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DEVELOPMENTS IN CRIMINAL LAW AND PROCEDURE IN THE NINTH CIRCUIT, 1977: A SURVEY

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The fourth amendment to the United States Constitution\(^1\) protects people from unreasonable governmental\(^2\) searches and seizures. Thus, the fourth amendment applies only when it appears that a search or seizure has taken place.\(^3\) In the seminal case of *Katz v. United States*,\(^4\) the Court rejected the "trespass" doctrine\(^5\) and held that a search or

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1. U.S. CONST. amend. IV. The amendment reads as follows:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The fourth amendment affords no protection against searches and seizures by private parties. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (the amendment "was not intended to be a limitation on other than governmental agencies . . . "); *United States v. Ogden*, 485 F.2d 536, 538 (9th Cir. 1973), *cert. denied*, 416 U.S. 987 (1974) ("If the search was private, the Fourth Amendment does not apply.").


5. Under the "trespass" doctrine, "surveillance without any trespass and without the
seizure, as those terms are used in the fourth amendment, occurs when the government invades the defendant's "reasonable expectation of privacy." The "reasonableness" of a search or seizure generally depends on the factual circumstances surrounding the governmental conduct in question. However, warrantless searches, with a few well-delineated exceptions, are regarded as unreasonable per se.

"[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home . . . , is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." The unique security problems posed by incarcerated persons, however, require that fourth amendment problems arising in the prison setting receive a somewhat different treatment. While a prisoner does not surrender all his fourth amendment rights, governmental interests are accorded great weight in such cases. An example is United States v. Hearst, a case in which jail officials secretly monitored a conversation between the incarcerated defendant and her visitor. Noting that the monitoring in question was a routine security measure, the Ninth Circuit held that the monitoring seizure of any material object fell outside the ambit of the Constitution . . . ."

See Goldman v. United States, 316 U.S. 129, 135 (1942) (use of listening device which was attached to the outside of, but did not penetrate, the wall of suspect's office did not violate fourth amendment); Olmstead v. United States, 277 U.S. 438, 465-66 (1928) (wiretap accomplished without trespass upon suspects' properties "did not amount to a search or seizure within the meaning of the Fourth Amendment."). The Court in Katz declared that Goldman and Olmstead "can no longer be regarded as controlling." 389 U.S. at 353.

6. 389 U.S. at 360-61 (Harlan, J., concurring). In his concurring opinion, Justice Harlan articulated a useful two-prong test for determining whether a defendant entertained a reasonable expectation of privacy. It must appear "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’" Id. at 361.


11. See Lanza v. New York, 370 U.S. 139, 143 (1961) ("In prison, official surveillance has traditionally been the order of the day.")

12. See Bouse v. Bussey, 573 F.2d 548 (9th Cir. 1977) (forcible removal of a sample of pubic hair during pretrial detention constituted unreasonable search).


14. Defendant's visitor was not her attorney. The monitoring of conversation between a prisoner and her attorney may constitute a violation of the sixth amendment. See Massiah v. United States, 377 U.S. 201 (1964).
was reasonable, and hence not violative of the fourth amendment.\textsuperscript{15}

In two recent cases involving the use of electronic devices, the intrusive activity was held to be outside the scope of the fourth amendment. \textit{Hodge v. Mountain States Telephone and Telegraph Co.}\textsuperscript{16} involved the use of a pen register, a device which produces a written record of all the telephone numbers dialed from a given telephone.\textsuperscript{17} In rejecting the defendant's argument that the fourth amendment prohibits the use of such a device, the Ninth Circuit emphasized that the amendment protects only the contents of a conversation, not the fact that it occurred.\textsuperscript{18} Relying on an earlier Ninth Circuit case in which it had been held that no reasonable expectation of privacy exists with respect to telephone company billing records,\textsuperscript{19} the \textit{Hodge} court noted that "pen register records are even farther removed than billing records from the content of the communications."\textsuperscript{20} Consequently, "the information recorded by pen registers is not entitled to Fourth Amendment protection."\textsuperscript{21}

Electronic tracking devices which enable investigators to monitor the movements of a suspect also fall outside the scope of the fourth amendment, \textit{i.e.}, their use does not constitute a search.\textsuperscript{22} Therefore, a warrant to use such a device is unnecessary "unless fourth amendment rights necessarily would have to be violated in order to initially install the device."\textsuperscript{23} These rules were applied by the Ninth Circuit in \textit{United States v. Curtis},\textsuperscript{24} in which a tracking device was installed on an airplane rented by the defendant. The court held that the fourth amendment had not been violated even though no prior judicial approval of

\textsuperscript{15} 563 F.2d at 1346.

\textsuperscript{16} 555 F.2d 254 (9th Cir. 1977).

\textsuperscript{17} See id. at 255 n.1; Note, \textit{The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool}, \textit{60 Cornell L. Rev.} 1028, 1029 (1975).

\textsuperscript{18} 555 F.2d at 256.

\textsuperscript{19} United States v. Fithian, 452 F.2d 505 (9th Cir. 1975), in which the court stated: "No one justifiably could expect that the fact that a particular call was placed will remain his private affair when business records necessarily must contain this information." Id. at 506 (footnote omitted).

\textsuperscript{20} 555 F.2d at 257.

\textsuperscript{21} Id. \textit{Accord}, United States v. Clegg, 509 F.2d 605, 610 (5th Cir. 1975). Apparently, "[t]he possibility that the Fourth Amendment applies to pen registers has not been foreclosed in all circuits." 555 F.2d at 257 n.7. See, e.g., United States v. John, 508 F.2d 1134 (8th Cir.), \textit{cert. denied}, 421 U.S. 962 (1975).

\textsuperscript{22} United States v. Pretzinger, 542 F.2d 517, 520 (9th Cir. 1976); United States v. Hufford, 539 F.2d 32, 33 (9th Cir.), \textit{cert. denied}, 429 U.S. 1002 (1976). "[T]he device only augments that which can be done by visual surveillance alone . . . ." Id. at 34.

\textsuperscript{23} United States v. Pretzinger, 542 F.2d 517, 520 (9th Cir. 1976) (citing United States v. Hufford, 539 F.2d 32, 34 (9th Cir.), \textit{cert. denied}, 429 U.S. 1002 (1976)).

\textsuperscript{24} 562 F.2d 1153 (9th Cir. 1977).
the use of the device had been obtained.25 Significantly, the court expressly confined its holding to the circumstances of the case,26 and it declared that "in the ordinary case, we are inclined to the view that secret surveillance devices in vehicles should be installed pursuant to court order . . . ."27 In a footnote,28 the author of the opinion expressed both his reluctance to follow the Ninth Circuit precedents,29 and his preference for the Fifth Circuit view that the use of tracking devices does constitute a search and, hence, may not be undertaken in the absence of prior judicial approval.30

The fourth amendment affords protection against governmental searches and seizures.31 In United States v. Humphrey,32 an airline employee opened a package in the presence of the package's owner. The search was conducted in accordance with the company's policy of in-

25. Id. at 1156.
26. The court emphasized that Government officials, prior to installing the device, "had been given reliable information, based on articulable facts, that the plane was being utilized in the pursuit of criminal activity by a specific, identifiable individual." Id.
27. Id.
28. Id. at n.2.
29. See cases cited in note 21 supra.
30. See United States v. Holmes, 521 F.2d 859, 864-67 (5th Cir. 1975), aff'd on rehearing, 537 F.2d 227, 227-28 (5th Cir. 1976), (en banc) (per curiam) (8-8 decision).
31. See note 2 supra. Searches and seizures by private parties will be treated as governmental activity "when the government has preknowledge of and yet acquiesces in a private party's conducting a search and seizure which the government itself, under the circumstances, could not have undertaken . . . ." United States v. Goldstein, 532 F.2d 1305, 1311 (9th Cir.), cert. denied, 429 U.S. 960 (1976) (quoting United States v. Clegg, 509 F.2d 605, 609 (5th Cir. 1975)). "[A] search is a search by a federal official if he had a hand in it . . . . It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress." Lustig v. United States, 338 U.S. 74, 78-79 (1949). In United States v. Cella, 568 F.2d 1266 (9th Cir. 1977), the court treated a private individual as a government agent with respect to actions undertaken by him pursuant to an agreement whereby he became an informant and gathered information for the government. Id. at 1282. In United States v. Ogden, 485 F.2d 536 (9th Cir. 1973), cert. denied, 416 U.S. 987 (1974), an airline employee's search of a passenger's bag was held to be individual action, thus beyond the scope of the fourth amendment, because the search was not prompted by federal agents or regulations nor conducted pursuant to any widespread governmental anti-hijacking effort, but resulted simply from the employee's own curiosity. Id. at 538-39. Cf. United States v. Pannon, 556 F.2d 961 (9th Cir. 1977) (search by airline employees subject to fourth amendment limitations because search was authorized by Air Transportation Security Act as part of government's air security program); United States v. Davis, 482 F.2d 893 (9th Cir. 1973) (search conducted as part of nationwide anti-hijacking program fell within fourth amendment regardless of whether it was conducted by private individual or public official). Other leading Ninth Circuit cases applying the rule of Lustig v. United States are Gold v. United States, 378 F.2d 588 (9th Cir. 1967) (no impermissible governmental involvement because opening of package was discretionary act of airline manager) and Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) (opening of package by airline employee solely to aid the enforcement of a federal statute constituted governmental search).
32. 549 F.2d 650 (9th Cir. 1977).
specting the contents of damaged packages to protect itself against spurious damage claims. Although the employee had previously informed an airport officer of his intention to search the package and the officer had stationed himself nearby to observe the inspection, the court held that the search was a private one and not a subterfuge by the government inasmuch as the employee had been motivated by private interests. 33

Since there can be no reasonable expectation of privacy with respect to abandoned property, the inspection, examination or confiscation of such property is not controlled by fourth amendment limitations. 34 "Abandonment is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts." 35 Among the factual situations in which abandonment has been found are: (1) suspect directed the destruction of materials; 36 (2) suspect jettisoned contraband from a moving vehicle; 37 (3) suspect denied ownership of suitcases; 38 and (4) suspect placed contraband behind the seat of police car in which he was being transported. 39

"The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." 40 However, the amendment does not proscribe all searches and seizures, only those that are unreasonable. 41 Although an intrusion incident to a brief detention is less severe than that involved in a full-scale arrest, 42 an investigatory stop may be reasonable, and thus

33. Id. at 653.

Even if the employee, in addition to his primary motive, may have desired to help the Government, the seizure, and the subsequent search, would not necessarily become governmental. See, e.g., Wolf Low v. United States, 391 F.2d 61 (9th Cir. 1968); Gold v. United States, 378 F.2d 588 (9th Cir. 1967).

Id. at 653 n.4.

34. See Hester v. United States, 265 U.S. 57, 58 (1924) ("[t]here was no seizure in the sense of the law" when officers examined the contents of bottles that had been abandoned); United States v. Humphrey, 549 F.2d 650, 652-53 (9th Cir. 1977) (when newspaper was taken from defendant who then proceeded to walk away, paper was abandoned, and defendant had no reasonable expectation of privacy with respect to such paper).


36. United States v. Cella, 568 F.2d 1266 (9th Cir. 1978).


38. United States v. Jackson, 544 F.2d 407 (9th Cir. 1976); United States v. Colbert, 474 F.2d 174 (5th Cir. 1973).


constitutional, even under circumstances which do not establish probable cause to arrest. If after a valid investigatory stop probable cause arises, the search [or arrest] may then be made. In United States v. Coades, for example, police officers in pursuit of two bank robbers observed two pedestrians a short distance from the bank. No other people were in sight, and the pedestrians matched the descriptions previously given by eye witnesses. The officers ordered the suspects to halt. At that point, one of the suspects dropped a mask and surgical gloves resembling those that had been worn by the robbers. The suspects were arrested and subsequently argued in court that the evidence obtained incident to the arrest should have been suppressed since the officers had no probable cause to arrest at the time they ordered the suspects to halt. The court concluded that, under the circumstances, an investigatory stop was warranted. The detention, in turn, revealed the gloves and mask which provided probable cause to arrest; hence the arrest too was valid.

Unlike an investigatory stop, an arrest may not be based merely on "reasonable suspicion" but requires "probable cause." An officer, to have probable cause to arrest, must have facts and circumstances within his knowledge and of which he had reasonably trustworthy information sufficient to warrant a prudent man in believing that an of-
In determining whether an arrest was based on probable cause, the court will examine the circumstances that were within the knowledge of the arresting officer at the moment of the arrest. If, in retrospect, it appears that the quantum of evidence sufficient to establish probable cause was not present until after the arrest, the arrest will be invalidated.

**B. The Exclusionary Rule**

As a judicially created remedy designed to safeguard the rights secured by the fourth amendment, the exclusionary rule requires that evidence obtained in contravention of the fourth amendment be excluded from a criminal prosecution. The courts have stressed that the rule is intended to eliminate the incentive for, thereby deterring, constitutionally offensive police conduct in gathering evidence.


51. See United States v. Sanudo-Perez, 564 F.2d 1288, 1290-91 (9th Cir. 1977) ("Viewing the facts retrospectively with respect to what everyone ultimately learned, probable cause could be discerned. But these facts were not put together until after the arrest . . . "). A valid arrest may result from an investigatory stop although such a stop need not, itself, be based on probable cause. See notes 41-43 supra and accompanying text.

52. See, e.g., Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) (exclusionary rule applies to criminal trials in state courts as well as federal courts); Weeks v. United States, 232 U.S. 383, 391-92, 398 (1914) (evidence obtained in violation of the fourth amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure). But see, e.g., United States v. Calandra, 414 U.S. 338, 347-48, 350 (1974) (exclusionary rule does not proscribe the use of illegally seized evidence in all proceedings; application of the rule is restricted to those areas where its remedial objectives can be most efficaciously served; "[a]llowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties.").

53. See, e.g., Mapp v. Ohio, 367 U.S. 643, 656, 659 (1961) (admission of illegally obtained evidence encourages fourth amendment violations; the purpose of the exclusionary rule is to compel respect for the constitutional guarantees of the fourth amendment and to preserve judicial integrity); United States v. Winsett, 518 F.2d 51, 53 (9th Cir. 1975) (the exclusionary rule "was designed not to compensate for the unlawful invasion of one's privacy but to deter future unlawful police conduct . . . ") (citing Elkins v. United States, 364 U.S. 206, 217 (1960)).

In United States v. Hole, 564 F.2d 298, 301 (9th Cir. 1977), the Ninth Circuit reemphasized the policy of deterrence underlying the rule, concluding that "no sound reason [exists] to vitiate an agent's affidavit submitted in support of a request for a search warrant even if the affidavit contains information which is both material and false as long as the misstatement was made in good faith and neither intentionally nor recklessly."
Although recognizing the importance of protecting fourth amendment rights, the Ninth Circuit has favored restricting the application of the exclusionary rule to those areas in which its remedial objectives are most efficaciously served.\(^5\) The "fruit of the poisonous tree" doctrine,\(^5\) for example, requires the suppression of evidence obtained through the use of other information gathered in a constitutionally offensive manner.\(^5\) The application of this doctrine, however, may be

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\(^5\) See United States v. Raftery, 534 F.2d 854 (9th Cir.), cert. denied, 429 U.S. 862 (1976) ("[t]he purpose of the rule would not be served by forbidding the Government from using the evidence to prove the entirely separate offense of perjury before a grand jury occurring after the illegal search and seizure and suppression of the evidence in the state court."). Cf: United States v. Ryan, 548 F.2d 782, 787 (9th Cir. 1976), cert. denied, 430 U.S. 965 (1977) (due process rights of third person are not violated if government informer freely consented to electronic surveillance). See also Harrington v. California, 395 U.S. 250 passim (1969); United States v. Peliter, 422 U.S. 531 (1975).

\(^5\) See Wong Sun v. United States, 371 U.S. 471, 484-88 (1963) (exclusionary rule precludes use of evidence obtained as "fruit" of illegal search); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) ("[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.").

\(^5\) Wong Sun v. United States, 371 U.S. 471, 484-88 (1963). See, e.g., United States v. Humphrey, 549 F.2d 650, 652 (9th Cir. 1977) (improper for court to consider acts establishing abandonment of property if acts "tainted" by unlawful police action); United States v. Cella, 568 F.2d 1266, 1284-85 (9th Cir. 1977) (defendant who claims he was the victim of an unconstitutional search must go forward with specific evidence demonstrating the unlawful conduct; burden then shifts to the prosecution to establish an independent source of evidence); United States v. Sand, 541 F.2d 1370, 1375-76 (9th Cir. 1976), cert. denied, 429 U.S. 1103 (1977) (absent a showing of illegally secured information there is no fourth amendment violation and government not obliged to demonstrate independent origin of evidence).

It is unclear whether the rule requires exclusion of evidence garnered through exploitation of statements obtained in the absence of Miranda warnings. See United States v. Lemon, 550 F.2d 467, 472 (9th Cir. 1977) (whether "fruits" doctrine applies to evidence obtained in absence of Miranda warnings is unresolved). See also Miranda v. Arizona, 384 U.S. 436 (1966) (government must immediately honor any request for an attorney or refrain from further questioning until a lawyer is secured). The Ninth Circuit has concluded, however, that when the "fruit" of an initial illegal confession is a second confession, the degree to which the second confession was voluntary, rather than the illegality surrounding the first, determines its admissibility. United States v. Toral, 536 F.2d 893, 896-97 (9th Cir. 1976) (second confession not suppressed when illegality surrounding first was due to incomplete Miranda warnings rather than coercion). Cf: United States v. Womack, 542 F.2d 1047, 1051 (9th Cir. 1976) (when first confession invalid due to absence of counsel, second confession suppressed despite waiver because of defendant's belief that counsel unavailable). The mere fact that the prosecution elects not to introduce an inculpatory statement made by the defendant after receiving Miranda warnings does not raise a presumption of illegality, at least when the statement has low evidentiary value. United States v. Gaines, 563 F.2d 1352, 1359 (9th Cir. 1977).

Even when evidence is improperly seized, a conviction will stand if there is no reasonable possibility that the items obtained from the search contributed to the conviction. "Only when the Government's evidence so overwhelmingly supports the verdict that the tainted evidence becomes relatively insignificant does the admission of such evidence not contribute
avoided if the evidence could have been obtained through independent and lawful means, or, if the connection between the evidence introduced at trial and the initial search or seizure was sufficiently attenuated to "dissipate the taint" of the primary illegality. In United States v. Cella, for example, the Ninth Circuit reaffirmed that no taint exists if the illegally obtained information causes the Government to intensify its investigation or if it gives an impetus or direction to the prosecution. In so concluding, the court adhered to the test previously established in United States v. Cales, directing that,

"[t]he district court must seek to discover what kind of direction and impetus the illegal...[conduct] gave to the...investigation: did anything seized illegally, or any leads gained from that illegal activity, tend significantly to direct the investigation toward the specific evidence sought to be suppressed? Under this test the government should have the opportunity to establish that, even though the [illegally obtained] information...may have been a factor in the decision to 'target' [an individual]...the evidence which it intends to use at trial was obtained from sources sufficiently independent of the...[illegality]."

The exclusionary rule may be invoked only by those persons having standing to litigate the legality of a search or seizure. Determined pursuant to federal law, proper standing requires that the defendant be "aggrieved" by an allegedly illegal seizure. A litigant is sufficiently to the conviction.” United States v. Hunt, 548 F.2d 268, 269 (9th Cir. 1977) (Sneed, J., dissenting).

57. See United States v. Abascal, 564 F.2d 821, 829 (9th Cir. 1977) (necessity of searching defendant's car could be independently supported by information derived from legal sources unrelated to initial illegal search); United States v. Caceres, 545 F.2d 1182, 1188 (9th Cir. 1977) (admission of information obtained from tape monitoring of face-to-face conversation proper when application for authorization is based on independent recollection of previous meetings rather than on previously unauthorized monitorings).

58. Wong Sun v. United States, 371 U.S. 471, 491 (1963). The exclusionary rule does not mandate exclusion of properly seized evidence merely because it was obtained contemporaneously with an unlawful seizure. Id. at 491. United States v. Daniels, 549 F.2d 665, 668 (9th Cir. 1977) (seizure of marijuana pursuant to warrant proper although letters illegally seized in same search; "Wong Sun's 'taint' reaches items derived from unconstitutional behavior, not items derived from constitutional behavior even when contemporaneous with that which is unconstitutional.").

59. 568 F.2d 1266 (9th Cir. 1977).
60. 493 F.2d 1215 (9th Cir. 1974).
61. United States v. Cella, 568 F.2d 1266, 1286 (9th Cir. 1977) (quoting United States v. Cales, 493 F.2d 1215, 1215-16 (9th Cir. 1974)).
62. Id. 1279 ("The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.") (quoting Elkins v. United States, 262 U.S. 206, 224 (1960)).
63. See Fed. R. Crim. P. 41(e).
aggrieved to challenge the validity of a search and seizure only if he satisfies three requirements.

[T]here is no standing to contest a search and seizure where . . . the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.64

The Ninth Circuit in *United States v. Cella*65 rejected the adoption of the “target doctrine” as a basis for standing. This doctrine confers the right to contest the seizure of evidence upon the person against whom the seized evidence is to be used. This per se grant of standing endows the “target” of the search with the same power to object to the propriety of the search as that of the actual victim.66 Noting that the adopt-
tion of the doctrine would be constitutionally inconsistent, the *Cella* court concluded that "the rights protected by the Fourth Amendment are personal rights, and may be enforced by exclusion of evidence secured by means of an unlawful search and seizure only by one whose own protection and privacy was infringed by the search and seizure."67

In *United States v. Jamerson*, 68 however, the Ninth Circuit conferred the benefit of automatic standing69 upon defendants charged with Dyer Act70 violations. Recognizing the soundness of the Supreme Court's reasoning in *Jones v. United States*,71 the *Jamerson* court concluded that "a person accused of a Dyer Act violation . . . has automatic standing to contest the validity of a search or seizure of a vehicle or its contents where possession of the vehicle forms a basis of the charge."72

C. Search Warrants and Probable Cause

The fourth amendment sets forth the conditions under which a warrant may issue.73 In applying these fourth amendment protections, the Supreme Court has articulated the several requirements which must be met before a search warrant will be considered valid. First, the affidavit presented to the magistrate in support of the warrant must allege facts sufficient to enable the magistrate to determine that probable cause for the search or arrest exists.74 Second, the items to be seized and the place to be searched must be described with particularity, indi-

67. 568 F.2d at 1281. The Ninth Circuit concluded that the persons "against whom the search is directed" may include only the actual victims of the privacy invasion. *Id.* at 1282.
68. 549 F.2d 1263 (9th Cir. 1977).
69. "Automatic" standing is conferred on a defendant "by a charge of a crime which includes as an essential element possession of the evidence seized, with such possession or rights to possession existing at the time of the seizure." *United States v. Celia*, 568 F.2d 1266, 1280 (9th Cir. 1977) (quoting *United States v. Boston*, 510 F.2d 35, 37 (9th Cir. 1974), cert. denied, 471 U.S. 990 (1975)). See *Brown v. United States*, 411 U.S. 223, 228-29 (1973) and text accompanying note 64 supra. The justification for automatic standing lies in preventing the government from taking inconsistent positions during the course of the trial. Absent the doctrine, the prosecution could avoid the strictures of the fourth amendment by denying that the defendant possessed the seized evidence while simultaneously charging him with such possession.
70. 18 U.S.C. § 2312 (1977) (prohibition against knowingly transporting a stolen vehicle in interstate commerce).
72. 549 F.2d at 1269.
73. U.S. Const. amend. IV. "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
cating that evidence of criminal activity will be found at the place to be searched.\textsuperscript{75} Third, the person issuing the warrant must be a neutral and detached magistrate capable of determining whether probable cause exists for the requested arrest or search.\textsuperscript{76} The Court has stated that in determining the existence of these requirements a common sense approach should be used.\textsuperscript{77}

Where the inference of probable cause is to be drawn solely from information furnished by an unnamed informant rather than from the direct observations of the affiant, the reliability of the informant and his information must be established. The Supreme Court set forth a two-pronged test in \textit{Aguilar v. Texas}\textsuperscript{78} and \textit{Spinelli v. United States}\textsuperscript{79} which requires (1) that the affidavit set forth the underlying circumstances which reveal the source of the informer’s information pertaining to the criminal activity, and (2) that the affidavit contain sufficient facts to enable the magistrate to conclude that the unnamed informant is credible or that his information is reliable. The Ninth Circuit recently applied this test in the case of \textit{United States v. Hellman},\textsuperscript{80} which involved a mail fraud through the use of credit cards. Appellant argued that the affidavit on which a search warrant was issued was insufficient under \textit{Aguilar} and \textit{Spinelli} since certain information contained therein was supplied by a special investigator from a credit card association.\textsuperscript{81} The court upheld the warrant, however, finding the affidavit to be sufficient. According to the court, the information contained in the affidavit was reliable since it was information which would be disclosed in a routine check by experienced investigators.\textsuperscript{82} Further, the source of the informant’s information was sufficiently established since “the affidavit contained highly detailed information setting forth the nature and underlying circumstances of the affiant’s personal investigation.”\textsuperscript{83} Thus the two requirements of \textit{Aguilar-
Spinelli were met and the warrant was valid.

In United States v. Garrett, the Ninth Circuit reaffirmed that the second prong of the Aguilar-Spinelli test "can . . . be met by circumstantial evidence on the trustworthiness of the tip." In that case, an unnamed informant told a police officer that he had made several heroin purchases from the defendant. The informant stated that he had observed heroin at the defendant's residence and gave a detailed description of the residence, the car and some personal and family attributes of defendant. The police officer stated in the affidavit that he had independently corroborated the informer's tip as to all facts but the presence of the heroin, and that further inquiry had shown defendant to be a known narcotics dealer.

The court held that the first prong of the Aguilar-Spinelli test was met since the informant was relating his personal observations and was directly involved in the criminal activity. The court then concluded that the second prong was also met even though there was no direct objective evidence in the affidavit supporting the credibility of the informant or the reliability of his information. The independent corroboration of the facts by the officer, the defendant's notorious reputation, and the informant's involvement in the crime constituted a sufficient basis of circumstantial evidence from which such reliability could be inferred, and the constitutional minimums were therefore met.

In addition to showing the existence of probable cause, an affidavit must "particularly" describe the items to be seized and the premises to be searched. The Ninth Circuit found a search to be unlawful and unreasonable for failure to meet this constitutional requirement in United States v. Drebin. There, a warrant describing the items to be seized as "illegally produced and stolen copies of . . . motion picture films which are duly copyrighted" was invalid since it "left to the executing officers the task of determining what items fell within the broad categories stated in the warrant" and since "[t]he warrant provided no guidelines for the determination of which films had been illegally re-

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84. 565 F.2d 1065 (9th Cir. 1977), cert. denied, 435 U.S. 974 (1978).
85. Id. at 1070 (citing United States v. Harris, 403 U.S. 573 (1971) and Draper v. United States, 358 U.S. 307 (1959)).
86. Id.
87. Id.
88. Id.
89. Id.
90. U.S. Const. amend. IV. See notes 73 & 75 supra.
91. 557 F.2d 1316 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978). The error in admitting the evidence obtained from the unlawful search was, however, found to be harmless beyond a reasonable doubt. Id. at 1323.
produced."^92

When first amendment rights are involved, this "particularity" requirement is even more strictly applied. The Supreme Court held in *Marcus v. Search Warrant* ^94 that where allegedly obscene materials are sought to be seized, there must be a "step in the procedure before seizure designed to focus searchingly on the question of obscenity."^95 This first amendment protection was reemphasized in *Roaden v. Kentucky*^96 where the Court stated:

In short, . . . the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. . . . No less a standard could be faithful to First Amendment freedoms.**^97

The Ninth Circuit reaffirmed this stringent approach in two 1977 cases. In *United States v. Tupler*,^98 the court held a seizure of allegedly obscene films invalid where the procedure by which the warrant was issued was not designed to enable the magistrate to "focus searchingly" on the question of obscenity. Although the affidavit requesting the warrant described photographs on the film boxes which portrayed sexual activity, this was not sufficient to give the judge probable cause to believe that the films were obscene. According to the court, "[a] searching focus on obscenity requires the issuing judge or magistrate to base his evaluation of probable cause on direct evidence of the contents of at least a fair sample of the material itself."^100 In *United States v. Sherwin*,^101 the Ninth Circuit upheld the sufficiency of search warrant affidavits which gave specific facts as to the contents of allegedly ob-

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^92. *Id.* at 1322-23.


^94. 367 U.S. 717 (1961) (warrant for the seizure of allegedly obscene books could not be issued on the conclusory opinion of a police officer that the books sought to be seized were obscene).

^95. *Id.* at 722.

^96. 413 U.S. 496 (1973) (seizure incident to arrest without a warrant of allegedly obscene film was unreasonable under fourth amendment standards).

^97. *Id.* at 504 (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)).

^98. 564 F.2d 1294 (9th Cir. 1977).

^99. *Id.* at 1297.

^100. *Id.* at 1298. The court held the warrant insufficient even though it also contained several pieces of circumstantial evidence implicating the defendants in the crime of transporting obscene materials interstate.

However, the seizure of other magazines not described in the warrant was found to be unlawful and unreasonable in light of the first amendment protections to which such materials are entitled. The court stated that "[t]he importance of protecting First Amendment freedoms precludes police officers from making ad hoc determinations at the scene as to which materials are probably obscene." Such a procedure failed to allow a magistrate to "focus searchingly on the question of obscenity" and was therefore an unreasonable seizure under first amendment standards.

In the area of particularity, courts are also faced with the issue of whether misrepresentations in the affidavit render it insufficient under fourth amendment standards. In United States v. Hole, the Ninth Circuit found an affidavit for a search warrant sufficient despite material, although unintentional, misstatements. The court stated that since the purpose of the exclusionary rule under the fourth amendment is to deter lawless police action, "there is no sound reason to vitiate an agent's affidavit . . . even if the affidavit contains information which is both material and false as long as the statement was made in good faith and neither intentionally nor recklessly." The authority to issue a search or arrest warrant is placed solely in the hands of a neutral and detached magistrate. In United States v. Garrett, one appellant argued that a search warrant was constitutionally insufficient since it was signed by a state judge of record rather

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102. Id. at 198.
103. Id. at 200.
104. Id. at 201.
105. See United States v. Prewitt, 534 F.2d 200 (9th Cir. 1976); United States v. Damitz, 495 F.2d 50 (9th Cir. 1974).
106. 564 F.2d 298 (9th Cir. 1977).
107. Id. at 301. The affidavit contained an accurate summary of a criminal record report of the California Department of Justice. However, the report itself was incorrect as to certain material dates.
108. Id. See, e.g., Linkletter v. Walker, 381 U.S. 618 (1965); United States v. Damitz, 495 F.2d 50, 55-56 (9th Cir. 1974) ("A rule excluding evidence because of a Fourth Amendment violation should be motivated by a basic purpose of the Amendment and the exclusionary rule, namely the deterrence of lawless police action."
109. 564 F.2d at 301. In holding as it did, the Ninth Circuit aligned itself with a majority of the circuits which have considered the issue. See United States v. Rosenbarger, 536 F.2d 715, 720 (6th Cir. 1976), cert. denied, 431 U.S. 965 (1977); United States v. Marihart, 492 F.2d 897, 899-900 (8th Cir.), cert. denied, 419 U.S. 827 (1974); United States v. Carmichael, 489 F.2d 983, 988 (7th Cir. 1973) (en banc). But see United States v. Astroff, 556 F.2d 1369 (5th Cir. 1977) (even negligent misstatements vitiate an otherwise valid affidavit if the misstatements are material).
110. See note 76 supra and accompanying text.
111. 565 F.2d 1065 (9th Cir. 1977), cert. denied, 435 U.S. 974 (1978).
than a federal magistrate and since it failed to designate the name of
the federal magistrate to whom the search warrant was to be re-
turned.\textsuperscript{112} The Ninth Circuit found no insufficiency. Issuance of a
federal warrant by a judge of a state court is expressly authorized by
rule 41(a) of the Federal Rules of Criminal Procedure, and since the
warrant return was made within two days to a federal magistrate, no
reversible error was committed.\textsuperscript{113}

\textbf{D. Electronic Surveillance}

Following the Supreme Court's decision in \textit{Katz v. United States},\textsuperscript{114} Congress enacted the Omnibus Crime Control and Safe Streets Act of
1968.\textsuperscript{115} Title III of the Act prohibits the interception\textsuperscript{116} of wire or oral
communications except within narrowly defined circumstances.\textsuperscript{117} In
\textit{Hodge v. Mountain States Tel. & Tel. Co.},\textsuperscript{118} the Ninth Circuit held that
the installation of a pen register\textsuperscript{119} neither violated the fourth amend-
ment nor exceeded the permissive scope of Title III.\textsuperscript{120} The court
relied upon the statutory definition of "interception" in determining that
a pen register was incapable of making the "aural acquisition" prohib-
ited by Title III.\textsuperscript{121}

\begin{thebibliography}{120}
\bibitem{112} \textit{Id.} at 1071.
\bibitem{113} \textit{Id.}
\bibitem{114} 389 U.S. 347 (1967) (as fourth amendment protects people, not places, physical pene-
tration into a constitutionally protected area not necessary to invoke fourth amendment pro-
tection).
\bibitem{116} The concept of interception is defined in 18 U.S.C. § 2510(4) as "the \textit{aural} acquisi-
tion of the contents of any wire or oral communication through the use of any electronic,
mechanical, or other device." (emphasis added).
\bibitem{117} 18 U.S.C. §§ 2511(2) (1976).
\bibitem{118} 555 F.2d 254 (9th Cir. 1977).
\bibitem{119} A pen register is "a device attached to a given telephone line . . . [which] records on
a paper tape dashes equal in number to the number dialed . . . . There is neither recording
or \textit{sic} monitoring of the conversation." \textit{Id.} at 255 n.1 (quoting United States v. Caplan,
\bibitem{120} 555 F.2d at 256, 257. The court in \textit{Hodge} held that the use of a pen register in
connection with an investigation into obscene phone calls was not prohibited by Title III of
the Crime Control Act because a pen register is "incapable of making an aural acquisition of
any communication" and is therefore not an "interception" as defined by § 2510(4) of the
Act. \textit{Id.} at 257. \textit{See note 116 supra.} Use of a pen register also does not violate the fourth
amendment because a pen register record does not monitor the content of a conversation
nor, since the record does not indicate whether calls placed on the monitored phone were
completed, establish that a conversation took place. "[T]he expectation of privacy pro-
tected by the Fourth Amendment attaches to the content of the telephone conversation and
not to the fact that a conversation took place." 555 F.2d at 256 (quoting United States v.
Baxter, 492 F.2d 150, 167 (9th Cir. 1973), \textit{cert. denied}, 416 U.S. 940 (1974)).
\bibitem{121} 555 F.2d at 257. \textit{See note 120 supra.}
In *United States v. Bowler*, the Ninth Circuit reiterated the rationale of *Hodge* in holding that "snifters" also are not governed by Title III. In so concluding the court stated that the use of a snifter is not restricted by the Crime Control Act because "the right of privacy protected by the wire tap statute goes to message content rather than the fact that a call was placed."

Under the Crime Control Act, authorized wiretaps are permitted but applications for such authorization must comply with the standards of specificity and necessity enumerated in the Act. In *United States v. Spagnuolo* the Ninth Circuit analyzed the adequacy of affidavits submitted to support applications for wiretaps in connection with breaking an illegal gambling business. The standard to be utilized in such an analysis is defined in the Crime Control Act, but interpretations of that standard have varied. In an attempt to promulgate a manageable standard by which to judge the sufficiency of affidavits under the Act, the *Spagnuolo* court set out certain guidelines. The affidavit, when viewed in its entirety, must give a factual basis "sufficient to show that ordinary investigative procedures have failed or will...

122. 561 F.2d 1323 (9th Cir. 1977).
123. A snifter "records each telephone emission of a 2,600 cycle tone characteristic of the illegal use of a blue box." *Id.* at 1325. "A blue box... is used to circumvent the toll call billing system of the phone company." *Id.* at 1324 n.1.
124. *Id.* at 1325.
125. *Id.* (quoting *United States v. Goldstein*, 532 F.2d 1305 (9th Cir.), *cert. denied*, 429 U.S. 960 (1976)). Cf. *United States v. Cornfeld*, 563 F.2d 967 (9th Cir. 1977) (under 47 U.S.C. § 605 and 18 U.S.C. § 2511(2)(a)(i), telephone company was within its rights in monitoring telephone lines by tape recorder on suspicion that subscriber was using illegal "blue box" to make long distance calls, and disclosing such information to the FBI).
127. *Id.* § 2518.
128. 549 F.2d 705 (9th Cir. 1977) (affidavit sufficient where it included account of nine month investigation, infiltration and FBI surveillance of gambling organization, even though government unable to identify all participants).
129. 18 U.S.C. § 2518(1)(c) states:
(1) Each application for an order authorizing or approving the interception of a wire or oral communication... shall include the following information:
(1) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous...
131. 549 F.2d at 710.
fail in the particular case at hand." The affidavit must reveal that a good faith effort has been made to identify those violating the law. Further, it must be shown that normal investigative techniques, employed for a reasonable period of time, have failed to build the case. Any showing that the employment of normal investigative techniques would be too dangerous or unlikely to succeed must, in order to allow the district judge to determine whether a wiretap is necessary, meet a standard of reasonableness with regard to the factual history.

The Ninth Circuit has utilized the same standards of reasonableness in analyzing compliance with the minimization requirements of section 2518(5) of the Crime Control Act. In conducting an authorized wiretap, the executing officers must limit the extent of their interference with communication outside the scope of the wiretap order. In addition, once a pattern of innocent calls develops, recording of such calls should be terminated. The reasonableness of the interception and

132. Id. According to the Spagnuolo court, this may be accomplished by a description of the particular illicit operation’s peculiarities which necessitate a wiretap and of the unsuccessful investigatory efforts of the police. Id. See, e.g., United States v. Feldman, 535 F.2d 1175 (9th Cir.), cert. denied, 429 U.S. 940 (1976); United States v. Turner, 528 F.2d 143 (9th Cir.), cert. denied, 423 U.S. 996 (1975); United States v. Kerrigan, 514 F.2d 35 (9th Cir.), cert. denied, 423 U.S. 924 (1975).

133. 549 F.2d at 710. The procedures need not have been completely unsuccessful, but need only reach a stage at which further use cannot reasonably be required. Id. at n.1. See United States v. Abascal, 564 F.2d 821 (9th Cir. 1977); United States v. Sandoral, 550 F.2d 427 (9th Cir. 1976); United States v. Scully, 546 F.2d 255 (9th Cir. 1976), cert. denied, 430 U.S. 970 (1977).

134. 549 F.2d at 710 (“[A]n affidavit is not insufficient because it did not prove beyond a shadow of doubt that ordinary techniques will fail or that their use will result in a loss of life or some equivalent disaster”). Cf. United States v. Abascal, 564 F.2d 821, 826 (9th Cir. 1977) (“The government must do more than merely characterize a case as a ‘gambling conspiracy’ or a ‘drug conspiracy’ or any other kind of case that is in general ‘tough to crack’.”).

135. 18 U.S.C. § 2518(5) (1976) states in part:

No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days . . . . Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, [and] shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . .

See United States v. Abascal, 564 F.2d 821, 827 (9th Cir. 1977) (no failure of minimization where authorized life of wiretaps very brief, identities of those involved in drug conspiracy uncertain and guarded language used on telephone).

136. See 564 F.2d at 827.

137. Id. Cf. United States v. Chavez, 533 F.2d 491, 494 (9th Cir.), cert. denied, 426 U.S. 911 (1976) (pattern of innocent calls not established by fact that many conversations often started innocently and covered wide-ranging topics not related to criminal activity); United States v. Armocida, 515 F.2d 29, 42-43 (3rd Cir.), cert. denied, 423 U.S. 858 (1975) (government evidence indicated efforts made to reduce interception of innocent personal calls to smallest practicable number).
the extent of minimization must be determined by the facts of each case.\textsuperscript{138}

Codifying the "fruit of the poison tree" doctrine with respect to the Crime Control Act,\textsuperscript{139} section 2515 of the Act prohibits the use at trial, and in certain other proceedings,\textsuperscript{140} of the content of any intercepted wire communication or any evidence derived therefrom "if the disclosure of that information would be in violation of this chapter."\textsuperscript{141}

In \textit{United States v. Donovan},\textsuperscript{142} the Supreme Court held that suppression of evidence under section 2515 was not warranted where law enforcement officials had failed to comply with the identification and notice requirements of the Crime Control Act,\textsuperscript{143} but had satisfied all other statutory requirements for obtaining a wiretap authorization.\textsuperscript{144}


\textsuperscript{140} The protection of \textsection 2515 extends to grand jury proceedings, but only when a grand jury witness has sufficient standing to pray for the statutory suppression remedy. \textit{See} United States v. Privitera, 549 F.2d 1317 (9th Cir.), \textit{cert. denied}, 431 U.S. 930 (1977) (bank depositors whose records not object of subpoena are not "aggrieved" and hence unable to object to subpoena). \textit{See generally} Gelbard v. United States, 408 U.S. 41, 47, 52 (1972) (grand jury witnesses can refuse to testify where the substance of their testimony was discovered by illegal electronic surveillance).

\textsuperscript{141} 18 U.S.C. \textsection 2515 (1976). \textit{See} United States v. Donovan, 429 U.S. 413, 434, 435-36, 438 (1977) (failure to comply with statutory identification and notice requirements of the Crime Control Act does not require suppression of evidence obtained under intercept order that in all other respects satisfies statutory requirements); United States v. Cabral, 554 F.2d 363, 365 (9th Cir. 1977) (suppression not required where communication used as evidence against defendant was not unlawfully intercepted, the orders authorizing the interception were not insufficient on their face and interceptions were made in conformity with intercept orders); United States v. Spagnuolo, 549 F.2d 705, 711 (9th Cir. 1977) (suppression required where conversations intercepted under invalid wiretap formed the essence of the probable cause allegations in affidavits for two subsequent wiretaps).

\textsuperscript{142} 429 U.S. 413 (1977).

\textsuperscript{143} 18 U.S.C. \textsection 2518(1)(a), (b)(iv), (8)(d) (1976).

\textsuperscript{144} 429 U.S. at 432. The circumstances that trigger suppression under \textsection 2515 are enumerated in \textsection 2518(1)(a): "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." In \textit{Donovan}, the facts were such that the only question was whether the communications were "unlawfully intercepted." The Court stated that "the intercept order may issue only if the issuing judge determines that the statutory factors are present, [i.e., failure or unlikely success of normal investigative techniques and existence of probable cause to believe that (i) an individual is engaged in criminal activity, (ii) particular communications concerning the offense will be obtained through interception; and (iii) the target facilities are being used in
The Ninth Circuit relied on the Donovan rationale in United States v. Cabral. In Cabral the government failed to comply with section 2518(1)(b)(iv) of the Crime Control Act, requiring that individuals known to be engaged in criminal activity be named in wiretap applications. The Cabral court found that, as in Donovan, suppression of the evidence was not required since the communications used against Cabral had not been unlawfully intercepted, the orders authorizing the interception were not insufficient on their face, and the interceptions were made in conformity with the intercept orders.

E. Warrantless Searches Based on Probable Cause

1. Search Incident to Arrest

The rationale justifying the warrantless search incident to arrest has traditionally been the need for protection of the arresting officer and the preservation of evidence. The search must, of course, be incident to a valid arrest. Under the prevailing view, the search is considered reasonable even if made in the absence of evidence of the crime for which the suspect was arrested or in the absence of fear of the arresting officer for his safety. The permissible scope of such a search is, however, limited to the arrestee's person and the area within his...

connection with the specified criminal activity] and the failure to name additional targets in no way detracts from the sufficiency of those factors." Id. at 435.

145. 554 F.2d 363 (9th Cir. 1977).
146. Id. at 365. See note 42 supra.
148. Gustafson v. Florida, 414 U.S. 260, 265-66 (1973) (custodial arrest justifies full search of arrestee's person even absent fear of officer for safety); United States v. Robinson, 414 U.S. 218, 235 (1973) (full personal search incident to custodial arrest not only an exception to warrant requirement, but also reasonable). See, e.g., United States v. Magana, 512 F.2d 1169, 1171 (9th Cir. 1975), cert. denied, 423 U.S. 826 (1975) (where agents saw suspect "throw something away" near scene of drug arrest in progress, seizure of heroin in plain view valid as incident to arrest); United States v. Heiden, 508 F.2d 898, 902 (9th Cir. 1974) (search in border checkpoint interrogation room while arrest forms filed valid as incident to arrest); Busby v. United States, 296 F.2d 328, 332 (9th Cir.), cert. denied, 369 U.S. 876 (1961) (search prior to arrest disclosing illegal firearms upheld where plain view provided probable cause to arrest prior to search).
149. Gustafson v. Florida, 414 U.S. 260, 266 (1973); United States v. Robinson, 414 U.S. 218, 236 (1973). Both Gustafson and Robinson involved the permissible scope of a search incident to a full custody arrest for a traffic offense. In sustaining full body searches as incident to arrest, the Robinson Court commented:

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be upon the person of the suspect.

414 U.S. at 235. Mr. Justice Powell, concurring, further observed that "a valid arrest justi-
mediate control.\textsuperscript{150}

An incidental search need not be \textit{subsequent} to the underlying arrest; it need only be substantially contemporaneous therewith.\textsuperscript{151} In \textit{United States v. Chatman},\textsuperscript{152} for example, government-directed surveillance of appellant revealed behavior suggestive of heroin importation. Appellant carried no identification and, when stopped for interrogation, he repeatedly attempted to conceal a bulge in the pocket of his trousers. After refusing to produce the bulging object on request, his trousers were searched. As a result of this search, narcotics were discovered in the bulging pocket, and appellant was placed under arrest. The Ninth Circuit, concluding that probable cause to arrest the suspect existed at the time the trousers were searched, reaffirmed that "[a]s long as probable cause to arrest exists before the search, a search substantially contemporaneous with the arrest is incident thereto."\textsuperscript{153}
2. Emergency or Exigent Circumstances

The courts have long recognized the validity of warrantless searches based upon probable cause where immediate action is necessary to preserve evidence\(^{154}\) or to protect police officers.\(^{155}\) So long as the officer's belief in the exigency is reasonable the search will be sustained, even if the emergency is subsequently found to have been illusory.\(^{156}\)

In *United States v. Spanier*,\(^{157}\) for example, the arresting officers followed several bank-robbery suspects to a nearby dwelling. The residence was surrounded, shots were exchanged, and the officers observed smoke and sparks rising from the chimney. Although the officers soon had control over five persons who had surrendered, there was no reason to believe that all persons connected with the robbery had vacated the premises. In order to check for additional confederates, the officers immediately entered the dwelling, discovered no additional persons, and refrained from conducting a thorough search until after a search warrant had been procured. In upholding the validity of the warrantless entry and subsequent search, the Ninth Circuit reiterated that officers need not lay seige to a dwelling, pending the arrival of a proper
warrant, where to do so would substantially risk the destruction or removal of evidence.\textsuperscript{158} Although it is continually emphasized that such warrantless entries are solely for the narrow purpose of securing and safeguarding the premises against the loss or destruction of evidence,\textsuperscript{159} an officer searching pursuant to this purpose may lawfully seize evidence in plain view.\textsuperscript{160}

3. Investigative Detention

Pursuant to the Supreme Court's reasoning in \textit{Terry v. Ohio},\textsuperscript{161} a police officer may detain a suspect whom he reasonably believes is engaging in or is about to engage in criminal activity and may conduct a carefully limited warrantless search for weapons if he further concludes that the suspect may be armed and dangerous.\textsuperscript{162}

The officer's decision to detain a suspect need not be based upon probable cause, but may rest upon his "reasonable suspicion" that criminal activity is afoot.\textsuperscript{163} The articulable facts underlying the of---

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\textsuperscript{158} \textit{Id.}, slip op. at 2-3. \textit{See also} United States v. Grummel, 542 F.2d 789, 791 (9th Cir. 1976) (per curiam), \textit{cert. denied}, 429 U.S. 1051 (1977) (seige unnecessary where warrantless entry made to effect arrest and secure premises pending warrant); United States v. McLoughlin, 525 F.2d 517, 521 (9th Cir. 1975), \textit{cert. denied}, 427 U.S. 904 (1976) (delay unnecessary where to do so risks destruction of evidence).

\textsuperscript{159} United States v. Spanier, No. 76-2174, slip op. at 3 (9th Cir. Jan. 19, 1977) ("officers . . . had the right to make the house secure so that, when they returned with a warrant, whatever evidence there was at the time of the arrest would still be there"); United States v. Grummel, 542 F.2d 789, 791 (9th Cir. 1976) (per curiam), \textit{cert. denied}, 429 U.S. 1051 (1977) ("[T]he warrantless entry . . . went no further than to . . . secure the premises to the extent necessary to prevent destruction of the evidence until a warrant could be obtained."); United States v. McLoughlin, 525 F.2d 517, 521 (9th Cir. 1975), \textit{cert. denied}, 427 U.S. 904 (1976) ("[T]hese exigent circumstances justify an entry . . . to secure the premises to the extent necessary to prevent the destruction or removal of the evidence. They, however, carry the officers no further.").

\textsuperscript{160} \textit{See} United States v. Fulton, 549 F.2d 1325, 1327 (9th Cir. 1977); United States v. Hobson, 519 F.2d 765, 776 (9th Cir.), \textit{cert. denied}, 423 U.S. 931 (1975). For a discussion of the doctrine of plain view seizures, see notes 184-89 \textit{infra} and accompanying text.

