1-1-1984

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

Recommended Citation

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CRIMINAL LAW IN THE NINTH CIRCUIT:
RECENT DEVELOPMENTS

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Federal Rule of Criminal Procedure 8 sets forth the requirements for joinder of offenses and joinder of defendants in federal practice. Rule 8(a) permits the joinder of offenses against a single defendant if they are (1) of the same or similar character, or (2) based on the same act or transaction, or (3) based on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Rule 8(b) permits joinder of two or more defendants “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.”

Although joinder of offenses or defendants may be proper under Federal Rule of Criminal Procedure 8, a defendant may still move for severance under Federal Rule of Criminal Procedure 14 if the joinder is prejudicial to him. The denial of severance under Rule 14 is within the discretion of the trial court and will be reversed on appeal only if the defendant shows that the joint trial was “so manifestly prejudicial that it outweighs the dominant concern with judicial econ-

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2329. FED. R. CRIM. P. 8(a) provides:
Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

2330. 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.

2331. FED. R. CRIM. P. 14 provides:
If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

2332. United States v. Ortiz, 603 F.2d 76, 78 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980).
The Ninth Circuit has recently considered several cases where defendants have contested their joint trials with other defendants.

1. Joinder by common conspiracy charge

In *United States v. Kaiser*,234 Kaiser, one of five defendants, contended that the district court erred in denying his motion for mistrial based on his allegedly improper joinder with the other defendants under Rule 8(b). He was indicted on two substantive drug charges and a charge of conspiracy to distribute heroin.235 The only link between Kaiser and the other defendants, who were charged with various other offenses, was the conspiracy charge. He was acquitted of the conspiracy charge at the close of the Government's case because of the inadmissibility of some of the Government's evidence.236 He was, however, convicted of one count of distribution of heroin.237

The Ninth Circuit stated that a single conspiracy count can link defendants together to allow joinder under Rule 8(b).238 However, the conspiracy charge must have been made in good faith.239 Since Kaiser proffered no evidence of governmental bad faith in charging him with conspiracy, his appeal based on misjoinder was dismissed.240

Kaiser and co-defendant Acosta also appealed the district court's denial of their motions for severance under Rule 14.241 The Ninth Circuit held, without substantial analysis, that Kaiser neither met the burden of proving "clear," "manifest," or "undue" prejudice from the joint trial, nor showed that the jury was unable to "compartmentalize"
the evidence against the various defendants. The court rejected Acosta's claim of prejudice because his arguments related to the conspiracy count on which he was acquitted.

Similarly, in United States v. Abushi, four defendants contested their joinder in a single trial under Rule 8(b). The defendants were indicted on charges of illegal dealing in food stamps and conspiring to defraud the United States. Three of the defendants had engaged in illegal food stamp dealings with federal agents over a one-year period. They claimed that the conspiracy charge was brought in bad faith. The Ninth Circuit summarily dismissed this claim, as the evidence was sufficient to establish the conspiracy. Thus, it was clear that the Government did not act in bad faith in charging the three defendants with conspiracy.

The fourth defendant, Abushi, had fraudulently redeemed food stamps at the same store as the other three defendants, but had participated in only one act with the other three defendants. He contended that the Government's evidence showed the existence of two unrelated conspiracies rather than one conspiracy, and that "proximate or simultaneous conspiracies with one common conspirator" are not sufficient to establish a single conspiracy. The Ninth Circuit declined to decide whether the conspiracy charge was properly formu-
lated so as to sustain the joinder, but rather rejected Abushi’s claim by simple application of Rule 8(b). The court stated that the requirements of Rule 8(b) are met “as long as all defendants participated in the same series of transactions, . . . even though not all defendants participated in every act.” One person may serve as a common link between the transactions. The court held that the facts alleged in the indictment and proved at trial were sufficient “common link[s]” to allow joinder under Rule 8(b).

The defendants also claimed that the trial court erred in denying their motion for severance under Rule 14. The Ninth Circuit summarily rejected this claim, stating that since there was sufficient evidence of one overall conspiracy, the defendants had not shown that they were prejudiced by their joint trial. Therefore, there was no abuse of discretion.

These cases indicate that in the Ninth Circuit a defendant’s attack on joinder under a linking conspiracy count will fail unless he shows that it was not brought in good faith. Furthermore, even if the conspiracy count alone is insufficient to sustain joinder, the joinder may still be upheld under the “same series of transactions” language of Rule 8(b). Thus, misjoinder will be found only when a conspiracy count was brought in bad faith and the individual substantive counts are so unrelated as to not constitute the “same series of transactions.”

2. Prejudicial joinder

In United States v. Rasheed, defendant Phillips contended that the trial court improperly denied her motion for severance under Rule 14. Defendants Phillips and Rasheed were jointly tried on various counts relating to a mail fraud scheme, and for obstruction of jus-

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in furtherance of a common plan. Id. (citing Blumenthal v. United States, 332 U.S. 539, 556-57 (1947)).

