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

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CRIMINAL LAW IN THE NINTH CIRCUIT:
RECENT DEVELOPMENTS

IV. Trial Proceedings
   A. Joinder and Severance ................................ 274
      1. Joinder of defendants ................................ 274
      2. Joinder of counts .................................... 281
   B. Guilty Pleas .......................................... 284
      1. Voluntariness of plea .................................. 284
      2. Guilty plea constitutes a conviction ............... 288
   C. Jury Administration .................................. 290
      1. Generally ........................................... 290
      2. Composition of a jury .................................. 294
      3. The Allen charge ................................... 298
   D. Prosecutorial Misconduct ............................. 302
      1. Dismissal for vindictive prosecution ............... 304
      2. Improper vouching for the credibility of witnesses ................................................. 307
      3. Improper references to matters not in evidence .... 311
      4. Improper comments on a defendant’s silence ...... 317
      5. Prejudicial remarks in closing argument .......... 319
   E. Continuance .......................................... 322
   F. Admission of Evidence ................................ 325
      1. Competency to stand trial .......................... 325
      2. Relevancy ........................................... 331
         a. links to the crime .................................. 331
         b. element of charge .................................. 332
         c. impeachment ....................................... 333
         d. rebuttal ........................................... 334
         e. existence of a scheme or conspiracy ............. 336
         f. motive ............................................. 337
      3. Prejudice ............................................ 338
      4. Character evidence .................................. 340
         a. relevancy ......................................... 340
         b. Rule 403—probative value versus prejudicial impact ................................................. 347
      5. Scope of examination .................................. 354
      6. Opinion ............................................ 357
         a. lay opinion testimony ............................ 357

271
b. expert opinion testimony ........................................... 365
7. Hearsay ................................................................. 372
   a. admissions .......................................................... 372
   b. co-conspirator exception ....................................... 375
   c. declaration against interest ................................... 400
   d. business records exception .................................... 405
   e. public records exception ....................................... 413
   f. harmless error .................................................... 416
8. The right to present evidence ..................................... 417
G. Jury Instructions .......................................................... 424
   1. Instructions to a capital sentencing jury ..................... 425
   2. Instructions calling for a “conclusive presumption”
      on the issue of intent ........................................... 432
   3. Instructions concerning criminal intent and deliberate
      ignorance .......................................................... 435
   4. Instructions regarding the credibility of government
      witnesses .................................................................. 438
   5. Instructions concerning the specific intent and
      knowledge elements of an offense ................................ 442
   6. Instructions defining the “reasonable doubt”
      standard .................................................................. 450
   7. Limiting and curative instructions ............................. 452
   8. Standard of review .................................................. 457
   9. Erroneous jury instructions that did not prejudice
      the defendant ......................................................... 460
   10. Instructions in entrapment cases ............................... 465
   11. Jury instructions that broaden the grand jury
       indictment ............................................................ 468
   12. The accomplice credibility instruction ....................... 469
   13. Instructions on robbery through intimidation .............. 471
   14. Instructions in antitrust cases ................................. 472
   15. Instructions in conspiracy cases ............................... 473
   16. Failure to instruct the jury on lesser-included
       offenses .............................................................. 478
H. Judicial Misconduct ......................................................... 479
   1. Reprimand ............................................................ 480
   2. Interruptions ........................................................ 482
   3. Comments ............................................................ 483
   4. Questioning witnesses .............................................. 485
   5. Polling the jury ....................................................... 487
V. Post-Conviction Proceedings ............................................ 489
A. Double Jeopardy

1. Cumulative punishment for "the same offense" at a single trial

2. Prohibition against retrial for "the same offense"

3. Sentencing changes

4. Point in proceedings at which jeopardy attaches

B. Inconsistent Verdicts

C. Appellate Review

1. The plain error rule

2. Finality

3. Government appeals

4. Timeliness

5. Abatement

D. Sentencing

1. Jurisdiction of sentencing authority

2. Presentence information

3. Judge's discretion
   a. automatic or arbitrary sentences
   b. disparate sentences for co-defendants
   c. Rule 35 motions

4. Resentencing
   a. on remand
   b. crediting prior time in custody

5. Consecutive sentences

6. Youth Corrections Act

7. Section 2255 proceedings

8. Due process at sentencing

9. Death penalty

E. Cruel and Unusual Punishment

F. Probation

1. Restitution

2. Revocation of probation

G. Parole

1. Parole boards' discretion

2. Due process in revocation proceedings

3. Special parole terms

4. Revocation of special parole terms

5. Reconsideration of presumptive parole dates

H. Habeas Corpus

1. Certificate of probable cause

2. Requirement of constitutional claim
IV. TRIAL PROCEEDINGS

A. Joinder and Severance

Rule 8 of the Federal Rules of Criminal Procedure provides for joinder of more than one defendant in the same action, or of more than one count against a single defendant. If either the defendant or the government is prejudiced by joinder, however, the trial court has discretion to grant severance pursuant to Federal Rule of Criminal Procedure 14.

1. Joinder of defendants

In United States v. Gee, defendant Gee was tried jointly with two co-conspirators for conspiring to distribute cocaine. Gee's co-conspirators, also charged with several substantive offenses, pleaded guilty to

1950. 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 transactions 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 the defendants need not be charged in each count.

1951. 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.

1952. 695 F.2d 1165 (9th Cir. 1983).
1953. Id. at 1166. 21 U.S.C. § 846 (1982) provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter [on drug abuse prevention] 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."
all charges at the close of the evidence. On appeal, Gee contended that the trial court had erroneously denied his motion to sever his trial from the trial of his co-conspirators.

The Ninth Circuit held that the trial judge did not abuse his discretion in refusing to grant the defendant's motion to sever. Applying the test recently articulated in United States v. Escalante, the court stated that Gee had failed to demonstrate that any of his substantive rights were clearly prejudiced by the joint trial. Furthermore, the court found that Gee had waived his right to severance because he had failed to renew his motion to sever at any point subsequent to his initial objection. Finally, the Ninth Circuit stated that, even if any of Gee's

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1954. 695 F.2d at 1166.
1955. Id. at 1169. Gee acknowledged, however, that the trial judge has the discretion to determine whether severance is required to protect the defendant's rights. Id.
1956. Id. at 1170.
1957. 637 F.2d 1197 (9th Cir.), cert. denied, 449 U.S. 856 (1980). Defendant Escalante made a pretrial motion requesting the court to sever his trial from that of his co-defendants on the ground that evidence of the organized crime connections of one of his co-defendants would be highly prejudicial. Id. at 1200-01. The court denied the motion and Escalante was convicted of conspiring to import heroin in violation of 21 U.S.C. §§ 963, 952(a) and 960(a)(1). 637 F.2d at 1199.

The Escalante court noted that "[t]he test for determining abuse of discretion in denying severance under Rule 14 is whether a joint trial would be so prejudicial that the trial judge could exercise his discretion in only one way." Id. at 1201. The court further stated that the defendant:

must show more than that a separate trial would have given him a better chance for acquittal. . . . He must also show 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 each defendant. . . . [T]he prejudice must have been of such magnitude that the defendant was denied a fair trial.

Id. (citations omitted). The Ninth Circuit found that Escalante had not sustained his burden of proof, and the court therefore affirmed the conviction. Id. at 1202. The court noted that reference to the organized crime connections of Escalante's co-defendants was undoubtedly harmful; however, the trial judge had carefully instructed the jury that such evidence was not to be considered in determining Escalante's guilt or innocence, thereby neutralizing its prejudicial effect. Id.

1958. 695 F.2d at 1170. The court commented that the cases cited by the defendant were inapposite. The court distinguished the instant case from United States v. Mardian, 546 F.2d 973, 977 (D.C. Cir. 1971), noting that in Mardian there was a vast difference in the amount of evidence presented against each defendant. As a result, one of the defendants was exposed to the danger that the guilt of his co-defendants would be attributed to him. No such disparity existed in Gee. Distinguishing United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971), the court stated that Gee was not a case in which the offense for which the defendant was tried was only remotely related to those for which his co-defendants were simultaneously prosecuted. 695 F.2d at 1170.

1959. 695 F.2d at 1170 (citing United States v. Figueroa-Paz, 468 F.2d 1055, 1057 (9th Cir.}
substantive rights had been prejudiced as a result of the joint trial, the
effect of that prejudice was dispelled by the trial judge's limiting
instruction.\footnote{1960}

In \textit{United States v. Brooklier},\footnote{1961} the Ninth Circuit considered
whether the admission of pretrial statements made by a non-testifying co-
defendant, in which he admitted he was the acting boss of an organized
crime family, necessitated severance.\footnote{1962} Five members of La Cosa Nos-
stra were indicted on charges of racketeering,\footnote{1963} extortion,\footnote{1964}
obstruction of justice,\footnote{1965} and aiding and abetting.\footnote{1966} Although co-defendant
Dragna did not testify, the jury learned that defendants Brooklier and
Sciortino were in prison at the time Dragna claimed to have been the
acting boss. Brooklier and Sciortino contended that severance of
Dragna's trial was necessary because Dragna's statements compelled the
impermissible inference that he was acting as the boss in their place.\footnote{1967}

The Ninth Circuit affirmed the trial court's denial of Brooklier and

\footnote{1960} \textit{Id.} (citing United States v. Escalante, 637 F.2d 1197, 1201 (9th Cir.),
cert. denied, 449 U.S. 856 (1980)). \textit{See supra note 1957 for a discussion of
Escalante.}

\footnote{1961} 685 F.2d 1208 (9th Cir. 1982) (per curiam), 

\footnote{1962} \textit{Id.} at 1218. Before the statements were admitted into evidence, the names of the four
other defendants were deleted and the jury was instructed that the statements could only be
considered when determining Dragna's guilt, not that of his co-defendants. \textit{Id.}

\footnote{1963} 18 U.S.C. § 1962(c) (1976), a portion of the Racketeering Influence and Corrupt Orga-
nizations Act, provides:

\textit{It shall be unlawful for any person employed by or associated with any enter-
prise 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 af-
fairs through a pattern of racketeering activity or collection of unlawful debt.}

\footnote{1964} 18 U.S.C. § 1951(a) (1976), a portion of the Hobbs Act, provides in part:

\textit{Whoever in any way or degree obstructs, delays, or affects commerce or the
movement of any article or commodity in commerce, by robbery or extortion or
attempts or conspires so to do, or commits or threatens physical violence to any
person or property . . . shall be fined not more than $10,000 or imprisoned not more
than twenty years, or both.}

\footnote{1965} 18 U.S.C. § 1510(a) (1976) provides in part that \textit{"[w]hoever injures any person in his
person or property on account of the giving by such person or by any other person of any such
information to any criminal investigator . . . [s]hall be fined not more than $5,000, or impris-
oned not more than five years, or both."}

\footnote{1966} 18 U.S.C. § 2 (1976) provides:

(a) Whoever commits an offense against the United States or aids, abets, coun-
sels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by
him or another would be an offense against the United States, is punishable as a
principal.

\footnote{1967} 685 F.2d at 1218. From 1969 through 1976, the co-defendant, Dragna, had several
conversations with an FBI agent during which the agent attempted to persuade Dragna to
become an informant. In 1976, Dragna was subpoenaed to appear before the grand jury.
Dragna sought the aid of the FBI agent who informed him that their conversations might be
Sciortino's motion to sever. The court noted that, even if the suggested inference could be drawn, it was not sufficiently incriminating to require severance. The Ninth Circuit stated that severance is not required under Bruton v. United States unless the non-testifying defendant's statements "clearly inculpate" his co-defendants. Here, however, the statements tended to implicate Brooklier and Sciortino only when combined with other evidence of their guilt.

The Ninth Circuit was faced with a similar question in United States v. McCown. Defendant McCown and two co-defendants were indicted on various counts of a seventeen count indictment relating to a conspiracy to distribute cocaine and firearms. McCown sought to sever the trial of all the counts on which he was charged from those on which his co-defendants were charged. The district court, however, granted his request with respect to count seventeen only.

kept confidential if he cooperated. However, Dragna was not given immunity and his pretrial statements to the FBI agent were admitted. id. at 1217.

1968. id.
1969. id. Both parties stipulated and the jury was instructed that mere membership in La Cosa Nostra was not illegal. id.
1970. 391 U.S. 123 (1968). In Bruton, the defendants, Bruton and Evans, were tried jointly for armed postal robbery. Evans did not take the stand. A postal inspector testified, however, that Evans had confessed to him that he and Bruton had committed the robbery. The trial court instructed the jury that the confession was competent evidence against Evans, but it was inadmissible hearsay against Bruton and could not be considered when determining Bruton's guilt or innocence. Both defendants were convicted. id. at 124. The Eighth Circuit set aside Evans' conviction, but affirmed Bruton's conviction because of the trial judge's careful limiting instructions to the jury. id.

The United States Supreme Court reversed Bruton's conviction, stating that the prejudice which resulted from the admission of Evans' incriminating confession could not be dispelled upon cross-examination because Evans did not testify. id. at 137. Thus, the Court held that Bruton's sixth amendment right to confrontation had been violated. id. See infra note 1980. The Court further stated that the instructions to the jury to disregard Evans' hearsay statements inculpating Bruton were not an adequate substitution for the defendant's sixth amendment rights. 391 U.S. at 137.

1971. 685 F.2d at 1218. E.g., United States v. Knuckles, 581 F.2d 305, 313 (2d Cir.) (severance not required where incriminating statement made by co-defendant neither mentioned defendant by name nor gave physical description of him not "clearly inculpatory" when standing alone), cert. denied, 439 U.S. 986 (1978).
1972. 685 F.2d at 1218 (citing United States v. Wingate, 520 F.2d 309, 314 (2d Cir. 1975) (tendency of co-defendant's written confession to inculpate defendant when combined with additional evidence of defendant's guilt does not render confession inadmissible as long as it is not "powerfully incriminating"), cert. denied, 423 U.S. 1074 (1976)).
1973. 711 F.2d 1441 (9th Cir. 1983).
1974. id. at 1448. In count 17, McCown was charged with unlawfully possessing cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (1982). That statute provides in pertinent part that "[i]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."
On appeal, McCown advanced two arguments in support of his contention that the trial court had erred in refusing to sever every count on which he was indicted. McCown first argued that he was entitled to severance under Bruton because the admission of inculpatory statements made by a co-defendant had prejudiced his case. The Ninth Circuit responded that Bruton was inapplicable because the incriminating statements made by one of McCown's co-defendants were made in furtherance of a conspiracy, not in a confession. Consequently, the court found that the statements were admissible under the co-conspirator exception to the hearsay rule. In addition, the Ninth Circuit held that McCown's sixth amendment right to confrontation had not been jeopardized because the statements were sufficiently reliable to justify their admission.

McCown further contended that he had been unfairly prejudiced as a result of being tried jointly with co-defendants who were depicted throughout the trial as "'despicable individuals constantly and relentlessly engaging in their unlawful pursuits.' " Applying the test articulated in United States v. Abushi, the court held that reversal was not warranted because McCown had failed to demonstrate that the district

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1975. 711 F.2d at 1448.
1977. 711 F.2d at 1448.
1978. Id. There was independent evidence that a conspiracy existed, that the co-defendant's statements were made in furtherance of the conspiracy, and that McCown knowingly participated in the conspiracy. Thus, the court ruled that the co-defendant's statements were admissible under the co-conspirator exception to the hearsay rule. Id. at 1448-49 (citations omitted). See Fed. R. Evid. 801(d)(2)(E).
1979. 711 F.2d at 1448-49.
1980. U.S. CONST. amend. VI provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation . . . [and] to be confronted with the witnesses against him."
1981. 711 F.2d at 1449 (citing Dutton v. Evans, 400 U.S. 74, 88-89 (1970) (plurality opinion)). In Dutton, the United States Supreme Court articulated four factors that are indicative of a statement's reliability: (1) the declaration contains no assertion of a past fact and consequently carries a warning to the jury against giving it undue weight; (2) the declarant has personal knowledge of the identity and role of participants of the crime; (3) the possibility that the declarant was relying upon faulty recollection is remote; and (4) the circumstances under which the statement was made do not provide reason to believe the declarant had misrepresented the defendant's involvement in the crime. If these factors are present, the unavailability of the declarant for cross-examination does not violate the confrontation clause of the sixth amendment and the statement is admissible. Dutton, 400 U.S. at 88-89.
1982. 711 F.2d at 1448. McCown contended that transference of his co-defendants' guilt could only be prevented by severance. Id.
1983. 682 F.2d 1289 (9th Cir. 1982). In Abushi, the Ninth Circuit stated that "[t]he test for determining whether the district court abused its discretion is whether a joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial." Id. at 1296.
The court had abused its discretion in refusing to sever all of the counts against McCown. The Ninth Circuit noted that the district court had carefully advised the jury as to which defendants were charged in each count, and that McCown had "failed to show an inability on the part of the jury to compartmentalize the evidence" as it related to him.

In *United States v. Ramirez*, the Ninth Circuit again held that a defendant had not been prejudiced as a result of a joint trial. Defendant Ramirez was indicted on charges that he instigated and financed a scheme to import marijuana into the United States from Mexico. After the district court denied his severance motion, Ramirez was tried together with a co-conspirator, Reynolds, and found guilty on all counts.

On appeal, Ramirez contended that he was prejudiced by the joint trial and, therefore, that the trial court had erred in denying his severance motion. Ramirez first argued that his defense was irreconcilable with that of his co-defendant because Reynolds had admitted committing the acts for which he was indicted, but claimed to have been acting as a government informant. Second, Ramirez alleged that the evidence against Reynolds was so strong that it caused the jury to find Ramirez

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1984. 711 F.2d at 1449.
1985. *Id.* (citations omitted).
1986. 710 F.2d 535 (9th Cir. 1983).
1987. *Id.* at 547.
1988. *Id.* at 537-38. Ramirez was convicted of conspiring to import and distribute marijuana, and to transport stolen aircraft in violation of 18 U.S.C. § 371 (1976) which provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, 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.

In addition, Ramirez was convicted of transporting a stolen aircraft in violation of 18 U.S.C. § 2312 (1976) and importing marijuana in violation of 21 U.S.C. § 960(a)(1) (1982). 18 U.S.C. § 2312 (1976) provides that "[w]hoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 21 U.S.C. § 960(a)(1) (1982) provides in pertinent part that "[a]ny person who . . . knowingly or intentionally imports or exports a controlled substance . . . [or] brings or possesses on board a vessel, aircraft, or vehicle a controlled substance . . . shall be imprisoned not more than five years, or be fined not more than $15,000, or both." Moreover, Ramirez was convicted of possessing with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) (1982) which provides in relevant part that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

1989. 710 F.2d at 545.
1990. *Id.*
1991. *Id.* at 546.
guilty by association.1992 Finally, Ramirez contended that he was prejudiced because testimony of two co-conspirators, admitted at the joint trial, would not have been admissible had he been tried separately.1993

The Ninth Circuit focused on "whether the jury [could] reasonably be expected to compartmentalize the evidence as it relate[d] to [the] separate defendants" when it considered Ramirez' claim that he had been prejudiced as a result of the joint trial.1994 The Ninth Circuit ultimately upheld the district court's denial of Ramirez' motion to sever, rejecting each of Ramirez' arguments.1995

The court first stated that a showing of conflicting defenses is not enough to require severance.1996 The defendant must also show that "acceptance of one party's defense will preclude the acquittal of the other."1997 However, no such mutual exclusivity existed in this case.1998 Acceptance of Reynolds' "informer" defense did not relieve the government of its burden of establishing Ramirez' participation in the criminal enterprise, and Ramirez' guilt depended upon sufficient proof connecting him with the smuggling scheme.1999

The court further reasoned that, although the evidence against co-defendant Reynolds was overwhelming, there was little chance that it "spilled over" onto Ramirez.2000 Ramirez' guilt or innocence was dependent upon the prosecution's success in convincing the jury that Ramirez financed and directed the smuggling operation.2001 Proof on that issue

1992. Id. at 547 (relying on United States v. DeRosa, 670 F.2d 889 (9th Cir.) (appellate court must be cautious of situations where jury may impute guilt of some defendants to others when reviewing trial court's denial of severance motion), cert. denied, 459 U.S. 993, 1014 (1982)).
1993. Id.
1994. Id. at 546 (quoting United States v. Brady, 579 F.2d 1121, 1128 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979)).
1995. Id. at 547.
1996. Id. at 546 (citing United States v. Brady, 579 F.2d 1121, 1128 (9th Cir. 1978) (antagonism of defenses insufficient to justify reversal of trial court's decision not to sever even if defendants seek to blame each other), cert. denied, 439 U.S. 1074 (1979)).
1997. Id. (citing United States v. Salomon, 609 F.2d 1172, 1175 (5th Cir. 1980) (defendant failed to demonstrate co-defendant's reliance on an entrapment defense and defendant's own theory of defense was "antagonistic to the point of being mutually exclusive"); United States v. Ziperstein, 601 F.2d 281, 285 (7th Cir. 1979) (co-defendant's alleged nonparticipation in the conspiracy did not preclude acquittal of other defendants who maintained no conspiracy existed), cert. denied, 444 U.S. 1031 (1980)).
1998. Id. at 546.
1999. Id. The court also noted that acceptance of Reynolds' defense would not guarantee the prosecution's success in establishing Ramirez' guilt. Id.
2000. Id. at 547.
2001. Id.
was distinct from proof of Reynolds' acts.\textsuperscript{2002}

Finally, the Ninth Circuit rejected Ramirez' argument that testimony of his co-conspirators would not have been admitted at a separate trial because the existence of a conspiracy would not have been established.\textsuperscript{2003} The Ninth Circuit noted that the record as a whole sufficiently established the existence of a conspiracy.\textsuperscript{2004} In addition, one of the co-conspirators had testified that Reynolds had made statements linking Ramirez to the conspiracy.\textsuperscript{2005} The court stated that this testimony would have been admissible against Ramirez at a separate trial because it related to statements of a co-conspirator in furtherance of the conspiracy.\textsuperscript{2006}

2. Joinder of counts

In United States v. Bennett,\textsuperscript{2007} defendant Bennett was convicted on one count of conspiracy,\textsuperscript{2008} forty-nine counts of making false statements to the United States Department of Labor,\textsuperscript{2009} seven counts of theft and embezzlement,\textsuperscript{2010} and two counts of filing false income tax returns.\textsuperscript{2011}

\begin{itemize}
  \item [2002.] Id.
  \item [2003.] Id.
  \item [2004.] Id. See United States v. Brock, 667 F.2d 1311, 1315 (9th Cir. 1982) (statements of co-conspirator made during course of and in furtherance of conspiracy admissible under FED. R. EVID. 801(d)(2)(E) only if independent proof of conspiracy and of defendant's connection to conspiracy exists), cert. denied, 460 U.S. 1022 (1983).
  \item [2005.] 710 F.2d at 547.
  \item [2006.] Id. FED. R. EVID. 801(d)(2)(D) provides in pertinent part that "[a] statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."
  \item [2007.] 702 F.2d 833 (9th Cir. 1983).
  \item [2008.] 18 U.S.C. § 371 (1976) provides in pertinent part:
    If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof . . . 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 for not more than five years, or both.
  \item [2009.] 18 U.S.C. § 1001 (1976) provides in relevant part:
    Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
  \item [2010.] 18 U.S.C. § 665(a) (1976) provides in pertinent part:
    Whoever, being an officer, director, agent, or employee of . . . any agency receiving financial assistance under the Comprehensive Employment and Training Act of 1973 embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance . . . shall be fined not more than $10,000 or imprisoned for not more than two years, or both.
  \item [2011.] 26 U.S.C. § 7206(1) (1976) provides:
On appeal, Bennett contended that the trial court had committed reversible error in joining the fraud and tax evasion counts. Applying Rule 8(a) of the Federal Rules of Criminal Procedure, the Ninth Circuit held that joinder was appropriate because the tax evasion and fraud counts were offenses of the same character, and because the tax evasion counts had resulted primarily from the need to conceal the illegal proceeds obtained through the defendant's fraud.

In United States v. Nolan, the defendant, an ex-felon, was convicted on four counts of violating federal firearms statutes. Count four involved the receipt of a gun subsequently used by Nolan in the shooting death of a man outside a Tucson bar. Nolan's state trial for this murder was still pending when the district court decided to proceed on the firearms offenses.

Citing United States v. Bronco, the defendant contended that the...
trial court abused its discretion when it refused to grant his motion to sever count four.\textsuperscript{199} The court of appeals distinguished \textit{Bronco}, however, noting that the overlap of proof on the several firearms offenses was significant.\textsuperscript{200} Consequently, the court found that joinder was both economical and logical.\textsuperscript{201}

Nolan further contended that the trial court’s failure to sever count four violated his fifth amendment “right to testify” because he was unable to give exculpatory testimony on count four for fear it would be used against him in the state murder trial.\textsuperscript{202} The Ninth Circuit stated that a defendant “must show that he has important testimony to give on some counts and a strong need to refrain from testifying on those he wants severed,” in order to justify severance.\textsuperscript{203} Although Nolan stated he would give exculpatory testimony on all four counts, he wanted to refrain from testifying on count four merely because he was afraid the testimony would be used against him in the state murder trial.\textsuperscript{204} The Ninth Circuit stated that every defendant must consider the possibility that his testimony will later be used against him when deciding whether to testify.
on his own behalf. Moreover, the defendant was never forced to testify in any way, nor did the government attempt to coerce Nolan's exercise of his fifth amendment rights. Thus, the court held that joinder was proper because Nolan had not established a "strong need to refrain from testifying."

B. Guilty Pleas

1. Voluntariness of plea

When a defendant pleads guilty to a criminal charge, the plea operates as a waiver of the constitutional right to a jury trial, the privilege against self-incrimination, and the right to confront his accusers. Because of the waiver of constitutional rights involved, the court accepting the guilty plea must show that the defendant "voluntarily and understandingly" entered his or her plea of guilty.

The United States Supreme Court ruled in *Marshall v. Lonberger* that a guilty plea will be sustained where the record fairly supports the conclusion that the defendant was aware of and understood the charges against him. In a prior proceeding in an Illinois state court, the defend-

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2025. *Id.* (citing *Harrison v. United States*, 392 U.S. 219, 222 (1968) (waiver of privilege against self-incrimination by defendant who chooses to testify is no less effective even though defendant may have been motivated to take witness stand only to refute evidence adduced against him)).

2026. *Id.* at 242 (citing *Carnley v. Cochran*, 369 U.S. 506, 516 (1962) (record must show that defendant rejecting constitutional right to counsel did so "intelligently and understandingly").

2027. 700 F.2d at 483.


2029. *Id.* at 242 (citing *Carnley v. Cochran*, 369 U.S. 506, 516 (1962) (record must show that defendant rejecting constitutional right to counsel did so "intelligently and understandingly").

tant pleaded guilty to a charge of attempted murder. The prosecution used the record of this conviction in a subsequent trial in Ohio to prove a specification against the defendant for aggravated murder. The Ohio trial court had conducted a pretrial hearing in which it found that the defendant's guilty plea in the Illinois sentencing proceeding had been entered intelligently and voluntarily. Documentary evidence of this conviction was introduced at the defendant's trial. The jury was instructed that the Illinois conviction was to be considered only in connection with the issue of aggravated circumstances. After the Ohio jury returned a verdict of guilty on the charge of aggravated murder, the defendant was sentenced to death.

The defendant contended that his guilty plea to the murder charge in the Illinois court was not voluntary because he had no knowledge that the charge against him was attempted murder. The Court reiterated the principle that a guilty plea cannot be voluntary unless the accused has received "'real notice of the true nature of the charge against...

2031. Id. at 426. To impose the death sentence on the defendant for aggravated murder under Ohio law, the prosecution had to allege a specification and prove beyond a reasonable doubt the aggravating circumstances contained in it. Here, the prosecution alleged that the defendant had been previously convicted of a crime of purposeful killing of another, or of attempt to kill another. Id. at 426 n.2.

2032. Id. at 428-29.

2033. Id. See infra note 2034.

2034. 459 U.S. at 426-30. The state offered into evidence copies of the grand jury indictment, a certified copy of a "conviction statement," and the transcript of the Illinois sentencing hearing in which the defendant pleaded guilty. Id. at 426. The indictment referred to one count against the defendant of "intentionally and knowingly attempting to kill." At the sentencing hearing, the relevant exchanges between the defendant, the defendant's attorney, the prosecuting attorney, and the sentencing judge show that all references to the charge of attempted murder consist simply of "attempt":

The Court: In other words, you are pleading guilty, that you did on August 25, 1968, commit the offense of aggravated battery on one Dorothy Maxwell, and that you did on the same date attempt on Dorothy Maxwell, with a knife, is that correct?
The Defendant: Yes, sir.
The Court: And you did on the same date commit the offense of aggravated battery on one Wendtian Maxwell, is that correct?
That is what you are pleading to, sir?
The Defendant: Yes, sir.
The Court: And understand by pleading guilty to this indictment you are waiving your right to a trial by this Court or trial by this Court and a jury?
The Defendant: Yes.

. . . .
The Court: Understand by pleading guilty I could sentence you from one to ten on the aggravated battery and attempt one to twenty. So I could sentence you to the penitentiary for a maximum of from one to forty years. Understand that?
The Defendant: Yes, sir.
Id. at 427-28.
The Court found, however, that it could presume that the defendant knew of the attempted murder charge against him. The Court pointed out that the defendant, who was intelligent and experienced in the criminal justice system, would have understood that references at the Illinois hearing to "attempt" meant "attempt to kill." Because the defendant was presumed to have knowledge of the indictment containing the charge of attempt, the Court determined that his plea of guilty in the Illinois proceedings was knowing and voluntary. Therefore, it upheld as constitutional the defendant's conviction for aggravated murder based on this prior conviction.

The Ninth Circuit considered two cases in which the defendants contended that their guilty pleas had not been voluntary and intelligent. In both cases the resulting conviction had been used as a predicate in a subsequent criminal conviction.

In United States v. Goodheim, the defendant contended that a prior felony conviction could not be used as a predicate to charge him with receipt and possession of a firearm by a convicted felon because the guilty plea entered in the prior felony proceeding was not voluntary. On remand from the Ninth Circuit, the district court held an evidentiary hearing to determine whether the plea was voluntary and intelligent. The lower court accepted the testimony as to the customs and practices of the trial judge who accepted the defendant's guilty plea because the witnesses had no specific recollection of the actual proceedings occurring years earlier. The inference created from this testimony—that the trial judge consistently followed a "painstaking probing" of the defendant's plea—supported the defendant's claim of an involuntary plea.

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2035. Id. at 436 (quoting Smith v. O'Grady, 312 U.S. 329, 334 (1941) (defendant who is tricked into pleading guilty to serious offense, denied copy of the charge against him and assistance of counsel, is denied notice—the "first and most universally recognized requirement of due process").

2036. Id. (quoting Henderson v. Morgan, 426 U.S. 637, 647 (1967) ("[I]t may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.").

2037. Id. The Court noted that the defendant was represented at the Illinois proceedings by two competent lawyers, either of whom may have advised the defendant of the charge of attempted murder. Also, the indictment may have been read at any of several proceedings at which the defendant appeared. Id. at 434 n.3, 437.

2038. Id. at 438.

2039. 686 F.2d 776 (9th Cir. 1982).

2040. Id. at 777.

2041. Id. Goodheim's guilty plea was entered in 1964. The Ninth Circuit stated that, "[w]hen the prior conviction is a number of years old and the record of the taking of the plea is silent, it may frequently occur that there will be no evidence available ... other than the defendant's testimony and the custom of the trial court in taking pleas." Id. (quoting United States v. Pricepaul, 540 F.2d 417, 423 (1976)). The witnesses offering testimony as to the practices of the trial judge had made numerous appearances before him. Id.
ant's understanding of the meaning and consequences of entering a guilty plea—was not rebutted by any credible testimony of the defendant. The Ninth Circuit found this inferential evidence to be clear and convincing and, thus, affirmed the district court's finding that the defendant's guilty plea in the prior felony proceeding had been voluntary and intelligent.2042

In a similar case, the court in United States v. Freed2043 affirmed the lower court's finding, based upon an evidentiary hearing, that the defendant's guilty plea had been constitutionally accepted. There, the defendant contended that he was not advised of his rights and hence was not aware of them when he entered his plea. The Ninth Circuit stated that the court is not required to specifically articulate the rights being waived upon entry of a guilty plea.2044 All that is required is that the record show that the plea was made "understandingly and voluntarily."2045 The district court heard testimony from the defendant's former attorney regarding his practice in advising clients, and testimony as to the trial court's practice in taking guilty pleas. In the absence of credible rebuttal by the defendant, the evidence was found to clearly and convincingly support the trial court's conclusion that the defendant's plea was voluntarily and intelligently made.2046

In Gano v. United States,2047 the defendant contended that the judge who accepted his plea coerced him into pleading guilty by suggesting that the defendant would be found guilty on at least two counts.2048 The Ninth Circuit affirmed the district court's finding that any emotional effect from the remark was attenuated by the five weeks which passed between the defendant's arraignment and entry of his plea. The court also noted that subsequent to the alleged remark, the defendant had consented to a transfer to the district where the judge had been appointed so that he could enter his plea before the judge. Accordingly, the court found that these two events negated any claim by the defendant that his plea was not voluntarily made.2049

2042. Id. at 778.
2043. 703 F.2d 394 (9th Cir.), cert. denied, 104 S. Ct. 131 (1983).
2044. Id. at 395 (citing Wilkins v. Erickson, 505 F.2d 761, 763 (9th Cir. 1974) ("whole record" sufficient to show plea is voluntary and intelligent without specific articulation of Boykin rights) (see supra notes 2028-29 and accompanying text)).
2045. Id. (quoting Wilkins v. Erickson, 505 F.2d 761, 763 (9th Cir. 1974)); see Brady v. United States, 397 U.S. 742, 748 (1970).
2046. 703 F.2d at 395.
2047. 705 F.2d 1136 (9th Cir. 1983).
2048. Id. at 1137.
2049. Id. at 1137-38.
2. Guilty plea constitutes a conviction

The United States Supreme Court in *Dickerson v. New Banner Institute, Inc.*, held that firearms disabilities imposed by federal statute apply to a person who pleads guilty to a state felony offense even when the record is subsequently expunged under state procedures. In *Dickerson*, the defendant corporation received a license as a dealer in firearms and ammunitions, and as a manufacturer of ammunition. The Treasury Department’s Bureau of Alcohol, Tobacco and Firearms subsequently revoked the license after it learned that the company’s director, shareholder and Chairman of the Board had previously pled guilty to a felony in an Iowa state court. This fact had not been disclosed on the application for the license. In addition, the Bureau contended that the defendant was ineligible for the license because of the disabilities imposed by the federal Gun Control Act.

The *Dickerson* Court first looked at the issue of whether the director of the defendant corporation, Kennison, had in fact been convicted within the meaning of the gun control statute. After plea negotiations, Kennison had pled guilty to an Iowa state crime of carrying a concealed handgun in return for dismissal of a charge of kidnapping his estranged wife. Under Iowa law in effect at the time, and because of the “unusual circumstances” of the case, the state court deferred entry of a formal judgment against Kennison and placed him on probation. Upon completion of Kennison’s term, the state court followed procedures then in effect and expunged Kennison’s record with reference to the deferred judgment.

The Court ruled that the question of whether one has been “convicted” is necessarily one of federal, not state, law. Because the term “convicted” does not have the same meaning in every federal statute,

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2052. 460 U.S. at 115.
2053. 18 U.S.C. § 922(g)(1) (1976) provides: “[i]t shall be unlawful for any person—(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport any firearm or ammunition in interstate or foreign commerce.” 18 U.S.C. § 922(h)(1) (1976) provides: “[i]t shall be unlawful for any person—(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”
2054. 460 U.S. at 106-08.
2055. Id. at 111-12 (citing United States v. Benson, 605 F.2d 1093, 1094 (9th Cir. 1979)).
2056. Id. at 112 n.6.
the majority looked at the intent of Congress in enacting Title IV. According to the Court, Congress sought "to keep firearms out of the hands of presumptively risky people." The Court placed emphasis on the language of Title IV which provides that disabilities be imposed on a person convicted of "a crime punishable by imprisonment for a term exceeding one year." Therefore, the Court found it irrelevant that the director did not actually receive a prison term, but was placed on probation. For these reasons, the Court found that a guilty plea accepted by a state court and followed by a sentence of probation is a conviction within the meaning of federal gun control laws.

The Dickerson Court then determined whether Kennison's conviction was nullified, as the defendant contended, by the subsequent expunction of his record by the state court. The Court again examined the language of the statute and Congress' intent in enacting Title IV, and found nothing to indicate that the federal firearms disabilities would be removed following expunction of a state conviction. In reaching its conclusion, the Court lent great weight to its belief that a contrary decision would frustrate the purpose of the federal statute and hamper its enforcement. Because Kennison's conviction was not nullified by expunction of his record, the defendant corporation was ineligible for a dealer's license under the firearms disability provision of the federal Gun Control Act.

The dissent in Dickerson did not equate the notation by the Iowa state court of Kennison's guilty plea and his probation with a conviction. After reviewing several congressional acts, the dissent determined that at the least the acceptance of a plea is needed, and at the most

2057. Id. The Court pointed out that Title IV applies not only to a person convicted of a disqualifying offense, but also to a person "merely under indictment for such a crime." Id.
2058. Id. at 113 (quoting 18 U.S.C. § 922(g) (1976)). The Court stated: "If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is a 'clearly expressed legislative intent to the contrary.'" Id. at 110 (quoting Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).
2059. Id. at 114.
2060. Id. at 115. The Court noted that the language of Title IV clearly indicates that expunction "does not alter the historical fact of the conviction, and does not open the way to a license despite the conviction." Id.
2061. 460 U.S. at 121.
2062. Id. at 123 (Rehnquist, J., dissenting).
the entry of a formal judgment is required to constitute a conviction.\textsuperscript{2063}

The Ninth Circuit followed the \textit{Dickerson} decision to conclude in \textit{United States v. Freed}\textsuperscript{2064} that a prior felony conviction resulting from entry of a guilty plea could serve as a predicate conviction for possessing firearms.\textsuperscript{2065} After the defendant had satisfied the conditions of his probation, the state court set aside his conviction and released him from "all penalties and disabilities" resulting from the state conviction. The defendant argued that this release constituted an expunction and, therefore, the prior conviction could not serve as a predicate for purposes of the federal firearms laws. The court reasoned that, even if the release was an expunction as the defendant contended, under \textit{Dickerson} an expunction does not automatically remove any disabilities imposed by the federal gun control statutes.\textsuperscript{2066} Accordingly, the Ninth Circuit affirmed the defendant's conviction for possessing firearms as a convicted felon.\textsuperscript{2067}

\textbf{C. Jury Administration}

A fair and impartial jury is a fundamental right guaranteed under the sixth amendment.\textsuperscript{2068} Such a jury may consider only evidence produced at trial, unaffected by extrinsic facts.\textsuperscript{2069} A trial court has both broad authority and great responsibility to effectuate this guarantee.\textsuperscript{2070}

1. Generally

In \textit{United States v. Halbert},\textsuperscript{2071} the Ninth Circuit upheld the trial court's refusal to conduct an evidentiary hearing in light of accusations

\textsuperscript{2063} Id. (Rehnquist, J., dissenting). Justice Rehnquist reviewed federal statutes in which Congress has explicitly defined the term "conviction"; that term is not defined in Title IV of the Gun Control Act.

\textsuperscript{2064} 703 F.2d 394 (9th Cir.), cert. denied, 104 S. Ct. 131 (1983).

\textsuperscript{2065} Id. at 395.

\textsuperscript{2066} Id. (citing \textit{Dickerson v. New Banner Inst., Inc.}, 460 U.S. 103, 115 (1983); \textit{see also} \textit{United States v. Bergeman}, 592 F.2d 533, 537 (9th Cir. 1979) (expunction of felony conviction under state law does not change status of defendant as convicted felon for purposes of federal gun control statute)).

\textsuperscript{2067} Id.


\textsuperscript{2069} See Turner v. Louisiana, 379 U.S. at 472 (conviction reversed where deputies who had custody of jurors were material witnesses); Remmer v. United States, 347 U.S. 227 (1954) (future jury foreman contacted by person who remarked that he could profit by acquitting defendant).

\textsuperscript{2070} \textit{United States v. Hendrix}, 549 F.2d 1225, 1227 (9th Cir.), cert. denied, 434 U.S. 818 (1977). \textit{See infra} note 2075.

\textsuperscript{2071} 712 F.2d 388 (9th Cir. 1983), cert. denied, 104 S. Ct. 997 (1984).
of juror misconduct. The defendant charged that a member of the jury which convicted him of mail fraud had improperly considered a newspaper article concerning Halbert's beach house and life style.

The court determined that the trial court's refusal to conduct an evidentiary hearing was not an abuse of discretion. Although a hearing on such matters is "usually preferable," none was required in this case because the court knew the exact scope and nature of the extraneous information. The court gave substantial weight to the fact that the jury had heard considerable evidence at trial concerning the matters in the article, and to the district court's conclusion regarding the juror's conduct.

The defendant in *United States v. Barrett* claimed that the trial court's refusal to excuse or to allow the interview of an allegedly sleeping juror was reversible error. Before the jury retired for deliberations, a juror had reported to the judge that he had been sleeping during the trial. When counsel for the government refused to stipulate to the juror's re-

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2072. Id. at 389.
2073. Id. Halbert was convicted on 21 counts of mail fraud in violation of 18 U.S.C. § 1341 (1976), which provides in part: "Whoever, having devised or intending to devise any scheme or artifice to defraud . . . places in any post office or authorized depository for mail matter [any thing connected with the fraud] shall be fined . . . or imprisoned. . . ."
2074. 712 F.2d at 389.
2075. Id. In applying this "abuse of discretion" standard, the court cited United States v. Hendrix, 549 F.2d 1225, 1229 (9th Cir.), cert. denied, 434 U.S. 818 (1977). In *Hendrix*, the Ninth Circuit held that it was within the court's discretion to deny the defendant's motion for a new trial in light of allegations by the defendant's relatives that a juror had uttered statements indicating prejudice before the trial. Id. at 1229.

In determining that the juror's misconduct did not require reversal, the *Halbert* court applied the rule stated in United States v. Bagnariol, 665 F.2d 877, 887 n.6 (9th Cir. 1981): "The appellant is entitled to a new trial if there existed a reasonable possibility that the extrinsic material could have affected the verdict." Id. (quoting United States v. Vasquez, 597 F.2d 192, 193 (9th Cir. 1979)). The *Bagnariol* court reviewed several cases in which courts have determined whether a juror's misconduct required reversal by the appellate court. Although the court could perceive no "bright line" with which to test juror misconduct, it did discern the following three similarities in cases where convictions were reversed: (1) the misconduct related directly to a material aspect of the case; (2) a "direct and rational connection" existed between the extrinsic material and a prejudicial jury conclusion; and (3) harsher treatment was given to convictions where the trial court failed to conduct an evidentiary hearing than when no hearing was held. Id. at 885.

2076. 712 F.2d at 389. The district court found that there was "no reasonable possibility" that the verdict was colored by the juror's consideration of the article. Id.
2077. 703 F.2d 1076 (9th Cir. 1983).
2078. Barrett was convicted of bank robbery in violation of 18 U.S.C. § 2113(a) (1976), which provides in part: "Whoever, by force and violence, or by intimidation, takes . . . from the person or presence of another any property or money . . . in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . [s]hall be fined . . . or imprisoned . . . ."
placement, the court refused to order a substitution. After the jury returned its verdict, the court denied the defendant’s motion to interview a juror, taking judicial notice that “there was no juror asleep during this trial.”

The Ninth Circuit remanded, holding that when the juror was sleeping during the trial, the court is required to investigate whether the defendant had been prejudiced by the allegedly sleeping juror.

In United States v. Rubio, the defendant contended that the trial court had erred by retaining the alternate jurors after the jury had retired, in violation of the Federal Rules of Criminal Procedure. Because the defendant had failed to make a timely objection at trial, the Ninth Circuit reviewed the claim under a standard requiring reversal only on a showing of plain error. The court held that under these facts, the retention of alternate jurors was “certainly not plain error” because “there [was] no reasonable possibility” that the error affected the verdict. The court observed that the alternates were sequestered separately from the main jury, separate marshals were assigned to each group, and no contact was allowed between the two groups.

2079. 703 F.2d at 1082. The judge erroneously believed that he was without authority to order the substitution himself. Id. at 1083 n.12. However, the Ninth Circuit noted that: “Under rule 24(c) of the Federal Rules of Criminal Procedure, a trial judge has independent authority to order such a substitution.” Id.

2080. Id. at 1082. The court noted that only misconduct that amounts to a deprivation of the fifth amendment due process or sixth amendment impartial jury guarantees would warrant a new trial. Therefore, a new trial might not be necessary even if juror misconduct was found on remand. Id. at 1083 n.13.

2081. Id. at 1083. The court recognized that other circuits have allowed a trial court to find that no juror was sleeping during trial without conducting any inquiry. See United States v. Curry, 471 F.2d 419, 421-22 (5th Cir.), cert. denied, 411 U.S. 967 (1973); United States v. Carter, 433 F.2d 874, 876 (10th Cir. 1970). However, the Ninth Circuit distinguished both Curry and Carter because the “sleeping juror” allegation had come from defense counsel. The courts in both those cases emphasized that counsel should have brought the sleeping juror to the court’s attention during the trial, and should not be allowed to benefit by failing to do so. Curry, 471 F.2d at 422; Carter, 433 F.2d at 876.

2082. 727 F.2d 786 (9th Cir. 1984). The defendant was convicted of several narcotics and firearms violations arising from his association with the Hell’s Angels Motorcycle Club. Id. at 790.

2083. Id. at 799. FED. R. CRIM. P. 24(c) provides in part: “An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.”

2084. 727 F.2d at 799. Under the “plain error rule,” in the absence of a timely objection by the appellant at trial, a criminal conviction will be reversed only in situations where it appears necessary “to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process.” United States v. Giese, 597 F.2d 1170, 1199 (9th Cir.) (quoting Marshall v. United States, 409 F.2d 925, 927 (9th Cir. 1970)), cert. denied, 444 U.S. 979 (1979). See FED. R. CRIM. P. 52(b); United States v. Perez, 491 F.2d 167, 173 (9th Cir.), cert. denied, 419 U.S. 858 (1974).

2085. 727 F.2d at 799 & n.7.

2086. Id.
In *United States v. Daly*, the defendant challenged the trial court's refusal to dismiss a juror for cause. The disputed juror had been an inspector of police for the Dutch government. When asked during voir dire whether he could be impartial, the prospective juror, Damwyk, had indicated first "I will try," and later "O.K., I will do it." Damwyk was ultimately excused on a peremptory challenge. On appeal, the defendant contended that the court's refusal to excuse Damwyk for cause was error because his responses demonstrated actual bias.

The Ninth Circuit held that the defendant had failed to show actual bias on the part of Damwyk and upheld the trial court's refusal to exclude him for cause. The court stated that the mere fact that the prospective juror was a former police officer did not necessarily indicate he was inherently biased, particularly in view of the fact that he had not been a police officer for twenty years. Furthermore, Damwyk had ultimately stated that he could be impartial.

In *United States v. Brooklier*, the defendants challenged their racketeering convictions on the grounds that the trial court failed to excuse four allegedly biased jurors for cause. The jurors had stated dur-

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2087. 716 F.2d 1499 (9th Cir. 1983), cert. dismissed, 104 S. Ct. 1456 (1984).
2088. *Id.* at 1509. Defendant Criswell was the ringleader of an interstate car smuggling operation based in Southern California. Criswell was convicted of conspiracy, receiving and transporting falsely made securities in interstate commerce, and causing the transportation of stolen automobiles in interstate commerce. *Id.*
2089. *Id.* at 1507.
2090. *Id.* Citing Hines v. Enomoto, 658 F.2d 667, 672 (9th Cir. 1981), the Ninth Circuit went on to state that a trial court's failure to excuse a prospective juror after discovering actual bias is reversible only if it results in "a prejudicial diminution or peremptory challenges." 716 F.2d at 1507. See *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977) (refusal to dismiss jurors who worked at another branch of robbed bank held reversible error even when those jurors were dismissed by peremptory challenge); *United States v. Nell*, 526 F.2d 1223, 1230 (5th Cir. 1976) (failure to dismiss juror who stated that he did not like unions held reversible error).
2091. 716 F.2d at 1507 (citing United States v. Mitchell, 556 F.2d 371, 377 (6th Cir.) (failure to excuse former police officer not error where court satisfied juror could be impartial), cert. denied, 434 U.S. 925 (1977); *Mikus v. United States*, 433 F.2d 719, 724 (2d Cir. 1970) (failure to excuse police officer not reversible error per se)).
2092. *Id.*
2093. *Id.*
2094. 685 F.2d 1208 (9th Cir. 1982) (per curiam), cert. denied, 459 U.S. 1206 (1983).
2095. Defendants were convicted of violating the RICO statute, 18 U.S.C. § 1962(c), (d) (1976); extorting, 18 U.S.C. § 1951 (1976) ("whoever . . . obstructs, delays, or affects commerce . . . by robbery or extortion . . . shall be fined . . . or imprisoned . . . ."); obstructing justice, 18 U.S.C. § 1510 (1976) ("whoever injures any person . . . on account of the giving of such person . . . any such information [relating to a violation of any United States criminal statute] to any criminal investigator"); and aiding and abetting, 18 U.S.C. § 2 (1976) ("whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principle. . . . Whoever willfully causes an act . . . .

ing voir dire that they believed in the existence of a criminal organization known as La Cosa Nostra. 2096

The Ninth Circuit held that the trial court had not abused its discretion by refusing to excuse the jurors. 2097 Quoting the Supreme Court in *Irvin v. Dowd*, 2098 the court noted that because public attention is unavoidable in many cases, it may be virtually impossible to obtain a panel of qualified jurors totally without opinion as to the merits of the case. 2099

The court then held that the jurors were not impossibly biased. Each of the jurors stated that he or she had not formed an opinion as to the defendants' guilt, would keep an open mind, and would listen to the evidence and follow the court's instructions. They would only then decide whether La Cosa Nostra existed as a criminal organization and whether the defendants were members. 2100

2. Composition of a jury

The sixth amendment requires that grand and petit juries be drawn "from a fair cross-section of the community in the district or division wherein the court convenes." 2101 When a defendant is a member of a

to be done which if directly performed by him or another would be an offense . . . is punishable as a principal.").

2096. 685 F.2d at 1223.
2097. Id.
2098. 366 U.S. 717 (1960). In *Irvin*, the Supreme Court held that the trial court's refusal to grant defendant a second change of venue was reversible error. Because of extensive pretrial publicity, venue in the defendant's murder trial had been changed from Evansville, the situs of the crimes, to nearby Gibson County. However, the court refused the defendant's request for another change to a more remote venue under a state statute precluding more than one venue change in a case. *Id.* at 720. The Court held that the defendant had been denied a trial by an impartial jury because of the "'pattern of deep and bitter prejudice'" within the community. *Id.* at 727. The Court noted that during the time preceding his trial, "a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against [the defendant]." *Id.* at 725. Although it held against the government, the Court noted in dictum that it would be impossible to guarantee a completely neutral jury to every criminal defendant. *Id.* at 722-23.

2099. 685 F.2d at 1223.
2100. Id. The court cited *Dennis v. United States*, 339 U.S. 162, 168 (1949). In that case, the Supreme Court upheld the denial of the defendant's motion for change of venue from the District of Columbia. The defendant, a communist, had argued that a large portion of the district was employed by the government, was bound by a loyalty oath and might be fearful of reprisal for acquitting the defendant. *Id.* at 165.

2101. United States v. Brady, 579 F.2d 1121, 1133 (9th Cir. 1978) (test for constitutionally selected jury same under fifth and sixth amendments and under Jury Selection and Service Act), *cert. denied*, 439 U.S. 1074 (1979); U.S. CONST. AMEND. VI. The Jury Selection and Service Act, 28 U.S.C. § 1861 (1976), provides that "[i]t is the policy of the United States that all litigants in Federal Court entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."

In *Duren v. Missouri*, 439 U.S. 357 (1979), the Supreme Court enunciated a three-prong
group in the community and that group has been systematically excluded from his jury, that defendant may also challenge the jury under the equal protection clause of the fourteenth amendment.2102

In United States v. Herbert,2103 the Ninth Circuit considered whether the trial court's jury selection procedure had violated the sixth amendment fair cross-section requirement by underrepresenting Native Americans.2104 During the trial Herbert had moved for a transfer from the Phoenix, Arizona Division to the Prescott Division, claiming that the lower percentage of Native Americans in Phoenix caused members of that race to be underrepresented in the jury pool.2105

Applying the test from Duren v. Missouri,2106 the court held that use of the more predominately Anglo Phoenix Division jury pool did not violate the sixth amendment fair cross-section requirement.2107 The Ninth Circuit reasoned that, pursuant to the Jury Selection and Service Act,2108 a petit jury may be selected from only one division.2109 Moreover, the court ruled that Herbert had failed to show that Native Americans were systematically excluded from the Phoenix Division.2110

Affirming the trial court, the Ninth Circuit found that venue was properly set in Phoenix because the crimes had occurred there, and it was the most convenient location for all persons involved in the trial.2111

test to determine whether the government has violated the sixth amendment fair cross-section guarantee:

In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 364. See also United States v. Brady, 579 F.2d at 1133 (no violation of fair cross-section requirement absent showing of “systematic exclusion” or “substantial deviation” between identifiable groups).

2103. 698 F.2d 981 (9th Cir.), cert. denied, 104 S. Ct. 87 (1983). The defendant was convicted of various firearms violations.
2104. Id. at 983.
2105. Id. at 984. Herbert cited the trial court's failure to grant his motion to transfer as evidence of the systematic exclusion of Native Americans from the Phoenix Division jury pool. Id.
2106. 439 U.S. 357 (1979). In Duren, the Supreme Court held unconstitutional a Missouri statute granting women automatic exemptions from jury service upon request. Id. at 370. See supra note 2102.
2107. 698 F.2d at 984.
2108. See supra note 2102.
2109. 698 F.2d at 984.
2110. Id.
2111. Id. FED. R. CRIM. P. 18 provides that venue is properly set “within the district with due regard to the convenience of the defendant and the witnesses and the prompt administra-
In Morgan v. United States, the Ninth Circuit held that the district court had erred when it dismissed Morgan’s second habeas corpus petition without holding an evidentiary hearing into Morgan’s claims that the jury selection process was unconstitutional. Morgan, who was black, alleged that no members of his race had served as federal jurors for over twenty years in the Spokane, Washington district where he was tried, including the three years during which charges were pending against him.

The Ninth Circuit agreed that Morgan had failed to establish a violation of the sixth amendment fair cross-section requirement. However, the court concluded that an evidentiary hearing was required because, as a member of the allegedly excluded group, Morgan could challenge the jury selection process under the fourteenth amendment due process clause. The court stated that under an equal protection analysis, complete exclusion of a racial group triggers concerns other than whether the fair cross-section requirement is met. Complete exclusion of
a racial group can violate equal protection even when the number of that
group in the total population is small.2117 Comparing Morgan's allega-
tions of complete exclusion with the less serious allegations of partial
exclusion made in Rose v. Mitchell2118 and Guice v. Fortenberry,2119 the
Ninth Circuit reversed and remanded for a hearing to determine whether
blacks had been purposefully excluded from Spokane federal juries.2120

In Weathersby v. Morris,2121 the Ninth Circuit found that the exclu-
sion of all members of the defendant's race from his jury did not violate
Weathersby's sixth and fourteenth amendment rights.2122 Weathersby
contended that the prosecutor had impermissibly used his peremptory
challenges to exclude all black members from the jury panel in his mur-
der trial.2123

In addressing the defendant's fourteenth amendment claim, the
Ninth Circuit first discussed the Supreme Court's holding in Swain v.
Alabama.2124 In that case, the Court applied a heavy presumption that
peremptory challenges were exercised for permissible trial-related rea-
sons.2125 However, the Ninth Circuit distinguished Swain from the situa-
tion in this case where the prosecutor volunteered the reasons for the
exercise of its challenges.2126 The prosecutor in Weathersby claimed that

2117. 696 F.2d at 1241. See Norris v. Alabama, 249 U.S. 587 (1935) (denial of equal protec-
tion where no black had served on jury in at least 24 years).
2118. 443 U.S. 545 (1979). The Court in Rose reaffirmed the long-standing rule that a crimi-
nal defendant's fourteenth amendment rights are violated when he is indicted by a grand jury
from which members of his class have been systematically excluded. Id. at 559. Such a viola-
tion requires reversal even when the selection of the petit jury which convicted the defendant
was not subject to such discrimination. Id. at 552-59.
2119. 661 F.2d 496 (5th Cir. 1981) (en banc). In Guice, the Fifth Circuit applied the test
stated in Castaneda and Rose in light of defendant's contention that blacks are under-
represented as grand jury foremen. The court remanded for an evidentiary hearing, noting the
improbability that, in a 60% black population, none of the 31 grand jury foremen was black.
Id. at 505.
2120. 696 F.2d at 1241.
2121. 708 F.2d 1493 (9th Cir. 1983), cert. denied, 104 S. Ct. 719 (1984).
2122. Id. at 1497.
2123. Id. at 1494.
2124. 380 U.S. 202 (1965). The Swain Court had upheld a black defendant's conviction by a
jury from which all blacks had been excused through the use of peremptory challenges. The
prosecutor had given no reason for exercising the challenges. The Supreme Court applied a
strong presumption that, absent a lengthy record of systematic exclusion of a particular group,
peremptory challenges were exercised for permissible reasons. Id. at 222. The Court empha-
sized that peremptory challenges are often exercised upon "'sudden impressions and unac-
countable prejudices we are apt to conceive upon the bare looks and gestures of another.'" Id.
at 220 (quoting Lewis v. United States, 146 U.S. 370, 376 (1892)).
2125. Id. at 222. The Ninth Circuit in Weathersby stated that the presumption may be re-
butted by showing a "'systematic exclusion of a particular group over a period of time in prior
prosecutions.'" 708 F.2d at 1496 (citing Swain v. Alabama, 380 U.S. at 227).
2126. 708 F.2d at 1496. In making this distinction, the court relied upon United States v.
one or two of the excused jurors had been represented by the defendant's
counsel, another had known the defendant's wife, and others had given
evasive answers to questions. In addition, the prosecutor felt that some
black jurors might be subject to intimidation by members of the Black
Guerrilla Family, a prison gang. Under these circumstances, the
court concluded, the prosecutor is no longer protected by the Swain
presumption. Accordingly, the court may review the prosecutor's reasons to
determine whether an identifiable group was excluded for reasons unre-
related to obtaining a fair and impartial jury.

The Ninth Circuit determined that the prosecutor's stated motives
for using his challenges were "well within the broad range of discretion
for exercising peremptory challenges." The court thus found no vi-
olation of the defendant's fourteenth amendment rights.

The court also dismissed the defendant's contention that the prose-
cut's use of peremptory challenges violated the defendant's sixth
amendment right to an impartial jury composed of a fair cross-section of
the community. The court ruled that the fair cross-section require-
ment, as applied by the Supreme Court in Taylor v. Louisiana, re-
quired only that petit juries be selected from a representative source, and
not that the jury itself be representative.

3. The Allen charge

The practice of instructing a deadlocked jury that its duty is to re-
turn a verdict if possible, in good conscience, and to listen to the argu-
ments of other jurors in reexamining their own positions has been a
matter of vigorous and sometimes colorful debate. In the Ninth Cir-

Greene, 626 F.2d 75 (8th Cir.), cert. denied, 449 U.S. 876 (1980), where a prosecutor's use of
peremptory challenges to excuse all black jurors was presumed proper in the absence of an
indication that the challenges were exercised for impermissible reasons. Id. at 76.
2127. 708 F.2d at 1496-97.
2128. Id.
2129. Id. at 1497. The Ninth Circuit found that the prosecutor's stated reasons for excusing
the jurors would justify a peremptory challenge. In this connection, the court noted that "a
prosecutor may have the strongest reasons to mistrust the character of a juror offered, from his
habits and associations, and yet find it difficult to formulate and sustain a legal objection to
him. In such cases, the peremptory challenge is a protection against his being accepted." Id.
at 1496-97 (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).
2130. Id. at 1497.
2131. Id.
2133. 708 F.2d at 1497 ("[a defendant] is not entitled to a jury of any particular
composition").
2134. "Since its approval over seventy years ago, the Allen charge has persisted through the
years, not so much an object of commendation as it is a product of toleration." United States
cuit, use of such an instruction is permissible when the charge contains all the elements sanctioned by the United States Supreme Court in *Allen v. United States.* In addition, the period of deliberation after the charge must be sufficient for the jury to reach a reasoned decision; the entire period of deliberation cannot be so long as to indicate that the charge produced a verdict by coercion; and there must not be any other indication of jury coercion in the record.

In *United States v. Foster,* the Ninth Circuit upheld the trial judge's use of an *Allen* charge. After five days of deliberation in the defendants' narcotics offense trial, a member of the jury sent the judge a note requesting release from duty because of the strain on the juror's family and job. The judge conferred with counsel and instructed the jury to continue its deliberations. When he received a second note indicating that another juror asked to be released and that the jury was at a "stand-off," the judge "reminded the jurors of the importance of the case and

v. Fioravanti, 412 F.2d 407, 415 (3d Cir.) (footnote omitted), cert. denied, 396 U.S. 837 (1969). The charge has been severely criticized because of its inherently coercive nature, see *Salemme v. Ristaino,* 587 F.2d 81, 89 (1st Cir. 1978), and because it tends to complicate cases on appeal, see *Andrews v. United States,* 309 F.2d 127, 129 (5th Cir. 1962) ("Like Banquo's ghost it will not remain at rest."). *cert. denied,* 372 U.S. 946 (1963). Three circuits have approved the use of the *Allen* charge only in a modified form. See STANDARDS RELATING TO TRIAL BY JURY § 5.4 (1968); *United States v. Thomas,* 449 F.2d 1177 (D.C. Cir. 1971); *United States v. Fioravanti,* 412 F.2d at 420; *United States v. Brown,* 411 F.2d 930 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970). Other circuits have modified the charge to include "balancing" elements. See *Burrup v. United States,* 371 F.2d 556, 558 (10th Cir.) (charge permissible provided jury is given to understand they are not required to give up their conscientiously held convictions), cert. denied, 386 U.S. 1034 (1967). Still others, including the Ninth Circuit, have allowed the charge only when given in a strict form, not alterable by the trial court. See *United States v. Beattie,* 613 F.2d 762, 765-66 (9th Cir.), cert. denied, 446 U.S. 982 (1980); *United States v. Pope,* 415 F.2d 685, 691 (8th Cir. 1969), cert. denied, 397 U.S. 950 (1970); *United States v. Harris,* 391 F.2d 348, 355 (6th Cir.), cert. denied, 393 U.S. 874 (1968); *United States v. Ken- ner,* 354 F.2d 780, 782-84 (2d Cir. 1965), cert. denied, 383 U.S. 958 (1966).

2135. 164 U.S. 492 (1896). The original charge as summarized by the Court is as follows:

In a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

*Id.* at 501.


2137. 711 F.2d 871 (9th Cir. 1983), cert. denied, 104 S. Ct. 1602 (1984).
thanked them for their work.” The jury was then asked to consider whether it would like a day off. The jury indicated that it did not, but that some jurors thought that “'discussions [were] hopelessly deadlocked.'” The judge then gave the jury a modified Allen charge. Three days later, the jury returned guilty verdicts against three defendants.

The defendants appealed their drug offense convictions, contending that the Allen charge had coerced the jury. The Ninth Circuit upheld the convictions, finding that the judge’s Allen charge and the surrounding circumstances did not have a coercive effect upon the jury. The court also found that the jury’s eight and one-half day deliberation was not out of proportion to the complexity of the questions to be decided. The court noted that the fact that the jury acquitted three defendants after the Allen charge had been given undermined the defend-

2138. Id. at 883. The Ninth Circuit held that this earlier admonition did not constitute another Allen charge. Id. at 884 n.8. The Ninth Circuit requires reversal when a trial judge gives two Allen charges during the course of a jury’s deliberations. Id. See United States v. Seawell, 550 F.2d 1159, 1163 (9th Cir. 1977), cert. denied, 439 U.S. 991 (1978).

2139. 711 F.2d at 883.

2140. The charge given to the jury was as follows:

Ladies and Gentlemen, I am going to ask that you resume your deliberations for a further period of time in an attempt to return a verdict. As I have told you, each of you must agree in order to return a verdict. You have the duty to consult with one another and to deliberate with a view of reaching an agreement if this can be done without violence to individual judgment.

Each juror must decide the case for himself or herself, but only after impartial consideration of the evidence with his or her fellow jurors. During the course of your deliberations, each of you should not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. No juror, however, should surrender his or her honest conviction as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Id. at 883-84 n.7.

2141. Id. at 884. A fourth defendant had been acquitted after the first three days of deliberation. Id. at 883.

2142. See supra note 265.

2143. 711 F.2d at 884.

2144. Id. (citing United States v. Hooton, 662 F.2d 628, 636 (9th Cir. 1981) (propriety of an Allen charge must be judged by its coercive effect, and that of its surrounding circumstances), cert. denied, 455 U.S. 1004 (1982)).

2145. Id. The Hooton court cited United States v. Contreras, 463 F.2d 773, 774 (9th Cir. 1972) (per curiam), where the Ninth Circuit disapproved of the use of an Allen charge given to the jury after eight hours of deliberation and where the jury had not indicated that it was deadlocked. United States v. Hooton, 662 F.2d 628, 636 (9th Cir. 1981), cert. denied, 455 U.S. 1004 (1982). The Ninth Circuit, however, found United States v. Beattie, 613 F.2d 762, 765-66 (9th Cir.), cert. denied, 446 U.S. 982 (1980) to be more applicable to the facts in Foster. 711 F.2d at 884. In Beattie, the trial court gave an Allen charge to the jury when it indicated that it was deadlocked after eight hours of deliberation. 613 F.2d at 764. The jury returned a guilty verdict five hours later. Id. at 763. The court found that the trial court’s instructions were not coercive, and affirmed the convictions. Id. at 766.
ants' claim that the charge was coercive. Moreover, there was no indication that the judge or jury had expressed frustration at the failure of the jury to reach a verdict. Finally, the court ruled that since the trial judge was unaware of which jurors were in the minority, there was no way that the Allen charge could imply to those jurors that the judge was speaking directly to them.

In United States v. Ramirez, the Ninth Circuit found that a trial court's admonition to a deadlocked jury was not coercive. After twelve hours of deliberation, the jury returned verdicts as to two defendants, but were unable to agree as to a third defendant. Instead, they presented a completed “verdict form,” indicating that they were unable to agree on a verdict for every count concerning that defendant. The trial court stated that the form presented was “unacceptable” and ordered the jury to continue its deliberations. The jury subsequently found the third defendant guilty on two counts of a seven count indictment.

Relying upon Jenkins v. United States, the defendant contended that his conviction for conspiring to transport stolen aircraft and marijuana importation and distribution was the result of the coercive effect of the court's statements to the jury. In Jenkins, the Supreme Court held that a judge's statement, to a jury deadlocked after only two hours, that “[y]ou have got to reach a decision in this case” was revers-
The Ninth Circuit held that the court's statement to the Ramirez jury did not have the same coercive effect as the statement made in Jenkins. The court found that the trial court did not instruct the jury that it had to reach a verdict. It further determined that the jury did not understand the court's statements to require such a decision. More importantly, the court found that the fact that the jury reached guilty verdicts on only two of the seven counts against the defendant indicated that the court's statements had no coercive effect on the jury.

**D. Prosecutorial Misconduct**

The prosecutor enjoys the special and sometimes unenviable position of reconciling professional responsibilities. He or she has obligations to the state, the judicial system, and the defendant. The prosecutor's

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2156. 380 U.S. at 446.
2157. 710 F.2d at 544.
2158. Id. In reaching this conclusion, the court relied upon Walsh v. United States, 371 F.2d 135, 136 (9th Cir.), cert. denied, 388 U.S. 9 (1967). In that case, the jury had indicated to the judge that "[w]e the jury find it impossible to reach a verdict in this case." Id. at 137. The trial court responded:

- I don't know just exactly what that message means.
- If there is any reasonable doubt in your mind, that man is entitled to your verdict of not guilty. He is entitled not to have to run the gauntlet twice.
- But if there isn't any reasonable doubt, from the evidence—I heard the testimony but I haven't looked at any of the documentary evidence, so I can say I don't know what the evidence in the case is.
- If there is no reasonable doubt, the Government is entitled to a verdict of conviction.

*Id.*

The jury returned a guilty verdict later that evening. The Walsh court found these comments to be coercive because they implied that the jury must reach a verdict for either the defendant or the government. *Id.* at 138.

2159. 710 F.2d at 544. In making this finding, the court compared United States v. Beattie, 613 F.2d 762, 765 (9th Cir.), cert. denied, 446 U.S. 982 (1980), *supra* note 2145, where the jury had deliberated for three and one half hours after receiving an Allen charge, with United States v. Contreras, 463 F.2d 773, 774 (9th Cir. 1972), *supra* note 2145, where the jury found the defendant guilty only 35 minutes after the Allen charge was given.

2160. 710 F.2d at 544.
2161. The Ninth Circuit established standards for appropriate prosecutorial conduct in United States v. Ellsworth, 647 F.2d 957 (9th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982). The court quoted at length Berger v. United States, 295 U.S. 78, 88 (1935): 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
absolute discretion to determine whether or not to file charges is merely one indication of his or her crucial position in the law enforcement process.2162 The prosecutor’s motivation for bringing a particular action is not subject to review in the courts.2163 He or she decides whether to press a case or dismiss it, determines the specific charges against a defendant, and is usually responsible for reducing a charge.2164

Concomitant with the wide range of prosecutorial duties, prosecutorial misconduct may manifest itself in various ways. Prosecutorial misconduct includes vindictive prosecution, impermissible vouching for the credibility of witnesses, improper references to matters not in evidence, improper comments on a defendant’s silence, and prejudicial remarks in closing argument.

Although all prosecutors, as members of the legal community, are subject to controls on their professional conduct, they are usually immune from judicial review pursuant to the constitutional separation of powers.2165 The Ninth Circuit has repeatedly held that the prosecutor’s

647 F.2d at 961 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

2162. The United States Attorney has broad discretion in deciding which cases to prosecute. United States v. Nixon, 418 U.S. 683, 693 (1974) ("[e]xecutive [b]ranch has exclusive authority and absolute discretion to decide whether to prosecute a case"); see also United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976) (vindictive reindictment is improper, but prosecutor has discretion in choosing which charges to bring).

In recognition of the prosecutor’s dominant role in the American legal system, the Wick- ersham Commission acknowledged over 50 years ago that the prosecutor’s office “is the pivot on which the administration of criminal justice in the States turns.” 1 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 11 (1931). For a discussion of the powers of the prosecutor, see Vlasinin, The Prosecutor in American Criminal Procedure: Observations of a Foreign Student, 12 Loy. L.A.L. Rev 833, 833-50 (1979).

2163. Spillman v. United States, 413 F.2d 527, 530 (9th Cir.), cert. denied, 396 U.S. 930 (1969). The courts may, however, grant relief if the prosecutor uses his or her constitutionally derived powers as a device to deny the defendant’s constitutional rights. Blackledge v. Perry, 417 U.S. 21, 27 (1974).

2164. The prosecutor must, however, avoid selective prosecution, which entails the filing of a charge against a defendant, motivated by a purpose other than good faith enforcement of the law. The Ninth Circuit established the test for selective prosecution in United States v. Gil- lings, 568 F.2d 1307, 1309 (9th Cir.) (defendant must establish a prima facie case: "(1) that others are generally not prosecuted for the same conduct; and (2) that the decision to prosecute this defendant was based on such impermissible grounds as race, religion, or the exercise of constitutional rights") (citing United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974) (mere conscious use of selectivity in enforcement of law is not in itself a constitutional violation)), cert. denied, 436 U.S. 919 (1976). See also United States v. Gardiner, 531 F.2d 953 (9th Cir.) (member of Tax Rebellion Committee claimed that he was being prosecuted for his vocal opposition to income tax laws), cert. denied, 429 U.S. 853 (1976).

2165. United States v. Olson, 504 F.2d 1222, 1225 (9th Cir. 1974) (citing United States v.
conduct is not subject to direct judicial review absent gross abuse of discretion. In reviewing appeals alleging prosecutorial misconduct, the Ninth Circuit accords great deference to the trial judge's decision and exercises extreme caution. The appellate court will overturn the lower court verdict only if it was more probable than not that the misconduct substantially affected the judgment. The Ninth Circuit has recently considered claims of prosecutorial misconduct pertaining to all of the above categories.

1. Dismissal for vindictive prosecution

Presumed vindictiveness applies when the government escalates the harshness of its charges against a defendant due to animosity toward the defendant for asserting his or her legal rights. It usually involves a

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Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965). See also Spillman v. United States, 413 F.2d 527, 530 (9th Cir.) (court could not inquire into United States Attorney's motives for prosecution), cert. denied, 396 U.S. 930 (1969).

See, e.g., United States v. Chanen, 549 F.2d 1306, 1311 (9th Cir.) (indictment would not be overturned unless prosecutorial misconduct created intrusion into defendant's constitutional rights), cert. denied, 434 U.S. 825 (1977). The Ninth Circuit has stated that it will not interfere with prosecutorial discretion "unless it is abused to such an extent as to be arbitrary and capricious and violative of due process." United States v. Welch, 572 F.2d 1359, 1360 (9th Cir.) (per curiam), cert. denied, 439 U.S. 842 (1978). For a discussion of the prosecutor's broad discretion in exercising the powers given to him, see K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188-214 (1969); Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 U.C.L.A. L. Rev. 1 (1971).

In North Carolina v. Pearce, 395 U.S. 711 (1969), the Court observed that a defendant may not be punished for successfully challenging his or her conviction. Id. at 723-24. The Court introduced the doctrine of presumed vindictiveness in order to address the consideration that "[t]he existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case." Id. at 725 n.20. The Court held that whenever a judge increases the defendant's sentence after a new trial, the judge must provide the reasons for doing so. Id. at 726. Vindictiveness can be presumed, if the judge provides no objective reasons. The Ninth Circuit considers it "inherently suspect" if the prosecutor attempts to impose higher charges upon retrial for the same offense as originally charged. United States v. Preciado-Gomez, 529 F.2d 935, 939 (9th Cir.), cert. denied, 425 U.S. 953 (1976).

The defendant has the initial burden of demonstrating facts sufficient to give rise to a presumption of vindictiveness. United States v. Griffin, 617 F.2d 1342, 1347 (9th Cir.), cert. denied, 449 U.S. 863 (1980). See also United States v. Robinson, 644 F.2d 1270, 1272 (9th Cir. 1981) (mere fact that new charges followed defendant's exercise of procedural rights was insufficient to raise presumption of vindictiveness, where there were no grounds to inquire into prosecutor's motives).

The burden then shifts to the prosecutor, who must show that "independent reasons or
defendant who has successfully challenged an indictment or conviction and is later reindicted for either a higher crime or other crimes arising from the same set of facts. The result of the reindictment is that a defendant may receive a stricter sentence than if he or she had not challenged the original proceeding. The Supreme Court has held that vindictive prosecution constitutes a “due process violation of the most basic sort,” because it punishes a defendant for doing that which the law clearly permits.2169 “[F]or an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is ‘patently unconstitutional.’ ” 2170

intervening circumstances” support his or her decision, thus dispelling the appearance of vindictiveness. Griffin, 617 F.2d at 1347. See also United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976) (prosecution bears heavy burden of proving that any increase in the severity of the charges was not motivated by vindictiveness). The prosecutor must identify either specific new conduct of the defendant since the time of the original proceeding justifying the increased penalty sought, or other circumstances serving as an “adequate substitute.” United States v. Preciado-Gomez, 529 F.2d 935, 940 (9th Cir.), cert. denied, 425 U.S. 953 (1976) (citing United States v. Gerard, 491 F.2d 1300, 1306 (9th Cir. 1974)). In Preciado-Gomez, upon reindictment, the prosecutor added two extra counts arising from the facts. The prosecutor could not identify any specific conduct by the defendant since the time of the original proceeding. The court, however, found an “adequate substitute,” because in the interim new evidence justifying the new counts had been uncovered. Id. at 941.

In United States v. Griffin, 617 F.2d 1342 (9th Cir.), cert. denied, 449 U.S. 863 (1980), a seminal case on vindictive prosecution, the Ninth Circuit held that “the presumption of vindictiveness may be inferred even in the absence of evidence that the prosecution in fact acted with a malicious or retaliatory motive in seeking the . . . indictment.” Id. at 1346 (citing Blackledge v. Perry, 417 U.S. 21, 27-28 (1974) (convicted defendant is entitled to pursue his statutory right to trial de novo without fear of state retaliation with increased charges)). See also United States v. Groves, 571 F.2d 450, 453 (9th Cir. 1978) (“it is the appearance of vindictiveness, rather than vindictiveness in fact, which controls”) (emphasis in original) (citing United States v. De Marco, 550 F.2d 1224 (9th Cir.) (apprehension and appearance of vindictiveness are adequate to create heavy burden for prosecutor), cert. denied, 434 U.S. 827 (1977)).

Nonetheless, “[t]he presumption applies only to the extent it reflects the very real likelihood of actual vindictiveness.” United States v. Gallegos-Curiel, 681 F.2d 1164, 1167 (9th Cir. 1982). Even in cases where action detrimental to a defendant has been taken after the exercise of a legal right, the presumption of vindictiveness attaches only where a reasonable likelihood of improper motive exists. United States v. Goodwin, 457 U.S. 368, 372-80 (1982). See also United States v. Thurnhuber, 572 F.2d 1307, 1310-11 n.3 (9th Cir. 1977), where the court noted that the presumption of vindictiveness “arises only as a shield against the possibility of actual vindictiveness and not against those situations which simply appear to the defendant to be vindictively motivated.” In Thurnhuber, the defendant was originally indicted on one count of fraud. The district court declared a mistrial, and the government filed a superseding indictment charging the defendant with three counts of fraud, on which he was convicted. The Ninth Circuit held that the presumption of vindictiveness was invalid, because the district court declared a mistrial on its own initiative, not in response to a defense motion. Id. at 1310.

2170. Id. at 363 (citing Chaffin v. Stynchcombe, 412 U.S. 17, 32-33 n.20 (1973)).
In *United States v. Brooklier*, the Ninth Circuit held that vindictiveness could not be presumed, even if the addition of an extortion charge subjected the defendants to a greater risk of punishment. When the prosecutor increases the charges before trial, no reasonable probability of vindictiveness arises, because he or she may discover additional information that creates a basis for more prosecution, or may realize that state information has greater significance than originally anticipated.

The defendants, members of a secret national racketeering organization, appealed their convictions for racketeering. They contended that the addition of an extortion charge in subsequent indictments violated the vindictiveness doctrine. The court ruled that where the earlier indictment was replaced by one containing fewer charges and lighter penalties, the doctrine did not apply. Before trial the government may reconsider societal interest in prosecution, particularly when, as here, a court order requires the prosecutor to obtain a new indictment, so that he or she must review the evidence and which charges to submit to the grand jury.

Defendant Brooklier objected to the government's application for electronic surveillance of his conversation concerning an extortion plan. Brooklier contended that the court order authorizing the surveillance was based on an affidavit which did not give a "full and complete statement as to whether or not other investigative procedures [had] been tried and failed or why they reasonably appear[ed] to be unlikely to

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2171. 685 F.2d 1208 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983).
2172. *Id.* at 1215.
2173. *Id.* (citing United States v. Goodwin, 457 U.S. 368, 381 (1982) (presumption of vindictiveness is not warranted where initial charges may not reflect extent to which defendant is legitimately subject to prosecution)).
2174. 18 U.S.C. § 1962 (1976) provides in pertinent part: "It shall be unlawful for any person who has received any income derived . . . from . . . racketeering . . . to use or invest . . . any part of such income . . . [in] activities . . . which affect . . . interstate or foreign commerce."
2175. 685 F.2d at 1215.
2176. *Id.*
2177. *Id.* at 1216 (citing United States v. Goodwin, 457 U.S. 368, 382 (1982)).
2178. *Id.* (citing United States v. Gallegos-Curiel, 681 F.2d 1164, 1169-71 (9th Cir. 1982)).
2179. *Id.* at 1221.
The court held that the government should have included the information required by the wiretap statute. Nonetheless, there was no evidence of the government's intentional omission of the information. Thus, in admitting the recording of Brooklier's conversation, the district court did not commit error. The defendant had the burden of proving a deliberate omission or bad faith, and he showed only negligence. Mere negligence in preparing the affidavit for a wiretap order will not result in suppression of the obtained evidence.

2. Impermissible vouching for the credibility of witnesses

Since the prosecution, in representing the government, may command the respect of the jury, it must avoid improper assertion of personal or professional integrity, such as using the prestige of its office to bolster its arguments. Whenever the prosecution asserts its opinions concerning the trial in the jury's presence, the defendant may suffer a violation of his or her fifth amendment right to a fair trial. The prosecution oversteps a fine line if it conveys a personal belief, presumably based on matters known only to it, or places the prestige of its office behind the credibility of its witnesses.

The Supreme Court has emphasized that the prosecutor has particular responsibility to "avoid improper suggestions, insinuations, and, especially, assertions of personal knowledge ...." The Court subsequently extended this rule in order to prohibit prosecutorial vouching for the credibility of a government witness. The Court observed that vouching occurs in two ways. The prosecution may place the prestige of its office behind the witness, or may suggest that information not presented to the jury supports the witness' testimony.

2180. Id.
2182. 685 F.2d at 1221-22.
2183. Id. at 1222.
2184. Id. at 1221 (citing Franks v. Delaware, 438 U.S. 154, 171 (1978) (defendant is entitled to hearing after making substantial preliminary showing that false statement was knowingly and intentionally, or recklessly, included in warrant affidavit)).
2185. "It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE—THE PROSECUTION FUNCTION § 5.8(b) (1974).
2188. Id. at 359-60 n.15.
The defendants in United States v. Brooklier contended that the government improperly vouched for the credibility of a government witness. During the trial, defense counsel described government witness Fratianno as a perjurer, paid informant, and murderer who avoided a death sentence by cooperating with the FBI. In rebuttal, the government introduced Fratianno's plea agreement, which required him to testify truthfully.

The Ninth Circuit noted that whenever the government mentioned the plea agreement during trial, the court cautioned the jury that the agreement did not imply that the testimony was necessarily truthful. The jurors made the exclusive determination of the credibility of all witnesses, thus precluding government vouching when introducing the plea agreement.

In United States v. Rohrer, the Ninth Circuit again held that no improper vouching for a government witness occurred, where a witness' cooperation agreement was admitted. The court found that the government did not put its prestige behind the witness or refer implicitly to evidence outside the record, and that the agreement pertained to material facts at issue.

The defendants, appealing various drug convictions, argued that the admission of a government witness' agreement with the government and the latter's references to it at trial created impermissible vouching, implying that the testimony had to be truthful. Citing Brooklier, the Ninth Circuit held that the government could refer to the cooperation agreement as a factor bearing on the witness' credibility. The government made certain to ask the jury to consider the agreement in

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2189. 685 F.2d 1208 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983).
2190. Id. at 1218.
2191. Id.
2192. Id. at 1218-19.
2193. Id. at 1219.
2194. 708 F.2d 429 (9th Cir. 1983).
2195. Id. at 433. See United States v. Rubier, 651 F.2d 628, 630 (9th Cir.) (per curiam) (letters containing immunity for testimony agreement were relevant and admissible), cert. denied, 454 U.S. 875 (1981).
2196. 21 U.S.C. § 841(a) (1976) provides in pertinent part: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to... possess with intent to... distribute... a controlled substance."
2197. 708 F.2d 429, 432-33 (9th Cir. 1983).
2199. 708 F.2d at 433.
determining the witness' motives. In addition, the court did not receive the full transcript of the cooperation agreement into evidence until after the defendant's impeachment of the witness' motives in cross-examination.2200

2200. Id. In United States v. Tham, 665 F.2d 855 (9th Cir. 1981), cert. denied, 456 U.S. 944 (1982), defendant Tham similarly claimed that the prosecutor had improperly vouched for a witness' credibility by suggesting that the witness had testified truthfully because his plea agreement with the government required truthful testimony. Id. at 861. For support, Tham cited United States v. Roberts, 618 F.2d 530 (9th Cir. 1980), cert. denied, 452 U.S. 942 (1981), where a conviction was reversed based on the impropriety of a similar closing argument. 665 F.2d at 862. Roberts was also the basis of the defendants' arguments in United States v. Brooklier, 685 F.2d 1208, 1218 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983), and United States v. Rohrer, 708 F.2d 429, 433 (9th Cir. 1983).

In Roberts, the prosecutor mentioned that a detective had been monitoring the testimony of a government witness. This implied that the government possessed information with which to determine the truthfulness of the witness. The prosecutor argued to the jury that the witness had testified truthfully because he was afraid of violating his plea agreement, which would be nullified if he lied. The court found that the implication amounted to improper vouching. 618 F.2d at 533-34. Following reversal of the conviction on grounds of improper vouching, the Ninth Circuit held in United States v. Roberts, 640 F.2d 225 (9th Cir.), cert. denied, 452 U.S. 942 (1981), that retrial was not barred on double jeopardy grounds. Id. at 227-28. The court reasoned that there was no showing that the prosecutor made the comments in order to provoke a mistrial. Id. at 228.

The Ninth Circuit nonetheless found no vouching present in Tham, Brooklier, or Rohrer. In each case, the court held that the defendants' reliance on Roberts was misplaced. The Tham court distinguished Roberts on the basis that there was no contention in Tham that the prosecutor argued facts not in evidence. 665 F.2d at 862. In Brooklier, the court similarly held that “[w]e reversed the conviction [in Roberts] primarily because the statement that the detective was monitoring the witness improperly referred to facts outside the record. Here, no such argument was made.” 684 F.2d at 1218. The Rohrer court stressed that in Roberts, the government put its prestige behind the witness, which was a distinguishing factor. 708 F.2d at 433.

Both Tham and Rohrer emphasized the importance of curative instructions. The Tham court held that the prosecutor acted properly, partially because the district judge instructed the jury to regard the testimony of a witness granted immunity “with greater care than the testimony of an ordinary witness.” 665 F.2d at 862. The Rohrer court similarly stressed that the government had carefully asked the jury to look to the plea agreement to consider the witness' motives. 708 F.2d at 433.

In United States v. West, 680 F.2d 652 (9th Cir. 1982), the defendant similarly claimed that during closing argument, the government improperly vouched for the credibility of a witness. The prosecutor had enhanced the witness' credibility by stressing that the witness was an officer of the court and a member of the United States Attorney's Office:

If you are willing to believe that an officer of this Court and a member of the U.S. Attorney's Office is going to commit perjury, which is what she would have had to do, . . . then I would think that . . . you would have doubt about the whole case, and that you would have to acquit the Defendant if you are willing to believe that; that this conviction is so important to the Government . . . that an officer of the U.S. Attorney's Office would take that stand and commit perjury.

Id. at 655.

The Ninth Circuit found that there was sufficient error to merit reversal. Id. at 657. The court used the “more probable than not” harmless error standard, see United States v. Valdez, 554 F.2d 911, 914-16 (9th Cir. 1977), stating that it was compelled to reverse the
In *United States v. Gibson*, the court held that a prosecutor may distinguish direct from circumstantial evidence without violating the vouching rule, and he or she may help the jury to remember a witness' testimony by referring to the witness' age, occupation, or other distinguishing characteristics.

The defendant appealed a conviction for mail fraud, wire fraud, and inducing others to travel in interstate commerce for purposes of fraud. He objected to the prosecutor's statements that there would be "direct evidence, in my view, in the view of the government, . . . that shows that . . . [the defendant] intended all along to take this money for himself, . . . not to tell the truth about what was going on, and [to] intentionally [defraud] these people for . . . his own personal gain." The prosecutor also referred to one government witness as an "actor who was also a disabled veteran."

The Ninth Circuit found the defendant's objections without merit. The court held that the prosecutor properly distinguished between direct and circumstantial evidence and was merely helping the jury to remember the "disabled veteran," since there were many witnesses. Thus the court found that the prosecutor's statements did not violate the vouching rule.

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conviction if it was more probable than not that the error substantially influenced the verdict. 680 F.2d at 656-57.
2201. 690 F.2d 697 (9th Cir. 1982), cert. denied, 460 U.S. 1046 (1983).
2202. Id. at 703.
2203. 18 U.S.C. § 1341 (1976) provides in pertinent part: "Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . places in any post office . . . any matter or thing whatever to be sent or delivered by the Postal Service, . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.”
2204. 690 F.2d 697, 702 n.6 (9th Cir. 1982), cert. denied, 460 U.S. 1046 (1983).
2205. Id. at 703 n.6.
2206. Id. at 703.
2207. Id. As in United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983), and United States v. Rohrer, 708 F.2d 429 (9th Cir. 1983), the court in *Gibson* found no merit in the defendant's argument that the prosecutor vouched for evidence in violation of the rule of *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980) (conviction reversed where government's case was not compelling and court could not deem prosecutor's remarks harmless), cert. denied, 452 U.S. 942 (1981). See supra note 2200.

The *Gibson* court also disagreed with the defendant's other objections of prosecutorial
3. Improper references to matters not in evidence

The prosecutor's conduct during trial is an important element of the defendant's due process rights. Thus the prosecutor must avoid conduct which improperly prejudices the defendant's case. The prosecutor must confine his or her comments to the facts in evidence and reasonable conclusions drawn from them. In determining whether the prosecutor's conduct requires reversal of the conviction, the Ninth Circuit will consider them under a "plain error" standard of review because the defendant neglected to preserve the issues for appeal by objecting at trial. 690 F.2d 697, 703 (9th Cir. 1982), cert. denied, 460 U.S. 1046 (1983).

Under the plain error doctrine, the court has discretion to grant or deny review when the defendant neglects to preserve an issue with a proper objection. United States v. Lopez, 575 F.2d 681, 685 (9th Cir. 1978). The plain error doctrine emanates from the rule that if the defendant does not object at trial, appellate relief is normally precluded. United States v. Cornfield, 563 F.2d 967, 970 (9th Cir. 1977) (failure to object at trial necessitates proof of plain error to warrant reversal), cert. denied, 435 U.S. 922 (1978); accord United States v. Garcia, 555 F.2d 708, 711 (9th Cir. 1977) (per curiam). The Ninth Circuit will reverse a criminal conviction on the basis of plain error only under exceptional circumstances. United States v. Giese, 597 F.2d 1170, 1199 (9th Cir.), cert. denied, 444 U.S. 979 (1979); United States v. Segna, 555 F.2d 226, 231 (9th Cir. 1977) (prosecutor's remark improperly shifting burden of proof to defendant constituted plain error).

The court in Gibson held that there was no indication that a "clear miscarriage of justice" existed or that "the integrity and reputation of the judicial process" might be at stake. 690 F.2d at 703 (quoting United States v. Berry, 627 F.2d 193, 199 (9th Cir. 1980) (under plain error standard, court must determine if error was highly prejudicial and if defendant preserved the issue for appeal), cert. denied, 449 U.S. 1113 (1981)). Even if the prosecutor's actions were in error, they could not be described as "highly prejudicial error affecting substantial rights," and thus, the prosecutor's conduct did not qualify as plain error. 690 F.2d at 703 (quoting United States v. Giese, 597 F.2d 1170, 1198-1200 (9th Cir.), cert. denied, 444 U.S. 979 (1979)).

Relying on Gibson, the court in United States v. Lane, 708 F.2d 1394 (9th Cir. 1983), held that the prosecutor's statements during closing argument did not require reversal of the defendant's conviction. Id. at 1399. The defendant challenged the district court's refusal to grant a mistrial for prosecutorial misconduct. Id. The district court lacked the opportunity to remedy any error since the defendant had neglected to object to the remarks when made. Thus the court considered the prosecutor's remarks under the plain error doctrine, holding that the remarks, even if erroneous, did not require reversal. Id. (citing United States v. Giese, 597 F.2d 1170, 1198-1200 (9th Cir.) (conviction upheld where evidence was compelling, and prosecutor's improper remarks would not have affected outcome of trial), cert. denied, 444 U.S. 979 (1979)). The court used substantially the same plain error analysis as in Gibson, holding that the defendants were not deprived of a fair trial; there was no "clear miscarriage of justice" or risk that "the integrity of the judicial process might be affected." Id. (quoting United States v. Gibson, 690 F.2d 697, 703 (9th Cir. 1982), cert. denied, 460 U.S. 1046 (1983)).

United States v. Bracy, 566 F.2d 649, 658 (9th Cir. 1977) (closing remarks about defendant's drug-related profits were not improperly prejudicial because record supported them), cert. denied, 439 U.S. 818 (1978). See also United States v. Esquer-Gomez, 550 F.2d 1231, 1234 (9th Cir. 1977) (court allowed statement that prosecutor was "trying to avoid bringing out some other matters that should not come out"); Tenorio v. United States, 390 F.2d 96, 98-99 (9th Cir.) (court allowed closing remark concerning heroin-induced destruction, as within common knowledge of reasonable people), cert. denied, 393 U.S. 874 (1968); United States v.
sider whether a jury instruction can counteract the prejudice,\(^2\) and whether the error was harmless.\(^2\)

In *United States v. Nadler*,\(^2\) the Ninth Circuit ruled that the district court properly denied motions for a mistrial, where it was more probable than not that several evidentiary errors did not substantially affect the jury's verdict.\(^2\) The defendants appealed their convictions for conspiring to print, possess, and transfer counterfeit federal reserve notes\(^2\) and for counterfeiting and possessing counterfeit plates.\(^2\)

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\(^2\)Fulton, 549 F.2d 1325, 1328 (9th Cir. 1977) (court allowed closing remark that defendant was a "big dope peddler" since it was reasonable inference from evidence).

\(^2\)United States v. Pratt, 531 F.2d 395, 401 (9th Cir. 1976) (where prosecutor openly displayed gun to jury, despite prior inadmissibility ruling, trial judge's instruction could not cure prejudice).

\(^2\)The Supreme Court has likewise established that a prosecutor may not attest to facts within his or her personal knowledge that are not in evidence, unless he or she testifies as a witness. Berger v. United States, 295 U.S. 78, 84 (1935) (prosecutor improperly commented that he "knew" that witness was actually acquainted with defendant, even though witness testified to the contrary); Hall v. United States, 150 U.S. 76, 80-81 (1893) (prosecutor committed reversible error by remarking that "we know" that Mississippi trials of white men for killing blacks are farces).

\(^2\)American Bar Association Standards Relating to the Administration of Criminal Justice—The Prosecution Function, § 5.8(b) (1974), provides that a prosecutor acts unprofessionally if he or she expresses a personal belief regarding the defendant's guilt. *See supra* note 2185. This standard has been upheld in several circuits. *See, e.g.*, United States v. Gonzalez-Vargas, 558 F.2d 631, 633 (1st Cir. 1977); United States v. Cain, 544 F.2d 1113, 1116 (1st Cir. 1976); United States v. Cotter, 425 F.2d 450, 453 (1st Cir. 1970); Patriarca v. United States, 402 F.2d 450, 451 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969); United States v. States, 280 F.2d 472, 475 (1st Cir. 1960); United States v. Benson, 487 F.2d 978, 981 (3d Cir. 1973); United States v. Schartner, 426 F.2d 470, 477 (3d Cir. 1970); United States v. Bobo, 477 F.2d 974, 991 (4th Cir. 1973), cert. denied, 421 U.S. 909 (1974); United States v. Splain, 545 F.2d 1131, 1134-35 (8th Cir. 1976); Sanchez v. Heggie, 531 F.2d 964, 966 (10th Cir.), cert. denied, 429 U.S. 948 (1976). The Fifth Circuit has noted:

The purpose of summations is for the attorneys to assist the jury in analyzing, evaluating, and applying the evidence. It is not for the purpose of permitting counsel to "testify" as an "expert witness" . . . . Therefore, an attorney's statements that indicate his opinion or knowledge of the case as theretofore presented before the court and jury are permissible if the attorney makes it clear that the conclusions he is urging are conclusions to be drawn from the evidence.

United States v. Morris, 568 F.2d 396, 401 (5th Cir. 1978) (emphasis in original).

\(^2\)698 F.2d 995 (9th Cir. 1983).

\(^2\)Id. at 1001.

\(^2\)18 U.S.C. § 371 (1976) provides in pertinent part:

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

\(^2\)18 U.S.C. § 471 (1976) provides: "Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

\(^2\)18 U.S.C. § 474 (1976) provides in pertinent part:

Whoever, having control, custody, or possession of any plate . . . from which has
During the trial, the United States Attorney made a motion in front of the jury to admit a document previously ruled inadmissible. Defense counsel referred twice to the document during cross-examination. The district court denied defense counsel's motion for a mistrial.\footnote{2215}

During a Secret Service agent's testimony, he referred twice to a search warrant which the court had held invalid, and to counterfeit money which had been suppressed. The court struck the improper testimony and held an off-the-record discussion with the United States Attorney to ensure that the agent would not mention the suppressed evidence again. However, the agent referred again to the search warrant and the counterfeit bills. The court immediately suspended further testimony by the agent.\footnote{2216}

The court again denied the defendants' motion for a mistrial, concluding that the jury could easily have determined from the witness' testimony that the agents did not discover anything when they searched the counterfeit printing shop. Thus the court held that any prejudice to the defendants was speculative.\footnote{2217}

The defendants nonetheless claimed that misconduct by the prosecutor and witness deprived the defendants of a fair trial. They argued that the prosecutor's statement before the jury, and the agent's references to suppressed evidence, implied to the jury that other evidence of guilt was being withheld. The defendants were not satisfied with the court's jury instruction to draw no inferences about why the seized items were not admitted into evidence.\footnote{2218}

The Ninth Circuit held that the defendants incurred no prejudice from the prosecutor's and witness' remarks regarding inadmissible evidence.\footnote{2219} The court of appeals will reverse only if it appears more probable than not that the misconduct significantly affected the jury's decision.\footnote{2220} Since the district court is better equipped to understand the

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\footnote{2215. 698 F.2d 995, 1001 (9th Cir. 1983).}
\footnote{2216. Id.}
\footnote{2217. Id.}
\footnote{2218. Id.}
\footnote{2219. Id.}
\footnote{2220. Id. (citing United States v. Tham, 665 F.2d 855, 860 (9th Cir. 1981), cert. denied, 456 U.S. 942 (1982); United States v. Berry, 627 F.2d 193, 201 (9th Cir. 1980) (conviction will be affirmed if non-constitutional error is more probably harmless than not), cert. denied, 449 U.S. 1113 (1981). See also United States v. Sanford, 673 F.2d 1070, 1072-73 (9th Cir. 1982) (absent substantial prejudice to defendant, trial court's discretion regarding prosecutorial misconduct will not be disturbed); United States v. Valle-Valdez, 554 F.2d 911, 916 (9th Cir. 1977) (given timely objection, incomplete jury instruction which may have substantially affected de-}

\end{footnotes}
circumstances surrounding the incident and to evaluate its impact, the appellate court must defer to the district court's handling of the alleged misconduct during trial.\textsuperscript{2221}

The Ninth Circuit emphasized the importance of the district court's jury instruction to draw no adverse inferences from the comments. The court stressed that proper jury instructions may cure prosecutorial error.\textsuperscript{2222} Moreover, before the agent's improper remarks, the jury had already learned about the presence of the counterfeit money at the print shop. This issue surfaced during questioning by the defense. Thus the defendants suffered no prejudice from the agent's comments.\textsuperscript{2223}

The Ninth Circuit also observed that the agent stated that his references to the inadmissible evidence were inadvertent.\textsuperscript{2224} The district
court acted quickly to suspend further testimony by the agent, and carefully reviewed the circumstances surrounding the incident before denying the defendants' motion for a mistrial. The Ninth Circuit found no abuse of discretion in the district court's denial of the defendants' motion.  

The court decided that the cumulative effect of the misconduct, if any, created no prejudice to the defendants. Citing *United States v. Berry*, the court acknowledged the requirement of examining the cumulative effect of several errors when assessing prejudicial impact. The stronger the prosecutor's case, the less likely that the defendant will be prejudiced by error or misconduct. In reaching its decision, the court considered that evidence of the defendants' guilt was strong, and that in each instance defense counsel was the first to bring the existence of the inadmissible evidence to the jury's attention.

In *United States v. Crenshaw*, the court held that improper prosecutorial comments require a mistrial only when the comments are so severe that they prejudice the defendant, and the prejudice is not counteracted by the trial court's instructions.

The defendants in *Crenshaw* were convicted of bank robbery. Shortly after the robbery and again one week before trial, two witnesses

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2225. *Id.* (citing Stoppelli v. United States, 183 F.2d 391, 395 (9th Cir.), *cert. denied*, 340 U.S. 864 (1950)). As the Court noted in Bruton v. United States, 391 U.S. 123, 135 (1968), "[n]ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently."


2227. 698 F.2d at 1002. This same standard has been followed in the Fifth Circuit. *See, e.g.*, United States v. Ramsey, 493 F.2d 457, 459 (5th Cir.) (any claim of trial judge's impropriety must be considered in light of record in its totality), *cert. denied*, 419 U.S. 994 (1974).

2228. 698 F.2d 1002 (citing United States v. Berry, 627 F.2d 193, 210 (9th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); United States v. Hibler, 463 F.2d 455 (9th Cir. 1972) (Ninth Circuit has special obligation to examine allegations of prejudice when government's evidence is based on uncorroborated accomplice testimony)).

2229. 698 F.2d 1002.

2230. 698 F.2d 1060 (9th Cir. 1983).

2231. *Id.* at 1063 (citing United States v. Potter, 616 F.2d 384, 391-92 (9th Cir. 1979) (prosecutor's impropriety during closing summation in interjecting his personal belief about witnesses' guilt and credibility did not require reversal of conviction), *cert. denied*, 449 U.S. 832 (1980)).

2232. 18 U.S.C. § 2113(a) (1976) provides in pertinent part: "Whoever, by force and violence . . . takes . . . from the person or presence of another any property or money or any other thing of value belonging to . . . any bank . . . shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

18 U.S.C. § 2113(d) (1976) provides in pertinent part: "Whoever, in committing, or attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person . . . shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."
selected the defendants' pictures from a photographic lineup. The prosecutor notified these witnesses on the morning of the trial that the two persons they had identified would be present in the courtroom at the defendants' table.\textsuperscript{2233} The trial court made a pretrial ruling that the prosecutor's comments destroyed the reliability of later identifications and rendered inadmissible any in-court identification.\textsuperscript{2234} During the trial, however, the witnesses were requested to pick again the pictures of the robbers they had previously selected from the photographic lineup.

One defendant contended that this procedure constituted an in-court identification, which was so tainted by impermissibly suggestive pretrial identification procedures that he was denied due process.\textsuperscript{2235} Both defendants argued that the district court should have declared a mistrial for prosecutorial misconduct because of statements made by the prosecutor during trial and admission of the photographic identifications.\textsuperscript{2236}

The Ninth Circuit disagreed, holding that because the subsequent prosecutorial misconduct did not influence the initial identifications, the court did not abuse its discretion by allowing a repeat of the photographic identifications at trial.\textsuperscript{2237} The court held that the prejudicial effect of the prosecutor's statements to the witnesses was minimal and was neutralized by the court's limiting instructions.\textsuperscript{2238}

One defendant also contended that evidentiary errors and instances of prosecutorial misconduct were cumulatively so prejudicial that he was denied a fair trial.\textsuperscript{2239} Considering the case in its entirety, the court held that the defendant was not significantly deprived of a fair trial by any cumulative prejudice from purported errors and prosecutorial misconduct.\textsuperscript{2240} The court noted that when evidentiary errors and prosecutorial misconduct are "'more probably harmless than not,'" there is no need for reversal.\textsuperscript{2241} Thus, in light of the overwhelming evidence against the defendant, including fingerprints, the total effect of any errors concerning admission of illegally seized evidence and the prosecutor's remarks did

\begin{footnotesize}
\bibitem{2233} 698 F.2d at 1063.
\bibitem{2234} Id.
\bibitem{2235} Id. at 1062.
\bibitem{2236} Id. at 1063.
\bibitem{2237} Id.
\bibitem{2238} Id.
\bibitem{2239} Id.
\bibitem{2240} Id. at 1063-64.
\bibitem{2241} Id. at 1063 (citing United States v. Berry, 627 F.2d 193, 201 (9th Cir. 1980), \textit{cert. denied}, 449 U.S. 1113 (1981)). This same standard of "'more probably harmless than not'" was used in United States v. Nadler, 698 F.2d 995, 1001 (9th Cir. 1983). \textit{See supra} note 2220.
\end{footnotesize}
not necessitate overturning the decision.\textsuperscript{2242}

In \textit{United States v. Kahan & Lessin Co.},\textsuperscript{2243} the court ruled that government misconduct did not require dismissal of an indictment, where the trial judge gave appropriate cautionary instructions after improper questions were asked by counsel.\textsuperscript{2244}

The defendants were indicted for conspiring to restrain trade by agreeing to fix prices, terms, and conditions of the sale of health foods.\textsuperscript{2245} They contended that questions posed by government counsel should have resulted in a mistrial.\textsuperscript{2246} Counsel asked one witness if he was a co-defendant with Kahan and Lessin in a related action. Counsel also asked several witnesses about meetings held before the start of the conspiracy as alleged in the indictment. The court held that on both occasions the trial judge cured the evidentiary errors with cautionary jury instructions and by disallowing the questions.\textsuperscript{2247} The Ninth Circuit held that the defendants had a fair trial, and that whatever acts of prosecutorial misconduct occurred, considered alone or together, did not require reversal.\textsuperscript{2248}

4. Improper comments on a defendant's silence

In \textit{United States v. Miller},\textsuperscript{2249} the Ninth Circuit considered the prosecutor's comment on the defendant's exercise of his right to remain silent

\begin{thebibliography}{99}
\bibitem{2242} 698 F.2d at 1063-64.
\bibitem{2243} 695 F.2d 1122 (9th Cir. 1982).
\bibitem{2244} \textit{Id.} at 1124-25.
\bibitem{2245} 15 U.S.C. § 1 (1976) provides in pertinent part: “Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .”
\bibitem{2246} 695 F.2d at 1124.
\bibitem{2247} \textit{Id.} at 1124-25 (citing \textit{United States v. Sanford}, 673 F.2d 1070, 1073 (9th Cir. 1982) (on motions for mistrial, trial court retains wide discretion, but cannot unfairly prejudice defendants)).
\bibitem{2248} 695 F.2d at 1125 (citing \textit{United States v. Ochoa-Sanchez}, 676 F.2d 1283, 1289 (9th Cir.) (improper question in context of total trial did not necessitate reversal), \textit{cert. denied}, 459 U.S. 911 (1982)).

The defendants also claimed that they were denied necessary testimony because the government did not extend immunity to several of their witnesses. \textit{Id.} at 1124. The court held that there was no error, since the defendants neglected to prove that the testimony would have benefited them. \textit{Id.} (citing \textit{United States v. Garner}, 663 F.2d 834, 839 (9th Cir. 1981) (when government fails to extend immunity, there is no error, in absence of evidence that witnesses would have testified favorably), \textit{cert. denied}, 456 U.S. 905 (1982)).

The defendants also argued that they were denied several witnesses due to prosecutorial coercion. \textit{Id.} The court disagreed, noting that the defendants failed to substantiate their assertions. \textit{Id.} at 1125. Even though the defendants asserted that the government actively discouraged witnesses from cooperating, they did not show that they were denied access to witnesses. \textit{Id.} at 1124.

\bibitem{2249} 688 F.2d 652 (9th Cir. 1982) (en banc).
\end{thebibliography}
at trial. Without deciding whether the comment was improper, the court held that it was harmless beyond a reasonable doubt.\textsuperscript{2250}

The defendant was indicted for receiving stolen property, based on his possession of a stolen trailer.\textsuperscript{2251} The court allowed the prosecutor's remark during closing argument concerning the defendant's explanation of what had happened to the trailer.\textsuperscript{2252} The court reasoned that the comment merely preceded reiteration of testimony concerning the defendant's preindictment statement that he no longer had the property.

\textsuperscript{2250} Id. at 661. The Supreme Court has held that a prosecutor's comment on a defendant's refusal to testify violates the self-incrimination clause of the fifth amendment. See, e.g., Griffin v. California, 380 U.S. 609, 613 (1965). The Ninth Circuit has also ruled on this issue. See, e.g., United States v. Parker, 549 F.2d 1217, 1221 (9th Cir.) (comment on defendant's silence was improper, but harmless beyond a reasonable doubt), \textit{cert. denied}, 430 U.S. 971 (1977); United States v. Helina, 549 F.2d 713, 718 (9th Cir. 1977) (prosecutor may not comment on accused's pretrial silence for purposes of impeaching his trial testimony).

The Ninth Circuit recently considered allegations of improper prosecutorial comment in United States v. Armstrong, 654 F.2d 1328 (9th Cir. 1981), \textit{cert. denied}, 454 U.S. 1157 (1982). The prosecutor had indirectly commented on the defendant's failure to testify by asking the jury, "Did you hear him deny the misrepresentations, Ladies and Gentlemen?" Id. at 1336 n.6.

The court acknowledged that the comment was prohibited, but held that it was "harmless beyond a reasonable doubt." Id. at 1336-37 (citing United States v. Passaro, 624 F.2d 938, 945 (9th Cir. 1980) (plain error not ground for reversal if court is convinced it was harmless beyond reasonable doubt), \textit{cert. denied}, 449 U.S. 1113 (1981)). The conviction was affirmed because the court decided that the remark was an isolated comment not stressing any inference of guilt. Moreover, the trial judge added a curative instruction. Id.

In United States v. Fleishman, 684 F.2d 1329 (9th Cir.), \textit{cert. denied}, 459 U.S. 1044 (1982), the court again considered allegations of improper prosecutorial comments on the defendants' failure to testify. Id. at 1343. The court held that the text should be "whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." Id. (citing United States v. Wasserteil, 641 F.2d 704, 709 (9th Cir. 1981) (prosecutor's reference to failure of defense to provide certain explanation did not infringe on defendants' fifth amendment rights)). As in United States v. Armstrong, 654 F.2d 1328, 1336-37 (9th Cir. 1981), \textit{cert. denied}, 454 U.S. 1157 (1982), the court in Fleishman noted that the trial court's jury instructions cured any possible prejudice. Id. at 1344. \textit{Cf.} United States v. Cornfeld, 563 F.2d 967, 971 (9th Cir. 1977) (per curiam) (prosecutor's remarks were appropriate because "the jury would [not] naturally and necessarily take them to be comments on the failure of the accused to testify"), \textit{cert. denied}, 435 U.S. 922 (1978).

\textsuperscript{2251} 18 U.S.C. § 2315 (1976) provides in pertinent part: "Whoever receives . . . any goods . . . of the value of $5,000 or more . . . , moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen . . . [s]hall be fined not more than $10,000, or imprisoned not more than ten years, or both."

