Ninth Circuit Survey—Criminal Law in the Ninth Circuit: Recent Developments
CRIMINAL LAW IN THE NINTH CIRCUIT: RECENT DEVELOPMENTS

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I. Arrest, Search, and Seizure

A. Scope of the Fourth Amendment

The fourth amendment's scope is principally defined by the personal nature of fourth amendment rights. By manipulating the standing requirements of the fourth amendment, the Supreme Court is attempting to narrow the amendment's scope. In two decisions during the 1980 term, the Court further limited who may invoke the exclusionary rule, and curtailed the suppression of evidence under the federal courts' supervisory powers.

1. Standing to invoke the exclusionary rule

In United States v. Salvucci, the Court overturned the "automatic standing" rule of Jones v. United States, holding that defendants charged with possessory crimes must establish that their own fourth amendment rights have been violated in order to invoke the exclusionary rule. The Court reasoned that since a defendant's testimony at a pretrial "standing" hearing is now barred from the prosecution's case-in-chief, the automatic standing rule is no longer necessary. However, as Justice Marshall noted in his dissenting opinion, the extreme likelihood that such testimony would be admissible for impeachment undermines this rationale. The Court also noted that it "has not decided whether Simmons v. United States precludes the use of a defendant's testimony at a suppression hearing to impeach his testimony at trial."
However, the Court’s recent fifth amendment decisions strongly suggest that it is eager to permit this use of prior testimony.\textsuperscript{8}

The Court attempted to dismiss criticism of its holding by observing that \textit{Simmons} "not only extend[ed] protection against th[e] risk of self-incrimination in all of the cases covered by \textit{Jones}, but also grant[ed] a form of 'use immunity' to those defendants charged with nonpossessory crimes. In this respect, the protection of \textit{Simmons} is therefore broader than that of \textit{Jones}."\textsuperscript{9} However, under \textit{Jones}, a defendant did not need to present \textit{any} information regarding his possession of the illegally seized evidence; since possession was an essential element of the offense, automatic standing was conferred.\textsuperscript{10} Under \textit{Simmons}, cases involving nonpossessory crimes may require a defendant to admit ownership or possession, but such testimony is barred from trial only on the issue of guilt.\textsuperscript{11} As Justice Brennan stated in his dissent in \textit{Harris v. New York},\textsuperscript{12} "'[a]n incriminating statement is as incriminating when used to impeach credibility as it is when used as direct proof of guilt and no constitutional distinction can legitimately be drawn.'"\textsuperscript{13}

A third case further demonstrates the trend in the Court’s recent decisions to narrow the fourth amendment’s scope by restricting standing. In \textit{Rawlings v. Kentucky},\textsuperscript{14} the Court decided that the petitioner lacked a reasonable expectation of privacy in a companion’s purse, despite his declared ownership of the illegal drugs inside.\textsuperscript{15} Six police officers arrived at a residence where the petitioner and his companion were visiting.\textsuperscript{16} The officers sought to arrest another party pursuant to an arrest warrant, but were unable to locate him.\textsuperscript{17} While searching for him, the officers smelled marijuana smoke, and observed several seeds in plain view. The occupants were then detained while two of the of-

\begin{itemize}
  \item \textsuperscript{8} See, e.g., Jenkins v. Anderson, 447 U.S. 231 (1980) (prearrest silence admissible to impeach defendant’s credibility); Oregon v. Hass, 420 U.S. 714 (1975) (inculpatory statements obtained after defendant asserted his \textit{Miranda} rights admissible to impeach his credibility); Harris v. New York, 401 U.S. 222 (1971) (inculpatory statements made after arrest but prior to \textit{Miranda} warnings admissible to impeach defendant’s credibility).
  \item \textsuperscript{9} 448 U.S. at 90.
  \item \textsuperscript{10} 362 U.S. at 264-65.
  \item \textsuperscript{11} 390 U.S. at 394.
  \item \textsuperscript{12} 401 U.S. 222 (1971).
  \item \textsuperscript{13} \textit{Id.} at 231 (Brennan, J., dissenting) (quoting People v. Kulis, 18 N.Y.2d 318, 324, 221 N.E.2d 541, 543 (1966) (Keating, J., dissenting)).
  \item \textsuperscript{14} 448 U.S. 98 (1980).
  \item \textsuperscript{15} \textit{Id.} at 104-05.
  \item \textsuperscript{16} \textit{Id.} at 100.
  \item \textsuperscript{17} \textit{Id.}
\end{itemize}
ficers obtained a search warrant.\textsuperscript{18} After returning with the warrant, the officers ordered the petitioner's companion to empty her purse onto the coffee table. While doing so, she asked the petitioner to “take what was his.” He immediately claimed ownership of the several vials of drugs. Although it was unclear how the drugs arrived in the purse, apparently the petitioner had put them there that morning.

The Court held that although the petitioner had claimed ownership of the drugs, five factors prevented him from having a legitimate expectation of privacy in his companion's purse:\textsuperscript{19} (1) he had known his companion for only a few days; (2) he “had never sought or received access to her purse prior to that sudden bailment”; (3) he had no right to exclude other persons from access to the purse; (4) “the precipitous nature of the transaction hardly support[ed] a reasonable inference that petitioner took normal precautions to maintain his privacy”; and (5) he “had no subjective expectation that . . . [the] purse would remain free from governmental intrusion.”\textsuperscript{20}

2. Suppression of evidence under supervisory powers

During the 1980 term, the Court further narrowed the scope of the fourth amendment by subjecting the federal courts' supervisory powers to the fourth amendment's standing limitations. In \textit{United States v. Payner},\textsuperscript{21} the Court decided that federal courts do not have authority under their supervisory powers to exclude evidence obtained in deliberate violation of a third party’s fourth amendment rights.\textsuperscript{22} The IRS was investigating the financial activities of American citizens in the Bahamas. In their zeal to gain information, IRS agents deliberately participated in the unlawful seizure of a briefcase belonging to a Mr. Wolstencroft, vice-president of a Bahamian bank, and arranged the theft of a rolodex from the bank's office.\textsuperscript{23} Contrary to Payner's claims, the records obtained from the search of the briefcase showed that he maintained a foreign bank account.

At a consolidated suppression hearing and court trial, Payner was convicted of falsifying his federal income tax return. Afterwards, the court determined that most of the Government's evidence had been obtained through a “flagrantly illegal” search.\textsuperscript{24} An extensive review of

\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.} at 105.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.} at 727 (1980).
\textsuperscript{22} \textit{Id.} at 735.
\textsuperscript{23} \textit{Id.} at 740-41.
\textsuperscript{24} \textit{Id.} at 729.
Supreme Court decisions indicated to the court that it was obligated, under its supervisory powers, to exclude evidence obtained by government conduct that was "purposefully illegal or motivated by an intentional bad faith hostility to a constitutional right." Finding that both criteria were met by the "outrageous" circumstances of the search, and that the need for deterrence was especially compelling, the court suppressed the evidence derived from the search of the briefcase.

The Supreme Court reversed the trial and appellate courts, holding that federal courts do not have authority under their supervisory powers to exclude evidence "seized unlawfully from a third party not before the court." The Court reasoned that the same considerations underlying the application of the exclusionary rule were present in determining whether to suppress evidence under the judicial supervisory powers. Only when other social interests outweighed the need to introduce relevant evidence at trial would the Court consider it appropriate to suppress tainted evidence under the judicial supervisory powers. Absent a violation of the defendant's fourth amendment rights, the interest in deterring egregiously illegal searches was considered to be insufficient to outweigh the need for relevant evidence.

In a dissent joined by Justices Brennan and Blackmun, Justice Marshall criticized the Court for "engraft[ing] . . . standing limitations of the Fourth Amendment onto the exercise of supervisory powers." Marshall explained that the policies underlying the supervisory powers

26. Id. at 130. As part of the effort to search Wolstencroft's briefcase, the IRS arranged a "date" for him when he visited Miami. While the two were at a restaurant, IRS agents entered the date's apartment and stole the briefcase. In a parking lot five blocks away, a "trusted" locksmith made a key to the briefcase. Eight blocks from there, in an IRS agent's home, the contents were photographed by the IRS supervising agent and by a photography expert using a high-speed microfilmer. After the lookout in the restaurant notified the agents that the couple had finished dinner, the briefcase was locked and returned to the date's apartment.

Needing further information, the IRS sent the date to visit Wolstencroft in the Bahamas. There she stole his rolodex. For her role in the "briefcase caper," and for stealing the rolodex, she received $1,000.

The district court concluded that the IRS's actions constituted a prima facie violation of three Florida criminal statutes: larceny, acting as a first degree principal in a crime, and unauthorized appropriation of trade secrets. Id. at 130 n.66.
27. Id. at 134 n.75.
28. 447 U.S. at 735.
29. Id. at 734-37.
30. Id. at 734-35.
31. Id.
32. Id. at 748 (Marshall, J., dissenting).
and the exclusionary rule are different. Exercise of the supervisory powers is intended to protect the court's integrity, rather than to vindicate the defendant's constitutional rights. By subjecting the supervisory powers to the fourth amendment's standing requirement, federal courts would be prevented from withholding their imprimatur upon egregiously illegal searches, unless the defendant could establish a violation of his fourth amendment rights. Marshall criticized this rule as frustrating the distinct policy underlying the supervisory powers.33

Marshall also observed that such a rule renders the supervisory powers superfluous.34 If the defendant must establish a violation of his fourth amendment rights before a court may suppress evidence under its supervisory powers, then an independent constitutional basis for suppression would already exist.

Marshall's second point of criticism addressed various characterizations of the district court's exercise of its supervisory powers. The majority first characterized this as a case in which the district court was not supervising the administration of justice "'among the parties before the bar,'" presumably referring to the absence of the third party whose rights the search violated. Marshall refuted this characterization by explaining that the Government was before the bar, making this an appropriate instance for using the supervisory powers.36 Marshall further noted that the central role of the illegal search distinguished this exercise of supervisory power from Chief Justice Burger's characterization of it as an exercise of "'general supervisory authority over operations of the Executive Branch.'"37

To prove that this was not a case of "indiscriminate" or "unbending" application of the exclusionary rule, Marshall quoted the district court's qualification that suppression under its supervisory powers was "'done only as a last resort.'"38 He also explained that the district court considered suppression proper under its supervisory powers only when the Government's conduct was "'purposefully illegal,'" or was "'motivated by an intentional bad faith hostility to a constitutional right.'"39 Only after finding that both requirements were met, and that there was no other deterrent to the Government's policy of violating

33. Id. at 748-49.
34. Id. at 748.
35. Id. at 749 (quoting 447 U.S. at 735 n.7).
36. 447 U.S. at 749.
37. Id. at 750 (quoting 447 U.S. at 737 (Burger, C.J., concurring)).
38. 447 U.S. at 750 (quoting United States v. Payner, 434 F. Supp. 113, 134 n.74 (1977)).
constitutional rights, did the district court suppress the evidence. From this analysis, Marshall concluded that suppression under the supervisory power was patently appropriate.

The most disturbing aspect of the Supreme Court's decision is that it subordinates the interests protected by the fourth amendment to the gathering of criminal evidence. The Court quite clearly stated that, by itself, the interest in deterring illegal searches is outweighed by the need for relevant evidence. While it acknowledged that the corrective measures adopted by the IRS were disappointingly weak, the Court nevertheless found that "[t]o require in addition [to these corrective measures] the suppression of highly probative evidence in a trial against a third party would penalize society unnecessarily." Considering the egregiously illegal circumstances of the search, society was probably penalized more by the Government's deliberate violation of constitutionally protected rights than by the suppression of evidence.

Despite the Court's disclaimer that "[n]o court should condone the unconstitutional and possibly criminal behavior" of the IRS, the unmistakable effect of this decision is to encourage the Government's policy of instructing its agents "to purposefully conduct an unconstitutional search and seizure of one individual . . . to obtain evidence against third parties."

**B. Fruit of the Poisonous Tree**

The "poisonous fruit" doctrine extends the application of the exclusionary rule to evidence obtained as a result of a fourth amendment violation. The purpose of the exclusionary rule is "to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." When this purpose is not served, the Supreme Court has emphasized that the application of the exclusionary rule is inappropriate. Three exceptions to the exclusionary rule recognize instances when the purpose underlying the rule will not be served by its application: (1) in-

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40. 447 U.S. at 750.
41. Id. at 751.
42. Id. at 734-35.
43. Id. at 733 n.5.
44. Id. at 734 n.5.
45. Id. at 733.
46. Id. at 730 (quoting United States v. Payner, 434 F. Supp. at 132-33).
48. Id. at 348.
dependent source,\textsuperscript{49} (2) inevitable discovery,\textsuperscript{50} and (3) attenuation.\textsuperscript{51}

In \textit{United States v. Crews},\textsuperscript{52} the Supreme Court decided that a robbery victim's in-court identification of the defendant did not constitute a "fruit" of the defendant's illegal arrest. The police had observed a black youth loitering in the area of the robbery who matched the descriptions given by three separate robbery victims. After a bystander tentatively identified the youth as having been present on the day of one of the robberies, the police detained him for an hour at the Washington, D.C. Park Police headquarters on the pretext of being a suspected truant.\textsuperscript{53} The police's true purpose for keeping the defendant was to photograph him for identification by the victims. The following day, the police showed one of the victims an array of eight photographs, among which was one of the defendant. Although the victim had made no identification from more than one hundred photographs\textsuperscript{54} in previous displays, this time she immediately identified the defendant's photograph. Another victim made a similar identification three days later. Eleven days later both victims identified the defendant at a court-ordered lineup.\textsuperscript{55}

At a pretrial suppression hearing, the trial court suppressed the photographic and lineup identifications as "fruits" of the illegal detention. However, the court allowed the introduction of the victims' in-court identification of the defendant on the ground that it was based on independent recollection untainted by the intervening identifications.\textsuperscript{56} The defendant was thereafter convicted of the armed robbery of the first victim.\textsuperscript{57}

On appeal, the Supreme Court decided that the victim's in-court identification did not constitute a "fruit" of the defendant's illegal arrest. The Court's analysis addressed whether the three necessary ele-

\textsuperscript{49} No deterrence is achieved by suppressing evidence "gained from an independent source." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (by implication).

\textsuperscript{50} No deterrence is achieved by suppressing "evidence . . . that . . . would have been discovered" regardless of a fourth amendment violation. Brewer v. Williams, 430 U.S. 387, 406 n.12 (1977) (by implication).

\textsuperscript{51} No deterrence is achieved by suppressing evidence that "has 'become so attenuated as to dissipate the taint'" of a fourth amendment violation. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (by implication) (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)).

\textsuperscript{52} 445 U.S. 463 (1980).

\textsuperscript{53} Id. at 467.

\textsuperscript{54} Id.

\textsuperscript{55} Id.

\textsuperscript{56} Id. at 468.

\textsuperscript{57} Id.
ments comprising an in-court identification resulted from a fourth amendment violation: (1) whether the robbery victim's presence in court was the product of police misconduct, (2) whether the victim's ability to give accurate identification testimony was affected by that misconduct, and (3) whether the defendant's presence in court constituted an illegal "fruit" of the arrest.58

The Court decided that the victim's presence in court was not a product of police misconduct, as this was "not a case in which the witness' identity was discovered or her cooperation secured only as a result of an unlawful search or arrest."59 The victim had notified the police immediately after the attack and had voluntarily continued to assist them. The Court acknowledged that under some circumstances the intervening photographic and lineup identifications could affect the reliability of an in-court identification. However, the Supreme Court upheld the trial court's specific determination that the reliability of the in-court identification had remained unaffected by the previous intervening identifications.60 The Court also stated that the defendant's own presence at trial as a result of the illegal arrest did not immunize him from prosecution because "[a]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction."61

However, a plurality of the Court expressly declined to decide the question raised by the defendant's argument: "whether respondent's person should be considered evidence, and therefore [suppressable as] a possible 'fruit' of police misconduct."62 Such a decision was unnecessary, the plurality reasoned, because "respondent's unlawful arrest served merely to link together two extant [untainted] ingredients in his identification,"63 the victim's presence in court and her ability to identify the robber.

By characterizing the function of the arrest as a link between two untainted elements, the plurality creates the impression that the arrest played a neutral role in the identification, and that this neutral role somehow prevented the illegality of the arrest from tainting the identification process. The implication is that since the defendant's presence in court functioned only as a link between two untainted elements in

58. Id. at 471.
59. Id. at 471-72.
60. Id. at 472-73.
61. Id. at 474.
62. Id. at 475.
63. Id.
the identification, his “person” never functioned as evidence in the identification process. Since the defendant's person did not function as evidence in the identification, the plurality reasoned that it was unnecessary to decide whether it should be considered evidence, i.e., a suppressible “fruit” of the illegal arrest.

At the beginning of the analysis, however, the plurality identified the defendant's presence in terms indicating that his presence did function as physical evidence in the identification. Yet at this later point in the analysis, the Court's terminology so characterized the role of the arrest as to obscure the evidentiary function of the defendant's presence in the identification process. By so characterizing the role of the arrest, the plurality precluded from ever arising, and therefore, made unnecessary a decision on, the issue of whether the defendant's presence should be considered evidence for identification purposes.

This characterization of the role of the arrest does not indicate whether the arrest's legality is relevant to the admissibility of the identification. Since the plurality's preceding analysis never considered the evidentiary function of the defendant's presence to arise as an issue, one would expect the legality of the arrest to be irrelevant to the admissibility of the identification. However, the plurality's analysis indicates that the admissibility of the identification is affected by whether there were some untainted, reasonable grounds to suspect Crews of the offense prior to his arrest. Because the analysis seeks some independent, reasonable grounds to justify his presence in court, this suggests that the legality of the arrest has some relevance to the admissibility of the identification.

Contrary to the intimations in Justice White's concurring opinion, the plurality was not suggesting that reasonable suspicion replace probable cause to arrest. The confusion in the plurality's analysis derived from unconsciously mixing two “poisonous tree” doctrines: independent source and inevitable discovery.

The analysis first consciously argued that the victim's descriptions of Crews constituted independent grounds for reasonable suspicion

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64. "A victim's in-court identification of the accused has three distinct elements . . . . Third, the defendant is also physically present in the courtroom, so that the victim can observe him and compare his appearance to that of the offender." Id. at 471.

65. "[P]rior to his illegal arrest, the police both knew respondent's identity and had some basis to suspect his involvement in the very crimes with which he was charged. . . . Here, in contrast [to Davis v. Mississippi, 394 U.S. 721 (1969)], the robbery investigation had already focused on respondent, and the police had independent reasonable grounds to suspect his culpability." 445 U.S. at 475-76.

66. Id. at 478.
prior to his illegal arrest. Then, unconsciously, the analysis incorporated the inevitable discovery doctrine at the conclusion of distinguishing this case from *Davis v. Mississippi*. The resulting, and probably unintentional, implication is that since the investigation had focused on Crews prior to his illegal arrest, through the independent evidence of the victims' descriptions, the reasonable suspicion then existing would have inevitably led to the discovery of more evidence, constituting probable cause to arrest. Then Crews' presence in court for identification purposes would have been justified, making it unnecessary to decide whether his presence was illegally obtained evidence.

The obvious problem with this line of reasoning is that the hypothetical, untainted discovery of additional evidence constituting probable cause may never have occurred. There is, in fact, no evidence suggesting that it would have inevitably occurred. In Justice White's words: "the presence of Crews in the courtroom would not have occurred but for his arrest without probable cause . . . ."

Despite the illegal arrest, a majority of the Court would have admitted the in-court identification by extending the rationale of *Ker v. Illinois*, reaffirmed in *Frisbie v. Collins*. That rationale provides that "the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction" illegally.

Applying this rule to *Crews* extends the use of the defendant's presence in court beyond the legally recognized purpose of enabling "the Government . . . to prove his guilt through the introduction of evidence wholly untainted by the police misconduct." By admitting the identification when made in court, the majority permits the prosecution to prove his guilt through evidence which would otherwise have been tainted by the illegal detention. For example, if Crews had been identified by the victims when originally detained, as in a "walk-up," this evidence would have been *inadmissible* as tainted by the illegality of the detention, just as were the subsequent photographic and lineup

67. See supra note 65.
68. 445 U.S. at 478.
69. The majority was comprised of Justices Powell, Blackmun, White, Burger and Rehnquist.
70. 119 U.S. 436 (1886).
72. Id. at 522 (citing *Ker v. Illinois*, 119 U.S. 436, 444 (1886)).
73. 445 U.S. at 474. Neither *Ker* nor *Frisbie* involved the use of the defendant's presence for the purpose of an in-court identification. *Ker* permitted the trial of a criminal defendant who had been virtually kidnapped from Peru to stand trial for larceny. *Frisbie* similarly permitted the trial of a defendant who had been blackjacked and kidnapped to stand trial for murder.
identifications. By admitting the identification simply because it is made in court, the majority permits the defendant's lawful presence in court for trial to be used for the unlawful purpose of discovering evidence otherwise gathered in violation of the fourth amendment.

Admitting the identification circumvents the exclusionary rule's enforcement of the fourth amendment. A rule excluding in-court identification testimony when the defendant's presence has been procured illegally would comport with the deterrence rationale underlying the exclusionary rule, and would restore the fourth amendment's protection.

C. Warrants

1. Search—sufficiency of affidavit

In United States v. Lefkowitz,74 the court upheld the sufficiency of an affidavit supporting a warrant to search the defendant's corporate offices and his residence.75 In an appeal from a conviction of several tax fraud offenses,76 the defendant argued that the failure of the affidavit to disclose his estranged wife's identity as one of the informants prevented the magistrate from making an informed and independent determination of probable cause because her information may have been tainted by "vengeance, and perhaps a desire to obtain advantageous property settlement information."77

The court applied the Franks v. Delaware78 test for challenging an affidavit otherwise valid on its face. Under this test, the defendant must prove that: (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit purged of its falsities would be insufficient to establish probable cause.79 The court found that the defendant asserted no proof of the first requirement. The second requirement was not met because even if the wife's identity had been disclosed, the affidavit would still have shown probable cause from information obtained from IRS files and investigations showing the com-

74. 618 F.2d 1313 (9th Cir. 1980).
75. Id. at 1315.
77. 618 F.2d at 1317.
78. 438 U.S. 154, 155-56, 171-72 (1978) (defendant's substantial preliminary showing of intentional or reckless false statement in affidavit triggers his right to request a hearing to determine affidavit's sufficiency when purged of the false statement).
79. Id. at 155-56.
mission of tax fraud. In *United States v. Federbush*, appellants Federbush and Quilici unsuccessfully challenged the sufficiency of affidavits supporting search warrants instrumental to their convictions for mail and wire fraud. During their investigation, FBI agents concluded that the appellants were operating a sham bank consisting of nothing more than a charter with the names of Federbush and Quilici. The appellants had persuaded a travel agency to deposit its funds in a *bona fide* bank account in the name of the sham bank. They then transferred the travel agency's assets abroad, and paid the agency's obligations with worthless checks. The appellants told the payees that the checks were good and would be honored. FBI agents arrested Federbush and Quilici after a payee of one of the dishonored checks reported that they were arriving for a meeting to resolve the non-payment problem. Federbush was arrested at the payee's office and Quilici in his San Francisco hotel room. The agents seized briefcases from each, and subsequently obtained warrants to search the briefcases and the appellants' hotel rooms.

The court summarily rejected the appellants' challenge to the sufficiency of the search warrant affidavits, holding that the affidavits' description adequately supported the magistrate's conclusion that 18 U.S.C. Section 2314 had been violated. "The affidavits described the fraudulent scheme—checks drawn on what appeared to be a nonexistent bank and payees unable to collect—and described the travel of [the appellants] from Boston to San Francisco in connection with the scheme." Utilizing the reasonableness standard articulated in *United States v. Hendershot*, the court summarily decided that the affidavit sufficiently indicated that evidence would reasonably be located in the briefcases in the appellants' possession when arrested.

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80. 618 F.2d at 1317 n.4.
81. 625 F.2d 246 (9th Cir. 1980).
82. *Id.* at 252.
83. *Id.* at 250.
84. *Id.* at 248.
85. *Id.* at 251.
86. The statute proscribes interstate transportation of forged securities or of a person in furtherance of a fraudulent scheme.
87. 625 F.2d at 252.
88. 614 F.2d 648, 654 (9th Cir. 1980). In upholding the sufficiency of an affidavit supporting a warrant to search an automobile used in connection with a bank robbery, the court stated that an affidavit's facts need only show that "it would be reasonable to seek the evidence in the place indicated."
89. 625 F.2d at 252 (citing *United States v. Hendershot*, 614 F.2d at 654).
2. Home arrest

As is the quintessential seizure, arrest of the person is governed by the fourth amendment requirement of reasonableness. Prior to United States v. Watson, the Supreme Court had not been presented with the issue of whether a warrant was required to make a felony arrest in public when the police had sufficient opportunity to obtain one. The "course of [the Supreme Court's] modern decisions construing the Warrant Clause of the Fourth Amendment" indicated that, absent exigent circumstances, such an arrest should be made only upon a warrant. Contrary to this expectation, the Court decided in United States v. Watson, that a warrant was not required to make a felony arrest in public. Justices Powell and Stewart, however, emphasized that in Watson the Court did not decide "whether or under what circumstances an officer lawfully may make a warrantless arrest in a private home or other place where the person has a reasonable expectation of privacy." This question was decided in Payton v. New York. There, the Court held that "the Fourth Amendment ... prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." In Payton, after two days of intensive investigation, the police broke into and entered the defendant's apartment without a warrant to arrest him for a murder committed two days earlier. They seized a 30-caliber shell casing, in plain view, which was admitted into evidence at his trial. In the companion case, Riddick v. New York, police went to the defendant's apartment without a warrant to arrest him for two armed robberies committed three years earlier. They knocked and entered after the defendant's young son opened the door. The defendant was found sitting in bed covered by a sheet. Before allowing him to dress, the police searched

93. 423 U.S. at 426-27 n.1 (Powell, J., concurring); id. at 436-38 (Marshall, J., dissenting).
94. 423 U.S. at 433 (Marshall, J., dissenting).
95. See id. at 443-53 (Marshall, J., dissenting).
97. Id. at 414, 424.
98. Id. at 432-33 (Powell, J., concurring).
100. Id. at 576.
101. Id.
for weapons in a chest of drawers two feet from the bed, and found narcotics and related paraphernalia. The defendant was subsequently indicted and convicted on narcotics charges.\(^{102}\)

The Court's rationale for holding the entries illegal began with a reiteration of principles evolved through fourth amendment litigation, which focused on the preservation of "the sanctity of the home"\(^{103}\) from warrantless invasions, absent exigent circumstances.\(^{104}\) The Court rejected New York's argument that the reasons supporting the \textit{Watson} decision were applicable to \textit{Payton}. Those reasons, absent in \textit{Payton}, were: (1) a "well-settled common-law rule"\(^{105}\) permitting felony arrest in a public place upon probable cause, (2) a "clear consensus among the States adhering to that . . . rule,"\(^{106}\) and (3) "the expression of the judgment of Congress that such an arrest is 'reasonable.'"\(^{107}\)

The Court's discussion showed that not only was there "no direct authority supporting forcible entries into a home to make a routine arrest,"\(^{108}\) but the authorities "strongly suggest that the prevailing practice was not to make such arrests except in hot pursuit or when authorized by a warrant."\(^{109}\) The Court's conclusion derived from: (1) its own analysis of a seminal passage of "equivocal dictum"\(^{110}\) from \textit{Semayne's Case};\(^{111}\) (2) the sharply divided analysis of this passage by common law commentators;\(^{112}\) (3) common law decisions, especially those inspired by Lord Coke, which "clearly viewed a warrantless entry for the purpose of arrest to be illegal";\(^{113}\) and (4) common law and colonial "zealous and frequent repetition of the adage that a 'man's house is his castle.'"\(^{114}\)

\(^{102}\) \textit{Id.} at 578.

\(^{103}\) \textit{Id.} at 589 (quoting \textit{United States v. Reed}, 572 F.2d 412, 423 (2d Cir.), \textit{cert. denied}, 439 U.S. 913 (1978)).

\(^{104}\) 445 U.S. at 590-601.

\(^{105}\) \textit{Id.} at 590.

\(^{106}\) \textit{Id.}

\(^{107}\) \textit{Id.}

\(^{108}\) \textit{Id.} at 598.

\(^{109}\) \textit{Id.}

\(^{110}\) \textit{Id.} at 592.

\(^{111}\) 77 Eng. Rep. 194, 195-96 (K.B. 1603). \textit{Semayne's Case} is one of the earliest common law expressions regarding warrantless arrests in residences. Its dictum on this question is extensively quoted by scholars who are sharply divided over whether it condones warrantless entries, or \textit{circumscribes} the extent of authority in executing the King's writ. The Supreme Court adopted the latter interpretation. The actual issue in \textit{Semayne's Case} did not involve entry to arrest, but to effect service of civil process.

\(^{112}\) 445 U.S. at 592-98.

\(^{113}\) \textit{Id.} at 594.

\(^{114}\) \textit{Id.} at 596.
The Court acknowledged that a majority of states permit warrantless home arrest absent exigent circumstances, but explained that the kind of unanimity present in *Watson* was lacking. Its decision that a "clear consensus" was absent was based on the strength of a declining trend to permit such arrests indicated by several state courts resting their decisions upon a violation of their state constitutions.115 Lastly, congressional expression that warrantless home arrests are reasonable was also considered lacking.116

Two years ago, the Ninth Circuit anticipated the *Payton* decision by announcing a similar, but more exacting and expansive rule in *United States v. Prescott*.117 Although the Ninth Circuit stated in *United States v. Blake*,118 that the Supreme Court reiterated the *Prescott* rule in *Payton v. New York*, this is incorrect. The *Prescott* rule differs from the *Payton* rule in two respects. Under *Prescott*, an arrest warrant "must describe 'the place to be searched,' . . . and 'the persons or things to be seized.'"119 Under *Payton*, an arrest warrant need only describe the arrestee,120 as required in the usual arrest warrant. In addition, the holding in *Prescott* requires an arrest warrant when a suspect is arrested in a third person's residence: "absent exigent circumstances, police . . . must obtain a warrant before entering a dwelling to carry out the arrest."121 This requirement was reiterated in *United States v. Jabara*,122 when the court stated that an arrest warrant was required to arrest both defendants within one defendant's residence: "the agents did not have arrest warrants for Jabara or McClain at the time of their arrests. Because the arrests took place at Jabara's residence, the Government must establish exigent circumstances in order for the arrest to be justified under the Fourth Amendment."123 In *Payton*, however, the Supreme Court specifically reserved decision on this question: "[n]or do these cases raise any question concerning the authority of the police, without either a search or arrest warrant, to

115. Id. at 598-600.
116. Id. at 601.
117. 581 F.2d 1343, 1350 (9th Cir. 1978). The Supreme Court in *Payton* did not have occasion to specify what a warrant for a home arrest must contain. In *Prescott*, the Ninth Circuit held that such a warrant "must describe 'the place to be searched' . . . and 'the persons . . . to be seized.'" 581 F.2d at 1350.
118. 632 F.2d 731, 733 (9th Cir. 1980).
119. 581 F.2d at 1350.
120. 445 U.S. at 575-76 (by implication).
121. 581 F.2d at 1350.
122. 618 F.2d 1319, 1324 (9th Cir.), cert. denied, 446 U.S. 987 (1980).
123. Id.
enter a third party's home to arrest a suspect."

Between the Court's decisions in Prescott and Payton, only two Ninth Circuit cases were decided on the question of warrantless home arrest. Both represent exigent circumstance exceptions to the warrant requirement, leaving Prescott's rule unchanged when Payton was decided. Because the Payton decision did not reach either of the above questions distinguishing its holding from the holding in Prescott, the Payton decision leaves intact the Ninth Circuit's more exacting and expansive Prescott rule.

In United States v. Blake, the court decided that its Prescott rule should be applied retroactively, holding that the defendant's warrantless home arrest was illegal. The FBI established Blake's identity by comparing a photograph taken of him with a surveillance camera in the bank that he robbed to a driver's license photograph of a man stopped a week earlier on suspicion of casing a bank. The day after the robbery, the FBI learned from Blake's estranged wife where he was living. A local police officer then went to Blake's house and waited there for about an hour until Blake drove up and entered the house with his female companion. After learning of his arrival, and without obtaining an arrest warrant, the FBI went to the house and positioned local police around it. An agent knocked on the door and announced his identity. After receiving no response, he began kicking the door. A woman then opened the door. The agent pulled her out onto the step and entered the house with another agent. They found Blake emerging from a bedroom and immediately arrested him. The

124. 445 U.S. at 583.
125. United States v. Jabara, 618 F.2d 1319, 1324 (9th Cir.), cert. denied, 446 U.S. 987 (1980). In Jabara, an eleven month investigation by drug enforcement agents led to the arrest of one of the defendants, when she sold heroin to an undercover agent. The agents initially contacted a magistrate to obtain arrest warrants for her confederates. When they learned that, instead of cooperating in the arrest of the others, she had made several attempts to warn them of her arrest, the agents obtained permission from the supervising assistant district attorney to make warrantless arrests. Accordingly, the others were arrested in their apartment at about 9:35 p.m. The defendants argued that exigent circumstances were absent, thereby precluding their warrantless arrests. The court upheld the arrests on the ground that the "probability of destruction of evidence and flight do constitute exigent circumstances." Id. at 1324. In United States v. Stubblefield, 621 F.2d 980, 982 (9th Cir. 1980), the court upheld the warrantless entry into a house to search for an unapprehended bank robbery suspect on grounds that hot pursuit and the possibility that the suspect was inside constituted exigent circumstances.
126. 632 F.2d 731 (9th Cir. 1980).
127. Id. at 732.
128. Id. at 733.
129. Id.
agents searched him, finding a bait bill in his pocket that had been taken from the bank. 130 After advising him of his Miranda rights at the local police station, the agents began questioning him. At first he denied having knowledge of the robbery, but he later confessed when he was confronted with the surveillance photograph and the bait bill. He then consented to a search of the house, which produced three more bait bills. 131

Blake argued that his warrantless arrest violated the Payton-Prescott rule, and that evidence obtained as a result should have been suppressed at trial. 132 The Government contended that the warrantless arrest was justified by exigent circumstances, and, alternatively, that the Payton-Prescott rule should not be applied retroactively. 133

The Ninth Circuit first decided that the trial court's determination that exigent circumstances were present was "clearly erroneous." 134 The trial court had reached its decision by applying the criteria of a District of Columbia case, Dorman v. United States. 135 The Dorman court looked to: (1) the gravity of the crime involved, (2) the reasonableness of the belief that the suspect is armed, (3) the degree of probable cause for the arrest, (4) the likelihood that the suspect is on the premises, (5) the risk of escape, and (6) the manner of entrance by the police. 136 While acknowledging that a "district court's finding of exigent circumstances should not be lightly rejected," 137 the appellate court was "left with the definite and firm conviction that a mistake [had] been committed." 138

The court's conclusion derived from its own application of the Dorman criteria to the facts presented, using the definition of exigent circumstances developed in United States v. Flickinger. 139 The court noted that while the crime was serious, it had not caused any bodily injury, and no weapon had been used in its commission. 140 Although

130. Id.
131. Id.
132. Id.
133. Id.
134. Id. at 734.
136. Id.
137. 632 F.2d at 734.
138. Id. (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).
139. 573 F.2d 1349, 1355 (9th Cir.), cert. denied, 439 U.S. 836 (1978). The Flickinger court stated that "[t]he term 'exigent circumstances,' in conjunction with an arrest in a residence, refers to a situation where the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action."
140. The discovery of a pellet gun under the seat of the car that Blake was driving when
the officers had a high degree of probable cause to arrest, there was no apparent substantial reason to believe that the appellant would think that his apprehension was imminent and flee. In fact, the “measured and deliberate manner” in which the police pursued their investigation indicated that they thought that “arrest was not . . . required immediately upon the ripening of probable cause.” In addition, the officers’ entry was by force.

The court contrasted the facts of Dorman to those in the instant case. In Dorman, the police had tried to obtain a warrant, but a magistrate was unavailable, and to find a judge authorized to issue the warrant at 9:00 p.m. on a Friday would have been quite time consuming. Defendant Dorman had used a gun in his robbery and had fired a shot in the course of it. There was a strong possibility that he would flee from his home because he would be likely to realize that he had left at the robbery documents identifying his name and address. His arrest only four hours after the robbery indicated that there was “no delay of the police’s ‘own making.’” Also, the officers entered peacefully after announcing their purpose.

A factor that the court considered even more decisive than the incongruity between the present facts and those in Dorman was that obtaining a warrant here would have entailed neither “great difficulty nor . . . the loss of any substantial amount of time.” The court stated that “adequate time to obtain a warrant . . . requires a stronger showing with respect to the Dorman criteria than otherwise is necessary.” Here the arresting officer testified that he knew that a warrant could have been obtained by telephone, but decided to make the arrest without one. Also, the arrest was made at 3:00 p.m. on a weekday and was preceded by about an hour of surveillance. Because of the ease with which a warrant could have been obtained, and because of the factual disparity between the present case and Dorman, the Ninth Circuit found the trial court determination that exigent circumstances were present to be clearly erroneous.

stopped a week earlier “provided only a weak inference that . . . [he] might be armed.” 632 F.2d at 734.

141. Id.
142. Id.
143. Id.
144. Id. (quoting Dorman v. United States, 435 F.2d 385, 393-94 (D.C. Cir. 1970)).
145. 632 F.2d at 734.
146. Id.
147. Id.
148. Id.
In deciding the retroactivity issue, the court acknowledged that certain Supreme Court decisions could have provided a basis for deciding that prospective application was mandatory. The court stated that the decision of *Stovall v. Denno* may have required only prospective application if the purpose of the new constitutional principle of *Payton-Prescott* did not “enhance the truth-finding function of the trial.” However, the court considered that, in this respect, the *Payton-Prescott* rule did “not clearly favor either retroactivity or prospectivity.” Therefore, prospective application of the *Payton-Prescott* rule was permissible, not mandatory. Whether to apply this rule prospectively was to be determined, apparently, by the criteria established in *Chevron Oil Co. v. Huson*. Under those criteria, prospective application is appropriate “[w]here the decision establishes a new principle of law ‘either by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed.’” In a footnote, the court noted that there was no clear past precedent in the Ninth Circuit on the requirement of a warrant for home arrest.

149. Id.
150. 388 U.S. 293 (1967).
151. 632 F.2d at 735.
152. Id. (quoting Desist v. United States, 394 U.S. 244, 249-52 (1969)).
154. 632 F.2d at 734-35 (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971)).
155. 632 F.2d at 735 n.1. The decisions from 1959 to 1972 never addressed the question of the necessity of a warrant for home arrest. Instead the cases “focused on whether the officers had probable cause to make an arrest and whether the officers entered the residence only after announcing their identity and purpose and being denied admittance.” *Id.* In Williams v. United States, 273 F.2d 781, 790-94 (9th Cir. 1959), *cert. denied*, 362 U.S. 951 (1960), the court upheld the warrantless home arrest of defendants for federal narcotics violations on the grounds that: (1) there was probable cause to arrest, and (2) the arrests were validly executed by a state police officer, pursuant to California Penal Code § 844, when “[a]fter receiving no response to their knocking, the officers simply opened an unlocked door and entered without objection.” *Id.* at 793. In Munoz v. United States, 325 F.2d 23, 26-27 (9th Cir. 1963), the court invalidated the warrantless arrest of defendant in his hotel room for federal narcotics violations on the grounds that the arresting officer: (1) gave defendant notice of his authority and purpose “practically instantaneous[ly]” with entry by passkey, and (2) was not refused admittance, all in violation of 18 U.S.C. § 3109 (1948). 325 F.2d at 26. The court in Ng Pui Yu v. United States, 352 F.2d 626, 631-32 (9th Cir. 1965), upheld the warrantless arrest of defendant for federal narcotics violations when defendant opened his hotel room door just as federal agents were assembling before the door to make the arrest, on the grounds that: (1) there was probable cause to arrest, and (2) “entry made through the open door was not made in violation of 18 U.S.C. § 3109.” 352 F.2d at 631-32. In Jack v. United States, 387 F.2d 471, 473 (9th Cir. 1967), *cert. denied*, 392 U.S. 394 (1968), the court upheld a theoretically warrantless arrest of defendant in his apartment for federal narcotics violations on the grounds that: (1) there was probable cause to arrest, and (2) the officers’ entry with a passkey obtained from landlord after knocking, announcing their iden-
The court’s primary emphasis was on showing that the *Prescott* decision was “clearly foreshadowed.” It referred to two cases decided prior to *Prescott* in which the Ninth Circuit “indicated that a

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156. United States v. Blake, 632 F.2d at 735.

157. United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974). The court invalidated the warrantless ruse entry of federal narcotics agents into a locked commercial building to arrest the defendant in his office, on the ground that “the agents did not have probable cause to believe that Phillips was in the office building at the time of the raid.” *Id.* at 1136. Regarding the legitimacy of a warrantless arrest on premises deemed a *house* for the purposes of 18 U.S.C. § 3109, the court stated:

An officer without an arrest warrant certainly has no more license than an officer with a warrant in seeking entry to effect an arrest. The constitutional safeguard that assures citizens the privacy and security of their homes unless a judicial
warrant very likely was required to legitimate an arrest within a residence based on probable cause in the absence of exigent circumstances." 158 Considering these cases, and the Ninth Circuit's persistent avoidance of the issue, the court felt that "reasonable observers" 159 should have been put on notice that the issue eventually might be decided against their interests, by requiring a warrant for residential arrests absent exigent circumstances.

The court also stated that to decide that the Prescott rule should be applied only prospectively would require a determination that the Prescott holding did not merely reiterate the preexisting circuit case law. This, the court said, would contradict the rationale of the Prescott court, and its finding that the "fundamental source" of its holding was "the sanctity of the home in England immediately before the revolution." 160 For this reason, and because the Prescott decision was clearly foreshadowed, the court held that the Prescott rule would be applied retroactively. The court clarified, however, that since its decision relied only upon Ninth Circuit law, it was unnecessary to decide or comment upon the possible retroactivity of Payton. 161

In United States v. Johnson, 162 the Ninth Circuit overturned the defendant's conviction for aiding and abetting obstruction of correspondence because his warrantless home arrest was illegal. Johnson was one of three men who had been contacted to help fraudulently cash a mistakenly mailed United States Treasury check. After studying the check, Johnson phoned another person for assistance in cashing the check. 163

A warrant was issued for the arrest of Dodd, one of the other men who had given Johnson's telephone number as the place where he could be reached. Investigation revealed that Johnson had been in—

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158. 632 F.2d at 735. The court clarified that in neither Phillips nor Calhoun was there a specific holding to this effect. However, "in Calhoun the government apparently agreed that under such circumstances a warrant was required." Id.
159. Id. at 735-36.
160. Id. at 736.
161. Id.
162. 626 F.2d 753 (9th Cir. 1980).
163. Id. at 754-55.
volved in Dodd’s past criminal activity. Although the Secret Service agents expected to arrest Dodd at Johnson’s residence, no warrant was obtained for Johnson’s arrest.164

After a short stake out of Johnson’s residence, the Secret Service agents watched Johnson’s car pull into the driveway and the two passengers enter the house. The agents approached the doorway, drew their guns, and pointing them downwards, knocked at the door and identified themselves by fictitious names. When Johnson answered the door, the agents identified themselves as special agents. Johnson invited them inside in response to their request to talk to him. One of the agents remained with Johnson in the living room while the other briefly searched the other rooms for persons who might present a danger. A woman was discovered and was asked to wait in the living room. After finding no one else, the agents returned their guns to their holsters.165

The agents asked Johnson to step into the bedroom to talk and he agreed. Before entering, one of the agents informed Johnson of his constitutional rights. He responded that he wished to cooperate. He then told them of his involvement in the scheme and was informed that he was under arrest. After arriving at the police station, Johnson was again given his Miranda warnings. Thereafter, he signed under oath a written statement similar to the admission given at his home.

Johnson appealed his conviction on the ground that his incriminating statements were the fruits of an illegal arrest. In analyzing the legality of the arrest, the court first addressed the question of when the arrest occurred, using the objective criteria of whether a person innocent of a crime would have thought that the defendant was “free to choose between terminating or continuing the encounter with the [police],”166 considering all of the circumstances. The court determined that the arrest occurred when Johnson opened his door to confront agents with drawn weapons.167 The ensuing search of his house while the agents’ guns were still drawn, and while he was held in his living room by another agent, constituted additional circumstances warranting a reasonable person’s conclusion that he was under arrest.168 Under all of these circumstances, the court considered it extremely doubtful that Johnson would have thought that he was free to leave at any time, or to request the officers to leave “after the initial

164. Id. at 755.
165. Id.
166. Id.
167. Id. at 755-56.
168. Id. at 755.
The court explained that where, as here, a suspect is arrested while standing inside his home, with the arresting officers standing outside with drawn weapons, "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home." This rule is designed to prevent the officers from avoiding an illegal entry into a home but controlling the suspect's movements from outside through the threat of using weapons "that greatly extend the 'reach' of the arresting officers."

The court then addressed the question of whether the warrantless arrest of Johnson in his doorway violated the fourth amendment. It noted the Supreme Court's decision in *Payton v. New York* for its "strong language . . . emphasizing the special protection [that] the Constitution affords to individuals within their homes," and for the close parallel between the involuntariness of Johnson's opening of his door and the opening of Riddick's door by his three year old son. In neither case did the defendant voluntarily expose himself to a warrantless arrest as in a public place.

After noting the validity of warrantless, felony arrests in public, the court distinguished this case from two others where warrantless felony arrests made within the defendant's doorway were upheld. The court explained that the warrantless arrest of the defendant in *United States v. Santana* was upheld because she had first voluntarily exposed herself to public view in her doorway; "her . . . retreating into her house [afterwards] could not thwart an otherwise proper arrest by officers who pursued her inside." In *United States v. Botero*, the warrantless arrest in the defendant's doorway was upheld because the defendant voluntarily opened his door after the police had properly identified themselves, thereby voluntarily exposing himself to public view. Exigent circumstances were also present.

In the present case, the warrantless arrest was invalid because the
agents had misrepresented their identities; thus, Johnson's initial exposure to the view and the physical control of the agents was not consensual. His subsequent invitation to enter was also considered involuntary because of the "coercive effect of the weapons brandished by the agents." For these reasons, Johnson's arrest in his doorway was held to be unconstitutional.

D. Warrantless Searches

1. Vehicle searches

The Supreme Court has interpreted the fourth amendment's prohibition against unreasonable searches to mean that warrantless searches "are per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." These exceptions are "jealously and carefully drawn." Those seeking exemption must show that "the exigencies of the situation made that course imperative." The burden of proof is upon "those seeking the exemption." Searches under exigent circumstances, and in certain situations, vehicle searches and administrative searches may be executed without a warrant.

The Supreme Court has historically recognized a distinction between searches of fixed structures and searches of "movable vessel[s]." It has upheld warrantless automobile searches under the theory that, when potentially mobile, an automobile's mobility presents an inherent exigency: "it is not practicable to secure a warrant because

180. 626 F.2d at 757.
181. Id.
182. Id.
183. Id. The court decided that both the admission in Johnson's house, and the one given at the police station constituted fruits of the unlawful arrest. Id. at 757-58.
188. Recognized exigencies are: (1) to protect police or third persons, Mincey v. Arizona, 437 U.S. 385, 392 (1978); United States v. Flickinger, 573 F.2d 1349, 1355 (9th Cir. 1978), cert. denied, 439 U.S. 836 (1979); United States v. McLaughlin, 525 F.2d 517, 521 (9th Cir. 1975), cert. denied, 427 U.S. 904 (1976); (2) to prevent escape, United States v. Flickinger, 573 F.2d 1349, 1355 (9th Cir. 1978), cert. denied, 439 U.S. 836 (1979); United States v. Valentia, 569 F.2d 1069, 1071 (9th Cir. 1978); and (3) to preserve evidence, United States v. Santana, 427 U.S. 38, 43 (1976); Cupp v. Murphy, 412 U.S. 291, 296 (1973); Schmerber v. California, 384 U.S. 757, 770-71 (1966).
189. Carroll v. United States, 267 U.S. 132, 151, 154 (1925). For an historical review of this recognized distinction, see id. at 143-53.
the vehicle can be quickly moved out of the locality or jurisdiction.”

In *United States v. Emens*, the court upheld the defendants' challenge to warrantless searches of their automobiles and boats on appeal from their convictions for smuggling marijuana. Customs officers had followed a boat that was suspected of being used for smuggling marijuana as it was trailered to a warehouse. A consent search of the boat revealed 1,910 pounds of marijuana. While the defendants were being questioned, other officers had entered the warehouse and found 90 additional pounds of marijuana in another boat. The remaining defendants were subsequently arrested, or taken into custody. Afterwards, two more of their boats, one parked behind a residence, the other at sea, and two of their trucks, were searched without warrants. These searches yielded approximately 16,000 additional pounds of marijuana.

The court held that the Government failed to meet its burden to overcome the presumption that the warrantless searches were unreasonable. The court explained that exigent circumstances were absent, and that, because the defendants "were handcuffed, and the boat was immobilized in a private warehouse," the vehicle exception was inapplicable. The court's summary of the facts lacks sufficient detail to determine the extent of the immobility of the vehicles that were searched away from the warehouse premises. However, the "custody" of some suspects at their residence, and the "arrest" of others at another residence does imply a similar immobility rendering the vehicle exception also inapplicable to the searches conducted there. However, it is unclear why the vehicle exception was not applied to the search of the boat at sea, since its mobility would seem unrestricted.

In *United States v. Williams*, the court refused to uphold the warrantless search of a mobile home and car, suspected of being used for the manufacture of P.C.P., on the grounds of the vehicle exception, but the court did uphold the search under the exigent circumstances

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190. Id. at 153.
191. 649 F.2d 653, 658 (9th Cir. 1980).
192. Id. at 655.
193. Id. at 655-56.
195. 649 F.2d at 658.
196. Id. at 657 (footnote omitted); see also *United States v. McCormick*, 502 F.2d 281, 287 (9th Cir. 1974) (vehicle exception inapplicable where suspect was immediately handcuffed in his home, thus preventing use of automobile in driveway).
197. 649 F.2d at 655-56.
198. 630 F.2d 1322 (9th Cir.), *cert. denied*, 101 S. Ct. 197 (1980).
A border patrolman obtained consent to search the trunk of a car that he suspected of being used to smuggle illegal aliens. The driver said that his uncle, who had been riding in a mobile home in tandem with this and another car, had the key. When the patrolman located the mobile home, the uncle first confirmed, and then denied having a nephew in the area, and further asserted that no one inside the mobile home had a key to anything.

The patrolman returned to the car and forced open the trunk. Inside he found several cardboard boxes containing beakers, plastic bags filled with white powder, and wet paper towels reeking of a strong chemical odor. Five hours later, a warrantless search of the mobile home produced various laboratory apparatus and chemicals. At the same time, a warrantless search of the third car in the tandem revealed large quantities of chemicals. The defendants appealed their convictions for conspiracy and attempt to manufacture P.C.P., alleging the warrantless searches to be illegal. The Government justified its searches under the vehicle and exigent circumstances exceptions.

The court found that the search of the mobile home was not justified under the vehicle exception because it would not have been removed before a search warrant could have been obtained, since its occupants had been arrested and were in custody. Also, the greater expectations of privacy implicit in travelling in a mobile home precluded treating it as an ordinary automobile, subject to the vehicle exception. The court, nevertheless, upheld the warrantless searches of the mobile home and the third automobile as justified by exigent circumstances. One of the officers testified at the suppression hearing that "they entered the motor home because of the volatility of half-manufactured PCP." This statement was sufficient, the court said, for the trial court to find that "manufacture of this particular controlled substance under these conditions created special dangers." Similarly, the chemical odor emanating from the third automobile justified

199. Id. at 1326-27.
200. Id. at 1324.
201. Id.
202. Id.
203. Id. at 1323.
204. Id. at 1326-27.
205. Id. at 1326.
206. Id.
207. Id. at 1326-27.
208. Id. at 1327.
209. Id.
its warrantless search.\textsuperscript{210}

In \textit{United States v. Kimak},\textsuperscript{211} the court upheld the warrantless search of an automobile at a Drug Enforcement Agency (DEA) garage that had been seized pursuant to the federal forfeiture statute\textsuperscript{212} for transporting M.D.A., a controlled substance. After the driver had admitted that five pounds of marijuana and a small amount of M.D.A. were in the car, it was towed to a DEA garage where a warrantless search produced the described contraband.\textsuperscript{213} The defendant challenged both the seizure and the search.

The court reasoned that because

\begin{itemize}
  \item at the time of the seizure, the automobile was on the street and not only had been [used], but was still being used to facilitate the completion of the sale of MDA. . . .
  \item [T]he seizure of the defendant’s automobile at that time was [therefore] valid under the “automobile exception” announced in \textit{Carroll v. United States}.\textsuperscript{214}
\end{itemize}

Because the forfeiture seizure was legal, the court held the subsequent search to be legal.\textsuperscript{215}

In \textit{United States v. Brannon},\textsuperscript{216} the court upheld the warrantless search of an automobile suspected of transporting armed kidnappers.\textsuperscript{217} Investigators from the District Attorney’s office observed two men and a woman enter a car that was reported to have been used in an armed kidnapping.\textsuperscript{218} The men fit the descriptions of the armed kidnappers. One carried a cardboard box, the other held a jacket over his arm from which a weapon appeared to protrude.\textsuperscript{219} They placed these items in the trunk, and then drove off. When stopped by the investigators, the woman refused to leave the car. She was pulled out and found to be wearing a holstered pistol in her waistband. Without a search warrant, the investigators opened the trunk and found a

\begin{footnotesize}
\item[210.] \textit{Id.}
\item[211.] 624 F.2d 903 (9th Cir. 1980).
\item[212.] 21 U.S.C. § 881 (1976) provides, in pertinent part: “[t]he following shall be subject to forfeiture to the United States and no property right shall exist in them . . . [a]ll conveyances, including . . . vehicles . . . which are used, or are intended for use, to transport . . . [illegal controlled substances].”
\item[213.] 624 F.2d at 905.
\item[214.] \textit{Id.} (citations omitted).
\item[215.] \textit{Id.}
\item[216.] 616 F.2d 413 (9th Cir. 1980).
\item[217.] \textit{Id.} at 416.
\item[218.] \textit{Id.} at 415.
\item[219.] \textit{Id.}
\end{footnotesize}
loaded sawed-off shotgun, ammunition and a pair of "patch pants." These items, including the pistol, resembled those photographed by surveillance cameras during a bank robbery the previous day. Subsequently, the defendants were found guilty of assault with a deadly weapon. On appeal they challenged the validity of the warrantless search of the car. The Government contended that it was justified under the vehicle exception, and was necessitated by exigent circumstances.

Citing *Carroll v. United States* and *Chambers v. Maroney*, the Brannon court upheld the search under the vehicle exception. Probable cause was established when the investigators saw what appeared to be a concealed weapon placed in the trunk of a car suspected of being used in a reported armed kidnapping. The court's decision is consistent with the *Carroll-Chambers* principle that a vehicle, especially one stopped on the roadside, presents an inherent exigency by its sheer potential mobility. If the propriety of the decision is at all questionable, it is because the vehicle exception is itself suspect, at least in those cases where probable cause to search the vehicle is also sufficient to constitute probable cause to arrest. In this circumstance, and absent other exigencies, the exigency presented by the vehicle's mobility is removed by the legal ability of the police to obtain custody of the occupants.

The Ninth Circuit has already implicitly accepted the principle that the *Carroll* exception is inapplicable when a vehicle's occupants have been arrested and taken into custody, and the car is not otherwise potentially subject to removal. In *United States v. Emens*, *United States v. Williams*, and *United States v. McCormick* the court has recognized this principle. If Brannon were treated consistently with these cases, the police should have been required to obtain a warrant before searching the trunk.

220. *Id.*
221. *Id.*
222. *Id.* at 416.
223. *Id.*
226. 616 F.2d at 416.
227. *Id.* at 415.
228. See 649 F.2d at 657 n.5.
229. *Id.* at 658.
230. 630 F.2d 1322, 1326 (9th Cir. 1980).
231. 502 F.2d 281, 286-87 (9th Cir. 1974); accord, United States v. Connolly, 479 F.2d 930, 935 (9th Cir. 1973).
232. 616 F.2d at 415.
The facts suggest that the officers had probable cause to arrest the defendants for armed kidnapping. Two men fitting the description of armed kidnappers were seen placing into the trunk of a car, which was reportedly used in the kidnapping, objects appearing to be concealed weapons. If these facts were sufficient to "make an immediate . . . search of the trunk for instrumentalities of a crime," presumably armed kidnapping, they should have been sufficient to establish probable cause to arrest the defendants for that crime.

The probable cause to arrest legally enabled the police to take custody of the defendants. The legal ability to arrest the defendants established the officers' control over the car. This removed the exigency of the car's potential mobility that justified dispensing with the warrant requirement. In the absence of the exigency, the police should have been required to obtain a warrant before searching the car's trunk.

For this reason, although the court's decision is factually consistent with the Carroll-Chambers concept that a vehicle stopped at the roadside presents an inherent exigency by its sheer potential mobility, the decision is inconsistent with the Ninth Circuit's recognition that the potential mobility is removed when the occupants are arrested.

In United States v. Mackey, the Ninth Circuit upheld the warrantless search of the car of two bank robbers, and of a paper bag found inside. The two defendants were arrested in their getaway car while fleeing from the scene of a bank robbery. After the arrest, the police immediately searched the car without a warrant. A further warrantless search of a paper bag found beneath the passenger's front seat revealed a hand gun and the stolen money. After the search, the car was impounded to search it further. At the police station, it was searched before and after interrogation.

Mackey, the defendant who drove the car, appealed his conviction of aiding and abetting an armed bank robbery on two grounds: (1) that

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233. Id. at 416.
234. A warrant should have been required, unless the court means to distinguish between a search conducted when custody is legally possible, and one conducted after custody has actually occurred. It is unlikely that the court attaches legal significance to such a distinction in this context because it is theoretically indefensible. It is indefensible because the legality of the respective searches would turn on whether the police overtly arrested and took custody of the vehicle's occupants before initiating the search. Endorsing such a distinction would leave up to the police's discretion whether they should be required to obtain a warrant.
235. 626 F.2d 684 (9th Cir. 1980).
236. Id. at 685.
237. Id.
238. Id.
the warrantless search of the car at the scene of his arrest was not justified under the automobile exception to the warrant requirement, and (2) that the warrantless search of the paper bag violated his fourth amendment rights.\(^{239}\)

On the first issue, the defendant contended that there was no danger that the car might be removed because the police had seized exclusive control of the car upon arrest, and therefore, no exigency existed.\(^{240}\) He attempted to distinguish his case from *Chambers v. Maroney*\(^{241}\) on the ground that, in his case, the police had decided to impound the car at the time of arrest, thereby establishing "complete and exclusive possession of the car" at that time.\(^{242}\) In *Chambers*, the defendant argued, the police "merely moved [the car] to the street outside the police station to conduct the search,"\(^{243}\) indicating that "the police there did not intend to seize exclusive control of the car,"\(^{244}\) and that "the possibility that some person might rightfully demand the use of the car was still present."\(^{245}\)

In finding the automobile search valid, the court questioned the validity of the defendant's analysis of *Chambers* on the ground that subsequent Supreme Court decisions clarify that "*Chambers* was formulated as a practical rule that does not draw fine distinctions among searches conducted after a car is stopped on a street or highway."\(^{246}\) The court stated that it did not need to decide whether it was the inten-

\(^{239}\) Id. at 684.

\(^{240}\) Id. at 685.

\(^{241}\) 399 U.S. 42 (1970) (upheld the legality of a warrantless search of the defendants' automobile conducted at the police station after the arrest).

\(^{242}\) 626 F.2d at 685.

\(^{243}\) Id.

\(^{244}\) Id.

\(^{245}\) Id.

\(^{246}\) Id. at 686 n.2 (citing Arkansas v. Sanders, 442 U.S. 753, 763 n.10, 765-66 n.14 (1979) (requiring a warrant, in absence of exigent circumstances, to search luggage located in trunk of taxi which police had legally stopped at roadside); United States v. Chadwick, 433 U.S. 1, 12, 13 n.7 (1977) (requiring a warrant, in absence of exigent circumstances, to search double-locked footlocker that had just been lifted into trunk of car, when it remained under continuous exclusive control of agents, and when storage facilities were readily available); Texas v. White, 423 U.S. 6, 68 (1975) (upholding warrantless search of defendant's car on ground that probable cause to search for forged checks that defendant was seen stuffing between seats when police car stopped at bank drive-in window persisted at police station, where search was made); Cardwell v. Lewis, 417 U.S. 583 (1974) (a plurality opinion, upholding a warrantless automobile search at an impoundment lot the day after arrest); Cady v. Dombrowski, 413 U.S. 433, 441-43 (1973) (upholding warrantless search of car trunk while car was stored at unguarded garage car-lot, on ground that search for defendant policeman's service revolver was standard practice); Coolidge v. New Hampshire, 403 U.S. 443, 460-64, & n.20 (1971) (requiring warrant to search car on ground that the vehicle exception did not apply because neither defendant nor his wife could have gained access to car).
tion of the police to impound an automobile *contemporaneously* with arrest would subject the automobile to the police’s exclusive control. The Ninth Circuit declined to reach this question because the trial judge had found that the car was impounded *after* the arrest and search. In addition, the defendant had offered no evidence either to refute that finding or to “suggest that the police intended all along to impound the car.”

In challenging the search of the paper bag, the defendant argued that the critical factor in the Court’s decision in *Arkansas v. Sanders*, prohibiting the warrantless search of a suitcase found in the trunk of a car, was the fact that luggage “is a common repository for one’s personal effects, and therefore is inevitably associated with the expectation of privacy.” The defendant argued that a paper bag is similarly a common repository of personal effects.

While noting that the rationale of *Sanders* extends to containers other than luggage, the court stated that extending the *Sanders* rationale to this case would depend on whether the defendant possessed “a sufficient privacy interest in the paper bag to justify imposing the warrant requirement.” The court concluded that the defendant could not reasonably entertain sufficient expectations of privacy in a paper bag. The rationale was based primarily upon the bag’s physical properties: “[i]t is easily torn, it cannot be latched, and . . . its contents can frequently be discerned merely by holding or feeling [it].” Because “[a] paper bag is among the least private of containers,” the court considered it indistinguishable, in privacy terms, from “any other part of the automobile.” Since the search of the car was considered legal, so was the search of the bag.

Judge Tang argued in his dissent that the majority wrongly assumed that the defendant bore the burden of proving that he possessed a reasonable expectation of privacy in the bag. He noted that warrantless searches are unreasonable *per se*, and that “[t]he burden is on those seeking the exemption to show the need for it.” He explained that

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247. 626 F.2d at 686.
249. 626 F.2d at 686 (quoting *Arkansas v. Sanders*, 442 U.S. at 762).
250. *Id.*
251. *Id.* at 687.
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 686-87.
257. *Id.* at 688 (Tang, J., dissenting).
the Government had failed to carry that burden because it merely argued that Arkansas v. Sanders applies only to luggage.

Judge Tang cited a footnote in Sanders to refute the proposition that "the search of the bag was part of the search of the car and so was within the automobile exception." In addition to contending that the search was not within the automobile exception, Judge Tang argued that the search could not be justified under any other recognized exception. The most pertinent ones that were inapplicable here were exigent circumstances and plain view: "there was no danger of evidence being lost . . . [n]or were the contents of the bag in plain view. The container was not of a type whose outward appearance reveals its contents."259

The majority's decision to uphold the warrantless search of the car is inconsistent with its recognition in Emens,260 Williams,261 and McCormick,262 that the vehicle exception is inapplicable when the arrest of its occupants removes the vehicle's potential mobility.263

The majority's rationale upholding the search of the paper bag is weak for two reasons. First, the properties of the paper bag upon which its rationale relies do not necessarily lead to the conclusion that "[a] paper bag is among the least private of containers."264 The court asserts that a paper bag is inherently only minimally private. However, there is nothing inherently less private about a container that "is easily torn, . . . cannot be latched . . . [and the contents of which] can frequently be discerned merely by holding or feeling."265 than there is about any shopping bag into which one's purchases are placed by a store clerk. Few people, however, would consider the materials and construction of the bag relevant to their expectation that it be free from unwanted inspection. By making privacy depend upon the construction of a container, the court's decisions become inherently susceptible to arbitrary distinctions. Protecting some containers, but not others, also amounts to protecting places, rather than people, and by arbitrary standards.

The second weakness in the court's rationale lies in failing to con-

258. Id. (citing Arkansas v. Sanders, 442 U.S. at 765 n.13 for the proposition that "applicability of warrant requirement to searches of containers does not depend on whether they are seized from automobiles").
259. 626 F.2d at 688.
260. 649 F.2d 653 (9th Cir. 1980).
261. 630 F.2d 1322 (9th Cir.), cert. denied, 101 S. Ct. 197 (1980).
262. 502 F.2d 281 (9th Cir. 1974).
263. See United States v. Emens, 649 F.2d at 657 n.5.
264. 626 F.2d at 687.
265. Id.
Consider the true basis from which people's expectations of privacy arise. Most people simply do not derive an expectation of privacy from such facts as the construction or materials of a container. Such expectations arise from the social context in which an inspection occurs. For example, most international travellers expect, at a border, to open upon request even locked trunks of the kind protected in *United States v. Chadwick*\(^{266}\) from warrantless inspection. On a picnic, or at the beach, these same persons would expect even their paper bags to remain free from unwanted police inspection. These expectations are patently reasonable, but their reasonableness has nothing to do with the construction of the containers.

If the court is serious about protecting privacy interests, its criteria for determining the reasonableness of a person's expectation of privacy should derive from what people actually expect in a given situation, rather than from an esoteric, legal sense of what expectations are compatible with the police's interest in discovering evidence expeditiously. Using a legal standard of reasonableness that accounts for the social context in which a search occurs would protect those expectations that people actually rely upon daily.

Such a rule would more meaningfully preserve privacy as a characteristic condition of American life in a way contemplated by the Supreme Court in *Katz v. United States*.\(^{267}\) To do this would, however, lead the court to acknowledge that in most contexts, Americans expect a fairly high degree of privacy to attend themselves and their possessions. As a result, warrantless searches of almost any container would become truly the exception.

2. Search of the person incident to arrest

In *United States v. Ziller*,\(^{268}\) the Ninth Circuit rejected the contention that *United States v. Chadwick*\(^{269}\) required suppression of evidence seized from an arrestee's wallet, without a warrant, after it had been reduced to the exclusive control of the authorities.

Federal agents had lawfully arrested Ziller at San Francisco Airport and transported him directly to the San Francisco Federal Build-

\(^{266}\) 433 U.S. 1 (1976) (search of footlocker in federal building after arrest of defendants).

\(^{267}\) 389 U.S. 347, 351-52 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.").

\(^{268}\) 623 F.2d 562 (9th Cir.) (per curiam), *cert. denied*, 101 S. Ct. 221 (1980).

\(^{269}\) 433 U.S. 1, 15 (1977) (search of footlocker in exclusive control of federal agents while suspects in custody not incident to arrest and required warrant).
ing. Once there, agents searched the defendant, confiscated his wallet, and removed from it a piece of paper which was instrumental to his subsequent conviction. On appeal, defendant challenged the admissibility at trial of the slip of paper on the ground that it had been illegally seized without a warrant. Defendant argued that the searching officers had exclusive control over his wallet after his arrest and therefore, under Chadwick, any further search of it required a warrant. However, because the Chadwick Court expressly excluded seized personal property “immediately associated with the person of the arrestee” from the warrant requirement, the court rejected defendant’s challenge. It correctly pointed out that the instant factual situation was more properly placed in the mold of United States v. Robinson, in which the Court held that, given a lawful custodial arrest, “a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable search’ under that Amendment.” On this reasoning, the Robinson Court found that the arresting officer was fully justified in seizing and opening without a warrant a crumpled cigarette package on the person of the arrestee which was found to contain heroin-filled gelatin capsules.

3. Border searches

The authority to conduct border searches derives from customs laws that exempt customs agents from the fourth amendment’s warrant requirement. “As reflected in the legislation conferring sweeping authority upon customs officials to conduct border searches, Congress has determined that at least some measure of the individual

270. 623 F.2d at 562.
271. Id.
272. Id. at 563.
273. 433 U.S. at 15.
274. 623 F.2d at 563.
276. Id. at 235.
277. Id. at 236. While it is certainly arguable that the concern of the Chadwick Court (arrestee access to weapon or opportunity to destroy evidence) is no longer an issue once personal effects are removed from the control of the arrestee, and that, therefore, the “not immediately associated with the arrestee” qualification should not be mechanically applied, it is clear that Robinson is directly applicable to the facts in Ziller.
279. The fourth amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV.
right to privacy must yield to this superior national right."

This broad reach of the customs legislation imposes duties upon the courts to prevent undue extensions of this border search exception beyond the actual borders of the nation. As the Supreme Court in *Carroll v. United States* noted:

Travellers may be . . . stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

Although initially a source of controversy, it is now settled that the concept of a border extends some distance beyond the actual boundary line. The concept of the "elastic" or "extended" border is necessary because of the problems that a rigid definition of the border posed for law enforcement agents. The actual limits of this extended border area, however, have not been settled.

The concept of the extended or elastic border was adopted by the Ninth Circuit in *Alexander v. United States*. In *Alexander*, the court stated that the legality of a search for contraband by customs officers, not made at or in the immediate vicinity of the border, must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty

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282. Id. at 154.


285. "No customs search can be made precisely at the border. All must be made somewhere north of the border between Mexico and the United States." *Id.* at 57 n.22 (quoting *Murgia v. United States*, 285 F.2d 14, 16 (9th Cir. 1960), *cert. denied*, 366 U.S. 977 (1961)); see also *United States v. Rodriguez*, 195 F. Supp. 513, 516 (S.D. Tex. 1960) ("[N]or do I conceive it to be the law that, where the suspect may momentarily escape detection and pass safely through the first Custom's check, he is immune from further interrogation or examination by Customs officers . . . "). *aff'd*, 292 F.2d 709 (5th Cir. 1961).

that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States.\footnote{287}

This test was refined in \textit{Castillo-Garcia v. United States},\footnote{288} in which the Ninth Circuit held that a vehicle search 105 miles from the border constituted an extended border search. The continuous surveillance of the defendants after crossing the border was considered a more important factor in the court's rationale than the distance from the border.

The distance from the border, whether it be 105 miles or 500 miles, is important \textit{only as it relates to the surveillance} and any other circumstances which aids the fact finder in determining with reasonable certainty that any contraband which might be found in the vehicle at the time of the search was aboard the vehicle at the time of entry into the jurisdiction of the United States.\footnote{289}

Because some nexus to the border is required in order to allow warrantless searches near the border where probable cause would otherwise be required, the concept of continuous surveillance after a border crossing developed. Thus, if

surveillance subsequent to the creation of the border nexus signals the probability of unchanged conditions [since the crossing], a search may be justified, although distant in both time and space from the border. Surveillance serves to preserve the necessary nexus, and to expand the permissible area in which a border search may take place.\footnote{290}

The Ninth Circuit has clearly followed this expansive reasoning.\footnote{291}

\footnote{287} \textit{Id.} at 382.
\footnote{288} 424 F.2d 482 (9th Cir. 1970).
\footnote{289} \textit{Id.} at 485 (emphasis added); see also United States v. Weil, 432 F.2d 1320 (9th Cir. 1970), \textit{cert. denied}, 401 U.S. 947 (1971).
\footnote{290} \textit{Border Search}, supra note 280, at 68; see United States v. Martinez, 481 F.2d 214, 218-19 (5th Cir. 1973) (150 miles and 142 hours from border), \textit{cert. denied}, 415 U.S. 931 (1974); Rodriguez-Gonzalez v. United States, 378 F.2d 256, 258 (9th Cir. 1967) (20 miles and 15 hours from border).
\footnote{291} See supra note 290 and accompanying text. Only a Sixth Circuit district court has taken a step to limit the necessary conclusion that constant surveillance places any search within the elastic border. In United States v. Cusanelli, 357 F. Supp. 678, 680 (S.D. Ohio 1972), \textit{aff'd}, 472 F.2d 1204 (6th Cir.) (per curiam), \textit{cert. denied}, 412 U.S. 953 (1973), customs agents pursued a suspicious airplane from Miami to Ohio where a search disclosed marijuana. The court rejected the prosecution's argument that this was a valid border search, despite the constant vigil kept on the airplane. Observing that Ohio was not in the "geographical area within reasonable extension of the immediate entry point," the court declined
It has been suggested that as "applied, constant surveillance establishes a 'nexus' with the border that appears indefinitely elastic." This suggestion is borne out in the 1980 case of *United States v. Moore.* The defendants were apprehended at a small airport in California after flying into the United States from Mexico. The only surveillance of the defendants' airplane was by government agents on a radar screen. The court characterized the ensuing search as an extended border search and upheld its validity based on *Castillo-Garcia.*

If the court's analysis was correct, *Moore* expands the extended border search doctrine to allow mechanical surveillance without any visual verification of the border crossing at all. The analysis in *Moore* demonstrates the court's willingness to overlook the limits espoused in *Cusanelli* and to expand the doctrine as necessary. More importantly, the Ninth Circuit appears willing to disregard the right to privacy of travellers once inside the boundaries of the United States.

The problems of indefinite elasticity and reasonable suspicion could have been avoided if the Ninth Circuit had analyzed *Moore* as a search at the functional equivalent of the border, rather than as an extended border search. In *Almeida-Sanchez v. United States,* the Supreme Court discussed the concept of the border, stating that "searches . . . may in certain circumstances take place not only at the border itself, but at its functional equivalents as well."

The Ninth Circuit applied this concept in *United States v. Potter,* a case strikingly similar to *Moore.* The *Potter* court upheld a search of the defendants' aircraft shortly after it landed in Las Vegas. The court relied on the functional equivalent doctrine, without discuss-

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292. *Border Search,* supra note 280, at 69. Surveillance is not the sole factor in determining the validity of the search, however, as *Alexander* and *Weil* illustrate. Although it is not certain to what extent, both *Alexander* and *Weil* require a reasonable certainty that contraband has been smuggled across the border. Hence, "[t]hat the vehicle or pedestrian searched has crossed an international boundary is not, therefore, the sine qua non of a valid border search . . ." *Id.* at 63 (citing *United States v. Weil,* 432 F.2d 1320 (9th Cir. 1970), cert. denied, 401 U.S. 947 (1971)).

293. 638 F.2d 1171 (9th Cir. 1980).
294. *See supra* note 291.
296. *See generally* *Almeida-Sanchez v. United States,* 413 U.S. 266, 272-73 (1973) (search of auto on road lying at least twenty miles north of Mexican border held not at functional equivalent of a border).
297. *Id.*
298. *Id.*
299. 552 F.2d 901 (9th Cir. 1977).
ing the extended border concept, and concluded that the "search of an aircraft arriving at an inland city airport after a non-stop flight from Mexico would clearly be the functional equivalent of a border search."³⁰⁰

In setting forth the standards for concluding that a search occurred at the functional equivalent of a border, the court "required . . . that 'the totality of the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information be sufficient in the light of their experience to warrant a firm belief that a border crossing has occurred.' "³⁰¹ In Moore, as in Potter, it was reasonably clear that customs agents had a firm belief that the defendants' airplane had crossed the border since they had tracked it on radar. As the court correctly concluded, the "reliable technology used by the agents in this case was more than acceptable."³⁰²

Thus, by employing the proper analysis, the Ninth Circuit could have avoided (1) a further expansion of the extended border search doctrine and potential conflict with Carroll, and (2) the inference that the reasonable suspicion requirement of previous Ninth Circuit extended border search cases was no longer required. The functional equivalent analysis in Potter avoids both of these problems, and the facts of Moore fit nicely into the Potter analysis.

Only one week after Moore, the Ninth Circuit, in United States v. Smith,³⁰³ again considered the limits of the extended border search. This time the court's decision was analytically sound, representing a proper application of the doctrine. It is clear from Smith that distance from the border is no longer a factor relevant to the court's analysis.³⁰⁴ Customs agents, in searching a commercial airplane bound from Lima, Peru to San Francisco during an intermediate stop in Los Angeles, discovered about three and one-half pounds of cocaine hidden in the ceiling panels of the right rear lavatory of the plane. The plane was searched while the passengers were processed through customs. The agents replaced the cocaine and kept the right rear lavatory under sur-

³⁰⁰ Id. at 907 (citing Almeida-Sanchez v. United States, 413 U.S. at 273).
³⁰¹ 552 F.2d at 907 (citing United States v. Tilton, 534 F.2d 1363, 1366-67 (9th Cir. 1976)) (emphasis in original).
³⁰² United States v. Moore, 638 F.2d at 1173.
³⁰³ 629 F.2d 1301 (9th Cir. 1980).
³⁰⁴ Previously the time under surveillance and distance from the border when searched were factors considered by both the Ninth and Fifth Circuits. See United States v. Fogelman, 586 F.2d 337 (5th Cir. 1978); United States v. Weil, 432 F.2d 1320, 1323 (9th Cir. 1970) (surveillance made it "reasonably certain" suspect had crossed border), cert. denied, 401 U.S. 947 (1971).
veillance for the remainder of the trip. Shortly after leaving Los Angeles, the defendant entered the center lavatory carrying a shoulder bag. Sixteen minutes later, defendant emerged and upon an immediate search of the right rear lavatory, the cocaine was discovered missing. When the plane landed in San Francisco, defendant was detained for a continuing customs examination and the cocaine was found.\(^{305}\)

Defendant, on appeal, attempted to argue that this second search, by virtue of its occurring in San Francisco, was "too remote from the border to constitute a valid customs search."\(^{306}\) The court rejected defendant's claim and held that the "distance is not a factor here, however, because the appellant had not mingled in the normal stream of commerce so as to lessen the certainty that the contraband had come directly across the border."\(^{307}\) Thus, clearly from this case the distance consideration is no longer an essential part of the reasonable suspicion analysis.\(^{308}\)

In upholding this second search as valid, the court further rejected defendant's claim that once the customs agents had made their original search of his person and bag in Los Angeles, they could make no further search without a warrant.\(^{309}\) The court relied upon \textit{Weil} for the proposition that if an initial border search disclosed nothing, a second search was permitted "when [the] agents had cause to believe that the vehicle and its occupant had picked up [smuggled] contraband."\(^{310}\) The court analogized the instant case to \textit{Weil} and reasoned:

There, as here, the first search was unavailing because the smuggler was physically separated from the contraband at the time the search occurred. The second search which took place in \textit{Weil}, as in this case, when the smuggler had gained possession of the contraband on this side of the border, was upheld. The same result should follow here.\(^{311}\)

Finally, the court rejected defendant's claim that this case was factually distinct from the extended border search cases. Defendant argued that in this case the contraband had already been discovered prior to

\(^{305}\) 629 F.2d at 1302-03.
\(^{306}\) Id. at 1303.
\(^{307}\) Id. at 1304 citing United States v. Sayer, 579 F.2d 1169 (9th Cir. 1978) (agent reasonably certain contraband had just come across border); United States v. Warner, 441 F.2d 821, 833 (5th Cir. 1971) (agents had reasonable cause to suspect vehicles contained imported contraband), \textit{cert. denied}, 404 U.S. 829 (1971).
\(^{308}\) \textit{See supra} note 304 and accompanying text.
\(^{309}\) 629 F.2d at 1303.
\(^{310}\) Id.
\(^{311}\) Id.
the challenged search while in the earlier cases it had not. The court stated that the "essential holding of Alexander is that the agents could defer seizure of contraband until, by means of surveillance, they had identified those responsible for its unlawful importation," and found that was all that Smith involved.

In Smith and Moore, the Ninth Circuit has again assumed a leading role in expanding the increasingly indefinite border area. Should this expansion continue, the fourth amendment protection against warrantless searches once inside the nation's boundaries will collide with this extended second border search doctrine. Because the need to enforce the integrity of the boundaries seems to be paramount to the court, border search extensions will probably continue despite the collision course.

4. Administrative searches

Administrative searches are also governed by the fourth amendment. In Camara v. Municipal Court, the Supreme Court upheld the fourth amendment right of an apartment tenant to refuse a warrantless inspection of his residence for a possible violation of the building's occupancy permit. The Court held that routine administrative inspections of residences require a warrant, which should normally be sought only after entry is refused. This rule was expanded in See v. City of Seattle to non-residential, commercial structures, where the Court upheld the fourth amendment right of a warehouse owner to refuse a warrantless inspection for a possible violation of the municipal fire code.

