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Ninth Circuit Survey—Criminal Law in the Ninth Circuit: Recent Developments, Parts IV & V

CRIMINAL LAW IN THE NINTH CIRCUIT: RECENT DEVELOPMENTS

IV. TRIAL PROCEEDINGS

A. Joinder and Severance

Under Rule 8 of the Federal Rules of Criminal Procedure, joinder of two or more counts against one defendant, or joinder of two or more defendants in one action, is permissible in certain circumstances.[1311] If it appears upon joinder that one or more of the parties is unduly prejudiced, the court may, in its discretion, sever the counts or sever the defendants under Rule 14 of the Federal Rules of Criminal Procedure.[1312]

The purpose of joinder is to achieve judicial economy; the purpose

1311. FED. R. CRIM. P. 8 provides:

(a) Joinder of Offenses. 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.

(b) Joinder of Defendants. 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.

1312. FED. R. CRIM. P. 14 provides in pertinent part:

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.

of severance is to rectify any prejudice resulting from a properly joined action.[1313] The Ninth Circuit recently considered six cases in which joinder and severance issues were raised.

In *United States v. Escalante,*[1314] defendant Escalante was convicted of conspiring to import heroin. He made a pretrial motion requesting that the court sever his case from that of his co-defendants on the ground that the organized crime connections of one co-defendant would be disclosed at trial and would be greatly prejudicial.[1315] The trial court rejected his severence motion.[1316]

In upholding Escalante's subsequent conviction, the Ninth Circuit focused on the discretionary nature of an order to sever.[1317] The court held that the test for determining an abuse of discretion in denying severance is "whether a joint trial would be so prejudicial that the trial judge could exercise his discretion in only one way."[1318] The court observed that a defendant has both the burden of proving clear, manifest or undue prejudice from the joint trial,[1319] and of showing more than that a separate trial would have provided a better chance for acquittal.[1320] The court stated that a defendant bears the difficult burden of demonstrating:

> [a] violation of one of his substantive rights by reason of the joint trial: unavailability of full cross-examination, lack of opportunity to present an individual defense, denial of Sixth Amendment confrontation rights, lack of separate counsel among defendants with conflicting interests, or failure properly to instruct the jury on the admissibility of evidence as to

1313. *E.g.,* United States v. Brashier, 548 F.2d 1315, 1323 (9th Cir. 1976), *cert. denied,* 429 U.S. 1111 (1977).

1314. 637 F.2d 1197 (9th Cir.), *cert. denied,* 449 U.S. 856 (1980).

1315. *Id.* at 1201.

1316. *Id.* at 1200.

1317. *Id.* at 1201. *See* United States v. Gay, 567 F.2d 916, 919-20 (9th Cir.) ("The broad discretion of the District Court as an aspect of its inherent right and duty to manage its own calendar" was not abused when defendant's severance motion, which was based on a co-defendant's offer to give exculpatory evidence, was denied), *cert. denied,* 435 U.S. 999 (1978). *See also* United States v. Kaplan, 554 F.2d 958, 966-67 (9th Cir. 1977) (refusal to sever not abuse of discretion where there was only "remote likelihood" that co-defendant's exculpatory testimony would become available after severance).

1318. 637 F.2d at 1201 (citing United States v. Mills, 597 F.2d 693, 696 (9th Cir. 1979); United States v. Adams, 581 F.2d 193, 198 (9th Cir.), *cert. denied,* 439 U.S. 1006 (1978)).

1319. 637 F.2d at 1201. *See* United States v. McDonald, 576 F.2d 1350, 1355 (9th Cir.), *cert. denied,* 439 U.S. 830 (1978).

1320. 637 F.2d at 1201 (citing United States v. Adams, 581 F.2d 193, 198 (9th Cir.), *cert. denied,* 439 U.S. 1006 (1978)); United States v. Campanale, 518 F.2d 352, 359 (9th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976).

> each defendant [citations omitted]. In other words, the prejudice must have been of such magnitude that the defendant was denied a fair trial.[1321]

The *Escalante* court stated that "[t]he prime consideration in assessing the prejudicial effect of a joint trial is whether a jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants."[1322] Recognizing that careful instructions to the jury will neutralize the prejudicial effect of evidence pertaining to co-defendants, the court assumed that a normal jury would follow a judge's instructions to limit certain evidence to certain defendants.[1323] The court thus found that Escalante did not sustain his burden of proving prejudice and affirmed the conviction.[1324]

In *United States v. Seifert,*[1325] the Ninth Circuit recently considered the propriety of severance motions to enable co-defendants to testify on behalf of other defendants at separate trials. Both before and during trial a co-defendant told counsel that he would testify and exculpate Seifert.[1326]

When the co-defendant abruptly refused to testify, Seifert moved for severance under Rule 14 of the Federal Rules of Criminal Proce-

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1321. 637 F.2d at 1201.

1322. *Id. See* United States v. Brady, 579 F.2d 1121, 1128 (9th Cir. 1978) (a properly instructed jury should be reasonably able to appraise the separate evidence against each defendant, notwithstanding the fact that each defendant was blaming the others for the crime), *cert. denied,* 439 U.S. 1074 (1979); United States v. Gaines, 563 F.2d 1352, 1356 (9th Cir. 1977) (denial of severance motion not error where trial court protected defendant's rights by allowing into evidence only a summary of a co-defendant's confession, excluding any reference to defendant); United States v. Campanale, 518 F.2d 352, 359 (9th Cir. 1975) (conclusion that jury was able to compartmentalize evidence followed from verdict finding only some defendants guilty of same offenses), *cert. denied,* 423 U.S. 1050 (1976).

1323. 637 F.2d at 1201-02. *See* United States v. Sullivan, 595 F.2d 7, 8-9 (9th Cir.) ("Our whole jury system is based on the recognized ability of the jury to follow the court's instructions."), *cert. denied,* 442 U.S. 933 (1979); United States v. McDonald, 576 F.2d 1350, 1356 n.8 (9th Cir.) (no abuse of discretion in denial of severance where defendant's argument based on slight prejudice resulting from joined jury trial), *cert. denied,* 439 U.S. 830 (1978); United States v. Martinez, 429 F.2d 971, 975 (9th Cir. 1970) (no abuse of discretion where trial court exercised care in instructing jury to safeguard individual interests of each defendant), *cert. denied,* 401 U.S. 915 (1971). *Cf.* Krulewitch v. United States, 336 U.S. 440, 453 (1949) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.").

1324. 637 F.2d at 1202. The Ninth Circuit recognized that some of the evidence relating to Escalante's co-defendants was harmful to him. The court concluded, however, that the jury was carefully instructed to disregard that evidence in determining Escalante's guilt or innocence and that Escalante had shown no reason to believe that the jury would not have been able to follow the trial judge's instructions. *Id.*

1325. 648 F.2d 557 (9th Cir. 1980).

1326. *Id.* at 563.

dure.[1327] Although the trial court recognized that there was a "high probability that [the co-defendant] would have testified on behalf of Seifert at a separate trial,"[1328] it did not find manifest prejudice, and denied the motion.[1329]

The Ninth Circuit reversed. The court noted that the defendant was required to show that failure to sever was so manifestly prejudicial as to outweigh the concern for judicial economy.[1330] In addition, the court stated that the defendant must show that if the trial had been severed, the co-defendant would have testified favorably for Seifert.[1331] The court found that Seifert had sustained his burden and that "[c]onsiderations of judicial economy [did] not outweigh the seriousness of the prejudice to Seifert, who was denied the right to present important exculpatory evidence."[1332]

A different result was reached in *United States v. Mayo.*[1333] There, as in *Seifert,* a defendant sought severance in order to use a co-defendant's allegedly exculpatory testimony. The trial judge denied the motion, and the Ninth Circuit affirmed.[1334] Using the test applied in *Seifert*,[1335] the court found that Mayo did not show that the co-defendant would testify on Mayo's behalf.[1336]

In *United States v. Kenny,*[1337] three defendants were tried and convicted of conspiracy, fraudulent government contracting activities, and

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1327. *Id.*

1328. *Id.*

1329. *Id.*

1330. *Id. See* United States v. Armstrong, 621 F.2d 951, 954 (9th Cir. 1980) ("Joinder is the rule rather than the exception."). The *Seifert* court relied on *Escalante* for the proposition that a requirement of "manifest prejudice" obligated the defendant to show a violation of a substantive right. 648 F.2d at 563 (citing United States v. Escalante, 637 F.2d 1197, 1202 (9th Cir. 1980), *cert. denied,* 449 U.S. 856 (1981)). *See supra* text accompanying note 1321.

1331. 648 F.2d at 563. *See* United States v. Vigil, 561 F.2d 1316, 1317 (9th Cir. 1977) (per curiam) ("When the reason for severance is the asserted need for a codefendant's testimony, the defendant must show that he would call the codefendant at a severed trial, that the codefendant would in fact testify, and that the testimony would be favorable to the moving defendant.").

1332. 648 F.2d at 564. Moreover, the court noted that the trial court must also consider the possible weight and credibility of the testimony and the economy of severance at the time the motion was made. *Id. See* United States v. Kaplan, 554 F.2d 958, 966 (9th Cir. 1977). The court determined that the co-defendant's testimony would have rebutted the testimony of the Government witness as it related to Seifert, and that another witness' testimony inculpating Seifert would also have been discredited. 648 F.2d at 564.

1333. 646 F.2d 369 (9th Cir.), *cert. denied,* 454 U.S. 1127 (1981).

1334. *Id.* at 374.

1335. *See supra* text accompanying note 1331.

1336. 646 F.2d at 374.

1337. 645 F.2d 1323 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981).

bribery. An additional count of income tax evasion was joined against defendant Kenny.[1338] On appeal, the defendants claimed that the income tax evasion count against Kenny should have been severed. Kenny asserted prejudice due to a lack of preparation; the other defendants claimed prejudice because the tax evasion charge against Kenny was brought at the same trial.[1339]

The Ninth Circuit upheld the joinder under Rule 8(b) of the Federal Rules of Criminal Procedure "on the basis that the defendants were 'alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.' "[1340] The court stated that the participation of all defendants in every act constituting each joined offense was not essential to proper joinder.[1341] Noting that " 'Rule 8(b) should be construed broadly in favor of initial joinder,' "[1342] the court observed that initial joinder is proper against multiple defendants " 'whenever the common activity constitutes a substantial portion of the proof of the joined charges.' "[1343]

The *Kenny* court reaffirmed the principle that the defendant has the burden of showing that the concern for judicial economy is outweighed by the joinder's prejudicial effect. If the defendant sustains this burden, the court must exercise its discretion and sever.[1344] The court determined that the defendants had not sustained their burden and affirmed their convictions.[1345]

In *United States v. Burreson,*[1346] three defendants were convicted of violations of the Investment Company and Investment Advisors Acts of 1940, securities fraud, mail fraud, and conspiracy.[1347] Conspir-

1338. *Id.* at 1327 n.1.

1339. *Id.* at 1344.

1340. *Id.* (quoting FED. R. CRIM. P. 8(b)).

1341. *Id.*

1342. *Id.* (quoting United States v. Ford, 632 F.2d 1354, 1373 (9th Cir. 1980)).

1343. 645 F.2d at 1344 (quoting United States v. Roselli, 432 F.2d 879, 899 (9th Cir. 1970), *cert. denied,* 401 U.S. 924 (1971)).

1344. 645 F.2d at 1344. Moreover, the court made it clear that the burden of proof on defendants is substantial: they must "make a strong showing of prejudice in order to obtain relief under the rule." *Id.* (citing Williamson v. United States, 310 F.2d 192, 197 (9th Cir. 1962)).

1345. 645 F.2d at 1345. The court stated that much of the evidence relating to the tax evasion charges also related to the charges of fraud and bribery and would have been admissible in any event. *Id. See* United States v. McDonald, 576 F.2d 1350, 1355 (9th Cir. 1978) (some degree of prejudice necessarily occurs when defendants are joined for trial, but more than a slight degree of prejudice must be shown before severance will be granted).

1346. 643 F.2d 1344 (9th Cir. 1981).

1347. *Id.* at 1346.

acy was the only offense charged against all defendants.[1348] On appeal, the defendants claimed that they were improperly joined in the same indictment and that their motions to sever should have been granted.[1349]

The Ninth Circuit rejected defendants' contentions, holding that Rule 8(b) of the Federal Rules of Criminal Procedure allowed joinder because proper joinder did not require the participation of all defendants in every act.[1350] Moreover, the court noted that "when one person serves as a common link between the transactions, joinder under Rule 8(b) is proper."[1351] The common link in *Burreson* was the holding company the defendants had used for their illicit enterprise.[1352]

The court also found no evidence of prejudice because each defendant was independently represented, and the jury was able to separate the charges against the individual defendants.[1353]

In *United States v. Davis,*[1354] three defendants were convicted of various drug related charges.[1355] One defendant, Snyder, sought severance of three counts in which he was not named.[1356] On appeal, Snyder claimed that the initial joinder was improper under Rule 8(b)[1357] and that the trial court abused its discretion in not severing the three counts

1348. *Id.*

1349. *Id.* at 1347.

1350. *Id.* ("[A]s long as all defendants participated in the same series of transactions, defendants may be joined even though not all defendants participated in every act.") (citing United States v. Roselli, 432 F.2d 879, 899 (9th Cir. 1970), *cert. denied,* 401 U.S. 924 (1971)). *See also* United States v. Ford, 632 F.2d 1354, 1370 (9th Cir. 1980) (all counts related to defendants' scheme of enriching themselves at expense of union pension funds of which they were trustees).

1351. 643 F.2d at 1347 (citing United States v. Patterson, 455 F.2d 264, 266 (9th Cir. 1972) (joinder proper where one defendant served as link between all defendants in the transactions leading to indictment for mail fraud)).

1352. 643 F.2d at 1347.

1353. *Id. See* United States v. Camacho, 528 F.2d 464, 470 (9th Cir.) (no prejudice in joint trial of co-defendants where each defendant represented by individual counsel and jury properly instructed to apply evidence separately as to each), *cert. denied*, 425 U.S. 995 (1976). The *Burreson* court also found that the jury was able to separate the evidence based on the fact that on several counts, the jury found one or more defendants guilty, while finding another not guilty of the same charge. 643 F.2d at 1347. *Accord* United States v. Campanale, 518 F.2d 352, 359 (9th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976).

1354. 663 F.2d 824 (9th Cir. 1981).

1355. *Id.* at 826-27.

1356. *Id.* at 831. Snyder sought severance of counts 2, 8, and 9. Count 2 charged conspiracy to possess hashish oil with the intent to distribute, but it involved a beating, to which Snyder was not a party. Count 8 charged a continuing criminal enterprise against defendant Davis that incorporated by reference the first 7 counts of the indictment. Count 9 charged only Davis with willfully filing a false tax return. *Id.* at 831-32.

1357. *See supra* note 1311.

under Rule 14.[1358]

In affirming the denial of severance, the Ninth Circuit first applied the transaction test set forth in Rule 8[1359] and determined that joinder was proper.[1360] The court also found that because there was a substantial overlap of evidence,[1361] the remaining count was properly joined.[1362] The court next determined that the trial court did not abuse its discretion in denying severance under Rule 14[1363] because the defendant had not sustained his burden of proving the necessary degree of prejudice.[1364]

B. Guilty Pleas

1. Rule 11 violations

The effect of a guilty plea extends beyond an explicit admission of the offense charged; it is in itself a conviction.[1365] Following a plea of guilty, the court need only enter judgment and impose sentence.[1366] A guilty plea also results in a waiver of constitutional challenges which might have prevented the prosecution from proving factual guilt.[1367]

Because of its final consequences, the entry of a guilty plea must be preceded by procedural safeguards which ensure that the plea was made intelligently, voluntarily, and with a full understanding of the

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1358. 663 F.2d at 831. *See supra* note 1312.

1359. 663 F.2d at 831-32. The court noted that the term "transaction," within the meaning of Rule 8, depends not so much on the immediateness of the connection between occurrences, but upon their logical relationship. *Id.* (citing United States v. Friedman, 445 F.2d 1076, 1083 (9th Cir.), *cert. denied,* 404 U.S. 958 (1971); Moore v. New Cotton Exch., 270 U.S. 593, 610 (1926)).

1360. 663 F.2d at 832.

1361. *Id.* The court found that count 2 was essentially the same as count 1, with which Snyder was charged, and that the testimony of the same witnesses established both counts. The court also found that because count 8 incorporated by reference the counts in which Snyder was charged, it too arose out of the same transaction. *Id.*

1362. *Id.* The court considered Rule 8(b)'s objective of maximum trial convenience consistent with minimum prejudice. *See* United States v. Roselli, 432 F.2d 879, 899 (9th Cir. 1970), *cert. denied,* 401 U.S. 924 (1971); 8 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 8.02[2] (2d rev. ed. 1982).

1363. 663 F.2d at 833.

1364. *Id.* at 832-33.

1365. Boykin v. Alabama, 395 U.S. 238, 242 (1969) (guilty plea results in waiver of right to jury trial, privilege against self-incrimination, and right to confrontation). *Id.* at 243.

1366. *Id.* at 242.

1367. Boykin v. Alabama, 395 U.S. at 242-43. The defendant, however, retains other constitutional claims that would have prevented conviction even if factual guilt were established. *See* Menna v. New York, 423 U.S. 61, 62-63 n.2 (1975) (guilty plea no bar to defendant's claim that indictment violated double jeopardy clause).

significance of a waiver of constitutional rights.[1368] Rule 11 of the Federal Rules of Criminal Procedure sets forth these procedural guidelines.[1369]

The Ninth Circuit has extended a number of the Rule 11 protections to state court defendants seeking federal habeas corpus relief. The voluntariness requirement, for example, was recently at issue in *Steinsvik v. Vinzant*[1370] where it was alleged that a state court failed to inform the defendant of the consequences of his guilty plea.

Steinsvik pled guilty to credit card forgery in 1971 and was placed on probation. In 1974 his probation was revoked, and he was given a maximum sentence to run concurrently with sentences imposed as a result of his conviction for the crime of grand larceny.[1371] Steinsvik contended that his right to due process was violated when he was not informed of (1) the maximum sentence and the court's duty to impose it, and (2) the possibility of deportation and the court's power to forbid it prior to his 1971 plea. He further contended that there was substantial evidence of his incompetence to enter a plea of guilty, thus requiring the trial court to convene a competency hearing.[1372]

A procedural standard adopted by the Ninth Circuit in *Pebworth v. Conte*[1373] requires that prior to pleading guilty a defendant be advised

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1368. Boykin v. Alabama, 395 U.S. at 242-43.

1369. FED. R. CRIM. P. 11(c) provides that:

> Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
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> (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
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> (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
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> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
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> (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
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> (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 answers may later be used against him in a prosecution for perjury or false statement.

1370. 640 F.2d 949 (9th Cir. 1981).

1371. *Id.* at 950-51.

1372. *Id.* at 951.

1373. 489 F.2d 266, 267 (9th Cir. 1974).

of all the potential punishments which may be imposed. In *Steinsvik,* the court held that even if the *Pebworth* requirement had not been satisfied, the defendant's due process rights were not violated because he was not prejudiced by the sentence imposed.[1374] According to the court, the lack of prejudice stemmed from the fact that although Steinsvik was given the maximum sentence, he was placed on probation after pleading guilty.[1375]

The court also found no merit in Steinsvik's contention that he was denied due process when the state court did not inform him of the possibility of deportation.[1376] In reaching this decision, the court relied upon previous Ninth Circuit authority which indicated that when the possibility of deportation is a collateral rather than a direct consequence of a guilty plea, the trial judge is not required to inform the defendant of the possibility of deportation.[1377] The court stated that Steinsvik's deportation did not result from his 1971 guilty plea but rather "was contingent upon and a result of his later conviction for an unrelated offense."[1378]

The defendant further contended that there was substantial evidence of his mental incompetence when he entered his guilty plea.[1379] The Ninth Circuit recognizes that a competency hearing is required when doubt exists as to a defendant's ability to make a choice of pleas

1374. 640 F.2d at 955.

1375. *Id.* In reaching this decision the court relied on Yellowwolf v. Morris, 536 F.2d 813 (9th Cir. 1976). In *Yellowwolf,* two defendants claimed that they had not been informed of their potential maximum sentences. The court set aside the guilty plea of one of the defendants when he proved that additional information would have resulted in a change of plea. The other defendant was denied relief because he was unable to show any prejudice. According to the court, while this second defendant may not have been aware of the potential sentence at the time he entered his plea, he was placed on probation and thus "had nothing of which to complain." *Id.* at 817.

1376. Steinsvik v. Vinzant, 640 F.2d at 956. 8 U.S.C. § 1251(a)(4) (1976) provides:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General be deported who . . . (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial.

1377. 640 F.2d at 956 (citing Fruchtman v. Kenton, 531 F.2d 946, 948-49 (9th Cir.), *cert. denied,* 429 U.S. 895 (1976)). In *Fruchtman,* the court held that the possibility of deportation is not a direct consequence of a guilty plea, and a court is not required to advise an alien that he could be subject to deportation as a result of that plea. The *Steinsvik* court limited the application of *Fruchtman,* however, to those cases in which the possibility of deportation is a collateral result of a plea. 640 F.2d at 956.

1378. 640 F.2d at 956.

1379. *Id.* at 951.

and to understand the consequences of that choice.[1380] The *Steinsvik* court noted that a determination of competency to enter a plea of guilty involves a more comprehensive inquiry than that required in determining competency to stand trial.[1381]

Steinsvik based his claim of incompetency on (1) his confusion regarding the sentencing procedure, (2) his recent hospitalization and psychiatric treatment, (3) his recent hospitalization for an overdose of barbiturates, and (4) his limited knowledge of the English language.[1382] The record, however, revealed nothing which would have caused the judge "or any reasonable person to have had good-faith doubt as to [the] petitioner's competency."[1383]

The court recognized that Steinsvik would be entitled to relief if evidence introduced subsequent to the entry of his plea revealed that he was in fact incompetent, regardless of the insufficiency of the evidence to raise a good faith doubt in the mind of the trial judge.[1384] However, the supplementary testimony presented did not persuade the court that Steinsvik lacked the competency to plead guilty.[1385]

In contrast, the dissent reasoned that a substantial doubt existed as to Steinsvik's competency to enter a guilty plea.[1386] The judge noted that when the habeas petition was filed, additional evidence surfaced: thirty-three hours prior to his pleading guilty, Steinsvik had taken an overdose of barbiturates.[1387] This evidence combined with Steinsvik's past history of psychological problems and suicide attempts led the dissent to conclude that compelling doubts existed regarding his

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1380. Sailer v. Gunn, 548 F.2d 271, 275 (9th Cir. 1977).

1381. 640 F.2d at 951 (citing Sieling v. Eyman, 478 F.2d 211, 214-15 (9th Cir. 1973)). In *Sieling,* Judge Hufstedler's language in Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir. 1970) was quoted with approval: "the standards of competency to plead guilty are higher than those of competency to stand trial."

1382. 640 F.2d at 952-54.

1383. *Id.* at 953. The court cited Sailer v. Gunn, wherein it was indicated that psychiatric care alone is insufficient reason for finding incompetency. 640 F.2d at 953 n.4 (citing Sailer v. Gunn, 548 F.2d at 275). The *Sailer* court stated:

> [U]nder the due process clause a hearing on a defendant's competence to plead guilty is required if the trial judge entertains or should reasonably have entertained a good-faith doubt as to the competence of the defendant to understand the nature and consequences of his plea or to participate intelligently in the proceedings, including his ability to make a reasoned choice among alternatives presented to him.

548 F.2d at 275.

1384. 640 F.2d at 954 (citing Zapata v. Estelle, 588 F.2d 1017, 1021-22 (5th Cir. 1979) (presentation of sufficient facts to create a substantial doubt as to competence results in entitlement to evidentiary hearing)).

1385. 640 F.2d at 954.

1386. *Id.* at 957 (Fletcher, J., dissenting).

1387. *Id.*

competency.[1388]

The dissent raises a qualitative question regarding the degree of fairness afforded this defendant at the time he entered his plea. Although granting a competency hearing may lead to retrospective conjecture as to the actual mental competence of the defendant, it is inconsistent with judicial concern for fairness to deny a hearing that potentially may raise serious doubts about the defendant's competency. In this instance, the balance between judicial economy and the assurance of judicial fair play should weigh heavily on the side of a defendant whose competence to plead guilty is legitimately in doubt.

The Ninth Circuit further interpreted the procedural requirements of Rule 11 in *United States v. DeFilippis.*[1389] In that case, the defendant requested an evidentiary hearing to ascertain the existence of a condition in her husband's plea agreement which allegedly operated to dismiss charges against her. The trial judge refused the request after finding no mention of the condition in the transcript of the plea proceedings.[1390]

On appeal, the Ninth Circuit declined to remand the case for further evidentiary findings.[1391] The court noted that under the full colloquy requirement of Rule 11,[1392] a federal court should not look beyond the plea transcript of its own proceedings unless otherwise required by unusual circumstances.[1393] The court also noted that since the same judge had presided both at the defendant's trial and the plea proceeding, and had conducted the requisite colloquy during these proceed-

1388. *Id.* at 958. *See* Van Poyek v. Wainwright, 595 F.2d 1083, 1085 (5th Cir. 1979) (evidentiary hearing granted where defendant had attempted to hang himself and set fire to his jail cell mattress but court had been unaware of incidents prior to accepting defendant's plea); Saddler v. United States, 531 F.2d 83, 86 (2d Cir. 1976) (evidentiary hearing required where the court had been unaware of the defendant's history of mental illness); Manley v. United States, 396 F.2d 699, 701 (5th Cir. 1968) (evidentiary hearing required where the defendant was experiencing drug withdrawal on the day of his plea).

1389. 637 F.2d 1370 (9th Cir. 1981).

1390. *Id.* at 1375.

1391. *Id.* at 1376.

1392. *Id.* at 1375 n.10. FED. R. CRIM. P. 11 was amended in 1975 to require a thorough and personal discussion between the court and a defendant pleading guilty or nolo contendere.

1393. 637 F.2d at 1375. The court distinguished Anthony v. Fitzharris, 389 F.2d 657, 660 (9th Cir. 1968), a case which indicated that a plea transcript should not be regarded as conclusive. This distinction was based on two aspects of the case: (1) *Anthony* involved allegations of threats and coercion, which would not have appeared on the record; and (2) the *Anthony* court was interpreting 28 U.S.C. § 2254(d), which specifically mandates a hearing because under this statute a federal judge is required to review state court proceedings. 637 F.2d at 1375.

ings, he had more freedom to deny a full evidentiary hearing.[1394]

The denial of an evidentiary hearing in *DeFilippis* effectively limited the circumstances in which further testimony will be admitted regarding the content of a contested plea agreement. The court thereby emphasized that the record should contain a transcription of any colloquy that may have occurred. However, notwithstanding the apparent completeness of a plea transcript, this approach discounts the merits of testimony offered as a clarification of past events.

In a third case, *United States v. Romero,*[1395] the Ninth Circuit determined that the defendant was not prejudiced by the district court's entry of a not guilty plea pursuant to Rule 11(a).[1396] Romero claimed he was denied a fair trial because the district court did not read the indictment at the time of his arraignment as required by Rule 10.[1397] This purportedly resulted in his inability to answer when asked how he wished to plead. Consequently, the district court entered a plea of not guilty pursuant to Rule 11(a).[1398]

The Ninth Circuit found Romero's claims of prejudice to be groundless because he had previously read a copy of the indictment.[1399] The court noted that arraignment standards require only that the "defendant know what he is accused of and be able adequately to defend himself."[1400] Since Romero was fully aware of the charges against him and had assistance of appointed counsel at that time, the court concluded that these standards had been met.[1401] The court also observed that reversal of a conviction is warranted by the existence of potential prejudice, but not by failure to comply with technical arraignment

1394. *Id.* The court relied on Blackledge v. Allison, 431 U.S. 63 (1977), in which the defendant had entered a guilty plea in exchange for receiving a shorter term for the crime of safe robbery. *Id.* at 65. When this agreement was ignored, he appealed. The Court found that the ambiguous nature of the record prevented a summary dismissal of the writ. *Id.* at 76. The Court also found that when a judge is present at both a plea proceeding and at a § 2255 proceeding, a judge's recollection may enable him to dismiss a § 2255 motion. *Id.* at 74 n.4. *See* Gustave v. United States, 627 F.2d 901, 903 (9th Cir. 1980) (judge's presence at both proceedings resulted in his ability to assert that defendant was represented by competent counsel).

1395. 640 F.2d 1014 (9th Cir. 1981).

1396. *Id.* at 1015. FED. R. CRIM. P. 11(a) provides: "[i]f a defendant refuses to plead . . . the court shall enter a plea of not guilty."

1397. 640 F.2d at 1015. FED. R. CRIM. P. 10 provides that: "[a]rraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto."

1398. 640 F.2d at 1015.

1399. *Id.*

1400. *Id.*

1401. *Id.*

procedures.[1402]

C. *Jury Administration*

1. Voir dire

The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.[1403] To assure a jury's impartiality, judicial decisions and various statutes provide for a voir dire examination of prospective jurors by either the court or the attorneys for the parties.[1404] A prospective juror who appears partial may be excused by either party's exercising a challenge "for cause" or a "peremptory" challenge. Challenges for cause require proof of "a narrowly specified . . . and legally cognizable . . . partiality."[1405] A party is allowed an unlimited number of challenges for cause.[1406] Peremptory challenges may be made "for a real or imagined partiality that is less easily designated or demonstrable."[1407] The number of allowable peremptory challenges is fixed by statute.[1408] The Supreme Court and the Ninth Circuit have recently considered cases involving all of these aspects of the pretrial determination of a jury's impartiality.

a. *racial bias*

In *Rosales-Lopez v. United States,*[1409] the Supreme Court granted certiorari to resolve an inter-circuit conflict[1410] over whether it is revers-

1402. *Id. See* United States v. Rogers, 469 F.2d 1317, 1317-18 (5th Cir. 1972) (conviction valid absent a showing of prejudice where defendant was not formally arraigned); Garland v. Washington, 232 U.S. 642, 646-47 (1914) (second arraignment on larceny charge held technical formality not affecting defendant's substantive rights).

1403. U.S. CONST. amend. VI.

1404. *See, e.g.,* FED. R. CRIM. P. 24(b).

1405. Swain v. Alabama, 380 U.S. 202, 220 (1964) (citing Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

1406. The party need only furnish a satisfactory reason why a juror should not be seated. BLACK'S LAW DICTIONARY 769 (5th ed. 1979).

1407. Swain v. Alabama, 380 U.S. 202, 220 (1964) (citing Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

1408. *See, e.g.,* Hayes v. Missouri, 120 U.S. 68, 70 (1886) (number permitted is within discretion of state legislature "limited only by the necessity of having an impartial jury"); Stilson v. United States, 250 U.S. 583, 586 (1919) (number regulated by common law or Congress).

1409. 451 U.S. 182 (1981).

1410. Some circuits, including the Ninth, require a trial judge to ask a question concerning racial or ethnic prejudice only when there is some indication that the particular case is likely to have racial overtones or to involve racial prejudice. *See, e.g.,* United States v. Polk, 550 F.2d 1265 (10th Cir.), *cert. denied,* 434 U.S. 838 (1977); United States v. Perez-Martinez, 525 F.2d 365 (9th Cir. 1975). The majority of circuits, however, have adopted a per se rule that a

ible error to decline a racial minority defendant's request that the court ask prospective jurors questions concerning racial or ethnic prejudice.[1411] Rosales-Lopez was charged with conspiring to smuggle Mexican aliens into the United States.[1412] Because Rosales-Lopez was of Mexican descent, defense counsel requested the court to ask the prospective jurors if they would consider his race in their evaluation of the case, and how it would affect them.[1413] The judge asked the jurors a series of questions, including one regarding their attitudes about the "alien problem."[1414] He did not, however, ask any questions directed specifically to possible racial or ethnic prejudice.[1415] The judge concluded his voir dire by inquiring whether there were any reasons why the jurors could not act fairly and impartially.[1416]

After the voir dire, defense counsel again requested the judge to ask the jurors a question about racial or ethnic prejudice; the judge refused to do so.[1417] On appeal, the Ninth Circuit upheld the judge's refusal.[1418]

The Supreme Court began its analysis by emphasizing the broad discretion accorded to trial judges in determining how best to conduct voir dire.[1419] The Court stated that it is difficult for an appellate court to review a trial judge's decisions respecting voir dire because the judge determines the impartiality and credibility of prospective jurors from his immediate perceptions of their demeanor and responses to questions.[1420] Furthermore, Rule 24(a) of the Federal Rules of Criminal Procedure provides trial judges with the ability to exercise broad discretion during voir dire examination.[1421]

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trial judge must ask a question on racial or ethnic prejudice when requested by the defendant. *See, e.g.,* United States v. Bowles, 574 F.2d 970 (8th Cir. 1978); United States v. Robinson, 485 F.2d 1157 (3d Cir. 1973); United States v. Carter, 440 F.2d 1132 (6th Cir. 1971); United States v. Gore, 435 F.2d 1110 (4th Cir. 1970); Frasier v. United States, 267 F.2d 62 (1st Cir. 1959).

1411. 451 U.S. at 183.

1412. *Id.* at 184.

1413. *Id.* at 185.

1414. *Id.* at 186.

1415. *Id.* at 185.

1416. *Id.* at 186.

1417. *Id.*

1418. *Id.* at 187.

1419. *Id.* at 189 (citing Ham v. South Carolina, 409 U.S. 524, 528 (1973); Aldridge v. United States, 283 U.S. 308, 310 (1931)).

1420. 451 U.S. at 188.

1421. FED. R. CRIM. P. 24(a) provides that the trial court may conduct the voir dire itself or may allow the parties to conduct it. If the court conducts it, the parties may "supplement the examination by such further inquiry as [the court] deems proper"; alternatively, the

The Court explained, however, that in particular cases certain constitutional requirements concerning voir dire must be met and cited *Ham v. South Carolina* [1422] as an example of the "special circumstances" that constitutionally require questioning about racial prejudice.[1423] In *Ham,* the black defendant was convicted of a drug offense.[1424] His defense was that the police had "framed" him in retaliation for his well-known participation in civil rights activities.[1425] The Court held that because racial issues were "inextricably bound up with the conduct of the trial,"[1426] there was a consequent need to inquire specifically during voir dire about the possibility of racial prejudice.[1427]

The Court in *Rosales-Lopez* indicated that absent "special circumstances," the Constitution leaves the determination of the need to question about racial prejudice to the judicial system within which the trial court operates.[1428] It stated that within the *federal* court system, over which it exercised supervisory authority, it preferred allowing the *defendant* to determine whether inquiries should be made into the racial or ethnic prejudice of prospective jurors;[1429] a trial court's failure to honor a defendant's request would be considered reversible error only when the circumstances indicated that there was a "reasonable possibility" that racial or ethnic prejudice might have influenced the jury.[1430]

As examples of when such a "reasonable possibility" might exist, the Court cited cases in which the defendant was accused of violent crimes perpetrated against a victim who was a member of a different racial or ethnic group.[1431] It explained that because cases with this par-

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court may limit participation to the submission of additional questions, which the court must ask only "as it deems proper."

1422. 409 U.S. 524 (1973).

1423. 451 U.S. at 189.

1424. 409 U.S. at 524.

1425. *Id.*

1426. *Id.* (citing Ristaino v. Ross, 424 U.S. 589, 596 (1976)).

1427. 409 U.S. at 527.

1428. 451 U.S. at 190.

1429. *Id.* at 191.

1430. *Id.*

1431. *Id.* at 191-92 (citing Ristaino v. Ross, 424 U.S. 589 (1976); Aldridge v. United States, 283 U.S. 308 (1931)). In *Ristaino,* a black defendant was convicted of armed robbery, assault, and battery with intent to commit murder against a white security guard. 424 U.S. at 590. The Court held that under these circumstances there was no constitutional requirement to question jurors about racial or ethnic prejudice because, unlike the situation in *Ham,* racial issues were not bound up with either the commission of the crimes or the conduct of the defense. *Id.* at 597-98. The Court stated, however, that if such a case were tried in the federal court system, it would use its supervisory authority to require the federal trial judge to ask questions of the jurors directed toward the discovery of racial prejudice. *Id.* at 597 n.9. In *Aldridge,* where a black defendant was convicted of murdering a white policeman,

ticular fact pattern were almost certain to raise such a possibility, federal trial judges were absolutely required to make an inquiry regarding racial or ethnic prejudice if requested by the defendant.[1432] The Court added that other circumstances might suggest the need to inquire about racial or ethnic prejudice; however, it remained the trial judge's responsibility to determine whether the circumstances of a particular case indicated that racial or ethnic prejudice might exist, subject to case-by-case appellate review.[1433]

The Court determined that in *Rosales-Lopez* no violent criminal acts had been perpetrated upon a victim of a different racial or ethnic group, nor did the case involve allegations of racial or ethnic prejudice.[1434] Thus, *Rosales-Lopez* contained no "special circumstances" of constitutional dimension.[1435] The Court then considered whether other factors might indicate that racial or ethnic prejudice influenced the jury.[1436] Finding no such possibility,[1437] the Court held that neither the Constitution nor the Court's supervisory role required a reversal of Rosales-Lopez's conviction.[1438]

The Supreme Court's decision in *Rosales-Lopez* comports with the Ninth Circuit's position that, absent a constitutional *requirement* to examine the jury on voir dire about racial prejudice, a trial judge is re-

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the Court did hold that the federal trial judge's failure to inquire into the possibility of racial prejudice was reversible error. 283 U.S. at 314-15.

1432. 451 U.S. at 192. In his concurring opinion, Justice Rehnquist doubted the wisdom of creating a per se rule requiring a district court to conduct voir dire about the issue of racial prejudice in every case involving a "violent crime" between members of different racial or ethnic groups. *Id.* at 194 (Rehnquist, J., concurring). He observed that the use of the terms "violent crime" and "different racial or ethnic groups" was likely to spawn new litigation over the meaning of those terms and their application by the district court in its assessment of the possibility of the existence of racial prejudice. *Id.* Furthermore, he foresaw the possibility that trial judges might decide that asking questions about racial prejudice could exacerbate whatever prejudice might exist, rather than aid in exposing it. *Id.* at 195. Justice Rehnquist concluded that it was inappropriate for the Court to determine that there was always a "reasonable possibility" of prejudice when the crime committed was violent; such a determination should be made by the trial court, " 'subject to case-by-case review by the appellate courts.' " *Id.* at 194-95 (quoting *id.* at 192).

1433. *Id.* at 192.

1434. *Id.*

1435. *Id.*

1436. *Id.* at 192-93. These factors included the jurors' attitudes toward aliens and Rosales-Lopez's romantic involvement with the Caucasian daughter of one of the witnesses. *Id.* at 193.

1437. *Id.* at 193-94. The Court stated that the possibility that such prejudice influenced the jury was remote because the trial court had asked the jurors about their attitudes concerning the "alien problem," and because the testimony of Rosales-Lopez's girlfriend's mother had been substantially corroborated by other Government witnesses. *Id.* at 193.

1438. *Id.* at 194.

quired to inquire about racial or ethnic prejudice only when the particular circumstances of a case indicate that such prejudice may exist.[1439] This is a considerably more relaxed standard than that established by other circuits, where a trial judge must ask questions concerning racial prejudice if a minority defendant so requests.[1440]

In his dissenting opinion in *Rosales-Lopez,* Justice Stevens emphasized that the plurality's decision represented a change in long-standing federal law.[1441] To illustrate this change, he cited *Aldridge v. United States*,[1442] which required voir dire of jurors about racial or ethnic prejudice.[1443] The *Aldridge* Court, however, did not appear to *limit* its holding only to facts involving defendants and victims of different racial groups. Although *Aldridge did* involve the murder of a white police officer by a black defendant, the opinion rested on state court decisions that did not necessarily involve defendants and victims of different races.[1444]

Justice Stevens agreed with the majority of federal judges who have interpreted *Aldridge* as establishing a firm rule entitling a minority defendant to some voir dire about possible racial or ethnic bias, regardless of the specific facts of the case.[1445] He concluded that although the voir dire in *Rosales-Lopez* was sufficient to expose any juror prejudice arising from the particular facts of the case it was inadequate as a matter of law because "it wholly ignored the risk that potential jurors in the Southern District of California might be prejudiced against the defendant simply because he is a person of Mexican descent."[1446]

The Court's refusal to hold that defendants such as Rosales-Lopez are entitled to voir dire regarding racial or ethnic prejudice demonstrates an unwillingness to believe that many potential jurors "harbor strong prejudices against all members of certain racial, religious, or ethnic groups for no reason other than hostility to the group as a

1439. *See* Rosales-Lopez v. United States, 617 F.2d 1349, 1354 (9th Cir. 1980), *aff'd*, 451 U.S. 182 (1981); United States v. Perez-Martinez, 525 F.2d 365, 368 (9th Cir. 1975).

1440. *See supra* note 1410.

1441. 451 U.S. at 196 (Stevens, J., dissenting).

1442. 283 U.S. 308 (1931).

1443. *Id.* at 315.

1444. *Id.* at 311-12. The Court in *Aldridge* relied upon the decision in Pinder v. State, 27 Fla. 370, 8 So. 837 (1891). In *Pinder,* both the defendant and the victim were black, and the Court noted the Florida court's holding that the trial court erred by refusing to ask the jurors if they could give the defendant, a Negro, as fair and impartial a trial as they could a white person. 283 U.S. at 311.

1445. 451 U.S. at 201-02 (Stevens, J., dissenting).

1446. *Id.* at 202.

whole."[1447] The Court expressed concern that requiring an inquiry about racial prejudice whenever the defendant is a member of a minority group creates the impression " 'that justice in a court of law may turn upon the pigmentation of skin [or] the accident of birth.' "[1448] It admitted, however, that "avoiding the inquiry does not eliminate the problem, and . . . [the defendant's] trial is not the place in which to elevate appearance over reality."[1449] Thus, both "reality" and legal authority appear to require trial judges to honor a minority defendant's request for voir dire about racial prejudice; their failure to do so should constitute reversible error, regardless of the factual circumstances of the case.

b. *bias against the charge*

In *United States v. Pimentel,*[1450] the Ninth Circuit considered whether the trial judge's voir dire had adequately explored the possibility that the jurors had preconceptions about the legality of wiretapping.[1451] Pimentel alleged that post-trial conversations with the jurors indicated that some of them had made up their minds about his guilt before the court had instructed them on the law.[1452] He contended that this demonstrated that those jurors had believed that all wiretapping was illegal, and that they failed to consider his primary defense of lack of intent.[1453] A proper voir dire, Pimentel argued, would have uncovered these attitudes, permitting those jurors to have been excused for cause or to have been challenged peremptorily.[1454]

The Ninth Circuit reviewed the district court's voir dire questions and found that while the judge had not asked all of Pimentel's pro-

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1447. *Id.* at 196-97 (Stevens, J., dissenting).

1448. *Id.* at 190 (quoting Ristaino v. Ross, 424 U.S. 589, 596 n.9).

1449. 451 U.S. at 191. In his dissent, Justice Stevens quoted the following statement by Justice Hughes in *Aldridge:*

> The argument is advanced . . . that it would be detrimental to the administration of the law in the courts . . . to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

Id. at 200-01 (quoting *Aldridge,* 283 U.S. at 314-15).

1450. 654 F.2d 538 (9th Cir. 1981).

1451. *Id.* at 541-42. Pimentel was a private investigator hired by companies to determine whether any of their employees were engaged in unlawful activities. *Id.* at 539. He was convicted of 2 counts of illegal wiretapping. *Id.*

1452. *Id.* at 542.

1453. *Id.*

1454. *Id.*

posed questions, which had been designed to probe *each* juror's attitude about wiretapping, he had asked the jurors as a group if they had any preconceptions or prejudices about federal wiretap laws.[1455] Receiving no response to this question, the judge later asked each juror if he or she had any responses to questions that had already been asked of the entire group, or if he or she could render a verdict solely on the evidence presented at trial and the instructions given by the court.[1456] None of the jurors indicated any problems.[1457] The Ninth Circuit held that the above procedure did not constitute an abuse of discretion.[1458] This holding reaffirmed its position that voir dire questions concerning the jurors' attitudes towards the charged offense do not need to be asked specifically of each juror, but may be addressed to the jurors as a group.[1459] The court further held that the recounting by defense counsel of his post-trial conversations with some of the jurors, as well as a declaration filed by one of the jurors personally, was inadmissible to demonstrate an inadequate voir dire.[1460]

The Ninth Circuit also considered Pimentel's argument that the application of Local Rule 326-1 of the Northern District of California deprived him of three of the ten peremptory juror challenges allowed under Rule 24(b) of the Federal Rules of Criminal Procedure, thus violating his sixth amendment right to a fair trial.[1461] During voir dire, the defense had exercised only one of the two challenges to which it was

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1455. *Id.*

1456. *Id.*

1457. *Id.*

1458. *Id.* (citing United States v. Giese, 597 F.2d 1170, 1182 (9th Cir.), *cert. denied,* 444 U.S. 979 (1979)). The *Pimentel* court indicated that it would not reverse unless the procedures used, or the questions asked, by the district judge were so unreasonable as to constitute an abuse of discretion. 654 F.2d at 542 (citing United States v. Rosales-Lopez, 617 F.2d 1349, 1353 (9th Cir. 1980), *aff'd,* 451 U.S. 182 (1981)).

1459. The Ninth Circuit had previously held in *United States v. Giese,* 597 F.2d 1170 (9th Cir.), *cert. denied,* 444 U.S. 979 (1979), where the defendant was charged with conspiracy to bomb two military recruiting centers, that voir dire had been sufficient even though the trial court had not asked every juror specific questions about his or her attitudes towards law enforcement and military personnel, the use of firearms, and the Vietnam War. *Id.* at 1182.

1460. 654 F.2d at 542. Only juror testimony concerning extraneous influences on the deliberation is admissible; juror testimony concerning the motives of individual jurors and conduct during deliberations is inadmissible. *See* Mattox v. United States, 146 U.S. 140, 148-49 (1892); FED. R. EVID. 606(b).

1461. 654 F.2d at 540. FED. R. CRIM. P. 24(b) provides that "[i]f the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges." Local Rule 326-1 provides that peremptory challenges allowed the parties under rule 24(b) should be exercised alternately between the Government and the defense. The rule allows the Government one challenge per round and the defense one challenge during its first and last rounds. The defense is also entitled to two challenges during every other round. The rule

entitled in round two and had passed both of the challenges to which it was entitled in round three. The defense had then exercised all of its remaining challenges.[1462] Pimentel argued that treating his three passes as waivers of peremptories under the local rule was analogous to the district court's actions in *United States v. Turner.*[1463]

In *Turner,* the defendant and his two co-defendants had agreed that each would be able to use three of the ten peremptories allowed them under Rule 24(b) and that the final challenge would be exercised jointly.[1464] During voir dire, Turner passed three times and accepted the jury panel as then constituted.[1465] After one of Turner's co-defendants had exercised one of his peremptories, Turner attempted to use a peremptory challenge to excuse the new member of the panel.[1466] The Ninth Circuit held that the refusal to permit Turner to exercise a peremptory challenge in that situation unduly restricted Turner's use of his challenges.[1467]

The *Pimentel* court distinguished *Turner.*[1468] It explained that in *Turner* the treatment of the defendant's passes as waivers of peremptories had prevented the defendant from exercising a peremptory against a juror who had not been a member of the panel he had accepted.[1469] However, because Pimentel had the opportunity to exercise a peremptory against each juror selected *after* his passes, the court considered the system under Local Rule 326-1 fundamentally fair and consistent with dicta in *Turner.*[1470]

The court reaffirmed that although the peremptory challenge is one of the most important rights of the accused, neither the number of peremptory challenges nor the manner of their exercise is constitutionally guaranteed.[1471] It held, therefore, that Pimentel's constitutional right to a fair trial had not been violated, and that his use of perempto-

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states that if either party passes a peremptory challenge, that challenge shall be treated as if it has been waived. N.D. CAL. R. 326-1.

1462. 654 F.2d at 540.

1463. *Id.* (citing United States v. Turner, 558 F.2d 535 (9th Cir. 1977)).

1464. 558 F.2d at 536-37.

1465. *Id.* at 537.

1466. *Id.*

1467. *Id.* at 538. The *Turner* court also noted, in dicta, that a defendant's pass of a peremptory challenge could not be characterized as a waiver of challenges to jurors not yet placed on a panel. *Id.*

1468. 654 F.2d at 540-41.

1469. *Id.* at 541.

1470. *Id. See supra* note 1467.

1471. 654 F.2d at 540 (citing Stilson v. United States, 250 U.S. 583, 586 (1919); *Turner,* 558 F.2d at 538).

ries had not been unreasonably restricted.[1472]

The Ninth Circuit's decision in *Pimentel,* as well as those of other circuits in similar cases,[1473] reflects a justifiable unwillingness to reverse a conviction solely because the defendant did not exercise all the peremptories to which he was entitled by statute.[1474] The Ninth Circuit's position permitting a defendant to exercise a peremptory challenge only against jurors who were not panel members when the defendant earlier waived a peremptory upholds the defendant's right to a fair trial and permits local jurisdictions to establish their own rules governing the manner in which a defendant may exercise peremptories.

c. *overlapping venires*

In *United States v. Patterson,*[1475] the Ninth Circuit considered whether the trial judge's voir dire adequately explored the possibility of prejudice against the defendant stemming from overlapping venires.[1476] Patterson had been tried and acquitted of charges arising from an alleged sale of phencyclidine (PCP) to DEA agents.[1477] The next day, he was tried for conspiracy to distribute cocaine and heroin, possession of cocaine for distribution, and distribution of cocaine and heroin.[1478] He was found guilty on all counts.[1479] Patterson pointed out that half of the jurors in his second trial had been members of the

1472. 654 F.2d at 541.

1473. *See, e.g.,* United States v. Anderson, 562 F.2d 394, 396-97 (6th Cir. 1977) (no abuse of discretion where, pursuant to local rule, trial court refused to permit defense to exercise peremptory challenges to jurors whom it had previously accepted and to withdraw peremptories it had previously exercised); United States v. Mackey, 345 F.2d 499, 502-03 (7th Cir.) (no abuse of discretion where trial court refused to allow either Government or defense more than one opportunity to exercise peremptory challenge to each prospective juror, even though defendant denied effective use of two challenges), *cert. denied,* 382 U.S. 824 (1965).

1474. The Ninth Circuit demonstrated this same unwillingness in United States v. Vallez, 653 F.2d 403 (9th Cir.), *cert. denied,* 454 U.S. 904 (1981). In *Vallez,* the Ninth Circuit considered whether denying defendants charged with first-degree murder the exercise of more than 16 peremptory challenges deprived them of 4 of the 20 challenges allowed for capital offenses under FED. R. CRIM. P. 24(b). The Ninth Circuit held that, because the Government had agreed before trial not to seek the death penalty, and because rule 24(b)'s purpose was to insure that the jury was not tainted by opinions about capital punishment, the rule did not apply in this case. *Id.* at 406 (citing United States v. Martinez, 536 F.2d 886, 890 (9th Cir.), *cert. denied,* 429 U.S. 907 (1976); Loux v. United States, 389 F.2d 911, 915 (9th Cir.), *cert. denied,* 393 U.S. 867 (1968)).