\textsuperscript{2252} 688 F.2d 652, 661 (9th Cir. 1982) (en banc). The prosecutor stated:

\textit{When you get to the jury room, there is one question I want . . . all of you [to] ask each other . . . [T]he evidence is uncontradicted [that] the trailer that was found abandon[ed] in the woods [had been] in Howard Miller's possession . . . sometime in the fall of 1980. I want you to ask yourselves, if that is so, what happened to it? What was Mr. Miller's explanation of what happened to that trailer? Id. (emphasis in original).
Thus the prosecutor referred not to the defendant's failure to testify, but to one of his pretrial declarations. Moreover, the Ninth Circuit deemed it significant that the court promptly instructed the jury to disregard any implication of guilt, that the prosecutor's comment was not extensive, and that he did not emphasize any inference of guilt from the defendant's silence.

5. Prejudicial remarks in closing arguments

The Ninth Circuit recently considered several cases concerning allegations of improper prosecutorial statements in closing argument. In each case, the court rejected the defendants' claims of prosecutorial misconduct. The Ninth Circuit places much faith in corrective measures which may neutralize any improper remark, and requires reversal only upon proof of gross behavior. "Counsel are necessarily permitted a degree of latitude in the presentation of their closing summations." In United States v. Foster, the Ninth Circuit held that any prejudice from the prosecutor's misstatements during closing argument was neutralized by a corrective statement. At trial the defendants were

2253. Id.
2254. Id. See also Anderson v. Nelson, 390 U.S. 523, 523-24 (1968) (per curiam) (comment on defendant's failure to testify is not harmless error where comment is extensive, inference of guilt is emphasized, and there is evidence that could have supported acquittal); United States v. Sigal, 572 F.2d 1320, 1323 (9th Cir. 1978) (error was harmless where comment was not extensive, there was marginal emphasis on any inference of guilt, and there was no substantial evidence supporting an acquittal).
2255. In United States v. Parker, 549 F.2d 1217 (9th Cir.), cert. denied, 430 U.S. 971 (1977), the defendant contended that the prosecutor created prejudice through improper statements during closing argument. The Ninth Circuit held that statements require reversal only where "they are so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge." Id. at 1222 (citing United States v. Benson, 487 F.2d 978, 981 (3d Cir. 1973)).
2256. United States v. Potter, 616 F.2d 384, 392 (9th Cir. 1979) (quoting United States v Rich, 580 F.2d 929, 936 (9th Cir.) (court allowed prosecutor's expression of his personal belief about credibility of witnesses and his invitation to jury to compare for itself the handwriting of two exhibits), cert. denied, 439 U.S. 935 (1978)).
2257. 711 F.2d 871 (9th Cir. 1983), cert. denied, 104 S. Ct. 1602 (1984).
2258. Id. at 883.
convicted of various drug-related offenses.\textsuperscript{2259} During closing argument, the prosecutor implied that defense counsel was part of a conspiracy to distribute heroin.\textsuperscript{2260} Defense counsel objected to this line of argument.

The trial court allowed defense counsel to request that the prosecutor correct his statement. The court held that the prosecutor's corrective statement neutralized any prejudice. The prosecutor told the jury that he had been referring to the defendants only, and had not intended to suggest that defense counsel was part of the conspiracy.\textsuperscript{2261}

The appellate court held that the prosecutor's remarks may have been improper, exceeding the liberal scope permitted counsel in closing argument.\textsuperscript{2262} Nonetheless, the court stated that the comments were not so severe that they prejudiced the defendants, and that they could be neutralized by the trial judge. These two criteria constitute the court's test for determining if there is reversible error.\textsuperscript{2263} Thus, the Ninth Circuit will tolerate a significant level of impropriety before ordering a reversal.

In United States v. Mehrmanesh,\textsuperscript{2264} the Ninth Circuit again denied an appeal, holding that a timely cautionary instruction balanced an improper comment.\textsuperscript{2265} The defendant appealed a conviction for importing heroin and attempting to possess with intent to distribute heroin.\textsuperscript{2266} He

\textsuperscript{2259} 21 U.S.C. § 841(a)(1) (1976) provides in pertinent part: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to . . . possess with intent to . . . distribute . . . a controlled substance."

\textsuperscript{2260} 21 U.S.C. § 846 (1976) provides in pertinent part: "Any person who . . . conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both."

\textsuperscript{2261} 711 F.2d at 883. The prosecutor reminded the jury that an agent had testified that one of the defendants had given the government information to support a warrant for the search of a witness' home. The prosecutor argued that defense counsel did not ask the agent whether the defendant had supplied the information. The prosecutor then suggested that the defendants were "hanging together" to hide their guilt, and that defense counsel supported the conspiracy. \textit{Id.}

\textsuperscript{2262} \textit{Id.} See also United States v. Parker, 549 F.2d 1217, 1222 (9th Cir.) (prosecutor's comments, although inferential, were within latitude permitted counsel in closing argument, since he did not misstate or exceed evidence in any significant respect), cert. denied, 430 U.S. 971 (1977).

\textsuperscript{2263} 711 F.2d at 883.

\textsuperscript{2264} 689 F.2d 822 (9th Cir. 1982).

\textsuperscript{2265} \textit{Id.} at 835.

\textsuperscript{2266} 21 U.S.C. § 841(a)(1) (1976) provides in pertinent part: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to . . . possess with intent to . . . distribute . . . a controlled substance."

\textsuperscript{2266} 21 U.S.C. § 846 (1976) provides in pertinent part: "Any person who . . . conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both."

\textsuperscript{18} 18 U.S.C. § 2(a) (1976) provides in pertinent part: "Whoever commits an offense against the United States . . . is punishable as a principal."
argued that in closing argument, the prosecutor caused him incurable prejudice by making improper remarks regarding Rule 404(b) prior acts evidence.2267 The court agreed with the defendant's claim that the prosecutor had commented improperly on the absence of certain explanations by the defendant after his arrest.2268 Nonetheless, the court summarily found the error cured by the district court's cautionary jury instruction and order to strike the comment.2269

Thus, even though the Ninth Circuit acknowledged the likely presence of prosecutorial error, it summarily held that a curative measure counteracted the improper conduct. Error alone is not sufficient for reversal under Ninth Circuit standards.2270

The court in United States v. Candelaria2271 held that the prosecutor is entitled to latitude in closing argument, including making comments on matters within the common knowledge of all reasonable people.2272 This discretion permits references such as the prosecutor's remark that people should not joke about acts such as bomb threats.2273

2267. 689 F.2d 822, 835 (9th Cir. 1982).
2268. Id. (citing Doyle v. Ohio, 426 U.S. 610, 618 (1976) (violation of due process if defendant's silence, either at time of arrest or after receiving Miranda warnings, is used to impeach explanation subsequently offered at trial)). In Doyle, the petitioners took the stand during their criminal trials and gave an exculpatory explanation. Over their counsel's objection, they were cross-examined as to why they had not given the arresting officer the exculpatory story. They were subsequently convicted, and the convictions were affirmed. Doyle v. Ohio, 426 U.S. 610, 615-16 (1976). The Court held that post-arrest silence following Miranda warnings is ambiguous, and that it would be unjust to allow a defendant's silence to be used to impeach an explanation later given at trial. Id. at 619.

2269. 689 F.2d 822, 835 (9th Cir. 1982). See also United States v. Shelton, 588 F.2d 1242, 1247 (9th Cir. 1978) (error in admission of evidence can normally be cured by instructing jury to disregard it), cert. denied, 442 U.S. 909 (1979); United States v. Wycoff, 545 F.2d 679, 682 (9th Cir. 1976) (allowing government to show defendant had exercised his right to remain silent was harmless error, where trial court promptly and forcefully instructed jury to disregard testimony), cert. denied, 429 U.S. 1105 (1977).

2270. See DeFoor, Prosecutorial Misconduct in Closing Argument, 7 NOVA L.J. 443, 456-57 (1983) which states:

Other than the special rules concerning comment upon the defendant's failure to testify, the rules concerning a prosecutor's argument are fairly broad. . . . The prosecutor is allowed to advance all legitimate arguments, and is free to make logical inferences based upon the evidence to support his theory of the case. . . . Generally speaking, much discretion is vested in the trial court in keeping counsel's arguments within the scope of the issues and evidence. There have been cases where prosecutors made statements so far from the facts as to constitute deliberate misrepresentation. Such cases are, fortunately, rare, and are . . . obviously reprehensible and reversible . . . .

2271. 704 F.2d 1129 (9th Cir. 1983).
2272. Id. at 1132 (citing Tenorio v. United States, 390 F.2d 96, 99 (9th Cir.) (counsel entitled to reasonable degree of latitude in presentation of argument), cert. denied, 393 U.S. 874 (1968)).
2273. Id.
In *Candelaria*, the defendant was convicted of making a false bomb threat.2274 At trial, he admitted making the threat by telephone call, but testified that he possessed no malicious intent. Defense counsel argued in closing that the call was a prank and therefore not subject to punishment under the statute.2275 The district judge refused to give a jury instruction proposed by defense counsel, which would have resulted in acquittal if the jury could not find beyond a reasonable doubt that the bomb threat was serious.2276

On appeal, the defendant contended that some of the prosecutor's remarks during closing argument deviated from the evidence, evoking a judgment based on emotion rather than reason and depriving him of a fair trial.2277 While arguing the element of intent, the prosecutor asserted that the defendant was probably not joking, explaining that today, when people are subjected to bomb threats, one does not joke about these things.2278 The court noted that defense counsel argued the point in its own closing, and the prosecutor had the prerogative to respond to it.2279 Thus, the prosecutor's remarks did not exceed the scope of his discretion.

**E. Continuance**

The decision to grant or deny a continuance is within the discretion of the trial judge2280 and will be reversed only upon a clear showing of abuse of discretion.2281 Additionally, a defendant must show that his

2274. 18 U.S.C. § 844(e) (1976) provides in pertinent part: Whoever, through the use of the . . . telephone . . . willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made . . . unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of an explosive shall be imprisoned for not more than five years or fined not more than $5,000, or both.

2275. 704 F.2d at 1130-31.

2276. *Id.* at 1131. Defense counsel requested the following jury instruction: "A false bomb report made as a joke or jest or prank is not a crime. If you cannot find, beyond a reasonable doubt, that the false statement was not a joke, jest, or prank, you must find the defendant not guilty." *Id.*

2277. *Id.* at 1132.

2278. *Id.*

2279. *Id.* The Ninth Circuit accords discretion when the prosecutor responds to defense comments. See, e.g., United States v. Fulton, 549 F.2d 1325, 1328 (9th Cir. 1977) (prosecutor's remark fell within degree of latitude allowed in argument, especially since it was made in partial response to defense counsel's arguments); United States v. Greenbank, 491 F.2d 184, 188 (9th Cir.) (prosecutor allowed to praise informant, after defense characterized him as "a rat"), cert. denied, 417 U.S. 931 (1974).


2281. United States v. Hernandez, 608 F.2d 741, 746 (9th Cir. 1979).
defense was prejudiced before the decision will be reversed.\textsuperscript{2282}

In \textit{Morris v. Slappy},\textsuperscript{2283} the Supreme Court held that the trial judge did not abuse his discretion by denying the defendant's motions for continuances. In \textit{Morris}, the defendant was appointed a new public defender when six days before trial his previously appointed attorney had emergency surgery.\textsuperscript{2284} On both the first and second day of trial, the defendant complained that his new attorney had not had sufficient time to prepare. The trial judge construed the defendant's remarks as motions for a continuance and, after being told by the attorney that he was ready to proceed, denied the motions.\textsuperscript{2285} On the third day of trial, the defendant presented the court with a pro se petition in which he claimed that he was unrepresented by counsel, stating that his attorney was in the hospital.\textsuperscript{2286} The court treated the petition as a renewal of the defendant's continuance motion and again denied it.\textsuperscript{2287}

On a writ of habeas corpus, the district court construed the pro se petition to include claims that the trial court abused its discretion in denying a continuance to permit more time for trial preparation and to allow the hospitalized attorney to represent the defendant.\textsuperscript{2288} The district court rejected both claims.\textsuperscript{2289} The court of appeals reversed, holding that it was an abuse of discretion to deny a continuance which would have permitted the hospitalized attorney to represent the defendant.\textsuperscript{2290}

The Supreme Court reversed the court of appeals, stating that the court misread the record.\textsuperscript{2291} The Court concluded that the court of appeals misread the record in two ways. First, the Court stated it could not "fathom" how the defendant's complaint about lack of time to prepare

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\textsuperscript{2282} United States v. Petsas, 592 F.2d 525, 527 (9th Cir.), cert denied, 442 U.S. 910 (1979).
\textsuperscript{2283} 461 U.S. 1 (1983).
\textsuperscript{2284} \textit{Id.} at 5 (defendant's attorney represented him at his preliminary hearing and conducted an investigation into case prior to having emergency surgery).
\textsuperscript{2285} \textit{Id.} at 6-7. On both the first and second day of trial, when the defendant made motions for a continuance, the attorney clearly stated he was prepared to proceed and the defendant indicated that he did not object to the attorney. On the first day, the defendant stated he was "satisfied with the Public Defender." \textit{Id.} at 6 (emphasis in original). On the second day, the defendant stated, "I don't mean he's not a good P.D., \textit{I don't have anything against him.}" \textit{Id.} at 7 (emphasis in original).
\textsuperscript{2286} \textit{Id.}
\textsuperscript{2287} \textit{Id.}
\textsuperscript{2288} \textit{Id.} at 9.
\textsuperscript{2289} \textit{Id.} at 10.
\textsuperscript{2290} \textit{Id.} at 10-11. The court of appeals held that the defendant's sixth amendment right to counsel included the right to a meaningful attorney-client relationship. \textit{Id.} at 10. Accordingly, the court held that the trial court's failure to balance the defendant's right against the state's interest in proceeding with the trial violated the defendant's right to counsel and, therefore, required reversal of his conviction. \textit{Id.} at 11.
\textsuperscript{2291} \textit{Id.} at 12.
could be construed as an "unspoken preference" for the hospitalized attorney and, second, the Court noted that, on the record, it was reasonable to conclude that the belated requests for the previous attorney's assistance were a "transparent ploy for delay."2292 Accordingly, the Supreme Court held that the trial judge was justified in denying the continuances and that no abuse of discretion occurred.2293

In United States v. Barrett,2294 the Ninth Circuit held that the trial court abused its discretion by denying the defendant a continuance to obtain an expert's assistance in attacking a government expert's credibility.2295 The government notified the defendant of its intention to call a photographic expert eight days before trial and provided the defendant with a copy of the expert's report only two days before trial. The defendant made numerous motions for continuances before and during the trial based on an inability to secure an expert to assist him in preparing his defense.2296 The trial record indicated that the defendant, given more time, could probably have obtained the needed expert.2297

The Ninth Circuit adopted the Second Circuit rule which requires that a defendant be given adequate time to secure an expert's assistance in attacking a government expert's findings.2298 The court limited the application of the rule to instances where the expert's assistance was needed to prepare for defense cross-examination and rebuttal of the government expert's credibility. The rule requiring adequate time to secure an expert does not extend to situations where the expert's assistance is needed to provide affirmative proof of the defendant's innocence.2299 Although the court held that the denial of the continuance was an abuse of discretion, the denial was found to be harmless error in view of the overwhelming amount of evidence produced by the government in addition to the expert's testimony. Thus, reversal of the conviction was not

2292. Id. at 13.
2293. Id. at 14-15. Justice Brennan, joined by Justice Marshall, agreed with the majority's conclusion that the trial judge did not abuse his discretion by denying the defendant's motions for a continuance. Id. at 19 (Brennan, J., concurring in result). Justice Blackmun, joined by Justice Stevens, also agreed that the defendant failed to make a timely motion and that the trial judge's denial of the motions was not an abuse of discretion. Id. at 29 (Blackmun, J., concurring in judgment).
2294. 703 F.2d 1076 (9th Cir. 1983).
2295. Id. at 1081.
2296. Id. at 1080.
2297. Id. at 1081.
2298. Id. at 1080-81 (citing United States v. Kelly, 420 F.2d 26, 29 (2d Cir. 1969) (reversed convictions because defendants were denied a continuance to check government test results introduced at trial)).
2299. Id. at 1081.
required.\textsuperscript{2300}

In \textit{United States v. Nolan},\textsuperscript{2301} the Ninth Circuit held it was not an abuse of discretion for the district court to refuse to continue the defendant's trial until the completion of a related state murder trial.\textsuperscript{2302} From the record, it was clear that the district court had attempted to accommodate the defendant, having granted three continuances to await the state trial outcome, until it became clear that the state trial would not proceed in a timely fashion.\textsuperscript{2303} In holding that the district judge did not abuse his discretion, the Ninth Circuit stated "[w]e do not expect a district judge to put himself at the mercy of state proceedings whenever there is a somewhat related case in state court."\textsuperscript{2304}

In \textit{United States v. Daly},\textsuperscript{2305} the Ninth Circuit found that a district court's denial of a continuance was not an abuse of discretion. In \textit{Daly}, the defendant requested a continuance, stating that his wife, his only defense witness, was unavailable to testify.\textsuperscript{2306} The defendant offered evidence that his wife, who was eight months pregnant, had been told by her physician to avoid "severely emotional" situations. The district court found, however, that she was experiencing a normal pregnancy and was available to testify.\textsuperscript{2307} The Ninth Circuit found support for the denial in the evidence and, therefore, held that the denial was not an abuse of discretion.\textsuperscript{2308}

\section*{F. Admission of Evidence}

1. Competency to stand trial

A criminal defendant is incompetent to stand trial when he cannot rationally consult with counsel to assist in preparing his defense and lacks the capacity to rationally and factually understand the proceedings against him.\textsuperscript{2309} The Supreme Court has repeatedly held that trial of an

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\textsuperscript{2300} \textit{Id.} at 1081-82. \textit{Fed. R. Crim. P.} 52(a) provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."
\textsuperscript{2301} 700 F.2d 479 (9th Cir.), \textit{cert. denied}, 103 S. Ct. 3095 (1983).
\textsuperscript{2302} \textit{Id.} at 482.
\textsuperscript{2303} \textit{Id.}
\textsuperscript{2304} \textit{Id.}
\textsuperscript{2305} 716 F.2d 1499 (9th Cir. 1983), \textit{cert. dismissed}, 104 S. Ct. 1456 (1984).
\textsuperscript{2306} \textit{Id.} at 1511.
\textsuperscript{2307} \textit{Id.}
\textsuperscript{2308} \textit{Id.} The Ninth Circuit relied on the rule that a decision to deny a continuance will not be reversed unless there is a clear abuse of discretion. \textit{Id.} (citing \textit{United States v. Hoyos}, 573 F.2d 1111, 1114 (9th Cir. 1978)). \textit{See supra} text accompanying notes 2280-81.
\textsuperscript{2309} \textit{Dusky v. United States}, 362 U.S. 402 (1960) (per curiam) (in reversing a defendant's conviction on grounds that the district court had used an improper standard to determine competency, the Supreme Court held that the test for determining competency is whether the
incompetent defendant violates due process. In federal courts, the accused, the prosecution, or the court sua sponte may move for a judicial determination of the accused's mental competency pursuant to 18 U.S.C. section 4244. Furthermore, a defendant's section 4244 motion defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him”). See also Drope v. Missouri, 420 U.S. 162, 171-72 (1975) (defendants who lack the capacity to understand the nature and object of the proceedings against them and consult with counsel to assist in preparing their defense are incompetent to stand trial); Pate v. Robinson, 383 U.S. 375, 387 (1966) (accused has constitutional right to hearing on his present competency if there is substantial evidence that because of mental illness he is incapable of understanding nature of proceedings against him or of assisting in his defense).

The Ninth Circuit uses the Dusky test for determining competency to stand trial: a criminal defendant is competent to stand trial where he or she has “sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and [has] a rational as well as factual understanding of the proceedings.” Chavez v. United States, 656 F.2d 512, 518 (9th Cir. 1981) (citing Drope, 420 U.S. at 172; Pate, 383 U.S. at 378; Dusky, 362 U.S. at 402).

The Ninth Circuit has developed a different test for determining a defendant's competency to plead guilty. In Chavez, the court stated that a defendant who decides to plead guilty must have the capacity to make a rational choice between standing trial and pleading guilty. 656 F.2d at 515 (citing Sailer v. Gunn, 548 F.2d 271, 275 (9th Cir. 1977)). The court reasoned that a defendant is not competent to waive his constitutional right to a fair trial when mental illness has substantially impaired his ability to make a rational choice among the available alternatives and his ability to understand the nature and consequences of his waiver. Chavez, 656 F.2d at 518 (citations omitted).

2310. See Drope v. Missouri, 420 U.S. 162, 172 (1975) (“[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.”); Pate v. Robinson, 383 U.S. 375, 378, 385 (1966) (“[T]he conviction of an accused person while he is legally incompetent violates due process” because it is incompatible with the “constitutional right to a fair trial.”).

2311. A due process evidentiary hearing is constitutionally compelled at any time that there is “substantial evidence” that the defendant may be mentally incompetent . . . . Evidence is “substantial” if it raises a reasonable doubt about the defendant's competency . . . . The function of the trial court . . . is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue. Darrow v. Gunn, 594 F.2d 767, 770-71 (9th Cir. 1979) (quoting Moore v. United States, 464 F.2d 653, 666 (9th Cir. 1972) (per curiam)). The constitutional standard on review is whether “the evidence of incompetence [is] such that a reasonable judge would be expected to experience a genuine doubt respecting the defendant's competence.” Chavez v. United States, 656 F.2d 512, 516 (9th Cir. 1981) (citing Basset v. McCarthy, 549 F.2d 616, 621 (9th Cir.), cert. denied, 434 U.S. 849 (1977)).

2312. 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, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its
to determine competency cannot be denied without first granting a psychiatric examination of the accused unless "the trial judge correctly determines that the motion is frivolous or is not in good faith or does not set forth the grounds relied upon for believing that the accused may be incompetent." Thus, once the motion is made, the court should ordinarily defer making a determination of competency until after the initial psychiatric examination has taken place.

A competency hearing is required by section 4244 if the psychiatrist’s report "indicates a state of present insanity or . . . mental incompetency in the accused." Conversely, if the psychiatrist’s report does not indicate a present state of insanity or incompetency, a judicial determination of the accused’s competency is not required. Nevertheless, a hearing is required for due process reasons if the evidence raises a reasonable doubt regarding the accused’s competence, despite the psychiatrist’s conclusion that the defendant is neither insane nor incompetent. The trial court has discretion to grant or deny subse-

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2313. United States v. Irvin, 450 F.2d 968, 970 (9th Cir. 1971) (citing Meador v. United States, 332 F.2d 935 (9th Cir. 1964)). See also Chavez v. United States, 641 F.2d 1253, 1256 (9th Cir. 1981) ("A defendant’s first motion for a psychiatric examination under § 4244 may not be denied unless the court correctly determines that the motion is frivolous or not made in good faith.") (citations omitted). Furthermore, § 4244 literally reads that "[u]pon such a motion . . . the court shall cause the accused . . . to be examined as to his mental condition by at least one qualified psychiatrist." 18 U.S.C. § 4244 (1976) (emphasis added).
2315. See supra note 2312.
2316. United States v. Winn, 577 F.2d 86, 92 (9th Cir. 1978) (hearing on defendant’s competency not required on the basis of a § 4244 motion when one report did not indicate a present state of insanity or incompetency).
2317. Chavez v. United States, 656 F.2d 512, 517 (9th Cir. 1981) (history of antisocial behavior and treatment for mental illness, emotional outbursts in open court and conflicting psychiatric reports sufficient to raise a reasonable doubt about defendant’s competence and to require an evidentiary hearing on that issue).
quent motions for psychiatric examination after the initial (mandatory) examination and determination.\textsuperscript{2318} In exercising its discretion, however, the trial court must decide whether there is sufficient doubt concerning the defendant's competence to warrant further inquiry, in order to afford the defendant due process.\textsuperscript{2319}

In United States v. Bradshaw,\textsuperscript{2320} the Ninth Circuit upheld the trial court's denial of the defendant's section 4244 motions because they "bordered on the frivolous"\textsuperscript{2321} and set forth no grounds for believing the defendant was incompetent as required by the statute.\textsuperscript{2322} Bradshaw was convicted of kidnapping a nine year old boy from a motel where the victim lived with his mother.\textsuperscript{2323} Bradshaw also resided at the motel and was employed as its maintenance man and manager.\textsuperscript{2324} While the victim's mother moved belongings from the motel to a new home, the boy visited Bradshaw in his room where defendant suggested that they move to Oklahoma together.\textsuperscript{2325} The two subsequently met at an appointed location and began their journey to Oklahoma, during which the two engaged in oral copulation and mutual sodomy.\textsuperscript{2326} Bradshaw also gave the boy marijuana and speed capsules, and tried to dye the child's hair.\textsuperscript{2327}

\begin{itemize}
\item \textsuperscript{2318} Id. at 517.
\item \textsuperscript{2319} Id. (citing United States v. Clark, 617 F.2d 180, 185 (9th Cir. 1980)).
\item \textsuperscript{2320} 690 F.2d 704 (9th Cir. 1982), cert. denied, 103 S. Ct. 3543 (1983).
\item \textsuperscript{2321} Id. at 712-13.
\item \textsuperscript{2322} Id.
\item \textsuperscript{2323} Id. at 706. 18 U.S.C. § 1201(a) provides in part:
\begin{quote}
Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when: (1) the person is willfully transported in interstate or foreign commerce; shall be punished by imprisonment for any term of years or for life.
\end{quote}
\begin{footnotes}
18 U.S.C. § 1201(a) (1976). Bradshaw was convicted by a jury and sentenced to thirty years in prison. 690 F.2d at 707.
\item \textsuperscript{2324} 690 F.2d at 707. The Bradshaw court noted that the defendant and the victim had spent a great deal of time together before the kidnapping in what the victim's mother described as a "father-son type of relationship." Id. However, the victim's mother began doubting the nature of the boy's relationship with Bradshaw and arranged for the boy to stay with his aunt. Id. The mother's doubt was prompted in part "by her observation of bite marks, or 'hicckeys', on [her son's] neck once or twice after his trips with [Bradshaw]." Id.
\item \textsuperscript{2325} Id.
\item \textsuperscript{2326} Id.
\item \textsuperscript{2327} Id. The Bradshaw court characterized the "kidnapping" as follows: "when the mother moved from the motel . . . her son ran away with the appellant." Id. at 706. Superficially, it would appear that the boy consented to go with the defendant, and that therefore, there was no unlawful confinement or illegal detention sufficient to warrant a kidnapping charge. For the statutory definition of kidnapping, see 18 U.S.C. § 1201(a) (1976); see also supra note 2323. Bradshaw's chief defense at the trial was that the boy consented. Bradshaw, 690 F.2d at 709. Yet, in ruling favorably on the admission of evidence of drug use and evi-
\end{footnotes}
\end{itemize}
On appeal, Bradshaw contended that the trial court erred in denying his two section 4244 motions for a psychiatric examination and a competency determination.

Affirming the district court's denial of both motions, the Ninth Cir-
cuit concluded that Bradshaw's motions were frivolous and failed to set forth grounds for believing that Bradshaw was incompetent.\footnote{2330} The court stated that a successful section 4244 motion requires: (1) some showing of incompetency which prompted the motion, and (2) some reasons for concluding that the defendant may be incompetent.\footnote{2331} Neither a psychiatrist's report labelling Bradshaw as a mentally disordered sex offender,\footnote{2332} nor the psychiatrist's follow-up letter claiming that Bradshaw was unable "to cooperate in such a manner that would minimize the possibility of punishment,"\footnote{2333} established sufficient grounds to justify a section 4244 examination.\footnote{2334} The court further noted that defense counsel had twice declined to make a section 4244 motion when the trial court had provided the opportunity to do so.\footnote{2335} Consequently, the Ninth Circuit held that both motions had been properly denied.\footnote{2336}

\footnote{2330}{690 F.2d at 713.}
\footnote{2331}{Id.}
\footnote{2332}{The court indicated that [In his first report, Dr. Moses found Bradshaw to be "an extremely immature, though not necessarily mentally-ill person." The appellant was diagnosed as suffering from a "gender identity disorder of childhood," and from "undifferentiated type" schizophrenia complicated by extensive drug use. No opinion was given other than that the appellant was a "mentally disordered sex offender," and this assessment was never in doubt nor disputed. \textit{Id.} at n.10.}
\footnote{2333}{The psychiatrist's second "report" was merely a one sentence letter and was not based upon a second interview with the defendant. The letter stated:

\begin{quote}
 pursing to my psychiatric examination of David Leon Bradshaw, it is my considered opinion that, because of a mental disorder, he is not capable at the present time of objective, rational decisions regarding matters concerning his own defense or to cooperate in such a manner that would minimize the possibility of punishment.
\end{quote}
\textit{Id.} at n.11.}
\footnote{2334}{A motion for a judicial determination of mental competency of the accused must set forth the reasons or grounds for believing that the defendant is incompetent. 18 U.S.C. § 4244 (1976). Various evidence may be heard by the courts in determining possible incompetence. See Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Tillery v. Eyman, 492 F.2d 1056 (9th Cir. 1974) (emotional outburst in open court resulting in forcible removal from courtroom); Moore v. United States, 464 F.2d 663 (9th Cir. 1972) (history of antisocial behavior and treatment for mental illness). \textit{Id.} at 713-14.}
\footnote{2335}{690 F.2d at 713-14. A § 4244 motion can be denied without a psychiatric examination "only if the trial judge correctly determines that the motion is frivolous, is not in good faith or does not set forth the grounds relied upon for believing that the accused may be incompetent." United States v. Irvin, 450 F.2d 968, 970 (9th Cir. 1971) (trial judge improperly denied § 4244 motion when no suggestion of frivolity or bad faith appeared on record and counsel's statements adequately provided grounds for believing that accused was unable to assist in his defense because "he in fact did not assist [his attorney] and . . . he positively appeared to [his attorney] to be unable to do so"). The \textit{Bradshaw} court distinguished \textit{Irvin}, noting that unlike \textit{Bradshaw}, no frivolity had been demonstrated and the attorney's observations in \textit{Irvin} had presented adequate grounds to support the § 4244 motion. 690 F.2d at 714.
2. Relevancy

The basic test for the admission of evidence in a federal court is relevancy. Relevancy is the probative relationship between an item of evidence and a fact sought to be proved in the case. Federal Rule of Evidence 401 refers to this relationship as a tendency to make a consequential fact more or less probable. However, not all relevant evidence is admissible. Although relevant, evidence may be disallowed because of its prejudicial impact, its tendency to confuse the issues or mislead the jury, or because its presentation may cause undue delay, waste of time, or a needless cumulative effect. The trial court is given considerable discretion in determining relevancy, and its decision will be overturned only for clear abuse of that discretion.

a. links to the crime

Circumstantial evidence which tends to link the defendant to the crime may be admitted as relevant. The defendant in United States v. Akbar was convicted on one count of air piracy in connection with the hijacking of a commercial airplane from California to Cuba. A United States passport bearing four Cuban immigration stamps was found in the defendant's possession at the time of his arrest. On appeal, the defendant argued that the slight probative value of the stamps was outweighed by their prejudicial effect. The district court had admitted the stamps as evidence that the passport was stamped in Cuba while

2337. Fed. R. Evid. 402 states: “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.”

2338. Fed. R. Evid. 401 advisory committee note.

2339. Fed. R. Evid. 401 states: “‘Relevant evidence’ means 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.”


2341. Fed. R. Evid. 403 states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”

2342. See United States v. Spetz, 721 F.2d 1457, 1476 (9th Cir. 1983) (citing United States v. Cox, 633 F.2d 871, 874 (9th Cir. 1980)) (“On review, a district court's ruling to admit evidence and determine relevancy should not be disturbed unless there is a clear abuse of discretion”), cert. denied, 454 U.S. 844 (1981).


2344. Id.

2345. Id. at 379.
in the defendant's possession.\textsuperscript{2346} The Ninth Circuit found that the district court had not abused its discretion in admitting the stamps as relevant evidence.\textsuperscript{2347} The court also found that evidence of the defendant's membership in the Black Muslims was relevant because, during the flight, the hijacker had stated that he was "'one of Muhammed's.'"\textsuperscript{2348} While the defendant was not convicted on this evidence alone, the stamps and statement were relevant as circumstantial evidence linking the defendant with the crime.\textsuperscript{2349}

\textbf{b. element of charge}

Some evidence may be relevant because it tends to prove an element of the charge. In \textit{United States v. Miller},\textsuperscript{2350} the defendant was convicted of receiving stolen goods in violation of 18 U.S.C. section 2315.\textsuperscript{2351} This statute requires that the receiver of goods have knowledge that they were stolen.\textsuperscript{2352} The \textit{Miller} court allowed the prosecution to introduce photographs of a trailer allegedly stolen by the defendant in order to show his knowledge of its theft.\textsuperscript{2353} The photographs had been taken by the victim of the theft who had recognized his stolen trailer while visiting the defendant's property. Although the trailer had been modified somewhat,\textsuperscript{2354} the victim recognized it because of its uniquely large size and sturdy construction.\textsuperscript{2355} The defendant protested admission of these photographs as irrelevant under Rules 401 and 403 of the Federal Rules of Evidence.\textsuperscript{2356} However, the court found that the photographs showed the alterations that had been made to the trailer since the theft, and such alterations gave rise to an inference of knowledge by the defendant of its theft.\textsuperscript{2357}

Miller maintained that this evidence was highly prejudicial since there was no indication in the record that he had made any of the altera-

\begin{footnotesize}
2346. \textit{Id.}
2347. \textit{Id.}
2348. \textit{Id.}
2349. \textit{Id.}
2350. 688 F.2d 652 (9th Cir. 1982).
2351. 18 U.S.C. § 2315 (1982) states in pertinent part: "[W]hoever receives . . . goods . . . knowing the same to have been stolen . . . [s]hall be fined . . . or imprisoned . . . or both."
2352. \textit{Id.}
2353. 688 F.2d at 661-62.
2354. The trailer was upside down, its axles had been removed, its tail end had been cut off, and it had been painted. \textit{Id.} at 655.
2355. \textit{Id.}
2356. \textit{Id.} at 662.
2357. \textit{Id.} See generally \textit{United States v. Gibson}, 625 F.2d 887, 888 (9th Cir. 1980) (defendant's criminal behavior subsequent to alleged commission of crime admitted as evidence because conduct tended to present a whole picture indicating guilt).
\end{footnotesize}
The court found this argument unconvincing, reasoning that the disappearance of the trailer along with the evidence of the alterations permitted the jury to infer that Miller knew that the trailer had been stolen.\textsuperscript{2359}

The defendant, in \textit{United States v. Palmer},\textsuperscript{2360} was convicted of obtaining cocaine by misrepresentation in violation of 21 U.S.C. section 843(a)(3).\textsuperscript{2361} As a practicing dentist, the defendant claimed that all the cocaine he had purchased was used in his practice. In order to show misrepresentation, an element of the charge, the government produced evidence that the defendant had purchased large quantities of cocaine, but that his records showed only six references to its use in the treatment of patients. The defendant argued that evidence of his lack of compliance with state drug recordkeeping requirements was irrelevant and prejudicial.\textsuperscript{2362} However, the court found that the failure to keep proper records was relevant to the government's charge that the drugs were used for personal consumption and concluded that any resulting prejudice implying that state regulations were violated was minimal.\textsuperscript{2363}

c. impeachment

Evidence may be admitted because it is relevant to disprove a witness' statement. Impeachment evidence includes evidence which questions the accuracy of a witness' observation, his recollection, or the truthfulness of his testimony.\textsuperscript{2364}

In \textit{United States v. Spetz},\textsuperscript{2365} a book about drug dealing written by the defendant who had been charged with violating a federal narcotics law\textsuperscript{2366} was admitted as evidence to impeach his father's testimony. During cross-examination, the defendant's father had denied stating that he "'would not be surprised if [his son] had been arrested for drug dealing.'"\textsuperscript{2367} He claimed that "he had no 'inkling or knowledge' that his

\ \textsuperscript{2358} 688 F.2d at 661.
\ \textsuperscript{2359}  Id. at 661-62.
\ \textsuperscript{2360} 691 F.2d 921 (9th Cir. 1982).
\ \textsuperscript{2361}  Id. at 922. 21 U.S.C. § 843(a)(3) (1982) states in pertinent part: "It shall be unlawful for any person knowingly or intentionally . . . to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge. . . ."
\ \textsuperscript{2362} 691 F.2d at 923.
\ \textsuperscript{2363}  Id.
\ \textsuperscript{2364}  G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 79 (1978).
\ \textsuperscript{2365} 721 F.2d 1457 (9th Cir. 1983).
\ \textsuperscript{2366} 21 U.S.C. § 846 (1982) proscribes conspiracy, or attempting to conspire to commit any offense defined in the Controlled Substances Act.
\ \textsuperscript{2367} 721 F.2d at 1476.
son knew anything about [drug] dealing." When the prosecutor had asked him to identify the book and questioned him regarding its contents, the father stated "that he thought the book was about 'international skiing.'" However, as the father had admitted substantial familiarity with the general nature of the book, and because the district judge pointed out that "'every few pages they talk about pot transactions,'" the court ruled that the book was relevant to disprove the father’s statement regarding his lack of knowledge about his son’s drug dealing.

When the defense did not request limiting instructions to restrict the use of the evidence solely to impeaching the father’s testimony, as required by Rule 105, the court found that the book was also relevant to show the defendant’s prior familiarity with drug dealings. In finding no abuse of discretion, the appellate court noted that the trial court had found conclusive evidence of guilt based on other evidence and that the book only had some significance to show the defendant’s familiarity with drug transactions.

d. rebuttal

The Ninth Circuit, in United States v. Crenshaw, held that evidence was relevant to rebut the prosecution’s inference that one of the defendants, Lehman, had planned the robbery of a small rural bank at Belfair, Washington. Defendants Gordon and Crenshaw were charged with bank robbery, while Lehman was charged with aiding and abetting the robbery, all in violation of 18 U.S.C. sections 2, 2113(a) and 2113(d). Evidence was offered to establish that Lehman had piloted

2368. Id.
2369. Id. at 1476 n.35.
2370. Id.
2371. Id. at 1476.
2372. Fed. R. Evid. 105 requires that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."
2373. 721 F.2d at 1477.
2374. Id.
2375. 698 F.2d 1060 (9th Cir. 1983).
2376. Id. at 1066.
2377. Id. at 1061 n.1. 18 U.S.C. § 2113(a) (1982) states in pertinent part: "Whoever enters . . . any bank . . . with intent to commit . . . any felony affecting such bank . . . [s]hall be fined . . . or imprisoned . . . or both." 18 U.S.C. § 2113(d) (1982) states in pertinent part: "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 . . . or imprisoned . . . or both."
the getaway plane used in the robbery.\textsuperscript{2378} In addition, the prosecution had been allowed to introduce, under Rule 404(b) of the Federal Rules of Evidence, evidence of previous bank robberies committed by Lehman to show a common plan or scheme.\textsuperscript{2379} At trial, Lehman offered the affidavit of Danny Mack Martin who took credit for planning the robbery at issue.\textsuperscript{2380} The trial court excluded the affidavit as irrelevant.\textsuperscript{2381} Lehman also offered evidence that Martin had robbed a bank in Silverdale, Washington, a few months before the Belfair robbery. Lehman intended to show that Martin's modus operandi in the Silverdale robbery was evidence that he, not Lehman, had played the same role in the Belfair robbery. Lehman argued that this evidence should be admitted to rebut any inferences produced by the admission of evidence of the three prior robberies by Lehman.\textsuperscript{2382} The trial court denied the admission.\textsuperscript{2383} Finally, Crenshaw, as a witness for the defense, was not allowed to testify that Martin planned the robbery.\textsuperscript{2384}

The government argued that evidence of Martin's masterminding was irrelevant because Lehman was charged with aiding and abetting and not with planning the robbery, and even if relevant, the evidence would confuse the issues and mislead the jury.\textsuperscript{2385} The government further noted that the district court had concluded that the issue was not whether the defendant planned the robbery, but whether or not he "flew that airplane out of Kitsap County."\textsuperscript{2386} The appellate court's response was that the indictment did not specify how Lehman aided and abetted, nor was the term "aiding and abetting" limited by instructions to the jury.\textsuperscript{2387} The court concluded that the jury could have reasonably in-

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{2378}
\item \textsuperscript{2378}§ 2(a) (1982) states: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."
\item \textsuperscript{2379} 698 F.2d at 1065.
\item \textsuperscript{2380} Id. at 1064-65. The affidavit stated: "Mr. Crenshaw and another man named Gordon robbed the Belfair bank, and to the 'best of my knowledge, Dennis Lehman had nothing whatsoever to do with the Belfair bank robbery.'" \textit{Id.}
\item \textsuperscript{2381} Id. at 1065.
\item \textsuperscript{2382} Id. at 1065 n.5.
\item \textsuperscript{2383} Id. at 1065.
\item \textsuperscript{2384} Id. at 1064.
\item \textsuperscript{2385} Id. at 1066.
\item \textsuperscript{2386} Id. at 1065-66. The government argued that the evidence of the prior bank robberies was introduced not to show that Lehman planned the robbery, but to show that Lehman's manner of robbing banks was to pilot the getaway plane. \textit{Id.} at 1065 n.7.
\item \textsuperscript{2387} Id. at 1065. The jury instructions were:
\begin{quote}
In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself \textit{in some way} with the criminal venture, and willfully participate in it as he would in something he wishes to bring about; that is to say, that he willfully seek by \textit{some act or omission} of his to make the criminal venture succeed.
\end{quote}
\end{enumerate}
\end{footnotesize}
ferred from the evidence of Lehman's previous bank robberies, the argu-
ment of counsel, jury instructions, and comments of the trial judge, that
Lehman was guilty of aiding and abetting because he planned the rob-
bery, regardless of whether or not he piloted the getaway plane. Had the government not presented its evidence in such a manner as to
give rise to this inference, the issue of who planned the robbery would
have been irrelevant. But once the inference was made, Lehman was
entitled to introduce evidence that Martin had planned the robbery.
The court also took care to establish the distinction between evidence of
the prior robberies to show a "common plan" and evidence to show parti-
cipation in the planning of the robbery at issue. The court im-
plied that had the prosecution drawn such a distinction for the jury, the
district court's ruling that the proffered evidence was irrelevant might
have been affirmed.

e. existence of a scheme or conspiracy

A defendant's statement that "[W]e don't have competitors. We
take care of them one way or another . . . [W]e either burn them
down or blow them up," was admitted in United States v. Deluca because it was relevant to show participation in an alleged conspiracy. The defendants were convicted of conspiracy and racketeering when eight of the defendant's competitors in the auto parts trade were hit by arson. Co-defendant Lee challenged the admission of the statement against him charging that it was only relevant to determine the object of the conspiracy, arson, which is proscribed by 18 U.S.C. section 844. The court rejected this argument and held that the statement was "relevant to show agreement and participation or membership in the

Id. The court noted that this would include participation in the planning of the crime.
2388. Id.
2389. Id.
2390. Id. at 1066.
2391. Id. (citing United States v. Brannon, 616 F.2d 413, 418 (9th Cir.) (defendant entitled
to prove his innocence by showing that someone else committed the crime), cert. denied, 447 U.S. 908 (1980).
2392. Id. at 1065.
2393. Id.
2394. Id.
2395. United States v. Deluca, 692 F.2d 1277, 1285 (9th Cir. 1982).
2396. United States v. Deluca, 692 F.2d 1277 (9th Cir. 1982).
2397. Id. at 1285.
2398. Id. at 1280.
2399. Id. at 1285.
2400. Id. at 1280. 18 U.S.C. § 844(i) (1982) provides in pertinent part: "Whoever mali-
ciously damages or destroys . . . by means of fire or an explosive, any building, vehicle, or
conspiracy."

In *United States v. Gibson*, investors offered as testimony statements made by the defendant’s employees concerning assurances, financing, and the projected rate of return on a franchise investment. The court allowed the statements, over a hearsay objection, because they were relevant to prove the existence of a scheme and were not offered for their truthfulness. They were also admitted to show the defendant’s participation in, and intent regarding, the scheme. The court held that the evidence, viewed in a light most favorable to the government, demonstrated that the defendant authorized the making of the statements, and thus, they were admissible against him.

### f. motive

The full text of a cooperation agreement made by a government witness, Green, was admitted by the prosecution in *United States v. Rohrer*. Green had agreed to testify against Rohrer who was on trial for possession with intent to distribute and conspiracy to distribute co-

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other real or personal property used in interstate or foreign commerce shall be imprisoned . . . or fined . . . or both. . . ."

2401. 692 F.2d at 1285.


2403. 18 U.S.C. §§ 1341, 1343, & 2314 (1982) respectively prohibit mail fraud, wire fraud and inducing people to travel in interstate commerce for purposes of fraud.

2404. 690 F.2d at 700.

2405. *Id.*

2406. *Id.* at 701-02. In reaching this conclusion, the court relied on decisions made in the Second, Fifth and Tenth Circuits regarding this issue of admissibility. In *United States v. AMREP Corp.*, 560 F.2d 539 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978), statements and representations made by salesmen trained and instructed by the corporate officers in the furtherance of a fraudulent sales program were admissible against the officers even though the salesmen themselves were not knowing participants of the scheme. *Id.* at 545. The Tenth Circuit held that the conduct of the company was admissible to demonstrate a course of business to prove a plan or scheme to defraud. *United States v. Krohn*, 573 F.2d 1382, 1387 (10th Cir.), *cert. denied*, 436 U.S. 949 (1978). The Fifth Circuit also followed the Second Circuit’s reasoning in *United States v. Toney*, 605 F.2d 200, 207 (5th Cir. 1979), *cert. denied*, 444 U.S. 1090 (1980), where salesmen’s statements were admissible to show a scheme to promote the product in a certain manner. *Id.*

2407. 690 F.2d at 701 (citing *Glasser v. United States*, 315 U.S. 60, 80 (1942) (“The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.”)).

2408. *Id.* at 701-02. While a corporate officer’s conviction cannot properly be based on his employees’ statements without a showing of express or implied authorization, evidence that the officer formed the sales strategy and instructed the employees and monitored their progress implied sufficient authorization. *Id.* at 701.

2409. *Id.* at 702.

2410. 708 F.2d 429, 433 (9th Cir. 1983).
In exchange, Green’s sentence, for conviction on drug charges, was reduced. The defense had attacked Green’s credibility by extensively questioning his motive for testifying for the state and by referring to the agreement. The prosecution then introduced the cooperation agreement to support Green’s credibility. On appeal, Rohrer accused the government of impermissibly vouching for Green by referring to the agreement. The court emphatically replied that the government had “in no way put its prestige behind the witness.” Noting that the government was careful to request that the jury only look to the issue of Green’s motive, the court found, that without a doubt, the agreement was relevant to the issue of Green’s credibility and that the government properly introduced the agreement as a factor bearing on Green’s credibility.

3. Prejudice

Even if evidence is relevant, it may be excluded if its prejudicial impact substantially exceeds its probative value. Thus, while evidence of unquestioned relevance may be excluded in this manner, the trial judge is given great deference regarding this decision. Appellate courts apply the abuse of discretion standard on review.

In United States v. Crenshaw, Crenshaw argued that evidence which included a picture of the getaway plane, receipts for gasoline for

2411. 21 U.S.C. § 841(a) (1982) states in pertinent part: “(a) It shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .”
2412. 708 F.2d at 431.
2413. Id. at 433.
2414. Id.
2415. Id. at 432-33.
2416. Id. at 433.
2417. Id. See United States v. Rubier, 651 F.2d 628, 630 (9th Cir.) (government entitled to have all terms of agreement on record after defense brought up subject of immunity-for-testimony agreement), cert. denied, 454 U.S. 875 (1981); United States v. Brooklier, 685 F.2d 1208, 1218-19 (9th Cir. 1982) (introduction of witness’ plea agreement does not constitute government vouching when jury instructed that it was exclusive judge of credibility), cert. denied, 459 U.S. 1206 (1983).
2418. 708 F.2d at 433. See United States v. Tham, 665 F.2d 855, 861-62 (9th Cir. 1981) (proper for prosecution to point to language of plea agreement regarding witness’ motivation when defense argued motivation of witness testifying under immunity), cert. denied, 456 U.S. 944 (1982).
2419. FED. R. EVID. 403.
2420. United States v. Crenshaw, 698 F.2d 1060, 1063 (9th Cir. 1983) (“ ‘The judge’s determination of this balance is given great deference and this court will reverse it only where there is an abuse of discretion.’ ” (citations omitted)).
2421. Id.
the airplane, an FBI agent's statements regarding the arrest, and a letter written by Crenshaw to co-defendant Lehman should have been excluded because of its prejudicial effect. The court found no abuse of the trial court's discretion. Defendant Gordon argued that prejudice resulting from cumulative errors required a reversal even if the errors were harmless when considered separately. The court applied the "more harmless than not" standard in finding that even if considered cumulatively, Gordon was not significantly harmed by these purported errors. The court's decision was bolstered by the fact that Gordon's fingerprints were found at the bank where the robbery occurred. In light of the Ninth Circuit's holding that fingerprint evidence alone is enough for conviction, the cumulative effect of the errors was not consequential.

In United States v. Rohrer, where the credibility of the government witness, Green, was challenged, the district court refused to allow expert witnesses to testify as to the effects of Green's drug use. The appellate court found that there was no abuse of discretion in deciding that the psychiatrists' testimony was highly prejudicial when weighed against its probative value because one of the psychiatrists had never met Green and the other had met him only once. The issue here was the witness' credibility rather than his competency. Although the issue of witness credibility is a question for the jury, admission of expert testimony bearing on credibility is within the judge's discretion.

2422. Id. at 1063 n.4.
2423. Id. at 1063-64.
2424. Id. at 1062. Purported errors were prosecutorial misconduct and tainted in-court identification testimony.
2425. Id. at 1063.
2426. Id. at 1063-64. See United States v. Berry, 627 F.2d 193, 201 (1980) (conviction should be affirmed if nonconstitutional error is more likely to be harmless than not), cert. denied, 449 U.S. 1113 (1981). See also FED. R. CRIM. P. 52(a) (harmless error is "[a]ny error, defect, irregularity or variance which does not affect substantial rights").
2427. 698 F.2d at 1064.
2428. Id. See United States v. Scott, 452 F.2d 660 (9th Cir. 1971) (fingerprints at scene of crime together with fingerprints on stolen checks sufficient evidence to submit case to jury).
2429. 708 F.2d 429 (9th Cir. 1983).
2430. Id. at 434.
2431. Id. See United States v. Bernard, 625 F.2d 854 (9th Cir. 1980) (expert testimony concerning effect of drugs on witness' perceptions based on hypothetical question rather than examination excluded as mere hypothesis).
2432. 708 F.2d at 434. The court distinguished the issues of credibility and competency by relying on United States v. Hiss, 88 F. Supp. 559, 560 (S.D.N.Y. 1950), where psychiatric evidence was admissible to show insanity of a government's witness. Green's sanity was not at issue.
2433. 708 F.2d at 434 (citing United States v. Bernard, 625 F.2d 854, 860 (9th Cir. 1980)).
Ninth Circuit has held that such testimony by experts tends to usurp the jury’s function of determining guilt.\textsuperscript{2434} The court concluded that the prejudicial impact of the psychiatrists’ \textit{speculation} on the effects of Green’s drug use outweighed its probative value.\textsuperscript{2435}

4. Character evidence

Federal rule of Evidence 404(b) allows admission of evidence of other crimes when it is relevant to prove intent, knowledge, plan, motive, opportunity, preparation, identity, or absence of mistake or accident.\textsuperscript{2436} These purposes are merely illustrative, and not exclusionary.\textsuperscript{2437} In keeping with the general rule excluding circumstantial use of character evidence,\textsuperscript{2438} Rule 404(b) prohibits evidence of other crimes, wrongs, or acts when offered to prove character by showing that subsequent conduct was in conformity with it.\textsuperscript{2439} The Ninth Circuit has “uniformly recognized that the rule is one of inclusion and that other acts evidence is admissible whenever relevant to an issue other than the defendant’s criminal propensity.”\textsuperscript{2440} In addition to establishing relevancy, the court must also weigh the propensity of the evidence against its prejudicial impact.\textsuperscript{2441}

\textit{a. relevancy}

Although the general proposition is that all relevant evidence is admissible,\textsuperscript{2442} the Federal Rules of Evidence provide some exceptions, specifically Rule 404(b).\textsuperscript{2443} Therefore, even though evidence of other crimes or wrongdoings may be relevant under Rules 401 and 402, its admission will be denied under Rule 404(b) if its only relevance is to

\begin{itemize}
\item \textsuperscript{2434} Id. at 434.
\item \textsuperscript{2435} Id. (citing United States v. Bernard, 625 F.2d 854, 860 (9th Cir. 1980)).
\item \textsuperscript{2436} Fed. R. Evid. 404(b) states:
\begin{quote}
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.
\end{quote}
\item \textsuperscript{2437} United States v. Masters, 622 F.2d 83, 86 (9th Cir. 1980).
\item \textsuperscript{2438} Fed. R. Evid. 404(b) advisory committee note.
\item \textsuperscript{2439} See supra note 2436.
\item \textsuperscript{2440} United States v. Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982). \textit{See also} United States v. Rocha, 553 F.2d 615, 616 (9th Cir. 1977) (per curiam); United States v. Riggins, 539 F.2d 682, 683 (9th Cir. 1977), cert. denied, 429 U.S. 1045 (1977); 2 J. Weinstein & M. Berger, WEINSTEIN’S EVIDENCE, § 404[08] (1981).
\item \textsuperscript{2441} United States v. Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982). \textit{See infra} note 2511.
\item \textsuperscript{2442} Fed. R. Evid. 402 states in pertinent part: “All relevant evidence is admissible, except as otherwise provided . . . by these rules . . . .”
\item \textsuperscript{2443} See supra note 2436.
\end{itemize}
show that a party has a propensity to commit the crime in question.\textsuperscript{2444}

In order for character evidence to be admissible under this Rule, proof must be offered that it is relevant for some other purpose.\textsuperscript{2445}

The proponent carries the burden of showing how Rule 404(b) evidence is relevant.\textsuperscript{2446} "[S]pecifically, it must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence."\textsuperscript{2447} This burden of precise articulation proves to be a light one, indeed, since the court generally will allow other crimes evidence under its inclusionary rule whenever the prosecution can show "at least some logical connection, however weak," between the evidence and a central element of the case.\textsuperscript{2448}

In \textit{United States v. Mehrmanesh},\textsuperscript{2449} the Ninth Circuit affirmed the judgment of the district court convicting the defendant of importing heroin and attempting to possess heroin with intent to distribute, despite charges by the defendant that the lower court had erred in admitting evidence of his prior and subsequent crimes and wrongs.\textsuperscript{2450} Government agents had monitored the delivery of a suitcase containing heroin to Mehrmanesh's home and had found other drugs, drug paraphernalia, and opium while searching the house.\textsuperscript{2451}

At trial, the district court allowed the government to introduce four categories of other acts evidence including (1) evidence of a prior hashish smuggling incident for which the defendant had been convicted, (2) evidence of the defendant's use of narcotics, (3) evidence of his prior and subsequent sales of narcotics, and (4) evidence of his possession of narcotics at the time of his arrest.\textsuperscript{2452}

The government introduced the evidence of a prior incident of hashish smuggling to show motive, opportunity, intent, preparation, plan,

\begin{itemize}
  \item \textsuperscript{2444} United States v. Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982).
  \item \textsuperscript{2445} \textit{Id}.
  \item \textsuperscript{2446} \textit{Id}.
  \item \textsuperscript{2447} \textit{Id}.
  \item \textsuperscript{2448} United States v. Hernandez-Miranda, 601 F.2d 1104 (9th Cir. 1979).
  \item \textsuperscript{2449} United States v. Hernandez-Miranda, 601 F.2d 1104 (9th Cir. 1979).
  \item \textsuperscript{2450} \textit{Id}.
  \item \textsuperscript{2451} \textit{Id}.
  \item \textsuperscript{2452} \textit{Id}.
\end{itemize}
knowledge and absence of mistake or accident. However, the prosecution failed to identify which facts the evidence would tend to prove and demonstrate why such facts could be inferred. Nevertheless, the court allowed the smuggling incident evidence because it had some “logical connection” to the defendant’s knowledge of the contents of the suitcase. While the court seemed reluctant to allow evidence so weakly connected, it supported its ruling by reasoning that since Mehrmanesh’s only defense was that he was unaware that there was cocaine in his suitcase, the prior smuggling incident was relevant to the issue of intent, a central element of the case, because it tended to prove that he had knowledge of the contents of the suitcase. The court stated, “[w]e cannot say that the logical inference . . . is completely lacking in this case.”

The Ninth Circuit failed to find any logical relationship between Mehrmanesh’s prior use of cocaine and his importation of drugs, other than a general propensity to use drugs. The trial court allowed the evidence of prior use of narcotics and, on appeal, the government argued that the testimony was relevant to show intent, knowledge, motive, opportunity and absence of mistake or accident. Noting that the prosecution had failed to precisely articulate any connection between the evidence and a consequential fact, the Ninth Circuit disallowed the evidence because the only inference to be drawn was a likelihood that he would import drugs since he had used them before. The court stated: “[T]his is precisely the inference we [condemn].”

In reviewing the trial court’s error in admitting the evidence of prior

2453. Id.
2454. Id. at 831. Knowledge is one of the elements of the crime. Id. The court relied on United States v. Sinn, 622 F.2d 415 (9th Cir.) (defendant’s possession of cocaine five years previously was relevant to issue of knowledge where sole question was one of intent on charge of importing and possessing cocaine with intent to distribute), cert. denied, 449 U.S. 843 (1980) and United States v. Sigal, 572 F.2d 1320 (9th Cir. 1978) (evidence of prior charge of importing controlled substance and conviction for possession of controlled substance relevant to defendant’s knowledge and intent when defense was lack of knowledge and innocent association with wrongdoers).
2455. 689 F.2d at 831 (citing United States v. Hernandez-Miranda, 601 F.2d 1104, 1108-09 (9th Cir. 1979) (“the greater the similarity of the prior act to the present offense, the less tenuous the logical inference that may be drawn regarding knowledge or intent”)).
2456. 689 F.2d at 831.
2457. Id. at 831-32.
2458. Id. at 831.
2459. Id. at 831-32.
2460. Id. at 832 (citing United States v. Masters, 450 F.2d 866, 867 (9th Cir. 1971)). In Masters, the prosecution sought to introduce evidence of prior marijuana use in a charge of aiding and abetting a marijuana smuggling scheme. The court stated: “We see little or no significant relationship between isolated incidents of marijuana consumption and willingness to
drug use for possible reversal, the court looked to whether this error affected a substantial right and whether admission of the evidence was more likely than not to be harmless. The court concluded that there was little evidence of cocaine use, few references to the defendant's drug use, and sufficient limiting instructions to the jury. Because there was also strong direct and circumstantial evidence against the defendant, the court found the error of admission "more probably than not harmless."

Testimony of Mehrmanesh's prior possession and numerous sales of heroin and cocaine was also admitted by the trial court. The Ninth Circuit agreed it was admissible stating that it has "consistently held that evidence of a defendant's prior possession or sale of narcotics is relevant under Rule 404(b) to issues of intent, knowledge, motive, opportunity, and absence of mistake or accident in prosecutions for possession of, importation of, and intent to distribute narcotics." Mehrmanesh possessed a large amount of drugs and sold them before and after his arrest, and therefore, the jury could properly infer that he intended more than mere personal use. Intent was a major issue, because Mehrmanesh denied knowledge of the contents of the suitcase delivered to him and in his possession. Accordingly, the Ninth Circuit found that the trial court did not abuse its discretion by admitting the evidence of prior pos-

engage in a smuggling conspiracy. On that theory, anyone who drank during the Prohibition era should have been a rumrunning suspect." Masters, 450 F.2d at 867.

FED. R. CRIM. P. 52(a) states: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

689 F.2d at 832 (citing United States v. Castillo, 615 F.2d 878, 883 (9th Cir. 1980) ("beyond a reasonable doubt" standard need not be applied to any determination of harmless error resulting from admission of evidence that does not assume constitutional proportions)).

689 F.2d at 832.

Id.

Id. The evidence included large quantities of other drugs seized at his home at the time of arrest. Id.

Id. (citing United States v. Sinn, 622 F.2d 415, 416 (9th Cir.), cert. denied, 449 U.S. 843 (1980); United States v. Young, 573 F.2d 1137 (9th Cir. 1978); United States v. Brown, 562 F.2d 1144 (9th Cir. 1977); United States v. Rocha, 553 F.2d 615 (9th Cir. 1977); United States v. Marshall, 526 F.2d 1349 (9th Cir.), cert. denied, 426 U.S. 923 (1976)).

689 F.2d at 832.

Id. See United States v. Sinn, 622 F.2d 415, 416 (9th Cir.) (evidence of prior cocaine possession admissible on issue of knowledge when defendant denied knowing that cocaine was in a camera case when he was arrested for possession with intent to distribute cocaine), cert. denied, 449 U.S. 843 (1980). Mehrmanesh relied on United States v. Powell, 587 F.2d 443 (9th Cir. 1978), where evidence of defendant's prior marijuana trafficking conviction was ruled inadmissible in a prosecution for possession of marijuana with intent to distribute. The court noted that this reliance was misplaced, since intent was not an issue in Powell because the defendant had denied any participation in the crime. 689 F.2d at 832.
session and sales of narcotics.\textsuperscript{2469}

The Ninth Circuit again demonstrated its commitment to the inclusionsary rule in \textit{United States v. Bradshaw},\textsuperscript{2470} where evidence of drug use and sexual relations with a nine year old boy, which was obviously prejudicial, was admitted as relevant against the defendant in a kidnapping charge. The defendant had taken the victim from California to Oklahoma, stopping along the way at motels where the defendant had given the boy drugs and where the two had engaged in mutual sodomy and oral copulation.\textsuperscript{2471} On appeal, Bradshaw maintained that the evidence concerning sexual activity and drugs was irrelevant to the kidnapping charge.\textsuperscript{2472} The court found the evidence to be relevant for two reasons. First, because Bradshaw argued that the victim consented to the trip and therefore was not kidnapped, the evidence was relevant to show Bradshaw's dominion over the victim.\textsuperscript{2473} This evidence directly related to the issue of consent.\textsuperscript{2474} Second, the evidence of sexual relations was also relevant to show Bradshaw's motive for taking the boy.\textsuperscript{2475} In answer to Bradshaw's contention that motive is not an element of a kidnapping charge,\textsuperscript{2476} the court replied that although motive need not be proved, it is relevant as evidence of the commission of any crime.\textsuperscript{2477} Specifically, the Ninth Circuit held in \textit{United States v. Gibson}\textsuperscript{2478} that evidence of sexual relations was relevant to show motive in a kidnapping charge and to demonstrate the relationship between the defendant and the victim to present a more complete picture.\textsuperscript{2479}

Bradshaw also objected to evidence of sexual relations and drug use prior to the kidnapping.\textsuperscript{2480} This activity was admitted as relevant to the issue of consent, because the defendant's chief defense at trial was that

\textsuperscript{2469} 689 F.2d at 833.
\textsuperscript{2470} 690 F.2d 704 (9th Cir. 1982).
\textsuperscript{2471} Id. at 707.
\textsuperscript{2472} Id. at 708.
\textsuperscript{2473} Id. See Holden v. United States, 388 F.2d 240, 242 (1st Cir.) (evidence of rape admissible in kidnapping charge where defense was consent), \textit{cert. denied}, 393 U.S. 864 (1968).
\textsuperscript{2474} 690 F.2d at 708.
\textsuperscript{2475} Id.
\textsuperscript{2476} 18 U.S.C. § 1201(a)(1) (1982) provides in pertinent part:

\begin{quote}
Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when (1) the person is willfully transported in interstate or foreign commerce;
\end{quote}

shall be punished by imprisonment for any term of years or for life.
\textsuperscript{2477} 690 F.2d at 708.
\textsuperscript{2478} 625 F.2d 887 (9th Cir. 1980).
\textsuperscript{2479} Id. at 888.
\textsuperscript{2480} 690 F.2d at 709.
the boy had consented. The trial court noted the relevancy of the evidence by observing that it would be difficult for the defendant to argue that a relationship caused the boy to consent if there were no prior acts of sexual gratification.

In addition, since the defense counsel had opened up this area on cross-examination, the Ninth Circuit found that the trial court had not abused its discretion by allowing the prosecution to ask questions concerning drug use and sexual activity prior to the kidnapping.

*United States v. Daly* involved a car theft scheme in which expensive automobiles were stolen, their motor serial numbers were changed, and counterfeit certificates of titles were prepared. The cars were then taken to another state where new certificates were issued under which the stolen cars were sold. Daly, who helped to sell the cars at his lot, was convicted on a conspiracy count and on two counts of receiving falsely made securities. Daly objected to testimony, admitted under Rule 404(b), given by a co-defendant who claimed that she had received a car from Daly's lot which she knew had been stolen. Daly charged that because the testimony referred to the co-defendant's acquisition of a car not named in the conspiracy count and to the knowledge of the stolen nature of cars named in other counts, the testimony was not relevant. However, because the Ninth Circuit "has adopted the position that Rule 404(b) is an inclusionary rule," the court admitted the testimony as circumstantial evidence of knowledge, namely that Daly knew the cars he sold were stolen and that their title certificates were false. In deciding that the testimony was admissible, the court also noted that the district judge had issued carefully worded limiting instructions directed to the issue of Daly's knowledge.

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2481. *Id.*
2482. *Id.* at 709 n.3.
2483. *Id.* at 709 n.4.
2484. 716 F.2d 1499 (9th Cir. 1983).
2485. *Id.* at 1502-03. 18 U.S.C. § 371 (1982) provides in pertinent part: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . 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 . . . or imprisoned . . . or both.
18 U.S.C. § 2315 (1982) states in pertinent part: "Whoever receives . . . falsely made . . . securities . . . which constitute interstate or foreign commerce, knowing the same to have been so falsely made . . . [s]hall be fined . . . or imprisoned . . . or both."
2486. 716 F.2d at 1510.
2487. *Id.*
2488. *Id.* (quoting United States v. Diggs, 649 F.2d 731, 737 (9th Cir.), cert. denied, 454 U.S. 970 (1981)).
2489. *Id.*
2490. *Id.* See infra notes 2556-58 and accompanying text.
In *United States v. Crenshaw*, evidence of previous crimes relevant under Rule 404(b). Evidence of three bank robberies committed by the defendant was offered by the government, not to prove the defendant's propensity to commit robberies, but to identify the defendant by showing that the conduct during prior robberies was uniquely similar to the one at issue. The robberies were also introduced by the government as evidence of a common plan or scheme under Rule 404(b). Since the record indicated that the trial judge carefully examined each robbery for its similarities to the one at issue, the appellate court concluded that the trial court properly allowed the evidence under Rule 404(b) for the purposes articulated by the prosecution.

One aspect of relevancy considered by the Ninth Circuit is how close in time another act is to the offense charged. Generally, evidence of a remote act is less relevant, since the logical relationship between the evidence and the ultimate proposition is more tenuous. However, in *United States v. Rohrer*, the court admitted evidence seized on November 2, 1981, fifteen months after the last offense charged on one count and two and one-half years after the offenses charged in another. The defendant was convicted on several counts of possession with intent to distribute cocaine and conspiracy to distribute cocaine. The prosecution introduced a scale with traces of cocaine and baggies as evidence of "other crimes" to corroborate a witness' testimony that the defendant kept these items for use in distributing cocaine. The defendant argued that his possession of these items was not close enough in time to the conspiracy to be relevant. The court admitted the scale and baggies under Rule 404(b) as evidence of the continuation of a conspiracy and proof of a plan or scheme, taking into consideration that the items could have been recently acquired.

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2491. 698 F.2d 1060 (9th Cir. 1983).
2492. Id. at 1064.
2493. Id. The court followed the standard set out in *Parker v. United States*, 400 F.2d 248 (9th Cir. 1968), cert. denied, 393 U.S. 1097 (1969), where the court held that "[p]roof of conduct similar to that charged, which is peculiar, unique, or bizarre, is admissible to tend to prove identity. . . . Proof of other crimes has likewise been held admissible to show a common scheme, plan, design, [or] system." Id. at 252 (citations omitted).
2494. 698 F.2d at 1064.
2495. *United States v. Lopez-Martinez*, 725 F.2d 471, 476-77 (9th Cir. 1984) (quoting *United States v. Bronco*, 597 F.2d 1300, 1302-03 (9th Cir. 1979)).
2496. 708 F.2d 429 (9th Cir. 1983).
2497. Id. at 434-35.
2498. Id. at 431.
2499. Id. at 435.
2500. Id.
2501. Id. The court relied on *United States v. Uriarte*, 575 F.2d 215 (9th Cir. 1978), where
alleged that the conspiracy continued through "at least" 1980, and the court held that the items found more than one year later were relevant to prove that the plan existed.\textsuperscript{2502}

The court in \textit{United States v. Lopez-Martinez}\textsuperscript{2503} allowed evidence of a statement the defendant had made about a prior marijuana offense which occurred eight years prior to the heroin offense presently at trial.\textsuperscript{2504} The defendant was charged with knowingly and intentionally importing and possessing with intent to distribute heroin.\textsuperscript{2505} He had been arrested crossing the border from Mexico to Arizona while carrying a package that contained about a pound and a half of heroin. After his arrest, the defendant waived his \textit{Miranda} rights and stated that he had been paid $1000 to carry the small package. He denied knowledge of the contents, but speculated that it might be marijuana.\textsuperscript{2506} At trial, the prosecutor introduced evidence of a statement the defendant had made while under arrest in 1974 for possession of marijuana with intent to distribute. He had stated to a DEA agent that he had been paid $1000 to carry 680 pounds of marijuana from Mexico to Arizona.\textsuperscript{2507} Here, the defendant's only defense was that he thought he was carrying marijuana rather than heroin when arrested.\textsuperscript{2508} The prior statement was relevant to prove that he knew that he was not carrying a pound and a half of marijuana for $1000 when he previously had been paid $1000 to carry 340 pounds of marijuana.\textsuperscript{2509} Since both arrests were for possession with intent to distribute, there was enough similarity, albeit different drugs, to find the prior act relevant and admissible to prove knowledge and intent under Rule 404(b).\textsuperscript{2510}

\textit{b. Rule 403—probative value versus prejudicial impact}

Even if evidence under 404(b) is admissible for some relevant pur-
pose other than to prove character, it still may be excluded under Rule 403 if its undue prejudice outweighs its probative value.\footnote{2511} The Ninth Circuit will review claims of prejudice under an abuse of discretion standard,\footnote{2512} as district courts have wide discretion in determining prejudice under Rule 403.\footnote{2513} Even though more than “a ‘mechanical recitation’ of the factors of probative value and prejudice”\footnote{2514} must be presented, when “the district court [has] engaged in a Rule 403 balance, the demands of that rule have been met.”\footnote{2515}

*United States v. Bradshaw*\footnote{2516} demonstrates the breadth of the district court’s discretion in ruling on the prejudicial effect of evidence. The defendant, convicted of kidnapping, charged that the district court failed to clearly articulate its balancing analysis under Rule 403 when it admitted prejudicial evidence of sex and drug activity with a nine year old boy.\footnote{2517} While a more clearly drawn statement of balancing probative value against prejudice was desirable, lack of formal articulation did not constitute reversible error.\footnote{2518} The appellate court found the requirements of Rule 403 satisfied when, taken as a whole, the record showed that the trial judge did the necessary balancing before admitting prejudicial evidence.\footnote{2519} The court also noted that the evidence was directly relevant to the issue of consent, the chief defense of the defendant.\footnote{2520}

About four months later, the Ninth Circuit used the *Bradshaw* reasoning in affirming the district court’s balancing prescribed by Rule 403 in *United States v. Carruth*.\footnote{2521} The defendant was indicted for tax fraud in connection with the operation of limited partnership tax shelters.

\footnotesize{2511. FED. R. EVID. 403 provides in pertinent part: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .” See also United States v. Bradshaw, 690 F.2d 704 (9th Cir. 1982) (Rule 404(b) subject to the balancing test of Rule 403) (citing United States v. Sangrey, 586 F.2d 1312, 1314-15 (9th Cir. 1978), cert. denied, 103 S. Ct. 3543 (1983)).}
\footnotesize{2512. United States v. Cox, 633 F.2d 871, 874 (9th Cir. 1980), cert. denied, 454 U.S. 844 (1981).}
\footnotesize{2513. United States v. Nadler, 698 F.2d 995, 1000 (9th Cir. 1983) (citing United States v. Bosley, 615 F.2d 1274, 1278 (9th Cir. 1980)).}
\footnotesize{2514. United States v. Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982) (citing United States v. Sangrey, 586 F.2d 1312, 1315 (9th Cir. 1978)).}
\footnotesize{2515. United States v. Carruth, 699 F.2d 1017, 1022 (9th Cir. 1983), cert. denied, 104 S. Ct. 698 (1984).}
\footnotesize{2516. 690 F.2d 704 (9th Cir. 1982), cert. denied, 103 S. Ct. 3543 (1983).}
\footnotesize{2517. Id. at 708. See supra notes 2470-71 and accompanying text.}
\footnotesize{2518. 690 F.2d at 708-09 (quoting United States v. Potter, 616 F.2d 384, 389 (9th Cir. 1979), cert. denied, 449 U.S. 832 (1980).}
\footnotesize{2519. Id. at 709. See infra notes 2521-22 and accompanying text.}
\footnotesize{2520. 690 F.2d at 708. See supra notes 2474-83 and accompanying text.}
\footnotesize{2521. 699 F.2d 1017 (9th Cir. 1983).}
formed for breeding non-existing cattle.\textsuperscript{2522} He objected to the admission of personal income tax returns under Rule 404(b). Although the defendant admitted having bank accounts in Mexico and Bermuda, he claimed that these accounts were inactive.\textsuperscript{2523} The prosecution had used the tax returns which showed \textit{no} foreign bank accounts to refresh the defendant's memory.\textsuperscript{2524} Bank records were offered to show that these accounts were very active. Tax forms were offered to indicate an intent to defraud and were also used for impeachment purposes.\textsuperscript{2525} The defendant argued that even if relevant, the evidence was prejudicial under Rule 403 and that the district court erred by failing to enunciate its reasons for rejecting the defendant's prejudice objection.\textsuperscript{2526} The Ninth Circuit again held that the demands of the Rule were met because the record indicated that the district court had engaged in a balancing analysis.\textsuperscript{2527}

The Ninth Circuit found no abuse of discretion by the district court in \textit{United States v. Ruster}.\textsuperscript{2528} The district judge allowed evidence of several previous false claims and break-ins to be admitted under Rule 404(b) to establish the guilt of the defendant, who was charged with filing applications for Supplemental Security income under false and fraudulent names and social security numbers.\textsuperscript{2529} The chief defense was insanity and the sole issue was whether the defendant was sane at the time he made the false claims.\textsuperscript{2530} Although the court found the evidence to be relevant to the issue of the defendant's mental state during the later offenses, the defendant claimed its probative value was outweighed by its prejudicial effect under Rule 403.\textsuperscript{2531} The court noted that the trial judge's balancing of the issue of admission of evidence in chambers was a proper exercise of discretion in the matter.\textsuperscript{2532} Ruster also argued that each prior incident should be balanced separately to determine its prejudicial effect.\textsuperscript{2534}

\textsuperscript{2522} The defendants were convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371. \textit{See supra} note 2485.

\textsuperscript{2523} 699 F.2d at 1022.

\textsuperscript{2524} \textit{Id.}

\textsuperscript{2525} \textit{Id.}

\textsuperscript{2526} \textit{Id.}

\textsuperscript{2527} \textit{Id.} (citing \textit{United States v. Sangrey}, 586 F.2d 1312, 1315 (9th Cir. 1978)).

\textsuperscript{2528} 712 F.2d 409 (9th Cir. 1983).

\textsuperscript{2529} \textit{Id.} at 410-12. 18 U.S.C. § 287 (1976) provides in pertinent part: "Whoever makes or presents to any person . . . in the civil . . . service of the United States . . . any claim upon or against the United States . . . knowing such claim to be false . . . shall be fined . . . or imprisoned . . . or both."

\textsuperscript{2530} 712 F.2d at 412.

\textsuperscript{2531} \textit{Id.} at 411-12.

\textsuperscript{2532} \textit{Id.} at 412 (quoting \textit{United States v. Ives}, 609 F.2d 930, 932 (9th Cir. 1979) ("When insanity is presented as a defense, the trial judge should be free in his admission of all possibly relevant evidence.")", \textit{cert. denied}, 445 U.S. 919 (1980)).
dicial effect. The court stated that in a case where there had been “nu-
merous similar previous incidents,” separate balancing was not
required. The court cited no cases to support its holding.

In reviewing the balancing conducted by the trial court, the Ninth
Circuit in recent cases has considered the effect of (a) overwhelming di-
rect evidence, (b) cautionary instructions issued to the jury, and (c) whether “other crimes” evidence stemmed from the same
transaction.

In United States v. McCown, three defendants, McCown, Barnes, Sr., and his son, Barnes, Jr., were convicted of offenses relating to con-
spiracy to distribute and distributing cocaine and firearms. There had
been several meetings between the undercover agent and the defendants
between June 17, 1981 and October 9, 1981, when the cocaine transac-
tions actually occurred. The agent had testified that at one of these
meetings, in response to the agent’s request to see some cocaine, Mc-
Cown had responded by saying “‘[w]e are not used to flashing it in pub-
lic.’” McCown claimed that the cumulative effect of this statement
and evidence regarding an earlier meeting between the agents, McCown
and Barnes, Jr., gave the impression that he was “‘involved in all kinds
of nefarious and illegal transactions with other people outside of the of-
fense charged.’” The court concluded that not only was the evidence
relevant under Rule 404(b) to put the events of October 9th in con-
text, but also that the overwhelming evidence of the October 9th
transaction outweighed any prejudicial effect that may have occurred.

Specifically regarding the statement offered by the undercover agent,
the court noted that McCown had not objected to the admission at the
time of testimony, but had moved for a mistrial after the court had re-
cessed for the day. The court found that the district court did not
abuse its discretion by deciding that the statement’s effect was so minimal

2533. Id.
2534. United States v. McCown, 711 F.2d 1441, 1453 (9th Cir. 1983).
2535. Id. at 1453-54. See United States v. Nadler, 698 F.2d 995, 1000 (9th Cir. 1983).
2536. United States v. McCown, 711 F.2d 1441, 1454 (9th Cir. 1983); United States v.
    Miller, 688 F.2d 652, 659-60 (9th Cir. 1982).
2537. 711 F.2d 1441 (9th Cir. 1983).
2538. Id. at 1444-45.
2539. Id. at 1453.
2540. Id.
2541. Id.
2542. Id. See United States v. Masters, 622 F.2d 83, 84-88 (4th Cir. 1980) (evidence of prior
crime admissible where it furnished part of context of present crime).
2543. 711 F.2d at 1453.
2544. Id.
that delivery of cautionary instructions would probably heighten the prejudicial effect of a statement that the jury had largely ignored.\textsuperscript{2545}

Limiting instructions were given regarding several other statements referring generally to McCown's experience with other illegal activities.\textsuperscript{2546} The court ruled that these statements were merely part of a "sales pitch" to demonstrate the defendants' ability to deliver on their promises to the agents and were not unduly prejudicial.\textsuperscript{2547}

The Ninth Circuit makes the assumption that juries follow admonitions and curative instructions.\textsuperscript{2548} The force and delivery of the instruction is weighed against the prejudice generated by the evidence.\textsuperscript{2549} This assumption is taken into consideration during the balancing procedure under Rule 403.\textsuperscript{2550} In \textit{McCown}, the district court instructed the jury that evidence that Barnes, Sr. was smoking marijuana was to be discounted in determining guilt.\textsuperscript{2551} The agent testified that he had seen Barnes, Sr. smoking marijuana at a meeting and had speculated that it was a means of "inspecting" the samples that Barnes, Sr. had received earlier from the agent.\textsuperscript{2552} The court noted that Barnes, Sr.'s own counsel had questioned the agent in great detail about the incident on cross-examination, thereby drawing the jury's attention to it.\textsuperscript{2553} Additional evidence had been introduced showing that Barnes, Sr. was anxious to obtain samples of the marijuana he was to receive in the exchange. Thus, the jury could infer that any method used to test the marijuana would involve illegal conduct.\textsuperscript{2554} The court did not rule on the admissibility of the evidence under Rule 404(b), but found that the jury instructions were sufficient to dispel any prejudice that the testimony might have caused.\textsuperscript{2555}

At another point in the trial, the agent mentioned incidentally that Barnes, Sr. had stated that he had been arrested.\textsuperscript{2556} There was an immediate objection by the \textit{prosecutor}, preventing the charge from being dis-
The judge offered to give curative instructions, but the defense did not request them. The appellate court found that under the circumstances, there was no abuse of discretion by the trial court in refusing to grant a mistrial.

The same conclusion was reached when Barnes, Jr. rejected the district court judge's offer to give a cautionary instruction when the prosecutor mentioned in his opening statement that Barnes, Jr. was facing sentencing in another matter. The evidence of the pending sentence was never presented because of a stipulation that Barnes, Jr. was under indictment. The court stated that the strong evidence against Barnes, Jr. precluded a reversal based on the prosecutor's statement even if error had occurred.

Testimony regarding a prior counterfeiting operation was admitted in *United States v. Nadler* where the defendants were convicted of conspiracy and on various counterfeiting charges. The testimony was offered under Rule 404(b) to prove the defendants' intent to commit counterfeiting as well as their knowledge of the activity. It was offered to show a common plan or scheme and to provide evidence regarding the background and development of the conspiracy. The defendants contended that the testimony was inadmissible to prove intent because lack of intent was not asserted. Nevertheless, the court ruled in favor of the prosecutor and found that the evidence was admissible to

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2557. *Id.* The prosecutor would have an interest in objecting to any inadmissible reference to a prior conviction on which a reversal or mistrial could be based.

2558. *Id.*

2559. *Id.* See *United States v. Feroni*, 655 F.2d 707, 712-13 (6th Cir. 1981) (where witness referred to defendant as a "three-time loser," the trial court offered to give automatic cautionary instructions, but defense counsel declined; error in not giving curative instructions was harmless where the reference was inadvertent, elicited by defense counsel on cross-examination, and the effect of the remark was mitigated by other evidence, including overwhelming evidence of defendant's guilt). *Cf.* *United States v. Regner*, 677 F.2d 754, 757 (9th Cir.) (district court not required to give limiting instructions to the jury unless requested by counsel and such failure is not "plain error"), *cert. denied*, 459 U.S. 911 (1982).

2560. 711 F.2d at 1454.

2561. *Id.*

2562. *Id.* See *supra* text accompanying notes 2534 & 2543.

2563. 698 F.2d 995 (9th Cir. 1983).


2565. 698 F.2d at 1000.

2566. *Id.*

2567. *Id.*
show a common scheme or plan and to provide information concerning
the background and development of the conspiracy.\textsuperscript{2568} Noting that any
possible prejudice was minimized by cautionary jury instructions con-
cerning the testimony, the appellate court found no abuse of
discretion.\textsuperscript{2569}

When “other crimes” evidence stems from part of the same transac-
tion, the Ninth Circuit has held that the evidence is admissible as direct
evidence of the crime charged, and not barred by Rule 404(b).\textsuperscript{2570} However,
any “other crimes” evidence may be admitted under Rule 404(b)
for a relevant purpose, such as to establish identity, if it is not unduly
prejudicial.\textsuperscript{2571}

Recently, in \textit{United States v. Miller},\textsuperscript{2572} where the defendant con-
tended that “other crimes” evidence was prejudicial, the trial court de-
nied a motion to preclude introduction of such evidence, on the grounds
that it was “part of the same transaction,” even though not part of the
indictment.\textsuperscript{2573} The issue was whether a trailer in the defendant’s posses-
sion was the same as that stolen from the victim.\textsuperscript{2574} The “other
sequences” evidence pertained to conveyor belts allegedly stolen when the
trailer was taken, and was introduced to establish identity.\textsuperscript{2575} While
noting that “[c]ompetent and relevant evidence of guilt is not inadmissi-
ble simply because it tends to show the commission of another of-
fense,”\textsuperscript{2576} the appellate court reviewed the trial court’s finding under the
standard of Rule 404(b) rather than as direct evidence of the crime
charged.\textsuperscript{2577} The evidence was of substantial probative value because it
tended to identify the stolen trailer in the defendant’s possession.\textsuperscript{2578} The

\textsuperscript{2568} \textit{Id.} (citing United States v. Magnano, 543 F.2d 431, 435 (2d Cir. 1976) (in prosecution
for conspiracy to traffic narcotics, trial court did not abuse its discretion in admitting testi-
mony concerning defendants’ prior drug dealings for purpose of showing background and de-
velopment of conspiracy), \textit{cert. denied}, 429 U.S. 1091 (1977); United States v. Fassler, 434
F.2d 161, 162 (9th Cir. 1970) (evidence of other similar acts relevant to issue of whether there
was agreement or arrangement to smuggle marijuana), \textit{cert. denied}, 401 U.S. 1011 (1971)).

\textsuperscript{2569} \textit{Id.}

\textsuperscript{2570} United States v. Passaro, 624 F.2d 938, 943 (9th Cir. 1980), \textit{cert. denied}, 449 U.S. 1113

\textsuperscript{2571} United States v. Miller, 688 F.2d 652 (9th Cir. 1982).

\textsuperscript{2572} \textit{Id.}

\textsuperscript{2573} \textit{Id.} at 659.

\textsuperscript{2574} \textit{Id.}

\textsuperscript{2575} \textit{Id.}

\textsuperscript{2576} \textit{Id.} The \textit{Miller} court cited United States v. Masters, 622 F.2d 83, 87 (4th Cir. 1980) for
the proposition that “competent and relevant evidence of guilt is not inadmissible simply be-
cause it tends to show the commission of another offense.” 688 F.2d at 659.

\textsuperscript{2577} 688 F.2d at 659.

\textsuperscript{2578} \textit{Id.} See United States v. White, 645 F.2d 599, 602-03 (8th Cir.) (admission of dent
puller seized from residence of co-defendant together with testimony that dent puller can be
risk that the jury would infer a propensity for committing the crime from the introduction of this evidence was much less than that of "other crimes" evidence pertaining to separate criminal transactions because only one event was at issue.\textsuperscript{2579}

In \textit{United States v. McCown},\textsuperscript{2580} McCown argued that evidence of the events that constituted the charge of unlawfully possessing cocaine with intent to distribute should not have been admitted in the trial on the remaining counts of conspiracy, unlawful distribution of cocaine, and unlawful use of a communication facility.\textsuperscript{2581} However, the court ruled that the evidence was probative of the conspiracy and the roles of the co-conspirators.\textsuperscript{2582}

5. Scope of examination

The trial court is generally vested with broad discretion in matters concerning the examination of witnesses.\textsuperscript{2583} The scope of matters that may be inquired into on cross-examination is also subject to the court's discretion and control.\textsuperscript{2584} In a criminal case, however, the scope of

\begin{itemize}
  \item used to start stolen cars relevant under Rule 404(b) to complete story of bank robbery and kidnapping for which defendant was on trial, \textit{cert. denied}, 452 U.S. 943 (1981); United States v. Gibson, 625 F.2d 887, 888 (9th Cir. 1980) (where defendant charged with kidnapping fled with calculator belonging to victim, the evidence was admissible to connect defendant with car used in kidnapping).
  \item 688 F.2d at 659. \textit{Cf.} United States v. Two Eagle, 633 F.2d 93, 96-97 (8th Cir. 1980) ("other crimes" evidence that was probative of identity held not to be unfairly prejudicial).
  \item 711 F.2d at 1454. \textit{See supra} notes 2537-43 and accompanying text.
  \item 711 F.2d at 1454.
  \item \textit{Id.} \textit{See} United States v. Moreno-Nunez, 595 F.2d 1186, 1188 (9th Cir. 1979) (probative value of evidence concerning defendant's willingness to supply narcotics during negotiation with undercover agents to show background and development of conspiracy was not outweighed by danger of unfair prejudice).
  \item FED. R. EVID. 611(a) provides in part that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses," The advisory committee explains that "[sp]elling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge." FED. R. EVID. 611(a) advisory committee note. \textit{See also} \textit{J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE 611[01],} at 611-13 (1978) ("[T]he purpose of Rule 611(a) is to encourage flexibility in order to promote the public's and parties' interest in the efficient ascertainment of truth without unnecessarily sacrificing the dignity of the individual witness.").
  \item 611(b) (emphasis added). \textit{See supra} note 2583 for a discussion of the court's general discretion in matters concerning the examination of witnesses. \textit{See also} United States v. Miranda-Uriarte, 649 F.2d 1345, 1353 (9th Cir. 1981); Chipman v. Mercer, 628 F.2d 528, 530 (9th Cir. 1980); and United States v. Palmer, 536 F.2d 1278, 1282 (9th Cir. 1976) for the proposition that the extent of cross-examination is a matter within the discretion of the trial court.
\end{itemize}
cross-examination reaches constitutional dimensions because of the defendant's right to confront his accusers.\textsuperscript{2585} Although an accused's right to cross-examine witnesses is conferred by the Constitution, the trial court may limit the scope of cross-examination. Recent Ninth Circuit decisions have considered the defendant's confrontation right in relation to the trial court's discretion to limit the scope of this right.

The Ninth Circuit held that the scope of cross-examination was not improperly restricted by the trial court in \textit{United States v. Bennett}.\textsuperscript{2586} Bennett was convicted on various criminal charges arising out of a plan to defraud the government of CETA funds.\textsuperscript{2587}

Relying on the test enunciated in \textit{Chipman v. Mercer},\textsuperscript{2588} the Ninth

\textsuperscript{2585} "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. The Supreme Court has recognized that "the right of cross-examination . . . is implicit in the constitutional right of confrontation." Chambers v. Mississippi, 410 U.S. 284, 295 (1973). However, the Court qualified this language by further observing that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." \textit{Id.} at 295. Yet the Court cautioned that the "denial or significant diminution [of the right to confront and to cross-examine] calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." \textit{Id.} at 410. \textit{Chambers} may thus be considered a benchmark against which limitations on the right to cross-examine should be measured.

\textsuperscript{2586} 702 F.2d 833, 836 (9th Cir. 1983).

\textsuperscript{2587} \textit{Id.} at 835. The Comprehensive Employment and Training Act (CETA), is "a federally funded grant-in-aid program to assist the unemployed through job creation . . . . CETA funds are used to hire the unemployed in nearly any relevant capacity." A. Saltzstein, \textit{Public Employees and Policymaking} 71 (1979). Bennett, the secretary-treasurer of a local labor union, fraudulently billed the CETA program for work that was never performed by his accomplices. 702 F.2d at 835. The funds were then "kicked back to Bennett." \textit{Id}. The defendant further "misrepresented facts in order to collect salaries for four employees for work in fact not performed." \textit{Id.} The Ninth Circuit affirmed Bennett's convictions for conspiracy in violation of 18 U.S.C. § 371, for making false statements to the Department of Labor in violation of 18 U.S.C. § 1001, for theft and embezzlement of CETA funds in violation of 18 U.S.C. § 665(a), and for filing false income tax returns in violation of 26 U.S.C. § 7206(1). \textit{Id.}

\textsuperscript{2588} 628 F.2d 528 (9th Cir. 1980). In \textit{Chipman}, a state court refused to allow the defendant in a burglary prosecution to cross-examine the state's sole eyewitness in order to expose the witness' potential bias. \textit{Id.} at 529-30. The defendant petitioned for and was granted a writ of habeas corpus. \textit{Id.} at 529. On appeal, the Ninth Circuit held that "the denial of cross-examination for bias or prejudice in this case violated the confrontation clause." \textit{Id.} at 533. In so holding, the court observed that "[w]hen the cross-examination relates to impeachment evidence, the test as to whether the trial court's ruling violated the sixth amendment is 'whether the jury had in its possession sufficient information to appraise the biases and motivations of the witness.'" \textit{Id.} at 530 (citations omitted) (emphasis added).

The \textit{Bennett} court did not explain whether the cross-examination inquiry at issue related to impeachment evidence, and thus called for the "\textit{Chipman} test" analysis. More importantly, the Ninth Circuit failed to discuss the facts and circumstances of the examination process in \textit{Bennett} which justified the court's conclusion that the \textit{Chipman} standards were met. Yet the Ninth Circuit itself recognized in \textit{Chipman} that "[c]onfrontation questions must be resolved on a case-by-case basis based on examination of all circumstances and evidence." \textit{Id.} (citing
Circuit summarily concluded that the jury possessed adequate information to evaluate the motivations and biases of those witnesses which the defendant claimed he was unable to fully cross-examine.\textsuperscript{2589} Hence, it held that the defendant's sixth amendment confrontation right had not been violated.\textsuperscript{2590}

In light of the Supreme Court's requirement that limitations on the scope of cross-examination in a criminal case be "closely examined,"\textsuperscript{2591} the \textit{Bennett} decision is open to criticism. The \textit{Bennett} court offered no description as to what testimony was elicited and from whom in order to explain what information the jury had in its possession. Thus in terms of when and under what circumstances the trial court's control over the defendant's right to cross-examine witnesses implicates the sixth amendment, the \textit{Bennett} opinion is of little value.

In \textit{United States v. Goodheim},\textsuperscript{2592} the Ninth Circuit held that the government's inquiry into aliases used by a person whose surname the defendant had assumed was relevant to prove the defendant's use of the name as an alias.\textsuperscript{2593} Goodheim, a convicted felon, was charged in part with making a false statement in connection with the purchase of firearms\textsuperscript{2594} by using the name "Alexander Fischer" on forms he filled out to acquire the firearms.\textsuperscript{2595} While questioning Goodheim on direct examination, defense counsel asked him when he had begun using the name "Alexander Fischer."\textsuperscript{2596} Counsel was apparently attempting to elicit the defendant's state of mind concerning his use of the name.\textsuperscript{2597} Goodheim's response indicated that he merely assumed the last name of his

\begin{footnotes}
\footnotetext[2589]{702 F.2d at 836.}
\footnotetext[2590]{Id.}
\footnotetext[2591]{410 U.S. 284, 295 (1973). \textit{See supra note} 2586 and accompanying text.}
\footnotetext[2592]{686 F.2d 776 (9th Cir. 1982).}
\footnotetext[2593]{Id. at 779.}
\begin{quote}
It shall be unlawful . . . for any person in connection with the acquisition or attempted acquisition of any firearm . . . from a . . . licensed dealer . . . knowingly to make any false . . . oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification intended or likely to deceive such . . . dealer . . . with respect to any fact material to the lawfulness of the sale . . . .
\end{quote}
\footnotetext[2595]{686 F.2d at 779. \textit{See also} United States v. Goodheim, 651 F.2d 1294 (9th Cir. 1981).}
\footnotetext[2596]{686 F.2d at 779.}
\footnotetext[2597]{Id. The \textit{Goodheim} court noted that a conviction under 18 U.S.C. § 922(a)(6) (1976) required proof of "the making of a false statement in connection with" the firearm's acquisition. \textit{Id.} at 780 (emphasis added).}
\end{footnotes}
best friend, Michael Fischer, “who was ‘like a brother.’”

On appeal, Goodheim argued that the trial court had erred in permitting the government to cross-examine him concerning aliases used by Michael Fischer because such testimony was irrelevant. However, the Ninth Circuit found the testimony was relevant to rebut Goodheim's direct examination testimony. The court reasoned that since the government had demonstrated that both Michael Fischer and Goodheim had used the “Fisher” surname and that the defendant had used the name “Alexander Fisher,” the testimony was relevant to show that Michael Fischer had used the surnames interchangeably, and that Goodheim had assumed the surnames as aliases, not merely because Michael was like a brother. Accordingly, the court found that Goodheim's argument was meritless or, at best, concluded that any error was harmless.

6. Opinion
   a. Lay opinion testimony

Rule 701 of the Federal Rules of Evidence limits opinion testimony by lay witnesses to inferences or opinions that are rationally based upon the witness' perception and helpful to a clear understanding of the

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2598. Id. at 779.
2599. Id.
2600. Id.
2601. Id.
2602. Id. “ ‘Relevant evidence’ means 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.” FED. R. EVID. 401. In Goodheim, the existence of a false statement made in connection with the acquisition of firearms was an essential element of the offense charged. The government contended that Goodheim knowingly made a false statement by affixing the name “Alexander Fischer” to the firearms forms. The government attempted to establish on cross-examination that Goodheim assumed Fischer’s surname for the purpose of using aliases. Such evidence would have a reasonable tendency of making the existence of the requisite false statement more probable than it would have been without the testimony. This same cross-examination evidence tended to impeach Goodheim's prior testimony. Cross-examination may extend to “matters affecting the credibility of the witness.” FED. R. EVID. 611(b). Furthermore, the test for the permissible scope of cross-examination is simply whether the inquiry is “reasonably related to the issues [the defendant] puts in dispute by his testimony on direct.” United States v. Miranda-Uriarte, 649 F.2d 1345, 1353 (9th Cir. 1981). Since Goodheim's direct testimony implied that he used the Fischer surname because Michael Fischer was his best friend and like a brother, there was a disputed issue as to whether his use of Alexander Fischer on the firearms forms was indeed a false statement. The inquiry was thus relevant both to refute Goodheim's claim that he assumed Fischer's surname because he thought of him as a brother and to show that Goodheim's purpose was in fact to use an alias or make a false statement.
2603. 686 F.2d at 779.
2604. Rule 701(a) expressly requires firsthand knowledge or observation of the event or mat-
witness' testimony or the determination of a disputed fact. The limitations found in Rule 701 are aimed at accurately reproducing the event for the trier of fact. However, the trial court has broad discretion to determine whether a lay witness is qualified under Rule 701 to testify on a matter of opinion.

In United States v. Barrett, the Ninth Circuit considered whether the trial court had abused its discretion in admitting lay opinion testimony by the defendant's girlfriend identifying him as the person in bank surveillance photographs. Barrett was convicted of robbing a federally insured savings and loan. Since the bank surveillance photo-
graphs showed a man with a full beard and mustache, while Barrett was clean-shaven at trial, the bank robber's identity was the major issue.\textsuperscript{2611} On appeal, Barrett challenged the admissibility of the testimony of Barbara Lemon, his live-in girlfriend, which indicated that Barrett was the person depicted in the bank surveillance photographs taken during the robbery.\textsuperscript{2612} Barrett argued that Lemon's identification was unnecessary because the jury had been allowed to compare the bank surveillance photographs with Barrett's in court appearance and with two separate photographs of Barrett wearing a beard and mustache.\textsuperscript{2613} Thus, he reasoned, Lemon's lay opinion identification violated the opinion rule because it was not "helpful" to the determination of the robber's identity.\textsuperscript{2614}

The court, however, rejected Barrett's argument, reasoning that lay opinion identification is considered helpful and therefore admissible under Rule 701 if a defendant's appearance has changed significantly since the commission of the crime.\textsuperscript{2615} Since Barrett had a mustache and

\textsuperscript{2611} 703 F.2d at 1079-80.
\textsuperscript{2612} Id. at 1085-86.
\textsuperscript{2613} Id. at 1086.
\textsuperscript{2614} Id. As discussed in note 2605 and the accompanying text, supra, lay opinion testimony is permitted if it is "helpful to a clear understanding of [the witness'] testimony or the determination of a fact in issue." Fed. R. Evid. 701(b) (emphasis added). Although the defendant in Barrett construed the opinion rule as excluding testimony unless it is "helpful to . . . the determination of a fact in issue," 703 F.2d at 1086, the express language of Rule 701 also permits the introduction of lay opinion testimony where the testimony is helpful to a clear understanding of the witness' testimony. Fed. R. Evid. 701(b). While the Barrett court did not need to address this issue, it did note that Lemon testified that Barrett shaved his beard and mustache on the day of the robbery. 703 F.2d at 1080. Therefore, the court could have permitted the introduction of Lemon's lay opinion under the guise that it was helpful to a clear understanding of her other testimony.

Furthermore, the defendant in Barrett implicitly contended that "necessity" is a requirement for the introduction of lay opinion testimony by arguing that the evidence before the jury obviated "any need for Lemon's lay-opinion identification." Id. at 1086. However, the advisory committee rejected Barrett's position by merely requiring testimony to be "helpful," noting that "necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration." Fed. R. Evid. 701 advisory committee note (citations omitted).

\textsuperscript{2615} 703 F.2d at 1086 (citing United States v. Borrelli, 621 F.2d 1092, 1095 (10th Cir.), cert. denied, 449 U.S. 956 (1980)). Borrelli involved the admissibility of testimony by Borrelli's stepfather concerning Borrelli's resemblance to the subject depicted in bank surveillance photographs taken during a bank robbery. United States v. Borrelli, 621 F.2d 1092, 1095 (10th Cir.), cert. denied, 449 U.S. 956 (1980). The Borrelli court held that the trial court did not abuse its discretion by admitting the lay opinion identification into evidence. The court reasoned that Borrelli had significantly altered his appearance during the time between the robbery and the trial by "changing his hairstyle and growing a moustache, thereby making it difficult for the jury to compare his appearance in court with the appearance of the man in the bank surveillance photograph." Id. The court therefore found the opinion testimony helpful
full beard near the time of the robbery, yet was clean-shaven at the
trial, the court found that Lemon's opinion testimony on the identifi-
cation issue was "helpful" as required by Rule 701. The court ac-
cordingly held that the trial court did not abuse its discretion in
admitting Lemon's identification of Barrett.

In United States v. Goodheim, the Ninth Circuit held that lay
opinion testimony identifying a picture of the defendant as the person
who committed a firearms violation was permissible as long as proper
safeguards and procedures were followed. Goodheim was convicted
of receipt and possession of firearms by a convicted felon, and of making
to the determination of the identity issue "[b]ecause Borrelli's stepfather was in a much better
position than the jury to give an opinion as to the resemblance between Borrelli at the approxi-
mate date of the robbery and the man in the surveillance photograph." Id.

Prior to Barrett, the Ninth Circuit considered the admissibility of lay opinion identifica-
tion testimony in United States v. Butcher, 557 F.2d 666 (9th Cir. 1977). In Butcher, the court
held that opinion testimony by two police officers and the defendant's probation officer identi-
fying the defendant as the person in bank surveillance photographs did not constitute prejudi-
cial error. Id. at 670. The court found that the officers' testimony fell under Rule 701, since
"their opinions were rationally based on prior contacts and conversations with the defendant
and definitely pertained to the determination of the fact in issue." Id. at 669 (footnote omit-
ted). Unlike the defendants in Barrett and Borrelli, however, the defendant's physical appear-
ance at the time of the trial in Butcher was only "slightly different than his appearance at the
time of his arrest." Id. at 667 (emphasis added). The Butcher court nonetheless reasoned that
even if admission of the testimony erroneously invaded the province of the jury, the error was
not prejudicial because ample evidence in the record, aside from the testimony, supported the
defendant's conviction. Id. at 669-70.

Other Ninth Circuit decisions are consistent with the result reached in Barrett. See, e.g.,
United States v. Brannon, 616 F.2d 413 (9th Cir.) (lay witness opinion testimony identifying
defendant in bank surveillance photographs properly admitted under Rule 701 where identifi-
cations were sufficiently reliable), cert. denied, 447 U.S. 908 (1980); United States v. Saniti, 604
F.2d 603 (9th Cir.) (roommates' opinion evidence identifying defendant as person in bank
surveillance photographs admissible), cert. denied, 444 U.S. 969 (1979); United States v.
Young Buffalo, 591 F.2d 506 (9th Cir.) (lay opinion identification by defendant's wife and

2616. 703 F.2d at 1086.
2617. Id.
2618. Id. The Barrett court cited United States v. Butcher, 557 F.2d 666, 670 (9th Cir. 1977)
for the principle that "the trial court's discretion to admit lay-opinion testimony under Rule
701 [will not be disturbed] absent clear abuse." 703 F.2d at 1086. See supra note 2615 for a
discussion of Butcher.
2619. 686 F.2d 776 (9th Cir. 1982).
2620. Id. at 779. The Goodheim court cited Simmons v. United States, 390 U.S. 377, 384
(1968) as authority for what constitutes proper procedural safeguards. Simmons involved a
situation where several witnesses made in court identifications which the defendant argued
stemmed from previous exposure to a suggestive photographic array. The Court held that the
due process test, when applied to a pretrial photographic identification, is whether the identifi-
cation procedure "was so impermissively suggestive as to give rise to a very substantial likeli-
hood of irreparable misidentification." Id. at 384. In so holding, the Court found that the
identification procedures used in Simmons were not violative of due process because the photo-
a false statement in connection with the receipt of a firearm. On appeal, the evidentiary dispute concerned the introduction of testimony by the firearms dealer identifying a photograph of Goodheim as the person who purchased or "received" the three weapons in issue. Goodheim asserted that there was a "serious question" as to whether he was in fact the person who received the firearms. Thus, he argued that the trial court committed prejudicial error in allowing the photographic identification because the court neglected to take appropriate safeguards.

graphic identifications were necessary (since the perpetrators of the crime were still at large) and reliable. Id.

Similarly, the firearms dealer in Goodheim made a pretrial identification of Goodheim by selecting a photograph of the defendant from a series of photographs shown to him by a government agent. 686 F.2d at 779. However, the Goodheim court did not discuss the necessity or reliability of the dealer's pretrial photographic identification as required by Simmons. Rather, it merely implied that the prior identification was reliable because the dealer never wavered in his identification when the photospread identification testimony was offered to rebut defense counsel's suggestion that the government helped the gun dealer identify Goodheim. Id. at n.2.

2621. 686 F.2d at 779-80. 18 U.S.C. app. § 1202(a)(1) (1976) provides that a convicted felon "who receives, possesses, or transports in commerce . . . any firearm shall be fined not more than $10,000, or imprisoned not more than two years, or both."

18 U.S.C. § 922(h)(1) (1976) provides in part: "It shall be unlawful for any person . . . who has been convicted . . . of . . . a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm . . . which has been shipped or transported in interstate commerce."


It shall be unlawful . . . for any person in connection with the acquisition or attempted acquisition of any firearm . . . from a . . . licensed dealer . . . knowingly to make any false . . . oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such . . . dealer . . . with respect to any fact material to the lawfulness of the sale . . .

The Ninth Circuit affirmed Goodheim's conviction on all counts.

2622. 686 F.2d at 778-79.

2623. Id. at 778. The Goodheim court found that on the record there was no "serious question" that the defendant was in fact the person who had received the weapons. Id. at 779 n.2. The court observed that the dealer had identified Goodheim on direct examination "as the person to whom he sold and delivered the firearms . . . [and that] he never wavered in his identification." Id.

2624. Id. at 779. Goodheim asserted that permitting the dealer to render his opinion that the person in the photograph was the same person to whom the weapons were sold constituted reversible error because the court did not follow the standards set forth in United States v. Brown, 501 F.2d 146 (9th Cir. 1974), rev'd on other grounds sub nom. United States v. Nobles, 422 U.S. 225 (1975). 686 F.2d at 779. Brown involved an expert witness' comparison of bank surveillance photographs taken during a robbery with those taken of the defendants in custody. The Brown court held:

[When a party seeks to introduce expert testimony on personal photographic identification . . . he should first be required to make an offer of proof to the court outside the presence of the jury.

After the elicitation of what facts the expert has depended upon in reaching his conclusions, the court should determine whether it has been convinced by a preponderance of the evidence that the facts offered are beyond the jury's common experi-
Goodheim claimed that the trial court failed to comply with the requirements set forth by the Ninth Circuit concerning the introduction of opinion testimony on personal photographic identification. The standards that he contended were applicable require the government to make an offer of proof to the court outside the jury's presence, elicit the facts on which the witness' opinion is based, and convince the court by a preponderance of the evidence that such facts are beyond the jury's common experience, before the testimony is admitted. However, the court rejected Goodheim's claim. The court reasoned that no error was committed because the standards argued for by Goodheim apply only to expert testimony and the firearms dealer had testified as a lay witness, not as an expert.

The decision in Goodheim may be criticized because the court failed to analyze the reliability and necessity of the dealer's pretrial photographic identification. On the other hand, because the dealer had personal knowledge of the firearms transaction, the lay opinion identification testimony based on the photograph of Goodheim is arguably analogous to the type of testimony in bank robbery cases permitting lay witness identifications of persons depicted in bank surveillance photographs taken during a robbery. Accepting this analogy, the opinion rendered in Goodheim would have been helpful to a determination that the defendant was the individual who had received the firearms. This analogy fails, however, when considered in light of the fact that the bank surveillance photograph cases all involved situations where the defendant's appearance changed between the time of the crime and the time of trial. There was no indication in Goodheim that the defendant's appearance at trial was any different than when he allegedly received the firearms.

In United States v. Burnette, the Ninth Circuit held that it was
not an abuse of discretion to permit a police officer to render his opinion that a bank robber's accomplice was removing a rear license plate from the getaway car. Theresa Burnette was convicted as an accessory after the fact to an armed robbery of a federally insured savings and loan. The robbery was perpetrated by "a lone black gunman." An eyewitness informed the authorities that the gunman entered a "waiting automobile occupied by two other black persons." Descriptions of the gunman, the getaway car, and its Nevada license plate number were heard over a police radio broadcast by Sergeant Hallums of the Tucson Police Department, who later spotted a Buick bearing Nevada license plates outside a Tucson motel. Hallums approached the scene and observed a black female, subsequently identified as Theresa Burnette, by the rear of the car, who appeared to be removing the license plate. A later search of Theresa's motel room produced evidence of the robbery, including two Nevada license plates with the reported license number and two District of Columbia license plates. Theresa was arrested near the car with two screws fitting the Buick's rear license plate bracket and a key to the motel room in her possession.

On appeal, Theresa challenged the admission of Sergeant Hallums' testimony that "in his opinion, Theresa was removing the rear license plate from the blue and white Buick." The Ninth Circuit, however, held that the district court's admission of the opinion testimony did not

2634. "Whoever, knowing that an offense against the United States has been committed, receives, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment [shall be guilty of an offense against the United States]." 18 U.S.C. § 3 (1976). The defendant was presumably "assisting the offender in order to prevent his apprehension" pursuant to § 3 by removing the getaway vehicle's Nevada license plates bearing numbers known to the authorities, and replacing them with two District of Columbia license plates. 698 F.2d at 1051. The Ninth Circuit found that the defendant's contentions that the jury was improperly instructed concerning the elements of the offense and that there was insufficient evidence to support her conviction as an accessory after the fact to armed robbery without merit. Id. at 1050.
2635. 698 F.2d at 1042.
2636. Id. at 1043.
2637. Id.
2638. Id.
2639. Id. at 1044.
2640. Id. at n.6.
2641. Id. at 1043. The court explained in a footnote that although the screws and motel room key were "actually found under the rear seat of the police car used to transport Theresa to the Tucson Police Station[,] [t]he officer's testimony at trial clearly established that only Theresa could have secreted the key and screws under the seat." Id. at 1043 n.4.
2642. Id. at 1051. The Ninth Circuit noted that the defendant's pretrial motion to preclude the opinion testimony was denied by the trial court. Id. See Fed. R. Crim. P. 12(b)(6)(3).
amount to a clear abuse of discretion because Sergeant Hallums' opinion was rationally based upon his personal perception and was helpful in determining the existence of a disputed fact. The Ninth Circuit explained that the license plate was still affixed to the Buick when Sergeant Hallums arrived, Theresa was at the rear of the car apparently holding a screwdriver, and the rear license plate was missing shortly thereafter. Alternatively, the court found that even if the trial court erred in admitting Sergeant Hallums' opinion testimony instead of limiting his testimony to the underlying facts, the error was harmless.

