6-1-1979


Recommended Citation


Available at: http://digitalcommons.lmu.edu/lr/vol12/iss3/1
DEVELOPMENTS IN CRIMINAL LAW AND
PROCEDURE IN THE NINTH CIRCUIT, 1978:
A SURVEY

CONTENTS

I. ARREST, SEARCH, AND SEIZURE ............................
   A. Scope of the Fourth Amendment ......................... 508
      1. Reasonable expectation of privacy ............ 508
         a. Abandoned property ........................ 510
         b. Electronic tracking devices ............ 511
      2. Investigatory stops and reasonable suspicion .... 512
      3. Arrests and probable cause .................... 514
   B. The Exclusionary Rule ............................... 516
   C. Search Warrants and Probable Cause ............. 522
      1. Inferences and common knowledge ............ 523
      2. Information from informants and co-conspirators ............................... 524
      3. Items and premises described with particularity ........................................ 526
      4. Misrepresentations and omissions .................. 527
   D. Electronic Surveillance ............................ 529
   E. Warrantless Searches ............................ 533
      1. Search incident to arrest ..................... 533
      2. Emergency or exigent circumstances ........ 535
      3. Investigative detention ........................ 538
      4. Warrantless vehicle searches .................... 540
      5. Seizure of items in plain view ................ 542
      6. Consent searches .............................. 543
      7. Border searches ............................... 546
      8. Probation searches ............................. 549
   F. Identifications ..................................... 550

II. PRELIMINARY PROCEEDINGS ............................. 554
   A. Grand Jury ........................................ 554
      1. Selection .................................... 554
      2. Witnesses .................................... 556
   B. Indictments ...................................... 558
      1. When required ................................ 558
      2. Sufficiency .................................. 558
      3. Duplicity and multiplicity .................... 560

505
4. Evidence before the grand jury .......................... 561
5. Prosecutorial misconduct .................................. 561
6. Joinder of offenses ....................................... 564
7. Delay .................................................. 565
8. Amendments and variances ................................ 565

C. Guilty Pleas ............................................ 566

D. Discovery ............................................. 569
1. Jencks Act ........................................... 569
2. Prosecutor’s duty to disclose ............................. 571
3. Depositions ........................................... 573
4. Pre-sentence reports .................................... 573
5. Competency reports ..................................... 574

E. Right to Jury Trial ..................................... 574

III. PROCEDURAL RIGHTS OF THE ACCUSED ................. 575

A. Right to Counsel ....................................... 575
1. General and statutory .................................... 575
2. Waiver of the right to counsel ............................ 577
3. The right of self-representation ............................ 579
4. Effective assistance of counsel ............................ 580

B. Right to Speedy Trial ................................... 583
1. Pre-accusatorial delay .................................... 583
2. Post-accusatorial delay ................................... 584

C. Bail .................................................... 586

IV. CONFESSIONS ........................................... 587

A. Custodial Questioning .................................... 587
B. Voluntariness .......................................... 588
C. Waiver ................................................. 589

V. TRIALS .................................................. 592

A. Elements of Crimes ..................................... 592
1. Intent .................................................. 592
2. Conspiracy ............................................. 594
3. Lesser included offenses .................................. 597
4. Crimes involving regulation of firearms ................. 598
5. Crimes involving aliens .................................. 599
6. Securities .............................................. 600

B. Severance ............................................... 602

C. Conduct of the Trial .................................... 607
1. Conduct of the trial judge ............................... 607
   a. Pre-trial proceedings ................................ 607
   b. Discretion during trial ............................... 610
   c. Limitations on discretion ............................ 616
d. Discretion in post-trial proceedings .......... 617

2. Conduct of the prosecutor ...................... 619
   a. Pre-trial proceedings ....................... 619
   b. During the trial ............................ 623
   c. Relief for abuse of discretion .......... 625

3. Conduct of the jury ............................ 625

D. Evidence .......................................... 627
1. Relevancy ...................................... 627
2. Legal relevancy ................................ 629
3. Prosecutor's rule .............................. 630
4. Impeachment ................................... 632
5. Authentication and identification ............ 633
6. Scientific evidence and expert opinion....... 634
7. Privilege ...................................... 636
8. Hearsay ........................................... 637
   a. Testimony constituting hearsay ............ 638
      i. prior consistent and inconsistent
         statements ................................ 638
      ii. admissions generally .................. 639
      iii. vicarious admissions by co-conspirators
         ........................................... 640
   b. Hearsay exceptions .......................... 641
      i. exceptions applicable to writings ...... 641
      ii. declarations against interest ........ 643
   c. Constitutional dimensions of hearsay problems
      ............................................. 644

9. Scope of examination ........................... 645
10. Presumptions ................................... 646

E. Defenses .......................................... 647
1. Insanity ....................................... 647
2. Due process .................................... 649
3. Competency to stand trial ..................... 651
4. Entrapment ..................................... 654

VI. POST-CONVICTION PROCEEDINGS .................. 656

A. Sentencing ....................................... 656
1. Review ......................................... 656
2. Information that may be considered .......... 657
3. Consecutive sentences ........................ 659
4. Increase in sentence .......................... 659
5. Computation of time served ................. 661
6. Cruel and unusual punishment ................. 661
B. Appeals .............................................. 662
   1. Finality ........................................ 662
   2. Jurisdiction ................................... 663
   3. Standard of review ............................ 664
   4. Concurrent sentence doctrine ................... 667
   5. New trial ...................................... 668
C. Habeas Corpus ...................................... 669
   1. Jurisdiction ................................... 669
   2. Relief for federal prisoners .................... 669
   3. Relief for state prisoners ....................... 673
D. Double Jeopardy .................................... 674
   1. Separate offenses ................................ 674
   2. Attachment of jeopardy ........................ 675
   3. Collateral estoppel ................................ 676
   4. Government appeals ............................. 677

VIII. JUVENILE OFFENDERS ............................ 678

I. ARREST, SEARCH, AND SEIZURE

A. Scope of the Fourth Amendment

   1. Reasonable expectation of privacy

   The fourth amendment to the United States Constitution\(^1\) prohibits
   unreasonable searches and seizures by the government. In *Katz v. United States*,\(^2\) the Supreme Court explained that the existence of a
   fourth amendment violation depends in large part on whether or not
   the person affected entertained a legitimate expectation of privacy.\(^3\) Justice Harlan, concurring in *Katz*, set forth the appropriate test: 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'."\(^4\) However, the fourth
   amendment is not merely an embodiment of "the right to privacy."\(^5\) In
   terms of fourth amendment jurisprudence, the invasion of a privacy

---

1. U.S. Const. amend. IV. The amendment reads:
   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.
3. Id. at 351-52.
4. Id. at 360, 361-62.
5. Id. at 350-51.
interest must be accompanied by governmental action in the form of a search or seizure. Thus, the amendment’s proscription does not apply to private action, and it is not applicable when the governmental activity at issue does not involve a search or a seizure.

Recently, in *Rakas v. Illinois*, the Supreme Court applied even more rigorously the principle that the rights secured by the fourth amendment are personal ones. The Court rejected the notion that shorthand phrases such as “legitimately on the premises” or “target” theory of standing encapsulate the core of fourth amendment protections. Instead, the Court insisted that the analysis must focus on the substantive rights of the particular criminal defendant claiming a fourth amendment violation, that is, on the defendant’s privacy interests in the particular area searched and property seized. The petitioners in *Rakas* were passengers in a car that had been stopped and searched; incrimi-

---

6. *Id.* (“right to be let alone by other people... left largely to the law of the individual States”); *United States v. Rich*, 580 F.2d 929, 939 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (evidence admissible when obtained by private search of abandoned motel room); *United States v. Louderman*, 576 F.2d 1383, 1389 (9th Cir. 1978) (absent FBI approval, use of pen register by telephone company lacks requisite state involvement).

7. *Cuevas-Ortega v. INS*, 588 F.2d 1274, 1277 (9th Cir. 1979) (no search or seizure when illegal alien voluntarily spoke to INS agents who knocked on her door); *United States v. Olander*, 584 F.2d 876, 888 (9th Cir. 1978) (boarding a boat to serve civil process is neither a search nor a seizure); *United States v. Miroyan*, 577 F.2d 489, 492-93 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978) (use of transponder to monitor location of rented airplane held not a search). See also *United States v. Jernigan*, 582 F.2d 1211, 1212-13 (9th Cir.), *cert. denied*, 439 U.S. 991 (1978) (agents’ or informants’ consent to recording of conversation renders fourth amendment claim moot); *United States v. Walker*, 575 F.2d 209, 212 (9th Cir.), *cert. denied*, 439 U.S. 931 (1978) (co-owner’s consent to search of photos validates invasion of appellant’s privacy); *United States v. King*, 587 F.2d 956, 962 (9th Cir. 1978) (sound recording made by agent who is a party to conversation or one made with the consent of one of the parties to the conversation not a violation of the fourth amendment).


9. The Court reiterated that, being personal rights, they may not be vicariously asserted. *Id.* at 133-34 (citing *Alderman v. United States*, 394 U.S. 165, 174 (1969)). However, the Court specifically refused to characterize the initial inquiry in terms of standing, preferring an analytical approach based on “the extent of a particular defendant’s rights under the Fourth Amendment.” *Id.* at 139. It is therefore unnecessary to determine whether or not a particular search was violative of another’s rights. *Id.* at 150.

10. The Court in *Rakas* explained that the phrase “legitimately on the premises,” originally coined in *Jones v. United States*, 362 U.S. 257 (1960), was intended to reflect the notion that a person could have a reasonable expectation of privacy (and hence a legally sufficient interest under the fourth amendment) in a place he was using that was not his own home. *Id.* at 140-42. The insufficiency of its use as an analytical tool was evident from the disparate results in cases in which it had been literally applied. *Id.* at 145-46 n.13.

11. The *Rakas* petitioners had argued that any defendant at whom a search was directed should have standing to contest the use of evidence seized as a result of that search; this rule was urged in an attempt to broaden the *Jones* rule of standing. *Id.* at 132-33.

12. *Id.* at 140-48.
nating evidence was found in the locked glove compartment and under the front seat of the car, which neither passenger owned. The petitioners argued, however, that the evidence seized should have been excluded from the trial. The Court held that the petitioners failed to show that the areas searched were ones in which "a passenger qua passenger . . . would . . . normally have a legitimate expectation of privacy." \(^{13}\)

a. Abandoned property

In *Hester v. United States*,\(^ {14}\) the Supreme Court held that the examination of the contents of abandoned bottles did not constitute a seizure cognizable under the fourth amendment.\(^ {15}\) The Court explained that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields."\(^ {16}\) Forty years later, the Court in *Katz* disavowed fourth amendment interpretations based solely upon location; however, the open fields doctrine was at least tacitly approved when the *Katz* Court stated "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."\(^ {17}\) Thus, lower courts have reasoned that, while the open fields doctrine may have no independent vitality post-*Katz*, "open fields are not areas in which one traditionally might reasonably expect privacy."\(^ {18}\)

In *United States v. Basile*,\(^ {19}\) the Ninth Circuit relied on the post-*Katz* "open fields" doctrine to find that the appellants did not have a reasonable expectation of privacy in an old truck, apparently abandoned, set on blocks "probably" 100 yards from the appellant's residence.\(^ {20}\) After discussing the facts, the court stated: "The trial court's conclusion that the defendants had no reasonable expectation of privacy with respect to the panel truck is amply supported by the evidence."\(^ {21}\) Oddly, this conclusion was based in part upon a literal open fields approach rather than upon a *Katz* analysis. The court distinguished *Wattenburg v.*

---

13. *Id.* at 148-49.
15. *Id.* at 58.
16. *Id.* at 59.
17. 389 U.S. at 351.
18. United States v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976) (per curiam).
20. *Id.* at 1055.
21. *Id.* at 1056.
United States, which had held that a stockpile of Christmas trees was protected from governmental intrusion because the stockpile was within the curtilage of a lodge operated by the defendant. However, the basis for distinguishing the cases seems to be the relative distances involved (in Basile 100 yards; in Wattenburg twenty to thirty-five feet), rather than an expectation of privacy test. The stockpile of trees in Wattenburg was "about five feet from a parking area used by personnel and patrons of the lodge" (hardly a strong basis for a privacy argument), while the truck in Basile was abandoned, if at all, in a relatively isolated area adjacent to the defendant's home.

b. Electronic tracking devices

Generally, the use of an electronic tracking device that merely aids visual surveillance does not violate a person's reasonable expectation of privacy. However, because tracking cannot be accomplished until after the device is installed, the Ninth Circuit has used a two-step analysis to determine if a fourth amendment violation has occurred. First, it must be shown that no violation was presented by the installation itself. Second, if the installation was proper, it must appear that the continued surveillance by the device did not violate a reasonable expectation of privacy.

In United States v. Dubrofsky, the court applied that analysis to a situation in which a lawful customs search revealed that a package from Thailand contained heroin in its hollowed-out walls. Drug enforcement agents placed a tracking device in the package that not only facilitated surveillance of its location but also transmitted a different signal when the package had been opened. The court first found that it was "reasonable to suspect that a crated package like the one in controversy contain[ed] contraband." This justified the initial installation.

22. 388 F.2d 853 (9th Cir. 1968).
23. 569 F.2d at 1056.
24. Id.
25. 388 F.2d at 857 (reasonable expectation of privacy alternate holding).
26. 569 F.2d at 1055. See also id. at 1058 (Hufstedler, J., dissenting) (majority opinion cannot be reconciled with Wattenburg).
29. 581 F.2d 208 (9th Cir. 1978).
30. Id. at 211.
31. Id. See United States v. Botero, 589 F.2d 430, 432 (9th Cir. 1978), cert. denied, 99 S.
Next, the court acknowledged that, while a device indicating no more than "here I am" is included within permissible techniques of surveillance, a device indicating that a package has been opened presents a different problem. The court concluded that it was a slight intrusion, one analogous to the permissible use of binoculars designed for night. However, had the beeper related much more than the information that the package had been opened, it might well have been considered equivalent to a wiretap.

2. Investigatory stops and reasonable suspicion

"The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." However, the amendment only proscribes searches and seizures that are unreasonable. Because the intrusion occasioned by an investigatory stop is less severe than that in an arrest, the standard by which reasonableness is judged has been defined as a "founded or reasonable suspicion" rather than probable cause. Even if the local

---

32. "Permissible techniques of surveillance include more than the five senses of officers and their unaided physical abilities. Binoculars, dogs that track and sniff out contraband, searchlights, fluorescent powders, automobiles and airplanes, burglar alarms, radar devices, and bait money . . . [are all permissible] in the usual case." 581 F.2d at 211.

See also United States v. Miroyan, 577 F.2d 489, 492 (9th Cir.), cert. denied, 439 U.S. 896 (1978) (transponder attached to rented plane did not violate reasonable expectation of privacy any more than a beeper to aid surveillance of an automobile on public roads); United States v. Botero, 589 F.2d 430, 432-33 (9th Cir. 1978), cert. denied, 99 S. Ct. 2162 (1979) (beeper and fluorescent powder placed in package by narcotics agents pursuant to lawful customs search not violative of defendant's constitutional rights).

The Ninth Circuit has also indicated that a contraband dealer "cannot expect Fourth Amendment rights to protect his privacy in the same manner as one who deals in legitimate merchandise." Id. In addition, the Ninth Circuit has reaffirmed that the use of a pen register which produces a written record of all telephone numbers dialed from a given telephone is not subject to fourth amendment proscriptions. United States v. Louderman, 576 F.2d 1383, 1389 (9th Cir. 1978); Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254 (9th Cir. 1977).

33. 581 F.2d at 211-12.
34. Id.
37. The "founded suspicion" test enunciated by the Ninth Circuit has been found to be indistinguishable from the "reasonable suspicion" test of the United States Supreme Court. United States v. Contreras-Diaz, 575 F.2d 740, 744 (9th Cir.), cert. denied, 439 U.S. 855
police are involved, the federal standard for judging the legality of the stop is used. 38

The Ninth Circuit has found a reasonable suspicion justifying investigatory stops in the following factual settings: (1) when the suspect saw the patrol car, he backed up to a retaining wall over which he appeared to throw an object; 39 (2) after suspects requested birth certificates of deceased persons, they were followed and found to be driving a truck with license plates registered to another vehicle; 40 (3) when a suspect was found driving an old car, the right rear tire of which had no tread in violation of the vehicle code; 41 (4) after being directed by a radio bulletin to investigate a possible burglary, police found suspects stooping over "suspiciously" at the rear of the car; 42 (5) at a border patrol checkpoint for brief questioning; 43 (6) after a car exceeding the speed limit was stopped, some passengers gave contradictory explanations regarding their destination and others, unable to speak English, resembled "illegal aliens' with whom . . . [the officer] had previously come in contact." 44

Even if the stop is justified and the person is so "seized," the fourth amendment requires that the detention be "strictly tied to and justified by" the circumstances that legitimized the initial stop. 45 In United

(1978) (citing United States v. Rocha-Lopez, 527 F.2d 476, 477-78 (9th Cir. 1976)). "In order for such a stop to be valid it must be based on a 'reasonable suspicion' that illegal activity had occurred or was occurring." United States v. Orozco, 590 F.2d 789, 792 (9th Cir.), cert. denied, 439 U.S. 1049 (1979).

The United States Supreme Court has defined a "reasonable suspicion" as those "specific and articulable facts" to which an officer can point together with "rational inferences from those facts" which "reasonably warrant' a belief that his safety or that of others is in danger." United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

38. United States v. Orozco, 590 F.2d 789, 792 (9th Cir.), cert. denied, 439 U.S. 1049 (1979); United States v. Grajeda, 570 F.2d 872, 874 (9th Cir. 1978); United States v. Colom, No. 77-1040, slip op. at 1186 (9th Cir. June 15, 1978). But see United States v. Contreras-Diaz, 575 F.2d 740, 744 (9th Cir.), cert. denied, 439 U.S. 855 (1978) (because state officer involved, initial inquiry on basis of California law subject to subsequent application of federal standards).

40. United States v. Kennedy, 573 F.2d 657 (9th Cir. 1978).
41. United States v. Grajeda, 570 F.2d 872 (9th Cir. 1978).
42. United States v. Colom, No. 77-1040 (9th Cir. June 15, 1978).
43. United States v. Rubalcava-Montoya, 597 F.2d 140 (9th Cir. 1978).
44. United States v. Contreras-Diaz, 575 F.2d 740, 743 (9th Cir.), cert. denied, 439 U.S. 855 (1978). See also United States v. Soloman, 528 F.2d 88, 90-91 (9th Cir. 1975) (validity of stop upheld based on driver's inability to open hood of car and lack of knowledge of the coolant recovery system).
States v. Kennedy, the Ninth Circuit found that the discrepancy in vehicle license information together with the receipt of birth certificates of deceased persons justified the initial stop but not the extended inquiry into the suspect's arrest history or possession of weapons.

3. Arrests and probable cause

An arrest, unlike an investigatory stop, requires "probable cause." Probable cause to arrest demands a comparison between the arresting officer's own knowledge and an objective standard. At the moment of the arrest, the officer must have been aware of facts and circumstances based on "reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the . . . [suspect] had committed or was committing an offense." As in United States v. Colom, however, a founded suspicion to detain may also ripen into probable cause to arrest.

The Ninth Circuit has upheld findings of probable cause to arrest when supported by (1) evidence obtained from co-conspirators or informants together with the officer's independent observations, (2) information gathered with the aid of electronic surveillance devices, and (3) direct observation by an officer or reasonable inferences drawn from circumstances surrounding an offense. However, until United

46. 573 F.2d 657 (9th Cir. 1978).
47. Id. at 659. See also United States v. Luckett, 484 F.2d 89 (9th Cir. 1973) (jaywalking does not provide reason to suspect incidence of other crimes). Cf. United States v. Contreras-Diaz, 575 F.2d 740, 745 (9th Cir.), cert. denied, 439 U.S. 855 (1978) (totality of circumstances formed basis for rational suspicion of possible criminal activity).
48. Draper v. United States, 358 U.S. 307 (1959). If probable cause is established, the arrest is almost certainly valid regardless of whether the arresting officer had a warrant. See Gerstein v. Pugh, 420 U.S. 103, 113 (1975) (arrest supported by probable cause never invalidated solely because of failure to secure warrant).
50. No. 77-1040 (9th Cir. June 15, 1978).
51. Id. slip op. at 1864-65 (radio bulletin directing officers to investigate plus additional information from suspect's explanation of activities sufficient to arrest).
52. United States v. Blalock, 578 F.2d 245, 247 (9th Cir. 1978); United States v. Moreno, 569 F.2d 1049, 1051-52 (9th Cir. 1978). See also Cabral-Avila v. INS, 589 F.2d 957, 959 (9th Cir. 1978), cert. denied, 99 S. Ct. 1245 (1979) (court found probable cause necessary to justify arrests of illegal aliens based on informant's information coupled with conduct observed at petitioner's residence).
54. United States v. Oaxaca, 569 F.2d 518, 521 (9th Cir.), cert. denied, 439 U.S. 926 (1978) (get-away car in bank robbery registered to person residing near bank; officers saw suspect leave residence and hastily return when patrol car spotted); United States v. Baker, 567 F.2d
States v. Prescott, the question of whether probable cause to arrest could be sufficient justification for a warrantless entry into a private residence had not been answered by the Ninth Circuit. The court had avoided the question by finding that "exigent circumstances" existed or that the building at issue was actually a place of business.

In Prescott, the court joined the District of Columbia and Second Circuits in holding that, absent exigent circumstances, officers having probable cause must first obtain a warrant before entering a dwelling to effect an arrest. Three months later in United States v. Johnson, however, the Ninth Circuit upheld a warrantless arrest inside a suspect's apartment. The court held that, even though there were no exigent circumstances and there was ample time to obtain an arrest warrant, probable cause existed for the arrest; therefore, appellant's constitutional rights had not been violated. The distinction between the cases, which the court did not mention, is that in Prescott the officers literally kicked down the door, while in Johnson the agents

924, 926 (9th Cir. 1978) (suspects inextricably enmeshed with other in sale and delivery of contraband in which undercover agent participated).

55. 581 F.2d 1343 (9th Cir. 1978).

56. The Supreme Court has never resolved the issue, but has expressly reserved this "grave constitutional question" on several occasions. Jones v. United States, 357 U.S. 493, 499-500 (1958). See also United States v. Watson, 423 U.S. 411, 418 n.6 (1976) (warrantless arrest based on probable cause valid; subsequent search of car with consent also valid).

57. "Exigent circumstances" refers to that situation in which the constitutional warrant requirement with its consequent delay must yield to an urgent need for immediate police action. Immediate action is called for when the suspect is armed or might escape or when there is risk of destruction of evidence or risk of danger to officers or third persons. See United States v. Botero, 589 F.2d 430, 432 (9th Cir. 1978), cert. denied, 99 S. Ct. 2162 (1979) (contraband in imminent danger of destruction constituted an exigent circumstance justifying warrantless entry into private dwelling); United States v. Flickinger, 573 F.2d 1349, 1356 (9th Cir.), cert. denied, 439 U.S. 836 (1978) (possible alerting phone call from arrested cohort increased hazard of risks noted above); United States v. Valentin, 569 F.2d 1069, 1071 (9th Cir. 1978) (transmitters in contraband having been discovered, the risk of destruction of evidence and suspect escape increased).


60. United States v. Reed, 572 F.2d 412, 424 (2d Cir. 1978).


63. Id., slip op. at 4121.
knocked, used fictitious names, and were admitted voluntarily after the suspect opened the door and found the agents with their guns drawn.

Within the same three month period, the Ninth Circuit again avoided the issue of a warrantless arrest in a private residence by finding, in *United States v. Botero*,64 that the arrest actually took place in the doorway of the suspect’s apartment.65 Citing *United States v. Santana*,66 the court found that, because the arrest could have taken place when the suspect opened the door, the agents could have followed the suspect into the apartment to effect the arrest. Therefore, his retreat could not divert the arrest.67

Finally, the validity of an arrest warrant supported only by a criminal complaint filed by the prosecutor rather than by probable cause went undecided in *Myers v. Rhay*.68 The court held that “the proper time to challenge the probable cause underlying an arrest is prior to the prosecution of the case, while the illegal detention is in progress.”69

B. The Exclusionary Rule

The exclusionary rule is a judicially created remedy70 providing fourth amendment protections against illegal searches and seizures by prohibiting the use of illegally obtained evidence by the prosecution in a criminal trial.71 The purpose of the exclusionary rule is “to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures;”72 it is not designed to redress the injury to the privacy of the victim of the illegal search.73 Therefore, the Supreme Court has emphasized that the exclusionary rule should be applied only in those areas in which “its remedial objectives are thought most efficaciously served,”74 *i.e.*, when

64. 589 F.2d 430 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2162 (1979).
65. *Id.* at 432.
66. 427 U.S. 38, 42 (1976) (doorway of a private residence held to be a public place).
68. 577 F.2d 504 (9th Cir.), *cert. denied*, 439 U.S. 968 (1978).
69. *Id.* at 507. *See* Gerstein v. Pugh, 420 U.S. 103 (1975); Ierardi v. Gunter, 528 F.2d 929 (1st Cir. 1976).
70. *Weeks v. United States*, 232 U.S. 383 (1914) (exclusionary rule first enunciated, that fourth amendment rights were to be protected by suppressing illegally obtained evidence in federal prosecutions).
71. *Mapp v. Ohio*, 367 U.S. 643 (1961) (due process clause of fourteenth amendment requires that evidence obtained in unconstitutional searches and seizures is inadmissible in state courts, as well as federal courts, for use by the prosecution in criminal trials).
73. 414 U.S. at 347.
74. *Id.* at 348. *See* United States v. Ceccolini, 435 U.S. 268, 275 (1978) (exclusion of a
future unlawful police conduct will thereby be deterred. Following this standard for application of the exclusionary rule, the Ninth Circuit declined to apply the exclusionary rule in 1978 in cases in which it thought the rule's deterrent purpose would not be furthered. It also refused to apply the exclusionary rule when the fourth amendment violation played only a minimal role in discovery of evidence.

Application of the exclusionary rule is further limited by the require-

witness's testimony requires a more direct connection with the illegal search than exclusion of physical evidence); Stone v. Powell, 428 U.S. 465, 486 (1976) ("[D]espite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons."); United States v. Romero, 585 F.2d 391, 396 (9th Cir. 1978) ("In deriving the outer perimeters of the exclusionary rule, courts have . . . balance[d] the deterrence value of excluding a particular class of evidence against the policies in favor of admitting all evidence relevant to the fact-finding process.").

75. See United States v. Romero, 585 F.2d 391 (9th Cir. 1978) (where preparation of federal search warrant was not based upon evidence obtained by invalid state warrant, federal warrant was valid, and deterrent value of applying exclusionary rule was inapplicable); United States v. Radlick, 581 F.2d 225 (9th Cir. 1978) (Ninth Circuit declined to apply exclusionary rule, remanding case to district court for determination of the issue of whether proceeding under state warrant inconsistent with Fed. R. Crim. P. 41 was intentional, thus requiring application of the exclusionary rule); United States v. Newell, 578 F.2d 827, 834-35 (9th Cir. 1978) (little or no remedial effect would be achieved by excluding evidence gathered in military interrogation by military investigator in contravention of military regulations requiring presence of counsel); United States v. Schmidt, 573 F.2d 1057, 1063 (9th Cir.), cert. denied, 439 U.S. 881 (1978) (exclusionary rule not applied because: (1) minimal interaction between U.S. and Peruvian officials did not support the defendant's contention that the Peruvian drug investigation was a "joint" operation with U.S., thus Peruvian authorities' conduct not attributable to U.S. officials; (2) subsequent confession was voluntary, not the fruit of coerced Peruvian confession; and (3) physical evidence was not the fruit of prior coerced confession); United States v. Walker, 569 F.2d 502, 504 (9th Cir.), cert. denied, 435 U.S. 976 (1978) (deterrence function of rule would not be served by retroactive application of United States v. Fannon, 556 F.2d 961 (9th Cir. 1977), rehearing en banc denied, 569 F.2d 1106 (9th Cir. 1978)) (fourth amendment reasonableness standards mandated for air-planes searches, where evidence was obtained by airline employee acting in good faith).

The Ninth Circuit also declined to apply the exclusionary rule in several cases involving foreign searches. See United States v. Rose, 570 F.2d 1358, 1362 (9th Cir. 1978) (fourth amendment exclusionary rule is inapplicable where circumstances of foreign search were not "extreme" or no joint venture between the foreign officials and U.S. officials existed). But see United States v. Emery, 591 F.2d 1266 (9th Cir. 1978) (substantial participation in the arrest process by both U.S. and Mexican officials supported a finding of joint venture, thus requiring suppression of a confession made in absence of Miranda warnings).

In addition, the Ninth Circuit refused to apply the exclusionary rule in a civil case. See Cuevas-Ortega v. INS, 588 F.2d 1274 (9th Cir. 1979) (since exclusionary rule traditionally applies only when criminal or quasi-criminal sanctions might be imposed, it is not applicable to deportation proceedings).

76. See United States v. Brock, 571 F.2d 480, 484 (9th Cir. 1978) ("[I]f the illegally obtained leads were so insubstantial that their role in the discovery of the evidence sought to be suppressed 'must be considered de minimis,' then suppression is inappropriate.") (quoting United States v. Bacall, 443 F.2d 1050, 1056-57 (9th Cir.), cert. denied, 404 U.S. 1004 (1971)).
ment that the person asserting the illegality of the search or seizure have standing to do so. In *Brown v. United States*, the Supreme Court summarized the three requirements for standing, at least one of which must be met by the defendant for the standing requirement to be satisfied: defendant must (1) have been on the premises at the time of the search or seizure, (2) allege a proprietary or possessory interest in the premises, or (3) be charged with an offense that includes possession of the seized evidence as an essential element of the offense charged.

However, in the recent case of *Rakas v. Illinois*, the Supreme Court held that meeting one of these requirements, by being "legitimately on the premises" at the time of the search, does not in and of itself establish the defendant's right to challenge the legality of the search or seizure. In its analysis, the Court rejected the "target theory," which allows a court to examine the issue of standing by determining whether the search was directed at the defendant, without deciding whether that particular defendant's fourth amendment rights were violated. Affirming its previous holding that fourth amendment rights are personal and cannot be asserted vicariously, the Court held that a defendant's own reasonable expectation of privacy must have been violated by the search or seizure in order for the defendant to have stand-

---

77. See FED. R. CRIM. P. 41(e) (only a "person aggrieved" may move for suppression of illegally seized evidence).
79. *Id.* at 229. See *Chapman v. United States*, 365 U.S. 610 (1965) (defendant with possessory interest in the premises searched has standing to challenge the legality of the search); *Jones v. United States*, 362 U.S. 257, 264-67 (1960) (when defendant was charged with a crime which included as an essential element possession of the evidence seized, "person aggrieved" standing requirement satisfied; court also found that defendant's being "legitimately on the premises" at the time of the search satisfied the "person aggrieved" standing requirement).
81. *Id.* at 132-38.
82. The "target theory" states that the person at whom the search is directed may contest the validity of the search, even though his fourth amendment rights may not have been violated. *Id.* at 132-33. It thus considers the standing question (Was this defendant a target of the allegedly illegal search?) separately from the substantive question of whether defendant's fourth amendment rights were violated (Did this defendant have a reasonable expectation of privacy that was violated by the search/seizure?). *Id.* at 139. See *United States v. Cella*, 568 F.2d 1266, 1281 (9th Cir. 1977) (Ninth Circuit rejected "target theory" as a basis for standing).
83. 439 U.S. at 139.
84. *Id.* at 137-38 (citing *Alderman v. United States*, 394 U.S. 165, 174 (1969) (evidence obtained by illegal electronic surveillance could only be suppressed against a defendant whose premises were illegally monitored; it could not be suppressed against co-defendants or co-conspirators whose fourth amendment rights were not violated)).
It concluded that, while a defendant's legitimate presence on the premises at the time of the search and seizure may be relevant to establishing defendant's reasonable expectation of privacy, it is not controlling in determining defendant's standing to challenge the evidence. Applying this analysis, the Court found that the facts in *Rakas* did not support the defendants' capacity to challenge the legality of the evidence. As passengers, the defendants were legitimately in the vehicle searched. However, they had neither a property or possessory interest in the automobile nor a reasonable expectation of privacy in the areas of the automobile searched (locked glove compartment and beneath front seat). Therefore, since the court concluded that their fourth amendment rights had not been violated, the defendants were unable to challenge the legality of the evidence used against them.

The Ninth Circuit had already adopted a similar approach to standing issues in the 1977 case of *United States v. Cella*. In *Cella*, the court rejected the "target theory," requiring that a defendant's fourth amendment rights must have been violated by the search or seizure in order for him to have standing. Decisions by the Ninth Circuit in 1978 involving issues of standing are consistent with this view.

The "fruit of the poisonous tree" doctrine is an extension of the exclusionary rule. It requires suppression of evidence obtained by means of unconstitutionally acquired evidence. In 1978, the Ninth Circuit

---

85. 439 U.S. at 139. The Court stated that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment rather than on any theoretically separate but invariably intertwined concept of standing." *Id.*
86. *Id.* at 148. The Court rejected defendants' argument that being "legitimately on the premises" (set forth in *Jones v. United States*, 362 U.S. 257, 267 (1960)) conferred standing. It stated that this standard was "too broad a gauge for measurement of Fourth Amendment rights." *Id.* at 142.
87. *Id.* at 149-50.
88. 568 F.2d 1266 (9th Cir. 1977).
89. *Id.* at 1281. In rejecting the "target theory," the court stated, "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." *Id.*
90. See *United States v. Sturgis*, 578 F.2d 1296 (9th Cir. 1978) (when appellant claimed no proprietary interest in items seized or premises searched, he had no normal possessory standing, while lacking automatic standing since possession of stolen money is not an essential element of charge of armed bank robbery); *United States v. Rubalcava-Montoya*, 597 F.2d 140 (9th Cir. 1978) (although not present during transportation of illegal aliens, defendant had standing because he owned the vehicle searched).
91. *Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963) (statements made by defendant at time of his arrest and narcotics taken from third party as a result of these statements were fruits of unlawful state action and should have been excluded from evidence).
applied the “fruit of the poisonous tree” doctrine in two situations: (1) to suppress evidence or testimony resulting from exploitation of physical evidence obtained in an illegal search\(^{92}\) and (2) to suppress evidence acquired through exploitation of statements made in the absence of *Miranda* warnings.\(^{93}\)

The “fruit of the poisonous tree” doctrine does not apply and evidence is admissible if: (1) the evidence could have been procured through lawful, independent means;\(^{94}\) (2) the connection between the evidence introduced at trial and the initial search and seizure is so attenuated as to “dissipate the taint” of the original illegality;\(^{95}\) or (3) the original search and seizure did not violate the fourth amendment.\(^{96}\)

---

92. See United States v. Rettig, 589 F.2d 418 (9th Cir. 1978) (where search for evidence of marijuana possession exceeded the scope of the warrant in that evidence of cocaine possession was also sought and seized, all evidence was suppressed); United States v. Rubalcava-Montoya, 597 F.2d 140 (9th Cir. 1978) (testimony of illegal aliens who were discovered in illegal search conducted without probable cause or consent was suppressed as “fruit” of the illegal search, where government did not establish that the testimony was so attenuated from the illegal search as to be untainted).

93. See United States v. Kennedy, 573 F.2d 657 (9th Cir. 1978) (where probable cause for search warrant was established by questioning that occurred during “custodial interrogation” but without *Miranda* warnings, the evidence seized pursuant to the search warrant was the “fruit” of a *Miranda* violation, and must be suppressed). Cf. Myers v. Rhay, 577 F.2d 504, 508-09 (9th Cir.), *cert. denied*, 439 U.S. 968 (1978) (where state prisoner was afforded a full and fair state hearing at which to challenge confession as fruit of illegal arrest, habeas corpus was properly denied); United States v. Schmidt, 573 F.2d 1057, 1062-65 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978) (subsequent confession to U.S. officials not fruit of coerced confession to Peruvian officials; physical evidence obtained prior to coerced confession could not be fruit of it).

94. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Cf. United States v. Romero, 585 F.2d 391, 395 (9th Cir. 1978) (court’s determination that federal warrant was untainted was based on a finding that the warrant was in fact based on independent untainted information gathered prior to execution of illegal state warrant; “inevitable discovery” rule not applied).

95. Wong Sun v. United States, 371 U.S. 471, 491 (1963). See United States v. Ceccolini, 435 U.S. 268 (1978) (less attenuation needed for live witness testimony to be admissible than for tangible evidence); United States v. Rich, 580 F.2d 929, 936-37 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (taint of original illegal search dissipated so that defendant’s subsequent admissions were admissible where there were: (1) repeated *Miranda* warnings, (2) lapse of one week between search and admissions, and (3) defendant initiated interview).

96. See United States v. Rich, 580 F.2d 929, 939 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (no fourth amendment violation when evidence was discovered by innkeeper after defendant had abandoned motel room); United States v. Walker, 575 F.2d 209, 212 (9th Cir.), *cert. denied*, 439 U.S. 931 (1978) (no fourth amendment violation where co-owner of evidence consented to search); United States v. Walker, 569 F.2d 502-04 (9th Cir.), *cert. denied*, 435 U.S. 976 (1978) (no fourth amendment violation when airline employee conducted search prior to ruling that employees are thereby performing a federal function and that such searches must therefore be made in conformity with the fourth amendment).
In *United States v. Ceccolini*, the Supreme Court distinguished between applying the "fruit of the poisonous tree" doctrine when the "fruit" is potentially tainted testimony as compared to tangible evidence. In *Ceccolini*, a witness who was willing to testify about defendant's illegal gambling operations was discovered as a direct result of an illegal search. The Court held that the witness' testimony was admissible, even though it was the "fruit" of an illegal search. Reasoning that "the cost of excluding live-witness testimony often will be greater" than the cost of excluding tangible evidence, the Court required "a closer, more direct link between the illegality and that kind of testimony."

Voluntary acts or admissions occurring after the illegal search or seizure can also provide the independent and lawful means necessary to admit evidence against a "fruit of the poisonous tree" argument. The determination of whether a subsequent confession is the "fruit" of a prior illegal confession depends on whether the second confession was made voluntarily. In *United States v. Schmidt*, the Ninth Circuit denied petitioner's claim that admissions made to federal agents were the "fruits" of a prior coerced confession to Peruvian police. In so doing, it held the following factors to be determinative of the voluntariness of the subsequent confession: (1) petitioner had not lost his will to resist, as evidenced by signing a "forced signature" on his confession; (2) there were repeated *Miranda* warnings; and (3) there was a lapse of one week between the illegal search and defendant's admissions.

---

98. *Id.* at 278.
99. *Id.*
100. *Id.*
101. *Id.* In its opinion, the Court stated that "the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." *Id.* at 280.
102. See Cuevas-Ortega v. INS, 588 F.2d 1274 (9th Cir. 1979) (no violation where petitioners voluntarily went to INS office and made statements that were not induced by improper action of immigration officers); *United States v. Lopez*, 581 F.2d 1338, 1342-43 (9th Cir. 1978) (petitioner consented to search of vehicle's trunk after unlawful search); *United States v. Rich*, 580 F.2d 929, 936-37 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978) (although original search may have been illegal, statements made by defendant were admissible when: (1) defendant initiated the interview, (2) there were repeated *Miranda* warnings, and (3) there was a lapse of one week between the illegal search and defendant's admissions); Hoonsilapa v. INS, 575 F.2d 735, 738 (9th Cir.), *modified*, 586 F.2d 755 (9th Cir. 1978) (petitioner's wife and attorney, attempting to adjust his legal status, voluntarily submitted his visa petition, thereby rendering invalid the claim that visa petition was product of illegal arrest and search); *United States v. Brock*, 571 F.2d 480, 483 (9th Cir. 1978) (assuming initial search was illegal, petitioner's subsequent voluntary appearance and admissions to F.B.I. cured any defects in evidence).
104. *Id.* at 1063.
(2) he admitted not fearing the federal agents;105 and (3) he had taken at least one course in criminal law and was well aware of his Miranda rights.106

The Ninth Circuit suppressed evidence solely on statutory grounds in United States v. Santora.107 Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968,108 courts may not authorize break-ins for the purpose of planting bugging devices. Therefore, a search warrant issued on the basis of information obtained through a wiretap initiated in violation of the Act and the incidental fruits of the warrant were suppressed.109

C. Search Warrants and Probable Cause

The fourth amendment sets forth the conditions under which a warrant may issue.110 In applying these fourth amendment protections, the Supreme Court has articulated the requirements that must be met before a search warrant will pass constitutional muster. 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.111 Second, the items to be seized and the place to be searched must be described with particularity, and in such a way as to indicate that criminal activity is likely to have occurred.112 Third, the person issuing the warrant must be a neutral and detached magistrate, capable of determining whether probable cause for the requested arrest or search exists.113 The Court has stated that, in evaluating compliance with these requirements, the affidavit should be read as a whole, using a common sense approach.114

105. Id. at n.5.
106. Id. at n.6.
109. 583 F.2d at 468.
110. 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."
114. United States v. Harris, 403 U.S. 573, 577 (1971) (citing United States v. Ventresca,
1. Inferences and common knowledge

In *United States v. Fried*, the Ninth Circuit stressed that "great deference" is owed the decision of the magistrate who determines that probable cause exists. The magistrate is entitled to "infer" information to substantiate elements of the offense charged and to use "common knowledge" to support the conclusion in the affidavit that the evidence to be seized will have a nexus with the criminal activity charged. In *Fried*, for example, the court determined that the magistrate could infer that, because debentures were stolen in New York and because at least one was found in San Francisco, it was probable that the debentures had been transported in interstate commerce by one or more of the suspects. Furthermore, the magistrate could rely upon common knowledge that debentures are customarily traded in amounts of $1,000 or more in order to find that some debentures were possessed in violation of a statute requiring that the property in question be worth more than $5,000.

In 1978, it was common for the Ninth Circuit to uphold findings of probable cause based upon inferences. In *United States v. Martinez*, the court upheld a search warrant for appellant's house. Although most of the information in the affidavit was based upon appellant's alleged gambling activities at a bar, appellant had received at least two telephone calls at his residence. During the calls, he was alleged to have given out wagering information. Therefore, it was permissible for the magistrate to infer that gambling records permitting appellant to answer telephone inquiries were kept at the house.


117. 576 F.2d at 791.

118. 588 F.2d 1227 (9th Cir. 1978).

119. *Id.* at 1234. See *United States v. Radlick*, 581 F.2d 225, 229 (9th Cir. 1978) (court allowed magistrate to make appropriate inferences regarding the use of the chemical piperidine in the illicit manufacture of PCP); *United States v. Dubrofsky*, 581 F.2d 208, 212-13 (9th Cir. 1978) (court upheld issuance of warrant to search suspect's home in Boulder Creek after his arrest in Santa Cruz for importation of heroin, after court determined that it is a normal inference that heroin importers keep heroin and related paraphernalia at their homes); *United States v. Miroyan*, 577 F.2d 489, 494 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978) (court held it was reasonable to infer defendant had probably been carrying contraband and probably had it in his motel room). See also *United States v. Spearman*, 532 F.2d 132, 133 (9th Cir. 1976) (court held that a search warrant may be upheld when the nexus between the items to be seized and the place to be searched rests not upon direct observa-
United States v. Solario\textsuperscript{120} is a rare example of a Ninth Circuit refusal to infer probable cause in 1978. In Solario, one of four search warrants had been issued. One of the four authorized a search of petitioner's parents' home in order to recover a revolver allegedly in the possession of petitioner's brother. Upon searching the home, the officers found an unregistered semi-automatic rifle that petitioner admitted was his. On appeal, the court granted the motion to suppress. The only factors supporting the warrant were that a reliable informant (1) had seen petitioner's brother with a revolver between four and one-half and sixteen and one-half months ago, (2) had heard the brother say he owned several handguns, (3) had seen the brother with a handgun in the parents' home three times during 1976, and (4) had bought narcotics from the brother, with some of the purchases occurring in the parent's home. The court concluded that the primary information was stale and the rest of the information was insufficient to cure the staleness.\textsuperscript{121}

2. Information from informants and co-conspirators

Where the inference of probable cause is to be drawn solely from information furnished by an unnamed informant rather than from direct observation of the affiant, the reliability of the informant and his information must be established. In Aguilar v. Texas\textsuperscript{122} and Spinelli v. United States,\textsuperscript{123} the Supreme Court set forth a two-pronged test which requires (1) that the affidavit set forth the underlying circumstances necessary to enable the magistrate to evaluate independently the informant's conclusions,\textsuperscript{124} 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.\textsuperscript{125}

The Ninth Circuit recently applied this test in United States v. McCre,\textsuperscript{126} which involved the sighting of what appeared to be parts of a machine gun by two social workers who were visiting the home of a

\footnotesize{\textsuperscript{120} 577 F.2d 554 (9th Cir. 1978).}
\footnotesize{\textsuperscript{121} Id. at 555-56. See United States v. Sherwin, 572 F.2d 196, 198 (9th Cir. 1977), cert. denied, 437 U.S. 909 (1978) (to determine if affidavit is sufficient to support a warrant the magistrate must look only to the information on the face of the document).}
\footnotesize{\textsuperscript{122} 378 U.S. 108 (1964).}
\footnotesize{\textsuperscript{123} 393 U.S. 410 (1969).}
\footnotesize{\textsuperscript{124} Id. at 413.}
\footnotesize{\textsuperscript{125} Id.}
\footnotesize{\textsuperscript{126} 583 F.2d 1083 (9th Cir. 1978) (per curiam).}
welfare recipient. The welfare recipient, the former wife of appellant, told them her husband stored his guns in the basement and was going to Montana soon on a shooting spree. On the basis of this information, an agent of the Bureau of Alcohol, Tobacco, and Firearms obtained a warrant to search the home. Appellant argued that the affidavit was insufficient under *Aguilar* because the social workers were “not credible and reliable informants,” for they lacked knowledge about firearms. Their conclusions about the machine gun were said to be “mere beliefs or suspicions and insufficient to constitute probable cause.” The court distinguished *Aguilar*, stating that “[t]hese were not professional informants, but known private citizens giving good faith observations upon which it was reasonable to rely.” Thus, there was probable cause for the issuance of the warrant.

In *United States v. Moreno*, the court, relying upon its previous statements in *United States v. Smith*, held that information provided by a co-conspirator who was under arrest and whose reliability had not been proven could still be a basis for probable cause when that information was detailed and corroborated by observation. In *Moreno*, the informant’s statements concerning the appearance and behavior of his heroin “connection” were corroborated by agents who monitored a telephone call between the informant and his “connection,” and who subsequently observed a “buy.” The court held that the *Aguilar-Spinelli* test had been satisfied because the affidavit in support of the warrant to search the “connection’s” residence set out the informant’s statements, the agent’s corroborating observations, and the statements of an agent whose experience in investigating narcotics led him to conclude that more heroin would be found at the residence.

Finally, it is well established in the Ninth Circuit that the second prong of the *Aguilar-Spinelli* test “can . . . be met by circumstantial

---

127. *Id.* at 1085.
128. *Id.*
129. In *Aguilar*, the unidentified informant was not shown to have spoken on the basis of personal knowledge or to have relied upon specific facts or circumstances. 378 U.S. at 113-14.
130. 583 F.2d at 1085.
131. See *Rutherford v. Cupp*, 508 F.2d 122, 123 (9th Cir. 1974), *cert. denied*, 421 U.S. 933 (1975) (per curiam) (informant was a neighbor of defendant and had no apparent ulterior motive).
132. 569 F.2d 1049 (9th Cir.), *cert. denied*, 435 U.S. 972 (1978).
133. 503 F.2d 1037 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975).
134. 569 F.2d at 1051.
135. *Id.* at 1052.
evidence on the trustworthiness of the tip.”136 When fear for their safety required that informants' names be withheld, the court, in *United States v. Louderman*,137 upheld the validity of a search warrant based on two factors: (1) the informants' reliability was demonstrated by their history of supplying informative leads that had resulted in numerous arrests, and (2) the information they supplied was corroborated through various means of investigation.138

3. Items and premises described with particularity

As a "fundamental protection . . . intended to prevent general searches,"139 an affidavit must particularly describe the items to be seized and the premises to be searched.140 While a warrant's description of the items to be seized may be sufficiently specific to withstand a claim of overbreadth, the actual execution of the warrant may not. The execution may fail for technical reasons141 or because the search exceeded the scope authorized by the warrant.142

---

137. 576 F.2d 1383 (9th Cir. 1978).
138. Id. at 1389 (The F.B.I. was advised that the telephone company, through the use of a pen register, had obtained evidence of wire fraud; “corroboration through various means of independent investigation” consisted of the subpoenaed results of the pen register investigation.). *See also* United States v. Fried, 576 F.2d 787, 791 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978) (where affidavit was based largely on statement of informant who saw and handled stolen debenture in hotel room and subsequently delivered it to agent, reliability of informant could be inferred from informant's detailed description of criminal activity).
139. United States v. Dubrofsky, 581 F.2d 208, 213 (9th Cir. 1978). *See* Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (“the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings”). *Cf.* United States v. Rettig, 589 F.2d 418, 423 (9th Cir. 1978) (when agents concealed from issuing magistrate the scope of their intended search and used warrant for general exploratory search, all evidence was suppressed).
140. U.S. CONST. amend. IV. *See* United States v. Louderman, 573 F.2d 1383 (9th Cir. 1978) (court held that the items described were sufficiently related to the investigation of wire fraud).
141. *See, e.g.*, FED. R. CRIM. P. 41(c) (1), which provides in part: “The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime.” "Daytime" is defined as “the hours from 6:00 a.m. to 10:00 p.m. according to local time.” FED. R. CRIM. P. 41(h). *Cf.* United States v. Kim, 577 F.2d 473 (9th Cir. 1978) (although the record indicated a dispute as to five minute period, warrant was not prematurely executed).
142. *See, e.g.*, United States v. Rettig, 589 F.2d 418, 423 (9th Cir. 1978) (court found agents intentionally exceeded scope of warrant authorizing search for marijuana). *But see, e.g.*, United States v. McCrea, 583 F.2d 1083, 1085-86 (9th Cir. 1978) (per curiam) (court upheld seizure of pipe bomb as within the scope of warrant directing search for machine gun and parts).
In *United States v. Dubrofsky*, an agent was informed by telephone that a warrant had been issued, but the caller did not disclose to him the identity of the specific items authorized to be seized. The court upheld the execution of the warrant only on the "peculiar facts" of the case. These facts included the agent's testimony that he had participated in at least ten searches of a similar nature and had assumed that the warrant authorized no greater or lesser search than he had routinely conducted in the other cases. Relying primarily on hindsight, the court found that appellant's rights had not been jeopardized and, consequently, the execution of the warrant could be upheld.

4. Misrepresentations and omissions

In the area of particularity, the court must also determine whether misrepresentations or omissions in the affidavit render it insufficient under fourth amendment standards. The Supreme Court in *Franks v. Delaware* recently held that, in order to obtain a hearing on the veracity of an affiant, the challenger must allege that any omissions or misrepresentations were made recklessly or with intent to deceive the court. Even when sufficient allegations have been made, if the allegedly false portions of the affidavit are set aside and, without them, the affidavit remains sufficient, no hearing will be permitted. Only when the sufficiency of the affidavit depends upon the allegedly reckless or deliberate misstatements will a hearing be granted. An affidavit containing omissions or misstatements resulting from negligence, but which otherwise establishes probable cause, will be sufficient to support the warrant.

In *United States v. Rettig*, the Ninth Circuit was confronted with a bad faith omission that, unlike that in *Franks*, did not undercut the factual sufficiency of the affidavit but, rather, operated to deprive the magistrate of the ability to properly supervise the scope of the search. On April 2, 1975, agents of the Drug Enforcement Agency

---

143. 581 F.2d 208 (9th Cir. 1978).
144. Id. at 213.
146. The allegations may not be merely conclusory; they must be fully supported. Id. at 171.
147. Id. at 171-72.
148. Id. at 172.
149. Id. at 171.
150. 589 F.2d 418 (9th Cir. 1978).
151. Id. at 423. Cf. United States v. Romero, 585 F.2d 391 (9th Cir. 1978) (government's failure to inform federal magistrate that evidence sought under federal warrant had been suppressed by state court did not impair magistrate's finding of probable cause); United
had sought an arrest warrant for defendant Rettig and a warrant to search his home from a federal magistrate. The agents alleged many details of a complicated conspiracy to import cocaine. Although the magistrate issued the arrest warrant, he declined to issue the search warrant because he found that the information in support was stale. The next day, Rettig was arrested in his home while attempting to destroy approximately one pound of marijuana. Following the arrest, a new search warrant was sought, this time from a state court magistrate. The affidavit purported simply to seek evidence linked to marijuana. No intention to search for evidence of cocaine importation was revealed, and the affidavit contained no mention of the federal court’s denial of a warrant on the previous day. The state magistrate granted the warrant. The ensuing search was calculated to seek evidence relating to the cocaine conspiracy. Although the issuing magistrate had authorized a search for personal papers indicating occupancy of the premises, the quantity and nature of the personal papers and effects seized clearly exceeded the limited objectives stated in the warrant.\(^{152}\)

The court found that, while the basis for the warrant to search for marijuana was sufficient, the actual search exceeded the scope of the warrant.\(^{153}\) The determination of whether the scope of a search exceeds the warrant’s authorization was said to rest upon both the purpose disclosed to the magistrate for the issuance of the warrant and the manner of the execution of the search.\(^{154}\) In *Rettig*, the court found it impossible to determine which of the items actually seized would have been discovered had the search not exceeded the scope of the warrant. Therefore, all items seized were suppressed.\(^{155}\)

In finding that the agents had deliberately concealed facts from the issuing magistrate, the court stated:

---

States v. Miroyan, 577 F.2d 489, 494 & n.2 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978) (although illegal entry and improper observation formed the basis for part of the affidavit, the remaining facts were sufficient to support issuance of the warrant); United States v. Walker, 575 F.2d 209, 213 & n.3 (9th Cir.), *cert. denied*, 439 U.S. 931 (1978) (inaccurate statement that items sought to be seized were stolen was not intentional, negligent, or material).

152. 589 F.2d at 423.

153. *Id.*

154. *Id*; VonderAhe v. Howland, 508 F.2d 364, 369 (9th Cir. 1975). *Cf.* United States v. Dubrofsky, 581 F.2d 208 (9th Cir. 1978) (where agent was ignorant of warrant’s limitations, but conducted search reasonably and in apparent good faith, exceeding warrant’s scope was not fatal).