Exceptions to this rule have been made for pervasively regulated businesses in which the federal government has an important interest. The leading Supreme Court case is United States v. Biswell. There the Court upheld a warrantless regulatory inspection of a locked gun storeroom pursuant to the Gun Control Act of 1968, on the grounds that: (1) there was an important federal interest in preventing violent

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312. Id. at 1304.
313. Id. As cited in Smith, it appears that the Fifth Circuit had also expanded the extended border search cases. See, e.g., Government of Canal Zone v. Eulberg, 581 F.2d 1216 (5th Cir. 1978); United States v. Warner, 441 F.2d 821 (5th Cir. 1970), cert. denied, 404 U.S. 829 (1971).
315. Id. at 539-40.
316. 387 U.S. 541 (1967).
317. Id. at 545-46.
crime, (2) inspection was crucial to the regulatory scheme, and (3) knowledge of the federal licensee that his pervasively regulated business was subject to inspection minimized his justifiable expectations of privacy.\textsuperscript{319}

Exceptions to the See rule have also been made for historically closely regulated industries. The leading case in this area is \textit{Colonnade Catering Corp. v. United States}.\textsuperscript{320} This case involved the warrantless breaking and entering of a caterer's locked liquor storeroom by federal inspectors. Although the Court stated that "[t]he general rule . . . in \textit{See v. City of Seattle} . . . is . . . not applicable" to historically regulated industries, it invalidated the forcible search on the ground that the exclusive congressional sanction for refusing entry was a fine, which precluded the use of force to effect an entry.\textsuperscript{321}

In \textit{United States v. Raub},\textsuperscript{322} the court upheld an agent's warrantless inspection aboard a fishing boat.\textsuperscript{323} An agent of the Marine Fisheries Service was told by two fishermen, who were authorized to fish in the area, that they did not recognize a particular boat that was fishing with a gill net.\textsuperscript{324} At that time of year, only Point Elliot Treaty Indians were permitted to fish in this area for sockeye or pink salmon using gill nets. The agent obtained permission to board the reported boat. When he confronted the defendant with the discrepancy between the placard displayed on the boat representing him as a Point Elliot Treaty Indian and his own Indian identity card, the defendant admitted that the placard was not his. Later, the agent reboarded the boat, and after issuing the defendant a citation, seized one of his sockeye salmon and a swatch of his gill net. On appeal from his conviction for violating 16 U.S.C. section 776,\textsuperscript{325} defendant argued that salmon fishing was exempt from the Biswell-Colonnade warrant exception because federal regulation of it was a recent development, and because the statute permits inspecting officers unlimited investigatory discretion.

The court provided a detailed history which showed that commercial fishing has long been closely regulated by the federal govern-

\textsuperscript{319} \textit{Id.} at 315-16.
\textsuperscript{320} 397 U.S. 72 (1970).
\textsuperscript{321} \textit{Id.} at 76-77.
\textsuperscript{322} 637 F.2d 1205 (9th Cir. 1980).
\textsuperscript{323} \textit{Id.} at 1210-11.
\textsuperscript{324} A gill net is a flat net suspended vertically in the water that catches a fish's gill covers in its meshes when it tries to withdraw.
Because the statute and detailed regulations promoted salmon conservation, an important federal interest was also present. The court explained that the statute's provisions carefully limited the authority and scope of warrantless searches to those necessary to protect the federal interest in salmon conservation. For these reasons, and for the reason that the defendant's awareness of the federal regulations precluded his possessing a reasonable expectation of privacy, the court decided that the case came within the Biswell-Colonnade exception, upholding the warrantless inspection.

**E. Warrantless Arrests**

The fourth amendment to the United States Constitution provides, in pertinent part, that "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures shall not be violated, and no warrants shall issue, but upon probable cause . . . particularly describing the . . . person . . . to be seized." Historically, the Supreme Court has recognized the validity of warrantless arrests, even in situations where it would not be impractical to obtain an arrest warrant. The Court has, however, strictly adhered to the probable cause standard, requiring "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense."

In *United States v. Bernard*, the Ninth Circuit applied a variation of this test, holding that where officers working in close concert collectively have knowledge sufficient to constitute probable cause, the fourth amendment requirement of probable cause to arrest is satisfied although the arresting officers were unaware of the other officers' information.

326. 637 F.2d at 1209.
327. Id.
328. Id. at 1210.
329. Id.
330. U.S. CONST. amend. IV.
333. 623 F.2d 551 (9th Cir. 1979).
334. Id. at 561.
335. Id. at 560.
336. Id. at 561.
In *Bernard*, Federal Drug Enforcement Administration (DEA) agents had been informed by a suspect in custody for illegal manufacture of methamphetamine that he and Bernard had made the drug during the previous year. The informant also claimed that Bernard and others were manufacturing it in Oregon and that the necessary chemicals had been obtained by Bernard under the cover of a legitimate business. Subsequent DEA investigation verified that Bernard had purchased chemicals necessary for amphetamine manufacture. On one occasion, agents observed defendants Bard and Childress pick up chemicals ordered by Bernard and take them to Childress' residence in Hermiston, Oregon. While surveilling the suspects, investigating agents noted what appeared to be counter-surveillance activities by Bard and Childress after they had picked up the chemicals. During this time, the DEA received independent tips from other informants that methamphetamine would soon be manufactured in the Clarks-town, Oregon area and made available in the Hermiston-Pendleton area.

On the day of defendants' arrests, DEA agents followed defendant Bard to a mobile home located in a trailer park where a number of vehicles, which had previously been seen at the residences under surveillance, were parked. These vehicles and the mobile home were then followed to a state park where defendants conducted a counter-surveillance sweep of the surrounding area before carrying boxes from their vehicles to the mobile home.

In the ensuing hours, agent Nielsen observed that all the vents and the door of the mobile home had been left open while the curtains remained drawn. He also heard voices, which he guessed to be Bard's and Childress', informing their companions that the park was under surveillance by DEA agents. At about this same time Nielsen observed defendant Brock rush out of the mobile home, gasping and shaking his head in an apparent effort to draw some fresh air. The agent also thought he smelled something "cooking" but could not identify the odor. Nielsen then conferred with agent Lackey, who was also surveilling the area, and the two concluded that the mobile home was being

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337. 623 F.2d at 553.
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.* at 553-54.
343. *Id.* at 554.
344. *Id.*
used by the suspects as a laboratory. At this point, agent Fredericks arrived and conferred with agent Lackey. Lackey related his conclusion to Fredericks but failed to inform him of the choking incident or of the suspects' conversation indicating their knowledge of the on-going surveillance. On the basis of the information he had gathered prior to the stakeout, the incomplete information related to him by Lackey, and Lackey's own conclusions, Fredericks ordered the defendants' warrantless arrests. The ensuing search of the mobile home revealed evidence of methamphetamine production. Prior to their trial, defendants successfully moved for suppression of all evidence as the fruit of an arrest unsupported by probable cause.

The court of appeals reversed. Following a citation of the familiar tests for probable cause and warrantless arrests, the court reviewed all of the facts known to agent Fredericks at the time he ordered the arrests. The court acknowledged that "the specific infor-

345. Id.
346. Id.
347. Id.
348. Id.
349. Id. at 562.
350. The test if [sic] probable cause is whether at the moment of arrest the facts and circumstances within the knowledge of the arresting officers "and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

Id. at 559 (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)).
351. "If the officers have probable cause to make the arrest it is not necessary to prove exigent circumstances to justify a warrantless arrest." 623 F.2d at 559 (citing United States v. Watson, 423 U.S. 411, 423 (1976)).
352. The facts which emerged from the prearrest investigation were summarized as follows: (1) an informant's tip that Bernard was operating an illegal methamphetamine manufacturing business and might be ready to produce the drug sometime around March, 1978; (2) corroborating surveillance information that Bernard was purchasing the necessary chemicals and that some of the chemicals were located in the Meachem, Oregon area and probably in the Hermiston, Oregon area; (3) knowledge that Bernard and his associates acted suspiciously while purchasing the chemicals and indications that they were conducting counter-surveillance activities; (4) knowledge that Bernard had instructed the chemical supplier to give the chemicals to Childress, and that Childress and Bard had picked up the chemicals the same day; (5) knowledge that vehicles which had been seen at the residences in Meachem and Hermiston, where some of the chemicals had been taken, were seen together at the scene of the arrest; and (6) knowledge that Bernard associated with suspected drug traffickers. 623 F.2d at 559.

Agent Fredericks testified that his arrest decision was based upon the above information combined with (1) an inference that the location of the mobile home in an isolated area would be suitable for the maintenance of a clandestine laboratory, (2) knowledge that some of the persons in the park had assisted Bernard in purchasing chemicals, (3) an inference that the boxes transferred to the mobile home contained the chemicals associated with amphetamine production, (4) an inference that the windows and vents of the mobile home were
mation known to agent Fredericks was insufficient to warrant a prudent man in believing that the defendants were committing an offense.”\textsuperscript{353} It also noted that no agent was aware of Bernard’s presence at the park until after the arrests and that Fredericks was not apprised of the choking incident or the fact that agent Nielsen might have smelled something cooking.\textsuperscript{354}

The court then turned its attention to the Government’s argument that a probable cause assessment need not be confined to the personal knowledge of agent Fredericks, but might properly take into consideration the collective knowledge of all agents involved in the operation. It found that the collective knowledge of agents Fredericks, Lackey, and Nielsen “was sufficient to constitute probable cause.”\textsuperscript{355} The court then focused upon the question of whether Fredericks “could rely upon information known to agents Lackey and Nielsen which had not been communicated to Fredericks” at the time he ordered the arrests.\textsuperscript{356} Passing over the question of how one might rely upon information not within one’s own knowledge, the court drew upon case authority from other circuits which held in various factual contexts that probable cause may be present on the basis of all “objective facts available for consideration by the agencies or officers participating in the arrest.”\textsuperscript{357}

We recognize that in some\textsuperscript{358} of the cases holding that the collective knowledge of the arresting officers could be considered in determining probable cause, the substance of information obtained by other officers had been communicated to the arresting officers. . . . We do not find, however, that this is

\begin{itemize}
  \item left open to provide ventilation for the lab while the curtains remained drawn to conceal the operation, and (5) an inference that the defendants were involved in counter-surveillance activities when they were driving around the area of the park. \textit{Id.} at 559-60.
  \item \textit{Id.} at 560.
  \item \textit{Id.}.
  \item \textit{Id.}.
  \item \textit{Id.} (emphasis added).
  \item \textit{Id.} at 560-61 (quoting \textit{United States v. Stratton}, 453 F.2d 36, 37 (8th Cir.), \textit{cert. denied}, 405 U.S. 1089 (1972)). For the same proposition, the court cited the following cases: \textit{United States v. Caraballo}, 571 F.2d 975, 977 (5th Cir. 1978); \textit{United States v. Rose}, 541 F.2d 750, 756 (8th Cir. 1976), \textit{cert. denied}, 430 U.S. 908 (1977); \textit{United States v. Heisman}, 503 F.2d 1284, 1290 n.5 (8th Cir. 1974); \textit{Moreno-Vallejo v. United States}, 414 F.2d 901, 904 (5th Cir. 1969), \textit{cert. denied}, 400 U.S. 841 (1970).
  \item Of the four cases cited by the court, three show that the arresting officer was in possession of secondhand knowledge constituting probable cause which had been communicated to him by fellow officers prior to the arrest. The three cases are: \textit{United States v. Rose}, 541 F.2d 750, 752-53 (8th Cir. 1976), \textit{cert. denied}, 430 U.S. 908 (1977); \textit{United States v. Heisman}, 503 F.2d 1284, 1286-87 (8th Cir. 1974); \textit{Moreno-Vallejo v. United States}, 414 F.2d 901, 902-03 (5th Cir. 1969), \textit{cert. denied}, 400 U.S. 841 (1970).
\end{itemize}
required, particularly where, as here, the agents were working in close concert.\(^{359}\)

In an attempt to bolster its collective knowledge theory, the court drew an analogy between the instant factual situation and a case in which a law enforcement officer made an arrest on the strength of a police radio bulletin.\(^{360}\) In the latter instance the arresting officer is entitled to rely upon a radio bulletin which is based upon probable cause.\(^{361}\) The court compared agent Fredericks' position with that of the arresting officer in *United States v. Gaither.*\(^{362}\) In *Gaither*, the Fourth Circuit held that an arrest made on the basis of a radio bulletin was based on probable cause because the bulletin was grounded on the personal observation of the FBI.\(^{363}\) The *Bernard* court felt that "[s]imilarly, agent Fredericks was entitled to rely on the observations and knowledge of agents Lackey and Nielsen, even though some of the critical information had not been communicated to him."\(^{364}\)

The outcome of *Bernard* is unsatisfactory. The court accepts,

\(^{359}\) United States v. Bernard, 623 F.2d at 561 (citation omitted). A reading of the cited collective knowledge cases gives no indication whether their outcomes would have been different had the information constituting probable cause not been communicated to the arresting officer. Likewise, there is no indication of the possible outcome had the person ordering the arrest not been in possession of sufficient facts to make a finding of probable cause on his own at the time that he gave the order. These courts had no occasion to consider the type of situation presented in *Bernard.*


\(^{361}\) In *Whitely v. Warden*, 401 U.S. 560 (1971), the Supreme Court found that a warrant which was the basis of a bulletin for defendant's arrest was invalid due to the failure of the underlying affidavit to show probable cause. *Id.* at 568. Consequently, the Court held that the arrest made on the strength of the resulting radio bulletin was unconstitutional. *Id.* at 569. The Court did acknowledge, however, that the arresting officers were entitled in the first instance to assume that a warrant underlying the radio bulletin had been issued after a proper judicial assessment of probable cause and to act on the basis of the bulletin. *Id.*


\(^{363}\) *Id.* at 458.

\(^{364}\) 623 F.2d at 561. If it was the court's intention to bolster its view of the collective theory with the radio bulletin analogy it certainly chose a very weak crutch. In the *Gaither* case the arresting officer was acting merely as an instrument of other officers whose burden it was to make a correct assessment of probable cause to arrest. The *Gaither* court had no occasion to address the problem which would have arisen had the decision-making officers made an incorrect assessment of probable cause and then ordered the officer to arrest. In *Bernard*, agent Fredericks would be more correctly placed in the role of the officer who broadcasts the arrest order. In the final analysis, it was his decision to arrest and that decision may be properly reached only on the basis of facts at hand which would support a personal finding of probable cause in each case. To say that such a decision may be properly made by an individual in possession of less than sufficient facts to cross the threshold of probable cause is clearly contrary to prevailing views of the individual's right to be safeguarded from unjustified intrusion upon personal liberty.
without clear explanation, the doctrine of collective knowledge. The collective knowledge approach to the assessment of probable cause, accepting as it does all knowledge possessed at the time of an arrest by any member of a law enforcement agency, seems to proceed from the premise that arrest decisions are made by agencies in some sort of corporate capacity. It would appear, however, that ultimate arrest decisions, and ultimate determinations of probable cause, are made by individuals in authority or on the scene. The concept of some sort of a corporate brain or central information repository which may be drawn upon by an officer making the arrest decision, without his knowledge, is a convenient fiction.

In Bernard, the facts are susceptible to a reading which would indicate that agent Fredericks, as agent in charge, made an unfortunate error in assessing probable cause to arrest. Yet, instead of suffering the consequences of his error (i.e. suppression of the evidence seized as an incident of an illegal arrest), the Government is courteously given a second bite at the apple by being judicially allowed to refer back to the "corporate information repository" and to take after the fact informational supplements to support Fredericks' earlier uninformed arrest decision. It is no justification for this departure from constitutional principles to summarily conclude, as the Bernard court did, that agent Fredericks was entitled to "rely upon information . . . which had not been communicated to [him]." 365

365. Id. at 560. Nowhere does the court undertake to explain why this conclusion is justified. The practical effect of embracing the collective knowledge theory is to subject the officer making the arrest decision to a less strict standard than that applied to the magistrate who issues arrest warrants. It is, to say the least, anomalous to allow an officer in the position of Fredericks to patch up gaping holes in his required knowledge after the crucial arrest decision has been made. Quite properly, the magistrate is not allowed such a luxury. When that official warrants an arrest without sufficient facts before him to make a correct probable cause determination, the warrant is irretrievably invalid. If there is some justification for this anomaly, it is not to be found in the Bernard opinion. Just as the magistrate must be apprised of the collective knowledge of the officers, the arresting officer should be apprised of the "corporate" knowledge which constitutes probable cause. See United States v. Del Porte, 357 F. Supp. 969, 974 (S.D.N.Y. 1973), in which the district court observed that:

While hearsay from fellow officers is a valid basis for probable cause, (citation omitted) and while the Second Circuit seems to have approved cases in other circuits which hold that the collective knowledge of a large police organization can be imputed to an individual arresting officer, see United States v. Canieso, 470 F.2d 1224 n.7 (1972), that concept would not appear to be applicable when the hearsay is communicated to no one until after the arrests have been made . . . .

Taken to its extreme, the Bernard rule tacitly encourages law enforcement officers to arrest with less than probable cause known to them with the hope that there might be sufficient knowledge within the agency as a "corporate" unit.
F. Investigative Stops

In Dunaway v. New York, the United States Supreme Court held that where investigating officers detain an individual and take him to a police station for interrogation, such a detention is a "seizure" within the fourth amendment and requires a showing of probable cause.

Although the detectives in Dunaway lacked sufficient information for an arrest warrant, they were ordered to "pick up" defendant Dunaway, who was located at a neighbor's residence. The defendant was not told that he was under arrest, but was taken into custody and brought to the police station where he was interrogated. The officers conceded at trial that had Dunaway attempted to leave, he would have been physically restrained.

The Court concluded that "detention for custodial interrogation—regardless of its label— intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." Because statements made by Dunaway at the station house should have been suppressed at trial, the Court reversed his conviction.

In United States v. Mendenhall, a divided Court declined to apply the Dunaway rule in an analogous situation involving the interrogation of an airline passenger who was suspected of carrying narcotics. In Mendenhall, DEA agents assigned to Detroit's Metropolitan Airport observed the defendant deplaning and concluded that her behavior was typical of a person transporting narcotics. The agents

367. 442 U.S. at 216.
368. Id. at 203.
369. 442 U.S. at 216.
372. The Court apparently found Dunaway distinguishable because Dunaway's detention was involuntary. See id. at 554-55.
373. Mendenhall's behavior apparently coincided with the suspect conduct characteristics of the DEA's drug courier profile. Specifically, the agents noted that (1) defendant was arriving from Los Angeles, a city considered the source of much of Detroit's heroin, (2) defendant was the last to disembark from the plane, she appeared nervous, and she looked over the area where the agents stood, (3) defendant walked past the baggage area without claiming any luggage, and (4) defendant switched airlines for her flight out of Detroit to Pittsburgh. Id. at 547 n.1.
approached Mendenhall, identified themselves as government agents, and requested to see her identification and airline ticket. She produced a driver’s license bearing her name and a ticket bearing a different name. When asked about the discrepancy, Mendenhall replied that she “just felt like using” the false name. The agents then specifically identified themselves as narcotics agents, whereupon Mendenhall became visibly distraught.

The agents returned the identification and asked the defendant if she would accompany them to the airport DEA office to answer some additional questions. She silently complied with this request. At the office, Mendenhall was asked if she would consent to a search of her handbag and person, but was also cautioned that she need not assent. She replied, “Go ahead.” The handbag search revealed a receipt for a plane ticket issued three days earlier in the name of “F. Bush.” Mendenhall admitted that she had used that ticket for her trip to Los Angeles.

At this point, a female police officer arrived to conduct the search of Mendenhall’s person. After being assured by the agents that Mendenhall had consented to the search, the officer escorted Mendenhall to a private room. There the officer received Mendenhall’s express consent to the search. Upon being instructed to disrobe, the defendant stated that she had a plane to catch. She was assured that if she possessed no narcotics there would be no problem. As Mendenhall shed her clothes, she removed two packets from her underclothing, one of which appeared to contain heroin. She was then arrested on possession charges.374

The district court denied Mendenhall’s motion to suppress the packets on the ground that the agents’ detention of defendant was justified under the standards for investigatory stops enunciated in Terry v. Ohio375 and United States v. Brignoni-Ponce.376 The court further ruled that no arrest or detention had taken place after the initial stop because the defendant had accompanied the agents “voluntarily in a spirit of apparent cooperation.”377

The Sixth Circuit concluded that the factual predicates for the in-
vestigatory stop and subsequent events were indistinguishable from those in United States v. McCaleb,\textsuperscript{378} thus compelling the reversal of Mendenhall's conviction.

The Supreme Court reversed the court of appeals and affirmed Mendenhall's conviction. Justice Stewart, writing for himself and Justice Rehnquist,\textsuperscript{379} held the view that Mendenhall had never been seized and that she had both accompanied the agents and submitted to the strip search freely and voluntarily.\textsuperscript{380} Justice Powell, joined by Chief Justice Burger and Justice Blackmun,\textsuperscript{381} expressed the opinion that, while it could be assumed that a seizure had occurred, it had been based upon reasonable suspicion and was therefore not violative of the fourth amendment.\textsuperscript{382} The concurring justices agreed with Justice Stewart that Mendenhall had voluntarily accompanied the agents and submitted to the strip search.\textsuperscript{383} Justice White, writing for the four dissenters, would have held that a seizure unjustified by reasonable suspicion had occurred,\textsuperscript{384} that Mendenhall had been under detention amounting to an arrest not based on probable cause or consent when she accompanied the agents,\textsuperscript{385} and that her subsequent consent to the strip search was fatally tainted by the agents' earlier unconstitutional conduct.\textsuperscript{386}

\textsuperscript{378} 552 F.2d 717 (6th Cir. 1977). In McCaleb, defendants were stopped by DEA agents at Detroit Airport after they arrived from Los Angeles. The stop was based upon defendants' behavioral conformity with the drug courier profile. See supra note 373. After asking the suspects for identification and tickets, the agents noticed that one suspect's identification did not coincide with his luggage tag, and that the other two had flown under false identities. The three were escorted to the DEA airport office where the agents searched defendant McCaleb's bag and discovered a quantity of heroin. Id. at 719.

The Sixth Circuit held that while observation of a combination of drug courier characteristics could provide the reasonable suspicion necessary to justify an investigatory stop, the observations in McCaleb did not do so. The court alternatively held that even if the initial stop was valid, it became an arrest and exceeded the scope of investigation permitted by Terry when the defendants were "taken" to the DEA office. Id. at 720. The McCaleb court did not address the issue of the voluntariness of the defendants' accompaniment of the agents. Presumably, the Government never raised the issue.

\textsuperscript{379} Although Justice Stewart was a member of the Dunaway majority, in Mendenhall he adopted the reasoning of the Dunaway dissent.

\textsuperscript{380} 446 U.S. at 554-55.

\textsuperscript{381} Justice Blackmun was a member of the Dunaway majority and Justice Powell did not participate in the case.

\textsuperscript{382} 446 U.S. at 560 (Powell, J., concurring).

\textsuperscript{383} Id.

\textsuperscript{384} Id. at 574 (White, J., dissenting).

\textsuperscript{385} Id. at 574-75.

\textsuperscript{386} Id. at 577.
The Stewart-Rehnquist opinion

Prior to oral argument before the Supreme Court, the Government's sole contention was that the agents' actions amounted to a lawful investigatory stop followed by a consent to search. The Government raised its "no seizure" contention for the first time in its brief on the merits and again at oral argument. Justice Stewart justified this departure from the Court's policy of refusing to consider matters neither raised nor decided by the courts below on the ground of extraordinary circumstances.

Preliminarily, Justice Stewart observed that "'[o]bviously not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.'" Citing Terry and Sibron v. New York as examples, Justice Stewart concluded that the Court had never before expressly defined those factors which indicate a seizure has been made.

Noting that the fourth amendment's protections are not intended to preclude all contact between law enforcement officers and the public, the Stewart opinion enunciated an objective totality of the circumstances test (first advocated by Justice Rehnquist in Dunaway), by which police-citizen interaction should be evaluated in determining the existence of a seizure. The question to be raised was whether a reasonable person under the circumstances would believe that she was not

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387. Id. at 551 n.5.
388. Id. "We consider the Government's contention that there was no seizure of the respondent . . . because the contrary assumption, embraced by the trial court and the Court of Appeals, rests on a serious misapprehension of federal constitutional law." Id.
389. Id. at 552 (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).
391. 446 U.S. at 552-53.
392. Justice Rehnquist asserted that the voluntariness of the detention is determined by "whether the police conduct, objectively viewed, restrained petitioner's liberty by show of force or authority. . . . The question turns on whether the officer's conduct is objectively coercive or physically threatening . . . ." 442 U.S. at 224 (Rehnquist, J., dissenting).
393. We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.
446 U.S. at 554.
Justice Stewart concluded that "nothing in the record" suggested that Mendenhall had any objective reason to believe that she was not free to terminate the conversation with the agents and proceed on her way.

Following this determination, Justice Stewart ruled that Mendenhall had been neither seized nor constructively arrested when she was escorted to the DEA office. This conclusion was based on an acceptance of the district court's finding of voluntariness, which Justice Stewart found amply supported by the record. That a contrary finding was made by the court of appeals was deemed irrelevant in that that court had been "mistaken in substituting for [the district court's] finding its view of the evidence."

The concurring and dissenting opinions

Justice Powell in his concurring opinion agreed in all respects with the findings of Justice Stewart, except that he declined to address the Government's "no seizure" argument because "neither of the courts below considered the question." Instead, he undertook a Terry analysis, which led to the conclusion that the agents' initial seizure of Mendenhall was valid, and deferred to the trial court's finding that Mendenhall's subsequent compliance with the agents' requests was voluntary.

394. The dissent criticized Justice Stewart for ignoring the likelihood that the record was devoid of such evidence because the precise issue had never been raised or addressed below. Id. at 569 & n.2, 570-71 (White, J., dissenting). This is a valid criticism. Because of prior decisions, the parties had no reason to make a record of the objective factors stressed by Justice Stewart.

395. Id. at 555. In reaching this conclusion, Justice Stewart found it decisive that (1) the agents neither wore uniforms nor displayed weapons, (2) they did not summon Mendenhall to them but approached her instead, and (3) the agents requested but did not demand to see Mendenhall's identification and ticket.

396. Id. The plurality opinion did not address the question of why the record was sufficient on the voluntariness issue and what distinguished it from the deficient record in Dunaway. Compare the dissenters' evaluation of the record in the instant case. See id. at 570 & n.3 (White, J., dissenting).

397. Id. at 557 (citation omitted).

398. Id. at 560 (Powell, J., concurring). Justice Powell did not, however, reject Justice Stewart's objective test. "I do not necessarily disagree with the views expressed in Part II-A. For me, the question whether the respondent in this case reasonably could have thought she was free to 'walk away' when asked by two Government agents for her driver's license and ticket is extremely close." Id. at 560 n.1.

399. Id. at 565. Justice Powell concluded that the combination of the agents' experience and their observations of Mendenhall's behavior furnished a reasonable suspicion of criminal activity which outweighed the relatively modest intrusion upon the individual's personal liberty interests. He considered the intrusion "quite modest" in view of the fact that Mendenhall would not have been initially isolated from public aid had she felt threatened, that
As to the plurality’s finding that Mendenhall had accompanied the agents voluntarily, the dissents argued that the record was devoid of evidence which would support such a finding either in the first instance by the trial court or by the Supreme Court on review. The dissent also argued that “[t]he evidence of consent here is even flimsier than that we rejected in Dunaway where it was claimed that the suspect made an affirmative response when asked if he would accompany the officers to the police station.”

The dissenters found it “unbelievable” that the present chain of events demonstrated no infringement of constitutionally protected privacy interests and stated that “[t]he rule of law requires a different conclusion.”

Satisfactory reconciliation of Dunaway and Mendenhall is not possible if one is attempting to discern a uniform progression in the Court’s approach to the permissible extent of the Terry stop, or even to when a Terry stop occurs. It does seem possible, however, to draw some conclusions as to the prevailing sentiments among a majority of the Court. First, the crux of the Dunaway decision, that police may not under ordinary circumstances detain a suspect for custodial questioning in the absence of probable cause or consent, appears unquestioned. Second, a majority of the Court appears disinclined to accept the proposition that involuntariness may be presumed where the subject of a Terry stop, or one upon whom criminal suspicion has focused, acts in conformity with a police request without being first informed that he is not obligated to so act. Third, a majority of this Court has probably accepted the position that the existence of a seizure is properly evaluated only in light of all the objective circumstances surrounding a po-

the agents identified themselves and made only reasonable requests and inquiries, that there was no physical touching or display of weapons, and that the questioning was brief. Id. at 562-63. Balancing the “compelling [public] interest in detecting those who would traffic in deadly drugs for personal profit,” id. at 561, against “the nature and scope of the intrusion, and . . . the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise,” id., Powell concluded that the stop was justified. Id. at 565 (Powell, J., concurring).

400. Id. at 576 (White, J., dissenting).

The heart of the dissent lies in the contention that, whether or not the initial stop of the defendant was violative of Terry and fourth amendment principles, “she undoubtedly was ‘seized’ within the meaning of the Fourth Amendment, when the agents escorted her from the public area of the terminal to the DEA office for questioning and a strip search of her person.” Id. at 574. Justice White noted that from the moment Mendenhall left the terminal in the company of the DEA agents, the factual setting of the case became indistinguishable from that in Dunaway, and that Dunaway therefore demanded that the case be treated as one of constructive arrest made without probable cause. Id. at 574-75.

401. Id. at 576 (citation omitted).

402. Id. at 577 (footnote omitted).
lice-citizen interaction, and that the intentions of the investigating officers are irrelevant insofar as they remain uncommunicated to the subject of an alleged seizure.

_Mendenhall_ is consistent with recent Ninth Circuit prearrest detention decisions. For example, in _United States v. Post_, a DEA agent stopped the defendant and his companion in an airport terminal. The stop was based on reasonable suspicion. Post and his companion agreed to accompany the agent to an interrogation room. Post was questioned and searched; the search produced packets of heroin.

Post was convicted in the district court after his motion to suppress the heroin was denied. On appeal, the Ninth Circuit acknowledged the close factual similarity of _Dunaway_, but correctly distinguished that case. In _Dunaway_, the trial court resolved the issue of the voluntary character of the accompaniment adversely to the Government and the Supreme Court chose to accept that finding. Since the district court in _Post_ had made no specific finding of involuntariness, and because there was an evidentiary conflict on the issue, the court of appeals felt constrained to view the evidence in the light most favorable to the state as the prevailing party below. Relying on _United States v. Chatman_, the court held that no fourth amendment interest of the defendant had been violated.

_United States v. Perez-Esparza_ similarly represents an instance of correct Ninth Circuit treatment of a _Dunaway_-type case. _Perez-Esparza_ involved an interior border stop of a suspected drug smuggler. Because they had reasonable suspicion that the defendant was smuggling drugs, DEA agents directed United States Customs agents to stop defendant's car if it should pass their checkpoint. The Customs agents acted in conformity with this request when defendant drove

403. 607 F.2d 847 (9th Cir. 1979).
404. The observations which the court found sufficient to justify reasonable suspicion were: (1) one suspect paced the length of the airport while tightly clutching a brief case, (2) this suspect met with defendant Post and both purchased round trip tickets to Los Angeles, (3) defendant's first initial and last name were identical to those of a known narcotics trafficker, and (4) the behavior of the two suspects coincided with a judicially approved profile of typical narcotics courier characteristics. _Id._ at 849-50 & n.3.
405. 442 U.S. at 207 & n.6.
406. 607 F.2d at 851.
407. 573 F.2d 565 (9th Cir. 1977). In _Chatman_, the Ninth Circuit held that where reasonable suspicion to make a stop exists, the stop does not become a detention just because the officer, without coercion, directs that the questioning occur in a less public place. _Id._ at 567.
408. The _Post_ court properly ignored the suggestion in _Dunaway_ that all requests made of subjects of _Terry_ stops are inherently coercive. _See supra_ note 373.
409. 609 F.2d 1284 (9th Cir. 1979).
410. _Id._ at 1285.
through the checkpoint some hours later. Defendant was held at the Customs office for two and one-half hours while the agents awaited the arrival of the DEA agents. When those agents finally arrived, they issued *Miranda* warnings and informed Perez-Esparza that he was being held on suspicion of drug smuggling and that a search warrant for his car was presently being sought. The defendant then invited the agents to conduct a search, and the agents discovered a quantity of cocaine concealed in a headlight. The agents issued *Miranda* warnings again after the cocaine was discovered.

In reversing Perez-Esparza's conviction for possession with intent to distribute, the court of appeals properly held that the prolonged detention of the defendant was so similar to a traditional arrest that *Dunaway* mandated suppression because there was no probable cause to support the "arrest." However, Perez-Esparza also serves to highlight a difficulty which was not addressed in *Dunaway* and which the Ninth Circuit declined to resolve in this case. The difficulty arises when a valid *Terry* stop is made and, for some extraordinary reason, the officer who makes the stop is unable to determine quickly whether there exists probable cause to arrest. This situation was squarely presented in 1980 in *United States v. Erwin*.

In *Erwin*, the defendant was properly detained by DEA agents at San Francisco International Airport following her arrival from Bangkok, Thailand. A baggage search was conducted which revealed items that, combined with Erwin's apparent difficulty in walking and sitting, led the agents to believe that she had concealed drugs in a body cavity. When Erwin refused to submit to a strip search, the agents applied for a court order requiring her to consent to the search and to an x-ray.

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411. Id. at 1291.

412. Id. at 1286-87. There was no question in Perez-Esparza that the defendant had not consented to the prolonged detention. Therefore, there could be no question as to the applicability of *Dunaway*. Under the objective *Mendenhall* test for seizure, it is clear that a reasonable person detained as was Perez-Esparza would have concluded that he was not free to walk away once customs agents had separated him from his car.

413. Id. at 1287 n.2. The Perez-Esparza court recognized that situations arise in which a suspect is detained pending the arrival of specialized agents and the detaining officer is incapable of resolving the matter himself. The Ninth Circuit has previously held that such extended detentions are valid in view of such circumstances. *United States v. O'Looney*, 544 F.2d 385, 389-90 (9th Cir.), cert. denied, 429 U.S. 1023 (1976). The Perez-Esparza court was not forced to resolve the question of the constitutionality of such prolonged stops after *Dunaway* because the DEA agents in this case were not essential to the questioning of the defendant and therefore the case was not within the *O'Looney* exception.

414. 625 F.2d 838 (9th Cir. 1980).
and, if the x-ray revealed objects concealed in a body cavity, to a body cavity search as well. The order was eventually obtained and an x-ray examination revealed a foreign object concealed in Erwin's vagina. Erwin then removed a heroin-filled plastic container from her vagina and was arrested. The detention, from inception to arrest, lasted seven hours.\textsuperscript{415}

On review of the trial court's refusal to suppress the heroin as the product of an illegal arrest, the court of appeals rejected Erwin's argument that the seven hour detention constituted an arrest made in the absence of probable cause and that the heroin seized incident to the illegal arrest should have been suppressed.\textsuperscript{416} The court distinguished the cases upon which Erwin based her argument, \textit{Perez-Esparza, Dunaway} and \textit{United States v. Beck},\textsuperscript{417} by pointing out that the instant detention was made in the context of a border search.\textsuperscript{418} Noting that "government intrusions on citizens' mobility at the international borders are reviewed by the courts under different standards than other police investigatory techniques,"\textsuperscript{419} the court stated that the standard measure of the propriety of a border detention is whether the scope of the detention exceeded "what was necessary for the agents to conduct a legal border search."\textsuperscript{420}

The \textit{Erwin} court held that defendant's detention pending issuance of the search warrant was reasonable.\textsuperscript{421} In view of the fact that no warrant is usually required for a border search, but "[g]iven the strong preference for search warrants in body cavity searches expressed by this court in \textit{United States v. Cameron}, it would be inconsistent for the court now to hold that, in trying to follow the preference for a warrant, the agents detained a traveler for an excessive period."\textsuperscript{422}

The \textit{Erwin} reasoning is irreproachable. Certainly drug smugglers cannot be allowed to conceal contraband in such a way that enforce-

\footnotesize
\begin{itemize}
  \item \textsuperscript{415} \textit{Id.} at 840.
  \item \textsuperscript{416} \textit{Id.} at 841.
  \item \textsuperscript{417} 598 F.2d 497 (9th Cir. 1979). In \textit{Beck}, the Ninth Circuit held that where four customs cars were used to surround defendant's taxi and several agents escorted defendant from the vehicle, the display of excessive force would have led one to reasonably believe that he was under arrest. \textit{Id.} at 500.
  \item \textsuperscript{418} 625 F.2d at 841.
  \item \textsuperscript{419} \textit{Id.} (citing United States v. Shorter, 469 F.2d 61, 63 (9th Cir. 1972), \textit{cert. denied}, 411 U.S. 918 (1973)).
  \item \textsuperscript{420} 625 F.2d at 841.
  \item \textsuperscript{421} \textit{Id.}
  \item \textsuperscript{422} \textit{Id.} (citing United States v. Cameron, 538 F.2d 254 (9th Cir. 1976)). The \textit{Erwin} court also noted that \textit{Cameron} itself "indicates that a reasonable detention while a warrant is being obtained is not invalid." 625 F.2d at 841 (citing 538 F.2d at 258 n.7).
\end{itemize}
ment officers are faced with the Hobson's choice of either letting them go or detaining them pending issuance of a warrant with the knowledge that a subsequent warrant-authorized search would be invalidated due to the prior illegal "arrest." However, the concern expressed by the Erwin court—that law enforcement efforts should not be penalized where agents have at all times acted with regard for constitutional safeguards—would appear to be equally applicable outside the limited context of border searches. As recognized by the Perez-Esparza court, situations will arise where some delay after a valid initial stop is not only unavoidable but also required by valid law enforcement concerns and reasonable under all of the surrounding circumstances. In such cases, the Dunaway limitation on the permissible scope of the Terry stop should not be applied so inflexibly as to operate as a universal bar to otherwise justifiably prolonged detentions.\footnote{Perhaps the key to rationalizing an extraordinary circumstances exception to the Dunaway rule lies in the construction of a test which would take into account the motivations of the authorities responsible for the prolonged detention. This approach is suggested by the language of the Perez-Esparza decision. See 609 F.2d at 1287 n.2.}

\section*{G. Outrageous Government Conduct}

The outrageous government conduct or involvement defense was first recognized by the Ninth Circuit in the 1971 decision of Greene v. United States.\footnote{454 F.2d 783 (9th Cir. 1971).} The court of appeals reversed appellants' convictions for possession of unregistered distilling apparatus, illegal sale of distilled spirits, and conspiracy\footnote{Id. at 783-84.} on the ground that government agents had too directly and continuously involved themselves over a lengthy period of time in the creation and maintenance of the criminal operation.\footnote{Id. at 786-87.} In Greene, a government agent posed as an underworld syndicate figure and established a relationship with appellants which led to their sale of illegal spirits to government agents, and consequently, to their conviction for distilling violations.\footnote{Id. at 784.} While this case was pending, the agent, still acting in his undercover capacity, reinitiated contact with appellants.\footnote{Id. Approximately a year after their conviction, they were released from jail and were contacted again by the agent.\footnote{Id. at 784-85.}} For about two and one-half years, the agent continued his undercover role en-
couraging the defendants in their illegal manufacturing. The agent offered to supply some equipment for this operation and actually provided two thousand pounds of sugar at wholesale. Eventually, over several months, the defendants made three shipments of illegal spirits for which they were arrested and convicted.

The Ninth Circuit found that the agent’s conduct after the first conviction rose to a level of “‘creative activity’ . . . substantially more intense and aggressive than the level of such activity charged against the Government in . . . entrapment cases.” However, the court held that the defendants could not take advantage of the entrapment defense because they were deemed “predisposed” to commit the crime. Even so, the court reasoned that “although this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative.” Thus, look-

430. During the two and one-half year interval between appellants’ reassociation with the government agent and their second arrest, the agent encouraged their efforts at every opportunity. Of a total of thirty-two contacts between the parties during this time, the agent, Courtney, initiated twenty-two. Id. at 785.

431. Id. at 787.

432. Id. at 785-86. The agent extended his participation by securing for appellants a distillery site and offering to supply them a still and a still operator.

433. Id. at 785.

434. Id. at 787.

435. Generally a claim of entrapment arises if a defendant can show that the criminal design originated with the government which then induced the defendant to commit the crime. See LAFAVE & SCOTT, CRIMINAL LAW § 48, at 371 (1972).

436. In the federal system, the predisposition of the defendant to commit the charged crime negates the effectiveness of the entrapment defense. Thus, the defendant must be an innocent person who would not have committed the crime but for the government inducement. Hampton v. United States, 425 U.S. 484, 488-89 (1976); United States v. Russell, 411 U.S. 423, 433 (1973); Sherman v. United States, 356 U.S. 369, 372 (1958); Sorrell v. United States, 287 U.S. 435, 441-42 (1932). The majority of the state courts also follow this approach. See Donnelly, Judicial Control of Informants, Spies, Stool Pigeons & Agent Provocateurs, 60 YALE L.J. 1091, 1105-06 (1951). But see People v. Barraza, 23 Cal. 3d 675, 591 P.2d 147, 153 Cal. Rptr. 459 (1979) (minority test adopted; governmental acts looked at objectively without reference to the subjective intent or predisposition of the defendant).

437. 454 F.2d at 787. The court of appeals cited the following six factors, the aggregation of which compelled the dismissal of the indictment: (1) agent Courtney had reestablished contact with appellants following their initial arrest when he ordinarily would have had no reason to do so, (2) the length of the government involvement in the criminal operation (approximately two and one-half years), (3) the government’s substantial participation in the scheme, including the offers of supplies and the actual furnishing of supplies, (4) the “veiled threat” to appellants to produce bootleg which was couched in his statement that his superior was becoming impatient with the delay in delivery, (5) government activity which re-
ing at the government’s involvement in the criminal activity, the court concluded that the only fair remedy would be to vacate the defendants’ convictions and dismiss their indictments. The Greene decision thus opened a new defense for predisposed defendants unable to invoke the entrapment defense.

While the Ninth Circuit in Greene endorsed the outrageous conduct defense, to date the United States Supreme Court has neither totally rejected nor clearly accepted the use of the defense as a bar to criminal prosecution. In United States v. Russell, a decision subsequent to Greene, five members of the Court conceded that they might “some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” The Russell Court declined, however, to hold that the Government’s supplying of a critical, but otherwise legal and obtainable chemical, to a criminal drug manufacturing operation constituted such objectionable conduct. The Court also held that the entrapment defense was inapplicable because the defendants were predisposed to commit the crime. Following Russell, the Court in Hampton v. United States divided on the question of whether government misconduct or over-involvement in a criminal scheme could stand as an absolute bar to prosecution in light of a defendant’s predisposition. The plurality opinion indicated that the only remedy available to “predisposed” individuals would be the entrapment defense. The concurring justices felt that the due process clause would still bar some prosecutions in spite of the predisposition of the individual.

established what had been a defunct criminal operation, and (6) the fact that the government was at all times appellants’ sole customer. Id. at 786-87.

438. Id. at 787.
440. Id. at 431-32.
441. Id. at 432.
442. Id.; see supra note 436 and accompanying text.
444. Writing for himself and two other members of the Court, Justice Rehnquist stated that “[t]he remedy of the criminal defendant with respect to the acts of Government agents, which, far from being resisted, are encouraged by him, lies solely in the defense of entrapment.” Id. at 490.
445. Justice Powell, in a concurring opinion joined by Justice Blackmun, agreed that the particular fact that the government agents in Hampton supplied the contraband which defendant was prosecuted for selling did not constitute a violation of due process ideals. Adhering to the Russell principles, however, the justices rejected the position that “the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances.” Id. at 492 (Powell, J., concurring).
Thus, the Court, while endorsing the entrapment defense, has not stated clearly whether due process principles may ever be invoked to vacate a conviction because of outrageous governmental conduct.

This lack of resolution by the high Court has caused some confusion in the latest Ninth Circuit decisions, which have rejected claims of outrageous governmental conduct. Although Greene has not been overturned, the viability of the defense has been questioned and the rationale employed by the circuit in rejecting these claims has not been clear.

For example, in United States v. McQuin, the Ninth Circuit rejected appellants' claim of outrageous government conduct involving an FBI agent's encouragement and participation in a bank robbery. The FBI became involved when it acted on a tip from a paid informant, Canale, that defendant McQuin was looking for an armed accomplice to assist in a planned bank robbery. The FBI arranged for Canale to introduce agent Taulbee as an underworld figure and willing accomplice. The agent was accepted readily by McQuin and briefed on the details of the latter's plan. They agreed to commit the robbery eight days after this initial meeting. When agent Taulbee and informant Canale arrived at McQuin's residence on the appointed day, they were met at the door by a woman who falsely informed them that defendant was in jail. At trial, McQuin claimed that Canale had told him later that day that Taulbee was going to have him killed for not going through with the robbery. On the following day, Canale and Taulbee again went to McQuin's residence and met with their "partner." There, according to McQuin's testimony, Taulbee had entered McQuin's room with gun drawn and had intimidated him into participating in the robbery on that day. McQuin and an accomplice were arrested by waiting FBI agents as they approached the targeted bank wearing ski masks and carrying weapons. McQuin was later convicted.

446. 612 F.2d 1193 (9th Cir.), cert. denied, 445 U.S. 955 (1980).
447. Id. at 1196.
448. Id. at 1194.
449. Id.
450. Id. at 1194-95.
451. Id. at 1195. Canale, however, testified that Taulbee merely had "felt like" having defendant killed. Id. Although the jury apparently believed Taulbee's and Canale's testimony, the court assumed "for purposes of argument" that McQuin's version was the accurate one. Id. at 1196.
452. Id. at 1195. The testimony on this point was contradictory. Id. at 1195, 1196. The court did not assume the accuracy of McQuin's testimony here and in fact avoided consideration of the outrageous conduct issue by finding that the jury had not believed him. Id. at 1196.
in the district court of conspiracy and attempted bank robbery. On appeal, the defendant claimed that the outrageousness of the government's conduct in the course of its undercover investigation should have barred his prosecution and compelled reversal of his conviction.453

The Ninth Circuit acknowledged that the Supreme Court's Hampton decision had "'left open the possibility that the conviction of a predisposed defendant may be reversed where the government involvement in the criminal scheme reaches such an outrageous level as to violate due process,'"454 but found that, even if Canale had told the defendant that Taulbee was going to have him killed for his lapse, the government had not engaged in outrageous conduct.455 While not commending the informant's actions, the court characterized the statements as "vulgarity and 'puffing' engaged in by all participants in the transaction."456 Turning next to McQuin's allegations that Taulbee had threatened him with a drawn gun, the court declined to state whether such conduct, if proved, would have amounted to outrageous conduct.457 In light of the contradictory testimony given by the agent and the defendant himself, the court observed that the defendant "suffers . . . from an inability even to establish that the conduct he claims was outrageous even occurred."458

The Ninth Circuit also rejected an outrageous government conduct/involvement defense in United States v. Wylie,459 where the defendant alleged that federal agents were the motivating force in the LSD sales for which defendant was prosecuted.460 In Wylie, defendant Bachrach had approached a friend, Bloch, and discussed with him the possibility of obtaining a chemical, ergotamine tartrate (ET), necessary for manufacturing LSD, and of selling the LSD itself.461 After Bachrach financed an unsuccessful trip to Poland by Bloch to obtain ET, Bloch contacted federal agents and informed them of Bachrach's scheme.462 The agents instructed Bloch to tell Bachrach that he had

453. Id. at 1194.
454. Id. at 1196 (quoting United States v. Gonzales-Benitez, 537 F.2d 1051, 1055 (9th Cir. 1977)).
455. Id.
456. Id. (quoting United States v. Reynoso-Ulloa, 548 F.2d 1329, 1339 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978)).
457. 612 F.2d at 1196.
458. Id.
460. Id. at 1377-78.
461. Id. at 1374.
462. Id.
contacted a source for the ET. Bachrach later met with undercover DEA agents and explained to them that he required a quantity of ET to supply a clandestine laboratory operating in Berkeley. The agents agreed to supply the ET in return for a portion of the LSD manufactured. Three days later, Bachrach gave to the agents 400 units of LSD and a price list of the different types of LSD which were available. A number of ET-LSD exchanges followed, culminating with the defendants' arrests. The defendants were subsequently convicted of various counts of conspiracy, manufacture, and distribution. On appeal, the defendants claimed that the government involvement in the criminal operation was so improper that it constituted a violation of due process because the federal agents had suggested that the defendants supply LSD in return for the ET.

The court of appeals found little difficulty in disposing of defendants' "outrageous government involvement" defense. Although the court noted authority supporting the existence of the due process defense, it could characterize the government involvement in Wylie only as "good, solid undercover investigative work." Undercover infiltration of a criminal enterprise, based on the information of an informant, was a long accepted tactic for the detection of crime. Moreover, the court refused to place any special emphasis on the creativity of the undercover investigation, on which the defense had focused. The court felt that the decisions which establish the outrageous government conduct or involvement defense "focus on the outrageousness of the governmental agents’ involvement in the criminal activity. Any consideration of the creativity exercised by the government agents is secondary to the consideration of the outrageousness of their involvement." The defendants emphasized that the agents had suggested that LSD should be exchanged for ET. However, the court

463. Id.
464. Id. This price list was made in the handwriting of defendant Wylie.
465. Id. at 1375.
466. Id. at 1377. Bachrach claimed he had intended only to purchase ET.
467. Id.
468. Id. (citing Hampton v. United States, 425 U.S. 484, 495 (1976) (Powell, J., concurring); United States v. Russell, 411 U.S. 423, 431-32 (1973); United States v. McQuin, 612 F.2d 1193, 1196 (9th Cir.), cert. denied, 445 U.S. 955 (1980); United States v. Prairie, 572 F.2d 1316, 1319 (9th Cir. 1978); United States v. Gonzales, 539 F.2d 1238, 1239 (9th Cir. 1976); United States v. Gonzales-Benitez, 537 F.2d 1051, 1055 (9th Cir.), cert. denied, 429 U.S. 923 (1976)).
469. 625 F.2d at 1378.
470. Id. at 1377 n.7.
rejected the outrageous conduct claim\(^{471}\) because the defendants' predisposition toward the sale of LSD was clearly established on the record.\(^{472}\) Finally, the court rejected the claim that the agents' maintenance of a series of transactions, all of which were separately charged in the indictment, provided support for the defense.\(^{473}\) The court believed the agents had acted justifiably because they were investigating a large scale distribution ring and were anxious to uncover as many participants as possible.\(^{474}\)

The court's reasoning on two points is somewhat faulty. First, its rejection of the creativity argument is questionable in light of the Greene court's emphasis of this point.\(^{475}\) However, Greene can be distinguished factually from Wylie.\(^{476}\) Second, the court improperly cited the defendants' predisposition as a reason for not invoking the outrageous conduct defense. Predisposition, an issue in entrapment cases,\(^{477}\) has no applicability in Greene-type cases.\(^{478}\)

In sum, while the Ninth Circuit in both McQuin and Wylie at least tacitly endorsed the outrageous conduct defense, the court rejected its application to the facts in those cases. In the process of rejecting the defendants' claims, the Ninth Circuit's language reflects questions the circuit may have as to the continued viability of the defense, especially in light of the post-Greene Supreme Court decisions.

\(^{471}\)\textit{Id.} at 1378.

\(^{472}\)\textit{Id.}

\(^{473}\)\textit{Id.}

\(^{474}\)\textit{Id.}

\(^{475}\) 454 F.2d at 787.

\(^{476}\) The Wylie court noted the "unique" circumstances of Greene in which the government "directly and continuously involved itself in the creation and maintenance of the criminal operations," a state of affairs the Wylie court thought not to be present in its facts. 625 F.2d at 1379 n.11 (quoting United States v. Granger, 475 F.2d 1022, 1024 (9th Cir.), cert. denied, 412 U.S. 929 (1973)). Although unclear in the opinion, it appears that the clandestine laboratory had been operating prior to the time that the government became involved in the enterprise. Thus, the governmental acts were not "creative" of a criminal enterprise.

\(^{477}\) See \textit{supra} note 436 and accompanying text.

\(^{478}\) Hampton v. United States, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring); Greene v. United States, 454 F.2d 783 (9th Cir. 1971). The proper focus should be on the question of whether the government created the opportunity for criminal activity and participated in the activity to such an extent that it would be fundamentally unfair to allow the government to prosecute its co-participants. Although the Wylie defendants may have been predisposed toward the sale of LSD, they were prosecuted for the sales to the government agents. A correct inquiry would be limited to the question of whether the government created the opportunity for the criminal sales to occur by supplying the ET and then participated to an unacceptable extent by demanding the ET-LSD exchanges.
H. Promise by Agent

In *United States v. Hudson*, the Ninth Circuit addressed the question of whether the United States Attorney must honor promises made by federal agents to criminal defendants. The court held that where the promise is clearly beyond the agent's authority, and where the defendant has not detrimentally relied upon it, "fundamental fairness does not require that the United States Attorney abide by the agent's promise."  

In *Hudson*, defendants Russo and Hudson were arrested by San Francisco police on suspicion of possessing and passing counterfeit money. Hudson was released from custody the same day and was requested to meet with counterfeiting expert, Secret Service Agent McMann, the following week. After this meeting, a complaint was filed against Hudson, to which she pleaded not guilty.  

Prior to her trial, Hudson moved for dismissal on the ground that agent McMann had promised codefendant Russo that all charges against the two would be dropped, provided that Russo cooperated in apprehending the supplier of the counterfeit obligations. The district court denied Hudson's request for an evidentiary hearing on the motion, as well as the motion itself. Hudson was convicted of passing and possessing counterfeit obligations.  

On appeal, Hudson contended that the denial of her motion to dismiss was error. The court of appeals acknowledged that "it is a question of first impression in this circuit whether the United States Attorney is bound by the acts and promises of other federal agents" not within the United States Attorney's office. At the outset, the court recognized that the federal courts were bound to ensure that prosecutors scrupulously honored their promises to criminal defendants. However, the court failed to discover any authority for the proposition that federal prosecutors should or could

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479. 609 F.2d 1326 (9th Cir. 1979).
480. *Id.* at 1328.
481. *Id.* at 1329.
482. *Id.* at 1327-28.
483. *Id.* at 1328.
484. *Id.*.
485. *Id.*.
486. *Id.*.
487. *Id.*.
488. *Id.* at 1327.
489. *Id.* at 1328.
490. *Id.* at 1328 n.3 (citing Santobello v. New York, 404 U.S. 257 (1971); United States v. Carter, 454 F.2d 426 (4th Cir. 1972)).
be bound by promises made to defendants without the prosecutor's knowledge or consent. In Hudson, the defendant never contended that agent McMann's alleged promise was made with the United States Attorney's knowledge or consent.

Curiously, the court cited United States v. Lombardozzi\(^4\) as holding that even "where an FBI agent convinced the defendant that he was speaking for the Assistant United States Attorney, the prosecution would not be bound by the agent's alleged promise of concurrent federal and state sentences."\(^5\) In fact, the Lombardozzi court stated no such holding. Rather, the Fourth Circuit merely found that no promise had actually been made by the agent, and that it was insignificant that the defendant might have subjectively believed that the agent was speaking for the United States Attorney.\(^6\) The court did not discuss the result that might have been reached had the agent misrepresented his prosecutorial authority.\(^7\) Citing the absence of two critical factors, the court of appeals refused to find that Hudson was entitled to benefit from any promise which agent McMann might have made to her co-defendant.\(^8\) These factors were: (1) it was not alleged that the United States Attorney knew about or had sanctioned the agent's alleged action, and (2) the lack of any detrimental reliance by Hudson on the alleged promise which might indicate that its nonenforcement would be fundamentally unfair.\(^9\) The court concluded by stating:

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\(^4\) 467 F.2d 160 (2d Cir. 1972), cert. denied, 409 U.S. 1108 (1973). Defendant Lombardozzi was charged with agreeing to transport a stolen check across state lines. At the time, he was awaiting sentencing on a state perjury charge. Lombardozzi's claim on appeal was that his plea of guilty to the federal charge was made on the basis of a promise made to him by a federal agent that any federal sentence resulting from his plea would run concurrently with, and no longer than, any sentence he received on the state perjury charge. Id. at 161.

\(^5\) United States v. Hudson, 609 F.2d at 1328-29 (citing United States v. Lombardozzi, 467 F.2d 160, 163 (2d Cir. 1972), cert. denied, 409 U.S. 1108 (1973)).

\(^6\) United States v. Lombardozzi, 467 F.2d at 162.

\(^7\) Even though it cited and relied to some degree on the "authority" of Lombardozzi, the Hudson court apparently recognized that the former case was factually dissimilar in a number of critical respects. The Hudson court noted that, in Lombardozzi, the defendant "knew the agent could not bind the Department of Justice and the agent never guaranteed the defendant anything." United States v. Hudson, 609 F.2d at 1329. The Hudson court also acknowledged that defendant Lombardozzi, prior to his sentencing, assured the trial court that there had been no inducements of which the court had not been informed. Id. There were no similar facts or knowledge on the part of defendant in Hudson.

\(^8\) The court noted, but expressed no opinion on, the issue of whether Hudson, under other circumstances, would be entitled to assert third party beneficiary status to an agreement such as that which defendant Hudson maintained was made. Id. at 1329 n.5. (citation omitted).

\(^9\) Id. at 1329.
While we do not suggest that federal agents as a matter of law may never bind the prosecution to promises made to criminal defendants, . . . we do hold that under the facts of this case, where a federal agent is alleged to have made a promise clearly outside his authority and the defendant has incurred no detriment in reliance upon the promise, fundamental fairness does not require that the United States Attorney abide by the agent's promise.497

II. PROCEDURAL RIGHTS OF THE ACCUSED

A. The Right Against Self-Incrimination

The fifth amendment to the United States Constitution provides, in part, that "no person shall be compelled in any criminal case to be a witness against himself."498 It prohibits the government from compelling self-incriminating answers in any proceeding, judicial or extrajudicial, criminal or civil, if they possibly could subject the individual to criminal responsibility.499

During the 1980 term, the United States Supreme Court considered whether the fifth amendment privilege extends to false immunized testimony500 and prearrest silence.501 In addition, the Supreme Court more specifically defined "interrogation"502 within the meaning of Miranda v. Arizona.503

At the same time, the Ninth Circuit examined the scope of the fifth amendment privilege as it applies to income tax returns.504

I. Use of immunized testimony

In United States v. Apfelbaum,505 the Supreme Court held that neither the federal immunity statute506 nor the fifth amendment barred

497. Id.
498. U.S. CONST. amend. V.
504. United States v. Neff, 615 F.2d 1235 (9th Cir. 1980); United States v. Carlson, 617 F.2d 518 (9th Cir. 1980).
506. 18 U.S.C. § 6002 (1976) provides that when a witness is compelled to testify over his claim of a fifth amendment privilege, no testimony or other information compelled under the order to testify may be used against the witness in any criminal case, "except [in] a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." (emphasis added).
the use of respondent's immunized grand jury testimony at a subsequent prosecution for making false statements during that testimony.\textsuperscript{507} In \textit{Apfelbaum}, the Government compelled respondent, who had asserted his constitutional right to remain silent, to testify before a federal grand jury after granting him immunity pursuant to section 6002 of title 18 of the United States Code.\textsuperscript{508} Respondent was later indicted and convicted under section 1623(a) of title 18\textsuperscript{509} for false swearing during his grand jury testimony. At trial, respondent had objected to the use of his immunized testimony except the portions charged in the indictment as false, but the trial court admitted other portions of the testimony as being relevant to prove that he had knowingly made the charged false statements.\textsuperscript{510}

The Third Circuit reversed the trial court, holding that because such immunized testimony did not constitute the "corpus delicti" or "core" of the false statements offense, it could not be admitted.\textsuperscript{511} The Supreme Court granted certiorari because its own conflicting authority had led to differences among the circuits on this issue.\textsuperscript{512}

\textsuperscript{507} 445 U.S. at 117.
\textsuperscript{508} Id.; see supra note 506.
\textsuperscript{509} 18 U.S.C. § 1623(a) (1976) provides in pertinent part that "[w]hoever under oath in any proceeding before . . . a grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."
\textsuperscript{510} 445 U.S. at 119.
\textsuperscript{511} 584 F.2d 1264, 1265 (3d Cir. 1978), rev'd, 445 U.S. 115 (1980).
\textsuperscript{512} 445 U.S. at 119. In Counselman v. Hitchcock, 142 U.S. 547 (1892), the Supreme Court stated that an immunity statute "[c]annot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect." \textit{Id.} at 585. This principle was recently cited with approval in New Jersey v. Portash, 440 U.S. 450, 456-57 (1979). Thus, prior to \textit{Apfelbaum}, the Supreme Court apparently maintained that a valid immunity statute must have the same effect as the fifth amendment, i.e., the involuntary witness must be left in the same position as if he had never testified.

The \textit{Apfelbaum} Court explained that this requirement was a misconception because properly drawn immunity statutes had long been recognized as valid, 445 U.S. at 125, and because prosecution for making false statements during immunized testimony was constitutionally permitted. \textit{Id.} at 126 (citing United States v. Wong, 431 U.S. 174 (1977); United States v. Mandujano, 425 U.S. 564 (1976)). The Court reasoned that the Constitution does not, therefore, require an immunity statute to have the same effect as the fifth amendment because the mere grant of immunity and consequent compulsion to testify places a witness asserting his fifth amendment privilege in the dilemma of having to decide whether to answer the questions truthfully or falsely, a position he never would have been in had he simply been permitted to remain silent upon the invocation of his privilege. 445 U.S. at 120-21 n.6.

The \textit{Apfelbaum} Court also cited language in recent decisions as a source of difficulty for the courts of appeals. This language, "if taken literally, would preclude the introduction of immunized testimony even for the purpose of establishing the 'corpus delicti' or core of the
In a well reasoned opinion, the Court eliminated this confusion, holding that "neither the immunity statute nor the Fifth Amendment precludes the use of [a] respondent's grand jury testimony at a subsequent prosecution for making false statements, so long as that testimony otherwise conforms to applicable rules of evidence." After concluding that section 6002 creates a blanket exemption from the bar against the use of such testimony where the witness is subsequently prosecuted for making false statements, the Court addressed the constitutional question. The Court stated that it was "analytically incorrect to equate the effect of remaining silent as a result of the invocation of the Fifth Amendment privilege with the protections conferred by the privilege." It concluded that "[f]or a grant of immunity to provide protection 'coextensive' with that of the Fifth Amendment, it need not perjury offense." Id. (citations omitted); see Kastigar v. United States, 406 U.S. 441 (1972), where the Supreme Court upheld the constitutionality of an immunity statute, but stated that the statute "prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." Id. at 453 (emphasis in original); see also New Jersey v. Portash, 440 U.S. 450, 459 (1979), where the Supreme Court stated that "[t]estimony given in response to a grant of legislative immunity is the essence of coerced testimony [and involves] the constitutional privilege against self-incrimination in its most pristine form." The Court also stated that "a defendant's compelled statements may not be put to any testimonial use whatsoever against him in a criminal trial" because to do so would be a denial of due process of law. Id.

As a result of this confusing language, the Seventh Circuit in United States v. Patrick, 542 F.2d 381, 385 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977), and the Third Circuit in United States v. Apfelbaum, 584 F.2d 1264, 1265 (3d Cir. 1978), rev'd, 445 U.S. 115 (1980), had held that the Government may introduce into evidence only so much of the witness' testimony as is essential to establish the "corpus delecti" of the offense of perjury. The Second and Tenth Circuits, on the other hand, had held that false, but not truthful, immunized testimony is admissible in a subsequent prosecution for perjury. See United States v. Berardelli, 565 F.2d 24, 28 (2d Cir. 1977); United States v. Moss, 562 F.2d 155, 165 (2d Cir. 1977), cert. denied, 455 U.S. 914 (1978); United States v. Housand, 550 F.2d 818, 822 (2d Cir.), cert. denied, 431 U.S. 970 (1977); United States v. Dunn, 577 F.2d 119, 125-26 (10th Cir. 1978), rev'd on other grounds, 442 U.S. 100 (1979). Finally, the Sixth and Eighth Circuits had held that any portion of immunized testimony may be used for any purpose in such a prosecution. Daniels v. United States, 196 F. 459, 462-63 (6th Cir. 1912); Edelstein v. United States, 149 F. 636, 642-44 (8th Cir. 1906).

513. 445 U.S. at 131.

514. Id. at 121. The Court concluded that the language of § 6002 makes no distinction between truthful and untruthful statements made during the course of giving immunized testimony. Id. It also noted that the immunity statute's legislative history made it evident that "Congress intended to permit the use of both truthful and false statements made during the course of immunized testimony in a subsequent prosecution for perjury if such use was not prohibited by the fifth amendment." Id. at 123. To reach its conclusion, the Court relied on both Senate and House of Representative Reports concerning the proposed § 6002 immunity legislation. S. Rep. No. 617, 91st Cong., 1st Sess., 145 (1969); H.R. Rep. No. 1549, 91st Cong., 2d Sess., 42 (1970).

515. 445 U.S. at 127. See generally cases cited and discussion supra note 514.
leave the witness as if he had remained silent.”

The Court reasoned that the “Fifth Amendment did not prevent the use of respondent’s immunized testimony at his trial because, at the time he was granted immunity, the privilege did not protect him against false testimony that he might later decide to give.” In other words, a future intention to commit perjury does not create a substantial and real hazard of incrimination.

The result of the Court’s decision as it applies to the specific facts in Apfelbaum is sound. The Court’s holding, however, that neither “the [immunity] statute nor the Fifth Amendment requires that the admissibility of immunized testimony be governed by any different rules than other testimony at a trial for making false statements,” sweeps more broadly than the facts in Apfelbaum required. In Apfelbaum petitioner was prosecuted for making false statements while giving immunized testimony. As Justice Blackmun noted, the Court’s statement of its holding . . . makes no distinction between a prosecution for false testimony given under a grant of immunity and a prosecution for false testimony in other contexts . . . . There is no occasion to determine whether the immunized testimony could have been used to prove perjury or false statements occurring at some other time.

Nonetheless, the Court has at least eliminated the considerable confusion surrounding the issue whether immunized testimony, false or not, is admissible in a prosecution for perjury during that testimony.

2. Use of prearrest silence

In a recent decision, Jenkins v. Anderson, the Supreme Court held that prearrest silence prior to an affirmative assertion of the right

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516. Id.
517. Id. at 130.
518. Id. at 128. The Court stated that “[t]he central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination.” Id. (quoting Marchetti v. United States, 390 U.S. 39, 53 (1968)).

The Marchetti Court stated that the law must look not to whether the act is a past or a prospective occurrence, but instead solely to the substantiality of the risks of incrimination. 390 U.S. at 54. Thus, the Court held that the privilege against self-incrimination was not entirely inapplicable to prospective acts, although it did indicate that, ordinarily, prospective acts will involve only speculative and insubstantial risks of incrimination. Id. at 54.
519. 445 U.S. at 117.
520. Id. at 118.
521. Id. at 133 (Blackmun, J., concurring).
to remain silent may be used to impeach a defendant's credibility without violating the fifth amendment or the fundamental fairness guaranteed by the fourteenth amendment.\textsuperscript{523} The Court rejected petitioner's contention that use of his prearrest silence for impeachment constituted a denial of due process under \textit{Doyle v. Ohio}.\textsuperscript{524}

At his trial in a Michigan state court for first degree murder, petitioner testified that he had acted in self-defense.\textsuperscript{525} On cross-examination, the prosecutor questioned him concerning his silence about his involvement in the crime until two weeks after the killing when he surrendered to government authorities. The prosecutor referred again to petitioner's prearrest silence in closing argument, suggesting that he would have spoken sooner had he really killed in self-defense.\textsuperscript{526} Petitioner was convicted and the Sixth Circuit affirmed.\textsuperscript{527}

The Supreme Court affirmed, relying on \textit{Raffel v. United States} and \textit{Brown v. United States}.\textsuperscript{528} In \textit{Raffel}, the Supreme Court held that the fifth amendment is not violated when a defendant who testifies at his second trial is impeached by his prior silence during his first trial.\textsuperscript{529} In \textit{Brown}, the Court held that a defendant who takes the stand on his own behalf waives the right to invoke on cross-examination the privilege against self-incrimination regarding matters made relevant by his direct examination.\textsuperscript{530}

Using the \textit{Brown} rationale to extend the \textit{Raffel} holding, the Supreme Court in \textit{Jenkins} held that the fifth amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility.\textsuperscript{531} The Court distinguished this rule from the fifth amendment

\begin{footnotes}
\item[523] Id. at 238.
\item[524] 426 U.S. 610, 617 (1976) (prosecution's cross-examination revealing defendant's silence after arrest and after \textit{Miranda} warnings violates due process).
\item[525] 447 U.S. at 232.
\item[526] Id. at 233-34.
\item[527] Id. at 234.
\item[528] 271 U.S. 494 (1926).
\item[530] 271 U.S. at 495-97. The \textit{Raffel} Court explicitly rejected the contention that the possibility of impeachment by prior silence is an impermissible burden upon the exercise of fifth amendment rights. The Court stated: "We are unable to see that the rule that [an accused who] testifies . . . must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not." \textit{Id.} at 499.
\item[531] 356 U.S. at 157. The Court in \textit{Brown} stated that it was the choice of the defendant whether to take the witness stand and risk cross-examination. Therefore, once a defendant decides to testify, "the interests of the other party and regard for the function of the courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." \textit{Id.} at 156.
\item[532] 447 U.S. at 238.
\end{footnotes}
prohibition against the prosecution commenting on the silence of a defendant who asserts the right to remain silent during his criminal trial.\textsuperscript{533} In \textit{Jenkins}, petitioner was silent \textit{before} arrest but later chose to testify. The Court stated that such impeachment was proper in that it followed the petitioner's own decision to testify, and became important in advancing the truth-finding function of the criminal trial.\textsuperscript{534}

In finding that the use of petitioner's prearrest silence in \textit{Jenkins} comported with due process, the Court noted that the defendant in \textit{Doyle v. Ohio}\textsuperscript{535} was silent after he had been informed by the police of his right to remain silent.\textsuperscript{536} Use of his silence violated due process because of the implicit assurance given in the warning that it would not be used.\textsuperscript{537} Because petitioner's silence in \textit{Jenkins} was prior to any government warning, its use was permissible.\textsuperscript{538}

3. Interrogation within the meaning of \textit{Miranda}

The Supreme Court recently considered the admissibility of statements of an in custody suspect following \textit{Miranda} warnings. In \textit{Rhode Island v. Innis},\textsuperscript{539} the Court defined \textit{interrogation} within the meaning of \textit{Miranda v. Arizona}.\textsuperscript{540} In \textit{Innis}, a taxicab driver, who had been robbed

\begin{footnotesize}
\textsuperscript{533} \textit{Id.} at 235 (citing Griffin v. California, 380 U.S. 609, 614 (1965)).
\textsuperscript{534} 447 U.S. at 238.
\textsuperscript{535} 426 U.S. 610 (1976).
\textsuperscript{536} 447 U.S. at 239-40.
\textsuperscript{537} \textit{Id.} at 240 (citing Doyle v. Ohio, 426 U.S. 610, 617 (1976)).
\textsuperscript{538} \textit{Id.} The Court's analysis is defensible. The \textit{Doyle} Court predicated its holding upon the defendants' having been advised of their right to remain silent by government authorities prior to their exercising it. 426 U.S. at 617. Nevertheless, \textit{Jenkins} results in the anomaly that while the right to remain silent does not arise from the \textit{Miranda} warnings, evidence of its exercise is constitutionally protected only if it follows \textit{Miranda} warnings given by the government.

While the Court's reliance on \textit{Raffel} regarding the fifth amendment issue is suspect, see 447 U.S. at 245-46 n.10 (Stevens, J., concurring); \textit{id.} at 252 (Marshall, J., dissenting), it, too, is technically defensible. \textit{Raffel} was never expressly overruled. The critical defect in \textit{Jenkins} is its effect. As Justice Marshall observed, "[t]o penalize [petitioner] for failing to relinquish his privilege against self-incrimination by permitting the jury to draw an adverse inference from his silence . . . replaces the privilege against self-incrimination with a duty to incriminate oneself." 447 U.S. at 250 (Marshall, J., dissenting) (citation omitted). It forces one, before being accused, to incriminate oneself voluntarily or to face the prospect of an attack on one's subsequent testimony based on the failure to volunteer a statement to the police. This tension between the right against self-incrimination and the right to testify in one's own defense is "an intolerable burden on the exercise of those rights." \textit{Id.} at 254 (Marshall, J., dissenting).

\textsuperscript{539} 446 U.S. 291 (1980).
\textsuperscript{540} 384 U.S. 436 (1966). The \textit{Miranda} standards include as constitutional safeguards the requirements that the defendant be informed that he has the right to remain silent, and that anything he does say can be used against him in a court of law. \textit{Id.} at 479. In addition, he
by a man wielding a sawed-off shotgun, identified a picture of respondent as that of his assailant. Shortly thereafter, a patrolman arrested respondent on the street, and advised him of his *Miranda* rights. When other police officers arrived at the arrest scene, respondent, who was unarmed, was advised twice again of his *Miranda* rights. Respondent stated that he understood his rights and wanted to speak with an attorney.\(^{441}\)

Respondent was then placed in a police car to be driven to the central station in the company of three police officers, who had been instructed not to question him or intimidate him in any way.\(^{442}\) While en route to the station, two of the officers discussed the missing shotgun. One stated that there were “a lot of handicapped children running around in this area” because a school for handicapped children was located nearby, and “God forbid one of them might find a weapon with shells and they might hurt themselves.”\(^{443}\) Respondent then interrupted the conversation, stating that the officers should turn the car around so that he could show them where the gun was located.\(^{444}\)

Upon returning to the arrest scene where a search for the gun was in progress, respondent was again advised of his *Miranda* rights. He replied that he understood those rights but that he wanted to get the gun out of the way because of the children located in the area. He then led the police to the shotgun.\(^{445}\)

Respondent was convicted of kidnapping, robbery, and the murder of another taxicab driver.\(^{446}\) The trial court, denying respondent’s motion to suppress the shotgun and the statements he had made to the police regarding its discovery, ruled that he had waived his *Miranda* rights.\(^{447}\)

The Rhode Island Supreme Court set aside the conviction and held that respondent was entitled to a new trial.\(^{448}\) The court concluded that Innis had invoked his *Miranda* right to counsel, and that, contrary to *Miranda’s* mandate that in the absence of counsel all custo-

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\(^{441}\) 446 U.S. at 294.

\(^{442}\) Id.

\(^{443}\) Id. at 294-95.

\(^{444}\) Id. at 295.

\(^{445}\) Id.

\(^{446}\) Id. at 295-96.

\(^{447}\) Id. at 296.

\(^{448}\) Id. at 296-97.
diary interrogation must cease, the officers in the vehicle had "interrogated" respondent without a valid waiver of his right to counsel.549

The United States Supreme Court had decided previously in Brewer v. Williams550 that the sixth amendment right to counsel prohibited law enforcement officers from deliberately eliciting incriminating information from a defendant in the absence of counsel after a formal charge against the defendant had been filed.551 Because respondent in Brewer had already been arraigned when his statements were elicited, the Court was able to base its holding on the sixth amendment right to counsel rather than on the fifth amendment privilege against self-incrimination. With Innis, the Court was confronted with a similar fact situation without the sixth amendment application because the statements had been elicited prior to any "critical stage" proceedings. The Court consequently had to formulate a working definition of "interrogation" to determine whether or not respondent's statements should have been suppressed.552

While the Innis Court held that interrogation may be conducted indirectly, it concluded that Innis' statements were not a reasonably foreseeable response to the officers' conversation and, thus, were not the product of an unlawful interrogation.553 It concluded that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.554 In other words, "interrogation" includes any words or actions on the part of the police that they should know are reasonably likely to elicit an incriminating response from the suspect.555 The Court stated that this functional-equivalent analysis focuses primarily upon the perception of

549. Id. at 296.
550. 430 U.S. 387 (1977). In Brewer, the defendant responded to what has been labeled "the Christian Burial Speech" while he was being driven to Des Moines, Iowa, after he had been arrested, arraigned, and briefly jailed for abducting a ten year old girl. The speech was made by a police officer who was aware that the defendant was a former mental patient and also deeply religious. In the speech, the officer urged the defendant to locate the girl's body because her parents were entitled to a Christian burial for the child, who had been abducted on Christmas Eve. The defendant eventually made several incriminating statements and finally directed the police to the girl's body. Id. at 392-93.
551. 430 U.S. at 401.
553. 446 U.S. at 302-03.
554. Id. at 300-01.
555. Id. at 301.
the suspect, rather than upon the intent of the police.\textsuperscript{556}

Thus, the Supreme Court refused to adopt a strict "hands-off" rule concerning police conduct once the suspect has chosen to exercise his right to remain silent under \textit{Miranda}. Instead, it opted for a more flexible standard whereby the courts will decide on a case by case basis whether police should have known that their words or conduct were reasonably likely to elicit an incriminating response.

In his dissent, Justice Marshall\textsuperscript{557} stated that while he was in substantial agreement with the majority's definition of interrogation, he believed the majority had failed to apply faithfully its own test to the facts of the case.\textsuperscript{558} He argued that the police officers' conduct amounted to a patent psychological appeal to the conscience of the petitioner, and that this factor should not be overlooked simply because the officers were supposedly talking among themselves instead of directly to the petitioner.\textsuperscript{559}

Justice Stevens, in a separate dissenting opinion,\textsuperscript{560} remarked that under the majority's holding, a suspect is afforded considerably less protection than that granted by \textit{Miranda}.\textsuperscript{561} If a suspect does not appear to be susceptible to a particular type of psychological pressure, the police are apparently free to exert that pressure on him despite his request for counsel, as long as they are careful not to punctuate their statements with question marks. If, contrary to reasonable expectation, the suspect makes an incriminating statement, that statement can be used against him at trial. In its desire to protect the admissibility of a suspect's statements to law enforcement officials, the \textit{Innis} Court encourages police to devise indirect means of eliciting statements.

4. Assertion of the privilege in federal tax returns

In two recent decisions the Ninth Circuit examined the effect of

\begin{itemize}
  \item \textsuperscript{556} Id.
  \item \textsuperscript{557} Id. at 305 (Marshall, J., dissenting).
  \item \textsuperscript{558} Id. He also noted that the case was an "aberration." \textit{Id.}
  \item \textsuperscript{559} Id. at 306. Marshall's argument seems to be a valid criticism of the majority opinion in that it appeared from the facts in \textit{Innis} that the police officers' conversation might elicit a self-incriminating response from the petitioner. Under the majority's definition, this would appear to constitute a form of interrogation.
  \item \textsuperscript{560} Id. at 307 (Stevens, J., dissenting).
  \item \textsuperscript{561} Id. at 311-12. Justice Stevens argued that in order to give full protection to a suspect's right to be free of any form of interrogation once his \textit{Miranda} rights have been exercised, "the definition of 'interrogation' must include any police statement or conduct that has the same purpose or effect as a direct question." \textit{Id.} at 311. He went on to argue that any statement that appears to call for a response from the suspect, as well as those that are designed to do so, should be considered interrogation. \textit{Id.}
\end{itemize}
the fifth amendment on self-incriminating assertions made in tax
returns.

In United States v. Neff, the Ninth Circuit rejected appellant’s
assertion of his privilege against self-incrimination in response to each
federal income tax return question requesting financial information. Neff had submitted individual tax return forms in 1974 and 1975 with
the words “Object: Self-Incrimination” printed in response to each
question requesting financial and tax status information. After the IRS
notified Neff that the returns were unacceptable, he refused to complete
the tax returns, claiming that to do so would waive his right to fifth
amendment protections. He was subsequently convicted, under In-
ternal Revenue Code section 7203, of two counts of willful failure to
file income tax returns. On appeal, the Ninth Circuit was asked to con-
sider Neff’s claim that he was denied his privilege against self-incrim-
nation when forced to complete his income tax returns.

The Supreme Court was confronted with a related issue in United
States v. Sullivan. The Supreme Court held that the privilege
against self-incrimination does not justify an outright refusal to file any
income tax return. An objection may be raised properly only in re-
response to specific questions asked in the return. If the privilege
against self-incrimination is validly exercised in response to specific
questions asked in the return, it constitutes an absolute defense to a
prosecution for willful failure to file an income tax return.

Other circuits, when faced with wholesale assertions of the privi-
lege against self-incrimination similar to those in Neff, have held that
such assertions constitute an outright refusal to file a return, and that
consequently the fifth amendment defense to a section 7203 prosecu-

562. 615 F.2d 1235 (9th Cir. 1980).
563. Id. at 1237.
564. Id.
565. I.R.C. § 7203 (1976) provides in pertinent part that “any person required . . . to pay
. . . tax, or required . . . to make a return . . . who willfully fails to pay such . . . tax [or]
make such return . . . shall . . . be guilty of a misdemeanor . . . .”
566. 274 U.S. 259 (1927).
567. Id. at 263.
568. Id.; see Garner v. United States, 501 F.2d 228, 239 n.18 (9th Cir. 1974) (en banc),
569. Garner v. United States, 424 U.S. 648, 662-63 (1976) (questions on income tax re-
turns are “neutral on their face and directed at the public at large”); Albertson v. SACB, 382
§ 7203, there must be something peculiarly incriminating about his circumstances that justi-
fies his reliance on the fifth amendment.” United States v. Neff, 615 F.2d at 1239 (9th Cir.
1980).
tion is invalid under Sullivan. The Neff court criticized this approach as simply an avoidance of the fifth amendment issue and held that each invocation of the fifth amendment must be independently analyzed. In affirming appellant's conviction, the court held that the response to each unanswered question must present a "real and appreciable danger" of incrimination before reliance on the fifth amendment is justified. The court stated that in determining whether a real and appreciable danger of incrimination exists, the trial court must examine the implications of the questions and the setting in which they are asked. In addition, the trial court "must be governed as much by [its] personal perception of the peculiarities of the case as by the facts actually in evidence." Applying these criteria to the facts of Neff, the court concluded that appellant had no valid fifth amendment defense to the section 7203 prosecution. Appellant's refusal to complete the forms was motivated, if by anything, by a desire to protest taxes, rather than by a fear of self-incrimination, and "at no point during the trial . . . was the district judge presented with any indicia of potential incrimination."