\textsuperscript{161} 392 U.S. 1 (1968).

\textsuperscript{162} \textit{Id.} at 30. \textit{See also} United States v. Homburg, 546 F.2d 1350, 1352-54 (9th Cir. 1976), \textit{cert. denied}, 431 U.S. 940 (1977) (following anonymous airport bomb threat, a strong suspicion that suitcase contained explosives justified \textit{Terry}-type search revealing heroin); United States v. Hill, 545 F.2d 1191, 1193 (9th Cir. 1976) ("\textit{Terry} does not . . . limit a weapons search to a so-called 'pat down' search. Any limited intrusion designed to discover guns, knives, clubs or other instruments of assault are [sic] permissible.").

\textsuperscript{163} United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (roving-patrol stop for illegal aliens permissible only where based on reasonable suspicion). The Ninth Circuit has concluded that a "founded suspicion" is the functional equivalent of the standard enunciated in \textit{Brignoni-Ponce}. United States v. Rocha-Lopez, 527 F.2d 476, 477 (9th Cir. 1975), \textit{cert. denied}, 425 U.S. 977 (1976) (marijuana smuggling conviction sustained where initial vehicle stop based upon "founded suspicion" of alien smuggling). \textit{See also} United States v.
ficer's belief may be derived either from personal observation or an informant's tip which, although insufficient to sustain an arrest or to support a search warrant, carries sufficient indicia of reliability to justify interrogation. Of course, information may be gleaned during the interrogation which elevates the officer's suspicion to the level of probable cause, and a formal arrest or search may then be executed.

An officer may properly display force to effectuate an investigative stop when it becomes apparent that the suspect will not otherwise comply, or when necessary to ensure the officer's safety. Under such circumstances, detention at gunpoint does not transform the "stop" into

Holland, 510 F.2d 453, 455 (9th Cir.), cert. denied, 422 U.S. 1010 (1975) (suspect's activities need not be wholly inconsistent with innocent behavior to give rise to founded suspicion); United States v. Mallides, 473 F.2d 859, 861 (9th Cir. 1973) (similar fourth amendment standards apply to both vehicle and pedestrian stops); Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966) ("A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing.").

The court in Holland reiterated several factors to be considered in evaluating the propriety of an investigatory stop:

The reasonableness of such on-the-scene detention is determined by all the circumstances. The seriousness of the offense, the degree of likelihood that the person detained may have witnessed or been involved in the offense, the proximity in time and space from the scene of the crime, the urgency of the occasion, the nature of the detention and its extent, the means and procedures employed by the officer, the presence of any circumstances suggesting harassment or a deliberate effort to avoid the necessity of securing a warrant—these and other factors will be relevant . . . .

510 F.2d at 455-56 (quoting Arnold v. United States, 382 F.2d 4, 7 (9th Cir. 1967)).

164. Adams v. Williams, 407 U.S. 143, 146-47 (1972) (Terry-type search valid when based upon tip from known informant who had provided information in past). See also United States v. McLaughlin, 525 F.2d 517, 520 (9th Cir. 1975), cert. denied, 427 U.S. 904 (1976) (attempted vehicle stop reasonable when based upon reliable informant's tip, officer's observation of package transfer, and vehicle's evasive action). But cf. United States v. DeVita, 526 F.2d 81, 82-83 (9th Cir. 1975) (per curiam) (vague tip from unreliable informant did not constitute founded suspicion sufficient to support vehicle stop).

165. See United States v. Garcia-Rodriguez, 558 F.2d 956, 964-65 (9th Cir. 1977), cert. denied, 434 U.S. 1050 (1978) (following valid investigatory stop of vehicle, marijuana odor and contraband in plain view constituted probable cause to search); United States v. Thompson, 558 F.2d 522, 524 (9th Cir. 1977), cert. denied, 435 U.S. 914 (1978) (search valid when based on marijuana odor detected during interrogation); United States v. Bates, 533 F.2d 466, 469 (9th Cir. 1976) (seizure of smuggled contraband valid where officer's suspicion elevated to probable cause during questioning).

166. See, e.g., United States v. Thompson, 558 F.2d 522, 524 (9th Cir. 1977), cert. denied, 435 U.S. 914 (1978) (officer drew weapon after vehicle lurched forward and began to move). See also note 167 infra.

167. United States v. Coades, 549 F.2d 1303, 1305 (9th Cir. 1977) (per curiam) (initial stop with drawn weapons reasonable when bank robbery suspects believed armed). See also United States v. Russell, 546 F.2d 839, 841 (9th Cir. 1976) (Wright, J., concurring) (initial vehicle stop with drawn weapons reasonable where officers suspected a possible ambush); United States v. Richards, 500 F.2d 1025, 1028-29 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975) (reasonable to draw weapon where suspects believed armed and officer's order to stop aircraft engines ignored); McNeary v. Stone, 482 F.2d 804, 807 (9th Cir.), cert.
an arrest for which probable cause would be required. 168

The interrogation, moreover, may be conducted at a location other than that of the initial confrontation. In *United States v. Chatman*, 169 the suspect, upon arrival at an airport, had been stopped for questioning concerning possible heroin trafficking. The suspect, who carried no identification and who seemed extremely nervous, was escorted to an interview room for interrogation. Concluding that no arrest had taken place, the Ninth Circuit observed that "[f]ound suspicion . . . justified the interrogation, and it was not improper, in absence of protest or coercive circumstances, to arrange that it take place free from public view with its attendant embarrassment." 170

4. Warrantless Vehicle Searches

Motor vehicle searches have historically fallen outside the purview of the warrant requirement when based upon probable cause and conducted under exigent circumstances. 171 Although the finding of exigency rests upon the vehicle's mobility and the ease with which it may

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168. *See* notes 166-67 *supra*. *But see* *United States v. Strickler*, 490 F.2d 378, 380 (9th Cir. 1974) (heavily armed approach to fully surrounded vehicle where occupants ordered to raise hands constituted arrest).

169. 573 F.2d 565 (9th Cir. 1977).

170. *Id.* at 567 (citing *United States v. Salter*, 521 F.2d 1326, 1328-29 (2d Cir. 1975) (bus station baggage room)). *See also* *United States v. Scheiblauer*, 472 F.2d 297, 299 (9th Cir. 1973) (by implication) (airport security office).

171. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) (where warrantless highway search proper, and removal of vehicle to station is reasonable, search conducted there is proper) (citing *Carroll v. United States*, 267 U.S. 132, 149 (1925) (search of bootlegger's vehicle on road proper on theory of mobility)) ("[A] search warrant [is] unnecessary where there is probable cause to search an automobile stopped on the highway; the car is moveable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained."). *See* *United States v. Abascal*, 564 F.2d 821, 828-29 (9th Cir. 1977) (officers need not take action at instant probable cause ripens; vehicle search justified on exigent circumstances when new probable cause appears); *United States v. Gulma*, 563 F.2d 386, 390 (9th Cir. 1977) (vehicle search immediately following lawful arrest justified by exigent circumstances); *United States v. Garcia-Rodriguez*, 558 F.2d 956, 964-65 (9th Cir. 1977), *cert. denied*, 434 U.S. 1050 (1978) (detection of marijuana odor during valid investigatory stop, plain view sighting of contraband and exigent circumstances justified immediate warrantless search); *United States v. Peterson*, 549 F.2d 654, 660 (9th Cir. 1977) (corroborated informant's tip and independent agent observation constitute probable cause for warrantless search where exigent circumstances also present); *United States v. Phoester*, 544 F.2d 353, 374 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977) (where real possibility that kidnapper's confederate might attempt to destroy evidence in vehicle, immediate search following impoundment justified); *United States v. McClain*, 531 F.2d 431, 433-35 (9th Cir.), *cert. denied*, 429 U.S. 835 (1976) (search valid where vehicle accessible to "other people" but no evidence confederates presented); *United States v. Hickman*, 523 F.2d 323, 328-29 (9th Cir. 1975),
be moved from the jurisdiction, a vehicle subject to search on the highway may properly be removed to the stationhouse before the search is conducted. The Supreme Court has traditionally sustained the warrantless search of vehicles under circumstances in which it would otherwise invalidate the search of an office or dwelling as a violation of the fourth amendment.

Quite apart from searches designed to uncover contraband or other instrumentalities of crime, the Supreme Court, in South Dakota v. Opperman, upheld the warrantless inventory search of an impounded vehicle. Such incursions must be conducted pursuant to

cert. denied, 423 U.S. 1050 (1976) (search of decoy boat externally identical to and bearing same registration as suspect boat valid).


In Opperman Mr. Chief Justice Burger explained the two-fold rationale for the lesser fourth amendment protection afforded a vehicle:

First, the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible. . . . [Second,] less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office . . . [due to] pervasive and continuing governmental regulation and controls . . . [and] the obviously public nature of automobile travel.


176. Id. at 375-76. The Chief Justice, writing for the majority of five, isolated three considerations underlying the propriety of routine inventory searches: safeguarding the owner's property while it remains in police custody; shielding the police against claims of lost or stolen articles; and protecting the police from potential danger. Id. at 369.

Rejecting the broad authorization proffered by the majority, however, Mr. Justice Marshall argued in dissent for more stringent prerequisites:

[T]here must be specific cause to believe that a search of the scope to be undertaken is necessary in order to preserve the integrity of particular valuable property threatened by the impoundment . . . [and] even where a search might be appropriate, such an intrusion may only follow the exhaustion and failure of reasonable efforts under the circumstances to identify and reach the owner of the property in order to facilitate alternative means of security or to obtain his consent to the search . . . .
the standard operating procedures of the relevant police agency\textsuperscript{177} and must be free from any "investigatory police motive."\textsuperscript{178} In \textit{United States v. Hellman},\textsuperscript{179} for example, appellant's vehicle was partially blocking a driveway at the time of his arrest. Pursuant to a standard police department regulation, the vehicle was cited, impounded on the spot and immediately searched, ostensibly for inventory purposes. The search disclosed incriminating evidence. The impoundment regulation, however, was silent as to both inventory and protective storage of the vehicle's contents. Testimony of the impounding officer at the suppression hearing further revealed that one of his motives in citing and impounding the vehicle had been to justify an investigatory search. The Ninth Circuit reversed the conviction, reasoning that the investigatory police motive alone was sufficient to render the warrantless search unreasonable.\textsuperscript{180} As independent grounds for reversal the \textit{Hellman} court stressed the importance of the routine nature of an inventory search, concluding:

It is the inventorying practice and not the impounding practice that, if routinely followed . . . could render the inventory a reasonable search under \textit{Opperman}. The fact that other police departments routinely follow such a practice may give support to the proposition that such a practice, if locally followed, is reasonable. It does not, however, render reasonable a search where the inventorying practice is not locally followed and the search, thus, is a departure from local practice. A locally followed practice gives some assurance that a particular car was not singled out for special searching attention.\textsuperscript{181}

The discovery of incriminating evidence need not coincide with the

\textit{Id.} at 393-94 (Marshall, J., with Brennan & Stewart, JJ., dissenting) (emphasis added) (footnotes omitted).

\textsuperscript{177} \textit{Id.} at 376.

\textsuperscript{178} \textit{Id.}

\textsuperscript{179} 556 F.2d 442 (9th Cir. 1977).

\textsuperscript{180} \textit{Id.} at 444.

\textsuperscript{181} \textit{Id.} The \textit{Hellman} court suggested, however, that even extraordinary procedures might be reasonable under the fourth amendment when supported by "some special reason for the taking of safeguarding or security precautions that are not customarily taken." \textit{Id.} See, e.g., South Dakota v. \textit{Opperman}, 428 U.S. 364, 366, 369 (1976) (valuables in plain view might provide incentive for theft); \textit{Cady v. Dombrowski}, 413 U.S. 433, 443 (1973) (unguarded pistol might fall into thieves' hands).

Justice Powell's concurring opinion in \textit{Opperman}, however, counsels that the rationale dispensing with the warrant requirement may be absent in such situations. In the inventory search, reasons Powell, "[t]he officer does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department . . . policy and occur whenever an automobile is seized. There are thus no special facts for a neutral magistrate to evaluate." 428 U.S. at 383 (Powell, J., concurring).
initial vehicle inventory. The appellant in *United States v. Jamerson* was arrested in the early morning hours for possession of a stolen vehicle. Immediately thereafter, at the scene of the arrest, officers inventoried the contents of the vehicle to preclude claims of lost or stolen articles. Following a request from the owner late that afternoon for the vehicle's release, an officer entered to remove the contents. Noticing a protruding piece of newspaper under a mat behind the driver's seat, the officer removed the mat and discovered incriminating evidence wrapped in the paper. The Ninth Circuit summarily approved the bifurcated inventory process observing that "the police were 'indisputably engaged in a caretaking search of a lawfully impounded vehicle.'"

5. Seizure of Items in Plain View

The courts have sanctioned the warrantless seizure of evidence found in "plain view" by an officer lawfully in the place where the discovery occurs. The officer need not be present on the authority of a warrant, but may be acting pursuant to one of the recognized exceptions to the warrant requirement. "Plain view" seizures are valid, however,
only when the officer inadvertently discovers, and immediately recognizes, the inculpatory character of the objects seized.

During the survey period the Ninth Circuit applied the plain view doctrine summarily and tended to focus upon the propriety of the officer's presence in the area where the evidence was discovered. In United States v. Fulton, for example, the Ninth Circuit analyzed only the justification for the presence of federal agents in the suspect's motel room. The court found the circumstances to be sufficiently exigent to sustain a warrantless entry and, hence, the plain view seizure.

6. Hot Pursuit

A police officer in hot pursuit of a suspect may lawfully enter premises and seize evidence without a warrant under circumstances in which delay might result in destruction of the evidence or heightened danger to the officer. The entry must, of course, be based upon probable

search); United States v. Fulton, 549 F.2d 1325, 1327 (9th Cir. 1977) (seizure of items in plain view proper following warrantless entry based on exigent circumstances that partner in room would destroy evidence); United States v. Allende, 486 F.2d 1351, 1353 (9th Cir. 1973), cert. denied, 416 U.S. 958 (1974) (objects in plain view during limited search incident to arrest properly seized without warrant); United States v. Walling, 486 F.2d 229, 236 (9th Cir. 1973), cert. denied, 415 U.S. 923 (1974) (seizure of items in plain view revealed by flashlight proper following valid investigatory stop of vehicle).


187. Id. at 466. (["The seizure] is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."). See also United States v. Sedillo, 496 F.2d 151, 151-52 (9th Cir.), cert. denied, 419 U.S. 947 (1974) (seizure of forged check in envelope protruding from pocket upheld even though check itself and endorsement not visible until after seizure and no pre-seizure cause to suspect contraband); United States v. White, 463 F.2d 18, 21 (9th Cir.) (per curiam), cert. denied, 409 U.S. 1024 (1972) (seizure of pill bottles in plain view during investigation of nondrug-related theft upheld when bottles lacked price tags, sales identification or prescription labels, but bore warning that prescription required).

In his dissenting opinion to the Court's denial of certiorari in Sedillo, Mr. Justice Douglas approved Ninth Circuit Judge Hufstedler's dissent, agreeing that the plain view doctrine is inapplicable where the incriminating aspects of an object are not immediately apparent. 419 U.S. at 947-48 (Douglas, Brennan & Marshall, JJ., dissenting).

188. 549 F.2d 1325 (9th Cir. 1977).

189. Id. at 1327. In Fulton, extensive surveillance of defendant's motel room coupled with an informant's tip revealed the probable involvement of defendant and an unidentified female in heroin importation. Although the defendant was arrested in the parking lot of the motel, agents strongly believed that the female remained in the room. Fearing the destruction of incriminating evidence, agents effected a warrantless entry, secured the premises, and seized items in plain view.

cause,\(^1\) and need not conform to the knock and announce statute\(^2\) when compliance "would create palpable peril to the life or limb of the . . . officers."\(^3\)

7. Consent Searches

Searches undertaken by law enforcement officials with the consent of the party or parties involved do not require a showing of probable cause.\(^4\) The burden is on the government to show that consent was freely and voluntarily given\(^5\) and not the product of duress—either express or implied.\(^6\) The government must show the voluntary nature of the consent from the "totality of the circumstances."\(^7\)

In 1977, the Ninth Circuit reaffirmed the long established rule\(^8\) that a person in custody may validly consent to a search, as long as there is valid when arrest initiated in public place and delay realistically expected to result in destruction of evidence; Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (delay in pursuit of armed felon unnecessary where to do so would gravely endanger lives of officers or others). The exemption provides relief from the warrant requirement even when the "pursuit" ends almost as soon as it begins. United States v. Santana, 427 U.S. at 43 ("'Hot pursuit' means some sort of a chase, but it need not be an extended hue and cry 'in and about [the] public streets.' [T]hat the pursuit . . . ended almost as soon as it began did not render it any the less a 'hot pursuit' sufficient to justify . . . warrantless entry.").

191. See, e.g., United States v. Scott, 520 F.2d 697, 700 (9th Cir. 1975), cert. denied, 423 U.S. 1056 (1976) (knowledge that suspects not in first six of seven apartment units in which they were most likely to be found contributed to sufficient probable cause for warrantless search of seventh unit).

192. 18 U.S.C. § 3109 (1976) provides:

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

193. Gilbert v. United States, 366 F.2d 923, 932 (9th Cir. 1966), cert. denied, 388 U.S. 922 (1967), 393 U.S. 985 (1968) (unannounced entry to execute warrant permissible where armed murderer believed present). Compliance with the announcement statute, however, does not per se render the hot pursuit exception inapplicable. United States v. Flores, 540 F.2d 432, 435-36 (9th Cir. 1976) (search following announced entry valid as hot pursuit where high risk of destruction of evidence and suspect's escape); United States v. Scott, 520 F.2d 697, 700 (9th Cir. 1975), cert. denied, 423 U.S. 1056 (1976) (announced warrantless entry in hot pursuit valid where armed robbers thought to be present).


197. See id. at 226-27, 229; United States v. Agosto, 502 F.2d 612, 614 (9th Cir. 1974) (per curiam) (threat by law enforcement officers that in the absence of consent they would secure the premises and procure a search warrant does not necessitate a finding of duress or coercion; remanded in order to determine voluntariness from "totality of circumstances").

198. See United States v. Watson, 423 U.S. 411, 424 (1976); United States v. Townsend, 510 F.2d 1145, 1146 (9th Cir. 1975) (per curiam); United States v. Rothman, 492 F.2d 1260, 1265 (9th Cir. 1973); United States v. Page, 302 F.2d 81, 83 (9th Cir. 1962) (en banc).
no evidence of coercion or duress. The fact that a person is in custody when consent is given is simply one factor to be considered in analyzing the totality of the circumstances.

The voluntary nature of the consent is all that the government must prove in order to justify a consent search. Unlike the fifth amendment Miranda warnings, there is no requirement that a person being asked to consent to a search be informed of his right to refuse such consent. Whether a person has been warned is but one factor to be considered "within the totality of circumstances" when determining whether the consent was voluntarily given. It has previously been held in the Ninth Circuit that trial courts must enter specific findings as to the circumstances surrounding a consent to search.

In United States v. Lemon, the Ninth Circuit rejected the argument that any evidence seized as a result of a consent search undertaken after the Miranda warnings have been given is an "illegally obtained statement" and is therefore excluded from evidence. The court stated that "[a] consent to a search is not the type of incriminating statement toward which the fifth amendment is directed" since it is "not in itself 'evidence of a testimonial or communicative nature' . . . ."

199. United States v. Thompson, 558 F.2d 522, 525 (9th Cir. 1977), cert. denied, 435 U.S. 914 (1978); United States v. Lemon, 550 F.2d 467, 471 (9th Cir. 1977); United States v. Tolias, 548 F.2d 277, 278 (9th Cir. 1977) (per curiam). Cf. United States v. Gulma, 563 F.2d 386, 389 (9th Cir. 1977) (third person with common authority over motel room consented to search while under arrest).

200. See United States v. Tolias, 548 F.2d 277, 278 (9th Cir. 1977) (per curiam) (defendant was given his Miranda rights, was in his own store, and knew from past experience that he could refuse consent).


202. See Miranda v. Arizona, 384 U.S. 436 (1966). Miranda requires that an accused who is subjected to "custodial interrogation" must be advised of his fifth amendment right to remain silent. Id. at 467-68.


205. Id.

206. 550 F.2d 467 (9th Cir. 1977).

207. Id. at 472-73.

208. Id. at 472. See Schmerber v. California, 384 U.S. 757, 761-64 (1966) (withdrawal of blood sample was not testimonial in nature and, therefore, did not involve fifth amendment violation); Tremayne v. Nelson, 537 F.2d 359, 360-61 (9th Cir. 1976) (search conducted after voluntary consent and which uncovered incriminating blood stain did not violate defendant's fifth amendment rights). In Lemon, the court declined to decide whether the "fruits" doctrine of Wong Sun v. United States, 371 U.S. 471, 484-86 (1963) (exclusion of "fruits" of illegally obtained evidence in violation of the fourth amendment) applied to a violation of Miranda, since the court found no Miranda violation. 550 F.2d at 472. The Supreme
A consent to search may be given by any person who possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected." Thus, persons who share authority over premises or effects assume the risk that one person may, on his own, consent to a search of the common area which will prove detrimental to another. In 1977, the Ninth Circuit held that such common authority necessary to justify the consent need only rest on "mutual use of the property by persons having joint access or control for most purposes . . . ."

8. Border Searches

The federal government has an inherent power to keep international borders secure from the entry of contraband and illegal aliens. In manifestation of this right, searches made at an international border, or its "functional equivalent," are exempt from the fourth amendment requirement of probable cause. Thus, persons, packages, and vehicles Court, in Michigan v. Tucker, 417 U.S. 433, 447 (1974), had earlier declined to answer the same question.

209. United States v. Matlock, 415 U.S. 164, 171 (1974). See Frazier v. Cupp, 394 U.S. 731, 740 (1969) (consent by defendant's cousin to search duffel bag which was used jointly by them; focus on mutual control, use and access); United States v. Murphy, 506 F.2d 529, 530 (9th Cir. 1974), cert. denied, 420 U.S. 996 (1975) (per curiam) (consent by employee to search employer's warehouse). Cf. United States v. Bussey, 507 F.2d 1096, 1097 (9th Cir. 1974) (while first co-conspirator's consent to search jointly occupied motel room was valid, her consent to search second co-conspirator's personal luggage was not).

210. See United States v. Matlock, 415 U.S. 164, 171 n.7 (1974); Frazier v. Cupp, 394 U.S. 731, 740 (1969); United States v. Canada, 527 F.2d 1374, 1378-79 (9th Cir. 1975), cert. denied, 429 U.S. 867 (1976) (consent by companion of defendant permitting airport authorities to search shared bag was valid when defendant did not object). The Canada case also refuted the notion that third-party consent searches are upheld only in situations involving absentee defendants. Id. at 1379.

211. United States v. Gulma, 563 F.2d 386, 389 (9th Cir. 1977). In Gulma, the defendants gave a key to a motel room to a third person who was to find a buyer for the heroin that was deposited in the room. The defendants did not want the key back from the third person. The court found that the third person had been given complete control of the room, hence his consent to a search thereof was valid. Id. at 389-90.


213. Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973); United States v. Potter, 552 F.2d 901, 907 (9th Cir. 1977). See also United States v. Tilton, 534 F.2d 1363, 1364-65 (9th Cir. 1976); United States v. Solmes, 527 F.2d 1370, 1372 (9th Cir. 1975).

214. See Boyd v. United States, 116 U.S. 616, 623 (1886); United States v. Carter, 563 F.2d 1360, 1361 (9th Cir. 1977); Rodriguez-Gonzalez v. United States, 378 F.2d 256, 258 (9th Cir. 1967); Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), cert. denied, 385 U.S. 977 (1966).
hicles crossing the border are subject to a full search based on little or no suspicion. Furthermore, there is no requirement that *Miranda* warnings be given to a person crossing the border. The search, however, must meet the fourth amendment requirement of reasonableness.

For the search to seriously intrude upon a person’s dignity, however, additional suspicion is required—dependent upon the degree of intrusion necessary. For example, in order to initiate a strip or “skin search,” there must be a real suspicion that the person to be searched has contraband concealed on his or her body. This real suspicion must be based on objective, articulable facts that bear some reasonable relationship to the suspicion that something is concealed on the body. In the recent case of *United States v. Wilmot*, the Ninth Cir-

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218. Chavez-Martinez v. United States, 407 F.2d 535, 539 (9th Cir.), *cert. denied*, 396 U.S. 858 (1969). *Miranda* warnings need only be given to a person crossing the border when there is probable cause to believe that an offense has been committed or that the person has been arrested. *Id.* at 539.


220. *See* United States v. Wilmot, 563 F.2d 1298, 1300 (9th Cir. 1977) (object felt during “pat-down” search supplied real suspicion to justify strip search); United States v. Leverette, 503 F.2d 269, 270 (9th Cir. 1974); United States v. Holtz, 479 F.2d 89 (9th Cir. 1973); United States v. Sosa, 469 F.2d 271, 272 (9th Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); United States v. Gil de Avila, 468 F.2d 184, 186 (9th Cir.), *cert. denied*, 410 U.S. 958 (1972) (behavior by companions of person subjected to skin search can supply real suspicion); United States v. Shields, 453 F.2d 1235, 1236 (9th Cir.) (per curiam), *cert. denied*, 406 U.S. 910 (1972); United States v. Johnson, 425 F.2d 630 (9th Cir. 1970), *cert. denied*, 404 U.S. 802 (1971); United States v. Guadalupe-Garza, 421 F.2d 876, 879 (9th Cir. 1970); United States v. Summerfield, 421 F.2d 684, 685 (9th Cir. 1970) (per curiam); Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967).

221. *See* United States v. Leverette, 503 F.2d 269, 270 (9th Cir. 1974); United States v. Johnson, 425 F.2d 630, 632 (9th Cir. 1970), *cert. denied*, 404 U.S. 802 (1971); United States v. Guadalupe-Garza, 421 F.2d 876 (9th Cir. 1970). In *Guadalupe-Garza*, the court defined the real suspicion necessary to justify the initiation of a strip search as “subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs officer to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law.” *Id.* at 879.

222. 563 F.2d 1298 (9th Cir. 1977).
cuit reaffirmed previous decisions holding that a reasonable pat-down search for weapons is not the equivalent of a strip search. In Wilmot, the court also further defined its views as to strip-searches. Such a search was upheld where the combined factors of a suspect's behavior during a pat-down for weapons and the detection of a secreted object next to the skin gave rise to a "real suspicion."

To initiate a search that involves a severe intrusion upon a person's dignity, such as the search of a body cavity, there must exist a clear indication or plain suggestion that contraband has been secreted beyond the surface of the skin. The search of the body cavity must be conducted in a reasonable manner as required by the fourth amendment. In 1977, the Ninth Circuit rejected the argument that the removal of an artificial leg at the "functional equivalent" of an international border constituted a body cavity search, holding that forced removal of such a limb "in no way involves the same embarrassment and intrusion" as a body cavity search.


224. 563 F.2d at 1300. On crossing the border, Wilmot had been subjected to a pat-down search for the detection of weapons. He aroused the custom inspector's suspicions by refusing to spread his legs, and ultimately a suspicious object was felt in his groin area. When the object was again detected during a second pat-down after Wilmot emptied his pockets, he was subjected to a strip search which revealed a packet of heroin.

225. Rivas v. United States, 368 F.2d 703, 710 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967). See United States v. Mastberg, 503 F.2d 465, 471 (9th Cir. 1974); United States v. Brown, 421 F.2d 181 (9th Cir. 1969) (per curiam); United States v. Castle, 409 F.2d 1347, 1348 (9th Cir.) (per curiam), cert. denied, 396 U.S. 975 (1969); Morales v. United States, 406 F.2d 1298, 1299-1300 (9th Cir. 1969); Huguez v. United States, 406 F.2d 366, 377 (9th Cir. 1968).


227. Defining the point at which a skin search turns into a body cavity search has been problematic for the Ninth Circuit. It is settled that the "manual opening of the vagina" is a body cavity search. Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967). See United States v. Shields, 453 F.2d 1235, 1236 (9th Cir.) (per curiam), cert. denied, 406 U.S. 910 (1972). The weight of authority holds that the examination of spread buttocks is not a body cavity search as only the skin around the anus is being inspected—therefore not requiring the clear indication standard. See United States v. Summerfield, 421 F.2d 684, 685 (9th Cir. 1970) (per curiam); United States v. Brown, 421 F.2d 181 (9th Cir. 1969) (per curiam); United States v. Castle, 409 F.2d 1347, 1348 (9th Cir.) (per curiam), cert. denied, 396 U.S. 975 (1969). Compare Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967) (rectal exam constitutes body cavity search).

228. United States v. Cameron, 538 F.2d 254, 258 (9th Cir. 1976). See United States v. Guadalupe-Garza, 421 F.2d 876, 878 (9th Cir. 1970); Huguez v. United States, 406 F.2d 366, 374-79 (9th Cir. 1968).

229. United States v. Carter, 563 F.2d 1360, 1361 (9th Cir. 1977). In Carter, the court expressly left open the question whether the removal and search of an artificial leg at the
In recent years, the trend in the Supreme Court has been to limit congressional efforts to expand the physical area within which a border search could be conducted. The Court has consistently held that only searches conducted at the border or its "functional equivalent" are exempt from the fourth amendment requirement of probable cause.

This trend began with the decision in *Almeida-Sanchez v. United States*. In *Almeida-Sanchez*, the Court held that searches conducted by roving patrol units at a point removed from the border or its "functional equivalent" must be based on probable cause or a warrant authorizing random searches in a given area. In 1975, the Court extended the *Almeida-Sanchez* holding to require that searches conducted at permanent checkpoint stations removed from the border or its "functional equivalent" be based on probable cause or consent. The trend continued with the Court's decision in *United States v. Brignoni-Ponce* which held that a roving patrol unit may stop a vehicle in close proximity to the border for questioning of the occupants about their residence status only if there exists a reasonable suspicion based on articulable facts that the vehicle contains illegal aliens. In

"functional equivalent" of the border constituted a strip search because the court had already found sufficient real suspicion to justify a strip search.

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231. See *United States v. Tutwiler*, 505 F.2d 758, 759-60 (9th Cir. 1974) (search near border justified by probable cause).


234. *Id.* at 273.

235. *Id.* at 283 (Powell, J., concurring).


238. *Id.* at 884. Those factors that the Court felt the border patrol could use as a basis for establishing reasonable suspicion included: characteristics of the locality, proximity to the border, the previous experience of the officer, usual traffic in the area, information of recent border crossings, the behavior of the driver; characteristics of the vehicle itself; and the clothing and haircut of the occupants of the vehicle.
1977, the Ninth Circuit reaffirmed its position\textsuperscript{239} that the reasonable suspicion standard established by the Supreme Court in \textit{Brignoni-Ponce} is basically the same as the founded suspicion standard applied by the Ninth Circuit.\textsuperscript{240} The trend toward limitation, however, was halted by the Supreme Court decision in \textit{United States v. Martinez-Fuerte}.\textsuperscript{241} The Court in \textit{Martinez-Fuerte} held that routine traffic stops for brief questioning at reasonably located permanent checkpoints need not be based on "individualized suspicion"\textsuperscript{242} or authorized by warrant.\textsuperscript{243} Thus, the Court refused to extend the standard necessary to justify a roving patrol unit stop for questioning at permanent checkpoints.\textsuperscript{244}

In 1977, the Ninth Circuit found the Oak Grove Border Station in San Diego County to be a permanent checkpoint within the meaning of \textit{Martinez-Fuerte}.\textsuperscript{245} Although this checkpoint was not in constant operation, it was clearly marked and in operation five days a week.\textsuperscript{246} Furthermore, Oak Grove was strategically located so as to ensure the success of the other checkpoints.\textsuperscript{247} These characteristics were sufficient to establish Oak Grove as "reasonably located [and] 'permanent' . . . ."\textsuperscript{248} Therefore, it appears that in at least a limited sense, the Ninth Circuit may be willing to extend its definition of permanent checkpoint to evade the Supreme Court restrictions on roving stops.

The trend in both the Supreme Court\textsuperscript{249} and the Ninth Circuit\textsuperscript{250} has

\begin{itemize}
\item \textsuperscript{239} See United States v. Gonzalez-Diaz, 528 F.2d 925 (9th Cir.) (per curiam), cert. denied, 425 U.S. 977 (1976); United States v. Rocha-Lopez, 527 F.2d 476 (9th Cir. 1975), cert. denied, 425 U.S. 977 (1976).
\item \textsuperscript{240} United States v. Avalos-Ochoa, 557 F.2d 1299, 1301 (9th Cir.), cert. denied, 434 U.S. 974 (1977); ("founded suspicion" and the "reasonable suspicion" of \textit{Brignoni-Ponce} are essentially the same) cf: United States v. Vasquez-Cazares, 563 F.2d 1329, 1331 (9th Cir. 1977) (per curiam) (founded suspicion satisfies standard under \textit{Brignoni-Ponce}).
\item \textsuperscript{241} 428 U.S. 543 (1976).
\item \textsuperscript{242} \textit{Id.} at 562.
\item \textsuperscript{243} \textit{Id.} at 565.
\item \textsuperscript{244} In \textit{Martinez-Fuerte}, the Court expressly noted that a vehicle may be stopped and its occupants questioned based "largely on the basis of apparent Mexican ancestry . . . ." \textit{Id.} at 563. In \textit{Brignoni-Ponce}, however, the Court held that roving-patrol stops based on the factor of "Mexican descent," although a relevant factor, was not sufficient alone to supply the reasonable suspicion necessary to justify the stop. 422 U.S. at 885-87.
\item \textsuperscript{246} 554 F.2d at 919.
\item \textsuperscript{247} \textit{Id.} at 921.
\item \textsuperscript{248} \textit{Id.}
\item \textsuperscript{249} See United States v. Peltier, 422 U.S. 531 (1975) (\textit{Almeida-Sanchez} not to be applied retroactively).
\item \textsuperscript{250} See United States v. Torres-Rios, 534 F.2d 856 (9th Cir. 1976), \textit{cert denied}, 429 U.S.
been to apply the border search cases prospectively. In *United States v. Escalante*, the Ninth Circuit held that *United States v. Ortiz* should not be applied retroactively. Thus, evidence seized at fixed checkpoint searches that took place after the Supreme Court's decision in *Almeida-Sanchez*, but before the Ninth Circuit's holding that such searches must be based on probable cause, need not be excluded. The court reasoned that the purpose of the exclusionary rule would not be served by excluding such evidence because at the time "there was no holding which gave law enforcement agencies adequate notice of the unconstitutionality of fixed checkpoint searches conducted without probable cause or consent."

**F. Identifications**

That an accused has the right to the presence of counsel during post-indictment lineups is well established. Reasoning that the purpose of this safeguard is to reveal prejudice which might otherwise go unnoticed at trial, the Ninth Circuit has, however, held that counsel's presence is not essential at pre- or post-lineup conferences between a witness and law enforcement personnel.

Further, the presence of counsel is not required during a photographic display identification. Such identifications, however, may

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862 (1977) (deny retroactive treatment to *Brignoni-Ponce*); *United States v. Bowen*, 500 F.2d 960, 975-81 (9th Cir. 1974) (en banc), aff'd, 422 U.S. 916 (1975) (*Almeida-Sanchez* should not be applied retroactively).

251. 554 F.2d 970 (9th Cir.), cert. denied, 434 U.S. 862 (1977).

252. 422 U.S. 891 (1975).


254. 554 F.2d at 973.

255. Id.


257. *United States v. Parker*, 549 F.2d 1217, 1223 (9th Cir.), cert. denied, 430 U.S. 971 (1977) (counsel's presence not required during post-lineup conversation); *Doss v. United States*, 431 F.2d 601, 603-04 (9th Cir. 1970) (counsel unnecessary because "the ordinary witness is capable of recalling and recounting conversations concerning the identity of a suspect. . . .").

be challenged as offensive to due process of law when the procedure involved is "unnecessarily suggestive." Such a challenge requires the court to examine the totality of the circumstances and to determine whether the procedure used was conducive to "irreparable mistaken identification" or created a "very substantial likelihood of irreparable misidentification." In United States v. Lustig, for example, the witness-officer had observed the accused for thirty seconds to one minute; the witness later selected the defendant's photograph from among a group of five unidentified pictures. The Ninth Circuit failed to find undue suggestiveness in this procedure.

Also governed by the requirement of due process is the showup between witness and suspect. In United States v. Coades, for example, the Ninth Circuit held that a showup at a bank shortly after a robbery presented only a minimal possibility of mistaken identification. While recognizing that a showup is more suggestive than a lineup because the

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259. United States v. Ash, 413 U.S. 300 (1973). The due process requirement provides protection for the accused in any identification situation when the presence of counsel is not required.


261. Id. at 302.

262. Simmons v. United States, 390 U.S. 377, 384-86 (1968) (photo display proper when little suggestiveness in photos shown, need for their use great, and all witnesses positively identified suspect). In evaluating the likelihood of misidentification, the Court stated in Neil v. Biggers, 409 U.S. 188 (1972), that the inquiry should broadly focus on the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199 (Biggers held showup several months following crime proper when accused spoke words similar to those spoken by criminal and witness identification positive). See, e.g., Greenfield v. Gunn, 556 F.2d 935 (9th Cir.), cert. denied, 434 U.S. 928 (1977) (showup at emergency hospital proper when witness had previously identified accused at scene of crime prior to arrival of police); United States v. Baxter, 492 F.2d 150 (9th Cir.), cert. dismissed, 414 U.S. 801 (1973) (where immediate action necessary to locate suspect and witnesses had adequate opportunity to observe, photo display proper in which witnesses shown numerous photos both before and after that of accused); McNeary v. Stone, 482 F.2d 804 (9th Cir.), cert. denied, 414 U.S. 1071 (1973) (necessity for using particular procedure is to be stressed); United States v. Gaines, 450 F.2d 186 (3d Cir. 1971), cert. denied, 405 U.S. 927 (1972) (showup proper at bank 30 minutes following robbery).

263. 555 F.2d 737 (9th Cir. 1977), cert. denied, 434 U.S. 1045 (1978).

264. Id. at 749. See also United States v. Kimbrough, 528 F.2d 1242, 1243-47 (7th Cir. 1976) (30 seconds viewing proper); United States v. Reid, 527 F.2d 380, 385 (2d Cir. 1975) (10-15 seconds viewing sufficient).

265. 549 F.2d 1303 (9th Cir. 1977).
suspect is the only person to be viewed, the court concluded that the
return of the accused to the scene not only allows the witness to give a
fresh identification, but facilitates the quick release of innocent suspects
as well.

II. PRELIMINARY PROCEEDINGS

A. Grand Jury

Serving as a buffer between the accuser and the accused to ensure
that the ultimate charge is founded on reason, the function of the grand
jury is to inquire into crimes allegedly committed and to return an in-
dictment if warranted by the evidence.

To ensure impartiality, the grand jury selection process must be free
from intentional discrimination against identifiable segments of the
community from which the juries are drawn. In federal grand jury
proceedings, the selection therefore must comply with the provisions of
the Jury Selection and Service Act of 1968. The Act requires that
the grand jury be selected from a fair cross section of the community,
with no citizen being excluded because of race, color, religion, sex, na-
tional origin, or economic status.

A problem, then, arises when a defendant claims that the grand jury
selection procedure did not utilize a fair cross section of the commu-
nity. The Ninth Circuit addressed this issue in the cases of United

In United States v. Potter, the defendant was convicted of importing

266. Id. at 1305.
267. Id. See also Russell v. United States, 408 F.2d 1280, 1284 (D.C. Cir.), cert. denied,
395 U.S. 928 (1969) (although suggestive, on-the-scene identification not violative of due
process).
not considered adversary in nature, scope of grand jury's inquiry is not to be narrowly re-
269. See Apodaca v. Oregon, 406 U.S. 404, 413 (1972) (defendant may not challenge
makeup of jury merely because it contains no members of his race but must prove systematic
exclusion of his race). See generally Swain v. Alabama, 380 U.S. 202, 208-09 (1965); Cassell
v. Texas, 339 U.S. 282, 286-87 (1950); Akins v. Texas, 325 U.S. 398, 403-04 (1945); Ruthen-
berg v. United States, 245 U.S. 480 (1918). See also Tollett v. Henderson, 411 U.S. 258, 266
(1973) in which the defendant, after pleading guilty to a charge of murder, challenged the
constitutionality of the grand jury selection. The Court held that the guilty plea constituted
a break in the chain of events which had preceded it in the criminal proceedings and that the
defendant could not, therefore, raise the claim of unconstitutionality.
271. Id. §§ 1861, 1862.
272. 552 F.2d 901 (9th Cir. 1977).
273. 557 F.2d 1293 (9th Cir. 1977).
marijuana in violation of federal law.\(^{274}\) On appeal, he challenged the
district court's grand jury selection procedure contending that persons
between the ages of eighteen and thirty-four, persons with only a high
school education or less, and persons of black ancestry were under-
represented.\(^{275}\)

Though 28 U.S.C. section 1867\(^{276}\) provides for a stay of proceedings
or dismissal of the indictment if there has been a substantial failure to
comply with the provisions of the Jury Selection Act of 1968, the Ninth
Circuit noted in \(\text{Potter}\) that the grand jury need not be a "statistical
mirror of the community."\(^{277}\) "[B]efore the absence of a fair cross-
section is established and corrective measures are required, appellant
must establish a substantial deviation with respect to a cognizable
group."\(^{278}\)

The Ninth Circuit further recognizes that, as there is no precise defi-
nition of "cognizable group,"\(^{279}\) a static, fixed definition is undesir-


\(^{275}\) The district court selected 7,436 names at random from voter registration lists as the
first step toward selecting a grand jury. Questionnaires were then mailed to 2,112 of these
individuals. The grand jury was selected from among the 1,449 questionnaires returned to
the clerk of the court. 552 F.2d at 903.

Defendant's expert presented figures compiled from an analysis of 311 questionnaires se-
lected at random from among those returned to the court. This analysis, together with
Census Bureau and Voter Registration statistics, indicated that: (1) whereas 41.2% of the
general adult population of the pertinent judicial division was between the ages of 18 and
34, persons between the ages of 18 and 34 comprised only 29.7% of the voter registration lists
and 28.6% of the random sample of the jury wheel; (2) 75.1% of the general adult population
had a high school education or less, while only 53.1% of the jury wheel sample had a high
school education or less; and (3) while blacks comprised 8.5% of the general population of
the district, they made up only 5.8% of the sample. \(\text{Id.}\)


\(^{277}\) The court stated:

"There is no requirement that a grand jury be a statistical mirror of the community.
\(\text{United States v. DiTommaso}, 405 F.2d 385, 389 (4th Cir. 1968), or that it conform to the
proportionate strength of each identifiable group in the total population, \(\text{Simmons v. United States}, 406 F.2d 456, 461 (5th Cir. 1969).\)" \(\text{United States v. Gast}, 457 F.2d 141,
142 (7th Cir.), \text{cert. denied}, 460 U.S. 969, \ldots \) (1972), but "any substantial deviations
must be corrected by use of supplemental sources." \(\text{S. Rep. No. 981, 90th Cong., 1st
Sess. at 17 (1967).}\) 552 F.2d at 903.

\(^{278}\) \(\text{Id.}\)

\(^{279}\) The requirement of a cognizable group emanates from the language of \(\text{Hernandez v. Texas}, 347 U.S. 475 (1954),\) where the Supreme Court held that the determination of a cog-
nizable group within a community is a question of fact. It must be demonstrated that the
laws, as applied, single out a distinct class for different treatment, not based on some reason-
able classification, thereby violating constitutional guarantees. Thus, systematic exclusion
based on economic, social, political, racial, religious or geographical grounds in the commu-
nity would violate the cross-section requirement. \(\text{Id. at 478}.\) \(\text{See Thiel v. Southern Pacific
able. Indeed, cognizability will vary with differences in the composition of classes in geographically distinct communities. "The essence of the cognizability requirement is the need to delineate an identifiable group which, in some objectively discernible and significant way, is distinct from the rest of society, and whose interests cannot be adequately represented by other members of the grand jury panel." Community attitudes and prejudices against a group are therefore factors to be considered in determining the group's cognizability.

Applying these concepts in Potter, the court concluded that with respect to persons in the eighteen to thirty-four age group, the only common identifiable characteristic was that all members were between the ages of eighteen and thirty-four. Such a characteristic provides no reason to "arbitrarily single out a narrow group of 'young persons' as opposed to 'middle aged' or 'old' persons for purposes of jury service."

With respect to defendant's contention that blacks were substantially underrepresented, the Ninth Circuit recognized race as a cognizable factor but concluded that there was no substantial deviation in the instant case. The meaning of "substantial" rests in the analysis of

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280. 552 F.2d at 903. For a thorough review of the cases, see the appendix to Judge Goldberg's opinion for the Fifth Circuit in Foster v. Sparks, 506 F.2d 805, 811-37 (5th Cir. 1975).
281. 552 F.2d at 903-04.
282. Id. at 904. See, e.g., United States v. Guzman, 337 F. Supp. 140, 143-44 (S.D.N.Y.), aff'd, 468 F.2d 1245 (2d Cir. 1972), cert. denied, 410 U.S. 937 (1973) (18 to 21 year-olds have no constitutional right to serve on juries; persons between the ages of 24-30 do not constitute a cognizable group for jury selection purposes).
283. 552 F.2d at 904. See, e.g., Cobb v. Robinson, 528 F.2d 1331, 1336 (2d Cir. 1975), cert. denied, 424 U.S. 947 (1976) (attempt to include persons of better than average intelligence on jury not proscribed by Constitution); Quadra v. Superior Court, 403 F. Supp. 486, 494-97 (N.D. Cal. 1975) (persistent underrepresentation of women and non-whites sufficient to establish prima facie case of unconstitutionality).
285. 552 F.2d at 905. The less-educated, like the young, are a diverse group lacking sufficient common characteristics or attitudes to set it apart from the rest of society. Id.
286. Id.
287. Id. at 905-06.
people and not percentages. The deviation in the Potter case, if corrected, would have resulted in the addition of less than one black on a grand jury of twenty-three. The deviation of 2.7% was therefore not substantial.

Similarly, in United States v. Kleffgen the Ninth Circuit followed its decision in Potter, holding that defendant failed to establish substantial deviation resulting in underrepresentation of a cognizable group in the community.

After the grand jury is empaneled, the proceedings are usually conducted by a United States Attorney. The appointment of a special prosecutor to appear before the grand jury, however, has also been recognized as a proper procedure.

Federal grand juries have the authority to call witnesses and compel the production of documentary evidence. The fifth amendment privilege against self-incrimination applies only to individuals; it cannot be utilized by, or on behalf of, any organization or corporate entity. Thus, where an individual has the responsibility of carrying out a corporation's obligations under a collective bargaining agreement, and where such individual is acting as an agent of the corporation, records prepared by that individual for the corporation are properly subject to subpoena by the grand jury. The individual may not assert the fifth amendment privilege against their production.

289. Defendant maintained that 8.5% of the community population was black but only 5.8% of the jury wheel was black—a 2.7% disparity. The court pointed out that correction of this deviation would add but one black per group of 50 jurors. A 4.3% disparity would be required to result in the addition of one black to the average grand jury. The court therefore concluded that the 2.7% deviation was not substantial. 552 F.2d at 906.
290. 557 F.2d 1293 (9th Cir. 1977).
291. Id. at 1297.
292. 28 U.S.C. § 515(a) (1976) allows for the special appointment of attorneys to conduct any kind of legal proceeding which a United States Attorney may conduct. See United States v. Crutchfield, 547 F.2d 496, 502 (9th Cir. 1977) (appointment of special prosecutor to appear before grand jury not error); United States v. Alessio, 528 F.2d 1079, 1083 (9th Cir.), cert. denied, 426 U.S. 948 (1976) (government prosecutor properly before grand jury); United States v. Zuber, 528 F.2d 981, 982 (9th Cir. 1976) (per curiam) (“strike force” prosecutor appointed under § 515(a) is “attorney for the government” within meaning of Fed. R. Crim. P. 6(d)).
294. Hale v. Henkel, 201 U.S. 43, 75-76 (1906). While the fifth amendment privilege against self-incrimination does not protect corporate records, United States v. White, 322 U.S. 694, 699 (1944), the fourth amendment does extend to corporate entities and affords protection from an unreasonably broad subpoena duces tecum.
296. In re Molina, 552 F.2d 898, 899-900 (9th Cir. 1977).
297. Id. See also Wilson v. United States, 221 U.S. 361, 380-85 (1911) (president of cor-
Similarly, a bank depositor does not have standing to enjoin the bank from complying with or the government from enforcing a grand jury's subpoena of bank records in an investigation of possible crimes.\textsuperscript{298} Nor does a grand jury witness have a "supervisory-power" right to an affidavit from the government that production of handwriting exemplars is relevant to an ongoing grand jury investigation.\textsuperscript{299}

Finally, the government's failure to immediately notify the court, counsel and grand jury that a government witness has committed perjury before the grand jury is not a denial of due process requiring dismissal of the indictment if the witness' testimony was immaterial and was not relied upon by the grand jury in returning the indictment against a defendant.\textsuperscript{300}


\textsuperscript{299} \textit{In re} Hergenroeder, 555 F.2d 686, 686 (9th Cir. 1977) (per curiam). In \textit{Hergenroeder}, defendant refused to produce a handwriting exemplar. The Ninth Circuit pointed out that defendant had no fourth amendment right under United States v. Mara, 410 U.S. 19 (1973), nor fifth amendment right under United States v. Wade, 388 U.S. 218 (1967), to so refuse.