1475. 648 F.2d 625 (9th Cir.1981).

1476. *Id.* at 629-30.

1477. *Id.* at 628.

1478. *Id.*

1479. *Id.*

venire in his previous trial.[1480] He argued that, because evidence of his prior arrest and indictment on narcotics charges would have been inadmissible as direct evidence of his guilt,[1481] disclosing his prior arrest and indictment to six jurors through overlapping venires was prejudicial.[1482]

The Government argued that the district court had conducted a "vigorous" examination of the jury, negating any inference of prejudice.[1483] The court of appeals, however, found that this "vigorous" examination consisted solely of asking the jurors as a group if any of them knew Patterson, if any of them knew anything about the case, and if anyone had mentioned anything to them individually about Patterson.[1484] The court did not ask any questions of the individual jurors or any questions specifically addressed to the previous day's experience.[1485]

The Ninth Circuit determined that although Patterson had been acquitted in his first trial, the jurors' knowledge during the second trial of his prior arrest and indictment, combined with their possible ignorance of his acquittal and the short length of time between the two trials, created a significant risk of prejudice.[1486] This risk of prejudice, coupled with the failure to examine the jurors individually on voir dire, and the possibility that the jurors did not understand that the court's general questions referred only to the previous day's experiences, convinced the Ninth Circuit that the voir dire had been inadequate to provide " 'any reasonable assurances that prejudice would be discovered if present.' "[1487]

The *Patterson* court noted the Supreme Court's reversal of the Ninth Circuit's decision in *Leonard v. United States.*[1488] The *Leonard*

1480. *Id.* at 629.

1481. FED. R. EVID. 404(b).

1482. 648 F.2d at 629.

1483. *Id.* at 629-30.

1484. *Id.* at 630.

1485. *Id.*

1486. *Id.* at 629.

1487. *Id.* at 630 (quoting United States v. Baldwin, 607 F.2d 1295, 1298 (9th Cir. 1979)). The court observed that the district court was apparently attempting to avoid tainting the jury through questions that conveyed more information than the jurors already had, but that in so doing, it failed to ask questions sufficiently specific in scope and direction. 648 F.2d at 630.

1488. 648 F.2d at 629 (citing 324 F.2d 914 (9th Cir. 1963), *rev'd,* 378 U.S. 544 (1964) (per curiam)). In *Leonard,* the Ninth Circuit affirmed a defendant's conviction even though the panel from which jurors were eventually selected to try a second charge against the defendant was sitting in the courtroom when a guilty verdict on the first charge was returned against him. The first charge against the defendant had been based upon forging and utter-

court held that "[p]rospective jurors who have sat in the courtroom and heard a verdict returned against a man charged with crime in a similar case immediately prior to the trial of another indictment against him should be automatically disqualified from serving at the second trial."[1489] While admitting the inevitability of prejudice when a defendant's past guilt is conclusively established in the presence of prospective jurors, or when prospective jurors have previously participated in convicting the defendant, the Ninth Circuit limited the holding of the *Leonard* court to factual situations in which (1) specific circumstances suggest a significant risk of prejudice and (2) examining or admonishing the jurors fails to negate that inference.[1490] Thus, the Ninth Circuit has implied that the existence of overlapping venires does not automatically require reversal of a defendant's conviction.[1491] However, a court's refusal to reverse a defendant's conviction under these

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ing Government checks, the second charge upon the transportation of a forged instrument in interstate commerce. 324 F.2d at 914. Although the jurors who tried the second charge had not been asked about possible prejudice from the prior exposure, the Ninth Circuit found the defendant's conviction supported by "strong and convincing evidence." *Id.* at 915.

1489. 378 U.S. at 545. Other circuits have relied on *Leonard* in reversing convictions because of overlapping venires. For example, in Donovan v. Davis, 558 F.2d 201 (4th Cir. 1977), the defendant was convicted of rape in a second trial by some of the same jurors who had previously acquitted him of unauthorized use of a motor vehicle. *Id.* at 202. Although the jurors common to both trials had acquitted the defendant in his first trial, the Fourth Circuit held that prejudice still must have existed at his second trial because the evidence at his first trial had demonstrated his strong attraction to women; the defendant had apparently used vehicles from a used car lot to take women home, to take his girlfriend for rides, and to take trips with other women. *Id.* at 203-04. Similarly, in Virgin Islands v. Parrott, 551 F.2d 553 (3d Cir. 1977), the Third Circuit held that prejudice must have existed during a defendant's second trial for murder and possession of an unlicensed firearm, because some jurors had previously convicted the defendant for possession of an unlicensed firearm. *Id.* at 554. Finally, in Mottram v. Murch, 458 F.2d 626 (1st Cir.), *rev'd on other grounds,* 409 U.S. 41 (1972), the defendant had been tried for car theft and subsequently for being an habitual offender. During the first trial, the defendant took the stand, was confronted with evidence of several prior convictions, and invoked his fifth amendment privilege. *Id.* at 628. During the second trial, the defendant did not testify. *Id.* The First Circuit held that juror prejudice must have existed during the second trial because the jurors common to both trials could have called upon their recollection of the defendant as an uncooperative witness with a history of criminal conduct. *Id.* at 630-31.

1490. 648 F.2d at 629.

1491. For example, if the jurors who sat in a defendant's second trial acquitted him in his first trial, *and* the charges against the defendant in both trials involved entirely different offenses, and/or the length of time between trials was more than a few days, the defendant's conviction would not automatically be reversed. The *Patterson* court compared this situation to the one in United States v. Splain, *id.* (citing 545 F.2d 1131, (8th Cir. 1976)), in which a witness made an oblique reference to the defendant's previous alleged crimes. 545 F.2d at 1133. The defendant argued that this constituted introduction of evidence of his past crimes. *Id.* The *Splain* court did not consider the witness's statement to be sufficiently prejudicial to require a reversal of the defendant's conviction. *Id.*

circumstances is only justifiable if voir dire has established that each juror who sat in the defendant's second trial was convinced of his or her innocence in the first trial, and that no juror remaining from the first trial received an unfavorable impression of the defendant.

d. *pretrial publicity*

In *United States v. Mayo,*[1492] the Ninth Circuit considered whether the trial judge's voir dire had been sufficient to uncover prejudice from pretrial publicity.[1493] Mayo was charged with mail and securities fraud.[1494] The Government's allegations, as well as Mayo's two previous convictions of federal crimes, had been discussed in local newspaper articles.[1495] The court asked the jurors if they had heard or seen anything about the case in the media, and none of them responded affirmatively.[1496] The court specifically found that each juror had responded negatively; thus, it declined to question the jurors individually.[1497] The Ninth Circuit held that because pretrial publicity had been insubstantial, the trial court had not abused its discretion by failing to question the jurors individually.[1498]

In *United States v. Flores-Elias,*[1499] the Ninth Circuit again considered the extent of voir dire necessary in cases involving pretrial publicity. Flores-Elias was charged with smuggling and conspiring to smuggle illegal aliens from El Salvador into the United States.[1500] During the smuggling, thirteen of the Salvadorans died in the Arizona desert, and the incident received widespread media coverage.[1501]

The Ninth Circuit observed that the publicity in the case had focused mainly on the victims and their plight rather than on Flores-

1492. 646 F.2d 369 (9th Cir.), *cert. denied sub nom.* Dondich v. United States, 454 U.S. 1127 (1981).

1493. *Id.* at 373-74.

1494. *Id.* at 371.

1495. *Id.* at 373.

1496. *Id.*

1497. *Id.*

1498. *Id.* at 374 (citing United States v. Polizzi, 500 F.2d 856, 880 (9th Cir. 1974), *cert. denied,* 419 U.S. 1120 (1975)). The *Polizzi* defendants were charged with various gambling offenses. 500 F.2d at 868. Certain newspaper articles had commented on the defendants' alleged ties to the Mafia and on the prosecution's "skimming" allegations. *Id.* at 878. The judge limited his voir dire on these subjects to two questions addressed to the first panel of prospective jurors and to two questions addressed to an individual juror selected later. *Id.* at 879-80. The Ninth Circuit held that, because the pretrial publicity had been insubstantial, the trial judge had not abused his discretion by so limiting his voir dire. *Id.* at 880.

1499. 650 F.2d 1149 (9th Cir.), *cert. denied,* 454 U.S. 904 (1981).

1500. *Id.* at 1150.

1501. *Id.*

Elias,[1502] and had been factual in nature rather than emotional or accusatory.[1503] Furthermore, only two of the jurors had read or heard anything about the case, and both of them had assured the district court that they could render an impartial verdict based on the evidence produced at trial.[1504] Emphasizing that further questioning might have only "fanned the embers of incipient prejudice by arousing curiosity,"[1505] the Ninth Circuit held that the trial judge had not abused his discretion during voir dire.[1506]

The *Flores-Elias* court additionally considered whether the district judge had abused his discretion by rejecting Flores-Elias's challenges for cause of two jurors who had read or heard something about his case.[1507] The court determined that, under the circumstances of the case, Flores-Elias was unable to demonstrate either inherent or actual prejudice from the pretrial publicity.[1508] It held, therefore, that because a defendant is not "entitled to a jury composed only of persons who had no prior knowledge of . . . [the] case,"[1509] the trial judge had not abused his discretion by rejecting Flores-Elias's challenges.[1510]

In *United States v. Dufur,*[1511] the Ninth Circuit considered whether the trial judge had abused his discretion by denying the defendant's motions for a change of venue, exclusion of the press from pretrial proceedings, dismissal or sequestration of the jury, and interviews with the

1502. *Id.* The publicity had focused to a small degree on the charges against Flores-Elias's co-defendants, but it had referred to Flores-Elias only once by name. *Id.*

1503. *Id.*

1504. 650 F.2d at 1151.

1505. *Id.* (citing Beck v. Washington, 369 U.S. 541, 548 (1962); United States v. Geise, 597 F.2d 1170, 1182-83 (9th Cir.), *cert. denied,* 444 U.S. 979 (1979)).

1506. 650 F.2d at 1151. The court indicated that it would reverse a conviction only if there had been plain error, and if it were necessary to prevent a clear miscarriage of justice. *Id.* (citing United States v. Berry, 627 F.2d 193, 199 (9th Cir. 1980), *cert. denied,* 449 U.S. 1113 (1981); United States v. Sims, 617 F.2d 1371, 1377 (9th Cir. 1980); United States v. Krasn, 614 F.2d 1229, 1235 (9th Cir. 1980)).

1507. 650 F.2d at 1151.

1508. *Id.*

1509. *Id.* (citing United States v. Ferreboeuf, 632 F.2d 832, 835 (9th Cir. 1980), *cert. denied,* 450 U.S. 934 (1981)).

1510. 650 F.2d at 1151 (citing United States v. Sutton, 446 F.2d 916, 923 (9th Cir. 1971), *cert. denied,* 404 U.S. 1025 (1972)). In *Sutton,* one of the prospective jurors admitted that she might be a "little prejudiced" if it was shown during trial that the defendant, or the witnesses on his behalf, had been connected with a rock concert. 446 F.2d at 923. She later stated that such facts would not affect her as far as the evidence was concerned, that she could evaluate the witnesses' testimony regardless of "what they did or didn't do prior to that [testimony]," and that she could be fair. *Id.* The Ninth Circuit held that the trial judge had not abused his discretion by refusing to excuse this juror for cause. *Id.*

1511. 648 F.2d 512 (9th Cir. 1980), *cert. denied,* 450 U.S. 925 (1981).

jurors after the verdict.[1512] Dufur was charged with murder.[1513] He argued that the jurors had been exposed to pretrial publicity about him and "significant details" of the crime.[1514] The Ninth Circuit observed that the trial judge had conducted extensive voir dire of the prospective jurors, interviewing individually any who had been exposed to the publicity.[1515] Furthermore, once the jury had been impaneled, the judge had repeatedly admonished it to avoid exposure to publicity about the case.[1516] The Ninth Circuit held, therefore, that the trial judge had not abused his discretion by denying any of Dufur's motions.[1517]

The Ninth Circuit decisions regarding pretrial publicity are consistent with the Supreme Court's position that juror exposure to information about a defendant's prior convictions or to news accounts of the crime with which the defendant is charged does not alone presumptively deprive him or her of due process.[1518] Accordingly, the Ninth Circuit has adopted the position that a court's examination or admonition of jurors should be tailored to the nature and amount of publicity surrounding the case.

Thus, in cases involving a substantial amount of pretrial publicity, the Ninth Circuit has held that a trial judge is required to examine each juror individually, out of the presence of the other jurors, to ascertain what information the jurors have accumulated about the case, the source of that knowledge, and the nature and strength of the opinions they may have formed as a consequence.[1519] In cases involving a smaller amount of publicity (*Mayo, Flores-Elias,* and *Dufur),* the Ninth

1512. *Id.* at 513.
1513. *Id.*
1514. *Id.*
1515. *Id.*
1516. *Id.*
1517. *Id.* (citing Frame v. United States, 444 F.2d 71, 72 (9th Cir.), *cert. denied,* 404 U.S. 942 (1971)). The *Frame* defendants were charged with manufacturing large quantities of drugs. 444 F.2d at 71. The case had received substantial publicity. *Id.* at 72. The Ninth Circuit upheld the trial judge's denial of defense motions to sequester the jury and to inquire every day about what media information the jurors had received. *Id.*
1518. *See* Murphy v. Florida, 421 U.S. 794 (1975). In *Murphy,* some of the prospective jurors revealed during voir dire that they vaguely recalled reading about the robbery with which the defendant was charged. *Id.* at 800. All of them had some knowledge of the defendant's past crimes. *Id.* The trial court found, however, that none of the jurors believed the defendant's past to be relevant to the present robbery. *Id.* The Supreme Court held that this factor, combined with the absence of incensed community reaction, indicated that there had not been any inherent prejudice in the trial setting or in the jury selection process. *Id.* at 803.
1519. *See* United States v. Silverthorne, 400 F.2d 627, 638-40 (9th Cir. 1968), *aff'd after retrial,* 430 F.2d 675 (9th Cir. 1970), *cert. denied,* 400 U.S. 1022 (1971).

Circuit requires only that a trial judge question the jurors as a group and then question individually those jurors who respond affirmatively to the initial inquiries.[1520] Finally, if a trial judge has conducted the voir dire examination in a manner appropriate to the amount of publicity, the Ninth Circuit leaves to his or her discretion the question of whether to allow challenges for cause (*Flores-Elias).*

2. Prejudicial events during trial

Juror prejudice not evident at the beginning of a trial may nevertheless appear during a trial because of the manner in which the trial is conducted, or because of incidents which occur among the jurors themselves. The United States Supreme Court and the Ninth Circuit have recently decided cases concerning the effect of these factors upon the impartiality of the jurors and whether they resulted in the deprivation of a fair trial.

a. *live media coverage*

In *Chandler v. Florida,*[1521] the Supreme Court considered the constitutionality of a state judicial canon permitting radio, television, and still-photography coverage of a criminal trial, notwithstanding the objection of the accused.[1522] The *Chandler* defendants were charged with conspiracy to commit burglary, grand larceny, and possession of burglary tools.[1523] The case attracted the attention of the media, which focused on the identity of the defendants as policemen and the fact that the star witness was an amateur radio operator who had accidentally overheard and recorded conversations between the defendants over their police walkie-talkies during the burglary.[1524]

By pretrial motion, the defendants sought to prevent electronic coverage of the trial.[1525] The trial court denied the motion, and the Florida Supreme Court declined to rule on the constitutionality of the

1520. *See also* United States v. Geise, 597 F.2d 1170, 1183 (9th Cir.), *cert. denied,* 444 U.S. 979 (1979); United States v. Polizzi, 500 F.2d 856, 880 (9th Cir. 1974), *cert. denied,* 419 U.S. 1120 (1975).

1521. 449 U.S. 560 (1981).

1522. *Id.* at 562. The particular state canon involved was Canon 3A(7) of the Florida Code of Judicial Conduct, which provides for the electronic coverage of trials "[s]ubject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure fair administration of justice in the pending case."

1523. 449 U.S. at 567.

1524. *Id.*

1525. *Id.*

judicial canon.[1526] During voir dire, each prospective juror was asked if he or she would be able to be "fair and impartial," despite the presence of a television camera during the trial, and each responded affirmatively while a television camera recorded the voir dire.[1527]

The defendants then moved to sequester the jury because of the television coverage.[1528] The trial judge denied the motion, but admonished the jurors not to watch or read anything about the case in the media.[1529] During the trial, a television camera covered the testimony of the radio operator and both closing arguments.[1530] No untoward events occurred during the filming, except for the judge's request of a cameraman to discontinue a movement that he apparently found distracting.[1531] Only two minutes and fifty-five seconds of the trial was broadcast, depicting only the prosecution's side of the case.[1532] The jury returned a verdict of guilty on all counts.[1533]

On appeal to the Supreme Court, the defendants relied on a previous Supreme Court opinion, *Estes v. Texas,*[1534] to argue that televising criminal trials is inherently a denial of due process, and that *Estes* established a per se constitutional rule to that effect.[1535] The Court noted that only four Justices had joined in the *Estes* opinion and that four Justices had dissented; thus, the opinion represented only a plurality of the Court.[1536] The *Chandler* Court, therefore, determined that it was necessary to examine Justice Harlan's limited concurrence in *Estes,* which provided the fifth vote supporting the judgment.[1537]

The Court emphasized Justice Harlan's observations that forbidding televisions in the courtroom " 'would doubtless impinge upon one of the valued attributes of our federalism by preventing the states from

1526. *Id.*
1527. *Id.*
1528. *Id.*
1529. *Id.*
1530. *Id.* at 568.
1531. *Id.*
1532. *Id.*
1533. *Id.*
1534. 381 U.S. 532 (1965). Estes had been indicted for swindling, and massive pretrial publicity had given the case national notoriety. *Id.* at 535. A pretrial hearing on his motion to prevent electronic coverage of the trial was carried live on television and radio. *Id.* Some of the jurors had seen or heard all or part of the broadcasts. *Id.* at 551. Although live telecasting was prohibited during most of the trial, videotapes without sound were made of the whole proceeding, and film clips of the trial were shown on regularly scheduled news programs. *Id.* at 537.
1535. 449 U.S. at 570.
1536. *Id.* at 570-72.
1537. *Id.* at 571.

pursuing a novel course of procedural experimentation,' "[1538] but that, " '*at least as to a notorious criminal trial . . ., the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial.*' "[1539] The Court concluded that the *Estes* holding was limited to similar circumstances, and that the *Estes* Court had not announced a per se constitutional rule banning electronic coverage of criminal trials.[1540]

The Court then considered whether it should promulgate such a rule now.[1541] It reviewed the inherent dangers of televised trials and specifically noted the psychological impact of the presence of cameras in courtrooms.[1542] It observed, however, that changes in television

1538. *Id.* (quoting *Estes,* 381 U.S. at 587 (Harlan, J., concurring)).

1539. *Id.* (emphasis added in *Chandler).*

1540. 449 U.S. at 573-74. Justices Stewart and White disagreed with the Court's opinion that *Estes* did not announce a per se constitutional rule banning electronic coverage of trials, but they favored overruling the opinion. *Id.* at 587 (Stewart, J., concurring); *id.* at 615-16 (White, J., concurring). Justice Stewart pointed out that even if Justice Harlan had limited the banning of electronic coverage to "notorious" criminal trials, the Court itself described the *Chandler* case as involving this type of trial. *Id.* at 585 n.3 (Stewart, J., concurring). Justice Stewart further noted that because Justice Harlan had stated he was "by no means prepared to say that the constitutional issue should ultimately turn upon the nature of the particular case involved," it was doubtful that Harlan had intended to limit his concurrence at all. *Id.* at 585-86 (quoting *Estes,* 381 U.S. at 590 (Harlan, J., concurring)).

Justice White added that the Court's opinion was inconsistent with *Estes* because, even if the holding in *Estes* were limited to "notorious" cases, *id.* at 587 (citing *Estes,* 381 U.S. at 591 (Harlan, J., concurring)), the *Estes* Court expressly stated that the defendants were not required to show prejudice. *Id.* at 587 (White, J., concurring). *See Estes,* 381 U.S. at 542. The *Chandler* Court held, however, that "[a]bsent a showing of prejudice . . . to these defendants," Florida's canon was not unconstitutional. 449 U.S. at 582-83. Because the Florida canon made no exception for the "notorious" case, Justice White reasoned that, under *Chandler,* a defendant would be required to show prejudice even in a notorious case; he concluded that such a requirement effectively eviscerates *Estes. Id.* at 588 (White, J., concurring).

1541. *Id.* at 574.

1542. *Id.* at 575-80. The Court quoted Justice Harlan's comments in *Estes:*

> [T]here is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be appearing before a "hidden audience" of unknown but large dimensions. There is certainly a strong possibility that the "cocky" witness having a thirst for the limelight will become more "cocky" under the influence of television. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense attorney, and even a conscientious judge will not stray, albeit unconsciously, from doing what "comes naturally" into pluming themselves for a satisfactory television "performance?"

Id. at 571-72 (quoting *Estes,* 381 U.S. at 591 (Harlan, J., concurring)).

The Court also noted the concern of Justices Warren and Harlan in *Estes* that covering select cases "singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others," thereby bringing public humiliation upon the ac-

technology since the time of *Estes* rendered some of the more disruptive factors of electronic coverage less substantial than they were in the past.[1543]

The Court added that the states have established certain safeguards to protect witnesses who are children, victims of sex crimes, informants, or just very timid from the glare of publicity and the tensions of being "on camera."[1544] The Court further determined that empirical data did not establish that the mere presence of the broadcast media inherently affects trial participants adversely.[1545]

The Court emphasized that the Florida canon requires that an accused's objections to broadcast coverage be heard and considered on the record.[1546] In addition to providing a record for appellate review, this procedure allows the trial court to define the steps necessary to lessen or eliminate risks of prejudice to the accused.[1547] The Court noted that the *Chandler* defendants had not requested an evidentiary hearing to show adverse impact or injury.[1548] It reiterated the showing of impartiality during voir dire, the trial court's instructions that the jurors not watch television accounts of the trial, and the lack of specific defense evidence that any participant had been affected by the presence of cameras in the courtroom.[1549]

Explaining that it lacked constitutional authority "to oversee or harness state procedural experimentation,"[1550] the Court emphasized that "[t]he Florida program is inherently evolutional in nature . . . provid[ing] guidance for . . . new canons . . . [that are] subject to control by the trial judge."[1551] The Court held that "there is no reason for this Court . . . to invalidate Florida's experiment," unless the defendant can show "prejudice of constitutional dimensions."[1552]

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cused with such randomness that it might violate due process. 449 U.S. at 580 (quoting *Estes,* 381 U.S. at 565 (Warren, C.J., concurring); *accord id.* at 587 (Harlan, J., concurring).

1543. 449 U.S. at 576. Justice Stewart noted, however, Justice Harlan's observation in *Estes* that the use of television there was "relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom," *id.* at 584 (Stewart, J., concurring) quoting *Estes,* 381 U.S. at 588 (Harlan, J., concurring), substantiating his opinion that the *Estes* Court believed that any electronic coverage, no matter how subtle, violated the defendant's due process rights). *Id.* at 584 (Stewart, J., concurring) (citing *Estes,* 381 U.S. at 542-50).

1544. 449 U.S. at 577.

1545. *Id.* at 578-79.

1546. *Id.* at 577.

1547. *Id.*

1548. *Id.*

1549. *Id.* at 581-82.

1550. *Id.* at 582.

1551. *Id.*

1552. *Id.*

The implication of *Chandler* is that electronic coverage of trials in the federal court system will most likely increase. The Supreme Court has held, however, that "there is no constitutional right to have . . . [live witness] testimony recorded and broadcast,"[1553] and that "the guarantee of a public trial . . . confers no special benefit on the press."[1554] It has further stated that the guarantee of a public trial is for the defendant's benefit alone and does not imply that the public has a constitutional right of access to criminal trials.[1555]

The *Chandler* Court recognized that "[i]nherent in electronic coverage of a trial is the risk that . . . the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected."[1556] Although such a risk may not justify prohibiting all electronic coverage of trials as unconstitutional, forcing defendants to assume such a risk without their consent, while also shifting to them the burden of proving resulting prejudice, arguably diminishes their due process rights.

Furthermore, the contribution to society from electronic coverage of trials, and the ensuing wider public acceptance and understanding of decisions,[1557] may not outweigh the cost to society of numerous trial delays and appeals from such coverage. This cost could be reduced if the Supreme Court were to exercise its supervisory authority over federal courts to require that defendants consent to electronic coverage of their trials.

Regardless of the consent issue, however, it is unlikely that proper electronic coverage of trials will violate a defendant's due process rights. If trial judges adequately conduct voir dire examinations and admonish jurors about the consequences of television coverage, and if an effort is made to be aware of and to protect defendants and witnesses from the unfavorable consequences of the presence of cameras in the courtroom, it is likely that televised trials will be conducted with the dignity and decorum necessary to ensure that the defendant receives a fair trial.

1553. Nixon v. Warner Communications, 435 U.S. 589, 610 (1977) (common law right of access to judicial records not authority for releasing to broadcasters tapes of conversations between defendants).

1554. *Id.*

1555. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 392-94 (1979) (constitutional right of press to attend criminal trials not violated by court orders excluding public and press from pretrial suppression hearing).

1556. 449 U.S. at 577.

1557. *Id.* at 565-66.

b. *juror misconduct*

In *United States v. Perez,*[1558] the Ninth Circuit considered whether dismissal of a juror during trial deprived the defendant of an impartial jury. The *Perez* jury had listened to a witness whose testimony was translated through an interpreter from Spanish into English.[1559] At the end of the testimony, one of the jurors questioned the interpreter's translation of one of the witness's words.[1560] When the interpreter protested that the juror should have been listening to the English rather than to Spanish, the juror replied, "You're an idiot."[1561] The judge, not hearing the juror's precise words, immediately requested that she raise her question with the court, and after learning the basis of her confusion, the interpretation problem was resolved by asking the witness additional questions.[1562]

At the end of the day, the judge expressed concern to Perez and both counsel about the form as well as the language of the juror's outburst.[1563] He stated that he believed the juror had formed an opinion about certain events at issue, and had developed anger for either Perez, the prosecution, or the proceedings in general.[1564] He then announced his intention to dismiss the juror because he feared that her attitude might influence the other jurors.[1565] The next day, the judge interviewed the juror in his chambers; although she told him that she had actually stated "it's an idiom" rather than "you're an idiot," the judge excused her.[1566]

Perez contended that the judge's cause for dismissing the juror was insufficient, and that her dismissal inhibited the remaining jurors.[1567] The Ninth Circuit, however, determined that regardless of the content of the juror's statement, the judge was entitled to dismiss a juror because of his perception that she was angry and opinionated.[1568] It held,

1558. 658 F.2d 654 (9th Cir. 1981).
1559. *Id.* at 662.
1560. *Id.*
1561. *Id.*
1562. *Id.* at 663.
1563. *Id.*
1564. *Id.*
1565. *Id.*
1566. *Id.*
1567. *Id.*
1568. *Id.* (citing United States v. Berry, 627 F.2d 193, 197 (9th Cir. 1980), *cert. denied,* 449 U.S. 1113 (1981); United States v. Avila-Macias, 577 F.2d 1384, 1387 (9th Cir. 1978)). In *Berry,* the jury foreman informed the court that he had inadvertently read the first few lines of a newspaper article which described the defendant as a disbarred attorney. 627 F.2d 197. The judge questioned the foreman in his chambers, asking him whether he had continued to

therefore, that the trial judge had not abused his discretion by dismissing the juror.[1569]

c. *jury separation*

In *United States v. Diggs,*[1570] the Ninth Circuit considered a question of first impression: whether the separation of a jury *during trial* constituted reversible error.[1571] Because one of the jurors became ill, the jury was recessed for eleven days between the close of the presentation of evidence and closing arguments.[1572] Defendant Oliverez moved for a mistrial, arguing that the separation of the jury prejudiced him in three ways: (1) the memories of the jurors had probably become vague during the separation; (2) some of the jurors might have commenced deliberations among themselves during the separation; and (3) the jurors might have felt pressured to return a quick verdict from concern for the health of the recently ill juror.[1573]

The Ninth Circuit, however, determined that Oliverez's alleged prejudice was merely hypothetical.[1574] It noted that the trial court had taken several precautions to ensure that prejudice did not occur.[1575] Moreover, Oliverez was unable to show actual prejudice.[1576] The

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read the article after realizing that it concerned the defendant (in which case he would have learned the cause of the defendant's disbarment), and whether he had read anything that might influence him. *Id.* The foreman replied negatively to both questions. *Id.* The Ninth Circuit determined that although the information that the juror had learned about the defendant may have unfavorably impressed him, the incident was not so prejudicial as to have denied the defendant a fair trial. *Id.* It therefore held that the trial judge had not abused his discretion by refusing to grant the defendant a mistrial. *Id.*

In *Avila-Macias,* the jury foreman sent a note to the court stating that one of the jurors had passed by a bar in which some of the defendant's alleged drug offenses had occurred. 577 F.2d at 1387 (One of the witnesses had testified that while he was inside the bar, he had seen the defendant, outside, transfer a packet of heroin to someone else.) *Id.* The judge asked both counsel whether they objected to the juror's action; both responded that it was insignificant. *Id.* After the jury returned its verdict, the judge asked whether the juror had gone inside the bar, and the answer was in the negative. *Id.* The Ninth Circuit held that under these circumstances, the trial judge had not abused his discretion in determining the probability of prejudice or in determining what action to take. *Id.*

1569. 658 F.2d at 663.

1570. 649 F.2d 731 (9th Cir. 1981).

1571. *Id.* at 737. The court stated that although the Ninth Circuit had decided cases involving separation of the jury *during deliberations, see, e.g.,* United States v. Eldred, 588 F.2d 746 (9th Cir. 1978); United States v. Menna, 451 F.2d 982 (9th Cir. 1971), it knew of no cases involving separation of the jury *during trial* itself. 649 F.2d at 737.

1572. 649 F.2d at 737.

1573. *Id.* at 737-38.

1574. *Id.* at 738.

1575. *Id.*

1576. *Id.* The court observed that the circuits are virtually unanimous that to demonstrate

Ninth Circuit held, therefore, that the trial judge had not abused his discretion by refusing to grant Oliverez's motion for a mistrial.[1577]

The Ninth Circuit's decisions regarding juror misconduct and jury separation reflect a policy of allowing the trial judge the discretion to determine how such incidents affect a jury. This policy is based on the sensible notion that the trial judge, with his or her first-hand knowledge of both the jurors and the circumstances of the trial, is in the best position to determine whether prejudice has actually occurred during the trial. The judge's decision should, therefore, be reversed only for clear abuse of discretion.

D. Prosecutorial Misconduct (During Trial)

While inequity resulting from prosecutorial misconduct in pretrial proceedings may be rectified at the trial level, any unfairness resulting from prosecutorial misconduct during trial can be remedied only on appeal. The Ninth Circuit recently considered three decisions in which a claim was raised that the prosecution had engaged in misconduct during trial proceedings.

In *United States v. Ellsworth,*[1578] the prosecutor agreed to furnish the defense with exculpatory evidence at trial, but waited until opening statements before actually doing so. The defendant claimed that the prosecutor's actions in delaying presentation of the evidence had amounted to misconduct, and as such had violated his due process rights and his right to fair trial.[1579]

In rejecting the defendant's claim, the Ninth Circuit set forth the

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reversible error defendants must show that they suffered *actual prejudice* from a jury separation. *Id.* (citing United States v. Carter, 602 F.2d 799, 805-06 (7th Cir. 1979); United States v. Almonte, 594 F.2d 261, 267 (1st Cir. 1979); Blackmon v. United States, 474 F.2d 1125, 1126 (6th Cir.), *cert. denied,* 414 U.S. 912 (1973); United States v. Harris, 458 F.2d 670, 674-75 (5th Cir.), *cert. denied,* 409 U.S. 888 (1972); United States v. Siragusa, 450 F.2d 592, 595 (2d Cir. 1971); United States v. Weiss, 431 F.2d 1402, 1407 (10th Cir. 1970); Sullivan v. United States, 414 F.2d 714, 716 (9th Cir. 1969); Cardarella v. United States, 375 F.2d 222, 227-28 (8th Cir. 1967)).

The *Diggs* court emphasized that in this case the jurors had had ample opportunity to refresh their memories by listening to tapes of testimony given during the trial and by reexamining exhibits. 649 F.2d at 738. The trial judge had, in addition, repeatedly admonished the jurors not to discuss the case or to express any opinion about it until it was formally submitted to them. *Id.* He also ascertained that the juror who had been ill had fully recovered before the beginning of deliberations to prevent any temptation to shorten the deliberations out of concern over the juror's health. *Id.*

1577. 649 F.2d at 738.

1578. 647 F.2d 957 (9th Cir. 1981), *cert. denied,* — U.S. —, 102 S. Ct. 2008 (1982).

1579. *Id.* at 959-60.

guidelines for proper prosecutorial conduct.[1580] Based on an examination of these guidelines, the court concluded that the actions of the prosecutor in the instant case neither denied the defendant a fair trial nor constituted a denial of due process.[1581] According to the court, the time for delivery of exculpatory evidence to the defense was a determination which fell within the prosecutor's discretion.[1582] Finding no abuse of discretion, the court, thus, upheld the defendant's conviction.[1583]

In *United States v. Pimentel,*[1584] the defendant was convicted of illegal wiretapping.[1585] On appeal, Pimentel argued that the prosecutor prejudiced the case by making improper statements during closing arguments and by changing the order of the trials on separate counts of the eight count indictment.[1586]

1580. 647 F.2d at 961.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

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

1581. 647 F.2d at 961. The *Ellsworth* court stated:

> The evidence was not suppressed by the prosecutor here; it was tardily produced, but it was produced *before* opening statements. No request was made for a recess, continuance, postponement or mistrial. Only after defendant had taken his chance with the jury was the issue raised. We find no error in such proceedings.

Id. (emphasis in original). The court also relied on United States v. Agurs, 427 U.S. 97, 107-10 (1976) and United States v. Baxter, 492 F.2d 150 (9th Cir. 1973), *cert. denied,* 414 U.S. 801 (1974), for its holding that the defendant was not denied due process: "To establish a violation of due process, the defendant must show (1) a request by the defendant for favorable evidence possessed by the prosecutor, (2) suppression of evidence by the prosecutor, (3) that the evidence suppressed is favorable to the defendant, and (4) that the evidence is material." 647 F.2d at 691 n.8 (quoting United States v. Baxter, 492 F.2d at 173-74). *See also* United States v. Smith, 609 F.2d 1294, 1303 (9th Cir. 1979) (no prejudice when information received after testimony had begun); United States v. Ramirez, 608 F.2d 1261, 1264 (9th Cir. 1979) (no prejudice when defendant received information the morning of trial and did not move for continuance); United States v. Burke, 506 F.2d 1165, 1168 (9th Cir. 1974) (failure of defense counsel to read statement produced at close of Government's case not prosecutorial error), *cert. denied,* 421 U.S. 915 (1975).

1582. 647 F.2d at 961.

1583. *Id.* The court, nonetheless, did not condone the actions of the prosecutor because they gave the appearance of unfairness. *Id.*

1584. 654 F.2d 538 (9th Cir. 1981).

1585. *Id.* at 539.

1586. *Id.* at 542.

Specifically, Pimentel asserted that in addressing the jury, the prosecutor had made statements concerning Pimentel's failure to testify on his own behalf which implied that Pimentel had the burden of producing evidence.[1587] The Ninth Circuit, relying only upon the "cold print of the record,"[1588] accorded great deference to the trial judge's conclusion that the prosecutor's statement, in context, "would not lend itself to a clear invitation to a jury to hold the defense responsible for not producing evidence."[1589]

As to Pimentel's claim that he was prejudiced by the prosecutor's rearrangement of the trials, the court held that no proof of prosecutorial misconduct existed.[1590] Although the court recognized that the change in trial order placed Pimentel in a strategically unfortunate position, it accepted the prosecutor's stated concern for judicial economy and found no proof of intent to prejudice Pimentel.[1591]

In *United States v. Dufur*,[1592] the defendant was convicted of the first degree murder of a customs officer.[1593] On appeal, Dufur contended that the district court had committed reversible error by, inter alia, denying his motion for a mistrial based on the prosecutor's comments during closing arguments.[1594]

Here, as in *Pimentel,* the defendant contended that the prosecutor had prejudiced his case by commenting indirectly on his failure to testify on his own behalf.[1595] The court agreed that the prosecutor's statements could reasonably be interpreted as an indirect reference to Dufur's failure to testify, but determined that, taken as a whole, the statements were not sufficiently prejudicial to warrant a mistrial.[1596] Accordingly, the Ninth Circuit affirmed the conviction.[1597]

1587. *Id.*

1588. *Id.* at 543.

1589. *Id. See* United States v. Cornfeld, 563 F.2d 967, 971 (9th Cir. 1977) (prosecutor's comments must be such "that the jury would naturally and necessarily take them to be comments on the failure of the accused to testify."), *cert. denied,* 435 U.S. 922 (1978).

1590. 654 F.2d at 544-45.

1591. *Id.* at 545.

1592. 648 F.2d 512 (9th Cir. 1980), *cert. denied,* 450 U.S. 925 (1981).

1593. *Id.* at 513.

1594. *Id.*

1595. *Id.* at 515.

1596. *Id.* The *Dufur* court, like the *Pimental* court, used the test enunciated in United States v. Cornfeld, 563 F.2d 967, 971 (9th Cir. 1977). *See supra* note 1589 and accompanying text.

1597. 648 F.2d at 515.

E. Continuance

The grant or denial of a continuance lies within the trial court's discretion and is rarely overturned on appeal.[1598] A reviewing court, however, may reverse the denial of a request for continuance upon a showing of clear abuse of discretion by the trial judge[1599] and actual prejudice to the defendant.[1600]

The Ninth Circuit recently considered the denial of a continuance in *United States v. Veatch.*[1601] In *Veatch*, the defendant was convicted of transporting fraudulently obtained property in interstate commerce.[1602] Near the end of the trial, one of the three defense attorneys received word that his father had died.[1603] Veatch moved for a continuance so that the attorney could return home and make the necessary funeral arrangements.[1604] The district court denied the motion because the case was not complex and there were "two competent counsel remaining" to defend Veatch.[1605] The bereaved attorney ultimately decided to remain in the trial and participate in closing arguments.[1606]

On appeal, Veatch asserted that the emotional strain on the attorney caused by the death of his father had resulted in ineffective representation during trial.[1607] The Ninth Circuit, however, determined that

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1598. Avery v. Alabama, 308 U.S. 444 (1940). The *Avery* Court stated:

> [M]any procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.

Id. at 446 (footnote omitted).

1599. United States v. Ortiz, 603 F.2d 76, 78 (9th Cir. 1979), *cert. denied,* 444 U.S. 1020 (1980); United States v. Mills, 597 F.2d 693, 698-99 (9th Cir. 1979); United States v. Rinn, 586 F.2d 113, 118 (9th Cir. 1978), *cert. denied,* 441 U.S. 931 (1979); United States v. Michelson, 559 F.2d 567, 572 (9th Cir. 1977).

1600. United States v. Hernandez, 608 F.2d 741, 746 (9th Cir. 1979); United States v. Petsas, 592 F.2d 525, 527 (9th Cir.), *cert. denied,* 442 U.S. 910 (1979).

1601. 647 F.2d 995 (9th Cir. 1981).

1602. *Id.* at 996.

1603. *Id.* at 1004.

1604. *Id.*

1605. *Id. See* United States v. Lustig, 555 F.2d 737, 744 (9th Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978); United States v. Mardian, 546 F.2d 973, 979 n.9 (D.C. Cir. 1976) ("[A] defendant's right to an attorney of his choice is 'not so absolute as to permit disruption of the fair and orderly administration of justice when another competent attorney is available to continue the defense.' ") (quoting United States v. Mitchell, 389 F. Supp. 917, 921 (D.D.C. 1975).

1606. 647 F.2d at 1004.

1607. *Id.* at 1005. Veatch claimed that the ineffectiveness of counsel was a result of the "severe emotional consequences of the death of an immediate family member." *Id.* He pointed to the brevity of the bereaved attorney's closing arguments as evidence of prejudice resulting from the court's denial of his motion. *Id.*

Veatch had suffered no specific prejudice and that he had been adequately represented by defense counsel.[1608] The court held, therefore, that the trial judge's refusal to grant a continuance was not an abuse of discretion.[1609]

F. Admission of Evidence

1. Competency to stand trial

Defendants who lack the capacity to understand the nature and object of proceedings against them, to consult with counsel, or to assist in preparing their defense, are considered mentally incompetent and may not be subjected to trial.[1610] Under 18 U.S.C. section 4244 the accused, the prosecution, or the court may move for a judicial determination of competency.[1611] The defendant's first motion under section 4244 may not be denied unless the court "correctly determines that the motion is frivolous or not made in good faith."[1612]

When a section 4244 motion is granted, the court must order a psychiatric examination of the defendant.[1613] If the examination indicates the defendant is incompetent, the court must hold a competency hearing, at which evidence of the defendant's mental condition, including the psychiatric report, may be introduced.[1614] Conversely, if the examination indicates the defendant is competent, the court need hold

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1608. *Id.* Veatch was unable to point to any specific prejudice other than the brevity of the bereaved attorney's final summation. The Ninth Circuit noted that Veatch's other two attorneys also gave closing arguments and that there was no reason to believe "that all three arguments [had] failed to fully explore all facts and issues related to the case." *Id.*

1609. *Id.*

1610. Drope v. Missouri, 420 U.S. 162, 171 (1975).

1611. 18 U.S.C. § 4244 (1976) provides:

> Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused . . . . Upon such a motion or upon similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused . . . to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. . . . If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto.

1612. Chavez v. United States, 641 F.2d 1253, 1256 (9th Cir. 1981) (citations omitted).

1613. 18 U.S.C. § 4244 (1976).

1614. *Id.*

a competency hearing only if there is "substantial evidence"[1615] of the defendant's incompetence, i.e., evidence which raises a reasonable doubt about the defendant's competency.[1616] Regardless of the psychiatric findings, the court must make a final determination of the defendant's fitness to stand trial. The court has discretion to grant or deny any subsequent section 4244 motions.[1617]

In *United States v. Veatch,*[1618] the first psychiatric examination found the defendant competent to stand trial, and a hearing was not ordered.[1619] Because eleven months elapsed between his first section 4244 motion and his first trial, Veatch again moved for a competency hearing.[1620] The district court denied the motion, and Veatch appealed, arguing that the district court, while not *required* to hold a competency hearing, had erred in this case.[1621]

The Ninth Circuit, recognizing that the probative value of a prior psychiatric report might diminish over time,[1622] ruled that the quality of the evidence contained in a prior competency report must be reassessed.[1623] The court reviewed the facts which had been before the district court[1624] and those submitted by Veatch in an offer of proof.[1625] It

1615. *See* Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972). " 'Substantial evidence' is a term of art. . . . Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competency to stand trial." *Id.*

1616. Chavez v. United States, 641 F.2d at 1257. "This is true even if the psychiatrist's report 'indicates' sanity or competence and thus would not require a hearing under [§ 4244]." *Id.* Moreover, "[t]he trial court must accept as true all evidence of possible incompetence in deciding whether the evidence is substantial. It may find such evidence not credible only after the actual, adversary competency hearing." *Id.* at 1258.

1617. United States v. Clark, 617 F.2d 180, 185 (9th Cir. 1980).

1618. 647 F.2d 995 (9th Cir.), *modified,* 674 F.2d 1217 (9th Cir. 1981), *cert. denied,* — U.S. —, 102 S. Ct. 2013 (1982).

1619. *Id.* at 1000.

1620. *Id.*

1621. *Id.* at 1001.

1622. *See* United States v. Caplan, 633 F.2d 534, 539-40 (9th Cir. 1980).

1623. 647 F.2d at 1001 (citing United States v. Caplan, 633 F.2d 534, 539-40 (9th Cir. 1980)). The *Caplan* court stated:

> [The court] should consider, inter alia, the detail and thoroughness of the prior reports, the seriousness of illness reported, and the prognosis, if any, for future recovery . . . . Besides past reports, other factors for consideration could include the time elapsed for treatment, the opportunity to study the defendant during the time of treatment or commitment, and the court's own observation of the defendant . . . .

633 F.2d at 539-40.

1624. Facts which had been before the district court necessarily included the judge's personal observation of the defendant. The judge's study of the defendant during a case is very important because "unusual behavior on the part of the defendant before and during his trial may also reflect on his current mental competency." United States v. Clark, 617 F.2d 180, 186 (9th Cir. 1980) (citing Drope v. Missouri, 420 U.S. 162, 180 (1975)). Because the

concluded that none of the new facts differed substantially from those which had been before the psychiatric staff when it first declared Veatch competent.[1626] The Ninth Circuit held, therefore, that because Veatch's offer of proof failed to raise any reasonable doubt concerning the continuing validity of the examining psychiatrists' report, the district court did not abuse its discretion in denying Veatch's motion for a second competency hearing.[1627]

The *Veatch* court may have overlooked the standard for evaluating evidence of incompetency set forth in *Chavez v. United States.*[1628] Considering the information contained in the psychiatric report submitted in Veatch's offer of proof, it is arguable that a reasonable doubt about Veatch's competency was raised and a hearing was required.

2. Relevancy

The federal rules define relevancy in terms of the evidence's impact on the probable truth of a consequential fact.[1629] Determinations of relevancy are entrusted to the broad discretion of the trial court.[1630] The degree to which the Ninth Circuit will scrutinize the trial court's decision, however, is not always the same. This was demonstrated during the survey period by two cases which used different standards to evaluate the relevancy of expert testimony. In *United States v. Burreson,*[1631] the Ninth Circuit indicated that in the absence of abuse it

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court of appeals made no mention of any such behavior on Veatch's part, it can be surmised that the district court judge did not observe any unusual behavior, and that this was germane to the district judge's conclusion that the July 1979 psychiatric report was still valid. *Cf.* Chavez v. United States, 641 F.2d 1253, 1260 (9th Cir. 1981) (defendant's emotional outbursts during trial one ground for court's decision that reasonable doubt about defendant's competency had been raised).

1625. 647 F.2d at 1001. The offer was submitted on the invitation of the court of appeals, and contained the defendant's long history of emotional and mental problems, the fact of his incompetence to stand trial on at least one previous occasion, and a psychiatric report, based on an examination conducted the day before trial began, that Veatch was incompetent to stand trial. *Id.*

1626. *Id.* at 1002. The court noted that (1) Veatch's medical history was known to the district court and to the examining psychiatrists who had submitted the first report; and (2) the psychiatric report submitted by Veatch in his offer of proof was substantially similar to previous reports which the examining psychiatrists and the trial judge had studied. *Id.*

1627. *Id.*

1628. 641 F.2d 1253 (9th Cir. 1981). *See supra* notes 1615-16 and accompanying text.

1629. FED. R. EVID. 401 states: " 'Relevant evidence' means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

1630. United States v. Salazar-Gaeta, 447 F.2d 468, 469 (9th Cir. 1971) (per curiam) (upholding introduction of evidence of "rather tenuous" relevancy as being within wide discretion of trial judge).

1631. 643 F.2d 1344 (9th Cir.), *cert. denied,* 454 U.S. 847 (1981).

was within the trial court's discretion to permit expert testimony.[1632] In *United States v. Smith,*[1633] the Ninth Circuit held that it was error for the judge to exclude "certainly relevant" expert evidence.[1634]

In *Burreson,* the Ninth Circuit held that testimony on the general nature of mutual funds, restricted security investments for mutual funds, and the fiduciary duties of fund management was relevant[1635] to a case involving conspiracy to convert, manipulate, and engage in self-dealing in mutual funds.[1636] The defendants, chairpersons of three mutual funds, sought financing for their own corporations and investment firms.[1637] The Ninth Circuit relied on *Hamling v. United States,*[1638] for the rule that abuse of discretion is the standard for the admissibility of *expert* testimony and held that there was no abuse in admitting the expert's testimony.[1639]

In *United States v. Smith,*[1640] the Ninth Circuit reversed a trial judge's determination that psychiatric testimony was not relevant to the involuntariness of a bank robber's confession.[1641] The trial judge had excluded the psychiatric testimony as being irrelevant on the basis that it did not relate to the "conditions under which the confession was given, whether the defendant was mistreated, whether he was advised of his rights, [and] whether he was given improper offers of re-

1632. *Id.* at 1349.

1633. 638 F.2d 131 (9th Cir. 1981).

1634. *Id.* at 134.

1635. The court considered the challenge to the evidence in terms of its being both irrelevant *and* prejudicial. 643 F.2d at 1349. The Ninth Circuit ruled on both in the same statement: "We have examined the testimony and in our opinion permitting [the expert's] testimony was within the court's discretion. There was no abuse here." *Id.* at 1349 (citing Hamling v. United States, 418 U.S. 87 (1974)). An offer of proof was required by the trial judge as to the extent of the expert's anticipated testimony, and the judge cautioned the jury on the proper use of that testimony. *Id.* Such precautions no doubt buttressed the willingness of the court to find no abuse.

1636. *Id.* at 1346. The defendants were prosecuted for violations of the Investment Company and Investment Advisers Acts of 1940, securities fraud, mail fraud, under 15 U.S.C. §§ 80a-1 to 80a-52 and 80b-1 to 80b-21, 77q, 1341 and for conspiracy, under 18 U.S.C. § 371.

1637. In the first of three fraudulent transactions, the president arranged for the chairperson's mutual funds to loan money to one of the owner's companies. The owner used part of the loan to buy a certificate of deposit. The certificate then became security for a bank loan to one of the chairperson's investment adviser firms. In the second transaction, one of the chairpersons invested in an outside company which loaned part of that money to the chairperson. In the third, another chairperson's funds were invested in the owner's other company, and the owner lent some of that money back to the chairperson.

1638. 418 U.S. 87 (1974).

1639. 643 F.2d at 124-27.

1640. 638 F.2d 131 (9th Cir. 1981).

1641. *Id.* at 134.

ward."[1642] The Ninth Circuit however, characterized the testimony as "certainly" relevant to the defendant's "mental condition," such as, the absence or presence of free will, mental illness, or intoxication, and ruled that it should have been admitted.[1643] The *Smith* court made no mention of the *Hamling* rule that abuse of discretion is the standard for the admissibility of expert testimony.[1644] However, because the testimony would have gone to the weight of the confession rather than its admissibility, and because the evidence of guilt was overwhelming without the confession, the conviction was upheld.[1645] Although the *Burreson* and *Smith* decisions appear to conflict, they can be reconciled on the theory that trial judges have broader discretion to *admit* than to *exclude* evidence of questionable relevancy.

3. Prejudice

a. jail cell informant context

In 1980 the Supreme Court ruled that the use of a jail cell informant may violate a suspect's sixth amendment right to counsel, even when the informant is not instructed to elicit incriminating statements, but merely to be "alert" to them.[1646] The Ninth Circuit, however, has placed an important limitation on this rule. In *Bagley v. United States,*[1647] the court held that a showing of prejudice at trial is necessary to establish a violation of sixth amendment rights in the jail cell informant context.[1648] Furthermore, the court ruled that no prejudice arises when an informant merely relates to federal agents a suspect's version of the charges against him or her.[1649]

1642. *Id.* at 133.