155. 589 F.2d at 423. Although it is permissible to seize items not described in the warrant, the search must have been confined to the terms of the warrant and must have been conducted in good faith. *Id.*
A judicial officer cannot perform the function of issuing a warrant particularly describing the places to be searched and the things to be seized, and of supervising the proper return of such process, where the police fail to disclose an intent to conduct a search the purposes and dimensions of which are beyond that set forth in the affidavits. 156

D. Electronic Surveillance

Soon after the Supreme Court's decision in Katz v. United States, 157 Congress enacted the Omnibus Crime Control and Safe Streets Act. 158 The legislative history of the Act indicates that Congress intended Katz to serve as a guide to courts in determining when a person has a justifiable expectation of privacy in his communications under the Act. 159 Title III of the Act prohibits the interception 160 of wire or oral communications, except within narrowly defined circumstances. 161

In United States v. McIntyre, 162 the issues revolved around the prosecution of a former chief of police who had "bugged" the office of his assistant chief of police in violation of Title III of the Crime Control Act. Applying an analysis based upon the Katz approach, the Ninth Circuit held that the assistant chief of police had a reasonable expectation that conversations in his office would not be overheard. 163 Furthermore, the McIntyre court held that, because the bugging involved in that case was part of a criminal investigation, rather than part of an internal affairs investigation, Title III controlled. 164

Title III prohibits only the "willful" interception of communica-

156. Id.
160. The concept of interception is defined in the Crime Control Act § 2510(4) as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."
162. 582 F.2d 1221 (9th Cir. 1978).
163. Cf. United States v. Bunkers, 521 F.2d 1217 (9th Cir.), cert. denied, 423 U.S. 989 (1975) (under certain circumstances, employer may search employee's work area for lost property or to supervise work); United States v. Davis, 482 F.2d 893 (9th Cir. 1973) (employee's reasonable expectation of privacy may be diminished by established regulatory scheme or specific office practice).
164. The court noted that Title III of the Crime Control Act was particularly written to apply to criminal investigations. 582 F.2d at 1224. Cf. United States v. Bunkers, 521 F.2d 1217 (9th Cir.), cert. denied, 423 U.S. 989 (1975) (holding that some searches of employees by employers in a noncriminal context are justifiable).
In *McIntyre*, the defendants contended that their bugging of the office of an assistant chief of police was not "willful" within the meaning of the statute because they had a good faith belief that their conduct was legitimate. The court of appeals acknowledged that the meaning of willful had not been uniformly applied in federal criminal statutes and that an examination of each statute was necessary to determine the legislative intent in the use of the word. Relying on *United States v. Murdock*, the court interpreted a willful act as one done with a "bad purpose" or "evil motive." Consequently, the officers' belief that their conduct was legal was merely a defense of ignorance of the law.

The court held that a police officer acts with "bad purpose" and, hence, willfully under Title III, when he "engages in electronic surveillance (1) without a court order, and (2) in the absence of the kind of emergency described in 18 U.S.C. § 2518(7)." Because the defendants in *McIntyre* had failed to obtain a court order or to establish the existence of an emergency, their act was "willful" under Title III.

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. While the Act sets forth the standard to be used, interpretations have varied. In *United States v. Spagnuolo*, the Ninth Circuit enunciated guidelines by which to judge the sufficiency of affidavits submitted to support applications for wiretaps. "[T]he affidavit, read in its entirety, must give a factual basis sufficient to show that ordinary investigative procedures

---

167. 582 F.2d at 1224-25.
168. *Id.* at 1225.
170. *Id.* § 2518.
171. *The* Crime Control Act § 2518, *supra* note 158, states in pertinent part:

(1) Each application for an order authorizing or approving the interception of a wire or oral communication . . . shall include the following information

(c) 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 . . .

173. 549 F.2d 705 (9th Cir. 1977) (*affidavit sufficient where it included account of nine month investigation, infiltration, and F.B.I. surveillance of gambling organization, even though government unable to identify all participants*).
have failed or will fail in the particular case at hand." This entails finding that the affidavit reveals a good faith effort made to identify those violating the law, and that the affidavit shows that normal investigatory techniques, employed for a reasonable period of time, have failed to build the case. Moreover, any showing that the employment of normal investigatory techniques would be either too dangerous or unlikely to succeed must meet only a slight standard of reasonableness with regard to the factual history of the investigation.

Pursuant to the Spagnuolo analysis, the Ninth Circuit recently upheld the sufficiency of affidavits in United States v. Kim. In Kim, the court found the affidavits sufficient when it was shown that the Hawaiian police had conducted a four month investigation into gambling operations revealing the use of a central telephone location, that the location had been moved three times, and that alternatives to wiretapping had been tried to no avail. The court stated that, while the Government must show more than mere difficulty in solving a case, the procedures used need not have been a complete failure. It must only be shown that the effectiveness of the methods used has been exhausted.

The Ninth Circuit has also used the Spagnuolo standards of reasonableness in determining compliance with the minimization requirements of section 2518(5) of the Crime Control Act. In Kim, the defendant argued that there had been a violation of the minimization standards in that the wiretap had intercepted a casual conversation about bridge.

174. Id. at 710.
175. Id.
176. Id. at 710-11.
177. 577 F.2d 473 (9th Cir. 1978).
178. Id. at 477 (citing United States v. Kalustian, 529 F.2d 585, 589 (9th Cir. 1975)).
179. Id. at 477 (citing United States v. Spagnuolo, 549 F.2d 705, 710 (9th Cir. 1977)). See United States v. Martinez, 571 F.2d 589 (9th Cir. 1978) (No. 77-2643; unpublished opinion) (affidavits sufficient when six month investigation and infiltration of gambling ring by F.B.I. failed to disclose names of suspects outside Los Angeles area, and when only remaining investigative step would have been grant of immunity to major participant). Cf. United States v. Santora, 583 F.2d 453 (9th Cir. 1978), opinion vacated in light of Dalia v. United States, 99 S. Ct. 1682 (1979), 99 S. Ct. 2155 (1979) (where affidavit was sufficient to support initial intercept order relating to certain suspects, "incorporation by reference" of statements in first affidavit into request for second wiretap failed to show how investigative techniques had not succeeded with regard to second group of suspects).
180. The Crime Control Act § 2518(5), supra note 158, 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 . . . .
The court held, however, that because the bridge conversation included a discussion of bet cancellations, the interception did not violate the minimization requirements of the Act.\(^{181}\)

Section 2515 of the Crime Control Act codifies the "fruit of the poisonous tree" doctrine in the area of electronic surveillance. That section requires exclusion 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."\(^{182}\) In United States v. Santora,\(^{183}\) the Ninth Circuit confronted an issue that has sharply divided the circuits: whether Title III of the Crime Control Act empowers district courts to authorize break-ins for the purpose of installing listening devices\(^{184}\) and, hence, whether evidence thus acquired would be fruit of the poisonous tree. Title III, itself, contains no provision empowering courts to authorize break-ins. While the Santora court agreed with several circuits that Congress was aware of the entry problem involved in planting a bugging device, it was unwilling to assume that Congress "chose to grant authority to permit either break-ins or technical trespasses to install bugging devices by implications derived from its silence."\(^{185}\) Consequently, the court held that neither

\(^{181}\) 577 F.2d at 483. See also United States v. Abascal, 564 F.2d 821, 827 (9th Cir.), cert. denied, 435 U.S. 942 (1977) (officers must limit interference with communication outside scope of wiretap order; once pattern of innocent calls develops, recording of such calls should terminate).

\(^{182}\) Crime Control Act § 2515, supra note 158. See United States v. Donovan, 429 U.S. 413 (1977) (suppression of evidence not warranted where law enforcement officials failed to comply with identification and notice requirements but had satisfied all other requirements of Act). Cf. United States v. Spagnuolo, 549 F.2d 705 (9th Cir. 1977) (suppression required where conversations intercepted under invalid wiretap formed essence of probable cause in affidavits for two subsequent affidavits).


\(^{184}\) The Second and Third Circuits have held that Title III implicitly authorizes break-ins without specific judicial approval. United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), cert. denied, 98 S. Ct. 2231 (1978); United States v. Dalia, 575 F.2d 1344 (3d Cir. 1978), aff'd, 99 S. Ct. 1682 (1979). See discussion of Dalia at text accompanying note 187 infra. The Fourth Circuit has held that Title III implicitly authorizes break-ins, but only with judicial approval. Application of United States, 563 F.2d 637 (4th Cir. 1977). The Eighth Circuit, while not finding implicit authority in Title III, has upheld judicially approved break-ins on a different theory. United States v. Agrusa, 541 F.2d 690 (8th Cir.), cert. denied, 429 U.S. 1045 (1976) (exigent circumstances permitted break-in where requirement that an announcement precede the entry would warn suspect to avoid making incriminating statements). The Sixth Circuit has held that neither Title III nor any other statute empowers courts to authorize break-ins. United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978). The District of Columbia Circuit has held that there is no implicit authority in Title III to order break-ins. United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977), cert. denied, 439 U.S. 833 (1978).

\(^{185}\) 583 F.2d at 461.
Title III nor any other statute empowers district courts to authorize break-ins to plant bugging devices. Therefore, under Santora, the evidence obtained via a court-authorized break-in must be excluded.\textsuperscript{186}

However, a 1979 Supreme Court decision, Dalia v. United States,\textsuperscript{187} has come to a contrary conclusion. In Dalia, the Court held that neither the fourth amendment nor the Crime Control Act precludes the use of covert entry for the installation of eavesdropping devices.

In United States v. Louderman,\textsuperscript{188} the court reiterated the principles of Hodge v. Mountain States Telephone & Telegraph Company\textsuperscript{189} by holding that it would continue to recognize a distinction between a pen register, which merely records the numbers dialed, and a bugging, which intrudes upon the content of the communication.\textsuperscript{190} In Louderman, the court found no fourth amendment violation in the use of a pen register by a telephone company, especially when the company's intrusion was unaccompanied by governmental participation.\textsuperscript{191}

\section*{E. Warrantless Searches}

\subsection*{1. Search incident to arrest}

Law enforcement officers may conduct limited searches incident to lawful arrests\textsuperscript{192} in order to prevent the destruction of evidence and to...

\textsuperscript{186} Id. at 465. The court specifically noted that Congress had relied upon Katz v. United States, 389 U.S. 347 (1967) and Berger v. New York, 388 U.S. 41 (1967). Berger struck down a New York surveillance statute which permitted seizure of conversations without sufficiently narrow warrant procedures. Implicit in Berger was a holding that the fourth amendment protects conversations without regard to physical trespasses. Katz, decided six months later, expressly held that fourth amendment protections extend to conversations in which a person has a reasonable expectation of privacy.

\textsuperscript{187} 99 S. Ct. 1682 (1979).

\textsuperscript{188} 576 F.2d 1383 (9th Cir. 1978).

\textsuperscript{189} 555 F.2d 254, 256-57 (9th Cir. 1977).

\textsuperscript{190} 576 F.2d at 1389.

\textsuperscript{191} See Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254 (9th Cir. 1977); United States v. Goldstein, 532 F.2d 1305, 1312 (9th Cir.), \textit{cert. denied}, 429 U.S. 960 (1976) ("the right of privacy protected by the wiretap statutes goes to the message content rather than the fact that a call was placed"). \textit{Cf.} United States v. Jernigan, 582 F.2d 1211 (9th Cir.), \textit{cert. denied}, 439 U.S. 991 (1978) (consent to monitoring of phone call by one party without the knowledge of the other not a violation of fourth amendment rights).

When electronic beepers, trackers, or transponders do little more than aid visual surveillance, no fourth amendment issue is presented. See, \textit{e.g.,} United States v. Dubrofsky, 581 F.2d 208 (9th Cir. 1978); United States v. Miroyan, 577 F.2d 489 (9th Cir.), \textit{cert. denied}, 439 U.S. 896 (1978).

\textsuperscript{192} \textit{E.g.,} United States v. Robinson, 414 U.S. 218, 224 (1973) (after arrest for driving without a license, limited patdown search of arrestee's person upheld) ("it is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment."). In Cupp v. Murphy, 412 U.S. 291 (1973), the Court employed...
ensure the safety of arresting officers. Such searches will be upheld even though no evidence is in fact found and even though the officer does not actually fear for his safety.

The permissible scope of incidental searches is limited to the arrestee's person and the area within his immediate control. This area has been described by the Supreme Court as encompassing "the area from within which . . . [an arrestee] might gain possession of a weapon or destructible evidence." The Ninth Circuit interpreted this language broadly in 1978, sustaining the search of a purse found lying on the front seat of an arrestee's vehicle after the arrestee had been removed from the auto and placed in custody.

 Searches are considered to be incident to arrest provided they are "substantially contemporaneous" with the arrest. In United States v. Chadwick, however, the Supreme Court distinguished two situations in which a search may involve "personal property . . . immediately as-

the incidental search rationale to justify a limited search even though the suspect was merely "detained" and not under actual arrest. While noting that a full search would not have been justified, the Court nonetheless held that "[l]imited searches of defendant's person, conducted incident to a stationhouse detention, with probable cause, and in the face of the ready destructibility of evidence [are] valid under the principle of Chimel v. California." Id. at 295-96.

193. United States v. Chadwick, 433 U.S. 1, 15 (1977) (search of locked footlocker conducted more than one hour after arrest of owner held not to be incident to arrest); United States v. Robinson, 414 U.S. 218, 234 (1973) (search of defendant's person immediately after his arrest for a traffic offense was incident thereto).

194. Gustafson v. Florida, 414 U.S. 260, 266 (1973) ("Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the petitioner or that he did not himself suspect that the petitioner was armed."); United States v. Robinson, 414 U.S. 218, 235 (1973).


196. Id. See United States v. Dixon, 558 F.2d 919, 922 (9th Cir. 1977), cert. denied, 434 U.S. 1063 (1978) (search and seizure of bag containing heroin, found on car floor after defendant had left auto and while he was being handcuffed, held valid as incident to arrest); United States v. Gonzales-Rodriguez, 513 F.2d 928, 931-32 (9th Cir. 1975) (search of camper for weapons held valid even though only way driver could have retrieved weapon from its hiding place was to get out of drivers seat, open door of camper and enter vehicle); United States v. Basurto, 497 F.2d 781 (9th Cir. 1974) (search of defendant's home after his arrest in front yard held not incident to arrest).


198. United States v. Chatman, 573 F.2d 565, 567 (9th Cir. 1977) (per curiam) (search of defendant's paws prior to arrest for narcotics possession valid as "substantially contemporaneous with the arrest"); United States v. See, 505 F.2d 845, 855 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975) (search of defendant's person and auto conducted before actual arrest but at a time when he was "not free to leave" held incident to arrest); United States v. Murray, 492 F.2d 178, 188-89 (9th Cir. 1973), cert. denied, 419 U.S. 942 (1974) (search of garment bag being carried by defendant which took place before formal arrest held valid because officer had probable cause to detain suspect).

associated with the person of the arrestee." If the search involves any other type of property, and if the arresting officers have taken exclusive control of such property, then the search will not be upheld as incident to arrest. A more lenient standard, however, is applied to searches of the arrestee himself and to searches of property immediately associated with him. In United States v. Oaxaca, for example, the arrestee's shoes were seized while he was in custody, six weeks after his arrest. The Ninth Circuit attached "no great significance" to the fact that the delay was so much longer than the ten hour delay in United States v. Edwards and concluded that it would have been a "useless and meaningless formality" to require a warrant.

2. Emergency or exigent circumstances

The validity of a warrantless entry on private property is recognized if immediate action is necessary to preserve evidence, to pro-

200. Id. at 15. The Court in Chadwick struck down the stationhouse search of a locked footlocker originally seized from the open trunk of defendant's vehicle following his arrest.

201. Id.

202. See generally United States v. Edwards, 415 U.S. 800, 805 (1974) (seizure of defendant's shirt and pants ten hours after arrest held valid) (the seizure was "no more than taking from respondent the effects in his immediate possession that constituted evidence of crime" (emphasis added)).

203. 569 F.2d 518 (9th Cir.), cert. denied, 439 U.S. 926 (1978).


205. 569 F.2d at 524. See United States v. Collom, No. 77-1040 (9th Cir. June 15, 1978) (search of arrestee's wallet upheld as incidental although it took place at stationhouse "some time" following arrest).

206. In Johnson v. United States, 333 U.S. 10, 14 (1948), the Court underscored the importance of the warrant requirement in protecting property owners' reasonable expectations of privacy: "The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." Id. at 14. Cf. Michigan v. Tyler, 436 U.S. 499, 505 (1978) (innocent fire victim still has reasonable expectation of privacy in whatever remains of his property); Camara v. Municipal Court, 387 U.S. 523, 528 (1967) ("The basic purpose of [the fourth amendment] . . . is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.").

207. Cupp v. Murphy, 412 U.S. 291 (1973). In Cupp, the police took fingernail scrapings from a person without a warrant. The Court upheld this action because of "the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence." Id. at 296 (emphasis added). See Mincey v. Arizona, 437 U.S. 358, 394 (1978) (discovery of murder did not, by itself, create an exigent circumstance because "[t]here was no indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant."); United States v. Santana, 427 U.S. 38, 43 (1976) (warrantless entry into house reasonable because once defendant saw the police there was "a realistic expectation that any delay would result in destruction of the evidence."); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (warrantless taking of blood sample upheld where delay necessary to obtain a warrant threatened the destruction of the evidence).
tect law enforcement officers or third persons, or to prevent the escape of suspects. Exigencies sufficient to justify warrantless action generally occur whenever the "inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action" by the authorities. The trial court's findings in this area will not be disturbed unless "clearly erroneous."

The Supreme Court in 1978 decided two cases concerning exigent circumstances. In the first of these cases, *Michigan v. Tyler*, investigators collected evidence from the scene of a fire immediately after the fire was extinguished. Three weeks later the inspectors returned to obtain additional evidence. In upholding the initial entries and striking down those that occurred weeks later, the Court observed that "[a] burning building clearly presents an exigency of sufficient proportions to render a warrantless entry "reasonable", but "once in the build-

---

208. Mincey v. Arizona, 437 U.S. 385, 392 (1978) ("[W]hen the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if . . . a killer is still on the premises.") ("The need to protect or preserve life or avoid serious injury is justification for what would otherwise be illegal absent an exigency or emergency"). (quoting Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963) (opinion of Burger, J.)); *United States v. Flickinger*, 573 F.2d 1349, 1355 (9th Cir.), cert. denied, 439 U.S. 836 (1978) ("Where the crime on which arrest is based is a crime of violence . . . the increased danger to the community and to the arresting officers justifies the avoidance of delay involved in obtaining a warrant."); *United States v. McLaughlin*, 525 F.2d 517, 521 (9th Cir. 1975), cert. denied, 427 U.S. 904 (1976) ("To delay the entry until the warrant was obtained . . . increased the likelihood that innocent persons would be harmed . . . "); *United States v. Hobson*, 519 F.2d 765, 776 (9th Cir.), cert. denied, 423 U.S. 931 (1975) (warrantless search of house upheld where some weapons in plain view and house is reported to contain people "who know how to use [the weapons] and have expressed an intent to do so.").

209. *United States v. Flickinger*, 573 F.2d 1349, 1355 (9th Cir. 1978), cert. denied, 439 U.S. 836 (1979) ("In some cases we have treated the suspect's knowledge that he is at risk of immediate apprehension as an exigent circumstance justifying immediate action."); *United States v. Valentin*, 569 F.2d 1069, 1071 (9th Cir. 1978) (warrantless entry into house reasonable because "it was likely that the occupant might attempt to escape."). *Cf. Johnson v. United States*, 333 U.S. 10, 15 (1948) (exigent circumstances not present because "[n]o suspect was fleeing or likely to take flight.").

210. *United States v. Flickinger*, 573 F.2d 1349, 1355 (9th Cir. 1978), cert. denied, 439 U.S. 836 (1979). *See Michigan v. Tyler*, 436 U.S. 499, 509 (1978); *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973) ("Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation . . . "). The balancing test referred to in the text must be decided on the basis of the totality of circumstances. *United States v. Flickinger*, 573 F.2d at 1354. *See, e.g., Michigan v. Tyler*, 436 U.S. at 509 ("A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable'.").


213. Id. at 509.
ing, [officials] may [only] remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches.\textsuperscript{214} In \textit{Mincey v. Arizona},\textsuperscript{215} however, the Court declined to hold that the discovery of a homicide creates circumstances sufficiently demanding to allow police investigators to enter and search the scene of the crime, beyond an immediate search for victims, without a warrant.\textsuperscript{216}

The courts have noted that one alternative to a warrantless dwelling search is to post a guard nearby until a warrant can be obtained.\textsuperscript{217} In \textit{United States v. Flickinger},\textsuperscript{218} the Ninth Circuit explicitly recognized this possibility, although cautioning that “[s]uch measures, while appropriate in some cases, may carry their own unacceptable dangers, i.e., a heightened risk of weapons play and danger to third parties.”\textsuperscript{219}

“Hot pursuit” is a recognized exigency wherein a police officer in the process of apprehending a suspect may lawfully enter premises without a warrant, when delay might result in destruction of evidence or danger to the officer.\textsuperscript{220} In \textit{United States v. Oaxaca}\textsuperscript{221} a hot pursuit entry into a

\textsuperscript{214} \textit{Id.} at 511. The Court based its decision on findings that

\[\ldots\] immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims.

\textit{Id.} at 510.

\textsuperscript{215} 437 U.S. 385 (1978).

\textsuperscript{216} \textit{Id.} at 394.

\textsuperscript{217} \textit{E.g., id.} (police guard at apartment minimized possibility of evidence being lost, destroyed or removed during time required to obtain search warrant); United States v. Santana, 427 U.S. 38, 44-45 (1976) (“[t]he failure to seek a warrant was harmless because it would have been proper to keep the Santana residence under surveillance while the warrant was being sought”) (Stevens, J., concurring). \textit{Cf. United States v. Curran, 498 F.2d 30, 35 (9th Cir. 1974) (agents had house surrounded and could have kept it this way until a warrant was obtained, “but such a siege would not have been reasonable or adequate”).}

\textsuperscript{218} 573 F.2d 1349 (9th Cir. 1978), \textit{cert. denied}, 439 U.S. 836 (1979).

\textsuperscript{219} \textit{Id.} at 1356. \textit{See also United States v. McLaughlin, 525 F.2d 517, 521 (9th Cir. 1975) (in rejecting a police guard requirement the court must consider “the legitimate interests of the neighbors whose surroundings should not be impressed with a state of siege, [and] innocent persons who might be injured accidentally as a consequence of a large number of armed and mobile men”).}

\textsuperscript{220} United States v. Santana, 427 U.S. 38, 43 (1976) (suspect standing in doorway ran inside house to avoid arrest) (“[A] suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place . . . .”); \textit{Warden v. Hayden, 387 U.S. 294} (1967) (delay in pursuit of armed felon and delay in search of premises where felon located unnecessary, where to do so would gravely endanger lives of officers or others).

\textsuperscript{221} 569 F.2d 518 (9th Cir.), \textit{cert. denied}, 439 U.S. 926 (1978).
garage was upheld because police officers believed an armed robbery suspect was inside and heard a "very loud noise" coming from inside.\textsuperscript{222}

3. Investigative detention

In \textit{Terry v. Ohio}\textsuperscript{223} the Supreme Court held that law enforcement officers may detain a person without a warrant, probable cause or consent if the officers have a reasonable suspicion\textsuperscript{224} "that criminal activity is afoot."\textsuperscript{225} An investigatory stop is deemed to have occurred "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."\textsuperscript{226}

\textsuperscript{222} \textit{Id.} at 521-22. \textit{See also} Warden v. Hayden, 387 U.S. 294 (1967) ("The police were informed that an armed robbery had taken place, and that the suspect had entered \textit{a certain house} less than five minutes before they reached it. They acted reasonably when they entered the house and began to search \ldots").

\textsuperscript{223} 392 U.S. 1 (1968) (stop and frisk of persons who appeared to be planning a robbery upheld).

\textsuperscript{224} "Reasonable suspicion" required that "the police officer \ldots point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant \textit{[the] intrusion.}" \textit{Terry v. Ohio}, 392 U.S. 1, 21 (1968). The facts need not provide "probable cause" to believe the suspect guilty of a crime. \textit{United States v. Brignoni-Ponce}, 422 U.S. 873, 880 (1975).

"Reasonable suspicion" and "founded suspicion" are indistinguishable standards. \textit{United States v. Contreras-Diaz}, 575 F.2d 740, 744 (9th Cir.), \textit{cert. denied}, 439 U.S. 855 (1978); \textit{United States v. Collom}, No. 77-1040, slip op. at 1866 n.4.

\textsuperscript{225} \textit{Terry v. Ohio}, 392 U.S. 1, 30-31 (1968). \textit{See, e.g., United States v. Espinoza}, 578 F.2d 224 (9th Cir.) (per curiam), \textit{cert. denied}, 439 U.S. 849 (1978) (2:15 a.m. stop of truck reasonable after driver left van at gas station and joined accomplices in truck); \textit{United States v. Walker}, 576 F.2d 253 (9th Cir. 1978) (per curiam) (reasonable stop of arrestee's companion; she did not respond to "stop" command, hid large bag in bushes, and reached into purse); \textit{United States v. Collom}, No. 77-1040, slip op. at 1866 (9th Cir. June 15, 1978) (investigatory stop appropriate; officers, directed to scene of possible burglary, saw suspects stooping down at rear of car, then retreating quickly when officers approached).

In balancing the need for intrusion against the degree of inconvenience, the Ninth Circuit determines reasonableness by looking at all the circumstances. Some of the factors considered are:

"[t]he seriousness of the offense, the degree of likelihood that the person retained 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 \ldots ."

\textit{United States v. Holland}, 510 F.2d 453, 455-56 (9th Cir.), \textit{cert. denied}, 422 U.S. 1010 (1975) (quoting Arnold v. United States, 382 F.2d 4, 7 (9th Cir. 1967)).

\textsuperscript{226} \textit{Terry v. Ohio}, 392 U.S. 1, 19 n.16 (1968). \textit{See United States v. Luckett}, 484 F.2d 89, 90 (9th Cir. 1973) (per curiam) ("'Once the police officers required appellee to come to the police car, he was 'seized' \ldots .'").

Any such detention must be reasonably related in scope to the circumstances justifying its inception. In *United States v. Contreras-Diaz*, however, police lawfully stopped defendant's vehicle while speeding but detained the passengers longer than was necessary to write the traffic citation. The detention was extended in order to give border patrol agents time to arrive. Observing that the passengers spoke no English, had no identification, physically resembled aliens, and gave conflicting stories as to their destination, the Ninth Circuit sustained the stop.

An officer who has detained a suspect may lawfully conduct a weapons search when "justified in believing that the individual whose suspicious behavior he is investigating . . . is armed and presently dangerous." The search must be no more intrusive than necessary to discover weapons that could be used to harm the officer. In 1977, this concern for the officer's safety prompted the Supreme Court to hold that the police, after stopping a vehicle for a traffic violation, may order the driver out of his auto so that his movements may be better observed.

The specific articulable facts upon which the officer must base his "reasonable suspicion" need not be personally observed. Rather, a rea-
reasonable suspicion may be based on an informant's tip that has "sufficient indicia of reliability" to justify interrogation. In United States v. Sierra-Hernandez, for example, a Terry stop based on an informant's tip was upheld; the informant personally gave the information to the police officer, and the tip indicated that a specific individual was in the process of committing a specific crime nearby.

4. Warrantless vehicle searches

Vehicle searches fall outside the fourth amendment warrant requirement when both probable cause and exigent circumstances exist at the time of the seizure. Although the finding of exigency traditionally rests upon the vehicle's mobility and the ease with which it may be moved from the area, warrantless searches have also been sustained when necessary to protect the guarding officers or the general public.

233. Adams v. Williams, 407 U.S. 143, 147 (1972) ("Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized."). Cf. United States v. DeVita, 526 F.2d 81, 82-83 (9th Cir. 1975) (per curiam) (vague tip about possible criminal activity at uncertain future date from "unlisted" informant held unreliable).

234. 581 F.2d 760 (9th Cir. 1978).

235. Id. at 763. Whether the information is sufficient to justify detention must be determined from the facts of each case, for there is no per se rule of reliability. However, "[i]nformation from a citizen who confronts an officer in person to advise that a designated individual present on the scene is committing a specific crime should be given serious attention and great weight by the officer." Id.

236. Although courts usually refer to this warrant exception as the "automobile exception," it applies to a wide variety of vehicles. E.g., Carroll v. United States, 267 U.S. 132, 151 (1925) ("goods in course of transportation and concealed in a movable vessel . . ."); United States v. Flickinger, 573 F.2d 1349 (9th Cir.), cert. denied, 439 U.S. 836 (1978) (warrantless search and seizure of aircraft held within exception); United States v. Hickman, 523 F.2d 323, 328-29 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976) (warrantless search and seizure of boat held within exception).

237. United States v. Trejo-Zambrano, 582 F.2d 460, 463 (9th Cir. 1978) (vehicle searched after reliable informant told agents that marijuana was inside).

238. United States v. Chadwick, 433 U.S. 1, 12 (1977); United States v. Azhocar, 581 F.2d 735, 737 (9th Cir. 1978), cert. denied, 99 S. Ct. 1213 (1979); United States v. Beasley, 476 F.2d 164, 166 (9th Cir. 1973) (search of car at stationhouse upheld because "mobility" was still a factor); United States v. Gibbs, 435 F.2d 621, 623 (9th Cir. 1970), cert. denied, 401 U.S. 994 (1971) ("[A]gents had reasonable cause to believe that . . . [the parked car] would soon be moved outside the jurisdiction.").

239. Cady v. Dombrowski, 413 U.S. 433, 447 (1973) (search of auto upheld where police believed a weapon to be inside) ("Here the justification . . . [was] concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle."); Cooper v. California, 386 U.S. 58, 61-62 (1966) (search of auto while in police custody upheld even though conducted one week after impoundment) ("It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it."); United States v.
to prevent the destruction or removal of evidence,\textsuperscript{240} and to safeguard contraband and dangerous items.\textsuperscript{241} Therefore, the fact that a car is stopped on the highway with probable cause to believe that it was involved in a crime is sufficient to justify an immediate search, without any further showing of exigency.\textsuperscript{242}

A vehicle properly subject to search upon the highway may be removed to the stationhouse before the search is conducted.\textsuperscript{243} In \textit{United States v. Trejo-Zambrano},\textsuperscript{244} however, the Ninth Circuit went even further by validating a delayed warrantless automobile search conducted at a nearby gas station rather than at the police station. The court reasoned that by taking the car to the gas station, the police “could conduct the search thoroughly, with more ease and with greater safety.”\textsuperscript{245}

In \textit{South Dakota v. Opperman},\textsuperscript{246} the Supreme Court confirmed that warrantless inventory searches of impounded vehicles may be conducted without probable cause.\textsuperscript{247} A proper inventory search must be conducted solely to protect the car or its contents; the police must have


\textsuperscript{241} United States v. Moreno, 569 F.2d 1049, 1052 (9th Cir.), \textit{cert. denied}, 435 U.S. 972 (1978) (search of auto held proper when police had probable cause to believe weapon inside).

\textsuperscript{242} United States v. Trejo-Zambrano, 582 F.2d 460 (9th Cir. 1978) (search of car believed to contain contraband proper); United States v. Azhocar, 581 F.2d 735 (9th Cir. 1978), \textit{cert. denied}, 99 S. Ct. 1213 (1979); United States v. Abascal, 564 F.2d 821, 828 (9th Cir. 1977), \textit{cert. denied}, 435 U.S. 953 (1978) (search of auto stopped on highway upheld when agents had probable cause to believe car contained LSD).

\textsuperscript{243} Chambers v. Maroney, 399 U.S. 42, 52 (1970) (“There is little to choose in terms of practical consequences between an immediate search without a warrant and the car’s immobilization until a warrant is obtained.”) (footnote omitted). As long as the initial stop is legal, the circumstances surrounding it are irrelevant in determining whether a delayed search will be valid. \textit{Compare id.} n.10 (upholding delayed search of car stopped in a “dark parking lot in the middle of the night”) \textit{with Texas v. White}, 423 U.S. 67 (1975) (per curiam) (upholding delayed search of car seized at 1:30 in afternoon). Mr. Justice Marshall’s dissent in \textit{White} noted that in view of the time of the instant seizure there was “no indication that an immediate search would have been either impractical or unsafe for the arresting officers.” 423 U.S. at 70.

\textsuperscript{244} 582 F.2d 460 (9th Cir. 1978).

\textsuperscript{245} \textit{Id.} at 463.

\textsuperscript{246} 428 U.S. 364 (1976).

\textsuperscript{247} \textit{Id.} at 370 n.5. The Court justified allowing inventory searches without probable cause by categorizing them as routine, non-criminal police procedures. \textit{Id. See also} United States v. Jamerson, 549 F.2d 1263, 1271 (9th Cir. 1977) (discovery of contraband held proper although made while officer removing vehicle contents inventoried several hours earlier).
no investigatory motive.\textsuperscript{248} The Ninth Circuit has expanded \textit{Opperman} by consistently validating any subsequent search of a vehicle validly seized for forfeiture.\textsuperscript{249} The Ninth Circuit reluctantly applied this rule in \textit{United States v. Johnson},\textsuperscript{250} upholding an extremely intrusive "inventory search" conducted two weeks after seizure for the avowed investigatory purpose of discovering contraband.\textsuperscript{251}

5. Seizure of items in plain view

The warrantless seizure of items in "plain view" is authorized when (1) the officer is legitimately in the area or on the premises at the time of the discovery,\textsuperscript{252} (2) the objects to be seized are in plain view,\textsuperscript{253} (3) it is immediately apparent that the item is evidence, contraband, or the fruit or instrumentality of crime,\textsuperscript{254} and (4) the discovery of the item is

\begin{itemize}
\item \textsuperscript{248} 428 U.S. at 376.
\item \textsuperscript{249} \textit{E.g.}, \textit{United States v. Johnson}, 572 F.2d 227, 232 (9th Cir.), \textit{cert. denied}, 437 U.S. 907 (1978). \textit{But see} \textit{South Dakota v. Opperman}, 428 U.S. 364, 377 n.2 (1976) (Powell, J., concurring) ("The unrestrained search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances.").
\item \textsuperscript{250} 572 F.2d 227 (9th Cir.), \textit{cert. denied}, 437 U.S. 907 (1978).
\item \textsuperscript{251} \textit{Id.} at 233.
\item \textsuperscript{252} \textit{Coolidge v. New Hampshire}, 403 U.S. 443, 466 (1971) (plain view seizure of auto parked on private property struck down) ("The plain view doctrine serves to supplement the prior justification . . . whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused."). \textit{E.g.}, \textit{Harris v. United States}, 390 U.S. 234, 236 (1968) (upholding seizure of evidence coming into plain view after agent lawfully opened door of impounded auto); \textit{United States v. Bialock}, 578 F.2d 245, 248 (9th Cir. 1978) (plain view seizure upheld when agent in store making arrest was lawfully behind counter for purpose of flushing out and securing hidden persons when discovery occurred. \textit{Cf.} \textit{United States v. Basurto}, 497 F.2d 781, 788 (9th Cir. 1974) (police illegally entered defendant's home, so plain view seizure inadmissible); \textit{United States v. Valentin}, 569 F.2d 1069, 1071 (9th Cir. 1978) (seizure of evidence appearing in plain view upheld when officer was lawfully in house to make arrest); \textit{United States v. Oaxaca}, 569 F.2d 518, 522 (9th Cir.), \textit{cert. denied}, 439 U.S. 926 (1978) (seizure of evidence appearing in plain view upheld when officers lawfully inside house during "hot pursuit").
\item \textsuperscript{253} It should be noted, however, that when police simply observe evidence in plain view they are not considered to be conducting searches within the fourth amendment. \textit{Ker v. California}, 374 U.S. 23, 43 (1963) ("The discovery of the brick of marijuana did not constitute a search, since the officer merely saw what was placed before him in full view."); \textit{United States v. Walling}, 486 F.2d 229, 236 (9th Cir. 1973), \textit{cert. denied}, 415 U.S. 923 (1974) (use of flashlight to illuminate interior of auto not a "search").
\item \textsuperscript{254} \textit{Coolidge v. New Hampshire}, 403 U.S. 443, 466 (1971) ("The extension of the original justification 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."); \textit{United States v. Sedillo}, 496 F.2d 151, 152 (9th Cir.), \textit{cert. denied}, 419 U.S. 947 (1974) (seizure of envelope in plain view in defendant's pocket upheld as inadvertent discovery of an "incriminating object"). The dissent in \textit{Sedillo} took issue with the liberal interpre-
inadvertent.\textsuperscript{255} The fourth requirement of inadvertent discovery was addressed by the Ninth Circuit in 1978. In \textit{United States v. Blalock},\textsuperscript{256} the court validated the plain view seizure of a bag of heroin although the searching officers knew of the bag’s contents in advance and its exact location.\textsuperscript{257} The court found the inadvertence requirement to be inapplicable because the agents entered the shop to effect a lawful arrest and not to seize the heroin.\textsuperscript{258}

The Ninth Circuit in 1978 addressed whether the seizure of contraband is valid under the “plain view” doctrine when only an opaque container is visible to the seizing officer. In \textit{United States v. Blalock},\textsuperscript{259} only an unmarked brown paper bag was in plain view, but the police had information that heroin was inside. The court summarily upheld the search, stating that “[t]he inescapable nexus between the brown bag and the purpose of the Agents’ entry and arrest of Blalock is too obvious to play riddle games.”\textsuperscript{260}

6. Consent searches

Law enforcement officers may conduct searches without warrants or probable cause if they first obtain the valid consent of the party or parties involved.\textsuperscript{261} Searches based on the consent of a third party can be

\textsuperscript{255} See also United States v. Morell, 524 F.2d 550, 555-56 (2d Cir. 1975) (inadvertence requirement not applicable because primary motive for entry was to make arrest rather than to seize evidence). Despite this reluctance to apply the inadvertence requirement, the Ninth Circuit has adopted Mr. Justice Stewart's reasoning and language in \textit{Coolidge} which includes this requirement. United States v. Brown, 470 F.2d 1120, 1122-23 (9th Cir. 1972). See United States v. Sedillo, 496 F.2d 151, 152 (9th Cir.), \textit{cert. denied}, 419 U.S. 947 (1974) (Hufstedler, J., dissenting).

\textsuperscript{256} 578 F.2d 245 (9th Cir. 1978).

\textsuperscript{257} Id. at 249.

\textsuperscript{258} Id. at 248-49.

\textsuperscript{259} Id. at 247-48. See also United States v. Morell, 524 F.2d 550, 555-56 (2d Cir. 1975) (inadvertence requirement not applicable because primary motive for entry was to make arrest rather than to seize evidence). Despite this reluctance to apply the inadvertence requirement, the Ninth Circuit has adopted Mr. Justice Stewart's reasoning and language in \textit{Coolidge} which includes this requirement. United States v. Brown, 470 F.2d 1120, 1122-23 (9th Cir. 1972). See United States v. Sedillo, 496 F.2d 151, 152 (9th Cir.), \textit{cert. denied}, 419 U.S. 947 (1974) (Hufstedler, J., dissenting).

\textsuperscript{260} Id. at 249.

\textsuperscript{261} Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (stolen checks found during consent search of vehicle stopped for traffic violations). See Bumper v. North Carolina, 391 U.S. 543 (1968) (to get consent to search, police falsely told owner of the house that they had search warrant).
upheld under the "property" theory,262 the "agency" theory,263 or the "assumption of risk" theory.264

The consent must be given freely and voluntarily and may not be the result of expressed or implied duress or coercion.265 Voluntariness is a question of fact to be determined on the basis of the totality of the circumstances.266 The trial court's findings on this issue will be dis-

262. Under this theory, consent to search will be upheld if the party consenting has a recognizable property interest in the place or object searched. Bumper v. North Carolina, 391 U.S. 543, 548 n.11 (1968) (consent by owner to search house and rifle binding on third party). See id. at 543 n.4 (Black, J., dissenting); United States v. Walker, 575 F.2d 209, 212 (9th Cir.), cert. denied, 439 U.S. 931 (1978) (partially relied on property theory by noting that "Steams as a co-owner and possessor of the negatives and as owner (or co-owner) of the prints could consent to a search and thereby bind [defendant]").

263. The "agency theory" will validate a consent when the consenting party has been given authority to consent from the owner or possessor of the object of the search. Stoner v. California, 376 U.S. 483, 489 (1964) (hotel clerk did not have authority to consent to search of patron's room because consent could be given only by guest "either directly or through an agent."). The Court in Stoner stressed that the interpretation of "apparent authority" must be reasonable. Id. at 488. In United States v. Walker, 576 F.2d 253 (9th Cir. 1978), cert. denied, 99 S. Ct. 865 (1979), for example, agents knocked on defendant's apartment door and were admitted by a woman who answered the door. The defendant later consented to a search, and the court upheld the entry and search by reasoning that "[t]he agents were admitted to the apartment by one who had apparent authority to permit entry." Id. at 256.

264. Use of this theory requires mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

United States v. Matlock, 415 U.S. 164, 171 n.7 (1974) (consent of one roommate to search room valid as against the other).

The Ninth Circuit used this theory once in 1978. In United States v. Walker, 575 F.2d 209 (9th Cir.), cert. denied, 439 U.S. 931 (1978), the defendant entrusted his friends to return to him developed photographic prints. While returning the pictures, however, one friend allowed them to be inspected by jail guards. The court found the search to be valid because a co-principal of the defendant, a co-owner of the negatives, had "assumed the risk that the messenger might consent to let anyone inspect or examine [the photographs]." Id. at 212. See United States v. Murphy, 506 F.2d 529, 530 (9th Cir. 1974), cert. denied, 420 U.S. 996 (1975) (employee's "custody of the key gave him sufficient dominion over the premises" to enable him to grant the necessary consent). In United States v. Dubrofsky, 581 F.2d 208 (9th Cir. 1978), consent to search a house was given by the defendant's living companion. Both resided on the premises, and the court held the companion's consent binding because she was a mutual user of the property.


266. Id. at 227; United States v. Sierra-Hernandez, 581 F.2d 760, 764 (9th Cir.), cert. denied, 439 U.S. 936 (1978); United States v. Rothman, 492 F.2d 1260, 1265 (9th Cir. 1973) (consent to search was not voluntary because it was "systematically psychologically coerced") ("Where the consent is obtained through a misrepresentation by the government . . . or under inherently coercive pressure and color of the badge . . . such a consent is not voluntary.").

The Ninth Circuit has isolated several factors which may be considered in evaluating the voluntary nature of consent. See, e.g., United States v. Heimforth, 493 F.2d 970, 972 (9th
turbed only if “clearly erroneous.”

Although consent need not be given with knowledge of the right to refuse, the government must meet a more stringent burden when consent is given while the consenting party is in police custody. The Ninth Circuit, however, has narrowly interpreted the term “custody.” In United States v. Scharf, for example, the court refused to overturn a trial court ruling that consent to search, which was given in the presence of five police officers, one of whom stood holding a shotgun, was not given in a “custodial environment.”

A valid consent search may not exceed the scope of the area for which the consent is given. The failure to object to the continuation of the search, however, can be considered as an indicator that the search was within the scope of the initial consent.

The Ninth Circuit held in 1978 that consent to an “administrative search” could not be judged by the same free and voluntary standard used in full-scale searches for evidence of crimes. In McMorris v.
Alioto, the plaintiff-attorney was compelled to pass through a magnetometer and face the possibility of a limited body search each time he entered the San Francisco courthouse. The plaintiff argued that he did not voluntarily “consent” to the searches because he was forced either to submit to a search or forego the practice of law by being held in contempt each time he missed a court appearance. The Ninth Circuit rejected this claim, reasoning that persons are not “physically” coerced into the searches, for they “may leave the premises at any time, even after activating the magnetometer . . . [and] may not be subjected to a pat-down search unless . . . [they] fully and voluntarily agree to it.”

7. Border searches

Persons entering the United States at the border or its “functional equivalent” may be searched without any showing of probable cause. All such searches, however, must satisfy the “reasonableness” requirement of the fourth amendment. Additionally, only a single search at the border is permitted and once the subject of a search

275. 567 F.2d 897 (9th Cir. 1978).
276. Id. at 901.
277. Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973); United States v. Sayer, 579 F.2d 1169 (9th Cir. 1978) (customs search of passenger arriving from Canada at Los Angeles International Airport was a valid border search). Mail and packages may also be searched at border equivalents. See United States v. Botero, 589 F.2d 430 (9th Cir. 1978), cert. denied, 99 S. Ct. 2162 (1979) (search at San Francisco International Airport of leather handbags sent from Colombia valid); United States v. Dubrofsky, 581 F.2d 208 (9th Cir. 1978) (package mailed from Thailand validly searched at San Francisco International Airport). Unlike persons, however, mail or packages entering from abroad may be inspected only if customs officials have “reasonable cause” to suspect that the mail contains contraband. United States v. Ramsey, 431 U.S. 606, 611 (1977). E.g., United States v. Botero, 589 F.2d at 432; United States v. Dubrofsky, 581 F.2d at 211. This standard is considerably less stringent than the requirement of probable cause. Id.

Airports are not the only “functional equivalents” of borders. In United States v. Solmes, 527 F.2d 1370, 1372 (9th Cir. 1975), the court held that a bay adjacent to the ocean was the functional equivalent of the border with regard to vessels that have traveled in foreign waters before entry.

279. Klein v. United States, 472 F.2d 847, 849 (9th Cir. 1973). Cf. United States v. Cameron, 538 F.2d 254, 258-59 (9th Cir. 1976). The defendant in Cameron was subjected to two forced digital probes, two enemas, and was forced to drink a liquid laxative as part of a border search. Holding the search to be unreasonably intrusive, the court observed: “[A]lthough there is no per se requirement for a warrant to conduct a body search in border crossing cases . . . the absence of a warrant is an important factor in assessing the reasonableness with which the authorities acted.” Id.

280. United States v. Selby, 407 F.2d 241, 242 (9th Cir. 1969). See United States v. Sayer, 579 F.2d 1169, 1171 (9th Cir. 1978) (“[t]he search in Los Angeles was merely a secondary examination which was a continuation of the preliminary inspection begun in Vancouver,”
has "mingled with the normal stream of commerce," customs officials must be reasonably certain that any contraband thought to be in the suspect's possession has entered from abroad.\textsuperscript{281}

A proper border search may be no more intrusive than necessary to determine whether the subject has contraband in his possession.\textsuperscript{282} As the intrusiveness of the search increases, so also does the measure of the cause necessary to make it reasonable.\textsuperscript{283} For example, to uphold a strip search, the government need only show a "reasonable suspicion" that the suspect is carrying contraband.\textsuperscript{284} To justify a body cavity search, however, the more demanding "clear indication" standard must be met.\textsuperscript{285}

Although fixed border patrol checkpoints\textsuperscript{286} are not considered to be

\begin{footnotesize}
\begin{enumerate}
\item United States v. Sayer, 579 F.2d 1169, 1170 (9th Cir. 1978) (search of passenger upheld after customs officials watched him disembark from plane and then speak briefly with one other person).
\item United States v. Cameron, 538 F.2d 254, 258 (9th Cir. 1976). See United States v. Wilmont, 563 F.2d 1298 (9th Cir. 1977) (patdown search followed by emptying of pockets, followed by second patdown search, followed by strip search held valid in view of suspect's unusual conduct).
\item United States v. Palmer, 575 F.2d 721, 723 (9th Cir.), cert. denied, 439 U.S. 875 (1978) (lifting of skirt to reveal undergarment far less intrusive than strip search and required less justification to render it reasonable).
\item Id.; United States v. Carter, 563 F.2d 1360, 1361 (9th Cir. 1977) (no decision on whether removal of artificial leg was equivalent to a strip search). Information provided by the companions of the person searched may be used to justify the strip search. United States v. Gil de Avila, 468 F.2d 184, 186 (9th Cir. 1972), cert. denied, 410 U.S. 958 (1973). The court should consider the totality of circumstances to determine the legality of strip searches. United States v. Mastberg, 503 F.2d 465, 469 (9th Cir. 1974).
\item United States v. Cameron, 538 F.2d 254, 257 (9th Cir. 1976) ("searches involving a 'serious invasion of personal privacy and dignity,' such as close scrutiny of intimate portions of the body, may proceed only when there is a clear indication or plain suggestion that the individual may be involved in the importation of contraband.") (quoting United States v. Henderson, 390 F.2d 805, 808 (9th Cir. 1967)).
\item Noting the extreme intrusiveness of body cavity searches, the Ninth Circuit has issued a cautionary warning to all officials: "In a situation thus laden with the potential for fear and anxiety, a reasonable search will include, beyond the usual procedural requirements, reasonable steps to mitigate the anxiety, discomfort, and humiliation that the suspect may suffer." United States v. Cameron, 538 F.2d at 258.
\item Almeida-Sanchez v. United States, 413 U.S. 266 (1973). There is a difference between "permanent checkpoints" and "temporary checkpoints." Permanent checkpoints are maintained "at or near intersections of important roads leading away from the border," located within the meaning of\textit{Martinez-Fuerte}, while temporary checkpoints are established in other strategic locations. United States v. Martinez-Fuerte, 428 U.S. 543, 552 (1976);
\end{enumerate}
\end{footnotesize}
functional border equivalents, routine stops for questioning may nevertheless be conducted without consent, probable cause, or reasonable suspicion. Probable cause or consent, however, is required to justify any subsequent searches at fixed checkpoints. The Ninth Circuit found the requisite probable cause clearly lacking in United States v. Rubalcava-Montoya. The Rubalcava-Montoya court refused to sustain the search of defendant's vehicle when based only on the searching officer's knowledge that the suspect had been arrested previously for the same crime at the same location, and that he had a "dejected hangdog demeanor" when he exited his car.

Roving patrols in the vicinity of, but not at, the border may stop a vehicle only if the officers are aware of specific articulable facts, together with rational inferences from those facts, that warrant a suspicion that illegal entry or smuggling is in progress. A subsequent search, however, must be based on probable cause.

When an officer's constant surveillance of a particular vehicle in a sparsely populated area convinces him that the vehicle has just crossed the border, an "extended border search" may be conducted. As with

United States v. Vasquez-Guerrero, 554 F.2d 917, 920 (9th Cir.), cert. denied, 434 U.S. 865 (1977) (Oak Grove checkpoint was "permanent" and reasonable).


288. See United States v. Rubalcava-Montoya, 597 F.2d 140 (9th Cir. 1978).


290. 597 F.2d 140 (9th Cir. 1978).

291. Id. at 142.

292. United States v. Brignoni-Ponce, 422 U.S. 873, 884, 887 (1975) (roving patrol stopped defendant's vehicle solely because its occupants appeared to be of Mexican descent; subsequent search invalid); United States v. Pulido-Santoyo, 580 F.2d 352, 356 (9th Cir. 1978) ("A reasonable or founded suspicion is all that is necessary—some basis from which it can be determined that the detention was not arbitrary or harassing."). The Ninth Circuit has also held that there is no substantial difference between the doctrines of "founded suspicion" and "reasonable suspicion." United States v. Gonzales-Diaz, 528 F.2d 925 (9th Cir. 1975) (per curiam), cert. denied, 425 U.S. 977 (1976).

In United States v. Avalos-Ochoa, 557 F.2d 1299 (9th Cir.), cert. denied, 434 U.S. 974 (1977), the court named several considerations relevant to determining whether a reasonable suspicion exists:

the location and traffic patterns of the area in which the vehicle is seen, information about recent illegal border crossings in the area, the driver's behavior such as erratic driving or attempts to escape, the appearance of a heavily loaded car, and the officer's experience in detecting illegal entry and smuggling.

Id. at 1302. See United States v. Mastberg, 503 F.2d 465, 468 (9th Cir. 1974) (considerations to establish a "real suspicion of smuggling" listed).


294. United States v. Pulido-Santoyo, 580 F.2d 352, 354 n.1 (9th Cir. 1978) (issue not decided because requirements of "founded suspicion" met); United States v. Tutwiler, 505
searches at the border itself, "extended border searches" will be upheld without a showing of even "reasonable suspicion."295

Generally, border search rulings will not be applied retroactively.296 In United States v. Barela,297 for example, the Ninth Circuit upheld a search that was valid under the then-existing law, but which became illegal under the rules of subsequent Supreme Court decisions.298

8. Probation searches

The Federal Probation Act299 provides that convicted offenders may be placed on probation "for such period and upon such terms and conditions as the court deems best."300 The Ninth Circuit has held that conditions of probation are only valid if they "contribute significantly both to the rehabilitation of the convicted person and to the protection of the public."301

Rehabilitation can be accomplished by imposing any conditions "reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty."302

In United States v. Consuelo-Gonzales,303 the court observed that these conditions of probation could include the defendant's agreement to submit to all searches "conducted in a reasonable manner and at a reasonable time by a probation officer."304 Although the officer conducting the search reasonably must believe in the necessity of the incur-

---

295. See United States v. Pulido-Santoyo, 580 F.2d 352 (9th Cir. 1978); United States v. Tutwiler, 505 F.2d 758 (9th Cir. 1974).
296. See United States v. Peltier, 422 U.S. 531, 534-35 (1975) (Almeida-Sanchez should not be applied retroactively); United States v. Torres-Rios, 534 F.2d 865, 867 (9th Cir. 1976), cert. denied, 429 U.S. 898 (1977) (Brignoni-Ponce should not be applied retroactively).
297. 571 F.2d 1108 (9th Cir.), cert. denied, 436 U.S. 963 (1978).
300. Id. The purpose of the Act is to provide "an amelioration of the sentence by delaying actual execution or providing a suspension so that the stigma might be withheld and an opportunity for reform and repentence be granted before actual imprisonment should stain the life of the convict." United States v. Murray, 275 U.S. 347, 357 (1928).
301. United States v. Consuelo-Gonzales, 521 F.2d 259, 264 (9th Cir. 1975) (any contraband found during an improper probation search may not be used to convict the probationer of a new offense). Those conditions and restraints which are invalid with respect to prisoners and parolees will also be improper if applied to probationers. Id.
302. Id. at 263.
303. 521 F.2d 259 (9th Cir. 1975).
304. Id. at 263. The condition struck down in Consuelo required that the probationer
sion, probable cause to search need not be established. The Ninth Circuit in 1978, however, upheld a probation search based on an overly broad condition similar to that struck down in Consuelo, because the authority was "narrowly and properly exercised."