2352. 682 F.2d at 1296. The court declined to decide whether Levine should be followed in the Ninth Circuit. Id.

2353. Id. See supra note 2330.

2354. 682 F.2d at 1296 (quoting United States v. Burreson, 643 F.2d 1344, 1347 (9th Cir.), cert. denied, 454 U.S. 847 (1981)).

2355. 682 F.2d at 1296 (citing United States v. Patterson, 455 F.2d 264, 266 (9th Cir. 1972)).

2356. 682 F.2d at 1296. Note that the court specifically did not hold that these “common links” rendered the conspiracy charge sufficient to sustain the joinder. See supra note 2351 and accompanying text.

2357. Id. at 1296.

2358. Id. See supra notes 2332-33 and accompanying text.

2359. 663 F.2d 843 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982).
Most of the evidence at the trial was against Rasheed; in fact, much of it related to events which occurred before Phillips joined the scheme. The Ninth Circuit stated that the existence of stronger evidence against a co-defendant is insufficient to sustain a motion for severance. The court further stated that the ultimate question in determining the propriety of severance is whether the jury could follow the court's admonitory instructions and independently weigh the evidence against each defendant. The court held that, because the district judge had repeatedly instructed the jury not to consider against Phillips any evidence of acts committed prior to the date of her joining the scheme, and because Phillips showed nothing indicating that the jury was unable to compartmentalize the evidence, the district judge did not abuse his discretion in denying Phillips' motion for severance.

A similar issue arose in United States v. Armstrong, where defendant Armstrong was tried for various fraud offenses with three co-defendants. He contended that it was error to deny his motion for severance because only a small part of the trial was devoted to him. The Ninth Circuit, however, noted that nine out of thirty-nine witnesses testified in relation to Armstrong, and that this was not "unduly disproportionate." The court therefore held that Armstrong failed to show the "clear," "manifest," or "undue" prejudice necessary to reverse his conviction.

In United States v. DeRosa, five defendants were tried jointly on various drug related charges, including one Racketeer Influence and Corrupt Organizations Act (RICO) count which was the sole basis for

\[\text{\textsuperscript{2360}}\text{Id. at 845.}\]
\[\text{\textsuperscript{2361}}\text{Rasheed was the founder of a church where he established a scheme to solicit donations by implying that the donors would receive in return an "increase of God" of four times the original donation. Id. About a year after the beginning of the scheme, Phillips became a minister of the church, then a full-time employee and director. She kept the books for the church and helped run the donation program. Id. at 846.}\]
\[\text{\textsuperscript{2362}}\text{Id. at 854 (citing United States v. Gaines, 563 F.2d 1352, 1355 (9th Cir. 1977)).}\]
\[\text{\textsuperscript{2363}}\text{663 F.2d at 854 (quoting United States v. Brady, 579 F.2d 1121, 1127-28 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979)).}\]
\[\text{\textsuperscript{2364}}\text{663 F.2d at 854-55. The court noted that there was never any attempt to confuse the date of Phillips joining the church, and that the jury had shown its ability to distinguish the evidence against each defendant by convicting Phillips on the obstruction of justice charges, while acquitting Rasheed. Id. at 855.}\]
\[\text{\textsuperscript{2365}}\text{654 F.2d 1328 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982).}\]
\[\text{\textsuperscript{2366}}\text{Id. at 1336.}\]
\[\text{\textsuperscript{2367}}\text{Id. (citing United States v. Escalante, 637 F.2d 1197, 1201 (9th Cir.), cert. denied, 449 U.S. 856 (1980)).}\]
\[\text{\textsuperscript{2368}}\text{670 F.2d 889 (9th Cir. 1982).}\]
trying all the defendants together. At the close of the Government’s case, the court dismissed the RICO count against two of the defendants, DeSantis and Bertman. These two then moved for severance, claiming prejudice if they were forced to continue in a joint trial. The district court denied the motion.

On appeal, the Ninth Circuit stated that special attention should be paid to the possibility of prejudice when the count forming the original basis for joinder is dismissed. In particular, where a RICO count is used to join the defendants, the label “racketeer” may smear all of them, even after dismissal. In determining if DeSantis or Bertman were prejudiced by the joint trial, the court divided the trial evidence into three categories:

1. Incriminating evidence that would be admissible against the complaining defendant even in a separate trial;
2. Incriminating evidence, directly relevant to that defendant’s guilt, that would not be admissible in a separate trial, but is admitted at the joint trial with an instruction that it is inadmissible against the complaining defendant; and
3. Evidence inadmissible in a separate trial, which does not expressly relate to the guilt of the complaining defendant, but which creates a risk of guilt by association.

With respect to Bertman, the court stated that all of the evidence incriminating him at the joint trial would have been admissible at a separate trial. It also noted that none of the evidence incriminating the other defendants contained any specific reference to Bertman. Finally, the court concluded that because Bertman’s activities involved discrete, simple transactions easily distinguishable by the jury from those of his co-defendants, and because the admissible evidence against Bertman was so compelling, the possibility that the jury convicted Bertman based on guilt by association with the other defendants was remote.