Whereas Neff concerned the validity of a fifth amendment assertion made in a tax return to avoid self-incrimination for non-tax law violations, United States v. Carlson raised the question whether the privilege against self-incrimination may be validly asserted in a tax return to avoid self-incrimination for a past violation of income tax laws. The Carlson decision is especially noteworthy in that it presented a question of first impression not only to the Ninth Circuit, but also to the United States Supreme Court and the federal circuit courts. In Garner v. United States, the Supreme Court had held that the privilege against self-incrimination, if validly exercised, is an

571. 615 F.2d at 1238-39.
572. Id. at 1239.
573. Id. (citing Marchetti v. United States, 390 U.S. 39, 48 (1968)).
574. Id. at 1239-40.
575. Id. at 1240 (citing Hoffman v. United States, 341 U.S. 479, 486-87 (1951)).
576. Id. at 1240-41. Appellant had appended 100 pages of protest material to his incomplete forms. Id. at 1237. At trial, he presented no evidence to the trial judge to substantiate his fifth amendment claims. Id. at 1241.
577. 617 F.2d 518 (9th Cir. 1980).
578. Id. at 520.
579. Id.
absolute defense to a section 7203 prosecution for failure to file an income tax return. The Garner Court, however, expressly limited its holding to only those claims of privilege justified by a fear of self-incrimination for crimes other than those under the tax laws.

In Carlson, appellant, a tax protester, utilized a tax evasion scheme whereby he first claimed ninety-nine invalid withholding exemptions on a withholding tax form, and later refused on fifth amendment grounds to provide any information from which his tax liability could be calculated on his year-end federal income tax return. Appellant was convicted of failure to file a tax return over his defense that he had validly asserted his fifth amendment privilege. He argued that the fifth amendment constituted a valid defense to his refusal to file a return on the ground that a truthfully completed return would have constituted evidence tending to incriminate him as to the filing of the previous false withholding form. Although conceding that a truthfully completed return would have provided incriminating evidence to appellant, the Ninth Circuit refused to uphold the validity of his fifth amendment claim. The court stated that an individual who seeks to frustrate the tax laws by claiming too many withholding exemptions, with an eye to covering that crime and evading the tax return requirement by assertion of the fifth amendment, is not entitled to that amendment's protection. In reaching this conclusion, the Ninth Circuit adopted the balancing approach advocated by the Supreme Court in California v. Byers, whereby the public need for the disclosure requirement is balanced against the individual's claim to constitutional protections. The Ninth Circuit held that the importance of the pub-

581. Id. at 662-63.
582. Id. at 650 n.3.
583. 617 F.2d at 519.
584. Id.
585. Id.
586. Id. at 523.
587. Id.
589. The Byers Court stated:

Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

Id. at 427.

The decision concerned §20002(a)(1) of the CAL. VEH. CODE (West 1971), which requires anyone involved in an automobile accident resulting in damage to property to stop and furnish his name and address at the scene of the accident. The plurality opinion never reached the balancing stage because it held that the statute compelled non-testimonial be-
lic revenue interests far outweighed the importance of protecting Carlson's patently calculated scheme to avoid the payment of taxes.\textsuperscript{590}

The result in \textit{Carlson} may seem reasonable given appellant's premeditated scheme to violate the law and subsequently immunize himself from prosecution via his privilege against self-incrimination. However, in less clear-cut circumstances, for example where no obvious tax evasion scheme is present, balancing the defendant's constitutional protections against the public's need for revenue could seriously undermine fifth amendment protection.\textsuperscript{591} The apparent willingness of the Ninth Circuit to balance constitutional guarantees against what the court might deem to constitute the public need is simplistic. The statute in \textit{Byers} required a driver of a vehicle involved in an accident with property damage to give the owner of that property his name and address. The statute promoted satisfaction of civil liability arising from automobile accidents.\textsuperscript{592} Absence of such a statute would preclude, as a practical matter, most successful prosecutions of driving violations resulting in accidents.\textsuperscript{593} No better alternative exists to serve this statute's purpose. In problems incident to the federal statute requiring the filing of tax returns and to prosecutions for failure to file such returns, however, an equally effective alternative exists. A restriction limiting the use of compulsory information on tax returns to the collection of taxes would preserve the fifth amendment privilege while accommodating the government's interest in securing revenue from the public.\textsuperscript{594}

\begin{itemize}
\item havior, rendering moot appellant's assertion of the fifth amendment claim on that ground. \textit{Id.} at 431-34.
\item Justice Harlan in his concurring opinion disagreed with the majority and instead found that the statute compelled testimony. \textit{Id.} at 434 (Harlan, J., concurring). He then applied the balancing test to the statute in question and concluded that the fifth amendment defense was outweighed by the statute's demand for disclosure. \textit{Id.} at 448-49 (Harlan, J., concurring).
\item 590. 617 F.2d at 523.
\item 591. The Ninth Circuit noted that it is possible that the crime of claiming too many withholding allowances, even when not undertaken as part of a scheme such as appellant's, may never be protected by the assertion of the fifth amendment privilege on a tax return because of the "character and urgency of the tax laws." 617 F.2d at 523 n.6.
\item 592. 402 U.S. at 430.
\item 593. \textit{Id.} at 443.
\item 594. Prosecution of willful failure to file a tax return is normally based on evidence from collateral sources. The government does not ordinarily depend upon self-provided information to develop its case as it does in the hit and run context considered in \textit{Byers}. The balancing proposed in \textit{Byers}, if adopted at all, should be restricted to situations in which the evidentiary problem is similarly acute.
\end{itemize}
B. The Right to Counsel

1. Attachment of the right

The right to the assistance of counsel flows from two sources: the fifth amendment right against self-incrimination and the sixth amendment right to counsel. While the fifth amendment derivation arises when a suspect is held for "custodial interrogation," the sixth amendment derivation attaches only with the institution of adversary judicial proceedings.

In 1980, the Ninth Circuit decided two cases dealing with this issue. In United States v. Zazzara, the defendant claimed that his right to effective assistance of counsel had been violated by the failure of his attorney, Kirk, to render adequate assistance at an FBI interview. In order to question Kirk, Zazzara's friend and business partner, an FBI agent had gone to Kirk's office. By coincidence, Zazzara, whom the agent also had wanted to interview, was at the office when the agent arrived. Deciding to interview Zazzara instead, the agent read him his Miranda warnings. Kirk acted as Zazzara's attorney, but did not object to any of the questions asked by the agent. At the time of the interview, the FBI investigation into Zazzara's activities had just begun; he had been neither arrested nor indicted.

The court of appeals rejected the defendant's contention of ineffective assistance, finding that the defendant had no constitutional right to counsel at the time of the interview. In reaching this conclusion, the court examined both the fifth and sixth amendment sources of the right. First, the court held that the fifth amendment right to counsel had not attached because the interview was not "custodial.

595. U.S. Const. amend. V provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

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


600. 626 F.2d 135 (9th Cir. 1980).

601. See infra text accompanying notes 652-91.

602. Id. at 137-38.

603. Id.

604. Id. at 137-38.

605. Id. The court noted that the test used by the Ninth Circuit to determine when an interrogation is "custodial" is "whether a reasonable person would have believed himself to be in custody." Id. at 137. The court found that a reasonable person would not have
the court held that the defendant did not have a sixth amendment right to counsel because at the time of the interview he had not been "arrested or indicted." 606

In the other 1980 case, United States v. Erwin, 607 the defendant argued that her rights of notice and an opportunity to be heard under the due process clause of the fifth amendment were violated because the Government had prevented her attorney from attending a hearing for an order compelling her to submit to strip and body cavity searches. 608 The defendant had been detained by customs officials who had suspected that she had something hidden in a body cavity. The defendant's attorney learned of the officials' plan to seek the court order and requested from the assistant United States Attorney the name of the magistrate who would hear the order application. The request was refused, and the defendant's attorney was not present at the hearing. 609

Viewing the order application as the "functional equivalent" of a request for a search warrant, "traditionally an ex parte proceeding," 610 the Ninth Circuit ruled that since the defendant would not have had a right to the presence of counsel at a search warrant application proceeding, she did not have the right to have counsel present in this proceeding. 611

thought himself to be in custody at the interview in this case because the encounter was coincidental and the record showed that the FBI agent exerted no pressure on the defendant to stay and answer questions. For an example of a case where the Ninth Circuit has held that the defendant reasonably could have believed that he was in custody, see United States v. Kennedy, 573 F.2d 657, 660-61 (9th Cir. 1978) (four agents stopped defendant's car, put him in their vehicle, and questioned him for 45 minutes about his past criminal acts; defendant's belief that he was in custody held reasonable).

606. 626 F.2d at 138; see also Brewer v. Williams, 430 U.S. 387, 398-99 (1977); Kirby v. Illinois, 406 U.S. 682, 690 (1972); United States v. King, 472 F.2d 1, 5 (9th Cir.), cert. denied, 414 U.S. 916 (1971);

607. 625 F.2d 838 (9th Cir. 1980).

608. The defendant raised no right to counsel claim under either the fifth amendment self-incrimination clause or the sixth amendment. The self-incrimination clause would not apply because she was not in custody and subject to interrogation at the time of the order application. The sixth amendment would also be inapplicable because she had not been indicted or formally charged at that time.

609. 625 F.2d at 840.

610. Id.

611. Id. The court cited no authority for its position other than the ex parte tradition of search warrant application hearings. The result is also supported by a consideration of the desirability of having the Government obtain a court order prior to conducting a body cavity search. The Ninth Circuit has noted the benefits of such a procedure, but has held that the Government is not required to obtain a court order before conducting a body cavity examination in a border search context. See United States v. Cameron, 538 F.2d 254, 258-
The Ninth Circuit distinguished the District of Columbia Circuit's decision in *United States v. Crowder*, which involved a "search" via a "surgical exploration of the accused's body." The *Crowder* court had approved the lower court's imposition of a full adversary hearing at which the defendant was represented by counsel before issuing a search warrant authorizing the surgery. However, the special health risk present in *Crowder* was the missing factor in *Erwin*. By distinguishing *Crowder*, the *Erwin* court implicitly recognized, however, that in special circumstances, such as where a dangerous procedure is to be used, a suspect may have a due process right to the presence of counsel at an application hearing.

2. The right to appointed counsel

The sixth and fourteenth amendments require states to afford an indigent defendant the right to appointed counsel in criminal proceedings. This requirement applies to both felonies and misdemeanors. However, the Supreme Court has held that this right is limited. In *Scott v. Illinois*, the Court ruled that imposition of imprisonment triggered an indigent's right to appointed counsel. The Court held that defendant Scott had no right to appointed counsel in a misdemeanor prosecution where, although the misdemeanor charge carried a possible prison sentence, he was only fined. Thus, under *Scott*, a misdemeanor conviction which results in a prison sentence is constitutionally

59 (9th Cir. 1976) (search warrant obtained before a body cavity examination can help allay the apprehensions of suspects and assure that the search is conducted in a reasonable manner). A rule requiring the presence of suspects' counsel at hearings for orders compelling submission to body cavity searches might discourage the Government from using this discretionary procedure and, thus, its benefits would be lost. Cf. *United States v. Duvall*, 537 F.2d 15, 22 (2d Cir.) (a holding that the right to counsel is triggered by the use of an arrest warrant predicated on a complaint, but not triggered by the use of an arrest warrant predicated on an affidavit, would tend to discourage the former's use, whereas the policy should be to encourage it), *cert. denied*, 426 U.S. 950 (1976).


613. 625 F.2d at 840.

614. 543 F.2d at 316. The *Erwin* court misconstrues *Crowder* by stating that *Crowder* had "required the presence of counsel" at the search warrant application hearing. 625 F.2d at 840. *Crowder* merely approved the district court's holding of a full adversary hearing; this procedure contributed to making the search reasonable. See 543 F.2d at 316.

615. 625 F.2d at 840.


619. Id. at 373-74.
valid only if the defendant was afforded "the right to assistance of appointed counsel in his defense."\(^{620}\)

In the latter part of its 1979 term, the Supreme Court in \textit{Baldasar v. Illinois}\(^{621}\) considered the issue of whether a \textit{Scott}-like conviction could be used under a repeat offender statute to convert a defendant's subsequent, counseled misdemeanor conviction into a felony with an increased prison term. Defendant Baldasar was first convicted for shoplifting, a misdemeanor punishable by not more than one year in prison and a fine not to exceed $1,000. Although Baldasar, an indigent, had not been represented by counsel at this proceeding, the conviction was valid under \textit{Scott} because the penalty imposed was a fine, not incarceration. A few months later, the defendant was again charged under the same statute, which provided that a second conviction could be treated as a felony with a prison term of one to three years.\(^ {622}\) Baldasar was represented by counsel at the second trial. Over defense objections that the prior conviction was too unreliable to support enhancement because Baldasar had been unrepresented, the prosecution introduced evidence of the first conviction and asked that the defendant be punished as a felon. The jury found Baldasar guilty on the felony charge, and he was sentenced to jail for one to three years.\(^ {623}\) Had the defense objections to the use of the first conviction been sustained, Baldasar could have been sentenced to prison for only one year.

In a per curiam opinion, the Supreme Court reversed the judgment and held that Baldasar's prior uncounseled conviction could not be used for the purpose of increasing the prison term of his subsequent conviction.\(^ {624}\) However, a five member majority could not agree on a common reason for the result. Separate rationales were given in three concurring opinions written by Justices Stewart,\(^ {625}\) Marshall,\(^ {626}\) and Blackmun.\(^ {627}\)

All five justices in the majority agreed that Baldasar had been sentenced to a prison term solely because of his prior uncounseled conviction.\(^ {628}\) Only four—Stewart, Marshall, Brennan, and Stevens—agreed

\(^{620}\) Id.
\(^{621}\) Id. at 222 (1980) (per curiam).
\(^{622}\) Id.
\(^{623}\) Id.
\(^{624}\) Id.
\(^{625}\) Id. (Stewart, J., concurring).
\(^{626}\) Id. (Marshall, J., concurring).
\(^{627}\) Id. (Blackmun, J., concurring).
\(^{628}\) See \textit{id.} at 224 (Stewart, J., concurring); \textit{id.} (Marshall, J., concurring); \textit{id.} at 229 (Blackmun, J., concurring).
that this use of the uncounseled conviction was improper because it was a violation of Scott. These four justices reasoned that Baldasar's uncounseled conviction was invalid under Scott for the purpose of imposing any term of imprisonment, whether it be for that conviction itself or to add to the penalty imposed for a subsequent conviction under a repeat offender statute.630

Justice Blackmun concurred. He argued that an indigent defendant must be afforded the right to assistance of appointed counsel whenever he is prosecuted for an offense punishable by more than six months imprisonment, exactly the punishment Baldasar faced in his first trial. Since Baldasar's first conviction was invalid under Justice Blackmun's approach, it should not have been used to enhance the second conviction's term of imprisonment.632 Citing his dissent in Scott, Justice Blackmun emphasized that his approach would provide a “measure of clarity for all concerned.”634

In an opinion written by Justice Powell, the four dissenting justices attacked the majority on two grounds. First, the dissenters contended that Baldasar's prior uncounseled conviction was constitutionally valid under Scott because no term of imprisonment had been given and therefore it could be used to enhance a prison sentence imposed for a subsequent offense. Justice Powell found support for this position in Scott, which he characterized as holding that "an uncounseled misdemeanor conviction is constitutionally valid if the offender is not jailed."637

The dissent's interpretation of Scott completely misconstrues that decision. In Scott, the Supreme Court expressly held that "no indigent criminal defendant [may] be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." The Court then affirmed the penalty imposed on the uncounseled defendant, a fine, because it did not involve incarceration. Scott therefore teaches that an uncounseled convic-

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629. See id. at 224 (Stewart, J., concurring); id. (Marshall, J., concurring). Justices Brennan and Stevens joined in both the concurring opinions of Justices Stewart and Marshall.
630. Id.
631. Id. at 230 (Blackmun, J., concurring).
632. Id.
633. 440 U.S. at 389 (Blackmun, J., dissenting).
634. 446 U.S. at 230 (Blackmun, J., concurring).
635. Id. at 230-35 (Powell, J., dissenting).
636. Id. at 230.
637. Id.
638. 440 U.S. at 374.
639. Id.
tion may be constitutionally valid if a fine is imposed and at the same
time be constitutionally invalid if a prison sentence is imposed. Noth-
ing in Scott suggests that if a fine is imposed for an uncounseled con-
viction, the conviction then becomes valid for all purposes.

Moreover, the Scott Court distinguished fines from incarceration
because of the central premise of Argensinger v. Hamlin: that actual
imprisonment is so severe a sanction it should be imposed only if the
defendant has been afforded the assistance of appointed counsel. The
enhanced portion of Baldasar's sentence was imposed solely be-
cause of the first, uncounseled conviction. Since nothing had
changed between the first and second convictions, either to reduce the
severity of a prison term or to remedy the uncounseled nature of the
first conviction, the Argensinger-Scott rationale should apply to pro-
hibit the state from enhancing Baldasar's prison sentence from a max-
imum of one year to a maximum of three years.

The second objection raised by the dissent was that the majority's
decision would create confusion and impose greater costs on local
courts. Justice Powell predicted that the confusion would arise be-
cause no judge could know whether a defendant was likely to become a
repeat offender. Thus, judges would be forced either to appoint
counsel for all indigents charged with enhanceable offenses, resulting in
higher costs for local governments, or forego the possibility of imposing
increased prison terms for subsequent offenses.

At least three justices disagreed with Justice Powell's assessment of
the difficulty of determining whether an indigent would become a re-
peat offender on the ground that the determination in many cases
would be a "relatively easy exercise of prosecutorial discretion." But
to a certain extent Justice Powell's predictions are probably accurate.

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641. 440 U.S. at 372-73.
642. See supra note 629.
643. For a similar approach excluding the admission of an uncounseled felony conviction
to enhance punishment for a subsequent offense, see Burgett v. Texas, 389 U.S. 109, 115
(1967).
644. 446 U.S. at 234 (Powell, J., dissenting).
645. Id. at 231.
646. Id. at 235.
647. Id. at 229 n.3 (Marshall, J., concurring).
648. The actual financial impact of Baldasar will not be as great as Justice Powell implies.
As of 1979, an indigent defendant charged with any crime carrying a possible jail term
greater than six months (the period covered by Baldasar) already would be entitled to ap-
pointed counsel under state law in at least 31 states. 440 U.S. at 386-88 nn.18-21 (Brennan,
J., dissenting). Furthermore, as a practical matter, appointed counsel is now constitutionally
However, the constitutional right of an indigent to be imprisoned only if he has been afforded the right to assistance of appointed counsel should outweigh the financial burden it imposes on local governments.649

While the result reached in Baldasar follows from Scott, it cannot be considered as an extension of that decision. Scott applies to all misdemeanor convictions.650 Baldasar is not as extensive. Justice Blackmun’s concurring opinion651 would limit Baldasar’s application to situations in which an uncounseled conviction carrying a potential penalty of greater than six months imprisonment is used to enhance the prison term of a subsequent conviction. The decision does not speak to prior convictions for offenses carrying a potential jail term of less than six months. In light of Justice Blackmun’s position, it is unlikely that Baldasar will be extended to cover these convictions.

3. Effective assistance of counsel

The sixth amendment of the Constitution guarantees the right to effective counsel.652 However, an accused’s right to effective counsel arises when either his fifth or sixth amendment right to counsel has been triggered. For example, in United States v. Zazzara,653 the Ninth Circuit addressed the question of effective assistance of counsel raised under both the fifth and sixth amendments.654

To then succeed on an ineffective counsel claim, the Ninth Circuit requires that an accused overcome on appeal a two-prong test set out in

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649. See 446 U.S. at 229 n.3 (Marshall, J., concurring); Bounds v. Smith, 430 U.S. 817, 825 (1977) (rejecting argument that state need not expend funds to ensure prison inmates’ constitutional right of access to courts: “[T]he cost of protecting a constitutional right cannot justify its total denial.”); Mayer v. Chicago, 404 U.S. 189, 196-97 (1971) (rejecting argument that financial burden to state justified providing free trial transcripts to indigent appellants only when appellants were subject to imprisonment). But see Scott v. Illinois, 440 U.S. 367, 373 (1979) (extension of indigents’ right to appointment of counsel not justified, in part, because of substantial costs which would be imposed on states).

650. See 440 U.S. at 373-74.

651. 446 U.S. at 230 (Blackmun, J., concurring).


653. 626 F.2d 135 (9th Cir. 1980).

654. Id. at 137. The court noted that the prerequisite to a claim of ineffective counsel is that the defendant had a constitutional right to counsel at the time in question.
Cooper v. Fitzharris. First, the defendant must at least show that his attorney failed to provide him with reasonably competent and effective representation. Under this first prong of Cooper, the Ninth Circuit will reject a claim if it finds either that no error was committed, or that the acts or omissions resulted from a reasonable trial strategy.

United States v. Sheker is an example of the latter kind of error. The defendant in Sheker had been convicted of impersonating an Internal Revenue Service agent to obtain a "thing of value," the whereabouts of a witness against him in a state criminal action. The defendant alleged that his attorney had erred by stipulating that the information which the defendant had sought was a "thing of value" within the meaning of the statute under which the defendant was charged. Rejecting this claim, the court found that the stipulation

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656. 586 F.2d at 1330.
657. See United States v. Zazzara, 626 F.2d 135, 138 (9th Cir. 1980) (counsel's failure to move to suppress indictment not error where motion would have been futile because there were no grounds to support it); United States v. Winston, 613 F.2d 221, 223 (9th Cir. 1980) (counsel's failure to request recusance not error because motion would have been improper); Cody v. Morris, 623 F.2d 101, 103 (9th Cir. 1980) (failure to make motion to suppress and to call certain witnesses not error under the Cooper standard); United States v. Brackenridge, 590 F.2d 810, 811 (9th Cir.) (per curiam) (failure to move for judgment of acquittal at end of prosecution's case did not constitute ineffective counsel where prosecution had presented sufficient evidence to convict defendant), cert. denied, 440 U.S. 985 (1979); United States v. Currie, 589 F.2d 993, 995 (9th Cir. 1979) (several failures by counsel not deemed constitutional errors); see also United States v. Collom, 614 F.2d 624, 634 (9th Cir. 1979) (counsel's failure to obtain certain information about co-defendant not error where counsel effectively presented an abundance of such information to the jury) (decided prior to Cooper), cert. denied, 446 U.S. 923 (1980).
658. See United States v. Gray, 626 F.2d 102, 106 (9th Cir. 1980) (ineffective counsel not shown by attorney's advice to forego full trial because the decision frequently is in defendant's best interest); United States v. Brackenridge, 590 F.2d 810, 811 (9th Cir.) (per curiam) (defendant's attorney had advised defendant to testify but testimony damaged her cause; however, counsel not ineffective because the prosecution's case against defendant was so strong that a competent attorney "would have thought it wiser to have the jurors hear appellant's version . . . than to leave them with only the prosecution's uncontradicted version"), cert. denied, 440 U.S. 985 (1979).
659. 618 F.2d 607 (9th Cir. 1980) (per curiam).
660. Id. at 608.
661. Id. at 610. The defendant also alleged that counsel's failure to obtain an advance ruling on the admissibility of potential impeachment evidence, his previous impersonations of an agent of the CIA, demonstrated that counsel was incompetent. Id. He argued that this failure prevented him from testifying in his own behalf and from directly appealing an adverse ruling by the trial judge. In holding against the defendant, the court first noted that counsel probably could not have forced the judge to make an advance ruling. Second, the court reasoned that in light of the related state charges against the defendant for murder and kidnapping, and the prosecution's interest in exposing the motive for the defendant's imper-
was part of counsel's trial strategy to narrow the case to the question of impersonation and to eliminate evidence of motive, proof of which would have been very prejudicial to the defendant.\textsuperscript{662} Thus, because the stipulation was part of a reasonable trial strategy, the defendant had not demonstrated that his counsel had been ineffective.

Moreover, to violate the constitutional standards under the first prong of \textit{Cooper}, the error must be one that a reasonably competent attorney would not have made because the defendant "'assumes the risk of ordinary error.'"\textsuperscript{663} The application of this rule is illustrated in \textit{United States v. Campbell}.\textsuperscript{664} In \textit{Campbell}, the court found that trial counsel erred by informing the trial judge, in the presence of the jury, that the defendant was taking the stand against his advice.\textsuperscript{665} The attorney took this action in an effort to comply with section 7.7 of the ABA Defense Function Standards that requires counsel not to aid in a client's perjury and to indicate on the record when a client testifies against his advice.\textsuperscript{666} The Ninth Circuit held that the mistake was "one which a 'reasonably competent attorney' might make in an effort to comply with his ethical duties,"\textsuperscript{667} and thus did not violate the constitutional standard.\textsuperscript{668}

\textsuperscript{662} 618 F.2d at 610. The court also ruled that the information sought by the defendant was a "thing of value" within the meaning of the statute. \textit{Id.} at 609.

\textsuperscript{663} 586 F.2d at 1330 (quoting McMann v. Richardson, 397 U.S. 759, 774 (1970)); see Rivera v. United States, 318 F.2d 606, 608 (9th Cir. 1963).

\textsuperscript{664} 616 F.2d 1151 (9th Cir.), \textit{cert. denied}, 447 U.S. 910 (1980).

\textsuperscript{665} \textit{Id.} at 1152.

\textsuperscript{666} ABA \textbf{DEFENSE FUNCTION STANDARDS} § 7.7(c) provides in part:

\begin{quote}
If . . . during the trial . . . the defendant insists upon testifying falsely in his own behalf, the lawyer may not lend his aid to the perjury. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court.
\end{quote}

\textsuperscript{667} 616 F.2d at 1152.

\textsuperscript{668} The court also held that counsel's actions did not deny the defendant a fair trial because it was unlikely that the jury understood the implication of counsel's statement and thus, the jurors were not precluded from independently judging the merits of the case. \textit{Id.} at 1152-53. The court noted that Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978), held that the defense counsel's actions of abruptly halting cross-examination of the defendant and then telling the judge that he wished to withdraw from the case but could not reveal his reason, were tantamount to informing the judge that the defendant was lying, thus denying the defendant a fair trial. \textit{Id.} at 730. The \textit{Campbell} court distinguished \textit{Lowery} on the ground that at defendant Campbell's trial, the jury was the trier of fact, while in \textit{Lowery} that
The court's conclusion is questionable. Undoubtedly, defense counsel made a good faith effort to comply with his ethical duties. However, Defense Function Standard section 7.7(c) expressly warns an attorney against revealing to the court that his client is taking the stand against his advice.\(^{669}\) Yet, defense counsel in *Campbell* did exactly what the standard advised against. Furthermore, counsel apparently knew in advance that the defendant intended to testify falsely.\(^{670}\) Thus, he had ample opportunity to make a record of the fact by less revealing means.\(^{671}\) In sum, defense counsel's error does not appear to be one that a competent attorney would have made.

If a defendant can show that his attorney's representation fell below that of a reasonably competent defense counsel, the defendant must also fulfill the second prong of *Cooper* and prove that his counsel's acts resulted in prejudice to his defense.\(^{672}\) This application of the harmless error rule was first enunciated by the Ninth Circuit in *Cooper v. Fitzharris*.\(^{673}\) That appeal was predicated upon trial errors,\(^{674}\) and the court, in part, held that the harmless error rule applied especially in that context because such errors appear "on the face of the trial record."\(^{675}\) The court noted that the errors in *Cooper* had been affirmative omissions by the defense attorney himself.\(^{676}\) Consequently, the court was able to distinguish factually Supreme Court decisions which have indicated that the harmless error rule was not applicable to any right to counsel violations.\(^{677}\) The *Cooper* court stated, "In this case, appellant position was occupied by the judge. See 616 F.2d at 1153. The court reasoned that jurors would be less aware of an attorney's ethical duties than a judge and could have interpreted counsel's actions as an attempt to keep the defendant off the stand so that he would not be subject to damaging cross-examination. *Id.*

\(^{669}\) ABA Defense Function Standards § 7.7(c); see supra note 666.

\(^{670}\) 616 F.2d at 1152.

\(^{671}\) See, e.g., 575 F.2d at 731 n.5.

\(^{672}\) 586 F.2d at 1331.

\(^{673}\) 586 F.2d 1325 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979).

\(^{674}\) The court noted that the claim was based on "specific acts and omissions of counsel at trial." *Id.* at 1331 (emphasis added). The specific errors listed were the failure to move to suppress evidence, the failure to object to evidence, and the failure to stipulate to a prior conviction to avoid damaging government proof. *Id.* at 1332.

\(^{675}\) *Id.*

\(^{676}\) *Id.*

does not assert that he was denied counsel at trial, or that counsel, though present, was prevented from performing a critical function or otherwise impeded in the advocacy of appellant's cause.\textsuperscript{678} Thus, the court attempted carefully to contrast cases in which some outside factor, such as the court\textsuperscript{679} or a statute\textsuperscript{680} had interfered with a defendant's right to effective counsel.\textsuperscript{681} The facts and reasoning of Cooper appear to limit the case to those errors made by counsel at trial and not caused by some outside impediment.

Recent decisions show that the Ninth Circuit is willing to use the harmless error rule in situations outside of Cooper's facts and reasoning. First, the Ninth Circuit has ignored the Cooper court's apparent distinction between trial and non-trial errors for the purpose of the harmless error rule, and has instead required a showing of prejudice when non-trial errors are alleged.\textsuperscript{682} For example, in United States v. Winston,\textsuperscript{683} the defendant appealed his conviction claiming ineffective counsel based upon his attorney's failure to request recusance of the trial judge, discover a codefendant's psychiatric report prior to trial, and inform the defendant of the trial judge's participation in the codefendant's competency hearing. Even though the latter two alleged errors had occurred before trial, and under Cooper would not have required a showing of prejudice, the Ninth Circuit held that the defendant had not been prejudiced and affirmed the conviction.\textsuperscript{684}

A particularly clear example of the abandonment of the Cooper distinction between trial and non-trial errors was presented in United States v. Coupez.\textsuperscript{685} The defendant, who proceeded pro se at trial, was required by the appellate court to prove that she had been prejudiced by counsel's alleged defective representation before trial. The defendant charged that the trial court's restrictions on joint defense strategy meetings, denial of continuances, and denial of the defendant's plan for

\textsuperscript{678} 586 F.2d at 1332.
\textsuperscript{680} E.g., Herring v. New York, 422 U.S. 853, 865 (1975).
\textsuperscript{681} For a critical discussion of the Cooper holding, see 586 F.2d at 1334-42 (Hufstedler, J., dissenting).
\textsuperscript{682} See United States v. Coupez, 603 F.2d 1347, 1350-51 (9th Cir. 1979) (harmless error rule applied to defendant's claim that court's orders prevented counsel from rendering effective assistance prior to trial); Ewing v. Williams, 596 F.2d 391, 395 (9th Cir. 1979) (harmless error rule applied to errors occurring prior to trial); see also United States v. Williams, 624 F.2d 75, 77 (9th Cir. 1980) (no prejudice shown in post-trial error claim).
\textsuperscript{683} 613 F.2d 221 (9th Cir. 1980).
\textsuperscript{684} Id. at 223-24.
\textsuperscript{685} 603 F.2d 1347 (9th Cir. 1979).
a combination of pro se and counsel representation at trial prevented her attorney from discharging his normal functions as defense counsel and caused him to render ineffective assistance.

The Ninth Circuit panel believed that the actions of the trial judge were justified. The Coupez court stated that “Cooper requires that a showing of a lack of effective representation must be coupled with a factual showing of actual prejudice to a defendant's defense because of such defective representation.”686 Finding no prejudice, the court affirmed the conviction.687 Thus, the Coupez court required a showing of prejudice even when the ineffective representation was caused by the trial court. The court, however, has ignored the Cooper court's warning that the harmless error rule should not apply to claims that counsel was impeded in the advocacy of an accused's cause by some outside factor, such as the court.688

Post-Cooper decisions have employed indiscriminately the harmless error rule. Thus, a defendant must show both that his counsel rendered ineffective assistance and that he was prejudiced thereby under a harmless error standard. Even so, in light of Cuyler v. Sullivan,689 the harmless error rule is inapplicable to ineffective counsel claims based on unconstitutional multiple representations.690 Where an actual conflict exists which adversely affects a counsel's representation, prejudice need not be demonstrated in order for a defendant to obtain relief.691

4. Conflict of interest

The sixth amendment guarantees an accused the right to the assist-

686. Id. at 1350.
687. 603 F.2d at 1350-51. For a different approach, see United States v. Panza, 612 F.2d 432, 439 (9th Cir. 1979), cert. denied, 447 U.S. 925 (1980). In Panza, the Ninth Circuit disposed of a similar claim, that the trial judge's actions had prevented counsel from rendering effective assistance, without using the Cooper standard. The court held that the trial judge's order striking the defendant's testimony because he refused to answer questions on cross-examination was proper and thus did not deny him effective counsel.
688. 586 F.2d at 1332; see supra notes 679-81 and accompanying text.
689. 446 U.S. 335, 349 (1980) (defendant must show “conflict of interest actually affected the adequacy of his representation.”).
690. See Brown v. United States, 625 F.2d 210 (9th Cir. 1979), vacated and remanded, 446 U.S. 962 (1980). In Brown, the Ninth Circuit had applied the Cooper standard in rejecting an accused's claim of inadequate counsel resulting from his attorney's alleged conflict of interest. In addition to the accused, counsel was also representing, in an administrative proceeding, a federal agent who was a witness against the accused. The Supreme Court vacated and remanded the case for further consideration in light of Cuyler. Id. at 212.
691. 446 U.S. at 350; see infra notes 716-17 and accompanying text.
ance of counsel unburdened by conflicting loyalties. However, there is no *per se* rule against multiple representation; the sixth amendment is violated only when an actual conflict of interest exists.

The Supreme Court in its 1978 decision of *Holloway v. Arkansas*, ruled that if timely objections to joint representation are raised, the trial court must either appoint separate counsel or investigate the objections to "ascertain whether the risk [of conflicting interests is] too remote to warrant separate counsel." In *Holloway*, the trial judge required a public defender to represent three defendants at the same trial. The judge declined to appoint separate counsel despite the attorney's repeated objections that a conflict of interest existed between the clients that would prevent him from providing effective assistance. All three defendants were convicted. Because the trial judge failed to act on the objections, the Supreme Court reversed the convictions.

In addition, the Court refused to apply the harmless error rule to the defendants' claim. Citing *Glasser v. United States*, the Court declared that reversal is required whenever a trial judge improperly requires joint representation over timely objection. As further justification, the Court noted that a rule requiring a defendant to show that a conflict of interests prejudiced him would not be susceptible of intelligent, evenhanded application. The evil is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. To assess the impact of a conflict of interests on the attorney's opinions, tactics, and decisions in plea negotiations would be virtually

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696. Id. at 484 (footnote omitted).
697. Id. at 477.
698. Id. at 477-78.
699. Id. at 481.
700. Id. at 484.
701. Id. at 488-91.
702. 315 U.S. 60, 76 (1942) ("The 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.").
703. 435 U.S. at 488.
impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation. 704

In the 1980 decision of Cuyler v. Sullivan, 705 the Supreme Court again reviewed a conflict of interest claim. Defendant Sullivan, along with two others, had been charged with two counts of first degree murder. Two privately retained lawyers represented all three defendants, who were tried at three separate trials. Sullivan, tried first, presented no defense in the face of entirely circumstantial evidence. He was convicted and sentenced to life imprisonment. His two codefendants were acquitted at separate trials. Neither Sullivan nor his attorneys raised any objections to the joint representation. 706

After exhausting his state appeals, Sullivan sought federal habeas corpus relief, claiming that he had been denied effective counsel by reason of his lawyers' conflict of interest in representing three defendants. 707 He argued that his attorneys' decision to rest the defense was caused by the conflict. 708

The Third Circuit reversed the district court's ruling against Sullivan. 709 The Third Circuit first held that the evidence established multiple representation of the defendants by the two lawyers. 710 In reaching this conclusion, it noted that the lawyers had prepared the defense in consultation with all the defendants, that both had played important roles at all of the trials and that both had advised Sullivan with regard to whether he should rest the defense. 711

Second, the court held that a possibility of a conflict of interest had existed in the attorneys' joint representation of the three defendants. 712

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704. Id. at 490-91 (emphasis in original).
705. 446 U.S. 335 (1980).
706. Id. at 337-38.
707. Id. at 339. Sullivan had raised this issue in his state appeal but the Pennsylvania Supreme Court held that there had been no multiple representation and that resting the defense had been a legitimate tactic. Id.
710. 593 F.2d at 518-19.
711. Id. In a state court proceeding, the two attorneys, DiBona and Peruto, gave conflicting versions of their respective roles in representing the defendants. DiBona said that they had been associate counsel at each trial; Peruto stated that he assisted DiBona at Sullivan's trial and had been chief counsel at the other defendants' trials. DiBona also claimed that he had encouraged Sullivan to testify while Peruto said he had not wanted to present a defense at Sullivan's trial because it would expose the defense's witnesses for the other trials. 446 U.S. at 338-39.
712. 593 F.2d at 521.
It then granted Sullivan relief because of the possible existence of the conflict.

On appeal, the Supreme Court accepted the Third Circuit's determination that multiple representation had existed, but vacated the decision, holding that the mere possibility of a conflict of interest was insufficient to invalidate a criminal conviction. The Court went on to declare that in order to show a violation of his right to effective counsel by reason of a conflict of interest, "a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." However, the Court noted that once he has met this standard, the defendant need not demonstrate prejudice in order to obtain relief. Since both sides claimed that they should prevail under this new standard, the Court remanded the case to resolve the issue.

The Cuyler standard represents a retreat from the Court's position in Holloway, which declared that a defendant need not show prejudice in order to obtain relief on a conflict of interest claim. Under Cuyler, a defendant apparently must demonstrate not only the existence of an actual conflict, but also the adverse effect it has on his lawyer's performance. Thus, the Cuyler Court in effect requires a defendant to show that he was prejudiced by the conflict. While perhaps following the letter of the Holloway decision, the Cuyler Court clearly evades its spirit.

The Supreme Court in Cuyler also refused to expand the rule of Holloway to require state trial courts to initiate an inquiry into the propriety of multiple representation in all cases. Holloway requires in-
vestigation when timely objections are made. However, the Cuyler Court stated that "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry [into the joint representation]." This statement suggests that state courts have an affirmative duty to investigate in some situations, even though no objections to the multiple representation have been raised.

5. Government interference with the attorney-client relationship

The Supreme Court, in Massiah v. United States, held that the sixth amendment right to counsel prohibits the government from interfering with a defendant's right to the assistance of counsel once formal proceedings have commenced. In Massiah, government officials used a codefendant to elicit incriminating statements from Massiah in the absence of counsel. Massiah, who had been indicted, was unaware that the codefendant was acting as a government agent. The elicited statements were introduced at his trial, and he was convicted. The Supreme Court reversed the conviction, holding that the sixth amendment prohibits the use of an accused's incriminating statements which government agents "had deliberately elicited from him after he had been indicted and in the absence of his counsel."

In 1980, the Supreme Court reaffirmed Massiah in United States v.

721. 435 U.S. at 484.
722. 446 U.S. at 347 (footnote omitted). The Court found that the trial judge did not have an affirmative duty to investigate whether a conflict existed in this case. Id. at 348. In reaching this conclusion, the Court noted that the defendants were being tried at separate trials, that no participant in Sullivan's trial objected to the joint representation, that the lawyers' opening argument in Sullivan's case outlined a defense compatible for all three defendants and suggested that the defense would call witnesses who might be needed later for the trials of the other defendants. Id. at 346-48. The Cuyler Court also noted that counsel's decision to rest Sullivan's defense was, on its face, reasonable in light of the weakness of the prosecution's case. Id. at 347-48.
723. Proposed Federal Rule of Criminal Procedure 44(c) provides in part:

Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation.

725. Id. at 206.
726. Id. at 203.
727. Id.
728. Id. at 206.
Henry. Defendant Henry had been indicted on a bank robbery charge and was being held in a city jail pending trial. Government agents working on the case contacted a paid FBI informant, Nichols, who was serving a sentence in the same jail. After Nichols informed them that he was being held in the same cellblock as Henry, the agents told him to be alert to statements made by federal prisoners, but not to initiate any conversations with or to question Henry regarding the bank robbery. A few weeks after this discussion, Nichols was released from jail. He then reported to the agents that Henry had told him about the bank robbery. The agents paid Nichols for this information.

At Henry's trial, Nichols testified about what Henry had revealed to him. Neither Henry nor the jury were then aware that Nichols was a paid informant. On the basis of this testimony, Henry was convicted and sentenced to twenty-five years in prison.

Two years after his conviction, Henry moved to vacate his sentence claiming that he had just discovered that Nichols was a paid informant and that Nichols intentionally had been placed in the same cell to procure information about the robbery. He contended that the admission of Nichols' statements had violated his sixth amendment right to counsel under Massiah.

A divided Supreme Court affirmed the Fourth Circuit's decision that had ordered Henry's sentence vacated. The Court held that Henry's statements to Nichols should not have been admitted at trial because they were the product of governmental interference with his right to counsel. The Court observed that the agents had "intentionally creat[ed] a situation likely to induce Henry to make incriminating statements without the assistance of counsel," and that the situation led the informant to "deliberately elicit" the statements.

730. Id. at 265-66. The record did not disclose whether the agents had contacted Nichols with the intent to obtain information about Henry or the robbery. Id.
731. Id.
732. Id. at 266.
733. Id. at 267.
734. Id.
735. Id.
736. Id. at 267-68.
737. 590 F.2d 544 (4th Cir. 1978).
738. 447 U.S. at 275.
739. Id. at 274-75.
740. Id.
741. See id. at 270-71; id. at 275-77 (Powell, J., concurring).
In his dissent, Justice Blackmun attacked the majority’s "likely to induce" language as a radical departure from Massiah's "deliberately elicited" test.\textsuperscript{742} Justice Blackmun argued that Massiah required intentional elicitation.\textsuperscript{743} Hence, Justice Blackmun viewed the majority's "likely to induce" standard as requiring only a "negligent triggering of events."\textsuperscript{744} The dissenting opinion focused on the FBI agents' conduct and not on the conduct of the informant.\textsuperscript{745}

This view misconstrues the majority's position which focused on the conduct of both the informant and the FBI agents. The Henry majority ruled that the informant had deliberately elicited incriminating statements from Henry within the meaning of Massiah.\textsuperscript{746} In reaching this conclusion, the majority noted that Nichols had not listened passively to Henry's statements to other prisoners but had engaged in "some conversations with Mr. Henry . . . and Henry's incriminatory statements were 'the product of this conversation.'"\textsuperscript{747} Furthermore, the Court found that Nichols had used his position as a fellow prisoner "sharing a common plight"\textsuperscript{748} to gain Henry's confidence in order to secure incriminating statements.\textsuperscript{749}

The Court also examined the conduct of the FBI agents to determine whether the informant's actions could be attributed to the government.\textsuperscript{750} The majority concluded that even though the agents had said that they did not intend that the informant affirmatively elicit the information, the agents "must have known" that the situation they had created would likely lead the informant to take affirmative steps to secure incriminating statements from Henry.\textsuperscript{751} Consequently, the govern-

\textsuperscript{742} Id. at 277 (Blackmun, J., dissenting).
\textsuperscript{743} Id. at 278-79.
\textsuperscript{744} Id.
\textsuperscript{745} Id.
\textsuperscript{746} See id. at 269-74; id. at 277 (Powell, J., concurring) ("I understand that the decision today rests on a conclusion that this informant deliberately elicited incriminating information . . . .")
\textsuperscript{747} Id. at 271-72.
\textsuperscript{748} Id. at 273-74.
\textsuperscript{749} See id. at 273-74 and 274 n.12. The Court found the fact that Henry would seek Nichols' aid in his planned escape attempt was evidence that Nichols had taken steps to gain Henry's trust. Id. at 274 n.12.
\textsuperscript{750} Id. at 270-71.
\textsuperscript{751} Id. The Court's conclusion that the agents must have known that their actions would lead Nichols to take affirmative steps to elicit the statements is supported by the facts of the case. The agents were aware that Nichols had easy access to Henry and that he would be able to engage him in conversation without arousing his suspicions. Id. Furthermore, they knew that Nichols had a strong financial interest in obtaining incriminating statements from Henry because he would only be paid if he produced useful information under his contingent fee arrangement with them. Id. at 270 n.7.
ment became responsible for the informant’s actions.

Contrary to the dissent’s interpretation, the Henry majority did not abandon Massiah’s “deliberately elicited” standard; rather, they found the standard satisfied by the actions of the informant. In both cases, the informant deliberately elicited the information from the defendant. The “likely to induce” language in Henry was used to find a connection between the conduct of the FBI agents and the informant. This language was not an attempt by the majority to substitute a negligence standard for Massiah’s “deliberately elicited” test.\textsuperscript{752}

The majority opinion also dealt with the Government’s contention that Brewer v. Williams\textsuperscript{753} had modified the Massiah “deliberately elicited” standard to require actual interrogation.\textsuperscript{754} Brewer involved a police officer’s interrogation of an indicted defendant without the presence of his counsel. Dicta indicated that the sixth amendment would not have been triggered in the absence of “interrogation.”\textsuperscript{755} The Henry Court rejected this argument.\textsuperscript{756} Moreover, the Court appeared to doubt that “interrogation” was ever a necessary prerequisite for sixth amendment protections because the Massiah Court had not inquired whether the informant or the defendant had initiated the discussion in that case.\textsuperscript{757}

The Court was also careful to distinguish Henry factually from a situation where the information was gathered by an inanimate device, as was employed in United States v. Hearst.\textsuperscript{758} The informant in Henry

\textsuperscript{752} Id. at 270-71. While Massiah is silent on the issue of the government’s responsibility for an informant’s conduct, the Henry Court could not avoid it because of the agents’ claim that they had told Nichols not to question Henry, implying that the government should not be held responsible for Nichols’ actions. See id. at 271-72.

\textsuperscript{753} 430 U.S. 387 (1977).

\textsuperscript{754} 447 U.S. at 271-72.

\textsuperscript{755} The Brewer Court stated that “no such sixth amendment protection would have come into play if there had been no interrogation.” 430 U.S. at 401.

\textsuperscript{756} 447 U.S. at 271. In United States v. Hearst, 563 F.2d 1331, 1348 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978), the Ninth Circuit took the position that the Government advocated in Henry, interpreting Brewer as modifying Massiah so as to require actual interrogation. Id. In light of Henry, the Hearst position on this issue is no longer good law, even though the Henry Court exempted Hearst from its holding. See 447 U.S. at 271 n.9.

\textsuperscript{757} 447 U.S. at 271-72; see also Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980) (“The definitions of ‘interrogation’ under the Fifth and Sixth Amendments, if indeed the term ‘interrogation’ is even apt in the Sixth Amendment context, are not necessarily interchangeable . . . .”). But see 447 U.S. at 277 (Powell, J., concurring) (“To demonstrate an infringement of the Sixth Amendment, a defendant must show that the government engaged in conduct that . . . is the functional equivalent of interrogation.”) (citations omitted).

\textsuperscript{758} 563 F.2d 1331, 1347-48 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978). As part of standard prison policy, an electronic recording device made tapes of defendant Hearst’s conversations with visitors. Id. at 1344. Portions of the taped conversations were later intro-
was instructed to be alert to statements but not to initiate conversation with Henry. The Court pointed out that a recording device "has no capacity of leading the conversation into any particular replies." By contrast, the instant informer had not been a passive listener.

Thus, under Henry, an informant acting at government direction may be deemed to have deliberately elicited incriminating statements from a defendant if the informant took some affirmative actions to secure the statements. However, the defendant need not show that actual interrogation took place.

Related to Massiah-type government action are government actions which substantially interfere with the attorney-client relationship itself. In Weatherford v. Bursey, an undercover agent submitted to prosecution in order to maintain his false identity. At Bursey's request, the agent met twice with Bursey and his attorney to prepare for the upcoming trial. Accidentally, the agent's "cover" was revealed prior to trial; so he testified for the Government. However, the agent did not disclose any information he had received at the pretrial defense meetings, either to his superiors or to the court. The Supreme Court held that the agent's attendance at the meetings had not violated the sixth amendment because no tainted evidence had been introduced at trial, the defense's strategy had not been revealed, and the purpose of the agent's presence at the meetings had not been to obtain evidence but to maintain his cover.

In the Ninth Circuit opinion of United States v. Glover, a government agent questioned defendant Glover without the permission of his counsel. However, the agent falsely told Glover that his attorney had consented to the interview. Shortly after the interview had commenced, Glover's attorney happened to observe the conversation and terminated the meeting. Glover later expressed the fear that his counsel had "crossed" him, and he moved to dismiss the indictment because of the government's interference with his attorney-client relationship. There was no evidence that the visitor, at government direction, had attempted to engage the accused in incriminating conversation. Id. at 1347.

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759. 447 U.S. at 271 n.9.
760. Id. at 271.
762. Id. at 549.
763. Id. at 555-56.
764. Id. at 558.
766. Id. at 859. The defendant felt "crossed" apparently because the agents' questioning involved the location of stolen gems. Glover had previously refused to admit knowledge of this information. Moreover, he had also repudiated his attorney's suggestion to cooperate.
relationship. The Ninth Circuit rejected this contention because the interview had not produced any incriminating information and the agent's purpose in conducting the meeting had been to obtain Glover's cooperation in the prosecution of defendants other than Glover. Thus, Glover had not been prejudiced by the divulgence of defense information so as to establish a violation of the sixth amendment. The court stated, however, that had any incriminating evidence been obtained by the agents, "this would [have been] a different case."

In 1980, the Ninth Circuit followed Bursey and Glover in United States v. Irwin. Defendant Irwin contended on appeal that the indictment should have been dismissed because the government's "gross intrusion" into his attorney-client relationship had violated his right to counsel. After Irwin had been indicted, a federal agent contacted him seeking his cooperation in setting up a drug arrest. The agent suggested that Irwin have his attorney attempt to make a deal with the prosecutor. During the course of their conversations, which occurred without the consent of defense counsel, Irwin made several incriminating statements. While the district court denied the defense motion to dismiss the indictment, the court stated that it would suppress any inculpatory statements that were the result of the post-indictment conversations.

The Irwin court rejected a *per se* rule that mere government interference with the attorney-client relationship violates the sixth amendment. Rather, the appellate court stated that a government intrusion violates the right to counsel only when it substantially prejudices the defendant.

Applying this standard to Irwin's claims, the court found no sixth amendment violation. First, the court noted that Irwin's incriminating with the authorities in return for special consideration from the United States Attorney's Office. *Id.*

767. *Id.* at 864.
768. *Id.*
769. 612 F.2d 1182 (9th Cir. 1980).
770. *Id.* at 1184.
771. *Id.*
772. *Id.* at 1186-87; *see also* 429 U.S. at 552; 596 F.2d at 863.
773. 612 F.2d at 1187. The court's prejudice requirement should not be mistaken for the harmless error rule. In *Glover*, the Ninth Circuit interpreted the Supreme Court's decision in Holloway v. Arkansas, 435 U.S. 475, 488-91 (1978), as holding that once a sixth amendment violation is established, courts should not consider whether the error was harmless or not. 596 F.2d at 862. However, the *Glover* court noted that "prejudice" could still be used to determine whether the right to counsel was violated. *Id.* at 862-63. Hence, the *Irwin* court required a showing of prejudice to see if the right to counsel had been violated. *See* 612 F.2d at 1187-89.
statements had not prejudiced him because the trial judge had said that he would exclude them.\textsuperscript{774} This action not only prevented the introduction of the evidence, it also allowed Irwin’s counsel to prepare his case uninhibited by the threat of possible introduction of the statements.\textsuperscript{775} Second, there was no evidence that the agent’s conduct had destroyed Irwin’s confidence in his attorney.\textsuperscript{776} Finally, the court noted that the agent had not been attempting to discover defense strategy and that defense counsel himself had revealed his trial plans in his first conference with the prosecutor.\textsuperscript{777} Consequently, the court found no prejudice and affirmed his conviction.

\textit{Irwin} represents an extension of \textit{Glover}. The \textit{Glover} court implied that had incriminating information been given to the agent during the interview, it might have ruled differently.\textsuperscript{778} In \textit{Irwin}, incriminating statements \textit{were} made to the agent. However, the \textit{Irwin} court held that the district judge’s exclusion order effectively prevented any prejudice to the defendant from the statements. This ruling makes it unlikely that a government intrusion into an attorney-client relationship will be remedied by dismissal of the indictment, the relief sought by Irwin.

\textbf{C. The Sixth Amendment Right to Present a Defense}

The sixth amendment of the United States Constitution guarantees the criminally accused “the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor.”\textsuperscript{779} The confrontation clause safeguards the defendant’s right to stand face-to-face with and to cross-examine witnesses testifying against him. In addition, it gives the jury an opportunity to judge the witness’ demeanor and credibility.\textsuperscript{780} A companion to the right of confrontation, the compulsory process clause,\textsuperscript{781} enables the defendant to discover and subpoena potentially exculpatory witnesses. This clause entitles the defendant to present evidence in his favor and to have that evidence afforded the same opportunity for belief as evidence presented by the prosecution.\textsuperscript{782} Together, the confrontation

\begin{itemize}
\item\textsuperscript{774} Id. at 1187-88.
\item\textsuperscript{775} See id. at 1188.
\item\textsuperscript{776} Id. at 1188-89.
\item\textsuperscript{777} Id. at 1189.
\item\textsuperscript{778} See 596 F.2d at 864.
\item\textsuperscript{779} U.S. CONST. amend. VI.
\item\textsuperscript{780} Mattox v. United States, 156 U.S. 237, 242-43 (1895).
\item\textsuperscript{781} U.S. CONST. amend. VI.
\item\textsuperscript{782} One commentator has noted: [The right entitles a defendant to discover the existence of potential witnesses; to put them on the stand; to have their testimony believed; to have their testimony
clause and the compulsory process clause constitutionalize the accused's right to present a defense.\textsuperscript{783}

1. The right to confrontation

Historically, cross-examination has been considered a vital tool for discovering the truth.\textsuperscript{784} The confrontation clause of the sixth amendment requires the prosecution to produce, in person, any witness upon whose testimony it intends to rely at trial.\textsuperscript{785} Usually, a defendant must have an opportunity to cross-examine every witness who presents evidence against him at trial. Sometimes, however, avenues other than cross-examination may satisfy the requirements of the truth-determining process.\textsuperscript{786}

\textit{a. preparing for cross-examination}

Preparation for trial is a critical part of the defendant's ability to confront the witnesses against him. Implicit in the defendant's confrontation right is the government's duty "to provide an indigent criminal defendant with the essential tools of trial defense."\textsuperscript{787} In some criminal cases, a transcript of a related prior proceeding may be essential to the presentation of an adequate defense.\textsuperscript{788} If the defendant establishes that access to a transcript of the proceeding is necessary to his defense and makes a timely request for its production, the courts generally will comply with the request.\textsuperscript{789}

In \textit{United States v. Rosales-Lopez},\textsuperscript{790} the defendant made a timely request for a copy of an evidentiary hearing transcript. The judge, who

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\item admitted into evidence; to compel witnesses to testify over claims of privilege; and to enjoy an over-all fair balance of advantage with the prosecution with respect to the presentation of witnesses.
\end{itemize}


\textsuperscript{783} Westen, supra note 783, at 74.

\textsuperscript{784} 5 J. WigmOrE, EVIDENCE \S 1395 (rev. ed. 1974).

\textsuperscript{785} Simmons v. United States, 440 F.2d 890, 891 (7th Cir. 1971) (where "the opportunity to cross-examine the declarant is essential to a defendant's right of confrontation, it must be the government's burden to produce the declarant").

\textsuperscript{786} \textit{See}, e.g., Dutton v. Evans, 400 U.S. 74 (1970) (hearsay statements admissible because there was sufficient indication of reliability of the statement).


\textsuperscript{789} \textit{See}, e.g., United States v. Johnson, 584 F.2d 148 (6th Cir. 1978), \textit{cert. denied}, 440 U.S. 918 (1979); United States v. Baker, 523 F.2d 741 (5th Cir. 1975); United States v. Acosta, 495 F.2d 60 (10th Cir. 1974).

\textsuperscript{790} 617 F.2d 1349, 1355 (9th Cir. 1980).
had held the evidentiary hearing, denied Rosales-Lopez' request because he had failed to establish any "particularized need" for the transcript.\textsuperscript{791} Although the Ninth Circuit held that the legal standard applied by the judge was erroneous, the error was deemed harmless beyond a reasonable doubt. The court found that, overall, there was a strong consistency between the testimony given by the witness at the evidentiary hearing and at the trial. Thus, there was little impeachment value in the transcript.\textsuperscript{792}

The government's duty to ensure that an indigent defendant has the means with which to formulate an effective defense is also explicitly guaranteed by 18 U.S.C. section 3006A.\textsuperscript{793} To show that a violation of this statute has reached constitutional proportions, a defendant must establish, by clear and convincing evidence, that the violation prejudices him.\textsuperscript{794}

In the 1980 Ninth Circuit opinion of \textit{United States v. Sims}, the trial court rejected Sims' section 3006A(e)(1) motion for the appointment of a psychologist, who would have assisted in the preparation of the defense by rebutting the reliability of eyewitness identification.\textsuperscript{795} The appellate court affirmed for two reasons. First, relying on the Fifth Circuit standard in \textit{United States v. Theriault},\textsuperscript{796} the court believed that a reasonable privately retained attorney probably would not have hired such an expert for his client.\textsuperscript{797} In this regard, the court noted that the
admissibility of the proposed testimony was highly disfavored by the Ninth Circuit. A "reasonable" attorney would consider the probability of the testimony's admissibility before engaging an expert. Second, Sims failed to show that the absence of an expert's services diminished the effectiveness of his cross-examination. Further, he made no showing that an expert would have assisted his defense in any other way. Thus, the court could not conclude that Sims' sixth amendment rights to effectively cross-examine witnesses and to present an effective defense were violated.

Generally, in non-capital cases, the prosecution is not required to furnish the defendant with a pretrial list of witnesses which it intends to call at trial. The Ninth Circuit has said, furthermore, that a defendant's sixth amendment rights are not violated when the Government does furnish a witness list, but then calls witnesses who are not included on the list.

In United States v. Sukumolachan, the defendant claimed that the Government's omission of two names from a witness list, voluntarily provided to the defense, had misled the defendant in his trial preparation, violating his confrontation right. One witness, however, "provided straightforward information about where the defendant lived," and the other witness was the informer of whose "existence and possible testimony" the defendant "was well aware." The court was unable to find that Sukumolachan had suffered any prejudice. By

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798. 617 F.2d at 1375; see United States v. Fosher, 590 F.2d 381 (1st Cir. 1979) (eyewitness identification would have been inadmissible, therefore, it was not necessary for the court to authorize funds for an expert).

799. Id at 1375; accord, United States v. Spaulding, 588 F.2d 669 (9th Cir. 1978); United States v. Hartfield, 513 F.2d 254 (9th Cir. 1979); United States v. Bass, 477 F.2d 723 (9th Cir. 1973); Christian v. United States, 398 F.2d 517 (10th Cir. 1968).

800. United States v. Glass, 421 F.2d 832, 833 (9th Cir. 1969); Rosenzweig v. United States, 412 F.2d 844, 845 (9th Cir. 1969); accord, United States v. Chase, 372 F.2d 453, 466 (4th Cir.), cert. denied, 387 U.S. 907, 913 (1967).

801. United States v. Angelini, 607 F.2d 1305, 1309 (9th Cir. 1979) (citing Weatherford v. Bursey, 429 U.S. 545 (1977)).

802. 610 F.2d 685 (9th Cir. 1980) (per curiam).

803. 610 F.2d at 688.

804. Id.

805. Id.
determining that the defendant had not been misled, the court disposed of this case on the narrowest possible ground.\textsuperscript{806} As a result, the court did not reach the constitutional question of whether the defendant’s right to effective cross-examination had been violated.

In \textit{United States v. Tousant},\textsuperscript{807} the appellant asserted that the right to an adequate cross-examination could be satisfied only by the pretrial disclosure of the identity of an informer. The decision whether to disclose the identity of an informer depends on “a balancing of the needs of law enforcement against the [defendant’s] interest in having a fair trial.”\textsuperscript{808} This decision is a matter of discretion for the court.\textsuperscript{809} In \textit{Tousant}, the district court found that the informer was enrolled in a federal witness protection program and “seriously feared for his life.”\textsuperscript{810} Moreover, the trial record indicated that the defendant had cross-examined the informer extensively.\textsuperscript{811} Consequently, the court of appeals held that the trial court did not abuse its discretion in determining that the defendant’s interest in preparing his defense was outweighed by the government’s interest in protecting the informer’s identity. Further, there was no showing by the defendant that his cross-examination right was unduly prejudiced by withholding the informer’s identity prior to trial.\textsuperscript{812}

\textit{b. limiting cross-examination at trial}

The United States Supreme Court held in \textit{Douglas v. Alabama} that “a primary interest secured by [the confrontation clause] is the right of cross-examination.”\textsuperscript{813} In \textit{Douglas}, the defendant was blocked from cross-examining his alleged accomplice because the accomplice invoked the right against self-incrimination. Although the prosecutor had read the witness a confession he signed, which also damaged the

\textsuperscript{806} \textit{Id.}

\textsuperscript{807} 619 F.2d 810 (9th Cir. 1980) (per curiam). The trial court denied Tousant’s motion to disclose the identity of the informer prior to trial. \textit{Id.} at 813.

\textsuperscript{808} United States v. Brown, 562 F.2d 1144, 1148 (9th Cir. 1977) (citing Roviaro v. United States, 353 U.S. 53, 60-62 (1957)).

\textsuperscript{809} United States v. Brown, 562 F.2d at 1148 (citing United States v. Anderson, 509 F.2d 724, 729-30 (9th Cir. 1974), \textit{cert. denied}, 420 U.S. 910 (1975)); cf. United States v. Hoyos, 573 F.2d 1111 (9th Cir. 1978) (discretion to grant continuance to obtain witnesses).

\textsuperscript{810} 619 F.2d at 813.

\textsuperscript{811} \textit{Id.}

\textsuperscript{812} \textit{Id.}; cf. United States v. Bonilla, 615 F.2d 1262 (9th Cir. 1980) (per curiam); see notes 679-85 \textit{supra} and accompanying text. The appellant’s assertion in \textit{Bonilla} of prejudicial error based upon the failure of the government to produce an informant prior to trial related to compulsory process rights rather than confrontation rights.

\textsuperscript{813} 380 U.S. 415, 418 (1965); see \textit{Alford v. United States}, 282 U.S. 687, 691 (1931) (“Cross-examination of a witness is a matter of right.”).
defendant, the accomplice never acknowledged the statement as his own. In light of the weight of the alleged confession, the Court held that Douglas' inability to cross-examine the witness "plainly denied him the right of cross-examination secured by the confrontation clause." The Court noted that the prejudice caused by the denial of cross-examination did not constitute "a mere minor lapse" but, rather, a substantial unfairness requiring reversal.

The Court implied, however, that the right of cross-examination, although of considerable importance, is not absolute. While a defendant's right to cross-examine adverse witnesses is not unrestricted, the defendant must be afforded a level of cross-examination which satisfies his confrontation right. Any examination beyond what is constitutionally mandated is a matter within the discretion of the trial court. When a trial court prohibits a defendant's cross-examination for impeachment purposes, the test of whether the sixth amendment has been violated is "whether the jury had sufficient information to appraise the bias and motives of the witness."

In Chipman v. Mercer, the Ninth Circuit applied this test to a trial court's refusal to allow cross-examination regarding the possible bias of the prosecution's only eye witness who positively identifies Chipman. Chipman was a resident of a facility for the mentally ill. The defense sought to establish that the witness lived across the street from the facility, that she knew Chipman lived in the facility which was operated by Chipman's aunt, and that she had attempted to convince city officials to close the facility because she believed the occupants were undesirable neighbors. The defense counsel was permitted, however, to inquire only into the witness' possible racial bias.

The appellate court initially noted that, although the confrontation

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814. 380 U.S. at 416.
815. Id. at 419.
816. Id. at 420.
821. 628 F.2d 528 (9th Cir. 1980).
822. Id. at 530.
823. Id.
clause "tips the scales in favor of permitting cross-examination," it does
not require the court to allow cross-examination where the probative
value of the testimony would most likely be outweighed by an adverse
effect on the fair and efficient administration of the trial.824 The trial
court had sustained a relevancy objection, ruling that the defense had
not made a showing of "particular enmity between the witness and the
defendant."825 However, the defendant's offer of proof set out evidence
from which the trier of fact could have found that the witness harbored
a general bias against a group of which the defendant was a member.826
Thus, cross-examination concerning this bias was necessary to expose
the possible prejudice of the witness against Chipman.827 Further, the
witness' testimony was crucial because it was the only evidence which
clearly placed Chipman at the scene of the crime. The Ninth Circuit
observed that the prosecution's other evidence was not overwhelming.
In light of all these facts, the appellate court held that the denial of an
opportunity to cross-examine the witness violated Chipman's confront-
tation right.828

The Ninth Circuit also held that the right of cross-examination
had been violated in Burr v. Sullivan.829 Citing an Oregon statute, the
Oregon state court, which had tried Burr for arson, prohibited Burr's
attorney from questioning Burr's two alleged accomplices about subse-
quent burglaries to which they had confessed in juvenile proceed-
ings.830 During Burr's trial, the accomplices were under the continuing
jurisdiction of the juvenile court.831 Thus, it was arguable that the wit-
nesses testified because they hoped for leniency. The Ninth Circuit,

824. Id. at 531; see FED. R. EVID. 403; CAL. EVID. CODE § 352 (West 1966).
825. 628 F.2d at 528. The defense did not assert that the witness had hopes of receiving
better treatment from the government in exchange for her testimony, as is the most common
situation. See, e.g., Davis v. Alaska, 415 U.S. 308 (1974); Burr v. Sullivan, 618 F.2d 583 (9th
Cir. 1980).
826. 628 F.2d at 529-30.
827. Id. at 532; see, e.g., United States v. Kartman, 417 F.2d 893 (9th Cir. 1969) (cross-
examination concerning witness' possible bias against draft-resisters or anti-war
protesters).
828. 628 F.2d at 533.
829. 618 F.2d 583, 588 (9th Cir. 1980).
830. At Burr's trial, both accomplices testified on cross-examination that they had admit-
ted to the commission of over forty-five burglaries in a juvenile proceeding after the arson.
However, the trial judge struck the testimony of the first witness and forbade the defense
counsel from using the juvenile records of the second in its closing argument. The court
based its refusal on OR. REV. STAT. § 419.567(3) (1975), which states, in part: "No informa-
tion appearing in the record of the case [juvenile proceeding] . . . relating to the child's
history . . . may be disclosed . . . without the consent of the [juvenile] court . . . ." 618
F.2d at 585 n.1.
831. 618 F.2d at 586.
relying on the factually similar Supreme Court decision of *Davis v. Alaska*, held that the state's interest in keeping juvenile proceedings confidential must give way "to the defendant's right to cross-examine the state's witnesses to show bias." Because the accomplices were subject to further juvenile proceedings, the Burr court found that an even stronger showing of potential bias existed than in *Davis*, in which the key witness was merely on probation.

In addition, the Burr court noted that defense counsel's failure to articulate the specific grounds on which he was probing the witnesses' credibility would not foreclose raising on appeal the defendant's constitutional right. Instead, the court held that the defense counsel's articulation was sufficient because the witnesses' positions strongly indicated that there was a possibility of bias. Further, the defense attorney did indicate that he was attempting to probe the witnesses' credibility. His statement was broad enough to come within the requirements of *Alford v. United States*.

In *United States v. Williams*, the Ninth Circuit held that the trial court had not committed reversible error regarding the defendant's motion to strike the testimony of a prosecution witness who had pleaded her fifth amendment right on cross-examination. Defense counsel had sought to establish the witness' desire to implicate Williams in order to protect her roommate Clark, an alleged missing accomplice, who had participated with the witness and the defendant in the charged bank robbery. The witness had admitted on cross-examination that she had been convicted of the *Williams* robbery, via a plea bargain which

832. 415 U.S. 308 (1974). In *Davis*, the state had relied on the testimony of a juvenile witness who was on probation to link the defendant to the crime. The trial court thereafter refused to allow the defense to cross-examine the witness as to his prior juvenile adjudications and probation status. The defense sought to establish the possible bias of the witness. The Supreme Court ruled that "[t]he state's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.* at 320.

833. 618 F.2d at 586.

834. *Id.* at 586; see *supra* note 833.

835. 618 F.2d at 586-87.

836. The witnesses, although accomplices of the defendant, were not being tried for the offense. They remained under the continuing jurisdiction of the juvenile court after having confessed to other offenses. *Id.* at 586. See *supra* notes 831-32 and accompanying text.

837. Defense counsel stated that he was "attacking the veracity of the witness." 618 F.2d at 586.

838. *Id.* at 587. In *Alford v. United States*, 282 U.S. 687 (1931), the Supreme Court stated that the cross-examiner should be given reasonable latitude in questioning witnesses in order to ensure that he have an opportunity to test the credibility of the witnesses. *Id.* at 692.

839. 626 F.2d 697 (9th Cir. 1980).

840. *Id.* at 699-700.
required her to testify against Williams, and had been convicted of a
burglary in a previous case.\footnote{Id. at 700.} The witness had disclosed her rela-
tionship with Clark, their drug addiction, and their commission of crimes
to support that drug habit.\footnote{Id. at 700-01. Williams' counsel made no offer of proof and made no argument in support of his motion to strike.} To further demonstrate the witness' bias, counsel asked whether she had committed burglaries and whether she
and/or Clark had stolen the car used in the Williams robbery.\footnote{Id. at 701.} The
jury had also been told that Clark had furnished the stolen car.\footnote{415 U.S. 308 (1974).} The trial court sustained objections to these questions on the basis of the
witness' assertion of her fifth amendment privilege against self-incrimina-
tion. In response to the trial court's ruling, the defendant moved to
strike the witness' entire testimony. Although the trial court twice de-
ferred the argument on this motion, defense counsel failed to pursue
the resolution of the issue.\footnote{626 F.2d at 703.} Consequently, the Ninth Circuit focused
on the defendant's inability to cross-examine.\footnote{626 F.2d at 702.}

On appeal, Williams argued that the trial court had erred in not
granting his motion to strike. Williams relied on Davis v. Alaska,\footnote{415 U.S. at 320 (quoting Alford v. United States, 282 U.S. at 694).} in
which the court held that refusal to permit cross-examination of a wit-
ness regarding a felony conviction, for impeachment purposes, is re-
sversible error without a showing of prejudice.\footnote{626 F.2d at 703.} However, the Ninth
Circuit observed that Davis required a court to protect a witness who
had properly invoked his right against self-incrimination and to protect
a witness from harassment or humiliation.\footnote{626 F.2d at 702.} In this regard, the court
noted that the witness had admitted two felony convictions, the Wil-
liams robbery and a burglary in another case.\footnote{Id. at 701.} Further, the Ninth
Circuit noted that a court need not allow repetitious or cumulative
cross-examination. The court found that the cross-examination had
uncovered "considerable evidence" of the witness' bias.\footnote{Id.} Conse-
quently, the court concluded that the trial court had properly restricted
cross-examination. The appellate court found that the defendant was
not prejudiced because the claim of privilege related to "collateral mat-

\begin{itemize}
  \item \footnote{Id. at 700.} \footnote{Id. at 700-01. Williams' counsel made no offer of proof and made no argument in support of his motion to strike.}
  \item \footnote{Id. at 701.}
  \item \footnote{415 U.S. 308 (1974).}
  \item \footnote{626 F.2d at 703.}
  \item \footnote{415 U.S. at 320 (quoting Alford v. United States, 282 U.S. at 694).}
  \item \footnote{626 F.2d at 702.}
\end{itemize}
Moreover, even if the court erred in not striking the witness' testimony, it was held harmless beyond a reasonable doubt.\textsuperscript{853}

A criminal defendant's right to cross-examine the state's witnesses was upheld in \textit{United States v. Bejar-Matrecios}.

The defendant in \textit{Bejar-Matrecios} was convicted in district court of illegal reentry into the United States after having been previously deported.\textsuperscript{855} In order to convict a defendant for such a violation, the previous deportation must have been lawful.\textsuperscript{856} The trial court, however, prohibited Bejar-Matrecios from cross-examining a Government witness as to whether the Immigration Service regulations required that an arrested alien be advised of his right to speak with the consul of the alien's country. In pursuing this line of questioning, defense counsel was attempting to show that this right had been violated,\textsuperscript{857} that the violation prejudiced him,\textsuperscript{858} and that the prior deportation was, therefore, unlawful.\textsuperscript{859} The Ninth Circuit held that the lack of cross-examination had "prevented Bejar from making an effective defense" and, consequently, Bejar's conviction was reversed.\textsuperscript{860}

Where the identity of a criminal defendant is a significant issue,
the defendant has a right to establish that he is a victim of mistaken identity.\textsuperscript{861} This right may require that he be allowed to challenge the witness’ identification.\textsuperscript{862} For example, in \textit{United States v. Robinson},\textsuperscript{863} two bank tellers identified Robinson in court as one of three bank robbers shown in bank surveillance photographs. Robinson sought to challenge the identifications by offering testimony of a “disinterested government official,” that the individual in the photographs resembled one Turner.\textsuperscript{864} The Second Circuit held that the trial court’s exclusion of the proffered evidence constituted reversible error because identification of Robinson was a principle issue in the case.\textsuperscript{865}

In \textit{United States v. Brannon},\textsuperscript{866} defendant Cox asserted that he had been mistaken for Garrett. Cox appealed his conviction on the ground that the district court had erred in not admitting into evidence photographs of Garrett for the jury to compare with bank surveillance photographs introduced by the Government.\textsuperscript{867} Although the Ninth Circuit agreed with Cox that “[a] defendant is entitled to prove his innocence

\textsuperscript{861} United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980); accord Pettijohn v. Hall, 599 F.2d 476, 482-83 (1st Cir.), cert. denied, 444 U.S. 946 (1979); Grant v. Aldredge, 498 F.2d 376, 381-82 (2d Cir. 1974); Holt v. United States, 342 F.2d 163, 165-66 (5th Cir. 1965); see 1 J. Wigmore, EVIDENCE § 34 (3d ed. 1940); 2 J. Wigmore, EVIDENCE § 413 (3d ed. 1940).

862. \textit{United States v. Robinson}, 544 F.2d 110, 112-13 (2d Cir. 1976); \textit{cf.} Chambers v. Mississippi, 410 U.S. 284 (1973) (because testimony critical to defendant’s defense was excluded and because defendant was prohibited from cross-examining his witness under state’s voucher rule, defendant was denied due process rights).

863. 544 F.2d 110, 112-13 (2d Cir. 1976).

864. \textit{Id.} The government official was not planning to testify that the individual in the picture did not resemble Robinson, a comparison which the jury could make for itself. Rather, he was going to testify that the person photographed resembled Turner, whose absence from the courtroom precluded the jury from making its own comparison. \textit{Id.}

865. \textit{Id.}

866. 616 F.2d 413 (9th Cir. 1980).

867. \textit{Id.} at 417.
by showing that someone else committed the crime," it also noted that the district court had broad discretion in determining whether to admit the photographs. At trial, three bank tellers identified Cox, while only one witness, who was friendly to the defendants, testified that the robber in the surveillance photographs "could be" Garrett. As a result, the appellate court thought that the testimony presented was insufficient to raise a substantial controversy to warrant overturning the trial court's decision to exclude the photographs of Garrett.

In Brannon, the identification of Cox as the third robber in the bank was a crucial issue. This situation was very similar to that presented in Robinson. However, the different results in the two cases may stem from the relationship between the defendant and the witnesses. In Robinson, the witness was "disinterested"; in Brannon, the witness was "friendly" to the defense. Thus, the Brannon evidence may not have been as credible as that in Robinson. However, the right to confrontation should permit a defendant to present evidence which tends to challenge eyewitness identifications.

c. hearsay evidence

Generally, the confrontation clause ensures that the reliability of evidence is tested by the process of cross-examination. However, when out-of-court statements are admitted into evidence to prove the truth of the matter asserted, there usually is no opportunity to cross-examine the actual declarant. Thus, possible confrontation clause

868. Id. at 418 (citing United States v. Robinson, 544 F.2d 110 (2d Cir. 1976); United States v. Holt, 342 F.2d 163 (5th Cir. 1965)).
869. 616 F.2d at 418; see United States v. McLennan, 563 F.2d 943, 948 (9th Cir. 1977) (trial judge has broad discretion to determine relevance of evidence), cert. denied, 435 U.S. 969 (1978). A court is not required to admit relevant evidence if it feels that the evidence is likely to confuse the issues or mislead the jury. Fed. R. Evid. 403.
870. 616 F.2d at 417.
871. Id. at 418.
872. Id. at 417-18.
873. 544 F.2d at 112.
874. Id. at 113.
875. 616 F.2d at 417.
876. United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980) (court held it was error to exclude as irrelevant testimony that another man, fitting the description of the bank robber, had used bait money taken in the crime charged to purchase a car); Pettijohn v. Hall, 599 F.2d 476, 482-83 (1st Cir.), cert. denied, 444 U.S. 946 (1979); Holt v. United States, 342 F.2d 163, 166 (5th Cir. 1965). The appellate court in Brannon even indicated that "it would have been preferable to admit the photographs." 616 F.2d at 418.
violations arise even though both the confrontation right and the evidentiary rule of hearsay share the common goal of ensuring testimonial reliability.\textsuperscript{879}

In \textit{Ohio v. Roberts},\textsuperscript{880} the United States Supreme Court examined the relationship between the confrontation clause and the hearsay rule. Roberts was charged with check forgery and possession of stolen credit cards. At the preliminary hearing, the defense called, as its sole witness, Anita Isaacs, the daughter of the theft victims. Isaacs testified that she had allowed Roberts to use her apartment.\textsuperscript{881} Throughout lengthy questioning by defense counsel,\textsuperscript{882} Isaacs denied that she had given Roberts checks and credit cards without informing him that she did not have permission to use them. Following the preliminary hearing, Isaacs left Ohio and talked by telephone with her parents only twice, once via a social worker.\textsuperscript{883} However, her parents did not know how to reach their daughter.\textsuperscript{884} As the trial neared, the prosecution sent five subpoenas to her parents’ residence, three of which were issued after the state knew that Isaacs had left home.\textsuperscript{885} Isaacs did not return to Ohio for the trial and, consequently, the state was allowed to introduce a transcript of her preliminary hearing testimony at Roberts’ trial.\textsuperscript{886} He was convicted. On appeal, the Ohio Court of Appeals reversed the conviction after concluding that the prosecutor had not made an adequate showing of a good faith effort to locate Isaacs.\textsuperscript{887} The Ohio Supreme Court then affirmed on other grounds.\textsuperscript{888} The court found sufficient basis for concluding that due diligence would not have brought Isaacs to trial.\textsuperscript{889} The court held, however, that the transcript was inadmissible because Isaacs had not been “cross-examined” at the

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\item \textsuperscript{879} California v. Green, 399 U.S. 149, 155-56 (1970) (hearsay rules and confrontation clause do not completely overlap).
\item \textsuperscript{880} 448 U.S. 56 (1980).
\item \textsuperscript{881} \textit{Id.} at 58.
\item \textsuperscript{882} \textit{Id.} The defense attorney did not ask to have Isaacs declared a hostile witness. Nor did he request permission to place her on cross-examination. \textit{Id.} However, he did employ leading questions, which are considered the primary tool of cross-examination. \textit{Id.} at 70.
\item \textsuperscript{883} \textit{Id.} at 56.
\item \textsuperscript{884} \textit{Id.}
\item \textsuperscript{885} \textit{Id.} at 79 & n.3 (Brennan, J., dissenting).
\item \textsuperscript{886} \textit{Id.} at 60.
\item \textsuperscript{887} \textit{Id.} The appellate court concluded that Barber v. Page, 390 U.S. 719, 722-25 (1968), required a showing that some affirmative action had been taken to secure the presence of the witness. 448 U.S. at 60.
\item \textsuperscript{888} 448 U.S. at 60.
\item \textsuperscript{889} \textit{Id.} at 61. The court distinguished Barber v. Page, 390 U.S. 719 (1968), because in \textit{Barber} the government knew where the witness could be located, while in \textit{Roberts}, Isaacs’ location was completely unknown. 448 U.S. at 60-61.
\end{itemize}
\end{footnotesize}
After reexamining the relationship between hearsay declarations and the confrontation clause, the Supreme Court concluded that the proponent had to show that the declarant was unavailable and that the statement was reliable. First, focusing on the question of reliability, the Court held that Isaacs' preliminary hearing testimony was reliable because "as a matter of form," she had actually been cross-examined. Defense counsel's method of questioning Isaacs had allowed him to challenge her truthfulness, her perception and memory, and her communicative abilities. Thus, even without a formal request to cross-examine Isaacs, the purpose of cross-examination was satisfied. Consequently, the Court reversed the decision of the Ohio Supreme Court.