The Ninth Circuit will not consider constitutional challenges to probation searches after the probation period has expired. In Cervantes v. Walker, for example, the defendant was convicted of possession of narcotics and was placed on three years probation. As a condition of probation, he was to submit to a search of his person and property at any time without notice. The issue of whether that condition was unconstitutional was found to be moot because the probationary period expired shortly before oral argument.

F. Identifications

The sixth amendment right to counsel attaches when "the accused requires aid in coping with legal problems or assistance in meeting his adversary." It is well established that a post-indictment lineup is a "critical stage" in the proceedings and that the accused therefore has the right to presence of counsel. The Ninth Circuit has, however,

submit to searches of her person or property any time that a law enforcement officer requested. Id. at 261 n.1.

305. Id. at 266. All that is necessary to sustain a probation search is "a reasonable belief on the part of the probation officer that such a search is necessary to perform properly his duties." Id.

306. That condition read: "You shall submit person and property to search and seizure at any time of the day or night when so requested by a probation officer with or without a warrant and with or without probable cause." United States v. Jeffers, 573 F.2d 1074, 1075 (9th Cir. 1978).

307. Id. United States v. Gordon, 540 F.2d 452, 454 (9th Cir. 1976) (search pursuant to overbroad condition of probation reasonable where probation officer had received information that probationer was violating the conditions of his probation and search was reasonably and properly exercised). Gordon held that Consuelo "established the proper language for future probation orders, but it did not invalidate prior, broader orders which would be narrowly and properly exercised." Id. Although the search in Jeffers was conducted with the aid of police officers, the court stated that "[a] probation officer may enlist the aid of police, and police may be present to expedite a search." United States v. Jeffers, 573 F.2d 1074, 1075 (9th Cir. 1978). See United States v. Consuelo-Gonzales, 521 F.2d 259, 266 (9th Cir. 1975) (probation search may be made "under the immediate and personal supervision of probation officers").

308. 589 F.2d 424 (9th Cir. 1978).

309. Id. at 425.

310. U.S. CONST. amend. VI. The amendment provides in part: "In all criminal proceedings the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."


refused to extend the counsel guarantee to conferences between a witness and prosecuting authorities held either during or after the lineup.\textsuperscript{313} The Supreme Court has held that no sixth amendment right to counsel exists at post-indictment identifications based on photo displays,\textsuperscript{314} and the Ninth Circuit, in \textit{United States v. Kim},\textsuperscript{315} has apparently extended that rationale to identifications based on recorded sounds. In \textit{Kim}, the court held that a pre-trial identification of voices obtained through lawful electronic surveillance is not a critical stage of a criminal proceeding for sixth amendment purposes.\textsuperscript{316}

In cases where the defendant is not entitled to presence of counsel during identification procedures, he may nonetheless assert a fifth or fourteenth amendment due process claim if the identification was conducted in a manner "unnecessarily suggestive and conducive to irreparable mistaken identification."\textsuperscript{317} In accord with this standard is \textit{Simmons v. United States}\textsuperscript{318} wherein it was stated that "convictions based on eyewitness identifications at trial following a pre-trial identification by photograph will be set aside only if the photograph procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable mis-identification."\textsuperscript{319} The Ninth Circuit has generally utilized a two-part approach in implementing this decision.\textsuperscript{320} First, the court considers the necessity of the procedure and second, it determines the substantial likelihood of irreparable mis-identification by using the "totality of the circumstances" criteria enunciated in \textit{Neil}

\begin{thebibliography}{9}
\bibitem{313} United States v. Rich, 580 F.2d 929, 933 (9th Cir.), \textit{cert. denied}, 439 U.S. 935 (1978) (fact that defendant's counsel was absent from the post-lineup interview of a witness did not constitute a denial of due process); United States v. Parker, 549 F.2d 1217, 1223 (9th Cir.), \textit{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 (9th Cir. 1970) (defendants' counsel is not entitled to listen in on any remarks that may pass between witnesses and officers, both during the proceeding or afterward).
\bibitem{314} United States v. Ash, 413 U.S. 300, 317-21 (1973) (presence of counsel not essential because of ability to recreate photo spread and confront witnesses at trial).
\bibitem{315} 577 F.2d 473 (9th Cir. 1978).
\bibitem{316} \textit{Id.} at 480-82.
\bibitem{317} Stovall v. Denno, 388 U.S. 293, 302 (1967).
\bibitem{318} 390 U.S. 377 (1968).
\bibitem{319} \textit{Id.} at 384. See United States v. Ash, 413 U.S. 300, 320 (1973) (due process requirement provides protection in any identification procedure conducted in absence of counsel).
\end{thebibliography}
Using this standard, it has been held that lack of necessity for a pre-trial identification procedure is not sufficient by itself to invalidate an in-court identification. Further, unnecessary suggestibility alone will not require exclusion of identification testimony, for the primary focus is on the reliability of the witness.

In the case of United States v. Crawford, the Ninth Circuit seems to have stepped away from the two-part approach. The court stated that, if the necessity of the procedure should be given any effect at all, it should be considered as part of the evaluation of the law enforcement officials' conduct that may have made the identification "impermissibly suggestive." The Crawford court asserts that Simmons never established a two-part test and that "necessity" was simply one factor in the overall evaluation. In a footnote, the court pointed out that the factors utilized in Neil were not "precisely applicable" to Simmons or the present case, because Neil involved exclusion of evidence of a pre-trial identification and Simmons and Crawford involved overturning a conviction based on an in-court identification.

While this is a departure from previous Ninth Circuit language, it does not appear to be a significant break. The court merely removes the first prong of the two-part test and places it with the factors to be considered in the second prong. However, doubt now exists as to the nature of the test and the weight of the factors involved. This has especial relevance when considering Washington v. Cupp. There the Ninth Circuit held that reliability of an out-of-court identification allegedly tainted by earlier suggestive out-of-court identification procedures will be tested by using the same standard as for in-court identification. Will the court use the two-part approach or will it

321. 409 U.S. 188 (1972). This inquiry should focus broadly 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 199-200.
324. 576 F.2d 794 (9th Cir.) (per curiam), cert. denied, 439 U.S. 851 (1978).
325. Id. at 797.
326. Id.
327. Id. n.1.
328. Id.
329. 586 F.2d 134 (9th Cir. 1978).
330. Id. at 136-37.
utilize the *Crawford* standard?\(^{331}\)

The rule that unnecessary suggestibility by itself will not require exclusion of identification testimony was originally enunciated with regard to visual identification.\(^{332}\) In *United States v. Flickinger*,\(^{333}\) the Ninth Circuit held that this test was "equally applicable to a voice identification."\(^{334}\) In *Flickinger*, an FCC agent identified two suspects by comparing a recording of two voices with the live voices of the suspects. The court found the identification procedure unnecessarily suggestive in that it was akin to a face-to-face interview rather than a lineup.\(^ {335}\) However, several factors indicated that the suggestive element did not undermine the reliability of the identification. First, the agent was experienced in voice identification; second, he had a tape of the voices and was able to become very familiar with their sound so as to assure more reliable identification; and third, the identification was based solely on his own comparison between the taped and live voices.\(^ {336}\)

*Flickinger* is consistent with other cases decided in the Ninth Circuit this past year in that the court has focused on the reliability of the witnesses' identification rather than on the flaws of the pre-trial identification procedure.\(^ {337}\)

---

331. It is interesting to note that in *United States v. Barron*, 575 F.2d 752 (9th Cir. 1978), decided 12 days after *Crawford* and involving much the same factual situation (pretrial photo identifications) the court made no mention of the *Crawford* decision or the test enunciated therein.


333. 573 F.2d 1349 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978).

334. *Id.* at 1358.

335. *Id.*

336. *Id.* United States v. Kim, 577 F.2d 473 (9th Cir. 1978) (identification upheld even though F.B.I. agent who conducted voice identification asked each witness if he could identify a particular defendant and then asked the witness to identify that defendant while a tape of his voice was being played; not impermissible prompting). *See also* United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977) (police officer's in-court identification of defendant's voice upheld because it was based on the officer's independent acquaintance with the defendant and not upon the unnecessarily suggestive pretrial identification).

337. United States v. Barron, 575 F.2d 752, 754 (9th Cir. 1978) (where defendant was only one in lineup with a big nose; only one of twenty-five surveillance pictures displayed the victim bank in background; some witnesses viewed allegedly suggestive photo spread before viewing lineup pictures; some witnesses making identification from photo spread were aware the other witnesses had positively identified someone at the lineup; one witness received non-verbal approval after making identification and another was told she made correct selection; court upheld in-court identification); United States v. Flickinger, 573 F.2d 1349, 1358 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978) (citing *Manson v. Brathwaite*, 432 U.S. 98, 111 (1977)).

In *United States v. Rich*, 580 F.2d 929, 935 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978),
In *United States v. Satterfield*, the court stated that the “manner in which in-court identifications are conducted rests with the sound discretion of the trial court.”

So long as attempts are made to minimize any prejudicial effect and the probative value outweighs such effect, the identification will be admissible. In *Satterfield*, the defendant was made to wear a mask similar to the one involved in the crime. The probative value outweighed the prejudicial impact because: (a) by seeing the defendant in the mask the jury could better evaluate the witness’ ability to make a positive identification; (b) the jury could compare the defendant to the person pictured in the bank surveillance photographs; and (c) defendant was allowed to put it on and remove it outside the presence of the jury thereby restricting the possibly prejudicial use to the minimum necessary.

Finally, in *United States v. Peele*, the Ninth Circuit considered a due process claim where there was no government involvement in the suggestive identification procedure. In that case, the witness had seen defendant’s picture in the newspaper and she told the prosecuting authorities that it helped her in identifying the defendant at a lineup. The court enunciated the familiar two-part approach used to determine whether defendant’s due process rights were violated by the pre-trial identification but concluded that it was not applicable since there was no government involvement.

## II. Preliminary Proceedings

### A. Grand Jury

1. Selection

The fifth amendment provides that, in federal criminal prosecutions, “[n]o person shall be held to answer for a capital, or otherwise infa-

---

339. Id. at 690.
340. Id.
341. Id.
342. 574 F.2d 489 (9th Cir. 1978).
343. Id. at 490.
344. See notes 320-24 and accompanying text.
345. 574 F.2d at 490 (9th Cir. 1978). However, the court made it clear that a case might arise where the mind of a witness is so clouded by suggestions from non-government sources that a conviction based principally on the testimony of that witness violates due process. Id.
mous crime, unless on a presentment or indictment of a Grand Jury.” The Supreme Court has long recognized that, while a state need not provide for a grand jury indictment, if it does use the grand jury, the jury may not be selected in a manner that deliberately and systematically discriminates against persons of a particular race. Congress, in 1968, enacted the Jury Selection and Service Act to ensure that juries are chosen from a fair cross-section of the community in the district in which the court convenes and that no citizen is excluded because of race, color, religion, sex, national origin or economic status.

In *United States v. Brady* the defendants contended that the Montana Jury Selection Plan systematically excluded Indians from the grand and petit panels in violation of the Federal Act. Section 1867 of the Act provides for a dismissal of indictment or a stay of proceedings if there has been a substantial failure to comply with its provisions, and section 1863 allows additional sources to supplement the voter lists when it is determined that the voter lists do not represent a fair cross-section of the community.

The Ninth Circuit recently created a new test to determine when supplemental source lists should be added to voter lists to implement the purposes of the Act; the inquiry focuses on whether there is a “substantial deviation” between cognizable groups' numbers in the community and their representation on the voter list. This standard represented a sudden departure from previous Ninth Circuit authority, which re-

---

346. U.S. Const. amend. V.
347. Hurtado v. California, 110 U.S. 516 (1884) (due process clause of the fourteenth amendment does not require grand jury indictment in a state prosecution for murder).
348. *See* Peters v. Kiff, 407 U.S. 493 (1972) (white defendant entitled to federal habeas corpus relief when all blacks were systematically excluded from state grand and petit juries that indicted and convicted him); Neal v. Delaware, 103 U.S. 370 (1880) (discriminatory administration of fair jury selection laws is unconstitutional).
350. *Id.* §§ 1861-1862.
351. 579 F.2d 1121 (9th Cir. 1978).
352. Appellant argued the latest census figures showed that Indians comprised approximately 30% of the population of Rosebud County (one of 15 counties in the Billings Division), while only 6 1/2% of those selected for the grand jury from that county were Indian. Appellant also presented evidence that Indians comprised only 4 1/4% of the registered voters. *Id.* at 1133-34.
354. *Id.* § 1863(b)(2).
355. United States v. Potter, 552 F.2d 901, 903 (9th Cir. 1977) (defendant failed to establish substantial underrepresentation of blacks on grand jury panel). *See also* United States v. Kleifgen, 557 F.2d 1293, 1296 (9th Cir. 1977) (defendant failed to prove blacks or males were substantially underrepresented on the grand jury panel).
quired proof of "systematic exclusion." In *Brady*, the court incorporated both tests and held that, to prevail under either a constitutional challenge or a statutory challenge, appellants must prove either a "systematic exclusion" of an identifiable group or "substantial deviation" between identifiable groups on a division-wide basis.

In applying these new standards in *Brady*, the Ninth Circuit held that while Indians formed a cognizable group able to challenge the Montana Jury Selection Plan, they failed to support their claim by offering statistical proof of substantial deviation on a district- or division-wide basis. The fact that no Indian was called on three successive grand jury panels did not establish "substantial deviation."

2. Witnesses

Once the grand jury has been impaneled, it has the power to subpoena witnesses and to compel the production of documents. While the fifth amendment's privilege against self-incrimination applies in the grand jury setting, it is not a violation of the privilege to compel handwriting samples for identification purposes so long as they are not

---

356. United States v. Brady, 579 F.2d 1121, 1131-32 (9th Cir. 1978). See United States v. James, 453 F.2d 27, 29 (9th Cir. 1971) (plaintiff must show a discriminatory purpose or effect in the jury selection plan); United States v. Parker, 428 F.2d 488, 489 (9th Cir.), cert. denied, 400 U.S. 910 (1970) (plaintiff has burden to show systematic exclusion of an identifiable group in the community to show a prima facie case). These two tests appear to mirror those adopted by the Supreme Court in *Swain v. Alabama*, 380 U.S. 202 (1965), for constitutional challenges to the composition of juries. United States v. Brady, 579 F.2d at 1132.

357. 579 F.2d at 1133. Following the lead of the Fifth Circuit in *Foster v. Sparks*, 506 F.2d 805, 816-17 (5th Cir. 1975), the Ninth Circuit incorporated the test of "substantial deviation" for constitutional challenges to the jury panel developed by the Supreme Court in *Castenada v. Partida*, 430 U.S. 482 (1977), into the previous Ninth Circuit test of "systematic exclusion" for statutory challenges laid down in *United States v. James*, 453 F.2d 27, 29 (9th Cir. 1971). The *Brady* Court thus removed any distinction between a constitutionally-selected jury and a jury properly selected under the Act. 579 F.2d at 1132-33.

358. The requirement of a cognizable group originated in *Hernandez v. Texas*, 347 U.S. 475, 478 (1954), in which the Supreme Court held that the determination of a cognizable group is a question of fact. It must be demonstrated that the law singled out this class and treated it differently based on economic, social, political, racial, religious, or geographic grounds. Systematic exclusion based on these grounds violates the cross-section requirement. See *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946). See also *Ballard v. United States*, 329 U.S. 187, 195 (1946) (women may not be excluded from federal juries).

359. 579 F.2d at 1134.

360. *Id.* at n.3.

361. *Kastigar v. United States*, 406 U.S. 441, 443 (1972) (government has the power to compel persons to testify before grand juries).

362. *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (defendant under investigation for securities violations is not obliged to answer questions after invoking the fifth amendment).
used as testimonial expressions of the truth of the writing.363

The Supreme Court, in Fisher v. United States,364 rejected the contention that an attorney could raise the fifth amendment privilege in his client's behalf.365 The decision did, however, establish a test for the proper assertion of an attorney-client privilege. Relying on federal evidentiary rules, the Court held that if documents were turned over to an attorney by a client in the course of seeking legal advice, and if a client would have a fifth amendment privilege if the documents had been in his possession, the attorney may successfully raise the attorney-client privilege in response to a subpoena duces tecum.366 If the proceeding is before a state court, however, the attorney-client privilege is a matter of state law.367 The existence of an attorney-client privilege is therefore determined on the basis of federal evidentiary rules rather than on constitutional considerations. In Lowthian v. United States,368 the Ninth Circuit ruled that the proper procedure for challenging a subpoena duces tecum is for the attorney to refuse to produce the documents and then to appeal any contempt judgment entered against him as a result of that refusal.369

Although a witness may refuse to testify to facts that might incriminate him,370 one who refuses to testify or provide information without just cause is subject to civil contempt and can be confined during the life of the grand jury proceedings; in no case, however, may this confinement exceed eighteen months.371

And, finally, while proceedings of the grand jury are secret,372 gener-

363. Gilbert v. California, 388 U.S. 263, 266-67 (1967). E.g., United States v. Antill, 579 F.2d 1135, 1136 (9th Cir. 1978) (handwriting sample is an identifying physical characteristic outside protection of fifth amendment; request for specific phrases in handwriting not violative of fifth amendment privilege).


365. Id. at 396. In Fisher, the Internal Revenue Service had summoned attorneys to produce specified documents prepared by their client's accountants, and the attorneys raised the client's fifth amendment privilege.

366. Id. at 401-05; In re Fred R. Wittee Center Glass No. 3, 544 F.2d 1026, 1028 (9th Cir. 1976) (work papers prepared by accountant can be subpoenaed so long as taxpayer producing them is not compelled to "restate, repeat or affirm" the incriminating information).

367. Beckler v. Superior Court, 568 F.2d 661, 662 (9th Cir. 1978) (attorney-client privilege is a matter of state law and not a matter of constitutional law under the fifth amendment).

368. 575 F.2d 1292 (9th Cir. 1978).

369. Id. at 1293.


371. 28 U.S.C. § 1826 (1976); In re Garmon, 572 F.2d 1373 (9th Cir. 1978) (court allowed the civil contempt sentence to be imposed upon a witness already serving a criminal sentence by suspending the criminal sentence during the period of the contempt confinement).

372. FED. R. CRIM. P. 6(e). For the Supreme Court's rationale for secrecy of the grand jury, see United States v. Procter & Gamble Co., 356 U.S. 677, 681 n.6 (1958).
ally, testimony before the grand jury can be used for impeachment purposes.  

B. Indictments

1. When required

The fifth amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." The Federal Rules of Criminal Procedure codify this requirement and require an indictment for offenses punishable by death or imprisonment for a term exceeding a year, but any other offense may be prosecuted by indictment or information. A defendant whose offense does not fit within these requirements is not entitled to a criminal indictment.

2. Sufficiency

The indictment must be a plain, concise, and definitive statement of the essential facts constituting the offense charged. It must adequately inform the defendant of the charges against him and may not be so unfairly ambiguous or vague as to mislead him. A defendant has standing to object to the wording of an indictment if, by naming an unindicted co-conspirator, it is unduly prejudicial to him. A

373. United States v. Shield, 571 F.2d 1115, 1120 (9th Cir. 1978) (court allowed impeachment of witness before the grand jury with the transcript of the grand jury proceedings); Gollaher v. United States, 419 F.2d 520, 523 (9th Cir.), cert. denied, 396 U.S. 960 (1969) (use of grand jury testimony to impeach defendant was proper and any weight as affirmative evidence was incidental to its impeachment purpose).

374. U.S. Const. amend. V.


376. United States v. Marthaler, 571 F.2d 1104, 1105 (9th Cir. 1978) (defendant charged with criminal contempt of court is not entitled to indictment).


379. United States v. Allsup, 573 F.2d 1141, 1145-46 (9th Cir.), cert. denied, 436 U.S. 961 (1978) (slightly erroneous recitation of facts did not make indictment for transportation and possession of firearms by convicted felon unduly inflammatory or prejudicial); United States v. Love, 535 F.2d 1152, 1158 (9th Cir.), cert. denied, 429 U.S. 847 (1976) (surplusage in indictment regarding requisite intent for mail fraud not misleading or prejudicial when defendant represented by counsel chargeable with knowledge of intent necessary to prove offense).

380. United States v. Lyman, 592 F.2d 496 (9th Cir. 1978), cert. denied, 99 S. Ct. 2864
defendant lacks standing, however, to raise the due process claims of the unindicted co-conspirator. 381

An indictment is sufficient if it sets forth the essential facts constituting an offense in the language of the proscriptive statute, or if it refers directly or by implication to the essential elements of the crime. 382 When the indictment is sufficient, it is within the court's discretion to allow a bill of particulars. 383 Absent abuse, the exercise of this discretion will not be disturbed. 384

Federal Rule 7 of Criminal Procedure requires that the indictment be signed by a government attorney. 385 The signature of the United States Attorney himself, however, is not necessary. The Ninth Circuit, in United States v. Walls, 386 held that the signature of an assistant United States Attorney was sufficient to show the concurrence of the United States Attorney in an action taken by the grand jury. 387 Rule 7 permits allegations made in one count of the indictment to be incorpo-

(1979) (defendant not prejudiced by the naming of an unindicted co-conspirator when jury instructed that indictment was not evidence).

381. Id. at 502-03.
382. United States v. Anderson, 532 F.2d 1218, 1222 (9th Cir.), cert. denied, 429 U.S. 839 (1976). See United States v. Chenaur, 552 F.2d 294 (9th Cir. 1977), in which defendant alleged that the indictment which closely followed statutory language of 18 U.S.C. § 1006 (1976) (fraud against government institutions), was insufficient to adequately inform him of the nature of the charges against him. The Ninth Circuit held that the indictment was sufficient because it stated precise dates and amounts with respect to the fraudulent transactions. Id. at 301. See also Hamling v. United States, 418 U.S. 87, 117-18 (1974) (sufficiency of indictment defined); United States v. Hess, 124 U.S. 483, 487 (1888) (language of statute may be used in a general sense so long as accompanied by a statement of facts sufficient to inform accused of specific offense); United States v. Markee, 425 F.2d 1043, 1047-48 (9th Cir.), cert. denied, 400 U.S. 847 (1970) (distinction exists between an indictment that fails to state essential facts and one that fails to state theory upon which the facts will be proved).

In United States v. Bolar, 569 F.2d 1071 (9th Cir. 1978), the indictment for possession of counterfeiting materials was not fatally defective in failing to state that photographic negatives of Federal Reserve notes were subject to forfeiture, since defendant was not deprived of the opportunity to seek return of negatives and since such negatives were, per se, contraband. Cf. United States v. Hall, 521 F.2d 406, 408 (9th Cir. 1975) (defendant prosecuted for smuggling diamonds on indictment which failed to state smuggled materials must be forfeited to the United States was deprived of opportunity to contest the forfeiture).

383. FED. R. CRIM. P. 7(f); United States v. Dreitzler, 577 F.2d 539, 553 (9th Cir. 1978) (court's refusal to allow a bill of particulars was not an abuse of discretion when the indictment was adequate to allow defendant to prepare his defense); United States v. Chenaur, 552 F.2d 294, 302 (9th Cir. 1977) (proper exercise of discretion to deny motion for bill of particulars when prosecutor supplied information requested in open court instead of giving written bill).

384. United States v. Clay, 476 F.2d 1211, 1215 (9th Cir. 1973) (no abuse of discretion in denying bill of particulars when defendant given full discovery).

385. FED. R. CRIM. P. 7(c)(1).
386. 577 F.2d 690 (9th Cir.), cert. denied, 439 U.S. 893 (1978).
387. Id. at 696. Accord, United States v. Wright, 365 F.2d 135, 137 (7th Cir. 1966), cert.
rated by reference into another count in order to avoid unnecessary repetition. Dismissal of one count of an indictment, if referred to in remaining counts, does not require reversal of the conviction of the remaining counts if the reference is so complete so as to incorporate the matter from the dismissed counts.

3. Duplicity and multiplicity

The problem of duplicity arises when an indictment charges two or more distinct offenses in a single count, thereby precluding the jury in a general verdict from acquitting or convicting the defendant on each separate charge. In order for a defendant to dismiss an indictment on the grounds of duplicity, substantial prejudice must be shown and the objection must be made by a motion prior to trial.

A multiplicitous indictment is one which charges a single offense in several counts. A defendant may be prejudiced by multiple sentences resulting from a single offense. The imposition of consecutive sentences based on multiplicitous counts is therefore deemed unconstitutional.

---


389. See United States v. Weiner, 578 F.2d 757 (9th Cir.), cert. denied, 439 U.S. 981 (1978). The defendant in Weiner contended his conviction on six counts of securities fraud should be reversed because the first paragraph of each count realleged by reference portions of the two counts of conspiracy which were dismissed before the case was submitted to the jury. The Ninth Circuit held that the reference to the dismissed counts was sufficiently full to incorporate them into the remaining counts. Id. at 776.

390. United States v. Buck, 548 F.2d 871 (9th Cir.), cert. denied, 434 U.S. 890 (1977) (defendant claimed indictment was duplicitous in that it charged two separate statutory violations stemming from the same acts; appellate court found the acts to constitute two separate offenses; even assuming the charges were duplicitous, defendant failed to show prejudice).

391. In United States v. Gulino, 588 F.2d 256 (9th Cir. 1978), the Ninth Circuit held that a defendant who failed to object to the indictment on grounds of duplicity until appeal had waived the error. Defendant also claimed counts I and V of his indictment for perjury before the grand jury were duplicitous, but the court found each count contained a separate instance of perjury.

In United States v. Buck, 548 F.2d 871 (9th Cir.), cert. denied, 434 U.S. 890 (1977), and Gulino, both defendants asserted as duplicitous two separate counts charging the same offense. An analysis of the cases indicates this was really a multiplicity question, but the court, in both cases, chose to dispose of the case assuming the defendants’ charges that the indictment was duplicitous.


393. Launius v. United States, 575 F.2d 770, 771 (9th Cir. 1978) (two counts of indictment
4. Evidence before the grand jury

In *United States v. Fried*,\(^{394}\) the Ninth Circuit affirmed its position that, when a duly constituted grand jury returns an indictment valid on its face, no independent inquiry may be made to determine the sufficiency of the evidence presented to the grand jury. Although the indictment may be challenged if it can be demonstrated there is a complete absence of evidence,\(^ {395}\) a heavy burden is placed on the one who challenges the presumption of validity.\(^ {396}\)

5. Prosecutorial misconduct

The federal courts, in the exercise of their inherent supervisory powers, have the discretion to dismiss an indictment on the basis of governmental misconduct.\(^ {397}\) This remedy is used to discourage future deliberate prosecutorial misconduct and to preserve judicial integrity.\(^ {398}\) The Ninth Circuit, however, considers this a harsh sanction and has been reluctant to dismiss indictments because of prosecutorial misconduct.\(^ {399}\) In *United States v. Owen*,\(^ {400}\) the court adopted the view held by the Fifth, Seventh, and Eighth Circuits that there must be actual prejudice to the accused by virtue of the alleged acts of miscon-
duct. The United States Attorney has a duty to prosecute for all offenses against the United States. This power permits broad discretion in determining which cases to file. The Ninth Circuit has held that the doctrine of separation of powers precludes judicial interference with the Attorney General's prosecutorial discretion unless it is abused to such an extent as to be "arbitrary, capricious, and violative of due process." Indictment on a more serious charge after an accused has exercised a procedural right places a heavy burden on the prosecution to show that the additional charges are not vindictive in nature.

The Ninth Circuit, in United States v. Allsup, found this heavy burden satisfied. Allsup charged prosecutorial vindictiveness when he was indicted on a gun charge after he refused to plea bargain his prior prosecution for bank robbery. The Ninth Circuit, relying on the recent Supreme Court decision in Bordenkircher v. Hayes, reaffirmed its po-


404. United States v. Welch, 572 F.2d 1359, 1360 (9th Cir. 1978) (court has no power to dismiss indictment on grounds it violated Justice Department internal policy). See also United States v. Chavez, 566 F.2d 81 (9th Cir. 1977) (federal court has no power to determine if internal policy of Attorney General's office is violated). But see United States v. Mikka, 586 F.2d 152 (9th Cir. 1978), where the court found that the previous state prosecution of defendant and the later federal prosecution lacked the identity necessary to invoke the petite policy of the Department of Justice, which states that no federal case should be prosecuted when there has been a state prosecution for the same act or acts, absent compelling federal reasons.

405. United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976) (defendant was initially arraigned on a misdemeanor charge of unlawful entry into the United States, but was reindicted on felony charges of unlawful entry after he refused to waive his right to be tried by a judge and a jury; sufficient appearance of vindictiveness to place heavy burden on prosecution to justify the increased charge).

The concept of retaliatory prosecution was examined in North Carolina v. Pearce, 395 U.S. 711 (1969). The Pearce 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. Id. at 725. This principle was extended to deter prosecutorial vindictiveness in Blackledge v. Perry, 417 U.S. 21, 28 (1974).


407. 434 U.S. 357 (1978) (Supreme Court held there was no violation of due process clause of the fourteenth amendment when prosecutor explicitly warned defendant in plea
sition that the prosecution, as part of the plea bargaining process, can use potential charges against the defendant as a bargaining tool.\textsuperscript{408} Thus, when the subsequent charge is part of the plea bargaining process, and a failure to plea bargain results in the actual filing of that charge, there is no prosecutorial misconduct.

In \textit{United States v. Groves},\textsuperscript{409} the Ninth Circuit failed to find a reason for the defendant's reindictment on a more severe charge. In Groves, after a plea bargain was struck and the negotiated charges filed, the defendant exercised a procedural right.\textsuperscript{410} The prosecution then filed another more serious indictment against the defendant. The Ninth Circuit held that a manifest appearance of vindictiveness, rather than vindictiveness in fact, was sufficient grounds for reversal of the conviction and dismissal of the indictment.\textsuperscript{411} The defendant in Groves was arrested pursuant to an investigation for marijuana trafficking between California and Canada by agents of the Drug Enforcement Administration. The defendant, while plea bargaining, supplied the name and address of the principal drug supplier, but refused to cooperate further out of fear for his life. The negotiations for plea bargaining were completed and the defendant was then charged with cocaine possession. Eight days after he moved for a dismissal of the cocaine charge under the Speedy Trial Act,\textsuperscript{412} the prosecution filed a felony indictment against him for conspiracy to distribute marijuana.\textsuperscript{413} Reversing the district court's ruling that there was no vindictiveness, the Ninth Circuit found that the "coincidence of events presents overwhelming circumstantial evidence" that the indictment was filed in retaliation for appellant's assertion of his procedural right to use the Speedy Trial Act.
The court also held that, while one of the factors to consider in questioning vindictiveness is the factual similarity/dissimilarity of the two charges, the fact that the two indictments involved different crimes is not dispositive of the issue. 14

6. Joinder of offenses

Federal Rule of Criminal Procedure 8(b) provides that two or more defendants may be charged in the same indictment if they are alleged to have participated in the same act or the same series of acts or transactions constituting an offense or offenses. 15 It is insufficient that the acts are of the "same or similar character," as provided in rule 8(a); there must exist a more substantial relationship. 16 Although the purpose of rule 8(b) is to promote trial efficiency, that advantage must be balanced against subjecting the defendant to potential prejudice. 17 In United States v. Barney, 18 the joinder of a stolen vehicle charge against two defendants with a perjury charge against one of the two defendants was held to be proper because the underlying facts of both offenses were so intertwined that the same evidence could prove both offenses. Conspiracy will provide the necessary link to satisfy the requirement that the charges against more than one defendant constituted a "series of acts or transactions," but the government must use conspiracy in good faith and not merely to bypass the requirements of the rules of joinder. 19

14. Id. at 453.
15. Id. at 454.
17. United States v. Satterfield, 548 F.2d 1341, 1344-45 (9th Cir. 1977) (when appellant involved in only two of five similar bank robberies with which co-defendant charged, joinder improper and prejudicial because most evidence adduced at trial related to robberies in which appellant was not involved).
18. United States v. Martin, 567 F.2d 849, 853 (9th Cir. 1977) (joinder of defendant charged with five counts of indicum with co-defendant charged with ten counts was improper, but any error was harmless). See United States v. Olander, 584 F.2d 876 (9th Cir. 1978) (where two defendants, charged with violating court order against fishing in violation of treaty rights, were together fishing in one boat, there was no error in trying the two defendants together).
7. Delay

The due process clause of the fifth amendment protects against pre-indictment delay that creates substantial prejudice to a defendant's rights to a fair trial and was purposely designed to give the prosecution a tactical advantage over the accused.\textsuperscript{421} In addition to the constitutional protection, Federal Rule of Criminal Procedure 48(b) provides for discretionary dismissal of an indictment if there is unnecessary delay in presenting the charge to the grand jury or in bringing the defendant to trial.\textsuperscript{422} In \textit{United States v. Jernigan},\textsuperscript{423} the Ninth Circuit found that there was deliberate delay in arresting the defendant, thereby preventing him from going before a magistrate, having bail set and being released. Since no prejudice to the defendant could be shown from the delay, dismissing the indictment and vacating conviction was considered too drastic a remedy, and the court upheld the conviction.\textsuperscript{424}

8. Amendments and variances

Because a felony defendant in federal court has a fifth amendment right to be charged only by indictment,\textsuperscript{425} neither the prosecutor nor the court may materially amend an indictment.\textsuperscript{426} A trial judge, however, may amend the indictment by withdrawing a portion of the

\textsuperscript{421} U.S. Const. amend. V. See United States v. Marion, 404 U.S. 307, 324 (1971) (defendant failed to show prosecutorial delay prejudiced right to a fair trial, or that delay was designed to gain tactical advantage, and therefore due process claims were speculative and premature); United States v. Barney, 568 F.2d 134, 139 (9th Cir.), \textit{cert. denied}, 435 U.S. 955 (1978) (government's delay in filing indictment in transporting stolen vehicle charge did not deny defendant due process where no prejudice and no intentional delay shown); United States v. Manning, 509 F.2d 1230, 1234 (9th Cir. 1974), \textit{cert. denied}, 423 U.S. 824 (1975) (due process rights not violated by three and one-half year delay between acts constituting conspiracy and indictment, when defendant failed to show prejudice, harassment, or an intentional ploy by prosecution to gain a tactical advantage).

\textsuperscript{422} Fed. R. Crim. P. 48(b). See United States v. Simmons, 536 F.2d 827, 832-38 (9th Cir.), \textit{cert. denied}, 429 U.S. 854 (1976), for standards to evaluate the propriety of dismissal with prejudice under rule 48(b) for delay in bringing a case to trial after indictment. Dismissal must be exercised with caution, and only after a warning to the prosecution that further delay will result in dismissal of the indictment. \textit{See also} United States v. Charnay, 577 F.2d 81 (9th Cir. 1978), where the Ninth Circuit upheld the trial court's dismissal of the indictment after the trial court had given a clear and express warning that the indictment would be dismissed if the prosecutor was not prepared.

\textsuperscript{423} 582 F.2d 1211 (9th Cir.), \textit{cert. denied}, 439 U.S. 991 (1978).

\textsuperscript{424} \textit{Id.} at 1214. The court added, however, that repetition of this type of behavior would lead to dismissal of an indictment in a future case. \textit{Id.}

\textsuperscript{425} U.S. Const. amend V.

\textsuperscript{426} United States v. Dawson, 516 F.2d 796, 804 (9th Cir.), \textit{cert. denied}, 423 U.S. 855 (1975) (withdrawal of part of the indictment from the jury's consideration did not materially alter or broaden the essential nature of the offense charged).
charge, deleting surplusage, or making a purely formal change by instructions to the jury if the offense charged remains the same and the defendant has not been prejudiced.\textsuperscript{427}

A material variance between the indictment and the proof at trial may result in reversal if the result is prejudicial to the defendant's substantive rights.\textsuperscript{428} The Ninth Circuit has interpreted these rights to include only: (1) preventing the defendant from presenting his defense properly; (2) taking him unfairly by surprise; or (3) exposing him to double jeopardy.\textsuperscript{429}

While an amendment to an indictment is a change in the indictment itself, the Ninth Circuit recognizes that a variance between the indictment and the proof at trial may result in a constructive amendment.\textsuperscript{430}

\subsection*{C. Guilty Pleas}

A defendant's plea of guilty operates as a waiver of his constitutional rights to a trial by jury, confrontation with his accusers, and the privilege against self-incrimination.\textsuperscript{431} A plea of guilty is an explicit admission of all the elements of the offense charged and is itself a conviction.\textsuperscript{432} Once the accused has admitted his guilt, any constitutional challenges that would have prevented the prosecution from proving factual guilt become irrelevant, but he does not waive other constitutional claims that would have prevented conviction even if factual guilt were established.\textsuperscript{433} Applying this reasoning in \textit{Launius v.}

\begin{itemize}
\item \textsuperscript{427} United States v. Abascal, 564 F.2d 821, 832-33 (9th Cir. 1977), \textit{cert. denied}, 435 U.S. 953 (1978) (trial judge upheld in striking the word “import” from charge of conspiracy to “import, distribute and possess” LSD because there was no need to establish importation to convict for possession and distribution).
\item \textsuperscript{428} Berger v. United States, 295 U.S. 78, 82 (1935) (substantial rights include right to be definitely informed of charge so as to prevent surprise at trial and right to insure freedom from multiple prosecutions for same offense; variance fatal only if it affects substantial right).
\item \textsuperscript{429} United States v. Anderson, 532 F.2d 1218, 1227 (9th Cir.), \textit{cert. denied}, 429 U.S. 839 (1976) (jury instructions did not operate to amend the indictment).
\item \textsuperscript{430} United States v. Lyman, 592 F.2d 496 (9th Cir. 1978), \textit{cert. denied}, 99 S. Ct. 2864 (1979) (no constructive amendment occurred when charges which were not proved were surplusage and did not support conviction for conspiracy).
\item \textsuperscript{431} Boykin v. Alabama, 395 U.S. 238, 243 (1969) (guilty plea is a waiver of jury trial, privilege against self-incrimination, and right to confront accusers).
\item \textsuperscript{432} McCarthy v. United States, 394 U.S. 459, 466 (1969). \textit{See} Forstner v. INS, 579 F.2d 506, 508 (9th Cir. 1978), where the Ninth Circuit held that even if a conviction after a guilty plea could at some future time be expunged from the record under an Oregon law, it did not render it any less a final conviction.
\item \textsuperscript{433} Menna v. New York, 423 U.S. 61, 63 n.2 (1975) (guilty plea did not bar defendant's claim that his indictment violated the double jeopardy clause).
\end{itemize}
CRIMINAL LAW SURVEY: 1978

United States, the Ninth Circuit held that the appellants' guilty pleas to two counts of conspiracy (when in fact there was only one conspiracy) did not result in a waiver of their right to challenge the consecutive sentences imposed for the two counts as a violation of the double jeopardy clause.

The use of the "conditional guilty plea," wherein the defendant is allowed to plead guilty and yet preserve his right to appeal certain issues, was strongly rejected by the Ninth Circuit in 1978. In United States v. Benson, the court held that its use was grossly inconsistent with the Supreme Court's rulings in the Brady line of cases.

Before accepting a guilty plea, the court must be satisfied that the accused makes the plea knowingly, voluntarily, and with an understanding of the consequences of the rights waived. When a guilty plea is entered as a result of a plea bargain with the prosecutor, and the prosecutor fails to keep his bargain, the plea is considered involuntary and the court can allow the defendant to withdraw his plea or require specific performance of the promise inducing the plea.

---

434. 575 F.2d 770 (9th Cir. 1978).
435. Id. at 771.
436. 579 F.2d 508 (9th Cir. 1978).

438. 579 F.2d at 511.
440. Santobello v. New York, 404 U.S. 257, 261-62 (1972) (defendant pled guilty after agreement with prosecutor that he would make no recommendation as to sentence; prosecutor failed in his promise and Supreme Court vacated conviction and remanded for the court to either allow withdrawal of plea or specific performance of the agreement by prosecutor).
entered on the erroneous advice of the accused's counsel that he may plead and still preserve issues for direct appeal, the defendant can attack the voluntary and intelligent character of his plea.441

The court must also satisfy the requirements of Federal Rule of Criminal Procedure 11 governing the acceptance of guilty pleas; if the requirements are not met, the defendant must be given the opportunity to plead anew.442 Rule 11(c) requires the judge to inform the defendant of the nature of the charges against him, the minimum and maximum penalties provided by law, and other specified consequences of the plea.443 In United States v. Hamilton,444 the court held that this rule did not require that the judge specifically inform the defendant of the possibility of consecutive sentences where the defendant was advised of the possible sentences as to each of the two counts and could reasonably conclude there was a possibility of consecutive sentencing.445 The court held further that the requirement of informing the defendant of the penalties does not necessarily mean that the words literally must come from the judge's lips, as long as the judge ensures that the defendant understands the possible penalties.446 This decision is consistent with the Ninth Circuit's previous position that compliance with rule 11 does not require adherence to formal procedures447 or ritualistic performances,448 so long as the record shows the defendant voluntarily and knowingly pled.

The Ninth Circuit, however, has adhered strictly to the rule that when a statute requires a mandatory parole term appended to the sen-

441. See Tollett v. Henderson, 411 U.S. 258, 266-67 (1973) (for plea to be subject to collateral attack because of erroneous advice of counsel, accused must show that advice of attorney fell below minimum standards for competence demanded of attorneys in criminal cases).
444. 568 F.2d 1302 (9th Cir.), cert. denied, 436 U.S. 944 (1978).
445. Id. at 1306.
446. Id. The judge informed the defendant of all rule 11 matters except penalties, and then asked if the defendant understood the penalties as explained by the prosecutor.
447. Fruchtman v. Kenton, 531 F.2d 946 (9th Cir.), cert. denied, 429 U.S. 895 (1976) (court's failure to specifically advise accused that guilty plea constituted a waiver of rights to confrontation and compulsory process not violative of rule 11).
448. Guthrie v. United States, 517 F.2d 416, 418 (9th Cir. 1975) (rule does not require needless colloquy and time consuming padding of record when record shows plea voluntary and supported by fact); United States v. Youpee, 419 F.2d 1340, 1344 (9th Cir. 1969) (no ritual is prescribed by rule 11).
tence, the accused must be so informed. 449 In United States v. Del Prete, 450 the court held that, while the defendant had been advised of the existence of the special parole term, the court had failed to explain adequately that if any term of imprisonment were imposed, the special parole term of three years or more would be required in addition to the prison term.

Rule 11 requires additionally that the court be satisfied that the plea has a factual basis before judgment can be entered on the plea. 451 In United States v. Herrell, 452 a felon charged with possession of firearms challenged the validity of his previous grand theft conviction because the record showed no factual basis for his guilty plea, as required by an Arizona law similar to rule 11(f). In affirming his conviction, the Ninth Circuit held that his grand theft conviction had not been challenged prior to his being found in possession of the firearms, and, because his appeal was based on a violation of a statute and not constitutional grounds, it was unavailing. 453

D. Discovery

1. Jencks Act

Rule 16 of the Federal Rules of Criminal Procedure provides for discovery to the federal criminal defendant of his own pre-trial statements, confession, grand jury testimony, prior criminal record, and the results of medical or scientific tests. 454 It also provides that the defendant can inspect and copy any documents or tangible evidence in the government’s possession that are material to the preparation of his defense or are intended for use as evidence by the government. 455 The

449. Bunker v. Wise, 550 F.2d 1155 (9th Cir. 1977) (court gave retroactive effect to Harris decision); United States v. Harris, 534 F.2d 141 (9th Cir. 1976) (defendants who plead guilty must be advised that mandatory special parole term will be appended to sentence).

450. 567 F.2d 928 (9th Cir. 1978).


452. 588 F.2d 711 (9th Cir. 1978).

453. Id. at 713.

454. Fed. R. Crim. P. 16. But see United States v. Emery, 591 F.2d 1266 (9th Cir. 1978) (prosecutors with “open file” policies for discovery did not violate policy and defendant not unduly prejudiced when, after defense counsel examined file, additional report was prepared and added to the file without notifying accused); United States v. Rinn, 586 F.2d 113, 120 (9th Cir. 1978) (government’s failure to disclose pretrial inculpatory statement made by defendant in presence of two government agents was not reversible error when defendant was not under interrogation and was unaware the other participants were government agents).

455. Fed. R. Crim. P. 16. But see Jett v. Castaneda, 578 F.2d 842, 845 (9th Cir. 1978), where the Ninth Circuit reversed a contempt conviction for failure to comply with discovery order where the district court had no grand jury investigation pending and no charges were pending.
government does not have to disclose a list of witnesses or the contents of statements made by its witnesses prior to trial. The Jencks Act, however, provides that once a government witness has testified at trial, the defendant is entitled to inspect any pre-trial statements made by the witness to aid in cross-examination.

The Ninth Circuit has ruled that rough notes taken during interviews with potential witnesses during the course of an investigation are discoverable materials and, therefore, must be preserved. In United States v. Shields, however, the court refused to apply the holding retroactively in the absence of some showing of prejudice.

In Goldberg v. United States, the Supreme Court held that notes taken by government attorneys while interviewing their witnesses may be discovered by the defendant if they are "truly the statement of the witness—that is, a statement written and signed or otherwise adopted or approved by him or a substantially verbatim recording of an oral statement." This requirement is not satisfied unless a lawyer reads

---

456. United States v. Thompson, 493 F.2d 305, 309 (9th Cir.), cert. denied, 419 U.S. 834 (1974). See United States v. Rinn, 586 F.2d 113 (9th Cir. 1978) (although court did not reach issue of obligation to inform, entire criminal record of government witness was supplied to defendant even though government not obliged to furnish it); United States v. Seymour, 576 F.2d 1345, 1348-49 (9th Cir.), cert. denied, 439 U.S. 857 (1978) (trial court's action ordering parties to exchange lists of witnesses, summaries of their testimonies, and all trial exhibits would not be sanctioned by court of appeals, but due to defendant's minimal compliance, his failure to object, and overwhelming evidence of guilt, defendant was not prejudiced and any error was harmless).

457. 18 U.S.C. § 3500 (1976). The Jencks Act grew out of Jencks v. United States, 353 U.S. 657, 668-72 (1972), in which the Supreme Court held that after a prosecution witness had testified at trial, any previous statements made by the witness relating to this testimony were to be turned over to the defendant for his inspection and use in cross-examination or impeachment of the witness.

458. See United States v. Dreitzler, 577 F.2d 539, 553 (9th Cir. 1978) (defendant not prejudiced by trial court's refusal to disclose names of expert witnesses and their test results since the witnesses were not called at trial); United States v. Lyman, 592 F.2d 496 (9th Cir. 1978), cert. denied, 99 S. Ct. 2864 (1979), where it was found there was no merit to a contention that the government violated the Jencks Act when the government in fact tendered the notes for defense inspection but they were not accepted nor utilized by the defense.

459. United States v. Harris, 543 F.2d 1247, 1247-48 (9th Cir. 1976) (court rejected the government's argument that destruction of notes was proper because agents had incorporated contents into a formal report).

460. 571 F.2d 1115, 1119 (9th Cir. 1978) (defendant failed to show any prejudice resulting from destruction of notes).


462. Id. at 102 n.5 (emphasis in original). 18 U.S.C. § 3500(e)(1) (1976) defines "statement" as "a written statement made by said witness and signed or otherwise adopted or approved by him." See United States v. Adams, 581 F.2d 193, 199 (9th Cir.), cert. denied, 439 U.S. 1006 (1978) (court refused to overturn the district court's ruling that the unreleased
back, or the witness himself reads, what the lawyer has written.\textsuperscript{463} The Goldberg court emphasized that the determination of whether notes constitute a "statement" within the statutory definition must be made initially by the trial court.\textsuperscript{464} The court of appeals may overturn those findings only if they are clearly erroneous.\textsuperscript{465}

The district court found on remand\textsuperscript{466} that the writings were not producible under the Jencks Act, and the defendant appealed. The Ninth Circuit, in \textit{United States v. Goldberg},\textsuperscript{467} affirmed the district court's ruling that the attorney's notes had not been adopted or approved by the defendant and therefore were not "statements" of the witness for discovery purposes. The court further held that the government was not required to produce the witnesses' personal notes which were not in the government's possession at the time of the Jencks motion and of which the government was unaware.\textsuperscript{468}

2. Prosecutor's duty to disclose

The Supreme Court also has recognized that in some instances a refusal of discovery to a defendant is a denial of due process,\textsuperscript{469} and, in certain cases, the prosecutor may have an affirmative duty to disclose to the defendant evidence that might exculpate him.\textsuperscript{470} In \textit{Brady v. Maryland},\textsuperscript{471} the Supreme Court ruled that "suppression by the prose-

\textsuperscript{463} 425 U.S. at 110 n.19.
\textsuperscript{464} \textit{Id}. at 111.
\textsuperscript{466} 435 F. Supp. 1172, 1177 (D. Ariz. 1977), \textit{affd}, 582 F.2d 483 (9th Cir. 1978).
\textsuperscript{467} 582 F.2d 483 (9th Cir. 1978).
\textsuperscript{468} \textit{Id}. at 487. Goldberg was convicted of fourteen counts of mail fraud. The government's case against the defendant consisted primarily of the testimony of Newman, a fellow employee. Prior to trial, the government delivered to Goldberg a copy of Newman's testimony before the grand jury and a memorandum of an interview of Newman by two government attorneys. The memorandum indicated the lawyers were going to conduct further interviews with Newman. During the trial, Newman disclosed that he did have subsequent meetings with the attorneys and the defendant moved for a copy of the attorneys' notes. When the notes were turned over to the court, it was discovered that the government had 40 pages of notes by Newman himself of which they previously had been unaware. \textit{Id}. at 484-86.
\textsuperscript{469} Cicenia v. Lagay, 357 U.S. 504, 510-11 (1958), \textit{overruled on other grounds}, 384 U.S. 436 (1966) (denial of defendant's motion to see his written confession was not a denial of due process in absence of showing of any prejudice).
\textsuperscript{470} Napue v. Illinois, 360 U.S. 264, 269-70 (1959) (prosecutor has duty to disclose when he knows his witness perjured himself); Alcorta v. Texas, 355 U.S. 28, 30, 32 (1957) (prosecution has duty to correct misleading impression created by his witness).
\textsuperscript{471} 373 U.S. 83 (1963).
cution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The test of whether the evidence is material is whether the requested evidence would affect the outcome of the trial, and the Ninth Circuit interprets this test as synonymous with the harmless error standard. If the request is couched in such general terms as for "all Brady material" or "anything exculpatory," however, it is the equivalent of no request at all, and the court may deny the motion.

A mere delay in disclosure of Brady material, however, will warrant reversal only if the "lateness of the disclosure so prejudiced appellant's preparation or presentation of his defense that he was prevented from receiving his Constitutionally guaranteed fair trial." In United States v. Shelton, for example, the appellant claimed that his conviction for filing a false income tax return should be reversed because the prosecution delayed in disclosing over 500 pages of alleged Brady material until the eve of trial, and failed to release an additional 1900 pages of Brady material until after the trial.

The Ninth Circuit found the failure to disclose material until the eve of trial insufficient to prejudice the defendant's preparation or presentation of his case. The Shelton court further found a portion of the material released after the trial to be merely cumulative or collateral in effect, and therefore non-prejudicial to the defense. Although the Ninth Circuit found the remaining documents to be material in the Brady sense, the request for new trial was rejected since the Government had made a good faith effort to locate the materials prior to trial.

472. Id. at 87.
474. United States v. Goldberg, 582 F.2d 483, 490 (9th Cir. 1978) (the usefulness of the notes related to the impeachment of the witness Newman, not to the guilt or innocence of the defendant; therefore, if there was error in excluding them, it was harmless beyond reasonable doubt).
475. United States v. Weiner, 578 F.2d 757, 767 (9th Cir.), cert. denied, 439 U.S. 981 (1978) (in securities fraud prosecution it was not error to deny broad motion for all SEC transcripts and statements and FBI interviews).
477. 588 F.2d 1242 (9th Cir. 1978), cert. denied, 99 S. Ct. 2822 (1979).
478. Id. at 1247.
479. Judge Ely, however, rejected the majority position that the error was harmless beyond a reasonable doubt. Instead, Judge Ely reasoned that the conviction should be reversed because the government had been lax and had failed to seriously undertake their duty to produce the evidence requested. Id. at 1252-53 (Ely, J., dissenting).
and the defense had exhibited a lack of diligence in attempting to obtain the evidence independently.\footnote{Id. at 1249 & n.12.} Emphasizing the significance of a diligent defense attempt to obtain Brady material, the Ninth Circuit agreed with the Seventh Circuit that "a failure to exercise diligence can be so obviously bordering on gamesmanship as to place the evidence constructively in the category of non-newly discovered."\footnote{Id. at 1250 (quoting United States v. Hedgeman, 564 F.2d 763, 768 (7th Cir. 1977)).}

3. Depositions

The taking of depositions in criminal cases is limited to the purpose of preserving testimony under exceptional circumstances, such as when a witness will be unable to attend the trial.\footnote{United States v. Singleton, 460 F.2d 1148, 1154 (2d Cir. 1972), cert. denied, 410 U.S. 984 (1973). Fed. R. Crim. P. 15; 18 U.S.C. § 3503(a) (1978). Motions under rule 15 are considered under the same legal standard as § 3503(a).} Depositions, therefore, are generally disallowed merely for discovery purposes.\footnote{See In re United States, 348 F.2d 624, 626 (1st Cir. 1965) (defendant not allowed to take deposition on bare assertion that witness may not be at trial).} If the defendant does not plead or prove the unavailability of the witness at trial, it is within the discretion of the court to deny the motion for a deposition.\footnote{United States v. Rich, 580 F.2d 929, 933-34 (9th Cir.), cert. denied, 439 U.S. 984 (1978) (defendant who sought deposition failed to plead or prove unavailability of witnesses). See United States v. Schmidt, 573 F.2d 1057, 1066 (9th Cir.), cert. denied, 439 U.S. 881 (1978) (Ninth Circuit upheld as not clearly erroneous the finding of the trial court that defendant was not denied his right to take depositions).}

4. Pre-sentence reports

The pre-sentence report is usually made available on request to the defense counsel prior to sentencing so that the defendant can contest any alleged factual inaccuracies.\footnote{FED. R. CRIM. P. 32(c)(3). See United States v. Perri, 513 F.2d 572, 575 (9th Cir. 1972), in which the court held that fundamental fairness required that the defendant be told of the substance of all information which adversely affects his interests.} The disclosure of the report, however, is discretionary and may be withheld if its disclosure would adversely affect the defendant or other persons.\footnote{FED. R. CRIM. P. 32(c)(3)(A).} The Ninth Circuit has held that in noncapital cases, the defendant's right to confrontation is not violated when the court withholds information that might disrupt an existing police investigation, and the judge indicates that he has not relied on the withheld portion.\footnote{Pavo v. Cardwell, 583 F.2d 1075, 1077 (9th Cir. 1978). The defendant was convicted of assault with a deadly weapon. Portions of the presentence report were withheld on
In *United States v. Dubrofsky*, the Ninth Circuit seemed to go one step further and sanctioned the withholding of information to protect ongoing police investigations when the judge did not rely "exclusively or even compellingly" on the confidential information, but, in addition to the report, relied on information available to the defendant and information gleaned from the trial.