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2369. Id. at 892.
2370. Id. at 897.
2371. Id. (citing Schaffer v. United States, 362 U.S. 511, 516 (1960)).
2372. 670 F.2d at 897 n.11 (citing United States v. Guiliano, 644 F.2d 85, 89 (2d Cir. 1981)). The court noted, however, that in this case the jury’s copy of the indictment did not link Bertman or DeSantis to the RICO count, and the prosecutor had refrained from arguing their relationship to the racketeering enterprise in a prejudicial way.
2373. 670 F.2d at 898.
2374. Id. at 899. The court emphasized that the trial judge gave the jury exemplary instructions throughout the trial, and that during closing arguments both “the prosecutor and defense counsel effectively sorted out the evidence against each defendant.” Id. The court did note, however, that there may be cases where a defendant with a “limited role” may prove prejudice from joinder. Id. at 899 n.14. Such prejudice is more likely where a defend-
With respect to DeSantis, the court also found that the evidence was so compelling that the risk of prejudicial guilt by association with the co-defendants was insubstantial. It stated that the Government had based its case against DeSantis only on evidence admissible against him and had not attempted to impugn him by reference to the evidence of his co-defendants’ guilt. The court found only two instances of inadmissible references to DeSantis during the joint trial and determined them to be “inconsequential.”

In United States v. Doe, defendant Doe was tried jointly with defendant Roe on various drug charges related to the smuggling of heroin from Korea. During the investigation and pretrial proceedings, Doe repeatedly exculpated Roe while incriminating himself. Before trial and at the conclusion of the Government’s case, Doe moved for severance because he felt a “moral obligation” to testify on behalf of

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2375. Id. at 900.
2376. Id. In one instance co-defendant DeRosa identified a drug supplier as “D.” Although the Government implied that “D” was DeSantis in its opening argument, it did not use this implication in its closing argument. In the second instance, DeRosa implied that DeSantis was a cocaine supplier. The trial court held the testimony inadmissible against DeSantis. The Ninth Circuit noted that this could not have prejudiced DeSantis since DeSantis conceded at the trial that DeRosa portrayed DeSantis as a cocaine supplier. Id. at 899-900.

2377. Id. DeSantis asserted three additional grounds for severance, each of which the court briefly dismissed. Id. at 897 n.10. He contended first that since the linking RICO charge was not alleged in good faith, severance was required after its dismissal. Id. (citing United States v. Ong, 541 F.2d 331, 337 (2d Cir. 1976), cert. denied, 429 U.S. 1075 (1977)). The Ninth Circuit rejected this contention, noting sufficient support in the record to uphold the trial judge’s ruling that the Government did not act in bad faith. 670 F.2d at 897 n.10 (citing United States v. Aiken, 373 F.2d 294, 299 (2d Cir.), cert. denied, 389 U.S. 833 (1967)).

Secondly, DeSantis claimed that joinder was improper because the RICO count was based on an incorrect legal theory. The court held that DeSantis had waived this argument by not raising it pretrial. 670 F.2d at 897 n.10 (citing Fed. R. Crim. P. 12(f); United States v. Braunig, 553 F.2d 777, 780 (2d Cir.), cert. denied, 431 U.S. 959 (1977)). Finally, DeSantis claimed that the joint trial prejudiced him since he was unable to argue inferences from the fact that he testified and his co-defendants did not. The Ninth Circuit rejected this claim, stating that it was persuaded that such inferences would not have helped DeSantis and thus finding no abuse of discretion by the trial judge. 670 F.2d at 987 n.10 (citing United States v. De La Cruz Bellinger, 422 F.2d 723, 727 (9th Cir.) (“Unless a defendant can show that his defense probably would have benefited from commenting on a co-defendant's refusal to testify, denial of the motion to sever is not prejudicial.”), cert. denied, 398 U.S. 942 (1970)).

2378. 655 F.2d 920 (9th Cir. 1980).
2379. Id. at 923.
Roe but did not wish to testify on behalf of himself. Doe contended that with separate trials he could testify for Roe without being compelled to testify against himself at his own trial. The trial court denied the motion and Doe testified, exculpating Roe and incriminating himself. He was found guilty on two counts while Roe was acquitted.

On appeal, the Ninth Circuit rejected Doe’s contentions, stating first that Doe was not compelled to testify on behalf of Roe but did so of his own choice. Secondly, the court stated that even if the severance motion were granted, Doe would only have been protected against his own testimony if his trial had occurred before Roe’s. If it had occurred after, his testimony at Roe’s trial could have been introduced at his own trial. The court thus concluded that separate trials would have eliminated possible prejudice from the joint trial only if Doe’s occurred first and Roe’s occurred second. The court determined that Doe had made no request in his severance motion to have his own trial first, and even if he had, the trial court would have been within its discretion to reject the motion. It therefore held that the district judge did not abuse his discretion in failing to grant the severance motion.

