5) which were later added to the rule.[1220]

2. Voluntary stipulations

Regardless of the interpretation used, rule 11 has not been applied

1213. *Id.* at 1092.

1214. 604 F.2d 931 (5th Cir. 1979) (en banc).

1215. *Id.* at 939-40.

1216. *Id.* at 936, 939. The court based its grouping distinction on pre- and post-*McCarthy* provisions of rule 11. *Id.* at 939-40.

1217. 598 F.2d at 509.

1218. 441 U.S. 780, 784 (1979). The Court noted that respondent's "only claim is of a technical violation of the rule [11]. That claim could have been raised on direct appeal, . . . but was not." *Id.*

1219. Section 11(c)(5) is listed in tandem with several of the fundamental or "core" provisions of the rules such as the defendant's right to be informed of the nature of the charge, 11(c)(1), his or her right to know the minimum penalty provided by law, 11(c)(1), the right to plead not guilty, 11(c)(3), and that he or she has a right to a jury trial, 11(c)(3).

1220. The Conference Committee Notes states that

> "Rule 11(c) *enumerates* certain things that a judge must tell a defendant before the judge can accept that defendant's plea of guilty or nolo contendere."

H.R. REP. No. 414, 94th Cong., 1st Sess. 9 (1975) (emphasis added).

when a defendant merely makes a damaging stipulation of facts prior to trial.[1221] This rule was followed in the 1979 case of *United States v. Stapleton* when defendant made a potentially damaging statement concerning the admissibility of evidence.[1222] The reason behind this rule is that a defendant, in making a damaging stipulation, does not undertake the same risks that he would if he pleaded guilty. Thus, there is not as great a need to afford a stipulating defendant the equivalent level of protection associated with guilty pleas.[1223]

3. State court proceedings

But, the Ninth Circuit has extended some of the protections afforded by rule 11 to state court defendants by requiring that they be informed of all possible punishments prior to pleading guilty.[1224] This requirement, known as the *Pebworth* rule, was at issue in the 1979 case of *Miller v. McCarthy* where defendant pleaded nolo contendere to a rape charge in a California state court.[1225] After conviction, defendant Miller, by way of a federal habeas corpus petition, contended that his plea would have been altered had he been apprised of the full range of allowable punishments. Because California law equated the legal effect of a plea of guilty with that of nolo contendere, the Ninth Circuit applied federal law controlling guilty pleas.[1226]

In this regard, earlier Ninth Circuit cases had held that a defendant could have his state court guilty plea set aside if he could show that knowledge of the additional sentencing information would have changed his plea.[1227] Because the district court failed to conduct an evidentiary hearing on this matter, the case was remanded.[1228]

4. Competency to plead guilty

Mental competency was at issue in the post conviction proceedings of Sara Jane Moore after she challenged her guilty plea following an attempted assassination of former President Gerald R. Ford.[1229]

1221. *E.g.*, United States v. Miller, 588 F.2d 1256, 1264 (9th Cir. 1978); United States v. Terrack, 515 F.2d 558, 560 (9th Cir. 1975).

1222. 600 F.2d 780, 782 (9th Cir. 1979).

1223. United States v. Terrack, 515 F.2d 558, 561 (9th Cir. 1975). However, a trial judge is still required to insure that stipulations are made in a voluntary manner. United States v. Miller, 588 F.2d 1256, 1264 (1978).

1224. Pebworth v. Conte, 489 F.2d 266, 267 (9th Cir. 1974).

1225. 607 F.2d 854 (9th Cir. 1979).

1226. *Id.*, at 856.

1227. Yellowwolf v. Morris, 536 F.2d 813, 816 (9th Cir. 1976).

1228. 607 F.2d at 856-57.

1229. United States v. Moore, 599 F.2d 310 (9th Cir. 1979).

Moore had pleaded guilty but later claimed that her original plea was invalid because of her own mental incompetence at the time it was made.[1230] The Ninth Circuit rejected her claim, noting that she had been found competent to stand trial by six psychiatrists and psychologists.[1231] In addition, she was unable to demonstrate to the court that her alleged impaired mental ability was sufficient to prevent her from making "a reasoned choice among . . . alternatives."[1232] The Ninth Circuit was also influenced by the fact that the examinations which found her competent occurred within a short period of time prior to her plea.[1233]

5. Plea bargaining

In the 1979 Ninth Circuit decision of *United States v. Arnett*,[1234] defendant Steven Arnett agreed to plead guilty to one count of an indictment if the Government in turn agreed not to oppose any position he would take regarding sentencing.[1235] The Government kept its part of the bargain during the sentencing hearing,[1236] and shortly thereafter Arnett brought a rule 35 motion asking for a reduction of his sentence.[1237] The Government was allowed by the district court to oppose this motion.[1238] It contended that since Arnett had presented no new evidence which would justify a reduction in his sentence, his rule 35 motion should have been denied.[1239] On appeal, Arnett moved to

1230. *Id.* at 312-13.

1231. *Id.* at 313.

1232. *Id.* This competency test, which is followed in the Ninth Circuit, was enunciated in Sieling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973) (citing with approval Judge Hufstedler's language in Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir. 1970)).

1233. 599 F.2d at 314. *Cf.* Makal v. Arizona, 554 F.2d 1030, 1035 (9th Cir. 1976) (since petitioner was found competent to stand trial only seventeen days prior to the time he pled guilty, the court could reasonably conclude that he was competent to make a guilty plea).

1234. No. 79-1243 (9th Cir. Oct. 15, 1979).

1235. *Id.*, slip op. at 285.

1236. *Id.*, slip op. at 288.

1237. *Id.*, slip op. at 287. FED. R. CRIM. P. 35 provides:

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

1238. No. 79-1243, slip op. at 288.

1239. *Id*, slip op. at 285.

strike this response, contending that it violated the original plea bargain agreement.[1240]

Arnett relied on the Fifth Circuit decision of *United States v. Ewing*.[1241] It interpreted a similar plea bargain agreement, in which the Government agreed not to oppose defendant, to include the rule 35 proceedings which followed the trial.[1242] The Ninth Circuit, however, found that the Government had fulfilled its part of the bargain by not opposing Arnett during the initial sentencing process.[1243] Thus, the actions it took during the rule 35 proceedings were found to be proper.[1244]

The decision in *Arnett* is sound from both a procedural and policy standpoint. Except for the statement offered by the Government to the effect that Arnett had presented no new evidence, his motion was unopposed as to substantive issues.[1245] In addition, from a procedural standpoint it would seem unwise to extend the scope of such agreements to the point where the government would be virtually neutralized during any type of post sentencing or appellate review.[1246]

6. Acceptance of the guilty plea

A trial court has broad discretion in deciding whether a guilty plea should be accepted.[1247] The standard for acceptance, established by the Supreme Court in *North Carolina v. Alford*, is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."[1248] In *United States v. O'Brien*, the Ninth Circuit followed this standard and rejected the defendant's argu-

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1240. *Id.*

1241. 480 F.2d 1141, 1143 (5th Cir. 1973).

1242. No. 79-1243, slip op. at 285.

1243. *Id.*, slip op. at 288. The court found persuasive United States v. Johnson, 582 F.2d 335, 337 (5th Cir. 1978), *cert. denied*, 439 U.S. 1051 (1979), which held that *Ewing* did not give a defendant the right to an unopposed rule 35 motion. *Id.*

The Ninth Circuit also found the Supreme Court decision of Santobello v. New York, 404 U.S. 257 (1971) to be controlling in evaluating such disputes. No. 79-1243, slip op. at 286. *Santobello* held that principles of contract law should govern plea bargain agreements. 404 U.S. at 262-63. Thus, trial courts normally have the responsibility to determine the terms of such an agreement. No. 79-1243, slip op. at 287. However, the defendant in *Arnett*, instead of asking for a remand in order that such a determination could be made, requested that his rule 35 motion be heard by a different judge. *Id.*

1244. No. 79-1243, slip op. at 288.

1245. *Id.*

1246. *Id.*

1247. *E.g.*, United States v. Cepeda Penes, 577 F.2d 754, 756 (1st Cir. 1978); United States v. Bettelyoun, 503 F.2d 1333, 1336 (8th Cir. 1974); United States v. Ammidown, 497 F.2d 615, 619 (D.C. Cir. 1973); United States v. Martinez, 486 F.2d 15, 20 (5th Cir. 1973).

1248. 400 U.S. 25, 31 (1970).

ment which would have limited the court's discretion in such a determination.[1249] Specifically, the court declined to "adopt a rule making it an abuse of discretion to reject a guilty plea when a defendant refuses to admit guilt."[1250]

7. Influence of counsel

A guilty plea will normally not be invalidated because a defendant, in making such a plea, relied on the mistaken, but good faith advice of his attorney.[1251] If the level of advice falls below what the courts would consider to be within the range of competence normally demanded of criminal attorneys, then a court could invalidate a guilty plea on the grounds that it was not knowingly or intelligently made.[1252]

The Ninth Circuit followed this standard in two cases and rejected the claims of two defendants who challenged their guilty pleas on these grounds.[1253] In *United States v. Boniface* defendant was unable to demonstrate that he had been coerced by his attorney into pleading guilty.[1254] Likewise, in *United States v. Moore*, there was no showing of incompetence because defendant's attorney had repeatedly advised against a guilty plea, defendant had been satisfied with his performance, and there was no indication that he had ever been unprepared prior to the time the plea was made.[1255]

C. Jury Administration

1. Waiver of jury of twelve

The sixth amendment guarantees a criminal defendant the right to trial by jury.[1256] In a federal court, an important element of that right

1249. 601 F.2d 1067, 1069-70 (9th Cir. 1979).

1250. *Id.* at 1070.

1251. Brady v. United States, 397 U.S. 742, 756-57 (1970); McMann v. Richardson, 397 U.S. 759, 769-71 (1970); Parker v. North Carolina, 397 U.S. 790, 797-98 (1970). *Accord*, Domenica v. United States, 292 F.2d 483, 485 (1st Cir. 1971) ("Mere prediction by counsel of the court's likely attitude on sentence, short of some implication of an agreement or understanding, is not ground for attacking a plea."); Floyd v. United States, 260 F.2d 910, 912 (5th Cir. 1958), *cert. denied*, 359 U.S. 947 (1959) ("[i]t has nowhere been held that if counsel advises his client in good faith that a plea of guilty will result in a recommendation of a lighter sentence in one of several indictments, this strips a plea of its voluntary nature."); Pinedo v. United States, 347 F.2d 142, 148 (9th Cir. 1965); ("Due process does not require 'errorless counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance.' ")

1252. *E.g.*, McMann v. Richardson, 397 U.S. 759, 771 (1970).

1253. United States v. Boniface, 601 F.2d 390, 393 (9th Cir. 1979); United States v. Moore, 599 F.2d 310, 313 (9th Cir. 1979).

1254. 601 F.2d 390, 393 (9th Cir. 1979).

1255. 599 F.2d 310, 313 (9th Cir. 1979).

1256. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall

is that the jury be composed of twelve members.[1257] However, the right to a jury of twelve can be waived.[1258]

Federal Rule of Criminal Procedure 23(b) requires court approval of a written stipulation by the parties in order to proceed with fewer than twelve jurors.[1259] Oral stipulations can satisfy the requirements of rule 23(b) if it appears from the record that the "defendant *personally* gave express consent in open court, intelligently and knowingly, to the stipulation."[1260]

In *United States v. Reyes*,[1261] a juror was excused because of a physical disability after the trial had begun. By oral stipulation, the parties agreed to proceed with eleven jurors.[1262] The defendant later moved for a new trial, contending that the oral waiver was insufficient. The trial court denied the motion after the judge was assured that the defendant had made a knowing waiver. The Ninth Circuit reversed, citing the trial judge's failure to directly interrogate the defendant.[1263] In reaching its decision, the court reasoned that rule 23(b) waiver was similar to the waiver of a jury trial under rule 23(a)[1264] and that "the better practice . . . [is] to interrogate the defendant so as to satisfy [the court] that the defendant is fully apprised of his rights and freely and voluntarily desires to relinquish them."[1265]

2. Extrinsic material in jury room

It has been long established that jurors should be influenced only

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enjoy the right to a speedy and public trial by an impartial jury . . . ." U.S. CONST. amend. VI.

1257. FED. R. CRIM. P. 23(b) provides that "[j]uries shall be of 12 but at any time before the verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 . . . ."

1258. *E.g.*, Patton v. United States, 281 U.S. 276, 312 (1950).

1259. FED. R. CRIM. P. 23(b) provides in part that "the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 . . . ." *See* United States v. Taylor, 498 F.2d 390, 392 (6th Cir. 1974) (per curiam) ("waiver of a jury trial, even the waiver of one juror, is the waiver of a basic and important right which cannot be accomplished upon a 'silent record' "). *But see* United States v. Stolarz, 550 F.2d 488, 493 (9th Cir.), *cert. denied*, 434 U.S. 851 (1977) (pre-trial stipulation to proceed with less than 12 jurors in the event of juror disability is effective throughout trial and defendant not required to consent again when the need arises during trial).

1260. United States v. Lane, 479 F.2d 1134, 1136 (6th Cir.), *cert. denied*, 414 U.S. 861 (1973) (per curiam) (emphasis added) (oral stipulation intelligently and knowingly expressed was valid waiver of jury of 12).

1261. 603 F.2d 69 (9th Cir. 1979).

1262. *Id.* at 70-71.

1263. *Id.* at 72.

1264. *Id.* at 71. Rule 23(a) requires that a waiver of jury trial in criminal cases be written.

1265. *Id.*

by evidence submitted in open court.[1266] "Accordingly, courts have been continually sensitive to the jeopardy to a criminal defendant's sixth amendment rights posed by any jury exposure to facts collected outside of trial."[1267]

In *United States v. Vasquez*,[1268] a clerk-bailiff left an official court file containing unadmitted and prejudicial information in the jury room during deliberations.[1269] After the jury returned a guilty verdict, the judge questioned each of the jurors to determine whether the verdict was tainted because of the exposure to the extrinsic information. Based on the juror response, the verdict was sustained.[1270]

The Ninth Circuit, facing a question of first impression, adopted the test of the Fifth Circuit, which requires a new trial if there exists a reasonable possibility that the extrinsic information could have affected the verdict.[1271]

Under this test the court found that the trial judge "should not [have investigated] the subjective effects of any such breach upon the jurors," when attempting to determine if a reasonable possibility of harm existed.[1272] Instead the "hearing should have been limited to ascertaining the extent, if any, that jurors *saw or discussed* the prejudicial extrinsic evidence or other circumstances surrounding the breach."[1273] Since it was clear that the prejudicial information had been before the jurors and that some had reviewed the file, the Ninth Circuit ruled that "it [was] a useless exercise even to ask the jurors whether the evidence

1266. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

1267. United States v. Howard, 506 F.2d 865, 866 (5th Cir. 1975); *accord*, Jackson v. United States, 414 U.S. 820 (1971). For an extensive list of cases involving juror exposure to extrinsic material, see 506 F.2d at 866-87.

1268. 597 F.2d 192 (9th Cir. 1979).

1269. The government conceded that the file included prejudicial information. The file included motions which had been denied and evidence which had been ruled inadmissible prior to trial. Some jurors admitted reviewing the file extensively. *Id.* at 193, 194.

1270. *Id.*

1271. *Id.* at 193 n.1. *E.g.*, United States v. Howard, 506 F.2d 865, 866 (5th Cir. 1975). The Second, Tenth and D.C. Circuits require reversal "if there is the slightest possibility that harm could result." 597 F.2d at 193 n.1. *E.g.*, United States v. Marx 485 F.2d 1179, 1184 (10th Cir. 1973), *cert. denied*, 416 U.S. 986 (1974); Dallago v. United States, 427 F.2d 546, 548, 550-51 (2d Cir. 1967). If the error "might have operated to the substantial injury of the defendant," the Seventh and Eighth Circuits will require reversal. 597 F.2d at 193 n.1. *E.g.*, Osborne v. United States, 351 F.2d 111, 119 (8th Cir. 1965); United States v. Grady, 185 F.2d 273, 275 (7th Cir. 1950).

1272. 597 F.2d at 194 (citing United States v. Howard, 506 F.2d 865, 869 (5th Cir. 1975)).

1273. 597 F.2d at 194 (emphasis added). The court felt that the judge "should reach a judgment on the reasonable possibility of harm on his own without the benefit of juror opinions which might negate or affirm a conclusion of harm." *Id.*

affected their verdict."[1274] Thus, the conviction was reversed.

3. Juror bias

The sixth amendment guarantees that all criminal defendants shall have the right to a trial by an impartial jury.[1275] The voir dire examination of prospective jurors helps to ensure this right.[1276] The trial court has considerable discretion over the conduct of voir dire.[1277] This discretion is limited only by the requirement that the examination provide some reasonable basis for determining whether a prospective juror would be impartial, so that counsel is then able to exercise his peremptory challenge.[1278] The required scope and content of voir dire is necessarily dependent upon the circumstances of each case.

Recent Ninth Circuit decisions illustrate the case-by-case factual inquiry which is employed when courts determine the adequacy of a voir dire. For instance, in *United States v. Baldwin*[1279] the defendant was convicted of stealing cacti from government owned land. Two agents of a state commission were principal witnesses for the prosecution. The defendant contended that the trial court committed reversible error by refusing to ask the following defense-proposed voir dire questions: "1) Whether any of the prospective jurors would give greater or lesser weight to the testimony of a law enforcement officer, by the mere reason of his/her position; [or] 2) Whether any of the prospective jurors were acquainted with any of the prospective witnesses in the case."[1280] The *Baldwin* court reversed the conviction and held that

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1274. *Id.*

1275. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

1276. United States v. Giese, 597 F.2d 1170, 1181 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979).

1277. The Federal Rules of Criminal Procedure provide:

> The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

FED. R. CRIM. P. 24(a).

1278. United States v. Segal, 534 F.2d 578, 581 (3d Cir. 1976) (discretion of judge balanced against right of parties to information upon which to exercise challenges); Cook v. United States, 379 F.2d 966, 971 (5th Cir. 1967) (Trial court should have asked questions that would have elicited information that "was reasonably necessary to enable the accused to exercise his peremptory challenges.").

1279. 607 F.2d 1295, 1297 (9th Cir. 1979).

1280. *Id.* at 1297. Baldwin submitted eleven questions; the court asked only whether any venireperson had been the victim of theft. *Id.*

the judge's failure to ask the two questions so limited the scope of voir dire that there was no reasonable opportunity for defense counsel to expose any possible juror prejudice.[1281]

In reaching this conclusion, the court relied upon *Brown v. United States*[1282] which recognized that jurors may be predisposed to lend credibility to the testimony of government witnesses merely because of their position. *Brown* concluded that in situations where the testimony of an official-witness is significant, a request to ask veniremen about their attitudes towards officials should be granted.[1283] The *Baldwin* decision also depended upon *Cook v. United States*[1284] which held that the trial court should question prospective jurors about possible relationships with important government witnesses.[1285] Finally, the *Baldwin* court decided that reversal was required even if prejudice to the defense had not been proven since the meaningful number of peremptory challenges had been reduced by the inadequate voir dire.[1286]

In *United States v. Giese*[1287] the defendant was convicted of various offenses in connection with the bombings of military recruiting centers. The bombings were carried out as a protest against the Vietnam War. On appeal defendant claimed that the voir dire was inadequate. However, during voir dire, the trial court thoroughly examined several of the prospective jurors about their attitudes toward war protests, the military, law enforcement officers, and pretrial publicity. Although other veniremen were subjected to a more limited inquiry, the judge admonished them to consider the more detailed questions asked of other prospective jurors and to answer those if their responses would have been different. The trial court also permitted the defense to sug-

1281. *Id.* at 1298. "[T]he trial judge should keep uppermost in his mind the fact that the parties have the right to some surface information about prospective jurors which might furnish the basis for an informed exercise of peremptory challenges . . . ." *Id.* at 1297. *See* United States v. Segal, 534 F.2d 578, 581 (3d Cir. 1976); United States v. Jackson, 542 F.2d 403, 413 (7th Cir. 1976) ("[T]he trial judge does not possess unlimited discretion to ignore proposed questions . . . . Adequate questioning must be conducted to provide under the facts in the particular case some basis for a reasonably knowledgeable exercise of the right of challenge. . . .") (citation omitted).

1282. 338 F.2d 543, 545 (D.C. Cir. 1964) ("[W]hen important testimony is anticipated from certain categories of witnesses, whose official or semi-official status is such that a juror might reasonably be . . . inclined to credit their testimony, a query as to whether a juror would have such an inclination . . . should be given if requested.").

1283. *Id.* However, the court also noted that the test for reversal should be dependent upon "the degree of impact which the testimony in question would be likely to have had on the jury and what part such testimony played in the case as a whole." *Id.*

1284. 379 F.2d 966 (5th Cir. 1967).

1285. *Id.* at 971.

1286. 607 F.2d at 1298. *See* United States v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977).

1287. 597 F.2d 1170, 1181-83 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979).

gest additional questions after the initial voir dire, most of which were subsequently asked.[1288]

In evaluating the propriety of the voir dire examination, the *Giese* court reasoned that a relatively elaborate voir dire was necessary because crimes of terrorism directed against the government easily arouse prejudice.[1289] The court concluded that the voir dire in the instant case was adequate to reveal the prejudices of the veniremen. It noted that the examination of several of the jurors was beyond reproach.[1290] The court relied upon *United States v. Amaral*[1291] in which the Ninth Circuit had approved a limited examination of some veniremen when they had been reminded that the more detailed questions asked of others were asked of all. More important, the *Giese* court concluded that the voir dire was sufficient because it had accomplished its purpose of identifying biased jurors—several of the veniremen subjected to the limited inquiry had answered questions asked of others and had admitted strong feelings about law enforcement officers and the Vietnam War.[1292] According to the *Giese* court, the trial court was not obligated to ask all of the questions submitted by the defense as long as the voir dire was adequate.[1293]

In *United States v. Clabaugh*[1294] the defendants were convicted of two separate robberies. Two jurors revealed possible sources of bias, but the trial court ceased examining them after each claimed that he could act impartially. One juror had been the project architect for the corporate headquarters of one of the banks that had been robbed. Although he had no financial interest in the bank, he was acquainted with all of the corporate officers. The other juror had been employed by the police department as a radio operator for eighteen years.[1295] The *Clabaugh* court acknowledged that subjective assurances of impartiality

1288. *Id.* at 1182. "[T]he court refused to ask requested questions about President Ford's conditional amnesty plan and his pardon of former President Nixon . . . ." *Id.*

1289. *Id.* at 1181. The court recognized that the scope and content of voir dire varied with each case. *Id.*

1290. *Id.* at 1182.

1291. 488 F.2d 1148, 1150 (9th Cir. 1973). The *Amaral* court approved a voir dire where the first venireperson was asked about racial prejudice and the court "reminded the prospective jurors that all questions asked of one juror were asked of all and that the voir dire process was a cumulative one designed to probe into the juror's state of mind to discover whether each could determine guilt or innocence based solely on the evidence presented at trial." *Id.*

1292. 597 F.2d at 1182.

1293. *Id.* at 1182-83.

1294. 589 F.2d 1019 (9th Cir. 1979) (per curiam).

1295. *Id.* at 1023.

were not sufficient to indicate the presence of bias,[1296] but identified the issue in the case as determining "when . . . a possibility of bias become[s] sufficiently definite so that further inquiry is necessary."[1297] The court distinguished cases where a more substantial possibility of bias had been shown,[1298] concluded that the potential bias revealed in this case did not make further questioning necessary, and thus upheld the trial court's actions.[1299]

Voir dire examination will not always result in the elimination of biased jurors. For example, in *United States v. Eubanks*[1300] the defendants were convicted of conspiring to distribute heroin. After the conclusion of the trial, the defense counsel discovered that a juror had two sons serving long prison terms for robbery and murder. The crimes had been committed so that the sons could obtain heroin for their own use. The trial court denied the defendant's motion for a new trial, reasoning that the single juror could not have influenced the jury verdict.[1301] The *Eubanks* court reversed, noting that "[i]f only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury."[1302]

In *United States v. Ortiz* the defendant was convicted of conspiring to distribute heroin.[1303] The defense alleged that the jury was biased because one of the prospective jurors made the following statement during voir dire examination: "I don't like heroin. I'm kind of prejudiced. I hate the stuff and what it does. I honestly don't know if I could be fair or not. If I had my way, I would hang them if they were guilty."[1304] The juror was subsequently dismissed, and the *Ortiz* court concluded that the defendant had failed to carry his burden of showing

1296. *Id.* The court cited Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971). *See also* United States v. Martin, 507 F.2d 428, 432-33 (7th Cir. 1974) ("The sole purpose of voir dire is not to tell potential jurors that they are to be fair and then ask them if they think they can be impartial.")

1297. 589 F.2d at 1023.

1298. *Id.* The cases cited by the defense included United States v. Allsup, 566 F.2d 68 (9th Cir. 1977) (bias inferred from jurors who were employees of bank that was robbed by the defendant and who should have been excused for cause); United States v. Nell, 526 F.2d 1223 (5th Cir. 1976) (one juror disliked unions, and the other had argued with the union that was a party).

1299. 589 F.2d at 1023.

1300. 591 F.2d 513, 516-17 (9th Cir. 1979) (per curiam).

1301. The trial judge believed the juror was biased. *Id.* at 517 n.4. However, he did not believe that a poorly educated Oklahoma Indian could influence the outcome of a two-hour jury deliberation. *Id.* at 517.

1302. *Id.* (citing United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir.), *cert. denied*, 434 U.S. 818 (1977)).

1303. 603 F.2d 76, 78 (9th Cir. 1979).

1304. *Id.* at 80.

that he was prejudiced by the jury hearing the statement.[1305]

4. The *Allen* charge

In *Allen v. United States*,[1306] the Supreme Court approved supplemental jury instructions that had been given by the trial court to encourage a jury verdict. In essence, the instructions urged the jurors to reach a verdict if they could conscientiously do so and instructed minority jurors to consider the reasonableness of their views that had not impressed the majority.[1307] Since the *Allen* decision, many courts have shown an understandable reluctance to use this procedural device. If an *Allen* charge is used prematurely or indiscriminately, it can easily jeopardize the defendant's right to an impartial jury.[1308]

The Ninth Circuit has generally approved the use of the *Allen* charge if given as part of the original instructions,[1309] in response to a jury's request,[1310] or in response to a jury deadlock.[1311] Thus, the *Allen*

1305. *Id.* *See* United States v. White, 524 F.2d 1249, 1252 (5th Cir.), *cert. denied*, 426 U.S. 922 (1975) ("Prejudice of a juror will not be presumed, but must be demonstrated."). *But see* United States v. Eubanks, 591 F.2d 513, 517 (9th Cir. 1979) (bias presumed where sons of juror in jail partly because of heroin use; defendant accused of distributing heroin); United States v. Allsup, 566 F.2d 68, 71-72 (9th Cir. 1977) (bias may be presumed if certain family or emotional relationships are involved).

1306. 164 U.S. 492, 501-02 (1896).

1307. The charge instructed the jury that:

> [I]n a large proportion of cases, absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that *it was their duty to decide the case if they could conscientiously do so*; that they should listen, with a disposition to be convinced, to each other's arguments; that, *if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.*

Id. at 501-02 (emphasis added).

1308. "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ." U.S. CONST. amend. VI. Under the best of circumstances, the use of the *Allen* charge "approaches the ultimate permissible limits to which a court may go in guiding a jury towards a verdict." Sullivan v. United States, 414 F.2d 714, 716 (9th Cir. 1969).

1309. United States v. Guglielmini, 598 F.2d 1149, 1154 (9th Cir.), *cert. denied*, 444 U.S. 943 (1979) (possible coercive effect of charge eliminated by giving the instruction as part of the original instructions).

1310. United States v. Seawell, 550 F.2d 1159, 1163 (9th Circ. 1977), *cert. denied*, 439 U.S. 991 (1978) ("If the charge is to pass muster as instruction on the law there is little need to repeat it save at the jury's request.").

1311. United States v. Peterson, 549 F.2d 654, 659 (9th Cir. 1977) (single *Allen* charge after jury reported deadlocked is proper).

charge was improperly given when circumstances did not indicate clearly a jury deadlock.[1312] The Ninth Circuit also has forbidden giving the charge in response to a second reported deadlock after it had already been given in response to the first reported deadlock.[1313]

Several circuits have critized the *Allen* charge because it instructs jurors to distrust their own judgments when they are contrary to those of a large majority of jurors.[1314] These circuits have adopted standard instructions[1315] which eliminate this aspect of the charge and merely encourage collective deliberations. Thus far, the Ninth Circuit has not disapproved of the "minority-majority" element of the instruction. In *United States v. Guglielmini*,[1316] the Ninth Circuit refused to recommend the use of its supervisory powers to discontinue the use of the *Allen* charge or to adopt a *per se* rule. However, the *Guglielmini* court recognized that further consideration of *Allen* charges was inevitable.[1317]

1312. United States v. Contreras, 463 F.2d 773, 774 (9th Cir. 1972) (per curiam) (*Allen* charge given prematurely when there was no clear indication that the jury was deadlocked).

1313. United States v. Seawell, 550 F.2d 1159, 1163 (9th Cir. 1977), *cert. denied*, 439 U.S. 991 (1978) ("[I]t is reversible error to repeat an *Allen* charge . . . after a jury has reported itself deadlocked and has not itself requested a repetition of the instruction.").

1314. *See, e.g.*, United States v. Thomas, 449 F.2d 1177, 1185 (D.C. Cir. 1971) (en banc) (concerned about coercive effect of "minority-majority" element of the *Allen* charge); United States v. Fioravanti, 412 F.2d 407, 416-19 (3d Cir.), *cert. denied*, 396 U.S. 837 (1979).

1315. The standards most commonly accepted have been those adopted by the ABA:

> Length of deliberations; deadlocked jury.
>
> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> (i) that in order to return a verdict, each juror must agree thereto;
>
> (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberation and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 15-16 (1968).

1316. 598 F.2d 1149, 1153 (9th Cir. 1979).

1317. *Id.*

D. Impeachment of Witnesses

At common law, a party was not allowed to impeach his own witnesses.[1318] This maxim, known as the "voucher" rule, was founded on the following three principles, which slowly eroded during the development of the modern court system: "First, that the calling party vouched for the testimony of his own witnesses; second, that the calling party was therefore morally bound by that testimony; and third, that to allow the calling party to impeach was to invite the prospect of making a case by coercing the witness . . . ."[1319] In 1975 Congress abolished this common law principle in the federal judicial system by enacting rule 607 of the Federal Rules of Evidence which provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him."[1320]

Rule 607 was at issue in the 1979 Ninth Circuit case of *United States v. Petsas*.[1321] Defendant Petsas, convicted of supplying false information to the Federal Department of Housing and Urban Development, contended on appeal that the trial court had abused its discretion in allowing the Government to impeach its own witness. The witness, Sharon Barrow, had been convicted of lying to the Federal Housing Administration in connection with some of the defendant's activities. Before trial, the court ordered the Government not to use this information for impeachment purposes, but later rescinded this order because it appeared that Barrow had lied on the stand.[1322]

Petsas claimed that the Government's sole motive for calling Barrow was to later impeach her. The Ninth Circuit allowed the impeachment because under the Federal Rules of Evidence a party may impeach its own witness by showing previous criminal acts.[1323]

In further support of its decision, the court cited *United States v. Binger*.[1324] In *Binger*, the court considered the permissibility of impeaching a coconspirator witness with evidence that he had pleaded guilty to a substantive count for which the defendant was being tried. The court primarily considered the taint a witness' guilty plea could lend to the claims of a defendant charged with same crime. Following *Bingler*, the fact that the *Petsas* court allowed the impeachment was

1318. 3A J. WIGMORE, EVIDENCE § 896, at 659-60 (Chadbourn rev. ed. 1970).
1319. 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 297, at 182 (1979).
1320. FED. R. EVID. 607.
1321. 592 F.2d 525 (9th Cir. 1979).
1322. *Id.* at 528.
1323. *Id.* (citing FED. R. EVID. 607 and 609(a)).
1324. 469 F.2d 275 (9th Cir. 1972).

deemed to be harmless error in light of the weight of the evidence presented against the defendant.[1325]

E. Exclusion of Witnesses

The exclusion of witnesses serves two purposes in adjudicatory proceedings: 1) preventing the testimony of one witness from being colored by what he hears in the testimony of another, and 2) assisting the prosecutor, defense counsel, judge, and jury in detecting error or falsehood by a witness.[1326] Rule 615 of the Federal Rules of Evidence codifies the procedure for excluding witnesses in the federal courts. It states in pertinent part that "[a]t the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion."[1327]

In *United States v. West*,[1328] defendants argued that under rule 615 witnesses should have been excluded from a pretrial hearing because of the possibility that their subsequent testimony might have been improperly influenced. But the Ninth Circuit properly interpreted rule 615 to mandate exclusion only during the evidentiary portion of a trial when other witnesses are giving testimony.[1329] The purpose of such a rule is to prevent collusive testimony among witnesses.[1330] In *West*, this possibility would have been remote because the witnesses were exposed to a pretrial proceeding in which offers of proof were discussed.[1331]

However, a trial judge does have the discretion to order the exclusion of witnesses in situations where rule 615 would not apply.[1332] In *West*, neither defendant could prove he had been prejudiced because of the trial court's failure to exercise this discretion.[1333] Thus, the Ninth Circuit noted that "[a]ny prejudice asserted [was] merely speculative" and upheld the trial court's action.[1334]

1325. 592 F.2d at 528 (citing 469 F.2d at 275-76).
1326. 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 371, at 595-96 (1979).
1327. FED. R. EVID. 615.
1328. 607 F.2d 300, 305-06 (9th Cir. 1979).
1329. *Id.* at 306, (citing United States v. Brown, 547 F.2d 36, 37 (3d Cir. 1976), *cert. denied*, 431 U.S. 905 (1977)). The language of the rule itself limits its scope to the testimonial phase of a trial. 547 F.2d at 37.
1330. 6 J. WIGMORE, EVIDENCE §§ 1837, 1838 (Chadbourn rev. ed. 1976).
1331. 607 F.2d at 305.
1332. *Id.* at 306.
1333. *Id.*
1334. *Id.*

F. Prosecutorial Misconduct

The alleged misconduct of the prosecution was the subject of several Ninth Circuit criminal cases in 1979. In *United States v. Jones*,[1335] defendant initially failed to object to misrepresentations made during the prosecutor's opening statement. Because of this initial failure, the Ninth Circuit noted that reversal could occur on appeal only if there was plain error.[1336] However, the prosecutor's error was anything but "plain." In his opening statement he had mistakenly referred to the get-away car as a "truck."[1337] Since there was no possibility of prejudice from such a miscue, especially because the jury had been warned that the prosecutor's statements were not evidence, the Ninth Circuit had no difficulty dismissing defendant's claim.[1338]

The Ninth Circuit also found harmless error in *United States v. Vargas-Rios*, in which a prosecutor, in addition to minor misstatements, argued that defendant was a coconspirator in a drug distribution scheme because he must have been capable of smelling the heroin located inside his vehicle.[1339] No evidence, however, had been offered to establish the extent of defendant's olfactory abilities.[1340] Although the Ninth Circuit was critical of the prosecutor's performance, it found the nature of the errors to be trivial.[1341] The court noted that the argument in controversy had been subject to rebuttal by the defense and that the prosecutor had not repeated this particular mistake in his closing statements.[1342] Thus, judgment was affirmed, and the errors ruled harmless.[1343]

A similar situation arose in *United States v. Lyman*, where the prosecutor sought to bolster the credibility of one of his witnesses by remarking to the jury that the witness kept notes in a diary.[1344] The Ninth Circuit first disposed of the Government's contention that defendant's failure to interrupt the prosecutor's argument meant that he had lost the right to raise the issue on appeal. The court noted that defendant's motion for a mistrial which followed the argument in ques-

1335. 592 F.2d 1038 (9th Cir.), *cert. denied*, 441 U.S. 951 (1979).
1336. *Id.* at 1043.
1337. *Id.*
1338. *Id.* at 1044.
1339. 607 F.2d 831, 838 (9th Cir. 1979).
1340. *Id.*
1341. *Id.*
1342. *Id.*
1343. *Id.*
1344. 592 F.2d 496, 498 (9th Cir. 1978), *cert. denied*, 442 U.S. 931 (1979).

tion was sufficient to prevent a foreclosure of review.[1345]

The *Lyman* court then weighed the seriousness of the prosecutor's error using a standard which calls for reversal when it can be shown that the jury's verdict was materially affected.[1346] Because other testimony tended to establish the credibility of the witness, the court found the prosecutor's error not to be material.[1347]

Guilt by association was the issue surrounding the alleged prosecutorial misconduct in *United States v. Marques*.[1348] Defendant Marques objected to the prosecutor's statements linking him to the Hell's Angels.[1349] The court acknowledged that attempts to link a defendant with organized crime can be reversible error if "the spectre of organized crime . . . serves no proper purpose and is without foundation in the evidence."[1350] In *Marques*, however, evidence had been admitted which indicated that the Hell's Angels were prominent customers of defendant's alleged drug sales.[1351] Thus, the Ninth Circuit had little difficulty in allowing defendant's conviction to stand.[1352]

G. Continuance

A trial court has broad discretionary powers in granting or denying a party's request for a continuance.[1353] A decision denying a request for continuance normally will not be reversed on appeal unless there is a showing of abuse of discretion by the trial court[1354] or a showing that defendant was actually prejudiced by the denial.[1355] Reversals of continuance decisions are so rare that one leading commen-

1345. *Id.* at 499. The court acknowledged that the Fifth Circuit forecloses review if closing argument is not interrupted and plain error is not involved. *Id.* at 499 n.2. *E.g.*, United States v. Ward, 481 F.2d 185, 186-87 (5th Cir. 1973). The First and Eighth Circuits "have suggested" that such objections should be made during argument. 592 F.2d at 499 n.2. *E.g.*, Holden v. United States, 388 F.2d 240, 242-43 (1st Cir.), *cert. denied*, 393 U.S. 464 (1968); Birnbaum v. United States, 356 F.2d 856, 866 (8th Cir. 1966). The Second Circuit, on the other hand, allows for such objections at the end of argument. *E.g.*, United States v. Briggs, 457 F.2d 908, 911-12 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972).