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2643. 698 F.2d at 1051. The Burnette court cited United States v. Cox, 633 F.2d 871 (9th Cir. 1980), cert. denied, 454 U.S. 844 (1981), and Unitec Corp. v. Beatty Safway Scaffold Co., 358 F.2d 470 (9th Cir. 1966), for the abuse of discretion standard applicable to the admission of opinion testimony. In Cox, the Ninth Circuit acknowledged that the trial court committed error in admitting a lay witness' impression that the defendant, who was charged with possession of unregistered firearms (pipebombs), was involved in a bombing incident based solely upon her opinion of what the defendant had meant in his conversation with her. 633 F.2d at 875-76. The court, nonetheless, found that there was no clear abuse of discretion, and that the error committed was harmless. Id. at 876 (citing Unitec Corp. v. Beatty Safway Scaffold Co., 358 F.2d 470 (9th Cir. 1966)). The court in Unitec Corp. found that it was not an abuse of discretion for the trial court to liberally admit opinion evidence on the causes of property damage in a breach of contract and negligence action. 358 F.2d at 477-78. However, the issues in Unitec Corp. were tried without a jury. Id. at 478. The Unitec Corp. court explained that “[w]here the court is the sole trier of fact, there is even less reason to exclude opinion testimony.” Id. (emphasis added). It should be noted that both Cox and Burnette were tried before a jury, so that, arguably, the trial court had less discretion to admit the disputed opinion testimony in those cases.

2644. 698 F.2d at 1051 (citing Fed. R. Evid. 701 (opinion testimony by lay witnesses “is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue”)).

2645. Id.

2646. Id.

The Burnette court explained that the “fact in issue”—Theresa's removal of the license plate and hence her complicity in the robbery—was effectively put to rest even without the disputed opinion testimony. Id. Her fingerprints were found on the license plate and in the motel room, and two screws fitting the license plate bracket of the getaway car were on her person at the time of her arrest. Id. The Burnette court, however, recognized that limiting Hallums' testimony to the underlying facts “would have perhaps been better.” Id. In this regard, consider the Ninth Circuit's discussion of the rationale of the opinion rule and the circumstances under which lay opinion testimony should and should not be admitted in United States v. Skeet, 665 F.2d 983 (9th Cir. 1982):

Opinions of non-experts may be admitted where the facts could not otherwise be adequately presented or described to the jury in such a way as to enable the jury to form an opinion or reach an intelligent conclusion. If it is impossible or difficult to reproduce the data observed by the witnesses, or the facts are difficult of explanation, or complex, or are of a combination of circumstances and appearance which cannot be adequately described and presented with the force and clearness as they appeared to the witness, the witness may state his impressions and opinions based on what . . . the witness has seen or heard. If the jury can be put into a position of equal vantage with the witness for drawing the opinion, then the witness may not give an opinion.
b. expert opinion testimony

Expert testimony is permitted under the Federal Rules of Evidence if it will assist the trier of fact to understand or determine a fact at issue. A qualified expert is not limited to testifying in the form of an opinion, but may also give the trier of fact a dissertation or exposition of relevant scientific or other principles to apply to the facts of a particular case. The facts or other information upon which an expert may base an opinion may be derived from three sources: (1) information obtained by firsthand observation or examination, such as a treating physician's testimony about what his observations revealed; (2) information presented at trial, such as an opinion in response to a hypothetical question; and (3) information or facts given to the expert out of court other than that which the expert perceived. The Federal Rules of Evidence expand the common law by permitting an expert to form an opinion based upon facts or data, which themselves are inadmissible, if such information is "reasonably relied upon by experts in the particular field in forming opinions." Similarly, an expert may even render an opinion...
on an "ultimate issue to be decided by the trier of fact."\textsuperscript{2653}

In \textit{Barefoot v. Estelle},\textsuperscript{2654} the Supreme Court held that it was not unconstitutional for the State of Texas to introduce expert psychiatric testimony at a sentencing hearing to assist the jury's determination of whether the death penalty was required in a particular case.\textsuperscript{2655} Following a jury trial, Barefoot was convicted by a Texas court of the capital murder of a policeman.\textsuperscript{2656} Pursuant to Texas law, a separate hearing was held before the same jury to determine whether the defendant should be sentenced to life imprisonment or death.\textsuperscript{2657} The statute authorized the presentation of any constitutionally acquired evidence concerning any matter which the court deemed relevant to sentencing.\textsuperscript{2658} In addition, the state and the defendant were given the opportunity to argue for or against the imposition of capital punishment.\textsuperscript{2659} The state presented evidence of Barefoot's prior convictions\textsuperscript{2660} and of his bad reputation.\textsuperscript{2661} The prosecution also called two psychiatrists as experts at the punishment hearing.\textsuperscript{2662} In response to hypothetical questions,\textsuperscript{2663} both psychi-

\textsuperscript{2653} FED. R. EVID. 704. "In many jurisdictions evidence in the form of an opinion is excluded if it purports to resolve the 'ultimate issue' to be decided by the trier of fact." S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL § 704, at 478 (3d ed. 1982). However, the basic approach to lay and expert opinions under the Federal Rules of Evidence "is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called 'ultimate issue' rule is specifically abolished by the instant rule (Rule 704)." FED. R. EVID. 704 advisory committee note.

\textsuperscript{2654} 103 S. Ct. 3383 (1983).

\textsuperscript{2655} Id. at 3396.

\textsuperscript{2656} Id. at 3389.

\textsuperscript{2657} TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1981) provides in part:

\begin{itemize}
  \item[(a)] Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable.
\end{itemize}

\textsuperscript{2658} Id.

\textsuperscript{2659} Id.

\textsuperscript{2660} 103 S. Ct. at 3389. The prosecution established that the defendant had two prior drug offense convictions and had been convicted twice for unlawful possession of firearms. \textit{Id.} at 3406 (Blackmun, J., dissenting).

\textsuperscript{2661} Id. at 3389. Several character witnesses from towns in five states were called by the prosecution. "Without mentioning particular examples of Barefoot's conduct, these witnesses testified that Barefoot's reputation for being a peaceable and law abiding citizen was bad in their respective communities." \textit{Id.} at 3407 (Blackmun, J., dissenting).

\textsuperscript{2662} Id. at 3389. "In the presence of the jury, and over defense counsel's objection, each was qualified as an expert psychiatrist witness." \textit{Id.} at 3407 (Blackmun, J., dissenting).

\textsuperscript{2663} Both psychiatrists were asked to assume as true about Barefoot the four prior convic-
The defendant did not offer any expert testimony at the sentencing hearing, nor did he introduce any evidence to rebut the psychiatric opinions given by the state's experts.

Texas law required the trial court to submit at least two special questions to the jury after the evidence was presented: (1) whether the defendant's actions causing the death were deliberately committed "with the reasonable expectation that the death of the deceased or another would result;" and (2) whether there was "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The jury returned an affirmative answer to both statutory questions, a result which required the death penalty under Texas law.

On certiorari from a denial of a stay of execution, the defendant contended that the Court must vacate his death sentence because the United States Constitution barred the state's use of psychiatric testimony against him at the punishment hearing. In an opinion written by Justice White, the Court noted that there were three aspects to Barefoot's claim: (1) psychiatrists were incompetent, both individually and as a group, to predict with a satisfactory degree of reliability that a particular offender will commit future crimes and thus continue to endanger society; (2) psychiatric testimony about future dangerousness based upon hypothetical questions was, in any event, impermissible absent a personal examination of the defendant; and (3) the use of hypothetical questions

2664. Id.
2665. Id. at 3397 nn.5 & 7.
2667. TEX. CRIM. PROC. CODE ANN. § 37.071(b)(2) (Vernon 1981).
2668. 103 S. Ct. at 3389-90. If the jury finds that the state has proved beyond a reasonable doubt that the answer to each issue submitted is "yes," then the death sentence is imposed. TEX. CRIM. PROC. CODE ANN. § 37.071(c), (e) (Vernon 1981).
2669. Barefoot's petitions for habeas corpus relief were denied by the Texas state courts and the federal district court. In Barefoot v. Estelle, 697 F.2d 593 (5th Cir. 1983), the Fifth Circuit denied a stay of execution pending appeal of the district court's judgment on the merits. The Supreme Court granted certiorari, treating Barefoot's application for a stay of execution as a petition for a writ of certiorari before judgment. 103 S. Ct. at 3390-92.
2670. 103 S. Ct. at 3395.
and psychiatric testimony in Barefoot's particular case was so unreliable that the Court should vacate his sentence because it was imposed in violation of his right to due process of law.\textsuperscript{2671} The Court rejected each of these claims.\textsuperscript{2672}

The Court noted that a ruling which excluded entirely from all trials psychiatric testimony about a defendant's future dangerousness would be akin to "disinvent[ing] the wheel."\textsuperscript{2673} Initially, such a ruling would be contrary to the Court's own precedents which establish that it is constitutionally permissible to consider the probability of a defendant's future dangerousness in imposing the death penalty.\textsuperscript{2674} The Court reasoned that because it was not impossible for lay persons to predict a criminal's future dangerousness,\textsuperscript{2675} it made little sense to conclude that psychiatrists were so incapable of rendering an opinion on the issue that they should not be permitted to testify.\textsuperscript{2676}

\textsuperscript{2671} Id. at 3395-96.
\textsuperscript{2672} Id. at 3396-400.
\textsuperscript{2673} Id. at 3396.
\textsuperscript{2674} Id. (citing Jurek v. Texas, 428 U.S. 262, 274-76 (1976) (plurality opinion)). The Jurek Court stated that a capital sentencing procedure which requires the jury to consider, inter alia, the probability that a defendant will commit future violent acts and endanger society is constitutionally acceptable under the eighth and fourteenth amendments. Although a determination based upon predictions of future behavior may be difficult to make, it is not impossible. Thus, the jury's task is basically no different from the task performed countless times each day [by any sentencing authority which necessarily must foretell a criminal's likely future conduct when it determines what sentence to impose]. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced. Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality opinion). See also Estelle v. Smith, 451 U.S. 454, 473 (1981) (states are allowed in capital cases to prove a defendant's future dangerousness as required by statute; Jurek in no sense disapproved of "the use of psychiatric testimony bearing on the issue of future dangerousness").

In California v. Ramos, 103 S. Ct. 3446, 3457 (1983), the Court stated that a jury instruction in a capital sentencing procedure which informed the jury of the governor's power to commute a life sentence without parole did not violate the eighth and fourteenth amendments. By informing the jury that the defendant could possibly be returned to society, the instruction merely required the jury's assessment of whether the defendant's probable future behavior made it undesirable to permit him to return to society. The Court indicated that because the instruction focused the jury's attention on the likelihood of the defendant's future dangerousness, Jurek was controlling. Id. at 3454. See Gregg v. Georgia, 428 U.S. 153, 203-04 (1976) (plurality opinion) (desirable to permit open and far-ranging argument which places all possible information before the jury).

The Barefoot Court observed that "[a]lthough there was only lay testimony with respect to dangerousness in Jurek, there was no suggestion by the Court that the testimony of doctors would be inadmissible. To the contrary, the Court said that the jury should be presented with all of the relevant information." 103 S. Ct. at 3396.

\textsuperscript{2675} The Court was referring to the Jurek case, where only lay testimony concerning the defendant's future dangerousness was presented. See supra note 2674.

\textsuperscript{2676} 103 S. Ct. at 3396. The Court noted that civil commitment similarly requires a finding
Secondly, the Court pointed out that federal and state evidentiary rules generally permit the admission of all relevant and unprivileged information.2677 It is for the trier of fact to determine the weight of the evidence presented, evidence which the defendant may rebut by cross-examination and by the introduction of contradictory evidence. Thus, psychiatric opinion about an individual's future dangerousness could be contradicted by evidence establishing that the opinion is incorrect or generally so unreliable that the fact finder should ignore it.2678 The Court reasoned that if jurors could decide about future dangerousness without the aid of psychiatric testimony, they should be allowed to hear a state psychiatrist's opinion on the issue along with the opinions of the defendant's experts.2679

Finally, the Court was not persuaded by the views expressed in the amicus brief filed by the American Psychiatric Association (APA). Although the APA's view reflected Barefoot's position that such opinions are almost entirely unreliable,2680 the Court was unwilling to convert that conclusion into a constitutional prohibition against the use of an entire class of expert testimony.2681 The Court emphasized that professional doubts about the utility of psychiatric predictions could be called

that the individual involved is dangerous to himself and others. Predictions in commitment hearings about an individual's future dangerousness routinely turn on the meaning of facts interpreted by expert psychiatrists and psychologists. The Court stated that acceptance of Barefoot's claim would cast doubt upon its approval of such predictions in civil commitments and other contexts. *Id.* at 3396-97 (citing Addington v. Texas, 441 U.S. 418, 429 (1979) (The factual issues in a commitment proceeding are only the beginning of the inquiry; "[w]hether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.").

2677. *Id.* at 3397. "The [provision] that all relevant evidence is admissible, with certain exceptions, . . . [is] 'a presupposition involved in the very conception of a rational system of evidence.'" Fed. R. Evid. 402 advisory committee note.

2678. 103 S. Ct. at 3397.

2679. *Id.* Barefoot did not offer any evidence at his trial to contradict the testimony of the state's experts. *Id.* at n.5. Furthermore, the defendant could not claim that he was denied the opportunity to present expert testimony at his trial because of his indigence. Under Texas law, an indigent defendant is provided with a $500 payment for "'expenses incurred for purposes of investigation and expert testimony.'" *Id.* (citing TEX. CRIM. PROC. CODE ANN. art. 26.05, § 1(d) (Vernon Supp. 1982)).

2680. 103 S. Ct. at 3397. The Court noted that the APA's position that psychiatric testimony on the issue of future dangerousness is too unreliable to be used as evidence was presented and rejected in Estelle v. Smith, 451 U.S. 454, 472-73 (1981). In *Estelle*, the Court vacated the defendant's death sentence because he was not informed of his fifth amendment right to remain silent, nor of his sixth amendment right to the assistance of counsel before a pretrial psychiatric examination. *Id.* at 466-71. Nevertheless, the Court stated that its decision "in no sense disapprov[ed] the use of psychiatric testimony bearing on the issue of future dangerousness." *Id.* at 473. See also supra note 2674.

2681. 103 S. Ct. at 3397. The Court stated:
to the jury's attention by the opposing party. Therefore, the adversary process provides the trier of fact with information from which it could sort out the reliable from the unreliable evidence on the issue of future dangerousness.\textsuperscript{2682}

The Court also held that psychiatric testimony on the issue of future dangerousness need not be based on personal examination of the defendant, but could properly be given in response to hypothetical questions.\textsuperscript{2683} The Court reasoned that expert opinion is often admitted in the form of a conclusion based on hypothetical questions.\textsuperscript{2684} Although Barefoot's case involved the death penalty, the Court found no constitutional barrier to the application of the normal evidentiary rules controlling the use of expert testimony.\textsuperscript{2685}
The Court likewise rejected Barefoot's claim that the use of hypothetical questions to predict future dangerousness in his particular case violated his right to due process of law. Barefoot claimed that the psychiatrists should not have been allowed to render an opinion on the ultimate question before the jury, that the hypothetical questions alluded to disputed facts, and that the responses to the questions were so certain that they constituted assertions of fact rather than opinions. The Court, however, agreed with the lower courts and found no constitutional infirmity in the application of the state's evidentiary rules.

Justice Blackmun filed a dissenting opinion in which he noted that the psychiatric profession itself conceded that psychiatric predictions concerning future dangerousness are wrong more often than not. He concluded that the Court's commitment to reliability in the...
death penalty arena required that such highly prejudicial and non-probative testimony “on the ultimate question of life or death be excluded from a capital sentencing hearing.”

7. Hearsay
   a. admissions

   Statements made, authorized, acquiesced in, or adopted by a party-opponent are not hearsay under the Federal Rules of Evidence if offered against the party-opponent. Statements made by the opposing party's agent or co-conspirator are similarly not hearsay. Such statements are deemed “admissions” and are excluded from the hearsay rule as a result of our adversary system rather than out of satisfaction that such statements are trustworthy.

   APA’s best estimate is that two out of three predictions of long-term future violence made by psychiatrists are wrong . . . [and] the Court does not dispute this proposition. Id. at 3408 (Blackmun, J., dissenting) (emphasis in original) (citations omitted).

2693. Id. at 3410 (Blackmun, J., dissenting). See Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (qualitative difference between death penalty and life imprisonment requires greater reliability in determination to impose the death sentence).

2694. 103 S. Ct. at 3413 (Blackmun, J., dissenting). Justice Blackmun made three points in his dissent. First, he believed that psychiatric testimony is too unreliable to be allowed at a capital hearing. Id. at 3408 (Blackmun, J., dissenting). He noted that even the majority opinion admitted that such testimony increased the probability of the death sentence, but was wrong two out of three times. Id. (Blackmun, J., dissenting). Second, Justice Blackmun did not believe that the adversarial process could adequately protect defendants from inaccurate opinions because experts themselves were incapable of distinguishing between valid and invalid psychiatric opinions. Thus, he could not understand how jurors could be expected to make such a distinction. Id. at 3413 (Blackmun, J., dissenting). He was also unconvinced that cross-examination and the introduction of rebuttal evidence could adequately overcome the prejudicial impact of misleading psychiatric testimony. Id. at 3414-16 (Blackmun, J., dissenting).

Finally, Justice Blackmun stated that neither Jurek v. Texas nor Estelle v. Smith supported the conclusion that expert psychiatric testimony is necessarily admissible on the issue of a defendant's future dangerousness. Id. at 3416 (Blackmun, J., dissenting). He suggested that since Jurek involved only lay opinion, the fact that the Jurek court did not disapprove of the use of psychiatric testimony was irrelevant. Id. (Blackmun, J., dissenting). Similarly, Justice Blackmun noted that the Smith Court never reached the issue of the reliability of expert psychiatric testimony nor did it reject the APA's position in Barefoot. Id. at 3417 (Blackmun, J., dissenting).

2695. FED. R. EVID. 801(d)(2) provides:

A statement is not hearsay if . . . offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

2696. FED. R. EVID. 801(d)(2) advisory committee note.

This notion, that it does not lie in the opponent's mouth to question the trustworthi-
In United States v. Gibson,2697 the Ninth Circuit held that out of court statements made by the defendant's salesmen were admissible against the defendant for the nonhearsay purpose of showing the existence of a scheme to defraud investors.2698 Gibson was convicted on several counts of fraud surrounding his corporation's sale of franchise distributorship rights and franchises to fast food restaurants.2699

On appeal, he contended that the trial court erred in admitting the testimony of defrauded investors concerning statements made by the corporation's salesmen.2700 The defendant claimed that the statements testified to by the investors were hearsay because the trial court failed to find either that the defendant had authorized the statements2701 or had been present2702 when the statements were made.2703 Gibson additionally al-

ness of his own declarations, is an expression of feeling rather than logic but it is an emotion so universal that it may stand for a reason. The feeling that one is entitled to use the opponent's words is heightened by our contentious or adversary system of litigation.


2697. 690 F.2d 697 (9th Cir. 1982), cert. denied, 460 U.S. 1046 (1983).

2698. Id. at 701-02.

2699. Id. at 699-700. 18 U.S.C. § 1341 (1976) provides in pertinent part:

   Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343 (1976) proscribes the same offense through the use of the wires. 18 U.S.C. § 2314 (1976) in relevant part provides:

   Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more;

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

2700. 690 F.2d at 700.

2701. "A statement is not hearsay if... offered against a party and is... a statement by a person authorized by him to make a statement concerning the subject." Fed. R. Evid. 801(d)(2)(C).

2702. "A statement is not hearsay if... offered against a party and is... a statement of which he has manifested his adoption or belief in its truth." Fed. R. Evid. 801(d)(2)(B).

Although the Gibson court noted that "a corporate officer [could not] be convicted on the basis of the statement of any salesman [and that] the prosecution must show that the corporate officer 'expressly or impliedly authorized or ratified' the representations," it held that he evidence showed that Gibson had "authorized and ratified the making of [the] statements" based
leged that his confrontation rights were violated by the admission of the hearsay statements. However, the court rejected the defendant’s claims, holding that the statements were not hearsay and did not violate Gibson’s rights under the confrontation clause.

The court reasoned that the purpose of the disputed testimony was not to prove the truth of the statements related by the investors, but rather to prove the fact that the statements had been made by the salesmen. That fact was relevant to establish the existence of a plan to defraud investors. In the alternative, the court explained that if the statements were hearsay, they were nevertheless admissible under one of two exceptions to the hearsay rule: (1) statements by an agent; or (2) statements by a co-conspirator.

In reaching its conclusion, the court surveyed recent decisions in other circuits supporting its construction and interpretation of the hearsay rule. However, the court’s reliance on decisions from other circuits upon the “scope of the scheme [and] the facts and circumstances of the . . . case.” 

690 F.2d at 701-02. Accordingly, the salesmen’s statements were also “admissible to show Gibson’s participation in, and intent regarding, the scheme to defraud these investors.” 

Id. at 701.

Id.

“Hearsay” is any out of court statement offered to prove the truth of the matter asserted. FED. R. EVID. 801(c).

690 F.2d at 701. See Dutton v. Evans, 400 U.S. 74 (1970) (defendant’s confrontation rights are potentially violated whenever hearsay evidence is admitted under the co-conspirator exception). See also infra note 2742.

Id. at 700.

690 F.2d at 700.

2705. “Hearsay” is any out of court statement offered to prove the truth of the matter asserted. FED. R. EVID. 801(c).

690 F.2d at 701. See Dutton v. Evans, 400 U.S. 74 (1970) (defendant’s confrontation rights are potentially violated whenever hearsay evidence is admitted under the co-conspirator exception). See also infra note 2742.

Id. at 700.

A statement offered against a party is not hearsay if it is “a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship.” FED. R. EVID. 801(d)(2)(D).

690 F.2d at 701. A statement offered against a party is not hearsay if it is a “statement by a co-conspirator of a party [made] during the course and in furtherance of the conspiracy.” FED. R. EVID. 801(d)(2)(E). In light of the Gibson court’s conclusion that the statements were not hearsay, it was unnecessary for the court to discuss the co-conspirator exception to the hearsay rule since no conspiracy had been charged. On the other hand, the Ninth Circuit has held that the co-conspirator exception may be used even though no conspiracy is charged. See United States v. Williams, 435 F.2d 642 (9th Cir. 1970) (in a prosecution for narcotics, concert of action established by independent evidence).

573 F.2d at 1382 (10th Cir.), cert. denied, 436 U.S. 949 (1978), involved a prosecution for mail fraud in which the alleged victims of the scheme testified about
cruits was arguably unnecessary, because the Ninth Circuit has adopted this line of reasoning in the past with respect to the admission of statements by a co-conspirator.\(^{2711}\) Thus, there was ample authority for the *Gibson* court to allow the statements for the nonhearsay purpose of establishing the existence of a scheme to defraud investors.\(^{2712}\)

**b. co-conspirator exception**

Rule 801(d)(2)(E) of the Federal Rules of Evidence\(^{2713}\) excludes from the hearsay rule a co-conspirator's out of court statement offered against another co-conspirator.\(^{2714}\) However, the exclusion is subject to statements and representations made by participants in the scheme. *Id.* at 1386. In rejecting the defendant's hearsay argument, the Tenth Circuit observed that:

The statements and representations complained of were not offered to prove the truth of the matters stated, and indeed the Government says the statements were essentially untrue. Since the Government sought to prove the making of the statements but not the truth of the matters asserted by them, there is no actual hearsay question. *Id.* (citations omitted).

*United States v. AMREP Corp.*, 560 F.2d 539 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978), likewise involved a business fraud scheme. There, the Second Circuit held that "statements and representations made by the [corporation's] sales representatives in furtherance of the scheme are admissible against the [defendant] officers" where there is evidence linking the defendant officers to the scheme. 560 F.2d at 545 (citations omitted). However, the rationale supporting the admissibility of the evidence in *AMREP* was that the statements were authorized admissions. *Id.*

Similarly, the *Gibson* court reasoned that the salesmen's statements were independently admissible against the defendant as authorized admissions because the evidence indicated that the defendant had authorized and ratified these statements. 690 F.2d at 701-02.

\(^{2711}\) *See United States v. Calaway*, 524 F.2d 609 (9th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976), where the court held that "statements and representations made by the [corporation's] sales representatives in furtherance of the scheme are admissible against the [defendant] officers" where there is evidence linking the defendant officers to the scheme. *See also United States v. Hatcher*, 496 F.2d 529 (9th Cir. 1974) (per curiam) (statements may be admissible to show that they were made, rather than for the truth of the matter asserted).

\(^{2712}\) The court recognized in a footnote that the truth or falsity of the statements "was important to the outcome of the case. However, the fact that the statements were made was not used to prove the truth of the content of the statements. Instead, the government sought to show their falsity [i.e., that they were fraudulent] through independent evidence." 690 F.2d at 700 n.1.

\(^{2713}\) *FED. R. EVID.* 801(d)(2)(E) provides: "A statement is not hearsay if . . . offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

\(^{2714}\) *See United States v. Fielding*, 645 F.2d 719, 725 (9th Cir. 1981). *See also United States v. Weiner*, 578 F.2d 757, 768 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978). The *Weiner* court noted that, in the Ninth Circuit,

[t]he quantum of independent proof necessary for the application of the co-conspirator hearsay exception is sufficient, substantial evidence to establish a *prima facie* case that the conspiracy existed and that the defendant was a part of it. Once the existence of a conspiracy has been established, independent evidence is necessary to show *prima facie* the defendant's connection with the conspiracy, even if the connection is slight. 578 F.2d at 768-69 (emphasis added) (citations and footnote omitted). Compare this less strin-
the limitation that the proponent of the evidence first lay a foundation establishing that: (1) the declaration was made in furtherance of the conspiracy; (2) the declaration was made during the conspiracy; (3) there is independent proof of the existence of the conspiracy; and (4) there is independent proof of the defendant's connection with the conspiracy. Recent Ninth Circuit decisions have considered both the sufficiency of the foundational requirements and the extent to which co-conspirators' statements themselves may be used as independent proof of the conspiracy's existence.

In *United States v. Everett*, the Ninth Circuit held that a hearsay statement made by an indicted co-conspirator's agent is admissible under the co-conspirator admission exception where the agent is "sufficiently connected" to the conspiracy to qualify as an indicted co-conspirator. The Ninth Circuit has held that:

Once the existence of a conspiracy has been established only slight evidence is required to connect any given defendant with it. The "slight" evidence must be of a quality which will reasonably support a conclusion that the particular defendant in question willfully participated in the unlawful plan with the intent to further some object or purpose of the conspiracy. A common purpose and plan need not be proved by direct evidence but may be inferred from circumstantial evidence.

United States v. Freie, 545 F.2d 1217, 1221-22 (9th Cir. 1976) (citations omitted), *cert. denied*, 430 U.S. 966 (1977). *Freie* involved a prosecution for conspiracy to possess marijuana with intent to distribute. The court found that three of the defendants were sufficiently connected to the conspiracy based upon direct and circumstantial evidence of their involvement in a shoot-out with customs officers at an airstrip. However, the court held that a co-defendant discovered 40 miles from the airstrip was not adequately connected. Cf. *United States v. Dunn*, 564 F.2d 348 (9th Cir. 1977), where the court restated the "slight" evidence rule:

Once the evidence 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.

*Id.* at 357 (emphasis in original) (footnote omitted).


2717. The "sufficiency" of the agents' connection to the conspiracy was not discussed in the court's opinion. The court merely noted that the employee "was a target of investigation." *Id.* at 601.
conspirator.\footnote{2718}{Id.} Defendants Everett and Chira were convicted of conspiracy to defraud the United States government by hindering and obstructing the Internal Revenue Service in the collection of tax revenue.\footnote{2719}{18 U.S.C. § 371 (1976) provides in pertinent part:}

\begin{verbatim}
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 five years or both. A jury found Chira and Everett guilty of defrauding the Treasury Department, a United States agency, by impairing, impeding, and obstructing its lawful function of collecting tax revenue. \footnote{2720}{692 F.2d at 598.} \footnote{2721}{The government’s witness “was an Intervest employee who acted as a ‘trustee’ for Intervest’s clients in tax shelter transactions,” and who “testified at trial in return for immunity.” \textit{Id.} at 598 n.2.} \footnote{2722}{Id. at 601.} It is possible that the employee’s declarations were independently admissible as circumstantial evidence of Chira’s state of mind because the statements tended to show that Chira, the listener, knew of the document tying the defendants to the illegal transaction. When so construed, the evidence would be relevant to the issue of whether Chira intended to defraud the United States. In fact, the \textit{Everett} court explained that “[a] conspiracy to defraud the United States . . . only requires an agreement to impede the government’s lawful functions.” \textit{Id.} at 599. Thus, the court reasoned that “the jury could have inferred from the evidence presented that Chira intended to agree with Everett and others to impede the collection of taxes.” \textit{Id.} at 601-02.

Similarly, the testimony concerning the substance of the telephone conversation may have been relevant to impeach Chira by showing the existence of contradictory facts had he denied knowledge and preparation of the document. \textit{See} 3 J. \textit{Weinstein} & M. \textit{Berger}, \textit{Weinstein’s Evidence} ¶ 607[05] at 607-50 (1978).}
The court adopted the trial court’s rationale, noting that the Intervest employee was acting as an agent of Intervest, an indicted co-conspirator. Furthermore, the court reasoned that since the Intervest employee was himself a target of the government’s investigation of the crime and “sufficiently connected” to the conspiracy, he qualified as an unindicted co-conspirator whose statements were admissible for the purpose of Rule 801(d)(2)(E).

In any event, the court concluded that the government’s witness had provided sufficient direct testimony to show that Chira knew of and was connected with the conspiracy. Therefore, even if the trial court erred in admitting the hearsay, the error was harmless.

In United States v. De Luca, the court held that an alleged co-conspirator’s extrajudicial remark concerning the destruction of an auto parts competitor was made in furtherance of a conspiracy to commit arson and extortion. The statement was therefore properly admitted against a co-defendant in a prosecution arising from his attempt to control the rebuilt foreign auto parts market in Southern California.

Defendant Kaye was the owner of a company which manufactured rebuilt electric foreign auto parts. The court noted that he disliked competition. Between 1974 and 1980, eight of Kaye’s competitors were struck by arson. Kaye and three co-defendants were subsequently tried and convicted on counts of conspiracy, racketeering, extortion, and the use of explosives, based upon acts of arson and threats to Kaye’s competitors.

On appeal, the conspiracy count was reversed because of an erroneo-
ous jury instruction. However, the Ninth Circuit rejected Kay's contention that reversal of the conspiracy count precluded reliance on the co-conspirator's hearsay remark as support for Kaye's other convictions. The court reasoned that since the evidence was sufficient to establish a prima facie showing of a conspiracy as well as Kaye's connection with it, the co-conspirator hearsay was admissible despite the ultimate outcome on the conspiracy count.

Alternatively, Kaye contended that the co-defendant's statement was inadmissible against him because it was not made during the course of or in furtherance of the conspiracy. The Ninth Circuit also repudiated his claim. The court admitted that the co-defendant's reference to the fate of Kaye's competitors would not necessarily further the conspiracy's objectives. Nevertheless, the court reasoned that the trial

is the general federal conspiracy statute. The conspiracy count also failed because the trial court erred in giving a multiple-object conspiracy jury instruction. Reversing the conspiracy conviction and the convictions under § 844(i) still had no effect on the extortion and racketeering counts. The Racketeer Influenced and Corrupt Organizations Act (RICO) generally augments the federal conspiracy statute by prohibiting a pattern of racketeering activity. See 18 U.S.C. §§ 1961-1968 (1982). "Racketeering activity" includes extortion under RICO. The DeLuca court reasoned that each fire formed the basis for extortion by physical violence as defined by state law irrespective of the arson counts. The fires were further "charged as predicate offenses under state law for the RICO count." The DeLuca court cited United States v. Batimana, 623 F.2d 1366, 1368 (9th Cir.), cert. denied, 449 U.S. 1038 (1980), and United States v. Spawr Optical Research, Inc., 685 F.2d 1076, 1082 (9th Cir. 1982), cert. denied, 103 S. Ct. 1875 (1983), for this proposition. In Batimana, the defendants in a prosecution for conspiracy to possess and distribute heroin challenged their connection to the conspiracy rather than the conspiracy's existence. 623 F.2d at 1368. The Batimana court noted that in the Ninth Circuit, the trial judge may provisionally admit out of court statements subject to later motions to strike. Id. at 1369 (citing United States v. Vargas-Rios, 607 F.2d 831, 836-37 (9th Cir. 1979)). Notwithstanding this rule, the Batimana court concluded that the evidence against the defendants was sufficient to meet the prima facia showing irrespective of the challenged statements. Id. The DeLuca court likewise found that a conspiracy had existed which "began with the first arson in 1973." 692 F.2d at 1284. Hence, the reversal of the conspiracy count because of the erroneous jury instruction did not mean that the trial judge erred when he provisionally admitted the disputed statement upon hearing sufficient evidence to establish a prima facia conspiracy and Kaye's connection to it. Id. at 1281. However, the DeLuca court's use of Spawr Optical as authority for the principle that "co-conspirator hearsay [is] admissible notwithstanding the eventual result on the conspiracy count" is misplaced. Id. The court in Spawr Optical affirmed the defendant's convictions of conspiracy to violate export laws. 685 F.2d at 1083. The disputed statement: "there is another competitor that's gone," was uttered by a co-defendant holding a lit match in Kaye's presence. Id.
judge could have found that the remark was threatening toward the listener, who subsequently went to work for one of Kaye's competitors.2739

Furthermore, the court found that the statement was made "during the course of the conspiracy."2740 The court reasoned that the statement must have been uttered after 1973 and during the conspiracy's course because the threatening remark clearly referred to the destruction of Kay's competitors by fire, and the speaker used the present tense.2741

Finally, the court held that the statement manifested adequate signs of reliability to meet the confrontation requirements of the sixth amendment of the United States Constitution and the Supreme Court decisions interpreting the confrontation clause.2742 The court explained that the

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2739. Id. at 725-28.
2740. Id. The court observed that "[t]he conspiracy began with the first arson in 1973." Id. 2741. Id. See supra note 2736.
2742. Id. The confrontation cause, discussed infra at notes 2845-46 and accompanying text, provides that "[i]n criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Supreme Court has warned that a defendant's confrontation rights are potentially violated whenever hearsay evidence is admitted under the co-conspirator exception. Dutton v. Evans, 400 U.S. 74, 86-89 (1970). The problem in terms of confrontation clause analysis stems from the declarant's assertion of his fifth amendment right against self-incrimination. The declarant co-conspirator is thereby made unavailable for cross-examination, which constitutes "the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974). To reconcile these two seemingly inconsistent constitutional provisions, the Supreme Court has developed a two-prong test to determine when an accused's rights under the confrontation clause are violated by the admission of hearsay evidence. In order to comport with the substance of the confrontation clause, the government must prove that the hearsay evidence is both necessary and reliable. Ohio v. Roberts, 448 U.S. 56, 64-66 (1980). The necessity requirement is satisfied where the prosecution shows that the declarant is unavailable. Id. at 65. The fulfillment of this requirement is a relatively simple task where the declarant invokes the fifth amendment. A declarant is "unavai[able] as a witness" when he is "exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement." Fed. R. Evid. 804(a)(1).

The prosecution can satisfy the reliability requirement by demonstrating that the evidence is "trustworthy." Ohio v. Roberts, 448 U.S. 56, 65-66 (1980). In addition, the Ninth Circuit has recently held that "the relevant factors for testing the reliability of coconspirator's statements suggested in Dutton v. Evans . . . are still to be considered in this circuit for judging whether a defendant's confrontation rights were violated by the admission of coconspirator statements against him." United States v. Fleishman, 684 F.2d 1329, 1339 (9th Cir.), cert. denied, 459 U.S. 1044 (1982); see also United States v. Perez, 658 F.2d 654, 660-61 (9th Cir. 1981). The Fleishman court observed:

The four reliability factors discussed in Dutton and Perez are: (1) whether the decla-
"reliability" requirement was satisfied because the declarant's statement was spontaneous, against his penal interest, and within his personal knowledge. Accordingly, the court held that the statement was admissible against Kaye.

In *United States v. Gee*, the Ninth Circuit considered whether the trial court had committed reversible error by admitting alleged co-conspirators' out of court statements which were made before independent evidence could establish the defendant's participation in an alleged conspiracy to distribute cocaine.

The defendant was prosecuted for conspiracy alone. The court noted that the government's only evidence against Gee was the testimony of an undercover agent and two tape-recorded conversations involving Gee, his alleged co-conspirators, and the undercover agent.

The *Gee* court recognized the Ninth Circuit rule which provides that an alleged co-conspirator's statements, made before the defendant's involvement in the conspiracy can be independently shown, are not ad-

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684 F.2d at 1339 (citing Perez, 658 F.2d at 661).
2743. 692 F.2d at 1284. This fact established factors one and three of the *Dutton* test. *See supra* note 2742. *Cf.* FED. R. EVID. 803(1) and (2).
2744. 692 F.2d at 1284. This fact arguably satisfied the fourth prong of the *Dutton* test. *See supra* note 2742. *Cf.* FED. R. EVID. 804(b)(3).
2745. 692 F.2d at 1284. The *DeLuca* court did not elaborate on its finding that the declarant's statement was within his personal knowledge. If the court meant that the declarant's remark indicated personal knowledge of Kaye's identity and participation in the crime, then the second factor of the *Dutton* test was satisfied. Since Kaye was present when the remark was made, it is reasonable to infer this interpretation. On the other hand, it is of little consequence if the court meant something else because the court correctly cites *United States v. Fleishman*, 684 F.2d 1329, 1339-40 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982), for the principle that "not all of *Dutton*'s reliability factors are necessary for admission of declarations." 692 F.2d at 1285.
2746. 692 F.2d at 1284.
2747. 695 F.2d 1165 (9th Cir. 1983).
2748. *Id.* at 1166.
2749. *Id.* The defendant was prosecuted under 21 U.S.C. § 841(a)(1) (1976), which makes it unlawful for any person to intentionally or knowingly distribute a controlled substance or to possess a controlled substance with intent to distribute, and 21 U.S.C. § 846 (1976), which provides: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." The Ninth Circuit affirmed Gee's conviction for conspiring to distribute cocaine in violation of § 846, 695 F.2d at 1170.
2750. 695 F.2d at 1170.
missible to show the defendant's participation.\footnote{2751} The court conceded that the statements were made before independent evidence had established Gee as a participant in the conspiracy; nevertheless the court concluded that the admission of the statements resulted in harmless error because evidence of the defendant's guilt was overwhelming.\footnote{2752}

In light of the Ninth Circuit rule prohibiting the admission of co-conspirator statements against the defendant, made prior to the defendant's participation in the conspiracy,\footnote{2753} the Gee court's holding is questionable. The government's evidence against Gee consisted primarily of hearsay.\footnote{2754} Furthermore, many of the tape-recorded conversations between the undercover agent and Gee were unintelligible.\footnote{2755}

Therefore, if the Ninth Circuit rule is taken literally,\footnote{2756} it is arguable that the Gee court should have reversed Gee's conviction. The Ninth Circuit conceded that the trial judge admitted co-conspirator statements

\footnote{2751. \textit{Id.} at 1169. The Gee court cited United States v. Williams, 668 F.2d 1064 (9th Cir. 1982) and United States v. Eubanks, 591 F.2d 513 (9th Cir. 1979) as authority for this rule. In Williams, the court reversed Williams' conviction for conspiring to collect a debt by extortionate means. The trial judge made no initial determination concerning whether the alleged co-conspirator's statement had been made during and in furtherance of the conspiracy, although it was brought to the judge's attention by the defense counsel. Therefore, the Ninth Circuit held that the hearsay statement made by the defendant's alleged co-conspirator had been improperly admitted. 668 F.2d at 1070. Eubanks involved a prosecution for conspiracy to distribute heroin and to possess heroin with intent to distribute. Again, the court reversed the defendant's conviction because the trial judge failed to determine whether the foundational requirements for the co-conspirator exception to the hearsay rule had been satisfied. 591 F.2d at 521. On review, the court held that the incriminating statements "were inadmissible hearsay because they were not made in furtherance of the alleged conspiracy." \textit{Id.} at 519.

2752. 695 F.2d at 1169.

2753. \textit{See supra} note 2751 and accompanying text.

2754. Hearsay evidence is any "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." \textit{Fed. R. Evid.} 801(o). The evidence at issue in Gee consisted mainly of two tape-recorded conversations involving Gee, his alleged co-conspirators, and the undercover agent, as well as the undercover agent's testimony at trial relating to the out of court conversations. 695 F.2d at 1166. Of course, the trial judge has the responsibility to determine whether a sufficient foundation has been established for declarations to be admissible under the co-conspirator exception. United States v. Miranda-Uriarte, 649 F.2d 1345, 1349 (9th Cir. 1981) (citations omitted). Furthermore, the order of proof is within the sound discretion of a trial judge, who may admit co-conspirators' statements conditionally subject to a later motion to strike. \textit{Id.} at 1349 (hearsay statements made before independent evidence established that a conspiracy existed were improperly admitted, but the error was harmless because the declarations were merely cumulative and evidence of the defendant's participation in the conspiracy was overwhelming). Therefore, it is reasonable to infer that the trial judge in Gee heard sufficient evidence to establish a prima facie showing of a conspiracy before the disputed testimony was introduced. The Ninth Circuit acknowledged that there was overwhelming evidence of Gee's guilt without elucidation. 695 F.2d at 1169.

2755. 695 F.2d at 1170 (Fletcher, J., concurring).

2756. \textit{See supra} notes 2751 & 2753 and accompanying text.
uttered before independent evidence had established Gee as a participant in the conspiracy charged. On the other hand, a reversal may have been inconsistent with the Ninth Circuit's position that all the proponent needs to show and the judge needs to find to admit a co-conspirator's statements is evidence sufficient to sustain a finding that a conspiracy existed.

In United States v. Tamura, the Ninth Circuit considered whether the trial court had abused its discretion by admitting certain telex messages implicating the defendant in a bribery scheme. Tamura was the manager of a Los Angeles based corporation which imported telephone cables manufactured by its parent corporation in Japan. He was convicted on several counts of bribery, mail and wire fraud, conspiracy, racketeering, and Travel Act violations arising from a scheme to rig the bidding for supplying telephone cable to the City of Anchorage, Alaska. By bribing a city engineer to tell the defendant's company

2757. 695 F.2d at 1169.
2758. See supra notes 2713-14.
2759. 694 F.2d 391 (9th Cir. 1982).
2760. Id. at 594.
2761. Id. 18 U.S.C. § 201(b) (1976) provides: 
Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official, or person selected to be a public official . . .

... shall be fined not more than $20,000 or three times the monetary equivalent [of the thing offered] . . . or imprisoned for not more than fifteen years, or both.
18 U.S.C. §§ 1341-1343 (1976) generally proscribe the use of the mail, wire, radio, or television for the purpose of conducting, promoting, or carrying on a device or scheme to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, and impose a penalty for violation of not more than a $1,000 fine, five years imprisonment, or both.
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.
18 U.S.C. § 1951 (1976) provides in pertinent part: 
(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —
   (1) distribute the proceeds of any unlawful activity; or
   
   (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1) [or] (3) , shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
(b) As used in this section “unlawful activity” means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.
which kinds of cable the city did not intend to purchase, the company would bid artificially low on the "non-buy items" and thus be awarded the contract even though the company was not the lowest bidder on the cables actually purchased.2762

The defendant’s company communicated with its headquarters and subsidiaries through a corporate telex network. Telex messages indicating Tamura’s participation in the scheme were offered into evidence at trial over Tamura’s objection that the telex messages constituted inadmissible hearsay. On appeal, the defendant’s principal argument against admissibility was that the telex messages did not come within the business records exception.2763

The Ninth Circuit, however, did not address the business records exception issue because it found other grounds sufficient to warrant admission of the telex messages.2764 The court first observed that the telex messages authored by the defendant were properly received as admissions.2765 The court then discussed the trial court’s conclusion that some of the telex messages were independently admissible as co-conspirator statements made in furtherance of the conspiracy. Since Tamura’s basic challenge on appeal concerned the admissibility of the telex messages under the business records exception, the Ninth Circuit reasoned that he had waived any objection to those telex messages admitted under the co-conspirator exception.2766

2762. 694 F.2d at 594.
2763. Id. at 597-98. The business records exception to the hearsay rule provides:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness [is not excluded by the hearsay rule] unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

FED. R. EVID. 803(6).
2764. 694 F.2d at 598. The court pointed out that the trial court admitted the telex messages "on three alternative grounds: (1) they fell within the business records exception to the hearsay rule; (2) they were admissible as co-conspirator statements . . . and (3) they were not hearsay because they were not used to assert the truth of their contents." Id. at 597-98.
2765. Id. "A statement is not hearsay if . . . offered against a party and is . . . his own statement, in either his individual or representative capacity.” Fed. R. Evid. 801(d)(2)(A).
See also United States v. Perez, 658 F.2d 654, 659 (9th Cir. 1981) (“Defendant’s own statements are admissions wholly apart from the coconspirator exception and as such are admissible as nonhearsay”).
2766. 694 F.2d at 598. “A statement is not hearsay if . . . offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.” Fed. R. Evid. 801(d)(2)(E). The waiver rule dictates that a defendant make "known to the court the action which he desires the court to take or his objection to the action of the
Finally, the court held that the remaining telex messages were admissible for the non-hearsay purpose of refuting Tamura's assertion that he was unaware of the bribery scheme and was merely following orders. The court implied that the telex messages were relevant as circumstantial evidence of Tamura's knowledge of the bribery scheme. The court reasoned that since "the only manner in which the telexes could have prejudiced [Tamura] was their use for the non-hearsay purpose of showing his knowledge of the scheme," the trial court had not abused its discretion in admitting this evidence.

In United States v. Brooklier, the Ninth Circuit held that co-conspirators' out of court statements are admissible as independent evidence of the co-conspirators' participation in the conspiracy. The defendants were convicted of violating federal racketeering statutes as a result of their participation in a conspiracy to extort money from Los Angeles pornographers and bookmakers. The defendants challenged court and the grounds therefor." FED. R. CRIM. P. 51. Furthermore, error "may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and ... a timely objection or motion to strike appears of record, stating the specific ground of objection." FED. R. EVID. 103(a)(1) (emphasis added). The record in Tamura indicated that the defendant objected that the telexes were "inadmissible hearsay" at trial. However, since Tamura did not challenge on appeal the statements' admissibility under the co-conspirator statements exception, the court considered it waived. Id. at 598.

2767. 694 F.2d at 597. However, since Tamura did not challenge on appeal the statements' admissibility under the co-conspirator statements exception, the court considered it waived. Id. at 598.

2768. 694 F.2d at 598. The court explained that most of the telex messages were instructions to employees concerning concealment of the bribery scheme rather than factual assertions. The commentators have noted that "[a]n utterance or a writing may be admitted to show the effect on the hearer or reader when this effect is relevant. The hearsay rule does not apply because the utterance is not being offered to prove the truth or the falsity of the matter asserted." 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 801(c)[01] at 801-77-78 (1979).

2769. 694 F.2d at 598.

2770. 685 F.2d 1208 (9th Cir. 1982) (per curiam), cert. denied, 459 U.S. 1206 (1983).

2771. Id. at 1219-20. The court found that the defendants were all members of the Los Angeles "family" of "La Cosa Nostra, a secret national organization engaged in a wide range of racketeering activities, including murder, extortion, gambling, and loansharking." Id. at 1213.

2772. In 1974, defendants Dominic Brooklier and Samuel Sciortino were charged with violating 18 U.S.C. § 1962(d) (1976), which proscribes engaging in a conspiracy to conduct an extortion ring. 685 F.2d at 1214 n.5. In 1980, an indictment was brought charging defendants with violating 18 U.S.C. § 1962(c) (1976), which makes it unlawful to "conduct or participate, directly or indirectly, in the conduct of such [racketeering] enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c) (1976). "Extortion" is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (1976). 18 U.S.C. § 1951(a) (1976) provides in part:

"Whoever in any way or degree obstructs, delays, or affects commerce ... by ... extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in
the admission of their alleged co-conspirators' statement on the basis that their co-conspirators' involvement in the conspiracy had not been corroborated by independent evidence.

The defendants asserted that, in the absence of such independent corroboration, the statements were inadmissible.

The court stated that in determining whether the declarants participated in the conspiracy, the court treats each declarant's statement as independent evidence of his participation. In other words, the court treats the statements as "verbal acts" showing involvement.

The defendants appealed their convictions for racketeering violations and for violating 18 U.S.C. §§ 1951(a) and (2). For further discussion of the Racketeer Influenced and Corrupt Organizations Act (RICO), see supra note 2732 and accompanying text.

The disputed statements were disclosed by the testimony of Aladena "Jimmy the Welder" Fratianno, a government witness to whom defense counsel referred as "a perjurer, paid informant, and murderer who escaped the death penalty by cooperating with the FBI, and whose book sales would be enhanced by a conviction." The court stated that Fratianno's testimony "was the only link connecting Brooklier and Sciortino to the... extortion attempt," because the declarants did not testify.

The Brooklier court cited United States v. Snow, 521 F.2d 730 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976), for the rule that a declarant's involvement in a conspiracy must be corroborated by independent evidence in order to invoke the co-conspirator exception to the hearsay rule. In Snow, the defendant appealed a conviction of conspiracy to possess cocaine with intent to distribute. The defendant argued that there was insufficient evidence of conspiracy and of his link to it to satisfy the foundational requirement for admissibility of an undercover agent's testimony regarding out of court statements made to him by the defendant's allegedly independent co-conspirator. The defendant contended that because these requirements were not independently met, the trial court erred in admitting the defendant's co-conspirator's extrajudicial statements implicating the defendant in the crime. However, the court viewed this reasoning as unpersuasive, finding instead that the following constituted sufficient independent evidence of a conspiracy: the agent's accounts of discussions with the defendant in which plans for supplying the cocaine were described in great detail; the defendant's presence at the co-conspirator's home at the time the sale of cocaine was to take place; the defendant's walking directly to the room where the drugs were found; and the defendant's attempted flight upon learning that law enforcement agents were present.

Brooklier, however, is distinguishable from Snow on its facts. The court noted that since neither of the declarants testified, the testimony concerning their out of court statements was the only link connecting the remaining co-defendants to the extortion attempt.

The Brooklier court cited United States v. Calaway, 524 F.2d 609 (9th Cir. 1975), cert. denied, 424 U.S. 967 (1976), as authority for this principle. In Calaway, the court upheld the defendants' convictions for conspiring to violate federal gambling statutes despite arguments that the trial court erred in admitting "out of court (hearsay) statements by other conspirators, implicating them in the conspiracy." The defendants contended that there was insufficient independent evidence linking them to the conspiracy to permit the use of the hearsay statements against them. However, the court reasoned that since the existence of the charged conspiracy was proven on the record before it,
The use of alleged co-conspirators’ out of court statements for the non-hearsay purpose of showing involvement in the conspiracy arguably raises serious confrontation clause problems. The defendant against whom the alleged co-conspirator statements are offered loses the opportunity to cross-examine his “accusers” when they invoke the fifth amendment privilege against self-incrimination.

The Ninth Circuit held that the improper admission of a co-conspirator's statements was harmless error in United States v. Foster. Foster and his three co-defendants, Gibson, Wilson, and Jackson, were convicted of possession of heroin with intent to distribute and of conspiracy to possess heroin with intent to distribute.

The evidence at trial disclosed that Foster was in charge of an organization of persons which illegally distributed and sold heroin in the San Diego area. The organization's operation was intricate. Pushers sold the heroin in the streets. Upon obtaining a customer, the pusher would telephone an answering service number and leave a message for his supplier. The supplier would be reached through his beeper, obtain the pusher's telephone number, and ascertain the amount of heroin required to fill the order. The pusher would then receive this amount. The heroin for such distribution and sale was obtained and packaged by Foster and others. The court found that this evidence was clearly sufficient to show that a conspiracy existed as charged in the indictment.

On appeal, however, Foster contended that the trial court erroneously admitted statements made by defendant Jackson to undercover agents under the co-conspirator exception. The first statement was made during a heroin sale to an undercover agent. Jackson told the agent that Foster’s lieutenants did not have any drugs, that Foster was no longer selling drugs, and that the arrest of his co-conspirators had

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2779. See supra note 2714.
2780. See supra note 2742.
2781. 711 F.2d 871 (9th Cir. 1983), cert. denied, 104 S. Ct. 1602 (1984).
2782. 21 U.S.C. § 846 (1976) provides: “Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment . . . .” The intentional or knowing distribution of heroin or possession with intent to distribute is prohibited in 21 U.S.C. § 841(a)(1) (1976).
2783. 711 F.2d at 875-76.
2784. Id. at 876.
2785. Id. at 880.
2779. Id. at 613 (citing Fed. R. Evid. 801(d)). The Calaway court found that more than enough evidence existed, exclusive of hearsay, to support a finding that the appellant participated in the conspiracy. Therefore, admitting the hearsay statements was not error. Id.
Foster.2786 In the second statement, Jackson told another undercover agent that "Greg" (Foster) was no longer selling the drug because he had been robbed, but that he intended to sell heroin again after recovering the money.2787 Foster claimed that both statements failed to meet the co-conspirator exception's foundational requirements.2788

The Ninth Circuit agreed, finding that both statements were "mere narrative declarations insufficient" to meet the "in furtherance of the conspiracy" requirement of Rule 801(d)(2)(E).2789 The court rejected the government's position that the second statement was Jackson's "attempt to nurture [the agent's] continued interest in the organization by predicting that Foster would soon" renew selling heroin.2790 The court stated that a co-conspirator's declaration is inadmissible unless he is attempting to induce the listener to deal with or otherwise assist the conspirators in the achievement of their common objective.2791

The court further stated that declarations regarding activities of the conspiracy, including declarations of future plans, are also inadmissible

2786. Id.
2787. Id.
2788. Id. See supra notes 2713-15 and accompanying text for a discussion of the co-conspirator exception and its foundational requirements.
2789. 711 F.2d at 880 (citing Fed. R. Evid. 801(d)(2)(E)) ("A statement is not hearsay if . . . offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy"); United States v. Perez, 658 F.2d 654, 658 (9th Cir. 1981) (declaration must be in furtherance of conspiracy to be admissible under Rule 801(d)(2)(E)); and United States v. Fielding, 645 F.2d 719, 726 (9th Cir. 1981) (hearsay declarations of co-conspirators in marijuana smuggling venture regarding declarant's general business relationship with defendant, made to impress undercover agent in order to facilitate a new deal involving a new conspiracy that did not include defendant, were not "in furtherance of" conspiracy charged; admission of statements through undercover agent's testimony constituted reversible error).
2790. 711 F.2d at 880.
2791. Id. (citing United States v. Fielding, 645 F.2d 719, 726 (9th Cir. 1981) (quoting United States v. Moore, 522 F.2d 1068, 1077 (9th Cir. 1975), cert. denied, 423 U.S. 1049 (1976)).

In Moore, the court held that a co-defendant's statement implicating Moore in a prosecution for conspiracy to steal, conceal and sell government property was not made "in furtherance of" the conspiracy. United States v. Moore, 522 F.2d 1068, 977 (9th Cir. 1975), cert. denied, 423 U.S. 1049 (1976) (footnote omitted). The statement was made to a government witness who testified that, during a conversation with Moore's co-defendant concerning the stolen property, the co-defendant said that if he had to "go legitimate" he would have to get out of business. Id. at 1075. The court stated:

There is nothing to support a conclusion that [the co-defendant], by making the statement, was seeking to induce [the government witness] to deal with the conspirators or in any other way to cooperate or assist in achieving the conspirators' common objectives. Rather, the statement was, at best, nothing more than the [co-defendant's] casual admission of culpability to someone he had individually decided to trust.

Id. (citations omitted).
unless made with the intent to elicit the listener's cooperation. The court, however, reasoned that no such intent was evident from either of Jackson's statements. Therefore, the court found that admission of Jackson's statements under the co-conspirator exception had been improper. Nevertheless, the court held that reversal was not required because the error was harmless, reasoning that Foster was implicated by almost every witness and that there was overwhelming evidence of his guilt.

In United States v. Layton, the Ninth Circuit held that the trial court had abused its discretion in excluding certain statements made by Jim Jones, the leader of a religious organization known as the People's Temple, that were offered against Layton in his trial for the killing of a United States Congressman.

Layton was a member of the People's Temple "security force" and a follower of Jim Jones. He was charged with conspiring to murder and with aiding and abetting the murder of a congressman by participating in the shooting of Congressman Leo Ryan shortly before the mass suicide at Jonestown, Guyana. Congressman Ryan had visited Jones-town with a group of concerned relatives of Jonestown residents to

2792. 711 F.2d at 880.
2793. Id.
2794. Id. Although Gibson, a co-defendant of Foster, similarly contended that the trial court violated Rule 801(d)(2)(E) in admitting the first of Jackson's two statements described above, the court rejected his claim in a footnote. The court stated that "Gibson's contention based on the admissibility of statements under Fed. R. Evid. 801(d)(2)(E) relates only to the Jackson/Callier conversation described above. Gibson was never mentioned by Jackson in these statements. Thus, there is no basis for Gibson's challenge that the trial court violated Rule 801(d)(2)(E)." Id. at 882 n.5.
2795. Id. at 880-81. The court correctly stated that a "reversal is required only if it is more probable than not that the error materially affected the verdict." Id. at 880.
2796. Id. at 881.
2798. Id. at 557.
2799. 18 U.S.C. § 351(a), (b) (1976) provide in pertinent part:
   (a) Whoever kills any individual who is a Member of Congress . . . shall be punished . . . . (b) If two or more persons conspire to kill or kidnap any [congressman] and one or more persons do any act to effect the object of the conspiracy, each shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if death results to such individual.
2801. Jonestown was a settlement located in the jungle of the Republic of Guyana. It was
conduct a congressional investigation into reports of poor living conditions there and of residents being held against their will. He was killed at an airstrip near Jonestown when members of the People's Temple security force began shooting from a truck at Ryan and his party as they were preparing to leave Jonestown in two planes. Ryan's party included defectors from the Temple. Layton had feigned defection and was permitted to board one of the planes. As the plane was preparing to take off, Layton withdrew a concealed revolver that had apparently been given to him by other Temple members and shot two of the passengers. Layton was disarmed when his gun misfired, and the occupants of the plane escaped into the jungle. Layton was taken into custody by Guyanese civilians shortly thereafter.

Layton was additionally charged with conspiracy to murder and with aiding and abetting the attempted murder of Richard Dryer, who was wounded in the airstrip shooting incident. Dryer was an internationally protected person as the Chief of Mission for the United States in Guyana.

Layton's first trial resulted in a hung jury and was declared a mistrial by the district court. Prior to his second trial, the government moved for an order permitting the presentation of certain previously excluded statements at the retrial. The district court, however, again ruled that the statements were inadmissible, either as hearsay not falling within any exception to the hearsay rule, or as violative of the sixth amendment confrontation clause. The government appealed the court's denial of the evidentiary motion; the Ninth Circuit reversed as to

composed of approximately 1200 members of the People's Temple, a religious organization whose membership was primarily made up of American citizens. The leader of the People's Temple was Jim Jones, who also had control over most of the events in Jonestown. 720 F.2d at 551.

2802. Id.
2803. Id. at 552.
2804. Id.
2805. 18 U.S.C. § 1116(a) (1982) proscribes the killing or attempted killing of an internationally protected person, which includes any representative, officer, employee, or agent of the United States Government.
18 U.S.C. § 1117 (1982) provides: "If two or more persons conspire to violate section . . . 1116 . . . and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life."
2806. 720 F.2d at 551.
2807. Id. "At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial . . . ." Fed. R. Crim. P. 12(d)(I).
2808. 720 F.2d at 551.
three categories of evidence involving Jones, and it affirmed as to one
category respecting statements made by another Temple member.2809

The Ninth Circuit first observed that the government had offered
the statements made by Jim Jones and another Temple member to estab-
lish that Jones, Layton, and other Temple members had agreed to kill
Congressman Ryan before Ryan's delegation left Jonestown for the air-
strip and possibly before Ryan's arrival at Jonestown.2810 Based on the
government's offer of proof,2811 the district court found and the Ninth
Circuit agreed that the government had established a prima facie case of
a conspiracy to kill the congressman.2812 The district judge nevertheless
concluded that the statements at issue were inadmissible hearsay or were
so untrustworthy that they did not satisfy the requirements of the con-
frontation clause.2813 The Ninth Circuit reviewed each category of ex-
cluded evidence separately.2814

The first category of excluded statements consisted of tape-recorded
speeches made by Jim Jones to members of the People's Temple before
Congressman Ryan had arrived at Jonestown.2815 The speeches related
Jones's belief that the Ryan party was antagonistic to the People’s Tem-
ple movement, that they had lied about the Jonestown community, and
that Jones desired to kill the congressman.2816 The government offered
the statements to establish both that Jones had intended to kill Congress-
man Ryan and that Jones had participated in the conspiracy.2817 The

2809. *Id.*
2810. *Id.* at 555.
2811. *Id.* The government's offer of proof showed that the events at the airstrip had been
planned and coordinated: Layton discharged his gun in the plane immediately after other
Temple members shot at part of the Ryan delegation outside; Layton and Jones had been
involved in a discussion just before the Ryan party left for the airstrip; Layton had pretended
to defect with other Temple members who had left Jonestown with Ryan; Layton had engaged
in a conversation at the airstrip with a member of the group that had killed Ryan; and Lay-
ton's gun had apparently been given to him by another Temple member. *Id.* at 554.
2812. *Id.* at 553.
2813. *Id.* at 551.
2814. *Id.*
2815. *Id.* at 555. In response to reports of poor living conditions in Jonestown and of the
detention of residents against their will, Congressman Ryan went to Guyana. Ryan sent a
telegram on November 1, 1978 advising Jones of his intended visit and his plan to conduct an
official congressional investigation. Concerned relatives of Jonestown residents also planned to
join the Congressman. Ryan's impending visit was discussed by Jones in nightly speeches
piped through loudspeakers throughout Jonestown to its residents. *Id.* at 551.
2816. *Id.* at 555. In one of the speeches, Jones stated: "Here comes this man into our com-
munity . . . . If they enter this property illegally, they will not leave it alive." *Id.* Jones
stated in another pre-arrival speech that Congressman Ryan would regret it if he stayed "long
enough for tea," and that Jones did not want to pass up the opportunity of shooting "someone
in the ass like [Congressman Ryan]." *Id.*
2817. *Id.*
government contended that the statements were admissible under the co-conspirator exception to the hearsay rule. The district court excluded the statements, however, because it found that Jones' statements were not made "in furtherance of" any conspiracy.

The Ninth Circuit reversed. The court observed that statements advancing the objectives of a conspiracy satisfy the "in furtherance of" requirement of the co-conspirator exception. The court reasoned that

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2818. Id. "A statement is not hearsay if . . . offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).

The government contended that the statements were also admissible under the state of mind exception or as "nonassertive conduct." 720 F.2d at 555. "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition" is not excluded by the hearsay rule. Fed. R. Evid. 803(3). Furthermore, hearsay is an out of court statement. Fed. R. Evid. 801(c) (emphasis added). All evidence of verbal or nonverbal conduct which is not intended as an assertion is excluded from operation of the hearsay rule. Fed. R. Evid. 801(a) advisor committee note.

2819. 720 F.2d at 555-56. Before a statement of a co-conspirator is admitted into evidence against a defendant, the court must have independent proof of the conspiracy and of the defendant's connection to it. Id. at 555. Furthermore, the court must conclude that the statement was made both during and in furtherance of the conspiracy. United States v. Fielding, 645 F.2d 719, 726 (9th Cir. 1981). In Layton, the district court conceded that a conspiracy had been established but concluded that the government had failed to satisfy the "in furtherance of" requirement. 720 F.2d at 557.

2820. 720 F.2d at 564.

2821. Id. at 556-57 (citing 4 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE § 801(d)(2)(E)(I), at 801-174 (1981) (context in which particular statement is made must be examined in order to determine whether it advances conspiracy's objectives); United States v. Sears, 663 F.2d 896, 905 (9th Cir. 1981) (detailed account of bank robbery given to woman induced by defendant to let robbers use her home to dispose of their disguises following robbery furthered conspiracy's objectives of robbing bank and escaping safely), cert. denied, 455 U.S. 1027 (1982); United States v. Mason, 658 F.2d 1263, 1270 (9th Cir. 1981); United States v. Traylor, 656 F.2d 1326, 1333 (9th Cir. 1981) (statement ordering person not part of conspiracy to sell drugs to obtain materials for mixing of drugs was in furtherance of conspiracy); United States v. Sandoval-Villalvazo, 620 F.2d 744, 747 (9th Cir. 1980) (approving admission of statements made to reassure buyers of contraband of conspiracy's existence and to prevent buyer's departure prior to actual sale); United States v. Eubanks, 591 F.2d 513, 520 (9th Cir. 1979) (per curiam) (one conspirator's order to another to stop using heroin in order to be "'cleaned up' enough" to dispense drug, and statements concerning actual negotiations of heroin sale were in furtherance of conspiracy to distribute drugs); United States v. Eaglin, 571 F.2d 1069, 1083 (9th Cir. 1977) (statements made to inform conspirator about his co-conspirator's actions, to encourage continued involvement in conspiracy, or to allay fears of co-conspirator, were in furtherance of conspiracy), cert. denied, 435 U.S. 906 (1978); Salazar v. United States, 405 F.2d 74 (9th Cir. 1968) (per curiam) (statements made to reassure buyers that drug sales would occur and to prevent buyers from leaving before sales were completed were in furtherance of conspiracies to sell drugs)).

In Layton, the district court reasoned that Jones' statements were merely narrative declarations, conversations, or casual admissions of guilt which did not further any conspiracy to kill Congressman Ryan. 722 F.2d at 557. The Ninth Circuit, on the other hand, held that the statements were "expressions of future criminal intent." Id.
Jones' statements, when considered in context, supported an inference that they were made in furtherance of the conspiracy: they were made in front of a large crowd of Temple members over whom Jones exerted considerable influence; they informed Temple members of Ryan's arrival; they implied that Jones had spies among Ryan's group; and they expressed Jones' desire to shoot someone like Ryan.\textsuperscript{2822} The court distinguished \textit{Layton} from those cases where mere casual admissions of guilt, narrations of past criminal conduct, or mere conversations by a conspirator about a crime had been excluded.\textsuperscript{2823} The court concluded that Jones' statements were expressions of future criminal intent not only likely to further the conspiracy but also made with the intention of advancing it.\textsuperscript{2824} Therefore, the Ninth Circuit held that under any standard of review the district court had erred in excluding the statements on the basis that they failed to satisfy the "in furtherance of" requirement.\textsuperscript{2825} The court nevertheless remanded for a determination of whether the statements had been made before the conspiracy's inception, as Layton contended, or whether they had been made during its pendency.\textsuperscript{2826} The Ninth Circuit directed that if the district court found on remand that the

\textsuperscript{2822} 720 F.2d at 557. The Ninth Circuit considered the statements “rallying cries of a charismatic leader to his devoted followers.” \textit{Id.} Thus, the court concluded that “Jones's statements both had the effect of and were intended to enlist the crowd into compliance with the imminent murder of Ryan and to bolster the resolve of any in the audience who might already have agreed to help.” \textit{Id.} (footnote omitted).

\textsuperscript{2823} \textit{Id.} at 556-58 (citing United States v. Fielding, 645 F.2d 719, 726-27 (9th Cir. 1981) (hearsay declarations about declarant's general business relationship with defendant were not in furtherance of charged conspiracy to distribute drugs); United States v. Castillo, 615 F.2d 878, 883 (9th Cir. 1980) (co-conspirator's statement to fellow inmate that he and defendant were “fixing to kill a Mexican” was inadmissible hearsay because it was not intended to further conspiracy but was instead mere casual admission to person conspirator had decided to trust); United States v. Eubanks, 591 F.2d 513, 519-20 (9th Cir. 1979) (per curiam) (statements made by co-conspirator to his common law wife were not evidence that conspirator was attempting to induce his wife into joining conspiracy)).

\textsuperscript{2824} 720 F.2d at 557. The Ninth Circuit acknowledged that there is some disagreement concerning which analysis to apply, stating that:

[C]ourts sometimes focus on the speaker's intent in making the statements and sometimes on their probable effect. Thus, courts have applied both a prospective, scienter analysis and a retrospective, objective analysis. The relationship between these two analyses is unclear. Statements made with the intent of furthering the conspiracy will undoubtedly be admitted whether or not they result in any benefit to the conspiracy. On the other hand, it is unclear whether a statement which was not intended to further the conspiracy, but which in fact furthers or is likely to further the conspiratorial objectives, would be admissible.

\textit{Id.} at 556-57 n.5. The court did not resolve the issue that it raised because it concluded that Jones' statements “were not only likely to advance the conspiracy, but . . . were made with the intention of doing so.” \textit{Id.}

\textsuperscript{2825} \textit{Id.} at 557.

\textsuperscript{2826} \textit{Id.} at 558.
statements had been made during the pendency of the conspiracy, the statements had to be admitted against Layton under the co-conspirator exception.\textsuperscript{2827}

The second of the four categories of excluded statements consisted of a statement made by Jones to his attorney shortly after the Ryan party left Jonestown for the airstrip.\textsuperscript{2828} Jones told his attorney that Layton and another Jonestown resident had taken all of the weapons from Jonestown and were going to the airstrip to perform violent acts, that everything was lost at that time, and that Layton was not really a defector but was instead going to the airstrip to carry out a violent mission.\textsuperscript{2829} The government contended that the assertions were admissible under the declaration against interest exception to the hearsay rule because they were adverse to Jones' penal interest.\textsuperscript{2830} However, the district court excluded the statements on the basis that they were untrustworthy and not sufficiently against Jones' penal interest.\textsuperscript{2831} The Ninth Circuit reversed on both grounds.\textsuperscript{2832}

The court first noted that Jones was unavailable as a witness, as required under the declaration against interest exception,\textsuperscript{2833} because he was dead.\textsuperscript{2834} Contrary to the district court,\textsuperscript{2835} the Ninth Circuit fur-

\textsuperscript{2827} Id.
\textsuperscript{2828} Id.
\textsuperscript{2829} Id.
\textsuperscript{2830} Id. Declarations against penal interest are admissible as an exception to the hearsay rule if the declarant is unavailable as a witness and the statement, when made, so tended to subject the declarant to civil or criminal liability that a reasonable person in the same position would not have made the statement unless he or she believed it to be true. \textit{Fed. R. Evid.} 804 (b)(3). In addition, when the statement is offered to exculpate a defendant, there must be corroborating circumstances clearly indicating the statement's trustworthiness. \textit{Id.} With respect to the second test under Rule 804(b)(3), "the corroborating circumstances must do more than indicate the trustworthiness of the statement; they must \textit{clearly} indicate it." \textit{United States v. Satterfield}, 572 F.2d 687, 693 (9th Cir.), \textit{cert. denied}, 439 U.S. 840 (1978) (emphasis in original).

In \textit{Layton}, the Ninth Circuit noted that all three requirements must be satisfied in order to admit evidence offered to \textit{exculpate} a defendant pursuant to Rule 804(b)(3). 720 F.2d at 559. However, the statements in \textit{Layton} were offered by the government in order to \textit{inculpate} the defendant. \textit{Id.} at 558. The Ninth Circuit nevertheless declined to decide whether the third factor—corroboration of the statement's trustworthiness—was necessary when the statement is offered to inculpate a defendant because it found that Jones' statement was trustworthy. \textit{Id.} at 559. \textit{See infra} note 2839 for a further discussion of the declaration against interest exception to the hearsay rule.

\textsuperscript{2831} 720 F.2d at 559.
\textsuperscript{2832} Id.
\textsuperscript{2833} \textit{See supra} note 2830.
\textsuperscript{2834} 720 F.2d at 559.
\textsuperscript{2835} Id. The district court stated that Jones' statements were untrustworthy because he made them to his attorney. \textit{Id.}
ther found that statements to an attorney are likely to be more reliable than statements made to another individual since a client might be more candid with his or her attorney. 2836 Finally, the court noted that Jones' statements about Layton were subsequently corroborated. 2837 Therefore, the court held that Jones' statements were not untrustworthy merely because he had made them to his attorney. 2838

The Ninth Circuit next held that the statements were clearly against Jones' penal interest. 2839 The court indicated that Congress' motive in enacting the declaration against interest exception to the hearsay rule was to expand the admissibility of remarks which tended to subject declarants to criminal liability. 2840 The court observed that Jones' statements in Layton showed that he had detailed information concerning events which would occur in the very near future. In addition, Jones would have expected that his follower's acts would be imputed to him since he controlled most events in Jonestown. Furthermore, when he spoke to his attorney, he had already expressed a desire to kill Ryan. In light of these circumstances, the Ninth Circuit reasoned that Jones' statements would tend to subject him to criminal liability for both Ryan's murder and participation in the conspiracy. 2841

The court further found that Jones' statements were trustworthy based upon the surrounding circumstances and corroborating evidence. 2842 The court indicated that the airstrip violence transpired exactly as Jones had said it would, that the group was on its way to the

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2836. Id.
2837. Id. Furthermore, the court did not view Jones' conversation with his attorney as a normal consultation between a client and his lawyer in light of the circumstances of the case.  Id.
2838. Id.
2839. Id. at 559-60 (citing United States v. Satterfield, 572 F.2d 687, 691 (9th Cir.) (co-defendant's statement that he did not deny defendant's involvement in robbery because he did not want to jeopardize his own appeal was against his penal interest within meaning of Rule 804(b)(3)), cert. denied, 439 U.S. 840 (1978); United States v. Hoyos, 573 F.2d 1111, 1115 (9th Cir. 1978) (solidly inculpatory statements against penal interest within meaning of Rule 804(b)(3)); United States v. Benveniste, 564 F.2d 335, 341 (9th Cir. 1977) (statements by unindicted co-conspirator to defendant's investigator implicating co-conspirator to defendant's investigator implicating co-conspirator to defendant's investigator implicating co-conspirator in major drug sale negotiation admissible as against her penal interest)).

The district court found that the statements tended to implicate other Temple members, not Jones, in the airstrip shootings that were about to take place. Therefore, the trial judge suggested that "Jones had an incentive to misrepresent the events at the airstrip and to divert guilt away from himself and on to other members of the Temple." Id. at 559. Consequently, the statements would not have been adverse to Jones' penal interest. Id. at 560.
2840. Id. at 559.
2841. Id. at 560.
2842. Id. at 560-61.
airstrip when Jones spoke with his attorney, and that Layton was feigning defection just as Jones had stated. These facts, which were corroborated by eyewitness testimony and Layton’s own confession, highlighted the reliability of Jones’ statements and established that he was part of a preconceived plan to shoot people in both planes.\textsuperscript{2843} The Ninth Circuit found that this evidence did not suggest that Jones was attempting to shift guilt from himself, as the district court had maintained. Instead, the court determined that the statements were spontaneous and made, as the events were occurring or about to occur, to Jones’ trusted advisor. When taken together, all of these factors indicated the trustworthiness of the statements. Therefore, the statements were admissible as declarations against Jones’ penal interest.\textsuperscript{2844}

The Ninth Circuit also held that the trial court erred in excluding Jones’ statements on the ground that their admission would violate Layton’s confrontation clause rights.\textsuperscript{2845} The court explained that the confrontation clause analysis consists of a two-prong test which focuses on the disputed testimony’s necessity and reliability.\textsuperscript{2846} Since Jones was dead, the use of his hearsay statements was clearly necessary.\textsuperscript{2847}

With respect to the reliability prong, the court utilized the four-part test enunciated in \textit{Dutton v. Evans}.\textsuperscript{2848} The court explained that the two

\textsuperscript{2843} Id. at 560.
\textsuperscript{2844} Id. at 560-61. The court also noted that Jones’ statements were not made in an effort to try to win favor with the police, and that he subsequently took responsibility for the murders in his “last hour” speech. \textit{Id.} at 560.
\textsuperscript{2845} Id. at 561. “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” \textsc{U.S. Const.} amend. VI.
\textsuperscript{2846} 720 F.2d at 561 (citing United States v. Perez, 658 F.2d 654, 660 (9th Cir. 1981) (admission of evidence under hearsay exception insufficient to satisfy constitutional requirements under confrontation clause; confrontation clause analysis should proceed case by case under a two-tier approach that tests necessity and reliability of contested testimony); Ohio v. Roberts, 448 U.S. 56, 65-66 (1980)). In \textit{Roberts}, the Court stated:

The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers’ preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that “there is no material departure from the reason of the general rule.”


\textsuperscript{2847} 720 F.2d at 561.
\textsuperscript{2848} \textit{Id.} In \textit{Dutton v. Evans}, 400 U.S. 74, 88-89 (1970) (plurality opinion), the Supreme Court set forth a four-prong test to determine the reliability of a co-conspirator’s out of court statements: (1) whether the declaration contained assertions of past fact; (2) whether the de-
most important factors for establishing reliability under *Dutton* are (1) the existence of corroborating evidence and (2) a declaration against penal interest. Although the court recognized that some of Jones' statement to his attorney were erroneous, it nevertheless concluded that they were reliable to establish Jones' awareness of and participation in the airstrip events. Moreover, the statements were corroborated by the events at the airstrip. The court further concluded that Jones' statements were against his penal interest, that they were apparently not intended to incriminate Layton, and that neither the declarations themselves nor the context in which they were made demonstrated inherent unreliability. Thus, the statements did not violate Layton's confrontation clause rights.

The third category of statements disallowed by the district court consisted of tape-recorded statements about the events at the airstrip made by Jones just prior to and in the course of the mass suicide at Jonestown. The district judge ruled that although these statements...
were declarations against Jones' penal interest, they were nevertheless inadmissible because they violated the confrontation clause. The trial court emphasized that Jones made the statements while he was in a highly irrational and agitated state. Accordingly, the judge reasoned that the declarant's availability for cross-examination purposes would be essential in order to ascertain the accuracy of the statements.

The Ninth Circuit reversed, concluding that under the Dutton rationale, the declarations made in this "last hour" speech were not so inherently unreliable that they warranted exclusion. The Ninth Circuit focused on whether Jones had personal knowledge of the events and whether his statements might have resulted from faulty recollection. Although the trial court apparently equated irrational conduct with an inability to have personal knowledge or an accurate memory of events, the Ninth Circuit reasoned that a person's irrational or highly agitated state alone does not mean that he cannot relate recent events or have personal knowledge of events which are about to happen. The court found not only that Jones had personal knowledge of the events that were about to occur at the airstrip, but also that his statements were completely corroborated by the subsequent events. In addition, the receiving word of the shootings, Jones indicated that one of his people on the plane was going to shoot the pilot and that it was Layton's apparent role. The statements made after Jones received word about the shootings indicated that he knew that Ryan was dead and that Jones' people had killed Ryan. Jones stated at one point: "They're my people. . . . I don't know who fired the shot, I don't know who killed the Congressman. But as far as I'm concerned, I killed him." Id. at 562. Although Jones did not mention Layton directly, he stated: "There's one man there who blames, and rightfully so, Debbie Blakely, . . . for the murder of his mother and he'll sh— he'll stop that pilot by any means necessary. He'll do it." Id. Blakely was Layton's sister and he apparently blamed her for his mother's death. Therefore, the Ninth Circuit reasoned that Jones entertained a belief that Layton's role in the events at the airstrip was to shoot the pilot. The court found that Jones' belief was corroborated by Layton's demand to be seated on the smaller of the two planes, by his smuggling a pistol aboard the plane, and by the fact that he had seated himself directly behind the pilot. Id. at 562 n.11.

The district judge's decision was bolstered by Jones' declaration: "I don't know who killed the Congressman. But as far as I'm concerned, I killed him." Id. The judge had inferred that this declaration was possibly indicative of "the ravings of a madman who may merely be asserting an identification with the killers on a mystical bizarre level." Id.

As discussed supra at note 2846, the confrontation clause was apparently designed to give the accused an effective means to test the accuracy of adverse testimony by cross-examination of the witness.

See supra note 2848 and accompanying text.

See supra note 2848 and accompanying text.

Id. (citing Dutton v. Evans, 400 U.S. 74, 88-89 (1970) (plurality opinion); United States v. Perez, 658 F.2d 654, 661-62 (9th Cir. 1981); United States v. Snow, 521 F.2d 730, 734-35 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976)).

Id.

Id. The court observed that Jones said one of his followers would shoot the pilot,
court determined that it was unlikely that Jones’ memory was faulty when he made the statements because they were made soon after the events at the airstrip occurred.2864 Furthermore, the court explained that the jury would be in a better position than it would otherwise be to determine Jones’ mental state when he made the statements, since they were on tape.2865 Accordingly, the “last hour” statements were admissible.2866

The final category of excluded statements consisted of statements made by Temple member Carter to Parks following Layton’s arrest on the day of the shootings.2867 Parks was a genuine Temple defector who had been aboard Layton’s plane at the time of the shootings.2868 Carter told Parks that he had been sent by Jones to infiltrate the Concerned Relatives Group2869 by feigning defection in an effort to find out who was accompanying Ryan to Jonestown and reason for the trip.2870 The statements were offered by the government as statements against Carter’s penal interest on the theory that Carter’s acts constituted a link in the chain of events leading to Ryan’s assassination.2871 The trial court disallowed the statements on the ground that they were not sufficiently against Carter’s penal interest, and would violate the confrontation clause if admitted.2872 The Ninth Circuit affirmed, but only on the ground that the

implying that Layton’s part in the airstrip murders was to shoot the pilot. Further, Jones’ previous statements to his attorney indicated that Jones knew Layton’s defection was feigned. Id.

2864. Id.

2865. Id. Although the Layton court conceded that cross-examination would be more effective, it suggested that because Jones’ statements were on tape, the dangers involved in admitting the statements were minimized. Id. at 562-63. Presumably, the court meant that the jury would be able to determine Jones’ mental state at the time he made the statements from the sound of his voice on the tape.

2866. Id. at 563.

2867. Id.

2868. Id. at 551-52.

2869. This was a group of relatives of Jonestown residents who had planned to join Ryan on his trip to Jonestown. Id. at 551.

2870. Id. at 563.

2871. Id. The government contended that:

Carter’s infiltration was the first link in a chain that ended with the murder of Congressman Ryan . . . [and] that Carter provided Jones with information that the Ryan delegation was hostile and had to be silenced. Thus, the statements were against Carter’s penal interest in that they implicated him in the conspiracy to murder Ryan.

Id. In addition, the government suggested that the statements were made immediately following the murders, at a time when a reasonable person in Carter’s position would have suspected that an inquiry would focus on actions leading up to the killings. Thus, the government reasoned that a person in Carter’s position would not utter such incriminating statements unless he believed that they were true. Id.

2872. Id. The trial judge also indicated that the government may have been unable to satisfy the unavailability requirement under both the confrontation clause and the hearsay exception,
comments were not solidly against Carter’s penal interest.\textsuperscript{2873}

The Ninth Circuit conceded that if Carter’s infiltration was the first link in a chain that ended with Congressman Ryan’s murder, it was arguable that the statements tended to subject Carter to criminal liability as required for the declaration against interest exception.\textsuperscript{2874} The court nonetheless recognized that its function on review was limited to determining whether the trial court had abused its discretion.\textsuperscript{2875} The court reasoned that unlike Jones’ statements to his attorney, Carter’s statements did not establish that Carter had detailed information of the conspiracy to assassinate Ryan. Moreover, Carter’s mere infiltration of the Concerned Relatives Group was not a criminal act and did not itself suggest any connection between the infiltration and the subsequent conspiracy to kill Ryan. Since Carter’s infiltration was arguably too remote from the Jonestown events to make his declarations clearly incriminatory, the court held that the district court had not abused its discretion in deciding to exclude them.\textsuperscript{2876}

c. \textit{declaration against interest}

The Federal Rules of Evidence create an exception to the hearsay rule permitting the admission of certain out of court statements when the declarant is unavailable as a witness and the statement when made was against the declarant’s interest.\textsuperscript{2877} Rule 804(b)(3) expands the common

\begin{itemize}
\item since Carter did not invoke his fifth amendment rights but merely suggested that he would invoke his privilege against self-incrimination if he was called as a witness. \textit{Id.} A witness is unavailable under the Federal Rules of Evidence if he or she “is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his [or her] statement.” \textit{Fed. R. Evid. 804(a)(1).} In \textit{Layton}, however, the Ninth Circuit did not reach this issue because it concluded that the district court did not abuse its discretion in excluding the statements after finding that they were not sufficiently against Carter’s penal interest. 720 F.2d at 563.

\item 2873. 720 F.2d at 563.

\item 2874. \textit{Id.} The Ninth Circuit stated that the only question at issue was whether the statements tended to subject Carter to criminal liability. The court observed that invoking the fifth amendment is circumstantial evidence that a statement is against a declarant’s penal interest. \textit{Id.} (citing United States v. Benveniste, 564 F.2d 335, 341 (9th Cir. 1977) (unindicted co-conspirator’s assertion of fifth amendment probative to issue of whether her prior out of court statements tended to subject her to criminal liability sufficient to satisfy against penal interest requirement)). The court nevertheless refused to disturb the lower court’s ruling on appeal because it found that there were equally good arguments for exclusion. \textit{Id.}

\item 2875. \textit{Id.} See United States v. Satterfield, 572 F.2d 687, 690 (9th Cir). (standard for appellate review of decision to exclude hearsay statement under Rule 804(b)(3) is whether trial court abused its discretion), \textit{cert. denied}, 439 U.S. 840 (1978).

\item 2876. 720 F.2d at 563.

\item 2877. \textit{Fed. R. Evid. 804(b)(3).} The foundation required for admitting a declaration against interest places a burden on the proponent to establish that: (1) the declarant is unavailable as a
law exception in two respects: (1) the definition of "unavailability" is extended to include those situations in which the declarant cannot remember the statement or refuses to testify despite a court order to do so, and (2) the exception includes declarations against penal interest. However, the use of statements against penal interest inculpating the accused necessarily raises confrontation clause problems because an "unavailable" declarant whose statement is offered against the accused cannot be cross-examined by the accused.

2878. The declarant is "unavailable as a witness" under the Federal Rules when the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
(3) testifies to a lack of memory of the subject matter of his statements; or
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a [dying declaration, declaration against interest, or statement of personal or family history], his attendance or testimony) by process or other reasonable means.

FED. R. EVID. 804(a). Cf. CAL. EVID. CODE § 240 (West Supp. 1985), which follows the common law in its definition of unavailability, provides: "'Unavailable as a witness' includes, in addition to cases where the declarant is physically unavailable (i.e., dead, insane, or beyond the reach of the court's process), situations in which the declarant is legally unavailable (i.e., prevented from testifying by a claim or privilege or disqualified from testifying)." Id. assembly committee comment.

2879. See, e.g., United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973), where the court held that a statement to a police informant was admissible under the declaration against interest exception because the statement was contrary to the declarant's penal interest. Id. at 986-87. As two commentators note:

Rule 804(b)(3) expands the common law exception for declarations against interest. Prior to the enactment of the Federal Rules, declarations against interest were usually limited to statements against pecuniary or proprietary interests. This Rule expands the exception to cover declarations against penal interest, something that commentators and many Judges have been urging for some time.

S. SALTSBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL § 804 at 652 (3d ed. 1982).

2880. See 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[03] (1984). Professor Weinstein notes at page 804-112 that:

[i]f the confrontation clause is to have any meaning, then every statement that on its face is against declarant's interest cannot be admitted without analysis of its reabilit-
In *United States v. Carruth*, the Ninth Circuit held that statements made by the defendant's accountant were admissible under the declaration against interest exception for the purpose of implicating the defendant in a prosecution for tax fraud. Carruth was convicted of conspiracy to defraud the United States as a result of his involvement in an operation that sold limited partnership tax shelter schemes. Carruth and Reed, his co-defendant, syndicated limited partnerships through Carruth's wholly-owned corporation to engage in cattle breeding. Carruth's corporation then contracted with Reed, and with corporations that Reed owned or controlled, to acquire, feed, and manage the cattle for the limited partnership. However, the government charged that Reed's corporations were mere fronts used to create the appearance of and documentation for cattle, feed purchases, and partnership loans which were in fact nonexistent. Carruth's conviction was based on tax forms that he filed as the general partner of the limited partnerships, reflecting such nonexistent transactions.

On appeal, Carruth challenged the trial court's admission of statements made by his accountant to an Internal Revenue Service agent and to employees of Carruth's corporation before the accountant's death, contending that the testimony relating the statements was inadmissible in the setting of the case. Even aside from constitutional considerations, unreliable statements must be excluded as a matter of evidentiary law.

*Cf.* The advisory committee's note to Rule 804(b)(3):

The third-party confession . . . may include statements implicating [the accused], and under the general theory of declarations against interest they would be admissible as related statements. . . . [Supreme Court decisions dealing with the constitutional right to confrontation] by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. . . . The rule does not purport to deal with questions of the right to confrontation.

*See also* J. COTCHETT & A. ELKIN, FEDERAL COURTROOM EVIDENCE 168.1 (4th rev. 1982) ("Counsel should look to Dutton v. Evans, 400 U.S. 74 (1970), for the standards which must be met in order to afford a criminal defendant his constitutional right to confrontation" (discussing the declaration against interest exception)).


2882. *Id.* at 1022-23.

2883. *Id.* at 1019. 18 U.S.C. § 371 (1976) provides in part:

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.

Carruth was sentenced to three years imprisonment. 699 F.2d at 1019.

2884. 699 F.2d at 1019.

2885. *Id.*

2886. *Id.*

2887. *Id.*
hearsay. However, the court concluded that the statements were against the accountant's interest when made because they indicated that he knew that the cattle and feed figures listed on the partnership's tax returns were highly inflated. Nonetheless he prepared the returns without examining the underlying documentation. Because the accountant died shortly before the indictment, he was "unavailable as a witness" as required by Rule 804(b)(3). Accordingly, the court held that the trial court had not abused its discretion in ruling that the evidence was admissible.

In *United States v. Rhodes*, the Ninth Circuit held that the trial court had properly excluded co-defendant's hearsay remark exculpating Rhodes because it was not against the co-defendant's penal interest when made and was not sufficiently corroborated.

Rhodes was convicted of conspiracy to possess and distribute checks which had been stolen from the mail. The evidence introduced at trial established that all of the stolen checks had passed through the post office where Rhodes was employed, that Rhodes had been seen with a box of mail, and that Rhodes had pulled checks from the mail and had cashed them. Rhodes sought to controvert this evidence with the testimony of a co-defendant's attorney who had been present when co-defendant Lewis stated out of court that Rhodes "was not the source of the stolen checks." Lewis later suffered a heart attack during Rhodes' trial and was otherwise unavailable as a witness.

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2888. *Id.* at 1022.
2889. *Id.* at 1022-23.
2890. *Id.*
2891. 713 F.2d 463 (9th Cir.), *cert. denied*, 104 S. Ct. 535 (1983).
2892. *Id.* at 473.
2893. *Id.* at 466. See 18 U.S.C. § 371 (1976), *supra* note 2883. 18 U.S.C. § 1708 (1976) makes it unlawful to willfully possess mail matter stolen from an unauthorized depository for mail matter, which includes any private mail box or any mail receptacle. Rhodes was sentenced to three years imprisonment for his participation in the conspiracy to possess and distribute stolen checks. 713 F.2d at 466.
2894. 713 F.2d at 474.
2895. *Id.* at 472. The statement was made in a hallway outside the courtroom during a recess in the trial proceedings. Although Rhodes apparently expected the co-defendant to testify at his trial, the court was advised that the co-defendant would take the fifth amendment if asked to testify. *Id.* at 472-73.
2896. *Id.* at 473. The requirement of unavailability under the declaration against interest exception (Fed. R. Evid. 804(b)(3)) is satisfied by the declarant's exercise of a claim of privilege or by an existing physical illness or infirmity which prevents the declarant's presence or testimony at the hearing. Fed. R. Evid. 804(a)(1), (4). Although the trial court in *Rhodes* was advised that Rhodes' co-defendant would invoke the fifth amendment and not testify, the Ninth Circuit stated that the trial court correctly ruled that the witness was unavailable as a result of his heart attack. 713 F.2d at 473.
Rhodes asserted that the co-defendants unavailability rendered the statement admissible under the statement against penal interest exception to the hearsay rule. The trial court disagreed, and ruled that the statement was inadmissible notwithstanding the witness’ unavailability because it was not against the declarant’s penal interest when made and was not trustworthy.

The Ninth Circuit affirmed. The court reasoned that the statement was not against the co-defendant’s penal interest because he had previously pleaded guilty to the conspiracy charge when he made the statement. Moreover, the government had previously agreed to dismiss all remaining charges against the declarant pursuant to a plea bargain arrangement. Hence, the statement did not tend to subject him to criminal liability. Accordingly, the trial court’s finding that the statement was not against the co-defendant’s penal interest did not amount to an abuse of discretion.

The Ninth Circuit also found that the surrounding circumstances failed to corroborate Lewis’ assertion. In fact, the court observed that the surrounding circumstances indicated the statement was unreliable rather than “clearly indicating” its trustworthiness. The court

2897. 713 F.2d at 473. If the declarant is unavailable as a witness, a statement which tended to subject him to criminal liability when made such “that a reasonable man in his position would not have made the statement unless he believed it to be true” is not excluded by the hearsay rule. FED. R. EVID. 804(b)(3). However, “[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” Id. (emphasis added).

2898. 713 F.2d at 473.
2899. Id.
2900. Id.
2901. Id.
2902. Id.
2903. Id. (citing United States v. Satterfield, 572 F.2d 687, 693 (9th Cir.) (trial court did not abuse its discretion in denying defendant’s motion to admit exculpatory evidence offered as a statement against interest where the circumstances indicated that the co-defendant might have staged the argument during which the statements were made with the defendant’s help), cert. denied, 439 U.S. 840 (1978); United States v. Poland, 659 F.2d 884 (9th Cir.) (trial court did not abuse its discretion in excluding exculpatory evidence offered as a statement against the declarant’s penal interest where there was an absence of corroborating evidence as well as positive evidence that showed that the statement was untrustworthy—such as evidence of the declarant’s drug addiction, bad criminal record, psychiatric problems, and psychiatric disorders), cert. denied, 454 U.S. 1059 (1981)).
2904. Id. “A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” FED. R. EVID. 804(b)(3). See supra note 2897 and accompanying text.
2905. 713 F.2d at 473.
ord or other qualified witness, though not necessarily the declarant. 2914

Finally, the court has the discretion to exclude a business record where the method or circumstances of preparation or the source of the information indicates a lack of trustworthiness. 2915

In United States v. Pazsint, 2916 the Ninth Circuit held that tape recordings of witnesses' emergency calls to the police department did not fall within the business records exception to the hearsay rule. 2917 Pazsint was convicted of forcibly assaulting an Internal Revenue Service agent with a deadly weapon, arising from the agent's attempt to question Pazsint about his income taxes. 2918 At trial, Pazsint raised a hearsay objection to the introduction of tape-recorded emergency telephone calls by eyewitness reporting the event to the police. 2919 However, the trial judge overruled Pazsint's objection and admitted the tape recordings pursuant to the business records exception. 2920

On appeal, Pazsint contended that the trial judge's ruling was erroneous. 2921 The Ninth Circuit agreed with Pazsint, observing that the business records exception is applicable only where the person recording the information is acting in the regular course of business. 2922 The court recognized that a police officer's report indicating his own observations

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2914. Id.
2915. Id.
2916. 703 F.2d 420 (9th Cir. 1983).
2917. Id. at 424.
2918. Id. at 421.
2919. 18 U.S.C. § 111 (1982) makes it a felony for any person to forcibly assault, resist, oppose, impede, intimidate, or interfere with certain federal officers or employees. In Pazsint, an IRS agent unsuccessfully attempted to question the defendant's wife about the couple's income tax returns. 703 F.2d at 422. After returning to his car, the agent remained parked outside the Pazsint home as he filled out a report. Pazsint's wife called her husband at work and asked him to come to her aid because she was frightened. She explained that the agent said he was with the IRS and questioned her, but would not leave. She described the agent and his car to Pazsint. Id. When Pazsint arrived, the agent was pulling away from the house onto a highway. Pazsint forced the agent off the road with his pickup truck. Brandishing a .44 caliber handgun, Pazsint forced the agent to take a spread-eagle position on the trunk of his car. Id. Pazsint frisked the agent, refused to let him identify himself, shouted obscenities, and asked the agent what he meant by coming to his house and threatening his wife. Id.
2920. Id. at 424.
2921. Id.
2922. Id. (citing Clark v. City of Los Angeles, 650 F.2d 1033, 1037 (9th Cir. 1981), cert. denied, 456 U.S. 927 (1982) as authority for principle that business records exception only applies if person providing information to be recorded "is acting routinely, under a duty of accuracy, with employer reliance on the result, or in short 'in the regular course of business'"). Although the Pazsint court found that the police officer who made the tape-recorded emergency calls was acting in the regular course of business, it concluded that he lacked knowledge of the accuracy or "truthfulness" of the information being recorded. Id. at 425.
explained that the statement was made after the co-defendant had pleaded guilty, did not subject him to additional criminal liability, was not made until the time of trial, and was made to an attorney for a co-conspirator's benefit. Additionally, the co-defendant became unavailable because of his decision to invoke his fifth amendment right against self-incrimination and he had made prior statements that were inconsistent with Rhodes' offer of proof. Therefore, the trial court did not abuse its discretion by excluding the statement.

*d. business records exception*

Records of regularly conducted business activity are admissible into evidence pursuant to an exception to the hearsay rule. This exception is founded on the theory that such records are inherently reliable. To qualify a writing as a "business record" under this exception, the proponent must convince the court that the record was made: (1) in the regular course of business; (2) by a person with knowledge, or from information transmitted by a person with knowledge under a business duty to report; and (3) at or near the time the information was received. This foundation must be established by the custodian of rec-

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2906. Id.
2907. Id.
2908. FED. R. EVID. 803(6). The scope of this exception is potentially enormous. The term "business," as defined by the rule, includes "business, institution, association, profession, occupation, and calling of every kind whether or not conducted for profit." Id. Similarly, the exception permits a wide array of "records," including a "memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses." Id.
2909. The reliability of a business record is supplied by systematic checking, by regularity and continuity which produce habits of precision, by the business' actual reliance upon the record, and by the recordkeeper's occupational duty to make an accurate record. FED. R. EVID. 803(6) advisory committee note (citing C. MCCORMICK, EVIDENCE §§ 281, 286, 287 (1st ed. 1954) and Laughlin, Business Entries and the Like, 46 IOWA L. REV. 276 (1961)).
2910. "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . ." FED. R. EVID. 104(a).
2911. This requirement is established where the employer relies on the record in the regular course of business. FED. R. EVID. 803(6) advisory committee note. In this regard, the Supreme Court held in Palmer v. Hoffman, 318 U.S. 109 (1943), that records kept in contemplation of litigation are not records of a regularly conducted business activity. The disputed record in Palmer was an accident report prepared by a railroad company's employee for use in litigation. The Court reasoned that the company's business was railroad, not accident reporting. Id. at 111-12. Hence, the report was not " 'in the regular course' of business." Id. at 113.
2912. FED. R. EVID. 803(6). Professor Weinstein explains that "[t]he rationale for the exception fails unless some element of unusual reliability can be established for the records in question by such factors as systematic checking, habits of precision on the part of the record keeper, reliance by others on the records, or a duty to record accurately." 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(6)(03) (1984) (citations omitted).
2913. FED. R. EVID. 803(6).
embodying the statements were made by the police officer in the regular course of business. The Pazsint court conceded that the police officer was acting in the regular course of business when he made the recordings. Furthermore, the "emergency calls" by witnesses reporting the actions of Pazsint and the IRS agent described either an exciting event or the witnesses' present sense impression of the incident. Nevertheless, the court did not find an alternative basis for admitting the tapes, and held that the trial court had erred in admitting them.

In United States v. Foster, the Ninth Circuit held that a ledger containing records of drug transactions implicating a defendant in a conspiracy to distribute heroin was properly admitted as a business record.

The ledger contained entries recording drug transactions that established co-defendant Gibson's involvement in an enterprise engaged in the illegal sale and distribution of heroin. Over the defendant's objection at trial, the district court admitted the ledger as a business record under Rule 803(6).

On appeal, the defendant contended that the trial court erred because the records were not maintained in the regular course of business and because the transactions entered were untrustworthy. However,
and knowledge may be admitted under the business records exception. However, the court explained that statements made by third persons under no duty to report are inadmissible under the business records exception. The court reasoned that although the police officer recording the emergency calls was acting in the regular course of business, the tapes were inadmissible because the officer had no personal knowledge of the truthfulness of the information being recorded. The court noted that the witnesses had personal knowledge of the information conveyed but were not under a business duty to report the information. The court, therefore, concluded that the tapes were inadmissible at trial because the presumption of reliability and regularity accorded a business record could not be given to the witnesses' tape-recorded statements.

It may be argued that the tape-recorded emergency calls which the witnesses in Pazsint made to the police station were admissible on grounds that the informants' statements qualified as either excited utterances or present sense impressions, and that the tape recordings

2923. *Id.* at 424.
2924. *Id.* The Pazsint court is not entirely accurate in its statement of the rule. As one commentator has explained:

The recorders need not have first hand knowledge. . . . As the comments of the Senate Judiciary Committee. . . indicate, Congress intended a liberal interpretation of the phrase "person with knowledge." The name of the person whose first-hand knowledge was the basis of the entry need not even be known so long as the regular practice was to get the information from such a person. Cases which at first glance appear divergent are explicable on the ground of multiple hearsay. If the informant's statement satisfied some other hearsay exception and was then recorded pursuant to the business records rule, no hearsay bar remained . . . . For instance, if the informant's statement qualifies as an admission, or an excited utterance . . . the record embodying the statement is admissible if it was made in the course of a regularly conducted activity.


This interpretation is consistent with Rule 805, which provides that "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." *Fed. R. Evid.* 805.

Furthermore, the Pazsint court cites United States v. Smith, 521 F.2d 957 (D.C. Cir. 1975), as authority for its interpretation of the rule. 703 F.2d at 424-25. Yet the Smith court itself recognized that while such hearsay in a business record is not admissible under the business record exception, the hearsay is admissible if it falls within any other exception . . . . Thus, . . . the hearsay recorded by a police officer [in a record made in the regular course of business] might be admissible if it was an admission, a spontaneous exclamation, a dying declaration, or a declaration against interest.

521 F.2d at 964-65.
2925. 703 F.2d at 425.
2926. *Id.*
2927. *Id.*
2928. "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay
the court noted that according to the Ninth Circuit, operating accounts of illegal enterprises constitute business records, subject only to the customary requirements concerning the admissibility of writings. The court stated that a business record is admissible under Rule 803(6) if maintained in the regular course of a business activity. The court further stated that this requirement is met when the record is made in accordance with established procedures for the "routine and timely making and preserving of business records," and the business depends upon the accuracy of the record.

The court noted that the witness testified that she usually recorded her large drug transactions, regularly entered the number of balloons she sold on a particular day, and the amount of money she received in return. She relied on the entries and recorded the transactions contemporaneously. Therefore, the court held that the ledger was properly admitted because there was sufficient evidence to satisfy Rule 803(6).

In Keogh v. Commissioner, the Ninth Circuit affirmed the tax court's finding that a casino employee's personal diary, showing the amounts of tip income he had received, was admissible as a business record in a trial to determine the tax liability of Keogh, another casino employee. Keogh dealt blackjack, or "21," at the Dunes Hotel in Las Vegas, Nevada. Blackjack dealers earned regular wages as well as occasional tips or "tokes" in the form of coins or casino chips from blackjack players. Dealers were required to report their total annual toke income to their employer. The amounts reported were included on the W-

2939. Id. at 882 n.6 (citing United States v. Baxter, 492 F.2d 150, 165 (9th Cir. 1973) (in a conspiracy prosecution, coded names used by customers, their phone numbers, record of amounts of narcotics smuggled for them, and record of money received in return was properly admitted as business record of narcotics operations), cert. denied, 416 U.S. 940 (1974); and Arena v. United States, 226 F.2d 227, 234-35 (9th Cir. 1955) (books containing running accounts of illegal bets properly admitted as business records in a prosecution for perjury), cert. denied, 350 U.S. 954 (1956)).

2940. Id. (citing Clark v. City of Los Angeles, 650 F.2d 1033, 1036-37 (9th Cir. 1981) (discussing elements of Rule 803(6) in action challenging discriminatory enforcement of zoning and permit requirements by City of Los Angeles; held that diary kept for purposes of litigation was inadmissible as business record because it was not made to be used in vendor's business of selling new and used merchandise), cert. denied, 456 U.S. 927 (1982)).

2941. Id. at 882.

2942. Id. Neither the incompleteness of the ledger nor the arbitrary sequence of the entries destroyed the accuracy of the entries. Id.

2943. 713 F.2d 496 (9th Cir. 1983).

2944. Id. at 500.

2945. Id. at 498. "Players often gave toves to the dealers directly, at other times, they placed bets for the dealers, with a player determining after a winning bet how much of the winnings was the dealer's to keep." Id.
LOYOLA OF LOS ANGELES LAW REVIEW

2 forms of the employer and in the dealer's tax returns. The Commissioner contended that Keogh had underreported his tip income during the years 1969 through 1971 and assessed a deficiency. The Commissioner recomputed Keogh's tip income through statistical analysis utilizing dated entries in a personal diary kept by John Whitlock, Jr., a fellow employee who had worked at the Dunes as a blackjack dealer from March 1967 to May 1970. The tax court agreed with the Commissioner's analysis, but reduced the asserted deficiency by twenty percent.

On appeal, Keogh contended that the trial court erred in admitting the diary under the business records exception. Keogh argued that the business records exception was inapplicable because the diary was not a commercial business record maintained by one obligated to accurately record transactions. Since the diary at issue was an employee's per-

2946. Id.
2947. Id. "[T]he term 'deficiency' means the amount by which the tax imposed . . . exceeds the excess of . . . the sum of . . . the amount shown as the tax by the taxpayer upon his return." 26 U.S.C. § 6211(a)(1)(A) (1976). "If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary." 26 U.S.C. § 6215(a) (1976). The losing party in a Tax Court case may appeal (as of right) to the United States Court of Appeals. 26 U.S.C. § 7482(a) (1976).
2948. 713 F.2d at 498. A photocopy of the Whitlock diary was a principal piece of evidence against Keogh. The diary contained wage entries made approximately every two weeks corresponding to the Dunes' payroll records. The diary also contained columns for "tips" in which an entry of "off," "sick," "vac," or a dollar amount was made daily by Whitlock. The date of the month and the day of the week were listed in the diary on the left side of each page, with separate vertical columns designated as "gross," "net," "tax," and "tips." Id. Keogh claimed that he recorded his daily toke income but had discarded his records each month after he reported his income to the Dunes. However, the Commissioner's use of the Whitlock diary's tip entries resulted in an average daily toke income per dealer that exceeded the amount reported by Keogh on his tax return. Id. at 498-99. The Ninth Circuit recognized that there were several problems with the Commissioner's analysis. Since Whitlock's diary covered only a portion of the years in question, some calculations were necessarily extrapolated from amounts that Whitlock had entered in previous years: In addition, Whitlock was not a 21 dealer during the entire time covered by the diary, and it was unclear when he switched from being a craps dealer (who earns more in tokes than a 21 dealer) to a blackjack dealer. Furthermore, the Commissioner's analysis ignored consultations with gaming experts outside of the IRS and failed to consider other relevant factors such as the economy, seasons, etc. Finally, Whitlock had an undisputedly poor reputation for truthfulness and honesty, had been fired from the Dunes for unsatisfactory work and had been convicted of receiving stolen property.
2949. Id.
2950. Id. at 499-500.
2951. Id. To support this proposition, Keogh cited United States v. Kim, 595 F.2d 755, 759-
sonal record rather than a record of the business concern involved (the Dunes), Keogh reasoned that the diary was not a "business record."

The Ninth Circuit disagreed. The court indicated that personal records maintained for business purposes may be able to qualify as business records, provided that such records are regularly and continually maintained, and checked systematically in order to establish the reliability usually found in records kept by a business enterprise. The court reasoned that although Whitlock's diary was personal to him, it showed every indication of being kept in the course of his "business activity."

Furthermore, Whitlock's former wife testified concerning the regularity of the entries as follows: (1) that she had seen only Whitlock make entries; (2) that he usually entered them after his work shift and made no entries on his days off; (3) that when no entries were made for three to four days, he would copy entries for those days from a record kept in his wallet; and (4) that she understood that his diary contained a record of tips he had received as a blackjack dealer.

64 (D.C. Cir. 1979) (telex summarizing two year old bank records made in response to subpoena inadmissible under business records exception; telex was not prepared at or near time of the acts reported, telex was not sent in regular course of business, and trial court did not abuse its discretion in refusing to admit telex where circumstances indicated lack of trustworthiness) and Seattle-First Nat'l Bank v. Randall, 532 F.2d 1291, 1296 (9th Cir. 1976) (bank's loan procedure manual inadmissible as business record because it was not made as record of any act, transaction, event, or occurrence, and because it was not made contemporaneously with transaction or within reasonable time thereafter). However, the Ninth Circuit used these same cases as support for its conclusion that the Whitlock diary was admissible as a business record. The court stated that the cases stressed "just the sort of timeliness and regularity of entries that are present here." 713 F.2d at 500. The Keogh court also cited Sabatino v. Curtiss Nat'l Bank, 415 F.2d 632 (5th Cir. 1969) (blue covered book in which decedent recorded checks and reconciled his bank statements contemporaneously with writing of checks and analysis of statements admissible as business record, even though check record kept by decedent was used in his personal business) to support its finding that the diary was admissible as a business record. 713 F.2d at 500.

2952. 713 F.2d at 499.
2953. Id.
2954. Id. (citing 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(6)[03], at 803-155 (1981); United States v. Hedman, 630 F.2d 1184, 1197-98 (7th Cir. 1980) (diary kept by contractor's employee who was responsible for making extortionate payoffs to city building inspectors admissible as business record); United States v. McPartlin, 595 F.2d 1321, 1347-50 (7th Cir. 1979) (desk calendar appointment diaries kept by unindicted co-conspirator, a corporate officer who testified for the government in prosecution of defendant corporation's alleged bribery of city officials, were admissible as business records; diaries were kept as part of business activity, entries were made with regularity at or near time of described event, and corporate officer, who needed to rely on entries, would have little reason to distort or falsify entries).
2955. Id.
2956. The principal evidence at trial was a photocopy of the Whitlock diary and testimony by Whitlock's former wife. Whitlock himself was subpoenaed by the Commissioner, but failed to appear. Id.
2957. Id. at 499-500.
The court further found that the diary entries were reliable notwithstanding Keogh's contrary contention.\textsuperscript{2958} The court reasoned that because the diary contained Whitlock's own personal financial records, his motives in making the entries were not suspect absent a reason for him to have lied to himself.\textsuperscript{2959} The Ninth Circuit concluded that the trial court had not abused its discretion by admitting the diary without the personal testimony of Whitlock, its "custodian,"\textsuperscript{2960} concerning his reliance on the records kept there.\textsuperscript{2961} The court noted that the record failed to suggest that Whitlock did no rely on his personal financial diary.\textsuperscript{2962}

Finally, the court rejected Keogh's contention that admission of the Whitlock diary violated the "best evidence" rule because it was a photocopy.\textsuperscript{2963} Keogh urged that the tax court erred in determining that there

\textsuperscript{2958} Id. at 500. The trial court may exclude an otherwise proper business record if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." \textit{FED. R. EVID.} 803(6). Keogh cited \textit{Palmer v. Hoffman}, 318 U.S. 109 (1943) to support his contention that the diary entries were untrustworthy because there was no explanation concerning Whitlock's motives for preparing the diary. \textit{713 F.2d} at 500. In \textit{Palmer}, a railroad was barred from using the report of a deceased engineer in a grade crossing collision case because the record had been made in contemplation of the litigation. The Court indicated that in determining whether the source of the information was contained in a business record or whether its method of preparation was trustworthy, the trial court may look to the motivation for the report as an aid. 318 U.S. at 114. The \textit{Keogh} court held that \textit{Palmer} was inapposite because there was "no evidence that Whitlock's motives in making the entries were suspect." 713 F.2d at 500.