Finally, in *United States v. Sears,* defendant Strozyk was charged jointly with defendants Sears and Werner on one count of robbery of a savings and loan. Sears and Werner were also charged with a second count of bank robbery. Strozyk moved the trial court for severance of both offenses and defendants. The district court granted Strozyk’s motion to sever the savings and loan count from the bank robbery count but denied his motion to sever his trial from the other

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2380. *Id.* at 924.
2381. *Id.* at 926.
2382. *Id.* at 924.
2383. *Id.*

2384. *Id.* at 926 (citing *United States v. Gay*, 567 F.2d 916, 918 (9th Cir.) (defendant may not call co-defendant to the witness stand in joint trial), *cert. denied*, 435 U.S. 999 (1978); *United States v. Roberts*, 503 F.2d 598, 600 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975)).
2385. 655 F.2d at 926.
2386. *Id.* at 926-27 (citing *United States v. Gay*, 567 F.2d 916, 919-21 (9th Cir.) (severance should not be allowed to give defendants greater rights, such as the right to order their individual trials, than they would have had without a joint indictment), *cert. denied*, 435 U.S. 999 (1978)).
2387. 655 F.2d at 927 (citing *United States v. Gay*, 567 F.2d 916, 919 (9th Cir.), *cert. denied*, 435 U.S. 999 (1978); *Parker v. United States*, 404 F.2d 1193, 1194 (9th Cir. 1968), *cert. denied*, 394 U.S. 1004 (1969)).
On appeal, Strozyk claimed several instances of prejudice arising from the joint trial. First, he claimed that he was unable to fully cross-examine a witness who testified that Strozyk told him the details of the savings and loan robbery. Strozyk contended that the witness actually learned the details from Sears while Sears was in jail after being arrested for the bank robbery. He was prevented from raising the issue of where this conversation occurred, however, since doing so would inform the jury of Sears' involvement in another crime. The court rejected this claim, stating that the location of the alleged conversation between Sears and the witness was not relevant, and that Strozyk's counsel had agreed with the court that raising Sears' incarceration would not assist Strozyk.

Second, Strozyk claimed that he was prejudiced when another witness mentioned the bank robbery committed by Sears and Werner alone, contending that the jury might have inferred that he was involved in it. The court rejected this claim also, accepting the district court's statement that the existence of another count with respect to Sears and Werner was not communicated to the jury.

Third, Strozyk claimed that a witness' whispered comments to the judge, along with lengthy sidebar discussions, implied to the jury that testimony was being curtailed and caused him to appear guilty. The court rejected this claim, stating that these procedures were initially suggested by Strozyk's counsel in order to avoid mention of the bank robbery and hence prejudice to Sears and Werner.

Finally, Strozyk claimed that some of the testimony against Sears and Werner alone prejudiced him at trial. The court, however, em-

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2389. Id. at 898.
2390. Id. at 900.
2391. Id. at 901.
2392. Id.
2393. Id.
2394. Id.
2395. Id. at 901-02.
2396. Id. at 902.
2397. Id. This testimony included a witness' statement that Strozyk admitted that he (Strozyk) and "some others" had robbed a savings and loan. The unnamed "others" were, in fact, co-defendants Sears and Werner. Strozyk claimed that the statement was inadmissible as a confession by one defendant against a co-defendant. See Bruton v. United States, 391 U.S. 123 (1968). The Ninth Circuit found the testimony admissible and noted that while it might be harmful to Sears or Werner, it did not improperly prejudice Strozyk. 663 F.2d at 902. Strozyk also claimed prejudice from a witness' confusion of him with co-defendant Sears. The Ninth Circuit dismissed this claim, stating that Strozyk could have, but did not, cross-examine the witness to clarify the matter, and that the jury was instructed to consider
phasized that the trial court had instructed the jury to compartmentalize the evidence and to weigh the evidence separately against each defendant. It thus held that Strozyk had received a fair trial and was not prejudiced by joinder with Sears and Werner.

These decisions demonstrate the reluctance of the Ninth Circuit to overturn a district court’s finding that a defendant was not denied a fair trial by being joined with other defendants. In order to find an abuse of discretion by the trial judge, the Ninth Circuit must find clear, manifest, or undue prejudice. Because the judge can successfully abate possible prejudice due to joinder by limiting the admissibility of evidence and by carefully instructing the jury to compartmentalize and weigh the evidence separately against each defendant, it is not surprising that reversals due to improper joinder are rare.

3. Procedure—time of severance motion

In United States v. Barker, the defendant moved before trial to sever perjury and false statement counts from the substantive assault and deprivation of civil rights counts. Since the alleged perjury and false statements were simply denials of the substantive counts, Barker contended that inclusion of all counts in a single trial would indicate to the jury that the Government and the grand jury did not believe his denials and would thus impeach his testimony. He also contended that the Government’s introduction of his grand jury testimony denying the offenses in order to prove the perjury counts compelled him to testify at the trial regarding the substantive counts.