1643. *Id.* at 134.

1644. *See* 418 U.S. at 124-27.

1645. The *Smith* court found that the error regarding the exclusion was not "of a constitutional" dimension. 638 F.2d at 133.

1646. United States v. Henry, 447 U.S. 264 (1980). In *Henry,* an FBI informant who shared the defendant's cell was told to "be alert" to possible incriminating statements, but not to "initiate questioning" or conversation. *Id.* at 266. At Henry's trial, the informant testified to several incriminating statements. *Id.* at 267. The Court held that the information was "deliberately elicited" and was thus in violation of *Massiah v. United States. Id.* at 271 (citing 377 U.S. 201 (1964) (indicted defendant's right to counsel violated where incriminating statements, deliberately elicited by co-defendant/police informant, used against defendent at trial)).

1647. 641 F.2d 1235 (9th Cir.), *cert. denied,* 454 U.S. 942 (1981).

1648. *Id.* at 1239. Although the Supreme Court had not ruled on this issue at the time of the *Bagley* decision, the *Bagley* court determined that *Henry* did not affect the rule established by the Ninth Circuit in United States v. Glover, 596 F.2d 857, 862-64 (9th Cir.) (prejudice essential to establish a *Massiah* violation), *cert. denied,* 444 U.S. 860 (1979).

1649. 641 F.2d at 1239. Moreover, the court determined that the debriefing of the inform-

Appellant Bagley, a probationer, was charged with several counts of illegal receipt, possession, and sale of firearms, and one count of obstruction of justice.[1650] His cellmate, McKenzie, an informant, contacted the U.S. Attorney's Office and offered to provide state authorities with information regarding Bagley's involvement in two unsolved homicides in exchange for dismissal of federal probation revocation proceedings.[1651] McKenzie did not provide the Government with any new information about the firearms violations, and he did not testify at Bagley's trial.[1652] Moreover, the Government had specifically instructed McKenzie not to attempt to elicit any information from Bagley concerning the federal charges.[1653]

b. extrajudicial information

In *Bagley* the appellant demanded a new trial because a note sent to the jury in response to its question concerning the immunity of a Government witness contained extrajudicial information.[1654] He argued that the question indicated that some jurors doubted the credibility of the witness, and the answer may have assuaged those doubts.[1655] The Ninth Circuit ruled that Bagley suffered no prejudice as a result of the note because the testimony of the witness was "merely cumulative to that of his business partner," with whom the witness had purchased

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ant by federal agents did not prejudice Bagley at trial because none of the information was given to the prosecution. *Id.*

1650. *Id.* at 1237. Defendants were indicted for violations of 18 U.S.C. App. § 1202(a) (1976), 18 U.S.C. § 922(a)(1) (1976), 18 U.S.C. § 922(h) (1976), and 18 U.S.C. § 1503 (1976).

1651. *Id.* at 1237-39.

1652. *Id.* at 1239. Neither the transcript of the probation revocation hearing against Bagley, held before McKenzie contacted the Government, nor the trial transcript revealed any apparent changes in the Government's use of the evidence. *Id.*

1653. *Id.* at 1238-39. *Cf. Henry,* 447 U.S. at 226 (instruction to "be alert" created situation conducive to incrimination in absence of counsel).

1654. 641 F.2d at 1240-41. When counsel for both sides agreed that the witness had not been granted immunity, that information was given to the jury. *Id.* at 1241. Subsequently realizing that this answer gave the jury information not introduced as evidence during trial, counsel contacted the judge, who instructed the jury to disregard the answer. *Id. See* United States v. Vasquez, 597 F.2d 192, 193 (9th Cir. 1979) (new trial granted because jury had access to official court file which contained suppressed evidence): "[W]e hold that the appellant is entitled to a new trial if there existed a reasonable possibility that [the extrajudicial] . . . material could have affected the verdict." *Id.* at 193. The Second, Tenth, and District of Columbia Circuits adhere to the view that reversal is required if there is the "slightest possibility" that harm to the defendant could result from the conveyance of extrajudicial information to the jury. *See, e.g.,* United States v. Marx, 485 F.2d 1179, 1184 (10th Cir. 1973), *cert. denied,* 416 U.S. 986 (1974); Dallago v. United States, 427 F.2d 546, 560 (D.C. Cir. 1969); United States v. Adams, 385 F.2d 548, 550-55 (2d Cir. 1967).

1655. 641 F.2d at 1241.

guns from Bagley.[1656] In so holding, the court stated that it was adhering to the rule that extrajudicial information prejudices a defendant only when there is a "reasonable possibility" that the information affected the verdict.[1657]

The dissent agreed with the reasonable possibility standard announced by the majority but argued that the note to the jury did affect the verdict.[1658] The dissent reasoned that although the court had cautioned the jury not to consider the answer to the question, "the jury deliberated for only two more minutes before returning a guilty verdict."[1659] The dissent concluded that "[w]here the jury's uncertainty centered around the credibility of a key witness, the resolution of that uncertainty could unquestionably have affected the verdict."[1660]

c. evidence later held to be inadmissible

In both *Bagley* and *United States v. Escalante,*[1661] the Ninth Circuit reaffirmed the rule that any prejudice to a defendant resulting from evidence subsequently found to be inadmissible may be cured by a cautionary instruction to the jury.[1662] In *Bagley,* the Ninth Circuit held that reversible error did not result from the admission of prejudicial testimony that defendant had killed his ex-girlfriend's cat because she had talked to his probation officer.[1663] The obstruction of justice count had been dismissed when the court learned that the cat had been killed prior to the girlfriend's conversation with the officer.[1664] The court thus reasoned that any prejudice was cured by the trial court's instruction to the jury to ignore all evidence supporting the obstruction of justice count.[1665] Moreover, the court found that any collateral prejudice on the firearms counts that defendant suffered from the testimony was negated by other evidence which was more than sufficient to support a

1656. *Id.*

1657. *Id.* at 1240-41 (citing United States v. Vasquez, 597 F.2d 192, 193 (9th Cir. 1979)).

1658. 641 F.2d at 1242 (Fletcher, J., concurring in part and dissenting in part).

1659. *Id.* The opinion does not state how long a period elapsed from the time the jury received the answer to the time the curative instruction was given. *Id.* at 1237.

1660. *Id.* at 1242. Judge Fletcher felt that the majority had employed the corrrect standard, but had reached the wrong conclusion. *Id.*

1661. 637 F.2d 1197 (9th Cir.), *cert. denied,* 449 U.S. 856 (1980).

1662. 641 F.2d at 1240; 637 F.2d at 1202-03 (citing United States v. McDonald, 576 F.2d 1350, 1356 n.8 (9th Cir.), *cert. denied,* 439 U.S. 830 (1978)). *See also* United States v. Kennedy, 564 F.2d 1329, 1334 (9th Cir. 1977), *cert. denied,* 435 U.S. 944 (1978).

1663. 641 F.2d at 1240.

1664. *Id.*

1665. *Id.* The Ninth Circuit admitted that the story did not place the defendant in a "sympathetic light." *Id.*

conviction.[1666]

Conversely, the *Escalante* court did not rely on curative jury instructions to negate the prejudice from testimony later held to be inadmissible. The testimony, which concerned a prior heroin smuggling venture, had been allowed on the condition that the prosecutor could connect it to the conspiracy at issue by showing that the heroin smuggled had been used in the conspiracy.[1667] When it became apparent that none of the smuggled heroin was used in the conspiracy, defense counsel moved for a mistrial.[1668] The district court denied the motion, but struck the testimony and ordered the jury to disregard it.[1669]

The Ninth Circuit noted that the prosecutor's lack of preparation was "unfortunate,"[1670] and that the Government may have wished to associate the defendant "with the aura of . . . criminal activity."[1671] Nevertheless, the court held that the testimony did bear on defendant's intent to join the conspiracy.[1672] The court reasoned that the district court had struck the testimony under Federal Rule of Evidence 403[1673] because its probative value was outweighed by its prejudicial effect.[1674] The Ninth Circuit suggested, however, that had the district court admitted the evidence with proper instructions, the Ninth Circuit would have sustained the admission[1675] under Federal Rule of Evidence 404(b)[1676] as proof of a prior similar act.[1677] Thus, rather than weigh probative value against prejudicial effect, the Ninth Circuit ruled that

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1666. *Id.*

1667. 637 F.2d at 1202.

1668. *Id.* Prior to the inception of the conspiracy, an associate had sent to San Francisco all the heroin that Escalante had smuggled. *Id.*

1669. *Id.*

1670. *Id.* at 1204.

1671. *Id.* at 1203.

1672. *Id.* at 1203-04.

1673. FED. R. EVID. 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially out-weighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

1674. 637 F.2d at 1204.

1675. *Id.*

1676. FED. R. EVID. 404(b) provides in pertinent part that "[e]vidence of other crimes, wrongs, or acts . . . may . . . be admissible . . . as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

1677. 637 F.2d at 1204. The court attempted to excuse the prosecution's failure properly to present the evidence as proof of a prior similar act on the rationale that "the district judge was not inclined to admit accounts of similar acts that did not tie directly to the conspiracy." *Id.* The Ninth Circuit thus stated that the trial judge may have been reluctant to admit the evidence on the alternate theory of a prior similar act. *Id.*

the trial court did not abuse its discretion in denying a mistrial.[1678] The question raised by the *Escalante* decision is whether evidence which fails to be sufficiently probative under Rule 403 may be rehabilitated under some other rule. Until *Escalante*, Rule 403 operated as a check on *all* evidence, including evidence admissible under Rule 404(b).[1679]

d. Rule 403

i. probative value versus prejudicial effect

While *Escalante* touched only tangentially on Rule 403's probative value versus prejudicial effect standard, *People v. Dela Rosa*[1680] and *United States v. Diggs*[1681] addressed the issue directly.

The *Dela Rosa* court held that photographs of bloody murder victims were not so prejudicial as to outweigh their probative value in defendant's murder trial.[1682] It also held that testimony regarding a previous murder spree and the theft of a gun belonging to the victims' relative was properly admitted because it tended to link the defendant to a gun similar to the murder weapon.[1683] Further, because the disputed testimony did not specifically mention the previous murders other than to corroborate testimony about the date on which the defendant had come into possession of the gun, any prejudice from the intimation of other crimes was deemed "speculative."[1684]

In *Diggs,* the defendant claimed that he was prejudiced by the ad-

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1678. *Id.*

1679. *See* United States v. Herrell, 588 F.2d 711 (9th Cir. 1978), *cert. denied,* 440 U.S. 964 (1979), where the Ninth Circuit stated:

> In interpreting Fed. R. Evid. 404(b), this court has held:
> Evidence of prior acts is admissible to demonstrate a defendant's criminal intent if (1) the prior act is similar and close enough in time to be relevant, (2) the evidence of the prior act is clear and convincing and (3) the trial court determines that the probative value of the evidence outweighs any potential prejudice.

Id. at 714 (citing United States v. Brashier, 548 F.2d 1315, 1325 (9th Cir. 1976), *cert. denied,* 429 U.S. 1111 (1977)).

1680. 644 F.2d 1257 (9th Cir. 1981) (per curiam).

1681. 649 F.2d 731 (9th Cir.), *cert. denied,* 454 U.S. 970, (1981).

1682. 644 F.2d at 1261. "The bodies were not mutilated and did not appear to be sexually abused; the only 'gruesome' feature was that the bodies were bloodied." *Id.*

1683. *Id.* at 1261-62.

1684. *Id.* The *Dela Rosa* court, however, reversed the defendant's conviction because the trial court failed to give a cautionary instruction about the credibility of a Government witness who had been promised "unofficial" immunity. *Id.* at 1259-60. The court reasoned that because the witness' testimony was secured by a promise of immunity from a police lieutenant, the witness might have been motivated to testify for personal gain. *Id.* At the very least, the court concluded, the jury should have been cautioned about such a suspect motivation so as to minimize "any unfairness" to the defendant. *Id.* at 1260.

mission of testimony concerning fictitious banking transactions.[1685] The Ninth Circuit held, however, that any resulting prejudice was outweighed by the testimony's probative value because the testimony served to rebut the defendant's claim of entrapment by demonstrating his predisposition to commit the crimes charged.[1686] The testimony was also probative both of the defendant's specific intent to defraud and his knowledge and opportunity to do so because it showed that the fictitious bank never had assets.[1687]

ii. confusion

Under Rule 403, the district court has the discretion to exclude relevant evidence if it is potentially confusing to the jury or cumulative to facts already in evidence.[1688] In *United States v. Ness*,[1689] the Ninth Circuit upheld the exclusion of a slide show that defendant wanted to introduce.[1690] The defendant claimed that the show led him to believe that he had no tax liability.[1691] The court stated that the testimony of the defendant and the show's lecturer was adequate to establish the content of the show, and that further evidence was cumulative and potentially confusing to the jury.[1692]

4. Previous convictions

Evidence pertaining to a defendant's prior criminal activity is generally inadmissible because the jury may infer that the defendant possesses a character trait consistent with that activity.[1693] Evidence of

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1685. 649 F.2d at 737. A witness testified that he never recovered several deposits made in Diggs' fictitious bank. *Id.*

1686. *Id.*

1687. *Id.*

1688. *See supra* note 1673.

1689. 652 F.2d 890 (9th Cir.) (per curiam), *cert. denied,* 454 U.S. 1126 (1981).

1690. *Id.* at 893.

1691. *Id.*

1692. *Id. See* Cooley v. United States, 501 F.2d 1249, 1253-54 (9th Cir. 1974) (no abuse of discretion in excluding letter appearing in *Congressional Record*, Internal Revenue Service Training Manual, and Supreme Court opinions, despite defendant's claim that it did not tend to prove a willful act in failing to file tax return), *cert. denied,* 419 U.S. 1123 (1975).

1693. FED. R. EVID. 404(b) provides in pertinent part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."

The admission of evidence of other crimes can be highly prejudicial. When such evidence lacks significant probative value, it is excludable under Federal Rule of Evidence 403. FED. R. EVID. 609(a) also provides that in certain cases the court must specifically weigh the probative value of the evidence of a witness' prior crimes against the prejudice to the defendant when such evidence is admitted to impeach the witness. A claim that evidence of past crimes is more prejudicial than probative cannot be raised for the first time on appeal

predisposition is admissible, however, to rebut a defense of entrapment,[1694] and prior criminal activity is relevant to predisposition when such activity is similar to the offense charged.[1695]

In *United States v. Bramble,*[1696] the Ninth Circuit held that a predisposition to sell cocaine could not be inferred from an earlier conviction for possession of marijuana,[1697] absent evidence that the marijuana previously possessed was of a "commercial quantity."[1698] Because evidence of a commercial quantity had not been introduced, the *Bramble* court held that admitting evidence of the marijuana conviction was reversible error per se.[1699] Moreover, the Ninth Circuit instructed the judge on retrial to weigh the probative value of the previous conviction against its prejudicial impact if the amount of marijuana was found to be of commercial quantity.[1700]

Another exception to the general rule prohibiting the admission of evidence pertaining to prior convictions is the admission of such evidence to show identity or common plan.[1701] Such evidence is admissible, however, only if it is " 'so unusual and distinctive as to be like a signature,' "[1702] and a similar crime may not meet the requisite particularity or identifying test contemplated by the identity or common plan

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and an objection must be preserved for appeal. *See, e.g.,* United States v. Moore, 653 F.2d 384, 390 (9th Cir.), *cert. denied,* 454 U.S. 1102 (1981) (pattern of conduct by defendant indicating waiver of objection to prior conviction resulted in failure to preserve objection for appeal).

1694. *See* Sorrells v. United States, 287 U.S. 435, 451 (1932) (predisposition and criminal design relevant to entrapment defense).

1695. *See* United States v. Segovia, 576 F.2d 251, 252-53 (9th Cir. 1978) (prior conviction for selling marijuana admissible against entrapment defense to charge of selling cocaine); De Jong v. United States, 381 F.2d 725, 726 (9th Cir. 1967) (evidence of prior crimes relevant where defendant engaged in illegal operations similar to those charged).

1696. 641 F.2d 681 (9th Cir. 1981).

1697. *Id.* at 682-83 (citing Enriquez v. United States, 314 F.2d 703 (9th Cir. 1963) (prior conviction for possession of marijuana not admissible to establish intent to sell heroin)). The court rejected any distinction between intent to sell and predisposition to sell. 641 F.2d at 683 n.2.

1698. 641 F.2d at 683. The defendant's previous conviction involved the cultivation of 21 marijuana plants. *Id.* The *Bramble* court explained that because it did not know if such an amount was indicative of mere personal use or a full-scale commercial operation, it could not take judicial notice of whether the prior conviction involved a commercial quantity. *Id.*

1699. *Id.*

1700. *Id.*

1701. FED. R. EVID. 404(b) provides in pertinent part: "[E]vidence of other crimes . . . may, however, be admissible . . . as proof of . . . plan . . . [or] identity . . . ." For authorities discussing the common law admissibility of evidence of other crimes, see United States v. Phillips, 599 F.2d 134, 136 n.2 (6th Cir. 1979).

1702. United States v. Phillips, 599 F.2d 134, 136 (6th Cir. 1979) (quoting MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 157 at 328 (1954)).

exception.[1703] In *United States v. Ezell,*[1704] the Ninth Circuit held that a description of how a bank robber performed an earlier bank robbery was not admissible to show identity or common plan because the points of similarity between the two robberies were "so common to most bank robberies as to be entirely unhelpful."[1705] The error, however, was harmless because other evidence overwhelmingly supported the defendant's guilt.[1706]

Evidence of prior convictions is also admissible to show motive, state of mind, or intent.[1707] Such evidence, however, cannot be used to prove the defendant's guilt or as evidence of his criminal character. Consequently, as the Ninth Circuit acknowledged in *United States v. Mayo,*[1708] statements about defendant's prior criminal record, which may have been admissible against a co-defendant, could not be used against the defendant.[1709] A "strong case" against the defendant, however, coupled with limiting instructions, rendered the error harmless.[1710]

1703. *Compare* United States v. Phillips, 599 F.2d at 136-37 (general testimony that defendant had committed other bank robberies not within intent and plan exception) *with* Parker v. United States, 400 F.2d 248, 252 (9th Cir. 1968) (defendants' actions in previous crime "identical" to those alleged in the indictment). The *Phillips* court stated: "Something more than repeated performance of the same class of crimes is required. . . ." 599 F.2d at 136.

1704. 644 F.2d 1304 (9th Cir. 1981).

1705. *Id.* at 1306. The Ninth Circuit did not elaborate on the description of the earlier robbery or its similarity to the robbery before the court. *Id.* The court also declined to rule on whether a passing reference by a hospital guard to the effect that he had been assigned to guard appellant at the hospital four days before the robbery, violated the prohibition against evidence of prior convictions. *Id.* The court reasoned that "even if" the admission of the testimony were error, it was harmless because it was improbable that the error materially affected the jury's decision. *Id.* at 1304-05 (citing United States v. Valle-Valdez, 554 F.2d 911, 915-17 (9th Cir. 1977) (non-constitutional error resulted in reversal because it was "more probable than not" that it materially affected the verdict; more stringent "reasonable possibility" test reserved for constitutional error)).

1706. 644 F.2d at 1306. The defendant was positively identified by three eyewitnesses and was photographed by a camera activated during the robbery. *Id.*; *see* United States v. Marques, 600 F.2d 742, 750-51 (9th Cir.) (note found during co-defendant's arrest, defendant's drug sale to DEA agents, and defendant's rental of truck in which large amounts of drugs found, all "overwhelmed" wrongful admission of evidence that defendant had previously bought drugs for personal use), *cert. denied,* 444 U.S. 1019 (1979).

1707. FED. R. EVID. 404(b).

1708. 646 F.2d 369 (9th Cir.) (per curiam), *cert. denied,* 454 U.S. 1127 (1981).

1709. *Id.* at 372.

1710. *Id.* Defendant had been convicted of mail and securities fraud related to a scheme to market worthless debt securities of the Quimby Island Reclamation District No. 2090. *Id.* "The record contains substantial evidence that [he] made knowing and material misrepresentations . . . [and] knowingly and deceitfully caused the District to transfer assets without adequate consideration." *Id.*

5. Identifications

In 1969, the Ninth Circuit noted that hearings on "tainted" identification testimony must be held outside the jury's presence.[1711] In contrast, the Supreme Court recently held, in *Watkins v. Sowders,*[1712] that due process does not require that the admissibility of eyewitness identification testimony be determined in the jury's absence.[1713] The *Watkins* Court noted that federal courts, including the Ninth Circuit, have "admonished" lower courts to hold hearings outside the jury's presence;[1714] consequently, the impact of *Watkins* will most likely be con-

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1711. *See* United States v. Allison, 414 F.2d 407, 410 (9th Cir. 1969). In *Allison,* an alleged bank robber moved to suppress the identification testimony of bank employees on the theory that a photographic display before the employees constituted a line-up in the absence of defense counsel. *Id.* at 409. The Ninth Circuit upheld the trial judge's denial of the motion, noting:

> We agree that where a timely and sufficient motion is made to suppress identification testimony on the ground that it has been tainted by pretrial photographic identification procedures, it must be heard and determined by the court outside the jury's presence in the same manner as any other motion to suppress evidence alleged to be inadmissible because unlawfully obtained.

Id. at 410. As of the end of the survey period, no Ninth Circuit case has cited *Allison* for this proposition.

1712. 449 U.S. 341 (1981). For a discussion of *Watkins,* see 67 A.B.A.J. 341 (1981); Note, *Fourteenth Amendment—The Last Gasp of Due Process Requirements on Eyewitness Identifications: The Admissibility of Identification Evidence May Be Determined in the Jury's Presence,* 72 J. CRIM. L. 1410 (1981) (noting with approval the dissent's position on the unreliability of eyewitness identifications) [hereinafter cited as *Fourteenth Amendment*].

1713. *Watkins* was a consolidation of two cases presenting constitutional claims asserted in both state and federal court proceedings. *Id.* at 342. The first case arose out of a line-up and a show-up following a liquor store robbery and shooting. Watkins v. Kentucky, 565 S.W.2d 630, 631 (1978) (refusal to conduct suppression hearing not error; identification procedure not impermissibly suggestive), *aff'd sub nom.* Watkins v. Bordenkircher, 608 F.2d 247 (6th Cir. 1979). The second case arose out of a photographic selection viewed by the victim of a rape three days after the offense. Summitt v. Kentucky, 550 S.W.2d 548, 550 (1977) (holding a hearing outside jury's presence to determine admissibility of identification evidence preferred, but not constitutionally required), *aff'd,* 608 F.2d 247 (6th Cir. 1979).

1714. 449 U.S. at 345. A review of the cases cited by the *Watkins* Court reveals no compelling authority requiring hearings outside the jury's presence. *See* United States v. Mitchell, 540 F.2d 1163, 1166-67 (3d Cir. 1976), *cert. denied,* 429 U.S. 1099 (1977) (defendant could have requested hearing outside jury's presence); United States v. Cranson, 453 F.2d 123, 128 (4th Cir. 1971) (per curiam) (at a minimum defendant must demonstrate pretrial identification before court will consider motion for evidentiary hearing outside jury presence) (dictum because defendant could not show pretrial identification); Haskins v. United States, 433 F.2d 836, 838 n.2 (10th Cir. 1970) (hearing outside presence of jury would be "better practice") (dictum because identification had independent source); United States v. Ranciglio, 429 F.2d 228, 230 (8th Cir. 1970) (upholding trial court's determination, outside presence of jury, that "in-court identifications had independent origins and were not influenced by tainted lineup") (dictum because jury presence not at issue); United States v. Allison, 414 F.2d 407, 410 (9th Cir. 1969) (motion to suppress identification testimony "must be heard and determined" outside jury's presence) (dictum because jury presence not at issue); United States v. Broadhead, 413 F.2d 1351, 1354 (7th Cir. 1969) (upholding pretrial hearing on identification

fined to state court proceedings.[1715] Although the *Watkins* Court stated that outside hearings are "advisable,"[1716] the case is significant because it reflects a substantial shift in Supreme Court attitudes toward eyewitness identification testimony. Whereas the Court had previously viewed such testimony with considerable suspicion,[1717] *Watkins* implicitly held that such testimony is not inherently unreliable.[1718]

Specifically, the *Watkins* Court refused to apply *Jackson v. Denno,*[1719] which *may* require outside hearings to determine the voluntariness of confessions,[1720] to situations involving challenges to identification testimony.[1721] The Court distinguished between confessions and eyewitness identifications by noting that involuntary confessions are inadmissible because of "special considerations": (1) unreliability of the confession and (2) social repugnance to "wring[ing]" a confession out of the accused.[1722] Conversely, the Court reasoned that "[w]here identification evidence is at issue, no such special considerations justify a departure from the presumption that juries will follow instructions."[1723] Moreover, the Court found that juries could evaluate, "under the instruction of the trial judge," the reliability of "admitted" eyewitness identification testimony.[1724] The Court did not reconcile a jury's duty to weigh "admitted" identification testimony with the viola-

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testimony) (dictum because of independent basis for identification); Clemons v. United States, 408 F.2d 1230, 1237 (D.C. Cir. 1968) (en banc) (court should rule on challenged in-court identification based on "facts elicited outside the presence of a jury") (dictum because jury presence not at issue). *See* 449 U.S. at 345 n.2.

The *Watkins* Court cited only one case requiring an outside hearing in some circumstances. 449 U.S. at 345 n.2 (citing United States *ex rel* Fisher v. Driber, 546 F.2d 18 (3d Cir. 1976)). *Fisher* mandates that a state trial court grant an outside hearing if the challenge to the identification testimony is not frivolous. 546 F.2d at 22-23.

1715. Given the absence of compelling authority for outside hearings, however, see *supra* note 1714, the circuits may find in *Watkins* some latitude to permit identification hearings in the jury's presence.

1716. 449 U.S. at 349.

1717. *Id.* at 347. *E.g.,* Manson v. Braithwaite, 432 U.S. 98, 111-12 (1972); United States v. Wade, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known . . . .").

1718. 449 U.S. at 345.

1719. 378 U.S. 368 (1964).

1720. *See Fourteenth Amendment, supra* note 1712, at 1415 n.50: "The *Jackson* Court never explicitly held that the jury must be excluded from the presentation of evidence on the voluntariness of a confession before the judge's initial determination of admissibility." The *Watkins* Court assumed that the *Jackson* Court had made such an explicit determination. 449 U.S. at 345-46 n.2.

1721. 449 U.S. at 347.

1722. *Id.*

1723. *Id.*

1724. *Id.*

tion of due process that results from the jury's exposure to *inadmissible* identification testimony. Rather, the Court reasoned that because juries must evaluate the reliability of admissible identification testimony and because cross-examination would allow the defendant to dispel any prejudice arising from the jury's exposure to that testimony, a jury could be trusted to disregard inadmissible identification testimony.[1725] The practical effect of such a rule, however, is that "almost all identification evidence will be allowed to make an impression upon the jury."[1726]

Justice Brennan, in his dissenting opinion, argued that identification evidence *does* implicate the "special considerations" of *Jackson v. Denno* and should, like confessions, be considered outside the jury's presence.[1727] These "special considerations" were the "inherent unreliability" of the challenged testimony and its "powerful" impact on the jury.[1728] Justice Brennan reasoned that juries could not be trusted to disregard inadmissible identification testimony.[1729] Neither cross-examination nor jury instructions could dispel the impact of an inadmissible identification.[1730]

6. Scope of examination

a. generally

In *United States v. Seifert,*[1731] the Ninth Circuit clarified the circumstances under which a non-party witness may invoke the fifth amendment privilege to refuse to answer questions during cross-exami-

1725. *Id.* at 350 n.1. The Court's use of the word "admitted" is problematic. Admission implies that the evidence has *already met* threshold standards of reliability. *See* Manson v. Brathwaite, 432 U.S. 98, 114 (1972) (jury should not hear eyewitness testimony which does not exhibit "aspects of reliability").

1726. *See Fourteenth Amendment, supra* note 1712, at 1422, which suggests that, after *Watkins,* there is no way to keep unreliable identification testimony from making an impression on the jury, with the exception of testimony tainted by line-ups held in the absence of defense counsel. *See* Gilbert v. California, 388 U.S. 263, 269-74 (1967). The article further argues that because "almost any" identification testimony may now come before a jury, "many innocent defendants" will be convicted in the wake of *Watkins. Fourteenth Amendment, supra* note 1712, at 1424. Such an assertion presumes that juries will find it difficult to distinguish admissible from inadmissible identification evidence.

1727. 449 U.S. at 349 (Brennan, J., dissenting).

1728. *Id.* at 352.

1729. "The powerful impact that much eyewitness identification evidence has on juries, *regardless of its reliability,* virtually mandates that when such evidence is inadmissible, the jury should *know nothing* about the evidence." 449 U.S. at 449-50 (Brennan, J., dissenting) (emphasis added).

1730. *Id.*

1731. 648 F.2d 557 (9th Cir. 1980).

nation. Seifert, Ehrlich, and Peres were indicted on nineteen counts of interstate transportation of property obtained by fraud and one count of conspiracy.[1732] The three opened a retail video store and induced their suppliers to sell them large amounts of merchandise on credit. The defendants then shipped the merchandise out of state without payment to the creditors.[1733] Saka, a prosecution witness, testified that he had purchased merchandise from Seifert and Ehrlich with borrowed money.[1734] On cross-examination, Saka testified at length but refused to provide the name of his lender for fear of his life.[1735] In response to the Government's objection to the question, Seifert made an offer of proof setting forth the defense's theory that it was Saka who had financed the business in which he and Peres were partners.[1736] The court then allowed the defense, outside the presence of the jury, to ask Saka for the identity of the lender. Saka again refused to answer, asserting the fifth amendment privilege against self-incrimination.[1737]

On appeal, the defendants first claimed that Saka should have been required to assert the privilege before the jury.[1738] The Ninth Circuit agreed, reasoning that, in light of his other testimony, Saka's refusal to answer the one question would have been a form of impeachment.[1739] Accordingly, the court distinguished the rule announced in prior Ninth Circuit decisions that bars calling a co-defendant[1740] or non-party witness[1741] for the sole purpose of eliciting the

1732. *Id.* at 559. Peres pled guilty to one count in a plea bargain and testified against the other two defendants.

1733. *Id.*

1734. *Id.* at 559-60.

1735. *Id.* at 560.

1736. *Id.*

1737. *Id.*

1738. *Id.*

1739. *Id.* at 560-61. The court cited dictum from United States v. Gay, 567 F.2d 616, 620 (9th Cir.), *cert. denied*, 435 U.S. 999 (1978) and J. WEINSTEIN AND M. BERGER, 3 WEINSTEIN'S EVIDENCE § 611(04), at 611-49 (1978), for the proposition it announced, making this issue one of first impression in the Ninth Circuit. 648 F.2d at 560. However, because Seifert and Ehrlich had ample opportunity to impeach Saka's testimony through the examination of other witnesses and on cross-examination, forcing Saka to answer before the jury for this purpose would have been "merely cumulative." *Id.* at 561.

1740. *E.g.*, United States v. Espinoza, 578 F.2d 224, 228 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 849 (1978). In *Espinoza*, the co-defendant in an alien smuggling case claimed he was denied the right to confront the defendant Espinoza, who validly asserted the fifth amendment privilege. The Ninth Circuit held that "[i]t is clearly established that a defendant cannot call a co-defendant to the stand if the co-defendant will merely be invoking his Fifth Amendment right not to testify." *Id.* at 228 (citing United States v. Virgil, 561 F.2d 1316, 1318 (9th Cir. 1977)).

1741. *E.g.*, United States v. Licavoli, 604 F.2d 613, 624 (9th Cir. 1979) (non-party witnesses in receipt of stolen goods would refuse to testify if called; defendant could not call

assertion of the privilege before the jury.[1742] The court observed that the jury would not give undue weight to a selective assertion of the privilege as it might if a witness refused to answer all questions.[1743] Moreover, requiring a non-party witness to assert the privilege before the jury does not burden the witness because the assertion is not being used against him or her in the instant proceeding nor can it be so used in a subsequent prosecution.[1744]

The court next rejected defendants' contention that Saka had waived his privilege as to the lender's name by his testimony on direct examination.[1745] In so doing, it adhered to the settled rule that a non-party witness may refuse to answer additional questions as to matters about which he or she has already testified, even if the prior testimony was incriminating, provided the answers would tend to incriminate him or her further.[1746]

The court found no error in the trial court's denial of the defense motion to strike Saka's testimony because cross-examination had been restricted.[1747] All or a portion of the testimony of a witness who rightly claims the privilege on cross-examination need be stricken only if the assertion forecloses examination as to matters that are "direct" rather than "collateral."[1748] Noting the trial court's broad discretion to determine whether testimony must be stricken,[1749] the Ninth Circuit framed the questions on appeal as " 'whether the defendant has been deprived

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them for sole purpose of forcing them to refuse to testify in the presence of the jury), *cert. denied,* 446 U.S. 935 (1980).

1742. *Id.* at 560.

1743. *Id.* at 561.

1744. *Id.* at 560-61.

1745. *Id.* at 561.

1746. *Id.* (citing *In re* Master Key Litigation, 507 F.2d 292, 294 (9th Cir. 1974) (witness' refusal to answer questions in oral deposition during course of civil antitrust suit upheld although he had testified to some facts tending to implicate him in conspiracy: "an ordinary witness may . . . refuse to answer any questions about a matter already discussed, even if the facts already revealed are incriminating, as long as the answers sought may tend to *further* incriminate him." (citation omitted) (emphasis in original)); Shendal v. United States, 312 F.2d 564, 566 (9th Cir. 1963) (grand jury witness who had already allegedly incriminated himself by admitting he collected certain money at request of employer could invoke fifth amendment as to quantity collected because answer might well "provide a link not already provided" by his previous testimony).

1747. 648 F.2d at 561-62.

1748. *Id.* at 561.

1749. *Id.* at 562. *See* United States v. Star, 470 F.2d 1214, 1217-18 (9th Cir. 1972) (cross-examination of a witness about his long-term use of drugs was subject to a claim of privilege and withstood a motion to strike despite defense counsel's offer of proof that drug use can impair memory. The court did not abuse its discretion in finding that jury had ample opportunity to assess witness' memory through his other testimony).

of his right to test the truth of the direct testimony,' . . . and whether answers to the particular questions 'would . . . have undermined the government's case.' "[1750] The court concluded that the source of Saka's money was unimportant to the defense theory which had been adequately presented in closing argument and in the course of trial.[1751]

b. impeachment

The Federal Rules of Evidence permit witness' credibility to be supported or attacked by evidence of: (1) the *reputation* of a witness' character for truthfulness or untruthfulness; (2) an *opinion* regarding a witness' character for truthfulness or untruthfulness; or (3) *specific instances of conduct* demonstrating a witness' character for truthfulness or untruthfulness.[1752] Evidence that *attacks* a witness' credibility is said to "impeach" that witness. It includes evidence showing a witness' bias or demonstrating that a witness' prior statements are inconsistent with his or her present testimony.[1753] The reputation of, or an opinion concerning, a witness' character for truthfulness is generally proved extrinsically, through the testimony of someone other than the witness. The Federal Rules of Evidence, however, expressly forbid extrinsic proof of specific instances of conduct; such instances are proved through cross-examination of the witness whose impeachment is sought.[1754]

The Ninth Circuit has recently considered cases in which convictions have been attacked based on the admission of Government evidence that either supports the credibility of Government witnesses or attacks the credibility of defense witnesses. For example, in *United States v. Green,*[1755] the Ninth Circuit considered whether it is proper for the prosecution to offer extrinsic evidence of specific instances of the defendant's conduct for impeachment purposes. The defendants were convicted of conspiring to (1) obstruct justice, (2) make false statements, and (3) violate citizens' civil rights. The defendants had agreed with a private investigator to "plant" drugs on the premises of a drug

1750. 648 F.2d at 562 (citations omitted).

1751. *Id.* The court observed that only by "the most extended and poorly supported set of inferences" would the answer to the disputed question have shown that Saka had been the original investor and that he had not purchased the video equipment as he claimed. *Id.*

1752. FED. R. EVID. 608.

1753. *See* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 79 (1978).

1754. *See* FED. R. EVID. 608(b). FED. R. EVID. 609 creates an exception to this "extrinsic evidence" rule, whereby a witness' conviction of a crime *may* be proved by extrinsic evidence.

1755. 648 F.2d 587 (9th Cir. 1981).

manufacturing company. The agreement was an effort by the defendants to provide the state prosecutor with information about illegal drug manufacturing activities in exchange for the prosecutor's dropping charges against them for conspiring to manufacture and distribute LSD.[1756] At trial, the defendants testified and, on rebuttal, the Government presented a handwritten formula for LSD belonging to one of the defendants, and the testimony of several witnesses concerning specific instances of the defendants' previous drug activities.[1757] The defendants argued that the introduction of this evidence violated Federal Rule of Evidence 608(b).[1758]

The Ninth Circuit first noted that it was within the trial court's discretion to determine the purpose for the introduction of the evidence. It agreed that there was an adequate basis for concluding that the LSD formula and the testimony of certain witnesses were admissible to prove aspects of the Government's case other than attacking the defendant-witnesses' credibility.[1759] The court, however, found that the testimony of two other Government witnesses was so unrelated to the issues in the case that its use was obviously designed to impeach the defendants.[1760] The court held, therefore, that admitting this evidence

1756. *Id.* at 591.

1757. *Id.* at 596.

1758. FED. R. EVID. 608(b) provides in pertinent part: "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, . . . may not be proved by extrinsic evidence."

1759. 648 F.2d at 596. Federal Rule of Evidence 402 provides that "[e]vidence which is not relevant is not admissible." The LSD formula and the testimony relating to the defendants' past drug activities were not directly relevant to whether they *conspired* to obstruct justice, to make false statements, or to violate citizens' civil rights. To be relevant, the evidence would have to have been used for either impeachment purposes or for purposes stated in Federal Rule of Evidence 404(b): "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The court stated that the LSD formula and the particular testimony involved could have been used by the Government to demonstrate "capacity"; presumably, this referred to the defendants' opportunity to commit the alleged crimes. Ascribing any other logical meaning to the term "capacity," such as the defendants' propensity for committing the alleged crimes, would necessarily require the evidence to be excluded under Federal Rule of Evidence 404(b): "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."

1760. 648 F.2d at 596. During cross-examination, one of the defendants testified that she had never seen LSD or ergotamine tartrate (an LSD precursor) from 1972 to 1974 and had never delivered ergotamine tartrate to anyone intending to process it into LSD. The other defendant testified that the only time he had ever made LSD was during 1965 to 1966, pursuant to a government contract.

On rebuttal, one of the Government witnesses testified that she had received ergotamine tartrate from the first defendant two or three times during 1972 and had received LSD from the second defendant at least five or six times during 1971. The other Government witness

directly violated Rule 608(b), constituting reversible error.[1761]

In *United States v. Dunn,*[1762] the Ninth Circuit considered the propriety of the prosecution's offer of evidence, for impeachment of a defense witness, that members of the witness' family had been convicted of criminal offenses. The defendant in *Dunn* had been convicted of conspiring to counterfeit United States currency. At trial, a defense witness testified that Dunn had known nothing of the conspiracy.[1763] On cross-examination, the prosecutor questioned the witness about her brother's criminal convictions. The Government contended that this questioning was incidental to a showing that the witness was biased against a key Government witness, who was an associate of her brother and had revealed her part in the same conspiracy to the police.[1764]

The Ninth Circuit held that the Government's method of impeachment had been "wholly irregular and prejudicial."[1765] The court noted that if the Government had intended to show that the witness was biased against her brother's associate, it could have elicited his betrayal of her, rather than the wholly irrelevant information of her brother's crimes. The court viewed the Government's tactic as an attempt to create guilt by association and held that to permit such questioning constituted error.[1766] The court concluded that the error could not be declared harmless[1767] because the jury might have believed the

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testified that the second defendant had worked for him between 1963 and 1966, and at no time during that period had that defendant made LSD for the government. *Id.*

1761. *Id.* at 597. The Government argued against construing Rule 608(b) in this manner because witnesses could then commit perjury without fear of rebuttal. The court, however, stated that such an argument would be persuasive only if a witness' statements were *volunteered* on either direct or cross-examination. Because the statements in this case were direct responses to questions during cross-examination, the court referred the Government to Federal Rule of Evidence 608(b), permitting the impeachment of a witness through cross-examination. *Id.* at 596 n.12 (citing United States v. Chew Kam Tom, 640 F.2d 1037, 1039-40 (9th Cir. 1981)).

1762. 640 F.2d 987 (9th Cir. 1981).

1763. *Id.* at 988. The defense witness had been living with the defendant at the time of his arrest and had herself pled guilty to participating in the conspiracy. *Id.* The only evidence connecting the defendant with the conspiracy was the testimony of one of the counterfeiters who had been caught in the act of manufacturing money and who was granted immunity for testifying against the defendant. *Id.* at 987. For conviction, the Government relied on the long standing Ninth Circuit rule that a conviction may be based on "the uncorroborated testimony of an accomplice . . . [if it] 'is not incredible or unsubstantial on its face.' " *Id.* at 987 n.1 (quoting United States v. Sigal, 572 F.2d 1320, 1324 (9th Cir. 1978); *see also* United States v. Turner, 528 F.2d 143, 161 (9th Cir.), *cert. denied,* 423 U.S. 996 (1975); United States v. Bagby, 451 F.2d 920, 930 (9th Cir. 1971)).

1764. 640 F.2d at 987-88.

1765. *Id.* at 989.

1766. *Id.*

1767. *Id.* The court was reluctant to declare the district court's error prejudicial because

witness if the Government had questioned her properly. The case, therefore, was remanded for a new trial.[1768]

In *United States v. Harrington,*[1769] the Ninth Circuit considered whether it was proper for the prosecution to impeach a defendant-witness with evidence of his failure to inform authorities that his criminal conduct occurred under duress. Harrington was convicted of transporting illegal aliens in his van. At trial, he testified that a man with a knife coerced him into transporting the aliens.[1770] During cross-examination, the prosecutor asked whether Harrington told the police officer who stopped him, or the border patrol agent who later arrested him, that he was transporting the aliens under threat.[1771] Harrington admitted that he had not, and argued on appeal that the prosecutor had violated his constitutional rights by inquiring about his post-arrest silence.[1772]

The Ninth Circuit first observed that the prosecutor's questions were clearly probative of the defendant's credibility: "[i]t would seem natural that if [the defendant] had been threatened with a weapon, he would have blurted that [fact] out to the police officer as soon as he was

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the improperly questioned witness had been only one of two witnesses who testified for the defendant. To convict the defendant, the jury had to disbelieve both the defense witnesses, not just the one impeached by improper cross-examination.

1768. In remanding the case for new trial, the court reflected more than just a concern about the Government's improper impeachment of a defense witness. The district court had also refused to postpone sentencing to allow a new defense attorney to obtain a transcript and to familiarize himself with the record. *Id.* at 988. Furthermore, the prosecution's evidence of the defendant's guilt appeared to be extremely weak. The court noted that although the defendant had known the other alleged counterfeiters and had lent them certain items such as chairs and a hotplate, Secret Service surveillance had failed to observe the defendant inside the print shop or with the counterfeiters while they were engaged in anything illegal. *Id.* at 988-89. The court concluded that the prosecution's lack of evidence, coupled with the above mentioned two marginally prejudicial irregularities, required a new trial. *Id.* at 989.

1769. 636 F.2d 1182 (9th Cir. 1980).

1770. *Id.* at 1184. The defendant had been driving a van through Arizona when he was stopped by a police officer and a border patrol agent. Border patrol agents had previously observed the defendant stopping in Douglas, Arizona, at several areas known to be alien pick-up spots. The defendant testified that he had been en route to see a female friend in Texas, but stopped in Douglas to try to get some marijuana. He further testified that shortly after leaving Douglas, he stopped to pick up some hitchhikers. *Id.* According to the defendant, the male hitchhiker threatened him with a knife and forced him to transport the aliens, warning him that the alien behind him in the van also had a weapon. *Id.* The court noted that the defendant, upon being stopped by the police officer, got out of his van and met the officer at the rear. *Id.* The border patrol agent then informed the defendant that he was an immigration officer and that he was going to check the van. He discovered seventeen illegal aliens inside. *Id.*

1771. *Id.* at 1185.

1772. *Id.*

a safe distance away from the van."[1773] However, because the prosecutor's questions referred both to when the defendant alighted from the van (*before* the arrest), and to when the aliens were removed from the van (*after* the arrest), the questions may have violated Harrington's constitutional rights.[1774] The Ninth Circuit, however, held that it was harmless error to have permitted questioning on Harrington's post-arrest silence, because the questions focused primarily on the pre-arrest period, and Harrington's credibility had already been challenged by other evidence.[1775]

In *United States v. Halbert,*[1776] the Ninth Circuit considered whether it was proper for the prosecution to support its witness' credibility with evidence of a co-defendant's guilty plea to the same offense for which the defendant was standing trial. Halbert and two co-defendants were indicted on sixteen counts of mail fraud. Both co-defendants pled guilty, then testified against Halbert at his trial. During direct examination, the prosecutor asked the co-defendants about their pleas, and over the defendant's objection, both were allowed to tell the jury that they had pled guilty to the same conspiracy for which Halbert was being tried. Moreover, the prosecutor reiterated information about one co-defendant's plea on redirect examination, briefly referred to both pleas in closing argument, and introduced into evidence copies of the co-defendants' plea agreements.

The Ninth Circuit reasoned that although the guilty plea of a co-defendant may not be offered as substantive evidence of another de-

1773. *Id.* at 1187 (citing Jenkins v. Anderson, 447 U.S. 231 (1980)). Defendant Jenkins testified that he had stabbed and killed the victim in self-defense. The Supreme Court held that the prosecutor had not violated Jenkins' constitutional rights during cross-examination by asking whether he had reported the stabbing to anyone, suggesting that Jenkins would have done so if he had truly killed in self-defense. The Court reasoned that by deciding to testify, Jenkins exposed himself to impeachment because of his prior silence, which had not been induced by the police through, e.g., *Miranda* warnings. *Id.* at 238.

1774. 636 F.2d at 1187 (citing Doyle v. Ohio, 426 U.S. 610, 619 (1976) (unconstitutional to cross-examine defendant on his post-arrest silence)).

1775. 636 F.2d at 1187. Harrington's credibility had already been challenged when, responding to a question, he admitted that the hitchhiker who allegedly coerced him into transporting the aliens had not entered the van with him. The aliens also testified that they did not know of anyone having a knife, and the police officer testified that the defendant had alighted from the van voluntarily at least twice after picking up the aliens (suggesting that the defendant was not being forced to drive the van by threat of violence). *Id.* The court concluded that these facts contributed so much strength to the Government's case that there could be no doubt as to the validity of the verdict. *Id.* (citing Bradford v. Stone, 594 F.2d 1294, 1296-97 (9th Cir. 1979); United States v. Wycoff, 545 F.2d 679, 682 (9th Cir. 1976), *cert. denied,* 429 U.S. 1105 (1977)).

1776. 640 F.2d 1000 (9th Cir. 1981).

fendant's guilt,[1777] it *may* be offered as evidence of a witness' credibility,[1778] regardless of whether the Government or the defense is the proffering party.[1779] The court held that the guilty pleas had been properly admitted because they had been offered only as evidence of the witnesses' credibility.[1780] Halbert's conviction was reversed, however, because the jury instructions failed to apprise the jury that they could consider the pleas for this purpose only.[1781]

7. Hearsay — co-conspirator exception

The co-conspirator hearsay exception is an evidentiary rule permitting the use of certain out-of-court statements by one conspirator to be used against a co-conspirator.[1782] All co-conspirators' statements, however, are not made admissible by this exception. Admissibility hinges on the existence of certain foundational requirements: (1) the

1777. *Id.* at 1004 (citing Baker v. United States, 393 F.2d 604, 614 (9th Cir.), *cert. denied,* 393 U.S. 836 (1968)).

1778. 640 F.2d at 1004 (citing United States v. King, 505 F.2d 602, 607 (5th Cir. 1974); Isaac v. United States, 431 F.2d 11, 15-16 (9th Cir. 1970)).

1779. 640 F.2d at 1004 (citing United States v. Whitehead, 618 F.2d 523, 529 (4th Cir. 1980); United States v. Romeros, 600 F.2d 1104, 1105 (5th Cir. 1979) (per curiam), *cert. denied,* 444 U.S. 1077 (1980); United States v. Veltre, 591 F.2d 347, 349 (5th Cir. 1979); United States v. Anderson, 532 F.2d 1218, 1230 (9th Cir.), *cert. denied,* 429 U.S. 839 (1976); United States v. Bryza, 522 F.2d 414, 424-25 (7th Cir. 1975), *cert. denied,* 426 U.S. 912 (1976); United States v. King, 505 F.2d 602, 607 (5th Cir. 1974); United States v. Binger, 469 F.2d 275, 276 (9th Cir. 1972); Isaac v. United States, 431 F.2d 11, 15 (9th Cir. 1970); Baker v. United States, 393 F.2d 604, 614 (9th Cir.), *cert. denied,* 393 U.S. 836 (1968)).

1780. 640 F.2d at 1005.

1781. *Id.*

1782. Numerous Ninth Circuit cases have applied the co-conspirator exception, which is codified in Federal Rule of Evidence 801(d)(2)(E) as a form of non-hearsay admission. *See, e.g.,* United States v. Sandoval-Villalvazo, 620 F.2d 744, 746-47 (9th Cir. 1980); United States v. Weiner, 578 F.2d 757, 767-72 (9th Cir.), *cert. denied,* 439 U.S. 981 (1978); United States v. Testa, 548 F.2d 847, 851-52 (9th Cir. 1977); Carbozo v. United States, 314 F.2d 718, 735-38 (9th Cir. 1963), *cert. denied,* 377 U.S. 953 (1964). The exception, however, has not been particularly favored by the courts, perhaps because the Supreme Court has warned that it will "view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." Grunewald v. United States, 353 U.S. 391, 404 (1957).

As noted by the Supreme Court, "the limits of this hearsay exception have simply been defined by the Court in the exercise of its rule-making power . . . . [T]he limited scope of the hearsay exception in federal conspiracy trials is a product, not of the Sixth Amendment, but of the Court's 'disfavor' of 'attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.'" Dutton v. Evans, 400 U.S. 74, 82 (1970) (quoting Grunewald v. United States, 353 U.S. 391, 404 (1957)). Acknowledging that the exception is well settled but disfavored, the Supreme Court has stated: "There are many logical and practical reasons that could be advanced against . . . [the] rule . . . . But however cogent these reasons, it is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule." Krulewitch v. United States, 336 U.S. 440, 443 (1949).

declaration must be made in furtherance of the conspiracy; (2) the declaration must be made during the course of the conspiracy; and (3) there must be independent proof of the conspiracy's existence and of the connection of the declarant and the defendant to it.[1783] Recent litigation in the Ninth Circuit has focused on these foundational requirements for the admissibility of co-conspirator hearsay.