Defendant claimed a supervisory right to a government affidavit indicating the relevancy of the exemplar to the grand jury investigation. Though such a proposition appears to be supported by \textit{In re} Schofield, 486 F.2d 85 (3d Cir. 1973), the Ninth Circuit's approach to grand jury supervision has been more narrow. \textit{See United States v. Chanen}, 549 F.2d 1306, 1313 (9th Cir. 1977). Thus, the court held in \textit{Hergenroeder} that the exculpatory affidavit was unnecessary since it would not advance the administration of justice and would delay grand jury investigations. \textit{See also} \textit{In re} Braughton, 520 F.2d 765, 766-67 (9th Cir. 1975) (contempt order affirmed for defendant's refusal to provide handwriting exemplar for grand jury).

\textsuperscript{300} United States v. Bracy, 566 F.2d 649, 654-56 (9th Cir. 1977) (witness' testimony was so far removed from truth that it had nothing to do with return of indictment; furthermore, extensive cross-examination resolved any doubt with respect to perjured testimony). \textit{See} United States v. Basurto, 497 F.2d 781, 785 (9th Cir. 1974) (indictment dismissed because based, in substantial part, on witness' perjured testimony).

On the issue of materiality with respect to prosecutor's duty to volunteer exculpatory matters to the defense, see United States v. Agurs, 427 U.S. 97, 109-13 (1976). \textit{See also} United
B. Indictments

1. Statute of Limitations

The fifth amendment to the United States Constitution requires an indictment by grand jury for all capital or otherwise infamous crimes.\(^\text{301}\) This provision applies only to the federal government. A state may therefore adopt the use of an information issued by a prosecutor as a form of accusation.\(^\text{302}\)

An indictment must be returned within the time prescribed by the applicable statute of limitations,\(^\text{303}\) unless the prosecutor affirmatively establishes that the subject of the indictment is a fugitive fleeing from justice.\(^\text{304}\) Under 26 U.S.C. section 6531, when a federal income tax violation action is instituted before a United States commissioner within the statute of limitations, the time for returning an indictment is extended an additional nine months from the date of filing the complaint.\(^\text{305}\)

In *United States v. Towill*,\(^\text{306}\) for example, the defendant was suspected of falsifying corporate tax returns. One day prior to the tolling of the statute of limitations for the crime, with no indictment yet returned, a complaint was filed against defendant before the I.R.S. com-

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\(^{301}\) U.S. CONST. amend. V. An "infamous crime" has been held to be one which is punishable by hard labor or imprisonment for a term exceeding one year. FED. R. CRIM. P. 7. See *United States v. Jordan*, 508 F.2d 750, 753 (7th Cir.), *cert. denied*, 423 U.S. 842 (1975) (where offense not punishable by imprisonment for more than one year, fact that defendant convicted of four counts and sentenced to consecutive terms totaling 15 months does not convert offense into "infamous crime" for purposes of fifth amendment requisite of indictment by grand jury).


\(^{303}\) 18 U.S.C. § 3282 (1976) provides that for most crimes, indictments must be returned within five years after the offense was committed. When an indictment filed within the prescribed time period is dismissed after the statute has been tolled, the Government may refile within six months. *Id.* § 3288. If the first indictment, although properly filed, "runs into legal pitfalls," then a second indictment may nevertheless be filed after the statute has run so long as the same facts are alleged and a substantially similar offense is charged. *United States v. Charnay*, 537 F.2d 341, 354 (9th Cir.), *cert. denied*, 429 U.S. 1000 (1976) (citing *Mende v. United States*, 282 F.2d 881, 883-84 (9th Cir. 1960), *cert. denied*, 364 U.S. 933 (1961)).


\(^{306}\) 548 F.2d 1363 (9th Cir. 1977).
missioner.\textsuperscript{307} Some time later, after the statute of limitations had apparently run, an indictment was returned.

Defendant moved to dismiss the indictment. The government responded with an affidavit setting forth the following reasons for the failure of the grand jury to return the indictment within the prescribed time period: (1) the tax division of the Justice Department had authorized prosecution of defendant some six months prior to the tolling of the statute; (2) but, the United States Attorney requested additional consideration of the decision; (3) final authorization for prosecution was not made until one day before the tolling of the statute at which time the grand jury was not in session.\textsuperscript{308} Hence, the government filed the complaint pursuant to 26 U.S.C. section 6531\textsuperscript{309} to preserve its cause of action against the defendant.

The district court granted defendant's motion to dismiss stating that the purpose of section 6531 is to afford the government additional time to indict a defendant where no grand jury is in session at the expiration of the statute of limitations.\textsuperscript{310} Since the government had been authorized to indict defendant some six months prior to the tolling of the statute, while the grand jury was still in session, the government had had ample time to present its case to a grand jury. The delay in the return of the indictment, according to the district court, was unjustified.

The Ninth Circuit rejected the district court's reasoning concluding that the mere fact that a grand jury is empaneled does not preclude the use of a section 6531 complaint.\textsuperscript{311} Only if the facts show that the

\textsuperscript{307} Id. at 1365.

\textsuperscript{308} Id. Furthermore, the government explained that it would be highly impractical to summon a grand jury on two days notice prior to the tolling of the statute of limitations. Id.\textsuperscript{309} See note 305 supra and accompanying text.

\textsuperscript{310} 548 F.2d at 1365.

\textsuperscript{311} Id. at 1366-67. The Ninth Circuit dismissed, as erroneous, the district court's conclusion that the \$ 6531 complaint procedures were unavailable to the prosecutor because the government could have convened the grand jury prior to the tolling of the statute. Id. The Ninth Circuit reasoned that the district court ignored the United States Attorney's practice of giving the court clerk five days notice before summoning a grand jury. Id. The leading case on this issue is Jaben v. United States, 381 U.S. 214 (1965). The Ninth Circuit explained the \textit{Jaben} holding as follows:

\textit{[B]ecause \$ 6531 is not intended to give the Government an automatic nine month extension to make its case, the provision is available only “in the event that a grand jury is not in session at the end of the normal limitation period . . . [and the Government] cannot obtain an indictment because of the grand jury schedule.” . . . The district court's opinion [in Towill] erroneously suggests that as long as a grand jury is empaneled, and regardless of its schedule, it is “in session” within the meaning of \textit{Jaben}. A close reading of \textit{Jaben} convinces us that the Court meant to equate “session” with the current “grand jury schedule,” not with the theoretical possibility of summoning a grand jury on short notice.}

548 F.2d at 1366-67 (quoting Jaben v. United States, supra, at 219-20, 226). The Ninth
government was dilatory in presenting its completed case to a grand jury would a section 6531 complaint be precluded.\footnote{312}

2. Sufficiency

Federal Rule of Criminal Procedure 7(c) requires that an indictment consist of a plain, concise, and definite written statement of the essential facts comprising the offense charged.\footnote{313} The language of the indictment must apprise the defendant of the nature of the offense alleged\footnote{314} and not operate so as to mislead the defendant.\footnote{315} In general, an indictment is sufficient when it sets forth the offense in the words of the statute itself, so long as the language clearly and unambiguously states all of the elements of the charged offense.\footnote{316}

\footnote{Circuit focused on the language of United States v. Smith, 371 F. Supp. 672 (M.D.N.C. 1973), wherein it was stated:}{[When a grand jury is not in actual session, the government may proceed by using the tolling exception to the statute of limitations and have a complaint issued . . . . There is no requirement that the government must call a special session of the grand jury merely because a grand jury is available.]}\footnote{Id. at 674.}{See also United States v. Miller, 491 F.2d 638, 644-45 (5th Cir.), cert. denied, 419 U.S. 970 (1974) (mere fact that grand jury is sitting at time a complaint is issued does not preclude activation of § 6531).}

\footnote{312.}{548 F.2d at 1365, 1367. In the instant case, the facts clearly indicated that the government's case was not ready for presentation to the grand jury until two days prior to the expiration of the statute. In the face of a sworn affidavit stating that the Government had asked for reconsideration of the decision to prosecute, the district court was not justified in finding that the case was ready for presentation to the grand jury six months prior to the end of the statute. \textit{Id.} The Ninth Circuit reversed the district court's dismissal of the indictment because there existed no justifiable reasons for its finding. \textit{See, e.g.,} Campbell v. United States, 373 U.S. 487, 493 (1963); United States v. Page, 302 F.2d 81, 85 (9th Cir. 1962).}{

\footnote{313.}{Russell v. United States, 369 U.S. 749, 763 (1962); United States v. Hamling, 481 F.2d 307, 312 (9th Cir. 1973), \textit{aff'd}, 418 U.S. 87, 117 (1974). \textit{See, e.g.,} United States v. Charnay, 537 F.2d 341, 351-53 (9th Cir.), \textit{cert. denied}, 429 U.S. 1000 (1976) (material misrepresentation adequately alleged where indictment described defendant's activities and omissions; failure to allege specific intent to defraud in a separate count not fatal when intent could be inferred from allegation of operation of scheme in deceitful manner).}{

\footnote{314.}{United States v. Love, 535 F.2d 1152, 1158 (9th Cir.), \textit{cert. denied}, 429 U.S. 847 (1976) (surplusage in indictment regarding requisite intent for mail fraud not misleading or prejudicial where defendant represented by counsel chargeable with knowledge of intent necessary to prove offense).}{

\footnote{315.}{United States v. Anderson, 532 F.2d 1218, 1222 (9th Cir.), \textit{cert. denied}, 429 U.S. 839 (1976). \textit{See United States v. Chenaur, 552 F.2d 294 (9th Cir. 1976) in which defendant alleged that the indictment, which closely followed the statutory language of 18 U.S.C. § 1006 (fraud against government institutions) was insufficient to adequately inform him of the nature of the charges against him. The Ninth Circuit held the indictment to be sufficient as it stated precise dates and amounts with respect to the fraudulent transactions. 552 F.2d at 301. When an indictment is sufficient, it is within the trial court's discretion to decide whether a bill of particulars is necessary. In \textit{Chenaur}, there was no abuse of discretion in denying defendant's motion for a bill of particulars. \textit{Id.} at 302. \textit{See also} Hamling v.}
Furthermore, the incorporation of counts by reference is permitted by rule 7(c)(1) so long as the indictment, when read in its entirety, alleges the offense with precision. In United States v. Davison\textsuperscript{317} the Ninth Circuit held that an indictment which charged defendant with felony murder without specifically charging him with robbery in a separate count was sufficient.\textsuperscript{318} Similarly, a count in an indictment is not improper if it simply charges the commission of a single offense by different means. In United States v. Outpost Development Co.,\textsuperscript{319} the Ninth Circuit held that when evidence in a mail fraud indictment is sufficient with respect to a quoted fraudulent statement in each count, conviction would be sustained despite the fact that multiple specific acts have been alleged in each count.

3. Challenging the Indictment

Occasionally, the federal courts will dismiss indictments because of the way in which the prosecution seeks and secures the charges from the grand jury.\textsuperscript{320} The rationale for such dismissals is to preserve judicial resources.
cial integrity and to prevent improper prosecutorial conduct.\textsuperscript{321} Traditionally, however, most courts, including the Ninth Circuit, have been reluctant to dismiss indictments because of prosecutorial conduct.\textsuperscript{322}

The government's prosecutor has a duty to prosecute all offenses against the United States.\textsuperscript{323} The power vested in the United States Attorney under this principle gives him broad discretion in determining which cases to file.\textsuperscript{324} However, reindictment of an accused for more severe offenses subsequent to his exercise of a procedural right places a heavy burden on the prosecution to show that the additional charges are not vindictive in nature.\textsuperscript{325}

Prosecutorial misconduct was found to have occurred in the case of

\textsuperscript{321} See United States v. Leibowitz, 420 F.2d 39, 42 (2d Cir. 1969).

\textsuperscript{322} See United States v. Chanen, 549 F.2d 1306 (9th Cir.), cert. denied, 434 U.S. 825 (1977), in which the prosecutor read transcripts of sworn testimony instead of presenting live witnesses. The court ruled that such conduct did not constitute fundamental unfairness to defendant. \textit{Id.} at 1311. See also Loraine v. United States, 396 F.2d 335, 339 (9th Cir.), cert. denied, 393 U.S. 933 (1968) (indictment not invalid merely because of Government's failure to produce all evidence in its possession tending to undermine the credibility of witnesses appearing before the grand jury); Laughlin v. United States, 385 F.2d 287, 292 (D.C. Cir. 1967), cert. denied, 390 U.S. 1003 (1968) (indictment valid despite prosecutor's gratuitous characterization of grand jury witness as a prostitute); United States v. Bruzgo, 373 F.2d 383, 387 (3d Cir. 1967) (indictment valid despite prosecutor's threats to grand jury witness).


\textsuperscript{325} United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976). The concept of retaliatory prosecution was examined in the case of North Carolina v. Pearce, 395 U.S. 711 (1969), where the Court held that due process prohibits a judge from increasing a sentence in retaliation for defendant's exercise of his statutory right to challenge his original conviction. \textit{Id.} at 725. This principle was extended to prosecutorial vindictiveness in Blackledge v. Perry, 417 U.S. 21, 28 (1974).

In United States v. Thurnhuber, 572 F.2d 1307 (9th Cir. 1977), the court noted that while a defendant's motion for a mistrial is a procedural right for purposes of the \textit{Blackledge} rule, the mistrial which was declared in \textit{Thurnhuber} was not granted in response to defendant's motion. \textit{Id.} at 1310. See United States v. Preciado-Gomez, 529 F.2d 935, 937-41 (9th Cir.), cert. denied, 425 U.S. 933 (1976). Rather, the court, on its own motion, had declared the mistrial. 572 F.2d at 1310. Thus, since defendant did not attempt to assert any procedural right, the prosecutor's addition of two counts to the indictment could not be characterized as a retaliatory response to an assertion of a procedural right by the defendant. \textit{Id.}


Similarly, a defendant's motion for dismissal of an indictment on no grounds other than the "interest of justice" will be denied. United States v. Hall, 559 F.2d 1160, 1164 (9th Cir. 1977), cert. denied, 435 U.S. 942 (1978). See United States v. DeDiego, 511 F.2d 818, 824 (D.C. Cir. 1975) ("A trial judge has no discretion to end prosecutions unless there are legal grounds for the exercise of discretion.").
United States v. DeMarco, and the indictment was consequently dismissed. The defendants in DeMarco were charged as a result of an investigation into the preparation of former President Nixon's tax returns. They were granted a change of venue to the district of their residence. The district court found that the prosecutor had told one of the defendants that more counts would be added to the indictment if he successfully exercised his right to change venue. Upon the district court's granting of the motion to change venue, a new indictment with an additional charge was returned against that defendant. The Ninth Circuit, adopting the district court's reasoning, held that the trial court's dismissal of the indictment was clearly warranted in light of the government's action.

The Ninth Circuit has further held that bad faith on the part of the government in destroying or suppressing evidence prior to trial requires dismissal of the indictment. In United States v. Hawk, the government's intentional destruction of dynamite resulted in a due process violation requiring dismissal of an indictment charging defendants with three counts relating to the transportation of destructive devices—despite the good faith on the part of the government.

4. Joinder of Offenses

Federal Rule of Criminal Procedure 8(a) provides that two or more offenses may be charged in the same indictment if the offenses charged are: (1) similar in character; or (2) based on the same act or transaction; or (3) based on two or more acts or transactions arising out of a common plan or scheme. Accordingly, the government may have two
indictments outstanding against an accused at one time. Thus in
*United States v. Holm*, the government's use of the word "super-
seded" in a December indictment did not preclude the trial of defen-
dant on a November indictment.

Where a criminal statute provides an exclusive remedy for conduct
within the statute's coverage, the government's attempt to circumvent
that statute by indictment under another theory may result in reversal
of a conviction based upon that theory. In *United States v. Snell*,
defendants' conduct fell within a bank robbery statute which provided
an exclusive remedy for conduct in violation of the statute. The gov-
ernment indicted defendants for attempted extortion rather than at-
tempted bank robbery, thereby exposing them to potential fines and
terms of confinement in excess of that provided for in the bank robbery
statute. Since defendants were exclusively chargeable under the bank
robbery statute, the Ninth Circuit reversed the conviction for attempted
extortion.

5. Duplicity

A general verdict of guilty will not reveal the charge upon which the
jury finds a defendant guilty. An indictment is duplicitous when it
charges two or more distinct offenses in a single count thereby preclud-
ing the jury from convicting or acquitting the defendant on each sepa-
rate charge. In order for a defendant to reverse a conviction or
dismiss an indictment on the grounds of duplicity, substantial prejudice
must be shown. In *United States v. Buck*, defendant claimed that
the indictment was duplicitous in that it charged him with two separate
statutory violations for the same acts. Defendant was charged with

1334-1335 (9th Cir. 1977) (per curiam) (government entitled to join in one indictment five
counts charging defendant with willful infringement of copyright and conversion of motion
pictures from interstate shipment).

331. 550 F.2d 568, 569 (9th Cir.) (per curiam), *cert. denied*, 434 U.S. 856 (1977). See also
Thompson v. United States, 202 F. 401, 404 (9th Cir. 1913).

332. 550 F.2d 515, 517-18 (9th Cir. 1977). Accord, United States v. Beck, 511 F.2d 997,

333. See, e.g., United States v. Hicks, 529 F.2d 841, 843 (5th Cir.) (per curiam), *cert.
denied*, 429 U.S. 856 (1976) ("the specter of double jeopardy is raised by the jury's inability
to find the defendant innocent of one of the charges in the duplicitous count").


The concept of duplicity should not be confused with the concept of multiplicity. A mul-
tiplicitous indictment is one which charges a single offense in various counts. This may
result in prejudice to a defendant if multiple sentences result from the single offense. See
United States v. Chrane, 529 F.2d 1236, 1238 (5th Cir. 1976), wherein the Fifth Circuit
found that an indictment charging two counts of failure to file income tax returns and two
counts of failure to supply information to the I.R.S. was multiplicitous.
furnishing false information in connection with the acquisition of ammunition in violation of 18 U.S.C. section 922(a)(6) and making a false statement with respect to information required to be kept by a licensed firearm dealer, in violation of 18 U.S.C. section 924. The Ninth Circuit, in affirming the district court's conviction, noted that section 924(a) creates an offense separate from section 922(a)(6). Furthermore, even assuming that the charges were duplicitous, defendant showed no prejudice since the district court’s instructions emphasized that each acquisition by defendant was a violation of two separate statutes. Any error to defendant was harmless as the sentences imposed by the court were concurrent.

6. Pre-Indictment Delay

The due process clause of the fifth amendment requires dismissal of an indictment if a defendant establishes (1) that preindictment delay has resulted in substantial prejudice to his right to a fair trial and (2) that the delay was an intentional device designed to give the government a tactical advantage over the defendant.335

The Ninth Circuit, in United States v. Seawell,336 recently held that an unsupported claim that the memories of witnesses have dimmed as a result of pre-indictment delay does not in itself constitute substantial prejudice. "Mere speculation cannot serve as the grounds for a finding of substantial prejudice."337

The Ninth Circuit has not made it clear whether the elements of substantial prejudice and intentional delay by the government for an improper purpose are to be applied conjunctively or disjunctively.338 In

335. See United States v. Marion, 404 U.S. 307, 324 (1971) (construing U.S. Const. amend. V); United States v. Manning, 509 F.2d 1230, 1234 (9th Cir. 1974) (same); United States v. Andros, 484 F.2d 531, 533 (9th Cir. 1973); United States v. Erickson, 472 F.2d 505, 507 (9th Cir. 1973) (same).

336. 550 F.2d 1159, 1164 (9th Cir. 1977) (six month delay).


338. In United States v. Mays, 549 F.2d 670, 675 n.7 (9th Cir. 1977), the court pointed out that:

Some Ninth Circuit cases have stated the two elements in the disjunctive. E.g., United States v. Sand, 541 F.2d 1370, 1373 (9th Cir. 1976); United States v. Manning, 509 F.2d 1230, 1234 (9th Cir. 1974), cert. denied, 423 U.S. 824 . . . (1975); United States v. Erickson, 472 F.2d 505, 507 (9th Cir. 1973). Others have stated that both elements must be shown. United States v. Cordova, 532 F.2d 1073, 1076 (9th Cir. 1976); United States v. Andros, 484 F.2d 531, 533 (9th Cir. 1973); United States v. Griffin, 464 F.2d 1352, 1354 (9th Cir. 1972), cert. denied, 409 U.S. 1009 . . . (1973). It is noted that in none of the above cases was the prejudice found to be "actual" or "substantial."
United States v. Mays, 339 the court rejected both the disjunctive and conjunctive interpretations and opted instead for an ad hoc balancing approach as the best means to accommodate the fair administration of justice. 340 The factors the Ninth Circuit considered in applying the balancing approach were: (1) the existence of actual prejudice resulting from the delay, 341 (2) the length of the delay; 342 and (3) the reason for the delay. 343 "The greater the length of the delay and the more substantial the actual prejudice to defendant becomes, the greater the reasonableness and the necessity will have to be to balance out the prejudice." 344

While the balancing approach speaks of only three factors, the Mays court also stated that dismissal of an indictment because of delay must be accompanied by some culpability on the government’s part either in the form of intentional misconduct or negligence. The facts of Mays centered around defendant’s alleged misapplication for bank funds. The alleged offenses occurred in 1969, yet the indictments were not returned until some four and one-half years later. It was found that reports of the alleged offenses were made known to the FBI shortly after their commission. The United States Attorney concluded that there was not sufficient evidence to indict defendants, and a three year period of governmental inactivity resulted. The investigation accelerated in 1973, and an indictment was filed in 1974. By this time three key witnesses had died. Furthermore, the testimony of witnesses before the grand jury suggested that memories had dimmed. The district court found that the delay was unnecessary; that death of witnesses constituted actual prejudice; and that the dimming of memories contributed to prejudice. The district court dismissed certain counts of the indict-

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339. 549 F.2d 670 (9th Cir. 1977).
340. Id. at 677.
341. Id. at 677-78. Actual prejudice will inevitably be either the loss of witnesses and/or physical evidence or the dimming of witnesses’ memories. Id. at 672. The initial burden of presenting evidence of prejudice is on the defendant. Id. See, e.g., United States v. Griffin, 464 F.2d 1352, 1354-55 (9th Cir. 1972), cert. denied, 409 U.S. 1009 (1973) (burden on defendant to show prosecutorial vindictiveness); United States v. Hauff, 395 F.2d 555, 557 (7th Cir.), cert. denied, 393 U.S. 843 (1968) (defendant failed to show that two-year pre-indictment delay was prejudicial). “To establish actual prejudice sufficient to warrant a dismissal, the defendant must show not only the loss of the witness and/or evidence but also [must] . . . demonstrate how that loss is prejudicial to him.” 549 F.2d at 677. This may be a difficult showing for the defendant to make in light of the problems inherent in establishing the nature of the testimony of a missing witness. Id. at n.12.
342. 549 F.2d at 678.
343. Id.
344. Id.
ment. The Ninth Circuit agreed with the district court’s treatment of the case except for the final element regarding actual prejudice.

In reversing the district court’s dismissal of the indictment, the Ninth Circuit noted that while defendants described the general involvement of the decedents in the case, they did not provide any information as to the usefulness of the decedents’ testimony to defendants’ case. Self-serving affidavits made by defendants in an attempt to show to which facts decedents would have testified are speculative and are not sufficient to show actual and substantial prejudice.

Similarly, while the record was replete with examples of the witnesses’ inability to remember certain aspects of key transactions, the defendants failed to show how these witnesses would have testified had their memories not been impaired. Because of such failure, no actual prejudice was demonstrated.345

C. Guilty Pleas

A defendant’s guilty plea, as distinguished from an admission or an extrajudicial confession, is itself considered a conviction.346 A plea of guilty need be followed only by the court’s entry of judgment and imposition of sentence.347 A guilty plea also results in the waiver of such constitutional rights as the privilege against self-incrimination,348 the

345. Judge Ely, in dissent, argued with respect to actual prejudice that
[[the question for the trial Judge should not be whether the record, viewed in light of
independently proved testimony of now deceased witnesses, indicates that a defendant
is either guilty or innocent as charged. Rather, the inquiry should be whether that
determination can be made, ultimately, in a forum wherein the Judge has confidence
that the pertinent transaction can be reconstructed accurately.]]

Id. at 682. The test according to the dissent is not whether the independent evidence demonstrates that the missing or impaired witness intended to exculpate the defendant, but rather whether the “witness had a material basis upon which to provide significantly exculpatory information.” Id. See United States v. Barket, 530 F.2d 189, 196 (8th Cir. 1976) (dismissal of indictment affirmed where missing witnesses might have been able to demonstrate validity of transaction). Cf. United States v. Lovasco, 451 U.S. 785 (1977) (prosecution of defendant following delay caused by ongoing investigation does not constitute denial of due process, even if defendant's case “somewhat prejudiced” by lapse of time); United States v. Quinn, 540 F.2d 357, 361-63 (8th Cir. 1976) (dismissal of indictment not warranted where missing informant clearly had no basis for providing information material to defense).

With respect to the dimming of memories, see United States v. Clardy, 540 F.2d 439, 441-42 (9th Cir. 1976) (five-month delay not prejudicial to defendant); United States v. Naftalin, 534 F.2d 770, 773 (8th Cir. 1976) (where recorded statements exist, memories of witnesses not critical).

348. See United States v. Pierce, 561 F.2d 735, 738 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978) (“A voluntary guilty plea does not waive the right against self-incrimination for
right to trial by jury, and the right to confront accusers.\(^{349}\)

The entering of a guilty plea must be preceded by procedures which
eNSure that the defendant’s waiver of his rights is voluntarily, intelli-
gently, and knowingly\(^{350}\) with a full understanding of its conse-
quences.\(^{351}\)

In *Bunker v. Wise*,\(^ {352}\) the Ninth Circuit reaffirmed the principle pre-
al prior activities of the defendant; it waives the privilege only with respect to the crime
which is admitted. The defendant retains his privilege as to crimes for which he may still be liable.”). *See* e.g., United States v. Roberts, 503 F.2d 598, 600 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975); United States v. Johnson, 488 F.2d 1206, 1209-10 (1st Cir. 1973); United States v. Romero, 249 F.2d 371, 375 (2d Cir. 1957); Burbey v. Burke, 295 F. Supp. 1045, 1049 (E.D. Wis. 1969). In *Pierce*, the court rejected the Government’s argument that the defendant, simply by accepting probation conditions which required him to disclose
certain financial information, waived his fifth amendment privilege with regard to such con-
ditions. 561 F.2d at 739. *Cf.* United States v. Consuelo-Gonzalez, 521 F.2d 259, 262-66 (9th Cir. 1975) (en banc) (search of defendant’s home pursuant to a federal probation condition
that defendant submit to search of his person or property at any time held invalid).

Circuit stated that a defendant does not waive the right to raise the double jeopardy issue on appeal by entering a guilty plea. *Id.* at 864.

*See* *Menna v. New York*, 423 U.S. 61, 62-63 (1975) (per curiam) (guilty plea “does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.”). *See also* United States v. O’Donnell, 539 F.2d 1233, 1236-37 (9th Cir.), *cert. denied*, 429 U.S. 960 (1976) (Constitution protects accused from convictions by
trial but not from convictions by way of guilty plea).

Ninth Circuit has held that no formal procedure is required in explaining to an accused that he waives rights by pleading guilty (so long as the record demonstrates that he did so volun-
tarily and knowingly), rule 11 now requires that the judge specifically inform the accused of
the rights he waives prior to the court’s acceptance of the plea. *Compare* Fruchtman v.
Kenton, 531 F.2d 946, 948 (9th Cir.), *cert. denied*, 429 U.S. 895 (1976) (court’s failure to
specifically advise accused that guilty plea constituted waiver of rights to confrontation and
compulsory process not violative of rule 11) and Wilkins v. Erickson, 505 F.2d 761, 763 (9th
Cir. 1974) (*Boykin* does not require specific articulation of these rights in state proceeding)
(1969) (district courts must strictly comply with rule 11). The Ninth Circuit has concluded
that strict compliance with rule 11 does not require adherence to formal procedures.

351. *See* Arndell v. Warden, Nevada State Prison, 549 F.2d 1284, 1285-86 (9th Cir. 1977)
(on writ of habeas corpus, district court properly reviewed transcript of all state proceedings and justifiably concluded that guilty plea voluntarily made with full understanding of its consequences and that no promises of probation were made). *See also* Dyer v. Wilson, 446 F.2d 900, 901 (9th Cir. 1971) (per curiam) (federal court may rely upon state court’s findings in habeas corpus petition only after independent review has been made of transcript of the state hearing); *Fed. R. Crim. P.* 11(c)(1) (court must advise defendant of mandatory mini-
mum penalty provided by law and any maximum possible penalty).

352. 550 F.2d 1155 (9th Cir. 1977).
viously established in *United States v. Harris*[^353^] that when a guilty plea is taken, rule 11 requires that defendant be advised that a mandatory special parole term will be appended to the sentence.[^354^] The critical issue in *Bunker* was whether the principle should be given retroactive effect.[^355^]

The first step in determining retroactive application of a principle is to establish whether a new rule has been announced.[^356^] If a new rule is established, then the propriety of retroactivity must be tested under the traditional three-pronged analysis.[^357^] If no new rule is established, then "no such testing is necessary as, by definition, without a new rule there is no change in the law and the question of retroactivity is immaterial."[^358^]

The *Bunker* court's examination of the *Harris* principle revealed that prior decisions had foreshadowed the results in *Harris* and had, thus, minimized the novelty of the principle.[^359^]

[^353^]: 534 F.2d 141 (9th Cir. 1976).

[^354^]: *Id.* at 141-42. In *Bunker*, the district court judge failed to mention that a finding of guilt under 28 U.S.C. § 2255 (conspiracy to distribute heroin and cocaine) carried with it a three-year special parole term. Arguing that he was a drug addict who, if placed on special parole, would return to drugs and crime, defendant claimed that he would have preferred confinement rather than the special parole and would not have pled guilty had he known of the special parole term. Concluding that defendant had been prejudiced by the court's failure to mention the special parole term, the Ninth Circuit, applying *Harris*, stated that rule 11 requires the court to advise a defendant of such a special parole term. 550 F.2d 1155, 1156 (9th Cir. 1977).

[^355^]: *Id.* at 1157. The guilty plea entered by defendant in *Bunker* was made prior to the *Harris* decision and the amendment to rule 11.

[^356^]: *United States v. Bowen*, 500 F.2d 960, 975 (9th Cir. 1974), *aff'd on other grounds*, 422 U.S. 916 (1975). *See also* Bracco v. Reed, 540 F.2d 1019, 1020 (9th Cir. 1976) (to constitute new rule, decision must either overrule clear past precedent or disrupt long accepted, widely recognized practice).

[^357^]: The analysis has evolved from a line of cases beginning with Linkletter v. Walker, 381 U.S. 618 (1965). The test requires an analysis of: (1) the purpose of the new rule; (2) the extent of reliance upon the old rule; and (3) the effect retroactive application would have upon the administration of justice. *Id.* at 629. *See, e.g.*, Michigan v. Payne, 412 U.S. 47, 51 (1973); Halliday v. United States, 394 U.S. 831, 832 (1969).

[^358^]: *United States v. Bowen*, 500 F.2d 960, 975 (9th Cir. 1974).

[^359^]: 550 F.2d at 1157. The court's analysis of the precedents dealing with voluntariness and consequences of pleas reveals the evolution of the Ninth Circuit's opinion on the subject:

Four years before Bunker entered his plea, the Court in *McCarthy v. United States*, 394 U.S. 459 (1969), . . . , held that no guilty plea is proper without strict adherence to the procedures and language of Rule 11 in "determining that the plea is made voluntarily with understanding of . . . the consequences of the plea. . . ."

Moreover, prior decisions of this circuit made clear the need to advise Bunker of the mandatory special parole term as a direct, and not a collateral, consequence of the plea. A defendant must be informed of all direct consequences of his plea, but need not necessarily be informed of collateral consequences. Collateral consequences include civil proceedings leading to commitment, loss of good time credit, loss of the right to
Thus, since Harris and Bunker represented logical extensions of prior decisions, they required no retroactivity analysis. The court in Bunker noted the Second Circuit’s decision in Ferguson v. United States where, under identical circumstances, the court decided not to limit the rule 11 extension to prospective application. Thus, in Bunker, the court reversed the conviction allowing defendant to plead anew, holding that Harris should not be limited to prospective application because that decision “merely applied an existing rule, and not a new one, to a variant fact situation.” Therefore, while a defendant need not be informed of all conceivable consequences “such as when he may be considered for parole or that, if he violates his parole, he will again be imprisoned,” the nature and operation of mandatory spe

travel abroad, loss of the right to vote, possibility of dishonorable discharge from the armed services. See Fruchtman v. Kenton, 531 F.2d 946, 948-49 (9th Cir.), cert. denied, 429 U.S. 895 (1976). Most recently, the Ninth Circuit in Sanchez v. United States, 572 F.2d 210, 211 (9th Cir. 1977) (per curiam), held that revocation of parole is a collateral rather than a direct consequence of a guilty plea. See also Michel v. United States, 507 F.2d 461, 465 (2d Cir. 1974) (potential deportation of an alien defendant was deemed a collateral consequence).] One year later we held that, where the maximum penalty was less than six years and the defendant entering the plea was eligible for sentencing under the Federal Youth Corrections Act, he must be advised of this fact and the terms that attached to such a sentence, Freeman v. United States, 350 F.2d 940, 942 (9th Cir. 1965).

In Combs v. United States, 391 F.2d 1017 (9th Cir. 1968), we held that Rule 11 required that a defendant be informed of the maximum allowable sentence he could receive.

Three years later in United States v. Myers, 451 F.2d 402 (9th Cir. 1972), a plea under Rule 11 was held invalid because the defendant was not aware that any sentence the federal court might impose would not begin until he was received in federal custody. In so holding, the panel reviewed previous cases in our circuit and concluded: “that any factor that necessarily affects the maximum term of imprisonment is a consequence of the plea within the meaning of Rule 11.” Id. at 404.

The same year, we recognized that Rule 11 was violated when the court failed to inform the defendant of the range of allowable punishments to which the plea subjected him.

550 F.2d at 1157-58 (footnotes omitted).

360. 550 F.2d at 1157.

361. 513 F.2d 1011 (2d Cir. 1975), cited in Bunker, 550 F.2d at 1158.

362. Id. at 1012-13. Quoting Ferguson, the Bunker court stated:

[D]efendants who plead guilty to charges under the Drug Control Act must be informed of the mandatory term of special parole at the taking of the plea. . . . “[This principle] does not reach the threshold of novelty which must be crossed before one enters upon the now familiar tripartite retroactivity analysis. . . . Retroactivity analysis is appropriate for cases departing radically from precedent . . . or announcing new rules which conflict with well-established prior practice. . . . But it is irrelevant to that application of well-established principles to varying fact situations which represents the bulk of judicial decision-making.”

550 F.2d at 1158 (quoting Ferguson v. United States, 513 F.2d 1011, 1012-13 (2d Cir. 1975)).

363. 550 F.2d at 1159.

364. Id. at 1158. See Roberts v. United States, 491 F.2d 1236, 1237-38 (3d Cir. 1974) (mandatory special parole term is a direct consequence of the plea).
cial parole terms under the Drug Control Act are direct consequences of the plea and, thus, must be disclosed to the defendant.

D. Discovery

Discovery motions or subpoenas for pre-trial, pre-indictment, and pre-arraignment discovery require notice and hearing or opportunity to respond in writing. A defendant will not be allowed to embark upon discovery "fishing expeditions." Thus in United States v. Spagnuolo, the Ninth Circuit held that a trial court properly denied a defendant's discovery motion where no evidence existed to support

365. United States v. Castaneda, 571 F.2d 444, 448 (9th Cir. 1977) (Interim Report).
366. Ogden v. United States, 303 F.2d 724 (9th Cir. 1962). See FED. R. CRIM. P. 16(a)(1), (2).
367. United States v. Spagnuolo, 549 F.2d 705, 712-13 (9th Cir. 1977). In Brady v. Maryland, 373 U.S. 83 (1963), however, the Supreme Court held that due process is denied where a prosecutor fails, following defendant's request, to disclose evidence favorable to the defense. Id. at 87. See also United States v. Palmer, 536 F.2d 1278, 1280-81 (9th Cir. 1976) (no due process violation where information sought not exculpatory).

Tempering Brady is the Jencks Act, 18 U.S.C. § 3500 (1976), which precludes discovery of statements made by government witnesses until the witnesses have testified on direct examination. The Jencks Act grew out of Jencks v. United States, 353 U.S. 657, 668-72 (1957), in which the Supreme Court held that after a prosecution witness has testified at trial, any previous statement made by the witness relating to his testimony shall be turned over to defendant for his inspection and use in cross-examination or impeachment of the witness. See also Dennis v. United States, 384 U.S. 855, 870-71 (1966), where the Court commented upon the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. This realization is reflected in the enactment of the so-called Jencks Act, . . . responding to this Court's decision in . . . [Jencks] . . . which makes available to the defense a trial witness' pre-trial statements insofar as they relate to his trial testimony.

368. United States v. Hickok, 481 F.2d 377, 380 (9th Cir. 1973) (constitutional validity of the Jencks Act upheld); United States v. Wood, 550 F.2d 435, 440 (9th Cir. 1977) (denial of discovery of notes of interview between Government witness and United States Attorney proper where material sought did not relate to subject of direct examination); United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976) (Jencks Act violated where law enforcement agents destroyed notes taken during interview with potential witnesses); United States v. Carrasco, 537 F.2d 372, 376 (9th Cir. 1976) (police may not destroy notes given to them by informant where notes constitute "statement" within meaning of Jencks Act).

FED. R. CRIM. P. 17 allows a defendant who cannot pay fees for witnesses the right of compulsory process to obtain favorable witnesses at government expense upon a showing that the witness is necessary to an adequate defense. Id. at 17(b). Although actual presence may be preferable to stipulation, defendant must show that actual presence is necessary to an adequate defense where the testimony would be received without cross-examination. United States v. Martin, 567 F.2d 849 (9th Cir. 1977). In Martin, the Ninth Circuit stated, "A motion to have a witness produced is addressed to the sound discretion of the trial court, and an indigent defendant has no absolute right to subpoena all witnesses at Government expense." Id. at 852. See, e.g., United States v. Maynard, 485 F.2d 247, 248 (9th Cir. 1973).
the defendant's contention that F.B.I. investigative files would reveal a taint that would support a fruit of the poisonous tree argument.

Granting discovery motions is within the trial court's discretion. When a defendant's discovery request is nonspecific, the government's duty to respond “must derive from the obviously exculpatory character of the certain evidence in the hands of the prosecutor." When a general request is made, the proper standard of materiality is whether the sought after evidence would create a reasonable doubt. In United States v. Lasky, defendant requested Brady material; however, the Ninth Circuit, in Lasky, found the record to show that any further evidence sought by defendant to attack a witness' credibility would not create a reasonable doubt that did not otherwise exist. The record clearly revealed that other testimony, standing alone, established defendant's guilt.

When a discovery motion is denied, a clear showing of prejudice to the defendant is required to warrant reversal by the appellate court.}

368. See, e.g., United States v. Marshall, 532 F.2d 1279, 1284-85 (9th Cir. 1976).
370. When a defendant makes a request for information, he must show that the request is material to the preparation of his defense and that the request is reasonable. See, e.g., United States v. Clardy, 540 F.2d 439, 442 (9th Cir.), cert. denied, 429 U.S. 963 (1976); United States v. Marshall, 532 F.2d 1279, 1284 (9th Cir. 1976). “Materiality” refers to evidence that would allow a defendant to substantially alter the quantum of proof in his favor. 532 F.2d at 1285. “Reasonableness” requires that the request be specific and not overly burdensome on the government. Id.
372. See United States v. Fulton, 549 F.2d 1325, 1328-29 (9th Cir. 1977), in which handwritten notes differed from witness' testimony. These notes were not supplied to defendant until it was time for cross-examination by the defense. Defendant, however, failed to show any prejudice. Similarly, defendant failed to show that late delivery of grand jury testimony resulted in prejudice. However, the trial court, under Federal Rule of Criminal Procedure 16(d)(2), has broad discretion in handling discovery requests. Thus, it was proper in Fulton to recess the trial to allow the defense time to prepare its cross-examination. This was necessary in light of a witness' late revelation of unrecorded statements made by the defendant to the witness subsequent to defendant's arrest, and the prosecution's representation that it had just become aware of these unrecorded statements. There was, therefore, no abuse of discretion by the trial court. Finally, the defendant's contention that the prosecution intentionally withheld unrecorded statements to use for subsequent impeachment without factual support. Id. See United States v. Garcia, 555 F.2d 708, 710 (9th Cir. 1977) (government's failure to provide discovery of one piece of paper not prejudicial error where defense given time to view the paper subsequent to discovery of the oversight); United States v. Hendrix, 549 F.2d 1225, 1230 (9th Cir.), cert. denied, 434 U.S. 818 (1977) (refusal of de-
Thus, even when the trial court unjustifiably denies a discovery request, such a denial will not be reversed absent a clear showing of prejudice.\(^{373}\)

Such a showing of prejudice was made by the defendant in United States v. Roybal.\(^{374}\) In that case, the defendant sought the disclosure of information which the government intended to elicit from its informant witnesses. Although the prosecution learned the subject matter of the informant's testimony one month prior to trial, it made no effort to disclose the information. Instead, the prosecution, without warning the defendant, waited until trial to produce the testimony. The Ninth Circuit held such action to be a violation of the discovery order resulting in serious prejudice to the defendant.\(^{375}\) "While the evidence in question does not come within the rule of Brady v. Maryland . . ., as it is not an exculpatory statement, and it is not a statement under the Jencks Act . . ., its introduction under circumstances such as these is a matter that we cannot ignore."\(^{376}\) The Roybal decision indicates the Ninth Circuit's willingness to reverse a conviction in cases of patent disregard of fair discovery procedures.

In affirming the trial court's dismissal of an indictment, the Ninth
Circuit in *United States v. Hawk*\(^{377}\) held that prejudice to a defendant is presumed upon the government's intentional destruction of evidence.\(^{378}\) Concluding that the destruction of potentially relevant evidence was constitutionally offensive, the Ninth Circuit observed that governmental participation in withholding, destroying, or causing the loss of evidence in a criminal case always has due process implications. The extent of the due process violation . . . involves consideration of a number of subjective and objective factors, including the deliberateness of the governmental conduct, the good or bad faith of the governmental agent, and the importance of the evidence to the defense of the case.\(^{379}\)

The intentional destruction of evidence by the government results in a due process violation even without any showing by a defendant that the challenged evidence would have helped his defense.\(^{380}\) While the government's bad faith will result in automatic reversal of a criminal conviction, or dismissal of an indictment,\(^{381}\) the prosecution's good faith does not preclude a due process violation.\(^{382}\)

Discovery is also controlled by the fifth amendment privilege against self-incrimination. The fifth amendment provides that "[n]o person . . . shall be compelled . . . to be a witness against himself."\(^{383}\) Compelled production of documents falls within the scope of the privilege against self-incrimination.\(^{384}\) The Ninth Circuit has traditionally ap-
plied this principle to cases involving the production of tax records. It is thus within the scope of the fifth amendment protection against self-incrimination for a defendant to refuse to produce his books and records during an Internal Revenue Service criminal investigation.

The deposition is a useful pretrial discovery technique as it allows for oral examination and cross-examination of the deponent, thereby permitting counsel to exact precise evidence and information in preparation for trial. Federal Rule of Criminal Procedure 15(f) governs objections to deposition testimony and requires that the grounds for an objection be stated at the time the deposition is taken. Unjustified absence by a defendant from the deposition may constitute a waiver of all objections to the taking and later use of the deposition.

belonging to defendants could not be compelled under the fifth amendment proscription against self-incrimination).

385. See, e.g., United States v. Cohen, 388 F.2d 464, 471-72 (9th Cir. 1967) (where tax records are prepared by an accountant from information supplied by the taxpayer, fifth amendment privilege against self-incrimination is applicable). See also Garner v. United States, 501 F.2d 228, 236 (9th Cir. 1972), aff'd, 424 U.S. 648 (1976) (defendant should claim his fifth amendment rights prior to filing his tax returns); United States v. Judson, 322 F.2d 460, 464-65 (9th Cir. 1963) (attorney who had retained client's tax records had right to invoke fifth amendment privilege on client's behalf).

386. United States v. Helina, 549 F.2d 713, 716 (9th Cir. 1977). Although the Ninth Circuit adopts this principle, the court notes that two recent Supreme Court decisions may intimate a different result. Id. at 716 n.3. In Fisher v. United States, 425 U.S. 391 (1976), the Court held that an attorney's production of his client's tax records pursuant to a lawful summons did not violate the client's fifth amendment privilege. Id. at 396-401. The rationale is that enforcement of the summons against the attorney does not have the effect of compelling any action on the part of the client. 549 F.2d at 716 n.3.

Similarly, in Andresen v. Maryland, 427 U.S. 463 (1976), the Court held that the search and seizure of an individual's business records and their subsequent introduction into evidence did not violate the individual's fifth amendment privilege. Id. at 470-77.

The Ninth Circuit, however, distinguished Helina from the Supreme Court decisions that "[a] party is privileged from producing the evidence but not from its production." 549 F.2d at 716 n.3. See, e.g., Johnson v. United States, 228 U.S. 457, 458 (1913). For further treatment of this issue, see Garner v. United States, 501 F.2d 228, 236 (9th Cir. 1972), aff'd, 424 U.S. 648 (1976) (defendant should claim fifth amendment privilege prior to filing tax return); Smith v. United States, 236 F.2d 260, 265-66 (8th Cir.), cert. denied, 352 U.S. 909 (1956) (in prosecution for tax evasion, Government allowed to produce tax records of partnership of which defendant was a partner); Beard v. United States, 222 F.2d 84, 91 (4th Cir.), cert. denied, 350 U.S. 846 (1955) (bank records prepared by defendant bookkeeper for corporation admissible against defendant); United States v. Mousley, 210 F. Supp. 510, 512 (E.D. Pa. 1962), aff'd mem., 311 F.2d 795 (3d Cir. 1963) (failure of taxpayer to furnish records is a proper subject of comment by trial court).

In Helina, the appeal focused upon certain prosecutorial comments concerning defendant's invocation of the fifth amendment privilege against self-incrimination by refusing to produce his tax records.

387. FED. R. CRIM. P. 15(f).

388. 18 U.S.C. § 3503(b) (1976). See Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (Court defines waiver as "an intentional relinquishment or abandonment of a known right or privi-
E. Right to Jury Trial

An individual charged with an offense has a constitutional right to trial by an impartial jury. Despite the all-inclusive language of the Constitution, it has been held that a person accused of a petty offense has no such right to a jury trial.

It has been consistently held that an offense is petty when the imprisonment authorized by law does not exceed six months. The Ninth Circuit has extended this principle by adopting the position of a federal statute which defines petty offenses as those which carry a punishment of imprisonment for no more than six months or a fine of not more than $500.00 or both. Thus, a defendant is entitled to a jury trial.
where a finding of guilt would result in a fine of not more than $1,000.00 or imprisonment for not more than six months, or both.  

The Ninth Circuit has further held that a defendant charged with a minor, rather than a petty, offense must be specifically advised by the magistrate of his right both to jury trial and to trial before a district court judge.

Once a defendant exercises his right to a jury trial in federal court, he is entitled to a jury of twelve persons. Rule 23(b) provides, however, that at any time prior to the verdict, the parties may stipulate in writing, with court approval, that the jury shall be comprised of fewer than twelve members. Once such a stipulation has been made, it may be effectuated without any further consent by defendant.

454, 475-77 (1975). The Ninth Circuit justified its adoption of § 1(3) by citing the need for objective standards in the law. 552 F.2d at 279-80.

The dissenting opinion of Judge Wallace noted that the Supreme Court in Muniz declined to grant a defendant labor union a jury trial in a criminal contempt proceeding for which defendant was fined $10,000.00. Id. at 281. Wallace pointed to the difference in severity between a fine in excess of $500.00 and imprisonment in excess of six months and concluded that in determining whether a defendant has a constitutional right to a jury, the seriousness of the potential punishment must be ascertained. Only a potential fine which constitutes a serious deprivation of liberty triggers the right to a jury trial. Id. at 282. The reasoning of the majority, argued Wallace, established a rigid standard inconsistent with Muniz. Id.

The majority, however, argued that the fine imposed on the union in Muniz amounted to a penalty of about $.75 per member. Id. at 279. "It is not unrealistic to treat any fine in excess of $500.00 as a serious matter to all individuals . . . ." Id. at 280. "Nothing in . . . [Muniz] suggests that a jury trial would not have been required if the fine imposed had had the impact of the $500.00 fine upon each of the 13,000 individuals who were members of the union." Id. See generally Argersinger v. Hamlin, 407 U.S. 25, 48 (1972) (Powell, J., concurring) (deprivation of property can have serious impact on individual); Tate v. Short, 401 U.S. 395, 399 (1971) (a non-indigent who refuses to pay a fine can be imprisoned); United States v. Goeltz, 513 F.2d 193, 195-96 (10th Cir. 1975) (definition of petty offense).

393. 552 F.2d at 280. See also United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977) (jury trial allowed for possible jail sentence exceeding 6 months).

394. United States v. Marcyes, 557 F.2d 1361, 1368 (9th Cir. 1977). In Marcyes, defendant was charged with possession of dangerous fireworks. The offense carried a punishment of imprisonment in excess of six months. Under 18 U.S.C. § 3401(b)(1976), the magistrate is required to inform the defendant charged with a minor offense that he, the defendant, has the right to both a trial before the district court judge and to a trial by jury. In Marcyes, no mention was made of defendant's right to a jury, thus reversal of defendant's conviction was necessary. Id. at 1368. See United States v. Miller, 468 F.2d 1041, 1043-44 (4th Cir.), cert. denied, 410 U.S. 935 (1973) (literal compliance with § 3401(b) is required).