1346. 592 F.2d at 499.

1347. *Id.*

1348. 600 F.2d 742 (9th Cir. 1979).

1349. *Id.* at 749.

1350. *Id.* (citing United States v. Love, 534 F.2d 87, 88 (6th Cir. 1976)).

1351. 600 F.2d at 749.

1352. *Id.* at 749, 752.

1353. *E.g.*, Avery v. Alabama, 308 U.S. 444, 446 (1940); United States v. Rinn, 586 F.2d 113, 118 (9th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979); United States v. Harris, 436 F.2d 775, 776 (9th Cir. 1970).

1354. *E.g.*, United States v. Rinn, 586 F.2d 113, 118 (9th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979); United States v. Hoyos, 573 F.2d 1111, 1114 (9th Cir. 1978).

1355. United States v. Harris, 501 F.2d 1, 4-5 (9th Cir. 1974).

tator has classified them as trial court actions which are "ordinarily not reviewable."[1356]

Four appeals following denials of continuance requests in criminal cases were heard by the Ninth Circuit in 1979. In all four, the action of the trial court was upheld. One of the four, *United States v. Petsas*, involved an agreement by the defendant with the court not to seek a second continuance if his request for a first continuance was granted.[1357] Subsequent to the agreement defendant asked for a second continuance one day before the trial was scheduled to begin. In *United States v. West*, defendant, who was a prisoner representing himself, claimed that the trial court's refusal to grant a continuance just prior to the time of his closing statement prevented him from preparing an adequate defense.[1358] Defendants unsuccessfully requested a continuance in *United States v. Hernandez* in order to investigate the background of a key Government witness for impeachment purposes.[1359] The Ninth Circuit upheld the denial in *Hernandez* and noted that to establish abuse of discretion by the trial court, the moving parties must do more than show there was a mere *possibility* that impeachable evidence might have been produced had the additional time been granted.[1360]

In each of these three decisions the actions taken by the trial court in denying continuance appears to be sound. However, in a fourth Ninth Circuit case, *United States v. Mills*,[1361] the trial court's denial of a continuance request rests on a less secure foundation.

The defendant in *Mills* requested a one day continuance after the Government had called a "surprise" witness to the stand. Additional time was needed to produce evidence which would either rebut or impeach the witness.[1362] After a brief discussion of the general law governing continuances, the Ninth Circuit affirmed the trial court action.[1363] The court did not find the clear abuse necessary to disturb the trial court action.[1364]

Because of the broad discretion allowed trial courts, it is difficult to fault the *Mills* decision. However, a denial of a continuance request for

1356. 3 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 832, at 333 (1969). *See* Avery v. Alabama, 308 U.S. 444, 446 (1940) ("Disposition of a request for continuance . . . is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.").
1357. 592 F.2d 525, 527 (9th Cir. 1979).
1358. 607 F.2d 300, 305 (9th Cir. 1979).
1359. 608 F.2d 741, 746 (9th Cir. 1979).
1360. *Id.*
1361. 597 F.2d 693 (9th Cir. 1979).
1362. *Id.* at 698.
1363. *Id.* at 699.
1364. *Id.*

only one day when a party has been surprised is questionable.[1365] Certainly *Mills* can be factually distinguished from *Hernandez*, where a continuance was also denied. There, the defense had both adequate advance warning about the witness and access to appropriate reference and investigatory material,[1366] so there was sufficient time to investigate these matters, had the defense chosen to do so.[1367] None of these options, however, was available to the defendant in *Mills*.

H. Admission of Evidence

1. Character evidence

a. character trait

Under the common law tradition[1368] and the Federal Rules of Evidence,[1369] prosecutors generally are not allowed to introduce evidence of a defendant's character trait to show a prior disposition to commit the offense with which he is charged. The same restrictions do not apply to defendants.[1370]

But once a defendant attempts to prove his or her good character, the prosecution then is permitted to rebut this evidence by presenting character evidence of its own.[1371] Under the common law, both sides

1365. *Cf.* Gavino v. MacMahon, 499 F.2d 1191, 1196 (2d Cir. 1974) (per curiam) (trial court's overriding concern with calendar and failure to grant a continuance when trial date in a multi-defendant narcotics case was set approximately one month after arraignment and two weeks after pretrial discovery and where defense attorneys were required to interview out-of-state witnesses constituted a "gross abuse of discretion"); J.E. Hanger, Inc. v. United States, 160 F.2d 8, 9 (D.C. Cir. 1947) (trial court's refusal to grant two day continuance to defense attorney after Government had unexpectedly rested its case and after court's previous assurance that one would be available constituted an abuse of discretion).

1366. 608 F.2d at 746.

1367. *Id.*

1368. *See* Michelson v. United States, 335 U.S. 469, 475 (1948).

1369. FED. R. EVID. 404(a) provides:

> Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
> (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
> (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

1370. 1 J. WIGMORE, EVIDENCE § 56, at 450 (3d ed. 1940) ("[A] *defendant may offer his good character* to evidence the improbability of his doing the act charged, unless there is some collateral reason for exclusion; and the law recognizes none such."). *Accord*, FED. R. EVID. 404(a)(1) which permits a defendant to introduce character trait evidence.

1371. FED. R. EVID. 404(a)(1). *See* Michelson v. United States, 335 U.S. 469, 479 (1948)

were limited to presenting testimony as to the defendant's reputation.[1372] When character evidence is permitted the Federal Rules allow proof to be established by means of personal opinion. Specific instances of conduct then may be raised on cross-examination.[1373]

The Ninth Circuit considered these issues in the 1979 case of *United States v. Giese*.[1374] The effect of *Giese* was to allow a criminal conviction of a defendant partially based on the contents of books he read. This holding is not only highly questionable, but also appears to set a dangerous precedent regarding government infringement of a defendant's first amendment rights.[1375]

The defendant—a university professor, who opposed the American involvement in the Vietnam conflict, and proprietor of the "Radical Education Project" bookstore was convicted of conspiracy and other crimes associated with the bombing of military recruiting centers in Portland, Oregon.[1376] The fundamental evidentiary issue at trial centered around the use of a book entitled *From the Movement Toward Revolution*. The Government was able to use *From the Movement Toward Revolution* as the centerpiece of a two-pronged evidentiary attack on the defendant.

It first used the book as physical evidence to establish the existence of the bombing conspiracy because it bore the fingerprints of Giese and the other defendants.[1377] Secondly it was also permitted to use the *contents* of *From the Movement Toward Revolution* ostensibly to impeach Giese's character.[1378]

Normally, adverse character evidence cannot be introduced against a defendant.[1379] But the majority in *Giese* noted that defendant first "testified about the contents of a number of books and suggested

("The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.").

1372. 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 409, at 117-20 (1969); *but see* Smith v. United States, 173 F.2d 181, 185 (9th Cir. 1949) ("[I]f the defendant attempts to prove his innocence by evidence of good reputation, the prosecution may, in rebuttal, present evidence of bad reputation, and in doing so, present evidence of specific criminal acts.").

1373. FED. R. EVID. 405(a).

1374. 597 F.2d 1170 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979).

1375. *See id.* at 1208-09 (Hufstedler, J., dissenting).

1376. *Id.* at 1174-76.

1377. *Id.* at 1185-86.

1378. *Id.* at 1189-91. Giese also was forced to read selected passages while he was on the stand. Had the introduction of the book itself been proper, this Government tactic would have been permissible. *Id.* at 1208 (Hufstedler, J., dissenting).

1379. Michelson v. United States, 335 U.S. 469, 475-76 (1948); FED. R. EVID. 404(a)(1).

they were indicative of his peaceable character."[1380] Once the defendant had testified, the majority felt that the trial court correctly had afforded the Government an opportunity to cross examine and rebut such testimony.[1381] The court concluded that such testimony may not have been "a persuasive form of character evidence," but instead found the issue to be "whether the government had a right to respond once the defendant had, of his own volition, chosen that method of proving he was a peaceable, law-abiding individual."[1382]

Dissenting Judge Hufstedler found the majority's version of the case factually and legally erroneous. While the majority might have been correct technically in saying that Giese utilized a number of books to establish his peaceable character, it inexplicably ignored the trial testimony which preceded this event. The record of the case presented in Judge Hufstedler's dissent shows that the subject of books was actively pursued by the Government *not* for the purpose of impeaching character evidence as the majority maintained, but rather to establish that the defendants were violent, revolutionary characters who formed a conspiracy after reading the books.[1383]

Particular emphasis was placed on books such as *The Blasters Handbook*, *The Underground Bombing Manual*, and *The Anarchist's Cookbook*.[1384] Judge Hufstedler's comments in this regard are pertinent:

> The prosecutor used the contents of this book [*From the Movement to Revolution*] in the same way in which he used the contents of books describing the manufacture of explosives and explosive devices: namely, to convince the jury that it should attribute the ideas in the book to the defendants, who thereafter acted upon them to form the conspiracy and to engage in the substantive offenses. This was the very purpose that the prosecutor had announced in his opening statement. The prosecutor had been unable to produce any evidence of any kind that linked Giese with these so-called do-it-yourself manuals. He therefore concentrated his attention on [*From the Movement Toward Revolution*] which Giese admitted that he had read. The Government has never argued that the book was admissible for impeachment purposes. Rather, its

1380. 597 F.2d at 1188-89.
1381. *Id.* at 1190 & n.23.
1382. *Id.* at 1191.
1383. *Id.* at 1207 (Hufstedler, J., dissenting).
1384. *Id.* at 1202, 1203, 1204 (Hufstedler, J., dissenting).

> argument before us, consistent with its argument in the trial court, was that [*From the Movement Toward Revolution*] was admissible to prove that Giese adopted the ideas of the book and, acting on those ideas, joined a conspiracy to bomb recruiting centers.[1385]

Since the Government ultimately failed to establish any evidentiary connection between Giese and the blasting manuals or the books he stocked in his store, its case against him fundamentally turned on his "revolutionary" reading habits.[1386]

Thus, the majority's holding runs squarely afoul of the first amendment[1387] and the earlier Ninth Circuit case of *United States v. McCrea*.[1388] In *McCrea* the appellate panel found that introduction by the Government of book titles in an attempt to establish illegal possession of firearms was prejudicial to the defendant because this evidence had no probative value.[1389] This prejudice occurred even though the Government had made no inflammatory or exploitive remarks concerning the literature after it was introduced.[1390] But in *Giese*, the Government's exploitation of book titles and contents was pervasive throughout the trial.[1391] Thus, the prejudice resulting from the use of the book titles in *Giese* was all the more egregious.

The majority's argument that *Giese* and *McCrea* could be distinguished is unpersuasive. The majority assumed that *From the Movement Toward Revolution* was a critical piece of evidence because the fingerprints of the defendants were found on it.[1392] But this line of reasoning is specious at best. No evidence was offered that the prints were made at approximately the same point in time.[1393] Instead, what little evidence there was indicated that the prints had been made over a broad time span.[1394] In dissent Judge Hufstedler concluded: "The fingerprint evidence did not prove that the persons whose prints appeared had been associated with each other. The evidence only proved

1385. *Id.* at 1207 (Hufstedler, J., dissenting).
1386. *See id.* at 1202-03 (Hufstedler, J., dissenting) (Although the Government presented two witnesses in an effort to establish the conspiracy, both were "seriously impeached" by the defense. Thus, the Government's principal case rested on the revolutionary reading material.).
1387. *Id.* at 1208-09 (Hufstedler, J., dissenting).
1388. 583 F.2d 1083 (9th Cir. 1978).
1389. *Id.* at 1086.
1390. *Id.*
1391. 597 F.2d at 1202-07 (Hufstedler, J., dissenting).
1392. *Id.* at 1206-07 (Hufstedler, J., dissenting).
1393. *Id.* at 1207 (Hufstedler, J., dissenting).
1394. *Id.*

that persons who handled the book had been associated with the book."[1395] Thus, in *Giese*, just as in *McCrea*, the use of book titles was of "no probative value" and was therefore unnecessary.[1396]

b. other criminal conduct

The Federal Rules of Evidence generally prohibit admission of evidence of other crimes or acts to prove that a defendant possesses certain character traits consistent with the crime charged.[1397] Such evidence may be admissible, however, to establish circumstantially an element of the crime charged, such as motive or intent.[1398] Once the trial judge decides the evidence is relevant, he must weigh its probative value against unfair prejudice to the defendant.[1399]

In *United States v. Aims Back*,[1400] the defendant was charged with raping a woman who was accompanied by a friend. The friend was allowed to testify that she too had been raped, although defendant was not charged with this second offense.[1401] The Ninth Circuit noted that the evidence had little, if any, probative value and was highly prejudicial,[1402] because the jury could have inferred that if the defendant raped the friend he also raped the victim. The court held that this was

1395. *Id.* at 1206-07 (Hufstedler, J., dissenting).

1396. *See* 583 F.2d at 1086.

1397. FED. R. EVID. 404(b) provides in part: "[e]vidence 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." However, FED. R. EVID. 609 allows evidence of conviction of a crime to be established by public record in order to attack the credibility of a witness, including a defendant who takes the stand. But there are restrictions. In United States v. McLister, 608 F.2d 785 (9th Cir. 1979), in which the defendant was convicted of distributing cocaine, the Government had cross-examined him about a nine-year-old misdemeanor conviction for marijuana possession. The Ninth Circuit, in holding admission of this evidence improper, noted the admission did not satisfy rule 609(a) requirements. The crime did not involve dishonesty or false statement, it was not punishable by death or imprisonment for more than one year, and its probative value did not outweigh its prejudicial effect to the defendant. *Id.* at 789.

1398. FED. R. EVID. 404(b) includes "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

1399. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See, e.g.*, United States v. Batts, 573 F.2d 599, 603 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978) (evidence of prior activity in drugs was considered relevant to show defendant's knowledge, motive, and intent even though a different drug had been involved).

1400. 588 F.2d 1283 (9th Cir. 1979).

1401. *Id.* at 1285.

1402. Id. at 1286. The Advisory Committee's Note to FED. R. EVID. 403 defines unfair prejudice as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

"an inference which rule 404(b) specifically intends to prohibit."[1403] The court further cautioned that such evidence is "not looked upon with favor and must be carefully scrutinized to determine probative value."[1404]

The prejudice to Aims Back was further compounded by the trial judge's cautionary instructions to the jury. He gave them no specific reasons for the introduction of the evidence but did remark that it could be considered for " 'what value it may have in just establishing the whole pattern of the evening.' "[1405] This instruction was almost an open invitation for the jury to infer the commission of one criminal act from another. Consequently, the Ninth Circuit correctly concluded that Aims Back had not been afforded a fair trial.[1406]

Evidence of a prior theft was in issue in *United States v. Watkins*, where defendant was convicted of tax evasion.[1407] He had attempted to take advantage of tax laws which provide preferential treatment to income derived from the sale of timber. But Government figures showed that he had included an excessive amount of timber in this category.[1408] The Government also was able to successfully introduce evidence which suggested that the defendant's excessive lumber had been stolen from the property of another company.[1409] Defendant objected to the use of this evidence because the amount of timber he claimed excluded any illegally taken.[1410]

The *Watkins* court, however, found the theft evidence justified under rule 404(b) which allows for admission of other crimes in order to prove that defendant was acting in accordance with a general plan.[1411] The court found the evidence of stolen timber relevant to

1403. 588 F.2d at 1286.

1404. *Id.* at 1287.

1405. *Id.* at 1286. The court distinguished United States v. Sangrey, 586 F.2d 1312 (9th Cir. 1978), where testimony of the victim's friend that the defendant had raped her just before raping the victim was found to be nonprejudicial. This testimony, unlike that in *Aims Back*, was used to show opportunity because the defendant claimed that he had not been at the scene of the crime. 588 F.2d at 1286.

1406. 588 F.2d at 1286.

1407. 600 F.2d 201, 202 (9th Cir.), *cert. denied*, 444 U.S. 871 (1979). The defendant was charged with three counts. It is unclear how the evidence of the timber and alleged theft related to these counts.

1408. *Id.* at 203.

1409. *Id.*

1410. *Id.*

1411. *Id.* at 204. FED. R. EVID. 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.

prove a plan of providing "false information in an effort to avoid tax."[1412] Exactly why this conclusion follows was not made very clear by the opinion.

The *Watkins* "general plan" holding is one of the few exceptions to the general rule which excludes evidence of prior independent offenses.[1413] Under the general rule, the similarity between the two offenses must be so great that commission of one shows intent to engage in the other.[1414] If any significant degree of dissimilarity exists, there is a strong possibility that the evidence will be excluded.

For instance, in the 1979 Ninth Circuit case of *United States v. Marques*,[1415] evidence of prior cocaine sales was held to be inadmissible in a trial concerning charges of manufacturing methamphetamine.[1416] The court found significant dissimilarity because of the differences in drugs, activities (versus manufacture) and the scope of distribution.[1417]

The holding in *Marques* basically was consistent with that of *United States v. Moreno-Nunez* where evidence of defendant's attempted sale of marijuana and other contraband was admitted in a heroin conspiracy trial.[1418] Even though the drugs involved were not the same, the great similarity in the pattern of activity ("willingness to deal in illegal drugs") was certainly material to establishing defendant's motive and intent under rule 404(b).[1419]

However, in *United States v. Hernandez-Miranda*, the Ninth Circuit found significant dissimilarity between smuggling marijuana in a back pack and importing heroin in the trunk of a car.[1420] Even though smuggling was the common denominator in both offenses, the court justifiably found the connection too tenuous to support admission of

1412. 600 F.2d at 204.

1413. Rule 404(b) allows such evidence to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," *Accord*, Bowie v. United States, 345 F.2d 605, 609 (9th Cir. 1965).

1414. *E.g.*, United States v. Segovia, 576 F.2d 251, 252 (9th Cir. 1978).

1415. 600 F.2d 742 (9th Cir. 1979).

1416. *Id.* at 751.

1417. *Id.*

1418. 595 F.2d 1186, 1188 (9th Cir. 1979).

1419. *Id. Accord*, United States v. Segovia, 576 F.2d 251 (9th Cir. 1978) (defendant's willingness to arrange for the sale of marijuana was relevant to the issue of his predisposition to distribute cocaine because entrapment defense raised); United States v. Hearst, 563 F.2d 1331, 1336-37 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978) (evidence that the defendant had assisted her companions in escaping from a sporting goods store and in stealing a vehicle was relevant to show that she had not been acting under duress during her participation in the robbery).

1420. 601 F.2d 1104, 1108 (9th Cir. 1979).

the evidence. In so holding, the court noted that such a linkage could be established only if "common human experience demonstrates that it is more probable than not that a person who has knowingly smuggled marijuana on his person will know of the presence of contraband concealed in a vehicle."[1421]

Similarity of activities, however, was insufficient to overcome the strong prejudicial effect of evidence introduced by the Government in *United States v. Calhoun*.[1422] Defendant was charged with a bank robbery and had later purchased a car using $3,000 in small bills. None of the bills could be traced to the robbery in question, but the Government established that some were the fruits of a former robbery in which defendant had participated. The Ninth Circuit reversed the lower court conviction, holding that such evidence was overly prejudicial to defendant under rule 403 and that its only value was to establish criminal disposition, a practice which is prohibited by rule 404(b).[1423]

2. Use of prior convictions to impeach a testifying defendant

The Federal Rules of Criminal Procedure include specific guidelines for the use of a defendant's prior criminal record for purposes of impeachment if he testifies at trial. Rule 609(a) limits the use of such impeaching evidence to: "(1) crimes punishable by death or imprisonment of more than one year, provided that the probative value of such evidence outweighs its prejudicial effect; (2) crimes involving dishonesty or false statements."[1424]

1421. *Id.*

1422. 604 F.2d 1216 (9th Cir. 1979).

1423. *Id.* at 1218-19. *Cf.* United States v. Riggins, 539 F.2d 682, 683-84 (9th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977) (because it was stolen in the same burglary and cashed at same location at approximately the same time, introduction of money order bearing defendant's fingerprint was proper even though it was not among those money orders named in the indictment).

1424. FED. R. EVID. 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Rule 609(a) is a codification of the approach espoused by the District of Columbia Court of Appeals in Luck v. United States, 348 F.2d 763, 769 (D.C. Cir. 1965) (trial judge should use discretion in determining whether impeaching evidence should be admitted by considering such factors as "nature of prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction").

In *United States v. Cook*, the Ninth Circuit considered for the first time an appeal by a potential witness who refused to testify after he learned that under rule 609 his prior criminal record could be used for impeachment purposes.[1425] Prior to *Cook*, the Ninth Circuit generally followed the rule of *United States v. Murray*, which denied such an appeal when a defendant refused to testify.[1426] The courts considered the defendant's silence as a waiver of his right to later object to the adverse ruling which would have allowed the admission of impeaching evidence.[1427] The majority in *Cook*, however, recognized that such decisions were not in reality waivers, but rather were made for tactical reasons.[1428]

The *Murray* rule also presented a non-testifying defendant with what amounted to a Hobson's choice. If she remained silent, she would lose her right to appeal an adverse ruling on the admissibility of impeaching evidence. If she testified in order *not* to lose her appeal rights, she would instead lose the protections afforded by the fifth amendment right to remain silent.[1429]

The *Cook* majority also noted that prior to rule 609, courts were not required to make preliminary rulings on issues involving the admissibility of evidence.[1430] Rule 609, on the other hand, made such decisions mandatory.[1431] As a result, appeals courts could now review concrete decisions. But *Murray's* absolute bar against review frustrated this policy.

For these reasons, the *Cook* majority had little difficulty in dis-

1425. 608 F.2d 1175 (9th Cir. 1979) (en banc).

1426. 492 F.2d 178, 197 (9th Cir. 1973), *cert. denied*, 419 U.S. 942 (1974). *Accord*, United States v. Fulton, 549 F.2d 1325, 1327 (9th Cir. 1977). *See, e.g.*, Shorter v. United States, 412 F.2d 428, 431 (9th Cir.), *cert. denied*, 396 U.S. 970 (1969) (when defendant elected to tell jury about his former convictions in order to mitigate their adverse impact, he was deemed to have waived his opportunity to object to the issue of their admissibility on appeal). *Contra*, United States v. Hickey, 596 F.2d 1082, 1087 (1st Cir. 1979). *But see* United States v. Fearwell, 595 F.2d 771, 773, 775 (D.C. Cir. 1978) (Wright, J.) (appeals court remanded an erroneous lower court decision on rule 609 where defendant chose not to testify); United States v. Hayes, 553 F.2d 824, 826-27 (2d Cir. 1977) (trial court's rule 609 decision that it would have refused to suppress evidence under rule 609 was reviewed even though defendant chose not to testify).

1427. *See, e.g.*, United States v. Murray, 492 F.2d at 197.

1428. 608 F.2d at 1184.

1429. *Id.* at 1192 (Hufstedler, J., dissenting).

1430. *Id.* at 1185. *See, e.g.*, Shorter v. United States, 412 F.2d 428, 430 (9th Cir.), *cert. denied*, 396 U.S. 970 (1969) (because trial court had not rendered a decision on the admissibility of impeaching evidence, appeals court declined to review).

1431. Rule 609(a) requires a trial judge to weigh probative value of the evidence versus its impeaching effect except when prior crimes of falsehood or dishonesty are involved. See note 1424 *supra*.

carding the *Murray* rule.[1432] In its place, the Ninth Circuit now requires that prior to trial a non-testifying defendant must: (1) satisfy the court that he would be willing to testify if his prior convictions are excluded and (2) disclose the nature of his testimony in order that both the trial and appellate courts can perform the requisite balancing test required by Rule 609.[1433]

In addition, the court held that a defendant must now follow the procedures outlined in Federal Rule of Evidence 103. This rule requires a party to show that a substantial right has been affected by an evidentiary ruling.[1434]

Having moved this far away from the *Murray* waiver doctrine, the majority suddenly reversed course and retreated to the secure haven of legal tradition. It reinstated the waiver doctrine under the new name of "abandonment."[1435] The court went on to hold that if a defendant fails to properly comply with the requirements of rule 103, he will be deemed to have "abandoned the point."[1436] On this ambiguous note, the majority concluded that "pre-Rule 609 cases in this circuit still have some value."[1437]

1432. 608 F.2d at 1187.

1433. *Id.* at 1186.

1434. *Id.* FED. R. EVID. 103(a) provides:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

The concurring opinion authored by Judge Kennedy voiced concern over the speculative nature of this procedure since defendants would not be bound by their pretrial statements after they took the stand. 608 F.2d at 1189 (Kennedy, J., concurring). Thus, according to Judge Kennedy, courts would be forced to make advanced rulings based on proposed hypothetical testimony which might never materialize in the actual trial. *Id.*

But such concerns would still not justify a retention of *Murray* because a defendant's constitutional right to remain silent would still be jeopardized by its absolute waiver doctrine. *Cf., e.g.*, Brooks v. Tennessee, 406 U.S. 605, 611 & n.6 (1972) (Tennessee statute requiring that a defendant desiring to testify do so before other defense evidence is presented imposes a penalty on his fifth amendment rights if he chooses to initially remain silent).

1435. 608 F.2d at 1197 (Hufstedler, J., dissenting). *See id.* at 1186 where the majority requires non-testifying defendant to take certain steps to preserve his right to appeal.

1436. *Id.*

1437. *Id.* Both the majority and one concurring opinion cited New Jersey v. Portash, 440 U.S. 450 (1979), in support of or in opposition to the issue of whether a non-testifying defendant waived her right to appeal. 608 F.2d at 1185-86; *id.* at 1191 (Kennedy, J., concurring). But *Portash* did not address this question because it had already been dealt with by the New Jersey appellate court. See 440 U.S. at 462 n.2 (Powell, J., concurring).

With the waiver doctrine not so neatly disposed of, the Ninth Circuit then considered the merits of Cook's evidentiary claim. Cook had objected to the Government's intended use of his past robbery convictions for impeachment purposes.[1438] Because robbery is not classified as a crime involving "dishonesty or false statement,"[1439] a trial court, under rule 609, would be required to weigh the probative evidentiary value of such a conviction against its prejudicial effect.[1440] The district court in *Cook* failed to do this because it erroneously assumed that robbery convictions were crimes of falsehood which did not require a rule 609(a) balancing test.[1441]

Rather than reverse the lower court action and follow the express will of Congress, the Ninth Circuit adeptly carved out its own legislative exception to rule 609.[1442] This action arose from the court's fear that the particular defendant in *Cook* might take the stand and misrepresent himself. According to the court's hypothetical scenario, this would occur after a pretrial conditional ruling that would have prohibited the Government from impeaching defendant's testimony with his record of prior convictions. The advance conditional ruling would then have no relevance to what would later occur during trial. And, once it had been made, the Government would be forced to sit by silently unable to rebut defendant's misrepresentations.[1443]

1438. 608 F.2d at 1183.

1439. Courts have experienced difficulty in following the plain language of rule 609(a)(2) which exempts only crimes involving dishonesty or falsehood from the probative value balancing test. Other crimes such as larceny and robbery have found their way into this category. But the Senate Report covering rule 609(a) was very explicit on this subject. It stated that

> [w]ith respect to defendants, the committee agreed with the House limitation that only offenses involving false statements or dishonesty may be used. By that phrase, the committee means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of *crimen falsi* the commission of which involves some element of untruthfulness, deceit or falsification bearing on the accused's propensity to testify truthfully.

S. REP. NO. 93-1277, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7061. *Accord*, United States v. Gross, 603 F.2d 757, 758-59 (9th Cir. 1979) (per curiam) (Government did not meet burden for establishing probative value of prior narcotics offense); United States v. Fearwell, 595 F.2d 771, 775-76 (D.C. Cir. 1978) (petty larceny not within 609(a)(2)); United States v. Hastings, 577 F.2d 38, 41 (8th Cir. 1978) (narcotics); United States v. Ashley, 569 F.2d 975, 978-79 (5th Cir. 1978) (shoplifting); United States v. Seamster, 568 F.2d 188, 191 (10th Cir. 1978) (burglary); United States v. Hayes, 553 F.2d 824, 826-27 (2d Cir.), *cert. denied*, 434 U.S. 867 (1977) (importing narcotics); United States v. Smith, 551 F.2d 348, 362-63 (D.C. Cir. 1976) (armed robbery).

1440. FED. R. EVID. 609(a)(1).

1441. 608 F.2d at 1187; *id.* at 1194-95 (Hufstedler, J., dissenting).

1442. *Id.* at 1186-87. See *id.* at 1195 (Hufstedler, J., dissenting).

1443. *Id.* at 1187.

The *Cook* majority then concocted its own judicial home remedy for this perceived rule 609 shortcoming, namely, the "rare case exception." It noted that "in rare cases the *court's suspicions* may be adequately grounded in the prior course of the trial to permit an advance ruling that the accused's record will shed probative light on the testimony the accused has indicated he will offer."[1444] The court then concluded that *Cook* could qualify as one of these rare cases.[1445]

Cook's "rare case" exception is a classic example of how judicial gerrymandering can frustrate the clear intent of a piece of legislation. Nowhere in rule 609 are these provisions for *Cook*'s "rare case" exception. Rule 609 provides that for past felonies not involving crimes of dishonesty, the court must perform a balancing test, not a "rare case" test. In a balancing test the Government has the burden of showing that the probative value of the defendant's past convictions clearly outweigh its prejudicial effect.[1446] In a "rare case" such as *Cook* this burden will not be met.[1447]

3. Hearsay

Hearsay is defined in the Federal Rules of Evidence as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[1448] With certain exceptions, hearsay is not admissible in federal courts.[1449] The hearsay rule is based on the principle that the opponent is unable to confront and cross-examine[1450] the "real" witness in order to expose errors, weaknessess, or deficiencies in his state-

1444. *Id.* (emphasis added).

1445. *Id.*

1446. *E.g.*, United States v. Smith, 551 F.2d 348, 360 (D.C. Cir. 1976).

1447. 608 F.2d at 1195 (Hufstedler, J., dissenting). *See id.* at 1186 (trial judge did not establish a clear record on balancing); *id.* at 1187 (his balancing was inarticulate).

The Ninth Circuit did, however, in United States v. Gross, 603 F.2d 757 (9th Cir. 1979) (per curiam) apply rule 609 in a straightforward manner. There, a trial court had erroneously admitted evidence of defendant's prior narcotic conviction. The court noted that narcotics offenses did not fall within the *crimen falsi* category of rule 609(a)(2). Since the Government had not met its burden of showing the probative value of this evidence, the conviction was reversed. Although *Gross* did not acknowledge the "rare case exception," it relied directly on *Cook* for the proposition that the Government was required to meet its burden of proof. *Id.* at 758-59.

1448. FED. R. EVID. 801(c).

1449. FED. R. EVID. 802.

1450. Cross-examination contributes to reliability of testimony by shedding light on a witness' perception, memory, and narration and by exposing inconsistencies, incompleteness, and inaccuracies in his testimony. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 800[01], at 800-10 (1978) [hereinafter cited as WEINSTEIN].

ments.[1451] In addition, admission of hearsay evidence would circumvent two other Anglo-American judicial devices designed to insure accurate testimony: the oath and personal presence at trial.[1452] But certain exceptions have been carved out of the hearsay rule. In some circumstances there is an overriding need to admit hearsay, while in others there is a high probability that the hearsay will be trustworthy.[1453] In fact, the exceptions are so numerous that the rule has been said to be shaped by them.[1454]

a. statements against interest

One exception to the hearsay rule concerns declarations against interest. This exception allows a statement made by an unavailable declarant adverse to his own interest to be admitted into evidence, because it is assumed a person would not make a damaging statement against himself unless it were true.[1455]

Developments in the last century limited this exception to statements concerning the declarant's pecuniary or proprietary interest. Thus, declarations against penal interest are not admissible.[1456] This limitation has been criticized[1457] on the ground that a person would be as unlikely to make a statement rendering him liable to criminal punishment as he would be to subject himself to pecuniary or proprietary obligations.[1458]

The Federal Rules of Evidence[1459] and other modern codifications[1460] expressly include statements against penal interest as hearsay exceptions. However, some state codes do not.[1461] Consequently, the United States Supreme Court, in the 1979 case of *Green v. Georgia*, was confronted with the question of whether certain evidence, normally excluded under one of these state codes, should be admitted.[1462] In

1451. 5 J. WIGMORE, EVIDENCE § 1362, at 3 (J. Chadbourn rev. ed. 1974) [hereinafter cited as WIGMORE].