In *United States v. Perez,*[1784] the defendant had been convicted of both conspiracy to distribute and distribution of cocaine.[1785] The defendant challenged the sufficiency of the evidence of the conspiracy and his connection with it.[1786] The charges against him arose out of a series of meetings between other defendants and a Government agent and informant. Although the defendant was not at any of these meetings, he was named as the source of the drugs which were ultimately sold to the agent. At one of the meetings, his co-defendants made telephone arrangements with the defendant for transporting cocaine, and on two other occasions, he spoke by phone with the Government agent regarding the proposed drug sales.[1787] The trial court admitted the co-conspirators' statements naming the defendant as the source of the illegal drugs.[1788]

On appeal, the defendant argued that there was insufficient evidence of the conspiracy and of his involvement with it.[1789] Considering this claim, the Ninth Circuit outlined the test to determine the existence of a conspiracy under the co-conspirator hearsay exception. First, a prima facie case must be established "through the introduction of substantial independent evidence other than the contested hearsay," although the evidence "need not compel a finding of conspiracy beyond a reasonable doubt."[1790] The court next noted that "[c]ircumstantial evidence is often sufficient to establish the existence of a conspiracy," and, once a conspiracy has been established, "only 'slight evidence' is necessary to connect a co-conspirator to the conspiracy."[1791] The court held

1783. *See* United States v. Weiner, 578 F.2d 757, 768 (9th Cir.), *cert. denied,* 439 U.S. 981 (1978). As early as 1949, the Supreme Court noted that these requirements had been "scrupulously observed by federal courts." Krulewitch v. United States, 336 U.S. 440, 443-44 (1949).

1784. 658 F.2d 654 (9th Cir. 1981).

1785. *Id.* at 656.

1786. *Id.*

1787. *Id.* at 657.

1788. *Id.* at 658.

1789. *Id.* at 656, 658.

1790. *Id.* at 658.

1791. *Id. See* United States v. Calaway, 524 F.2d 609 (9th Cir. 1975), *cert. denied,* 424 U.S. 967 (1976), where the Ninth Circuit noted that a conspiracy may be proved by evidence that

that there was abundant independent evidence presented at trial to establish the existence of the conspiracy.[1792] The court found that the two telephone conversations between the defendant and the Government agent,[1793] the defendant's return call to a co-conspirator during a meeting between the co-conspirator and agent, and the co-conspirator's acknowledgement of the call from the defendant[1794] were sufficient, by themselves, to establish the conspiracy.[1795] Furthermore, the telephone calls between the defendant and his co-conspirators that were witnessed by the Government agent, and the telephone conversations between the defendant and the agent, were deemed sufficient "[s]ubstantial independent evidence" to prove "the critical nexus" between the defendant and the conspiracy.[1796]

In *United States v. Miranda-Uriarte,*[1797] the Ninth Circuit considered the nature and amount of independent evidence necessary to establish a conspiracy.[1798] The defendant, Uriarte, was charged with conspiracy to distribute heroin. At trial, the Government presented evidence of meetings from March 18 through March 27, 1980 between various co-conspirators and a Government agent. Although Uriarte was not present at the meeting on March 18, he was named as the heroin source for the proposed sale, as well as the source of the heroin sample for the agent. At subsequent meetings attended by Uriarte and the other conspirators, further samples were supplied and negotiations continued. On March 27, Uriarte delivered a package of heroin to the agent in exchange for $14,000. The defendants were then arrested.[1799]

On appeal, Uriarte challenged the admission of the March 18 co-conspirators' statements naming him as the source of the first heroin sample and as the source for the proposed heroin sale.[1800] He argued

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is entirely circumstantial, and items of circumstantial evidence must be viewed collectively, not in isolation. *Id.* at 612. "Slight evidence" has been defined as "of the quality which will reasonably support a conclusion that the particular defendant . . . wilfully participated in the unlawful plan with the intent to further some object or purpose of the conspiracy." United States v. Freie, 545 F.2d 1217, 1222 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977).

1792. 658 F.2d at 659.

1793. *Id.* The court characterized these conversations as "admissions to the conspiracy under Federal Rule of Evidence 801(d)(2)(A)." *Id.*

1794. *Id.* The court characterized the acknowledgement as "an implied assertion and admissible as nonassertive conduct under Federal Rule of Evidence 801(a), (c)." *Id.*

1795. *Id.* Additional substantial evidence of the conspiracy had also been presented such as meetings to exchange cocaine and the actual exchange of, and payment for, the cocaine.

1796. *Id.* at 659-60.

1797. 649 F.2d 1345 (9th Cir. 1981).

1798. *Id.* at 1349-50.

1799. *Id.*

1800. *Id.* at 1350.

that the evidence was inadmissible because the Government had failed to present sufficient independent evidence of the existence of a conspiracy as of March 18, and of his participation in the conspiracy as of that date.[1801] The court acknowledged that there was "no *direct* evidence, apart from the challenged statements," establishing a conspiracy or Uriarte's participation in it as of March 18.[1802] The court, however, determined that there was sufficient *circumstantial* evidence to support the finding.[1803] The court noted that the testimony of events from March 20 through March 27 provided "abundant" and "overwhelming" evidence that Uriarte was the source of the heroin and that he was a key participant in the conspiracy.[1804] This evidence, in turn, supported an inference that the conspiracy had existed as of the first meeting and that Uriarte was connected to it.[1805] Thus, the first meeting was part of a "chain of events" and the subsequent meetings constituted circumstantial evidence linking Uriarte to the conspiracy from its inception.[1806] Although the court considered the challenged hearsay to be cumulative, it was direct evidence of Uriarte's participation in the conspiracy from March 18.[1807]

1801. *Id.*

1802. *Id.*

1803. *Id.* (emphasis added). *See also supra* note 1791.

1804. 649 F.2d at 1350. The court noted that the evidence of the events from March 20 through March 27 indicated that Uriarte was the "bellwether of the entire plan." *Id.* The court specifically referred to testimony that Uriarte "controlled the negotiations." *Id.*

1805. *Id.* As for the requirement that there be proof of the defendant's connection with the conspiracy, the court noted that "[o]nce the existence of the conspiracy has been clearly established, independent evidence is necessary to show *prima facie* the defendant's connection with the conspiracy, *even if the connection* [as opposed to the *evidence* establishing that connection] is slight." *Id.* at 1349 (emphasis added). The *Miranda-Uriarte* court cited United States v. Weiner, 578 F.2d 757, 769 (9th Cir.), *cert. denied,* 439 U.S. 981 (1978), as authority for this formulation. In setting out essentially the same precept, the *Weiner* court cited United States v. Dunn, 564 F.2d 348, 357 (9th Cir. 1977), for a discussion of the "slight evidence" rule as it related to the question of the sufficiency of the evidence. 578 F.2d at 769 n.7. In *Dunn,* the court "[correctly] restate[d] the slight evidence rule . . . as [it was] reasonably certain that [its] predecessors intended it," thereby establishing the rule as follows:

> Once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the *connection is slight,* is sufficient to convict him with knowing participation in the conspiracy. Thus, the word "slight" properly modifies "connection" and not "evidence." It is tied to that which is proved, not to the type of evidence or the burden of proof.

564 F.2d at 357 (footnote omitted) (emphasis in original). *See supra* note 1791 for a comparison of the *Freie* court ruling, which considered "slight" to modify *evidence* rather than *connection.*

1806. 649 F.2d at 1350.

1807. *Id.*

In *United States v. Fielding,*[1808] the Ninth Circuit elaborated upon the "in furtherance" requirement for the admission of co-conspirator hearsay. Fielding challenged the admission of statements made by two co-defendants implicating him in a marijuana importation conspiracy.[1809] The statements, which included a claim that Fielding had failed to pay for a previous shipment of marijuana and descriptions of prior activities of the conspirators, were made during an initial meeting between a Government agent and Fielding's co-defendants. The co-defendants also made general statements about the conspiracy and discussed possible methods of collecting the money they claimed Fielding owed them.[1810] The trial court admitted the co-defendants' statements because they were made during the course of the conspiracy and concerned payments for a drug shipment "encompassed by the charged conspiracy."[1811]

The Ninth Circuit found the challenged statements inadmissible under the co-conspirator exception because they were not made in furtherance of the conspiracy.[1812] The court reaffirmed the "in furtherance" requirement,[1813] and then reviewed the types of statements that have *not* met this requirement. For example, casual admissions of culpability, confessions or admissions of a co-conspirator, mere conversation between conspirators, or narrative declarations are not admissible under the co-conspirator exception. These types of declarations do not "further the common objectives of the conspiracy."[1814] In contrast, statements intended to set transactions in motion, recruit members, obtain the acquiescence or silence of others, or otherwise assist the conspirators in achieving their objectives are considered "in furtherance" of the conspiracy.[1815]

1808. 645 F.2d 719 (9th Cir. 1981).

1809. *Id.* at 725.

1810. *Id.* at 724-25.

1811. *Id.* at 725.

1812. *Id.* at 727.

1813. *Id.* at 725-26. The *Fielding* court noted that the Ninth Circuit had emphasized "that the 'in furtherance of' requirement remained 'viable, and we believe that this is as it should be. "The agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." Advisory Committee's Note to Proposed Fed.R.Ev[id]. 801(d)(2)(E).' " *Id.* (quoting United States v. Moore, 522 F.2d 1068, 1077 n.5 (9th Cir. 1975), *cert. denied,* 423 U.S. 1049 (1976)). The agency theory of conspiracy refers to the concept that conspirators are partners in crime and the law should regard them as agents of one another, acting and speaking on each other's behalf within the scope of their authority. *See* Anderson v. United States, 417 U.S. 211, 218-19 n.6 (1974).

1814. 645 F.2d at 726 (citing United States v. Eubanks, 591 F.2d 513, 520 (9th Cir. 1979) (per curiam)).

1815. 645 F.2d at 726-27.

The court described the co-conspirator statements in *Fielding* as "[g]eneral statements" concerning the defendant's business relationship which "in no way advanced" the charged conspiracy.[1816] The court also found that the statements were made to impress the Government agent in an effort to initiate a new transaction that would not have involved Fielding.[1817] By referring to cases that hold that viable objectives must still exist for there to be a continuing conspiracy, the court concluded that the "in furtherance" requirement cannot be satisfied by statements made *after* the conspiracy has degenerated or the common purpose has deteriorated.[1818] Noting that the conspirators' aims were in conflict, the court found that the claims of Fielding's co-defendants for payment were only "tangentially related" to the underlying objective of the conspiracy, and did not meet the "in furtherance" test.[1819] The court, therefore, held that the trial court erred in admitting the statements.[1820]

8. Expert opinion

The district court has wide discretion in the admission or exclusion of evidence, "particularly . . . in the case of expert testimony."[1821] Qualification as an "expert" entitles the witness to give his or her opinion[1822] on matters involving specialized areas.[1823] Because experts testify to matters not within their personal knowledge, their testimony is

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1816. *Id.* at 727.

1817. *Id.*

1818. The *Fielding* court cited cases where the charged conspiracy was "yet in being" or where the conspirators were still united by common objectives. These cases were contrasted to the conspiracy in *Fielding,* which was described as having "degenerated into after-the-fact internecine quarrels and beliefs of betrayal." *Id.* Similarly, the Supreme Court held that statements made to conceal essentially achieved or failed conspiracies are not "in furtherance of" the main conspiracy. *See* Krulewitch v. United States, 336 U.S. 440, 444 (1949).

A key element of the "in furtherance" requirement is an ongoing conspiracy. This element indicates that the contours of the "in furtherance" requirement significantly overlap the requirement that the declaration be made during the course of the conspiracy.

1819. 645 F.2d at 727.

1820. *Id.* at 728.

1821. Hamling v. United States, 418 U.S. 87, 108, 126-27 (1974) (district court did not abuse discretion in refusing to admit comparable nonobscene materials in obscenity case where court was willing to allow experts to discuss materials).

1822. E. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 13 (2d ed. 1972) ("An observer is qualified to testify because he has firsthand knowledge . . . . The expert has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw.").

1823. *See* FED. R. EVID. 702 which allows expert opinion, but confines such testimony to "scientific, technical, or other specialized knowledge."

allowed under a hearsay exception.[1824] Expert testimony is also an exception to the opinion rule[1825] which limits the opinions of laypersons to those inferences which are: (1) rationally based on their perception[1826] and (2) helpful to clarify their testimony or to determine a fact in issue.[1827] Under these exceptions, expert opinion could conceivably allow more testimony into evidence than lay opinion where the expert has first hand knowledge.[1828] For example, lay opinion testimony could be excluded where the witness has no personal perception of the facts. The same testimony, however, would be admissible if delivered by an expert witness.

The logical relationship between the two exceptions was briefly addressed by the Ninth Circuit in *United States v. Maher.*[1829] The *Maher* court held that the admission of evidence as lay opinion is harmless error when the witness could have qualified as an expert.[1830] The testimony of the witness, an agent of the Drug Enforcement Administration experienced in "surveillance and countersurveillance techniques in narcotics operations," concerned the *modus operandi* of persons who attempt to evade surveillance and its similarity to defendant's activities.[1831] Because the testimony was admissible as expert opinion, "any alleged error" in admitting it under the rubric of lay opinion was harmless.[1832]

An expert's qualifications to testify about a given field may be challenged, but the matter depends upon the "judge's discretion[,] reviewable only for abuse."[1833] One such challenge has been to a *psychol-*

1824. *See supra* note 1822.

1825. The opinion rule for federal courts is found in FED. R. EVID. 701.

1826. FED. R. EVID. 701 advisory committee notes.

1827. *See* Allen v. Matson Navigation Co., 255 F.2d 273, 275, 278 (9th Cir. 1958) (testimony that floor was "slippery" by one who walked on it admissible). Commentators have severely criticized the exclusion of lay opinion because of the problem of separating "inference and reflection" from "observation and memory." E. MCCORMICK, *supra* note 1822, at § 11; J. WIGMORE, EVIDENCE § 1974 (1940) ("The exclusionary rulings here abound particularly in absurdities and quibbles.").

1828. *See* E. MCCORMICK, *supra* note 1822, at 30 (expert's "knowledge may in some fields be derived from reading alone").

1829. 645 F.2d 780, 783-84 (9th Cir. 1981).

1830. *Id.* at 784. FED. R. EVID. 702 defines expert as one "qualified . . . by knowledge, skill, experience, training, or education."

1831. 645 F.2d at 784.

1832. *Id.* Because of the logical relationship between the allowance of expert opinion and the limited allowance for lay opinion in cases where the layperson is also an expert with firsthand knowledge, *see supra* text accompanying note 1828, there could have been no error based on a rule excluding opinion testimony, as defendant contended. *See id.* at 783.

1833. E. MCCORMICK, *supra* note 1822, at 30. Moreover, "[r]eversals for abuse are rare." *Id.*

ogist testifying as to a defendant's sanity, on the theory that mental disease is the province of *psychiatry.*[1834] Psychology has withstood the challenge; psychologists can testify about sanity when they have sufficient education and experience in mental disease.[1835]

Conversely, psychiatrists have been challenged when they rely on *psychological* test results.[1836] In *United States v. Bilson*,[1837] the Ninth Circuit held that a psychiatrist may testify as to a defendant's sanity when the psychiatrist's opinion is based on psychological test results.[1838] Bilson, the defendant, pled insanity to charges of attempted aircraft piracy and using a firearm in the commission of a felony.[1839] In holding that a prosecution psychiatrist was qualified to express an opinion, the court stated that the defendant's counsel had ample opportunity on cross-examination to obtain testimony regarding any lack of the witness' qualifications.[1840]

9. Law of the case

The doctrine of "law of the case" provides that a court's ruling on a legal issue constitutes the law which must be applied whenever that issue recurs in the same case.[1841] This doctrine is predicated upon a notion of judicial economy [1842] and is applicable unless: (1) the original ruling was clearly erroneous,[1843] or (2) the issue arises in a subsequent proceeding which presents a change in relevant cir-

1834. *See* Jenkins v. United States, 307 F.2d 637, 643 (D.C. Cir. 1962) (district court excluded psychologists' opinions on ground they lacked medical training).

1835. *Id.* at 645. The *Jenkins* court said completion of a graduate training program approved by the American Psychological Association plus experience in the "treatment and disagnosis [sic] of [mental] disease in association with psychiatrists or neurologists" would qualify a psychologist to testify on an individual's sanity. *Id.*

1836. *See id.* at 640-41.

1837. 648 F.2d 1238 (9th Cir. 1981) (per curiam).

1838. *Id.* at 1239.

1839. *Id.*

1840. *Id.*

1841. *See In re* Staff Mortgage & Inv. Corp., 625 F.2d 281, 283 (9th Cir. 1980) ("The law of the case concerns the continued application of a rule of law previously determined in that same case."). The doctrine applies to principles of law enunciated by both trial and appellate courts. *See* Petition of United States Steel Corp., 479 F.2d 489, 493 (6th Cir. 1973) ("law of the case" doctrine applicable when issue on which appellate court ruled is considered by trial court on remand); Petersen v. Federated Dev. Co., 416 F. Supp. 466, 474 (S.D.N.Y. 1976) ("law of the case" doctrine applicable when issue on which trial court ruled is considered by court of coordinate jurisdiction). *See generally* 1B J. MOORE AND T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.404[1],[4],[10] (2d ed. 1982).

1842. *See* White v. Murtha, 377 F.2d 428, 431 (5th Cir. 1967) ("The 'law of the case' rule is based on the salutary and sound public policy that litigation should come to an end.").

1843. Kimball v. Callahan, 590 F.2d 768, 771-72 (9th Cir.) ("law of the case" doctrine not applicable when initial decision clearly erroneous), *cert. denied,* 444 U.S. 826 (1979).

cumstances.[1845]

In *United States v. Estrada-Lucas,*[1845] the Ninth Circuit considered whether a trial court had violated the "law of the case" by altering at retrial its initial ruling regarding the admissibility of polygraph examination results.[1846]

Defendant Acevedo[1847] was charged with importing undeclared merchandise in violation of 18 U.S.C. section 545.[1848] In her defense, she asserted that the merchandise had been orally declared to United States customs agents stationed at the Mexican border.[1849] Seeking to enhance her credibility on this point, Acevedo submitted to and passed a polygraph examination, the results of which were held inadmissible because the test questions had not been sufficiently specific.[1850] Acevedo subsequently took and passed a second polygraph examination which was structured to conform to the trial judge's specificity requirements.[1851] Her motion to admit these results into evidence was granted.[1852]

At Acevedo's initial trial,[1853] she inadvertently revealed the existence of the first polygraph test during direct examination.[1854] In response to the Government's argument that the defense had opened the door to questioning regarding this test, the trial court ruled that the

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1844. *See id.* ("law of the case" doctrine not applicable when evidence in subsequent trial substantially different from that presented in first trial); United States v. Bettenhausen, 499 F.2d 1223, 1229-30 (10th Cir. 1974) ("law of the case" doctrine no bar to trial judge altering ruling on jury instructions when evidence at first trial rebutted sanity presumption but evidence at second trial was insufficient to achieve this result).

1845. 651 F.2d 1261 (9th Cir. 1980).

1846. *Id.* at 1263-64.

1847. Acevedo was indicted under her maiden name, Blanca Estrada-Lucas. At trial, however, she moved to omit her maiden name from the indictment and requested that she be referred to by her married name, Blanca Acevedo. *Id.* at 1262 n.1.

1848. *Id.* at 1262. 18 U.S.C. § 545 (1976) provides in pertinent part:

> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper . . .
>
> . . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

1849. 651 F.2d at 1262.

1850. *Id.* at 1262-63.

1851. *Id.* at 1263.

1852. *Id.*

1853. The defendant was tried twice. Her first trial resulted in a hung jury. Upon retrial, however, she was convicted of the offense charged. *Id.* at 1262.

1854. 651 F.2d at 1263. It is not entirely clear whether this revelation was actually inadvertent. The circuit court characterized it as "apparently inadvertent." *Id.* at 1264.

results of the first test were admissible for the limited purpose of impeaching the results of the second.[1855] The court, in addition, specified that Acevedo would be allowed, for rehabilitative purposes, to testify that she had passed the first examination.[1856]

At retrial, the Government elicited information regarding the existence of the first test for impeachment purposes.[1857] Defense counsel subsequently sought to introduce the results of this test into evidence in order to minimize the effects of the impeachment.[1858] Relying, however, on his pretrial ruling that the results of the first polygraph were inconclusive, the trial judge refused to admit these results.[1859]

On appeal, Acevedo argued that the trial court had abused its discretion in refusing to admit the results of the first polygraph examination at her second trial.[1860] The Ninth Circuit accepted this argument, noting that the lower court had unjustifiably departed from the "law of the case" by denying admission of the test results after previously admitting them at defendant's original trial.[1861] According to the court, the departure was untenable because neither of the exceptions to the "law of the case" doctrine was established. The trial court's initial ruling regarding admissibility of the first test was well reasoned and not "clear error,"[1862] and the second trial did not present a "change in relevant circumstances."[1863]

G. Voluntariness Hearing

In *Jackson v. Denno,*[1864] the Supreme Court established that a hearing to determine the voluntariness of a defendant's confession must be held out of the presence of the jury.[1865] Thereafter, Congress

1855. *Id.* at 1263.
1856. *Id.*
1857. *Id.*
1858. *Id.*
1859. *Id.*
1860. *Id.*
1861. *Id.* at 1264-65.
1862. *Id.* The appellate court reached this conclusion after noting that the results of the first polygraph examination were reflective of Acevedo's credibility. *Id.*
1863. *Id.* The court observed that while slight differences existed, the defense sought at both trials to admit the results of the first polygraph examination in order to rebut the Government's attack on the validity of the second examination. *Id.*
1864. 378 U.S. 368 (1964).
1865. *Id.* at 394. The defendant in *Jackson,* while in pain and awaiting surgery in a hospital, confessed to shooting a policeman. The confession was admitted into evidence at the defendant's trial, and the jury was allowed to hear conflicting testimony regarding the cir-

codified the decision by providing that a confession is admissible only if voluntary, and that before such confessions are received into evidence, the trial judge is to "determine any issue as to voluntariness" outside of the jury's presence.[1866]

In *United States v. Maher,*[1867] the Ninth Circuit considered whether a defendant's failure to make a timely motion to determine the voluntariness of his statement constitutes a waiver of his right to exclude involuntary statements.[1868] Maher was convicted of conspiracy and possession of marijuana with intent to distribute.[1869] At the time of his arrest, Maher made certain incriminating statements denying ownership of a BMW automobile.[1870] On appeal, Maher argued that the trial court committed reversible error by refusing to hold a hearing on the voluntariness of the statements.[1871]

The Ninth Circuit noted that Maher's attorney had been notified before trial of the defendant's statements. Nevertheless, the voluntariness issue was not raised in pretrial motions or at trial, nor was the admissibility of the statements objected to until the close of the trial, at which time Maher's attorney requested a hearing on their voluntariness.[1872] The court held that because of the untimeliness of the defense motion, the trial court was correct in refusing to hold a voluntariness hearing.[1873]

The holding in *Maher* is consistent with Ninth Circuit precedent[1874] and with that of other circuits.[1875] There was no mention in

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cumstances surrounding the confession. The prosecution, for example, denied the veracity of the defendant's claim that he was denied water until he confessed. The jury was then left to determine the voluntariness of the confession. *Id.* at 370-74. In holding that such procedure violated the fifth and fourteenth amendments of the United States Constitution, the Court stated that "[i]t is both practical and desirable that in cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence." *Id.* at 395.

1866. 18 U.S.C. § 3501(a) (1976).

1867. 645 F.2d 780 (9th Cir. 1981).

1868. *Id.* at 183. FED. R. CRIM. P. 12(f) provides that "[f]ailure by party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver."

1869. 645 F.2d at 781.

1870. *Id.* at 783. DEA agents suspected that the BMW was one of two cars used by the defendant and his co-defendants in the drug trafficking. *Id.*

1871. *Id.*

1872. *Id.*

1873. *Id.*

1874. In Jacobson v. California, 431 F.2d 1017 (9th Cir. 1970), the court upheld the defendant's murder conviction, rejecting the argument that his confessions were improperly admitted into evidence because no hearing was held to determine the voluntariness of the confessions. "Only where there is an objection to a confession on the grounds it is involun-

Maher, however, of the reason for the defendant's delay in requesting a voluntariness hearing. The court, therefore, did not discuss the trial judge's discretionary power to permit such a hearing when good cause is shown.[1876]

H. Jury Instructions

Jury instructions are the principal means used by trial courts to apprise jurors of the legal bases upon which their verdict is to rest.[1877] It is, therefore, essential that these instructions be "clear, concise, accurate and impartial statements of the law[,] written in understandable language and delivered in conversational tone . . . ."[1878] Instructions which lack these characteristics often result in misapplication of relevant legal principles and, consequently, may constitute grounds for reversal.[1879] The Ninth Circuit expressly addressed the subject of jury instructions in twelve recent decisions.

1. Standard of review

In *United States v. Dacus*,[1880] the Ninth Circuit defined and applied the standard of review customarily utilized in determining the propriety of jury instructions. Defendant Dacus, the owner of numerous land developments in Nevada, was indicted and convicted on thirteen counts of selling unregistered lots from a "subdivision" in

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tary or where there is present in the record evidence tending to show such involuntariness, need there be held the special hearing out of the presence of the jury provided for in Jackson v. Denno . . . ." *Id.* at 1019.

Similarly, in United States v. Yamashita, 527 F.2d 954 (9th Cir. 1975) (per curiam), the Ninth Circuit held that "18 U.S.C. § 3501(a) requires a hearing 'only if the issue of voluntariness is raised.' " *Id.* at 955 (citations omitted).

1875. In United States v. Gresham, 585 F.2d 103 (5th Cir. 1978), the defendant requested a voluntariness hearing late in the trial. The Fifth Circuit held that, "[a]ssuming that such a request was sufficient to raise the issue, . . . the court was not required to grant the request at the time it was made." *Id.* at 108.

In United States v. Stevens, 445 F.2d 304 (6th Cir.) (per curiam), *cert. denied,* 404 U.S. 945 (1971), the defendant argued that his conviction should be overturned despite his receipt of *Miranda* warnings, because he did not sign the accompanying acknowledgment and a hearing was not held to determine the voluntariness of his confessions. The Sixth Circuit disagreed, however, and held that "a hearing is required only if the issue of voluntariness is raised." *Id.* at 305.

1876. *See supra* note 1868.

1877. 3 ABA STANDARDS FOR CRIMINAL JUSTICE 100 (2d ed. 1980).

1878. Devitt, *Ten Practical Suggestions About Federal Jury Instructions,* 38 F.R.D. 75, 79 (1966).

1879. *Id.*

1880. 634 F.2d 441 (9th Cir. 1980).

violation of the Interstate Land Sales Act.[1881] For purposes of this Act, the term "subdivision" is defined in accordance with 15 U.S.C. section 1701(3) as "any land, located in any State or in a foreign country, which is divided or proposed to be divided into fifty or more lots, whether contiguous or not, for the purpose of sale or lease as part of a *common promotional plan* . . . ."[1882]

On appeal, Dacus argued that the district court had erred in giving a detailed instruction to the jury defining the term "common promotional plan."[1883] Noting that the standard of review was whether an

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1881. *Id.* at 442-43 n.1. Dacus was specifically charged with violating 15 U.S.C. § 1703(a)(1) (1976). This section, as amended by 15 U.S.C. § 1703(a)(1) (Supp. IV 1980), provides:

> (a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails —
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> (1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1706 of this title and a printed property report, meeting the requirements of section 1707 of this title, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser.

1882. 15 U.S.C. § 1701(3) (1976) *amended by* 15 U.S.C. § 1701(3) (Supp. IV 1980) (emphasis added). The term "common promotional plan" is left essentially undefined by § 1701(3). This section does, however, provide that such a plan is presumed to exist when "subdivided land is offered for sale or lease by a single developer or developers acting in concert, and such land is contiguous or is known, designated or advertised as a common unit or by common name." *Id.*

The district court determined that Dacus had acted pursuant to a common promotional plan based on the fact that the lots in question were: (1) known collectively by one or two common names, (2) offered for sale in aggregate newspaper advertisements, and (3) eventually sold through one office by individuals who had authority to negotiate land sales from any of the defendant's developments. 634 F.2d at 444.

1883. 634 F.2d at 445. Dacus specifically contended that the instruction impermissibly broadened the scope of the term beyond the intent of Congress. The disputed instruction provided:

> Even if you do not find both of these elements [supporting a presumption of a common promotional plan] you must still find that a common promotional plan existed if you find a sufficient number of the following to convince you beyond a reasonable doubt that the sale of the lots in the various parcels of land were being made as part of a common enterprise; [T]hey are that the defendant developers acted through common sales agents. That defendant developers acted through common sales facilities such as a common sales office or offices with a common telephone number. That the sales activities were directed by a common sales manager. That the sales in the various parcels were made with the same developer executing the contract of sale. That common advertising was used for the various subdivisions. That the lots were treated by defendants as part of a common inventory.

Id. at n.7.

Dacus also argued on appeal that the district court had erred in failing to instruct the jury that specific intent is a necessary element of a § 1703(a)(1) violation. *Id.* at 446. The Ninth Circuit held that the district court's refusal to give a specific intent instruction was proper. *Id.* In so holding, the court observed that the "Interstate Land Sales Act [had been]

instruction was "misleading or represented a statement inadequate to guide jury deliberations,"[1884] the Ninth Circuit held that the district court's instruction did not constitute reversible error.[1885] According to the court, it was clear, structured in accordance with evidence presented in the case, and did not appear unfair or prejudicial to the defendant.[1886]

2. Defendants' ability to control the content of instructions

In *United States v. Buras,*[1887] the Ninth Circuit considered whether a trial court was required to adopt verbatim the text of a defendant's proposed jury instruction. Defendant Buras, a free-lance truck driver, was indicted on four counts of willful failure to file income tax returns in violation of 26 U.S.C. section 7203.[1888] At the close of his trial, he requested that the district court: (1) instruct the jury that the Government could avail itself of the civil remedy of assessing Buras' taxes under 26 U.S.C. sections 6020(b)(1) and (2) without filing criminal charges,[1889] and (2) instruct the jury on the meaning of "willfulness" as

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modeled [after] the Securities Act of 1933 (15 U.S.C. §§ 77a et. seq.)." *Id. See also* Schenker v. United States, 529 F.2d 96, 97 (9th Cir.), *cert. denied,* 429 U.S. 818 (1976). The court then reasoned that because specific intent is not an element of registration requirements under the Securities Act, United States v. Murdock, 290 U.S. 389, 396-97 (1933), it could not be considered an element of registration requirements under § 1703(a)(1). 634 F.2d at 446.

1884. 634 F.2d at 446.

1885. *Id.*

1886. *Id.* To the extent that the review standard articulated in *Dacus* contains no requirement that a disputed instruction be examined *as a whole,* it is inconsistent with prior rulings of both the United States Supreme Court and the Ninth Circuit. *See, e.g.,* United States v. Park, 421 U.S. 658, 674-76 (1975) (standard of review is whether instruction, viewed *as a whole,* was misleading or contained a statement of law inadequate to guide jury's determination); United States v. Grayson, 597 F.2d 1225, 1230 (9th Cir.) ("Standard of review is whether instruction taken *as a whole* was misleading or represented a statement inadequate to guide jury deliberations."), *cert. denied,* 444 U.S. 873 (1979) (emphasis added). *See also* Stoker v. United States, 587 F.2d 438, 440 (9th Cir. 1978); United States v. Brashier, 548 F.2d 1315, 1328 (9th Cir.), *cert. denied,* 429 U.S. 1111 (1976). The *Dacus* case should not, however, be regarded as an actual departure from precedent. The court unquestionably *applied* the established standard of review when it evaluated the *entire* text of the challenged instruction prior to rendering its decision. 634 F.2d at 445-46.

1887. 633 F.2d 1356 (9th Cir. 1980).

1888. *Id.* at 1358. 26 U.S.C. § 7203 (1976) provides in pertinent part:

> Any person required under this title to pay any estimated tax or tax, as required by this title or by regulations made under authority thereof to make a return . . . willfully fails to pay such estimated tax or tax . . . at the time or times required by law or regulations, shall . . . be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

1889. 633 F.2d at 1360. 26 U.S.C. §§ 6020(b)(1) and (2) (1976) provide in pertinent part:

> [i]f any person fails to make any return . . . the Secretary [of the Treasury] shall make such return from his own knowledge and from such information as he

used in section 7203.[1890] The court rejected both instructions and gave instead an alternative instruction defining the term "willfulness." This instruction was similar in content to that proposed by Buras.[1891]

On appeal, Buras contended that the district court's refusal to utilize his requested instructions constituted reversible error.[1892] The Ninth Circuit disagreed holding that the district court had not erred in refusing to instruct the jury that the Government could pursue the civil remedy of assessment.[1893] The court reasoned that the "availability of a civil remedy is irrelevant to the issue of criminal liability,"[1894] and that "[s]uch an instruction would serve only to confuse the jury."[1895]

The Ninth Circuit ruled, in addition, that the district court had not erred in refusing to give Buras' proposed instruction on "willfulness." According to the court, "[a] defendant has no right to have the jury instructed in the precise language he may desire."[1896] It was, therefore, sufficient, the court concluded, that the district court gave an "alternative instruction that covered the substance of Buras' proposed instruction."[1897]

In *United States v. Kenny,*[1898] decided two months after *Buras,* the Ninth Circuit reached a similar conclusion. Defendant Kenny and three others were convicted of conspiring to defraud the government in violation of 18 U.S.C. section 371.[1899] On appeal, the defendants ar-

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can obtain through testimony or otherwise. Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

1890. 633 F.2d at 1360.

1891. *Id.* at 1359-60.

1892. *Id.* at 1360. Buras also argued on appeal that the district court had erroneously instructed the jury that wages constitute income. In upholding the district court's instruction, the Ninth Circuit relied on the Supreme Court's ruling in Stratton's Independence, Ltd. v. Howbert, 231 U.S. 399, 415 (1913) (income defined as the gain derived from labor), and on Treas. Reg. § 1.61-2(a)(1) (1954) (wages and salaries classified as income for taxation purposes). 633 F.2d at 1361.

1893. 633 F.2d at 1360.

1894. *Id.*

1895. *Id.* The First and Tenth Circuits have established similar rulings. *See* United States v. Borque, 541 F.2d 290, 296 (1st Cir. 1976); United States v. Merrick, 464 F.2d 1087, 1093 (10th Cir.), *cert. denied,* 409 U.S. 1023 (1972).

1896. 633 F.2d at 1360.

1897. *Id.*

1898. 645 F.2d 1323 (9th Cir.), *cert. denied,* 452 U.S. 920 (1981).

1899. *Id.* at 1327. 18 U.S.C. § 371 (1976) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspir-

gued that the district court had erred in refusing to utilize a proposed instruction distinguishing multiple conspiracies from the single conspiracy charged in the indictment.[1900]

The Ninth Circuit held that while a "jury must be instructed as to the defense theory of the case, . . . the exact language proposed by the defendant need not be [employed] . . . ."[1901] The court concluded that because the district court's own instructions on multiple and single conspiracies were sufficient to enable a jury to understand the distinctions between these offenses, that court did not err in rejecting the defendants' proposed instruction.[1902]

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acy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

1900. 645 F.2d at 1336-37. The defendants raised two additional arguments on appeal. First, they contended that the district court's instructions failed to specifically delineate the unlawful nature of the conspiratorial agreement. According to the defendants, this rendered the instructions inadequate to guard against a finding of "guilt by association." *Id.* The Ninth Circuit rejected this claim, holding that the instructions given were sufficient to prevent the jury from reaching any such finding. *Id.* at 1337.

Second, the defendants contended that the district court should have ordered a dismissal of their indictment because the "grand jury did not receive any instructions as to the applicable law . . . ." *Id.* at 1347. Noting that Kenny sought to introduce into grand jury proceedings an analogue to petit jury instructions, the Ninth Circuit located no authority which would justify such an undertaking. Consequently, this contention was similarly rejected. *Id. See* Costello v. United States, 350 U.S. 359, 362 (1956), in which the Court stated that the "work [of grand juries is] not [to be] hampered by rigid procedural or evidential rules." *See also* United States v. Kennedy, 564 F.2d 1329, 1337 (9th Cir. 1977) (" 'The function of a grand jury is investigative. Its proceedings are not adversary in nature, but rather consist of inquiries conducted by laymen without resort to the technicalities of trial procedure.' ") (quoting United States v. Ruyle, 524 F.2d 1133, 1135 (6th Cir. 1975), *cert. denied,* 425 U.S. 934 (1976)), *cert. denied,* 435 U.S. 944 (1978).

1901. 645 F.2d at 1337.

1902. *Id.* The Ninth Circuit noted that the instructions given by the district court specifically provided that " 'proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment.' " *Id.* The court further observed that "[t]he instructions . . . directed the jury to acquit any defendant not found a member of the conspiracy charged . . . ." *Id.*

The position adopted by the *Buras* and *Kenny* courts regarding a defendant's ability, or rather relative *inability,* to control the content of jury instructions is consistent with that previously articulated by the Supreme Court and the Ninth Circuit. *See* Sugarman v. United States, 249 U.S. 182, 185 (1919). In *Sugarman,* the defendant was convicted of violating the Espionage Act by willfully causing or attempting to cause insubordination in United States military forces. His conviction resulted from words spoken at a Socialist Party meeting which was attended by draft registrants. The defendant appealed, arguing that the district court had erred in refusing to give a requested instruction on the extent to which an individual's freedom of speech is protected by the first amendment. The Supreme Court held that the lower court was not obliged to adopt the exact instruction requested by the defendant. It was sufficient, the Court implied, that the district court had given an alternative instruction which adequately apprised the jury of the constitutional protections afforded speech. *See also* United States v. Witt, 648 F.2d 608, 610 (9th Cir. 1981) (district court not obliged to use defendant's instruction on reasonable doubt and presumption of innocence if

3. Instructions in conspiracy cases

In *United States v. Diggs,*[1903] the Ninth Circuit considered whether evidence of a defendant's criminal activity is admissible to prove the existence of an unrelated conspiracy when accompanied by an appropriate limiting instruction. Defendant Diggs was convicted of conspiring to commit mail and wire fraud in the course of operating a fictitious bank.[1904] His conviction expressly resulted from the issuance of false certificates of deposit and letters of credit on behalf of bank clients. The clients, in turn, used this negotiable paper to obtain legitimate bank loans for which they otherwise did not qualify because of insufficient collateral.[1905] At trial, a Government witness testified that Diggs had also used the bank to obtain money fraudulently from third parties.[1906] The district court admitted this testimony over the defendant's objection.[1907]

On appeal, Diggs argued that the testimony was inadmissible under: (1) Federal Rule of Evidence 404(b) because it proved only his criminal propensities,[1908] and (2) Federal Rule of Evidence 403 because, while it may have proved something other than his criminal propensities, its probative value was outweighed by its prejudicial effect.[1909] Alternatively, Diggs asserted that even if the testimony were

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court's instruction adequate); United States v. Collom, 614 F.2d 624, 632 (9th Cir. 1979) (refusal to utilize defendant's specific intent instruction not error when court's instruction adequately charged jury as to meaning of that term), *cert. denied,* 446 U.S. 923 (1980).

The remaining federal circuit courts have established similar rulings. *See, e.g.,* United States v. Brake, 596 F.2d 337, 339 (8th Cir. 1979); United States v. Irwin, 593 F.2d 138, 140 (1st Cir. 1979) (per curiam); United States v. Southers, 583 F.2d 1302, 1306-07 (5th Cir. 1978); United States v. Westbo, 576 F.2d 285, 289 (10th Cir. 1978); United States v. Jackson, 569 F.2d 1003, 1009 (7th Cir.), *cert. denied,* 437 U.S. 907 (1978); United States v. Rosa, 493 F.2d 1191, 1195 (2d Cir.), *cert. denied,* 419 U.S. 850 (1974); United States v. Bobo, 477 F.2d 974, 988 (4th Cir. 1973), *cert. denied,* 421 U.S. 909 (1975); United States v. Blair, 456 F.2d 514, 520 (3d Cir. 1972); Carter v. United States, 427 F.2d 619, 623 (D.C. Cir. 1970); United States v. Blane, 375 F.2d 249, 252 (6th Cir.), *cert. denied,* 389 U.S. 835 (1967).

1903. 649 F.2d 731 (9th Cir. 1981).

1904. *Id.* at 734. Diggs specifically violated 18 U.S.C. §§ 371, 1341, and 1343. *Id.*

1905. *Id.*

1906. *Id.* The witness stated that he had made three deposits in Diggs' bank totalling $16,500 and had never recovered any of the funds. *Id.* at 737.

1907. *Id.* at 737.

1908. *Id.* FED. R. EVID. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

1909. 649 F.2d at 737. FED. R. EVID. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

admissible, the district court had erred in failing to give the jury a limiting instruction.[1910]

The Ninth Circuit held that Rule 404(b) did not preclude admission of the witness' testimony.[1911] The court rejected the argument that the testimony proved only the defendant's criminal propensities, noting that it would be useful in determining his motive and intent, as well as the existence of a conspiracy.[1912] According to the court, the significance of the testimony in establishing such factors as motive and intent also demonstrated that its probative value outweighed its prejudicial effect. Consequently, the court similarly held that Rule 403 did not preclude its admission.[1913]

The Ninth Circuit ruled, in addition, that the district court had provided the jury with an adequate limiting instruction.[1914] It was sufficient, the court observed, that the district court had admitted the witness' testimony and *simultaneously* instructed the jury to consider it only as evidence of the defendant's intent or as evidence of the presence of a conspiracy.[1915]

In *United States v. Burreson,*[1916] the Ninth Circuit considered whether the defendants were entitled to a jury instruction defining multiple conspiracies. Defendant Burreson and two co-defendants were convicted of conspiring to violate the Investment Company and Investment Advisors Acts of 1940.[1917] They appealed contending that they had been prejudiced at trial because "the jury was not given an instruction on separate conspiracies and . . . was therefore precluded from

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

1910. 649 F.2d at 737.

1911. *Id.*

1912. *Id.* Since Diggs raised the defense of entrapment, however, *see id.*, the circuit court would probably have admitted the testimony even if it had shown nothing but his criminal propensities. *See* United States v. Reynoso-Ulloa, 548 F.2d 1329, 1341 (9th Cir. 1977) (evidence of defendant's criminal propensity and predisposition admissible to rebut entrapment defense).

1913. 649 F.2d at 737.

1914. *Id.*

1915. *Id. Accord* United States v. Nichols, 534 F.2d 202, 205 (9th Cir. 1976) (evidence of defendant's prior criminal activity admissible when court instructs jury to use it only as proof of defendant's intent). *Cf.* United States v. Aims Back, 588 F.2d 1283, 1285-87 (9th Cir. 1979) (evidence of defendant's additional criminal activities *inadmissible* when district court's limiting instruction did not specify purpose for which the evidence was being admitted, but instead provided that it could be accepted by the jury "for what value it may have in . . . establishing the whole pattern of the evening.").

1916. 643 F.2d 1344 (9th Cir. 1981).

1917. *Id.* The defendants specifically violated 15 U.S.C. §§ 80a-36, 80a-17, 80b-6 and 18 U.S.C. §§ 1342 and 371. *Id.*

finding that the proof established . . . [such] conspiracies."[1918] The defendants argued that an instruction of this type was required by *Kotteakos v. United States.*[1919]

The Ninth Circuit held that the district court had not erred in refusing to give a multiple conspiracy instruction.[1920] The court distinguished *Kotteakos,* noting that the defendants were connected in that case solely on the basis of fraudulent loans obtained from the same individual.[1921] In contrast, the defendants in *Burreson* were directly connected through interrelated financial transactions.[1922]

The Ninth Circuit was faced with a similar issue in *United States v. Mayo.*[1923] Defendant Mayo and a co-defendant were indicted for conspiring to commit mail and securities fraud. The indictment specifically charged that the defendants had engaged in a single conspiracy to induce the public to purchase worthless securities.[1924] Following their convictions, the defendants appealed, arguing that the district court's refusal to instruct the jury on multiple conspiracies had created a prejudicial variance between the indictment and the proof.[1925]

The circuit court held that the district court's failure to give a multiple conspiracy instruction did not create a prejudicial variance.[1926] The court reasoned that while the evidence demonstrated that the de-

1918. 643 F.2d at 1348. The defendants raised two additional challenges to the district court's jury instructions. First, they argued that the jury had been improperly instructed on the elements of knowledge, willfulness, and unlawfulness. *Id.* at 1350. Noting that these terms had been defined and repeated in connection with different counts, the circuit court determined that these instructions, considered as a whole, were satisfactory. *Id.* Second, they contended that the jury had been improperly instructed on the Investment Company and Advisors Acts. *Id.* The circuit court, however, summarily dismissed this contention. *Id.*

1919. 328 U.S. 750 (1946).

1920. 643 F.2d at 1348.

1921. *Id.* In *Kotteakos,* thirty-two defendants were charged with a single conspiracy to violate the National Housing Act. No connection between the defendants was established, however, other than that each had obtained a fraudulent loan from an individual named Brown. The Government conceded that the proof established several conspiracies, and the Supreme Court reversed the appellate court's determination that the failure to give a multiple conspiracy instruction was not prejudicial. 328 U.S. at 769-71.

1922. 643 F.2d at 1346. It was established at trial that each defendant had been involved in at least three fraudulent transactions involving mutual funds. *Id.* at 1349. *Cf.* United States v. King, 472 F.2d 1, 12 (9th Cir.) (trial court's refusal to instruct on multiple conspiracies not error when evidence indicated that majority of co-conspirators knew each other and participated in an illegal plan to distribute controlled substances), *cert. denied,* 414 U.S. 864 (1973).

1923. 646 F.2d 369 (9th Cir. 1981).

1924. *Id.* at 374.

1925. *Id.*

1926. *Id.*

fendants had made several sales of securities to different members of the public, the jury could still have rationally concluded that they had combined in a single conspiracy for the unifying purpose of "bilking the unsuspecting public by foisting worthless stock upon it."[1927]

4. Instructions permitting a jury to make inferences or presumptions

In addition to that issue previously discussed,[1928] the *Mayo* court also considered whether the Supreme Court's ruling in *Sandstrom v. Montana*[1929] prohibited delivery of an instruction allowing the jury to infer that the defendant intended the natural and probable consequences of his acts.[1930]

The circuit court held that *Sandstrom* was distinguishable and,

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1927. *Id.* The *Mayo* court's ruling is consistent with prior decisions of the Ninth, Fifth, and Second Circuits. *See, e.g.,* United States v. Lutz, 621 F.2d 940, 942-43 (9th Cir. 1980) (prejudicial variance did not result from district court's failure to instruct on multiple fraud schemes when jury could rationally have determined that defendants had engaged in unitary fraud scheme); United States v. Eubanks, 591 F.2d 513, 517-18 (9th Cir. 1979) (prejudicial variance did not result from district court's failure to instruct on multiple conspiracies when jury could rationally have found that defendants had engaged in a single conspiracy); United States v. Ashley, 555 F.2d 462, 467-68 (5th Cir. 1977) (prejudicial variance did not result from district court's failure to instruct on multiple conspiracies when jury could rationally have found that defendants had engaged in a single conspiracy); United States v. Perry, 550 F.2d 524, 531 (9th Cir.) (prejudicial variance did not result from district court's failure to instruct on multiple conspiracies when jury could rationally conclude that there was one general conspiracy), *cert. denied,* 431 U.S. 918 (1977); United States v. Finkelstein, 526 F.2d 517, 521-22 (2d Cir. 1975) (prejudicial variance did not result from district court's failure to instruct on multiple conspiracies when jury could rationally have concluded that defendants' activities manifested unifying purpose to defraud public), *cert. denied,* 425 U.S. 960 (1976).

1928. *See supra* notes 1923-27 and accompanying text.

1929. 442 U.S. 510 (1979). In *Sandstrom,* the trial court instructed the jury that "[t]he law *presumes* that a person intends the ordinary consequences of his voluntary acts." *Id.* at 513 (emphasis added). The Supreme Court concluded that because the jury could have interpreted this "presumption" as conclusive, the instruction violated the fourteenth amendment's requirement that a State prove every element of a criminal offense beyond a reasonable doubt. The Court was clear in pointing out, however, that an instruction which allowed the jury to *infer* the intent of a criminal defendant was constitutionally permissible. *Id.* at 517-24.

1930. 646 F.2d at 375. The disputed instruction specifically provided:

> Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may *infer* the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind. You may consider it reasonable to *draw the inference* and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence.

Id. (emphasis added).

therefore, did not prohibit use of such an instruction.[1931] Specifically, the court noted that the *Sandstrom* instruction had been condemned because it allowed the jury to *presume* rather than *infer* that a person intended the ordinary consequences of all voluntary acts.[1932] The instruction challenged by Mayo, however, allowed only *an inference* of intent.[1933]

In *United States v. Tunnell,*[1934] the Ninth Circuit considered a somewhat related issue. Defendant Tunnell was convicted of receiving, concealing and facilitating the transportation of marijuana known to have been illegally imported in violation of 21 U.S.C. section 176(a).[1935] On appeal, Tunnell challenged the district court's use of an instruction which allowed the jury to presume that an individual possessing marijuana also knew of its unlawful importation.[1936] Specifically, Tunnell asserted that such presumptions had been declared unconstitutional in *Leary v. United States.*[1937]

The Ninth Circuit acknowledged that the *Leary* Court had *partially* invalidated the challenged presumption.[1938] In addition, the court noted that *Leary* had been given full retroactive effect in *United States v. Scott.*[1939] The court was careful to emphasize, however, that

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1931. *Id.*

1932. *Id. See supra* note 1929.

1933. 646 F.2d at 375.

1934. 650 F.2d 1124 (9th Cir. 1981).

1935. *Id.* at 1124-25. 21 U.S.C. § 176(a) was repealed by Pub. L. No. 91-513, Title III, § 1101(a)(2), (9), 84 Stat. 1291, 1292 (1970). It provided in pertinent part:

> Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned . . . .
>
> Whenever on trial for violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

1936. 650 F.2d at 1125.

1937. *Id.* In Leary v. United States, 395 U.S. 6 (1969), the Supreme Court held that the presumption in § 176(a) constituted a denial of due process and therefore violated the fifth amendment. *Id.* at 37. The Court noted, however, that the inference or presumption would be permissible when it appeared "on the basis of the available materials that the [possessor of marijuana was aware of the] high rate of importation or [was] aware that [the particular] marijuana was grown abroad." *Id.* at 46-47.

1938. 650 F.2d at 1125.

1939. *Id.* In United States v. Scott, 425 F.2d 55, 59 (9th Cir. 1970), the court concluded that "the decision in *Leary* partially invalidating the presumption is fully retroactive."

neither *Leary* nor *Scott* resulted in the presumption's *complete* invalidity.[1940] Thus, while an instruction containing the presumption usually required reversal of a defendant's conviction, this was unnecessary in instances when "giving . . . the instruction under the circumstances of the case was harmless beyond a reasonable doubt."[1941]

Applying the principles enunciated in *Leary* and *Scott,* the circuit court reversed the district court's judgment of conviction.[1942] Noting that Tunnell had been found guilty solely on the basis of testimony given by a Government agent,[1943] the court stated that this testimony did not unequivocally demonstrate the defendant's possession of marijuana, as well as his knowledge of its illegal importation.[1944] Even assuming that the jury believed the agent's testimony regarding Tunnell's possession, it still needed to reconcile the agent's assertion that Tunnell knew of its unlawful importation with his own assertion that he lacked such knowledge.[1945] Since it was impossible to ascertain whether the jury had resolved this credibility issue in favor of the Government *or* had relied on the presumption in the instruction, the court concluded that it could not determine whether the instruction was harmless beyond a reasonable doubt.[1946]

1940. 650 F.2d at 1125.