395. FED. R. CRIM. P. 23(b).

396. Id.

397. United States v. Stolarz, 550 F.2d 488, 493 (9th Cir. 1977) (where pretrial stipulation specified that deliberation would proceed in the event one juror became disabled, rule 23(b) did not require defendant's consent when stipulation put into effect). See United States v. Smith, 523 F.2d 788, 791 (5th Cir. 1975), cert. denied, 424 U.S. 973 (1976) (signed stipulations not required for compliance with rule 23(b); oral stipulation will suffice if defendant intelligently and personally consents).
The Constitution further requires that grand and petit juries be drawn from a representative cross-section of the community. \(^{398}\) A defendant may, therefore, be able to challenge jury selection procedures on the ground that they are not productive of a representative cross-section. \(^{399}\)

In *Carmical v. Craven*\(^{400}\) the petitioner, on a writ of habeas corpus, claimed that the jury panel which tried his case was discriminatorily selected on the basis of race and financial status. \(^{401}\) The state selection process there involved required prospective jurors to submit to a "clear-thinking test," the purpose of which was to determine whether prospective jurors met acceptable standards of innate intelligence. \(^{402}\)

Relying on a lower court decision, \(^{403}\) petitioner asserted that the use of the "clear-thinking test" to select the jury in his case had resulted in "unconstitutionally gross discrimination along racial, economic and cultural lines." \(^{404}\) The district court disagreed, ruling that even if the test resulted in discrimination against blacks and persons of lower economic status, there was no evidence that such discrimination was the object of the test, and that it was administered to all persons regardless of race or income. \(^{405}\) The Ninth Circuit initially reversed, holding that effect, rather than purpose, is determinative in establishing a prima facie case of invidious discrimination. The court observed, "[w]hen a jury selection system actually results in master jury panels from which identifiable classes are grossly excluded, the subjective intent of those who develop and enforce the system is immaterial." \(^{406}\)

Upon remand, the district court ruled that the petitioner would bear

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\(^{400}\) 547 F.2d 1380 (9th Cir. 1977).

\(^{401}\) Id. at 1381.

\(^{402}\) Id. The test consisted of 25 questions which were to be answered in ten minutes. To qualify for jury duty, 20 correct answers were required. The test was created under the auspices of a special committee of judges and attorneys. Id.

\(^{403}\) People v. Craig, No. 41750 (Superior Court of Alameda County, 1968) (further use of "clear-thinking test" prohibited on ground that it resulted in disproportionate exclusion of blacks from jury panel).

\(^{404}\) 547 F.2d at 1381.


\(^{406}\) Carmical v. Craven, 457 F.2d 582, 587 (9th Cir. 1971).
the initial burden of establishing a prima facie case of exclusion based on racial considerations, and that once this burden was met, the state would bear the burden of proving the validity of the test.\footnote{Carmical v. Craven, 547 F.2d 1380, 1381-82 (9th Cir. 1977).}

After a hearing, the district court denied petitioner relief, concluding that there was evidence from which some disproportion might be inferred but that the comparative test results from the “small, select, racially homogeneous areas, do not establish gross and unequivocal exclusion of identifiable classes” from the county from which the panels were drawn.\footnote{Id. at 1382.} The district court concluded that educational levels, not race, were responsible for the exclusion.\footnote{Id.}

In affirming, the Ninth Circuit in \textit{Carmical II} recognized that exclusion from jury duty on the basis of race or financial status is unconstitutional.\footnote{Id.} However, the court also acknowledged that states are permitted to prescribe relevant qualifications for their jurors.\footnote{Id.}

The Ninth Circuit was reluctant to adopt the trial court’s finding that educational levels were responsible for the exclusion in question.\footnote{Id. at 1383.} Instead, the appellate court found that the evidence produced by the petitioner fell far short of that necessary for a prima facie showing that the exclusion stemmed from racial or economic discrimination.\footnote{Id. at 1383.} The court thus avoided a decision on the issue of the validity and appropriateness of the “clear-thinking test” and offered little guidance as to the future use of similar tests.

\textbf{Juror bias or misconduct may constitute a denial of the defendant’s}

\footnote{Carmical v. Craven, 547 F.2d 1380, 1381-82 (9th Cir. 1977).}
\footnote{Id. at 1382.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{See Carter v. Jury Commissioner, 396 U.S. 320, 332 (1970) (states are free to set specified age and educational qualifications).}
\footnote{547 F.2d at 1382-83.}
\footnote{Id. at 1383. Petitioner sought to establish discrimination by means of a statistical analysis. The petitioner isolated five of a total of 25 jury panels selected during the years in which the “clear-thinking test” was administered. The study was designed to determine how a total of 2,127 individuals fared in the test or preceding screening process. Of the 2,127, 1,024 were blacks from low-income backgrounds. Of the 1,024, 297 were rejected by the written test while 95 passed, a failure rate of 75.8%. The remaining 1,103 individuals came from “white, middle and upper-income” areas. Of these individuals, 92 were rejected while 409 passed, a failure rate of 18.4%. Noting that petitioner offered no information as to the test results of blacks and whites with comparable economic and educational levels, the court correctly reasoned that such evidence fell short of a prima facie showing of exclusion based on race and economic status. In fact, respondent submitted evidence showing that blacks and whites with comparable educational levels produced similar statistics with respect to the pass/fail rates of the test. Furthermore, petitioner’s study considered only 7% of the approximately 30,000 people called to form the five panels selected by the petitioner for the study. \textit{Id.} at 1382.}
sixth amendment right to an impartial jury. It is within the trial court's broad discretion, however, to give meaning to this guarantee.

In *United States v. Hendrix*, the Ninth Circuit considered whether the trial court had abused its discretion in denying defendant's request for an investigation into juror bias. The appellate court ruled that it is within the trial judge's discretion to hold an evidentiary hearing on such allegations.

The extent and nature of the investigative hearing, if ordered, is also within the judge's discretion. The character and seriousness of the alleged misconduct or bias and the credibility of the source are factors for the judge to consider in determining the scope of the investigative hearing.

There are two purposes served by an evidentiary hearing. First, it enables the court to determine the truthfulness of the allegations of juror bias. Second, it ensures that the trial is fair and not prejudiced by any misconduct.

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414. See, e.g., Tillman v. United States, 406 F.2d 930, 937 (5th Cir.), vacated per curiam on other grounds, 395 U.S. 830 (1969) (improper influence by communications with juror); Stone v. United States, 113 F.2d 70, 77-78 (6th Cir. 1940) (outside influence on jurors resulted in prejudice to defendant).

415. See, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-67 (1976) (district court judge required to assess probable publicity of murder trial and effect on prospective jurors); Sheppard v. Maxwell, 384 U.S. 333, 338-45, 358-63 (1966) (pretrial publicity denied defendant right to fair trial); United States v. Doe, 513 F.2d 709, 711-12 (1st Cir. 1975) (harmless private communication between juror and third party); Tillman v. United States, 406 F.2d 930, 937 (5th Cir.), vacated per curiam on other grounds, 395 U.S. 830 (1969) (private communication between juror and third person possibly prejudicial); United States v. Miller, 381 F.2d 529, 539 (2d Cir. 1967), cert. denied, 392 U.S. 929 (1968) (no denial of due process where juror informed at social gathering that outsider did not like what was going on at the trial); United States v. Flynn, 216 F.2d 354, 372 (2d Cir. 1954), cert. denied, 348 U.S. 909 (1955) (juror communication with third party). For additional discussion of trial court discretion in this area, see notes 625-26 infra, and accompanying text.

416. 549 F.2d 1225 (9th Cir.), cert. denied, 434 U.S. 818 (1977).

417. The allegedly biased statement was the following:

Well, I really shouldn't be serving today because my husband is on vacation, and he asked me to get excused so I could join him, because I have served on jury duty several times. But we just had a case where a policewoman was tried for selling narcotics and the damned Judge let her go. And she was absolutely guilty. And I am here to see that they put some of these people away. These Judges are absolutely too lenient and they are letting too many people run around.

Id. at 1227.

418. Id. See United States v. Doe, 513 F.2d 709, 711-12 (1st Cir. 1975).

419. 549 F.2d at 1227. See United States v. Doe, 513 F.2d 709, 712 (1st Cir. 1975); Tillman v. United States, 406 F.2d 930, 938 (5th Cir.), vacated per curiam on other grounds, 395 U.S. 830 (1969); note 415 supra.

420. See United States v. McKinney, 429 F.2d 1019, 1026 (5th Cir. 1970), cert. denied, 401 U.S. 922 (1971) (formulation of rigid rules requiring trial judge, where bias is alleged, to conduct full investigation to determine whether misconduct has occurred and was prejudicial, and to set forth his findings if prejudice did not occur).

421. 549 F.2d at 1228-29.
ror bias or misconduct.\textsuperscript{422} Second, if the allegations are true, the hearing enables the court to determine whether the bias has been so substantial as to deprive defendant of his fifth amendment due process rights or his sixth amendment right to trial by an impartial jury.\textsuperscript{423}

In applying these principles to \textit{Hendrix}, the Ninth Circuit noted that reversal of a district court's procedural decisions should occur only if there has been a clear abuse of discretion.\textsuperscript{424} In \textit{Hendrix}, given the content of the allegations, there was no such abuse of discretion by the district court.\textsuperscript{425} Furthermore, the Ninth Circuit found that the alleged bias was not prejudicial to defendant and did not deny defendant his right to a trial by impartial jury.\textsuperscript{426}

Similarly, the appellate court will not interfere with the procedure employed by the trial court in conducting voir dire examinations unless there has been a clear abuse of discretion.\textsuperscript{427} The peremptory chal-

\textsuperscript{422} Id.
\textsuperscript{423} Id. at 1229. \textit{See United States v. Klee}, 494 F.2d 394, 396 (9th Cir.), \textit{cert. denied}, 419 U.S. 835 (1974) (the test is whether or not misconduct has so prejudiced defendant that he has not received fair trial). \textit{See also Cavness v. United States}, 187 F.2d 719, 723 (9th Cir.), \textit{cert. denied}, 341 U.S. 951 (1951).
\textsuperscript{425} 549 F.2d at 1229.
\textsuperscript{426} Id. at 1229-30. The court pointed out that it is more likely to infer from the juror's statement that she was referring to those individuals who are "absolutely guilty" as being the ones who "should be put away." A juror's desire to convict those who are absolutely guilty is not inconsistent with her duty as a juror. Furthermore, the juror's statement came before she was examined and prior to her swearing to impartiality. "[J]urors are presumed to have performed their official duties faithfully." Id. at 1230. \textit{See Cavness v. United States}, 187 F.2d 719, 723 (9th Cir.), \textit{cert. denied}, 341 U.S. 951 (1951) (no prejudice to defendant where juror, accompanied by marshall, made two telephone calls during jury deliberations).

Finally, the court pointed out that the nature of the alleged bias was different from that which courts have traditionally viewed as involving high risks of prejudice. 549 F.2d at 1230. \textit{Hendrix} did not involve a private communication or tampering with a juror during trial about a matter pending before the jury, nor did the alleged statement involve the influence of the press upon the jury. Id. \textit{See United States v. Shahan}, 517 F.2d 1173, 1178-79 (8th Cir.), \textit{cert. denied}, 423 U.S. 893 (1975) (failure of juror to disclose views against long hair and drug abuse not prejudicial to defendant's case); \textit{United States v. Klee}, 494 F.2d 394, 396 (9th Cir.), \textit{cert. denied}, 419 U.S. 835 (1974) (premature discussion among jurors not prejudicial). \textit{See generally United States v. Hall}, 536 F.2d 313, 324-26 (10th Cir.), \textit{cert. denied}, 429 U.S. 919 (1976) (court's refusal to question prospective jurors individually during voir dire regarding pretrial publicity not reversible error absent clear abuse of discretion); \textit{United States v. Chiarizio}, 525 F.2d 289, 295 (2d Cir. 1975) (ambiguous comment by prospective juror, overheard by other jurors, held insufficient to warrant reversal based on jury prejudice).

\textsuperscript{427} \textit{United States v. Perry}, 550 F.2d 524, 528 (9th Cir.), \textit{cert. denied}, 431 U.S. 918 (1977). \textit{See also United States v. Silverthorne}, 430 F.2d 675, 678 (9th Cir. 1970), \textit{cert. denied}, 400
challenge is one of the most important rights reserved to an accused.\(^{428}\) Although the district court is given broad discretion with respect to the procedures by which a peremptory challenge may be made, the procedures chosen by the district court must not unduly restrict a defendant's use of such a challenge, and defendant must be given adequate notice of the method to be implemented by the district court.\(^{429}\) In *United States v. Turner*,\(^{430}\) the Ninth Circuit reversed a conviction where the trial court had treated the defendant's acceptance of the jury panel, prior to the prosecution's challenges, as a waiver of his peremptory challenge rights.\(^{431}\) Notwithstanding that notice of the challenge procedures had been given to the defendant, such a waiver was held to be an undue restriction on defendant's challenge rights.\(^{432}\) Any error resulting in a restriction of the exercise of a defendant's peremptory challenge requires automatic reversal and no actual prejudice need be shown.\(^{433}\)

**F. Plea Bargain Agreements**

Plea bargain agreements have been recognized as a viable tool in the administration of the criminal justice system.\(^{434}\) Federal Rule 11(e)\(^{435}\) allows prosecutors and defense attorneys to negotiate a guilty plea which, when pled by the defendant, requires the government to dismiss

\(^{428}\) U.S. 1022 (1971) (minimal knowledge by prospective juror of pendency of criminal proceedings not sufficient to establish prejudice to defendant).

\(^{429}\) See United States v. Sams, 470 F.2d 751, 755 (5th Cir. 1972) (where defense counsel unaware of jury selection procedure, court abused discretion in denying defendant right to challenge juror after having failed to challenge same juror earlier in selection process).

\(^{430}\) 558 F.2d 535 (9th Cir. 1977). But cf. United States v. Rowe, 435 F.2d 1298, 1299 (9th Cir. 1970) (per curiam) (counsel responsible for knowing challenge procedure of court).

\(^{431}\) United States v. Stilson, 250 U.S. 583, 586-87 (1919) (neither number of peremptory challenges nor manner of their exercise is constitutionally secured).

\(^{432}\) Id. at 538.

\(^{433}\) See Swain v. Alabama, 380 U.S. 202, 220 (1965) (function of peremptory challenge requires that its use not be subject to inquiry).


\(^{435}\) FED. R. CRIM. P. 11(e).

\(^{436}\) Id. at 11(e)(1).
or reduce the charges, or make specific sentence recommendations.\footnote{437} In the alternative, the U.S. Attorney may agree that a specific sentence is the proper manner in which to dispose of the case.\footnote{438}

All successful negotiations must be disclosed to the court,\footnote{439} which must then inform the defendant of its acceptance or rejection of the agreement. Acceptance binds the court to the terms of the agreement,\footnote{440} whereas the defendant must be informed of a rejection and allowed to withdraw the plea.\footnote{441} Statements made in connection with

\footnote{437} \textit{Id.} at 11(e)(1)(B). The court, however, is not bound by any sentence recommendations offered by the U.S. Attorney. \textit{Id.} at 11(e)(1).
\footnote{438} \textit{Id.} at 11(e)(1)(C).
\footnote{439} \textit{Id.} at 11(e)(2). \textit{See}, e.g., United States v. Maggio, 514 F.2d 80, 89 (5th Cir.), \textit{cert. denied}, 423 U.S. 1032 (1975). \textit{See also} Blackledge v. Allison, 431 U.S. 63, 79 (1977) (suggestion made that court inform defendant that bargain may be disclosed without jeopardy to agreement).
\footnote{440} \textit{FED. R. CRIM. P.} 11(e)(3) (court must, upon acceptance, embody negotiated disposition in judgment and sentence).
\footnote{441} \textit{Id.} at 11(e)(4). The court must, in addition, inform the defendant that the plea, if maintained, may result in a sentence less favorable than that provided for in the agreement. \textit{Id.} A rejected agreement does not render a guilty plea invalid; the court must, however, inform the defendant of and sentence him within the maximum permissible sentence, and make certain that the defendant was aware that any negotiations did not bind the court. United States v. Thompson, 541 F.2d 794, 795 (9th Cir. 1976) (per curiam) (where defendant received sentence in excess of that recommended, plea not void since defendant aware judge not bound and sentence within maximum allowable).

In United States v. Henderson, 565 F.2d 1119 (9th Cir. 1977), the Ninth Circuit adhered to a strict interpretation of the language of rule 11(e). Henderson had received a promise from the United States Attorney concerning the disposition of the case: “4 years maximum, concurrent with other charge to which I have made guilty plea. Possible I will receive lesser sentence, including probation.” The court, however, imposed consecutive sentences totaling nine years. Noting that the defendant clearly had understood that the actual sentence was to be solely within the judge’s discretion, the Ninth Circuit did not accept defendant’s contention that the court had rejected the agreement while failing to offer defendant an opportunity to withdraw the plea.

Defendant had argued that subsections (e)(3) and (e)(4) of rule 11, regarding acceptance and rejection of the plea agreement were applicable to (e)(1)(A), (B), and (C) type agreements. The court, however, found that the language of (e)(3) and (e)(4) failed to support defendant’s contention. Subsection (e)(3) does not mention a recommendation as does (e)(1)(B) but rather speaks only of a disposition which “tracks” the language in (e)(1)(C). The court pointed out that it would have been easy for the draftsmen to insert into (e)(3) the word “recommendation” or similar phraseology to (e)(1)(B). Similarly, it would have been easy for draftsmen to insert into (e)(4) the words “recommended sentence” or some similar language that referred to (e)(1)(B). “Moreover, if we were to read them into . . . [(e)(3)] or . . . [(e)(4)], we would make . . . [(e)(1)(B)] surplusage, by turning all (1)(B) agreements into (1)(C) agreements, so far as their effect is concerned.” \textit{Id.} at 1122. \textit{Accord}, United States v. Sarubbi, 416 F. Supp. 633, 636 (D. N.J. 1976). \textit{See also} United States v. Futeral, 539 F.2d 329, 331 n.1 (4th Cir. 1975) (dictum).

The appellate court construed the agreement to provide a nonbinding recommendation of disposition rather than a rule 11(e)(1)(C) specific sentence. In so concluding, however, the Ninth Circuit suggested that in cases in which the trial court intends to impose a sentence
a plea later withdrawn because the court rejected the underlying agreement are inadmissible in any proceeding against the defendant.442

III. PROCEDURAL RIGHTS OF THE ACCUSED

A. Right to Counsel

1. The Right to Appointed Counsel

The sixth amendment guarantees to the accused the assistance of counsel in all criminal prosecutions.443 This guarantee binds the states through the due process clause of the fourteenth amendment.444 If the accused is indigent, he is entitled to have counsel appointed by the court.445 In the view of the Supreme Court, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."446 The accused bears the burden of proving that he is "substantially more onerous" than that recommended in a type (e)(1)(B) agreement, the court should offer the defendant an opportunity to withdraw the plea. This procedure, reasoned the court, would guard against misunderstanding in cases where the defendant considered the warnings of total judge discretion as "ritual incantations, not to be taken seriously."565 F.2d at 1123.

442. Fed. R. Crim. P. 11(e)(6). However, a statement made by defendant under oath in connection with a plea later withdrawn, is admissible in a criminal proceeding for perjury or false statement. Id.

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


445. Id. See Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (assistance of counsel required before an accused can be "imprisoned for any offense"); Johnson v. Zerbst, 304 U.S. 458, 467-68 (1938) (appointment of counsel necessary in all federal cases where defendant unable to obtain counsel and has not intentionally and competently waived his right to counsel); Powell v. Alabama, 287 U.S. 45 (1932) (failure of state trial court to appoint counsel in a capital case was a denial of due process).

446. Griffin v. Illinois, 351 U.S. 12, 19 (1956). The Court has made several efforts to equalize the advantages enjoyed by indigent and non-indigent defendants in criminal prosecutions. In Griffin, the Court held that an indigent defendant must be furnished with a free copy of trial transcripts where an appeal without them would be ineffectual. Id. Griffin provided the foundation for the Court's decision in Douglas v. California, 372 U.S. 353 (1963), wherein it was held that an indigent must be provided with counsel on any appeal to which he is entitled as a matter of right. Cf. Ross v. Moffit, 417 U.S. 600, 609-10 (1974) (indigent defendant has no right to counsel on appeal which is discretionary). See also Williams v. Oklahoma City, 395 U.S. 458 (1969) (transcript for appealing a violation of a municipal ordinance); Gardner v. California, 393 U.S. 367 (1969) (transcript of evidentiary hearing in habeas corpus proceeding for use in de novo application to higher court); Roberts v. LaVallee, 389 U.S. 40 (1967) (transcript of preliminary hearing); Draper v. Washington, 372 U.S. 487 (1963) (screening in forma pauperis cases for appeal); Smith v. Bennett, 365 U.S. 708 (1961) (conditioning collateral attack of a conviction on a filing fee); Burns v. Ohio, 360 U.S. 252 (1959) (conditioning direct appeal on payment of a filing fee).
financially unable to retain counsel. A defendant cannot be imprisoned for any length of time if he has been denied the assistance of counsel at trial.

In 1977, the Ninth Circuit restated its position that a trial court does not abuse its discretion in refusing to allow a defendant to substitute counsel "on the eve of trial" absent a compelling reason.

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

The Supreme Court has held that the sixth amendment right to counsel attaches upon the initiation of a criminal adversary proceeding, i.e., upon the filing of formal charges against the accused. Subsequent to that point, there is a right to counsel at all critical stages where the substantial rights of the accused are affected. Thus, there is a crucial distinction between mere investigation and the initiation of a crime.

447. The Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1976) reads in part: "Unless the defendant waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him." Id. § 3006A(b). See United States v. Ellsworth, 547 F.2d 1096 (9th Cir. 1976), cert. denied, 431 U.S. 931 (1977) (denial of assistance of counsel not improper where defendant failed to prove his alleged indigency by refusing to comply with court's request that he complete a standard financial affidavit form). See also United States v. Schmitz, 525 F.2d 793, 795 (9th Cir. 1975) (defendant's conclusionary affidavit of poverty not "sufficient to entitle him to a free transcript" pursuant to the Criminal Justice Act).

448. Argersinger v. Hamlin, 407 U.S. 25 (1972). "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." Id. at 37.


450. United States v. Michelson, 559 F.2d 567 (9th Cir. 1977).

451. Massiah v. United States, 377 U.S. 201, 206 (1964). The right to counsel prior to the filing of an indictment or information is covered by the due process clause of the fifth amendment. See Miranda v. Arizona, 384 U.S. 436 (1966) (right to have counsel present at custodial police interrogation).


453. See United States v. Ash, 413 U.S. 300 (1973) (no right to have counsel present at post-indictment photo identification session); United States v. Wade, 388 U.S. 218 (1967) (no
nal proceeding.\textsuperscript{454}

In \textit{Brewer v. Williams},\textsuperscript{455} the Supreme Court stated that the "clear rule of \textit{Massiah [v. United States]}\textsuperscript{456} is that once adversary proceedings have commenced against an individual, he has a right to legal representation \textit{when the government interrogates him."}\textsuperscript{457} In 1977, the Ninth Circuit relied on \textit{Brewer} to hold that the government, in making a secret tape recording of an incriminating conversation that had occurred within the defendant's jail cell, did not violate her sixth amendment right to counsel because no governmental interrogation—either formal or surreptitious—had been involved.\textsuperscript{458}

3. Effective Assistance of Counsel

The Supreme Court has repeatedly held that the sixth amendment right to counsel constitutes a right to \textit{effective} counsel.\textsuperscript{459} While thus implying that the sixth amendment requires some minimum level of

right to counsel when having blood taken or being fingerprinted); United States v. DeVaughn, 541 F.2d 808 (9th Cir.) \textit{(per curiam), cert. denied}, 434 U.S. 954 (1976) \textit{(defendant who made statements to government informant after charges had been dismissed did not have to be warned of right to counsel since no longer under indictment)}.

454. \textit{See} United States v. Wade, 388 U.S. 218, 226-27 (1967) \textit{(right to have counsel present at post-indictment line-up); Hoffa v. United States, 385 U.S. 293, 309-10 (1966) \textit{(right to counsel after defendant taken into custody and charged); Escobed v. Illinois, 378 U.S. 478, 490-91 (1964) \textit{(right to counsel when suspect taken into custody and is focus of investigation); Massiah v. United States, 377 U.S. 201 (1964) \textit{(right to counsel attaches when indicted). Cf. Kirby v. Illinois, 406 U.S. 682, 690 (1972) \textit{(no per se exclusionary rule applicable to testimony based on a police station show-up where counsel not present).}

The government apparently possesses the power to determine when the right to counsel will attach in a given case inasmuch as it controls the point in time at which "mere investigation" gives way to a prosecutorial proceeding. \textit{See} Hoffa v. United States, 385 U.S. 293, 310 (1966), in which the Court stated:

There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fifth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.\textit{Id. See also} United States v. King, 472 F.2d 1, 5 (9th Cir. 1972), \textit{cert. denied}, 414 U.S. 864 (1973) \textit{(defendants who have been neither indicted nor arrested have no right to be warned of their right to counsel prior to speaking to a federal informant)}.


457. 430 U.S. at 400-01 \textit{(emphasis added)}.


competency on the part of counsel, the Court has yet to articulate any standards to be used in assessing such competency. Rather, the Court has expressly left the determination of the “proper standards of performance of attorneys” to the “good sense and discretion of the trial courts.”

Within the Ninth Circuit, three alternative standards for reviewing the effectiveness of counsel have been formulated: whether “defendant's representation has been so inadequate as to make his trial a farce, sham, or mockery of justice;” whether counsel has rendered “reasonably effective” assistance; or whether counsel's ineffectiveness has resulted in a denial of fundamental fairness to the defendant. Although there is some overlap between the standards, a majority of the Ninth Circuit cases in the area of counsel effectiveness have adopted the “farce or mockery of justice” standard and have either found the counsel to be effective or have refused to “second guess” counsel with respect to trial tactics.


461. United States v. Stem, 519 F.2d 521, 524 (9th Cir.), cert. denied, 423 U.S. 1033 (1975). See, e.g., Gardner v. Griggs, 541 F.2d 851, 853 (9th Cir. 1976); United States v. Martin, 489 F.2d 674, 677 (9th Cir. 1973), cert. denied, 417 U.S. 948 (1974); United States v. Ortiz, 488 F.2d 175, 177 (9th Cir. 1973); Parker v. United States, 474 F.2d 697 (9th Cir. 1973) (per curiam); United States v. Miramon, 470 F.2d 1362, 1363 (9th Cir. 1972), cert. denied, 411 U.S. 934 (1973).

462. See, e.g., United States v. Elkins, 528 F.2d 236, 238 (9th Cir. 1975); United States v. Miramon, 470 F.2d 1362, 1363 (9th Cir. 1972), cert. denied, 411 U.S. 934 (1973); United States v. Steed, 465 F.2d 1310, 1317 (9th Cir.), cert. denied, 409 U.S. 1078 (1972); Leano v. United States, 457 F.2d 1208, 1209 (9th Cir.), cert. denied, 409 U.S. 889 (1972); United States v. Smith, 446 F.2d 1117, 1119 (9th Cir. 1971), cert. denied, 417 U.S. 915 (1974); Pinedou v. United States, 347 F.2d 142, 148 (9th Cir. 1965); Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963).

463. See, e.g., United States v. Bradford, 528 F.2d 899, 900 (9th Cir. 1975); United States v. Stern, 519 F.2d 521, 524 (9th Cir.), cert. denied, 423 U.S. 1033 (1975); Mengarelli v. United States, 476 F.2d 617, 619 (9th Cir. 1973); Johnson v. Craven, 432 F.2d 418, 419 (9th Cir. 1970); Pinedou v. United States, 347 F.2d 142, 148 (9th Cir. 1965).

464. See Gardner v. Griggs, 541 F.2d 851, 853 (9th Cir. 1976); United States v. Miramon, 470 F.2d 1362, 1363 (9th Cir. 1972), cert. denied, 411 U.S. 934 (1973); United States v. Leano, 457 F.2d 1208, 1209 (9th Cir.), cert. denied, 409 U.S. 889 (1972).

465. See, e.g., United States v. Stern, 519 F.2d 521, 524 (9th Cir.), cert. denied, 423 U.S. 1033 (1975); Krutchan v. Eyman, 406 F.2d 304, 312 (9th Cir. 1969), vacated on other grounds, 408 U.S. 934 (1972); Borchert v. United States, 405 F.2d 735, 758 (9th Cir. 1968), cert. denied, 394 U.S. 972 (1969); Dalrymple v. Wilson, 366 F.2d 183, 185 (9th Cir. 1966) (per curiam).

466. See, e.g., United States v. Eaglin, 571 F.2d 1069 (9th Cir. 1977); De Kaplany v. Enomoto, 540 F.2d 975, 987 (9th Cir. 1976) (en banc), cert. denied, 429 U.S. 1075 (1977); United States v. Stern, 519 F.2d 521, 524-25 (9th Cir.), cert. denied, 423 U.S. 1033 (1975) (counsel declined to raise insanity defense because would have been counterproductive); United States v. Martin, 489 F.2d 674, 677 (9th Cir. 1973), cert. denied, 417 U.S. 948 (1974)
In 1977, the Ninth Circuit decided in Cooper v. Fitzharris467 that the appropriate standard is whether "trial counsel failed to render reasonably effective assistance."468 The Cooper court expressly disapproved of the use of the "farce or mockery of justice" standard within the Ninth Circuit.469 The case was remanded to the district court for a factual determination of whether the petitioner had been deprived of the effective assistance of counsel, without regard to whether the petitioner had been prejudiced.470

Specific prejudice must be shown, however, when a defendant claims that his attorney's representation of a codefendant at trial resulted in a conflict of interest and, consequently, a denial of the effective assistance of counsel.471 In United States v. Eaglin,472 the court rejected petitioner's claim that he had been prejudiced by his counsel's joint representation of a coconspirator where the record revealed that the trial judge had "meticulously" inquired of both petitioner and his counsel whether there would be a conflict of interest and had been assured by defendant both in an affidavit and in open court that there was no conflict.473

(withdrawal of motion to suppress heroin seized in warrantless search where probable cause existed); United States v. Ortiz, 488 F.2d 175, 177 (9th Cir. 1973); Mengarelli v. United States, 476 F.2d 617, 619 (9th Cir. 1973) (retrospective finding that trial tactics were unwise does not usually "rise to the level of a deprivation of a constitutional right").

467. 551 F.2d 1162 (9th Cir. 1977).
468. Id. at 1166.
469. Id. at 1166. "The farce or mockery standard today is little more than a metaphor indicating that the petitioner has a relatively heavy burden to prove ineffectiveness of counsel."
470. Id. at 1165, 1166. The court's holding that a conviction could not stand regardless of prejudice once a defendant had met the burden of showing that he had been denied effective assistance of counsel was based on two recent Supreme Court cases: Herring v. New York, 422 U.S. 853 (1975) (denial of opportunity to make a summation at the conclusion of trial violates right to counsel regardless of nature of case or strength of prosecution's evidence) and Geders v. United States, 425 U.S. 80 (1976) (refusal to allow a defendant to consult with counsel during an overnight recess was a denial of right to counsel even though prejudice not claimed). Id. at 1165.
471. See United States v. Kutas, 542 F.2d 527 (9th Cir. 1976), cert. denied, 429 U.S. 1073 (1977) (defendant failed in her burden of showing that actual conflict of interest existed which prejudiced her case); United States v. Nystrom, 447 F.2d 1350, 1351 (9th Cir.), cert. denied, 404 U.S. 993 (1971); Davidson v. Cupp, 446 F.2d 642, 643 (9th Cir. 1971) (per curiam). See also Carlson v. Nelson, 443 F.2d 21, 22 (9th Cir. 1971) (per curiam).
472. 571 F.2d 1069 (9th Cir. 1977).
473. Id. at 1085-86. "Where a defendant appeals his conviction on the ground that his counsel represented more than one defendant, we will, absent unusual circumstances, reject such an argument if it appears that the trial court made sufficient inquiry of the parties and counsel concerning possible conflict of interest." Id. at 1086. See United States v. Horne, 423 F.2d 630, 631 (9th Cir. 1970); Kaplan v. United States, 375 F.2d 895, 897-98 (9th Cir. 1967). Eaglin claimed that counsel had slighted his defense in an effort to obtain an acquit-
B. Right to Speedy Trial

1. Pre-Accusatorial Delay

The Supreme Court has held that the sixth amendment right to a speedy trial attaches only after an indictment or information has been filed against the accused or after an arrest has been made. Therefore, the validity of a delay in bringing charges against an accused must be determined under the due process clause of the fifth amendment.

The role of the due process clause, however, is limited in “protecting against oppressive [pre-indictment] delay” because of the primary statutory protection “against the bringing of overly stale criminal charges” found in the applicable statutes of limitation.

It is settled that the government is not constitutionally required to file charges either at that point in time at which probable cause to arrest has been established or upon the collection of evidence sufficient to prove the defendant’s guilt beyond a reasonable doubt.

...
The Supreme Court, in *United States v. Marion*, established the rule that the due process clause of the fifth amendment does not require that an indictment be dismissed unless the accused shows that the pre-indictment delay "caused substantial prejudice" to his right "to a fair trial and that the delay was an intentional device to gain [a] tactical advantage over the accused." Cases within the Ninth Circuit have split on the question of whether *Marion* requires the accused to show that there has been both actual prejudice and a tactical advantage gained or whether a showing of either is sufficient.

In *United States v. Mays*, the Ninth Circuit declined to adopt either the disjunctive or conjunctive standards that had been adopted by the earlier cases. Rather, the approach adopted by the *Mays* court involved an evaluation of the circumstances surrounding each individual case. The court identified three factors in particular that should be balanced in assessing the validity of a pre-indictment delay: (1) the actual prejudice resulting from the delay, as demonstrated by the defendant, on the one hand; and (2) the length of the delay; and (3) the reason for the delay on the other hand. In any case, regardless of the degree of actual prejudice resulting from the delay, a criminal prosecution should not be dismissed absent "some culpability on the government's part either in the form of intentional misconduct or negligence."  

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482. *Id.* at 324. In *Marion*, the Court found that there had been no showing of any prejudice to the defense and that there had been no showing that the government intentionally delayed the filing of the indictment to gain some tactical advantage. *Id.* at 325.
484. *See* United States v. Sand, 541 F.2d 1370, 1373 (9th Cir. 1976); United States v. Manning, 509 F.2d 1230, 1234 (9th Cir. 1974), *cert. denied*, 423 U.S. 824 (1975); United States v. Erickson, 472 F.2d 505, 507 (9th Cir. 1973).
485. 549 F.2d 670 (9th Cir. 1977).
486. *Id.* at 677.
487. *Id.*
488. *Id.* The court noted that "[i]o establish actual prejudice sufficient to warrant a dismissal, the defendant must show not only the loss of [a] witness and/or [physical] evidence but also [m]ust demonstrate how that loss is prejudicial to him." *Id.* (footnote omitted). Such a showing must be "definite and not speculative." *Id.* See also United States v. Galardi, 476 F.2d 1072, 1075 (9th Cir.), *cert. denied*, 414 U.S. 839 (1973) (allegation that missing witnesses "might have been useful" not sufficient showing of actual prejudice).
489. 549 F.2d at 678.
490. *Id.* See also United States v. Lovasco, 431 U.S. at 789-90; United States v. Marion, 404 U.S. at 324-25. The burden is on the government to justify the length of the pre-indictment delay. 549 F.2d at 678.
2. Post-Accusatorial Delay

a. Sixth Amendment Protection

The right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment."\(^\text{491}\) In *Barker v. Wingo*,\(^\text{492}\) the Court established a test by which claims of speedy trial violations are to be evaluated. The test is essentially an ad hoc balancing of the conduct of the government against the conduct of the defendant.\(^\text{493}\) Pursuant to *Barker*, four factors are to be considered by the trial court: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant.\(^\text{494}\) None of the four factors is a "necessary or sufficient condition to the finding of a deprivation of the right of speedy trial."\(^\text{495}\) Rather, the factors are related and "must be considered together with such other circumstances as may be relevant."\(^\text{496}\) The length of the delay is considered by both the Supreme Court\(^\text{497}\) and the Ninth Circuit\(^\text{498}\) to be the "triggering mechanism" which, when "presumptively prejudicial,"\(^\text{499}\) requires inquiry into the other factors.

In 1977, the Ninth Circuit repeatedly balanced the *Barker* factors in favor of the government, rejecting all sixth amendment claims of denial of a speedy trial.\(^\text{500}\)

\(^{492}\) 407 U.S. 514 (1972).
\(^{493}\) Id. at 530-33.
\(^{494}\) Id. at 530.
\(^{495}\) Id. at 533.
\(^{496}\) Id. In *Barker*, the Court identified three interests of the defendant that the speedy trial clause is designed to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Id. at 532 (footnote omitted). The most serious of the three is the defendant's interest in not having his defense impaired because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id.
\(^{497}\) Id. at 533.
\(^{498}\) See United States v. Simmons, 536 F.2d 827, 830-31 (9th Cir. 1976) (six-month delay sufficient to trigger further inquiry); United States v. Geelan, 520 F.2d 585, 587 (9th Cir. 1976) (six-year delay between indictment and arraignment presumptively prejudicial).
\(^{499}\) United States v. Simmons, 536 F.2d 827, 830-31 (9th Cir. 1976). "Unless there is a delay that is presumptively prejudicial, there is no need to inquire into the other factors of the balancing process." Id. at 831.
\(^{500}\) See Blackburn v. United States District Court, 564 F.2d 332, 334 (9th Cir. 1977 ) (per curiam) (delay of 14 weeks, 2 days between declaration of mistrial and final rescheduling of a retrial not unconstitutional where accused was free on bond and acquiesced in most of the delay, and there was no showing that defense had been impaired); United States v. Gaines, 563 F.2d 1352, 1356-57 (9th Cir. 1977) (delay of 137 days between indictment and trial not unreasonable especially where no claim of prejudice); United States v. Robles, 563 F.2d 1308, 1309 (9th Cir. 1977) (per curiam) (delay of three years between offense and retrial
Although none of the four factors is controlling, the Ninth Circuit has tended to focus on the factor involving prejudice to the defendant. In United States v. Gaines, the Ninth Circuit held that a delay of 137 days was not unreasonable, particularly in light of the fact that the defendant made no claim that he had been prejudiced by the delay. The prejudice-to-defendant factor, however, is not essential to a successful claim of denial of the right to a speedy trial.

In 1977, the Ninth Circuit reaffirmed its position that conclusory allegations of prejudice are not sufficient to demonstrate actual prejudice. When a defendant alleges that he has suffered anxiety and depression due to the delay, the court will require him to demonstrate that his suffering is more severe than that experienced by criminal defendants in general. The burden of proving such anxiety—especially for a defendant who is not being held in custody—is very difficult.

b. Statutory Protection

In an effort to reduce crime and "the danger of recidivism," Congress enacted the Speedy Trial Act of 1974 which imposes specific time periods within which an accused must be brought to trial.
The Act requires that if a defendant is being held in custody "solely for the purpose of awaiting trial," then he must be brought to trial within ninety days from the beginning of such continuous detention.\textsuperscript{513} In 1977, the Ninth Circuit held that a violation of the ninety-day period does not require dismissal but requires only that the defendant be released from custody for the remainder of the time necessary to bring him to trial.\textsuperscript{514} This holding is consistent with previous Ninth Circuit decisions.\textsuperscript{515} Continuances granted at the request of the defendant are excluded in calculating the ninety-day period.\textsuperscript{516} In \textit{United States v. Lemon},\textsuperscript{517} the Ninth Circuit held that a defendant who is being detained pending a determination as to his mental competency is not in detention "solely" for the purpose of awaiting trial.\textsuperscript{518} Consequently, such a detention is excluded in calculating the ninety-day period under the Act.\textsuperscript{519}
IV. CONFESSIONS

A. In General

In *Miranda v. Arizona*, the Supreme Court established procedural safeguards to protect the rights of defendants who are subjected to custodial interrogations. In general, the compulsive atmosphere inherent in the custodial questioning of defendants requires that a defendant be warned that he has a right to remain silent, that anything he says may be used against him, and that he has the right to the presence of an attorney, either retained or appointed.

B. When Miranda Warnings Are Required

Although *Miranda* only applies to custodial interrogations conducted or instigated by law enforcement officials, the Ninth Circuit has suggested that warnings might be required if a private investigator acts as the agent of, or at the suggestion of, such officials. Further, all questioning by the police is not considered to be "custodial." The police may ask investigatory questions without having given the *Miranda* warnings. Recently, in *United States v. Gaines*, the Ninth Circuit reaffirmed that police officers are not required to give the

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521. "Custodial interrogations" is a term of art which describes the point in criminal proceedings at which the *Miranda* safeguards become necessary to protect the defendant's privilege against self-incrimination. This point is reached "when [an] individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way." *Id.* at 477. *See also Developments in Criminal Law and Procedure in the Ninth Circuit, 1976: A Survey*, 10 Loy. L.A.L. Rev. 855, 916-17 nn.495-503 (1977) and accompanying text.
523. *Id.* at 444.
524. *See United States v. Parr-Pla*, 549 F.2d 660 (9th Cir.), *cert. denied*, 431 U.S. 972 (1977) (*Miranda* warnings not required when interrogation conducted by investigator employed by hotel); *United States v. Birmstihl*, 441 F.2d 368 (9th Cir. 1971) (per curiam) (*Miranda* does not apply to purely private interrogation).
525. *See also Byars v. United States*, 273 U.S. 28, 33-34 (1929) (the "substance" of the transaction determines whether a constitutional right has been violated); *United States v. Birmstihl*, 441 F.2d 368, 370 (9th Cir. 1971) (per curiam) (*Miranda* warnings may be required if court finds that private party acting as actual or ostensible police agent); *Corngold v. United States*, 367 F.2d 1, 4-5 (9th Cir. 1966) (constitutional protections apply when airport official opens suitcases at request of government agent); *Taglavore v. United States*, 291 F.2d 262, 266 (9th Cir. 1961) ("violation of a constitutional right by subterfuge cannot be justified").
526. *See Beckwith v. United States*, 425 U.S. 341 (1976) (*Miranda* does not apply in setting of voluntary interview between defendant and agents of Internal Revenue Service); *United States v. Walker*, 538 F.2d 266 (9th Cir. 1976) (per curiam) (*Miranda* does not apply when defendant voluntarily meets with government agents).
527. 563 F.2d 1352 (9th Cir. 1977).
Miranda warnings before asking routine investigatory questions in connection with a lawful vehicle stop. The Ninth Circuit has also held that Miranda-type warnings are not required at a probation revocation hearing, although other constitutional protections may be necessary.

C. Compliance with Miranda—Waiver of Miranda Protection

After proper Miranda warnings have been given, the defendant may waive his rights to consult with an attorney and to remain silent. The waiver must, however, be intelligent, voluntary and knowing. Moreover, a "heavy burden rests on the government to demonstrate that the defendant . . . waived his privilege against self-incrimination and his right to retained or appointed counsel." In determining whether there has been a knowing, voluntary, and intelligent waiver of Miranda rights, the focus is on the ability of the defendant to understand his constitutional protections. In United States v. Bowler, the Ninth Circuit affirmed the defendant's conviction on fraud by wire. In so doing, the court held that the evidence supported the finding that the defendant "not only understood his [Miranda] rights but exercised them intelligently, freely and voluntarily, answering some questions while refusing to answer others."  

528. Id. at 1358. The court denied relief in United States v. Hickman, 523 F.2d 323 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976), holding that investigatory questions could be posed to the occupants of a stopped automobile. The Gaines court, quoting United States v. Jones, 543 F.2d 1171, 1173 (5th Cir. 1976), cert. denied, 430 U.S. 957 (1977), stated that "several courts including this one have ruled that routine inquiries into the ownership of a stopped vehicle, the identity of its driver or occupants, and other such matters by law enforcement personnel do not constitute custodial interrogation . . . ." 563 F.2d at 1359 (emphasis in original).

529. See United States v. Hill, 548 F.2d 1380, 1381 (9th Cir. 1977) (warnings on privilege against self-incrimination not required at probation revocation hearing since no additional punishment could be imposed as the result of an admission).

530. Id. See also United States v. Segal, 549 F.2d 1293 (9th Cir.), cert. denied, 431 U.S. 919 (1977) (analysis of due process rights accorded to a defendant after a probation revocation hearing).


532. Id.


534. See, e.g., United States v. Indian Boy X, 565 F.2d 585, 591-92 (9th Cir. 1977); United States v. Bowler, 561 F.2d 1323, 1326 (9th Cir. 1977).

535. 561 F.2d 1323 (9th Cir. 1977).

536. Id. at 1326. The court upheld the district court's finding of a valid waiver, which finding involved "a determination of the credibility of conflicting testimony and consideration of Bowler's age, education, mental condition and articulateness, as well as the particular setting in which the statements were given." Id.
In *United States v. Ford*, the government demonstrated a valid waiver where the defendant had been informed of her *Miranda* rights in both English and Thai, her native language. In *United States v. Indian Boy X*, the Ninth Circuit upheld a juvenile's waiver of his *Miranda* rights since it appeared that "the examining officers were . . . scrupulously fair and deliberate in ascertaining that both 'X' and his parents understood his rights under *Miranda*."

A waiver is not irrevocable. A defendant may cut off questioning at any point, even after having initially waived his *Miranda* rights. Also, the mere refusal to answer some questions is not necessarily an assertion of the right to remain silent or a revocation of an earlier waiver. In *United States v. Ford*, the court found that "intermittent silences in response to certain questions did not effect a revocation of the waiver" where the record showed that defendant's "right to cut off questioning" was "scrupulously honored."

**D. Use of Evidence Obtained in Violation of *Miranda***

Although *Miranda* established the rule that evidence obtained during the interrogation of a defendant not properly informed of his rights is inadmissible, the use of statements obtained in violation of *Miranda* does not always necessitate a reversal of the conviction. In *United States v. Lemon*, the Ninth Circuit affirmed a bank robbery conviction despite some question as to whether statements of the defendant admitted into evidence were made before or after he was advised of his *Miranda* rights. The court stated that it did not believe that "any of the statements made by [defendant] contributed in any

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537. 563 F.2d 1366 (9th Cir. 1977).
538. *Id.*. The district judge found, after observing defendant in the courtroom, that she had a sufficient command of English to have understood her rights and that she voluntarily waived them.
539. 565 F.2d 585 (9th Cir. 1977).
540. *Id.* at 591-92. The court quoted DeSouza v. Barber, 263 F.2d 470, 476-77 (9th Cir.), *cert. denied*, 359 U.S. 989 (1959) regarding the competency of an infant to admit or waive his right to counsel: "Whether the confession of admission is competent depends not alone upon the infant's age, but also upon his intelligence, education, information, understanding and ability to comprehend." 565 F.2d at 592. The court further held that a waiver of *Miranda* rights is also a waiver of the right to prompt arraignment enunciated in McNabb v. United States, 318 U.S. 332 (1943) and Mallory v. United States, 354 U.S. 449 (1957). *Id.* at 591.
541. 384 U.S. at 473-74.
542. 563 F.2d 1366 (9th Cir. 1977).
543. *Id.* at 1366-67 (quoting Michigan v. Mosley, 423 U.S. 96, 104 (1975)).
544. 384 U.S. at 479.
545. 550 F.2d 467 (9th Cir. 1977).
way to his conviction" and held that the admission of the statements, even if they were obtained in violation of *Miranda*, was "harmless error beyond a reasonable doubt." Further, as established in *Brown v. Illinois*, the giving of *Miranda* warnings following an illegal arrest does not render admissible incriminating statements obtained as a result of the illegal arrest. The Ninth Circuit followed this holding in *United States v. Sanudo-Perez*, in which it concluded that the government had failed to meet its burden of proving that incriminating statements made after a *Miranda* warning were not the product of defendant's illegal arrest.

V. TRIALS

A. Elements of Crimes

1. Intent

The prosecution must establish criminal intent as an element of virtually every federal crime. If direct evidence is not available to prove the defendant's state of mind, then circumstantial evidence, from which the jury may draw inferences, may be introduced to prove the requisite criminal intent.