1452. WEINSTEIN, *supra* note 1450, at 800-11.

1453. WIGMORE, *supra* note 1451, § 1420, at 251-53.

1454. WEINSTEIN, *supra* note 1450, at 800-09.

1455. WEINSTEIN, *supra* note 1450, ¶ 804(b)(3)[01], at 804-90.

1456. *See* WIGMORE, *supra* note 1451, § 1476, at 349-58.

1457. *Id.* § 1477, at 360 ("barbarous doctrine"); C. MCCORMICK, LAW OF EVIDENCE § 278, at 674 (2d ed. 1972); Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451, 475 (1952) ("foolish rule").

1458. WEINSTEIN, *supra* note 1450, ¶ 804(b)(3)[01], at 804-91.

1459. FED. R. EVID. 804(b)(3).

1460. CAL. EVID. CODE § 1230 (West 1976); KAN. STAT. ANN. § 60-460(j) (1976); N.J. STAT. ANN. § 2A:84A, EVID. R. 63(10) (West 1976).

1461. *E.g.*, GA. CODE ANN. § 38-301 (Harrison 1974).

1462. 442 U.S. 95 (1979) (per curiam).

Green, two defendants, Green and Moore, had been tried separately and convicted of raping and murdering the same person. At a second trial, held for sentencing purposes, Green sought to introduce testimony indicating that he had not been present when the murder was committed. This testimony came from a witness who had testified at the trial of Moore. The witness stated that Moore had admitted to killing the victim after sending Green on an errand. At Moore's trial, this testimony had been admitted under Georgia' hearsay exception as an admission against the declarant. But at Green's punishment hearing the trial court had excluded the same testimony because it constituted a statement against penal interest as far as Moore was concerned.

The Supreme Court reversed, ruling that regardless of whether the testimony fell within Georgia's hearsay rule, its exclusion constituted a violation of due process since it was "highly relevant to a critical issue in the punishment phase of the trial . . . and substantial reasons existed to assume its reliability."[1463] In Green's case, reliability was underscored by the fact that the State had earlier considered the testimony highly relevant when it imposed the death sentence on Moore.[1464] But, as it had done in a prior case,[1465] the Court declined to rule on the constitutionality of Georgia's hearsay exception. It found, instead, that its application in "these unique circumstances" had deprived Green of a fair trial on the issue of punishment.[1466]

In view of the criticism of non-admissibility of declarations against penal interest and the trend to include such declarations within the hearsay exception, it seems curious that the United States Supreme Court has approached this issue on a case-by-case basis. The abandonment of such an archaic impediment to the fact-finding process is long overdue. The Supreme Court's hesitant approach to this issue can only prolong the lingering of this anachronism in state statutes.

b. expert opinion of business records

Records kept for business purposes can often be admitted under

1463. *Id.* at 97 (citations omitted).

1464. *Id.*

1465. In Chambers v. Mississippi, 410 U.S. 284 (1973), the Court held that "under the facts and circumstances" of that case, the exclusion of statements against penal interest deprived the defendant of a fair trial. *Id.* at 303.

1466. 442 U.S. at 97. In contrast, the Court's rulings in the areas of the confrontation and compulsory process clauses of the sixth amendment have persuaded one commentator to conclude that "the Court has rejected the more narrow interpretations of the two clauses in favor of broad readings which effectively constitutionalize the law of evidence in criminal cases." Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 625 (1978).

an exception to the hearsay rule. Rule 803(6) of the Federal Rules of Evidence provides such an exception for records that are regularly produced and can be attested to by a qualified expert witness.[1467] In *United States v. Licavoli*,[1468] the Ninth Circuit was called upon to decide an issue of first impression—the requirements for admissibility of an expert's opinion under the business records exception of rule 803(6).

Licavoli was indicted by a federal grand jury on a charge of knowingly receiving stolen property valued in excess of $5,000 and constituting a part of interstate commerce, a violation of 18 U.S.C. § 2315. The property consisted of a valuable painting ostensibly stolen from the home of its owner, Charma Signer. Signer and her insurance company had retained an appraiser who had valued the painting at $10,000, and the insurer had adopted the appraisal as the basis for settling Signer's insurance claim. Licavoli claimed that the painting was actually not worth more than the minimum federal jurisdictional amount of $5,000. Over his objection, the $10,000 appraisal was admitted into evidence as a business record of the insurance company. On appeal, Licavoli argued that the appraiser's qualifications as an expert witness had not been established in accordance with rule 702 of the Federal Rules of Evidence.[1469] But the court decided against an inflexible rule requiring that such qualifications be established in every case.[1470] Such a rule would be particularly burdensome and unnecessary in the case of many routine business records. These documents normally tend to be inherently trustworthy because of the relatively high degree of care that goes into their preparation.[1471] This degree of care undoubtedly occurred in *Licavoli* where an insurer, obviously interested in minimizing costs, readily accepted the appraiser's $10,000 valuation of the stolen prop-

1467. FED. R. EVID. 803(b) provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

1468. 604 F.2d 613 (9th Cir. 1979).

1469. *Id.* at 622. FED. R. EVID. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

1470. 604 F.2d at 622.

1471. *Id.*

erty.[1472] Since Licavoli failed to mount a serious challenge to the appraiser's qualifications, the $10,000 estimate was allowed to stand.[1473] Thus, the Ninth Circuit appears to be adopting a standard akin to a rebuttable presumption in favor of an expert's qualifications when a circumstantial endorsement of his work product or statements can be found.

c. summaries of business records

Federal Rule of Evidence 1006 permits the use of summaries when an exceptionally large number of documents are involved.[1474] In some instances, summaries can provide the only useful means by which both the court and jury can evaluate a large volume of evidence.[1475]

The latest Ninth Circuit opinion dealing with rule 1006 and summaries was *United States v. Johnson*.[1476] In *Johnson*, the Government attempted to admit a summary of documents under rule 1006 without first establishing that the underlying materials used as the basis of the summary were covered by one of the exceptions to the hearsay rule.[1477] In support of its position, the Government argued that rule 1006 obviated the need to comply with hearsay requirements.[1478]

The Ninth Circuit, in rejecting this contention, made a number of telling points concerning the structure of the Federal Rules of Evidence. It noted that rule 1006 was located under Article X which deals

1472. *Id.* at 623. *Cf., e.g.*, United States v. Gutierrez, 576 F.2d 269, 276 (10th Cir.), *cert. denied*, 439 U.S. 954 (1978) (court used circumstantial evidence to substantiate the validity of a cashier's check); United States v. Hudson, 479 F.2d 251, 253 (9th Cir. 1972), *cert. denied*, 414 U.S. 1012 (1973) (court did not require independent evidence in order to establish that the person who recorded certain selective service records actually had first hand knowledge, because the face of the record itself indicated as much).

The business evidence contested in *Hudson* was admitted under 28 U.S.C. § 1733(a)(1976) which is similar to FED. R. EVID. 803(b), which is set out at note 1467 *supra*. Section 1733(a) provides: "[B]ooks or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept."

1473. 604 F.2d at 622-23.

1474. FED. R. EVID. 1006 states:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court may order that they be produced in court.

1475. "The admission of summaries of voluminous books, records or documents offers the only practical means of making their contents available to judge and jury." FED. R. EVID. 1006, ADV. COMM. NOTES.

1476. 594 F.2d 1253 (9th Cir. 1979).

1477. *Id.* at 1257.

1478. *Id.* at 1255, 1257.

with best evidence exceptions. Hearsay exceptions, on the other hand, are found under Article VIII. An exception under one Article cannot by some magical formula produce an exception under another. Only Congress may expressly exempt a particular item of evidence in both areas.[1479] The court observed that Congress has done this with respect to certain types of evidence,[1480] but not in regard to the type of business records the Government sought to introduce in *Johnson*.[1481]

Before summaries of such records can be introduced, the proponent must satisfy the court that the underlying records are admissible.[1482] Since this was not done in *Johnson*, the Ninth Circuit reversed defendant's lower court conviction.[1483] The court, however, stopped short of the Second Circuit requirement[1484] that the underlying materials already be admitted into evidence before an exception to the best evidence rule can be invoked, holding that they must only be admissi-

1479. *See id.* at 1255: "[W]hen Congress intended to provide an exception to the hearsay rule for materials which it exempted from the best evidence rule in Article X, it did so by a provision in Article VIII."

1480. *Id.*

1481. For example, rule 1005 provides that public records may be proved with other than the original under some circumstances. Rules 803(8), (9), and (10), however, provide the hearsay exception for various types of public records. Similarly, rule 1007 allows the use of secondary materials to prove the contents of testimony or a written admission of a party. But rule 801(d)(2) provides that admissions are not subject to the hearsay rule.

594 F.2d at 1255.

The holding is supported by Judge Weinstein and Professor Berger: Before the chart, summary, or calculation may be admitted, it is necessary for the party offering the exhibit to lay a proper foundation for the admission of the original or duplicate materials on which the exhibit is based, or for the parties to stipulate to the admissibility of the materials. Charts, summaries, or calculations are inadmissible as evidence if, for any reason, the original or duplicate materials on which they are based are inadmissible. Thus, if the original materials contain hearsay and fail to qualify as admissible evidence under one of the exceptions to the hearsay rule, the chart, summary, or calculation based on that material is inadmissible.

5 WEINSTEIN, *supra* note 1450, ¶ 1006[03], at 1006-5 to 1006-6 (footnotes omitted).

1482. 594 F.2d at 1257.

1483. *Id.*

1484. "As was stated in Gordon v. United States, 438 F.2d 858, 876 (5th Cir. 1971), *cert. denied*, 404 U.S. 828, 92 S. Ct. 63, 30 L. Ed. 2d 56 (1971) . . . when summaries are used . . . the court must ascertain with certainty that they are based upon and fairly represent competent evidence already before the jury. . . ." United States v. Conlin, 551 F.2d 534, 538 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977). Although the Second Circuit still adheres to this requirement, the Fifth Circuit does not. There is a lack of unanimity in the interpretation of rule 1006 by the various circuits. *See, e.g.*, Case & Co., Inc. v. Board of Trade, 523 F.2d 355, 361 (7th Cir. 1975) (inference that summary is admissible if underlying evidence made available to opposing party); United States v. Scales, 594 F.2d 558, 563 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979) (purpose of summaries is to aid jury in examination of evidence already admitted); United States v. Smyth, 556 F.2d 1179, 1184 (5th Cir. 1977) (no requirement that underlying document must be admitted, but there is an implication that they must be admissible).

ble.[1485] This allows a judge discretion in determining that the foundation requirement has been satisfied, while maintaining the integrity of that requirement.

d. public records

Federal Rule of Evidence 803(8)[1486] provides a hearsay exception for public records and reports. The purpose of this exception was to avoid disruption of governmental work when public officials had to come into court to authenticate documents.[1487] Rule 803(8) supplanted section 1733 of title 28[1488] which was considered unduly restrictive, in that it applied only to records of federal departments or agencies, which necessitated resort to the less appropriate business record exception to the hearsay rule.[1489] In contrast, rule 803(8) does not distinguish between federal and non-federal offices; the only requirement is that the record be that of a public body.[1490]

In *United States v. Orozco*,[1491] the Ninth Circuit considered whether the rule 803(8) hearsay exception would apply to routine law enforcement reports. Defendants were convicted of possessing cocaine and heroin with intent to distribute. At their trial, computer data cards[1492] were admitted into evidence[1493] to show that one defendant's

1485. 594 F.2d at 1257 n.6. The court adopted the Fifth Circuit rule which requires only that the underlying materials be admissible, but not necessarily admitted.

1486. FED. R. EVID. 803 provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

1487. WEINSTEIN, *supra* note 1450, ¶ 803(8)[01], at 803-191.

1488. 28 U.S.C. § 1733(a)(1976) provides: "Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept."

1489. WEINSTEIN, *supra* note 1450, ¶ 803(8)[01], at 803-190. Unlike rule 803(6), which governs the admissibility of business records, rule 803(8) omits foundation requirements, because the assurances of accuracy are usually even greater for public records than for regular entries.

1490. *Id.* at 803-190.

1491. 590 F.2d 789 (9th Cir. 1979).

1492. The Treasury Enforcement Communications System (TECS) procedure is for a customs official to enter into a computer the license plate numbers of vehicles approaching the

car had been recorded crossing the Mexican border on the night of the arrest. The data on the cards consisted of license plate numbers which were routinely recorded by customs officials as vehicles approached an inspection station. Normally law enforcement reports and observations are not afforded any protection from the hearsay rule. But the court of appeals reasoned that Congress did not intend to exclude records of routine, non-adversarial matters.[1494] The routine recordation of license numbers of all vehicles passing the customs station was not of an adversarial confrontation nature which might cloud the perception of the customs inspector, and in the absence of circumstances indicating lack of trustworthiness, the Treasury Enforcement Communications System data cards were admissible evidence.[1495]

e. confessions of a co-defendant

In *Bruton v. United States*,[1496] the United States Supreme Court established a rule that the confession of a co-defendant who did not take the stand could not be introduced if the confession implicated the defendant. If admitted, the defendant would be deprived of his rights under the sixth amendment confrontation clause.

In *United States v. Vissars*,[1497] the Ninth Circuit held that a viola-

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border station; the computer determines whether a particular license number has appeared within the previous 72-hour period. *Id.* at 793.

1493. The district court had admitted the evidence under the "business records" exception, FED. R. EVID. 803(6), but the court of appeals felt the evidence qualified under the "public records" exception of rule 803(8)(B). 590 F.2d at 793.

1494. *Id.* In United States v. Grady, 544 F.2d 598, 604 (2d Cir. 1976), the Second Circuit upheld the admission of Irish police records of routine recording of serial numbers of weapons found in Northern Ireland, under rule 803(8)(B), stating:

> Rule 803(8)(B) allows admission of records and reports of public offices or agencies setting forth 'matters observed pursuant to duty imposed by law as to which matters there was a duty to report,' but is subject to an exception for 'matters observed by police officers and other law enforcement personnel.' In adopting this exception, Congress was concerned about prosecutors attempting to prove their cases in chief simply by putting into evidence police officers' reports of their contemporaneous observations of crime . . . . The reports admitted here were not of this nature; they did not concern observations by the Ulster Constabulary of the appellants' commission of crimes. Rather, they simply related to the routine function of recording serial numbers and receipt of certain weapons found in Northern Ireland.

1495. 590 F.2d at 794.

1496. 391 U.S. 123 (1968). The Court, in overruling Delli Paoli v. United States, 352 U.S. 232 (1957), held that limiting instructions that the testimony was inadmissible hearsay against the defendant were not an adequate substitute for the defendant's constitutional right of cross-examination. 391 U.S. at 137. The Court was concerned that, in spite of instructions to the contrary, jurors would not be able to disregard the wrongly-admitted testimony. *Id.* at 128.

1497. 596 F.2d 400 (9th Cir. 1979).

tion of the *Bruton* rule does not require an automatic reversal. Co-defendants Vissars and Keenberg were convicted of theft of government property. At a joint trial, an F.B.I. agent testified about a post-arrest conversation in which Vissars implicated Keenberg in the thefts. Keenberg then took the stand and admitted the thefts, relying on an entrapment defense. On appeal he claimed that the agent's testimony violated his constitutional right to confront an adversary because Vissars never took the stand.

The court noted that because Keenberg repeated on the stand all the evidence concerning his participation in the thefts, the agent's testimony was cumulative and provided the jury with no information they would not otherwise have heard. The court ruled that the *Bruton* violation was harmless beyond a reasonable doubt because other evidence properly admitted against Keenberg was overwhelming and because the agent's testimony had an insignificant impact on the minds of the jurors.[1498] In using the Constitutional error standard[1499] to find that a *Bruton* violation did not constitute reversible error, the Ninth Circuit followed well-defined precedent.[1500]

The Ninth Circuit applied the *Bruton* rule to a non-jury case in *United States v. Longee*.[1501] There, the trial court allowed an out-of-court statement of one defendant to be admitted against a co-defendant, even though the defendant did not take the witness stand. The holding is seemingly inconsistent with an earlier ruling in *Cockrell v. Oberhauser*,[1502] in which the Ninth Circuit held that the *Bruton* rule does not apply in a non-jury trial because a judge is assumed to be capable of applying the law of limited admissiblity.[1503] In *Cockrell*, however, one defendant in a joint trial was tried by a jury and the other by the court, and the trial judge had carefully instructed the jury on the limited admissiblity of certain statements against the defendant in the

1498. *Id.* at 404.

1499. See notes 1565-88 *infra* and accompanying text.

1500. *E.g.*, Harrington v. California, 395 U.S. 250, 254 (1968) (*Bruton* violation harmless error where other evidence was overwhelming and challenged testimony was cumulative); Schneble v. Florida, 405 U.S. 427, 430-32 (1972) (*Bruton* violation harmless error where evidence of guilt was overwhelming and prejudicial impact of challenged statements was insignificant).

1501. 603 F.2d 1342 (9th Cir. 1979).

1502. 413 F.2d 256 (9th Cir. 1969), *cert. denied*, 397 U.S. 994 (1970).

1503. *Id.* at 258. Other courts have cited *Cockrell* for this proposition: Young v. Maryland, 455 F.2d 679, 687 (4th Cir. 1972) (Sobeloff, S.C.J., dissenting); United States v. Corbin Farm Service, 444 F. Supp. 510, 538 n.13 (E.D. Cal. 1978).

jury trial.[1504] The appellate court reasoned that nothing in *Bruton* suggests that the judge was incapable, in the non-jury trial, of applying the law that he had himself announced.[1505] In *Longee*, by contrast, the trial judge made no attempt to disregard the impermissible testimony. In fact, he had specifically referred to it in his findings.[1506] The distinguishing factor in these cases is apparently some indication that the trial judge recognized the evidentiary restrictions mandated by *Bruton* and complied with them in his decision.

4. Prosecutorial Misconduct

a. use of perjured testimony

A criminal defendant is denied due process of law if his conviction is based on perjured testimony knowingly used by the prosecution.[1507] The same is also true if the prosecution allows unsolicited false testimony to be presented and permits it to go uncorrected.[1508] False testimony that relates only to the credibility of a witness is also covered by this principle.[1509]

In *Carothers v. Rhay*,[1510] decided in 1979, the Ninth Circuit was confronted by a similar question: whether a defendant's due process rights had been violated when the prosecutors knew that one of their witnesses was in defendant's words "an admitted perjuror."[1511] The principal evidence introduced against the defendant was the testimony

1504. This was not sufficient under *Bruton*, 391 U.S. 123, and the conviction of this defendant was reversed. 413 F.2d at 257, 258.

1505. *Id.* at 258.

1506. 603 F.2d at 1345.

1507. Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam).

1508. Alcorta v. Texas, 355 U.S. 28, 31 (1957) (per curiam). In *Alcorta*, a man accused of murdering his wife admitted his guilt but claimed the killing was done in a fit of passion from finding his wife, whom he had suspected of infidelity, kissing another man. *Id.* at 31-32. The other man had told the prosecutor of an affair with the victim and was advised not to volunteer this information but to answer truthfully if questioned about it. At trial, he was questioned about his relationship with the victim but denied anything more than a casual friendship. The prosecutor did not challenge this testimony. The Supreme Court reversed, holding that the defendant had not been accorded due process of law. *Id.*

1509. Napue v. Illinois, 360 U.S. 264, 269 (1959). A prosecution witness testified that he had received no promise of consideration in return for his testimony. The state attorney knew this was false and did not correct it. *Id.* at 265. The Supreme Court noted that "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . . ." It therefore ruled that "[t]he principle that a state may not knowingly use false evidence, including: [f]alse testimony, to obtain a tainted conviction . . . does not cease to apply merely because the false testimony goes only to the credibility of the witness." *Id.* at 269.

1510. 594 F.2d 225 (9th Cir. 1979).

1511. *Id.* at 229.

of an accomplice, who admitted at trial that he had previously lied to investigating officers and to a special inquiry judge. The court ruled that this admission merely went to the credibility of the witness, which "was fully explored at trial and was properly a matter for the consideration of the jury."[1512] The court held that the perjured testimony doctrine does not apply when there is no allegation of any specific evidence presented that the prosecutor knew to be false.[1513]

b. evidence of defendant's post-arrest silence

In *Doyle v. Ohio*,[1514] the United States Supreme Court held that it is a violation of due process to use a defendant's silence, either at the time of arrest or after giving *Miranda* warnings, for impeachment purposes.[1515] In 1978, the Ninth Circuit further defined this rule in *Douglas v. Cupp*,[1516] holding that even an inadvertent mention of a defendant's post-arrest silence necessitated reversal of a conviction.[1517] Even though the defendant's silence was not used either to suggest guilt or to impeach the defendant, and was not mentioned during the rest of the trial,[1518] the court concluded that a juror might have *inferred* that the defendant was guilty and that his alibi defense was a later fabrication.[1519]

But, some nine months later the Ninth Circuit effectively blunted the impact of *Douglas* with its decision in *Bradford v. Stone*.[1520] The prosecutor, during cross-examination, asked the defendant if he had said anything about his alibi to the arresting policeman. Defendant admitted he had not. The prosecutor then used this silence to attack the defendant's credibility. Although the court found both the cross-

1512. *Id.*
1513. *Id.*
1514. 426 U.S. 610 (1976).
1515. Id. at 619. The Court also reasoned that post-arrest silence in response to *Miranda* warnings is "insolubly ambiguous because of what the State is required to advise the person arrested." *Id.* at 617 (footnote omitted). Even in a decision concerning a pre-*Miranda* trial, however, the Ninth Circuit held that admission of a policeman's testimony as to the defendant's silence in the face of accusatory statements, as an implied admission of guilt, was violative of the defendant's fifth amendment privilege against self-incrimination. Cockrell v. Oberhauser, 413 F.2d 256, 257 (9th Cir. 1969), *cert. denied*, 397 U.S. 994 (1970).
1516. 578 F.2d 266 (9th Cir. 1978), *cert. denied*, 459 U.S. 1081 (1979).
1517. *Id.* at 267.
1518. *Id.* at 268 (Carter, J., dissenting).
1519. *Id.* at 267. The Ninth Circuit has refused to extend the rule prohibiting the impeachment of an accused by his prior silence to situations in which the silence of non-defendant witnesses might conceivably suggest that the explanation of a defendant is recent fabrication. United States v. Shields, 571 F.2d 1115, 1118 (9th Cir. 1978).
1520. 594 F.2d 1294 (9th Cir. 1979) (per curiam).

examination exchange and the prosecutor's summation comments to be violations of the rule set forth in *Doyle*, it concluded that neither warranted a reversal. With regard to the exchange, the court simply stated that defense counsel did not object to the prosecutor's question, nor did he ask that the answer be stricken.[1521]

As to the summation comments, the court held that by virtue of defense counsel's closing argument, in which he suggested possible explanations for a defendant's failure to discuss his alibi, the door had been opened for the prosecution to respond by suggesting contrary explanations.[1522] The court also concluded that the remainder of the evidence precluded doubt about the verdict.[1523] The distinguishing factor between the two decisions appears to be the sufficiency of other evidence. In *Douglas* the majority felt that "much of the evidence" was "equivocal."[1524] In *Bradford*, on the other hand, the court characterized the defendant's alibi as "inconclusive and uncorroborated."[1525] Even in *Douglas*, however, the sufficiency of other evidence was in some doubt, as the dissent concluded that other evidence against Douglas was sufficient to sustain a conviction.[1526] Unfortunately, the facts in *Douglas* were not published.[1527]

5. Opinion testimony

a. expert opinion

Rule 702 of the Federal Rules of Evidence[1528] authorizes the admissibility of expert testimony in a limited set of circumstances. Rule 104(a) gives the trial judge the discretion to determine whether or not an "expert" witness has the necessary qualifications.[1529]

1521. *Id.* at 1296.

1522. *Id.*

1523. *Id.*

1524. Douglas v. Cupp, 578 F.2d at 267.

1525. 594 F.2d at 1296.

1526. "In addition, the testimony of the victims of the burglary provided extensive affirmative evidence of Douglas's guilt, including his admission of guilt when confronted by the victims." 578 F.2d at 268 (Carter, J., dissenting).

1527. The case was tried in a base-line state court. The Oregon Court of Appeals affirmed the conviction without opinion. 23 Or. App. 221, 541 P.2d 833 (1975). The defendant did not go to the Oregon Supreme Court but rather sought federal habeas corpus relief in a district court: this relief was denied. 578 F.2d at 266-67.

1528. FED. R. EVID. 702 reads: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

1529. FED. R. EVID. 104(a) states:

Preliminary questions concerning the qualification of a person to be a witness, the

The admissibility of expert opinion recently arose in the Ninth Circuit concerning the controversial subject of hypnosis. While many courts are reluctant to allow in-court hypnosis, many are more willing to allow a witness' memory to be refreshed by hypnotic means out of court.[1530] Some jurisdictions, including the Ninth Circuit, permit pretrial hypnosis of witnesses for the purpose of memory refreshment in both civil[1531] and criminal[1532] cases. In these jurisdictions there is no longer any question concerning the reliability of such evidence, so the fact that recollection was hypnotically refreshed goes to the issue of credibility rather than admissibility.[1533] This means there is no need to establish a prior foundation concerning the reliability of such evidence by means of expert testimony before the evidence itself is introduced.[1534]

In *United States v. Awkard*,[1535] a 1979 Ninth Circuit case, a Government witness, after hypnosis, was able to recall the identity of participants in a prison murder. The trial court allowed his testimony to be preceded by that of a Government expert who attested to the reliability of hypnotic stimulation in enhancing memory over the defense counsel's objection that there was no need for such expert opinion.[1536] Since admissibility of the hypnotically educed evidence was not at issue, there was no need for a foundation to be established prior to the testimony itself. Thus the Ninth Circuit ruled that the trial court had

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existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

1530. *Refreshing the Memory of a Witness Through Hypnosis*, 5 UCLA-ALASKA L. REV. 266, 282 (1976). *See also* Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N.L. REV. 1 (1977).

1531. In Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974), the court ruled that hypnotism did not render testimony inherently untrustworthy and noted that the witness, a victim of a helicopter crash, testified about the accident from his present recollection, even though it was refreshed by hypnosis. The court noted that the fact of hypnosis affects credibility but not admissibility of evidence. *Id.* at 509-10.

1532. United States v. Adams, 581 F.2d 193 (9th Cir. 1978), *cert. denied*, 439 U.S. 1006 (1979), was the first Ninth Circuit criminal case in which hypnotically educed testimony was admitted. The court suggested minimum standards to be followed to ensure reliability, which include maintenance of complete stenographic records of interviews of hypnotized persons who later testify. *Id.* at 199 n.12.

1533. United States v. Awkard, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 100 S. Ct. 179 (1979).

1534. However, in United States v. Adams, 581 F.2d 193, 198-99 (9th Cir. 1978), *cert. denied*, 439 U.S. 1006 (1979), the court suggested that the opposing attorney could have objected to the evidence on the basis that a proper foundation was not laid.

1535. 597 F.2d 667.

1536. *Id.* at 669-70. See note 1540 *infra* and accompanying text.

failed to exercise its discretion[1537] in allowing an expert on hypnosis to testify in this regard.[1538] The Ninth Circuit cited several factors which supported its abuse-of-discretion finding. The defendant had not challenged the witness' recall ability;[1539] thus there was no need for the prosecution to raise the issue of reliability in the first instance. In addition, the expert testimony was found to have improperly buttressed[1540] the testimony of the witness who then testified as a result of the hypnotic stimulation. The court also ruled that it was error to permit the witness to testify on direct examination that he had been hypnotized.[1541]

b. lay opinion

Historically, witnesses were required to testify to "facts," rather than "opinions," because inference-drawing was considered to be the province of the jury.[1542] Inferences of witnesses having no greater skill than the jury were inadmissible when the jury was equally capable of drawing the same conclusions.[1543] Because of practical difficulties in application,[1544] and the realization that a distinct line cannot be drawn between fact and opinion,[1545] the so-called Opinion Rule has been criticized by commentators[1546] and eroded by courts and legislators.[1547]

1537. *Id.* at 670. Admission of expert testimony is within the discretion of the trial judge. United States v. Barnard, 490 F.2d 907, 913 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974). The general test regarding admissibility of expert testimony is whether the jury can receive "appreciable help" from such testimony. United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973). The judge must weigh the probative value of the testimony evidence against its prejudicial effect and this determination should not be disturbed unless blatantly erroneous. *Id.*

1538. 597 F.2d at 670. The expert was internationally recognized, and the court felt his testimony in support of the ability of the witness to recall events was prejudicial. *Id.*

1539. *Id.*

1540. *Id.* The rationale for not allowing expert testimony in this instance was analyzed in terms of other evidence rules. For instance, prior consistent statements by a witness may not be introduced unless an adverse party has charged the witness with recent fabrication or improper influence or motive. Furthermore, evidence of truthful character may be introduced only in the forms of opinion or reputation evidence, but only when the witness' character trait for veracity has been attacked. *Id.*

1541. However, the court found the errors were not prejudicial in view of the sufficiency of the other evidence. *Id.* at 671-72.

1542. *See* 7 J. WIGMORE, EVIDENCE, §§ 1917-20 (3d ed. 1940) [hereinafter cited as 7 WIGMORE].

1543. *Id.* § 1924 at 22.

1544. *Id.* § 1923 at 23.

1545. 3 WEINSTEIN, *supra* note 1450, ¶ 701[01] at 701-06.

1546. Wigmore advocated "the *entire abolition of the rule* as such." 7 WIGMORE, *supra* note 1542, § 1929 at 27 (emphasis in original).

1547. 3 WEINSTEIN, *supra* note 1450, ¶ 701[01] at 701-07.

Rule 701 of the Federal Rules of Evidence[1548] has abandoned the traditional rule of exclusion for a discretionary rule of admission.[1549] The rule requires that the lay witness' opinion or inference must be rationally based on his perception of matters testified to and be helpful to the trier of fact.[1550] Rule 701, when read in conjunction with rule 403,[1551] requires the trial judge to decide not only whether the proffered testimony will invade the province of the jury, but also whether it will be unduly prejudicial to the defendant.[1552]

In the 1979 case of *United States v. Young Buffalo*,[1553] the Ninth Circuit had to weigh the prejudicial and probative effects of witnesses identifying a criminal defendant from photographs. The defendant, convicted of bank robbery, had objected after his estranged wife and his probation officer had given their opinions about his resemblance to a robber depicted in bank surveillance photographs. The defendant contended that, since neither witness was an expert in photographic identification, the testimony usurped the function of the jury. He also argued that "the identifications by those close to [him] were more prejudicial than probative."[1554] After noting that rule 701 permitted lay testimony, the court conceded the danger of prejudice in this case, but not for the reason defendant stated. The court cited *United States v. Butcher*,[1555] a 1977 Ninth Circuit decision, for the proposition that the use of such testimony is not encouraged because the balance does not weigh heavily in favor of probative value over prejudicial effect.

In *Butcher*, a defendant was identified from bank surveillance photographs by two law enforcement officials and the defendant's state parole officer. The *Butcher* court felt the possibility of prejudice was increased because the defendant "was presented as a person subject to a certain degree of police scrutiny."[1556] The court also discussed an

1548. FED. R. EVID. 701 provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

1549. 3 WEINSTEIN, *supra* note 1450, ¶ 701[01] at 701-09.

1550. *Id.* at 701-10.

1551. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

1552. *See* United States v. Butcher, 557 F.2d 666, 669 (9th Cir. 1977).

1553. 591 F.2d 506 (9th Cir.), *cert. denied*, 99 S. Ct. 2178 (1979).

1554. *Id.* at 513.

1555. 557 F.2d 666.

1556. *Id.* at 669.

issue that was not mentioned in *Young Buffalo*; namely, the merits of requiring the Government to initially demonstrate the necessity of using a probation officer instead of some other witness.[1557] That practice is questionable because after an officer testifies the defendant cannot freely examine the effect which the relationship between himself and the witness might have had on the officer's testimony without revealing the prejudicial fact that the defendant was a parolee. Although admitting the possibility of such prejudice, the *Butcher* court felt that the lower court did not commit reversible error, because (1) a hearing on the admissibility of the officers' testimony had been conducted, at which time the defendant had the opportunity to extensively examine the relationship between the defendant and the witnesses, and (2) the other evidence was ample, by itself, to support the conviction.[1558]

The *Young Buffalo* court came to the same conclusion by a different route. It implied that the testimony of the wife and parole officer carried little weight, stating that the testimony was somewhat equivocal and cumulative to identifications of other witnesses. The court also noted that neither the wife nor the parole officer had unqualifiedly identified the defendant as the man in the photographs.[1559]

Although the contention that the identifications were prejudicial because they were made by those close to the defendant was not discussed in *Young Buffalo*, the 1979 decision in *United States v. Saniti*[1560] seems to be dispositive of this issue. There, the witnesses who identified the defendant from bank surveillance photographs were his roommates. Rather than finding prejudice in that fact, the Ninth Circuit implied that their close relationship increased the probative value of their testimony, noting that "[t]heir perception of his appearance and clothing were rationally based upon their association with him."[1561]

6. Harmless error

Trial court errors in admitting or excluding evidence are deemed to be harmless when they are found not to affect "substantial rights" of a party.[1562] The reviewing court must view the alleged error in the context of the particular circumstances of the case.[1563] Trial court errors in admitting or excluding evidence are divided into two groups, constitu-

1557. *Id.* at 670.
1558. *Id.*
1559. 591 F.2d at 513.
1560. 604 F.2d 603 (9th Cir. 1979).
1561. *Id.* at 605.
1562. 1 WEINSTEIN, *supra* note 1450, ¶ 103[06] at 103-43; *see* 28 U.S.C. § 2111 (1976).
1563. Kotteakos v. United States, 328 U.S. 750, 762 (1946).

tional and non-constitutional, with a different standard used for each.[1564]

a. constitutional error

Federal constitutional errors are errors that violate federal constitutionally guaranteed rights.[1565] In *Chapman v. California*,[1566] the United States Supreme Court declined to rule that all federal constitutional errors are harmful[1567] and stated that some constitutional errors in particular cases may be so unimportant and insignificant that they may be deemed harmless.[1568] The Court, declaring adherence to the standard of *Fahy v. Connecticut*,[1569] held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[1570] This means that the error complained of must be shown not to have contributed to the adverse verdict.[1571] The degree of "contribution" required was left unclear. If the Court meant that the error must not contribute *at all* to the verdict, it would seem to belie the Court's acknowledgement that some errors are harmless because it could be argued that *any* error contributes, at least to some degree, to the verdict.