\textsuperscript{2959} 713 F.2d at 500. The trustworthiness of the tip entries was further substantiated by the fact that other entries corresponded with the casino's payroll records. The court did not consider the tip entries to be any less reliable merely because Whitlock had reported less tip income to the government than he had in fact received and entered into the diary. \textit{Id.}.

\textsuperscript{2960} The foundation for the admission of a business record may be "shown by the testimony of the custodian or other qualified witness." \textit{FED. R. EVID.} 803(6).

\textsuperscript{2961} 713 F.2d at 500.

\textsuperscript{2962} \textit{Id.}

\textsuperscript{2963} \textit{Id.} The "best evidence" rule generally requires the production of an original in order to prove the contents of a writing, recording, or photograph unless the original is shown to be unavailable. \textit{FED. R. EVID.} 1002, 1004. "The 'best evidence' rule comes into play only when the terms of a writing are being established and an attempt is made to offer secondary evidence, i.e., a copy, to prove the contents of the original writing." J. \textsc{Cotchett} & A. \textsc{Elkin}, \textsc{Federal Courtroom Evidence} § 1002, at 188 (1983). In \textit{Keogh}, the government offered a photocopy of the Whitlock diary rather than the original. 713 F.2d at 500. A photocopy is considered to be a "duplicate" under \textit{FED. R. EVID.} 1001(4). However, "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." \textit{FED. R. EVID.} 1003. Several authors have commented that:

Rule 1003 departs from the common law in providing that a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate under the circumstances of a particular case. In essence, someone opposing the introduction of a duplicate must show some reason why the original should be produced. In common law jurisdictions, the assumption is that the Best Evidence Rule, adopted for the
was no genuine question as to the original's authenticity. However, the Ninth Circuit explained that Keogh's contention that the testimony of Whitlock's former wife failed to prove the source of the entries did not address whether the duplicate diary was an accurate photocopy of the diary kept by Whitlock. Since no one disputed that the photocopy was a duplicate of the diary actually kept by Whitlock, the tax court did not violate the "best evidence" rule in admitting the photocopy.

**e. public records exception**

The public records exception allows into evidence a broad category of writings that would otherwise be regarded as inadmissible hearsay. The exception is premised upon the inherent reliability of public records and the desire to avoid the inconvenience of bringing busy public employees into court to testify as to matters that generally have been thoroughly and reliably reported and recorded.

However, concerns voiced in the House of Representatives regarding the validity of this rationale when applied in the criminal context...
moved Congress to amend the public records exception to exclude in criminal cases records of observations by police officers and other members of law enforcement agencies. This exclusion in turn has raised the recurring problem of whether the business records exception can be used to admit evidence in a criminal case that is excluded under Rule 803(8).

The Ninth Circuit recently held in United States v. Wilson that a marshal's receipt for a United States prisoner qualified as a public record under the exception. Wilson was convicted of escaping from a federal halfway house where he was serving a sentence for counterfeiting, a misdemeanor. His sentence had been reduced to six months on the condition that he spend the time in a treatment-oriented institution. However, two weeks after Wilson arrived at the halfway house, he signed out and failed to return. The defendant was subsequently stopped by marshals who asked for some identification. He tendered two pieces of false identification and offered a phony explanation as to why he was in the area. The officers arrested the defendant.

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Much controversy surrounded the adoption of 803(8). The House, desiring to restrict the scope of subsection (b), added the latter qualifying conditions as to the admissibility of reports on matters observed. This was done to limit the admissibility of law enforcement reports . . . . The purpose of the criminal law enforcement reports exception was to exclude observation made by officials at the scene of a crime or apprehension, because observations made in an adversarial setting are less reliable than observations made by public officials in other situations. Congress, however, did not intend to exclude records of routine, non-adversarial matters.

Id. (citing United States v. Hernandez-Rojas, 617 F.2d 533 (9th Cir.), cert. denied, 449 U.S. 564 (1980) (warrant of deportation made by law enforcement officer in criminal case considered ministerial observation and hence admissible)).


2971. S. Saltzburg & K. Redden, supra note 2879, at 579.

2972. 690 F.2d 1267 (9th Cir. 1982), cert. denied, 104 S. Ct. 205 (1983).

2973. Id. at 1275-76.

2974. Id. at 1269-70. 18 U.S.C. § 751(a) provides in relevant part:

(a) Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States . . . . pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both . . . .


2975. 690 F.2d at 1270.

2976. Id.

2977. Id.

2978. Id.
Wilson raised three evidentiary claims on appeal. First, he challenged the admission of photocopies of the two pieces of false identification, claiming that these photocopies did not qualify for admission under the business records exception to the hearsay rule. Secondly, he argued that the introduction of a certified copy of the judgment and order relating to the underlying crime for which he was serving his sentence at the time of his escape was inadmissible hearsay because it related to a misdemeanor conviction. Therefore, he contended that the prior conviction did not come within the judgment of previous conviction exception to the hearsay rule. However, the court concluded that the objections were waived because the defendant had failed to raise them at trial.

Finally, Wilson urged that the marshal's receipt indicating that a United States prisoner, Wilson, had been delivered to the halfway house from which he had escaped was inadmissible hearsay. Although the

2979. See Fed. R. Evid. 803(6) which provides:

The following are not excluded by the hearsay rule . . . : A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with the knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

For a discussion of the business records exception, see supra notes 2908-66 and accompanying text. The Wilson court points out in a footnote that the photocopies were independently admissible under Fed. R. Evid. 1003, which makes duplicates admissible unless a genuine question is raised concerning the original's authenticity or unless it would be unfair to admit the duplicate under the circumstances. Because the photocopies were certified on both sides as required by Fed. R. Evid. 902(4) (self-authentication of certified public records), the court reasoned that they also could have been introduced under the public records exception, Fed. R. Evid. 803(8), regardless of the defendant's challenge to their admissibility as business records. 690 F.2d at 1275 n.2.

2980. See Fed. R. Evid. 803(22). The defendant correctly noted that the misdemeanor conviction for which he was serving a six month sentence was not a crime "punishable by death or imprisonment in excess of one year" as required by Rule 803(22). 690 F.2d at 1275. However, the court did not need to address this issue because it concluded that Wilson had waived this objection. Id.

2981. In this regard, see the discussion of the waiver rule under the co-conspirator exception at note 2766, supra. A party in a criminal action must make "known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor [unless he] has no opportunity to object to a ruling or order." Fed. R. Crim. P. 51. Furthermore, "[e]rror may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and . . . a timely objection or a motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." Fed. R. Evid. 103(a)(1). The Wilson court noted that Wilson's attorney failed to object to the admission of the photocopies and specifically stated that "he had no objection to the admission of the judgment and the commitment order itself," thereby waiving any objections on appeal. 690 F.2d at 1275.
court noted that this hearsay objection was properly raised at trial, it held that the evidence was nevertheless admissible under the public records exception. The court reasoned that the receipt had been properly authenticated at trial by the director of the halfway house, who had signed the document.

Implicit in the holding was the court's judgment that the receipt at issue was not the observation of the marshal, which would have been inadmissible under the exclusion for observations of police officers. Instead, the court viewed the document as the observation of the corrections officer who signed it.

\textit{f. harmless error}

Although the Supreme Court has held that the introduction of hearsay evidence against a criminal defendant may violate the confrontation clause, the erroneous introduction of inadmissible hearsay against a criminal defendant does not necessarily assume constitutional proportions. When the introduction of hearsay amounts to a violation of an evidentiary rule, the courts consider its prejudicial impact under the "harmless error" standard set forth in Rule 52(a) of the Federal Rules of Criminal Procedure.

In \textit{United States v. Greene}, the Ninth Circuit held that the erroneous introduction of hearsay evidence in a prosecution for tax evasion

\begin{itemize}
  \item 2983. \textit{Id.} at 1275-76. See \textit{Fed. R. Evid.} 803(8) and \textit{supra} note 2979.
  \item 2984. 690 F.2d at 1275-76. See \textit{Fed. R. Evid.} 901(a), (b)(1), (b)(7) (requirement of authentication may be established by testimony of witness with knowledge; public records routinely authenticated by mere proof of custody). See also \textit{Fed. R. Evid.} 901 advisory committee note. 2985. "Matters observed by police officers and other law enforcement personnel" are excluded in criminal cases from the public records and reports exception. \textit{Fed. R. Evid.} 803(8) (B). See \textit{supra} notes 2967 & 2969.
  \item 2987. \textit{See} \textit{Dutton v. Evans}, 400 U.S. 74, 86 (1970). \textit{See also} \textit{United States v. Castillo}, 615 F.2d 878, 883 (9th Cir. 1980) (discussing the \textit{Dutton} four factor test for determining whether admission of hearsay amounts to a constitutional violation). The \textit{Castillo} court also observed that when the introduction of inadmissible hearsay arguably violates the confrontation clause, the court must determine whether the error was harmless "beyond a reasonable doubt." \textit{Id.} (quoting \textit{Chapman v. California}, 386 U.S. 18 (1967)).
  \item 2988. "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." \textit{Fed. R. Crim. P.} 52(a). Thus, reversal under this standard is only required if the error affected "substantial rights," which means that "nonconstitutional errors are measured against the more-probable-than-not standard." \textit{United States v. Valle-Valdez}, 554 F.2d 911, 916 (9th Cir. 1977). Therefore, the appellate court may affirm if it finds that the introduction of the hearsay statement "was more probably than not harmless." \textit{United States v. Castillo}, 615 F.2d 878, 883 (9th Cir. 1980) (citing \textit{Valle-Valdez}, 554 F.2d at 916).
  \item 2989. 698 F.2d 1364 (9th Cir. 1983).
\end{itemize}
was harmless error because it affected none of the accused's substantial rights.\textsuperscript{2990}

Greene was found guilty of willfully attempting to evade payment of federal income taxes as a result of understating his taxable income for two consecutive years.\textsuperscript{2991} On appeal, he challenged his conviction in part on the claim that the trial court committed reversible error when it erroneously permitted the introduction of an Internal Revenue Service (IRS) agent's hearsay testimony.\textsuperscript{2992} The disputed testimony consisted of the agent's conversations with individuals, revealing Greene's true net worth.\textsuperscript{2993}

Assuming that the disputed testimony was hearsay, the court considered the prejudicial effect of the evidence in light of the harmless error rule,\textsuperscript{2994} since Greene did not contend that the error reached constitutional proportions.\textsuperscript{2995} The court concluded, after reviewing the record, that the error was more probably than not harmless, and resulted in no violation of Greene's substantial rights.\textsuperscript{2996}

8. The right to present evidence

A criminal defendant has the right to present favorable evidence under the sixth and fourteenth amendments.\textsuperscript{2997} The accused's right to

\textsuperscript{2990} Id. at 1375.
\textsuperscript{2991} Id. at 1367. 26 U.S.C. § 7201 (1982) provides:
Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than five years, or both, together with the costs of prosecution.
\textsuperscript{2992} 698 F.2d at 1375.
\textsuperscript{2993} Id. The government was forced to use a net worth method of computing Greene's taxable income because Greene refused to answer any questions or provide records to the IRS agent. The government simply estimated the increase in Greene's net assets in order to determine his true taxable income. Id. at 1370.
\textsuperscript{2994} See supra note 3.
\textsuperscript{2995} 698 F.2d at 1375. The Greene court noted in passing that there were no constitutional issues that could have been raised by Greene's evidentiary challenge. Id.
\textsuperscript{2996} Id. The court's conclusion that the error was harmless was substantiated by the record. The court noted that at trial, "the government introduced the testimony of 59 witnesses and 345 exhibits in order to prove that Greene had unreported income in 1973 and 1974 upon which a tax of $97,000 was due." Id. at 1367.
\textsuperscript{2997} "In all criminal prosecutions, the accused shall enjoy the right... to have compulsory process for obtaining witnesses in his favor..." U.S. Const. amend. VI. This right "is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment." Washington v. Texas, 388 U.S. 14, 17-18 (1967) (footnote omitted). The right to compulsory process implicitly precludes the state from arbitrarily excluding the testimony of a witness, because "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses
introduce evidence, however, is not absolute.2998 The states have a legitimate interest in reliable and efficient trials and are free to fashion rules of evidence and procedure for their own courts.2999 Therefore, evidence may be excluded when a significant state interest is at issue.3000 In order to resolve the inherent conflict between state evidentiary rules of exclusion and the defendant's right to present evidence, the United States Supreme Court has used a balancing approach which weighs the interest of the defendant against the state's interest in the evidentiary rule.3001

In Perry v. Rushen,3002 the Ninth Circuit held that the application of California evidence law to exclude evidence proffered by the defendant, that a third party committed the charged offense, did not violate due process or the defendant's right to compulsory process under the United States Constitution.3003 Perry was convicted in California Superior Court of aggravated assault.3004 The female victim had been attacked in whose testimony he had no right to use.” Id. at 23. In addition, the accused's right to due process in a criminal trial "is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

2998. Few rights are more fundamental than that of an accused to present witnesses in his own defense . . . . [But] [i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

2999. See Ohio v. Roberts, 448 U.S. 56, 65-66 (1980) (state interest in reliable trials can prevail over defendant's right to exclude out of court statements under the confrontation clause where hearsay evidence is necessary and reliable); Chambers, 410 U.S. at 295 (“[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.”).

3000. See Ohio v. Roberts, 448 U.S. 56, 64 (1980) (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)) (“'general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.'”).

3001. See Chambers v. Mississippi, 410 U.S. 284, 295 (1973); Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam) (“Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment.”).

3002. 713 F.2d 1447 (9th Cir. 1983).

3003. Id. at 1455.

3004. Id. at 1449. “Every person who commits an assault upon the person of another . . . . by any means of force likely to produce great bodily injury is punishable by imprisonment in the state prison for two, three or four years . . . .” CAL. PENAL CODE § 245(a)(1) (West Supp. 1984). “Assault” is defined as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” CAL. PENAL CODE § 240 (West 1970).
a park and had twice identified Perry as the perpetrator, once at the police station shortly following the attack and again at Perry’s trial.\textsuperscript{3005} Perry testified in his own defense that he had never entered the park on the day of the attack.\textsuperscript{3006} He attempted to support his story by proffering the testimony of two women who had been robbed and raped in the same area of the park by another man who, Perry argued, resembled him.\textsuperscript{3007} One attack had occurred three years before and the other had taken place just an hour before the charged assault.\textsuperscript{3008} Perry contended that the proffered evidence—that a similar looking man had committed assaults in a similar fashion in the same area of the park around the same time—suggested that the other man might have committed the charged assault.\textsuperscript{3009}

However, under California Evidence Code section 352, the trial court is given discretion to exclude such collateral evidence “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”\textsuperscript{3010} California courts have interpreted section 352 to mean that evidence of third party culpability, which merely suggests that someone other than the defendant has committed the offense, is inadmissible, unless coupled with substantial evidence directly connecting that third party with the commission of the crime in question.\textsuperscript{3011} After com-

\textsuperscript{3005} 713 F.2d at 1448-49. The victim’s identification was based on Perry’s general appearance as well as a distinctive scar on his forehead. He was also identified by other witnesses who had observed him in the park moments before the attack and again when he was fleeing from the area after the victim screamed. Id. at 1449.

\textsuperscript{3006} Id.

\textsuperscript{3007} Id. The court noted that both Perry and Wolfe are black, of similar height and weight, and had distinctive “sectionally braided” hair on the day of the assault. On that afternoon, Wolfe was wearing a brown leather jacket and blue jeans; Perry wore a light brown jacket and blue warm-up pants. Wolfe [was] convicted of both previous attacks. Id.

\textsuperscript{3008} Id.

\textsuperscript{3009} Id.

\textsuperscript{3010} CAL. EVID. CODE § 352 (West 1966). The Perry court observed that § 352 resembles Rule 403 of the FEDERAL RULES OF EVIDENCE. 713 F.2d at 1449 n.1. Rule 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.

\textsuperscript{3011} This is California’s so-called Mendez-Arline rule. 713 F.2d at 1449 (citing People v. Green, 27 Cal. 3d 1, 22, 609 P.2d 468, 480, 164 Cal. Rptr. 1, 13 (1980)). Accord People v. Mendez, 193 Cal. 39, 223 P. 65 (1924); overruled on other grounds, People v. McCaughan, 49 Cal. 2d 409, 317 P.2d 974 (1957); People v. Arline, 13 Cal. App. 3d 200, 91 Cal. Rptr. 520 (1970); People v. Edmond, 200 Cal. App. 2d 278, 19 Cal. Rptr. 302 (1962)). In Arline, the
paring photographs of the defendant and the third party in *Perry*, the trial judge concluded that misidentification by the victim was unlikely. Therefore, he exercised his discretion under section 352 to exclude the evidence.

The Ninth Circuit affirmed the district court's denial of Perry's petition for a writ of habeas corpus. In so holding, the court applied a balancing test in order to resolve the conflict between the competing individual and state interests. The court balanced Perry's right to present evidence against the state's interest in applying the evidentiary rule excluding such evidence. The court indicated that a prerequisite to the application of the balancing test is a determination of the weight to be given to the respective interests which conflict. While the court conceded that the right to present a defense is fundamental, it rejected Perry's contention that the right to present evidence carried such conclusive weight that it was unconstitutional to exclude any relevant evidence. Instead, the court declared that the state also has a legitimate defendant sought to introduce evidence that a third person committed a prior robbery using the same modus operandi as the robbery in which the defendant was charged. The evidence was offered to establish that the third person committed the charged offense, not the defendant. However, the evidence advanced failed to sufficiently establish a modus operandi. Therefore, the trial court properly excluded the evidence under §352 as not tending to directly connect the third person with the charged robbery. *Arlino*, 13 Cal. App. 3d at 204, 91 Cal. Rptr. at 522. In *Green*, the California Supreme Court affirmed the Mendez-Arlino rule and set forth the principle that a defendant's proffered evidence that another person committed the offense at issue is inadmissible "if it simply affords a possible ground of suspicion against such person; rather, it must be coupled with substantial evidence tending to directly connect that person with the actual commission of the offense." *People v. Green*, 27 Cal. 3d 1, 22, 609 P.2d 468, 480, 164 Cal. Rptr. 1, 13 (1980). The *Green* court reasoned that the Mendez-Arlino rule places "reasonable limits on the trial of collateral issues... and... avoid[s] undue prejudice to the People from unsupported jury speculation as to the guilt of other suspects." *Id.* (citations omitted).

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3012. 713 F.2d at 1449. The judge explained: "Except for the race of the man, there is nothing similar." *Id.*
3013. *Id.* Perry was subsequently convicted of aggravated assault and sentenced to three years in prison. *Id.*
3014. *Id.* at 1455.
3015. *Id.* at 1450.
3016. *Id.*
3017. *Id.* (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *United States v. Garner*, 581 F.2d 481, 488 (5th Cir. 1978); *United States v. Ballesteros-Acuna*, 527 F.2d 928, 930 (9th Cir. 1975); *United States v. Thomas*, 488 F.2d 334, 335 (6th Cir. 1973)).
3018. 713 F.2d at 1451. Perry cited *United States v. Armstrong*, 621 F.2d 951 (9th Cir. 1980), as support for this proposition. In *Armstrong*, the defendant was charged with committing three armed robberies. Testimony that another man who matched the robber's description had used "bait money" from one of the robberies to purchase an automobile was excluded as "irrelevant." The Ninth Circuit reversed, and held that "[f]undamental standards of relevancy, subject to the discretion of the court to exclude cumulative evidence and to ensure orderly presentation of a case, require the admission of testimony which tends to prove that a
and compelling interest in reliable and efficient trials. The court further suggested that unusually compelling circumstances are required before the state's strong interest in efficiently administering trials is outweighed. Since the exclusion of relevant evidence significant to

The Perry court, however, distinguished Armstrong in two respects. First, Armstrong involved the erroneous exclusion of evidence under Fed. R. Evid. 403. Second, the Armstrong court did not mention the sixth amendment or due process. Thus, the Perry court reasoned that Armstrong did not support "a belief that the Federal Rules of Evidence are constitutionally required, or that the Constitution requires admission of all relevant evidence." 713 F.2d at 1451.

The Ninth Circuit indicated that Perry had similarly misplaced reliance on United States v. Robinson, 544 F.2d 110 (2d Cir. 1976) (exclusion of testimony that person in bank surveillance photograph resembled a suspect in other robberies and not the defendant constituted reversible error because it severely prejudiced defendant's alibi defense), cert. denied, 434 U.S. 1050 (1978) and Holt v. United States, 342 F.2d 163 (5th Cir. 1965) (error to exclude testimony relevant to defendant's alibi defense). The Perry court acknowledged that the Fifth Circuit seemingly equated Rule 403 with due process in United States v. Davis, 639 F.2d 239, 244 (5th Cir. 1981) ("If the trial court abuses its discretion in excluding evidence under Rule 403, the error is of constitutional proportion."). Yet the Ninth Circuit in Perry declined to equate Rule 403 with the "due process line" or to agree "that every error in applying such a rule results in a constitutional violation." 713 F.2d at 1451 n.2.

Finally, the Perry court distinguished Armstrong on its facts. The court concluded that the evidence offered in Armstrong—that a man matching the robber's description had used bait money to buy an automobile the day after the robbery—may have presented "some 'substantial evidence tending to directly connect that person with the actual commission of the offense.'" Id. at 1451 (citing People v. Green, 27 Cal. 3d 1, 22, 609 P.2d 468, 480, 164 Cal. Rptr. 1, 3 (1980)).

3019. 713 F.2d at 1451 (citing Younger v. Harris, 401 U.S. 37 (1971) (state's interest in efficient criminal trial process sufficient to bar federal courts from enjoining most state criminal trials); Branzburg v. Hayes, 408 U.S. 665, 690 (1972) (state interest in "[t]he fair and effective law enforcement" outweighs reporter's first amendment interest in withholding source's identity); Cox v. Louisiana, 379 U.S. 559, 562 (1965) (state's prohibition of picketing near courthouse justified by interest in protecting judicial system); United States v. Nixon, 418 U.S. 683, 709-12 (1974) (interest in preserving confidentiality in White House conversations outweighed by demonstrated need for evidence in pending criminal trial); Ohio v. Roberts, 448 U.S. 56 (1980) (accused's right to confront witnesses under confrontation clause can be outweighed by state's interest in reliable trials where hearsay evidence is necessary and trustworthy)).

3020. Id. at 1452. The Ninth Circuit relied on two Supreme Court cases, Chambers v. Mississippi, 410 U.S. 284 (1973), and Washington v. Texas, 388 U.S. 14 (1967), for this proposition. In Chambers, the defendant sought to introduce testimony that a third person had confessed to the crime charged. The Court indicated that the hearsay was reliable because it was against the declarant's interest, and critical because only the excluded evidence could present Chamber's side of the story. Therefore, the exclusion of this reliable and critical evidence deprived the defendant of due process. Chambers, 410 U.S. at 302. In Washington, the trial court excluded the proffered testimony of the defendant's accomplice in a murder prosecution pursuant to an antiquated state statute, barring persons charged or convicted as co-participants in the same offense from testifying for one another but not for the prosecution. The evidence indicated that the defendant had tried to persuade the accomplice to leave the scene, and that Washington had in fact fled before the accomplice fired the fatal shot. The
Perry's defense implicated both his right to due process and his right to compulsory process, it was necessary for the court to balance the significance of Perry's proffered evidence against the state's interest in excluding it.\textsuperscript{3021}

In applying the balancing test to the facts in \textit{Perry}, the court noted that the state's interest in excluding the evidence under section 352 was significant, though not compelling.\textsuperscript{3022} The state's interest was two-fold: (1) to limit distractions resulting from the introduction of evidence on a collateral matter; and (2) to avoid unsupported jury speculation concerning the guilt of other suspects.\textsuperscript{3023} The court reasoned that the state had a legitimate interest in avoiding the injection of collateral issues into the trial because of the time required to present not only Perry's evidence,\textsuperscript{3024} but also the prosecution's rebuttal evidence.\textsuperscript{3025} The Ninth Circuit also

\textbf{\textit{evidentiary rule} excluding such testimony was apparently based on the belief that accomplices would commit perjury in order to get each other acquitted.} \textit{Washington}, 388 U.S. at 21. However, the Supreme Court held that the state's rule violated the defendant's right to compulsory process because "the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." \textit{Id.} at 23.

The \textit{Perry} court concluded that "[i]n each of these cases, the [excluded] evidence was highly exculpatory: third party confessions, if believed, would \textit{necessarily} exonerate the defendant of the primary offense. In each case, also, the evidence was crucial to the defense; no other avenues were available to prove the defendant's story." 713 F.2d at 1452 (emphasis in original). Relying upon these precedents, the district court in \textit{Perry} had concluded that the exclusion of the evidence at issue did not violate due process because it was not both crucial and exculpatory. \textit{Id.} Nevertheless, the Ninth Circuit declined to adopt a per se test that only the exclusion of "crucial and exculpatory" evidence can violate due process. \textit{Id.} Rather, it concluded that \textit{Chambers} and \textit{Washington} established that "[w]here the state interest is strong, only the exclusion of critical, reliable and highly probative evidence will violate due process. When the state interest is weaker, less significant evidence is protected." \textit{Id.}

\textit{3021.} 713 F.2d at 1452-53. The court stated:

\begin{quote}
In evaluating the significance of the evidence, the court should consider all of the circumstances: its probative value on the central issue, its reliability, whether it is capable of evaluation by the finder of fact, whether it is the sole evidence on the issue or merely cumulative, and whether it constitutes a major part of the attempted defense. The weight of the state's interest likewise depends upon many factors. The Court must determine the purpose of the rule, its importance, how well the rule implements this purpose, and how well the purpose applies in the case at hand. The court must give due weight to the substantial state interest in preserving orderly trials, in judicial efficiency, in excluding unreliable or prejudicial evidence.
\end{quote}

\textit{Id.}

\textit{3022.} \textit{Id.} at 1453.

\textit{3023.} \textit{Id.} at 1453-54 (citing People v. Green, 27 Cal. 3d 1, 22, 609 P.2d 468, 480, 164 Cal. Rptr. 1, 13 (1980) (citation omitted in original)).

\textit{3024.} Although Perry's attorney urged that his presentation of the witnesses' testimony would require only 45 minutes, the Ninth Circuit suggested that "the introduction of evidence of [the third party's] crimes quite possibly might require rebuttal or, at the most extreme, a full-scale defense of [the third party] by the prosecution." \textit{Id.} at 1453.

\textit{3025.} \textit{Id.}
found that the state had a legitimate interest in avoiding jury confusion. The court recognized that although the jury's role is to weigh conflicting inferences of fact, certain evidence may have so little probative value and produce such confusion that it may be constitutionally excluded. Nevertheless, the Ninth Circuit acknowledged that the weight which it accorded these interests depended upon the relevance of the excluded matter.

The court concluded that Perry's proffered evidence was only slightly connected to this case. The court observed that the evidence identifying Perry as the assailant was strong; that the third party "suspect" lacked Perry's prominent forehead scar; that the third party's facial features did not resemble Perry's; and that the clothing worn by the third party was clearly distinguishable from the clothes worn by Perry. Accordingly, the evidence had little probative value on the issue of identification.

The court similarly rejected Perry's contention that the evidence concerning the third party raised a significant question of identity. The court explained that the cases Perry relied upon involved circumstances under which the defendant sought to introduce the testimony of an eyewitness who identified a person other than the defendant as the perpetrator of the charged offense, or where the defendant sought to introduce the direct testimony of a third party who would have admitted

3026. Id. at 1453-54.
3027. Id. at 1454.
3028. Id. The court reasoned that the testimony would merely "show that another black man, of roughly Perry's height and weight, wearing braided hair and somewhat similar clothing was near the scene an hour before and had a history of sexual assaults." Id.
3029. Id. Perry was positively identified by the victim only minutes after the attack. Id.
3030. In addition, Perry wore chin whiskers and a mustache, while the third party was clean shaven. Id. Moreover, the victim's assailant had been jogging with a dog. Id. at 1448. The third party did not have a dog. Id. at 1454.
3031. "[A]lthough both wore blue pants, [the third party's] jeans were not likely to be mistaken for the warm-up pants worn by Perry." Id. at 1454.
3032. Id. The Perry court concluded that Perry's case was analogous to United States v. Brannon, 616 F.2d 413 (9th Cir.) (no abuse of discretion under Fed. R. Evid. 403 to exclude photographs offered by the defendant in a bank robbery prosecution of another person who defendant claimed resembled the person shown in bank surveillance photographs), cert. denied, 447 U.S. 908 (1980). 713 F.2d at 1454.
3033. 713 F.2d at 1454. Perry relied on Pettijohn v. Hall, 599 F.2d 476 (1st Cir.), cert. denied, 444 U.S. 946 (1979) for this proposition.
3034. Pettijohn v. Hall, 599 F.2d 476 (1st Cir.) (sixth amendment right to call witnesses in one's defense required that defendant be permitted to call an eyewitness and ask questions about an earlier misidentification in order to raise the defense that another man, with similar characteristics, had committed the crime), cert. denied, 444 U.S. 946 (1979).
that he committed the offense for which the defendant was on trial.\textsuperscript{3035}

Conversely, Perry merely sought to establish that a third party, who faintly resembled him in appearance, had committed other similar crimes in the same area.\textsuperscript{3036} As a result, the Ninth Circuit found that the evidence offered by Perry failed to impugn the strong identification of him as the victim’s assailant.\textsuperscript{3037} Thus, the evidence was not “critical” in the constitutional balance, and its exclusion did not violate due process or the right to compulsory process.\textsuperscript{3038}

\textbf{G. Jury Instructions}

The instructions to the jury are one of the most important aspects of the criminal trial. In addition to outlining the issues and the law, the general instructions must include an explanation of how to weigh the evidence presented in determining the disputed facts. It is vital that the charge to the jury be presented in a clear, concise fashion so that obscure legal principles are made understandable.

A common criticism of a judge’s instructions is that they tend to obfuscate and confuse the issues rather than clarify them. Indeed, it has been said that the jury instructions consist mostly of “ineffective rigma-roles, incantations, or semi-magical rituals which the judge utters to the jury’s uncomprehending ears.”\textsuperscript{3039} Nevertheless, a party has a right to

\begin{footnotesize}
\textsuperscript{3035} United States v. Crenshaw, 698 F.2d 1060 (9th Cir. 1983) (error to exclude evidence that a third party had actually planned the robbery for which defendant was charged with aiding and abetting).
\textsuperscript{3036} 713 F.2d at 1455.
\textsuperscript{3037} Id.
\textsuperscript{3038} Id. One commentator has suggested that the state trial court in Perry initially erred in excluding the disputed evidence. He states:

\begin{quote}
The facts in Perry would seem clearly to meet the test of relevancy set forth in Green. Furthermore, the proffered evidence constituted evidence of \textit{significant} probative value to D’s defense. As pointed out in \textit{People v. Reeder} (1978) 82 CA3d 543, 553, 147 CR 275, 281: “Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence of \textit{significant} probative value to his defense.” In Perry, the court should have held that it was an abuse of discretion for the trial court to exclude D’s proffered evidence that X was the perpetrator of the assault offense against V.
\end{quote}

\textbf{B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK} § 22.1 at 619 (2d ed. 1982). Jefferson explains that the Perry dissent pointed out that the only issue was one of identity; that D persuasively suggested similarities in appearance and in modus operandi between X and V’s assailant, placed X in physical and temporal proximity to the crime, identified and exploited a variety of weaknesses in the prosecution identification testimony, and indicated that the proffered evidence to establish X’s culpability could be presented in less than an hour.

\begin{quote}
\textit{Id.} at 618.
\end{quote}

\textsuperscript{3039} C. JOINER, CIVIL JUSTICE AND THE JURY 139 (1962) (quoting Judge Jerome Frank).
\end{footnotesize}
demand that the principles of law applicable to the facts in the case be presented to the jury, and the judge has a duty to honor that request.

1. Instructions to a capital sentencing jury

In California v. Ramos, the defendant was convicted in the district court of first-degree murder, and sentenced to death. On appeal, the United States Supreme Court considered the constitutionality of an instruction to the sentencing jury. California law required that the trial judge inform the sentencing jury that life imprisonment without the possibility of parole may at a later date be commuted or modified by the governor to a sentence that would include the possibility of parole. The Supreme Court reversed the California Supreme Court's decision and held that the disputed instruction was not unconstitutional.

Defendant Ramos was convicted of first-degree murder committed during the perpetration of a robbery, a "special circumstance" that allowed the jury to sentence him to death in accordance with California Penal Code section 190.2. On appeal, the California Supreme Court affirmed his conviction, but reversed the death sentence, concluding that the Briggs instruction was unconstitutional under federal standards.

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3041. CAL. PENAL CODE § 190.3 (West Supp. 1984). This instruction is contained within a section of the Penal Code that was added as a result of a voter initiative on Nov. 7, 1978. Popularly known as the "Briggs Instruction," it "appears to be unique among the 38 states which have capital punishment statutes currently in effect." People v. Ramos, 30 Cal. 3d 553, 592, 629 P.2d 908, 830, 180 Cal. Rptr. 266, 288 (1982).
3042. 103 S. Ct. at 3449.
3043. CAL. PENAL CODE § 190.2 (West Supp. 1984) provides in pertinent part:
(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found . . . to be true:

(17) The murder was committed while the defendant was engaged in . . . the commission of, attempted commission of, or the immediate flight after committing . . . the following felonies:
(i) Robbery in violation of Section 211.

3044. People v. Ramos, 30 Cal. 3d 353, 639 P.2d 908, 180 Cal. Rptr. 266 (1982). Specifically, the court found the instruction to be violative of the defendant's due process rights as well as misleading and prejudicial. The court noted that the possibility of a future gubernatorial commutation was irrelevant to the jury's sentencing decision because it had nothing to do with the particular defendant or his offense. The court also ruled that the instruction biased the jurors in favor of the death penalty because they may think that is the only method for keeping the defendant removed from society. Such a result, the court reasoned, violated Ramos' due process rights. Id. at 596-600, 629 P.2d at 933-36, 180 Cal. Rptr. at 291-94.

On remand of the case, the California Supreme Court held that the Briggs Instruction was unconstitutional under California's constitutional standards. People v. Ramos, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984).
Certiorari was granted to review the constitutional issues involved.

In challenging the instruction, Ramos first argued that the sentencing jury could not constitutionally consider possible commutation and that the instruction misled the jury because it did not inform it that a death sentence could also be commuted by the governor. Justice O'Connor, writing for jury's decision because it brought to their attention the possibility that Ramos may one day be returned to society. The effect of this instruction was to focus the jury's attention on the defendant's possible future dangerousness and the issue whether it was desirable that he ever be released into society.

The Court did not agree with the defendant's characterization of the Briggs Instruction as "misleading." In the majority's opinion, the instruction actually clarified California's sentencing procedure by correcting the misperception that life imprisonment without possibility of parole was irrevocable.

Ramos next argued that the Briggs Instruction undermined the jury's ability to make an individualized sentencing decision. The defendant claimed that the instruction encouraged the jury to vote for the death penalty without considering if the facts actually justified such a severe penalty. The majority dismissed this argument, ruling that the Briggs Instruction did not have any limiting effect on what sentence was

3045. California v. Ramos, 103 S. Ct. at 3451. Ramos specifically contended that the possible commutation of a life sentence was irrelevant to the jury's decision and that it was too speculative for the jury to consider. Id. at 3453.

3046. Id. at 3454. The Court relied upon Jurek v. Texas, 428 U.S. 262 (1976), in deciding that consideration of a defendant's future dangerousness was not "unconstitutionally vague." In Jurek, the Court ruled on instructions which asked the jury to determine if the defendant would constitute a "continuing threat to society" if he were not sentenced to death. Id. at 272. In upholding the instruction, the Court noted that "prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system." Id. at 275.

Because the Briggs Instruction informed the jury that the Governor could commute a life sentence without possibility of parole to a lesser sentence that would include the possibility of parole, it presumably had the effect of making the jury consider if Ramos should ever be released from prison. As the dissent points out, this would seem to encourage the jurors to vote for a sentence of death to ensure that a dangerous felon would never be released. 103 S. Ct. at 3460 (Marshall, J., dissenting).

3047. 103 S. Ct. at 3454-55 n.19. The majority also noted that California Penal Code § 190.3 allows the defendant to "present any evidence to show that a penalty less than death is appropriate in his case." Id.

3048. Id. at 3455.

3049. Id. at 3456. Ramos relied on Beck v. Alabama, 447 U.S. 625 (1980), to support this argument. In Beck, the Court struck down an Alabama statute that precluded giving a lesser included offense charge in capital cases. The Court decided that the unavailability of lesser included offense instructions and the apparent mandatory nature of the death penalty both interject "irrelevant considerations into the factfinding process, diverting the jury's attention
chosen, but rather, simply introduced another element for the jury to consider in making their decision.\textsuperscript{3050}

Finally, the Court considered Ramos' contention that the instruction was unconstitutional because it biased the jury in favor of the death penalty by creating the misleading impression that a death sentence was the only way to ensure that the defendant would not return to society.\textsuperscript{3051} Ramos maintained that the jury should also have been instructed regarding the governor's power to commute a death sentence.

After first observing that Ramos never requested such an instruction during trial, the Court concluded that an instruction revealing the governor's power to commute a death sentence may actually operate to the defendant's disadvantage,\textsuperscript{3052} and, in any event, California state law precluded giving such an instruction.\textsuperscript{3053} The fact that no other states allowed any instruction at all regarding the possibility of commutation did not sway the Court in its decision; the majority simply noted that the states were free to provide greater criminal justice protection than that required by the federal Constitution.\textsuperscript{3054}

In an oftentimes bitter dissent, Justice Marshall rejected the majority's arguments and claimed that the Court was encouraging the death sentence by deceiving the jury.\textsuperscript{3055} His most compelling argument for invalidating the instruction was based on the fact that the jury is told that the governor may commute a life sentence without possibility of pa-

\begin{itemize}
\item from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." \textit{Id.} at 642.
\item \textsuperscript{3050} 103 S. Ct. at 3456. The Court ruled that the decision in \textit{Beck v. Alabama} did not apply here because of the "fundamental differences" between the two decisions. In \textit{Beck}, the Court was concerned with the jury being diverted from its central task of determining the defendant's guilt or innocence. But in Ramos' case, the instruction merely introduced another one of the "'countless considerations weighed by the jury in seeking to judge the punishment appropriate to the individual defendant.'" \textit{Id.} (quoting \textit{Zant v. Stephens}, 103 S. Ct. 2733, 2755 (1983) (Rehnquist, J., concurring)).
\item \textsuperscript{3051} \textit{Id.} at 3458.
\item \textsuperscript{3052} \textit{Id.} The Court felt that such an instruction would somehow induce the jury to approach the sentencing decision with less appreciation of its moral impact. The Court cited \textit{People v. Morse}, 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964) for the proposition that a defendant would be prejudiced by such an instruction. In \textit{Morse}, the California Supreme Court held that an instruction disclosing the Governor's power to reduce a death penalty would "foster the dual vices of foisting upon the jury alien issues and concomitantly diluting its own sense of responsibility." \textit{Id.} at 653, 388 P.2d at 47, 36 Cal. Rptr. at 215.
\item \textsuperscript{3053} 103 S. Ct. at 3458. \textit{See supra} note 3052.
\item \textsuperscript{3054} \textit{Id.} at 3459-60. Justice O'Connor concluded that the Court's decision meant only that the giving of the instruction in question was not prohibited by the eighth and fourteenth amendments.
\item \textsuperscript{3055} 103 S. Ct. at 3460 (Marshall, J., dissenting).
\end{itemize}
role, but not that the governor may also commute a death sentence. This would presumably lead the jury to believe that voting for a death sentence would be the only guarantee of keeping the criminal off the streets. Justice Marshall felt this to be misleading because the governor does have the power to commute a death sentence.

Justice Marshall also indicated that he would disallow the Briggs Instruction because it injected a factor into the jury's considerations that it had no relation or relevance to the character of the defendant or his crimes. He also argued that the jury may be encouraged to impose death to "immunize" its actions from later review by the governor. He concluded by noting that the majority should have been swayed by the fact that the vast majority of the states do not allow any directive at all regarding the commutation power.

In Zant v. Stephens, the United States Supreme Court considered whether a death sentence may constitutionally be sustained when one of the statutory aggravating circumstances found by the jury is subsequently ruled invalid. The Court responded in the affirmative, reversing a Fifth Circuit Court of Appeals decision and affirming the determination of the Georgia Supreme Court.

Defendant Stephens was found guilty of first-degree murder and the jury sentenced him to death. The disputed jury instructions concerning the aggravating circumstances identified in the Georgia capital sentencing statute, which, if found to be true, allowed the jury to sentence the defendant to death.

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3056. Id. (Marshall, J., dissenting).
3057. Id. at 3461 (Marshall, J., dissenting). In Justice Marshall's view, the Constitution simply does not permit a state to 'stack the deck' against a capital defendant in this manner." Id. (Marshall, J., dissenting) (quoting Witherspoon v. Illinois, 391 U.S. 510, 523 (1968)).
3058. 103 S. Ct. at 3464 (Marshall, J., dissenting). Justice Marshall argued that the possibility of the defendant's release through commutation was not a permissible factor for the jury to consider while making its sentencing decision.
3059. Id. at 3465-67 (Marshall, J., dissenting). He noted that California was the only state which actually required that the jury be instructed to consider possible gubernatorial commutation. Id. at 3466, n.12 (Marshall, J., dissenting).

Justice Blackmun joined in a portion of the dissent, contending that the majority never addressed the real issue, but instead substituted "an intellectual slight of hand for legal analysis." Id. at 3468 (Blackmun, J., dissenting). Justice Stevens dissented on the ground that the Court should never have initially granted certiorari. He reasoned that the decision of the California Supreme Court did not substantially prejudice the legitimate interests of the prosecutor. Therefore, the case was not deserving of judicial review. Id. (Stevens, I., dissenting).
3061. Stephens was also convicted of armed robbery, kidnapping and motor vehicle theft. He received life sentences on the robbery and kidnapping charges. Stephens v. Zant, 631 F.2d 397, 399 (5th Cir. 1980).
3062. GA. CODE ANN. § 27-2534.1(b) (1973) provided in pertinent part:
At the trial, the state argued that the evidence established aggravating circumstances as identified in the Georgia Code. The trial judge subsequently instructed the jury, following the basic guidelines set out in the Code and observing these guidelines, the jury convicted Stephens and sentenced him to death.

Following the trial, but before Stephens' appeal was heard by the Georgia Supreme Court, that court struck down a portion of the state code defining aggravating circumstances for purposes of the death penalty. Nevertheless, the Georgia Supreme Court affirmed the defendant's death sentence, noting that the jury had found additional aggravating circumstances present at the time of his offense that justified imposition of the death penalty.

After Stephens had exhausted his state post-conviction remedies, his application for a writ of habeas corpus was denied by the federal district court. On appeal, the Court of Appeals for the Fifth Circuit reversed. It held that the jury instructions were sufficiently prejudicial to Stephens to require a reversal of the district court's denial of habeas corpus relief.

In all cases . . . for which the death penalty may be authorized, the judge shall . . . include in his instructions to the jury . . . any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence: (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions. Stephens' prior criminal record included convictions on two counts of armed robbery, five counts of burglary and one court of murder. Zant v. Stephens, 103 S. Ct. at 2736.

The trial judge specifically instructed the sentencing jury that they could consider, as one of the aggravating circumstances, the fact that the murder "was committed by a person who has a substantial history of serious assaultive criminal convictions." Zant v. Stephens, 456 U.S. 410, 412 n.1 (1982).

In Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976), the Georgia Supreme Court held that Ga. CODE § 27-2534.1(b)(1), which allowed for the death penalty where the offense is committed by a person with a "substantial history of serious assaultive criminal convictions," was unconstitutionally vague. 236 Ga. at 541, 224 S.E.2d at 392. Interpreting the landmark case of Furman v. Georgia, 408 U.S. 238 (1972) (as standing for the proposition that a "wide latitude of discretion in a jury as to whether or not to impose the death penalty is unconstitutional," the court held that the language of the statute was too subjective to be properly applied in as serious a matter as the death penalty. 236 Ga. at 541, 224 S.E.2d at 392.

The Supreme Court of Georgia reviewed Stephens' convictions in Stephens v. State, 237 Ga. 259, 227 S.E.2d 261 (1976). The additional aggravating circumstances found were: "(1) The murder was committed by a person with a prior record of conviction for a capital felony . . . [and] (2) [t]he murder was committed by a person who has escaped from the lawful custody of a peace officer . . . ." Id. at 261, 227 S.E.2d at 263.

The Fifth Circuit found that the mere presence of the unconstitutionally vague jury instruction regarding the aggravating circumstance "may have unduly directed the jury's attention to his prior convictions." Stephens v. Zant, 631 F.2d 397, 406 (5th Cir. 1980), as modified, 648 F.2d 446, 446 (5th Cir. 1981). The court was concerned because the unconstitu-
Zant v. Stephens reached the United States Supreme Court on Warden Zant's petition for certiorari. Relying upon the response to this question, the majority held that previous Supreme Court cases did not require the invalidation of Stephens' death sentence. Finally, the Court ruled that because the trial judge did not give undue emphasis to the rule of aggravating statutory circumstances in his instructions to the jury, Stephens' death sentence could be upheld. The Court observed that, although the invalid portion of the statute may have given added weight

3068. The certified question presented to the Georgia Supreme Court was as follows: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?" Zant v. Stephens, 250 Ga. 97, 98, 297 S.E.2d 1, 2 (1982).
3069. The Court first held that the "limited purpose" achieved by the finding of statutory aggravating circumstances did not run afoul of the ruling in Furman v. Georgia, 408 U.S. 238 (1972). Furman was summarized to stand for the proposition that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Zant v. Stephens, 103 S. Ct. at 2741 (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976)). The majority opinion found that statutory aggravating circumstances play a "constitutionally necessary function" in that they provide for categorical narrowing at the definition stage. Id. at 2743.
3070. 103 S. Ct. at 2749. The Court in effect accepted the Georgia Supreme Court's determination that the instructions had "an inconsequential impact on the jury's decision regarding the death penalty." Id. The Court also considered it important that the Georgia system had
to Stephens' past convictions, this was neither prohibited by Georgia law, nor did it constitute reversible error.\textsuperscript{3071}

Justice Rehnquist concurred in the Court's judgment and rejected Stephens' argument that the erroneous instruction had a prejudicial effect on the jury. After first noting that sentencing decisions are usually accorded much greater finality than conviction,\textsuperscript{3072} Justice Rehnquist argued that the improper instruction introduced only one of countless considerations of which a jury takes account in determining a sentence. As such, the one error could not have had an inordinate effect on the jury's decision.\textsuperscript{3073}

Justice Marshall, in a vigorous dissent, contended that the majority's decision left far too much discretion in the hands of the jury and was inconsistent with the Court's earlier decisions.\textsuperscript{3074} He maintained that the jury instruction as given may have led the jurors to balance the statutory aggravating circumstances against any mitigating circumstances, thereby depriving the defendant of any favorable circumstances surrounding the commission of the offense. Justice Marshall would have vacated Stephens' death sentence because he reasoned that there was no way for the Court to determine whether the jury would have returned a death sentence if the judge had not erroneously instructed it regarding the statutory aggravating circumstances.\textsuperscript{3075}

These cases are but two examples of the current Supreme Court's
willingness to uphold state capital sentencing procedures against constitutional challenge. If, in the judgment of the Court, a state’s death penalty statute genuinely allows a jury to make an individualized determination on the basis of the defendant’s character and the circumstances of the crime, the sentence will stand. The broad test for a state death penalty statute is whether it violates the constitutional prohibition on arbitrary and capricious sentencing determinations.3076

2. Instructions calling for a “conclusive presumption” on the issue of intent

In Connecticut v. Johnson,3077 the United States Supreme Court decided, in a plurality opinion, that a jury instruction which calls for a “conclusive presumption” on the issue of a defendant’s intent could never be treated as harmless error.3078 In affirming the judgment of the Connecticut Supreme Court, the Court held that such a presumption became the equivalent of a directed verdict and deprived the defendant of the unfettered consideration of the jury.3079

Defendant Johnson had been convicted in the Connecticut Superior Court of attempted murder, kidnapping in the second degree, robbery in the first degree, and sexual assault in the first degree.3080 The judge had

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3076. A stark illustration of the high Court’s recent interpretations of state death penalty statutes is the increased frequency of executions being carried out in many states. The current attitude of a majority of the Court may best be summed up in an excerpt from a recent decision denying an application for a stay of execution. In a case that had been before the Supreme Court on four previous occasions, the majority opinion observed that “[t]his case has been in litigation for a full decade, with repetitive and careful reviews by both state and federal courts, and by this Court. There must come an end to the process of consideration and reconsideration.” Sullivan v. Wainwright, 104 S. Ct. 450, 452 (1983) (per curiam). In a concurring opinion, Chief Justice Burger denied that the Court had “rushed to judgment” and declared that “[t]he argument so often advanced by the dissenters that capital punishment is cruel and unusual is dwarfed by the cruelty of ten years on death row inflicted upon this guilty defendant by lawyers seeking to turn the administration of justice into the sporting context that Roscoe Pound denounced three-quarters of a century ago.” Id. (Burger, C.J., concurring).

3077. 460 U.S. 73 (1983) (plurality opinion).

3078. Justice Stevens did not feel that the case raised a valid federal question, and argued that the writ of certiorari should be dismissed. However, since a fifth vote was needed to authorize the entry of a Court judgment, he joined with the plurality. Id. at 89-90 (Stevens, J., concurring in the judgment).

3079. Id. at 84.

3080. Id. at 75. The evidence showed that Johnson had agreed to ride with a young woman in her car to show her the way to her destination. Instead the defendant and four companions seized her car, robbed the woman, and threatened her with bodily harm. Thereafter, all five men sexually assaulted her. A short while later, Johnson directed the driver to a bridge, bound the woman’s hands with a cord and threw her over the railing into a river. She managed to survive this ordeal, obtain help and subsequently identify Johnson and his accomplices. Id. at 76-77.
instructed the jury first that the state had to prove the existence of every element of the crimes charged beyond a reasonable doubt and explained the presumption of innocence.\textsuperscript{3081} The court next described the element of \textit{intent} to the jury and stated that "'a person's intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act.'"\textsuperscript{3082}

On appeal to the Connecticut Supreme Court, Johnson argued that the foregoing "conclusive presumption" instruction was unconstitutional under the ruling of a recent United States Supreme Court case.\textsuperscript{3083} The Connecticut court agreed, and reversed the defendant's convictions for attempted murder and robbery.\textsuperscript{3084} Subsequently, the Supreme Court granted the state's petition for certiorari because there had been inconsistent state court opinions on the subject.\textsuperscript{3085}

Analogizing to the decision in \textit{Sandstrom v. Montana},\textsuperscript{3086} the plurality opinion observed that a "conclusive presumption" on the issue of intent would ease the state's burden of proof and may have led the jurors to believe that, once they found certain preliminary facts, they had to rule against the defendant on the element of intent.\textsuperscript{3087} Since such an error would violate Johnson's basic constitutional rights, it could not be

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\item \textsuperscript{3081} \textit{Id.} at 78.
\item \textsuperscript{3082} \textit{Id.} (quoting court transcript at 22-23).
\item \textsuperscript{3083} \textit{Id.} at 79. In the interim between Johnson's conviction and appeal, the Supreme Court decided the case of Sandstrom v. Montana, 442 U.S. 510 (1979). In \textit{Sandstrom}, a unanimous Supreme Court declared that a jury instruction which stated that "'[t]he law presumes that a person intends the ordinary consequences of his voluntary acts'" was unconstitutional because it deprived the defendant of his right to due process of law. \textit{Id.} at 513-14. The \textit{Sandstrom} Court decided that because the jury could have "interpreted the judge's instruction as constituting either a burden-shifting presumption... or a conclusive presumption," it invaded the fact-finding mission of the jury and relieved the state or proving the existence of every element of the crime beyond a reasonable doubt. \textit{Id.} at 524.
\item \textsuperscript{3084} \textit{Id.} at 79-80. The Connecticut Supreme Court affirmed Johnson's convictions for kidnapping and sexual assault because the instructions regarding those offenses did not include the "conclusive presumption" language.
\item \textsuperscript{3085} \textit{Id.} at 75. In \textit{Sandstrom}, the Court merely ruled that such an instruction violated the due process clause. The Court left open the question whether the giving of the instruction could ever be harmless error. Sandstrom v. Montana, 442 U.S. 510, 526-27 (1979).
\item In its petition for certiorari, the state argued that the erroneous jury instruction should have been analyzed for harmlessness under the rule announced in \textit{Chapman v. California}, 386 U.S. 18 (1967). In \textit{Chapman}, the Supreme Court observed that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," \textit{id.} at 23, thus implying that violation of other constitutional rights may be harmless under the circumstances. But the Court went on to declare that before a constitutional error could be held harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." \textit{Id.} at 24.
\item \textsuperscript{3086} \textit{Id.} 510 (1979). \textit{See supra} note 3083.
\item \textsuperscript{3087} \textit{Id.} at 84 (quoting Sandstrom v. Montana, 442 U.S. 510, 523 (1979)). The Court held that the trial judge's instruction may have led the jurors to disregard Johnson's defense
The Ninth Circuit addressed the question of jury instructions that called for a reasonable assumption of a defendant's intent in United States v. Lord. The crucial difference between these instructions and those struck down in Connecticut v. Johnson was the inference that the jury was allowed to make in determining the intent of the defendant.

Defendant Lord was convicted in the district court of distribution and conspiracy to distribute cocaine, and of carrying a concealed weapon in the commission of a felony. The evidence showed that Lord had sold cocaine to an informant for the Drug Enforcement Administration. His principle defense during the trial was that he had been entrapped by the government. Nevertheless, the jury convicted him and sentenced him to five years in prison.

Lord raised a number of arguments on appeal, one of which the Ninth Circuit found convincing enough to vacate his conviction. As to the jury instructions, however, the court of appeals found no error.

theories because of a belief that the intent element of the offenses had already been proved. Justice Blackmun declared that a verdict reached in such a fashion could not be upheld because [t]o allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made.

460 U.S. at 86.

3088. Id. at 88. In writing for the dissent, Justice Powell viewed the Court's decision as serious error because it would "create an automatic reversal whenever a Sandstrom-type instruction is given, regardless of the conclusiveness of the evidence of intent." Id. at 90 (Powell, J., dissenting).

Justice Powell argued that the Court had gone far beyond the scope of Sandstrom and disputed the plurality's characterization of the conclusive presumption instruction as being equivalent to a directed verdict on the issue of intent. He contended that "[a] directed verdict removes an issue completely from the jury's consideration. Such a presumption, by contrast, leaves the issue ultimately to the jury." Id. at 95 (Powell, J., dissenting).

He went on to argue that since the evidence of intent varies widely with each individual case, the plurality should not have established an automatic rule of reversal. Indeed, there may be facts whereby "a reviewing court might well say beyond a reasonable doubt that the jury found the presumption unnecessary to its task of determining intent." Id. at 101 (Powell, J., dissenting). He concluded that, because this was an issue more appropriate to the consideration of a state court, he would remand the case for determination of whether the erroneous instruction was "harmless beyond a reasonable doubt." Id. at 102 (Powell, J., dissenting).

3089. 711 F.2d 887 (9th Cir. 1983).

3090. Id. at 888.

3091. Id. at 889. Lord conceded that he had freely delivered one-half gram of cocaine to the informant, but claimed that subsequent sales were made as a result of threats against him by DEA agents.

3092. Id. at 888. The court found a possibility that prosecutorial misconduct may have caused a valuable defense witness to invoke his fifth amendment privilege against self-incrimination. Since his testimony may have been relevant to Lord's entrapment defense, the Ninth Circuit remanded the case for an evidentiary hearing. Id. at 891.
The defendant claimed that the disputed instruction was infirm under the rule of *Sandstrom v. Montana*. The Ninth Circuit first observed that the instruction in *Sandstrom* regarding intent was dissimilar to that given to Lord's jury. The court then noted it had recently upheld an instruction substantially comparable to the one in question and held that the district judge did not err in his instructions to the jury.  

3. Instructions concerning criminal intent and deliberate ignorance

In *United States v. Garzon*, the Ninth Circuit considered the context in which a "conscious avoidance" instruction is warranted. Such an instruction is usually justified in a case where the defendant pleads innocent to actual knowledge of the illegal nature of his act, but, where the facts indicate that he or she deliberately avoided learning the truth regarding its illegality.

Defendant Garzon was convicted of possessing cocaine with the intent to distribute and conspiring to distribute cocaine. The facts adduced

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3093. The instruction on intent that the trial judge gave to the jury is as follows: "'It is ordinarily reasonable to assume that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted . . .'" *Id.* at 892.

3094. 442 U.S. 510 (1979). The instruction held to be improper in *Sandstrom* was that "'[t]he law presumes that a person intends the ordinary consequences of his voluntary acts.'" *Id.* at 513 (emphasis added). See supra note 3083 and accompanying text for a discussion of the *Sandstrom* decision.

3095. 711 F.2d at 892.

3096. *Id.* In *United States v. Mayo*, 646 F.2d 369 (9th Cir.), *cert. denied*, 454 U.S. 1127 (1981) (per curiam), the court considered an intent instruction which informed the jury that it was "reasonable" to draw an "inference" that a person intends the natural consequences of his acts. *Id.* at 375. The court distinguished this instruction from that held improper in *Sandstrom v. Montana* because the former, unlike the latter, "does not tell the jury to presume intent from a voluntary act but merely permits the jury to infer intent." *Id.*

The Ninth Circuit in *Lord* did not give a rationale for its decision, but merely cited to *Mayo* as an example where a similar instruction had been upheld. The court apparently felt that Lord's instruction did not create a "conclusive presumption" for the jury, but merely allowed them to make an inference—to assume the defendant's intent from the acts he committed. Such an assumption is permitted, thus the instruction was proper.

*Lord* and its progeny stand for the proposition that the Ninth Circuit will not uphold an instruction that supposedly allows a jury to conclusively presume a defendant's intent, but will allow an instruction whereby the jury may assume, or infer a criminal defendant's state of mind. It seems doubtful, however, that the average juror would be able to distinguish the legal niceties and treat the two directives differently.

3097. 688 F.2d 607 (9th Cir. 1982).

3098. "The substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable." *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976). "Deliberate ignorance" instructions have been approved in criminal cases by the Courts of Appeals for the Second, Sixth, Seventh and Tenth Circuits. See *Jewell*, 532 F.2d at 702 n.12.
at trial showed that Garzon's co-defendant, Moreno, had instigated contact with a Drug Enforcement Administration (DEA) informant regarding possible drug transactions. The sales took place at Garzon's father's residence, with the father actively participating. There was conflicting testimony as to Garzon's participation in the drug transactions. The defendant claimed that he had no knowledge of any cocaine deal, while the DEA agents and the informant testified that Garzon openly negotiated the sale of the drugs.\footnote{3099} Garzon contended that he was only present at these meetings because his father had asked him to be there. The defendant denied having had any discussion with the DEA agents regarding the sale and admitted only to carrying a package across a room and opening it to show the agents its contents. It was later revealed that the package contained cocaine. Over the objection of defense counsel, the trial judge granted the government's request that a "conscious avoidance" instruction be read to the jury.\footnote{3100}

On appeal, the Ninth Circuit noted that such an instruction has a limited use and should only be given in those cases where it is clear that the defendant acted with deliberate ignorance.\footnote{3101} Otherwise, there would be a chance that the defendant could be convicted on a negligence standard. That is, the jury might return a guilty verdict if they felt that the defendant should have known that his conduct was illegal.\footnote{3102} Because the court was not convinced that Garzon acted with deliberate ignorance, and since the government had not argued that the error was harmless, his conviction was reversed.\footnote{3103}

The issue of conscious avoidance was again addressed by the Ninth

\footnote{3099. 688 F.2d at 608.}
\footnote{3100. The gist of the instruction was that "the jury could have found the appellant had the requisite knowledge if he was aware of the high probability that a drug deal was taking place and deliberately avoided learning the truth." \textit{Id.} at 609.}
\footnote{3101. \textit{Id.} The court cited its opinion in United States v. Murrieta-Bejarano, 552 F.2d 1323 (9th Cir. 1977), for the proposition that the instruction "should not be given in every case where a defendant claims a lack of knowledge, but only in those comparatively rare cases where, in addition, there are facts that point in the direction of deliberate ignorance." \textit{Id.} at 1325. The instruction was approved in \textit{Murietta} because of the overwhelming evidence that showed the defendant knew he was smuggling drugs.
}
\footnote{3102. 688 F:2d at 609.}
\footnote{3103. \textit{Id.} The Ninth Circuit felt that the evidence was insufficient for a reasonable jury to conclude that Garzon had intentionally tried to avoid learning of the drug transaction. Indeed, the court wrote that the defendant's conduct "was inconsistent with conscious avoidance." \textit{Id.} (emphasis in original). This was because he had willingly opened a bag containing cocaine to show it to the DEA agents. Such conduct, the court reasoned, showed that he was not trying to avoid enlightenment, and it was up to the jury to determine whether he was telling the truth in denying knowledge of the contents of the package.}
Circuit in *United States v. Suttiswad*. Defendant Suttiswad, a native of Thailand, was charged with importing and possessing heroin, with intent to distribute. He was arrested by custom officer at San Francisco International Airport when they found 3.98 pounds of heroin concealed behind linings in his luggage. He claimed that an American named “Tom,” whom he met in Bangkok, had given him money, clothing and a suitcase so he could visit the United States. Suttiswad maintained that he had no knowledge of the contraband hidden in the suitcase.

At trial, the judge instructed the jury that “the element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what otherwise would have been obvious to him.” Suttiswad was convicted and sentenced to two concurrent terms of five years. On appeal, he maintained that it was reversible error for the trial judge to have given a “conscious avoidance” instruction under the facts of his case.

After explaining the proper use of the “deliberate ignorance” instruction, the Ninth Circuit found that the facts were sufficient to show that Suttiswad had deliberately closed his eyes to what should have been obvious, namely that the suitcase probably contained contraband. Considering the instructions as a whole, the Ninth Circuit found no error.

In considering whether “deliberate ignorance” instructions are proper, the Ninth Circuit appears to place great importance on facts which suggest that the defendant purposely contrived to avoid learning the truth. The evidence in *Suttiswad* was overwhelming to show that the

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3104. 696 F.2d 645 (9th Cir. 1982).
3105. *Id.* at 646-47.
3106. *Id.* at 650.
3107. *Id.* at 650-51. Alternatively, Suttiswad argued that the instruction was unsound because it did not require the jury to find that the defendant was aware of the “high probability” that he was carrying drugs into the United States. *Id.* at 651. The Ninth Circuit disagreed, noting that although the trial judge’s instructions did not contain the words “high probability,” the jury was sufficiently instructed “to find that defendant had a subjective awareness” of the existence of the contraband. *Id.* at 652. The jury was also instructed that negligence or mistake was insufficient to impute willfulness or knowledge.
3108. See supra notes 3098 and 3101. The court cited to its earlier decisions in *Jewell* and *Murrieta-Bejarano*.
3109. 696 F.2d at 651. The court observed that the defendant showed deliberate ignorance if he was not suspicious of the fact that a relative stranger had given him an airline ticket, clothing, cash, and a heavy, perfumed suitcase.
3110. Judge Hug dissented on the basis that the “instruction given in this case would permit conviction on deliberate avoidance of knowledge without a subjective awareness of high probability.” *Id.* at 654 (Hug, J., dissenting). He interpreted the court’s decision in *United States v. Valle-Valdez*, 554 F.2d 911 (9th Cir. 1977) to require the “high probability” finding.
defendant had purposely avoided learning that drugs may have been present in the suitcase. At first impression, the facts in Garzon seem to suggest the same; that there was no way the defendant could not have known that a drug transaction was occurring. However, Garzon may be distinguished from Suttiswad in one crucial respect: Garzon's conduct was simply inconsistent with a person deliberately trying to avoid learning the truth, since he in fact opened a bag containing the cocaine. It was for the jury to determine if he was telling the truth when he denied knowing the white powder was cocaine.

4. Instructions regarding the credibility of government witnesses

As the trier of fact, the jury is normally the sole judge of the credibility of a witness and will determine the weight to give such person's testimony. However, when the testimony in question is that of an immunized government witness, or a co-defendant, it is especially important that the jury consider the credibility of the declarant carefully. An interested witness is presumably much more likely to alter his or her testimony to the prejudice of the defendant.\footnote{Indeed, in United States v. Blue, 430 F.2d 1286, 1287 (5th Cir. 1970) (per curiam), the Fifth Circuit held that it is proper to instruct the jury that it should acquit if it does not accept the testimony of a government witness, and that such an instruction did not remove from the jury the question of reasonable doubt.}

In United States v. Tamura,\footnote{Id. at 594. Tamura's conviction was based on a kick-back scheme involving a rigged system of bidding to gain contracts from a municipally owned utility. Tamura's defense was that he was unaware of the bribery scheme.} the Ninth Circuit ruled on the issue of giving the jury limiting instructions when a government witness is also a co-defendant. Tamura was convicted on fifty-nine counts of bribery, mail and wire fraud, conspiracy, rackettering, and Travel Act violations.\footnote{Id. at 594.} On appeal, he argued that the trial court erred in failing to give appropriate jury instructions concerning the guilty pleas and the credibility of the government's two main witnesses.\footnote{Id. Two of the co-defendants had agreed to testify against the others in return for plea bargains.}

Tamura contended that the trial judge committed reversible error by admitting the guilty pleas of the co-defendants into evidence without giving a limiting instruction to the jury.\footnote{Id. at 601. However, the judge did instruct the jury that "[y]ou must base your verdict as to each of the remaining defendants solely on the evidence against each." Id. at 602. It was established that Tamura's attorney not only consented to the instruction, but was asked at least five times whether he had objections to the instruction. In fact, it was the defense counsel who initially brought the guilty pleas to the jury's attention.} After noting that the defendant
never requested that such an instruction be given, the Ninth Circuit held that the district court did not commit plain error. The main justification for this holding was that the prosecutor did not misuse the guilty pleas by insinuating that they were evidence of Tamura's guilt.

Instructions that appeared to identify the credibility of the government's key witness as the primary issue in the case were considered by the Ninth Circuit in United States v. Rohrer. Defendants Rohrer and Bump were convicted in the district court of possession with intent to distribute and conspiracy to distribute cocaine. Much of the government's case rested on the testimony of a convicted drug dealer, testimony that the trial judge did caution the jury about.

The Fifth Circuit took a somewhat different approach in United States v. King, 505 F.2d 602 (5th Cir. 1974). The court stated that "this circuit had emphasized that cautionary instructions by the trial court are both essential and effective in avoiding prejudice where the fact of a coconspirator's guilty plea is brought out at a trial before a jury." Thus, a sua sponte instruction on the issue is not required in the Ninth Circuit.

Tamura also challenged the district court's failure to give a specific credibility instruction regarding the testimony of the co-defendants. The Ninth Circuit dismissed this argument, observing that the trial judge gave alternate instructions, indicating to the jury that the co-defendant's credibility "was open to question." The issue had to be determined on a case-by-case basis.

Tamura further contended that he had been unfairly surprised by the testimony of a government witness. The court of appeals agreed with the defendant on this point, but saw no error in the district court's offer to remedy the testimony's prejudicial effect by either cautioning the jury or excluding the testimony altogether. At trial, Tamura refused both these alternatives and insisted on either a dismissal, mistrial, or continuance. The Ninth Circuit decided that the district court did not abuse its discretion by giving a limiting instruction rather than the remedies the defendant requested.

The defendants were specifically found guilty of violating 21 U.S.C. §§ 841(a) and 846. At the trial, this witness admitted during cross-examination that he had used drugs

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3116. Id. This ruling is supported by the Ninth Circuit decision in United States v. Anderson, 642 F.2d 281 (9th Cir. 1981). There, the court ruled that the trial judge's failure to give the jury a cautionary instruction regarding a co-defendant's guilty plea when only one of the defendants requested it and the request was later withdrawn was not plain error. Id. at 286.

3117. 694 F.2d at 602. Tamura also challenged the district court's failure to give a specific credibility instruction regarding the testimony of the co-defendants. The Ninth Circuit dismissed this argument, observing that the trial judge gave alternate instructions, indicating to the jury that the co-defendant's credibility "was open to question." Id. See, e.g., United States v. Allen, 579 F.2d 531, 533 (9th Cir.) (jury instruction upheld where the trial judge gave a "general" instruction on witness credibility), cert. denied, 439 U.S. 933 (1978); United States v. Allain, 671 F.2d 248, 254 (7th Cir. 1982) (instruction approved which stated that the witness' testimony "must be considered with caution and great care").

3118. 708 F.2d 429 (9th Cir. 1983).

3119. The defendants were specifically found guilty of violating 21 U.S.C. §§ 841(a) and 846.

3120. At the trial, this witness admitted during cross-examination that he had used drugs
Both Rohrer and Bump contended on appeal that the trial judge's focus on the credibility of the government's witness denied their their right to a jury trial. The Ninth Circuit did not agree, observing that the trial judge remedied any potential prejudicial effect by immediately reminding the jury of the correct burden of proof. Thus, the error, if any, was deemed harmless.

In *United States v. Lane*, the question presented was whether the trial judge's refusal to give a requested cautionary instruction regarding the credibility of a witness constituted reversible error. The Ninth Circuit decided that while such an instruction, if requested, is usually required to be given, refusal to do so did not amount to automatic reversible error.

Defendant Lane was charged with obstruction of justice by initiating extensively in the past and had experienced blackouts during the period in which defendant's alleged illegal acts had taken place. The trial judge instructed the jury at length regarding this government witness, and specifically told it to consider the informant's credibility. The trial judge informed the jury that, if after considering all the evidence, "you're left with a reasonable doubt about the guilt or innocence of either of the defendants on any charge, it's your duty to acquit on those charges." The trial judge also argued that the district court committed prejudicial error by refusing to give the jury a limiting instruction regarding the use of testimony that only pertained to Rohrer. After noting that the trial judge has great discretion as to the giving of additional instructions, the Ninth Circuit decided that Bump's contention was without merit. The court thought it was clear that the jury did not associate the questioned testimony with Bump.

Defendant Bump also argued that the district court committed prejudicial error by refusing to give the jury a limiting instruction regarding the use of testimony that only pertained to Rohrer. After noting that the trial judge has great discretion as to the giving of additional instructions, the Ninth Circuit decided that Bump's contention was without merit. The court thought it was clear that the jury did not associate the questioned testimony with Bump.
false charges of embezzlement and misconduct against a union officer. Unbeknownst to Lane, one of his accomplices had decided to cooperate with the government, in exchange for immunity from prosecution. Much of the government's case rested upon his testimony and on certain taped conversations between him and Lane.

At the trial, Lane requested that the jury be given a cautionary instruction informing it that the government's key witness had been granted immunity for his testimony. The district court refused this request, and Lane was subsequently convicted.

On appeal, Lane contended that the refusal to give the requested cautionary instruction amounted to reversible error. The Ninth Circuit first observed that if such an instruction is requested, the trial judge is usually required to comply. But the court noted that this rule only applied in instances where the witness' testimony was largely uncorroborated by the evidence. Since the incriminating conversations between Lane and the informer were tape recorded, and because the trial judge had cautioned the jury to some degree regarding the informer testimony, Lane's conviction was affirmed.

Lane was charged with violating 18 U.S.C. § 1503, which provides in pertinent part: "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate or impede . . . the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1503 (1982).

Id. at 1398.

Id. Accord Guam v. Dela Rosa, 644 F.2d 1257, 1260 (9th Cir. 1980) (defendant's conviction was reversed where the primary evidence of his guilt was supplied by an informer, and the district court had refused a requested cautionary instruction about informer testimony); see also United States v. Bernard, 625 F.2d 854, 857 (9th Cir. 1980) (court held that trial judge committed prejudicial, reversible error by refusing to give cautionary instruction regarding testimony of accomplice).

Id. at 1398. Both Dela Rosa and Bernard were cases in which the defendant's guilt rested almost entirely on the testimony of the accomplice or informer.

Id. at 1399. The district court had told the jury to consider whether the informer had any interest in the determination of the case and if he was biased toward any principal involved in the case. Another factor in the Ninth Circuit's decision was the fact that Lane's attorney was allowed to bring the immunity issue to the jury's attention during the cross-examination of the informer. The court did note that "if this testimony had been uncorroborated it would have been reversible error to refuse the instruction." Id. at 1398-99.

Nevertheless, the court seemed to step back from its earlier ruling in United States v. Bernard, 625 F.2d 854 (9th Cir. 1980) (see supra note 3127). The Bernard court stated that it would be desirable for the trial judge to inform the jury on accomplice testimony, "even if such an instruction were not requested." Id. at 857 (emphasis added). This may have been due to the fact that the informant in Bernard was paid by the government, was a drug addict, and was not prosecuted. That court also minimized the effect of the defense counsel admonishing the jury in regard to accomplice testimony, observing that "[c]ounsel's argument is neither law nor evidence, and the jury is so instructed." Id. The two opinions are not completely inconsistent,
5. Instructions concerning the specific intent and knowledge elements of an offense

A crime that is traditionally classified as a specific intent offense requires a high level of culpability on the part of the defendant. Specific intent is usually proven through a showing of actual subjective intent, involving purposefulness of knowledge, as opposed to mere negligence or recklessness.3130

In Wainwright v. Sykes,3131 the Supreme Court ruled that a state prisoner who was barred by a procedural default from raising a constitutional issue on direct appeal could not litigate that claim in a habeas corpus proceeding without showing “cause for” and “actual prejudice” from the default.3132 This decision played a major role in the case of Myers v. Washington,3133 a recent Ninth Circuit ruling dealing with a defendant making a collateral attack on an earlier conviction by challenging the jury instruction on intent given at his trial.

Defendant Myers was convicted in 1957 of second-degree murder and his conviction was affirmed on appeal.3134 Two decades after his trial, Myers petitioned the Supreme Court of Washington for release from prison, arguing inter alia that the instructions given to the jury were unconstitutional.3135 The Washington court disagreed and upheld his conviction.3136

but the Bernard court was clearly more concerned with the possible prejudicial effect of accomplice testimony.

3130. For the government to establish specific intent on the part of an accused, it “must prove that the defendant knowingly did an act which the law forbids, [or knowingly failed to do an act which the law requires,] purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.' I DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.03 (3d ed. 1977).
3132. Id. at 90-91. In Wainwright, the Supreme Court reversed a decision by the Fifth Circuit and ruled that the defendant was not entitled to federal habeas corpus relief. At the original trial, the defendant had failed to object to the admission of inculpatory statements made by him after his arrest on murder charges, a failure which amounted to non-compliance with the Florida “contemporaneous-objection rule.” The Supreme Court denied the habeas corpus relief because the defendant had not shown cause for this non-compliance with the rule, nor had he made any showing of actual prejudice.
3133. 702 F.2d 766 (9th Cir. 1983).
3136. The Supreme Court of Washington held that even though the challenged instructions may have been defective, “we believe the negative effect on the administration of justice out-
Myers next filed for federal habeas corpus relief in 1985 in the United States district court, raising the same arguments he made with the Washington Supreme Court. The district court also denied relief and Myers appealed to the Ninth Circuit.

In 1981, the Ninth Circuit agreed with Myers' contentions and reversed the decision of the district court. The court of appeals found that the jury instructions given at Myers' 1957 trial were constitutionally defective because they shifted to the defense the burden of persuasion on the intent element of the offense. The court also decided that the instructions violated the due process clause of the Constitution.

The state appealed this decision to the Supreme Court, which vacated the determination of the Ninth Circuit and remanded the case for further consideration in light of two recent Supreme Court rulings. Thus the Ninth Circuit was once again faced with the question of whether Myers could collaterally attack his earlier conviction, an attack based on alleged violations at his trial of legal rules that were not recognized until long after his conviction.

After considering the impact of the two recent Supreme Court cases,
the Ninth Circuit affirmed its ruling in Myers I. The court distinguished the two decisions, noting once again that there was no feasible way for Myers to know in 1957 that the jury instructions were open to a due process attack. Because there was a strong possibility that the improper instruction had played a role in Myers' conviction, the Ninth Circuit reversed the district court's denial of relief.

In United States v. Ramirez, the Ninth Circuit considered whether the district court erred in refusing to allow the defendant's requested jury instructions regarding his participation in the offense charged. The court of appeals affirmed the trial court's decision, ruling that the jury was properly instructed as to the defendant's theory.

Defendant Reynolds was convicted in the lower court of foreign transportation of stolen aircraft and was sentenced to four years in

3144. Id. at 769. The court observed that the defendants in Isaac had petitioned for federal habeas corpus relief "on the ground that the instructions given at their trials, allocating to them the burden of proof on their claims of self-defense, violated the Due Process Clause." Id. at 767. However, the Supreme Court reaffirmed the rule that a defendant "must demonstrate cause and actual prejudice before obtaining relief." Engle v. Isaac, 456 U.S. 107, 129 (1982). The Court found the defendants' appeal to be without merit because their legal basis for relief either was known to them, or should have been known to them, at the time of their trials. Id. at 131-33. Thus, they could not complain at that late date that they had unknowingly waived a constitutional objection. Id. at 131. As such, they did not satisfy the "cause" requirement of Wainwright v. Sykes. See supra text accompanying note 3132.

In Frady, the defendant based a collateral attack on his murder conviction on the grounds that the trial judge's instructions on malice were erroneous. United States v. Frady, 456 U.S. 152, 157-58 (1982). Frady had not challenged the disputed instructions either at trial or on direct appeal. The Supreme Court found that Frady had not met the "actual prejudice" requirement of Wainwright because the erroneous instruction concerning malice had not substantially prejudiced his case to the degree "necessary to overcome society's justified interests in the finality of criminal judgments." Id. at 175.

3145. 702 F.2d at 768. The Ninth Circuit noted that in Isaac the appellant had relied on In re Winship, 397 U.S. 358 (1970), to establish the basis for attacking his conviction. However, Winship had been decided more than a decade after Myers' trial and appeal. Thus, the court ruled that "the Supreme Court's reason for finding no 'cause' in Isaac is inapplicable to Myers." 702 F.2d at 768 (footnote omitted).

The court distinguished Frady because the appellant there had denied having anything at all to do with the killing in question. Thus, he suffered no prejudice from the improper instructions. Id. In contrast, Myers had admitted to the killing "but introduced evidence from which lack of the intent element of second degree murder could have been inferred." Id. at 768-69.

3146. 702 F.2d at 769. In his dissent, Judge Poole maintained, as he had in Myers I, that the defendant was barred from obtaining habeas corpus relief under the rule of Wainwright v. Sykes. Id. (Poole, J., dissenting).

3147. 710 F.2d 535 (9th Cir. 1983).

3148. Id. at 544.

3149. Reynolds was convicted of violating 18 U.S.C. § 2312 (1982), which provides: "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."
prison. His conviction arose out of the thefts of two aircraft and the use of those planes to transport approximately 1000 pounds of marijuana into the United States from Mexico. The evidence adduced at trial showed that Reynolds had been working as an informer for the Los Angeles Police Department (LAPD) before the alleged conspiracy commenced.\footnote{1985 CRIMINAL LAW SURVEY 445} During the trial, Reynolds freely admitted that he had acted to implement the goals of the conspiracy, but maintained that at all times during this scheme his role was that of a police informant.

Reynolds claimed that since he was acting on behalf of the police, it was impossible for him to have the specific intent necessary to sustain a conviction.\footnote{1985 CRIMINAL LAW SURVEY 445} He then offered two jury instructions that were consistent with this theory.\footnote{1985 CRIMINAL LAW SURVEY 445} The district court refused both and instead instructed the jury regarding the specific intent requirement of the crimes charged.\footnote{1985 CRIMINAL LAW SURVEY 445} Reynolds argued on appeal that the district court’s refusal to give his requested instructions constituted reversible error.

The Ninth Circuit first noted that a district court need not give a defendant’s proposed jury instruction in the exact language requested. The important consideration is whether the instruction ultimately given adequately instructed the jury as to the defendant’s theory.\footnote{1985 CRIMINAL LAW SURVEY 445} The court then cited two recent Ninth Circuit decisions in which similar claims...
were presented by a defendant, and ruled that these were dispositive of the issue.3155

The court of appeals determined that the trial judge’s instructions on the specific intent element of the offense charged had adequately conveyed Reynolds’ defense theory to the jury. This was because the jury could never have found the requisite intent on Reynolds’ part if they had believed that he was simply acting on behalf of the police.3156 Because the district court’s instruction had fairly informed the jury of the defendant’s theory, its refusal to give his proposed instruction was not error and his conviction was upheld.3157

While distinctions continue to be made between crimes that require the specific intent of a defendant and those that call for a general intent, the Supreme Court has observed that such distinctions are more likely to confuse than enlighten juries.3158 Nevertheless, the Ninth Circuit continues to adhere to the “venerable” definition of a specific intent which requires that the government prove that a defendant knowingly committed a forbidden act, purposely intending to violate the law.

It is axiomatic that a jury must be instructed as to the knowledge element required to find a defendant guilty of the crime charged. An offense must have been committed with the particular mental state that would warrant punishment. Thus, it is essential to inquire into an ac-

3155. 710 F.2d at 543. In United States v. Hughes, 626 F.2d 619 (9th Cir.), cert. denied, 449 U.S. 1065 (1980), overruled on other grounds, United States v. DeBright, 730 F.2d 1255 (9th Cir. 1984), the defendant was charged with converting government property, specifically wild horses. He claimed that the United States Bureau of Land Management (BLM) had authorized him to sell the horses, and during the trial requested a jury instruction as to that theory. The district court refused, and the Ninth Circuit affirmed because the trial court had instructed as to the required criminal intent. The court observed that “[i]f the jury had believed that [the defendant] had the authorization of the BLM to sell the horses . . . they could not have found the intent necessary to support the conviction.” Id. at 627.

Similarly, in United States v. Lee, 589 F.2d 980 (9th Cir.), cert. denied, 444 U.S. 969 (1979), the defendant had been convicted of illegally obtaining defense secrets and selling these secrets to Russian agents. On appeal, Lee maintained that he had been working for the CIA by selling misinformation to the Soviets, and thus did not possess the requisite intent to be found guilty. As in Hughes, the district court charged the jury as to the specific intent element and the Ninth Circuit upheld its refusal to give other requested instructions. The court of appeals noted that “[h]ad the jury believed that Lee was acting for the C.I.A. or had a reasonable belief that he was acting for the C.I.A. then they could not have found that he had the specific intent as the judge had instructed them.” Id. at 986.

3156. 710 F.2d at 543-44.
3157. Id. at 544.
3158. See United States v. Bailey, 444 U.S. 394, 403 (1980), wherein the court opined that “[i]t is a venerable distinction between specific and general intent, however, that it is the source of a good deal of confusion.” The Court went on to consider several alternatives to the traditional mens rea analysis.
cused’s state of mind at the time he or she performed the alleged act to determine culpability.

In United States v. Burnette, the Ninth Circuit determined the adequacy of jury instructions concerning the knowledge required for a person to be convicted of aiding and abetting armed bank robbery. Defendant Lynette Burnette was charged with aiding and abetting armed bank robbery in violation of 18 U.S.C. section 2. Defendant Theresa Burnette was charged as an accessory after the fact to armed bank robbery in violation of 18 U.S.C. section 3. Both were convicted of the charges and both contended on appeal that the district court’s jury instructions were erroneous.

During the trial, Lynette had requested a jury instruction to the effect that she could not be found guilty of aiding and abetting an armed bank robbery without proof beyond a reasonable doubt that she knew the robber had actually been armed. The district court refused to so instruct the jury and Lynette’s defense counsel made a timely objection.

The Ninth Circuit agreed with Lynette’s contention and reversed her conviction. The court ruled that a defendant must have actual knowledge that the principal has and intends to use a gun to be guilty of

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3159. 698 F.2d 1038 (9th Cir.), cert. denied, 103 S. Ct. 2106 (1983).
3160. 18 U.S.C. § 2(a) (1982) provides: “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”
3161. 18 U.S.C. § 3 (1982) provides in pertinent part: “Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.”
3162. 698 F.2d at 1042. The actual perpetrator of the robbery was Michael Burnette. Lynette and Theresa were believed to have been in the “getaway car,” and were instrumental in attempts to cover up the robbery.
3163. Id. at 1050.
3164. The seminal Ninth Circuit case on the matter is United States v. Short, 493 F.2d 1170 (9th Cir.), cert. denied, 419 U.S. 1000 (1974), wherein the driver of a “getaway car” used in a bank robbery was convicted in the trial court of aiding and abetting the crime. The situation in Short is almost indistinguishable from Burnette; the district judge in the former also instructed the jury that they need not find that Short knew the robber was armed in order to convict him of aiding and abetting. In both cases, the Ninth Circuit reversed the conviction, finding the instruction to be erroneous because “it fails to require the jury to find an essential element of the crime of armed bank robbery as a prerequisite to conviction.” United States v. Short, 493 F.2d at 1172. The essential element was the state of mind of the aider and abettor, who is made punishable as a principal, and “the proof must encompass the same elements as would be required to convict any other principal.” Hernandez v. United States, 300 F.2d 114, 123 (9th Cir. 1962). That is, the abettor must share in the criminal intent of the principal, which in this situation demands that he or she knew the principal was armed and intended to use the weapon, and intended to aid the principal in that respect. Accord United States v. Jones, 592 F.2d 1038, 1042 (9th Cir.), cert. denied, 441 U.S. 951 (1979).
the offense of aiding and abetting armed bank robbery. The trial court's failure to give a requested instruction to this effect constituted reversible error.

Theresa Burnette argued on appeal that the district court improperly instructed the jury regarding the elements of the offense of being an accessory after the fact to armed bank robbery. Specifically, she contended that the instructions were inadequate to instruct the jury that it must find beyond a reasonable doubt that she knew the gunman was armed in order to find her guilty as an accessory after the fact.

The alleged error was based upon the trial judge referring to the code section while neglecting to restate the elements of a violation of that section. The Ninth Circuit dismissed this argument, observing that the trial judge had previously stated in full the elements of the offense, and reiterating the rule that jury instructions are to be interpreted as a

3165. 698 F.2d at 1050 (citing United States v. Jones, 592 F.2d 1038, 1042 (9th Cir.), cert. denied, 441 U.S. 951 (1979)). Lynette's conviction was reversed only as to the armed portion of the offense. In such a situation, the government has the option of retrying the defendant for aiding and abetting armed bank robbery, or allowing the district court to resentence under the charge of aiding and abetting unarmed bank robbery, if there is sufficient evidence to convict the defendant of the lesser offense. In Lynette's case, the court found the evidence sufficient. Id. (citing United States v. Short, 493 F.2d 1170 (9th Cir.), cert. denied, 419 U.S. 1000 (1974)).

3166. Id. Most of the circuit courts that have directly ruled on this question would agree with the result in Burnette. See, e.g., United States v. Longoria, 569 F.2d 422, 425 (5th Cir. 1978) (government must establish defendant knew the principal was armed and that he intended to aid him in that respect); United States v. Sanborn, 563 F.2d 488, 491 (1st Cir. 1977) ("[T]o convict an aider and abettor of the aggravated offense we think the Government must show that the accomplice knew a dangerous weapon would be used or at least that he was on notice of the likelihood of its use.")

The Fourth Circuit, however, has taken a somewhat different approach to this issue and, in United States v. McCaskill, 676 F.2d 995 (4th Cir.), cert. denied, 459 U.S. 1018 (1982), decided that the district judge did not err in failing to sua sponte give an instruction similar to that deemed necessary in Short. The Fourth Circuit distinguished McCaskill from Short in two respects: (1) there was no question that McCaskill did know the robbers were armed; and (2) unlike the situation in Short, McCaskill did not make a timely objection to the instruction in question. Id. at 1001.

Thus, the Fourth Circuit would leave the decision in the hands of the trial judge as to instructing the jury on the aider and abettor's knowledge of the principal's use of a gun. If the evidence was undisputed that the defendant possessed this knowledge, such an instruction is not necessary. But, judging from the decision in Short, the Ninth Circuit would require the instruction in all instances, regardless of any clear evidence of the abettor's knowledge.

3167. 698 F.2d at 1051-52. The trial judge informed the jury of the elements of the offense of armed bank robbery under 18 U.S.C. § 2113(d). One of these elements was the use of a gun in the commission of the robbery. He then instructed the jury that "in order to find Theresa guilty as an accessory after the fact, it must find beyond a reasonable doubt that she knew that Michael Curtis Burnette . . . [committed] the bank robbery . . . in violation of Title 18, United States Code Section 2113(d)." 698 F.2d at 1052 (quoting trial court transcript).

3168. 698 F.2d at 1051-52.

3169. Id. at 1052.
whole.  

In *United States v. Herbert*, the Ninth Circuit held that the district court judge erred in giving jury instructions which could permit a conviction for illegal possession or transfer of unregistered weapons when one of the defendants did not know that the weapons were firearms within the meaning of the applicable statute. Defendants John and Joseph Herbert were convicted of possessing and transferring unregistered machine guns in violation of 26 U.S.C. sections 5861(d), (e) and (f).

At the trial, the district court gave an instruction to the jury regarding the knowledge element of the charged offenses. It provided that the government did not need to prove that the defendant knew that the weapon was a firearm within the meaning of the statute. Both John and Joseph Herbert objected to the instruction at the trial, and on appeal argued that the charge was erroneous because a person could be convicted without knowledge of the true nature of the weapon.

As to Joseph Herbert, the Ninth Circuit agreed, noting that in order to convict him under the statute, it must be shown that the defendant knew that he was dealing with such a dangerous device as would alert a person to the likelihood of its regulation. The court reasoned that, since the weapons looked perfectly legal on the exterior, and legal fire-

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3170. *Id.* The Ninth Circuit also observed that the district court had instructed the jury on the lesser included offense of accessory after the fact to unarmed bank robbery "despite the fact that the evidence conclusively established that the robber was armed." *Id.* at n.30. The court of appeals reasoned that this instruction emphasized the fact that Theresa could not be found guilty as an accessory unless she knew Michael was armed. *Id.*

3171. 698 F.2d 981 (9th Cir.), cert. denied, 104 S. Ct. 87 (1983).

3172. 26 U.S.C. § 5861(d)-(f) (1976) provides: It shall be unlawful for any person—(d) to receive or possess a firearm which is not registered to him . . . or (e) to transfer a firearm in violation of the provisions of this chapter; or (f) to make a firearm in violation of the provisions of this chapter . . . ."

Both John Herbert and Joe Herbert were convicted of violating the statute. Joe and John Herbert are brothers, and according to evidence presented at trial, John was the instigator of the crime while Joe stood by and watched. Joe contended that he did not know that the weapons had been converted into illegal automatics. 698 F.2d at 986.

3173. 698 F.2d at 986.

3174. *Id.* Since the weapons externally appeared to be legal semi-automatics, Joe Herbert argued that there was no way for him to know they were illegal. *Id.*

3175. *Id.* (citing *United States v. DeBartolo*, 482 F.2d 312, 316 (1st Cir. 1973)). The *DeBartolo* court ruled that a sawed-off shotgun fell within the category of dangerous devices that should alert one to the likelihood of regulation. *United States v. DeBartolo*, 482 F.2d 312, 316 (1st Cir. 1973). *Accord United States v. Tarr*, 589 F.2d 55, 60 (1st Cir. 1978) ("All that is required for proof of a violation is that the accused know that a machine gun is being transferred and intentional participation in such transfer."); *Morgan v. United States*, 564 F.2d 803, 805 (8th Cir. 1977) ("Sufficient intent is established if the defendant is shown to have possessed an item 'which he knew to be a firearm, within the general meaning of that term.'" (quoting *United States v. Vasquez*, 476 F.2d 730, 732 (5th Cir.), cert. denied, 414 U.S. 836 (1973))).
arms were quite prevalent in society, the guns were not of the type that would naturally alert a reasonable person to their illegality. In light of the fact that Joseph Herbert was merely a passive spectator while the crime was committed, and that there was insufficient evidence to show that he knew the true character of the guns, the error in the instruction was not harmless. Thus, his conviction was reversed.

As to John Herbert, however, the Ninth Circuit held that the error was harmless, because his defenses were, first, that he had never possessed the weapons; and second, that he was entrapped. Further, there was overwhelming evidence that John Herbert knew that the weapons were automatic.

6. Instructions defining the "reasonable doubt" standard

In a criminal trial, the prosecution has the burden of proving the guilt of the accused beyond a reasonable doubt and a conviction may not be sustained if this burden is not met. The Supreme Court has ruled that this standard of proof is mandated by the Constitution, and is required in both criminal and quasi-criminal proceedings. An exact definition of the term is difficult to ascertain, but nevertheless a careful explanation of its meaning must be given by the judge to the jury.

The Ninth Circuit addressed the issue of jury instructions that define the reasonable doubt standard in United States v. Miller. Miller was convicted in the district court of receiving and concealing stolen goods. He complained of several errors on appeal, one of which was

3176. 698 F.2d at 986.
3177. Id. at 987. The court observed that "[m]ere presence while a crime is being committed is insufficient to infer criminal knowledge or intent." Id. (citing United States v. Sutherland, 463 F.2d 641, 648 (5th Cir.), cert. denied, 409 U.S. 1078 (1972)).
3178. Id.
3179. Id. The Ninth Circuit reasoned that, since this evidence was so overwhelming, there was no "'reasonable possibility that the error materially affected the verdict.'" Id. (quoting United States v. Valle-Valdez, 554 F.2d 911, 915 (9th Cir. 1977)).
3180. See In re Winship, 397 U.S. 358, 364 (1970) ("'[I]f there remain any doubt about the constitutional statute of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'").
3181. 688 F.2d 652 (9th Cir. 1982).
3182. Id. at 655. Miller was specifically charged with violating 18 U.S.C. § 2315 (1982), which provides in pertinent part:

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise securities, or money of the value of $5,000 or more, . . . knowing the same to have been stolen, unlawfully converted, or taken;

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

The facts adduced at trial showed that Miller received and concealed a stolen trailer.
the trial court's instructions defining reasonable doubt.\textsuperscript{3183}

Miller's proposed instruction was similar to that upheld in an earlier Ninth Circuit decision, an instruction he claimed was required because the government's case depended largely on circumstantial evidence.\textsuperscript{3184} The Ninth Circuit disagreed, noting that it had previously upheld an instruction which excluded language similar to that offered by Miller.\textsuperscript{3185} The court then explicitly approved the trial court's language that defined reasonable doubt as the type of a doubt that would make a reasonable person hesitate to act,\textsuperscript{3186} observing that it fairly and adequately informed the jury as to the correct standard.\textsuperscript{3187}

The Ninth Circuit again dealt with instructions defining this concept in \textit{United States v. Rhodes}.\textsuperscript{3188} Defendants Dudley and Rhodes made various challenges to their convictions,\textsuperscript{3189} including a challenge to the instruction given to the jury on the meaning of reasonable doubt.\textsuperscript{3190} The instruction given by the trial court defined reasonable doubt as the kind

\begin{itemize}
\item \textsuperscript{3183} 688 F.2d at 662. The disputed portion of the jury instruction was as follows: "A reasonable doubt is a doubt based on reason and common sense. It's the kind of a doubt that would make a reasonable person hesitate to act." \textit{Id.} at n.6 (emphasis omitted). As the Ninth Circuit noted, this instruction is substantially the same as that at \textsc{Devitt & Blackmar, Federal Jury Practice and Instructions} § 11.14 (3d ed. 1977).
\item \textsuperscript{3184} 688 F.2d at 662 n.6. Miller's proposed instruction was similar to that upheld by the Ninth Circuit in \textit{United States v. James}, 576 F.2d 223, 227 n.3 (9th Cir. 1978). In \textit{James}, the court declared that "although a criminal defendant is entitled to an instructive regarding his theory of the case, challenges which merely pertain to the trial judge's language, or formulation of the charge are reversible only for an abuse of discretion." \textit{Id.} at 227 (citation omitted). Miller's proposed instruction can be found at 688 F.2d at 662 n.8.
\item \textsuperscript{3185} 688 F.2d at 662. \textit{See United States v. Grayson}, 597 F.2d 1225, 1230 (9th Cir.) (court upheld trial court's decision not to instruct jury that if they found the evidence pointing to either a verdict of guilt or innocence they must choose innocence), \textit{cert. denied}, 444 U.S. 875 (1979). The court also observed that, according to \textit{United States v. Witt}, 648 F.2d 608, 611 (9th Cir. 1981), the Ninth Circuit does not always require a definition of reasonable doubt. However, having an instruction on the concept, the instruction must accurately convey the term's meaning. 688 F.2d at 662.
\item \textsuperscript{3186} \textit{Id.}
\item \textsuperscript{3187} \textit{Id.} The "hesitate to act" language was also upheld in \textit{United States v. Robinson}, 546 F.2d 309, 313-14 (9th Cir. 1976), \textit{cert. denied}, 430 U.S. 918 (1977); \textit{United States v. Patman}, 557 F.2d 1181, 1182 (5th Cir. 1977), \textit{cert. denied}, 441 U.S. 933 (1979); and \textit{United States v. Knight}, 547 F.2d 75, 77 (8th Cir. 1976).
\item Miller also objected on appeal to the trial court's refusal to give an eyewitness "identification instruction." The Ninth Circuit dismissed this argument by noting that Miller had failed to comply with \textsc{Fed. R. Crim. P.} 30, which requires a party to raise a timely objection at trial to the omission of a requested instruction. 688 F.2d at 662-63.
\item \textsuperscript{3188} 713 F.2d 463 (9th Cir.), \textit{cert. denied}, 104 S. Ct. 535 (1983).
\item \textsuperscript{3189} \textit{See infra} notes 3288-305 and accompanying text for a full discussion of the facts of \textit{Rhodes}.
\item \textsuperscript{3190} 713 F.2d at 471. The Ninth Circuit observed that a defendant in a criminal case has a constitutional right to have the jury instructed correctly regarding the concept of proof beyond a reasonable doubt. \textit{Id.} (citing \textit{Taylor v. Kentucky}, 436 U.S. 478 (1978)). However, the court
of a doubt that would make a reasonable person hesitate to act. The district judge went on to define these terms and the defendants contended that the effect of this further explanation was to transform the instruction into an erroneous willingness to act instruction. Dudley also argued that the trial court's instruction tended to suggest that the test of reasonable doubt was whether the jury was comfortable with its verdict.

The Ninth Circuit disagreed on both counts, ruling that the instructions, taken as a whole, were adequate to inform the jury of the correct definition of reasonable doubt. The court also stated that even if the district judge's explanation had transformed the "hesitate to act" language into the erroneous "willingess to act" language, it did not necessarily constitute reversible error. The instructions conveyed the meaning of the term accurately, and that is all that is required by the Ninth Circuit.

7. Limiting and curative instructions

The traditional function of a limiting or curative instruction has been to caution a jury regarding the proper use that it can make of certain evidence. It is a recognition that, especially in respect to evidence of additional crimes committed by a defendant, a jury could easily use such evidence for improper purposes. The most troubling aspect of the instruction itself is that a judge can never really know how a jury has been affected by certain testimony; all he or she can do is instruct on its proper purpose.

In United States v. Bradshaw, the Ninth Circuit considered the

3191. 713 F.2d at 471 (emphasis in original). The district court's instruction on reasonable doubt was identical to that given in Devitt & Blackmar; see supra note 3183.

3192. 713 F.2d at 472. The Supreme Court has declared that such an instruction should not be phrased in terms of "willingness to act." Holland v. United States, 348 U.S. 121, 140 (1954).

3193. 713 F.2d at 472.

3194. Id. The court also decided that when the trial judge instructed the jury to be "comfortable" with its decision, he was merely informing them that they should not be concerned with the length of time it might take them to reach a decision. Id.

3195. Id. The court cited its decision in United States v. Robinson, 546 F.2d 309, 313 (9th Cir. 1976), cert. denied, 430 U.S. 918 (1977), for the proposition that "[t]he courts of appeals have consistently held that [the willingness to act] language does not constitute reversible error." Id.

3196. The Ninth Circuit decided that the disputed instruction met the "test" of United States v. Clabaugh, 589 F.2d 1019 (9th Cir. 1979), wherein the court declared that the test is whether "the instructions, as a whole, fairly and accurately convey the meaning of reasonable doubt." Id. at 1022 (citations omitted).

3197. 690 F.2d 704 (9th Cir. 1982), cert. denied, 103 S. Ct. 3543 (1983).
adequacy of instructions informing the jury of the limited purpose for which certain evidence was admitted during the trial. The court found that because the instruction requested by the defendant differed only slightly from that given by the trial judge, the jury was not misled, and therefore affirmed the defendant's conviction.3198

Defendant Bradshaw was convicted of kidnapping and sentenced to thirty years in prison.3199 On appeal, he argued that the trial court abused its discretion in not giving a requested cautionary instruction to the jury. The instruction was designed to admonish the jury to only consider evidence regarding the offense charged, since the district court had admitted evidence of additional crimes committed by Bradshaw.3200

The Ninth Circuit first decided that the evidence of other crimes committed by Bradshaw was not unduly prejudicial because it was sufficiently probative to show the defendant's motive in committing the charged offense.3201 The court then noted that, once evidence of other crimes is admitted at trial, the trial judge should caution the jury regarding the limited purpose for which it was admitted.3202 Bradshaw requested such an instruction,3203 and the district court complied by giving

3198. Id. at 710.
3199. Id. at 707. Bradshaw was convicted of violating 18 U.S.C. § 1201(a) (1982), which provides in pertinent part:

Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when: (1) the person is willfully transported in interstate or foreign commerce . . .

shall be punished by imprisonment for any term of years or for life.

The evidence showed that Bradshaw befriended the nine-year-old son of a woman who lived in the same motel complex as Bradshaw. He spent a substantial amount of time with the boy for six months, until the mother sent the boy to live with his aunt. Her reason for sending him away was a doubt about her son's relationship with the defendant. Bradshaw continued to meet with the boy and later suggested that the two of them move to Oklahoma together. The boy agreed, and they soon left California for Oklahoma, where Bradshaw was arrested.690 F.2d at 706-07.3200. 690 F.2d at 709. It was established at the trial that while Bradshaw and the boy were travelling, they engaged in mutual sexual activity. There was also evidence that showed Bradshaw had supplied the boy with marijuana and "speed." Id. at 708. The district judge admitted evidence of these crimes over the defendant's objections.3201. Id. at 708-09. The Ninth Circuit observed that "[e]vidence of drug use and sexual relations with a nine-year-old boy was obviously prejudicial to the defendant. But it was also relevant to show Bradshaw's dominion over [the boy]." Id. at 708. The court ruled that the probative value of this evidence was not outweighed by the danger of undue prejudice to the defendant. Id.

3202. Id. at 709 (citing United States v. Sangrey, 586 F.2d 1312, 1314 (9th Cir. 1978)). The court noted that the purpose of a limiting instruction is to "reduce or eliminate prejudice which would otherwise occur." Id. (citing United States v. O'Brien, 601 F.2d 1067, 1070 (9th Cir. 1979)).

3203. Had Bradshaw not requested a limiting instruction, the district court was not required
the jury a directive almost identical to that proposed by the defendant.\textsuperscript{3204}

The court observed that jury instructions do not have to be given in the exact words requested by a defendant; thus, the district court’s action was not an abuse of discretion.\textsuperscript{3205} The Ninth Circuit thought the instruction could have been more carefully drafted, but, because the one in question was substantially identical to that requested by Bradshaw, the trial court’s decision did not constitute reversible error.\textsuperscript{3206}

In \textit{United States v. McCown},\textsuperscript{3207} the Ninth Circuit considered several objections to both the inclusion and exclusion of various jury instructions. The court of appeals ruled on both the adequacy of curative instructions and on a claimed violation of the Federal Rules of Criminal Procedure.

Defendants McCown, Gary Lee Barnes (Barnes, Sr.), and Gary Leslie Barnes (Barnes, Jr.), were convicted on various courts relating to a conspiracy to distribute and actual distribution of cocaine and firearms. The convictions stemmed from a joint undercover investigation by the Drug Enforcement Administration and the Bureau of Alcohol, Tobacco, and Firearms.\textsuperscript{3208}

On appeal, both Barnes, Sr. and Barnes, Jr. complained that they had been prejudiced by testimonial evidence of a co-defendant’s guilty plea. The trial judge had initially allowed the prosecutor to question the co-defendant on cross-examination regarding a plea bargain agreement.\textsuperscript{3209} But on the next day of the trial, the district judge reversed to give one sua sponte. \textit{Id.} (citing \textit{United States v. Sangrey}, 586 F.2d 1312, 1315 (9th Cir. 1978)). However, the \textit{Sangrey} court also stated that a limiting instruction would have been “appropriate.” \textit{United States v. Sangrey}, 586 F.2d 1312, 1315 (9th Cir. 1978). In \textit{United States v. Ailstock}, 546 F.2d 1312, 1315 (9th Cir. 1976), the Sixth Circuit held that it constituted reversible error for the district court \textit{not} to give a limiting instruction sua sponte, when testimony was allowed at trial that revealed the defendant’s prior prison record. \textit{Id.} at 1291-92.

\textsuperscript{3204} 690 F.2d at 710. The district court’s instruction was essentially a shorter version of that requested by Bradshaw.

\textsuperscript{3205} \textit{Id.} The court also noted that the sufficiency of jury instructions is determined by viewing them as a whole. \textit{Id.} This is the general rule in the circuit courts. \textit{See, e.g., Davis v. McAllister}, 631 F.2d 1256, 1260 (5th Cir. 1980), \textit{cert. denied}, 452 U.S. 907 (1981); \textit{United States v. Burns}, 624 F.2d 95, 105 (10th Cir.), \textit{cert. denied}, 449 U.S. 954 (1980).

\textsuperscript{3206} 690 F.2d at 710. It was also important to the Ninth Circuit’s decision that the disputed evidence “was admitted only for purposes of proving motive and disproving consent.” \textit{Id.} But in reality, it would seem that a jury might easily use the highly prejudicial testimony regarding Bradshaw’s heinous acts for other purposes, such as inferring guilt on the kidnapping charge.

\textsuperscript{3207} 711 F.2d 1441 (9th Cir. 1983).

\textsuperscript{3208} \textit{Id.} at 1443.

\textsuperscript{3209} \textit{Id.} at 1451. Testimony of the co-defendant’s guilty plea was first brought out by
himself and instructed the jury to disregard the evidence of the co-defendant's guilty plea. Defendants Barnes, Sr. and Barnes, Jr. contended that the curative instruction was insufficient to correct the error and that they were unfairly prejudiced.

The Ninth Circuit disagreed, ruling that the trial judge did cure his initial error in admitting the evidence. Important to the court's decision was the fact that the jury instructions admonished the jury that they were not to use evidence of another defendant's guilty plea in determining the guilt or innocence or the defendants before them.

During the trial, Barnes, Jr. had requested a jury instruction regarding an entrapment defense. The district judge had maintained until closing argument that he would not grant the request. But after closing arguments the trial judge reversed his earlier position and sua sponte decided to give an entrapment instruction. On appeal, Barnes, Jr. claimed that this action violated Rule 30 of the Federal Rules of Criminal Procedure and that the late decision deprived his counsel of the opportunity to argue for the entrapment theory to the jury.

The Ninth Circuit observed that a violation of Rule 30 by a district court is deemed to be reversible error only if the defense counsel's closing argument is substantially prejudiced thereby. However, the court de-
clared that the risk of a prejudicial effect is far greater when the defense counsel goes into closing arguments with the expectation that a certain instruction will be given and then it is withheld by the court. The situation as regards Barnes, Jr. differed since his attorney did not expect an entrapment instruction to be given. The court concluded by noting that the instruction was "merely superfluous" in any event because there was no evidence to support a finding of entrapment.

The Ninth Circuit also considered curative instructions as to Barnes, Sr., and evidence of "prior bad acts." During the trial there was testimony by one of the undercover agents that he had seen Barnes, Sr. smoking a marijuana cigarette. On appeal, Barnes, Sr. argued that, notwithstanding the trial judge's curative instruction, he had been unfairly prejudiced by this testimony. The court of appeals disagreed and ruled that the district court's instruction dispelled any possible prejudicial effects.

At another point in the trial, an agent mentioned that Barnes, Sr. had told him he had previously been arrested. The prosecutor objected to this statement and the nature of Barnes' prior arrest was not revealed to the jury. The trial judge offered to caution the jury regarding the testimony but Barnes, Sr. did not request such a curative instruction. The Ninth Circuit ruled that the district court was correct in denying Barnes' later request for a mistrial.

defense"), cert. denied, 444 U.S. 967 (1979); United States v. Lyles, 593 F.2d 182, 186 (2d Cir.) ("But it is settled law in this Circuit that reversal is appropriate only when a defendant can demonstrate that a Rule 30 lapse has resulted in prejudice."), cert. denied, 440 U.S. 972 (1979).

3217. 711 F.2d at 1452. The court noted that such a situation could devastate a closing argument because counsel may have tailored it toward the jury receiving a particular instruction.

3218. Id. The court decided that the inclusion of the entrapment instruction after closing argument "did not prejudice Barnes, Jr., since the evidence would not have supported a finding of entrapment even if that defense had been more strenuously urged upon the jury." Id.

3219. Id. at 1454.

3220. Id. The district court judges had admonished the jury that this evidence was not to be used by it in deciding Barnes' guilt or innocence on the charges before them. The Ninth Circuit declared that the prejudicial effect of this testimony was compounded by Barnes, Sr.'s own defense counsel because he questioned the agent further on the matter during cross-examination. Id. Nevertheless, the court of appeals declined to overrule the district court's decision.

3221. Id. The court cited to its earlier decision in United States v. Johnson, 618 F.2d 60 (9th Cir. 1980), where the court stated that "[a]lthough curative instructions are not always effective, we have stated that we must assume that the jury followed the curative instruction." Id. at 62 (citations omitted).

3222. 711 F.2d at 1454.