Second, the Supreme Court held that Isaacs' absence had met the unavailability standard of the Constitution. The Court reaffirmed the rule established in Barber v. Page, in which the Court stated that "a witness is not "unavailable" for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial." In Barber, the Court did not find a good faith effort when a state had made no effort to obtain a witness who was in federal prison in another state. Roberts sheds some light on the meaning of "good faith effort." The

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890. 448 U.S. at 61. The Ohio Supreme Court concluded that California v. Green, 399 U.S. 149 (1970), "goes no further than to suggest that cross-examination actually conducted at a preliminary hearing may afford adequate confrontation for purposes of a later trial." 448 U.S. at 61 (emphasis in original). However, the Court relied on the dissent in Green for its holding that "the mere opportunity to cross-examine at a preliminary hearing did not afford constitutional confrontation for purposes of trial." Id.; see 399 U.S. at 195-202 (Brennan, J., dissenting).

891. 448 U.S. at 65-66. The Court noted that reliability may be inferred if the statement falls within an established hearsay exception. Otherwise the evidence will only be admitted if "particularized guarantees of trustworthiness" are shown. Id. at 66.

892. Id. at 70-71.

893. Id. at 71.

894. Id. at 77. By concluding that Isaacs actually had been cross-examined, the Court avoided deciding whether California v. Green, 399 U.S. 149 (1970), required that a witness actually be cross-examined at the preliminary hearing before his testimony can be admitted at trial, or whether the mere opportunity to cross-examine satisfies the confrontation clause. See supra note 891. The Court also declined to decide whether de minimus questioning, rather than full and formal cross-examination, is sufficient to satisfy the confrontation right. 448 U.S. at 70.

895. 448 U.S. at 77.


898. 390 U.S. at 723-25. But see Mancusi v. Stubbs, 408 U.S. 204 (1972) (witness had established permanent residency outside the United States).
Roberts Court stated that the prosecution did not have to make an effort to locate the witness if the witness' procurement was impossible. If there is even a slight possibility of producing the witness at the trial, then the effort required of the prosecution becomes a question of reasonableness.\textsuperscript{999} In either case, the burden remains with the prosecution to establish that a "good faith effort" had been made.\textsuperscript{900} The Court concluded that the prosecutor had acted reasonably and was not required to do more than he had done.\textsuperscript{901}

The dissent in Roberts disagreed with this second conclusion.\textsuperscript{902} The dissent noted that the prosecutor had made no actual effort to locate Isaacs.\textsuperscript{903} Moreover, the dissent concluded that subpoenaing Isaacs and speaking with her parents were not sufficient efforts to locate the witness. The dissenters did not think that the improbability of success should become the rule by which a prosecutor's actions may be excused.\textsuperscript{904}

In light of the importance of a defendant's right to confrontation,\textsuperscript{905} the weak showing of good faith effort allowed by the majority is a retreat from Barber.\textsuperscript{906} A cursory investigation would have been more reasonable.\textsuperscript{907} As such, Roberts illustrates that a good faith effort is difficult to define and subject to the changing perceptions of the Court.

In United States v. Neff,\textsuperscript{908} the defendant asserted that an Internal Revenue Service Certificate of Assessments and Payments constituted inadmissible hearsay and that its admission into evidence violated the confrontation clause. The IRS certificate stated that Neff "had filed no proper tax returns during 1974 and 1975."\textsuperscript{909}

The court first rejected Neff's claim that the certificate was inad-

\textsuperscript{999} 448 U.S. at 74.
\textsuperscript{900} Id. at 74-75.
\textsuperscript{901} Id. at 75-76.
\textsuperscript{902} Id. at 79-80 (Brennan, J., dissenting).
\textsuperscript{903} Id. at 79 (Brennan, J., dissenting). The prosecutor did not investigate the few good leads which he did have (e.g., a social worker in San Francisco who had been in contact with Isaacs and the possibility that someone in Tucson might have been able to contact Isaacs). Id. at 81.
\textsuperscript{904} Id. at 81-82 (Brennan, J., dissenting).
\textsuperscript{905} \textit{See} Pointer v. Texas, 380 U.S. 400, 405 (1965) ("essential and fundamental requirement" for a fair trial).
\textsuperscript{906} 390 U.S. at 72 ("possibility of a refusal is not the equivalent of asking and receiving a rebuff") (citation omitted). \textit{But see} Mancusi v. Stubbs, 408 U.S. 204 (1972).
\textsuperscript{907} \textit{See} 448 U.S. at 80 (Brennan, J., dissenting).
\textsuperscript{908} 615 F.2d 1235, 1241 (9th Cir.), \textit{cert. denied}, 447 U.S. 925 (1980).
\textsuperscript{909} Id. Neff was convicted in district court of willful failure to file income tax returns.
Since the IRS certificate was admitted "to prove the 'nonoccurrence' of Neff's... tax returns, was 'made and preserved' by the IRS, 'a public office or agency', and was 'evidence in the form of a certification in accordance with rule 902,' the court of appeals held that the certificate was admissible under the hearsay exception of rule 803(10) of the Federal Rules of Evidence. The court then was left with the issue whether the admission of the evidence violated the confrontation clause.

The Neff court applied the four-pronged test developed by the Supreme Court in Dutton v. Evans. In determining whether the admission of hearsay evidence amounts to a constitutional violation, the Supreme Court balanced (1) whether the statement asserted a past fact, (2) whether the declarant had personal knowledge of the fact asserted, (3) the possibility of faulty recollection, and (4) the possibility that the facts asserted were misrepresented by the declarant. The Neff court concluded that the IRS certificate was the result of "systematized data storage and retrieval by a public agency charged with the responsibility of maintaining accurate financial and tax information... and involved no risk of faulty human recollection and little likelihood of misrepresentation of significant data." Hence, the document was deemed reliable, satisfying the confrontation clause.

910. Id. at 1241-42. Federal Rule of Criminal Procedure 27 states that "[a]n official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions." FED. R. CRIM. PROC. 27.

911. FED. R. EVID. 803(10). See supra notes 909-11 and accompanying text.


913. 400 U.S. at 88-89 [these four factors are collectively referred to as "indicia of reliability"].

914. 615 F.2d at 1242.

915. Id.; see United States v. Lee, 589 F.2d 980, 988 (9th Cir.) ("statements made by public officials in the discharge of their duties" are generally considered trustworthy), cert. denied, 444 U.S. 969 (1979); Warren v. United States, 447 F.2d 259, 262 (9th Cir. 1971) ("a probability of trustworthiness is found in the official's duty to maintain accurate records"); see also Mattox v. United States, 156 U.S. 237 (1895) (out-of-court statements which are the focus of the confrontation clause do not include statements made by public officials in the discharge of their duties); accord, United States v. Mix, 446 F.2d 615, 622 (5th Cir. 1971); United States v. Thompson, 420 F.2d 536, 545 (3d Cir. 1970). But see United States v. Oates, 560 F.2d 45, 64-65 (2d Cir. 1977) (chemical analysis report held inadmissible where the chemist who performed the analysis was not present at trial to testify either as to procedures used in identifying the substance or as to his reasons for concluding that the substance was heroin).

Neff urged the Ninth Circuit to rely on Oates. The court, however, rejected Neff's argument that admission of the certificate was contrary to FED. R. EVID. 803(8). 615 F.2d at 1242 n.7. The document offered in Oates consisted of evaluative reports, 560 F.2d at 67 n.19, 68, 69, whereas the document offered in Neff was a national record "inherently less...
In *United States v. Castillo*, the district court erroneously admitted hearsay testimony at trial under the co-conspirator's rule. The statement, "We are fixing to kill a Mexican," was made by one person to the defendants, both of whom were members of the alleged conspiracy. However, the erroneous admission of a hearsay statement may not offend constitutional principles. The appellate court must decide "whether the effect of that error was so prejudicial as to require reversal."

The *Castillo* court looked to the four "indicia of reliability" set forth in *Dutton* to determine whether the trial court's error amounted to a violation of the defendant's right to confrontation. The co-conspirator, who allegedly made the statement, was not asserting a past fact which might have been "clouded by a faulty recollection." Rather, the defendant was stating his present intention to kill a Mexican." Based on these facts, the court of appeals concluded that the statement was sufficiently reliable to go to the jury. Thus, the error was not a constitutional violation.

In *United States v. May*, the defendants asserted that the trial court had erroneously admitted Apprehension Data Cards in violation of the hearsay rule. The trial court specifically stated, however, that it was admitting the photographs on the data cards only as circumstantial evidence (that is, as non-hearsay) that the persons...
graphed were on the base on the date in question and that each was served on that date with a letter barring him from re-entering the base without prior authorization.\textsuperscript{926} The appellate court agreed that the photographs were not hearsay because they were not "an assertion, oral, written, or non verbal, as required by Federal Rule of Evidence 801(a)."\textsuperscript{927}

Had the May court found that the data cards were admitted in violation of the hearsay rule,\textsuperscript{928} the error probably would not have required reversal because the prosecution called several witnesses who testified as to the preparation of the photographs and data cards and the service of the bar letters.\textsuperscript{929} The court observed that the defendants were afforded a full opportunity to cross-examine these witnesses.\textsuperscript{930} The confrontation clause does not prohibit a witness "under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact" from testifying as to what he has seen and heard.\textsuperscript{931} Accordingly, the court held that the defendant's confrontation rights had not been violated.\textsuperscript{932}

The delicate balance between hearsay exceptions and the confrontation clause is threatened when a codefendant's statement which inculpates the accused is admitted into evidence without an opportunity to meaningfully cross-examine the codefendant.\textsuperscript{933} In \textit{Bruton v. United States}, the United States Supreme Court held that where the codefendant's confession, which implicated the defendant, was admitted at a joint trial during which the codefendant did not take the stand, the defendant was denied his right to confrontation.\textsuperscript{934}

In \textit{Bruton}, the Supreme Court overruled the holding of \textit{Delli Paoli v. United States}\textsuperscript{935} because the \textit{Bruton} Court found that admonitions to the jury are "'intrinsically ineffective in that the effect of such a

\begin{itemize}
  \item 926. 622 F.2d at 1007.
  \item 927. \textit{Id}; see infra notes 929-30 and accompanying text.
  \item 928. Had the trial court admitted the evidence "to prove the truth of the matter asserted" it would have been hearsay. \textit{Fed. R. Evid.} 801(c).
  \item 929. 622 F.2d at 1008.
  \item 930. \textit{Id}.
  \item 932. 622 F.2d at 1008.
  \item 933. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE at 274-76 (1978).
  \item 934. 391 U.S. 123, 127-28 (1968). Both Bruton and his codefendant, Evans, were convicted in district court of armed postal robbery. At their joint trial a postal inspector testified that Evans had orally confessed to him that Evans and Bruton had committed the armed robbery. The trial judge instructed the jury that the confession was competent evidence against Evans, but that it constituted inadmissible hearsay which must be disregarded as to Bruton. \textit{Id} at 124-25.
  \item 935. 352 U.S. 232 (1957), overruled, 391 U.S. 123 (1968) (encroachment on the right to
nonadmissible declaration cannot be wiped from the brains of the jurors.' Thus, the Court found that the admission of "powerfully incriminating extrajudicial statements of a codefendant" in a joint trial, without an opportunity to cross-examine, violates the defendant's confrontation right. In 1979, the Ninth Circuit held that the Bruton rule was not violated when a codefendant's statement, which did not "powerfully incriminate" the defendant, was admitted into evidence subject to the trial court's jury instruction. In United States v. Buckner, the defendant was convicted of various income tax violations. The trial court admitted into evidence statements of Buckner's codefendants. The jury was instructed that "the statement of each declarant was admitted only as to that particular declarant and against no one else." On appeal, Buckner contended that the statements were admitted in violation of the Bruton rule.

The Ninth Circuit, however, disagreed. The court observed that the codefendant's statements, insofar as they related to Buckner, dealt with matters already conceded by him. Furthermore, the trial court had admitted only portions of the statements which, in its opinion, did not transgress the Bruton rule; all other material was excised from the statements. The Ninth Circuit concluded from these facts that the statements of the codefendants did not tend to "powerfully incriminate" Buckner, and thus, his right to confrontation was not violated.

Buckner is consistent with Bruton. The Bruton Court sought to prevent juries from taking into account unchallenged and "powerfully incriminating" hearsay statements of codefendants. Distinguishing Bruton, the Buckner court found that the statements were not "powerfully incriminating." Hence, the Ninth Circuit held that the admonition to the jury was sufficient and effective.

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936. 391 U.S. at 129 (quoting Delli Paoli v. United States, 352 U.S. at 247 (Frankfurter, J., dissenting)).
937. 391 U.S. at 135-36.
939. 610 F.2d 570 (9th Cir. 1979), cert. denied, 445 U.S. 961 (1980).
940. Id. at 574.
941. Id.
942. Id.
943. Id.
944. 391 U.S. at 135.
945. 610 F.2d at 574; see Parker v. Randolph, 442 U.S. 62 (1979).
The existence of a Bruton error does not require automatic reversal. In Harrington v. California, the Court recognized that a Bruton error could be “harmless beyond a reasonable doubt” if the statement was merely cumulative of properly admitted evidence.

In United States v. Lutz, the Ninth Circuit held that a Bruton error did not require reversal because it was “harmless beyond a reasonable doubt.” The four codefendants appealed their convictions for mail and wire fraud. During the course of their trial, a letter of apology written by Lutz to a defrauded client was admitted into evidence. The letter “indicated that Zitek had been fired because of ‘promises made in the field to clients.’” While conceding that admission of this letter constituted a Bruton error as to defendant Zitek, the Government argued that the error was “harmless beyond a reasonable doubt.” The Ninth Circuit agreed. The court noted that five or six witnesses, including the recipient of the letter, testified that Zitek had made false promises. In light of this independent evidence, the court concluded that the assertions made in the letter were cumulative and affirmed the conviction.

2. The right to compulsory process

Prior to 1967, the United States Supreme Court had never based a decision on the compulsory process clause. Then in 1967, the Court in Washington v. Texas recognized that the compulsory process clause was intended not only to enable the defendant to produce witnesses but also to have them testify at trial. Washington’s alleged accomplice in a murder, who had been tried separately and convicted, was disqualified from testifying on Washington’s behalf at his trial because of a Texas statute which rendered accomplices incompetent to

948. 395 U.S. at 254.
949. 621 F.2d 940, 947 (9th Cir. 1980).
950. Id. at 947.
951. Id.
952. Id. This approach is consistent with other recent Ninth Circuit cases. See, e.g., United States v. Vissars, 596 F.2d 400 (9th Cir. 1979) (Bruton error harmless because it did not provide the jury with any information it wouldn’t otherwise have heard); United States v. Cornejo, 598 F.2d 554 (9th Cir. 1979) (Bruton error harmless where three bank employees positively identified the defendant and other evidence strongly supported his conviction).
954. 388 U.S. 14, 23 (1967).
testify for one another. In deciding this case, Chief Justice Warren reached beyond the "fundamental fairness" requirements of the due process clause and relied, instead, on the specific words of the sixth amendment. The issue was "[w]hether the Sixth Amendment guarantees a defendant the right . . . to put his witnesses on the stand, as well as to compel their attendance in court." In answering this question affirmatively, the Supreme Court for the first time firmly established that a defendant is entitled to a meaningful opportunity to present a defense through witnesses.

a. Mendez-Rodriguez rule

Since 1967, the Ninth Circuit has examined the compulsory process clause several times. In United States v. Mendez-Rodriguez, shortly after the defendant was arrested for allegedly smuggling illegal aliens into the United States, the government deported three of the six aliens apprehended. The government's actions placed the potential witnesses beyond its subpoena power, thus preventing the defendant from interviewing the aliens and ascertaining for himself which aliens would have been valuable witnesses. The court of appeals concluded that this interference amounted to a violation of the defendant's right to compel favorable witnesses to testify, and, thus, required reversal of his conviction.

Subsequent decisions have stated that under Mendez-Rodriguez a defendant must be given "a reasonable opportunity to interview alien witnesses and determine their possible value to the preservation of an effective defense." The Ninth Circuit's definition of what is "reasonable" has varied considerably. For example, in the 1972 decision of United States v. Romero, the court concluded that the defendant had been given a reasonable opportunity to interview witnesses when the aliens were not deported until after the defendant was indicted. Four years later in United States v. Lomeli-Garnica, the Ninth Circuit upheld a conviction when the government had allowed a potential wit-
ness to return to Mexico just twelve days after the defendant was arrested.963

The 1980 decision of United States v. Castillo964 provided the opportunity for the Ninth Circuit to clarify the definition of "reasonable." While incarcerated in a federal correctional institution, Castillo was involved in an altercation which resulted in the death of another inmate, Flores. Following the incident, the government deported two alien inmates, Ramos and Gonzales, who were present at the incident.965

Before their deportation, Ramos had been available for questioning for over one month, and Gonzales for five months. Moreover, in separate interviews with federal agents, both aliens had denied seeing the incident. Castillo claimed that the government's deportation of Ramos and Gonzales violated his right to compulsory process.966

The Castillo court first conceded that "the government's obligation to retain a deportable alien who may be a material witness is not easily defined in terms of its time element."967 However, the court concluded that the Mendez-Rodriguez rule had not been violated.968 In so holding, the court went beyond the issue of time. In light of the results of their government interviews, the court agreed with the Government that the witnesses' testimony would not have "contributed significantly" and noted that the government's deportation of the two aliens was done in "good faith."969 However, for the third time, a panel of the Ninth Circuit left open the exact time parameters of the government's obligation.

In the 1980 case of United States v. Gonzales970 the district court dismissed indictments against nine individuals because the Government had failed to retain two illegal aliens, Rivera and Avila, as material witnesses, thereby violating the defendants' rights to compulsory

963. 495 F.2d 313, 314 (9th Cir. 1974). The witness in this case was not an illegal alien and was not deported. The Court stated that further detainment of the witness would have imposed a substantial hardship on him with only a slight possibility of benefit to the defendant. In light of these facts, the government's actions apparently were neither unreasonable nor in bad faith.
964. 615 F.2d 878, 882 (9th Cir. 1980).
965. Id. at 880-81.
966. Id. at 882.
967. Id.
968. Id.
969. Id. The court stated that the compulsory process clause does not require that the government "retain indefinitely every alien who may have some remote connection with alleged criminal activity." Id.; see United States v. Sanchez-Murillo, 608 F.2d 1314, 1318 (9th Cir. 1979); United States v. Orozco-Rico, 589 F.2d 433, 435 (9th Cir. 1978); United States v. Lomeli-Garnica, 495 F.2d 313, 314 (9th Cir. 1974).
970. 617 F.2d 1358, 1360-61 (9th Cir. 1980), cert denied, 101 S. Ct. 268 (1980).
process and due process. On appeal, the Ninth Circuit held that the unavailability of Avila did not violate the defendant's due process rights because it was not caused by "unilateral government action." With respect to Rivera, however, the appellate court found that the government had allowed him to voluntarily return to Mexico rather than being deported. This action was deemed a unilateral governmental interference with the defendants' opportunity to interview Rivera before trial. Thus, the Ninth Circuit, after distinguishing its 1979 decision of United States v. Valdez, held that the district court's dismissal was proper as to those counts for which Rivera may have been a material witness. However, the Gonzales court reached its decision citing only the due process clause, without mentioning the compulsory process clause, upon which the Mendez-Rodriguez rule also is based.

b. other related cases

In United States v. Bonilla, the defendant claimed that the government's failure to produce an informant for a pretrial interview constituted reversible error. The court quickly disposed of this claim with a two-step analysis. First, the court pointed out that in Roviaro v. United States, the Supreme Court firmly established that where an informant is a material witness to a criminal transaction, or clearly would be of help to the defendant in the preparation of his defense, the Government need disclose only his or her identity prior to trial. The court reemphasized what the Ninth Circuit has been asserting over the past decade—that unless a defendant could reasonably have benefited from a missing witness's testimony, there is no denial of constitutional rights. The defendant must have been prejudiced by the witness's absence. Id. (citing United States v. Sanchez-Murillo, 608 F.2d 1314, 1318 (9th Cir. 1979); United States v. Valdez, 594 F.2d 725, 728 (9th Cir. 1979); United States v. Orozco-Rico, 589 F.2d 433, 435 (9th Cir. 1978), cert. denied, 442 U.S. 920 (1979); United States v. Castellanos-Machorro, 512 F.2d 1181, 1183-84 (9th Cir. 1975); United States v. Loneli-Garnica, 495 F.2d 313, 314 (9th Cir. 1974)).
ond, the court emphasized that the duty to disclose the identity of an informant does not require the Government to actually produce an informant in advance of trial.979 The court in dicta further emphasized that the Government is required only to exert reasonable efforts to produce an informant at trial when his "'presence has been properly requested by the defendant.'"980

Bonilla argued, in effect, that the constitutional right to compel witnesses to testify in one's favor extends to pretrial access to witnesses in order to prepare trial strategy.981 However, knowledge of the identity of an informant is the limit of the defendant's constitutional rights. Thus, the Government is under no "general obligation to produce an informer."982

The 1979 Ninth Circuit opinion of United States v. Panza983 also touched on principles embodied in the compulsory process clause. Panza took the stand during his trial for armed robbery. After offering his version of the events, Panza then refused to answer questions posed to him on cross-examination. As a result, the trial court ordered Panza's testimony stricken from the record because the prosecution's questions were reasonably related to matters raised by the defendant's testimony. Further, the testimony of three other defense witnesses was stricken because it was no longer relevant once the defendant's testimony was removed from the record.984 Panza claimed that the court's action denied him his constitutional right to testify and to present witnesses on his own behalf.985

At common law, defendants did not have the right to testify on their own behalf.986 This right was a statutory creation.987 Some

979. 615 F.2d at 1264.
980. Id. (quoting United States v. Hart, 546 F.2d 798, 799 (9th Cir. 1976), cert. denied, 429 U.S. 1120 (1977)).
981. See United States v. Cook, 608 F.2d 1175, 1180 (9th Cir. 1979), cert. denied, 444 U.S. 1034 (1980); Callahan v. United States, 371 F.2d 658, 660 (9th Cir. 1967).
982. Velarde-Villarreal v. United States, 354 F.2d 9, 12 (9th Cir. 1965).
983. 612 F.2d 432 (9th Cir.), cert. denied, 447 U.S. 925 (1980).
984. Id. at 440.
985. Id. at 437. In Robbins v. Cardwell, 618 F.2d 581 (9th Cir. 1980), the Ninth Circuit declined to decide whether prohibiting a defense witness, or the accused himself, from testifying, violates the confrontation clause or the right to present a defense implicit in the sixth amendment. Id. at 582. Without reaching the constitutional question, the court found that "the preclusion of the witness's testimony had no effect on the course of the proceedings or outcome of the case." Id. at 583 (footnote omitted). Had the court reached the constitutional question, it should have addressed the compulsory process clause, rather than the confrontation clause, since a defendant's right to call witnesses to testify in his favor clearly arises from the former, not the latter. See supra note 954 at 613.
courts, however, have recognized that this right overlaps with constitutional interests. 988 Even so, a defendant must testify "truthfully in accordance with the oath." 989 There is no right to commit perjury. 990 Moreover, once a defendant chooses to testify he may not subsequently refuse to answer questions on cross-examination which are reasonably related to his direct testimony. 991 If a defendant refuses to answer on cross-examination, the court may, in its discretion, strike the testimony if it feels that this sanction is the only way to accommodate the law's interest in arriving at the truth. 992 The propriety of a given sanction will vary with the circumstances. 993

In Panza, the defendant refused to answer questions on cross-examination which were "directed at the core of the defense Panza had outlined in his direct testimony." 994 Had his refusal related to merely collateral matters, the appellate court might have been more inclined to find an abuse of the trial court's discretion. 995 In light of the significance of the questions which Panza refused to answer, the striking of Panza's testimony was not inconsistent with his right to testify on his own behalf and present his defense. 996

D. The Right to a Speedy Trial—Post-Accusatorial Delay

While the sixth amendment to the Constitution guarantees the criminally accused the right to a speedy trial, 997 this constitutional right is not triggered until the defendant has been arrested or formally charged with a crime. 998 A Fourth Circuit decision 999 recently read-

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987. 18 U.S.C. § 3481 (1976) provides: "In trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness."


990. Id. at 54.


992. 612 F.2d at 438-39.

993. See United States v. Cardillo, 316 F.2d 606, 613 (2d Cir.), cert. denied, 375 U.S. 822 (1963); Yates v. United States, 227 F.2d 844, 846 (9th Cir. 1955).

994. 612 F.2d at 439.


996. 612 F.2d at 438-39.

997. U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

998. Dillingham v. United States, 423 U.S. 64 (1975) (per curiam); United States v.
addressed\textsuperscript{1000} the question of what "arrest" would be a sufficient triggering event for speedy trial purposes. In \textit{United States v. MacDonald},\textsuperscript{1001} an army doctor was convicted of murdering his family.\textsuperscript{1002} In 1970, the doctor first was investigated and formally charged with the murders by the Army. Seven months later, it dismissed the charges and honorably discharged him. During this period, the Army restricted the doctor to his quarters and relieved him of his duties. After his discharge, the Justice Department continued the investigation, utilizing the Army's investigative services. In 1975, four and one-half years after the Army's formal charge, an indictment issued from a federal grand jury. For two years during this period, the doctor tried to speed up the government investigation. When brought to trial, the doctor moved to have his indictment dismissed on speedy trial grounds. Although the trial court denied his motion, the Fourth Circuit reversed and ordered the indictment dismissed.\textsuperscript{1003} Ultimately, the Supreme Court reversed and remanded the case, deeming the interlocutory appeal inappropriate for the speedy trial claim.\textsuperscript{1004} Consequently, the trial went forward and ended in a conviction.\textsuperscript{1005} In 1980, the Fourth Circuit basically reiterated its initial position and reversed the conviction with instructions to dismiss the indictment.

The 1980 decision, like the 1976 opinion,\textsuperscript{1006} held that the speedy

\textsuperscript{1000} The Fourth Circuit first looked at this issue in 1976 when the defendant made an interlocutory appeal from the trial court's denial of his motion to dismiss the indictment on speedy trial grounds. \textit{United States v. McDonald}, 531 F.2d 196 (4th Cir. 1976). The court of appeals agreed with the defendant and ordered his indictment dismissed. \textit{Id.} at 209. Without reaching the merits of the case, the Supreme Court reversed the Fourth Circuit decision because the Court felt that the interlocutory appeal was improper. 435 U.S. 850 (1978). The Court held that the speedy trial claim could best be judged post-trial. \textit{Id.} at 858-59.


\textsuperscript{1002} For a detailed discussion of the facts, see \textit{United States v. MacDonald}, 531 F.2d 196, 200-02 (4th Cir. 1976).

\textsuperscript{1003} \textit{Id.} at 209.

\textsuperscript{1004} 435 U.S. 850 (1978).

\textsuperscript{1005} 632 F.2d at 261.

\textsuperscript{1006} 531 F.2d at 202-05.
trial right was triggered by the military "arrest."\textsuperscript{1007} According to the Fourth Circuit, the "offending delay" ran from the military arrest until the trial took place.\textsuperscript{1008} Both opinions assumed that the speedy trial clause was triggered because MacDonald's military restraint was equivalent to a civilian arrest and MacDonald was "subjected to 'actual restraint imposed by arrest and holding to answer in a criminal charge.'"\textsuperscript{1009} Moreover, both opinions agreed that the dismissal of the charges and the Army's honorable discharge of the defendant did not alter the outcome.\textsuperscript{1010} The Supreme Court has, once again, decided to review the Fourth Circuit case.\textsuperscript{1011}

The Ninth Circuit in \textit{United States v. Henry}\textsuperscript{1012} briefly touched on a situation similar to that in \textit{MacDonald}. In \textit{Henry}, the defendant first had been charged by a complaint, which was eventually dismissed by the Government, and then later the defendant was indicted by a federal grand jury for the same crime.\textsuperscript{1013} Unlike \textit{MacDonald}, \textit{Henry} involved the same investigating and charging branch of the government. However, the \textit{Henry} court evaded the resolution of this issue by finding instead that the defendant had not been prejudiced by either delay.\textsuperscript{1014}

Prejudice to the defendant is one of four factors the Supreme Court has noted in determining whether a defendant's sixth amendment rights have been violated.\textsuperscript{1015} The other three factors are length of the delay, reason for the delay, and the defendant's assertion of his right.\textsuperscript{1016} While the Court in \textit{Barker v. Wingo}\textsuperscript{1017} declared that none of these factors are necessary or sufficient and that the balancing of them

\textsuperscript{1007} The dissenting opinion in 1976 argued that MacDonald had not been arrested as required under \textit{United States v. Marion}, 404 U.S. 307 (1971), because MacDonald was not actually confined. 531 F.2d at 210-14 (dissenting opinion).

\textsuperscript{1008} 632 F.2d at 261.

\textsuperscript{1009} \textit{Id.}; 531 F.2d at 204. \textit{But see id.} at 210-14 (dissenting opinion).

\textsuperscript{1010} \textit{See} 632 F.2d at 261-62; 531 F.2d at 204. In the 1976 opinion, the Fourth Circuit found that the end of the Army's investigation did not from a practical standpoint dispel the effects of the government's initial accusation. MacDonald, of course, realized that the favorable conclusion of the [Army] proceedings was not the end of the government's efforts to convict him. Prudence obliged him to retain attorneys at his own expense for his continuing defense.

\textit{Id.}

\textsuperscript{1011} 101 S. Ct. 3004 (1981).

\textsuperscript{1012} 615 F.2d 1223 (9th Cir. 1980).

\textsuperscript{1013} \textit{Id.} at 1227.

\textsuperscript{1014} \textit{Id.} at 1232-33. The circuits have variously interpreted this question. \textit{See id.} at 1233 n.13.


\textsuperscript{1016} \textit{Id.}

\textsuperscript{1017} 407 U.S. 514 (1972).
must be performed on an ad hoc basis, the outcome in two 1980 Ninth Circuit cases hinged on the presence or absence of prejudice.

In Henry, the length of the delay was more than one year, the delay was negligently, rather than deliberately, caused by the Government, and Henry had made an adequate assertion of his right. The Ninth Circuit found that these three factors were "slightly weighted" in Henry's favor but held that he was not deprived of his right to a speedy trial because he had not been prejudiced "in any manner."

Henry, however, claimed a unique kind of prejudice. At the time of his federal indictment by an Arizona federal grand jury, Henry had been fighting extradition from Maryland to Arizona, where he had been indicted for attempted murder. He was then arrested by federal authorities on a warrant of removal in Maryland and released on bond. After he appeared in Arizona for his federal arraignment, he was arrested by Arizona authorities on the state charge. Henry contended that he had been prejudiced by the federal indictment because he was denied his right to contest the extradition proceedings. The Ninth Circuit rejected this claim because the federal actions did not affect his federal trial. Thus, the court held that the issue was "pertinent to the state proceedings, not the federal proceedings."

In the second case, United States v. Tercero, the Ninth Circuit also held that the defendant had not been prejudiced by the length of delay involved. The court noted that the twenty-month period of delay was sufficiently lengthy to favor Tercero's position, but also noted that the Government had not made a deliberate attempt to hamper the defense. In addition, the court excused Tercero's failure to assert his right to a speedy trial. However, the court held that he had not been prejudiced because he had not been incarcerated during the delay, could not claim that he had suffered from anxiety or concern relating to the delay, and had failed to show any impairment to his trial defense. Instead, Tercero was helped by the delay because the key prosecution witness suffered a partial memory loss. As a result, Tercero's conviction was affirmed.

Both Tercero and Henry indicate the Ninth Circuit's unwillingness

1018. Id. at 530.
1019. 615 F.2d at 1233-34.
1020. Id. at 1234.
1021. Id. at 1227.
1022. Id. at 1234.
1023. Id.
1024. 640 F.2d 190 (9th Cir. 1980).
1025. Id. at 193-95.
to find a speedy trial violation without a showing of actual prejudice. However, the 1980 Fourth Circuit decision of *United States v. MacDonald*\(^{1026}\) appears to have adopted a more relaxed standard. The *MacDonald* court stated that a "substantial possibility of prejudice is what controls."\(^{1027}\) MacDonald had suffered approximately a nine-year delay, although about four years of that period was attributable to a pre-trial appeal process.\(^{1028}\) The Fourth Circuit held that the "risk to MacDonald was simply too great [so that] . . . [t]he intervening period of over nine years rendered it virtually impossible for MacDonald to prove the recollections of each witness to see if they were fuller than or different from what he had stated when his statement was taken."\(^{1029}\) The Supreme Court has not spoken clearly on this standard of possible prejudice, although past Supreme Court decisions imply that actual prejudice must be identified.\(^{1030}\) The Court may come to grips with this question because it has decided to review the Fourth Circuit's decision.\(^{1031}\)

### E. The Right to a Public Trial: Richmond Newspapers, Inc. v. Virginia

#### 1. The sixth amendment

The sixth amendment of the United States Constitution provides that a criminal defendant has the "right to a speedy and public trial."\(^{1032}\) This right helps to insure that the criminally accused will be "fairly dealt with and not unjustly condemned."\(^{1033}\) The United States Supreme Court also has held that the right to a public trial belongs to the defendant alone.\(^{1034}\) Alternatively, in *Gannett Co. v. DePasquale*, 632 F.2d 258 (4th Cir. 1980), cert. granted, 101 S. Ct. 3004 (1981).

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1027. Id. at 264.
1028. Id. at 263. See *supra* note 1001 and accompanying text.
1029. 632 F.2d at 263.
1032. U.S. Const. amend. VI.
the Court stated that, under the sixth amendment, the public may not demand access to a criminal trial.\textsuperscript{1036}

In \textit{Gannett}, without objection from the prosecution, the three defendants of a highly publicized trial requested that their \textit{pretrial} suppression hearing be closed because of potential adverse publicity. The trial judge ruled that the press had a constitutionally protected right of access but, after balancing this first amendment right against the defendants' constitutional right to a fair trial, granted the defendants' motion for exclusion of the press.\textsuperscript{1037} Two newspapers challenged the judge's order.

The Supreme Court, in upholding the trial judge's order, recognized an independent public interest in open criminal proceedings\textsuperscript{1038} but held that this interest did not amount to a constitutional right under the sixth amendment.\textsuperscript{1039} Yet, because of this public interest, a defendant cannot compel a closed proceeding without the consent of the prosecutor and judge.\textsuperscript{1040} The Court referred to the language\textsuperscript{1041} and history\textsuperscript{1042} of the sixth amendment in rejecting the contention that the sixth amendment guaranteed the public a right to attend a criminal trial. Moreover, while the Court assumed arguendo that there was historical support for a "common-law right of the public to attend criminal trials,"\textsuperscript{1043} it found no evidence that such a right existed in the \textit{pretrial} setting.\textsuperscript{1044}

In sum, although the facts in \textit{Gannett} involved a pretrial proceeding, the language of the plurality opinion encompassed trials.\textsuperscript{1045} As a result, following \textit{Gannett}, the public's right under the sixth amendment in the \textit{trial} setting was still somewhat unclear.\textsuperscript{1046}

The Court's most recent pronouncement in \textit{Richmond Newspapers, Inc. v. Virginia}\textsuperscript{1047} apparently has foreclosed argument that the public

\textsuperscript{1035} 443 U.S. 368 (1979).
\textsuperscript{1036} \textit{Id.} at 391.
\textsuperscript{1037} \textit{Id.} at 376.
\textsuperscript{1038} \textit{Id.} at 383.
\textsuperscript{1039} \textit{Id.} at 391.
\textsuperscript{1040} \textit{Id.} at 383.
\textsuperscript{1041} \textit{Id.} at 379-81.
\textsuperscript{1042} \textit{Id.} at 385-87.
\textsuperscript{1043} \textit{Id.} at 387.
\textsuperscript{1044} \textit{Id.} at 387-91.
\textsuperscript{1045} \textit{See, e.g.,} \textit{Id.} at 391.
\textsuperscript{1046} \textit{See id.} at 394-97 (Burger, C.J., concurring) (limiting \textit{Gannett} to pretrial proceedings); \textit{see also} Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814, 2841, 2841 n.1 (1980) (Blackmun, J., concurring).
\textsuperscript{1047} 448 U.S. 555 (1980) (plurality opinion).
has a constitutional right to attend criminal trials guaranteed by the sixth amendment. The Richmond Newspapers decision, which arose from a closed trial, declared that the public has a right of access to criminal trials but based this right on the first amendment, without mentioning the sixth.\textsuperscript{1048} Thus, in light of Gannett and Richmond Newspapers, the public cannot claim that a right to attend criminal proceedings stems from the sixth amendment.\textsuperscript{1049}

2. The first amendment

The Gannett Court left unanswered whether the first amendment guaranteed the public a right to attend criminal proceedings. The Court observed that, even if the first amendment did guarantee a right of access, the trial court had properly balanced the constitutional rights of the press and public against the defendants' constitutional right to a fair trial.\textsuperscript{1050}

The Court affirmatively answered this question in Richmond Newspapers, Inc. v. Virginia.\textsuperscript{1051} As in Gannett, the criminal defendant in Richmond Newspapers moved that his murder trial be closed to the public because of publicity problems.\textsuperscript{1052} Referring to a Virginia statute,\textsuperscript{1053} the trial judge, without objection from the prosecution, excluded the public and the press.\textsuperscript{1054} At a hearing following the judge's initial ruling,\textsuperscript{1055} counsel for the newspaper reporters argued that the judge had improperly ruled by not making any evidentiary findings or

\textsuperscript{1048} Id. at 580. Moreover, this right was found to be implicit in the first amendment. \textit{Id.} The Court indirectly removed the sixth amendment from consideration by conceding that "neither the Constitution nor the Bill of Rights contains any provision which by its terms guarantees to the public the right to attend criminal trials." \textit{Id.} at 575.

\textsuperscript{1049} Id. at 603 (Blackmun, J., concurring); see \textit{id.} at 598 (Stewart, J., concurring). \textit{But see id.} at 564 (appearing to limit Gannett to pretrial hearings); \textit{id.} at 584 (Brennan, J., concurring).

\textsuperscript{1050} 443 U.S. at 391-93.

\textsuperscript{1051} 448 U.S. 555 (1980).

\textsuperscript{1052} Id. at 559. Defendant Stevenson's trial had been much publicized. This publicity caused his third trial to end in mistrial; a prospective juror had read about Stevenson's two previous trials in a newspaper and had told other prospective jurors about the case before the retrial began. The first trial was reversed by the Virginia Supreme Court because of improperly admitted evidence. The second trial resulted in mistrial after a juror was excused when no alternate was available. \textit{Id.}

\textsuperscript{1053} VA. CODE § 9.2-266 (1975) provides in part: "In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."

\textsuperscript{1054} 448 U.S. at 560.

\textsuperscript{1055} Reporters of Richmond Newspapers, Inc. sought a hearing on a motion to vacate the closure order. \textit{Id.}
considering any less drastic measures. The judge, accepting the defendant's argument that closure was necessary, ordered the trial to continue as a closed proceeding. The trial was held, and in the published court order the defendant was declared not guilty. Allowed to intervene nunc pro tunc, the newspaper company petitioned the Virginia Supreme Court for writs of mandamus and prohibition and filed an appeal from the closure order. Failing at the state court level, the company petitioned the United States Supreme Court, which granted the petition.

The Supreme Court concluded that the trial judge had erred in not setting out reasons for closure and in not considering less drastic solutions. Hence, the Court held that "absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." The Court based its conclusion on implicit first amendment guarantees.

The Court first observed that a presumption of openness in criminal trials has existed since the drafting of the Bill of Rights. The Court further noted that several benefits have resulted from this openness—for example, fairness to the defendant and a perception of fairness by the public.

In light of this history of open proceedings, the Court held that the first amendment guaranteed the public a right to attend criminal trials. The Court declared that the freedoms of speech and of press, the right to assembly, and the right to petition the government for redress of grievances “share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.”

1056. Id.
1057. See supra note 1053.
1058. 448 U.S. at 561.
1059. Id. at 562.
1060. Id.
1061. Id. at 562-63. The Court rejected a mootness argument because it deemed the action capable of repetition. Id. at 563.
1062. Id. at 580-81.
1063. Id. at 581 (emphasis added) (footnote omitted).
1064. Id. at 580. No other part of the Constitution or the Bill of Rights was specifically referred to. See id. at 573-75; see supra note 1065 and accompanying text.
1065. 448 U.S. at 564-69, 575.
1066. Id. at 569-73.
1067. Id. at 575-80.
1068. U.S. CONST. amend. I.
1069. 448 U.S. at 575. The Court further stated: [p]lainly it would be difficult to single out any aspect of government of higher
In regard to the freedoms of speech and press, the Court held that those rights would have little meaning if the right to attend trials was not protected. The Court declared, "[f]ree speech carries with it some freedom to listen." The Court held that the right to receive information prohibited the government from "summarily closing" the courtroom doors.

The Court also noted that the right of assembly guarantees a person's right to "listen, observe, and learn." The Court deemed the right of assembly a "catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked." The right of assembly insures the people and their media representatives a right to attend criminal trials which have been traditionally open.

Consequently, in spite of the lack of an enumerated constitutional right, the Court held that the first amendment implicitly guaranteed the "right to attend criminal trials." The Court declared the right of the public to attend trials a fundamental right and applied this right to the states through the due process clause of the fourteenth amendment. However, because the Virginia trial court had not recognized this right, had not made any findings of fact to support closure of the trial, and had not inquired into alternatives other than closure, the Supreme Court held that the trial court had erred and reversed the closure ruling.

3. Effect of Richmond Newspapers on first amendment law

Traditionally the first amendment has protected the flow of information to the public. Such protection has developed because first
amendment cases generally have involved sources willing to divulge information. Until Richmond Newspapers, the Supreme Court had not held that the press had a right to gather information from an unwilling source. In Richmond Newspapers, the Court held that the right to attend trials and disseminate information about them furthers the workings of the government. Moreover, although it had indicated previously that the press had no greater access to information than the public, the Court placed special emphasis on the importance of media attendance at trial proceedings. Thus, while Richmond Newspapers may be a “watershed case,” its factual setting may limit application.

4. Richmond Newspapers and courtroom proceedings

Although under Richmond Newspapers the press and public have a


1081. See id. at 1315-16.

1082. 448 U.S. at 575 (“public access” to trials was regarded by framers as part of the judicial “process” itself). See generally Emerson, Legal Foundations of the Right to Know, 1976 WASH. U.L.Q. 1, 14-16.


1084. 448 U.S. at 572-73. The Court stated:

[Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard.

Id.

1085. Id. at 582 (Stevens, J., concurring).

1086. The opinion of the Court emphasized the fact that trial proceedings have been open traditionally. Id. at 564-73, 575. On this ground, the opinion distinguished Pell v. Procunier, 417 U.S. 817 (1974), and Saxbe v. Washington Post Co., 417 U.S. 843 (1974), 448 U.S. at 576 n.11, both of which dealt with access to prisons. The Richmond Newspapers Court stated that “[p]enal institutions do not share the long tradition of openness.” 448 U.S. at 576 n.11.
first amendment right of access to criminal trials, the holding probably will have little practical effect. The importance of attendance by the public and press in the courtroom has long been recognized and protected by the Court. For example, in *Nebraska Press Association v. Stuart* the Court implied that even though courts must protect a defendant's right to a fair trial, a prior restraint order limiting publication of information would not be upheld unless a heavy burden were met. Even under *Gannett* the rights of the public and press were deemed protected because a defendant could not unilaterally close a criminal proceeding by waiving his sixth amendment right. In sum, *Richmond Newspapers* is but a continuation of a long line of cases which noted the importance of public attendance at criminal trials.

However, *Richmond Newspapers*, unlike *Gannett* and its predecessors, affirmatively declared that the public has a constitutional right to attend criminal trials. Moreover, although this right is not absolute, it can be limited only after a determination by the trial court that a defendant's right to fair trial is jeopardized.

The Court held that the following alternatives to closure must be considered before a trial judge imposes a closure order: exclusion of witnesses from the courtroom, sequestration of witnesses from the courtroom, sequestration of witnesses during the trial, and sequestration of jurors.

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1087. *Richmond Newspapers* will have little effect in California. The California courts already recognize a right of access to criminal trials by the press as members of the general public. Oxnard Publishing Co. v. Superior Ct., 68 Cal. Rptr. 83 (1968). The court held that a public trial is not a private right of parties, but one involving additional interests, including those of the public. Absent extraordinary circumstances, the requests of the accused alone are not sufficient to justify closing the proceedings. *Id.* at 94. Kirstowski v. Superior Ct., 143 Cal. App. 2d 745, 750-51, 300 P.2d 163, 167 (1956).

1088. *Richmond Newspapers* stated three purposes served by public trials. First, a public trial serves as a check on the judiciary. 448 U.S. at 569; see *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975); *Sheppad v. Maxwell*, 384 U.S. 333, 349-50 (1966); *In re Oliver*, 333 U.S. 257, 268-70 (1948). Secondly, public trials increase the respect for the judiciary. 448 U.S. at 570-73. Finally, public trials serve a therapeutic function in that they provide an outlet for community hostility. *Id.*


1090. *Id.* at 561.

1091. 443 U.S. at 382-83. ("In an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation"). *Id.* at 383. See *supra* note 1049 and accompanying text.

1092. 448 U.S. at 580.

1093. *Id.* at 580-81.

Two effects *Richmond Newspapers* will have outside the criminal trial context are unknown. First, whether the *Richmond Newspapers* holding will apply to pretrial proceedings is unclear. The *Gannett* Court never decided the question of what effect the first amendment has in pretrial hearings.\(^{1095}\) In addition, the language and facts of *Richmond Newspapers* are limited to the trial itself.\(^{1096}\) However, the reasons behind *Richmond Newspapers* would appear to have equal validity in a pretrial hearing. A pretrial hearing is of equal importance, and sometimes of greater importance,\(^{1097}\) than the trial itself.\(^{1098}\) Second, *Richmond Newspapers* may be valid in *civil* trials also. In a footnote, the Court indicated that it would apply the holding in civil proceedings because civil actions also have a history of openness.\(^{1099}\) Consequently, the role of the first amendment in these two areas is subject to further clarification.

**III. PRETRIAL PROCEEDINGS**

A. Indictments

1. Sufficiency

Every defendant in a criminal prosecution has an inalienable right

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\(^{1095}\) 443 U.S. at 392. The opinion of the Court merely assumed *arguendo* that the first amendment guaranteed a right of access but it found that the trial judge had balanced properly the competing rights involved. *Id.* at 392-93.

\(^{1096}\) See 448 U.S. at 564. Moreover, the opinion of the Court noted that some alternatives to closure available at trial are not available at pretrial proceedings. *Id.* at 581. However, this lack of alternatives should not preclude the Court from recognizing a first amendment right of access in a pretrial setting. If such a right exists, however, the trial court may have only two options after balancing the constitutional interests: to leave open or close the pretrial hearing.

\(^{1097}\) For example, a pretrial suppression hearing may result in the exclusion of critical government evidence.

\(^{1098}\) 443 U.S. at 436 (Blackmun, J., dissenting).

If the Court found that the right of access had to be considered at pretrial proceedings the continued effect of § 868 of the California Penal Code may be in jeopardy. Section 868 allows a defendant the absolute right to receive a closed preliminary hearing. This section recently has been challenged in Cromer v. Superior Ct., 109 Cal. App. 3d 728, 167 Cal. Rptr. 671 (1980). The defendant sought a writ of mandamus to have her preliminary hearing transcript withheld from the public until trial began, so that potential jurors could not be prejudiced. The appellate court issued the writ. *Id.* at 736, 167 Cal. Rptr. at 675. *But see* Gannett Co. v. DePasquale, 443 U.S. at 393 ("[A]ny denial of access in this case was not absolute but only temporary. Once the danger of prejudice had dissipated, a transcript of the suppression hearing was made available. The press and the public then had a full opportunity to scrutinize the suppression hearing."). The California Supreme Court has decided to hear the *Cromer* appeal.

\(^{1099}\) 448 U.S. at 580 n.17.
"to be informed of the nature and cause of the accusation" against him. A primary function of the indictment is to fulfill this notice requirement. In *Russell v. United States*, the Supreme Court formulated the test by which the adequacy of an indictment is to be measured. First, the indictment must contain the elements of the offense to be charged and must sufficiently apprise the defendant of what he must be prepared to meet at trial. Second, the indictment must allow the defendant to plead a bar to future prosecution for the same offense.

The Ninth Circuit strictly adheres to the *Russell* criteria. Last term, in *United States v. Cecil*, the Ninth Circuit reversed defendants' convictions because of the insufficiency of the indictment upon which they were tried. The indictment charged defendants and others with conspiring, "beginning on or before July, 1975, and continuing thereafter until on or after October, 1975, within the District of Arizona and elsewhere," to import and distribute marijuana in violation of federal law. It did little else. The court observed that "[t]he indictment fail[ed] to state any other facts or circumstances pertaining to the conspiracy or any overt acts done in furtherance thereof." The court held that because of the "glaring lack of factual particularity of the indictment," it did not inform the defendants of the specific offenses with which they were charged. Accordingly, it was fatally de-

1100. U.S. CONST. amend. VI.
1102. Id. at 763-64.
1103. Id. at 763, 765.
1104. Id. at 764.
1106. 608 F.2d 1294 (9th Cir. 1979) (per curiam).
1107. Id. at 1295.
1108. The court stated that "[t]he present indictment is a rather barren document." Id. at 1296.
1109. Id. at 1297. In a recent case, *United States v. Giese*, 597 F.2d 1170 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979), the Ninth Circuit upheld one count of a ten-count indictment, which charged defendants with conspiracy relating to two bombing incidents at military recruiting stations. The indictment alleged thirteen acts defendants committed in furtherance of the conspiracy, including attending meetings, attempting to burglarize a named individual's home to get money to purchase weapons, travelling to a specified site to test explosives, going to the recruiting stations, and preparing a list of objectives. *Id.* at 1174-76, 1176 n.2.
1110. 608 F.2d at 1297. *Fed. R. Crim. P. 7(c)(1)* states in pertinent part: "The indictment or information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged . . . ." (emphasis added).
ffective. Moreover, the court was particularly disturbed with the failure of the indictment to place the conspiracy within a specific time frame.\textsuperscript{1111} Definiteness, as to time and place of the alleged offense, is essential in order to allow a defendant to prepare a proper defense and to allow him to plead double jeopardy to future prosecution.\textsuperscript{1112}

The indictment in \textit{Cecil} did little more than track the language of the statute that defendants were accused of violating, which prompted the Ninth Circuit to emphasize that when the language of the criminal code is used, it must be supplemented with specific facts and circumstances relating to the offense with which the particular defendant is charged.\textsuperscript{1113}

2. Amendment

A person's absolute fifth amendment right to a grand jury indictment in any serious\textsuperscript{1114} federal criminal proceeding\textsuperscript{1115} has remained undiminished throughout the years.\textsuperscript{1116} With roots going back to pre-Norman England,\textsuperscript{1117} the grand jury indictment is still considered a fair method of bringing persons accused of crimes to trial and protecting citizens from unfounded accusations.\textsuperscript{1118} To insure such protection, "a court cannot permit a defendant to be tried on charges that are not

\begin{itemize}
\item \textsuperscript{1111} 608 F.2d at 1297.
\item \textsuperscript{1112} Wong Tai v. United States, 273 U.S. 77, 80-81 (1927).
\item \textsuperscript{1113} 608 F.2d at 1297; see Hamling v. United States, 418 U.S. 87, 117-18 (1974); Russell v. United States, 369 U.S. 749, 765-66 (1962); United States v. Hess, 124 U.S. 483, 486 (1888); United States v. Simmons, 96 U.S. 360, 362 (1878); United States v. Keith, 605 F.2d 462, 464 (9th Cir. 1979); United States v. Curtis, 506 F.2d 985, 990-91 (10th Cir. 1974). Notably, the trial judge in \textit{Cecil} had recognized the insufficiency of the factual allegations of the indictment but had ruled that the Government's "open file" discovery remedied its defects. Before its ruling, the trial court initially indicated that a bill of particulars would be a remedy. The Ninth Circuit disagreed, holding that neither a bill of particulars nor an "open file" discovery would cure an invalid indictment. 608 F.2d at 1296.
\item \textsuperscript{1114} The fifth amendment requires a grand jury indictment for "a capital, or otherwise infamous crime." An infamous crime is one which is subject to an infamous punishment, \textit{Ex parte} Wilson, 114 U.S. 417, 423 (1885), which punishment includes imprisonment in a state prison or penitentiary. Mackin v. United States, 117 U.S. 348, 352 (1886).
\item \textsuperscript{1115} This requirement is one of the few criminal procedure rights guaranteed by the Bill of Rights that is not incorporated into the fourteenth amendment. In \textit{Hurtado} v. California, 110 U.S. 516 (1884), the Supreme Court upheld defendant's conviction for first degree murder where the charge had been made by information and not by indictment. The Court held that due process of law, required of the states by the fourteenth amendment, did not require indictment or presentment by the grand jury for prosecution of felonies.
\item \textsuperscript{1116} See, e.g., Stirone v. United States, 361 U.S. 212, 215-19 (1960); \textit{Ex parte} Bain, 121 U.S. 1, 12-13 (1887).
\item \textsuperscript{1117} See Morse, \textit{A Survey of the Grand Jury System}, 10 Ore. L. Rev. 101, 102-07 (1931).
\item \textsuperscript{1118} See Russell v. United States, 369 U.S. 749, 761 (1962); Stirone v. United States, 361 U.S. 212, 218 (1960); \textit{Ex parte} Bain, 121 U.S. 1, 12-13 (1887).
\end{itemize}
made in the indictment against him."\textsuperscript{1119} If any changes are to be
made to an indictment, they must be made by the grand jury.\textsuperscript{1120} Any
other amendment to an indictment violates a defendant's fifth amend-
ment rights.\textsuperscript{1121}

In two recent cases, \textit{United States v. Marolda}\textsuperscript{1122} and \textit{United States
v. Carlson},\textsuperscript{1123} the Ninth Circuit strictly applied the rule that a court
cannot by any means (bill of particulars, physical alterations or instruc-
tions to jury) alter the material or essential nature of an indictment or
broaden the offense charged.\textsuperscript{1124} In \textit{Marolda}, the indictment charged
defendant with acting "without proper authorization and without ben-
etit to" the union in using union funds.\textsuperscript{1125} However, the trial court's
instructions to the jury allowed for conviction if the jury found that the
defendant used the union funds with the intent to defraud and without
a good faith belief that the expenditure benefited the union, even if the
expenditure was authorized or would have been authorized had the
union known of it.\textsuperscript{1126} The Ninth Circuit reversed the defendant's con-
viction on the ground that this was prejudicial variance from the of-
fense charged in the indictment.\textsuperscript{1127} Under the indictment, the
Government had to show both "that the expenditures were neither
properly authorized by nor beneficial to the union."\textsuperscript{1128} The Ninth Cir-
cuit held that the defendant was prejudiced by the trial court's instruc-
tions because it submitted the issue of scienter to the jury but withheld
the issues of union authorization and benefit which were the crux of his
defense.\textsuperscript{1129}

\textsuperscript{1120} Russell v. United States, 369 U.S. 749, 770 (1962); Stirone v. United States, 361 U.S.
\textsuperscript{1121} Stirone v. United States, 361 U.S. at 216-17.
\textsuperscript{1122} 615 F.2d 867 (9th Cir. 1980).
\textsuperscript{1123} 616 F.2d 446 (9th Cir. 1980).
\textsuperscript{1124} See United States v. Dawson, 516 F.2d 796, 803-04 (9th Cir.), cert. denied, 423 U.S.
855 (1975).
\textsuperscript{1125} 615 F.2d at 867 n.2 (quoting count one of the indictment). Defendant was charged
\textit{Id.} at 868.
\textsuperscript{1126} 615 F.2d at 870.

Whether [defendant's] use of the credit card was properly authorized was an issue
written into the indictment and hotly contested at trial. . . . By the charge to the
jury, the court first dwelt upon the language in the indictment concerning authori-
ization at some length and then later treated it as surplusage, effectively telling the
jury to disregard it.

\textit{Id.}
\textsuperscript{1127} \textit{Id.}
\textsuperscript{1128} \textit{Id.} at 872.
\textsuperscript{1129} \textit{Id.}
In *Carlson*, defendant was convicted on three counts of misapplying bank funds in violation of federal law. Each count specifically charged defendant, a bank president, with misapplying bank funds "by fraudulently causing to be disbursed by the said Bank, and converting to his personal use," monies from a specified promissory note which purportedly represented a loan to a named person. At trial, in addition to introducing evidence to prove the charge of fraud in the indictment, the Government contended that one of the loans was inadequately secured. Over defendant's objection, the trial judge instructed the jury that if it found that the loan was inadequately secured and that defendant knew as much, it could find the defendant guilty of misapplication. Defendant appealed on the ground that the instruction impermissibly broadened the scope of the indictment to permit conviction for acts of misapplication based on an inadequately secured loan rather than the fraud for which he was indicted by the grand jury. The Ninth Circuit agreed, holding that the instruction constituted an impermissible amendment to the indictment. In finding reversible error, the Ninth Circuit noted that the Government's case of conversion was complex, but that its case of lack of security was fairly simple. It concluded that it was "not improbable that . . . where guilt was found the jury took the easy road to a verdict."

3. Information

The fifth amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." An infamous crime is

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1130. 616 F.2d at 447. Defendant was charged with violation of 18 U.S.C. § 656 (1976).
1131. *Id*. at 447 (quoting count ten of the indictment).
1132. *Id*. The court relied almost exclusively on *Howard v. Daggett*, 526 F.2d 1388 (9th Cir. 1975) (per curiam), to support its holding. *Id*. at 448. However, as the dissent points out, such reliance is somewhat unjustified as the facts in *Howard* may be distinguished from those in *Carlson*. 616 F.2d at 449 (dissenting opinion). The indictment in *Howard* charged defendant with inducing two named women to engage in prostitution and with travelling across state lines for that purpose. At trial, evidence was introduced regarding other prostitutes defendant was involved with, and the trial judge's instructions to the jury permitted conviction based upon such additional evidence. 526 F.2d at 1390. Thus, in *Howard*, the trial judge's instructions to the jury impermissibly amended the indictment such that defendant could be convicted for the same charge as in the indictment, but on facts other than those alleged in the indictment. Conversely, in *Carlson*, the trial judge's instructions to the jury allowed conviction for a charge not in the indictment, yet based on facts alleged in the indictment.
1133. 616 F.2d at 447.
1134. *U.S. Const*. amend. V.
one which is subject to an infamous punishment.\textsuperscript{1135} An infamous punishment includes imprisonment in a state prison or penitentiary, with\textsuperscript{1136} or without\textsuperscript{1137} hard labor. It is the punishment potentially imposed, not the actual punishment, that determines whether a punishment is infamous.\textsuperscript{1138} In a recent case, \textit{United States v. May},\textsuperscript{1139} the Ninth Circuit considered the effect of a pretrial court order limiting potential punishment upon conviction. In \textit{May}, defendants had been charged, by information, with unlawfully reentering a naval installation.\textsuperscript{1140} The statutory penalty for this violation was six months in prison.\textsuperscript{1141} However, several minor defendants were subject to punishment under the Youth Corrections Act\textsuperscript{1142} which authorized confinement for more than one year.

To insure a six month maximum penalty for these defendants, the district court ordered, before trial, that it would not sentence any of the defendants under the Act. The Ninth Circuit upheld the informations with respect to the minors, holding that the trial judge’s determination that the defendants should not be sentenced under the Youth Corrections Act was valid. Thus, the offense charged did not carry an infamous punishment and the charge by information was proper.\textsuperscript{1143}

In the past few years, several circuits have held that willful failure to file an income tax return is an offense for which the Government may proceed by information.\textsuperscript{1144} In \textit{United States v. Driscoll},\textsuperscript{1145} the Ninth Circuit joined these circuits. The rationale for not requiring an indictment for failure to file an income tax return is that the maximum punishment for such offense is one year imprisonment,\textsuperscript{1146} and a sentence of one year or less cannot be served in a penitentiary without the defendant’s consent.\textsuperscript{1147}

\begin{thebibliography}{9}
\bibitem{1135} \textit{Ex parte} Wilson, 114 U.S. 417 (1885).
\bibitem{1136} \textit{Id.} at 429.
\bibitem{1137} Mackin v. United States, 117 U.S. 348, 352 (1886).
\bibitem{1138} Fitzpatrick v. United States, 178 U.S. 304, 307 (1900).
\bibitem{1139} 622 F.2d 1000 (9th Cir. 1980).
\bibitem{1140} \textit{Id.} at 1003.
\bibitem{1141} \textit{Id.} at 1002 (citing 18 U.S.C. § 1382 (1976)).
\bibitem{1142} \textit{Id.} at 1003 (citing 18 U.S.C. §§ 4216, 5010, 5017(e) (1976)).
\bibitem{1143} \textit{Id.} at 1005.
\bibitem{1145} 612 F.2d 1155 (9th Cir. 1980).
B. Identifications

1. Photographic

The Supreme Court has declared that convictions based upon in-court identifications following a pretrial photographic identification will be set aside when the "photographic identification procedure [is] so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."\(^4\) The Court has also declared that such a standard necessarily dictates that "each case must be considered on its own facts."\(^5\) Within this broad Supreme Court standard, the Ninth Circuit has developed its own analytical framework.\(^6\) The court will first look at the necessity for the photographic identification,
The court will then look at the likelihood of irreparable mis-identification. This factor is appraised based upon: (1) the length of time and the conditions under which the witness observed the perpetrator during commission of the crime, (2) the similarity between the description of the perpetrator given by the witness immediately after the crime and the actual physical characteristics of the person subsequently identified, and (3) the possible prejudicial influence of one witness' opinion on the recollections of other witnesses also present at the time of the improper identification.

In *Mata v. Sumner*,1152 in a habeas corpus appeal, the court applied this analysis to invalidate an identification. In *Mata*, a prison knifing was observed by two witnesses. On the day of the incident, one witness, Almengor, was shown several hundred photographs of inmates. He did not identify the defendant, but he did positively identify one inmate who, as it turned out, had been outside the prison on the day of the killing.1153 He also identified three others. The second witness, Allen, was shown no photographs on that day because he claimed evidence of separate pretrial identifications introduced as part of the prosecutor's case, and the Ninth Circuit's factors as applicable to later in-court identifications. Id.

The set of factors promulgated in *Neil*, and reiterated in *Manson v. Brathwaite*, 432 U.S. 98, 114-16 (1977) were: (1) the opportunity to view, (2) degree of attention, (3) accuracy of description, (4) the witness' level of certainty, and (5) the time between the crime and the confrontation. Comparing these factors to those of the Ninth Circuit, it would appear that the *Neil* list adds time between crime and confrontation, but omits police conduct focusing attention on a particular person and the prejudicial impact of other witnesses, two items which seem particularly appropriate for photographic sessions. Otherwise, the two sets of factors substantially restate the same ideas.

Other circuits generally use an unadorned two-step analysis derived from *Simmons*: the courts will look first at suggestiveness, then at reliability. See, e.g., United States v. Williams, 616 F.2d 759, 761 (5th Cir. 1980) (per curiam) (display of single photograph impossibly suggestive but identification in court was nevertheless reliable under *Manson* factors); United States v. Mears, 614 F.2d 1175, 1177-78 (8th Cir. 1980) (photographic display improper because defendant was only person in display with two photos, but in-court identification permitted due to "ample opportunity" to observe defendant during commission of the crime); Summitt v. Bordenkircher, 608 F.2d 247, 252 (6th Cir. 1979) (because identification from a "multitude of police photographs" was proper, no need to consider independent reliability of in-court identification); United States v. Bubar, 567 F.2d 192, 198-99 (2d Cir.) (sharper focus and contrast in defendant's picture, a narrow strip of light not in other photos above defendant's head, and his hair and moustache differed from others in spread were not suggestive, thus obviating any need to consider reliability), cert. denied, 434 U.S. 872 (1977).

1152. 611 F.2d 754 (9th Cir. 1979), vacated on other grounds, 449 U.S. 539 (1981).
1153. Id. at 756.
he could make no identification. Eight days later, both witnesses were shown twenty-four photographs. Neither identified the defendant and both witnesses complained that the photographs were too old. Three days later, both witnesses were shown fifteen photographs, three of which were updated—those of the three inmates who were later charged. However, photographs of the three inmates whom Almengor previously had identified were not included. This time each witness identified the defendant as the assailant.\textsuperscript{1154}

The \textit{Mata} court first ruled that there was no necessity to use the photographic identification procedures because the defendant had been isolated after the stabbing.\textsuperscript{1155} The dissent, however, pointed out that the alternative, a lineup, would have been impractical, partly because of safety risks posed by the congregation of a “substantial” group of inmates.\textsuperscript{1156}

The majority in \textit{Mata} then found that three of the four areas of examination bearing on the likelihood of irreparable misidentification tainted the photographic procedures, namely, (1) conditions of observation, (2) similarity of description, and (3) police focus on a particular individual.\textsuperscript{1157} Specifically, the violence of the knifing incident and the threat presented by the knife were poor conditions for the witnesses to observe the perpetrator.\textsuperscript{1158} The court also observed that the descriptions of the perpetrators after the crime were “not detailed”\textsuperscript{1159} and that prison officials had engaged in a “systematic” plan to produce an identification of the defendant.\textsuperscript{1160} The \textit{Mata} court found that such a systematic plan was due to the three different photographic sessions,\textsuperscript{1161} in which the witnesses made the “correct” selection only on the third time around, and then only after pressure had been exerted by prison authorities.\textsuperscript{1162} Moreover, prior “mistaken” selections had been removed, the number of photos had been reduced drastically, and updated

\textsuperscript{1154} \textit{Id.}  
\textsuperscript{1155} \textit{Id.} at 757.  
\textsuperscript{1156} \textit{Id.} at 760 (Sneed, J., dissenting).  
\textsuperscript{1157} \textit{Id.} at 759.  
\textsuperscript{1158} Standing alone, this factor would vitiate the observation of any witness who had been involved in a violent incident. \textit{Id.} at 758.  
\textsuperscript{1159} \textit{Id.}  
\textsuperscript{1160} \textit{Id.} at 759.  
\textsuperscript{1161} \textit{Id.; see also} United States v. Higginbotham, 539 F.2d 17, 23 (9th Cir. 1976) (while repeated showings were not violative of due process where witness has been consistently definite, they did present opportunities for abuse when witness was equivocal on first selection and definite on later showing).  
\textsuperscript{1162} The defendant asserted that the California Department of Corrections “reminded” witness Allen of his upcoming parole hearing date and threatened to send him to another state prison where his life would be in danger if he failed to cooperate. 611 F.2d at 756.
photos of only the defendant and his codefendants had been substituted.\textsuperscript{1163}

The dissent, on the other hand, argued that pressure was necessary in the volatile prison situation to protect other inmates, that the new photograph of the defendant could be justified on the basis that his earlier photo bore little resemblance to the way he looked at the time of the crime and that the photographic selection “remained large.”\textsuperscript{1164} The dissent further pointed out that three state courts and one federal court prior to the Ninth Circuit’s ruling had not discerned the “systematic plan” which was so important to the Ninth Circuit result.\textsuperscript{1165} Because the Ninth Circuit framework is based on factors which necessitate a case by case analysis without the benefit of mechanistic or per se rules, the question arises as to whether the federal appellate courts have now in \textit{Mata} a potent weapon with which to strike down any photographic identification which does not strike their fancy.\textsuperscript{1166}

2. Accidental

In \textit{Green v. Loggins},\textsuperscript{1167} the Ninth Circuit held that an accidental pretrial encounter between a witness and the accused may irreparably taint a later in-court identification.\textsuperscript{1168} Whether such an encounter does so taint an in-court identification depends upon a two-step test

\begin{itemize}
\item \textsuperscript{1163} \textit{Id.} at 759.
\item \textsuperscript{1164} \textit{Id.} at 761 (Sneed, J., dissenting).
\item \textsuperscript{1165} \textit{Id.} at 760.
\item \textsuperscript{1166} \textit{Id.} at 762-63 (The opportunity to repeatedly review state court decisions turning on the amorphous standard of “impermissible suggestiveness” “more resembles a game of chance than it does the wise administration of criminal justice.”).
\item \textsuperscript{1167} 614 F.2d 219 (9th Cir. 1980).
\item \textsuperscript{1168} \textit{Id.} at 223. Harmless accidental encounters are found in United States v. Colclough, 549 F.2d 937, 941-42 (4th Cir. 1977) (witness inadvertently encountered black defendant in hall outside courtroom and immediately identified defendant who was standing in a crowd of other blacks with nothing to single him out); United States v. Massaro, 544 F.2d 547, 550 (1st Cir. 1976) (witness saw defendant in hall outside courtroom as he was being escorted by two plain-clothed marshals, although the circumstances did not suggest defendant was in custody), \textit{cert. denied}, 429 U.S. 1052 (1977); United States v. Matlock, 491 F.2d 504, 505 (6th Cir.) (per curiam) (witness saw defendant as defendant was led from cell to courtroom), \textit{cert. denied}, 419 U.S. 864 (1974); United States v. Davis, 487 F.2d 112, 122 (5th Cir. 1973) (witness saw accused in custody outside courtroom but situation held to be different from “identification made prior to trial”), \textit{cert. denied}, 415 U.S. 981 (1974); United States v. Matlock, 491 F.2d 880, 883 (9th Cir. 1972) (confrontation between witness and handcuffed defendant in courtroom corridor immediately prior to trial); United States v. Conner, 462 F.2d 296, 297 (D.C. Cir. 1972) (per curiam) (confrontation in police station lobby where witness, as officers brought in two men, told person at desk that one of the two men was the robber); Allen v. Moore, 453 F.2d 970, 972-74 (1st Cir.) (witnesses, stepping out of police car, saw defendant walking alone on the street and saw him again after entering courthouse as he paced the corridor), \textit{cert. denied}, 406 U.S. 969 (1972); United States v. Davis, 407 F.2d 846, 847 (4th
mandated by the Supreme Court. The first step is whether the encounter is unnecessarily and impermissibly suggestive. The second step is whether, even given an impermissibly suggestive encounter, the totality of the circumstances nonetheless indicates that the in-court identification is reliable.

In Green, the witness saw a fatal restaurant shooting. Four hours later, from a photo selection including two photos of the defendant, he chose another man. A few days later, the witness disappeared, without explanation, for three months. When he was eventually located, the police scheduled a lineup to resolve questions arising from his selection of the other man at the photo session. During the few days just before the lineup, the witness was warned not to have any contact with the police. But on the day before the lineup, the witness, while intoxicated, went to a local police station where he was allowed to sleep off his condition in a holding cell.

Coincidentally, the defendant was being held in the same cell. However, the witness did not appear to recognize the defendant until near the end of defendant’s stay, when a booking officer asked both men to identify themselves by name.

The Green court found three aspects of the encounter unnecessarily and impermissibly suggestive: the jail-house setting, which suggested to the witness that the defendant had been accused of a crime; the mention of defendant’s name by the booking officer, etc. The two steps are derived from language in Stovall v. Denno, 388 U.S. 293, 302 (1967) invalidating confrontations that are “unnecessarily suggestive and conducive to irreparable mistaken identification.” The Ninth Circuit has characterized the two steps in different language on occasion. See, e.g., United States v. Flickinger, 573 F.2d 1349, 1358 (9th Cir.) (“Stovall suggests a two-part test concerning exclusion of identification testimony by requiring that the procedure be ‘unnecessarily suggestive and conducive to irreparable mistaken identification . . . ’”) (emphasis in original), cert. denied, 439 U.S. 836 (1978); United States v. Peele, 574 F.2d 489, 490 (9th Cir. 1978) (“What controls the case is the likelihood of irreparable misidentification balanced against the necessity for the Government to use the identification procedures in question.”).

The Green court, reviewing the proceedings at the district court level, stated that after the district court “properly concluded” that the encounter was unnecessarily and impermissibly suggestive, it “was then obligated to examine the overall reliability of [witness] subsequent identification.” 614 F.2d at 224. However, if a court is “obligated” to examine the reliability of the in-court identification even after determining that an encounter was impermissibly suggestive, then impermissible suggestiveness as a test is rendered redundant.

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1171. 614 F.2d at 223.
1172. Id. at 221.
1173. Id. at 221-22.
1174. Id. at 223.
which the court said identified the defendant as the state's suspect in the murder case; \footnote{175} and that the encounter was the "result of the state's negligent exercise of its control over both the witness and the accused." \footnote{176}

To assess the reliability of the in-court identification, the court examined the circumstances surrounding the witness' observation of the crime. The court then analyzed these circumstances in terms of the factors which the United States Supreme Court considered in \textit{Neil v. Biggers}. \footnote{177} The Ninth Circuit applied those factors as follows:

1. \textit{Opportunity to view} Witness had viewed defendant in the restaurant for not more than five minutes; \footnote{178}

2. \textit{Witness' degree of attention} Witness had been merely a casual observer; \footnote{179}

3. \textit{Accuracy of witness' prior description} Approximately four hours after the shooting, the witness picked the wrong man at the photo session, even though there were two photos of the defendant in the selection; \footnote{180}

4. \textit{Witness' level of certainty} Witness did not recognize the defendant in the holding cell until after the booking officer had asked for their names; \footnote{181}

5. \textit{Time between crime and confrontation} More than three months had elapsed between the time of the crime and the witness' subsequent confrontation with the defendant. \footnote{182}

Thus, the court found that the factors presented uniformly undermined the reliability of the in-court identification. \footnote{183} Moreover, the

\footnote{175} \textit{Id}. On the other hand, one can argue that the only necessarily suggestive aspect of the witness finding the defendant in a "holding cell" would be that the defendant, like the witness, was also drunk. Moreover, the mention of the defendant's name by the booking officer did not of itself connect the defendant to the crime; the Ninth Circuit presumed an antecedent connection in the witness' mind between the defendant's \textit{name} and the crime, whereas the facts as stated by the appellate court reveal only a connection between defendant's \textit{face} and the crime. Finally, to assume negligence on the state's part under these circumstances is to impose on the state a duty to monitor a witness until the time of the lineup and to affirmatively prevent him, if necessary, from entering a police station.

\footnote{176} The court did not elaborate on its "negligent exercise" language.

\footnote{177} 409 U.S. 188, 199-201 (1972) (under the totality of the circumstances, victim's identification of defendant after a showup held to be suggestive but reliable).

\footnote{178} 614 F.2d at 224.

\footnote{179} \textit{Id}.

\footnote{180} \textit{Id}.

\footnote{181} \textit{Id} at 224-25.

\footnote{182} \textit{Id} at 225.

\footnote{183} \textit{Id}. However, the witness' nonrecognition in \textit{Green} of the defendant is not surprising, considering that witness was just waking up from a drunken sleep. \textit{Id} at 221-22.
other evidence of defendant's guilt, since not relevant to the issue of the reliability of the in-court identification, could not rehabilitate that identification.\textsuperscript{1184}

\section*{C. Bail}

\subsection*{1. Non-capital cases}

Under 18 U.S.C. section 3146, a criminal defendant in a non-capital case may be released before trial if the judicial officer is reasonably assured of the defendant's timely appearance at trial.\textsuperscript{1185} The most common method of obtaining a pretrial release is via "the execution of a bail bond with sufficient solvent securities, or the deposit of cash in lieu thereof."\textsuperscript{1186} An appearance bond, another common means of obtaining pretrial release, is obtained by the defendant depositing cash or other security equal to ten percent of the amount of the bond.\textsuperscript{1187} Generally, the full amount of the bond is returned to the defendant once he or she has complied with all the conditions of release.\textsuperscript{1188} However, it is not always clear whether a defendant has met the conditions of release.

In the 1979 case of \textit{United States v. Grattan},\textsuperscript{1189} defendant, Grattan, was convicted in district court for wilfully failing to surrender himself to the United States Marshal, pursuant to a district court order, after having been released on an appeal bond.\textsuperscript{1190} Approximately five

\begin{footnotesize}
\begin{itemize}
  \item the other hand, the witness' inability to identify the defendant a mere four hours after the incident is a much stronger indication of witness' unreliability. \textit{Id.} at 221.
  \item 18 U.S.C. § 3146(a) (1976) provides:
    \begin{enumerate}
      \item Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose . . . conditions of release which will reasonably assure the appearance of the person for trial.
    \end{enumerate}
  \item 18 U.S.C. §§ 3146(a), 3148 (1976). 603 F.2d at 117. Section 3148(2) provides that a person "who has been convicted of an offense and . . . has filed an appeal . . . shall be treated in accordance with the provisions of section 3146." For the provisions of § 3146(a) see \textit{supra} note 1186.
\end{itemize}
\end{footnotesize}
months after being sentenced on drug charges, Grattan was released on $50,000 bail. The bond did not restrict where Grattan could live or travel.\(^{191}\) Grattan subsequently traveled to Mexico and ceased contact with his attorney and surety. Approximately six months later, Grattan's convictions were affirmed and he was ordered to surrender to the United States Marshal.\(^{192}\) Grattan never received a copy of the order, however, and failed to surrender on the designated day.\(^{193}\) As a result, he was charged with willfull failure to surrender.\(^{194}\)

By the terms of the bond, Grattan clearly had no obligation to appear before the court until the court of appeals decided the case.\(^{195}\) Moreover, it was the court's responsibility to notify Grattan of the surrender order.\(^{196}\) The Ninth Circuit held that he could not be convicted of willfully failing to appear as required\(^{197}\) because there was no evidence that Grattan had been notified of either the surrender order or of the disposition of his appeal.

The *Grattan* court relied on *Graves v. United States*,\(^{198}\) in which the Ninth Circuit stated that the words "knowingly" or "wilfully" require proof of culpable intent.\(^{199}\) In *Graves*, the defendant had been convicted of knowingly failing to report for induction into the armed forces. The court of appeals reversed after finding that Graves was not aware that he had been ordered to report for service.\(^{200}\) Similarly, Grattan was unaware that he had been ordered to surrender and, thus, could not have intentionally failed to do so. Had the terms of Grattan's bond required that he keep in touch with the court or his attorney, then the court could have found that he intentionally failed to comply with

\(^{191}\) 603 F.2d at 117. Grattan was not required to live within the district, to notify anyone if he changed his address or made travel plans, or to keep in touch with anyone. *Id.*

\(^{192}\) *Id.*

\(^{193}\) The order was sent by certified mail to Grattan's Ramona, California address. Because he was in Mexico at the time, the order was returned to the district court. The court never sent a copy to Grattan's attorney or surety. *Id.*

\(^{194}\) *Id.* at 118.

\(^{195}\) United States v. Brizuela, 508 F.2d 386, 387 (9th Cir. 1974) (bond was improperly forfeited where bond imposed no obligation on defendant to appear until appellate court was finished with his case, and defendant became unavailable four months prior to dismissal of his appeal).

\(^{196}\) *Fed. R. Crim. P.* 49.

\(^{197}\) 603 F.2d at 118.

\(^{198}\) 252 F.2d 878 (9th Cir. 1958).

\(^{199}\) *Id.* at 882; see United States v. Hoffman, 137 F.2d 416, 419 (2d Cir. 1943).

\(^{200}\) 252 F.2d at 881. Graves was away from home, working in the fields and sleeping in his truck, when his notice to report for service arrived. His mother had no way of contacting him. *Id.* at 880.
the surrender order.1201

2. Forfeiture

In the 1980 decision of United States v. Kodelja,1202 the defendant Kodelja was required to maintain daily contact with his attorney as a condition of his release under a bond posted for him by Allied Fidelity Corporation (Allied).1203 When Kodelja subsequently was arrested on a different charge, Kodelja's friend posted bail with a promissory note secured by two quitclaim deeds.1204 Soon after his release, Kodelja fled and the Government successfully moved for a forfeiture of the bail bond posted by Allied.1205

On appeal, Allied contended that it should not have to forfeit the bond because Kodelja's duty to report under the bond was too vague. Rejecting this argument, the Ninth Circuit stated that the clear meaning of the condition on the bond was that Kodelja was to appear "once each day, except on weekends, during working hours, when an employee, or Mr. Goodman himself was present to verify...[Kodelja's] presence in Las Vegas."1206 Thus, there apparently was no question that Kodelja knew that he was supposed to remain in Las Vegas.