This question was addressed in *Harrington v. California*,[1572] in which the Court found a violation of the *Bruton* rule[1573] to be harmless error beyond a reasonable doubt. The majority, responding to a vociferous dissent, claimed to be reaffirming *Chapman*, and held that the case against the petitioner was so overwhelming that, unless it could be said that *no* violation of the *Bruton* rule could constitute harmless error, the conviction must be affirmed.[1574] Three Justices dissented,[1575]

1564. United States v. Valle-Valdez, 554 F.2d 911, 915 (9th Cir. 1977).

1565. *Id.* at 916; Chapman v. California, 386 U.S. 18, 21 (1967). Some examples are the fifth amendment (self-incrimination clause), *id.*; the sixth amendment (confrontation clause), Schneble v. Florida, 405 U.S. 427 (1971); the fourth amendment (exclusionary rule based on unreasonable searches), United States v. Barclift, 514 F.2d 1073 (9th Cir.), *cert. denied*, 427 U.S. 842 (1975).

1566. 386 U.S. 18, 21 (1967).

1567. *Id.* at 22. There are certain exceptions, such as errors dealing with coerced confession, right to counsel and right to an impartial judge. *Id.* at 23 & n.8.

1568. *Id.* at 22.

1569. 375 U.S. 85, 86-87 (1963) ("[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction").

1570. Chapman v. California, 386 U.S. at 24

1571. *Id.*

1572. 395 U.S. 250 (1969).

1573. Bruton v. United States, 391 U.S. 123 (1968). *See* note 1500 *supra* and accompanying text.

1574. 395 U.S. at 254.

1575. Brennan, J., joined by Marshall, J., and Warren, C.J. *Id.* at 255.

and charged that this decision overruled *Chapman*, claiming *Chapman* meant "that for an error to be harmless it must have made *no* contribution to a . . . conviction."[1576] The dissent accused the majority of shifting "the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided 'overwhelming' support for the conviction,"[1577] and noted that the Supreme Court in *Chapman* had *criticized* the reliance of California courts on "overwhelming evidence" in finding error to be harmless.[1578]

Nevertheless, the Supreme Court again relied on "overwhelming" untainted evidence in *Schneble v. Florida*[1579] in finding a *Bruton* rule violation to be harmless error. In an attempt to clarify its position, it stated the *Chapman* rule in three different ways: that as beyond a reasonable doubt the alleged error was harmless;[1580] that there was no reasonable possibility that the error contributed to the verdict;[1581] and that the minds of an average jury would not have found the evidence significantly less persuasive had the error not occurred.[1582] By its decision, the Court made clear that, no matter which formulation is used, the impact of untainted evidence in deciding harmless error is not prohibited.

The Ninth Circuit has followed this approach. In the 1979 case of *Bradford v. Stone*,[1583] the court held that a *Doyle* violation[1584] was harmless beyond a reasonable doubt and " 'did not contribute to the verdict obtained.' "[1585] Although the court cited only *Chapman* for the constitutional error rule, one of the factors contributing to its decision was that "the remainder of the evidence preclude[d] doubt about the verdict."[1586] The court was more exacting in citing authorities in *United States v. Vissars*,[1587] another 1979 decision. There, a *Bruton* violation was held to be harmless beyond a reasonable doubt, but the court cited both *Harrington* and *Schneble* for the proposition that a

1576. *Id.* (Brennan, J., dissenting) (emphasis in original).
1577. *Id.*
1578. *Id.* at 256; Chapman v. California, 386 U.S. at 23.
1579. 405 U.S. 427 (1972).
1580. *Id.* at 430.
1581. *Id.* at 432.
1582. *Id.* (citing Harrington v. California, 395 U.S. 250, 254 (1969)).
1583. 594 F.2d 1294 (9th Cir. 1979).
1584. In Doyle v. Ohio, 426 U.S. 610 (1976), it was "held that the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after [he received] *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* at 619.
1585. 594 F.2d at 1297 (quoting Chapman v. California, 388 U.S. 18, 24 (1966)).
1586. *Id.* at 1296.
1587. 596 F.2d 400 (9th Cir. 1979).

Bruton error can be harmless beyond a reasonable doubt because of "overwhelming" properly admitted evidence.[1588] This broadens the scope of "harmless error," with the result that fewer convictions will be overturned for constitutional errors than under the stricter interpretation of *Chapman*.

b. non-constitutional error

Errors in such matters as jury instructions, comments by counsel, and rulings on admissibility of evidence where fourth amendment claims are not involved have generally been considered "non-constitutional."[1589] As the Ninth Circuit stated in 1977 in *United States v. Valle-Valdez*,[1590] the interests involved in such cases are not sufficiently important to merit explicit constitutional protection; the court stated it was therefore not compelled to use the *Chapman* standard.[1591] The court discussed two different standards for deciding reversibility of non-constitutional errors, and chose the more lenient one. Subsequent Ninth Circuit cases, however, have not been consistent.

The court in *Valle-Valdez* rejected the "highly probable" standard under which an appellate court will reverse unless it is highly probable that the error did not materially affect the verdict.[1592] The court explicitly adopted the "more probable than not" standard, under which an appellate court will reverse unless it is more probable than not that the error did not materially affect the verdict.[1593] In rejecting both the *Chapman* and "highly probable" standards in cases where errors do not reach federal constitutional proportions, the court showed concern for judicial economy by noting that a test more rigorous than that chosen would necessarily result in more reversals.[1594] However, the court observed that two previous Ninth Circuit cases[1595] had apparently used the *Chapman* standard, and ended the discussion with the statement, curious in light of the prior analysis, that, for purposes of the instant decision, any inconsistency need not be resolved because under either the *Chapman* or the "more probable than not" standard, the *Valle-*

1588. *Id.* at 404.
1589. United States v. Valle-Valdez, 554 F.2d 911, 916 (9th Cir. 1977).
1590. *Id.*
1591. *Id.*
1592. *Id.* at 915-16.
1593. *Id.* at 916.
1594. *Id.*
1595. United States v. Duhart, 496 F.2d 941 (9th Cir.), *cert. denied*, 419 U.S. 967 (1974) (non-constitutional error harmless beyond a reasonable doubt); United States v. Rea, 532 F.2d 147 (9th Cir.), *cert. denied*, 100 S. Ct. 179 (1979) (reversal because non-constitutional error not harmless beyond a reasonable doubt).

Valdez conviction must be overturned.[1596]

Two years later, the inconsistency has still not been resolved. Four 1979 Ninth Circuit cases use either the *Chapman* standard, the "more probable than not" standard, or a hybrid. In *United States v. Awkard*,[1597] the court held that impermissible bolstering of a witness' testimony was not reversible error under the facts because it was "more probable than not" that the erroneous admission of the evidence did not materially affect the jurors' verdict;[1598] the court cited *Valle-Valdez*. However, in *United States v. Lasky*,[1599] substantially the same panel[1600] (including one circuit judge[1601] who sat in both *Awkard* and *Valle-Valdez*) held that a non-constitutional error was "harmless beyond a reasonable doubt," and cited *Chapman*.[1602] Similarly, in *United States v. Marques*,[1603] a different panel[1604] decided that the admission of evidence of prior similar illegal activity "was harmless beyond a reasonable doubt because other evidence against [appellant] was substantial to the point of being overwhelming."[1605] The court did not cite *Chapman*, but the language used was the *Chapman* standard, as construed in subsequent Supreme Court cases, almost verbatim.[1606] In *United States v. Hernandez-Miranda*,[1607] yet another panel[1608] held that the admission of evidence of a prior offense of the defendant was error, but was not "prejudicial." The only reason given for this conclusion was that "[a]ll of [the] evidence" (including, apparently, the inadmissible prior offense evidence) created "a strong, if not overwhelming, case" against the defendant.[1609] This is neither the "more probable than not" standard nor the *Chapman* standard.[1610] As no authority was cited for it, it

1596. 554 F.2d at 917.
1597. 597 F.2d 667 (9th Cir.), *cert. denied*, 100 S. Ct. 179 (1979).
1598. *Id.* at 671-72.
1599. 600 F.2d 765 (9th Cir. 1979).
1600. The *Awkard* panel consisted of Goodwin, Tang and East; the *Laskey* panel consisted of Goodwin, Tang and Merrill.
1601. Goodwin, C.J.
1602. 600 F.2d at 770.
1603. 600 F.2d 742 (9th Cir.), *cert. denied*, 100 S. Ct. 119 (1979).
1604. Carter, Choy and Bright.
1605. 600 F.2d at 751.
1606. *See* notes 1566-88 *supra* and accompanying text.
1607. 601 F.2d 1104 (9th Cir. 1979).
1608. Hufstedler, Anderson and Firth.
1609. 601 F.2d at 1109.
1610. United States Supreme Court cases construing *Chapman* have indicated that one factor an appellate court may consider in applying the standard is whether *untainted* evidence of guilt is "overwhelming." *See* notes 1566-88 *supra* and accompanying text.

is possible the court is breaking new ground here, which is certainly not needed if consistency throughout the circuit is desirable.

The *Chapman* constitutional error standard is stricter than the "more probable than not" non-constitutional error standard, and can therefore be expected to result in more reversals of convictions. Of course, where an error is found harmless under the constitutional error test, as in *Marques*, *Lasky* and *Valle-Valdez*, it will be harmless under the less stringent test. A potential equal justice problem might arise if a court applying the *Chapman* standard might overturn a conviction that would not be reversed under the lesser standard. For this reason, it is advisable that all panels of the Ninth Circuit use the same test in deciding whether a non-constitutional error is harmless. To the extent that the analysis of *Valle-Valdez* is persuasive, that test should be the "more probable than not" standard.

7. Presumptions

A presumption is a procedural rule which requires the existence of a "presumed fact" to be assumed when a "basic fact" is established, unless and until a certain specified condition is fulfilled.[1611] Presumptions are utilized in federal law to lessen the prosecution's burden by authorizing shortcuts in proof and exerting pressure on persons most knowledgeable to come forward with an explanation.[1612] Numerous state and federal criminal statutes contain presumptions, which, like other statutes, are invalid if they violate federal constitutional rights of a criminal defendant.

A number of United States Supreme Court cases have defined standards under which the constitutionality of criminal statutory presumptions are tested. In *Tot v. United States*,[1613] the Supreme Court in 1943 held that the controlling test was "that there be a rational connection between the facts proved and the facts presumed."[1614] The Court stated that a statutory presumption will not be upheld if the inference of one fact from proof of the other "is arbitrary because of lack of connection between the two in common experience."[1615] In the 1969 decision of *Leary v. United States*,[1616] the Court, attempting to clarify the "rational connection" concept, held that a criminal statutory presump-

1611. 1 WEINSTEIN, *supra* note 1450, ¶ 300[01] at 300-1.
1612. *Id.*, ¶ 303[01] at 303-8.
1613. 319 U.S. 463 (1943).
1614. *Id.* at 467.
1615. *Id.* at 467-68.
1616. 395 U.S. 6 (1969).

tion is irrational and arbitrary, and therefore unconstitutional, unless it can be said with substantial certainty "that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[1617] Because the presumption in question did not pass this test, the Court did not reach the issue of whether a criminal statutory presumption that does pass this test must also satisfy the criminal "reasonable doubt" standard if an essential element of the crime charged depends upon its use.[1618]

This issue was reached in 1979 in *Ulster County Court v. Allen*.[1619] The defendants had been convicted of illegal possession of two handguns that had been found in the handbag of a female companion with whom they had been travelling by automobile when they were arrested. The New York statute under which they were convicted stated that, with certain exceptions, the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle.[1620] The defendants sought habeas corpus relief in federal court. The Court of Appeals for the Second Circuit, without deciding if the presumption was constitutional as applied in this case, had concluded that the presumption was unconstitutional on its face, under the *Leary* test.[1621] The Supreme Court reversed, distinguishing between permissive and mandatory presumptions, and enunciating a different standard for each.

The Court first noted that the ultimate test of a presumption's constitutional validity is that it "must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt."[1622] The Court then defined a "permissive presumption" as one in which the trier of fact is allowed, but not required, to infer the presumed fact from the proven fact.[1623] Because the burden of proof remains with the State, and the trier of fact is free to accept or reject the presumption, the Court reasoned that the facts of the particular case are to be considered in deciding if the connection between the assumed and proven facts is valid.[1624] The proper test to apply is the *Leary* standard, as long as "the presumption

1617. *Id.* at 36.
1618. *Id.* at 36 n.64.
1619. 99 S. Ct. 2213 (1979).
1620. *Id.* at 2217-18 (citing N.Y. PENAL LAW § 265.15(3) (McKinney 1980)).
1621. Allen v. County Court, 568 F.2d 998, 1007 (2nd Cir. 1977), *reversed*, 99 S. Ct. 2213 (1979).
1622. 99 S. Ct. at 2224.
1623. *Id.*
1624. *Id.*

is not the sole and sufficient basis for a finding of guilt," since the prosecution may rely on all the evidence to meet the "reasonable doubt" standard required for a guilty verdict.[1625]

The Court defined a "mandatory presumption" as one *requiring* the factfinder to find the assumed fact from the proven fact, at least until the defendant rebuts the connection between the two.[1626] It thus may affect both the strength and the placement of the "no reasonable doubt" burden. Because the trier of fact must accept the presumption (absent a sufficient rebuttal by the defendant), and may not reject it based on an independent evaluation of the particular facts of the case, "the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases."[1627] For this reason, mandatory presumptions are judged on their face. Because the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption, unless the proven fact supports the inference of guilt beyond a reasonable doubt.[1628] The Court noted that the New York statutory presumption involved was a permissive one, and it was therefore error for the appellate court to judge it on its face. The Court ruled that, considering the facts of the case, the jury could have validly assumed that it was more probable than not the assumed fact flowed from the proven fact.[1629]

8. Spousal privilege

The marital relationship yields two types of privileges that are recognized in federal courts.[1630] The first protects confidential communications between spouses, and the second prevents one spouse from testifying against the other in a criminal trial.[1631] The reason most often cited for the privileges is that they act to protect "the sanctity and tranquility of the marital relationship."[1632]

The privilege which renders a spouse incompetent to testify against his or her marital partner is also known as the "anti-marital facts privilege." It has been criticized as an impediment to the truth-

1625. *Id.* at 2230.
1626. *Id.* at 2224-25.
1627. *Id.* at 2226.
1628. *Id.* at 2229.
1629. *Id.* at 2230.
1630. United States v. Apodaca, 522 F.2d 568, 570 (10th Cir. 1975).
1631. *Id.*
1632. Lutwak v. United States, 344 U.S. 604, 615 (1953). *See also* 8 WIGMORE, *supra* note 1451, § 2228 at 214-15 and § 2332 at 642-44.

finding process,[1633] and, at least where a spouse wants to testify, as an illogical anachronism.[1634] In such a case, it can be argued, the marital relationship is beyond the point of being protected. The United States Supreme Court, however, rejected this argument in the 1958 decision *Hawkins v. United States*.[1635] It reasoned that some troubled marriages can be saved, absent an unforgivable act by one of the parties, such as adverse testimony in a criminal proceeding.[1636]

Nevertheless, there are a number of exceptions to the rule. The privilege does not apply in proceedings brought by one spouse against the other for personal wrong or injury, such as battery, bigamy and abandonment.[1637] In 1979, the Ninth Circuit utilized two other exceptions in refusing to recognize the privilege in *United States v. Saniti*[1638] and *Garcia-Jaramillo v. INS*.[1639] In *Saniti*, the trial court had found that the defendant had entered into the marriage for the purpose of invoking the marital privilege. The appellate court followed well-defined precedent[1640] in holding that the privilege cannot be claimed when the marriage is not entered into in good faith. In *Garcia-Jaramillo*, the defendant had entered into a sham marriage in order to avoid immigration laws but had obtained a divorce prior to his deportation hearing. In denying the spousal privilege, the court cited *Volianitis v. INS*,[1641] which had noted that the generally accepted rule is that "divorce removes any bar of incompetency."[1642]

In *United States v. Tsinnijinnie*,[1643] a 1979 case, the Ninth Circuit first squarely considered a collateral issue: should the anti-marital facts privilege be extended to bar a witness from relating an excited utter-

1633. "This privilege has no longer adequate reason for retention. In an age which has so far rationalized, depolarized and dechivalrized the marital relation . . . this marital privilege is the merest anachronism in legal theory and an indefensible obstruction to truth in practice." 8 WIGMORE, *supra* note 1451, § 2228 at 221.

1634. "But family harmony is nearly always past saving when the spouse is willing to aid the prosecution. The privilege, in truth, is an archaic survival of a mystical religious dogma and of a way of thinking about the marital relation, which are today outmoded." C. MCCORMICK, LAW OF EVIDENCE § 66 at 145-46 (1954) (footnotes omitted) [hereinafter cited as MCCORMICK].

1635. 358 U.S. 74, 77-78 (1958).

1636. *Id.* at 78.

1637. *See* 8 WIGMORE, *supra* note 1632, § 2240 at 253; MCCORMICK, *supra* note 1634, § 66 at 145.

1638. 604 F.2d 603 (9th Cir. 1979) (per curiam).

1639. 604 F.2d 1236 (9th Cir. 1979).

1640. *E.g.*, Lutwak v. United States, 344 U.S. 604, 614 (1953); United States v. Mathis, 559 F.2d 294, 295 (5th Cir. 1977); United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975).

1641. 352 F.2d 766 (9th Cir. 1965).

1642. *Id.* at 768.

1643. 601 F.2d 1035 (9th Cir. 1979).

ance by a spouse who was prohibited from testifying? The findings of the lower court showed that the defendant, after arguing with his wife and threatening to kill his mother-in-law, drove his truck into the structure in which they were staying. As his mother-in-law fled, he struck her with the vehicle, killing her. At trial, the defendant prevented his wife from testifying against him by invoking the spousal privilege. A witness was permitted to testify that moments after the crime, he heard the wife exclaim, "He ran over my mother."[1644] On appeal, defendant contended that this violated the spousal privilege.

The Ninth Circuit had never directly considered this issue. In three previous cases,[1645] it had held that the privilege should be extended to bar admission of a spouse's out-of-court statements, but in all three cases this conclusion had been mere dicta.[1646] The court, after noting that privileges are to be narrowly construed because they act as barriers to the fact-finding process,[1647] considered the impact of admission of a spouse's hearsay statements on the underlying reason for the privilege.[1648] In determining that the possibility of damage to the marital relationship in these circumstances is slight, the court cited with approval from a similar Second Circuit case:

> This is not a case where the prosecution called the husband to the stand. If he had testified under those circumstances, the common law rule would have been violated. Here, however, we are one step removed from actual testimony. Therefore, there is no chance that we might be repulsed by a spouse actually testifying against his mate . . . . Nor is there a chance that marital frictions will be aggravated, . . . for there is the convenient buffer of the third person actually making the remarks.[1649]

1644. *Id.* at 1037.

1645. United States v. Price, 577 F.2d 1356 (9th Cir.), *cert. denied*, 439 U.S. 853 (1978); Peek v. United States, 321 F.2d 934 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964); Olender v. United States, 210 F.2d 795 (9th Cir. 1954).

1646. In two cases, the privilege had been waived: Peek v. United States, 321 F.2d 934, 943 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964); Olender v. United States, 210 F.2d 795, 800 (9th Cir. 1954). In the other, United States v. Price, 577 F.2d 1356, 1365 (9th Cir.), *cert. denied*, 439 U.S. 853 (1978), the statements had been admitted as admissions of a co-conspirator.

1647. 601 F.2d at 1038.

1648. *Id.* The court stated that Hawkins v. United States, 358 U.S. 74 (1958), "outlined two justifications for the privilege: fostering marital harmony and avoiding the spectacle of pitting one spouse against the other." 601 F.2d at 1038. However, a careful reading of *Hawkins* reveals no mention of the second justification.

1649. 601 F.2d at 1038 (citing United States v. Mackiewicz, 401 F.2d 219, 225 (2d Cir.), *cert. denied*, 393 U.S. 923 (1968)). The Seventh Circuit allows admission of a spouse's out-

The *Tsinnijinnie* court agreed with the argument that a person cannot prevent his or her spouse from making adverse statements in public, for if they are revealed in court by a third party, any strain on the marriage comes from "the out-of-court behavior of the spouse, not the advent of the trial. . . ."[1650]

The arguments the court cites are persuasive, but one of the court's own conclusions is of questionable validity: "[W]hen a marriage has deteriorated to the point where one spouse makes statements damaging to the other, that marriage will usually proceed to its fate regardless of how the spousal privilege is applied."[1651] Nevertheless, the court's refusal to extend the spousal privilege to bar a witness from relating an excited utterance by a spouse was proper. It may be viewed as further erosion[1652] of a privilege seen by some as having lived beyond its usefulness.[1653]

V. POST-CONVICTION PROCEEDINGS

A. Double Jeopardy

The United States Constitution provides that "no person shall be . . . subject, for the same offense, to be twice put in jeopardy."[1654] In a jury trial, once the jury is impaneled and sworn, jeopardy attaches;[1655] from that moment, unless certain defined exceptions apply,[1656] the de-

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of-court statements, United States v. Cleveland, 477 F.2d 310, 313 (7th Cir. 1973) (following the reasoning in *Mackiewicz*), but the Fifth Circuit does not, United States v. Williams, 447 F.2d 894, 898 (5th Cir. 1971) (ruling that it would undercut the marital privilege). *Contra*, United States v. Williams, 447 F.2d 894 (5th Cir. 1971) (held admission of out-of-court statement by wife to impeach husband's testimony at trial was in violation of marital privilege).

1650. 601 F.2d at 1039 (citing 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 218 at 625 (1978)). *Accord*, Trammel v. United States, 100 S. Ct. 906, 913-14 (1980). The *Trammel* Court excluded inter-spousal testimony concerning acts committed or words spoken in the presence of a third person from the reach of the *Hawkins* immunity rule. Confidential communications between spouses is still protected. *Id.* at 913. *See* Blau v. United States, 340 U.S. 332, 333-34 (1951).

1651. 601 F.2d at 1039.

1652. *See* text accompanying notes 1637-41 *supra*.

1653. *See* notes 1633-34 *supra* and accompanying text.

1654. U.S. CONST. amend. V. For an evaluation of recent trends in double jeopardy, see Comment, *Double Jeopardy Consequences of Mistrial, Dismissal and Reversal of Convictions on Appeal*, 16 AM. CRIM. L. REV. 235 (1979) (recent cases may diminish number of defendants spared second trials).

1655. Crist v. Bretz, 437 U.S. 28, 29 (1978).

1656. These exceptions are certain mistrials, see notes 1659-77 *infra* and accompanying text; certain dismissals, *e.g.*, United States v. Scott, 437 U.S. 82 (1978) (defendant himself sought to have his trial dismissed on the merits, so government appeal did not offend double jeopardy clause); and certain retrials after appeal; *cf.* Burks v. United States, 437 U.S. 1

fendant cannot be retried for the same offense.

The United States Supreme Court recently expressed the rationale of the double jeopardy clause: "[T]he guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense."[1657] A secondary reason for the protection against double jeopardy is the promotion of judicial economy.[1658]

1. Separate offenses

When a defendant is prosecuted twice under separate statutes for a single act, the United States Supreme Court applies a test first fashioned in *Blockburger v. United States*.[1659] In order to prosecute the defendant twice, it must be determined that the single act constituted two separate offenses. The *Blockburger* test to determine whether there are two separate offenses arising from a single act examines "whether each provision [of the statutes] requires proof of an additional fact which the other does not."[1660] The focus of the test is on the statutory elements of the alleged offenses. If each statute under which the defendant is being prosecuted requires proof of facts not required by the other, then the test is satisfied, and separate prosecutions are not barred under the double jeopardy clause.[1661]

The *Blockburger* test permits successive prosecutions for several offenses arising from a single act. Although it has been suggested that consecutive sentences be imposed for several offenses rather than subjecting the defendant to successive prosecutions,[1662] this alternative to

(1978) (defendant whose conviction was reversed because government's evidence was insufficient to support verdict cannot be retried). *See* notes 1695-1703 *infra* and accompanying text for a discussion of the relationship between retrials and the double jeopardy clause. For a discussion of *Burks*, see Note, 1979 DET. C. L. REV. 193 (1979).

1657. Abney v. United States, 431 U.S. 651, 661 (1977).

1658. United States v. Gamble, 607 F.2d 820, 823 (9th Cir. 1979).

1659. 284 U.S. 299 (1932).

1660. *Id.* at 304. For Ninth Circuit cases using this test, see United States v. Kearney, 560 F.2d 1358 (9th Cir.), *cert. denied*, 434 U.S. 971 (1977); United States v. Stolarz, 550 F.2d 488 (9th Cir.), *cert. denied*, 434 U.S. 851 (1977).

1661. 284 U.S. at 304. In Iannelli v. United States, 420 U.S. 770 (1975), the Court explained that the *Blockburger* test serves the function of "identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction." *Id.* at 785 n.17.

1662. Abbate v. United States, 359 U.S. 187 (1959) (Brennan, J., concurring). Justice Brennan argued that the practice of permitting successive prosecutions enabled the government to wear down the defendant via a multitude of prosecutions which amounted to "repetitive harassment." *Id.* at 199-200.

Blockburger has not been adopted by the Supreme Court.

The Ninth Circuit Court of Appeals used the *Blockburger* test in the 1979 case of *Walker v. Loggins*.[1663] The defendant in *Walker* had been convicted of manslaughter and assault with a deadly weapon arising from a single act perpetrated against the same individual. Walker argued that conviction for both offenses constituted double jeopardy. However, under *Blockburger*, the Ninth Circuit found the offenses distinct—manslaughter need not be committed with a deadly weapon, as is required for the assault charge, and the death of a human being is not an element of assault with a deadly weapon, but is required for a manslaughter charge. Thus, Walker was properly convicted of both offenses.[1664]

The Ninth Circuit also followed *Blockburger* in *United States v. Snell*,[1665] where the defendant had been convicted of conspiracy to commit bank robbery and attempted extortion. The extortion conviction was reversed on appeal, the Ninth Circuit deciding that attempted bank robbery was the proper charge.[1666] Snell contended that a subsequent prosecution for attempted bank robbery arising from the same transaction would constitute double jeopardy. The court rejected the standard applied in *Abbate v. United States*,[1667] which had called multiplying offenses for the same acts "repetitive harrassment."[1668] Noting that in *Walker v. Loggins* the Ninth Circuit had reaffirmed its adherence to the *Blockburger* test,[1669] the court held that, since attempted extortion involves elements not required for attempted bank robbery, and vice versa, double jeopardy did not bar the retrial. In addition, the court said that the government's conduct here was not "repetitive harrassment," where the court of appeals had reversed the conviction *because* attempted bank robbery was the proper charge.[1670]

In another 1979 decision, *United States v. Bender*,[1671] the defendant had been acquitted of an income tax violation under 26 U.S.C.

1663. 608 F.2d 731 (9th Cir. 1979).

1664. *Id.* at 733. Walker had originally been prosecuted in California superior court, and had filed a petition for habeas corpus with the United States district court. The Ninth Circuit noted that, under federal law, Walker could have been convicted and sentenced for both offenses. California state law, while allowing the convictions, prohibited *punishment* for both. The court could find no error in California's more lenient rule. *Id.*

1665. 592 F.2d 1083 (9th Cir.), *cert. denied*, 442 U.S. 944 (1979).

1666. United States v. Snell, 550 F.2d 515 (9th Cir. 1977).

1667. 359 U.S. 187 (1959).

1668. *Id.* at 200.

1669. 592 F.2d at 1085.

1670. *Id.* at 1085 n.2.

1671. 606 F.2d 897 (9th Cir. 1979).

§ 7201.[1672] He was then found guilty of violating 26 U.S.C. § 7206(1),[1673] dealing with perjury convictions as a result of false income tax statements. The government contended that, since the latter was a lesser included offense of the former, the double jeopardy clause did not prevent Bender's conviction on the second charge. Instead, the Ninth Circuit held that section 7206(1) would not be a lesser included offense within section 7201 unless the section 7201 charge required proof of elements not required for the first charge.[1674] Conceding that the elements of both offenses are not identical, the Ninth Circuit nevertheless stated that "in any particular case . . . on the proof offered, the factual elements may be identical."[1675] The court determined that Bender had been acquitted of the section 7201 violation because the court believed both his story about the source of unexplained funds and that his failure to report certain interest income was not willful. Since the court had found Bender's story to be true, and had found a lack of willfullness, there were no grounds for the perjury conviction under section 7206(1).

In *United States v. Guido*,[1676] the court did not reach the double jeopardy issue; instead it used its supervisory power to reverse a conviction pursuant to a second indictment for conspiracy. The defendants had been convicted in the Eastern District of California and then in the United States District Court for the District of Arizona, for conspiracy to import and possess marijuana. In finding separate conspiracies, the Arizona court had relied on a difference in participants, time, and purposes. The Ninth Circuit found that these differences were more illusory than real. Although some minor participants had changed, Guido and Boyle were the key participants at both times. Further, although there was a six-month time lapse, the court found that this apparent lull did not necessarily indicate a lapse in or termination of the conspiracy. Nor did the Ninth Circuit find a difference in purpose; although the California indictment mentioned merely a conspiracy to import, and the Arizona indictment charged both conspiracy to import and conspiracy to possess with intent to distribute, it was clear that the purpose of

1672. This section provides in pertinent part that "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony."

1673. Section 7206(1) provides that anyone who "willfully makes and submits any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony."

1674. 606 F.2d at 898 (citing Sansone v. United States, 380 U.S. 343 (1965)).

1675. *Id.* at 898.

1676. 597 F.2d 194 (9th Cir. 1979).

the California acts included both. Finding the same source, the same distribution points, and one period of time, the Ninth Circuit held that there was only one conspiracy.[1677]

Although the court could have applied the *Blockburger* test to this fact situation, it did not reach the constitutional issue of double jeopardy. Instead, the court used its "supervisory power of the administration of criminal justice"[1678] to correct the unfairness which stemmed from two prosecutions for the same offense.[1679]

In *United States v. Solano*,[1680] members of the Hell's Angels Motorcycle Club had been prosecuted in state court for various offenses. For violations arising out of the same acts, they were charged in federal court under the Racketeer Influenced and Corrupt Organizations (RICO) provisions of the United States Code.[1681] They contended that the double jeopardy clause precluded the RICO prosecution. The Ninth Circuit stated that the doctrine of dual sovereignty allows successive state and federal prosecutions for the same act.[1682] In addition, even where some of the defendants had been tried in federal court, the Ninth Circuit reiterated its holding in *United States v. Rone*,[1683] where

1677. *Id.* at 198.

1678. *Id.*

1679. Other cases in which the court used its supervisory power to reverse a conviction include Marshall v. United States, 360 U.S. 310 (1959); McNabb v. United States, 318 U.S. 332 (1943); and Delaney v. United States, 199 F.2d 107 (1st Cir. 1952).

1680. 605 F.2d 1141 (9th Cir. 1979).

1681. 18 U.S.C. § 1962(a)-(d) (1976). This statute, which had as its purpose "reducing invidious capabilities of persons in organized crime to infiltrate the American economy," United States v. Frumento, 563 F.2d 1083, 1090 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978), made it unlawful to invest proceeds of racketeering activity in enterprises engaged in interstate or foreign commerce. Such proceeds can be invested in securities if they do not amount to one percent of the outstanding securities in a class.

1682. 605 F.2d at 1143 (citing Abbate v. United States, 359 U.S. 187 (1959)). For a general discussion of the problems of successive state and federal prosecutions, see *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: a Fifth Amendment Solution*, 31 STAN. L. REV. 477 (1979) (arguing that such successive prosecutions violate the purpose of the fifth amendment).

1683. 598 F.2d 564 (9th Cir. 1979). In *Rone*, the Ninth Circuit applied the *Blockburger* test (see note 1660 *supra* and accompanying text) to determine that the defendants could be sentenced consecutively for two extortion offenses and for RICO violations arising out of the same acts since the offenses involved different elements. The defendants had also contended that Wharton's Rule precluded the RICO conviction. That rule, which takes its name from Francis Wharton, whose treatise on criminal law identified the doctrine, states an exception to the general rule that a conspiracy and the substantive offense that is its goal do not merge. Wharton said that where the offense itself requires two or more participants—e.g., adultery—the act should not be indicted both substantively and as a conspiracy. 2 F. WHARTON, CRIMINAL LAW § 1604, at 1862 (12th ed. 1932). *E.g.*, Ianelli v. United States, 420 U.S. 770 (1975) (applying Wharton's Rule). The *Rone* court held that, since § 1962(c) plainly indicates that an individual acting alone may violate the statute, Wharton's Rule did not cause

it had held that "a defendant can be convicted and separately punished both for the predicate acts which form the basis of a RICO charge, and for a substantive violation of RICO without violating the Double Jeopardy Clause."[1684]

2. Mistrials

a. on defendant's motion

When the defendant himself moves for a mistrial, the bar of double jeopardy is generally waived. However, where the prosecutor or judge in bad faith deliberately provokes a mistrial, there is no waiver.[1685]

In *United States v. Gamble*,[1686] the defendant was charged with failure to file income tax returns. Gamble moved for and was granted a new trial on the grounds of prosecutorial misconduct because the government attorney had continually given his assurance that certain facts placed in issue were true. Gamble then filed a motion to bar reprosecution because of double jeopardy.[1687] The court stated that, after a defendant's motion for a mistrial, retrial is not barred under the double jeopardy clause "unless there is bad faith conduct by the judge or prosecutor which threatens harrassment of the accused by multiple prosecutions or affords the prosecution a more favorable opportunity to convict by intentionally provoking the mistrial request."[1688] The *Gamble* court, in affirming the defendant's conviction, held that although the trial judge had been correct in finding prosecutorial misconduct, he had also found that "the prosecuting attorney did not act in bad faith to deliberately provoke a mistrial."[1689]

b. mistrial on judge's sua sponte *declaration*

Where the mistrial is declared on the judge's own motion, a stricter standard is applied by the Ninth Circuit. *United States v. Sanders*[1690]

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the substantive offense to merge with the RICO charge. In addition, legislative history indicated that Congress intended separate offenses. 598 F.2d at 570.

1684. 605 F.2d at 1143 (citing United States v. Rone, 598 F.2d 564, 571 (9th Cir. 1979)).

1685. *See* United States v. Dinitz, 424 U.S. 600, 611 (1976) (double jeopardy clause protects against conduct by judge or prosecutor intended to provoke mistrials, thereby subjecting defendant to burden of multiple prosecutions).

1686. 607 F.2d 820 (9th Cir. 1979).

1687. *Id.* at 822.

1688. *Id.* at 823 (citing United States v. Dinitz, 424 U.S. 600, 611 (1976)).

1689. 607 F.2d at 823. The court refused to disturb this finding since it was "clearly supported by the record." *Id.*

1690. 591 F.2d 1293 (9th Cir. 1979).

involved such a *sua sponte* declaration. There, a prosecution witness was indicted for perjury as a result of her testimony at trial. The judge, fearing that the defendant would be prejudiced in the jury's eyes by the "tainted" testimony, declared a mistrial over the defendant's objection. The *Sanders* court observed that, since the defendant intended to attack the witness's credibility, it was more likely that he "would have benefited rather than suffered from the 'tainted' testimony."[1691] The court cited *Arizona v. Washington*[1692] for the proposition that, to justify a new trial, there must be "manifest necessity" for declaring a mistrial over the objection of the defendant.[1693] Not finding such necessity in *Sanders*, where it appeared that the trial judge did not consider alternatives to a mistrial, the Ninth Circuit ruled that double jeopardy barred further prosecution of the defendant.[1694]

3. Retrials

In *United States v. Phillips*, the defendants' convictions had been reversed on the ground that the government's conduct had unduly prejudiced them.[1695] Upon remand, the defendants moved to dismiss on the ground that a retrial would violate the double jeopardy clause. They argued that "the double jeopardy clause bars a retrial after a successful appeal by a criminal defendant when reversal was predicated upon prosecutorial misconduct or overreaching."[1696] Although the

1691. *Id.* at 1298.