3223. Id. The court noted that its decision in United States v. Regner, 677 F.2d 754, 757 (9th Cir.) (district court's failure to give a limiting instruction where defendant did not request one did not amount to "plain error"), cert. denied, 459 U.S. 911 (1982), supported affirmance.
8. Standard of review

The basic test used by the Ninth Circuit when reviewing alleged instructional errors is to view the jury instructions as a whole, as opposed to reading the disputed instruction in its own narrow context. This was the standard of review utilized in the recent case of United States v. Cusino. 3224 Defendant Cusino was convicted in the trial court on one count of mail fraud and six counts of wire fraud. 3225 The convictions stemmed from a scheme whereby Cusino defrauded potential investors who were interested in an energy amplifying machine which he had allegedly invented. 3226

On appeal, the government conceded that there was insufficient evidence to support the mail fraud conviction, but argued for the affirmation of the wire fraud verdict. 3227 Cusino first contended that the district court committed prejudicial error in instructing the jury on the elements of wire fraud. Instead of informing the jury that it must find Cusino had devised the alleged scheme, the trial judge gave instructions regarding a purported scheme. 3228

The Ninth Circuit noted that the district court had read the indictment in its entirety to the jury, and it had been instructed that, to be proved by the government, the scheme had to be substantially the one alleged. 3229 As such, Cusino's objection did not meet the applicable standard—the instruction was, more probably than not, harmless beyond a reasonable doubt. 3230 The court acknowledged the general rule that jury

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3224. 694 F.2d 185 (9th Cir. 1982), cert. denied, 103 S. Ct. 2096 (1983).
3225. The relevant statute violated was 18 U.S.C. § 1343 (1982), which provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any . . . signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

3226. 694 F.2d at 186. The facts adduced at trial showed that Cusino solicited investors for a device which he claimed could amplify energy by a ratio of nine to one. He eventually received over $916,000, much of which was wired from a Nevada bank to a California bank. Id.
3227. Id.
3228. Id. at 187.
3229. Id. at 187-88.
3230. Id. at 187. The Ninth Circuit cited to its earlier decision in United States v. Valle-Valdez, 554 F.2d 911 (9th Cir. 1977). There the court ruled that an appellate court must reverse a conviction where the defendant makes a timely objection to a deficient jury instruction, unless it is more probable than not that the error did not materially affect the verdict.” Id. at 915 (emphasis in original).

Cusino also argued that the jury was not informed that the wire transmissions must have been made with the specific intent to defraud, which is an essential element of the scheme. 694 F.2d at 187. The Ninth Circuit held that this was a misconception of the specific intent re-
instructions are to be examined as a whole and that they will not be found to be defective unless "plain error" is shown.3231

The defendant also argued that the evidence supported an instruction on good faith, as a complete defense to the allegations. The Ninth Circuit noted that the jury had been told that it must find the defendant acted with a specific intent to defraud in order to convict him. The court felt that this was tantamount to an instruction on good faith, since good faith is essentially the obverse of intent to defraud.3232 Thus, the instruction in question did not amount to plain error.3233

Finally, Cusino contended that the combination of alleged errors in the instructions amounted to plain error.3234 The Ninth Circuit dismissed this argument, stating that the instructions, taken as a whole, were adequate.3235 The court then affirmed the defendant's conviction of wire fraud.

In United States v. Kendrick,3236 the Ninth Circuit considered the standard of review to be used when a defendant assigns as error the refusal of the district court to give a requested jury instruction.3237 Kendrick had been charged with violating federal securities laws,3238 and had

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3231. 694 F.2d at 187-88. See infra note 3314.
3232. 694 F.2d at 188 (citing United States v. Westbo, 576 F.2d 285, 289 (10th Cir. 1978)).
3233. Id. See Fed. R. Crim. P. 52(b) (plain errors that affect "substantial rights" may be raised on appeal even though defendant failed to object during trial).

The Ninth Circuit stated that Cusino also failed to object at trial to a jury instruction "which this Court has condemned several times." 694 F.2d at 188. The court did not explain exactly what that instruction was, but instead cited to its decision in United States v. Brown, 522 F.2d 10 (9th Cir. 1975). Judging from the Brown opinion, the district court in Cusino most likely gave an instruction regarding the burden of proof that omitted the words "beyond a reasonable doubt." See id. at 11. The Ninth Circuit noted that at Cusino's trial, the district court made 10 references to "beyond a reasonable doubt" in other instructions to the jury. 694 F.2d at 188. The effect of this was to cure any prejudicial errors that may have occurred due to the one deficient instruction.

3234. 694 F.2d at 188.
3235. Id. The court referred to the Supreme Court's decision in United States v. Park, 421 U.S. 658 (1975), where the Court stated that "in reviewing jury instructions, our task is also to view the charge itself as part of the whole trial." Id. at 674.
3236. 692 F.2d 1262 (9th Cir. 1982), cert. denied, 461 U.S. 914 (1983).
3237. Id. at 1266. Kendrick also contended on appeal that the jury instruction that was given on fraud was deficient. Id. at n.3. The Ninth Circuit refused to consider this issue because the defendant had not objected to the instruction during the trial. The court noted that the "general rule is that appellants cannot raise a new issue for the first time in their Reply Brief." Id. (quoting Thompson v. Commissioner, 631 F.2d 642, 649 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981)).
requested an instruction to the effect that he may have had implied au-
thority to draw on one of his customer's accounts.\textsuperscript{3239} The trial court refused to give the instruction and Kendrick was ultimately convicted.

On appeal, Kendrick claimed that such refusal constituted revers-
ible error.\textsuperscript{3240} The Ninth Circuit disagreed, stating that there was no
evidence to suggest that the defendant had any implied authority to with-
draw the funds,\textsuperscript{3241} and that the jury instructions were complete. The
court concluded by stating that the district court's instructions covered
this aspect of Kendrick's case adequately and that was all that was
required.\textsuperscript{3242}

In \textit{United States v. Candelaria},\textsuperscript{3243} the Ninth Circuit reviewed a re-
quest for a jury instruction which was denied due to lack of supporting
evidence. Candelaria was charged with communicating a false bomb
threat in violation of 18 U.S.C. section 844(e).\textsuperscript{3244} At trial, the defense
requested a jury instruction to the effect that the jury must find the de-
fendant not guilty if it considered his actions merely a joke or prank.\textsuperscript{3245}

\textsuperscript{3239} 692 F.2d at 1266. The defendant was accused of making unauthorized drafts on a
margin account of a customer, depositing the money in his own account, and then falsely
reporting to the customer that the withdrawals had been made for the purpose of acquiring
securities for him. \textit{Id.} at 1264.

\textsuperscript{3240} Kendrick presumably relied on the customer's testimony at trial, "that at a May 1978
SEC proceeding he had 'testified that an implied authorization might have been interpreted
from the course of transactions between myself and Kendrick and Co.'" \textit{Id.} at 1266 n.4.

\textsuperscript{3241} The Ninth Circuit observed that "[t]here was nothing from which the jury could have
concluded that appellant had implied authority to draw on [the customer's] non-discretionary
account for his own benefit." \textit{Id.} at 1266. Kendrick may have had implied authority to
purchase stock, but not to use the funds for his own purposes.

\textsuperscript{3242} \textit{Id.} The court cited its earlier decision in \textit{United States v. Kenny}, 645 F.2d 1323 (9th
Cir.), \textit{cert. denied}, 452 U.S. 920 (1981). The \textit{Kenny} court held that:
When a defendant's jury instructions have been refused, the following principles ap-
ply. The jury must be instructed as to the defense theory of the case, but the exact
language proposed by the defendant not be used, and it is not error to refuse a pro-
posed instruction so long as the other instructions in their entirety cover that theory.
\textit{Id.} at 1337.

\textsuperscript{3243} 704 F.2d 1129 (9th Cir. 1983).

\textsuperscript{3244} 18 U.S.C. § 844(e) (1982) provides:
Whoever, through the use of the mail, telephone, telegraph, or other instrument
of commerce, willfully makes any threat, or maliciously conveys false information
knowing the same to be false, concerning an attempt or alleged attempt being made,
or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or
destroy any building, vehicle, or other real or personal property by means of fire or
an explosive shall be imprisoned for not more than five years or fined not more than
$5,000, or both.

\textsuperscript{3245} 704 F.2d at 1131. Candelaria conceded that he had made the bomb threat but con-
tended that he had no malicious reason for doing so. He also testified that he had been drink-
ing that night. His defense counsel argued that in light of these facts, it was obvious that the
call was made in jest, and therefore it should not be subject to punishment under the statute.
\textit{Id.} at 1130-31.
The district judge instructed the jury regarding the issues of malice and intent, but refused the defendant's proposed instruction. On appeal, Candelaria argued that the trial court's refusal constituted reversible error.

The Ninth Circuit observed that the underlying issue was whether 18 U.S.C. section 844(e) actually required or allowed criminal sanctions for threats made in jest, but the court concluded that it need not address the issue. The court failed to find any evidence or testimony in the record that would suggest the threat was in fact made in jest. Because the defendant's theory did not appear to have any support whatsoever in the evidence or in the law, the district judge was not obliged to instruct on that theory.

9. Erroneous jury instructions that did not prejudice the defendant

In United States v. Bertman, the Ninth Circuit considered whether jury instructions regarding coercion, which failed to inform the
jury that the burden of proof was on the government, constituted reversible error. Defendant Bertman had been convicted of violating the Travel Act by travelling in interstate commerce with the intent to promote a bribery scheme in violation of Hawaiian law.

Bertman requested, over the government's objection, a jury instruction stating that the government had to prove, beyond a reasonable doubt, that he did not engage in the bribery scheme as a result of extortion or coercion. The district court refused Bertman's requested instruction, but it did instruct the jury that coercion could be a defense to bribery. On appeal, Bertman contended that the district court's instruction erroneously shifted the burden of proof on coercion from the government to himself, despite Hawaiian law clearing placing that burden on the government.

The Ninth Circuit agreed that the district court erred in failing to place on the government the burden of proving the absence of coercion. However, the court did not agree that this error required a reversal of Bertman's conviction, because the defendant failed to present

3252. The Travel Act is codified in 18 U.S.C. § 1952(a)(3) and (b)(2) (1982), and provides in pertinent part:

Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce . . . with intent to . . . promote, manage, establish, [or] carry on . . . any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

As used in this section "unlawful activity" means . . . extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

3253. 686 F.2d at 773.

3254. Id. at 774. The charges against Bertman arose from an alleged scheme by him to bribe the Liquor Control Administrator of Honolulu in order to secure approval of his plan to import Coors beer into Hawaii. The defendant did in fact give the Liquor Administrator gifts and promised to pay him $500,000 over a period of two years. Bertman contended that these transactions were a result of "coercive pressure" placed on him by the Administrator and that he merely played along in order to preserve his chances of obtaining a permit. Id. at 773.

3255. Id. at 774.

3256. Bertman was charged in the indictment with bribery of a public official in violation of HAWAII REV. STAT. § 710-1040(l) (Supp. 1976), which provides in relevant part that: "A person commits the offense of bribery if: (a) He confers, or offers or agrees to confer, directly or indirectly, any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion, or other action in his official capacity . . . ."

Section 710-1040(2) provides: "It is a defense to a prosecution under subsection (1) that the accused conferred or agreed to confer the pecuniary benefit as a result of extortion or coercion." HAWAII REV. STAT. § 710-1040(2) (Supp. 1976).

3257. 686 F.2d at 775. The court noted that since the coercion defense under Hawaii law was nonaffirmative, all Bertman need do was to present "some credible evidence of coercion." Id. at 774-75. The burden then shifts to the government to negate the defense beyond a reasonable doubt. Id. at 775. Thus, the court concluded that Bertman had not shown evidence of the essential element of the coercion defense. Id.
any credible evidence whatsoever that would entitle him to an instruction on the defense of coercion. The Ninth Circuit held that because Bertman was not entitled to an instruction regarding a coercion defense, the one given by the district court, albeit clearly erroneous, could only have benefitted the defendant and was therefore harmless.

Potentially erroneous jury instructions were discussed by the Ninth Circuit in United States v. Alexander. The defendant was convicted on four counts of first degree murder and on four counts of burglary committed in the perpetration of a felony. On appeal, Alexander contended that conflicting jury instructions were prejudicial to him, while the government argued that the judge's instruction on manslaughter was improperly given.

The trial judge had instructed the jury that coercion or duress could provide a legal excuse for the crime of robbery, but not for murder. He also gave an instruction, at Alexander's request, on the elements of voluntary manslaughter, and explained that an act causing death may constitute voluntary manslaughter if it is committed under duress or coercion and without malice aforethought.

The government argued that the manslaughter instruction should not have been given to the jury. The Ninth Circuit decided that the issue was moot because the jury had convicted Alexander of first degree murder and thus must have found the existence of malice aforethought when the homicides occurred. Such a finding showed that the jury

3258. Id. The court observed, that even if Bertman's testimony was believed, it did not establish that "he was constrained . . . to do what his free will would have refused." Id.
3259. Id. That erroneous jury instructions may actually work to the benefit of a defendant is well documented in the federal circuit courts. See, e.g., United States v. Winter, 663 F.2d 1120, 1142 (1st Cir. 1981) (district court error in giving conspiracy instructions only benefitted defendant because it required government to prove more than necessary), cert. denied, 460 U.S. 1011 (1983); United States v. Shoup, 608 F.2d 950, 964 (3d Cir. 1979) (giving entrapment instruction when not required only benefitted defendant); United States v. Rea, 532 F.2d 147, 149 (9th Cir.) (ambiguity in the instructions could only have helped defendant because it may have given jurors more stringent view of government's burden of proof), cert. denied, 429 U.S. 837 (1976); United States v. Furr, 528 F.2d 578, 580 (5th Cir. 1976) (since defendant was not entitled to duress instructions at all, he could not complain that the one he received was too narrow).
3260. 695 F.2d 398 (9th Cir. 1982), cert. denied, 103 S. Ct. 2458 (1983).
3261. Id. at 401.
3262. Id.
3263. Id.
3264. The government relied on United States v. Buchanan, 529 F.2d 1148, 1153 (7th Cir.), cert. denied, 425 U.S. 950 (1976), which states flatly that "coercion is not a defense to murder."
3265. 695 F.2d at 401. "Malice aforethought" has been defined as:
the characteristic mark of all murder, as distinguished from the lesser crime of man-
did not believe that Alexander committed the crimes under the influence of duress or coercion, and as a result, any potential error was clearly harmless.

The Ninth Circuit concluded its discussion of the jury instructions by noting that any potential conflict arising from the voluntary manslaughter directive was a result of the defendant requesting such an instruction. The court then ruled that Alexander was precluded from arguing on appeal errors which he invited.

In United States v. Manuel, the Ninth Circuit considered whether an involuntary manslaughter instruction could be consistent with a self-defense instruction given in the same proceeding. Defendant Manuel had requested jury instructions on both self-defense as a defense to the murder charge, and on involuntary manslaughter as a lesser-included offense. The district court refused to give both instructions and compelled Manuel to make a choice between the two, whereupon the defense proceeded on the self-defense theory.

On appeal, Manuel argued that the trial judge committed reversible error by refusing to instruct on the two theories. The Ninth Circuit agreed that the trial court erred, holding that there were indeed situations where a defendant could legitimately claim both involuntary manslaughter which lacks it. It does not mean simply hatred or particular ill will, but extends to and embraces generally the state of mind with which one commits a wrongful act .... It is not synonymous with premeditation, however, but may also be inferred from circumstances which show a wanton and depraved spirit, a mind bent on evil mischief without regard to its consequences.

Virgin Islands v. Lake, 362 F.2d 770, 774 (3d Cir. 1966).

3266. 695 F.2d at 401.
3267. Id. at 402.
3268. Id.
3269. Id. Accord United States v. Gray, 626 F.2d 494, 501 (5th Cir. 1980) ("Under the doctrine of invited error, a defendant who asks for an instruction will not be heard to complain about the instruction on appeal.").
3270. 706 F.2d 908 (9th Cir. 1983).
3271. Id. at 915.
3272. Id. The district court relied upon United States v. Skinner, 667 F.2d 1306, 1309-10 (9th Cir. 1982), cert. denied, 103 S. Ct. 3569 (1983), for the proposition that an involuntary manslaughter instruction need not be given when the defense also requests a self-defense instruction. In Skinner, the defendant had admitted to intentionally killing the victim, allegedly in self-defense. The court reasoned that an instruction on involuntary manslaughter (an unintentional, but criminally negligent offense), would be inconsistent with Skinner's intentional act. Because no rational jury could convict Skinner of involuntary manslaughter, he was not entitled to such an instruction. Id. at 1310.
slaughter and self-defense instructions.\textsuperscript{3273} Even though the Ninth Circuit ruled that the district court had erred in rejecting Manuel's requested instructions, it held the error to be harmless because Manuel was not entitled to an involuntary manslaughter instruction in any event.\textsuperscript{3274}

Manslaughter is a lesser-included offense of the crime of murder.\textsuperscript{3275} In order for a defendant to be entitled to an instruction regarding a lesser-included offense, it is essential that a rational jury could find the defendant guilty of the lesser-included offense, but not guilty of the greater offense.\textsuperscript{3276} The Ninth Circuit concluded that Manuel could not be convicted of the lesser offense of involuntary manslaughter because there was no evidence to show that he acted without malice,\textsuperscript{3277} a requisite condition for an involuntary manslaughter conviction.\textsuperscript{3278} Because the defendant was not entitled to a jury instruction regarding involuntary manslaughter, the lower court's error was deemed harmless.\textsuperscript{3279}

\textsuperscript{3273} 706 F.2d at 915. As an example, the court gave a situation where the defendant is assaulted,

but does not have a reasonable apprehension of suffering great bodily harm or death, and is therefore privileged to use force, but only non-deadly force, in self-defense. . . . If the defendant attempts to use non-deadly force, but does so in a criminally negligent manner and death results, then both involuntary manslaughter and self-defense instructions would be warranted.

\textit{Id.} The Ninth Circuit distinguished these circumstances from \textit{Skinner} because, in the latter, the defendant had \textit{intentionally} shot and killed the victim. Here, the court is theorizing a \textit{negligent} killing. \textit{Id.}

\textsuperscript{3274} \textit{Id.} at 916.

\textsuperscript{3275} \textit{See} United States v. Celestine, 510 F.2d 457, 460 (9th Cir. 1975; \textit{see generally} C. \textsc{Toricca}, \textsc{Wharton's Criminal Law} § 152 (14th ed. 1979).

\textsuperscript{3276} United States v. Skinner, 667 F.2d 1306, 1309 (9th Cir. 1982); \textit{see also} United States v. Johnson, 637 F.2d 1224, 1233-34 (9th Cir. 1980); \textit{Fed. R. Crim. P.} 31(c).

\textsuperscript{3277} "Malice" has been defined as "a condition of the mind which prompts a person to do a wrongful act wilfully . . . to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse." 1 \textsc{Devitt} & \textsc{Blackmar}, \textsc{Federal Jury Practice and Instructions} § 16.06 (3d ed. 1977).

\textsuperscript{3278} 706 F.2d at 916. 18 U.S.C. § 1112(a) (1982) provides:

Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

- Voluntary—Upon a sudden quarrel or heat of passion.
- Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

The Ninth Circuit noted that, even if the court accepted Manuel's version of the facts, there was clear evidence of a malicious killing. At best, Manuel stood by and watched his friends beat the victim with a heavy board and helped drag the body to another location where a heavy tree stump was dropped on him. At worst, Manuel himself had dropped the tree stump on the victim. The court argued that a rational jury could not consider this evidence without concluding that "Manuel acted with wanton and callous disregard of human life amounting to malice." 706 F.2d at 916.

\textsuperscript{3279} 706 F.2d at 916.
10. Instructions in entrapment cases

Entrapment occurs when the government induces a person to commit a crime which that person would not otherwise be predisposed to commit. In *United States v. Tornabene*, the Ninth Circuit considered whether the lower court's jury instructions on entrapment constituted reversible error. Tornabene was charged with distributing LSD in violation of 21 U.S.C. section 841(a)(1). At trial, he requested a jury instruction that placed the burden on the government to prove beyond a reasonable doubt that the defendant was not entrapped. The district judge refused to give the instruction and Tornabene was subsequently convicted.

On appeal, Tornabene argued that the lower court committed reversible error by refusing his proposed instruction. After noting that the requested instruction did not conform to the suggested approach of a treatise on the subject, the Ninth Circuit nevertheless found no error in the district court's ruling. The court of appeals held that the entrapment instructions that were given adequately informed the jury that

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3280. United States v. Bagnell, 679 F.2d 826, 834 (11th Cir. 1982), cert. denied, 460 U.S. 1449 (1983). The elements of entrapment are present "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." Sorrells v. United States, 287 U.S. 435, 442 (1932). The justification for the defense is "that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government." United States v. Russell, 411 U.S. 423, 435 (1973).

3281. 687 F.2d 312 (9th Cir. 1982).

3282. Id. at 317. The basis for Tornabene's indictment was a sale of approximately 5,000 units of LSD that he made to two undercover Drug Enforcement Administration agents.

3283. Id.

3284. The Ninth Circuit noted that the defendant's proposed instruction reflected an amendment of *Devitt & Blackmar's Federal Jury Practice & Instructions* to conform with United States v. Johnson, 590 F.2d 250 (7th Cir. 1979), reh'g en banc, 605 F.2d 1025, cert. denied, 441 U.S. 1033 (1980). On the first appeal, the *Johnson* court overturned the defendant's conviction because the jury instructions failed to specifically place the burden of proof on the entrapment issue on the government. 590 F.2d at 251. The court noted that entrapment instructions are "exceptions to the general rule" that the "propriety of a given instruction is to be determined from all the instructions viewed as a whole." *Id.*

On rehearing, the Seventh Circuit reversed itself and declared that "[i]t is axiomatic that in determining the propriety of an instruction that all the instructions be considered as a whole." 605 F.2d at 1027 (emphasis added). Since the district judge had placed the burden of proof on the government in other jury instructions, the court found that his failure to specifically include it in the entrapment directive did not constitute reversible error. *Id.* at 1028. The Seventh Circuit stated that, while it is "preferable" to have the specific provision, a lack thereof would not "automatically require reversal." *Id.* The Eleventh Circuit is in accordance with this view. See United States v. Sonntag, 684 F.2d 781 (11th Cir. 1982).

3285. 687 F.2d at 317.
the government had to prove lack of entrapment beyond a reasonable
doubt. The court concluded by stating that the instruction in ques-
tion was virtually identical with entrapment instructions it had approved
in earlier decisions.

In United States v. Rhodes, the Ninth Circuit ruled on various
challenges to the district court's instructions to the jury. The court of
appeals ultimately agreed with the trial court in all respects and affirmed
the defendants' convictions.

Defendants Rhodes and Dudley were convicted in the lower court
of conspiracy to possess and distribute stolen mail. Dudley was also
convicted on two counts of possession of stolen mail. The convictions
stemmed from a scheme whereby the defendants planned to distribute
numerous checks which had been stolen from the mail.

On appeal, Dudley first argued that the trial court erred in refusing
to instruct the jury concerning the defense of entrapment. Dudley
claimed that the man who arranged the meeting at which his arrest took
place was, in reality, a government agent, and that he had been
entrapped.

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3286. Id.
3287. Id. The court cited its earlier decisions in United States v. Pico-Zazueta, 564 F.2d
1367 (9th Cir. 1977), cert. denied, 435 U.S. 946 (1978), and United States v. Reynoso-Ulloa,
548 F.2d 1329 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978). But it is unclear from these
two cases whether the jury was specifically instructed that the government bore the burden to
prove beyond a reasonable doubt that the defendant was not entrapped.

However, in another Ninth Circuit case decided just six months before Tornabene, the
court held that:

[a]n entrapment charge must clearly instruct the jury that the Government must
prove beyond a reasonable doubt that the defendant was ready and willing to commit
the crimes whenever an opportunity was afforded. It is the rule in this circuit that
where the substance of this charge is omitted, the instructions are not adequate.
United States v. Dearmore, 672 F.2d 738, 741 (9th Cir. 1982) (emphasis added). See also
United States v. Wolffs, 594 F.2d 77, 83 (5th Cir. 1979) (entrapment directive must "unmistak-
ably apprise" jury of government's burden).

Because the Tornabene opinion did not describe the disputed instructions, it is difficult to
determine whether they conform to the standard established in earlier decisions.
3288. 713 F.2d 463 (9th Cir.), cert. denied, 104 S. Ct. 535 (1983).
3289. Id. at 476.
3290. Id. at 466. The defendants were convicted of violating the general conspiracy statute.
18 U.S.C. § 371 (1982) provides in pertinent part: "If two or more persons conspire . . . to
commit any offense against the United States . . . and one or more of such persons do any act
to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned
not more than five years, or both."

3291. 713 F.2d at 466. Specifically Dudley violated 18 U.S.C. § 1708 (1982), which pro-
scribes the offense of the theft or receipt of stolen mail.
3292. 713 F.2d at 467.
3293. Id. The Ninth Circuit explained that the person who had arranged this meeting, Will
Cunningham, was a "bounty hunter" who shared information with the police about fugitives
The Ninth Circuit reiterated the requirements that must be present for an entrapment defense: (1) the government must have induced the defendant to commit the criminal act, and (2) the defendant must lack any predisposition to commit the crime. The Ninth Circuit decided that Dudley could not satisfy either of these tests. The court ruled that there was no evidence to show that the person who arranged the meeting at which Dudley was arrested was a government agent. In addition, the court noted that there was overwhelming proof to show that the defendant was predisposed to participate in the conspiracy. The court concluded by stating that because there was not sufficient evidence to show the defendant had been entrapped, the issue was not one for the jury to consider. As such, the district court judge had acted correctly, and indeed had a duty to rule on the defense theory as a matter of law, since there was no factual issue for the jury.

Dudley also contended on appeal that the district judge had erroneously instructed the jury on the definition of constructive possession. The concept of constructive possession was crucial to Dudley's conviction because it could not be proved that he was in actual physical possession of stolen checks. Dudley claimed that the trial judge's choice of language tended to nullify the knowledge requirement of constructive possession. The Ninth Circuit disagreed, ruling that the defendant misconstrued the district court's language, and that the example used by he was seeking. The court declared that such conduct did not transform him into a government agent.

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3294. Id. (citations omitted).
3295. Id. (citing United States v. Glassel, 488 F.2d 143, 146 (9th Cir. 1973), cert. denied, 416 U.S. 941 (1974)).
3296. 713 F.2d at 467. See supra note 3294.
3297. 713 F.2d at 467. The court recited a litany of various acts that Dudley engaged in to further the objects of the conspiracy. These included recruiting persons to distribute stolen checks, actual receipt of stolen checks, the opening of mail, and the attempted sale of stolen checks. Id.
3298. Id. (citing United States v. Glaeser, 550 F.2d 483, 487 (9th Cir. 1977)).
3299. Id. at 470. The Ninth Circuit noted that the standard of review in this respect was "whether the instruction, taken as a whole, was misleading or represented a statement inadequate to guide jury deliberations." Id. (quoting United States v. Grayson, 597 F.2d 1225, 1230 (9th Cir.), cert. denied, 444 U.S. 873 (1979)).
3300. Id. at 471. The trial court instructed the jury that "[a] person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it." Id.

The judge went on to give an example of the concept, using his and his wife's possession of
the trial court was adequate to explain the concept to the jury.\footnote{3301}

Finally, defendant Rhodes argued that there was insufficient evidence to support the inferences made in the court's jury instruction regarding the stolen checks.\footnote{3302} The district court had told the jury that, if it believed the letters were placed in the mail and had not been received, it could infer that they had been stolen while in the possession of the post office. At trial, Rhodes contended that the government should have the burden of proving that the letters were indeed properly posted and addressed. He then offered two alternate instructions to that effect. The trial court refused to give either instruction.

The Ninth Circuit agreed with the government's position that the entire dispute was moot because the parties had stipulated that the items stolen from the mail had been properly mailed, but never received.\footnote{3303} The court went on to say that, even if the instruction was improper, it constituted harmless error.\footnote{3304} The instruction did not tell the jury that they must draw certain inferences; it merely informed them that they could. Because the jury did not have to rely exclusively on the inferences in the disputed instruction, any error committed was harmless.\footnote{3305}

11. Jury instructions that broaden the grand jury indictment

It is a universally accepted rule in the federal judiciary that a court may not amend a grand jury indictment through its instructions to the jury.\footnote{3306} This issue was recently dealt with by the Ninth Circuit in

their cars as an illustration. The disputed passage in the instruction was: "[m]y wife is driving in one car probably now." \textit{Id.} (emphasis omitted).

Dudley maintained that the trial judge's use of the term "probably now" confused the knowledge requirement because it implied that a defendant may be in constructive possession of an item "whether or not the defendant has knowledge that another person has actual possession of the item." \textit{Id.}

\footnote{3301. \textit{Id.} The court of appeals stated that the use of the word "probably," "merely referred to the likelihood that the trial judge's wife was in actual, as opposed to constructive, possession of the car." \textit{Id.}}

\footnote{3302. \textit{Id.} at 475.}

\footnote{3303. \textit{Id.} The court also ruled that the instruction was proper given the large number of checks involved. It was ludicrous to believe that the 841 checks had been stolen after delivery to each intended recipient, rather than while in the custody of the post office. \textit{Id.}}

\footnote{3304. \textit{Id.} The court observed that "[t]he giving of an erroneous jury instruction is a nonconstitutional error." \textit{Id.} (citing United States v. Valle-Valdez, 554 F.2d 911, 916 (9th Cir 1977)). A defendant's conviction will not be reversed as a result of a nonconstitutional error unless it is " 'more probable than not' " that the error " 'materially affected the verdict.' " \textit{Id.} (quoting United States v. Valle-Valdez, 554 F.2d 911, 916 (9th Cir. 1977)).}

\footnote{3305. \textit{Id.} at 476.}

\footnote{3306. See, e.g., United States v. Davis, 679 F.2d 845, 851 (11th Cir. 1982), \textit{cert. denied}, 459 U.S. 1207 (1983); United States v. Ramirez, 670 F.2d 27, 28 (5th Cir. 1982); United States v. Winter, 663 F.2d 1120, 1139 (1st Cir. 1981), \textit{cert. denied}, 460 U.S. 1011 (1983); United States...
United States v. Pazsint. The defendant had been charged in a grand jury indictment with impeding, intimidating, and interfering with a federal officer by use of a dangerous weapon in violation of 18 U.S.C. section 111. However, he was tried and convicted before a jury which was instructed only on the offense of forcible assault.

On appeal, Pazsint argued that he was convicted of an offense different from that charged in the indictment. The Ninth Circuit agreed, ruling that an amendment of the indictment that charges a new crime through the jury instructions constitutes per se reversible error. The jury instructions were held to be clearly erroneous because they did not describe the offense charged in the indictment. The effect of this was to destroy the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. The conviction was therefore reversed.

12. The accomplice credibility instruction

In 1909, the United States Supreme Court observed that the testimony of criminal accomplices "ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses." The very real possibility that one accomplice to a crime may be tempted to testify falsely against another in an attempt to receive

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3307. 703 F.2d 420 (9th Cir. 1983).
3308. 18 U.S.C. § 111 (1982) provides in pertinent part:

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person . . . while engaged in or on account of the performance of his official duties . . . [and] in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Pazsint, while brandishing a handgun, had made a "citizen's arrest" of an IRS agent whom he believed to be harassing his wife. 703 F.2d at 422.
3309. 703 F.2d at 422. In returning the indictment, the grand jury had chosen to omit the words "assaults", "resists", and "opposes", and had only charged Pazsint with impeding, intimidating and interfering with a federal officer. Id. at 423. But he was actually found guilty of another crime—that of assault on an officer with a deadly weapon. Id. at 424.
3310. Id. at 423. See also Stirone v. United States, 361 U.S. 212 (1960). In Stirone, the defendant was indicted and charged with interfering with interstate commerce by extortion, but he was convicted of an additional charge of unlawful exportation of steel. The court reaffirmed the rule that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." Id. at 217.
3311. 703 F.2d at 424. The district court had first read the indictment to the jury, then gave them instructions only on the crime of forcible assault. As a result, the Ninth Circuit found the instructions to be "both conflicting and misleading." Id.
a reduced charge has led most federal courts to give cautionary instructions to juries hearing such testimony. The issue in *United States v. Moore* 3313 was whether it constituted "plain error" 3314 for a court not to give an accomplice directive in the absence of a request for such an instruction.

Moore was on trial for the offense of aiding and abetting a bank robbery. During the trial, one of the robbers pleaded guilty and testified against the alleged accomplices. Moore was named as the driver of the "getaway car" and was convicted on the charge. 3315

On appeal, he contended that the district court committed plain error in not giving the jury a cautionary instruction regarding the accomplice testimony. 3316 The Ninth Circuit took note of the fact that Moore did not request such an instruction during the trial, a request that, if not honored by the judge, would have constituted reversible error. 3317 However, the court held that there was no plain error in this situation because the rule in the Ninth Circuit is that where the defendant does not request an accomplice instruction, it is not plain error to fail to give one sua sponte. 3318

3313. 700 F.2d 535 (9th Cir. 1983), modified, 730 F.2d 558 (9th Cir. 1984).
3314. "Plain error" has been defined as "a highly prejudicial error affecting substantial rights." *United States v. Giese*, 597 F.2d 1170, 1199 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979). A criminal conviction will be reversed on the basis of plain error "in the very exceptional situation only, situations wherein it appears to be necessary in order to prevent miscarriage of justice or to preserve the integrity and reputation of the judicial process." *Id.* (quoting *Marshall v. United States*, 409 F.2d 925, 927 (9th Cir. 1969)).

The Federal Rules of Criminal Procedure that plain errors "may be noticed although they were not brought to the attention of the court." *Fed. R. Crim. P.* 52(b). The purpose of the rule is to prevent wholesale reversals for immaterial and harmless errors, while protecting the defendant from those errors so substantial that his case was irreparably prejudiced.
3315. 700 F.2d at 536.
3316. *Id.*
3317. *Id.*
3318. *Id.* (citing *United States v. Gere*, 662 F.2d 1291, 1295 (9th Cir. 1981)). The circuit courts are somewhat divided on this issue, but the majority have ruled that, when an accomplice instruction is not requested, it is plain error to fail to give the directive only if substantial prejudice to the defendant will result from its omission. *See, e.g.*, United States v. Jones, 673 F.2d 115, 119 (5th Cir.) (court should give a cautionary directive regarding "uncorroborated accomplice testimony (1) where it is solely relied upon for conviction and (2) where there are strong indicia that the testimony of the accomplice may be a fabrication"), *cert. denied*, 459 U.S. 863, (1982); United States v. Fortes, 619 F.2d 108, 124 (1st Cir. 1980) (failure to give a cautionary instruction sua sponte will not constitute plain error if the accomplice testimony is both internally "consistent and credible").

However, the First Circuit did reverse a conviction for failure to give a cautionary instruction where the only evidence connecting the defendant with a bank robbery "came from the mouths of others involved in that escapade." *McMillen v. United States*, 386 F.2d 29, 36 (1st Cir. 1967), *cert. denied*, 390 U.S. 1031 (1968). And in *United States v. Windom*, 510 F.2d 989 (5th Cir.), *cert. denied*, 423 U.S. 862 (1975), the court stated flatly that "[t]he failure to give
13. Instructions on robbery through intimidation

In *United States v. Hopkins*, the Ninth Circuit addressed the accuracy of a jury instructions defining the offense of taking by intimidation. Defendant Hopkins was convicted of attempted bank robbery by intimidation, a violation of 18 U.S.C. section 2113(a).

On appeal, Hopkins contended that the district court abused its discretion by refusing to modify the jury instructions to conform to the suggested approach of an earlier Ninth Circuit case. The instruction given by the district court stated that intimidation could be established by proof of an act "as would produce in the ordinary person fear of bodily harm." The requested instruction stated that an attempt to "take" by intimidation meant to take "in such a way that would put an ordinary, reasonable person in fear of bodily harm." While the difference may seem to be one of semantics, the Ninth Circuit ruled that the "reasonable person" standard was a more accurate statement of the law, and thus should be used in the future. However, the Ninth Circuit also held that the lower court did not abuse its discretion in using the alternate instruction.

such an instruction where the testimony of the accomplice is the only direct evidence against the accused is plain error." *Id.* at 994 (citation omitted).

Defendant Moore prevailed, however, on another argument. During his trial the district court had asked for a numerical division of the jury during its deliberation. Such an inquiry is forbidden in the Ninth Circuit and Moore's conviction was accordingly reversed. *700 F.2d* at 536.

3319. *703 F.2d* 1102 (9th Cir.), *cert. denied*, 104 S. Ct. 399 (1983).

3320. 18 U.S.C. § 2113(a) (1982) provides in pertinent part:

> 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 . . .
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

3321. *703 F.2d* at 1103. The earlier case was *United States v. Alsop*, 479 F.2d 65 (9th Cir. 1973).

3322. *Id.* (quoting 2 *DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 44.05 (3d ed. 1977)).

3323. *Id.* (emphasis in original) (quoting United States v. Alsop, 479 F.2d 65, 67, n.4 (9th Cir. 1973)). In the text of its opinion, the *Alsop* court actually approved language similar to that in *Devitt & Blackmar*. But in a footnote, the court stated that the proper test in determining the presence of intimidation is an objective one, and that "requires the application of the standard of the ordinary man." *United States v. Alsop*, 479 F.2d 65, 67 n.4 (9th Cir. 1973). The court then suggested, but did not command, that in the future it would be wise for the district courts to use a definition including the terms, "ordinary, reasonable person." *Id.* (emphasis added).

3324. *703 F.2d* at 1103. *Cf.* United States v. Roustio, 455 F.2d 366, 371 (7th Cir. 1972)
14. Instructions in antitrust cases

According to the United States Supreme Court, "[i]t has long been settled that an agreement to fix prices is unlawful per se."3325 The Ninth Circuit recently addressed the "per se" theory of price fixing in United States v. Kahan & Lessin Co.3326

The defendants, two health food distributors, were convicted of conspiring to restrain trade by fixing prices, terms, and conditions for the sale of health foods in violation of section 1 of the Sherman Act.3327 On appeal, the defendants argued that the district court erred in instructing the jury on the government's "per se" theory regarding price fixing.3328

The Ninth Circuit noted that, while the theory should be used with some caution, the Supreme Court had recently reaffirmed the rule of conclusive presumption of illegality in price fixing cases.3329 The defendants contended that the "per se" rule should not apply if it could be shown that the price fixing had some procompetitive justifications.3330 The Ninth Circuit rejected this argument without discussion, noting simply that the Supreme Court had specifically ruled against that justification.3331

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3326. 695 F.2d 1122 (9th Cir. 1982) (per curiam).
3327. 15 U.S.C. § 1 (1982) provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."
3328. 695 F.2d at 1125.
3329. Id. The Ninth Circuit specifically referred to Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982), and Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980). In Maricopa County, the Court stated that "[w]e have not wavered in our enforcement of the per se rule against price-fixing." 457 U.S. at 347. And in Target Sales, the Court declared that "since price-fixing agreements have been adjudged to lack any 'redeeming virtue,' it is conclusively presumed illegal without further examination under the rule of reason." 446 U.S. at 650.
3330. 695 F.2d at 1125.
3331. Id. The Supreme Court decided that "[t]he anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some." Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 351 (1982). The defendants also argued that they were entitled to a mistrial due to prejudicial questions asked of witnesses by government counsel. The Ninth Circuit ruled that the district court cured these errors with appropriate cautionary instructions. It noted that "the trial court has broad discretion, and its rulings will not be reversed unless there was an abuse of that
15. Instructions in conspiracy cases

A conspiracy is an inchoate offense, the essence of which is an agreement between two or more persons to commit an unlawful act. The rationale behind the law of conspiracy is the protection of society from the dangers of concerted criminal activity, a danger considered so great that it warrants criminal sanctions regardless of whether the crime agreed upon is actually committed.\textsuperscript{3332}

In \textit{United States v. Brooklier},\textsuperscript{3333} the Ninth Circuit considered the adequacy of jury instructions defining the elements of a conspiracy. Five defendants were convicted in the district court of violating the Racketeer Influenced and Corrupt Organizations (RICO) statute.\textsuperscript{3334} They contended on appeal that the jury was erroneously instructed regarding the elements of a RICO conspiracy. The Ninth Circuit upheld the disputed instruction and stated that, not only was the instruction not prejudicial to the defendants, but it actually placed an undue burden on the government.

It was adduced at trial that all five defendants were members of La Cosa Nostra, a secret nationwide organization allegedly engaged in a wide range of criminal activities, including murder, gambling and extortion.\textsuperscript{3335} Specifically, the defendants were members of the Los Angeles "family" and their convictions stemmed from both conspiracy to violate and substantive violations of RICO.\textsuperscript{3336}

On appeal, the defendants argued that the jury instructions were defective because they allowed the jury to convict on the basis of multiple discretion that unfairly prejudiced the appellants." 695 F.2d at 1125. Finding none, the court of appeals affirmed the lower court's decision.

\textsuperscript{3332} United States v. Feola, 420 U.S. 671, 693-94 (1975). The Court noted that danger was inherent in an unlawful agreement, because "[c]riminal intent has crystallized, and the likelihood of actual, fulfilled commission warrants preventative action." \textit{Id.} at 694.

\textsuperscript{3333} 685 F.2d 1208 (9th Cir. 1982) (per curiam), \textit{cert. denied}, 459 U.S. 1206 (1983).

\textsuperscript{3334} \textit{Id.} at 1213. This statute is codified at 18 U.S.C. § 1962 (1982) and provides in pertinent part:

\begin{itemize}
  \item[(c)] 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.
  \item[(d)] It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.
\end{itemize}

As the Ninth Circuit explained, "[t]he essence of a RICO conspiracy is not an agreement to commit racketeering acts, but an agreement to conduct or participate in the affairs of an enterprise through a pattern of racketeering." 685 F.2d at 1216 (citing United States v. Zemek, 634 F.2d 1159, 1170 n.15 (9th Cir. 1980), \textit{cert. denied}, 450 U.S. 916 (1981)).

\textsuperscript{3335} 685 F.2d at 1213.

\textsuperscript{3336} \textit{Id.} at 1213-14. In addition, two defendants were convicted of extorting money from an FBI-operated pornography business.
conspiracies without finding the existence of an overall conspiracy. The Ninth Circuit stated that the pattern of racketeering required could be established by showing two or more acts or attempts of the requisite type that the defendant committed and that were connected by a common scheme or plan. The court then noted that, in order to convict under the disputed instructions, the jury had to find that each defendant had agreed to participate in two specific racketeering acts.

The Ninth Circuit ruled that these instructions were sufficient to explain the elements of a RICO conspiracy and that they required the jury to find the existence of an overall conspiracy. Moreover because the instructions could have been interpreted to require that the government prove the defendants had actually participated in two or more acts of racketeering, they constituted an undue addition to the government's burden of proof. As such, the defendants actually benefitted by the language of the instructions, and their convictions were affirmed.

The Ninth Circuit considered the adequacy of the jury instructions in a prosecution charging multiple-object conspiracy in United States v. DeLuca. DeLuca and three co-defendants were convicted on a twenty count indictment charging conspiracy, racketeering and extortion. The charges stemmed from allegations that the defendants committed arson in their attempts to eliminate competing businesses in the foreign auto-

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3337. Id. at 1222. A portion of the disputed instruction consisted of the trial judge's response to an inquiry from the jury. The judge stated that "[e]ach individual has to have knowledge of two or more racketeering acts and been a part of and committed those, and as part of those it could be conspiracies to commit those racketeering acts." Id. The Ninth Circuit observed that these instructions were not "models of clarity," but noted that any ambiguity only favored the defendants. Id.

3338. "The purpose of the RICO statute is to allow a single prosecution of persons who engage in a series of criminal acts for an enterprise, even if different defendants perform differing tasks or participate in separate acts of racketeering." Id.

3339. Id.

3340. Id. The jury was also told that "they must find each defendant was employed by or associated with a racketeering enterprise, and that the racketeering offenses were connected by a common scheme, plan, or motive so as to constitute a pattern 'and not merely a series of disconnected acts.'" Id.

3341. Id. at 1223.

3342. Id. Most courts that have considered the question hold that only an agreement is necessary for the defendant to be guilty of a conspiracy to violate RICO. See, e.g., United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981) ("a RICO conspiracy count must charge as a minimum that each defendant agreed to commit two or more specified predicate crimes"), cert. denied, 460 U.S. 1011 (1983); United States v. Elliott, 571 F.2d 880, 903 (5th Cir.) (defendant "must have objectively manifested an agreement to participate . . . through the commission of two or more predicate crimes"), cert. denied, 439 U.S. 953 (1978) (emphasis omitted).

3343. 692 F.2d 1277 (9th Cir. 1982).
mobile parts industry.\textsuperscript{3344} The Ninth Circuit ruled that the disputed instruction was erroneous because it may have allowed the jury to focus on a legally insufficient object of the conspiracy.\textsuperscript{3345}

On appeal, the defendants contended that the arson convictions should be reversed because the crime charged in the indictment did not meet the Ninth Circuit's definition of the term "explosive."\textsuperscript{3346} The court agreed, noting that it was bound by an earlier decision and was thus forced to interpret the meaning of "explosive" narrowly.\textsuperscript{3347} This action directly affected the next issue on appeal, the multiple-object conspiracy instructions, because the trial judge had instructed the jury that it need find only one of the multiple objects to convict under the conspiracy count. The Ninth Circuit ruled that, in such a case, if the appellate court holds that any of the supporting counts are legally insufficient, the conspiracy count must also fail.\textsuperscript{3348} The rationale behind this rule is the danger that the jury may have relied on insufficient legal grounds to convict the defendant.\textsuperscript{3349} Because the district court's instruction may have
had this effect, the court reversed the defendants' convictions under one of the conspiracy counts of the indictments.3350

The Ninth Circuit construed unambiguous jury instructions that may have prejudiced the defendant's right to a unanimous jury verdict in United States v. Echeverry.3351 The court reversed the defendant's conviction on the basis of indefinite jury instructions regarding the duration of the alleged conspiracy.

Defendant Echeverry was found guilty of conspiracy to distribute cocaine.3352 The indictment charged that the conspiracy had existed existed between December, 1980, and June, 1981, and proof was offered at trial of cocaine sales by the defendant on those dates.3353 In response to an inquiry by the jury concerning the duration of the conspiracy, the trial judge gave an instruction stating that they could find Echeverry guilty if they found the existence of a conspiracy "between two or more persons for some period of time, though not necessarily the entire period of time, within the dates charged in the indictment."3354

On appeal, Echeverry claimed that his case was prejudiced by this instruction and by the variance between the indictment and the evidence of the duration of the conspiracy that was offered at trial. The Ninth Circuit agreed that the ambiguity of the judge's instruction may well have harmed the defendant, and therefore constituted reversible error.3355 The court observed that the trial judge could simply have told reversed where there was a failure of proof in regard to an alleged objective of the conspiracy and the jury may have based its verdict upon that objective); Van Liew v. United States, 321 F.2d 664, 672 (5th Cir. 1963) ("The guilty verdict was general. With inquiry forever foreclosed, it is just as likely that the verdict was based on the insufficient charge...") (emphasis in original).

But see United States v. Dixon, 536 F.2d 1388, 1401-02 (2d Cir. 1976) (affirming the rule in the Second Circuit that where an indictment charged a conspiracy to engage in various offenses "and only one was proved, the conviction could still stand").

3350. 692 F.2d at 1281. Defendant Danno also argued on appeal that the trial judge should have used a "more strongly worded" jury instruction regarding the testimony of a government witness who had once been addicted to drugs. The Ninth Circuit ruled that the district court did not abuse its discretion in its choice of language for the instruction, observing that "[o]ne instruction that fairly conveys the care to which the testimony should be subjected is adequate." Id. at 1285-86. Furthermore, because the witness admitted to only a prior addiction, the trial judge would have been justified in refusing any addict-witness instruction whatsoever. Id.

3351. 698 F.2d 375 (9th Cir. 1983) (per curiam).
3352. Id. at 376. Echeverry was specifically found guilty of violating 21 U.S.C. § 846 (1982), the attempt and conspiracy statute as regards illegal drugs.
3353. 698 F.2d at 376.
3354. Id. (emphasis in original).
3355. Id. at 377. Most troubling to the Ninth Circuit was the fact that there was no way to determine if the jurors had agreed on the existence and duration of the same conspiracy. The court noted that both the judge and the jury seemed confused regarding the duration of the
the jury that they did not have to find the existence of a conspiracy over
the entire period, but that they still must unanimously agree on the dates
of any conspiracy in which they found that Echeverry had participated.\textsuperscript{3356}

In \textit{United States v. Jones},\textsuperscript{3357} the defendants were convicted of vari-
os offenses in connection with sale/leaseback transactions in which in-
vestors would buy equipment from one company and lease it back to a
trucking company.\textsuperscript{3358} The disputed instructions involved the conspir-
acy prosecution for mail and securities fraud.

The defendants first argued that it was error for one of the instruc-
tions to incorporate count one of the indictment in its explanation of the
conspiracy's overt acts.\textsuperscript{3359} The Ninth Circuit dismissed this contention,
noting that the instruction distinguished the allegations in the indictment
from the overt acts charged and that it was standard practice to incorpo-
rate overt acts in such a manner.\textsuperscript{3360}

The defendants next argued that the conspiracy instructions were
erroneous because they did not require unanimity by the jury. They
maintained that, as a result of the "overt act" instruction, members of
the jury may not have relied on the same overt act to convict.\textsuperscript{3361}

The Ninth Circuit disagreed, noting that the disputed instruction

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\textsuperscript{3356} \textit{Id.} at 377. Echeverry's conspiracy conviction had to be reversed because it was im-
possible for the court to determine if the jury's verdict was unanimous. The Ninth Circuit also
reversed the guilty verdict on the substantive counts because the jury had most likely relied on
the conspiracy conviction in determining Echeverry's complicity as to those courts.

This was due to the fact that the trial judge submitted the case to the jury with an instruc-
tion approved by the Supreme Court in \textit{Pinkerton v. United States}, 328 U.S. 640 (1946).
Under such an instruction, once the jury determines the defendant's guilt as to the conspiracy
count, it is allowed to rely on the acts performed in furtherance of the conspiracy by the
defendant's co-conspirators in deciding whether the defendant himself was guilty of the sub-
stantive courts. \textit{Pinkerton}, 328 U.S. at 646-47. Since Echeverry's conspiracy conviction was
fatally flawed, it also tainted the guilty verdict on the substantive counts due to the jury's
reliance on the conspiracy conviction. \textit{Id.} at 377-78.

\textsuperscript{3357} 712 F.2d 1316 (9th Cir. 1983).

\textsuperscript{3358} \textit{Id.} at 1319-20. In this case, the defendants controlled both the company which leased
the equipment and the company which was selling the equipment.

\textsuperscript{3359} \textit{Id.} at 1322. The defendants contended that the jury may have based its findings of an
overt act in support of the conspiracy on legally insufficient grounds—namely, on the intro-
ductive paragraphs of count one of the indictment, which simply alleged that the trucking
company was engaged in the transportation of property. \textit{Id.}

\textsuperscript{3360} \textit{Id.} The Ninth Circuit neither cited authority for this proposition, nor did it quote the
instruction in question.

\textsuperscript{3361} \textit{Id.} The instruction stated that "the jury must find at least one conspirator guilty of
one of the overt acts." \textit{Id.}
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referred many times to a certain overt act.\textsuperscript{3362} Furthermore, another instruction did require that the jury bring forth a unanimous verdict. Reading the instructions as a whole, the court could not say that reversible error had occurred.\textsuperscript{3363}

16. Failure to instruct the jury on lesser-included offenses

A lesser-included offense is one that is included in the definition of the primary offense charged. To be convicted of the lesser offense, a defendant need not be specifically charged with that crime. It is generally agreed, however, that because the lesser crime merges into the greater offense, a defendant may not be convicted of both crimes.

In \textit{United States v. Harvey},\textsuperscript{3364} a consolidated appeal involving defendants convicted of separate offenses, the Ninth Circuit dealt with the question of instructing the jury on lesser-included offenses within the crime charged. Both defendants had been convicted in the district courts of involuntary manslaughter involving alcohol related automobile deaths.

On appeal, defendant Harvey argued that the district court erred because it failed to instruct the jury that it need not unanimously decide in favor of the defendant on the manslaughter charge before it could deliberate on lesser-included offenses.\textsuperscript{3365} The Ninth Circuit rejected this argument, stating that it saw no error in the trial judge's instruction.\textsuperscript{3366}

\textsuperscript{3362} \textit{Id.} The language used in the instruction referred to "the overt act" or "such overt act." \textit{Id.}

\textsuperscript{3363} \textit{Id.} The court ruled that taken together, the two instructions did require that the jury return a unanimous verdict on the overt act committed.

\textsuperscript{3364} 701 F.2d 800 (9th Cir. 1983).

\textsuperscript{3365} \textit{Id.} at 806. The district court had followed the suggested approach in \textit{1 Devitt & Blackmar, Federal Jury Practice and Instruction} (3d ed. 1977). Section 18.05 provides, in pertinent part, that "if the jury should unanimously find the accused 'Not Guilty' of the crime charged in the indictment (information) then the jury must proceed to determine the guilt or innocence of the accused as to any lesser offense which is necessarily included in the crime charged." Thus, the trial court had instructed the jury that they first had to decide in favor of the defendant on the greater charge before moving on to the lesser ones.

\textsuperscript{3366} 701 F.2d at 806. Harvey had argued that the Ninth Circuit should adopt the rule proposed in \textit{United States v. Tsanas}, 572 F.2d 340 (2d Cir.), \textit{cert. denied}, 435 U.S. 995 (1978). There, the Second Circuit held that a defendant could choose to have the jury instructed that they could move on to a lesser offense if they could not reach agreement on the greater offense. \textit{Id.} at 346. The \textit{Tsanas} court also ruled tha the defendant must make a timely request for such an instruction. Harvey did not make her request until the jury had deliberated for three hours.

701 F.2d at 806. Thus, her request was not timely and, because the \textit{Tsanas} rule "is not of constitutional dimension," the Ninth Circuit decided that the district court did not err." \textit{Id.} See also \textit{United States v. Dixon}, 507 F.2d 683 (8th Cir. 1974) (court affirmed conviction of lesser offense when jury reported it could not decide on greater charge), \textit{cert. denied}, 424 U.S. 976 (1976).
The court found that Harvey's neglect in not making a timely request for her proposed instruction was decisive on the issue.\footnote{3367} Defendant Chase asserted on appeal that the trial court committed prejudicial error by not instructing the jury on the lesser offense of careless driving.\footnote{3368} The government conceded that careless driving is a lesser-included offense within vehicular involuntary manslaughter, but argued that a reasonable jury simply could not have convicted Chase of careless driving.\footnote{3369} The Ninth Circuit agreed and affirmed the conviction.\footnote{3370}

**H. Judicial Misconduct**

A jury's verdict will not be overturned based on the conduct of a trial judge unless that conduct, when measured against the facts of the case and the result of the trial, was clearly prejudicial.\footnote{3371} This assessment is to be made in light of the evidence of the defendant's guilt.\footnote{3372}

3367. 701 F.2d at 806. Harvey also argued that the district court erred because it did not use the exact language of an earlier Ninth Circuit decision regarding the correct instruction on the knowledge element of involuntary manslaughter. \textit{Id.} The court dismissed this contention, stating that the instruction given in the trial court had the same effect that the proposed instruction would have had.

Harvey's involuntary manslaughter conviction was ultimately reversed by the Ninth Circuit due to inadmissible evidence being introduced at trial. The court held that evidence of the defendant's blood alcohol tests should have been suppressed because the blood sample was seized without a warrant, consent, or a prior formal arrest. For the conviction to stand, Harvey should have been arrested prior to the taking of the blood sample. \textit{Id.} at 802.

3368. The Ninth Circuit noted that "[a] defendant is entitled to a lesser included offense instruction if: (1) the lesser included offense is identified within the offense charged; and (2) a rational jury could find the defendant guilty of the lesser offense but not the greater." \textit{Id.} at 807 (citing United States v. Johnson, 637 F.2d 1224, 1233-34 (9th Cir. 1980); United States v. Muniz, 684 F.2d 634, 636 (9th Cir. 1982)).

The above is the general rule among the circuit courts as to the inclusion of a lesser included offense instruction. \textit{See, e.g.}, United States v. Campbell, 652 F.2d 760, 761-62 (8th Cir. 1981); United States v. Busic, 592 F.2d 13, 24 (2d Cir. 1978).

3369. 701 F.3d at 807. The evidence at trial showed that the defendant had not acted "in anything less than a grossly negligent manner." \textit{Id.} He also had not offered any witnesses to rebut the government's charges. In fact, Chase's defense was basically limited to an attempt to exclude evidence of his blood alcohol level at the time of the accident. \textit{Id.}

3370. \textit{Id.} The court ruled that the evidence adduced "at trial was not such that a reasonable jury could find Chase guilty of careless driving and not involuntary manslaughter." \textit{Id.}

3371. United States v. Eldred, 588 F.2d 746, 750 (9th Cir. 1978) (asking defense counsel to stop questioning witness on matters which witness had no knowledge, instructing defense counsel to proceed after covering the same subject with a witness for the third time, and attempting to ascertain relevance and admissibility of a line of questioning did not constitute judicial efforts to intimidate defense counsel and were not clearly prejudicial).

3372. United States v. Poland, 659 F.2d 884, 886, 894 (9th Cir.) (even if sarcastic statements of trial judge were error, which they were not, evidence of guilt was too strong to affect the verdict), \textit{cert. denied}, 454 U.S. 1059 (1981).
1. Reprimand

In United States v. Bennett, defendant Bennett was convicted of embezzling CETA funds. During the trial, the judge rebuked defense counsel several times. The defendant argued that these reprimands conveyed an impression to the jury of bias, and thus denied him a fair trial. The Ninth Circuit affirmed the conviction, stating that it was justifiable for the trial judge to reprimand defense counsel for holding a document in his hand in a way designed to give the appearance that he was reading from it, where the judge had previously warned defense counsel in a sidebar conference not to use that tactic. All of the other reprimands, with the exception of one, took place outside the presence of the jury and were not prejudicial. The one instance of judicial impropriety took place when the trial judge rebuked defense counsel for asking that a witness' nonresponsive answer be stricken from the record. Subsequently, that answer was stricken. The court reasoned that this one instance of misconduct, when measured against the entirety of the case and the substantial evidence of guilt adduced at trial, did not warrant reversal.

In United States v. DeLuca, the trial judge raised his voice at

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3373. 702 F.2d 833 (9th Cir. 1983).
3374. Id. at 835. Bennett participated in a scheme to defraud the government of CETA funds through a series of kickbacks, in contravention of 18 U.S.C. § 665(a) (Supp. V 1981), which states:

> Whoever, being an officer, director, agent, or employee of, or connected in any capacity with any agency receiving financial assistance under the Comprehensive Employment and Training Act knowingly hires an ineligible individual or individuals, embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance pursuant to such Act shall be fined not more than $10,000 or imprisoned for not more than 2 years, or both; but if the amount so embezzled, misapplied, stolen or obtained by fraud does not exceed $100, such person shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.

Bennett also violated 18 U.S.C. § 1001 (1976), which provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

3375. 702 F.2d at 836.
3376. Id.
3377. Id.
3378. Id.
3379. Id.
3380. 692 F.2d 1277 (9th Cir. 1982). Defendant DeLuca attempted to dominate the rebuilt foreign auto parts market in Southern California. Over a six year period, from 1974 to 1980, eight rival companies were victims of arson. As Circuit Judge Wright stated, "he did not like
defense counsel, refused to allow their approach to the bench, and ad-
monished them. Most of the instances cited by the defendants took
place outside the jury’s presence. Those which the jury did observe were
provoked by defense counsel, or were deemed proper exercises of the
judge’s power to control the proceedings.

While expressing concern for the trial judge’s conduct, the Ninth
Circuit concluded that the defendants failed to show “the extremely high
level of interference necessary” to overturn their convictions. The
court attached great importance to the trial judge’s three cautionary in-
teructions to the jury that his admonitions to defense counsel were not
evidence and were not to be considered in arriving at a verdict.

Defendants also objected to the trial judge’s restriction on the cross-
examination of government witnesses. The court stated that the re-
quirement of confrontation is satisfied once cross-examination reveals
enough information with which to assess a witness’ possible bias and moti-

competition.” Id. at 1280. Defendants were variously charged with conspiracy, racketeering,
 extortion and explosives counts.


3381. Id. at 1282.
3382. Id.
3383. Id. Defense counsel repeatedly and unnecessarily requested permission to approach
the bench and was repeatedly rebuffed.
3384. Id. See United States v. Saavedra, 684 F.2d 1293, 1299 (9th Cir. 1982) (comments by
counsel during closing argument require reversal only when so palpable as to be likely to cause
prejudice to defendant and where that prejudice is not neutralized by trial judge).
3385. 692 F.2d at 1282. See United States v. Robinson, 635 F.2d 981, 984-86 (2d Cir. 1980)
(judge’s instructions made it clear that jury alone was to decide credibility of witnesses), cert.
3386. 692 F.2d at 1282.
3387. The sixth amendment guarantees a criminal defendant the right to confront the wit-
nesses against him. The main purpose of confrontation is to allow the defendant to cross-
examine those witnesses so that the jury will be able to assess the witnesses’ demeanor, credi-

bility, and truth of their testimony. Chipman v. Mercer, 628 F.2d 528 (9th Cir. 1980).
3388. 692 F.2d at 1282. If the right to effective cross-examination is denied, constitutional
error exists without the need to show actual prejudice. Skinner v. Cardwell, 564 F.2d 1381, 1388
(9th Cir. 1977), cert. denied, 435 U.S. 1009 (1978).

3389. 692 F.2d at 1282-83. A judge cannot be faulted for using his authority to prevent what
2. Interruptions

In *United States v. DeLuca*, the defendants contended that an interruption by the trial judge during cross-examination of a witness diluted the impact of that cross-examination. While not discounting the defendants' allegation, the court nonetheless held that a judge may intervene to clarify evidence or testimony. Since the judge's comments were not directed at the credibility of the witness, the interruption did not constitute reversible error.

In *United States v. Moreno-Pulido*, the defendant was convicted of manufacturing and selling counterfeit immigration green cards. The trial judge twice interrupted defense counsel's summation. The defendant claimed a denial of due process. He alleged that the judge's first comment was erroneous as to the law, and that the two interruptions discredited the defense in the eyes of the jury. Defense counsel had suggested that green card forms could not pass as completed documents and therefore did not come under 18 U.S.C. section 1426(b). The judge

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he thinks is a waste of time. United States v. Panza, 612 F.2d 432, 440 (9th Cir. 1979), *cert. denied*, 447 U.S. 925 (1980).

3390. 692 F.2d 1277 (9th Cir. 1982).

3391. *Id.* at 1282. The judge insisted on apprising the courtroom that he had a policy of refusing to accept sentencing recommendations.

3392. *Id.*


3394. 692 F.2d at 1282. Although the circuit judge who wrote the opinion denied the appeal, he remarked in a parting statement that if there were a retrial, he would anticipate that "more judicial restraint will characterize the proceedings." *Id.* at 1283.

3395. 695 F.2d 1141 (9th Cir. 1983).

3396. *Id.* at 1141-42. The defendant violated 18 U.S.C. § 1426(a), (b) (1976), which provides:

(a) Whoever falsely makes, forges, alters or counterfeits any oath, notice, affidavit, certificate of arrival, declaration of intention, certificate or documentary evidence of naturalization or citizenship or any order, record, signature, paper or proceeding or any copy thereof, required or authorized by any law relating to naturalization or citizenship or registry of aliens; or

(b) Whoever utters, sells, disposes of or uses as true or genuine, any false, forged, altered, antedated or counterfeited oath, notice, affidavit, certificate of arrival, declaration of intention to become a citizen, certificate or documentary evidence of a naturalization or citizenship, or any order, record, signature or other instrument, paper or proceeding required or authorized by any law relating to naturalization or citizenship or registry of aliens, or any copy thereof, knowing the same to be false, forged, altered, antedated or counterfeited . . .

... shall be fined not more than $5,000 or imprisoned not more than five years, or both.

3397. 695 F.2d at 1146. *See supra* note 3396.
interrupted and contradicted defense counsel's interpretation of the statute. The Ninth Circuit found that the judge's interruption was proper to forestall jury confusion on a matter of law.3398

The second interruption was occasioned by defense counsel's attempt to define the scope of the duress defense it was using in the case.3399 The trial judge interrupted to state that the court, not defense counsel, would instruct the jury on the proper boundaries for such a defense.3400

The Ninth Circuit concluded that the trial judge's two interruptions in the two-day trial were "brief, limited to the law and carefully couched to show respect for defense counsel's role."3401 The defense was not unfairly discredited and the remarks did not deny defendant's right to due process of law.3402

3. Comments

In evaluating whether a defendant was denied a fair trial by a comment of a trial judge, the defendant must show that prejudice derived from that comment.3403 In United States v. Herbert,3404 an attorney, John Herbert, was one of the defendants. He was convicted of conspiring to violate firearm laws and of possessing, making and transferring unregistered machine guns.3405 Defense counsel attempted to establish that due to the complexity of the Gun Control Act, Herbert did not under-

3398. 695 F.2d at 1146.
3399. Id. Defense counsel argued that the defendant did not have a "reasonable opportunity to escape compulsion" and that a "reasonable opportunity" should be understood by reference to the defendant's "entire life structure."
3400. Id.
3401. Id. at 1147.
3402. Id. Compare United States v. Hickman, 592 F.2d 931 (6th Cir. 1979) (trial court's 250 interjections, in limiting cross-examination by defense, in taking over cross-examination of defense witnesses, and exhibiting an anti-defendant tone left a firm impression of judicial prejudice); United States v. Sheldon, 544 F.2d 213 (5th Cir. 1976) (appellate court reversed where trial judge intervened approximately 130 times during defendant's presentation and only 10 times in government's case, stating that jury must have understood such behavior to indicate trial judge's belief that defense was without merit).
3404. 698 F.2d 981 (9th Cir.), cert. denied, 104 S. Ct. 87 (1983).
3405. Id. at 983. 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.

26 U.S.C. § 5861(d)-(f) (1976) provides:
stand what weapons fell within the purview of that Act. Defense counsel asked Herbert how complicated the Act was and the prosecutor objected on the grounds that the question called for a legal opinion. The trial judge sustained the objection and commented, "[y]ou're not implying it's too complicated for a lawyer, are you?"

The Ninth Circuit characterized the comment as "obviously a jocular aside." Although the comment could have been construed by the jury to mean that because he was a lawyer, Herbert should have understood the Act, the Ninth Circuit nonetheless stated that the comment could have had only minimal impact and therefore did not prejudice the defendant's right to a fair trial. Further, the trial court later cautioned the jury not to draw any inferences from the court's action in the case.

In *United States v. Greene*, defendant Greene was convicted of attempting to evade federal income taxes. Greene maintained that his unreported income was generated from foreign bank accounts. He introduced bank records to support his contention, but did not do so until the trial had already begun. The trial judge commented on the lateness of the records, and explained to the jury that since the records had not been timely produced, it could take lateness into account in appraising the credibility of the records.

The Ninth Circuit reasoned that because the judge did not characterize the foreign bank records as unreliable, but merely stated that late-

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It shall be unlawful for any person—

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

(e) to transfer a firearm in violation of the provisions of this chapter; or

(f) to make a firearm in violation of the provisions of this chapter . . . .

Herbert was converting semi-automatic weapons to fully automatic weapons while preserving the look of semi-automatic weapons. 698 F.2d at 983.

3406. 698 F.2d at 984-85.

3407. Id. at 985.

3408. Id. Actually, because Herbert was videotaped with an informant discussing what steps to take if apprehended by the police with the weapons, the Ninth Circuit's characterization is a particularly appropriate one.

3409. Id.

3410. Id. Compare United States v. Middlebrooks, 618 F.2d 273 (5th Cir.) (some remarks may be so prejudicial that no cautionary instruction can cure the impropriety), cert. denied, 449 U.S. 984 (1980).

3411. 698 F.2d 1364 (9th Cir. 1983).

3412. 26 U.S.C. § 7201 (1976) provides: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

3413. 698 F.2d at 1375.
ness could be a factor in evaluating credibility, the defendant was not prejudiced. The court also pointed out that Greene did not object at the time of the judge's comments, but only raised the issue on appeal.

Greene also failed to object when the trial judge chastised a defense witness in front of the jury for being present during defense counsel's opening statement. The judge then cautioned the jury that the witness might be influenced to conform his testimony to the facts defense counsel indicated that he expected to prove. The Ninth Circuit disposed of this issue by pointing out that the trial judge also reprimanded the prosecutor for not immediately objecting to the witness' presence. The judge also instructed the jury that defense counsel had the right to inform the witness outside of the courtroom about the content of his opening statement. The court held that the trial judge's comments regarding the witness did not constitute reversible error, because they were within his broad discretion to supervise the trial, and because the defendant was not prejudiced by the comments.

4. Questioning witnesses

A trial judge has the authority to question witnesses in order to clarify and develop facts but must never prejudice a defendant by taking a partisan stance. In United States v. Bradshaw, the defendant was convicted of kidnapping a nine year old boy. Bradshaw argued that the trial judge improperly interrogated a prosecution witness, thereby prejudicing Bradshaw's case. The witness was a woman who had raised the defendant for a number of years. Bradshaw had allegedly told

3414. Id.
3415. Id.
3416. Id.
3417. Id.
3418. Id.
3419. Id.
3420. Id. See Rogers v. United States, 609 F.2d 1315, 1318 (9th Cir. 1979) (federal judges have broad discretion in supervising the trial, questioning witnesses and controlling counsel, but it is important that appearance of partiality or hostility be avoided).
3421. See United States v. Medina-Verdugo, 637 F.2d 649, 653 (9th Cir. 1980) (trial judge asked three questions deemed pertinent and designed to clarify facts, and gave a curative instruction to the jury).
3422. 690 F.2d 704 (9th Cir. 1982), cert. denied, 103 S. Ct. 3543 (1983).
3423. 18 U.S.C. § 1201(a) (1976) provides: "Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . shall be punished by imprisonment for any term of years or for life."
3424. 690 F.2d at 707. Defense counsel made a motion for mistrial based partly on the judge's improper questioning. Bradshaw alleged partisanship and a high degree of prejudice. Id. at 710-11.
the woman that he intended to leave the state with the boy. The trial judge took over the questioning following redirect examination of the woman.  

Bradshaw claimed that the trial judge's use of the phrases "impending kidnapping" and "a crime as serious as kidnapping" were suggestive of how the judge felt the proceedings should be decided and thus unduly influenced the jury. The Ninth Circuit dismissed this allegation by pointing out that the witness' testimony had already established Bradshaw's plans to leave the state with the boy. The court minimized the importance of the alleged impropriety, stating that the witness' testimony should be read as a whole and not in selected passages. The court concluded that, when viewed in perspective, the trial judge's questioning was aimed at the issue of the boy's consent and at the nonresponsiveness of the witness. Additionally, the court noted that the trial judge had cautioned the jury that it alone would decide the facts and credibility of the case and not to draw inferences from anything the trial judge had said. Such a cautionary instruction is generally an adequate curative. The judge's questioning was found not to have prejudiced the defendant.

3425. Id. at 711. The judge questioned the witness as to why she did not notify anyone once she had knowledge of Bradshaw's intent to leave the state with the boy. The significant portion of the examination was as follows:

THE COURT: And that's the only reason you didn't call the authorities and notify them of the impending kidnapping that you thought that you personally could handle the matter?

THE WITNESS: Before I was told anything I promised faithfully I would not tell anything of our conversation....

THE COURT: Well, when it develops that the conversation anticipates a crime as serious as kidnapping, don't you think that both morally and legally you are released from such an obligation?

Id.

3426. Id. See Offutt v. United States, 348 U.S. 11, 12 (1954) (a finding of partiality arises from the impression remaining after reading the entire record).

3427. 690 F.2d at 711.

3428. Id.

3429. Id. at 712.

3430. Id. See United States v. Siegel, 587 F.2d 721 (5th Cir. 1979) (a trial judge may question a witness provided he makes it clear that all matters of fact are for the jury to decide).

3431. 690 F.2d at 712. See also United States v. Gunter, 631 F.2d 583 (8th Cir. 1980) (cautionary instruction was not dispositive of whether trial judge improperly assumed prosecution's function).

3432. 690 F.2d at 712. See also United States v. Daniels, 572 F.2d 535 (5th Cir. 1978) (trial judge overstepped his bounds in questioning witness; court held that when counsel is competently conducting their case, judges shall refrain from questioning witnesses).
5. Polling the jury

The Supreme Court in *Brasfield v. United States* held that it was reversible error per se for a judge in a federal trial to inquire into the numerical split of a jury.

In *Locks v. Sumner* the appellant, Locks, was convicted of two murders in a California state court. He appealed the district court’s denial of his writ of habeas corpus. Locks sought to extend the rule in *Brasfield* to cover state trials. The state argued that *Brasfield* was merely an exercise of the Supreme Court’s supervisory power over the federal courts.

While acknowledging that the language in *Brasfield* appeared to have “constitutional underpinnings,” the Ninth Circuit relied heavily on recent decisions of other circuit courts which found *Brasfield* involved a supervisory rule and not a constitutional mandate. The court de-

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3433. 272 U.S. 448 (1926). See United States v. Noah, 594 F.2d 1303, 1304 (9th Cir. 1979) (court held that it was plain error to make inquiry as to the numerical division of a jury).

3434. The rationale behind the prohibition of making inquiry as to the numerical split of the jury is that it accomplishes nothing useful, but does have a tendency to coerce. *Brasfield*, 272 U.S. at 450.

3435. 703 F.2d 403 (9th Cir.), cert. denied, 104 S. Ct. 338 (1983). Before excusing the jury for the weekend, the trial judge, who was substituting for the judge who had heard the case but was ill that day, asked the foreman what the numerical split was after the last ballot. The inquiry went as follows:

   Court: “I say, just on a numerical basis only without telling how many for one side or how many for another, can you give me the standing of the jury at the last ballot?”

   Foreman: “They were eight on one position, three on another and one on another.”

   *Id.* at 405 n.1.

3436. *Id.* at 405-06. Locks emphasized the language of *Brasfield* which stated: “We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal.” *Id.* at 406 (quoting *Brasfield v. United States*, 272 U.S. 448, 450 (1926)).

3437. *Id.* Neither the Supreme Court nor the Ninth Circuit has held that the *Brasfield* rule is a necessary component of the sixth amendment right to an impartial jury which is made applicable to the states by the fourteenth amendment. *Id.* at 405.

3438. *Id.* at 406.

3439. See United States *ex rel.* Kirk v. Director, Dep’t of Corrections, 678 F.2d 723 (7th Cir. 1982); Cornell v. Iowa, 628 F.2d 1044 (8th Cir. 1980), cert. denied, 449 U.S. 1126 (1981); Ellis v. Reed, 596 F.2d 1195 (4th Cir.), cert. denied, 444 U.S. 973 (1979). In *Kirk*, the Seventh Circuit stated that if the strong language of *Brasfield* was not tempered, the court would find itself constrained to hold the rule to be constitutionally required. 678 F.2d at 725. All three of the above mentioned circuits did in fact temper *Brasfield*, analyzing this problem in a similar fashion. Each circuit concluded that the rule was not “essential” to a fair trial and thus not of constitutional dimension.

In *Burton v. United States*, 196 U.S. 283, 307-08 (1905), the Court, in dicta, stated that judges should not make inquiries into the division of the jury. After *Burton*, there was a controversy as to whether inquiry into jury balloting was reversible error per se in federal courts. The circuit courts all stated that the strong language in *Brasfield* was meant to condemn such practice. Further, these courts relied upon language in *Burton* to support their
clined to give the Brasfield rule constitutional dimension, but stated that inquiry by a trial judge which is likely to coerce a jury member into changing his views in order to reach a unanimous verdict would constitute reversible error. The determination of coercion must be made not in isolation, but within the context in which the inquiry was made. The Ninth Circuit found the circumstances in Locks to be uncoercive, and affirmed the district court's decision on this issue.

In United States v Akbar, defendant Akbar was convicted of air piracy in connection with the hijacking of a commercial airliner from Ontario, California, to Havana, Cuba. During deliberations, the jury sent an ambiguous note to the judge requesting transcripts of defense witnesses' testimony. The trial judge sought to clarify the request by questioning the jurors about who needed what testimony. The judge's question as to the necessity of rereading the testimony inadver-

 proposition: "[W]e do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge." Locks, 703 F.2d at 406 (citing Burton, 196 U.S. at 308). Considering both the relationship of Brasfield to Burton and the language of Burton, the Fourth, Seventh, and Eighth Circuits all concluded that the rule was only supervisory and not constitutionally mandated.

3440. Locks, 703 F.2d at 406.
3441. Id. (citing Cornell v. Iowa, 628 F.2d 1044, 1048 (8th Cir. 1980), cert. denied, 449 U.S. 1126 (1981)).
3442. Id. at 406-07 (citing Ellis v. Reed, 596 F.2d 1195, 1200 (4th Cir.), cert. denied, 444 U.S. 973 (1979)).
3443. Id. at 407. The jury was about to be dismissed for the weekend, and the judge was uncertain whether to have the jury continue its deliberations or to break. The court's reasoning was that the judge made a simple, uncoercive inquiry. He did not ask whether the jurors favored acquittal or conviction. Neither did the judge make any statement pressuring the jury to come to a decision and, in fact, the jury was not sent back to deliberate, but was immediately dismissed.

3444. 698 F.2d 378 (9th Cir.), cert. denied, 103 S. Ct. 2433 (1983).
3445. Id. at 379 n.1. The judge began to question the jurors one by one asking them if they wanted information and exactly what information they did want. Five jurors requested descriptions that some witnesses had given during their testimony and seven responded that they didn't need it. Then one juror spoke out:

JUROR NO. 8: It's only one person that's—all 11, I think, are for it. One is against is [sic]. So we can't come up with an agreement.
THE COURT: Eleven want the testimony read?
JUROR NO. 8: No. Eleven has [sic] decided. One hasn't.
THE COURT: Well, let me ask all of you eleven how you feel, if you need it, if you think that it's only fair that this one juror, whoever it may be, should have it. Have you anything against it?
JUROR NO. 10: No, we are not against it if she wants it.
THE COURT: And that juror, I take it, is No. 7 that wants it.
JUROR NO. 7: Yes.
JUROR NO. 8: Right.
THE COURT: All right. Juror No. 7, then, I will go back to you. Do you think you really need it to make a decision or can you go back and sit down with your fellow jurors, discuss it, go over it, and finish your deliberations without our reading all of this testimony? Or do you feel you want it?
tently elicited the jury's split vote on the issue of guilt. Akbar argued that this constituted reversible error. The Ninth Circuit disagreed, holding that the disclosure of the jury's split vote was unsolicited. The trial judge's question referred to a collateral issue and therefore was distinguishable from Brasfield. The court added that there was no coercion, since the requested transcripts were read to the jury before it resumed deliberations. Therefore, the conviction was affirmed.

V. POST-CONVICTION PROCEEDINGS

A. Double Jeopardy

The double jeopardy clause of the fifth amendment prohibits the criminally accused from being "twice put in jeopardy" for committing "the same offense." The clause, historically, has been applied to protect individuals "from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." The double jeopardy clause may also serve to prohibit cumulative sentencing for "the
same offense” at a single trial. The double jeopardy clause, however, prevents only the judiciary from imposing cumulative punishments for the same criminal conduct. The legislatures are free to expressly enact, and the courts are permitted to enforce, cumulative statutory punishments for criminal behavior arising from the same criminal activity. Additionally, double jeopardy clause issues arise in the context of criminal sentencing, although its principles generally have been applied less rigorously.

1. Cumulative punishment for “the same offense” at a single trial

The power of the legislature to define crime and fix punishment is not disturbed by the double jeopardy clause. However, the legislatures seldom expressly state their intent regarding cumulative punishment under two or more statutes for the same or similar criminal conduct. To fill this void, the courts developed judicial rules of statutory construction, such as the Blockburger test, to determine if the

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3454. At present the Supreme Court uses the term “cumulative” sentences in discussing double jeopardy principles. See infra notes 3466-504 and accompanying text. Cumulative sentences are defined as:

[S]eparate sentences (each additional to the others) imposed upon a defendant who has been convicted upon an indictment containing several counts, each of such counts charging a distinct offense, or who is under conviction at the same time for several distinct offenses; one of such sentences being made to begin at the expiration of another.

Black's Law Dictionary 1222 (rev. 5th ed. 1979). These types of sentences are contrasted to the “concurrent” type, which is to be served at the same time as another sentence which has been imposed. Id.

3455. Ex parte Lange, 85 U.S. 163 (1873) (double jeopardy clause protects not only against more than one trial, but prevents more than one sentence from being pronounced on same verdict).

3456. Missouri v. Hunter, 459 U.S. 359 (1983), see infra notes 3464-504 and accompanying text. Cf. Brown v. Ohio, 432 U.S. 161 (1977). “[T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense . . . .” Id. at 165.


3460. Blockburger v. United States, 284 U.S. 299 (1932). In Blockburger the defendant, a pharmacist, was charged with, inter alia, a single sale of narcotics which violated two statutory provisions: making a sale not made from the original stamp package, and permitting a sale not made pursuant to a written order of the purchaser. The Court formulated the often cited test to determine whether the two statutes describe the same offense: “A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the
statutes describe "the same offense." Under the Blockberger test, before cumulative punishment may be meted out for conviction of violating more than one statute at a single trial, each statute must require proof of a fact that the other does not.\textsuperscript{3461} Developed prudentially,\textsuperscript{3462} these rules of statutory construction became bedrock double jeopardy doctrine for multiple punishment analysis to determine if each statute was "the same offense."\textsuperscript{3463} Recently, however, the Supreme Court in Missouri v. Hunter\textsuperscript{3464} undermined the Blockburger test for determining "the same offense" by holding that the legislatures are free from double jeopardy constraints to expressly provide for cumulative punishments.\textsuperscript{3465}

In Missouri v. Hunter,\textsuperscript{3466} the Supreme Court held that the double jeopardy clause does not preclude imposing, at a single trial, cumulative sentences for two or more similar statutory offenses.\textsuperscript{3467} The Court reasoned that although each offense may not require proof of a fact that the other does not under the Blockburger test,\textsuperscript{3468} the legislatures are not precluded under the double jeopardy clause from expressly enacting statutory schemes that carry multiple punishments for the same criminal conduct.\textsuperscript{3469}

In Hunter, the defendant robbed a Kansas City, Missouri store at gunpoint and then exchanged gunfire with the police as he fled the scene.\textsuperscript{3470} Hunter was subsequently arrested, convicted and sentenced to, inter alia, ten years imprisonment for first degree robbery\textsuperscript{3471} and fifteen

\textsuperscript{3461} See supra note 3460.
\textsuperscript{3462} Whalen v. United States, 445 U.S. 684 (1979) (Rehnquist, J., dissenting) (rules of construction are not mandated by Constitution, but are attempt by judiciary to deduce legislative intent); but see Missouri v. Hunter, 459 U.S. 359 (1983) (Marshall, J., dissenting) (Blockburger rule is a constitutional doctrine to define "the same offense").

\textsuperscript{3463} Whalen v. United States, 445 U.S. 684, 691-92 (1979) (courts have consistently relied upon Blockburger test to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively).

\textsuperscript{3464} 459 U.S. 359 (1983).

\textsuperscript{3465} Id. at 368-69. See also Comment, Missouri v. Hunter, 9 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 461, 474 (1983).

\textsuperscript{3466} 459 U.S. 359 (1983).

\textsuperscript{3467} Id. at 368. See infra note 3489 and accompanying text.

\textsuperscript{3468} Blockburger v. United States, 284 U.S. 299 (1932), see supra note 3460.

\textsuperscript{3469} 459 U.S. at 368.

\textsuperscript{3470} Id. at 361.

\textsuperscript{3471} Id. at 362. MO. ANN. STAT. § 560.120 (Vernon 1969) defined first degree robbery as: "[T]aking the property of another . . . by putting him in fear of some immediate injury to his person . . . ." (amended in 1979, current version at MO. ANN. STAT. § 569.020 (Vernon 1979)).
years imprisonment for armed criminal assault, each sentence to run concurrently. The Missouri Court of Appeals reversed Hunter's armed criminal assault conviction on the grounds that it violated the double jeopardy clause under the Blockburger test.

3472. 459 U.S. at 362. Mo. Rev. Stat. § 559.225 (Vernon Supp. 1975) defined armed criminal assault so that: "[A]ny person who commits any felony . . . with . . . the use . . . of a dangerous or deadly weapon is also guilty of the crime of armed criminal action." It also provided that "[t]he punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed . . . with . . . the use . . . of a dangerous or deadly weapon." Id. (amended in 1977, current version at Mo. Ann. Stat. § 565.050 (Vernon 1979)).

3473. 459 U.S. at 362. Double jeopardy issues more frequently arise in the context of consecutive sentencing. Defendants, however, frequently appeal from concurrent sentencing, presumably because of the collateral consequences of multiple convictions. See infra note 3502 and accompanying text. The Hunter Court broadened its discussion beyond the facts to discuss cumulative sentences.


3475. 459 U.S. at 362-63. The Missouri Court of Appeals in State v. Hunter held that the two crimes arose out of the same criminal incident and thus the conviction violated the double jeopardy clause. 622 S.W.2d 374, 375-76 (Mo. Ct. App. 1981). The court vacated Hunter's conviction and sentence for armed criminal action, relying on the Missouri Supreme Court in State v. Haggard, 619 S.W.2d 44 (Mo. 1981) which reaffirmed two prior cases, Sours v. State, 593 S.W.2d 208 (Mo.), vacated, 446 U.S. 962 (1980) (hereinafter referred to as Sours I), and Sours v. State, 603 S.W.2d 592 (Mo. 1980), cert. denied, 449 U.S. 1131 (1981) (hereinafter referred to as Sours II).

In Sours I, the Missouri Supreme Court reversed the defendant's conviction for armed criminal action and affirmed his conviction for robbery, holding that the two were "the same offense" for double jeopardy purposes. 593 S.W.2d at 210. The United States Supreme Court vacated that decision and remanded the case for reconsideration in light of Whalen v. United States, 445 U.S. 684 (1980), see infra notes 3479-81 and accompanying text. The result of that reconsideration was Sours II, where the Missouri Supreme Court upheld its previous holding in Sours I. The court cited Blockburger as not only a rule of statutory construction, but also as a rule defining "the same offense" in double jeopardy cases. 603 S.W.2d at 595-97 (citing Whalen v. United States, 445 U.S. at 692 (1980); Simpson v. United States, 435 U.S. 6, 11 (1978); Brown v. Ohio, 432 U.S. 161, 166 (1977) (other citations omitted)).

Shortly after Sours II, in State v. Haggard, the Missouri Supreme Court reexamined its position on double jeopardy in light of Albernaz v. United States, 450 U.S. 333 (1981), see infra notes 3482-87 and accompanying text. 619 S.W.2d at 51. In Haggard, the Missouri Supreme Court aligned itself with the view of the concurring Justices in Albernaz and held that while the Missouri legislature had intended to twice punish the appellant, the multiple punishments for the same offense arising out of the same transaction violated the double jeopardy clause. Id. at 45, 51. "Until . . . the Supreme Court . . . declares clearly and unequivocally that the Double Jeopardy Clause . . . does not apply to the legislative branch of the government," the court in Haggard reasoned, "we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments for the same offense arising out of a single transaction." Id. at 51. The dissent in Haggard strongly criticized the majority's "cavalier evasion of the principles of Whalen and the mandate of Albernaz," noting that the rule of federal supremacy did not permit such a variance from federal case law. Id. at 55.

In State v. Hunter, the Missouri Court of Appeals vacated the defendant's conviction for armed criminal action, citing the Missouri Supreme Court ruling in Haggard as binding. 622 S.W.2d at 375.
The Supreme Court vacated and remanded the case, holding that the Missouri Supreme Court had misconstrued the Blockburger test.\textsuperscript{3476} The Supreme Court analyzed Blockburger in light of its recent decisions in *Whalen v. United States*\textsuperscript{3477} and *Albernaz v. United States.*\textsuperscript{3478}

In *Whalen,* the Court examined the District of Columbia statutes defining the crimes of rape and murder committed during a rape.\textsuperscript{3479} Although the Court rejected the imposition of cumulative punishments under these statutes, the Court limited the Blockburger test by stating in dicta that the double jeopardy clause limits the scope of punishment to the intent of Congress.\textsuperscript{3480} The Court reasoned that if Congress is silent, the courts should not administer punishment for the same offense under two statutes. The Court, however, drew upon authority from House Committee reports to underscore the power of Congress to define offenses and permit consecutive punishment for the same criminal conduct.\textsuperscript{3481}

In *Albernaz,* the defendant appealed from his conviction and consecutive sentencing for importing marijuana\textsuperscript{3482} and conspiracy to distribute marijuana\textsuperscript{3483} on double jeopardy grounds. The Court upheld the imposition of cumulative punishment on the ground that each violation of the Comprehensive Drug Abuse and Control Act of 1970\textsuperscript{3484} is a separate offense as defined by Congress,\textsuperscript{3485} and held that, under Blockburger, the two offenses were sufficiently distinguishable to permit cumulative punishment for violation of similar offenses.\textsuperscript{3486} Additionally, the Court em-
phasized in dicta that a finding under *Blockburger* that the statutes are not sufficiently dissimilar to permit consecutive sentencing should not be controlling if there is a clear indication of contrary legislative intent.\(^{3487}\)

Relying on *Whalen* and *Albernaz*, the Court in *Hunter* reasoned that with respect to cumulative sentences imposed in a single trial, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.\(^{3488}\) In fact, the double jeopardy clause does not apply to instances where the legislature expressly provides for cumulative punishment for the same act. The Court thus reasoned that the judiciary has no power under the fifth amendment double jeopardy clause to interfere with statutory schemes that expressly provide for cumulative punishment for the same criminal act. The Court limited the use of the *Blockberger* test to those instances in which Congress did not expressly indicate an intent to impose cumulative punishments.\(^{3489}\)

The majority opinion in *Hunter*, written by Chief Justice Burger, is, unfortunately, an abstract treatise on double jeopardy concepts rather than an attempt to squarely meet and resolve the issues on appeal. The defendant in *Hunter* appealed from concurrent not consecutive, or cumulative, sentences.\(^{3490}\) Chief Justice Burger’s analysis and review of precedent is, however, limited to cumulative sentencing double jeopardy principles.\(^{3491}\) This fundamental imprecision in the majority opinion may cause considerable confusion as the lower courts attempt to apply the Court’s holding in *Hunter*.\(^{3492}\)

\(^{3487}\) *Id.* at 340. Justice Rehnquist concluded his opinion with the statement that “the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.” *Id.* at 344. The concurring opinion by Justice Stewart, joined by Justices Marshall and Stevens, agreed that the intent of the legislature should be considered, but criticized Justice Rehnquist’s conclusion equating constitutionally permissible punishment to legislative intent as unsupportable by precedent or reasoning and unnecessary to reach the Court’s conclusion. The opinion emphasized 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, under the criterion of *Blockburger* v. United States.” 450 U.S. 344-45 (Stewart, J., concurring) (citation omitted).

\(^{3488}\) 459 U.S. at 366.

\(^{3489}\) *Id.* at 368. In reaching this conclusion, Chief Justice Burger relied exclusively on the recent precedents of *Whalen*, see *supra* notes 3479-81 and accompanying text, and *Albernaz*, see *supra* notes 3482-87 and accompanying text. *Id.* Additionally, Chief Justice Berger made reference to *Whalen* and *Albernaz* in holding that the Missouri Supreme Court in *Sours I*, *Sours II*, and *Haggard*, see *supra* note 3475 and accompanying text, had “misperceived the nature of the Double Jeopardy Clause’s protection against multiple punishments.” *Id.* at 366. 3490. See *supra* note 3473 and accompanying text.

\(^{3491}\) See *supra* notes 3488-89 and accompanying text.

\(^{3492}\) In *Whalen*, see *supra* notes 3479-81, *Albernaz*, see *supra* notes 3482-87 and accompany-
The dissent in Hunter argued that the double jeopardy clause should apply in the broader context of forbidding both multiple prosecutions and multiple punishments\textsuperscript{3493} for "the same offense."\textsuperscript{3494} The dissent urged that because the double jeopardy clause expressly forbids multiple prosecutions for "the same offense," the clause also forbids multiple punishment for "the same offense."\textsuperscript{3495} Accordingly, the double jeopardy clause does not permit the state to twice punish conduct that is, as here, "the same offense" within the meaning of the double jeopardy clause.\textsuperscript{3496} The dissent concluded that the Blockburger rule\textsuperscript{3497} is much more than a

\textsuperscript{3493} Justice Marshall, in the dissent, referred to double jeopardy principles in the context of multiple punishment rather than cumulative punishment as stated in the majority opinion. Although multiple punishment may denote consecutive sentencing, see BLACK'S LAW DICTIONARY 916 (rev. 5th ed. 1979), the context of Justice Marshall's discussion strongly suggests that he is addressing issues that arise from concurrent sentencing; i.e., compromise jury verdicts, see infra note 3501 and accompanying text, and collateral consequences of multiple convictions, see infra note 3502 and accompanying text.

The dissent's discussion of double jeopardy principles therefore more closely addresses the concurrent sentencing issue on appeal in Hunter, see supra note 3473 and accompanying text. The majority opinion, however, appears to limit its discussion to consecutive sentencing, see supra notes 3490-92 and accompanying text. This difference in treatment of double jeopardy principles only further disturbs the internal precision of the Hunter decision.

\textsuperscript{3494} 459 U.S. at 369 (Marshall, J., dissenting). The double jeopardy clause specifically protects against being twice put in jeopardy for "the same offense." Id. (Marshall, J., dissenting) (citing North Carolina v. Pearce, 395 U.S. 711 (1969) (double jeopardy clause embodies three separate constitutional protections: protection against second prosecution for the same offense after acquittal; protection against second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense); United States v. Benz, 282 U.S. 304 (1931) (double jeopardy guarantee applies to all cases where court attempts to inflict second punishment for same offense); Ex parte Lange, 85 U.S. 163 (1873) (double jeopardy guarantee protects not only against more than one trial, but also prevents more than one sentence from being pronounced on same verdict)).

\textsuperscript{3495} 459 U.S. at 369 (Marshall, J., dissenting). If the defendant in Hunter had been tried for the two crimes in separate trials, he would have been subjected to multiple prosecutions for "the same offense," in violation of the double jeopardy clause. Id. (citing Harris v. Oklahoma, 433 U.S. 682 (1977) (per curiam) (person tried and convicted for a crime which includes various incidents cannot be tried a second time for one of those incidents without violating double jeopardy clause); Brown v. Ohio, 432 U.S. 161 (1977), see infra note 3535).

\textsuperscript{3496} 459 U.S. at 373-74 (Marshall, J., dissenting).

\textsuperscript{3497} See infra note 3460.
rule of statutory construction; it is a constitutional doctrine that defines the term “the same offense” as set forth in the double jeopardy clause.\footnote{498} Without the restraint of the double jeopardy clause, legislatures would have the power to create endless variations of substantively identical crimes based on the same act and state of mind, and multiple punishments could be meted out ad infinitum for “the same offense.”\footnote{499} Therefore, the phrase “the same offense” must apply in both multiple prosecution and multiple punishment cases.\footnote{500}

Additionally, the dissent emphasized that multiple prosecution for “the same offense” creates severe hardships on defendants that the double jeopardy clause was meant to alleviate. The accused must pre-

\footnote{498} Id. at 374 & n.6 (Marshall, J., dissenting). Justice Marshall pointed out that the Blockberger rule was taken from Albrecht v. United States, 273 U.S. 1 (1927), wherein Justice Brandeis had expressly analyzed a multiple punishment claim in constitutional rather than statutory terms and rejected the claim because it would have been impossible to commit either crime without committing the other. Id. at 11 (Marshall, J., dissenting). Justice Marshall’s view that the Blockburger rule is a constitutional doctrine defining “the same offense” was also acknowledged in Justice Stewart’s concurring opinion in Albernaz, 450 U.S. 333, 345 (1981) (Stewart, J., concurring), see supra note 3487, and by the Missouri Supreme Court in State v. Haggard, 619 S.W.2d 44 (Mo. 1981), see supra note 3475.

\footnote{499} 459 U.S. at 371 n.3 (Marshall, J., dissenting). The issue clause, initially adopted to curb excesses in the common law, see supra notes 3451 & 3456, should extend to comprehensive criminal statutory schemes that have replaced the common law crimes. The Supreme Court has previously addressed the constitutional significance of changing from a common law tradition to a statutory scheme in the context of the seventh amendment right to trial by jury in civil matters. The result reached is irreconcilable with the double jeopardy treatment announced in Hunter. The seventh amendment right to a jury trial by its own terms applies only to suits at common law. See U.S. Const. amend. VII. In Curtis v. Loether, 415 U.S. 189 (1974), however, Justice Marshall wrote that the extension of the constitutional right to a jury trial in actions involving statutory matters is a matter too obvious to be doubted. Id. at 193. The Court held that a jury trial must be available if the statutory action involves rights and remedies of the sort typically enforced in an action at law. Id. at 194. In Hunter, the Court held that the double jeopardy clause has no application to statutory “offenses” passed by the legislature. 459 U.S. at 368-69.
pare a defense to each crime charged, risk a compromise jury verdict of guilty as to one charge, and accept the collateral consequences of multiple convictions.

As a statement of constitutional doctrine, Hunter may signify a substantial reduction in the power of the courts to define and apply double jeopardy clause principles. Formerly, under the rules of statutory construction announced in Blockburger, the judiciary was not compelled to endorse statutory schemes that provided for cumulative punishment for "the same offense." Now, under Hunter, the judiciary must mete out cumulative punishments if expressly provided by statute without scrutiny of whether the statutes provide for punishments for "the same offense" within the meaning of the double jeopardy clause.

The following decisions were heard by the Ninth Circuit prior to the Hunter ruling. Accordingly, the court did not examine express legislative intent. These decisions, therefore, must be considered only as further clarification of the Blockburger rule. Since express legislative intent was not considered in Hunter, the decisions are not conclusive as to the application of the Blockburger rule.

In United States v. Bennett, the defendant was indicted and convicted of, inter alia, making false statements to the United States Department of Labor and of theft and embezzlement of CETA funds. The defendant, as secretary-treasurer of a teamsters union local, had participated in a scheme to defraud the government of funds administered

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3501. 459 U.S. at 372 (Marshall, J., dissenting) (citing Cichos v. Indiana, 385 U.S. 76 (1966) (Fortas, J., dissenting) (submission of more than one charge gives prosecution advantage of offering jury a choice, a situation which may induce a doubtful jury to find defendant guilty of the less serious offense rather than to continue to debate defendant's innocence)).
3502. 459 U.S. at 372-73 (Marshall, J., dissenting) (citing Benton v. Maryland, 395 U.S. 784 (1969) (criminal convictions cause adverse collateral consequences such as use of habitual criminal statutes and character impeachment at a future trial); Sibron v. New York, 392 U.S. 40 (1968) (criminal convictions cause adverse collateral consequences such as deportation of aliens and loss of civil rights)).
3504. 702 F.2d 833 (9th Cir. 1983).
3505. 18 U.S.C. § 1001 (1979) states:
   Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false . . . statements or representations, or makes or uses any false writing . . . knowing the same to contain any false . . . statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
3506. 18 U.S.C. § 665(a) (1979) states:
   Whoever . . . connected in any capacity with any agency . . . receiving . . . any funds under the Comprehensive Employment and Training Act [and] knowingly enrolls an ineligible participant, embezzles . . . or obtains by fraud any of the moneys . . . which are the subject of a . . . contract pursuant to such Act shall be fined . . . or imprisoned . . . or both.
under CETA. The defendant appealed his conviction, claiming that his prosecution for both misrepresentation and embezzlement violated the double jeopardy clause.3507

The Ninth Circuit applied the Blockburger test,3508 and held that the offenses of misrepresentation and embezzlement each require proof of a fact that the other does not.3509 Consequently, the court concluded that these were separate offenses and affirmed the convictions.

In United States v. Bosque,3510 the defendant was convicted of aggravated bank larceny3511 and theft from an interstate shipment.3512 At the time of the incident, the defendant, a former Brinks guard, was assisting in transporting a currency shipment that had arrived at San Francisco via airplane from federally insured banks in Hawaii. The currency was to be transported by a Brinks truck to the San Francisco Federal Reserve Bank. Once the currency had been placed in the truck at the airport, the defendant seized the truck and fled, eventually commandeering another vehicle at gun point to facilitate his escape.3513 The defendant received concurrent sentences and appealed, claiming that the sentences constituted improper multiple punishment for a single act.3514

The Ninth Circuit reviewed the defendant's double jeopardy clause claim and held that the defendant committed two separate crimes under

3507. 702 F.2d at 835.
3508. Id. Blockburger v. United States, 284 U.S. 299, 304 (1932), see supra note 3460; see also Dixon v. Dupnik, 688 F.2d 682, 684 (9th Cir. 1982), see infra notes 3539-51 and accompanying text.
3509. 702 F.2d at 835. The court specifically found that § 665(a) requires the defendant to be connected with an agency receiving financial assistance under CETA while § 1001 does not. Furthermore § 1001 requires a showing of falsifying or concealing a material fact while § 665(a) does not.
3510. 691 F.2d 866 (9th Cir. 1982).
3511. 18 U.S.C. § 2113 (1976) states in pertinent part: "(b) Whoever takes . . . with intent to steal . . . any . . . money . . . exceeding $100 belonging to . . . any bank . . . shall be fined . . . or imprisoned . . . or both; . . . (d) Whoever, in committing, or in attempting to commit, any offense defined in . . . this section, assaults any person . . . shall be fined . . . or imprisoned . . . or both."
3512. 18 U.S.C. § 659 (1976) states in pertinent part: "Whoever embezzles [or] steals . . . from any . . . motortruck . . . with intent to convert to his own use any goods . . . which are a part of . . . an interstate . . . shipment of freight . . . [s]hall . . . be fined . . . or imprisoned . . . or both."
3513. 691 F.2d at 867.
3514. Id. at 867-68. The Ninth Circuit reached the merits of the issue although it commented in dicta that double jeopardy principles may not apply to concurrent sentences. Id. at 869. Under concurrent sentencing, the accused only serves the greater of the sentences imposed. But see Missouri v. Hunter, 459 U.S. 359, 372-73 (1983) (Marshall, J., dissenting) (each conviction causes collateral consequences under the penal codes).
the Blockburger test. The court found that bank larceny required stealing money belonging to a bank and interstate theft required taking money from a vehicle moving in interstate commerce. The court also found that the purpose of each statute differed. Accordingly, it affirmed the defendant's convictions.

In United States v. Herbert, the defendants were indicted and convicted for illegal sale of automatic weapons. The Ninth Circuit held that the defendants' multiple punishment from their convictions of conspiring to violate the firearm laws and of aiding and abetting in the making, possession and transfer of unregistered firearms did not violate the double jeopardy clause. The Ninth Circuit summarily disposed of the issue, stating that the double jeopardy clause only prevents multiple punishment for the same offense, and that the crimes of conspiracy and aiding and abetting are not the same. While conspiracy requires a prior agreement to commit an offense, aiding and abetting does not require a prior agreement, but only that the defendants consciously share in a criminal act.

In United States v. Smith, the defendants had participated in a massive heroin importation and distribution conspiracy throughout Cali-

3515. Id. (citing Blockburger v. United States, 284 U.S. 299 (1932), see supra note 3460; Albernaz v. United States, 450 U.S. 333 (1981), see supra note 3478).
3516. 691 F.2d at 869.
3517. Id. The purpose of § 659 is to protect interstate shipments. Section 2113 is designed to make it a federal offense to rob federally insured banks.
3518. 698 F.2d 981 (9th Cir. 1983), cert. denied, 104 S. Ct. 87 (1984).
3519. Id. at 983.
3520. The defendant's appeal on double jeopardy grounds was from concurrent sentences.
3521. 18 U.S.C. § 371 (1976), states: "If two or more persons conspire . . . to commit any offense against . . . or to defraud the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned . . . ."
3522. 26 U.S.C. § 5681 (1976) states in pertinent part: "It shall be unlawful for any person . . . (d) to receive or possess a firearm which is not registered to him . . . or (e) to transfer a firearm in violation of the provisions of this chapter; or (f) to make a firearm in violation of the provisions of this chapter . . . ."
3523. 698 F.2d at 985.
3524. Id. (citing United States v. Dinitiz, 424 U.S. 600 (1976) (double jeopardy clause protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for same offense); United States v. Wilson, 420 U.S. 332 (1975) (a defendant may not be tried or sentenced for same offense more than once); North Carolina v. Pearce, 395 U.S. 711 (1969), see supra note 3494).
3525. Id.
3526. Id. (citing United States v. Valencia, 492 F.2d 1071 (9th Cir. 1974) (conviction of conspiracy only requires proof of an agreement to commit an offense)).
3527. Id. (citing Pereira v. United States, 347 U.S. 1 (1954) (aiding and abetting does not presuppose existence of an agreement)).
3528. 690 F.2d 748 (9th Cir. 1982), cert. denied, 460 U.S. 1041 (1983).
fornia, Canada, Thailand and China. On appeal, defendant Smith contended that his conviction on separate counts of conspiracy and continuing criminal enterprise under the Comprehensive Drug Abuse and Control Act of 1970 violated the double jeopardy clause. The government conceded that there was a violation of the double jeopardy clause and, hence, the Ninth Circuit reversed the lesser included offense of conspiracy.

2. Prohibition against retrial for "the same offense"

Double jeopardy issues arise when a second criminal prosecution follows an acquittal or conviction for the same or a similar offense. The double jeopardy clause generally prohibits the government from prosecuting an accused for both a greater and lesser included offense. However, successive prosecutions of similar offenses are permitted under

3529. Id. at 749. The indictment named more than 20 co-defendants and a large group of unindicted co-conspirators as participants in the scheme. The thrust of the indictment was for, inter alia, possession and distribution of a controlled substance (heroin) in violation of 21 U.S.C. §§ 841(a)(1), 845(a) (1970).

3530. 21 U.S.C. § 846 (1976) states: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

3531. 21 U.S.C. § 848(b) (1976) states in pertinent part:

[A] person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of . . . subchapter [I] or subchapter II of this chapter . . . and

(2) such violation is a part of a continuing series of violations of . . . sub-

chapter [I] or subchapter II or this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of . . . management, and

(B) from which such person obtains substantial income or resources.


3533. 690 F.2d at 750 (citing Jeffers v. United States, 432 U.S. 137, 149-51 (1977) (Court assumed, arguendo, that prosecution for violations of §§ 846 and 848 violate double jeopardy clause because a conviction under § 848 requires proof of conspiracy making § 846 a lesser included offense)).

3534. Id.

3535. Brown v. Ohio, 432 U.S. 161 (1977). In Brown, the defendant stole a vehicle, and was arrested and convicted of joyriding; thereafter he was indicted for car theft. The court held that the subsequent car theft prosecution was barred by the double jeopardy clause prohibition against successive prosecution of the lesser included crime, followed by the greater included crime. Id. at 168.

3536. Id. at 169. But see id. at 169 n.7 ("An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.").
the Blockburger\textsuperscript{3537} rule if the respective prosecutions are brought under separate statutes where each requires proof of a fact that the other does not.\textsuperscript{3538}

In Dixon v. Dupnik,\textsuperscript{3539} the defendant was charged with a crime and released on his own recognizance. While free, the defendant was arrested for the unlawful sale of heroin.\textsuperscript{3540} After conviction and sentencing, the defendant was indicted under Arizona law for the crime of having committed a felony while free on his own recognizance.\textsuperscript{3541} If convicted of the second crime the defendant's sentence would be consecutive to that which he received for his conviction of the underlying heroin sale offense.\textsuperscript{3542} The defendant sought a writ of habeas corpus in federal court, claiming that his subsequent felony prosecution violated the double jeopardy clause because it arose from a separate, distinct prosecution and was a penalty for the same criminal offense.\textsuperscript{3543}

The Ninth Circuit agreed,\textsuperscript{3544} ruling that although the legislature has wide latitude to define the same offense in multiple statutes, the court may not apply these statutes against a criminal defendant in a manner that violates the double jeopardy clause.\textsuperscript{3545} Applying the Blockburger test, the court concluded that there were no elements in the statute proscribing the sale of heroin which were dissimilar from those in the statute making it a crime to commit a felony while released on one's own recognizance.\textsuperscript{3546} Consequently, the court held that the second conviction relating to the commission of a felony while free on one's own recognizance violated the double jeopardy clause because the offense underlying the

\textsuperscript{3537} 284 U.S.299 (1932), see supra note 3460.
\textsuperscript{3538} Id.
\textsuperscript{3539} 688 F.2d 682 (9th Cir. 1982).
\textsuperscript{3540} Id. at 683. ARIZ. REV. STAT. ANN. § 36-1002.02 (1974).
\textsuperscript{3541} ARIZ. REV. STAT. ANN. § 13-3970 (1978), provided in applicable part:

A person . . . convicted of committing any felony offense . . . which [was] committed while such person is released on . . . his own recognizance . . . is guilty of the offense of committing a . . . felony. . . . The sentence imposed shall be in addition to and shall be served consecutively to any penalty imposed for the offense committed while released on . . . his own recognizance.

This statute was repealed in 1981; its substance was incorporated into Arizona's penalty enhancement statutory scheme, ARIZ. REV. STAT. ANN. § 13-604(m) (1984). 688 F.2d at 683 n.3.
\textsuperscript{3542} See supra note 3541.
\textsuperscript{3543} 688 F.2d at 683.
\textsuperscript{3544} Id. at 686.
\textsuperscript{3545} Id. at 684 (citing Brown v. Ohio, 432 U.S. 161, 165 (1977)). See supra notes 3535-36 and accompanying text.
\textsuperscript{3546} 688 F.2d at 684 (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)). See supra notes 3460 & 3541.
felony conviction was without any dissimilar elements.\textsuperscript{3547}

The validity of the Ninth Circuit's decision in \textit{Dixon} is suspect, however, in light of the Supreme Court's decision in \textit{Missouri v. Hunter}.\textsuperscript{3548} This opinion significantly shifted the matrix of a double jeopardy analysis from applying judicially sanctioned rules of statutory construction to determine if the statutes are "the same offense" to examining, on a case by case basis, the statutory scheme and legislative record to ascertain the intent of the legislature.\textsuperscript{3549}

In \textit{Dixon}, it may be persuasively argued that the Arizona legislature intended cumulative punishment for a conviction of a felony committed while on release on one's own recognizance. In fact, the crime has now been incorporated as part of the state's penalty enhancement statute.\textsuperscript{3550}

In \textit{United States v. Brooklier},\textsuperscript{3551} the Ninth Circuit held that the double jeopardy clause did not prevent successive Racketeer Influence and Corrupt Organization (RICO) prosecutions and convictions arising from the same extortion incident if based on different RICO violations.\textsuperscript{3552} Defendant Brooklier and others were members of La Cosa Nostra, a racketeering organization. In 1980, they were indicted and subsequently convicted of RICO violations for extorting money from bookmakers and pornographers, including Sam Farkas. Previously, in 1974, the defendants had been indicted for RICO violations, including conspiracy to extort from the same Sam Farkas. In 1975, based on a plea agreement, the defendants pleaded guilty to the Farkas extortion conspiracy count. One of the acts of the Farkas extortion forming the basis of the 1980 indictment was the same act set forth in the 1974 indictment to which the defendants pleaded guilty. The indictments, however, were based on different RICO subsections.\textsuperscript{3553}

\textsuperscript{3547} 688 F.2d at 685-86. The state unsuccessfully attempted to distinguish \textit{Blockburger} by maintaining that the underlying felony and the § 13-3970 prosecution for the sale of heroin were dissimilar crimes—the first based on the commission of a felony, and the second on the conviction of a felony. The court held that each crime was based on the commission of the same wrongful act. The basis for the holding was that a conviction itself cannot be a wrongful "act" because the conviction represents the act of the state not of the defendant. \textit{Id.} at 685 (citing Powell v. Texas, 392 U.S. 514 (1968) (condition of public intoxication cannot be a crime unless the accused has committed some illegal act); Robinson v. California, 370 U.S. 660 (1962) (condition of under the influence of narcotics is not a crime unless the accused has committed some illegal act)).