1941. *Id.* The Ninth Circuit has consistently taken this approach. *See* United States v. Tapia-Lopez, 521 F.2d 582, 583 (9th Cir. 1975) (defendant entitled to reversal of conviction in a § 176(a) action unless presumption instruction was harmless beyond a reasonable doubt). *See also* United States v. Mahoney, 427 F.2d 658, 661 (9th Cir. 1970).

1942. 650 F.2d at 1125-27.

1943. *Id.* at 1125. The Government agent, Lusardi, testified that he arranged to purchase from Tunnell and another individual a quantity of marijuana represented to have been imported from Lebanon. *Id.* Lusardi further testified that when he met Tunnell later that day to consummate the purchase, Tunnell handed him the marijuana. *Id.* Tunnell subsequently took the stand and flatly denied: (1) making any statement to Lusardi regarding the sale of imported marijuana, and (2) possessing the marijuana in question. *Id.* at 1125-26.

1944. *Id.* at 1126. *Contra* Feldstein v. United States, 429 F.2d 1092 (9th Cir.), *cert. denied,* 400 U.S. 920 (1970), discussed *infra* note 1946.

1945. 650 F.2d at 1126.

1946. *Id. Accord* United States v. May, 431 F.2d 678, 683 (9th Cir. 1970) (presumption instruction in a § 176(a) action *not* harmless error beyond a reasonable doubt when defendant flatly contradicted testimony of Government agents regarding discovery of marijuana).

The Ninth Circuit has reached a different conclusion, however, when: (1) the same testimony establishes both the fact of possession and the fact of importation, Feldstein v. United States, 429 F.2d 1092, 1095 (9th Cir.) (presumption instruction harmless error when same testimony demonstrated the defendant's constructive possession of marijuana as well as his knowledge of its illegal importation), *cert. denied,* 400 U.S. 920 (1970), or (2) the defendant was apprehended with undeclared marijuana while in the process of crossing, or after having just crossed the United States border. United States v. Teran, 434 F.2d 605, 607 (9th Cir. 1970) (presumption instruction harmless error because "the knowing possession of undeclared marihuana found in an automobile which the defendant has just driven across

5. Surplus instructions

In *United States v. DeFilippis,*[1947] the Ninth Circuit considered whether the presence of surplus instructions (*i.e.,* instructions unnecessary to resolve the pertinent issue) affected the outcome of a decision. Defendant DeFilippis was indicted on eight counts of passing[1948] and uttering[1949] altered United States obligations with the intent to defraud.[1950] The indictments resulted from a scheme created by DeFilippis and her husband, whereby altered one-dollar bills were used to swindle local merchants.[1951]

At the close of her trial, DeFilippis requested that the district court strike any portions of the proposed jury instructions pertaining to the offense of uttering.[1952] The Government agreed, conceding that there was no evidence to support a conviction for that offense.[1953] The district court, nevertheless, instructed the jury that they could convict the defendant if they determined that she had *passed or uttered* altered

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the border establishes actual knowledge that the marihuana was illegally imported, *without reference to any presumption.*") (emphasis added). *See also* Zaragoza-Almeida v. United States, 427 F.2d 1148, 1149 (9th Cir. 1970); United States v. Simon, 424 F.2d 1049, 1050 (9th Cir.), *cert. denied,* 400 U.S. 827 (1970).

1947. 637 F.2d 1370 (9th Cir. 1981).

1948. The offense of *passing* altered United States obligations is generally defined as "putting them off in payment or exchange." BLACK'S LAW DICTIONARY 1289 (4th rev. ed. 1968). The term "obligations," in turn, signifies any "bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps, [or] other representatives of value, of whatever denomination, issued under any Act of Congress." 18 U.S.C. § 8 (1976).

1949. The offense of *uttering* altered United States obligations is generally defined as intending to pass or offering to pass them, coupled with a declaration that they are "good." BLACK'S LAW DICTIONARY 1716 (4th rev. ed. 1968). For a definition of the term "obligations," see *supra* note 1948.

1950. 637 F.2d at 1372.

1951. The DeFilippis' scheme operated in the following manner: "[Defendant DeFilippis and her husband] would enter a store and make a small purchase, paying with a twenty-dollar bill. The store would usually return change of a ten, five and several one-dollar bills. The DeFilippises would then walk away from the counter, exchange the good ten-dollar bill for a previously prepared one-dollar bill with the end of a ten-dollar bill taped over it, and return to the counter claiming that the clerk had mistakenly given them the altered bill." In most instances, the clerk would exchange the altered bill for a genuine ten. *Id.* at 1374.

Although the DeFilippises were forced to partially destroy a ten-dollar bill each time they altered a one-dollar bill, the ten-dollar bills remained valid. *See* Treas. Reg. § 100.5 (1980) (note worth face value if at least one-half intact). Thus, the DeFilippises were able to defraud a merchant out of nine dollars every time they successfully executed their scheme. 637 F.2d at 1374.

1952. 637 F.2d at 1374.

1953. *Id.*

United States obligations.[1954] DeFilippis was convicted on six of the original eight counts charged in the indictment.[1955]

On appeal, she argued that the district court's refusal to strike the uttering instruction may have caused the jury to convict her on a legally insufficient ground.[1956] The Ninth Circuit held that despite the presence of the uttering instruction, the jury could not have concluded on the facts presented that DeFilippis was guilty of that offense.[1957] Passing was the only logical basis for the jury's conviction.[1958] The court, therefore, reasoned that any error in including the uttering instruction was harmless and did not necessitate reversal.[1959]

6. Admissibility of co-defendants' guilty pleas

In *United States v. Halbert,*[1960] the Ninth Circuit reaffirmed that guilty pleas of co-defendants are admissible at a defendant's trial if accompanied by an adequate limiting instruction. Defendant Halbert

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1954. *Id.* at 1373. The court specifically instructed the jury that "the first element of a section 472 violation was satisfied if the defendant 'passed or uttered an altered United States Federal Reserve Note . . . .'" *Id.* The court then defined passing as "'putting [a note] off in payment or exchange,'" and uttering as "'requiring an intent or offer to pass a note, coupled with a declaration that it is good.'" *Id.*

1955. *Id.* at 1372.

1956. *Id.*

1957. *Id.* at 1373-74. The court based its holding on the ground that, contrary to the definition of uttering, see *supra* note 1949, the evidence established: (1) that DeFilippis had passed the one-dollar bills, rather than intended or offered to pass them, and (2) that she made no declaration that the bills were genuine.

1958. *Id.* at 1374.

1959. *Id.* at 1375. *See* FED. R. CRIM. P. 52(a). This ruling is consistent with previous Ninth Circuit decisions, as well as the decisions of other circuit courts. *See, e.g.,* United States v. Baker, 611 F.2d 961, 963-64 (4th Cir. 1979) (harmless error for court to instruct on "using facilities of interstate commerce" with intent to promote prostitution when evidence only supported an instruction for "traveling in interstate commerce" with intent to promote prostitution); United States v. Clavey, 565 F.2d 111, 116 (7th Cir. 1977) (harmless error for court to instruct jury on "taxable status of political campaign funds diverted to personal use" when no evidence implicated defendant in such diversion), *cert. denied,* 439 U.S. 954 (1978); United States v. Pyle, 424 F.2d 1013, 1016 (9th Cir. 1970) (harmless error for court to instruct jury on "constructive possession" of marijuana when evidence only supported a finding of "actual possession"); United States v. Mont, 306 F.2d 412, 417 (2d Cir. 1962) (harmless error for court to instruct jury on "selling and facilitating a sale of narcotics" when facts of case only supported a finding that defendants had "received and concealed narcotics").

But see United States v. Talkington, 589 F.2d 415 (9th Cir. 1978). In *Talkington,* the jury was instructed that it could base a finding of guilt on any one of five false statements made by the defendant in an Interstate Commerce Commission filing. Because three of the falsehoods were immaterial and the jury might have convicted on a legally insufficient ground, the court held that the instruction constituted reversible error. *Id.* at 417-18.

1960. 640 F.2d 1000 (9th Cir. 1981).

and two co-defendants were indicted on sixteen counts of mail fraud.[1961] The co-defendants pleaded guilty to the charges and testified against Halbert at his trial.[1962] Over Halbert's objection, the district court permitted both co-defendants to inform the jury that they had pleaded guilty to the offense for which Halbert was being tried. A conviction subsequently resulted.[1963]

On appeal, Halbert argued that: (1) the trial court had erred by allowing the prosecution to introduce his co-defendants' guilty pleas,[1964] and (2) the trial court had erred by failing to instruct the jury that a mail fraud conviction can result only when a defendant has made *material* misrepresentations.[1965]

The Ninth Circuit initially noted that while the guilty plea of a co-defendant may not be offered as substantive evidence of the guilt of those on trial,[1966] it may, under proper instructions, be considered by the jury for the limited purpose of evaluating the co-defendant's credibility as a witness.[1967] The court concluded, however, that the district court had failed to instruct the jury adequately on the limited use of the

1961. *Id.* at 1003.

1962. *Id.* at 1004.

1963. *Id.*

1964. *Id.* at 1003-04.

1965. *Id.* at 1007. Halbert was charged with making six misrepresentations. He also argued on appeal that his conviction should be reversed because the court's instructions raised the possibility that the jury could have based its verdict on one of the misrepresentations which Halbert alleged was unsupported by the evidence. *Id.* at 1008. In dictum, the court noted that in a mail fraud prosecution, the Government need not prove every misrepresentation charged in the indictment. "Even if the Government had not established one or more of the six acts of misrepresentation involved in this case, sufficient proof of even one of the acts would have been enough to support Halbert's conviction for mail fraud." *Id.*

1966. *Id.* at 1004. This principle is well established in federal circuit courts. *See, e.g.*, United States v. Whitehead, 618 F.2d 523, 529-30 (4th Cir. 1980); United States v. Weisle, 542 F.2d 61, 62 (8th Cir. 1976); United States v. Bryza, 522 F.2d 414, 425 (7th Cir. 1975), *cert. denied,* 426 U.S. 912 (1976); United States v. King, 505 F.2d 602, 607 (5th Cir. 1974); Baker v. United States, 393 F.2d 604, 614 (9th Cir.), *cert. denied,* 393 U.S. 836 (1968); Freije v. United States, 386 F.2d 408, 411 (1st Cir. 1967), *cert. denied,* 396 U.S. 859 (1969); United States v. Restaino, 369 F.2d 544, 545 (3d Cir. 1966); Jiron v. United States, 306 F.2d 946, 947 (10th Cir. 1962); United States v. Crosby, 294 F.2d 928, 949-50 (2d Cir. 1961), *cert. denied,* 368 U.S. 984 (1962); Payton v. United States, 222 F.2d 794, 796 (D.C. Cir. 1955).

1967. 640 F.2d at 1004. The Ninth Circuit, as well as a number of other circuits, recognizes that when accompanied by adequate cautionary instructions, the guilty pleas of co-defendants may be utilized by the jury in assessing witness credibility. United States v. Whitehead, 618 F.2d 523, 529-39 (4th Cir. 1980); United States v. Romeros, 600 F.2d 1104, 1105 (5th Cir. 1979) (per curiam), *cert. denied,* 444 U.S. 1077 (1980); United States v. Anderson, 532 F.2d 1218, 1230 (9th Cir.), *cert. denied,* 429 U.S. 839 (1976); United States v. Bryza, 522 F.2d 414, 424-25 (7th Cir. 1975), *cert. denied,* 426 U.S. 912 (1976); Issac v. United States, 431 F.2d 11, 14-15 (9th Cir. 1970); Baker v. United States, 393 F.2d 604, 614 (9th Cir.), *cert. denied,* 393 U.S. 836 (1968).

guilty pleas.[1968] This failure constituted reversible error.[1969]

The Ninth Circuit also held that because the evidence clearly demonstrated that Halbert's misrepresentations were material, the district court's failure to instruct on materiality was not erroneous.[1970]

7. Informant, addict, and eyewitness identification instructions

In *People v. Dela Rosa,*[1971] the Ninth Circuit considered whether the district court had erred by refusing to give the defendant's proposed informant, addict, and eyewitness identification instructions. Defendant Dela Rosa was indicted and convicted on three counts of robbery, two counts of murder, and one count of attempted murder.[1972] The prosecution's primary witness was an acquaintance of Dela Rosa's named Anthony Gumataotao.[1973] Gumataotao testified that Dela Rosa had admitted committing the crimes in question.[1974]

At the close of his trial, Dela Rosa requested that the district court give his proposed informant, accomplice, informant-addict, and eyewitness identification instructions.[1975] He argued that these instructions were supported by the evidence and were necessary to caution the jury regarding Gumataotao's reliability.[1976] The trial court refused to give the informant instruction on the ground that Gumataotao was neither

1968. 640 F.2d at 1006. The district court's only instruction regarding the use of co-defendants' guilty pleas read: "[The] disposition of [the co-defendants] . . . should not control or influence you in your verdict with reference to the remaining defendant, Mr. Halbert. You must base your verdict as to him solely on the evidence presented to you in this courtroom." *Id.*

The Ninth Circuit concluded that this instruction was insufficient to apprise the jury that it could use the pleas only as evidence of the co-defendant's credibility. *Id.* In addition, the court noted that the most effective practice would have been to instruct the jury when evidence of the plea was admitted and again in final instructions. *Id.* at 1006-07. In any event, the jury should have been told in unequivocal language that the plea may not be considered as evidence of a defendant's guilt. *Id.*

1969. *Id.* at 1007.

1970. *Id.* at 1008. The Ninth Circuit has reached a similar conclusion in previous decisions. *See* United States v. Valdez, 594 F.2d 725, 728-29 (9th Cir. 1979) (failure to instruct jury on materiality of false statements not erroneous considering clear proof of their materiality); United States v. Kostoff, 585 F.2d 378, 380 (9th Cir. 1978) (failure to instruct jury on materiality of misrepresentations not erroneous considering clear proof of their materiality).

1971. 644 F.2d 1257 (9th Cir. 1981) (per curiam).

1972. *Id.* at 1258.

1973. *Id.* at 1259. Gumataotao was, in fact, an accessory to the offenses committed by Dela Rosa. He had helped Dela Rosa hide the murder weapon and the property stolen from the victims. *Id.*

1974. *Id.*

1975. *Id.*

1976. *Id.*

paid nor received official immunity for his testimony.[1977] The court also refused to give the informant-addict and accomplice instructions, but did, however, give a general instruction on eyewitness identification.[1978]

On appeal, Dela Rosa argued that the superior court of Guam had erred in refusing to instruct the jury in the manner requested.[1979] The Ninth Circuit held that the superior court's refusal to deliver the defendant's proposed informant instruction constituted reversible error.[1980] The court reasoned that the definition of an informant included persons who provided evidence against a defendant for some personal advantage or vindication, as well as for pay or immunity.[1981] In reaching this conclusion, the court relied on: (1) *Federal Jury Practice and Instructions*, section 17.02 [1982] and (2) *Steinmark v. Parratt.* [1983]

The circuit court also held that while the evidence demonstrated that Gumataotao was an accessory after the fact, the superior court need not have given a separate accomplice instruction.[1984] The court stated that an informant instruction would have sufficed had the circumstances regarding Gumataotao's connection with the crime been incorporated therein.[1985]

1977. *Id.* Gumataotao was instead promised by law enforcement authorities that he would not be prosecuted. *Id.*

1978. *Id.* at 1259, 1261.

1979. *Id.* at 1259.

1980. *Id.* at 1260.

1981. *Id.* at 1259.

1982. DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS (3d ed. 1977). Section 17.02 provides:

> The testimony of an informer who provides evidence against a defendant for pay, *or for immunity from punishment, or for personal advantage or vindication* must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against defendant.

(emphasis added).

1983. 427 F. Supp. 931, 935 (D. Neb. 1977). In *Steinmark*, the defendant attacked his conviction for delivery of a controlled substance by petitioning the court for a writ of habeas corpus. The primary basis for this conviction had been the testimony of an undercover drug purchaser who was paid for his services by the Nebraska State Patrol. The district court classified this individual as an informant since he had provided "evidence against a defendant for pay or some other personal advantage." *Id.* at 935 n.4.

The *Dela Rosa* court's adoption of this definition, however, is entirely inconsistent with the only previous Ninth Circuit opinion on point. *See* United States v. Hoyos, 573 F.2d 1111, 1116 (9th Cir. 1978). In *Hoyos,* the Ninth Circuit held that " '[t]o be an informer the individual supplying the information generally is either paid for his services, or, having been a participant in the unlawful transaction, is granted immunity in exchange for his testimony.' " (quoting United States v. Miller, 499 F.2d 736, 742 (10th Cir. 1974)).

1984. 644 F.2d at 1261.

1985. *Id.*

With regard to the defendant's proposed addict instruction, the court noted that although the Ninth Circuit had not specifically decided whether such an instruction was required,[1986] recent cases indicated its appropriateness in certain circumstances.[1987] The court thus concluded that, on retrial, an addict instruction should be given if evidence could be established demonstrating Gumataotao's addiction to heroin.[1988]

Finally, the court summarily concluded that the superior court had not erred in rejecting Dela Rosa's detailed eyewitness identification instruction.[1989]

8. Definition of "reasonable doubt" and "presumption of innocence" in instructions

In *United States v. Witt,*[1990] the Ninth Circuit considered whether the district court had committed reversible error by failing to define for the jury the terms "reasonable doubt" and "presumption of innocence." Defendant Witt was convicted of violating 18 U.S.C. section 1014[1991] as a result of making false representations to the Alaska Federal Credit Union.[1992] On appeal, he raised two arguments: (1) that the district court had erred by refusing to instruct the jury on the meaning of "reasonable doubt"[1993] and (2) that the district court had erred by refusing to instruct the jury on the meaning of "presumption of innocence."[1994]

1986. *See* United States v. Cook, 608 F.2d 1175, 1182 (9th Cir. 1979), *cert. denied,* 444 U.S. 1034 (1980).

1987. 644 F.2d at 1261. *See* United States v. Bernard, 625 F.2d 854, 858-59 (9th Cir. 1980) (advisable to incorporate addict charge in instructions given at defendant's retrial when informant admitted drug addiction at trial); United States v. Tousant, 619 F.2d 810, 812 (9th Cir. 1980) (per curiam) (addict instruction should be given when informant's drug addiction is evident).

1988. 644 F.2d at 1261.

1989. *Id.* The court's ruling that a general eyewitness instruction is sufficient comports with previous Ninth Circuit decisions, as well as the decisions of other circuit courts. *See, e.g.,* United States v. Lone Bear, 579 F.2d 522, 524 (9th Cir. 1978); United States v. Kavanagh, 572 F.2d 9, 13 (1st Cir. 1978); United States v. Trejo, 501 F.2d 138, 140 (9th Cir. 1974); United States v. Amaral, 488 F.2d 1148, 1150-51 (9th Cir. 1973); United States v. Evans, 484 F.2d 1178, 1187-88 (2d Cir. 1973).

1990. 648 F.2d 608 (9th Cir. 1981).

1991. *Id* at 609. 18 U.S.C. § 1014 (1976) provides in pertinent part: "Whoever knowingly makes any false statement or report . . . for the purpose of influencing in any way the action of . . . a Federal credit union . . . shall be fined not more than $5,000 or imprisoned not more than two years, or both."

1992. 648 F.2d at 609.

1993. *Id.*

1994. *Id.* Although the district court did not attempt to define "reasonable doubt" or de-

Witt's initial argument raised a question of first impression for the Ninth Circuit.[1995] After noting that a number of other circuits were divided on the issue,[1996] however, the court held that the decision to define the term was discretionary.[1997] It then concluded that the lower court had not abused its discretion.[1998] Inexplicably, Witt's second argument was never properly addressed.[1999] The court merely observed that, although it was appropriate to instruct the jury on the existence of the presumption in some cases,[2000] an instruction was not always mandatory.[2001] The court, in fact, even failed to specify whether such an instruction was required by the facts as presented.[2002]

9. The *Allen* charge

In *United States v. Moore,*[2003] the Ninth Circuit considered

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scribe the "presumption of innocence," it did give the following instruction: "The law does not require a defendant to prove his innocence. He is presumed by law to be innocent. This means the government must prove all of its case against the defendant. The government must prove the defendant guilty beyond a reasonable doubt." *Id.* at 610.

1995. *Id.* In United States v. Robinson, 546 F.2d 309, 313-14 (9th Cir. 1976), *cert. denied,* 430 U.S. 918 (1977), the Ninth Circuit reviewed a jury instruction defining "reasonable doubt." After concluding that the instruction did not constitute reversible error, the court stated in dictum that an instruction defining that term must convey its meaning accurately. It did not, however, consider whether a trial court *must,* upon request, define "reasonable doubt."

1996. *Compare* United States v. Lawson, 507 F.2d 433, 439-44 (7th Cir. 1974) (failure to give instruction defining "beyond a reasonable doubt" no basis for reversing a trial otherwise fairly conducted), *cert. denied,* 420 U.S. 1004 (1975) *with* Blatt v. United States, 60 F.2d 481, 481 (3d Cir. 1932) (failure to give instruction defining reasonable doubt resulted in prejudicial error) *and* Nanfito v. United States, 20 F.2d 376, 378-79 (8th Cir. 1927) (failure to define reasonable doubt constituted prejudicial error) *and* Schenks v. United States, 2 F.2d 185, 187 (D.C. Cir. 1924) (failure to give instruction defining reasonable doubt resulted in reversible error).

1997. 648 F.2d at 611. This ruling was based in part on a statement made by the Supreme Court in Holland v. United States, 348 U.S. 121, 140 (1954) ("[A]ttempts to define the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury.").

1998. 648 F.2d at 611.

1999. *Id.*

2000. *Id. See* Taylor v. Kentucky, 436 U.S. 478, 490 (1978) (defendant's right to fair trial violated by failure to instruct on presumption of innocence when trial court's instructions were skeletal and prosecutor's improper suggestions made it likely that jury would convict on the basis of extraneous considerations).

2001. *See* Kentucky v. Whorton, 441 U.S. 786, 788 (1979) (per curiam) ("While this Court in *Taylor* reversed a conviction resulting from a trial in which the judge had refused to give a requested instruction on the presumption of innocence, the Court did not there fashion a new rule of constitutional law requiring that such an instruction be given in every criminal case.").

2002. 648 F.2d at 611. The Ninth Circuit simply concluded that the district court's instruction, apprising the jury of the existence of the presumption, was adequate. *Id.*

2003. 653 F.2d 384 (9th Cir. 1981).

whether the district court had acted properly in delivering an *Allen* charge to the jury.[2004] Defendant Moore was indicted for soliciting money in exchange for his promise not to testify at the trial of another.[2005] After the jury had deliberated for slightly over a day and a half, it notified the court of a deadlock.[2006] In response, the court gave a modified *Allen* charge.[2007] Following two more hours of deliberation, the jury rendered a guilty verdict.[2008]

On appeal, Moore argued that use of the *Allen* charge constituted reversible error.[2009] The Ninth Circuit, however, rejected this contention,[2010] noting that the charge was proper because it had not served to coerce the jury.[2011] The court's holding apparently rested on a combination of four factors: (1) the jury's indication of a deadlock prior to receiving the charge,[2012] (2) the period of deliberation following the charge, which the court reasoned was sufficient for each juror "to reach a . . . decision based on his own perception of the evidence and the

2004. *Id.* at 390. In Allen v. United States, 164 U.S. 492, 501-02 (1896), the Supreme Court approved auxiliary instructions given by the district court to encourage a jury verdict. The instructions essentially admonished the jurors to reach a verdict if they could conscientiously do so, and instructed minority jurors to consider the reasonableness of their views.

Use of the *Allen* charge has been expressly approved by the Ninth Circuit, especially when given in response to a jury's request, United States v. Seawell, 550 F.2d 1159, 1163 (9th Cir. 1977), *cert. denied,* 439 U.S. 991 (1978), or when given in response to a jury deadlock. United States v. Peterson, 549 F.2d 654, 659 (9th Cir. 1977). At least three circuits, however, have refused to utilize the instruction in its traditional form. *See* United States v. Silvern, 484 F.2d 879, 882-83 (7th Cir. 1973) (en banc); United States v. Thomas, 449 F.2d 1177, 1187 (D.C. Cir. 1971); United States v. Fioravanti, 412 F.2d 407, 420 (3d Cir. 1969).

2005. 653 F.2d at 385.

2006. *Id.* at 390.

2007. *Id.*

2008. *Id.*

2009. *Id.*

2010. 653 F.2d at 390. *Accord* United States v. Beattie, 613 F.2d 762, 764-66 (9th Cir.), *cert. denied,* 446 U.S. 982 (1980). In *Beattie,* the court upheld use of the *Allen* charge when it had been given after an eight-hour deliberation without indication of deadlock. The court noted that the three and one-half hours of deliberation following the charge were sufficient to permit jury members to reach a verdict, based on their own perceptions of the evidence and law. *Cf.* United States v. Contreras, 463 F.2d 773, 774 (9th Cir. 1972) (per curiam). In *Contreras,* the Ninth Circuit concluded that use of the charge was premature and coercive when the jury had deliberated for eight hours, had given no indication that it was deadlocked, and had reached a verdict within thirty-five minutes after the instruction was given.

2011. *Id. See* Jenkins v. United States, 380 U.S. 445, 446 (1965) (per curiam) (*Allen* charge proper when in its context and under all the circumstances of the case the instruction was not coercive); United States v. Beattie, 613 F.2d 762, 764 (9th Cir.) ("[T]o determine the propriety of the trial court's use of an *Allen* charge . . . we must examine the instruction 'in its context and under all the circumstances' to see if it had a coercive effect upon the jury."), *cert. denied,* 446 U.S. 982 (1980) (quoting Jenkins v. United States, 380 U.S. at 446).

2012. 653 F.2d at 390.

law,"[2013] (3) the absence of any evidence indicating that the judge or jury had expressed frustration at failing to reach a verdict,[2014] and (4) the absence of any evidence indicating that the judge had given minority jurors the impression that the charge was directed at them.[2015]

V. POST-CONVICTION PROCEEDINGS

A. Double Jeopardy

1. Post-conviction prosecutions

The double jeopardy clause bars successive prosecutions for the *same offense* after conviction.[2016] However, if the crime charged in a second prosecution arose from a criminal act or set of facts completely distinct from the original conviction, the second prosecution does not violate the double jeopardy clause. For example, in *United States v. Mayo,*[2017] two conspiracies involved "different co-conspirators, different victims, different purposes, different timespans, different locales, and different sections of the United States Code."[2018] The Ninth Circuit considered the two conspiracies to have arisen from distinct sets of facts, thus permitting a subsequent prosecution.[2019]

In *Mayo,* defendant Dondich was convicted of securities fraud for his involvement in a scheme to market worthless debt securities. Four years earlier, he had been convicted of conspiring to induce the sale of sugar futures contracts. The only element common to the two convictions was his use of a Colombian ranch as a financial asset to entice purchasers.[2020] Nevertheless, he argued that both convictions involved "one giant" conspiracy and that the second prosecution violated the double jeopardy clause.[2021] The Ninth Circuit found the securities fraud charge to be completely distinct from the earlier conspiracy.[2022]

2013. *Id.*

2014. *Id.*

2015. *Id.*

2016. North Carolina v. Pearce, 395 U.S. 711, 717 (1969); In re Nielsen, 131 U.S. 176 (1889).

2017. 646 F.2d 369 (9th Cir.) (per curiam), *cert. denied,* 454 U.S. 1127 (1981).

2018. *Id.* at 372-73.

2019. *Id.* at 373. *See also* Rogers v. United States, 609 F.2d 1315 (9th Cir. 1979) (1977 mail fraud conviction and 1979 mail fraud conviction considered factually distinct crimes, involving different development schemes, different offenses, and partially different time frames).

2020. 646 F.2d at 373.

2021. *Id.* at 372.

2022. In determining whether the securities fraud charge of the second prosecution and the earlier conspiracy charge were the same offense for double jeopardy purposes, the *Mayo* court applied the test stated in Arnold v. United States, 336 F.2d 347, 349 (9th Cir. 1964),

A more difficult double jeopardy issue concerns charges that could have been joined in a prior prosecution but were not. Faced with such a situation in *United States v. Brooklier,*[2023] the Ninth Circuit considered whether the *Blockburger* test[2024] was applicable to post-conviction prosecutions. The *Blockburger* test provides that multiple offenses arising from the same criminal act are separately punishable when each offense requires proof of a different element. If the charges had been joined originally in a single indictment, *Blockburger* would determine whether double jeopardy bars multiple punishment for those charges.[2025] In cases of successive prosecutions, however, a school of thought led by Justice Brennan favors the "same transaction" test,[2026]

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cert. denied, 380 U.S. 982 (1965): "is proof of the matter set out in a second indictment admissible as evidence under the first indictment, and could a conviction have been properly sustained on such evidence?" 646 F.2d at 372.

2023. 637 F.2d 620 (9th Cir. 1980), *cert. denied,* 450 U.S. 980 (1981).

2024. In Blockburger v. United States, 284 U.S. 299 (1932), the Supreme Court articulated a test for determining when a defendant may be prosecuted and punished for multiple statutory offenses arising from a single criminal act or transaction: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304.

The *Blockburger* test is a rule of statutory construction, focusing on the elements of an offense. It determines congressional intent to impose cumulative punishment for the violation of multiple offenses. *See* Whalen v. United States, 445 U.S. 684, 691 (1980). If each statutory offense for which the defendant is prosecuted requires proof of an element not required by the others, then the test is satisfied and multiple punishment is permissible under the double jeopardy clause.

2025. *See infra* note 2083. The *Brooklier* court noted that a defendant may be charged in a single prosecution with both conspiracy to violate RICO and a substantive RICO offense. 637 F.2d at 622. *See* United States v. Rone, 598 F.2d 564, 569-71 (9th Cir. 1979), *cert. denied,* 445 U.S. 946 (1980).

2026. As characterized in *Brooklier,* the "same transaction" test means that "[c]harges arising from a single transaction would have to be brought in a single prosecution; those omitted would be waived." 637 F.2d at 622. In Abbate v. United States, 359 U.S. 187 (1959), Justice Brennan wrote:

> Thus to permit the Government statutorily to multiply the number of offenses resulting from the same acts, and to allow successive prosecutions of the several offenses, rather than merely the imposition of consecutive sentences after one trial of those offenses, would enable the Government to "wear the accused out by a multitude of cases with accumulated trials." . . . Repetitive harassment in such a manner goes to the heart of the Fifth Amendment protection.

Id. at 199-200 (footnote and citations omitted). For a list of cases in which Justice Brennan has supported the "same transaction" test in concurring or dissenting opinions, see Thompson v. Oklahoma, 429 U.S. 1053, 1054 (1977) (Brennan, J., dissenting from denial of cert.).

Many commentators support the "same transaction" test. *E.g.*, J. SIGLER, DOUBLE JEOPARDY 222-23 (1969); *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 70, 106-07 (1977); Note, *Double Jeopardy: A Protection or an Empty Promise?,* 25 U. FLA. L. REV. 838, 842-43 (1973). *Cf.* Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence,* 89 YALE L.J. 962, 967-69 (1980) (variant of "same transaction" test proposed). The "same

which requires joinder of all charges arising from a single act or transaction.[2027] Although the *Brooklier* court preferred the "same transaction" test,[2028] Ninth Circuit precedent required application of the *Blockburger* doctrine to post-conviction prosecutions.[2029]

In *Brooklier,* the defendants had been convicted in 1975 of violating the Racketeer Influenced and Corrupt Organizations Act, (RICO),[2030] one charge of which was conspiracy to extort money from Sam Farkas, a bookie.[2031] The actual extortion from Farkas was cited as an overt act in furtherance of the conspiracy. Four years later, the defendants were charged with the actual extortion of money from Farkas.[2032] The defendants moved to dismiss this charge on double jeopardy grounds, claiming that both the 1979 charge and the 1975 charges related to a single incident of extortion. Applying the *Blockburger* test, the Ninth Circuit concluded that the second prosecution was not barred

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transaction" test has also been adopted in the American Bar Association Criminal Justice Standards, STANDARDS RELATING TO JOINDER AND SEVERANCE § 1.3(c) (1967).

2027. Under the "same transaction" test, there are exceptional circumstances when all charges against a defendant that grow out of a single criminal act would not be required to be joined in one trial. Such exceptions exist when a defendant tactically causes separate trials or when the crime charged in a second prosecution is discovered only after the first prosecution. 637 F.2d at 622 n.4. *See* Ashe v. Swenson, 397 U.S. 436, 453 n.7 (1970) (Brennan, J., concurring).

2028. *Id.* at 623-24.

2029. *Id.* at 623. Two Ninth Circuit decisions have applied the *Blockburger* test to post-conviction prosecutions. In United States v. Solano, 605 F.2d 1141 (9th Cir. 1979), *cert. denied,* 444 U.S. 1020 (1980), the defendants claimed that their RICO convictions had subjected them to double jeopardy, because seven months earlier they had been convicted of drug offenses which formed the basis of the subsequent RICO charges. In rejecting this argument, the Ninth Circuit stated that "[t]he traditional test to be applied in determining whether successive prosecutions are permissible was stated in *Blockburger*." *Id.* at 1144.

Similarly, in United States v. Snell, 592 F.2d 1083 (9th Cir.), *cert. denied,* 442 U.S. 944 (1979), the Ninth Circuit applied the *Blockburger* test to uphold a post-conviction prosecution. Snell was originally convicted of attempted extortion and conspiracy to commit a bank robbery. After the extortion conviction was reversed on appeal, the Government brought a new charge of attempted bank robbery. Although both the conspiracy and attempted bank robbery charges arose from the same transaction, the *Blockburger* test permitted the second prosecution. The court expressly refused to adopt Justice Brennan's "same transaction" test, because neither the Supreme Court nor the Ninth Circuit had adopted this standard. *Id.* at 1085.

2030. 18 U.S.C. §§ 1961-1968 (1976).

2031. Conspiracy to extort money is prohibited by 18 U.S.C. § 1962(d) (1976), which provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of . . . this section."

2032. Extortion of money is prohibited by 18 U.S.C. § 1962(c) (1976), which provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

by double jeopardy.[2033]

The court questioned, however, the scope of *Blockburger*[2034] and its application to post-conviction prosecutions.[2035] The court appeared to favor the "same transaction" test,[2036] for it promotes judicial economy and satisfies the underlying principles of the double jeopardy clause by protecting the accused from the psychological and financial burdens of repeated trials and by preventing the prosecution from reserving potential charges.[2037] The *Brooklier* case presented the Ninth Circuit with the opportunity to adopt the "same transaction" test, because the 1979 extortion charge arose from the same set of facts as the 1975 conviction and the Government was aware of the extortion charge at the time of the prior prosecution. However, the court felt that it did not have "free rein" to adopt this test.[2038]

2033. 637 F.2d at 624. *Blockburger* is not the only double jeopardy mechanism that precludes successive prosecutions; criminal collateral estoppel may bar a second prosecution even though the *Blockburger* test is satisfied. Collateral estoppel applies when a second prosecution requires relitigation of factual issues resolved in a prior adjudication. Application of collateral estoppel to criminal prosecutions is exceptional, because the basis of a jury's general verdict of innocent or guilty can rarely be traced to specific factual issues. *See* Ashe v. Swenson, 397 U.S. 436 (1970) (when acquittal for robbing participant in a poker game established that defendant was not one of the criminals, collateral estoppel applied to bar a subsequent prosecution for robbing another participant).

2034. *Blockburger* involved a single criminal act that violated two distinct statutory provisions. In a single proceeding, Blockburger was convicted of both offenses and given consecutive sentences. The *Brooklier* court hinted that *Blockburger* could be limited in application to cases involving the imposition of multiple punishment in a single prosecution. 637 F.2d at 622. *See* Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence,* 89 YALE L.J. 962, 965-67 (1980).

2035. The Supreme Court in Illinois v. Vitale, 447 U.S. 410, 416 (1980), and the Ninth Circuit in United States v. Solano, 605 F.2d 1141, 1144 (9th Cir. 1979), *cert. denied,* 444 U.S. 1020 (1980), and United States v. Snell, 592 F.2d 1083, 1085 n.2 (9th Cir.), *cert. denied,* 442 U.S. 944 (1979), relied on Brown v. Ohio, 432 U.S. 161 (1977), to apply the *Blockburger* doctrine to successive prosecutions. The *Brooklier* court disagreed with such an application. In *Brown,* the defendant was convicted of joyriding and, upon completion of his 30 day jail sentence, was charged and convicted of automobile theft. The Supreme Court applied *Blockburger* in finding automobile theft and joyriding to be the same offense within the meaning of the double jeopardy clause. The Court reasoned that since the *Blockburger* doctrine would bar prosecution of joyriding and automobile theft in a single indictment, the test would also bar successive prosecutions. The *Brooklier* court interpreted *Brown* as limited to circumstances in which conviction of a lesser included offense precludes subsequent prosecution for the greater offense. 637 F.2d at 623.

2036. *Id.* at 623-24.

2037. *Id.* at 622. *See* Ashe v. Swenson, 397 U.S. 436, 454 (1970) (Brennan, J., concurring). However, one problem with the "same transaction" test is the difficulty of adequately defining "a single criminal act, occurrence, episode, or transaction." *Id.* at 454 n.8.

2038. The *Brooklier* court stated: "[w]e also recognize many advantages of the same trans-

2. Retrials

a. after mistrial

i. on defendant's motion

When a defendant moves for mistrial based on trial error, reprosecution is generally permissible under the double jeopardy clause. There is an exception, however, when the defendant's motion is prompted by prosecutorial or judicial *overreaching.*[2039] Courts have found overreaching when the prosecutor or judge has deliberately and in bad faith provoked the defendant's mistrial request.[2040]

In *United States v. Roberts,*[2041] the Ninth Circuit determined that the prosecutor's comments during closing argument were not deliberately intended to provoke a mistrial.[2042] In May of 1978, the defendants were convicted for attempting to bomb a federal building in Arizona. The Ninth Circuit reversed the convictions on the ground that the prosecution committed reversible error by attempting to bolster its chief witness' credibility with evidence not on the record.[2043] After a retrial was scheduled, the defendants moved to dismiss on double jeopardy grounds.

Although *Roberts* involved appellate reversal for prosecutorial

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action test espoused by Justice Brennan and might well be moved to adopt it if we had free rein." 637 F.2d at 623-24 (footnote omitted).

In addition to considering itself bound by Ninth Circuit precedent, the *Brooklier* court also considered the Supreme Court to have "tacit[ly] endors[ed]" the application of *Blockburger* to "all post-conviction prosecutions," in Illinois v. Vitale, 447 U.S. 410 (1980). 637 F.2d at 624. In *Vitale,* the defendant struck and killed two children while driving his automobile. He pled guilty to the traffic violation of failing to reduce speed to avoid an accident, and was fined. The following day, he was charged with involuntary manslaughter. The *Vitale* Court interpreted Brown v. Ohio, 432 U.S. 161 (1977), as establishing *Blockburger* as "the principal test for determining whether two offenses are the same for purposes of barring successive prosecutions." 447 U.S. at 416. The Court further stated that the two offenses would be the same only if the manslaughter by automobile charge incorporated the driver's failure to reduce speed. It then remanded the case to the state court for a determination of the relationship between the two statutory offenses. *Id.* at 421.

2039. *See* United States v. Dinitz, 424 U.S. 600 (1976).

2040. In *Dinitz,* the Supreme Court stated:

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor," threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant.

Id. at 611 (citations omitted).

2041. 640 F.2d 225 (9th Cir. 1981).

2042. *Id.* at 228.

2043. United States v. Roberts, 618 F.2d 530, 535 (9th Cir. 1980).

misconduct rather than a successful defense motion for mistrial, the Ninth Circuit applied mistrial principles in concluding that double jeopardy did not bar retrial.[2044] The court found that even though the prosecutor's comments during closing argument were intentional and harmful to the defendant's case, there was no proof that they were intended to *provoke a mistrial.*[2045] The Ninth Circuit explicitly refused to extend double jeopardy protection to cases involving prosecutorial "gross negligence without the intent to provoke a mistrial."[2046]

In a dissenting opinion, Judge Norris asserted that the prosecutor's flagrant and intentional misconduct constituted prosecutorial *overreaching* which should bar retrial, regardless of a showing of intent to provoke a mistrial.[2047] The dissent pointed out that both Supreme Court[2048] and federal court decisions[2049] do not suggest the narrow in-

2044. The dissent found the issue of whether retrial is barred after appellate reversal for intentional prosecutorial overreaching to be a question of first impression. The general rule, stated as dictum in Burks v. United States, 437 U.S. 1, 14-15 (1978), is that appellate reversal for trial error does not bar retrial. However, the Supreme Court has not addressed whether the prosecutorial overreaching exception, which precludes retrial after a defendant's successful mistrial motion, applies equally to appellate reversal. The *Roberts* dissent posed several doctrinal considerations in support of expanding double jeopardy protection to appellate reversal for intentional prosecutorial misconduct. *See* 640 F.2d at 230-31.

2045. *Id.* at 228. For cases where the prosecutorial or judicial error was not deliberately intended to force the defendant to move for mistrial, see, e.g., Divans v. California, 434 U.S. 1303 (1977) (denial of application for stay of defendant's second state trial); Lee v. United States, 432 U.S. 23 (1977) (prosecutor failed to allege knowledge or intent in the information; court denied motion to dismiss before jeopardy had attached); United States v. Dinitz, 424 U.S. 600 (1976) (trial judge's expulsion of defendant's attorney for repeated misconduct during opening statement not done in bad faith); United States v. Calderon, 618 F.2d 88 (9th Cir. 1980) (portions of prosecutor's opening statement were later ruled inadmissible under complex co-conspirator hearsay exception); United States v. Gamble, 607 F.2d 820 (9th Cir. 1979) (prosecutor continually gave personal assurance that certain facts at issue were true), *cert. denied,* 444 U.S. 1092 (1980); Moroyoqui v. United States, 570 F.2d 862 (9th Cir. 1977) (prosecutor unintentionally elicited prejudicial information during direct examination), *cert. denied,* 435 U.S. 997 (1978).

2046. 640 F.2d at 228.

2047. *Id.* (Norris, J., dissenting). The dissent considered the issue not to be whether the prosecutor's comments were either intentional or grossly negligent, but whether there must be deliberate provocation of a mistrial request or simply an intent to harass or prejudice the defendant. *Id.* at 230 n.3.

2048. *See* Lee v. United States, 432 U.S. 23, 33-34 (1977) ("only if the underlying error was 'motivated by bad faith or undertaken to harass or prejudice' would there be any barrier to retrial") (citations omitted); United States v. Dinitz, 424 U.S. 600, 611 (1976) (retrial barred when prosecutorial or judicial error committed "in bad faith in order to goad the respondent into requesting a mistrial or to prejudice his prospects for an acquittal."); United States v. Jorn, 400 U.S. 470, 485 n.12 (1971) ("where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred.").

2049. Several federal circuit courts have applied a broad standard to prosecutorial and

terpretation of prosecutorial and judicial overreaching adopted by the majority.[2050] Instead, the double jeopardy clause bars retrial when intentional overreaching is motivated by bad faith or intended to harass or prejudice the defendant's chances for acquittal. The dissent concluded that had this case involved a mistrial rather than appellate reversal, double jeopardy would have barred reprosecution.

In *United States v. Zimmelman,*[2051] the defendant's motion for mistrial, based on prosecutorial misconduct during the cross-examination of a witness, was granted and a new trial ordered. The Ninth Circuit held that although the Government's cross-examination exceeded a prior court order *in limine,* the misconduct was not intentional and in bad faith.[2052] Therefore, the double jeopardy clause did not bar retrial.

ii. on court's order

When a judge declares a mistrial without the defendant's request or consent, the double jeopardy clause bars reprosecution unless there was a "manifest necessity" for the mistrial declaration.[2053] Courts have refused to formulate explicit rules governing *sua sponte* mistrial declarations. Instead, the "manifest necessity" standard requires a trial judge to exercise sound discretion on a case-by-case basis.[2054] A judge

judicial overreaching: retrial is barred if the error was motivated by bad faith, undertaken to harass or prejudice the defendant, or intended to provoke a mistrial request. *See, e.g.,* Mitchell v. Smith, 633 F.2d 1009, 1011-13 (2nd Cir. 1980), *cert. denied,* 449 U.S. 1088 (1981); United States v. Zozlio, 617 F.2d 314, 315 (1st Cir. 1980); United States v. Opager, 616 F.2d 231, 233-34 (5th Cir. 1980); Drayton v. Hayes, 589 F.2d 117, 121-22 (2d Cir. 1979); United States v. Martin, 561 F.2d 135, 139-40 (8th Cir. 1977); United States v. Kessler, 530 F.2d 1246, 1254-58 (5th Cir. 1976).

2050. The dissent noted that the majority opinion lacked reasons for distinguishing between prosecutorial overreaching intended to provoke a mistrial request and prosecutorial misconduct intended to harass or prejudice the defendant. The dissent found no reason to distinguish between the two for double jeopardy purposes and also noted that they are often inextricably intertwined. 640 F.2d at 229-30 (Norris, J., dissenting).

2051. 634 F.2d 1237 (9th Cir. 1980) (per curiam).

2052. The court stated that prosecutorial and judicial overreaching has been interpreted in the Ninth Circuit to mean improper conduct committed intentionally and in bad faith. *Id.* at 1238.

2053. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

2054. For cases in which the court abused its discretion in determining that there was a "manifest necessity" for declaring a mistrial *sua sponte,* see, e.g., United States v. Jorn, 400 U.S. 470 (1971) (plurality opinion) (mistrial declared after IRS failed to adequately warn taxpayer witnesses of right against self-incrimination); Downum v. United States, 372 U.S. 734 (1963) (jury discharged after prosecutor failed to produce key witness); United States v. Smith, 621 F.2d 350 (9th Cir. 1980) (jury discharged after one juror became unavailable and without court first considering alternatives; however, retrial permitted because defense counsel implicitly consented to mistrial declaration), *cert. denied,* 449 U.S. 1087 (1981); United States v. Sanders, 591 F.2d 1293 (9th Cir. 1979) (jury discharged after prosecution witness

must permit a defendant to have his or her trial completed by the first jury unless "a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."[2055]

In *United States v. Willis,*[2056] the Ninth Circuit determined that the trial court did not abuse its discretion in declaring a mistrial after the defendant failed to appear on the second day of trial.[2057] After a two hour recess during which Willis could not be located, the trial judge declared a mistrial *sua sponte.* Willis was later retried and convicted. On appeal, Willis argued that the trial court's failure to consider alternatives less drastic than mistrial constituted an abuse of discretion and

committed perjury); United States v. McKoy, 591 F.2d 218 (3d Cir. 1979) (mistrial declared to give defendant time to consult with independent counsel); United States v. Rich, 589 F.2d 1025 (10th Cir. 1978) (no reason orally stated for jury's discharge and none apparent from the record); Mizell v. Attorney Gen. of N.Y., 586 F.2d 942 (2d Cir. 1978) (jury discharged after two prosecution witnesses failed to appear), *cert. denied,* 440 U.S. 967 (1979); United States v. Horn, 583 F.2d 1124 (10th Cir. 1978) (mistrial declared when jury deliberated an hour after receiving *Allen* charge); Dunkerley v. Hogan, 579 F.2d 141 (2d Cir. 1978) (failure to consider feasible alternatives after learning defendant would be briefly hospitalized), *cert. denied,* 439 U.S. 1090 (1979); United States v. Starling, 571 F.2d 934 (5th Cir. 1978) (jury dismissed after defendant's communication with juror); 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 deliberation and upon foreman's opinion of hopeless deadlock).

For cases in which the court exercised sound discretion in determining that there was a "manifest necessity" for declaring a mistrial *sua sponte,* see, e.g., Arizona v. Washington, 434 U.S. 497 (1978) (possible jury bias from defense counsel's improper and prejudicial remarks during opening statement; judge's failure to set forth explicitly all factors justifying mistrial did not negate requisite "manifest necessity"); Illinois v. Somerville, 410 U.S. 458 (1973) (indictment insufficient to charge crime and incurable by amendment); Gori v. United States, 367 U.S. 364 (1961) (prosecutor's direct examination intended to elicit inadmissible evidence); Wade v. Hunter, 336 U.S. 684 (1949) (mistrial declared by court-martial in Germany because of tactical situation and distance to witnesses' residence); Lovato v. New Mexico, 242 U.S. 199 (1916) (jury dismissed after prosecutor's realization that defendant had neither been arraigned nor had entered a plea); Thompson v. United States, 155 U.S. 271 (1894) (jury discharged after learning that juror had also been member of defendant's grand jury); Simmons v. United States, 142 U.S. 148 (1891) (newspaper publication of defense counsel's letter, denying allegation of juror's acquaintance with defendant, prejudiced the jury); Rogers v. United States, 609 F.2d 1315 (9th Cir. 1979) (jury deadlock after deliberating three and one-half days following three day trial); United States v. Lorenzo, 570 F.2d 294 (9th Cir. 1978) (after three hour deliberation, each juror questioned whether their differences were irreconcilable); Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978) (jury deadlocked after twelve hour deliberation without possibility of reaching verdict); United States v. See, 505 F.2d 845 (9th Cir. 1974) (jury deadlocked after ten hour deliberation; judge refused to give *Allen* charge), *cert. denied,* 420 U.S. 992 (1975); United States v. Brahm, 459 F.2d 546 (3d Cir.) (mistrial declared after five hour deliberation for two day trial and without defendant's request that jury continue deliberations), *cert. denied,* 409 U.S. 873 (1972).

2055. United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion).

2056. 647 F.2d 54 (9th Cir. 1981).

2057. *Id.* at 59.

that retrial subjected him to double jeopardy.[2058] The Ninth Circuit pointed out that the exercise of sound discretion did not require consideration of alternatives such as continuance.[2059] The court also distinguished this case from a Third Circuit decision[2060] in which the judge declared a mistrial after waiting only ten minutes for the defendant's appearance at closing argument. The Ninth Circuit concluded that Willis' retrial was not barred by double jeopardy because the trial court had exercised sound discretion in declaring a mistrial.[2061]

b. for insufficient evidence

The double jeopardy clause does not bar retrial of a defendant who has succeeded in overturning his conviction.[2062] However, reprosecution for the same offense is prohibited once a reviewing court has determined that the evidence was legally insufficient to sustain the jury's guilty verdict.[2063]

The Supreme Court reaffirmed this principle in *Hudson v. Louisiana.*[2064] After Hudson was convicted of first degree murder in a state court, the trial judge granted his motion for a new trial on the ground of insufficient evidence to sustain a guilty verdict.[2065] Hudson was retried and was again found guilty.[2066] Relying on *Burks v. United*

2058. *Id.*

2059. *Id.* "Declaration of a mistrial is committed to the discretion of the trial court; express consideration of alternatives such as continuance is not required." *Id.* This proposition was not supported by any authority. It is well established, however, that a trial court *must* consider *all possible alternatives* before finding a "manifest necessity" for the *sua sponte* mistrial declaration. This protects the defendant's right to have his trial completed by the first jury. *See* United States v. Jorn, 400 U.S. at 487.