5. Competency reports

The Ninth Circuit, in *United States v. Winn*, was confronted with the question of a defendant's right to a pre-trial competency report. The court ruled that when a competency hearing is held without the testimony of the reporting psychiatrist or, when a competency hearing is not required, the decision to disclose the report rests with the trial court. While the Federal Rules of Criminal Procedure do not expressly regulate the disclosure of competency reports, the court analogized the exercise of its discretion to withhold these reports to rule 32(c)(3) governing disclosure of pre-sentence reports.

E. Right to Jury Trial

The United States Constitution guarantees a trial by jury in criminal prosecutions. The Supreme Court consistently has held that this right extends only to individuals charged with a serious offense that carries a punishment in excess of six months. Thus, if there is a pre-trial stipulation that the court will not impose a jail sentence in excess of six months, the ground that they would disrupt an existing police investigation. The court upheld the ruling, distinguishing *Pavao* from *Gardner v. Florida*, 430 U.S. 349 (1977), on the basis that the latter was a death penalty case.

488. 581 F.2d 208 (9th Cir. 1978) (defendant convicted of importing heroin and possession with intent to distribute).

489. The court distinguished this case from *United States v. Perri*, 513 F.2d 572 (9th Cir. 1975), where the judge made it clear that he relied solely on the confidential report in imposing the sentence. 581 F.2d at 214-15. Judge Sneed disagreed with the majority that protection of an existing police investigation was a reason recognized by rule 32(c)(3) for withholding information. He argued that the majority position was contrary to the court's ruling in *Perri*. Id. at 215.

490. 577 F.2d 86 (9th Cir. 1978). *Fed. R. Crim. P.* 12.2(c) governs psychiatric examination of federal criminal defendants and requires that the psychiatrist report only to the court.

491. 577 F.2d at 92. *But see In re Harmon*, 425 F.2d 916, 918 (1st Cir. 1970) (if psychiatrist testifies at a hearing, his report should be available to both prosecutor and defendant as basis for their examination).


493. *U.S. Const.* art. III, § 2, cl. 3; id., amend. VI.

of six months, the defendant has no right to a jury trial.\textsuperscript{495} Similarly, if the defendant is charged with violating a statute that does not prescribe any specific term of imprisonment, there is no right to a jury trial when the actual sentence imposed is six months or less.\textsuperscript{496}

The Federal Rules of Criminal Procedure require a jury of twelve and a unanimous verdict.\textsuperscript{497} If the jury is unable to reach a unanimous verdict, they may be asked to deliberate further, or they may be discharged.\textsuperscript{499} In \textit{United States v. Lopez},\textsuperscript{500} after the jury had begun deliberations and had been unable to reach a verdict, the defendant informed the court that she wished to waive her right to a unanimous verdict of twelve jurors and to accept the verdict of ten of the twelve. Following a jury poll, the defendant was found guilty on each count by a vote of ten to two. Reversing her conviction, the Ninth Circuit held that the unanimity required by rule 31 cannot be waived.\textsuperscript{501} Although the court did not consider the constitutional implications,\textsuperscript{502} it supported its view by reference to clear language of the rule. The court emphasized that a unanimous verdict requirement has a beneficial effect on the fact-finding process "by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury."\textsuperscript{503}

III. PROCEDURAL RIGHTS OF THE ACCUSED

A. Right to Counsel

1. General and statutory

Prior to the initiation of adversary criminal proceedings, the due process clause of the fifth amendment confers a right to counsel for

\textsuperscript{495} United States v. Marthaler, 571 F.2d 1104, 1105 (9th Cir. 1978) (in criminal contempt of court proceedings, pretrial stipulation that trial court would not impose sentence in excess of six months in jail made jury trial unnecessary).

\textsuperscript{496} Bloom v. Illinois, 391 U.S. 194, 211 (1968) (when no penalty is set by legislature, best evidence of actual seriousness of offense is penalty actually imposed).

\textsuperscript{497} FED. R. CRIM. P. 23.

\textsuperscript{498} Id. 31(a). In Apodaca v. Oregon, 406 U.S. 404, 406 (1972), however, the Supreme Court held that less than a unanimous verdict is acceptable in state cases.

\textsuperscript{499} FED. R. CRIM. P. 31(d).

\textsuperscript{500} 581 F.2d 1338 (9th Cir. 1978).

\textsuperscript{501} Id. at 1342.

\textsuperscript{502} The Fifth Circuit, however, in ruling that the right to a unanimous verdict may not be waived, based its ruling on the sixth amendment and rule 31. Sincoc v. United States, 571 F.2d 876, 878-79 (5th Cir. 1978). The Sixth Circuit reached a similar conclusion based only on rule 31. Hibdon v. United States, 204 F.2d 834, 836, 838 (6th Cir. 1953). The Third Circuit has held that unanimity is required based on the Supreme Court dicta in Apodaca v. Oregon. See note 498 supra. United States v. Scalzitti, 578 F.2d 507 (3d Cir. 1978).

\textsuperscript{503} 581 F.2d at 1341.
those party to criminal investigations. At the point where such proceedings begin, sixth amendment protections provide additional rights to counsel. In addition to judicial interpretations of constitutional requirements, Congress has enacted various statutes requiring the appointment of counsel when the accused is subject to governmental sanctions.

The Ninth Circuit in Jett v. Castaneda examined the scope of a section of the Criminal Justice Act. The Act provides that counsel be furnished to those "for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel." Upon review of the legislative history of this section of the Act, the court concluded that "Congress used [the term] 'Sixth Amendment' as shorthand for 'constitutional right to counsel,' whatever the specific derivation of the right."

If no constitutional right to counsel exists, federal statutes may create

---


507. 578 F.2d 842 (9th Cir. 1978).


509. Id.


511. 578 F.2d at 844-45. Jett involved the propriety of the appointment of counsel for an inmate who wished to speak with an attorney during the investigation of a fatal stabbing at the prison. Since the suspect's right to counsel in that situation was derived from the fifth amendment right against self-incrimination, it was posited that the "Sixth Amendment" reference in § 3006A provided the basis of the right "whatever the specific derivation of the right." Id. In addition, the Ninth Circuit held that absent an "indictment or other charge bringing a defendant before the court, or in the absence of a pending grand jury investigation, a district court has no general supervisory jurisdiction over the course of executive investigations." Id.
a right to counsel. In a deportation proceeding, for example, in which there is no constitutional right to counsel, the federal statutory right must be enforced.

The accused's right to counsel, however, is not without limitation. In 1978, for example, the Ninth Circuit found there to be no deprivation of the right to counsel when the defendant's counsel was removed because of a conflict of interest resulting from his representation of a co-defendant who had become a prosecution witness.

2. Waiver of the right to counsel

In an effort to "import a greater degree of flexibility and realism in the application of Miranda," the Ninth Circuit recently held that a suspect in a criminal investigation can waive his right to counsel, after asserting the right, but before actually speaking with an attorney. The court's rejection of a per se prohibition of such a waiver followed a host of inconsistent decisions on the waiver issue within the circuit. In formulating its decision in United States v. Rodriguez-Gastelum, the court attempted, by drawing from the "spirit of Mosley," to avoid

512. Castro-Nuno v. INS, 577 F.2d 577 (9th Cir. 1978) (no sixth amendment right to counsel in deportation proceeding).

513. 8 U.S.C. §§ 1252(b), 1362 provide aliens the privilege of representation in deportation proceedings. Castro-Nuno v. INS, 577 F.2d 577 (9th Cir. 1978), involved a deportation hearing where the attorney was present twice, but the hearing was continued at the I.N.A.'s request. At a third hearing, when the attorney representing Castro was absent, the defendant was deported although there was no waiver of counsel. The Ninth Circuit reversed the deportation order on the ground that the trial judge violated the defendant's statutory right to counsel. Id. at 579.

514. See United States v. Rich, 580 F.2d 929, 933-34 (9th Cir.), cert. denied, 439 U.S. 935 (1978) (federal agent's advice to witnesses that they need not confer with defense counsel did not interfere with defendant's sixth amendment right to counsel or his access to witnesses).

515. United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978) ("While a defendant's choice of counsel should not be subject to unnecessary interference, this right is not unlimited."). See United States v. Rohl, 588 F.2d 296 (9th Cir. 1978) (mem.) (representation by two attorneys is permitted on appeal for defendant in forma pauperis, but total compensation may not exceed the amount payable if only one attorney had been appointed).


517. Id. at 486-88.

518. 569 F.2d 482 (9th Cir.), cert. denied, 436 U.S. 919 (1978).

519. Id. at 487. See Michigan v. Mosley, 423 U.S. 96 (1975); Miranda v. Arizona, 384 U.S. 436 (1966). The Court in Miranda noted:

If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.
“imprison[jing] a man in his privileges.” The Ninth Circuit reasoned that, since the express procedures set down in Miranda concerning the right to silence had been modified, the similar language in Miranda concerning a defendant’s assertion of his right to counsel did not require actual consultation with an attorney before waiver. While acknowledging that the government bears a greater burden of showing waiver when the right to counsel is asserted than when the right to silence is asserted, the court concluded that the traditional waiver analysis provided in Johnson v. Zerbst would be sufficient to test the validity of the waiver.

Additionally, the Ninth Circuit held that statements made to a criminal suspect following the assertion of the right to counsel that can be distinguished from questioning, such as the presentation to him of available evidence, do not conflict with the requirements of Johnson v. Zerbst. Rodriguez-Gastelum provided the basis for several subsequent decisions that rejected claimed sixth amendment violations.

---

Id. at 473-74. The Court in Mosley allowed the questioning of a suspect who had earlier invoked his right to silence.

520. 569 F.2d at 487.

521. Id. at 486. See Miranda v. Arizona, 384 U.S. 436 (1966), in which the Court observed:

If, however, [the suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

Id. at 444-45.

522. 569 F.2d at 485 (citing Brewer v. Williams, 430 U.S. 387, 405 & n.10 (1977)).

523. 304 U.S. 458 (1938). The Johnson Court reasoned:

[Courts indulge every reasonable presumption against waiver of fundamental constitutional rights ... and ... we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Id. at 464 (citations omitted).

524. 569 F.2d at 488.

525. Id. Judge Goodwin, however, noted that the waiver must be “explicit, initiated by the suspect, and not in any way induced by the interrogators.” Id. at 489 (Goodwin, J., concurring and dissenting).

526. See United States v. Newell, 578 F.2d 827 (9th Cir. 1978) (valid waiver of right to counsel upon signing written waiver following the recitation of military equivalent to Miranda warnings); United States v. Evans, 575 F.2d 1286 (9th Cir.), cert. denied, 439 U.S. 854 (1978) (implied waiver found the day after the assertion of the right to counsel); United States v. Rose, 570 F.2d 1358 (9th Cir. 1978) (request for attorney, followed by cooperation with D.E.A. agents resulted in waiver of right to counsel). Cf. United States v. Nixon, 571 F.2d 1121 (9th Cir. 1978) (government failed to sustain burden of waiver where interrogation followed “hard on the heels of the demand for counsel.”).
In *United States v. Evans*, for example, illegal aliens were identified as passengers in Evans’s car when he attempted to enter a military base. The day after his request to speak to an attorney, he was questioned again by border patrol agents and he made incriminating statements. The court, in reliance on *Rodriguez-Gastelum*, concluded that the government sustained its heavy burden of demonstrating a voluntary waiver.

3. The right of self-representation

The implied sixth amendment right of self-representation was confirmed for defendants in state prosecutions in *Faretta v. California*. The rights incident to the sixth amendment right to counsel, such as confrontation and notice of charges, are said to be guaranteed to the “accused, not counsel.” The right to self-representation rests on the important value of free choice on which the Constitution is based. The Ninth Circuit has recognized that a defendant, in waiving his sixth amendment right to counsel, has constitutional as well as statutory justification for insisting upon self-representation.

In *Bittaker v. Enomoto* the Ninth Circuit reinstated the fundamental right of self-representation when it held that a state convict was entitled to federal habeas corpus relief because he was denied self-representation, even though the denial had occurred before *Faretta*.

Satisfaction of the traditional requirements of a knowing and intelligent waiver of the right to counsel is necessary before electing self-rep-

---

528. Id. at 1287.
529. 422 U.S. 806 (1975). See *Bittaker v. Enomoto*, 587 F.2d 400, 401 (9th Cir. 1978) (the federal right to self-representation existed in Ninth Circuit prior to *Faretta*).
531. Id. at 815 (quoting *Adams v. United States*, 317 U.S. 269, 279-80 (1942)).
532. *Bittaker v. Enomoto*, 587 F.2d 400 (9th Cir. 1978) (denial of right of self-representation alone sufficient to set aside conviction, actual prejudice need not be shown); *United States v. Price*, 474 F.2d 1223, 1227 (9th Cir. 1973) (pre-*Faretta* case holding that defendant need not show prejudice resulting from denial of right of self-representation). *But cf. Badger v. Cardwell*, 587 F.2d 968 (9th Cir. 1978). In *Badger* the Ninth Circuit observed that the right of self-representation is not to be confused with the right of presence. When the defendant represents himself, loses self-control and disrupts the trial, the rights to both presence and self-representation may not be curtailed unless it is also demonstrated that the defendant’s presence in the courtroom alone would still be too disruptive. *Id.* at 978-79.
533. 587 F.2d 400 (9th Cir. 1978).
534. Id. at 401-02. The court justified its decision in two steps: first, the right of self-representation existed within the Ninth Circuit before *Faretta*, pursuant to *Arnold v. United States*, 414 F.2d 1056, 1058 (9th Cir. 1969), cert. denied, 396 U.S. 1021 (1970); and second, federal courts must apply federal constitutional law in all cases properly before them under the federal habeas corpus statute. 587 F.2d at 402 n.1.
To establish that the waiver meets constitutional requirements to the satisfaction of the trial judge, the defendant should be addressed before trial and on the record informed of the nature of the charge, possible penalties, and the dangers of self-representation. Absent such a pre-trial, on-the-record finding of an intelligent and knowing waiver, a conviction may be reversed.

The *Faretta* right to forego representation of counsel does not, however, extend to a right to lay representation. While expressing a willingness to protect the accused’s sixth amendment rights, the Ninth Circuit is unwilling to forego the benefits it receives by allowing only qualified attorneys in court.

4. Effective assistance of counsel

It is implicit within the sixth amendment that counsel will perform at some minimal level of competency and effectiveness. In *Cooper v. Fitzharris* the Ninth Circuit resolved the uncertainty surrounding the standard by which an attorney’s performance is to be judged.

---

535. *Faretta v. California*, 422 U.S. 806, 835 (1975). In *Faretta* the Court explained: Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that “he knows what he is doing and his choice is made with eyes open.” *Id.* at 835 (citing Adams v. United States, 317 U.S. 269, 279 (1942)). See *United States v. Titus*, 576 F.2d 210, 211 (9th Cir.), cert. denied, 439 U.S. 860 (1978) (refusal to retain counsel, failure to fill out financial affidavit to qualify for appointed counsel, and statement of being better able to handle the case than an attorney, deemed waiver of counsel); *United States v. Aponte*, 591 F.2d 1247, (9th Cir. 1978) (conviction for bail jumping reversed when record did not reflect pre-trial waiver by accused of right to counsel).

536. *United States v. Gilling*, 568 F.2d 1507, 1309 (9th Cir. 1978) (per curiam) (“me too” uttered by a co-defendant is not proper showing of knowing and intelligent waiver of counsel); *United States v. Aponte*, 591 F.2d 1247 (9th Cir. 1978) (requirement of an on-the-record, knowing and intelligent, waiver of counsel before electing self-representation). Compare *Cooley v. United States*, 501 F.2d 1249, 1252 (9th Cir. 1974), cert. denied, 419 U.S. 1123 (1975) (failure to obtain an on-the-record waiver does not require reversal) with *United States v. Dujanovic*, 486 F.2d 182, 186-87 (9th Cir. 1973) (requirement of an on-the-record intelligent waiver must be met).

537. *United States v. Aponte*, 591 F.2d 1247 (9th Cir. 1978) (the specific finding of mental competency to stand trial should be distinguished from knowing and intelligent waiver of counsel).

538. *United States v. Wright*, 568 F.2d 142, 143 (9th Cir. 1978).

539. *Id*; *United States v. Marthaler*, 571 F.2d 1104, 1105 (9th Cir. 1978) (per curiam) (criminal contempt charge may lie against non-lawyer representing defendants in civil cases).


541. 586 F.2d 1325 (9th Cir. 1978) (en banc) (the appropriate standard is whether trial counsel failed to render reasonably competent and effective assistance).

542. *Id.* at 1328.
Cooper the Ninth Circuit rejected the traditional performance standard that required counsel's performance to be so poor as to reduce the trial to a "farce or mockery of justice." The Ninth Circuit held instead that the sixth amendment requires that "persons accused of crime be afforded reasonably competent and effective representation." While acknowledging that particularization of the "elements of the minimal performance to be expected of counsel . . . would serve to enhance the objectivity of the general standard," the Cooper court chose to refrain from enumerating such a checklist and noted that such matters "should be left to the good sense and discretion of the trial courts."

The majority also concluded that when such a claim is based on "specific acts and omission of counsel at trial . . . relief will be granted only if it appears that the defendant was prejudiced by counsel's conduct." The court distinguished this type of claim from those in which the harmless error standard is inapplicable. The harmless error rule would not apply when the claim is based on failure to either provide counsel or permit counsel to discharge his customary duties.

543. Id. at 1327. See McMann v. Richardson, 397 U.S. 759, 771 (1970) (effective assistance is that which is within "range of competence demanded of attorneys" in criminal cases).

544. 586 F.2d at 130. United States v. Kazni, 576 F.2d 238, 242 (9th Cir. 1978). The court in Kazni discussed the importance of a fully-developed factual record on the "ineffective" claim, noting that, while such records normally require collateral proceedings pursuant to 28 U.S.C. § 2255 (1976), if it was evident during the trial that the defendant's legal representation was so inadequate as obviously to deny him his Sixth Amendment right to counsel, or to deny him a fair trial in the due process sense, the failure of the trial court to take note sua sponte of the problem might constitute plain error which may be considered on direct appeal.

545. 586 F.2d at 242.

546. Id. at 1330.

547. Id. (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

548. 586 F.2d at 1332. The court noted that in such situations the "evil lies in what the attorney does not do, and is either not readily apparent on the record, or occurs at a time when no record is made." Concerning claims of "ineffective" counsel, the court observed that an analysis of the record would be helpful as the errors occur at trial and are "readily identifiable." Id.

In *Lowery v. Cardwell*\textsuperscript{550} the Ninth Circuit distinguished counsel's permissible passive refusal to actively pursue a particular line of defense from impermissible direct action that deprives the accused of a fair trial. Following what appeared to defense counsel to be a perjured statement by Lowery, counsel abruptly ceased examination of the defendant and called for a recess. In chambers, in absence of the defendant, the attorney moved to withdraw from the case declaring that he could not state the reason for his motion.\textsuperscript{551} This statement was held prejudicial because the trial judge, sitting as the finder of fact, could only rationally conclude that the defendant had suborned perjury.\textsuperscript{552} Although the Ninth Circuit was sympathetic to the dilemma of counsel seeking to uphold his ethical responsibilities while at the same time rendering a competent defense, the *Lowery* court found the attorney's behavior to be unduly prejudicial.\textsuperscript{553} While not prescribing the procedure to be followed under such circumstances, the court noted that, when counsel is surprised by his client's perjury, he should not act in such a fashion as to disclose his quandry to the fact finder.\textsuperscript{554} Relying on an alternative due process analysis, rather than on sixth amendment considerations,\textsuperscript{555} the Ninth Circuit concluded that, because the feasibility of withdrawal is unlikely, such action is unnecessary.\textsuperscript{556}

\textsuperscript{550} 575 F.2d 727 (9th Cir. 1978).
\textsuperscript{551} *Id.* at 729.
\textsuperscript{552} *Id.* at 730. See United States v. Dipp, 581 F.2d 1323 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 841 (1979). In *Dipp*, the defendant claimed that prosecutorial misconduct prevented evidence from reaching defense counsel and led to counsel's failure to advise the defendant to refuse to testify. The court rejected this claim, observing that "[t]he Supreme Court has clearly established that perjury is not a permissible response even when a witness' constitutional rights arguably have been violated." *Id.* at 1327.
\textsuperscript{553} 575 F.2d at 730.
\textsuperscript{554} *Id.* at 731 & n.4. The court noted that A.B.A. DISCIPLINARY RULE No. 7-102(A)(4) provides: "In his representation of a client, a lawyer shall not . . . knowingly use perjured testimony or false evidence." 575 F.2d at 730. Of significant consideration to the court were the A.B.A. Defense Function Standards which, while not on point for the specific factual situation, provide in relevant part:

[The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

A.B.A. DEFENSE FUNCTION STANDARDS § 7.7(c).
\textsuperscript{555} 575 F.2d at 730. In a concurring opinion, Judge Hufstedler observed that the issue should be based on the sixth amendment right to effective assistance of counsel. Of defense counsel she wrote, "his interest in saving himself from potential violation of the cannons was adverse to his client, and the end product was his abandonment of a diligent defense." *Id.* at 732.
\textsuperscript{556} *Id.* at 731.
B. Right to Speedy Trial

1. Pre-accusatorial delay

The importance of the sixth amendment right to a speedy trial has in recent years been increasing. While governmental fiscal policies have forced the criminal justice system to carry an enormous caseload, defendants have borne much of the hardship stemming from such policies. In response, Congress and the judiciary have attempted to fashion statutory and constitutional means of preventing oppressive delays between arrest and trial. These remedial measures, however, apply only to situations involving post-arrest delay. The justification for the difference in treatment lies in the belief that "post-arrest delay is inherently more capable of abuse and oppressive prejudice to the criminal defendant." The protection available to the individual in the pre-indictment setting stems from the applicable statute of limitations, with its built-in protection from "overly stale criminal charges." Additionally, the due process clause may provide relief in those situations where the pre-indictment delay is "oppressive."

In order for an accused to sustain a pre-indictment due process speedy trial claim, he must show actual prejudice resulting from the delay. The focus of the analysis at this point centers on the "reasons

557. United States v. Pallan, 571 F.2d 497, 499-501 (9th Cir.), cert. denied, 436 U.S. 911 (1978) ("[C]onsiderable attention has been directed to the fact that our criminal justice system is laboring under an ever-burgeoning case load.").
558. Tucker v. Wolff, 581 F.2d 235, 237 (9th Cir. 1978) ("A state government's allocation of resources plays a major role in creating congested dockets, and it is unfair to require defendants to bear the entire burden that results from the government's fiscal decisions.").
559. E.g., Barker v. Wingo, 407 U.S. 514 (1972) (judicial application of sixth amendment speedy trial provisions); United States v. Diaz-Alvarado, 587 F.2d 1002 (9th Cir. 1978) (remedy for violation of 18 U.S.C. § 3164 (1976) (Speedy Trial Act) is pre-trial release, not reversal of conviction or dismissal of indictment); United States v. Groves, 571 F.2d 450 (9th Cir. 1978) (defendant's assertion of speedy trial right pursuant to 18 U.S.C. § 3161(b) resulted in new indictment; court reversed based on valid vindictive prosecution claim).
564. United States v. Titus, 576 F.2d 210, 211 (9th Cir.), cert. denied, 439 U.S. 860 (1978) ("[A] finding of actual prejudice is a prerequisite to finding a due process violation.").
for the delay as well as the prejudice to the accused.\textsuperscript{565} The intrinsic difficulty in proving such a claim lies in the broad discretion granted the government in determining the point at which actual charges are filed.\textsuperscript{566} A claim of prejudicial delay may prevail when the defendant can show, for example, that the delay was motivated by a desire to harass the accused or to gain a tactical advantage.\textsuperscript{567}

In \textit{Arnold v. McCarthy},\textsuperscript{568} the Ninth Circuit reiterated that "the due process test for impermissible pre-accusatorial delay requires a delicate balance of the circumstances of each case."\textsuperscript{569} The prejudice must be "actual and not speculative"\textsuperscript{570} and must be compared with its justifying circumstances.\textsuperscript{571} In \textit{United States v. Mays},\textsuperscript{572} the Ninth Circuit in 1977 identified a third factor that should enter the due process balancing analysis—the length of the delay itself.\textsuperscript{573} The \textit{Arnold} court, however, rejected this factor from the analysis,\textsuperscript{574} allowing prosecutorial discretion "even if the suspect's defense might be somewhat prejudiced by the delay."\textsuperscript{575}

2. Post-accusatorial delay

The sixth amendment right to a speedy trial attaches once a person becomes accused either by or in a formal indictment or information or

\textsuperscript{566} \textit{Id.} at 791. \textit{See} Hoffa v. United States, 385 U.S. 293, 310 (1966). The Court in \textit{Hoffa} noted:

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 Fourth 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.

\textsuperscript{567} United States v. Barney, 568 F.2d 134, 136 (9th Cir.), \textit{cert. denied}, 435 U.S. 955 (1978) (defendant failed to show intentional delay to gain tactical advantage).
\textsuperscript{568} 566 F.2d 1377 (9th Cir. 1978).
\textsuperscript{569} \textit{Id.} at 1383.
\textsuperscript{570} \textit{Id.} at 1384. The \textit{Arnold} court failed to find actual prejudice even though the delay prevented a potential witness from testifying; more than a mere assertion that the "witness might have been useful" is needed. \textit{Id.} at 1385.
\textsuperscript{571} \textit{Id.} at 1383.
\textsuperscript{572} 549 F.2d 670 (9th Cir. 1977).
\textsuperscript{573} \textit{Id.} at 678.
\textsuperscript{574} 566 F.2d at 1383-84 n.1. Although the length of the delay had sixth amendment relevance, the court concluded that it was not of great import under a due process analysis. Delay was said to be evidence of possible, rather than actual, prejudice; a primary showing of actual prejudice must be made before the due process analysis begins. \textit{Id.}
\textsuperscript{575} \textit{Id.} at 1385.
else by the actual restraints imposed by arrest and holding to answer to a criminal charge. In determining whether a delay has extended beyond permissible bounds, the Ninth Circuit will balance four interrelated considerations: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. Although the test seems explicit, its application varies depending upon other relevant circumstances.

The gravity of the alleged crime, for example, may be considered in the equation.

In Tucker v. Wolff the court suggested that there was some point at which an alleged "congested docket" excuse will become "so unacceptable that by itself it violates the right to a speedy trial." The Supreme Court in Barker v. Wingo identified three categories of delay that should be assigned different weight in the analysis: (1) deliberate delay to hamper the defense demands a heavy weight against the government; (2) negligence or overcrowded courts should receive less weight against the government although such reason is the "ultimate responsibility" of the government; (3) valid reasons such as missing witnesses will justify appropriate delay. The court will also consider the defendant's timely assertion of his right, and this assertion "is entitled to strong evidentiary weight in determining whether defendant is being deprived of the right. . . . [F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." The defendant is therefore entitled to an evidentiary hearing.

577. Arnold v. McCarthy, 566 F.2d 1377, 1382 (9th Cir. 1978) ("[A]lthough standards are still imprecise, the courts have been more willing to find delay to be constitutionally impermissible.").
579. Id. at 533. See United States v. Martin, 587 F.2d 31, 33 (9th Cir. 1978) ("[D]efendant failed to show that the length of the delay was anything more than de minimus; . . . did not explain his failure to assert his speedy trial rights until appeal; and . . . failed to show prejudice . . . .").
580. Barker v. Wingo, 407 U.S. 514, 531 (1971) ("[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."). See United States v. Dreitzler, 577 F.2d 539 (9th Cir. 1978) (nine-month delay acknowledged as lengthy but allowable because of complex nature of the case).
581. 581 F.2d 235 (9th Cir. 1978).
582. Id. at 237. The delay in Tucker of 280 days was by itself sufficient to substantiate the claim of denial of a speedy trial. Id. at 238.
584. Id. at 531.
585. Id. at 531-32.
regarding his claim of timely assertion of the right.\footnote{586}{See Tucker v. Wolff, 581 F.2d 235, 237 (9th Cir. 1978) (public defender’s acquiescence to delay required a showing that defendant knowingly consented thereto).}

The prejudice to the defendant is to be viewed in terms of the interests that the right is designed to protect—those comprising a fair trial.\footnote{587}{These interests include: (1) prevention of oppressive pretrial incarceration; (2) minimization of the anxiety and concern of the accused; and (3) limitation of the possibility that the defense will be impaired. “The most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” Barker v. Wingo, 407 U.S. at 532.}

Although prejudice itself is not a strict requirement in order to sustain a claim of violation,\footnote{588}{Moore v. Arizona, 414 U.S. 25, 26 (1973) (per curiam) (prejudice not essential to claim of violation of speedy trial right).} nonprejudice was asserted by the Ninth Circuit this term in denying such claims.\footnote{589}{United States v. Dreitzler, 577 F.2d 539, 550 (9th Cir. 1978) (assertion of lost or pilfered records, changed testimony by witnesses and police harassment require more than self-serving hearsay statements). See Blackburn v. United States District Court, 564 F.2d 332, 334 (9th Cir. 1977) (per curiam) (“No showing has been made that any witness’ memory as to given matters has been dimmed or that the presentation of petitioner’s defense has been otherwise impaired as a result of this delay.”).}

C. Bail

“A bail bond is a contract between the government and the defendant and his surety, the forfeiture of which results in the surety becoming the government’s debtor.”\footnote{590}{Id.} The terms of the bond contract are strictly construed\footnote{591}{Id.} and, when there is a breach of a condition of the bond, the court declares a forfeiture.\footnote{592}{Id.} In 1978 the Ninth Circuit rejected a claim that a bail bond is to be interpreted by reference to applicable state law\footnote{593}{United States v. Vera-Estrada, 577 F.2d 598, 599-600 (9th Cir. 1978). The appellant in Vera claimed that CAL. PENAL CODE § 1305(a) (West Supp. 1978), requiring notification of the surety within 30 days of forfeiture, was to be read as an implied term of the bail bond contract. The appellant relied on dictum in United States v. Gonware, 415 F.2d 82 (9th Cir. 1969), which indicated that a bail bond is to be interpreted in accordance with applicable state law. The Ninth Circuit in Vera, however, expressed its belief that FED. R. CRIM. P. 46(e) is the exclusive rule of procedure governing such matters in federal court. 577 F.2d at 599-600.} and held that a surety is entitled to notice of forfeiture at the time the “government moves for judgment but not when the defendant fails to appear and his bond is forfeited.”\footnote{594}{577 F.2d at 600. See FED. R. CRIM. P. 46(e).}

In United States v. Jernigan,\footnote{595}{582 F.2d 1211 (9th Cir.), cert. denied, 439 U.S. 991 (1978).} the Ninth Circuit cautioned that Fed-
general Rule of Criminal Procedure 9(c)(1),\textsuperscript{596} requiring the arresting officer to bring an arrested person promptly before the court to obtain bail, must be satisfied or dismissal of the indictment may be warranted.\textsuperscript{597} In \textit{Jernigan} a warrant was issued on Tuesday, but the arrest was not made until late the following Friday afternoon. The arresting officer did not grant the defendant’s request to be taken before a magistrate and have bail set, and the defendant subsequently spent a three-day vacation weekend in jail. While acknowledging the deliberateness of the delay, the court found dismissal of the indictment to be “too drastic a remedy in this case.”\textsuperscript{598}

IV. Confessions

\textit{Miranda v. Arizona}\textsuperscript{599} established the basic guidelines to be followed by law enforcement officers when questioning suspects in a custodial setting.\textsuperscript{600} Before the suspect is questioned, he must be told that he has the right to remain silent, that anything he says may be used against him, that he has the right to consult with an attorney prior to any questioning, and that if he desires an attorney and cannot afford one, one will be appointed for him by the court.\textsuperscript{601} These warnings were seen by the Court as the only effective way to combat the inherent compulsive atmosphere of custodial questioning.\textsuperscript{602} A defendant’s refusal to answer questions after receiving \textit{Miranda} warnings may not be brought to the jury’s attention for either substantive or impeachment purposes.\textsuperscript{603}

A. Custodial Questioning

\textit{Miranda} warnings are required only when the questioning occurs in

\textsuperscript{596} FED. R. CRIM. P. 9(c)(1).
\textsuperscript{597} 582 F.2d at 1214.
\textsuperscript{598} \textit{Id}.
\textsuperscript{599} 384 U.S. 436 (1966).
\textsuperscript{600} \textit{Id} at 444.
\textsuperscript{601} \textit{Id} at 444-45, 467-74, 478-79.
\textsuperscript{602} \textit{Id} at 445-58, 467-68. If such warnings are not given prior to custodial questioning, the defendant’s statements may be used for impeachment purposes only. Harris v. New York, 401 U.S. 222 (1971).
\textsuperscript{603} See United States v. Weiner, 578 F.2d 757, 765 (9th Cir.) (per curiam), \textit{cert. denied}, 439 U.S. 981 (1978) (prosecutor’s reference to defendant’s failure to testify held proper, as the government “took no unfair advantage of the situation” for substantive or impeachment purposes); Douglas v. Cupp, 578 F.2d 266, 267 (9th Cir. 1978), \textit{cert. denied}, 99 S. Ct. 865 (1979) (question by prosecutor “Did he make any statements to you?” and the answer “No” held to have violated defendant’s \textit{Miranda} rights); United States v. Lorenzo, 570 F.2d 294, 297 (9th Cir. 1978) (government could not use the fact at trial that defendant had claimed his constitutional privileges at trial) (citing \textit{Miranda v. Arizona}, 384 U.S. 436, 438 n.37 (1966)).
a custodial setting and not all police questioning is necessarily custodial. For example, volunteered statements, as well as questioning during an investigatory stop, do not require Miranda warnings, "even though one's freedom of action is inhibited to some degree." Statements obtained as a result of questioning by foreign authorities who did not give Miranda warnings are admissible if found trustworthy, unless the questioning is the result of a joint venture between the foreign and United States authorities.

B. Voluntariness

A confession is not automatically admissible, even if the required Miranda warnings are given. No warning can make an involuntary

604. See, e.g., United States v. Scharf, No. 77-3080, slip op. at 4017 (9th Cir. Dec. 7, 1978) (defendant who arrived at his home to find it surrounded by patrol cars and who was questioned in one of those patrol cars by police, held to have been in custody for Miranda purposes); United States v. McCrea, 583 F.2d 1083, 1086 (9th Cir. 1978) (per curiam) (defendant who was told by officers searching his home pursuant to a search warrant that he was not in custody, and who proceeded to make incriminatory statements, held not to have been in custody as he was free to leave the premises at any time); United States v. Walker, 576 F.2d 253, 256 (9th Cir. 1978) (per curiam).

The Ninth Circuit test of custodial interrogation is an objective reasonable man test. The factors to be considered are the language used to summon him, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and pressure exerted to detain him. If the person reasonably believes he can not leave freely, he is considered in custody.

605. See, e.g., Pavao v. Cardwell, 583 F.2d 1075, 1077 (9th Cir. 1978) (per curiam) (defendant who was ordered out of car and directed to lie on ground after high speed chase and who simultaneously gave statement, without being questioned, was held to have volunteered the statement; Miranda warnings, therefore, were not required).

606. The investigatory stop, discussed in Terry v. Ohio, 392 U.S. 1 (1968), is a stop made by an officer who has only a reasonable suspicion, rather than probable cause, to suspect that criminal activity is afoot and that the suspect might be involved. Id. at 30.

607. United States v. Collom, No. 77-1040, slip op. at 1867 (9th Cir. June 15, 1978) (Miranda warnings are not required on Terry-type stop until probable cause to arrest is found). See also United States v. Dipp, 581 F.2d 1323, 1327 (9th Cir. 1978), cert. denied, 99 S. Ct. 841 (1979) (failure to give defendant Miranda warnings prior to his testifying before the grand jury does not make testimony inadmissible in subsequent perjury trial).

608. United States v. Emery, 591 F.2d 1266, 1268 (9th Cir. 1978) (questioning of defendant by Mexican authorities was a "joint venture" with American authorities, therefore, Miranda warnings were required). Cf. United States v. Schmidt, 573 F.2d 1057, 1063 (9th Cir.), cert. denied, 439 U.S. 881 (1978) (statements originally obtained by Peruvian authorities and later by DEA agents held to be products of separate operations and therefore admissible).

609. United States v. Johnson, No. 77-3808, slip op. at 4121 (9th Cir. Dec. 19, 1978) ("In addition to meeting the requirements set forth in Miranda, ... statements made by a defendant, in order to be admissible, must also be the product of a free and rational choice, as evidenced by the 'totality of the circumstances' surrounding the statements") (citation omitted); United States v. Curtis, 568 F.2d 643, 646-47 (9th Cir. 1978) (Miranda warnings not
confession admissible. The judge must determine whether the confession was given voluntarily by considering the totality of the circumstances present at the time of questioning. The compulsion invalidating the confession can arise from the threat of either penal sanctions or certain noncriminal sanctions.

C. Waiver

After a suspect has been given Miranda warnings, he may waive his right to remain silent or his right to counsel, or both. The waiver must be made knowingly, intelligently and voluntarily. Whether

---

610. See, e.g., Davis v. North Carolina, 384 U.S. 737, 740-42 (1966) (confession obtained during sixteen-day incommunicado questioning held involuntary; Miranda warnings are a significant factor in determining the voluntariness of a statement); United States v. Schmidt, 573 F.2d 1057, 1062 (9th Cir.), cert. denied, 439 U.S. 881 (1978) (confession to DEA agents which followed involuntary confession given to Peruvian agents, held voluntary) (the determination of voluntariness of a statement is done on a case-by-case basis; the test is “whether the accused, at the time he confesses, is in possession of ‘mental freedom’ to confess or deny a suspected participation in a crime.”) (quoting Lynons v. Oklahoma, 322 U.S. 596, 602 (1944)). Cf. United States v. Duncan, 570 F.2d 292, 293 (9th Cir. 1978) (per curiam) (statement made by defendant properly admitted against him, when he had been subpoenaed to appear before grand jury, had been given full Miranda warnings, and had executed a written waiver); United States v. Oaxaca, 569 F.2d 518, 522-23 (9th Cir.), cert. denied, 439 U.S. 926 (1978) (confession of defendant in bank robbery case who “seemed alert,” gave “fairly specific answers” to officers’ questions, was in good condition and not suffering adverse symptoms from medical problems was voluntary); Cuevas-Ortega v. INS, 588 F.2d 1274, 1277 (9th Cir. 1979) (because deportation proceedings are civil and not criminal in nature, the analysis of voluntariness is markedly different from that used in a criminal situation).

611. Sims v. Georgia, 385 U.S. 538, 544 (1967) (trial judge must make preliminary finding of voluntariness of confession and this finding must clearly appear from the record); United States v. Johnson, No. 77-3808, slip op. at 4121 (9th Cir. Dec. 19, 1978) (the “voluntariness test” is whether the confession was ‘extracted by any sort of threats or violence, . . . or by the exertion of any improper influence.’) (quoting Hutto v. Ross, 429 U.S. 28, 30 (1976)); United States v. Brown, 575 F.2d 746, 748 (9th Cir. 1978) (per curiam) (record must show trial court’s consideration of the voluntariness issue with unmistakable clarity). See also United States v. Curtis, 568 F.2d 643, 647 (9th Cir. 1978) (voluntariness will not be considered on appeal if not contested in the trial court) (“[I]t is particularly essential that this issue be raised before or during trial.”)

612. Ryan v. Montana, 580 F.2d 988, 990 (9th Cir. 1978) (compulsion not found in refusing to grant defendant immunity in probation revocation hearing). See Lefkowitz v. Cunningham, 431 U.S. 801, 804-06, 808-09 (1977) (choice of waiving immunity or losing job held compulsion within terms of fifth amendment).

613. Miranda v. Arizona, 384 U.S. 436, 475 (1966). The decision to speak must be an "unfettered exercise of [the defendant's] own will." Id. at 460. Cf. United States v. Botero, 589 F.2d 430, 433 (9th Cir. 1978), cert. denied, 99 S. Ct. 2162 (1979) (statement admissible when defendant, after waiving Miranda rights, was denied the right to make a phone call, when the understood purpose of the call was not to obtain an attorney).

there is a valid waiver is a factual inquiry, decided on a case-by-case basis. Although the suspect may revoke his waiver, and thereby preclude further questioning, pauses between answers given after a waiver will not necessarily serve as a revocation, nor will the suspect's choice to answer some questions and not others.

Once a defendant has claimed his right to remain silent, he may later change his mind and answer police questions. In Michigan v. Mosley, the Supreme Court ruled that a defendant had withdrawn his prior assertion of the fifth amendment right against self-incrimination. The Court, however, has not decided whether a defendant who has invoked his fifth or sixth amendment right to counsel may waive that right prior to consulting with counsel or outside the presence of counsel. The Ninth Circuit, however, in United States v. Rodriguez-Gastelum held that a defendant's statement obtained after an assertion of his fifth amendment right to counsel is not per se inadmissible if made prior to his consulting with counsel. Other circuits are divided on this issue, and prior to Rodriguez-Gastelum the Ninth Circuit's

615. See United States v. Schmidt, 573 F.2d 1057, 1062 (9th Cir.), cert. denied, 439 U.S. 881 (1978) (determination of admissibility of confession is on a case-by-case basis). See, e.g., United States v. Martinez, 588 F.2d 1227, 1234-35 (9th Cir. 1978) (defendant who testified to understanding Miranda warnings on a printed waiver card, which he had signed, held to have waived his Miranda rights knowingly and intelligently, although the oral warnings were given in Spanish spoken with Mexican accent, while defendant spoke Spanish with a Cuban accent; United States v. Basile, 569 F.2d 1053, 1056-57 (9th Cir.), cert. denied, 436 U.S. 920 (1978) (defendant was given Miranda warnings twice within forty-five minutes, freely talked with officers after these warnings and testified in his own defense as an intelligent and articulate witness; held to have impliedly waived Miranda rights).

616. United States v. Lorenzo, 570 F.2d 294, 298 (9th Cir. 1978) (failure to respond to one question out of several held not a revocation of defendant's waiver of Miranda rights).


618. See United States v. Ford, 563 F.2d 1366, 1367 (9th Cir.), cert. denied, 434 U.S. 1021 (1977) (intermittent silences in response to questions did not revoke prior Miranda waivers).

619. 423 U.S. 96 (1975). The defendant in Mosley was arrested for robbery, and before interrogation on that crime, was given his Miranda warnings. Defendant invoked the Miranda rights and questioning ceased. More than two hours later, another interrogator returned, gave the defendant new Miranda warnings, and began questioning concerning an unrelated murder. The Supreme Court held a statement, given during the second interrogation, to be admissible against the defendant in a murder prosecution. The Mosley Court found that per se application of the language in Miranda would be too restrictive on police and in effect would imprison the defendant in his rights. Id. at 102.

620. Id. at 101 n.7. ("The present case does not involve the procedures to be followed if the person in custody asks to consult with a lawyer, since Mosley made no such request at any time.")

621. 569 F.2d 482 (9th Cir.) (en banc), cert. denied, 436 U.S. 919 (1978).

622. The Fifth Circuit currently is split. Compare United States v. Massey, 550 F.2d 300, 307 (5th Cir. 1977) with United States v. Hodge, 487 F.2d 945, 946 (5th Cir. 1973) (per
position had been unclear. In *United States v. Flores-Calvillo*,\(^2\) for example, one Ninth Circuit panel had held that, once a request for counsel was made, no questioning could take place until after the defendant had consulted with counsel, and any statement obtained in the meantime would be excluded. In *United States v. Phester*,\(^3\) another panel held that such a request for counsel could be waived prior to defendant's consulting with counsel, and thereby make a statement given during this period admissible. The *Rodriguez-Gastelum* court faced a choice between the spirit or letter of *Miranda*. Seven members of the panel chose the former,\(^4\) allowing the defendant to waive his sixth amendment right to counsel after having asserted that right, provided the waiver is proper.\(^5\)

*Rodriguez-Gastelum* allows a police officer to inform a suspect of the evidence against him after the suspect has requested counsel. If the suspect is not badgered, pressured or coerced, he may then waive his previously invoked right to counsel.\(^6\)

The standard of waiver adopted by the *Rodriguez-Gastelum* court caused three members of the panel to dissent in part. The dissent proposed a stricter standard of waiver, observing that "[t]he waiver ... [should] be explicit, initiated by the suspect, and not in any way induced by the interrogators."\(^7\) The majority rejected this standard, as curiam. The Eighth and Tenth Circuits appear consistent with the new Ninth Circuit position. *See* United States v. Scogin, 459 F.2d 182, 184 (8th Cir. 1972); Halloway v. United States, 495 F.2d 835, 839 (10th Cir. 1974). The Seventh Circuit recently reserved this question. White v. Finkbeiner, 570 F.2d 194, 200-01 n.3 (7th Cir. 1978) (question whether right can ever be waived by defendant before it is honored is left "for another day").

\(^2\) No. 75-3785 (9th Cir. July 14, 1976), opinion vacated and remanded in light of *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir. 1978) (en banc), 571 F.2d 512 (9th Cir. 1978).

\(^3\) 544 F.2d 353 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977).

\(^4\) "[A] majority of the court is now satisfied that the *per se* rule ... is neither required by the Sixth Amendment nor consistent with good law enforcement. ... *Miranda* must be applied with ... 'flexibility and realism' ..." United States v. Rodriguez-Gastelum, 569 F.2d 482, 486 (9th Cir.) (en banc), cert. denied, 436 U.S. 919 (1978).

\(^5\) *Id.* at 487-88 (quoting United States v. Flores-Calvillo, No. 75-3785, slip op. at 4-5 (9th Cir. July 14, 1976), opinion vacated and remanded in light of United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir. 1978) (en banc), 571 F.2d 512 (9th Cir. 1978)).

\(^6\) 569 F.2d at 485 n.6, 487-88. *See* Pierce v. Cardwell, 572 F.2d 1339, 1341 (9th Cir. 1978) (police cannot question defendant after he has requested counsel, but may present the evidence they have against him and resume questioning should the defendant, after seeing this evidence, waive his request); United States v. Wilson, 571 F.2d 455, 457 (9th Cir. 1978) (statement made by defendant who had requested counsel but later waived his request after being informed of additional charge against him, was properly admitted against him at trial).

\(^7\) United States v. Rodriguez-Gastelum, 569 F.2d 482, 489 (9th Cir.) (en banc), cert. denied, 436 U.S. 919 (1978) (Anderson, Browning & Goodwin, Circuit JJ., dissenting).
it would have the same effect as a per se exclusion and would be, therefore, too restrictive.\textsuperscript{629}

V. TRIALS

A. Elements of Crimes

1. Intent

To sustain a conviction for a federal crime the prosecution is required to allege in the indictment,\textsuperscript{630} as well as to prove at trial, every element of the offense. This includes the element of criminal intent.\textsuperscript{631} Although the defendant is responsible for proving his appropriate defenses, the prosecution may not shift this essential element of the offense to the defendant.\textsuperscript{632} There are, however, exceptions to the

\textsuperscript{629} Id. at 488.

\textsuperscript{630} United States v. King, 587 F.2d 956, 963 (9th Cir. 1978) (failure of an indictment to detail each element of the charged offense generally constitutes a fatal defect).

\textsuperscript{631} United States v. Erksine, 588 F.2d 721, 722 (9th Cir. 1978) ("The rule that a defendant may rebut or seek to disprove the Government's case by showing that one or more elements of a criminal offense did not occur extends to any of the mental components necessary to establish guilt of the crime in question."); United States v. Ballesteros-Cordova, 586 F.2d 1321, 1323 (9th Cir. 1978) (per curiam) (tolling of statute of limitations pursuant to 18 U.S.C. § 3290 (1976) requires prosecution to prove concealment with intent to avoid arrest or prosecution); United States v. Edler Indus., Inc., 579 F.2d 516, 522 (9th Cir. 1978) (evidence of non-military uses of information is relevant to the issue of scienter; whether the defendant knew or should have known he was violating the law); United States v. Brown, 578 F.2d 1280, 1284 (9th Cir. 1978) (government required to prove intent relating to fraudulent act, but not as to knowledge that the instrument used is a security under the Security Act); United States v. McDonald, 576 F.2d 1350, 1359 (9th Cir.), cert. denied, 439 U.S. 830 (1978) (no specific intent proven "because the logical relationship between what he could have known and a specific intent has no rational basis"); United States v. Burnim, 576 F.2d 236, 237 (9th Cir. 1978) (unarmed bank robbery, as defined in 18 U.S.C. § 2113(a) (1976) is a general, rather than a specific intent crime); United States v. Pallan, 571 F.2d 497, 501 (9th Cir.), cert. denied, 436 U.S. 911 (1978) (in prosecution for tax evasion, the term "willfully" requires proof of specific intent); United States v. Lorenzo, 570 F.2d 294, 299 (9th Cir. 1978) (passing of counterfeit bill is not criminal offense in violation of 18 U.S.C. § 471 (1976) unless government proves knowledge of counterfeit nature and intent to pass "bad money"); United States v. Jones, 569 F.2d 499, 501-02 (9th Cir.), cert. denied, 436 U.S. 908 (1978) (refusal by trial court to instruct that "intent to avoid confinement was an element" of proof required for conviction for escape not reversible error); United States v. Jenkins, 567 F.2d 896, 897 (9th Cir. 1978) (government has the burden of proving the specific intent charged).

\textsuperscript{632} Tucker v. Wolff, 581 F.2d 235 (9th Cir. 1978). In Tucker the trial court instructed the jury that Nev. Rev. Stat. § 205.065 (1973) created a presumption that "anyone who unlawfully enters one of the structures does so 'with intent to commit grand or petit larceny or a felony therein, unless such unlawful breaking and entering or unlawful entry shall be explained by testimony satisfactory to the jury to have been made without criminal intent'," Id. at 238. Tucker's defense was that he was too intoxicated to form the intent required to commit the crime of burglary. The Ninth Circuit concluded that such a statutory presump-
general requirement of intent in some federal statutes.\textsuperscript{633}

In \textit{United States v. Erne},\textsuperscript{634} the court stated the factors that must be considered in evaluating the propriety of a criminal statute which does not require proof of a mental state, but rather imposes strict liability for a defendant's actions: (1) behaviors that are not positive aggressions, but rather neglect of a public welfare duty;\textsuperscript{635} (2) the nature of assumed responsibilities places the accused in a position to prevent the violation;\textsuperscript{636} (3) penalties for the violation are usually small and do no grave damage "to the accused's reputation;"\textsuperscript{637} (4) the "probability of regulation is so great that one who does the act is presumed to be aware of the regulation;"\textsuperscript{638} and (5) a legislative history that reveals an intention not to require proof of intent.\textsuperscript{639}

When the criminal statute is unclear as to the requisite level of intent, an analysis of the legislative history is required.\textsuperscript{640} In order to prove the requisite intent, the prosecution is entitled to present circumstantial evidence from which the trier of fact may draw reasonable inferences.\textsuperscript{641}

\begin{itemize}
\item \textsuperscript{633} See United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978). In \textit{Mowat}, the defendant was convicted of violating 18 U.S.C. \textsection{} 1382 (1976), which provides: "Whoever, within the jurisdiction of the United States, goes upon any military, naval or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation . . . [s]hall be fined not more than $500 or imprisoned not more than six months, or both." The court, noting that the statute did not require intent on its face and the common law term of "trespass" was not used concluded, that, "Congress clearly did not make motive or intent a factor in determining guilt and on these facts the absence of \textit{mens rea} does not invalidate the statute." \textit{Id}. at 239.
\item \textsuperscript{634} 576 F.2d 212 (9th Cir. 1978). The defendant in \textit{Erne} was convicted under 26 U.S.C. \textsection{} 7215 (1976) for failure to deposit withholding and FICA taxes into a bank trust account. The defendant asserted that such a crime required proof of intent to violate tax law. The Ninth Circuit, after an analysis of the factors, concluded that the statute, enacted in order to avoid "the difficulty of proving willfulness," was justified. \textit{Id}. at 215. \textit{See} \textsection{} 1958 U.S. CODE CONG. & AD. NEWS 2187, 2191.
\item \textsuperscript{635} 576 F.2d at 214.
\item \textsuperscript{636} \textit{Id}.
\item \textsuperscript{637} \textit{Id}.
\item \textsuperscript{638} \textit{Id}. at 214-15. \textit{See} Lambert v. California, 355 U.S. 225 (1957) (registration provision violates due process where no "willfulness" need be shown for conviction and applied to person who has no knowledge of duty to register).
\item \textsuperscript{639} 576 F.2d at 215.
\item \textsuperscript{640} United States v. Mowat, 582 F.2d 1194, 1203 (9th Cir. 1978) ("[T]he plain meaning of the statute . . . indicates that specific intent need not be proven."); United States v. Graham, 581 F.2d 789, 790 (9th Cir. 1978) (nothing in the legislative purpose or history suggests that Congress intended the corrupt purpose to be the only purpose).
\item \textsuperscript{641} United States v. Brown, 578 F.2d 1280, 1286 (9th Cir. 1978) (trier of fact can view evidence as a whole and consider relevant circumstances in determining specific intent);
\end{itemize}
The courts often must interpret statutory language that was intended to convey the level of intent required for conviction. Whereas the requirements of the phrase "knowing" have been addressed and settled by the Ninth Circuit, the meaning of the term "willful" has been interpreted in many ways depending on the specific statute. Generally, "an act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with a purpose either to disobey or disregard the law." The term "willful," however, is to be distinguished from "knowing" in that one can "willfully" break the law without knowing of its existence.

2. Conspiracy

The crime of conspiracy is a separate and distinct offense. In order to constitute a conspiracy, the following elements must be present: (1) two or more persons; (2) an agreement between the persons; and (3) at least one overt act in furtherance of the conspiracy. United States v. Winn, 577 F.2d 86, 91 (9th Cir. 1978) (circumstantial evidence can be used to prove any fact); United States v. McDonald, 576 F.2d 1350, 1360 (9th Cir.), cert. denied, 439 U.S. 830 (1978) (circumstantial evidence is sufficient to find intent to defraud); United States v. Young, 573 F.2d 1137, 1139 (9th Cir. 1978) ("conspiracy may be proved by evidence entirely circumstantial and viewed collectively").