On appeal, the Ninth Circuit stated that a motion to sever under Rule 14 must be timely made and properly maintained. Unless the severance motion is renewed at the close of all the evidence, or at

that witness’ testimony only against Sears. Id. Lastly, Strozyk claimed that he was prejudiced by testimony about the “dramatic” arrest of Sears and Werner. The court found no prejudice since the testimony clearly indicated that Strozyk was not involved. Id.

2398. 663 F.2d at 902.
2399. Id.
2400. 675 F.2d 1055 (9th Cir. 1982) (per curiam).
2401. Id. at 1058.
2402. Id.
2403. Id.
2404. Id. (citing United States v. Kaplan, 554 F.2d 958, 965 (9th Cir.) (right to severance waived when pretrial motion not renewed after prejudicial evidence became known), cert. denied, 434 U.S. 956 (1977)).
2405. 675 F.2d at 1058 (citing United States v. Figueroa-Paz, 468 F.2d 1055, 1057 (9th Cir. 1972)).
least at the introduction of the allegedly prejudicial evidence,\textsuperscript{2406} it is waived.\textsuperscript{2407} The court, therefore, did not address Barker's contentions, but simply held that because he had not properly maintained his motion by renewal during the trial or at the close of evidence, he had waived his right to appeal his conviction on the basis of the trial court's denial of his pretrial severance motion.\textsuperscript{2408}

\textbf{B. Guilty Pleas}

1. Competency to plead guilty

By pleading guilty, a defendant waives important constitutional rights to trial before a judge or jury. Such waivers must not only be voluntary,\textsuperscript{2409} "but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."\textsuperscript{2410} It is therefore an obvious requirement that a defendant be competent to plead guilty. In the Ninth Circuit, "[a] defendant is not competent to plead guilty if a mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea."\textsuperscript{2411} If questions of the defendant's competency are raised at the time of the guilty plea, the court must hold an evidentiary hearing on the issue.\textsuperscript{2412} If the judge himself entertains or should reasonably have entertained a good faith doubt as to the competency of a defendant to plead guilty, the due process clause requires the court, on its own

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{2406} 675 F.2d at 1058 (citing United States v. Kaplan, 554 F.2d 958, 965 (9th Cir.), \textit{cert. denied}, 434 U.S. 956 (1977)).
\item \textsuperscript{2407} 675 F.2d at 1058 (citing United States v. Burnley, 452 F.2d 1133, 1134 (9th Cir. 1971)).
\item \textsuperscript{2408} 675 F.2d at 1058-59.
\item \textsuperscript{2409} FED. R. CRIM. P. 11(d) provides:
\begin{quote}
The court shall not accept a plea of guilty or \textit{nolo contendere} without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or \textit{nolo contendere} results from prior discussions between the attorney for the government and the defendant or his attorney.
\end{quote}
\item \textsuperscript{2410} Brady v. United States, 397 U.S. 742, 748 (1970).
\item \textsuperscript{2411} Sieling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973) (quoting Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir.) (Huftfelder, J., dissenting), \textit{cert. denied}, 400 U.S. 834 (1970)).
\item This standard of competency, established by the \textit{Sieling} court, is higher than the standard of competency to stand trial, which is "the ability to understand the nature of the proceedings in which one is engaged and to assist in one's defense." Spikes v. United States, 633 F.2d 144, 146 (9th Cir. 1980) (citing United States v. Clark, 617 F.2d 180, 185 (9th Cir. 1980), \textit{cert. denied}, 450 U.S. 934 (1981)). See generally Note, \textit{Competence to Plead Guilty: A New Standard}, 23 DUKE L.J. 149 (1974).
\item \textsuperscript{2412} Spikes v. United States, 633 F.2d at 145 (citing \textit{Sieling}, 478 F.2d at 214).
\end{enumerate}
\end{footnotesize}
motion, to hold a competency hearing.\textsuperscript{2413} Appellate review of the issue is limited to whether a reasonable judge would be expected to entertain genuine doubt\textsuperscript{2414} about the defendant's competence.\textsuperscript{2415}

In\textit{ Chavez v. United States},\textsuperscript{2416} the Ninth Circuit reversed its earlier holding that Chavez was denied a fair competency hearing before accepting his guilty plea.\textsuperscript{2417} The court noted that the expanded appellate record\textsuperscript{2418} clearly showed that at the time of Chavez's guilty plea, he had had a hearing in which the district court had conducted an inquiry regarding both his understanding of the proceedings and his competence. The district court found him competent and accepted the guilty plea. The Ninth Circuit, finding no evidence that the trial court used an incorrect standard of competency,\textsuperscript{2419} affirmed the conviction.