2060. United States v. Tinney, 473 F.2d 1085 (3d Cir.), *cert. denied,* 412 U.S. 928 (1973). After waiting ten minutes for defendant Tinney to appear in court on the last day of his trial, the judge declared a mistrial. Seven minutes after the prosecutor had begun his closing address for Tinney's co-defendant, defendant Tinney entered the courtroom. The Third Circuit determined that the trial judge's failure to grant a continuance for a reasonable length of time constituted abuse of discretion. "Manifest necessity" did not exist to warrant such a hasty mistrial declaration.

2061. 647 F.2d at 59.

2062. United States v. Ball, 163 U.S. 662, 672 (1896).

2063. Burks v. United States, 437 U.S. 1 (1978) (double jeopardy clause barred retrial after appellate court determined that evidence was legally insufficient to sustain jury's guilty verdict).

2064. 450 U.S. 40 (1981).

2065. Under Louisiana law, a criminal defendant's only means of challenging the sufficiency of evidence is by a motion for new trial. Trial judges are not authorized to enter judgments of acquittal in jury trials. 450 U.S. at 41 n.1.

2066. During retrial, an eyewitness who was not present at the original trial testified for the prosecution. State v. Hudson, 373 So. 2d 1294, 1295 (La. 1979).

States,[2067] Hudson argued that the double jeopardy clause barred his second trial. In affirming his conviction, the Louisiana Supreme Court interpreted *Burks* as precluding a second trial only when a reviewing court has determined that "there was *no evidence* of the crime charged or an essential element thereof."[2068] Because the trial judge granted Hudson's motion for new trial on the basis of *insufficient* evidence rather than *no* evidence, the Louisiana Supreme Court concluded that *Burks* did not bar a second trial.[2069]

The Supreme Court disagreed with the Louisiana Supreme Court's interpretation of *Burks,*[2070] considering this case "precisely the circumstance"[2071] in which the double jeopardy clause precludes retrial: when a reviewing court[2072] has found the evidence legally insufficient to sustain the verdict.[2073]

In *United States v. Marolda,*[2074] the Ninth Circuit similarly dis-

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2067. 437 U.S. 1 (1978). Burks was convicted of bank robbery in federal district court. On appeal, his conviction was reversed on the ground that the evidence was insufficient to support a guilty verdict: after Burks had presented a prima facie defense of insanity, the prosecution failed to uphold its burden of proving sanity. The court of appeals then remanded to the district court for a determination of whether a verdict of acquittal or a new trial should be granted. The Supreme Court held that retrial was barred by double jeopardy and thus the only remedy available was an acquittal.

2068. 373 So. 2d at 1297. The Louisiana Supreme Court's interpretation of *Burks* was based on the following language:

> "The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. . . . *Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have been submitted to the jury."*
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> . . . .
>
> . . . "[I]t is apparent that such a decision will be confined to cases where the prosecution's failure is clear."

Id. at 1297-98 (emphasis added) (quoting Burks v. United States, 437 U.S. at 16-17).

2069. 373 So. 2d at 1298.

2070. "Nothing in *Burks* suggests, as the Louisiana Supreme Court seemed to believe, that double jeopardy protections are violated only when the prosecution has adduced no evidence at all of the crime or an element thereof." 450 U.S. at 43.

2071. *Id.* Adopting the reasoning of Justice Tate in his concurring opinion to the Louisiana Supreme Court's decision, the State contended that *Burks* was not controlling. It argued that the trial judge had granted the new trial not on the basis of insufficient evidence, but because he had personal doubts about the guilty verdict. The Supreme Court rejected this contention, stating that it was clear from the state court decisions that the new trial was granted on the ground of legally insufficient evidence.

2072. The reviewing court may be either the trial court or a court of appellate jurisdiction. Burks v. United States, 437 U.S. at 11.

2073. It makes no difference whether the determination of evidentiary insufficiency is made on the defendant's appeal, a motion for new trial, or a motion for judgment of acquittal. *Id.* at 16-17.

2074. 648 F.2d 623 (1981). Marolda had been installed as the president of a newly merged union local. After the executive board terminated the practice of allowing union officers to

missed the retrial of defendant Marolda because the trial evidence was insufficient to sustain the conviction. Marolda appealed his conviction for embezzling from a labor union,[2075] arguing both trial error and evidentiary insufficiency.[2076] Considering only the issue of trial error, the Ninth Circuit reversed the conviction.[2077] Upon retrial, Marolda moved to dismiss on double jeopardy grounds, contending that insufficient evidence had been introduced at the first trial to prove an element of the offense.[2078] The Ninth Circuit concluded that the trial error, leading to reversal of the conviction, had not prejudiced the prosecution[2079] and that there was no direct evidence supporting an essential element of the charged offense.[2080] Therefore, double jeopardy barred retrial.

3. Consecutive sentences

The fifth amendment guarantee against double jeopardy precludes

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charge gasoline purchases on union credit cards and adopted a new policy of providing a fixed monthly allowance, Marolda continued to use his credit card for two years. *Id.* at 625.

2075. Embezzling from a labor union violates 29 U.S.C. § 501(c) (1976).

2076. Marolda based his appeal on three arguments: "(1) the definition of the offense in instructions to the jury excluded statutory elements; (2) there was a prejudicial variance between the offense as set forth in the indictment and as defined in the instructions; and (3) the evidence was insufficient to support a conviction." 648 F.2d at 624.

2077. United States v. Marolda, 615 F.2d 867 (9th Cir. 1980).

2078. The Government failed to prove that Marolda had used the gasoline credit card without any benefit to the union. 648 F.2d at 624.

2079. *Id.* The trial error appeared in the court's jury instructions. As a result, the error did not prejudice the prosecution in the presentation of its case: no additional evidence would have been introduced, nor would a different trial strategy or theory have been pursued by the prosecution. Such reasoning distinguishes *Marolda* from the line of cases in which reversal is based on improperly admitted evidence. When failure to suppress evidence constitutes the trial error leading to reversal, the prosecution has been prejudiced. In such a case, it is impossible to know whether the prosecution might have introduced additional evidence or what theory the prosecution might have pursued had the faulty evidence been excluded. Thus, when evidence has been erroneously admitted, retrial cannot be barred for lack of sufficient evidence because the prosecution has been prejudiced. *See, e.g.,* United States v. Harmon, 632 F.2d 812, 814 (9th Cir. 1980) (per curiam) (double jeopardy clause not bar to retrial when reversal based on improper admission of evidence); United States v. Mandel, 591 F.2d 1347, 1373-74 (4th Cir.) (the sufficiency of the evidence should be determined by the trier of fact on retrial), *rev'd on other grounds,* 602 F.2d 653 (4th Cir. 1979) (*en banc*), *cert. denied,* 445 U.S. 961 (1980); United States v. Block, 590 F.2d 535, 544 (4th Cir. 1978) (*Burks* not to be extended to require acquittal when properly admitted evidence is insufficient to support guilty verdict).

2080. 648 F.2d at 625. The standard for determining whether evidence is sufficient to sustain a verdict "is whether, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* at 624 (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

multiple punishment for the same offense.[2081] However, the double jeopardy clause does not bar the imposition of cumulative punishment when a single criminal act violates more than one statutory offense, provided that the Supreme Court's *Blockburger* test is satisfied.[2082] To impose consecutive sentences, each statutory offense for which the defendant is convicted must require proof of a fact or element not required by the others.[2083]

2081. Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873). When successive criminal acts violate the same statutory offense or several statutory offenses, the double jeopardy clause does not preclude the imposition of consecutive sentences. In Fierro v. MacDougall, 648 F.2d 1259 (9th Cir.) (per curiam), *cert. denied,* 454 U.S. 933 (1981), the defendant was convicted of eighteen state crimes and sentenced to 184 years in state prison. In rebutting the defendant's argument that the sentencing court was without authority to impose consecutive sentences, the Ninth Circuit stated that "[t]he imposition of consecutive sentences is nothing more than the imposition, for each crime, of the sentence fixed by legislative act." *Id.* at 1260.

2082. Blockburger v. United States, 284 U.S. 299, 304 (1932). Blockburger was convicted for selling eight grains of morphine in violation of sections one and two of the Harrison Narcotic Act. Section one prohibited the sale or distribution of certain drugs except in or from the original stamped package. Section two forbade the sale of these drugs except pursuant to a written order. Blockburger was sentenced to five years imprisonment for each violation, the terms to run consecutively. He argued that because the sale involved only one transaction, it constituted a single offense for which only one penalty could be imposed. In affirming the consecutive sentences, the Supreme Court set forth the following test: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. *See supra* note 2024.

2083. Blockburger v. United States, 284 U.S. at 304. The *Blockburger* test is a rule of statutory construction; it focuses on the statutory elements of the offense. The Supreme Court has applied the *Blockburger* doctrine when a single act violates more than one substantive offense. *See, e.g.,* Whalen v. United States, 445 U.S. 684, 693 (1980) (consecutive sentences for the statutory offenses of rape and killing in the perpetration of rape held unconstitutional; conviction for rape does not require proof of additional facts from the offense of killing in the course of rape); Harris v. United States, 359 U.S. 19, 23 (1959) (consecutive sentences for the separate offenses of purchasing heroin from an unstamped package and receiving heroin with knowledge that it was unlawfully imported); Gore v. United States, 357 U.S. 386, 388 (1958) (consecutive sentences for three separate offenses arising from a single transaction: sale of drugs without a written order, sale of drugs not in the original stamped package, and sale of drugs with knowledge that they had been unlawfully imported).

The Supreme Court has applied the *Blockburger* test to determine whether multiple punishment may be imposed for convictions of conspiracy and the underlying substantive offense. *See, e.g.,* Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975) (*Blockburger* test satisfied for conspiracy and the substantive offense of conducting illegal gambling business). The Supreme Court has also applied the *Blockburger* test to determine whether multiple punishment may be imposed when a single act violates two conspiracy statutes. *See, e.g.,* American Tobacco Co. v. United States, 328 U.S. 781, 787-88 (1946) (multiple punishment for conspiracy to restrain trade and conspiracy to monopolize trade not precluded by double jeopardy clause, even though only one agreement existed).

In *Albernaz v. United States,*[2084] the Supreme Court applied the *Blockburger* doctrine to uphold consecutive sentences for a single conspiratorial agreement that violated two conspiracy statutes. The defendants were convicted and received consecutive sentences for conspiring to import marijuana, a violation of 21 U.S.C. sections 960(a)(1) and 963,[2085] and for conspiring to distribute marijuana, a violation of 21 U.S.C. sections 841(a)(1) and 846.[2086] The violation of these two conspiracy statutes arose from a single agreement having dual objectives: to import marijuana and then distribute it domestically.[2087]

The defendants argued that congressional intent to authorize multiple punishment for a single agreement that violated these two conspiracy statutes was unclear,[2088] and therefore the rule of lenity should operate to preclude consecutive sentences.[2089] The Supreme Court ruled, however, that absent explicit legislative history on the issue of cumulative punishment for the violation of several statutes, the *Block-*

2084. 450 U.S. 333 (1981).

2085. 21 U.S.C. § 963 (1976) provides that: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment . . . ." The intentional importation of marijuana is prohibited in 21 U.S.C. § 960(a)(1) (1976).

2086. 21 U.S.C. § 846 (1976) provides that: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment . . . ." The intentional or knowing distribution of marijuana or possession with intent to distribute is prohibited in 21 U.S.C. § 841(a)(1) (1976).

2087. Defendants Albernaz and Rodriguez negotiated with a Drug Enforcement Administration (DEA) agent to procure a cargo of marijuana from a freighter in the Bahamas. The DEA agent arranged a rendezvous with the freighter; the cargo was unloaded onto the pick-up boat; and the two defendants were then arrested in a Miami hotel. United States v. Rodriguez, 585 F.2d 1234, 1238-39 (1978).

2088. The defendants conceded that the legislative history is silent as to Congress' intent to impose multiple punishment for a single agreement that violated sections 846 and 963. However, the defendants interpreted this silence as an *ambiguity* over whether Congress intended to authorize multiple punishment. In support of this argument, the defendants contended that the existence of two distinct conspiracy statutes was the result of two different House committees having jurisdiction over various subchapters of the Drug Abuse Prevention and Control Act of 1970. 450 U.S. at 341 n.1. In response to this contention, the Government argued that coordination between the two committees demonstrated Congress' awareness of the separate conspiracy provisions. *Id.* The Supreme Court concluded that "if anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the *Blockburger* rule and legislated with it in mind." *Id.* at 341-42.

2089. The rule of lenity operates only when a statutory ambiguity exists. "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Bifulco v. United States, 447 U.S. 381, 387 (1980) (quoting Ladner v. United States, 358 U.S. 169, 178 (1958)). In *Albernaz,* the Supreme Court stated that the rule of lenity was inapplicable because there was no statutory ambiguity regarding multiple punishment. 450 U.S. at 343.

burger test is controlling.[2090] After finding the legislative history to be silent,[2091] the Court applied the *Blockburger* doctrine to determine whether Congress intended to authorize multiple punishment.[2092] The Court found that the two conspiracy statutes satisfied the *Blockburger* test.[2093] The distinguishing element of the two offenses was the proscribed object of the conspiracy: section 846 prohibited conspiring to distribute marijuana as opposed to section 963 which prohibited conspiring to import marijuana. The Supreme Court concluded that because Congress intended to authorize cumulative punishment for conspiring to import and distribute marijuana, the double jeopardy clause does not bar consecutive sentences.[2094]

In *United States v. Tavelman,*[2095] the Ninth Circuit upheld consecutive sentences for conspiring to possess cocaine with intent to dis-

2090. *Id.* at 340. Relying on Braverman v. United States, 317 U.S. 49 (1942), the defendants argued that the *Blockburger* doctrine is not applicable when a single conspiratorial agreement violates more than one conspiracy statute. *Id.* at 339. However, *Braverman* does not support this contention. Unlike the *Albernaz* case, *Braverman* did not involve separate conspiracy statutes; rather, the single conspiratorial agreement, although encompassing several criminal offenses, violated only *one* conspiracy statute. *See* American Tobacco Co. v. United States, 328 U.S. 781 (1946) (single conspiracy violated two distinct conspiracy statutes).

2091. 450 U.S. at 340.

2092. The Ninth Circuit has applied the *Blockburger* test to discern whether Congress intended to authorize multiple punishment for a single agreement that violated two conspiracy statutes. *See, e.g.,* United States v. Marotta, 518 F.2d 681, 685 (9th Cir. 1975) (congressional intent to impose cumulative punishment for a conspiracy that violated two different sections of the Comprehensive Drug Abuse Prevention Act of 1970).

2093. 450 U.S. at 339.

2094. *Id.* at 344. In a concurring opinion, Justice Stewart, joined by Justices Marshall and Stevens, disagreed with the fact that the majority equated legislative intent with constitutionality. The majority concluded that "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution." *Id.* (footnote omitted). The concurring Justices interpreted this statement as limiting the *Blockburger* doctrine to only those situations in which Congress has failed to expressly authorize cumulative punishment. They assert that to impose multiple punishment when a single criminal act violates several statutory offenses, the *Blockburger* test must be satisfied regardless of Congress' express intent to authorize multiple punishment. The concurring Justices stated that "[n]o matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not . . . ." *Id.* at 345 (Stewart, J., concurring). This concern, however, did not arise in the present case, because the legislative history was silent and consequently the Court applied the *Blockburger* test to determine whether Congress intended to impose multiple punishment.

2095. 650 F.2d 1133 (9th Cir. 1981).

tribute[2096] and for violating the Travel Act, which prohibits interstate travel for the purpose of distributing cocaine.[2097] The defendants had flown from Los Angeles to Reno for a substantial cocaine purchase and were subsequently arrested by Drug Enforcement Administration agents. Arguing that both convictions arose from a single transaction and identical facts, defendant Job contended that the conspiracy conviction and Travel Act violation were not separately punishable offenses.[2098]

In affirming consecutive sentences, the Ninth Circuit compared the elements of the two offenses: the conspiracy did not require proof of interstate travel, and the element of agreement was not required for the Travel Act violation.[2099] The court compared the *Tavelman* case to *United States v. Wylie,*[2100] in which the Ninth Circuit held that in the context of narcotic offenses, consecutive sentences for conspiracy and the substantive offense are permissible under the double jeopardy clause.[2101] In *Tavelman,* however, the court went an additional step by upholding multiple punishment for a single act which led to convictions of conspiracy and Travel Act violations.[2102]

4. Sentence enhancement

In *United States v. DiFrancesco,*[2103] the Supreme Court addressed

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2096. 21 U.S.C. §§ 841(a)(1), 846 (1976) prohibit conspiring to possess cocaine with intent to distribute. *See supra* note 2086.

2097. 18 U.S.C. § 1952(a)(3) (1976) provides that:

> (a) Whoever travels in interstate or foreign commerce . . . with intent to—
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in . . . (3), shall be fined . . . or imprisoned . . . or both.

2098. 650 F.2d at 1140.

2099. *Id.*

2100. 625 F.2d 1371 (9th Cir. 1980) (consecutive sentences for conspiring to manufacture and distribute LSD and for the actual distribution of LSD), *cert. denied,* 449 U.S. 1080 (1981).

2101. The *Wylie* court applied the *Blockburger* test in determining that the imposition of multiple punishment for conspiracy and the substantive charge did not violate the double jeopardy clause: "As a general rule, a substantive charge, and conspiracy charge based on the substantive charge, pass muster under the *Blockburger* test and retain their separateness." *Id.* at 1381. *Accord* United States v. Kearney, 560 F.2d 1358, 1365-67 (9th Cir.) (*Blockburger* "required proof" test applied to uphold consecutive sentences for conspiracy and the substantive narcotics offenses), *cert. denied,* 434 U.S. 971 (1977).

2102. *Accord* United States v. Stevens, 612 F.2d 1226, 1231 (10th Cir. 1979) (conspiracy to distribute heroin and interstate travel to promote a conspiracy to distribute heroin considered separately punishable offenses), *cert. denied,* 447 U.S. 921 (1980).

2103. 449 U.S. 117 (1980). *See* Note, United States v. DiFrancesco: *Court Upholds State Initiated Sentence Appeals,* 32 MERCER L. REV. 1261 (1981).

for the first time the constitutionality of the Organized Crime Control Act of 1970, 18 U.S.C. section 3576,[2104] which allows the Government to seek, through an appeal, an increase of the sentence of a "dangerous special offender." The Court determined that section 3576 does not violate the double jeopardy protection against multiple trials and multiple punishment.[2105]

In 1977, the defendant had been convicted for participating in an arson-for-hire scheme. The Government sought enhanced sentencing under the dangerous special offender statute.[2106] Prior to the special offender's sentencing hearing for the 1977 conviction, the defendant was convicted in 1978 of several crimes arising from the "Columbus Day bombings." He was first sentenced to nine years imprisonment for the 1978 conviction. He was then sentenced as a dangerous special offender for the 1977 conviction and given two ten-year terms. All sentences were to be served concurrently. Thus, the 1977 conviction resulted in additional punishment of only one year. Seeking a more severe sentence for the 1977 conviction, the Government appealed under section 3576. The Second Circuit dismissed the appeal on the ground that increase of the defendant's sentence constituted multiple punishment in violation of the double jeopardy clause.[2107]

2104. 18 U.S.C. § 3576 (1976) provides in part:

> With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. . . . The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the finding and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

2105. 449 U.S. at 139.

2106. 18 U.S.C. § 3575 (1976).

2107. United States v. DiFrancesco, 604 F.2d 769, 783-87 (2d Cir. 1979). *See infra* note 2116.

In upholding the constitutionality of section 3576, the Supreme Court first ruled that the Government's right to appeal the sentence of a dangerous special offender does not violate the double jeopardy guarantee against multiple prosecutions.[2108] The majority compared a criminal sentence with a verdict of acquittal, and concluded that the double jeopardy protection against retrial and appellate review following an acquittal[2109] should not be extended to sentencing appeals.[2110] In reaching this conclusion, the Court considered the history of sentencing, Supreme Court decisions regarding the finality of sentences,[2111] and double jeopardy policy considerations. The Court noted that review of a sentence does not subject the defendant to the same expense, anxiety, and insecurity as the guilt or innocence stage of trial.[2112] Moreover, unlike a verdict of acquittal, there is no expectation of finality when sentenced as a dangerous special offender, because section 3576 constitutes notice of the Government's right to appeal.[2113] The majority also stated that for double jeopardy purposes a sentence does not constitute an "implied acquittal" of a greater sentence[2114] and that a defendant does not have a right to know, at any time, the exact limit of his sentence.[2115]

2108. 449 U.S. at 139.

2109. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) ("the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.' ") (quoting United States v. Ball, 163 U.S. 662, 671 (1896)).

2110. 449 U.S. at 132.

2111. In making the determination that a criminal sentence does not have the same degree of constitutional finalilty as a verdict of acquittal, the Court examined two Supreme Court cases. In Bozza v. United States, 330 U.S. 160 (1947), the Court approved the imposition of both a fine and imprisonment after the defendant had previously been sentenced to only imprisonment. The charged offense required a mandatory minimum of both fine and imprisonment.

In North Carolina v. Pearce, 395 U.S. 711 (1969), the imposition of a harsher sentence on retrial, after the defendant had succeeded in reversing his original conviction, was held constitutional. The *DiFrancesco* Court stated that "[i]f any rule of finality had applied to the pronouncement of a sentence, the original sentence in *Pearce* would have served as a ceiling on the one imposed at retrial." 449 U.S. at 135 (footnote omitted). The *DiFrancesco* Court further stated that *Pearce* stands for the proposition that the imposition of a sentence less than the maximum does not operate as an implied acquittal of a greater sentence. *Id.* at 135 n.14. In comparing the enhancement of an existing sentence by an appellate court under section 3576 to the imposition of a harsher sentence on retrial, the *DiFrancesco* Court found the difference to be "no more than a 'conceptual nicety.' " *Id.* at 135-36 (quoting North Carolina v. Pearce, 395 U.S. at 722).

2112. 449 U.S. at 136-37.

2113. *Id.* at 136.

2114. *Id.* at 133.

2115. *Id.* at 137. In support of the proposition that a defendant does not have the right to

The Supreme Court also ruled that enhancement of an existing sentence by the court of appeals under section 3576 does not constitute multiple punishment.[2116] The Court considered whether Congress had intended to authorize an increase of punishment on appellate review, and it concluded that section 3576 clearly indicates that Congress authorized sentencing appeals for dangerous special offenders.[2117] Finally, the majority compared section 3576 to decisions upholding the constitutionality of two-tiered criminal proceedings.[2118] The Court noted that section 3576 establishes a "two stage sentencing procedure" that does not subject a dangerous special offender to a second trial.[2119]

In a dissenting opinion, Justice Brennan, joined by Justices White, Marshall, and Stevens, concluded that the imposition of an enhanced sentence under section 3576 constitutes multiple punishment in violation of the double jeopardy clause.[2120] The dissenting Justices found

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know the limit of his punishment, the Court cited cases in which a defendant's probation or parole had been revoked and a sentence of imprisonment imposed. The Court then compared a dangerous special offender, having knowledge that his sentence may be increased on review by a court of appeals under section 3576, to a defendant on probation or parole who is aware that imprisonment may later be imposed. *Id.*

2116. *Id.* at 138-39. The Second Circuit relied on dictum in United States v. Benz, 282 U.S. 304, 307 (1931), for its determination that an increased sentence under section 3576 constitutes multiple punishment. United States v. DiFrancesco, 604 F.2d at 785. In *Benz,* the Court held that a trial judge had authority to reduce a sentence after the defendant's service had begun. The *Benz* Court cited Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873), for the proposition that increasing the severity of a penalty during the same term subjects the defendant to double punishment for the same offense. The *DiFrancesco* Court pointed out, however, that this dictum in *Benz* was not supported by *Ex parte Lange.* In *Ex parte Lange,* the defendant had received *both* imprisonment and a fine, even though the criminal statute that he had violated provided for punishment by *either* imprisonment or fine. After the defendant paid the fine and served five days in prison, the trial court, on a writ of habeas corpus, vacated the former judgment and sentenced him to a one-year prison term. The Supreme Court held that the trial court lacked authority to impose a second punishment because the defendant had already fully performed one of the alternative penalties. The *DiFrancesco* Court considered *Ex parte Lange* and the dictum in *Benz* inapplicable to whether the imposition of an increased sentence under section 3576 constitutes multiple punishment. 449 U.S. at 139.

2117. *Id.*

2118. *Id.* at 139-41. *See, e.g.,* Swisher v. Brady, 438 U.S. 204 (1978) (Maryland's two stage juvenile proceeding held constitutional against double jeopardy challenge). The *DiFrancesco* Court proposed a sentencing statute that would serve the same purpose as section 3576 but without raising double jeopardy issues. Under this hypothetical statute, Congress would provide that defendants convicted as dangerous special offenders receive a mandatory maximum sentence. If the trial court felt that the defendant should not receive the maximum penalty, however, it could recommend a lesser sentence to the court of appeals. 449 U.S. at 142.

2119. *Id.* at 140 n.16, 141.

2120. *Id.* at 152 (Brennan, J., dissenting). The dissenting Justices stated that the Supreme Court "has consistently *assumed* that an increase in the severity of a sentence subsequent to

no basis for differentiating between the finality of sentences and the finality of an acquittal verdict; thus, the double jeopardy clause precludes Government sentencing appeals just as it prevents appeals from an acquittal.[2121] The dissent also disagreed with the majority's "startling conclusion" that double jeopardy considerations have no significant application to the prosecutorial right to appeal under section 3576 because these appeals expose the defendant to "minimal incremental embarrassment and anxiety."[2122] The dissent pointed out that sentencing is at least as critical to the defendant as the determination of guilt or innocence. In response to the majority's contention that a defendant does not possess an expectation of finality when sentenced as a dangerous special offender, the dissenting Justices asserted that this reasoning could logically be extended to justify a statutory right to appeal acquittal verdicts.[2123]

In a separate dissent,[2124] Justice Stevens stated that the rationale for allowing the imposition of a more severe sentence upon retrial has no application to whether an existing sentence may be increased upon the Government's appeal under section 3576.[2125]

The double jeopardy clause allows the imposition of a harsher sentence on retrial after a defendant has succeeded in reversing his conviction.[2126] In *Bullington v. Missouri,*[2127] decided five months after *United States v. DiFrancesco,*[2128] the Supreme Court made an exception to this rule. The Court held that the double jeopardy clause barred the imposition of the death penalty upon the defendant's retrial under the Mis-

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its imposition . . . constitutes multiple punishment in violation of the Double Jeopardy Clause." *Id.* at 144-45. Although the dissent recognized that this assumption has only been stated as dicta, it asserted that the number of cases and authority of their sources offer impressive evidence of the prevalence of this view. *Id.* at 145.

2121. *Id.* at 146-52. The dissent noted that the majority's use of North Carolina v. Pearce, 395 U.S. 711 (1969), to distinguish between the finality of sentences and the finality of a verdict of acquittal was misplaced. In *Pearce,* the Supreme Court approved the imposition of a harsher sentence on *retrial* after the defendant had succeeded in having his original conviction and sentence set aside. In contrast, section 3576 authorizes the enhancement of an existing sentence on *appeal.* The dissent stated that "[i]t is the fact of the retrial itself that gives the trial court power to impose a new sentence . . . ." 449 U.S. at 151 (Brennan, J., dissenting).

2122. *Id.* at 149-50.

2123. *Id.* at 150.

2124. *Id.* at 152-54 (Stevens, J., dissenting).

2125. Justice Stevens advocates the position taken by Justice Harlan in a separate opinion in North Carolina v. Pearce, 395 U.S. 711, 744 (1969) (Harlan, J., concurring in part and dissenting in part).

2126. North Carolina v. Pearce, 395 U.S. 711, 723 (1969).

2127. 451 U.S. 430 (1981).

2128. 449 U.S. 117 (1980).

souri capital murder statute when the first trial resulted in a sentence of life imprisonment.[2129]

Robert Bullington had been indicted in Missouri for capital murder for the drowning of a young woman. Missouri law provided only two possible sentences for a conviction of capital murder: death or life imprisonment without eligibility for probation or parole for fifty years.[2130] Missouri's capital murder statute also required a bifurcated proceeding.[2131] At the guilt or innocence stage of Bullington's trial, the jury found him guilty of capital murder. The second phase of the trial involved a separate sentencing proceeding, during which the jury heard additional evidence of aggravating circumstances.[2132] The death penalty could have been imposed if the jury was convinced beyond a reasonable doubt that the aggravating circumstances warranted such a punishment.

After the jury returned a sentence of life imprisonment, the trial judge granted Bullington's motion for a new trial.[2133] Immediately thereafter, the State sought a retrial and filed notice that it would again seek the death penalty. Bullington then moved to strike the notice, claiming that the double jeopardy clause prohibited imposition of the death penalty on retrial. The Missouri Supreme Court disagreed.[2134]

In determining that the double jeopardy clause barred the imposition of the death penalty at Bullington's second trial, the Supreme Court distinguished Missouri's bifurcated capital murder proceeding from Supreme Court decisions that have authorized harsher sentences upon retrial.[2135] The majority noted that the Missouri statute did not

2129. 451 U.S. at 446.

2130. MO. REV. STAT. § 565.008.1 (1978).

2131. MO. REV. STAT. § 565.006 (1978).

2132. MO. REV. STAT. § 565.006.2 provides that in the presentence hearing "the jury . . . shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas."

2133. The trial judge granted Bullington's motion for a new trial on the basis of Duren v. Missouri, 439 U.S. 357 (1979), which was decided while the motion had been pending. In *Duren,* Missouri's statute allowing women to claim automatic exemption from jury service was declared unconstitutional, because it violated a defendant's sixth amendment right to have a jury drawn from a fair cross-section of the community.

2134. State *ex rel.* Westfall v. Mason, 594 S.W.2d 908 (Mo. 1980).

2135. 451 U.S. at 438-40. The Court distinguished Missouri's capital murder statute from three Supreme Court decisions. In Stroud v. United States, 251 U.S. 15 (1919), the defendant was tried and convicted of first degree murder three times. At his first trial, he had been sentenced to death; upon retrial he was reconvicted and sentenced to life imprisonment. After obtaining a writ of error, Stroud was again tried and the death sentence was imposed. Unlike *Bullington*, *Stroud* did not involve a separate sentencing hearing, and there were no

provide the sentencer with unlimited discretion to select from a wide range of punishments; rather, explicit standards guided the jury's decision between life imprisonment and the death penalty.[2136] The Court compared Missouri's separate sentencing proceeding to "a trial on the issue of punishment,"[2137] in which the State had the burden of proving beyond a reasonable doubt that aggravating circumstances justified the death penalty. The Supreme Court also distinguished Missouri's capital murder proceeding from the dangerous special offender statute that was held constitutional in *United States v. DiFrancesco.*[2138]

The majority extended double jeopardy principles to the sentencing phase of trial.[2139] The Court first considered the rule that retrial is barred when a defendant's conviction has been reversed on the ground that the evidence was legally insufficient to sustain a guilty verdict.[2140] The Court applied this principle to Missouri's capital murder sentencing proceeding.[2141] Unlike usual sentencing proceedings in which it is impossible to determine why a sentence less than the statutory maximum has been imposed, Missouri's statute "*explicitly requires* the jury to determine whether the prosecution has 'proved its case.' "[2142] Thus,

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standards for setting the punishment. In North Carolina v. Pearce, 395 U.S. 711 (1969), the landmark case establishing the general rule that a harsher sentence may be imposed on retrial, a wide range of punishments was available without standards guiding the judge's discretion. Finally, in Chaffin v. Stynchcombe, 412 U.S. 17 (1973), the jury had unlimited discretion to select from a broad range of punishments for the defendant's robbery conviction: death, life imprisonment, or four to fifteen years imprisonment. The defendant was sentenced to fifteen years in prison; upon retrial he was reconvicted and sentenced to life imprisonment. Unlike *Bullington,* these three cases did not involve a separate sentencing proceeding, during which the prosecution could introduce evidence to support a particular sentence.

2136. 451 U.S. at 438.

2137. *Id.*

2138. 449 U.S. 117 (1980) (18 U.S.C. § 3576, authorizing the sentence of a dangerous special offender to be increased by court of appeals upon Government's appeal, held not to violate double jeopardy clause). The *Bullington* Court noted that *DiFrancesco* involved enhancement of an existing sentence on appellate review, rather than the imposition of a harsher sentence on retrial. Although section 3576 requires a separate presentence hearing to classify the defendant as a dangerous special offender, the judge is given unfettered discretion to impose a wide range of punishments. The *Bullington* Court also noted the different standards of proof: section 3576 requires only that the Government prove by a preponderance of the information that the defendant is a dangerous special offender, while Missouri's sentencing proceeding requires proof beyond a reasonable doubt that the death penalty is warranted. 451 U.S. at 440-41.

2139. *Id.* at 441-46.

2140. *See, e.g.,* Burks v. United States, 437 U.S. 1 (1978); Green v. United States, 355 U.S. 184 (1957) (retrial for first degree murder barred by double jeopardy clause after defendant had been found guilty of second degree murder at first trial).

2141. 451 U.S. at 445.

2142. *Id.* at 444.

the jury's verdict of life imprisonment indicated that the State had failed to introduce sufficient aggravating circumstances to warrant the imposition of the death penalty; and as a result, the death penalty could not be imposed at Bullington's second trial. The majority also applied to sentencing the double jeopoardy principle that bars retrial following a verdict of acquittal.[2143] The Court characterized the jury's verdict of life imprisonment as an acquittal of the death penalty, and thus double jeopardy barred imposition of the death penalty at Bullington's retrial.[2144]

In a dissenting opinion, Justice Powell, joined by Chief Justice Burger and Justices White and Rehnquist, concluded that the double jeopardy clause allows the imposition of a harsher sentence on retrial, including the death penalty.[2145] The dissent stated that the procedural differences between *Bullington* and previous Supreme Court decisions allowing harsher sentences on retrial were unimportant for double jeopardy purposes.[2146] The dissenting Justices considered this decision to be the first in which the Supreme Court has held that the double jeopardy clause applies equally to determinations of guilt or innocence and to the sentencing phase of trial.[2147]

The dissent also disagreed with the majority's application of the "implicit acquittal" principle to sentencing.[2148] It criticized the majority's decision as inconsistent with dictum in *United States v. DiFrancesco,*[2149] decided the same term, in which the Court stated that "the imposition of [a] sentence does not operate as an implied acquittal of any greater sentence."[2150] The dissent further noted that the policy reasons for attaching absolute finality to an acquittal verdict do not apply to a sentencing decision imposing less than the statutory maximum.[2151]

2143. *Id.* at 446. The majority determined that double jeopardy considerations which underlie the finality accorded to an acquittal were equally applicable to Missouri's sentencing hearing. *Id.* at 445-46.

2144. *Id.* at 445. The majority expressly refused to apply the reasoning in Stroud v. United States, 251 U.S. 15 (1919), to Missouri's sentencing procedure. 451 U.S. at 446. *See supra* note 2135.

2145. 451 U.S. at 453 (Powell, J., dissenting).

2146. *Id.* at 448-49 n.2.

2147. *Id.* at 449.

2148. *Id.* at 451.

2149. 449 U.S. 117 (1980).

2150. *Id.* at 136 n.14.

2151. 451 U.S. at 451 (Powell, J., dissenting). The dissent stated that "[t]he possibility of a higher sentence is acceptable under the Double Jeopardy Clause, whereas the possibility of error as to guilt or innocence is not . . . ." *Id.*

The dissent disagreed with the majority's application of Burks v. United States, 437

In a 1981 survey case, *United States v. Williams,*[2152] the Ninth Circuit considered whether increasing the severity of a sentence on retrial was warranted. In 1978, defendant Williams had been convicted by a federal jury of bank robbery, for which he received a twenty-year prison term with parole eligibility after six years and eight months. While his appeal was pending, Williams was convicted in a California superior court of first-degree murder. The state judge sentenced Williams to life imprisonment, to run *concurrently* with the twenty-year federal bank robbery sentence. Because California law established parole eligibility after serving seven years of a life term, Williams would have been eligible for parole under both sentences after seven years. Williams' bank robbery conviction was reversed by the Ninth Circuit, and in 1979 he was retried and again convicted. The district judge sentenced Williams to a ten-year prison term, to run *consecutively* with the state life term. Under this second federal sentence, Williams would be eligible for parole after serving ten years and four months—seven years for the state term, plus three years and four months for the consecutive ten-year federal term. Williams appealed this second bank robbery sentence, contending that a harsher sentence on retrial was unjustified.

The Ninth Circuit first determined whether the second federal bank robbery sentence was actually more severe than the original one.[2153] In making this determination, the court did not consider the technical length of the sentence but rather the overall impact of the sentence on the defendant.[2154] Although Williams' second bank robbery sentence was one-half as long as the original one, the practical effect of the second sentence was to increase the length of his incarceration.[2155] Therefore, the federal judge's imposition of a ten-year sen-

U.S. 1 (1978), to Missouri's capital murder sentencing proceeding. A sentence of life imprisonment does not invariably indicate that the State had introduced insufficient evidence to impose the death penalty. The dissent noted that the trial court had instructed the jury that although it might find sufficient aggravating circumstances to justify imposing the death penalty, it was not compelled to do so. Therefore, there was "significantly less reason to assume that the State failed to prove its case." 451 U.S. at 452 n.4 (Powell, J., dissenting).

2152. 651 F.2d 644 (9th Cir. 1981).

2153. *Id.* at 647.

2154. *See* Thurman v. United States, 423 F.2d 988, 989 (9th Cir.) (totality of the impact of a sentence on defendant determines its severity), *cert. denied,* 400 U.S. 911 (1970).

2155. The court compared Williams' situation to United States v. Young, 593 F.2d 891 (9th Cir. 1979). Young had been sentenced to a twelve-year prison term for a drug offense. While his appeal was pending, he was convicted of a separate drug offense and received a fifteen-year sentence, to run *concurrently* with the earlier sentence. After the first conviction was reversed on appeal, Young was retried and convicted. The district judge imposed a new twelve-year term, to run *consecutively* with the fifteen-year sentence. The sentence imposed

tence, to run consecutively with the state penalty, increased the severity of Williams' punishment.[2156]

After finding that the second bank robbery sentence was indeed harsher than the original one, the Ninth Circuit considered whether the increase in severity was warranted. The court applied the standard developed in *North Carolina v. Pearce*[2157]: a harsher sentence may be imposed on retrial when there exists "objective information concerning identifiable conduct on the part of the defendant, occurring after the . . . original sentencing proceeding."[2158] The Government argued that Williams' *indictment* and *conviction* for murder justified imposing a harsher sentence on retrial, because they occurred after the original bank robbery sentencing and reflected negatively on Williams' character.[2159] In rejecting this argument, the Ninth Circuit stated that only *conduct* occurring *after* the first sentencing may be used as a basis for increasing punishment on retrial. Because the murder had occurred *before* the original sentencing, it did not justify a harsher sentence on retrial.[2160] The court found nothing in the record concerning Williams' conduct after the first bank robbery sentencing that would justify imposing a harsher sentence, and thus it concluded that the district judge's second sentence had violated the *Pearce* standard.[2161] The 1979 bank robbery sentence was vacated and the case was remanded for resentencing.

In the 1981 case of *United States v. Diogenes,*[2162] the Ninth Circuit held that the federal bank robbery statute, 18 U.S.C. section 2113, preempts the permissible penalties for a bank robbery conviction.[2163] Section 2113 provides penalties for bank robberies of varying degrees of violence, as well as enhanced punishment when the defendant "uses" a dangerous weapon.[2164] Diogenes was convicted of bank rob-

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on retrial had the effect of increasing Young's original punishment of twelve years imprisonment to twenty-seven years. The Ninth Circuit determined that Young's second sentence was unwarranted, because the record failed to show any affirmative reasons justifying the imposition of a harsher sentence on retrial. *Id.* at 893. The fact that both of Young's trials had been in federal court, while Williams' intervening conviction had been in state court, was considered immaterial. 651 F.2d at 647.

2156. *Id.* at 648.

2157. 395 U.S. 711, 726 (1969).

2158. *Id.* This standard protects the defendant from potential vindictiveness by the resentencing judge when the defendant successfully appeals his original conviction. *Id.* at 725.

2159. 651 F.2d at 648.

2160. *Id.*

2161. *Id.*

2162. 638 F.2d 125 (9th Cir. 1981).

2163. *Id.* at 126.

2164. 18 U.S.C. § 2113 (1976) provides in pertinent part:

bery involving force, violence, and intimidation, a violation of section 2113(a).[2165] He was also convicted under 18 U.S.C. section 924(c)(2)[2166] for *carrying* a firearm during the commission of a federal felony. Diogenes received consecutive sentences of twenty years for the bank robbery conviction and five years for carrying a firearm. He appealed, contending that Congress had not intended multiple punishment for a single bank robbery. Relying on two recent Supreme Court decisions,[2167] the Ninth Circuit held that enhanced sentencing under section 924(c) is impermissible when a defendant has been convicted of a section 2113 bank robbery.[2168]

The court considered whether section 924(c)(2) remains applicable when a defendant *carries* rather than *uses* a firearm, since section 2113(d) authorizes the imposition of a harsher sentence for only the "use of a dangerous weapon" during the commission of a bank rob-

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(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; . . . Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

. . . .

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

2165. *Id.*

2166. 18 U.S.C. § 924(c) (1976) provides in relevant part:

Whoever—(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years.

2167. In Busic v. United States, 446 U.S. 398 (1980), the defendants were convicted of armed assault on federal officers and received enhanced sentences under section 924(c) for using a firearm. The Supreme Court held that sentence enhancement under section 924(c) is impermissible when the substantive felony statute contains its own enhancement provision. *Id.* at 404. In *Busic,* the Court relied on a 1978 decision, Simpson v. United States, 435 U.S. 6 (1978), which involved the federal bank robbery statute, 18 U.S.C. § 2113 (1976). Simpson was convicted of aggravated bank robbery in violation of section 2113(a); he received an enhanced penalty under both sections 2113(d) and 924(c)(1) for using a firearm. The Supreme Court concluded that a defendant convicted for a single bank robbery committed with a firearm may not be sentenced under both 924(c) and 2113(d). 435 U.S. at 16.

Neither *Busic* nor *Simpson* addressed whether a defendant convicted of *carrying* a firearm, rather than actually *using* it, may be punished under section 924(c)(2) when the enhancement provision of the underlying felony statute authorizes a harsher sentence only upon *"use"* of a firearm.

2168. 638 F.2d at 126. *Diogenes* overruled United States v. Brown, 602 F.2d 909 (9th Cir. 1979), which held that the Government had discretion to select whether to prosecute the defendant under section 2113(d) or section 924(c).

bery.[2169] After reviewing the legislative history of section 924(c),[2170] the Ninth Circuit concluded that Congress had clearly intended section 924(c) to be inapplicable when the underlying felony statute contains its own enhancement provision.[2171] In support of this conclusion, the court explained that the coexistence of enhanced sentencing under sections 2113 and 924(c)(2) would lead to absurd consequences: an enhanced sentence under section 924(c)(2) for *carrying* a firearm during a bank robbery might be greater than the penalty under section 2113(d) for actually *using* a dangerous weapon.[2172] Thus, section 2113 preempted the permissible penalties for Diogenes' bank robbery conviction; and as a result, the district court's imposition of a five-year prison term under section 924(c)(2) was unlawful.[2173]

The Ninth Circuit also considered whether Diogenes could have received an enhanced sentence under section 2113(d) for carrying a firearm.[2174] Invoking the doctrine of negative implication,[2175] the court determined that section 2113(d) applies only to a defendant who actually *uses* a dangerous weapon and not merely *carries* one.[2176] Thus, Diogenes' conviction for carrying a firearm did not warrant an increased penalty under the bank robbery statute.

B. Inconsistent Verdicts

A verdict is inconsistent when a defendant is found guilty on one count of an indictment and innocent on another despite evidence of

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2169. 638 F.2d at 127-28.

2170. Congressional intent regarding the scope of section 924(c) was found in Representative Poff's statement:

> For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112 or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies.

114 CONG. REC. 22232 (1968).

2171. 638 F.2d at 127-28.

2172. *Id.* at 128. The maximum penalty for committing a bank robbery with the *use* of a dangerous weapon, a violation of section 2113(d), is twenty-five years imprisonment. In contrast, the maximum sentence for *carrying* a firearm during the commission of a bank robbery in violation of sections 2113(a) and 924(c)(2) is thirty years' imprisonment.

2173. *Id.*

2174. *Id.* at 127.

2175. The doctrine of negative implication provides that the court may not expand the scope of enhanced sentencing when the legislature, by its explicit language, has preempted the field.

2176. *Id.*

culpability as to both counts.[2177] Verdicts are also inconsistent when evidence of culpability applies equally to co-defendants but one defendant is found guilty while another is found innocent.[2178]

In *Dunn v. United States,*[2179] the Supreme Court held that inconsistent verdicts in a criminal jury trial may stand.[2180] The Court reasoned that inconsistent verdicts do not, of necessity, indicate that the jury was not convinced of the defendant's guilt.[2181] Rather, such verdicts may be the result of jury sympathy for a defendant facing a harsh sentence.[2182] In addition, the Court held that although the verdict may have resulted from compromise or mistake on the part of the jury, verdicts cannot be overturned on the basis of speculation about or inquiry into such matters.[2183]

Because the *Dunn* Court's reasoning was in large part based upon the nature and function of juries, the Court did not address the effect of inconsistent verdicts in federal criminal bench trials. The circuits have split on this issue. In *McElheny v. United States,*[2184] for example, the Ninth Circuit upheld inconsistent verdicts in a bench trial, relying on *Dunn* and noting that it was "well settled" that verdicts need not be consistent.[2185] The court, however, did not address the issue of whether distinctions between jury and bench trials merited a different resolution of the inconsistent verdict issue.

Conversely, in *United States v. Maybury,*[2186] the Second Circuit reversed a guilty verdict in a bench trial on the ground that it was inconsistent with an acquittal on another count. The court interpreted *Dunn* narrowly, restricting its holding to *jury* trials.[2187]

2177. *See, e.g.,* McElheny v. United States, 146 F.2d 932, 933 (9th Cir. 1944).

2178. *See, e.g.,* United States v. Duz-Mor Diagnostic Lab., Inc., 650 F.2d 223, 225 (9th Cir. 1981).

2179. 284 U.S. 390 (1932).

2180. *Id.* at 393. "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." *Id.*

In *Dunn* the defendant was indicted on three counts of maintaining a common nuisance (keeping liquor for sale in the back room of his sporting goods store), unlawfully possessing liquor, and unlawfully selling liquor. On the same evidence, the jury found the defendant guilty on the first count but not guilty on the second and third counts. *Id.* at 391-92.

2181. *Id.* at 393 (citing Steckler v. United States, 7 F.2d 59, 60 (2d Cir. 1925)).

2182. 284 U.S. at 393.

2183. *Id.* at 394.

2184. 146 F.2d 932 (9th Cir. 1944).

2185. *Id.* at 933 (citing Dunn v. United States, 284 U.S. 390 (1932)).

2186. 274 F.2d 899 (2d Cir. 1960).

2187. *Id.* at 903. "Since we find no experience to justify approval of an inconsistent judgment when a criminal case is tried to a judge, we think logic should prevail." *Id.*

The *Maybury* court distinguished *Steckler* and *Dunn* by noting that those cases:

> show on their face that the decision to ignore inconsistencies in the verdict of a jury

In *United States v. West,*[2188] the Eighth Circuit declined to follow *Maybury.* Instead, the court relied on *Dunn* and *McElheny* and ruled that consistency in verdicts on a multiple-count indictment is unnecessary in either a bench or jury trial.[2189]

In *Rivera v. Harris,*[2190] the Second Circuit introduced the concept of "rational explanation."[2191] The court reasoned that because facially inconsistent verdicts might be rationally explained, such inconsistency does not constitute unfairness *per se.* In the absence of a rational explanation, however, an inconsistent verdict is a violation of a defendant's right to due process of law.[2192] The court observed that a requirement of appropriate findings would dispel any uncertainty about the validity of the conviction.[2193] Although the *Rivera* court cited *Maybury* with approval, it noted that its decision, unlike that in *Maybury,* was constitutionally based.[2194]

The Ninth Circuit recently considered the effect of inconsistent verdicts in a criminal bench trial in *United States v. Duz-Mor Diagnos-*

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in a criminal case was based on special considerations relating to the nature and the function of the jury in such cases rather than on a general principle to be applied even when these considerations were absent.

Id. at 902.

The relevant differences between jury and bench trials as noted by the *Maybury* court were: (1) the jury was originally a replacement of trial by ordeal and was not conceived of as a rational body. Its subsequent rationalization has been gradual and has not been completed, as inconsistent verdicts indicate; (2) the requirement of jury unanimity expresses the verdict of the neighborhood, community, or country. "Ignoring inconsistency in a jury's disposition of the counts of a criminal indictment may thus be deemed a price for securing the unanimous verdict that the Sixth Amendment requires." *Id.* at 902-03 (citing Andres v. United States, 333 U.S. 740, 748 (1948)).

Judges, on the other hand, should be as rational as possible; they do not reach unanimity with themselves, and they do not speak for the community. Thus, no allowance for inconsistency should be made. 274 F.2d at 902-03.

2188. 549 F.2d 545 (8th Cir.), *cert. denied,* 430 U.S. 956 (1977).

2189. *Id.* at 533 (citing Dunn v. United States, 284 U.S. 390 (1932); McElheny v. United States, 146 F.2d 932 (9th Cir. 1944)).

2190. 643 F.2d 86 (2d Cir. 1981).

2191. *Id.* at 92.

2192. *Id.* at 96. The *Rivera* court actually cited two tests for determining the validity of inconsistent verdicts: the identical evidence test, in which *any* difference as to evidence with respect to each count (or co-defendant) will justify apparent inconsistency; and the rational basis test, in which only a difference capable of explaining the apparent inconsistency will allow the verdict to stand. The second test was ultimately adopted by the court. *Id.* at 93.

2193. *Id.* at 97.

2194. *Id.* at 94 (citing United States v. Maybury, 274 F.2d 899 (2d Cir. 1944)). The *Rivera* court approved the basis of the *Maybury* decision, namely the existence of fundamental differences between judge and jury. *See supra* note 2187. But the court suggested that in contrast to the constitutional basis of its own holding, the *Maybury* court may simply have been exercising its supervisory power over the administration of criminal justice within the Second Circuit. 643 F.2d at 94.

tic Laboratory, Inc.[2195] The court distinguished *McElheny*[2196] and relied extensively on *Rivera*[2197] in holding that unless there existed a rational explanation for inconsistent verdicts, the defendant corporation would be deprived of its "fundamental interest in liberty" without due process of law.[2198] The court would then be required to set aside the conviction.[2199]

In *Duz-Mor*, the laboratory and its president and chief technologist, Irigene Morehead, were indicted for participation in an illegal kickback scheme.[2200] Morehead and her husband were the sole shareholders in the corporation.[2201] The trial judge dismissed the indictment against Morehead but ultimately entered a judgment of conviction against the corporation.[2202] Because the evidence of culpability applied equally to Morehead and the corporation, the latter's appeal raised the inconsistent verdict issue.[2203]

The court treated the dismissal of Morehead as an acquittal,[2204] thus bringing the inconsistency issue into sharp focus. Although it followed the reasoning of the *Rivera* court, the *Duz-Mor* court stressed that both the *Rivera* right to due process of law and an additional right to equal protection under the law were relevant to its decision. Because *Duz-Mor* involved inconsistency between verdicts as to multiple defendants, "there [was] a constitutional concern that like defendants be treated equally."[2205] Accordingly, the court remanded the case to the

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2195. 650 F.2d 223 (9th Cir. 1981).