1692. 434 U.S. 497, 516 (1978) (trial judge acted responsibly in declaring mistrial after improper comment by defense counsel where order supported "by high degree" of necessity for new trial). For a discussion of *Arizona v. Washington*, see Note, 7 FLA. ST. U. L. REV. 365 (1979).

1693. 591 F.2d at 1298. For a discussion of a Second Circuit case dealing with manifest necessity, see Dunkerly v. Hogan, 579 F.2d 141 (2d Cir. 1978) (retrial after *sua sponte* declaration of mistrial was prohibited where the record showed no manifest necessity), *cert. denied*, 439 U.S. 1090 (1979). See Comment, 10 RUT.-CAM. L. J. 457 (1979).

1694. 591 F.2d at 1298. The court suggested that the judge might have allowed cross-examination of the witness whose testimony was in question or might have issued a curative instruction. Nothing in the record indicated that such alternatives were considered. *Id.*

Other circuits agree with the Ninth Circuit that the reasons for a trial judge's declaration of a mistrial must affirmatively appear on the record of the trial court. *E.g.*, United States v. Horn, 583 F.2d 1124, 1128 (10th Cir. 1978) (nothing in record to support trial judge's conclusion that jury was deadlocked); Dunkerly v. Hogan, 579 F.2d 141, 147-48 (2d Cir. 1978) (lack of record evidence indicating why continuance would have been unreasonable alternative to mistrial), *cert. denied*, 439 U.S. 1090 (1979); United States v. Starling, 571 F.2d 934, 939, 941 (5th Cir. 1978) (trial judge's declaration of mistrial based on belief that jurors were prejudiced against defendant not supported by the record; alternatives to mistrial not considered).

1695. 600 F.2d 186, 187 (9th Cir.) (per curiam) (citing United States v. Phillips, 575 F.2d 1265 (9th Cir. 1978), *cert. denied*, 100 S. Ct. 131 (1979)).

1696. *Id.* at 187.

Ninth Circuit expressed some question about this reading of the law,[1697] it assumed *arguendo* that the defendants' premise was correct. Since previously the Ninth Circuit had explicitly stated that it did not find prosecutorial misconduct,[1698] and since the district court had found none on remand, it was held, even by this stricter standard, that the retrial was not barred.[1699]

In *United States v. Bodey*,[1700] the defendant had been tried on a bank robbery charge. His defense was insanity and he had moved for acquittal on that ground. The jury, however, had been unable to reach a verdict. Later, he was retried and convicted. He moved under 28 U.S.C. § 2255[1701] to vacate the sentence, claiming that he should have been acquitted at the first trial, so that the second violated the double jeopardy clause. He relied on *Burks v. United States*,[1702] which had held that where the evidence was insufficient at the first trial, the government should not have another chance at a second. The Ninth Circuit, finding that the evidence for Bodey's sanity at the first trial had been insufficient to meet the government's burden, followed *Burks* to hold that the double jeopardy clause barred Bodey's second trial.[1703]

4. The *Petite* policy

Under a Department of Justice policy known as the *Petite* policy,[1704] several offenses arising out of the same transaction should be

1697. *Id.* The court was not required to determine if the appellants were in fact correct in their interpretation because it could not affect the outcome of the case. The interpretation would only be relevant if in fact the court had found prosecutorial misconduct. However, the court had explicitly stated in the original appeal that it did not find any misconduct, and the district court on remand similarly found none. *Id.* The court also refused to address the government's contention that recent Supreme Court cases established that retrial is barred after a successful appeal by criminal defendants "only when the reversal resulted from insufficient evidence." *Id.* at 187 n.2 (citing United States v. Scott, 437 U.S. 82 (1978); Burks v. United States, 437 U.S. 1 (1978).

1698. United States v. Phillips, 575 F.2d 1265, 1267 (9th Cir. 1978).

1699. 600 F.2d at 187.

1700. 607 F.2d 265, 267 (9th Cir. 1979).

1701. *Id.* Bodey filed this motion under 28 U.S.C. § 2255 (1976) which provides that a prisoner who claims his sentence was imposed in violation of the Constitution or the laws of the United States may move the sentencing court to vacate it.

1702. 437 U.S. 1 (1978).

1703. Procedurally the two cases were slightly different since Bodey had been retried and Burke had not. The *Bodey* court characterized this difference as an " 'arbitrary distinction' which should not be given significance." 607 F.2d at 268.

1704. The policy is named for Petite v. United States, 361 U.S. 529 (1960). In *Petite*, the Government filed a motion to dismiss charges at a second trial which arose from the same transaction at issue in the first trial "on the ground that it is the general policy of the Federal Government that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions." *Id.* at 530. This

tried together. In two cases during the survey period, defendants contended that their second indictments violated the *Petite* policy and were, therefore, barred. Whether such a violation mandated dismissal had been expressly left open earlier in *United States v. Mikka*.[1705]

In the first 1979 decision, *United States v. Snell*,[1706] the Ninth Circuit held that, assuming *arguendo* that the *Petite* policy had been violated, "such a violation of the internal housekeeping rules of the Department of Justice does not entitle Snell to dismissal of the indictment."[1707] The court noted that the United States Supreme Court had remanded cases because of the *Petite* policy only at the request of the Department of Justice, and that the Supreme Court had stated that the *Petite* policy is not constitutionally required.[1708] According to the internal policy of the Justice Department such "binding effect" would, the Ninth Circuit said, "discourage the Department from adopting other such laudable policies."[1709]

In *United States v. Solano*,[1710] the court held that invocation of the *Petite* policy was not properly a part of a pre-trial appeal from a denial of a motion to dismiss because of double jeopardy.[1711] However, the court cited *Snell* for the proposition that, even if properly part of a pre-trial appeal, such an argument "does not compel dismissal of a federal prosecution."[1712]

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policy is "dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement." *Id. See generally* Comment, *The Problems of Double Jeopardy in Successive Federal-State Prosecutions: Fifth Amendment Solution*, 31 STAN. L. REV. 477, 488-94 (1979).

1705. 586 F.2d 152, 154 n.3 (9th Cir. 1978), *cert. denied*, 440 U.S. 921 (1979).

1706. 592 F.2d 1083 (9th Cir.), *cert. denied*, 442 U.S. 944 (1979). For a discussion of the separate offenses in *Snell*, see notes 1665-70 *supra* and accompanying text.

1707. 592 F.2d at 1087.

1708. *Id.* (citing Rinaldi v. United States, 434 U.S. 22, 29 (1977)).

1709. *Id.* The court also noted that the other circuits which had considered the question had agreed that "a criminal defendant cannot invoke the *Petite* policy as a bar to federal prosecution." *Id.* The court cited United States v. Howard, 590 F.2d 564, 567-68 (4th Cir.), *cert. denied*, 440 U.S. 976 (1979); United States v. Fritz, 580 F.2d 370, 375 (10th Cir.), *cert. denied*, 439 U.S. 947 (1978); United States v. Wallace, 578 F.2d 735, 740 n.4 (8th Cir.), *cert. denied*, 439 U.S. 898 (1978); United States v. Martin, 574 F.2d 1359, 1361 (5th Cir.), *cert. denied*, 439 U.S. 967 (1978); United States v. Hutul, 416 F.2d 607, 626 (7th Cir. 1969), *cert. denied*, 396 U.S. 1007, 1012, 1024 (1970).

1710. 605 F.2d 1141 (9th Cir. 1979). For a discussion of the separate offenses in *Solano*, see notes 1680-84 *supra* and accompanying text.

1711. *Id.* at 1143. The court characterized this type of appeal as an "*Abney* appeal," after Abney v. United States, 431 U.S. 651 (1977), which established the right to immediately appeal denials of such motions. 605 F.2d at 1142-43.

1712. 605 F.2d at 1143 (citing United States v. Snell, 592 F.2d 1083, 1087 (9th Cir.), *cert. denied*, 99 S. Ct. 2889 (1979)).

5. Harsher sentences

In *United States v. Clayton*,[1713] the defendant contended that the more severe sentence imposed at her resentencing "constituted double punishment for the same offense in violation of [her] right to be protected from being twice put in jeopardy for the same offense."[1714] Clayton had been convicted of passing counterfeit government obligations.[1715] She was sentenced to six years imprisonment but was placed on probation under certain conditions, one of which was that she "obey all laws."[1716] She later pleaded guilty to petty theft and at her probation revocation hearing it was ordered that the previously-imposed six-year prison sentence be carried out. Arguing on the technicality that she had not been on probation at the time of her resentencing,[1717] Clayton contended that her resentencing constituted double jeopardy for the same offense. Citing *North Carolina v. Pearce*,[1718] the Ninth Circuit said, "a harsher sentence on resentencing may be imposed if justified by reference to conduct of the defendant occurring subsequent to the original sentence."[1719] Since Clayton's violation of her probation constituted such justification, the court upheld the six-year sentence.

6. Appeals

The double jeopardy clause protects the defendant from the threat of multiple prosecutions for a single offense. Thus, where a defendant has been acquitted after jeopardy has attached, the government is prohibited from attacking the judgment of acquittal on appeal.[1720] Yet,

1713. 588 F.2d 1288 (9th Cir. 1979).

1714. *Id.* at 1290.

1715. Passing counterfeit government obligations or other securities is proscribed by 18 U.S.C. § 472 (1976).

1716. 588 F.2d at 1290.

1717. Clayton contended that, under 18 U.S.C. § 3651 (1976), she could not have been on probation. She had served twenty-four days of her sentence by twelve weekends of imprisonment before an earlier violation of probation and then had been required to serve six months. This constituted more than the six-month maximum provided for such probations under § 3651. However, since Clayton had not raised the question of the illegality of her sentence at the first probation hearing, she was precluded from doing so later. In addition, the Ninth Circuit found that any illegality had been corrected when she was resentenced. 588 F.2d at 1291.

1718. 395 U.S. 711 (1969) (harsher sentence on retrial after appeal did not violate double jeopardy clause where conduct occurring after the time of the original sentence appeared in record as reason for more severe sentence, and sentence was not the result of government vindictiveness).

1719. 588 F.2d at 1291.

1720. United States v. Jenkins, 420 U.S. 358 (1975) (reversal of judgment of acquittal would subject defendant to further litigation of factual issues in violation of double jeopardy guarantee against successive prosecution for single offense). *See also* United States v. Rojas,

when a defendant's conviction has been overturned, the government may file an appeal if the conviction will be merely reinstated and if the defendant will not be subjected to another trial should the government be successful.[1721] A defendant may appeal an order denying a motion based on double jeopardy grounds.[1722] Further, the defendant need not wait until a final judgment has been entered to file the appeal.[1723]

Failure to immediately appeal an order denying a motion based on double jeopardy grounds, however, may bar such an appeal later. The Federal Rules of Appellate Procedure provide that in criminal cases appeals must be filed within ten days from the entry of the judgment or order from which the appeal arises.[1724] In two 1979 cases, defendants raised the bar of double jeopardy after the ten-day period had elapsed.

In *United States v. Ajimura*,[1725] a mistrial had been granted, and Ajimura filed a motion to bar a retrial on the ground of double jeopardy. The motion was denied. Nine months later, Ajimura filed a motion to dismiss the indictment, which was denied,[1726] and he appealed.

554 F.2d 938 (9th Cir. 1977) (government may appeal if judgment of acquittal does not violate double jeopardy when reversal would reinstate prior guilty verdict and not subject defendant to retrial). *Cf.* United States v. Winnie Mae Mfg. Co., No. 78-2101 (9th Cir. June 13, 1979). The district court dismissed an indictment against the defendant after a jury was impaneled and sworn and a witness examined. The defendant attacked the government's appeal of the dismissal of the indictment, alleging that jeopardy had attached on the basis of Crist v. Bretz, 437 U.S. 28 (1978) (jeopardy attaches when jury impaneled and sworn). Because the dismissal of the indictment was unrelated to the defendant's guilt or innocence, the court allowed the government's appeal and ruled that a reversal of the dismissal of the indictment would not bar a trial of the defendant. No. 78-2101, slip op. at 2124.

1721. United States v. Wilson, 420 U.S. 332 (1975) (government may appeal determination of trial judge to set aside jury guilty verdict when reversal would reinstate guilty verdict and not subject defendant to second trial). *Accord*, Forman v. Wolff, 590 F.2d 283 (9th Cir. 1978) (per curiam), *cert. denied*, 99 S. Ct. 2839 (1979); United States v. Dreitzler, 577 F.2d 539 (9th Cir. 1978), *cert. denied*, 440 U.S. 921 (1979).

1722. Abney v. United States, 431 U.S. 651 (1977) (district court dismissals of motions to bar retrial on double jeopardy grounds constitute final decisions from which an immediate appeal may be taken).

1723. *Id.* at 662. The defendant may wait and file the appeal after the entry of a final judgment. *E.g.*, United States v. Alessi, 544 F.2d 1139 (2d Cir.) (order denying motion based on double jeopardy is merged in the final judgment and can be reviewed on appeal of final judgment), *cert. denied*, 429 U.S. 960 (1976).

1724. FED. R. APP. P. 4(b) provides in pertinent part:

> 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. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

1725. 598 F.2d 510 (9th Cir. 1979).

1726. *Id.* at 511.

The Ninth Circuit, observing that an order denying a motion to bar retrial because of double jeopardy is immediately appealable,[1727] held that, under rule 4(b), Ajimura's appeal nine months later was not timely. The court also agreed with the district court that the doctrine of res judicata[1728] had barred further consideration of the double jeopardy claim.

In a similar case, *United States v. Gamble*,[1729] the defendant had moved to dismiss after a mistrial on the ground of double jeopardy. His motion was denied. Like Ajimura, he did not appeal the order at that time; but unlike Ajimura, he was subsequently tried and convicted. On appeal, he raised the issue of double jeopardy. The Ninth Circuit said, "The issue we face is whether a defendant must appeal an order denying a motion to bar retrial on double jeopardy grounds within the ten days prescribed by Federal Rule of Appellate Procedure 4(b) after entry of the order, or be thereafter foreclosed from raising the issue."[1730] Noting that *Ajimura* had specifically left open the question of whether a double jeopardy claim may be reviewed on appeal from judgment of conviction,[1731] the Ninth Circuit held that "although an order denying a motion to bar retrial on grounds of double jeopardy is immediately appealable, this is permissive but not mandatory. The defendant may choose to appeal immediately or reserve the issue for appeal upon conviction in the subsequent trial."[1732] The court reasoned that the rights of the defendant and judicial economy will be furthered, and "piecemeal appeals" avoided, by permitting the issue to be raised on appeal after conviction.[1733]

7. Collateral estoppel

The United States Supreme Court in *Ashe v. Swenson*[1734] said that collateral estoppel "means simply that when an issue of ultimate fact

1727. The Ninth Circuit relied on Abney v. United States, 431 U.S. 651 (1977). 598 F.2d at 512.

1728. "The doctrine of res judicata . . . prevents 'splitting of a cause of action' and requires all grounds upon which a single claim is based to be asserted and concluded in one action, on pain of being barred from separate suit." C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 386 (1976).

1729. 607 F.2d 820 (9th Cir. 1979).

1730. *Id.* at 822.

1731. *Id.* at 822-23 (citing 598 F.2d at 513).

1732. 607 F.2d at 823. The Ninth Circuit cited a recent Seventh Circuit case in accord with its holding, United States v. Gaertner, 583 F.2d 308 (7th Cir. 1978) (per curiam) (defendant within his rights to delay appeal until final disposition of case in district court), *cert. denied*, 440 U.S. 918 (1979).

1733. 607 F.2d at 823.

1734. 397 U.S. 436 (1970).

has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[1735] *Ashe* established that this principle, first developed in civil litigation, is embodied in the fifth amendment guarantee against double jeopardy.[1736]

In *United States v. Sarno*,[1737] Sarno, acquitted of bribery and then indicted for perjury in the bribery trial, contended that the double jeopardy clause and the collateral estoppel doctrine precluded his indictment on the latter charge. The Ninth Circuit observed that acquittal of a defendant on a substantive charge should not *per se* bar his subsequent prosecution for perjury at the earlier trial. Thus, the court reasoned, "To hold otherwise . . . would be to put a premium on perjury and to make immunity from punishment for perjury rest on success in commission of the crime."[1738]

If, however, the alleged perjured testimony was material to the case, "the fact of its falseness should have been raised by the prosecutor during the course of the trial."[1739] The Ninth Circuit held that, in such cases, the prosecutor has no right to try to recover from its initial failure to convince the trier of fact by "rehashing evidence previously presented" in plain violation of the collateral estoppel doctrine.[1740]

To facilitate analysis of such cases, the Ninth Circuit, since *United States v. Hernandez*,[1741] has applied a three-step analysis:

> (1) An identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine; (2) an examination of the record of the prior case to decide whether the issue was "litigated" in the first case; and (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case.[1742]

In *Sarno*, the focus at the trial had been on the affirmative defense of entrapment. The Ninth Circuit held that Sarno's testimony concern-

1735. *Id.* at 443.
1736. *Id.* at 445.
1737. 596 F.2d 404 (9th Cir. 1979).
1738. *Id.* at 407 (quoting U.S. v. Fayer, 573 F.2d 741, 745 (2d Cir.) (quoting 70 C.J.S. PERJURY § 26 at 492), *cert. denied*, 439 U.S. 831 (1978)).
1739. 596 F.2d at 407.
1740. *Id.* The court cited Note, *Perjury by Defendants: The Uses of Double Jeopardy and Collateral Estoppel*, 74 HARV. L. REV. 752, 763 (1961).
1741. 572 F.2d 218 (9th Cir. 1978).
1742. 596 F.2d at 408 (quoting United States v. Hernandez, 572 F.2d 218, 220 (9th Cir. 1978)).

ing his defense had already been challenged, and therefore, the collateral estoppel doctrine applied as required by *Hernandez*. In addition, the same judge who granted the motion for judgment of acquittal had dismissed the perjury indictment, stating that he had already decided the issue.[1743] The Ninth Circuit therefore affirmed the dismissal.

The issue of collateral estoppel was also raised in *United States v. Lasky*,[1744] but the Ninth Circuit declined to apply that doctrine. The defendants raised what the court called the "novel" contention that a prior favorable administrative decision precluded trial on the same issues.[1745] The United States Postal Service, charging defendants with mail fraud, had filed an administrative complaint seeking to suspend mail service to the defendants' corporation. The administrative law judge, after a hearing, had dismissed the action on the ground that the evidence failed to establish the fraud. Noting that courts "have increasingly given res judicata and collateral estoppel effect to the determinations of administrative agencies,"[1746] the Ninth Circuit said that collateral estoppel should not be applied as rigidly to administrative decisions as to their judicial counterparts. The court cautioned that "due regard must be given in each case as to whether the application of the doctrine is appropriate in light of the particular prior administrative proceedings."[1747] However, since the defendants had not met their burden of isolating what issues were present in both the hearing and the pending trial, the Ninth Circuit held that it could not properly decide the issue of collateral estoppel on appeal.[1748] Thus, the issue of the applicability of the doctrine of collateral estoppel in a criminal proceeding following a prior favorable administrative determination remains open.

B. Appellate Review

In the federal judicial system, several threshold requirements must be satisfied prior to litigation before an appellate court. The appeal must be filed in a timely manner[1749] and involve issues which will have

1743. 596 F.2d at 408. Compare this holding with that in United States v. Bender, 606 F.2d 897 (9th Cir. 1979) (per curiam), discussed at notes 1671-75 *supra* and accompanying text. *Bender* also involved a perjury charge, but the issue raised was that the perjury and substantive offenses were the same.

1744. 600 F.2d 765 (9th Cir. 1979).

1745. *Id.* at 768.

1746. *Id.* The court cited United States v. Utah Constr. Co., 384 U.S. 394, 421-23 (1966), and Bowen v. United States, 570 F.2d 1311, 1321 (7th Cir. 1978) for this proposition.

1747. 600 F.2d at 768.

1748. *Id.* at 768-69.

1749. FED. R. APP. P. 4(b) provides in part: "In a criminal case the notice of appeal by a

significant legal consequences for at least one of the parties.[1750] The record presented to the appellate court for review must be adequate.[1751] And, with a few limited exceptions, the decision rendered by the trial judge must be final.[1752] In 1979, the Ninth Circuit was confronted with all of these procedural issues when deciding whether certain criminal cases should be heard on appeal.

1. Significant legal consequences

The Ninth Circuit refused to review *United States v. Martin*,[1753] which involved the pivotal question of whether or not defendant suffers any significant legal consequences as a result of conviction. Defendants were convicted on one count for conspiracy and on a second count for using a telephone to further that conspiracy. The trial court imposed concurrent sentences of equal length for each count. Defendants then appealed the validity of their convictions for the illegal use of the telephone. The Ninth Circuit declined to review and cited the concurrent sentencing doctrine as the basis for its refusal.[1754]

The concurrent sentencing doctrine provides for the exercise of appellate discretion, to review any cases where a defendant, convicted of two counts and concurrently sentenced, contests only one of the convictions.[1755] Under this doctrine a court may decline review where "no adverse collateral legal consequences . . . result from the additional conviction."[1756] Because the defendant is serving one sentence, reversal of the conviction of one count will have no effect on the duration of the prison term to be served. Thus, in the interest of judicial economy, the courts have fashioned this doctrine in order to avoid review. For instance, even if the defendants in *Martin* had prevailed on the merits, they still would have to serve the same length of prison term because of the concurrent sentence for the uncontested count of their conviction.

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defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from."

1750. U.S. CONST. art. III, § 2 (case or controversy must exist before federal courts can exercise jurisdiction); Roe v. Wade, 410 U.S. 113, 125 (1973) (actual controversy must exist at the time a case is under appellate review).

1751. FED. R. APP. P. 10 outlines procedures for preparing and forwarding records of trial court proceedings to the reviewing court; Frizell v. United States, 394 F.2d 783, 784 (9th Cir. 1968) (reviewing court did not consider an affidavit prepared by Government because it was not part of the record).

1752. 28 U.S.C. § 1291 (1976) provides in part that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions . . . ."

1753. 599 F.2d 880 (9th Cir. 1979).

1754. *Id.* at 887.

1755. *Id.*; Hirabayashi v. United States, 320 U.S. 81, 85 (1943).

1756. 599 F.2d at 887.

However, the concurrent sentence doctrine ignores the fact that numerous adverse legal consequences may result from a conviction even though an additional sentencing is not involved. An additional conviction on a person's record may, for example, adversely affect a sentencing judge in a subsequent criminal proceeding or enhance punishment under some states' habitual criminal statutes.[1757] Additional convictions may also be used to impeach a person's testimony at trial.[1758] As the Supreme Court noted, it is an "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences."[1759] Yet in spite of such language, numerous appellate panels in the Ninth Circuit have only paid lip service to potential adverse consequences in concurrent sentencing cases.[1760] *Martin* appears to be no exception to this firmly established practice.

2. Timeliness

Appeals by both the government and defendants must be made in a timely manner.[1761] The timeliness of a government appeal was at issue in the Ninth Circuit case of *United States v. Humphries*[1762] where a district court judge granted defendant's motion to suppress certain

1757. Benton v. Maryland, 395 U.S. 784, 790-91 (1969); Sibron v. New York, 392 U.S. 40, 54-56 (1968).

1758. Sibron v. New York, 392 U.S. 40, 55-56 (1968).

1759. *Id.* at 55 (1968). The Court extrapolated this from language in Pollard v. United States, 352 U.S. 354, 358 (1957).

1760. *E.g.*, United States v. Walls, 577 F.2d 690, 699 (9th Cir.), *cert. denied*, 439 U.S. 893 (1978) (court refused to hear defendant's challenge to his conviction under count of using mails for a scheme to defraud because he had been sentenced concurrently under another count involving interstate transportation of stolen money); United States v. Easley, 505 F.2d 184, 185 (9th Cir. 1974) (even though it appeared there was insufficient evidence to convict petitioner of counterfeiting charge, court refused to review because of concurrent sentence under conspiracy charge); Argo v. United States, 473 F.2d 1315, 1316 (9th Cir.), *cert. denied*, 412 U.S. 906 (1973) (even though technically incorrect to convict defendant of Federal Bank Robbery Act violation and assault with a dangerous weapon as an enhancement of the sentence under the Enhancement Sentencing Act, court found no prejudicial error because defendant had received the maximum sentence under the assault count); United States v. Martinez, 429 F.2d 971, 977 (9th Cir. 1970) *cert. denied sub nom.* Rojas v. United States, 401 U.S. 915 (1971) (even though evidence to support conspiracy count was tenuous, court refused to review in light of a concurrent sentence for a conviction of selling heroin).

1761. 18 U.S.C. § 3731 (1976) provides in part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

1762. 600 F.2d 1238 (9th Cir. 1979), *appeal docketed*, No. 78-1803 (U.S. Sup. Ct. June 1, 1979).

evidence.[1763] After the second hearing on this matter, the Government appealed. Defendant contended that the Government's appeal was nothing more than a device to circumvent the time limits of the Criminal Appeals Act by contesting the second order rather than the first.

The Ninth Circuit held that since substantially different issues were involved in the second hearing, the Government's subsequent appeal was timely.[1764] However, in dicta the court noted that even if the Government's appeal had been outside the requisite thirty day limit, this statutory violation would *not* have prevented the appellate court from hearing the appeal.[1765] The court based this dictum on the earlier Ninth Circuit case of *Meier v. Keller*[1766] which held that even though the courts did not favor violations of the thirty day maximum, that limitation would not be considered as a *jurisdictional* bar to appellate review.[1767] In reaching this decision, the *Meier* court appeared to be strongly influenced by precedent in other circuits.[1768]

The approach taken by the *Humphries* court contrasted sharply with that of a different panel of judges in *United States v. Ajimura*,[1769] decided almost six months later. In *Ajimura*, the defendant did not appeal a lower court ruling which initially disallowed his claim of a double jeopardy violation until well after the ten days allowed by rule 4(b) of the Federal Rules of Appellate Procedure.[1770] In refusing to hear petitioner's tardy claim, the lower court agreed with the Government's contention that the initial decision was res judicata and could no longer be attacked because the statutory time period for appeal had expired.[1771] The Ninth Circuit affirmed the lower court decision on the

1763. *Id.* at 1240.

1764. *Id.* at 1242-43.

1765. *Id.* at 1243 n.7.

1766. 521 F.2d 548 (9th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

1767. *Id.* at 553.

1768. *Id.* For similar decisions, *see, e.g.*, United States v. Crumpler, 507 F.2d 624 (5th Cir. 1975); United States v. Wolk, 466 F.2d 1143, 1146 n.2 (8th Cir. 1972); United States v. Welsch, 446 F.2d 220, 224 (10th Cir. 1971).

1769. 598 F.2d 510 (9th Cir. 1979). The *Humphries* panel consisted of Judges Choy, Sneed, and Kelleher. Judges Browning, Choy, and Hug made up the *Ajimura* court.

1770. *Id.* at 512.

1771. *Id.* The majority of other circuits hold that a tardy appeal creates an absolute jurisdictional bar preventing appellate review. *E.g.*, United States v. Mathews, 462 F.2d 182, 183 (3rd Cir.), *cert. denied*, 409 U.S. 896 (1972); United States v. Miles, 510 F.2d 1362, 1362 (4th Cir. 1975); United States v. Shillingford, 568 F.2d 1106, 1107 (5th Cir. 1978); Powell v. Ohio, 284 F.2d 522, 522 (6th Cir. 1960); United States v. Koptik, 300 F.2d 19, 22 (7th Cir.), *cert. denied*, 370 U.S. 957 (1962); Lewis v. United States, 555 F.2d 1360, 1362 (8th Cir. 1977); Robinson v. United States, 345 F.2d 1006, 1007 (10th Cir.), *cert. denied*, 382 U.S. 839 (1965). *But see* Schwander v. United States, 386 F.2d 20, 22-23 (5th Cir. 1967) (court accepted untimely appeal because petitioner had made a good faith effort to file after his conviction

tardiness of defendant's claim, noting that "[t]he time limits of rule 4(b) prevent undue delay in the administration of justice and provide finality of orders and judgments, and thus must be carefully respected."[1772]

The language of the *Ajimura* court suggests that an absolute jurisdictional bar exists against appeals not filed within the requisite statutory limits. Yet, as *Humphries* demonstrates, a much more tolerant approach is taken when a potentially late government appeal is involved. This disparity can be explained by the provision regulating the timeliness of government appeals, which calls for a liberal construction.[1773] Nonetheless, the end result indicates that an appealing defendant must carry a comparatively greater burden in order to meet the requirements of the Federal Rules of Appellate Procedure than those of the Criminal Appeals Act.

3. Finality

With the exception of a few specifically enumerated interlocutory matters,[1774] federal appellate courts do not have jurisdiction to review lower court decisions unless those decisions are final.[1775] Generally, trial court rulings are not considered final if they are reached either before the trial or the decision on the merits.[1776] One notable exception to this rule is a trial court's decision allowing a second trial notwithstanding the double jeopardy clause.[1777] Clearly, if such a decision was not considered final, then the defendant would be precluded from an appeal until *after* the unconstitutional trial in question took place.

The issue of whether a lower court double jeopardy decision is

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and was thwarted by court-appointed counsel who had insisted there was no merit in filing an appeal). The Supreme Court has also held that a court is without jurisdiction when an untimely notice of appeal is filed. United States v. Robinson, 361 U.S. 220, 224 (1960).

1772. 598 F.2d at 512.

1773. 18 U.S.C. § 3731 (1976) provides in part that "[t]he provisions of this section shall be liberally construed to effectuate its purposes."

1774. *E.g.*, 28 U.S.C. § 1292(a) (1976).

1775. 28 U.S.C. § 1291 (1976).

1776. *E.g.*, United States v. Ryan, 402 U.S. 530, 532 (1971) (district court order denying defendant's motion to quash a grand jury subpoena duces tecum not final and was not subject to immediate appeal); DiBella v. United States, 369 U.S. 121, 129 (1962) (ruling by trial court on admissibility evidence was not a final order); Cobbledick v. United States, 309 U.S. 323, 326 (1940) (appellate courts do not have jurisdiction over an appeal from an order denying motion to quash a subpoena duces tecum because such an order is not final); Howfield, Inc. v. United States, 409 F.2d 694, 696-97 (9th Cir. 1969) (district court order dismissing supression action was not final and appeal from that order was dismissed for want of jurisdiction).

1777. Abney v. United States, 431 U.S. 651, 662 (1977) ("pretrial orders rejecting claims of former jeopardy . . . constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of § 1291").

final arose in the 1979 case of *United States v. Ajimura*.[1778] Although the Ninth Circuit refused to hear the merits of defendant's double jeopardy claim because a timely appeal was not filed,[1779] the court noted that the district judge's initial consideration of the decision allowing the subsequent trial, notwithstanding the district court's double jeopardy determination, was final and therefore "immediately appealable."[1780] Defendant's failure to immediately appeal this final decision resulted in his untimely petition to the Ninth Circuit and thus foreclosed the possibility of review at that level.[1781]

4. Inadequacy of record on appeal

The Federal Rules of Appellate Procedure outline specific guidelines which must be followed when providing a reviewing court with the trial court record of proceedings.[1782] If the record is unavailable, the appellant may reconstruct the evidence or proceedings from the best means available, pursuant to rule 10(c).[1783]

If, on appeal, a petitioner's *only* claim of error is that of an inadequate trial court record (e.g., omission of the prosecutor's closing argument), then the reviewing court may vacate the judgment and remand the case for a determination as to whether petitioner was prejudiced. If the lower court determines that petitioner was prejudiced, a new trial can be ordered. If no prejudice is found, the original judgment may be reinstated.[1784]

The issue of an inadequate record submitted on appeal arose in the recent Ninth Circuit case of *United States v. Mills*.[1785] In that case, defendant contended that he entered into a plea bargaining argument

1778. 598 F.2d 510 (9th Cir. 1979).

1779. *Id.* at 513.

1780. *Id.* at 512. Since no conviction resulted from the trial court proceedings which Ajimura contested, the Ninth Circuit was not faced with the question of whether or not a double jeopardy claim could be reviewed on appeal following the conviction. *Id.* at 513. This practice is allowed in the Seventh Circuit. *Id.* See also United States v. Gaertner, 583 F.2d 308, 311 (7th Cir. 1978), *cert. denied*, 440 U.S. 918 (1979).

1781. 598 F.2d at 511 n.1.

1782. FED. R. APP. P. 10.

1783. FED. R. APP. P. 10(c) provides in part: "If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection."

1784. Brown v. United States, 314 F.2d 293, 295 (9th Cir. 1963). In *Brown*, appellant failed to show the error in the court reporter's neglecting to record counsel's closing argument. The court therefore vacated the judgment and remanded the case to determine if appellant had been prejudiced.

1785. 597 F.2d 693 (9th Cir. 1979).

with the trial judge at a pre-trial conference. The judge then sentenced him to practically the maximum term allowed for the particular offense,[1786] as if a plea bargaining agreement had not been made.

On appeal, the Ninth Circuit denied defendant's claim for relief due to the unavailability of a record upon which his claim could be evaluated. Moreover, even though a transcript was required pursuant to rule 10(c),[1787] it was not preserved. Defendant relied on two Ninth Circuit cases where the court vacated the sentences and remanded the cases for new trials because of an inadequate lower court record.[1788] The Ninth Circuit rejected this authority as factually dissimilar in that they involved omissions in the trial record of "open court" proceedings, which constitute a violation of 28 U.S.C. § 753(b).[1789] *Mills*, on the other hand, involved chamber proceedings not subject to the requirements of section 753.[1790]

5. Appeals by the Government

18 U.S.C. § 3731 sets forth the requirements for the government's appeal of an adverse criminal decision. Under this statute, the government essentially may only appeal dismissals or orders suppressing evidence.[1791] Furthermore, a section 3731 appeal is unavailable to the government if it occurs at a stage in the criminal proceedings which would result in a defendant being subjected to double jeopardy.[1792]

1786. *Id.* at 697-98.

1787. *Id.* at 698.

1788. *Id.* The cases relied on were United States v. Piascik, 559 F.2d 545, 546-47 (9th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978) (court reporter failed to record closing argument), and *Brown*.

1789. 597 F.2d at 698. 28 U.S.C. § 753(b) (1976) provides in part:

> One of the reporters appointed for each such [district] court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means . . . (1) all proceedings in criminal cases had in open court . . . .

1790. 597 F.2d at 698.