The degree of intent which the prosecution is required to prove var-

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546. Id. at 471.
547. Id. See also Milton v. Wainwright, 407 U.S. 371 (1972); Chapman v. California, 386 U.S. 18 (1967); United States v. Casimiro-Benitez, 533 F.2d 1121 (9th Cir.), cert. denied, 429 U.S. 926 (1976); United States v. Hatcher, 496 F.2d 529 (9th Cir. 1974).
548. 422 U.S. 590 (1975).
549. Id. at 603. See also *Wong Sun* v. United States, 371 U.S. 471, 487-88 (1963) (government not permitted to use defendant's admissions obtained as the result of an illegal arrest or detention unless it is demonstrated that the admissions were made under circumstances "sufficiently distinguishable to be purged of the primary taint").
550. 564 F.2d 1288 (9th Cir. 1977).
551. Id. at 1291.
552. See, e.g., *Smith* v. California, 361 U.S. 147, 150 (1959); Dennis v. United States, 341 U.S. 494, 500 (1951) (requirement of intent is rule rather than exception). Failure to allege the requisite intent in the indictment warrants dismissal of the complaint. United States v. Morrison, 536 F.2d 286, 289 (9th Cir. 1976); United States v. Pollack, 503 F.2d 87, 91 (9th Cir. 1974).
553. See, e.g., *United States v. Eaglin*, 571 F.2d 1069, 1076-77 (9th Cir. 1977) (jury is free to infer from circumstantial evidence that defendant was aware that person he aided was escaped prisoner); *United States v. Raftery*, 563 F.2d 965, 966 (9th Cir. 1977) (knowledge that hashish oil was being manufactured on premises inferred from evidence establishing defendant's general knowledge about drugs); *United States v. Ramos*, 558 F.2d 545, 547 (9th Cir. 1977) (defendant's intent to steal coffee inferred from facts surrounding theft and testimony of witness connecting defendant therewith); *United States v. Humphrey*, 549 F.2d 650, 653 (9th Cir. 1977) (intent to distribute inferred from strength of heroin and defendant's unemployed status).
ies according to the crime charged, and the degree required for any particular crime may be determined by examining the language of the statute and its legislative history.\footnote{554}

Federal statutes often require, as an element of the crime, proof that the defendant \textit{knowingly} performed the act.\footnote{555} Last term, in \textit{United States v. Jewell},\footnote{556} the Ninth Circuit approved an interpretation of the term “knowingly.” The \textit{Jewell} court concluded that a defendant’s deliberate avoidance of knowledge may be equated with actual knowledge upon a showing that the defendant acted with “an awareness of the high probability of the existence of the fact in question.”\footnote{557}

The Ninth Circuit in 1977 clarified the necessary elements of the “deliberate ignorance” doctrine as adopted in \textit{Jewell}.\footnote{558} A two-prong test must now be met before the doctrine will apply. There must be: (1) a subjective\footnote{559} awareness by the defendant of a high probability of the existence of the fact in question, and (2) a conscious or deliberate disregard of that probability by the defendant in order to remain ignorant of the fact.\footnote{560}

\footnote{554. United States v. Freed, 401 U.S. 601, 613-14 (1971) (Brennan, J., concurring).}
\footnote{555. \textit{See} United States v. McDaniel, 545 F.2d 642, 644 (9th Cir. 1976) (conviction reversed since jury not properly instructed that aiding and abetting firearm transportation must have been knowing).}
\footnote{556. 532 F.2d 697 (9th Cir.), \textit{cert. denied}, 426 U.S. 951 (1976).}
\footnote{557. \textit{Id.} at 700-04.}
\footnote{558. \textit{Compare} United States v. Valle-Valdez, 554 F.2d 911, 913-14 (9th Cir. 1977) \textit{and} United States v. Esquer-Gamez, 550 F.2d 1231, 1234-35 (9th Cir. 1977) \textit{with} United States v. Eaglin, 571 F.2d 1069, 1074-75 (9th Cir. 1977).}
\footnote{559. Subjectivity is required because a defendant, despite his awareness of the high probability of the fact in question, cannot be convicted if he actually believes that the fact in question does not exist or, in the case of possession of contraband, that the contraband was not present. \textit{United States v. Valle-Valdez}, 554 F.2d 911, 913 n.3 (9th Cir. 1977) citing \textit{United States v. Jewell}, 532 F.2d 697, 704 n.21 (9th Cir.), \textit{cert. denied}, 426 U.S. 951 (1976)).}
\footnote{560. \textit{See} United States v. Valle-Valdez, 554 F.2d 911, 913-14 (9th Cir. 1977). In this case, the court reversed defendant’s conviction under 21 U.S.C. § 841(a)(1) (1976) for possession of marijuana with intent to distribute. The trial court had issued the following instruction to the jury: The government has the burden of proving beyond a reasonable doubt that the Defendant had actual knowledge that marijuana was contained in the vehicle. It can meet that burden by proving beyond a reasonable doubt that the Defendant acted with a conscious purpose to avoid learning the truth of the contents of the vehicle. 554 F.2d at 913. The court held this jury instruction to be deficient in that it included the first prong of the “deliberate ignorance” test—defendant’s deliberate avoidance of learning the truth of what was in the vehicle—but failed to include the second prong of the test—defendant’s awareness of a high probability that the marijuana was present in the car. The effect of this omission was to allow the jury to convict the defendant even though it had not been proven that he possessed the marijuana “knowingly” as that word was interpreted in the \textit{Jewell} case. The instruction constituted reversible error. \textit{Id.} at 914.}
2. Conspiracy

"Conspiracy is established when there is an agreement to accomplish an illegal objective, coupled with one or more overt acts in furtherance of the illegal purpose and the requisite intent necessary to commit the underlying substantive offense." Thus the elements of conspiracy are: (1) an agreement between two or more persons to commit an unlawful act, (2) an overt act in furtherance of that agreement, and (3) intent. Once these elements have been established, only slight evidence is required to connect the defendant with the conspiracy. Such "slight evidence," however, must be sufficient to establish the defendant's knowledge of the conspiracy and his knowing acts in furtherance thereof; evidence which merely establishes the defendant's association with conspirators is insufficient.

The conspiracy may be prosecuted as a crime, separate and distinct from the substantive offense, but "when knowledge of a fact is required to convict for a substantive offense, knowledge is also required to convict for conspiracy to commit the substantive offense." The "deliberate ignorance" doctrine may therefore be employed in a conspiracy prosecution.

When a conspiracy indictment charges one conspiracy and the proof at trial shows several independent conspiracies, the resulting conviction may be reversed if such variance between allegations and proof prejudices the substantive rights of the defendant. In 1977, the Ninth Circuit reaffirmed its position that one single conspiracy may be found when there is a general agreement among several defendants to

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561. United States v. Orpeza, 564 F.2d 316, 321 (9th Cir. 1977) (citing United States v. Monroe, 552 F.2d 860, 862 (9th Cir.), cert. denied, 431 U.S. 972 (1977)). See also United States v. Thompson, 493 F.2d 305, 310 (9th Cir.), cert. denied, 419 U.S. 834 (1974).
562. United States v. Kearney, 560 F.2d 1358, 1362 (9th Cir.), cert. denied, 429 U.S. 841 (1977); United States v. Peterson, 549 F.2d 654, 657 (9th Cir. 1977). See also United States v. Carpio, 547 F.2d 490, 492 (9th Cir. 1976); United States v. Cruz, 536 F.2d 1264, 1266 (9th Cir. 1976); United States v. See, 505 F.2d 845, 856 (9th Cir. 1974).
563. United States v. Basurto, 497 F.2d 781, 793 (9th Cir. 1974), questioned on other grounds, 566 F.2d 649 (9th Cir. 1977) (mere association and activity with marijuana smugglers insufficient to support conspiracy allegation). See also Ong Way Jong v. United States, 245 F.2d 392, 394 (9th Cir. 1957) (to infer conspiracy solely from association is classic non sequitur).
564. See Pereira v. United States, 347 U.S. 1, 11 (1954); United States v. Ohlson, 552 F.2d 1347 (9th Cir. 1977).
565. United States v. Eaglin, 571 F.2d 1069, 1074 (9th Cir. 1977) (quoting United States v. Bekowies, 432 F.2d 8, 14 (9th Cir. 1970)).
566. See notes 556-60 supra and accompanying text.
567. See cases cited in note 564 supra.
perform various functions in carrying out the conspiratorial objectives. The existence of an overall scheme may be established upon proof that each defendant knew, or had reason to know, that others were involved in a broad project with an illegal purpose, and that his benefits were probably dependent upon the success of the entire operation.

3. Lesser Included Offenses

The Federal Rules of Criminal Procedure permit the jury to find a defendant guilty of a crime not alleged in the indictment if the non-alleged crime is necessarily included in the charged offense. In United States v. Whitaker, the District of Columbia Circuit developed the "inherent relationship" test for determining whether a crime may be considered a lesser included offense. Under this test, when two crimes relate to a violation of the same interests and are related in such a way that proof of the lesser crime is presented as part of the greater, the requisite inherent relationship is satisfied.

The inherent relationship test was adopted by the Ninth Circuit in United States v. Stolarz. Defendant was indicted for assault with intent to commit murder but found guilty of assault with a dangerous weapon with intent to do bodily harm. Reasoning that both

570. United States v. Kearney, 560 F.2d 1358, 1362 (9th Cir. 1977) (where evidence indicated defendant knew or had reason to know of broad project to transport narcotics, conspiracy allegation sustained). See also United States v. Monroe, 552 F.2d 860, 862-63 (9th Cir.), cert. denied, 431 U.S. 918 (1977); United States v. Perry, 550 F.2d 524, 528-29, 532-33 (9th Cir.), cert. denied, 431 U.S. 918 (1977); United States v. Baxter, 492 F.2d 150, 158 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974). The government, moreover, need not prove that an alleged co-conspirator knew all the purposes of and all of the participants in the conspiracy. United States v. Kearney, 560 F.2d 1358, 1362 (9th Cir. 1977); United States v. Hobson, 519 F.2d 765, 775 (9th Cir.), cert. denied, 423 U.S. 931 (1975).
572. 447 F.2d 314 (D.C. Cir. 1971).
573. Id. at 319.
574. 550 F.2d 488 (9th Cir.), cert. denied, 434 U.S. 851 (1977).
575. Defendant was indicted under 18 U.S.C. § 113(a) (1976), which provides:
Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:
(a) Assault with intent to commit murder or rape, by imprisonment for not more than twenty years.
576. The conviction was pursuant to 18 U.S.C. § 113(c) (1976), which provides:
Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:
(c) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine of not more than $1,000 or imprisonment for not more than five years, or both.
offenses related to the same interest in preventing and punishing assaults, and that proof of the lesser crime was presented as part of the greater,\textsuperscript{577} the \textit{Stolarz} court concluded that the defendant could properly be convicted of the lesser included offense.\textsuperscript{578}

4. Crimes Involving Federal Regulation of Firearms

Congress, through the Gun Control Act of 1968,\textsuperscript{579} has provided a comprehensive plan for the regulation and control of firearms. Section 922(h) of the Act makes it illegal for a felon to receive any firearm or ammunition which has been transported in interstate commerce.\textsuperscript{580} In several 1977 cases, the Ninth Circuit construed the words “firearms” and “receive . . . in interstate commerce” as those terms are used in section 922(h).

The defendant in \textit{United States v. Mitchell},\textsuperscript{581} convicted under section 922(h), contended that the word “firearm” excluded rifles and shotguns used for hunting or sporting purposes. While recognizing that other sections of the Gun Control Act not dealing with felons may provide exemptions for hunting guns, the Ninth Circuit held that section 922(h) contains no such exemption.\textsuperscript{582} The court’s examination of the legislative history and the language of the Gun Control Act indicated that the purpose of section 922(h) is to remove \textit{all} firearms from the possession of felons.\textsuperscript{583} Felons are “persons Congress classified as potentially irresponsible and dangerous. These persons are \textit{comprehensively} barred by the [Gun Control] Act from acquiring firearms by any means.”\textsuperscript{584}

\textsuperscript{577} The court recognized that since an assault with intent to murder may be committed without the use of a dangerous weapon, an assault with a dangerous weapon with intent to do bodily harm is not \textit{always} a lesser included offense. 550 F.2d at 491. In \textit{Stolarz} the assault was committed with a dangerous weapon, namely a knife.

\textsuperscript{578} 550 F.2d at 492. The Ninth Circuit also discussed notice to the defendant of the lesser offense. Such notice is required to prevent undue surprise. The court indicated that the notice requirement is satisfied if the indictment reveals sufficient facts to alert the defendant that a lesser charge clearly exists. \textit{Id.}


\textsuperscript{580} \textit{See} 18 U.S.C. § 922(h) (1976) which provides:

\begin{quote}
It shall be unlawful for any person—
\begin{enumerate}
\item 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.
\end{enumerate}
\end{quote}

\textsuperscript{581} 557 F.2d 1290 (9th Cir. 1977).

\textsuperscript{582} \textit{Id.} at 1291.

\textsuperscript{583} \textit{Id.} at 1291-92.

\textsuperscript{584} \textit{Id.} at 1292 (quoting \textit{Barrett v. United States}, 423 U.S. 212 (1976)) (emphasis added). \textit{See also} \textit{United States v. Haddad}, 558 F.2d 968 (9th Cir. 1977).
The Mitchell court also addressed the issue of when the receipt of a firearm by a felon has a sufficient nexus with interstate commerce to warrant the application of section 922(h). Relying on the reasoning of a recent United States Supreme Court decision, the Ninth Circuit held that the nexus with interstate commerce is satisfied if the firearm has at some point in time been transported interstate. Thus, the firearm need not be received directly from the stream of interstate commerce. Section 922(h) is applicable to a felon's receipt of a firearm even when the interstate movement of that firearm occurred prior to the passage of the Gun Control Act. The felon's knowledge of the movement of the firearm in interstate commerce at some point in time is not, however, an element of the crime. It is the felon's receipt of the weapon which is the central element of a section 922(h) violation.

5. Crimes Involving the Illegal Entry of Aliens

The Immigration and Nationality Act governs the admission and deportation of persons who are not United States citizens or nationals. The Act provides penalties for actions deemed to be subversive of congressional intent. Section 1324(a)(2) of Title 8, United States Code, for example, proscribes the knowing transportation of an alien in furtherance of the alien's unlawful presence in the United States.

Charged with a violation of section 1324(a)(2), the defendant in United States v. Moreno contended that employment situations and incidents thereof were automatically outside the scope of the Act. Although it reversed defendant's conviction, the Ninth Circuit rejected any such blanket exemption for employment-related transportation of

586. 557 F.2d at 1292. See Scarborough v. United States, 431 U.S. 563 (1977) (the nexus with interstate commerce requirement does not require "contemporaneous" interstate movement for purposes of 18 U.S.C. § 1202(a)(1) (1976), which prohibits possession of firearms by felons). Prior to Scarborough, there had been a conflict within the Ninth Circuit whether proof of prior movement in interstate commerce was sufficient to establish a nexus. Compare United States v. Malone, 538 F.2d 250 (9th Cir. 1976) (movement of weapons 6 and 18 months prior to defendant's possession thereof was insufficient nexus) and United States v. Cassity, 509 F.2d 682 (9th Cir. 1974) (shipment of rifle 7 years prior to defendant's purchase thereof was insufficient nexus) with United States v. Burns, 529 F.2d 114 (9th Cir. 1975) (shipment of gun 11 months prior to defendant's possession thereof was sufficient nexus).
587. 557 F.2d at 1292.
588. United States v. Haddad, 558 F.2d 968, 974 (9th Cir. 1977).
592. 561 F.2d 1321 (9th Cir. 1977).
illegal aliens. After considering the probable legislative intent, the Ninth Circuit concluded that to fall within the scope of the Act the transportation of an undocumented alien must bear a direct and substantial relationship to the furtherance of the alien's unlawful presence in this country. The defendant's transportation of aliens, as a part of his employment duties, had only a tangential connection with the alien's domestic presence; such an attenuated relationship is insufficient to fall within the proscriptions of section 1324(a)(2). 

B. Severance

The primary purpose of Federal Rule of Criminal Procedure 8(b), which governs joinder of defendants, is the promotion of efficiency in the administration of justice. Proper joinder pursuant to rule 8(b) requires that the charges against the defendants arise out of "the same series of acts or transactions constituting an offense . . . ."

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593. The statutory language specifically excludes employment situations from the harboring proscription of § 1324(a)(3); the exclusion, however, is limited to harboring only and does not apply to the transportation proscriptions of § 1324(a)(2). See United States v. Moreno, 561 F.2d 1321, 1322 (9th Cir. 1977).

594. 561 F.2d at 1322. Last term, in United States v. Gonzalez-Hernandez, 534 F.2d 1353 (9th Cir. 1976), the Ninth Circuit indicated that the following five factors must be present before a conviction under § 1324(a)(2) is proper: (1) defendant transported alien in the United States; (2) alien was not lawfully admitted into or entitled to enter the United States; and (3) this was known by defendant; (4) defendant knew alien's entry was within the last three years; and (5) defendant acted willfully in furtherance of alien's violation of the law. Id. at 1354. The court in Moreno did not acknowledge the existence of this five-prong test, other than to mention that "[t]his court in Gonzalez-Hernandez . . . left open exactly what constitutes in furtherance of the alien's violation of the law under § 1324(a)(2)." 561 F.2d at 1323.

595. Id. at 1322-23.

596. FED. R. CRIM. P. 8(b) provides:
Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.


598. United States v. Roselli, 432 F.2d 879, 898 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971) (quoting FED. R. CRIM. P. 8(b)). See United States v. Kearney, 560 F.2d 1358, 1362 (9th Cir.), cert. denied, 434 U.S. 826 (1977) in which the court rejected appellants' contention that the Government had erred by joining several "discrete" conspiracies into a single conspiracy count, thereby prejudicing them by guilt transference. The court stated that "[t]he standard for determining the existence of a single conspiracy . . . is whether there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy . . . ." Id. See also Williamson v. United States, 310 F.2d 192, 197 n.16 (9th Cir. 1962) (each count must arise out of the same series of acts or transactions).
this standard the Ninth Circuit most often requires a showing that "substantially the same facts . . . be adduced to prove each of the joined offenses." That the violations charged are merely similar in character is insufficient to warrant joinder.

In United States v. Satterfield, for example, appellant and a codefendant were joined in a single indictment charging five bank robberies. Both defendants were alleged to have committed two of the robberies, but the codefendant alone was charged with commission of those remaining. The government, moreover, did not allege that appellant was involved in these latter offenses. Although claiming improper joinder, appellant's rule 8(b) motion for severance was denied. Focusing upon the evidence presented at trial, which pertained largely to those offenses alleged to have been committed by the codefendant alone, the Ninth Circuit reasoned that had separate trials occurred, this evidence would have been largely irrelevant as to appellant. As substantially the same facts would not have been adduced at separate trials, the requisite "nexus between each offense . . . was absent" and joinder was, therefore, improper.

A defendant properly joined under rule 8(b) may, however, move for severance pursuant to rule 14 where prejudicial joinder may deny him a fair trial. Such motions to sever must be timely made and

599. United States v. Satterfield, 548 F.2d 1341, 1344 (9th Cir. 1977).
600. Id. (quoting United States v. Roselli, 432 F.2d 879, 898 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971)).
601. 548 F.2d 1341 (9th Cir. 1977).
602. Id. at 1345.
603. Id.
604. FED. CRIM. P. 14 provides:
If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at trial.
605. See 8 MOORE'S FEDERAL PRACTICE ¶ 14.02, at 14-3 (2d ed. 1948). The leading case in this area is Bruton v. United States, 391 U.S. 123 (1968). In Bruton the trial court was held to have violated the defendant's constitutional rights by denying severance. Evans and Bruton were indicted for armed postal robbery. At their joint trial a postal inspector testified that Evans had confessed that both he and an unnamed accomplice had committed the crime. Bruton was therefore implicated. The trial court admonished the jury that this statement was inadmissible hearsay against Bruton and should therefore be disregarded. Although the confession was competent evidence against Evans, the Supreme Court, in reversing Bruton's conviction, held that "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extra-judicial statements in determining [Bruton's] guilt, admission of Evans' confession in this joint trial violated [Bruton's]
preserved through renewal at the conclusion of trial. Unlike a rule 8(b) motion, which raises misjoinder as an issue of law, a motion pursuant to rule 14 is within the sound discretion of the trial court. The defendant, moreover, bears the heavy burden of demonstrating that the court abused its discretion by denying severance. In this connection, "the test is whether a joint trial is so prejudicial to one defendant as to require the exercise of that discretion in only one way, that is, by ordering a separate trial."

The Ninth Circuit found this discretion clearly abused in United States v. Vigil. Appellant and his codefendant were indicted for heroin importation. The codefendant claimed he was unaware of the presence of heroin in the vehicle at the time of his arrest, asserting in addition that he hardly knew appellant. Seeking appellant's corroboration, codefendant moved for severance in order that appellant might testify for him. The trial court was also informed that, although appellant would not testify at a joint trial, he would be willing to testify at a separate trial. While recognizing the importance of appellant's potentially exonerating testimony, the court nonetheless denied the motion, assuming instead that appellant might later decide to testify at the joint trial. Concluding that the trial court should have relied upon the "right of cross-examination secured by the Confrontation Clause of the Sixth Amendment."

Defendants may base assertions of prejudicial joinder upon various allegations, although reversal requires a clear showing of abuse of the trial court's discretion. See United States v. Garrett, 565 F.2d 1065 (9th Cir. 1977) (no severance required in joint trial of husband and wife where the court was informed that codefendant husband would, if necessary, exercise marital privilege to prevent wife from testifying and wife did not testify); U.S. v. Gaines, 563 F.2d 1352 (9th Cir. 1977) (disparity in proofs not sufficient to allow severance if jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants); United States v. Nace, 561 F.2d 763 (9th Cir. 1977) (evidence admissible against one of two defendants did not demonstrate prejudice requiring severance).

606. United States v. Kaplan, 554 F.2d 958, 965-66 (9th Cir. 1977) (per curiam); United States v. Figueroa-Paz, 468 F.2d 1055, 1057 (9th Cir. 1972).

607. See United States v. Friedman, 445 F.2d 1076, 1082 (9th Cir.), cert. denied, 404 U.S. 958 (1971).

608. Schaffer v. United States, 362 U.S. 511, 575 (1960). See United States v. Oropeza, 564 F.2d 316, 326 (9th Cir. 1977) (reversal proper only where defendant can demonstrate abuse of discretion); United States v. Gulma, 563 F.2d 386, 391 (9th Cir. 1977) (reversal proper only if discretion abused).

609. United States v. Cella, 568 F.2d 1266, 1288 (9th Cir. 1977). See also United States v. Oropeza, 564 F.2d 316, 326 (9th Cir. 1977); United States v. Wood, 550 F.2d 435, 439 (9th Cir. 1977); United States v. Campanale, 518 F.2d 352, 359 (9th Cir.), cert. denied, 423 U.S. 1050 (1976).

610. United States v. Kaplan, 554 F.2d 958, 966 (9th Cir.), cert. denied, 98 S. Ct. 483 (1977); accord, United States v. Cella, 568 F.2d 1266, 1288 (9th Cir. 1977).

611. 561 F.2d 1316 (9th Cir. 1977).
reason that appellant would testify, the Ninth Circuit observed that "[w]hen the reason for severance is the asserted need for a codefendant's testimony, the defendant must show that he would call the codefendant at a severed trial, that the codefendant would in fact testify, and that the testimony would be favorable to the moving defendant." Having satisfied this burden, the defendant in Vigil should have been granted a separate trial.

C. Conduct of the Trial

1. Conduct of the Trial Judge

The important responsibility of the trial judge to promote a fair trial has been consistently recognized by both the United States Supreme Court and the Ninth Circuit. In the execution of this responsibility, the court has necessarily been afforded a wide latitude of discretion both to regulate and to participate in the trial proceedings. The trial judge may, for example, grant or deny continuances and mistrials.

612. Id. at 1317; accord, United States v. Kaplan, 554 F.2d 958, 966 (9th Cir.) (per curiam), cert. denied, 98 S. Ct. 483 (1977); United States v. Wood, 550 F.2d 435, 439 (9th Cir. 1977).

613. Geders v. United States, 425 U.S. 80, 86 (1976) (court conduct unreasonable where defendant prevented from consulting with attorney during 17 hour recess) ("[t]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct . . . .") (quoting Quercia v. United States, 289 U.S. 466, 469 (1933)); United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975) (per curiam) (pro se defense does not allow court to assume exclusive responsibility of witness examination) ("The trial judge is charged with the responsibility of conducting the trial as fairly and impartially as possible."); Smith v. United States, 305 F.2d 197, 205 (9th Cir.), cert. denied, 371 U.S. 890 (1962) (court participation in witness examination not error where cumulative effect does not deny fair trial) ("A federal trial judge . . . has the responsibility to preside in such a way as to promote a fair and expeditious development of the facts unencumbered by irrelevancies.").

614. Geders v. United States, 425 U.S. 80, 86-87 (1976). Mr. Chief Justice Burger succinctly observed that "[t]he trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process . . . . If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings." Id. (citations omitted). See also United States v. Marshall, 532 F.2d 1279, 1286 (9th Cir. 1976) (refusal to allow defense counsel in summation to read into record portions of unrelated court opinions not error); United States v. Larson, 507 F.2d 385, 389 (9th Cir. 1974) (per curiam) (court participation in witness examination insufficiently prejudicial to warrant reversal); Robinson v. United States, 401 F.2d 248, 252 (9th Cir. 1968) (court questioning of witness did not approach outer limits of broad discretion to manage trial); Smith v. United States, 305 F.2d 197, 205 (9th Cir.), cert. denied, 371 U.S. 890 (1962) (court participation in examination not error if cumulative effect does not deny fair trial).

615. United States v. Jones, 564 F.2d 1315, 1316 (9th Cir. 1977) (per curiam) (not abuse of discretion to deny continuance where calendar long established and no acceptable justification for delay submitted); United States v. Thompson, 559 F.2d 552, 553 (9th Cir. 1977) (per curiam), cert. denied, 434 U.S. 973 (1977) (denial of continuance for production of absent
institute necessary security precautions, exclude cumulative evidence, or restrict the scope and extent of cross-examination.

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617. United States v. Bracy, 566 F.2d 649, 659 (9th Cir. 1977) (not error to permit plainclothes marshalls within courtroom at narcotics trial where case involved testimony of threatened witness). See also United States v. Clardy, 540 F.2d 439, 442-44 (9th Cir.), cert. denied, 429 U.S. 963 (1976) (not error to permit plainclothes marshalls within courtroom where terrorist attack possible and cautionary instruction given).

618. United States v. Henry, 560 F.2d 963, 965-66 (9th Cir. 1977) (limitation on number of character witnesses permitted where no showing made that additional witnesses would offer new evidence). See also Hamling v. United States, 418 U.S. 87, 127 (1974) ("The District Court retains considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative."); United States v. Fernandez, 497 F.2d 730, 735-36 (9th Cir. 1974), cert. denied, 420 U.S. 990 (1975) (needless presentation of cumulative evidence may be excluded at discretion of trial judge); Loux v. United States, 389 F.2d 911, 917 (9th Cir.), cert. denied, 393 U.S. 867 (1968) ("[t]he court needs the right to impose some limitation on the number of witnesses testifying about a particular fact. Decision as to how many must be left to the sound discretion of the judge.").

619. Skinner v. Cardwell, 564 F.2d 1381, 1388-89 (9th Cir. 1977) (not error to refuse defense cross-examination on collateral matter for impeachment purposes where information only marginally relevant and jury otherwise possessed sufficient information to appraise bias and motives of witness). See also United States v. Wood, 550 F.2d 435, 440 (9th Cir. 1976) (not error to restrict cross-examination of prosecution informant witness); United States v. Trejo, 501 F.2d 138, 140 (9th Cir. 1974) (court has broad discretion to curtail cross-examination on collateral matters); United States v. Haili, 443 F.2d 1295, 1299 (9th Cir. 1971) (court discretion to curtail scope of cross-examination not abusive unless right of confrontation denied); Enciso v. United States, 370 F.2d 749, 751 (9th Cir. 1967) (curtailment of cross-examination of drug informant witness not error).

In *Skinner v. Cardwell*, the Ninth Circuit enunciated for the first time the standard to be used in evaluating the trial court's discretion to curtail otherwise relevant cross-examination. Recognizing the need to balance the right of the defendant to cross-examine adverse witnesses against the need to exclude marginally relevant and unnecessary testimony, the *Skinner* court concluded:

The test for whether cross-examination about a relevant topic was effective, i.e., whether the trial court has abused its discretion, is whether the jury is otherwise in possession of sufficient information upon which to make a discriminating appraisal of the subject matter at issue. When the refused cross-examination relates to impeachment evidence, we look to see whether the jury had sufficient information to appraise the bias and motives of the witness.

The court's discretionary authority over the trial proceedings further extends to selection of the type and language of jury instructions, and the decision to discharge or poll jurors, or to sequester wit-

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621. 564 F.2d 1381 (9th Cir. 1977).


624. United States v. Thompson, 559 F.2d 552, 553 (9th Cir.) (per curiam), *cert. denied*, 434 U.S. 973 (1977) ("A court is not bound to accept the language of an instruction requested by counsel if the court gives it in substance."); United States v. Garcia-Rodriguez, 558 F.2d 956, 965-66 (9th Cir. 1977) ("A trial judge need not give an instruction proposed by counsel for either side, provided he gives adequate instructions on each element of the case."); Amsler v. United States, 381 F.2d 37, 52 (9th Cir. 1967) (court not bound to accept proffered language nor give requested instruction).

625. United States v. Lustig, 555 F.2d 737, 745-46 (9th Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978) (appellant's rights not violated by discharge of juror prejudice, when replacement with alternate approved by defense). *See also* United States v. Zambito, 315 F.2d 266, 269 (9th Cir.), *cert. denied*, 373 U.S. 924 (1963) (not error to discharge juror without hearing following disclosure in chambers of juror after disclosure in chambers of untruthful voir dire response).

626. United States v. Lustig, 555 F.2d 737, 746 (9th Cir. 1977), *cert. denied*, 434 U.S. 1045
nesses.627 Provided he maintains the requisite neutrality,628 the trial judge may actively participate in the criminal trial through questioning witnesses629 or commenting to the jury.630 In United States v. Allsup,631 however, the effect of the judge's otherwise permissible intervention

(1978). See also Shibley v. United States, 237 F.2d 327, 334 (9th Cir.), cert. denied, 352 U.S. 837 (1956) (court has discretion as to manner of polling jury).

627. United States v. Oropeza, 564 F.2d 316, 326 (9th Cir. 1977). See also Geders v. United States, 425 U.S. 80, 87-91 (1976) (error to preclude defendant from conferring with counsel during 17 hour recess); Taylor v. United States, 388 F.2d 786, 788 (9th Cir. 1967) (refusal to permit defense to call witness in courtroom in violation of sequestration order error where testimony important). The Court in Geders, importantly, distinguished the impact of a sequestration order on the defendant from that on a non-party witness, holding that, in light of alternative means of avoiding improper influence or coached testimony, an order preventing the defendant from consulting his attorney for any purpose during a 17 hour recess violated his sixth amendment right to the assistance of counsel. 425 U.S. at 88, 91.

The choice of sanctions for violation of a sequestration order falls within the discretion of the court. It is clear that a witness present in the courtroom while under such an order is not automatically disqualified, but may testify at the discretion of the court. United States v. Oropeza, 564 F.2d at 326; Taylor v. United States, 388 F.2d at 788; Spindler v. United States, 336 F.2d 678, 682 (9th Cir. 1964), cert. denied, 380 U.S. 909 (1965) (disqualification for violation of sequestration order not automatic; sanctions within court discretion).

628. The Ninth Circuit, of course, continues to recognize the importance of the appearance of neutrality in this context.

While the trial judge has a broad discretion with respect to his interrogation of witnesses, he must always be sensitive to his role as judge and the fact that in the eyes of the jury he "occupies a position of preeminence and special persuasiveness" and accordingly "be assiduous in performing his function as governor of the trial dispassionately, fairly and impartially." United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975) (per curiam) (quoting Pollard v. Fennell, 400 F.2d 421, 424 (4th Cir. 1968)). See also United States v. Pena-Garcia, 505 F.2d 964, 967 (9th Cir. 1974) (cumulative effect of court's questioning of alien required reversal) ("[t]he judge cannot conduct his questioning in such manner as to convey to the jury the impression that he has formed an opinion as to the truth of the witness' statement or the verdict that should be returned. [Nor may] the judge . . . usurp [the] role [of] competent counsel."); United States v. Harris, 501 F.2d 1, 10 (9th Cir. 1974) (court must avoid even appearance of advocacy or partiality); United States v. Malcolm, 475 F.2d 420, 427-28 (9th Cir. 1973) (court interruption of prosecution cross-examination and closing argument not error).

629. United States v. Cornfeld, 563 F.2d 967, 971 (9th Cir. 1977) (per curiam), cert. denied, 435 U.S. 922 (1978) (questioning permitted to clear up ambiguities and clarify issues for jury). See also United States v. Larson, 507 F.2d 385, 389-90 (9th Cir. 1974) (per curiam) (court participation in examination insufficiently prejudicial to warrant reversal); United States v. Aguilar, 472 F.2d 553, 555 (9th Cir. 1972) (per curiam) (court examination to elicit answers in greater detail permitted); Smith v. United States, 305 F.2d 197, 204-05 (9th Cir.), cert. denied, 371 U. S. 890 (1962) (court participation in examination not error where cumulative effect does not deny fair trial).

630. United States v. Lustig, 555 F.2d 737, 751 (9th Cir. 1977), cert. denied, 434 U.S. 1045 (1978) (although no prejudice possible because jury had retired, court retains right of fair comment). See also United States v. Diaz-Rodriguez, 478 F.2d 1005, 1006 (9th Cir.) (per curiam), cert. dismissed, 412 U.S. 964 (1973) (not error to comment on evidence when it is made clear that jury is ultimate fact-finder); Duke v. United States, 255 F.2d 721, 728 (9th
into defense cross-examination was to rehabilitate a prosecution witness whose eyewitness identification had been seriously undermined by defense counsel. The Ninth Circuit found this participation improper, observing that "[t]he impact of the district court's interrogation was to destroy the effect of telling cross-examination, to rehabilitate the witness, and to give her testimony an extra and a potentially prejudicial persuasiveness."632

Only an egregious exercise of this discretionary authority over the trial proceedings will justify reversal on appeal.633 "[U]nless [the trial judge's] misadventures so persistently pervade the trial or, considered individually or together, are of such magnitude that a courtroom climate unfair to the defendant is discernable from the cold record, the defendant is not sufficiently aggrieved to warrant a new trial."634

To obtain effective review of the trial environment and any alleged abuse of discretion on the part of the trial judge, a complete and accurate record of the trial proceedings is required. It is therefore mandatory that all proceedings in open court, especially the opening and closing statements of counsel, be recorded by the court reporter.635 Where there is a failure to record any part of the proceedings, the appropriate remedy may be to vacate the judgment and remand the case to determine whether an appellant was prejudiced by such error.636

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631. 566 F.2d 68 (9th Cir. 1977).
632. Id. at 73.
633. United States v. Marshall, 532 F.2d 1279, 1286 (9th Cir. 1976) ("We have long held that the trial judge's discretion in his management of the trial is wide, and that prejudicial error is committed only when that discretion is abused.").
634. Smith v. United States, 305 F.2d 197, 205 (9th Cir.), cert. denied, 371 U.S. 890 (1962). See also United States v. Stanfield, 521 F.2d 1122, 1125-26 (9th Cir. 1975) (per curiam) (trial judge's opening statement for both sides that obscured correct standard for jury consideration of evidence constituted prejudicial error).

Although the Ninth Circuit stressed that voir dire examinations, opening and closing statements of counsel and bench conferences when requested by court or counsel should be included in the record, it acknowledged that "not . . . every word spoken during a criminal trial must be recorded," indicating that pre-charge, in-chambers discussions of court and counsel probably fall outside the ambit of the statute. 559 F.2d at 547-48. Of course, the defendant may at trial waive the requirements of the statute (28 U.S.C. § 753(b)). Id. at 550.

636. United States v. Piascik, 559 F.2d 545, 547 (9th Cir. 1977), cert. denied, 434 U.S. 1062 (1978). "The appropriate procedure [on appeal] is to vacate the judgment and remand for a hearing to determine whether appellant was prejudiced by the error in failing to record the
2. Conduct of the Prosecutor

That the United States Attorney must conform to a high standard of conduct in the exercise of his prosecutorial discretion is beyond doubt. This discretion is necessarily broad, as to both the cases to be tried and the charges to be filed, and pursuant to the separation of powers is generally immune from judicial review.

The prosecutor, however, may be neither unconstitutionally selective nor unconstitutionally aggressive. If [so], a new trial may be ordered. If [not], a new final judgment may be entered. See United States v. Agurs, 427 U.S. 97, 110-11 (1976) (prosecutorial nondisclosure of unrequested information must create reasonable doubt of guilt not otherwise extant to warrant reversal) (citing Berger v. United States, 295 U.S. 78, 88 (1935)); Berger v. United States, 295 U.S. 78, 88 (1935) where Mr. Justice Sutherland observed:

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. . . . [H]is twofold aim. . . . is that guilt shall not escape or innocence suffer. . . . [W]hile he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. Moroyoqui v. United States, 570 F.2d 862, 864 (9th Cir. 1977) (prosecutor may not "goad" defendant into requesting mistrial); United States v. Segna, 555 F.2d 226, 234 (9th Cir. 1977) (highly emotionally charged testimony of decedent's wife introduced by prosecutor, admitted in absence of objection) ("[S]uch an intentional injection of sympathy and prejudice falls far below the standard of conduct that should be expected of a responsible representative of the United States Attorney.") (Gray, District J., sitting by designation, dissenting); United States v. Polizzi, 500 F.2d 856, 892 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975) (improper closing remarks implying defendant was violent cured by cautionary instruction) ("The prosecution, as the representative of the government, is expected to follow high standards in conducting its case. . . . [B]ut during an extensive and fiercely contested trial, we cannot realistically expect perfection.").

638. United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976) (retrial of indictment impermissible but prosecutor retains discretion as to initial charges); United States v. Olson, 504 F.2d 1222, 1225 (9th Cir. 1974) (dismissal of multi-count indictment reversed when trial judge improperly attempted to limit prosecutor to single count); Spillman v. United States, 413 F.2d 527, 530 (9th Cir.), cert. denied, 396 U.S. 930 (1969) (prosecution decision contra to voluntary Justice Department memorandum not subject to court review) ("The United States Attorney must be given wide latitude in order to effectively enforce the federal criminal laws.").

639. United States v. Olson, 504 F.2d 1222, 1225 (9th Cir. 1974) ("[A]s an incident of the constitutional separation of powers . . . the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.") (quoting United States v. Cox, 342 F.2d 167,171 (5th Cir.), cert. denied, 381 U.S. 935 (1965)); United States v. Gray, 448 F.2d 164, 168-69 (9th Cir. 1971), cert. denied, 405 U.S. 926 (1972) (district court not authorized, without prosecutorial consent, to accept guilty pleas to lesser included offenses); Spillman v. United States, 413 F.2d 527, 530 (9th Cir.), cert. denied, 396 U.S. 930 (1969) (prosecution decision contra to voluntary Justice Department memorandum not subject to court inquiry); In re United States, 306 F.2d 737, 738 (9th Cir. 1962) (improper dismissal of three counts of four count indictment on ground that one count imposed sufficient sentence denied executive branch right to prosecute).
in initiating charges against the accused, nor vindictive in retaliation for the defendant’s successful assertion of procedural rights.

In *United States v. Thurnhuber*, for example, the defendant was originally indicted and tried on one count of federal credit fraud. Following the district court’s sua sponte declaration of a mistrial, the government filed a superseding indictment charging the defendant with three counts of fraud; the defendant was convicted on all three counts. Although reemphasizing “that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive,” the Ninth Circuit reasoned that this presumption was inapplicable because the mistrial was declared, not in response to a defense motion, but on the court’s own initiative. The *Thurnhuber* court further observed that the presumption of retaliation “arises only as a shield against the possibility of actual vindictiveness and not against

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640. A successful allegation of selective prosecution requires the claimant to establish a prima facie case of discrimination by demonstrating first “that others similarly situated generally have not been prosecuted for conduct similar to that for which he was prosecuted [and] secondly . . . that his selection was based on an impermissible ground such as race, religion or his exercise of his first amendment right of free speech.” *United States v. Scott*, 521 F.2d 1188, 1195 (9th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976) (member of tax rebellion group prosecuted for tax evasion; discriminatory prosecution claim rejected). *See also* *United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972) (member of census resistance group prosecuted for failure to answer; discriminatory prosecution claim sustained); *United States v. Sacco*, 428 F.2d 264, 271 (9th Cir.), *cert. denied*, 400 U.S. 903 (1970) (selective prosecution claim under alien registration statute rejected). Claims of discriminatory prosecution are deemed waived unless properly filed as part of a pretrial motion. *Fed. R. Crim. P.* 12(b)(2).


It is the prosecutor’s burden in such cases to isolate either indefensible conduct of the defendant since the time of the original indictment justifying the increased penalty sought, or other circumstances affirmatively appearing which serve as an adequate substitute. 529 F.2d at 940 (citing United States v. Gerard, 491 F.2d 1300, 1306 (9th 1974)). *Cf.* *North Carolina v. Pearce*, 395 U.S. 711, 724-26 (1969) (absent affirmative demonstration of justification, imposition of higher sentence by judge violates due process). *See also* *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1369-71 (9th Cir. 1976) (felony reindictment conviction reversed following defendant’s refusal to waive right to jury trial on original misdemeanor charge).

642. 572 F.2d 1307 (9th Cir. 1977).

643. *Id.* at 1310 (quoting *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1369 (9th Cir. 1976)) (emphasis deleted).

644. *Id.*
those situations which simply appear to the defendant to be vindictively motivated.\textsuperscript{645}

The prosecutor is held to an exemplary standard of behavior throughout the trial proceeding.\textsuperscript{646} He must therefore confine his remarks to the facts in evidence and reasonable inferences drawn therefrom.\textsuperscript{647} The prosecutor, moreover, may not make comments which the jury would naturally and necessarily interpret as referring to the failure of the accused to testify.\textsuperscript{648}

\textsuperscript{645} Id. n.3 (emphasis in original).

\textsuperscript{646} See note 637 supra.

\textsuperscript{647} United States v. Bracy, 566 F.2d 649, 658 (9th Cir. 1977) (closing comments concerning defendant’s illegal profit from smuggled narcotics not prejudicial when supported by record); United States v. Esquer-Gamez, 550 F.2d 1231, 1234 (9th Cir. 1977) (statement that prosecutor was “trying to avoid bringing out some other matters that should not come out” not error, when no reference to prior criminal conduct of defendant in record and other evidence of guilt overwhelming); United States v. Fulton, 549 F.2d 1325, 1328 (9th Cir. 1977) (closing reference to defendant as “big dope peddler” constituted reasonable inference from evidence falling within permissible latitude of argument); United States v. Jamerson, 549 F.2d 1263, 1267 (9th Cir. 1977) (incidental references to insignificant matter not in record permitted); United States v. Parker, 549 F.2d 1217, 1222-23 (9th Cir.), \textit{cert. denied}, 430 U.S. 971 (1977) (factual statements not fully supported by record fall within permissible latitude of argument where no significant misstatement of evidence and cautionary instruction given); United States v. Gorostiza, 468 F.2d 915, 916 (9th Cir. 1972) (closing reference to Pony Mason-like approach of defense fell within permissible latitude of argument); United States v. Cummings, 468 F.2d 274, 277-78 (9th Cir. 1972) (improper closing remarks concerning indictment procedure undermined presumption of innocence, requiring reversal); United States v. Escoto-Nieto, 417 F.2d 623, 624 (9th Cir. 1969) (implied reference to prior narcotic smuggling activities without basis in record warranted reversal); Tenorio v. United States, 390 F.2d 96, 98-99 (9th Cir.), \textit{cert. denied}, 393 U.S. 874 (1968) (closing comment concerning heroin-caused destruction and human waste permissible in narcotics trial as within common knowledge of reasonable people).

Of course, the failure of defense counsel to object to otherwise impermissible evidence properly places that evidence before the jury, allowing prosecutorial comment. United States v. Jamerson, 549 F.2d at 1266-67.

The Ninth Circuit recognizes a latitude of discretion in prosecutorial response to defense arguments. \textit{See} United States v. Fulton, 549 F.2d at 1328 (characterization of defendant as “big dope peddler” permitted in partial response to defense arguments); United States v. Parker, 549 F.2d at 1222-23 (unobjected-to response inferring personal belief in witness’ veracity not plain error where credibility hotly contested); United States v. Greenbank, 491 F.2d 184, 188 (9th Cir.), \textit{cert. denied}, 417 U.S. 931 (1974) (praise and commendation of informant permitted after defense characterization as “a rat.”).

648. Griffin v. California, 380 U.S. 609, 610-15 (1965). \textit{See} United States v. Cornfeld, 563 F.2d 967, 970-71 (9th Cir. 1977) (per curiam) (reference to defendant’s secrecy concerning crime harmless because not naturally and necessarily taken as comment on silence); United States v. Parker, 549 F.2d 1217, 1221 (9th Cir. 1977) (reference to defendant’s silence improper but harmless beyond reasonable doubt); United States v. Helina, 549 F.2d 713, 718 (9th Cir. 1977) (skillful cross-examination not indirect comment on taxpayer’s failure to produce privileged books and records) (“Crafty questioning may constitute ‘comment’ despite its obliquity.”); United States v. Bodey, 547 F.2d 1383, 1387-88 (9th Cir. 1977) (statement that defendant was “faking” lack of memory during cross-examination harmless where
In reviewing the propriety of prosecutorial conduct the appellate focus is normally on the prejudicial effect of an alleged error, rather than on the motive underlying its commission. Since curative instructions by the trial judge may operate to neutralize the prejudicial impact of improper remarks, the defendant must normally object at trial or appellate relief is precluded. In the absence of such timely objection the Ninth Circuit will grant relief only when "necessary . . . to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process." Prosecutorial comments which offend constitu-

weight attached by jury doubtful and curative instruction given); United States v. Wycoff, 545 F.2d 679, 681-82 (9th Cir. 1976) (reference to defendant's silence improper but harmless beyond reasonable doubt when evidence of guilt overwhelming and curative instruction given); Scarborough v. Arizona, 531 F.2d 959, 961-62 (9th Cir. 1976) (closing remarks concerning defendant's silence during arrest and following Miranda warnings constituted reversible error). Cf. United States v. Murray, 530 F.2d 856, 857 (9th Cir. 1976) (reference to failure of defense to produce corroborative witness permitted as not indirect comment on defendant's silence); United States v. Grammer, 513 F.2d 673, 676 (9th Cir. 1975) (closing comment on defense failure to call expert fingerprint witness in rebuttal not improper as indirect comment on silence); Ignacio v. Territory of Guam, 413 F.2d 513, 521 (9th Cir. 1969), cert. denied, 397 U.S. 943 (1970) (closing comment on defense failure to produce rebuttal ballistics expert not indirect comment on defendant's failure to testify).

649. United States v. Dixon, 562 F.2d 1138, 1143 (9th Cir. 1977) (no punishment of prosecutor's unintentional blunder when no showing of prejudice made); United States v. Segna, 555 F.2d 226, 231 n.4 (9th Cir. 1977) (improper comments which shifted constitutional burden of proof required reversal despite good faith of prosecutor).

The appellate court, of course, is not precluded from considering the bad faith of the prosecutor. United States v. Segna, 555 F.2d at 231 n.4. See United States v. Trejo, 501 F.2d 138, 141 (9th Cir. 1974) (application of FED. R. CRIM. P. 52(b) within discretion of court); Billeci v. United States, 290 F.2d 628, 629 (9th Cir. 1961) (application of FED. R. CRIM. P. 52(b) within court discretion); FED. R. CRIM. P. 52(b).

650. See United States v. Parker, 549 F.2d 1217, 1222-23 (9th Cir.), cert. denied, 430 U.S. 971 (1977) (prosecutor's inferential arguments from evidence proper when jury instructed that closing arguments themselves not evidence); United States v. Bodey, 547 F.2d 1333, 1388 (9th Cir.), cert. denied, 431 U.S. 932 (1977) (impact of prosecutor's statement that defendant "faking" memory lapse during testimony minimized when clear curative instruction given); United States v. Pratt, 531 F.2d 395, 398 (9th Cir. 1976) (although no objection at trial, no reversal for improperly exhibited weapon when evidence of guilt substantial and cautionary instruction given); United States v. Gomez, 523 F.2d 185, 186 (9th Cir. 1975), cert. denied, 423 U.S. 1075 (1976) (not error for prosecutor to indicate defendant's son a fugitive when curative instruction given); United States v. Bashaw, 509 F.2d 1204, 1205 (9th Cir. 1975) (improper summation harmless when cautionary instruction given and evidence of guilt overwhelming).

651. United States v. Cornfeld, 563 F.2d 967, 971 (9th Cir. 1977), cert. denied, 435 U.S. 922 (1978) (when no objection made at trial and no plain error, no reversal granted); United States v. Garcia, 555 F.2d 708, 711 (9th Cir. 1977) (per curiam) (no objection made and reversal only if plain error); United States v. Memoli, 449 F.2d 160, 160 (9th Cir. 1971) (per curiam), cert. denied, 405 U.S. 928 (1972) (plain error required for reversal if no objection).

652. United States v. Segna, 555 F.2d 226, 231 (9th Cir. 1977) (prosecutor statement impossibly shifting burden of proof to defendant constituted plain error). See also United States v. Cornfeld, 563 F.2d 967, 970 (9th Cir. 1977) (failure to object at trial requires dem-
tionally protected rights of the accused are fundamentally erroneous and warrant reversal unless harmless beyond a reasonable doubt. Prosecutorial misconduct not of constitutional dimensions will justify reversal unless it is more probable than not that the error did not materially affect the verdict.

In *United States v. Segna* for example, the prosecutor in his closing remarks made erroneous and misleading statements of the law, effectively shifting the burden of proof from the government to the defendant. The defendant was consequently deprived of the benefits of the reasonable doubt standard. Although the Ninth Circuit acknowledged that the prejudicial impact of the comments may have been mitigated by both cautionary instructions and repeated correct statements of the law, the court nonetheless found it highly probable that the verdict had been “materially affected” and hence that the defendant had been “seriously prejudiced.”

The prosecutor’s responsibility to seek substantial justice encompasses a duty of material disclosure to the defense. In *United States v. Valle-Valdez*, 554 F.2d 226 (9th Cir. 1977) (when only contested issue was defendant’s sanity, and was extremely close, prosecutor’s statement shifting burden of proof to defense to establish insanity was plain error).