\textsuperscript{3548} 459 U.S. 359 (1983), see supra notes 3464-504 and accompanying text.


\textsuperscript{3550} See supra note 3541 and accompanying text.

\textsuperscript{3551} 685 F.2d 1208 (9th Cir. 1982) (per curiam), cert. denied, 459 U.S. 1206 (1983).

\textsuperscript{3552} Id. at 1214-15.

\textsuperscript{3553} Id.
The Ninth Circuit applied the Blockburger test\textsuperscript{3554} to the 1974 and 1980 RICO violation convictions arising from the Farkas extortion. It concluded that the convictions resulted from violations of different RICO statute subsections, each having dissimilar and distinct elements, such that the defendants' subsequent convictions did not violate the double jeopardy clause.\textsuperscript{3555}

In \textit{United States v. Stearns},\textsuperscript{3556} the defendants had been convicted of theft and interstate transportation of stolen property in connection with the theft of a yacht and the disappearance of the persons aboard.\textsuperscript{3557} Several years later, additional facts were discovered and the government proceeded against the defendants on felony (robbery) murder charges.\textsuperscript{3558} Prior to the felony murder trial, the defendants moved for dismissal on double jeopardy grounds. The trial court denied the dismissal motion and defendants appealed, contending that a subsequent prosecution after trial and conviction of a lesser included offense is barred by the double jeopardy clause.\textsuperscript{3559}

The Ninth Circuit held that an exception applies to the double jeopardy bar to subsequent prosecution for a greater offense where the government diligently, albeit unsuccessfully, attempted to discover sufficient evidence to proceed on the more serious charge at the first trial.\textsuperscript{3560} 

\textsuperscript{3554} The 1974 indictment charged these appellants under 18 U.S.C. § 1962(d), which makes it unlawful to engage in a conspiracy to conduct an extortion ring. The 1980 indictment charges the appellants with violation of 18 U.S.C. § 1962(c), which makes it unlawful to participate in an enterprise affecting interstate commerce through a pattern of racketeering activity.

\textsuperscript{3555} Id. at 1214 n.5.

\textsuperscript{3556} Id. at 1214-15 (citing Blockburger v. United States, 284 U.S. 299 (1932), see supra note 3460).

\textsuperscript{3557} Id. at 392. The victims, Eleanor and Malcolm Graham, and their yacht had disappeared from the atoll of Palmyra in the South Pacific in August of 1974. The defendants, who had been at the atoll at the same time, appeared in Hawaii in October of 1974 with the Grahams' vessel. The yacht had been registered under a new name, its trim repainted, and its figurehead removed. The defendants claimed that the Grahams had drowned; the state made a thorough search, but was unable to discover any clues as to their disappearance. The defendants were indicted and convicted on charges of theft and interstate transportation of stolen property. \textit{Id.}

\textsuperscript{3558} Id. In 1981, Mrs. Graham's remains were discovered and the circumstances suggested foul play. Subsequently, appellants were indicted for felony murder. \textit{Id.}

\textsuperscript{3559} Id. On appeal, the Ninth Circuit acknowledged that this contention was meritorious. \textit{Id.} at 393 (citing Illinois v. Vitale, 447 U.S. 410 (1980) (subsequent prosecution for a greater included offense generally is barred by prior prosecution of a lesser included offense based on the same transaction)).

\textsuperscript{3560} Id. The court adopted dicta from Brown v. Ohio, 432 U.S. 161 (1977). In Brown, the
court noted that the exercise of due diligence is a factual issue, and upon reviewing the record, it found that the government had demonstrated its diligence to the trial court.\footnote{3561}

In \textit{United States v. Gooday},\footnote{3562} Gooday had been tried on a one count indictment for first-degree murder. During the trial, Gooday requested that the jury also be instructed on the lesser included offenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter. The jury acquitted Gooday of first-degree murder, but could not reach a verdict on the lesser included offenses. The trial court declared a mistrial and, using the same indictment, set the case for retrial on the lesser included offenses. On appeal, Gooday contended that the indictment ceased to exist when the jury acquitted him of first-degree murder. The Ninth Circuit disagreed.\footnote{3563}

The Ninth Circuit recognized that if the jury is not instructed on the lesser included offenses, an acquittal of the crime explicitly charged necessarily implies an acquittal on all lesser offenses included within that charge.\footnote{3564} The court held, however, that since the jury was instructed on the indictment for first-degree murder and the three additional lesser included offenses that Gooday had requested, Gooday's acquittal on the first-degree murder charge did not preclude retrial on the three lesser included offenses on which the jury was instructed but could not reach a verdict.\footnote{3565}

The court had suggested that "where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence," a subsequent prosecution should not be barred by the double jeopardy clause. \textit{Id.} at 169 \& n.7.

The court in \textit{Stearns} also considered the underlying policies served by the double jeopardy clause: prevention of multiple punishments for a single offense, harassment, and the physical, psychological and financial burdens of multiple prosecutions, balanced against society's interest in imposing just punishment on the guilty. 707 F.2d at 393 (citing Howard v. United States, 372 F.2d 294, 299 \& n.10 (9th Cir.), \textit{cert. denied}, 388 U.S. 915 (1967)). After carefully weighing these considerations, the court, adopting the \textit{Brown} dicta, held that the state may proceed on the more serious felony murder charges without offending double jeopardy principles. \textit{Id.} at 394.

The search for the missing persons aboard the vessel had been conducted by an investigation team of FBI agents and Coast Guard scuba divers. The search canvassed the island and lagoons where the boat had last been seen with its missing occupants. The court noted that a more thorough search using bloodhounds, experts on discovery of bodies, and divers capable of operating at great depths might have been employed, but would have required an exorbitant amount of time, effort and money. The court further found that these measures were not warranted based on the facts known during the investigation.\footnote{3566}

\footnotetext[3561]{707 F.2d at 394. The search for the missing persons aboard the vessel had been conducted by an investigation team of FBI agents and Coast Guard scuba divers. The search canvassed the island and lagoons where the boat had last been seen with its missing occupants. The court noted that a more thorough search using bloodhounds, experts on discovery of bodies, and divers capable of operating at great depths might have been employed, but would have required an exorbitant amount of time, effort and money. The court further found that these measures were not warranted based on the facts known during the investigation.}

\footnotetext[3562]{714 F.2d 80 (9th Cir. 1983).}

\footnotetext[3563]{\textit{Id.} at 81.}

\footnotetext[3564]{\textit{Id.} at 82 (citing \textit{In re Nielsen}, 131 U.S. 176 (1889) (an acquittal on explicit charge bars subsequent indictment on implicit lesser included offenses)).}

\footnotetext[3565]{\textit{Id.} (citing Edmonds v. United States, 273 F.2d 108 (D.C. Cir. 1959) (reversal of de-}
3. Sentencing changes

A sentence does not have the constitutional finality that attends an acquittal.\textsuperscript{3566} Double jeopardy considerations do not prohibit the courts from changing a sentence,\textsuperscript{3567} although increasing a sentence by resentencing is generally prohibited unless the sentence was illegal or erroneous when first imposed.\textsuperscript{3568} The underlying rationale for permitting the correction of sentences is that "the Constitution does not require that sentencing should be a game in which the wrong move by the judge means immunity for the prisoner."\textsuperscript{3569}

In \textit{United States v. Carter},\textsuperscript{3570} the defendant was convicted of rape\textsuperscript{3571} and sentenced to five years imprisonment.\textsuperscript{3572} After appeal and affirmation of his convictions, the defendant moved to reduce his sentence. The district court granted his motion and reduced his sentence to four months in a community treatment center, and four years and eight months probation.\textsuperscript{3573} The government objected on the grounds that the sentence was illegal, stating that the sentence of probation is not permitted for the crime of rape.\textsuperscript{3574} The trial court granted the government's defendant's second-degree murder conviction obtained under a first-degree murder indictment did not bar retrial for second-degree murder even though the defendant could not have been retried after an implied acquittal on the first-degree murder count specified in the indictment), \textit{cert. denied}, 362 U.S. 977 (1960); Forsberg v. United States, 351 F.2d 242 (9th Cir. 1965) (in a two count indictment, acquittal on one count does not preclude retrial if the jury cannot reach a verdict on the other count), \textit{cert. denied}, 383 U.S. 950 (1966)).

\textsuperscript{3567.} \textit{Id.}
\textsuperscript{3569.} \textit{Id.}
\textsuperscript{3570.} 704 F.2d 1063 (9th Cir. 1983).
\textsuperscript{3571.} 18 U.S.C. § 2031(b) (1976) states: "Whoever, within the special maritime and territorial jurisdiction of the United States, commits rape shall suffer death, or imprisonment for any term of years or for life."
\textsuperscript{3572.} 18 U.S.C. § 4205(b) (1976) states:

\begin{quote}
Upon entering a judgment of conviction, the court . . . may (1) designate . . . a minimum term at the expiration of which the prisoner shall become eligible for parole. . . . or (2) the court may fix the maximum sentence . . . to be served [and] specify that the prisoner may be released on parole [when] the Commission may determine.
\end{quote}

\textsuperscript{3573.} 704 F.2d at 1063. Carter sought reduction of his sentence under \textit{Fed. R. Crim. P. 35(b)}, which states: "The court may reduce a sentence within 120 days after the sentence is imposed . . . . Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision."

\textsuperscript{3574.} 704 F.2d at 1063-64. 18 U.S.C. § 3651 (1976). The government specifically contended that § 3651 prohibits the sentence of probation for rape. Section 3651 states, in part: "Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction . . . when satisfied that the ends of justice . . . will be served thereby, may suspend . . . sentence and place the defendant on probation . . . ." 18 U.S.C. § 3651 (1976) (emphasis added).
motion and resentenced the defendant to thirty months imprisonment with parole eligibility after six months. The defendant appealed the sentence on double jeopardy clause grounds.

The Ninth Circuit ruled that the double jeopardy clause does not bar the increase of an illegal or erroneous sentence. It found that the initial resentence was illegal and thus, held that the sentence could be corrected and increased without violating the defendant's double jeopardy clause rights.

In United States v. Wingender, the Ninth Circuit held that the district court may modify the sentencing order to correct a mistake that caused an ambiguity, notwithstanding the fact that the effect of the change was to make the sentences imposed run consecutively rather than concurrently. In 1979, the defendant received a suspended sentence for falsifying a loan application. In 1981, the suspended sentence was reinstated after the defendant was convicted of violating federal counterfeiting laws.

The district court ordered the defendant to serve the reinstated sentence consecutively with any state criminal counterfeiting convictions and sentences. The next day, the prosecutor realized that the district court had erred, since there was no state conviction or sentence. Two days later the court modified its sentencing order, and the defendant was ordered to serve consecutive sentences for violation of the two federal statutes. The Ninth Circuit allowed this change on the ground that the trial court was only clarifying previous ambiguities in the sentence. The court held that the uncorrected sentence's reference to any state sentence was so ambiguous as to be illegal, such that the ambiguity could be corrected to refer to the federal sentence rather than the nonexistent state sentence.

3575. 704 F.2d at 1064. Carter was resentenced under 18 U.S.C. § 4205(b)(1); see supra note 3572.
3576. 704 F.2d at 1064. The court reasoned that 18 U.S.C. § 3651 (1976) and the parallel provisions of FED. R. CRIM. P. 32(e) act as a limitation on FED. R. CRIM. P. 35(b), such that the trial court's sentence of Carter to probation was illegal.
3577. 704 F.2d at 1064 (citing Bozza v. United States, 330 U.S. 160 (1947) (double jeopardy clause does not prevent increasing illegal or erroneous sentences); United States v. Connolly, 618 F.2d 553 (9th Cir. 1980) (correction of an illegal sentence to comply with requirements of law does not violate double jeopardy clause, even if the sentence is increased)).
3578. 711 F.2d 869 (9th Cir. 1983).
3579. Id. at 870-71.
3582. 711 F.2d at 869-70.
3583. Id. at 870 (citing United States v. Alverson, 666 F.2d 341 (9th Cir. 1982) (an ambiguous sentence may be clarified without placing the defendant in jeopardy a second time)).
In *United States v. Hagler*, the defendant had been convicted on thirteen counts of a twenty count indictment for credit card fraud. He received a sentence of one year and a fine of $1000 for his conviction on count fifteen. His sentence on the other counts was suspended, conditional on five years probation. He was also ordered to make restitution of $77,000. On appeal, his conviction on five of the counts, including count fifteen, was reversed and the case was remanded for resentencing. The defendant was thereafter resented in the identical manner that he had been sentenced initially, with the exception that he was sentenced under count sixteen rather than count fifteen.

The defendant appealed, claiming, inter alia, that the resentencing violated his double jeopardy clause rights. The Ninth Circuit affirmed the sentence, noting that the defendant did not receive any net increase in his sentence and was not subjected to a retrial. The court therefore reasoned that the defendant’s only plausible double jeopardy clause argument was that he had a right to know at the termination of his trial the precise count on which he would be punished. The court held that double jeopardy clause protections do not include a right to know at a particular time what the sentence will be.

4. Point in proceedings at which jeopardy attaches

Protection against double jeopardy generally attaches when the jury has been impaneled and sworn. The criminal defendant may be retried for the same crime if the trial did not end in a conviction or an acquittal.

court in *Wingender* noted that as a general rule, the increase of a legal sentence violates the double jeopardy clause. *Id.* (citing *Kennedy v. United States*, 330 F.2d 26 (9th Cir. 1964) (double jeopardy clause prohibits ten year sentences for crimes with maximum sentences fixed by statute at five years)). The court in *Wingender* concluded, however, that there is no such bar to increase an illegal or erroneous sentence. *Id.* (citing *United States v. Carter*, 704 F.2d 1063 (9th Cir. 1983)). *See supra* notes 3570-77; *United States v. Henry*, 680 F.2d 403 (9th Cir. 1982) (a sentence may be increased to correct an illegal sentence without violating double jeopardy clause); *United States v. Busic*, 639 F.2d 940 (3d Cir.) (there is no double jeopardy bar to increasing sentence on one count of a two count conviction, if conviction on other count has been vacated), *cert. denied*, 452 U.S. 918 (1981).

3584. 709 F.2d 578 (9th Cir.), *cert. denied*, 104 S. Ct. 282 (1983).
3585. *Id.* at 579.
3586. *Id.*
3587. *Id.* (citing *United States v. DiFrancesco*, 449 U.S. 117 (1980) (a sentence does not have the finality of an acquittal)).
3589. State v. Perez, 22 U.S. (9 Wheat.) 579 (1824). The *Perez* Court held that a second trial is not precluded under the double jeopardy clause if the second trial is manifestly necessary to safeguard the interest of justice. *Id.* at 580. The Court then permitted a second trial since the jury had become deadlocked at the first trial. *Id.*
In People of Guam v. Fejeran, Fejeran, a juvenile, had been convicted in superior court of murder. On appeal to the Ninth Circuit, Fejeran sought to overturn his conviction on the ground that he had been placed in jeopardy for the same offense in a prior juvenile court proceeding. The juvenile court had held a certification hearing solely to determine whether Fejeran should be tried as a juvenile or if the court should transfer his case to superior court for adult proceedings.

The Ninth Circuit held that Fejeran had never been put in jeopardy by the juvenile proceeding. The court reasoned that the certification hearing was not an adjudication to determine whether Fejeran had committed criminal acts. The court concluded that Fejeran’s double jeopardy argument failed because he could not be placed in jeopardy by a juvenile proceeding lacking jurisdiction to decide his guilt or innocence.

Under the Ninth Circuit’s decision in Fejeran, jeopardy does not attach until the initiation of proceedings that will determine whether the defendant is criminally culpable and should be punished. This holding is thus consistent with the fundamental fairness notions of the double jeopardy clause.

B. Inconsistent Verdicts

Inconsistent verdicts generally occur when a defendant is acquitted on some counts and convicted on other related counts in the same action. If the counts are legally severable so as to constitute different crimes, the conviction will not be overturned for inconsistency.

3590. 687 F.2d 302 (9th Cir. 1982) (per curiam), cert. denied, 460 U.S. 1045 (1983).
3591. Id. at 303.
3592. Id. The Guam Code of Civil Procedure § 255 provides for a certification hearing to determine in which forum, the juvenile or superior court, the actual adjudication hearing will proceed. Additionally, Rule 20(e)(J)(2) of the Rules of Procedure of Juvenile Court of Guam provides:

"Upon filing of such a petition [for certification], the court shall schedule it for preliminary hearing for the sole purpose of determining whether the juvenile should be certified to the criminal court for prosecution as an adult. The evidence to be presented and considered . . . shall . . . not [relate] to the issues of guilt or innocence of the charge or of probable cause."

687 F.2d at 304.
3593. 687 F.2d at 303-04. The court distinguished the facts in Fejeran from those in Breed v. Jones, 421 U.S. 519 (1975). In Breed, the Court held that a juvenile’s transfer from the juvenile court system to the state court for prosecution as an adult violated the double jeopardy clause because at a juvenile hearing the court had found that the youth had violated a state criminal statute. Id. at 527, 541.
3594. See supra notes 3452-57 and accompanying text.
In United States v. Powell, the Ninth Circuit reversed Powell's convictions on three counts listed as overt acts to support a conspiracy charge because she was acquitted on the conspiracy charge. The court held that these were inconsistent verdicts.

In the first count, Powell was acquitted of conspiring to knowingly and intentionally possess cocaine with the intent to distribute. She was convicted on three other counts, however, of using a telephone to further the conspiracy described in count one. Since these three counts were based on the conspiracy charge in count one, the Ninth Circuit found that the convictions on the communication charges were inconsistent with the acquittal on the underlying conspiracy charge.

In United States v. Upshaw, the court affirmed Upshaw's conviction of aiding and abetting and employee of a federally insured savings and loan institution to fraudulently misapply funds. The court held that Upshaw had not been subjected to inconsistent verdicts, even though the employee was acquitted. The Ninth Circuit offered two rea-
sons for its decision: (1) legislative history indicated that Congress reacted against the common law rule tying the fate of an accessory to that of the principal, and (2) under the statute, the government need not identify, let alone indict and convict, any specific employee. The court cautioned against inferring too much from what appear to be inconsistent verdicts. Often there are less obvious reasons for an inconsistency than an improper conviction.

C. Appellate Review

1. The plain error rule

Generally, the admissibility of evidence may not be challenged on appeal if the proper objection was not raised at the trial level. However, the Federal Rules of Criminal Procedure allow an appeal to be brought where the improperly admitted evidence affects a party's substantial rights. This standard of "plain error" allows a court to hear an appeal which might otherwise have been unreviewable. However, the existence of plain error does not automatically mean that a reversal is warranted. If the error is harmless beyond a reasonable doubt, the conviction will be upheld.

In United States v. Wilson, the court upheld an escape convic-
tion but acknowledged that the trial court erred in admitting false statements made by the defendant. The defendant contended that he had made the false statements while he was in custody but before he had been given Miranda warnings. The Ninth Circuit considered this contention even though the defendant had failed to properly object to the admission of the statements during trial. The court held that “admission of those statements clearly violated [the defendant’s] Fifth Amendment rights [against self-incrimination] and this rises to the level of ‘plain error.’”

Despite the finding of plain error, Wilson’s conviction was upheld. After reviewing the record as a whole, the Ninth Circuit found that evidence of the defendant’s guilt was substantially, independently, and credibly represented at the trial level so as to convince the court that the error was “harmless beyond a reasonable doubt.”

2. Finality

The jurisdiction of the court of appeals is limited to the final decisions of the district courts. In the Territory of Guam, however, this jurisdiction extends to the final decisions of the appellate division of the district court. To determine the standard of finality for these appellate division decisions, the Ninth Circuit has used a test “‘analogous to the standard applied by the United States Supreme Court to test the finality of state court judgments pursuant to 28 U.S.C. § 1257.’”

The Supreme Court has recognized four situations in which the strict rule of finality necessary to establish federal appellate jurisdiction may be relaxed. The Ninth Circuit determined, in Guam v.

3611. 18 U.S.C. § 751(a) (1976) provides in pertinent part: “Whoever escapes . . . from . . . custody . . . shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined . . . or imprisoned . . . .”

3612. 690 F.2d at 1275.

3613. Id. at 1273.

3614. Id. at 1274.

3615. Id. at 1275. The substantial evidence included the defendant’s “fidgety” appearance and an unsuccessful search for a man whom the defendant claimed to be visiting. Id. at 1270.

3616. 28 U.S.C. § 1291 (1976) states in pertinent part: “The courts of appeals shall have jurisdiction of appeals from all final decisions of the . . . District Court of Guam . . . .”


3618. Guam v. Quinata, 704 F.2d 1085, 1086 (9th Cir. 1983) (citing Guam v. Kingsbury, 649 F.2d 740, 742 (9th Cir.), cert. denied, 454 U.S. 895 (1981)).

28 U.S.C. § 1257 (1976) states in pertinent part: “Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court . . . .”

3619. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). The four situations are:
Quinata,\textsuperscript{3620} that because later review of the federal issue might be precluded if Quinata prevailed on nonfederal grounds, a review of the ruling by the Appellate Division of the District Court of Guam was necessary.\textsuperscript{3621}

In Quinata, the defendant had been charged with committing a crime which occurred just prior to his eighteenth birthday. After originally filing and then dismissing the charges in superior court, the Government of Guam refiled in juvenile court. The juvenile court dismissed for lack of jurisdiction because the defendant was then over eighteen years of age. The government filed an appeal with the Appellate Division of the District Court of Guam which reversed the decision of the juvenile court. The defendant then appealed to the Ninth Circuit pursuant to 28 U.S.C. section 129\textsuperscript{1}. The Ninth Circuit raised the question of the finality requirement because the defendant’s case was still scheduled to be tried by the juvenile court.\textsuperscript{3623}

One exception to the finality requirement provides that when the party seeking review might prevail on nonfederal grounds, thus precluding review of the federal issue by the Supreme Court, an interlocutory appeal will be allowed. Relying on this exception, the Ninth Circuit held that Quinata’s appeal was reviewable.\textsuperscript{3624} It reasoned that if the trial was allowed to proceed in the juvenile court without review by the court of appeals, the defendant might succeed on other grounds, preventing a fur-

\textsuperscript{(1)} where the federal issue on appeal is conclusive or the outcome of further proceedings is preordained; (2) where the issue on appeal will survive and require further decision regardless of the outcome of future state court proceedings; (3) where the issue on appeal cannot be reviewed at a later time regardless of the final outcome in the state court; and (4) where the party seeking review of the issue might prevail on nonfederal grounds, thus precluding review of the federal issue by the Supreme Court. \textit{Id.} at 476-87.

\textsuperscript{3620} 704 F.2d 1085 (9th Cir. 1983).

\textsuperscript{3621} \textit{Id.} at 1086. The Appellate Division of the District Court of Guam had reversed the juvenile court’s order of dismissal and had directed the juvenile court to proceed.

Before proceeding with the issue of the applicability of a § 1257 exemption, the Ninth Circuit qualified its adherence to the standard of analogy as set forth in Guam v. Kingsbury, 649 F.2d 740 (9th Cir.), cert. denied, 454 U.S. 895 (1981). The Ninth Circuit stated that the Kingsbury court had been imprecise in analogizing review of Guam appellate decisions to Supreme Court review of state court rulings. Although this statement is based on the dissent in Kingsbury, 649 F.2d at 744-48 (Poole, J., dissenting), the Quinata court stated that “[t]he federal balance requires special rules to prevent Supreme Court review from becoming entangled in state law matters, and no such intent is present in our review of Guam cases, as we have jurisdiction to decide Guam local law questions.” Guam v. Quinata, 704 F.2d at 1086. Nevertheless, the Kingsbury rule was applied as the law of the circuit.

\textsuperscript{3622} \textit{See supra} note 3616 for statutory language.

\textsuperscript{3623} 704 F.2d at 1086.

\textsuperscript{3624} \textit{Id.} (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)).
ther determination on the jurisdictional question.\textsuperscript{3625} Although the court acknowledged Congress' strong policy against "piecemeal" or interlocutory appeals,\textsuperscript{3626} it reasoned that the importance of the jurisdiction issue outweighed stated congressional concerns.\textsuperscript{3627} In further support of its position, the Ninth Circuit pointed out that review of this decision would not result in additional interruption of the trial.\textsuperscript{3628} Therefore, the court proceeded to consider the merits of the defendant's appeal.

3. Government appeals

The United States Supreme Court has held that in the absence of express statutory authority, the government may not appeal in a criminal case.\textsuperscript{3629} In \textit{Guam v. Okada},\textsuperscript{3630} the Ninth Circuit held that the Legislature of Guam does not have the power to authorize government appeals in criminal cases decided in the District Court of Guam.\textsuperscript{3631}

In \textit{Okada}, an indictment was dismissed when it was found that the defendant's due process rights had been violated.\textsuperscript{3632} The government

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\begin{itemize}
  \item \textsuperscript{3625} Id. \textit{The court also recognized the "important federal interest in the prompt . . . resolution of significant issues of Guam law."} \textit{Id.} \textit{Unlike the hands-off policy of the federal courts toward state law, federal courts possess a legitimate interest in the development of Guam law.} \textit{Id.}
  \item \textsuperscript{3626} \textit{Id.} \textit{at 1086-87.}
  \item \textsuperscript{3627} \textit{Id.} \textit{at 1087. Congress was concerned with the "'effective and fair administration of criminal law'" which could be hampered by the delays and disruptions accompanying an intermediate appeal.} \textit{Id.} \textit{(quoting Abney v. United States, 431 U.S. 651, 657 (1977)). Although a defendant may not appeal an unsuccessful challenge to the trial court's subject matter jurisdiction before trial, see United States v. Layton, 645 F.2d 681, 683 (9th Cir.), cert. denied, 452 U.S. 972 (1981), the Ninth Circuit reasoned that the seriousness of the matter at hand far outweighed these concerns.} \textit{704 F.2d at 1087.}
  \item \textsuperscript{3628} \textit{704 F.2d at 1087.}
  \item \textsuperscript{3629} United States v. Wilson, 420 U.S. 332, 336 (1975) ("This Court early held that the Government could not take an appeal in a criminal case without express statutory authority.").
  \item \textsuperscript{3630} \textit{694 F.2d 565 (9th Cir. 1982).}
  \item \textsuperscript{3631} \textit{Id.} \textit{at 570.}
  \item \textsuperscript{3632} \textit{Id.} \textit{at 566. The government had failed to preserve "certain discoverable evidence."} \textit{Id.}
  \item Traditionally, government appeals were not favored because of the potential for a double jeopardy claim by a defendant. The Ninth Circuit did not need to deal with the double jeopardy question here: "'[I]t is well settled that an appellate court's order reversing a conviction is subject to further review even when the appellate court has ordered the indictment dismissed . . . since reversal on appeal would merely reinstate the jury's guilty verdict.'" \textit{Id.} \textit{at 566 n.1 (quoting United States v. Wilson, 420 U.S. 322, 344-45 (1975)).}
  \item \textit{See also Virgin Islands v. Hamilton, 475 F.2d 529 (3d Cir. 1973) where the government of the Virgin Islands brought an appeal of the district court's reversal of a criminal conviction.} \textit{Id. at 529-30. The government claimed that the sole authorization for the appeal was 28 U.S.C. § 1291. This claim was rejected by the Third Circuit. Where there was no additional statutory authority for the appeal, § 1291, standing alone, was not sufficient authorization.} \textit{Id. at 531.}
\end{itemize}
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appealed and the defendant brought a motion to dismiss on the ground that there was no statutory authority expressly authorizing a government appeal in a criminal case.3633

The court did not agree with Guam’s argument that the Guam Code of Criminal Procedure provided the necessary authority for an appeal.3634 In fact, the Ninth Circuit held that the Guam Legislature has no authority to allow government appeals from judgments of Guam’s District Court.3635

In reaching their decision, the court briefly reviewed the structure and power of the Guam Legislature.3636 The court found that section 1424(b) of the Organic Act of Guam provides that federal rules of procedure are applicable to the District Court of Guam.3637 The court therefore reasoned that Guam could not enact laws regarding procedure for either the District Court of Guam or for an appeal from the district court to the Ninth Circuit.3638

If the right to appeal is a procedural right, then the Guam Legisla-

3633. 694 F.2d at 566. The defendant had been convicted in the Superior Court of Guam. The Guam Government appealed to the Ninth Circuit when the Appellate Division of the District Court of Guam reversed the conviction. Id.

3634. Id. at 569. Guam Crim. P. Code § 130.20(a) (1977) provides for initial appeals from the trial court to the intermediate appellate court. The issue here, however, was "whether any law authorizes a second appeal, from the District Court to this court." 694 F.2d at 568.

3635. Preliminarily, the Ninth Circuit discussed the scope of the Criminal Appeals Act, 18 U.S.C. § 3731 (1976) and whether it authorized appeals by prosecuting entities other than the United States. 694 F.2d at 567 n.3. However, the Government of Guam did not claim that § 3731 applied in the present case. It appears that the Ninth Circuit was merely reasserting its interpretation of § 3731 to the United States Supreme Court, which, in an earlier case, had declined to decide the scope of that section. The Ninth Circuit stated:

"This court held in Arizona v. Manypenny, 608 F.2d 1197, 1199 (9th Cir. 1979), that section 3731 was "limited by its own terms to appeals by the United States as a prosecuting entity." The Supreme Court declined to decide whether section 3731 authorizes federal appeals by prosecuting entities other than the United States. Manypenny, 451 U.S. at 243, n.18, 101 S. Ct. at 1665. In the absence of Supreme Court instructions to the contrary, we adhere to our former view and hold that section 3731 does not authorize appeals by prosecuting entities such as states and territorial governments.

694 F.2d at 567 n.3.

636. Id. at 569. The present government of Guam was established by Congress in 1950. The laws regulating that government are contained in the Organic Act of Guam, 48 U.S.C. §§ 1421-28 (1976).

637. 694 F.2d at 569. Section 1424 of the Organic Act of Guam concerns the Guam court system and to what extent the Guam Legislature can enact laws regulating those courts. The pertinent part of § 1424(b) states: "The rules . . . promulgated and made effective by the Supreme Court . . . pursuant to section 2072 of title 28, in civil cases; [and] sections 3771 and 3772 of title 18, in criminal cases; . . . shall apply to the District Court of Guam and to appeals therefrom . . . ." 48 U.S.C. § 1424(b) (1976).

638. 694 F.2d at 569.
Substantive law defines crimes and establishes punishments, while procedural law describes the manner in which the crimes are prosecuted and the punishments are enforced. The Ninth Circuit held that the right to an appeal is a procedural right and that a restriction on appeals by the government "does not affect the rules by which courts decide whether the defendant has committed a crime. It simply limits the Government's ability to continue its prosecution." The court held that since the right to appeal is procedural and Guam has no authority to legislate procedure, Guam's Criminal Procedure Code cannot provide the authority for a government appeal. Since the government could not claim any other statutory authority for its appeal, the defendant's motion to dismiss was granted.

The effect of the Ninth Circuit's decision is clear. The Guam Legislature is not empowered to enact laws controlling procedure in either the district court or on appeal to the Ninth Circuit. Therefore, it is irrelevant whether or not the statute involved specifically authorized a government appeal, since the Guam Legislature had no authority to pass such a statute.

4. Timeliness

Under Rule 33 of the Federal Rules of Criminal Procedure, a defendant's motion for a new trial based on newly discovered evidence will not be considered timely unless it is brought within two years after final judgment. A judgment is considered final on the date the appellate process "is terminated." When an appellate court issues its mandate of affirmance, the process is terminated.

In United States v. Cook, the Ninth Circuit rejected the defendant's contention that his motion for a new trial, filed more than two years

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3639. Id.
3640. Id.
3641. Id.
3642. Id. Guam also argued that as a matter of policy, decisions from their district court should be reviewable by the Ninth Circuit since the Guam District Court, as a territorial court, was not created under Article III of the United States Constitution and therefore, the right to appeal to the Supreme Court is unclear. Id. The Ninth Circuit rejected this argument, ruling that such a concern should be addressed to the United States Congress, not the federal courts. Id. at 569-70. See Guam v. Olsen, 431 U.S. 195, 201 (1977).
3643. 694 F.2d at 570. The government's appeal was initially heard on the merits but subsequently the decision was vacated. Id. at 566.
3644. FED. R. CRIM. P. 33.
3645. United States v. Cook, 705 F.2d 350, 351 (9th Cir. 1983) (citing United States v. White, 557 F.2d 1249, 1250 (8th Cir. 1977)).
3646. 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 558 (2d ed. 1982).
3647. 705 F.2d 350 (9th Cir. 1983).
after his conviction was affirmed, was timely.\(^{3648}\) The defendant's robbery conviction had been affirmed by the Ninth Circuit in June, 1979. A petition for rehearing was denied, and the court issued its mandate of affirmance on October 11, 1979. The defendant thereafter sought review by the United States Supreme Court which denied certiorari on January 14, 1980. The defendant filed a motion for a new trial on December 14, 1981.\(^{3649}\)

The defendant argued that the two year time period under Rule 33 did not begin to run until the date the Supreme Court denied certiorari.\(^{3650}\) According to the defendant, his motion for a new trial would therefore be timely, with one month to spare.\(^{3651}\) The Ninth Circuit rejected this argument, however, because the defendant had neither obtained nor sought to obtain a stay of the appellate court's mandate of affirmance before proceeding to the Supreme Court.\(^{3652}\) Under the Federal Rules of Appellate Procedure, a mandate may be stayed pending an appeal to the Supreme Court if a motion is filed.\(^{3653}\) The Ninth Circuit held that without this motion, the action on a petition for certiorari is unimportant to the issue of timeliness under Rule 33.\(^{3654}\)

5. Abatement

If a defendant, convicted of a criminal act, dies before his pending appeal has been heard, the United States Supreme Court has held that all proceedings, including the appeal, shall be abated.\(^{3655}\) This rule of abatement was extended by the Ninth Circuit in United States v. Oberlin,\(^{3656}\) to include a defendant who died before an appeal had been filed.\(^{3657}\) The defendant had committed suicide immediately following sentencing and an appeal was filed on the deceased's behalf three days later.\(^{3658}\) The Ninth Circuit dismissed the appeal and remanded to the district court

\(^{3648}\) Id. at 351.
\(^{3649}\) Id. at 350.
\(^{3650}\) Id.
\(^{3651}\) Id. at 351.
\(^{3652}\) Id.
\(^{3653}\) FED. R. APP. P. 41(b) states in pertinent part: "A stay of mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion . . . ." 
\(^{3654}\) 705 F.2d at 351.
\(^{3655}\) Durham v. United States, 401 U.S. 481, 483 (1971) (per curiam) (citing Crooker v. United States, 325 F.2d 318 (8th Cir. 1963)). In Durham, the Supreme Court conducted a survey of various circuits which revealed that the federal courts have expressed a seemingly unanimous agreement for abatement.
\(^{3656}\) 718 F.2d 894 (9th Cir. 1983).
\(^{3657}\) Id. at 896.
\(^{3658}\) Id. at 895.
with instructions to dismiss the indictment.\textsuperscript{3659}

Historically, the reason for the abatement rule was that "crimes . . . are buried with the offender."\textsuperscript{3660} Recently, the courts have based their decisions on the procedural rights of the accused, including the right to the resolution of an appeal on the merits.\textsuperscript{3661} Although Oberin died before an appeal was filed, he nevertheless possessed the right to appeal.\textsuperscript{3662} Like the criminal who dies with an appeal pending, Oberlin was "denied the resolution of the merits of the case on appeal."\textsuperscript{3663} The Ninth Circuit therefore dismissed the appeal.

\textbf{D. Sentencing}

1. Jurisdiction of sentencing authority

In general, once a final judgment or order has been appealed, the court which rendered the judgment no longer has jurisdiction over any matters involved in the appeal.\textsuperscript{3664} Thus, once a defendant has been sentenced and the sentence has been appealed, the district court lacks juris-

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\item \textsuperscript{3659} Id. at 896.
\item \textsuperscript{3660} Id. (citing United States v. Dunne, 173 F. 254 (9th Cir. 1909)).
\item \textsuperscript{3661} United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977).
\item \textsuperscript{3662} 709 F.2d at 896.
\end{itemize}

In a petition for rehearing, the government claimed that by killing himself, Oberlin waived his right to appeal. \textit{Id.} The court did not agree that suicide was "the ultimate waiver." Furthermore, the court held that the doctrine of waiver is in no way connected with an issue of abatement. \textit{Id.}

\textsuperscript{3663} Id.\textsuperscript{3664} In re Matter of Thorpe, 655 F.2d 997, 998 (9th Cir. 1981). \textit{See also} Moroyoqui v. United States, 570 F.2d 862, 864 (9th cir. 1977) (once appeal was lodged, district court had no jurisdiction to proceed with new trial). \textit{Cert. denied}, 435 U.S. 997 (1978); Kinard v. Jordan, 175 Cal. 13, 16 (1917) (once appeal from judgment is taken, consent of parties cannot reinvest lower court with jurisdiction).

The jurisdiction referred to is not statutory, nor is it derived from any mandatory language in the Federal Rules of Criminal Procedure. Rather, it is "judge-made doctrine designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time." \textit{9 J. Moore, Moore's Federal Practice}, \textit{\$ 203.11, n.1} (2d ed. 1983). As such, the rule is not without exceptions. \textit{See e.g.,} Oliver v. Home Indemnity Co., 470 F.2d 329 (5th Cir. 1972) (district court modified judgment after appeal had been filed and court of appeals dismissed appeal on grounds that it was moot). In addition, the trial court may act to enforce the conditions of a bond under which the defendant has been released after appeal has been taken (\textit{see} United States v. Black, 543 F.2d 35 (7th Cir. 1976); United States v. Elkins, 683 F.2d 143 (6th Cir. 1982)) or, with leave of the appellate court, to correct inadvertent errors in the record (\textit{see} FED. R. CIV. P. 60(a); Huey v. Teledyne, Inc., 608 F.2d 1234 (9th Cir. 1979), \textit{Cert. denied}, 458 U.S. 1106 (1982); Perlman v. 322 West Seventy-Second Street Co., 127 F.2d 716 (2d Cir. 1942)).
diction to entertain a motion to reduce the sentence. However, the lower court's jurisdiction is merely stayed while the appeal is pending, and is resumed when the district court receives the mandate of the court of appeals.

In United States v. Coleman, the Ninth Circuit considered whether sentencing occurs on the date of the sentencing hearing or on the date the sentence is docketed. In Coleman, the defendant's sentencing hearing had been held prior to the issuance of the appellate court's mandate disposing of the defendant's appeal. However, the defendant's sentence was not entered on the district court docket until after the appellate court's mandate had been docketed.

Challenging the validity of her sentence, Coleman argued that the district court had lacked jurisdiction to sentence her because the sentencing hearing, at which she was orally sentenced, had been held while her appeal was pending in the circuit court. Rejecting Coleman's contention, the Ninth Circuit held that sentencing takes place when the sentence is docketed. Consequently, the defendant's sentence was valid because it was docketed subsequent to the appellate court's disposition of her appeal.

3666. See J. MOORE, supra note 3664, at ¶ 203.11.
3667. 688 F.2d 663 (9th Cir. 1982) (per curiam). The defendant had been convicted of the robbery of a savings and loan association, in violation of 18 U.S.C. § 2113(a) (1976). The district court granted the defendant's motion for arrest of judgment and judgment of acquittal notwithstanding the verdict on the basis that the government had failed to prove that the institution robbed was a federal savings and loan. United States v. Coleman, 656 F.2d 509, 510 (9th Cir. 1981). The government then appealed the grant of the defendant's motion and the Ninth Circuit reversed and reinstated the jury verdict. Id. at 512. The present action ensued.
3668. 688 F.2d at 663.
3669. Id. at 664. The sentencing hearing was held on November 30, 1981, and the mandate disposing of the defendant's appeal did not issue until December 2, 1981. Id.
3670. Id. The appellate court's mandate was docketed on December 8, 1981; the defendant's sentence was docketed on December 14, 1981. Id.
3671. Id.
3672. Id. The court particularly noted three factors which indicate that the docketing date, rather than the date of the sentencing hearing, is the sentencing date: (1) the 10-day period during which an appeal may be filed begins to run upon entry of judgment on the docket; (2) the Third Circuit has held that the activity which is prohibited while an appeal is pending is the entry of judgment (see District 65 v. McKague, 216 F.2d 153, 155 (3d Cir. 1954)); and (3) a motion for a new trial under Federal Rule of Criminal Procedure 33 may be heard and denied while the appeal is pending, but may not be granted until after remand. 688 F.2d at 664. However, the court also noted that Coleman's counsel had agreed to proceed with the sentencing hearing prior to the appellate court's disposition of Coleman's appeal. Id.
3673. 688 F.2d at 664. The court observed that "[w]hile the district court's practice in this case is not preferred, . . . the district court had jurisdiction to sentence when the mandate from the circuit was docketed in the district court." Id.
2. Presentence information

A defendant is entitled to be apprised of adverse information relied upon by the sentencing judge when imposing sentence. However, if adverse information is neither presented to the sentencing judge nor relied upon by the judge in passing sentence, the information need not be disclosed to the defendant.

In Baumann v. United States, the Ninth Circuit addressed the disclosure requirements concerning presentence information about the defendant provided by the government to the sentencing authority. Baumann claimed that a letter from an Assistant United States Attorney, which discussed Baumann's prospects for rehabilitation and recommended that parole not be granted, was a "presentence report" within the meaning of Federal Rule of Criminal Procedure 32(c). He argued

3674. See United States v. Perri, 513 F.2d 572, 575 (9th Cir. 1975) (imposition of sentence based on allegations in confidential reports was improper when defendant was denied access to reports). Section 404(a) of the AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (Approved Draft 1968) provides: "Fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects his interests and which has not otherwise been disclosed in open court be called to the attention of the defendant, his attorney, and others who are acting on his behalf."

The defendant's right to inspect the adverse information in a presentence report has been held to be absolute, except as to the recommendation of sentence which is clearly excluded by Federal Rules of Criminal Procedure 32(c). United States v. Woody, 567 F.2d 1353, 1361 (5th Cir.) (defendant has constitutional right to test accuracy of any statement relied upon by judge in sentencing), cert. denied, 436 U.S. 908 (1978). For the text of FED. R. CRIM. P. 32(c), see infra note 3677.

3675. United States v. Kenny, 645 F.2d 1323, 1348-49 (9th Cir.) (letter from non-party containing no factual information or opinion as to sentence and not relied upon by sentencing judge not required to be disclosed to defendant before sentencing hearing), cert. denied, 452 U.S. 920 (1981); United States v. Read, 534 F.2d 858, 859 (9th Cir. 1976) (disclosure of information obtained by judge prior to sentencing not required if judge has good reason for nondisclosure, so long as judge does not rely on information in sentencing).

3676. 692 F.2d 565 (9th Cir. 1982). Baumann was convicted on four counts of mail fraud and aiding and abetting a corporation which was engaged in a fraudulent land sale contract scheme. He was fined $1000 and received a total sentence of ten years imprisonment, which was later reduced to five years. Id. at 569.

3677. Id. at 573. FED. R. CRIM. P. 32(c) provides in part:

(1) . . . The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence . . . unless, with the permission of the court, the defendant waives a presentence investigation and report . . .

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty . . . or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(3) . . .

(A) Before imposing sentence the court shall upon request permit the defend-
that because the letter was not disclosed to him or his attorney, Rule 32(c)(3)(A) had been violated and his sentence was therefore invalid.\textsuperscript{3678} The court rejected this argument for two reasons.

First, the letter was never submitted to the court nor relied upon by the judge in passing sentence.\textsuperscript{3679} In addition, the letter was not a "presentence report," but rather a communication to the Parole Commission.\textsuperscript{3680} The defendant, therefore, was not entitled to relief on the ground that he was not apprised of the contents of the letter.\textsuperscript{3681}

The Ninth Circuit will vacate a sentence on appeal if the judge relied on false or unreliable information when sentencing.\textsuperscript{3682} In \textit{United States v. Ruster},\textsuperscript{3683} the defendant challenged his sentence claiming that the judge had relied on misinformation when imposing the sentence.\textsuperscript{3684} The defendant had been convicted, under 18 U.S.C. section 287,\textsuperscript{3685} on six counts of filing fraudulent social security applications and making false disability claims thereunder.\textsuperscript{3686} The trial court levied the maximum fine and sentenced the defendant to three consecutive five-year prison terms and five years of probation.

The record showed that the sentencing judge believed that Ruster would be eligible for parole after serving forty-eight months of his term.\textsuperscript{3687} However, Ruster would not be eligible, under the parole

\begin{footnotes}
\item 3678. 692 F.2d at 573.
\item 3679. Id.
\item 3680. Id.
\item 3681. Id. at 574. Judge Pregerson agreed with the majority on this issue. \textit{Id.} at 582 (Pregerson, J., concurring and dissenting).
\item 3682. United States v. Williams, 668 F.2d 1064, 1072 (9th Cir. 1982) (defendant's right to due process is violated when judge determines sentence using "materially false or unreliable" information); Farrow v. United States, 580 F.2d 1339, 1359 (9th Cir. 1977) (defendant's motion to vacate denied where judge was apprised of both defendant's and prosecutor's view of facts and it was not clear that challenged information was the basis of sentence); United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971) (sentence vacated where district court relied on information in presentence report and no information was provided to corroborate serious charges made therein), \textit{cert. denied}, 404 U.S. 1061 (1972).
\item 3683. 712 F.2d 409 (9th Cir. 1983).
\item 3684. Id. at 412.
\item 3685. 18 U.S.C. § 287 (1976) provides in part: "Whoever makes or presents . . . any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."
\item 3686. 712 F.2d at 410.
\item 3687. At the conclusion of the sentencing hearing, the probation officer stated that Ruster would be eligible for parole after serving 48 to 60 months of his sentence, partially confirming
\end{footnotes}
rule, until after he had served at least one-third of his prison term, or sixty months. The Ninth Circuit held that the judge's understanding of the parole rule was incorrect, and the record clearly showed that he relied on that misunderstanding when sentencing. The court therefore vacated Ruster's sentence and remanded for resentencing.

3. Judge's discretion

a. automatic or arbitrary sentences

Generally, a sentence within statutory limits is not subject to review on appeal. However, if it appears that the sentencing court abused its discretion or failed to exercise discretion, the sentence will be subject to limited review.

In United States v. Lopez-Gonzales, for example, the Ninth Circuit considered whether the district court had failed to exercise its discretion by mechanically imposing the maximum sentence following the defendant's conviction for felony illegal entry in violation of 8 U.S.C. section 1325. Although the defendant was permitted to present mitigating evidence that the judge's misunderstanding that the defendant would be eligible for parole after 48 months.

3688. The federal parole rule is contained in 18 U.S.C. § 4205(a) (1976) which provides in part: "Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms. . . ."

3689. The court rejected the prosecution's argument that the misinformation was not materially false enough to require vacating the sentence, holding that, in a sentence the length of Ruster's, the difference between serving four years and five years in prison before becoming eligible for parole is material. 712 F.2d at 412-13.

3690. Id. at 415.


In California, the determination that a judge has abused his or her sentencing discretion requires a "clear showing that [the] sentencing decision was arbitrary or irrational." People v. Giminez, 14 Cal. 3d 68, 72, 534 P.2d 65, 67, 120 Cal. Rptr. 577, 579 (1975). The District of Columbia Circuit has found review proper when the sentencing judge relied on improper or inaccurate information, the defendant was not represented by counsel at sentencing, a stiffer sentence was imposed because the defendant asserted his innocence at trial, the prosecutor violated his agreement not to allocute at sentencing, or the judge failed to exercise discretion. United States v. Stoddard, 553 F.2d 1275, 1289 (9th Cir. 1977).

3693. 688 F.2d 1275 (9th Cir. 1982).

3694. Id. at 1276. 8 U.S.C. § 1325 (1976) provides in pertinent part:

Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immi-
gating evidence prior to sentencing, the record suggested that the trial judge had ignored Lopez-Gonzales' evidence as well as any other individual circumstances relating to the defendant's case. Instead, the judge had automatically imposed the maximum sentence.

The government offered two arguments on appeal in support of the trial court's sentence. The government first argued that the sentence should be upheld because the defendant was given the opportunity to present mitigating evidence at the sentencing hearing. However, the court rejected this argument because, even though the defendant was given the opportunity to present evidence of mitigating circumstances, the judge had failed to consider the evidence.

The government next argued that the trial judge had exercised discretion but merely omitted to state on the record that he had taken the defendant's individual circumstances into account. The government implied that requiring a sentencing judge to state that he or she has exercised discretion is to compel the performance of a "hollow ritual." The Ninth Circuit also rejected this argument, stating that the rule requiring the trial court to exercise discretion ensures the performance of a judicial obligation to weigh mitigating and aggravating circumstances before imposing sentence. Thus, requiring the sentencing judge to make clear in the record that he exercised discretion is not a "hollow ritual." Consequently, the Ninth Circuit held that the district judge failed to exercise discretion by automatically imposing the maximum sentence, and remanded the case for resentencing.

The defendant was apprehended after fleeing from a border patrol agent while driving an automobile in which several other illegal aliens were concealed. After a bench trial and conviction, the defendant was sentenced to the maximum term of two years imprisonment. See Verdugo v. United States, [Vol. 18]
In *United States v. Ismond*, the defendant also challenged his sentence on the ground that the judge had mechanically imposed sentence. The defendant had pleaded guilty to a charge of unlawful reentry after being deported, in violation of 8 U.S.C. section 1326. Contrary to the lenient sentence recommended by the government in exchange for the guilty plea, the judge imposed a two-year term of imprisonment. The record suggested that the sentence had been mechanically imposed because the judge had stated that each time the defendant was apprehended in Washington and appeared before him, he would impose a two-year sentence.

The Ninth Circuit distinguished *Ismond* from *Lopez-Gonzales*.

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402 F.2d 599, 611 (9th Cir. 1968) (in order to obtain accurate evaluation of the offender, sentencing judge has broad scope of inquiry), cert. denied, 402 U.S. 961 (1971). The court also noted that automatically imposing sentence is contrary to the public policy favoring evaluation of each defendant according to individual circumstances. *Lopez-Gonzales*, 688 F.2d at 1277. This principle has also been applied in other circuits. See, e.g., *United States v. Sparrow*, 673 F.2d 862, 866 (5th Cir. 1982) (sentencing procedure at which defendant was denied opportunity to offer mitigating evidence contradicted policy in favor of individualizing sentences); *Woosley v. United States*, 478 F.2d 139, 144 (8th Cir. 1973) (automatic imposition of maximum prison term on conscientious objector clearly conflicts with Supreme Court sentencing guidelines on individual sentencing); *United States v. Daniels*, 446 F.2d 967, 971 (6th Cir. 1971) (mechanical imposition of five-year sentences on all conscientious objectors demonstrates "inflexible practice in sentencing contradict[ing] the judicially approved policy in favor of 'individualizing sentences' "); *United States v. McCoy*, 429 F.2d 739, 743 (D.C. Cir. 1970) (judge's policy of imposing sentence entirely by reference to crime committed is not an exercise of discretion).

3703. 704 F.2d 1155 (9th Cir. 1983).

3704. Id. 8 U.S.C. § 1326 (1976) provides in part:

> Any alien who—

1. has been arrested and deported or excluded and deported, and thereafter
2. enters, attempts to enter, or is at any time found in, the United States, unless

the Attorney General has expressly consented . . . shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

The defendant, who had a drinking problem, had been deported from the United States in 1973. He resided near the United States-Canada border. On the night of his arrest, he had taken a taxi across the border into the United States and had gone to a tavern, where he became intoxicated. Later, local police officers noticed the defendant and reported his presence to the dispatcher, stating their intention to send him back to Canada. A border patrol agent listening to the transmission recognized Ismond's name and, remembering Ismond's earlier deportation, had him detained. 704 F.2d at 1156.

3705. In exchange for Ismond's guilty plea, the government had recommended that he "be deported on unsupervised probation [on condition that] he not return to the United States without official approval for five years." 704 F.2d at 1156.

3706. Id. The judge also expressed his concern that, if not punished, the defendant would feel free to enter the United States with impunity and commit crimes, or cause crimes to be committed, in the United States. The judge based his concern on the defendant's prior record. Id.

because the judge in Ismond had considered the defendant's individual circumstances.\footnote{3708} The court explained that Lopez-Gonzales forbids a court from mechanically imposing a specific sentence on all members of a certain class of offenders. However, it does not forbid a court from imposing the same sentence on a particular offender every time he commits a particular offense.\footnote{3709} The court affirmed the sentence, noting that it would be exceeding its authority in overruling a sentencing decision when the record clearly showed that the trial court had exercised discretion.\footnote{3710}

In United States v. Medina-Cervantes,\footnote{3711} the Ninth Circuit considered whether the defendant's sentence resulted from an unconstitutional exercise of the trial court's sentencing discretion. Certain statements made by the sentencing judge implied that he had imposed the maximum sentence, not as a sanction for the crime committed, but to punish the defendant for having asserted his sixth amendment right to a jury trial.\footnote{3712} Although the sentence was within the statutory range, the Ninth Circuit found that the trial judge's language clearly gave rise to an inference of impropriety which the record failed to dispel. Consequently, in order to avoid any "chilling effect" on a defendant's exercise of his right to a jury trial, the court vacated the sentence and remanded the case for resentencing.\footnote{3713}

\footnote{3708} 704 F.2d at 1157.
\footnote{3709} Id.
\footnote{3710} Id. The Ninth Circuit, however, questioned the wisdom of this sentence, noting the somewhat innocent circumstances of the offense, as well as the fact that the defendant would impose a burden on American taxpayers during his two-year prison term. \textit{Id.} at 1156-57. However, since the trial judge did exercise discretion, the court lacked authority to overrule the sentence "even though the [trial] court may have exercised its discretion in a manner that does not commend itself to a panel of appellate judges." \textit{Id.} at 1157.

\footnote{3711} 690 F.2d 715 (9th Cir. 1982). The defendant was convicted of illegal entry and illegal reentry into the United States after having been deported, in violation of 8 U.S.C. §§ 1325 and 1326. \textit{See supra} notes 3694 & 3704. He was sentenced to two years imprisonment and fined $1000 for each violation, the sentences to run concurrently. 690 F.2d at 716.

\footnote{3712} The trial judge had stated that Medina-Cervantes had "a lot to lose," implying that imposition of the maximum penalty was a consequence of his insistence on a jury trial. The judge further stated that, in his view, the defendant was "just thumbing his nose at our judicial system." 690 F.2d at 716. The judge also itemized the costs of the defendant's jury trial and stated that the purpose in imposing the maximum fine was to reimburse the government for those costs. \textit{Id.} at 716-17.

\footnote{3713} \textit{Id.} at 717. In so holding, the court relied on United States v. Stockwell, 472 F.2d 1186 (9th Cir.) (an accused may not be subject to more severe punishment because of exercising his right to jury trial and court must not create appearance of such practice), \textit{cert. denied}, 411 U.S. 948 (1973).

In a footnote, the court explained that defense attorneys would be reluctant to advise their clients to go to trial if the defendant could be punished more severely as a result of exercising this right. Such an attitude by attorneys would result in "chilling" the exercise of a defend-
b. disparate sentences for co-defendants

A sentencing court has discretion to impose disparate sentences upon co-defendants provided that the court explains its reasons for doing so and does not otherwise abuse its discretion. The Ninth Circuit recently affirmed this principle in United States v. Chiago. After pleading guilty to first-degree murder and robbery, Chiago was given consecutive sentences of life imprisonment for murder and twenty-five years imprisonment for robbery. However, his three co-defendants each received one term of life imprisonment. The record showed that Chiago played a more brutal part in committing the murder than his co-defendants.

Chiago argued that the trial court abused its discretion by imposing a more severe sentence on him than it had imposed on his co-defendants. The court rejected Chiago's argument and upheld his sentence.

ant's right to trial, a right which is constitutionally guaranteed and for the exercise of which no defendant should fear penalty. 690 F.2d at 716 n.3.

3714. See, e.g., United States v. Garrett, 680 F.2d 650 (9th Cir. 1982) (disparity in sentences imposed on co-defendants does not by itself indicate abuse of discretion); United States v. Bectroft, 608 F.2d 753 (9th Cir. 1979) (an explanation is required when court imposes disparate sentences, but no formal statement of reasons).

3715. 699 F.2d 1012 (9th Cir.), cert. denied, 104 S. Ct. 171 (1983).


(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

18 U.S.C. § 1153 (1976) provides in part: “Any Indian who commits against the person or property of another Indian or other person . . . murder . . . shall be subject to the same laws and penalties as all other persons . . . .” 18 U.S.C. § 2112 (1976) provides in part: “Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than fifteen years.” Finally, 18 U.S.C. § 2114 (1976) provides in part:

Whosoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person [of such property] shall . . . if in effecting or attempting to effect such robbery he wounds the person having custody of [such property], or puts his life in jeopardy by use of a dangerous weapon . . . be imprisoned twenty-five years.

3717. 699 F.2d at 1013. In imposing sentence, the trial judge stated that Chiago “committed physical and abusive assaults on [the victim], . . . repeatedly stabbed her, . . . showed a total lack of concern for her, and . . . demonstrated a wanton and depraved spirit of mind [and was] bent on evil without regard as to its consequences.” Id.

3718. Id. at 1014. Chiago's counsel declined to advance this argument in accordance with Anders v. California, 386 U.S. 738 (1967) (court appointed counsel on appeal may, if he or she
noting that the trial court took individual circumstances into account when it sentenced each defendant, explained its reasons for imposing disparate sentences, and did not otherwise abuse its discretion.\textsuperscript{3719}

c. Rule 35 motions

Rule 35(b) of the Federal Rules of Criminal Procedure provides that a sentencing court has discretion to reduce a sentence either by reducing the term of incarceration or by granting probation within 120 days after the sentence becomes final.\textsuperscript{3720}

In \textit{United States v. Carter},\textsuperscript{3721} the Ninth Circuit held that a trial court's discretion under Rule 35(b) to reduce a sentence from incarceration to probation does not apply to rape convictions.\textsuperscript{3722} Carter was convicted of rape and sentenced to a five-year term of imprisonment pursuant to 18 U.S.C. section 4205(b)(2).\textsuperscript{3723} After the Ninth Circuit affirmed his conviction, Carter moved for a reduction of sentence pursuant to Rule 35(b). The district court granted the motion, reducing the defendant's sentence to four months in a treatment center and four years and eight months probation.\textsuperscript{3724}

In a motion to correct the sentence, the government argued that 18 U.S.C. section 3651\textsuperscript{3725} does not allow probation for a rape conviction

\textsuperscript{3719} 699 F.2d at 1014 n.2.
\textsuperscript{3720} FED. R. CRIM. P. 35(b) provides in pertinent part:

The court may reduce a sentence within 120 days after the sentence is imposed or probation is revoked, 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. . . . Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

\textsuperscript{3721} 704 F.2d 1063 (9th Cir. 1983). The defendant was convicted of rape under 18 U.S.C. § 2031 (1976) which provides: “Whoever . . . commits rape shall suffer death, or imprisonment for any term of years or for life.”
\textsuperscript{3722} 704 F.2d at 1064.
\textsuperscript{3723} 18 U.S.C. § 4205(b) (1976) provides in part: “Upon entering a judgment of conviction, . . . (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.”
\textsuperscript{3724} 704 F.2d at 1063.
\textsuperscript{3725} 18 U.S.C. § 3651 (1976) provides that “[u]pon entering a judgment of conviction of any offense \textit{not punishable by death or life imprisonment}, any court having jurisdiction . . . may suspend the imposition or execution of sentence and place the defendant on probation.” (emphasis added).
because rape is punishable by life imprisonment. The court granted the government's motion and modified the sentence to thirty months imprisonment with eligibility for parole beginning after six months.

On appeal, the defendant argued that Rule 35(b) permits the reduction of a sentence of imprisonment to probation for a rape conviction, notwithstanding the contrary provision of section 3651. The court rejected the defendant's argument, holding that section 3651 limits the scope of the district court's discretion under Rule 35(b). As a result, the court affirmed the granting of the government's motion to correct the defendant's illegal sentence.

A sentencing court's decision against holding a hearing on a Rule 35 motion will not be disturbed absent an abuse of discretion. In United States v. Holt, the appellant contended that the district court was required to hold a hearing on his Rule 35 motion, and had failed to do so. However, the defendant did not demonstrate that the district judge abused his discretion by ruling on the motion without a hearing. The court rejected the defendant's claim, holding that its author-

3726. 704 F.2d at 1063-64.
3727. Id. at 1064. The modified sentence was imposed under 18 U.S.C. § 4205(b) (1976), which provides in part:

Upon entering a judgment of conviction, the court . . . may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court . . . .

3728. 704 F.2d at 1064. The defendant relied on 18 U.S.C. § 3771 (1976) which nullifies all laws not consistent with federal rules. The court noted that § 3771 would nullify § 3651 if § 3651 were in conflict with Rule 35(b), but found it doubtful that such a conflict exists. Id. A more reasonable interpretation suggests that § 3651 is a limitation on the court's Rule 35(b) probation granting power. Id.

3729. Id. The Fifth Circuit agrees with this position. See United States v. Denson, 603 F.2d 1143, 1146 (5th Cir. 1979) (district court exceeded its authority by ordering probation for defendants convicted of offense punishable by life imprisonment). The Carter court also noted that even if 18 U.S.C. § 3771 did nullify 18 U.S.C. § 3651, the trial court's decision would be upheld because Fed. R. Crim. P. 32(e) repeats the § 3651 provision that probation may not be granted for offenses punishable by life imprisonment. Since § 3771 applies only to the nullification of laws, not of federal rules, the government's motion would also have been properly granted under Rule 32(e). 704 F.2d at 1064.

3730. 704 F.2d at 1064.
3731. See United States v. Denson, 603 F.2d 1143, 1146 (5th Cir. 1979) (district court exceeded its authority by ordering probation for defendants convicted of offense punishable by life imprisonment). The Carter court also noted that even if 18 U.S.C. § 3771 did nullify 18 U.S.C. § 3651, the trial court's decision would be upheld because Fed. R. Crim. P. 32(e) repeats the § 3651 provision that probation may not be granted for offenses punishable by life imprisonment. Since § 3771 applies only to the nullification of laws, not of federal rules, the government's motion would also have been properly granted under Rule 32(e). 704 F.2d at 1064.

3732. 704 F.2d 1140 (9th Cir. 1983) (per curiam).
3733. Id.
3734. Id. The court stated that the record appeared to be complete and it did not appear that additional useful information would have been derived from an oral hearing on the motion. Id.
ity to reverse is conditional on a showing of abuse by the trial court. Accordingly, although it expressed uneasiness at the lack of a hearing, the Ninth Circuit affirmed the district court's order denying the defendant's motion.

4. Resentencing

a. on remand

In most cases, the original sentencing judge resents the defendant when resentencing is required. Remanding to a different judge for resentencing is appropriate only in unusual circumstances. To determine whether a case should be remanded to a different judge for resentencing, the Ninth Circuit uses a three-part test adopted in United States v. Arnett. The court looks to (1) whether the original judge would reasonably be expected to approach resentencing with an unbiased attitude, (2) whether reassignment would be advisable in order to preserve the appearance of justice, and (3) whether any resulting waste or duplication of effort would outweigh the appearance of fairness gained.

In a recent Ninth Circuit case, United States v. Medina-Cervantes, the defendant requested that the court remand his case to a different judge for resentencing. The original judge had sentenced the defendant to the maximum statutory penalty under circumstances which gave rise to an inference of injustice. The Ninth Circuit applied the Arnett test and concluded that there was no reason to believe that the original judge would be unable to proceed properly in resentencing.

3735. Id. The court relied on United States v. Krueger, 454 F.2d 1154 (9th Cir. 1972) (per curiam) (no hearing or oral argument required on Rule 35 motions).
3736. 704 F.2d at 1140. The Ninth Circuit distinguished Holt from United States v. Ginsburg, 398 F.2d 52 (3d Cir. 1968), cert. denied, 403 U.S. 931 (1971), in which the appellant had been convicted and sentenced under 18 U.S.C. § 1461 (1958) (prohibiting distribution of pornography by mail). The interpretation of § 1461 was subsequently altered on appeal to the United States Supreme Court. See Ginsburg v. United States, 383 U.S. 463 (1966). In Ginsburg, the Third Circuit found that, in light of the Supreme Court's interpretation of the sentencing statute, a hearing was necessary to allow Ginsburg to present any new evidence which might bear on his sentence. 398 F.2d at 56. No such change in substantive law had occurred which would require a hearing for Holt. 704 F.2d at 1140.
3737. United States v. Larios, 640 F.2d 938, 943 (9th Cir. 1981) (usually, resentencing is done by original sentencing judge).
3738. United States v. Arnett, 628 F.2d 1162, 1165 (9th Cir. 1979).
3739. 628 F.2d 1162 (9th Cir. 1979).
3740. Id. at 1165.
3741. 690 F.2d 715 (9th Cir. 1982). See also supra text accompanying notes 3711-13.
3742. 690 F.2d at 717.
3743. See supra text accompanying note 3712.
3744. 690 F.2d at 717.
The court added, however, that under the circumstances of the case, the district judge should state the basis for the new sentence he imposed in order to preserve the appearance of justice.\footnote{Id.} Furthermore, the Ninth Circuit stated that remanding to the same judge would preserve judicial resources. The court, therefore, denied the defendant's request and remanded to the original judge.\footnote{Id.}

In \textit{United States v. Hagler},\footnote{709 F.2d 578 (9th Cir.), cert. denied, 104 S. Ct. 282 (1983).} the defendant challenged the sentence imposed on him after the Ninth Circuit had remanded for resentencing. Convicted on thirteen of twenty counts of credit card fraud,\footnote{Id. at 579.} Hagler was originally sentenced to one year in prison on count fifteen and fined $1000. He was further ordered to make restitution in the amount of $77,000. Sentences on the remaining counts were suspended, conditioned on five years probation.\footnote{Id. at 579.}

On appeal, the Ninth Circuit reversed five of the counts, including count fifteen, and remanded for resentencing.\footnote{Id. at 579.} Hagler was then resentenced on count sixteen to the identical sentence he had earlier received on count fifteen with similar provisions for probation, restitution, and concurrent sentences on the other counts.\footnote{Id. at 579.}

On his second appeal, Hagler first argued that the resentencing amounted to vindictiveness in violation of his due process rights.\footnote{Id. at 579.} The court rejected this argument, distinguishing \textit{North Carolina v. Pearce}.\footnote{395 U.S. 711 (1969).} The court observed that there was no net increase in Hagler's punishment, and found no suggestion of vindictiveness in the record.\footnote{Id. at 723-24. "[V]indictiveness against a defendant for having successfully attacked his first conviction must play not part in the sentence he receives after a new trial. . . . [D]ue process also requires that a defendant be freed of apprehension of such a retaliatory motivation . . . ." Id. at 725. In \textit{Pearce}, a harsher sentence was imposed after retrial, with nothing in the record to explain the augmentation of sentence. In \textit{Hagler}, the same sentence was imposed on remand, with nothing in the record to suggest a vindictive motive.}

\footnote{Id. at 723-24. "[V]indictiveness against a defendant for having successfully attacked his first conviction must play not part in the sentence he receives after a new trial. . . . [D]ue process also requires that a defendant be freed of apprehension of such a retaliatory motivation . . . ." Id. at 725. In \textit{Pearce}, a harsher sentence was imposed after retrial, with nothing in the record to explain the augmentation of sentence. In \textit{Hagler}, the same sentence was imposed on remand, with nothing in the record to suggest a vindictive motive.}

\footnote{709 F.2d at 579.}
Hagler next contended that, on the first appeal, the Ninth Circuit had no right to remand for resentencing on counts which had not been contested in that appeal. The court responded that the defendant had placed the entire judgment in issue when he appealed, and had not objected when the government sought to vacate the entire sentence. The court held that under 28 U.S.C. section 2106 the remand was within the scope of the court's authority.

### b. crediting prior time in custody

Section 3568 of 18 U.S.C. contains the federal sentencing policy with respect to credit for time spent in custody prior to sentencing. If a prisoner has served any prior time in custody in connection with the offense for which sentence is imposed, that time should be credited by the Attorney General to the sentence term.

In *Granger v. United States*, the defendant brought a motion under 28 U.S.C. section 2255 seeking modification of his sentence because the Bureau of Prisons had failed to credit him for time previously served. The defendant had been sentenced to five years for bank robbery, six months of which he was to serve in custody. Execution of the remaining four and one-half years was suspended beginning the date the defendant was released from prison. After the defendant had served

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Id.
3755. Id.
3756. Id. The court held that Hagler had "placed the entire judgment in issue by the inclusiveness of his notice of appeal." Id. Furthermore, the government had stated in its brief that it "sought to have the entire sentence vacated and the matter remanded for resentencing," but Hagler did not file a reply nor seek a rehearing on the matter. Id.
3757. 28 U.S.C. § 2106 (1976) provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

3758. 709 F.2d at 579.
3759. 18 U.S.C. § 3568 (1976) provides in part:

> The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.

3760. Id.
3761. 688 F.2d 1296 (9th Cir. 1982) (per curiam).
3762. For a discussion of § 2255 motions, see infra notes 3885-95 and accompanying text.
3763. 688 F.2d at 1296.
3764. Id.
the six months and had been released on probation, he violated one of the conditions of his probation. After revoking the defendant's probation, the district court sentenced him to three years in prison.\footnote{3765}

The Bureau of Prisons failed to credit Granger with the six months he had served before the probationary period began. The Ninth Circuit stated that, unless the record indicates otherwise, any time that a convicted defendant has spent in custody on the same charge before sentence was imposed is presumed to have been credited by the sentencing judge.\footnote{3766} The record in \textit{Granger} did not show that credit was not given. Thus, the Bureau of Prisons acted properly in presuming that the district court had already taken the six-month period of custody into account, since it had sentenced Granger to only three of the remaining four and one-half years.\footnote{3767} Accordingly, the Ninth Circuit affirmed the district court's denial of Granger's section 2255 motion.\footnote{3768}

5. Consecutive sentences

Unless otherwise indicated by the language or legislative history of a statute, imposing multiple punishments for a single illegal act or transaction violates the fifth amendment guarantee against double jeopardy.\footnote{3769} The Supreme Court, in \textit{Albernaz v. United States},\footnote{3770} recently reaffirmed the \textit{Blockburger} test for determining when consecutive sentences for two statutory offenses are proper. The rule states that when the same act or transaction violates two distinct statutory provisions, the test for determining whether one or two offenses have been committed is “whether

\footnote{3765. \textit{Id.}}
\footnote{3766. \textit{Id.} at 1297. The court relied on its decision in \textit{Myers v. United States}, 446 F.2d 232, 234 (9th Cir. 1971), in which the court held that “in any situation where, as a matter of mechanical calculation, credit could have been given within the terms of the maximum [sentence] possible, the court would conclusively presume that such was done.”}
\footnote{3767. 688 F.2d at 1297. When he denied Granger's § 2255 motion, the district court judge stated that had he known the more lenient three-year sentence he imposed would create confusion under § 3568, he would have specified that Granger was to serve a total of three and one-half years imprisonment. \textit{Id.}}
\footnote{3768. \textit{Id.} The Ninth Circuit suggested that the district court should have explicitly considered the amount of time Granger had previously served. \textit{Id.}}
\footnote{3769. \textit{Whalen v. United States}, 445 U.S. 684, 689 (1980) (court, unless authorized by Congress, may not impose multiple punishments); \textit{United States v. Alexandro}, 675 F.2d 34, 42 (2d Cir.) (“if Congress intended multiple punishments for the same act or transaction, imposition of such sentences is not a constitutional violation”), \textit{cert. denied}, 459 U.S. 835 (1982); \textit{United States v. Sperling}, 560 F.2d 1050, 1056 (2d Cir. 1977) (when congressional intent is not explicit, multiple punishments may not be imposed).}
\footnote{3770. 450 U.S. 333, 344 (1981).}
\footnote{3771. \textit{Blockburger v. United States}, 284 U.S. 299 (1932). The rule will be referred to herein as the \textit{“Blockburger test.”}}
each provision requires proof of a fact which the other does not.\textsuperscript{3772}

In \textit{United States v. Goodheim},\textsuperscript{3773} the Ninth Circuit applied the \textit{Blockburger} test to determine whether the defendant had improperly received consecutive sentences. The defendant, an ex-felon, was convicted of receiving a firearm shipped in interstate commerce\textsuperscript{3774} and of making a false statement in connection with the acquisition of that firearm.\textsuperscript{3775} Each count concerned the same firearm.\textsuperscript{3776} The defendant received separate sentences for each violation, the sentences to run consecutively.\textsuperscript{3777}

On appeal, the defendant argued that the consecutive sentences were imposed in violation of the double jeopardy clause because his acts constituted only one offense.\textsuperscript{3778} Applying the \textit{Blockburger} test, the court held that the offenses charged against Goodheim are separate offenses because each requires proof of a fact not required to establish the other offense.\textsuperscript{3779} Accordingly, the Ninth Circuit held that imposition of consecutive sentences was lawful.\textsuperscript{3780}

In a recent case of first impression, \textit{United States v. Coleman},\textsuperscript{3781} the Ninth Circuit considered whether consecutive sentences may be imposed for making and transferring a single destructive device in violation of

\textsuperscript{3772} \textit{Id.} at 304.

\textsuperscript{3773} 686 F.2d 776 (9th Cir. 1982).

\textsuperscript{3774} Goodheim was convicted of violating 18 U.S.C. § 922(h)(1) (1976), which provides in part:

\begin{quote}
It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

\ldots

[

\begin{quote}
to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.
\end{quote}

\end{quote}

\textsuperscript{3775} Goodheim was also convicted of violating 18 U.S.C. § 922(a)(6) (1976), which provides in part:

\begin{quote}
It shall be unlawful—

\ldots

(6) for any person in connection with the acquisition \ldots of any firearm or ammunition [from a person licensed to deal in firearms] \ldots knowingly to make any false or fictitious oral or written statement \ldots intended or likely to deceive \ldots with respect to any fact material to the lawfulness of the sale.
\end{quote}

\textsuperscript{3776} 686 F.2d at 780.

\textsuperscript{3777} \textit{Id.}

\textsuperscript{3778} \textit{Id.} at 779.

\textsuperscript{3779} \textit{Id.} at 780. For example, the court noted that the defendant could have received the firearm without making a false statement about it and he could have made a false statement in connection with its acquisition without ever receiving it. \textit{Id.} (quoting \textit{United States v. Gardner}, 605 F.2d 1076, 1077 (8th Cir. 1979)).

\textsuperscript{3780} \textit{Id.}

\textsuperscript{3781} 707 F.2d 374 (9th Cir.), \textit{cert. denied}, 104 S. Ct. 171 (1983).
sections 5861(e) and (f) of the National Firearms Act.

The defendant was convicted on nine counts relating to a conspiracy to commit murder and to recover fraudulently life insurance proceeds. In furtherance of the conspiracy, Coleman forged the victim’s signature on life insurance applications and constructed two Molotov cocktail firebombs. He gave the bombs to two accomplices for use in killing the victim and the victim’s business partner.

Coleman was convicted of both making and transferring a bomb without complying with the provisions of the Act. On appeal, Coleman claimed that making and transferring the firebombs was a single transaction, for which multiple punishments were impermissible absent specific congressional intent.

Relying on decisions in the Fourth and Eighth Circuits, the court held that making and transferring a dangerous device under 26 U.S.C. section 5861 constitute separate acts because neither is incidental.

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3782. *Id.* at 378-80. For text of § 5861(e) & (f) of the National Firearms Act, see infra note 3783.

3783. *Id.* at 375. Five counts were brought under 18 U.S.C. § 1341 for mail fraud with the remaining four counts relating to various violations of the National Firearms Act, 26 U.S.C. §§ 5801-5872 (1976). *Id.* at 375-76. Coleman contested his sentences on the four counts brought under §§ 5861, 5822, 5871 and 5812 of the National Firearms Act. The National Firearms Act is concerned with the registration and payment of taxes on firearms and other dangerous devices. The pertinent provisions of § 5861 are: “It shall be unlawful for any person . . . (e) to transfer a firearm in violation of the provisions of this chapter; or (f) to make a firearm in violation of the provisions of this chapter.” Section 5822 provides in part:

No person shall make a firearm unless he has (a) filed with the Secretary a written application, in duplicate, to make and register the firearm . . . ; (b) paid any tax payable on the making . . . ; (c) identified the firearm to be made . . . ; (d) identified himself . . . ; and (e) obtained the approval of the Secretary to make and register the firearm and the application form shows such approval.

Section 5871 provides in part: “Any person who violates . . . this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both . . . .” Section 5812 provides in part:

(a) A firearm shall not be transferred unless (1) the transferee of the firearm has filed with the Secretary a written application, in duplicate, for the transfer and registration of the firearm . . . ; (2) any tax payable on the transfer is paid . . . ; (3) the transferee is identified . . . ; (4) the transferee of the firearm is identified . . . ; (5) the firearm is identified . . . ; and (6) the application form shows that the Secretary has approved the transfer and the registration of the firearm to the transferee.

3784. 707 F.2d at 379.

3785. United States v. Kaplan, 588 F.2d 71, 75 (4th Cir. 1978) (“making and transferring an illegal firearm are separate and independent crimes, not incidental to one another, and permit separate sentences”), modified on other grounds sub nom. United States v. Seidel, 620 F.2d 1006 (4th Cir. 1980).

3786. United States v. Kiliyan, 504 F.2d 1153, 1155 (8th Cir. 1974) (“unlawful making and unlawful transfer [of a destructive device] are separate, non-merged offenses” for which consecutive sentences are permissible), *cert. denied*, 420 U.S. 949 (1975).
to the other.\textsuperscript{3787} The Ninth Circuit reasoned that the separate natures of the two acts posed separate dangers which, when combined, greatly increased the danger to the victims.\textsuperscript{3788} Because the acts were separate, imposition of separate, consecutive sentences was held proper.\textsuperscript{3789}

In \textit{United States v. Thornton},\textsuperscript{3790} the defendant claimed the district court had exceeded its authority by ordering that sentences imposed for violations of the National Firearms Act run consecutively to a state sentence the defendant was then serving.\textsuperscript{3791} The court regarded the defendant’s argument as an attempt to extend to consecutive sentencing the rule that a federal court cannot order a federal sentence to run concurrently with a state sentence.\textsuperscript{3792} The court rejected the attempt.

\textsuperscript{3787}707 F.2d at 380. As in \textit{Goodheim, see supra} notes 3773-80 and accompanying text, the defendant could have done one act without doing the other, i.e., he could have made the bombs without transferring them or vice-versa.

In reaching this conclusion, the court discussed two Ninth Circuit cases, \textit{United States v. Clements}, 471 F.2d 1253 (9th Cir. 1972) and \textit{United States v. Edick}, 603 F.2d 772 (9th Cir. 1979), both of which addressed the imposition of multiple sentences for violations of different provisions of the National Firearms Act. In \textit{Clements}, the defendant was convicted of the three separate offenses of making, possessing and failing to pay taxes on an unregistered firearm. The Ninth Circuit held that these acts constituted a single transaction because the maker of a firearm necessarily possesses it. 471 F.2d at 1254, 1257. The court in \textit{Clements} stated that unless the legislative history gave a clear indication that Congress intended to authorize multiple punishments for a single transaction, a sentencing authority would be subject to the ten-year sentence limitation set forth in 26 U.S.C. \textsection{5871} (1976), for any single act or transaction, even if the offensive behavior violated more than one provision of the Act. 471 F.2d at 1254. 26 U.S.C. \textsection{5871} (1976) provides for a maximum of ten years in prison, a $10,000 fine, or both for a violation of any provision of the Act.

In \textit{Edick}, the Ninth Circuit refined the \textit{Clements} rule, considering whether the rule prohibits consecutive sentences per se for single act violations, or just those consecutive sentences which in the aggregate exceed the ten-year maximum sentence for each violation of the Act. 603 F.2d at 773-74. The court held that consecutive sentences are prohibited when individual counts arise from the same act, whether or not the combined length of the consecutive sentences would exceed ten years. \textit{Id.} at 775.

The \textit{Edick} decision has not been the rule in the Fourth and Fifth Circuits. \textit{See United States v. Kaplan}, 588 F.2d 71, 74-75 & n.3 (4th Cir. 1978); \textit{Rollins v. United States}, 543 F.2d 574, 575 (5th Cir. 1976) (per curiam) (consecutive sentences which together exceed the statutory ten-year maximum violate congressional intent).

The \textit{Coleman} court distinguished both \textit{Clements} and \textit{Edick} because those cases were concerned only with single transaction violations and Coleman's violations were clearly separate acts. 707 F.2d at 380.

\textsuperscript{3788}707 F.2d at 380.

\textsuperscript{3789} \textit{Id.}

\textsuperscript{3790} 710 F.2d 513 (9th Cir. 1983).

\textsuperscript{3791} \textit{Id.} at 515. Thornton was convicted of possessing a firearm without a serial number and possessing an unregistered firearm, in violation of 26 U.S.C. \textsection{5861}(d) and (I). He was given two five-year concurrent sentences, to run consecutively to an independent state sentence he was then serving. \textit{Id.} at 514-15.

\textsuperscript{3792} \textit{Id.} at 515-16. The reason for the rule is based on the separation of authority between the sentencing judge and the Attorney General. It is based on 18 U.S.C. \textsection{3568} and 4082 (see
The court explained that under 18 U.S.C section 3568, a sentence begins to run at the time the convicted person is received at the penitentiary or place of confinement. The Attorney General has the exclusive authority to select the institution of confinement. Thus, the federal judge has no authority to order concurrency of state and federal sentences because the federal sentence does not begin until the defendant arrives at the place of confinement selected by the Attorney General.

The Ninth Circuit held, however, that the statutes discussed above did not restrict a federal court's authority to delay the commencement of a federal sentence until after completion of a state sentence. The
infra notes 3793 & 3795) and was relied upon in United States v. Myers, 451 F.2d 402 (9th Cir. 1972). In Myers, the defendant had pleaded guilty to federal charges and was sentenced at the same time that he was in state custody awaiting trial on state charges. He was convicted of the state offenses, served a prison term, and then was paroled into federal custody to begin serving the federal sentence. At that time, Myers filed a § 2255 motion to vacate his guilty plea on the ground that it was involuntary since he had not been informed that his federal sentence would begin to run only after he had served his state sentence. Id. at 403. The court affirmed the district court's order vacating the guilty plea, id. at 406, and noted in its reasoning that [u]nder section 3568, the district judge was powerless to impose a federal sentence to run concurrently with any state confinement. The most the district judge could have done was to have recommended to the prison authorities that a federal sentence be made concurrent with or consecutive to state confinement. Prison authorities need not and do not always follow such recommendations. Id. at 404 (footnote omitted).

The Thornton court also noted that dictum in United States v. Williams, 651 F.2d 644 (9th Cir. 1981) supported Thornton's attempt to extend the rule. In Williams, the court stated: "The Ninth Circuit has concluded that a federal judge is powerless to order that a federal sentence run concurrently with state confinement. This rule would equally seem to preclude a district court from ordering that a federal sentence run consecutively to a state sentence." 651 F.2d at 647 n.2 (citations omitted). The Thornton court, however, rejected this attempt to extrapolate because the Williams court failed to cite any authority for this proposition. 710 F.2d at 516.

3793. 18 U.S.C. § 3568 (1976) provides in part: "The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence."
3794. 710 F.2d at 516.
3795. 18 U.S.C. § 4082 (1976) provides in part:
(a) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.
(b) The Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise . . . .
3796. 710 F.2d at 516 (citing United States v. Myers, 451 F.2d 402, 404 (9th Cir. 1972)).
3797. Id. The court explained that such an order does not infringe upon the Attorney General's exercise of authority to designate the institution for service of the sentence. Id. The court also cited several cases from other circuits in support of this holding. See United States v. Campisi, 622 F.2d 697, 699 (3d Cir. 1980) (when federal sentence is ordered consecutive to state sentence, federal sentence begins to run after release from state confinement); Cox v.
court noted that a prior Ninth Circuit decision had held that the predecessor statute to section 3568 did not prohibit the imposition of a federal sentence consecutive to a state sentence. Consequently, the court affirmed the trial court's order.

In United States v. Jones, the defendants had been convicted of mail fraud, securities fraud and misapplication of funds in connection with sale/leaseback transactions. On appeal, defendant Jamerson claimed that the sentence imposed upon him was illegal because it required him to serve, on separate counts, a prison term concurrent with a probation term that carried a restitution provision.

Jamerson relied on United States v. Edick, arguing that probation and prison terms may not be served concurrently. The Ninth Circuit noted that the language relied upon by the defendant was

United States ex rel. Arron, 551 F.2d 1096, 1098 (7th Cir. 1977) (when federal sentence ordered consecutive to state sentence, time spent in state custody not credited against federal term); United States v. Lee, 500 F.2d 586, 587-88 (8th Cir.) (court's discretion to order consecutive state and federal sentences well settled; statement by court that state and federal sentences to run concurrently recommendation only), cert. denied, 419 U.S. 1003 (1974); Laviole v. United States, 310 F.2d 117, 118 (1st Cir. 1962) ("There is no impropriety in the imposition of a [federal] sentence to commence on and after a state court sentence presently being served.").

The Thornton court was referring to Hayden v. Warden, 124 F.2d 514 (9th Cir. 1941), which dealt with the nearly identical predecessor statute to not bar the imposition of a federal sentence consecutive to a state sentence. 124 F.2d at 514-15.

The fraudulent scheme involved a trucking brokerage company and a trucking company. Jamerson became president of the trucking company and managed it on a day-to-day basis. Investors were fraudulently induced to buy equipment from the brokerage company and lease it back to the trucking company. The defendants then looted the assets of the trucking company to meet the obligations of the brokerage company. As happens in the classic "Ponzi scheme," the scheme eventually collapsed and the investors lost their investments.

Id. at 1319-20.

The court characterized this argument as "novel," noting later that normally a defendant will not be heard to complain of concurrent sentences "because restraints on liberty will end sooner than if probation were imposed consecutively to the prison term." Id. 603 F.2d 772 (9th Cir. 1979). Edick addressed the imposition of consecutive sentences for multiple violations of the National Firearms Act. See supra note 3787. The language relied upon by Jamerson is:

[T]he trial court's error was to subject Edick to two punishments when . . . only one was authorized. Either prison time or probation was valid under the statutory alternatives, but, to avoid an illegal cumulation of punishment, the sentences had to be imposed concurrently. Manifestly, prison time and probation cannot be served concurrently.

603 F.2d at 777.
"clearly dictum unrelated to the holding or focus of the case." In addition, the court noted that in an earlier Ninth Circuit case, *Green v. United States*, the court held that concurrent probation and prison terms were permissible. Furthermore, pursuant to 18 U.S.C. section 3651, courts have broad discretion in setting probation terms, including requiring restitution as long as the complete sentence is within statutory limits. Therefore, Jamerson’s contention was held to be without merit.

Generally, any change increasing the penalty imposed under a legal sentence violates the double jeopardy clause of the fifth amendment. However, an increase in the penalty resulting from the clarification of an ambiguous sentence does not violate the double jeopardy clause because an ambiguous sentence has no legal effect.

In *United States v. Wingender*, the Ninth Circuit considered whether the double jeopardy clause prohibits modifying a sentencing order to correct an error when the effect of the correction is to make sentences run consecutively rather than concurrently, thereby increasing the penalty. The district court had reinstated Wingender’s suspended sentence following the defendant’s conviction and sentencing for

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3805. *Id.* The court added that "[n]othing in logic or law suggests that a court may not impose concurrent prison and probation terms." *Id.* The court pointed out that decisions requiring concurrent probation and prison terms have been left undisturbed by the Supreme Court. *Id.* See *Burns v. United States*, 287 U.S. 216 (1932).

3806. 298 F.2d 230, 232 (9th Cir. 1961).

3807. 18 U.S.C. § 3651 (1976) provides in part:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction . . . when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

3808. 712 F.2d at 1323 (citing *Phillips v. United States*, 679 F.2d 192, 194 (9th Cir. 1982) (sentences requiring both probation and restitution are permissible)).

3809. *Id.*

3810. See *Kennedy v. United States*, 330 F.2d 26, 27-28 (9th Cir. 1964) (changing concurrent sentences to consecutive sentences “clearly increased petitioner’s punishment” and was invalid).

3811. See *United States v. Alverson*, 666 F.2d 341, 347-48 (9th Cir. 1982).

3812. 711 F.2d 869 (9th Cir. 1983).

3813. *Id.* at 870.

3814. *Id.* at 869-70. Wingender had been convicted in 1979 of falsifying a loan application in violation of 18 U.S.C. § 1014 (1976), for which he received a suspended sentence. 18 U.S.C. § 1014 (1976) provides in part:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of [a federal credit agency or federally insured lending institution] . . . shall be fined not more than $5,000 or imprisoned not more than two years, or both.
counterfeiting in violation of 18 U.S.C. section 472. The sentencing order provided that the reinstated sentence was to be served consecutively "to any state sentence for which the defendant now stands committed." However, Wingender was not then committed under any state sentence, but only under the federal sentence.

Two days later, the district judge corrected the mistake, modifying the sentencing order so that the reinstated sentence ran consecutively to the federal sentence. The defendant then moved to correct the sentence, alleging that the resulting increase in penalty violated the double jeopardy clause. The district court denied the motion.

On appeal, the Ninth Circuit affirmed the district court's ruling. Relying on United States v. Alverson, the Ninth Circuit held that modification of the reinstated sentence did not violate the double jeopardy clause, although it increased the penalty. The court reasoned that although a legal sentence may not be modified so as to increase the penalty, there is no such bar to increasing an illegal or erroneous sentence because neither is legally effective. The court concluded that the original reinstatement order, referring to "any state sentence," was so ambiguous under the circumstances as to be illegal and thereby ineffec-

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3815. 711 F.2d at 869-70. 18 U.S.C. § 472 (1976) provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

Wingender was sentenced to two years imprisonment on the counterfeiting conviction. 711 F.2d at 870 n.1.  
3816. 711 F.2d at 870.  
3817. Id.  
3818. Id.  
3819. The defendant's motion was brought under Fed. R. Crim. P. 35, which provides in part: "The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence."  
3820. 711 F.2d at 870.  
3821. Id. at 871. The court first noted that sentences generally run concurrently unless the sentencing order specifies that the sentences are to run consecutively. Id. at 870 (citing McNealy v. Johnston, 100 F.2d 280, 282 (9th Cir. 1938); Borum v. United States, 409 F.2d 433, 440 (D.C. Cir. 1967), cert. denied, 395 U.S. 916 (1969)).  
3822. 666 F.2d 341, 347-48 (9th Cir. 1982).  
3823. 711 F.2d at 870.  
3824. Id. See United States v. Carter, 704 F.2d 1063, 1064 (9th Cir. 1983) (correction of an illegal grant of probation after rape conviction not a double jeopardy violation); United States v. Henry, 680 F.2d 403, 411 (5th Cir. 1982) (upholding lower court's action in vacating illegal sentence and increasing sentence on unchallenged count in order to fulfill original sentencing intent); United States v. Busic, 639 F.2d 940, 950-51 (3d Cir.) (augmentation of sentence not a double jeopardy violation), cert. denied, 452 U.S. 918 (1981).
Therefore, the modification was permissible.\textsuperscript{3826}

6. Youth Corrections Act

The Federal Youth Corrections Act (YCA)\textsuperscript{3827} provides sentencing judges with broad and flexible discretion when sentencing youth offenders. The YCA was designed to encourage rehabilitation, rather than solely to punish youthful offenders.\textsuperscript{3828}

Section 5010 of the YCA contains the sentencing options available to a judge. The judge may place the offender on probation,\textsuperscript{3829} sentence the offender to the custody of the Attorney General for treatment and supervision,\textsuperscript{3830} sentence the offender to confinement under another appropriate punishment provision,\textsuperscript{3831} or sentence the offender to the custody of the Attorney General for an initial period of observation to

\begin{itemize}
\item \textsuperscript{3825} 711 F.2d at 870. At the time the suspended sentence was reinstated, no state sentence existed and the defendant had just received a federal sentence. \textit{Id.}
\item \textsuperscript{3826} The Ninth Circuit also stated that no prejudice would result either to the defendant or to his counsel because the district judge had promptly corrected his mistake. \textit{Id.} at 870-71.
\item \textsuperscript{3827} Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1976).
\item \textsuperscript{3828} See United States v. Lane, 284 F.2d 935, 941 (9th Cir. 1960) (YCA "permit[s] the substitution of correctional rehabilitation rather than retributive punishment"); H.R. REP. No. 2979, 81st Cong., 2d Sess. (1950). \textit{See also} Ralston v. Robinson, 454 U.S. 201 (1981). In \textit{Ralston}, the Court reviewed the principles behind the YCA. \textit{Id.} at 206-10. The \textit{Ralston} Court found that the YCA endorses the use of discretion by judges when choosing among sentencing options, and prescribes basic conditions of treatment for youth offenders. \textit{Id.} at 206. Citing \textit{Dorszynski v. United States}, 418 U.S. 424 (1974), the Court stated that "the principal purpose of the YCA is to rehabilitate persons who, because of their youth, are unusually vulnerable to the danger of recidivism." 454 U.S. at 206. This purpose is implemented by segregating youth offenders from adults during the period of treatment. \textit{Id.} at 207.
\item \textsuperscript{3829} 18 U.S.C. § 5010(a) (1976) provides: "If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation."
\item \textsuperscript{3830} 18 U.S.C. § 5010(b), (c) (1976) provide:
\begin{itemize}
\item (b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the [United States Parole] Commission as provided in section 5017(c) of this chapter; or
\item (c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter.
\end{itemize}
\item \textsuperscript{3831} 18 U.S.C. § 5010(d) (1976) provides: "If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision."
determine the most appropriate alternative. 3832

In Tuten v. United States, 3833 the Supreme Court considered whether a conviction for which probation was imposed under section 5010(a) of the YCA is automatically expunged once the offender is unconditionally discharged after serving his full term of probation. 3834 In 1971, nineteen year old Tuten pleaded guilty to a charge of carrying a pistol without a license and was sentenced to two years probation under section 5010(a). 3835 At the end of the probationary period, Tuten was unconditionally discharged from the YCA program. In 1980, Tuten was tried and convicted under the same statutory provision he had violated in 1971. 3836 As a result of the earlier conviction, the judge sentenced Tuten as a felon under the District of Columbia recidivist statute. 3837

On appeal to the District of Columbia Court of Appeals, Tuten contended that the district court erred in sentencing him as a recidivist. 3838 He claimed that the 1971 conviction could not serve as the basis for treating him as a recidivist because the record of that conviction had been expunged, under section 5021(a), 3839 once he had successfully completed the probationary term. 3840 Tuten relied on section 5021(b), which provides that a conviction for which probation was imposed is automatically set aside if the court unconditionally discharges the offender from probation prior to the expiration of the maximum period of probation originally imposed by the court. 3841

3832. 18 U.S.C. § 5010(e) (1976) provides:
If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Commission shall report to the court its findings.
3834. Id. at 661.
3835. Id. Tuten was charged with carrying a pistol without a license under D.C. CODE § 22-3204 (1973). Id.
3836. Id.
3837. Id. at 661-62. Tuten's earlier conviction made him subject to the recidivist provision of D.C. CODE § 22-3204. On the second conviction, Tuten was given an indeterminate sentence of two to six years imprisonment. 460 U.S. at 662.
3839. 18 U.S.C. § 5021(b) (1976) provides:
Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.
3840. 460 U.S. at 662.
3841. Id. In keeping with the YCA's rehabilitative purpose, § 5021 was meant to spare youth offenders from the social stigma and potentially detrimental economic effect of having a
The circuit court rejected Tuten’s argument, holding that the automatic expunging provision applies only when the youth offender is unconditionally discharged prior to completing the probationary term. Since Tuten was discharged only after fully completing probation, the circuit court held that section 5021(b) did not apply and affirmed Tuten’s sentence on the 1980 conviction.

Justice Marshall, writing for a unanimous Court, agreed with the circuit court that the plain language of the statute is contrary to the interpretation urged by Tuten. In addition, the Court noted that the legislative history of the 1961 amendment to the YCA, which added section 5021(b), “echo[es] the language of § 5021(b) limiting the set-aside to youth offenders discharged before their original probationary terms expire.” Finally, the Court found that this particular limitation was consistent with the rehabilitative purposes of the YCA as well as with congressional intent to provide an incentive for good behavior.

criminal record, as well as to provide incentive to youth offenders to adhere to the rules and conditions of probation. See Dorszynski v. United States, 418 U.S. 424, 433-35 (1974) (§ 5021(b) provides judges with a powerful tool in exercising discretion in the treatment of youth offenders and restoring them to acceptable patterns of behavior); Doe v. Webster, 606 F.2d 1226, 1244 (D.C. Cir. 1979) (in keeping with the purposes of the YCA, once set-aside is granted, conviction records are segregated from other files and ex-offender may legally deny conviction); Tatum v. United States, 310 F.2d 854, 856 (D.C. Cir. 1962) (“a person sentenced under the Youth Corrections Act can, by virtue of his own good conduct, be spared the lifelong burden of a criminal record”).

3842. Tuten v. United States, 440 A.2d at 1013.
3843. 460 U.S. at 662-63.
3844. Id. at 667. The Court quoted Durst v. United States, 434 U.S. 542, 548 (1978) for the statement: “‘[Section 5021(b)] extend[s] the benefit of a certificate [setting aside the conviction] to youths sentenced to probation under § 5010(a) when the court unconditionally discharges the youth prior to expiration of the sentence of probation imposed.’” 460 U.S. at 666 (emphasis added by Tuten Court).
3845. 460 U.S. at 666 (footnote omitted). The Court discussed the fact that prior to the amendment adding § 5021(b), the set-aside provision was available only to offenders sentenced to confinement who were unconditionally discharged therefrom prior to completing the maximum sentence imposed. Id. at 665. The Court stated that § 5021(b) was enacted to provide a similar opportunity to youth offenders sentenced to probation rather than to confinement. Id. at 665-66. For the legislative history of § 5021(b), see H.R. REP. No. 433 and S. REP. No. 1048, 87th Cong., 1st Sess. 1 (1961).
3846. 460 U.S. at 667. The Court reasoned that the probationer’s incentive to be on exemplary behavior might be significantly weakened if the conviction was automatically set aside upon expiration of the probation term. Id. Furthermore, the Court found that the relief from the adverse consequences of a criminal record envisioned by § 5021(b) would not necessarily be frustrated if a court failed to grant an unconditional discharge before the term of probation ended. The Court pointed to two safeguards against such a possibility: (1) pursuant to United States Parole Commission procedures, a parole officer is required to file a report prior to the end of the probationer’s term, detailing the probationer’s conduct and reminding the court that an early discharge will set aside conviction (see GUIDE TO JUDICIARY POLICIES AND PROCEDURES: PROBATION MANUAL § 5011 (1978)), and (2) if the probationer believes the court
Court thus concluded that the language of the statute, the legislative history and the rehabilitative purposes of the YCA all indicate that a conviction must be expunged only when the offender is granted an early discharge. Accordingly, the circuit court’s judgment upholding Tuten’s sentence was affirmed.

In United States v. Bell, the Ninth Circuit considered whether a district court may impose a fixed term of less than six years for treatment and supervision under section 5010(b) of the YCA. Bell was convicted of conspiring to defraud the United States and of making a false claim against the United States. He was sentenced to a period of two years for treatment and supervision pursuant to section 5010(b) on count one, and five years probation pursuant to section 5010(a) on count two. On appeal from the district court’s denial of its motion to correct the sentence on count one, the government claimed that a court may not impose a fixed sentence under the YCA. Bell, on the other hand, inadvertently failed to grant an early discharge, he or she may move the sentencing court to grant an unconditional early discharge nunc pro tunc and set aside the conviction (see Fed. R. Crim. P. 35). 460 U.S. at 667-68.

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argued that the sentencing options provided in section 5010 were not exclusive, so that a district court had discretion to impose a specific sentence of less than six years.\textsuperscript{3855}

Finding in favor of the government, the Ninth Circuit held that although a district court has discretion to choose among the sentencing options provided in section 5010, it is limited to imposing one of those options.\textsuperscript{3856} The court reasoned that the rehabilitative purpose underlying the YCA is best served by allowing youth corrections authorities to determine the exact period of confinement based on each individual offender's needs.\textsuperscript{3857} Thus, the court stated that if the youth offender is to serve less than the statutory six years, that decision is properly made by the parole Commission, not by the district court.\textsuperscript{3858}

In \textit{United States v. Ballesteros},\textsuperscript{3859} the defendant contended that the Federal Magistrate Act of 1979,\textsuperscript{3860} prohibiting YCA sentences that are

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\textsuperscript{3855} 707 F.2d at 1081. The court distinguished \textit{United States v. Amidon}, 627 F.2d 1023 (9th Cir. 1980), and \textit{United States v. Smith}, 683 F.2d 1236 (9th Cir. 1982) (en banc), \textit{cert. denied}, 459 U.S. 1111 (1983), which Bell relied on for this argument. In \textit{Amidon}, the court held that an indeterminate sentence imposed under § 5010(b) cannot exceed the maximum period of confinement that could be imposed on an adult offender convicted of the same offense. 627 F.2d at 1027. \textit{Smith} dealt with the application of the split sentence provision of 18 U.S.C. § 3651 to probation terms imposed under § 5010(a) of the YCA. 683 F.2d at 1240-42. Neither case addressed whether a court may impose indeterminate sentences with fixed maximum terms less than those provided by statute. 707 F.2d at 1081-82.

\textsuperscript{3856} 707 F.2d at 1082. In so holding, the Ninth Circuit is in agreement with several other circuits. See \textit{Taylor v. Carlson}, 671 F.2d 137, 138 (5th Cir. 1982); \textit{Watts v. Hadden}, 651 F.2d 1354, 1372 (10th Cir. 1981); \textit{United States v. Jackson}, 550 F.2d 830, 832 (2d Cir. 1977); \textit{Burns v. United States}, 552 F.2d 828, 830-31 (8th Cir. 1977).

\textsuperscript{3857} 707 F.2d at 1082.

\textsuperscript{3858} \textit{Id.} Bell also argued that courts should be given broad discretion in sentencing under the YCA because the original rehabilitative purpose behind the YCA “has fallen into disfavor, and . . . the Parole Commission's implementing regulations and administration of the statute are inconsistent with its original intent.” \textit{Id.} (citing \textit{United States v. Jackson}, 550 F.2d 830, 832 (2d Cir. 1977), and \textit{Watts v. Hadden}, 651 F.2d 1354, 1372 (10th Cir. 1981)).

Although the Ninth Circuit found this argument persuasive, the court responded that “\textit{while} the underlying predicate of the YCA and the reality of Youth Act treatment may be incongruent, we agree with the Second Circuit that any changes in the YCA must come from the Congress, not the courts.” 707 F.2d at 1082.

\textsuperscript{3859} 691 F.2d 869 (9th Cir. 1982) (per curiam), \textit{cert. denied}, 460 U.S. 1042 (1983).

\textsuperscript{3860} \textit{Federal Magistrate Act of 1979}, Pub. L. No. 96-82, 93 Stat. 643 (1979). The Federal Magistrate Act amended 18 U.S.C. § 3401, the sentencing provisions section applicable when trial on a misdemeanor offense is heard by a magistrate, by adding a new subsection (g). 93 Stat. at 646. The new subsection (g) provides in part:

The magistrate may, in a case involving a youth offender in which consent to trial
longer than the maximum adult sentence for the same crime, operated retroactively to invalidate his sentence. In 1977, Ballesteros had pleaded guilty to a misdemeanor offense. He was sentenced under section 5017(c) of the YCA to an indeterminate term of confinement not to exceed four to six years. An adult sentence for the same offense would have resulted in a maximum sentence of one year in prison and a $5000 fine.

In rejecting Ballesteros' argument, the Ninth Circuit distinguished United States v. Amidon, which held that implicit in the Federal Magistrate Act is the mandate that a youth offender may not be sentenced to any term of confinement longer than that which could be imposed on an adult for the same offense. The Ballesteros court noted that Amidon's sentence had not been final on the effective date of the Federal Magistrate Act, whereas Ballesteros' sentence became final in 1977, two years prior to adoption of the Act. Moreover, the Ninth Circuit observed that courts generally do not apply ameliorative legislation to sentences finalized prior to the effective date of that legislation.

The court then considered Ballesteros' claim that imposing a four-to-six year term on a youth offender for a misdemeanor offense violates the equal protection clause of the Constitution. Rejecting this argument as well, the Ninth Circuit held that when a sentence longer than that which could be imposed on an adult is imposed on a youth offender under the YCA, the longer sentence does not violate the equal protection clause if its purpose is rehabilitative. The court therefore affirmed

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3860. 691 F.2d at 870.
3861. Id. Ballesteros pleaded guilty to violating 21 U.S.C. § 844, which prohibits, and contains the penalties for, illegally importing, manufacturing, distributing or storing controlled substances.
3862. Id. See supra note 3854.
3863. 691 F.2d at 870.
3864. 627 F.2d 1023 (9th Cir. 1980).
3865. Id. at 1027.
3866. Id. 691 F.2d at 870.
3867. See United States ex rel. Sero v. Preiser, 506 F.2d 1115, 1120 (2d Cir. 1974) (when the law in question operates in the same general way on all members of the class in question (here, youth offenders), no equal protection violation exists); cf. United States ex rel. Sero v. Preiser, 506 F.2d 1115, 1120 (2d Cir. 1974) (when
Ballesteros' sentence.  

In *United States v. Jenkins*, the defendant also claimed that his sentence was imposed in violation of the equal protection clause. Unlike Ballesteros, who was a youth offender, Jenkins challenged his sentence as an adult offender. Jenkins was convicted of simple assault, in violation of 18 U.S.C. section 113(e). He was given a suspended sentence of ninety days in prison and was placed on a two-year probationary term.

On appeal, Jenkins argued that the magistrate lacked the statutory authority to sentence him to a probationary period in excess of six months for a petty crime. He based his argument on section 3401(g)(3) of the Federal Magistrate Act, which provides that a magistrate shall not impose on a youth offender a term of probation greater than six months for a petty crime. Jenkins further contended that if a magistrate does have authority to impose a longer term of probation on an adult offender, that authority violates the equal protection clause.

The court rejected both of Jenkins' arguments. First, the court noted that a magistrate's general power to grant probation is contained in 18 U.S.C. section 3401(d). The provision for imposing probation on youth offenders, contained in section 3401(g)(3), is merely an exception to that general power, and does not affect the general grant of authority to magistrates. Jenkins was not a youth offender; thus, the section 3401(g)(3) exception did not apply to him.

Examining Jenkins' equal protection argument, the court stated that youth offenders are treated the same as adults, but are given longer sentences than adults could receive, there is denial of equal protection), *cert. denied*, 421 U.S. 921 (1975).

3870. 691 F.2d at 870.
3871. 734 F.2d at 1322 (9th Cir. 1983).
3872. *Id.* at 1324. Jenkins was originally charged with "assault by striking, beating or wounding, in violation of 18 U.S.C. § 113(d) (1976)." *Id.* After consenting to be tried by a magistrate, Jenkins requested and was granted a jury trial on the assault charge. The government then reduced the charge to simple assault, under 18 U.S.C. § 113(e) (1976), a petty offense which carries a maximum punishment of three months in prison, a fine of $300, or both. The court denied Jenkins' request for a jury trial on the reduced charge. 734 F.2d at 1324.
3873. 734 F.2d at 1324.
3874. *Id.* at 1327.
3875. 18 U.S.C. § 3401(g)(3) (1982) provides: "[T]he magistrate may not suspend the imposition of sentence and place the youth offender on probation for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense."
3876. 734 F.2d at 1327.
3877. *Id.* 18 U.S.C. § 3401(d) (1976) provides: "The probation laws shall be applicable to persons tried by a magistrate under this section, and such officer shall have power to grant probation and to revoke or reinstate the probation of any person granted probation by him."
3878. 734 F.2d at 1327.
3879. *Id.*
the classification neither violated a fundamental interest, nor involved a suspect class. The court further found that Congress had limited a magistrate's power to sentence youth offenders for misdemeanors and petty offenses because it desired to implement the rehabilitative purposes of the YCA. Citing its decision in *Ballesteros*, the court reaffirmed the principle that an equal protection challenge to statutory sentencing distinctions based on the age of the offender will fail so long as the sentence serves the purpose for which it was designed. Jenkins did not argue that the YCA failed to serve its rehabilitative purposes. Accordingly, the court held that Jenkins' right to equal protection had not been infringed, and affirmed his sentence.

7. Section 2255 proceedings

28 U.S.C. section 2255 (1976) provides that after a prisoner is sentenced, he or she may move the sentencing court to vacate, set aside, or correct the sentence on the ground that it was improperly imposed. The general rule is that such motions should be presented to the original sentencing judge. It is permissible, however, under Rule 4(a) of the

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3880. *Id.*
3881. *Id.*
3883. 734 F.2d at 1327.
3884. *Id.*
3885. A sentence was improperly imposed if "the sentence was imposed in violation of the Constitution or laws of the United States, or . . . the court was without jurisdiction to impose such sentence, or . . . the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255 (1976). A § 2255 motion is also known as a "writ for error corum nobis."
3886. This posture is a relatively recent one in the Ninth Circuit, having first been stated in Wilson v. United States, 534 F.2d 130 (9th Cir. 1976), and reaffirmed in Farrow v. United States, 580 F.2d 1339 (9th Cir. 1978). The earlier view expressed some uncertainty concerning the propriety of allowing the original sentencing judge to hear the § 2255 motions, reflecting a concern that the original judge might bear an inherent prejudice toward the prisoner. See, e.g., Gravenmier v. United States, 469 F.2d 66 (9th Cir. 1972) (trial judge can hear and decide § 2255 motions); Odom v. United States, 455 F.2d 159 (9th Cir. 1972) (trial judge not required to disqualify himself from hearing § 2255 motion); Dukes v. United States, 407 F.2d 863 (9th Cir.) (there is no wrong, per se, in trial judge hearing § 2255 motion), *cert. denied*, 396 U.S. 897 (1969).

Rules Governing Section 2255 Proceedings,\textsuperscript{3887} to present the motion to another district court judge if the original sentencing judge is unavailable.