642. United States v. Jewel, 532 F.2d 697, 700 (9th Cir.), cert. denied, 426 U.S. 951 (1976) ("knowingly" requirement may be satisfied upon showing that the defendant acted with "deliberate ignorance . . . or an awareness of the high probability of the existence of the fact in question"). See United States v. Valle-Valdez, 554 F.2d 911, 913-14 (9th Cir. 1977) ("knowing" requires subjective awareness of a high probability of the existence of the fact in question and a conscious or deliberate disregard of that probability by the defendant in order to remain ignorant of the fact).

643. United States v. McIntyre, 582 F.2d 1221, 1225 (9th Cir. 1978) ("The meaning of 'willful' has not been uniformly applied in federal criminal statutes.").

644. United States v. Winn, 577 F.2d 86, 91 (9th Cir. 1978). See United States v. McIntyre, 582 F.2d 1221 (9th Cir. 1978). The defendants in McIntyre were convicted of the willful interception of oral communications by wire in violation of 18 U.S.C. § 2511(1)(a)-(b) (1976). The Ninth Circuit concluded that a willful state of mind to do the illegal act, rather than a willful desire to break the law, was the pivotal issue. 582 F.2d at 1225. Similarly, in United States v. Dreitzler, 577 F.2d 539 (9th Cir. 1978), when the language requiring "bad purpose" was omitted from the jury instruction, the court found there to be no error when the instruction as a whole conveyed the need for the necessary specific intent. Id. at 549. See also United States v. Jones, 569 F.2d 499, 501-02 (9th Cir.), cert. denied, 436 U.S. 908 (1978) (willful failure to remain or return does not require an intent to avoid confinement).

645. United States v. Brown, 578 F.2d 1280 (9th Cir. 1978). The defendant in Brown was convicted in violation of 15 U.S.C. § 77(a) (1976). The Ninth Circuit concluded that knowledge that the items involved in the fraud were securities as defined by the statute was unimportant as long as specific intent regarding the fraudulent, misleading or deceitful conduct was demonstrated. 578 F.2d at 1284.

646. United States v. Carman, 577 F.2d 556 (9th Cir. 1978). In Carman, the defendant was acquitted of one of the substantive offenses that gave rise to the conspiracy. As a result, the Ninth Circuit reversed the conspiracy count because of the following combination of factors in the case: the conspiracy count was of the "composite" type; the jury received a "one-is-enough" charge, making it impossible to know upon which crime the conspiracy verdict was based; and one of the substantive counts was reversed for failure to state a crime.
order to sustain a conspiracy conviction, the prosecution must establish an agreement to engage in criminal activity accompanied by an overt act committed in furtherance of the agreement. Whereas the defendant must be more than a mere spectator, only "slight evidence" is needed to link the defendant to the established conspiracy. The Ninth Circuit in 1978 emphasized that the prosecution must establish beyond a reasonable doubt the defendant's connection with the conspiracy, however slight it may be. 

Id. at 566. The court emphasized that such a result is limited to the situation in which all three factors exist and, therefore, in other situations a conspiracy conviction may prevail even if all of the substantive counts are reversed. Id. at 567-68. See United States v. Talkington, 588 F.2d 415, 417 (9th Cir. 1978) ("one-is-enough" charge makes it impossible to affirm conviction when three of five false statements were not found to be material). Cf. United States v. Miller, 546 F.2d 320, 325 (9th Cir. 1976) (completion of objective is not element of conspiracy and, therefore, acquittal on substantive count does not preclude conviction on conspiracy count with substantive offense as its object).

647. United States v. Carman, 577 F.2d 566, 567 n.12 (9th Cir. 1978). This act need not be unlawful. Id. See United States v. Adams, 581 F.2d 193 (9th Cir.), cert. denied, 439 U.S. 1006 (1978), where the court reasoned that the initial agreement need not contemplate "the entire series of assaults... The ongoing relationship and the similarity of the crimes over a short period of time convince us that there was an implicit continuing agreement to commit the crimes." Id. at 197 n.10. See also United States v. Espinoza, 578 F.2d 224, 228 (9th Cir.), cert. denied, 439 U.S. 849 (1978) (prior similar act may be used to prove existence of unlawful agreement); United States v. Uriarte, 575 F.2d 215, 218 (9th Cir.), cert. denied, 439 U.S. 936 (1978) (evidence of other criminal activity relevant to existence and aims of conspiracy admissible).

648. 577 F.2d at 567 n.12. In addition, there is no need for the object of the agreement to be completed in order for a conspiracy count to be sustained. United States v. King, 587 F.2d 956, 962 (9th Cir. 1978) (fact that drug deal never materialized irrelevant to conspiracy charge); United States v. Espinoza, 578 F.2d 224, 228 (9th Cir.), cert. denied, 439 U.S. 849 (1978) ("Espinoza with knowledge of the existence of the unlawful enterprise acted to further it.").

649. United States v. Rosales, 584 F.2d 870, 874 (9th Cir. 1978) (in view of evidence suggesting that defendant was actual supplier of cocaine, court distinguished cases in which defendant was "merely a spectator—knowing or unknowing—and not a participant in the criminal activity"). See United States v. Radlick, 581 F.2d 225, 228 (9th Cir. 1978) (contention of unknowing participation justifies admission of evidence to prove intent under Fed. R. Crim. P. 404(b)).

650. United States v. Thomas, 586 F.2d 123, 127 (9th Cir. 1978) ("the only issue is whether the evidence was sufficient to establish beyond a reasonable doubt that Thomas had a slight connection to the Avery conspiracy proved"). See United States v. Fried, 576 F.2d 787, 793 n.7 (9th Cir.), cert. denied, 439 U.S. 895 (1978), where the court distinguished between the quantum of evidence needed to support a conviction (each element must be proven beyond a reasonable doubt) and the lesser amount needed to allow the introduction of co-conspirator's statements pursuant to Fed. R. Evid. 801(d)(2)(E) (judicial policy of placing probative and reasonably credible evidence before the trier of fact). See also United States v. Dunn, 564 F.2d 348, 356-57 (9th Cir. 1977) (discussion of the slight evidence rule in the context of sufficiency of evidence).

651. In United States v. Thomas, 586 F.2d 123 (9th Cir. 1978), the Ninth Circuit reasoned:
A frequent contention on appeal is that in the indictment the prosecution alleged a single conspiracy yet proved more than one at trial, with the appellant common to both. Such variance in proof, it is often alleged, is prejudicial. Refuting this challenge, the court in United States v. Thomas emphasized that Kottekos v. United States involved uniquely erroneous jury instructions and stressed that whether a scheme is one or several conspiracies becomes a question of fact once a prima facie case of a single conspiracy is presented. In Thomas, the court enunciated the standard of proof by which a charge of conspiracy would be judged. The government must show that (1) the defendant knew of and agreed to the purpose of the conspiracy; (2) he had reason to know others were involved; and (3) his benefits were dependent on the success of the entire venture.

The Ninth Circuit in 1978 reaffirmed that while 42 U.S.C. section 1985 reaches private conduct, it is limited to conspiracies motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus."

Once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy. The word "slight" properly modifies "connection" and not "evidence." It is tied to that which is proved, not to the type of evidence or the burden of proof. Id. at 127 (quoting United States v. Dunn, 564 F.2d 348, 357 (9th Cir. 1977)). See United States v. Weiner, 578 F.2d 757, 769 (9th Cir.), cert. denied, 439 U.S. 981 (1978) ("Once the existence of a conspiracy has been established, independent evidence is necessary to show prima facie the defendant's connection with the conspiracy, even if the connection is slight.").

652. United States v. Brown, 578 F.2d 1280 (9th Cir.), cert. denied, 439 U.S. 928 (1978). The defendant in Brown alleged that the evidence showed two conspiracies, with the defendant a common factor in each. The Ninth Circuit sustained a finding that the second transaction was merely "a new source of revenue . . . utilized in the consummation of the on-going conspiracy." Id. at 1286.

653. Id. at 1286.
654. 586 F.2d 123, 131-32 (9th Cir. 1978).
655. 328 U.S. 750 (1946).
656. 586 F.2d 123 at 131-32.
657. Id. at 132. See Kottekos v. United States, 328 U.S. 750 (1946). In Kottekos, thirty-two defendants were charged with one conspiracy. The jury was instructed that, "It is one conspiracy, and the question is . . . which of the defendants . . . are members." Id. at 767. The evidence showed that although there was one central figure, there were at least eight independent groups, none of which had any connection with any other. The court of appeals held the instruction to be plainly wrong, since the jury could not possibly have found . . . that there was only one conspiracy. Id. at 768.
658. 586 F.2d at 132.
659. Blevins v. Ford, 572 F.2d 1336 (9th Cir. 1978). Convicted of defrauding investors, Blevins brought a civil action against the government witness, his own attorney, and the prosecuting attorney for conspiring to conceal the witnesses' perjury at the first trial. The dismissal of Blevin's 42 U.S.C. § 1985 claim was sustained. The court noted: "While 42
3. Lesser included offenses

In order for a crime to be a lesser included offense of another crime "the two offenses 'must relate to protection of the same interests, and must be so related that in the general nature of these crimes . . . proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense." This formulation provides the necessary guidance for determining whether a crime is a lesser included offense pursuant to the Federal Rules of Criminal Procedure. The Ninth Circuit recently reaffirmed the "inherent relationship" test in United States v. Raborn. Convicted of bribery, the defendant in Raborn claimed on appeal that the trial court erroneously refused to give an instruction on an alternative lesser included offense. The court reasoned that, whereas "both sections seek to prevent the divided loyalty of public employees," the element in the lesser offense, that salary be compensation to an employee of the United States, required more than the greater offense in which compensation was required only "in return for influence or the commission of a wrongful act." The

U.S.C. § 1985 reaches private conduct, it does not extend to 'all tortious, conspiratorial interferences with the rights of others,' but is rather limited in its coverage to conspiracies motivated by 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus,' Id. at 1338 (citing Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971)). In response to Blevin's statement that he had "suffered discrimination at the hands of a group of attorneys," the court stated: "The complaint does not charge a conspiracy directed at non-lawyers as a class, but only the specific conduct of three people who are also lawyers, directed at one person who is not a lawyer, but not because he is not a lawyer." Id. at 1338.

660. United States v. Stolarz, 550 F.2d 488, 491 (9th Cir. 1977) (quoting United States v. Whitaker, 447 F.2d 314, 318 (D.C. Cir. 1971)). This test is often referred to as the "inherent relationship" test. 662. 575 F.2d 688 (9th Cir. 1977).

661. FED. R. CRIM. P. 31(c). Upon a proper showing that the lesser crime is indeed a "lesser included offense," the defendant is entitled to an instruction on the lesser crime. Such a showing, in addition, permits a jury to find guilt on the lesser charged offense, even if not alleged in the indictment. See 8A MOORE'S FEDERAL PRACTICE ¶ 31.03 [1]-[5] (2d ed. 1977).

662. 575 F.2d 688 (9th Cir. 1978).
663. The defendant was indicted under 18 U.S.C. § 201(c) (1976), which "requires proof that: (1) a public official (2) corruptly (3) asked, demanded, received, or agreed to receive an item of value (4) in return for being influenced in the performance of any official act or being influenced to commit or aid in committing a fraud on the United States, or being induced to act in violation of an official duty." 575 F.2d at 692.

664. Defendant claimed that a violation of 18 U.S.C. § 209 was a lesser offense included within 18 U.S.C. § 201(c). "Section 209 prohibits (1) an officer or employee of the executive branch or an independent agency of the United States government from (2) receiving salary or any contribution to or supplementation of salary from (3) any source other than the United States (4) as compensation for services as an employee of the United States. 575 F.2d at 691-92.

665. Id. at 692.
666. Id.
lesser offense, therefore, would have required proof of an additional element not needed to constitute the greater offense.

4. Crimes involving regulation of firearms

The Gun Control Act of 1968,\textsuperscript{668} has been construed quite liberally by the courts.\textsuperscript{669} Sections of the Act proscribing a felon's mere possession of a firearm have been the subject of an array of challenges.\textsuperscript{670} Recently, in \textit{United States v. Robbins}\textsuperscript{671} the Ninth Circuit applied the rule of \textit{Barrett v. United States},\textsuperscript{672} in which the Supreme Court held that, for a conviction to be sustained, it does not matter that the transportation in interstate commerce occurred long before the defendant received the firearm.\textsuperscript{673}

In \textit{Robbins} the defendant was convicted of receipt of firearms through interstate commerce in violation of both 18 U.S.C. sections 1202(a) and 922(h).\textsuperscript{674} The court concluded that a sufficient "nexus" is established by the fact that the firearm "previously traveled in interstate commerce."\textsuperscript{675} A temporary confiscation of the firearm by law enforcement agents and subsequent return to the defendant will not "insulate" the "receipt" element of a section 922(h) violation.\textsuperscript{676}

The Ninth Circuit also considered under what circumstances a previ-

\textsuperscript{667} \textit{Id. See also} Olais-Castro v. United States, 416 F.2d 1155 (9th Cir. 1969).


\textsuperscript{670} \textit{See} 18 U.S.C. § 922(h) (1976) which provides: "It shall be unlawful for any person (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." \textit{See also} 18 U.S.C. Appendix 1202(a) (1976) (prohibits possession, receipt or transport by a felon of a firearm that has traveled in interstate commerce); United States v. Herrell, 588 F.2d 711 (9th Cir. 1978) United States v. Robbins, 579 F.2d 1151, 1153 (9th Cir. 1978).

\textsuperscript{671} 579 F.2d 1151 (9th Cir. 1978).

\textsuperscript{672} 423 U.S. 216 (1976).

\textsuperscript{673} \textit{Id.} at 216; United States v. Robbins, 579 F.2d at 1153.

\textsuperscript{674} The defendant in \textit{Robbins} consented to the search of his vehicle, which led to the discovery of a pistol manufactured in Connecticut. After paying a $100 fine for carrying a pistol without a permit, he sought return of the pistol. Upon signing the receipt for the pistol and taking possession of it, the prosecution alleged that he violated § 922(h), prohibiting receipt of a firearm by a felon. 579 F.2d at 1154.

\textsuperscript{675} \textit{Id.} at 1153 (citing Scarborough v. United States, 431 U.S. 563, 564 (1977)).

\textsuperscript{676} \textit{Id.} at 1154. \textit{See} United States v. Haddad, 558 F.2d 968, 974 (9th Cir. 1977) ("receipt" is sufficient for a violation of § 922(h)).
ously convicted felon’s status may change, rendering the application of firearm regulation statutes inappropriate. The court concluded that “convicted felon as used in the statute does not include one whose prior conviction is later reversed because of certain constitutional defects.” On the other hand, the violation of statutes providing for procedural safeguards or ones which expunge a defendant’s record upon fulfillment of parole or sentence conditions do not result in a changed status.

5. Crimes involving aliens

The deportation of aliens is governed by the Immigration and Nationality Act. The proceedings are civil in nature and “must conform to traditional standards of fairness encompassed in due process.” In the proceedings, the defendant alien must initially establish that he entered the United States lawfully. If this burden is sustained, the Immigration and Naturalization Service must present

677. United States v. Herrell, 588 F.2d 711 (9th Cir. 1978). The defendant in Herrell alleged that his prior guilty plea to a grand theft charge was void because the value of the goods admittedly stolen had not been factually established. This was said to be in violation of ARIZ. R. CRIM. P. 17-3, which provides:

Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court and determine that he wishes to forego the constitutional rights of which he has been advised, that his plea is voluntary and not the result of force, threats or promises (other than a plea agreement) and that there is a factual basis for the plea.

Herrell claimed additionally that since his grand theft charge had been dismissed and his civil rights restored pursuant to Arizona’s expungement statute, his status as a convicted felon had changed, rendering § 922(h) inapplicable to him. Id. at 713.

678. 588 F.2d at 713 (citing United States v. Pricepaul, 540 F.2d 417, 424 (9th Cir. 1976)).

679. In Herrell, the court concluded that the federal rules were not constitutionally mandated by Boykin v. Alabama, 395 U.S. 238, 243 (1969). 588 F.2d at 713 n.4. Boykin provides the only constitutional requirements for a guilty plea: the defendant must be informed of waiver of right against compulsory self incrimination, jury trial, and confrontation of accusers. 395 U.S. at 243. The court further stated in Herrell that the federal rules are based on the “housekeeping power of the Supreme Court” in order to assure voluntariness. 588 F.2d at 713 n.4.

680. ARIZ. REV. STAT. § 13-1744 (1957-77 Supp.), amended and renumbered as ARIZ. REV. STAT. § 13-807 (1978), contains the proviso: “except that the conviction may be pleaded and proved in any subsequent prosecution of such person for any offense as if the judgment of guilt has not been set aside.” 588 F.2d at 712.

681. 588 F.2d at 713.


684. Cuevas-Ortega v. INS, 588 F.2d at 1277.

685. 8 U.S.C. § 1361 (1976); Hoonsilapa v. INS, 575 F.2d 735 (9th Cir.), modified, 586 F.2d 755 (1978) (burden of showing lawful entry is on the subject of the proceeding).
"clear, unequivocal, and convincing" evidence of alienage and deportability. If it does so, a rebuttable presumption of deportability is created. Although the defendant may elect to remain silent, such silence could lessen the government's burden of proof.

Whether or not an alien will be deported depends upon whether the government can establish that the alien has exceeded the terms of his admission or has violated one of the regulations that governs his stay. Certain criminal conduct is proscribed by such regulations. Consequently, an alien involved in a state or federal criminal action may find himself subject to deportation proceedings. For example, in *McJunkins v. INS* the Ninth Circuit concluded that the government might establish a prima facie case for deportation by showing that the defendant alien was found to be an addict in a proceeding under the Narcotic Addict Rehabilitation Act. Recently, the Ninth Circuit concluded that information that is initially the product of an illegal search, but is subsequently obtained from an independent source, may be used by the government at a deportation proceeding.

6. Securities

The purpose of the Securities Act of 1933 is to "compel full and fair disclosure in the issuance of securities so that investors will be ade-

---

687. 575 F.2d at 737.
688. Cuevas-Ortega v. INS, 588 F.2d at 1277-78.
689. Hoonsilapa v. INS, 575 F.2d at 737.
690. See Winestock v. INS, 576 F.2d 234 (9th Cir. 1978). The defendant in *Winestock* was convicted of dealing in counterfeit obligations in violation of 18 U.S.C. § 473 (1976). As a result he was found to be deportable for conviction of a crime involving moral turpitude under 8 U.S.C. § 1251 (a)(4) (1976). 576 F.2d at 235. See also Forstner v. INS, 579 F.2d 506 (9th Cir. 1978) (per curiam). Forstner pleaded guilty to a state narcotics charge and subsequently was deported pursuant to § 1251(a)(11) (deportation required for any alien convicted of "illicit possession of narcotics or marijuana") 579 F.2d at 507.
691. 579 F.2d 533 (9th Cir. 1978).
692. Narcotic Addict Rehabilitation Act of 1966, §§ 2-316, 42 U.S.C. §§ 3401-3426 (1976); 579 F.2d at 536. The court reconciled its result with Robinson v. California, 370 U.S. 660 (1962) (imposition of criminal sanctions for acquiring status of addict constitutes cruel and unusual punishment) by emphasizing that Congress has power to "impose conditions upon the privilege of remaining in this country which could not be imposed upon citizens." 579 F.2d at 536.
693. Hoonsilapa v. INS, 575 F.2d at 738. As a result of an illegal search of the defendant's home the INS was alerted that the defendant was possibly subject to deportation. A search of the files subsequently unearthed enough information to sustain deportation. The court held "that there is no sanction to be applied when an illegal arrest only leads to the discovery of the man's identity and that merely leads to the official file." 7d. at 738.
quately protected."\(^{695}\) The Ninth Circuit in 1978 addressed several claims that convictions for securities laws violations were improper because the instruments used in the transactions were not securities as defined by the Act.

In *United States v. Dunlap,\(^{696}\) the defendants were indicted under 18 U.S.C. section 2314\(^{697}\) for transportation of counterfeit securities in interstate commerce. The securities at issue were counterfeit department store scrip. The prosecution maintained that such instruments fell within the definition of securities as either an "evidence of indebtedness" or an instrument "commonly known as a security."\(^{698}\) The Ninth Circuit concluded that "the statute disclose[d] no congressional intent to give a broad meaning to include" as securities "all obligations on the part of the maker of a paper to the holder."\(^{699}\) In declining to make the two above-mentioned phrases a catchall rubric, the court cautioned that criminal statutes are to be strictly construed.\(^{700}\)

In contrast, however, the Ninth Circuit in *United States v. Urciuoli*\(^{701}\) affirmed a conviction for transporting stolen securities.\(^{702}\) The defendant in *Urciuoli* asserted that canceled certificates ceased to be "securities" within the scope of the Securities Act.\(^{703}\) The court rejected this assertion, reasoning that the certificates retained their status as securities since there was nothing on their face to suggest their invalidity or nonredeemable status to an innocent purchaser who may have bought them for value.\(^{704}\)

\(^{695}\) United States v. Carman, 577 F.2d 556, 564 (9th Cir. 1978).
\(^{696}\) 573 F.2d 1092 (9th Cir. 1978).
\(^{698}\) 573 F.2d at 1093. 18 U.S.C. § 2311 (1976) provides in part: "‘Securities’ includes any note, stock certificate, bond, debenture, check, draft, . . . evidence of indebtedness, . . . or, in general, any instrument commonly known as a ‘security,’ . . . or any forged, counterfeited, or spurious representation of any of the foregoing . . . ."
\(^{699}\) 573 F.2d at 1094.
\(^{700}\) *Id.* See *Prussian v. United States*, 282 U.S. 675 (1931) (strictly construe criminal statutes).
\(^{701}\) 575 F.2d 768 (9th Cir. 1978) (per curiam).
\(^{703}\) 575 F.2d at 769.
\(^{704}\) *Id.* But see *United States v. Simpson*, 577 F.2d 78 (9th Cir. 1978). Simpson was convicted in violation of 18 U.S.C. § 2314 (1976) (transportation of forged securities). Upon receiving canceled certificates, Simpson forged the names of the true owners and sold them to a stock brokerage firm. He claimed that since the securities were "valueless," they fell outside the scope of § 2314. The court, while doubting the correctness of his premise, assumed its validity, but held the certificates to have value by reason of the fact that they were sold at their actual market value. *Id.* at 80. Simpson's conviction, however, was reversed because he forged the endorsements on genuine certificates rather than forging the certificates themselves, as the court held the statute required. *Id.* at 81.
B. Severance

Rule 8(b) of the Federal Rules of Criminal Procedure permits joinder of two or more defendants if the charges against them arise out of "the same series of . . . transactions constituting an offense." While recognizing that the primary purpose of joinder is the promotion of efficiency in the administration of justice, the Ninth Circuit has been careful to guard against potential prejudice that may result from the joinder of multiple defendants. The Ninth Circuit therefore has interpreted rule 8(b) to require that "substantially the same facts . . . be adduced to prove each of the joined offenses."

A defendant properly joined under rule 8(b), however, may move for severance pursuant to rule 14 when prejudicial joinder threatens to

705. 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.

706. The general rule is that a joint trial "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burdens upon citizens to sacrifice time and money to serve on juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once." United States v. Brady, 579 F.2d 1121, 1128 (9th Cir. 1978). See also United States v. Adams, 581 F.2d 193, 197 (9th Cir.), cert. denied, 439 U.S. 1006 (1978) ("The purpose of Rule 8(b) is to balance the need to avoid the potential prejudice that may result from joining multiple defendants with the need to attain trial efficiency.").

707. United States v. Satterfield, 548 F.2d 1341, 1344 (9th Cir. 1977). Compare id. (when defendant was involved in only two of five charged bank robberies and most evidence related to other three, joinder improper because substantially same facts would not have been adduced at separate trials; allegation of charges similar in character insufficient to warrant joinder) with United States v. Adams, 581 F.2d 193, 197 (9th Cir.), cert. denied, 439 U.S. 1006 (1978) (conviction for conspiracy, assault with intent to rob, robbery, and murder affirmed, rejecting contention that the five substantive charges did not constitute a "series of acts or transactions," so as to permit joinder under rule 8(b) rejected). The Adams court found the five incidents to constitute a series; the conspiracy count, charged in good faith, provided the necessary link. 581 F.2d at 197. See also United States v. Olander, 584 F.2d 876, 885 (9th Cir. 1978) (no error in conducting joint trial where co-defendants found fishing in violation of a court injunction protecting Indian fishing rights: "Rules 8(b) and 13 . . . fit these cases exactly. [The co-defendants] 'participated in the same act or transaction'—they were together, fishing on [co-defendant's] boat, when caught."); United States v. Barney, 568 F.2d 134, 135 (9th Cir. 1978), cert. denied, 435 U.S. 955 (1978) (per curiam) (no error in joining stolen vehicle charge against appellant and co-defendant with perjury charge against co-defendant when perjury count related to receipt appellant possessed when apprehended while driving stolen vehicle: "[A]lleged false testimony related directly to the illegal transaction with which appellant was charged . . . . Indeed, the facts underlying the joined offenses were so intertwined that most of the evidence admissible in proof of one was also admissible in proof of the other.") (citations omitted).

708. FED. R. CRIM. P. 14 provides:
deny him a fair trial.\textsuperscript{709} Unlike a rule 8(b) motion, which raises misjoinder as an issue of law,\textsuperscript{710} the decision to grant or deny a motion for severance lies within the sound discretion of the trial court.\textsuperscript{711} The Ninth Circuit will not disturb a trial court's refusal to sever a joint trial unless the defendant can demonstrate that the prejudice to him from joinder so outweighed the consequent gain in judicial economy and efficiency that the refusal constituted an abuse of discretion.\textsuperscript{712} To meet this heavy burden the defendant must establish that a joint trial was so prejudicial as to have compelled the trial court to exercise its discretion to sever.\textsuperscript{713}

Although "[t]he burden of proving this prejudice is a difficult one and the ruling of the trial judge will rarely be disturbed,"\textsuperscript{714} a successful challenge to a denial of severance has been made in at least three kinds of circumstances. Severance is improperly denied when (1) joinder effectively denies a defendant his sixth amendment right to con-

---

\textsuperscript{709} See 8 MOORE'S FEDERAL PRACTICE \S14.02[1], at 14-3 (2d rev. ed. 1978). See also United States v. Roselli, 432 F.2d 879, 901-02 (9th Cir. 1970) (although joinder is proper under rule 8(b), severance permitted when facts of a given case make it unlikely that jury will reach proper verdict; when few defendants are joined and few factual issues are involved, jurors competent to give impartial consideration).

\textsuperscript{710} See United States v. Friedman, 445 F.2d 1076, 1082 (9th Cir.), cert. denied, 404 U.S. 958 (1971).

\textsuperscript{711} United States v. Adams, 581 F.2d 193, 197 (9th Cir.), cert. denied, 439 U.S. 1006 (1978) ("Rule 14 motions for severance are committed to the sound discretion of the trial court."). See United States v. Hernandez-Berceda, 572 F.2d 680, 682 (9th Cir. 1978) ("Although the decision to grant . . . severance is a matter in which a trial judge has wide discretion . . . that discretion is not without limits.") (citations omitted).

\textsuperscript{712} See United States v. Uriarte, 575 F.2d 215, 217 (9th Cir.), cert. denied, 439 U.S. 963 (1978). The court noted that the "test for when severance should be granted is . . . whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever." \textit{Id.} (citations omitted) (quoting United States v. Brashier, 548 F.2d 1315, 1323 (9th Cir. 1976)). See also United States v. Adams, 581 F.2d 193, 198 (9th Cir.), \textit{cert. denied}, 439 U.S. 1006 (1978) (sufficient prejudice not shown merely because separate trial might offer better chance for acquittal).

\textsuperscript{713} United States v. Brady, 579 F.2d 1121, 1128 (9th Cir. 1978) ("[U]ltimate question is whether under all of the circumstances, it is within the capacity of the jurors to follow the court's admonitory instructions and, correspondingly whether they can collate and appraise the independent evidence against each defendant solely upon that defendant's own acts.").

\textsuperscript{714} \textit{Id.} at 1127.
frontation, \(^1\) (2) evidence, admissible only against a co-defendant, also incriminates the defendant, and despite admonitory instructions, cannot reasonably be expected to be ignored in the jury's determination of the defendant's guilt \(^2\) or innocence, \(^3\) and (3) it is clear that a co-

---

\(^1\) See Bruton v. United States, 391 U.S. 123, 125 (1968). Bruton, the leading case in this area, concerns the violation of a defendant's constitutional rights to confront and cross-examine the witnesses against him. In that case, defendants Evans and Bruton were jointly tried for armed postal robbery. Prior to trial, Evans had made a confession that incriminated Bruton. Although the confession was admitted into evidence, Evans did not testify. The court clearly instructed the jury that the confession was to be considered only in deciding the guilt or innocence of Evans. The Supreme Court reversed Bruton's conviction on the ground that his constitutional right to confront and cross-examine Evans, a witness against him, had been violated. The Court argued that it was unrealistic to assume that the jury could apply the confession against Evans and ignore its implication of Bruton. As such, the confession unduly prejudiced Bruton and subjected him to a conviction based upon incompetent evidence. The Court stressed that severance of trial could dispel such prejudice. But see United States v. Basile, 569 F.2d 1053, 1057-58 (9th Cir.), cert. denied, 436 U.S. 920 (1978). In Basile, the Ninth Circuit affirmed defendant Holden's conviction for possession of marijuana. In Bruton, the defendant was unable to cross-examine a co-defendant whose out-of-court statement, inculpatory as to the defendant, had been admitted into evidence. In Basile, the evidentiary constraints inherent in a joint trial had prevented Holden's introduction of the out-of-court statements of his co-defendant, Basile. The statements were exculpatory as to Holden. The Ninth Circuit, however, found no error in the trial court's refusal to sever. The court reasoned that because the evidence that Holden sought to introduce was eventually admitted, albeit not in the desired context, no undue prejudice had resulted from the joint trial.

Judge Hufstedler dissented, contending that Basile's statements could not be used to exculpate Holden without impermissibly inculpating Basile:

The only way to safeguard Holden's right to introduce the exculpatory evidence and at the same time protect Basile from evidence inadmissible against him . . . is to sever the trials of the two men.

The error was not cured by the opportunity that Holden later had to cross-examine Basile after he took the stand. The maximum that Holden could have realized from cross-examining Basile was a denial that Basile owned the marijuana [sic], with an opportunity to impeach that portion of Basile's testimony, and an admission that Basile had made exculpatory statements about him. The ability to bring out before the jury that Basile was a liar certainly did not cast Basile's exculpatory statements about Holden in an attractive light.

\(^2\) Id. at 1061 (citations omitted). \(^3\) See United States v. Olander, 584 F.2d 876, 877 (9th Cir. 1978) (appellant's claim of right to separate trial disappeared when co-defendant, who made out-of-court statement implicating appellant, chose to testify at joint trial). See United States v. Adams, 531 F.2d 193, 197-198 (9th Cir.), cert. denied, 439 U.S. 1006 (1978). The Ninth Circuit in Adams affirmed Pinkerton's conviction for conspiracy, assault, robbery and murder, and rejected his claim that joinder with Adams prejudiced his defense because it required the jury to consider evidence of one assault with which only Adams was charged. The Adams court concluded that Pinkerton had not carried the burden of demonstrating prejudice sufficient to require severance, stating that "[h]ere [Pinkerton] can show no prejudice other than that which necessarily inheres wherever multiple defendants or multiple charges are jointly tried. Furthermore, the instructions delivered to the jury were calculated to remove, to the extent possible, any prejudice resulting from joinder." Id. at 198 (footnote omitted).

---

\(^715\) Cf. United States v. Sanchez, 532 F.2d 155, 157-58 (9th Cir. 1976). In Sanchez,
defendant will provide testimony exculpating the defendant only if their trials are separate.\textsuperscript{718}

In 1978, the Ninth Circuit applied these precedents in several cases challenging denials of severance, and in no case found severance improperly denied. In \textit{United States v. Brady}\textsuperscript{719} for example, the Ninth Circuit affirmed appellants' convictions for voluntary manslaughter, concluding that neither had demonstrated a likelihood of prejudice sufficient to set aside the trial court's exercise of discretion in denying severance. In \textit{Brady}, appellants' claims were based on two instances of rebuttal testimony in which a government agent testified about statements made out of court by each appellant, contradicting the in-court testimony given by each. Had the evidence consisted solely of the agent's testimony that each appellant had accused the other, out-of-court, of responsibility for the death, severance would have been required in order to prevent deprivation of sixth amendment confrontation rights. However, no such deprivation had occurred; each appellant who made an extrajudicial statement testified in court and subjected himself to cross-examination. The statements, therefore, failed to add "'substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination',"\textsuperscript{720} and the \textit{Brady} court con-

\textsuperscript{717}. \textit{See also} \textit{United States v. Brady}, 579 F.2d 1121 (9th Cir. 1978). The \textit{Brady} court rejected appellants' contentions that their mutual antagonism had resulted in undue prejudice warranting severance, stating that "'while a great disparity in proof may be sufficient to allow a severance in certain cases, the fact that the evidence against one co-defendant is more damaging than the evidence against another one is not a ground for severance.'" \textit{Id}. at 1128. There can be no undue prejudice, therefore, if the jury can compartmentalize the evidence relating to each defendant, and consider the volume and limited admissibility of such evidence. \textit{Id}. Accord, \textit{United States v. Companale}, 518 F.2d 352, 359 (9th Cir. 1975), \textit{cert. denied}, 423 U.S. 1050 (1976) (no undue prejudice if the jury can reasonably be expected to compartmentalize evidence as it relates to separate defendants in light of its volume and limited admissibility).

\textsuperscript{718}. \textit{United States v. Vigil}, 561 F.2d 1316, 1317 (9th Cir. 1977) (per curiam) ("When the reason for severance is the asserted need for a co-defendant's testimony, the defendant must show that he would call the co-defendant at a severed trial, that the co-defendant would in fact testify, and that the testimony would be favorable to the moving defendant." Once the defendant has satisfied this burden, he should be granted a separate trial.).

\textsuperscript{719}. 579 F.2d 1121 (9th Cir. 1978).

\textsuperscript{720}. \textit{Id}. at 1129 (quoting \textit{United States v. Bruton}, 391 U.S. 123, 128 (1968)).
cluded that the trial court had not abused its discretion in denying seve-
rance.\textsuperscript{721}

The defendant in \textit{United States v. Uriarte}\textsuperscript{722} appealed his conviction for conspiracy to import marijuana, contending that the admission of evidence concerning his co-defendant's previous arrest for possession of marijuana created an inference so prejudicial to him as to mandate severance. The \textit{Uriarte} court, however, found no abuse of discretion in the trial court's denial of severance. No testimony had linked Uriarte to the evidence against his co-defendant and, as a safeguard, limiting instructions had been given regarding the permissible use of the evidence of the co-defendant's previous arrest. The Ninth Circuit therefore found that a joint trial was not unduly prejudicial to the appellant, concluding that "[s]imilar cases have arisen where members of the con-
spiracy who . . . were not involved in all aspects of the conspiracy, have been denied severance. This court has not found it impossible to try co-conspirators together, even when not all of the evidence admitted applied to each co-conspirator."\textsuperscript{723}

In \textit{United States v. Hernandez-Berceda},\textsuperscript{724} the Ninth Circuit affirmed the appellant's conviction for conspiracy to import heroin, concluding that his asserted need for a co-indictee's testimony warranted neither severance nor continuance. The court held that when the reason asserted for severance or continuance "is the need for a codefendant's testimony, [either] should be granted upon a showing that (1) the code-
fendant would be called; (2) he would in fact testify; and (3) the testi-
mony would be favorable to the requesting defendant."\textsuperscript{725} In \textit{Hernandez}, a co-indictee, Barron, had offered to provide exculpatory testimony for the appellant, but only if their trials were separate. On this basis the appellant requested severance of their joint trial. Shortly before trial, however, Barron pleaded guilty, and appellant changed his

\textsuperscript{721} Severance was also held to have been properly denied despite each appellant's con-
tention that the other's antagonistic testimony had been unduly prejudicial to him. The court stated that "[c]onflicting and antagonistic defenses being offered at trial do not neces-
sarily require granting a severance, even if hostility surfaces or defendants seek to blame one another." \textit{Id.} at 1128. The \textit{Brady} court concluded that neither appellant was unduly prejudiced by the testimony of the other. It was undisputed that both had participated in the incident and "[c]onsequently, it would be only natural for one to try to place the blame on the other . . . [T]here is no sound reason to suggest that the members of the jury, being properly instructed as they were, could not realistically appraise the evidence against each appellant." \textit{Id.}

\textsuperscript{722} 575 F.2d 215 (9th Cir.), \textit{cert. denied}, 439 U.S. 963 (1978).

\textsuperscript{723} \textit{Id.} at 217 (citations omitted).

\textsuperscript{724} 572 F.2d 680 (9th Cir. 1978).

\textsuperscript{725} \textit{Id.} at 682.
motion for severance to one for continuance, maintaining that Barron would only provide the exonerating testimony after he was sentenced. Applying to this motion for continuance the standards governing a motion for severance in order to obtain a co-defendant's testimony, the Ninth Circuit concluded that a sufficient showing of prejudice had not been established. The Hernandez-Berceda court reasoned that because of an agreement that other outstanding charges against him were to be dropped, Barron had no real incentive for postponing testifying. A reasonable doubt existed as to whether Barron would testify, and the trial court, therefore, did not abuse its discretion in denying the motion for a continuance.

C. Conduct of the Trial

1. Conduct of the trial judge

The trial court judge is more than a moderator during the life of the trial. It is incumbent upon a judge to ensure that the trial is conducted fairly. To do so, he is vested with a broad range of discretionary powers in order to meet situations as they arise during the course of the trial.

a. Pre-trial proceedings

Unless hearing a motion, the trial court judge usually is not involved to a significant degree in pre-trial proceedings. The judge, however, has considerable latitude in dealing with these motions. The trial court in its discretion may properly dismiss the indictment of a federal grand

---

726. Quercia v. United States, 289 U.S. 466, 469 (1933) (error for judge to instruct jury that defendant was lying because he wiped hands repeatedly while testifying); United States v. James, 576 F.2d 223, 228 (9th Cir. 1978) (“[Judges] are not referees at prize-fights but functionaries of justice.”) (quoting Johnson v. United States, 333 U.S. 46, 54 (1948)); United States v. Aguiar, 472 F.2d 553, 555 (9th Cir. 1972) (per curiam) (“[A] trial judge is more than a moderator or umpire.”) (citations omitted).

727. See, e.g., United States v. Eldred, 588 F.2d 746, 749 (9th Cir. 1978) (“A trial judge must constantly be aware of the sensitive role he plays . . . and avoid even the appearance of advocacy or partiality.”).

728. See, e.g., United States v. Marshall, 532 F.2d 1279, 1286 (9th Cir. 1976) (trial judge’s discretion in the management of the trial is broad); Roseman v. United States, 364 F.2d 18, 27 (9th Cir. 1966) (conduct of trial is always a matter within the discretion of the trial court judge).

729. See Geders v. United States, 425 U.S. 80, 86 (1976) (“The 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.”).
jury,730 decide questions involving the Federal Rules of Criminal Procedure,731 and rule on motions for change of venue.732 The court further is empowered to disqualify the prosecutor,733 to protect against the

730. United States v. King, 586 F.2d 847 (9th Cir. 1978) (No. 78-1230; unpublished opinion) (court can dismiss indictment if an essential element of the charged offense is not charged); United States v. Owen, 580 F.2d 365, 367 (9th Cir. 1978) (a federal court using "its inherent supervisory powers" can dismiss indictment obtained as a result of prosecutor's impropriety). See United States v. Giese, 597 F.2d 1170, 1177 (9th Cir. 1979) (indictment must contain the elements of offense to be charged and sufficiently apprise defendant of charges against him) (quoting Russell v. United States, 369 U.S. 749, 763-64 (1962)); United States v. Lyman, 592 F.2d 496, 500 (9th Cir. 1978), cert. denied, 99 S. Ct. 2864 (1979) (striking of overt acts from indictment charging conspiracy held proper as it did not materially alter nature of indictment) (citing United States v. Dawson, 516 F.2d 796, 804 (9th Cir.), cert. denied, 423 U.S. 855 (1975)). Cf. United States v. Fried, 576 F.2d 787, 792 (9th Cir.), cert. denied, 439 U.S. 895 (1978) (trial court cannot inquire into sufficiency of evidence presented to grand jury).

731. The trial court has wide discretion in dealing with motions for severance. E.g., United States v. Olander, 584 F.2d 876, 885 (9th Cir. 1978) (trial court has considerable discretion in criminal contempt case to grant or deny severance); United States v. Adams, 581 F.2d 193, 197 (9th Cir.), cert. denied, 439 U.S. 1006 (1978) (rule 14 motions for severance are committed to sound discretion of trial court); United States v. Brady, 579 F.2d 1121, 1128 (9th Cir. 1978) (test on appeal of denial of severance motion is whether joint trial would be so prejudicial to defendant as to require exercise of trial court's discretion in only one way, to order a separate trial); United States v. McDonald, 576 F.2d 1350, 1355 (9th Cir.), cert. denied, 439 U.S. 830 (1978) (decision on rule 14 severance is within sound discretion of the trial court); United States v. Hernandez-Berceda, 572 F.2d 680, 682 (9th Cir. 1978) (trial court has wide discretion to grant severance); United States v. Barney, 568 F.2d 134, 136 (9th Cir.) (per curiam), cert. denied, 435 U.S. 955 (1978) (joinder did not violate Fed. R. Crim. P. 8(b) as nothing made joinder unduly prejudicial); United States v. Gay, 567 F.2d 916, 919 (9th Cir. 1978) (rule 14 severance is entirely within trial court's discretion).

The trial court judge has considerable discretion to direct discovery. See United States v. Dipp, 581 F.2d 1323, 1327 (9th Cir. 1978), cert. denied, 99 S. Ct. 841 (1979) (trial court judge has broad discretion in determining sanctions for rule 16 violations); United States v. Rich, 580 F.2d 929, 934 (9th Cir.), cert. denied, 439 U.S. 935 (1978) (denial of rule 15 motion is well within the discretion of the trial court); Jett v. Castaneda, 578 F.2d 842, 845 (9th Cir. 1978) (trial court could not properly enter discovery orders before a case or controversy arose); United States v. Gillings, 568 F.2d 1307, 1310 (9th Cir.) (per curiam), cert. denied, 436 U.S. 919 (1978) (sanctions for violating pretrial discovery rules are largely within trial court's discretion).

The trial court judge also is broadly vested with discretion in other areas. E.g., United States v. Dreitzler, 577 F.2d 539, 545 (9th Cir. 1978) (district court has limited discretion in resolving a rule 29(e) motion); United States v. Charnay, 577 F.2d 81, 84 (9th Cir. 1978) (dismissal with prejudice under rule 48(b) calls for trial court's sensitive exercise of discretion); Fassler v. Moran, 576 F.2d 1372, 1373 (9th Cir. 1978) (per curiam) (trial court may not extend time for rule 59(b), (d) & (e) motions except as provided in the rule); United States v. Barron, 575 F.2d 752, 756 (9th Cir. 1978) (rule 12.1 allows trial judge to exclude defendant's alibi defense if notification is but one day late if the judge has weighed the interest of the defendant in a full and fair trial against the interests of avoiding surprise and delay).

732. United States v. Dreitzler, 577 F.2d 539, 552 (9th Cir. 1978) (decision on change of venue motion is within sound discretion of the trial court).

733. United States v. Weiner, 578 F.2d 757, 767 (9th Cir.), cert. denied, 439 U.S. 981
effects of excessive pre-trial publicity, and to allow hearings to determine a defendant’s competency.

When an accused challenges a judge’s ability to hear his case by a 28 U.S.C. section 144 motion alleging that the judge is biased, the judge may properly rule on the legal sufficiency of the supporting affidavit. In United States v. Azhocar, the Ninth Circuit held that only after the legal sufficiency of an affidavit alleging bias has been affirmatively determined must the trial judge withdraw from the case. The Azho-

(1978) (mere fact that attorney now working for Securities and Exchange Commission once worked for law firm that had previously represented defendant does not necessarily disqualify United States Attorney’s Office from the action). The Weiner court held that to disqualify the Government, the defendant would have to show: (1) that the attorney in question could have imputed to him the knowledge of the previous case possessed by the other members of his law firm, (2) that this knowledge also could be imputed to the other attorneys at the Securities and Exchange Commission, and (3) that this knowledge could be imputed to the United States Attorney’s Office through the alleged cooperation between it and the Securities and Exchange Commission.

734. United States v. Eldred, 588 F.2d 746, 751 (9th Cir. 1978) (in light of the kind of publicity and length of elapsed time involved, any possible juror prejudice stemming from newspaper articles four and twelve months prior to trial would have been detected by judge’s inquiries of the prospective panel of jurors); United States v. McDonald, 576 F.2d 1350, 1354 (9th Cir.), cert. denied, 439 U.S. 830 (1978) (trial court is given wide latitude in gauging effects of pretrial publicity on prospective jurors). Cf. United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978) (restraining order on media prior to any attempted contact with jurors has a heavy presumption against its constitutionality) (“The government... must show that the activity restrained poses a clear and present danger or a serious and imminent threat to a protected competing interest...”).

735. Compare United States v. Richardson, 586 F.2d 661, 667 (9th Cir. 1978) (denial of competency hearing held not an abuse of discretion) with United States v. Ives, 574 F.2d 1002, 1005 (9th Cir. 1978) (trial court abused its discretion in not considering proffered evidence of change in defendant’s competency when there had been four differing determinations of defendant’s competency within five months).

736. 28 U.S.C. § 144 (1976) states in part:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

737. 581 F.2d 735, 739 (9th Cir. 1978), cert. denied, 99 S. Ct. 1213 (1979) (neither adverse rulings nor merely ill-advised remarks are sufficient to show bias). See also United States v. Grinnell Corp., 384 U.S. 563, 583 (1966) (bias must result from an extra-judicial source).

738. 581 F.2d at 738. The court rejected the claim that the trial judge can decide only the timeliness of the affidavit and must assign the § 144 motion to another judge for hearing on the sufficiency of the affidavit. Id. See Berger v. United States, 255 U.S. 22, 36 (1921) (judge against whom bias affidavit is filed may properly rule on that affidavit’s legal sufficiency); United States v. Olander, 584 F.2d 876, 883 (9th Cir. 1978) (“Only if [the judge] finds [the affidavit legally] sufficient is he required to have another judge hear the motion.”). See also United States v. Cassasa, 588 F.2d 282, 284 (9th Cir. 1978) (“The facts indicating bias must be substantial.”).
court employed a three-step test by which to test the legal sufficiency of the affidavit:

It must state facts which if true fairly support the allegation that bias or prejudice stemming from (1) an extrajudicial source (2) may prevent a fair decision on the merits. The focus is not only on the source of the facts and their distorting effects on a decision on the merits... but also on (3) the substantiality of the support given by these facts to the allegation of bias...739

In United States v. Olander740 the Ninth Circuit applied the same standard to a 28 U.S.C. section 4551 motion alleging that the judge's impartiality might reasonably be questioned.742

b. Discretion during the trial

The trial court judge, in controlling the flow of information to the jury, may exercise a wide latitude of discretion when ruling on admissibility of evidence,743 interpreting the Federal Rules of Evidence,744

739. 581 F.2d at 739-40.
740. 584 F.2d 876, 883 (9th Cir. 1978) (newspaper article that did not quote trial court judge directly but was rather the "figurative interpretation" of a person interviewed by a newspaper reporter held insufficient to allege impartiality).
741. 28 U.S.C. § 455 (1976) states in relevant part: "(a) Any... judge... shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (b) He shall also disqualify himself...: (1) Where he has a personal bias or prejudice concerning a party..."
742. 584 F.2d at 882 ("We agree with the Fifth Circuit that... the test for bias or prejudice is the same under both statutes."). See Davis v. Board of School Comm'r's, 517 F.2d 1044, 1052 (5th Cir. 1975) (test for disqualification of judge is same for motions made pursuant to §§ 144-145).
743. United States v. Cassasa, 588 F.2d 282, 285 (9th Cir. 1978) ("A trial judge is allowed great discretion in determining whether to admit evidence as relevant... and he may exclude evidence that is 'too flimsy'.").
744. The trial court has discretion in deciding whether to admit sound recordings into evidence. See United States v. King, 586 F.2d 847 (9th Cir. 1978) (No. 78-1230; unpublished opinion) (sound recordings deemed admissible). The Ninth Circuit has articulated a standard for the admission of sound recordings, holding that "the trial court, in the exercise of its judicial discretion, must be satisfied that the recording is accurate, authentic, and generally trustworthy." Id. The King court specifically rejected the addition of requiring a finding of voluntariness vis-à-vis the making of the statement recorded. Id. Cf. United States v. McKeever, 169 F. Supp. 426, 430 (S.D.N.Y. 1958), rev'd on other grounds, 271 F.2d 669 (2d Cir. 1959) (proponent must lay proper foundation to admit sound recording, including that the conversation elicited was made voluntarily). Instead, the Ninth Circuit has held that voluntariness goes to the trustworthiness of the recording and its probative value. United States v. King, 586 F.2d 847 (9th Cir. 1978) (No. 78-1230; unpublished opinion). See also United States v. Rinn, 586 F.2d 113, 117-18 (9th Cir. 1978) (tape recordings admissible after judge determined that "one could pick up and follow what was on them;") judge properly allowed jury to use prosecution transcripts to aid in understanding the tapes when judge corrected errors in the transcript and instructed the jury "that it was the tape recordings, not the transcript, which were controlling").
minimizing potentially prejudicial publicity,\textsuperscript{745} deciding whether to recess the court or to sequester the jury,\textsuperscript{746} and dealing with jury misconduct.\textsuperscript{747} Although the judge is allowed to comment on the evidence

The trial court judge has discretion in admitting polygraph results, United States v. Mcintyre, 582 F.2d 1221, 1226 (9th Cir. 1978) (admissibility of polygraph results for even a limited purpose is within the judge's wide discretion). United States v. Radlick, 581 F.2d 225, 229 (9th Cir. 1978) (polygraph results admissible only in trial court's discretion), and in the admission of in-court identifications, United States v. Satterfield, 572 F.2d 687, 690 (9th Cir.), \textit{cert. denied}, 439 U.S. 840 (1978) (admission of in-court identification of defendant in bank robbery case was in court's discretion).

\textsuperscript{744} See, e.g., United States v. Spaulding, 588 F.2d 669, 670 (9th Cir. 1978) (gun that had probative value admitted into evidence in mail extortion case was an exercise of the court's discretion); United States v. Radlick, 581 F.2d 225, 229 (9th Cir. 1978) (previous conversations held admissible in trial court's discretion by rule 404(b)); United States v. Espinoza, 578 F.2d 224, 227-28 (9th Cir.) (per curiam), \textit{cert. denied}, 439 U.S. 849 (1978) (admission of prior similar acts by defendant in accordance with rule 404(b) was not error absent a showing of an abuse of discretion); United States v. Walls, 577 F.2d 690, 696-97 (9th Cir.), \textit{cert. denied}, 439 U.S. 893 (1978) (danger of prejudice outweighing probative value of proffered evidence to show a common scheme or plan by defendant's prior conduct is a decision committed to the sound discretion of the trial court); United States v. Phillips, 577 F.2d 495, 501 (9th Cir.), \textit{cert. denied}, 439 U.S. 831 (1978) (determination of general relevancy of evidence for rule 403 is within trial court's discretion); United States v. McDonald, 576 F.2d 1350, 1356 (9th Cir.), \textit{cert. denied}, 439 U.S. 830 (1978) (whether probative value of evidence of defendant's prior actions to show knowledge and motive outweighs potential prejudicial impact is a decision committed to the sound discretion of the trial court); United States v. Peele, 574 F.2d 489, 491 (9th Cir. 1978) (determination of witness' competency lies in court's discretion); United States v. Young, 573 F.2d 1137, 1140 (9th Cir. 1978) (rule 404(b) balance in admitting evidence of defendant's prior acts is generally a matter of the judge's discretion); United States v. Shields, 571 F.2d 1115, 1118-19 (9th Cir. 1978) (refusal to exercise discretion under rule 403 to exclude evidence of witness' prior silence to impeach his testimony held proper when judge's curative instructions minimized possibility of consideration of defendant's silence); United States v. Kizer, 569 F.2d 504, 506 (9th Cir.), \textit{cert. denied}, 98 S. Ct. 1626 (1978) (court's exercise of discretion in closing off impeachment was not improper); United States v. Curtis, 568 F.2d 643, 645 (9th Cir. 1978) (rule 403 balance and procedure is within sound discretion of the trial court).

\textsuperscript{745} See also Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) ("If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered."); United States v. Eldred, 588 F.2d 746, 751 (9th Cir. 1978) (admonishment to jury to avoid news regarding trial held proper).

\textsuperscript{746} 588 F.2d at 752.

\textsuperscript{747} See, e.g., United States v. Moore, 580 F.2d 360, 365 (9th Cir.), \textit{cert. denied}, 439 U.S. 970 (1978) (when defendant "believed that one or more jurors had missed significant portions of the summation, the onus was on him to ask the court to do something about it . . . . [In] not conducting an examination of the juror \textit{sua sponte}, the court did not abuse its considerable discretion in this area.") (citations omitted); United States v. Weiner, 578 F.2d 757, 765 (9th Cir.), \textit{cert. denied}, 439 U.S. 981 (1978) (when juror initiated a conversation with the bailiff asking if the judge expected a verdict and the bailiff answered that he didn't know, it was not an abuse of discretion to deny the motion for a new trial as there was no prejudice); United States v. Avila-Macias, 577 F.2d 1384, 1387 (9th Cir. 1978) (juror who passed by outside a bar wherein alleged drug buy took place not precluded from serving on panel) ("The trial judge acted within appropriate limits of his discretion in appraising the
presented to the jury and to question the witnesses such comments or questions should not be arbitrary and must comport with the standards governing a judge's office.

In 1978, the Ninth Circuit in United States v. Adams set a standard for the admissibility of statements made under hypnosis used to refresh a witness' memory. Addressing a question of first impression, the Adams court applied the civil trial standard: the condition of hypnosis bears on credibility rather than admissibility.

Great care must be taken, however, to ensure that the statements were the product of the witness' own recollection and not the result of suggestions given while under hypnosis. Failure to disclose the state of hypnosis is highly prejudicial, however, and may result in the grant of a new trial.

probability of prejudice and the nature of any initiative he felt impelled to take in the matter.