1791. 18 U.S.C. § 3731 (1976) provides in part:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

1792. *Id.* The pertinent language of the statute reads as follows:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the

A government appeal under section 3731 was at issue in the Ninth Circuit case of *United States v. Humphries*.[1793] The Government appealed two trial court orders which suppressed evidence stemming from the arrest of defendant Humphries. Defendant argued that the Government had no right to appeal because the subject of review was a "Motion to Determine the Admissibility of Evidence" and not a "decision . . . suppressing or excluding evidence" as is required by section 3731.[1794] The Ninth Circuit dismissed this rather "hypertechnical" distinction, noting that the effect and not the label is the critical matter in determining whether a trial judge ruling is actually a motion to suppress.[1795] In reaching this conclusion, the court also observed that section 3731 should be construed broadly and significantly limited only by the strictures of the double jeopardy clause imposed by the Constitution.[1796]

6. Waiver of the right to appeal

The rules and statutes governing the conduct of federal criminal procedure often contain specific provisions which allow defendants to challenge the legality of actions taken by government or law enforcement officials. But if a defendant fails to utilize the specific procedures available to him for challenge, the courts invariably will construe this inaction as a waiver of the defendant's right of appeal.[1797]

The Ninth Circuit addressed this issue in the 1979 case of *United States v. Morgan*[1798] where a defendant failed to utilize his option under Title III of the Omnibus Crime Control Act which expressly allows for challenges to government electronic surveillance practices. Since the defendant was neither denied the opportunity to make such a challenge nor unaware of the fact that it could be made, the court held that he had waived his Title III objections and that such objections

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double jeopardy clause of the United States Constitution prohibits further prosecution.

See United States v. Rojas, 554 F.2d 938, 941 (9th Cir. 1977) (per curiam), *supplemented*, 574 F.2d 476 (9th Cir. 1978).

1793. 600 F.2d 1238 (9th Cir. 1979) *appeal docketed*, No. 78-1803.

1794. *Id.* at 1241.

1795. *Id.*

1796. *Id.* at 1242.

1797. *E.g.*, United States v. Plotkin, 550 F.2d 693, 695 (1st Cir. 1977), *cert. denied*, 434 U.S. 820 (1977)(appellant's neglect to timely raise issue of Government's alleged failure to comply with wiretapping law, constituted a waiver of right to appeal this issue); United States v. Johnson, 539 F.2d 181, 189-90 (D.C. Cir. 1976) (same as above); United States v. Chiarizio, 525 F.2d 289, 293-94 (2nd Cir. 1975) (appellant's failure to timely raise issue of tape recording constituted waiver of right to appeal this issue).

1798. 595 F.2d at 1168 (9th Cir. 1979).

could no longer be raised on appeal.[1799] The court, however, concluded that if defendant's belated challenge had involved matters which fell within the plain error category, an appellate court would have had discretion to review such a claim.[1800]

C. New Trials

Under rule 33 of the Federal Rules of Criminal Procedure, a defendant is entitled to a new trial when he discovers evidence which was not presented at his or her trial.[1801] To qualify for the new trial, defendant must make the appropriate motion within two years after the initial judgment was rendered.[1802] In addition, he must demonstrate that the new evidence could alter the outcome in his favor.[1803]

Cases raising these issues have been particularly troublesome for the federal judiciary because no uniform standard of probability has been used to determine whether the new evidence will mandate a new trial. The Fourth, Fifth, Sixth, and Seventh Circuits appear to follow the more liberal "*Larrison* rule" which permits a new trial when a defendant can demonstrate that an acquittal *might* have resulted had the evidence in question been initially introduced.[1804] On the other hand,

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1799. *Id.* at 1170.

1800. *Id.* at 1170-71.

1801. FED. R. CRIM. P. 33 provides in part:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

1802. *Id.*

1803. *Id.*

1804. *E.g.*, United States v. Wallace, 528 F.2d 863, 866 (4th Cir. 1976); United States v. Smith, 433 F.2d 149, 151 (5th Cir. 1970); Gordon v. United States, 178 F.2d 896, 900 (6th Cir. 1949), *cert. denied*, 339 U.S. 935 (1950); United States v. Gabriel, 597 F.2d 95, 98 (7th Cir. 1979). *See* United States v. Hamilton, 559 F.2d 1370, 1373 n.6 (5th Cir. 1977) (*Larrison* cited as standard under which appellants would gauge new evidence). *Contra*, United States v. Williams, 415 F.2d 232, 233 (4th Cir. 1969) (court used "probability" test instead of *Larrison* test).

The *Larrison* rule, originating from the case of Larrison v. United States, 24 F.2d 82 (7th Cir. 1928), requires that the following conditions be met before a new trial will be granted:

a. The court is reasonably well satisfied that the testimony given by a material witness is false.
b. That without it the jury *might* have reached a different conclusion.
c. That the party seeking the new trial was taken by surprise when the false testi-

the District of Columbia, First, Second, Third, Eighth, Ninth and Tenth Circuits follow a standard which requires that the new evidence "would *probably* produce an acquittal."[1805]

The Ninth Circuit addressed this "possibility - probability" dichotomy in *United States v. Krasny*,[1806] decided in 1979. Krasny was convicted of a drug distribution conspiracy partly on the strength of testimony given by a co-conspirator. After trial, the Government informed Krasny that new information had been uncovered which shed considerable doubt on the veracity of the co-conspirator's testimony.[1807] Krasny's motion for a new trial on the basis of the newly discovered evidence was denied by the trial court. On appeal to the Ninth Circuit, the issue was whether the *Larrison* or the more stringent "probability" standard should apply.

Noting that *Krasny* was a case of first impression, the court acknowledged confusion in the Ninth Circuit over the appropriate standard because *Larrison*, rather than the more prevalent "probability"

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mony was given and was unable to meet it or did not know of its falsity until after the trial.

Id. at 87-88.

1805. *E.g.*, United States v. Reese, 561 F.2d 894, 902 (D.C. Cir. 1977); United States v. Street, 570 F.2d 1, 3-4 (1st Cir. 1977); United States v. Stofsky, 527 F.2d 237, 245-46 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976); United States v. Frye, 548 F.2d 765, 769 (8th Cir. 1977); United States v. Perno, 605 F.2d 432 (9th Cir. 1979); United States v. Cervantes, 542 F.2d 773, 779 (9th Cir. 1976); United States v. Jackson, 579 F.2d 553, 557 (10th Cir.), *cert. denied*, 439 U.S. 981 (1978). The "probability rule" derives from United States v. Bertone, 249 F.2d 156, 160 (3d Cir. 1957) and requires that:

a. The evidence must have been discovered after the trial;
b. The failure to learn of the evidence must not have been caused by defendant's lack of diligence;
c. The new evidence must not be merely cumulative or impeaching;
d. It must be material to the principal issues involved; and
e. It must be of such a nature that in a new trial it would probably produce an acquittal.

The District of Columbia Circuit refers to this same test as the "*Thompson*" test after Thompson v. United States, 188 F.2d 652, 653 (D.C. Cir. 1951). *Accord*, United States v. Reese, 561 F.2d 894, 902 (D.C. Cir. 1977); United States v. Mackin, 561 F.2d 958, 961 (D.C. Cir. 1977).

The U.S. Supreme Court has acknowledged the existence of the two competing standards, but has not found it necessary to resolve this issue. United States v. Johnson, 327 U.S. 106, 111 n.5 (1946).

Courts in several circuits have occasionally recognized both tests in the same opinion without giving an explicit endorsement to either. *See, e.g.*, United States v. Mackin, 561 F.2d at 961; *In re* United States, 565 F.2d 173, 177 n.3 (1st Cir. 1977); United States v. Meyers, 484 F.2d 113, 116-17 (3d Cir. 1973).

1806. 607 F.2d 840 (9th Cir. 1979).

1807. *Id.* at 842.

standard, was authority in two former cases.[1808] However, the court noted that under *Larrison* even a witness's relatively minor indiscretions would be sufficient to warrant a new trial.[1809] Thus, the Ninth Circuit rejected *Larrison* and held that the "probability" standard is proper where a convicted defendant discovers that the government has used false testimony during the initial trial.[1810] But the court was careful to limit the use of the "probability" standard to situations where the government has not knowingly used the false testimony.[1811]

The dissent relied on the United States Supreme Court case of *Mesarosh v. United States*[1812] which established a virtual per se rule mandating a new trial where a government witness presented "tainted" testimony.[1813] *Mesarosh's* per se approach was based on Chief Justice Warren's analogy which likened the introduction of false testimony at a trial to the total contamination of a reservoir.[1814] Since, according to Chief Justice Warren, all the waters in a reservoir would become tainted by the offending substance, the only practical remedy would be a complete drain and refill. This he likened to a new trial.[1815]

No one can argue with the Chief Justice's physics. Liquid substances will spread uniformly throughout a solution. But the pervasiveness of false testimony is certainly open to question. Nonetheless, the principles behind *Mesarosh* were not challenged by either the majority or minority. Both, however, did disagree over the breadth of its holding.[1816] The majority sought to limit *Mesarosh* to its "peculiar" facts which involved a government witness who had been "wholly discredited."[1817]

But these differences appear less than persuasive. Normally *any* witness who has perjured himself can be "wholly discredited." Ironically, the *Krasny* majority indicated as much when it argued against the less stringent *Larrison* standard. The majority noted that in situa-

1808. *Id.*
1809. *Id.* at 843 n.2. The court noted that one case, Mejia v. United States, 291 F.2d 198 (9th Cir. 1961), was decided on its own "peculiar" facts, while the other, Strangway v. United States, 312 F.2d 283 (9th Cir.), *cert. denied*, 373 U.S. 903 (1963), did not involve newly discovered evidence.
1810. 607 F.2d at 846. The court utilized the reasoning of the Second Circuit in United States v. Stofsky, 527 F.2d 237, 245-46 (2nd Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).
1811. 607 F.2d at 846.
1812. 352 U.S. 1 (1956).
1813. *Id.* at 12.
1814. *Id.* at 9.
1815. *Id.* at 14.
1816. *Id.* at 9, 14.
1817. 607 F.2d at 845 (quoting Mesarosh v. United States, 352 U.S. at 9).

tions where even a part of a witness's testimony is discovered to be perjured, juries are normally instructed to disregard *all* of it.[1818] Arguably then, a "wholly discredited" witness is not very different from one whose testimony is "totally disregarded." Thus, there appears to be little justification for the majority's distinction which results in an overly restrictive interpretation of *Mesarosh*.

To compound matters, the majority attempted to distinguish an earlier Ninth Circuit case, *Williams v. United States*,[1819] which relied directly on *Mesarosh*.[1820] In *Williams*, a defendant challenged his conviction after it was discovered that the chief prosecution witness conspired to deprive another defendant of his civil rights by offering perjured testimony.[1821] Although factually similar to *Mesarosh*, there is nothing in the *Williams* opinion which attempted to limit *Mesarosh* to a situation where a government witness was "wholly discredited."[1822] Thus, the *Krasny* majority's statement that "[w]e have followed this approach in cases where the factual circumstances have closely paralleled those found in *Mesarosh*" is simply an ex post facto attempt to create support for a legal principle which did not exist prior to the *Krasny* case itself.

1818. 607 F.2d at 843 (quoting United States v. Stofsky, 527 F.2d 237, 245-46 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976)).

The weakness of the *Krasny* majority's "wholly discredited" distinction is also evident from a quoted passage in *Mesarosh* which observed: "When uncontested challenge is made that a finding of subversive design by petitioner was in part the product of three perjurious witnesses, it does not remove the taint for a reviewing court to find that there is *ample innocent testimony* to support the Board's findings." 352 U.S. at 11 (quoting Communist Party v. Subversive Activities Control Bd., 351 U.S. 115, 124 (1956)). Thus, *Mesarosh* would appear to encompass situations where perjury occurred but where there was also "ample innocent testimony." This would parallel many of the factual patterns found where a witness is not totally unreliable or discredited.

On the other hand, the presumed "wholly unreliable" category could easily be subsumed under both the *Larrison* and "probability" tests. A court would inevitably conclude in a *Mesarosh* situation that a jury would either "probably" or "possibly" reach a new verdict because of the severity of the taint involved when a witness has committed perjury in another case dealing with the same subject matter. Professor Moore appeared to make this connection when he noted that "the testimony of a principle government witness inherently possesses a high degree of materiality." 8A MOORE'S FEDERAL PRACTICE § 33.04(1), at 33-27 (2d ed. 1978). He then compared this statement favorably with *Mesarosh*, apparently indicating that in a *Mesarosh* situation the factors which are critical to finding a new trial under the traditional "probability" test would be present. *Id.* at § 33.04(1), at 33-27 & n.4.

1819. 500 F.2d 105 (9th Cir. 1974).

1820. 607 F.2d at 845.

1821. 500 F.2d at 106.

1822. In fact there is language in *Williams* which would support a broad application of *Mesarosh*. The court noted that "[a] conviction based substantially upon tainted evidence cannot stand." *Id.* at 108. Nothing was said about the degree of taint.

Arguably, *Mesarosh*'s rather inflexible per se approach leaves much to be desired. Rather than critically examine this Supreme Court opinion directly, the Ninth Circuit chose to circumvent its effect by creating the somewhat artificial "wholly discredited" standard and rule 33 distinctions. However, the *Krasny* majority's concern with the problems created by the relatively lenient *Larrison* rule appears to be well founded. *Krasny's* clear expression in favor of the more demanding "probability" standard may help eliminate the potential tendency to award a new trial where only "inconsequential" prevarications have occurred.

D. Sentencing

1. Judge's information in determining sentence

A judge has wide discretion in selecting the type of information which may be considered in determining a sentence.[1823] The information need not conform to the standards required for evidence introduced at trial, as long as it is not false or unreliable.[1824] Short of this, a sentencing judge is entitled to draw reasonable inferences from any information which is introduced.[1825]

These principles were applied in the 1979 case of *United States v. Morgan*,[1826] where defendant claimed that the trial judge unjustifiably considered his acquittal of a prior charge in enhancing his sentence.[1827] Morgan relied on *United States v. Tucker*,[1828] in which the Supreme Court held that a sentencing judge could not consider a prior conviction obtained in violation of the sixth amendment to enhance a sentence.[1829] But the Ninth Circuit rejected this argument, noting that

1823. *E.g.*, Williams v. New York, 337 U.S. 241, 246-47 (1949); *Accord*, United States v. Morgan, 595 F.2d 1134, 1136 (9th Cir. 1979); *See also* United States v. Wright, 593 F.2d 105, 109 (9th Cir. 1979) (sentencing judge may take into account the character of defendant's associates); United States v. Martinez-Navarro, 604 F.2d 1184, 1186 (9th Cir. 1979) (per curiam) (sentencing judge may take into account the defendant's truthfulness while on the witness stand).

1824. Townsend v. Burke, 334 U.S. 736, 740-41 (1948) (sentencing based on materially untrue assumptions inconsistent with due process). *Cf.* United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971) (sentencing judge was not allowed to rely on information of "little value," including speculative assumptions by law enforcement officials that defendant may have been involved in more serious criminal activities); Farrow v. United States, 580 F.2d 1339, 1360 (9th Cir. 1978) (en banc) ("unwarranted weight [may] not be given to [hearsay evidence] to enhance [a] sentence").

1825. *E.g.*, United States v. Robelo, 596 F.2d 868, 870 (9th Cir. 1979).

1826. 595 F.2d 1134 (9th Cir. 1979).

1827. *Id.* at 1135.

1828. 404 U.S. 443 (1972).

1829. *Id.* at 449.

Tucker has traditionally been limited to its particular circumstances.[1830] Therefore, the court declined to extend it to cover prior acquittals.[1831] In addition, the court found nothing to indicate that the sentencing judge in *Morgan* relied on erroneous information.[1832] In fact, it appeared that contrary to Morgan's assertions, the judge may have viewed Morgan's acquittal in a favorable light.[1833] Thus, the court had little difficulty in upholding Morgan's original sentence.[1834]

2. Disclosure to defendant

The Ninth Circuit requires that a defendant be informed of all harmful information used by a judge in arriving at the sentence.[1835] This procedure allows the defendant an opportunity for rebuttal. In *Serapo v. United States*,[1836] the trial judge, who had heard the trials of two co-defendants, stated that she believed defendant Serapo was more deeply involved in a drug conspiracy than he had previously admitted. She then sentenced him to a one year prison term. On appeal, Serapo contended that the use of such information was an abuse of the court's discretion because there was no opportunity for rebuttal.[1837]

The Ninth Circuit affirmed the trial court because the same information had been available in the pre-sentence report. Thus, there had been ample opportunity for a response by the defendant prior to sentencing.[1838]

3. Enhancement

An enhancement statute generally increases the minimum and

1830. 595 F.2d at 1136. *E.g.*, Farrow v. United States, 580 F.2d 1339, 1345 (9th Cir. 1978) (en banc) (*Tucker* requires a prior conviction rendered invalid by *Gideon*, mistaken belief in its validity, and enhancement of sentence); Tisnado v. United States, 547 F.2d 452, 457 (9th Cir. 1976) (*Tucker* not extended to fourth amendment violations). *Contra*, Jefferson v. United States, 488 F.2d 391, 393 (5th Cir. 1974) (extended to fifth amendment); Taylor v. United States, 472 F.2d 1178, 1179-80 (8th Cir. 1973) (extended to fifth amendment); Martinez v. United States, 464 F.2d 1289, 1290 (10th Cir. 1972) (*Tucker* extended to invalid statutory presumption).

1831. 595 F.2d at 1137.

1832. *Id.*

1833. *Id.*

1834. *Id.* at 1138.

1835. *E.g.*, United States v. Perri, 513 F.2d 572, 575 (9th Cir. 1975).

1836. 595 F.2d 3 (9th Cir. 1979).

1837. *Id.* at 3-4.

1838. *Id.* at 4. *Accord, e.g.*, United States v. Leonard, 589 F.2d 470, 472 (9th Cir. 1979) (defendant's sentence was affirmed in light of the fact that he failed to take advantage of opportunities provided at sentencing hearing to contest the accuracy of the pre-sentence report).

maximum sentence which may be imposed for a subsequent offense following a prior conviction.[1839] But, a person sentenced under an enhancement statute because of a prior offense which is later overturned, can petition for a reduction of the enhanced sentence. In such situations, a remand for resentencing can be ordered even though there is no showing that the trial court relied on the enhancement statute when making the original sentence.[1840]

However, in the application of an enhancement statute the sentencing judge is required to give a defendant the opportunity to affirm or deny the existence of prior convictions.[1841] In *United States v. Harris*,[1842] decided in 1979, the Ninth Circuit addressed for the first time the issue of whether a defendant is personally required to make such an affirmance or denial.[1843] Defendant claimed that the enhancement statute was violated when his attorney, rather than Harris himself, acknowledged the existence of a prior conviction at a sentencing hearing.[1844] However, the Ninth Circuit instead found that Harris, by remaining silent at the hearing, had failed to take advantage of the "opportunity" afforded him by the statute.[1845]

1839. 18 U.S.C. § 924(c) (1976) provides:

> Whoever—
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

1840. United States v. Harris, 592 F.2d 1058, 1060 (9th Cir. 1979). *See also*, Murgia v. United States, 448 F.2d 1275, 1276 (9th Cir. 1971) (per curiam) (petitioner's motion for resentencing was granted after his first conviction was overturned even though he had only received the minimum sentence for second time offenders).

1841. 21 U.S.C. § 851(b) (1976)) provides in part: "[t]he court shall after conviction but before pronouncement of sentence inquire of the person . . . whether he affirms or denies that he has been previously convicted. . . ."

1842. 592 F.2d 1058 (9th Cir. 1979).

1843. *Id.* at 1060.

1844. *Id.* at 1059.

1845. *Id.* at 1061. The court referred to the Fifth Circuit case of United States v. Garcia, 526 F.2d 958, 961 (5th Cir. 1976), which required literal compliance with this provision: however, *Garcia* followed the Seventh Circuit case of United States v. Scales, 249 F.2d 386, 370 (7th Cir. 1957), *cert. denied*, 356 U.S. 945 (1958), which did not require the defendant's personal affirmance or denial.

4. Government's option to prosecute under a more severe statute

Generally a defendant who violates more than one statute can be prosecuted and sentenced under either, even though different penalties may be prescribed for the same conduct. In the 1979 case of *United States v. Batchelder*,[1846] the Supreme Court found that because a defendant does not have a constitutional right to choose the statutory scheme under which he may be prosecuted, the Government's decision to pursue the harsher of two such statutes did not violate defendant's due process rights.[1847]

The Ninth Circuit extended the *Batchelder* rule in the 1979 case of *United States v. Brown*,[1848] where defendant, who pleaded guilty to one count of bank robbery and one firearm count,[1849] was sentenced to consecutive terms of twenty years for the bank robbery count and five years for the firearm violation. Alternatively, the Government could have prosecuted the combined offense under a third statutory provision which had a more lenient sentence.[1850] In relying on *Batchelder*, the court nevertheless found that the Government could prosecute under the harsher alternative if it chose to do so.[1851]

5. Increase in sentence at retrial

In *North Carolina v. Pearce*,[1852] the Supreme Court addressed the problem of sentencing after a defendant had successfully overturned his original conviction, was retried, again convicted, and then given a harsher sentence.[1853] Although the Court held that it was constitutionally permissible to impose a harsher sentence on retrial,[1854] it expressly prohibited this practice unless defendant's behavior *following* his original conviction justified such a result.[1855]

The Ninth Circuit applied the *Pearce* rule in *United States v. Young*,[1856] where defendant was convicted and sentenced to a twelve

1846. 442 U.S. 114 (1979).
1847. *Id.* at 125.
1848. 602 F.2d 909 (9th Cir. 1979).
1849. *Id.* at 910.
1850. *Id.* at 912.
1851. *Id.*
1852. 395 U.S. 711 (1968).
1853. *Id.* at 713.
1854. *Id.* at 723.
1855. *Id.* at 726. *Accord*, United States v. Clayton, 588 F.2d 1288, 1291 (9th Cir. 1979) (second sentence imposing greater probationary period was justified in view of fact that defendant failed to satisfactorily comply with conditions of original sentence).
1856. 593 F.2d 891 (9th Cir. 1979).

year prison term and special parole of three years.[1857] While on bail pending appeal of this sentence, he was convicted of yet another offense, and given a prison term to run concurrently with the original sentence.[1858] The original conviction was then overturned and upon retrial the defendant was reconvicted and sentenced to a prison term which ran *consecutively* with his other sentence.[1859] As a result, defendant's original twelve year term was lengthened to a twenty-seven year term. Because nothing in the record supported such a dramatic increase in punishment, the Ninth Circuit remanded for resentencing.[1860] In so doing, the court stated that due process considerations "require that a trial judge . . . never impose a heavier sentence upon a reconvicted defendant simply to punish him for having his original conviction set aside."[1861]

6. Concurrent sentence doctrine

Under the concurrent sentence doctrine, an appellate court may decline to hear an issue raised with regard to one count of an indictment when the defendant was also convicted of another count and concurrently sentenced.[1862] But the doctrine may only be used if no adverse collateral legal consequences will result therefrom.[1863]

The Ninth Circuit applied this doctrine in two 1979 cases which involved concurrent sentences with no apparent adverse consequences to defendants.[1864] But in *United States v. Magdaleno-Aguirre*,[1865] the court refused to apply the doctrine where a juvenile was convicted on both a misdemeanor and a felony count.[1866] After he was concurrently sentenced on both counts, he then appealed the felony conviction.[1867] The Government contended that the felony conviction should stand be-

1857. *Id.* at 892.
1858. *Id.*
1859. *Id.*
1860. *Id.* at 893.
1861. *Id.* On some occasions it may be necessary to assign a new judge when the original sentencing judge adheres to an erroneous view even after such error has been brought to his or her attention. Leano v. United States, 592 F.2d 557, 559-60 (9th Cir. 1979).
1862. Hirabayashi v. United States, 320 U.S. 81, 85 (1943). *Accord*, United States v. Diaz-Alvarado, 587 F.2d 1002, 1005 (9th Cir. 1978), *cert. denied*, 440 U.S. 927 (1979); United States v. Cella, 568 F.2d 1266, 1288 (9th Cir. 1978).
1863. *E.g.*, United States v. Walls, 577 F.2d 690, 699 (9th Cir. 1978); United States v. Moore, 452 F.2d 576, 577 (9th Cir. 1971) (per curiam).
1864. United States v. Valenzuela, 596 F.2d 824, 829 (9th Cir. 1979); United States v. Boyce, 594 F.2d 1246, 1252 (9th Cir. 1979) (per curiam).
1865. 590 F.2d 814 (9th Cir. 1979).
1866. *Id.* at 815.
1867. *Id.* at 814-15.

cause defendant would have received the same sentence under the misdemeanor count alone.[1868] However, the Ninth Circuit rejected this argument and held that the concurrent sentence doctrine was inapplicable due to the potentially damaging consequences of a felony conviction as compared to those of a misdemeanor conviction.[1869]

7. Presentence jail credit

In computing a defendant's sentence, there is no constitutional requirement that credit be given for time served prior to the imposition of the sentence.[1870] Any credit given is the result of legislative grace.[1871]

Pre-sentence jail credit was ostensibly at issue in the 1979 Ninth Circuit case of *United States v. Clayton*,[1872] where defendant Clayton was originally sentenced to six years imprisonment.[1873] The sentence was then modified so that Clayton would be confined on successive weekends until she had accumulated ninety days in a "jail-type institution." The rest of her six year sentence was suspended and replaced by a five year probationary period.[1874] Clayton completed twenty-four days of her weekend sentence and then failed to appear. Her probation was revoked, the original six-year sentence was reimposed and, as part of its conditions, Clayton was required to spend six months in confinement plus another five years on probation.[1875] She then completed the six-month sentence, but during the ensuing probation period she was convicted of three petty theft violations. The lower court thereafter ordered her to complete the remainder of the original six year sentence in confinement.[1876]

On appeal, Clayton contended that the order imposing the six-month confinement (subsequent to violation of the weekend imprisonment) was invalid in that the total prison sentence exceeded the six months limitation provided in 18 U.S.C. Section 3651.[1877] Clayton ar-

1868. *Id.* at 815.
1869. *Id.* (citing United States v. Horning, 409 F.2d 424, 426 (4th Cir. 1969)).
1870. *E.g.*, Makal v. Arizona, 544 F.2d 1030, 1035 (9th Cir. 1976); Gray v. Warden, 523 F.2d 989, 990 (9th Cir. 1975).
1871. *E.g.*, Gray v. Warden, 523 F.2d 989, 990 (9th Cir. 1975).
1872. 588 F.2d 1288 (9th Cir. 1979).
1873. *Id.* at 1289.
1874. *Id.*
1875. *Id.* at 1290.
1876. *Id.*
1877. *Id.* 18 U.S.C. § 3651 (1976) provides in part:

> Upon entering a judgment of conviction of any offense . . . if the maximum punishment provided for such offense is more than six months, [the] court . . . may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution . . . for a period not exceeding six months and that

gued that the twenty-four days served under the original sentence order, plus the six months of subsequent confinement, resulted in a prison sentence in excess of the six months statutory maximum. Consequently, the second order placing her on probation was also invalid. Accordingly, Clayton believed that she was not on probation at the time of her arrest and conviction for petty theft. Therefore, the final reinstatement of the six-year sentence did not amount to a revocation of probation, but rather double punishment for the same crime.[1878]

The court suggested two different modes of analysis to judge the legality of Clayton's sentence. First, it characterized the original order as a split sentence of ninety days and five years probation. Under this approach, probation could not begin until the completion of the ninety day confinement.[1879] Thus, Clayton would not have been technically on probation when she failed to comply with the terms of her weekend service.[1880] However, the court refused to rule so since Clayton had neglected to raise this issue at the appropriate time.[1881] Additionally, the court noted that an imposition of weekend service rather than regular confinement was actually illegal.[1882] However, this error was corrected by the second order which required a six-month period of confinement.[1883] Thus, the court concluded that the first alternative was a legally imposed sentence.[1884] Under the second approach, the Ninth Circuit construed the original punishment as a six-year suspended sentence, followed by a five-year probationary period, which was conditioned on Clayton's serving ninety days in jail.[1885] This alternative was also found to be legal.[1886]

Nevertheless, the court was still faced with the problem of how to compute the six-month limitation of 18 U.S.C. § 3651, *i.e.*, should the multiple sentences be measured cumulatively or on a "sentence-by-sentence basis."[1887] The court held that although the six-month limitation should have been calculated on a cumulative basis, Clayton's sentence

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the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

1878. 588 F.2d at 1290.

1879. *Id.* at 1291.

1880. *Id.*

1881. *Id.*

1882. *Id.* (citing United States v. Haseltine, 419 F.2d 579, 581-82 (9th Cir. 1969), *rev'd on other other grounds sub nom.* United States v. Bishop, 412 U.S. 346, 351 & n.3 (1972)).

1883. 588 F.2d at 1291.

1884. *Id.*

1885. *Id.*

1886. *Id.*

1887. *Id.* at 1292.

still was affirmed.[1888] The Ninth Circuit seemingly misapplied 18 U.S.C. § 3568 which vests power in the Attorney General, rather than the courts, to deduct pre-sentence time served in confinement as a credit toward reducing a prisoner's overall sentence.[1889] However, the twenty-four days served in jail were part of Clayton's *original* sentence and not related to a pre-sentencing confinement. Ultimately, the Ninth Circuit considered the interpretation of a federal statute, an issue to be clearly within the province of the judiciary. Thus, the application of a pre-sentence credit statute to these facts appears to be nothing more than an avoidance of the consequences of its own statutory interpretation.

E. Probation

The federal system of probation is governed by the Federal Probation Act.[1890] Section 3651 of the Act provides that the court "may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best."[1891] The Ninth Circuit has limited this broad grant of discretion by holding that probation conditions must "reasonably relate" to the underlying purposes of the Act,[1892] construed as the rehabilitation of the convicted person and the protection of the public.[1893] Numerous Ninth Circuit decisions have considered the extent to which probation conditions may infringe upon the constitutional rights of probationers.[1894] A successful constitutional challenge may be foreclosed if there is a reasonable relationship between the conditions

1888. *Id.*

1889. *Id.*

1890. 18 U.S.C. §§ 3651-3656 (1976 & Supp. 1979). Probation is a system of tutelage whereby a court supervises and controls the conduct of a convicted defendant. Frad v. Kelly, 302 U.S. 312, 318 (1937). Important policy considerations underlie any system of probationary release, similar to those supporting prisoner release on parole. Probation, like parole, seeks to reintegrate individuals as constructive members of society as soon as they are able. Morrissey v. Brewer, 408 U.S. 471, 477 (1972).

1891. 18 U.S.C. § 3651 (1976).

1892. United States v. Consuelo-Gonzales, 521 F.2d 259, 264 (9th Cir. 1975) (en banc).

1893. *Id.*

1894. *See, e.g.*, United States v. Jeffers, 573 F.2d 1074, 1075 (9th Cir. 1978) (per curiam) (probation condition, though overbroad in its scope, nevertheless supported search of probationer because authority granted by the condition was narrowly and properly exercised); United States v. Pierce, 561 F.2d 735, 739-41 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978) (condition of probation requiring release of confidential financial information not necessarily an infringement on probationer's right against self-incrimination); United States v. Gordon, 540 F.2d 452, 453-54 (9th Cir. 1976) (same as *Jeffers*).

of probation and the goals of the Federal Probation Act.[1895]

Tension exists between probationers' rights and the purposes of the Act not only in the area of probation conditions, but also in the revocation process. The procedural rights guaranteed a probationer before revocation include a preliminary and final revocation hearing, written notice of claimed violations, an opportunity to be heard and present evidence, a limited right of confrontation, a "neutral and detached hearing body," and written findings by that body.[1896] Recently, there have been challenges as to the propriety of revocation absent a formal warning to the probationer as to what conduct will result in revocation.

1. Grounds for revocation

The principle Ninth Circuit decision in this area is *United States v. Dane*[1897] decided in 1977. In *Dane*, the probationer contended that revocation was improper because he was not notified of which condition he allegedly violated. The Ninth Circuit initially noted that the essential element of due process was a prior "fair warning of those acts which may lead to a loss of liberty."[1898] The court considered the circumstances surrounding the grant of probation and then implied the existence of a prior fair warning. The probationer's actions transgressed this "fair warning" and thus probation was justifiably re-

1895. United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975) (en banc) (infringement of fundamental rights must serve the broad purposes of the Federal Probation Act). The probation system cannot, however, serve as "a subterfuge for criminal investigations." *Id.* at 267. *See* Latta v. Fitzharris, 521 F.2d 246 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975). *See also* United States v. Graham, 575 F.2d 739, 740 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 853 (1978) (search proper since probation was not a subterfuge for criminal investigations; probation has law enforcement as well as rehabilitative aspects).

1896. Gagnon v. Scarpelli, 411 U.S. 778, 788-89 (1973); Morrissey v. Brewer, 408 U.S. 471, 489 (1972). A probationer is also granted a limited right to counsel. Gagnon v. Scarpelli, 411 U.S. at 790; Mempa v. Rhay, 389 U.S. 128 (1967).

1897. 570 F.2d 840 (9th Cir. 1977), *cert. denied*, 436 U.S. 959 (1978).

1898. *Id.* at 843. The court in *Dane* noted:

> [A]s a general matter, formal conditions of probation serve the purpose of giving notice of proscribed activities. But a formal condition is not essential for purposes of notice. Courts have sustained the revocation of probation for criminal activity committed prior to the effective date of the conditions, . . . or where the defendant was not aware of the conditions. . . . In such a case knowledge of the criminal law is imputed to the probationer, as is an understanding that violation of the law will lead to the revocation of probation. On the other hand, where the proscribed acts are not criminal, due process mandates that the petitioner cannot be subjected to a forfeiture of his liberty for those acts unless he is given fair prior warning.

Id. at 843-44.

voked.[1899]

Dane was relied on in the 1979 case of *United States v. Furukawa*.[1900] As a condition of his probation, Furukawa was told to associate with only "law-abiding" persons. His probation officer specifically instructed him not to associate with Takagi because he appeared to be involved in "law-violating" activities.[1901] Furukawa's continued association with Takagi and two other individuals led to the revocation of his probation.[1902] On appeal Furukawa contended that this condition exceeded the scope of the probation officer's authority because Takagi was a "law-abiding" person.[1903]

The Ninth Circuit upheld the order of the probation officer noting that "[a] person disobeying the law today and hence not being law-abiding may as yet have no criminal record . . . ."[1904] Furukawa also challenged his association with one of the two other people, Okubo, on the grounds that he was unaware of Okubo's prior conviction for trespassing.[1905] But the court found that knowledge of Okubo's previous *arrest* for narcotics violations and his reputation as a gambler should have put Furukawa on notice that Okubo was not "law-abiding."[1906] Therefore, Furukawa "had *fair warning* that association with Okubo would violate the . . . condition of his probation and might 'lead to a loss of liberty.' "[1907]

2. Mitigating evidence

The right of the probationer to present evidence to mitigate the probation violation is absolute. In *United States v. Diaz-Burgos*,[1908] the defendant was convicted of illegal entry into the United States, placed on probation, and deported. After another illegal entry, he was again arrested and his probation revoked. At the hearing the violation was "obvious if not admitted" and the district court refused to hear any evidence offered by Diaz-Burgos, or to hear a full explanation from his attorney.[1909] The Ninth Circuit reversed and noted the Supreme

1899. *Id.* at 844-46.
1900. 596 F.2d 921 (9th Cir. 1979).
1901. *Id.* at 922.
1902. *Id.* at 923.
1903. *Id.* at 922.
1904. *Id.*
1905. *Id.* at 923.
1906. *Id.*
1907. *Id.* (quoting United States v. Dane, 570 F.2d 840, 843 (9th Cir. 1977), *cert. denied*, 436 U.S. 959 (1978) (emphasis added).
1908. 601 F.2d 983 (9th Cir. 1979) (per curiam).
1909. *Id.* at 984.