Allied also asserted that it should be relieved of its obligations because its risk was enlarged when Kodelja was released on bail after being arrested the second time.1207 It has long been established that "the mere arrest and incarceration of a person released on bail does not exonerate the bail, if the accused subsequently is at liberty and at the time he is required to appear on the first charge."1208 Thus, Allied's

1202. 629 F.2d 1330 (9th Cir. 1980).
1203. Id. at 1332.
1204. Id. Kodelja's friend and the friend's attorney filed affidavits as justifications pursuant to FED. R. CRIM. P. 46(d). The court rejected, without explanation, Allied's argument that the magistrate abused his discretion in accepting these affidavits. It also held that the promissory note was properly accepted as "other security" pursuant to 18 U.S.C. § 3146(a)(3) (1976).
1205. Id. at 1331.
1206. Id. at 1332.
1207. Id. at 1331.
1208. People v. Meyers, 215 Cal. 115, 118, 8 P.2d 837, 839 (1932) (emphasis in original). In Meyers, the defendant's surety was discharged from his or her duty because the state had released Meyers from custody and ordered her not to return to the state. The appellate court concluded that these acts, among others, interfered significantly with the surety's ability to perform his or her duty under the bond. In Kodelja, the state was not in any way responsible for Kodelja's absence from Las Vegas.
responsibility was not changed by Kodelja's second release from custody.

Moreover, a surety has the power to arrest his or her principal without a warrant to secure his appearance in court. Thus, as the appellate court noted, Allied had the option of arresting Kodelja and surrendering him to the proper authorities had it felt that Kodelja's second arrest and release increased its risk.

3. Capital cases

Section 3148 of title 18 of the United States Code limits the right to bail in capital cases. If the federal judicial officer believes that the defendant in a capital case will flee or pose a danger to the public if released, the judicial officer may detain the defendant. Since 1972, when the United States Supreme Court struck down the Georgia death penalty statute in Furman v. Georgia, there has been a continuing controversy over the validity of statutes linked to the concept of capital punishment. One line of cases has held that certain statutes denying bail in capital cases were based on the "strong flight urge" reaction, a response to the potential punishment of the death penalty and, therefore, such statutes did not survive the holding in Furman. Thus, the decision to deny bail to such defendants was based impermissibly upon the potential severity of the punishment.

The other line of authority expressed the viewpoint that the denial of bail in "capital" cases was tied to the nature of the offense allegedly committed by the defendant and, thus, Furman did not invalidate the denial of bail in those cases. This view was adopted by the Ninth Circuit in Reese v. United States, 76 U.S. 541 (1869); Stuyvesant Ins. Co. v. United States, 410 F.2d 524 (8th Cir. 1969).

A person (1) who is charged with an offense punishable by death shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any person or to the community. If such a risk of flight or danger is believed to exist . . . the person may be ordered detained.

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Circuit in the 1980 case of *United States v. Kennedy*. The *Kennedy* court noted that the federal statute differs from many state statutes because it allows a federal court to deny bail if it concludes that the defendant will pose a danger to others if released, rather than limiting denial of bail to cases where the court concludes that there is a high risk that the defendant will flee. In contrast, section 3146 does not allow the court in non-capital cases to evaluate the potential for danger which will be created by releasing the defendant. Reviewing the two statutes, the Ninth Circuit observed that when Congress enacted section 3148, it must have concluded that in situations where there is “substantial evidence that the defendant has committed a crime then punishable by death,” the possibility that the defendant would pose a danger to others is sufficiently high to warrant allowing the court to weigh that risk in deciding whether to release the defendant before trial. Thus, different bail conditions were imposed by Congress because the underlying offenses were different, not because the potential penalties were different. Consequently, the court held that section 3148 “survived Furman,” and Kennedy’s bail had been properly denied.

D. Defendant’s Right to Discovery

1. Exculpatory evidence

In *Brady v. Maryland*, the United States Supreme Court held that prosecutorial suppression of evidence favorable to an accused and

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1216. 618 F.2d 557 (9th Cir. 1980).
1217. *Id.* at 558. The district court concluded that Kennedy “was a substantial flight risk and no condition of release would reasonably assure that the defendant would not pose a danger to any other person.” *Id.*
1219. 618 F.2d at 559.
1221. 618 F.2d at 559.
1222. *Id.*; see *United States v. Watson*, 496 F.2d 1125 (4th Cir. 1973). *Kennedy* is not inconsistent with *United States v. Martinez*, 536 F.2d 886 (9th Cir.), *cert. denied*, 429 U.S. 907 (1976), in which the Ninth Circuit held that the defendants did not have a right to twenty peremptory jury challenges under *Fed. R. Crim. P.* 24(b). The purpose of rule 24(b) was to assure that the jury was not biased by opinions about capital punishment. 618 F.2d at 558. Since the prosecutor had agreed not to seek the death penalty, there was no reason to allow twenty peremptory challenges. 536 F.2d at 890. The purpose of the statute was clearly tied to the penalty involved.
1223. 618 F.2d at 559.
material to either guilt or punishment violates the due process clause of the Constitution.\textsuperscript{1225} Although the prosecution has a duty to disclose exculpatory evidence upon request by the defendant,\textsuperscript{1226} there is no constitutional obligation to provide unlimited disclosure of its files to the defendant.\textsuperscript{1227} Under \textit{United States v. Agurs},\textsuperscript{1228} evidence is material if "the suppressed evidence 'creates a reasonable doubt that did not otherwise exist.'"\textsuperscript{1229}

Neither \textit{Brady} nor \textit{Agurs} established procedures which the prosecution must follow for disclosing evidence to the defense. However, those decisions do say that if the prosecution has doubts about the materiality of information in its possession, it may submit the information to the court for a determination of materiality.\textsuperscript{1230} The question of who should make the initial determination of materiality was raised in the 1980 Ninth Circuit decision of \textit{United States v. Gardner}.\textsuperscript{1231}

In \textit{Gardner}, the defendant made a \textit{Brady} request at trial for production of evidence. After an in camera review of several documents submitted by the Government, the court turned over a single document to the defense. On appeal, Gardner questioned this procedure because the documents had been prescreened and edited by the Government prior to the review by the court. Gardner contended that this method of production "inadequately protected his constitutional rights."\textsuperscript{1232}

The Ninth Circuit stated that the Government had properly submitted to the trial court only those prescreened documents that the Government had determined were arguably subject to disclosure under \textit{Brady} and \textit{Agurs}. As justification for submitting edited documents, the

\textsuperscript{1225} \textit{Id.} at 90-91. The Ninth Circuit has held that absent a showing that the evidence sought was clearly favorable to the defense, a defendant is not entitled to discovery. \textit{United States v. Wencke}, 604 F.2d 607, 612 (9th Cir. 1979) (per curiam).
\textsuperscript{1226} \textit{Id.} at 87; \textit{Moore v. Illinois}, 408 U.S. 786, 794 (1972).
\textsuperscript{1228} 427 U.S. 97 (1976).
\textsuperscript{1229} \textit{United States v. Gardner}, 611 F.2d 770, 774 (9th Cir. 1980) (quoting \textit{United States v. Agurs}, 427 U.S. at 112).
\textsuperscript{1230} 427 U.S. at 106; Palermo v. United States, 360 U.S. 343, 354 (1959). In camera inspection procedure for discovery of exculpatory evidence has been employed in other circuits. \textit{See United States v. Allen}, 554 F.2d 398, 411-12 (10th Cir.) (no error in trial court's use of in camera inspection to determine materiality of alleged exculpatory evidence), \textit{cert. denied}, 434 U.S. 836 (1977); \textit{United States v. Ross}, 511 F.2d 757 (5th Cir. 1975) (in camera inspection of documents approved procedure in dealing with \textit{Brady} requests); \textit{Taglianetti v. United States}, 398 F.2d 558, 571-72 (1st Cir. 1968) (in camera inspection proper where defendant did not establish strong necessity for disclosure, and procedure "was especially appropriate since the government had a substantial interest in preserving the secrecy of its investigation of organized crime").
\textsuperscript{1231} 611 F.2d 770 (9th Cir. 1980).
\textsuperscript{1232} \textit{Id.} at 774.
Gardner court cited the government's need to withhold sensitive information, as well as the trial court's ability to determine whether the excised portions were necessary for a proper determination of materiality.\textsuperscript{1233} The Ninth Circuit found that the procedure used by the trial court to determine the materiality of evidence was proper absent a "more concrete showing" of improper suppression by the government.\textsuperscript{1234}

While Brady requires that favorable evidence, already in existence, be turned over to the defense, the Government is not required to create exculpatory evidence.\textsuperscript{1235} In United States v. Sukumolachan,\textsuperscript{1236} the defendant sought voiceprint analyses of recorded telephone conversations to prove that a codefendant's voice was an impersonation. There was, however, no evidence that any analyses existed. Consequently, the Ninth Circuit held that the defendant could not compel the Government under Brady to make the voiceprint analyses.\textsuperscript{1237}

\textsuperscript{1233} Id. at 775. An additional argument for allowing the Government to prescreen and edit documents was discussed in United States v. Cobb, 271 F. Supp. 508, 513 (N.D. Ill. 1967). The Cobb court noted that the Government faces the dilemma of not knowing which of the evidence it possesses will be presented. "[R]equiring the Government to submit for in camera examination before trial" places an intolerable burden on the court. 271 F. Supp. at 163. The court concluded, "in view of the practical difficulties, the decision as to whether the government possesses any [exculpatory] evidence must be left to its good conscience. . . ." Id. at 164.

\textit{But see} United States v. Bryant, 448 F.2d 1182, 1184 n.1 (D.C. Cir. 1971) (per curiam) (court suggested that it is the defendant's right to decide for himself the usefulness of all discoverable evidence).

\textsuperscript{1234} 611 F.2d at 775. The court cited United States v. Frazier, 394 F.2d 258 (4th Cir.), \textit{cert. denied}, 393 U.S. 984 (1968), in support of this proposition. In Frazier, the defendant did not claim that the government possessed or had knowledge of exculpatory evidence or that it suppressed any exculpatory information. \textit{Id.} at 262.

Gardner places the burden on the defendant to show that specific, exculpatory evidence was improperly suppressed by the Government. The court, however, addressed only the procedure used by the trial court in determining the materiality of the evidence. By referring to Frazier, the Gardner court seemed to suggest that an assertion of improper suppression of exculpatory evidence is necessary in order for the court to find reversible error.

\textsuperscript{1235} United States v. Goldberg, 582 F.2d 483, 490 (9th Cir. 1978) ("Under no circumstances is the Government required to volunteer to the defendant potentially exculpatory information which it neither possesses nor of which it is aware."); \textit{cert. denied}, 440 U.S. 933 (1979); United States v. Walker, 559 F.2d 365, 373 (5th Cir. 1977) (no duty to "seek out" exculpatory evidence); United States v. Beaver, 524 F.2d 963, 966 (5th Cir. 1975) (no affirmative duty to discover information not in Government's possession); \textit{cert. denied}, 425 U.S. 905 (1976); United States v. Gonzales, 466 F.2d 1286, 1288 (5th Cir. 1972) ("Brady does not impose on the prosecutor a general duty to help the defense find witnesses who might be favorable to the defendant.").

\textsuperscript{1236} 610 F.2d 685 (9th Cir. 1980) (per curiam).

\textsuperscript{1237} \textit{Id.} at 687.
In *United States v. Bernard*, the Ninth Circuit excused deliberate efforts to block discovery by not recording exculpatory evidence. In *Bernard*, the defendants sought the unrecorded interview statements of a witness. The defendants contended that the government agent who had interviewed the witness had deliberately blocked discovery by refusing to make notes during the interview. The agent admitted at trial that, to avoid factual contradictions which might hamper the Government's success in court, he did not take notes when interviewing potential witnesses. Only when the agent knew that the witness or defendant knew "exactly what he . . . [was] saying" would the agent make a report. The agent's acts thus deprived the defendants of potentially favorable evidence.

Following *Sukumolachan* and *Brady*, the Ninth Circuit held that there was no "constitutional basis for compelling the creation" of exculpatory evidence. The court did not condone the agent's acts or motivation but, rather, held that motivation was irrelevant to the question of production of *Brady* evidence. This conclusion is consistent with *Brady*, in which the Supreme Court held that the search for exculpatory evidence should be made "irrespective of the good faith or bad faith of the prosecution. . . . [because the underlying principle is not] punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."

2. Inculpatory statements

Rule 16 of the Federal Rules of Criminal Procedure provides that "[u]pon request of a defendant the government shall permit the defendant to inspect and copy . . . the substance of any oral statement which the government intends to offer in evidence at the trial made by any person then known to the defendant to be a government agent."
In *United States v. Sukumolachan*, the Government did not disclose an inculpatory statement made by the defendant until the morning of the trial. Although not permitted to use the statement in its case-in-chief, the prosecution was allowed to use it for impeachment. Consequently, the defendant did not testify. On appeal, Sukumolachan contended that his right to discovery had been violated, thus entitling him to a new trial.

The Ninth Circuit held that the use of the inculpatory statement was not prejudicial because the defendant was able to avoid impeachment by not testifying. The court distinguished *Sukumolachan* from situations in which inculpatory statements were not disclosed until after the defendant had testified. In those instances, "whenever the government’s failure to disclose such statements poses a serious detriment to the preparation for trial and substantially determines a defendant's defense strategy, there should be a new trial."

The *Sukumolachan* court also noted that in the trial court's view the defendant had been afforded sufficient time to prepare a rebuttal. Because the trial court was able to correct any prejudice stem-
3. Witness statements

The Federal Rules of Criminal Procedure do not allow disclosure of statements made by government witnesses or prospective government witnesses except as provided in the Jencks Act. The Jencks Act requires the Government to produce any statement made by a Government witness which has been adopted or approved by the witness and which relates to the witness’ trial testimony. defendant would have testified. The trial court considered this sufficient time to enable the defendant to prepare a rebuttal and to avoid impeachment. Accord, United States v. Bockius, 564 F.2d 1193, 1197 (5th Cir. 1977) (“trial judge was able to counteract the use of undisclosed evidence by giving the defense the time it requested [one-half day] to prepare its response”).

1250. FED. R. CRIM. P. 16(2) provides that

[except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.]

1251. The Jencks Act, 18 U.S.C. § 3500 (1976), provides that

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United 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.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under
In *Palermo v. United States*, the Supreme Court ruled on the “scope and meaning of the statutory definition of ‘statement’ contained in” the then-new Jencks Act. The defendant in *Palermo* sought a memorandum which summarized selected portions of an interview made by a government agent. The Court found that the legislative intent of the Jencks Act indicated “that only those statements which could properly be called the witness’ own words should be made available to the defense for purposes of impeachment.” Thus, the Court held that the non-verbatim, non-contemporaneous memorandum was not discoverable under the Jencks Act.

In the 1980 Ninth Circuit decision of *United States v. Bettencourt*, the defendant contended that it was error to admit evidence of his prior state arrest which had been expunged from the record. Bettencourt asserted that the police record upon which the Government witness relied in testifying should have been disclosed pursuant to the Jencks Act.

Rejecting this argument, the Ninth Circuit held that the police record was not a Jencks Act statement. Because the police record had been prepared by an officer other than the witness, the court found it was not a statement “made by” the witness. Therefore, the record was not discoverable under the Act.

Certain notes made by a government agent during the course of a
criminal investigation may be discoverable as statements under the Jencks Act. This issue was raised in *United States v. Augenblick*,1259 where the defendant sought notes of an interview made by a government agent. In holding that the notes were not discoverable, the Supreme Court expressed doubt as to whether or not such notes constituted a statement within the meaning of the Act. The Court stated that the record did not indicate whether the notes had been made during or after the interview. Therefore, the Court could not decide with certainty whether the Jencks Act had been violated.1260

In *Goldberg v. United States*,1261 the Court held discoverable a prosecutor's notes of an interview with a witness who had verified the accuracy of the notes. In his concurring opinion, Justice Stevens stated that in order for such notes to be subject to production under the Jencks Act, they must be a "factual narrative by the witness . . . supported by a finding of unambiguous and specific approval by the witness."1262

The Ninth Circuit in *United States v. Johnson*1263 held that notes taken by FBI agents in interviews with prospective Government witnesses or the accused are potentially discoverable materials and, thus, a trial court has a duty to review such materials for their discoverability. Although the Jencks Act was cited as the principle foundation for this holding,1264 the Ninth Circuit has noted other bases for the rule.1265

The court of appeals went a step further than *Johnson* in *United States v. Harris*.1266 Criticizing the routine destruction of these rough interview notes, the *Harris* court required their future preservation. The court observed that a trial court has the duty of determining ultimately what is discoverable; consequently, the court emphasized that "the routine disposal of potentially producible materials by the FBI amounts to a usurpation of the judicial function of determining what evidence must be produced in a criminal case."1267 Hence, the court held that such notes had to be preserved in order that the defendant's

1260. Id. at 354-55.
1262. Id. at 114-16 (Stevens, J., concurring).
1263. 521 F.2d 1318 (9th Cir. 1975).
1264. See id. at 1319-20.
1266. 543 F.2d 1247 (9th Cir. 1976).
1267. Id. at 1248.
discovery rights would not be violated.1268

*Harris* was concerned with preserving interview notes as statements under the Jencks Act. In the 1980 decisions of *United States v. Bernard*1269 and *United States v. Spencer*,1270 the Ninth Circuit addressed the issue of whether an agent's surveillance notes were statements under the Jencks Act and, thus, subject to preservation by the governmental agency.1271 The defendants in *Bernard* and *Spencer* urged that the Ninth Circuit adopt a "broad prophylactic rule" requiring that all law enforcement notes be preserved.1272

The Ninth Circuit held that because surveillance notes are generally sketchy, incomplete, and made at different times, they are not Jencks Act statements and need not be preserved under *Harris*. The *Bernard* court observed that interview notes, unlike surveillance notes, contain potential testimony; moreover, the circumstances of an interview allow the agent to prepare complete notes.1273 Preservation of surveillance notes would be too staggering a burden, the court held, and, therefore, destruction of such notes would not preclude testimony at trial.1274

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1268. *Id.* at 1249.

1269. 623 F.2d 551 (9th Cir. 1980) (revising 607 F.2d 1257 (9th Cir. 1979)).

1270. 618 F.2d 605 (9th Cir. 1980).

1271. In *Bernard*, the Government appealed the pretrial suppression of the agent's testimony. Citing *Harris*, the district court excluded the agent's testimony because he had destroyed his investigatory observation notes after incorporating them into a final report. 623 F.2d at 555-56. The Ninth Circuit held that the Jencks Act does not require the pretrial production of a witness' statement. The Jencks Act only requires production of statements after the witness has testified on direct examination at trial. The Ninth Circuit does not include pretrial suppression hearings in its definition of "trial." *Id.* at 556 (citing *United States v. Spagnuolo*, 515 F.2d 818 (9th Cir. 1975); *United States v. Curran*, 498 F.2d 30 (9th Cir. 1974)). Therefore, the agent's testimony at the pretrial hearing did not have to be suppressed even though his notes had been destroyed. 623 F.2d at 558.

In *Spencer*, the defendant contended that surveillance notes made during the investigation that led to his arrest, which were used to compile a final report and then routinely destroyed, were statements under the Jencks Act. Based on this contention, the defendant moved to strike the trial testimony of the arresting officer. The trial court denied the motion, ruling that surveillance notes were not statements under the Jencks Act. 618 F.2d at 605-06. 1272. 618 F.2d at 606.

1273. 623 F.2d at 557-58; *accord*, *United States v. Lane*, 574 F.2d 1019 (10th Cir. 1978). Even when interview notes are incomplete, *Harris* may require preservation of the notes for judicial determination of their discoverability. 618 F.2d at 606; *of*, *United States v. Cruz*, 478 F.2d 408, 413 (5th Cir. 1973) ("fact that investigator's notes contained occasional verbatim recitation of phrases used by the person interviewed did not make such notes Jencks Act material").

1274. 623 F.2d at 557-58; *see supra* note 1271. The *Spencer* court believed that a judicial invasion into law enforcement would occur if all government agents' notes had to be preserved. 618 F.2d at 607; *accord*, *United States v. Lane*, 574 F.2d 1019, 1022 (10th Cir. 1978).
Bernard and Spencer refused to extend Harris. Instead, the circuit
continues to require only that notes of a government agent which con-
tain verbatim, contemporaneous statements by the witness be preserved
for a judicial determination of their status under the Jencks Act.

While Harris forbids the destruction of interview notes, the opin-
ion does not address fully the question of what remedies the appellate
court should employ if a Harris violation occurs. Under the Jencks
Act, if the prosecution “elects” not to comply with a discovery order,
the court “shall strike from the record the testimony of the witness” and
may order a mistrial if the “interests of justice” necessitate. Harris
was prospective in effect; investigations commenced prior to Harris
would not result in the exclusion of testimony. Thus, the admission of
such testimony would be subject to the harmless error rule. Left
unanswered by Harris was the treatment to be accorded erroneously
admitted testimony which developed from post-Harris investigations
during which notes had been destroyed.

Recent cases in which the trial court erred by not following Harris
have not resulted in automatic reversal of a conviction. Instead,
while acknowledging the Harris violation, these decisions have af-
firmed convictions using harmless error analysis. Similarly, in United States v. Lutz, in which the trial court had violated Harris

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1275. See 543 F.2d at 1253.
1276. 18 U.S.C. § 3500(d) (1976); see Lewis v. United States, 340 F.2d 678, 682 (8th Cir.
1965) ("Once producibility is established the defendant has an absolute right to the state-
ment, or, in the alternative, to have the testimony of the witness stricken if the Government
refuses to comply, and failure to so order is reversible error.") (emphasis added); cf. United
States v. Pope, 574 F.2d 320, 325 (6th Cir. 1978) ("elects" in the Act indicates a conscious
choice; therefore, when a negligent violation occurs, the Act allows a judge discretion in
ordering the appropriate remedy); accord, United States v. Heath, 580 F.2d 1011, 1019 (10th
Cir. 1978); United States v. Polizzi, 500 F.2d 856, 893 (9th Cir. 1974), cert. denied, 419 U.S.
1120 (1975).
1277. See 543 F.2d at 1253; see United States v. Robinson, 546 F.2d 309, 312 (9th Cir. 1976).
1278. See 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); United States v.
Woods, 550 F.2d 435, 440 (9th Cir. 1976).
1279. See 543 F.2d at 1253.
1280. See, e.g., United States v. Hozian, 622 F.2d 439, 441-42 (9th Cir. 1980) (error of
admission subject to harmless error); United States v. Marques, 600 F.2d 742, 748 (9th Cir.
1979). The reliance by these courts on United States v. Wood, 550 F.2d 435 (9th Cir. 1976),
is misplaced because Wood concerned a pre-Harris destruction of notes. See supra note 1277
and accompanying text.
1281. See cases cited supra note 1278.
1282. 621 F.2d 940, 948 (9th Cir. 1980).
by not turning over a federal prosecutor's interview notes, the Ninth Circuit employed the harmless error rule.

The difference between Lutz and the cases involving a Harris violation is the availability of Jencks Act material, which the Ninth Circuit can view in the perspective of the rest of the trial evidence. In Lutz, the Ninth Circuit could judge if the unavailability of the Jencks Act material was ultimately harmless because the notes had been preserved. In the other cases, the notes had been destroyed and could not be reviewed by either the trial court or the appellate court. Thus, without having the materials available, the Ninth Circuit appears to be guessing as to the harmlessness of a Harris violation. Harris sought to avoid this guessing game by requiring the preservation of such materials so that the courts independently could arrive at the proper determination about discovery.

4. Identity of government witnesses

The Federal Rules of Criminal Procedure do not provide for discovery of the identity of a Government informant or witness. Although evidence favorable to an accused must be disclosed under Brady, the Supreme Court held in Weatherford v. Bursey that the prosecution need not reveal the identity of a witness before trial.

In the 1979 decision of United States v. Jones, the defendant contended that the trial court erred in denying his pretrial motion to discover the identity of a Government witness. In affirming the denial, the Ninth Circuit, relying on Weatherford, held that a defendant's

1283. Id. at 948.
1284. 622 F.2d at 441-42; 600 F.2d at 748. See United States v. Miranda, 526 F.2d 1319, 1329 (2d Cir. 1975) (lost tape recording did not require reversal where government had not deliberately lost the evidence and there was not a “significant chance” in light of the whole record that the availability of the recording “would have avoided a verdict of guilty”), cert. denied, 429 U.S. 821 (1976).
1285. Such material may show that a key witness had lied. United States v. Knowles, 594 F.2d 753 (9th Cir. 1979) (conviction reversed); see Krilich v. United States, 502 F.2d 680, 686 (7th Cir. 1974) (“Where the government fails to comply with the requirements of the Jencks Act, a conviction should be reversed unless it is perfectly clear that the defense was not prejudiced by the omission”) (emphasis added), cert. denied, 420 U.S. 992 (1975); United States v. Pope, 574 F.2d 320, 326 (6th Cir. 1978) (harmless error rule will be invoked if the failure to strike testimony could have adversely affected the outcome of the trial). But compare United States v. Johnson, 521 F.2d 1318, 1320 (9th Cir. 1975) (“substantial rights” of the defendant must have been affected by the failure to make a Jencks Act statement available).
1286. 543 F.2d at 1248.
1288. Id. at 559.
1289. 612 F.2d 453 (9th Cir. 1979), cert. denied, 445 U.S. 966 (1980).
rights under *Brady* and the Jencks Act are not violated when the Government refuses to divulge the identity of an informant or witness.\textsuperscript{1290}

The Ninth Circuit has extended the limitation of disclosure set forth in rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act “to prohibit the pretrial disclosure of the identity of government witnesses in the absence of a showing of reasonable necessity by the defense.”\textsuperscript{1291} If the defendant can show that his discovery request is reasonable and necessary to defense preparation, the trial court may, in its discretion, allow disclosure.\textsuperscript{1292} The 1980 decision of *United States v. Tou##
The "reasonable efforts" standard is the generally accepted burden that the circuits place on the Government when the defense requests the presence of an informant at trial.  

E. Destruction of Evidence: United States v. Loud Hawk

When the Government loses or destroys criminal evidence, concern arises about insuring the defendant a fair trial and maintaining judicial integrity. Generally, courts will not reverse a conviction unless the unavailability of evidence results in prejudice to the defendant. In United States v. Augenblick, the United States Supreme Court stated that, absent the most extreme violation of due process, loss or destruction of evidence does not amount to a constitutional issue. As a result, the Supreme Court has not set forth guidelines to be used in determining when destruction of evidence is prejudicial to the defendant.

Prior to Augenblick, the Court in Killian v. United States, suggested that the circumstances under which evidence is lost or destroyed are relevant to the sanctions that will be applied. The Killian Court stated that if evidence was destroyed by the Government "in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive [defendant] of any right." Outside of the Ninth Circuit, the federal circuits have struggled with this question and have adopted various tests to determine whether loss or destruction of evidence necessitates exclusion of secondary evidence or reversal of a conviction. Generally, the circuits have fo-

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1298. Id. at 1264 (quoting Velarde-Villarreal v. United States, 354 F.2d 9, 12 (9th Cir. 1965)).
1299. See United States v. Hart, 546 F.2d 798, 802 n.8 (9th Cir. 1976), cert. denied, 429 U.S. 1120 (1977), and the cases cited therein.
1300. 628 F.2d 1139 (9th Cir. 1979), cert. denied, 445 U.S. 917 (1980).
1301. See, e.g., United States v. Loud Hawk, 628 F.2d 1139 (9th Cir. 1979), cert. denied, 445 U.S. 917 (1980).
1305. Id. at 242 ("Almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed.").
1306. Id.
1307. Some circuits have adopted balancing tests to determine if sanctions should be applied when evidence has been lost or destroyed. The Court of Appeals for the District of Columbia stated that district courts "should weigh the degree of negligence or bad faith involved [on the government's part], the importance of the evidence lost, and the [other]
cused on the materiality of the evidence, prejudice to the defendant and good faith on the part of the Government.

The Ninth Circuit has consistently looked to the degree of bad faith exhibited by the Government and the amount of prejudice suffered by the defendant. The application of these factors, however, has not always been clear.1308

In the 1979 decision of *United States v. Loud Hawk*,1309 the Ninth Circuit established guidelines for determining whether loss or destruction of evidence requires suppression of secondary evidence or reversal of a conviction. In *Loud Hawk*, the evidence was destroyed by state police officers who had been asked to aid an FBI surveillance of fugitives of the 1973 Wounded Knee occupation. Despite an explicit instruction not to stop the suspects' vehicles, but only to notify the FBI, an Oregon State Trooper sighted and stopped the vehicles. The FBI was notified subsequent to the removal of the suspects and the impoundment of the vehicles. Next, the state police, without any federal assistance, obtained a state search warrant and subsequently found

evidence of guilt adduced at trial in order to come to a determination that will serve the ends of justice." United States v. Bryant, 439 F.2d 642, 653 (D.C. Cir. 1971).

The First Circuit stated that

[w]hen evidence in a criminal trial is destroyed, special scrutiny must be undertaken to ascertain whether defendant's right to due process has been prejudiced. A three-pronged examination is in order: first, was the evidence material to the question of guilt or the degree of punishment; second, was defendant prejudiced by its destruction; and third, was the government acting in good faith when it destroyed the evidence.

United States v. Picariello, 568 F.2d 222, 227 (1st Cir. 1978) (citing United States v. Heiden, 508 F.2d 898, 902 (9th Cir. 1974); United States v. Sewar, 468 F.2d 236 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973)).

The Fifth Circuit stated that the determination of "[w]hether a defendant has been deprived of [his] right of due process will depend upon the materiality of the evidence, the likelihood of mistaken interpretation of it by government witnesses or the jury, and the reasons for its nonavailability to the defense." United States v. Herndon, 536 F.2d 1027, 1029 (5th Cir. 1976).

The Seventh Circuit held that when "there is no hint of bad faith or deliberate suppression of evidence which might reasonably have exculpatory value to the defendant... [and the] defendant has pointed to no concrete area of prejudice due to the disposition" of the evidence, there is no necessity for reversal of a conviction. United States v. Shafer, 445 F.2d 579, 582 (7th Cir. 1971).

1308. See United States v. Higginbotham, 539 F.2d 17, 21 (9th Cir. 1976) (degree of negligence or bad faith, importance of lost evidence, and sufficiency of other evidence are factors to be considered); United States v. Heiden, 508 F.2d 898, 902 (9th Cir. 1974) (defendant must show "(1) bad faith or connivance on the part of the government or (2) that he was prejudiced by the loss of the evidence"); United States v. Henry, 487 F.2d 912 (9th Cir. 1973) (per curiam) ("good faith" destruction and no prejudice shown); United States v. Sewar, 468 F.2d 236 (9th Cir. 1972) (suppression of evidence not warranted when non-preservation was unintentional), cert. denied, 410 U.S. 916 (1973).

1309. 628 F.2d 1139 (9th Cir. 1979), cert. denied, 445 U.S. 917 (1980).
various firearms and several cases of dynamite in the vehicles. Finally, due to the lack of storage facilities, problems with the chain of custody, and a concern for public safety, the state police destroyed the dynamite. Although taking no active part in the state's actions, federal agents did observe the search and subsequent destruction of the evidence. \footnote{1310. Id. at 1141-43.}

A federal indictment charged the defendants with possession of a destructive device. The district court dismissed with prejudice the dynamite counts on the ground of unlawful suppression of evidence because the dynamite had been destroyed. \footnote{1311. Id. at 1143. The dismissal was ordered pursuant to rule 48(b) of the Federal Rules of Criminal Procedure, which provides for dismissal due to unnecessary delay in bringing a defendant to trial.} When the Government declined to continue with the other counts until it could appeal the dismissal, the district court dismissed the entire indictment with prejudice. \footnote{1312. 628 F.2d at 1143.}

The Government appealed both dismissals and the Ninth Circuit Court of Appeals affirmed the decision of the district court. However, upon application for en banc reconsideration, the Ninth Circuit remanded the case to the district court to obtain findings of fact regarding (1) federal participation in the search and destruction of the dynamite, and (2) prejudice suffered by the defendants as a result of the destruction of the dynamite. \footnote{1313. Id. at 1143-44.}

The district court found no federal participation in the destruction of the dynamite, \footnote{1314. Id. at 1148.} but did find prejudice to the defendants “to the extent that their ability to observe the destruction and to analyze samples of [the dynamite] deprived them of the opportunity to contest the government’s conclusion that the substance destroyed was indeed explosive.” \footnote{1315. Id. at 1149.} In addition, the district court found that the destruction of the dynamite containers was prejudicial because the defendants were denied the chance to fingerprint the containers. \footnote{1316. Id.}

In reviewing the findings of fact, the Ninth Circuit looked to its previous application of the principles used when evidence has been lost or destroyed. The \textit{Loud Hawk} opinion phrased them as follows:

When the government loses or destroys tangible evidence prior to trial, a motion to suppress secondary evidence . . . will be granted . . . if the defendant can show (1) bad faith or
The opinion of the court did not thoroughly analyze or discuss the rationale behind this two part test. However, a majority of the Loud Hawk court joined in a concurring opinion which set forth several factors to be considered in determining whether to exclude secondary evidence due to the loss or destruction of the original evidence. The Loud Hawk concurring opinion, written by Judge Kennedy, took this approach because previous Ninth Circuit courts had failed to discuss the rationale behind their position.

First of all, the concurring judges cited the concern of the judicial system in providing the defendant “an opportunity to produce and examine all relevant evidence, to insure a fair trial.” Next, in weighing the conduct of the Government, the concurring opinion declared that the court should determine “whether the Government acted in disregard for the interests of the accused, whether it was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification.”

In determining prejudice to the defendant, the court should consider the centrality of the evidence to the case and its importance in establishing the elements of the crime or the motive or intent of the defendant; the probative value and reliability of the secondary or substitute evidence; the nature and probable weight of factual inferences or other demonstrations and kinds of proof allegedly lost to the accused; the probable effect on the jury from absence of evidence, including dangers of unfounded speculation and bias that might result to the defendant if adequate presentation of the case requires explanation about the missing evidence.

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1317. Id. at 1146 (emphasis added). Note that in United States v. Heiden, 508 F.2d 898, 900 (9th Cir. 1974), the court stated the test in the disjunctive. See supra note 1329.

1318. Id.

1319. Of the eleven justices sitting en banc, six subscribed to the concurring opinion which set forth the factors to use in balancing Government participation in the loss or destruction of evidence against prejudice to the defendant. Id. at 1151 (Kennedy, J., concurring).

1320. Id.

1321. Id.

1322. Id. at 1152.

1323. Id. The court analogized the approach adopted in Loud Hawk to a similar balancing approach adopted to determine whether pre-indictment delay requires dismissal of an indictment. United States v. Mays, 549 F.2d 670 (9th Cir. 1977). In Mays, the court adopted
After setting out the applicable legal principles, the opinion of the court and the concurring opinion disagreed with the district court’s findings of prejudice to the defendants. The majority first found that the defendants were not prejudiced by the inability to analyze the dynamite and to observe its destruction. The court noted that the defendants’ expert did not express any opinion as to whether the explosion shown in some photographs was the result of dynamite. The concurring judges believed the secondary evidence of the dynamite to be sufficiently probative and reliable.

Both opinions also agreed that there was no prejudice to the defendants in the destruction of the boxes and plastic covering the explosives, because the absence of fingerprints had little significance to prove or disprove handling. As a result, the Ninth Circuit reversed the district court rulings on the motion to suppress and on the dismissal of the indictment.

In her dissenting opinion, Judge Hufstedler first argued that the appellate court, under a clearly erroneous standard, should not have substituted its own conclusion about the alleged prejudice the defendant suffered because of the district court’s findings. The effect of Loud Hawk, the dissent charged, put the entire burden of proof on the defense because the defendants were required to show that the substance destroyed was not dynamite (although such proof had been destroyed by the Government); having failed to do so, they could not claim “prejudice” (although a prima facie case had been established). The dissent further noted that the destruction of the fingerprint evidence also could have been relevant defense evidence.

a test which balanced all the circumstances including actual prejudice to the defendant and the Government’s reason for the delay.

1324. 628 F.2d at 1145, 1149.
1325. Id. at 1155 (Kennedy, J., concurring).
1326. The court’s opinion pointed out that the defendant’s inability to fingerprint the dynamite containers was exculpatory since any fingerprints could only aid the prosecution. Id. at 1149. The concurring opinion concluded that the defendant’s inability to fingerprint the containers was not prejudicial since fingerprints of third parties would not be necessarily exculpatory. Id. at 1155 (Kennedy, J., concurring).
1327. Id. at 1151.
1328. Judge Hufstedler was joined by Judges Ely and Hug. Id. at 1156.
1329. Id. at 1156. Moreover, the dissent charged that the majority accepted the principles set out in United States v. Heiden, 508 F.2d 898, 902 (9th Cir. 1974), without addressing the fact that Heiden established a disjunctive test (either bad faith or prejudice to the defendant could be shown). 628 F.2d at 1158. See text accompanying note 1317, supra.
1330. 628 F.2d at 1157 (Hufstedler, J., dissenting).
1331. The dissent believed that if the cartons of dynamite had not disclosed evidence of the defendants’ fingerprints, that fact would have been helpful to the defense. Id.
Consequently, the Government actions prevented the defendants from discovering evidence that might have been favorable to their defense. Finally, the dissent argued that the interests of deterring governmental misconduct, of protecting a defendant’s right to a fair trial, and of preserving the integrity of the judicial process should not be balanced against each other because each has independent value.

In sum, the *Loud Hawk* test leaves a defendant with a near impossible task. Besides requiring evidence of governmental bad faith, *Loud Hawk* demands a showing of actual prejudice from evidence unavailable for testing because of governmental destruction. However, the balancing approach is not altogether new to the Ninth Circuit or the other circuits. Moreover, the factors set out in the concurring opinion should provide a better guide than past Ninth Circuit discussions in this area in spite of the difficulties it presents defendants. The Ninth Circuit applied the *Loud Hawk* balancing test in *United States v. Tercero*. The defendant in *Tercero* sought to have his conviction for possession of marijuana reversed because certain arrest photographs had been lost or destroyed.

The *Tercero* court found no bad faith on the part of the Government because the photographs had been destroyed in the course of routine file cleaning. The court also found no prejudice to the defendant since the arrest photographs were deemed neither essential to his defense nor useful for impeachment purposes. As a result, the

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1332. The dissent pointed out that the prejudice stems from the fact that the defendants are prevented from “finding out for themselves,” *id.* at 1158, and analogized to other Ninth Circuit opinions voicing concern for the unfettered ability of the Government to make decisions unilaterally. *Id.* See *United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971), and *United States v. Tsutagawa*, 500 F.2d 420 (9th Cir. 1974), which held that the Government’s routine deportation of illegal aliens who might provide exculpatory evidence was violative of a defendant’s compulsory process rights.

1333. 628 F.2d at 1158 (Hufstedler, J., dissenting).

1334. *See cases cited supra* in note 1308.

1335. *See supra* note 1307.

1336. 640 F.2d 190 (9th Cir. 1980).

1337. *Id.*

1338. *Id.* at 192. The court noted that the defendant conceded that there was no evidence of bad faith and cited the Government’s efforts to find the photographs.

The court did, however, repeat a warning “that the government ‘flirt[s] with the danger of reversal any time evidence is lost or inadvertently destroyed.’” *Id.* (quoting *United States v. Heiden*, 508 F.2d 898, 903 n.1 (9th Cir. 1974)). The Ninth Circuit has also stated that “[w]hen evidence is seized, the government should take every reasonable precaution to preserve it.” *United States v. Heiden*, 508 F.2d at 903 n.1.

1339. *Id.* at 193. The witness who testified as to what the defendant was wearing when arrested admitted that he had no independent recollection of this. The witness stated that
court concluded that reversal of the conviction was unwarranted.\textsuperscript{1340}

\textbf{F. Abuse of Process}

In \textit{United States v. Wilson},\textsuperscript{1341} the Ninth Circuit upheld the trial court’s denial of the defendant’s motion to suppress statements allegedly resulting from the United States Attorney’s abuse of prosecutorial discretion in serving the defendant with a grand jury subpoena.\textsuperscript{1342} In so doing, the court applied the “arbitrary and capricious” standard it had used before in considering alleged violations of the Attorney General’s prosecutorial discretion.\textsuperscript{1343}

Agent Flett of the Drug Enforcement Agency was informed by physician Palmer that narcotic prescriptions bearing Palmer’s forged signature had been passed at a local pharmacy and that a portion of the doctor’s prescription booklet was missing.\textsuperscript{1344} Flett relayed this information to Assistant United States Attorney Diskin.\textsuperscript{1345}

On March 1, 1979, Diskin ordered the preparation of a grand jury subpoena for defendant Wilson, a registered nurse and an employee of Dr. Palmer.\textsuperscript{1346} The subpoena directed Wilson to appear before the grand jury at 11:00 a.m. on March 13, 1979. Instead of giving the subpoena to the United States Marshal for routine service, Diskin gave it to agent Flett with instructions not to make service until so directed by Diskin. On March 12, 1979, Diskin requested Flett to deliver service to Wilson the following morning at Dr. Palmer’s office. Actual service was not completed until 10:30 a.m. on March 13, 1979 (one-half hour before the scheduled appearance) when Wilson arrived at work.\textsuperscript{1347}

Following a conversation with her employer, Wilson asked Flett how she could avoid an appearance before the grand jury. When Flett replied that any decision would have to be made by the United States Attorney in charge, Wilson requested that the agents escort her to the courthouse.\textsuperscript{1348} En route, Flett explained to Wilson that she was not required to speak with the agents and that she had the right to the

\begin{footnotes}
\item[1340] \textit{Id.}
\item[1341] 614 F.2d 1224 (9th Cir. 1980).
\item[1342] \textit{Id.} at 1228.
\item[1343] \textit{Id.}
\item[1344] \textit{Id.} at 1226.
\item[1345] \textit{Id.}
\item[1346] \textit{Id.}
\item[1347] \textit{Id.}
\item[1348] \textit{Id.}
\end{footnotes}
presence of counsel except during the appearance before the grand jury. Wilson then expressed a desire to speak with Assistant United States Attorney Diskin. The suspect was escorted to the United States Attorney’s office, where Diskin informed her that the subpoena did not require her presence in his office, but did require her to appear before the grand jury. Wilson was then given the Miranda warnings, which she waived. During the ensuing interview Wilson confessed to the forgeries of the narcotics prescriptions.

At a suppression hearing which followed Wilson's indictment, the district court found that (1) the paramount reason for delayed service was that the government desired to acquire additional evidence against Wilson, and (2) the direction to appear at the United States Attorney's office was for the purpose of allowing the witness to obtain vouchers for witness fees, a routine accounting procedure. Wilson was subsequently convicted of acquiring controlled substances through use of forged order forms.

In affirming Wilson's conviction, the Ninth Circuit initially observed that “[s]upervisory control of grand jury procedures is narrowly construed in the Ninth Circuit.” The court noted that in view of the constitutional independence of the grand jury it would be antithetical for the court to exercise oversight. The court stated that “[t]he legal

1349. Id.
1350. Id.
1351. Id. These findings demonstrate that the trial court wholly accepted Diskin’s testimony at the suppression hearing. Id.
1352. Id. at 1225.
1353. Id. at 1227 (citing In re Grand Jury Proceedings, Hergenroeder, 555 F.2d 686 (9th Cir. 1977)).
1354. Id. at 1227 (citing United States v. Chanen, 549 F.2d 1306 (9th Cir.), cert. denied, 434 U.S. 825 (1977)). The court relied heavily on the language in Chanen, stating that
[g]iven the constitutionally-based independence of each of three actors—court, prosecutor and grand jury—we believe a court may not exercise its “supervisory power” in a way which encroaches on the prerogatives of the other two unless there is a clear basis in fact and law for doing so. If the district courts were not required to meet such a standard, their “supervisory power” could readily prove subversive of the doctrine of separation of powers.

614 F.2d at 1227 (quoting United States v. Chanen, 549 F.2d at 1313 (emphasis added)).

However, in Chanen, the remedy sought by the defendant under the court’s supervisory power was dismissal of the indictment on the ground of prosecutorial misconduct in the presentation of evidence to the grand jury. Id. at 1313. In Wilson, the defendant merely sought to suppress the statements made as a result of an alleged abuse of process. This action required a far less drastic and intrusive remedy under a comparatively restrained exercise of supervisory power. The cases upon which the Chanen court relied in reaching its decision not to dismiss the indictment involved instances in which the defendant claimed that dismissal of the indictment was the appropriate remedy for the alleged prosecutorial misconduct. See, e.g., United States v. Estepa, 471 F.2d 1132, 1133 (2d Cir. 1972); Loraine
basis for a court’s assertion of its supervisory power ‘is the need to preserve the integrity of the judicial process and to avoid any fundamental unfairness.’ It concluded that “it is far from clear” that the manner in which the grand jury subpoena was served ‘implicates any of those interests.’ The court was unable to discern any clear basis in law justifying the exercise of supervisory power. While recognizing the “propriety” of the guidelines contained in the United States Attorney’s Manual, the court reiterated that they carried no force of law and that it was not mandatory for the judiciary “to enforce an agency regulation unless compliance with the regulation is mandated by the Constitution or federal law.”

Turning to the circumstances surrounding the service of the subpoena on Wilson, the court found that the Government was exercising a legitimate prerogative in issuing a subpoena forthwith, because the delay in actual service was due to the Assistant United States Attorney’s desire to gather additional evidence that he believed would be forthcoming. The district court’s acceptance of the Government's explanation was upheld under the “clearly erroneous” standard of review.

Neither could the court find that the record would support a conclusion that the subpoena was used as a device to facilitate an office interrogation of the defendant. The court again noted that the district court accepted the Government's explanation that grand jury witnesses were routinely directed to the courthouse floor, where the

1355. United States v. Wilson, 614 F.2d 1224, 1227 (9th Cir. 1980) (quoting United States v. Chanen, 549 F.2d at 1313).
1356. Id.
1357. Id. (citing United States v. Caceres, 440 U.S. 741, 749-51 (1979)).

The court professed a reluctance to interfere with the Attorney General’s prosecutorial discretion absent evidence of capriciousness or arbitrariness which rises to the level of unfairness. Likewise, the court claimed a lack of authority to enforce the Attorney General’s in-house rules unless their breach rose to the same level. “The per se rule urged by appellant would be inconsistent with the narrow scope of [the court’s] supervisory power over grand jury proceedings. Whether judicial integrity will be jeopardized or fundamental fairness threatened must be determined on a case by case basis.” Id. at 1227-28.
1358. Id. at 1228. Diskin testified at the suppression hearing that he believed that Wilson was likely to forge another prescription in the period between issuance and service of the subpoena. Id. at 1226.
1359. Id. at 1228.
United States Attorney's office was located, for purely administrative purposes. At no point could the court discern that any pressure was applied to Wilson in an attempt to cajole her into talking to the Government. In fact, the defendant had been fully informed of her rights at all times. On these facts, the court could find no abuse of process.

IV. TRIAL PROCEEDINGS

A. Joinder and Severance

1. Joinder

The joinder of charges and defendants in federal criminal cases is governed by the provisions of Federal Rule of Criminal Procedure 8. Rule 8 is designed to balance the need to avoid undue prejudice to defendants that may result from joining multiple charges or defendants against the need to attain judicial efficiency in the conduct of trials.

Rule 8(a) provides for the joinder of charges in an action against a single defendant. Under rule 8(a), two or more offenses may be charged in the same indictment if the offenses (1) are of the same or similar character, (2) are based on the same act or transaction, or (3) are based on two or more acts or transactions connected together or constituting part of a common scheme or plan.

1361. 614 F.2d at 1228.
1362. Id.
1363. FED. R. CRIM. P. 8.
1364. United States v. Martin, 567 F.2d 849, 853 (9th Cir. 1977); cf. United States v. Bronco, 597 F.2d 1300, 1303 (9th Cir. 1979) (severance should have been granted where prejudice to defendant from joinder of charges outweighed need for judicial economy).
1365. 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.

1366. United States v. Satterfield, 548 F.2d 1341, 1344 (9th Cir. 1977) ("Rule 8(a) applies only to joinder of offenses against a single defendant."), cert. denied, 439 U.S. 840 (1978).
1367. E.g., United States v. Bronco, 597 F.2d 1300, 1301 (9th Cir. 1979) (conspiracy to sell counterfeit money charge properly joined with two substantive charges arising from an independent set of events under rule 8(a) because all three were counterfeiting charges and thus similar).
1368. E.g., United States v. Armstrong, 621 F.2d 951, 954 (9th Cir. 1980) (joinder of two counts of bank robbery proper where robberies occurred 30 minutes apart and thus were part of the same transaction or series of transactions).
1369. E.g., United States v. Goldberg, 549 F.2d 1334, 1335 (9th Cir. 1977) (per curiam) (joinder of one count of theft of motion pictures with five counts of copyright infringement proper under rule 8(a) because of likelihood that all offenses were part of a common plan).
The Ninth Circuit has broadly construed rule 8 in favor of initial joinder.\textsuperscript{1370} For example, in \textit{United States v. Armstrong},\textsuperscript{1371} the Ninth Circuit affirmed the joinder of three separate bank robbery counts against one defendant. In \textit{Armstrong}, two of the robberies were committed thirty minutes apart on the same day; the other bank robbery had occurred a month earlier. All three took place in Sacramento, California. The court found that joinder of the two robberies which occurred on the same day satisfied rule 8(a) because they "were clearly part of the same transaction or series of transactions."	extsuperscript{1372} As to the earlier robbery count, the court found that it was properly joined with the other two robberies because all three "could be considered as transactions constituting part of a common scheme or plan."\textsuperscript{1373}

In multiple defendant actions, the provisions of rule 8(b)\textsuperscript{1374} govern both the joinder of defendants and the joinder of all charges against the defendants.\textsuperscript{1375} Under rule 8(b), as long as all defendants participate in an act or transaction or series of acts or transactions constituting an offense or offenses, the defendants and offenses may be joined together.\textsuperscript{1376} Offenses of the same or similar character that do not arise from the same transaction or transactions may not be used to join multiple defendants, even though such joinder is proper with a single defendant under rule 8(a).\textsuperscript{1377}

\textsuperscript{1370} United States v. Friedman, 445 F.2d 1076, 1082 (9th Cir.), \textit{cert. denied}, 404 U.S. 958 (1971).
\textsuperscript{1371} 621 F.2d 951 (9th Cir. 1980).
\textsuperscript{1372} \textit{Id.} at 954.
\textsuperscript{1373} \textit{Id.}
\textsuperscript{1374} \textit{FED. R. CRIM. P. 8(b)} provides:

\begin{quote}
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.
\end{quote}

\textsuperscript{1375} United States v. Satterfield, 548 F.2d 1341, 1344 (9th Cir. 1977) (joinder in indictment of charges against one defendant with separate charges against a codefendant controlled by rule 8(b)), \textit{cert. denied}, 439 U.S. 840 (1978); \textit{see} United States v. Friedman, 445 F.2d 1076, 1082 (9th Cir.) (joinder of substantive charges against one defendant in multiple defendant action governed by rule 8(b)), \textit{cert. denied}, 404 U.S. 958 (1971).

\textsuperscript{1376} \textit{FED. R. CRIM. P. 8(b)}; United States v. Roselli, 432 F.2d 879, 899 (9th Cir. 1970) (joinder against defendants of separate charges of failing to report income proper where the offenses arose from defendants' participation in the same illegal acts), \textit{cert. denied}, 401 U.S. 924 (1971).

\textsuperscript{1377} United States v. Satterfield, 548 F.2d 1341, 1344-45 (9th Cir. 1977) (similar modus operandi in bank robbery offenses insufficient to justify joinder of the charges against defendants), \textit{cert. denied}, 439 U.S. 840 (1978); United States v. Roselli, 432 F.2d 879, 898 (9th Cir. 1970) ("Charges against multiple defendants may not be joined merely because they are similar in character. . . ."), \textit{cert. denied}, 401 U.S. 924 (1971).
To determine whether charges joined against multiple defendants are sufficiently related to meet the provisions of rule 8(b), the Ninth Circuit usually requires that "substantially the same facts must be adduced to prove each of the joined offenses."\textsuperscript{1378} The mere charging of a conspiracy count linking together separate substantive charges against various defendants ordinarily will be sufficient to satisfy the rule.\textsuperscript{1379} However, a conspiracy charge must be brought in good faith, not for the purpose of avoiding the requirements of rule 8(b).\textsuperscript{1380} The dismissal of a conspiracy count serving as the link between defendants or charges will not retroactively establish misjoinder under rule 8(b); severance subsequent to proper initial joinder is governed by rule 14, not rule 8(b).\textsuperscript{1381} Likewise, in United States v. Jabara,\textsuperscript{1382} the Ninth Circuit held that acquittal of the linking conspiracy charge did not alter the initial joinder pursuant to rule 8(b).\textsuperscript{1383}

In order to obtain relief on a claim of rule 8(b) misjoinder, an appellant must prove not only that joinder was improper but also that it was prejudicial.\textsuperscript{1384} The only exception to this application of the

\textsuperscript{1378} United States v. Satterfield, 548 F.2d 1341, 1344 (9th Cir. 1977) (joinder improper where appellant was charged in four counts of a ten count indictment and the majority of the evidence related to the other six counts); cert. denied, 439 U.S. 840 (1978); see United States v. Barney, 568 F.2d 134, 135 (9th Cir.) (per curiam) (joinder of perjury charge against codefendant with transportation of stolen vehicle charge against codefendant and appellant permissible where facts underlying both offenses were so intertwined that most evidence admissible in proof of one charge was also admissible in proof of the other); cert. denied, 435 U.S. 955 (1978).

\textsuperscript{1379} United States v. Valenzuela, 596 F.2d 824, 829 (9th Cir.) (initial joinder of defendants proper where, in addition to separate substantive charges against various defendants, all were charged with conspiracy to possess with intent to distribute heroin); cert. denied, 441 U.S. 965 (1979); United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971) (court assumed appellant's initial joinder to eight codefendants not error where all were charged with conspiracy to commit bribery in one count of a ten count indictment; however, severance granted).

\textsuperscript{1380} United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971).

\textsuperscript{1381} Schaffer v. United States, 362 U.S. 511, 515-16 (1960) (proper joinder under rule 8(b) not vitiated by mid-trial dismissal of conspiracy count; severance subsequent to proper joinder controlled by rule 14); Fernandez v. United States, 329 F.2d 899, 905-06 (9th Cir.) (dismissal on appeal of the conspiracy count which linked the defendants did not retroactively establish misjoinder; where initial joinder proper, subsequent severance governed by rule 14); cert. denied, 379 U.S. 832 (1964).

\textsuperscript{1382} 618 F.2d 1319 (9th Cir.), cert. denied, 446 U.S. 987 (1980).

\textsuperscript{1383} Id. at 1328.

\textsuperscript{1384} United States v. Martin, 567 F.2d 849, 854 (9th Cir. 1977) (joinder of defendants under rule 8(b) improper, but reversal not required because error harmless where evidence of appellant's guilt was overwhelming); United States v. Satterfield, 548 F.2d 1341, 1346 (9th Cir. 1977) (reversal required where defendants were misjoined and evidence introduced against codefendant prejudiced appellant), cert. denied, 439 U.S. 840 (1978); United States v. Roselli, 432 F.2d 879, 901 (9th Cir. 1970) (even if joinder were improper, reversal not re-
harmless error rule is where two or more defendants were jointly tried on wholly unrelated charges. In this situation, prejudice is assumed and reversal is automatic.

2. Severance

Even though joinder of claims or defendants may be proper under rule 8, a defendant may move for severance under rule 14 of the Federal Rules of Criminal Procedure if joinder would be so prejudicial that it would deny him or her a fair trial. A rule 14 motion is subject to the discretion of the trial judge, unlike a rule 8 motion alleging misjoinder which raises a non-discretionary question of law. A trial judge's denial of a motion to sever will be overturned on appeal only if the appellant proves that the joint trial was so prejudicial that the trial judge could have ruled in only one way, to order severance.

In assessing prejudicial effect, the Ninth Circuit has measured whether "the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants [or counts] in the light of

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1386. See Metheany v. United States, 365 F.2d 90, 94-95 (9th Cir. 1966).

1387. 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.


1390. United States v. Ragghianti, 527 F.2d 586, 587 (9th Cir. 1975) (trial judge erred in not granting motion to sever the two counts of bank robbery joined against defendant where there was a lack of evidence linking the defendant to the first count); United States v. Thomas, 453 F.2d 141, 144 (9th Cir. 1971) (no abuse of discretion in denying motion to sever defendants charged with transporting marijuana where there was little likelihood that the codefendant would testify in appellant's behalf at severed trial), cert. denied, 405 U.S. 1069 (1972).
its volume and limited admissibility." The court has often stated that potential prejudice arising from joinder of defendants or counts can be neutralized by careful jury instructions.

The Ninth Circuit followed these principles in 1980. For example, in *United States v. Escalante*, the defendant claimed that he had been prejudiced by the joint trial with his codefendants because a codefendant's connections to organized crime and gangland murder had been revealed to the jury. The Ninth Circuit agreed that this information was highly prejudicial to Escalante, but held that the judge's instructions to the jury to disregard this information in determining the guilt or innocence of the defendants were sufficient to neu-

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1391. United States v. Brady, 579 F.2d 1121, 1128 (9th Cir.) (prejudice arising from joinder of defendants in manslaughter prosecution was insufficient to require reversal of denial of severance motion where no reason to believe that jury could not realistically appraise the evidence against each defendant; the trial was relatively simple, and the judge instructed the jury on the limited use of the evidence), cert. denied, 439 U.S. 1074 (1978); accord, United States v. Toussaint, 619 F.2d 810, 813-14, (9th Cir. 1980) (no merit to appellant's claim that joinder of defendants in heroin prosecution caused the jury to be confused so that they might have been unable to compartmentalize the evidence as it applied to each defendant where the facts of the case were uncomplicated); United States v. Campanale, 518 F.2d 352, 359 (9th Cir. 1975) (prejudice from joint trial of defendants on racketeering charges insufficient to overturn denial of severance motion where factual issues were not complex and jury was able to compartmentalize the evidence, as shown by the variation in its verdicts among the defendants), cert. denied, 423 U.S. 1050 (1976).

1392. See *United States v. Uriarte*, 575 F.2d 215, 217 (9th Cir.) (court's limiting instruction diminished possible prejudice to appellant from evidence admissible solely against codefendant), cert. denied, 439 U.S. 963 (1978); United States v. Cozzetti, 441 F.2d 344, 349 (9th Cir. 1971) (no abuse of discretion in denial of severance motion where counsel and judge repeatedly made jury aware of the limited admissibility of the evidence against the various defendants); cf. United States v. Brashier, 548 F.2d 1315, 1324 (9th Cir. 1976) (appellant could have requested judge to give a cautionary instruction to jury that would have cured any possible prejudice from evidence admissible only in connection with one count against him), cert. denied, 447 U.S. 929 (1980).

1393. See, e.g., United States v. Lutz, 621 F.2d 940, 945 (9th Cir. 1980) (judge's instructions to jury to give separate consideration to each defendant were sufficient to eliminate any prejudice to defendants from joint trial for fraud); United States v. Abraham, 617 F.2d 187, 191 n.1 (9th Cir.) (judge's denial of severance of defendants charged with same robbery not an abuse of discretion where he instructed jury to consider the evidence against each of them separately), cert. denied, 447 U.S. 929 (1980).

1394. 637 F.2d 1197 (9th Cir.), cert. denied, 449 U.S. 856 (1980).

1395. The defendant also claimed prejudice from joinder because of his alleged short involvement in the conspiracy (four months in a conspiracy lasting 27 months). *Id.* at 1200. The Escalante court did not discuss this assertion. In *United States v. Uriarte*, 575 F.2d 215, 217 (9th Cir.), cert. denied, 439 U.S. 963 (1978), the Ninth Circuit affirmed that members of a conspiracy whose involvement in it lasted for only a short period may be tried with other members who were fully involved in the conspiracy. But cf. United States v. Lutz, 621 F.2d 940, 942 n.1 (9th Cir. 1980) (court noted without comment the trial judge's severance of two defendants' trials because of their short involvement in the conspiracy and the relatively few counts for which they were charged).
tralize its prejudicial effects. Since the defendant did not show any reason why the jury would have been unable to follow these instructions, he failed to prove the "manifest prejudice" required to overturn the denial of his severance motion.

A similar charge of jury confusion was asserted in United States v. Reed by a defendant who was put on trial for two bank robberies. He contended that the similarity of the crimes could have resulted in jury confusion about the evidence or in the jury's use of a finding of guilt on one count to presume a finding of guilt on the other charge. Rejecting these arguments, the Ninth Circuit found that while these risks are present to a certain degree in any case where there is joinder, Reed was not unduly prejudiced because the presentation of evidence as to the two counts was separate and distinct, there was no confusion on the part of counsel or witnesses, and the court carefully instructed the jury to consider the evidence for each count separately and gave them separate verdict forms for each count.

The Escalante and Reed decisions demonstrate that because an orderly and clear presentation of evidence and careful instructions by the trial judge are sufficient to diminish the prejudice resulting from joinder, the Ninth Circuit will not require severance. However, the actual effectiveness of jury instructions to neutralize prejudice arising from joinder is debatable, and probably undeterminable due to the secrecy of jury deliberations. As a result of this secrecy, in most cases an appellate court's determination of the effectiveness of jury instructions is limited to whether, in light of the clarity of the instructions and the complexity of the trial, it can reasonably assume that the jury did follow them.

In 1980, the Ninth Circuit also held, in United States v. Armstrong, that a defendant's claim of potential self-incrimination did not automatically require severance. In Armstrong, the defendant claimed that he was prejudiced by the joinder against him of three separate bank robbery charges because he wished to testify about only two

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1396. 637 F.2d at 1201-02.
1397. Id. at 1202.
1398. 620 F.2d 709 (9th Cir. 1980).
1399. Id. at 712. FED. R. EVID. 404(b) prohibits the admission of evidence of crimes, wrongs, or acts "to prove-the character of a person in order to show that he acted in conformity therewith."
1400. Id. at 712.
1402. 621 F.2d 951 (9th Cir. 1980).
1403. Id. at 954.
of the counts but not about the third. The denial of severance forced him to testify regarding all three robberies. Rejecting this argument, the court noted the general rule that there is no need for severance on self-incrimination grounds until the defendant shows that he has "'both important testimony to give concerning one count and strong need to refrain from testifying on the other.'"\textsuperscript{1404} The defendant failed to show that he had important testimony to give on the two counts about which he wanted to testify.\textsuperscript{1405} As a result, he had no basis for his claim that the joinder of charges compelled him to take the stand (and thus incriminate himself) on the count about which he did not care to testify. In sum, the defendant did not show any need to testify on any of the counts, and consequently he failed to demonstrate that he was prejudiced by joinder of the charges.\textsuperscript{1406}

In \textit{United States v. Lutz},\textsuperscript{1407} one defendant argued that he was prejudiced by the joint trial with his codefendants because one of them attempted to shift all of the blame for the mail fraud scheme to him. Lutz contended that severance was required because of the resulting antagonistic defenses. The court rejected this contention simply by citing its earlier decision in \textit{United States v. Brady},\textsuperscript{1408} where the court stated: "Conflicting and antagonistic defenses being offered at trial do not necessarily require granting a severance, even if hostility surfaces or defendants seek to blame one another."\textsuperscript{1409} The \textit{Brady} court held

\begin{itemize}
\item \textsuperscript{1404} Id. (quoting \textit{Baker v. United States}, 401 F.2d 958, 977 (D.C. Cir. 1968) (per curiam), \textit{cert. denied}, 400 U.S. 965 (1970)); accord, \textit{United States v. Forrest}, 623 F.2d 1107, 1115 (5th Cir. 1980); \textit{United States v. Werner}, 620 F.2d 922, 930 (2d Cir. 1980); \textit{United States v. Bronco}, 579 F.2d 1300, 1303 (9th Cir. 1979) ("accused should show the specific testimony he will present about one offense, and his specific reasons for not testifying about the others, to justify severance"); \textit{United States v. Jardan}, 552 F.2d 216, 220 (8th Cir.), \textit{cert. denied}, 433 U.S. 912 (1977).

\item \textsuperscript{1405} Armstrong follows the rationale advanced by the District of Columbia Circuit in \textit{Baker v. United States}, 401 F.2d 958, 976-77 (D.C. Cir. 1968) (per curiam), \textit{cert. denied}, 400 U.S. 965 (1970). The \textit{Baker} court declared that a defendant who wishes to testify as to some counts and not testify as to others is prejudiced by joinder only when the advantages and disadvantages of testifying are different for each of the joined counts. \textit{Id.} Thus, the defendant's freedom to determine whether to testify at his trial is infringed upon by the competing considerations arising from each count. However, where the advantages and disadvantages of testifying are substantially the same, the defendant's choice is not infringed; accordingly, no prejudice follows from joinder. \textit{Id.}

\item \textsuperscript{1406} 621 F.2d at 954.

\item \textsuperscript{1407} 621 F.2d 940, 945 (9th Cir. 1980).

\item \textsuperscript{1408} 579 F.2d 1121 (9th Cir. 1978), \textit{cert. denied}, 439 U.S. 1074 (1979).

\item \textsuperscript{1409} \textit{Id.} at 1128; cf. \textit{United States v. Kozloski}, 453 F.2d 889, 890 (9th Cir. 1971) (per curiam) (no abuse of discretion in denying severance motion where defendant alleged he would be prejudiced in joint trial by his codefendant's poor quality as a witness and because hostility had developed between them); \textit{United States v. Meyer}, 404 F.2d 254, 255 (9th Cir. 1968) (codefendant's testimony which was damaging to appellant did not immediately jus-
that severance was not required because the defendants' attempts to blame each other were merely cumulative of the Government's case against each of them and because the jury could assess the relative credibility of their testimony.\textsuperscript{1410}

\section*{B. Guilty Pleas}

\subsection*{1. Generally}

Although a guilty plea has been defined as a "formal admission in court as to guilt,"\textsuperscript{1411} it is not entirely clear what constitutes a formal admission or when a formal admission occurs. For example, the Ninth Circuit in United States v. Stapleton\textsuperscript{1412} rejected the argument that a defendant's stipulation to the facts necessary to convict him constituted a guilty plea.\textsuperscript{1413} Nevertheless, the consequences of a guilty plea are significant and numerous; it is a conviction of the offense charged,\textsuperscript{1414} concomitant with an admission of the material elements of the offense.\textsuperscript{1415} In addition, a defendant who pleads guilty waives his right against self-incrimination, his right to a jury trial, and his right of confrontation.\textsuperscript{1416} The guilty plea also operates as a waiver of independent constitutional claims arising prior to the entry of the plea.\textsuperscript{1417}

The due process clause of the Constitution mandates that the deci-

\begin{footnotesize}
\textsuperscript{1410} \textit{579 F.2d} at 1128.
\textsuperscript{1411} \textit{BLACK'S LAW DICTIONARY} 637 (5th ed. 1979).
\textsuperscript{1412} \textit{Id.} at 780 (9th Cir. 1979).
\textsuperscript{1413} \textit{Id.} at 782; \textit{accord}, United States v. Miller, 588 F.2d 1256, 1263 (9th Cir. 1978); \textit{cert. denied}, 440 U.S. 947 (1979). \textit{But see} Cox v. Hutto, 589 F.2d 394, 395-96 (8th Cir. 1979) (per curiam) (stipulation to past convictions under habitual offender statute equivalent to guilty plea).
\textsuperscript{1415} \textit{Id.; accord}, McCarthy v. United States, 394 U.S. 459, 466 (1969) (guilty plea is "admission of all the elements of a formal criminal charge"); Larios-Mendez v. Immigration & Naturalization Serv., 597 F.2d 144, 146 (9th Cir. 1979) (per curiam) (material facts alleged in information and complaint deemed admitted); United States v. Benson, 579 F.2d 508, 509 (9th Cir. 1978).
\textsuperscript{1417} Tollett v. Henderson, 411 U.S. 258, 267 (1973); Larios-Mendez v. Immigration & Naturalization Serv., 597 F.2d 144, 146 (9th Cir. 1979) (per curiam) (guilty plea operates as a waiver of all constitutional claims arising prior to trial). \textit{Compare} United States v. Leming, 532 F.2d 647 (9th Cir. 1975); \textit{cert. denied}, 424 U.S. 978 (1976) with Barnett v. Hopper, 548 F.2d 550, 552 (5th Cir. 1977) (guilty plea does not constitute a waiver of constitutional consequences occurring subsequent to sentence).
\end{footnotesize}
tion to plead guilty be made voluntarily and intelligently.\textsuperscript{1418} Accordingly, the pleader must have the requisite mental capacity to enter such a plea.\textsuperscript{1419} For example, in \textit{United States v. Navarro-Flores},\textsuperscript{1420} the defendant, a Spanish-speaking man, claimed that he had not intelligently waived his rights because of the "ineffectiveness and misleading character of [his] interpreter's translation that resulted . . . in his misunderstanding of his rights."\textsuperscript{1421} The court of appeals rejected this argument, which was made in support of the defendant's motion to withdraw his guilty plea prior to sentencing.\textsuperscript{1422} The Ninth Circuit upheld the district court's determination that the translation was credible. It noted that the defendant's motion was made solely in response to his learning about his co-defendant's imprisonment,\textsuperscript{1423} an insufficient reason for granting a motion to withdraw a guilty plea.

2. Appeal of a motion to withdraw

The procedure utilized by a defendant to withdraw a plea of guilty is governed by Federal Rule of Criminal Procedure 32(d).\textsuperscript{1424} Under rule 32(d), a defendant may withdraw his plea prior to sentencing upon leave of the court. During a rule 32(d) proceeding, the defendant must present plausible, fair, and just reasons for his motion.\textsuperscript{1425}

Because an order granting a defendant's motion to withdraw a guilty plea is considered to be interlocutory,\textsuperscript{1426} it is generally not ap-

\textsuperscript{1419} See Sailer v. Gunn, 548 F.2d 271, 275 (9th Cir. 1977) ("The test [of mental capacity] is whether the defendant had the 'ability to make a reasoned choice among the alternatives presented to him.'") (quoting Seiling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973)); cf. Westbrook v. Arizona, 384 U.S. 150 (1966) (per curiam) (competency to stand trial is not necessarily competency to waive constitutional right to counsel).
\textsuperscript{1420} 628 F.2d 1178 (9th Cir. 1980) (per curiam).
\textsuperscript{1421} Id. at 1183.
\textsuperscript{1422} See Fed. R. Crim. P. 32(d); see also infra notes 1426 & 1427 and accompanying text.
\textsuperscript{1423} 628 F.2d at 1184.
\textsuperscript{1424} Fed R. Crim. P. 32(d) provides: "A motion to withdraw a plea of guilty or \textit{nolo contendere} 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."
\textsuperscript{1425} See United States v. Navarro-Flores, 628 F.2d 1178, 1184 (9th Cir. 1980) (per curiam) (standard of review on appeal from denial of motion for leave to withdraw is whether trial court abused its discretion); United States v. Ulano, 468 F. Supp. 1054 (C.D. Cal. 1979), \textit{aff'd per curiam}, 614 F.2d 1257 (9th Cir. 1980) (withdrawal denied on basis of finding that plea bargain and rule \textit{I} not violated); \textit{cf.} United States v. King, 618 F.2d 550 (9th Cir. 1980) (denial of rule 32(d) motion proper where the only basis of defendant's motion is that the court failed to inform him of collateral consequences of guilty plea).
\textsuperscript{1426} United States v. Martin, 611 F.2d 260 (9th Cir. 1979).
pealable under 18 U.S.C. section 3731. Thus, in United States v. Martin, the Government could not appeal a district court’s order granting the defendant’s motion to withdraw, at least until there was an order terminating the then current proceedings against the defendant.

However, in United States v. LaBinia, the Ninth Circuit noted that an order granting a motion to withdraw a guilty plea and a separate order dismissing an indictment are appealable together under section 3731. In LaBinia, the defendant pled guilty to an indictment under the Hobbs Act for attempted bank extortion. Subsequently, he brought a motion under rule 32(d) to have his plea withdrawn on the ground that attempted bank extortion was not chargeable under the Hobbs Act. The trial court granted this interlocutory motion, and, in a separate order, dismissed the indictment on the same grounds. The Government appealed both orders. The court of appeals held that it had jurisdiction over the Government’s appeal under section 3731 because “[w]here, as here, the basis of the dismissal of the indictment is inextricably intertwined with an appealable order ‘both orders must be reviewed together.’”

The court, without explaining its conclusion, relied upon the Second Circuit holding in United States v. Tane. In Tane, the Second Circuit exercised jurisdiction under section 3731 to hear the Government’s appeal of a district court’s interlocutory order suppressing certain evidence. The evidence was the basis for an indictment, which was dismissed subsequent to the granting of the suppression order. Accordingly, the Second Circuit referred to both the suppression and indictment orders as “inextricably intertwined” and, as such, held that

1427. Criminal Appeals Act, 18 U.S.C. § 3731 (1976), provides in relevant 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. . . .

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court [sic] suppressing or excluding evidence . . . .

1428. 611 F.2d 260 (9th Cir. 1979).

1429. Id. at 261.

1430. 614 F.2d 1207 (9th Cir. 1980).

1431. Id. at 1208.


1433. 614 F.2d at 1208 n.2 (quoting United States v. Tane, 329 F.2d 848, 851-52 (2d Cir. 1964)).

1434. 329 F.2d 848 (2d Cir. 1964); accord, United States v. Dote, 371 F.2d 176, 179 (7th Cir. 1966).

1435. 329 F.2d at 851.
they were appealable together under section 3731.\footnote{1436}

LaBinia, however, is distinguishable from Tane. Unlike Tane, where the interlocutory suppression order removed the basis for the indictment, the grant of LaBinia’s motion to withdraw his guilty plea did not remove the basis for his indictment. Although both the motion to withdraw his guilty plea and the dismissal of his indictment developed because LaBinia’s offense was not chargeable under the Hobbs Act, the grant of the motion was not the basis for the motion to dismiss the indictment. Thus, the LaBinia court appears to have applied incorrectly the “inextricably intertwined” theory.

In addition, the LaBinia court failed to mention the Ninth Circuit’s prior holding in United States v. Kanan.\footnote{1437} The Kanan court was faced with facts similar to those of Tane, except that the indictment was dismissed at the Government’s insistence. The Government had wanted to seek review of a suppression order.\footnote{1438} Because of the Government’s actions, the Kanan court distinguished Tane\footnote{1439} and refused to exercise jurisdiction\footnote{1440} to review the suppression order. Thus, even though the indictment and suppression orders were “inextricably intertwined,” the Kanan court refused to follow Tane.\footnote{1442}

\footnote{1436. Id. at 851-52.}
\footnote{1437. 341 F.2d 509 (9th Cir. 1965).}
\footnote{1438. Id. at 510-11.}
\footnote{1439. Id. at 513.}
\footnote{1440. The courts in both Tane and Kanan were concerned with § 3731 prior to its amendment in 1971. Before the amendment, § 3731 provided in pertinent part:}
\footnote{1441. 341 F.2d at 514.}
\footnote{1442. Id. at 513-14.}
Moreover, the Kanan court read section 3731 narrowly, stating:
It follows from all that has been said that reading § 3731 in the light of its legislative history, as we are required to do, the
Government may appeal thereunder from a decision or judg-
ment, 'setting aside, or dismissing' an indictment only if such decision or judgment is based upon a defect in the indictment or in the institution of the prosecution.\(^{1443}\)
Thus, because the suppression order was neither a defect in the indict-
ment nor in the institution of the prosecution, the suppression order
was not appealable.
Following Kanan, the order in LaBinia granting the defendant's
motion to withdraw his guilty plea would be neither a defect in the
indictment nor in the institution of the prosecution. Thus, in addition
to the lack of support provided by the Tane decision, the Kanan deci-
sion should have barred the LaBinia court's exercise of jurisdiction.

3. Rule 11

Rule 11 of the Federal Rules of Criminal Procedure\(^{1444}\) sets forth
the required manner by which federal courts are to accept guilty

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\(^{1443}\) Id. at 511 (quoting United States v. Apex Distrib. Co., 270 F.2d 747, 755 (9th Cir. 1959)) (emphasis in the original).

\(^{1444}\) FED. R. CRIM. P. 11 states, in relevant part:

(c) Advice to Defendant. Before accepting a plea of guilty or nolo con-
tendere, 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 in-
criminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further
trial of any kind, so that by pleading guilty or nolo contendere he waives the
right to a trial; and

(5) 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 an-
swers may later be used against him in a prosecution for perjury or false
statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of
guilty or nolo contendere without first, by addressing the defendant personally in
open court, determining that the plea is voluntary and not the result of force or
threats or of promises apart from a plea agreement. The court shall also inquire as
to whether the defendant's willingness to plead guilty or nolo contendere results
from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussion with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the
pleas. Under rule 11(c), the trial judge must personally question the defendant to determine whether he or she understands the nature of the charges, the range of possible sentences, and his or her constitutional rights.

The 1980 Ninth Circuit decision, United States v. King, reaffirmed that court's position in Sanchez v. United States. Although the trial judge must inform the defendant of the direct consequences of his or her plea of guilty, under Sanchez, the defendant need not be informed of the collateral consequences. Thus, as provided in rule 11, and as mandated by King and Sanchez, the trial judge need only

defendant, the inquiry into voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.


1446. FED. R. CRIM. P. 11(c). But see Johnson v. United States, 542 F.2d 941, 942 (5th Cir. 1976) (per curiam) (sufficient that the defendant's counsel address the defendant).

1447. FED. R. CRIM. P. 11(c).

1448. Id. In Lewis v. United States, 601 F.2d 1100, 1101 (9th Cir. 1979) (per curiam), the court held that rule 11 requires that the defendant understand only the range of possible sentences and penalties. Accord, United States v. Eaton, 579 F.2d 1181, 1183 (10th Cir. 1978) (a broad explanation of the range of sentences is sufficient if it includes the ultimate sentence); Johnson v. United States, 539 F.2d 1241, 1242 (9th Cir. 1976), cert. denied, 431 U.S. 918 (1977); cf. Hinds v. United States, 429 F.2d 1322, 1323 (9th Cir. 1970) (improper for the court to inform the defendant of the probability of receiving one sentence or another).

1449. FED. R. CRIM. P. 11(c)(2)-(3). These provisions require that the defendant must be informed that he has a right to an attorney, the right to plead not guilty, the right of confrontation, the right to cross-examination, and the right against self-incrimination.

1450. 618 F.2d 550 (9th Cir. 1980).

1451. 572 F.2d 210, 211 (9th Cir. 1977) (per curiam).

1452. Before December 1, 1975, rule 11 required that the defendant be informed of “the consequences of the plea.” FED. R. CRIM. P. 11, 383 U.S. 1097 (1966). That language does not appear in the present rule. FED. R. CRIM. P. 11(c). Under Sanchez v. United States, 572 F.2d at 211, a court need not attempt to explain all the consequences that may flow from conviction or from the imposition of the sentence, so long as the court explains the direct consequences. Thus, in Sanchez, the possibility of parole revocation was deemed collateral. Id.; see also Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976) (the possibility of potential deportation is collateral); Paulisi v. Daggett, 527 F.2d 305, 309 (7th Cir. 1975) (the possibility that a federal sentence might be ruled to run consecutively to a state sentence is collateral); Redwine v. Zuckert, 317 F.2d 336, 338 (D.C. Cir. 1963) (the likelihood of an undesirable military discharge is functionally collateral). See generally NOTES OF THE ADVISORY COMM. ON 1975 AMENDMENTS OF RULES, FED. R. CRIM. P. 11, reprinted in 8 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 11.01[4], at 11-10 (2d ed. 1977) (court must explain consequences, not implications, of entering guilty plea); J. BOND, PLEA BARGAINING AND GUILTY PLEAS 148 (1975) (discussion of the classification of consequences as direct or indirect).

1453. But cf. United States v. Harris, 534 F.2d 141, 141-42 (9th Cir. 1976) (failure to advise defendant of special parole term constitutes “manifest injustice” because the special parole term is a direct consequence of the plea, and under FED. R. CRIM. P. 32(d), warrants withdrawal of the guilty plea).

1454. FED. R. CRIM. P. 11.
inform the defendant that as a direct result of his or her guilty plea, he or she may be subject to the range of sentences provided by law for the offense, and that answers given under oath during the rule 11 proceeding can be used against him or her in any later prosecution for perjury.

In King, the defendant, on his plea of guilty, was convicted of filing a criminally false and fraudulent income tax return. On appeal, the defendant contended that the district court had abused its discretion in denying his motion to withdraw his guilty plea because he had not been informed of the potential effects his guilty plea might have on subsequent civil litigation the Government might bring to recover unpaid taxes. In rejecting the defendant's arguments, the court noted that, although it might be desirable to inform a defendant that his guilty plea might estop him from denying in a subsequent civil action the falsity of his return, neither rule 11 nor any other authority required that this information be given to the defendant. Thus, the King court determined that the effect a guilty plea may have on subsequent, related civil litigation was a "collateral consequence" of pleading guilty.