The *Valle-Valdez* court, however, avoided resolving any possible inconsistency in the harmless error standard for jury instructions, reasoning that “application of either the probability or the reasonable possibility standard results in reversal.” 554 F.2d at 917.

The operational constraints in this area have been defined both by Supreme Court decisions and local rules of court. See *United States v. Jones*, 564 F.2d 1315, 1316 (9th Cir. 1977) (per curiam) (suppression of defendant’s inculpatory statement upheld when prosecution offered no justification for failure to follow local rule requiring written notice of intent to use). For further discussion of the prosecutor’s role in pretrial discovery, see notes 369-71 supra, and accompanying text.
v. Agurs, the Supreme Court provided the benchmark by which prosecutorial nondisclosure of material information is to be evaluated. Recognizing that the extent of the duty to disclose turns upon both the nature of the information and the scope of the defense request, Agurs outlines the standard of review for each of the three situations in which nondisclosure may occur: knowing use of perjured testimony by the prosecution, failure to supply specific evidence in response to a specific defense request, and failure to disclose in response either to a general demand for all exculpatory material or, no request at all.

659. Id. at 103. "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. (emphasis added) (footnotes omitted). See also United States v. Brown, No. 76-2925 (9th Cir. Oct. 6, 1977) (as amended Jan. 6, 1978) (nondisclosure upon general demand of government witness' false statement, not perjured but relevant for impeachment purposes, not error when no reasonable doubt as to guilt not otherwise extant created); United States v. Lasky, 548 F.2d 835, 839 (9th Cir.) (per curiam), cert. denied, 434 U.S. 821 (1977) (when cross-examination answer of government witness concealing additional information so equivocal as to fall short of perjury, nondisclosure must create reasonable doubt of guilt not otherwise extant); United States v. Pope, 529 F.2d 112, 114 (9th Cir. 1977) (per curiam) (failure to disclose false testimony by material government witness concerning plea bargain constituted reversible error when bargain could affect credibility and, without testimony, strong likelihood of acquittal). Cf. United States v. Bracy, 566 F.2d 649, 654-57 (9th Cir. 1977) (prosecution failure to immediately disclose witness perjury before grand jury not denial of due process when testimony immaterial, not relied upon by jury, and witness extensively cross-examined at trial concerning perjury).

Rejecting a broader interpretation of the operative language of Agurs that could include evidence relevant to witness credibility, the Ninth Circuit has specified that the "reasonable likelihood" standard is limited to the knowing use of perjured testimony.

660. 427 U.S. at 104, 106. "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." Id. at 106. "[T]he suppression by the prosecution of evidence favorable to a accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 104 n.10 (quoting Brady v. Maryland, 373 U.S. 83, 87 (1965)).

661. 427 U.S. at 106-07. The Court explained the rationale for reversal as follows: [If the omitted evidence creates a reasonable doubt as to guilt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.]

Id. at 112-13 (emphasis added) (footnotes omitted). See also United States v. Bracy, 566 F.2d 649, 658-59 (9th Cir. 1977) (no prejudice occurred when jury otherwise apprised of all exculpatory and impeaching evidence); Skinner v. Cardwell, 564 F.2d 1381, 1386 (9th Cir. 1977) (failure to disclose details of plea bargain with government witness not error when undisclosed detail created no reasonable doubt of guilt).

Cognizant of the difficulties inherent in disclosure decisions, Mr. Justice Stevens cau-
The Ninth Circuit in *United States v. Brown*, for example, was confronted with prosecutorial nondisclosure, following a general defense demand for all exculpatory matter, of portions of a material government witness' pretrial statement. In fact, the undisclosed portions contained false claims. While acknowledging the relevancy of the statement for impeachment purposes, the *Brown* court rejected appellant's claim of prejudicial nondisclosure, reiterating that, absent perjury at trial or a specific defense request, to warrant reversal, any undisclosed evidence must raise a reasonable doubt as to guilt.

Moreover, as circumstances had suggested that appellant's co-counsel was aware of the undisclosed statements, the Ninth Circuit observed further that the defense

either negligently failed to discover and utilize information in their own possession or deliberately withheld vital information from the trial court as a ploy for a new trial or appellate reversal. In either event, defense counsel will not be heard on appeal complaining about the failure of the prosecution to disclose this very information.

3. Conduct of the Jury

The efficacy of the jury as a procedural safeguard is seriously undermined when a juror is prejudiced or otherwise improperly influenced. Recognizing that the evaluation of such impropriety has

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427 U.S. at 108.

A well-reasoned dissent in *Agurs*, however, urged adoption of a less stringent standard of review: "If there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced reasonable doubt in the minds of enough jurors to avoid a conviction, then the judgment of the conviction must be set aside." 427 U.S. at 119 (Marshall & Brennan, JJ., dissenting) (emphasis added) (footnote omitted).

662. No. 76-2925 (9th Cir. Oct. 6, 1977) (as amended Jan. 8, 1978) (nondisclosure, upon general demand, of government witness' false statement, not perjured but relevant for impeachment, not error when no reasonable doubt not otherwise extant created).

663. *Id.*, slip op. at 2302-03.

664. *Id.*, slip op. at 2303 (footnote omitted).

665. The Supreme Court has characterized the jury as a protective buffer, fundamental to the equitable administration of justice: "The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (jury selection from representative community cross section essential to sixth amendment guarantees; systematic exclusion of women from venire impermissible) (citing *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (sixth amendment applicable to states via fourteenth amendment)).

666. *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir.), *cert. denied*, 434 U.S. 818
traditionally fallen within the discretion of the trial judge, the Ninth Circuit in United States v. Hendrix agreed that the decision to hold an evidentiary hearing to investigate allegations of juror bias or misconduct, as well as to determine that hearing's nature and scope, is within the province of the court. The jury in Hendrix had been impaneled for several hours when the defendant's wife and mother-in-law complained to defense counsel of juror statements allegedly revealing a bias against, and a predisposition to convict, criminal defendants. Denying the defense request for an immediate investigation, the trial court instead heard arguments three weeks later on the defendant's motion for a new trial based on the allegations. While reserving unqualified approval of the court's procedure, the Ninth Circuit nonetheless concluded that a proper response to allegations of bias or misconduct should "be directed by the content of the allegations, including the seriousness of the alleged misconduct or bias, and the credibility of the source."

(1977) (trial judge possesses broad discretion in initiation and control of evidentiary hearings on juror bias or misconduct) ("If only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel."). See also Tillman v. United States, 406 F.2d 930, 937 (5th Cir.), vacated on other grounds, 395 U.S. 830 (1969) (trial judge has broad discretion as to evidentiary hearings on juror misconduct); Stone v. United States, 113 F.2d 70, 77 (6th Cir. 1940) (error to deny juror discharge motion when attempted bribe of juror raised presumption of prejudice).


668. 549 F.2d 1225 (9th Cir.), cert. denied, 434 U.S. 818 (1977).

669. Id. at 1227-28.

670. Id. at 1229 & n.3 ("[W]e do not mean to imply that the approach taken to the problem was ideal. We simply hold that it did not amount to an abuse of discretion."). Recognizing the rarity of reversal for conducting too extensive an evidentiary hearing, the Ninth Circuit observed that the judge could have questioned the juror personally during or immediately following the trial or at the later hearing. Id.

671. Id. at 1227-28 & n.2. See also United States v. McKinney, 429 F.2d 1019, 1031 (5th Cir.), cert. denied, 401 U.S. 922 (1970) (Godbold, J., dissenting) (although majority held evidentiary hearings mandatory, court should have discretion to consider the source and content of misconduct or bias allegations).
Subject to certain exceptions, the Federal Rules of Evidence do not permit specific acts of a witness' conduct to be proved, for the purpose of attacking or supporting his credibility, by extrinsic evidence.672 "[T]he examiner must take his answer"673 and is precluded from refuting the witness' denial that he engaged in a particular act by calling other witnesses to prove the misconduct.674 This rule, which follows conventional federal practice,675 is applied throughout the circuits,676 including the Ninth.677 Yet, in United States v. Batts,678 the Ninth Circuit upheld the trial court's admission of extrinsic evidence to prove a witness' misconduct, thereby ignoring the express provisions of rule 608(b). In Batts the defendant was accused of the importation and possession of hashish.679 He took the witness stand in his own defense. On cross-examination, the prosecutor questioned him regarding his knowledge of the use of cocaine; the defendant denied any such knowledge.680 In order to refute the defendant's denial, the prosecutor called a rebuttal witness who testified that the defendant had sold cocaine to an undercover agent seven months earlier.681 By allowing this extrinsic evidence to be admitted, the trial court clearly failed to adhere to rule 608(b). In upholding the lower court's decision, the Ninth Circuit recognized that rule 608(b) precluded the admission of extrinsic evid-
However, the court stated that a "rigid, blind application" of this rule would result in submitting a distorted view of the case to the jury, and would thus defeat the ultimate purpose of the rules of evidence: the ascertainment of the truth. The court viewed the issue in this case as essentially a confrontation between rules 608(b) and 102, which required the trial court to undertake a balancing test. Yet, rule 608(b) specifically prohibits the extrinsic proof of a witness' conduct—the use of any "balancing" by the trial court is simply not a part of the rule's application.

### b. Proof of Consequential Facts

The Federal Rules of Evidence preclude the admission of evidence of prior acts to prove an accused's propensity to act in conformity with the crime charged. However, prior acts that are relevant to prove a material fact in a case are admissible. Because the prior conduct is

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682. Id. at 517.
683. Id.
684. See Fed. R. Evid. 102.
685. FED. R. EVID. 404(b) states:

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.

The rationale for the exclusion of evidence of prior acts to prove criminal disposition has been discussed as follows:

The rule is justified primarily on the ground that the probative value of propensity evidence is outweighed by its prejudicial effect on a jury. The introduction of such evidence is said to create a danger that the jury will punish the defendant for offenses other than those charged, or at least that it will convict when unsure of guilt, because it is convinced that the defendant is a bad man deserving of punishment. In addition, it is argued that the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor. At the least, it is said that such evidence would be given greater probative weight than it deserves, and so lead to convictions on insufficient evidence. Furthermore, saddling a person forever with his record might tend to discourage reformation.


686. See Fernandez v. United States, 329 F.2d 899, 908 (9th Cir.), cert. denied, 379 U.S. 832 (1964) ("Relevant evidence which tends to prove a material fact in the case on trial is admissible even though it incidentally shows that the accused committed another offense at a different time and place."); United States v. Grammer, 513 F.2d 673, 677 (9th Cir. 1975) (handwriting samples culled from defendant's prison records admissible even though they incidentally revealed the existence of such records). But see United States v. Pavon, 561 F.2d 799 (9th Cir. 1977) (probation officer's testimony from which jury could infer that defendant had committed prior criminal acts was inadmissible). Attorneys must be prepared to inform the court precisely how the proffered character evidence "may tend to prove or disprove a proper consequential fact in the case." 2 WEINSTEIN, supra note 673, ¶ 404 [08], at 404-42.
not part of the crime charged, some relevancy between the two acts must exist. However, if the probative value of the proffered character evidence is outweighed by undue prejudice to the defendant, the judge may exclude it under rule 403. The appellate court will scrutinize the judge's actions in order to determine whether an abuse of discretion has occurred.

The Ninth Circuit has held that where the defendant's criminal intent is at issue, evidence of prior acts will be admissible if three criteria are met: "(1) the prior act . . . [must be] similar and close enough in time to be relevant, (2) the evidence of the prior act . . . [must be] clear and convincing," and (3) as with all prior acts, the probative effect must outweigh potential prejudice. However, in United States v. Riggins, the court recognized that

[t]he other crimes disclosed by the proffered evidence must be "similar," to the offense charged if similarity of the crimes is the basis for the relevance of the evidence. But relevance is the essential criterion. Relevant evidence is not to be excluded because it fails to meet a similarity requirement.

Following the holding in Riggins, the Ninth Circuit upheld the admission of evidence of dissimilar acts in United States v. Hearst. Hearst was on trial for armed robbery committed in San Francisco. During its case-in-chief, the Government introduced evidence which connected her with criminal activity at a sporting goods store in Los Angeles. The Government also presented evidence which showed that Hearst was involved in a kidnapping and a theft. All of these acts were subsequent to those charged in the indictment. On appeal, Hearst claimed that these acts were so dissimilar to the crimes charged that

689. See United States v. Brown, 562 F.2d 1144, 1148 (9th Cir. 1977).
690. As provided in FED. R. EVID. 404(b), intent is only one of the issues which may be proved by prior acts. Thus, acts not part of the crime charged may be used to show motive, opportunity, plan, scheme, knowledge, modus operandi, or absence of mistake or accident. See United States v. Testa, 548 F.2d 847, 851 (9th Cir. 1977).
692. 539 F.2d 682 (9th Cir. 1976) (per curiam), cert. denied, 429 U.S. 1045 (1977).
693. Id. at 683. See also United States v. Satterfield, 548 F.2d 1341, 1346 (9th Cir. 1977) ("[T]he test of admissibility is frequently whether the prior offenses are similar to those charged.").
694. 563 F.2d 1331 (9th Cir. 1977).
they "offer[ed] little insight into her state of mind during the robbery."\textsuperscript{695} In rejecting Hearst's argument, the court stated that the subsequent acts, although dissimilar to the robbery, were most relevant to the issue of her state of mind as of the time the robbery was committed.\textsuperscript{696} Since Hearst had raised a defense of duress at the trial, the court viewed the evidence of the subsequent acts as tending to show that she had willingly participated in later criminal activity with the same people that had been involved in the robbery.\textsuperscript{697} Consequently, it could be inferred that she had not acted under duress when she participated in the bank robbery itself.\textsuperscript{698} The relevance, then, of the evidence of Hearst's Los Angeles activities was not "depend[ent] on the similarity" to the crime charged.\textsuperscript{699} Rather, the relevance lay in the proof of a consequential fact in the case—Hearst's state of mind. The lack of similarity was, therefore, not a sufficient reason for excluding the proffered evidence since the relevance criterion was satisfied.\textsuperscript{700}

2. Sufficiency of the Evidence

In determining whether the evidence is sufficient to sustain a verdict, the appellate court must necessarily look to the facts of each case. However, "[a] verdict of a jury in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."\textsuperscript{701} The Ninth Circuit will thus not invade the jury's province in reviewing a case.\textsuperscript{702} And, direct evidence is not considered as being more probative than circumstantial evidence.\textsuperscript{703} Even where a case is tried before a judge only, the burden of proof is the same as in a case tried before a jury: guilt must be proved beyond a
3. Privilege

Society recognizes that confidential communications arising from certain relationships are privileged. This notion, based upon the common law, allows at least one participant in a relationship to prevent testimonial disclosure of the content of communications occurring within that relationship. Under the Federal Rules of Evidence, the courts, absent statutes to the contrary, are empowered to interpret the common law principles of privilege "in the light of reason and experience."

Confidential communications between attorney and client were privileged at common law and are so recognized today. The privilege

*reasonable doubt.* Applying these standards, the Ninth Circuit sustained the majority of convictions which were appealed on the grounds of insufficiency of evidence.

705. United States v. Valdovinos, 558 F.2d 531 (9th Cir. 1977) (evidence sufficient to sustain defendants' participation in conspiracy); United States v. Ferguson, 555 F.2d 1372 (9th Cir. 1977) (per curiam) (evidence sufficient to sustain conviction for possession of marijuana with intent to distribute); United States v. Segna, 555 F.2d 226 (9th Cir. 1977) (evidence sufficient to permit jurors to conclude that defendant was sane; case reversed on other grounds); United States v. Green, 554 F.2d 372 (9th Cir. 1977) (sufficiency of evidence upheld in affirming violation of the Mann Act); United States v. Chenaud, 552 F.2d 294 (9th Cir. 1977) (evidence sufficient to prove that institution protected by 18 U.S.C. § 1006 was defrauded); United States v. Polk, 550 F.2d 566 (9th Cir. 1977) (evidence sufficient to prove defendant had failed to withhold taxes from employees' wages); United States v. Perry, 550 F.2d 524 (9th Cir.), cert. denied, 434 U.S. 972 (1977) (evidence sufficient to prove defendants' participation in conspiracy); United States v. Parr-Pla, 549 F.2d 660 (9th Cir.) (per curiam), cert. denied, 431 U.S. 972 (1977) (sufficiency of the evidence upheld in proving defendant's knowledge that travelers checks he possessed were stolen and contained counterfeit signatures). In United States v. Ramos, 558 F.2d 545 (9th Cir. 1977), the trial court sustained the defendant's motion for judgment of acquittal after the jury had found him guilty of theft from a foreign shipment. The government appealed, maintaining that there was sufficient evidence for the jury's verdict. The Ninth Circuit agreed and reinstated the verdict of guilty.

The Ninth Circuit Court reversed the following cases due to insufficiency of the evidence: United States v. Drebin, 572 F.2d 215 (9th Cir. 1977), cert. denied, 98 S. Ct. 2232 (1978) (government failed to prove absence of first sale of motion pictures in copyright infringement action); United States v. Cloughessy, 572 F.2d 190 (9th Cir. 1977) (insufficient evidence to prove defendant's connection with conspiracy).

706. See generally C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 72 (2d ed. 1972) [hereinafter cited as McCORMICK].
707. Id.
708. Id. § 73.
710. 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961) [hereinafter cited as WIGMORE].
protects those disclosures which are “necessary to obtain informed legal advise.”711 Thus, it is the substance of matters communicated to the attorney in professional confidence which will fall within the privilege.712 The attorney-client privilege, however, will not “conceal everything said and done in connection with an attorney’s legal representation of a client in a matter.”713 Where fee arrangements and client identity are at issue, the Ninth Circuit has held that such matters will not be viewed as privileged if a party can show a “legitimate need for a court to require disclosure.”714 However, an exception to this rule is allowed where disclosure will implicate the client “in the very criminal activity for which legal advice was sought.”715

In addition to spoken communications between attorney and client, the privilege also extends to papers prepared by the attorney which contain confidential information revealed by the client.716 If the papers contain unprivileged information received from third parties and communications made between attorney and client, the privilege will not be applied unless the claimant demonstrates that disclosure will reveal confidential communications made within the confines of the attorney-client relationship.717 The Ninth Circuit dealt with this issue in In re Fischel.718 The attorney had prepared summaries of her client’s business transactions with third parties. At the client’s trial, the attorney testified and was ordered to produce these documents. She refused, claiming the attorney-client privilege.719 On appeal, the court stated that in order to preclude disclosure a link must be established between the unprivileged and the privileged information which demonstrates

712. McCormick, supra note 706, at § 91. The general principles upon which the attorney-client privilege is based have been enumerated by Professor Wigmore:

(I) Where legal advice of any kind is sought
(2) from a professional legal adviser in his capacity as such,
(3) the communications relating to that purpose,
(4) made in confidence
(5) by the client
(6) are at his instance permanently protected
(7) from disclosure by himself or by the legal adviser,
(8) except the protection be waived.
Wigmore, supra note 710, at § 2292.
713. In re Fischel, 557 F.2d 209, 212 (9th Cir. 1977).
714. United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977) (attorney-client privilege will not prevent production of attorney's business records where client secured legal representation in furtherance of illegal purpose).
715. Id.
716. In re Fischel, 557 F.2d 209, 211 (9th Cir. 1977).
717. Id. at 212.
718. 557 F.2d 209 (9th Cir. 1977).
719. Id at 210-11.
that the two are so interwoven that "disclosure of the former leads irresistibly to disclosure of the latter."  

Although recognition of this privilege fosters the needed openness between attorney and client, the privilege will not apply if the client is using the legal representation to further an illegal plan. Additionally, negation of the privilege occurs even where the attorney was not aware of his client's improper purpose.  

Two privileges arising out of the marital relationship are also recognized by the federal courts. The confidential communications privilege bars testimony regarding private intra-spousal expressions, even if the marriage has ended. This privilege applies "only to utterances or expressions intended by one spouse to convey a message to the other." The "anti-marital facts" privilege, which does not survive the marriage, prevents one spouse from testifying against the other.

4. Hearsay

Within our judicial system, witnesses normally testify under three conditions: oath, personal presence, and cross-examination. These conditions buttress the reliability factor of testimonial proof. "The danger against which the hearsay rule is directed is that evidence

720. Id. at 212.
721. For a discussion of the policies supporting the attorney-client privilege, see Wigmore, supra note 710, at § 2291.
723. United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir. 1971).
727. See United States v. Bolzer, 556 F.2d 948, 951 (9th Cir. 1977) (defendant's ex-wife's testimony identifying his clothes related only her knowledge and was therefore not precluded by the confidential communications privilege).
728. Id.
729. Id.
730. McCormick, supra note 706, at § 245.
731. Fed. R. Evid. 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay statements are to be distinguished from those which are admitted simply to show that the statement was made. Such statements are not hearsay and are therefore admissible. See United States v. McLennan, 563 F.2d 943, 946 (9th Cir. 1977), cert. denied, 435 U.S. 969 (1978) (statement by defendant's former attorney not admitted to prove truth of what attorney had said—that acts of defendant were illegal—but merely to show that statement was made); United States v. Bigelow, No. 75-3845 (N.D. Cal. Jan. 31,
which is untested by these three conditions will be unreliable because faults in the perception, memory and narration of the declarant will not be exposed.”  

Certain extrajudicial statements are nevertheless extremely important in the proof of a case; strict adherence to the hearsay rule would, therefore, result in the exclusion of crucial evidence, and an increase in the likelihood of an erroneous decision. Exceptions to the hearsay rule serve to remedy this problem. Out-of-court statements which bear strong indicia of reliability may be admissible, thereby furthering the goal of admitting all highly relevant evidence.

In criminal cases, the admission of hearsay statements may conflict with the defendant’s confrontation rights guaranteed by the sixth amendment. Clearly, where the declarant is not on the witness stand, the defendant is denied the opportunity to confront and cross-examine his accuser. However, in Dutton v. Evans the Supreme Court held that the presence of certain criteria will be “viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.” Thus, where statements are admitted under exceptions to the hearsay rule, it is sufficient if they bear “indicia of reliability” such that “the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.”

a. Prior Inconsistent Statements

The Federal Rules allow the use of prior inconsistent statements for substantive purposes of those statements fall within the confines of rule

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1777), aff'd, 549 F.2d 809 (9th Cir. 1977) (“[T]he significance of these statements lies not in the truth of what they assert, but in the fact of their being said.”).

732. 4 Weinstein, supra note 673, at ¶ 800[01], at § 800-11 (1977).

733. See id.

734. See Adv. Comm. Note, Fed. R. Evid. 804, subdivision (b) in which the Committee states:

[H]earsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. (Emphasis added).


736. U.S. Const. amend. VI, cl. 2. See generally Bruton v. United States, 391 U.S. 123, 136 (1968), where the Supreme Court recognized that due process requires that a defendant be permitted to confront the witnesses against him in order to defend against the State's accusations.


738. See note 759 infra and accompanying text.

739. 400 U.S. at 89.

801(d)(1)(A). As such, these statements are categorized as non-hearsay. The Ninth Circuit applied this rule in upholding the use of grand jury statements as direct evidence in United States v. Morgan. Relying on the Conference Committee’s notes following rule 801(d)(1)(A), the court had no difficulty in allowing the sworn statements before the grand jury to be admitted for substantive purposes.

The defendant in Morgan attacked the government’s use of the prior testimony on the ground that at the time it was offered, it was not yet inconsistent with the witnesses’ trial testimony, as 801(d)(1)(A) requires. This situation arose because the government had used the prior testimony both to impeach and to refresh witnesses’ recollections. Thus, in some instances the grand jury statements were admitted before the witnesses had actually contradicted the statements in their trial testimony. While not applauding “the indiscriminate use of prior-prepared statements,” the court focused on Judge Weinstein’s analysis as to the proper test for inconsistency under 801(d)(1)(A). The court felt the key to be “whether [the prior statement] . . . is helpful in resolving a material, consequential fact in issue.” Finding that the grand jury testimony clearly served this purpose, the Morgan court affirmed the trial judge’s action.

b. Statements of Co-Conspirators

Statements made by co-conspirators during the course and in fur-
therance of a conspiracy are non-hearsay under the Federal Rules of Evidence. Before such statements may be submitted to the jury, however, the Ninth Circuit requires that independent evidence establish a prima facie showing that (1) a conspiracy existed and (2) the party against whom the statements are offered was a member of the conspiracy. This independent evidence may be either circumstantial or direct. Once the conspiracy has been shown to exist, however, only slight evidence is necessary to connect the defendant with it.

Although a co-conspirator's statement may properly be admitted into evidence as non-hearsay, compliance with the confrontation clause is not automatic. Conversely, an improperly admitted statement which constitutes hearsay does not necessarily violate the right to confrontation. In either instance, the admission of an extra-judicial declaration may deny the defendant of his sixth amendment right to confront the witnesses against him. The trier of fact may consequently be deprived of a satisfactory basis for evaluating the truth of the out-of-court statement.

In Dutton v. Evans, the Supreme Court isolated four indicia of

748. Fed. R. Evid. 801(d)(2)(e). See, e.g., Anderson v. United States, 417 U.S. 211, 218 (1974); United States v. Eaglin, 571 F.2d 1069, 1077 (9th Cir. 1977); United States v. Di Rodio, 565 F.2d 573, 575 (9th Cir. 1977). Statements made by a coconspirator after the conspiracy has ended may not be used to prove their truth. Such statements, however, may be employed to show the declarant's state of mind, United States v. Brown, 562 F.2d 1144, 1148 (9th Cir. 1977), motive, opportunity, intent, plan, knowledge or absence of mistake or accident. Fed. R. Evid. 404(b).

749. United States v. Testa, 548 F.2d 847, 852-53 (9th Cir. 1977).

750. United States v. Dixon, 562 F.2d 1138, 1141 (9th Cir. 1977), cert. denied, 435 U.S. 927 (1978) (evidence sufficient to permit introduction of testimony); United States v. Peterson, 549 F.2d 654, 658 (9th Cir. 1977) (showing insufficient to meet prima facie burden); United States v. Testa, 548 F.2d 847, 852 (9th Cir. 1977) (evidence offered by prosecution sufficient).

751. United States v. Cruz, 536 F.2d 1264, 1266 (9th Cir. 1977). Both forms of evidence are weighted equally. United States v. Turner, 528 F.2d 143, 162 (9th Cir.), cert. denied, 423 U.S. 996 (1965) ("Circumstantial evidence is not inherently less probative than direct evidence . . . .").


753. U.S. Const. amend. VI provides that the accused "[i]n all criminal prosecutions . . . shall enjoy the right . . . to be confronted with the witnesses against him."


755. California v. Green, 399 U.S. 149 (1970). The Court observed that "[m]erely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." Id. at 156.


reliability which bear on the propriety of admission of an extra-judicial statement in the absence of confrontation of the declarant. The Ninth Circuit in United States v. Eaglin held that a constitutional analysis of the confrontation clause is proper only in those cases which fail the Dutton test, hearsay violations notwithstanding.

5. Cross-Examination

a. Scope of Cross-Examination and the Criminal Defendant

The Federal Rules of Evidence limit the scope of cross-examination to those areas brought out on direct examination. However, the trial court is given the discretion to allow counsel to question a witness as though on direct examination. This procedure eliminates the need to later call the witness for direct examination, and also allows the trial judge to save time by controlling the order of proof during the trial. Where the witness is a criminal defendant, however, fifth amendment problems may arise. Unlike other witnesses, a criminal defendant cannot be called to the witness stand by the prosecutor. Therefore, where the court permits a prosecutor to question a defendant “as if on direct examination,” it is allowing the government to do on cross-examination what it cannot normally do at all—that is, call the defendant as a witness and question him. This may even be directly violative of the accused’s fifth amendment rights.

Although this improbable situation arose in the recent case of United

759. The four factors considered by the Court to be of importance in this area are:
(1) The statement includes no express assertion of past fact;
(2) The declarant had personal knowledge of the identity and role of participants in the crime;
(3) The possibility is remote that the declarant was relying on faulty recollection; and
(4) The circumstances under which the statement was made gave no reason to believe that the declarant had misrepresented the defendant’s involvement in the crime.

760. 571 F.2d 1069 (9th Cir. 1977).

761. Id. at 1081-82.

762. Fed. R. Evid. 611 (b) states:
Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

See 3 Weinstein, supra note 673, at ¶ 611[02].


764. According to McCormick, “[t]he scope of cross-examination is essentially a matter of control over the production of evidence; the primary policy being served is the orderly conduct of the trial.” McCormick, supra note 706, ¶ 132 at 280.

765. See Carlson, Cross-Examination of the Accused, 52 Cornell L.Q. 705, 709 (1967).
States v. Batts, the Ninth Circuit affirmed the conviction. Batts had been arrested for possession of hashish as he entered the United States from Canada. During the trial, a customs inspector testified that while searching Batts, he had found a silver trinket around his neck. He further testified that Batts had told him it was a "coke spoon." At that point, the trinket was admitted into evidence without objection. Batts was the first witness to testify for the defense. At no time during his direct examination did Batts testify regarding the "coke spoon" or its intended use. On cross-examination the prosecutor went beyond the scope of Batts' direct testimony and questioned Batts as to his knowledge about the coke spoon's use and his knowledge about cocaine use itself.

In its analysis of Batts' testimony, the Ninth Circuit focused upon two issues. First, the court observed that the coke spoon had already been received into evidence without objection when Batts testified. The court further noted that Batts' own counsel had not objected to the prosecutor's inquiry about the coke spoon or cocaine use. Therefore, only the trial court could have ordered the testimony stricken. The Ninth Circuit, however, doubted the availability of such an action since "it was at least arguable that appellant had opened up the subject area by testifying to other contemporaneous events at the port of entry." This reasoning seems to ignore basic tenets which are applicable to a trial court's control of cross-examination. When a defendant opens up a subject area on direct examination by testifying to a few isolated events, the prosecutor's questions must still be reasonably related to those matters brought out on such examination by the defendant.

766. 558 F.2d 513 (9th Cir. 1977).
767. Id. at 515.
768. Id. at 515-16.
769. Id. at 516. Batts denied knowledge of both, whereupon the prosecutor extrinsically impeached his testimony; such impeachment was in violation of Fed. R. Evid. 608(b). See notes 672-84 supra and accompanying text.
770. 558 F.2d at 516.
771. Id.
772. The Federal Rules utilize a restricted form of cross-examination whereby the cross-examiner is limited by the direct examiner's choice of topics. However, subdivision (b) [of Rule 611] recognizes that the object of adducing all relevant information on cross-examination may have to be modified in the interests of justice. As in the case of Rule 403, the judge must balance the factors of prejudice, confusion and delay against the probative value of the testimony which would be excluded in deciding whether to curtail cross-examination. See 3 Weisnei, supra note 673 ¶ 611[02], at 611-31 (emphasis added).
773. See United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977) (per curiam), cert. denied, 435 U.S. 1000 (1978). Defendant Hearst maintained that the trial court erred in denying her motion to limit the scope of her cross-examination when she took the witness stand. Hearst
Here, the prosecutor was allowed to question Batts regarding his possible cocaine use, a matter which did not illuminate the subject matter of the direct examination. Although Batts’ testimony did embrace certain events which occurred at the time of his arrest, the contemporaneous discovery of the coke spoon was irrelevant as to any of the events which led to the charges against Batts.

Second, the court stated that even if Batts’ counsel had objected to the prosecutor’s inquiry, “it was still within the court’s power to admit the testimony.”

Relying on federal rule 611(b), the Ninth Circuit approved the prosecutor’s questioning of the defendant as though he were on direct examination. Although the government initially was precluded from calling Batts to the stand, the Batts court effectively eliminated this restriction by permitting Batts to be questioned beyond the scope of his direct examination. In sanctioning this procedure, the Ninth Circuit thus utilized rule 611(b) to circumvent the prohibition against permit-

had wanted to avoid invoking the fifth amendment in response to questions implicating her in other crimes for which she was not on trial. As part of her argument, Hearst claimed that the government had gone beyond the scope of her direct examination in questioning her about events to which she had not earlier testified. The court, however, found that while on direct examination Hearst attempted to show that from the time of her abduction to her arrest, she was coerced by her captors to behave as she did. Given this testimony, the Ninth Circuit held that Hearst had therefore placed her behavior during this period in issue. As such, the government’s cross-examination “about her activities, associations and residences during the interim year were more than ‘reasonably related’ to the subject matter of her prior testimony.”

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774. 558 F.2d at 516.

775. Id. Compare FED. R. EVID. 611(b) with CAL. EVID. CODE § 772(c)-(d) (West 1975), which provides:

(c) Subject to subdivision (d), a party may, in the discretion of the court, interrupt his cross-examination, redirect examination, or recross-examination of a witness, in order to examine the witness upon a matter not within the scope of a previous examination of the witness.

(d) If the witness is the defendant in a criminal action, the witness may not, without his consent, be examined under direct examination by another party.

776. See Tucker v. United States, 5 F.2d 818 (8th Cir. 1925), an early case which is precedent for the federal rule of limited cross-examination. Addressing itself to this issue, the court stated:

The primary purpose of cross-examination in the federal courts is to test the truth of the testimony adduced by the direct examination and to clarify or explain the same. It is not to prove independent facts in the case of the cross-examining party. If there is good reason why a defendant should not be compelled to be a witness against himself, there ought to be equally good reason why, if he has testified voluntarily upon one issue, he should not be compelled to testify against his will concerning matters wholly unrelated to that issue, which would not be within the scope of proper cross-examination if he were an ordinary witness.

Id. at 822. See also Brown v. United States, 356 U.S. 148 (1958). In dictum, the Supreme Court stated that a witness who voluntarily testifies, “certainly if he is a party, determines the area of disclosure and therefore of inquiry.” Id. at 155. This observation would seem
ting a prosecutor to call a criminal defendant to the witness stand. Not only does such bootstrapping conflict with the standards set by the federal rules, it raises serious questions of the constitutional ramifications for criminal defendants in future trials within this circuit.

b. Compliance with the Confrontation Clause

An accused's sixth amendment right to confront the witnesses against him has been considered an essential element of due process of law. An integral part of this right is cross-examination, which allows defense counsel to attack the weaknesses in the testimonial proof given against a defendant. The extent to which cross-examination will be allowed is within the trial court's discretion. The necessity of a thorough and effective cross-examination is manifest in order "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, . . . [can] appropriately draw inferences relating to the reliability of the witness." The Supreme Court, in Davis v. Alaska, has held that curtailment of this right may amount to a denial of confrontation rights.

The Ninth Circuit employed the Davis rationale in reversing the

to indicate that the cross-examiner is not permitted to go beyond the scope of the witness' direct testimony at all.

779. Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."). See United States v. Brady, 561 F.2d 1319 (9th Cir. 1977) (per curiam), in which the trial court refused to permit defense counsel to cross-examine the Government's key witness regarding her prior source of narcotics. The Ninth Circuit reversed the conviction, holding that "the Government's whole case turned on her [the witness'] credibility. . . . [C]ounsel thus must be given a maximum opportunity to test the credibility of the witness." Id. at 1320.
780. See Fed. R. Evid. 611(a). For further discussion of the court's discretion in this area, see notes 619-22 supra and accompanying text.
782. 415 U.S. 308 (1974). In Davis, the Court reviewed a burglary and larceny conviction resulting from a trial in which the court had prohibited the defense from questioning a key government witness regarding his juvenile record. The defense hoped to show that the witness was on probation at the time of the events about which he was to testify. The purpose of the inquiry was not for general impeachment; rather, defense counsel hoped to show the witness was biased due to his relationship with the state. In reversing Davis' conviction, the Court pointed out that limiting the defense's inquiry had resulted in placing an inaccurate view of the witness' credibility before the jury. Absent the benefit of the defense's theory, the jury would not be able to make an informed judgment from the evidence. Thus, Davis, precluded from presenting this evidence to the jury by questioning the witness, was "denied the right of effective cross-examination . . . ." Id. at 318.
783. 415 U.S. at 318.
lower court decision in *United States v. Alvarez-Lopez*. The government's case against Alvarez-Lopez depended primarily upon the testimony of their informant, Gentile. During direct examination as the government's witness, Gentile denied having previously been arrested for drugs. Defense counsel, however, had information showing that Gentile had been previously arrested for smuggling heroin, although the charge was later dismissed for undisclosed reasons. As in *Davis*, counsel's intent was not to impeach Gentile generally, but merely to reveal any biases which he might have. The trial judge, however, citing rules 609 and 404(b) of the Federal Rules of Evidence, prohibited any inquiry into Gentile's criminal record. Writing for the majority, Judge Hufstedler clearly rejected the trial court's reasoning. Curtailment of cross-examination in this instance had precluded the defense from illuminating a crucial issue in the case—the key witness' possible prejudice stemming from the fact that Gentile's prior criminal activity may have rendered him extremely vulnerable to government pressures at the time of his testimony. The defendant was entitled to

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784. 559 F.2d 1155 (9th Cir. 1977).
785. Id. at 1157.
786. FED. R. EVID. 609(a) states:
   **General Rule.** For the purpose of attacking the credibility of a witness evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
   FED. R. EVID. 404(b) states:
   **Other crimes, wrongs, or acts.** 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.
787. In responding to the use of these evidentiary rules as justification for curtailing the cross-examination of Gentile, Judge Hufstedler stated:

   Neither rule is applicable in this context. This case does not involve rules of impeachment or impeachment of a witness by collateral means. Moreover, it does not involve the rules of general impeachment applicable to cross-examination of a defendant in a criminal case who has taken the stand. The Evidence Code does not attempt to write a catalog of all the rules which govern evidence that can be used to impeach a witness. Rather, the code only attempts to lay down a few specific rules dealing with the situations in which impeachment upon collateral matters may be particularly subject to potential abuse, and, in those situations, to give substantial discretion to the trial court in admitting or excluding the impeaching evidence.

559 F.2d at 1158.
788. In *Davis v. Alaska*, 415 U.S. 308 (1974), Chief Justice Burger elaborated upon the importance of this issue:

   A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the
have this evidence brought out so that the jury could adequately assess the informant’s credibility. Addressing itself to this issue, the court stated: “Extensive cross-examination of a Government witness designed to reveal any biases or prejudices of the witness is compelled by the confrontation clause. Especially should great latitude be allowed when, as here, the key prosecution witness is also a professional informant.”  

6. Opinion Testimony

The Federal Rules of Evidence allow the opinion testimony of both lay and expert witnesses. The testimony of lay witnesses must be based upon personal knowledge and aid in resolving a fact in issue.

“The general test for the admissibility of expert testimony is whether the jury can derive ‘appreciable help’ from such testimony.” Not only must the witness be qualified by knowledge, skill, experience, training or education in order to testify as an expert, but the subject matter of the expert testimony must be “in accordance with a generally accepted explanatory theory.” In determining whether the expert testimony should be allowed, trial courts must balance the probative value of the evidence against any prejudice to the defendant. Judges main-
tain broad discretion in the matter of the admission or exclusion of evidence, however, and absent a clear abuse the appellate court will not disturb the lower court ruling.

E. Defenses

1. Entrapment

a. In General

In order to assert the affirmative defense of entrapment, the defendant must "come forward with evidence of his non-predisposition and of governmental inducement." The focus of the entrapment defense is on the intent or predisposition of the defendant to commit the crime, and the defense will be unsuccessful when the defendant is found to have been predisposed to commit the offense with which he is charged.

The defendant's predisposition to commit the alleged offense is a question of fact. Although an appellate court is normally reluctant to upset a factual determination in this area, the Ninth Circuit will

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797. United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977). For a discussion of the trial court's discretion to curtail direct and cross-examination, see notes 618-20 supra and accompanying text.

798. United States v. Butcher, 557 F.2d 666, 670 (9th Cir. 1977). For a discussion of the standard utilized by the Ninth Circuit to evaluate an abuse of discretion in the context of cross-examination, see notes 621-22 supra and accompanying text.


801. See United States v. Russell, 411 U.S. 423, 433-36 (1973). The trial court may, in its discretion, determine that the evidence is insufficient to warrant the submission of the entrapment issue to the jury. United States v. Glaeser, 550 F.2d 483, 487-88 (9th Cir. 1977). In such cases, the defendant may still attempt to assert a violation of due process of law. See notes 810-11 infra and accompanying text.


803. See United States v. Hermosillo-Nanez, 545 F.2d 1230, 1232 (9th Cir. 1976) (per curiam), cert. denied, 429 U.S. 1050 (1977) (on review of conviction all inferences are to be drawn in favor of Government; court's function is not to reweigh credibility of witnesses;
remand for reconsideration where evidentiary errors prevent the fact-finder from hearing all relevant testimony.\textsuperscript{804}

In United States v. Reynoso-Ulloa,\textsuperscript{805} the Ninth Circuit discussed several factors which it will consider in evaluating the predisposition of a defendant:

[T]he character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by the Government; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome by only repeated Government inducement or persuasion; and the nature of the inducement or persuasion supplied by the Government.\textsuperscript{806}

While none of these factors is conclusive, the most significant is "whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement."\textsuperscript{807}

An offer of money to the defendant by government agents, however, does not constitute entrapment absent a finding that the defendant was an unwilling person persuaded by the government to commit the offense.\textsuperscript{808} Moreover, a defendant need not admit the elements of the crime charged in order to assert the entrapment defense.\textsuperscript{809}

\textbf{b. Due Process}

The Ninth Circuit continues to leave open the possibility that the defendant can assert a due process challenge in addition to or in lieu of

\textsuperscript{804} United States v. Benveniste, 564 F.2d 335, 342 (9th Cir. 1977) (although admission of expert testimony on issue of predisposition was within court discretion, court may not admit prosecutorial hearsay evidence while excluding defense hearsay).

\textsuperscript{805} 548 F.2d 1329 (9th Cir. 1977).

\textsuperscript{806} \textit{Id.} at 1336 (footnotes omitted).

\textsuperscript{807} \textit{Id.} The proper inquiry for the jury is whether the government agents have convinced an otherwise unwilling person to commit a criminal act or, on the other hand, whether the defendant was predisposed to violate the law. \textit{Id.}

\textsuperscript{808} United States v. Esquer-Gamez, 550 F.2d 1231, 1234 (9th Cir. 1977).

\textsuperscript{809} United States v. Demma, 523 F.2d 981, 982 (9th Cir. 1975) (overruling Eastman v. United States, 212 F.2d 320 (9th Cir. 1954)). See United States v. Glaeser, 550 F.2d 483, 486 (9th Cir. 1977); United States v. Paduano, 549 F.2d 145, 148 (9th Cir.), \textit{cert. denied}, 429 U.S. 838 (1977). In \textit{Paduano}, the trial court erroneously instructed the jury that the defense of entrapment entailed an admission by defendant that he had in fact committed the offense charged. Nevertheless, reversal was deemed unnecessary since the jury had been properly instructed on two other counts, convictions on those counts were affirmed, and the sentences on each count were of equal length and were to run concurrently.
the entrapment defense. Such a challenge would be appropriate in cases where the conduct of law enforcement agents is "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ."

**c. Jury Instructions**

The Ninth Circuit has approved a jury instruction which provides that the essence of the entrapment defense is the predisposition of the defendant to commit the offense. The instruction reads in pertinent part:

> [Where a person already has the predisposition, that is, the readiness and willingness to break the narcotics laws, the mere fact that Government agents provided what appears to be a favorable opportunity, is not entrapment . . . . If, then, the jury should find beyond a reasonable doubt from the evidence in this case that before anything at all occurred respecting the alleged offenses involved in this case, the defendant was ready and willing to commit the crimes as charged in the Indictment, whenever opportunity was afforded, and the Government officers or their agents did no more than offer the opportunity, then the jury should find the defendant was not a victim of entrapment.

If the defendant does not object to the entrapment instruction at trial or submit an alternative instruction, he cannot later claim the entrapment instruction given was erroneous.

**2. Insanity**

The purpose of the insanity defense is "to save from criminal conviction one who lacks responsibility for his unlawful acts." An accused is presumed legally sane until he comes forward with some evidence of

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811. United States v. Russell, 411 U.S. 423, 431-32 (1973). See also Hampton v. United States, 425 U.S. 484 (1976). The Russell Court left open the possibility of a due process challenge. In Hampton, however, a plurality of the court seemed to foreclose this alternative, suggesting instead that the appropriate remedy is to prosecute "the police under the applicable provisions of state or federal law." 425 U.S. at 490.
812. United States v. Reynoso-Ulloa, 548 F.2d 1329, 1339 (9th Cir. 1977).
813. Jd. This instruction is substantially similar to that approved by the Ninth Circuit in United States v. Griffin, 434 F.2d 978, 981-82 (9th Cir. 1970), cert. denied, 402 U.S. 995 (1971) (standard jury instruction on entrapment sufficient). See also United States v. Pico-Zazueta, 564 F.2d 1367, 1370 (9th Cir. 1977); United States v. Reynoso-Ulloa, 548 F.2d 1329, 1339-40 (9th Cir. 1977) (elaborating instruction improper where it incorrectly states law).
814. United States v. Pico-Zazueta, 546 F.2d 1367, 1370 (9th Cir. 1977); see Esposito v. United States, 436 F.2d 603, 604 (9th Cir. 1970).
his insanity. Once the defendant comes forward with such evidence, the prosecutor bears the burden of showing defendant's sanity beyond a reasonable doubt. "The nature and quantum of evidence of sanity which the Government must produce to sustain its burden and take the case to the jury will vary in different cases." 

The Ninth Circuit defined insanity in *Wade v. United States*, where a part of the American Law Institute test for sanity was adopted. Under this test, "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." 

In adopting the ALI test for insanity, the Ninth Circuit substituted the word "wrongfulness" for the word "criminality" as several other circuits had done. "Wrongfulness" means moral rather than criminal
This rule has been interpreted to mean that "a defendant lacks substantial capacity to appreciate the wrongfulness of his conduct if he knows his act to be criminal but commits it because of a delusion that it is morally justified."  

In United States v. Monroe, the defendant insisted that testimony by a government witness to the effect that the defendant did not believe it was morally wrong to sell cocaine established the defendant's insanity under the Wade test. However, the testimony in question, taken in its entirety, suggested that the defendant "believed that selling cocaine was not morally wrong because he did not consider cocaine to be a dangerous drug." On the basis of such testimony, the jury could have concluded that the defendant's belief in the moral propriety of his actions "did not result from a mental disease or defect as required by Wade."  

In reviewing a jury's decision to reject an insanity defense and convict the defendant, the appellate court must view the evidence in a light most favorable to the Government. The conviction will be upheld when the reviewing court finds that the evidence was sufficient "to permit a rational conclusion by the jury that the accused was sane beyond..."
a reasonable doubt."831

3. Competency

Due process requires that the defendant be competent to stand trial.832 “Competency” refers to the defendant's ability to understand the nature and object of the proceedings against him, to consult with his attorney, and to assist his attorney in the preparation of his defense.833 Competency “relates not to mental illness in general but to the practical aspects of the defense of the action . . . .”834

Whenever there is substantial evidence before the court which creates a “genuine doubt” as to the defendant's competency to stand trial, the court must sua sponte conduct a hearing on the question.835 The court's failure to conduct such a hearing when one is warranted deprives the defendant of his constitutional right to a fair trial and necessitates reversal of the conviction.836 In Bassett v. McCarthy,837 after acknowledging the difficulties involved in ruling on an appellant's claim that he was improperly denied a competency hearing at the trial

831. United States v. Monroe, 552 F.2d 860, 864 (9th Cir.), cert. denied, 431 U.S. 972 (1977) (jury could have concluded that defendant's belief in the moral justification of his criminal acts did not result from mental disease or defect); United States v. Ortiz, 488 F.2d 175, 177 (9th Cir. 1973) (jury could properly resolve conflict in psychiatric testimony) (“If the jury chose to accept the doctor's opinion in spite of the alleged weaknesses in his reasons, we cannot say, as a matter of law, they could not do so.”).

832. See Pate v. Robinson, 383 U.S. 375, 378 (1966) (where evidence raises bona fide doubt as to defendant's competency, court must provide a hearing to determine competency notwithstanding defendant's failure to request one; court's failure to provide such a hearing denies defendant his right to fair trial.) (“The conviction of an accused person while he is legally incompetent violates due process . . . .”); De Kaplany v. Enomoto, 540 F.2d 975, 979-81 (9th Cir. 1976), cert. denied, 429 U.S. 1075 (1977) (competency hearing required where record as a whole, including testimony and events at trial, raises genuine doubt in mind of trial judge as to defendant's competency to stand trial).

833. Drope v. Missouri, 420 U.S. 162, 171-72 (1975); Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam). See 18 U.S.C. § 4244 (1976) (establishes pretrial procedures for determining whether accused is insane or “otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense.”).


835. Greenfield v. Guhn, 556 F.2d 935, 937 (9th Cir.), cert. denied, 434 U.S. 928 (1977); Bassett v. McCarthy, 549 F.2d 616, 619 (9th Cir.), cert. denied, 434 U.S. 849 (1977); De Kaplany v. Enomoto, 540 F.2d 975, 982-83 (9th Cir. 1976), cert. denied, 429 U.S. 1075 (1977). See Tillery v. Eyman, 492 F.2d 1056, 1059 (9th Cir. 1974) (trial court erred in failing to hold a hearing when substantial evidence before the court, including defendant's outbursts in the courtroom and bizarre, irrational behavior in confinement, indicated that he “may have been mentally incompetent to stand trial.”).


837. 549 F.2d 616 (9th Cir.), cert. denied, 434 U.S. 849 (1977).
court level, the Ninth Circuit ruled that, "in light of the record as a whole, . . . the trial court's failure to hold a competency hearing cannot be found to have denied petitioner a fair trial." Evidence cited by the court in support of its conclusion included petitioner's intelligence and ability to articulate, a staff report from the hospital to which petitioner had been committed following a prior plea of not guilty by reason of insanity, and the opinion of petitioner's own expert witness, who testified that petitioner had recovered somewhat from his mental illness and was capable of understanding what was happening around him.