Court's two step revocation process: (1) the court must determine whether probation conditions were violated and, if so, (2) whether the violations warrant revocation of probation.[1910] Since the court failed to allow appellant to show mitigating facts, the Ninth Circuit found that probationer's due process rights had been violated.[1911]

3. Revocation hearing procedures

a. dissimilarity to criminal trials

Another challenge to the hearing process was heard in *United States v. Rilliet*.[1912] Rilliet's probation was revoked for two violations of state law: the possession of firearms by an ex-felon and possession of cocaine.[1913] Defendant raised two issues regarding the revocation hearing. The first was whether the arrest was sufficient grounds for revocation.[1914] The Ninth Circuit found that since "substantial evidence" of state law violations was presented, a proper basis existed for revocation of Rilliet's federal probation status.[1915] Second, Rilliet argued that since the revocation hearing was held prior to his trial on the state charges, he was forced into an impermissible election of either remaining silent at the revocation hearing, thereby risking revocation, or testifying on his own behalf at the hearing thereby risking usage of his statements against him at the subsequent state trial.[1916]

The court noted that this argument had been previously rejected by the Ninth Circuit[1917] and thus held that the timing of the hearing

1910. *See* Morrissey v. Brewer, 408 U.S. 471, 485-89 (1972), made applicable to probation revocations in Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973). The revocation hearing must allow "an opportunity to be heard and to show . . . that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." Morrissey v. Brewer, 408 U.S. at 488.

1911. 601 F.2d at 985-86. The remedy for the procedural violation was not a release from custody, but a remand of the case at which the probationer would be accorded his full procedural rights. *Id.*

1912. 595 F.2d 1138 (9th Cir. 1979) (per curiam).

1913. *Id.* at 1139.

1914. *Id.* at 1140. *See* United States v. Marron, 564 F.2d 867, 871 (9th Cir. 1977) (conviction not a prerequisite to revocation); United States v. Lustig, 555 F.2d 751, 753 (9th Cir. 1977) (per curiam) (revocation proper when judge is reasonably satisfied that a state or federal law has been violated); United States v. Carrion, 457 F.2d 808, 809 (9th Cir. 1972) (per curiam) ("[P]robation may be revoked when the judge is reasonably satisfied that a state or federal law has been violated, and conviction is not a prerequisite.").

1915. 595 F.2d at 1140.

1916. *Id.*

1917. Ryan v. Montana, 580 F.2d 988, 994 (9th Cir. 1978) (use immunity for testimony given at state probation revocation hearing not mandated as a matter of constitutional law). *See* Flint v. Mullen, 499 F.2d 100, 103 (1st Cir. 1974) (per curiam) (no denial of due process or violation of the fifth amendment to hold state criminal trial after the revocation hearing).

had not forced Rilliet into an impermissible election.[1918] There are two reasons underlying the Ninth Circuit's position. First, full criminal procedural safeguards are not accorded a probationer in a revocation hearing.[1919] Second, refusal to waive the fifth amendment privilege in a revocation hearing does not automatically lead to revocation or to any other sanction. Therefore, the court decided that defendant was not forced to make an unconstitutional election.[1920]

b. delay

In *United States v. Olmos-Esparza*,[1921] the probationer was in state custody when the district court issued an order for his arrest to show cause why probation should not be revoked.[1922] Two years later, after the expiration of the initial probation period, a writ of habeas corpus was issued, and the probationer was released to appear at a federal probation revocation hearing. The probationer then moved to dismiss the original order to show cause on the ground that his appearance for the revocation hearing had been unreasonably delayed.[1923] The Ninth

1918. 595 F.2d at 1140.

1919. *See, e.g.*, United States v. Segal, 549 F.2d 1293, 1297 (9th Cir.), *cert. denied*, 431 U.S. 919 (1977) (same as above); Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (revocation not the equivalent of a criminal prosecution).

1920. 595 F.2d at 1140. *Cf.* Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977) (disqualification from political or public office for refusal to waive fifth amendment privilege; government cannot penalize assertion of that privilege by imposing sanctions to compel testimony not immunized); Lefkowitz v. Turley, 414 U.S. 70, 82-83 (1973) (disqualification from receipt of public contracts for failure to waive fifth amendment privilege held unconstitutional). *See* Ryan v. Montana, 580 F.2d 988, 990-94 (9th Cir. 1978). It is permissable to force a criminal defendant to make a "strategic choice" between testimony in mitgation of guilt or punishment and the risk of self-incrimination. McGautha v. California, 402 U.S. 183, 213-17 (1971) *vacated on other grounds*, 408 U.S. 941 (1972) (no constitutional right to trial bifurcation into separate guilt and punishment stages; not improper to condition right to remain silent on the issue of guilt on the surrendering of the opportunity to testify in mitigation of punishment); Baxter v. Palmigiano, 425 U.S. 308, 320 (1976) (permissible to draw negative inferences from prisoner's refusal to testify at a prison disciplinary hearing). In the past the Ninth Circuit has indicated that although not constitutionally mandated, use immunity for testimony given at revocation hearings held prior to criminal trials may be preferable. Ryan v. Montana, 580 F.2d 988, 994 (9th Cir. 1978); United States v. Segal, 549 F.2d 1293, 1297 (9th Cir.), *cert. denied*, 431 U.S. 919 (1977) (revocation process not to be equated with a criminal prosecution). *See also* United States v. Vandemark 522 F.2d 1019 (9th Cir. 1975) (exclusionary rule not applicable in revocation hearing when law enforcement officials conducting search were not aware of defendant's status as a probationer); United States v. Miller, 514 F.2d 41, 43 (9th Cir. 1975) (per curiam) (admission of hearsay evidence and unauthenticated records in a revocation hearing held proper).

1921. 600 F.2d 187 (9th Cir. 1979) (per curiam).

1922. *Id.* at 188.

1923. *Id.*

Circuit held that section 3653 of the Federal Probation Act[1924] does not mandate a revocation hearing immediately after the issuance of an order beginning the revocation process, if the probationer was in state custody at the time the order was issued.[1925]

F. Habeas Corpus

1. Independent state grounds doctrine

A federal prisoner can petition for habeas corpus relief if his or her confinement was the result of a criminal conviction which was obtained "in violation of the Constitution or laws of the United States."[1926] Federal habeas corpus petitions can also be made by state prisoners if they have exhausted all possible avenues of relief available to them within the state judicial system.[1927]

When the petition comes from a state prisoner, the success of that petition may ultimately depend on whether the prisoner complied with his state court procedures.[1928] Failure to raise certain objections during trial may often preclude a prisoner from later collaterally attacking his

1924. 18 U.S.C. § 3653 (1976) provides that one accused of violating the terms of probation shall be brought before a District Court "as speedily as possible" for a hearing on the alleged violations.

1925. 600 F.2d at 189. The execution of the order and bench warrant for probationer's arrest, issued within the original probationary period, could properly await enforcement until after the outcome of the pending state criminal charges and sentencing. *See* United States v. Bartholdi, 453 F.2d 1225, 1226 (9th Cir. 1972) (deferment of execution on bench warrant held proper; citing to prior Ninth Circuit law dealing with parole revocation).

1926. 28 U.S.C. § 2255 (1976) provides in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

1927. 28 U.S.C. § 2254 (1976) provides in part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

1928. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 453-54, 486-87 (1953) (because petitioner's attorney mailed appeal papers one day late and state supreme court thus refused to hear the appeal, there existed adequate and independent state procedural grounds which barred hearing of petitioner's habeas corpus motion by federal courts).

conviction by way of a section 2254 or section 2255 habeas corpus motion.[1929]

In this regard, the Supreme Court established what came to be known as the "deliberate by-pass" doctrine in the 1963 case of *Fay v. Noia*.[1930] Under this doctrine, a state prisoner was not barred from federal habeas relief unless he or she deliberately by-passed or waived certain state court procedures.[1931] In *Fay*, for instance, defendant failed to appeal his conviction on the grounds that his confession was coerced for fear that the appeal might result in the imposition of a death sentence instead of the possibility of a life term.[1932] The Supreme Court held that defendant was not thereby precluded from raising this issue by way of a section 2254 habeas motion, since his failure to do so during state proceedings did not amount to a deliberate by-pass of his available remedies.[1933]

But *Fay's* deliberate by-pass doctrine was weakened some ten years later by *Davis v. United States* in which the Supreme Court held

1929. E.g., Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977). A habeas corpus petitioner may also encounter procedural difficulties upon pleading guilty at trial and then later collaterally attacking the validity of the conviction. Courts have recognized a guilty plea as the equivalent of a waiver or a deliberate forfeiture of the opportunity to raise most substantive constitutional issues on appeal. Tollett v. Henderson, 411 U.S. 258, 266-67 (1973) (plea of guilty prevents defendant from raising "independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the plea"); Journigan v. Duffy, 552 F.2d 283, 285 (9th Cir. 1977) (guilty plea may operate as deliberate refusal to place constitutional claims before the state trial courts; it therefore can be a deliberate bypass of state procedure). *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 242 (1969) ("A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.").

However, if a state statute allows for appeal of constitutional issues despite the fact that he or she has pled guilty, then further appeal is not barred. Lefkowitz v. Newsome, 420 U.S. 283, 289-90 (1975). In Phillips v. Attorney General, 594 F.2d 1288 (9th Cir. 1979), two California state petitioners had pleaded nolo contendere (the equivalent of guilty in terms of its legal effect—CAL. PENAL CODE § 1016 (West 1970)) but later contested their conviction on the grounds that it violated the fourth and fifth amendments. Under CAL. PENAL CODE § 1538.5(m) (West 1970), a defendant who has pleaded guilty is not precluded from raising fourth amendment search and seizure challenges on appeal. In *Phillips* the court held that because of this statute, petitioners could also raise their fifth amendment claims since in the particular case the two constitutional issues were inseparably linked. 594 F.2d at 1290. Once this procedural barrier was hurdled, the court found that under *Lefkowitz* the fifth amendment issues could also be contested by way of habeas corpus motion. *Id.* The fourth amendment claims, however, were barred because of the rule in Stone v. Powell, 428 U.S. 465, 494 (1976) which prohibits federal habeas corpus petitions for fourth amendment issues if the "State has provided an opportunity for full and fair litigation of a Fourth Amendment claim. . . ."

1930. 372 U.S. 391 (1963).

1931. *Id.* at 438.

1932. *Id.* at 439-40.

1933. *Id.* at 439.

that the failure of a federal defendant to make a timely objection to the composition of his grand jury, as was required by the Federal Rules of Criminal Procedure, was fatal to his habeas corpus petition.[1934] The *Davis* Court established the "cause and prejudice" rule which requires a habeas corpus petitioner to show either that there was a valid reason for his lack of procedural compliance or that he was actually prejudiced by the alleged constitutional violation.[1935]

The "cause and prejudice" standard of *Davis* was extended in 1976 to state court proceedings where a defendant had likewise failed to make a timely objection to the make-up of his grand jury.[1936] Finally, in 1977, the Supreme Court expressly rejected the deliberate by-pass doctrine in *Wainwright v. Sykes*.[1937] In *Wainwright* certain inculpatory statements made by defendant were admitted in evidence at a Florida state court trial. Defendant did not challenge their admissibility until he filed a petition for habeas corpus relief after his conviction.[1938] Florida's contemporaneous objection rule required such challenges to be made at the time the evidence was introduced at trial.[1939] Although there had been no *deliberate* attempt by defendant to circumvent this rule, the Supreme Court applied the "cause and prejudice" standard of *Davis* rather than *Fay's* deliberate by-pass rule and dismissed his habeas petition.[1940]

Wainwright was applied by the Ninth Circuit in two 1979 habeas corpus cases. In *Lewis v. Cardwell*, the court refused to consider a habeas corpus motion because the petitioner had failed to object at trial to the prosecution's unconstitutional use of his post-arrest silence.[1941] Since the state in question, Arizona, had a contemporaneous objection rule similar to Florida's which barred appellate review of a claimed error unless objection was made at trial, the Ninth Circuit found that this constituted an independent state ground that prevented federal review.[1942]

Wainwright was also cited by the Ninth Circuit in *Carothers v. Rhay* where petitioner claimed that he had been denied due process

1934. 411 U.S. 233, 240-41 (1973).
1935. *Id.* at 238, 242, 244.
1936. Francis v. Henderson, 425 U.S. 436, 542 (1976).
1937. 433 U.S. 72, 87-88 (1977).
1938. *Id.* at 75.
1939. *Id.* at 76.
1940. *Id.* at 87-88.
1941. 609 F.2d 926, 927-28 (9th Cir. 1979).
1942. *Id.* at 928.

during his trial, but had failed to assert this issue on direct appeal.[1943] While the *Carothers* court denied petitioner's federal habeas corpus motion primarily because of his failure to exhaust state remedies by not completing the full appeals process, it also held in the alternative that petitioner's failure to pursue his direct appeal constituted a possible waiver of his claim under state law.[1944] The court felt that such a waiver could have amounted to a procedural bar under the *Wainwright* doctrine.[1945]

2. Exhaustion of state remedies

Both the independent state grounds and exhaustion doctrines are predicated on notions of comity and the desire to extend due deference to state court proceedings.[1946] Thus, the Ninth Circuit has on occasion been extremely hesitant to hear habeas corpus petitions when any *one* issue in that petition has not been properly presented to the state courts.[1947] This practice is based on the rationale that consideration of

1943. 594 F.2d 225, 228 (9th Cir. 1979).

1944. *Id.*

1945. *Id.*

1946. Younger v. Harris, 401 U.S. 37, 44 (1971); *Ex parte* Royall, 117 U.S. 241, 251 (1886).

1947. *See, e.g.*, Blair v. California, 340 F.2d 741, 744-45 (9th Cir. 1965) where the court, in refusing to review a mixed petition, stated: "It would create an impermissible anomaly were we to set machinery in motion which may ultimately afford Blair another state appellate court examination of these issues, and then thwart or embarrass the state court by purporting to decide those very questions on this appeal." *Id.* at 745 (footnote omitted). *But see, e.g.*, Phillips v. Pitchess, 451 F.2d 913, 919 (9th Cir. 1971) (court considered merits of petitioner's habeas claim on unconstitutional grand jury composition although it stated it could have denied relief because of his failure to exhaust state remedies on this particular issue); Davis v. Dunbar, 394 F.2d 754, 755 (9th Cir. 1968), *cert. denied*, 393 U.S. 884 (1972) (court considered two habeas claims previously rejected by state appeals court although petitioner had also included two new claims which had not been previously litigated). *See also* Shiers v. California, 333 F.2d 173, 174 (9th Cir. 1964) (court evaluated each issue in a habeas petition on the following procedural basis: "whether any of the contentions made in the present petition are the substantial equivalent of contentions presented by petitioner to the state courts upon his appeal from conviction")

With the exception of the Third and Fifth, the other circuits permit habeas review of mixed petitions. *E.g.*, Miller v. Hall, 536 F.2d 967, 969 (1st Cir. 1976); United States v. McMann, 394 F.2d 402, 404 (2d Cir. 1968); Hewett v. North Carolina, 415 F.2d 1316, 1320 (4th Cir. 1969) (exhausted and unexhausted claims must be unrelated); Meeks v. Jago, 548 F.2d 134, 137 (6th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977); Brown v. Wisconsin State Dep't of Pub. Welfare, 457 F.2d 257, 259 (7th Cir.), *cert. denied*, 409 U.S. 862 (1972); Johnson v. United States Dist. Court, 519 F.2d 738, 740 (8th Cir. 1975) (per curiam) (claims must be unrelated); Smith v. Gaffney, 462 F.2d 663, 664-65 (10th Cir. 1972).

The Fifth Circuit has to date declined to review mixed petitions unless the district court erroneously reviewed the exhausted claims. Galtieri v. Wainwright, 582 F.2d 348, 360-62 (5th Cir. 1978). The Third Circuit disapproved of mixed petitions in United States v. Hatrack, 563 F.2d 86, 96-97 (3d Cir. 1977).

"mixed petitions"—that is those containing both "exhausted" and "unexhausted" issues—would unduly interfere with state proceedings and result in piecemeal litigation.[1948]

In the 1979 case of *Carothers v. Rhay*, the Ninth Circuit reaffirmed this position, but since the district court had already erroneously ruled on the merits of the exhausted issues in the mixed petition, the court of appeals consented to review those issues as well.[1949]

3. Collateral attacks based on competency to stand trial

Post conviction challenges to a defendant's competency[1950] during trial raise special problems for the federal courts. Occassionally these challenges will occur years after the trial has taken place.[1951] Thus, a reviewing court may often be faced with an unpleasant dilemma. If defendant has indeed raised substantial doubts as to his or her competency, the court will have to either: a) order a competency hearing, or b) grant the relief unless a new trial can be expeditiously granted.[1952] Obvious problems may arise with a competency hearing which seeks to determine what a defendant's mental state was at the time he or she originally stood trial. If several years have elapsed, this may become an almost insurmountable task.[1953]

1948. Galtieri v. Wainwright, 582 F.2d 348, 356-60 (5th Cir. 1978) (court included an extended discussion of the policy reasons behind non-review of mixed petitions). The reasons for the contrary policy of permitting review were enunciated by the Eighth Circuit in Johnson v. United States Dist. Court, 519 F.2d 738, 740 (8th Cir. 1975) (per curiam) (court noted that "[a]lthough this requirement may be said to foster piecemeal litigation in the federal courts, we have struck the balance in favor of the prisoner's interest in the prompt consideration of exhausted claims").

1949. 594 F.2d 225, 228-29 (9th Cir. 1979). The *Carothers* court followed the earlier practice of the Ninth Circuit in this regard, citing Myers v. Rhay, 577 F.2d 504 (9th Cir.), *cert. denied*, 439 U.S. 968 (1978). In *Myers*, however, thirteen different issues were consolidated in one habeas petition and apparently only one had not already been exhausted through the state appeals process. *Id.* at 506-07.

1950. Conviction of an accused who is mentally incompetent is a violation of his or her due process rights. Drope v. Missouri, 420 U.S. 162, 172 (1975) (citing Pate v. Robinson, 383 U.S. 375, 385 (1966)).

1951. *E.g.*, Pate v. Robinson, 383 U.S. 375, 387 (1966) (six years); de Kaplany v. Enomoto, 540 F.2d 975, 976 (9th cir. 1976) (thirteen years); Rose v. United States, 513 F.2d 1251, 1256-57 (8th Cir. 1975) (seven years).

1952. *E.g.*, Pate v. Robinson, 383 U.S. 375, 386 (1966). Circuit courts subsequently read *Pate* as not mandating a per se rule against retroactive competency hearings, but rather as a prohibition against such hearings when there was no evidence available with which to judge defendant's competency at the time of the trial. *E.g.*, United States v. Hewitt, 528 F.2d 339, 343-44 (3d Cir. 1976).

1953. *See, e.g.*, Pate v. Robinson, 383 U.S. 375, 387 (1966) (because of six year time lapse between time of trial and proposed competency hearing, the difficulty associated with a jury determination of this issue, and the fact that expert witnesses could only testify with respect

For these reasons the Supreme Court in *Pate v. Robinson*, where six years had elapsed since the original trial, took a somewhat jaundiced view of post conviction competency hearings.[1954] Nonetheless, circuit courts, faced with a choice of the two unpleasant alternatives, tended to opt for such hearings when at all possible.[1955]

In the 1979 case of *Darrow v. Gunn*, the Ninth Circuit followed this procedure, although by a somewhat circuitous route.[1956] Darrow, a state prisoner, brought a habeas corpus petition challenging his competency at the time he had entered his guilty plea.[1957] The federal district court refused to grant this motion. Darrow appealed and the case was remanded by the Ninth Circuit for reconsideration of the competency issue. The case was further remanded by the district court to the original state court which then conducted a hearing and concluded that petitioner had been competent at the time of his guilty plea.[1958]

On further review, Darrow urged that under the rationale of the Supreme Court's holding in *Pate v. Robinson*, such a hearing was an unreliable guage of his competency and that, in addition, the trial court had erred in the first instance by not recognizing the need for a compe-

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to information in a written record, the Court felt that a competency hearing was not in order).

1954. *See* 383 U.S. 375, 387 (1966) (Court noted that "we have previously emphasized the difficulty of retrospectively determining an accused's competence to stand trial." (citing Dusky v. United States, 362 U.S. 402 (1960)).

1955. *See, e.g.*, Miranda v. United States, 458 F.2d 1179, 1182 (2d Cir.), *cert. denied*, 409 U.S. 874 (1972) (retrospective determination of competency some two years later was approved because unlike Pate v. Robinson, there was sufficient contemporaneous evidence of competency); Trantino v. Hatrack, 563 F.2d 86, 93 (3d Cir. 1977), *cert. denied*, 435 U.S. 978 (1978) (since contemporaneous evidence was available from original trial a state competency hearing was approved by the court); United States v. Makris, 535 F.2d 899, 904-05 (5th Cir. 1976) (since trial court would have the benefit of testimony of witnesses and doctor who had observed defendant at time of trial two and one-half years earlier, competency hearing was recommended by the appellate court as the preferred course of action despite awareness of its perils); Conner v. Wingo, 429 F.2d 630, 639-40 (6th Cir. 1970), *cert. denied*, 406 U.S. 921 (1972) (when faced with the dilemma of a retrial or a postconviction hearing, most courts would rather grapple with the relatively lesser problems presented by a competency hearing); Rose v. United States, 513 F.2d 1251, 1256-57 (8th Cir. 1975) (appellate court ordered district court to determine the feasibility of a competency hearing six years after original conviction); Sieling v. Eyman, 478 F.2d 211, 215-16 (9th Cir. 1973) (since experts had been allowed to examine petitioner prior to his original trial, a post conviction competency hearing would not face the same problems which would have been encountered in *Pate v. Robinson*, and a competency hearing was therefore feasible); Barefield v. New Mexico, 434 F.2d 307, 309 (10th Cir. 1970), *cert. denied*, 401 U.S. 959 (1971) (post trial competency hearing four years after trial was adequate in view of fact that psychiatrists who examined petitioner prior to his guilty plea were also available for testimony).

1956. 594 F.2d 767, 770-71 (9th Cir. 1979).

1957. *Id.* at 769.

1958. *Id.* at 770.

tency hearing before his guilty plea had been accepted.[1959] The Ninth Circuit held that there were sufficient grounds to justify the lower court's finding of competency.[1960] Unlike prior defendants who should have had a competency hearing, Darrow had not exhibited a long history of "irrational behavior and mental illness."[1961] Nor was he, as was one earlier defendant, subject to violent outbursts during trial which required forceable restraint.[1962] Since Darrow was retrospectively found to have been initially competent at his trial, the trial court's initial action in not requiring a competency hearing was upheld. Thus, the Ninth Circuit did not have to reach the issue of whether the post-conviction competency hearing was sufficient to "cure [any] omission of [the] pre-plea competency hearing," since the lower court had determined that none had been required.[1963]

4. Other procedural grounds for denial of habeas corpus relief

While habeas corpus petitions may normally be used to attack a conviction based on alleged constitutional violations, the Supreme Court has imposed one notable exception to this rule. In the 1976 case of *Stone v. Powell* the Court held that a prisoner could not use a habeas corpus motion to challenge the admissibility of evidence used at his trial allegedly in violation of the fourth amendment exclusionary rule if he had been afforded a "full and fair" opportunity to litigate this issue in the state court.[1964] In 1979 the *Stone* rule was applied by the Ninth Circuit in *Phillips v. Attorney General* where appellants were precluded from raising such fourth amendment claims on habeas corpus review.[1965]

The Ninth Circuit also held in *Crawford v. Bell* that while a habeas corpus motion is designed to challenge the legality of a prisioner's confinement, it cannot be used as a vehicle for attacking the terms or conditions of his imprisonment on the grounds that they constitute cruel

1959. *Id.*

1960. *Id.* at 771. "On the basis of our review of the record, we conclude that the trial court did not err in not ordering a hearing to determine Darrow's competence to plead guilty *sua sponte*, prior to accepting such a plea." *Id.*

1961. *Id. Cf., e.g.*, Moore v. United States, 464 F.2d 663, 665-66 (9th Cir. 1972) (per curiam) (defendant had an extensive history of mental illness, thus necessitating a competency hearing at his initial trial).

1962. 594 F.2d at 771. *Cf.* Tillery v. Eyman, 492 F.2d 1056, 1057 (9th Cir. 1974) (defendant's erratic and irrational behavior at trial, requiring his physical removal from the courtroom while he was screaming, required a competency hearing).

1963. 594 F.2d at 771.

1964. 428 U.S. 465, 494 (1976).

1965. 594 F.2d 1288, 1290 (9th Cir. 1979).

and unusual punishment.[1966] The court noted that even if relief had been granted it would not have resulted in the prisoner's release from confinement.[1967] Thus, other procedural devices need to be used in such situations.

Nor can a habeas petition be used to challenge a defect in a trial proceeding unless the trial resulted in a "complete miscarriage of justice."[1968] This position was reiterated by the Ninth Circuit in the 1979 case of *United States v. Harris* where the court noted that a section 2255 federal habeas motion could not be raised when all that could be shown was the failure of a lower court to follow the formalities of a particular procedural rule.[1969]

G. Challenges to Prison Conditions

1. Convicted persons

The eighth amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1970] Generally, the cruel and unusual punishment clause is thought to apply to punishment sustained by a person who has been convicted of certain criminal acts.[1971] Thus, the punishment, and whether it is cruel and unusual, varies with the nature of the criminal act involved.

The United States Supreme Court in *Estelle v. Gamble* set out the modern interpretation of "cruel and unusual punishment."[1972] In *Es-*

1966. 599 F.2d 890, 891 (9th Cir. 1979).

1967. *Id.* at 892.

1968. Davis v. United States, 417 U.S. 333 (1974). The Court noted that collateral relief should not be granted unless there was " 'a fundamental defect which inherently results in a complete miscarriage of justice.' " *Id.* at 346 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

The Supreme Court relied on the *Davis* rule in the 1979 case of *United States v. Addonizio* where it held that a prisoner could not use a habeas motion to attack the validity of his sentence when all he could show was a possible misinterpretation or incorrect assumption on the part of the sentencing judge. 442 U.S. 178, 186 (1979). Since the actions taken by the sentencing judge were well within the limits of his authority and did not result in the imposition of an illegal sentence the Court's decision in denying petitioner habeas relief was clearly called for.

1969. 592 F.2d 1058, 1060 (9th Cir. 1979) (petitioner claimed a technical violation of FED. R. CRIM. P. 35 in that attorney, rather than defendant, admitted the existence of a prior conviction at a sentencing hearing).

1970. U.S. CONST. amend. VIII.

1971. 248 C.J.S. § 1978 (1962). *But see* notes 2017 & 2018 *infra* and accompanying text, regarding the use of the eighth amendment in the review of confinement of persons *awaiting* trial.

1972. 429 U.S. 97 (1976). For a history of the eighth amendment, see Granocci, *"Nor*

telle the Court held that deliberate indifference by prison personnel to a prisoner's illness would violate the eighth amendment.[1973] The Court, per Justice Marshall, noted:

> The [eighth] Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ," against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society," or which "involve the unnecessary and wanton infliction of pain."[1974]

The amendment, then, is concerned with more than just physically barbarous punishments.[1975]

Although the Supreme Court has not addressed the permissible scope of federal remedial power in state prison systems, several lower federal courts in recent years have delved into the task of correcting objectionable prison conditions.[1976] These courts have relied on a broad interpretation of the eighth amendment in light of individual conditions or in some instances a totality of circumstances standard.

This new area of judicial concern represents a departure from a traditional hands-off doctrine which had prohibited courts from supervising or interfering with prison administration. It was feared that such interference would lead to an invasion of the separation of powers, to a destruction of federalism, and to remedies fixed by persons without penological expertise.[1977] The recent era (since the mid-1960's) of increased judicial activism is partly in response to a lack of interest on the part of the penal authorities, the legislatures, and the people in eliminating improper prison conditions.[1978] During this period, the

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Cruel and Unusual Punishment Inflicted:" the Original Meaning, 57 CALIF. L. REV. 839 (1969).

1973. 429 U.S. at 104.

1974. *Id.* at 102-03 (citations omitted).

1975. *See, e.g.*, Laamon v. Helgemoe, 437 F. Supp. 269, 317 (D.N.H. 1977) (prison authorities required to do more than allow inmates to "spend their days in a state of institutionally induced numb lethargy").

1976. *E.g.*, *Id.* See cases cited in Note, *Eighth Amendment Challenges to Conditions of Confinement: State Prison Reform by Federal Judicial Decree*, 18 WASHBURN L.J. 288, 293 n.48 (1979) [hereinafter cited as *Eighth Amendment Challenges*].

1977. *Eighth Amendment Challenges*, *supra* note 1976, at 291-92. Criticizing such a doctrine was a 1963 comment, Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

1978. *Eighth Amendment Challenges*, *supra* note 1976, at 290.

A recent prison riot at New Mexico State Penitentiary is illustrative of this apathy. The riot resulted in thirty-nine prisoner deaths, many due to grisly murders by fellow inmates.

Supreme Court has also demonstrated some sensitivity to prisoner rights.[1979]

However, the Court recently has maintained that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."[1980] The rationale underlying the court's deference to prison officials is the acknowledgement that federal court judges are not the best experienced evaluators of prison needs and that they should not second guess expert administrators. Thus, the new "due deference" barrier seems close to the old "hands off" doctrine.[1981] Due deference requires that courts interfere only when "constitutional violations and deprivations are clearly evident."[1982]

Yet, indications of potential sources of trouble in the prison conditions abounded years before the riot. Poor prison conditions (overcrowding; inadequate heating, ventilation, and lighting; problems with roaches and vermin) may have been partially the cause of the outbreak. In addition, the prison violence probably was due to inadequate prison security, which was under-manned and ill-trained.

These circumstances at the prison led to the filing of a 1977 federal class-action suit alleging inhumane treatment and incidents of violence and homosexual rape. Allegedly some inmates desired " 'protective custody' " to save themselves from their fellow inmates. Moreover, less than three weeks before the riot, an investigative report warned that "conditions inside the prison were so dangerous that prison officials were 'playing Russian roulette with the lives of inmates, staff and the public.' " *'Playing Russian Roulette,' Report Had Warned Prison*, L.A. Times, Feb. 5, 1980, § 1, at 17. See the lead article, *Execution Squad Atrocities in Riot Told; Toll Hits 39*, L.A. Times, Feb. 5, 1980, § 1, at 1.

1979. *See* Jackson v. Avery, 393 U.S. 483, 485 (1969) (reaffirmed prisoners' right of access to courts); Cooper v. Pate, 378 U.S. 546, 546 (1964) (per curiam) (freedom from religious discrimination).

The Supreme Court has said "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." Wolf v. McDonnell, 418 U.S. 539, 555-56 (1974). *See* Bounds v. Smith, 430 U.S. 817, 821 (1977) (prisoners' right of access to the courts well established); Cruz v. Beto, 405 U.S. 319, 322 (1972) (reasonable opportunity to practice religious faith to be accorded prison inmates); Lee v. Washington, 390 U.S. 333, 333-34 (1968) (racial discrimination unconstitutional within prison, except for "the necessities of prison security and discipline").

1980. Bell v. Wolfish, 441 U.S. 520, 547 (1979). In Procunier v. Martinez, 416 U.S. 396 (1974), the Court stated, "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism." *Id.* at 405. *Accord*, Bell v. Wolfish, 441 U.S. at 544-45 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 128 (1977); Meachum v. Fano, 427 U.S. 215, 228-29 (1976); Cruz v. Beto, 405 U.S. 319, 321 (1972).

1981. For a critical discussion of "due deference," see Berger, *Withdrawal of Rights and Due Deference: the New Hands Off Policy in Correctional Litigation*, 47 U. MO. KANSAS CITY 7 (1978).

1982. Frazier v. Ward, 426 F. Supp. 1354, 1358 (N.D.N.Y. 1977). The *Frazier* court provides an example of the necessarily hesitant stance federal courts must take when dealing with prison conditions and alleged constitutional violations.

Consequently, two competing doctrines—broad interpretations of the eighth amendment and the limiting notion of deference—are embroiled in any judicial review of prison conditions.

These competing doctrines were present in the 1979 case of *Spain v. Procunier*.[1983] In *Spain* six prisoners in California state prison at San Quentin brought suit on the grounds that the conditions of their confinement were a violation of the cruel and unusual punishment clause.[1984] The prisoners were assigned to the "adjustment center," which segregated and disciplined "disruptive prisoners," because they were involved in a major outbreak of violence in which three correctional officers and two inmates were killed.[1985] Awaiting the completion of their trial on charges stemming from the outbreak, the prisoners had been in the adjustment center four and one-half years when the *Spain* suit was filed.

The district court considered numerous allegations of constitutional deprivation in the adjustment center. Although rejecting several claims, the court first ordered that the six be returned to the general prison population because they were not accorded a " 'properly noticed disciplinary hearing.' "[1986] In addition, the court enjoined the use of tear gas except when serious harm was imminent.[1987] Third, the court prohibited the use of mechanical restraints, such as leg manacles and neck chains but not including hand cuffs, " 'unless an inmate acts in such a violent or otherwise dangerous manner as to present an actual or imminent threat of bodily harm or escape.' "[1988] Finally, it found " '[t]hat the denial of fresh air and regular outdoor exercise and recreation constituted cruel and unusual punishment.' "[1989]

The Ninth Circuit left untouched only one of the district court's orders—that dealing with outdoor exercise. It reversed and remanded the first order, which concerned the need for holding a hearing when the prisoners had been transferred to the adjustment center.[1990] Prior Ninth Circuit case law had held that such a hearing was necessary.[1991] However, subsequent Supreme Court decisions found that the due

1983. 600 F.2d 189 (9th Cir. 1979).
1984. *Id.* at 191.
1985. *Id.* at 192.
1986. *Id.* at 193 (quoting Spain v. Procunier, 408 F. Supp. 534, 547 (N.D. Cal. 1976)).
1987. *Id.* at 194.
1988. *Id.* at 197 (quoting Spain v. Procunier, 408 F. Supp. 534, 547 (1976)).
1989. *Id.* at 199 (quoting Spain v. Procunier, 408 F. Supp. 534, 547 (1976)).
1990. *Id.* at 193.
1991. Clutchette v. Procunier, 497 F.2d 809, 815, *modified*, 510 F.2d 613 (9th Cir. 1975), *rev'd sub nom.*, Enomoto v. Clutchette, 425 U.S. 308, *vacated in part*, 536 F.2d 305 (9th Cir. 1976).

process clause does not require a hearing prior to prison transfers, unless the prisoner had some expectation "rooted in state law" that he would not be transferred.[1992] Thus, on remand the district court was to consider whether any justifiable expectations were to be found in the appropriate state law.[1993]

In dealing with the substantive eighth amendment orders, the Ninth Circuit initially strongly reaffirmed protections of the amendment in the face of the state's position that the federal courts should defer to the administrators working with these dangerous prisoners.[1994] The court emphatically pointed out that the eighth amendment was designed specifically to protect convicted persons. Therefore, it refused mechanically to defer to state prison officials because to do so would make the eighth amendment a "nullity."[1995]

In the first substantive area, the court of appeals modified the district court's sweeping prohibition of the use of tear gas. The court differentiated tear gas dispensed in dangerous quantities (which was projected from a "tear gas billy") from tear gas dispensed in nondangerous quantities (which was projected from a "dust projector").[1996] As a result the lower court's strict prohibition was modified to allow for the use of nondangerous quantities "in order to prevent a perceived future harm."[1997] The court balanced the need for the gas against its potential for harm and relied on language of the Supreme Court from *Estelle v. Gamble*,[1998] which held that the eighth amendment prohibits punishments "incompatible with 'the evolving standards of decency that mark the progress of a maturing society' " or which " 'involves the *unnecessary* and *wanton* infliction of pain.' "[1999] Therefore, the use of dangerous quantities of tear gas in a situation requiring only slight force would be an unnecessary and wanton infliction of pain to the prisoner involved and to those in surrounding cells.