Finally, under rule 11(f), the trial court must determine that there is a factual basis in the record for the plea before it accepts the plea.

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1455. Fed. R. Crim. P. 11(c)(1). But see United States v. Ulano, 614 F.2d 1257, 1258 (9th Cir. 1980) (claim that special parole term not sufficiently explained rejected because raised only on second appeal).


The Committee recast the language of rule 11(c), which deals with the advice given to a defendant before the court can accept his plea of guilty or nolo contendere. The Committee acted in part because it believed that the warnings given to the defendant ought to include those that Boykin v. Alabama, 395 U.S. 238 (1969), said were constitutionally required. In addition, and as a result of its change in subdivision (e)(6), the Committee thought it only fair that the defendant be warned that his plea of guilty (later withdrawn) or nolo contendere, or his offer of either plea, or his statements made in connection with such pleas or offers, could later be used against him in a perjury trial if made under oath, on the record, and in the presence of counsel.

1457. 618 F.2d at 551.

1458. Id. at 552.

1459. Id.

1460. Id.

1461. See Santobello v. New York, 404 U.S. 257, 261 (1971); United States v. Del Prete, 567 F.2d 928, 930 (9th Cir. 1978) (signing a written guilty plea application containing all of the required items of disclosure inadequate because not on the record).

1462. Fed. R. Crim. P. 11(f); see, e.g., United States v. Lopez-Beltran, 607 F.2d 1223, 1225 (9th Cir.) (a personal inquiry into the underlying charges was mandated; thus, a brief recita-
4. Plea bargaining

a. the negotiating process

Plea bargaining has been recognized as both an essential and judicially necessary component of the criminal justice system.\textsuperscript{1463} Although the existence of a plea bargain is a question of fact, not until 1979 in \textit{United States v. Pantohan}\textsuperscript{1464} did the Ninth Circuit clarify what constitutes plea bargaining. In \textit{Pantohan}, the defendant appealed his conviction alleging, \textit{inter alia}, that certain self-incriminating statements should have been suppressed because they were made during plea bargain negotiations.\textsuperscript{1465} The defendant urged that a purely subjective test should be utilized to determine whether plea bargaining had occurred.\textsuperscript{1466} Rejecting this argument, the court followed the lead of the Fifth Circuit\textsuperscript{1467} and adopted a two-tiered test for determining whether an admission by a criminal defendant was made in the course of a plea bargain.\textsuperscript{1468} The court held that a plea bargain has taken place only if (1) the accused subjectively believed at the time of the discussion that plea negotiations were occurring, and (2) the accused's beliefs were reasonable under the circumstances.\textsuperscript{1469} The \textit{Pantohan} court determined that plea bargaining had not occurred because the defendant was not under arrest at the time he made his self-incriminating statements, and the government officials to whom his statements were directed had not made any promises nor had they directed any offer to the defendant.\textsuperscript{1470}
In the 1980 decision of *United States v. Castillo*, the Ninth Circuit applied the *Pantohan* two-tiered test in considering the scope of rule 11(e)(6). Rule 11(e)(6) provides, *inter alia*, that statements made in connection with plea negotiations are inadmissible against the pleading party. Confessions, however, are not excluded by this rule.

In *Castillo*, the defendant showed a correctional counselor a typewritten list of potential charges and said he would probably "cop" to one of the listed offenses. In rejecting the defendant's argument that the statement was made during plea negotiations, the court held that the defendant did not exhibit the requisite intent to negotiate as "he merely related voluntarily his expectations on the probable outcome of plea negotiations." The court further stated: "[O]bjectively, even if he had harbored a subjective intent to negotiate . . . , any expectation at that time would have been unreasonable because the counselor was not empowered to negotiate on behalf of the government.

The Ninth Circuit considered the scope of permissible conduct by the Government during plea bargain negotiations in *United States v. Gardner*. The Government, seeking to strike a plea bargain with the defendant, offered to abandon plans to seek a second indictment if the defendant would plead guilty to one count of the original indictment and cooperate in another criminal investigation. After rejecting the offer, the defendant was convicted on both the original and the sec-

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1471. 615 F.2d 878 (9th Cir. 1980).
1472. *Id.* at 885; FED. R. CRIM. P. 11(e)(6). Effective December 1, 1980, new rule 11(e)(6) attempts to remove the ambiguities which have caused confusion about when statements made in the course of plea bargaining are admissible. The new rule provides as follows:

(6) Inadmissibility of pleas, plea discussions, and related statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;
(B) a plea of *nolo contendere*;
(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or
(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

1473. FED. R. CRIM. P. 11(e)(6).
1474. 615 F.2d at 885.
1475. *Id*.
1476. *Id*.
1477. 611 F.2d 770 (9th Cir. 1980).
On appeal, he claimed that the Government's threat to obtain the second indictment created an atmosphere of vindictiveness. The Gardner court, relying on the Supreme Court decision of Bordenkircher v. Hayes, held that because the defendant was free to accept or reject the Government's offer, the Government could lawfully present the possible prosecutorial alternatives to the defendant. Thus, the Government could seek to induce the defendant to aid in another criminal investigation.

The Ninth Circuit also limited the Government's disclosure requirements during plea bargain negotiations in United States v. Krasn. In Krasn, the defendant was indicted for various gratuities offenses involving the meat packing industry. While he was negotiating a plea bargain, an antitrust investigation involving the same industry and the defendant began. The defendant pled guilty to some of the gratuities charges pursuant to the negotiated plea bargain and three years later was indicted on the antitrust charges. At an evidentiary hearing, the district court concluded that the gratuities plea bargain did not include a promise not to institute a criminal antitrust proceeding against the defendant. The defendant sought review of the district court's interpretation of the gratuities plea bargain and also claimed that the Government had acted in bad faith by not informing him, at the time he was plea bargaining to the gratuities charges, of the pendency of the antitrust investigation.

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1478. Id. at 773; see infra note 1479 and accompanying text.
1479. 434 U.S. 357 (1978). In Bordenkircher, the prosecutor informed the defendant that if he did not plead guilty to the pending charges, the Government would seek another indictment, under which the defendant could be sentenced to life imprisonment. The defendant declined and the Government obtained another indictment for a separate and distinct offense. The defendant was convicted under the second indictment and sentenced to life imprisonment. On appeal, he contended that the prosecutor's actions amounted to vindictive prosecution analogous to that in Blackledge v. Perry, 417 U.S. 21 (1974) (defendant charged with felony for same conduct which gave rise to misdemeanor charge after defendant appealed misdemeanor conviction). The Supreme Court disagreed, stating that “[t]he course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.” 434 U.S. at 365.
1480. 611 F.2d at 773; accord, United States v. Warren, 594 F.2d 1046, 1049 (5th Cir. 1979) (offer of probation in exchange for witness' testimony analogous to plea bargain); see Watkins v. Solem, 571 F.2d 435 (8th Cir. 1978) (prosecution's threat to file habitual criminal charges to induce guilty plea not vindictive because record in state court proceeding supported claim of voluntariness).
1481. 614 F.2d 1229 (9th Cir. 1980).
1482. Id. at 1233.
1483. Id. at 1233-34.
The court of appeals, after first affirming the district court's interpretation of the gratuities plea bargain, held that the Government was not obligated to inform the defendant of the initial phases of the antitrust investigation during the gratuities plea bargain negotiations. The court rationalized its holding on two grounds. First, the two indictments involved independent criminal investigations, although both had evolved from the same industry. Second, and more significant, at the time that the defendant was negotiating his gratuities plea bargain, the antitrust investigation was merely in its initial phases as "the government 'was not conducting an active, ongoing' investigation." This holding appears fair in light of the court's comment that had "the government had its antitrust case against Krasn ready to submit to the grand jury during the plea negotiations on the gratuities charges, then a different result might be required."

b. nature of the agreement

In United States v. Arnett, the Ninth Circuit firmly established that a plea bargain is contractual in nature. The court stated that the terms of the plea bargain should be determined under objective standards by the district court to which the plea was submitted.

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1484. Id. at 1233. The Ninth Circuit's review of a district court's findings are subject to the clearly erroneous standard. Id.; see United States v. Botero, 589 F.2d 430, 433 (9th Cir. 1978), cert. denied, 441 U.S. 944 (1979).
1486. 614 F.2d at 1234.
1487. Id.
1488. Id.
1489. Id.
1490. 628 F.2d 1162 (9th Cir. 1979). In Arnett, the defendant moved to strike the Government's responses to the court's inquiries during a FED. R. CRIM. P. 35 motion hearing on the ground that the responses violated his plea agreement. The Government contended that the scope of the plea agreement was not violated by its responses. Id. at 1163. The court remanded the case to the trial court to consider the terms of the agreement. Id. at 1166.
1491. 628 F.2d at 1164; accord, Jones v. Estelle, 584 F.2d 687, 689 (5th Cir. 1978); United States v. Crusco, 536 F.2d 21, 26 (3d Cir. 1976); see United States v. McIntosh, 612 F.2d 835, 837 (4th Cir. 1979) ("[W]here the content of a plea bargain and the authority for its offer are at issue ... traditional precepts of contract and agency should apply.").
1492. 628 F.2d at 1164; see United States v. Bronstein, 623 F.2d 1327, 1330 (9th Cir. 1980) (terms, intent and language of plea agreement self-evident); cf. United States v. Petsas, 592 F.2d 525, 527 (9th Cir. 1979) (objective determination established plea bargain for one offense but did not subsume related offense), cert. denied, 442 U.S. 910 (1979); Johnson v. Beto, 466 F.2d 478, 480 (5th Cir. 1972) (plea bargaining analogous to promissory estoppel; must have explicit expression of terms and reliance). But see United States v. Miller, 565 F.2d 1273, 1275 (3d Cir. 1977) (language of plea agreement determined by its plain meaning, not by objective interpretation), cert. denied, 436 U.S. 959 (1978).
Relying on Arnett, the court in United States v. Krasn held that appellate review of a district court's interpretation of a plea bargain is subject to the clearly erroneous standard. Furthermore, both parties must bargain and abide by the terms of the agreement in good faith. Thus, in Krasn, the court held that the Government did not breach its duty of good faith by withholding from the defendant information concerning the pendency of one criminal investigation involving the defendant while the defendant was negotiating a plea bargain to another indictment.

Various remedies, functionally equivalent to those in contract law, are available when either party breaches the agreement. Moreover, once one party withdraws from the agreement, the other party is no longer bound by it. For example, in United States v. Black, the defendant had been indicted on two counts of mailing threatening letters to a district court judge. Prior to any trial proceedings on these charges, Black had written two other threatening letters to a different district court judge. Following these acts, the Government struck a plea bargain with the defendant, who agreed to plead guilty to one count of obstruction of justice, and in return, the Government agreed

1493. 628 F.2d at 1164; see United States v. Simmons, 537 F.2d 1260, 1261 (4th Cir. 1976) (court approving plea bargain must determine whether the parties duly performed their mutual obligations); United States v. Avery, 589 F.2d 906, 908 (5th Cir. 1979) (remanded to determine implied meaning of prosecutor's promise); Jones v. Estelle, 584 F.2d 687, 689 (5th Cir. 1978) (affirming lower court interpretation of plea bargain terms and language); United States v. Scharf, 551 F.2d 1124, 1130 (8th Cir. 1977). See generally 2 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 539, at 477 (1969).

1494. 614 F.2d 1229 (9th Cir. 1980). See supra note 1482 and accompanying text.

1495. See United States v. Krasn, 614 F.2d 1229, 1234 (9th Cir. 1980) (Government has duty of good faith to defendant during plea bargain negotiations); United States v. Gardner, 611 F.2d 770 (9th Cir. 1980) (offering inducements to defendant during plea negotiations is not breach of good faith and did not impinge on defendant's right to plead not guilty and stand trial).

1496. See generally Santobello v. New York, 404 U.S. 257, 262 (1971) ("When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

1497. See supra note 1483-86 and accompanying text.

1498. 628 F.2d at 1166 (if, on remand, the court finds that the Government breached the agreement, then the defendant can rescind his guilty plea and stand trial on the original charges); see also Santobello v. New York, 404 U.S. 257, 260-62 (1971) (the fairness of any voluntary agreement turns upon the parties' expectations, first, that it will be honored by the other party, and second, that redress is available when necessary). See generally Westen & Westin, A Constitutional Law of Remedies for Broken Plea Bargains, 66 Calif. L. Rev. 471 (1978).

1499. See United States v. Black, 609 F.2d 1330 (9th Cir. 1979) (prosecution can reindict defendant on original charges after defendant successfully has prior guilty plea vacated).

1500. 609 F.2d 1330 (9th Cir. 1979).
to drop the remaining charges and refrain from prosecuting Black for the later criminal acts. While serving his sentence for his conviction on the single count, Black filed a section 2255 motion\textsuperscript{1501} and was successful in having his plea and sentence vacated.\textsuperscript{1502} Thereafter, the Government charged Black with \textit{all four} counts of writing threatening letters, and he was convicted. On appeal, Black claimed that the second indictment and longer sentence constituted vindictive prosecution. Distinguishing two Supreme Court cases,\textsuperscript{1503} the court held that the second indictment was based on criminal acts \textit{in addition} to those upon which the original indictment was based.\textsuperscript{1504} Moreover, the court held that the Government was no longer bound\textsuperscript{1505} by the plea bargain once it had been vacated.\textsuperscript{1506} Thus, because a plea bargain is contractual in nature,\textsuperscript{1507} the \textit{Black} court effectively condoned rescission as an appropriate remedy when the defendant is successful in having his plea bargain vacated.

\section*{C. Jury Administration}

\subsection*{1. The right to trial by jury}

In federal court, the right to trial by jury in criminal cases is guaranteed by the following two provisions of the Federal Constitution: (1) article III, section 2, clause 3, which provides that the trial of all crimes, except in cases of impeachment, shall be by jury;\textsuperscript{1508} and (2) the sixth amendment, which declares that in all criminal prosecutions the accused shall enjoy the right to be tried by an impartial jury drawn from the state and district where the crime was committed.\textsuperscript{1509} Moreover, the right to trial by jury is applicable to the states by virtue of the four-

\begin{itemize}
  \item \textsuperscript{1501} 28 U.S.C. § 2255 (1971).
  \item \textsuperscript{1502} 609 F.2d at 1332.
  \item \textsuperscript{1503} Blackledge v. Perry, 417 U.S. 21 (1974) (defendant should not be subjected to increased charges and longer sentences for the \textit{same conduct} on which he had been previously charged and sentenced); North Carolina v. Pearce, 395 U.S. 711 (1969) (same).
  \item \textsuperscript{1504} 609 F.2d at 1333.
  \item \textsuperscript{1505} \textit{Accord}, United States v. McMann, 436 F.2d 103, 106 (2d Cir. 1970) (reindictment on original charges after defendant revoked his part of plea bargain not vindictive), \textit{cert. denied}, 402 U.S. 914 (1971); see United States v. Gerard, 491 F.2d 1300, 1306 (9th Cir. 1974) ("The government should not be locked into its side of the bargain when the defendant succeeds in withdrawing his."); cf. United States v. Resnick, 483 F.2d 354, 358 (5th Cir.) (reindictment on original charges after accused refused to plead guilty not vindictive prosecution), \textit{cert. denied}, 414 U.S. 1008 (1973).
  \item \textsuperscript{1506} 609 F.2d at 1333.
  \item \textsuperscript{1507} \textit{See supra} notes 1490-91 and accompanying text.
  \item \textsuperscript{1508} U.S. CONST. art. III, § 2, cl. 3.
  \item \textsuperscript{1509} U.S. CONST. amend. VI.
\end{itemize}
The right to trial by jury has been characterized as “fundamental to the American scheme of justice,”\textsuperscript{1510} essential to a fair trial,\textsuperscript{1511} and necessary to prevent oppression by the government.\textsuperscript{1512}

The Constitution does not enumerate the offenses for which the right to trial by jury is guaranteed, but refers to all criminal prosecutions.\textsuperscript{1513} However, the Supreme Court has held that only defendants charged with serious offenses are entitled to that guarantee.\textsuperscript{1514} Conversely, the Supreme Court has denied the right to defendants charged with petty offenses,\textsuperscript{1515} namely, those offenses carrying a maximum potential penalty of six months imprisonment.\textsuperscript{1516} The Ninth Circuit, however, generally has defined petty offenses as misdemeanors which prescribe maximum penalties of six months imprisonment or a fine of five hundred dollars or both.\textsuperscript{1517}

In \textit{United States v. May},\textsuperscript{1518} the Ninth Circuit held that a pretrial order by the trial court limiting the potential sentence to six months confinement obviated the guarantee of a jury trial.\textsuperscript{1519} In \textit{May}, the defendants were charged with unlawfully reentering a naval installation,

\begin{itemize}
\item \textsuperscript{1510} Duncan v. Louisiana, 391 U.S. 145, 149 (1968).
\item \textsuperscript{1511} \textit{Id.}
\item \textsuperscript{1512} \textit{Id.} at 157-58 (“[A] general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.”).
\item \textsuperscript{1513} Singer v. United States, 380 U.S. 24, 31 (1965).
\item \textsuperscript{1514} See \textit{U.S. CONST.} amend. VI.
\item \textsuperscript{1515} See Duncan v. Louisiana, 391 U.S. 145, 159-61 (1968) (implication that a person facing a potential penalty in excess of six months imprisonment is thereby charged with a serious offense to which the right to a jury trial attaches); Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966). \textit{But see} Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (right to counsel is triggered if \textit{actual} sentence is imprisonment).
\item \textsuperscript{1516} Taylor v. Hayes, 418 U.S. 488, 496 (1974); Frank v. United States, 395 U.S. 147, 148 (1969); District of Columbia v. Clawans, 300 U.S. 617, 624 (1937); \textit{accord}, United States v. Marthaler, 571 F.2d 1104, 1105 (9th Cir. 1978) (per curiam); United States v. Coates, 573 F.2d 257, 258 (5th Cir. 1978) (per curiam).
\item \textsuperscript{1517} Baldwin v. New York, 399 U.S. 66, 69 (1970) ("no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized"); \textit{cf.} United States v. Smyer, 596 F.2d 939, 942 (10th Cir. 1979) (no guaranteed right to a jury trial where \textit{actual} sentence for multiple offenses does not exceed six months confinement).
\item \textsuperscript{1518} \textit{See} United States v. Hamdan, 552 F.2d 276 (9th Cir. 1977) (per curiam) (petty offenses defined under 18 U.S.C. § 1(3) (1976)). \textit{But see} United States v. Sanchez-Meza, 547 F.2d 461, 464 (9th Cir. 1976) (in spite of maximum penalty of six months imprisonment, right to jury trial applies to defendant accused of conspiracy because crime was a serious offense at common law and because crime is "morally offensive and \textit{malum in se}”).
\item \textsuperscript{1519} 622 F.2d 1000 (9th Cir. 1980).
\item \textsuperscript{1520} \textit{Id.} at 1005; \textit{accord}, United States v. Marthaler, 571 F.2d 1104 (9th Cir. 1978) (per curiam).
\end{itemize}
an offense carrying a maximum potential penalty of six months confinement. Additionally, due to the defendants' minor age, they were subject to punishment under the Youth Corrections Act, which could have resulted in confinement in excess of one year. The trial court entered an equitable pretrial order which limited punishment to that prescribed for unlawfully reentering the naval installation. Concomitantly, the trial court denied the defendants' motion for a jury trial. After conviction, the defendants appealed, contending that the trial court's denial of their motion for a jury trial was improper. The Ninth Circuit disagreed and affirmed the trial court's ruling. Relying on Taylor v. Hayes and United States v. Marthaler, the court held that since the pretrial order limited the potential penalty to six months confinement, the defendants were not accused of a serious offense, and thus, the defendants did not have a constitutional right to a jury trial.

The May court misapplied the holdings of Taylor and Marthaler to the facts of May. First, May involved a statute with a specified maximum sentence in excess of six months. In this situation, the Supreme Court has focused on whether the potential penalty authorized by the legislature was in excess of six months confinement. The legislative determination of maximum penalty is a significant indicator of the seriousness of the crime. If found to be "serious," the charged crime triggers the right to trial by jury. Hence, the actual sentence imposed by a judge should not be determinative of the seriousness of the crime. Second, Taylor and Marthaler were criminal contempt cases in which the sentencing was within the sole discretion of the trial judge because of the absence of legislative authorization of serious penalties for con-

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1522. 18 U.S.C. §§ 5010, 5017(c) or 4216 (1976). But cf. United States v. Doe, 627 F.2d 181, 183 (9th Cir. 1980) (a juvenile prosecuted under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-42 (1976), has "neither a constitutional right to a jury trial . . . nor a statutory right to a jury trial"). However, if the juvenile elects to be prosecuted as an adult, he "has a sixth amendment right to a jury trial in any case in which he is charged with an offense punishable by more than six months imprisonment." 627 F.2d at 183.
1523. 622 F.2d at 1004.
1524. Id. at 1005.
1526. 571 F.2d 1104 (9th Cir. 1978) (per curiam).
1527. 622 F.2d at 1005.
1529. Duncan v. Louisiana, 391 U.S. 145, 159-61 (1968) (sixty-day sentence not determinative of right to trial by jury when potential punishment was two years).
tempts. In those cases, the *actual* imprisonment imposed was the key factor in determining whether the defendants were denied their right to trial by jury.\footnote{1530} Because the potential penalty in *May* exceeded six months imprisonment and did not arise in criminal contempt proceedings, the defendants' right to trial by jury appears to have been violated; thus, the reasoning employed is erroneous.

2. Jury representation

Federal jury selection is governed by the Jury Selection and Service Act (Act),\footnote{1531} which assures that defendants are tried before impartial juries.\footnote{1532} The Act states:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.\footnote{1533}

The Act provides various procedures for implementing this policy\footnote{1534} along with a procedure which enables defendants to challenge their indictments or convictions if the grand jury which indicted them, or the petit jury which convicted them, was not selected in accordance...
In 1979, the Supreme Court in *Duren v. Missouri* set out the standard to be used in determining whether the “fair cross section” requirement was met. The Court declared that

[i]n order to establish a prima facie violation of the fair cross section requirement, the defendant must show (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Moreover, *Duren* also requires a showing that the particular distinctive group was absent from the defendant’s venire. However, even if a defendant establishes the prima facie violation, his indictment or conviction still may withstand challenge if the state demonstrates that those aspects of the jury selection process that result in the underrepresentation manifestly and primarily advance a significant state interest.

In *United States v. Berry*, the Ninth Circuit applied the *Duren* test in affirming the trial court’s denial of the defendant’s motion to dismiss his indictment. Defendant Berry was indicted by a grand jury selected from the combined Phoenix and Prescott divisions of the District of Arizona. Under the jury selection system then in operation, prospective jurors in each division who lived more than one hundred miles from the division courthouse could exempt themselves from jury service. The defendant contended that the jury service exemption resulted in a jury pool in which Indians were underrepresented, thus violating the fair cross section requirement of the Jury Selection and

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1535. *Id.* § 1867. Moreover, the Act provides that “[t]he procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime . . . may challenge any jury on the ground that such jury was not selected in conformity with the provision of this title.” *Id.* § 1867(e).

1536. 439 U.S. 357 (1979); see *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation.”).

1537. 439 U.S. at 364.

1538. The *Duren* Court held that the defendant must demonstrate “that the underrepresentation of [the distinctive group], generally and on his venire, was due to their systematic exclusion in the jury-selection process.” 439 U.S. at 366 (emphasis added).

1539. 439 U.S. at 368.

1540. 627 F.2d 193 (9th Cir. 1980).

1541. *Id.* at 195.
Service Act. The trial court denied his motion for dismissal of the indictment.

On appeal, the defendant reasserted his contention that his indictment was unconstitutional. The Ninth Circuit, however, affirmed his conviction and held that the defendant had failed to show a prima facie violation of the fair cross section requirement of Duren. While Berry might have satisfied the first three numerically listed elements of Duren, he failed to satisfy the fourth element which required evidence that Indians were underrepresented on his particular venire. Consequently, the court held that the defendant's failure to introduce any evidence demonstrating underrepresentation of Indians on his venire was "fatal to [his] argument." In sum, Berry distills the Duren test into four distinct elements.

1542. Id. at 195-96.
1543. See supra text accompanying note 1537.

The court held that Indians were a distinctive group in the community. Id.; accord, United States v. Brady, 579 F.2d 1121, 1131 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979); cf. United States v. Foxworth, 599 F.2d 1, 4 (1st Cir. 1979) (registered voters in a given city or town not a "distinct" group); United States v. Potter, 552 F.2d 901, 905 (9th Cir. 1977) (young people and less educated people are not cognizable groups); United States v. Kleifgen, 557 F.2d 1293, 1296 (9th Cir. 1977) (young people, poorly educated people, and unemployed people do not constitute cognizable classes); United States v. Butera, 420 F.2d 564, 570-72 (1st Cir. 1970) (young adults and less educated people are cognizable groups, but residents of particular counties not a "distinct" group).

In addition, the Berry court noted the defendant's statistical evidence but refused to rule on it because the defendant's claim failed under the fourth element of Duren. 627 F.2d at 196. Compare United States v. Goodlow, 597 F.2d 159, 162 (9th Cir.) (the defendant's failure to offer evidence concerning whether the subject groups were underrepresented resulted in the court's refusal to rule upon the distinctiveness of the groups), cert. denied, 422 U.S. 913 (1979) with United States v. Masbeny, 609 F.2d 183, 190 (5th Cir. 1980) (the court refused to decide whether each group alleged by the defendant to be underrepresented was "distinctive" under the Duren test, and instead based its decision on the ground that the subject groups were not unconstitutionally disproportionate).

1544. 627 F.2d at 196. See supra note 1539 and accompanying text.
1545. Id.
1546. Id. To establish a prima facie violation of the fair cross section requirement a defendant must show:

(1) that the group alleged to be excluded is a distinctive group in the community;
(2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community;
(3) that this general underrepresentation is due to systematic exclusion of this group in the jury selection process; and
(4) that the systematic exclusion of this group from the jury selection process resulted in an underrepresentation of this group on the defendant's venire.
3. Juror bias

An impartial jury is a constitutional right guaranteed the criminally accused by the sixth amendment.\textsuperscript{1547} Voir dire examination of potential jurors provides the prosecution and defense an opportunity to select impartial jurors who will decide a case solely on the admissible evidence presented during the trial.\textsuperscript{1548} Hence, “a court [may not] force a party to exhaust his peremptory challenges on persons who should be excused for cause . . . .”\textsuperscript{1549}

In \textit{United States v. Allsup},\textsuperscript{1550} the Ninth Circuit held that it was reversible error not to excuse for cause two jurors who were employed by the bank, although not the particular bank branch, which the defendant allegedly had robbed. At trial the defendant had been forced to use up his peremptory challenges on such prospective jurors.\textsuperscript{1551} The \textit{Allsup} court inferred juror bias, despite the juror’s untested claim of impartiality,\textsuperscript{1552} from the jurors’ employment and their reasonable apprehension of violence from the bank robbers resulting from their occupation.\textsuperscript{1553}

The defendants in \textit{United States v. Panza},\textsuperscript{1554} citing \textit{Allsup}, argued they were prejudiced by the impanelment of two prospective jurors who banked at a bank branch different than the one which allegedly had been robbed by the defendants. The defendants also contended that they had been forced impermissibly to use one of their peremptory challenges to exclude a person who banked at the branch that had been robbed.\textsuperscript{1555}

The Ninth Circuit, however, disagreed. The court reasoned that

\textsuperscript{1547} U.S. CONST. amend. VI; see United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir.), cert. denied, 434 U.S. 818 (1977).

\textsuperscript{1548} Ham v. South Carolina, 409 U.S. 524, 532-33 (1973) (Marshall, J., dissenting). There are two ways of excluding jurors. First, a juror may be challenged for cause if the juror fails to meet statutory requirements or is prejudiced toward the defendant. \textit{See} 28 U.S.C. §§ 1865-1866 (1976). Second, a juror may be excluded by a \textit{peremptory} challenge, a method of excluding qualified jurors without cause. \textit{See} United States v. Barnes, 604 F.2d 121, 169-75 (2d Cir. 1979) (Meskill, J., dissenting) (discussion of peremptory challenge); \textit{FED. R. CRIM. P. 24(b)}.

\textsuperscript{1549} United States v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977) (quoting United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976)).

\textsuperscript{1550} 566 F.2d 68 (9th Cir. 1977).

\textsuperscript{1551} \textit{Id.} at 71, 72.

\textsuperscript{1552} \textit{See} Silverthorne v. United States, 400 F.2d 627, 638 (9th Cir. 1968) (merely obtaining subjective assurances of impartiality was insufficient to determine whether bias existed).

\textsuperscript{1553} 566 F.2d at 71.

\textsuperscript{1554} 612 F.2d 432 (9th Cir. 1979), \textit{cert. denied}, 447 U.S. 925 (1980).

\textsuperscript{1555} \textit{Id.} at 440-41.
under Alsup, the determinative issue was “whether the 'potential for substantial emotional involvement, adversely affecting impartiality' that is evident when a prospective juror works for a bank is also present when a prospective juror does business with a bank.” The court held “that there was insufficient potential for prejudice to require exclusion of the two prospective jurors who banked with a different branch than the one that was robbed.” As to the prospective juror who banked with the branch that was robbed, the court thought a closer question was presented but still refused to reverse because the possibility of bias was not deemed substantial. The court did observe that the “better practice” would have been to excuse the juror.

Thus, under Panza and Alsup, a prospective juror who conducts business with, or is employed by, an establishment against which the defendant is accused of having committed a crime, should be excused from the jury which considers the defendant's case. This rule is similar to appellate determinations that a prospective juror must be excluded from impanelment if the juror (1) holds a position similar to the victim of the crime, or (2) is closely associated with a victim of the same offense.

Once voir dire examinations are completed and jurors are sworn in, it is presumed that jurors will conduct themselves in an impartial manner. However, if an incident later occurs which may tend to

1556. Id. at 441 (quoting United States v. Alsup, 566 F.2d at 71).
1557. Id.
1558. Id.
1559. Id.
1560. Cf. United States v. Clabaugh, 589 F.2d 1019, 1023 (9th Cir. 1979) (per curiam) (court affirmed trial court's approval of juror who four years before had been a project architect for the corporate headquarters of the loan association robbed by the defendant).
1561. See United States v. Poole, 450 F.2d 1084, 1084-85 (3d Cir. 1971) (per curiam) (dicta) (bank teller); Sims v. United States, 405 F.2d 1381, 1384 n.5 (D.C. Cir. 1968) (dicta) (taxicab driver).
1562. See United States v. Eubanks, 591 F.2d 513, 516-17 (9th Cir. 1979) (per curiam) (new trial ordered because of discovery that juror who served in trial for conspiracy to possess heroin had two sons who were imprisoned for murder and robbery in connection with an attempt to acquire heroin); Virgin Islands v. Bodle, 427 F.2d 532, 534 (3d Cir. 1970) (rape victim's brother was juror on rape case); Jackson v. United States, 395 F.2d 615, 616-18 (D.C. Cir. 1968) (juror had been involved in love triangle similar to that alleged in defendant's murder trial); see also United States v. Jones, 608 F.2d 1004, 1010 (4th Cir. 1979) (Murnaghan, J., dissenting) (suggesting a per se rule of disqualification where a juror is related to a victim of a similar crime). But see United States v. Caldwell, 543 F.2d 1333, 1345-47 (D.C. Cir. 1975) (allowed a son and a father-in-law of policemen to serve as jurors in a case arising from a policeman slaying), cert. denied, 423 U.S. 1087 (1976).
1563. Cavness v. United States, 187 F.2d 719, 723 (9th Cir.) (jurors are presumed to have performed their official duties faithfully), cert. denied, 341 U.S. 951 (1951).
bias the jury, the trial court should adequately investigate the incident
to determine whether it will unconstitutionally prejudice the defendant.\textsuperscript{1564} If the trial judge then determines that the allegations of
misconduct are true and that the incident denied the defendant a fair trial,
a mistrial must be declared.\textsuperscript{1565} Generally, the Ninth Circuit has de-
ferred to lower court determinations regarding prejudice.\textsuperscript{1566}

In \textit{United States v. Berry},\textsuperscript{1567} the defendant, a disbarred attorney,
was tried for offenses related to perjury and the obstruction of justice.
After the trial court had ruled evidence of the defendant's disbarment
inadmissible, the jury foreman informed the trial judge that he had
accidently read the first few lines of a newspaper article which de-
scribed the defendant as a disbarred attorney.\textsuperscript{1568} The defendant
moved for a mistrial, and the trial judge instituted an investigation of
the incident. The judge questioned the jury foreman in chambers as to
whether the foreman had continued to read the article once the defend-
ant's name was mentioned and whether the foreman had read anything
which may have influenced him.\textsuperscript{1569} After the foreman responded neg-
atively to both inquiries, the judge questioned the other jurors in open
court regarding whether they had read the article.\textsuperscript{1570} Upon obtaining
an indication that the jury had not read the article, the judge denied the
defendant's motion.

On appeal, the defendant contended that the trial judge had failed
to investigate the incident adequately\textsuperscript{1571} and had erred in refusing to
grant a mistrial.\textsuperscript{1572} The Ninth Circuit, however, upheld the trial
judge's actions. The court initially concluded that the trial judge did

\textsuperscript{1564} The Ninth Circuit has held that the exact procedure a trial court follows is within its
discretion. \textit{United States v. Hendrix}, 549 F.2d 1225, 1227-28 (9th Cir.), \textit{cert. denied}, 434 U.S.
investigation mandatory), \textit{cert. denied}, 401 U.S. 922 (1971). The purpose of an adequate
investigation is two fold: (1) to determine the truthfulness of the alleged juror bias and (2) to
determine if the bias has deprived the defendant of his fifth amendment (due process) or
sixth amendment (impartial jury) guarantees. 549 F.2d at 1228-29.

\textsuperscript{1565} \textit{See} \textit{United States v. Hendrix}, 549 F.2d 1225, 1229 (9th Cir.), \textit{cert. denied}, 434 U.S.
818 (1977); \textit{United States v. Klee}, 494 F.2d 394, 396 (9th Cir.), \textit{cert. denied}, 419 U.S. 835
(1974).

\textsuperscript{1566} \textit{See} \textit{United States v. Hendrix}, 549 F.2d at 1229.

\textsuperscript{1567} 627 F.2d 193 (9th Cir. 1980).

\textsuperscript{1568} \textit{Id.} at 197.

\textsuperscript{1569} \textit{Id.}

\textsuperscript{1570} \textit{Id.}

\textsuperscript{1571} \textit{Id.} The defendant argued that the trial judge should have asked the jury foreman
"precisely what he remembered from the article and should have questioned each of the
other jurors individually in chambers."

\textsuperscript{1572} \textit{Id.} The defendant argued that the foreman's conduct alone justified a mistrial.
not abuse his discretion in conducting the investigation.\textsuperscript{1573} In commending the trial judge's actions, the court noted that the judge had "questioned the jurors enough to satisfy himself that no significant bias had been caused but refused to conduct such an inquisition that the jurors might conclude that [the defendant] had been involved in other criminal activity."\textsuperscript{1574} Moreover, the court held that the juror's partial reading of the article did not warrant by itself a mistrial. The court observed that the foreman had been conscientious in voluntarily revealing that he had read the article, and the court emphasized that the only information the foreman gleaned was that the defendant was a disbarred attorney.\textsuperscript{1575} The Ninth Circuit reasoned that while "[t]his information may not have impressed [the foreman] favorably . . . it was not so prejudicial as to deny [the defendant] a fair trial."\textsuperscript{1576} Thus, the court's review in \textit{Berry} is consistent with the Ninth Circuit position that the trial judge is "in a better position than [the appellate court] to determine whether what happened was prejudicial."\textsuperscript{1577}

4. The \textit{Allen} charge

The \textit{Allen} charge\textsuperscript{1578} is a jury instruction in which the trial judge

\footnotesize
\begin{itemize}
  \item 1573. \textit{Id.}
  \item 1574. \textit{Id.}
  \item 1575. \textit{Id.}
  \item 1576. \textit{Id.}
  \item 1577. United States v. Goliday, 468 F.2d 170, 172 (9th Cir. 1972) (per curiam), \textit{cert. denied}, 410 U.S. 934 (1973); \textit{see} United States v. Hendrix, 549 F.2d at 1229; United States v. Klee, 494 U.S. at 396 ("When a wise and experienced judge, who presided at the trial and observed the jury, comes to such a conclusion, it is not for us to upset it."); \textit{cf.} United States v. Noah, 475 F.2d 688, 692 (9th Cir.) (quoting \textit{Marshall} v. United States, 360 U.S. 310, 312 (1959)) (per curiam) ("The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. Generalizations beyond that statement are not profitable, because each case must turn on its special facts.")\textit{, cert. denied}, 414 U.S. 821 (1973).
  \item The result in \textit{Berry} is somewhat contrary to that in \textit{Marshall} v. United States, 360 U.S. 310 (1959) (per curiam). In \textit{Marshall}, jurors had read a newspaper article which revealed the defendant's previous record and other defamatory matters. The trial court had excluded the record from the trial. \textit{Id.} at 311. The trial court accepted the jurors' assurances of their impartiality, but the Supreme Court ordered a new trial. \textit{Id.} at 312-13. However, the Court reached this conclusion on the basis of its supervisory powers, not a constitutional right. \textit{Id.} at 313. \textit{Berry} was factually different from \textit{Marshall} because the juror in \textit{Berry} discovered only that he had been disbarred, not the cause of the disbarment. The information in \textit{Marshall} was far more damaging and extensive than that in \textit{Berry} and reached several jurors, whereas in \textit{Berry} only one juror had seen the article.
  \item 1578. In \textit{Allen} v. United States, 164 U.S. 492 (1896), the Supreme Court approved instructions which in substance stated:
    that in 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, yet they should examine the question
advises deadlocked jurors to reconsider their opinions in light of each other's arguments "with a disposition to be convinced," especially considering the majority's viewpoint.\footnote{1579} Since its initial approval by the Supreme Court in \textit{Allen v. United States},\footnote{1580} there has been a trend towards abolishing or limiting its use.\footnote{1581} Courts have disfavored the instruction because of its potential coercive effect on minority jurors.\footnote{1582}

The Ninth Circuit, however, has taken the position that jury instructions similar to the \textit{Allen} charge are not per se invalid.\footnote{1583} The court instead seeks to see if the instruction had a coercive effect upon the jury.\footnote{1584} The circuit has examined the coercive effect of the instruction by considering the cumulative effect of many factors, including: (1) the instruction's content and its variance from the original \textit{Allen} instruction,\footnote{1585} (2) whether it was given prematurely,\footnote{1586} (3) the amount

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 was 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.

\textit{Id.} at 501.

\textit{Id.} at 507.

\textit{Id.} at 508.


\footnote{1582} United States v. Seawall, 583 F.2d 416, 418 (9th Cir.), \textit{cert. denied}, 439 U.S. 991 (1978); Marsh v. Cupp, 536 F.2d 1287, 1290 (9th Cir.), \textit{cert. denied}, 429 U.S. 981 (1976); \textit{cf.} United States v. Williams, 626 F.2d 697, 704 (9th Cir. 1980) (court avoided claim of coercive \textit{Allen}-type charge by holding that the jury instructions were not a modified \textit{Allen} charge, but "merely a restatement of prior [valid] instructions").

\footnote{1583} \textit{Compare} United States v. Contreras, 463 F.2d 773, 774 (9th Cir. 1972) (per curiam) (modified \textit{Allen} instruction coercive) \textit{with} Dearinger v. United States, 378 F.2d 346, 347 n.2 (9th Cir. 1967) (identical instruction as used in \textit{Contreras}, but not coercive).
of deliberation after it is utilized,\textsuperscript{1587} and (4) whether the instruction was given as part of the original jury instruction or as a supplemental instruction.\textsuperscript{1588} Moreover, whether the instruction was given prematurely depends on whether the jury was sufficiently deadlocked when the instruction was used. In this regard, the Ninth Circuit has noted several factors: (1) the length of deliberation prior to the instructions use,\textsuperscript{1589} (2) the complexity of the deliberated issue,\textsuperscript{1590} (3) whether the jury returns to the court to receive further instructions or to rehear testimony prior to its use,\textsuperscript{1591} and (4) how the court perceived that the jury was deadlocked.\textsuperscript{1592}

One Ninth Circuit decision, \textit{United States v. Contreras},\textsuperscript{1593} suggested that the factor of prematurity alone would be sufficient to reverse a conviction. In \textit{Contreras}, a drug smuggling case, the jury had deliberated for approximately eight hours before they returned to court for further instruction concerning the definition of evidence and con-

\textsuperscript{1586} United States v. Contreras, 463 F.2d 773, 774 (9th Cir. 1972) (per curiam).
\textsuperscript{1587} United States v. Contreras, 463 F.2d at 774 (thirty-five minutes; coercive); United States v. Moore, 429 F.2d 1305, 1307 (9th Cir. 1970) (extensive deliberation and review of testimony after receipt of instruction; not coercive); \textit{accord} United States v. Robinson, 560 F.2d 507, 517-18 (2d Cir. 1977) (en banc) (four hours; not coercive), \textit{cert. denied}, 435 U.S. 905 (1978); United States v. DeStefano, 476 F.2d 324, 337 (7th Cir. 1973) (four hours; not coercive); United States v. Pope, 415 F.2d 685, 690-91 (8th Cir. 1969) (almost four hours; not coercive), \textit{cert. denied}, 397 U.S. 950 (1970). \textit{But see} United States v. Williams, 626 F.2d 697, 704 (9th Cir. 1980) (although not \textit{Allen} charge problem because later instructions were deemed restatement of valid original instruction, court also noted that “the return of a verdict within one hour does not strongly indicate coercion.”).\textsuperscript{1588}

\textsuperscript{1588} \textit{See} United States v. Williams, 624 F.2d 75, 77 (9th Cir. 1980) (“less likelihood of coercion” if \textit{Allen} charge given in original instructions); United States v. Guglielmini, 598 F.2d 1149, 1153 n.4 (9th Cir. 1979) (coercive effect “eliminated by giving the instruction as part of the original instruction to the jury”); \textit{accord} United States v. Wiebold, 507 F.2d 932, 934 (8th Cir. 1974) (preferable to give \textit{Allen} charge as part of the original instructions prior to deadlock). \textit{But see} United States v. Seawall, 550 F.2d 1159, 1163 (9th Cir. 1977) (second reading of \textit{Allen} charge, unless requested by the jury, is reversible error).\textsuperscript{1589}

\textsuperscript{1589} United States v. Peterson, 549 F.2d 654, 659 (9th Cir. 1977) (two days of deliberations after three day conspiracy trial); \textit{cf.} United States v. Goldstein, 479 F.2d 1061, 1069 (2d Cir.) (mistrial declared when jury appeared deadlocked) (time needed to reach a verdict is “best left to a trial judge”), \textit{cert. denied}, 414 U.S. 873 (1973).\textsuperscript{1590}

\textsuperscript{1590} United States v. Peterson, 549 F.2d 654, 659 (9th Cir. 1977) (three day conspiracy trial with testimony of 24 witnesses involved “unraveling of events and personalities [which] was not an easy task for a fact finder”); \textit{see} Sullivan v. United States, 414 F.2d 714, 716 (9th Cir. 1969) (\textit{Allen} charge “should be given only when it is apparent to the district judge from the jury’s conduct . . . that it is clearly warranted.”).\textsuperscript{1591}

\textsuperscript{1591} \textit{See} United States v. Peterson, 549 F.2d 654, 659 (9th Cir. 1977); Sullivan v. United States, 414 F.2d 714, 717 (9th Cir. 1969).\textsuperscript{1592}

\textsuperscript{1592} United States v. Peterson, 549 F.2d at 659; Sullivan v. United States, 414 F.2d at 717 (court determined jury was deadlocked after jury indicated its difficulty in reaching a verdict).\textsuperscript{1593}

\textsuperscript{1593} 463 F.2d 773 (9th Cir. 1972) (per curiam).
spiration. The trial judge then asked whether the jury had reached a verdict on any count of the indictment. The jury responded negatively, and the judge *sua sponte* gave the jury a modified *Allen* charge. Following thirty-five minutes of further deliberations, the jury returned a guilty verdict. On appeal, the *Contreras* court concluded that the modified *Allen* charge was given prematurely and, consequently, reversed the conviction. The court noted the following: "Here, although the jury had deliberated for nearly eight hours, there was no indication that it was deadlocked. In seeking clarification of the judge's instructions, the jury did not indicate that it was having trouble reaching a unanimous verdict."

In the 1980 case, *United States v. Beattie*, the defendant, relying on *Contreras*, argued that the *Allen* charge in his trial had been given prematurely, and thus, his conviction should be reversed. The defendant was tried on various criminal counts related to mail fraud. Following four days of testimony, the case went to the jury. After one hour of deliberation, the jury recessed for the night. The following day, deliberations continued, and the jury returned to court once to be re-instructed regarding the elements of mail fraud and once to rehear the testimony of a witness. The following morning, the jury again returned

1594. *Id.* at 774.
1595. *Id.*
1596. *Id.* (citations omitted).
1597. 613 F.2d 762 (9th Cir.), *cert. denied*, 446 U.S. 982 (1980).
1598. The court instructed the jury, in pertinent part, as follows:

> Just a word or two about approaching your task.

> It frequently develops that a jury may be evenly divided where half of you think there's reasonable doubt, the other half see no reasonable doubt. I'd suggest in a case like that, if half or almost half of you have doubts about the proof, that those who have no doubts would wonder if they were right to be as certain as they are when a substantial number of other jurors seem to find doubts about the sufficiency of the evidence.

> Conversely, it would seem to me that if only one or two had doubts, that they should re-appraise those doubts and consider the views of the fellow jurors and decide whether those doubts are reasonable when so many of their fellow jurors don't see them as reasonable doubt.

> This is simply a method of re-examining your views about the case and it is without any intention of the Court to suggest that anyone should give up an honestly held conviction about the weight and sufficiency of the evidence. But you will recall I did tell you that it would be desirable, from time to time, to re-appraise your views, to consider the impact on your views and the views of your fellow jurors and to change your views from time to time if you thought it appropriate to do so.

> But always remember that it is your conscientious view about the evidence that must control and you don't give up a conscientiously held view solely for purposes of arriving at a verdict, although, as I say, it is highly desirable that there be a verdict on all or substantially all of the counts or at very least on some of the counts.

*Id.* at 763-64; *see supra* note 1578 and accompanying text.
for instructions. The trial judge then asked the jury if they were in agreement on any count of the indictment. The jury foreman indicated that they were not, and thereupon, the trial judge advised the jury utilizing an Allen-type instruction. Following three and one-half hours of further deliberations, the jury returned a guilty verdict.

The Ninth Circuit held that the Allen charge in Beattie did not have a coercive effect on the jurors, and it affirmed the defendant's conviction. The court initially suggested that Beattie was factually similar to Contreras and thus reversal might result. However, the court interpreted Contreras differently. The court concluded that the Contreras court must have examined factors other than prematurity in reaching its decision that the modified Allen charge was coercive. As a result, the Beattie court did not overrule Contreras, but employed a consideration of several factors with prematurity merely being one of them, in concluding that reversal was not necessary.

The court first noted that the Beattie instruction contained all of the elements of the original Allen charge, consistently approved of by the Ninth Circuit. Second, the court ruled that the three-and-one-half hours of deliberation following the instruction did not raise a suspicion of coercion. Third, the court stated that the total time of deliberation, approximately twelve hours, “was [not] so disproportionate . . . as to raise an inference that the Allen charge coercively pro-

1599. 613 F.2d at 763.
1600. Id. at 764. However, a basic factual distinction is that in Contreras the jury deliberated only 35 minutes after the Allen charge was given; whereas in Beattie, the jury required three and one half hours.
1601. The Beattie court believed that the Contreras court's statement that “[w]e have a profound feeling that [the modified Allen instruction] was coercive upon the jury,” 463 F.2d at 774, suggested that the Contreras court did examine the instruction “in its context and under all the circumstances.” 613 F.2d at 765. But see United States v. Guglielmini, 598 F.2d 1149, 1151 (9th Cir.) (Contreras holding that Allen charge was improper rested on the lack of indication of jury deadlock), cert. denied, 444 U.S. 943 (1979).
1602. 613 F.2d at 764-65.
1603. Id. at 765-66; accord, United States v. Scruggs, 583 F.2d 238, 241 (5th Cir. 1978); United States v. Smith, 521 F.2d 374, 376-77 (10th Cir. 1975); United States v. Martinez, 446 F.2d 118, 119-20 (2d Cir.), cert. denied, 404 U.S. 994 (1971).
1604. 613 F.2d at 765. Those elements approved in Allen represent: (1) a sufficient reminder to “each of the jurors of [his] obligation to give ultimate controlling weight to his own conscientiously held opinion,” and (2) “nothing express or implied in that instruction which was more coercive in tendency than the original Allen charge.” Id. (quoting Sullivan v. United States, 414 F.2d 714, 718-19 (9th Cir. 1969)). See generally supra note 1581 and accompanying text.
1605. See 613 F.2d at 764, 765 (citing numerous Ninth Circuit opinions).
1606. Id. at 765. In Contreras only 35 minutes passed between the Allen charge and the verdict. 463 F.2d at 774.
duced the result.1607 Finally, the court concluded that other factors utilized in previous Ninth Circuit decisions1608 were either absent, or if present, not suggestive of coercion.1609 Accordingly, after a careful review of the instruction under all the circumstances, the Beattie court found it not coercive,1610 and thus, limited to the facts, appropriate.1611

D. Prosecutorial Misconduct

Although the issue of prosecutorial misconduct has recently absorbed much of the Ninth Circuit's attention, few consistent themes have emerged from the court's opinions.1612 Perhaps the lack of any common theme is due to the ad hoc nature of evidentiary decisions made during trial.

The overriding concern in this area is the fifth amendment right of the defendant.1613 Whenever the prosecution comments or injects its opinions into the trial in the presence of the jury, the defendant may be deprived of his right to a fair trial. The reason is that the prosecution, in acting for the government, may appear more credible in the eyes of the jury. Thus, in each case the focus of the court's attention is upon the effect of the comment on the jury and the likelihood that the defendant will be deprived of a fair trial. However, the courts must be careful not to constrict the ability of the prosecution to respond properly to the arguments raised by the defendants at trial.

The basic rule was set forth in Berger v. United States,1614 in which the Supreme Court stated that the prosecutor has a special obligation to "avoid improper suggestions, insinuations, and especially assertions of personal knowledge."1615 From Berger, a further rule developed,
which disapproved of the prosecution vouching for the credibility of a
Government witness. Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness’ testimony.\textsuperscript{1616}

In \textit{United States v. Roberts},\textsuperscript{1617} decided by the Ninth Circuit in
1980, the latter type of vouching was at issue. In \textit{Roberts}, the prosecutor noted that, because of directly conflicting testimony, either the defendant or the government witness was lying. The prosecutor then suggested that the Government witness would not be lying because he had more to lose. He had signed a plea agreement, and a police officer “was sitting in the courtroom to be certain that the government witness did not lie.”\textsuperscript{1618} Further, the prosecutor suggested that if the Government witness lied the plea agreement would be called off.\textsuperscript{1619}

In examining the prosecutor’s comments to determine whether they violated the well-established rule against prosecutorial comments, the court noted that “the second type of vouching involves prosecutorial remarks that bolster a witness’ credibility by reference to matters not in the record.”\textsuperscript{1620} The court reasoned that the “prosecutor in this case referred to evidence not in the record by declaring that Detective Sellers (the police officer) was monitoring Adamson’s testimony.”\textsuperscript{1621} The court concluded that “[i]n effect, the prosecutor was telling the jury that another witness could have been called to support Adamson’s testimony. This was error.”\textsuperscript{1622}

\begin{footnotes}
\item[1617] 618 F.2d 530 (9th Cir. 1980).
\item[1618] \textit{Id.} at 533.
\item[1619] \textit{Id.} Defense counsel properly objected to the prosecutor’s reference to evidence outside the record.
\item[1620] \textit{Id.}
\item[1621] \textit{Id.} at 534.
\item[1622] \textit{Id.} (citing \textit{United States v. Morris}, 568 F.2d 396 (5th Cir. 1978) (improper to imply that witness not called supports the prosecution) and \textit{Reichert v. United States}, 359 F.2d 278 (D.C. Cir. 1966) (improper to refer to witness’ statements not in record)).
\end{footnotes}
The court rejected the prosecutor's contention that the comments were harmless error.\textsuperscript{1623} Noting that the Government did not have a strong case, and that Adamson was the Government's chief witness, the court held the conduct impermissible.\textsuperscript{1624} Undoubtedly crucial to the court's decision was the fact that the Government's case rested almost entirely upon the credibility of Adamson as a witness.\textsuperscript{1625}

The only other recent case in which the Ninth Circuit has considered in relative depth a claim of prosecutorial misconduct was United States v. Castillo,\textsuperscript{1626} in which the defendant was convicted of manslaughter for stabbing another prisoner while in federal prison. On appeal, the defendant asserted that certain comments made by the prosecution at trial were improper and prejudicial.\textsuperscript{1627}

The Ninth Circuit proceeded to examine the prosecution's comments. During cross-examination of two defense witnesses, the prosecutor asked questions that elicited invocations of the privilege against self-incrimination by each of the witnesses and then, in closing argument, commented on the invocations of the privilege.\textsuperscript{1628} In holding the prosecution's comments improper, the court relied on the Supreme Court case of Namet v. United States\textsuperscript{1629} and found that a "refusal to answer based upon the fifth amendment is not a permissible basis for inferring how the witness would have answered, absent the privilege."\textsuperscript{1630}

The Ninth Circuit, however, affirmed defendant's conviction on the ground that the prosecution's conduct and the court's failure to instruct the jury on the privilege did not constitute reversible error. Because defendant's counsel had failed to request an instruction curing the damaging effect of the prosecution's comments, the court examined whether the trial court's failure to give such a curative instruction sua sponte was "plain error" under rule 52(b) of the Federal Rules of

\textsuperscript{1623} Id. at 534.
\textsuperscript{1624} Id. at 535.
\textsuperscript{1625} Id. The court in Roberts relied upon previous authority which declared that such prosecutorial remarks may be fatal if "the remarks, fairly construed, were based on the District Attorney's personal knowledge apart from the evidence in the case and that the jury might have so understood." Id. (citing Orebo v. United States, 293 F.2d 747, 749 (9th Cir. 1961)).
\textsuperscript{1626} 615 F.2d 878 (9th Cir. 1980).
\textsuperscript{1627} Id. at 881.
\textsuperscript{1628} Id. at 884.
\textsuperscript{1629} 373 U.S. 179 (1963).
\textsuperscript{1630} 615 F.2d at 884.
Criminal Procedure.\textsuperscript{1631} The court held that

\[\text{the failure to give a curative instruction, however, was harmless. The inferences sought each went to the question of premeditation and conspiracy. As noted earlier, the jury failed to accept the government's theory of premeditation when it convicted the defendant of manslaughter. The matters involved in the questioning were strictly collateral to the issue of Castillo's guilt, of which there was substantial independent evidence.}\textsuperscript{1632}

In the majority of recent cases, the Ninth Circuit cursorily refused to overturn the defendants' convictions for alleged prosecutorial misconduct. In \textit{United States v. Potter},\textsuperscript{1633} defendant physician appealed his conviction for fifty-four counts of unlawfully distributing controlled substances, alleging error in the trial court because of alleged improprieties in the Government's closing argument.\textsuperscript{1634}

Two witnesses each had testified that they had engaged in oral sex with the defendant doctor and had received, in exchange, prescriptions for quaaludes and other drugs.\textsuperscript{1635} In contesting the propriety of the prosecution's comments in closing argument regarding the sexual activities, defendant asserted that "the government's closing argument, taken as a whole, deprived him of a fair trial."\textsuperscript{1636}

Again, as in \textit{Castillo}, the court noted that defendant had not objected to any of the statements of which he subsequently complained and required that defendant "demonstrate plain error as to the other statements."\textsuperscript{1637} The court examined the standard by which earlier cases in the Ninth Circuit judged alleged prosecutorial improprieties. The court stated:

This court has held repeatedly that "improprieties in counsels'

\textsuperscript{1631} Id. The court noted that defense counsel failed to request an instruction at trial curing the damaging effect of the prosecution's comments. \textit{Id.}

\textsuperscript{1632} Id. at 884-85.
\textsuperscript{1633} 616 F.2d 384 (9th Cir. 1979), \textit{cert. denied}, 449 U.S. 832 (1980).
\textsuperscript{1634} Id. at 387.
\textsuperscript{1635} Defendant also sought, unsuccessfully, to challenge the admission of such evidence at trial as irrelevant and prejudicial under \textsc{Fed. R. Evid.} 403 \& 404(b). 616 F.2d at 386.
\textsuperscript{1636} Id. at 391. Specifically, defendant asserted that he was deprived of a fair trial because the prosecutor (1) appealed to the emotions and prejudice of the jurors by emphasizing the evidence of sexual activities; (2) interjected his personal belief concerning the issues of guilt and credibility of witnesses; (3) contained inflammatory and improper attacks on appellant's character; and (4) improperly referred to the failure of appellant to call certain witnesses and to produce certain documents.
\textit{Id.}

\textsuperscript{1637} Id.
arguments to the jury do not require a new trial unless they are so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge. As we noted in Rich, "Counsel are necessarily permitted a degree of latitude in the presentation of their closing summations." 1638

After examining each of the alleged improprieties, 1639 the court concluded that these "comments of the prosecutor were [not] 'so gross as probably to prejudice the defendant.'" 1640 And even if the conduct was prejudicial, the prejudice "was 'neutralized' by the court's instructions and the prosecutor's own comment [that counsel's statements are not evidence]." 1641

Similarly, in United States v. Schindler, 1642 the Ninth Circuit noted that any prejudice by the prosecutor in his opening statement was cured by the "trial court's admonition that the statements of counsel were not evidence." 1643 In Schindler, the prosecution had described a witness as "concerned for her life if she made records available" 1644 and later had questioned the witness as to whether she had "ever had a conversation with [the defendant] during which the subject of contracts to kill someone arose." 1645 The court noted that although "evidence that appellant had threatened to kill the witness and others was excluded, the prosecutor's question did not explicitly support that appel-

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1639. The court observed:

It is true, as appellant argues, that there were instances where the prosecutor improperly interjected his own opinion and commented on factual matters not in the record. During his argument he commented on Sheri Cosner as follows: "It is quite apparent, I think, to everybody here that this is a girl that is not only accustomed to the usage of dangerous drugs, but it appears to me, based on observation, and it is your observation that counts, of course, that in light of her testimony that she still uses quaaludes to this day." The prosecutor also argued that "Dawn Campbell's problem may be . . . and I suspect they revolved . . . around the use of drugs."

Probably the most questionable comment was the prosecutor's argument in rebuttal that it was "not an unusual prosecution function" to promise not to prosecute a witness "who gives important testimony against an individual, who in the eyes of the Government has committed far more serious crimes."

616 F.2d at 392.

1640. Id.

1641. Id.

1642. 614 F.2d 227 (9th Cir. 1980).

1643. Id. at 228.

1644. Id.

1645. Id.
lant had threatened the witness with physical harm." Based on these facts the court held that other "evidence of appellant's guilt independent of the prosecutor's comment . . . was very strong indeed. Under these circumstances, we cannot say appellant did not receive a fair trial."

Whether the prosecutor's comments upon defendant's failure to testify constituted reversible error was the issue decided in United States v. Bonilla. Bonilla, convicted of distribution of cocaine in violation of federal law, appealed, contending that the prosecutor's comments regarding his failure to testify constituted reversible error. The court cited the earlier case of Hayes v. United States, which held that the prosecutor's comments must be "manifestly intended" or "of such a character that the jury would naturally and necessarily take . . . [them] to be a comment on the failure of the accused to testify." The Bonilla opinion is notably devoid of any reasoning which explains the court's conclusion that the standard in Hayes had not been met. Thus, despite its articulation of the manifest intention standard, the Bonilla court failed to address the level of proof necessary to decide whether related comments will constitute reversible error.

The Ninth Circuit, in United States v. Mouton, again upheld the defendant's conviction on appeal despite the existence of prosecutorial comments at defendant's trial. Defendant asserted

1646. Id.
1647. Again the court noted the failure of the defendant to object at trial. Id.
1648. Id.; see also County of Maricopa v. Mayberry, 555 F.2d 207 (9th Cir. 1977); United States v. Cash, 499 F.2d 26 (9th Cir. 1974).

Although the court in Schindler upheld defendant's conviction it noted without any other discussion that the prosecutor may have reached the limits of acceptable comment. "In this case the prosecutor came uncomfortably close to providing [an] impermissible aid [to jury]." 614 F.2d at 228.

1649. 615 F.2d 1262 (9th Cir. 1980).
1650. 368 F.2d 814 (9th Cir. 1966).
1651. Id. at 816.
1652. 617 F.2d 1379 (9th Cir. 1980).
1653. During his rebuttal final argument, the prosecutor stated:

Now Mr. Cook did make mention of the vast resources of the government or that the FBI has this wonderful ability to do many things, and implied in that you should require something in addition to what the law otherwise requires. That, of course, would be in violation of your duty as jurors. You're required to apply the facts as you find them to the law as the court gives it, and if you find the defendant guilty, that's it. Because the government is involved in this, that doesn't mean you have to find more evidence than you otherwise would have to.

Defendant further refers to a portion of the prosecutor's rebuttal wherein he attempted to respond to defense counsel's question concerning an additional 150 checks allegedly manipulated by Levias that were not in evidence or part of the
that the prosecutor put the Government's and his own credibility at issue when he commented as to the veracity of certain tapes in evidence at trial.\textsuperscript{1654}

On appeal, the court accepted the prosecutor's contention "that wide latitude in summation is allowed the prosecutor when the comments are in response to defense counsel. The . . . remark[s] of the prosecutor [were] allegedly made in response to . . . defense argument[s]."\textsuperscript{1655} For each of the asserted prejudicial comments\textsuperscript{1656} the court of appeals reviewed the record and held:

[W]e are convinced that the comments attacked by defendant were within the scope of proper argument, in light of the fact that defense counsel first opened the door on the contested subjects. Even if we consider the comments as slightly improper, we could not conclude that it was more probable than not that the error materially affected the verdict, which is required for reversal under \textit{United States v. Valle-Valdez}.\textsuperscript{1657}

While no recent prosecutorial misconduct case was cited for authority, it is clear that the court is continuing to uphold convictions if the prejudicial error is less than serious.\textsuperscript{1658}

Finally, the prosecutorial misconduct issue arose recently in the grand jury context in \textit{United States v. Bettencourt}.\textsuperscript{1659} In sustaining defendant's conviction, the court rejected defendant's claim that the prosecutor utilized "perjured" testimony before the grand jury.\textsuperscript{1660} The court found that "[n]othing in the record . . . supports an inference that the prosecutor was aware of any inaccuracy in the testimony

\textsuperscript{1654} See supra note 1654.

\textsuperscript{1655} Id.

\textsuperscript{1656} Id.

\textsuperscript{1657} 617 F.2d at 1385 (citations omitted).

\textsuperscript{1658} See \textit{United States v. Roberts}, 618 F.2d 530 (9th Cir. 1980) (conviction reversed because error prejudicial); see also supra notes 1618-26 and accompanying text.

\textsuperscript{1659} 614 F.2d 214 (9th Cir. 1980).

\textsuperscript{1660} Id. at 215. Defendant relied upon \textit{United States v. Basurto}, 497 F.2d 781 (9th Cir. 1974). In \textit{Basurto}, this court found that a prosecutor's presentation of perjured testimony relating to a material matter resulted in a denial of due process before a grand jury. More recent decisions from this circuit have suggested that prosecutorial misconduct must be "flagrant" to violate due process. See, e.g., \textit{United States v. Vargas-Rios}, 607 F.2d 851 (9th Cir. 1979); \textit{United States v. Kennedy}, 564 F.2d 1329, f338 (9th Cir. 1977), cert. denied, 435 U.S. 944 (1978).
presented.”1661 The opinion concluded that defendant was not thereby deprived of due process.1662

There appears to be a single thread running through the numerous recent prosecutorial decisions in the Ninth Circuit: the court’s willingness to extend wide latitude to the prosecution in its argument. It is not clear whether the prosecution’s misconduct must actually be “flagrant”1663 or whether there are some instances in which the courts will require something less. Roberts suggests that the Ninth Circuit is not totally unreceptive to prosecutorial misconduct claims on appeal. But a study of the recent cases suggests that any defendant asserting such a claim will likely face a substantial burden on appeal to convince the court that his conviction below ought to be overturned.

E. Continuance

Trial courts are vested with such broad discretion1664 to grant or deny continuances that their decisions will be reversed on appeal only upon proof of an abuse of discretion and of actual prejudice to the defendant.1665 During the 1980 survey period, the Ninth Circuit acted consistently with this policy in reviewing and upholding three continuance motion denials.

In United States v. Jones,1666 the defendant argued that denial of his continuance motion deprived him of sufficient time to “digest” material received under the Jencks Act1667 on the morning of his trial and resulted in a violation of his fifth and sixth amendment rights.1668 The Ninth Circuit found no due process or effective assistance of counsel violation because the government had complied with the requirements of the Jencks Act. Moreover, the court emphasized that the trial court

1661. Id. at 216.
1662. Id.
1663. See supra note 1659.
1664. 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.”) (footnote omitted); Ungar v. Sarafite, 376 U.S. 575, 589 (1964) (continuance is discretionary with trial judge; denial may not violate due process even if defendant consequently “fails to offer evidence or is compelled to defend without counsel”).
1665. United States v. Hernandez, 608 F.2d 741, 746 (9th Cir. 1979); see Baker v. United States, 393 F.2d 604, 608 (9th Cir.) (no abuse of discretion in granting prosecution continuance because no prejudice resulted), cert. denied, 393 U.S. 836 (1968). But see United States v. Harris, 436 F.2d 775, 776 (9th Cir. 1970) (actual prejudice requirement stated in the alternative).
1666. 612 F.2d 453 (9th Cir. 1979), cert. denied, 445 U.S. 966 (1980).
1668. 612 F.2d at 455.
had not abused its discretion in denying the motion. 1669

In United States v. Sukumolachan, 1670 one of the appellant's codefendants, Hiller, pled guilty and was scheduled for sentencing after the appellant's trial. The appellant sought Hiller's testimony and moved for a continuance on the ground that Hiller would not testify before he was sentenced. The appellant supported his motion with his counsel's affidavit stating that counsel was "informed" that after Hiller had been sentenced he would be "available and willing to testify," and that counsel "believed" that Hiller would testify to certain facts favorable to the appellant's defense. 1671 The trial court had held that counsel's assertions were conjectural and denied the continuance motion. 1672 The Ninth Circuit upheld the lower court's ruling and observed that the defense counsel should have stated "with particularity" the grounds for his beliefs. 1673 On this basis, no abuse of discretion was found. 1674

In United States v. Sandoval-Villalvazo, 1675 the defendant's motion for a ten-minute continuance was denied. At the first scheduled trial date, almost two months before this motion, the defendant acquiesced to his codefendant's continuance motion only after ascertaining that a certain subpoenaed witness who had failed to appear would later be available to testify. 1676 An eleven-day continuance was granted. During this time, the appellant failed to subpoena this witness, and no subpoena was issued when he again failed to appear. Two days later, the court granted the defendant a continuance of two working days to obtain this witness. Again, he was not subpoenaed, and again he failed to appear. The court then granted the appellant's request to present the witness after the Government's rebuttal, if he had appeared by then. After the Government stated that it had no rebuttal, the defendant moved for a ten minute recess, which the trial court denied. 1677 Following the Government's closing arguments, the witness suddenly appeared, and the defense moved to reopen its case in order to call the witness. The court denied this motion also. 1678

1669. Id. (citing United States v. Hoyos, 573 F.2d 1111 (9th Cir. 1978); United States v. Hernandez-Berceda, 572 F.2d 680 (9th Cir.), cert. denied, 436 U.S. 949 (1978)).
1670. 610 F.2d 685 (9th Cir. 1980) (per curiam).
1671. Id. at 687.
1672. Id.
1673. Id.
1674. Id.
1675. 620 F.2d 744 (9th Cir. 1980).
1676. Id. at 747.
1677. Id. at 747-48.
1678. Id. at 748.
The Ninth Circuit found no abuse of discretion. It quoted United States v. Hoyos, which requires proof that "due diligence has been used to obtain [the witness'] attendance on the day set for trial." The Sandoval-Villalvazo court found that the defendant "was aware of the problem of securing the attendance of this particular witness and chose not to issue a subpoena for him." Moreover, the Ninth Circuit noted that the trial court had continued the trial for the "sole purpose" of enabling the defendant to obtain the witness' appearance and, thus, had not abused its discretion in denying either the motion for a further, brief continuance or the motion to reopen the defense.

F. Admission of Evidence

1. Character evidence—rule 404(b)

Federal Rule of Evidence 404(b) allows admission of evidence of other crimes, wrongs, or acts for purposes other than to prove the character of the defendant. Evidence admissible under this rule must meet three criteria. First, the proffered evidence must be an act separate from the crime charged. Second, the evidence must be relevant to the issue for which it is proffered. Finally, the probative value of the proffered evidence must outweigh its prejudicial effect.

a. separate act

Rule 404(b) applies only to evidence of acts separate from the crime charged. Evidence of the same act charged is direct evidence and not subject to the conditions of rule 404(b). In United States v. Pas-
the Ninth Circuit upheld the trial court's ruling that evidence of the defendant's criminal activity concerning the same conspiracy charged in the indictment did not involve a separate criminal act, even though the activity had occurred a few months before the period covered by the indictment. Consequently, the evidence was admissible as direct evidence of the crime charged and was not barred by rule 404(b).

b. relevancy

To be properly admissible under rule 404(b), evidence must show motive, intent, preparation, plan, knowledge, or absence of mistake or accident. Evidence relevant to show only defendant's character is not admissible. Relevant evidence admissible under rule 404(b) need not be excluded because the past act is not similar to the crime in question. However, in some cases the relevancy of other crimes, wrongs, or acts is dependent on the similarity to the offense charged. In such cases, the "greater . . . the dissimilarity of the two offenses, the more tenuous the relevance." For example, when a prior criminal act is relied upon to prove intent or knowledge, similarity between the two events is necessary to establish the threshold of

1687. 624 F.2d 938 (9th Cir. 1980).
1688. Id. at 943. Defendant was indicted on charges of manufacturing and conspiring to manufacture methamphetamine. The period covered by the indictment was approximately October, 1977, to March, 1978. The Government presented a witness who testified that in May, 1977, she observed the defendant pick out certain items to be purchased from a catalogue of laboratory glassware and that she, upon a codefendant's request, ordered the equipment knowing that it was to be used in a methamphetamine laboratory. Id. at 941. The trial court ruled that this evidence was direct evidence and, therefore, not evidence of prior criminal acts inadmissible under Fed. R. Evid. 404(b). Id. at 943.
1689. Fed. R. Evid. 404(b). Fed. R. Evid. 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."
1690. Fed. R. Evid. 404(b).
1691. United States v. Longoria, 624 F.2d 66, 69 (9th Cir. 1980); United States v. Riggins, 539 F.2d 682, 683 (9th Cir. 1976). United States v. Riggins, 539 F.2d 682, 683 (9th Cir. 1976). United States v. Heast, 563 F.2d 1331, 1336 (9th Cir. 1977) (per curiam) (similarity not required as long as the evidence was relevant to show duress), cert. denied, 435 U.S. 1000 (1978).
1692. United States v. Riggins, 539 F.2d 682, 683 (9th Cir. 1976). United States v. Hearst, 563 F.2d 1331, 1336 (9th Cir. 1977) (per curiam) (similarity not required as long as the evidence was relevant to show duress), cert. denied, 435 U.S. 1000 (1978).
1694. "Similarity" means similarity of the circumstances of the crime. Thus, in United States v. Heast, 563 F.2d 1331, 1336 (9th Cir. 1977) (per curiam), cert. denied, 435 U.S. 1000 (1978), evidence of defendant's Los Angeles robbery was held to be dissimilar from the San Francisco bank robbery for which she was on trial, even though the charges were similar. Likewise, in United States v. Hernandez-Miranda, 601 F.2d 1104, 1108 (9th Cir. 1979), evi-
relevance.\textsuperscript{1695}

The 1980 Ninth Circuit cases are consistent with this view. In *United States v. Sinn*\textsuperscript{1696} defendant was charged with possession of cocaine. The Ninth Circuit upheld the admission of a five year-old conviction for possession of cocaine to prove knowledge and intent. Likewise, in *United States v. Longoria*\textsuperscript{1697} the court of appeals upheld the admission of defendant’s 1977 conviction for transporting illegal aliens in his 1980 trial for the same crime. In both *Sinn* and *Longoria* the similarity of the acts justified their use under rule 404(b).

However, similarity is not required where evidence of other crimes is admitted to create a complete picture of the crime.\textsuperscript{1698} For example, in *United States v. Gibson*\textsuperscript{1699} the Ninth Circuit upheld the admission of defendant’s sexual assaults upon the victim during the kidnapping of the victim and her brother in defendant’s trial for kidnapping. Since the time sequence of the kidnapping was continuous, all crimes and acts committed in the course of the kidnapping were held admissible under rule 404(b) to link the chain of events.\textsuperscript{1700} The court, however, found no substantial issue of motive and intent.

\textsuperscript{1695} United States v. Hernandez-Miranda, 601 F.2d 1104, 1108 (9th Cir. 1979); United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976), cert. denied, 429 U.S. 1111 (1977).

\textsuperscript{1696} 622 F.2d 415 (9th Cir.), cert. denied, 449 U.S. 843 (1980).

\textsuperscript{1697} 624 F.2d 66, 69 (9th Cir. 1980).

\textsuperscript{1698} Such evidence is admitted when required to show a complete picture of a continuous crime. For example, in United States v. Goble, 512 F.2d 458, 473-74 (6th Cir. 1975), testimony that defendants were arrested while attempting to commit a burglary while using a stolen vehicle was admissible since it blended with the prior stealing of the vehicle and the subsequent concealment of the theft. These actions were relevant to the charge of auto theft conspiracy. Likewise, in United States v. Miller, 508 F.2d 444, 479 (7th Cir. 1974), evidence that police officers were disarmed by defendants and that defendant Miller then fled in a stolen police car was admissible in Miller’s trial for conspiracy to violate and two violations of the Dyer Act. The evidence formed a necessary link in the chain of events between defendant’s first interstate transportation of a stolen automobile and the second which took place after defendant took the police car. Also, in United States v. Gallington, 488 F.2d 637, 641 (8th Cir. 1973), cert. denied, 416 U.S. 907 (1974), evidence of shots fired from a pistol after kidnapping victim had escaped from his captors was an integral part of the offense of kidnapping for which the defendants were charged and thus admissible.

*United States v. Aims Back*, 588 F.2d 1283, 1286 (9th Cir. 1979), is an example of a non-continuous crime. There, in a trial for rape, evidence of a later rape committed by the defendant that same evening is not admissible under Fed. R. Evid. 404(b) to show the whole pattern of the evening. Rape, unlike the crime of kidnapping, is not a crime continuing over a period of time. Thus, evidence of the other crimes committed the same night need not be admitted to fill gaps in the time sequence of the commission of the crime charged.

\textsuperscript{1699} 625 F.2d 887 (9th Cir. 1980).

\textsuperscript{1700} Id. at 888.
Evidence otherwise admissible under rule 404(b) may still be excluded, under rule 403, if its probative value is substantially outweighed by the danger of causing unfair prejudice. In making this determination, the Ninth Circuit considers three factors: the cumulative nature of the evidence, the character of the act, and whether the other criminal act resulted in conviction.

The probative value of the proffered evidence is diminished if the evidence is merely cumulative on the issue which it was admitted to prove under federal rule 404(b). Following this rule, the Ninth Circuit in United States v. Bejar-Matrecios held that evidence of the prior act was cumulative and reversed the lower court’s conviction. In that case defendant was charged with illegal reentry into the United States after being previously deported. The trial court admitted evidence of defendant’s prior conviction for misdemeanor illegal entry to prove alienage, a material element of the crime. However, the Government had already presented a strong case for proving alienage by introducing seven documents of defendant’s earlier deportation. Because the evidence was cumulative it had a lesser probative value. The court concluded that this lesser probative value was substantially outweighed by the prejudicial nature of the evidence.

In United States v. Bettencourt the court considered what type of acts are deemed probative for the purposes of rule 403. There, the court stated:

“[P]rior crimes involving deliberate and carefully premedi-tated intent—such as fraud and forgery—are far more likely to have probative value with respect to later acts than prior crimes involving a quickly and spontaneously formed intent—such as . . . assault . . . . [T]he evidence of prior crimes involving intent of the moment are hardly ever proba-tive of later acts involving similarly split-second intent.”

1701. See United States v. Potter, 616 F.2d 384 (9th Cir. 1979), cert. denied, 449 U.S. 832 (1980).
1702. This last factor is used only when a conviction is necessary to prove the element for which it is proffered. See infra note 1710 and accompanying text.
1704. 618 F.2d 81 (9th Cir. 1980).
1705. Id. at 84.
1706. 614 F.2d 214 (9th Cir. 1980).
1707. Id. at 217 n.7 (quoting United States v. San Martin, 505 F.2d 918, 923 (5th Cir. 1974)).
In *Bettencourt*, the defendant was charged with interfering with a federal officer in the performance of his official duties. Bettencourt had tried to prevent federal agents from removing his client's car while they were searching it. During the trial, the Government produced evidence of the defendant's earlier state arrest for interfering with local police during the course of another search. The state arrest had occurred twenty-one months prior to the assault on the federal agents.\(^{1708}\) The Ninth Circuit held that specific intent to assault or impede is not ordinarily transferrable to events two years apart; thus, the probative value of the evidence in establishing Bettencourt's specific intent was minimal.\(^{1709}\)

Where the other act closely resembles the newly charged offense, the prejudicial effect is great.\(^{1710}\) The jury is likely to make the improper inference that the defendant, having once committed a crime, has a propensity to recommit that same crime.\(^{1711}\) Thus, in *United States v. Bejar-Matrecios*,\(^ {1712}\) the Ninth Circuit held that evidence of the defendant's prior guilty plea to the charge of misdemeanor illegal entry, although relevant to prove alienage in the present illegal entry charge,\(^{1713}\) had a high potential for prejudice.

The third factor considered in determining the probative value of evidence under rule 403 is whether the proffered act resulted in conviction. In *Bettencourt*,\(^ {1714}\) the prosecution sought to prove intent to interfere with a federal officer by introducing evidence of a similar state offense, for which the defendant had never been prosecuted. Since the intent to commit the prior offense had never been proven, the Ninth Circuit held that an inference of intent in the present prosecution could not be drawn. For this reason, it considered the probative value of the prior offense minimal, and decided that the evidence should have been excluded.

In 1980 the Ninth Circuit had five separate opportunities to balance these factors. In both *United States v. Sinn*\(^ {1715}\) and *United States v. Potter*,\(^ {1716}\) the court upheld the trial court's ruling that the prejudicial

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1708. 614 F.2d at 215.
1709. Id. at 217.
1711. *United States v. Bejar-Matrecios*, 618 F.2d 81, 84 (9th Cir. 1980).
1712. 618 F.2d 81 (9th Cir. 1980).
1713. Admissible evidence under Fed. R. Evid. 404(b) is not limited to the purposes listed in the rule. Thus, evidence can be admitted to prove alienage under rule 404(b). See C. McCormick, *Law of Evidence* § 190, at 448 (2d ed. 1972).
1714. 614 F.2d 214 (9th Cir. 1980).
1715. 622 F.2d 415 (9th Cir. 1980).
1716. 616 F.2d 384 (9th Cir. 1980).
effect of the evidence did not outweigh its probative value. The jury had been instructed as to the limited purpose of the evidence. Further, the probative value of the proffered evidence was not diminished by any of the three limiting factors stated previously.1717

The Ninth Circuit in *United States v. Lutz*1718 held that although the potential for prejudice was increased because of the similarity of the crimes, the limiting instruction by the judge effectively minimized any prejudice to the defendant.1719 Reaching a different conclusion in *United States v. Bejar-Matrecios*,1720 where no limiting instruction was given, the Ninth Circuit held that evidence of a similar crime was inadmissible.1721 In addition, the probative value was diminished because the evidence was merely cumulative. The determinative factor in both *Lutz* and *Bejar-Matrecios* was whether the limiting instruction was given.