Judge Hufstedler, in dissent, declared that the evidence raising a doubt as to petitioner's competency "was at least as substantial as the evidence tending to dispel doubt" and that, therefore, the lower court erred in failing to conduct a competency hearing.

VI. POST-CONVICTION PROCEEDINGS

A. Sentencing

Federal appellate courts are normally hesitant to review the sentence imposed after conviction unless the sentence exceeded the maximum allowable. The Ninth Circuit "has consistently held that the matter of sentencing is within the discretion of the trial judge and that where . . . the sentence falls within the bounds prescribed by statute, it is not reviewable." In United States v. Kearney, the court, after reaffirm-
ing this principle, set forth an exception. Where the sentence is based on misinformation, review may be warranted to remedy a constitutional violation. However, no such misinformation was considered by the sentencing judge in Kearney. In rejecting the defendant's contention that his twenty-five year sentence was an abuse of discretion on the ground that he was a "small fry," the Ninth Circuit concluded that the defendant's participation was "early, fundamental, and substantial."

In United States v. Stevens, the court labeled as "frivolous" the defendant's argument that a sentence in excess of six years under the Federal Youth Corrections Act was invalid. Since the statute specifically authorizes an extension of the sentence where the defendant may "not be able to derive maximum benefit from treatment" within six years, the sentence was within the discretion of the trial judge. In Masterana v. United States, the Ninth Circuit rejected defendant's argument that the sentencing judge had been unaware of Parole Commission guidelines and that those guidelines resulted in an incarceration longer than that intended to be imposed by the judge. It was further observed that even if the trial judge had not been familiar with the guidelines, his action in denying defendant's petition to correct sentence indicated approval of the parole board's actions.

When a defendant has remained in prison awaiting trial, he may attempt to credit the time served against the length of the sentence which is ultimately imposed. The right to credit time is not absolute; however, if the sentence imposed, when added to time already served, ex-

(citing with approval United States v. Weston, 448 F.2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972); United States v. James, 443 F.2d 348 (9th Cir. 1971). See United States v. Tucker, 404 U.S. 443, 447 (1972); United States v. Lustig, 555 F.2d 737, 751 (9th Cir. 1977), cert. denied, 434 U.S. 1045 (1978); United States v. Ferri, 513 F.2d 572, 575 (9th Cir. 1979).

847. 560 F.2d 1358 (9th Cir.), cert. denied, 434 U.S. 971 (1977).
848. Id. at 1369.
850. 560 F.2d at 1369.
851. Id.
852. 548 F.2d 1360 (9th Cir.), cert. denied, 430 U.S. 975 (1977).
853. 548 F.2d at 1361 n.4.
856. 548 F.2d at 1361 n.4.
857. 549 F.2d 1342 (9th Cir. 1977).
858. Id. at 1343.
859. Id.
860. See Hook v. Arizona, 496 F.2d 1172, 1173-74 (9th Cir. 1974).
ceeds the maximum punishment prescribed by law, then the defendant will be allowed to credit the time served. It is clear, however, that not all types of confinement will lead to this result. For example, confinement in a mental institution before trial is not equivalent to confinement in prison. In United States v. Robles, the Ninth Circuit held that a defendant is not sufficiently confined when he is released on bond pending appeal to warrant credit against the sentence for the time spent under the bond. Although one’s liberty is somewhat limited under these circumstances, it is not the type of situation in which credit will be extended.

In determining whether sentences should be imposed concurrently or consecutively, the court may look to the statute for aid. In United States v. Ortiz-Martinez, the court determined that consecutive sentences could not be imposed upon conviction for two different crimes resulting from the same transaction unless there was a clear intention from the face of the statutes that Congress intended cumulative punishment. Even though the statute covering each crime sets forth a sentence, the principle of United States v. Clements “militates against breaking this essentially unitary transaction into its component parts in order to exact consecutive sentences.”

In a slightly different situation, a defendant challenged the imposition of separate sentences on separate counts. The court held that since the sentences were concurrent and therefore added nothing, the sentence did not exceed the lawful penalty. The trial judge may, of course, in his discretion, order consecutive sentences imposed in order to insure that the defendant is punished for an original conviction and a subsequent one. However, a district court has no authority to im-

861. Id.
863. 563 F.2d 1308 (9th Cir. 1977), cert. denied, 435 U.S. 925 (1978).
864. Id. at 1309.
865. United States v. Ortiz-Martinez, 557 F.2d 214 (9th Cir. 1977).
866. Id.
867. Id. at 216.
868. 471 F.2d 1253 (9th Cir. 1972).
869. 557 F.2d at 217. The dissent, however, argued that since different facts were required for each of the two convictions, they should entail separate punishments. Id.
870. United States v. Davis, 548 F.2d 840, 845 (9th Cir. 1977).
871. Id.
872. United States v. Lustig, 555 F.2d 751, 753 (9th Cir. 1977), cert. denied, 434 U.S. 1045 (1978); United States v. Tacoma, 199 F.2d 482, 483 (2d Cir. 1952). Cf. United States v. Bartholdi, 453 F.2d 1225, 1226 (9th Cir. 1972) (probation revoked after expiration and defendant sentenced to four months consecutive to a state sentence he was serving).
pose a federal sentence concurrently with a state sentence.\textsuperscript{73} This is true "because a federal term cannot begin until a prisoner has been received by federal authorities."\textsuperscript{74}

When a defendant is retried after having had his first conviction set aside, the court is normally limited to the defendant's original sentence.\textsuperscript{75} However, where there have been events subsequent to the original sentencing which shed new light on defendant's "life, health, habits, conduct, and mental and moral propensities," the court may impose a more severe sentence upon reconviction.\textsuperscript{76}

A sentence may be considered cruel and unusual punishment if the penalty is "so out of proportion to the crime committed that it shocks a balanced sense of justice."\textsuperscript{77} In \textit{United States v. Tolias},\textsuperscript{78} the Ninth Circuit rejected defendant's argument that he was a victim of cruel and unusual punishment. The defendant, a homosexual, was sentenced to serve time in prison. He claimed this was a violation of his eighth amendment rights because "there are assaults and homosexual rapes in prison."\textsuperscript{79} The court held that this argument fell short of meeting the test for cruel and unusual punishment.\textsuperscript{80}

In deciding what sentence to impose a trial judge may, in his discretion, consider the defendant's candor as a witness.\textsuperscript{81} The Ninth Circuit recently reaffirmed this principle in two cases.\textsuperscript{82} In \textit{United States v. Lustig},\textsuperscript{83} the court emphasized that appellate review of the sentence imposed by a trial judge is improper absent some "extraordinary circumstance."\textsuperscript{84} While formulating a defendant's sentence, the trial judge must also design probation conditions which avoid the risk of

\textsuperscript{73} United States v. Segal, 549 F.2d 1293 (9th Cir.), \textit{cert. denied}, 431 U.S. 919 (1977).
\textsuperscript{74} \textit{Id.} at 1301; 18 U.S.C. \textsection 3568 (1976).
\textsuperscript{75} United States v. Hall, 559 F.2d 1160, 1162-63 (9th Cir. 1977), \textit{cert. denied}, 435 U.S. 942 (1978).
\textsuperscript{76} \textit{Id.} at 1163 (citing North Carolina v. Pearce, 395 U.S. 711, 723 (1969)).
\textsuperscript{77} Halprin v. United States, 295 F.2d 458, 460-61 (9th Cir. 1961) (quoting Gallego v. United States, 276 F.2d 914, 918 (9th Cir. 1960)).
\textsuperscript{78} 548 F.2d 277 (9th Cir. 1977).
\textsuperscript{79} \textit{Id.} at 279.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} United States v. Cluchette, 465 F.2d 749, 754 (9th Cir. 1972); \textit{see text accompanying notes 1195-96 infra.}
\textsuperscript{83} 555 F.2d 737 (9th Cir. 1977), \textit{cert. denied}, 434 U.S. 1045 (1978).
\textsuperscript{84} \textit{Id.} at 751 (citing United States v. Buck, 548 F.2d 871, 877 (9th Cir. 1977)). \textit{See note 846 supra} and accompanying text.
self-incrimination.\textsuperscript{885}

In addition to objecting to the length of sentences, defendants may attack their sentences on grounds of illegality.\textsuperscript{886} In \textit{United States v. Walker},\textsuperscript{887} the defendant contended that his previous conviction for a violent crime disqualified him from commitment under the National Addiction and Rehabilitation Act\textsuperscript{888} and that therefore his commitment was illegal.\textsuperscript{889} The court found the applicable sections applied only to the present offense or to \textit{two} prior offenses and therefore defendant's single conviction for a violent crime did not disqualify him.\textsuperscript{890}

The defendant in \textit{United States v. Marron}\textsuperscript{891} succeeded in attacking a split adult sentence imposed under 18 U.S.C. section 3651\textsuperscript{892} on the basis that he was a youthful offender.\textsuperscript{893} The court held that this sentence was illegal because a combination of rehabilitative treatment and retributive punishment was not intended by the Federal Youth Corrections Act.\textsuperscript{894} Although the court determined the sentence was illegal, the Ninth Circuit reaffirmed the principle that the trial court was entitled to resentence the defendant.\textsuperscript{895} To alter a sentence, the defendant must move for correction or modification thereof within 120 days.\textsuperscript{896} Although the Eighth Circuit has permitted an exception to this time limitation,\textsuperscript{897} the Ninth Circuit has found the limit to be jurisdictional in nature\textsuperscript{898} and has specifically declined to recognize the exception expressed by the Eighth Circuit.\textsuperscript{899}

Where there is a direct conflict between the written and the oral

\textsuperscript{885} United States v. Pierce, 561 F.2d 735, 740 (9th Cir. 1977), \textit{cert. denied}, 435 U.S. 923 (1978). The trial judge, however, need not take account of an unasserted fifth amendment claim.

\textsuperscript{886} See text accompanying notes 887-95 infra.

\textsuperscript{887} 564 F.2d 891 (9th Cir. 1977), \textit{cert. denied}, 435 U.S. 916 (1978).

\textsuperscript{888} Narcotic Addiction and Rehabilitation Act, 18 U.S.C. §§ 4251(f)(1), 4251(b) (1970).

\textsuperscript{889} 564 F.2d at 892.

\textsuperscript{890} Id.

\textsuperscript{891} 564 F.2d 867 (9th Cir. 1977).

\textsuperscript{892} A split sentence is one in which the defendant is placed on probation on the condition that he spend a specified amount of time in jail. \textit{See} 18 U.S.C. § 3651 (1976).

\textsuperscript{893} 564 F.2d at 868.

\textsuperscript{894} Id. at 869; United States v. Hayes, 474 F.2d 965, 967 (9th Cir. 1973); United States v. Waters, 437 F.2d 722, 726 (D.C. Cir. 1970).

\textsuperscript{895} 564 F.2d at 871 (citing Pollard v. United States, 352 U.S. 354 (1957)).

\textsuperscript{896} FED. R. CRIM. P. 35.

\textsuperscript{897} Kortness v. United States, 514 F.2d 167 (8th Cir. 1975).

\textsuperscript{898} United States v. United States District Court, 509 F.2d 1352 (9th Cir.), \textit{cert. denied}, 421 U.S. 962 (1975).

\textsuperscript{899} Sanchez v. United States, 572 F.2d 210 (9th Cir. 1977); Andrino v. United States Bd. of Parole, 550 F.2d 519 (9th Cir. 1977).
judgments, an unambiguous oral sentence will control.\textsuperscript{900} In United States v. Velazco-Hernandez,\textsuperscript{901} the court reaffirmed this principle but concluded that there was no conflict between the oral and written sentences involved in the case.\textsuperscript{902}

B. Probation Revocation

Probation revocation, like parole revocation, is not a stage of the criminal prosecution.\textsuperscript{903} It does, however, result in a loss of liberty and therefore a probationer is entitled to a hearing complying with due process requirements.\textsuperscript{904} In United States v. Segal,\textsuperscript{905} the Ninth Circuit determined that a probationer must be given both a preliminary hearing and a final revocation hearing before his probation may be revoked.\textsuperscript{906} The preliminary hearing is to be held at the time of arrest and should determine whether there is probable cause to believe that the probationer has committed a violation. The final revocation hearing must include the following minimum requirements:

(a) written notice of the claimed violations of [probation]; (b) disclosure to the [probationer] of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body . . . ; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation].\textsuperscript{907}

\textsuperscript{900} United States v. Munoz-Dela Rosa, 495 F.2d 253 (9th Cir. 1974).
\textsuperscript{901} 565 F.2d 583 (9th Cir. 1977).
\textsuperscript{902} Id. at 584.
\textsuperscript{903} Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (probation revocation); Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (parole revocation); United States v. Segal, 549 F.2d 1293, 1297 (9th Cir.), cert. denied, 431 U.S. 919 (1977) (probation revocation); see text accompanying notes 949-50 infra.
\textsuperscript{904} Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973). In United States v. Segal, 549 F.2d 1293 (9th Cir.), cert. denied, 431 U.S. 919 (1977), the Ninth Circuit differentiated between four types of proceedings in which the Supreme Court has required “differing levels of due process”:

\textsuperscript{905} Id. at 1296.
\textsuperscript{906} 549 F.2d 1293 (9th Cir.), cert. denied, 431 U.S. 919 (1977).
\textsuperscript{907} 549 F.2d 1297 (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972)).
In *Mempa v. Rhay*, the rights were extended to include the right to counsel. After the preliminary and final hearings, probation may then be revoked where the hearing officer is reasonably satisfied that a state or federal law or a condition of probation has been violated. In determining whether a condition of probation has been violated, the hearing officer must find that the condition was reasonably related to the purposes of the Federal Probation Act. There are three factors which contribute to such a determination: "(1) the purposes sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement." In *United States v. Pierce*, the Ninth Circuit found that a condition of probation which required the disclosure of certain financial information, even though it denied probationer the right against self-incrimination, carried out the purposes of the Act. Protection of the public and the needs of law enforcement were served through the acquisition of information on probationer's assets because such information permitted the detection of illegal investment activity. Rehabilitation of defendant would be furthered by such detection because it would deter the defendant from engaging in illegal activities. Such deterrence would also serve the interests of the public.

The court in *United States v. Dane* took a slightly different approach by concentrating on whether there had been an abuse of discretion by the judge in revoking probation. Where the offensive acts are not illegal, due process requires a "prior fair warning" to defendant.

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909. Id. at 137.
910. United States v. Carrion, 457 F.2d 808, 809 (9th Cir. 1972) (state conviction sufficient for revocation although appeal of conviction pending). In 1977 the Ninth Circuit reaffirmed the *Carrion* rationale twice: United States v. Marron, 564 F.2d 867, 871 (9th Cir. 1977) (facts may be considered from an invalid conviction since the conviction itself need not be considered); United States v. Lustig, 555 F.2d 751, 753 (9th Cir. 1977), cert. denied, 434 U.S. 1045 (1978) (certified copy of conviction which goes unchallenged is sufficient proof of a violation of probation).
911. United States v. Pierce, 561 F.2d 735, 739 (9th Cir. 1977) (citing United States v. Consuelo-Gonzalez, 521 F.2d 239, 262 (9th Cir. 1975) (en banc)).
912. Id.
913. 561 F.2d 735 (9th Cir. 1977).
914. Id. at 739-40.
915. Id.
916. Id.
917. 570 F.2d 840 (9th Cir. 1977).
918. Id. at 843 (citing Burns v. United States, 287 U.S. 216, 222 (1932)); United States v. Lara, 472 F.2d 128, 129 (9th Cir. 1972); Trueblood Longknife v. United States, 381 F.2d 17,
that those acts will lead to revocation. The court found that defendant Dane had been put on notice at his sentencing that the continuation of his life as a mercenary soldier would lead to a revocation of his probation. After considering two main concerns of a probation system, the Ninth Circuit concluded that the trial judge had not abused his discretion by revoking defendant's probation on the basis of acts committed outside the United States which were not illegal. The court reasoned that the acts showed probationer's continued fascination for weapons and soldiering, which could be reasonably construed as a threat to the community.

Rule 11(c) of the Federal Rules of Criminal Procedure requires the trial judge to personally address the defendant to determine whether his plea of guilty is made voluntarily and with an understanding of the nature of the charges and the consequences of the plea. The issue of


919. 570 F.2d at 844 (citing Tiitsman v. Black, 536 F.2d 678, 682 (6th Cir. 1976)). See United States v. Foster, 500 F.2d 1241, 1244 (9th Cir. 1974) (where defendant not advised that he was to report to probation department, his failure to do so could not be grounds for revocation). Cf. Bouie v. City of Columbia, 378 U.S. 347, 351-52 (1964) (conviction overturned since statute did not give prior notice that conduct was illegal).

920. 570 F.2d at 844.

921. The twin goals isolated by the Dane court were successful rehabilitation of the probationer and protection of the community. Id. at 845 (citing United States v. Consuelo-Gonzalez, 521 F.2d 259, 264 (9th Cir. 1975) (en banc); United States v. Winsett, 518 F.2d 51, 54-55 (9th Cir. 1975); and United States v. Nu-Triumph, Inc., 500 F.2d 594, 596 (9th Cir. 1974)).

922. Id. at 845-46.

923. Id. at 846.

924. FED. R. CRIM. P. 11(c) provides:

Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and
(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.
whether rule 11 applies to violations admitted by the probationer at revocation hearings was addressed by the Ninth Circuit in *United States v. Segal*. The court concluded that rule 11 requires advisement only before accepting a *plea of guilty*, not before admission of a violation, and that the admission of a probation violation is not equivalent to a guilty plea. The *Segal* court considered whether *Boykin v. Alabama* required specific waivers of the right to confrontation and the privilege against self-incrimination in a probation revocation hearing. After a survey of the case law which revealed that at the probation revocation hearing the defendant was at best entitled to an "attenuated confrontation right, a limited self-incrimination privilege and no right to jury trial" and was subject to the same maximum punishment of which she had been advised before pleading guilty, the court concluded that "the theoretical justifications for *Boykin*" were absent and, therefore, its protections did not apply. The court emphasized the inapplicability of *Boykin* as well as its inappropriateness. Since the probation officer's role is one of "representing his client's best interests as long as these do not constitute a threat to public safety, . . . [t]his function can best be carried out in a less adversary and contentious atmosphere." Otherwise, the court maintained, the next logical step would be a requirement that the probation officer advise the probationer of his or her rights at every meeting. Although this would not be necessary to protect the probationer's rights, it would interfere with the relationship between the probation officer and probationer which could best effect rehabilitation. In dissent, Judge Browning argued that a simple recitation of the rights guaranteed by *Gagnon v. Scarpelli* at a probation revocation hear-

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926. 549 F.2d at 1296. *See also* United States v. Hill, 548 F.2d 1380, 1381 (9th Cir. 1977) (rule 11 inapplicable since probation revocation not a stage of criminal proceeding).
927. 549 F.2d at 1300.
929. 549 F.2d at 1296.
930. *Id.* at 1299.
931. *Id.* at 1298-1300. *See also* United States v. Hill, 548 F.2d 1380, 1381 (9th Cir. 1977).
932. 549 F.2d at 1300.
933. *Id.* The Court discussed the difference in the nature of the proceedings prior to sentencing and during the probation period. Prior to sentencing, the proceedings are adversarial in nature. After sentencing, the prosecutor leaves and the relationship between the court and the defendant is one of cooperation. Under such circumstances, formalistic procedures are unnecessary and may even inhibit the rehabilitative process. *Id.* at 1300-01.
934. *Id.* at 1301.
935. *Id.*
where imposition of sentence could follow, would not significantly alter the nature of the proceedings. Overturning probation is the equivalent of imprisonment, and it is inappropriate to risk an uninformed and unjustified admission of a violation.

C. Parole Revocation

Under the Parole Commission and Reorganization Act, parole may be revoked when the parolee commits a crime while on parole, or when no additional crime has been committed by him while on parole, i.e., when the parolee has violated the terms of his order of parole, other than by committing a new crime. When parole is revoked not because of the commission of a crime but because of the violation of the terms of parole, the parolee receives credit for time spent on parole. This was not true under the law as it existed prior to the passage of the Act. In White v. Warden, the Ninth Circuit held that the Act is not to be applied retroactively. Consequently, defendant was not entitled to 776 days credit for time spent on parole prior to the effective date of the Act and prior to return to prison for a parole violation. The court’s conclusion was based on several factors, including the reasoning of the district court in Daniels v. Farkas, an earlier case in which it was held that the Act should apply prospectively only.

“Preponderance of the evidence” is the standard of proof required at revocation hearings. This is so even where the defendant has been previously acquitted on identical charges in a criminal trial. Reasoning that parole revocation is not a part of the criminal prosecution, that it is remedial rather than punitive in nature, and that it

937. See text accompanying notes 57-62 supra.
938. 549 F.2d at 1303.
939. Id.
941. White v. Warden, 566 F.2d 57, 59 (9th Cir. 1977).
943. See Act of June 25, 1948, Pub. L. No. 80-772, § 4205, 62 Stat. 854-55 (formerly codified at 18 U.S.C. § 4205) (repealed 1976). ("The time the prisoner was on parole shall not diminish the time he was sentenced to serve.").
944. 566 F.2d 57 (9th Cir. 1977).
945. Id. at 60-62.
947. See Morrissey v. Brewer, 408 U.S. 471, 479 (1972); Standlee v. Rhay, 557 F.2d 1303, 1307 (9th Cir. 1977); United States v. Carrion, 457 F.2d 808, 809 (9th Cir. 1972) (per curiam).
948. Standlee v. Rhay, 557 F.2d 1303, 1307 (9th Cir. 1977).
seeks to protect the welfare of parolees and safety of society, the Ninth Circuit concluded "that collateral estoppel does not bar a subsequent parole revocation hearing after a criminal acquittal."

The Ninth Circuit has extended the principle, originally announced as dictum in a 1976 case, that a trial court need not inform a defendant of the possibility of parole revocation when accepting his guilty plea. This conclusion was grounded on the fact that the parole board has authority separate and distinct from the sentencing judge. It can therefore determine whether the remainder of the defendant's pre-existing sentence will run concurrently or consecutively to his most recent sentence. The court concluded that revocation of parole is a collateral, rather than a direct, consequence of a guilty plea. While rule 11(c)(1) of the Federal Rules of Criminal Procedure requires the trial judge to inform a defendant of the maximum penalties for the offense charged prior to accepting his guilty plea, the defendant need only be informed of all direct consequences of his plea.

D. Appeal

1. Motion for Judgment of Acquittal

The test to be followed by an appellate court reviewing a lower court ruling on defendant's motion for acquittal under rule 29(c) is identical to that followed by the trial judge. The jurors are the sole judges of the credibility of the witnesses. It is their responsibility to resolve evidentiary conflicts and to draw any reasonable inferences from the

951. 557 F.2d at 1307. The Rhay court additionally focused on the differing standards of proof in criminal and civil actions as reason for the inapplicability of collateral estoppel. Id. at 1305, 1307.
952. United States v. Harris, 534 F.2d 141, 142 n.4 (9th Cir. 1976).
953. Sanchez v. United States, 572 F.2d 210, 211 (9th Cir. 1977) (per curiam).
954. Id.
955. Id.
956. Id.
958. FED. R. CRIM. P. 29(c). The rule provides:
   Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.
proven facts. On appeal, the evidence must always be viewed in a light most favorable to the government. The reviewing court does not reevaluate the evidence. Rather, it assesses the jurors' conclusions to determine if it was rational to conclude that the defendant's guilt was established beyond a reasonable doubt.

In United States v. Ramos, the court, relying on United States v. Nelson, held that the jury could have reasonably found the defendant guilty by believing certain witnesses and by disbelieving the defendant's alibi witness. The Ramos court held that reversal was required because the trial court had disregarded the Nelson standard by ignoring the evaluation of the testimony by the jury.

The Nelson test was employed by the Ninth Circuit in United States v. Rojas and United States v. Garcia-Rodriguez. In Rojas, application of the Nelson test led to the conclusion that the district court "erred as a matter of law in concluding that a jury could not rationally find defendant guilty beyond a reasonable doubt on the basis of the evidence presented." Similarly, the court in Garcia-Rodriguez reiterated the principle and concluded, following an in-depth evidentiary analysis, that there had been no error.

In United States v. Kaplan, a 1977 case, the court added a slightly new dimension to the old test:

Viewing the evidence in a light most favorable to the government as prevailing party, is the court satisfied that the jurors reasonably could decide that they would not hesitate to act in their own serious affairs upon factual assumptions as probable as the conclusions that the defendant is guilty as charged?

The Ninth Circuit again applied this slightly modified test in United...
States v. Dunn, concluding that the evidence was insufficient to justify the convictions of four of the defendants.

2. New Trial

The Ninth Circuit has not supplied a decisive test to determine when the defendant is sufficiently prejudiced by improperly admitted evidence to warrant a new trial under the federal rules. It is clear, however, that several factors are afforded weight. These factors include the inherent prejudice of the evidence presented, the forcefulness and timeliness of the trial court's curative instructions, and the overall strength of the prosecution's case.

In United States v. Nace, the court reiterated that the post-trial discovery of evidence which would have been valuable for impeachment purposes does not warrant the granting of a new trial. Furthermore, noted the court, since the exercise of due diligence in discovering new evidence is a prerequisite to the granting of a new trial on the ground of newly discovered evidence, the motion in Nace would have failed in any event inasmuch as counsel had not acted with due diligence.

3. Appealable Issues

A defendant generally will not be permitted to raise an objection or issue for the first time in the reviewing court. Where the issue is of a constitutional nature, however, the defendant's failure to object at the trial level cannot be considered a waiver of the issue. A second ex-

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975. 564 F.2d 348 (9th Cir. 1977).
976. Id. at 357, 359.
977. FED. R. CRIM. P. 33.
978. United States v. Martinez, 514 F.2d 334, 343 (9th Cir. 1975); United States v. Bashaw, 509 F.2d 1204, 1205 (9th Cir. 1975); Thurman v. United States, 316 F.2d 205, 206 (9th Cir. 1963).
979. 561 F.2d 763 (9th Cir. 1977).
980. Id. at 772 (citing United States v. Harris, 534 F.2d 1371, 1374 (9th Cir.), cert. denied, 429 U.S. 847 (1976)). E.g., United States v. Colacurcio, 499 F.2d 1401, 1406 (9th Cir. 1974); Lindsey v. United States, 368 F.2d 633 (9th Cir. 1966), cert. denied, 386 U.S. 1025 (1967).
981. United States v. Carey, 475 F.2d 1019 (9th Cir. 1973); Lindsey v. United States, 368 F.2d 633 (9th Cir. 1966), cert. denied, 386 U.S. 1025 (1967).
982. 561 F.2d at 772.
ception to the non-review rule recognized by the Ninth Circuit,985 is when a showing of "plain error" can be made. Again, the previously unraised issue may be asserted for the first time on appeal.986

In United States v. Goldstein,987 the court set aside the lower court's judgment and remanded the case since the parties had agreed that the stipulation leading to judgment erroneously deleted evidence relating to the defendant's motion to suppress. Inclusion of the evidence was necessary to allow the defendant to raise this point on appeal.988 The failure to meet this requirement was "plain error." In contrast, the court in United States v. Nace989 and United States v. Helina990 determined that "plain error" did not exist, and consequently affirmed the lower courts' decisions.991 In United States v. Kleifgen,992 the court did not apply the "plain error" exception but rather determined that no objection had been made and, therefore, the point had been "waived" for the purpose of appeal.993

Federal appellate jurisdiction is purely statutory in origin994 and is reserved primarily for the review of final decisions.995 In United States

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985. See note 986 infra.
987. 558 F.2d 918 (9th Cir. 1977).
988. Id. at 919.
989. 561 F.2d 763 (9th Cir. 1977).
990. 549 F.2d 713 (9th Cir. 1977).
991. 561 F.2d at 771; 549 F.2d at 718.
992. 557 F.2d 1293 (9th Cir. 1977).
993. Id. at 1299.
995. See 28 U.S.C. § 1291 (1976). Cf. United States v. Lansdown, 460 F.2d 164, 170-71 (4th Cir. 1972) (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)) (exception to "finality" rule for orders made during course of litigation which relates to collateral matters and which would not receive effective review as part of the final judgment in the action; order denying motion to dismiss on double jeopardy grounds is such a collateral order and is, therefore, reviewable prior to final judgment). Lansdown has been adopted in three other circuits. See United States v. Barket, 530 F.2d 181, 185 (8th Cir. 1975), cert. denied, 429 U.S. 917 (1977); United States v. DiSilvio, 520 F.2d 247, 248 n.20 (3d Cir.), cert. denied, 423 U.S. 1015 (1975); United States v. Beckerman, 516 F.2d 905, 906-07 (2d Cir. 1975).
v. Towill, the Ninth Circuit concluded that 18 U.S.C. section 3731 does not provide for appellate review of a denial of a governmental motion to dismiss the indictment.

In United States v. Ritte, the defendant appealed a magistrate's order for the forfeiture of the defendant's appearance bond for breach of a bail condition. The Ninth Circuit held that because district courts, not magistrates, have the power to adjudicate bond forfeitures and because the record did not indicate that the forfeiture finding had been adopted by the district court, there was no final appealable order within the meaning of 28 U.S.C. section 1291. Section 1291 does not authorize appeals from magistrates' decisions.

In Moroyoqui v. United States, however, the Ninth Circuit reversed its earlier position and held that an order denying a motion to dismiss on double jeopardy grounds is a final decision and is, therefore, appealable under section 1291. This result followed a United States Supreme Court decision announced during the pendency of the Moroyoqui appeal.

4. Discretion to Review

Although an issue not raised in the trial court normally will not be reviewed by the court of appeals, the reviewing court does have discretion to review such issues. In Standlee v. Rhay, for example, the court of appeals exercised its discretion to review and "dispose" of a previously unraised issue of little merit. In Schoultz v. Sheriff, Carson City, Nevada, rather than utilize its discretion to dispose of

996. 548 F.2d 1363 (9th Cir. 1977).
998. 558 F.2d 926 (9th Cir. 1977).
1000. 558 F.2d at 927.
1003. 570 F.2d 862 (9th Cir. 1977).
1005. 570 F.2d at 864.
1007. See text accompanying notes 983-86 supra; Frommhagen v. Klein, 456 F.2d 1391, 1395 (9th Cir. 1972).
1009. 557 F.2d 1303 (9th Cir. 1977).
1010. Id. at 1308 n.3.
1011. No. 76-3732 (9th Cir. Dec. 30, 1977) (unreported; see table, 568 F.2d 776, 778 (1977) (decisions without published opinions)).
the previously unraised issue because the issue was "of little merit," the Ninth Circuit instead held that because of the extensive record on the speedy trial issue, justice required that the court dispose of the newly raised "ineffectiveness of counsel" issue. The court concluded, however, that the sparseness of the record with respect to the ineffectiveness issue necessitated the return of the case to the trial court for further development of this issue.

The appellate court may also employ its discretion to refuse to review issues even when they have been previously raised. Such refusals often occur in cases in which the defendant has received concurrent sentences on several charges. In such cases, affirmance of the conviction on any single count renders review on the other counts unnecessary. Recent cases illustrating this discretionary power include United States v. Garcia-Rodriguez and United States v. Valdovinos.

5. Dismissal of Appeals

The death of an appellant during the pendency of an appeal of a criminal conviction abates the appeal and the trial court proceedings. In United States v. Bechtel, the Ninth Circuit reaffirmed this principle, indicating that although Durham v. United States had been overruled by Dove v. United States, this aspect of the case remained intact. Since the appellant in Bechtel had died while review of his criminal conviction was pending, the appeal was dismissed with directions to the trial court to dismiss the indictment.

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1012. Id., slip op. at 2657.
1013. Id., slip op. at 2658.
1015. See cases cited in note 1014 supra.
1016. 558 F.2d 956, 957 n.1 (9th Cir. 1977) ("Each appellant received a concurrent sentence on each of the two counts. Thus, if we affirm the conspiracy count, we need not consider the issues raised as to the possession count.").
1017. 558 F.2d 531, 534 (9th Cir. 1977) (power to refuse to review recognized, but review undertaken nevertheless).
1019. 547 F.2d 1379 (9th Cir. 1977).
1022. 547 F.2d at 1380.
1023. Id.
The reviewing court may also dismiss an appeal where the appellant has become a fugitive from justice and where there is no indication that he will surrender, regardless of the outcome of the appeal. In *United States v. Wood*, the Ninth Circuit concluded that there was no indication that the defendant would surrender upon a decision adverse to him; dismissal of the appeal was therefore appropriate.

6. Standard for Reviewing Court

It has consistently been held that since trial judges are in the best position to weigh and evaluate the credibility of witnesses, their findings will not be overturned on appeal unless they are “clearly erroneous.” Several recent Ninth Circuit cases upheld lower court findings under this standard.

The court of appeals also utilizes the “abuse of discretion” standard to determine whether to uphold a decision. In *United States v. Kearney*, the court indicated that the district judge has “great latitude in passing on the admissibility of evidence,” and therefore his decision will not be overturned absent an abuse of discretion. The Federal Rules of Evidence indicate that “[t]he extent of impeachment is [also] committed to the discretion of the trial court.” An appellate court will reverse only upon an abuse of that discretion. This stan-

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1025. 550 F.2d 435 (9th Cir. 1977).
1026. Id. at 437-38.
1027. See United States v. Johnson, 327 U.S. 106, 111-12 (1946); United States v. Townsend, 510 F.2d 1145, 1147 (9th Cir. 1975); United States v. Page, 302 F.2d 81, 82-83, 85-86 (9th Cir. 1962) (en banc).
1028. See, e.g., Moroyoqui v. United States, 570 F.2d 862, 864 (9th Cir. 1977) (trial judge's findings that conduct of prosecutor did not constitute “bad faith” or “overreaching” upheld because not clearly erroneous); United States v. Nace, 561 F.2d 763, 772-73 (9th Cir. 1977) (trial court's finding that government had not suppressed exculpatory evidence entitled to great deference and will not be overturned “unless it clearly appears that it is not supported by evidence”); United States v. Humphrey, 549 F.2d 650, 652 (9th Cir. 1977) (trial court's ruling on defendant's motion to suppress upheld under “clearly erroneous” standard); United States v. Tolias, 548 F.2d 277, 278 (9th Cir. 1977) (district court's decision as to whether defendant's consent to search was voluntary will not be reversed unless clearly erroneous).
1030. 560 F.2d 1358 (9th Cir. 1977).
1031. Id. at 1369.
1032. Fed. R. Evid. 608(b).
standard was altered in United States v. Stevens, wherein it was held that the appellate court should affirm on any grounds which will validate the lower court's result. In United States v. Segna, the court reaffirmed its rigorous standard that reversal is required in only those "very exceptional circumstances where reversal is necessary in order to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process."

7. Harmless Error

Not all errors committed at the trial level will result in a reversal for the defendant. If the error is classified as "harmless error," the verdict will not be disturbed by the appellate court. As a result, the difficult task is determining when an error is prejudicial or harmless. While there is no one test which is uniformly applied, the standards devised address the degree of certainty required before an error is classified as "harmless." The inquiry usually is whether it is "more probable than not," or whether it is "highly probable," that an error did not materially affect the judgment.

In United States v. Valle-Valdez, the most important case decided by the Ninth Circuit in this area in 1977, the court indicated that the most clearly articulated standard is one of "reasonable possibility" that the error materially affected the verdict. The court stated: "Which

1034. 548 F.2d 1360 (9th Cir.), cert. denied, 430 U.S. 975 (1977).
1035. Id. at 1363 n.9.
1036. 555 F.2d 226 (9th Cir. 1977).
1037. Id. at 231 (citing United States v. Wysong, 528 F.2d 345, 348 (9th Cir. 1976); United States v. Larson, 507 F.2d 385, 387 (9th Cir. 1974); United States v. Trejo, 501 F.2d 138, 141 (9th Cir. 1974); United States v. Cozzetti, 441 F.2d 344, 352 (9th Cir. 1971)).
1038. See United States v. Pettersen, 513 F.2d 1133, 1136 (9th Cir. 1975); United States v. Henson, 513 F.2d 156, 157-58 (9th Cir. 1975); United States v. Davis, 501 F.2d 1344, 1345 (9th Cir. 1974).
1039. United States v. Valle-Valdez, 554 F.2d 911, 915 (9th Cir. 1977).
1040. See generally Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988, 1018-21 (1973). In United States v. Valle-Valdez, 554 F.2d 911, 914-15 (9th Cir. 1977), the Ninth Circuit recognized that "standards guiding appellate determination of harmless error are variable, often confusing and frequently left unarticulated."

Perhaps the leading articulation of the harmless error standard is found in Chapman v. California, 386 U.S. 18, 22-24 (1967): "[B]efore a federal constitutional error can be held harmless, the [appellate] court must be able to declare a belief that it was harmless beyond a reasonable doubt." Therefore, the applicable standard depends on whether the alleged error was of a constitutional or nonconstitutional nature. See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963) (trial court refused to appoint counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession).

1041. 554 F.2d 911 (9th Cir. 1977). See text accompanying notes 1053-58 infra.
standard an appellate court selects depends on the type of case on appeal—criminal or civil\textsuperscript{1043}—or on the type of error committed in the trial court—constitutional or non-constitutional.\textsuperscript{1044} The court found that since improper jury instructions are considered “non-constitutional” errors, the “reasonable possibility” rule was inapplicable.\textsuperscript{1045} Rather, non-constitutional errors require application of the “more probable than not” standard.\textsuperscript{1046} Under the circumstances of \textit{Valdez}, however, the application of either the probability or reasonable possibility standard would have required reversal since “the erroneous jury instruction probably materially affected the verdict. Necessarily, therefore, there is a reasonable possibility that it had such an impact.”\textsuperscript{1047}

In \textit{United States v. Hunt},\textsuperscript{1048} the court interpreted the “reasonable possibility” standard to mean that the court must determine “beyond a reasonable doubt” that the error complained of did not contribute to the verdict.\textsuperscript{1049} Utilizing this test, the court found itself convinced beyond a reasonable doubt that the introduction into evidence of twelve packets of heroin that allegedly had been unconstitutionally seized did not contribute to defendant’s conviction because “the independent, untainted evidence of guilt was overwhelming.”\textsuperscript{1050} Therefore, the admission of the twelve packets constituted harmless error beyond a reasonable doubt.\textsuperscript{1051}

Rules 52(a) and (b) of the Federal Rules of Criminal Procedure indicate that the applicable standard for determining “plain” and “harm-
"less" error depends on the nature of the proceedings. In United States v. Segna, the court relied on Valle-Valdez in determining that it was highly probable that the prosecutor's improper argument materially affected the verdict and amounted to "plain error" under rule 52(b). In United States v. Dixon, the court found that since the trial court had considered an untimely motion for mistrial on the merits, the harmless error standard of rule 52(a) applied. The court then used the Valle-Valdez "more probable than not" test to find that the error in the prosecutor's closing argument probably did not materially affect the jury's deliberations and verdict.

The appellate court may find that an erroneous admission of evidence is harmless by virtue of other overwhelming evidence of guilt. Also, an error with respect to one count may be deemed harmless when concurrent sentences are imposed on several counts. In United States v. Esquer-Gamez, the error was found to be harmless, but the court reversed because the trial court failed to give a necessary jury instruction. The failure was overly prejudicial to the defendant.

8. Automatic Reversal

Although a departure from constitutional procedures does not always automatically result in reversal, the Supreme Court does require reversal when certain types of constitutional error are committed; i.e., certain errors are, as a matter of law, never harmless. In United

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1052. FED. R. CRIM. P. 52(a); harmless error— if the issue were raised below; FED. R. CRIM. P. 52(b); plain error— if the issue were not raised below; United States v. Kearney, 560 F.2d 1358, 1369 (9th Cir.), cert. denied, 434 U.S. 971 (1977); United States v. Esquer-Gamez, 550 F.2d 1231, 1236 (9th Cir. 1977).
1053. 555 F.2d 226 (9th Cir. 1977).
1054. See text accompanying notes 1040-46 supra.
1055. 555 F.2d at 232.
1056. 562 F.2d 1138 (9th Cir.), cert. denied, 435 U.S. 927 (1977).
1057. Id. at 1143.
1058. Id.
1059. FED. R. CRIM. P. 52(a); United States v. Jones, 460 F.2d 325 (9th Cir. 1972); see text accompanying notes 1047-50 supra.
1061. 550 F.2d 1231 (9th Cir. 1977).
1062. Id. at 1234.
1063. Id. at 1236.
States v. Turner, the court reiterated that an erroneous restriction of the right of peremptory challenge during jury selection results in an automatic reversal.

E. Habeas Corpus

Pursuant to statute, federal district courts are empowered to hear petitions for habeas corpus relief "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." In ruling on the petition, the district court judge is to presume that the factual findings of the state court are correct. This presumption is rebutted, however, if the petitioner demonstrates the presence of any one of eight sets of circumstances enumerated in the statute. Many habeas corpus decisions turn on whether the petitioner succeeds in overcoming the presumption.

In Arndell v. Warden, Nevada State Prison, for example, the defendant was seeking federal habeas corpus relief on the ground that his guilty plea was not given freely, voluntarily, and with a full understanding of its consequences. As a result of the plea, petitioner was

1066. 558 F.2d 535 (9th Cir. 1977).
1067. Id. at 538 (citing Swain v. Alabama, 380 U.S. 202, 219 (1965)).
1069. Id. § 2254(a).
1070. Id. § 2254(d). The presumption arises after a written determination has been made "by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties . . . ." Id.
1071. Section 2254(d) provides that a showing of any one of the following is sufficient to rebut the presumption that the state court determination is correct:

1. that the merits of the factual dispute were not resolved in the State court hearing;
2. that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
3. that the material facts were not adequately developed at the State court hearing;
4. that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
5. that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
6. that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;
7. that the applicant was otherwise denied due process of law in the State court proceeding; or
8. unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record . . . .
1072. 549 F.2d 1284 (9th Cir. 1977).
sentenced to an eight-year prison term for selling a controlled substance. The state court had held an evidentiary hearing and had concluded that the plea was valid. The district court reviewed transcripts of defendant’s arraignment, the hearings on sentencing and change of plea, and the aforementioned evidentiary hearing.1073 The Ninth Circuit held that the district court had acted properly in declining to issue the writ in light of the petitioner’s failure to establish the presence of any of the eight circumstances1074 specified by statute.1075

A prisoner must exhaust available state remedies before a federal court will entertain his petition for habeas corpus.1076 In fact, the Ninth Circuit generally refuses to resolve any issue raised in the petition until all issues raised therein have been exposed to available state remedies.1077 In Miller v. California,1078 the defendant alleged that his state conviction was constitutionally invalid on double jeopardy grounds. Earlier, the case had reached the Supreme Court on an obscenity issue.1079 Miller claimed that the instant conviction was barred as a result of prior convictions on the same charge stemming from the same incident. The court of appeals concluded that Miller’s contentions had probably been fully resolved by the Supreme Court’s decision; but if they had not been, federal habeas corpus would not lie at this stage because petitioner had “no business being here on issues not presented to the state courts.”1080

The courts of appeals do not automatically have jurisdiction to entertain all appeals from a district court’s denial of habeas corpus relief. Federal law specifically provides that no such appeal will lie “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.”1081

1073. Id. at 1286.
1074. See note 1071 supra and accompanying text.
1075. 549 F.2d at 1286.
1077. Gonzales v. Stone, 546 F.2d 807, 810 (9th Cir. 1976). The Fifth Circuit also adheres to this rule. See West v. Louisiana, 478 F.2d 1026, 1034 (5th Cir. 1973), aff’d on rehearing, 510 F.2d 363 (5th Cir. 1975). Some other circuits have adopted a different rule. See, e.g., Johnson v. United States Dist. Court, 519 F.2d 738, 740 (8th Cir. 1975) (federal court will decide exhausted issue unless interrelated with unexhausted issues presented in petition); Hewett v. North Carolina, 415 F.2d 1316, 1320 (4th Cir. 1969) (same).
1078. 551 F.2d 1168 (9th Cir. 1977) (per curiam).
1080. 551 F.2d at 1168.
In *Gardner v. Pogue*, the district court judge, after denying the writ, failed to issue either "a certificate of probable cause [or] a statement of his reasons for refusing to grant one." He had, however, granted the petitioner’s motion to proceed on appeal in forma pauperis. In asserting that the court of appeals had jurisdiction, the defendant raised two arguments: first, that the appellate court could itself issue the certificate of probable cause in the first instance; and second, that the district court’s decision to allow him to proceed in forma pauperis was tantamount to an issuance of the certificate of probable cause. The Ninth Circuit rejected both arguments. The court held that rule 22(b) prevents an appellate court from issuing the certification of probable cause in the first instance. It was also decided that a decision to allow the defendant to proceed in forma pauperis is not tantamount to an issuance of the certificate because of the different standards involved.

In a landmark decision, the Supreme Court held in 1890 that states may not prosecute a federal officer on state criminal charges when the alleged illegality stems from the performance of his federal

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1082. 558 F.2d 548 (9th Cir. 1977).
1083. *Id.* at 550.
1084. *Fed. R. App. P. 22(b).* On its face, 28 U.S.C. § 2253 (1976) allows “the justice or judge who rendered the order or a circuit justice or judge [to issue the] certificate of probable cause.” *Id.* (emphasis added). However, rule 22(b) requires the district court judge to issue a certificate “or a statement detailing his reasons for declining to confer one.” 558 F.2d at 550. It is obvious that the circuit court judge can issue the certificate in the first instance only when the trial judge has explained why he has failed to do so.

1085. 558 F.2d at 550. This result is compelled by rule 22(b) of the Federal Rules of Appellate Procedure. See *note 1084 supra* and accompanying text.

1086. 558 F.2d at 550-52. The court noted that an indigent’s motion to appeal in forma pauperis must be granted “if the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant . . . .” *Id.* at 551 (quoting *Ellis v. United States*, 356 U.S. 674, 675 (1958) (per curiam). See *Pembroke v. Wilson*, 370 F.2d 37, 39 (9th Cir. 1966) (“frivolous” standard appropriate for in forma pauperis petition by habeas corpus petitioner); 28 U.S.C. § 1915(a) (1976) (establishes “good faith” test for proceeding in forma pauperis).

In *Gardner*, however, the Ninth Circuit recognized that the standard “for granting a certificate of probable cause is stricter.” 558 F.2d at 551. Prior to *Gardner*, the circuit had not clearly formulated the test for determining when issuance of the certificate is proper. Compare *Poe v. Gladden*, 287 F.2d 249, 251 (9th Cir. 1961) (“not plainly frivolous”) with *Foster v. Field*, 413 F.2d 1050, 1051 (9th Cir. 1969) (per curiam) (“substantial question”); *In re Burwell*, 236 F.2d 770, 772 (9th Cir. 1956) (“questions of sufficient substance”); *Fouquett v. Bernard*, 198 F.2d 96, 98 (9th Cir. 1952) (“substantial question”). Although the *Gardner* decision did not fully resolve the uncertainty, the court appeared to adopt the “sufficient substance” test: “[A]ppellant’s contentions are not substantive enough to justify the grant of a certificate of probable cause, even though they do meet the good faith test for *in forma pauperis* relief.” 558 F.2d at 551.

1087. *In re Neagle*, 135 U.S. 1 (1890).
responsibilities. Habeas corpus relief is available to persons who have been imprisoned by the State as a result of actions taken pursuant to federal authority. When a federal officer seeks such relief on such a ground, major constitutional issues arise with respect to federal-state relations.

In Clifton v. Cox, a federal agent was charged under California law with second degree murder. The charge was brought after a shooting had taken place during a drug raid engineered by a task force comprised of members of various state and federal agencies. The defendant claimed that the shooting was justified under the circumstances and that he was exempt from state prosecution by reason of the supremacy clause.

The Ninth Circuit held that in acting as he did, the defendant probably had not exceeded the scope of his authority. However, even if he had, "this did not necessarily strip petitioner of his lawful power to act under the scope of authority given to him under the laws of the United

1088. Id. at 75-76. This result is mandated by the supremacy clause of the United States Constitution. See U.S. Const. art. VI; Clifton v. Cox, 549 F.2d 722, 730 (9th Cir. 1977).

1089. See 28 U.S.C. § 2241(c)(2) (1976). This section provides in pertinent part: "The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody for an act done or committed in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States . . . ."


In the Younger line of cases a petitioner seeks to avoid prosecution under a state criminal statute by challenging the constitutionality of the statute in federal court under 28 U.S.C. § 2241(c)(3). The reason for denying habeas corpus relief . . . is that the petitioner can assert his constitutional claim as a defense in the state court prosecution . . . .

In a situation like the instant case, . . . when a petitioner is held by the state "to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do . . . he cannot be guilty of a crime under the law of the State . . . ."

Id. at 729-30 (quoting In re Neagle, 135 U.S. 1, 75 (1890) (footnotes omitted)).

1091. 549 F.2d 722 (9th Cir. 1977).

1092. In Clifton, federal officers obtained a warrant to search a ranch for an illegal drug manufacturing operation. A warrant for the arrest of one of the owners of the ranch had also been procured. The officers were transported to the site by a helicopter which created a great deal of noise and flying debris. One agent fell during the commotion. Clifton, thinking the agent had been shot, forcefully entered a cabin on the property without identifying himself or knocking. The suspect ran into the back yard and toward a nearby wooded area. Clifton shouted twice for the decedent to halt. When his order was ignored, Clifton shot and killed the suspect. Id. at 724.

1093. See note 1088 supra.
The court considered the key issue to be whether the actions of the federal employee were necessary and proper under the circumstances. This determination is made according to both subjective and objective standards.