1992. Montayne v. Haynes, 427 U.S. 236, 242 (1976) (citing Meachum v. Fano, 427 U.S. 215 (1976)). *Meachum* held that the due process clause (U.S. CONST. amends. V and XIV) did not require a hearing with every disadvantageous transfer. In *Montayne*, the *Meachum* analysis was applied to the narrower case of a transfer having "substantial adverse impact on the prisoner." 427 U.S. at 242. The *Spain* prisoners faced a *Montayne*-type transfer.

1993. 600 F.2d at 193. The lower court was to reconsider in light of the later Supreme Court cases which require an inquiry into state law. *Cf.* Johnson v. Duffy, 588 F.2d 740, 744 n.2 (9th Cir. 1978) (*Meachum* distinguished because state law in *Johnson* did condition transfer on certain occurrences).

1994. 600 F.2d at 193.

1995. *Id.* at 194.

1996. *Id.*

1997. *Id.* at 196.

1998. 429 U.S. 97 (1976).

1999. 600 F.2d at 196 (quoting 429 U.S. at 102, 103).

However, the use of dangerous quantities in "grave circumstances" might be necessary, and thus, not a *wanton* infliction of pain.[2000]

Much the same balancing led to another modification of the district court's order, which had completely prohibited the use of neck chains and limited other mechanical restraints, except handcuffs, to certain circumstances.[2001] Prior to the initiation of the suit, these mechanical restraints were used whenever the prisoners had to leave the facility for appointments within the prison, such as the visitor's area, or outside the prison, such as court proceedings.

The court of appeals affirmed the district court's injunction against the imposition of the neck chains while within the prison confines but modified the lower court's order on all other grounds. The Ninth Circuit declined to hold that the neck chains themselves were cruel and unusual, but held that their use for four and one-half years was cruel because the state could not justify such use over the entire period, especially when the prisoners met with family, friends, and counsel inside the prison.[2002] The court further prohibited the use of mechanical restraints beyond hand cuffs or waist chains unless individualized circumstances indicated they were needed.[2003]

Regarding the denial of outdoor exercise, the court upheld the district court's order that the prisoners be allowed outdoor exercise one hour a day. While refusing to hold that outdoor exercise was constitutionally mandated in all situations, the Ninth Circuit did agree that the combination of conditions at the adjustment center made the denial of the outdoor exercise cruel and unusual punishment.[2004] In reaching this conclusion the court relied on the modern trend of the courts to recognize the importance of outdoor exercise.[2005] This trend reflects the overall liberalizing of eighth amendment protections—"that prisoners are not to be treated as less than human beings."[2006]

Spain represents a liberal view of eighth amendment protections balanced against concerns of prison administration. The Ninth Circuit modified almost every order of the district court in light of the perceived needs of the prison administration which had to deal with these dangerous prisoners. While the court of appeals never cited the due

2000. *Id.* at 195.
2001. *Id.* at 197.
2002. *Id.*
2003. *Id.* at 198.
2004. *Id.* at 199.
2005. *Id.*
2006. *Id.* at 200 (citing Furman v. Georgia, 408 U.S. 238, 271-73 (1972) (Brennan, J., concurring)).

deference language of the Supreme Court, the *Spain* opinion reflects this competing theme of judicial review of prison confinement. Yet, at the same time, the court did not lose sight of the constitutional protections afforded to convicted persons. Their needs as human beings were not overlooked. The issue of outdoor exercise is perhaps most illustrative of this point.

2. Detainees

While the prison conditions of incarcerated convicts have been reviewed in light of the standard of the eighth amendment, the prison conditions (which do not raise specific constitutional questions—such as the fourth amendment) of pre-trial detainees[2007] did not have a clear standard for constitutional review until the 1979 Supreme Court decision of *Bell v. Wolfish*.[2008]

Those persons incarcerated while awaiting trial traditionally have been viewed differently because detainees, unlike inmates, have not been convicted of a crime. Detention, like bail, is a tool to ensure the appearance of defendants at trial.[2009] Legal theorist William Blackstone noted the differences between convicted prisoners and detainees:

> But this imprisonment [pre-trial detention], as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, nor subjected to other hardship than such as are absolutely requisite for the purpose of confinement only . . . .[2010]

Thus, the state purposes of retribution, rehabilitation, and deterrence, which may validate certain treatment of convicted prisoners, is inapplicable to detainees.

As a consequence of these status differences between convicts and detainees, federal courts have used three basic sources of analysis to review prison conditions of detainees.[2011] Under one, the equal protec-

2007. Pre-trial detainees were defined by the Court in Bell v. Wolfish, 441 U.S. 520 (1979), as "those persons who have been charged with a crime but who have not yet been tried on the charge." *Id.* at 523. They are lawfully incarcerated prior to trial in order to insure their presence at trial. *Id.*

2008. 441 U.S. 520 (1979).

2009. Stack v. Boyle, 342 U.S. 1, 5 (1951).

2010. 4 W. BLACKSTONE, COMMENTARIES * 300.

2011. For a full discussion, see Note, *Standards for Evaluating Conditions of Pretrial Detention*, 10 TOL. L. REV. 493, 496-508 (1979) [hereinafter cited as *Standards*]; Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 948 (1970).

tion theory, the detainee is considered to be essentially in the same position as a bailee awaiting trial. The only difference between the two is that the bailee possesses sufficient wealth to avoid detention.[2012] Thus, some courts have taken the approach that conditions of detention which do more than merely insure a detainee's presence for trial are equivalent to discrimination based on wealth and violate the equal protection clause.[2013]

The second theory is based on the due process clause. Under it, the restrictions placed on a detainee are examined to determine whether or not they constitute punishment.[2014] Punishment has been construed to consist of any deprivation of liberty which does more than guarantee a detainee's presence for trial.[2015] If a detainee has been punished, a court could find that his due process rights have been violated, since he would be entitled to a hearing or trial before the state could legally impose any punitive measures.[2016]

Under a third analysis, the eighth amendment prohibition of cruel and unusual punishment (which is normally applied to prisoners convicted of crimes) has been used to invalidate punishment of a detainee.[2017] However, the analysis is essentially only a minimum-

2012. *See, e.g.*, Brenneman v. Madigan, 343 F. Supp. 128, 138 (N.D. Cal. 1972) (court observed that the difference between the detainee and the bailee stemmed from the relative poverty of the former).

2013. *See, e.g.*, Brenneman v. Madigan, 343 F. Supp. 128, 138 (N.D. Cal. 1972) (since deprivation of a fundamental right based on poverty (i.e. wealth) is unconstitutional, any greater loss of rights other than what is necessary to insure his custody would likewise violate the equal protection clause). *Cf., e.g.*, Douglas v. California, 372 U.S. 353, 355, 358 (1962) (refusal by state to appoint counsel for indigent on appeal was an impermissible discrimination based on wealth); Griffin v. Illinois, 351 U.S. 12, 17, 19 (1956) (state's refusal to provide indigent with transcript was discrimination based on wealth and violated equal protection rights).

2014. *See* Norris v. Frame, 585 F.2d 1183, 1187 (3d Cir. 1978) (under due process clause, detainee may not be punished at all); Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir.), *aff'g*, 371 F. Supp. 594 (S.D.N.Y. 1974) ("demands of due process" prevent state from depriving detainee of any rights other than those necessary to insure he will appear at trial). *See also* Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1079-80 (3d Cir. 1976) (constitutional protections for a pre-trial detainee should be greater than those for a convicted prisoner).

2015. *E.g.*, Norris v. Frame, 585 F.2d 1183, 1187 (3d Cir. 1978); Tyrrell v. Speaker, 535 F.2d 823, 827 (3d Cir. 1976) (citing Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974), *aff'g*, 371 F. Supp. 594 (S.D.N.Y. 1974)).

2016. *Cf., e.g.*, United States v. Lovett, 328 U.S. 303, 316-17 (1946), where the Supreme Court, in referring to a particular congressional enactment noted that "[t]he effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that that cannot be done either by a State or by the United States."

2017. *See, e.g.*, Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1079-80 (3d Cir. 1976) (since eighth amendment prohibits cruel and unusual punishment for prisoners, de-

threshold test, since courts have traditionally afforded detainees greater constitutional protections than those given convicted prisoners.[2018]

Each of these standards was discussed in the 1979 Supreme Court case of *Bell v. Wolfish*.[2019] There, pre-trial detainees confined at the Metropolitan Correctional Center (MCC), a federally-operated short term facility in New York City, brought a class action suit in federal district court challenging the following conditions within the facility: 1) the housing of two persons in rooms designed for one; 2) prohibition of all hard-cover books and magazines which were not sent directly from a publisher; 3) searches of prison rooms conducted without permitting detainees to observe; and 4) body cavity searches conducted after a detainee had contact with persons from the outside.[2020]

Both the district court and Second Circuit found that any practices other than those needed for purposes of detention could only be justified by "compelling necessity."[2021] The Supreme Court reversed and remanded, noting that the proper standard of review was that of due process, not "compelling necessity."[2022]

Thus, the outcome of *Bell* primarily hinged on whether treatment of detainees in the MCC was "punishment" and violated the due process clause.[2023] In determining the punishment issue, the majority adopted a test akin to the minimum rationality standard used in substantive due process cases.[2024] Under it, prison officials are required to

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tainees should be afforded at least this much protection); Rhem v. Malcolm, 371 F. Supp. 594, 623-24 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (1974) ("detainee is entitled to protection from cruel and unusual punishment at least as a matter of due process if not under the Eighth Amendment"); Jones v. Wittenberg, 323 F. Supp. 93, 99-100 (N.D. Ohio 1971) (cruel and unusual punishment clause should be applicable to detainees since they are presumed to be less culpable than convicted criminals to whom the clause also applies).

2018. *See, e.g.*, Norris v. Frame, 585 F.2d 1183, 1187 (3d Cir. 1978) (citation omitted) (eighth amendment "may be taken as a legitimate starting point because . . . '[i]t would be anomalous to afford a pretrial detainee less constitutional protection than one who has been convicted.' ").

2019. 441 U.S. 520 (1979).

2020. *Id.* at 528.

2021. *Id.* The district court had also applied an eighth amendment cruel and unusual punishment standard, but this standard was rejected by the court of appeals. *Id.* at 529.

2022. *Id.* at 534-35. The dissenting justices, with the exception of Justice Marshall, also applied a due process standard. *Id.* at 580 & n.4 (Stevens, J., dissenting).

2023. *Id.* at 535.

2024. *Id.* at 589 n.21 (Stevens, J., dissenting). Under the minimum rationality standard, all that is required is a showing of some rational basis for the existence of the particular statute or regulation. *E.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955). The *Bell* majority noted that "if a particular condition or restriction of pre-trial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' " 441 U.S. at 539.

show only that there is some rational justification for the deprivation imposed.[2025] As long as there is no subjective intent to "punish", the action will be upheld.[2026]

But as Justice Stevens noted in dissent, the majority's standard amounts to no standard at all.[2027] Even the most repressive measures adopted by officials can be justified under such rubrics as maintaining order and discipline or improving the administration of the detention center.[2028]

In addition, the majority's use of a test based on subjective intent flies in the face of standards traditionally used to measure punishment. In the 1963 case of *Kennedy v. Mendoza-Martinez*, the Supreme Court established several objective criteria such as whether the practice in question was traditionally regarded as punishment or promoted its aims of retribution or deterrence, whether alternative methods were available and whether the practice could be deemed excessive in light of these alternatives.[2029]

Justice Rehnquist, author of the majority opinion, had no difficulty evading the clear mandate of *Mendoza-Martinez*. After discussing its objective criteria, he interposed a classic non sequitur: "[t]hus, if a particular condition or restriction of pre-trial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' "[2030] Using this approach, the *Bell* majority was thus able to pay lip service to the due process standard, but in effect rendered it a nullity by defining "punishment" in such restrictive terms.[2031]

The other disturbing aspect of *Bell* was the majority's cavalier treatment of the detainee's first and fourth amendment rights. It held

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2025. 441 U.S. at 538-39.

2026. *Id.* at 538.

2027. *Id.* at 586 (Stevens, J., dissenting). Justice Stevens noted that:

> [A] careful reading of the Court's opinion reveals that it has attenuated the detainee's constitutional protection against punishment into nothing more than a prohibition against irrational classification or barbaric treatment. Having recognized in theory that the source of that protection is the Due Process Clause, the Court has in practice defined its scope in the far more permissive terms of equal protection and Eighth Amendment analysis.

Id.

2028. *Id.* at 587 (Stevens, J., dissenting). The dissenters observed that "[u]nder the test as the Court explains it today, prison guards could make regular use of dungeons, chains, and shackles, since such practices would make it possible to maintain security with a smaller number of guards." *Id.*

2029. 372 U.S. 144, 168-69 (1963).

2030. 441 U.S. at 539.

2031. *See id.* at 585 (Stevens, J., dissenting) (due process standards made more permissive by majority than test required by the eighth amendment or equal protection).

that these rights could be severely limited or restricted in the interests of prison safety and administration.[2032] Yet the cases relied on for support all dealt with the more limited rights of convicted prisoners.[2033]

Perhaps the real rationale for the *Bell* decision can be summed up in Justice Rehnquist's comment that "[w]e think the District Court and the Court of Appeals have trenched too cavalierly into areas that are properly the concern of MCC officials."[2034] Thus, it would appear that *Bell* signals a retreat on the part of the Court to its former laissez faire position. Short of oppressive measures which find no rational basis in modern penal or human experience, it appears that little can be expected in the way of judicially mandated reform of the nation's prison system or detention centers by the Supreme Court.[2035]

2032. *Id.* at 547. In a footnote, Justice Rehnquist sought rather tenuous support for his unprecedented holding on the basis that detainees may be equally or even more dangerous than convicted criminals. *Id.* at 546 n.28. Such an assertion is at odds with the presumption of innocence normally afforded detainees whose guilt has yet to be determined at trial. *E.g.*, Stack v. Boyle, 342 U.S. 1, 4 (1951). *See, e.g.*, McGinnis v. Royster, 410 U.S. 263, 273 (1973) (because of presumption of innocence state should not attempt rehabilitation of a detainee). Justice Rehnquist, in a bit of an ipse dixit, noted that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." 441 U.S. at 533.

Bell also is at odds with past Supreme Court decisions which were solicitous of rights of pre-trial detainees. *See, e.g.*, O'Brien v. Skinner, 414 U.S. 524, 529-30 (1974) (defendants confined and awaiting trial had a right to vote regardless of level of inconvenience this caused the state); Goosby v. Osser, 409 U.S. 512, 513, 520-21 (1973) (pre-trial detainees' claim that state procedures denied them their constitutional right to vote should be evaluated on its merits by lower courts).

2033. Jones v. North Carolina Prisoner's Labor Union, 433 U.S. 119 (1977) (state prison inmates); Pell v. Procunier, 417 U.S. 817 (1974) (state prisoners); Procunier v. Martinez, 416 U.S. 396 (1974) (California state prison inmates).

Justice Rehnquist disagreed with the proposition that such cases should be distinguished because they dealt with convicted prisoners. 441 U.S. at 547 n.29. His justification not only fails to support this point, but is also a contradiction in terms. He noted that "[t]hose decisions held that courts should defer to the informed discretion of prison administrators because the realities of running a *corrections institution* are complex and difficult, courts are ill-equipped to deal with these problems . . . ." *Id.* (emphasis added).

The majority's use of prior case authority (441 U.S. at 560 n.41) to justify body cavity searches of detainees was also misconceived. All of the cases cited dealt with convicted prisoners. See Daughtery v. Harris, 476 F.2d 292, 293 (10th Cir. 1973) (federal prisoners in maximum security at Ft. Leavenworth where there were known incidents of concealed contraband); Hodges v. Klein, 412 F. Supp. 896, 897-98 (D.C.N.J. 1976) (inmates in maximum security at Trenton State Prison); Bijeol v. Benson, 404 F. Supp. 595, 597 (S.D. Ind. 1975) (prisoners at U.S. penitentiary); Penn El v. Riddle, 399 F. Supp. 1059, 1060 (E.D. Va. 1975) (violent prisoners in Virginia state penitentiary who were in maximum security).

2034. 441 U.S. at 554.

2035. *Cf.* United States v. Bailey, 444 U.S. 394 (1980) (despite atrocities, violence, and inhuman conditions which were known to exist in the District of Columbia jail, the Court rejected a theory of duress or necessity as justification for a prisoner's escape).

H. Parole

Parole is a release from prison prior to the completion of a sentence, on the condition that the parolee abide by certain rules during the remainder of the time he has to serve.[2036] The United States Supreme Court has defined the purpose of the parole system as "to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed."[2037] Statutory authorization for the Federal Parole Commission is found in the Parole Commission and Reorganization Act adopted in 1976.[2038]

One substantial area of litigation has been over the Act's retroactive impact on those sentenced prior to its adoption. The Ninth Circuit recognized that the Act could not be given retroactive effect,[2039] but that the application of the 1976 Act's parole release standards to an adult prisoner sentenced at a prior time was not violative of the ex post facto prohibition. This is because the new standards do not increase

the district court's order for a new hearing to consider Benites' institutional performance as the basis for parole.[2047]

In *United States v. Wallulatum*,[2048] the prisoner challenged his status as a youthful offender. Wallulatum asserted that, by being sentenced for manslaughter as a youthful offender, he could serve up to six years, while as an adult the maximum would be only three years. Therefore, he contended, he was being denied equal protection of the law.[2049] The court of appeals did not reach this issue because the lower court had not made a determination as to whether under the new "offense severity"[2050] standard mandated by the Act,[2051] Wallulatum would still *benefit* from his status as a youthful offender as required by the Supreme Court.[2052] The case was remanded for that determination to be made.[2053]

Ex post facto problems have also arisen with regard to parole eligibility criteria outside the context of the 1976 Act. In *Mileham v. Simmons*,[2054] an Arizona state prisoner expected to be eligible for parole after an eight year period of confinement. This eligibility was computed by the Arizona Board of Pardons and Paroles in accordance with

1978). The court's conclusion can be reconciled with Rifai v. United States Parole Comm'n., 586 F.2d 695 (9th Cir. 1978), on the theory that even prior to the passage of the 1976 Act, "offense severity" could be considered by the Parole Commission in exercising its discretion to grant or deny parole. *See* text accompanying note 2041 *supra*. *Accord*, Shepard v. Taylor, 556 F.2d 648, 652 (2nd Cir. 1977) (Parole Commission's consideration only of the severity of defendant's offense rather than whether or not defendant was capable of being rehabilitated was a violation of the Constitutional ban on ex post facto laws).

2047. The relevant provisions of the 1976 Act were not in effect at the time of Benites' parole hearing and therefore were not applicable to his parole eligibility determination. 595 F.2d at 521. In explaining its holding the *Benites* court stated that "[t]he legislative history . . . demonstrates that institutional performance was to be the 'primary criterion in determining parole release.' " *Id.* at 520, *quoting* Rifai v. United States Parole Comm'n., 586 F.2d 695, 699 (9th Cir. 1978). *See also* De Peralta v. Garrison, 575 F.2d 749, 750-51 (9th Cir. 1978) (under Youth Corrections Act, criterion for release is whether prisoner is rehabilitated); Shepard v. Taylor, 566 F.2d 648, 653 (2d Cir. 1977) (severity of youth offender's crime is "conspicuously absent" as a parole eligibility factor under the Youth Corrections Act).

2048. 600 F.2d 1261 (9th Cir. 1979).

2049. *Id.* at 1262.

2050. A prisoner may be released if, among other things, the Parole Commission finds that "release would not depreciate the seriousness of [the] offense." 18 U.S.C. § 4206(a)(1) (Supp. 1976).

2051. 18 U.S.C. § 5017 (1976) of the Youth Corrections act was amended in 1976 so as to mandate release in accordance with the provisions of the Parole Commission and Reorganization Act.

2052. The United States Supreme Court in Dorszynski v. United States, 418 U.S. 424 (1974) established the standard that sentencing for a youthful offender be to his benefit.

2053. 600 F.2d at 1263.

2054. 588 F.2d 1279 (9th Cir. 1979).

an opinion letter of an assistant state attorney general.[2055] Two years after his conviction, however, the Attorney General of Arizona reinterpreted the penal statute governing attempted escapes. Under the new interpretation, Mileham would have to serve forty years before becoming eligible for parole release.[2056] Mileham sought relief in the Arizona courts when an earlier release date was denied. The Arizona Supreme Court agreed with the new interpretation of the statute and denied relief.[2057] On a petition for a writ of habeas corpus, the Ninth Circuit denied relief, holding that Mileham had no "vested right" in the earlier erroneous interpretation of the state statute by an assistant attorney general, given the presence of a later state court pronouncement on the matter.[2058] Since the reinterpretation of the statute by the state court was not "unforeseeable," there was no ex post facto prohibition to the consequent lengthening of Mileham's sentence.[2059]

Mileham had relied on *Love v. Fitzharris*[2060] in which the Ninth Circuit struck down an administrative reinterpretation of a California statute governing parole eligibility. The reinterpretation effectively increased punishment for a crime, and was held to be an improper ex post facto increase, even though imposed by administrative, rather than legislative, fiat.[2061] The *Mileham* court, however, considered *In re Costello*[2062] to be more closely on point.[2063] The *Costello* court held that no federal question was presented by a redetermination and increase of a California parolee's original sentence upon cause shown.[2064] The decision was based on the fact that California law, as interpreted by the state courts, had consistently held that such resentencing under the state indeterminate sentencing law was proper. Indeterminate sentencing was held to be tentative and subject to increase.[2065] The *Mileham* court also relied on *Rifai v. United States Parole Commission*[2066] and *Forman v. Wolff*[2067] in support of its conclusion.[2068] *Rifai*, however, is

2055. *Id.* at 1279-80.
2056. *Id.* at 1280.
2057. Mileham v. Arizona Bd. of Pardons & Paroles, 110 Ariz. 470, 520 P.2d 840 (1973).
2058. 588 F.2d at 1280.
2059. *Id.*
2060. 460 F.2d 382 (9th Cir. 1972), *vacated as moot*, 409 U.S. 1100 (1973).
2061. *Id.* at 385.
2062. 262 F.2d 214 (9th Cir. 1958) (per curiam).
2063. 588 F.2d at 1280.
2064. 262 F.2d at 215.
2065. *Id.* (citation omitted).
2066. 586 F.2d 695 (9th Cir. 1978).
2067. 590 F.2d 283 (9th Cir. 1978) (per curiam).
2068. 588 F.2d at 1280.

not on point since it involves a mere reemphasis of existing guidelines within a statutory framework and does not involve reinterpretation of the statutory framework itself. But, in *Forman*, it was ruled that there was no ex post facto violation when the Nevada Supreme Court reversed itself as to the construction of a state statute and restored the interpretation current at the time of the prisoner's original sentencing.

The Ninth Circuit's reliance in *Mileham* on *In re Costello* and *Forman* is misplaced. Both involved sentencing under a law already interpreted by state courts adversely to the prisoner/plaintiff. A state court's subsequent affirmation of that interpretation was therefore not unforeseeable.[2069] In contrast, Mileham was sentenced under a statute previously interpreted favorably to his position. His parole eligibility was thereafter determined pursuant to a subsequent unfavorable determination.

The Parole Commission has been granted substantial discretion by the 1976 Act in its determination of parole eligibility: "The Commission may grant or deny release on parole notwithstanding the [statutory] guidelines . . . if it determines there is good cause for so doing."[2070] This broad grant of authority has generated litigation charging abuse of this discretion.

In *United States v. Addonizio*,[2071] the petitioners claimed that the Parole Commission had exceeded its authority. The basis for this claim was that the post sentencing actions of the Commission prolonged petitioner's imprisonment, contrary to the original intent of the sentencing judge.[2072] The Court held that the error alleged to have occurred—that the judge was incorrect in his assumption about the future course of parole proceedings—was not of such a fundamental magnitude as to fall within the jurisdictional mandate for collateral attack.[2073] In reaching its conclusion, the Supreme Court found the opportunity to discuss generally the role of the Parole Commission: "The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission."[2074]

The Ninth Circuit has recently ruled on two similar challenges.[2075]

2069. *See* Forman v. Wolff, 590 F.2d at 285; In re Costello, 262 F.2d at 215.
2070. 18 U.S.C. § 4206(c) (Supp. 1976).
2071. 442 U.S. 178 (1979).
2072. *Id.* at 179.
2073. *Id.* at 186.
2074. *Id.* at 188.
2075. *See* Izsak v. Sigler, 604 F.2d 1205 (9th Cir. 1979); Petrone v. Kaslow, 603 F.2d 779 (9th Cir. 1979).

In *Izsak v. Sigler*,[2076] the petitioner had been convicted of manufacturing and distributing amphetamines and phencyclidine. He was sentenced for eight years under 18 U.S.C. § 4205(b)(2) which provides that the prisoner will be eligible for parole "at such time as the Commission may determine." Under the general guidelines used by the Commission, Izsak would have been eligible for parole in twenty-six months. However, the Commission felt that there was no excuse for the subject to become involved in this behavior because of his excellent training and education[2077] and concluded that he should be required to serve his full sentence. The petitioner contended that the Commission had acted in an "arbitrary and capricious" manner in light of the fact that the judge made him eligible for an early parole by sentencing him under § 4205(b)(2).[2078] The court rejected the argument that the actions and intent of the sentencing judge preempt the Commission's determination as to the factors relevant to the parole release. It held: "The import of this statutory scheme is clear: the judge has no enforcible (sic) expectations with respect to the actual release of a sentenced defendant short of his statutory term."[2079]

In *Petrone v. Kaslow*,[2080] the petitioner's challenge of the denial of his parole release, based upon an alleged frustration of the intent of the sentencing judge, was rejected. The Ninth Circuit held that it is well within the power of the Parole Commission to consider the prior criminal record of the petitioner in determining his parole eligibility.[2081] The court also held that an application for habeas corpus relief cannot be used to attack collaterally the Parole Commission's decision on the basis that its conduct frustrated the intent of the sentencing judge.[2082]

In *Brady v. United States Parole Commission*,[2083] the petitioner used a habeas corpus petition pursuant to 28 U.S.C. § 2241[2084] to chal-

2076. 604 F.2d 1205, 1205 (9th Cir. 1979).

2077. *Id.* at 1206 (petitioner was a law school graduate).

2078. *Id.* at 1207.

2079. *Id.* at 1208 (quoting Addonizio v. United States, 442 U.S. at 188-90).

2080. 603 F.2d 799, 780 (9th Cir. 1979).

2081. *Id.*

2082. *Id.* The Parole Commission had decided to continue further consideration of petitioner's parole beyond the one-third point of his original sentence. *Id.* at 779. Petitioner had been sentenced pursuant to 18 U.S.C. § 4205(b)(2) (Supp. 1976) which provides that "the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine." Petitioner had contended that the extension of his parole release consideration beyond the one-third point of his sentence was a frustration of the intent of the sentencing judge. 603 F.2d at 779-80.

2083. 600 F.2d 234 (9th Cir. 1979).

2084. The Ninth Circuit has consistently held that an attack upon custody, through a

lenge the Parole Commission's decision to keep him in custody beyond the one third point of his total sentence.[2085] Since during the pendency of his appeal Brady was released on parole, the court dismissed the case as moot.[2086] However, the court took note of the recent Supreme Court decision in *Addonizio* and observed that, even though that decision involved a construction of § 2255 whereas Brady's motion was brought under § 2241, "much of what has been said in *Addonizio* concerning the Parole Commission's discretion would seem to be applicable."[2087]

Conditions of parole are also established by the Parole Commission within the guidelines set by the Act.[2088] In *United States v. Dally*,[2089] Holiday, who had been convicted of possession of stolen mail, consented to allow his residence to be searched at any time as a condition of his parole. Holiday moved without notifying his parole officer, in violation of his parole agreement, and consequently, his new residence was searched. A firearm was seized and Holiday was convicted of possession of a weapon.[2090] He contended that the search was illegal and that the evidence should have been excluded. He proffered four reasons for the search's invalidity: (1) the search was not conducted by his parole officer and was not therefore a parole search, (2) the search was unreasonable, (3) the search was not authorized by California law, and (4) the search was a subterfuge for a criminal investigation.[2091] The Ninth Circuit upheld the search, finding that Holiday's

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§ 2241 habeas corpus motion, is the proper method for attacking Parole Commission action; by contrast, a motion for collateral attack pursuant to 28 U.S.C. § 2255 is an attack upon the sentence. *See* Elliot v. United States, 572 F.2d 238, 239 (9th Cir. 1978) (per curiam) (§ 2255 motion is an attack on the sentence, not the Parole Board's actions); Andrino v. United States Bd. of Parole, 550 F.2d 519, 520 (9th Cir. 1977) (per curiam) (§ 2241 motion proper vehicle for obtaining judicial review of parole board decisions); Tedder v. United States Bd. of Parole, 527 F.2d 593, 594 (9th Cir. 1975) (per curiam) (§ 2241 motion proper method for obtaining judicial review of parole board decisions).

2085. 600 F.2d at 235. Petitioner was sentenced under 18 U.S.C. § 4205(b)(2) (1976) which leaves discretion as to parole release entirely to the Parole Commission. *See* note 2082 *supra*. The Commission decided that parole consideration should be made after one-third of the imposed sentence had been served. 600 F.2d at 235.

2086. 600 F.2d at 236.

2087. *Id.* at 236 & n.1.

2088. *See* 18 U.S.C. § 4209(a) which provides:

> In every case, the Commission shall impose as a condition of parole that the parolee not commit another Federal, State, or local crime. The Commission may impose or modify other conditions of parole to the extent that such conditions are reasonably related to—
>
> (1) the nature and circumstances of the offense; and
>
> (2) the history and characteristics of the parolee.

2089. 606 F.2d 861 (9th Cir. 1979) (per curiam).

2090. *Id.* at 862.

2091. *Id.* at 863.

parole officer "reasonably believed" a search was appropriate.[2092] Further, the court held that the search, occurring immediately after Holiday was arrested, was nonetheless proper in that the state had a continuing interest in the parolee's progress so as to determine whether continuation or revocation of parole was proper under the circumstances.[2093]

Two aspects of *Dally* are troublesome. First, the court did not discuss the implications of a parole search conducted at the home of another person. In *Dally*, the parolee was living with someone, and the question arises whether a search of the residence would be proper if that residence was the actual home of someone other than the parolee. Second, the Ninth Circuit approved the forcible entry and search of the residence, citing *Latta v. Fitzharris*.[2094] The *Latta* court, however, specifically addressed and approved *consensual* search and reserved the question of whether forcible search could be made of a parolee's residence.[2095]

It is the procedural safeguards mandated for parole revocation hearings which continue to provide the greatest constitutional protection for parolees. Due process mandates: (1) a preliminary and final revocation hearing, (2) written notice of claimed parole violations, (3) disclosure of adverse evidence, (4) opportunity to present favorable evidence, (5) a limited right of confrontation, and (6) written findings by a detached and neutral body.[2096]

In *Robbins v. Thomas*,[2097] the question of what information the Parole Commission may consider and to what extent in the process that information may be heard was challenged. Robbins had been convicted of armed robbery, served some time and was then paroled.[2098]

2092. *Id.* The court cited Latta v. Fitzharris, 521 F.2d 246 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975). *Latta* held that state parolees are subject to search by their parole officer when he reasonably believes that such a search is necessary in the performance of his duties. *Id.* at 250. *Latta* also held that the fourth amendment does not require the parole officer to obtain a warrant. The special relationship between parolee and parole officer was thought to dispense with standard constitutional requirements. *Id.* at 250-51.

2093. 606 F.2d at 863.

2094. 521 F.2d 246 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975).

2095. 521 F.2d at 252 n.2. *Cf.* Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (Congressional remedy for refusal to consent to warrantless regulatory search precludes use of force as a remedy for that refusal).

2096. Morrissey v. Brewer, 408 U.S. 471, 489 (1972). The requirements are codified at 18 U.S.C. § 4214 (1976).

2097. 592 F.2d 546 (9th Cir. 1979) (per curiam).

2098. *Id.* at 547-48.

Five years later, in October, 1976, as provided by the Act,[2099] a hearing was held and the hearing officer recommended to the Parole Commission that Robbins' parole status be terminated. The next day, Robbins was arrested by local police for being under the influence of narcotics. In November, 1976, the Commission announced that it would not terminate Robbins' parole despite the hearing officer's recommendation. At another hearing in August, 1977, termination of Robbins' parole was again denied partly because of the October, 1976 arrest.[2100] Robbins claimed that his due process rights were violated and that § 4211(c)(1) limited the information which could be heard to the five year period before the hearing.[2101] The Ninth Circuit rejected this reading, holding that all information may be considered up until the moment the parole is terminated.[2102] However, if newly acquired evidence is considered after the initial hearing, a supplementary hearing is mandated by due process.[2103] Therefore, although Robbins' due process rights had been violated in November, 1976 when the Parole Commission decided to terminate his parole without affording Robbins a right to be heard, the hearing in August, 1977 afforded Robbins such an opportunity and provided a complete remedy. His writ of habeas corpus was consequently denied.[2104]

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2099. 18 U.S.C. § 4211(c) (1976) provides for termination of parole custody five years after release, after a hearing pursuant to § 4214(a)(2).

2100. 592 F.2d at 548.

2101. *Id.* Section 4211(c)(1) provides that "five years after each parolee's release on parole, the Commission shall terminate supervision over such parolee unless it is determined . . . that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violative of the criminal law." 18 U.S.C. § 4211(c)(1) (1976).

2102. 592 F.2d at 548-49. The court relied on legislative history and the import of the statutory scheme itself which extends jurisdiction of the Parole Commission over a parolee until the date of actual parole termination. "Until such time as parole is terminated, and the Parole Commission no longer has jurisdiction of the former parolee, it offends neither due process nor the applicable statutes for the Commission to reopen its proceedings and hold hearings concerning newly acquired information." *Id.* at 549 (footnote omitted).

2103. *Id.* at 549.

2104. *Id.*