In \textit{Gano v. United States},\textsuperscript{3888} the Ninth Circuit addressed the meaning of “unavailability” for purposes of presenting a section 2255 motion to a judge other than the original sentencing judge. The district judge who originally sentenced Gano, Judge Ferguson, had been appointed to the Ninth Circuit Court of Appeals between the time Gano was sentenced and the time Gano’s motion was filed. Consequently, the motion was referred to another judge.

The court held that when a judge is no longer on the district court, he or she is no longer “available” within the meaning of Rule 4(a).\textsuperscript{3889} Assignment of Gano’s motion to another judge was therefore proper.\textsuperscript{3890}

Circuit Judge Boochever, dissenting, made a persuasive argument that Gano’s motion should at least have been referred to the chief judge of the Ninth Circuit in order to determine whether it was in the public interest to temporarily assign Judge Ferguson to the district court.\textsuperscript{3891} The dissent noted that in order for Gano to succeed on his motion, he would have to establish (1) that his convictions were invalid because of lack of counsel, (2) that the sentencing judge incorrectly believed that Gano’s prior convictions were valid, and (3) that the sentence was enhanced because of the prior convictions.\textsuperscript{3892} Gano had established the first two elements of his claim; therefore a finding concerning the third factor would dispose of the claim.\textsuperscript{3893} However, the dissenting judge was concerned that the judge to whom the motion was referred would simply affirm the sentence for lack of information, since the original sentencing

\textsuperscript{3887} \textit{RULES GOVERNING § 2255 PROCEEDINGS} Rule 4(a) (1982) provides:

The original motion shall be presented promptly to the judge of the district court who presided at the movant’s trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.

\textsuperscript{3888} 705 F.2d 1136 (9th Cir. 1983).

\textsuperscript{3889} \textit{Id.} at 1137.

\textsuperscript{3890} \textit{Id.}


(b) The chief judge of a circuit or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit.

\textsuperscript{3892} 705 F.2d at 1138 (Boochever, J., dissenting) (citing Farrow v. United States, 580 F.2d 1339, 1345 (9th Cir. 1978)).

\textsuperscript{3893} \textit{Id.} (Boochever, J., dissenting).
judge was the only person who could say how much weight was given to the prior convictions in determining the sentence.\footnote{3894} Judge Boochever concluded that since the interests of judicial efficiency and the prevention of injustice may have been served by having the original judge hear Gano's motion, it should at least have been referred to the chief judge for consideration.\footnote{3895}

8. Due process at sentencing

The Supreme Court has made it clear that a criminal defendant is entitled to due process in the sentencing phase of a proceeding as well as in the trial phase.\footnote{3896} Although the extent of a defendant's due process rights at sentencing is unclear, the scope of these rights is narrower at sentencing than at trial.\footnote{3897}

In United States v. Adams,\footnote{3898} defendants Proctor and Mummert claimed that their due process rights had been violated during their sentencing hearings.\footnote{3899} The claim arose after the district court denied the defendants' motion to strike the previous testimony of a government witness or, in the alternative, to have the witness recalled for cross-examination.\footnote{3900}

On appeal, the Ninth Circuit upheld the district court's ruling.\footnote{3901}

\footnote{3894} Id. (Boochever, J., dissenting).
\footnote{3895} Id. at 1138-39 (Boochever, J., dissenting).
\footnote{3896} Gardner v. Florida, 430 U.S. 349, 358 (1977) (defendant has no right to a particular sentence, but the sentencing process must satisfy due process).
\footnote{3897} In United States v. Fatico, 458 F. Supp. 388, 397-98 (E.D.N.Y. 1978), aff'd, 603 F.2d 1053 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980), Judge Weinstein stated that "[t]he Circuit Courts are in fundamental agreement that: 'Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire procedure invalid as a violation of due process.'" (emphasis deleted) (quoting United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970)). While the circuit courts may be thus far in agreement, beyond that there is no clear indication of how far the sentencing court is required to go to protect the defendant's right to due process. Each case must be analyzed on its facts, but it appears that the appropriate standard of due process at sentencing is not as broad as at trial. See Gardner v. Florida, 430 U.S. 349, 358 n.9 (1977) (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands")). See also United States v. Morgan, 595 F.2d 1134, 1136 (9th Cir. 1979) (the standard for presenting information to the judge prior to sentencing is not as high as the standard for introducing evidence at trial).
\footnote{3898} 694 F.2d 200 (9th Cir. 1982), cert. denied, 103 S. Ct. 3085 (1983).
\footnote{3899} Id. at 202. The defendants were convicted on various charges associated with shipping, receiving and distributing obscene matter involving minors. Id. at 201.
\footnote{3900} Id. at 202. The appellants presented their motion at a continuance of the sentencing hearing. The witness who was wanted for cross-examination by the appellants was apparently not present when the motion was made, having testified before the hearing was continued. Id.
\footnote{3901} Id. at 203.
The court noted that, immediately after the witness had testified, the defendants were given an opportunity to cross-examine, which they declined. Instead, they presented the testimony of their own witness in rebuttal. The Ninth Circuit affirmed the sentences holding that under these circumstances, the district court did not abuse its discretion.

9. Death penalty

In a 1972 decision, Furman v. Georgia, the Supreme Court held that a capital sentencing procedure which fails to provide direction to the sentencer concerning the exercise of its discretion is unconstitutional because it violates the eighth amendment prohibition against cruel and unusual punishment and the fourteenth amendment guarantees of due process and equal protection under the law. In Furman, the Court found that the Georgia and Texas statutory schemes failed to sufficiently insulate a defendant from the risk of arbitrary and capricious imposition of the death penalty.

In the years immediately following Furman, approximately thirty-five states and the United States Congress amended their death penalty laws.
statutes to comport with the spirit of *Furman*.\footnote{3907} In *Gregg v. Georgia*,\footnote{3908} the Supreme Court held that imposition of the death penalty for a murder conviction is not per se unconstitutional,\footnote{3909} and that the revised Georgia sentencing scheme provides sufficient guidance to the sentencer to guard against an unlawful sentence.\footnote{3910}

The Georgia statutory scheme for capital cases includes a bifurcated trial, in which the determination of guilt is made during the first stage. If the defendant is found guilty, sentence is determined in the second stage.\footnote{3911} Once guilt has been established, the sentencer must find that at least one of ten statutory aggravating circumstances exists before the death penalty may be considered.\footnote{3912} In addition, the sentencer may consider any relevant nonstatutory mitigating or aggravating circum-

\footnote{3907. See Gregg v. Georgia, 428 U.S. 153, 179 n.23 (1976), for a listing of the states and statutes.}
\footnote{3908. 428 U.S. 153 (1976).}
\footnote{3909. Id. at 186-87 (Stewart, J., with Justices Powell and Stevens concurring and the Chief Justice and Justices White, Rehnquist and Blackmun concurring in the result).}
\footnote{3910. Id. at 198. Justice Stewart wrote:}
\footnote{Georgia's new sentencing procedures require as a prerequisite to the imposition to the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of *Furman*.}
\footnote{Id.}
\footnote{3911. See GA. CODE § 27-2538 and appendix to GA. CODE ch. 27-25 outlining unified appeal proceedings.}
\footnote{3912. GA. CODE § 27-2534.1 (1973) provided:}
\footnote{(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.}
\footnote{(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:}
\footnote{(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.}
\footnote{(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.}
\footnote{(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.}
\footnote{(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.}
\footnote{(5) The murder of a judicial officer, former judicial officer, district attorney or
stances as authorized by law. Finally, the Georgia system calls for automatic appeal to, and review by, the state supreme court.

In Zant v. Stephens, the defendant challenged the Georgia sentencing procedures on eighth amendment grounds, arguing that the statutory scheme was unconstitutional because it failed to instruct the sentencer to balance mitigating circumstances against aggravating circumstances before imposing the death penalty. In three separate opinions, a majority of the Court upheld the Georgia procedures as applied to Stephens.

After a state court jury trial, Stephens was convicted of murder and

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1985] CRIMINAL LAW SURVEY 551

solictor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

When the Georgia Code was revised in 1981, the portion of subsection (b)(1) providing "or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions" was deleted.

3913. Id. at § 27-2534.1(b).

3914. GA. CODE § 27-2537(c) (1983) provides:

(c) With regard to the sentence, the [state supreme] court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether . . . the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection (b) of Code Section [27-2534.1]; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.


3916. Id. at 2741-42.

sentenced to death.\textsuperscript{3918} The jury specified in writing that it had found three aggravating circumstances which warranted imposition of the death penalty: (1) the defendant had previously been convicted of a capital felony; (2) the defendant had a "substantial history of serious assaultive criminal convictions"; and (3) the defendant had escaped from a place of lawful confinement.\textsuperscript{3919}

While Stephens' appeal was pending in the state system, the Georgia Supreme Court held in another case\textsuperscript{3920} that one of the statutory aggravating circumstances identified by the jury in \textit{Zant} was "unconstitutionally vague."\textsuperscript{3921} However, when Stephens' appeal came before the Georgia Supreme Court on automatic review, the court affirmed the sentence, holding that the two other aggravating circumstances named by the jury were sufficient to justify imposing the death penalty.\textsuperscript{3922}

Stephens' case reached the United States Supreme Court after a series of appeals in the federal courts, in which Stephens had instituted

\textsuperscript{3918} 103 S. Ct. at 2736. After escaping from the Houston County jail, Stephens and an accomplice embarked on a two-day spree committing various car thefts, burglaries and an armed robbery, which culminated in the murder. The victim had surprised Stephens and his accomplice while they were burglarizing a home; they transported the victim away from the house and shot him. \textit{Id.}

\textsuperscript{3919} 103 S. Ct. at 2737. The jury stated that it had found the statutory aggravating circumstances contained in the judge's instructions designated as "One" and "Three". \textit{Id.} The judge's instructions provided in part:

\begin{quote}
You may consider any of the following statutory aggravating circumstances which you find are supported by the evidence. One, the offense of Murder was committed by a person with a prior record of conviction for a Capital felony, or the offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions. Two, the offense of Murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Three, the offense of Murder was committed by a person who has escaped from the lawful custody of a peace officer or place of lawful confinement. \textit{Id.}
\end{quote}

\textit{Id.} The Court pointed out that because of the two-part nature of circumstance "One" the jury findings could be considered either as three aggravating circumstances or two statutory circumstances, one having two bases. \textit{Id.} at 2737-38.


\textsuperscript{3921} 103 S. Ct. at 2738. The circumstance that the Georgia Supreme Court held invalid was the one providing that the defendant had "a substantial history of serious assaultive criminal convictions." \textit{Id.} (quoting Arnold v. State, 236 Ga. 534, 542, 224 S.E.2d 386, 392 (1976)). The Georgia court held that "the statutory language was too vague and nonspecific to be applied evenhandedly by a jury." 103 S. Ct. at 2738 n.5 (citing \textit{Arnold}, 236 Ga. at 540-42, 224 S.E.2d at 391-92).

The Fifth Circuit Court of Appeals had invalidated Stephens' sentence on the ground that it could not determine whether the jury had relied on the unconstitutional aggravating circumstance in deciding to impose the death penalty. The Supreme Court therefore certified to the Georgia Supreme Court a question regarding the validity of Stephens' sentence under state law when one of the aggravating circumstances had been invalidated.

The Georgia court responded at length, explaining the structure of Georgia sentencing procedures in homicide cases, and concluded that once a statutory aggravating circumstance is found to exist, "the case enters the area of the factfinder's discretion, in which all the facts and circumstances are considered."

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3923. 103 S. Ct. at 2738. The federal district court had denied Stephens' petition for a writ of habeas corpus. The Fifth Circuit Court of Appeals, however, invalidated Stephens' sentence because the Georgia Supreme Court had held that one of the aggravating circumstances found by Stephens' jury was unconstitutional. Stephens v. Zant, 631 F.2d 397, 406 (5th Cir. 1980).

Relying on Stromberg v. California, 283 U.S. 359 (1931), the Fifth Circuit stated that:

"If the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside."

It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance.

631 F.2d at 406 (citations omitted). The Fifth Circuit also expressed concern that evidence of the defendant's prior criminal record may have been improperly presented to the jury in connection with proving the unconstitutional circumstance. Id. This statement was later omitted from the opinion because such evidence would have been admissible under Georgia law whether or not the aggravating circumstance was in issue. See 648 F.2d 446 (5th Cir. 1981).

After the Fifth Circuit decision, Warden Zant petitioned for certiorari to the Supreme Court. It was granted in 454 U.S. 814 (1981).

3924. 103 S. Ct. at 2738. See supra note 3923.

3925. The Supreme Court certified the question: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?" 103 S. Ct. at 2739 n.11 (quoting Zant v. Stephens, 456 U.S. 410, 416-17 (1982)).

3926. See 103 S. Ct. at 2739-40 (quoting Zant v. Stephens, 250 Ga. 97, 99-100, 297 S.E.2d 1, 3-4 (1982)). The structure was explained by analogy to a pyramid containing all classes of homicides in which the severity of punishment grows incrementally the closer one approaches the apex. The death penalty is at the apex.

Starting from the base of the pyramid, the first line of demarcation separates statutorily defined murders from lesser homicides. The second line separates those murders for which the death penalty is a possible consequence from other forms of murder. Both statutory definitions and aggravating circumstances are elements in determining this class of murders. At least one statutory aggravating circumstance must be found to exist before the death penalty may be considered. The third line separates those murders for which the perpetrator may be sentenced to death from those for which he or she shall be sentenced to death. At this level, the discretion whether or not to impose the death penalty rests solely with the factfinder, who must consider all the relevant evidence, both as to the defendant and as to the crime, in mitigation or aggravation of the penalty. Should the death penalty be imposed, the case is then subject to automatic review by the Georgia Supreme Court. Id.
circumstances of the case determine . . . whether or not the case passes . . . into the area in which the death penalty is imposed.\textsuperscript{3927} In Stephens' case, the Georgia court advised, the sentence was valid because three statutory aggravating circumstances were found and only one was subsequently invalidated.\textsuperscript{3928}

The majority of the Supreme Court in Zant narrowed its consideration of the case to three issues: (1) is the jury in a Georgia capital case allowed too broad an area of discretion by virtue of the fact that specific statutory guidance ends after one aggravating circumstance is found; (2) was the rule of Stromberg v. California\textsuperscript{3929} violated in determining Stephens' sentence; and (3) must the sentence be invalidated because the unconstitutional aggravating circumstance was included in the jury instructions and may have been given undue weight, even though the defendant's prior criminal record was admissible?\textsuperscript{3930}

With respect to the first issue, the Court pointed out that Georgia, unlike many states, does not provide specific direction to the sentencer regarding the weighing of aggravating and mitigating factors once any aggravating factor has been found.\textsuperscript{3931} Stephens argued that a capital sentencing procedure which fails to provide guidance to the sentencer at the stage of separating cases in which the death penalty may be ordered from those in which it shall be ordered is unconstitutional under the rule of Furman v. Georgia.\textsuperscript{3932}

The court held that such guidance is not necessary so long as discretion is channeled to some extent.\textsuperscript{3933} The majority noted that in Gregg v.

\textsuperscript{3927} 103 S. Ct. at 2740 (quoting Zant v. Stephens, 250 Ga. 97, 100, 297 S.E.2d 1, 4 (1982)).
\textsuperscript{3928} 103 S. Ct. at 2740. The Georgia court explained that the function of the aggravating circumstance is limited to distinguishing those cases in which the death penalty may be imposed from those in which it may not be imposed. It serves no directional purpose thereafter. \textit{Id.} at 2741.
\textsuperscript{3929} 283 U.S. 359 (1931). \textit{See} discussion supra note 291.
\textsuperscript{3930} 103 S. Ct. at 2741.
\textsuperscript{3931} \textit{Id.} The Court cited, in a footnote, the statutory provisions of Arkansas, North Carolina, Tennessee and Wyoming which so provide. \textit{Id.} at n.12. The Model Penal Code § 210.6(2) (1980) also recommends specific jury instructions regarding the weighing of aggravating and mitigating factors.
\textsuperscript{3932} 103 S. Ct. at 2742. \textit{See supra} text accompanying notes 3904-06.
\textsuperscript{3933} 103 S. Ct. at 2742 n.14. \textit{See also} Godfrey v. Georgia, 446 U.S. 420, 428 (1980), holding that a state capital sentencing procedure "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.'" (plurality opinion) (quoting Gregg v. Georgia, 428 U.S. 153, 198 (1976); Proffitt v. Florida, 428 U.S. 242, 253 (1976)). The \textit{Zant} Court stated that it could not agree with Stephens' argument without being forced to overrule Gregg v. Georgia, in which the Court had approved Georgia's revised capital sentencing procedure even though it lacked the specific instructions argued for by Stephens. 103 S. Ct. at 2742.
the Georgia sentencing scheme had been held valid primarily because it requires a written finding of at least one valid statutory aggravating circumstance and requires a mandatory review by the state supreme court to determine whether the sentence was disproportionate or arbitrary. The Gregg Court had held that these procedures “adequately protected against the wanton and freakish imposition of the death penalty.” Since the Georgia scheme guides the jury by use of statutory aggravating circumstances, allows for consideration of evidence regarding both the individual characteristics of the defendant and of the crime, and mandates appellate review, the Court reaffirmed its holding that the Georgia scheme is constitutional. Consequently, since Stephens received full benefit of the scheme, his sentence would not be invalidated on this argument.

Stephens' second argument was that, under Stromberg v. California, his sentence should be set aside because the jury relied on an unconstitutional aggravating circumstance in reaching its decision. The Court stated that two rules may be extracted from Stromberg. First, Stromberg “requires that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.” This rule, the Court held, did not aid Stephens because the jury in his case did not return a general verdict; rather, by specifying exactly which aggravating circumstances it found to exist, the jury left no uncertainty to confound a reviewing court.

The second Stromberg rule requires that a general guilty verdict must be set aside if a single count indictment charges that a defendant

3935. 103 S. Ct. at 2742 (footnote omitted).
3936. Id. at 2743-44. The Court cautioned, however, that in order for a scheme such as Georgia's to be constitutional, “an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” Id. at 2742-43.
3937. Id. at 2744. The Court noted that Stephens' jury had found two valid aggravating factors which were rational and objectively determined and had been upheld by the Georgia Supreme Court on review. Id.
3938. 283 U.S. 359 (1931). In Stromberg, the Supreme Court overturned the verdict against the defendant because the jury below did not specify which section of a multi-part statute it relied on in determining guilt, and one applicable section of the statute had been held invalid. See also discussion of Stromberg supra note 291.
3939. 103 S. Ct. at 2744.
3940. Id.
3941. Id. at 2745.
3942. Id.
has committed a crime by both constitutionally protected and unprotected conduct, and the record does not negate the possibility that the verdict was based partially on the protected conduct. The Court declined to decide whether this rule would apply to Georgia capital sentencing procedures in general, holding that it did not apply in Zant because Stephens was not charged with committing any constitutionally protected act. Stephens’ challenge to his sentence under Stromberg thus also failed.

With respect to the third issue, Stephens claimed that his sentence was invalid because the jury was instructed to consider an invalid aggravating circumstance and such instruction may have affected their decision to impose the death penalty. The Court rejected this contention, reasoning that the aggravating circumstance was ruled invalid not because it infringed directly on any constitutional right, but rather because it was insufficient as a guideline in separating those murder cases for which the death penalty may be imposed from those in which it may not be imposed. The Court emphasized that the evidence underlying the finding of the invalid circumstance, that Stephens had a prior criminal record, would have been admissible during the sentencing phase of

3943. Id. at 2745-46 (citing Street v. New York, 394 U.S. 576, 588 (1969)). This extension of Stromberg was first made in Thomas v. Collins, 323 U.S. 516, 528-29, 540-41 (1945) (judgment reversed where single count contempt citation based on both a constitutionally protected and a nonprotected use of speech). In Street, the Supreme Court overturned the verdict where the defendant had been convicted on a single count indictment charging that both constitutionally protected speech and flag burning were unlawful. Street v. New York, 394 U.S. 576, 588, 594 (1969).

3944. 103 S. Ct. at 2746. In considering this possibility, the Court stated:

    The jury’s imposition of the death sentence after finding more than one aggravating circumstance is not precisely the same as the jury’s verdict of guilty on a single-count indictment after finding that the defendant has engaged in more than one type of conduct encompassed by the same criminal charge, because a wider range of considerations enters into the former determination. On the other hand, it is also not precisely the same as the imposition of a single sentence of imprisonment after guilty verdicts on each of several separate counts in a multiple-count indictment, because the qualitatively different sentence of death is imposed only after a channeled sentencing procedure.

Id. (footnote omitted).

3945. Id. at 2746. “In this case, the jury’s finding . . . raised none of the concerns underlying the holdings in Stromberg, Thomas, and Street, for it did not treat constitutionally protected conduct as an aggravating circumstance.” Id.

3946. Id. at 2747.

3947. See supra note 3943 and accompanying text.

3948. 103 S. Ct. at 2747. The Court distinguished several cases in which the invalid aggravating circumstance was also constitutionally protected conduct. Stromberg v. California, 283 U.S. 359 (1931) (display of a red flag); Terminiello v. Chicago, 337 U.S. 1 (1949) (expression of political views); United States v. Jackson, 390 U.S. 570 (1968) (request for jury trial). 103 S. Ct. at 2747.
the proceeding whether or not the invalid aggravating circumstance was at issue.\textsuperscript{3949} The Court refused to accord the improper instruction the status of a "constitutional defect," holding that the characterization of the evidence as tending to prove a statutory aggravating circumstance had an "inconsequential impact" on the jury when the evidence was otherwise admissible.\textsuperscript{3950}

In closing, the majority made two more remarks. First, it cited the importance of the mandatory review by the Georgia Supreme Court,\textsuperscript{3951} suggesting that if such a review had not taken place it would have reached a different result in \textit{Zant}.\textsuperscript{3952} Finally, the majority expressly reserved judgment concerning the effect of consideration of an invalid statutory circumstance by the sentencer which has been "specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty."\textsuperscript{3953} Since Georgia's capital sentencing scheme does not require such weighing by the sentencer, the determination of the question was not necessary to the disposition of \textit{Zant}.\textsuperscript{3954} The majority therefore reversed the decision of the Fifth Circuit Court of Appeals and upheld Stephens' sentence.\textsuperscript{3955}

Justice White, concurring in part and concurring in the judgment, disagreed with the majority's treatment of the \textit{Stromberg} problem. He cited a line of cases beginning with \textit{Claassen v. United States},\textsuperscript{3956} which

\begin{footnotes}
\item[3949] 103 s. Ct. 2747.
\item[3950] \textit{Id.} at 2749. The Court noted that a trial judge may properly instruct the jury to consider the defendant's prior criminal record in reaching the sentencing decision, and suggested that the following instruction would have been proper in \textit{Zant}:
\begin{quote}
If you find beyond a reasonable doubt that the defendant is a person who has previously been convicted of a capital felony, or that he has escaped from lawful confinement, you will be authorized to impose the death sentence, and in deciding whether or not that sentence is appropriate you may consider the remainder of his prior criminal record.
\end{quote}
\textit{Id.} This is the "hypothetical instruction" to which Justice Marshall, dissenting, referred. \textit{See infra} text accompanying note 3976.

In addition, the Court noted that the Georgia Supreme Court had impliedly approved the jury instructions as an accurate reflection of state law when it affirmed Stephens' sentence on direct appeal. 103 S. Ct. at 2749 n.25.
\item[3951] \textit{Id.} at 2749-50. \textit{See also supra} note 3914.
\item[3952] 103 S. Ct. at 2749. The Court stated: "Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review . . ." \textit{Id.}
\item[3953] \textit{Id.} at 2750. The Court appears to have answered this question in \textit{Barclay} v. \textit{Florida}, 103 S. Ct. 3418 (1983), in which it upheld the death penalty imposed under a statutory scheme in which the judge is instructed to weigh aggravating and mitigating circumstances and the judge had improperly considered a nonstatutory circumstance as an aggravating circumstance. See discussion of \textit{Barclay} beginning at text accompanying note 3977 \textit{infra}.
\item[3954] 103 S. Ct. at 2750.
\item[3955] \textit{Id.}
\item[3956] 142 U.S. 140 (1891). This line of cases includes \textit{Evans v. United States}, 153 U.S. 584,
held that if a general verdict is based on more than one count, and the evidence adduced supports the conviction and sentence on at least one count, the sufficiency of the evidence on the other counts need not be inquired into.\textsuperscript{3957} In Justice White's view, this rule suggests that even if the evidence of Stephens' prior criminal record had been constitutionally inadmissible, there would be no "Stromberg-Thomas-Street" problem because the sentence could be upheld on the valid grounds.\textsuperscript{3958}

Justice Rehnquist, concurring in the judgment, stated that he "[wrote] separately to make clear [his] understanding of the application of the Eighth and Fourteenth Amendments to the capital sentencing procedures used in this case."\textsuperscript{3959} He characterized the issues to be addressed in terms nearly identical to those used by the majority. With respect to the defendant's claim that a constitutionally acceptable capital sentencing procedure must provide instructions for weighing aggravating and mitigating circumstances, Justice Rehnquist said that such a "claim is, in my opinion, completely foreclosed by this Court's precedents."\textsuperscript{3960} Likewise, Justice Rehnquist agreed with the majority that the \textit{Stromberg} and \textit{Street} cases were not applicable to \textit{Zant}.\textsuperscript{3961} Furthermore, the inclusion of invalid statutory aggravating circumstances at the point of determining whether to impose the death penalty would have only a "minimal" effect on the jury's decision.\textsuperscript{3962} Similarly, Justice Rehnquist held, as did the majority, that whatever weight the evidence of Stephens' prior criminal record gained by virtue of being labelled a statutory aggravating circumstance was insignificant.\textsuperscript{3963}

\textsuperscript{3958} Id. at 2750 (White, J., concurring in part and concurring in the judgment).
\textsuperscript{3959} Id. at 2751 (White, J., concurring in part and concurring in the judgment).
\textsuperscript{3960} Id. (Rehnquist, J., concurring in the judgment).
\textsuperscript{3961} Id. at 2752 (Rehnquist, J., concurring in the judgment). Justice Rehnquist cited Gregg v. Georgia, 428 U.S. 153, 207 (1976), and drew a parallel between that case and \textit{Zant}, concluding with the majority that invalidating Stephens' sentence would require overruling \textit{Gregg}. 103 S. Ct. at 2752 (Rehnquist, J., concurring in the judgment).
\textsuperscript{3962} Id. at 2754 (Rehnquist, J., concurring in the judgment). Justice Rehnquist stated: The jury [in \textit{Zant}] received separate instructions as to each of several aggravating circumstances, and returned a verdict form separately listing three circumstances. The fact that one of these subsequently proved to be invalid does not affect the validity of the remaining two jury findings, just as the reversal on appeal of one of several convictions returned to separate counts does not affect the remaining convictions. There was "positive evidence" that Stephens' jury considered each aggravating circumstance "on its own merits and separately from the others."
\textsuperscript{3963} Id. (Rehnquist, J., concurring in the judgment).
\textsuperscript{3962} Id. at 2755 (Rehnquist, J., concurring in the judgment).
\textsuperscript{3963} Id. at 2757 (Rehnquist, J., concurring in the judgment). Justice Rehnquist stated: Whatever a defendant must show to set aside a death sentence, the present case in-
Justice Marshall, joined by Justice Brennan, dissented. The dissenters primarily objected to the majority's holding that submission of the unconstitutional aggravating circumstance to the jury was inconsequential. Justice Marshall maintained that, since Stephens' jury was given no guidance with respect to determining the actual sentence once it had found one aggravating circumstance, it was impossible to discern how much emphasis the jury actually placed upon the forbidden factor. In such circumstances, Justice Marshall stated, upholding the death penalty violates the eighth and fourteenth amendments.

Justice Marshall regarded the majority opinion as "an absolute mockery of [the] Court's precedents concerning capital sentencing procedures." The system approved by the majority, Justice Marshall reasoned, leaves the decision of whether a defendant is to live or die "to the unfettered discretion of the jury" if at least one statutory aggravating circumstance is found to exist. Such discretionary sentencing, Justice Marshall noted, was precisely the target of the court in Furman v. Georgia, and was the ill that the Court in Gregg v. Georgia found to be cured through revised statutory measures.

Furthermore, Justice Marshall noted that Stephens' jury was never advised that, once one statutory aggravating circumstance was found to exist, the statutory circumstances were to play no special role in the imposition of a particular sentence. Justice Marshall thus found that

volved only a remote possibility that the error [of instructing the jury to consider an invalid statutory circumstance] had any effect on the jury's judgment; the Eighth Amendment did not therefore require that the defendant's sentence be vacated.

*Id.* (Rehnquist, J., concurring in the judgment).

3964. *Id.* (Marshall, J., dissenting).

3965. *Id.* (Marshall, J., dissenting).

3966. *Id.* at 2763 (Marshall, J., dissenting). Justice Marshall stated:

Although the Court labors mightily in an effort to demonstrate that submission of the unconstitutional statutory aggravating circumstance did not affect the jury's verdict, there is no escape from the conclusion . . . that respondent was sentenced to death "under instructions that could have misled the jury." . . . Where a man's life is at stake, this inconvenient fact should not be simply swept under the rug.


3967. *Id.* at 2757 (Marshall, J., dissenting) (citing Gregg v. Georgia, 428 U.S. 153, 195 n.47 (1976) (plurality opinion)).

3968. *Id.* at 2760 (Marshall, J., dissenting).

3969. *Id.* (Marshall, J., dissenting).

3970. 408 U.S. 238 (1972).


3972. 103 S. Ct. at 2760 (Marshall, J., dissenting). Justice Marshall characterized the Georgia sentencing procedures, as approved by the Court, as embodying a "threshold theory," meaning that once the sentencer has passed the threshold of finding one statutory circumstance which
the majority made a patently unwarranted assumption that the jury gave no special weight to the invalid statutory circumstance.\textsuperscript{3974}

Finally, Justice Marshall disagreed with the Court's holding that submission of the invalid instruction to the jury did not reach the status of a constitutional defect.\textsuperscript{3975} He maintained that, even if the jury had received the majority's "hypothetical instruction," the sentence would nonetheless fail because of the lack of guidance given to the sentencer.\textsuperscript{3976}

In \textit{Barclay v. Florida},\textsuperscript{3977} the Supreme Court considered whether imposition of the death penalty was constitutional when the sentence was based in part on consideration of an aggravating circumstance not included in the Florida death penalty statute.\textsuperscript{3978} Barclay had been con-

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makes a defendant eligible for the death penalty, no more guidance or direction is constitutionally required to be given to the sentencer. \textit{Id.} at 2760 (Marshall, J., dissenting). Justice Marshall observed:

Under today's decision all the State has to do is require the jury to make some threshold finding. Once that finding is made, the jurors can be left completely at large, with nothing to guide them but their whims and prejudices. They need not even consider any statutory aggravating circumstances that they have found to be applicable. Their sentencing decision is to be the product of their discretion and of nothing else.

\textit{Id.} (Marshall, J., dissenting).

\textsuperscript{3974} \textit{Id.} at 2761 (Marshall, J., dissenting).

\textsuperscript{3975} \textit{Id.} at 2763-64 (Marshall, J., dissenting).

\textsuperscript{3976} \textit{Id.} at 2764 & n.8 (Marshall, J., dissenting). For the text of the "hypothetical instruction," see \textit{supra} note 3950.

\textsuperscript{3977} 103 S. Ct. 3418 (1983) (plurality opinion). The Court affirmed the imposition of the death penalty by a 6-3 vote. Justice Rehnquist wrote the plurality opinion, joined by Chief Justice Burger and Justices White and O'Connor. Justice Stevens, joined by Justice Powell, filed an opinion concurring in the judgment. Justice Marshall filed a dissenting opinion, in which Justice Brennan joined. Justice Blackmun filed a separate dissenting opinion.

\textsuperscript{3978} \textit{Id.} at 3420. The Florida death penalty procedure, codified in FLA. STAT. § 921.141 (1979), consists of three parts: an initial determination of guilt or innocence, the rendering of an advisory opinion by the jury, and final determination of the sentence by the judge. Section 921.141 provides:

\begin{quote}
(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However,
CRIMINAL LAW SURVEY

victed of first-degree murder and the jury recommended a sentence of life

this subsection shall not be construed to authorize the introduction of any evidence
secured in violation of the Constitution of the United States or the Constitution of
the State of Florida. The state and the defendant or his counsel shall be permitted to
present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury
shall deliberate and render an advisory sentence to the court, based upon the follow-
ing matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in sub-
section (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the ag-
gravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced
to life imprisonment or death.

(3) Findings in support of sentence of death.—Notwithstanding the recom-
medation of a majority of the jury, the court, after weighing the aggravating and
mitigating circumstances, shall enter a sentence of life imprisonment or death, but if
the court imposes a sentence of death, it shall set forth in writing its findings upon
which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection
(5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggra-
vating circumstances.

In each case in which the court imposes the death sentence, the determination of the
court shall be supported by specific written findings of fact based upon the circum-
stances in subsections (5) and (6) and upon the records of the trial and the sentencing
proceedings. If the court does not make the findings requiring the death sentence,
the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sen-
tence of death shall be subject to automatic review by the Supreme Court of Florida
within sixty (60) days after certification by the sentencing court of the entire record,
unless the time is extended for an additional period not to exceed thirty (30) days by
the Supreme Court for good cause shown. Such review by the Supreme Court shall
have priority over all other cases and shall be heard in accordance with rules promul-
gated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited
to the following:

(a) The capital felony was committed by a person under sentence of imprison-
ment.

(b) The defendant was previously convicted of another capital felony or of a
felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was
an accomplice, in the commission of, or an attempt to commit, or flight after com-
mitting or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or
imprisonment. The trial judge, after reviewing the presentence report, sentenced Barclay to death. As required by Florida law, the judge made a written account of the statutory aggravating and mitigating factors which had influenced his decision, but he also included as an aggravating factor the fact that Barclay had an "extensive criminal record." In addition, in the comments explaining his decision, the trial judge made a written account of the statutory aggravating and mitigating factors which had influenced his decision, but he also included as an aggravating factor the fact that Barclay had an "extensive criminal record."
judge "discussed the racial motive for the murder and compared it with his own experiences in the army in World War II, when he saw Nazi concentration camps and their victims." On appeal, the Florida Supreme Court affirmed, approving both the judge's findings and the sentence.

Barclay raised several challenges to his sentence before the United States Supreme Court. First, he argued that the trial judge improperly considered his prior criminal record as an aggravating circumstance. Second, he challenged the validity of the trial court's findings with respect to certain of the statutory aggravating circumstances. Finally, Barclay argued that the judge impermissibly considered racial hatred to be an aggravating circumstance.

The plurality disposed of Barclay's second and third contentions briefly, holding that the contested findings would be upheld as a matter of law unless they were "so unprincipled or arbitrary as to somehow violate the United States Constitution." The plurality thought that they were not. With respect to the contention that the judge should not have introduced his own experiences with Nazi concentration camps into the defendant's sentencing proceedings, the Court held that such a comparison was "neither irrational nor arbitrary," and would be upheld "[as] long as [the judge's] discretion is guided in a constitutionally adequate way . . . and so long as the decision [was] not so wholly arbitrary as to offend the Constitution."

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3983. Id. at 3423 (footnote omitted). The judge concluded:

To attempt to initiate such a race war in this country is too horrible to contemplate for both our black and white citizens. Such an attempt must be dealt with by just and swift legal process and when justified by a Jury verdict of guilty—then to terminate and remove permanently from society those who would choose to initiate this diabolical course.

Id. at 3423 n.6.

3984. See Barclay v. State, 343 So. 2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978). The Florida court later vacated its judgment sua sponte after the Supreme Court handed down Gardner v. Florida, 430 U.S. 349 (1977) (defendant was denied due process when, over jury's recommendation of life imprisonment, trial judge imposed death sentence based in part on presentence report, the contents of which were not disclosed to defendant and to which defendant was not given an opportunity to respond), and remanded Barclay for further hearings and resentencing. The trial court again imposed the death penalty, and the Florida Supreme Court affirmed in Barclay v. State, 411 So. 2d 1310 (Fla. 1981). The Florida Supreme Court refused, however, to "abrogate the law of the case," as decided on the first appeal, and confined its review of the second appeal to the proceedings on remand. 103 S. Ct. at 3422.

3985. 103 S. Ct. at 3422-24.

3986. Id. at 3423.

3987. Id. The Court distinguished Godfrey v. Georgia, 446 U.S. 420 (1980), in which imposition of the death penalty was held to be arbitrary. In Godfrey, the defendant had been sentenced to death on the strength of one unsupported aggravating circumstance. Id. at 3423 n.5.

3988. Id. at 3423-24. The Court further stated: "Such a comparison is not an inappropriate
The plurality agreed with Barclay that the trial judge's treatment of Barclay's prior criminal record as an "aggravating circumstance" was improper.\textsuperscript{3989} However, the Court rejected the suggestion that the error amounted to a constitutional violation. Citing \textit{Proffitt v. Florida},\textsuperscript{3990} the Court noted that the Florida sentencing procedures have survived constitutional attack.\textsuperscript{3991} Furthermore, the Court observed that, when a non-statutory aggravating circumstance plays a part in the determination of sentence and no mitigating factors are present, the Florida Supreme Court uses a "harmless error analysis."\textsuperscript{3992} In addition, the Court found that evidence of Barclay's criminal record was properly introduced at the sentencing phase, and there was no contention that Barclay was impugned for engaging in constitutionally protected activity.\textsuperscript{3993} The Court concluded that, since the Florida Supreme Court has approved of death sentences where both statutory and nonstatutory aggravating circumstances were taken into account, and "mere errors of state law are not the concern of this Court . . . unless they rise . . . to the level of a denial of rights protected by the United States Constitution," Barclay's argument would fail.\textsuperscript{3994}

Justice Stevens, joined by Justice Powell, wrote an opinion concurring in the judgment. Although he agreed with the plurality's decision, he wrote separately because "in some of its language the plurality speaks with unnecessary, and somewhat inappropriate, breadth."\textsuperscript{3995} Referring way of weighing the 'especially heinous, atrocious and cruel' statutory aggravating circumstance in an attempt to determine whether it warrants imposition of the death penalty." \textit{Id.} at 3424.

3989. \textit{Id.} at 3422. The Court noted that Florida conceded this point. \textit{Id.} (citing Mikenas v. State, 367 So. 2d 606, 610 (Fla. 1978)).
3991. 103 S. Ct. at 3425.
3992. \textit{Id.} at 3427 (citing Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977) (if no harm has resulted to the defendant, the sentence will be affirmed)). The Court also noted that the Florida court will reverse a death sentence if, after harmless error analysis, only one "relatively weak aggravating circumstance [is] left standing." \textit{Id.} (citing Lewis v. State, 398 So. 2d 432 (Fla. 1981)). In addition, a death sentence imposed over the life sentence recommendation by the jury will not be allowed to stand unless "‘the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.’" \textit{Id.} (quoting Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)).
3993. \textit{Id.} (citing Zant v. Stephens, 103 S. Ct. 2733, 2746-47 (1983)).
3994. \textit{Id.} at 3428 (citation omitted). The Court emphasized that, as in the Georgia scheme discussed in Zant v. Stephens, 103 S. Ct. 2733 (1983), the Florida Supreme Court automatically reviews all death sentences and had, in this case, done so twice. 103 S. Ct. at 3425 n.10 & 3428. Furthermore, the Florida Supreme Court adhered to the rule in Tedder v. State, \textit{supra} note 3992, in considering cases in which the trial judge had overridden the jury's life sentence recommendation, and would reverse unless "‘virtually no reasonable person could differ.’" \textit{Id.} at 3428 (quoting Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)).
3995. 103 S. Ct. at 3429 (Stevens, J., concurring in the judgment).
to the plurality's statement that "[o]ur review of [the Florida courts'] findings is limited to the question whether they are so unprincipled or arbitrary as to somehow violate the United States Constitution," Justice Stevens emphasized that the Court had never held that such an inquiry is sufficient in a capital case, "[n]or does a majority of the Court today adopt that standard." Instead, Justice Stevens observed, the Court has taken an active role in assuring that "the death penalty will be imposed in a consistent, rational manner." Accordingly, Justice Stevens stated that he wanted to focus attention on the factors which limit a sentencer's discretion.

Justice Stevens went on to concentrate his discussion on the constitutional posture in regard to statutory and nonstatutory aggravating and mitigating circumstances. He noted that it is not constitutionally necessary that nonstatutory mitigating circumstances be considered in the sentencer's balance. Nor is it mandated by the Constitution that only statutory aggravating circumstances be considered. The Florida scheme thus provides greater protection to defendants than is constitutionally required.

The Constitution does not require that nonstatutory mitigating circumstances be considered before the legal threshold is crossed and the defendant is found to be eligible for the death sentence. It is constitutionally acceptable to bring such evidence into the decisionmaking process as part of the discretionary post-threshold determination. In this case petitioner does not contend that any relevant mitigating evidence was excluded from his initial sentencing hearing, or that the trial court or jury was precluded as a matter of law from considering any information or arguments in mitigation.

At the time Barclay was sentenced, only statutory mitigating circumstances were weighed in the "threshold" determination of sentence under Florida law. Florida later amended its statute to allow all mitigating evidence, statutory or nonstatutory, to enter into the threshold decision.

Id. at 3430 n.2 (Stevens, J., concurring in the judgment).

4001. Id. at 3432-33 (citing Zant v. Stephens, 103 S. Ct. 2733 (1983); Gregg v. Georgia, 428 U.S. 153, 164, 196-97, 260 (1976); Proffitt v. Florida, 428 U.S. 242, 248, 256-57 n.14 (1976)), to support the proposition that "as long as [the nonstatutory] information is relevant to the character of the defendant or the circumstances of the crime," it is not constitutionally barred. 103 S. Ct. at 3433 (Stevens, J., concurring in the judgment).

4002. 103 S. Ct. at 3432-33 (Stevens, J., concurring in the judgment). In a footnote, Justice Stevens acknowledged that the Florida court sometimes confirms convictions when nonstatutory aggravating circumstances have been introduced, but never when no statutory aggravat-
Furthermore, Justice Stevens wrote, the Florida Supreme Court in performing automatic appellate reviews of all death penalty cases has not "become a rubber stamp for lower court death-penalty determinations." Rather, the Florida court reexamines the aggravating and mitigating factors in each case and has frequently reversed death sentences. In conclusion, Justice Stevens held that Barclay had been afforded all the constitutional protections due him, and concurred in the affirmance.

Justices Marshall and Brennan dissented in an opinion written by Justice Marshall. After reiterating his opinion that the death penalty is unconstitutional under all circumstances, Justice Marshall went on to explain the inadequacies in the plurality opinion.

Justice Marshall's objections to the majority's conclusion pertained to the sentencing judge's rationale for imposing the death penalty, and the Florida Supreme Court's cursory review of Barclay's case. Justice Marshall reasoned that since the jury had recommended life imprisonment rather than death, it must have found sufficient mitigating circumstances to outweigh the aggravating ones. Yet, the trial judge made no mention of such a finding by the jury, and, in fact, converted the nonexistence of one of the statutory mitigating circumstances into an aggravating circumstance. Justice Marshall noted that such a concluding circumstances have been found, and only when no statutory mitigating circumstances exist. "By definition, one or more statutory aggravating circumstances will always outweigh the complete absence of statutory mitigating circumstances." In such a situation, Justice Stevens explained, the Florida Supreme Court considers that inclusion of one or more nonstatutory aggravating factors along with at least one statutory factor does no harm because there is no possibility that the nonstatutory aggravating factors served to outweigh any mitigating factors. Stevens remarked that, since 1972, the Florida Supreme Court has affirmed only 120 of the 212 death penalty cases it reviewed. Stevens remarked that he did not "applaud" the cursory nature of the Florida Supreme Court's opinions upholding Barclay's sentence, but found no reason to reverse in the absence of any constitutional error.

Justice Marshall's reasoning that the jury's recommendation is based on a determination of whether sufficient aggravating circumstances exist to invoke the death penalty and whether there are sufficient mitigating circumstances which outweigh the aggravating factors, is based on FLA. STAT. § 921.141(2). See supra note 3977.

The trial judge concluded that, since
sion is clearly contrary to Florida law. Furthermore, Justice Marshall demonstrated that several of the judge's findings with respect to statutory aggravating circumstances were erroneous or suspect. Because of these factors, and the requirements of State v. Dixon and Tedder v. State, "the judge's sentencing order in this case was totally inadequate."

Justice Marshall also criticized the Florida Supreme Court's "perfunctory analysis" of Barclay's case on review. The Florida court had given some discussion to the situation of Barclay's co-defendant and indicated that "virtually the same considerations" applied to Barclay, ignoring the problems with the sentencing order and the significant differences between Barclay and his co-defendant. Justice Marshall concluded that Barclay's death sentence should be vacated.

Justice Blackmun also dissented in a brief separate opinion. He stated that "when a State chooses to impose capital punishment . . . it must be imposed by the rule of law." He concluded that the "errors

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Barclay had a prior criminal record, the mitigating circumstances that a defendant "has no significant history of prior criminal activity" (§ 921.141(6)(a)) did not apply, and the prior record constituted an aggravating circumstance. Id. (Marshall, J., dissenting). (citing Mikenas v. State, 367 So. 2d 606, 610 (Fla. 1978) ("substantial history of prior criminal activity is not an aggravating circumstance under the statute").

Id. at 3438-39 (Marshall, J., dissenting).

283 So. 2d 1, 9 (Fla. 1973) (all statutory aggravating factors "must be proved beyond a reasonable doubt before being considered by judge or jury"); cert. denied, 416 U.S. 943 (1974).

322 So. 2d 908, 910 (Fla. 1975) (after a jury recommendation of life imprisonment, a judge may not order death unless "the facts suggesting a sentence of death [are] so clear and convincing that no reasonable person could differ").

103 S. Ct. at 3440 (Marshall, J., dissenting). Justice Marshall went on to point out that the trial judge's errors were not accidental or unusual for that judge. In the past, the same judge had sentenced three other defendants to death over the life sentence recommendation of the jury, finding each time the same aggravating circumstances he found in Barclay's case. Justice Marshall stated:

The judge has repeatedly found that the felony was committed by a person under a sentence of imprisonment, that the defendant had previously been convicted of a violent felony, and that the defendant created a great risk of death to many persons, even though virtually all of these findings had no foundation in Florida law. And each time, Judge Olliff has recounted his experiences during World War II and recited boiler-plate language to the effect that he was not easily shocked but that the offense involved shocked him.

Id. (Marshall, J., dissenting). (emphasis in original) (footnotes omitted).

Id. at 3441 (Marshall, J., dissenting).

Id. (Marshall, J., dissenting) (quoting Barclay v. State, 343 So. 2d 1266, 1271 n.8 (Fla. 1977) (per curiam)). Justice Marshall noted that the Florida court had, in fact, stated: "[the trial judge's] thorough analysis is precisely the type we would expect from mature, deliberative judges in this state." Id. (Marshall, J., dissenting) (emphasis in original).

Id. at 3445 (Marshall, J., dissenting).

Id. (Blackmun, J., dissenting).
and missteps” in this case amounted to a denial of due process, and that the sentence should not have been upheld.\footnote{4020}

E. Cruel and Unusual Punishment

The eighth amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”\footnote{4021} It serves to confine the states’ power of punishment within civilized standards.\footnote{4022} Both barbarous forms of punishment and grossly excessive ones are cruel and unusual. A sentence may be excessive if it serves no appropriate societal interest, or is disproportionate to the offense.\footnote{4023} Thus, the eighth amendment has been interpreted as requiring that a punishment fit the crime.\footnote{4024} This does not imply, however, that capital punishment will always be struck down under the eighth amendment.\footnote{4025} Instead, the question is whether the defendant receives his or her “just dessert.” Thus, “‘imprisonment in the State prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment.’”\footnote{4026}

The Supreme Court has on occasion stated that the eighth amendment prohibits a sentence that is grossly disproportionate to the crime.\footnote{4027} The Court has used disproportionality of sentence to chal-

\footnote{4020. Id. at 3445-46 (Blackmun, J., dissenting).}
\footnote{4022. Trop v. Dulles, 356 U.S. 86, 100 (1958).}
\footnote{4024. Weems v. United States, 217 U.S. 349, 369 (1910).}

The Ninth Circuit interprets the eighth amendment as a prohibition against punishment “‘so out of proportion to the crime committed that it shocks a balanced sense of justice.’” United States v. Holman, 436 F.2d 863, 866 (9th Cir.) (court allowed eight-year prison sentence for narcotics violations) (quoting Gallego v. United States, 276 F.2d 914, 918 (9th Cir. 1960)), cert. denied, 402 U.S. 913 (1970).

The Supreme Court has interpreted the eighth amendment as a prohibition against any punishment inconsistent with “the evolving standards of decency that mark the progress of a maturing society.” Trop v. Dulles, 356 U.S. 86, 101 (1958).

\footnote{4025. See, e.g., Gregg v. Georgia, 428 U.S. 153, 168-69 (1973) (death penalty not per se cruel and unusual); Furman v. Georgia, 408 U.S. 238, 241-42 (1972) (per curiam) (death penalty is not cruel, unless manner of execution is inhuman and barbarous).
\footnote{4026. Weems v. United States, 217 U.S. 349, 368 (1910).}
lenge severe forms of punishment for non-capital crimes. Yet the Court has ruled that the length of prison sentences in felony cases is "purely a matter of legislative prerogative." This ruling has resulted in a drastic reduction of proportionality tests in non-capital cases. In recent years the proportionality analysis has appeared most frequently in opinions dealing with the death penalty.

In 1964, Rummel was convicted of fraudulently using a credit card; in 1969, he was convicted of passing a forged check; and in 1973, he was charged with obtaining money by false pretenses. The trial judge imposed a life sentence, relying on Texas' recidivist statute, which mandates a life sentence upon conviction for a third felony.

The Rummel Court recognized that some disproportionate prison sentences will violate the eighth amendment: "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, . . . [for example] if a legislature made overtime parking a felony punishable by life imprisonment." Id. at 274 n.11. The Court implied that proportionality was a constitutional requirement in death penalty cases. Id. at 272. The Court stated, however, that the eighth amendment did not require proportionality for non-capital crimes due to the substantial difference between the death penalty and any other punishment. Id. The Court quoted Justice Stewart in Furman v. Georgia, 408 U.S. 238 (1972) (per curiam):

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Rummel v. United States, 445 U.S. at 272 (quoting Furman v. Georgia, 408 U.S. at 306 (Stewart, J., concurring)).

The Rummel Court distinguished Weems v. United States, 217 U.S. 349 (1910), where a proportionality rationale was used to strike down a non-capital sentence. The distinction between the two cases was based on uniqueness. Rummel, 445 U.S. at 272-73. The Rummel Court emphasized the extreme and dramatic nature of Weems' punishment for falsifying a public record. The bizarre sentence included 12 years of hard labor and permanent civil disabilities. Id. at 273 (citing Weems, 217 U.S. at 366). See also Hutto v. Davis, 454 U.S. 370, 371 (1982) (per curiam), where the defendant asserted that a 40-year sentence was so grossly disproportionate to the crime of possessing fewer than nine ounces of marijuana that it constituted cruel and unusual punishment. The Hutto Court relied on Rummel as its sole authority: "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts . . . ." Id. at 375.

4030. In United States v. Valenzuela, 646 F.2d 352, 354 (9th Cir. 1980), for example, the Ninth Circuit struck down a disproportionality challenge, ruling that life imprisonment without possibility of parole was not sufficiently analogous to capital punishment to warrant disproportionality review. The Ninth Circuit observed that the Supreme Court has regarded life imprisonment without possibility of parole as similar to other prison sentences. Id. at 354 (citing Schick v. Reed, 419 U.S. 256, 267 & n.7 (1974)).


Except for cases involving capital punishment, few challenges to the proportionality of particular sentences have been successful. Rummel, 445 U.S. at 272.
In *Solem v. Helm*, the Supreme Court held that the eighth amendment prohibited a life sentence without possibility of parole for a recidivist convicted of a seventh, nonviolent felony. The life sentence was deemed disproportionate to his crime of passing a bad check.

By 1975, the State of South Dakota had convicted defendant Helm of six felonies: he had three convictions for third-degree burglary, and one conviction each for obtaining money under false pretenses, grand larceny, and third-offense driving while intoxicated. In 1979, Helm was charged with passing a "no account" check for one hundred dollars. The maximum punishment for that crime would normally have been five years imprisonment in the state penitentiary and a $5000 fine. Because of his criminal record, however, Helm was sentenced to life imprisonment without possibility of parole under South Dakota's recidivist statute.

In a five-to-four decision, Justice Powell reasoned that the proportionality principle should apply, thus invalidating the criminal sentence. The analysis relied on historical and Supreme Court precedent. The

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4032. 103 S. Ct. 3001 (1983).
4033. S.D. CODIFIED LAWS ANN. § 22-41-1.2 (1979) provides in pertinent part:
   Any person who, for himself or as an agent or representative of another for present consideration with intent to defraud, passes a check drawn on a financial institution knowing at the time of such passing that he or his principal does not have an account with such financial institution, is guilty of a Class 5 felony.
4034. S.D. CODIFIED LAWS ANN. § 22-7-8 (Supp. 1981) provides: "When a defendant has been convicted of at least three prior convictions [sic] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony."
The maximum penalty for a "Class 1 felony" was life imprisonment and a $25,000 fine. South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S.D. CODIFIED LAWS ANN. § 24-154 (1979). The Governor may pardon prisoners or commute their sentences, S.D. CONST. art. IV, § 3, but no other relief from sentence is available.

In the present case, the South Dakota Supreme Court affirmed the sentence. The Governor denied Helm's request for commutation. Helm then sought habeas corpus relief in the United States District Court, arguing that the sentence constituted cruel and unusual punishment under the eight and fourteenth amendments. The district court denied relief, but the court of appeals reversed. The United States Supreme Court granted certiorari to consider the eighth amendment question and affirmed.

4035. 103 S. Ct. at 3006-10. The Court observed that the belief that punishment should be proportionate to the crime is deeply embedded in common law. *Id.* at 3006. This belief was expressed in the Magna Carta, applied by English courts for centuries, and manifested in the English Bill of Rights in language that was used in the eighth amendment. *Id.* at 3007.

The constitutional concept of proportionality has been followed explicitly in the Supreme Court for almost a century. *Id.* at 3007-08. The Court has applied the principle to invalidate criminal sentences. *Id.* In *Weems v. United States*, 217 U.S. 349, 367 (1910), for example, the Court noted that "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *See also* Robinson v. California, 370 U.S. 660, 667 (1962) (statute making it a misdemeanor to be addicted to narcotics violates eighth and fourteenth amendments).

The Court has recently used proportionality to hold capital punishment excessive in cer-
Court observed that when sentences are reviewed under the eighth amendment, the proportionality analysis should be guided by objective criteria that prior Court cases have recognized. Such criteria include: (1) gravity of the offense and harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences imposed for commission of the same crime in other jurisdictions. The Court has recognized that the principle of proportionality applies to felony prison sentences. Solem v. Helm, 103 S. Ct. at 3009 (citing Weems, 217 U.S. at 377). Cf. Hutto v. Finney, 437 U.S. 678, 685 (1978) ("[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards"). Moreover, no penalty is per se constitutional; the Court noted in Robinson v. California, 370 U.S. at 667, that even a single day in prison may be unconstitutional under certain circumstances. Solem v. Helm, 103 S. Ct. at 3009-10.

The Supreme Court has recognized that the principle of proportionality applies to felony prison sentences. Solem v. Helm, 103 S. Ct. at 3009 (citing Weems, 217 U.S. at 377). Proportionality was the ground for striking down a death penalty for rape in Coker. The Coker Court stated that a punishment is unconstitutionally excessive "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain or suffering; or (2) is grossly out of proportion to the severity of the crime." Id. at 592.

4036. 103 S. Ct. at 3010-11. The Court reiterated the objective factors that prior Court cases have used. See, e.g., Coker v. Georgia, 433 U.S. 584, 592 (1977). Proportionality was the ground for striking down a death penalty for rape in Coker. The Coker Court stated that a punishment is unconstitutionally excessive "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain or suffering; or (2) is grossly out of proportion to the severity of the crime." Id. at 592.

4037. 103 S. Ct. at 3010 (citing Enmund v. Florida, 458 U.S. 782, 787 (1982) (Court compared robbery to murder); Coker v. Georgia, 433 U.S. 584, 597-98 (1977) (Court considered gravity of rape and compared it to other crimes such as murder); Robinson v. California, 370 U.S. 660, 666-67 (1962) (Court weighed nature of crime of drug addiction); Weems v. United States, 217 U.S. 349, 363, 365 (1910) (Court commented on pettiness of offense)).

4038. Id. (citing Enmund v. Florida, 458 U.S. 782, 795-96 (1982) (Court noted that all other felony murderers on death row were more culpable than defendant); Weems v. United States, 217 U.S. 349, 380-81 (1910) (Court enumerated more serious crimes that were subject to less severe penalties)).

4039. Id. (citing Enmund v. Florida, 458 U.S. 782, 792 (1982) ("only about a third of American jurisdictions would ever permit a defendant . . . [such as Enmund] to be sentenced to die"); Coker v. Georgia, 433 U.S. 584, 595-96 (1977) (Court observed that Georgia was only state authorizing death penalty for rape of adult female); Weems v. United States, 217 U.S. 349, 380 (1910) (Court considered that under federal law, a similar offense was punishable by only a fine and two years imprisonment). See also Gregg v. Georgia, 428 U.S. 153, 179-80 (1976) (Court considered that many states enacted statutes authorizing death penalty).

The Court in Helm first proceeded on the assumption that courts are competent to weigh the relative severity of crimes. 103 S. Ct. at 3011. Comparisons can be drawn with respect to the harm to the victim or society. The absolute magnitude of the crime may be relevant. Id. (citing Roberts v. Collins, 544 F.2d 168, 169-70 (4th Cir.) (per curiam) (assault with intent to murder deemed more serious than simple assault), cert. denied, 430 U.S. 973 (1977); Dembowski v. State, 251 Ind. 250, 252, 240 N.E.2d 815, 817 (1968) (armed robbery held more serious than robbery); Cannon v. Gladden, 203 Or. 629, 632, 281 P.2d 233, 235 (1955) (rape considered more serious than assault with intent to rape)).

The Helm court noted that the guilt of the offender is also an accepted criterion for comparing the gravity of offenses. 103 S. Ct. at 3011 (citing Enmund v. Florida, 458 U.S. 782, 798
Court considered the defendant's sentence without possibility of parole, and whether the chance of commutation was adequate to sustain an otherwise unconstitutional punishment.

In reviewing the defendant's sentence, the Court first considered the gravity of the offense and the harshness of the penalty. The Court noted that the offense of uttering a "no account" check for one hundred dollars is regarded by society as among the less serious crimes. The defendant's crime involved no violence or threat of violence, and the value of the check was relatively low.

The Court observed that the defendant's prior felonies were relatively minor; they were nonviolent and not directed against a person. The sentence was the most severe that the state could have given any criminal for any crime.

In considering the second criterion, sentences imposed on other criminals in the same jurisdiction, the Court observed that the defendant was treated in the same manner as, or more harshly than, other criminals in the state who committed far more serious crimes. The Court concluded that their crimes were more serious than uttering a "no account" check, even though the check writer had already committed six minor

(1982) (defendant's conduct was not as culpable as his accomplices', because of defendant's lack of intent to kill).

The Court's analysis next proceeded on the assumption that courts can compare different sentences. Id. The Court observed that comparisons can be drawn between capital and non-capital punishment, and between sentences of imprisonment and sentences with no deprivation of freedom. Id. at 3011-12. See Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (absent a knowing and intelligent waiver, defendant has right to representation at trial whenever imprisonment is involved). The Court noted that for sentences of imprisonment, the issue is where to draw the line. 103 S. Ct. at 3012. While recognizing that such decisions are problematic, the Court still acknowledged that the courts are constantly saddled with the responsibility of drawing similar distinctions in a variety of situations. Id. See, e.g., Barker v. Wingo, 407 U.S. 514, 522 (1972) ("any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case"); Baldwin v. New York, 399 U.S. 66, 69 (1970) (defendant has right to jury trial "where imprisonment for more than six months is authorized"). In citing these cases where the Court had distinguished between prison sentences, the Court implied that it was competent to draw similar lines in the present case.

4040. 103 S. Ct. at 3012-13.

4041. Id. at 3013.

4042. Id. at 3014. The Court noted that there was a handful of crimes that required punishment by imprisonment: murder; and on a second or third offense, treason, first-degree manslaughter, first-degree arson, and kidnapping. There was a second group of crimes for which life imprisonment could be imposed at the judge's discretion. These crimes included: on a first offense, treason, first-degree manslaughter, first-degree arson, and kidnapping; on a second or third offense, attempted murder, placing an explosive device on an aircraft, and first-degree rape; and any felony after three prior offenses. Id. There was a third group of very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault. Id.
In considering the final criterion, sentences imposed for commission of the same crime in other jurisdictions, the Court observed that such a strict sentence could not have been imposed in forty-eight of the fifty states. Nevada is the only state other than South Dakota that authorizes life imprisonment without possibility of parole under the facts of this case. The Court observed that there was no indication that any defendant whose prior offenses were as minor as Helm's had received the maximum penalty in Nevada. Thus, the Court concluded that Helm's sentence was harsher than it would have been in any other state.

The Court considered whether the possibility of commutation was adequate to sustain an otherwise unconstitutional punishment. The Court disagreed with the state's argument that this possibility matched the possibility of parole. The Court's analysis emphasized the distinctions between parole and commutation. Parole, an established area in the rehabilitative system, is normally anticipated in the overwhelming number of cases, assuming good behavior. Parole is governed by specified legal standards. Commutation, however, is an ad hoc use of executive clemency, that may occur at any time for any reason, without adherence to any standards. The Court distinguished Rummel v. Estelle, which held that a life sentence imposed after even a third nonvi-
volent felony conviction did not violate the eighth amendment.\textsuperscript{4052} Here the Court concluded that the South Dakota commutation system was different from the parole system presented in \textit{Rummel}.\textsuperscript{4053}

In distinguishing \textit{Rummel}, the Court noted that \textit{Rummel} did not rely merely on the existence of a parole system.\textsuperscript{4054} The \textit{Rummel} decision considered that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years."\textsuperscript{4055} In contrast, the \textit{Helm} Court noted that no life sentence in South Dakota had been commuted in over eight years, while parole, when authorized, was granted regularly during that period.\textsuperscript{4056} Even if Helm's sentence was commuted, he would be eligible to be considered only for parole, the terms of which are more stringent in South Dakota than in Texas.\textsuperscript{4057} Thus, the Court concluded that a life sentence imposed after a seventh felony conviction was significantly disproportionate to the offense and violated the eighth amendment.\textsuperscript{4058}

The dissent emphatically asserted the importance of attention to recent precedent, especially \textit{Rummel}. The dissent argued: "[T]oday the Court blithely discards any concept of stare decisis, trespasses gravely on the authority of the States, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases."\textsuperscript{4059} Moreover, the dissent rejected the argument that all of the defendant's crimes were relatively minor, and argued that by comparison Rummel was less culpable.\textsuperscript{4060} The dissent set out to prove that the differences between the instant case and \textit{Rummel} were insubstantial, that Helm's argument paled alongside Rummel's, and that Helm deserved his sentence, since even the \textit{Rummel} Court imposed life imprisonment.

\textsuperscript{4052} Id. at 285. See supra note 4029.
\textsuperscript{4053} 103 S. Ct. at 3015-16.
\textsuperscript{4054} Id. at 3015.
\textsuperscript{4055} Id. (citing \textit{Rummel v. Estelle}, 445 U.S. 263, 280 (1980)). \textit{Rummel} could have been eligible for parole in as few as 10 years. \textit{Id.} at 3016. "[A] proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." \textit{Rummel v. Estelle}, 445 U.S. at 280-81.
\textsuperscript{4056} 103 S. Ct. at 3016.
\textsuperscript{4057} Id.
\textsuperscript{4058} Id.
\textsuperscript{4059} Id. at 3017 (Burger, C.J., dissenting). "While the doctrine of stare decisis does not absolutely bind the Court to its prior opinions, a decent regard for the orderly development of the law and the administration of justice requires that directly controlling cases be either followed or candidly overruled." \textit{Id.} at 3020-21 (Burger, C.J., dissenting).

In response, the majority asserted that its decision was completely consistent with prior Court cases, including \textit{Rummel}. \textit{Id.} at 3008 n.13, 3016 n.32 (Burger, C.J., dissenting).
\textsuperscript{4060} Id. at 3017 (Burger, C.J., dissenting).
The dissent argued that although the majority holding could not be reconciled with *Rummel*, the majority did not overrule that case. Helm advanced the same argument as Rummel; the Court rejected Rummel's arguments, even though his case was stronger. The *Rummel* Court declined to ascertain, using a moral scale, whether Rummel had received a fair sentence. Thus, the *Rummel* Court's approach conflicted with that of the majority in the present case, which stressed the importance of judging the proportional gravity of an offense. The dissent argued, in contrast, that proportionality review has never been applied to a case involving solely a sentence of imprisonment. The dissent cited *Rummel* for the proposition that the eighth amendment does not empower courts to review a sentence of imprisonment to determine its proportionality to the offense. The *Rummel* Court emphasized that the Court may not usurp legislative discretion by drawing lines between different sentences of imprisonment.

The dissent argued that the majority's three objective criteria for determining proportionality were completely at odds with the reasoning in *Rummel*. The *Rummel* Court disagreed with precisely the same

4061. Id. at 3018 (Burger, C.J., dissenting).
4062. Id. (Burger, C.J., dissenting).
4063. Id. at 3017 (Burger, C.J., dissenting).
4064. Id. at 3018 (Burger, C.J., dissenting). The *Rummel* Court similarly said that proportionality analysis generally applied only to capital punishment cases because of the "unique nature of the death penalty." *Rummel* v. Estelle, 445 U.S. 263, 272 (1980).

The *Rummel* Court likewise rejected the importance of determining whether Rummel's punishment was disproportionate to his offense. *Id.* at 273. Such a determination was salient in *Weems* v. United States, 217 U.S. 349 (1910), where an extreme, painful penalty had been imposed. The *Rummel* Court distinguished *Weems* on the basis of the severity of the punishment.

4065. "Given the unique nature of the punishments considered in *Weems* . . . , one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, . . . the length of the sentence actually imposed is purely a matter of legislative prerogative." *Helm*, 103 S. Ct. at 3018 (Burger, C.J., dissenting) (quoting *Rummel* v. Estelle, 445 U.S. 263, 274 (1980) (emphasis in original)).

4066. Id. at 3019 (Burger, C.J., dissenting) (citing *Rummel* v. Estelle, 445 U.S. 263, 275 (1980)). The *Rummel* decision was followed in *Hutto* v. Davis, 454 U.S. 370, 374 (1981) (per curiam), where the Court condemned judicial intrusions into the line-drawing process that is the responsibility of the legislature.

This same philosophy had appeared 70 years earlier in *Weems* v. United States, 217 U.S. 349, 353 (1910) (citing *In re Bayard*, 63 How. Pr. 73, 78 (1882)), which asserted that "[c]ourts would not be justified in interfering with the discretion and judgment of the legislature, except in very extreme cases."

4067. 103 S. Ct. at 3019 (Burger, C.J., dissenting). First, the *Rummel* Court rejected Rummel's suggestion to consider the gravity of the offense, holding that the absence of violence does not necessarily decrease societal interest in the punishment for a particular crime. *Id.* (Burger, C.J., dissenting) (citing *Rummel* v. Estelle, 445 U.S. 263, 275 (1980)).

Next, the Court denied Rummel's argument to consider the sentences imposed for com-
analysis used by the majority in the present case.4068

The dissent asserted that the eighth amendment does not prohibit imprisonment disproportionate to the crime. It argued that the Court has applied a proportionality analysis only in extreme cases, such as capital punishment.4069 The dissent feared that the Court’s holding would inundate the appellate courts with cases in which guiding standards would be lacking: “By asserting the power to review sentences of imprisonment for excessiveness the Court launches into uncharted and uncharted waters.”4070

Addressing the specific facts of the present case, the dissent rejected the notion that Helm’s sentence was disproportionate to his crime. The dissent argued that Helm’s crimes, including burglary and drunk driving, had potential for violence, whereas Rummel committed “three truly non-violent felonies.”4071 Thus, the dissent disagreed with the majority holding that Helm’s sentence constituted cruel and unusual punishment, while Rummel’s did not.

The dissent rejected the majority opinion that a life sentence with possibility of commutation is excessive, in contrast to a life sentence with possibility of parole.4072 The dissent rebutted the majority’s holding by asserting that a well-behaved “lifer” in Helm’s position would most likely not serve for life.4073 In concluding, the dissent again emphasized the defendant’s seven felony convictions,4074 the importance of adherence to recent precedent,4075 and the Court’s inability to eclipse the power of the legislature.4076

mission of the same crime in other jurisdictions. The Rummel Court noted that recidivist laws vary widely among states, only some states have comprehensive provisions for parole, and such comparisons invade concepts of federalism. Id. (Burger, C.J., dissenting) (citing Rummel, 445 U.S. at 280-82). Finally, the Court rejected Rummel's suggestion to consider sentences imposed on other criminals in the same jurisdiction, holding that consideration of the severity of punishment is within the province of the legislature. Id. (Burger, C.J., dissenting) (citing Rummel, 445 U.S. at 282-83 n.27).

4068. Id. (Burger, C.J., dissenting).
4069. Id. at 3021 (Burger, C.J., dissenting).
4070. Id. at 3022 (Burger, C.J., dissenting).
4071. Id. at 3023 (Burger, C.J., dissenting).
4072. Id. (Burger, C.J., dissenting).
4073. Id. (Burger, C.J., dissenting). “Only a fraction of ‘lifers’ are not released within a relatively few years . . . [T]here is a significant probability that respondent will experience what so many ‘lifers’ experience.” Id. (Burger, C.J., dissenting).
4074. “Surely seven felony convictions warrant the conclusion that respondent is incorrigible.” Id. (Burger, C.J., dissenting).
4075. “It is even more curious that the Court should brush aside controlling precedents that are barely in the bound volumes of United States Reports.” Id. (Burger, C.J., dissenting).
4076. “The Court would do well to heed Justice Black's comments about judges overruling
F. Probation

1. Restitution

Restitution, as a condition of parole, is limited to the amounts for which a defendant is actually convicted.\(^\text{4077}\)

In \textit{United States v. Orr},\(^\text{4078}\) defendant Orr was charged with nine counts of embezzling\(^\text{4079}\) $3715 from two banks at which she had been employed. Orr plea bargained with the prosecution and agreed to plead guilty to a superseding indictment charging two misdemeanor counts of embezzling $100 from each bank. The prosecution, in return, agreed to drop the other charges and make no sentencing recommendations. The agreement did not make reference to restitution. In the presentence report, Orr admitted that she had taken $3815. According to the presentence interview, it was her belief that she could be made to repay only the amount that she was charged with in the indictment against her.\(^\text{4080}\) Nothing in the record indicated that Orr agreed to make total restitution as a condition of her probation.

On the first count, Orr was sentenced to ninety days imprisonment and on the second count she received a suspended sentence with five years probation.\(^\text{4081}\) The probation was made conditional on Orr making restitution of $3815.\(^\text{4082}\)

On appeal, Orr argued that she could not, as a condition of probation, be made to pay restitution in excess of the amount for which she

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\(^{4077}\) United States v. Orr, 691 F.2d 431, 433-34 (9th Cir. 1982). This is the rule in the majority of jurisdictions. \textit{See} United States v. Tyler, 602 F.2d 30, 33 (2d Cir. 1979) (restitution exacted for customs fraud violations); United States v. Buechler, 557 F.2d 1002, 1008 (3d Cir. 1977) (trial court exceeded its authority by imposing a restitution order in excess of amount specified in the plea bargain); United States v. Hoffman, 415 F.2d 14, 22-23 (7th Cir.) (where actual damages were not determined as to the amount and identity of aggrieved party, $10,000 restitution ordered to Illinois Director of Insurance was an abuse of authority), \textit{cert. denied}, 396 U.S. 958 (1969); United States v. Stoehr, 196 F.2d 276, 284 (3d Cir. 1952) (probation conditioned on payment of all income tax due; condition would become inoperative if by the time of prisoner's release, no determination of prisoner's tax liability could be made).

\(^{4078}\) 691 F.2d 431 (9th Cir. 1982).

\(^{4079}\) 18 U.S.C. § 656 (1976) provides in pertinent part:

\begin{quote}
    Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank . . . embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both . . .
\end{quote}

\(^{4080}\) 691 F.2d at 432.

\(^{4081}\) \textit{Id.}

\(^{4082}\) \textit{Id.}
was convicted. She also contended that restitution could not be ordered to the bank involved in count one, because it was not the count for which she received conditional probation.

The requirement of restitution as a condition of probation is authorized by 18 U.S.C. section 3651. In Karrel v. United States, the Ninth Circuit interpreted the statute to mean that restitution could be ordered only for amounts for which a defendant was convicted and not for counts which had been dismissed. Narrow exceptions have developed to this interpretation but, in general, this rule is applied. The Ninth Circuit in Orr held that the order for restitution of $3815 could not stand because the plea agreement did not specifically call for restitution. Also, the record made no indication that Orr had plea bargained for, or consented to, an amount in excess of the counts for which she was convicted as a condition of probation. Therefore, the sentencing court was limited to imposing restitution only on the counts for which Orr was convicted.

Orr's second contention was that she should not be required to repay the bank involved in the first count because probation was conditioned on the second count. The court found nothing in 18 U.S.C.

4083. Id.
4084. Id.
4085. 18 U.S.C. § 3651 (1976) provides that a defendant "may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had."
4086. 181 F.2d 981 (9th Cir. 1950).
4087. Id. at 987. The court's reasoning was that it was unfair to make a defendant pay for something for which he could not be convicted.
4088. 691 F.2d at 433. See Phillips v. United States, 679 F.2d 192 (9th Cir. 1982). In Phillips, the defendant pleaded guilty to three counts of a multicount indictment but no specific amount was mentioned in any of the counts. The defendant agreed to make restitution of a certain sum during plea bargaining. Because no restitution was ordered for dismissed counts, the Ninth Circuit upheld the order to make restitution for the agreed upon amount. The court explained that the plea bargain had been "fully explored in open court" and the defendant subsequently signed a stipulation that he would make restitution. Id. at 194.
4089. 691 F.2d at 433-34. In United States v. Landay, 513 F.2d 306 (5th Cir. 1975), a bank obtained a civil consent judgment against a defendant before he had pled. The defendant agreed that he would allow the civil judgment to be incorporated into the conditions of his probation. The amount that the defendant was obliged to pay was in excess of the amount covered by the counts for which he was convicted. The court nevertheless upheld the order to make restitution because the defendant freely admitted that he owed the bank exactly the amount the bank claimed. Id. at 308.

The prosecution in Orr made a Landay argument, but the Ninth Circuit held that Orr was distinguishable because Orr's "private agreement was not incorporated by her agreement in the order for restitution as part of the plea agreement." 691 F.2d at 433-34 n.3.
4090. 691 F.2d at 433-34.
4091. Id. at 434.
section 3651 to support that interpretation and cited case law involving similar sentences in multicount indictments.\textsuperscript{4092}

2. Revocation of probation

Although the district court has broad discretion to revoke probation when its conditions are violated,\textsuperscript{4093} that discretion is subject to appellate review for abuse or fundamental unfairness.\textsuperscript{4094} It is an abuse of discretion to revoke probation after an unreasonable delay or under circumstances that are "inherently misleading to the probationer."\textsuperscript{4095}

In \textit{United States v. Hamilton},\textsuperscript{4096} probationer Hamilton appealed an order revoking his probation.\textsuperscript{4097} In 1976, Hamilton was convicted of conspiring to possess and sell checks stolen from a bank. He was sentenced to five years imprisonment. The sentence was suspended on the condition that he complete five years of probation and spend 120 days in jail. Hamilton was allowed to serve the 120 days on weekends, and had completed forty-nine of the sixty weekends when he stopped reporting to

\textsuperscript{4092} \textit{Id.} See, e.g., Phillips v. United States, 679 F.2d 192, 194 (9th Cir. 1982) (none of conviction counts stated a specific amount, yet $6,000 restitution order upheld); United States v. Roberts, 619 F.2d 1, 2 (7th Cir. 1979) (amount of actual damages caused by defendant sufficient for trial judge to order restitution); United States v. Runck, 601 F.2d 968, 969 (8th Cir. 1979) (where judge imposed restitution as a condition of probation, not requested by the government attorneys, condition was not within locus of plea bargain), \textit{cert. denied}, 444 U.S. 1015 (1980).

\textsuperscript{4093} Higdon v. United States, 627 F.2d 893, 900 (9th Cir. 1980) (probation revoked where probationer did not meet his charitable work requirement).

\textsuperscript{4094} United States v. Dane, 570 F.2d 840, 843 & n.4 (9th Cir. 1977), \textit{cert. denied}, 436 U.S. 959 (1978). The \textit{Dane} court cited Burns v. United States, 287 U.S. 216 (1932), for the proposition that the main issue in probation revocation is serving justice with a proper regard for the best interests of the public and those of the defendant. Within those broad parameters, the sentencing court has broad discretion to revoke probation, subject to due process rights. The decision of a sentencing court will not be overturned short of a finding of an abuse of discretion. \textit{Dane}, 570 F.2d at 843. The court stated that the focus of review is not whether probation conditions have been violated, but whether an abuse of discretion has occurred. The court also noted that even though no condition may have been violated, probation can be revoked if the probationer's acts warrant such a treatment because probation is a privilege, not a right. \textit{Id.} at 843 n.4. See Trueblood Longknife v. United States, 381 F.2d 17, 19-20 (9th Cir.) (nowhere in \textit{Burns} does it say that discretion to revoke may only be exercised where conditions of probation have been violated), \textit{cert. denied}, 390 U.S. 926 (1967).

\textsuperscript{4095} United States v. Hamilton, 708 F.2d 1412 (9th Cir. 1983). See United States v. Tyler, 605 F.2d 851, 853 (5th Cir. 1979) (probation system imposes a duty not to delay unreasonably in bringing charges of probation violations); Greene v. Michigan Dep't of Corrections, 315 F.2d 546 (6th Cir. 1963) (authorities must use reasonable diligence to issue and execute warrant for arrest of parolee after a violation or waiver of violation and loss of jurisdiction may result).

\textsuperscript{4096} 708 F.2d 1412 (9th Cir. 1983).

\textsuperscript{4097} \textit{Id.} at 1413.
The record did not show that his probation officer reprimanded him; rather it indicated that the probation officer did not consider the breach to be either "notable or serious." Subsequently, Hamilton informed the district court on June 22, 1978 of his failure to complete his jail term, and petitioned that court in an effort to reschedule the remaining eleven weekends. Again, on August 23, 1978, the district court had notice of Hamilton's breach when he petitioned the district court for partial return of his probation bond. The court took no action, either to reschedule the eleven weekends or to revoke probation.

From the record, it was determined that Hamilton had a casual relationship with his probation officer. They did not meet regularly, although Hamilton made known his activities and whereabouts which evidently was acceptable to the probation officer.

Hamilton had completed over four of his five years of probation when he was assigned a new probation officer. The new officer mailed Hamilton directions to meet him on May 14, 1981, and an order to appear in district court on May 18, 1981. When Hamilton failed to appear on either date, a bench warrant was issued for his arrest. On July 13, 1981, a hearing to revoke his probation was held and Hamilton was charged with four probation violations: (1) failure to complete his 120 days in jail; (2) failure to report for his meeting with the new probation officer on May 14, 1981; (3) failure to appear in district court on January 14, and May 18, 1981; and (4) failure to work at a lawful occupation. The district court then revoked his probation and reinstated his five-year sentence.

Hamilton contended that the district court abused its discretion. At the probation revocation hearing, he admitted that he failed to finish out his 120 days, but he claimed he did not receive notice of the May 14 and May 18, 1981 dates until after May 18th. Hamilton also testified that the reason he received notice late was because he had moved to a new location, a fact he had made known to his former probation officer. The government introduced no evidence to rebut Hamilton's testimony. As for missing the January 14, 1981 appearance, Hamilton testified that he had appeared in court but found the courtroom closed. He also stated that his probation officer had told him that the judge was in Arizona. As to the government's contention that he was unemployed, Hamilton introduced "substantial, corroborated, and uncontradicted testimony that he

4098. Id.
4099. Id. at 1413-14.
4100. Id.
4101. Id.
was gainfully involved in personal business affairs." \(^{4102}\)

The Ninth Circuit held that the district court had committed an abuse of discretion by revoking Hamilton's probation. \(^{4103}\) The court pointed out that the district court had notice three years prior to the revocation hearing that Hamilton had not finished his 120-day jail term. \(^{4104}\) The court reasoned that since Hamilton had affirmatively made the default known and neither the district court nor the probation officer had taken action, failure to complete the jail term was not an adequate basis for revocation. \(^{4105}\)

The district court also based its revocation on Hamilton's failure to keep scheduled appointments, and to make written reports of his employment and whereabouts. \(^{4106}\) The Ninth Circuit noted the laxity of the first probation officer in overlooking Hamilton's failure to complete eleven weekends, allowing sporadic oral progress reports to substitute for timely written reports, contacting the probationer infrequently, and letting Hamilton live in Newport Beach without giving a specific address. \(^{4107}\) The court found that this laxity, when contrasted with the rigid expectations of the second probation officer, created an inconsistent standard. \(^{4108}\) The court held that Hamilton could not be expected to adhere to the second officer's stricter standards without adequate notice. \(^{4109}\) Therefore, the court stated that it would be unfair to penalize Hamilton for his failure to anticipate a varying standard. \(^{4110}\) The court indicated that if a new probation officer wants to enforce stricter standards than his predecessor, then the probationer must be so advised before a violation can become the basis of revocation. \(^{4111}\)

\(^{4102}\) Id.

\(^{4103}\) Id.

\(^{4104}\) Id.

\(^{4105}\) Id. at 1415.

\(^{4106}\) Id.

\(^{4107}\) Id.

\(^{4108}\) Id.

\(^{4109}\) Id.

\(^{4110}\) Id.

\(^{4111}\) The Ninth Circuit chose to steer a middle ground. It did not want to strip a probation officer or district court of the discretion to wait and "assess the cumulative effect of several violations." Id. See, e.g., Morrissey v. Brewer, 408 U.S. 471, 479-80 (1972) (question of whether to recommit parolee is complex and it is important to know gravity and number of infractions to make that evaluation); United States v. Johnson, 415 F.2d 1130 (9th Cir. 1969). In Johnson, the defendant was given probation for dispensing narcotics. One year later, Johnson pled guilty to burglary and the judge who had granted Johnson probation in the drug case wrote him a warning that any new violation would result in his probation being revoked. Subsequently, Johnson pled guilty to traffic violations and the judge revoked his probation.

The Ninth Circuit also did not want automatic revocation for minor or technical violations. 708 F.2d at 1415. See United States v. Tyler, 605 F.2d 851 (5th Cir. 1979) (no sugge-
The Ninth Circuit also found that Hamilton was gainfully employed. The court stated that activities that are related to starting or winding up a legitimate business enterprise constitute gainful employment. Thus, the district court’s revocation order was vacated and Hamilton’s probation was reinstated.

G. Parole

Parole is a conditional and revocable release of a prisoner serving a sentence. Federal adult prisoners serving a maximum term or terms of more than one year may apply for parole and may be released into a parole program according to the discretion of the Parole Commission.

After an inmate arrives at a federal prison, an initial hearing is held
to determine a parole release date. At this hearing, which is generally held within 120 days of the prisoner's incarceration, two examiners interview the prisoner and, in conjunction with parole guidelines set forth in 28 Code of Federal Regulations section 2.20, make recommendations to the Parole Commission. The Commission can take one of three actions in response to these recommendations: (1) set a presumptive parole date for release within ten years of the hearing; (2) set an effective date of parole; or (3) continue the inmate to a ten year reconsideration hearing. The presumptive parole date is a release date contingent upon the good conduct of the inmate, any new adverse information concerning the inmate and any other relevant matters. The Commission will only advance a presumptive parole date for superior conduct or exceptional circumstances.

An effective parole date is a release date approved after a hearing held within six months of the potential parole date or following a pre-release review of the inmate's record. A pre-release review is held to determine whether the presumptive parole date conditions have been met.

A ten-year reconsideration hearing is a review of the inmate's record after ten years. After holding a ten-year reconsideration hearing, the Commission may take one of the three steps outlined above: (1) set a presumptive parole date; (2) set an effective parole date; or (3) again continue the inmate for another ten-year reconsideration hearing. The ten-year reconsideration hearing may, like the presumptive parole date, be advanced for superior conduct or under exceptional circumstances.

In the case of prisoners having a minimum parole ineligibility in excess of ten years, an initial hearing is held approximately ninety days prior to the completion of that term.

1. Parole boards' discretion

The parole guidelines adopted by the United States Parole Commission establish suggested prison terms to be served before parole should be granted. The ranges are determined by the severity of the crime committed and the characteristics of the individual defendant.

The initial recommendation for a parole date is made by a panel of examiners after a parole hearing. The recommendation is subse-
quently reviewed by an administrative examiner. The administrative examiner then makes a recommendation to the Regional Commissioner, who may modify the recommendation. If the Regional Commissioner modifies the suggested parole date by more than six months, the matter is referred to the National Commissioners for consideration. The prisoner must be given written notice of this referral within twenty-one days of the original parole hearing, and the National Commissioners are obliged to act within thirty days after the referral.

After the Regional or National Commissioners have established a parole date, the prisoner may file a regional appeal within thirty days. The decision on the regional appeal may then be appealed to the National Appeals Board, which makes a final decision. The Ninth Circuit has held that it will not reverse the Parole Commission’s decision setting a parole date unless the Commission has abused its discretion.

118. 28 C.F.R. § 2.24(b)(2) (1983) provides in pertinent part: “[A] Regional Commissioner may . . . [o]n his own motion, modify the recommendation of a hearing examiner panel to bring the decision to a date not to exceed six months from the date recommended by the examiner panel.” See also Hatton v. Keohane, 693 F.2d 88, 89 (9th Cir. 1982) (Regional Commissioner may modify any sentence by up to six months, including one involving a reduced recommendation because of good behavior).


120. 28 C.F.R. § 2.24(a) (1983) provides:

A Regional Commissioner may review the recommendation of any examiner panel and refer this recommendation, prior to written notification to the prisoner, with his recommendation and vote to the National Commissioners for consideration and any action deemed appropriate. Written notice of this referral action shall be mailed or transmitted to the prisoner within twenty-one days of the hearing. Action shall be taken by the National Commissioners within thirty days of the date of referral action by the Regional Commissioner, except in emergencies.

121. 28 C.F.R. § 2.25(a) (1983) provides: “A prisoner or parolee may submit to the responsible Regional Commissioner a written appeal of any decision to grant . . . , rescind, deny or revoke parole . . . . This appeal must be filed on a form provided for that purpose within thirty days from the date of entry of such decision.”

122. 28 C.F.R. § 2.26 (1983) provides in part:

(a) Within 30 days of entry of a Regional Commissioner’s decision under § 2.25, a prisoner or parolee may appeal to the National Appeals Board on a form provided for that purpose . . . . The National Appeals Board may, upon the concurrence of two members, affirm, modify, or reverse the decision, or order a rehearing . . . .

(b) The National Appeals Board shall act within 60 days of receipt of the appellant’s papers, to affirm, modify, or reverse the decision.

(c) Decisions of the National Appeals Board shall be final.

123. See Hatton v. Keohane, 693 F.2d 88, 89 (9th Cir. 1982); O’Brien v. Putnam, 591 F.2d
In *Reynolds v. McCall*, the defendant pleaded guilty to armed bank robbery involving a kidnapping in violation of 18 U.S.C. section 2113(a), (d) and (e), and was sentenced to twelve years imprisonment. After a parole hearing, the examiner panel placed the defendant in the "Greatest II" offense severity category. However, based on the defendant's youth and favorable prognosis for rehabilitation, the panel recommended that Reynolds be released on parole after serving only forty-eight months in prison.

Nevertheless, the administrative hearing examiner recommended parole only after sixty months imprisonment, due to the severity of the crime. The Regional Commissioner agreed and referred the matter to the National Commissioners, but did not notify Reynolds of the referral until 131 days later. During this time, the National Commissioners notified Reynolds that they had affirmed the sixty month recommendation. Reynolds then instituted a series of appeals which ultimately brought him before the Ninth Circuit.

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53, 55 (9th Cir. 1979) (Commission's decision to consider the offense for which the prisoner was convicted was not an abuse of discretion).

4124. 701 F.2d 810 (9th Cir. 1982).

4125. 18 U.S.C. § 2113 (1982) provides in part:

(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 . . . of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, . . . with intent to commit . . . any felony . . . or any larceny—

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 . . . this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, should be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section . . . kills any person or forces any person to accompany him without the consent of such person, should be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

Reynolds was twenty-two years old at the time of sentencing, and could have been sentenced as a youth offender. However, he was sentenced as an adult offender. 701 F.2d at 811.

4126. 701 F.2d at 811. Reynolds was placed in the "Greatest II" category because the bank robbery involved a firearm and a kidnapping. *Id.*

4127. *Id.*

4128. *Id.*

4129. *Id.* The Regional Commissioner's failure to notify the defendant of the referral within twenty-one days contravened 28 C.F.R. § 2.24(a). *See supra* note 4120.

4130. 701 F.2d at 811.

4131. *Id.* at 811-12. On December 16, 1979, Reynolds filed a regional appeal, in which the Regional Commissioner upheld the previous sixty month recommendation. Reynolds then filed a national appeal, in response to which the National Appeals Board affirmed the Regional
On appeal, the defendant challenged the sixty month parole date recommendation on three grounds. He contended that: (1) the failure of the Regional Commissioner to give him timely notice of the referral to the National Commissioners was a violation of his due process rights; (2) the National Commissioners' extension of his parole term beyond that recommended by the examiner panel was an abuse of discretion; and (3) the placing of the defendant in the "Greatest II" severity category violated his due process rights. The Ninth Circuit addressed each contention and affirmed the denial of Reynold's habeas corpus petition.

With respect to his first claim, Reynolds argued that the Regional Commissioner's failure to give him timely notice of the referral to the National Commissioners impaired his ability to present additional information and arguments in his regional appeal. Relying on *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, the Ninth Circuit rejected this claim. The court held that Reynolds had adequate notice of the issues to be raised in his regional appeal because he was notified of the changed parole recommendation and the reasons for the change more than three weeks before he filed his regional appeal. Furthermore, even if Reynolds was confused by the defect in notification, he had ample opportunity to raise, and did raise, additional arguments before the National Appeals Board and the Ninth Circuit.

Commissioner's decision. Reynolds then petitioned for a writ of habeas corpus under 28 U.S.C. § 2241 (1976), which the district court denied. Finally, he appealed the district court's decision to the Ninth Circuit. The court noted that, in all, Reynolds had received six reviews of his parole application, "more than his 'day in court.'"
Reynolds presented two arguments in support of his second contention. Reynolds first argued that the Commissioners were precluded from reconsidering the severity of the offense in determining the parole term because this factor had already been considered in placing Reynolds in the “Greatest II” severity category. The Ninth Circuit rejected this argument outright, relying on *O'Brien v. Putnam.*

Second, Reynolds argued that the decision to extend his parole term was unjustified. The court also rejected this argument, holding that a sixty month parole term for a crime that fell in the “Greatest II” category and involved such aggravating circumstances as use of a firearm, kidnapping, and a large ransom demand did not constitute an abuse of discretion.

Finally, Reynolds contended that placing him in the “Greatest II” category violated due process. He claimed that the “Greatest I” category was more appropriate in his case because the kidnapping lasted only a short time and resulted in no harm to the hostage. The court rejected this argument on two grounds. First, the “Greatest II” category expressly includes the offense of holding a kidnap victim for ransom, an offense expressly excluded from the “Greatest I” category. Second,
in the event that an offense may be classified in more than one category, the most serious category must be used. Reynolds' offense was thus clearly a "Greatest II" offense.

2. Due process in revocation proceedings

The discretion vested in parole boards is generally quite broad. Parole may be revoked if, at a statutorily mandated hearing, the board finds that the parolee has committed a parole violation. In Morrissey v. Brewer, the Supreme Court expanded the scope of due process requirements for parolees by ruling that a parolee is entitled to two hearings before parole may be revoked: a preliminary hearing at the time of arrest to determine whether there was probable cause to believe a parole violation had occurred; and a later, more thorough, hearing to make the final revocation decision.

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4145. Id. (citing 28 C.F.R. § 2.20 note (c) (1983)).
4146. Id.
4147. See, e.g., 28 C.F.R. § 2.20 (1983), containing the Rules of the United States Parole Commission respecting parole guidelines and the statement of the Parole Commission's general policy with respect to granting parole. Section 2.20 provides in part:
(a) To establish a national parole policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Parole Commission has adopted guidelines for parole release consideration.
(b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics . . . .
(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.
See also Wash. State Bd. of Prison Terms & Paroles, Board Rule 2.210 (parole board has full discretion in setting the minimum term of confinement except when otherwise mandated by law); CAL. PENAL CODE § 5077 (Deering 1980) (board of prison terms has authority to set parole length and conditions, modify decisions of Department of Corrections and revoke parole).
4148. A parole revocation hearing is required by 18 U.S.C. § 4214 (1976), which provides for a preliminary hearing as well as for a final parole revocation hearing whenever a parolee has allegedly violated parole. Section 4214(d) provides in part:
Whenever a parolee is summoned or retaken . . . and the Commisson finds pursuant to the procedures of this section and by a preponderance of the evidence that the parolee has violated a condition of his parole the Commission may . . . :
(5) formally revoke parole.
18 U.S.C. § 4214(a)(1)(B) provides that the revocation hearing must be held within sixty days of determining whether probable cause exists to believe that the parolee has violated a condition of parole.
4150. 408 U.S. 471 (1972).
4151. Id. at 485-89. In Morrissey, two prisoners argued that they had been denied due process because their paroles were revoked on the basis of parole officers' reports without a hearing. On the facts of Morrissey, the Court held that a parolee is entitled to two hearings before
In *Pierre v. Washington State Board of Prison Terms and Paroles*, the defendant claimed that his due process rights had been violated because the Parole Board relied on incorrect information and failed to follow its guidelines in setting his minimum term. Pierre argued that the Parole Board had improperly added twenty-four months to his minimum term because the Board had relied on an FBI record that showed two previous convictions which were later reversed on appeal. Addition of the twenty-four months resulted in a guideline term of imprisonment of 132 months, which exceeded the guideline range of 92-123 months for a defendant with Pierre's characteristics convicted of the same crime.

The Ninth Circuit found Pierre's contentions to be without merit. The record showed that after the 132 month term was calculated, Pierre had informed the Parole Board that the prior convictions had been reversed. The Board subsequently reduced the guideline term to 108 months before the final decision was made. The court thus held that parole is revoked as protection against an unjust deprivation of liberty. *Id.* at 482. The Court reasoned that a preliminary hearing, as well as a formal revocation hearing, is a necessary due process requirement because (1) there is often a significant delay between arrest and the date of the formal hearing, and (2) since the arrest often occurs at a place distant from the institution where the parolee will await the formal hearing, there should be a prompt preliminary hearing before transporting and detaining the parolee. *Id.* at 485.

4152. 699 F.2d 471 (9th Cir. 1983). The defendant had been convicted in 1974 on two counts of robbery and was paroled in February, 1979. He allegedly participated in a robbery in June, 1979. On July 23, 1979, his parole was suspended. The Washington State Board of Prison Terms and Paroles conducted an administrative review on August 1, 1979 to determine whether probable cause existed to believe that Pierre had violated parole. The defendant was not present at this review.

Upon a finding of probable cause, the Board held a formal hearing on August 13, 1979 at which the defendant and his counsel were present and participated. After the August 13 hearing, the Board found that the defendant had violated the terms of his parole and revoked it. *Id.* at 471-72.

4153. *Id.* at 472. The court discussed the Washington State procedures for sentencing when the defendant is convicted of a felony offense, and the parole board guidelines for setting minimum parole terms. *Id.* According to a Washington statute, the court is required to sentence a person convicted of a felony to the maximum statutory term. *Id.* (citing WASH. REV. CODE § 9.95.010 (West 1977)). The Parole Board establishes the minimum term using guidelines similar to the United States Parole Commission guidelines. *See* 28 C.F.R. 2.20 (1982), *supra* note 4147 and WASH. REV. CODE § 9.95.040 (West 1977). So long as the term is within the guidelines range, the term is presumed valid. If the term is set outside the guidelines range, the Board must provide written reasons for the aberration. 699 F.2d at 472.

The WASH. REV. CODE sections cited above have been amended to provide that they will no longer apply to convictions after July 1, 1984. WASH. REV. CODE § 9.95.900 (West Supp. 1983-84).

4154. 699 F.2d at 472.
4155. *Id.*
4156. *Id.*
the Board was well within its discretion in imposing the 108 month minimum term without providing a written explanation for its decision.\textsuperscript{4157}

The court then addressed the constitutionality of the Parole Board's revocation procedures. The court addressed the issue with reference to the \textit{Morrissey} two hearing requirement, questioning whether both a preliminary hearing and a formal hearing are constitutionally required in every parole revocation case.\textsuperscript{4158} The court held that when an administrative review is conducted shortly after arrest, as was the case in \textit{Pierre}, there is no need for a \textit{Morrissey} style preliminary hearing, so long as the formal revocation hearing is held promptly thereafter.\textsuperscript{4159}

In \textit{Hopper v. United States Parole Commission},\textsuperscript{4160} the Ninth Circuit considered whether the defendant was entitled to habeas corpus relief as a result of the Parole Commission's failure to provide him with a timely revocation hearing.\textsuperscript{4161} Hopper had been convicted on various charges in a Nevada federal court in 1976.\textsuperscript{4162} He was paroled in May, 1979. While still on parole, he was arrested in California for armed robbery. Unable to post bail, Hopper remained in state custody until he was brought to trial six months later. He was convicted in state court and sentenced to

\textsuperscript{4157} \textit{Id.}

\textsuperscript{4158} \textit{Id.} at 472-73. In discussing the \textit{Morrissey} guidelines, the Ninth Circuit characterized them as "general framework to guide future parole revocation proceedings in order to guarantee that parolees are not deprived of procedural due process . . . [with the] themes of flexibility and informality [running] throughout . . . . [T]he two-hearing requirement was just one way to satisfy minimum due process; it is not the only way in every case." \textit{Id.} at 473.

One statutory exception to the two hearing requirement is contained in 18 U.S.C. \textsection 4214(b)(1) (1982), which states that no preliminary hearing is required when a parolee has been convicted of an offense between release on parole and the formal hearing, the conviction constituting probable cause per se.

\textsuperscript{4159} 699 F.2d at 473. In \textit{Pierre}, the final revocation hearing was held 121 days after parole was suspended and thirteen days after the determination of probable cause, well within the sixty day requirement of 18 U.S.C. \textsection 4214(a)(1)(B). The court distinguished \textit{Morrissey} on its facts, holding that \textit{Morrissey} does not absolutely require two hearings. Rather, it requires that due process be satisfied in every case. 699 F.2d at 473. The Court quoted \textit{Morrissey}, stating that: "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands . . . . [N]ot all situations calling for procedural safeguards call for the same kind of procedure.'" \textit{Id.} (quoting \textit{Morrissey}, 408 U.S. at 481).

The California Supreme Court applied this principle in \textit{In re Law}, 10 Cal. 3d 21, 27 (1973), holding that a preliminary hearing on a new charge held after suspension of parole may satisfy the pre-revocation hearing requirement.

\textsuperscript{4160} 702 F.2d 842 (9th Cir. 1983).

\textsuperscript{4161} \textit{Id.} at 845. Hopper also argued that the Parole Commission should have credited the time remaining on his federal sentence with time he spent in state custody, and that he received consecutive sentences in violation of the double jeopardy clause. \textit{Id.} at 844. The Ninth Circuit, however, did not reach these claims, finding them to be premature. \textit{Id.}

\textsuperscript{4162} \textit{Id.} at 844. Hopper was convicted of "possessing stolen bank funds, conspiracy, aiding and abetting escape, and false statements before a grand jury." \textit{Id.}
seven years in state prison on the robbery charge.\textsuperscript{4163}

Soon after Hopper was arrested in California, the United States Parole Commission issued a parole violator warrant for his arrest, which was subsequently lodged as a detainer with the California state police.\textsuperscript{4164} In November, 1981, after he had been in state prison for seven months, Hopper wrote to the Parole Commission to protest the delay in holding a parole revocation hearing.\textsuperscript{4165} In December, 1981, he filed a habeas corpus petition which the district court denied.

In appealing the denial of his habeas petition, Hopper advanced three arguments in support of his contention that he had been denied a timely revocation hearing. First, he claimed that the failure to hold a timely hearing amounted to a denial of his due process rights.\textsuperscript{4166} Relying on United States v. Wickham,\textsuperscript{4167} the Ninth Circuit held that Hopper failed to state a constitutional claim.\textsuperscript{4168} Under Wickham, Hopper was required to show that the delay was both unreasonable and prejudicial.\textsuperscript{4169} The court found that Hopper had failed to make such a showing, and thus declined to reach the issue.\textsuperscript{4170}

Second, Hopper argued that the Interstate Agreement on Detainers Act (IADA)\textsuperscript{4171} required dismissal of the federal parole revocation

\textsuperscript{4163} Id.
\textsuperscript{4164} Id. The legislative history of the Interstate Agreement on Detainers Acts defines "detainer" as a "notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." See H.R. REP. NO. 1018, 91st Cong., 2d Sess. 2 (1970) and S. REP. NO. 1356, 91st Cong., 2d Sess. 2 (1970), reprinted in U.S. CODE CONG. & AD. NEWS 4864.
\textsuperscript{4165} 702 F.2d at 845. While in state prison, Hopper had requested to be transferred to federal custody. The California Corrections Department agreed to transfer him if the United States Regional Parole Commissioner approved. In June, 1981, Hopper's case was reviewed and the case analyst recommended that Hopper remain in state custody with the detainer intact. Id. at 844.
\textsuperscript{4166} Id. at 845.
\textsuperscript{4167} 618 F.2d 1307 (9th Cir. 1979).
\textsuperscript{4168} 702 F.2d at 845.
\textsuperscript{4169} 618 F.2d at 1311. The court also cited Reese v. United States Board of Parole, 530 F.2d 231, 235 (9th Cir.) (delay in holding parole revocation hearing not violative of due process when petitioner did not show prejudice resulted from delay), cert. denied, 429 U.S. 999 (1976).
\textsuperscript{4170} 702 F.2d at 845. The court found that Hopper had failed to show that the delay had or would cause him any harm. Hopper generally alleged that the failure to hold a federal revocation hearing had adversely affected his eligibility for rehabilitation and parole in the state prison system. The court suggested, however, that Hopper should bring any such claims in state court. Id.
\textsuperscript{4171} The Interstate Agreement on Detainers Act, 18 U.S.C. app. (1982), contains the procedures for extradition of prisoners among the signatory states. Both California and the United States are parties to the IADA.
Article V(c) of the IADA provides that a failure to bring a prisoner to trial within the statutory period on the charge for which the detainer was lodged results in dismissal of that charge. In discussing Hopper's argument, the Ninth Circuit noted that only untried complaints, indictments and informations are covered by the IADA. An unadjudicated parole violator warrant, the court held, is not a complaint within the meaning of the IADA. Therefore, Hopper's second contention was also rejected.

Finally, Hopper argued that he was entitled, under 18 U.S.C. sections 4213 and 4214, to a revocation hearing within sixty days of the issuance of the parole violator warrant. Hopper claimed that the Parole Commission acted improperly by placing the warrant as a detainer before he was convicted of the state offense or before a hearing to determine probable cause was held. The court did not expressly decide whether Hopper was entitled to a hearing under those statutes. Instead, the Ninth Circuit held that even if a hearing had been required,

4172. 702 F.2d at 845.
4174. 702 F.2d at 846. The court distinguished United States v. Dobson, 585 F.2d 55 (3d Cir.), cert. denied, 439 U.S. 899 (1979), and United States v. Reed, 620 F.2d 709 (9th Cir.), cert. denied, 449 U.S. 880 (1980), relied upon by the Government "for the proposition that the IADA does not apply to an un[adjudicated] parole violator warrant." 702 F.2d at 846. Instead, the court found that the legislative history of the IADA indicates that Congress intended the IADA to apply only to outstanding criminal complaints, not to warrants.

The court also distinguished Moody v. Daggett, 429 U.S. 78 (1976), which held that when a parolee is serving an intervening sentence, no hearing is required if his parole is revoked by the same sovereign which handed down the intervening sentence. 702 F.2d at 846. In Hopper, the defendant was being held by California while on parole from United States custody. Therefore, the IADA provisions applied. Id. at 846-47.

4175. 18 U.S.C. § 4213 (1982) authorizes the issuance of a summons or warrant as soon as practicable after discovery of an alleged parole violation. 18 U.S.C. § 4214 (1982) provides that a parole revocation hearing be held within sixty days after the determination of probable cause to believe the existence of a parole violation, except when the parolee has been convicted of a crime after release on parole. In the latter case the conviction itself constitutes probable cause and a detainer may issue without a preliminary hearing. Id.

4176. Id.
4177. Id. Hopper claimed that the Parole Commission's acts affected certain state pretrial release rights, thereby triggering the sixty day hearing provisions. Id. The Ninth Circuit agreed that if unauthorized, the United States Parole Commission's acts would have entitled Hopper to both a preliminary hearing on the issue of probable cause and a final revocation hearing within sixty days thereafter. Id.

4178. Id. at 847-48. The court did hold that, to the extent Hopper claimed a right to a hearing merely because there was a detainer in place, his claim would fail. Id. at 848. The court reasoned that the latest date for a timely revocation hearing is calculated from the date the warrant is executed. Id. However, "[a] warrant is not considered 'executed' where a parolee has been arrested on an independent intervening charge, and a detainer is placed at the institution with custody." Id. (citing Cook v. United States Attorney General, 488 F.2d 667, 671 (5th Cir.), cert. denied, 419 U.S. 846 (1974); Wickham, 618 F.2d at 1309 n.3). Further-
Hopper nevertheless failed to state a claim for habeas relief because he had not shown that the delay between the time the warrant was issued and the time of conviction was unreasonable and prejudicial. The court also rejected Hopper's claim that placing the detainer constituted a "retaking" under section 4214(c), thereby entitling him to a hearing within ninety days of the placing of the detainer. The Ninth Circuit thus affirmed the order denying Hopper's petition for habeas corpus.

3. Special parole terms

21 U.S.C. section 960 (1982) provides that if a term of imprisonment is imposed, a special parole term must also be imposed. In United States v. Faherty, the Ninth Circuit considered whether the imposition of a special parole term is permissible when a defendant is given a suspended sentence conditioned on successfully completing a probationary period.

more, Hopper's warrant did not have to be executed until he was released from state custody. 702 F.2d at 848.

4179. Id. The court reasoned that Hopper would have to show that he was prejudiced by the delay from the time the warrant was issued to the time he was convicted on the state charge. Once he was convicted, the Parole Commission had express authority, under 18 U.S.C. § 4214(b)(1), to lodge the detainer because the conviction provided the necessary probable cause. See supra note 4158. The court found no prejudice to Hopper from the existence of the detainer. Hopper was held in state custody before his trial because he could not afford to post bail, and the fact that the detainer was in place did not prevent him from presenting favorable evidence to the parole board. 702 F.2d at 848.

4180. 18 U.S.C. § 4214(c) (1982) provides:
(c) Any alleged parole violator who is summoned or retaken by warrant under section 4213 who knowingly and intelligently waives his right to a hearing under subsection (a) of this section, or who knowingly and intelligently admits violation at a preliminary hearing held pursuant to subsection (a)(1)(A) of this section, or who is retaken pursuant to subsection (b) of this section, shall receive a revocation hearing within ninety days of the date of retaking. The Commission may conduct such hearing at the institution to which he has been returned, and the alleged parole violator shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel or another representative as provided in subsection (a)(2)(B) of this section.

4181. 702 F.2d at 848. The court held that the mere placing of a detainer does not constitute a "retaking" when the parolee has been arrested on an intervening charge. Id. (citing Doyle v. Elsea, 658 F.2d 512, 517 (7th Cir. 1981)).

4182. Id.

4183. 21 U.S.C. § 960 (1982) provides:
Any person who—
(1) . . . knowingly or intentionally imports or exports a controlled substance,
(2) . . . knowingly or intentionally brings or possesses on board a vessel, aircraft or vehicle a controlled substance, or
(3) . . . manufactures or distributes a controlled substance,
shall be punished as provided in subsection (b) of this section.

4184. 692 F.2d 1258 (9th Cir. 1982).

4185. Id. at 1261.
Faherty had been convicted of importing and possessing heroin.\textsuperscript{4186} She was sentenced to five years imprisonment pursuant to 21 U.S.C. section 960 (1982).\textsuperscript{4187} Faherty's sentence was suspended on condition that she spend 120 days in a jail-like facility and three years on probation.\textsuperscript{4188} On appeal, Faherty claimed that she should not have received a special parole term because her sentence of imprisonment was never executed.\textsuperscript{4189} The Ninth Circuit summarily concluded that suspension of the five year prison term did not eliminate the statutory requirement for a special parole term because Congress had specifically mandated its imposition.\textsuperscript{4190} The court therefore affirmed the district court's sentence.\textsuperscript{4191}

In a concurring opinion, Judge Burns made some additional comments on the application of special parole terms. He noted that when a defendant receives a split sentence,\textsuperscript{4192} the special parole term will never take effect unless the defendant violates probation.\textsuperscript{4193} In fact, unless probation was revoked, the defendant would never come to the attention of the Parole Commission because the Commission only reviews cases where the defendant has served more than one year in prison.\textsuperscript{4194} In addition, even if the defendant had violated probation and served out her five year term, it was highly unlikely that she would ever serve the special parole term.\textsuperscript{4195}


\textsuperscript{4187.} \textit{See supra} note 4183.

\textsuperscript{4188.} 692 F.2d at 1259.

\textsuperscript{4189.} \textit{Id.} at 1261.

\textsuperscript{4190.} \textit{Id.} The court also reasoned that if Faherty successfully served her three years of probation, the special parole term would no longer apply. If she did not satisfactorily complete her probationary period, Faherty would be required to serve the five years in prison after which the special parole term would begin. \textit{Id.}

\textsuperscript{4191.} \textit{Id.}

\textsuperscript{4192.} Faherty's sentence was "split" in that the five year prison term was suspended on condition that she spend 120 days in jail and three years on probation. \textit{Id.} at 1262 (Burns, J., concurring).

\textsuperscript{4193.} \textit{Id.}

\textsuperscript{4194.} \textit{Id.} 18 U.S.C. § 4205 (1976) only grants the Parole Commission jurisdiction over prisoners serving terms of one year or more. Since Faherty was to serve only four months in jail, unless she violated probation her case would never come before the Parole Commission and the special parole term would never attach. 692 F.2d at 1262 (Burns, J., concurring).