Yet, the limiting instruction was not the determinative factor in *Bettencourt*.1722 There the Ninth Circuit held that evidence of a similar prior offense, even when a limiting instruction was given by the trial judge, was too prejudicial when weighed against its slight probative value. The probative value was diminished because of the type of offense with which the defendant was charged, and because he had not

1717. In United States v. Sims, 617 F.2d 1371 (9th Cir. 1980), defendant was charged with bank robbery. Evidence that defendant did not return to a half-way house the night of the robbery was admitted at the trial. The evidence was relevant under the identity exception to rule 404(b). On appeal the Ninth Circuit held that the probative value of the evidence outweighed its prejudicial effect. The court said that the trial court's limiting instruction as to the proper weight the jury could give the evidence, coupled with the fact that no mention was made of defendant's prior criminal record, prevented the jury from making improper inferences and thus the evidence was not unduly prejudicial.

Likewise, in United States v. Potter, 616 F.2d 384 (9th Cir. 1979), the court held that evidence of defendant's sexual conduct with his patients, relevant to prove good faith and motive, was admissible in his trial for unlawfully distributing controlled substances and was not too prejudicial. Although the probative value was not diminished, the prejudicial effect was eased by the court's limiting instruction that the evidence of the sexual activities could only be used in determining the defendant's guilt of the crime charged.

1718. 621 F.2d 940 (9th Cir. 1980).

1719. In *Lutz*, defendants were convicted of mail and wire fraud. Evidence of defendant White's participation in a similar fraud which was the subject of a separate indictment was admitted to prove motive and intent at trial. The district court had cautioned the jury to consider the evidence solely for the purpose of proving these two issues.

1720. 618 F.2d 81 (9th Cir. 1980).

1721. In *Bejar-Matrecios*, defendant was charged with illegal re-entry into the United States following deportation. Over objection, evidence of defendant's guilty plea to the charge of misdemeanor illegal re-entry was admitted to prove alienage under rule 404(b). The jury was never informed of the purpose for which the evidence was offered.

1722. 614 F.2d 214 (9th Cir. 1980).
been prosecuted or convicted of the rule 404(b) offense. Thus, it appears that a limiting instruction is not enough to cure the prejudicial effect of evidence admitted under Federal Rule of Evidence 404(b) if the probative value of the proffered evidence is insignificant.

The determination of whether the probative value is outweighed by the prejudicial effect is a matter within the trial judge's discretion. If that decision is reasonable it will be reversed only upon a showing that the trial judge abused his discretion.

Even when it is determined that the trial judge did abuse his discretion, such error may not warrant reversal. Nonconstitutional errors in admitting evidence constitute reversible error "only if it is more probable than not that the erroneous admission of the evidence materially affected the jurors' verdict." In evaluating this effect, the Ninth Circuit considers whether the evidence erroneously admitted under rule 404(b) is merely cumulative as to the issue it was admitted to prove. If the evidence is cumulative, the court will usually hold that the admission was harmless error.

Recent Ninth Circuit cases follow this rule. In the one exception, United States v. Befar-Matrecios the court found that the prejudicial effect of the proffered evidence outweighed its probative value. In making that determination the court found that the evidence was

1723. In Bettencourt, defendant was charged with interfering with a federal officer in the performance of his official duties. Evidence was presented of defendant's earlier state arrest for the same charge. The probative value of this evidence was diminished because the crime was of the type that involved a quickly and spontaneously formed intent. See supra note 1708 and accompanying text. Also, the probative value was diminished because defendant was never prosecuted under the prior statute. See supra notes 1706-09 and accompanying text. The jury was properly charged that the evidence was admitted solely to prove intent.

1724. United States v. Longoria, 624 F.2d 66, 68 (9th Cir. 1980); United States v. Bosley, 615 F.2d 1274, 1278 (9th Cir. 1980); United States v. Sangrey, 586 F.2d 1312 (9th Cir. 1978); United States v. Bailey, 505 F.2d 417, 420 (D.C. Cir. 1974).

1725. United States v. Bosley, 615 F.2d 1274, 1278 (9th Cir. 1980); United States v. Sangrey, 586 F.2d 1312 (9th Cir. 1978).

1726. United States v. Longoria, 624 F.2d 66, 68 (9th Cir. 1980); United States v. Lutz, 621 F.2d 940, 944 (9th Cir. 1980); United States v. McMahon, 592 F.2d 871, 873 (5th Cir. 1979).

1727. A trial court can abuse its discretion by either admitting evidence inadmissible under Fed. R. Evid. 404(b), admitting irrelevant evidence, or admitting evidence which is too prejudicial under Fed. R. Evid. 403.

1728. United States v. Bettencourt, 614 F.2d 214, 218 (9th Cir. 1980) (quoting United States v. Awkard, 597 F.2d 667, 671 (9th Cir. 1979)).

1729. United States v. Hernandez-Miranda, 601 F.2d 1104, 1107-08 (9th Cir. 1979); accord, United States v. Williams, 596 F.2d 44, 50 (2d Cir. 1979); United States v. Bailey, 505 F.2d 417, 420-21 (D.C. Cir. 1974).

1730. 505 F.2d at 420-21.

1731. See, e.g., United States v. Bettencourt, 614 F.2d 214 (9th Cir. 1980).

1732. 618 F.2d 81 (9th Cir. 1980).
only slightly probative since it was cumulative on the issue of alienage, the issue it was admitted to prove under rule 404(b). The court then reversed defendant's conviction without determining whether the admission was harmless error. Had this analysis been made, a different result might have been reached.\textsuperscript{1733}

However, when a trial court sustains an objection that evidence already admitted in court is inadmissible under Federal Rule of Evidence 404(b), the court must cure the prejudicial effect of the evidence by either declaring a mistrial or by reading to the jury a curative instruction. If the court chooses to do the latter, the instruction to disregard the evidence must effectively dispel its prejudicial effect. The Ninth Circuit in \textit{United States v. Johnson}\textsuperscript{1734} determined the effect of the curative instruction by weighing "the forcefulness of the instruction and the conviction with which it was given against the degree of prejudice generated by the evidence . . . . In fixing the degree of prejudice, the probative force of the inadmissible evidence must be compared with that of the admissible evidence which supports the verdict."\textsuperscript{1735} In applying this test, the \textit{Johnson} court determined that although the instruction was not as forceful as it could have been, the prejudicial effect was slight. The evidence was merely cumulative and, therefore, not very prejudicial, even though the impact of the testimony was greater because the trial court itself elicited it.\textsuperscript{1736} Since the prejudice was so insignificant, reversal was not warranted.

2. Use of prior conviction to impeach

Federal Rule of Evidence 609(a) allows the admission of evidence of a witness's criminal convictions for purposes of impeachment if the

\textsuperscript{1733} When evidence is cumulative its probative value is minimal and thus there is a high probability that it will be inadmissible. However, when evidence is cumulative there is also a very good chance that the mistaken admission of the evidence will be harmless error. Thus few cases where admitted evidence is cumulative will result in reversal. \textit{United States v. Bettencourt}, 614 F.2d 214 (9th Cir. 1980); \textit{United States v. Hernandez-Miranda}, 601 F.2d 1104 (9th Cir. 1980).

However, these cases may be distinguishable from \textit{Bejar-Matrecios}. In \textit{Hernandez} and \textit{Bettencourt} the trial judges gave instructions to the juries about the limited purpose for which the evidence was admitted. In \textit{Bejar-Matrecios} the trial judge failed to give such an instruction. The Ninth Circuit might have reasoned that the failure to give the limiting instruction was reversible error in itself and thus the cumulativeness of the evidence is unimportant. This would explain the court's failure to go into the reversible error analysis. In any event the court fails to make this clear.

\textsuperscript{1734} 618 F.2d 60 (9th Cir. 1980).
\textsuperscript{1735} \textit{Id.} at 62.
\textsuperscript{1736} \textit{Id.}
prior crime was a felony or a crimen falsi.\textsuperscript{1737} Evidence admitted under rule 609, contrary to the general rule prohibiting admission of extrinsic evidence for purposes of impeachment, may be produced through specific instances of conduct.\textsuperscript{1738}

\textit{a. conviction under rule 609}

Rule 609 deals solely with criminal convictions. The Ninth Circuit has broadly interpreted the word \textit{conviction}. A guilty verdict is a conviction under rule 609; hence, convictions pending appeal may be used.\textsuperscript{1739} Moreover, verdicts where judgments have not been rendered are admissible,\textsuperscript{1740} even when the sentence is suspended and the convicting statute declared unconstitutional.\textsuperscript{1741} Recently the Ninth Circuit ruled admissible a verdict without a judgment where a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29\textsuperscript{1742}

\begin{quote}
1737. \textit{Fed. R. Evid.} 609(a) provides that:

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.

1738. \textit{Fed. R. Evid.} 608(b). In relevant part rule 608(b) states that “[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.”


1741. United States v. White, 463 F.2d 18 (9th Cir.) (per curiam), \textit{cert. denied}, 409 U.S. 1024 (1972). Defendant Alexander was charged with possession of drugs without a prescription. During his trial, he took the stand, and his three year-old prior conviction for manslaughter abortion was admitted to impeach him. The Ninth Circuit held that this use of the evidence was proper even though the sentence was suspended, no judgment was imposed and the Oregon statute under which he was convicted was later held unconstitutional. The fact that a guilty verdict was rendered provided sufficient reason to presently impeach Alexander’s testimony. \textit{Id.} at 20.

1742. \textit{Fed. R. Crim. P.} 29 provides:

(a) \textit{Motion before Submission to Jury}. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant’s motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) \textit{Reservation of Decision on Motion}. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury
was pending.\textsuperscript{1743} Thus, a jury verdict of guilty regardless of pending motions or subsequent dispositions constitutes a conviction under rule 609.\textsuperscript{1744}

However, to combat possible unfairness to the defendant, evidence of the pendency of these defense motions and subsequent dispositions may be presented to the jury.\textsuperscript{1745} This additional evidence insures that the jury will give the evidence of conviction its appropriate weight, thus, minimizing the prejudicial effect.

\textit{b. timing of a trial court’s ruling}

In the Ninth Circuit, a trial judge need not make a ruling on the admissibility of rule 609 evidence in advance of the introduction of the evidence at trial,\textsuperscript{1746} although the practice is encouraged.\textsuperscript{1747} The admission of evidence is subject to the sound discretion of the trial judge,
and the timing of the decision is accorded great deference by the appeals court.\textsuperscript{1748} Although the refusal to rule in advance might cause a dilemma for the defendant in planning his defense strategy,\textsuperscript{1749} such a decision is not necessarily error.\textsuperscript{1750} These rulings will not be reversed except for a showing of abuse.\textsuperscript{1751}

c. preservation of the right to appeal

Under \textit{United States v. Murray},\textsuperscript{1752} a defendant had to take the stand in order to preserve his right to appeal a rule 609 ruling. The Ninth Circuit in 1979 overruled \textit{Murray} in \textit{United States v. Cook}.\textsuperscript{1753} However, under \textit{Cook} a defendant must at least state on the record that he would have testified if his prior conviction had been excluded.\textsuperscript{1754} Further, he must outline sufficiently the nature of his testimony so that both the trial and appeals courts can perform the necessary balancing contemplated under rule 609(a)(1).\textsuperscript{1755} This procedure insures that the reviewing court has adequate evidence of the prejudice suffered by the defendant.\textsuperscript{1756}

Two 1980 decisions were guided by \textit{Cook} principles. In the first, \textit{United States v. Hendershot},\textsuperscript{1757} the defendant did not take the stand because of the trial court's advance ruling that his twelve year-old conviction for armed robbery could be used to impeach his testimony. The Ninth Circuit held that its review had been preserved properly when the defendant had stated on the record his intentions to take the stand if his prior conviction was excluded.\textsuperscript{1758} In the other case, \textit{United States v. Tercero},\textsuperscript{1759} defendant's attorney had stated at the sidebar that even if the court had ruled in advance and excluded the prior conviction, Tercero would not have testified due to the existence of a potential rebuttal witness. As a result, the \textit{Tercero} court held that appellate review

\textsuperscript{1748}. \textit{United States v. Tercero}, 640 F.2d at 196; \textit{United States v. Cook}, 608 F.2d at 1186.
\textsuperscript{1749}. This may produce hardship for a defendant who does not wish to take the stand on his own behalf for fear that evidence will be introduced to impeach his testimony which would be inadmissible under rule 609, but which he would be unable to object to until the evidence had already been introduced to the jury.
\textsuperscript{1750}. \textit{See supra} cases cited note 1748.
\textsuperscript{1751}. 640 F.2d at 196.
\textsuperscript{1752}. 492 F.2d 178, 197 (9th Cir. 1973), \textit{cert. denied}, 419 U.S. 942 (1974).
\textsuperscript{1753}. 608 F.2d 1175, 1183-86 (9th Cir. 1979) (en banc), \textit{cert. denied}, 444 U.S. 1034 (1980).
\textsuperscript{1754}. \textit{Id.} at 1186.
\textsuperscript{1755}. \textit{Id.}
\textsuperscript{1756}. \textit{Id.} at 1188 (Wallace, J., concurring).
\textsuperscript{1757}. 614 F.2d 648 (9th Cir. 1980).
\textsuperscript{1758}. \textit{Id.} at 651.
\textsuperscript{1759}. 640 F.2d 190 (9th Cir. 1980).
of the rule 609 ruling had not been preserved. Thus, both Hendershot and Tercero are consistent applications of the Cook doctrine although reaching different results.

In Tercero the Ninth Circuit also implicitly held that a defendant has the right to appellate review for abuse of the trial court's refusal to make an advance ruling even when the defendant does not take the stand.\(^{1760}\) Thus, review of the trial court's discretion in admitting evidence under rule 609 or of the court's failure to rule on admissibility is preserved if the defendant states that he will take the stand if the challenged prior conviction is excluded.

d. rule 609(a)(1)

Evidence of all felony convictions occurring in the ten years prior to trial are admissible under rule 609(a)(1) regardless of whether the crime involves dishonesty. However, to insure that the evidence of the prior conviction will be used by the jury solely for impeachment purposes, the trial judge must find that the probative value of the evidence outweighs its prejudicial effect.\(^{1761}\) If the judge finds otherwise, the evidence is inadmissible.\(^{1762}\) This determination should not be overruled absent a showing of abuse of discretion.\(^{1763}\) Such an abuse may be found if the trial court fails to apply appropriate legal principles in balancing the probative value against the prejudicial effect.\(^{1764}\)

The Ninth Circuit, in United States v. Field,\(^ {1765}\) considered several factors in reviewing a trial court's admission into evidence of defendant's prior conviction for receiving stolen property. First, the appellate court inquired into how recent the prior conviction was in relation to the charged crime. Recent prior convictions are presumed to carry a high degree of probity of the issue of veracity.\(^{1766}\) Also considered was

\(^{1760}\) Id. at 196. The court in fact did review this very question but held that the defendant was not prejudiced by the introduction of the evidence, even if it was introduced, because he would not take the stand. Thus, there was no basis for review under Cook.

\(^{1761}\) FED. R. EVID. 609(a)(1).

\(^{1762}\) Id.

\(^{1763}\) United States v. Field, 625 F.2d 862, 871 (9th Cir. 1980); United States v. Hendershot, 614 F.2d 648, 653 (9th Cir. 1980); United States v. Cook, 608 F.2d 1175, 1187 (9th Cir. 1979) (en banc), cert. denied, 444 U.S. 1034 (1980).

\(^{1764}\) United States v. Hendershot, 614 F.2d 648, 653 (9th Cir. 1980) (trial court's placing burden of showing prejudicial effect of prior conviction outweighed the probative value on defendant was abuse of discretion).

\(^{1765}\) 625 F.2d 862 (9th Cir. 1980).

\(^{1766}\) Id. at 872. Rule 609(b) does not allow admission of a conviction that occurred if more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative
the similarity of the two crimes. The greater the degree of similarity, the more likely it is that the use of the prior conviction may significantly prejudice the defendant because the jury might improperly use the prior conviction to find that the defendant had a propensity to commit the charged crime. The court finally considered whether the prior crime suggested a lack of veracity. If it did not, evidence of the prior crime would be irrelevant.

Affirming the trial court's determination that the conviction would be more probative than prejudicial, the Field court held that the prior conviction had been properly admitted. First, the Ninth Circuit noted that the conviction for receiving stolen property had occurred less than two years prior to defendant's trial for armed bank robbery; thus, it was deemed highly probative. Moreover, the prejudice was deemed slight because the prior conviction and the charged crime were sufficiently dissimilar. Finally, the Ninth Circuit concluded that the crime of receiving stolen goods suggested a lack of veracity.

Without reviewing the balancing done at the trial level, the Ninth Circuit in United States v. Hendershot reversed and remanded because of its uncertainty that the trial court had used the correct legal standards. The lower court had admitted the evidence of defendant's prior conviction under rule 609(a)(1) even though that conviction had occurred twelve years before his present trial for armed bank robbery. The defendant had urged that the prosecution had the burden of persuasion of establishing that the probative value outweighed the prejudicial effects. The prosecution, however, had relied upon Gordon v. United States which placed this burden of persuasion on the defendant. The Ninth Circuit rejected this view, and placed the burden on the prosecution. Since the trial court gave no indication

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value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

This rule further requires that the proponent of evidence of a conviction beyond the ten year limit must give notice to the adverse party so as to provide a fair opportunity to contest the use of such evidence. Fed. R. Evid. 609(b).

1767. Fed. R. Evid. 404(b) attempts to avoid this risk.

1768. 625 F.2d at 872.

1769. Id.

1770. Id. The conviction for stolen property was found to be dissimilar to the charged crime of armed bank robbery.

1771. Id.

1772. 614 F.2d 648 (9th Cir. 1980).

1773. Id. at 653.

1774. Id. at 652.

1775. 383 F.2d 936 (D.C. Cir. 1967).

1776. 614 F.2d at 654.
which standard it employed, the possibility that the trial court had applied an improper legal standard warranted reversal.\textsuperscript{1777}

e. rule 609(a)(2)

Unlike rule 609(a)(1), rule 609(a)(2) is not limited to felonies. Any conviction, misdemeanor or felony, which involves dishonesty or false statement is admissible for impeachment purposes.\textsuperscript{1778} Moreover, evidence under rule 609(a)(2) is not subject to a balancing of its probity against its prejudice\textsuperscript{1779} because crimen falsi are deemed peculiarly probative of credibility.\textsuperscript{1780} Because rule 609(a)(2) crimes are not subject to balancing, like those under rule 609(a)(1), convictions admissible under rule 609(a)(2) are narrowly defined.\textsuperscript{1781} The offense must be "in the nature of a crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully."\textsuperscript{1782} Convictions of crimes such as robbery and other crimes of violence are not considered within the provisions of rule 609(a)(2).\textsuperscript{1783} However, convictions of crimes involving the element of dishonesty or false statement are admissible under the rule. Hence, in United States v. Brashier,\textsuperscript{1784} mail fraud was held to be a crimen falsi since an element of that offense was the intent to deceive or defraud.\textsuperscript{1785}

The Ninth Circuit held in United States v. Field\textsuperscript{1786} that forgery is

\textsuperscript{1777} \textit{Id.}
\textsuperscript{1778} \textit{Fed. R. Evid. 609(a)(2).}
\textsuperscript{1779} United States v. Seamster, 568 F.2d 188, 190 (10th Cir. 1978) (prior conviction of burglary not automatically admissible under rule 609(a)(2)); United States v. Hayes, 553 F.2d 824, 827 (2d Cir.) (conviction for importation of cocaine, absent evidence of false written or oral statements, does not necessarily involve dishonesty or false statement), \textit{cert. denied}, 434 U.S. 867 (1977); United States v. Ortega, 561 F.2d 803, 806 (9th Cir. 1977) (petty shoplifting not evidence of dishonesty or false statement); United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976) (conviction of conspiracy to issue unauthorized securities and mail fraud does involve intent to deceive). The courts have refused to apply \textit{Fed. R. Evid. 403} to evidence admitted under rule 609(a)(2). Recently, in United States v. Field, 625 F.2d 862 (9th Cir. 1980), the Ninth Circuit was presented with this argument but avoided the problem because defendant had not raised this issue in his motion \textit{in limine} at the trial level. \textit{Id. at} 871 n.5.
\textsuperscript{1780} United States v. Ortega, 561 F.2d 803, 806 (9th Cir. 1977).
\textsuperscript{1783} United States v. Seamster, 568 F.2d 188, 190 (10th Cir. 1978); United States v. Ortega, 561 F.2d 803, 806 (9th Cir. 1977).
\textsuperscript{1784} 548 F.2d 1315 (9th Cir. 1976).
\textsuperscript{1785} \textit{Id. at} 1327.
\textsuperscript{1786} 625 F.2d 862 (9th Cir. 1980).
a *crimen falsi,* and thus, evidence of that crime was admissible under rule 609(a)(2). An essential element of forgery is the intent to deceive. Under *Brashier,* the evidence of the forgery conviction in *Field* was admissible because it directly bore on the defendant's credibility as a witness.

3. Hearsay

Rule 801(c) of the Federal Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay evidence is not admissible in federal courts. Exceptions to the hearsay rule, however, are numerous.

The Anglo-American rule against hearsay testimony developed in response to the fact that hearsay lacked three ideal conditions for testimony: oath, personal presence, and cross-examination. These conditions both encourage witnesses to put forth their best efforts and expose inaccuracies in perception, memory and narration. The presence or absence of these conditions, however, is not always an accurate measure of evidentiary reliability. The Federal Advisory Committee on Rules of Evidence attempted to effect a sensible accommodation between ideal and non-ideal testimony in the formulation of the federal hearsay rules. Consequently, the scheme adopted was a modified common law system of class exceptions, with the addition of the open-ended provisions in rules 803(24) and 804(b)(5), plus the exemption of certain "prior statements" from the definition of hearsay.

*a. non-hearsay*

By definition, out-of-court statements are not hearsay when of-

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1787. *Id.* at 871.
1788. *Id.*
1789. *FED. R. EVID.* 801(c).
1790. *FED. R. EVID.* 802.
1792. *Id.*
1793. *See id.* at 582-84.
1795. *4 WEINSTEIN'S EVIDENCE* ¶ 800[02], at 800-13 (1979) [hereinafter cited as Weinstein]. Types of prior statements excluded from the definition of hearsay are set forth in *FED. R. EVID.* 801(d).
1796. *FED. R. EVID.* 801(c).
ferred to prove some fact other than the truth of their content.\textsuperscript{1797} Two 1980 Ninth Circuit cases illustrate this point.

In \textit{United States v. Ponticelli},\textsuperscript{1798} the defendant had been convicted of perjury for testifying before a grand jury that he could not remember how he came into possession of a loan shark's client list. At trial, defendant Ponticelli offered the testimony of his former attorney, to whom Ponticelli had stated, prior to his grand jury testimony, that he could not remember where he had obtained the list. Ponticelli argued that the former attorney's testimony was offered to indirectly show the defendant's state of mind or bad memory, not to prove the substance of the statement. The trial court, however, excluded the testimony as hearsay, and the Ninth Circuit affirmed without much discussion.\textsuperscript{1799} This decision is proper since Ponticelli's statement to his attorney that he could not remember was offered to prove the truth of the matter asserted—Ponticelli's lack of memory.\textsuperscript{1800}

In \textit{United States v. May},\textsuperscript{1801} the Ninth Circuit held that the admission of a written name was not hearsay. The defendants had trespassed on government property at a Trident missile base, where they had been caught and photographed and identified on "Apprehension Data Cards."\textsuperscript{1802} Defense objected to the admission of these cards as hearsay.

After first holding that the photographs on the cards were not hearsay,\textsuperscript{1803} the \textit{May} court held that the names on the cards were not hearsay but were circumstantial evidence that the person photographed was actually the person named.\textsuperscript{1804} Citing other Ninth Circuit cases in

\textsuperscript{1797} An example of a non-hearsay use of out-of-court statements is where such statements are "relied on as constituting slander or deceit for which damages are sought." \textsc{McCormick, supra} note 1791, § 249, at 589; \textit{see also, e.g.}, \textit{United States v. May}, 622 F.2d 1000 (9th Cir. 1980) (photograph was non-hearsay).

\textsuperscript{1798} \textit{Id.} at 985 (9th Cir. 1980).

\textsuperscript{1799} \textit{Id.} at 991. The Ninth Circuit focused on defendant's major contention that the statement fell within the "state of mind" hearsay exception of rule 803(3). \textit{See infra} notes 1824-27 and accompanying text.

\textsuperscript{1800} Statements offered to circumstantially show the declarant's state of mind are not hearsay. However, direct statements of a declarant's state of mind are considered hearsay. \textit{See} \textsc{McCormick, supra} note 1791, § 249, at 590-91.

\textsuperscript{1801} 622 F.2d 1000 (9th Cir. 1980).

\textsuperscript{1802} \textit{Id.} at 1002-03.

\textsuperscript{1803} \textit{Id.} at 1007 ("a photograph is not an assertion, oral, written, or nonverbal, as required by \textsc{Fed. R. Evid.} 801(a)").

\textsuperscript{1804} \textit{Id.} ("We can know a person's name only by being told, either by the person or someone else, unless, of course, we happen to have christened the person. But a name, however learned, is not really testimonial. Rather it is a bit of circumstantial evidence.").
which written names had been admitted as non-hearsay, the court
concluded that in May a stronger foundation existed for the admission
of the names than had existed in the previous decisions.

Under the Federal Rules of Evidence, statements of co-conspirators are also not hearsay if the statements are made "during the
course and in furtherance of the conspiracy." For these statements
to be admissible there must also be sufficient independent evidence of
the conspiracy.

The courts have often stated that in order to be "in furtherance" of
a conspiracy a statement "must be an act in furtherance of the com-
mon object; mere conversation between conspirators is not that." Hence, the Ninth Circuit held in United States v. Eubanks that a
conspirator's statements made to a common-law wife were merely in-
formational, not attempts to draw her into the conspiracy. Yet, statements made to keep co-conspirators abreast of conspirators' activi-
ties, to induce continued participation in the conspiracy, or to allay
fears about the continued operation of the conspiracy are deemed to be
"in furtherance" of the conspiracy. In spite of these general prin-
ciples, whether a statement was made with the purpose of furthering the
object of the conspiracy may be susceptible to various appellate court
interpretations. In the 1980 case of United States v. Castillo, the "in
furtherance" element was deemed unfulfilled. The Ninth Circuit held
that the lower court had erred in admitting a confederate's remark to a
friend that "[w]e are fixing to kill a Mexican." The appellate court
held that the remark was not made to further the conspiracy, but

1805. United States v. Snow, 517 F.2d 441 (9th Cir. 1975); United States v. Campbell, 466
F.2d 529 (9th Cir. 1972); Bayless v. United States, 381 F.2d 67 (9th Cir. 1967).
1806. 622 F.2d at 1008.
1807. See United States v. Lutz, 621 F.2d 940, 946 (9th Cir. 1980) (out-of-court statements
by coparticipants in a mail or wire fraud scheme are admissible according to the same rules).
1808. FED. R. EVID. 801(d)(2)(E). The federal rules classify statements of co-conspirators
as non-hearsay. The majority rule merely grants an exception to the hearsay rule for such
statements. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 54, at 192 (1978).
1809. United States v. Batimana, 623 F.2d 1366 (9th Cir. 1980); United States v. Smith,
623 F.2d 627 (9th Cir. 1980); United States v. Lutz, 621 F.2d 940 (9th Cir. 1980).
1810. United States v. Birbaum, 337 F.2d 490, 495 (2d Cir. 1964) (quoting United States
v. Nardone, 106 F.2d 41, 43 (2d Cir.), rev'd on other grounds, 308 U.S. 338 (1939)).
1811. 591 F.2d 513 (9th Cir. 1979).
1812. Id. at 520.
1813. United States v. Eaglin, 571 F.2d 1069, 1083 (9th Cir. 1977); United States v.
Salazar, 405 F.2d 74 (9th Cir. 1968) (per curiam); accord, United States v. James, 510 F.2d
546, 549-50 (5th Cir. 1975) (allayed suspicions).
1814. 615 F.2d 878 (9th Cir. 1980).
1815. Id. at 883.
rather, was merely a "casual admission to someone he had decided to trust." This conclusion accords with previous Ninth Circuit case law.

Ruling the other way, a divided Ninth Circuit in *United States v. Sandoval-Villalvazo*, affirmed the lower court's admission of a statement made by one co-conspirator to another in the presence of a potential narcotics "buyer," an undercover agent from the Drug Enforcement Administration (DEA). While waiting for the narcotics seller to arrive, the conspirator had stated, "'Your Campa Rafa, he has no compassion on those of us who are just trying to make a buck or two . . . . Just because he has made his millions he doesn't worry about us.'" The majority of the appellate court held that the lower court was warranted in inferring that the statement was designed to keep the DEA "buyer" from leaving the scene, and was therefore "in furtherance" of the conspiracy. The dissenting Ninth Circuit judge considered the statement to be merely "idle conversation between two conspirators" that did nothing to further the conspiracy. In light of the long wait for the seller, however, the majority's conclusion appears correct and follows other precedent.

b. exceptions

i. then existing state of mind

Hearsay in the form of "[a] statement of the declarant's then existing state of mind" is admissible into evidence. Such a statement is deemed sufficiently trustworthy to admit into evidence because of its contemporaneousness with the state of mind.

In *United States v. Ponticelli*, the Ninth Circuit considered

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1816. Id.
1818. 620 F.2d 744 (9th Cir. 1980).
1819. Id. at 746.
1820. Id. at 747. The court noted that the undercover agent had waited about three and one half hours before the narcotics source had shown up. During the wait, other codefendants had repeatedly told the agent, acting as a buyer, that the source was being located. Id.
1821. Id. at 748 (Ferguson, J., dissenting).
1822. See United States v. James, 510 F.2d 546 (5th Cir. 1975). In a drug sale similar to that in Sandoval-Villalvazo, a coconspirator had said "the contact" had been made. The James court viewed this statement as made in furtherance of the conspiracy because it allayed the suspicions of the buyer. Id. at 549-50; accord, United States v. Salazar, 405 F.2d 74 (9th Cir. 1968) (per curiam).
1823. FED. R. EVID. 803(3).
1824. MccORMICK, supra note 1791, § 294, at 695.
1825. 622 F.2d 985 (9th Cir. 1980).
whether a statement made by an arrestee to his attorney met the requirements of the state of mind exception. Ponticelli was convicted of perjury for testifying to a grand jury that he did not remember how he came into possession of a loan shark's client list. Ponticelli offered to have his former attorney, who had represented him in a previous criminal prosecution related to the same loan sharking activities, testify that Ponticelli had told the attorney, prior to the grand jury proceeding, that he could not remember how he had obtained the list. The district court sustained the prosecutor's hearsay objection and excluded the proffered testimony. Ponticelli's counsel argued that the testimony came within the state of mind exception. The Ninth Circuit affirmed the lower court's ruling, however, observing that Ponticelli had been allowed a chance for reflection and misrepresentation before making the statement. Thus, the lower court did not abuse its discretion when it found that the statement was not sufficiently reliable to admit. This decision comports with the rationale behind the exception.1826

ii. business records

Certain records are admissible hearsay if they have been produced in the course of a "regularly conducted business activity."1827 The unusual reliability of such records is guaranteed by the following factors: (1) the duty of the recordkeeper accurately to record information under penalty of embarrassment or censure, (2) the customary checking or auditing of entries for correctness, (3) the habits of precision developed by recordkeepers from the regularity and continuity of such records, and (4) the reliance by businesses on such records.1828

Before business records may be admitted into evidence, however, certain foundational requirements must be met. The records must have

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1826. FED. R. EVID. 803(1) & (2), ADV. COMM. NOTES, 51 F.R.D. 315, 423 (1971). Exception (3) is essentially a "specialized application" of exception (1), since both are present sense impressions. Id. at 424.
1827. FED. R. EVID. 803(6), provides the following:
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.
been produced in the course of a regularly conducted business activity; the making of such records must have been a regular practice of that business activity; the records must have been made by, or from information transmitted by, a person with personal knowledge of the substance of the records; the records must have been made at or near the time of the events recorded; and a custodian of the records or other qualified witness must testify to the foregoing facts.1829

In United States v. Basey,1830 defendant's college records had been admitted into evidence to establish defendant's address. In a brief footnote, the Ninth Circuit determined that it was not necessary for the custodian, who testified to the foundation requirements, personally to have recorded the information or to know who did.1831 Although the Ninth Circuit had not decided this specific question since the adoption of the Federal Rules of Evidence, the decision is in accord with the understanding of the Senate Judiciary Committee,1832 decisions by other circuits,1833 and the opinions of several commentators.1834

In United States v. Sims,1835 the Ninth Circuit considered whether an FBI report prepared in a bank robbery investigation would be ad-
missible as a business record. The defendant was convicted of a bank robbery primarily on the strength of a teller’s identification. The report contained a description of the bank robber given by another eyewitness, a customer. This description differed from the one given by the teller. Because the customer had died prior to trial, the defendant sought to introduce the FBI report under the business records exception. The trial court declined to admit the report, and the Ninth Circuit affirmed, first holding that the public records exception, rule 803(8), not the business records exception, clearly covers admissibility of reports made by law enforcement officers. Moreover, the appellate court held that, assuming arguendo that the FBI report would have been admissible under the public records exception, it was not plain error to deny admission of the report because this ground was not raised in the lower court.

The first holding accords with previous Ninth Circuit case law. The legislative history of rule 803(8), however, does not show that Congress intended it to be the exclusive exception under which public records would be admissible. Nevertheless, the FBI report in Sims did not meet the requirements of the business records exception.

iii. public records

Public records and reports are excepted from the hearsay rule under certain conditions. Public records are deemed to be inherently reliable. The public records exception is justified by the high probability that a public officer will carry out his official duty to make accurate records and by the possibility that public inspection of such records may reveal inaccuracies and cause them to be corrected. Furthermore, this exception is necessary to prevent the inconvenience and waste of bringing into court public officials whose memories are

1836. Fed. R. Evid. 803(8).
1837. 617 F.2d at 1377-78.
1839. Weinstein, supra note 1795, ¶ 803(8)[01], at 803-195, and ¶ 803(8)[04], at 803-208 to 212.
1840. This is essentially a problem of double hearsay. McCormick, supra note 1791, § 310, at 725-26. "[A] business record containing an assertion by someone other than the maker should be admitted to prove the truth of that assertion only if the assertion itself comes within an exception to the hearsay rule." Id; see Weinstein, supra note 1795, ¶ 803(8)[04], at 803-160; Fed. R. Evid. 803(6), ADV. COMM. NOTES, 51 F.R.D. 315, 427 (1971).
probably less reliable than the written records. Unlike the business records exception, the public records exception requires no foundation due to its unusually high level of accuracy.

Rule 803(8) expressly excludes records of law enforcement officers in criminal cases, however. The Ninth Circuit interpreted the scope of this law enforcement records exclusion in United States v. Hernandez-Rojas. The defendant was convicted of illegal reentry into the United States. To establish his prior deportation, the Government introduced into evidence a deportation warrant which contained a dated notation signed by a United States Immigration Officer. The notation stated that the defendant had been “Deported to Mexico, Calexico, California.” The defendant argued that the deportation warrant was inadmissible hearsay because it was an observation made by a law enforcement officer in a criminal case. While noting that the law enforcement exception to rule 803(8) has been inflexibly applied by some circuits, the Ninth Circuit concluded that Congress had not intended to exclude routine, non-adversarial records. As a result, the deportation warrant was deemed admissible. The weight of authority supports this decision.

1843. Id. at 736; Report, New Jersey Supreme Court, Committee on Evidence 189 (1963), quoted in Weinstein, supra note 1795, ¶ 803(8)[01], at 803-190.
1844. Weinstein, supra note 1795, ¶ 803(8)[01], at 803-191.
1845. Fed. R. Evid. 803(8)(B) provides a hearsay exception for “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 . . .” (emphasis added).
1846. 617 F.2d 533 (9th Cir. 1980). The Ninth Circuit followed the Hernandez-Rojas decision in United States v. Bejar-Matrecios, 618 F.2d 81, 84 (9th Cir. 1980).
1847. 617 F.2d at 534-35 (citing United States v. Oates, 560 F.2d 45 (2d Cir. 1977)). In Oates, defendant was convicted of possessing heroin with intent to distribute. The official report and accompanying worksheet of a United States Customs Service chemist were admitted into evidence in the trial court under the business records exception, rule 803(6). On appeal, the Second Circuit, analyzing the admissibility of the chemist’s report and worksheet under the public records exception, found that “it was the clear intention of Congress to make evaluative and law enforcement reports absolutely inadmissible against defendants in criminal cases.” 560 F.2d at 72 (emphasis added). Judge Weinstein and Professor Berger have assailed this opinion as “unjustifiable and pernicious in effect.” Weinstein, supra note 1795, ¶ 803(8)[04], at 803-210.
1848. United States v. Orozco, 590 F.2d 789 (9th Cir.) (computer cards made by customs officials, containing the license numbers of automobiles which passed through the border, were admissible since they were not made in an adversarial situation that might cloud the officials’ perception), cert. denied, 442 U.S. 920 (1979); United States v. Union Nacional de Trabajadores, 576 F.2d 388, 390-91 (1st Cir. 1978) (defendant sought to exclude certified copy of marshal’s return, stating he had served injunction on defendant; court cited legislative history of rule 803(8) to decide Congress did not intend to cut back on common law rule that sheriff’s returns are admissible as “official records”); United States v. Grady, 544 F.2d 598, 604 (2d Cir. 1976) (routine records made by Irish police of weapons’ serial numbers
iv. absence of records

The absence of a public record, or the non-occurrence of an event which a public record normally chronicles, can be proved by evidence that a diligent search failed to disclose the record.\(^{1849}\) This exception to the hearsay rule is an extension of the public records exception. The absence of a record that would have been made by a public official under a duty accurately to make such records is considered as reliably probative of the non-occurrence of an event, just as the presence of a record would be probative of occurrence.\(^ {1850}\)

In *United States v. Neff*,\(^ {1851}\) an IRS "Certificate of Assessments and Payments," stating that defendant had not paid federal income taxes during certain years, was admitted into evidence by the trial court. A custodian of IRS records testified that, in producing the document, he had researched the National Computer Center where all tax information for every individual is merged. Defendant argued that the certificate was inadmissible hearsay because the prosecution failed to prove that a *diligent* search had been made. The Ninth Circuit curtly found that the failure to include the word "diligent" is an insufficient

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\(^{1849}\) FED. R. EVID. 803(10) provides:

To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry . . . [is not excluded by the hearsay rule].

\(^ {1850}\) See Wigmore, *supra* note 1828, § 1531, at 463.

\(^ {1851}\) 615 F.2d 1235 (9th Cir.), cert. denied, 447 U.S. 925 (1980).
ground to exclude evidence of the absence of a public record.¹⁸⁵²

4. Privileges

Since 1975, federal evidentiary privileges have been governed by rule 501 of the Federal Rules of Evidence. Rule 501 provides that privileges “shall be governed by the principles of the common law as . . . interpreted . . . in the light of reason and experience.”¹⁸⁵³ For example, in *Trammel v. United States*,¹⁸⁵⁴ the United States Supreme Court in 1980 reviewed a marital privilege¹⁸⁵⁵ to determine if it required amendment in light of “reason and experience.”¹⁸⁵⁶ The Court held that adverse spousal testimony could be barred only by the witness spouse, thus preventing the accused spouse from claiming the privilege.¹⁸⁵⁷ In sum, privileges, new¹⁸⁵⁸ and old, are subject to case-by-case scrutiny.¹⁸⁵⁹

a. attorney-client

Like the marital privileges,¹⁸⁶⁰ the attorney-client privilege¹⁸⁶¹ only applies to confidential communications.¹⁸⁶² Thus, as reaffirmed in the 1980 Ninth Circuit case of *United States v. Flores*,¹⁸⁶³ either the

¹⁸⁵². *Id.* at 1242.
¹⁸⁵³. *FED. R. EVID.* 501. This language governs criminal matters and, generally, federal question actions. *Cf.* *FED. R. CRIM. P.* 26. However, rule 501 requires state privilege law to apply in “civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision.” *FED. R. EVID.* 501; *see* 2 *WEINSTEIN'S EVIDENCE* ¶ 501[02], at 501-19 (1980). For a general discussion of federal privilege law, see 10 J. *MOORE, MOORE'S FEDERAL PRACTICE* ¶ 500.03-.21 (2d ed. 1979 & Supp. 1980-81).
¹⁸⁵⁵. *See* Hawkins v. United States, 358 U.S. 74 (1958) (adverse spousal testimony could be barred by either the witness spouse or the defendant spouse).
¹⁸⁵⁶. 445 U.S. at 47 (quoting *FED. R. EVID.* 501); *see* 445 U.S. at 48-53.
¹⁸⁵⁷. *Id.* at 53 (“This modification . . . further the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.”); *see* United States v. Tsinnijinnie, 601 F.2d 1035 (9th Cir. 1979) (defendant could not invoke marital privilege to bar third party witness from relating excited utterances by defendant's spouse), *cert. denied*, 445 U.S. 966 (1980).
¹⁸⁵⁹. 2 *WEINSTEIN'S EVIDENCE* ¶ 501[03], at 501-30 (1980).
¹⁸⁶⁰. *See generally* *McCORMICK, supra* note 1791, §§ 66-67, at 78-86.
¹⁸⁶¹. *See* Matter of Fischel, 557 F.2d 209, 211 (9th Cir. 1977) (elements of privilege); United States v. Landof, 591 F.2d 36, 38 (9th Cir. 1978) (burden of proof).
¹⁸⁶². Genson v. United States, 534 F.2d 719, 728 (7th Cir. 1976) (transfer of monies by client to attorney does not represent a communication which the client could anticipate as confidential). *See generally* *McCORMICK, supra* note 1791, § 91, at 187.
¹⁸⁶³. 628 F.2d 521 (9th Cir. 1980).
attorney or the client may assert the privilege to bar the disclosure of "communications obtained from [the] client during the course of the client's search for legal advice from the [attorney] in his capacity as a lawyer which were made in confidence by the client to the [attorney], [if] the privilege with respect to these communications has not been waived."1864 Whether the attorney-client privilege exists1865 is determined at the trial court hearing where the party invoking the privilege must establish that the attorney was acting in the capacity of a legal advisor.1866

Moreover, the attorney-client privilege does not protect communications made in the furtherance of criminal activities.1867 For example, in United States v. Berry,1868 the Ninth Circuit stated that an attorney cannot assert the privilege to bar testimony which would reveal that the defendant attorney had discussed andcondoned the criminally fraudulent schemes of clients.1869

The identity of a client is generally not considered a confidential communication,1870 and thus not privileged. The Ninth Circuit examined the scope of this principle in United States v. Flores.1871 In Flores, Thorp was an attorney who, after being consulted by approxi-
mately seventy clients, including the defendant, prepared fifteen administrative claims, alleging various civil rights violations. In one claim, the defendant admitted he had possessed a firearm. Subsequently, the defendant, a convicted felon, was indicted for possession of a firearm. In that prosecution, the Government sought to introduce the particular administrative claim which demonstrated that the defendant had possessed a firearm. The defendant filed a motion in limine to exclude the civil claim, arguing, inter alia, that it was hearsay. To avoid the hearsay problem, Thorp was called to the witness stand by the Government to establish a foundation for admission of the claim as an authorized statement of the defendant's agent. While on the stand, Thorp was asked a series of questions regarding whether some of his clients had authorized the civil claims and whether Flores was one of those clients. In response, Thorp invoked the attorney-client privilege. The district court found Thorp in contempt, and he appealed.

The court of appeals first held that responses to the questions involving whether the civil claim was authorized by some clients were not privileged, and, thus, Thorp could be compelled to respond by affirmation or denial. The court’s holding is justified because the administrative claim, a public document, was not intended to remain confidential. The court also held that Thorp had to respond to the question regarding the identity of his client. Although the identity of a client is generally not considered a confidential communication, the Ninth Circuit had held in Baird v. Koerner that when disclosure of the identity of a client creates a strong probability that the client will be implicated for criminal behavior, the privilege must be invoked to avoid disclosure of the client’s identity. The Flores court distinguished Baird on the ground that, in Baird, the criminal charges involved the same criminal activity for which the legal advice was sought, whereas, in Flores, the original consultation by Flores did

\[1872. \text{See 18 U.S.C. app. \$ 1202 (1976).}\]
\[1873. \text{See generally McCormick, supra note 1791, \$ 267, at 639.}\]
\[1874. 628 F.2d at 524.}\]
\[1875. \text{Id. at 526.}\]
\[1876. \text{Id.}\]
\[1877. \text{Id.}\]
\[1878. \text{See supra note 1870 and accompanying text.}\]
\[1879. 279 F.2d 623 (9th Cir. 1960).}\]
\[1880. \text{Id. at 630.}\]
\[1881. 628 F.2d at 526. In Baird, a client sought advice from his attorney concerning payment of back-due taxes to the IRS. The client gave the attorney the back-due amount which the attorney anonymously sent to the IRS. Subsequently, the IRS subpoenaed the attorney} \]
not concern a criminal charge facing Flores.\textsuperscript{1882}

However, the rationale of Baird supports Thorp’s position. As the court in Baird stated:

The doctrine is based on public policy. While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer.\textsuperscript{1883}

Thus, the Flores court’s holding that Thorp must reveal the identity of his client contradicts the public policy which seeks to insure free and confidential disclosure between attorney and client.\textsuperscript{1884} The decision, however, is supported by other authority.\textsuperscript{1885} In sum, while the Flores holding is distinguishable from Baird and has general support, the public policy advocated in Baird is frustrated by the conclusion in Flores.

\textbf{b. other: United States v. Gillock}\textsuperscript{1886}

Several privileges involving “confidential communications” are not recognized by the Ninth Circuit under rule 501.\textsuperscript{1887} In United States v. Webb,\textsuperscript{1888} the Ninth Circuit was asked to recognize a clergyman-penitent privilege. The court, avoiding the central issue,\textsuperscript{1889} held that a prisoner’s confession to a prison chaplain was not privileged be-

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\textsuperscript{1882} 628 F.2d at 526.
\textsuperscript{1883} 279 F.2d at 629-30.
\textsuperscript{1884} The court’s logic is questionable. It stated: “[A]t worst, the [administrative] claim is only circumstantial evidence that the ... Alfredo Flores charged in [the criminal claim] is the same Alfredo Flores named in the administrative claim.” 628 F.2d at 526.
\textsuperscript{1885} See generally Annot., 16 A.L.R.3d 1047, 1058-59.
\textsuperscript{1886} 445 U.S. 360 (1980).
\textsuperscript{1888} 615 F.2d 828 (9th Cir. 1980) (per curiam).
\textsuperscript{1889} This issue was also avoided in United States v. Luther, 481 F.2d 429, 432 (9th Cir. 1973) (no showing made by the plaintiff that clergyman privilege violated). But see In re Verplank, 329 F. Supp. 433, 435 (C.D. Cal. 1971) (clergyman-penitent privilege acknowledged in criminal matters in federal courts).
cause the communication was given in the presence of a third party, a security officer, thus destroying its confidentiality. The court further stated that even if the court were to recognize the clergyman-penitent privilege, the defendant would have to establish that confidentiality is not required if a prisoner takes reasonable steps to insure it. Assuming that the prison officials allowed such steps, the court found that the defendant had not taken them.

The Supreme Court in United States v. Helstoski held that the speech or debate clause of the Constitution bars the introduction of evidence in a federal prosecution of the legislative acts of a federal legislator. In United States v. Gillock, a state legislator argued that evidence of his state legislative acts should be excluded from a federal criminal prosecution. In Gillock, the defendant, a former Tennessee state legislator, was indicted on seven federal charges of accepting fees for using his office for personal gains. The Government sought to introduce damaging evidence of his legislative activities. The district court, relying on rule 501, granted the defendant's motion to suppress. The Sixth Circuit affirmed the district court's ruling, although excluding a few items from the suppression order since they were deemed to be insufficiently related to the legislative process.

The United States Supreme Court, however, reversed. The Court concluded that no authority existed either in the Federal Rules of Evidence or in the Constitution for extending the federal privilege to state legislators. The Court initially reasoned that, although the federal privilege rule is flexible, neither its predecessor in the proposed rules nor principles of federalism compelled a state

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1890. 615 F.2d at 828.
1891. The clergyman-penitent privilege has been recognized elsewhere. See Mullen v. United States, 263 F.2d 275, 280 (D.C. Cir. 1958) ("a clergyman shall not disclose . . . the secrets of a penitent's confidential confession . . . , at least absent the penitent's consent.").
1892. 615 F.2d at 828.
1893. Id.
1894. 442 U.S. 477, 489 (1979) (evidence of a defendant's committee activities and his votes and speeches on the floor of the state senate would be inadmissible).
1895. Id. at 494.
1897. Id. at 362.
1898. Id.
1899. Id.
1900. Id. at 374.
1901. Id. at 367.
1902. Id. at 366.
1903. Id. at 367.
1904. Id. Under the Judicial Conference's proposed rules, federal courts would have been
legislative privilege analogous to the privilege extended to federal legislators. The Court was not swayed by the fact that if Tennessee had prosecuted the defendant, most of the evidence could have been blocked by the defendant under a state-recognized privilege. Accordingly, the Court noted that the state-recognized privilege, by itself, did not authorize a similar federal privilege.

Furthermore, although state legislators enjoy that privilege in federal civil proceedings, the Court stated that neither historical antecedents nor the policy considerations which underlie the speech or debate clause dictated that the Court recognize a comparable evidentiary privilege for state legislators in federal criminal prosecutions. The "separation of powers" rationale which is the basis of the speech or debate clause would not warrant an extension of the federal privilege to state legislators. Moreover, although the need to insure legislative independence is a valid policy consideration, the courts have balked at immunizing state officials from federal civil suits.

Finally, the Court based its decision on two related rationales. First, the Court reasoned that an evidentiary privilege for state legislators would impair the federal government's prosecution of violations of criminal statutes. Second, the Court noted that Congress had permitted to apply only nine enumerated privileges, which did not include a state legislator's privilege. See Proposed Federal Rules of Evidence §§ 501-513, 56 F.R.D. 183, 230-60 (1973).

1905. "The claimed privilege was not... indelibly ensconced in our common law or an imperative of federalism." 445 U.S. at 368.


1907. 445 U.S. at 368; see Wolfe v. United States, 291 U.S. 7, 13 (1934) (the admissibility of evidence in criminal trials "is to be controlled by common law principles, not by local statute").

1908. Tenney v. Brandhove, 341 U.S. 367, 372 (1951); see infra note 1911 and accompanying text.

1909. 445 U.S. at 373.

1910. "Two interrelated rationales underlie the Speech or Debate Clause: first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence." Id. at 369.

1911. The Court distinguished Tenney v. Brandhove, 341 U.S. 367 (1951), in the following statement:

Although Tenney reflects this Court's sensitivity to interference with the functioning of state legislators, we do not read that opinion as broadly as Gillock would have us. First, Tenney was a civil action brought by a private plaintiff to vindicate private rights. Moreover, the cases in this Court which have recognized an immunity from civil suit for state officials have presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials.

445 U.S. at 372.

1912. Id. at 373; see United States v. Nixon, 418 U.S. 683 (1974) (the executive privilege yields to the interests of enforcing federal criminal statutes).
neither provided nor authorized federal courts to apply a speech or debate clause privilege to state legislators.\textsuperscript{1913} Thus, the Court reasonably concluded that "although principles of comity command careful consideration, our cases disclose that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields."\textsuperscript{1914}

V. POST-CONVICTON PROCEEDINGS

A. Double Jeopardy

1. Retrials

Retrial after mistrial is precluded by the double jeopardy clause in the absence of "manifest necessity" for the mistrial.\textsuperscript{1915} Since this is not a mechanical standard,\textsuperscript{1916} appellate courts have gradually outlined on a case by case basis when a trial court abuses its discretion by declaring a mistrial without manifest necessity.\textsuperscript{1917} Recently, the Ninth Circuit

\textsuperscript{1913} 445 U.S. at 374.
\textsuperscript{1914} Id. at 373.
\textsuperscript{1915} United States v. Perez, 22 U.S. 579, 580 (1824).
\textsuperscript{1916} See Arizona v. Washington, 434 U.S. 497, 505-06 (1978) (trial judge did not need to articulate all of the factors justifying declaration of mistrial because record showed defense counsel had aired highly improper and prejudicial information before jury).
\textsuperscript{1917} For instances where the trial court abused its discretion, see, e.g., United States v. Jorn, 400 U.S. 470 (1971) (plurality opinion) (trial judge declared mistrial on his own motion after concluding, despite one witness's statements to the contrary, that the IRS had failed to warn properly five taxpayer witnesses of their right against self-incrimination); Downum v. United States, 372 U.S. 734 (1963) (jury discharge after prosecution failed to produce key witness); United States v. McKoy, 591 F.2d 218 (3d Cir. 1979) (trial judge failed to consider adequately alternatives to mistrial); United States v. Rich, 589 F.2d 1025 (10th Cir. 1978) (trial court could give no reason for mistrial and none was apparent on record); Mizell v. Attorney Gen., 586 F.2d 942 (2d Cir. 1978) (failure to consider alternatives to mistrial), cert. denied, 440 U.S. 967 (1979); Dunkerly v. Hogan, 579 F.2d 141 (2d Cir. 1978), cert. denied, 439 U.S. 1090 (1979); United States v. Horn, 583 F.2d 1124 (10th Cir. 1978) (jury sent note declaring deadlock; judge gave Allen charge, allowed jurors overnight recess, and declared mistrial next morning after a one hour deliberation); United States v. Starling, 571 F.2d 934 (5th Cir. 1978) (judge had unfounded assumptions regarding juror bias); United States ex rel. Webb v. Court of Common Pleas, 516 F.2d 1034 (3d Cir. 1975) (mistrial declared after six and one half hours of jury deliberation following a six day trial where judge received only the foreman's opinion as to the hopelessness of the deadlock).

For instances where the trial court met the manifest necessity standard and thus properly exercised its discretion in declaring a mistrial, see, e.g., Arizona v. Washington, 434 U.S. 497 (1978) (defense counsel's opening statement alluded to prosecutor's having hidden evidence from defense at previous trial); Illinois v. Somerville, 410 U.S. 458 (1973) (mistrial based on indictment being insufficient to state a crime); Gori v. United States, 367 U.S. 364 (1961) (judge acted in sole interest of defendant in discharging jury when it appeared prosecution's questioning of leading witness would bring out inadmissible evidence); Wade v. Hunter, 336 U.S. 684 (1949) (mistrial of court-martial because of military necessity); Lovato v. New Mexico, 242 U.S. 199 (1916) (discharge of jury after district attorney realized defend-
considered this issue in two decisions. In a third decision, the court addressed a related question, whether the double jeopardy clause barred reprosecution after declaration of mistrial upon defendant’s motion charging prosecutorial error. In Rogers v. United States, the Ninth Circuit held that the double jeopardy clause did not bar retrial following a mistrial after a lengthy jury deadlock almost as long as the trial itself. Defendant claimed that a lack of manifest necessity for a declaration of mistrial after jury deadlock subjected him to double jeopardy on the retrial. The Ninth Circuit rebuffed the argument by declaring that jury deadlock is a “classic example” of necessity for a mistrial. The court refrained, however, from enunciating a per se rule. Rather, the trial judge’s determination that a particular jury deadlock creates a necessity for a mistrial is to be given “great deference” because he is in the position to assess the relevant factors,

ant had not entered plea after his demurrer to the indictment was overruled); Thompson v. United States, 155 U.S. 271 (1894) (mistrial after revelation that one of the trial jurors had been on defendants’ grand jury); Simmons v. United States, 142 U.S. 148 (1891) (newspaper story described a letter written by defense counsel denying allegation that a juror was acquainted with defendant); United States v. Lorenzo, 570 F.2d 294 (9th Cir. 1978) (three hours of jury deliberation where judge questioned each member of jury and determined it was their belief that their differences were irreconcilable); Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978) (twelve hours of jury deliberation where judge questioned foreman and jury as group with only one juror saying a verdict could be reached); United States v. See, 505 F.2d 845 (9th Cir. 1974) (ten hours of jury deliberation after three and a half day trial), cert. denied, 420 U.S. 992 (1975); United States v. Brahms, 459 F.2d 546 (3d Cir.) (five hours of deliberation after two day trial), cert. denied, 409 U.S. 873 (1972); United States v. Cordingley, 290 F.2d 392 (2d Cir. 1961) (mistrial after less than four hours).

1918. United States v. Smith, 621 F.2d 350 (9th Cir. 1980); Rogers v. United States, 609 F.2d 1315 (9th Cir. 1979). In a related double jeopardy context, involving the issue of retrial after reversal for insufficient evidence, the Ninth Circuit, in United States v. Lopez, 625 F.2d 889 (9th Cir. 1980), applied the established Supreme Court rule that retrial in such cases violates the double jeopardy clause. Burks v. United States, 437 U.S. 1, 11 (1978) (“The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”) (footnote omitted).

1919. United States v. Calderon, 618 F.2d 88 (9th Cir. 1980).

1920. 609 F.2d 1315 (9th Cir. 1979).

1921. Id. at 1317.

1922. Id. (citing United States v. Perez, 22 U.S. 579 (1824) (failure of jury to agree held not to bar retrial)).

1923. 609 F.2d at 1317.

1924. See Illinois v. Somerville, 410 U.S. 458, 467 (1973) (Court has “eschewed” “rigid, mechanical” rules in review of mistrials); United States v. Perez, 22 U.S. 579, 580 (1824) (“[The courts] are to exercise a sound discretion on the subject of mistrials; and it is impossible to define all the circumstances, which would render it proper to interfere.”).

1925. 609 F.2d at 1317. The Ninth Circuit considers the following factors:

(1) The jury’s collective opinion that it cannot agree;

(2) The length of the trial and complexity of the issues;
most "crucial" of which is the jury's opinion that it cannot agree. In Rogers, the trial judge specifically requested that the jury determine whether they could reach a verdict or whether they were hopelessly deadlocked. The jury replied that it was in a "deadlock," and the judge asked the jury foreperson for verification. Since the jury had at that point been deliberating three and a half days, almost as long as the trial, the judge was under no further obligation to inquire as to the possibility of a verdict.

In United States v. Smith, the Ninth Circuit held that a trial judge's declaration of mistrial after one juror became unavailable was an abuse of discretion because the record gave no indication that the lower court "even considered the possibility of a continuance before ordering a mistrial." In Smith, the juror was irreplaceable because the court had neglected to select an alternate juror. The defense refused to proceed with an eleven person jury. While the general rule is that unavailability of an irreplaceable juror will meet the manifest necessity standard, the Ninth Circuit held that failure to consider alternatives was dispositive.

In Smith, the Ninth Circuit held, however, that implied consent on the part of the defense counsel to the trial court's abuse of discretion in declaring a mistrial removes any double jeopardy bar to retrial. The court of appeals found such implied consent in the totality of a series of actions taken by Smith's counsel:

(1) A request after the declaration of mistrial but before the jury was dismissed that the court explain the mistrial to the

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(3) The length of deliberation;
(4) Whether defendant makes a timely motion for a mistrial; and
(5) The effects of exhaustion or coercion on the jury.

Id. (citing Arnold v. McCarthy, 566 F.2d 1377, 1387 (9th Cir. 1978); United States v. See, 505 F.2d 845, 851-52 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975)). Arnold included one factor omitted by Rogers, namely, any proper communications which the judge has had with the jury.

1926. 609 F.2d at 1317.
1927. Id.
1928. 621 F.2d 350 (9th Cir. 1980).
1929. Id. at 351.
1930. Oelke v. United States, 389 F.2d 668, 671 (9th Cir. 1967) (dictum) (jeopardy did not attach upon empaneling a jury to try four defendants where one defendant pleaded guilty, another was granted a severance and was later tried before the originally empaneled jury, and the remaining two were tried by a new jury), cert. denied, 390 U.S. 1029 (1968).
1931. 621 F.2d at 351 (citations omitted).
1932. Id. at 351. In support of this holding, the Smith court relied on the following federal cases: United States v. Gordy, 526 F.2d 631, 635 n.1 (5th Cir. 1976); United States v. Goldstein, 479 F.2d 1061, 1067 (2d Cir.), cert. denied, 414 U.S. 873 (1973); Raslich v. Bannan, 273 F.2d 420 (6th Cir. 1959).
jury so that they would not blame defendant because "Mr. Smith may see these people in other trials";

(2) A request for an admonition that the jurors not discuss the case and his lack of comment when the court replied: "It's conceivable that some may be called back";

(3) An affirmative answer to the trial court's observation that defense counsel's schedule would allow him to conduct a retrial in a few weeks;

(4) Assent to the court's having voir dire and rulings on two evidentiary matters in order to save time on retrial; and

(5) Assent to bringing the eleven person jury into the courtroom and excusing them.

Such actions, said the Ninth Circuit, indicated an affirmative understanding that there "could and would be a retrial." 1933

In United States v. Calderon, the Ninth Circuit ruled that a retrial after a mistrial did not subject appellant to double jeopardy when the mistrial resulted from a prosecutorial error made in good faith. In Calderon, the defendant successfully moved for mistrial based on the prosecutor's error in referring to inadmissible evidence during the opening statement. Appellant's subsequent motion to dismiss the indictment was denied. 1935 On appeal, he asserted that the prosecutor knew or should have known of the inadmissibility of the evidence referred to and that therefore the double jeopardy clause barred reprosecution. 1936 However, because the district court in Calderon implicitly found that the prosecutor had a good faith belief that his evidence was admissible under the "complex" co-conspirator exception to the hearsay rule, defendant's motion to dismiss the indictment after the mistrial was properly denied. 1937

1933. 621 F.2d at 352.
1934. 618 F.2d 88 (9th Cir. 1980).
1935. Id. at 89; see Moroyoqui v. United States, 570 F.2d 862, 864 (9th Cir. 1977) ("A motion for a mistrial by the defendant normally serves to remove any barrier to reprosecution. Such is not the case, however, when the prosecutor has through bad faith or overreaching 'goaded' the defendant into requesting a mistrial.") (citing Lee v. United States, 432 U.S. 23 (1977); United States v. Dinitz, 424 U.S. 600, 611 (1976); United States v. Jorn, 400 U.S. 470, 485 (1971)); see also United States v. Sanders, 591 F.2d 1293, 1296 n.4 (9th Cir.) ("Reprosecution may be barred if the motion was induced by prosecutorial misconduct 'intentionally calculated to trigger the declaration of a mistrial.'") (quoting United States v. Nelson, 582 F.2d 1246, 1249 (10th Cir. 1978)), cert. denied, 439 U.S. 1079 (1979).
1936. 618 F.2d at 89.
1937. Id. at 90.
2. Sentence modifications

Once a legal sentence for an offense has been imposed, the double jeopardy clause precludes a sentence increase for the same offense.\footnote{1938} In \textit{United States v. Wickham},\footnote{1939} the Ninth Circuit held that following a probation revocation proceeding, a resentencing which modified the initial sentence only to the extent that it eliminated a provision for parole at any time was not a sentence increase and therefore did not violate the double jeopardy clause.\footnote{1940} Defendant had been sentenced initially to ten years imprisonment pursuant to 18 U.S.C. section 4208(a)(2),\footnote{1941} which made him “eligible for parole ‘at such time as the board of parole . . . may determine.’”\footnote{1942} Two months later, the court granted defendant’s rule 35 motion,\footnote{1943} suspended all but six months of his sentence, and placed him on probation for five years. The court, either by design or oversight, omitted the (a)(2) provision from the amended order.\footnote{1944} Defendant later violated his probation, and the sentencing court ordered revocation of probation and the execution of the prior suspended sentence. Defendant contended that his sentence had been increased, arguing that the parole commission was obligated under 18 U.S.C. section 4208(a)(2) to give him meaningful parole consideration prior to or at the completion of the first third of his sentence.\footnote{1945} Now he would have no such guarantee.

\footnote{1938} “For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? . . . [If, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value?]” United States v. Benz, 282 U.S. 304, 308 (1930) (quoting \textit{Ex parte Lange}, 85 U.S. (18 Wall.) 163, 173 (1874)). A modern expression of the rule is found in United States v. Turner, 518 F.2d 14, 15 (7th Cir. 1975) (“The law is well settled that increasing a sentence after the defendant has commenced to serve it is a violation of the constitutional guaranty against double jeopardy.”). In the Ninth Circuit, the rule is exemplified by United States v. Bowens, 514 F.2d 440, 441 (9th Cir. 1975) (per curiam) (resentencing defendant under a different portion of the Federal Youth Corrections Act so as to impose a fine violated double jeopardy clause); \textit{accord}, United States v. Bynoe, 562 F.2d 126, 129 (1st Cir. 1977) (formal rule against any increase in penalty after service of probation has commenced); United States v. Durbin, 542 F.2d 486, 489 (8th Cir. 1976) (district court extension of original, valid twelve year sentence to fifteen years violated double jeopardy clause).
The Ninth Circuit, however, declared that the sentence had not been increased because "designation of a sentence under the (a)(2) provision" no longer has "any real effect on a prisoner's ultimate release date." New guidelines established by the parole commission in 1973 and the Parole Commission and Reorganization Act of 1976 emphasize gravity of the offense rather than institutional adjustment. Since the guidelines presume good institutional progress in any case, the Ninth Circuit noted that institutional adjustment and program progress become factors in determining the ultimate release date only when they reflect poorly on the prisoner. Thus, a prisoner would be considered for parole under information "little if any" different than that considered by the sentencing judge.

3. Sentencing enhancement

The double jeopardy clause forbids the imposition of more than one punishment for the same offense. A corollary provides that the Government may not prove violations of two separate criminal statutes with precisely the same factual showing. This corollary, while al-

1946. Id. at 1312.
1947. Both the new guidelines, codified in 28 C.F.R. § 2.20 (1978), and The Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, 90 Stat. 222, which re-enacted 18 U.S.C. § 4208(a)(2) as 18 U.S.C. § 4205(b)(2) (1976), had the effect of eliminating the distinction between (a)(2) prisoners and others. Among other factors, the guidelines emphasize the severity of offense, which could contribute to extending a prisoner's parole consideration beyond the one-third point. See O'Brien v. Putnam, 591 F.2d 53, 56 (9th Cir. 1979) (parole commission did not abuse its discretion in postponing hearing until one-third of prison term was served because of severity of offense of cocaine importation). Similarly, the recodification of 18 U.S.C. § 4208(a)(2) into 18 U.S.C. § 4205(b)(2) altered the previous statutory scheme such that (b)(2) prisoners and those with statutory minimum periods of incarceration now receive the same parole consideration. Petrone v. Kaslow, 603 F.2d 779, 780 (9th Cir. 1979) (per curiam); see also United States v. Addonizio, 442 U.S. 178, 184-90 (1979) (since release date has been committed by Congress to the Parole Commission, judges have no enforceable expectations as to a prisoner's actual release short of the statutory term).

1948. The new guidelines, which use "salient factors" relating to personal rehabilitative potential and severity of the offense, "can be used to predict when 86 percent to 94 percent of all prisoners will in fact be released." 618 F.2d at 1311.

1949. 618 F.2d at 1311-12 n.8 (citations omitted).
1950. Id. at 1312-13.
1951. Brown v. Ohio, 432 U.S. 161, 165 (1977) (auto theft and joyriding were the same offense).
1952. "Cases in which the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing ... raise the prospect of double jeopardy and the possible need to evaluate the statutes in light of the Blockburger test." Simpson v. United States, 435 U.S. 6, 11 (1978) (Congress did not intend a general firearm enhancement statute to apply in a context covered by a specific firearm enhancement statute, rendering double jeopardy argument irrelevant). The Blockburger test provides that "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be
lowing an exception for conspiracy and the underlying substantive offense,\footnote{1953} nevertheless has prompted challenges to a number of firearm enhancement statutes. Such statutes typically require an increase in a prisoner’s sentence if a firearm is used to commit certain felonies.\footnote{1954} Double jeopardy challenges to these statutes are, however, being rejected.

For example, in \textit{May v. Sumner},\footnote{1955} the appellant claimed that since he was “first convicted of robbery with a dangerous or deadly weapon and then received an additional sentence for using a firearm,”\footnote{1956} he was punished twice for the same offense. The Ninth Circuit rejected the argument by simply noting that the firearm

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\footnote{1953} The Sixth Circuit in \textit{United States v. Austin}, 529 F.2d 559, 562 (6th Cir. 1976), discussed the “same evidence” test, noting that “[a]s the Supreme Court has held, whenever it appears that the proof of one offense proves every essential element of another growing out of the same act, the Fifth Amendment limits the punishment to a single act.” (citing Gavieres v. United States, 220 U.S. 338, 343 (1911)). In \textit{United States v. Kearney}, 560 F.2d 1358 (9th Cir.), \textit{cert. denied}, 434 U.S. 971 (1977), appellants argued that the “same evidence” test precluded consecutive sentences for conspiracy and the substantive offense. The \textit{Kearney} court rejected the “same evidence” test, stating that the proper test was whether the same evidence is “required to prove” both the conspiracy and substantive counts. 560 F.2d at 1366 (quoting \textit{United States v. Boyle}, 482 F.2d 755, 766 (D.C. Cir.) (emphasis in \textit{Boyle}), \textit{cert. denied}, 414 U.S. 1076 (1973)). \textit{Kearney} relied on \textit{United States v. Ohlson}, 522 F.2d 1347, 1348-50 (9th Cir. 1977), which limited the merger of conspiracy and substantive charges to Wharton Rule situations, i.e., when the “essential participants are the only conspirators.” 560 F.2d at 1366-67 (emphasis in original). Recently, \textit{United States v. Wylie}, 625 F.2d 1371, 1381 n.14 (9th Cir. 1980), reiterated the \textit{Kearney} rule. Both \textit{Wylie} and \textit{Kearney} involved conspiracy to manufacture and distribute, and the subsequent distribution of, illegal drugs.

\footnote{1954} \textit{E.g.}, former \textsc{Cal. Penal Code} § 12022.5, which provided:

\begin{quote}
Any person who uses a firearm in the commission or attempted commission of a robbery, assault with a deadly weapon, murder, assault with intent to commit murder, rape, burglary, or kidnapping, upon conviction of such crime, shall, in addition to the punishment prescribed for the crime of which he has been convicted, be punished by imprisonment in the state prison for a period of not less than five years. Such additional period of imprisonment shall commence upon expiration or other termination of the sentence imposed for the crime of which he is convicted and shall not run concurrently with such sentence.
\end{quote}

This section has been recently amended to provide for an additional two year sentence when a person uses a firearm in the commission of a felony, “unless use of a firearm is an element of the offense of which he was convicted.” \textit{See} \textsc{Cal. Penal Code} § 12022.5 (Deering 1980).

\footnote{1955} 622 F.2d 997 (9th Cir. 1980).

\footnote{1956} \textit{Id.} at 998.
The enhancement statute in question had been interpreted by the state supreme court as not creating a separate offense.\textsuperscript{1957} The state legislature had established only one sentence for a given crime, albeit by means of two statutes.\textsuperscript{1958} Accordingly, the double jeopardy clause was not violated. The Ninth Circuit thus joined the Tenth in firmly rejecting double jeopardy challenges to firearm enhancement statutes.\textsuperscript{1959}

4. Appeals after acquittals

The Criminal Appeals Act allows the prosecution to appeal the dismissal of an indictment or information unless such appeal violates double jeopardy.\textsuperscript{1960} Acquittals, on the other hand, may not be appealed because such appeals are violative of double jeopardy.\textsuperscript{1961} However, because a "'trial judge's characterization of his own action cannot control the classification of the action,'"\textsuperscript{1962} the prosecution

\begin{itemize}
\item \textsuperscript{1957} Id. at 999 (citing \textit{In re} Culbreth, 17 Cal. 3d 330, 333, 551 P.2d 23, 25, 130 Cal. Rptr. 719, 721 (1976) ("[S]ection 12022.5 does not prescribe a new offense but merely additional punishment for an offense in which a firearm is used.").) In \textit{May}, appellant was appealing a denial of his habeas corpus petition, hence his challenge was to a state statute. 622 F.2d at 998.
\item \textsuperscript{1959} 18 U.S.C. § 3731 (1980) provides in part:
\begin{quote}
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.
\end{quote}
\item \textsuperscript{1960} United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (quoting United States v. Bell, 163 U.S. 662, 671 (1896)).
\item \textsuperscript{1961} United States v. Scott, 437 U.S. 82, 96 (1978) (dismissal of one count of an indictment on the basis of preindictment delay was not an "acquittal" because the dismissal did not resolve any factual elements in offense charged) (quoting United States v. Jorn, 400 U.S. 470, 478 n.7 (1971) (opinion of Harlan, J.) (plurality opinion)).
\end{itemize}
may still have an opportunity to appeal an "acquittal" if it can demon-
strate that the trial judge erroneously entered a judgment of acquittal
which was, in substance, a dismissal.\textsuperscript{1963}

In \textit{United States v. Gonzales},\textsuperscript{1964} the district court entered a judg-
ment of acquittal in a prosecution for conspiracy to transport, and for
actual transportation and harboring of, illegal aliens.\textsuperscript{1965} On the fourth
day of trial, after a jury had been empaneled, the prosecution admitted
that two potential witnesses had not been made available to the de-
fense,\textsuperscript{1966} but had been released by the Immigration and Naturalization
Service. The trial was suspended. A subsequent hearing was held at
which the prosecutor produced one of the two witnesses. At the hear-
ing, the defense successfully moved to dismiss the indictment, and
upon suggestion of the trial court, moved for judgment of acquittal.\textsuperscript{1967}
The judge granted the motion and denied the prosecutor's subsequent
motion to vacate.\textsuperscript{1968}

According to the Ninth Circuit, the "acquittal" was "clearly"
based on constitutional grounds arising from the unavailability of po-
tential material witnesses, and was, therefore, in substance an "order of
dismissal."\textsuperscript{1969} Of course, had the acquittal resulted from insufficient
evidence, appeal probably could not have been taken.\textsuperscript{1970} But, in order
to so acquit, the trial court would have needed to determine that there
was insufficient evidence for conviction "after the evidence on either
side [was] closed."\textsuperscript{1971} Because the district court made its determi-

\textsuperscript{1963.} \textit{See, e.g.,} Sanabria \textit{v. United States,} 437 U.S. 54, 77-78 (1978) ("acquittal" based on
erroneous evidentiary ruling was final and unreviewable based on the double jeopardy
clause); \textit{Fong Foo v. United States,} 369 U.S. 141 (1962) (per curiam) (acquittal based on
improper conduct of prosecutor and lack of credibility of government witnesses, though an
erroneous foundation, could not be reviewed without violating double jeopardy because the
trial did not terminate prior to the entry of judgment).
\textsuperscript{1964.} 617 F.2d 1358 (9th Cir. 1980).
\textsuperscript{1965.} \textit{Id.} at 1360-61.
\textsuperscript{1966.} \textit{Id.} at 1360; \textit{see United States v. Mendez-Rodriquez,} 450 F.2d 1 (9th Cir. 1971) (de-
portation of witnesses, who were illegal aliens, before affording defendant right to interview
and, if need be, subpoena them, violated defendant's right to compulsory process and right
to due process); \textit{United States v. Tsutagawa,} 500 F.2d 420 (9th Cir. 1974) (purpose of \textit{Men-
dez-Rodriquez} decision was to prevent government from being able to pick and choose
witnesses).
\textsuperscript{1967.} 617 F.2d at 1360-61.
\textsuperscript{1968.} \textit{Id.} at 1361.
\textsuperscript{1969.} \textit{Id.} at 1362.
\textsuperscript{1970.} \textit{United States v. Martin Linen Supply Co.,} 430 U.S. 564, 572 (1977) (acquittal based
on insufficient evidence).
\textsuperscript{1971.} 617 F.2d at 1362. \textit{Fed. R. Crim. P.} 29 provides in pertinent part:
The court on motion of a defendant or of its own motion shall order the entry of
judgment of acquittal of one or more offenses charged in the indictment or infor-
tion mid-trial, the acquittal was not based on insufficient evidence.\textsuperscript{1972}

5. Juvenile hearings

In \textit{Breed v. Jones},\textsuperscript{1973} the Supreme Court held that California's statutory scheme\textsuperscript{1974} providing for dispositional hearings to determine whether a minor should be tried as a juvenile or an adult involved an adjudication of the underlying offense.\textsuperscript{1975} Consequently, any subsequent prosecution of the same offense would be barred by the double jeopardy clause.\textsuperscript{1976} In \textit{Rios v. Chavez},\textsuperscript{1977} the Ninth Circuit applied \textit{Breed} retroactively.

Five years before \textit{Breed}, the presiding judge of a dispositional hearing directed that the appellant-minor in \textit{Rios} be tried as an adult. Appellant was convicted of the underlying offense and filed for habeas corpus relief after \textit{Breed} was announced.\textsuperscript{1978} The Ninth Circuit reversed appellant's conviction after concluding that the Supreme Court favors retroactive application of the law in double jeopardy contexts.\textsuperscript{1979}

The Ninth Circuit based its conclusion on \textit{Robinson v. Neil}.\textsuperscript{1980} A policy in favor of the liberal application of retroactivity in double jeopardy contexts was the "clear implication" of \textit{Robinson}'s distinction between "procedures which assure fairness at trial and the ban on double jeopardy which prevents a trial from occurring in the first place."\textsuperscript{1981} Moreover, since the original juvenile hearing in \textit{Rios} took place after the Supreme Court had afforded due process guarantees to juveniles in \textit{In re Gault},\textsuperscript{1982} and after the double jeopardy clause had been made

\begin{itemize}
\item \textsuperscript{1972} 617 F.2d at 1362.
\item \textsuperscript{1973} 421 U.S. 519 (1975) (initial dispositional hearing under \textsc{Cal. Welf. & Inst. Code} § 602 (West Supp. 1980) involved adjudication of underlying offense and thus jeopardy attached). The key language in § 602 refers to any person under the age of 18 who violates any law of this state or of the United States.
\item \textsuperscript{1974} \textsc{Cal. Welf. & Inst. Code} §§ 701, 702, 707 (West Supp. 1980) provide for the administrative hearings at which it is determined whether a minor is a "person described in Section 602." The offending hearing in \textit{Breed} was held pursuant to § 701. 421 U.S. at 521.\textsuperscript{1975} 421 U.S. at 531.
\item \textsuperscript{1976} \textit{Id.} at 532-33.
\item \textsuperscript{1977} 620 F.2d 702 (9th Cir. 1980).
\item \textsuperscript{1978} \textit{Id.} at 705.
\item \textsuperscript{1979} \textit{Id.}
\item \textsuperscript{1980} 409 U.S. 505 (1973).
\item \textsuperscript{1981} 620 F.2d at 706 (citing \textit{Robinson}, 409 U.S. at 509).
\item \textsuperscript{1982} 387 U.S. 1, 12-13 (1967).
\end{itemize}
applicable to the states in *Benton v. Maryland*, the state should have been on notice that *Breed* would be applied retroactively.

*Rios* is significant because the option of not applying *Breed* retroactively was open. The *Robinson* "implication" for more liberality in double jeopardy contexts was only that—an implication. The First Circuit, for example, has refused to apply *Breed* retroactively.

The question remains after *Rios* whether a hearing on the amenability of a minor to treatment under the juvenile justice system would escape the *Breed* prohibition if considerable weight were given to the offense charged. In all probability it would because the *Rios* court emphasized the risk of adjudication of guilt under the applicable statute. However, the *Rios* court also declared that "the attachment of jeopardy under *Breed* must turn on its own facts," and relied on the fact that the overwhelming majority of pages in the transcript of the original hearing, 140 out of 194, dealt with evidence of the alleged offense, in which the details of the crime were graphically expressed.

**B. Foreign Convictions**

The Treaty on the Execution of Penal Sentences between the United States and Mexico provides that Americans convicted of crimes in Mexico may serve their sentences in the United States, and vice versa. The American implementing legislation to the Treaty

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1984. 620 F.2d at 706.
1985. *Id.*
1986. *Jackson v. Justices of the Superior Court*, 549 F.2d 215 (1st Cir.), cert. denied, 430 U.S. 975 (1977). The court in *Jackson* distinguished *Robinson* by seizing on language in the latter case which "eschewed 'an ironclad . . . classification for retroactivity analysis.'" *Id.* at 217 (quoting *Robinson*, 409 U.S. at 509). Since the *Robinson* court did not absolutely mandate retroactivity, and since the "ends of public justice" would have been frustrated in the cases before *Jackson*, had retroactivity been applied (i.e., petitioners would escape all punishment), the court declined to apply *Breed* retroactively. 549 F.2d at 219. However, such a result seems to run contrary to language in *Breed*: "For, even accepting petitioner's premise that respondent 'never faced the risk of more than one punishment,' we have pointed out that 'the Double Jeopardy Clause . . . is written in terms of potential or risk of trial and conviction, not punishment.'" 421 U.S. at 532 (quoting *Price v. Georgia*, 398 U.S. 323, 329 (1970)) (emphasis in *Breed*).
1987. 620 F.2d at 708 ("Section 602 clearly opened up the possibility that Rios' guilt as a juvenile would be adjudicated at that hearing") (emphasis in original).
1988. *Id.*
1989. *Id.*
provides for a transfer hearing to be held in the transferring country. One of the conditions of the transfer is that the offender must agree not to assert any constitutional rights he might have regarding the foreign conviction.\(^{1992}\)

In *Pfeffer v. United States*,\(^{1993}\) appellant challenged the denial of his petition for habeas corpus which he filed after his transfer from a Mexican prison to one in the United States.\(^{1994}\) Appellant had been serving a twelve year sentence for a drug conviction handed down by a Mexican court.\(^{1995}\) At a hearing in Tijuana, Mexico, appellant consented to the transfer to the United States.\(^{1996}\) After transfer, he filed a petition for habeas corpus, arguing that the requirement that he forego any challenge to the constitutionality of his foreign conviction was itself unconstitutional.\(^{1997}\) Alternatively, he argued that he did not give free and voluntary consent to be transferred.\(^{1998}\)

The Ninth Circuit rejected the first contention by holding that the

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\(^{1992}\) Article VI of the Treaty on the Execution of Penal Sentences, 28 U.S.T. at 7406, provides:

> The Transferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts. The Receiving State shall, upon being advised by the Transferring State of action affecting the sentence, take the appropriate action in accordance with such advice.