2. Effect of factual basis for guilty plea

Federal Rule of Criminal Procedure 11(f)\textsuperscript{2420} requires that the court make an inquiry to satisfy itself that there is a factual basis for a guilty plea.\textsuperscript{2421} The rule serves two purposes. First, it assists the district court in ensuring that the defendant's plea is truly voluntary\textsuperscript{2422} and thus a valid waiver of the right to trial by jury, to confront one's

\begin{itemize}
  \item \textsuperscript{2413} Sailer v. Gunn, 548 F.2d 271, 275 (9th Cir. 1977).
  \item \textsuperscript{2414} The Ninth Circuit believes the terms "good faith doubt," "genuine doubt," "sufficient doubt," "bona fide doubt," "reasonable doubt" (or "reasonable grounds") and "substantial question" describe equivalent standards. Chavez v. United States, 656 F.2d 512, 516 n.1 (1981).
  \item \textsuperscript{2415} Bassett v. McCarthy, 549 F.2d 616, 621 (9th Cir.), cert. denied, 434 U.S. 849 (1977).
  \item \textsuperscript{2416} 656 F.2d 512 (9th Cir. 1981).
  \item \textsuperscript{2417} Chavez v. United States, 641 F.2d 1253, 1260-61, withdrawn, 656 F.2d 512 (9th Cir. 1981). In the first case, the Ninth Circuit described the facts giving rise to Chavez's assertion that his conviction should be overturned because the trial court did not order, on its own motion, a hearing on his competency to plead guilty. \textit{Id}. at 1255. After a lengthy examination of the due process requirements for a competency hearing and their statutory bases, the court held that there was sufficient evidence to require the trial court to hold an evidentiary hearing on Chavez's competency to plead guilty. \textit{Id}. at 1260. Since the record revealed no such hearing, the Ninth Circuit reversed the conviction and remanded to the district court, with orders to vacate the conviction and the guilty plea and to rearraign Chavez. \textit{Id}. at 1260-61.
  \item \textsuperscript{2418} Apparently the record on appeal for the first case did not reflect the "competency proceedings" which were in the district court docket. 656 F.2d at 515. The Ninth Circuit granted the Government's motion to expand the record to include this information. \textit{Id}. at 514.
  \item \textsuperscript{2419} \textit{Id}. at 514.
  \item \textsuperscript{2420} \textit{Fed}. \textit{R. Crim}. \textit{P}. 11(f) provides that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."
  \item \textsuperscript{2422} McCarthy v. United States, 394 U.S. 459, 465 (1969).
\end{itemize}
accusers and against compulsory self-incrimination.\textsuperscript{2423} Second, adherence to the rule develops a complete record that enables expeditious review on appeal and discourages "frivolous post-conviction attacks on the constitutional validity of guilty pleas."\textsuperscript{2424} The Ninth Circuit has recently considered the collateral effect of this finding of a factual basis for a guilty plea.

In \textit{United States v. Barker},\textsuperscript{2425} the defendant was indicted for first degree murder and conspiracy to commit murder.\textsuperscript{2426} Barker then entered a guilty plea, under a plea agreement, to second degree murder. At the hearing, the district judge attempted to establish that Barker, whose English language ability was limited, fully understood the effect of her plea.\textsuperscript{2427} After Barker's counsel assured the judge that she understood, the judge accepted the plea, dismissed the first degree murder and conspiracy indictment and sentenced Barker to twenty years imprisonment.\textsuperscript{2428}

Barker, with new counsel, moved to set aside her plea and conviction\textsuperscript{2429} on the ground that she had not been adequately informed of the nature of the second degree murder charge.\textsuperscript{2430} The district judge set aside the judgment and vacated his order dismissing the indictment.\textsuperscript{2431} Barker then attacked the reinstated first degree murder and conspiracy charges, arguing that because the district court's finding of a factual basis for second degree murder "acted as an acquittal" to the first degree murder and conspiracy charges, she was being placed in double jeopardy.\textsuperscript{2432} The district court rejected her implied acquittal theory and denied the motion to dismiss the indictment.\textsuperscript{2433}

\textsuperscript{2423} Id. at 466.
\textsuperscript{2424} Id. at 465.
\textsuperscript{2425} 681 F.2d 589 (9th Cir. 1982).
\textsuperscript{2426} Id. at 590.
\textsuperscript{2427} \textit{Id.} FED. R. CRIM. P. 11(d) provides in part that before accepting a plea of guilty, the court address the defendant in open court, inform him and make sure he understands the nature of the charges and the minimum and maximum penalties provided by law for the charges to which the plea is offered. Rule 11(d) requires in part that the court further ensure the plea was given voluntarily and not in response to threats or promises apart from the plea agreement.
\textsuperscript{2428} 681 F.2d at 590.
\textsuperscript{2429} Barker made this motion pursuant to 28 U.S.C. § 2255 (1976), which provides in pertinent part that "[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 . . . the sentence."
\textsuperscript{2430} 681 F.2d at 590.
\textsuperscript{2431} Id.
\textsuperscript{2432} Id.
\textsuperscript{2433} Id. The district court noted that while the Ninth Circuit had not yet considered this type of implied acquittal claim, the Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth
The Ninth Circuit was also unpersuaded by Barker's argument. It held that the district judge's review of the factual basis for a guilty plea on a lesser charge is not analogous to a jury's determination of guilt of a lesser included offense. The court stated that the trial judge's review was not a forum for consideration of the factual basis of charges abandoned by the prosecutor as a result of a plea bargain. It then held that the determination of a defendant's guilt "is restricted to the specific charge to which the defendant has agreed to plead guilty." Thus, the Ninth Circuit followed the majority of the other circuits which have rejected the implied acquittal theory.