748. See Quercia v. United States, 289 U.S. 466 (1933), wherein the Court observed: It is within [the trial court's] province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. Id. at 469. See also United States v. James, 576 F.2d 223, 228-29 (9th Cir. 1978) (comment to jury indicating that elements of offenses were established held not to be error) (quoting Quercia v. United States, 289 U.S. 466, 486 (1933)).

749. United States v. Eldred, 588 F.2d 746, 749 (9th Cir. 1978) (“A trial judge may participate in the examination of witnesses for the purpose of ‘clarifying the evidence, controlling the orderly presentation of evidence, confining counsel to evidentiary rulings, and preventing undue repetition of testimony.’ . . . Unless his intervention prejudiced the accused, [there is no error].”) (quoting United States v. Malcolm, 475 F.2d 420, 427 (9th Cir. 1973)); United States v. Landof, 591 F.2d 36, 39 (9th Cir.1978) (judge may properly question a witness to develop facts and clarify questions as long as it is done in a non-prejudicial manner and the court does not become "personally over-involved").


751. 581 F.2d 193, 198 (9th Cir.), cert. denied, 439 U.S. 1006 (1978) (memory of witness in criminal trial may properly be refreshed with statements made while under hypnosis).

752. Id. See also Kline v. Ford Motor Co., 523 F.2d 1067, 1069 (9th Cir. 1975) (per curiam) (witness whose memory was refreshed by statements made while under hypnosis was not incompetent to testify in automobile accident case).

753. 581 F.2d at 199.

754. Id. See also United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969) (failure to disclose hypnosis of witness in criminal action requires a new trial) (“The test . . . is not how the newly discovered evidence concerning the hypnosis would affect the trial judge . . . but whether . . . there was a significant chance that this added item . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.”).
The most effective tool the judge has for controlling the jury is his power to instruct the jury as to the applicable law of the case prior to its deliberations. The jury must be instructed fairly as to the theories of the case, although not necessarily in the precise language requested by counsel. The wide scope of discretion allowed the trial judge in this area is demonstrated by the standards employed on appellate review. Although an instruction may be given or omitted erroneously, it will not be held to be error if it is later withdrawn, a curative instruction given, or if the jury is not misled by it. Instructions are reviewed as a whole, in the context of the entire trial. The jury is presumed

755. See United States v. Johnson, No. 77-3808, slip op. at 4122 (9th Cir. Dec. 19, 1978) ("The duty to instruct the jury extends to the accurate definition of words and phrases having technical meanings."). See United States v. Carman, 577 F.2d 556, 563 (9th Cir. 1978) (jury instructions must accurately state the applicable law); United States v. James, 576 F.2d 223, 226 (9th Cir. 1978) (although criminal defendant is allowed to have jury instructed on his theory of the case, judge is given substantial latitude to tailor the instructions to cover fairly and adequately the issues presented).

756. United States v. Lone Bear, 579 F.2d 522, 524 (9th Cir. 1978) (jury instructions that contain "only insignificant wording changes" from those proposed by defendant are not an abuse of discretion) (citing United States v. James, 576 F.2d 223, 226 (9th Cir. 1978)); United States v. James, 576 F.2d 223, 226 (9th Cir. 1978) (neither party may insist upon any particular language in the jury instructions); United States v. Lyman, 592 F.2d 496, 504 (1978) ("Lyman was not entitled to an instruction that unduly restricted the possible factual bases of criminal liability."). Cf. United States v. Seymour, 576 F.2d 1345, 1348 (9th Cir.), cert. denied, 439 U.S. 857 (1978) (judge can refuse to give defendant's requested instructions if the jury charge in its entirety adequately covers the theory of defense offered at trial).

757. United States v. Collom, No. 77-1040, slip op. at 1870 (9th Cir. June 15, 1978) (withdrawal of instructions improperly before jury held proper if no doubt is left in the jury's mind as to what the court declares the law to be).

758. United States v. Dreitzler, 577 F.2d 539, 548 (9th Cir. 1978) (judge must provide jury with corrected instructions if the first instructions did not adequately cover all elements charged in the indictment); United States v. Walker, 575 F.2d 209, 213 (9th Cir.), cert. denied, 439 U.S. 931 (1978) (supplemental instructions must eliminate jury confusion). See United States v. Bayer, 331 U.S. 532, 536 (1947) (amplification of the jury charge is in the judge's discretion once an accurate and correct charge is given).

759. United States v. Boettjer, 569 F.2d 1078, 1083 (9th Cir.), cert. denied, 435 U.S. 976 (1978) ("Imprecision of statement and inexactness of language in the jury instructions is not reversible error, unless the jury is misled.").) (quoting Pittman v. United States, 368 F.2d 560, 560-61 (9th Cir. 1966) (per curiam), cert. denied, 386 U.S. 995 (1967)).

760. Stoker v. United States, 587 F.2d 438, 440 (9th Cir. 1978) (per curiam) (on review jury instructions must be considered as a whole); United States v. Allen, 579 F.2d 531, 533 (9th Cir. 1978) (jury instructions must be examined as a whole); United States v. Walls, 577 F.2d 690, 697 (9th Cir.), cert. denied, 439 U.S. 893 (1978) (consider jury instructions together to determine whether omission of one instruction was an abuse of discretion); United States v. Dreitzler, 577 F.2d 539, 549 (9th Cir. 1978) (there is no error when "the instructions as a whole communicate the proper notion of [the crime charged] in understandable terms"); United States v. Seymour, 576 F.2d 1345, 1348 (9th Cir.), cert. denied, 439 U.S. 857 (1978) ("[T]he adequacy of the jury instructions is not to be determined by the giving, or failure to give, any one or more instruction, but by examining the instructions as a whole."). United
to have followed the judge’s instructions. The court’s exercise of discretion in this area will be disturbed only if it is found that the instructions prejudiced, misled, or coerced the jury, or if they constitute plain error.

To obtain a fair trial for all parties, the trial judge has discretion to control the actions of all trial participants. Limiting instructions and admonishments to the jury, and control of cross-examination, arise

States v. Crawford, 576 F.2d 794, 799 (9th Cir.) (per curiam), cert. denied, 439 U.S. 851 (1978) ("[T]he question presented here is whether the erroneous impression given by a fair reading of the instruction is cured elsewhere, considering the jury charge as a whole."); United States v. James, 576 F.2d 223, 227 (9th Cir. 1978) (the adequacy of the entire charge must be reviewed in the context of the entire trial); United States v. Strand, 574 F.2d 993, 996 (9th Cir. 1978) (court’s instructions are considered as a whole in determining whether jury was correctly and clearly charged).

761. See also United States v. Park, 421 U.S. 658, 674 (1975) ("[A] single instruction to the jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.") (quoting Cupp v. Naughten, 414 U.S. 141, 146-47 (1973)).

762. United States v. Eldred, 588 F.2d 746, 752 (9th Cir. 1978) (faithful performance by the jurors of their duty must be presumed); United States v. Price, 577 F.2d 1356, 1366 (9th Cir. 1978) (jury assumed to have followed the court’s instructions); United States v. Strand, 574 F.2d 993, 996 (9th Cir. 1978) ("We must presume that the jury followed the court’s instruction.").

763. United States v. Cassasa, 588 F.2d 282, 286 (9th Cir. 1978) (suggestion by caretaking judge on Friday afternoon that the deadlocked jury recess until Monday held not coercive); Stoker v. United States, 587 F.2d 438, 440 (9th Cir. 1978) (per curiam) (standard on review is whether the instructions to the jury were misleading); United States v. Kostoff, 585 F.2d 378, 380 (9th Cir. 1978) (per curiam) (prejudicial error regarding jury instructions merits reversal); United States v. Jones, 569 F.2d 499, 501 (9th Cir.), cert. denied, 98 S. Ct. 2243 (1978) (instructions on willfulness held not in error as they accurately explained the applicable legal standard to the jury).

764. United States v. Kostoff, 585 F.2d 378, 380 (9th Cir. 1978) (plain error in jury instructions merits reversal). See also United States v. King, 586 F.2d 847 (9th Cir. 1978) (No. 78-1230; unpublished opinion) (failure to instruct the jury on every element of the charged offense is harmless error only if that element upon which the jury was not instructed is undisputed).

765. United States v. Miroyan, 577 F.2d 489, 494 (9th Cir.), cert. denied, 439 U.S. 896 (1978) (jury carefully instructed not to consider judge’s statement to panel of prospective jurors); United States v. Segovia, 576 F.2d 251, 253 (9th Cir. 1978) (instruction on the limited purpose for which evidence could be used should have been given, absence thereof not held to be reversible error in context of this case); United States v. James, 576 F.2d 223, 229 (9th Cir. 1978) (judge’s instructions properly limit the effect of his own comments on evidence); United States v. Sigal, 572 F.2d 1320, 1323 (9th Cir. 1978) (cautionary instruction immediately following introduction of evidence limiting the purpose for which that evidence could be admitted minimized any prejudice).

766. See, e.g., United States v. Eldred, 588 F.2d 746, 752 (9th Cir. 1978) (admonishment given to jury to avoid publicity pertaining to the trial).

767. United States v. Adams, 581 F.2d 193, 199-200 (9th Cir.), cert. denied, 439 U.S. 1006 (1978) (curtailment of cross-examination is within the judge’s discretion); United States v. Weiner, 578 F.2d 757, 766 (9th Cir.) (per curiam), cert. denied, 439 U.S. 981 (1978) (judge in securities fraud case can control extent and scope of cross-examination to preclude repetitive
Arguments to the jury,\textsuperscript{768} and the admissibility of evidence\textsuperscript{769} are some of the principal devices employed by the judge. The court has further discretion to grant or deny continuances,\textsuperscript{770} control the court's calendar,\textsuperscript{771} reveal the identity of an informant,\textsuperscript{772} and exclude witnesses from the courtroom.\textsuperscript{773} The contempt power\textsuperscript{774} and the power to ex-

questioning and time-wasting exploration of collateral matters; judge will not be reversed for curbing cross-examination unless by so doing he denies defendant's constitutional right to confrontation). \textit{See also} United States v. Lara-Hernandez, 588 F.2d 272, 274 (9th Cir. 1978) (per curiam) (sixth amendment does not give defendant a right to unlimited cross-examination). \textit{But cf.} United States v. Alvarez-Lopez, 559 F.2d 1155, 1159 (9th Cir. 1977) (limit on cross-examination was too severe and amounted to a denial of defendant's sixth amendment right of confrontation).

\textsuperscript{768}. See United States v. Eldred, 588 F.2d 746, 750 (9th Cir. 1978) (judge's limitations on counsel held as error only if it appears "that the conduct measured by the facts of the case presented together with the results of the trial was clearly prejudicial"); United States v. Sturgis, 578 F.2d 1296, 1300 (9th Cir.), \textit{cert. denied}, 439 U.S. 970 (1978) ("Not only should a judge interfere with an attorney's closing argument when it is 'legally wrong,' but he should also limit, for example, attorneys' remarks outside the record or unduly inflammatory."); United States v. Kim, 577 F.2d 473, 484 (9th Cir. 1978) (when prosecutor read entire indictment to jury, and judge properly instructed the jury that indictment was not evidence, there was no error); United States v. Barron, 575 F.2d 752, 758 (9th Cir. 1978) (closing argument beyond the evidence properly curtailed by the judge); United States v. Carreon, 572 F.2d 683, 686 (9th Cir. 1978) (per curiam) (judge who continually interrupted defense counsel's arguments sua sponte and who sustained his own objections to defense counsel's questions, deprived defendant of a fair trial).

\textsuperscript{769}. See note 743 supra.

\textsuperscript{770}. See United States v. Powell, 587 F.2d 443, 447 (9th Cir. 1978) (trial court has broad discretion in granting or denying continuances); United States v. Charnay, 577 F.2d 81, 83 (9th Cir. 1978) ("The decision whether to continue a trial to enable a party to procure an absent witness rests in the sound discretion of the trial court . . . ."); United States v. Hoyos, 573 F.2d 1111, 1114 (9th Cir. 1978) (decision to grant or deny continuance to allow defendant to obtain witness is within trial court's discretion); United States v. Hernandez-Berceda, 572 F.2d 680, 682 (9th Cir. 1978) (trial court's discretion to grant or deny continuance is not without limits); United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978) (trial court's grant or denial of continuance reversible only for abuse of discretion).

\textsuperscript{771}. United States v. Olander, 584 F.2d 876, 885 (9th Cir. 1978) ("The court has control of its own calendar . . . ."); United States v. Barney, 568 F.2d 134, 136 (9th Cir.) (per curiam), \textit{cert. denied}, 435 U.S. 955 (1978) (in response to exigencies created by court calendar, judge may allow less than the 10-day maximum for defendant to file objections to magistrate's recommendations).

\textsuperscript{772}. United States v. Hernandez-Berceda, 572 F.2d 680, 682-83 (9th Cir. 1978) (revelation of informant's identity is within trial court's discretion; court must carefully balance defendant's interest in preparing defense against safety of informant).

\textsuperscript{773}. United States v. Robbins, 579 F.2d 1151, 1154 (9th Cir. 1978) (not a breach of judge's discretion when witness present despite exclusion order allowed to testify); United States v. Avila-Macias, 577 F.2d 1384, 1389 (9th Cir. 1978) (judge has power to exclude witnesses from courtroom) ("[A]ppropriate sanction for violation of witness exclusionary rule is a matter which lies within the sound discretion of the trial court."). \textit{Cf.} United States v. Torbert, 496 F.2d 154, 158 (9th Cir.), \textit{cert. denied}, 419 U.S. 857 (1974) ("[I]t is ordinarily an abuse of discretion to disqualify a witness unless the defendant or his counsel have somehow cooperated in the violation of the order.").

\textsuperscript{774}. See notes 779-84 infra and accompanying text.
clude the defendant from the courtroom\(^\text{775}\) are more extreme sanctions available to the trial judge.

c. Limitations on discretion

The discretion of the trial court, however, is not without limitations. The judge must specifically find waivers of constitutional rights prior to trial,\(^\text{776}\) must ensure the defendant's right to counsel in deportation proceedings,\(^\text{777}\) and must honor state findings of historical fact in habeas corpus actions.\(^\text{778}\)

\(^\text{775}\) United States v. Kizer, 569 F.2d 504, 506-07 (9th Cir.), cert. denied, 98 S. Ct. 1626 (1978) (judge properly acted within his discretion in ordering defendant, who continued to argue with judge in front of jury after being warned, removed from courtroom). See Illinois v. Allen, 397 U.S. 337, 343 (1970) (defendant can lose right to be present at trial by continuing disruptive behavior) ("We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.").

\(^\text{776}\) United States v. Aponte, 591 F.2d 1247, 1250 (9th Cir. 1978) (court's allowing defendant to represent self without a specific finding of waiver by defendant of right to counsel before trial held to be error) ("Although a trial judge's failure to make a specific waiver inquiry is not per se reversible error . . . it will be only the rare case . . . in which an adequate waiver will be found on the record in the absence of a specific inquiry by the trial judge."). See United States v. Gillings, 568 F.2d 1307, 1309 (9th Cir.) (per curiam), cert. denied, 436 U.S. 919 (1978) (defendant in tax protest case cannot proceed in pro per unless the court finds through interrogation of defendant that he "understands the charges and the manner in which an attorney can be of assistance. The defendant must be aware that he or she will be on his or her own in a complex area where experience and professional training are greatly to be desired.").

\(^\text{777}\) Castro-Nuno v. INS, 577 F.2d 577, 579 (9th Cir. 1978) (absent waiver of statutory right to counsel in deportation hearing, judge sua sponte should have continued the hearing until defendant was properly represented); United States v. Barraza-Leon, 575 F.2d 218, 222 (9th Cir. 1978) (immigration judge must inform defendant of apparent grounds for relief from deportation; this duty satisfied when judge told defendant that defendant could retain counsel and present any evidence he wished against deportation). See also Cuevas-Ortega v. INS, 588 F.2d 1274, 1278 (9th Cir. 1978) (once an alien has been adjudicated deportable, voluntary departure is wholly within immigration judge's discretion).

\(^\text{778}\) See Taylor v. Cardwell, 579 F.2d 1380, 1382-83 (9th Cir. 1978) (the district court must accept state court findings of fact if made after a full and fair hearing and if they have substantial support in the record). Cf. Chard v. United States, 578 F.2d 1317, 1318 (9th Cir. 1978) (district court's refusal to conduct full evidentiary hearing on whether defendant had been properly informed of appeal rights not error when same issue had been raised previously and rejected as frivolous); Myers v. Rhay, 577 F.2d 504, 509 (9th Cir.) (per curiam), cert. denied, 439 U.S. 968 (1978) (if state court has provided a constitutionally adequate hearing, it is within trial court's discretion to hold evidentiary hearing on voluntariness of defendant's waiver); Stone v. Cardwell, 575 F.2d 724, 726 (9th Cir. 1978) (state court findings of fact are presumably correct but may be disturbed upon showing material facts not adequately developed or factual determinations not fairly supported by the record); Pierce v. Cardwell, 572 F.2d 1339, 1342 (9th Cir. 1978) (district court must grant an evidentiary hearing if the facts were not resolved at the state court level). See also Townsend v. Sain, 372
In *Hawk v. Cardoza* the Ninth Circuit significantly limited the criminal contempt power of the trial court judge. Adopting the Seventh Circuit's position, the Ninth Circuit now requires that "some sort of actual damaging effect on judicial order [be found] before one may be held in criminal contempt." The *Hawk* court concluded that a reading of the fourteenth amendment in conjunction with the first amendment allows a finding of contempt of court only if the offensive conduct was intentionally contemptuous. The favored procedure in these cases is not to mete out a summary sentence of criminal contempt, but to give the contemner reasonable notice of the specific charges against him and to give him a chance to be heard in his own behalf.

*d. Discretion in post-trial proceedings*

The trial judge's discretionary powers in most post-trial proceedings mirror those he had during the trial. One area of this discretion involves the declaration of mistrials. If, in the court's discretion, "there is

---

779. 575 F.2d 732, 734 (9th Cir. 1978) (per curiam) ("[W]e infer that fourteenth amendment due process, incorporating the first amendment, does demand some showing of intent for conviction of criminal contempt.").


781. See *In Re Dellinger*, 461 F.2d 389, 400 (7th Cir. 1972).

782. 575 F.2d at 735.

783. *Mayberry v. Pennsylvania*, 400 U.S. 455, 463-66 (1971). If the contemner is the defense counsel, the court must strike a balance among the competing constitutional interests. 575 F.2d at 735 (rights guaranteed by the first, sixth, and fourteenth amendments must be balanced if the contemner is the defendant's attorney).

784. See *Taylor v. Hayes*, 418 U.S. 488, 500 (1974) (elementary due process must be accorded the contemner although the full scale of trial rights would be inappropriate).

It is also the favored procedure to have the contempt proceedings before a judge different from the one involved in the controversy. *Cooke v. United States*, 267 U.S. 517, 539 (1925). *See also* *Taylor v. Hayes*, 418 U.S. 488, 501-02 (1974) (a different judge should try the contempt proceeding if the original judge has become embroiled in a running controversy).

785. When sentencing the defendant, for example, the judge retains broad discretion. *See United States v. Lincoln*, 581 F.2d 200, 201-02 (9th Cir. 1978) ("Sentencing is within the discretion of the trial judge . . . where, as here, the sentence falls within the bounds prescribed by statute, it is not reviewable [and] will not be reviewed absent some extraordinary circumstance."). *See, e.g., North Carolina v. Pearce*, 395 U.S. 711, 723 (1969) (sentencing judge may consider evidence from the defendant's prior record, pre-sentencing report, as well as from other sources); *Farrow v. United States*, 580 F.2d 1339, 1344 & n.2 (9th Cir. 1978) (en banc) (trial judge has wide discretion in sentencing); *In Re Garmon*, 572 F.2d 1373, 1375 (9th Cir. 1978) (prisoner, already serving a criminal sentence, and later sentenced for civil contempt, has former sentence tolled during period of civil contempt confinement).
either (1) a ‘manifest necessity’ for the discharge of the original proceedings, or (2) ‘the ends of public justice’ would be defeated,” the judge may properly declare a mistrial.786

Judicial discretion in a motion to vacate a sentence under 28 U.S.C. section 2255787 in which a defendant claims a Tucker violation788 has been delineated clearly by the Ninth Circuit in Farrow v. United States.789 The Ninth Circuit now holds that the original sentencing judge should hear the motion790 and determine whether the sentence he gave the defendant would have been different had the judge known of the invalidity of the prior conviction. If this question is answered affirmatively, the judge must then hold an evidentiary hearing to deter-

---

786. Arnold v. McCarthy, 566 F.2d 1377, 1386 (9th Cir. 1978) (citations omitted) (declaration of mistrial held not an abuse of discretion because jurors could not reach a verdict). See Wade v. Hunter, 336 U.S. 684, 690 (1948) (“[A] trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failing to discontinued would defeat the ends of justice.”); United States v. Lorenzo, 570 F.2d 294, 298 (9th Cir. 1978) (determination of manifest necessity is left to the sound discretion of the trial court).

The “particular circumstances” needed to declare a mistrial have been described as “unforeseeable circumstances that arise during a trial making its completion impossible.” 336 U.S. at 689. An example of these unforeseeable circumstances is “the failure of the jury to agree on a verdict.” Id. See also Arnold v. McCarthy, 566 F.2d at 1386 (manifest necessity sufficient to permit the declaration of a mistrial occurs when the jury cannot reach a verdict).

The pivotal issue in this area is often whether the jury is deadlocked. The Arnold court isolated several factors to be considered by the judge in making this determination:

1) A timely objection by defendant, (2) the jury’s collective opinion that it cannot agree, (3) the length of the deliberations of the jury, (4) the length of the trial, (5) the complexity of the issues presented to the jury, (6) any proper communications which the judge has had with the jury and (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict.

566 F. 2d at 1387. See also United States v. See, 505 F.2d 845, 851-52 (9th Cir. 1974), cert. denied., 420 U.S. 992 (1975) (most critical factor in determining whether the jury is hopelessly deadlocked is its statement to that effect; once receiving such a statement, the judge must independently determine whether further deliberations would overcome the deadlock by questioning the jurors).

787. 28 U.S.C. § 2255 (1976) states in pertinent part:

A prisoner in custody . . . 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 . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence . . . . Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . . grant a prompt hearing . . . .


789. 580 F.2d 1339, 1348 (9th Cir. 1978) (“[W]e now carefully outline the procedure for district courts to follow in § 2255 motions claiming Tucker violations . . . .”).

790. Id. at 1348-51.
mine the actual validity of the prior conviction.\textsuperscript{791}

2. Conduct of the prosecutor

\textit{a. Pre-trial proceedings}

The United States Attorney in every case must make an initial determination whether to prosecute. A government attorney has a duty\textsuperscript{792} in every trial to see that justice is done and, to this end, may exercise a broad range of discretionary powers.\textsuperscript{793} A decision to prosecute will not be found to be an abuse of discretion unless others similarly situated generally have not been prosecuted for similar conduct and the

\textsuperscript{791} \textit{Id.} at 1353. If the judge finds, however, that at the time of the sentencing he mistakenly believed the prior conviction to be valid and increased the petitioner's sentence because of it, an evidentiary hearing must be held to determine the validity of the prior conviction. \textit{Id.} at 1354.

At this evidentiary hearing, three issues must be examined: (1) petitioner's indigency at the time of the prior trial; (2) petitioner's lack of representation at the prior trial; and (3) absence of an effective waiver of petitioner's right to counsel. \textit{Id.} at 1353-54. These issues are determined based on the preponderance of the evidence. \textit{Id.} at 1355.

\textsuperscript{792} Berger v. United States, 295 U.S. 78 (1935), contains the seminal statement on the duty of a United States Attorney:

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 . . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

\textit{Id.} at 88. \textit{See} United States v. Powell, 587 F.2d 443, 447 (9th Cir. 1978) (prosecutor's failure to reveal the whereabouts of witness to defense "smack[ed] too much of a trial by ambush" and was a violation of prosecutor's duty) (quoting United States v. Kelly, 420 F.2d 26, 29 (2d Cir. 1969)). \textit{See also} Blevins v. Ford, 572 F.2d 1336, 1339 (9th Cir. 1978) (prosecutor enjoys immunity from civil rights action resulting from alleged misconduct at trial).

Although defense counsel is not under the same high duty as the prosecutor, he must still meet a minimum standard of conduct.

Defense counsel, of course, must represent clients with zeal, but an attorney impedes the administration of justice when he seeks to harass the judiciary by repeatedly pressing an obviously meritless argument solely for the purpose of trying to embarrass the trial court or to display his personal pique at one of its rulings.

United States v. Edwards, 587 F.2d 29, 31 (9th Cir. 1978) (application for defense counsel's investigator's fee denied).

\textsuperscript{793} \textit{See}, e.g., United States v. Clinton, 574 F.2d 464, 465 (9th Cir.) (per curiam), \textit{cert. denied}, 439 U.S. 830 (1978) (action for failure to file tax return may be filed either at defendant's place of residence or at the collection point where return should have been filed); Hooker v. Klein, 573 F.2d 1360, 1365 (9th Cir.), \textit{cert. denied}, 439 U.S. 932 (1978) (if government in good faith determines that extradition is warranted, prosecutor may pursue multiple extradition requests irrespective of earlier lack of success at same); United States v. McCoy, No. 78-1015, slip op. at 3906 (9th Cir. Nov. 27, 1978) (government was not under affirmative obligation to prevent destruction of evidence in possession of third party).
prosecutorial decision was based on an impermissible ground,\textsuperscript{794} or if such prosecution was a vindictive act toward the defendant.\textsuperscript{795}

All federal criminal prosecutions must proceed by way of a grand jury indictment.\textsuperscript{796} When presenting evidence to the grand jury, the prosecutor need not present all evidence favorable to the defendant,\textsuperscript{797} nor need he advise the grand jury of all matters bearing on the credibility of potential witnesses.\textsuperscript{798} Although the prosecutor may present evidence inadmissible under the Federal Rules of Evidence,\textsuperscript{799} deceptive

\textsuperscript{794}. United States v. Gillings, 568 F.2d 1307, 1309 (9th Cir.), cert. denied, 436 U.S. 919 (1978), sets out the prima facie case for selective prosecution: "defendant must show: (1) that others are generally not prosecuted for the same conduct; and (2) that the decision to prosecute this defendant was based on such impermissible grounds as race, religion, or the exercise of constitutional rights." \textit{Id.} Accord, United States v. Douglass, 579 F.2d 545, 550 (9th Cir. 1978) (no evidence introduced to show improper criteria as basis for prosecution for re-entering military reservation without permission); United States v. Arias, 575 F.2d 253, 255 (9th Cir.), cert. denied, 439 U.S. 868 (1978) (defendant did not show that the treatment accorded him differed from those similarly situated or that the prosecution was based on an "invidious" criterion; perjury prosecutions do not unfairly single out those who take the witness stand in their own defense). \textit{See also} United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975), cert. denied, 424 U.S. 955 (1976) (adopting Second Circuit prima facie case for selective prosecution) (citing United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974)).

\textsuperscript{795}. \textit{See} United States v. Arias, 575 F.2d 253, 255 (9th Cir.), cert. denied, 439 U.S. 868 (1978) (defendant has the burden of proof to show vindictiveness in the sense of bad faith or maliciousness, and a bare allegation is insufficient to do so). \textit{See also} Blackledge v. Perry, 417 U.S. 26, 28 (1974) (prosecution of a more serious charge after defendant's successful attack on his previous conviction held improper if determined to be vindictive). \textit{Cf.} United States v. Thurnhuber, 572 F.2d 1307, 1310 (9th Cir. 1977) (addition of two counts prior to second trial after court's sua sponte declaration of mistrial held not vindictive) ("Without that close temporal—or otherwise apparent—link between the exercise of the right and the 'penalty,' there can be no 'realistic likelihood of "vindictiveness"'"") (citations omitted); United States v. Groves, 571 F.2d 450, 453 (9th Cir. 1978) (manifest appearance of vindictiveness, as well as vindictiveness in fact, is sufficient to invoke the \textit{Blackledge} rule).

\textsuperscript{796}. U.S. CONsT. amend. V states in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury . . . ."

\textsuperscript{797}. \textit{See} United States v. Romero, 585 F.2d 391, 399 (9th Cir. 1978) ("Contrary to the obligation imposed upon the prosecution at trial, the Government is not required to present all evidence that might be exculpatory to a grand jury."); United States v. Thompson, 576 F.2d 784, 786 (9th Cir. 1978) (affidavit relating to a potential witness' credibility need not be presented to the grand jury by the prosecutor) ("Dismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way, as where perjured testimony has knowingly been presented . . . .").

\textsuperscript{798}. United States v. Thompson, 576 F.2d 784, 786 (9th Cir. 1978).

\textsuperscript{799}. \textit{See}, e.g., United States v. Romero, 585 F.2d 391, 399 (9th Cir. 1978) ("[T]he Court has established that a grand jury may return an indictment based solely upon hearsay evidence."). \textit{See generally} Costello v. United States, 350 U.S. 359, 363 (1956) ("An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.").
evidence, such as perjured testimony, may not be presented to the grand jury.

In 1978, both the Supreme Court and the Ninth Circuit closely examined plea bargain agreements. Following the Court's decision in *Bordenkircher v. Hayes,* the Ninth Circuit, in *United States v. Allsup,* approved the practice whereby the prosecutor initially does not file all possible charges against the accused but does so later if the defendant does not accept the plea bargain agreement. Although the Ninth Circuit found this practice not violative of the due process clause of the fourteenth amendment, as the defendant is free to accept or to reject the prosecution's offer, due process does require that a motion to withdraw a guilty plea be granted if the plea was not knowingly and intelligently entered into or if the state failed to keep its part of the bargain.

---

800. See *United States v. Kennedy,* 564 F.2d 1329, 1338 (9th Cir. 1977), cert. denied, 435 U.S. 944 (1978) ("[O]nly in a flagrant case, and perhaps only where knowing perjury, relating to a material matter, has been presented to the grand jury should the trial judge dismiss an otherwise valid indictment . . . .") See also *United States v. Thompson,* 576 F.2d 784, 786 (9th Cir. 1978) (dicta) ("Dismissal of an indictment is required . . . . where perjured testimony has knowingly been presented.").

801. 434 U.S. 357, 360-61 (1978) (additional charge of being repeat offender properly used as bargaining tool by prosecutor).

802. 573 F.2d 1141, 1143 (9th Cir. 1978). See *United States v. Gerard,* 491 F.2d 1300, 1305-06 (9th Cir. 1974) (since during the plea bargaining process "a prosecutor may properly indicate the risks in not pleading guilty, whether of a larger sentence or of a larger exposure . . . . we see no reason why the state should necessarily be precluded in all respects from actualizing these risks when the plea is withdrawn.").

803. *Bordenkircher v. Hayes,* 434 U.S. 357, 365 (1978) ("[T]he course of conduct engaged in by the prosecutor . . . . which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.").

804. Stone v. Cardwell, 575 F.2d 724, 726 (9th Cir. 1978). See *Santobello v. New York,* 404 U.S. 257, 261 (1971) ("The [guilty] plea must . . . . be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known . . . . When a plea rests in any significant degree on a promise or agreement of the prosecutor . . . . such promise must be fulfilled.").

Promises made by individual government attorneys are binding on all attorneys within the prosecutor's office. See *Giglio v. United States,* 405 U.S. 150, 154 (1972) (failure of prosecuting assistant U.S. Attorney to disclose that prosecutor's key witness was offered a plea bargain by another assistant U.S. Attorney violated defendant's due process rights). The Court observed:

The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government . . . . To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

*Id.; Santobello v. New York,* 404 U.S. 257, 262 (1971) ("The staff lawyers in a prosecutor's
As part of their obligation to ensure justice, United States Attorneys are under varying duties to reveal information to the defense. In United States v. Agurs the Supreme Court distinguished cases in which the prosecutor’s obligation is to provide defense counsel with specifically requested exculpatory information from cases in which only a general request is made. In the former circumstance the test of materiality is whether the requested information might affect the outcome of the trial; in the latter, the requested evidence must “create . . . a reasonable doubt [as to guilt] that would not otherwise exist.” In United States v. Goldberg, the Ninth Circuit applied the harmless error standard to a case in which information was specifically requested. Reasoning that the notes at issue related to witness credibility, rather than to the substantive issue of guilt or innocence, the Goldberg court concluded that there was no reasonable probability that use of the notes at trial would have had a material effect on the verdict. The Government’s failure to produce the notes, therefore, was harmless beyond a reasonable doubt.

The use of false testimony may also require a new trial. The office have the burden of ‘letting the left hand know what the right hand is doing’ or has done. That the breach of the agreement was inadvertent does not lessen its impact.

805. See United States v. Butler, 567 F.2d 885, 888 (9th Cir. 1978) (per curiam) (prosecutor’s nondisclosure of the “true nature of dealings” with its witness required a new trial; the government must disclose pertinent material evidence favorable to the defense, whether it relates to matters of substance or credibility). See also United States v. Agurs, 427 U.S. 97, 107-08 (1976) (prosecutor not volunteering exculpatory evidence was not denial of due process; prosecutor has constitutional duty to volunteer exculpatory information to the defense if not doing so would result in denial of defendant’s right to fair trial); Brady v. Maryland, 373 U.S. 83, 86-88 (1963) (suppression by prosecution of evidence favorable to accused upon request violates due process when evidence is material to guilt or to punishment, irrespective of good or bad faith of prosecution).

807. Id. at 104.
808. Id. at 112.
809. 582 F.2d 483, 490 (9th Cir. 1978).
810. Id. at 488-90. The Goldberg court analogized the standard of review for the denial of a request for specific exculpatory materials to the standard of harmless error: “whether the requested evidence might affect the outcome of the trial.” This standard appears to be synonymous with “a reasonable possibility that the error affected the verdict.” Id. (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Reasoning that the general request standard of Agurs is too difficult to apply, the Ninth Circuit will avoid its application whenever possible. While in Goldberg it was doubtful that the defendant’s request for “any statements” and “any documents” described “specific evidence” as contemplated by the Court in Agurs, the Ninth Circuit accepted arguendo defendant’s claim that the requests were sufficiently specific. 582 F.2d at 488-90.
811. Id. at 490.
812. United States v. Agurs, 427 U.S. 97, 103 (1976) (“[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is
Ninth Circuit in *United States v. Butler*\(^\text{813}\) defined its standards for evaluating intentional and negligent nondisclosure by the prosecution of the use of false testimony. Finding the standards developed by the Supreme Court in *Giglio v. United States*\(^\text{814}\) too restrictive,\(^\text{815}\) the Ninth Circuit formulated a test for negligent nondisclosure that requires a new trial whenever the nondisclosure "might reasonably have affected the jury's judgment on some material point without necessarily requiring a supplemental finding that it also would have changed its verdict."\(^\text{816}\) Since a finding of negligent nondisclosure is more probable than a finding of intentional nondisclosure,\(^\text{817}\) the prudent prosecutor should err on the side of a more complete disclosure.

**b. During the trial**

The prosecutor may comment on the evidence in both his opening\(^\text{818}\) statement and closing\(^\text{819}\) argument as well as dismiss counts of the in-
dictment following the presentation of all the evidence. He may not, however, limit the defendant's access to witnesses by his remarks to those witnesses.

A closely scrutinized area of prosecutorial conduct embraces comments on the defendant's assertion of his constitutional rights. In United States v. Lopez, for example, such a comment was allowed assertions of personal beliefs in closing argument were "not so gross as probably to prejudice the defendant" even though the prosecutor exceeded the bounds of propriety and ignored the judge's warnings; United States v. Rich, 580 F.2d 929, 936 (9th Cir.), cert. denied, 439 U.S. 935 (1978) (prosecutor's expression of obvious opinion on witness' credibility held not error when disclaimed as not evidence); United States v. Sturgis, 578 F.2d 1296, 1299-1300 (9th Cir.), cert. denied, 439 U.S. 970 (1978) (prosecutor's remark in closing argument that "birds of a feather flock together" strongly condemned, but held harmless in light of record replete with evidence of defendant's involvement in the alleged crime); United States v. Lopez, 575 F.2d 681, 685-86 (9th Cir. 1978) (under unusual circumstances of case, reference to post-Miranda silence in closing statement constituted harmless error not warranting reversal); United States v. Sigal, 572 F.2d 1320, 1322 (9th Cir. 1978) (prosecutor's comment "[b]ut the point is, ladies and gentlemen, that he . . . unlike the defendants Baker and Sigal came forward before the trial and admitted his guilt" held to be part of the prosecutor's effort to bolster the credibility of a key witness and in context was "not of such character that the jury would naturally and necessarily take them to be comments on the failure of the accused to testify.") (citing United States v. Cornfeld, 563 F.2d 967, 971 (9th Cir. 1977)); United States v. Lyman, 592 F.2d 496, 499 (9th Cir. 1978) (although prosecutor's remark was conceded to have been improper, as it was more probable than not that the remark did not materially alter the verdict, it was not held as error).

See, e.g., United States v. Price, 577 F.2d 1356, 1366-67 (9th Cir. 1978) (dismissing two counts of four-count indictment at end of closing arguments held not to violate prosecutor's duty of candor).

See, e.g., United States v. Rich, 580 F.2d 929, 934 (9th Cir.), cert. denied, 439 U.S. 935 (1978) (FBI agent's advice to witnesses that they need not confer with defense counsel held not to have improperly influenced the witnesses since they were told they had opportunity to so confer) ("[W]e recognize that the abuses can easily result when officials elect to inform potential witnesses of their right not to speak with defense counsel . . . . [I]t is imperative that prosecutors and other officials maintain a posture of strict neutrality when advising witnesses of their duties and rights.").

The prosecutor's comment was:

The remark made by the defendant, apparently to his mother when she said why did you do it and he said: I didn't mean to, he started it, or something along those lines. If anything, perhaps this shows this was the beginning of some remorse. He killed his brother by pointing the gun at him when all the brother had done was start to walk at him. And then the gravity of this begins to sink in, although he didn't seem to be too remorseful the next day when Agent Freking was driving here to Tucson when he was laughing at jokes or whatever. So in any event, this is a likely or possible explanation for this. And in view of the fact he never told any of the other agents that it was an accident or that William was the cause of this, I submit to you it is pretty suspicious or it is unlikely this is the real explanation here. If it really was an accident, why didn't he protest his innocence, why didn't he protest and say: Wait a minute, this was an accident. Why didn't he stay home and say I had no reason to turn myself in. Those were his words to Ken Freking. He realized he had to go turn himself in. Would he have felt the same way if it was just an accident? I say no.

Id. at 684.
as long as it was not "extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported the acquittal." Indirect remarks also are carefully examined, but are permissible as long as the jury would not naturally and necessarily construe the comment as one reflecting on defendant's failure to testify.

\[c. \text{Relief for abuse of discretion}\]

Improper prosecutorial remarks usually can be remedied by a curative instruction given by the court. Absent timely objection at trial, however, the Ninth Circuit normally will not consider the conduct unless it constitutes plain error. Comments adverse to the constitutionally protected rights of the accused are not necessarily plain error; even if found to be plain error, however, such conduct may be harmless error not warranting reversal.

\[3. \text{Conduct of the jury}\]

The unique value of the jury "lies in the interposition between the accused and his accuser of the commonsense judgment of a group of

824. \textit{Id.} at 685.
825. \textit{See, e.g.}, United States v. Sigal, 572 F.2d 1320, 1323 (9th Cir. 1978) (prosecutor's inadvertent and unintended comment on post-Miranda silence was plain error on face, but held to be harmless).
826. \textit{See United States v. Rich}, 580 F.2d 929, 936 (9th Cir.), \textit{cert. denied}, 439 U.S. 935 (1978) ("[I]mproprieties in counsel's arguments to the jury do not require a new trial unless they are so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge.") (citing United States v. Parker, 549 F.2d 1217, 1222 (9th Cir.), \textit{cert. denied}, 430 U.S. 971 (1977)).
827. \textit{See, e.g.}, United States v. Rich, 580 F.2d 929, 936 (9th Cir.), \textit{cert. denied}, 439 U.S. 935 (1978) (plain error is the standard of review as defendant did not make a timely objection to prosecutor's remark); United States v. Lopez, 575 F.2d 681, 684-85 (9th Cir. 1978) (no objection made to comment and no curative instruction requested; therefore, first inquiry on appeal is whether conduct in question amounts to plain error).

The Ninth Circuit has held that an objection or motion for mistrial during closing arguments need not be made until after the completion of the argument. United States v. Lyman, 592 F.2d 496, 499 (9th Cir. 1978) (motion for mistrial at end of prosecutor's closing argument held timely). A contrary rule prevails or is favored in the First, Second, Fourth and Fifth Circuits. \textit{See id.} at n.2 and cases cited therein.
828. \textit{See, e.g.}, United States v. Lopez, 575 F.2d 681, 685 (9th Cir. 1978). The Lopez court made this distinction:

It is crucial to keep in mind, however, that the standard of "plain error" only goes to the issue of \textit{reviewability} and \textit{not} to the issue of whether a reversal is warranted. . . . Thus, an error unobjected to at trial may be so plain as to be reviewable under Rule 52(b), yet the error may be harmless and therefore not justify a reversal. \textit{Id.} (emphasis in original).
This is jeopardized whenever an individual juror is exposed to information about the trial from sources outside of the courtroom. Such information would compromise the jury's exclusive function: to weigh the credibility of witnesses, to resolve evidentiary conflicts and to draw reasonable inferences from proven facts. Protection of the jury's "free and unfettered" discretion in these areas is left to the trial court.

Once the jury has returned a verdict, it may not thereafter impeach

829. Williams v. Florida, 399 U.S. 78, 100 (1970) (jury of less than 12 held constitutional). See also Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (petit jury must be selected from representative cross section of community). The Taylor court characterized the value and the purpose of a jury as being "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." Id. citing Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968) (sixth amendment right to trial by jury applied to states via the fourteenth amendment).

830. See, e.g., United States v. Weiner, 578 F.2d 757, 765 (9th Cir.) (per curiam), cert. denied, 439 U.S. 981 (1978) (juror-initiated conversation with bailiff held not prejudicial; judge, therefore, did not abuse discretion in denying motion for new trial); United States v. Avila-Macias, 577 F.2d 1384, 1387-88 (9th Cir. 1978) (judge did not abuse discretion by failing to disqualify juror who passed outside of bar wherein alleged drug buy took place); United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir. 1977), cert. denied, 434 U.S. 818 (1978) (juror's statement prior to empaneling about predisposition to convict criminal defendants did not sufficiently establish bias to require her exclusion from panel) ("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.").

831. United States v. Brady, 579 F.2d 1121, 1127 (9th Cir. 1978) (evidence in manslaughter trial was sufficient to allow jury finding of specific intent); United States v. Young, 573 F.2d 1137, 1139 (9th Cir. 1978) (evidence in conspiracy case was sufficient to allow jury finding of conspiracy even though all evidence was circumstantial).

832. The judge has considerable discretion to deal with jury misconduct. See United States v. Avila-Macias, 577 F.2d 1384, 1387 (9th Cir. 1978) ("The trial judge acted within appropriate limits of his discretion in appraising the probability of prejudice and the nature of any initiative he felt impelled to take in the matter."); United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir. 1977), cert. denied, 434 U.S. 818 (1978). The Hendrix court observed:

An important part of the district judge's broad discretion centers on his response to allegations of juror bias or misconduct. For example, it is within the trial court's discretion to determine whether and when to hold an evidentiary hearing on such allegations. If the judge orders an investigative hearing, it is within his discretion to determine its extent and nature.

The judge also has considerable discretion in dealing with jury bias stemming from trial publicity and from improper arguments by counsel. See United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978) (judge can protect juror from harassment by media after the trial is completed if reasonably necessary).

Should bias affect the jury beyond the reach of these above remedies, declaration of a mistrial may be necessary. See United States v. Love, 535 F.2d 152, 155 (9th Cir.), cert. denied, 429 U.S. 847 (1976) (mistrial not required because conversation between juror and defendant was entirely innocent).
that verdict. In *United States v. Weiner,* thirty minutes after a verdict had been returned and the jury polled and discharged, one juror informed the judge that she had not voted guilty. Rather, she maintained, her vote had been guilty "with reservation." The *Weiner* court denied the defendant's motion for a new trial, reasoning that a legally sufficient verdict had been returned and, as such, could not be impeached. Any juror uncertainty or misunderstanding regarding the verdict must be expressed at the time of the poll, not after the jurors have been excused and possibly subjected to "out-of-court cultivation." Furthermore, any such uncertainty must be reflected in the record.

D. Evidence

1. Relevancy

All evidence must satisfy the threshold requirement of relevancy before it can be admitted. The Ninth Circuit, in 1978, was confronted with such a relevancy issue in a major securities fraud case involving the now-defunct Equity Funding Corporation. The defend-

---

833. See *United States v. Weiner,* 578 F.2d 757, 764 (9th Cir.) (per curiam), cert. denied, 439 U.S. 981 (1978) (expression of reservation in out-of-court statement about verdict in securities fraud case held to be insufficient grounds on which to challenge the verdict). The philosophy behind not allowing a jury to impeach its verdict was set forth in *McDonald v. Pless,* 238 U.S. 264, 267 (1915), where the Court observed:

> When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room. 238 U.S. at 267.

834. 578 F.2d 757 (9th Cir.) (per curiam), cert. denied, 439 U.S. 981 (1978).

835. Id. at 764.

836. *Cf.* *Fox v. United States,* 417 F.2d 84, 88-89 (5th Cir. 1969) (a legally sufficient verdict was not returned when one juror did not respond when polled on verdict and other jurors thought that a majority was sufficient to find defendant guilty).

837. *United States v. Weiner,* 578 F.2d 757, 764 (9th Cir.) (per curiam), cert. denied, 439 U.S. 981 (1978). The *Weiner* court clarified the Ninth Circuit's statement in *United States v. Lustig,* 555 F.2d 737, 746 (9th Cir.), cert. denied, 434 U.S. 1045 (1977), that defendant "would have a valid objection if one or more jury members expressed some uncertainty as to the verdict." This language, reasoned the *Weiner* court, referred to expressions of uncertainty occurring at the time of polling, not after. 578 F.2d at 764 n.2.

838. *United States v. Lustig,* 555 F.2d 737, 746 (9th Cir.), cert. denied, 434 U.S. 1045 (1977) (record must reflect the uncertainty about or disagreement with the verdict expressed by the juror in order to be a basis on which to challenge the verdict) ("Where no dissent or uncertainty is demonstrated in court, testimony will not be received from juror or others regarding the verdict itself.").

839. *Fed. R. Evid.* 402 states, in part: "Evidence which is not relevant is not admissible." *See, e.g., United States v. King,* 587 F.2d 956, 962 (9th Cir. 1978) (recorded conversations held relevant to nature of conspiracy that may have ended at least three months before talks took place).
ants in *United States v. Weiner*\(^{840}\) appealed their convictions for securities fraud stemming from their employment as independent accountants for Equity Funding. The appellants challenged a jury instruction that had allowed the jury to measure the defendants' intent and good faith according to their compliance with generally accepted auditing standards (GAAS) and generally accepted accounting principles (GAAP).\(^{841}\) Ruling for the first time on this issue, the Ninth Circuit approved the lower court's instruction that evidence regarding compliance with GAAS and GAAP is relevant to, but not conclusive of, the issues of knowledge and willfulness.\(^{842}\) In so ruling, the *Weiner* court observed that the defendant's "consistent failure to apply GAAS and GAAP after they knew some kind of major fraud was afoot provided a basis from which the jury could reasonably infer defendants' knowing and willful participation in the fraud."\(^{843}\)

Federal Rule of Evidence 402 recognizes that relevant evidence must be suppressed if obtained in violation of the United States Constitution.\(^{844}\) Although rule 402 makes no specific mention of evidence obtained in violation of state constitutions, the Ninth Circuit, prior to the adoption of rule 402, required that procedures used to obtain evidence comply with both federal and state standards.\(^{845}\) After the adoption of rule 402, however, the Ninth Circuit retreated from this position. In *United States v. Grajeda*,\(^{846}\) the Ninth Circuit viewed the Federal Rules of Evidence as a comprehensive and exclusive code governing admissibility standards in federal courts.\(^{847}\) Evidence in *Grajeda*, obtained in violation of California law, was therefore admissible in federal court because it did not fall within any exception specified in rule 402.\(^{848}\)

\(^{840}\) 578 F.2d 757 (9th Cir.), cert. denied, 439 U.S. 981 (1978).

\(^{841}\) GAAS and GAAP are basic standards established by the accounting profession governing accounting methods.

\(^{842}\) 578 F.2d at 786.

\(^{843}\) Id. at 785.

\(^{844}\) FED. R. EVID. 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." See id., Adv. Comm. Notes.

\(^{845}\) See, e.g., *United States v. Solomon*, 528 F.2d 88, 90 (9th Cir. 1978).

\(^{846}\) 570 F.2d 872 (9th Cir. 1978).

\(^{847}\) Id. at 874.

\(^{848}\) Id. In *Grajeda*, appellant contended that both her arrest and subsequent search of her car by state police officers violated California law. The court indicated that, even if a determination of the propriety of the arrest and search was necessary, it would hold that no violation of California law had occurred. Id. n.2.
2. Legal relevancy

If relevant evidence is more prejudicial than probative, it can be excluded under Federal Rule of Evidence 403. In *United States v. Shields*, the defendant attended a pre-indictment conference with the Internal Revenue Service at which his accountant did not reveal any non-taxable sources of funds, even in response to direct questions from IRS investigators. However, at Shields' trial for income tax evasion, the accountant testified that he personally had observed a large "cash hoard" in Shields' possession. The prosecutor sought to impeach the accountant during cross-examination by questioning him about his failure to mention such a cash hoard at the IRS conference. Shields himself was not cross-examined about the pre-indictment conference. The prosecutor, however, referred broadly in closing argument to the failure of both Shields and his accountant to raise the cash hoard defense at the conference.

Shields argued on appeal that his privilege against self-incrimination had been violated by the cross-examination of the accountant.

---

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

The Ninth Circuit in 1978 did not reverse any district court rulings in the face of a rule 403 objection. See, e.g., *United States v. Sangrey*, 586 F.2d 1312 (9th Cir. 1978) (evidence of prior rape allegedly committed by defendant on same night as charged rape admitted); *United States v. Brady*, 579 F.2d 1121, 1129 (9th Cir. 1978) (photographs of decedent's battered face admissible in murder trial when principal issue was cause of death and photos were not of such gruesome and horrifying nature as to inflame jury); *United States v. Oaxaca*, 569 F.2d 518, 527 (9th Cir.), cert. denied, 439 U.S. 926 (1978) (impeachment evidence of prior conviction identical to charged offense not per se more prejudicial than probative); *United States v. Curtis*, 568 F.2d 643, 645-46 (9th Cir. 1978) (previous statement made by defendant, accused of raping and murdering a woman, that he would beat a woman who refused his sexual advances, held admissible).

The Ninth Circuit in 1978 twice evaluated jury comparisons of an accused's clothes. See *United States v. Satterfield*, 572 F.2d 687, 689-90 (9th Cir.), cert. denied, 439 U.S. 840 (1978) (judge carefully limited the number of times jury would see appellant wearing mask for purposes of comparison with bank photos and recognition ability of witnesses); *United States v. Oaxaca*, 569 F.2d 518, 524-25 (9th Cir.), cert. denied, 439 U.S. 926 (1978) (when FBI agent photographed in appellant's clothes so that jury could compare with black-and-white bank photos, fact that one item of clothing worn by agent only circumstantially connected with appellant not grounds for reversal).

850. 571 F.2d 1115 (9th Cir. 1978).

851. The prosecutor stated in closing argument: "The defense which is raised here, and the one that where the evidence is produced for the first time in court, never occurred outside of the court before, before we started on the Tuesday a week ago, the government was never offered these explanations which—." At this point defense counsel made a motion for mistrial that was denied. *Id.* at 1118.
Ninth Circuit refused to discuss this issue because Shields had not been questioned about his own silence at the conference. Although the Ninth Circuit recognized that the accountant’s testimony on cross-examination circumstantially suggested that Shields himself had been silent, the court held that rule 403, rather than the fifth amendment, is the standard for determining the admissibility of such circumstantial evidence. Because the accountant’s testimony was more probative than prejudicial, the Ninth Circuit affirmed.

3. Prosecutor’s rule

Specific acts are never admissible to prove conduct. However, such evidence is admissible under the so-called “prosecutor’s rule” for other purposes, such as proving motive, intent or knowledge. In narcotics cases, defendants often insist that evidence of acts involving drugs different from those involved in the charged offense be declared inadmissible. It is the type of activity that is important, however, not

852. Id.
853. See id. at 1118-19.
854. FED. R. EVID. 404(a) provides:
Character evidence generally. Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.
855. FED. R. EVID. 404(b) provides in pertinent part:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. 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.

See United States v. Sangrey, 586 F.2d 1312, 1314 (9th Cir. 1978) (rape victim’s testimony that she heard defendant say he was “going over to the other girl” admissible to show opportunity, plan and intent to rape other girl); United States v. Radlick, 581 F.2d 225, 229 (9th Cir. 1978) (evidence that defendant asked for drugs several days before beginning of the drug manufacturing conspiracy charged in indictment admissible to show knowledge); United States v. Espinoza, 578 F.2d 224, 227 (9th Cir., cert. denied, 439 U.S. 849 (1978) (prior incident in which appellant was detained on suspicion of transporting illegal aliens admissible in trial for such transportation to show knowledge and intent); United States v. Graham, 575 F.2d 739, 740 (9th Cir. 1978) (evidence of prior conviction as illegal alien and use of alias admissible to prove identity); United States v. Young, 573 F.2d 1137, 1140 (9th Cir. 1978) (testimony regarding prior drug transactions admissible to show knowledge and intent); United States v. Sigal, 572 F.2d 1320, 1323 (9th Cir. 1978) (prior drug transactions admissible to show knowledge and intent).
the identity of the drugs involved. For example, the Ninth Circuit has held that evidence of defendant's prior purchase of large quantities of marijuana is admissible to show a predisposition to sell cocaine.

Each item of proffered evidence allowed by the prosecutor's rule must be analyzed individually. In United States v. Powell, for example, the defendant denied that he was the source of large quantities of marijuana found in a co-defendant's garage. The Government sought to introduce evidence that Powell had been convicted of selling small quantities of marijuana to undercover agents in 1969 and evidence of a 1973 conviction arising from the discovery of huge amounts of marijuana in Powell's own garage and basement. The trial judge refused to admit the 1969 conviction on the grounds that it was too remote and did not tend to prove intent, common plan or motive. The trial court did, however, admit the 1973 conviction as probative of motive, accepting the Government's argument that defendant's past experience, in having drugs discovered in his own house, motivated him to hide the marijuana in someone else's house.