Similarly, 18 U.S.C. § 4108 provides in part:

(a) Prior to the transfer of an offender to the United States, the fact that the offender consents to such transfer and that such consent is voluntary and with full knowledge of the consequences thereof shall be verified in the country in which the sentence was imposed by a United States magistrate, or by a citizen . . . of the United States as defined in section 451 of title 28, United States Code. . . .

(b) The verifying officer shall inquire of the offender whether he understands and agrees that the transfer will be subject to the following conditions: (1) only the country in which he was convicted and sentenced can modify or set aside the conviction or . . . sentence, and any proceedings seeking such action may only be brought in that country . . . .

Additionally, 18 U.S.C. § 3244 provides in part:

> When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted offenders—

> (1) the country in which the offender was convicted shall have exclusive jurisdiction and competence over proceedings seeking to challenge, modify, or set aside convictions or sentences handed down by a court of such country . . . .

1993. 615 F.2d 873 (9th Cir. 1980).
1994. *Id.* at 875.
1995. *Id.*
1996. *Id.*
1997. *Id.*
1998. *Id.* at 876. The court did not explain why, if appellant's consent to be transferred from a Mexican to an American prison was not free and voluntary, appellant should not be simply transferred back to Mexico.
waiver of defendant’s constitutional rights, required by the statute, met the constitutional tests for a valid waiver.\textsuperscript{1999} The \textit{Pfeifer} court arrived at this conclusion by declaring that a waiver would be valid if it met a specific set of requirements: (1) voluntarily and knowingly made,\textsuperscript{2000} (2) accused must have access to counsel,\textsuperscript{2001} (3) a court must determine the validity of the waiver,\textsuperscript{2002} and (4) an affirmative showing that the waiver was intelligent and voluntary must appear in the record.\textsuperscript{2003} The Ninth Circuit found each of these requirements provided for in the implementing legislation.\textsuperscript{2004}

The \textit{Pfeifer} court buttressed its conclusion on the constitutional validity of the waiver requirement with a second argument. The circuit indicated that only the relinquishment of “vested” rights as a condition of receiving a benefit is an “unconstitutional condition.”\textsuperscript{2005} Since Americans held in Mexican prisons “have no right to relief from United States courts”\textsuperscript{2006} no vested rights are at stake and the waiver requirement is constitutional.\textsuperscript{2007}

\textsuperscript{1999} Id.
\textsuperscript{2000} Id. (citing McCarthy v. United States, 394 U.S. 459, 466 (1969) (waiver of rights via guilty plea: “[I]f a defendant’s guilty plea is not . . . voluntary and knowing, it has been obtained in violation of due process and is therefore void.”) (footnote omitted)).
\textsuperscript{2001} 615 F.2d at 876 (citing Tollett v. Henderson, 411 U.S. 258, 266-68 (1973) (when a defendant pleads guilty he can later attack the voluntary and intelligent character of that waiver by showing that the advice he received from counsel did not meet the standards for competency in criminal cases)).
\textsuperscript{2002} 615 F.2d at 876 (citing Boykin v. Alabama, 395 U.S. 238, 243-44 (1969) (court must exercise “utmost solicitude” to “make sure [defendant] has a full understanding of what the plea connotes and of its consequence”)).
\textsuperscript{2003} 615 F.2d at 876 (citing Boykin, 395 U.S. at 242) (“In \textit{Carnley v. Cochran}, 369 U.S. 506, 516 . . . [w]e held: Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused . . . intelligently and understandingly rejected the offer [of counsel]. Anything less is not waiver.”).
\textsuperscript{2004} 615 F.2d at 876. The Court concluded that the provisions of 18 U.S.C. § 4108 meet the requirements for voluntariness, access to counsel, determination of validity of waiver by a court, and a record of the proceeding. 615 F.2d at 876. The court also cited 18 U.S.C. § 4109 as providing for the appointment of counsel for the financially unable offender. 615 F.2d at 876.
\textsuperscript{2005} Id.
\textsuperscript{2006} Id. (citing Note, \textit{Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty}, 90 HARV. L. REV. 1500, 1524-25 (1977)).
\textsuperscript{2007} 615 F.2d at 876. The court cited three cases to imply that rights must be vested before their waiver, in exchange for a benefit, is constitutionally protected: United States v. Jackson, 390 U.S. 570 (1968) (statutory imposition of penalty for exercise of right to jury trial); Sherbert v. Verner, 374 U.S. 398 (1963) (Saturday work as condition of unemployment benefits interfered with free exercise of religion by Seventh-Day Adventist); Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967) (postponement of parole consideration for prisoners whose petitions for habeas corpus were denied). None of these cases distinguished between “vested” and “non-vested” rights; they simply held that the government could not condition
The court dismissed appellant's second contention, that his consent to transfer was not knowingly and intelligently given, with a simple reference to the record of the district court, which showed otherwise.\cite{2008}

_Pfeifer_ also signifies a Ninth Circuit rejection of the idea that the joint venture doctrine is applicable to the Treaty. The joint venture doctrine suppresses evidence obtained through the activities of foreign officials which violate the accused's fifth amendment rights in which United States officials substantially participated.\cite{2009} The participation in the criminal process implied by the Treaty, i.e., allowing a Mexican sentence to be carried out in the United States and "encouraging" Mexico to arrest American citizens who violate Mexican law, however, is insufficient to invoke the joint venture doctrine.\cite{2010}

C. Appellate Review

1. Orders reducing sentences

The Ninth Circuit concluded in _United States v. Hetrick_\cite{2011} that 28 U.S.C. section 1291, which allows the government to appeal any "final decision" of a district court,\cite{2012} allows appeals from sentence reduction orders. The question of the scope of section 1291 had arisen because 18 U.S.C. section 3731 enumerates a number of specific instances allowing government appeals in criminal cases, but sentence reduction orders are not included.\cite{2013} The _Hetrick_ court reasoned that, since the receipt of benefits on the relinquishment of rights found specifically in the Constitution. Although these cases undoubtedly involved "vested" rights, they are not direct authority for the proposition that a right must be vested before its waiver is constitutionally protected. The _Pfeifer_ court evidently acquired the "vested" distinction from Note, _Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty_, 90 HARV. L. REV. 1500, 1525 (1977).\cite{2008} 615 F.2d at 877.

\cite{2009} See _United States v. Emery_, 591 F.2d 1266 (9th Cir. 1978) (joint venture existed where American officials alerted Mexican police, coordinated surveillance at airport, supplied pilot for plane and gave signal to arrest); _Stonehill v. United States_, 405 F.2d 738 (9th Cir. 1968) (no joint venture because raids were planned by Philippine officers beforehand and American agents objected before raids to violation of search and seizure principles), _cert. denied_, 395 U.S. 960 (1969); _Brulay v. United States_, 383 F.2d 345 (9th Cir.) (no joint venture because American officials did not instigate search of automobile), _cert. denied_, 389 U.S. 986 (1967).

\cite{2010} 615 F.2d at 877 (citations omitted).

\cite{2011} 627 F.2d 1007, 1008 (9th Cir. 1980).

\cite{2012} 28 U.S.C. § 1291 (1976) provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

\cite{2013} 18 U.S.C. § 3731 (1976) provides in pertinent 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
Supreme Court has held that the specific instances enumerated in section 3731 do not confine the government's right of appeal in a criminal case, section 3731 does not limit the ambit of section 1291 with regard to sentence reduction orders.\(^1\) In so concluding, the Hetrick court observed that previous Ninth Circuit cases\(^2\) had been superseded by later Supreme Court decisions and precluded mandamus as an avenue for review of sentence reductions.\(^3\) Mandamus is precluded since it is only available where there are no other means of review.\(^4\)

2. Finality

Normally, a "final" decision by the district court is required before the federal court of appeals has jurisdiction over an appeal from the district court.\(^5\) However, one important exception is that pretrial orders rejecting claims of double jeopardy are immediately appealable.\(^6\) The theory of this exception is that the very nature of a double jeopardy claim requires access to immediate appeal, lest the exposure to double jeopardy become a fait accompli.\(^7\)

In United States v. Carnes,\(^8\) however, appellant could not come...
within this double jeopardy exception to the finality rule. In a prosecution for intentionally transporting illegal aliens,\textsuperscript{2022} appellant moved for acquittal on the ground of insufficient evidence. The motion was denied and the jury failed to reach a verdict. The district court granted an extension and appellant again moved for acquittal on the basis of insufficient evidence or, alternatively, for a dismissal of the indictment. The district court again denied appellant's motion. On appeal, the Ninth Circuit refused to consider the merits of the insufficiency argument because of the finality rule.\textsuperscript{2023} The court reasoned that denial of a motion for acquittal is not "final," even after a hung jury mistrial,\textsuperscript{2024} and that denial of a motion for dismissal is not final unless made on "colorable grounds of double jeopardy."\textsuperscript{2025} Such grounds were unavailable to appellant, even if she were to be subjected to another trial, because a retrial after a mistrial resulting from jury deadlock does not violate the double jeopardy clause unless the trial court abuses its discretion in declaring the mistrial,\textsuperscript{2026} and appellant had made no contention of any such abuse.\textsuperscript{2027}

\textsuperscript{2023} 618 F.2d at 69.
\textsuperscript{2024} Id. at 70.
\textsuperscript{2025} Id.
\textsuperscript{2026} United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (double jeopardy not violated where "manifest necessity" or "ends of justice" justify discharge of jury unable to reach verdict). The Supreme Court has expressly refused to make the standard for abuse of discretion more precise. Illinois v. Somerville, 410 U.S. 458, 462 (1973). The Ninth Circuit, however, in Arnold v. McCarthy, 566 F.2d 1377, 1386-87 (9th Cir. 1978), enumerated seven factors to test for abuse of discretion in declaring a mistrial after jury deadlock: (1) timely objection by defendant, (2) the jury's collective opinion that it cannot agree, (3) the length of deliberation by the jury, (4) the length of the trial, (5) the complexity of issues presented to the jury, (6) any proper communication between judge and jury, and (7) the effects of possible exhaustion and coercion of further deliberation on the verdict. Of these, the most critical is the jury's own statement that it cannot reach a verdict. Id. at 1386-87.

In actual litigation, a judge may properly declare a mistrial even though the period of jury deliberation was quite short. See United States v. Lorenzo, 570 F.2d 294, 299 (9th Cir. 1978) (three hours of deliberation where court questioned each member of the jury and determined that it was their belief that their differences were irreconcilable); United States v. Brah, 459 F.2d 546 (3d Cir.) (five hours of deliberation), cert. denied, 409 U.S. 873 (1972); United States v. Cording, 290 F.2d 392 (2d Cir. 1961) (four hours of deliberation). But see United States ex rel. Webb v. Court of Common Pleas, 516 F.2d 1034 (3d Cir. 1975) (declaration of mistrial after six and one-half hours of deliberation held abuse of discretion, where judge interrogated and received only foreman's opinion as to the hopelessness of the deadlock following six day trial).

\textsuperscript{2027} 618 F.2d at 70.
D. Sentencing

1. Judge's information in determining sentence

   a. refusal to cooperate

   Although the dominance of the therapeutic model of imprisonment has declined in recent years, sentencing philosophy in the federal court system still retains a strong emphasis on rehabilitation. Accordingly, district courts may take into account a wide variety of information regarding the defendant's background and character when fixing a sentence. Cooperation with law enforcement authorities in reporting felonies, i.e., in informing on compatriots, is a factor bearing on a defendant's character, because such conduct has been held to be evidence of good citizenship. However, such informing is taboo among criminals and prison inmates and therefore exposes the inform-
The issue thus raised is whether a trial court judge should properly consider for sentencing purposes a refusal to inform when such refusal is motivated by fears of physical retaliation.

The Supreme Court managed to sidestep this issue in Roberts v. United States, because defendant did not timely raise it at trial. In Roberts, defendant was a heroin dealer who rebuffed repeated requests to name his suppliers. He eventually pleaded guilty to two counts of using a telephone to facilitate the distribution of heroin. At the sentencing hearing, the district court adversely considered his failure to cooperate, sentencing him to consecutive one to four year terms on each count plus a special three year parole term. Alternatively, the court could have given him concurrent sentences, which, given his incarceration for the previous two years pending appeal, would have resulted in his immediate release. The district court justified imposition of the longer sentence on the defendant's failure to cooperate.

The Supreme Court, however, avoided the issue of whether fear of retaliation could negate the adverse effects of failure to inform. Because defendant did not voice his reasons for refusing to cooperate until his appeal was heard, the Court held it made no difference that such

omitted) (reporter had no first amendment right to withhold information about a crime by not responding to a grand jury subpoena and answering relevant questions).

However, Justice Marshall, in his dissent in Roberts v. United States, 445 U.S. 552 (1980), issued this refutation of the proposition that being an informant is evidence of good citizenship:

Our admiration of those who inform on others has never been as unambiguous as the majority suggests. The countervailing social values of loyalty and personal privacy have prevented us from imposing on the citizenry at large a duty to join in the business of crime detection. If the Court's view of social mores were accurate, it would be hard to understand how terms such as "stool pigeon," "snitch," "squealer," and "tattletale" have come to be the common description of those who engage in such behavior.

Id. at 569-70 (Marshall, J., dissenting). Justice Marshall also pointed out that the common law duty to inform was "developed in an era in which enforcement of the criminal law was entrusted to the general citizenry rather than to an organized police force." Id. at 569 (citing F. Pollock & F. Maitland, The History of English Law 582-83 (2d ed. 1903)).

2031. "The prison world is unique. . . . A 'code of silence' strengthened by taboos against 'ratting' and a pervasive fear of retaliation are characteristics of the prison social order." Mata v. Sumner, 611 F.2d 754, 760 (9th Cir. 1980) (Sneed, J., dissenting), vacated on other grounds, 101 S. Ct. 764 (1981).


2034. Defendant had already pled guilty to one count and had been sentenced. However, his conviction was vacated because the terms of the plea agreement were inadequately disclosed to the district court. 445 U.S. at 554.

2035. Id. at 555-56 n.3.
Trial judges may consider a wide range of information in selecting a sentence. This discretion, however, is not unlimited. Judges may consider neither unconstitutional prior convictions, at least where such convictions were the result of lack of effective counsel, nor false or

b. prior convictions

A court may even consider hearsay, United States v. Wondrack, 578 F.2d 808, 809 (9th Cir. 1978), though unwarranted weight may not be given to it. Gelfuso v. Bell, 590 F.2d 354, 356 (9th Cir. 1978); see also 18 U.S.C. § 3557 (1976) which provides that: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”

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reasons “would have merited serious consideration” at the sentencing hearing. Defendant could not voice them on appeal. The Court reasoned that since the fifth amendment must be invoked in a timely fashion, the sentencing court was justified in considering defendant’s silence on the issue of his failure to cooperate as indicative of his character. Because the Court framed the issue in terms of the inferences which could be drawn from the defendant’s exercise of his right to silence, the Court was able to confine its analysis to the need to make a timely assertion of the fifth amendment privilege.

2036. Id. at 559.

2037. “The privilege [against self-incrimination] may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the Tribunal which must pass on it.” Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 113 (1927) (alien silent on authorship of subversive pamphlet in deportation proceeding); see Garner v. United States, 424 U.S. 648 (1976) (taxpayer had right to claim fifth amendment privilege on tax return but waived the right by making certain disclosures); United States v. Kordel, 397 U.S. 1 (1970) (corporate officers, by not asserting in their answers to government interrogatories that there was no authorized person who could answer the interrogatories without the possibility of self-incrimination, waived their fifth amendment privilege).

2038. 445 U.S. at 559.

2039. In his dissent, Justice Marshall characterized the Court’s approach to waiver as “harsh and rigid,” 445 U.S. at 566, and argued that courts have a duty to inquire about that silence before drawing a negative inference from it. Id. at 567.

2040. United States v. Tucker, 404 U.S. 443, 446 (1972) (“[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider [or its source].”); Williams v. New York, 337 U.S. 241, 247 (1949) (“Highly relevant—if not essential—to . . . the judge’s selection of an appropriate sentence is the possession of the fullest information possible concerning defendant’s life and characteristics.”).

A court may even consider hearsay, United States v. Wondrack, 578 F.2d 808, 809 (9th Cir. 1978), though unwarranted weight may not be given to it. Gelfuso v. Bell, 590 F.2d 354, 356 (9th Cir. 1978); see also 18 U.S.C. § 3557 (1976) which provides that: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”

2041. United States v. Tucker, 404 U.S. 443, 448 (1972); cf. Portillo v. United States, 588 F.2d 714, 717 (9th Cir. 1978) (en banc) (no Tucker relief based on trial court’s consideration of conviction resulting from fourth amendment violation because sentence would have been the same even if sentencing judge had known of prior conviction’s invalidity); Farrow v. United States, 580 F.2d 1339, 1345 (9th Cir. 1978) (en banc) (prior conviction based on sixth amendment violation required for Tucker relief); Tisnado v. United States, 547 F.2d 452,
unreliable information in the presentence report.\textsuperscript{2042}

In \textit{Brown v. United States},\textsuperscript{2043} the Ninth Circuit considered assertions that because the trial judge had relied on both unconstitutional prior state convictions and false information in fixing sentence, resentencing was in order.\textsuperscript{2044} The district court had stated that it could not categorically deny that it had considered one of the challenged convictions when it sentenced defendant.\textsuperscript{2045} However, the district court had declined to resentence defendant, ruling that he must first attack the constitutionality of his conviction in the state courts.\textsuperscript{2046} On appeal, the Ninth Circuit remanded the case to the district court with instructions that it was to reconsider the sentence as if there had been no state conviction.\textsuperscript{2047} If the sentence were to remain unchanged, then no resentencing would be required.\textsuperscript{2048} On the other hand, if the sentence would be lighter, the lower court was directed to hear the defendant's

\textsuperscript{458} (9th Cir. 1976) (dictum) \textit{(Tucker} relief not available for prior conviction based on fourth amendment violation).

However, there is language in one pre-\textit{Tisonado} Ninth Circuit opinion extending \textit{Tucker} relief to all constitutionally invalid prior convictions. Wheeler v. United States, 468 F.2d 244, 245 (9th Cir. 1972) ("[A]ny reliance upon an invalid prior conviction to enhance a criminal sentence is constitutionally impermissible . . . .''); \textit{see also} Wilson v. United States, 534 F.2d 130, 134 (9th Cir. 1976) (Hufstedler, J., dissenting) ("A \textit{Tucker} violation occurs when a defendant has sustained constitutionally invalid prior convictions, and a sentencing judge took them into consideration in sentencing with adverse effect upon the defendant.").

\textsuperscript{2042} Townsend v. Burke, 334 U.S. 736, 740-41 (1948) (trial judge erred in passing sentence in reliance on eight prior convictions without giving uncounseled defendant opportunity to object that in two of the cases he had been found not guilty, and in a third the charge had been dismissed); \textit{see also} Farrow v. United States, 580 F.2d 1339, 1359 (9th Cir. 1978) (en banc) (sentencing judge presented with conflicting factual accounts need not accept defendant's account); United States v. Weston, 448 F.2d 626, 629-31 (9th Cir. 1971) (sentence based on unverified, unreliable charges of serious criminal conduct vacated), \textit{cert. denied}, 404 U.S. 1061 (1972).

\textsuperscript{2043} 610 F.2d 672 (9th Cir. 1980).

\textsuperscript{2044} Appellant filed a 28 U.S.C. \textsection 2255 petition in 1976, six years after his conviction for interstate transportation of forged securities, alleging that the sentencing court had been influenced by prior convictions in California, Michigan and Iowa. 610 F.2d at 674. He contended that two of the convictions were invalid because of denial of counsel, and that the third conviction was invalid for lack of effective counsel in that his attorney "improperly disregarded the coercive circumstances" under which his confession was obtained. \textit{Id. Section} 2255 provides that a federal prisoner may, at any time, move the court to vacate his sentence if it "was imposed in violation of the Constitution." 28 U.S.C. \textsection 2255 (1976).

\textsuperscript{2045} 610 F.2d at 674.

\textsuperscript{2046} \textit{Id.}

\textsuperscript{2047} \textit{Id.}

\textsuperscript{2048} \textit{Id.} "[W]here the judge determines . . . that a new sentence formulated without reliance on the challenged priors would nonetheless be the same, a hearing into the validity of the priors is . . . not required." Farrow v. United States, 580 F.2d 1339, 1353 (9th Cir. 1978) (en banc).
claim that the conviction was unconstitutional. The Ninth Circuit did not address the possibilities for manipulation inherent in this procedure, specifically, that the determination of the trial judge’s state of mind at sentencing was being vested in the trial judge himself.

However, the Ninth Circuit did address the issue of the exhaustion of state remedies. The Brown court, adhering to the established Ninth Circuit rule, provided that defendant would not be required to exhaust his state remedies in order to argue the constitutionality of his state conviction. This move had the advantage of promoting judicial economy, but the disadvantage of precluding the state’s determination of the constitutionality of its own proceeding.

Additionally, the Ninth Circuit rejected defendant’s attack on the integrity of the presentence report, applying the rule that defendants must challenge the accuracy of presentence reports when the opportunity exists in open court and the report has been made available. Since Brown and his counsel had reviewed the presentence report and had stated that there was nothing to say in mitigation, any subsequent challenge to the accuracy of the report was thereby foreclosed.

2049. 610 F.2d at 674-75. “The [28 U.S.C.] § 2255 petitioner need be afforded an evidentiary hearing into the validity of the priors only where the § 2255 judge has found that the original sentence . . . would not be appropriate.” Farrow v. United States, 580 F.2d 1339, 1354 (9th Cir. 1978) (en banc). The procedure outlined in both Brown and Farrow originated in the Fifth Circuit in Lipscomb v. Clark, 468 F.2d 1321 (5th Cir. 1972).

2050. A defendant attacking the constitutional validity of a prior state conviction must have a reasonable opportunity to do so in a federal trial court. United States v. Thoresen, 428 F.2d 654, 664 (9th Cir. 1970) (challenging prior state grand larceny conviction on, inter alia, denial of assistance of counsel). The Thoresen court derived its holding from Burgett v. Texas, 389 U.S. 109 (1967), which held that a Texas prosecutor could not introduce a prior Tennessee conviction to enhance a sentence when records of that conviction on their face showed a denial of right to counsel. 389 U.S. at 112, 115-16. The Seventh Circuit, in United States v. Martinez, 413 F.2d 61, 63 (7th Cir. 1969), later held that it made no difference whether the records showed on their face some ground of presumptive invalidity. The Ninth Circuit adopted this approach in Thoresen. 428 F.2d at 664.

The Fourth Circuit, however, has refused to let a defendant bypass the exhaustion of state remedies. Brown v. United States, 483 F.2d 116 (4th Cir. 1973). Brown gave two reasons for its holding: the state should be a party to the proceeding and therefore have an opportunity to be heard on the issue of the validity of its own convictions, and, statutorily, 28 U.S.C. § 2255(b) requires exhaustion of state remedies. Id. at 118-19. However, as the Fifth Circuit has noted, Tucker does not mandate exhaustion in considering the validity of prior convictions, leaving it to the circuits to decide the issue themselves. Mitchell v. United States, 482 F.2d 289, 293 (5th Cir. 1973) (a requirement of exhaustion of remedies “would erect an insuperable barrier to effective implementation of the Tucker rule.”).

2051. United States v. Leonard, 589 F.2d 470, 472 (9th Cir. 1979) (no denial of due process in imposing sentence where neither defendant nor his counsel objected to inaccuracies in presentence report at sentencing hearing or at hearing on motion to reduce sentence).

2052. 610 F.2d at 676.
2. Special parole terms

In *Bifulco v. United States*, the Supreme Court held that the federal prohibition against conspiracy or attempt to manufacture or distribute certain controlled substances codified in 21 U.S.C. section 846 does not authorize special parole terms. The question had arisen because the substantive prohibition against manufacture or distribution found in 21 U.S.C. section 841 does provide for such a special parole term. Because section 846 does not provide for special parole terms on its face, the federal courts have had to wrestle with the ambiguity of whether defendants sentenced under section 846 should have such parole terms added on to their sentences when they are sentenced to imprisonment. The Fourth, Tenth, and Second Circuits had answered in the affirmative. The Third Circuit and

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2054. 21 U.S.C. § 846 (1976) provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."
2055. 21 U.S.C. § 841(b)(1)-(3) (1976 & Supp. III 1979) provides for sentencing depending on the nature of the substance sought to be manufactured or distributed, as defined in the schedules found in 21 U.S.C. § 812. Section (b)(1)(A)'s special parole term language is as follows:

Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

The same language, except for variations in the length of the special parole term, is found in § 841(b)(2). Significantly, § 841(b)(3), applicable to schedule V substances, which have a low potential for abuse, carries no special parole term.
2057. United States v. Jacobson, 578 F.2d 863, 868 (10th Cir.) (wording of § 841(b)-(c) implied that "Congress viewed special parole term as being part of the term of imprisonment to which it was appended" as does the weight of authority allowing special parole term under § 846), cert. denied, 439 U.S. 932 (1978).
2058. United States v. Armedo-Sarmiento, 545 F.2d 785, 794-95 (2d Cir. 1976) (sentence of five years imprisonment with a $5000 committed fine plus three year special parole term under § 846 was within discretion of trial judge), cert. denied, 430 U.S. 917 (1977); United States v. Wiley, 519 F.2d 1348, 1351 (2d Cir. 1975) (per curiam) (special parole term after seven year prison term under § 846 "well within statutory limits"), cert. denied, 423 U.S. 1058 (1976).
2059. See also United States v. Rich, 518 F.2d 980, 986-87 (8th Cir. 1975) (special parole provisions of § (b)(1)(B) not unconstitutionally vague), cert. denied, 427 U.S. 907 (1976); United States v. Dankert, 507 F.2d 190, 190-91 (5th Cir. 1975) (per curiam) (special parole term under 21 U.S.C. § 963, a conspiracy provision, upheld because § 963 "must be considered in light" of its corresponding substantive offense statute).
a district court in the Ninth Circuit took the contrary position. The Supreme Court, reviewing the language, structure, and legislative history of sections 841, 846, and related parts of the Comprehensive Drug Abuse Prevention and Control Act of 1970, found the weight of authority against special parole terms under section 846.

3. Modifications

In probation revocation proceedings, 18 U.S.C. section 3653 affords defendants broad protection against sentence enhancement.

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2060. United States v. Mearns, 599 F.2d 1296, 1298 (3d Cir. 1979) (parole is distinct from imprisonment and § 846, by its “express terms,” provides for only fine and imprisonment), cert. denied, 447 U.S. 934 (1980); United States v. Jacquinto, 464 F. Supp. 728, 729 (E.D. Penn. 1979) (parole distinct from imprisonment, House Report on § 846 indicated an intent to fix the maximum penalty for the offense, and fact that all three penalties—fine, imprisonment, and special parole—are enumerated in §§ 841 and 845 but not in § 846 indicates that § 846 was not intended to include special parole term).

2061. Fassette v. United States, 444 F. Supp. 1245 (C.D. Cal. 1978) (conspiracy must be distinguished from substantive offense, and § 841's use of phrase “in addition to” further distinguishes imprisonment from special parole term).

2062. The Court noted that special parole is not authorized for all the substantive offenses to which the conspiracy provision of § 846 applies, e.g., 21 U.S.C. § 841 (b)(3)'s prohibition against the manufacture or distribution of schedule V substances, and thus concluded that the term “imprisonment” in § 846 does not necessarily include special parole. 447 U.S. at 388-89. The Court also noted the obvious distinction between imprisonment and special parole, which is a “period of supervision served upon completion of a prison term.” Id. Furthermore, the Court found that the words “in addition to such term of imprisonment” in the provisions for special parole in § 841 indicated that Congress wanted to distinguish between “imprisonment” and special parole for § 846 purposes. Id. at 388-90.

2063. The Court reasoned that since § 845 provides for sentences by reference to the penalty provisions of other offenses and specifically enumerates imprisonment, fines, and special parole in its sentencing scheme, Congress intentionally omitted special parole from § 846. 447 U.S. at 388-90. Section 845 provides for the doubling of § 841's penalties when distribution is made to a person under twenty-one years of age.

2064. The Court noted that every legislative reference to the forerunners of § 846 failed to mention special parole, even though special parole was explicitly recognized in the penalty provisions of some substantive offenses within the Comprehensive Drug Abuse Prevention and Control Act. 447 U.S. at 398. Furthermore, the Government's argument, that Congress must have desired special parole for the conspiracy offense because Congress' object was the deterrence of professional criminals trafficking in drugs, was refuted by the fact that Congress did not include special parole for such serious drug offenses as the conduct of a continuing criminal enterprise. Id.; see 21 U.S.C. § 848 (1976). Finally, the Court noted that the exclusion of special parole under § 846 is only logical. Section 846 punishes attempts as well as conspiracies. Congress would logically be less stringent with an inchoate crime than with a completed one. 447 U.S. at 398.


2066. 18 U.S.C. § 3653 (1976) provides, in pertinent part:

As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence,
In *United States v. McDonald*, the Ninth Circuit invoked section 3653 to reverse an addition of a special parole term and a determination that defendant was not suitable for handling under the Federal Youth Corrections Act. The special parole term and non-suitability determination had been added to the defendant's sentence after he was resentenced upon revocation of probation.

In *McDonald*, the defendant received, in 1972, a seven year sentence and a $7500 fine, with the proviso that if he would serve 180 days in confinement, the "execution" of the remainder of his sentence would be suspended and he would be on probation for five years. In addition, the court found McDonald suitable for handling under the Federal Youth Corrections Act. In 1976, he violated the terms of his probation, and it was revoked. The district court then vacated the 1972 sentence, and, after finding McDonald unsuitable for handling under the Federal Youth Corrections Act, imposed essentially the same sentence, but added a mandatory special parole term. On appeal, the defendant asserted that the second sentence was more severe than the first, and thus constituted a violation of section 3653.

Since it was the execution of the 1972 sentence which had been suspended, and not its imposition, the 1972 sentence was valid. The

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2067. 611 F.2d 1291 (9th Cir. 1980).
2069. 611 F.2d at 1293.
2070. Id. at 1292. The sentence, according to the Ninth Circuit, "appears to have been pursuant" to 18 U.S.C. § 5010(a) (1976), which allows for probation. 611 F.2d at 1294. The other alternatives available under § 5010 are sentencing defendant to the custody of the Attorney General for treatment and supervision, 18 U.S.C. § 5010(b), 5010(c) and sentencing him as an adult, 18 U.S.C. § 5010(d). The Supreme Court, in *Durst v. United States*, 434 U.S. 542, 553-54 (1978), declared that a judge may select a combination of these alternatives, thus calling into question previous Ninth Circuit authority, e.g., *United States v. Marron*, 564 F.2d 867, 870 (9th Cir. 1977) which had held that a judge could not combine probation and sentencing as an adult under the Youth Corrections Act.
2072. 611 F.2d at 1293.
2073. Id.
2074. Roberts v. United States, 320 U.S. 264, 268 (1943), clearly articulates the difference between the suspension of the imposition and the suspension of the execution of a sentence for probation purposes:

The difference in the alternative methods is plain. Under the first, where execution of sentence is suspended, the defendant leaves the court with knowledge that a fixed sentence for a definitive term of imprisonment hangs over him; under the second, he is made aware that no definite sentence has been imposed and that if his probation is revoked the court will at that time fix the term of his imprisonment.
court did not refrain from sentencing during the probation period: rather it determined the sentence, but chose not to execute it immediately. Accordingly, the 1972 sentence could not be increased.\textsuperscript{2075} Hence the addition of the special parole term\textsuperscript{2076} and the judgment of non-suitability under the Federal Youth Corrections Act\textsuperscript{2077} increased defendant's sentence, contrary to section 3653.

Whereas \textit{McDonald} represents the rule that a legally imposed sentence may not be increased even though its execution was suspended, the court in \textit{United States v. Connolly}\textsuperscript{2078} held that an illegal sentence could be increased when the original sentence was less than the statutory minimum. In \textit{Connolly}, the defendant was convicted of narcotics violations, given two consecutive five-year terms, but not given the mandatory special parole term as required by statute.\textsuperscript{2079} Six years later, Connolly, who had spent the interim as a fugitive from justice, unsuccessfully moved for correction of the sentence.\textsuperscript{2080} The prosecution then successfully moved to impose the mandatory parole term under Federal Rule of Criminal Procedure 35.\textsuperscript{2081} On appeal, the de-
fendant argued that the "correction" was in reality a resentencing, and thus allocution or a presentence report was required under rule 32 of the Federal Rules of Criminal Procedure.

The Ninth Circuit ruled that there was no need for allocution because a defendant's statements could not aid the court in correcting a sentence to the statutory minimum. There was also no need for a presentence report because the question of how much time defendant had left to serve had been committed to the parole commission.

Connolly also argued that the correction was a resentencing after an illegal sentence, and thus a de novo proceeding. The Ninth Circuit did not elaborate on this argument, except to flatly declare: "We hold [that the sentence correction] was neither a resentencing proceeding nor a de novo proceeding . . . ." Instead, the court analyzed the motion to correct the sentence and reasoned that since the motion charged an error in law, it could be collaterally attacked only if it resulted in a complete miscarriage of justice. But the motion did not effect that result where the trial court had "no discretion" not to increase the original, invalid sentence to the statutory minimum.

While the court's exposition of the de novo proceeding argument was at best sketchy, there is no question that the result is sound. The Supreme Court has ruled that the correction of an invalid sentence to the statutory minimum does not violate double jeopardy.

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2082. Fed. R. Crim. P. 32(a)(1) provides that before sentencing, the court shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

2083. Fed. R. Crim. P. 32(c)(1) provides that before sentencing, the probation service of the court shall make a presentence investigation and report to the court, unless the defendant waives them, or the court finds in the record sufficient information to make a meaningful exercise of sentencing discretion and the court so explains.

2084. 618 F.2d at 556.

2085. Id. at n.11 (citing United States v. Haseltine, 419 F.2d 579, 582 (9th Cir. 1969) (judiciary does not possess powers of parole and post sentence supervision)).

2086. 618 F.2d at 555.

2087. Id.

2088. Id.; see United States v. Addonizio, 442 U.S. 178, 185 (1979) ("The Court has held that an error of law does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice." Hill v. United States, 368 U.S. 424, 428").

2089. 618 F.2d at 555-56.

2090. Bozza v. United States, 330 U.S. 160, 166 (1947) (correction to include fine as well as imprisonment). In the Ninth Circuit, the rule has been followed in United States v. Stevens, 548 F.2d 1360, 1362 (9th Cir.) (court said "two" years when all parties had agreed on a plea bargain of "ten" years), cert. denied, 430 U.S. 975 (1977); United States v. Kenyon, 519 F.2d 1229, 1231 (9th Cir.) (correction to include mandatory special parole term), cert. denied, 423 U.S. 935 (1975). But see United States v. Munoz-Dela Rosa, 495 F.2d 253, 256 (9th Cir. 1974).
4. Consecutive sentences

For purposes of the Comprehensive Drug Abuse Prevention and Control Act of 1970, a conspiracy to violate the Act's prohibition against manufacture or distribution of certain controlled substances is a separate crime from manufacture or distribution itself, and may be punished by a separate, consecutive sentence. Because Congress intended that conspiracy and manufacture or distribution be punished separately under the Act, one convicted of both is not subjected to double jeopardy. Congressional intent to punish the same act as

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two or more offenses will normally preclude a double jeopardy challenge.2096

However, when Congress intends a conspiracy charge to merge with the substantive offense, consecutive sentences for each would violate the double jeopardy clause.2097 In United States v. Wylie,2098 the Ninth Circuit rejected the contention that the use of a Pinkerton instruction2099 effectively merged conspiracy and distribution charges such that they became one offense for double jeopardy purposes. A Pinkerton instruction allows the prosecution to achieve both conspiracy and substantive convictions by telling the jury that if it finds the elements of the conspiracy charge, it may also convict the defendant of the substantive charge if it finds that a coconspirator actually committed the substantive offense.2100 In Wylie, defendant argued that since "[t]he agreement necessary to prove the conspiracy charge was also necessary to prove the distribution charge," the two offenses merged under the Blockburger test,2101 by which multiple provisions create separate offenses when "each provision requires proof of a fact which the other does not."2102

The Ninth Circuit "acknowledg[ed] the logic to [defendant's] rea-

treated as a single offense would vitiate the deterrent effect of the [record piracy] statute."), cert. denied, 435 U.S. 918 (1978); United States v. Long, 524 F.2d 660, 661-62 (9th Cir. 1975) (since the "unit of prosecution" prescribed by Congress was the giving of false information, such conduct by defendant on two separate forms properly resulted in two distinct violations).

Nevertheless, because the crime of conspiracy is necessarily defined in terms of another "substantive" crime, a sentencing tribunal must be alert to the possibility that the legislature intended the conspiracy violation to merge with the substantive offense. Normally, this possibility is remote. "Unlike some crimes that arise in a single transaction . . . the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act." Iannelli v. United States, 420 U.S. 770, 777 (1975) (citing Pinkerton v. United States, 328 U.S. 640, 643 (1946)).

2096. "Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee [against double jeopardy] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165 (1977) (emphasis added) (citations omitted) (using Blockburger test to conclude that joyriding and auto theft are the "same statutory offense" for double jeopardy purposes). Id. at 166.

2097. See Prince v. United States, 352 U.S. 322, 327 (1957) (ascertainment of Congressional intent to merge crimes will normally be dispositive on the double jeopardy issue).

2098. 625 F.2d 1371 (9th Cir. 1980).

2099. Pinkerton v. United States, 328 U.S. 640 (1946) (conspirator could be properly punished for violations of substantive offense even though he was incarcerated when the substantive offense occurred).

2100. Id.

2101. 625 F.2d at 1381.

sioning, but held that the Blockburger test was irrelevant because it was merely a way to ascertain congressional intent "to impose separate punishment for multiple offenses" arising out of an act or transaction. Since it was already clear that Congress intended that there be punishment under two separate statutes, defendant was in jeopardy for two offenses, not one.

The Ninth Circuit also rejected Sixth Circuit authority that if the same evidence was used to prove each crime, defendant would be put in double jeopardy for, in effect, one offense. Finally, the Ninth Circuit concluded that the Supreme Court, in Pinkerton, had impliedly approved the use of consecutive sentences when Pinkerton instructions are given.

Because the Wylie court had the benefit of past litigation on the question of whether 18 U.S.C. sections 841 and 846 were the same offense, its result was reasonably predictable. Addition of the Pinkerton instruction did not change matters because of the known intent of Congress on the merger of the conspiracy and distribution statutes.

The Supreme Court, on the other hand, in Whalen v. United

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2103. 625 F.2d at 1381.
2104. Id. (citing Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975)).
2105. 625 F.2d at 1381-82 (citing authority found supra in note 2094).
2106. See supra note 2095 (congressional intent is dispositive on the merger issue).
2107. 625 F.2d at 1381 n.14 (citing United States v. Kearney, 560 F.2d 1358, 1367 (9th Cir. 1977)). The Sixth Circuit authority was United States v. Austin, 529 F.2d 559, 564 (6th Cir. 1976) ("Since proof of the substantive offenses . . . also proved every essential element of the conspiracy . . . appellant was doubly punished in violation of the Fifth Amendment.").
2108. 625 F.2d at 1382 n.15. In Pinkerton, defendant was a participant in a conspiracy, but incarcerated at the time of the substantive offense. The Supreme Court upheld a jury instruction which allowed him to be convicted of both the conspiracy and the substantive offense. See supra note 2095. For the conspiracy, defendant received two years and a $500 fine. For the substantive offense, defendant received two and one-half years, to run concurrently with the two year sentence, and another fine of $1000. The Ninth Circuit reasoned that since fines are equivalent to imprisonment for double jeopardy and multiple punishment purposes (citing Jeffers v. United States, 432 U.S. 137, 155 (1977) (separate fines under 21 U.S.C. §§ 846 and 848 were cumulative punishments)), Pinkerton was in effect dealing with a consecutive sentence situation since the fines, if not the prison terms, were unambiguously consecutive. Hence, by upholding the conviction, the Supreme Court was impliedly approving "the use of consecutive punishments in those cases where the Pinkerton instruction is given." 625 F.2d at 1382 n.15.
2109. See supra note 2094.

States," rendered a more contrived result in similar circumstances. Defendant had been convicted under one District of Columbia statute forbidding killing in the course of rape and another forbidding rape. He was sentenced to consecutive terms of twenty years to life for the killing and fifteen years to life for the rape.

As in Wylie, there was negative appellate court precedent on the question of whether the statutes were intended to merge. Unlike Wylie, the precedent was obviously nonbinding. While the Court was less than lucid in spelling out the relationship between statutory construction and the double jeopardy clause, the Court held that when federal courts construe a merger question to defendant's detriment and in so doing do not properly divine what Congress really authorized, they violate the double jeopardy clause. As such, the double jeopardy clause became a means by which the Court could dispense with its usual deference toward the District of Columbia Court of Appeals' construction of District of Columbia law.

2111. D.C. CODE ANN. § 22-2401 (1973) provides in part:
  Whoever, being of sound memory and discretion, kills another purposely . . . or in perpetrating or attempting to perpetrate any offense punishable by imprisonment . . . or without purpose so to do kills another in perpetration or in attempting to perpetrate any . . . rape . . . is guilty of murder in the first degree.
2112. D.C. CODE ANN. § 22-2801 (1973) provides in part: "Whoever has carnal knowledge of a female forcibly and against her will . . . shall be imprisoned for any term of years or for life."
2113. 445 U.S. at 685.
2114. Whalen v. United States, 379 A.2d 1152 (D.C. 1977) (statutes in question had different roots and served different societal purposes).
2115. In this case we have concluded that the customary deference to the District of Columbia Court of Appeals' construction of local federal legislation is inappropriate with respect to the statutes involved for the reason that the petitioner's claim under the Double Jeopardy Clause cannot be separated entirely from a resolution of the question of statutory construction.
2116. "The Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so." 445 U.S. at 689.
2117. See discussion of Pernell supra note 2115.
What Congress really authorized, however, was neither in the statutes nor in their legislative history. It was in another District of Columbia statute which purportedly enacted the Blockburger test as a rule of statutory construction for the District of Columbia. Applying the test, "whether each provision requires proof of a fact which the other does not," the Court held that the two statutes were the same because "[a] conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape."

While the immediate result of Whalen was the remanding of the case for further proceeding, i.e., vacating defendant's sentence for rape, the long run results of Whalen may be significant. Unless Congress makes its intent painfully clear, the literal application of the Blockburger test, together with the Court's ruling that consecutive sentences beyond congressional authorization offend the double jeopardy clause, could potentially be a powerful set of instruments with which to invalidate consecutive sentences.

5. Federalism and separation of powers

Rule 35 of the Federal Rules of Criminal Procedure vests in federal judges the power to reduce federal sentences, but it does not

2118. 445 U.S. at 690.
2119. D.C. CODE ANN. § 23-112 (1973) provides:
A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.
2120. The Court stated that the "phrasing of the statute is less than felicitous," 445 U.S. at 691, perhaps thereby acknowledging that the language of the statute does not explicitly say anything about forbidding consecutive sentences. Essentially, the Whalen majority was assuming that Congress knew that by explicitly permitting consecutive sentences in two specified instances, it was thereby stating a preference for non-consecutive sentences in unspecified situations. Yet the Court's entire discussion of the legislative history of the statute, id. at 692, evidences the congressional unhappiness with the District of Columbia Court of Appeals for not allowing consecutive sentences even when the offenses were different under Blockburger. Consequently, Congress felt the need to spell out a preference for consecutive sentences in different offenses as classified under Blockburger. The Court cites no legislative history demonstrating that Congress desired concurrent sentences for situations where the literal application of the Blockburger test would yield the same offense. Against this vacuum the Court argued that allowing consecutive sentences even when the statutory offenses were the same under Blockburger would allow consecutive sentences for "greater and lesser included offenses—an extraordinary view that the Government itself disavows." Id. at 691-92 n.6. Such an anomalous result, however, would be tempered by the sentencing court's explicit power to provide otherwise.
2121. Id. at 694 (citations omitted). The dissent argued that Blockburger is not a satisfactory test for "compound and predicate" offenses. Id. at 708 (Rehnquist, J., dissenting).
2122. Rule 35(b) of the Federal Rules of Criminal Procedure provides, in relevant part:
disturb the division of judicial and executive authority. In *United States v. Warren*, the Ninth Circuit affirmed a district court's order reducing two federal sentences. However, the circuit court held that the district court exceeded its authority under rule 35 to the extent that it ordered the transfer of the defendant from state to federal prison to enforce a plea bargain and the crediting of the federal sentences with time spent in state custody. While free pending an appeal of a 1975 federal conviction for which he was sentenced to twelve years in prison, the defendant in *Warren* pleaded guilty in 1977 to several state charges. The state court sentenced the defendant and ordered him to state prison. In the meantime, the federal government indicted the defendant for mail fraud. After a guilty plea to one count, the district court sentenced the defendant in 1978 to a five year prison term to run concurrently with his 1975 federal sentence. The defendant was then returned to the state prison by the district court.

While in state custody, the defendant filed a motion in federal court under rule 35. He successfully argued that his state guilty pleas were predicated upon separate agreements with local prosecutors and the United States Attorney's office that the defendant could serve his state sentence in federal prison. The court ordered reduction of his 1975 federal sentence from twelve to nine years. The court further ordered that the defendant be transferred from state to federal prison and that his federal sentences be credited with any time spent in state custody.

On appeal by the United States, the Ninth Circuit upheld the reductions of the two federal sentences as within rule 35. The Ninth Circuit, however, reversed the order to the extent that it purported to

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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.

**FED. R. CRIM. P. 35(b).**

2123. 610 F.2d 680 (9th Cir. 1980).
2124. *Id.* at 684-85.
2125. *Id.* at 683.
2126. Under the purported agreement, the state would recommend that the defendant serve his state time in federal prison and the federal government would not oppose a rule 35 motion for reduction of the 1975 sentence. The defendant preferred the federal prison because of its superior medical facilities. *Id.* at 682.
2127. *Id.*
2128. *Id.*
2129. *Id.* at 685.
transfer the defendant from state to federal prison and to credit the federal sentence with state time.\textsuperscript{2130} The court began its analysis of the transfer order by declaring that a sentence inconsistent with a plea bargain is not "illegal" under rule 35.\textsuperscript{2131} It then concluded that even if rule 35 supports an attack on a sentence as being inconsistent with a plea bargain, it only does so with respect to federal sentences.\textsuperscript{2132} Thus, rule 35 was unavailable to challenge state imprisonment on a state charge.

The Ninth Circuit also rejected the defendant's argument that regardless of rule 35 the federal court's personal jurisdiction over him, resulting from his appearance before it,\textsuperscript{2133} was enough to legitimize the transfer. The Ninth Circuit held that, even given the district court's personal jurisdiction, its attempt to transfer custody violated the principles of comity and separation of powers.\textsuperscript{2134} The court reasoned that, having first arrested the defendant, the federal authorities had priority of jurisdiction over him. Having such priority, they also had the power to relinquish it. The decision to relinquish it is, however, vested in the

\textsuperscript{2130} Id.

\textsuperscript{2131} Id. at 684. The Ninth Circuit cited two cases, Hill v. United States, 368 U.S. 424, 430 (1962), and United States v. Stevens, 548 F.2d 1360 (9th Cir.), cert. denied, 430 U.S. 975 (1977). However, the language in \textit{Hill} to which the Ninth Circuit referred merely said that the "narrow function of Rule 35 is to permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence." 368 U.S. at 430 (emphasis in original) (citations omitted). \textit{Hill} concerned a denial of allocution to the defendant as required by rule 32(a). The cite to \textit{Stevens} adds even less support to the Ninth Circuit's assertion because \textit{Stevens} held that rule 35 could be used to increase a sentence when it is imposed in an illegal manner. 548 F.2d at 1362 (judge said "two" years when he meant, and all parties had agreed to, "ten" years).

\textsuperscript{2132} 610 F.2d at 684.

\textsuperscript{2133} In the Ninth Circuit, the rule is that a court has exclusive personal jurisdiction over any person who appears before it regardless of how his appearance came about. See United States v. Zammillo, 432 F.2d 72, 73 (9th Cir. 1970) (per curiam) (defendant taken from jurisdiction of state authorities and put into federal custody); Strand v. Schmittroth, 251 F.2d 590, 600 (9th Cir.) (one sovereign yielding physical possession of defendant to another), \textit{cert. dismissed}, 355 U.S. 886 (1957); Stamphill v. Johnston, 136 F.2d 291, 292 (9th Cir.) (state authorities surrendered defendant to federal authorities even though state authorities were entitled to keep defendant until he finished serving his sentence), \textit{cert. denied}, 320 U.S. 766 (1943).

The Second Circuit, on the other hand, has recognized a more limited federal jurisdiction over a person who appears pursuant to a writ of \textit{habeas corpus ad testificandum}. See \textit{In re Liberatore}, 574 F.2d 78, 89 (2d Cir. 1978) (federal district court had no right to interrupt defendant's pre-existing state sentence for duration of contempt charge confinement because a "loan" by a sovereign with a right of prior jurisdiction "cannot empower the courts of the second sovereignty to tamper with the terms of the first jurisdiction's valid prior judgment of conviction"). The \textit{Warren} court showed an inclination toward the argument that the Ninth Circuit should adopt the \textit{Liberatore} approach. 610 F.2d at 684 n.8.

\textsuperscript{2134} 610 F.2d at 684.
The appropriate officer designated by the Attorney General had already decided, as a matter of comity, to return the defendant to state prison after the rule 35 hearing. Hence, the federal court was without authority to order the transfer.

The crediting of the federal sentences with state time also conflicted with the separation of powers. Such an order is the “functional equivalent” of letting a federal sentence run concurrently with a state one. As such, it specifies where a federal prisoner will spend at least part of his federal term. But, because it is the executive branch which has the authority to designate the place of confinement for federal prisoners, a federal district court would be without jurisdiction to order such a credit.

E. Probation

Last term, in Higdon v. United States, the Ninth Circuit found that the trial court abused its discretion by imposing an impermissible array of probation conditions on Higdon, who had been involved in

2135. Id. at 685 (citing Ponzi v. Fessenden, 258 U.S. 254, 262 (1922) (“[W]e have no doubt that [authority to transfer] exists and is to be exercised with the consent of the Attorney General. In that officer the power and discretion to practice the comity in such matters between the Federal and state courts is vested.”)); Strand v. Schmittroth, 251 F.2d 590, 609 (9th Cir.) (federal district court had no authority to issue writ of habeas corpus over federal probationer charged with state crime), cert. dismissed, 355 U.S. 886 (1957).

2136. 610 F.2d at 685. The “crediting” problem seems ultimately semantic. While the district court could not “credit” defendant’s sentence with state time, it still could have reduced it under rule 35 apart from considerations of state time and accomplished the effect precluded in Warren.

2137. Id. Sections 4082(a) and (b) of Title 18, U.S.C. provide:

(a) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.

(b) The Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise, and whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another.


See United States v. Clayton, 588 F.2d 1288, 1292 (9th Cir. 1979) (“It is the administrative responsibility of the Attorney General, the Department of Justice, and the Bureau of Prisons to compute sentences and apply credit where it is due. It is not the province of the sentencing court.”) (citations omitted).

2138. 627 F.2d 893 (9th Cir. 1980).

2139. This author discovered only one case as extreme as Higdon. In People v. Keller, 76 Cal. App. 3d 827, 143 Cal. Rptr. 184 (1978), defendant was convicted in municipal court of petty theft of a 49 cent ballpoint pen. As a condition of probation, defendant waived his fourth amendment rights for several years. The California Court of Appeal held the probation condition impermissible, stating, “[t]he probation condition here imposed, the waiver of
a kickback scheme while serving in the United States Army. Higdon, a former Master Sergeant, was courtmartialed in 1971 for receiving kickbacks from several servicemen's clubs which he operated in Vietnam. In 1973, he pleaded guilty to a single criminal count arising out of his involvement in the kickback scheme. He received a five year suspended prison sentence upon his acceptance of certain probation conditions. The conditions included forfeiture of all his assets, including his home, to the government and an agreement to work for charity full-time for three years (6,200 hours) without pay.

For three years, Higdon fulfilled his probation conditions and properly reported to his probation officer. During the fourth year, however, the probation officer discovered that Higdon had violated some of the conditions. Because of these violations, Higdon's probation was revoked and he was ordered to serve his full five year prison sentence with no credit given for the four years and four months of probation he had successfully completed.

After Higdon's request for modification of the prison sentence was denied, he collaterally attacked his sentence, asserting that the probation conditions were unlawful under the Federal Probation Act. Therefore, Higdon concluded, his probation should not have been revoked for the violation of these illegal conditions. The district court denied Higdon's motion and Higdon appealed to the Ninth Circuit.

The Ninth Circuit found that the trial judge had abused his discre-
tion under the Federal Probation Act when he imposed forfeiture and charitable work as conditions of Higdon’s probation.\footnote{Id. at 896-97.} In reaching this conclusion, the court was guided by the test set out in \emph{United States v. Consuelo-Gonzalez},\footnote{521 F.2d 259 (9th Cir. 1975) (en banc).} the circuit’s leading case on the propriety of probation conditions. In \emph{Consuelo-Gonzalez}, the court held that probation conditions must be reasonably related to rehabilitation of the offender, the primary purpose of probation,\footnote{521 F.2d at 264.} and to protection of the public.\footnote{627 F.2d at 897.}

The \emph{Higdon} court applied this test by using a two step analysis: “First, we consider the purposes for which the judge imposed the conditions . . . second [we] determine whether the conditions are reasonably related to the purposes.”\footnote{Id. at 896.} The court did not decide whether the sentencing judge had imposed the severe probation conditions for permissible purposes.\footnote{Id. at 898. The Ninth Circuit observed that the harshness of the conditions suggested that they may have been imposed to punish Higdon, or to circumvent the maximum five year sentencing limit for Higdon’s crime, a limit the sentencing judge had viewed as too lenient. \textit{Id.} Neither of these purposes is permissible under the \emph{Consuelo-Gonzalez} test. \textit{Id.} However, the court believed that it did not have to decide this issue because the probation conditions were clearly impermissible under the second part of the \emph{Consuelo-Gonzalez} test. \textit{Id.}}

For probation conditions to be “reasonably related” within the meaning of the \emph{Consuelo-Gonzalez} test, they must be narrowly drawn to achieve the permissible ends “without unnecessarily restricting the probationer’s otherwise lawful activities.”\footnote{521 F.2d at 264.} The court found that while either of the conditions imposed upon Higdon alone may have been within the bounds of judicial discretion,\footnote{627 F.2d at 897.} taken together they unnecessarily interfered with Higdon’s legitimate activities.\footnote{Id. at 899.}

The Government did not dispute the impermissibility of Higdon’s probation conditions before the Ninth Circuit. Rather, it argued that Higdon was bound by the conditions, even though some of them were impermissible, until he sought to have them modified. The Ninth Circuit responded to this contention stating: “The government’s argument

\begin{itemize}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Id. at 899.}
  \item \footnote{Id. at 899-90.}
\end{itemize}
proves too much. It is true that self-help, and particularly deceitful self-help, is not the proper response to unreasonable probation terms. But the reasonableness of revocation on the unusual facts of this case is related to the reasonableness of the probation terms." The court remanded the case to give the sentencing judge an opportunity to decide whether Higdon’s probation should be revoked solely on the basis of his noncompliance with reporting requirements related to the impermissible conditions.

In United States v. Ferguson, decided two months after Higdon, the Ninth Circuit held that the district court’s refusal to consider mitigating circumstances during a probation revocation hearing was an abuse of discretion in violation of the defendant’s due process rights. The court stated: “[a]dmisions of probation violations, unlike guilty pleas, do not automatically trigger sentencing.” It further observed that “[d]ue process requires that a probationer at a revocation hearing be given the opportunity to show that mitigating circumstances suggest the violation does not warrant revocation.”

F. Habeas Corpus

The writ of habeas corpus, or “Great Writ,” has been a fixture in the Anglo-American legal system. The writ tests “in a court of law the legality of restraints on a person’s liberty.” As codified under federal law, habeas corpus is available to a person “in custody in violation of the Constitution or laws or treaties of the United

2155. Id. at 900.
2156. The court remanded Higdon’s motion to the sentencing judge for a determination of “(1) whether Higdon’s probation should have been revoked for noncompliance with reporting requirements; and (2) whether if the revocation was proper his jail term should nevertheless be modified.” Id. (footnotes omitted). The court suggested that, “if the judge determines that probation should not have been revoked for mere noncompliance with reporting requirements, equitable considerations dictate that the remaining probation time [eight months at the time probation was revoked] be excused because of the twenty-nine months which Higdon has spent in jail.” Id. at n.18.
2157. 624 F.2d 81 (9th Cir. 1980) (per curiam).
2158. Id. at 83 (citing United States v. Diaz-Burgos, 601 F.2d 983, 985 (9th Cir. 1979) (quoting United States v. Segal, 549 F.2d 1293, 1298 (9th Cir.), cert. denied, 408 U.S. 919 (1977))).
2159. 624 F.2d at 83.
2160. C. Wright, LAW OF FEDERAL COURTS § 53, at 237 (3d ed. 1976) [hereinafter cited as Wright].
2161. Id. at 236-37.
2162. R. Sokol, FEDERAL HABEAS CORPUS § 1, at 29-30 (2d ed. 1969) [hereinafter cited as Sokol].
Habeas corpus is available only if a petitioner is in "custody." Under the traditional view, the only relief available under a habeas corpus petition was release from custody. Thus, if the petitioner was not in custody, the case would be moot. Although the Supreme Court has expanded the scope of available remedies in recent years, custody remains a statutory requirement. Custody, however, is not easily defined.

Custody does not require actual physical detention; rather, it involves restraints on one's liberty which are not shared by the general public. Thus, "custody" has been found where a petitioner is free on parole, is challenging a sentence that would run consecutively to a sentence presently being served, or is free on his own recognizance.

2164. 28 U.S.C. § 2241(c) (1976) states the following:

The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

2165. Id.

2166. Sokol, supra note 2162, § 6, at 65.

2167. Id.

2168. Id. at 65-66. Available remedies include unconditional release from custody, release from custody conditioned upon the state's decision to retry the petitioner within a reasonable time, the vacating of a sentence as unconstitutional even though this does not effect the petitioner's release, a transfer from one institution to another or even changing the nature of the custody within an institution, as release from solitary confinement, or the granting of adequate appellate review of an original conviction.


2171. Id. at 240-41.

pending service of sentence.\footnote{2173}

In \textit{Rose v. Morris},\footnote{2174} the Ninth Circuit considered whether a state detainer warrant against a federal prisoner was sufficient "custody" to confer habeas corpus jurisdiction on the federal courts. Petitioner had been convicted on a federal narcotics charge while on parole from two state convictions. As a result of the federal conviction, the state court revoked petitioner's parole. A state detainer warrant was issued requesting that the state be notified before the petitioner was released from federal custody so that the state could retake the petitioner and have him begin serving the balance of his state sentences. In a habeas corpus petition, Rose challenged the probation revocation and sentencing proceeding. The district court dismissed the petition on the ground that petitioner was not in "custody." The Ninth Circuit reversed, finding that there was sufficient custody\footnote{2175} under \textit{Jones v. Cunningham}\footnote{2176} and \textit{Peyton v. Rowe}.\footnote{2177}

2. Exhaustion of state remedies

Persons in state custody are statutorily required to exhaust their state court remedies before federal habeas corpus relief becomes available.\footnote{2178} Technically, however, this statutory requirement applies only to persons "in custody pursuant to a judgment of a State court,"\footnote{2179} even though a conviction is not entered.\footnote{2180} Federal courts, however, have imposed the exhaustion requirement as a matter of comity long before the requirement was written into statutory form.\footnote{2181} Thus, although federal courts have jurisdiction under section 2241(c) to hear pretrial habeas corpus petitions by persons in state custody, this jurisdiction will generally not be exercised in the absence of extraordinary circumstances.\footnote{2182}
In *Carden v. Montana*, the Ninth Circuit reviewed a habeas corpus petition which sought dismissal of state criminal charges prior to trial on the ground that the petitioners' right to a speedy trial had been violated. Petitioners had unsuccessfully asserted this same claim in the state courts in a pretrial motion, including an appeal to the Montana Supreme Court. At the district court habeas corpus hearing, the state conceded that petitioners had exhausted state remedies prior to trial. Nevertheless, the Ninth Circuit held that federal court jurisdiction over the habeas corpus application should not be exercised, citing considerations of comity, and finding no special circumstances in the case. This decision is supported by substantial authority.

This decision is supported by substantial authority.

However, jurisdiction may well have been exercised had petitioners sought immediate trial, rather than dismissal of the charges.

3. Effect of state court findings

Res judicata does not bar habeas corpus proceedings; thus, a state court's determination of a federal claim does not preclude federal re-examination of the claim. However, the weight that should be accorded a state court's determination poses a difficult problem. Justice Frankfurter, concurring in *Brown v. Allen*, stated that although a federal court may rely on a state court's determinations of historical facts in the absence of a "vital flaw" in the state court's factfinding process, it must independently decide questions of law and mixed questions of law and fact. While shedding some light on the issue, *Brown* did not give enough direction to the lower courts.

Facing this question again in *Townsend v. Sain*, the Supreme Court held that a federal court may "receive evidence and try the [historical] facts anew" on a habeas corpus petition and must do so if the petitioner did not receive a "full and fair evidentiary hearing in a state

[2183] 626 F.2d 82 (9th Cir. 1980).
[2184] Id. at 83-84.
[2185] Brown v. Estelle, 530 F.2d 1280, 1284 (5th Cir. 1980); Dolack v. Allenbrand, 548 F.2d 891, 893-94 (10th Cir. 1977); Scranton v. New York, 532 F.2d 292, 296 (2d Cir. 1976); Moore v. DeYoung, 515 F.2d 437, 442 (3d Cir. 1975); see Exhaustion Requirement, supra note 2182, at 720-24.

[2188] Id. at 506-08 (Frankfurter, J., concurring).
[2189] Wright, Miller, & Cooper, supra note 2181, § 4265, at 657.
The Court went on to identify six criteria under which a federal court must grant an evidentiary hearing. These criteria were eventually codified in 28 U.S.C. section 2254(d), which establishes a presumption that a state court's findings of fact after a hearing are correct unless one of the criteria is met. If none of the criteria are established, a federal court is entitled to rely on the state court findings without an evidentiary hearing. However, the courts have been "emphatic that the federal court may rely on the state court findings only after making an independent review of the record of the state

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2192. Id. at 312.
2193. Id. at 313.
2194. 28 U.S.C. § 2254(d) (1976) identifies eight, rather than six criteria. It provides the following:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

1. that the merits of the factual dispute were not resolved in the State court hearing;
2. that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
3. that the material facts were not adequately developed at the State court hearing;
4. that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
5. that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
6. that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
7. that the applicant was otherwise denied due process of law in the State court proceeding;
8. or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

2195. WRIGHT, MILLER & COOPER, supra note 2181, § 4265, at 670.
This last requirement recently caused the Ninth Circuit to vacate and remand a district court's dismissal of a habeas corpus petition in *Rhinehart v. Gunn.* While the district court appeared to rely on a state court's determination, but did not state any findings of fact nor include the transcript of any habeas corpus hearing in the record, the Ninth Circuit was simply unable to conclude that the district judge had made an "independent review of all relevant parts of the state court record." Following *Rhinehart*, the Ninth Circuit in 1980 vacated and remanded two district court dismissals on the same grounds.

In *Townsend*, the Supreme Court held that "a substantial allegation of newly discovered evidence" would be one criterion requiring an evidentiary hearing. The new evidence, however, must bear upon the constitutionality of a petitioner's custody, since evidence which related only to the guilt of a state prisoner is not a ground for federal habeas corpus relief. At an evidentiary hearing, the question arises as to what standard to apply to determine whether the newly discovered evidence warrants granting habeas corpus relief.

In *Quigg v. Crist*, the Ninth Circuit confronted this question. Citing decisions from other circuits and comparing habeas corpus petitions to motions for new trials, the court concluded that the proper standard to apply is whether the newly discovered evidence "would probably produce an acquittal."

### 4. Grounds for the writ

Habeas corpus is available to persons held in state custody only on the ground that such custody is "in violation of the Constitution or laws

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2196. *Id.* at 672.
2197. 598 F.2d 557 (9th Cir. 1979) (per curiam).
2198. *Id.* at 558.
2199. Patterson v. Warden, 624 F.2d 69 (9th Cir. 1980) (per curiam) (district court summarily dismissed petition for habeas corpus); Cody v. Morris, 623 F.2d 101 (9th Cir. 1980) (petitioner, who was transferred from federal to California custody to stand trial for murder, claimed his murder trial took place beyond the 120 day period prescribed by Article IV, paragraph (c), of the Interstate Agreement on Detainers Act, 18 U.S.C. app. (1976); district court denied petition without hearing).
2200. 372 U.S. at 313.
2201. *Id.* at 317.
2202. 616 F.2d 1107 (9th Cir. 1980).
2203. *Id.* at 1112; see Sims v. Brewer, 439 F. Supp. 891 (S.D. Iowa), *aff'd per curiam*, 567 F.2d 752 (8th Cir. 1977); Shuler v. Wainwright, 341 F. Supp. 1061 (M.D. Fla. 1972), *rev'd on other grounds*, 491 F.2d 1213 (5th Cir. 1974); *see also* Armstrong v. Collier, 536 F.2d 72 (5th Cir. 1976); Kelly v. Ragen, 129 F.2d 811 (7th Cir. 1942).
The Supreme Court recently considered whether the failure of retained counsel to provide adequate representation can render a trial so fundamentally unfair as to violate the fourteenth amendment, thereby providing the requisite grounds for obtaining a federal writ of habeas corpus.

In *Cuyler v. Sullivan*, the defendant accepted representation from the two lawyers retained by his two codefendants because he could not afford to pay for his own. All three codefendants were tried separately. Sullivan was the first to come to trial. After the prosecution had presented its case, defendant's counsel decided to rest without presenting any evidence. The defendant was convicted, and the conviction was affirmed on appeal. The codefendants, however, were acquitted at separate trials. During defendant's state court action for collateral relief, one of defendant's counsel testified that he had not wanted to put on a defense because he did not want to expose the defense witnesses for the upcoming trials of the other defendants. Nevertheless, collateral relief in the state courts was denied. Further, a federal district court denied defendant habeas corpus relief. On appeal, the Third Circuit granted habeas corpus, finding that, although multiple representation does not necessarily result in denial of effective assistance of counsel, a criminal defendant is entitled to reversal of his conviction whenever he makes "some showing of a possible conflict of interest or prejudice, however remote."

The Supreme Court vacated and remanded. In response to the state's argument that the blunders of retained counsel do not involve state action and, therefore, cannot provide the basis for habeas corpus relief, the Court held that a state criminal trial itself is a state action within the meaning of the fourteenth amendment. As such, when a state obtains a criminal conviction in which a defendant is inadequately assisted in violation of his sixth amendment rights, whether by retained or by appointed counsel, it is the state that unconstitutionally deprives the defendant of his liberty.

However, the Supreme Court went on to hold that the possibility of a conflict of interest of a defendant's retained counsel is not sufficient to

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2206. *Id.*
2207. *Id.* at 338-40.
2209. 446 U.S. at 342-43.
overturn a state's criminal conviction. Rather, to establish a violation of the sixth amendment, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Consequently, the Court remanded the case for a determination under this latter standard.

The constitutionality of the Treaty on the Execution of Penal Sentences between the United States and Mexico ('"Treaty"') was considered by the Ninth Circuit in the 1980 case of *Pfeifer v. United States Bureau of Prisons.* The Treaty provides that Mexicans convicted in the United States may elect to serve their incarcerations in Mexico, and that Americans convicted in Mexico may elect to serve their incarcerations in the United States. Under the terms of the Treaty, however, the transferring state reserves "exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts." In addition, the Treaty requires a prisoner's "express consent" that the transfer be given, and allows the receiving state to verify that a prisoner's consent is given "voluntarily and with full knowledge of the consequences thereof." The legislation implementing this Treaty requires verification that the prisoner understand and agree that "only the country in which he was convicted and sentenced can modify or set aside the conviction or sentence, and any proceedings seeking such action may only be brought in that country."

In *Pfeifer,* the petitioner asserted that the Treaty and its implementing legislation were unconstitutional because they deny American prisoners transferred from Mexico the right to challenge the constitutionality of their foreign convictions in United States courts. Alternatively, he asserted that his consent to the transfer was not voluntarily and knowingly given because the conditions of Mexican prisons denied him any real choice.

The court held that "the requirement that an offender agree not to challenge his or her conviction in a United States court is not an uncon-
The court explained that as a prisoner of Mexico, the petitioner did not have a right to relief in the United States courts. Because he relinquished nothing by agreeing to forego judicial review of his conviction in the United States, the consent requirement was constitutional. The court further decided that the petitioner's consent was given voluntarily and knowingly.

The Ninth Circuit also recently considered whether a violation of the Interstate Agreement on Detainers Act (IADA) constitutes a violation of federal law cognizable under section 2254. The IADA, enacted by Congress in 1970 and subsequently adopted by at least 46 states, "prescribes procedures by which a member State may obtain for trial a prisoner incarcerated in another member jurisdiction and by which the prisoner may demand the speedy disposition of certain charges pending against him in another jurisdiction." In the 1980 case of Cody v. Morris, petitioner sought habeas corpus relief from a California murder conviction on the ground that he was not brought to trial within 120 days of his transfer from federal to California custody as required by IADA. Reasoning that "Congress . . . made clear that the consequences of a failure to begin the trial within this [120 day] period would be a dismissal of the indictment, information or complaint with prejudice," the court found that a violation of the IADA would be cognizable under section 2254. With one exception, this decision accords with decisions in several other circuits.

2219. 615 F.2d at 876; accord Rosado v. Civiletti, 621 F.2d 1179, 1193, 1197-1200 (2d Cir. 1980) (by implication); Mitchell v. United States, 483 F. Supp. 291, 294 (E.D. Wis. 1980).

2220. 615 F.2d at 876.

2221. Id. at 877.


2223. Cody v. Morris, 623 F.2d 101, 102-03 (9th Cir. 1980).


2225. 623 F.2d 101 (9th Cir. 1980).

2226. 18 U.S.C. app. § 2, art. IV(c) (1976).

2227. 623 F.2d at 102.

2228. Id. at 102-03.

2229. Fasano v. Hall, 615 F.2d 555, 558 (1st Cir. 1980).

2230. Esola v. Groomes, 520 F.2d 830 (3d Cir. 1975); Young v. Mabry, 471 F. Supp. 553,
G. Cruel and Unusual Punishment

The Supreme Court held in *Rummel v. Estelle*\(^2\) that the eighth amendment does not require proportionality of sentence to crime for non-capital offenses. In *Rummel*, petitioner was convicted of obtaining $120.75 by false pretenses, a felony under Texas law,\(^3\) and sentenced to life imprisonment under a repeat offender statute. Petitioner had already been twice convicted of similar minor property offenses\(^4\) and the Texas repeat offender statute required a mandatory life sentence for anyone convicted three times of a felony less than capital.\(^5\)

Justice Rehnquist, speaking for the Court, reasoned that any requirement for proportionality under the eighth amendment should be confined to "unique" punishments. Specifically, the Court held that proportionality rationales found in the death penalty cases\(^6\) were inapplicable because of the qualitative difference between the death penalty and other kinds of punishment.\(^7\) This did not completely settle the proportionality issue, however, since the Court in *Weems v. United States*,\(^8\) had employed a proportionality rationale to strike down a


\(^{3}\) *TEX. PENAL CODE* arts. 1410, 1413 (Vernon 1953). These sections have been recodified at *TEX. PENAL CODE ANN.* tit. 7, § 31.02 (Vernon 1974).

\(^{4}\) In 1964, petitioner was convicted of credit card fraud of $80; in 1969, he was convicted of passing a forged check with a face value of $28.36. Petitioner's third felony conviction occurred in 1973. *445 U.S. at 265-66.*

\(^{5}\) In 1973, *TEX. PENAL CODE* art. 63 (Vernon 1925) provided: "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." This statute has since been recodified at *TEX. PENAL CODE ANN.* tit. 3, § 12.42(d) (Vernon 1974).

\(^{6}\) *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (rape may not be punished by death penalty); *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion) (death penalty not per se cruel and unusual).

\(^{7}\) *217 U.S. 349* (1910). Other non-death penalty cases may be distinguished. In *Robinson v. California*, 370 U.S. 660 (1962) (punishment of drug addiction is cruel and unusual), the Court said there are certain things which cannot be punished at all, *id* at 667; hence, proportionality was not necessary to the holding. Likewise, in *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion) (military desertion not punishable by denationalization), the holding did not require a proportionality analysis because of an independent rationale, namely, the scope of the federal government's power over citizens.
non-capital sentence under the eighth amendment. The Rummel court distinguished the punishment in Weems, as it had done with the death penalty, on grounds of uniqueness. It quoted at length the rather melodramatic description of Weems’ punishment for falsifying a public record, which included, inter alia, twelve years of hard labor and lifetime surveillance. Thus, by stripping away any mandate for proportionality under the eighth amendment, the Rummel court was able to uphold the application of the Texas repeat offender statute as “purely a matter of legislative prerogative.”

Despite the elegance of its analytical framework, Rummel leaves the eighth amendment in a state of severe philosophical tension. Proportionality, as part of a moral framework, is the essence of the theory of retributive justice. By rejecting proportionality as an eighth amendment principle for non-death penalty sentences, the Rummel court acknowledged that the eighth amendment does not embody the theory of retributive justice. However, by leaving proportionality as a constitutional requirement in death penalty cases, the Court created the anomaly that proportionality based retributive justice becomes a vehicle for leniency in death penalty cases, whereas rehabilitation

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2238. 445 U.S. at 272.
2239. Id. at 273 (quoting Weems v. United States, 217 U.S. 349, 366 (1910)). The Court did not address how restrictions on the prisoner’s liberty after release meaningfully differ from probation or parole.
2240. 445 U.S. at 274 (footnote omitted).
2241. Retributive justice is sometimes called simply “retribution,” and often connotes mere revenge. Commentators have distinguished retributive justice from vengeance on three grounds: (1) it is not arbitrary since it is administered by authority of law, rather than personal authority, (2) it is defined by preexisting rules, and (3) it is proportioned. See VAN DEN HAAG, supra note 2028.
2242. Justice Powell’s dissenting opinion expressed the link between proportionality and retributive justice: “Disproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted on the offender. The inquiry focuses on whether a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal.” 445 U.S. at 288 (Powell, J., dissenting) (emphasis added). Much the same point was once made by C.S. Lewis in his essay, The Humanitarian Theory of Punishment, in THEORIES OF PUNISHMENT 302 (S. Grupp ed. 1971) [hereinafter cited as Lewis]: “[T]he concept of Desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust.”
2243. See 445 U.S. at 272.
2244. Proportionality was the basis for invalidating a death penalty in Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion) (death penalty grossly disproportionate to rape). Similarly, in striking down discretionary death penalties in Furman v. Georgia, 408 U.S. 238 (1972), Justice Stewart evidenced some favor of retributive justice in his concurring opinion, stating:

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in pro-
or offender oriented sentencing becomes a vehicle for harshness through repeat offender statutes. Moreover, as the dissent points out, the tension is exacerbated by the failure of the Court in the death penalty opinions to confine its proportionality analysis to the "unique" death penalty, and by the Court's reluctance in *Rummel* to rule out proportionality in the extreme hypothetical case.

moting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy-of-self-help, vigilante justice, and lynching.

*Id.* at 308 (Stewart, J., concurring). One may argue, of course, that Stewart couches his argument in utilitarian terms based on social attitudes and not on what is intrinsically just. Nevertheless, by concentrating on the offending discretionary element in sentencing, the *Furman* Court evidences a pro-retributionist point of view. Justice Burger recognized this in his dissent where he criticized *Furman* as threatening to turn back the progress of penal reform toward "the blind imposition of uniform sentences for every person convicted of a particular offense." *Id.* at 403 (Burger, C.J., dissenting). At the very least this result runs contrary to the rehabilitative ideal of indeterminate sentencing.

2243. The rehabilitative philosophy stresses sentencing to suit the offender, not the offense. See Williams v. New York, 337 U.S. 241, 247 (1949) ("punishment should fit the offender and not merely the crime"). While Rummel was given a life sentence, Texas' "relatively liberal policy of granting 'good time' credits to its prisoners" would have allowed him to become eligible for parole in twelve years. 445 U.S. at 280. As such, *Rummel* represents an extreme example of the offender-oriented sentence: after twelve years, petitioner's liberty would depend on his "rehabilitation." Such a result puts immense power in the hands of the parole authorities. It was on such grounds that C.S. Lewis attacked the severing of moral Desert from sentencing: "The first result of the Humanitarian [rehabilitation and deterrence] theory is, therefore, to substitute for a definite sentence . . . an indefinite sentence terminable only by the word of . . . experts . . . . Lewis, *supra* note 2242, at 304. In an earlier passage, Lewis remarked:

> It will be vain for the rest of us, speaking simply as men, to say, "but this punishment is hideously unjust, hideously disproportionate to the criminal's deserts."

> The experts with perfect logic will reply, "but nobody was talking about deserts. No one was talking about punishment in your archaic vindicative sense of the word.

> Here are the statistics proving that this treatment deters. Here are the statistics proving that this other treatment cures. What is your trouble?"

*Id.* at 303 (emphasis in original).

Although not explicitly mentioned, the injustice of the result in *Rummel* may have been a motivating factor behind the eventual order of the district court for either Rummel's release or a new trial. The ostensible basis of the order was Rummel's lack of effective counsel at his earlier trial on the false pretenses charge. Rummel v. Estelle, 498 F. Supp. 793, 795 (W.D. Tex. 1980). Instead of appealing the ruling, Texas prosecutors worked out a plea bargain whereby Rummel would admit his guilt on the false pretenses charge in exchange for dropping charges under the habitual offender statute. Rummel would receive a seven year sentence on the false pretenses charge, which would result in his freedom as he had already served more than seven years. L.A. Times, Nov. 16, 1980, § 1, at 1, col. 2. Significantly, the headline of the report reads: "'Unjust' Life Sentence Comes to a Bizarre End."

2246. "Nothing in the *Coker* analysis suggests that principles of disproportionality are applicable only to capital cases." 445 U.S. at 292-93 (Powell, J., dissenting).

2247. The Court severely undercut its own analytical framework—that sentence length is a legislative prerogative—when it admitted in a footnote: "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dis-
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   A. Debra L. Korduner
   B. Lawrence N. Taubman
   C. Lawrence N. Taubman
   D. 1. Lawrence N. Taubman
       2. Douglas Smith
       3. Robert L. Heston
       4. Lawrence N. Taubman
   E. Douglas Smith
   F. Phyllis Kupferstein
   G. Douglas Smith
   H. Douglas Smith

II. PROCEDURAL RIGHTS OF THE ACCUSED
   A. Penny L. Reeves
   B. Gregory B. Thorpe
   C. Cynthia R. Urmer
   D. Andrea Marie Folin
   E. Lynn A. Ciani

III. PRETRIAL PROCEEDINGS
   A. Debra L. Korduner
   B. Jeffrey S. Calkins
   C. Cynthia R. Urmer
   D. Ellen M. Michaelson
   E. Ellen M. Michaelson
   F. Douglas Smith

IV. TRIAL PROCEEDINGS
   A. Gregory B. Thorpe
   B. Rod S. Berman
   C. Rod S. Berman
   D. Robert L. Heston
   E. Lawrence N. Taubman
   F. 1. Lynn A. Ciani
       2. Lynn A. Ciani
       3. Joel G. Plaisance
       4. Rod S. Berman

V. POST-CONViction PROCEEDINGS
   A. Jeffrey S. Calkins
   B. Jeffrey S. Calkins
   C. Jeffrey S. Calkins
   D. Jeffrey S. Calkins
   E. Debra L. Korduner
   F. Joel G. Plaisance
   G. Jeffrey S. Calkins

sent... if a legislature made overtime parking a felony punishable by life imprisonment.”
Id. at 274 n.11.