3. Plea agreements

Defendants often bargain with prosecutors to either plead guilty to a lesser charge in exchange for dismissal of a more severe charge, to plead guilty to some of the charges in exchange for dismissal of the remainder, or to plead guilty to all the charged offenses in exchange for the prosecutor's recommendation of a particular sentence. Such plea agreements are an essential part of the criminal justice system. They lead to prompt resolution of cases and, with proper implementation, promote effective and just administration of criminal law. The pro- and District of Columbia Circuits had considered and rejected this type of claim. Id. at n.1. (citations omitted).

2434. Id. at 591. Barker relied on Green v. United States, 355 U.S. 184 (1957), where the defendant was tried for first degree murder but the jury convicted him of second degree murder after being given a lesser included offense instruction. Id. at 185-86. After an appellate court reversed his conviction, Green was re-tried for first degree murder. Id. at 186. The Supreme Court held that the second trial violated the double jeopardy clause since the defendant was "in direct peril of being convicted and punished for first degree murder at his first trial." Id. at 190. The Barker court distinguished Green by noting that unlike Green, Barker had not stood trial on the first charge and thus had not been "in direct peril." 681 F.2d at 591.

2435. 681 F.2d at 591.

2436. Id. The court noted that the prosecutor's decision to plea bargain was within "the executive's undeniable discretion to decide not to pursue a particular prosecution any further." Id. (quoting United States v. Myles, 430 F. Supp. 98, 101 (D.D.C. 1977), aff'd, 569 F.2d 161 (D.C. Cir. 1978)). The district judge only has the discretion to accept or reject the plea bargain, tempered by a concern for the public interest. 681 F.2d at 592 (citing United States v. O'Brien, 601 F.2d 1067, 1069 (9th Cir. 1979); FED. R. CRIM. P. 11(e)(2)).

2437. 681 F.2d at 592. Barker, however, claimed that her case presented "extraordinary circumstances," implying that the district judge had considered and rejected the elements of first degree murder. She claimed that her responses, and those of her co-defendant, to the trial judge's numerous questions during her plea hearing revealed "the very essence of the Government's case." The Ninth Circuit, however, refused to infer from these circumstances that the district judge had considered and rejected the first degree murder charge. Id.

2438. See supra note 2433.

Procedures governing the conduct of parties to plea agreements are set forth in Federal Rule of Criminal Procedure 11(e). Before this rule can be applied by a court, however, a determination must be made regarding whether plea negotiations, in fact, have taken place. The Ninth Circuit has recently considered this issue in *United States v. Doe*. Defendants Doe and Roe were taken into custody after their implication in an attempt to smuggle heroin into the United States. Doe expressed a willingness to cooperate with further investigation by the drug enforcement agents, waived his right to counsel, and answered the agents' questions regarding his participation in the drug smuggling scheme. Doe then met with a United States Attorney, agreed to and did cooperate fully with drug enforcement authorities. Doe and Roe were later indicted for conspiracy, possession, and importation of heroin. At trial, Doe admitted his guilt and exculpated Roe. Doe was convicted on the substantive charges, while Roe was acquitted on all counts.

Doe appealed his conviction on the ground that the trial court "improperly excluded testimony relevant to the substance of the plea agreement." He asserted that the plea agreement consisted of the Government's agreement to drop charges against Roe and to recommend a reduced sentence for himself in exchange for his cooperation.

2440. *Fed. R. Crim. P.* 11(e) provides that the government and the defendant may negotiate for the purpose of reaching a plea agreement. The court may not participate in such discussions, but if an agreement is reached, the court may accept or reject the agreement or defer its decision until after consideration of the presentence report. Except in certain circumstances, withdrawn guilty pleas, offers to plead guilty or nolo contendere, pleas of nolo contendere, and statements relating to such pleas or offers are inadmissible in civil or criminal proceedings against the person who made the plea or offer.