2196. *Id.* at 226 n.2. The *Duz-Mor* court noted that: (1) *McElheny* concerned an inconsistency between multiple counts of an indictment whereas *Duz-Mor* concerned inconsistency between verdicts as to multiple defendants; *see supra* notes 2177-78 and accompanying text; (2) the *McElheny* court failed to consider the differences between judge and jury which were discussed in *Maybury* and *Rivera;* (3) regardless of whether consistency is constitutionally required, the court has the power to require findings explaining seemingly inconsistent verdicts as part of its supervisory power over the criminal justice system within its jurisdiction. 650 F.2d at 226 n.2.

2197. "[W]e adopt the *Rivera* approach." *Id.* at 227.

2198. *Id.* "[W]e do not hold that an inconsistency between the verdicts invalidates Duz-Mor's conviction. Rather, we are concerned with Duz-Mor's due process right to have its conviction rest on a rational basis, whether or not the conviction is consistent with the dismissal of the indictment against [the co-defendant]." *Id.* at 226 n.3.

2199. *Id.* at 227.

2200. Duz-Mor and Morehead were charged with offering to make payments in exchange for the referral of laboratory business for which they would be reimbursed from Medicare and MediCal funds. *Id.* at 225.

2201. *Id.*

2202. *Id.*

2203. *Id.*

2204. *Id.* at 227.

2205. *Id.* at 226 n.2. *See supra* note 2192. Although *Rivera* also concerned multiple de-

trial court for an explanation of its decision and ordered the corporation's conviction to be set aside unless the trial court could articulate a rational basis for the apparent inconsistency.[2206]

C. *Appeals*

1. Finality

Finality is a prerequisite to appeal within the federal judicial system.[2207] It acts to prevent piecemeal litigation by eliminating delays at the trial level, thus promoting effective and fair administration of the criminal law.[2208] The Supreme Court, however, has created an exception[2209] to the finality requirement when (1) there is a complete and final rejection of the claim,[2210] (2) the claim is separable from, and collateral to, the merits of the action,[2211] and (3) the right upon which the claim is based will be lost if immediate appeal is not permitted.[2212]

a. subject matter jurisdiction

In *United States v. Layton,*[2213] the Ninth Circuit ruled that a subject matter jurisdiction claim did not satisfy the last of the above requirements because it would not be lost upon denial of defendant's interlocutory appeal.[2214] According to the court, a subject matter claim could be effectively reviewed in a post-judgment appeal.[2215]

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fendants, one of whom received a facially inconsistent guilty verdict, the court did not address the equal protection issue.

2206. 650 F.2d at 227.

2207. 28 U.S.C. § 1291 (1976) provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts . . . except where a direct review may be had by the Supreme Court."

2208. DiBella v. United States, 369 U.S. 121, 124 (1962) (citing Cobbledick v. United States, 309 U.S. 323, 324-26 (1940)).

2209. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). In *Cohen,* the plaintiff was required by statute to post security for reasonable expenses incurred by the defense. He challenged this requirement in the trial court, but did not prevail. On appeal, he successfully argued that if he had to wait until after trial to appeal the imposition of the security, the issue would be irretrievably lost. *Id.* at 544-45. *See also* Abney v. United States, 431 U.S. 651, 660 (1977) (double jeopardy claim).

2210. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

2211. *Id.*

2212. *Id.*

2213. 645 F.2d 681 (9th Cir. 1981). *Layton* arose out of the Jonestown, Guyana massacre. The defendant, who was in Guyana when the indictment was returned, claimed that the statutes under which he was indicted required his presence in the United States. *Id.*

2214. *Id.* at 683.

2215. The *Layton* court relied on United States v. Sorren, 605 F.2d 1211, 1213-15 (1st Cir. 1979), in denying the interlocutory appeal. The *Sorren* court rejected a pretrial challenge to the court's personal jurisdiction, which *Layton* characterized as a "much more attractive

b. criminal action estoppel defense

In *United States v. Sears, Roebuck, and Co.,*[2216] the Ninth Circuit ruled that a defense based on the theory that the government "actively misled" the defendant failed to meet both the second and third requirements of the finality exception.[2217] According to the court, the issue raised by this defense was that of criminal intent. A hearing on the issue would therefore be indistinguishable from a trial on the merits.[2218] Such a hearing was certainly not separable from or collateral to the merits. Moreover, because the defense could be raised at trial,[2219] it would not be lost upon denial of defendant's immediate appeal.

c. selective prosecution

The *Sears* court also determined that although selective prosecution *may* provide the basis for an interlocutory appeal, the particular claim raised by the defendant did not satisfy the requirement of finality.[2220] The court cited language from *United States v. Wilson,*[2221] limiting application of the finality exception to prosecutions "based on impermissible grounds such as race, religion, or the exercise of constitutional rights."[2222] As a corporation, defendant Sears could not argue that it was being prosecuted on racial or religious grounds.[2223] Regarding its constitutional rights, the Ninth Circuit stated that defendant failed to make such a claim.[2224] Instead, Sears "merely [made] vague

candidate for interlocutory appeal." 645 F.2d at 683. Logically, however, the denial of a subject matter jurisdiction claim should be immediately appealable. Fair administration of justice and judicial economy are both served by speedy resolution of subject matter jurisdiction because the claim goes to the core of whether the trial should be held in the first place.

2216. 647 F.2d 902 (9th Cir. 1981).

2217. *Id.* at 904 n.12. Sears was charged with mailing false statements and presenting false invoices to the Customs Service. Sears argued that because the Service had always known that Sears' invoices did not reflect the actual (lower) price it had paid for merchandise imported from Japan, the Service was estopped from denying their accuracy. *Id.*

2218. *Id.*

2219. *Id.* The *Sears* court noted that requiring the defense to be raised at trial would enable the defendant to develop the defense to its greatest potential. *Id.*

2220. *Id.*

2221. 639 F.2d 500 (9th Cir. 1981).

2222. 647 F.2d at 904 (citing 639 F.2d at 503). *See* Oyler v. Boles, 368 U.S. 448, 456 (1962) (equal protection challenge to conviction under habitual offender statute denied because "[e]ven though the statistics . . . might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.").

2223. 647 F.2d at 904 (citing *United States v. Wilson*, 639 F.2d at 503-04).

2224. 647 F.2d at 904-05. The *Sears* court's language implies that the defendant did not argue that its right "to engage freely in business and foreign commerce" was a *constitutional* right. By disposing of the defendant's claim in this manner, the Ninth Circuit avoided ad-

assertions that its right to engage freely in business and foreign commerce [was] being interfered with by the instant prosecution."[2225] These assertions alone, the court determined, would not support a selective prosecution claim.[2226]

d. vindictive prosecution

Like selective prosecution claims, vindictive prosecution claims also merit immediate appeal.[2227] In *United States v. Shaw,*[2228] the Ninth Circuit determined that this principle extends as well to prosecutions that have the *appearance* of being vindictive.[2229] In *Shaw,* the appearance of vindictiveness arose when the prosecution moved to vacate a plea-bargained guilty plea in retaliation for the defendant's filing a motion in arrest of judgment against the single remaining charge.[2230] Although four counts had been filed against him,[2231] the defendant made a plea bargain allowing him to plead guilty to one count of his choice. Because his lawyers believed that the court lacked subject matter jurisdiction over the count of bribing a public official, the defendant chose to plead guilty to that count.[2232] In exchange, the prosecution dropped the charges on the other counts.[2233] Subsequently, defendant moved to arrest the judgment for lack of subject matter jurisdiction.[2234] The prosecution was then granted a motion to vacate, and the trial court changed Shaw's plea from guilty on one count to not guilty on all

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dressing whether the right asserted is indeed constitutional. Business liberty interests under the fourteenth amendment have been expressly accorded a lesser degree of protection than other constitutional interests since the decision in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Courts have, however, been willing to recognize that these interests should be afforded some protection, even if it is only that offered by the rational basis test. *See, e.g.,* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

2225. 647 F.2d at 905 (citing United States v. Choate, 619 F.2d 21, 23-24 (9th Cir. 1980)).

2226. 647 F.2d at 905.

2227. United States v. Griffin, 617 F.2d 1342, 1345 (9th Cir.), *cert. denied,* 449 U.S. 863 (1980).

2228. 655 F.2d 168 (9th Cir. 1981).

2229. *Id.* at 171. *See* United States v. Groves, 571 F.2d 450, 453 (9th Cir. 1978).

2230. 655 F.2d at 171.

2231. The four counts included conspiracy, mail fraud, and two bribery counts. *Id.* at 170.

2232. *Id.*

2233. *Id.*

2234. *Id.* Federal Rule of Criminal Procedure 34 provides:

> The court on motion of the defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after the verdict or finding of guilty, or after plea of guilty or *nolo contendere,* or within such further time as the court may fix during the 7-day period.

FED. R. CRIM. P. 34.

four counts.[2235] The Ninth Circuit ruled that the prosecution's motion to vacate created at least the appearance of vindictiveness, because its effect was to increase the defendant's total exposure to punishment.[2236]

e. grand jury investigations

The Supreme Court has prohibited interlocutory appeals from grand jury investigations,[2237] reasoning that the need for grand jury secrecy overrides the need for immediate appeal.[2238] However, once grand jury proceedings have terminated, a disclosure order under Federal Rule of Criminal Procedure 6(e) is considered a final decision.[2239] In *In re Grand Jury Investigation No. 78-184,*[2240] the Ninth Circuit ruled that because the grand jury investigation had been completed, a subsequent disclosure order in a civil action was appealable.[2241] The court rejected an argument raised by the Government that the order was not appealable because improperly obtained evidence from a grand jury may be suppressed in a subsequent civil proceeding.[2242] Inherent in the court's reasoning was the concept that the damage from

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2235. 655 F.2d at 170.

2236. *Id.* at 171 (citing Blackledge v. Perry, 417 U.S. 21, 28 (1974)). *See also* United States v. Burt, 619 F.2d 831, 836 (9th Cir. 1980) (when defendant proves that charges have been increased after exercising constitutional or statutory right, appearance of vindictiveness has been demonstrated); United States v. Groves, 571 F.2d 450, 453 (9th Cir. 1978) ("[I]t is the *appearance of vindictiveness,* rather than *vindictiveness in fact,* which controls.").

2237. Cobbledick v. United States, 309 U.S. 323, 327-28 (1940).

2238. In United States v. Procter & Gamble Co., 356 U.S. 677 (1958), the Court enumerated the reasons for secrecy:

> (1) To prevent escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [an] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Id. at 681-82 n.6 (quoting United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954)).

2239. *See* United States v. Sobatka, 623 F.2d 764, 766 (2d Cir. 1980).

2240. 642 F.2d 1184 (9th Cir. 1981), *cert. granted,* — U.S. —, 102 S. Ct. 2034 (1982).

2241. *Id.* at 1187. The defendants had plea bargained to tax fraud charges. The Civil Division of the United States Justice Department then moved for disclosure of grand jury proceedings for possible use in subsequent civil actions. Nine months after the order, the Government filed a civil suit. *Id.* at 1186-87. *See also* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 233 (1979) (Rehnquist, J., concurring); *In re* Grand Jury Investigation, 630 F.2d 996, 999-1000 (3d Cir.), *cert. denied,* 449 U.S. 1081 (1980).

2242. 642 F.2d at 1188. *See In re* April 1977 Grand Jury Subpoenas (General Motors), 584 F.2d 1366, 1370 (6th Cir. 1978) (en banc), *cert. denied,* 440 U.S. 934 (1979); Coson v. United States, 533 F.2d 1119, 1120-21 (9th Cir. 1976) (per curiam).

disclosure *itself* cannot be undone by subsequently suppressing the fruits of the disclosure.

f. juvenile certification orders

In *Guam v. Kingsbury*,[2243] the Ninth Circuit held that pretrial juvenile certification orders which cannot be appealed after conviction constitute final decisions.[2244] In *Kingsbury,* the defendant appealed the district court's affirmance of a Guam juvenile court's order certifying him to stand trial as an adult.[2245] The Ninth Circuit found the applicable Guam statutes and precedent unclear regarding whether a juvenile defendant was required to question the propriety of being tried as an adult before trial, and was, therefore, prohibited from raising that issue after trial.[2246] Consequently, the court examined the approach taken by other jurisdictions which had broad statutes similar to Guam's. Based on this examination, the court determined that those jurisdictions had construed such statutes to permit appeal of a juvenile certification order immediately after entry of the order, but not after the defendant's conviction. Hence, the court treated the order as a final decision for purposes of appeal.[2247]

The dissent pointed out that in *Guam v. Lefever,*[2248] the Ninth Circuit ruled that a trial court's denial of a motion to dismiss, based on the defendant's allegation that he was subject to the exclusive jurisdiction of the Guam juvenile court, did *not* constitute a final order.[2249] The order in *Lefever,* the dissent explained, could have been "fully reviewed" by the Ninth Circuit after Lefever's conviction and sentencing.[2250] The majority made no attempt to distinguish *Kingsbury* from *Lefever.* Moreover, the dissent noted that the practical effect of *Kingsbury* is to give the Guam Legislature the "power to control the scope of review by this court of cases coming from a district court."[2251]

2243. 649 F.2d 740 (9th Cir.), *cert. denied,* 454 U.S. 895 (1981).

2244. *Id.* at 743.

2245. *Id.* at 741.

2246. *Id.* at 742. Section 272 of the Guam Code of Civil Procedure provides in pertinent part: "An interested party aggrieved by order or decree of the court may apply to the District Court of Guam for the allowance of an appeal, and the said court may allow such appeal whenever in the opinion of said court the order or decree ought to be reviewed." GUAM CIV. PROC. CODE § 272 (1953) (amended 1974).

2247. 649 F.2d at 743.

2248. 454 F.2d 270 (9th Cir. 1972) (per curiam).

2249. 649 F.2d at 745 (Poole, J., dissenting) (citing *Guam v. Lefever*, 454 F.2d at 270).

2250. 649 F.2d at 745 (Poole, J., dissenting).

2251. *Id.* at 747.

2. Government appeals

Appeals brought by the Government in federal criminal cases are "not favored."[2252] The Government may appeal only if expressly authorized by statute.[2253] In *Arizona v. Manypenny,*[2254] the Supreme Court ruled that in cases where state law permits Government appeals and the case is removed to federal court, 28 U.S.C. section 1291[2255] provides the Government with the express authority to appeal the result of the federal decision.[2256]

In *Manypenny,* the defendant was indicted in an Arizona state court for commiting the crime of assault with a deadly weapon.[2257] Because the charge arose from an act committed while the defendant was on duty as a federal border patrol agent, he removed the case to federal court.[2258] The district court acquitted the defendant based on an immunity defense, and the Ninth Circuit dismissed Arizona's appeal for lack of express statutory authorization.[2259]

Under Arizona law, the prosecution had the right to appeal when the trial court exceeds its jurisdiction or abuses its discretion,[2260] as the prosecution claimed in this case.[2261] The Supreme Court observed that

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2252. Will v. United States, 389 U.S. 90, 96 (1967) (citing Carroll v. United States, 354 U.S. 394, 400 (1957)).

2253. United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977); United States v. Wilson, 420 U.S. 332, 336 (1975); United States v. Sanges, 144 U.S. 310, 312 (1892).

2254. 451 U.S. 232 (1981).

2255. *See supra* note 2207.

2256. 451 U.S. at 250.

2257. *Id.* at 235.

2258. *Id.* at 235-36. 28 U.S.C. § 1442(a)(1) (1976) provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

2259. 451 U.S. at 237-38.

2260. ARIZ. REV. STAT. ANN. § 12-2001 (1956).

2261. Arizona asserted that the district court misapplied the relevant immunity law and lacked jurisdiction to act on a Rule 29(c) motion 11 months after a guilty verdict had been returned. 451 U.S. at 237 n.8. Rule 29(c) states:

> If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within *7 days* after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal.

FED. R. CRIM. P. 29(c) (emphasis added).

The dissent pointed out that the Arizona law giving the prosecution the right to appeal

the policy behind the removal statute is to provide a trial free from local interest and prejudice.[2262] In addition, the Court stated that removal jurisdiction neither diminishes nor enlarges the substantive rights of the parties,[2263] which are determined by state law.[2264] Therefore, if Arizona had the right to appeal in state court, it should not lose that right merely because the case was removed to federal court.

The Court determined, however, that authorization to appeal under state law does not in itself establish the state's right to appeal in federal court.[2265] The right to appeal, the Court held, is derived from section 1291, which applies to "any litigant."[2266] Although express federal authority allowing the state to appeal was lacking,[2267] a state's appellate authority is a matter of state law, subject only to constitutional limitations.[2268] In *Manypenny,* the state's appellate authority under its own laws, combined with section 1291, created the necessary statutory authorization.[2269]

The Court found it necessary to distinguish *United States v. Sanges.*[2270] In *Sanges,* the Supreme Court held that the appellate jurisdiction of federal courts does not extend to criminal appeals in which the lower court found in favor of the defendant.[2271] The *Manypenny* court limited *Sanges* to federal appeals.[2272] The dissent, on the other hand, interpreted *Sanges* as applying equally to the states, reasoning that the required express authorization had to come from Congress.[2273] Because the federal statutes are "wholly barren" of any express authorization for states to undertake criminal appeals in federal courts, the dissent concluded that *Sanges* precluded Arizona's appeal.[2274]

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was not as explicit as the majority implied. ARIZ. REV. STAT. ANN. § 12-2001 (1956) states only that an appeal "may be granted," and routine granting hardly means that the "statute itself" mandates review in "every case." 451 U.S. at 255 (Brennan, J., dissenting).

2262. 451 U.S. at 242.

2263. *Id.*

2264. *Id.* at 243.

2265. *Id.* at 250. This is the critical point in the Court's logic. In a dissenting opinion, Justice Brennan pointed out that only Congress is constitutionally empowered to allow Government appeals in the federal courts. As such, "the Court's finding that Arizona . . . has sanctioned prosecutorial appeals in its courts is irrelevant." *Id.* at 252 (Brennan, J., dissenting).

2266. *Id.* at 244, 250.

2267. *Id.* at 244.

2268. *Id.* at 249.

2269. *Id.*

2270. 144 U.S. 310 (1892).

2271. *Id.* at 323.

2272. 451 U.S. at 247-49.

2273. *Id.* at 247 (Brennan, J., dissenting).

2274. *Id.* at 253.

D. Sentencing

1. Presentencing report

a. prosecutor's report

Due process requires that a sentence be vacated when it is based on a confidential report that is substantially and materially false.[2275] Accordingly, the Ninth Circuit recently ruled in *United States v. Wolfson*[2276] that a trial court may not receive from the prosecution an ex parte communication bearing on a sentence.[2277]

In *Wolfson,* the trial court denied the defendant's request to examine a presentence report after it was filed. The judge imposed the precise sentence that the prosecution had recommended, thereby suggesting that the court relied upon the prosecutor's ex parte report.[2278] On appeal, the Ninth Circuit vacated the sentence, holding that receipt of such communications by the trial court was improper.[2279] It reasoned that the *appearance* of justice is violated when a judge receives ex parte sentencing information from a prosecutor who is also an advocate.[2280] In addition, the court emphasized the necessity of avoiding the appearance of collusion between the prosecutor and the judge.[2281]

2275. In Townsend v. Burke, 334 U.S. 736, 741 (1948), the Court stated:

> It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

See also Farrow v. United States, 580 F.2d 1339, 1359 (9th Cir. 1978) (en banc); United States v. Perri, 513 F.2d 572, 574 (9th Cir. 1975).

2276. 634 F.2d 1217 (9th Cir. 1980).

2277. *Id.* at 1221.

2278. The following dialogue took place between the court and Mr. Markoff, Wolfson's attorney:

> MR. MARKOFF: Sir, if I may respectfully request then what information was brought to your attention from the United States Attorney's Office?
> THE COURT: I don't think that's any of your business, Mr. Markoff . . . .

Id..

2279. *Id.* at 1222.

2280. *Id.* Other circuits have also concluded that a sentencing judge may not receive an ex parte communication from the prosecutor concerning the defendant's sentence. *See, e.g.,* United States v. Huff, 512 F.2d 66, 71 (5th Cir. 1975); United States v. Rosner, 485 F.2d 1213, 1231 (2d Cir. 1973); United States v. Solomon, 422 F.2d 1110, 1119-21 (7th Cir. 1970).

2281. The Supreme Court has stated:

> "[E]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio, 273 U.S. 510, 532 [(1927)]. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice

In *United States v. Kenny,*[2282] however, the Ninth Circuit refused to extend the prohibition against ex parte sentencing communications to information submitted by third parties. In *Kenny,* a case involving fraud against the Navy, the court received from the acting Secretary of the Navy a letter stressing the importance of punishing those who "sacrifice the public trust for private gain."[2283] Although the prosecutor referred to the letter during the sentencing hearing,[2284] the defendants had not received a copy. The Ninth Circuit saw "no reason why" the letter had not been disclosed to the defendants,[2285] but nevertheless affirmed the sentences. The court held that the resentencing remedy was inappropriate in this case. The ex parte communication came not from the prosecutor, as in *Wolfson,* but from an outsider. The existence of the letter and its pertinent language was disclosed to the defendants at the sentencing hearing, evoking no objection. Lastly, the court found no indication that the judge relied on the communication in sentencing; the record contained ample, independent grounds for the sentences imposed.[2286]

b. in camera submission

In *United States v. Lee,*[2287] the Ninth Circuit held that a sentence will be vacated on appeal if it is *based* on information proven to be false or unreliable.[2288] In *Lee,* the defendant was sentenced to a term of life imprisonment for various acts of espionage against the United States. Documents were introduced during the trial, *in camera,* in response to a court order following the defendant's own discovery motion. The Government claimed national security concerns, and the

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must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 [(1954)].

In re Murchison, 349 U.S. 133, 136 (1955).

2282. 645 F.2d 1323 (9th Cir. 1981).

2283. *Id.* at 1348 n.26.

2284. *Id.* The prosecutor stated:

> I think the court has received a letter from the Department of the Navy itself, from the Acting Secretary of the Navy, and I just briefly would like to read what I think is significant in the last paragraph of Mr. Woolsey's letter in which he says: "It is essential to the Navy, indeed to all the nation's citizens, that other men and women who have the power to sacrifice the public trust for private gain know not just that yielding to such temptation is wrong, but also that it will be discovered and punished."

Id.

2285. *Id.* at 1349.

2286. *Id.* at 1348-49.

2287. 648 F.2d 667 (9th Cir. 1981).

2288. *Id.* at 668-69.

defendant was denied access to the information on those grounds.[2289]

On appeal, the defendant contended that the sensitive *in camera* submissions subconsciously influenced the trial judge and affected the sentencing decision.[2290] In rejecting the defendant's contention, the court held that although the defendant was not given the opportunity to prove the submissions contained false and unreliable information, the record clearly indicated that the submissions did *not* play a role in the sentencing process.[2291] The district judge stated that the sentence imposed was dictated by the record in the case and the gravity of the crime, and was in no way influenced by the content of the *in camera* submissions.[2292] The court summarily rejected the idea of a subconscious prejudice and noted that "[t]he very nature of the judicial function calls upon judges to rise above impermissible influences."[2293]

2. Special parole terms

A defendant who is convicted of *importing* controlled substances[2294] is subject to a mandatory special parole term for each offense.[2295] 21 U.S.C. section 963 provides that a conviction for attempting to import or conspiring to import controlled substances sub-

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2289. *Id.* at 668.

2290. *Id.*

2291. *Id.* at 669.

2292. *Id.* at 668. The trial judge stated:

> There was nothing whatever in any submissions. There was nothing whatever except what appeared in the record before this court and before the jury that the court looked to as the basis for imposing the sentence . . . . There was no recollection of the court at the time, nor is there now, of anything in any in camera submission which would in any way exacerbate the degree of culpability of this defendant, nor which could in any way persuade the court as to the sentence that ought to be imposed.

Id.

2293. *Id.* at 669. The court also rejected the defendant's argument that the *in camera* submissions constituted prohibited ex parte communications bearing on the sentence. United States v. Wolfson, 634 F.2d 1217 (9th Cir. 1980), prohibited ex parte sentencing reports submitted to the judge by the prosecutor. In this case, the submissions were in response to defense discovery motions and did not bear on the sentence. 648 F.2d at 669.

2294. 21 U.S.C. § 960(a) (1976) provides:

> Any person who —
> (1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,
> (2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or
> (3) contrary to section 959 of this title, manufactures or distributes a controlled substance, shall be punished as provided in subsection (b) of this section.

2295. 21 U.S.C. § 960(b) (1976) provides that in addition to any term of imprisonment, a special parole term of one to three years is imposed depending on the type of controlled substance imported.

jects a defendant to fine, imprisonment, or both, which "may not exceed the maximum punishment prescribed for the [actual] offense" of importation.[2296]

In *United States v. Anderson,*[2297] the Ninth Circuit ruled that special parole terms could not be imposed for a section 963 violation.[2298] The defendant had been convicted of one count of conspiracy to import heroin and had been sentenced to seven years' imprisonment and a special parole term of three years. In reaching this decision, the Ninth Circuit relied on the Supreme Court's holding in *Bifulco v. United States*[2299] that a judge may not prescribe a special parole term in connection with an *attempt* or *conspiracy* to manufacture a controlled substance,[2300] an offense governed by 21 U.S.C. section 846.[2301] Noting that the wording of section 963 was identical to that of section 846, the Ninth Circuit concluded that the *Bifulco* ruling was equally applicable to section 963.[2302] Therefore, the court held that the special parole term given in this case was improper and reversed and remanded the case for resentencing.[2303]

3. Rule 35 motions

Under Rule 35 of the Federal Rules of Criminal Procedure, a district court may reduce a sentence within 120 days after it becomes final if, upon further reflection, it seems unduly harsh.[2304] The 120-day limit

2296. 21 U.S.C. § 963 (1981) states: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

2297. 652 F.2d 10 (9th Cir. 1980) (per curiam).

2298. *Id.* at 11.

2299. 447 U.S. 381 (1980).

2300. *Id.* at 398.

2301. 21 U.S.C. § 846 (1976) states: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or the conspiracy."

2302. 652 F.2d at 11. *See also* Cates v. United States, 447 U.S. 932 (1980). In *Cates,* the Supreme Court vacated a § 963 sentence with a special parole term, remanding the case to the Fifth Circuit "for further consideration in light of *Bifulco v. United States*. *Id.* (citation omitted)." The Fifth Circuit subsequently vacated the defendant's special parole term. Cates v. United States, 626 F.2d 399, 400 (5th Cir. 1980).

2303. 652 F.2d at 11.

2304. Rule 35(b) provides, in pertinent part:

> 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 . . . .

explicit in the Rule serves two purposes. It protects the court from successive motions by prisoners and assures that the parole board's authority will not be usurped.[2305] Once the specified period has ended, however, the district court is deprived of jurisdiction.[2306] Furthermore, Rule 45(b), which otherwise provides for flexible time limits under the Federal Rules of Criminal Procedure,[2307] expressly prohibits flexibility where Rule 35 is concerned.[2308] Nevertheless, the Ninth,[2309] Fifth,[2310] and Fourth[2311] Circuits have allowed district courts to retain jurisdiction over motions *filed* within 120 days for a "reasonable time" after the time limit expires.

In *United States v. Smith,*[2312] the Ninth Circuit reaffirmed that the passing of a *reasonable* time beyond the 120-day limit serves to divest the district court of jurisdiction over the motion for reduction of sentence.[2313] A loss of jurisdiction to consider such a motion therefore operates as a de facto denial.[2314]

See United States v. Maynard, 485 F.2d 247, 248 (9th Cir. 1973).

2305. *See* United States v. Stollings, 516 F.2d 1287, 1289 (4th Cir. 1975); United States v. United States District Court, 509 F.2d 1352, 1356 n.6 (9th Cir.), *cert. denied,* 421 U.S. 962 (1975).

2306. *See* United States v. Mendoza, 565 F.2d 1285, 1287-88 (5th Cir.), *modified,* 581 F.2d 89 (5th Cir. 1978); United States v. United States District Court, 509 F.2d 1352, 1356 (9th Cir.), *cert. denied*, 421 U.S. 962 (1975).

2307. Rule 45(b) provides in pertinent part:

> When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect . . . .

2308. Rule 45(b) also provides in pertinent part: "[T]he court may not extend the time for taking action under Rules 29, 33, 34, and 35, except to the extent and under the conditions stated in them."

2309. *See* United States v. United States District Court, 509 F.2d 1352, 1356 (9th Cir.), *cert. denied*, 421 U.S. 962 (1975).

2310. *See* United States v. Mendoza, 565 F.2d 1285, 1291 (5th Cir.), *modified*, 581 F.2d 89 (5th Cir. 1978).

2311. *See* United States v. Stollings, 516 F.2d 1287, 1289 (4th Cir. 1975).

2312. 650 F.2d 206 (9th Cir. 1981).

2313. *Id.* at 208.

2314. *Id.* at 209. The court also rejected appellants' contentions that they were denied due process of law by the unreasonable delay of the district court in ruling on their motions. The district judge indicated in each case that he was satisfied that the original sentence was correct. The court held that there was no indication that had the delay not occurred the judge would have been more inclined to reduce the original sentences. *Id.*

4. Probation

a. maximum time limits

Unless an offense is punishable by death or life imprisonment, 18 U.S.C. section 3651 allows a federal judge to suspend imposition or execution of sentence and place the defendant on probation.[2315] This same statute, however, expressly limits any period of probation to five years[2316] and any period of incarceration to six months.[2317]

In *United States v. Rice,*[2318] the Ninth Circuit summarily ruled that a sentence of eighteen months' imprisonment, fifteen years' probation, and 4500 hours of community service was "improper" under section 3651.[2319] Rice had been convicted on three counts of receiving money or profits by defrauding a federal credit institution.[2320] Because the sentence offended *both* the six-month imprisonment limit and the five-year probation limit, it is unclear from the decision whether the result would have been the same if only one of the statutory limits had been violated. In any event, the Ninth Circuit implicitly held that the probation and incarceration limits establish *maximums,* regardless of the number of counts on which a defendant has been convicted. This interpretation is consistent with precedent in the Ninth,[2321] Seventh,[2322] and Third[2323] Circuits.

b. conditions of probation

Federal judges possess extensive authority to impose probation

2315. 18 U.S.C. § 3651 (1976) provides in pertinent part: "Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court . . . may suspend the imposition or execution of sentence and place the defendant on probation . . . ."

2316. "The period of probation, together with extension thereof, shall not exceed five years." *Id.*

2317. "[I]f the maximum punishment provided for such offense is more than six months, any court . . . may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation upon such terms and conditions as the court deems best." *Id.*

2318. 645 F.2d 691 (9th Cir.), *cert. denied,* 454 U.S. 862 (1981).

2319. *Id.* at 694.

2320. *Id.* at 691.

2321. *See* Thurman v. United States, 423 F.2d 988, 990 (9th Cir.), *cert. denied,* 400 U.S. 911 (1970).

2322. *See* United States v. Hargis, 568 F.2d 21, 23 (7th Cir. 1977).

2323. *See* United States v. Pisano, 266 F. Supp. 913 (E.D. Pa. 1967). *But see* United States v. Lancer, 361 F. Supp. 129, 132 (E.D. Pa. 1973), *vacated,* 508 F.2d 719 (3d Cir. 1975), *cert. denied,* 435 U.S. 923 (1978).

conditions.[2324] In exercising this authority, they may, in fact, even restrict constitutional rights.[2325] Conditions which have this effect, however, require "special scrutiny"[2326] and must be necessary to further the interests of public safety or rehabilitation.[2327]

In *United States v. Lowe,*[2328] the Ninth Circuit recently held that probation conditions restricting first amendment rights were valid in that they furthered the goal of public safety.[2329] In *Lowe,* the defendants had been convicted of trespassing on a submarine base. A condition of their probation forbade them from coming within 250 feet of the base. As a result, they were unable to distribute literature to persons entering the base or to attend weekly nuclear weapon protest meetings held on private property within the restricted area. The Ninth Circuit upheld the 250-foot condition as reasonably related to the goal of preventing the defendants from climbing the fence around the base. The court did not consider 250 feet an arbitrary distance, reasoning it was small enough to allow some "protest activity," but large enough to provide a "buffer zone" to protect the base and allow for detection of "would-be trespassers."[2330]

The dissent argued that the 250-foot limit only marginally protected against the possibility of trespass,[2331] and that it did not promote rehabilitation, but rather struck "at the core of constitutional rights vital to the fabric of [the American] political system."[2332]

2324. *See* United States v. Consuelo-Gonzalez, 521 F.2d 259, 264 (9th Cir. 1975).

2325. *See* Malone v. United States, 502 F.2d 554, 556-57 (9th Cir. 1974) ("[A] convicted criminal may be reasonably restricted as part of his sentence with respect to his associations in order to prevent his future criminality."), *cert. denied,* 419 U.S. 1124 (1975).

2326. United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975).

2327. *See* United States v. Pierce, 561 F.2d 735, 739 (9th Cir. 1977); United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 n.14 (9th Cir. 1975) (test for determining validity of probation conditions which may impinge on constitutional rights involves balancing those rights against goals of rehabilitation and public safety).

2328. 654 F.2d 562 (9th Cir. 1981).

2329. *Id.* at 567.

2330. *Id.* at 568. The court did not address the issue of rehabilitation. Had it done so, it would have confronted the somewhat Orwellian possibility of sanctioning probation conditions to "rehabilitate" conduct that was motivated by political ideology. As Judge Boochever argued: "Unlike the selfish motivation for most criminal conduct, the actions of the defendants in this case are based on a desire to publicize their belief that a federal program threatens the public welfare." *Id.* (Boochever, J., concurring in part and dissenting in part).

2331. *Id.* at 569.

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2331. *Id.* at 569.

2332. *Id.*

5. Youth Corrections Act

The Youth Corrections Act[2333] offers an alternative to judges when sentencing defendants between eighteen and twenty-six years old.[2334] When the Act was created in 1950, Congress considered the period from age sixteen to age twenty-three critical in determining whether a youthful offender would become a "hardened criminal."[2335] Consistent with the current sentencing philosophy, the goal of the Act was rehabilitation rather than retribution.[2336]

The Act has three basic features: "[1] flexibility in choosing among a variety of treatment settings and programs tailored to individual needs; [2] separation of youth offenders from hardened criminals; and [3] careful and flexible control of the duration of commitment and of supervised release."[2337] Additionally, the sentencing judge has the discretion to impose an adult sentence on a youthful offender. As such, the effect of the Act is simply to increase the judge's sentencing options.[2338]

Doubts have recently been raised regarding the ability of the Act to change the behavior of young criminals. Many authorities now believe that the federal criminal justice system cannot effectively diagnose

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2333. 18 U.S.C. §§ 5005-5026 (1976).

2334. Dorszynski v. United States, 418 U.S. 424, 437 (1974) (" 'The purpose of the . . . [Youth Corrections Act] is to provide a *new alternative sentencing* and treatment procedure for [youthful offenders].' ") (quoting S. REP. No. 1180, 81st Cong., 1st Sess. 1 (1949)) (brackets in original).

2335. "Reliable statistics demonstrate, beyond possible doubt, that the period of life between 16 and 23 years of age is the focal source of crime. It is during that period that habitual criminals are spawned." H.R. REP. No. 2979, 81st Cong., 2d Sess. 1, *reprinted in* 1950 U.S. CODE CONG. & AD. NEWS 3983, 3984.

2336. [B]y permitting the substitution of correctional rehabilitation for retributive punishment, a substantial contribution will have been made toward the urgently needed effort to stem and reverse the alarmingly increasing trend of criminal activity in the United States.

. . . .

The underlying theory of the bill is to substitute for retributive punishment methods of training and treatment designed to correct and prevent antisocial tendencies.

Id. at 3983, 3985. For a more detailed discussion of the Court's philosophy, see Dorszynski v. United States, 418 U.S. 424, 431-42 (1974).

2337. Durst v. United States, 434 U.S. 542, 545-46 (1978) (footnotes omitted).

2338. "[T]he Act was intended to increase the sentencing options of federal trial judges, rather than to limit the exercise of their discretion . . . ." Dorszynski v. United States, 418 U.S. 424, 440 (1974).

The Act has four sentencing provisions. Section 5010(a) of the Act states that "[i]f the court is of the opinion that the youth offender does not need commitment," imposition or execution of a sentence might be suspended, and the offender might be placed on probation. Sections 5010(b) and (c) provide that the offender, if committed, be placed in the custody of the Attorney General for treatment and supervision, instead of being otherwise imprisoned. Section 5010(d) allows the court to sentence the offender as an adult if it decides that he or she will not benefit from "treatment" as a juvenile.

or determine the proper treatment for a youthful offender.[2339] This belief apparently stems from the fact that it may not, as previously assumed, be possible to pinpoint the moment when the criminal tendencies of young offenders have been corrected.[2340] Accordingly, the "original rehabilitative purposes of the YCA have generally been abandoned."[2341]

Under another federal sentencing statute, 18 U.S.C. section 3651,[2342] judges may impose a "split sentence," which provides for both a confinement and a probation period. In *United States v. Smith,*[2343] the Ninth Circuit followed its prior ruling in *United States v. Roberts,*[2344] and upheld split sentences imposed on offenders sentenced under the Youth Corrections Act.[2345] In a concurring opinion, Judge Reinhardt conceded that a split sentence under section 3651 was acceptable for youthful offenders sentenced under the Act.[2346] He felt, however, that because Congress had intended the Act to separate youths from hardened criminals, a split sentence should not include

2339. *See* Partridge, Chaset, & Eldridge, *The Sentencing Options of Federal District Judges,* 84 F.R.D. 175, 200 (1980) [hereinafter cited as *Sentencing Options*].

2340. *Id.*

2341. United States v. Amidon, 627 F.2d 1023, 1026 (9th Cir. 1980). In *Sentencing Options,* the authors note that: (1) the Bureau of Prisons assigns youth offenders to exactly the same institutions as "adult" offenders, under a policy of assigning each offender to an institution of the lowest security level consistent with adequate supervision; (2) those sentenced under the Youth Corrections Act receive the same educational and vocational training as adults; and (3) for the most part, the Parole Commission uses the same guidelines to determine the release dates for those sentenced under the Act as for adults. *Sentencing Options, supra* note 2239, at 201-03.

2342. 18 U.S.C. § 3651 (1976) provides in pertinent part:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, . . . [the sentencing court] may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

2343. 645 F.2d 747 (9th Cir. 1981) (per curiam).

2344. 638 F.2d 134 (9th Cir. 1981). In *Roberts,* the defendant was sentenced to three years under the Attorney General's supervision. After the defendant served 90 days in a jail-type institution, the trial court would suspend the remainder of the treatment and supervision term and place the defendant on five years' probation. The court ruled that the trial judge had the authority to impose conditional probation under § 5010(a), even if the condition was confinement in a jail-type institution. *Id.* at 136.

2345. 645 F.2d at 748.

2346. *Id.* (Reinhardt, J., concurring). 18 U.S.C. § 5023(a) (1969) provides: "Nothing in [the Act] shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any way to amend, repeal, or affect the provisions of chapter 231 . . . [§§ 3651-56]." Section 5023(a) thus makes § 3651 applicable to a § 5010(a) sentence. *See* Durst v. United States, 434 U.S. 542, 549 (1978).

time in a jail-like facility.[2347] Judge Reinhardt did not, however, address the current abandonment of rehabilitation under the Act and the fact that a youthful offender serves almost exactly the same sentence as an adult.

The Ninth Circuit also considered the similarities between adult and Youth Corrections Act sentences in *United States v. Lowe.*[2348] Acting again in accordance with precedent,[2349] the *Lowe* court held that youthful misdemeanants could not be sentenced under the Youth Corrections Act for a period longer than the corresponding "adult" sentence.[2350] While *Lowe* is consistent with recent authority, it represents a departure from traditional concepts of sentencing under the Youth Corrections Act. Earlier cases in the Fifth[2351] and District of Columbia[2352] Circuits, as closely followed in the Ninth Circuit,[2353] viewed "confinement" under the Act as qualitatively different from "incarceration" in an ordinary prison.

E. Habeas Corpus

1. Scope of review

a. section 2255

A prisoner in custody pursuant to the judgment of a federal court may seek habeas relief under 28 U.S.C. section 2255.[2354] Claims per-

2347. 645 F.2d at 748 (Reinhardt, J., concurring).

2348. 654 F.2d 562 (9th Cir. 1981).

2349. *See* United States v. Amidon, 627 F.2d 1023 (9th Cir. 1980). In *Amidon,* the Ninth Circuit noted that "Congress has rejected the earlier conclusions of this court and others that the rehabilitative purposes underlying the YCA justify a longer confinement." *Id.* at 1026. The Federal Magistrate Act, 18 U.S.C. § 3401(g)(1) (1982), prohibits the imposition of longer sentences under the Youth Corrections Act when the corresponding "adult" penalty is shorter. *Amidon* extended this provision to the sentencing of all misdemeanants, whether by magistrate or by district court judge. 627 F.2d at 1027.

2350. 654 F.2d at 565.

2351. *See, e.g.,* Cunningham v. United States, 256 F.2d 467 (5th Cir. 1958). In *Cunningham,* the court noted that the Youth Corrections Act does not protect youthful offenders from heavier penalties than those imposed on "adult" offenders but affords them the opportunity to escape the physical and psychological traumas that accompany an ordinary penal sentence. At the same time, such offenders would obtain the benefits of corrective treatment, rehabilitation, social redemption, and restoration. *Id.* at 472.

2352. *See, e.g.,* Carter v. United States, 306 F.2d 283, 285 (D.C. Cir. 1962) ("basic theory of [the Youth Corrections] Act is rehabilitative and in a sense this rehabilitation may be regarded as comprising the *quid pro quo* for a longer confinement but under different conditions and terms than a defendant would undergo in an ordinary prison.").

2353. *See, e.g.,* Eller v. United States, 327 F.2d 639 (9th Cir. 1964); Young Hee Choy v. United States, 322 F.2d 64 (9th Cir. 1963); Standley v. United States, 318 F.2d 700 (9th Cir. 1963).

2354. 28 U.S.C. § 2255 (1976) provides in pertinent part: "A prisoner in custody under

mitted under this statute are expressly limited,[2355] but failure to allege one of the specified claims does not necessarily preclude review. Alternatively, a petitioner may assert and subsequently establish the presence of a fundamental defect that inherently results in " 'a complete miscarriage of justice.' "[2356] Technical errors of law are, however, appropriately outside the scope of section 2255.[2357]

The Ninth Circuit recently affirmed the "technical error" rule by holding in *United States v. Wilcox*[2358] that the issuance of a search warrant by a state court which was not "a court of record" did not merit section 2255 relief.[2359] According to the circuit court, while this constituted a violation of Federal Rule of Criminal Procedure 41(a),[2360] the violation was so technical in nature that it did not implicate fundamental rights.[2361]

b. section 2254(d)

When the validity of a state court judgment is at issue, habeas relief is governed by 28 U.S.C. section 2254.[2362] Claims permitted under this statute are also expressly limited, but in a manner substantially different from that provided for in 28 U.S.C. section 2255.[2363] More-

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sentence of a court established by Act of Congress . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."

2355. Section 2255 permits claims for relief when sentences are: (1) imposed in violation of the Federal Constitution; (2) imposed in excess of the district court's jurisdiction; (3) imposed in excess of the statutory maximum; or (4) otherwise subject to collateral attack. 28 U.S.C. § 2255 (1976).

2356. United States v. Wilcox, 640 F.2d 970, 972-73 (9th Cir. 1981) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)); *see* United States v. McDonald, 611 F.2d 1291, 1294 (9th Cir. 1980) (increase in sentence following parole violation considered fundamental defect).

2357. *E.g.,* United States v. Zazzara, 626 F.2d 135, 137 (9th Cir. 1980) (use of perjured testimony to obtain indictment not grounds for § 2255 relief); United States v. Boniface, 601 F.2d 390, 394 (9th Cir. 1979) (§ 2255 relief not permitted for violation of Interstate Agreement on Detainers Act).

2358. 640 F.2d 970 (9th Cir. 1981).

2359. *Id.* at 974.

2360. *Id.* FED. R. CRIM. P. 41(a) provides: "A search warrant authorized by this rule may be issued by a federal magistrate or a judge *of a state court of record* within the district wherein the property of person sought is located, upon request of a federal law enforcement officer or an attorney for the government." (emphasis added).

2361. 640 F.2d at 974. *Accord* United States v. Haywood, 464 F.2d 756, 760 (D.C. Cir. 1972).

2362. 28 U.S.C. § 2254(a) (1976) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . . ."

2363. Section 2254 permits claims for relief *only* when sentence is imposed in violation of the Constitution, laws or treaties of the United States. 28 U.S.C. § 2254(a) (1976). *See supra* note 2355 for claims permitted under 28 U.S.C. § 2255.

over, review of such claims is restricted by section 2254(d), which requires that factual determinations of a state court be *presumed correct* absent the existence of any one of eight enumerated factors.[2364]

The proper application of section 2254(d) was recently considered by the Supreme Court in *Sumner v. Mata.*[2365] Defendant Mata was convicted of murder in state court following a trial at which eyewitnesses identified him as a participant in the crime.[2366] On direct appeal, he argued for the first time that police had violated his right to due process by utilizing a pretrial photographic identification procedure.[2367] Applying the test enunciated in *Simmons v. United States,*[2368] the state appellate court rejected this contention.[2369]

Charging the same error, Mata then sought federal habeas relief pursuant to 28 U.S.C. section 2254.[2370] The district court denied such

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2364. When any of the following factors is established or admitted, the factual determinations of a state court *need not* be presumed correct:

> (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;
> (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.

28 U.S.C. § 2254(d) (1976).

2365. 449 U.S. 539 (1981).

2366. *Id.* at 541.

2367. *Id.* at 541-42. Mata did not raise the pretrial identification issue before the trial court. *Id.* For a complete description of the identification procedure, see Mata v. Sumner, 611 F.2d 754, 756-57 (9th Cir. 1979), *vacated,* 449 U.S. 539 (1981).

2368. 390 U.S. 377 (1968). In *Simmons,* the Supreme Court held that when a conviction was based on: (1) eyewitness identification by photograph before trial, followed by (2) eyewitness identification at trial, it could be set aside as a denial of due process "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of *irreparable misidentification." Id.* at 384 (emphasis added).

2369. 449 U.S. at 542. Upon review of the trial record, the state appellate court specifically concluded that the facts of the case did not adequately support Mata's claim. *Id.*

2370. *Id.* Prior to seeking a federal habeas writ, Mata raised the pretrial identification issue in *state* habeas corpus proceedings. A state superior and appellate court, as well as the

relief, and Mata appealed. After analyzing his argument under the *Simmons* standard, the Ninth Circuit granted a habeas writ.[2371] The circuit court did not, however, refer to the provisions of section 2254(d) in its opinion.[2372]

Noting that section 2254(d) was clearly applicable,[2373] the Supreme Court ruled that the Ninth Circuit should either have: (1) accorded a "presumption of correctness" to the factual findings of the state appellate court,[2374] or (2) *explained* why the presumption was inapplicable.[2375] The Court observed that an adequate explanation required the habeas court to state in its opinion the reasoning it utilized in determining the presence of one or more of the eight factors enumerated in section 2254(d).[2376] Because the Ninth Circuit neither applied the presumption nor provided such an explanation, the Supreme Court ultimately concluded that the circuit court had improperly analyzed Mata's challenge to his state court conviction.[2377] It, therefore, vacated that court's judgment and remanded the case for further proceedings.[2378]

In a dissent, Justice Brennan offered two reasons for upholding the Ninth Circuit's decision despite its failure to discuss section 2254(d). First, he contended that because Mata had neglected to raise the section 2254(d) argument before the circuit court, that court was not required to consider the provisions of the statute.[2379] Second, he asserted

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state supreme court, all denied relief. Mata thus complied with the exhaustion of state remedies doctrine. *Id. See* 28 U.S.C. §§ 2254(b)-2254(c) (1976).

2371. 449 U.S. at 543. According to the Ninth Circuit, the pretrial photographic identification procedure was " 'so impermissibly suggestive as to give rise to a . . . substantial likelihood of irreparable misidentification.' " *Id.* (quoting Mata v. Sumner, 611 F.2d 754, 759 (9th Cir. 1979), *vacated,* 449 U.S. 539 (1981)). This conclusion was based on the court's finding that: "(1) the circumstances surrounding the witnesses' observation of the crime were such that there was a grave likelihood of misidentification; (2) the witnesses had failed to give sufficiently detailed descriptions of the assailant; and (3) considerable pressure from both prison officials and prison factions had been brought to bear on the witnesses." *Id.*

2372. 449 U.S. at 547. *See also* Mata v. Sumner, 611 F.2d 754, 755-60 (9th Cir. 1979), *vacated,* 449 U.S. 539 (1981).

2373. 449 U.S. at 545-47.

2374. *Id.* at 547. The state appellate court was required to make its own factual findings because Mata raised the pretrial identification issue for the first time on appeal. *See supra* note 2367 and accompanying text.

2375. 449 U.S. at 552.

2376. *Id.* at 551. The Court specified that a discussion of the § 2254(d) factors was essential in order to fulfill the congressional mandate that "a state finding not be overturned merely on the basis of the usual 'preponderance of the evidence' standard." *Id.*

2377. *Id.* at 552.

2378. *Id.*

2379. *Id.* at 554-55 (Brennan, J., dissenting).

that because the issue addressed by the Ninth Circuit required the " 'application of constitutional principles to the facts as found,' "[2380] it was a mixed question of law and fact which fell outside the purview of section 2254(d).[2381]

On remand, the Ninth Circuit noted its "full awareness" of section 2254(d), but adhered to its initial determination that Mata's due process rights had been violated by use of the pretrial photographic identification procedure.[2382] The court characterized the issue raised under the *Simmons* standard as a mixture of law and fact.[2383] It then explained that, as its original analysis indicated, it did not dispute the "state [appellate] court's factual record per se,"[2384] but disagreed with the legal conclusion that the court had drawn based upon that record.[2385] Because state court conclusions of law are considered freely reviewable in a federal habeas proceeding and are not presumed correct under section 2254(d),[2386] the Ninth Circuit reasoned that it was free to reach a different legal determination from that reached by the state appellate court.[2387]

In concluding that a state court ruling on the issue raised under the *Simmons* standard need not be presumed correct, the Ninth Circuit appears to have directly contradicted the Supreme Court's express state-

2380. *Id.* at 557 (quoting Brewer v. Williams, 430 U.S. 387, 403 (1977)).