On appeal, the Ninth Circuit upheld the trial court's ruling that neither conviction was probative of intent or common plan. The court, however, reversed the trial court's ruling that Powell's 1973 conviction...

858. 587 F.2d 443 (9th Cir. 1978).
859. Id. at 445.
860. The court observed:

The basic criterion is that the evidence of other crimes must be relevant to prove an issue in the case. The only factual issue in this case was identity of the source of the marihuana stored in [the co-defendant's] garage. Powell did not purport to controvert intent, knowledge, or motive of the person who supplied the marihuana. He sought only to show that the source was not he. When a defendant denies participation in the act or acts which constitute the crime, intent is not a material issue for the purpose of applying Rule 404(b).

Id. at 448.
861. The court reasoned:

The Government produced no evidence which tended to connect Powell's prior criminal conduct with the marihuana in [the co-defendant's] garage. The probative value of evidence or other crimes where the issue is identity depends upon the extent to which it raises an inference that the perpetrator of the prior offenses was the perpetrator of the offense in issue. Thus, if the characteristics of both the prior offense and the charged offense are not in any way distinctive, but are similar to numerous other crimes committed by persons other than the defendant, no inference of identity can arise.

The 1973 marihuana offense resembled the offense charged only in that large quantities of marihuana were stored in a house, but nothing sets that prior offense apart from any other marihuana trafficking that involves large quantities of marihuana.

Id. (emphasis added).
viction was probative of motive. Rejecting the Government's reasoning, the court noted: "We are unable to follow the Government's peculiar inversion of logic, whereby dissimilarities in a succession of criminal acts becomes [sic] marks of identity of the perpetrator."\textsuperscript{862}

4. Impeachment\textsuperscript{863}

Federal Rule of Evidence 609 provides that prior felony convictions and convictions involving dishonesty are admissible for purposes of impeachment if they are less than ten years old and have not been set aside.\textsuperscript{864} In \textit{United States v. Trejo-Zambrano}\textsuperscript{865} the defendant's prior Federal Youth Corrections Act\textsuperscript{866} conviction had been set aside after a probationary period. His attorney, however, misread the clerk's docket sheet and failed to notice that the conviction had been set aside. At a

862. \textit{Id.} at 449. Thus, similarities between crimes are relevant to show common plan, but dissimilarities are not relevant to show motive.

863. The treatment given to impeachment in federal court is set forth in \textit{Fed. R. Evid. 607-610 and 613}. \textit{See generally} \textit{United States v. Cassasa}, 588 F.2d 282, 284-85 (9th Cir. 1978) (composite pictures, made by assembling slides of various features, that witnesses selected as most resembling robbers, are not relevant to impeach witnesses unless witnesses adopt composites as accurate representations of defendant); \textit{United States v. Powell}, 587 F.2d 443, 449 (9th Cir. 1978) (evidence that defendant had previously smoked marijuana not admissible to impeach unless defendant denied smoking).

864. \textit{Fed. R. Evid. 609} provides:

\begin{quote}
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.
\end{quote}

(b). . . Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction . . . .

Even though a conviction is within ten years of trial, it is within the trial court's discretion to hold that it is too remote to have probative value and is therefore inadmissible. \textit{See United States v. Powell}, 587 F.2d 443, 448 (9th Cir. 1978) (1969 offense too remote for 1977 trial). Unconvicted bad acts are not admissible unless probative of truthfulness. \textit{Fed. R. Evid. 608(b)} provides:

\begin{quote}
Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
\end{quote}

\textit{See United States v. Sangrey}, 586 F.2d 1312, 1314, 1315 n.2 (9th Cir. 1978) (testimony regarding unconvicted rape of another woman immediately prior to charged rape admissible for impeachment purposes).

865. 582 F.2d 460 (9th Cir. 1978).

pre-trial hearing on the admissibility of the conviction, the prosecutor, correctly and in good faith, stated that his copy of the FBI "rap" sheet indicated the conviction was still in force. Defense counsel then stated he would ask the defendant about the conviction on direct examination, apparently to avoid the sting of disclosure of the conviction on cross-examination. After the defendant was convicted, his counsel again looked at the docket sheet and noticed his mistake.

Federal Rule of Criminal Procedure 16(a)(1)(B) requires the prosecutor to supply the defendant with any copy of his prior record in the prosecutor's possession. In Trejo-Zambrano, the Ninth Circuit held that production of the FBI rap sheet was sufficient to comply with rule 16(a)(1)(B), refusing to impose a duty on prosecutors to investigate beyond the rap sheet to determine whether prior convictions have been set aside. The court stated that too great a danger of manufactured error would be created if reversal was required whenever defense counsel misread the record.

5. Authentication and identification

Federal Rule of Evidence 901(b) indicates various means of authentication and identification. Under rule 901(b)(1), for example, the testimony of witnesses with knowledge is sufficient. Rule 901(b)(3) allows the trier of fact to compare evidence with authenticated specimens. Under rule 901(b)(5), voice identifications can be made by proper opinion testimony based upon hearing the voice under circum-

867. FED. R. CRIM. P. 16(a)(1)(B) provides:
Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

868. 582 F.2d at 465.

869. Id.

870. See United States v. Ballesteros-Cordova, 586 F.2d 1321 (9th Cir. 1978) (admissible in-court identification of defendant based on driver's license photograph and testimony of agents who had detained suspect and viewed license); United States v. Weiner, 578 F.2d 757, 772 (9th Cir.), cert. denied, 439 U.S. 981 (1978) (identification of work papers in securities fraud case by witness who had used them or knew handwriting); United States v. Dreitzler, 577 F.2d 539, 553 n.24 (9th Cir. 1978) (lay opinion on handwriting, based upon familiarity not acquired for purposes of litigation, admissible under rule 901(b)(2), which is merely a specific case of rule 901(b)(1)).

871. See, e.g., United States v. Rich, 580 F.2d 929, 936 (9th Cir.), cert. denied, 439 U.S. 935 (1978) (prosecutor's invitation that jury compare for itself the handwriting on two exhibits already before it not plain error); United States v. Antill, 579 F.2d 1135, 1136 (9th Cir. 1978) (if exemplar used only for comparison purposes, fact that defendant is compelled to write sentences containing information about personal history does not violate privilege against self-incrimination).
stances connecting it with the alleged speaker.\textsuperscript{872}

In \textit{United States v. King}\textsuperscript{873} the Ninth Circuit rejected a rigid set of requirements governing the admissibility of recorded conversations. Although a list of requirements had been developed by the Second Circuit and adopted by the Eighth Circuit,\textsuperscript{874} the \textit{King} court opted for flexibility, leaving the determination of the trustworthiness of the recording to the trial judge's discretion. The court placed the burden on the proponent to produce clear and convincing evidence of the recording's authenticity.\textsuperscript{875}

6. Scientific evidence and expert opinion

Scientific evidence cannot be admitted unless the principles on which it is based have gained general acceptance in the scientific community.\textsuperscript{876} In \textit{United States v. Kilgus},\textsuperscript{877} a prosecution witness claimed to be able to identify unique objects using the Forward Looking Infrared (FLIR) tracking system. The witness admitted that he was not a qualified operator of the system and was not familiar with its technical aspects. Although defense cross-examination was limited by the military secrecy surrounding the FLIR system, evidence was introduced by the defense that demonstrated that the system's performance differs in response to atmospheric changes. Experts presented uncontradicted testi-

\textsuperscript{872} The identifications, however, cannot be made under unconstitutionally suggestive circumstances. \textit{United States v. Flickinger}, 573 F.2d 1349, 1358 (9th Cir.), \textit{cert. denied}, 439 U.S. 836 (1978).
\textsuperscript{873} 587 F.2d 956 (9th Cir. 1978).
\textsuperscript{874} United States v. McMillan, 508 F.2d 101, 104 (8th Cir. 1974), \textit{cert. denied}, 421 U.S. 916 (1975); United States v. McKeever, 169 F. Supp. 426, 430 (S.D.N.Y. 1958), \textit{rev'd on other grounds}, 271 F.2d 669 (2d Cir. 1959). The \textit{McKeever} court required that the following facts be shown before a sound recording may be admitted properly into evidence:

(1) That the recording device was capable of taking the conversation now offered in evidence.
(2) That the operator of the device was competent to operate the device.
(3) That the recording is authentic and correct.
(4) That changes, additions or deletions have not been made in the recording.
(5) That the recording has been preserved in a manner that is shown to the court.
(6) That the speakers are identified.
(7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.
169 F. Supp. at 430.
\textsuperscript{875} 587 F.2d at 561. Application of this flexible approach is exemplified in \textit{United States v. Thomas}, 586 F.2d 123, 133 (9th Cir. 1978); \textit{United States v. Rinn}, 586 F.2d 113, 117-18 (9th Cir. 1978).
\textsuperscript{876} United States v. Kilgus, 571 F.2d 508, 510 (9th Cir. 1978). \textit{See United States v. Radlick}, 581 F.2d 225 (9th Cir. 1978) (defendant's use of polygraph properly disallowed by trial court because of many variable factors affecting reliability of test).
\textsuperscript{877} 571 F.2d 508 (9th Cir. 1978).
mony that the FLIR can be used only for generic identifications and not specific ones. Unrebutted defense testimony further established that the FLIR is not a generally accepted scientific technique for the unique identification of remote objects. Under these circumstances, the Ninth Circuit held that the FLIR evidence was inadmissible. The court noted, however, that if a proper foundation were laid for the reliability of the FLIR system and the expertise of its operator, FLIR evidence of generic identifications could be admissible in future cases.

In United States v. Adams, the Ninth Circuit, for the first time in a criminal case, considered whether testimony based on memory refreshed by hypnosis is admissible. Adopting the rule applicable in civil cases, the Ninth Circuit held that hypnosis affects only the credibility and not the admissibility of such evidence. The court rejected defendant's contention that hypnotized witnesses are incompetent to testify as a matter of law. To prevent dangerous abuse of hypnosis in criminal cases, however, the court required that complete stenographic records be made of hypnosis sessions and that the sessions should be conducted by certified hypnotists.

Federal Rule of Evidence 702 provides that qualified experts may testify on scientific, technical, or other specialized matters if their opinions will assist the fact finder in understanding the evidence and arriving at a decision. In the absence of timely objections, however, allowing testimony of persons who are not qualified experts does not necessarily constitute plain error.

878. Id. at 510.
879. Id. at 510 n.2.
881. Id. at 198-99.
882. Id. at 199.
883. Id. n.12.
884. Id. n.13. These foundation requirements were not satisfied in the hypnosis session under review in Adams. The court, however, based its affirmance of the trial court's ruling on the defendant's failure to make any lack-of-foundation objections. Id.
885. Fed. R. Evid. 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." See United States v. Robbins, 579 F.2d 1151 (9th Cir. 1978) (testimony of qualified expert that gun was manufactured in a certain state admissible to show gun was transported in interstate commerce).
886. See United States v. Oaxaca, 569 F.2d 518, 526 (9th Cir.), cert. denied, 439 U.S. 926 (1978) (unobjected-to inconsistent and imprecise testimony of criminologist regarding hair identification not plain error).
7. Privilege

The marital privilege of a party to a lawsuit prevents that party's spouse from testifying against him. The Ninth Circuit, unlike other circuits, considers out-of-court statements by spouses to be within this marital privilege. In *United States v. Price*, however, the court adopted the rule that the privilege does not apply to vicarious admission made by a co-conspirator spouse. While recognizing the marital privilege's value in preserving family peace, the Ninth Circuit held that the relationship between husband and wife is not impaired when (1) no adverse testimony is given in court by a spouse, and (2) the out-of-court statements are made in furtherance of a conspiracy in which both spouses are involved.

In *Beckler v. Superior Court*, the Ninth Circuit suggested possible constitutional facets of the attorney-client privilege. An attorney in *Beckler* refused to comply with a California subpoena ordering him to appear before the grand jury and to produce his client's accounting records. He was found in contempt and sentenced by the state court. Affirming the district court's denial of the attorney's petition for writ of habeas corpus, the Ninth Circuit held that (1) the client's own privilege against self-incrimination was not violated by a subpoena directed at

---

887. *FED. R. EVID. 501* provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

*See, e.g.*, United States v. Landof, 591 F.2d 36, 38 (1978) (common law attorney-client privilege applied in bank embezzlement case); Beckler v. Superior Court, 568 F.2d 661, 662 (9th Cir. 1978) (state law applicable in action regarding attorney-client privilege; denial of petition for writ of habeas corpus proper).


889. *United States v. Price*, 577 F.2d at 1356 (9th Cir. 1978).

890. *Id.*

891. *See* notes 914-22 *infra* and accompanying text.

892. 577 F.2d at 1365.

893. *Id.*

894. 568 F.2d 661 (9th Cir. 1978).

his attorney, and (2) the applicability of the attorney-client privilege in this case was a matter of state law and not a matter of fifth amendment constitutional law. 896

Although no sixth amendment claim was raised in Beckler, the Ninth Circuit observed:

We note that certain basic elements of the attorney-client privilege which involves private consultation by a criminal defendant with his attorney could be so vital to the effective assistance of counsel as to be protected by the Sixth Amendment as made applicable to state proceedings by the Fourteenth Amendment. 897

The court recognized, however, that the Supreme Court has never identified this as a constitutional basis for the attorney-client privilege. 898

Until tested in the courts, the constitutional contours of the attorney-client privilege will remain unclear.

8. Hearsay

When testimony is given in court, the trier of fact can evaluate the sincerity, perception, memory, and narrative ability of a witness. The conditions of testimony in court—oath, personal presence, and cross-examination—tend to encourage truth and expose falsehood. 899 These are not, however, the only possible indicia of reliability. The exceptions to the hearsay rule are based in part on the recognition that many out-of-court statements may be more reliable than in-court testimony. 900 Adherence to the hearsay rule in all cases would, moreover, force the factfinder to go without relevant and reliable evidence necessary for a just and correct decision on the merits. 901 The federal hearsay exceptions reflect this balance between the practical need for

896. 568 F.2d at 662. See also FED. R. EVID. 501.

897. 568 F.2d at 663 n.3. The Ninth Circuit in Beckler noted that the Supreme Court had formulated a test for the proper assertion of the attorney-client privilege by an attorney in Fisher v. United States, 425 U.S. 391 (1976). The Ninth Circuit stated:

[The Fisher] test involves an evaluation of whether the client would have a Fifth Amendment privilege were the documents still in his hands. Although the Court thus made reference to a Fifth Amendment Constitutional standard to determine the extent of the attorney-client privilege under the Federal evidentiary rules, this differs from stating that such an interpretation of the attorney-client privilege is Constitutionally compelled by the Fifth Amendment.

568 F.2d at 662 n.2. But see Seidelson, supra note 895, at 707-10; Fixed Rules, supra note 895, at 485-86, 486 n.96. Both Professor Seidelson and the student author contend that the fifth and sixth amendments together may form a constitutional basis for the attorney-client privilege.

898. 568 F.2d at 663.

899. FED. R. EVID. 801 Adv. Comm. Note; 4 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE, \[\|800[01], at 800-10 (1978) [hereinafter cited as WEINSTEIN].


901. Id.
trustworthy evidence and the ideal of testimony given in court under the scrutiny of the trier of fact.

a. Testimony constituting hearsay

The federal definition of hearsay contains three elements: first, the declarant must make the statement out of court; second, the offered evidence must be a "statement"—a verbal assertion or nonverbal conduct intended as an assertion; finally, the statement must be offered to prove the truth of the matter asserted. If offered for another purpose, the statements are not hearsay.

i. prior consistent and inconsistent statements

The Federal Rules exclude certain prior consistent and inconsistent statements from the definition of hearsay and allow their admission as substantive evidence. Because these statements are not admissible

902. Fed. R. Evid. 801(c).
904. United States v. Oaxaca, 569 F.2d 518, 525 (9th Cir.), cert. denied, 439 U.S. 926 (1978) (comparison photos of bankrobber's clothing not assertive or testimonial in character, and, hence, not hearsay). See United States v. Rich, 580 F.2d 929, 937 (9th Cir.), cert. denied, 439 U.S. 935 (1978) (absence of entry in records of regularly conducted activity "probably not hearsay" according to authors of Adv. Comm. Note to Fed. R. Evid. 803(7) but treated specifically as exception to resolve doubts definitively in favor of admissibility; basis of this rationale is probably that absence of records is not assertive).
905. Many statements are relevant simply because they are made and not necessarily because the matter asserted is true. Such statements are frequently referred to as "verbal acts" or as part of the "res gestae," and they are not hearsay within the definition of Fed. R. Evid. 801. See United States v. Brady, 579 F.2d 1121, 1130 (9th Cir. 1978) (offer of proof must be made before court can decide if statements were part of res gestae); United States v. Phillips, 577 F.2d 495, 501 (9th Cir.), cert. denied, 439 U.S. 831 (1978) (completed portions of statements already in evidence are part of res gestae only if relevant); United States v. James, 576 F.2d 223, 229 n.10 (9th Cir. 1978) (statement by FBI agent over radio that extortionist's telephone call had begun held not a verbal act).

If statements are offered for purposes other than to prove the truth of the matter asserted, they are not hearsay even if they do not fit within the definition of verbal acts. See United States v. James, 576 F.2d 223, 229 (FBI agent's statement admissible for non-hearsay purpose of proving that radio messages received by witness were those sent by agent).

Prior inconsistent and consistent statements, when offered solely for impeachment or rehabilitative purposes, are not hearsay. United States v. Radlick, 581 F.2d 225, 229 (9th Cir. 1978) (declarant's acceptance of witness' offer to procure drugs offered to prove motive, intent and knowledge); United States v. Brady, 579 F.2d 1121, 1129 (out-of-court statements offered for impeachment only); United States v. Fried, 576 F.2d 787, 793 (9th Cir.), cert. denied, 439 U.S. 895 (1978) (out-of-court statements not offered for their truth).

906. Fed. R. Evid. 801(d)(1) states:
A statement is not hearsay if—
(1) The declarant testifies at the trial or hearing and is subject to cross-examination
unless the declarant is available for cross-examination under oath and in the presence of the fact finder, there is less reason to treat them as hearsay. The ideal conditions of testimony in court, though not available at the time the statements are made, will have been met subsequently.\textsuperscript{907}

\textbf{ii. admissions generally}

Admissions by a party opponent are not considered hearsay in federal court.\textsuperscript{908} Such statements are not admissible unless made voluntarily. In \textit{United States v. Brown},\textsuperscript{909} a defendant contested the use of an admission allegedly made while he was intoxicated. The trial court failed to find formally that the statement was voluntary. On appeal, the Ninth Circuit reversed, holding that the trial court must make an affirmative finding on the voluntariness issue.\textsuperscript{910}

The use of tacit admissions, or admissions by silence, is authorized by the Federal Rules of Evidence.\textsuperscript{911} In \textit{United States v. Lorenzo},\textsuperscript{912} for example, the defendant made a valid waiver of his \textit{Miranda} rights. He then failed to respond to the questions of a Secret Service agent concerning the presence of large numbers of small bills in defendant's possession, which suggested that defendant had changed large counterfeit bills. The court held that defendant's silence was a tacit admission and not an assertion of his previously waived \textit{Miranda} rights.\textsuperscript{913}

\footnotesize{[concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him. . . . \textit{See} United States v. Rinn, 586 F.2d 113, 119-20 (9th Cir. 1978) (statements regarding true source of drugs offered to rehabilitate); United States v. Allen, 579 F.2d 531, 532 (9th Cir. 1978) (prior consistent statement can be used by government to rehabilitate after government itself has introduced prior inconsistent statement); United States v. Strand, 574 F.2d 993, 996 n.4 (9th Cir. 1978) (because defendant had not yet testified, statements were not admissible as prior consistent statements under rule 801(d)(1)). \textit{See also} United States v. Thompson, 576 F.2d 784, 786 (9th Cir. 1978) (failure to advise grand jury of prior inconsistent statement not such a flagrant concealment as to justify dismissal of the indictment).

907. \textit{See} note \textsuperscript{899} supra and accompanying text.


909. 575 F.2d 746 (9th Cir. 1978).

910. \textit{Id.} at 748.

911. \textit{Fed. R. Evid.} 801(a)(2) provides that: "A 'statement' is . . . nonverbal conduct of a person, if it is intended by him as an assertion." \textit{Fed. R. Evid.} 801(d)(2)(B) provides that: "A statement is not hearsay if . . . [i]t is offered against a party and is . . . a statement of which [a party] has manifested his adoption or belief in its truth . . . ." 570 F.2d 294 (9th Cir. 1978).

912. \textit{Id.} at 298. \textit{Cf. Adv. Comm.} Note to rule 801(d)(2)(B) which provides: "In criminal cases, however, troublesome questions have been raised by decisions holding that failure to}
iii. Vicarious admissions by co-conspirators

Vicarious admissions of co-conspirators\textsuperscript{914} are admissible even though a conspiracy has not been charged\textsuperscript{915} and the co-conspirators are not co-defendants.\textsuperscript{916} A substantial foundation, however, is required: the statements must be made "during the course and in furtherance of the conspiracy,"\textsuperscript{917} and evidence of the conspiracy, independent of the statements themselves, must be introduced.\textsuperscript{918} Although the conspiracy must be established by substantial evidence, only slight evidence of defendant's connection need be presented.\textsuperscript{919}

In \textit{United States v. Rosales},\textsuperscript{920} the Ninth Circuit established that a determination of the prima facie existence of a conspiracy is a conclusion of law rather than a finding of fact. By characterizing this determination as legal, rather than factual, the \textit{Rosales} court was not bound to apply the "clearly erroneous" standard of review\textsuperscript{921} and was able to act independently in reversing the trial court's finding that the Govern-
ment had not established a conspiracy.\textsuperscript{922}

\textit{b. Hearsay exceptions}\textsuperscript{923}

i. exceptions applicable to writings

In \textit{United States v. Arias},\textsuperscript{924} an official trial transcript was offered in a perjury proceeding. The Ninth Circuit held that the reporter's standard recital in the transcript, that defendant was duly sworn, was admissible hearsay under the public records exception of rule 803(8).\textsuperscript{925} The court distinguished the situation presented in \textit{Arias} from those in which transcripts are used to prove the truth of their contents.\textsuperscript{926}

The defendant in \textit{United States v. Orozco}\textsuperscript{927} objected to the district court's admission into evidence of computer cards on the basis of the business records exception.\textsuperscript{928} The cards were prepared by customs officials on the Mexican border, who had observed defendant's vehicle passing through the border and entered the license plate number into a computer. Although the Ninth Circuit held admission of the computer cards to be proper, the court relied on the public records exception rather than the business records exception.\textsuperscript{929}

The \textit{Orozco} court noted that the language of the public records exception excludes "in criminal cases matters observed by police officers and other law enforcement personnel."\textsuperscript{930} If read literally, this language would have excluded the proffered computer records. The court, however, held that the purpose of this language was to exclude observations of law enforcement personnel made during confrontations of

\textsuperscript{922} Id. at 875-76.

\textsuperscript{923} In addition to recognizing the two classes of exceptions set forth in Fed. R. Evid. 803-804, the federal courts allow, under certain conditions, other exceptions having "equivalent circumstantial guarantees of trustworthiness." Fed. R. Evid. 803(24), 804(b)(5).

\textsuperscript{924} 575 F.2d 253 (9th Cir. 1978).

\textsuperscript{925} 575 F.2d 253 (9th Cir. 1978), cert. denied, 439 U.S. 868 (1978) (transcript admissible business record, at least when no timely objection made).

\textsuperscript{926} Id. at 254-55; Fed. R. Evid. 803(8).

\textsuperscript{927} 575 F.2d at 254 & n.1.

\textsuperscript{928} Id. at 793. See Fed. R. Evid. 803(6).

\textsuperscript{929} 590 F.2d 789 (9th Cir.), cert. denied, 439 U.S. 1049 (1979).

\textsuperscript{930} Id. at 793-94, 794 n.2.
an adversary nature with suspected criminals.\textsuperscript{931} Since the routine recording of license numbers was not an adversary confrontation, the literal language of the public records exception did not apply, and the computer cards were admissible.

In \textit{United States v. Rich},\textsuperscript{932} the Ninth Circuit made further comparisons between the business records and public records exceptions. The exceptions involved in \textit{Rich}, however, involved the exception pertaining to the \textit{absence}, rather than the presence, of records of regularly conducted activities.\textsuperscript{933} An FBI agent testified, without further foundation, that a search of various police records, credit records, and city directories disclosed no trace of the person who appellant claimed had borrowed his car.\textsuperscript{934} Although the appellant objected that the statements constituted "negative hearsay," the district court admitted the evidence.

The absence of public records hearsay exception has an express foundation requirement.\textsuperscript{935} The public records exception itself has no such foundation requirement.\textsuperscript{936} In contrast, the business records exception requires that the custodian of records or other qualified witness lay the necessary foundation, whereas the absence of business records exception has no \textit{express} foundation requirement.\textsuperscript{937}

The Ninth Circuit in \textit{Rich} assumed, without deciding, that such a foundation is a prerequisite to the admission of evidence of the absence of entries.\textsuperscript{938} The FBI agent's testimony about the absence of entries in both business and public records was therefore admitted without ade-

\textsuperscript{931} The Senate Committee Report to rule 803(8) explains:
Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

\textsuperscript{932} 580 F.2d 929 (9th Cir.), \textit{cert. denied}, 439 U.S. 935 (1978).

\textsuperscript{933} \textit{Id.} at 937-38. \textit{See} FED. R. EVID. 803(7) (absence of business records) and 803(10) (absence of public records).

\textsuperscript{934} 580 F.2d at 937.

\textsuperscript{935} FED. R. EVID. 803(10). This rule requires "evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record."

\textsuperscript{936} \textit{See} FED. R. EVID. 803(8).

\textsuperscript{937} FED. R. EVID. 803(6), the business records exception, requires that the "custodian" of records "or other qualified witness" lay the necessary foundation. In contrast, rule 803(7), the absence of business records exception, does not expressly require the testimony of a custodian or other qualified witness.

\textsuperscript{938} 580 F.2d at 937-38. Such an assumption is logical in light of the language in rule 803(7) that such evidence is admissible "unless the sources of information or other circumstances indicate lack of trustworthiness." FED. R. EVID. 803(7).
quate foundation. The Rich court, however, affirmed the district
court's admission of the agent's testimony because of appellant's failure
to make a lack-of-foundation objection. Appellant objected to the ad-
mission of the testimony only on the grounds of "negative hearsay." Furthermore, the court refused to invoke the plain error doctrine be-
cause appellant did not present evidence suggesting the unreliability of
the records underlying the improperly-introduced evidence.

ii. declarations against interest

The Ninth Circuit, in United States v. Satterfield, discussed
whether the trustworthiness of the witness, as well as that of the declar-
ant, is a proper area of inquiry in evaluating the applicability of the
declaration against interest exception. Appellant sought to introduce
exculpatory statements of a co-defendant who refused to testify at trial.
The Government offered evidence which, among other things, showed
that the witnesses who claimed to have heard the statements were not
present at the time the alleged statements were made.

939. 580 F.2d at 938-39. The "negative hearsay" objection itself was improper in light of
FED. R. EVID. 803(7) and 803(10), which specifically allow such evidence under controlled
circumstances.

940. 580 F.2d at 939. The court's reasoning seems to ignore the purpose of the proffered
evidence. It was offered to prove that a person, who appellant claimed had borrowed his
car, did not exist. Any set of records would seem inherently unreliable for such a purpose.

Since appellant had failed, however, to attack the evidence properly at three different
stages—objection, cross-examination, and appeal—the court apparently decided, in light of
the existence of other strong evidence, that it would not be unfair to apply the waiver rules
in a highly technical manner.

941. FED. R. EVID. 804(b)(3) provides:
The following are not excluded by the hearsay rule if the declarant is unavailable as a
witness:

. . . .

A statement which was at the time of its making so far contrary to the declarant's
pecuniary or proprietary interest, or so far tended to subject him to civil or criminal
liability, or to render invalid a claim by him against another, that a reasonable man in
his position would not have made the statement unless he believed it to be true. A
statement tending to expose the declarant to criminal liability and offered to exculpate
the accused is not admissible unless corroborating circumstances clearly indicate the
trustworthiness of the statement.

See also United States v. Hoyos, 573 F.2d 1111, 1115 (9th Cir. 1978) (although exception not
limited to direct confessions of criminal responsibility, the statements must, in a real and
tangible way, subject declarant to criminal responsibility; statements consisting principally
of material exculpating a co-defendant are suspect absent the presence of solidly inculpatory
statements).


943. Id. at 691-92. The circuits differ on this issue. Compare United States v. Atkins, 558
F.2d 133, 135 (3d Cir. 1977), cert. denied, 434 U.S. 1071 (1978) (trustworthiness of witness
irrelevant) with United States v. Bagley, 537 F.2d 162, 167 (5th Cir. 1976), cert. denied, 425
The *Satterfield* court discussed two arguments against considering witness trustworthiness. First, the court noted that the purpose of the hearsay rule is to test the reliability of statements made under conditions different from those under which testimony is given at trial. The credibility of witnesses testifying to out-of-court statements can be evaluated in court by the factfinder. Second, the court observed that the denial of access to such evidence might be an unconstitutional infringement of a defendant's fundamental right to call witnesses in his own defense.

The Ninth Circuit, however, also recognized some factors suggesting that witness trustworthiness is a proper ground for inquiry. First, the court pointed out that the declaration against interest exception itself refers to the trustworthiness of the statement, not that of the declarant. Second, the court noted that the exception's legislative history suggests that the rule was intended to be more than purely a hearsay rule. The drafters were suspicious of fabrication of both the existence and the contents of the declarations. Evidence showing that the witnesses could not have heard the statements when they were made is therefore highly relevant to the issue of fabrication.

The *Satterfield* court, however, found it unnecessary to decide whether witness trustworthiness should be considered because the trial judge based his decision solely on the trustworthiness of the declarant's statements rather than the trustworthiness of the witnesses.

c. **Constitutional dimensions of hearsay problems**

The admission of hearsay statements arguably conflicts with a defendant's sixth amendment right to confront and cross-examine adverse witnesses. In *Dutton v. Evans*, however, the Supreme Court held that such statements may be admissible if they are surrounded by sufficient

---

944. 572 F.2d at 691-92.
945. *Id.* at 691.
946. *Id.* at 692.
947. *Id.*
948. However, because the statements are against the defendant's penal interest, it appears that such declarants are untrustworthy. The trustworthiness requirement was added to keep declarants, who have escaped arrest or are outside the jurisdiction of the court, from giving gifts of exculpatory statements to their partners in crime. Language referring specifically to declarant reliability, therefore, would be anomalous.
949. 572 F.2d at 692.
950. *Id.* at 692-93. In a concurring opinion, however, Judge Sneed indicated that witness trustworthiness is a proper area for inquiry. *Id.* at 694 (Sneed, J., concurring).
indicia of reliability. In United States v. Weiner, the Ninth Circuit employed the Dutton analysis and admitted the vicarious admissions of a co-conspirator who had asserted his fifth amendment rights.

Sustaining hearsay objections to statements proffered by a defendant, however, may violate the fundamental right of an accused to call witnesses on his own behalf when the circumstances involved are grossly unfair. Refusal to admit hearsay statements under a hearsay exception, because of doubts as to a witness' credibility, may raise such an issue.

9. Scope of examination

The scope and extent of the examination of witnesses is within the discretion of the trial court. The exercise of such discretion will not be disturbed unless a defendant's constitutional right to confront and cross-examine witnesses is denied. Furthermore, improper limitation of examination is harmless error if the information sought is explored fully at other points during the trial.

The defendant in United States v. Lopez, charged with second-degree murder, claimed self-defense. On cross-examination, defendant

952. The Court considered four factors to be important: (1) the statement included 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 was 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. Id. at 88-89.


954. Id. at 771-72.


957. United States v. Whitson, 587 F.2d 948, 951 (9th Cir. 1978) (after defendant denied possessing a bomb, cross-examination regarding his knowledge of explosives was properly allowed); United States v. Sturgis, 578 F.2d 1296, 1300 (9th Cir.), cert. denied, 439 U.S. 970 (1978) (not abuse of discretion for trial judge to allow prosecution to elicit from defense witness that those found guilty of crime with which defendant was charged are not incarcerated); United States v. Weiner, 578 F.2d 757, 766 (9th Cir.), cert. denied, 439 U.S. 981 (1978) (defendants in securities fraud case allowed to cross-examine witness about extramarital relationships and fraud not charged in the indictment).

958. United States v. Price, 577 F.2d 1356, 1362 (9th Cir. 1978) (denial of cross-examination regarding relationship between witness and law enforcement officers harmless error when witness testified as to her dealings with law enforcement officers at later point in trial).

959. 575 F.2d 681 (9th Cir. 1978).
testified that he saw the decedent carrying a knife on the day of the murder. On redirect, defense counsel attempted to explore this testimony more fully; she was interrupted, however, by the trial judge who stated before the jury that he could not remember any references in defendant's testimony to a knife. The court reporter mistakenly agreed. The Ninth Circuit refused to reverse because, after the remarks of the judge and court reporter, defense counsel made no objection and did not ask the judge for permission to open a line of questioning regarding the knife as if on direct.  

10. Presumptions

In United States v. King, defendant was charged with conspiracy to distribute cocaine. Defendant, a physician, raised the medical exception to the statute, which makes it a crime to distribute or dispense controlled substances. The medical exception expressly places on the physician the burden of going forward with evidence of authorization to distribute or dispense such substances.

In certain situations, however, the burden of proof shifts to the government to prove beyond a reasonable doubt that the medical exception does not apply. As noted by the court in King, one such situation is that found in United States v. Black. In Black, the Government introduced evidence showing (1) that Black was a medical practitioner, (2) that Black was duly registered with the Attorney General to dispense controlled substances, and (3) that the transfers made by Black were to his own patients by prescription. Even though Black did not attempt to introduce any evidence on his behalf regarding the exception, and thus did not meet the burden expressly imposed on him by statute, the Ninth Circuit held that the express statutory presumption was rendered irrational and unconstitutional when the required evidence was introduced by the Government.

In King, it was undisputed that the defendant was a doctor, and evidence of his controlled substances registration was improperly suppressed by the trial judge. However, unlike Black, no evidence that the

960. Id. at 686. Judge Hufstedler, in dissent, argued that the defendant was deprived of his primary defense and that any attempt by defense counsel to pursue the questioning after the comments of the court reporter and judge would have been counterproductive. Id. at 687 (Hufstedler, J., dissenting).
961. 587 F.2d 956 (9th Cir. 1978).
963. 512 F.2d 864 (9th Cir. 1975).
964. Id. at 870-71.
965. Id. at 871.
subject transfers were made to patients by prescription was introduced. In fact, circumstantial evidence suggested the contrary. Nevertheless, the Ninth Circuit held that the facts brought forth in *Black* did not reach the minimum threshold that defendant doctors had to meet before the burden of proof regarding the medical exception was shifted to the Government. The statutory presumption was still irrational once evidence was brought forth showing that defendant was a physician registered to dispense controlled substances, regardless of evidence showing the manner of transfer.

**E. Defenses**

1. Insanity

The defense of insanity is intended to prevent the criminal conviction of a defendant who lacks responsibility for his acts. A defendant is presumed legally sane until he presents some evidence of his insanity. Only after the defendant comes forward with such evidence does the prosecutor bear the burden of demonstrating the defendant's sanity beyond a reasonable doubt.

The Ninth Circuit has adopted a portion of the American Law Institute (ALI) test for insanity. In this circuit, 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 . . . [wrongfulness] of his conduct or to conform his conduct to the requirement of law.”

---

966. 587 F.2d at 964-65.
967. *Id.*
968. *Id.* Judge Choy argued in a separate opinion that proof that the subject transfers were made to patients by prescription was necessary to show that the presumption was irrational because, by statute, doctors are not allowed to dispense controlled substances without prescriptions unless confronted with an emergency. *Id.* at 967 (Choy, J., concurring and dissenting).
970. See, e.g., United States v. Schmidt, 572 F.2d 206, 208 (9th Cir. 1978) (expert testimony that defendant was suffering from “schizophrenia of the chronically recurrent paranoid type” overcame presumption of sanity).
971. See United States v. Winn, 577 F.2d 86, 89 (9th Cir. 1978) (government did not have burden of proving defendant's sanity where defendant failed to give timely notice of intention to rely on insanity defense); United States v. Ingman, 426 F.2d 973, 976 (9th Cir. 1970) (“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.”) (quoting Brown v. United States, 351 F.2d 473, 474 (5th Cir. 1965)).
972. Wade v. United States, 426 F.2d 64, 71-74 (9th Cir. 1970) (en banc) (defendant's armed robbery conviction reversed).
973. *Id.* at 71 (bracket in original). This remains the standard instruction in the Ninth
The word “wrongfulness” was substituted for “criminality” and denotes moral, rather than criminal, wrongfulness. This insanity 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. Collom* the Ninth Circuit affirmed the defendant’s robbery conviction, rejecting his contention that, because evidence of delusional behavior was presented at his trial, the court should have supplemented the standard jury instructions on the insanity defense. The instructions that were given consisted of the Ninth Circuit’s adaptation of the ALI test and an explanation of wrongfulness; they did not include the further instruction that a person lacks substantial capacity if he knows that his act is criminal but nevertheless acts under a delusion that it is morally justified. The Ninth Circuit found it unnecessary to supplement the instructions, explaining that “a delusion that [a criminal act] is morally justified” is subsumed in the instruction that attributes lack of substantial capacity to mental defect or disease.

In *United States v. Winn* the Ninth Circuit affirmed the defendant’s conviction for making a false statement in a passport application. Winn contended that he was entitled to a jury instruction on the de-
fense of insanity despite his failure to comply with a procedural rule requiring notice of an intention to raise the defense. Winn argued that his procedural noncompliance with the rule should not bar his substantive right to insanity instructions. The Winn court rejected this contention, reasoning that the rule is not merely "formalistic," rather, it is "designed to insure that both the defendant and the government have ample opportunity to investigate the fact of an issue critical to the determination of guilt or innocence." 

Winn also claimed that the trial court had erred in refusing to instruct the jury that evidence of his mental state, even if insufficient to establish insanity, was still relevant to decide whether he had the specific intent to commit the crime with which he was charged. The Ninth Circuit disagreed, stating that, although a defendant is entitled to an instruction on his theory of the case if it is supported by the law and evidence, the "evidence at trial concerned . . . [defendant's] irresponsibility and drinking—not mental disease or defect." Therefore, the failure to instruct was not reversible error.

The Ninth Circuit will not disturb a jury's finding of a defendant's sanity if the evidence, when viewed most favorably to the government, is sufficient to permit a rational conclusion that the defendant was sane beyond a reasonable doubt.

2. Due process

In United States v. Russell, the Supreme Court held that the essence of the entrapment defense was the defendant's predisposition to commit the crime of which he is accused rather than the Government's conduct. The Court stated, however, that it "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar

---

981. Defendant had failed to comply with Fed. R. Crim. P. 12.2(a), which provides in pertinent part: "If a defendant intends to rely upon the defense of insanity . . . he shall [make known] such intention . . . If there is a failure to comply . . . insanity may not be raised as a defense. The court may for cause shown allow late filing . . . ."
982. 577 F.2d at 89.
983. Id.
984. Id. at 90.
985. United States v. Monroe, 552 F.2d 860, 864 (9th Cir.), cert. denied, 431 U.S. 972 (1977) (jury rationally could have concluded that defendant's belief in moral justification of criminal act did not result from mental defect or disease); United States v. Ortiz, 488 F.2d 175, 178 (9th Cir. 1973) (Ninth Circuit rejected insanity defense in aircraft piracy case, concluding that sufficient evidence had existed to support jury finding of sanity).
987. Id. at 433-36.
the government from invoking judicial processes to obtain a conviction.\footnote{988}

In \textit{Hampton v. United States},\footnote{989} a plurality of the Court indicated that due process principles would not prevent a predisposed defendant's conviction.\footnote{990} The Ninth Circuit, however, has seized upon the lack of majority concurrence to avoid foreclosing the possibility of a due process defense when the government's conduct is sufficiently offensive.\footnote{991} This defense exists not as an exception to entrapment law but, rather, as an independent protection afforded by the due process clause regardless of a defendant's predisposition.\footnote{992}

In \textit{United States v. Prairie},\footnote{993} the Ninth Circuit affirmed the defendant's conviction for distribution of cocaine. The defendant had attempted to invoke the due process defense by contending that the Government's employment of a particular informant was unconstitutional. The defendant argued that the use of the informant, a prostitute, was intended improperly to seduce him emotionally and sexually and thereby to persuade him to deal in cocaine. The Ninth Circuit found this assertion meritless. The Government had neither paid nor asked the informant to persuade the defendant to deal in drugs; rather it had paid her living expenses in return for information given in past cases. The \textit{Prairie} court held that this use of a paid informant, although it may have constituted a violation of state criminal prostitution laws, was not, without more, a violation of the defendant's due process


\footnote{989. 425 U.S. 484 (1976).

\footnote{990. \textit{Id.} at 495 (Powell \& Blackmun, JJ., concurring). The concurring opinion interpreted the plurality as saying that "the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior." \textit{Id.} at 492. Justice Rehnquist stated that the remedy for outrageous police conduct "lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." \textit{Id.} at 490 (plurality opinion, Stevens, J., taking no part in decision).

\footnote{991. \textit{See, e.g.,} \textit{United States v. Prairie}, 572 F.2d 1316, 1319 n.2 (9th Cir. 1978) (defendant's conviction affirmed where entrapment not shown by evidence); \textit{United States v. Reynoso-Ulloa}, 548 F.2d 1329, 1338-39 (9th Cir. 1977), \textit{cert. denied}, 436 U.S. 926 (1978) (same).

\footnote{992. \textit{United States v. Lue}, 498 F.2d 531, 534 (9th Cir.), \textit{cert. denied}, 419 U.S. 1031 (1974) (government's deception not violative of due process where government did not "implant" the criminal design in defendant's mind). \textit{See also} \textit{United States v. Price}, 577 F.2d 1356, 1367 (9th Cir. 1978). In \textit{Price}, the Ninth Circuit held that, because the crime of conspiracy was complete before there was any government participation, both the entrapment and due process defenses were barred.

\footnote{993. 572 F.2d 1316 (9th Cir. 1978).}
The defendant in *Prairie* also argued that the trial court erred in failing to submit his due process defense to the jury. The Ninth Circuit found no error, however, holding that the question of whether government conduct is so outrageous as to constitute a violation of due process is one of law for the court to decide.

3. Competency to stand trial

A defendant's conviction, when he has been required to stand trial while legally incompetent, will be reversed as violative of due process. A defendant is competent to stand trial if he is able to understand the nature and object of the proceedings against him, consult with his attorney, and assist his attorney in the preparation of his defense. In *Drope v. Missouri*, the Supreme Court held that it is the responsibility of the trial judge to prevent the trial of a defendant who is not competent to stand trial. This responsibility continues throughout the trial. A hearing on the issue of the defendant's competency is required sua sponte whenever a comprehensive evaluation of all available evidence leads the trial judge to doubt the defendant's competency. The doubt sufficient to require a hearing may be raised by any relevant evidence.

---

994. *Id.* at 1319 n.4. *Cf.* United States v. Gonzales-Benitez, 537 F.2d 1051, 1055 (9th Cir.), *cert. denied*, 429 U.S. 923 (1976) (no due process violation where government agents provided the contraband).

995. 572 F.2d at 1319 (following United States v. Gonzales, 539 F.2d 1238, 1240 n.1 (9th Cir. 1976)).

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


999. *Id.* at 181. "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change" in his competency. *Id.*

1000. United States v. Ives, 574 F.2d 1002, 1004 (9th Cir. 1978). *See* Pate v. Robinson, 383 U.S. 375, 385 (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); de Kaplan 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).

1001. Drope v. Missouri, 420 U.S. 162, 180 (1975) (relevant evidence includes defendant's irrational behavior, his demeanor at trial, and medical opinion). *See* United States v. Ives,
In state court, the trial judge’s obligation to hold a competency hearing derives solely from the requirements of due process. In the federal courts, the competency issue is raised by a motion made pursuant to 18 U.S.C. section 4244. The Ninth Circuit has held that an initial section 4244 motion gives the moving party the right to a mandatory psychiatric examination of the defendant. However, upon a subsequent section 4244 motion, the trial judge, after considering “all

574 F.2d 1002, 1004 (9th Cir. 1978) (“defendant’s bizarre actions or statements, or counsel’s statement that the defendant is incapable of cooperating in his own defense, or even psychiatric testimony need not alone raise sufficient doubt.”). See also 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”).

1002. United States v. Ives, 574 F.2d 1002, 1004 n.3 (9th Cir. 1978). The Ninth Circuit will not disturb a state court’s finding of a defendant’s competency if the state court has provided a constitutionally adequate hearing on the competency issue. See, e.g., Myers v. Rhay, 577 F.2d 504, 509-10 (9th Cir.), cert. denied, 439 U.S. 968 (1978). In Myers, the Ninth Circuit affirmed the district court’s refusal to grant a habeas corpus petitioner an evidentiary hearing on the issue of his competency and refused to independently examine the psychiatric record in the case. In an extensive evidentiary hearing, the state court trial judge had found Myers competent to stand trial. There was no procedural defect in the hearing process, and the determination of Myers’ competency had been affirmed by the state court of appeal. Because the procedure observed by the state court was constitutionally adequate, comporting with the standards set forth in Drope, the district court did not abuse its discretion in refusing to conduct a new hearing on the issue of Myers’ competency.

When a constitutionally adequate hearing has been held, the Ninth Circuit will overturn a district court’s determination of competency only when the finding was clearly erroneous. See, e.g., United States v. Aponte, 591 F.2d 1247 (9th Cir. 1978). In Aponte, the Ninth Circuit found no error in the trial court’s determination of the defendant’s competency. Although at trial the government’s psychiatrist had stated that Aponte possessed a paranoid personality and the court appointed psychiatrist had testified that Aponte was “acutely psychotic and incompetent,” the Ninth Circuit concluded that “[t]he district court’s determination of Aponte’s competency to stand trial is a finding of fact which may be set aside only if it is clearly erroneous. We cannot say that the judge’s competence determination was clearly erroneous in this case.” Id. at 1249.

1003. 18 U.S.C. § 4244 (1976) provides in part:

Whenever . . . the United States Attorney has reasonable cause to believe that a person . . . may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency . . . . Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused . . . . to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. . . . If the report . . . . indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing . . . . and make a finding with respect thereto.

1004. United States v. Ives, 574 F.2d 1002, 1005 (9th Cir. 1978).

1005. Id. See Meador v. United States, 332 F.2d 935, 937-38 (9th Cir. 1964).
available pertinent information," may determine that there is insufficient doubt as to the defendant's competency to require a hearing. While "appellate review of a failure to provide any hearing on a defendant's competence to stand trial is 'comprehensive and not limited by either the abuse of discretion or clearly erroneous standard'," the trial judge's decision to deny a subsequent section 4244 motion will not be reversed absent an abuse of discretion.

In *United States v. Ives*, the Ninth Circuit reversed the defendant's murder conviction, concluding that under the circumstances the trial court had abused its discretion in denying a subsequent section 4244 motion. Although four different determinations on the issue of the defendant's competency had been made in less than one year, the trial court refused to consider the testimony of two psychiatrists and a deputy U.S. marshall that was offered to prove a change in Ives' competency in the five months since his last psychiatric examination. This refusal was held to violate Ives' due process rights, which require "evaluation of all available pertinent information as a basis for establishing whether doubt of the defendant's competency is sufficient to warrant a hearing . . . . [G]iven the frequent fluctuations in Ives' competency to stand trial, the court's refusal to consider evidence of another possible change constituted an abuse of that discretion." Because Ives' competency at the time of trial could not be established in a new hearing, the Ninth Circuit granted a new trial.

1006. 574 F.2d at 1006.
1007. Id. at 1005. See United States v. Cook, 418 F.2d 321, 324 (9th Cir. 1969).
1008. 574 F.2d at 1005 n.3 (emphasis added) (quoting de Kaplany v. Enomoto, 540 F.2d 975, 983 (9th Cir. 1976), cert. denied, 429 U.S. 1075 (1977)).
1009. Id. at 1005.
1010. 574 F.2d 1002 (9th Cir. 1978).
1011. Ives was indicted for murder in March 1971, but following a court ordered examination he was found incompetent to stand trial and was committed. In a second hearing the court found him competent, and his trial began. Thereafter, a mistrial was declared and, following a third hearing, he was adjudged incompetent and recommitted. Once again the district court found Ives to be competent and a second jury trial, the subject of the current appeal, began. Id. at 1004.
1012. Id. at 1006-07.
1013. Six years had elapsed since trial, the judges in both previous trials were dead, and no psychiatric testimony existed of Ives' competency at the time the error had occurred. Id. at 1007. See also Bassett v. McCarthy, 549 F.2d 616 (9th Cir.), cert. denied, 434 U.S. 849 (1977). The Bassett court discussed the difficulties involved in ruling on an appellant's claim that he was improperly denied a competency hearing at the trial court level. While claims based on the issue of competency are likely to arise in cases where it is apparent that the defendant is mentally impaired to some extent, the appellate court must "sift the record of abnormal behavior for evidence which might, at a hearing on the issue of competence, be found to be relevant and material to competency." The trial record, however, is one "in
4. Entrapment

The affirmative defense of entrapment requires that the defendant present evidence of his nonpredisposition to violate the law and of government inducement to commit the charged offense. The defense will be unsuccessful if the court finds either the defendant predisposed to commit the crime or government inducement lacking. "Entrapment as a matter of law exists only when there is undisputed testimony making it patently clear that an otherwise innocent person was induced to commit the act complained of by the trickery, persuasion or fraud of a government agent." Entrapment is a defense, not in the sense that the defendant goes free though guilty but, rather, that the government "cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct."

The proper inquiry for the jury is whether or not the defendant was an unwilling participant in the criminal act. An "unwilling" defendant denotes one who is not predisposed to violate the law on any
propitious opportunity.1020 Predisposition is a question of fact,1021 and a conviction will not be overturned unless the jury rationally could not have concluded that predisposition existed.1022 The Ninth Circuit has cited several factors as relevant in determining whether the defendant was predisposed. A proper inquiry may include consideration of the defendant’s prior criminal record,1023 whether the suggestion of the criminal activity was first made by the government, whether the defendant engaged in the criminal activity for profit, and whether the defendant evidenced reluctance to commit the offense that was overcome only by repeated government inducement or persuasion.1024

In United States v. Donoho,1025 the Ninth Circuit refused to reverse the defendant’s conviction for possession of unregistered firearms. This decision rested in part on the Ninth Circuit’s nonacceptance of the defendant’s theory of entrapment. To support his theory, the defendant offered evidence of specific instances of conduct reflecting favorably on his character. The trial court, however, held the evidence to be inadmissible. The Ninth Circuit explained that, although instances of conduct are admissible when character is an essential element of a defense,1026 the defense of entrapment consists solely of government

1020. United States v. Glassel, 488 F.2d 143, 146 (9th Cir. 1973), cert. denied, 416 U.S. 941 (1974) (defendant’s conviction for possession of cocaine affirmed where evidence of entrapment was insufficient to submit that issue to jury).


1022. United States v. Donoho, 575 F.2d 718, 720 (9th Cir. 1978) (per curiam).

1023. See, e.g., United States v. Segovia, 576 F.2d 251, 252-53 (9th Cir. 1978). In Segovia, the Ninth Circuit affirmed the defendant’s conviction for possession of cocaine. Although the defendant contended that the trial court had improperly admitted evidence of his previous dealings in marijuana, the circuit court held that evidence of a defendant’s prior illegal conduct is relevant to the issue of his predisposition when it tends to prove that the defendant was engaged in illegal operations similar to those charged. In this case, the defendant’s distribution of marijuana was found to be sufficiently similar to the current charges to be relevant to the issue of his predisposition. It was further determined that the probative value of such evidence outweighed its potential for prejudice and was therefore admissible.

1024. United States v. Reynoso-Ulloa, 548 F.2d 1329, 1336 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978). See Pulido v. United States, 425 F.2d 1391, 1393-94 (9th Cir. 1970) (reasonable to conclude that where defendant was not an addict, government’s emotional appeal to a physical need for narcotics did not become coercive, and, therefore, predisposition existed).

1025. 575 F.2d 718 (9th Cir. 1978) (per curiam).