\textsuperscript{4195.} 692 F.2d at 1262 (Burns, J., concurring). Judge Burns pointed out that Faherty would probably never serve the special parole term because she would be eligible for "regular" parole as well as the early termination provisions for both the "regular" and "special" parole terms. \textit{Id.} The early termination provisions are contained in 18 U.S.C. § 4211(c)(1) (1982), which provides in part: "Five years after each parolee's release on parole, the Commission shall terminate supervision over such parolee unless it is determined, after a hearing . . . , that such
4. Revocation of special parole terms

18 U.S.C. section 4164, which removes the Parole Commission's jurisdiction over a released prisoner during the last 180 days of his maximum term, does not apply to mandatory special parole terms imposed after a conviction for manufacturing, possessing, or distributing controlled or counterfeit substances.

In Russie v. United States Department of Justice, the Ninth Circuit held that the Parole Commission retained jurisdiction over a defendant who violated his special parole term seventy-seven days before completion of that term. Defendant Russie had been convicted of distributing cocaine and was sentenced to one year in jail and a mandatory special parole term of three years. He completed his prison term and began serving his special parole term. Eleven weeks prior to completion of the special parole term, Russie was charged by a state court with distributing cocaine. A federal parole violation warrant went out the same day but was stayed until the state made a determination of Russie's guilt or innocence. To complicate matters, eleven weeks later Russie's parole officer gave Russie a notice of discharge signifying that he had completed his special parole term and was no longer under federal supervision.

supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law." Under 28 C.F.R. 2.57(e) (1983), the early termination provisions apply to special parole terms as well as to ordinary parole.

18 U.S.C. § 4164 (1982) provides: "A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days."

Special parole terms differ from traditional parole in that special parole is in addition to traditional parole and is not a substitute for it. Bunker v. Wise, 500 F.2d 1155, 1158 (9th Cir. 1977) (nature of special parole terms are so different that when court failed to inform petitioner of nature and operation of mandatory special parole term, motion to withdraw guilty plea was erroneously denied).

Russie v. United States Dep't of Justice, 708 F.2d 1445 (9th Cir. 1983). 21 U.S.C. § 841(b) (1976) makes a special parole term mandatory whenever a defendant is convicted under 21 U.S.C. § 841(a) (1976) and sent to prison. The minimum special parole term is controlled by (1) whether or not there has been a prior conviction and (2) the classification into which the controlled substance falls. 21 U.S.C. § 841(a) (1976) makes it "unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

Russie v. United States Dep't of Justice, 708 F.2d 1445 (9th Cir. 1983).

Id. at 1446.

Id. Apparently the parole officer thought that the federal parole violation warrant had been dismissed.
Three weeks later, Russie pleaded guilty to the state charge of distributing cocaine. He received a suspended ten year sentence on condition that he serve one year in county jail, complete six years of probation, make restitution, and pay a fine. He was also required to participate in a mental health counseling program. Russie was then informed that his parole officer had made a mistake and that he was still under the Parole Commission's authority. After finishing his state jail term, Russie was transferred to federal custody and imprisoned. At a parole revocation hearing, his special parole term was revoked and Russie was required to spend two more years in federal prison.

Russie then filed a petition for a writ of habeas corpus. The petition was denied by a federal magistrate on the grounds that the 180 day limitation of 18 U.S.C. section 4164 did not apply to special parole terms and that, in spite of erroneous information given to Russie by his parole officer, he was still under Federal Parole Commission authority. The district court affirmed the magistrate's decision.

On appeal, Russie contended that 18 U.S.C. section 4164 applied in his case and that the Commission had no power over him because it did not act prior to the 180 days before his maximum term had expired. The Ninth Circuit disagreed, holding that Russie was on special parole and was not shielded by the 180 day limitation of section 4164. The court pointed out that special parole operates differently from traditional parole in that it is imposed in addition to any other applicable parole terms. The court noted that to apply section 4164 to a case such as Russie's would contravene the purposes of the penalty structure of the

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4202. Shortly after being apprised that he was still subject to Federal Parole Commission Authority, Russie began serving his state term. He was enrolled in a work release program which allowed him to keep his job as a printer and report back to jail at night. After twelve days in the program, a federal detainer was filed with the jail and Russie was confined to county jail for nine months. He was then released. Id. at 1446-47.

4203. Id. Russie was given credit for the nine months he had served in county jail; so, in fact, his federal term was fifteen months, not two years. Special parole violators do not receive credit for the time spent on parole and they can be reincarcerated for the full special parole term. Bunker v. Wise, 550 F.2d 1155, 1159 (9th Cir. 1977).

4204. See supra note 4196.

4205. 708 F.2d at 1447.

4206. Id.

4207. Id.

4208. Id. at 1448.

4209. Id. at 1447. If the special parole term is revoked, under 21 U.S.C. § 841(c) (1982), the term is added to the original sentence. A parolee might be forced to serve all or part of that additional term (three years in Russie's case) without being credited for the time served on special parole. After coming within 77 days of completing his special parole term, Russie lost all credit and was met by the Parole Commission with a two-year sentence that at its maximum could have been a three-year sentence.
Comprehensive Drug Abuse Prevention and Control Act of 1970 and thereby nullify "an additional period of supervision Congress considered important enough to require by statute." 4210

Russie then argued that the Federal Parole Commission had no power to detain him since he had received his notice of discharge and was therefore no longer under federal supervision. 4211 The Parole Commission, however, had issued a parole violation warrant prior to the expiration of Russie's special parole term. 4212 Therefore, the Commission still retained jurisdiction over Russie and the power to enforce the warrant even after Russie's special parole term was scheduled to expire. 4213

Finally, Russie contended that even if the Commission still retained jurisdiction over him, it should be estopped from acting on the parole violation warrant. Russie claimed that he had relied on the Commission's notice of discharge and alleged that he would not have pled guilty to the state cocaine charge if he had known that he was still on federal parole. 4214 The Ninth Circuit held that Russie did not make a sufficient showing of affirmative misconduct on the government's part to warrant an application of estoppel. 4215 The court thus declined to view the mistake as reaching the necessary level of governmental misconduct to warrant judicial interference. 4216 Furthermore, the court concluded that revocation of Russie's special parole term and the two years prospective imprisonment did not "constitute a prejudicial change of position caused by the parole officer's mistake." 4217

4211. 708 F.2d at 1448. Russie objected to the federal detainer that the Parole Commission had filed with the state jail.
4212. Id.
4213. Id. See Barr v. Parker, 453 F.2d 865, 866-67 (9th Cir. 1971). A federal parole violation warrant acts as a freeze on the expiration of a parolee's sentence. The Parole Commission still retains jurisdiction over the parolee even after the presumptive expiration date of the parolee's sentence has come and gone. 28 C.F.R. § 2.44(d) (1982).
4214. 708 F.2d at 1448. Russie's parole officer admitted that he had mistakenly issued a notice of discharge to Russie. Russie also argued that the Commission discovered the error prior to his sentencing in state court, and failed to inform him that a federal parole violation warrant awaited him.
4215. Id. See Lavin v. Marsh, 644 F.2d 1378, 1382 (9th Cir. 1981) (government not guilty of affirmative misconduct and therefore not estopped by Army recruiter's misrepresentations because people who deal with the government must assume risk that misinformation may have been disseminated and should take proper procedures to confirm information); United States v. Harvey, 661 F.2d 767, 773, 775 (9th Cir. 1981) (in land dispute with government, mere negligence will not constitute affirmative misconduct; government must intentionally or actively conceal), cert. denied, 103 S. Ct. 74 (1982).
4216. 708 F.2d at 1449-50.
4217. Id. The court based its conclusion on Russie's failure to produce evidence of prejudice.
5. Reconsideration of presumptive parole dates

Presumptive parole dates are conditional and subject to being reopened. When a Regional Commissioner of the Federal Parole Commission receives any new and significant adverse information, he may recommend to the National Commissioners that a special hearing be held to reconsider a presumptive parole date.

In Williams v. United States Parole Commission, the Ninth Circuit held that defendant Williams' presumptive parole date could be reopened, and, after a special reconsideration hearing, could be extended more than five years. While incarcerated in a federal prison in Atlanta, Williams participated in the murder of an inmate. His murder charge was reduced to one count of accessory after the fact in return for his testimony at the trial of Leonard, the other participant in the murder. Williams pleaded guilty to the accessory count and was sentenced to eight years imprisonment, to be served consecutively with the sentence he was serving.

The sentencing judge filled out the standard parole comment form and indicated, by checking the appropriate box, that parole should be decided by the Parole Board. In a space reserved for comments, the judge remarked that Williams was a danger to society and had cooperated with the federal authorities only to avoid a murder charge.

The court noted that "Russie does not suggest that the government’s error in any way affected the underlying offenses, commission of which violated the terms of his special parole even though those offenses also led to his arrest and conviction in state court." The court appears to be saying that the parole officer's mistake had no impact on Russie's committing the crimes with which the state charged him. Russie's argument, which the court does not address here, was that he would not have pled guilty had he known he was subject to a retaking by the Parole Commission.

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4219. 28 C.F.R. § 2.28 (1982).
4220. 28 C.F.R. § 2.28(f) (1982). Section 2.28(f) provides that: "Upon receipt of new and significant adverse information . . . , the Regional Commissioner may refer the case to the National Commissioner with his recommendation and vote to schedule the case for a special reconsideration hearing." The definition of "new and significant" information is not contained in the regulations. See 28 C.F.R. § 2.1(i) (1981).
4221. 707 F.2d 1060 (9th Cir. 1983).
4222. Id. at 1065, 1061.
4223. Id. at 1061. The judge's remarks were as follows:

This man cooperated and was a government witness; however, the court is of the opinion his cooperation was to save himself from a prosecution for murder. He was given consideration for this by being prosecuted for accessory rather than the crime of murder. The record is of [sic] such that the court is of the opinion that at present time he would be a danger to the society.
Williams was transferred to the California State Prison at San Quentin because of threats to his life.

The Bureau of Prisons aggregated Williams' sentences in an effort to determine his eligibility for parole. On March 15, 1979, the Parole Commission in Burlingame, California convened. Based largely on Williams' own report and a prosecutor's letter that dealt with the Atlanta killing in a very general manner, the Commission recommended that Williams' presumptive parole date be scheduled for late 1980, or early 1981. The prosecutor's letter contained only a broad reference to a plea bargain and Williams' cooperation in the matter.

According to the Ninth Circuit, the hearing examiners did not have the judge's parole comment form before them at the time they scheduled the presumptive parole date. Neither was the court certain whether the presentence report had been present or what the contents of that report were because no mention of the report was found in the record of the examiners' hearing. The hearing examiners had concluded that Williams had been forced, by a threat to his life, to witness and assist Leonard in committing the murder. The examiners had also cited the United States Attorney's belief that the Government's case could not have proceeded successfully without Williams' cooperation.

Williams had also made a pro se request to the sentencing judge for reduction of sentence, in which he mentioned his presumptive parole date. The judge not only denied the request, but also ordered United States Probation Officer Salter to communicate the judge's dissatisfaction to the Parole Commission. Salter wrote a letter to the Commission on April 26, 1979 enclosing copies of the judge's parole comment and presentence report. The letter urged review of the presumptive parole date, characterizing Williams as violent and sociopathic.

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4225. 707 F.2d at 1061. While noting that the specifics of the plea bargain had been omitted in the prosecutor's letter, the court did indicate that it might be inferred from the fact there was a plea bargain that Williams had pled guilty to avoid prosecution for murder.
4226. Id. Circuit Judge Skopil, in his concurrence stated that "[t]he majority is more willing than I to accept the assertion of the Regional Commissioner and to infer from hearing reports that the parole comment form and pre-sentence reports were not available or not considered." Id. at 1067.
4227. Id. at 1062-63. Circuit Judge Duniway found a considerable discrepancy between the findings of the Parole Commission and the trial judge's view. Judge Duniway cited at length the conclusions of the hearing examiners. The hearing examiners repeatedly mentioned the threat of force that was exerted on Williams and also emphasized as an example of such coercion the fact that Williams had been forced by Leonard to become homosexual. Overall, the hearing examiners' conclusions depict a man deeply in fear of his life and cooperating with the prosecution to make an "unmakeable" case.
4228. Id. The letter stated:
Salter's letter resulted in an inquiry into the hearing examiners' decision. The inquiry revealed that "the only information . . . regarding the circumstances of the offense [provided to the hearing examiners] appear[ed] to be information which was provided by Williams." On May 23, 1979, Williams' case was reopened. The following day, Salter wrote the Commission again, detailing the prison killing and admitting the great difficulty the United States Government had encountered in convicting anyone of murder in Atlanta federal prison. Salter emphasized that Williams had assessed the mounting evidence against him and, in response, turned government witness. The Government, according to Salter, felt tremendous pressure to obtain a conviction in the case. Not only had two weapons been used in the killing, but at trial Leonard testified that Williams had also assaulted the murdered inmate. Salter also indicated that, after sentencing, Leonard confessed to a United States Marshall that the Government's depiction of the case was almost entirely accurate. Finally, Salter pointed out that Williams had prior knowledge of the intended killing and was not in "a situation which he suddenly found himself present in, with his much more powerful homosexual partner committing a killing he was bound to engage in."

On July 2, 1979, the examiners held a special reconsideration hearing. They considered the parole comment form and Salter's first letter as well as the information received after the reopening, including Salter's second letter. The hearing examiners again recommended the same presumptive parole date, concluding that there was insufficient new information on which to change their original decision.

The Regional Commissioner reviewed that ruling and, unhappy with the outcome, referred the case to the National Commissioners. Although the Regional Commission recommended April 15, 1989, the

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Let me point out to you that Williams pled guilty to a lesser offense to save himself from prosecution for murder . . . .

I urge you to review the presentence report which I prepared for our Court . . . . The pattern of violent, antisocial behavior is clear. I do not see how this man can be considered ready to live a law abiding life in society after being involved in such a violent offense. I will point out to you that at the age of 31 Williams has been involved in numerous burglaries, armed robberies, kidnappings, escapes, conveyance of contraband materials in prison, threats on correctional workers and now murder.

Id. at 1062.

4229. Id. A case analyst for the Parole Commission spoke with one of the hearing examiners and provided the Commissioner with the recollection of one of the hearing examiners.

4230. A hatchet and a knife were used in the murder. Id. at 1061, 1063.

4231. Leonard told the United States Marshall that the only exception to the government's depiction was that Williams had bludgeoned the victim but was doing such a bad job of it that Leonard had to take the hatchet away and do it himself. Id. at 1063.

4232. Id.

4233. Id.
National Commissioners decided on April 14, 1986 as Williams' presumptive parole date.\footnote{4234}

Williams then exhausted his administrative remedies and filed a petition for habeas corpus.\footnote{4235} The district court made two findings in dismissing the petition: (1) "that the sentencing judge's opinion as to the early parole date was new adverse information"; and (2) "that the reopening was valid on the basis of information received after the reopening."\footnote{4236}

The Ninth Circuit has held that a court should not overturn a Parole Commission decision unless the Commission has abused its discretion.\footnote{4237} The Commission has broad powers to effectuate the statutory provisions of parole,\footnote{4238} and the Commission's interpretation of its regulations\footnote{4239} will control unless that interpretation is demonstrated to be in conflict with the regulation or plainly erroneous.\footnote{4240}

In Williams, the Ninth Circuit found that the sentencing judge's opinion as to the new parole date was not new and significant information.\footnote{4241} The court, however, noted the statutory\footnote{4242} and regulatory\footnote{4243} requirements that the hearing examiners consider the sentencing judge's parole comment form.\footnote{4244} The court held that the parole comment form was new adverse information because it was not considered by the hearing examiners.\footnote{4245} Therefore, the Regional Commissioner was justified...
in reopening Williams’ case in order to consider the sentencing recommendations. After the case was reopened, the Parole Commission had authorization to consider any further information under 28 Code of Federal Regulations section 2.19. The Commission was then empowered to extend the presumptive parole date. The Ninth Circuit held that the Commission neither misconstrued the regulation nor abused its discretion.

H. Habeas Corpus

1. Certificate of probable cause

A state prisoner must obtain from the district court a “certificate of probable cause” before appealing a habeas petition to the circuit court. The district court generally grants a certificate when there is a “substantial showing of the denial of [a] federal right.” If the peti-

argument was that the examiners had the same information before them as was contained in the parole comment form. The court dismissed this contention by saying that even if the hearing examiners did have the same information, and it was not clear that they did, they did not follow the statutory and regulatory requirement to consider the sentencing judge’s recommendations. The second argument was that since Williams’ parole comment form and presentence report were in the Bureau of Prisons’ possession, the Commission’s failure to consider those documents was their own fault. In response to this argument, the Ninth Circuit declined to adopt a rule that precludes the reopening of a case because a document is misplaced while in the possession of the prison system. The court stated that the Parole Commission has national jurisdiction and is not a court, and should not be required to comport itself as such. The court explained that Williams was sent to San Quentin to protect him from being killed, and that the documents should not be presumed to be in the constructive possession of the Regional Commission in California and therefore before the hearing examiners. Id.

4246. Id.
4247. Id. at 1066.
4248. Id.
4249. Id. In his concurrence, Circuit Judge Skopil agreed with the majority that a sentencing judge’s parole comment form or a presentence report is new adverse information if it has not previously been considered, even if not considered due to inadvertence. Judge Skopil objected to the insufficient record compiled by the Parole Commission, thus making it difficult for the district court to determine what was available and considered by the hearing examiners. The judge observed that such omissions make the Parole Commission “practically unaccountable for its methods” and that such practice undermines appellate review of Commission decisions. Id. The judge noted the potential for arbitrariness when the Parole Commission does not compile a thorough record of what information the hearing examiners had before them. That arbitrariness, the judge concluded, is antithetical to the legislative intent of providing equitable parole proceedings.

4250. 28 U.S.C. § 2253 (1982) provides in pertinent part:
An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

4251. Harris v. Ellis, 204 F.2d 685, 686 (5th Cir. 1953). See also Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980) (a “substantial showing of the denial of [a] federal right” does
tioner shows probable cause for appeal, the appellate court must afford
the parties an opportunity to address the underlying merits.\textsuperscript{4252}

In \textit{Barefoot v. Estelle},\textsuperscript{4253} the Supreme Court held that the Fifth Cir-
cuit's refusal to stay the petitioner's death sentence pending appeal was
proper. Although the circuit court made its decision six days after Bare-
foot's appeal and five days before his execution date, the Supreme Court
held that the use of summary procedure was proper.\textsuperscript{4254} The Court fur-
ther held that the circuit court reached the merits even though it did not
expressly affirm the judgment of the district court.\textsuperscript{4255}

Barefoot was convicted in a Texas court of murdering a police of-
licer and was sentenced to death. The state appellate court affirmed his
conviction and sentence. The Supreme Court granted a stay of execution
pending disposition of an appeal for writ of certiorari. The Court subse-
quently denied certiorari and the state rescheduled Barefoot's execution.
He then applied unsuccessfully for habeas corpus in state court. Bare-
foot next filed a petition for writ of habeas corpus in federal court, and
the district court granted him a stay of execution. After an evidentiary
hearing the district court rejected Barefoot's claims and vacated the stay,
but granted him a certificate of probable cause to appeal to the Fifth
Circuit. The date of execution was set for January 25, 1983.\textsuperscript{4256}

On January 14, 1983, Barefoot moved to have the Fifth Circuit stay
his execution pending his appeal from the denial of his habeas corpus
petition. On January 19, the parties presented briefs and arguments to

\textsuperscript{4252} Garrison v. Patterson, 391 U.S. 464, 466 (1968) (per curiam). Garrison based its hold-
ing on Nowakowski v. Maroney, 386 U.S. 542 (1967) (per curiam), which ruled that when a
certificate of probable cause is granted the court of appeals must "proceed to a disposition of
the appeal in accord with its ordinary procedure." \textit{Id.} at 543 (emphasis added). But cf.
Carafas v. LaVallee, 391 U.S. 234 (1968), which interpreted Nowakowski as not necessarily
requiring a "full opportunity to submit briefs and argument." The Court in Carafas stated
that if an appeal is frivolous despite the issuance of probable cause, the court may take sum-
mary action. \textit{Id.} at 242.

\textsuperscript{4253} 103 S. Ct. 3383 (1983).

\textsuperscript{4254} \textit{Id.} at 3392.

\textsuperscript{4255} \textit{Id.} at 3393.

\textsuperscript{4256} \textit{Id.} at 3390.
the court. On January 20, the court issued an opinion and judgment denying Barefoot's stay.

The Fifth Circuit's opinion\textsuperscript{4257} stated that the court had studied the briefs and records filed. The court believed it met the requirements established for habeas corpus appeals because it had given "an unlimited opportunity" to argue the merits.\textsuperscript{4258} The court concluded that the petition lacked substantial merit and, consequently, denied the stay.\textsuperscript{4259}

On January 24, the Supreme Court stayed the petitioner's execution and, treating the application for the stay as a petition for certiorari, granted certiorari.\textsuperscript{4260}

Barefoot claimed that unless the circuit court believes a case to be frivolous, it should decide the appeal on its merits and stay the execution pending disposition. The state argued that the merits were decided and that Barefoot had ample time to present the merits of his case. The Supreme Court affirmed the circuit court's procedure and decision.\textsuperscript{4261}

The Supreme Court ruled that a petitioner who has probable cause for appeal must be afforded an opportunity to address the merits.\textsuperscript{4262} The Court further ruled that a court of appeals which is unable to resolve the merits of an appeal before the scheduled execution date must stay the execution. The Court held that summary procedures may be adopted to dispose of such cases.\textsuperscript{4263}

The Fifth Circuit presently requires a showing of some prospect of success on the merits before issuing a stay of execution.\textsuperscript{4264} The Court observed that "it is not clear" that this practice comports with the requirements that the petitioner be given the opportunity to present the merits and that the court address the merits of the petition.\textsuperscript{4265}

\begin{thebibliography}{9}
\bibitem{4257} Barefoot v. Estelle, 697 F.2d 593 (5th Cir. 1983) (per curiam).
\bibitem{4258} Id. at 597.
\bibitem{4259} Id. at 600.
\bibitem{4260} 103 S. Ct. at 3390.
\bibitem{4261} Id.
\bibitem{4262} See supra note 4252.
\bibitem{4263} 103 S. Ct. at 3392 (citing Carafas v. LaVallee, 391 U.S. 234 (1968)). The Court in Carafas stated that the requirement of a decision on the merits "does not prevent the court of appeals from adopting appropriate summary procedures for final disposition of such cases." 391 U.S. at 242. The Court in Garrison v. Patterson stated that "if a summary procedure is adopted the appellant must be informed, by rule or otherwise, that his opportunity will or may be limited." 391 U.S. at 466-67.
\bibitem{4264} 103 S. Ct. at 3392 (citing O'Bryan v. Estelle, 691 F.2d 706, 708 (5th Cir. 1982) (per curiam) (stay granted since challenge to exclusion of certain jurors presented a "substantial question"); Brooks v. Estelle, 697 F.2d 586 (5th Cir.) (per curiam) (stay denied since challenge to sentence, to exclusion of certain jurors, and to adequacy of trial counsel presented "no substantial question"), stay and cert. denied, 103 S. Ct. 1490 (1982)).
\bibitem{4265} 103 S. Ct. at 3392.
\end{thebibliography}
Court held, nevertheless, that the circuit court’s practice of deciding the merits of an appeal together with the application for a stay is consistent with the general rule.\(^{4266}\) Although the Fifth Circuit did not formally affirm the judgment of the district court, the Supreme Court held that the Fifth Circuit had ruled on the merits of the appeal.\(^{4267}\) The Court observed that the Fifth Circuit’s swift disposition of the stay did not mean that its treatment of the merits was inadequate or cursory.\(^{4268}\)

The Court concluded that the circuit court’s handling of the case was “tolerable” under its precedent but should not be accepted as the preferred procedure.\(^{4269}\) The Court set forth five guidelines for establishing procedures to handle applications for stays of execution. First, the district court should separate the meritorious appeals from the frivolous ones, primarily by granting or withholding a certificate of probable cause.\(^{4270}\) Second, when a certificate of probable cause is granted, the court of appeal should grant a stay of execution pending disposition of the appeal.\(^{4271}\) Third, an appellate court may adopt expedited procedures in resolving the merits of habeas appeals. The circuit court may promulgate rules which describe the manner in which such cases will be handled and inform counsel that the court may decide the merits of the case and the motion for a stay in a single opinion.\(^{4272}\) Fourth, second and successive habeas petitions should be dismissed if they fail to allege new grounds for relief or constitute an abuse of the writ.\(^{4273}\) Fifth, stays of execution are not automatic pending decision on a petition for writ of certiorari.\(^{4274}\)

In dissent, Justice Marshall argued that the Fifth Circuit’s proce-
dure did not give the petitioner an opportunity to address the underlying merits in accord with the court's "ordinary procedure." He disagreed with the view that it would be proper for a court of appeals to adopt summary proceedings for capital cases. He argued that appellate courts have consistently required that a stay of execution be granted unless the appeal is entirely frivolous.

Justice Marshall also argued that the circuit court failed to decide the case on its merits since it neither dismissed the appeal as frivolous nor expressly affirmed the judgment of the district court. According to Justice Marshall, the circuit court merely decided that the likelihood of Barefoot's succeeding on the merits was insufficient to justify the delay of a stay pending an appeal.

Justice Marshall characterized the majority's approval of summary procedures in capital cases as a way of allowing fewer procedural safeguards of defendant's rights which is contrary to the trend of the law. A grant of stay pending appeal on a writ of certiorari is based on the following standard:

"[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed."


4275. 103 S. Ct. at 3401 (Marshall, J., dissenting).

4276. Id. (Marshall, J., dissenting) (citing and quoting Nowakowski v. Maroney, 386 U.S. 542, 543 (1967)).

4277. Id. (Marshall, J., dissenting). The Fifth Circuit recently denied a stay in a summary proceeding in Brooks v. Estelle, 697 F.2d 586 (5th Cir.), stay and cert. denied 459 U.S. 1061, 1063 (1982). Justice Marshall argued that the denial of the stay in Brooks has no precedential value since the order did not discuss a standard to be applied in passing on applications for a stay pending appeal. 103 S. Ct. at 3401 n.5.

4278. 103 S. Ct. at 3401 (Marshall, J., dissenting). See, e.g., Goode v. Wainwright, 670 F.2d 941, 942 (11th Cir. 1982) (stay granted since appeal not frivolous); Shaw v. Martin, 613 F.2d 487, 493 (4th Cir. 1980) (stay granted); United States ex rel. De Vita v. McCorkle, 214 F.2d 823, 823 (3d Cir. 1954) (per curiam) (stay granted pending disposition of appeal); Fouquette v. Bernard, 198 F.2d 96, 97 (9th Cir. 1952) (stay granted). See also FED. R. CRIM. P. 38(a)(1) which states: "A sentence of death shall be stayed if an appeal is taken."

In Shaw v. Martin, the Fourth Circuit recognized that "[i]n the very nature of proceedings on a motion for a stay of execution, the limited record coupled with the time constraints . . . preclude any fine-tuned inquiry into the actual merits." 613 F.2d at 492. Until recently the Fifth Circuit also followed this approach. See United States ex rel. Goins v. Sigler, 250 F.2d 128, 129 (5th Cir. 1957) (per curiam) (stay granted pending disposition of appeal).

4279. 103 S. Ct. at 3402 (Marshall, J., dissenting).

4280. Id. at 3402-04 (Marshall, J., dissenting). Justice Marshall characterized the majority's opinion as an "egregious misreading of Garrison v. Patterson." Id. at 3403 (Marshall, J., dissenting).

4281. Id. at 3404-05 (Marshall, J., dissenting). Justice Marshall cited a series of capital cases...
He urged circuit judges not to adopt such procedures.\textsuperscript{4282}

2. Requirement of constitutional claim

Section 2254 requires that a federal habeas petition involve either a question of constitutional dimension or a violation of federal law or United States treaty.\textsuperscript{4283} Mere technical violations of rules do not rise to the level of a constitutional claim. In \textit{Wayne v. Raines},\textsuperscript{4284} the Ninth Circuit overturned the district court's grant of habeas relief because the petitioner failed to show more than a mere technical violation of a state rule of criminal procedure.\textsuperscript{4285}

In 1975, Wayne was charged with four separate armed robbery offenses. Before Wayne entered his guilty plea the trial judge advised him of the minimum and maximum sentences but failed to inform him of the applicable parole limitations, as required by the state rule of criminal procedure.\textsuperscript{4286} Wayne entered pleas of guilty and the trial court convicted him on all four offenses. He subsequently filed a habeas corpus petition alleging that his guilty pleas were not voluntarily or intelligently made and that he was denied effective assistance of counsel.\textsuperscript{4287}


\textsuperscript{4282} 103 S. Ct. at 3406 (Marshall, J., dissenting) (citing \textit{In re Burwell}, 350 U.S. 521, 522 (1956) (per curiam) (holding that appellate courts determine procedure for application for certificate of probable cause)).

\textsuperscript{4283} 28 U.S.C. § 2254(a) (1982) provides:

\textit{The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.}

\textsuperscript{4284} 690 F.2d 685 (9th Cir. 1982), \textit{cert. denied}, 104 S. Ct. 275 (1983).

\textsuperscript{4285} \textit{Id.} at 686. The district court held that Wayne's guilty pleas were obtained in violation of due process because at the time of his pleas he was not aware of the parole limitations applicable to the robbery charge. \textit{Id.}

\textsuperscript{4286} \textit{Ariz. R. CRM. P. 17.2(b)} (1983) provides that before the accused enters a guilty plea, the court must explain "[t]he nature and range of possible sentence[s] for the offense to which the plea is offered, including any special conditions regarding sentence, parole, or commutation imposed by statute."

\textsuperscript{4287} 690 F.2d at 686.
Wayne not only failed to show prejudice but also failed to allege that he was "actually unaware" of the parole limitations. The court ruled that he had in fact been adequately warned. Accordingly, the court vacated the grant of habeas corpus.

In *Locks v. Sumner*, the Ninth Circuit upheld the district court's denial of Locks' habeas corpus petition on the ground that he failed to show a constitutional claim cognizable under habeas corpus. Locks was convicted on two counts of first-degree murder in a California state court. He asserted that three constitutional violations tainted his convictions: an inquiry by the judge into the numerical division of the

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4288. *Id.* at 687. See United States v. Timmreck, 441 U.S. 780, 782-85 (1979) (failure to inform defendant represented by counsel that his guilty plea involved a mandatory special parole term is not constitutional violation); Wacht v. Cardwell, 604 F.2d 1245, 1247 (9th Cir. 1979) (failure of trial judge to inform defendant of ineligibility for parole is not constitutional violation).

4289. 690 F.2d at 687. In a dialogue between the trial court and Wayne, the judge asked Wayne if he understood that the minimum sentence was five years and the maximum was life, and that the sentences could be concurrent. Wayne repeatedly answered "yes." the trial record reflected that Wayne's attorney said: "Your Honor... I have explained to the defendant that, as the law stands now, he does face a minimum of five years without probation. There would be no probationary term until after that." *Id.* at 687. The circuit court held that the attorney used the words "probationary term" when he meant parole. 690 F.2d at 687 & n.1.

The court distinguished *Timmreck* and *Wacht* on the ground that there the petitioners were actually unaware of the parole limitations. 690 F.2d 687.

4290. *Id.* at 687-88. See *Wacht v. Cardwell*, 604 F.2d at 1247 (defendant failed to claim he was unaware of ineligibility for parole); United States v. Hamilton, 568 F.2d 1302, 1306 (9th Cir.) (per curiam) (clear from record defendant understood consequences of his plea), cert. denied, 436 U.S. 944 (1978). See also United States v. Timmreck, 441 U.S. at 785 (no relief since all defendant showed was failure to comply with formal requirements of rule); Hill v. United States, 368 U.S. 424, 429 (1962) (no claim where defendant was denied opportunity to speak in his own behalf before sentence was imposed).

The court in *Wayne* reserved the question of whether there would be a violation of due process if the trial court had not advised him that he would be ineligible for parole even under the minimum sentence. 690 F.2d at 688 n.3. The court nevertheless cited one Ninth Circuit case which held that a defendant who entered a guilty plea without being aware that he would not be eligible for parole does not plead with an "understanding of the consequences." *Id.* (citing Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964), overruled on other grounds, Heiden v. United States, 353 F.2d 53 (9th Cir. 1966)). This requirement that the defendant understand the consequences of pleading guilty to the charges was codified in the 1966 amendments to Rule 11 of the Federal Rules of Criminal Procedure. However, in 1974, Rule 11 was amended to eliminate the requirement that the accused be advised of parole eligibility. See *id.*

4291. 703 F.2d 403 (9th Cir.), cert. denied, 104 S. Ct. 338 (1983).

4292. *Id.* at 408.

4293. *Id.* at 405. Locks' conviction was affirmed; his petition for rehearing before the California Supreme Court and his petition for certiorari before the United States Supreme Court were both denied. His original petition for habeas corpus in federal court was dismissed for failure to exhaust state remedies on the jury inquiry issue. Locks' subsequent requests for review were rejected by the California courts and he returned to the federal courts. *Id.*
jury;\textsuperscript{4294} the court’s denial of his request for advisory counsel;\textsuperscript{4295} and the court’s failure to give him a full and fair suppression hearing on an allegedly illegal search.\textsuperscript{4296}

The first claim arose when the judge asked the foreman for the numerical division of the jury at the end of trial, before excusing the jury for the weekend. The judge also asked not to be told how many were for what side. Although the Supreme Court has held such an inquiry to be per se prejudicial in federal trials,\textsuperscript{4297} the Ninth Circuit held that this rule is not applicable to state courts.\textsuperscript{4298} Therefore, the \emph{Locks} court held the issue did not rise to the level of a constitutional claim.\textsuperscript{4299}

Locks’ second claim arose when he waived his right to counsel before trial because he was dissatisfied with his court appointed counsel. The trial court refused his request to have substitute counsel appointed, or to allow him to proceed in propria persona with his court appointed counsel as co-counsel. Just before the trial, Locks renewed his request for co-counsel, or, in the alternative, for advisory counsel. On appeal, Locks claimed he made errors during his self-representation. The Ninth Circuit held that although the trial court has the discretion to appoint co-counsel,\textsuperscript{4300} there is no constitutional right to co-counsel. Therefore, the issue did not constitute a claim of constitutional dimension.\textsuperscript{4301}

Locks’ third claim was that evidence used against him at trial was seized in an illegal search of his car. The general rule is that fourth amendment claims are not cognizable in habeas corpus proceedings.\textsuperscript{4302} Locks claimed that an exception applied because he did not receive a full and fair hearing on his fourth amendment claim.\textsuperscript{4303} He asserted that the exception applied because the California Court of Appeal considered evi-

\textsuperscript{4294} \textit{Id.} at 405-07.
\textsuperscript{4295} \textit{Id.} at 407-08.
\textsuperscript{4296} \textit{Id.} at 408.
\textsuperscript{4297} \textit{Id.} at 405 (citing Brasfield v. United States, 272 U.S. 448 (1926) (inquiry into division of jury is prejudicial per se and ground for reversal because of general tendency to be coercive)). For further discussion on the inquiry issue, see Part IV, \S H. Judicial Misconduct, supra notes 3433-50 and accompanying text.
\textsuperscript{4298} 703 F.2d at 405-06.
\textsuperscript{4299} \textit{Id.} at 406.
\textsuperscript{4300} \textit{Id.} at 407 (citing United States v. Halbert, 640 F.2d 1000, 1009 (9th Cir. 1981) (per curiam) (although no absolute right to both self-representation \textit{and} assistance of counsel, hybrid representation is within discretion of trial judge)).
\textsuperscript{4301} \textit{Id.} at 408 (citing United States v. Trappnell, 512 F.2d 10 (9th Cir. 1975) (per curiam)). The court in \textit{Trappnell} stated: "A defendant representing himself cannot be heard to complain that his Sixth Amendment rights have been violated." 512 F.2d at 12.
\textsuperscript{4302} 703 F.2d at 408 (citing Stone v. Powell, 428 U.S. 465 (1976) (fourth amendment claims not cognizable in habeas proceedings)).
\textsuperscript{4303} \textit{Id.}
dence not offered at the suppression hearing. However, the Ninth Circuit ruled that a state court's improper consideration of facts is not sufficient to establish that the defendant's claims were not fully and fairly considered. The court concluded that Locks had full and fair consideration before the state courts. Since he failed to make any claims of a constitutional dimension, the circuit court denied his petition for habeas corpus.

In Carlson v. Hong, the petitioner alleged that he was in state custody in violation of article IV(e) of the Interstate Agreement on Detainers Act. The Ninth Circuit in a per curiam decision affirmed the district court's denial of habeas relief on the ground that a claim based on a violation of article IV(e) does not rise to the "required level of seriousness." The court stated that a claim is cognizable under section 2254 only when error constitutes "a fundamental defect which inherently results in a complete miscarriage of justice" and presents "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." The court distinguished Carlson's claim from one arising under article IV(c) of the same act because that section requires that the detainee be brought to trial within 120 days and has its roots in the constitutional provision for speedy trials. Therefore, the Ninth Circuit rejected the defendant's petition for habeas corpus.

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4304. Id.
4305. Id. (citing Mack v. Cupp, 564 F.2d 898, 902 (9th Cir. 1977) (even if state court improperly considered facts not in the record, claim cannot be raised in habeas appeal)).
4306. Id.
4307. 707 F.2d 367 (9th Cir. 1983) (per curiam).
4308. Article IV(e) of the Interstate Agreement on Detainers Act, 18 U.S.C. app. § 2 (1982) states:

If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment . . . such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

4310. 707 F.2d at 368 (citing Hitchcock v. United States, 580 F.2d 964, 966 (9th Cir. 1978) (violation of article IV(e) of the Interstate Agreement on Detainers Act falls short of a "fundamental defect" causing a "complete miscarriage of justice" to require relief under 28 U.S.C. § 2255 (1982))).
4311. Id. (citing Davis v. Untied States, 417 U.S. 333, 346 (1974) (quoting Hill v. United States, 368 U.S. 424, 428 (1962))). In Davis, the court held that a conviction based on an already invalid military induction was a sufficient claim. 417 U.S. at 346.
4312. 707 F.2d at 368 (citing Cody v. Morris, 623 F.2d 101 (9th Cir. 1980) (claim under section IV(c) of Interstate Agreement on Detainers Act constitutes cognizable constitutional claim)).
3. Summary dismissal of claims without merit

Under Rule 4 of the Rules Governing Section 2254 Cases, a habeas petition that lacks merit as a matter of law may be summarily dismissed.\textsuperscript{4313}

In \textit{Gutierrez v. Griggs},\textsuperscript{4314} the Ninth Circuit held that if the petition lacks merit on its face, the district court may summarily dismiss the petition without resolving the question of whether the petitioner has exhausted all available state remedies.\textsuperscript{4315} Gutierrez was convicted of first-degree murder in a California state court.\textsuperscript{4316} At trial the court gave the jury one instruction defining duress as "imminent and immediate danger" but rejected Gutierrez's request for four additional duress instructions.\textsuperscript{4317} A California court of appeal upheld his conviction. Gutierrez then filed a habeas petition on the ground that his fourteenth amendment right to due process had been violated.

The Ninth Circuit stated that for his due process claim to be valid Gutierrez had to allege a valid duress defense.\textsuperscript{4318} Because the trial court found that the threat to Gutierrez was not imminent and immediate as required by California law,\textsuperscript{4319} the Ninth Circuit held that Gutierrez's claim lacked merit and, therefore, dismissed the appeal.\textsuperscript{4320} Accordingly,

\begin{footnotesize}
\begin{enumerate}
\item Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts states in pertinent part: "If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified." Rule 4, 28 U.S.C. following § 2254 (1982) (Rules Governing Section 2254 Cases in the United States District Courts).
\item 695 F.2d 1195 (9th Cir. 1983).
\item Id. at 1196.
\item Id. at 1196. Gutierrez and a co-defendant, both members of the Nuestra Familia gang, killed another member of the gang. The victim was on the gang's "hit list" because he had refused to kill someone else. \textit{Id}.
\item Id. at 1197 n.1. Gutierrez claimed that if he had not killed the victim, he too would have been marked for execution by the gang. \textit{Id}. at 1196.
\item Id. at 1199.
\item Id. at 1199. The four additional instructions would have negated elements of first and second-degree murder. The first two provided that duress could negate the deliberation and premeditation required for first-degree murder. The second two provided that duress could negate the malice aforethought required for first or second-degree murder. \textit{Id}. at 1197 n.1. Gutierrez claimed that if he had not killed the victim, he too would have been marked for execution by the gang. \textit{Id}. at 1196.
\item Id. at 1199.
\item Id. at 1199. The jury instruction on duress, CALJIC 4.40, defines duress as "threats and menaces" that "would cause a reasonable person to fear that his life would be in immediate danger if he did not engage in the conduct charged." 1 CAL. JURY INST. CRIM. § 4.40(1) (West 1979).
\item The Ninth Circuit agreed with the trial court finding that there was no duress. Gutierrez was armed at the time of the killing and presumably able to defend himself against immediate retribution. He could have asked for protection from the policeman who witnessed the murder. 695 F.2d at 1199.
\item Id. at 1199. The court reasoned that it would be wasteful to make an exhaustion inquiry if the petition, on its face, lacks merit as a matter of law. By summarily dismissing the
\end{enumerate}
\end{footnotesize}
the Ninth Circuit did not decide the exhaustion question.

4. Exhaustion of state remedies

State prisoners are required to present all claims in state court before their petition for a writ of habeas corpus can be reviewed by a federal court. The principle of exhaustion requires that the convicted prisoner make all possible appeals in the state system before beginning the collateral habeas proceeding in the federal courts. In *Rose v. Lundy*, the Supreme Court ruled that requiring total exhaustion of all claims best serves the policies underlying the exhaustion doctrine.

The Court enunciated these policies as follows: (1) to give state courts the first opportunity of review as required by principles of comity; (2) to generate a complete factual record which would aid federal courts in their review; (3) to require dismissal of mixed petitions containing both exhausted and unexhausted claims; and (4) to reduce piecemeal litigation.

In *Pappageorge v. Sumner*, the Ninth Circuit dismissed the habeas appeal because the petitioner failed to exhaust his state court remedies when he alleged an additional claim outside the record. On appeal, Pappageorge claimed for the first time that his state trial counsel failed to cross-examine prosecution witnesses properly. This claim was added to support his allegation of ineffective assistance of state trial counsel.
In a concurring opinion, Judge Ely noted that the Ninth Circuit has determined that the exhaustion requirement is satisfied if the claims in the federal habeas petition are the “substantial equivalent” of those presented to the state court. Judge Ely stated that since Pappageorge asserted a cross-examination deficiency which had not before been part of the state court record, the claim of ineffective assistance of counsel was “wholly transformed by other factual assertions.” Therefore, the claim could not be called “substantially equivalent” to that raised before the state court and the exhaustion requirement had not been met.

A different question arises when, rather than asserting new factual
allegations, the prisoner uses different legal authority to support existing claims. In *Hudson v. Rushen*, the Ninth Circuit rejected the view that the exhaustion doctrine requires the state court to pass on the constitutional claim under the particular legal authority advanced in federal court. The court distinguished the *Hudson* case from cases in which the exhaustion requirement had not been met because new factual allegations were raised before the federal court and from cases in which a new rule of federal law cast the legal issue in a fundamentally different light.

Hudson petitioned for habeas corpus relief on the ground that the state trial court violated his right to effective assistance of counsel. At the close of the prosecution’s case, Hudson made a motion for substitution of counsel which the trial court rejected. In the California courts, Hudson’s claim was decided under the rule articulated in *People v. Marsden*. In federal court, Hudson based his claim on authorities from the Ninth Circuit. The court concluded that the California authority substantially paralleled the Ninth Circuit authority. The court went on to state that since the underlying legal question remained the same, the state courts had a fair opportunity to pass upon it. Accordingly, the Ninth Circuit ruled that the exhaustion requirement was satisfied.

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4331. 686 F.2d 826 (9th Cir. 1982), cert. denied, 416 U.S. 916 (1983).
4332. Id. at 830.
4333. Id. (citing Schiers v. California, 333 F.2d 173 (9th Cir. 1964)). See supra note 4328 for a discussion of *Schiers*.
4334. 686 F.2d at 830 n.2 (citing Blair v. California, 340 F.2d 741 (9th Cir. 1965)). In *Blair*, an intervening change in federal law cast the case in a different light. At first, a California district court decision denied the habeas petitioner’s request for appointment of counsel on appeal. Subsequently, the Supreme Court in *Douglas v. California*, 372 U.S. 353 (1965), accorded a constitutional right to counsel on appeal from a state conviction. Therefore, the Ninth Circuit held that the prisoner had not exhausted state remedies. *Blair v. California*, 340 F.2d 741, 744 (9th Cir. 1965).
4335. 686 F.2d at 828.
4336. Id. at 829. The court in *People v. Marsden*, 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970), held that when a defendant moves for substitution of attorney after the commencement of the prosecution’s case, the trial court must permit the defendant to specify the reasons for the request. If the reasons present substantial grounds or call for further inquiry by the court, then the trial court must initiate a further hearing. Id. at 123-24, 65 P.2d at 47-48, 84 Cal. Rptr. at 159-60.
4337. 686 F.2d at 829. Specifically, Hudson asserted that United States v. Mills, 597 F.2d 693 (9th Cir. 1979) and *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970), supported his contention that his sixth amendment right to counsel had been denied.
4338. 686 F.2d at 830. The Ninth Circuit authority merely offered an “alternative formulation” of the standards governing the trial court’s inquiry into motions for new counsel. *Id*.
4339. *Id*.
4340. *Id*.
In *Ruviwat v. Smith*, the Ninth Circuit held that available state administrative remedies must be exhausted before a habeas corpus petition is made. The question of exhaustion of state administrative remedies was one of first impression before the Ninth Circuit. On three occasions, in 1976, 1979, and 1981, Ruviwat failed to appeal administrative parole decisions to the Regional Commissioner. Instead, Ruviwat petitioned for a writ of habeas corpus.

The court reasoned that the adoption of administrative exhaustion would aid judicial review by the development of a factual record, conserve the court's time since relief could be granted on an administrative level, and allow the administrative agency an opportunity to correct its own errors. By requiring the exhaustion of state administrative remedies the Ninth Circuit concurred with the Second, Third, Eighth and Tenth Circuits.

Ruviwat alternatively argued that even if he had not exhausted administrative remedies, the case involved "extraordinary circumstances" requiring equitable consideration. He claimed that his case was extraordinary because the Parole Commissioner had acted arbitrarily and he had already made unsuccessful appeals. He also claimed that the appeals process was too lengthy, and that the district court failed to direct the Parole Commission on the proper parole formula. The court held that there were no extraordinary circumstances because the alleged arbitrary action could be cured by administrative appeal. It held further that there was no evidence to show the appeals process was too lengthy and

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4341. 701 F.2d 844 (9th Cir. 1983) (per curiam).
4342. Id. at 845. The Ninth Circuit previously had reserved the question in Brady v. Smith, 656 F.2d 466 (9th Cir. 1981). 701 F.2d at 845 n.1.
4343. In 1976, Ruviwat failed to appeal a Parole Commission decision extending the usual confinement period beyond the guideline period. 701 F.2d at 844. In 1979, Ruviwat again failed to appeal the decision in a second parole hearing before the Hearing Examiner Panel in which the panel determined Ruviwat should continue in confinement until a ten-year reconsideration hearing in August, 1989. Id. at 844-45. Finally, in 1981, Ruviwat did not appeal the panel recommendation, which was made in an interim hearing, that there be no change in the ten-year reconsideration hearing. Id.
4344. Id. at 845.
4345. Id.
4346. At least four circuit courts have held that the exhaustion requirement is not met when an administrative remedy is still available. See, e.g., Arias v. United States Parole Comm'n, 648 F.2d 196 (3rd Cir. 1981) (administrative hearing still pending where Commission made good faith decision to reopen case); Clonce v. Presley, 640 F.2d 271 (10th Cir. 1981) (per curiam) (prisoner failed to appeal authority of federal parole violation warrant to federal administrative agencies); Guida v. Nelson, 603 F.2d 261 (2d Cir. 1979) (per curiam) (prisoner failed to appeal parole board's parole revocation); Pope v. Sigler, 542 F.2d 460 (8th Cir. 1976) (per curiam) (prisoner failed to show he had appealed parole board's decision).
4347. 701 F.2d at 845.
also held that the Parole Commission acted within the scope of its authority.\footnote{4348}

In addition to exhausting all state administrative remedies, the habeas petitioner must exhaust all judicial remedies. In \textit{Ventura v. Cupp},\footnote{4349} the habeas petitioner failed to exhaust his judicial remedies because the issues did not remain constant at each level of review. Accordingly, the Ninth Circuit remanded the case to the district court to determine any unexhausted or forfeited claims.\footnote{4350}

Ventura first appealed to the Oregon Court of Appeals, which affirmed his convictions, but he did not seek review by the Oregon Supreme Court. He then sought post-conviction relief in an Oregon trial court. The appellate court affirmed the trial court’s denial of relief and the Supreme Court of Oregon denied review. The United States Supreme Court denied the petition for a writ of \textit{certiorari}.\footnote{4351}

The Ninth Circuit ruled that Ventura failed to obtain complete judicial review of several questions by not presenting them to all appropriate appellate courts.\footnote{4352} He raised his claim of a violation of rights under \textit{Miranda v. Arizona}\footnote{4353} before the Oregon Court of Appeals but not before the Supreme Court of Oregon. He raised his double jeopardy claim with regard to consecutive sentences only in a petition for \textit{certiorari} to the Supreme Court. Finally, he raised his claim of deprivation of right to counsel only in his habeas corpus petition.\footnote{4354}

The Ninth Circuit remanded the case to the district court to determine whether all state remedies had been exhausted. The district court was also instructed to determine whether any failure to exhaust remedies constituted either a “deliberate bypass”\footnote{4355} or a situation in which there

\footnote{4348. \textit{Id.} Although 18 U.S.C. § 4206(a) (1982) establishes guidelines for determining parole, 18 U.S.C. § 4206(c) (1982) states that “[t]he Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing.”}

\footnote{4349. 690 F.2d 740 (9th Cir. 1982) (per curiam).}

\footnote{4350. \textit{Id.} at 742.}

\footnote{4351. \textit{Id.} at 741.}

\footnote{4352. Ventura was convicted of three counts of first degree robbery, two counts of first degree assault, and one count of being an ex-felon in possession of a firearm. \textit{Id.}}

\footnote{4353. 384 U.S. 436 (1966). Ventura claimed that evidence of statements he made to the police after his arrest should have been suppressed under his right against self-incrimination and under the \textit{Miranda} protections. \textit{690 F.2d} at 741-42.}

\footnote{4354. 690 F.2d at 741-42.}

\footnote{4355. \textit{Fay v. Noia}, 372 U.S. 391 (1963). In \textit{Fay}, the Court held that federal judges may deny habeas petitions if the prisoner “deliberately bypassed” state court procedures. The Court stressed that it must be the prisoner who makes “an intentional relinquishment or abandonment of a known right or privilege.” \textit{Id.} at 438-39 (quoting \textit{Johnson v. Zerbst}, 304 U.S. 458,
was cause for, and actual prejudice from, the failure to raise objections at trial. \footnote{In Szeto v. Rushen, the Ninth Circuit held that if a habeas petitioner files a “mixed petition” consisting of exhausted as well as unexhausted claims, then the rule of Rose v. Lundy requires dismissal of the entire petition without reaching the merits. The court thus remanded the case so that Szeto could amend his original petition, submit a new petition, or have the action dismissed without prejudice. Szeto was convicted in a California state court of being an accessory to a felony and of possession of a sawed-off shotgun. He then filed a petition for writ of habeas corpus on four claims. On one of the claims he failed to seek state habeas relief or other state judicial relief and, therefore, failed to exhaust all remedies for all claims in his petition. The court remanded the case to the district court on the grounds of comity and orderly procedure. The court held that the petitioner who abandons claims in the federal habeas forum which were not presented to the state courts runs the risk of forfeiting later consideration of the claims. The court concluded that the district court should have the first opportunity to consider these unexhausted claims.}

\footnote{A unilateral decision made by the prisoner's counsel does not automatically bar relief. \textit{Id.} at 439.}

\footnote{Wainright v. Sykes, 433 U.S. 72 (1977). In \textit{Wainright}, the Court held that a state prisoner is barred from federal habeas relief unless the prisoner shows cause for failure to object at trial and actual prejudice against the prisoner's case. The Court applied the test to bar relief because of a failure to object to the admission of a confession at trial. The Court rejected Fay's “sweeping language” establishing the “deliberate bypass” standard, especially because the state contemporaneous objection rules deserved greater respect than Fay gave them. \textit{Id.} at 87-91.}

\footnote{690 F.2d at 742.}

\footnote{709 F.2d 1340 (9th Cir. 1983).}

\footnote{455 U.S. 509 (1982).}

\footnote{709 F.2d at 1341.}

\footnote{\textit{Id.}}

\footnote{The charges against Szeto arose from Chinese gang warfare in which five bystanders and eleven others were injured. Szeto was convicted of aiding the perpetrators by disposing of their weapons, including a sawed-off shotgun, in San Francisco Bay. \textit{Id.} at 1340.}

\footnote{687 F.2d 655, 657-58 (2d Cir. 1982) (although Gul-}
In *Duckworth v. Serrano*, the Supreme Court held that an exception to the exhaustion requirement applies if either the state courts fail to provide any opportunity for redress or the process for correcting the exhaustion problem is "so clearly deficient" that seeking relief would be futile.

In *Aldan v. Salas*, the Ninth Circuit held that a four to six month delay in appellate review from the Superior Court of Guam to the Appellate Division of the District Court of Guam did not fall within the scope of the exception to the exhaustion requirement. Although Guam is a territory rather than a state, the court found it preferable to require the exhaustion of all local remedies before permitting federal habeas review.

Aldan was convicted on three counts of burglary after he entered a guilty plea in the Superior Court of Guam. He escaped custody before his sentencing and was sentenced in absentia in violation of Guam law. Shortly afterwards he was apprehended and the prosecution moved for a resentencing. The superior court denied the motion and Aldan did not appeal his conviction. He then filed a petition for habeas corpus with the superior court on the ground that the sentence...
was illegally imposed.\textsuperscript{4375} The petition was denied.\textsuperscript{4376}

Aldan did not appeal to the Appellate Division of the District Court of Guam. Instead, he filed a petition for writ of habeas corpus in the federal district court of Guam.\textsuperscript{4377} The district court denied the petition on the merits but held that the exhaustion requirement was discretionary.\textsuperscript{4378} The court stated that an extenuating circumstance existed in this case such that the exhaustion policy should be disregarded. The extenuating circumstance so described was a four to six month delay until the next three-judge panel convened to sit as the Appellate Division of the District Court of Guam.\textsuperscript{4379}

The Ninth Circuit held that the district court erred because the delay did not meet the criteria of \textit{Duckworth}.\textsuperscript{4380} The court stated that the district court judge may have reasoned that he was conserving judicial resources by rendering a decision since he would sit on the three-judge panel.\textsuperscript{4381} The Ninth Circuit observed, however, that the district court decides habeas petitions under the federal law while the appellate division decides appeals on the basis of territorial law.\textsuperscript{4382} Therefore, the defendant failed to exhaust territorial remedies and, accordingly, the court remanded the case.\textsuperscript{4383}

The scope of the exhaustion requirement may be limited when considerations of double jeopardy arise. In \textit{Hartley v. Neely},\textsuperscript{4384} the Ninth Circuit held that the exhaustion requirement may be satisfied prior to final judgment in state court where a habeas appeal is based on a double jeopardy claim.\textsuperscript{4385}

Hartley was released from custody after being granted a motion for mistrial resulting from prosecutorial misconduct. A second trial was brought on the same charges and he brought a motion to dismiss on a double jeopardy claim. He lost the motion but pursued his claim through the state court system; finally, he filed a petition for a writ of

\textsuperscript{4375}. 718 F.2d at 890.
\textsuperscript{4376}. \textit{Id}.
\textsuperscript{4377}. \textit{Id}.
\textsuperscript{4378}. \textit{Id} at 890-91. Although the territorial prosecutor conceded that a sentence imposed in absentia is contrary to § 1.13 of the Guam Code of Criminal Procedure, the district court disagreed. \textit{Id} at 891.
\textsuperscript{4379}. \textit{Id}.
\textsuperscript{4380}. \textit{Id} at 891.
\textsuperscript{4381}. \textit{Id}.
\textsuperscript{4382}. \textit{Id}.
\textsuperscript{4383}. \textit{Id}.
\textsuperscript{4384}. 701 F.2d 780 (9th Cir. 1983) (per curiam).
\textsuperscript{4385}. \textit{Id} at 781.
habeas corpus.4386

The Ninth Circuit joined the First, Second and Fifth Circuits in holding that pretrial habeas review is appropriate with respect to double jeopardy claims if all other state remedies are exhausted.4387 The court reasoned that a habeas petitioner can be assured freedom from double jeopardy only if his petition is heard before the second trial because the guarantee against double jeopardy includes not being "twice put to trial for the same offense."4388

However, since Hartley's mistrial was based on his own motion, the court concluded that a second trial would not be barred. The court stated that the double jeopardy exception would apply only if he could show that the prosecution provoked his mistrial motion at the first trial.4389 Therefore, the circuit court affirmed the district court's denial of the habeas corpus petition.4390

5. Presumption of correctness accorded state court findings

The rule on habeas corpus petitions, set forth in 28 U.S.C. section 2254(d), states that the judgment of the state trial court is presumed to be correct subject to eight exceptions. One exception applies when the federal court concludes, after considering the record as a whole, that the factual determination is "not fairly supported by the record."4391

In Marshall v. Lonberger,4392 the Supreme Court reversed the Sixth Circuit’s grant of a writ of habeas corpus on the ground that it errone-

4386. Id.
4387. Id. (citing Robinson v. Wade, 686 F.2d 298, 303 n.8 (5th Cir. 1982) (exhaustion question is limited to remedies available before commencement of criminal proceedings because double jeopardy cannot be adequately cured by post conviction relief); Benson v. Superior Court, 663 F.2d 355, 359 (1st Cir. 1981) (federal court's only way of preventing double jeopardy is to consider habeas corpus petition before trial); Drayton v. Hayes, 589 F.2d 117, 120 (2d Cir. 1979) (deference to state judicial system required by doctrine of comity met even though habeas corpus petition heard before second trial)).
4388. Id. (quoting Abnedy v. United States, 431 U.S. 651, 661 (1977) (right not to be tried twice for same offense would be significantly undermined if appellate review were postponed until after conviction and sentence)).
4389. Id. (citing United States v. Dinitz, 424 U.S. 600 (1979) (second trial not barred on double jeopardy grounds where initial mistrial was declared on defendant's own motion)).
4390. Id.
4391. 28 U.S.C. § 2254(d) (1982) states in pertinent part:
In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a [state prisoner], a determination after a hearing on the merits of a factual issue, made by a State court . . . in a proceeding to which the applicant for the writ and the State . . . were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct . . . (§)
. . . unless that part of the record of the State court proceeding in which the determination of such factual issue was made . . . is not fairly supported by the record.
ously applied the "fairly supported by the record" standard.4393 Lonberger was convicted in 1975 in an Ohio court for murder while committing rape. He was sentenced to death. He had been indicted by a state grand jury on two counts of "aggravated murder."4394 The first count charged him with murder with "prior calculation and design."4395 The second count charged him with murder while committing rape.4396 Both counts included a "specification" which required that he had previously been convicted of an "offense of which the gist was the purposeful killing of or attempt to kill another."4397

The State of Ohio sought to prove the specification of prior conviction for attempt to kill by introducing into evidence the record of a 1972 Illinois conviction. The Supreme Court observed that the parties had never agreed as to the "historical facts" surrounding Lonberger's guilty plea.4398 Lonberger was indicted in 1971 in Illinois for three counts of aggravated battery and one count of attempted murder.4399 The conviction statement stated that Lonberger was indicted for "aggravated battery, etc."4400 and that he pleaded guilty to the indictment. The transcript of the hearing at which Lonberger pleaded guilty showed that the sentencing judge referred to both aggravated battery and attempted murder. However, the judge referred only to "attempt" and failed to explicitly say "attempt to kill" or "attempted murder."4401

4393. Id. at 436-38.
4394. Id. at 425. Ohio's aggravated murder statute states in pertinent part: "(A) No person shall purposely, and with prior calculation and design, cause the death of another. (B) No person shall purposely cause the death of another while committing . . . rape . . . ." OHIO REV. CODE § 2903.01 (Page 1975).
4395. 459 U.S. at 425 (citing OHIO REV. CODE § 2903.01(A) (Page 1975)).
4396. Id. (citing OHIO REV. CODE § 2903.01(B) (Page 1975)).
4397. Id. at 425-26 & n.2 (citing OHIO REV. CODE § 2929.04(A)(5) (Page 1975). The death sentence could be imposed only in cases of aggravated murder where the specification was proven beyond a reasonable doubt. The Ohio statute states in pertinent part: "[I]f the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death [or life imprisonment] . . . ." OHIO REV. CODE ANN. § 2929.03(C) (Page 1982).

In determining whether to impose the death penalty or life imprisonment, the court is required to hold a presentence hearing to consider possible mitigating circumstances. OHIO REV. CODE §§ 2929.03(D), 2929.04 (Page 1975).
4399. Id. at 427.
4400. Id.
4401. Id. at 427-28. The Illinois judge stated in part: "Understand by pleading guilty I could sentence you from one to ten on the aggravated battery, and attempt one to twenty." Id. at 428.
Before the Ohio trial, the court conducted an in limine hearing to determine whether the Illinois guilty plea was voluntary. The Ohio court found that Lonberger "intelligently and voluntarily" entered his plea of guilty.\(^\text{4402}\) The evidence was admitted in the Ohio trial with an instruction that it be considered only with respect to the required specification of a previous conviction and not the underlying murder count.\(^\text{4403}\) Lonberger was convicted of murder while committing rape and sentenced to death.\(^\text{4404}\) The Ohio Court of Appeals affirmed the admission of Lonberger's guilty plea into evidence and held that it was "voluntarily and knowingly" made.\(^\text{4405}\)

In the federal habeas proceeding, the district court denied relief and found that an "ordinary person would have understood the nature of the charges to which [Lonberger] was pleading guilty."\(^\text{4406}\) The Sixth Circuit reversed the judgment and granted the habeas petition.\(^\text{4407}\) The Supreme Court granted certiorari and remanded\(^\text{4408}\) in light of \textit{Sumner v. Mata}.\(^\text{4409}\) The Sixth Circuit affirmed its original decision,\(^\text{4410}\) and the Supreme Court again granted certiorari.\(^\text{4411}\)

The Supreme Court agreed with the Sixth Circuit that the standard for voluntariness of a guilty plea is a question of federal law.\(^\text{4412}\) However, the Court characterized the issue as one of "historical fact" as to what the Illinois records showed about the guilty plea.\(^\text{4413}\) Therefore, the Court applied the presumption of correctness to state court findings re-

\begin{itemize}
\item \textsuperscript{4402.} \textit{Id.} at 428-29.
\item \textsuperscript{4403.} \textit{Id.} at 429.
\item \textsuperscript{4404.} \textit{Id.}
\item \textsuperscript{4405.} \textit{Id.} at 429-30.
\item \textsuperscript{4406.} \textit{Id.} at 430.
\item \textsuperscript{4409.} 449 U.S. 539, 550 (1981) (court must expressly apply one of exceptions listed in section 2254 if it fails to accord presumption of correctness to state trial court findings).
\item \textsuperscript{4410.} In Lonberger v. Jago, 655 F.2d 447, 449 (1981), the court held that Lonberger's 1972 guilty plea was "not demonstrably an intelligent one." The court found that the Ohio courts made incorrect factual determinations that were not "fairly supported by the records" as required by 28 U.S.C. § 2254(d)(8) (1976). \textit{Id.} at 449.
\item \textsuperscript{4411.} Marshall v. Lonberger, 454 U.S. 1141 (1982).
\item \textsuperscript{4412.} 459 U.S. at 431 (citing Henderson v. Morgan, 426 U.S. 637, 645 n.13 (1976) (guilty pleas not voluntary if defendant has "such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt"); Boykin v. Alabama, 395 U.S. 238, 243 (1969) (issue of effective waiver of federal constitutional right is governed by federal standards)). \textit{See also} Smith v. O'Grady, 312 U.S. 329 (1941) (defendant denied any "real notice" of true nature of charges against him).
\item \textsuperscript{4413.} 459 U.S. at 431-32.
\end{itemize}
quired by section 2254(d)(8).

The Supreme Court found that the Sixth Circuit failed to accord a “high measure of deference” to state court findings, particularly with respect to Lonberger’s credibility. The rationale for the “high measure of deference” standard is that the state trial court observes the witnesses and has the best opportunity to judge them. The Court based its conclusion that the guilty plea had been knowingly and intelligently made on the presumption that in most cases defense counsel routinely explain to the accused the charges against him. Therefore, the Court reversed the Sixth Circuit’s judgment.

6. Exception to state contemporaneous objection statutes

A federal court will not review a state court decision addressing both federal and state claims if the decision is based on adequate and independent state grounds. The state ground must be independent of the federal ground and adequate to support the judgment by itself so that a different ruling on the federal question would not change the outcome of the case. The question of adequacy frequently arises when a litigant fails to meet a state procedural ground and thereby forfeits raising constitutional claims on appeal.

In Wainwright v. Sykes, the Supreme Court held that failure to make constitutional objections before or at trial, in violation of state contemporaneous objection statutes, constitutes an independent and ade-

4414. Id. at 432-38.
4415. Id. at 432 (citing Sumner v. Mata, 455 U.S. 591 (1982) (“high measure of deference” standard applied to hold that state court findings not “fairly supported” by the record)). The Sixth Circuit held that the Ohio courts failed to make “explicit findings . . . concerning Lonberger’s credibility.” 651 F.2d at 448. In LaVallee v. Delle Rose, 410 U.S. 690 (1973), the Supreme Court held that a state court’s failure to make explicit findings with respect to credibility did not defeat the state court decisions. Id. at 694 (citing Townsend v. Sain, 372 U.S. 293, 314-15 (1963)). Therefore, the Supreme Court in Lonberger held that by allowing the Illinois conviction into evidence, the Ohio court tacitly refused to believe Lonberger’s testimony. 459 U.S. at 433-34. The Sixth Circuit also relied on the fact that “the state produced no contrary evidence.” Id. at 851. But the Supreme Court held that this standard goes beyond the high measure of deference required. Id.
4416. 459 U.S. at 434 (citing United States v. Oregon State Medical Soc’y, 343 U.S. 326, 339 (1952) (deference with respect to witnesses should go to trial judge because “[i]n doubtful cases . . . his power of observation often proves the most accurate method of ascertaining the truth . . . .” (quoting Boyd v. Boyd, 252 N.Y. 422, 429, 169 N.E. 632, 634 (1930))).
4417. 459 U.S. at 436 (citing Henderson v. Morgan, 426 U.S. 637, 645 (1976)).
4419. See generally id. at 122-23.
An exception to this rule applies only when the petitioner can show both cause for non-compliance with the state procedural rule and actual prejudice arising from an alleged constitutional violation. The Court left the precise definition of "cause" and "prejudice" open for future determination.

In two recent decisions, the Court gave some definition to these terms. In Engle v. Isaac, the Court examined the "cause for noncompliance" prong of the Sykes test and announced two holdings. First, an argument of alleged "futility" of a constitutional objection does not establish cause. Second, a prisoner's contention that he could not have known of the constitutional claim does not meet the cause for noncompliance requirement where the tools to construct the constitutional claim existed.

In United States v. Frady, the Court specified that "actual prejudice," as distinguished from a mere "possibility of prejudice," must be shown to establish the prejudice prong of the Sykes test.

The Supreme Court vacated and remanded a related case, Myers v. Washington, to the Ninth Circuit for further consideration in light of Isaac and Frady. On remand, the Ninth Circuit distinguished Isaac and Frady and held that the state contemporaneous objection rule did not bar federal habeas review.

The court reasoned that Myers did not have
the constitutional tool to make his claim at the time of his trial and, therefore, he had cause for failure to make an objection at trial.4431 Secondly, the court found that Myers suffered actual prejudice.4432

In 1977, Myers filed a petition for release from personal restraint which was denied by the Washington Supreme Court.4433 Before the state supreme court, Myers for the first time challenged a jury instruction from his 1957 murder trial. He contended that the instruction unconstitutionally shifted, to the defendant, the burden of persuasion with respect to the intent element.4434 The trial judge instructed the jury that they were to presume that the killing was without excuse or justification and that the death of the deceased was designed by the defendant.4435 Myers was convicted of second-degree murder.

In 1979, he filed his petition for a writ of habeas corpus in the district court, but the court granted the state's motion for summary judgment against Myers.4436 The Ninth Circuit reversed and remanded the district court decision.4437 The Supreme Court vacated and remanded the Ninth Circuit decision.4438

The controlling case law establishing the unconstitutionality of such jury instructions was not decided until more than a decade after Myers' trial.4439 Therefore, the Ninth Circuit on remand found that at the time of his trial, in 1957, Myers did not have the proper authority to support his claim. Without this authority he "could not know" of his constitutional claim and, therefore, had "cause" for failure to meet the state contemporaneous objection rule. Thus, the court held Isaac to be inapposite to Myers' case.4440

The Ninth Circuit also found that Myers suffered "actual prejudice" since there was conflicting evidence at trial on the question of design, and since Myers introduced evidence from which lack of intent could have

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4431. Id. at 768.
4432. Id. at 768-69.
4434. 702 F.2d at 766.
4435. 646 F.2d at 361 (emphasis added).
4436. Id. at 357.
4437. Id. at 363.
4439. 702 F.2d at 766. In Mullaney v. Wilbur, 421 U.S. 684 (1975), the Supreme Court established the unconstitutionality of shifting the burden of proof of an element of a crime. In Mullaney, a state statute required the defendant to prove that he acted in the heat of passion on sudden provocation in order to reduce the charge from murder to manslaughter. Id. at 684-85. The Court held that the statute violated due process by unconstitutionally shifting to the defendant the burden of proof. Id. at 704.
4440. 702 F.2d at 767-68.
been inferred.\textsuperscript{4441} The court therefore held Frady to be inapposite. Thus, for the second time, the Ninth Circuit reversed and remanded the lower court's denial of habeas corpus.\textsuperscript{4442}

The question of "actual prejudice" also arose in Leiterman v. Rushen.\textsuperscript{4443} In Leiterman, the Ninth Circuit held that no "actual prejudice" resulted because the allegedly illegal conduct of the arresting officers had no causal relationship to either the evidence used to convict the petitioner or the decision to prosecute him.\textsuperscript{4444}

Leiterman and two co-defendants were suspected of dealing in marijuana.\textsuperscript{4445} Police observed them transferring large packages from one car to the trunk of another.\textsuperscript{4446} Two armed police officers in plainclothes approached the defendants, identified themselves, and ordered them to halt.\textsuperscript{4447} The defendants fled and the officers opened fire, killing one man and wounding another.\textsuperscript{4448} At trial the defendants made a motion to suppress the evidence, asserting only that the police lacked probable cause to seize it.\textsuperscript{4449} However, they failed to bring a pretrial motion to suppress the evidence.\textsuperscript{4450} They also failed to address the issue of excessive violence.\textsuperscript{4451} The defendants were convicted of possession of marijuana.\textsuperscript{4452}

On appeal, the defendants claimed that their fourteenth amendment due process rights were violated by the arresting officer's use of excessive violence.\textsuperscript{4453} They also claimed that their sixth amendment right to effective assistance of counsel was violated because this claim was not raised at the trial and pretrial stages.\textsuperscript{4454} The California Court of Appeal did not discuss the issue of incompetent counsel and declined to reach the due process issue because it had not been raised at trial.\textsuperscript{4455}

The district court found that, although the police use of violence
was excessive, it did not render the conviction unconstitutional.\textsuperscript{4456} The district court reasoned that the police conduct did not affect the fairness of the trial and that the police had probable cause, before the shooting occurred, to believe that a crime was being committed.\textsuperscript{4457} Finally, the district court found that the conduct did not "rise to the level of outrageousness necessary to overturn the conviction."\textsuperscript{4458}

The Ninth Circuit stated that habeas corpus usually requires some causal nexus between the government action which violates the constitutional right and the conviction.\textsuperscript{4459} Though the court found some authority that outrageous conduct by a federal official might warrant the overturn of a federal conviction,\textsuperscript{4460} it found no cases in which the misconduct committed by local officers led to a reversal. More importantly, the Ninth Circuit found that any misconduct in this case had nothing to do with the production of evidence or the decision to prosecute.\textsuperscript{4461} The court concluded no "actual prejudice" existed and, therefore, that the Sykes exception to the contemporaneous objection rule did not apply.\textsuperscript{4462} Accordingly, it did not grant habeas corpus relief.\textsuperscript{4463}

In \textit{Kreck v. Spaulding},\textsuperscript{4464} the court held that Washington's contemporaneous objection rule in effect at the time of Kreck's trial allowed claims of constitutional dimension to be raised on appeal even though they had not been raised at trial.\textsuperscript{4465}

\textsuperscript{4456} Id.
\textsuperscript{4457} Id.
\textsuperscript{4458} Id.
\textsuperscript{4459} Id.

\textsuperscript{4460} Id. (citing United States v. Toscanino, 500 F.2d 267, 275-76 (2d Cir. 1974)). In Toscanino, the defendant appealed, on due process grounds, a conviction for counterfeiting. He alleged he had been kidnapped, tortured, and illegally extradited from Uruguay. United States v. Toscanino, 500 F.2d 267, 269-70 (2d Cir. 1974). The court remanded for an evidentiary hearing. \textit{Id.} at 281. On remand, the lower court held there was no participation by United States officials. United States v. Toscanino, 398 F. Supp. 916, 917 (E.D.N.Y. 1975). The Toscanino ruling was cited in United States v. Fielding, 645 F.2d 719, 723 (9th Cir. 1981). In Fielding, the court held that since there was no showing that the United States participated in Fielding's torture and kidnapping in Peru, the indictment need not be dismissed. \textit{Id.} at 723-24.\textsuperscript{4461} 704 F.2d at 443. \textit{Cf.} Rochin v. California, 342 U.S. 165 (1952) (forcible stomach pumping to retrieve morphine tablets later admitted in evidence constituted "brutal conduct" and violation of due process).\textsuperscript{4462}

\textsuperscript{4463} 704 F.2d at 444.
\textsuperscript{4464} Id.
\textsuperscript{4465} 721 F.2d 1229 (9th Cir. 1983) (amended opinion).

The amended opinion added the Washington State Supreme Court and Washington Court of Appeals opinions in its appendix. Judge Schroeder concurred in the original opinion, but joined the majority in the amended opinion. The major changes were a shortened discussion of the procedural default and an additional discussion of the issue of exhaustion which Judge Alarcon raised in his dissent.\textsuperscript{4465}

\textsuperscript{4456} \textit{Id.} at 1233-35. The court further held that Kreck had challenged the sufficiency of the
Kreck was convicted of second-degree felony murder under Washington law. The underlying felony was second-degree assault. The Washington assault statute set forth seven situations which constituted second-degree assault. Only the first two were at issue in the Kreck case. In the first, a person is guilty of second-degree assault if that person, "with the intent to injure" another, unlawfully administers a "drug . . . which is dangerous to life or health." In the second situation, a person is guilty of second-degree assault if that person "[w]ith intent . . . to enable or assist himself or any other person to commit any crime . . . administer[s] . . . chloroform . . . ."

The indictment charged Kreck with second-degree murder while committing a second-degree assault by using chloroform on his estranged wife after he had broken into his wife's home to retrieve furniture. However, the indictment did not specify under which section of the assault statute the charge was made. Nor did it specify any crime Kreck sought to further by committing assault. Kreck did not object to the information of the indictment in the state courts and, therefore, there was no exhaustion problem. Id. at 1234.

4466. Id. at 1230. The Washington second-degree murder statute in effect at the time of Kreck's trial provided in pertinent part:

The killing of a human being, unless it is excusable or justifiable, is murder in the second degree...

(2) When perpetrated by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a felony . . . .


4467. 721 F.2d at 1231. The second-degree assault statute in effect at the time of Kreck's trial provided in pertinent part:

Every person who, under circumstances not amounting to assault in the first degree—
(1) With intent to injure, shall unlawfully administer . . . any drug . . . the use of which is dangerous to life or health; or
(2) With intent thereby to enable or assist himself or any other person to commit any crime, shall administer to, or cause to be taken by, another, chloroform . . . .

Shall be guilty of assault in the second degree . . . .


4470. 721 F.2d at 1231 n.5. Kreck's indictment for second-degree murder stated in pertinent part:

That the defendant, Charles Kreck . . . engaged in the commission of the crime of Assault in the Second Degree . . . upon Jacosa Kreck, and did administer to . . . Jacosa Kreck, chloroform, and as a result . . . Jacosa Kreck . . . die[d].

Id.

4471. The state argued that, by using the word "chloroform" in the indictment, it had supplied the information required by subsection 2 of the assault code. Subsection 2 also required that the defendant administer chloroform with the intent to assist himself in committing "any crime." The indictment failed to identify an underlying crime. The state argued that identify-
sufficiency of the record at trial. He was convicted of second-degree murder while committing a felony. 4472

Kreck made a direct appeal to the state court claiming that the indictment was insufficient and that he was denied due process because the charges failed to give him adequate notice to prepare his defense. The state supreme court rejected this claim. 4473 He then sought a writ of habeas corpus in federal court. 4474

The State of Washington argued that the state contemporaneous objection rule barred relief because Kreck did not object to the indictment at the time of his trial. 4475 The Ninth Circuit held that where there is no clear state policy barring review of constitutional claims not asserted at trial, the policies of comity and finality are fostered by federal nonintervention, and a federal court may review the claim. 4476 The court found

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4472 Id. at 1232.
4473 Id. at 1234. Kreck also raised the issue in his petition for collateral review to the state court of appeals. Judge Alarcon disagreed with the majority's characterization of Kreck's claim before the state courts. In his dissent, he argued that Kreck challenged the sufficiency of the evidence and not the sufficiency of the indictment before the state courts. Id. at 1237 (Alarcon, J., dissenting). He therefore concluded that Kreck had not exhausted his state remedies. Id. at 1239-40 (Alarcon, J., dissenting). This disagreement between the majority and the dissent is probably the reason the court included the state court opinions as appendices.

The Washington Court of Appeals stated that Kreck argued that the state "failed to prove the crime of second-degree assault as defined in RCW 9.11.020(2)." State v. Kreck, 12 Wash. App. 748, 754, 532 P.2d 285, 289 (1975) (footnote omitted). That court reversed the conviction and remanded for retrial, urging the trial court "to specify which section or sections of RCW 9.11.020, if any, it finds the defendant violated." Id. at 755, 532 P.2d at 289 (footnote omitted).

The Washington Supreme Court reversed, holding there was substantial evidence that the defendant administered chloroform to enable himself to commit burglary. 86 Wash. 2d 112, 122, 542 P.2d 782, 788 (1975) (en banc).

4474. 721 F.2d at 1234. The district court held that Kreck had exhausted all state remedies; the circuit court did not disturb this holding. Id. at 1234-35. Both parties submitted stipulations to the Ninth Circuit stating that Kreck had challenged the sufficiency of the indictment in every available state forum. Id. at 1234. The court observed that the state cannot concede exhaustion. Id. (citing Jackson v. Cupp, 693 F.2d 867, 868 (9th Cir. 1982)). The court distinguished Jackson on the ground that the record in Kreck showed that the state had a fair opportunity to review Kreck's claim. Id.

4475. Id. at 1234 (citing Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977) (state contemporaneous objection rule bars review because it is an independent and adequate state ground)).
4476. Id. (citing Ulster County Court v. Allen, 442 U.S. 140 (1979)). In Ulster, the Court stated that "if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." 442 U.S. at 154 (footnote omitted). See also Maxwell v. Sumner, 673 F.2d 1031, 1034 (9th Cir.), cert. denied, 459 U.S. 976 (1982).

Judge Alarcon in his dissent argued that Kreck's counsel deliberately failed to raise the objection to the indictment in state court as part of his trial strategy to convince the judge that
that Washington has no clear contemporaneous exception policy that would qualify as an independent and adequate state ground barring federal habeas review.\textsuperscript{4477} The Ninth Circuit thus reviewed the matter and held that at the time of Kreck's trial Washington law allowed claims of constitutional error to be raised for the first time on appeal.\textsuperscript{4478} Therefore, the circuit court upheld the grant of habeas corpus.\textsuperscript{4479}

7. Requirement of specific factual allegations for federal petitioners

A prisoner in federal custody who files a habeas corpus petition is not automatically entitled to an evidentiary hearing under 28 U.S.C. section 2255.\textsuperscript{4480} The petitioner seeking a hearing must support his claim

Kreck was not guilty by virtue of insanity. 721 F.2d at 1238 (Alarcon, J., dissenting) (citing Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (purpose of honoring state contemporaneous objection rules is to prevent "sandbagging" where defense lawyers take their chances on obtaining not guilty verdict with intent of saving constitutional claims in event of appeal)).

\textsuperscript{4477} 721 F.2d at 1234-35. The Ninth Circuit has on two previous occasions held that state procedural policy did not bar habeas review. See Maxwell v. Sumner, 673 F.2d 1031, 1034 (9th Cir.) (no independent and adequate state ground because state courts denied Maxwell's federal claim on the merits rather than on state procedural grounds),\textsuperscript{4478} cert. denied, 459 U.S. 976 (1982); Quigg v. Crist, 616 F.2d 1107, 1111 n.4 (9th Cir.) (Montana's contemporaneous objection procedure at time of trial allowed claims of constitutional dimension to be raised for the first time on appeal),\textsuperscript{4479} cert. denied, 449 U.S. 922 (1980).

\textsuperscript{4477} 721 F.2d at 1235. The court cited several authorities for this proposition. First, it cited a Washington statute describing the issues reviewable in habeas corpus proceedings. The Washington statute permits inquiry "where it is alleged in the petition that the rights guaranteed the petitioner by the Constitution of the State of Washington or of the United States have been violated." WASH. REV. CODE ANN. § 7.36.130(1) (1961).

Second, the court cited Rule 2.5(a)(3) of the Rules of Appellate Procedure for the State of Washington which allows a party to raise for the first time on review a "manifest error affecting a constitutional right."

\textsuperscript{4478} See also State v. Ruzicka, 89 Wash. 2d 217, 220-21, 570 P.2d 1208, 1209-10 (1977) (claim raised first time on appeal generally will not be reviewed, but when claims go to issue of fair trial they are properly before court); State v. Peterson, 73 Wash. 2d 303, 306, 438 P.2d 183, 185 (1968) (footnote omitted) (failure to object at trial generally bars review on appeal, but where instruction invades a constitutional right, review is proper).

Judge Alarcon argued that a challenge to the sufficiency of the information cannot be raised on appeal. 721 F.2d at 1238 (Alarcon, J., dissenting) (citing State v. Piper, 194 Wash. 194, 77 P.2d 779 (1938) (sufficiency of the information could not be raised for the first time in Washington Supreme Court)). However, since Piper referred to the Washington Supreme Court, it may not bar a challenge to the sufficiency of the indictment on appeal so long as the claim is raised in the Washington Court of Appeals as well as the Washington Supreme Court.

\textsuperscript{4479} 721 F.2d at 1235.

\textsuperscript{4480} 28 U.S.C. § 2255 (1982) provides in pertinent part: "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

See Hodges v. United States, 368 U.S. 139, 140 (1961) (per curiam) (no hearing required when records of case conclusively show that petitioner was not entitled to relief); Coco v.
with specific factual allegations\textsuperscript{4481} which are not so patently frivolous as to warrant a summary dismissal.\textsuperscript{4482} When there is no manifest factual or legal invalidity to the petitioner's claims, the court must grant a hearing on the merits.\textsuperscript{4483}

In \textit{Baumann v. United States},\textsuperscript{4484} the Ninth Circuit remanded two of Baumann's claims for an evidentiary hearing because they were supported by specific factual allegations. The court dismissed two other claims on the basis of legal invalidity.\textsuperscript{4485}

Baumann was the president of a brokerage company which marketed land sale contracts held by a land sales company. The brokerage company collected periodic contract payments from lot buyers and forwarded them to investors who had purchased the contracts.\textsuperscript{4486} When financing problems occurred, the land sales company began writing spurious land sale contracts.\textsuperscript{4487} Finally, when legitimate sales failed to support the fraudulent sales, the operation collapsed.\textsuperscript{4488} Baumann was charged with conduct knowingly in furtherance of the fraudulent scheme, and aiding and abetting the fraudulent conduct.\textsuperscript{4489}

\begin{footnotesize}
\begin{enumerate}
\item United States, 569 F.2d 367, 369-71 (5th Cir. 1978) (no § 2255 hearing where defendant forfeited claims by choosing strategy of not raising claims at trial).
\item \textsuperscript{4481} "Specific factual allegations" are to be distinguished from "merely conclusionary statements." See Wagner v. United States, 418 F.2d 618, 621 (9th Cir. 1969) (claim of suppression of exculpatory evidence supported by specific factual allegation where a potential identification witness was instructed to avoid testifying). The "specific factual allegations" requirement does not require the prisoner to set forth the evidence in detail. The petitioner need only make factual allegations which, if true, would entitle him to relief. United States v. Hearst, 638 F.2d 618, 621 (1969)), cert. denied, 451 U.S. 938 (1981).
\item \textsuperscript{4482} When specific factual allegations are made, the claim is not frivolous. See Blackledge v. Allison, 431 U.S. 63, 77-78 (1977) (allegation of an allegedly unkept plea bargain not patently frivolous since petitioner indicated terms of promise as well as identity of witness); Machibroda v. United States, 368 U.S. 487 (1962) (government claim that petitioner's allegations were improbable due to lack of witnesses could not warrant court's denial of petitioner's opportunity to support his claim of alleged plea bargain). Cf. United States v. Malcolm, 432 F.2d 809, 812-13 (2d Cir. 1970) (claim that guilty plea was invalid due to incompetency was without merit since, immediately after making plea, petitioner had denied recent use of drugs and confirmed freedom from narcotics by certification of his physician); Choy v. United States, 344 F.2d 126, 127-28 (9th Cir.) (allegation of incompetency is frivolous when undocumented and unsupported by allegations of previous or subsequent history of incompetency, mental deficiency, or treatment), cert. denied, 382 U.S. 871 (1965).
\item \textsuperscript{4483} See Sosa v. United States, 550 F.2d 244, 250 (5th Cir. 1977) (literal language of § 2255 mandates a hearing if record does not show manifest invalidity of claim).
\item \textsuperscript{4484} 692 F.2d 565 (9th Cir. 1982).
\item \textsuperscript{4485} Id. at 581.
\item \textsuperscript{4486} Id. at 569.
\item \textsuperscript{4487} Id.
\item \textsuperscript{4488} Id. at 569-70.
\item \textsuperscript{4489} Two counts charged Baumann with mailing checks to investors in furtherance of the
\end{enumerate}
\end{footnotesize}
Baumann was convicted on four counts of mail fraud. He raised four claims in his habeas corpus petition. First, he alleged that the indictment was invalid because it was improperly drawn. Second, he argued that the government failed to disclose exculpatory evidence. Third, he raised several claims with respect to sentencing errors. Fourth, he claimed that in light of "newly discovered evidence," he was entitled to an evidentiary hearing. The district court held that the indictment was valid, summarily dismissed the exculpatory evidence and sentencing claims, and held the fourth claim not cognizable in a habeas corpus proceeding.

With respect to Baumann's first claim, the Ninth Circuit stated that an attack on the validity of an indictment generally is not reviewable without showing cause for failure to raise the claim before the trial court. However, the court ruled that such cause may be demonstrated if the petitioner can show that he failed to raise the claim before trial because of ineffective assistance of counsel. The court stated that a claim of ineffective assistance of counsel must rest on a showing of prejudice. It went on to conclude that Baumann could not have suffered any prejudice by his counsel's failure to move for dismissal of the indictment because the indictment was not defective as a matter of law. The Ninth Circuit therefore held that the record demonstrated conclusively that Baumann failed to state a claim for relief and was not entitled to a section 2255 evidentiary hearing.

Secondly, Baumann argued that the prosecution unconstitutionally

land sales company's scheme. The third and fourth counts charged him with mailing certain letters in furtherance of the scheme. Id. at 570.

4490. Id. at 569.
4491. Id. at 571.
4492. Id. at 572.
4493. Id. at 573-74.
4494. Id. at 578.
4495. Id. at 568.
4496. Id. at 572 (citing United States v. Zazzara, 626 F.2d 135, 137 (9th Cir. 1980) (denial of motion for new trial pursuant to § 2255 upheld because no cause shown for petitioner's failure to raise claim prior to trial that indictment was obtained on perjured testimony, where trial attorney knew information relevant to claim)).
4497. Id. (citing Zazzara, 626 F.2d at 137). Cf. Garrison v. McCarthy, 653 F.2d 374, 378 (9th Cir. 1981) (no cause shown where there was no showing that failure to object was anything other than tactical decision).
4498. 692 F.2d at 572 (citing Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc) (prisoner must show that omission constituted error that "reasonably competent attorney acting as a diligent conscientious advocate would not have made"), cert. denied, 440 U.S. 974 (1979)).
4499. Id.
4500. Id.
suppressed evidence which would show that the charges against him were based on contracts that were actually valid.\footnote{4501} Proof of this allegation could establish a violation of due process which would justify relief under section 2255.\footnote{4502} Baumann claimed that the prosecutor failed to disclose to the jury that investors who had testified against Baumann had actually received legitimate contract payments from the buyers themselves rather than fraudulent payments supplied by the land sales company.\footnote{4503} The court rejected the government's claim that Baumann failed to make a sufficient affirmative showing to justify section 2255 relief.\footnote{4504} The Ninth Circuit held that Baumann did not have to show that exculpatory material was in fact intentionally suppressed.\footnote{4505} The court further held that Baumann's claim was not so patently frivolous as to warrant summary dismissal.\footnote{4506} Therefore, the case was remanded for an evidentiary hearing on this claim.\footnote{4507}

Baumann also claimed several errors with respect to his sentencing. He claimed that, contrary to the law of criminal procedure, the court failed to disclose a presentence report to him.\footnote{4508} However, the Ninth Circuit held that the document in issue did not qualify as a presentence report.\footnote{4509} Consequently, the court ruled that Baumann was not entitled to an evidentiary hearing on this issue.\footnote{4510}

Baumann also challenged a presentencing interview with his probation officer, arguing that it violated his sixth amendment right to counsel

\footnote{4501} Id. (citing Brady v. Maryland, 373 U.S. 83 (1963) (prosecutorial suppression of exculpatory evidence constitutes violation of due process clause of fourteenth amendment)).
\footnote{4502} Id. (citing Levin v. Katzenbach, 363 F.2d 287, 290 (D.C. Cir. 1966)).
\footnote{4503} Id.
\footnote{4504} Id. at 573. The court found that the government misplaced its reliance on United States v. Agurs, 427 U.S. 97 (1976) because of its claim that Baumann failed to make a sufficient showing to justify § 2255 relief. 692 F.2d at 572. According to the court, Agurs addressed only the question of the materiality of undisclosed exculpatory evidence and not the question of the defendant's burden of production. Id.
\footnote{4505} 692 F.2d at 572-73.
\footnote{4506} Id. at 573 (citing United States v. Donn, 661 F.2d 820, 825 (9th Cir. 1981) (per curiam) (evidentiary hearing required since prisoner produced documents allegedly refuting presentence report)).
\footnote{4507} Id. The court refused to address the argument with respect to letters which Baumann did not include in his § 2255 petition. See Marshall v. United States, 465 F.2d 966, 967-68 (9th Cir. 1972) (per curiam). However, the court held that on remand Baumann should be allowed to raise the issue of prosecutorial suppression with respect to these letters. 692 F.2d at 573.
\footnote{4508} 692 F.2d at 573. \textit{FED. R. CRIM. P. 32(c)(3)(A)} requires disclosure of presentence reports if the defendant requests it.
\footnote{4509} 692 F.2d at 574.
\footnote{4510} Id.
and constituted custodial interrogation. The Ninth Circuit concluded that there was no custody and therefore the meeting with the probation officer did not constitute a "critical stage" of the proceeding requiring presence of counsel. Therefore, the court upheld the district court's summary dismissal of this claim.

Finally, Baumann claimed that certain additional evidence constituted "newly discovered evidence" which could be a basis for a new trial. In one letter the president of the land sales company said that the contracts purchased by Baumann's brokerage company were valid, and that Baumann could not have had any knowledge of the scheme. The magistrate concluded that claims of new evidence are not cognizable under section 2255 and recommended that the petition be denied. The district court accepted the magistrate's recommendation and denied the petition. In doing so, the district court stated that section 2255 does not allow relitigation of questions of guilt or innocence. The dis-

4511. Id.
4512. Id. at 574-78. The Ninth Circuit distinguished Estelle v. Smith, 451 U.S. 454 (1981), on the ground that the presentence interview is a "critical stage" in capital cases. 692 F.2d at 576.
4513. 692 F.2d at 578.
4514. Id.
4515. Id.
4516. Id. at 578-79 & n.6. Baumann objected to the magistrate's recommendation and cited contrary authority from other circuits. See, e.g., Lindhorst v. United States, 585 F.2d 361, 365 & n.8 (8th Cir. 1978) (newly discovered evidence raised in § 2255 motion is admissible subject to same test governing motions for new trial); Anderson v. United States, 443 F.2d 1226, 1227 (10th Cir. 1971) (per curiam) (case remanded for evidentiary hearing on newly discovered evidence of confession by prisoner's fellow inmate). See also Silverman v. United States, 556 F.2d 655 (2d Cir.) (no evidentiary hearing required since client knew of attorney's alteration of evidence and failed to object at trial and, therefore, by implication, evidence was not newly discovered), cert. denied, 434 U.S. 956 (1977); Morgan v. United States, 438 F.2d 291 (5th Cir. 1971) (per curiam) (no evidentiary hearing required because alleged newly discovered evidence was known to petitioner and his attorney).
4517. 692 F.2d at 579.
4518. Id. at 579 & n.7. The Ninth Circuit distinguished the district court authority, Hill v. United States, 368 U.S. 424 (1962), on the ground that Hill held that nonconstitutional claims are cognizable only if there is a "fundamental defect which inherently results in a complete miscarriage of justice." Id. at 428.

For further discussion of the proposition that a petitioner's guilt or innocence should not be relitigated in a collateral proceeding, see Townsend v. Sain, 372 U.S. 293, 317 (1963) (no evidentiary hearing required where newly discovered evidence relevant only to the guilt of the prisoner rather than constitutionality of his detention). See also Anderson v. Maggio, 555 F.2d 447, 451 (5th Cir. 1977) (no evidentiary hearing required despite evidence of retracted confession); Clark v. Untied States, 370 F. Supp. 92, 95 (W.D. Pa.) (appeal to executive clemency and not evidentiary hearing is recourse for relief because of newly discovered evidence), aff'd mem., 505 F.2d 1050 (3d Cir. 1974); Schneckloth v. Bustamonte, 412 U.S. 218, 265-66 (1973) (Powell, J., concurring) (habeas corpus review should occur only if there is a "colorable claim of innocence"). But see Anderson v. United States, 443 F.2d 1226, 1227 (10th Cir. 1971) (per
The Ninth Circuit held that, because the evidence could have been discovered with the exercise of reasonable diligence, it was not newly discovered. Therefore, it declined to decide the correctness of the district court holding that claims of newly discovered evidence were proper under section 2255. Instead, the Ninth Circuit held that Baumann had a claim of ineffective assistance of counsel.

In summary, Baumann was not entitled to an evidentiary hearing on the indictment and sentencing issues since they failed on questions of law. However, he was entitled to an evidentiary hearing on the questions of ineffective assistance of counsel and prosecutorial suppression of exculpatory evidence since these claims were based on sufficient factual allegations.

In Morgan v. United States, the Ninth Circuit remanded the case for a section 2255 evidentiary hearing because Morgan's discrimination claim was based on sufficient factual allegations. Morgan, a black man, was convicted in a Washington state court of various narcotics offenses. He filed a habeas petition to have his judgment vacated on the ground that no blacks had been on his grand or petit jury panels or on the master jury wheel during the three-year period when the criminal proceedings against him were pending. The district court summarily dismissed the motion on the ground that it stated only a legal conclusion unsupported by factual allegations. The Ninth Circuit affirmed because Morgan failed to alleged any information regarding the black population in the division or district in which he was indicted.

Morgan then filed a second section 2255 motion alleging no blacks had served on a federal jury in the district for more than twenty years.
The district court summarily dismissed the second motion on the grounds that it failed to allege new or different grounds for relief and that the prior determination was on the merits. The Ninth Circuit reversed and held that the rule against successive motions did not bar review of Morgan's second motion. The court concluded that summary dismissal was improper because the district court had not decided the earlier motion on the merits.

The Ninth Circuit went on to affirm the district court finding that Morgan failed to establish a prima facie case of discrimination under the sixth amendment. The court ruled that Morgan nonetheless had an equal protection claim since he was allegedly indicted by a grand jury from which members of his race had been purposefully excluded. The court held that an evidentiary hearing is needed where the exclusion has occurred over a period of time, especially where there has been complete exclusion from all of the juries. Therefore, the case was remanded for an evidentiary hearing.

4529. Id.
4530. Id.
4531. Id. Rule 9(b), 28 U.S.C. following § 2255 (1982), states:
A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.
4532. 696 F.2d at 1240. See Sanders v. United States, 373 U.S. 1, 19 (1963) (review of second habeas motion not barred if the first motion was not decided on the merits). A federal court can deny a motion without a hearing only if the record "conclusively showed the motion to be without merit." United States v. Donn, 661 F.2d 820, 824 (9th Cir. 1981).
4533. 696 F.2d at 1240 (citing Duren v. Missouri, 439 U.S. 357 (1979)). Duren established a three-part test for determining a prima facie violation of the sixth amendment requirement that the jury system reflect a fair cross-section of the community. First, the group alleged to be excluded must be a "distinctive" group in the community. Second, the group's representation on the list from which jurors are selected must be unfair and unreasonable in relation to the number of such persons in the community. Third, the underrepresentation must be the result of systematic exclusion of the group in the jury selection process. 439 U.S. at 364. Morgan failed to meet the latter two prongs of the test. 696 F.2d at 1240.
4534. 696 F.2d at 1240 (citing Castaneda v. Partida, 430 U.S. 482 (1977))). The Court in Castaneda established a three-part test for determining a prima facie case of discriminatory purpose. First, there must be discrimination against a distinct class. Second, there must be a degree of underrepresentation proven by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors. Third, there must be a selection procedure that is susceptible of abuse or that is not racially neutral. 430 U.S. at 494.
4535. 696 F.2d at 1241 (citing Rose v. Mitchell, 443 U.S. 545 (1979) (claim that no blacks had ever served as grand jury foremen rejected because discrimination not established at the evidentiary hearings); Guice v. Fortenberry, 661 F.2d 496 (5th Cir. 1981) (en banc) (claim that no blacks had served as jury foremen for the past 15 years was cause for evidentiary hearing)). The court considered Morgan's claim even more serious than those in Guice and Rose. Id.
4536. Id.
I. Ex Post Facto Clause

The ex post facto clause\(^4\) forbids Congress and the state legislatures from enacting statutes which impose or increase criminal punishment for penal acts committed prior to the statutes enactment.\(^4\) The ex post facto clause limits the power of the legislature but does not, on its face, apply to judicial decisions.\(^4\) The due process clauses of the fifth and fourteenth amendments, however, prohibit the courts from extending existing law to punish an act not considered unlawful when committed unless the extension was foreseeable.\(^4\)

In *Holguin v. Raines*,\(^4\) the Ninth Circuit reviewed the propriety of extending the defendant's minimum time of imprisonment by retroactively applying a new judicial and administrative interpretation of the Arizona parole statute.\(^4\) The defendant, Holguin, had been convicted of two separate crimes\(^4\) and had received consecutive sentences. At the time of Holguin's sentencing, the Arizona Department of Corrections relied on an unpublished opinion of the Arizona Attorney General and determined Holguin's parole eligibility from his consecutive sentences "by taking one-third of the total minimum terms of [his] imprisonment."\(^4\)

Subsequently, the Arizona Supreme Court interpreted the parole statute to mean that a criminal defendant convicted of two crimes and given consecutive sentences is not eligible for parole until he serves the complete sentence for the first crime and then serves one-third of the sentence for the second crime.\(^4\) Thereafter, the Arizona Attorney Gen-

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4540. Bouie v. City of Columbia, 378 U.S. 347 (1964). The *Bouie* Court reversed trespass convictions, holding that an unforeseeable judicial extension of the state's trespass statute by the state supreme court violated the due process clause of the fourteenth amendment. *Id.* at 353-54. In Marks v. United States, 430 U.S. 188 (1977), the Supreme Court held that retroactive application of the definition of obscenity announced in a recent Supreme Court decision, which made certain formerly lawful activity illegal, was a violation of the due process clause of the fifth amendment. *Id.* at 196.
4541. 695 F.2d 372 (9th Cir. 1982).
4543. 695 F.2d at 372. In 1972, Holguin began serving three concurrent sentences for assault with a deadly weapon. In 1973, Holguin received an additional sentence for kidnapping, to run consecutively with the earlier sentences for assault. *Id.*
4544. *Id.* at 372-73. The Arizona Supreme Court's unpublished opinion determined parole eligibility by taking one-third of the *total minimum terms* of the consecutive sentences. *Id.*
4545. *Id.* at 373. In Mileham v. Arizona Bd. of Pardons and Paroles, 110 Ariz. 470, 520
eral issued a new opinion on the parole statute's application to consecutive sentences that was consistent with the Arizona Supreme Court decision. Consequently, Holguin's parole eligibility date was extended to conform with these judicial and administrative changes.

Holguin petitioned for a writ of habeas corpus in a United States district court. The district court denied the petition on the ground that the Attorney General's new opinion did not violate the ex post facto clause because the changes merely reflected the interpretation of the parole statute made by the Arizona Supreme Court. The Ninth Circuit affirmed.

The Ninth Circuit equated administrative changes with legislative changes and, thus, subjected them to the same ex post facto scrutiny. The court held, however, that retroactive changes in the law do not violate the ex post facto clause if made in conformity with judicial interpretation of existing law. The Ninth Circuit relied on the rule that the ex

P.2d 840 (1974), the Arizona Supreme Court interpreted the Arizona parole statute to mean that "a prisoner serving a sentence for escape made consecutive to a robbery sentence becomes eligible for parole only after serving the complete sentence on the robbery conviction and one-third of the escape sentence." 695 F.2d at 373.

4546. The Arizona Attorney General's new opinion announced that "any prisoner sentenced to consecutive sentences would have to complete the first sentence and one-third of the second sentence before being eligible for parole." 695 F.2d at 373.

4547. Id. Under the prior Arizona Attorney General's opinion, Holguin was eligible for parole on November 8, 1979. Under the holding in Mileham, see supra note 4545, and pursuant to the Attorney General's new opinion, Holguin would not become eligible for parole until September 9, 1985.

4548. 695 F.2d at 373.

4549. Id. at 375.

4550. Id. at 374 (citing Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972), vacated as moot, 409 U.S. 1100 (1973)). In Love, the California Department of Corrections changed its interpretation of the California parole statute to increase the minimum number of terms for prisoners serving consecutive sentences prior to eligibility for parole. The court found that the change violated the ex post facto clause, holding that the clause applies to retroactive administrative interpretations as well as to legislative enactments. Love v. Fitzharris, 460 F.2d 382, 385 (9th Cir. 1972), vacated as moot, 409 U.S. 1100 (1973).

4551. 695 F.2d at 374 (citing Mileham v. Simmons, 588 F.2d 1279 (9th Cir. 1979)). In Simmons, the Ninth Circuit held that the Arizona Supreme Court did not violate ex post facto principles when it recalculated parole eligibility in Mileham v. Arizona Bd. of Pardons and Paroles, 110 Ariz. 470, 520 P.2d 840 (1974). Mileham v. Simmons, 588 F.2d 1279, 1280 (9th Cir. 1979). The Holguin court noted that to the extent the Simmons decision applies to Holguin it is bound by the Simmons result. The outcome of Holguin's ex post facto appeal, then, turned on whether the Arizona Attorney General's new opinion was consistent with the Arizona Supreme Court decision in Mileham v. Arizona. The Ninth Circuit then construed Mileham v. Arizona as applying to all consecutive sentencing situations and held that the Attorney General's new opinion was consistent with that decision. 695 F.2d at 375. See supra note 4545. The dissent, relying on Love v. Fitzharris, see supra note 4550, was not persuaded that the Attorney General's new opinion fell within the holding of the Arizona Supreme Court in Mileham v. Arizona. The dissent argued that the Attorney General's new opinion operated
post facto clause does not apply to a court decision construing state law.\textsuperscript{452}

Nevertheless, the court recognized that implicit in the ex post facto clause was the requirement that the judicial interpretations of existing laws be foreseeable.\textsuperscript{453} The court then determined that, under the controlling due process principles, the change in the interpretation of the parole statute was foreseeable.\textsuperscript{454}

The Ninth Circuit's decision in \textit{Holguin} underscores the need to make a threshold analysis of whether the imposition or increase of criminal punishment occurred because of changes in the law caused by administrative review, legislative enactment, or judicial decision, since their respective standards of ex post facto scrutiny are not uniform. The ex post facto clause is an absolute bar on retroactive legislative or administrative acts that impose or increase criminal punishment for prior acts, whereas the due process protection against retroactive application of judicial decisions is set at the lower standard of foreseeability.

The Ninth Circuit dealt with the issue of foreseeability in \textit{Camitsch} as a substantial disadvantage to prisoners already incarcerated, and that the new opinion was much broader than the narrow holding of the Arizona Supreme Court in \textit{Mileham v. Arizona}. The dissent, therefore, contended that the new opinion should be treated as an act of law applied retroactively, in violation of the ex post facto clause. 695 F.2d at 375-77 (Reinhardt, J., dissenting).

\textsuperscript{4552} 695 F.2d at 374. \textit{See} \textit{Marks v. United States}, 430 U.S. 188, 191 (1977) (the ex post facto clause “does not of its own force apply to the Judicial Branch”).

\textsuperscript{4553} 695 F.2d at 374. \textit{See} \textit{Marks v. United States}, 430 U.S. 188, 191-92 (1977) (the right of fair warning is protected against judicial action by the due process clauses of the fifth and fourteenth amendments); \textit{Bouie v. City of Columbia}, 378 U.S. 347, 354-55 (1964) (if the ex post facto clause bars the state from enacting and retroactively applying a criminal statute, it must follow that the due process clause bars the state court from achieving the same result by judicial construction); \textit{Forman v. Wolff}, 590 F.2d 283, 284 (9th Cir. 1978) (the principle of fair warning underlying the ex post facto clause limits the retroactive application of judicial decisions), \textit{c.f.}, \textit{Holguin}, 588 F.2d 1279 (9th Cir. 1979) (state court ruling adding the element of alleging and proving the accused's age to crime of illegal sale of cocaine was held foreseeable).

The most definitive analysis was made by the Supreme Court in \textit{Bouie v. City of Columbia}, \textit{supra} note 4540 and accompanying text. The \textit{Bouie} Court reasoned that “[i]f a judicial construction of a criminal statute is ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,’ it must not be given retroactive effect.” 378 U.S. 317, 354 (1964) (citation omitted).

Additionally, the Ninth Circuit and the Supreme Court appear to differ as to the constitutional basis of the foreseeability requirement. In \textit{Marks}, \textit{supra} note 4540 & 4553, and \textit{Bouie}, \textit{supra} note 4540, the Supreme Court placed the foreseeability requirement within the purview of the due process clause; however, in \textit{Forman}, \textit{supra} note 4553, the Ninth Circuit held that fair warning regarding judicial decisions is implicit in the ex post facto clause.
In this case, the defendant sought a writ of habeas corpus after the Montana Supreme Court affirmed his conviction on counts of sexual assault and non-consensual intercourse with four minor girls, ages twelve to fourteen. The defendant sought a new trial on the ground that the Montana Supreme Court improperly applied case law that had been decided subsequent to his trial with respect to a jury instruction.

The Ninth Circuit affirmed the district court's denial of the writ on the ground that the retroactive application of state decisional law did not violate due process because the change in the use of the jury instruction was foreseeable. The court reasoned that disapproval of the jury instruction in other Ninth Circuit state jurisdictions in the decade prior to the defendant's trial put him on notice of its eventual disfavor by the courts of Montana.

The Ninth Circuit in *Camitsch* has established an affirmative obligation on criminal defendants and their counsel to research changes in substantive law that occur in other jurisdictions within the circuit and to anticipate that the same change may occur in their own state between the time of trial and appeal. The defendant who fails to do so may be precluded from appealing the trial court's decision not to give a jury instruction that is subsequently changed by decisional law, if the change was foreseeable.

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4555. 705 F.2d 351 (9th Cir. 1983).
4556. *Id.* at 352-53. The defendant had requested a "charge easily made—difficult to disprove" instruction. This instruction states that the charge against the defendant is difficult to defend against, even if the accused is innocent; therefore, the testimony of the complaining witnesses must be examined with caution. The state decisional law in effect at the time of the defendant's trial limited the instruction to instances where the veracity of the complaining witness had been shown to be suspect. An unrelated subsequent appellate court decision further narrowed the use of the instruction to instances of both personal enmity and lack of corroboration. Due to the facts of the defendant's case, the intervening change in the law made his appeal for error of the trial court's refusal to offer the instruction moot. *Id.* at 353.
4557. *Id.*
4558. *Id.*
4559. *Id.* See, e.g., *State v. Settle*, 111 Ariz. 394, 531 P.2d 151 (1975) (instruction held to violate state constitution); *People v. Rincon-Pineda*, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975) (instruction found to be obsolete).
I. ARREST, SEARCH, AND SEIZURE
   A. Amy Zheutlin
   B. J. Kevin Lilly
   C. Mike Asawa
   D. Lisa Diane Mahrer
   E. Lisa Diane Mahrer
   F. Jayne Danowsky Taylor

II. PROCEDURAL RIGHTS OF THE ACCUSED
   A. Karen K. Gilbert
   B. Deborah J. Snyder
   C. Thomas Hoegh
   D. Deborah J. Snyder
   E. James J. Freedman
   F. James J. Freedman

III. PRETRIAL PROCEEDINGS
   A. Francine Parnes
   B. Susan J. Brant
   C. Jayne Danowsky Taylor
   D. Lisa Diane Mahrer
   E. J. Kevin Lilly
   F. Jayne Danowsky Taylor

IV. TRIAL PROCEEDINGS
   A. Jayne Danowsky Taylor
   B. Karen K. Gilbert
   C. J. Kevin Lilly
   D. Francine Parnes
   E. Deborah J. Snyder
   F. 1. Michael Reznick
      2.-4. Maxine Miller
      5.-8. Michael Reznick
   G. Timothy J. Oswald
   H. James J. Freedman

V. POST-CONVICTION PROCEEDINGS
   A. Thomas Hoegh
   B. Maureen G. Shanahan
   C. Lisa Diane Mahrer
   D. Colleen M. Regan
   E. Francine Parnes
   F. James J. Freedman
G. 1.-3. Colleen M. Regan  
4.-5. James J. Freedman  
H. Maureen G. Shanahan  
I. Thomas Hoegh