2381. 449 U.S. at 555 (Brennan, J., dissenting). According to Justice Brennan, § 2254(d) required a federal habeas court to defer to a state court's determination only when that determination was made in regard to an issue which was *entirely factual* in nature. *Id.* This application of § 2254(d) has consistently been upheld by the Supreme Court. *See* Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980) (state court ruling on question of multiple representation by attorneys regarded as a mixture of law and fact; § 2254(d) held inapplicable); Brewer v. Williams, 430 U.S. 387, 397 n.4, 401-04 (1977) (state court ruling on question of defendant's waiver of constitutional right deemed a strictly legal determination; § 2254(d) held inapplicable). *See also* Townsend v. Sain, 372 U.S. 293, 309 n.6, 318 (1963) (precursor to § 2254(d) held inapplicable when federal habeas court requested to consider a state court ruling on a question of law or a mixed question of law and fact).

2382. Mata v. Sumner, 649 F.2d 713, 715 (9th Cir. 1981).

2383. *Id.* at 717.

2384. *Id.* at 715.

2385. *Id.* at 716.

2386. *See supra* cases cited at note 2381.

2387. 649 F.2d at 717. As noted previously, the Ninth Circuit did not refer to § 2254(d) in its first opinion. *See supra* note 2372 and accompanying text. *See also* 449 U.S. at 559 (Brennan, J., dissenting). The circuit court's original analysis does, however, indicate that it substantially agreed with the basic facts adduced by the state appellate court. *See id.* at 556-57; Mata v. Sumner, 611 F.2d 754, 755-57 (9th Cir. 1979), *vacated,* 449 U.S. 539 (1981). It is, therefore, possible that rather than merely adopting on remand Justice Brennan's analysis, the Ninth Circuit *initially* characterized the relevant issue as a mixture of law and fact, and determined that it disagreed with the *legal conclusion* of the state court rather than its *factual findings.* On this basis, it may then have deemed it unnecessary to discuss § 2254(d).

ment in *Sumner* that "§ 2254(d) *is applicable* to the present [case]."[2388] The contradiction is, however, only superficial. A close reading of both decisions makes it clear that the circuit court did not, in fact, disregard a Supreme Court mandate. Any statements made by the Court regarding the applicability of section 2254(d) were in direct response to Mata's contention that use of the statute was inappropriate when a state appellate court, as opposed to a trial court, made the pertinent findings of fact.[2389] The question raised by the *Simmons* standard was never explicitly characterized as a factual finding entitled to a "presumption of correctness" on federal habeas review. Whether the Court implicitly characterized the issue in this manner is open to interpretation.[2390] This seems unlikely, however, because the same Court, composed of substantially the same justices, previously determined that the issue raised by this standard *did not* constitute a factual finding, but a legal conclusion.[2391]

It should also be noted that the Supreme Court specifically remanded *Sumner* to enable the Ninth Circuit either to apply a "presumption of correctness" to the factual findings of the state appellate court, or to explain why the presumption was inapplicable.[2392] Such an explanation, the Court stated, should rest on the presence of one or more of the section 2254(d) factors.[2393] In its opinion, however, the Ninth Circuit clearly indicated that it declined to apply the presumption, not because of the existence of one of these factors, but because the issue raised under the *Simmons* standard was a mixture of law and fact.[2394] How the Supreme Court will regard such an approach is presently unresolved.

2388. 449 U.S. at 545-46 (emphasis added).

2389. *See id.* at 545-47.

2390. *See* 649 F.2d at 717-18 (Sneed, C.J., dissenting).

2391. *See* Neil v. Biggers, 409 U.S. 188 (1972). In *Neil,* a federal habeas court concluded that pretrial identification procedures had violated a state prisoner's due process rights. The court reached this result after applying the *Simmons* standard. *Id.* at 199-200. The Supreme Court reversed, rejecting a contention that this violated an established practice not to depart from a lower court's factual findings unless those findings were clearly erroneous. *Id.* at 193 n.3. According to the Court, adherence to this "established practice" was unnecessary because the issue raised under the *Simmons* standard did not create a dispute over the *elemental facts* of the case so much as it created a dispute over the *constitutional significance* to be attached to those facts. *Id.*

At the time *Neil* was decided, the Supreme Court was composed of the following justices: Burger, Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, and Rehnquist. *See id.* at 189. With the exception of Justice Douglas, who was replaced by Justice Stevens in 1975, these same justices decided the issue raised in *Sumner. See* 449 U.S. at 540.

2392. *See supra* notes 2374-75 and accompanying text.

2393. *See supra* note 2376 and accompanying text.

2394. *See supra* notes 2383-87 and accompanying text.

2. Exhaustion of state remedies

A state prisoner must normally exhaust all available state judicial remedies before a federal court will consider that prisoner's petition for a writ of habeas corpus.[2395] The exhaustion requirement is derived from the doctrine of comity.[2396] Comity between courts assures that a federal court cannot upset a state court conviction unless the state courts have had an opportunity to determine whether a constitutional violation has occurred.[2397]

When a petition for a writ of habeas corpus contains more than one issue, the Ninth Circuit usually refuses to address any issue until available state remedies have been exhausted with respect to all issues.[2398] Hearing exhausted issues while refusing to hear unexhausted

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2395. Sweet v. Cupp, 640 F.2d 233, 235 (9th Cir. 1981); 28 U.S.C. § 2254(b) (1977). Section 2254(b) provides:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

In Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979), the court stated: "failure to exhaust state remedies with respect to one issue presented in a habeas corpus petition . . . requires dismissal of the entire petition by the district court." The court decided, however, to review the exhausted claims in the mixed petition because the district court had erroneously reached the merits of these claims. *See* Galtieri v. Wainwright, 582 F.2d 348, 362 (5th Cir. 1978) (court of appeals will review exhausted claim in mixed petition if district court erroneously reached merits).

2396. Darr v. Burford, 339 U.S. 200, 204 (1950) (Comity teaches that "one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.").

2397. Sweet v. Cupp, 640 F.2d 233, 236 (9th Cir. 1981).

2398. *See* Gonzales v. Stone, 546 F.2d 807, 810 (9th Cir. 1976) (court refused to hear two exhausted claims because petitioner also raised two unexhausted claims). Blair v. California, 340 F.2d 741, 744-45 (9th Cir. 1965) (court refused to review mixed petition containing both exhausted and unexhausted issues); Schiers v. California, 333 F.2d 173, 174 (9th Cir. 1964) (court declined to hear issues involving "substantial equivalent" of contentions being presented by petitioner to state courts in appeal from conviction).

Most other circuits permit habeas corpus review of mixed petitions when the exhausted and unexhausted claims are unrelated. *See, e.g.,* Meeks v. Jago, 548 F.2d 134, 137 (6th Cir. 1976), *cert. denied,* 434 U.S. 844 (1977); Brown v. Wisconsin Dep't of Pub. Welfare, 457 F.2d 257, 259 (7th Cir.), *cert. denied,* 409 U.S. 862 (1972); Hewett v. North Carolina, 415 F.2d 1316, 1320 (4th Cir. 1969). The Third Circuit, however, disapproves of hearing mixed petitions. *See, e.g.,* United States v. Hatrack, 563 F.2d 86, 96-97 (3d Cir. 1977).

The Ninth Circuit may also refuse to hear the merits of a petition for failure to exhaust state collateral remedies, a position taken recently in Campbell v. Crist, 647 F.2d 956, 956-57 (9th Cir. 1981) (interests of comity allow court to refuse to adjudicate appeal when record fails to reflect exhaustion of state collateral remedies); *see also* Rose v. Dickson, 327 F.2d 27, 28 (9th Cir. 1964).

issues in the same case would impair comity and frustrate the policy against fragmentary appeals.[2399] The exhaustion requirement was recently reaffirmed by the Ninth Circuit in *Sweet v. Cupp,*[2400] where the court found that the petitioner had failed both to appeal directly his equal protection claim and to seek relief under Oregon's post-conviction relief statutes.[2401]

The general rule requiring exhaustion does not, however, apply when the petitioner can show that further adjudication in state courts would be futile,[2402] or that fairness mandates that the federal court hear the petition.[2403] For instance, it would have been futile for the petitioner in *Montague v. Vinzant*[2404] to exhaust state remedies concerning the retroactivity of a repealed state statute when the state had a "savings" statute which expressly limited the retroactive effect of repealed statutes.[2405] The *Montague* court relied on *Sweet* for authority to use the futility doctrine despite the fact that the *Sweet* court's language with respect to the doctrine was clearly dictum.[2406] Because *Montague* involved futility, however, the doctrine should now be clearly established in Ninth Circuit law.

In *Little Light v. Crist,*[2407] the Ninth Circuit appeared to depart from its traditional reluctance to hear exhausted claims when accompanied by unexhausted claims.[2408] The court found that when certain "conditions of fairness" dictate, it could rule upon exhausted issues in a mixed petition.[2409] Little Light asserted for the first time in his petition

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2399. *See* Gonzales v. Stone, 546 F.2d 807, 809 (9th Cir. 1976); Blair v. California, 340 F.2d 741, 744-45 (9th Cir. 1965).

2400. 640 F.2d 233 (9th Cir. 1981).

2401. *Id.* at 238. The petitioner had relief available under Oregon post-conviction relief statutes. *See* OR. REV. STAT. §§ 34.330, 138.510-.680 (1959).

2402. Montague v. Vinzant, 643 F.2d 657, 659 (9th Cir. 1981); *see also Sweet v. Cupp*, 640 F.2d at 236 (dictum) ("We adopt the futility doctrine because it promotes comity by requiring exhaustion where resort to state courts would serve a useful function . . . .").

2403. Little Light v. Crist, 649 F.2d 682, 684 (9th Cir. 1981) (footnote omitted).

2404. 643 F.2d 657 (9th Cir. 1981).

2405. *Id.* at 659 ("savings" statute provided that repeal of criminal statute would not affect previously imposed penalty, unless repealing statute declared otherwise).

2406. *See* Sweet v. Cupp, 640 F.2d at 236, 238. In *Sweet*, the court adopted the futility exception to the exhaustion requirement, but found it inapplicable because of the clear availablity of a remedy in the Oregon post-conviction relief statutes. The *Sweet* court mentioned in passing that the petitioner's resort to state remedies is likewise deemed "futile" if the highest state court has recently decided the issue adversely to the petitioner's interests and there have been no intervening Supreme Court decisions on point. *Id.*

2407. 649 F.2d 682 (9th Cir. 1981).

2408. *Id.* at 684.

2409. The "conditions of fairness" influencing the court were the length of Little Light's incarceration (six years for a forcible rape conviction), his appeal pro se, the fact that refusal

to the district court that the state courts lacked jurisdiction over his offense.[2410] The Ninth Circuit, nevertheless, ruled upon the exhausted issues, adopting the Fifth Circuit's position in *West v. Louisiana.*[2411]

Since *Little Light,* two Ninth Circuit decisions appear to have further relaxed the exhaustion requirement. In the first decision, *Briggs v. Raines,*[2412] the court agreed to hear a habeas corpus petition, although the state had adopted a new rule of criminal procedure that might have permitted the petitioner to appeal at the state level before bringing his habeas action.[2413] This potential state remedy had been available to Briggs *before* he filed his habeas petition. Nevertheless, the court held that Briggs had exhausted his state remedies.[2414]

In making its determination, the *Briggs* court relied on two Supreme Court cases; however, the salient facts in those cases differ so significantly from *Briggs* that it is difficult to understand how they support that decision. The court itself offered no explanation.[2415] In *Roberts v. LaVallee,*[2416] for example, the change in the law creating an additional state remedy occurred *after,* not before, the habeas petitioner had filed in federal court.[2417] Similarly, in *Francisco v. Gathright,*[2418] the state supreme court case creating an additional state

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to review would require reinitiating the appeal in the state courts, and the state's failure to raise the exhaustion question. *Id.* at 684-85.

2410. *Id.* at 684. The petitioner alleged that the land on which he was arrested was the subject of an illegal land purchase, subject to exclusive federal jurisdiction.

2411. *Id.* at 684-85 (citing West v. Louisiana, 478 F.2d 1026, 1034-35 (5th Cir. 1973), *aff'd en banc,* 510 F.2d 363 (5th Cir. 1975) (requirement that petitioner must exhaust state remedies before seeking federal relief not jurisdictional prerequisite but instead based on flexible considerations of comity)). The *Little Light* court cited Galtieri v. Wainwright, 582 F.2d 348, 362 (5th Cir. 1978), in which the Fifth Circuit labelled as "erroneous" the district court's adjudication of the merits of an exhausted claim in a mixed petition. The *Little Light* court, however, did not label similar actions of district courts as "erroneous."

The *Little Light* court also cited Kelley v. Estelle, 521 F.2d 238, 240-41 (5th Cir. 1975), in which the Fifth Circuit stated that factors such as a pro se appeal, the length of incarceration, and considerations of fairness and judicial economy are reasons for departing from the exhaustion requirement in a mixed petition.

2412. 652 F.2d 862 (9th Cir. 1981).

2413. *Id.* at 863-64.

2414. *Id.* at 864.

2415. *Id.* at 865.

2416. 389 U.S. 40 (1967).

2417. *Id.* at 40-43. Shortly after the federal filing, the New York Court of Appeals held unconstitutional the contested requirement. *Id.* at 41 (citing People v. Montgomery, 18 N.Y. 2d 993, 995, 224 N.E.2d 730, 731 (1966)). On appeal, the Second Circuit held that petitioner Roberts should apply to the state courts for relief under the doctrine of *Montgomery.* 389 U.S. at 41. Instead, he petitioned the United States Supreme Court for a writ of certiorari. *Id.* at 42. The Court granted the writ and held that Roberts had thoroughly exhausted his state remedies and that additional state litigation would be burdensome. *Id.* at 42-43.

2418. 419 U.S. 59 (1974).

remedy was decided just four days *after* the habeas petition was received *in forma pauperis.*[2419] In both cases, the petitioners had exhausted their *then* available state remedies *before* filing their habeas petitions. Briggs, however, had almost nine months to avail himself of the new state remedy before filing his petition.[2420]

In the second decision, *Garrison v. McCarthy,*[2421] the Ninth Circuit reviewed two exhausted claims despite the presence of two unexhausted claims. The court explained that it was balancing "the possibility of judicial duplication" against comity concerns.[2422] It appears, however, that the court sought to avoid a possible conflict between federal and state decisions, as well as between decisions within the federal system itself. The district court had already ruled on the merits of the two exhausted claims. Therefore, if the Ninth Circuit had vacated the district court's judgment for failure to exhaust completely, Garrison could have relitigated all four claims in the district court once he exhausted his state judicial remedies. Likewise, upon consideration of unexhausted claims, the state court could reconsider the exhausted claims and decide them differently from the district court.[2423] Finally, the district court could reverse its decisions on the exhausted claims on a second habeas petition.[2424]

3. Sufficiency of record on review

In a federal habeas corpus proceeding, a state court's determination of the merits of a factual issue is presumed correct, unless the petitioner can show that the determination is not fairly supported by the record.[2425] If the state court's record is incomplete or otherwise indicates that the petitioner did not receive a full and fair factual hearing on the issues presented to the district court, that court must hold evi-

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2419. *Id.* at 61 n.3.

2420. 652 F.2d at 864. Briggs filed a petition in district court on March 6, 1980; the Arizona Supreme Court changed the relevant state law on July 13, 1979.

2421. 653 F.2d 374 (9th Cir. 1981).

2422. *Id.* at 378.

2423. *Id.* at 376.

2424. *Id.*

2425. 28 U.S.C. § 2254(d) (1976) provides in part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus . . . a determination . . . by a State court . . . evidenced by a written finding . . . shall be presumed to be correct . . . (8) . . . 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 . . . .

dentiary hearings on those issues.[2426] This point is exemplified by the Ninth Circuit's recent ruling in *Little Light v. Crist*[2427] that a district court could not summarily dismiss a petition unless it had a sufficient record of the relevant state court proceedings. According to the court, only the presence of a complete transcript would enable the court in a habeas proceeding to determine the adequacy of the state process.[2428] The case was, therefore, remanded to the district court in order that it either procure the record of the state trial court's hearing of the habeas petition or conduct an appropriate evidentiary hearing.[2429]

4. Delay in filing

Rule 9(a) of the Rules Governing Section 2254 Cases permits a court to dismiss a habeas corpus petition for prejudicial delay in filing it.[2430] Rule 9(a) specifically exempts a petition from dismissal when the petitioner could not have known the legal grounds for his petition before prejudice to the state occurred.[2431] In *Myers v. Washington,*[2432] the Ninth Circuit held that Rule 9(a) did not permit dismissal of a petition that challenged the constitutionality of jury instructions given twenty-four years earlier, because the petitioner could not have anticipated recent changes in the controlling law upon which his petition was based.[2433] However, the majority opinion failed to address the dissent's argument that challenges to similar jury instructions in other jurisdictions twenty-four years earlier should have put the petitioner on notice of the legal grounds upon which to assert a similar challenge in state court.[2434]

2426. In Townsend v. Sain, 372 U.S. 293 (1963), the Supreme Court ruled that an evidentiary hearing is mandatory if any of the following six circumstances is present: (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the factfinding procedure employed by the state court was inadequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed in the state court proceeding; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair factual hearing. *Id.* at 313.

2427. 649 F.2d 682 (9th Cir. 1981) (per curiam).

2428. *Id.* at 686.

2429. *Id.*

2430. Rule 9(a) of the Rules Governing Section 2254 Cases, 28 U.S.C. § 2254 (1976), provides in pertinent part: A petition may be dismissed if it appears that the state . . . has been prejudiced . . . by delay . . . unless the petitioner shows that [his petition] is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

2431. *Id.*

2432. 646 F.2d 355 (9th Cir. 1981).

2433. *Id.* at 361.

2434. *Id.* at 364 (Poole, J., dissenting).

5. Independent state grounds

The United States Supreme Court has established that absent proof of (1) sufficient cause for noncompliance with a state contemporaneous objection rule and (2) actual prejudice arising from an alleged constitutional violation, failure to comply with such a rule constitutes an adequate and independent state procedural ground which precludes federal habeas corpus review.[2435]

Again in *Myers v. Washington,*[2436] the Ninth Circuit held that although petitioner Myers failed to satisfy Washington's contemporaneous objection rule, he was nevertheless entitled to habeas corpus relief.[2437] At trial, Myers was found guilty of second degree murder, and his conviction was affirmed on appeal.[2438] Twenty years later Myers petitioned the Washington Supreme Court for release from personal restraint.[2439] He asserted for the first time that the jury instructions given by the trial court had unconstitutionally shifted to the defense the burden of proving the intent element of the crime.[2440]

Although the controlling law had changed since the time of Myers' conviction,[2441] the state high court reasoned that " 'the interest of the state in achieving a final judgment not subject to the frustrations associated with retrial years after the original proceeding outweighs any interest in readjudicating convictions according to subsequently developed legal standards.' "[2442] The court held that because Myers did not object to the jury instructions at trial or their validity on appeal, he was precluded from raising such an objection in a collateral attack.[2443] Myers subsequently petitioned for habeas corpus relief in federal district court. A motion for summary judgment was granted in

2435. Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977). The rule in *Sykes* required that motions to suppress a defendant's inculpatory statements be made at trial or not at all.

2436. 646 F.2d 355 (9th Cir. 1981).

2437. *Id.* at 360.

2438. *Id.* at 356.

2439. *Id.* This petition is used only by Washington appellate courts in lieu of the writ of habeas corpus and the application for post-conviction relief. Principles applicable to habeas petitions are, however, employed in considering personal restraint petitions. *Id.* at n.1.

2440. *Id.* at 356-57. The challenged jury instructions permitted the jury to presume (1) every killing to be without excuse or justification, and (2) intent to kill if the victim was killed by an act which would naturally and ordinarily result in death. *Id.* at 362 n.11.

2441. Instructions which shift the burden of proof on any element of a charged offense were declared unconstitutional in Mullaney v. Wilbur, 421 U.S. 684 (1975). That holding was reaffirmed in Hankerson v. North Carolina, 432 U.S. 233 (1977).

2442. 646 F.2d at 357 (quoting Petition of Myers, 91 Wash. 2d 120, 125-26, 587 P.2d 532, 535 (1979)).

2443. 646 F.2d at 357.

favor of the State, however, and Myers appealed.[2444]

The Ninth Circuit initially questioned whether the *Sykes* rule should extend to the procedural default involved in *Myers*.[2445] In the words of the court: "Here we have a failure to raise on appeal a constitutional issue that had not yet been identified, not a failure to object at trial to an alleged error that should have been apparent at the time."[2446] The court observed that the policy considerations announced in *Sykes* would not be furthered by denying Myers habeas corpus relief.[2447] The court further noted that normally the enforcement of state contemporaneous objection rules (1) encourages error free proceedings, (2) discourages "sandbagging" by defense attorneys who gamble on acquittals intending to raise constitutional challenges in federal habeas corpus proceedings if their clients are convicted, and (3) assures a record that reflects the fresh recollection of witnesses and the observation of their demeanor by the trial court.[2448] These considerations, the court reasoned, were not applicable to the case at bar because Myers had no reason to believe that his constitutional rights were violated by the jury instructions.[2449]

The court held, in addition, that even if the *Sykes* rule did apply to Myers' procedural default, he had satisfied that rule and was entitled to habeas relief.[2450] The court determined that because the basis for Myers' constitutional argument did not exist until a United States Supreme Court decision changed the prevailing law many years after his trial,[2451] he had adequate cause for not anticipating such a change on direct appeal.[2452] Furthermore, because the court found that one of the challenged instructions might well have played a crucial role in securing his conviction, he was deemed to have suffered actual prejudice as a result of the instructions.[2453]

In a dissent, Justice Poole stated that the policy considerations underlying the rule in *Sykes* were clearly implicated in *Myers*.[2454] He

2444. *Id.*
2445. *Id.* at 359.
2446. *Id.*
2447. *Id.*
2448. *Id.*
2449. *Id.* at 360.
2450. *Id.*
2451. *Id. See supra* note 2440 and accompanying text. The court characterized the state of federal constitutional law regarding presumptions and burdens of proof as "settled." 646 F.2d at 360. *But see infra* text accompanying notes 2454-55.
2452. 646 F.2d at 360.
2453. *Id.* at 360-61.
2454. *Id.* at 364 (Poole, J., dissenting).

pointed out that, although at the time of trial the state of Washington considered such instructions proper, there had been challenges to similar jury instructions in other jurisdictions.[2455] Justice Poole described the issue as one "on the frontier of the criminal law."[2456] He argued that a diligent and thoughtful attorney would have provided the trial court with the opportunity to consider such a challenge.[2457]

For the same reasons Justice Poole did not agree that Myers had demonstrated cause sufficient to satisfy the rule in *Sykes,* again noting that the constitutional issue at bar "could reasonably have been expected to be raised" at trial.[2458] He ultimately concluded that the majority holding created an exception that would devour the cause requirement of *Sykes.*[2459]

The plain implication of the *Myers* case is that, regardless of significant controversy elsewhere, if it appears that an objection made on constitutional grounds will not succeed in the forum, failure to object at trial and to raise the issue on direct appeal will not bar collateral attack in a federal habeas corpus proceeding. It should be noted, however, that the result in *Myers* might have been different had the basis for the petitioner's attack arisen sooner after trial or had there existed at the time of trial persuasive authority from other jurisdictions to support such a challenge.

6. Effective assistance of counsel

After pleading guilty, a defendant cannot challenge constitutional violations that occurred prior to entry of that plea.[2460] A defendant may, however, attempt to prove that, because the advice received from counsel was " 'not within the range of competence demanded of attorneys in criminal cases,' "[2461] the guilty plea was not knowing and intelligent.[2462]

2455. *Id.*
2456. *Id.*
2457. *Id.*
2458. *Id.* at 364-65.
2459. *Id.*
2460. Tollett v. Henderson, 411 U.S. 258, 267 (1973); Brady v. United States, 397 U.S. 742, 748 (1970); Thundershield v. Solem, 565 F.2d 1018, 1026 (8th Cir. 1977), *cert. denied,* 435 U.S. 954 (1978).
2461. Tollett v. Henderson, 411 U.S. 258, 267 (1973) (petitioner may attack character of guilty plea by showing that counsel's advice failed to meet standards set forth by Court in McMann v. Richardson, 397 U.S. 759, 770-71 (1970)).
2462. Tollett v. Henderson, 411 U.S. 258, 267 (1973) (petitioner may attack only voluntary and intelligent character of guilty plea, not deprivation of constitutional rights preceding it); Sober v. Crist, 644 F.2d 807, 808-09 (9th Cir. 1981) (per curiam).

The Supreme Court has held that a plea is not voluntary unless a defendant has received notice of the elements of the charged offense.[2463] In *Sober v. Crist,*[2464] the Ninth Circuit held that an evidentiary hearing on the effectiveness of defense counsel must be granted when the record shows that no "explanation" of the charge was given to the defendant and the prosecution cannot otherwise prove that one was given.[2465] In *Sober,* the defendant based his charge of ineffective counsel on his attorney's confusion as to the maximum sentence, his failure to spend sufficient time to elicit the facts, and his failure to explain the elements of, or the defenses to, the charge.[2466] The record showed that the trial court also neglected to advise the defendant of the elements of the crime.[2467] The Ninth Circuit placed the burden on the prosecution to prove that defense counsel had given the advice before the plea, but it failed to sustain this burden.[2468] Consequently, a hearing was considered necessary.

Moreover, in noteworthy dicta, the Ninth Circuit imposed the additional requirement that the defendant be informed of possible *defenses* to the crime as well as its elements, "at least where the attorney or court is made aware of facts that would constitute . . . a defense."[2469] This effectively imposes a duty on the prosecution to assume one of the duties normally performed by the defense attorney.

The Ninth Circuit has long recognized that a defendant's sixth amendment right to counsel may be impaired when a court refuses to grant a continuance due to the unavailability of retained counsel.[2470]

2463. Henderson v. Morgan, 426 U.S. 637, 647 (1976) (defendant's guilty plea held involuntary because he did not receive adequate notice of offense charged).

2464. 644 F.2d 807 (9th Cir. 1981) (per curiam).

2465. *Id.* at 810 (citing Burden v. Alabama, 584 F.2d 100, 102 (5th Cir. 1978) ("When the state record is insufficient to allow a determination of the merits of a defendant's habeas claims, the district court must hold a hearing to develop those facts.")); *see also* Machibroda v. United States, 368 U.S. 487, 495 (1962) ("The Government's contention that [petitioner's] allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence.").

2466. 644 F.2d at 808-09.

2467. *Id.* at 808.

2468. *Id.* at 810.

2469. *Id.* at 809 n.3 (citing Thundershield v. Solem, 565 F.2d 1018, 1028 (8th Cir. 1977) (petition denied because, although trial court inadvertently omitted reference to possible defense of justifiable homicide, record indicated that defense counsel had explained elements of charge and possible defenses), *cert. denied,* 435 U.S. 954 (1978)).

2470. Releford v. United States, 288 F.2d 298, 302 (9th Cir. 1961). In *Releford,* after the defendant's attorney became ill, the trial court refused to grant the defendant a continuance to secure a substitute attorney and insisted that an attorney who shared the same offices with the first attorney would suffice. *Id.* at 299-300. The court of appeals issued a writ of habeas corpus and the defendant was granted a new trial. *Id.* at 302.

Recently, the court extended this rule to cover *appointed* counsel, thus adopting the position of the California Supreme Court.[2471] In *Slappy v. Morris,*[2472] the Ninth Circuit ruled that there is no reason to differentiate between retained and appointed counsel "in the context of preserving any attorney-client relationship."[2473] That relationship, the court reasoned, involves an "intimate process of consultation and planning" which is "no less inviolable" if counsel is appointed rather than retained.[2474]

In *Slappy,* the defendant's first appointed attorney underwent an appendectomy and a second attorney was appointed six days before trial. The defendant refused to cooperate, insisting upon the first attorney's representation, but the court denied his request for a continuance. The Ninth Circuit held that the trial judge's failure to inquire how long the original counsel would be unavailable, when refusing to grant a continuance, constituted a "complete disregard" of Slappy's right to choose his own counsel.[2475] The *Slappy* court followed the established Ninth Circuit rule that in cases of complete disregard, the defendant need not establish prejudice; prejudice will be presumed.[2476]

7. Determinate sentencing

The purpose of California's Determinate Sentencing Law[2477] is to achieve uniformity in sentencing by requiring that all persons convicted of the same crime receive the same sentence, subject to certain aggravating, mitigating or enhancing circumstances.[2478] The law became effective in 1977, and acts as a replacement for the Indeterminate Sentencing Law.[2479] The Ninth Circuit recently examined the Determinate Sentencing Law for potential constitutional violations.

2471. *See* Smith v. Superior Court, 68 Cal. 2d 547, 561-62, 440 P.2d 65, 74, 68 Cal. Rptr. 1, 10 (1968).

2472. 649 F.2d 718 (9th Cir. 1981).

2473. *Id.* at 721.

2474. *Id.* (quoting Smith v. Superior Court, 68 Cal. 2d 547, 561-62, 440 P.2d 65, 74, 68 Cal. Rptr. 1, 10 (1968)).

2475. 649 F.2d at 722.

2476. *See* Releford v. United States, 288 F.2d 298, 301-02 (9th Cir. 1961) (complete disregard of right to choose counsel is reversible error regardless of whether prejudice shown).

2477. CAL. PENAL CODE § 1170 (West Supp. 1981). The Determinate Sentencing Law is applicable retroactively to prisoners who committed felonies prior to the law's effective date, July 1, 1977. *Id.* § 1170.2. *Id.*

2478. Guzman v. Morris, 644 F.2d 1295, 1296 (9th Cir. 1981).

2479. *Id.* at 1296. Under the Indeterminate Sentencing Law, criminal statutes contained minimum and maximum sentences. Judges did not sentence convicted criminals to specific prison terms, but to "the term prescribed by the law." The length of time a prisoner would actually serve was determined by the California Adult Authority. *Id.*

In *Guzman v. Morris*,[2480] defendant Guzman argued that the application of the Determinate Sentencing Law by the Community Release Board (CRB)[2481] deprived him of due process.[2482] Guzman asserted (1) that the CRB improperly considered his prior felony convictions in redetermining his prison release date,[2483] and (2) that he had received a longer sentence under the Determinate Sentencing Law than he would have served under the Indeterminate Sentencing Law.[2484]

The court found that the CRB had not violated Guzman's due process rights by considering his prior felony convictions because the CRB acted within the authority of its predecessor, the Adult Authority.[2485] The court rejected Guzman's second assertion by explaining that his new release date was actually two years earlier than that scheduled under the Indeterminate Sentencing Law,[2486] and that while the total prison term imposed could not have exceeded seven years under the Determinate Sentencing Law, a life term could have been imposed under the former law.[2487]

In *Lambdin v. California Correctional Institution*,[2488] the defendant challenged the Determinate Sentencing Law procedure by asserting that in redetermining his prison release date the CRB had denied him due process and equal protection, and had subjected him to double jeopardy and to cruel and unusual punishment. In addition, Lambdin argued that the CRB had violated his plea agreement by imposing consecutive as opposed to concurrent sentences.[2489]

2480. 644 F.2d 1295 (9th Cir. 1981).

2481. In 1979, the CRB was renamed the Board of Prison Terms. *Id.* at 1296 n.1.

2482. *Id.* at 1298.

2483. *Id.* at 1297-98.

2484. *Id.* at 1298-99. The Determinate Sentencing Law provides that the CRB must reset the prison terms of prisoners who were sentenced under the prior Indeterminate Sentencing Law. *Id.* at 1296. The court summarily dismissed three additional claims raised by Guzman. His contention that his due process and equal protection rights had been violated because a non-judicial body, the CRB, had increased his sentence after his prison term had begun was rejected, following an observation by the court that delegation of this type of authority to a non-judicial body is "well-settled." *Id.* at 1299. *See, e.g.*, Bennett v. California, 406 F.2d 36, 38 (9th Cir.), *cert. denied*, 394 U.S. 966 (1969). His claim that he had been subjected to double jeopardy was similarly rejected. According to the court he "simply was not put in jeopardy twice for the same offense." 644 F.2d at 1299. Finally, his claim that the Determinate Sentencing Law is an ex post facto law or a bill of attainder was rejected on the ground that he had suffered no additional punishment from the law's enactment. *Id.*

2485. 644 F.2d at 1298; *see also* Lambdin v. California Correctional Inst., 640 F.2d 245, 247 (9th Cir. 1981).

2486. 644 F.2d at 1299.

2487. *Id.*

2488. 640 F.2d 245 (9th Cir. 1981).

2489. *Id.* at 247.

In support of his contention that he was denied due process, Lambdin asserted that at his "serious offender hearing"[2490] he was entitled to have a jury trial with proof presented beyond a reasonable doubt, a unanimous jury verdict, and a complete right of confrontation. The Ninth Circuit found, however, that the rights accorded Lambdin under section 2165 of the California Administrative Code satisfied due process.[2491] The court, in addition, specifically rejected his assertion that his plea bargain had been violated by the CRB's imposition of consecutive sentences; it called the claim a "ludicrous exaltation of form over substance," because the total length of his sentence had not been affected.[2492] Lambdin's equal protection claim was denied because the court found the serious offender classification to be "so substantially related to the legitimate object of the DSL [*i.e.*, the achievement of uniform sentences] [that] it constitutes no denial of equal protection to one so denominated."[2493] The court also rejected Lambdin's argument that his serious offender hearing subjected him to double jeopardy reiterating that he had not been resentenced but had received a *redetermined* release date.[2494] Finally, the court summarily dismissed Lambdin's cruel and unusual punishment contention.[2495]

F. Ex Post Facto Clause

The ex post facto clause[2496] is triggered when the following circumstances are present: retroactivity of a statute and material disadvantage to the offender.[2497] A statute is normally considered retroactive when it applies to events occurring before its enactment.[2498]

2490. CAL. PENAL CODE § 1170.2(b) (West Supp. 1981) provides that when the CRB determines that aggravating circumstances indicate that a prisoner is a serious offender and that a longer term than the base term is appropriate, the prisoner must be afforded a "serious offender" hearing.

2491. 640 F.2d at 247-48. CAL. ADMIN. CODE tit. 15, R. 2165 (1981) provides that at serious offender hearings prisoners have all ordinary hearing rights including notice, right to counsel, opportunity to testify, to ask and answer questions, to produce evidence, to call witnesses in case of a factual dispute, and to receive a copy of the record.

2492. 640 F.2d at 248 (citing *In re* Thoren, 90 Cal. App. 3d 704, 709, 153 Cal. Rptr. 617, 620 (2d Dist. 1979)).

2493. 640 F.2d at 248.

2494. *Id.*

2495. *Id.*

2496. U.S. CONST. art. I, § 10, cl. 1 provides in pertinent part: "No State shall . . . pass any ex post facto law."

2497. *See* Lindsey v. Washington, 301 U.S. 397, 401 (1937); Calder v. Bull, 3 U.S. (3 Dall.) 385, 390 (1798).

2498. Weaver v. Graham, 450 U.S. 24, 29 (1981) (citing Lindsey v. Washington, 301 U.S. 397, 401 (1937); Calder v. Bull, 3 U.S. (3 Dall.) 385, 390 (1798)). *See also* Jaehne v. New York, 128 U.S. 189, 193-94 (1888) (dicta).

In *Weaver v. Graham*,[2499] the Supreme Court ruled that changes in the computation of "gain time for good conduct" are considered retroactive for ex post facto purposes when applied to offenders sentenced before the changes were enacted.[2500] The changes were considered retroactive although they operated *prospectively*, because they "change[d] the legal consequences" of the offender's crime after its commission.[2501]

The petitioner in *Weaver* was an inmate in a Florida prison who had been entitled under the old statute to automatic monthly gain time credits against his sentence if he simply avoided disciplinary infractions and performed assigned tasks.[2502] The new statute reduced the gain time credits available to inmates who avoided infractions and who performed their tasks,[2503] although it did provide for increased gain time if more extraordinary efforts were expended.[2504] The Court determined, however, that because the possibilities of increased gain time were discretionary and not automatic this provision failed to rectify the statute's material disadvantage to the offender.[2505]

2499. 450 U.S. 24 (1981).

2500. *Id.* at 31-33. *Weaver* involved Florida law, which uses the term "gain time" to refer to various kinds of time credited to reduce a prisoner's term. *Id.* at 25 n.1.

2501. *Id.* at 31.

2502. *Id.* at 26. The old statute directed that gain time for good conduct should be granted a prisoner as follows: "(a) Five days per month off the first and second years of his sentence; (b) Ten days per month off the third and fourth years of his sentence; and (c) Fifteen days per month off the fifth and all succeeding years of his sentence." FLA. STAT. § 944.27(1) (1975).

2503. 450 U.S. at 33. The Florida Legislature repealed § 944.27(1) in 1978 and enacted a new formula for monthly gain time deductions. The new statute provided: "(a) Three days per month off the first and second years of the sentence; (b) Six days per month off the third and fourth years . . .; and (c) Nine days per month off the fifth and all succeeding years of the sentence." FLA. STAT. § 944.275(1) (1979).

2504. A discretionary award of gain time was possible for acts such as saving a life or diligent performance in an academic program. FLA. STAT. § 944.275(3)(a) (1979).

2505. 450 U.S. at 35-36. Traditionally, parole had been viewed as a matter of "grace," not of right. *See, e.g.*, Cox v. Maxwell, 366 F.2d 765, 767 (6th Cir. 1966); Curtis v. Bennett, 351 F.2d 931, 933 (8th Cir. 1965). A convicted person, for example, does not possess a right to be conditionally released before a valid sentence has expired. Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 7 (1979). Furthermore, a state does not have a duty to establish a parole system, and if it does so, it is free to choose which factors to consider in granting parole. *Id.* at 7-8. *See* Wolff v. McDonnell, 418 U.S. 539, 557 (1974). The implication of *Weaver* is that the concept of parole as a matter of "grace" applies only to the legislature's decision to *create* a parole system. Once the system has been created, a defendant has a *right* to the parole provisions *in effect at the time that the offense was committed.*

G. Cruel and Unusual Punishment

1. Disproportionality

The Supreme Court has defined cruel and unusual punishment by referring to "evolving standards of decency" that mark the progress of a "maturing" society.[2506] The eighth amendment protection against such punishment seeks to confine the state's power to punish within civilized standards.[2507] Consequently, penal laws must be applied non-arbitrarily.[2508]

Disproportionality of punishment has been used as a reason to vacate severe forms of punishment for non-capital crimes.[2509] However, a recent Supreme Court ruling that the length of a prison sentence in felony cases is a matter of "legislative prerogative"[2510] has foreclosed, for most practical purposes, disproportionality challenges in non-capital cases.

Disproportionality still remains a viable means of attacking a death sentence under the cruel and unusual punishment clause.[2511] In *United States v. Valenzuela*,[2512] the Ninth Circuit ruled that, for disproportionality purposes, life imprisonment without possibility of parole is not analogous to capital punishment.[2513] Valenzuela's organization was one of the major sources of Mexican heroin being smuggled into the United States. He was convicted of nine drug smuggling offenses, including one continuing enterprise count for which he was sentenced to life in prison without possibility of parole.[2514] In rejecting Valenzuela's argument that life imprisonment without possibility of parole was analogous to a death sentence, the Ninth Circuit simply noted

2506. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). *See also* Weems v. United States, 217 U.S. 349, 378 (1910). The determination of what constitutes "cruel and unusual" punishment is based on ostensibly objective factors, including "public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries [as] reflected in their sentencing decisions." Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

2507. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality). The scope of "civilized" standards is not static. *Id.* at 101. The questionable assumption underlying this construction of the eighth amendment is that society becomes increasingly "civilized" as time passes.

2508. *See* Furman v. Georgia, 408 U.S. 238, 274 (1972) (per curiam) (Brennan, J., concurring).

2509. *See* Weems v. United States, 217 U.S. 349, 368 (1910).

2510. Rummel v. Estelle, 445 U.S. 263, 274 (1980).

2511. *Id.* at 272.

2512. 646 F.2d 352 (9th Cir. 1980).

2513. *Id.* at 354.

2514. Valenzuela was convicted of seven substantive narcotics counts under 21 U.S.C. § 841(a)(1) (1976), one count of conspiracy under 21 U.S.C. § 846 (1976), and a continuing enterprise count under 21 U.S.C. § 848 (1976).

that the Supreme Court has treated this punishment similarly to "other imprisonment sentences."[2515]

2. Right to medical treatment

The eighth amendment guarantees prisoners the right to adequate medical treatment. Deliberate indifference to serious medical needs constitutes " 'unnecessary and wanton infliction of pain.' "[2516] A claim of inadequate medical treatment, however, must be based on medical necessity, not the mere desire for medical aid.[2517] Recent judicial decisions make no distinction between mental and physical ailments.[2518] A prisoner is entitled to psychological or psychiatric treatment if it can be shown with reasonable medical certainty that (1) the prisoner's symptoms demonstrate a serious disease or injury; (2) the disease or injury is curable or may be substantially alleviated; and (3) the potential for harm to the prisoner by reason of delay or denial of care would be substantial.[2519]

The right to treatment has been limited to what is reasonable in terms of time and cost.[2520] However, in *Ohlinger v. Watson*,[2521] the Ninth Circuit ruled that *constitutionally adequate* treatment for sex offenders who are incarcerated for rehabilitation consists of such treatment that " 'will give each [offender] a realistic opportunity to be cured or to improve his or her mental condition.' "[2522] In *Ohlinger*, the de-

2515. 646 F.2d at 354 (citing Schick v. Reed, 419 U.S. 256, 267 & n.7 (1974)). *Schick* involved a challenge to a no-parole condition affixed to the commutation of a death penalty. The petitioner argued that had his death penalty been set aside in the wake of *Furman*, the no-parole condition would not have attached. However, because his case arose before *Furman*, he was now in a worse position than he would have been without the commutation. *Id.* at 259. In rejecting this argument, the Court characterized the petitioner's status after commutation as a "lesser punishment with conditions." *Id.* at 267.

2516. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (per curiam)).

2517. *See* Woodall v. Foti, 648 F.2d 268, 272 (5th Cir. 1981) (per curiam) (district court erred in dismissing prison inmate's complaint for psychiatric care as frivolous).

2518. *See, e.g.*, Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 763 (3d Cir. 1979) (psychological care of confined pretrial detainees should be same standard as medical care); Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) ("We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart. Modern science has rejected the notion that mental or emotional disturbances are the products of afflicted souls, hence beyond the purview of counseling, medication and therapy.").

2519. Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977).

2520. *See id.*; Woodall v. Foti, 648 F.2d 268, 272 (5th Cir. 1981) (per curiam).

2521. 652 F.2d 775 (9th Cir. 1981).

2522. *Id.* at 778 (quoting Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971)); *see also* McNeil v. Director, Patuxent Inst., 407 U.S. 245, 252 (1972); Jackson v. Indiana, 406 U.S. 715, 735-39 (1972).

fendants had been committed to an Oregon state prison for child molesting. Instead of receving the maximum sentence of fifteen years under the state sodomy statute, they were sentenced as "sex offenders" to indeterminate life sentences.[2523]

The Ninth Circuit ruled that the trial court, by following *Bowring v. Godwin*,[2524] unduly limited the state's responsibility to provide treatment.[2525] In *Bowring*, the defendant had been sentenced *solely* because he had committed criminal offenses; the underlying purpose of the sentence, therefore, was to *punish*. In *Ohlinger*, however, the underlying purpose of the statute under which the defendants had been sentenced was to *rehabilitate* sex offenders.[2526] The Ninth Circuit reasoned that because treatment was the statute's primary objective, persons sentenced on the basis of mental illness were entitled to treatment that was constitutionally adequate for sex offenders committed in civil proceedings.[2527] The court did not analyze whether there existed a "deliberate indifference" by the state toward the defendant's serious psychiatric needs, thereby obviating the need to address issues raised by the rule that indifference constitutes the gratuitous infliction of pain.[2528]

H. Commutations

State statutes mandating that inmates be given specific reasons for denial of their petitions for parole have been recognized as the source of a constitutionally protected liberty interest.[2529] Procedural due pro-

2523. 652 F.2d at 776. The *Ohlinger* court noted that under OR. REV. STAT. § 137.11 (repealed 1971), the court had the discretion to impose an indeterminate life sentence if: (1) the offense involved a child under sixteen years of age and (2) the defendant "had a mental or emotional disturbance, deficiency or condition, predisposing him to the commission of . . . [various sex offenses] to a degree rendering the person a menace to the health and safety of others." *Id.*

2524. 551 F.2d 44 (4th Cir. 1977).

2525. 652 F.2d at 777, 779.

2526. 652 F.2d at 777 (citing Barnett v. Gladden, 237 Or. 76, 390 P.2d 614 (1964)).

2527. 652 F.2d at 777 n.5.

2528. *See* Estelle v. Gamble, 429 U.S. 97, 106 (1976).

2529. Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 11 (1979). The statutes addressed by the Court provide in part:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment, medical care, or vocational or other

cess under the Constitution requires no more than the furnishing to prisoners of these reasons.[2530]

This limitation was illustrated in *Connecticut Board of Pardons v. Dumschat*,[2531] where the Supreme Court determined that the Board's consistent practice of granting commutations to most life inmates was insufficient to create a protected liberty interest.[2532] A group of life inmates argued that because the Board granted seventy-five percent of the commutation requests, it had " 'created an unwritten common law of sentence commutation' "[2533] and was thus required to explain its reasons for denial of an application.[2534]

Although the Second Circuit found the inmates' argument meritorious,[2535] the Supreme Court held that no explanation was necessary.[2536] The Supreme Court characterized the inmates' expectation of commutation as "simply a unilateral hope."[2537] It then explained that a constitutional liberty interest cannot be created by estoppel merely because a discretionary state privilege has been granted generously in the past.[2538] In apparently foreclosing past practice as a source of constitutional entitlement, the Court noted that "the statistical probabilities [of commutation] standing alone generate no constitutional protections . . . . The ground for a constitutional claim, if any, must be found in statutes and other rules defining the obligations of the authority charged with exercising clemency."[2539]

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training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

NEB. REV. STAT § 83-1, 114(1) (1976).

2530. 442 U.S. at 16.

2531. 452 U.S. 458 (1981).

2532. *Id.* at 467.

2533. *Id.* at 459 (quoting Brief of Respondents at 17, Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981)).

2534. 452 U.S. at 461.

2535. *Id.* at 462-63.

2536. *Id.* at 467.

2537. *Id.* at 465.

2538. *Id.*

2539. *Id.* In a concurring opinion, Justice Brennan qualified this statement. Although he agreed that a demonstration of the statistical likelihood of commutation was insufficient to establish a constitutionally protected liberty interest, he did not limit the source of such an interest to state statutes. Justice Brennan would require that the inmates "also show—by reference to statute, regulation, administrative practice, contractual arrangement or other mutual understanding—that particularized standards or criteria guide the State's decisionmakers." *Id.* at 467 (Brennan, J., concurring) (citing Leis v. Flint, 439 U.S. 438, 442 (1979); Perry v. Sindermann, 408 U.S. 593, 601 (1972); Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

If, as it appears, the majority opinion limits the source of constitutionally protected interests to "statutes or other rules," the validity of the holding in Perry v. Sindermann, 408

In addition, the Court concluded that the Connecticut commutation statute itself did not create a protected liberty interest. Because the statute contained no definitions, no criteria, and no requirements for commutation,[2540] it established no analogous duty or constitutional requirement.[2541] Absent such a duty, there was no basis for the inmates' claim that they were constitutionally entitled to an explanation when denied commutation.[2542]

In a dissenting opinion, Justice Stevens criticized the majority for holding that constitutionally protected liberty interests have their roots in state law.[2543] He found it "self-evident" that the liberty protected by the due process clause is bestowed by "the Creator" rather than the state.[2544] He further argued that because conviction does not *com-*

U.S. 593 (1972), is called into question. In the latter case, a teacher's employment was terminated without hearing or notice of reasons after he had been employed by a college for four successive years under a series of one year contracts. The Court stated that there "may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure" and that plaintiff was entitled to show whether such an equivalence existed in this case. *Id.* at 602-03. If the plaintiff was able to establish such a common law, then he would be entitled to an order obligating college officials to give him a hearing. *Id.* at 603.

There are two points of distinction between *Perry* and *Dumschat*: (1) *Perry* involved a property interest in employment, whereas *Dumschat* concerned a liberty interest in commutation; and (2) the past behavior establishing *Perry*'s "unwritten common law" was the behavior of the state toward Perry himself, whereas in *Dumschat*, the past behavior was that of the state toward other inmates. The *Dumschat* Court, however, did not cite either of these dissimilarities as its reason for refusing to apply the "unwritten common law" theory. Rather, it seemed to suggest "that state law is the only source of a prisoner's liberty worthy of federal constitutional protection." 452 U.S. at 467-68 (White, J., concurring).

2540. The Connecticut statute provides:

> (a) Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death shall be vested in the board of pardons.
>
> (b) Said board shall have authority to grant pardons, conditioned or absolute, for any offense against the state at any time after the imposition and before or after the service of any sentence.

CONN. GEN. STAT. ANN. §§ 18-26 (West Supp. 1981).

2541. 452 U.S. at 466.

The *Dumschat* Court distinguished Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1 (1979), by observing that the Nebraska parole statute under attack in that case expressly mandated that the Board "shall" release an inmate "unless" it decided that one of four specific reasons for denial was applicable. Because the statute explicitly established criteria for parole reviews, Nebraska inmates had an interest in the state's adherence to the criteria.

2542. *Id.* at 467.

2543. *Id.* at 469 (Stevens, J., dissenting). *Accord id.* at 467-68 (White, J., concurring) (citations omitted).

2544. *Id.* at 469 & n.1 (Stevens, J., dissenting) (citing Meachum v. Fano, 427 U.S. 215, 230 (Stevens, J., dissenting)).

pletely terminate a defendant's liberty,[2545] and because the Constitution affords some protection at different stages of the post-conviction process,[2546] the issue in *Dumschat* was not whether Connecticut life inmates were totally divested of any constitutionally protected liberty interest. Instead, the question presented was whether a refusal to commute a sentence constituted a deprivation of liberty sufficient to warrant invocation of the protection of the due process clause.[2547]

Justice Stevens observed that while the ordinary litigant is afforded procedural safeguards against arbitrary decision-making by the judiciary, the inmate does not enjoy the same protection.[2548] The obligation to justify publicly a denial of commutation would ensure that the Board's decision was not arbitrary.[2549] He therefore concluded that such an explanation was an essential element of the process that was due the *Dumschat* inmates.[2550]

2545. 452 U.S. at 469 (Stevens, J., dissenting). *Accord id.* at 468 (White, J., concurring) (citations omitted).

2546. *Id.* at 470-71 (Stevens, J., dissenting) (citations omitted). The pertinent stages here were identified as sentencing, commutation, and discharge. *Id.* at 471.

2547. *Id.* at 469.

2548. *Id.* at 472. "Indeed, as in this case, often he is not even afforded the protection of written standards to govern the exercise of the powers of the Board of Pardons." *Id.*

2549. *Id.* (citing Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 40 (1979) (Marshall, J., dissenting)).

2550. 452 U.S. at 472 (Stevens, J., dissenting).