1026. Fed. R. Evid. 405(b) provides that “[i]n cases in which character or a trait of character of a person is an essential element of a . . . defense, proof may . . . be made of specific instances of . . . conduct.”
inducement and nonpredisposition; it does not include character.\textsuperscript{1027}

Once the defendant has introduced evidence of his nonpredisposition and of government inducement, the government has the burden of showing that entrapment did not occur.\textsuperscript{1028} The trial court may, however, determine that the defendant’s evidence is insufficient to warrant submission of the entrapment issue to the jury.\textsuperscript{1029} In such cases, the defendant may still attempt to prove a violation of his due process rights.\textsuperscript{1030}

\section*{VI. \small{}Post-Conviction Proceedings}

\textbf{A. Sentencing}

1. Review

The broad discretion granted a sentencing judge is subject to limited review when the duration of the sentence falls within statutorily prescribed limits.\textsuperscript{1031} When a court imposes a sentence in excess of the maximum term authorized under the statute, however, the sentence is illegal and may be corrected under rule 35 of the Federal Rules of Criminal Procedure.\textsuperscript{1032} A defendant may argue on appeal that his

\begin{itemize}
  \item \textsuperscript{1027} United States v. Donoho, 575 F.2d 718, 719-20 (9th Cir. 1978) (per curiam). The Donoho court explained:
    \begin{quote}
      The inducement concerns actions taken by persons other than the defendant, and the predisposition concerns the defendant’s state of mind prior to the inducement.
    \end{quote}
    We recognize that proof of character may be relevant to the entrapment defense because it may make more probable than not that a defendant possessed a certain state of mind. It is the state of mind itself, however, and not the method of proving the state of mind, which operates as an essential element of the defense. . . . [P]redisposition may be shown by methods other than proof of character . . . . Because proof can be made by several methods, character is not even an essential method of proof, much less an essential element of the defense itself.
  \item \textsuperscript{1028} Pulido v. United States, 425 F.2d 1391, 1393 (9th Cir. 1970).
  \item \textsuperscript{1029} United States v. Glaeser, 550 F.2d 483, 487-88 (9th Cir. 1977) (mere fact that government agents made initial contact with defendant is evidence only that government furnished opportunity and will not, alone, support submission of entrapment issue to jury).
  \item \textsuperscript{1030} See notes 986-97 supra and accompanying text.
  \item \textsuperscript{1031} United States v. Washington, 578 F.2d 256, 258 (9th Cir. 1978) (imposition of maximum prison term for failure to appear for sentencing within discretion of sentencing judge); United States v. Taxe, 572 F.2d 216 (9th Cir.), \textit{cert. denied}, 436 U.S. 918 (1978) (no abuse of discretion in refusing to merge numerous violations into single course of conduct for sentencing purposes); United States v. Moreno, 569 F.2d 1049 (9th Cir.), \textit{cert. denied}, 435 U.S. 972 (1978) (imposition of 70-year sentence for distributing and dispensing heroin within discretion of sentencing judge).
  \item \textsuperscript{1032} \textit{FED. R. CRIM. P. 35} provides in part: “The court may correct an illegal sentence at any time and may correct an illegal sentence imposed in an illegal manner within the time provided . . . for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed . . . .”
  \end{itemize}
sentence, although within statutory limits, is unduly harsh. Absent some showing of abuse of discretion or illegality, the Ninth Circuit will summarily affirm such sentences as beyond review.\textsuperscript{1033} In \textit{United States v. Moreno},\textsuperscript{1034} for example, the defendants challenged the length of their sentences, alleging improper judicial motivation. The Ninth Circuit expressly withheld review of this claim, reasoning that the sentences were within the bounds prescribed by statute and, therefore, within the trial judge's discretion.\textsuperscript{1035}

\section{Information that may be considered}

The trial judge may consider a range of information, largely unlimited as to its nature or source.\textsuperscript{1036} Although the court may consider hearsay evidence of unproven criminal conduct contained in the presentence report,\textsuperscript{1037} due process requires that unwarranted weight not be given to such information in formulating the sentence.\textsuperscript{1038} In \textit{United States v. Weston},\textsuperscript{1039} the Ninth Circuit recognized the difference between reviewing a sentence and deciding that certain types of information.
tion should not be considered in formulating that sentence. This
distinction allows a sentence to be reviewed and vacated when it is
premised on unverified allegations of serious criminal conduct.\textsuperscript{1040}

The defendant in \textit{United States v. Wondrack},\textsuperscript{1041} for example, was
convicted of tax evasion. After expressly relying on a probation of-
icer's conclusion that the "probable source" of the defendant's miscel-
aneous income was from trafficking in narcotics, the district judge
increased the sentence that otherwise would have been imposed. The
defendant's miscellaneous income amounted to $125,000. Alleging that
this hearsay evidence was not sufficiently supported to pass the \textit{Weston}
standard, the defendant filed a motion to vacate his sentence. The
court noted that for several years prior to the year in question the de-
fendant's income had not exceeded $13,000 annually and that the de-
fendant had worked as a cargo handler for an international airline.
The court's finding that Wondrack's miscellaneous income probably
was acquired through drug dealings or some other illegal activity was
not "entirely without support" and, therefore, properly considered by
the sentencing judge.\textsuperscript{1042}

Consideration of improper information in formulating sentence is al-
leged frequently on appeal. Such attacks, however, are disposed of
generally on the basis of the trial court's disavowal of any reliance on
the challenged information.\textsuperscript{1043}

The Supreme Court in \textit{Gardner v. Florida}\textsuperscript{1044} concluded that a de-
fendant was denied due process of law when the death sentence was
imposed at least in part on the basis of information contained in a pre-
sentence report that he had had no opportunity to deny or explain.
While recognizing that fundamental fairness requires that a defendant
be told the substance of all derogatory information that adversely af-

\textsuperscript{1040}. Convicted of receiving, concealing and facilitating transportation of heroin, Weston
was initially sentenced to five years imprisonment. The prosecution demurred and asked
that a pre-sentence report be obtained. The pre-sentence report asserted, on belief, that
Weston was one of the large distributors of narcotics in the area. After considering this pre-
sentence report, the judge imposed a maximum 20-year sentence. Reasoning that the in-
crease in sentence was "[b]ased on unsworn evidence detailing otherwise unverified state-
ments of a faceless informer," the appellate court found that the sentencing judge had relied
improperly on the information contained in the pre-sentence report. \textit{Id.} at 631.
\textsuperscript{1041}. 578 F.2d 808 (9th Cir. 1978).
\textsuperscript{1042}. 578 F.2d at 810.
\textsuperscript{1043}. \textit{See} Chard v. United States, 578 F.2d 1317 (9th Cir. 1978) (no error in district
judge's refusal to order hearing on alleged inaccuracies in pre-sentence memorandum);
United States v. Stevenson, 573 F.2d 1105 (9th Cir. 1978) (no due process violation as there
was no indication judge materially relied upon speculative and unsupported information in
pre-sentence report).
\textsuperscript{1044}. 430 U.S. 349 (1977).
fects his interests and has not been disclosed in open court, the Ninth Circuit continues to allow nondisclosure in noncapital cases when the sentence determination has been made in only partial reliance on the withheld information.

3. Consecutive sentences

A court normally may impose consecutive sentences on a defendant for each offense. The propriety of consecutive sentences turns on whether the legislature defined several distinct offenses that could be committed during the course of a single transaction, or instead defined a single offense with progressively greater sanctions for aggravating circumstances. The Ninth Circuit has not favored separating essentially unitary transactions into their component parts in order to exact consecutive sentences in excess of the authorized maximum penalty for a single offense.

4. Increase in sentence

A court may not impose a greater sentence upon retrial following a successful appeal in retaliation for the defendant's assertion of procedural rights. To ensure the absence of such motivation, a more se-

1045. United States v. Dubrofsky, 581 F.2d 208, 214-15 (9th Cir. 1978) (quoting United States v. Perri, 513 F.2d 572, 575 (9th Cir. 1975)) (maintaining secrecy of government investigation held a proper basis for nondisclosure when sentencing judge did not rely exclusively on confidential memorandum).

1046. See Pavao v. Cardwell, 583 F.2d 1075, 1078 (9th Cir. 1978) (maintaining integrity of ongoing police investigation justified excising portion of pre-sentence report when consideration of excised portion in no way influenced sentence determination).

1047. See United States v. Dubrofsky, 581 F.2d 208, 213-14 (9th Cir. 1978) (consecutive sentencing within court's discretion when importation and distribution each comprised a distinct crime); United States v. Taxe, 572 F.2d 216, 217 (9th Cir.), cert. denied, 436 U.S. 918 (1978) (no abuse of discretion in refusing to merge numerous discrete violations into a single course of conduct for sentencing purposes, when merger would retard statute's deterrent effect).

1048. In United States v. Clements, 471 F.2d 1253, 1254 (9th Cir. 1972), the court stated: "Unless we can find from the face of the Act or from its legislative history a clear indication that Congress intended to authorize multiple punishments for a single transaction, we are obliged to construe the Act against the harsher penalties that result from cumulative punishments."

1049. North Carolina v. Pearce, 395 U.S. 711, 723-25 (1968) (imposition of greater sentence improper when no reason "based upon objective information concerning identifiable conduct . . . of defendant . . . after . . . the original sentencing" appears in record to justify increase); United States v. Lincoln, 581 F.2d 200, 201 (9th Cir. 1978) (subsequent increase in sentence proper when based on presentence report showing only negative information); United States v. Young, 573 F.2d 1137, 1140 (9th Cir. 1978) (greater sentence proper when imposed in reliance on subsequent indictment alleging narcotics trafficking occurring subsequent to original sentencing).
vere sentence after retrial must be justified by actions of the defendant occurring after the original sentencing and affirmatively appearing as part of the record.\textsuperscript{1050} Tried twice previously for the same offense, the defendant in \textit{United States v. Young},\textsuperscript{1051} for example, was convicted of conspiracy to possess cocaine with intent to distribute. The court imposed a six-year sentence and the defendant appealed, contending that the sentence should not have exceeded the three-year sentence imposed at the first trial. The Ninth Circuit, however, found the increase to be properly based upon an indictment alleging narcotics trafficking that occurred \textit{concurrently} with the offense for which the defendant was convicted but which was not revealed until after the second trial. Adding to the trial judge's understanding of the defendant's personal characteristics, this information was properly considered in formulating the ultimate sentence.\textsuperscript{1052}

If the court imposes sentence in an illegal manner, the same court may resentence the defendant even though the correction may increase the punishment initially pronounced.\textsuperscript{1053} When service of the legal portion of a sentence has commenced, however, the court may not increase or make more severe the valid portion of the sentence originally imposed.\textsuperscript{1054}

In \textit{United States v. Best},\textsuperscript{1055} for example, the court disapproved an attempt to impose in a lawful manner that portion of the prior sentence that, as originally imposed, was excessive. The defendant had been convicted on all three counts of an information charging him with aiding and abetting aliens to elude examination and inspection and was sentenced to six-months imprisonment on each count, sentences to run concurrently. The court further imposed a three-year probationary term to run consecutively with the prison term. As the maximum sentence allowed by statute on each count was six months in prison, the probationary term was excessive and, therefore, illegal. The court, upon the defendant's motion to correct the excessive sentence, resented the defendant to six months in prison on count one and concur-

\textsuperscript{1050} North Carolina v. Pearce, 395 U.S. 711, 726 (1968).
\textsuperscript{1051} 573 F.2d 1137 (9th Cir. 1978). The guilty verdict in the first trial was vacated and a mistrial declared in the second. \textit{Id.} at 1139.
\textsuperscript{1052} \textit{Id.} at 1140-41.
\textsuperscript{1053} United States v. Stevens, 548 F.2d 1360, 1362 (9th Cir.), \textit{cert. denied}, 430 U.S. 975 (1977) (proper to increase sentence to conform to that specifically required by law).
\textsuperscript{1054} Kennedy v. United States, 330 F.2d 26, 27 (9th Cir. 1964) (where statute fixed maximum penalty at five years, ten-year concurrent sentences for breaking and entering were void only as to excessive five years).
\textsuperscript{1055} 571 F.2d 484 (9th Cir. 1978).
rent probation terms of three years on counts two and three. Reasoning that this sentence amounted to an increase of the valid portion of the defendant's original sentence, the Ninth Circuit held it to be precluded by double jeopardy.\textsuperscript{1056}

5. Computation of time served

A defendant in the Ninth Circuit has no constitutional right to credit for time served prior to sentencing unless the sentence received was the statutory maximum and the pre-sentence incarceration was the result of indigency.\textsuperscript{1057} A sentence shorter than the statutory maximum is presumed to include credit for pre-sentence time served.\textsuperscript{1058}

Sentencing under the Federal Youth Corrections Act\textsuperscript{1059} is designed to provide treatment and rehabilitation, rather than retribution, for youthful offenders under twenty-two years of age.\textsuperscript{1060} The Act provides that the youth shall be released conditionally within four years from the date of conviction.\textsuperscript{1061} The Ninth Circuit, in *Ogg v. Klein*,\textsuperscript{1062} was asked to decide whether an escape tolled a youth offender's sentence. Shortly after incarceration, Ogg walked away from the facility without permission and remained on escape status for nearly five years. Eventually surrendering, he was released on his own recognizance pending an appearance to initiate proceedings on the escape charge. The United States Bureau of Prisons, contending that Ogg had yet to serve the remainder of his sentence, directed the United States Marshall to take Ogg into custody. Ogg then filed a habeas corpus action requesting release. He argued that he must be released after the expiration of four years from the date of conviction and that those four years had passed. Reasoning that an escape does and should toll the youth offender's sentence, the court denied Ogg's petition for habeas corpus relief.\textsuperscript{1063}

6. Cruel and unusual punishment

The Ninth Circuit has interpreted the eighth amendment prohibition against cruel and unusual punishment\textsuperscript{1064} to preclude penalties "so

\textsuperscript{1056} Id. at 486.
\textsuperscript{1057} Hook v. Arizona, 496 F.2d 1172, 1173-74 (9th Cir. 1974).
\textsuperscript{1058} Id.
\textsuperscript{1061} 18 U.S.C. § 5017(c) (1976).
\textsuperscript{1062} 572 F.2d 1379 (9th Cir. 1978).
\textsuperscript{1063} Id. at 1382.
\textsuperscript{1064} U.S. CONST. amend. VIII.
out of proportion to the crime committed that it shocks a balanced sense of justice. The defendant in United States v. Washington was charged in a one-count indictment with aiding and abetting mail theft, a felony, but was allowed to plead guilty to obstruction of the mail, a misdemeanor. A date was set for sentencing, but the defendant did not appear. He was later convicted of failure to appear and sentenced to five-years imprisonment. Reasoning that the sentence, when considered in light of the defendant's direct affront to the authority of the court, did not reveal the required gross disparity, the Ninth Circuit concluded that the sentence did not constitute cruel and unusual punishment.

B. Appeals

1. Finality

Section 1291 of the Judicial Code vests the federal courts of appeals with jurisdiction of appeals from all final decisions of the district courts of the United States, the Canal Zone, Guam and the Virgin Islands. Appellate review is not a constitutional right; it is purely statutory and arises only after the trial court has rendered a final decision in the case.

The imposition of sentence is the final judgment in a criminal case. In United States v. Richardson, however, the Ninth Circuit recognized an exception to the final judgment rule for collateral orders that would not be subject to effective post-judgment review. The Richardson court found jurisdiction to review a pre-trial denial of a motion to dismiss an indictment on double jeopardy grounds.

The Ninth Circuit traditionally had held that such an order was not within the collateral order exception developed by the Supreme Court in United States v. Holman, 436 F.2d 863, 866 (9th Cir.), cert. denied, 402 U.S. 913 (1970) (eight-year prison sentence for narcotics violations not cruel and unusual punishment) (quoting Gallego v. United States, 276 F.2d 914, 918 (9th Cir. 1960)).

1065. United States v. Holman, 436 F.2d 863, 866 (9th Cir.), cert. denied, 402 U.S. 913 (1970) (eight-year prison sentence for narcotics violations not cruel and unusual punishment) (quoting Gallego v. United States, 276 F.2d 914, 918 (9th Cir. 1960)).

1066. 578 F.2d 256 (9th Cir. 1978).

1067. Id. at 258. See also Territory of Guam v. Sablón, 584 F.2d 340 (9th Cir. 1978) (statute mandating life imprisonment for first-degree murder upheld against cruel and unusual punishment challenge).


1069. Id.


1071. 580 F.2d 946 (9th Cir. 1978).

1072. Id. at 947.

1073. See, e.g., United States v. Young, 544 F.2d 415, 416 (9th Cir.), cert. denied, 429 U.S.
Court in *Cohen v. Beneficial Industrial Loan Corp.* The Supreme Court, however, in *Abney v. United States* expressly held that "[a]lthough . . . a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, we conclude that such orders fall within the 'small class of cases' that *Cohen* has placed beyond the confines of the final-judgment rule."

2. Jurisdiction

Rule 4(b) of the Federal Rules of Appellate Procedure fixes the time for all appeals in criminal cases as "within 10 days after the entry of the judgment or order appealed from." Failure to satisfy this requirement deprives the appellate court of jurisdiction to hear the appeal. In *Hayward v. Britt*, the defendant filed a motion for reconsideration of judgment after his appeal time had expired. Aware that his appeal period had run, the appellant also asked that, if this motion was denied, the court vacate the original judgment and reenter it, thereby permitting a timely appeal to be made. Denying the motion for reconsideration, the trial court vacated and reentered the judgment and from this, the defendant then made a timely appeal. Observing that "[t]he

1024 (1976) (claim of double jeopardy does not concern a purely collateral matter and review should be postponed until final judgment).

1074. 337 U.S. 541 (1949). In a stockholder's derivative action, the district court denied the defendant's motion to require the plaintiff to give security for costs and expenses, pursuant to a New Jersey statute. The Supreme Court held that the order of denial was final and appealable. Mr. Justice Jackson, writing for the majority, observed:

[T]his order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably . . . .

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. . . .

We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.

*Id.* at 546-47.


1076. *Id.* at 659. *See also* Stack v. Boyle, 342 U.S. 1, 12 (1951) ("[t]his is a final decision that Congress has made reviewable. . . . While a final judgment is always a final decision, there are instances in which a final decision is not a final judgment.") (separate opinion of Jackson, J.) (citations omitted).

1077. FED. R. APP. P. 4(b).

1078. Smith v. United States, 425 F.2d 173, 174 (9th Cir. 1970) (oral declaration did not constitute compliance with the notice of appeal filing requirements).

1079. 572 F.2d 1324 (9th Cir. 1978).
vacation and reinstatement of the judgment are an attempt to circum-
vent the time requirements for the filing of an appeal," the Ninth
Circuit concluded that the motion to reconsider was insufficient to con-
fer appellate jurisdiction.

Except when further prosecution would place the accused in double
jeopardy, the government is given the right of appeal from an order
dismissing all or part of an indictment or information. In a state
criminal prosecution removed to federal court, the state has a similar
right of appeal under 18 U.S.C. section 3731.

3. Standard of review

Underlying the Federal Rules of Criminal Procedure is the philoso-
phy that it is wise to leave the details of procedure to the informed
discretion of the trial court. The appellate courts, therefore, will
review trial proceedings only to determine whether the trial court has
abused its discretion. In United States v. Gay, for example, a
defendant moved for severance upon the claim that the testimony of a
co-defendant would exculpate him. The co-defendant stated that he
would testify, but only if tried first. The trial court rejected the condi-
tional offer to testify and denied the motion to sever. Following a joint
trial, all defendants were convicted as charged. The defendant ap-
pealed, claiming that his motion for a separate trial was improperly
denied. The Ninth Circuit recognized that "the decision to grant the
severance [was] within the discretion of the court" and held that
"review on appeal is limited to whether . . . the joint trial . . . [was] so
prejudicial . . . as to require the exercise of that discretion in only one
way, by ordering a separate trial."
Although the trial court's findings of fact are not conclusive on appeal, there is a heavy burden on the party seeking to disturb them. A finding of fact must be "clearly erroneous" to warrant reversal on appeal. Although supporting evidence may be available, a finding is clearly erroneous when the reviewing court, on the entire record, is "left with the definite and firm conviction that a mistake has been committed." This standard, however, does not apply to the district court's conclusions of law. In *United States v. Rosales*, for example, the prosecution appealed a ruling by the district court suppressing the declaration of an alleged co-conspirator. Following an offer of proof by the Government, the trial judge ruled that a prima facie case of conspiracy had not been established and that the statements must be suppressed. Reasoning that whether facts presented by the Government were sufficient to create a jury question on the existence of a conspiracy was a question of law, rather than a finding of fact, the Ninth Circuit concluded that it was not confined to the "clearly erroneous or some other restricted standard of review" but could exercise independent judgment.

Reflecting the reality that jurors may not always be capable of strictly applying the instructions of the court or of basing their verdict exclusively upon the evidence developed at trial, rule 29 of the Federal Rules of Criminal Procedure provides relief to the victim of an improper or irrational verdict. If the evidence is insufficient to sustain a conviction, the defendant, by moving for acquittal, has the opportunity to take the case from the jury and have it determined by the trial judge. Although the Ninth Circuit has not considered the applicability of rule 29 to bench trials, it seems clear that, because the plea of "not guilty" asks the court for a judgment of acquittal, the rule is inapplicable.
If the reviewing court finds legal error in the proceedings below, it must determine the degree to which the error is prejudicial.\textsuperscript{1097} As a general rule, an error of constitutional dimensions is more likely to be found prejudicial than errors of nonconstitutional import.\textsuperscript{1098} Yet, the Supreme Court, in \textit{Chapman v. California},\textsuperscript{1099} held that such constitutional error was not prejudicial per se and can be held harmless if the Government shows the error to be "harmless beyond a reasonable doubt."\textsuperscript{1100} In \textit{United States v. Price},\textsuperscript{1101} the trial court improperly refused to permit a defendant to cross-examine a witness about her relationship with law enforcement officers. While recognizing that in most denial of effective cross-examination cases it would be rare to find the denial harmless,\textsuperscript{1102} the court determined the error in \textit{Price} to be harmless beyond a reasonable doubt.\textsuperscript{1103}

The Ninth Circuit will reverse under the "plain error" rule\textsuperscript{1104} only in those "very exceptional circumstances where reversal is necessary in order to prevent a miscarriage of justice or to preserve the integrity and

\textsuperscript{1097} There are three levels of error, (1) harmless error, (2) reversible error, and (3) plain error. Harmless error does not lead to reversal although properly objected to and raised on appeal. \textit{United States v. Price} 577 F.2d 1356, 1362 (9th Cir. 1978). Reversible error will result in reversal of the conviction when properly objected to and raised on appeal. \textit{Cooper v. Fitzharris}, 586 F.2d 1325 (9th Cir. 1978). If plain error is present, the conviction will be reversed even though there was no objection and the issue was not raised on appeal. \textit{United States v. Rich}, 580 F.2d 929, 938-39 (9th Cir.), \textit{cert. denied}, 439 U.S. 935 (1978).

\textsuperscript{1098} \textit{See} \textit{United States v. Valle-Valdez}, 554 F.2d 911, 915-16 (9th Cir. 1977) (constitutional errors distinguished from nonconstitutional errors: the Government must demonstrate that a constitutional error was harmless beyond a reasonable doubt, whereas the defendant must demonstrate that a non-constitutional error was harmful).

\textsuperscript{1104} \textit{FED. R. CRIM. P. 52(b).}
reputation of the judicial process." When the evidence against a defendant is so strong that the absence of error would not have changed the jury's verdict, plain error seldom will be found. In _United States v. Giese_, for example, the appellant contended that the prosecution committed blatant acts of misconduct during closing argument. At the trial, the defendant neither objected to the prosecution's statements nor asked for curative instructions. When considered in light of the large amount of evidence unaffected by anything the prosecution did during its final arguments, the court held that any impropriety did not amount to plain error.

Some constitutional errors, particularly those prejudicing rights essential to a fair trial, are reversible without regard to the presence or absence of prejudice. The Ninth Circuit has also reversed automatically on the basis of nonconstitutional errors so inherently prejudicial as to obviate the need for inquiry into actual harm.

4. Concurrent sentence doctrine

If the judge chooses concurrent sentences for convictions on multiple counts of an indictment, the "concurrent sentence doctrine" may apply on appeal. Under this rule, a federal appellate court may decline to decide an issue as to a conviction under one count of an indictment if the defendant has been validly convicted under another count and concurrent sentences were imposed. In _United States v. Raborn_, the

---

1105. _United States v. Uriarte_, 575 F.2d 215 (9th Cir.), _cert. denied_, 439 U.S. 963 (1978) (admission of rebuttal evidence given in connection with testimony concerning defendant's prior arrest did not constitute plain error so as to require reversal in absence of objection at trial); _United States v. Segna_, 555 F.2d 226, 231 (9th Cir. 1977) (prosecutor's erroneous statements shifted burden of proof to defendant, thus denying him of benefits of reasonable doubt standard and amounting to plain error).

1106. 597 F.2d 1170 (9th Cir. 1979).

1107. The trial transcript showed the prosecution had offered personal characterizations of the appellant, calling him "sick," "a wolf in sheep's clothing," and "a very dangerous individual." The prosecution had further asked the jury to place faith in the government's credibility and repeatedly commented on the defendant's failure to produce evidence. _Id._ at 1199.

1108. _Id._


1110. _United States v. Park_, 521 F.2d 1381, 1383 n.1 (9th Cir. 1975) (trial judge's reading of defendant's presentence report before determination of guilt was reversible per se).

1111. _United States v. Diaz-Alvarado_, 587 F.2d 1002 (9th Cir. 1978) (in exercise of discretion, court would not examine assertion that trial court erred in failing to give proposed jury instruction on conspiracy charge where defendants were validly convicted under distribution charge and concurrent sentences were imposed for convictions).

1112. 575 F.2d 688 (9th Cir. 1978).
defendant received a five-year sentence for conviction of bribery, false claims and tax evasion, a two-year sentence for accepting a gratuity, and a three-year sentence for filing a false income tax return, all sentences to be served concurrently. On appeal, Raborn made several challenges to his bribery conviction after the court upheld the tax evasion conviction. Observing that the sentences imposed on the bribery and tax counts were to run concurrently, the court refused to consider the issues relating to the bribery conviction.\textsuperscript{1113}

5. New trial

Upon a motion by the defendant, the trial court may grant a new trial "if required in the interest of justice."\textsuperscript{1114} Federal Rule of Criminal Procedure 33 implicitly denies the trial court the power to order a new trial sua sponte.\textsuperscript{1115}

A motion for new trial may be joined in the alternative with a motion for judgment of acquittal notwithstanding the verdict under rule 29(c) of the Federal Rules of Criminal Procedure.\textsuperscript{1116} In all cases in which the verdict or finding of guilt occurs after June 1, 1978, the defendant will be required to have made a timely motion in district court for a new trial under rule 33 to preserve that possibility should the granted motion of acquittal under rule 29(c) be reversed on appeal.\textsuperscript{1117}

To prevail in a rule 33 motion, the defense must demonstrate that a new trial would probably produce an acquittal.\textsuperscript{1118} In cases involving prosecutorial misconduct, however, the Ninth Circuit applies a more liberal standard of materiality.\textsuperscript{1119} In United States v. Butler,\textsuperscript{1120} for example, the appellants contended that the prosecution failed to disclose a promise to a key government witness that charges pending against him would be dismissed if he testified against the defendant. Reasoning that the newly discovered evidence would not have altered the jury's verdict, the trial court denied the defendant's motion for a new trial. The Ninth Circuit reversed, however, holding that the

\textsuperscript{1113} Id. at 690.
\textsuperscript{1114} FED. R. CRIM. P. 33.
\textsuperscript{1115} Id. ("The court on the motion of the defendant may grant a new trial . . . ") (emphasis added).
\textsuperscript{1116} United States v. Rojas, 574 F.2d 476, 476 (9th Cir. 1978) (supplemental order).
\textsuperscript{1117} Id.
\textsuperscript{1118} United States v. Cervantes, 542 F.2d 773, 779 (9th Cir. 1976) (availability of informant not sufficient to probably produce an acquittal).
\textsuperscript{1119} United States v. Butler, 567 F.2d 885, 891 (9th Cir. 1978) (new trial required if witness' false testimony might have affected the jury's assessment of credibility).
\textsuperscript{1120} 567 F.2d 885 (9th Cir. 1978).
Criminal Law Survey: 1978

Proper standard of materiality in nondisclosure cases is whether the newly discovered evidence might reasonably have affected the jury's judgment. A supplemental finding that the jury probably would have changed its verdict was unnecessary.

C. Habeas Corpus

1. Jurisdiction

The federal writ of habeas corpus embraces all claims by a petitioner that he was "denied rights secured to him under the federal Constitution or other federal law" in pre-conviction proceedings. The writ is available only to "in custody" petitioners in cases in which the justifying circumstances have not become moot and may be granted by any justice of the Supreme Court, or by any circuit or district court judge within their respective jurisdictions. In Cervantes v. Walker, a state prisoner filed a petition for habeas corpus relief challenging the conditions of his probation. Observing that the probation period had expired prior to oral arguments, the Ninth Circuit held the challenge to be moot.

2. Relief for federal prisoners

Often employed in lieu of habeas corpus, 28 U.S.C. section 2255 creates a post-conviction procedure on behalf of a prisoner in custody under sentence of a federal court. If this remedy fails or is not ap-
plicable, the propriety of the detention may be questioned under the traditional habeas corpus statute, 28 U.S.C. section 2241. On appeal in Elliot v. United States,\textsuperscript{1131} the prisoner alleged in a section 2255 motion to vacate or correct sentence that both the sentencing judge and the parole board relied upon false information that the prisoner had been convicted of rape. He further contended that the parole board was not giving serious consideration to his application for parole. The Ninth Circuit held that a motion under 28 U.S.C. section 2255 was not the appropriate vehicle to attack the parole board's actions, but that he should make his claim in a petition for writ of habeas corpus.\textsuperscript{1132}

Section 2255 grants subject matter jurisdiction to the federal courts to consider motions for post-conviction relief on four grounds: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack.\textsuperscript{1133} A sentence attacked collaterally because of a nonconstitutional error of federal law does not, however, automatically warrant relief.\textsuperscript{1134} The appropriate inquiry in such cases is whether the claimed error of law is a fundamental defect that "inherently results in a complete miscarriage of justice" presenting an "exceptional circumstance" in which the need for the remedy afforded by writ of habeas corpus is apparent.\textsuperscript{1135} In Marshall v. United States,\textsuperscript{1136} for example, the petitioner, under section 2255, collaterally challenged the government's failure to satisfy the pre-trial notice requirement to proceed against him as a dangerous special offender.\textsuperscript{1137} Despite petitioner's attempt to frame the notice require-
ment in constitutional terms, the court held that the notice requirement was clearly statutory in nature, and that this nonconstitutional claim did not present an "exceptional circumstance" constituting a fundamental defect leading to a complete miscarriage of justice.\footnote{1138}

The availability of section 2255 relief for a nonconstitutional error depends upon the degree of error and the injuries alleged. In \textit{Yothers v. United States},\footnote{1139} for example, the defendant pleaded guilty to conspiracy to import hashish and was sentenced to five-years imprisonment and a special parole term of two years. Yothers, alleging that he had failed to understand that the special parole term was a mandatory minimum rather than a maximum, filed a section 2255 motion to vacate the conviction and sentence so as to allow him to replead. The court found that the sentencing judge had failed to explain the unique nature and consequences of a special parole term. Such manifest noncompliance with rule 11(c)(1) of the Federal Rules of Criminal Procedure required that the conviction be set aside.\footnote{1140} In \textit{Lepera v. United States},\footnote{1141} however, the district court, under similar circumstances, denied the defendant's section 2255 petition for relief. Lepera had pled guilty in consideration of judicial and prosecutorial representations that he would receive concurrent sentences for convictions of conspiracy to distribute cocaine and parole violation. The court, however, had no authority to make such a promise because the parole board had exclusive jurisdiction to execute the parole violation warrant. The parole board eventually cooperated with the court, executing the parole violation warrant to allow the sentences to run concurrently. Concluding that Lepera had received the sentence bargained for, the Ninth Circuit found no prejudice with respect to total time served.\footnote{1142}

The Ninth Circuit, in 1978,\footnote{1143} delineated the procedure to be followed by the district courts when a convict files a section 2255 motion claiming a \textit{Tucker} violation. A \textit{Tucker}-type challenge alleges enhancement of the petitioner's sentence because of reliance on an invalid prior conviction.\footnote{1144} Section 2255 \textit{Tucker} petitions ordinarily should be de-

\begin{footnotes}
\footnotetext{1138}{576 F.2d at 162.}
\footnotetext{1139}{572 F.2d 1326 (9th Cir. 1978).}
\footnotetext{1140}{\textit{Id.} at 1328.}
\footnotetext{1141}{587 F.2d 433 (9th Cir. 1978).}
\footnotetext{1142}{Lepera asked the court to terminate his case rather than allow him an opportunity to replead. This buttressed the court's conclusion but was not itself pivotal. \textit{Id.} at 436.}
\footnotetext{1143}{Farrow v. United States, 580 F.2d 1339 (9th Cir. 1978) (en banc).}
\footnotetext{1144}{See United States v. Tucker, 404 U.S. 443 (1972). The Supreme Court stated:}
\end{footnotes}
cided by the original sentencing judge. The court recognized that a trial judge's familiarity with the case may lead him to give only pro forma consideration to the petition but concluded that such a danger is not unique to Tucker-type cases and that it is necessary to "trust that our judges will rise above such influences."1145

Section 2255 requires that an evidentiary hearing be held "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."1146 In a case in which the judge's own recollection enables him to determine whether the original sentence might have been different had he then known that the prior convictions were invalid, an evidentiary hearing is not necessary.1147 Furthermore, a hearing into the validity of the prior convictions is not required if the judge determines from the record that a new sentence, formulated without reliance on the challenged convictions, would nonetheless be the same.1148 It is only when the sentencing judge has found that the original sentence would be inappropriate that the petitioner must be afforded an evidentiary hearing on the validity of the prior convictions.1149

Upon reviewing a Townsend claim1150 pursuant to a section 2255 mo-

"[T]o permit a conviction obtained in violation of Gideon v. Wainwright, [372 U.S. 335 (1963)], to be used against a person either to support guilt or to enhance punishment for another offense... is to erode the principle of that case." 404 U.S. at 449. The Court went on to proscribe reliance on such invalid convictions to enhance punishment.

1145. Farrow v. United States, 580 F.2d 1339, 1350 (9th Cir. 1978) (en banc) (under sentence for jumping bail and failing to pay a special tax on 119 pounds of marijuana, defendant moved to vacate, alleging sentencing court had considered four invalid prior convictions). This same practice is followed with motions to correct or reduce sentence pursuant to FED. R. CRIM. P. 35.


1147. In Portillo v. United States, 588 F.2d 714 (9th Cir. 1978), the defendant moved on due process grounds to vacate his sentence, contending that the sentencing judge had relied on an invalid prior conviction. Denying the motion without an evidentiary hearing, the trial court concluded:

This Judge was, and still is, of the opinion that regardless of the invalidity surrounding... [the prior convictions]... the facts and circumstances surrounding this particular case dictate fifteen years to be the appropriate sentence for this particular conviction. Thus, no singular prior conviction or materially false assumption, enhanced this petitioner's sentence.

Id. at 715-16.

1148. Farrow v. United States, 580 F.2d 1339, 1352-53 (9th Cir. 1978).

1149. See United States v. Chard, 578 F.2d 1317, 1318 (9th Cir. 1978) (refusal to grant evidentiary hearing proper where record clearly indicated that allegedly inaccurate memorandum was not relied on in imposing sentence).

1150. Townsend v. Burke, 334 U.S. 736 (1948). The Supreme Court reversed the conviction of a defendant who was sentenced on the basis of materially untrue assumptions concerning his criminal record. The Court held that the pronouncement of sentence on a
tion, a sentence will be vacated on appeal only if the challenged infor-
mation is false and unreliable and, demonstrably, was the basis for the
sentence. It must appear affirmatively in the record that the court
based its sentence on improper information.

Absent a showing of cause and prejudice, failure to comply with rule
32(a)(1) by presenting “any information in mitigation of punishment”
at the time of sentencing may operate as a waiver of a subsequent sec-
tion 2255 challenge.

3. Relief for state prisoners

A state prisoner may petition a federal district court for habeas
 corpus relief by alleging that he is being held in violation of the Consti-
tution, laws or treaties of the United States. In 1978, state prisoners
filed habeas corpus petitions challenging the conditions of proba-
tion, the basis of a guilty plea, the adequacy of counsel at trial,
the revocation of parole absent a hearing, and the length of
delay prior to trial. The defendant in Bittaker v. Enomoto, for
example, sought a writ challenging the state’s earlier denial of his right
of self-representation. The court held that such state action was a
constitutional defect automatically prejudicing the defendant’s interest

1151. Farrow v. United States, 380 F.2d 1339, 1359 (9th Cir. 1978).
1152. Id.
statements by habeas corpus waived by failure to object).
1154. 28 U.S.C. §§ 2241-2255 (1976). When a state contains more than one federal judi-
cial district, venue is proper either in the district in which petitioner was convicted and
sentenced or in the district in which he is being held. 28 U.S.C. § 2241(d) (1976).
1155. Cervantes v. Walker, 589 F.2d 424 (9th Cir. 1978) (as condition of probation, peti-
tioner was subject to search at any time without notice).
1156. Stone v. Cardwell, 575 F.2d 732 (9th Cir. 1978) (petitioner, charged with lewd and
lascivious acts, pleaded guilty to child molestation pursuant to a plea bargain but received a
penalty nearly four times that which he would have received had he pleaded not guilty and
been convicted on the original charge).
1157. Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (petitioner cited counsel’s re-
peated failures to move to suppress evidence).
1158. Heinz v. McNutt, 582 F.2d 1190 (9th Cir. 1978) (petitioner’s parole revoked without
final revocation hearing pursuant to Washington statute which permitted automatic revoca-
tion of parole for persons convicted of a felony or misdemeanor while on parole).
1159. Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978) (petitioner contended that nine-
month delay between arrest and trial resulted in speedy trial violation).
1160. 587 F.2d 400 (9th Cir. 1978).
1161. See Arnold v. United States, 414 F.2d 1056, 1058 (9th Cir. 1969), cert. denied, 396
U.S. 1021 (1970). See also Faretta v. California, 422 U.S. 806 (1975) (defendant in state
criminal trial has constitutional right of self-representation).
The district court, in a habeas corpus proceeding, will accept state court findings of fact if made after a full and fair hearing and if substantially supported by the record. In *Taylor v. Cardwell*, a key prosecution witness stated after trial that his testimony had been false and that the government was aware of the fabrication. The district court appropriately accepted this finding of historical fact.

Findings of fact need not be accepted by the federal court absent a full and fair evidentiary hearing at the state level. In *Stone v. Cardwell*, for example, the petitioner contended that the lengthy sentence imposed was not in accordance with the plea bargain upon which his guilty plea had been based. Stone had suffered a sentence nearly four times as great as that which he would have received had he pleaded not guilty, stood trial, been convicted on all four charges against him, and been given the maximum sentence on all counts with the sentences to run consecutively. Despite this seemingly blatant irregularity, the state court found that the petitioner had failed to establish that his sentence was contrary to the plea bargain. To enable the district court to determine whether this finding was the product of a full and fair hearing, fairly supported by the record, the Ninth Circuit remanded the case to allow the petitioner to supplement the record with transcripts of the state proceedings.

**D. Double Jeopardy**

1. Separate offenses

The fifth amendment provides that no person shall be “twice put in jeopardy [for the same offense].” Courts frequently have limited the scope of this protection by adopting a narrow concept of an “offense.” The plea of former jeopardy is held inapplicable in a second prosecution for an offense that, although committed within the same act or as

1162. 587 F.2d at 402.
1163. See Gardner v. Pogue, 568 F.2d 648, 649 (9th Cir. 1978) (adherence to state court’s findings of fact).
1164. 579 F.2d 1380 (9th Cir. 1978).
1165. If the state court does not make findings of fact, the district court may make its own findings from the record. The court should conduct an evidentiary hearing for this purpose. *Id.* at 1382-83.
1166. 575 F.2d 724 (9th Cir. 1978).
1167. The Ninth Circuit noted: “If this was indeed pursuant to plea bargain it was a strange bargain.” *Id.* at 726.
1168. *Id.* at 726-27.
1169. U.S. CONST. amend. V.
part of the same transaction, is technically separate from the offense forming the basis of the first prosecution.\textsuperscript{1170} In \textit{United States v. Richardson},\textsuperscript{1171} for example, the court imposed consecutive sentences upon convictions of conspiracy to smuggle laetrile and conspiracy to receive and distribute smuggled goods. On appeal, the defendants contended that they were placed in double jeopardy because the conspiracy, while involving two discrete substantive offenses, was but a single agreement. Reasoning that the existence of two conspiracies was a factual question and that the evidence was sufficient to support the trial court finding, the Ninth Circuit held that the imposition of consecutive sentences did not subject the defendants to double jeopardy.\textsuperscript{1172}

To determine whether two offenses are distinct, the federal courts generally compare the statutory definitions to determine whether each requires proof of some element not required by the other.\textsuperscript{1173} In \textit{United States v. Robbins},\textsuperscript{1174} for example, the defendant argued that two convictions, one for possession of a gun and the other for receipt of the same gun, were essentially identical and violated the double jeopardy clause. The Ninth Circuit found this argument to be without merit and held that the receipt of the gun was a new and separate offense from possession of the gun, as it required proof of different facts.\textsuperscript{1175}

2. Attachment of jeopardy

"Jeopardy does not attach . . . until a defendant is put to trial before the trier of the facts."\textsuperscript{1176} In a jury trial, the defendant is first exposed to jeopardy when the jury is impaneled.\textsuperscript{1177} In a nonjury trial, jeopardy attaches when the court begins to hear evidence.\textsuperscript{1178}

\textsuperscript{1170} See Ciucci v. Illinois, 356 U.S. 571, 572 (1958) (each of four murders, although apparently taking place at same time, prosecuted singly at separate trials).

\textsuperscript{1171} 588 F.2d 1235 (9th Cir. 1978).

\textsuperscript{1172} Id. at 1241.

\textsuperscript{1173} See, e.g., Harris v. United States, 359 U.S. 19 (1959) (although evidentiary facts necessary to support a conviction for purchasing heroin and a conviction for receiving and concealing the same heroin were the same, ultimate facts were different); Gore v. United States, 357 U.S. 386 (1958) (consecutive sentences imposed for three counts of selling narcotics affirmed, even though convictions were all based on same sale).

\textsuperscript{1174} 579 F.2d 1151 (9th Cir. 1978).

\textsuperscript{1175} Id. at 1154.

\textsuperscript{1176} Serfass v. United States, 420 U.S. 377, 388-89 (1975) (jeopardy had not attached when district court dismissed indictment because petitioner had not been put to trial).

\textsuperscript{1177} Id.; Illinois v. Somerville, 410 U.S. 458, 466-71 (1973) (trial court declared mistrial after jury had been selected and sworn).

\textsuperscript{1178} Serfass v. United States, 420 U.S. 377, 388 (1975) (jeopardy had not attached when district court had before it only a motion for dismissal of indictment). See United States v. Choate, 527 F.2d 748, 751 (9th Cir. 1975), cert. denied, 425 U.S. 971 (1976) (government
There are some circumstances in which the first trial may be terminated after jeopardy has attached, but, short of final judgment, will not sustain the claim of double jeopardy. These circumstances include a mistrial if a “manifest necessity” for declaring a mistrial existed or “the ends of public justice would otherwise be defeated” by allowing the trial to proceed.\(^1\) In *United States v. Hooper*,\(^2\) the Ninth Circuit held that principles of double jeopardy did not prevent the defendant’s retrial after the trial court had declared a mistrial. After hearing the government’s opening statement and the testimony of two witnesses, the district judge noted that he had mistakenly impaneled less than the required twelve jurors and that, unless the parties stipulated to six jurors, he must declare a mistrial. When the defendant declined to waive his right to a twelve-member jury, the court declared a mistrial, dismissed the panel, and reset the case. The defendant’s subsequent motion to dismiss on double jeopardy grounds was denied, and the newly impaneled jury convicted him. Reasoning that continuance would have been an obvious procedural error requiring reversal, the Ninth Circuit held that the declaration of mistrial was of “manifest necessity” and in conformity with the ends of public justice, thus precluding the defendant’s double jeopardy claim.\(^3\)

3. Collateral estoppel

The doctrine of collateral estoppel is embodied in the fifth amendment’s double jeopardy prohibition. Accordingly, an acquittal based on a factual issue, also presented as an essential element of a second charge, necessarily bars trial on that charge.\(^4\) Charged initially with overbilling the government for legal services provided to minority businessmen, the defendant in *United States v. Hernandez*\(^5\) testified at trial to the number of hours spent giving legal advice to a partner in a certain business. Subsequent to a judgment of acquittal entered by the court, this partner was located and asserted that he had never had any

\(^{1179}\) United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (jury discharge for failure to agree to verdict without consent of prisoner does not bar a subsequent trial for same offense).

\(^{1180}\) 576 F.2d 1382 (9th Cir. 1978).

\(^{1181}\) Id. at 1383.

\(^{1182}\) Ashe v. Swenson, 397 U.S. 436, 443-45 (1970) (since jury in first trial had determined by its verdict that petitioner was not one of the robbers, the State was constitutionally foreclosed from relitigating that issue in another trial).

\(^{1183}\) 572 F.2d 218 (9th Cir. 1978).
such meetings with the defendant. A perjury indictment was then returned against the defendant, charging that he had lied regarding his meetings with the partner, and he was convicted.

The Ninth Circuit found the issue in both trials to be the number of hours that the defendant had spent with the partner giving legal advice. Reasoning that the acquittal in the first case meant that the judge had necessarily decided that the defendant’s relevant testimony was true, the court held that collateral estoppel foreclosed the Government from prosecuting the defendant for perjury.\footnote{1184}

4. Government appeals

The double jeopardy clause was designed to protect defendants against the possibility of a second trial with its attendant embarrassment, expense and ordeal. The doctrine, therefore, normally prevents a direct attack by the prosecutor upon a verdict of acquittal.\footnote{1185}

If a successful government appeal will not result in the defendant’s subjection to a second trial but will merely reinstate the jury’s guilty verdict, the defendant’s double jeopardy interests are not implicated.\footnote{1186} In \textit{United States v. Dreitzler},\footnote{1187} for example, the defendant was convicted by a jury on twenty-three counts of willfully misapplying bank funds. Thereafter, the district court granted the defendant’s motion for judgment of acquittal on all counts. The defendant asserted that the Government’s subsequent appeal violated double jeopardy. Reasoning that reinstatement of the verdicts, should the Government prevail on appeal, would not subject the defendant to multiple prosecutions, the Ninth Circuit held that double jeopardy did not preclude the appeal.\footnote{1188}

The defense of double jeopardy is available only when the defendant is twice placed in jeopardy by the same government for the same of-

\footnotesize
\begin{itemize}
\item\footnote{1184} \textit{Id.} at 222. \textit{Cf.} \textit{United States v. Dipp}, 581 F.2d 1323 (9th Cir. 1978), \textit{cert. denied}, 99 S. Ct. 841 (1979), in which a perjury conviction arising out of false testimony did not directly relate to the conspiracy for which the defendant was being tried. Therefore, the jury verdict of acquittal on the charged conspiracy did not necessarily determine whether the jury believed the defendant’s testimony and collateral estoppel was not applied.
\item\footnote{1185} See \textit{United States v. Rojas}, 554 F.2d 938, 941 (9th Cir. 1977) (no double jeopardy when government appeals court’s post-trial grant of motion to set aside jury verdict of guilty).
\item\footnote{1186} \textit{Forman v. Wolff}, 590 F.2d 283 (9th Cir. 1978) (remand to custody subsequent to order of release did not violate double jeopardy when prior resolution of guilt could be reinstated).
\item\footnote{1187} \textit{577 F.2d 539} (9th Cir. 1978).
\item\footnote{1188} \textit{Id.} at 433.
\end{itemize}
A single act, however, may offend the peace and dignity of both federal and state sovereigns and therefore may be punished by both.\textsuperscript{1190} 

Mindful of the potential for abuse in a rule permitting duplicate prosecutions, the Supreme Court has noted that "[t]he greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy."\textsuperscript{1191} In response to the fairness implications of the multiple prosecution power, the Department of Justice adopted a policy of refusing to bring a federal prosecution following a state prosecution, except when necessary to advance compelling federal law enforcement interests.\textsuperscript{1192} In United States v. Mikka,\textsuperscript{1193} however, the defendant was acquitted in state court in July 1977 on charges of armed robbery. In January 1978, he was indicted by a federal grand jury on three counts of possession of a firearm by a felon stemming from the same armed robbery. Following a jury verdict of guilty on all three counts, the defendant appealed, arguing that the federal prosecution contravened the Department of Justice policy. The Ninth Circuit disagreed, reasoning that the identity of charges necessary to invoke the policy was lacking.\textsuperscript{1194}

\section*{VII. Juvenile Offenders}

Federal criminal sentencing laws afford juvenile offenders different treatment than that provided to adults by statute.\textsuperscript{1195} Thus, a defendant under eighteen years of age is eligible for sentencing pursuant to

\begin{itemize}
\item \textsuperscript{1189} Abbate v. United States, 359 U.S. 187, 188-89 (1959) (federal prosecution for conspiracy to destroy federal communications facilities not barred under double jeopardy by state prosecution for conspiracy to destroy property of another). \textit{Cf.} Bartkus v. Illinois, 359 U.S. 121, 132, 136 (1959) (prosecution for violation of state robbery statute, after a prior acquittal for federal offense on substantially the same evidence, did not violate fourteenth amendment due process).
\item \textsuperscript{1190} United States v. Lanza, 260 U.S. 377, 382 (1922) (federal government counts for processing a still were not barred by prior state court judgment).
\item \textsuperscript{1191} Bartkus v. Illinois, 359 U.S. 121, 138 (1959) (prosecution for violation of state robbery statute, after a prior acquittal for a federal offense on substantially the same evidence).
\item \textsuperscript{1192} United States Attorney's Manual, § 9-2.142.
\item \textsuperscript{1193} 586 F.2d 152 (9th Cir. 1978).
\item \textsuperscript{1194} \textit{Id.} at 154.
\item \textsuperscript{1195} Underlying the use of special treatment for youthful offenders is the failure of traditional methods to curb juvenile recidivism. \textit{See} Dorszynski v. United States, 418 U.S. 424, 432-33 (1974) (nineteen-year old pleaded guilty to knowing and intentional possession of approximately 1,000 LSD tablets and was sentenced pursuant to the Federal Youth Corrections Act). \textit{See also} H. R. REP. No. 2979, 81st Cong., 2d Sess., 2-3, \textit{reprinted in} [1950] U.S. CODE CONG. & AD. NEWS 3983, 3985.
\end{itemize}
the Federal Juvenile Delinquency Act,1196 and a court may impose sentence upon a defendant between the ages of eighteen and twenty-two under provisions of the Federal Youth Corrections Act.1197 A "young adult offender"1198 being tried as an adult may also be sentenced pursuant to the Federal Youth Corrections Act if "the court finds that there are reasonable grounds to believe that the defendant will benefit from treatment provided under [that Act]."1199

Regulations promulgated during 1976 provide that a youth offender's sentence runs continuously from the date of his conviction. It is only when the juvenile is on bail pending appeal, in escape status, hiding from parole supervision, or serving time for civil contempt that the sentence period is tolled.1200 In 1978, the Ninth Circuit applied this same rule to juveniles sentenced before the 1976 regulations took effect.1201

Since 1976, when the Federal Youth Corrections Act became applicable to youth offenders,1202 the Parole Commission1203 has had to de-

---

1196. 18 U.S.C. §§ 5031-5042 (1976). See United States v. Hill, 538 F.2d 1072, 1074 (9th Cir. 1976) (seventeen-year old convicted of bank robbery sentenced pursuant to the Juvenile Delinquency Act) (purpose of Act is "to be helpful and rehabilitative rather than punitive, and to reduce . . . the stigma of criminal conviction"). A juvenile not surrendered to state authorities must be proceeded against under the federal juvenile delinquency statutes, unless he has requested in writing, on advice of counsel, to be proceeded against as an adult. 18 U.S.C. § 5032 (1976).

1197. 18 U.S.C. §§ 5005-5026 (1976). The Act gives the sentencing trial judges four options: (1) suspending imposition or execution of sentence by placing the offender on probation; (2) sentencing the offender to treatment and supervision at a special youth facility, to be discharged in no more than six years; (3) committing the offender to a youth institution for a term exceeding six years, up to the maximum period authorized by law for the offense; or (4) sentencing the offender as an adult. Id. § 5010(a)-(d).


1200. Parole, Release, Supervision and Recommitment of Prisoners, Youth Offenders, and Juvenile Delinquents, 28 C.F.R. § 2.10(c) (1978).

1201. Ogg v. Klein, 572 F.2d 1379 (9th Cir. 1978) (youth who had been at large for five years had his youth offender status tolled by his escape). See Suggs v. Daggett, 522 F.2d 396, 397 (10th Cir. 1975) (youth sentenced under Youth Corrections Act at large for 82 days) ("It would be a mockery . . . to allow the escapee to employ time spent in an escape status in tabulating the . . . period of treatment . . ."); Hartwell v. Jackson, 403 F. Supp. 1229, 1230 (D.D.C. 1975), aff'd mem. 546 F.2d 1042 (D.C. Cir. 1976) (youth sentenced under Youth Corrections Act at large for one period of 44 days and a second period of 777 days) ("It is unrealistic to suggest that Congress intended to repeal this general rule [that an escape tolls the running of a sentence] by implication.").


termine: (1) whether or not release would "depreciate the seriousness of . . . [the] offense or promote disrespect for the law," and (2) whether or not release would "jeopardize the public welfare." Because the Act may not be applied retroactively, the law in effect at the time of sentencing determines which factors the Parole Commission should consider.

A juvenile processed pursuant to the Federal Juvenile Delinquency Act may have neither his fingerprints lifted nor his photograph taken without the written consent of the court. In United States v. Duncan, however, a juvenile defendant allowed his fingerprints to be taken pursuant to a grand jury subpoena without such written consent. Although refusing to decide whether the Act had been violated, the Ninth Circuit justified admission of the fingerprints into evidence by reasoning that the "illegality, if any, was not egregious, and . . . the giving of the statement . . . [was] sufficiently the product of an exercise of free will . . . to purge any taint resulting from the extra-judicial order to furnish fingerprints."

A conviction under the Federal Youth Corrections Act will be set aside automatically when the offender is unconditionally discharged before the expiration of either the maximum sentence imposed or the maximum period of probation initially fixed by the court. Under such circumstances, the conviction may not be used subsequently for impeachment purposes. In United States v. Trejo-Zambrano, however, a vacated juvenile conviction was found to be properly admitted into evidence. The defendant in Trejo-Zambrano was charged with both conspiracy and possession of marijuana with intent to distribute. Although the prosecution furnished the defense with the record of a

1204. Id. § 4206(a)(1).
1205. Id. § 4206(a)(2).
1206. White v. Warden, 566 F.2d 57 (9th Cir. 1977) (appellant convicted of bank robbery and perjury not entitled to credit for 776 days spent on parole prior to effective date of Act). See De Peralta v. Garrison, 575 F.2d 749, 752 (9th Cir. 1978).
1207. De Peralta v. Garrison, 575 F.2d 749, 751 (9th Cir. 1978). In De Peralta, the Ninth Circuit held that under the law in effect at the time De Peralta was sentenced, the Parole Commission should have considered whether he was rehabilitated in deciding whether to release him on parole. Id. at 751-52.
1209. 570 F.2d 292 (9th Cir. 1978) (per curiam).
1210. Id. at 293.
1212. Fed. R. Evid. 609(c). Rule 609(c) reads in pertinent part: "Evidence of a conviction is not admissible . . . if . . . the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure . . . ."
1213. 582 F.2d 460 (9th Cir. 1978).
previous Youth Corrections Act conviction and the accompanying FBI rap sheet, defense counsel overlooked the clerk’s docket sheet entry showing that the prior conviction had been vacated. The conviction record was consequently admitted into evidence without defense objection. Reasoning that the defense counsel’s misreading of the docket entry “did not shift [to the prosecution] the responsibility of discovering that the Youth Corrections Act conviction had been vacated,” the Ninth Circuit found the admission to be proper. The Government had discharged its duty of discovery and disclosure by supplying the defense with the relevant documents.  

1214. Id. at 465.
1215. Id.