The court also rejected the state's contention that because the petitioner had not been suspended from his federal position, there was no urgency requiring habeas corpus relief. It was observed that "sufficient urgency is shown whenever it is made to appear that a federal officer is detained on charges of violating state law because of acts committed in the performance of his official duties."

The "adequate state ground" doctrine has been invoked frequently in recent years to prevent the Supreme Court from reviewing certain state cases. It has been held, however, that this doctrine is not a bar to the granting of habeas corpus relief by federal courts. Nevertheless, federal courts retain the discretion to refuse to review petitions for habeas corpus when the defendant has "deliberately by-pass[ed] the orderly procedure of the state courts . . . ."

Much
confusion has been generated by the courts' attempts to define "deliberate bypass," but the phrase is connected with the doctrine of waiver or forfeiture.\textsuperscript{1103}

A guilty plea is generally treated as a deliberate bypass of state remedies.\textsuperscript{1104} Such a plea will not, however, operate in this manner when the defendant can still raise his constitutional claim in a pending state habeas corpus proceeding.\textsuperscript{1105} In \textit{Journigan v. Duffey},\textsuperscript{1106} petitioner contended that his guilty plea in state court did not foreclose the availability of federal relief, since the state statutes underlying the conviction were allegedly unconstitutional. The \textit{Journigan} court noted that while a guilty plea is treated as a bar to federal habeas corpus relief because of the state bypass doctrine, its primary impact was to establish the factual guilt of the defendant.\textsuperscript{1107} But where the constitutional claim challenges the state's power to invoke criminal proceedings, or where the constitutional claim is inconsistent with factual guilt established by the plea, federal habeas corpus remains a viable remedy.\textsuperscript{1108}

In 1976, the Supreme Court held that where the state "has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."\textsuperscript{1109} This holding was contrary to


\textsuperscript{1104} McMann v. Richardson, 397 U.S. 759, 768-69 (1970) (guilty plea voluntarily given constituted bypass of state remedies and barred collateral attack based on deprivation of constitutional rights that occurred prior to entry of plea). \textit{Cf.} Lefkowitz v. Newsome, 420 U.S. 283, 288-89 (1975) (federal habeas corpus relief proper where state allowed defendant, after guilty plea and as an exception to the bypass doctrine, to raise on appeal constitutional claim stemming from pre-plea matters). \textit{See also} Tollett v. Henderson, 411 U.S. 258, 267 (1973) (guilty plea represents a break in the chain of events which makes up the criminal process and bars defendant from raising independent constitutional claims).


\textsuperscript{1106} 552 F.2d 283 (9th Cir. 1977).

\textsuperscript{1107} \textit{Id.} at 287-88.

\textsuperscript{1108} \textit{Id.} at 288. \textit{See} Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (explaining Blackledge v. Perry, 417 U.S. 21 (1974)). While the \textit{Journigan} court viewed \textit{Blackledge} as an exception to the doctrine which bars federal habeas corpus relief subsequent to a guilty plea, it limited this exception to situations in which habeas corpus relief would normally be barred for substantive reasons, not to situations in which relief would be barred because of the deliberate bypass of state remedies. 552 F.2d at 288 n.8.


In petitions for habeas corpus which do not involve fourth amendment rights, federal
the position taken by the Court seven years earlier. Since Stone v. Powell was decided, the Ninth Circuit has applied the rule enunciated therein to petitions filed by state prisoners and to attempted attacks by federal prisoners on their sentences. Because it is often difficult to determine if a fourth amendment claim was fully and fairly litigated at the state level, specific criteria to be considered in making the determination have been provided by the Supreme Court.

In an important 1977 decision, Mack v. Cupp, the Ninth Circuit stated that "[t]he Supreme Court has not yet delineated the perimeters of 'full and fair litigation' of a fourth amendment claim." The criteria provided by Townsend v. Sain are highly relevant in deciding what constitutes a full and fair consideration under Stone. These criteria, however, are not to "be applied literally . . . as the sole measure of fullness and fairness."

The Mack court clearly indicated that, under Stone, the only issue is

courts may hear the defendant's constitutional claims even though they were fully litigated in prior state proceedings. See Townsend v. Sain, 372 U.S. 293 (1963); Brown v. Allen, 344 U.S. 443 (1953).


1112. Tisnado v. United States, 547 F.2d 452 (9th Cir. 1976); Corley v. Cardwell, 544 F.2d 349 (9th Cir. 1976), cert. denied, 429 U.S. 1048 (1977); Bracco v. Reed, 540 F.2d 1019 (9th Cir. 1976).

1113. Tisnado v. United States, 547 F.2d 452, 456-59 (9th Cir. 1976). Federal prisoners may attack their convictions under 28 U.S.C. § 2255 (1976). This section provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

1114. In Townsend v. Sain, 372 U.S. 293, 313 (1963), the Court listed the following factors as relevant in determining whether federal habeas corpus relief is available:

(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

1115. 564 F.2d 898 (9th Cir. 1977).

1116. Id. at 900.

1117. See note 1114 supra and accompanying text.


1119. 564 F.2d at 901.

1120. Id. See United States v. New Jersey, 562 F.2d 903, 906-07 (3d Cir. 1977); Graves v.
whether the state court considered the claim fully and fairly; it is irrele-
vant whether the state court applied the law correctly.\textsuperscript{1121} In \textit{Mack},
the state court decided not to hold an evidentiary hearing after con-
cluding that there was no conflict between the defendant's recitation of
the facts and the version provided by the police. Under the circum-
stances, the failure to hold an evidentiary hearing did not render the
state litigation less than full and fair.\textsuperscript{1122}

The final argument made in \textit{Mack} was that the state appellate court
improperly considered facts not in the record. The Ninth Circuit
acknowledged that the state appellate court had probably erred but re-
fused to reverse. The mistake, if made, was harmless error,\textsuperscript{1123} since
\textit{Stone} indicates that "error in a state appellate review of a fourth
amendment claim does not necessarily justify habeas relief in a federal
court.\textsuperscript{1124}

Where a habeas corpus petition is \textit{filed} while the defendant is serving
his sentence, but the merits are not reached until the sentence has ex-
pired, the petition is moot with respect to the sentence.\textsuperscript{1125} Nevertheless,
if "any adverse collateral consequences"\textsuperscript{1126} remain from the
conviction, the petition is not moot.\textsuperscript{1127} Where the petitioner has not

\begin{itemize}
\item Estelle, 556 F.2d 743, 746 (5th Cir. 1977); O'\textit{Berry} v. Wainwright, 546 F.2d 1204, 1211-12
\item 1121. 564 F.2d at 901. The Ninth Circuit in \textit{Mack} relied heavily on its earlier decision in
\textit{Tisnado} v. United States, 547 F.2d 452 (9th Cir. 1976). In \textit{Tisnado} it was stated: "Since,
under \textit{Stone v. Powell}, the issue of whether the state court correctly applied the law of search
and seizure is apparently totally irrelevant as long as state procedures were 'fair,' . . . we
express no opinion on the merits of \textit{Tisnado}'s fourth amendment contentions." \textit{Id.} at 455
n.2.
\item 1122. 564 F.2d at 901. \textit{But see} \textit{Nardone} v. United States, 308 U.S. 338, 342-43 (1939)
(where evidence obtained through illegal wiretap, trial court's failure to pursue inquiry re-
garding possible taint on government's case was erroneous).
\item 1123. 564 F.2d at 902. The court stated: "[T]he [trial] court's mistaken recitation of the
facts, even assuming arguendo that it resulted in an incorrect decision, is not enough, in and
of itself, to establish that \textit{Mack}'s claims were not fully and fairly considered." \textit{Id.}
\item 1124. \textit{Id.}
\item 1125. \textit{Naylor v. Superior Court}, 558 F.2d 1363 (9th Cir. 1977). \textit{See generally} \textit{Spencer-
Lugo} v. \textit{Immigration & Naturalization Serv.}, 548 F.2d 870 (9th Cir. 1977) (per curiam).
\item 1126. In \textit{Carafas} v. \textit{LaVallee}, 391 U.S. 234 (1968), the Court provided this illustration of
"collateral consequences:"
\begin{quote}
In consequence of his conviction, [the defendant] cannot engage in certain businesses;
he cannot serve as an official of a labor union for a specified period of time; he cannot
vote in any election held in New York State; he cannot serve as a juror . . . . On
account of these "collateral consequences" the case is not moot. \textit{Id.} at 237-38.
\end{quote}
\item 1127. \textit{Naylor v. Superior Court}, 558 F.2d 1363, 1366 (9th Cir. 1977). \textit{See} \textit{Bjerkan} v.
United States, 529 F.2d 125, 126-27 (7th Cir. 1975); \textit{Bratcher} v. \textit{McNamara}, 448 F.2d 222,
224 (9th Cir. 1971); \textit{Lambert} v. \textit{Brown}, 435 F.2d 148, 148 (9th Cir. 1970); \textit{Wade} v. \textit{Carsley},
435 F.2d 68, 68 (5th Cir. 1970).
\end{itemize}
alleged any collateral consequences, it appears that the court sua sponte will make an attempt to uncover any such consequences.1128

The Ninth Circuit also decided in 1977 that the district court could consolidate a defendant's habeas corpus petitions.1129 In one case,1130 the petitioner alleged that he was unduly prejudiced by the consolidation. This argument was rejected since each issue was given due consideration.1131

In Andrino v. United States Board of Parole,1132 the defendant was serving a seven-year sentence for extortion and firearm offenses. After sentence was imposed, the Parole Board published new guidelines that were later applied to deny parole to the prisoner. The prisoner attacked his sentence under 28 U.S.C. section 2255,1133 arguing that the trial court would not have imposed the same sentence had it known that harsher parole guidelines would subsequently be imposed. The district court accepted petitioner's argument and modified the sentence. On appeal, the Ninth Circuit reversed for the Government, holding that habeas corpus, and not a motion pursuant to section 2255, is the correct vehicle for obtaining review of parole board decisions.1134 The Andrino court further held that a section 2255 motion could not be treated as a misbranded habeas corpus petition by the district court.1135

Where an accused is about to be extradited, he may file a petition for habeas corpus in the asylum state in an effort to defeat extradition.1136 A court in the asylum state will conduct a very limited inquiry1137 into the accused's claim. One factor that the reviewing court determines is whether the accused is a fugitive from justice.1138 In one recent

1128. Naylor v. Superior Court, 558 F.2d 1363, 1366 (9th Cir. 1977) (by implication).
1129. Wyatt v. United States Parole Comm'n, 571 F.2d 1089 (9th Cir. 1977).
1130. Id. at 1090.
1131. Id.
1132. 550 F.2d 519 (9th Cir. 1977) (per curiam).
1133. See note 1113 supra.
1134. 550 F.2d at 520; Tedder v. United States Bd. of Parole, 527 F.2d 593, 594 n.1 (9th Cir. 1975). The rule in other circuits, however, is contra. See, e.g., United States v. Salerno, 538 F.2d 1005 (3d Cir. 1976); Kortness v. United States, 514 F.2d 167 (8th Cir. 1975).
1135. 550 F.2d at 520. The reason for this holding is that a writ can only be procured from a court which has jurisdiction over the prisoner or his custodian. Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973).
1137. There will be a limited inquiry to determine whether: "(1) a crime has been charged in the demanding state; (2) the fugitive in custody is the person so charged; and (3) the fugitive was in the demanding state at the time the alleged crime was committed." Woods v. Cronvich, 396 F.2d 142, 143 (5th Cir. 1968) (per curiam).
1138. See id. at 143.
case,\textsuperscript{1139} the petitioner claimed that he was not a fugitive because the state attempting to extradite him was barred from prosecuting him due to the double jeopardy clause and the speedy trial protections of the sixth amendment. The Ninth Circuit concluded that a defendant may not raise the Bill of Rights in federal habeas corpus proceedings in the asylum state.\textsuperscript{1140} This rule is predicated on a federal policy which encourages the expeditious return of fugitive so that justice can be satisfied.\textsuperscript{1141}

\section*{F. Double Jeopardy}

The fifth amendment to the United States Constitution affords protections to individuals threatened with reprosecution for the same offense.\textsuperscript{1142} Specifically, a double jeopardy violation occurs when the defendant, after an express or an implied acquittal, is tried again for the same offense.\textsuperscript{1143} This double jeopardy prohibition is applicable to the states through the due process clause of the fourteenth amendment.\textsuperscript{1144}

Defendants often argue that there are double jeopardy implications when an accused is charged with the commission of two crimes stemming from the same incident.\textsuperscript{1145} The Ninth Circuit has consistently held that double jeopardy does not depend on the "identity of the evidence actually produced" at the trial(s).\textsuperscript{1146} Rather, the determination depends upon the statutory requirements of each substantive of-

\begin{footnotesize}
\begin{enumerate}
\item Price v. Pitchess, 556 F.2d 926 (9th Cir. 1977).
\item \textit{Id.} at 928. \textit{See also} Sweeney v. Woodall, 344 U.S. 86 (1952) (eighth amendment may not be raised); Watson v. Montgomery, 431 F.2d 1083 (5th Cir. 1970) (sixth amendment may not be raised); Johnson v. Matthews, 182 F.2d 677 (D.C. Cir.), \textit{cert. denied}, 340 U.S. 828 (1950) (sixth amendment may not be raised).
\item Price v. Pitchess, 556 F.2d 926, 928 (9th Cir. 1977).
\item U.S. Const. amend. V.
\item \textit{See United States v. Jenkins, 420 U.S. 358 (1975); Green v. United States, 355 U.S. 184 (1957).}
\item \textit{See Benton v. Maryland, 395 U.S. 784 (1969).}
\item This claim is frequently asserted when one of the charges is conspiracy to commit the other charge. \textit{See, e.g.}, Pereira v. United States, 347 U.S. 1, 11 (1954); Pinkerton v. United States, 328 U.S. 640, 643-44 (1946); United States v. Ohlson, 552 F.2d 1347, 1348 (9th Cir. 1977) (per curiam); United States v. Boyle, 482 F.2d 755, 766 (D.C. Cir.), \textit{cert. denied}, 414 U.S. 1076 (1973).
\item \textit{See United States v. Kearney, 560 F.2d 1358, 1366 (9th Cir.), \textit{cert. denied}, 434 U.S. 826 (1977); United States v. Ohlson, 552 F.2d 1347, 1348-50 (9th Cir. 1977) (per curiam). \textit{See} United States v. Rueter, 536 F.2d 296, 298 (9th Cir. 1976). This conclusion is based on the District of Columbia Circuit Court's decision in United States v. Boyle, 482 F.2d 755 (D.C. Cir.), \textit{cert. denied}, 414 U.S. 1076 (1973). In Boyle the court stated: "A double jeopardy violation] does not turn on the identity of evidence actually produced but on whether the same evidence is \textit{required} to prove the two offenses." \textit{Id.} at 766 (emphasis in original).}
\end{enumerate}
\end{footnotesize}
fense. Therefore, although the same evidence is produced for each charge, the defendant’s rights have not been violated if all elements of the respective statutory offenses were not proven.

In United States v. Ohlson, the defendant was convicted on a two count indictment for conspiracy to assist narcotics dealers in the manufacture and sale of illegal drugs, and for racketeering. The defense argued that under Wharton’s Rule the conspiracy charge “merged” with the racketeering claim. While acknowledging the general rule that conspiracy to commit a substantive offense can constitute an offense separate from the substantive charge, the court recognized that Wharton’s Rule is an exception to this principle, and held that this case did not merit the application of the exception.

In United States v. Chases, two separate indictments were filed against the defendant. The first indictment charged the accused with conspiracy to import marijuana; the second alleged that he was in possession of marijuana with the intent to distribute. It was held that conspiracy and possession are two “separate and distinct offenses.” Therefore, the filing of separate indictments stemming from one transaction did not result in a double jeopardy violation.

Double jeopardy claims are often predicated upon allegations of res judicata, collateral estoppel, or law of the case. In United

1147. See note 1146 supra and accompanying text. The Ninth Circuit position differs from the “same evidence” rule adopted by the Sixth Circuit in United States v. Austin, 529 F.2d 559 (6th Cir. 1976) (constitutionally impermissible to impose consecutive sentences for what amounts to same offense proven by same evidence).


1149. 552 F.2d 1347 (9th Cir. 1977).

1150. The Ohlson court explained Wharton’s Rule as follows: “Essentially, Wharton’s Rule states that an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as necessarily to require the participation of two persons for its commission.” Id. at 1348.

1151. Id. at 1349. See Iannelli v. United States, 420 U.S. 770, 781-82 (1975). The Ohlson court stated that adultery, incest, bigamy and dueling are classic Wharton Rule cases. 552 F.2d at 1349.

1152. 552 F.2d at 1349. Wharton’s “Rule applies only if the substantial offense necessarily requires the participation of two persons.” Id.

1153. 558 F.2d 912 (9th Cir. 1977).

1154. Id. at 914.

1155. Id.

1156. In Tait v. Western Md. Ry. Co., 289 U.S. 620, 623 (1933) the Supreme Court explained that res judicata applied where there was a previous final decision on the merits rendered by a court of competent jurisdiction.

1157. In Ashe v. Swenson, 397 U.S. 436 (1970), the defendant was arrested as a result of a
States v. Wise, the Ninth Circuit was confronted with such a double jeopardy claim based on collateral estoppel. The defendant had been convicted of criminal copyright infringement stemming from the wilful, illegal sale of motion pictures. The collateral estoppel contention was based on defendant's argument that the same issues had been litigated in previous film piracy cases. The court held that collateral estoppel requires an identity of issues and parties between the present dispute and any previous cases. When these requirements are met, retrial is barred.

In another 1977 film piracy case, the appellants claimed that the trial was barred by collateral estoppel because "previous film piracy cases . . . found that motion picture studios, including some involved in this case, [had] sold their films." The court, relying on its decision earlier that year in Wise, held that collateral estoppel did not apply since the requisite identity of issues and parties had not been shown.

Collateral estoppel was also the basis of the defendant's contentions.

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single robbery during which several persons were robbed. The Government proceeded to charge him with the robbery of one of the victims. The jury returned a verdict of acquittal with a specific finding that the defendant had not participated in the crime. Thereafter, the Government filed new charges against the defendant for robbery of a second victim in the same transaction.

The Court held that reprosecution on this second charge was barred by the doctrine of collateral estoppel, which is embodied in the double jeopardy provision of the fifth amendment. More specifically, the Court stated: "When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any further lawsuit." Id at 443.

In Messenger v. Anderson, 225 U.S. 436, 444 (1912), the Supreme Court supplied this definition of "law of the case":

In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.

1159. 550 F.2d 1180 (9th Cir.), cert. denied, 434 U.S. 929 (1977).
1160. Id. at 1187-88.
1161. It was alleged that the question of whether defendant's sales constituted "first sales" under the copyright laws was already litigated.
1163. 550 F.2d at 1188.
1165. Id at 1333.
1167. 550 F.2d 1180 (9th Cir.), cert. denied, 434 U.S. 929 (1977).
1168. 557 F.2d at 1333.
in *Standlee v. Rhay.*\textsuperscript{1169} In that case, the accused argued that since the trial court had found him not guilty, the parole board was prohibited from finding him guilty of a parole violation based on the same criminal activity of which he was acquitted.\textsuperscript{1170} The court rejected this contention, holding that collateral estoppel does not bar a parole revocation hearing after a criminal acquittal because of the difference in burdens of proof and available sanctions under the two proceedings.\textsuperscript{1171}

It is not always improper for the Government to prosecute a defendant more than once for the same offense. For example, where the defendant has moved for and obtained a mistrial, the prosecution is not barred from proceeding again on the same charge,\textsuperscript{1172} unless the motion was necessitated by bad faith or "overreaching" on the part of the Government.\textsuperscript{1173} In *Moroyoqui v. United States,*\textsuperscript{1174} the prosecutor elicited testimony that was improper and prejudicial to the defendant. The defendant moved for and was granted a mistrial. He then moved for dismissal alleging prosecutorial misconduct and overreaching, and claiming that a retrial would violate the double jeopardy clause. The trial court denied the motion, concluding that the prosecutor had not acted knowingly. The appellate court agreed that such a finding would permit reprosecution.\textsuperscript{1175}

The Supreme Court has clearly indicated that once jeopardy has attached, the Government will be prohibited from filing an appeal.\textsuperscript{1176} It is not always a simple task, however, to determine when jeopardy has in fact attached. The double jeopardy clause is offended when a defendant is threatened with multiple trials.\textsuperscript{1177} Generally, if a reversal of the lower court's verdict would necessitate further proceedings to resolve factual issues, an appeal by the government is barred.\textsuperscript{1178} The

\begin{flushright}
\textsuperscript{1169} 557 F.2d 1303 (9th Cir. 1977), cert. denied, 436 U.S. 910 (1978).
\textsuperscript{1170} Id. at 1305.
\textsuperscript{1171} Id. at 1305-07 (citing *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1971)).
\textsuperscript{1172} *United States v. Jorn*, 400 U.S. 470, 485 (1971); *Moroyoqui v. United States*, 570 F.2d 862, 864 (9th Cir. 1977).
\textsuperscript{1174} 570 F.2d 862 (9th Cir. 1977).
\textsuperscript{1175} Id. at 864.
\textsuperscript{1176} *United States v. Jenkins*, 420 U.S. 358 (1975) (double jeopardy violation when reversal would subject defendant to further litigation of factual issues involved in offense of which he was acquitted). \textit{Cf.} *United States v. Wilson*, 420 U.S. 332 (1975) (Government may appeal since reversal would lead to mere reinstatement of guilty verdict).
\textsuperscript{1178} *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569-70 (1977); United
primary test employed to determine if appeal may be pursued is whether, upon reversal for the prosecution, a previous finding of guilt can be reinstated.\textsuperscript{1179} If there has not been an earlier guilty verdict, but only a verdict of not guilty, then any appeal filed by the prosecution will result in a double jeopardy violation.\textsuperscript{1180}

In \textit{United States v. Rojas},\textsuperscript{1181} the Ninth Circuit, in conformity with other circuits,\textsuperscript{1182} held that the Government has a right to appeal where there is no danger that a second trial will be required.\textsuperscript{1183} In \textit{Rojas}, the jury returned a verdict of guilty but the lower court set aside that determination. The appellate court found that the prosecution could appeal, since any reversal would result in a reinstatement of the prior guilty verdict and the defendant would not be subject to a second trial.\textsuperscript{1184}

Later in 1977, the Ninth Circuit decided \textit{United States v. Ramos}\textsuperscript{1185} in conformity with \textit{Rojas}. In \textit{Ramos}, the defendant was convicted of


In \textit{United States v. Finch}, 548 F.2d 822 (9th Cir. 1976), \textit{rev'd}, 433 U.S. 676 (1977), the court of appeals distinguished \textit{Jenkins} and held that there was no double jeopardy violation caused by the prosecutor's appeal since reversal would necessitate only further legal determinations. \textit{Id.} at 826-27. The district court judge had dismissed the information after receiving an agreed statement of facts. The Supreme Court, on certiorari, reversed the Ninth Circuit's decision. 433 U.S. at 677. The Court noted that the district judge had dismissed without any determination of guilt or innocence. Therefore, if the Government was successful on appeal, there was no earlier guilty verdict to reinstate. \textit{See United States v. Wilson}, 420 U.S. 332, 352-53 (1975). Therefore, the prosecutor's appeal was barred by the double jeopardy clause.

\textsuperscript{1179} \textit{United States v. Wilson}, 420 U.S. 332, 352-53 (1975). In \textit{Wilson}, the jury had returned a guilty verdict which the trial judge set aside. The district judge's decision was based upon a determination that the defendant had been unduly prejudiced by the Government's delay in filing the action. The Court of Appeals ruled that the prosecutor was barred by double jeopardy from appealing. The Supreme Court reversed, however, holding that an appeal was proper because if the Government was successful, the earlier jury verdict could be reinstated. \textit{Id.}

\textsuperscript{1180} \textit{United States v. Jenkins}, 420 U.S. 358, 369 (1975). \textit{Cf. Serfass v. United States}, 420 U.S. 377 (1975). In \textit{Serfass}, the district court had granted defendant's pretrial motion to dismiss the indictment. The judge had relied on an oral stipulation and facts contained in petitioner's affidavit. The Government appealed and petitioner contended that the appeal was barred by the double jeopardy clause. The Supreme Court held for the Government, stating that the defendant had not yet been "put to trial before the trier of facts, whether the trier be a jury or a judge." \textit{Id.} at 388.

\textsuperscript{1181} 554 F.2d 938 (9th Cir. 1977).

\textsuperscript{1182} \textit{See United States v. Donahue}, 539 F.2d 1131, 1134 (8th Cir. 1976); \textit{United States v. Burroughs}, 537 F.2d 1156, 1157 (4th Cir. 1976); \textit{United States v. Cravero}, 530 F.2d 666, 669 (5th Cir. 1976); \textit{United States v. DeGarces}, 518 F.2d 1156, 1159 (2d Cir. 1975).

\textsuperscript{1183} 554 F.2d at 942.

\textsuperscript{1184} \textit{Id.} \textit{See United States v. Martin Linen Supply Co.}, 430 U.S. 564, 570 (1977).

\textsuperscript{1185} 558 F.2d 545 (9th Cir. 1977).
theft and possession of goods known to be stolen from a foreign shipment.\(^1\)

The defendant's motion for acquittal was granted, and the Government appealed. The court of appeals noted that there was no threat that multiple trial would result from this appeal\(^2\) and, therefore, held that there was no double jeopardy violation.\(^3\)

In *Ball v. United States*,\(^4\) the Supreme Court held that there is no bar to retrial of a defendant who has had his conviction set aside on appeal.\(^5\) The defendant essentially waives his right to assert a double jeopardy violation when he files an appeal.\(^6\) The Ninth Circuit followed this rule in *United States v. Hall*.\(^7\) In *Hall*, the court also discussed the sentence which could be imposed on the defendant if he were reconvicted. Ordinarily, the same sentence would be imposed on the defendant upon reconviction since the double jeopardy clause prohibits multiple punishment for the same offense.\(^8\) However, the clause does not represent an absolute bar to the imposition of a more severe sentence upon reconviction.\(^9\) The *Hall* court, quoting *North Carolina v. Pearce*,\(^10\) concluded that a more severe sentence could be imposed where events occurring since the original sentence was levied cast new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities."\(^11\) The Ninth Circuit also held, in conformity with its prior holdings,\(^12\) that the defendant's candor as a witness during his second trial may be considered in imposing a new sentence.\(^13\)

There is no violation of the double jeopardy clause when an illegal sentence is increased to meet the minimum punishment required by

\(^{1186}\) Id. at 546.

\(^{1187}\) Id.

\(^{1188}\) Id.

\(^{1189}\) 163 U.S. 662 (1896).


\(^{1191}\) 163 U.S. at 672. Note, however, that where the accused is charged with two offenses, and where he is convicted of one and acquitted of the other, double jeopardy only bars reproduction for the offense of which he was acquitted. Benton v. Maryland, 395 U.S. 784, 796 (1969). In this regard, it should be noted that a conviction for one charge may act as an implicit acquittal of another offense. See Green v. United States, 355 U.S. 184, 190 (1957) (conviction for second degree murder operated as acquittal of first degree murder).

\(^{1192}\) 559 F.2d 1160 (9th Cir. 1977), cert. denied, 435 U.S. 942 (1978).

\(^{1193}\) Id. at 1162-63.


\(^{1196}\) 559 F.2d at 1163.

\(^{1197}\) See United States v. Lustig, 555 F.2d 737, 751 (9th Cir. 1977), cert. denied, 434 U.S. 1045 (1978); United States v. Cluchette, 465 F.2d 749, 754 (9th Cir. 1972).

\(^{1198}\) 559 F.2d at 1163.
law for a given offense. In United States v. Stevens, a plea bargain arrangement resulted in the imposition of concurrent ten-year sentences. Upon entry of sentence, however, the court erroneously pronounced concurrent two-year sentences. The trial judge corrected the error two weeks later. Upon review, the Ninth Circuit concluded that the correction of a sentence in this manner does not violate double jeopardy, even when the punishment is enhanced thereby. The defendant alleged that the double jeopardy clause was violated because he had already begun serving the sentence. The court held otherwise, basing its decision on the fact that prompt proceedings were instituted to correct the error, in compliance with the time limits prescribed by federal rule 35.

There is also no fifth amendment violation when the defendant's prior criminal record is considered by parole boards in determining eligibility for parole. The Ninth Circuit, agreeing with other circuits, adopted this rule in 1977. The court of appeals reasoned that one of the aims of parole is to determine whether the defendant's release is compatible with the welfare of society. It is necessary to consider the defendant's prior record in order to make a proper determination. The court concluded that denial of parole after due consideration does not violate double jeopardy since there is no imposition of multiple punishment for the same offense.

1200. 548 F.2d 1360 (9th Cir.), cert. denied, 430 U.S. 975 (1977).
1201. Id. at 1361.
1202. Id.
1203. Id.
1204. Id. at 1362. See United States v. Munoz-Dela Rosa, 495 F.2d 253 (9th Cir. 1974) (no issue of double jeopardy when a sentence is corrected).
1205. 548 F.2d at 1362-63. See also United States v. Walker, 564 F.2d 891, 892 (9th Cir. 1977) (court rejected defendant's argument that an NARA commitment after beginning a sentence in prison was a double jeopardy violation).
1206. FED. R. CRIM. P. 35.
1208. See cases cited in note 1207 supra.
1209. Wyatt v. United States Parole Comm'n, 571 F.2d 1089 (9th Cir. 1977).
1210. Id. at 1091.
1211. Id.
G. Prisoners' Rights

The sixth amendment of the United States Constitution guarantees the right to an impartial jury. The Supreme Court has held that the trial judge has a responsibility to protect this right. In United States v. Hendrix, the Ninth Circuit held that the trial judge has wide discretion in establishing a procedure by which to deal with charges of juror bias. In so holding, the court distinguished dictum in the Supreme Court case of Wade v. Hunter which stated that it is "the duty of the judge" to direct a retrial in the event that he discovers facts indicating that a juror might be biased against a defendant. The Ninth Circuit expressly refused to establish mandatory procedures for a trial judge to follow in dealing with juror misconduct. Instead, it followed cases from other circuits which have recognized the wide discretion to be given to a trial judge in dealing with charges of juror bias. In Hendrix, charges of bias were made by the wife and mother-in-law of the defendant. They testified to an alleged statement by one juror which tended to show bias. The charges were made within a week after the conclusion of trial. The judge required the filing of affidavits and then heard arguments on the motion for a new trial based upon the allegations of juror bias. Determining that the juror had made the statements prior to her swearing under oath that she had no prejudice against the defendant, the judge refused to grant a new trial. Although the Ninth Circuit stated that the trial judge "could" have inquired further into the truth of statements and whether or not those statements, in fact, biased the juror, the court empha-

1212. U.S. Const. amend. VI.
1215. 549 F.2d 1225 (9th Cir.), cert. denied, 434 U.S. 818 (1977).
1216. Id. at 1227.
1217. 336 U.S. 684 (1949). In Wade, the Court stated:

[T]here have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of a jury might be biased against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial.

Id. at 689 (footnote omitted).
1218. Id.
1219. 549 F.2d at 1228 n.2.
1220. Id. at 1227-28 n.1 (citing United States v. Shahane, 517 F.2d 1173 (8th Cir.), cert. denied, 433 U.S. 924 (1975); United States v. Doe, 513 F.2d 709 (1st Cir. 1975); Tillman v. United States, 406 F.2d 930 (5th Cir.), vacated on other grounds, 395 U.S. 830 (1969); United States v. Miller, 381 F.2d 529 (2d Cir. 1967), cert. denied, 392 U.S. 929 (1968); United States v. Flynn, 216 F.2d 354 (2d Cir. 1954), cert. denied, 348 U.S. 909 (1955)).
1221. 549 F.2d at 1229 n.3.
sized the discretion to be given to the trial court. The Ninth Circuit determined that the alleged bias was not prejudicial1222 because jurors are presumed to act faithfully,1223 and because this was not the type of allegation involving highly prejudicial acts.1224

VII. Juvenile Offenders

When a minor is taken into custody for the alleged commission of a crime, the processes to which he is thereafter subjected will differ depending on whether he is tried as a juvenile1225 or as an adult. Many of the procedural differences1226 stem from the belief that juvenile proceedings are not equivalent to a criminal trial.1227 Although differences definitely do exist between the juvenile and adult systems, the Ninth Circuit has recognized that "the rights of juveniles at the adjudicative stage of a proceeding [are the same as] those essentials of due process and fair treatment afforded adults . . . ."1228 The Ninth Circuit relied upon this principle in United States v. Indian Boy X1229 for its conclusion that the minor defendant is given no greater rights than his

1222. Id. at 1230.
1223. Id. (citing Cavness v. United States, 187 F.2d 719, 723 (9th Cir.), cert. denied, 341 U.S. 951 (1951)).
1224. 549 F.2d at 1230 (citing United States v. Klee, 494 F.2d 394 (9th Cir.), cert. denied, 419 U.S. 835 (1974)).
1225. See Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (1976). A "juvenile" is defined in the following manner:

For the purposes of this chapter, a "juvenile" is a person who has not attained his eighteenth birthday, or for the purpose of proceedings . . . under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday, and "juvenile delinquency" is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.

1229. 565 F.2d 585 (9th Cir. 1977).
In addition, although the court clearly indicated that juvenile and adult offenders are theoretically entitled to the same rights, in many instances the former are deprived of these rights because a juvenile proceeding is not an adult criminal trial.

In *Indian Boy X*, a minor was charged in a juvenile proceeding with acts which, if committed by an adult, would constitute second degree murder and assault with a dangerous weapon. Three confessions were obtained from the minor by FBI agents. It was during the third confession that the accused acknowledged he had committed murder. This confession took place on a Friday afternoon, and the minor was not brought before a federal magistrate until the following Monday. The accused's parents were present when he was advised of his *Miranda* rights, and written waivers were obtained from both the father and the minor.

The appellant contended that his murder confession was illegally obtained because of the delay in bringing him before a federal magistrate. Relying on 18 U.S.C. section 5033, appellant argued that "detention for the purpose of interrogation, [was improper] regardless of how benign the questioning may be." The Ninth Circuit acknowledged that it had never interpreted section 5033 or its predecessor. The court, however, distinguishing decisions of other circuits, concluded that the minor's reliance on section 5033 was misplaced.

The Ninth Circuit reached its conclusion in *Indian Boy X* "in light of the strong policy . . . that the waiver of legal rights following *Miranda* . . . warnings also constitutes a waiver of these rights enunciated in

1230. *Id.* at 591.
1231. *See* notes 1226-27 supra and accompanying text.
1233. *Id.* § 113.
1234. Under 18 U.S.C. § 5033 (1976) when a juvenile is taken into custody, the authorities "shall immediately notify . . . the juvenile's parents, guardian, or custodian . . . ." There is also a requirement that "[t]he arresting officer . . . notify the parents . . . of the rights of the juvenile and of the nature of the alleged offense." *Id.*
1235. Section 5033 states in pertinent part: "The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate." *Id.*
1236. 565 F.2d at 590.
1237. *Id.*
1238. *See* United States v. DeMarce, 513 F.2d 755 (8th Cir. 1975) (confession obtained from juvenile was suppressed because of eighty hour delay between arrest and arraignment); United States v. Binet, 442 F.2d 296 (2d Cir. 1971) (confession obtained during four hour delay suppressed because delay motivated solely by desire to obtain confession); United States v. Glover, 372 F.2d 43 (2d Cir. 1967) (fifteen hour delay between arrest and arraignment improper, so that confession obtained during period should be suppressed).
McNabb . . . and Mallory . . . "1239 Since a minor may effectively waive his Miranda rights,1240 the waiver in this case also served to waive the accused's prompt arraignment rights under McNabb and Mallory.1241 The confession was therefore admissible.

Although the contours of a juvenile's speedy arraignment right are uncertain after Indian Boy X, the Ninth Circuit in 1977 did clarify the statutory provision giving the juvenile the right to a speedy trial.1242 Under 18 U.S.C. section 5036,1243 the "delinquent who is in detention pending trial [must be] brought to trial within thirty days from the date upon which such detention was begun . . . ."1244 A key issue which obviously must be resolved in applying section 5036 is the point at which the thirty day period commences. The Ninth Circuit has held that the period commences upon "(1) the date that the Attorney General certifies, or in the exercise of reasonable diligence, could have certified, to the conditions stated in Section 5032, or (2) the date upon which the Government formally assumes jurisdiction over the juvenile, whichever event earlier occurs."1245 Therefore, the time during which the juvenile was in a state's custody is not considered part of the thirty

1239. 565 F.2d at 591. Mallory v. United States, 354 U.S. 449 (1957) and McNabb v. United States, 318 U.S. 332 (1943) generally stand for the proposition that, if a confession is obtained as the result of an unnecessary delay between arrest and arraignment, the confession will be suppressed. This result is mandated by rule 5(a) of the Federal Rules of Criminal Procedure. Rule 5(a) states that the arresting officer "shall take the arrested person without unnecessary delay before the nearest available federal magistrate . . . ." In Indian Boy X, the court noted that 18 U.S.C. § 5033 is the direct counterpart of FED. R. CRIM. P. 5(a). 565 F.2d at 591. Therefore, the McNabb/Mallory rule is relevant to procedures followed under the Federal Juvenile Delinquency Act. Cf. United States v. Montes-Zarate, 552 F.2d 1330 (9th Cir. 1977) (per curiam), cert. denied, 435 U.S. 947 (1978) (analysis properly focused on time which passed between arrest and confession).

The Ninth Circuit consistently has held that waiver of Miranda rights also waives one's rights under McNabb/Mallory. See United States v. Mandley, 502 F.2d 1103 (9th Cir. 1974); United States v. Woods, 468 F.2d 1024 (9th Cir.), cert. denied, 409 U.S. 1045 (1972); United States v. Cluchette, 465 F.2d 749 (9th Cir. 1972); United States v. Lopez, 450 F.2d 169 (9th Cir. 1971), cert. denied, 405 U.S. 931 (1972); Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969), cert. denied, 397 U.S. 1058 (1970).

1240. 565 F.2d at 592. In order to determine whether the waiver was effective, the minor's age, intelligence, education, information, understanding and ability to comprehend should be analyzed. DeSeuza v. Barber, 263 F.2d 470, 477 (9th Cir. 1959). See also McBride v. Jacobs, 247 F.2d 595, 596 (D.C. Cir. 1957) (per curiam) (when child not competent to waive rights, parent may do so if there is no conflict of interest between parent and child); Williams v. Huff, 142 F.2d 91, 92 (D.C. Cir. 1944) (minor's competence to waive rights is question of fact).

1241. See note 1239 supra.

1242. See United States v. Andy, 549 F.2d 1281 (9th Cir. 1977) (per curiam).


1244. Id.

1245. United States v. Andy, 549 F.2d 1281, 1283 (9th Cir. 1977) (per curiam).
day period.\textsuperscript{1246}

When a juvenile is alleged to have committed a crime, he will either be tried as an adult\textsuperscript{1247} or subjected to juvenile delinquency proceedings. If the minor is tried as an adult, sentencing under the Federal Youth Corrections Act\textsuperscript{1248} may be proper.\textsuperscript{1249} It is uncertain whether a minor who is convicted of a crime, and who is potentially eligible for sentencing under the Federal Youth Corrections Act, has a right to be proceeded against by indictment.\textsuperscript{1250} However, where a youth is facing juvenile delinquency proceedings, the Ninth Circuit has rejected an allegation that section 5032\textsuperscript{1251} "violates the Fifth Amendment by instructing the United States Attorney to proceed by information rather than indictment."\textsuperscript{1252} This result is mandated by the court's belief, discussed earlier,\textsuperscript{1253} that juvenile delinquency proceedings do not constitute a criminal trial.

In \textit{United States v. Ramirez},\textsuperscript{1254} the Ninth Circuit avoided the constitutional question whether, when a defendant can be sentenced for a misdemeanor conviction under the Act, the fifth amendment requires the prosecution to proceed by indictment. The court, in a decision

\textsuperscript{1246} \textit{Id.} In \textit{Andy}, the defendant was in custody from January 2, 1976 until his trial on February 19, 1976. He argued that his speedy trial right secured by \textsection 5036 was violated because more than 30 days had elapsed, while he was in custody, before he was brought to trial. However, a certain amount of this time had been spent in state custody. Since the court of appeals could not determine what amount of time was spent in state, as opposed to federal custody, it remanded to the district court for an exact determination. \textit{Id.} at 1283.

\textsuperscript{1247} 18 U.S.C. \textsection 5032 (1976) provides in pertinent part:

A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter [Federal Juvenile Delinquency Act] unless he has requested in writing upon advice of counsel to be proceeded against as an adult, except that, with respect to a juvenile sixteen years and older alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony punishable by a maximum penalty of ten years imprisonment or more, life imprisonment, or death, criminal prosecution [as an adult] may be begun . . . by the Attorney General . . .

\textit{Id.} (emphasis added). It is clear from the language of \textsection 5032 that, under the circumstances described therein, a minor may be tried as an adult for the substantive crime committed. In comparison, a juvenile subjected to proceedings under the Federal Juvenile Delinquency Act (18 U.S.C. \textsection\textsection 5031-5042 (1977)) is not the defendant in a criminal trial. \textit{See} note 1227 \textit{supra} and accompanying text. Instead, because of the commission of an act which would be chargeable as a crime if the juvenile were an adult, the juvenile is adjudged a juvenile delinquent. He is therefore eligible for treatment under the Federal Juvenile Delinquency Act. \textit{See} note 1225 \textit{supra}.

\textsuperscript{1248} 18 U.S.C. \textsection\textsection 5005-5026 (1976).

\textsuperscript{1249} \textit{See id.} \textsection 5010(a)-(e).

\textsuperscript{1250} \textit{See} notes 1254-59 \textit{infra} and accompanying text.

\textsuperscript{1251} 18 U.S.C. \textsection 5032 (1976).

\textsuperscript{1252} \textit{United States v. Indian Boy X}, 565 F.2d 585, 595 (9th Cir. 1977).

\textsuperscript{1253} \textit{See} note 1227 \textit{supra} and accompanying text.

\textsuperscript{1254} 556 F.2d 909 (9th Cir.), \textit{cert. denied}, 434 U.S. 926 (1977).
which was rendered under the mistaken belief than an indictment had not been filed, first concluded that the Government must proceed by indictment against a defendant subject to sentencing under the Act. The court withdrew this earlier decision when it was discovered that an indictment had in fact been filed. On rehearing, the Ninth Circuit concluded that the constitutional issue could be avoided.

In addition, the court refused to reconsider an earlier case in which it was held that the imposition of a Federal Youth Corrections Act sentence upon a misdemeanor conviction was valid.

When a juvenile is tried as an adult and a conviction is obtained, the trial court is supposed to state for the record that the youth would fail to benefit from sentencing under the Act, if a sentence thereunder is not imposed. In United States v. Silla, the district court judge

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1255. The Ninth Circuit in Ramirez addressed the question: "Does the Fifth Amendment require that a prosecution for a misdemeanor be initiated by indictment when the defendant can be sentenced under the Federal Youth Corrections Act (18 U.S.C. § 5010(b))?" Id. The court held that an indictment was required under the fifth amendment.

The Government petitioned for rehearing and the motion was granted. At this time, the court was informed for the first time "[t]hat criminal proceedings against Ramirez were initially instituted by indictment, and not by information as represented by both parties [previously]." Id. at 925 (emphasis added). After the indictment had been filed, a superseding criminal information was filed charging the defendant with a misdemeanor. The defendant did not object to this action. He waived a jury and was convicted on the misdemeanor charge upon a set of stipulated facts. The indictment was not dismissed until Ramirez appeared for sentencing.

1256. See note 1255 supra.

1257. 556 F.2d at 925-26. The court stated: "As the full history has unfolded, it is evident that the case does not present the constitutional issue that we earlier decided. Ramirez, through his lawyer, made no objection to the superseding information, and the underlying indictment was not dismissed until Ramirez was sentenced upon the information." Id. In support of the proposition that the constitutional issue may not be raised for the first time on appeal, see United States v. Golden, 532 F.2d 1244 (9th Cir. 1976); United States v. Hord, 459 F.2d 1003 (9th Cir. 1972).

One court has concluded that an indictment was not required where, as the result of a misdemeanor conviction, the defendant could be sentenced under the Act. See Harvin v. United States, 445 F.2d 675 (D.C. Cir.), cert. denied, 404 U.S. 943 (1971). Cf. United States v. Reef, 268 F. Supp. 1015 (D. Colo. 1967) (indictment required).

1258. See Eller v. United States, 327 F.2d 639 (9th Cir. 1964).

1259. The defendant wanted the Ninth Circuit to reconsider its position "in light of the realities of such commitments as described by Judge Weigel, dissenting in United States v. Leming (9th Cir. 1975) 532 F.2d 647, at 652 . . . , and recognized . . . in United States ex rel. Sero v. Preisner (2d Cir. 1974) 506 F.2d 1115." 556 F.2d at 926.

1260. 18 U.S.C. § 5010(b)-(e) (1976) indicates that the trial court's decision on how to sentence the juvenile, after he has been tried and convicted of a crime, will depend on whether he will "benefit" from sentencing under the Act.

1261. In Dorszynski v. United States, 418 U.S. 424, 444 (1974) the Court observed: "Literal compliance with the Act can be satisfied by any expression that makes clear the sentencing judge considered the alternative of sentencing under the Act and decided that the youth..."
erroneously remarked for the record that the defendant was not eligible for Federal Youth Correction Act treatment, rather than stating that he could not benefit by such treatment. The Ninth Circuit concluded that the requisite test, formulated earlier by the Supreme Court,1263 "does not lay down an inflexible standard under which only established phraseology will suffice."1264 In Silla, the district court did explain its decision on the ground that the defendant had "more of a record; he was more deeply involved in this transaction."1265 This language was sufficient to meet the procedural standard required by the Supreme Court.

An accused who is subjected to juvenile delinquency proceedings is afforded statutory protection against the public disclosure of his identity.1266 There is a specific requirement that the juvenile record and file be sealed when the proceedings are completed.1267 Once sealed, the files are subject to release only in the limited circumstances which are enumerated in the statute.1268

In United States v. Chacon,1269 an adult defendant and a juvenile offender were arrested and charged with importing marijuana, and possession with the intent to distribute. The minor was tried and acquitted in a juvenile proceeding. Thereafter, the adult was brought to trial. He moved for production of the sealed juvenile trial transcript.1270 The district court, relying on provisions of the Federal Juvenile Delinquency Act,1271 refused to grant the motion. In the interim, a codefendant was somehow able to procure a copy of the juvenile file. The defendant alleged that his due process, equal protection and statutory

offender would not derive benefit from treatment under the Act." See also United States v. Cruz, 523 F.2d 473, 474 (9th Cir. 1975), cert. denied, 423 U.S. 1060 (1976).
1262. 555 F.2d 703 (9th Cir. 1977).
1264. 555 F.2d at 708.
1265. Id.
1266. Under 18 U.S.C. § 5038(d)(2) (1976), where a minor is tried as a juvenile and not as an adult, "neither the name nor picture of [the] juvenile shall be made public by any medium of public information . . . ." Id.
1267. Id. § 5038(a).
1268. The exceptions under which disclosure of sealed juvenile records is permitted are enumerated in id. § 5038(a)(1)-(6).
1269. 569 F.2d 1373 (9th Cir. 1977).
1270. Neither the defendant nor his attorney was allowed to attend the prior juvenile proceedings. The defendant argued that production of the juvenile records was necessary to impeach certain witnesses. Id. at 1374.
rights were violated by the denial of his motion.

On appeal, the Ninth Circuit agreed with the defendant that discovery was potentially available in this case. The court held that the exception to the rule against disclosure provided in 28 U.S.C. section 5038(a)(1)-(5) applied in this case. The district court is empowered to balance the interests in favor of, and against, disclosure. If the "evidence contained within the transcript [was] material to presentation of a proper defense [it] was disclosable under an appropriate limiting order." In Chacon, the court of appeals proceeded to inspect the juvenile record in camera.

Deborah A. Ballins — Electronic Surveillance
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Search Warrants and Probable Cause

Sharon R. Biederman — Confessions
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Prisoners' Rights

Michael J. Cappelli — Preliminary Proceedings

1272. The defendant claimed his rights under the Jencks Act, 18 U.S.C. § 3500 (1976), were violated.

1273. See note 1268 supra.

1274. 569 F.2d at 1375.

1275. Id. The court was very explicit in limiting its holding to the facts in this case:

To permit release of juvenile records to any court for any purpose would substantially weaken the protection intended by Congress in enacting § 5038. We therefore limit our holding to the facts of this case, that is, one in which the juvenile himself was involved in the transaction on which the prosecution of the defendants is based, even though the juvenile is not a party to the action.

Id. at 1375-76.

1276. The court of appeals concluded that the district court should have examined the juvenile transcript for disclosable information. The court avoided remanding the case by examining the transcript itself in camera. After performing this task, the Ninth Circuit panel affirmed the conviction on the ground that the transcript was valueless to the defendant.

Id. at 1375.

A concurring opinion in Chacon preferred to reach the same result by resort to the sixth amendment's confrontation clause, instead of an expansive reading of 18 U.S.C. § 5038(a)(1)-(5) (1976). 569 F.2d at 1376-77 (Kennedy, J., concurring).
Cathy L. Cobbs
- Post-Conviction Proceedings

Deena Goldwater
- Evidence
  Severance

Thomas F. Hozdik
- Conduct of the Trial
  Warrantless Searches Based on
  Probable Cause

John W. Shaw
- Border Searches
  Consent Searches
  Elements of Crimes
  Procedural Rights of the Accused