2441. 655 F.2d 920 (9th Cir. 1980), as corrected, 656 F.2d 411 (9th Cir. 1981).
2442. 655 F.2d at 922-23.
2443. *Id.* at 923.
2444. *Id.*
2445. *Id.*
2446. *Id.* at 924.
2447. *Id.*
2448. *Id.* The exclusion of this testimony arose in an evidentiary context. The appellant argued that under *Fed. R. Crim. P.* 11(e)(6), evidence of "statements made in connection with, and relevant to" a plea of guilty or an offer to plead guilty is "not admissible in any civil or criminal proceeding against the person who made the plea or offer." *Id.* at 925. Doe made a pretrial motion to suppress statements he had made to government agents after his arrest, claiming that they were made during plea negotiation. *Id.* at 923. At the hearing on his motion, the court excluded testimony which Doe claimed would have shown that he was engaged in plea negotiations. *Id.* at 925. It was this exclusion of testimony which he argued on appeal was improper. *Id.* at 924.
with the authorities. The United States Attorney testified that there was no plea agreement, but rather that Doe only requested favorable treatment for Roe in exchange for his cooperation.\footnote{2449}

The Ninth Circuit allowed that the exclusion of the testimony might have been improper,\footnote{2450} but concluded that no prejudice had occurred because it found nothing in the record to show that Doe was ever engaged in plea negotiations.\footnote{2451} The court reiterated the two factors normally examined in determining the existence of plea negotiations: (1) whether the accused subjectively expected to negotiate a plea; and (2) whether the accused's belief was reasonable considering the objective circumstances.\footnote{2452} The court indicated that Doe's actions did not satisfy the first part of the test since nothing in the record showed that Doe had pled or offered to plead guilty.\footnote{2453} The court stated that rather than attempting to plea bargain, Doe had simply incriminated himself in order to exculpate Roe. The court also noted that even if an agreement had been made, Doe was not prejudiced by admission of his statements made to the agents during their investigation because he fully incriminated himself in both his testimony and his closing statement.\footnote{2454} Finally, the court concluded that even if an agreement had been made, there was no evidence of the Government's failure to comply.\footnote{2455} Therefore, it held that the trial court's exclusion of testimony regarding the alleged plea agreement was not improper.\footnote{2456}

The Ninth Circuit has also recently considered the propriety of certain conditions upon which a plea agreement was based. In \textit{Phillips v. United States},\footnote{2457} the defendant pleaded guilty, pursuant to a plea bargain, to three counts of mail fraud and using a fictitious name to defraud.\footnote{2458} Twenty-three other counts were dismissed. At the guilty plea proceedings, the defendant agreed that restitution would be determined by the probation department and would not be limited by the

\footnotesize{
\begin{itemize}
  \item \footnote{2449} Id.
  \item \footnote{2450} Id. The testimony might have been admissible as an exception to the hearsay rule under \textsc{FED. R. EVID.} 801(d)(2)(D).
  \item \footnote{2451} 655 F.2d at 925.
  \item \footnote{2452} Id. This two-part test is outlined in United States \textit{v. Robertson}, 582 F.2d 1356, 1366 (5th Cir. 1978) (en banc), and was adopted by the Ninth Circuit in United States \textit{v. Pantohan}, 602 F.2d 855, 857 (9th Cir. 1979) and United States \textit{v. Castillo}, 615 F.2d 878, 885 (9th Cir. 1980).
  \item \footnote{2453} 655 F.2d at 925.
  \item \footnote{2454} Id. at n.8.
  \item \footnote{2455} Id. At the sentencing hearing, the Government asked for and was denied the right to allocute (presumably on behalf of Doe) at the sentencing proceedings. \textit{Id.} at 925, 927-29.
  \item \footnote{2456} Id. at 925.
  \item \footnote{2457} 679 F.2d 192 (9th Cir. 1982).
  \item \footnote{2458} Id. at 193.
\end{itemize}
}
amounts he had received as a result of his fraudulent activities as set forth in the indictment.\textsuperscript{2459} He was sentenced to one year in prison, given five years probation and ordered to make $6,000 restitution. Defendant signed a stipulation agreeing to pay the $6,000 in monthly installments, but then challenged his sentence on the ground of excessive restitution as a probation condition.\textsuperscript{2460} The district court denied his motion.\textsuperscript{2461}

The Ninth Circuit held that the district court had the power to order the defendant to pay $6,000 restitution as a probation condition even though the counts to which he pleaded guilty did not specify any monetary loss.\textsuperscript{2462} The court noted that 18 U.S.C. section 3651 provides that as a condition of probation, a defendant “[m]ay be required to make restitution or reparation to aggrieved parties for 

\textit{actual damages or loss caused by the offense for which conviction was had...}”\textsuperscript{2463} The court stated, however, that the defendant was not being made to pay an amount related to a dismissed count but rather an amount that he could realistically pay as determined by the probation department.\textsuperscript{2464} The court also stated that the term “offense” as used in section 3651 could be interpreted, in the case of mail fraud, to refer to the entire fraudulent scheme involving the use of the mails rather than to any specific fraudulent mailings.\textsuperscript{2465} The court thus concluded that when a defendant agrees to pay restitution pursuant to a

\textsuperscript{2459} The indictment for all 26 counts indicated he had fraudulently received $1,856.81. \textit{Id.} at 193 n.1. The subsequent probation report indicated he had received $59,125. \textit{Id.} at 193.

\textsuperscript{2460} \textit{Id.} at 194.

\textsuperscript{2461} \textit{Id.}

\textsuperscript{2462} \textit{Id.}

\textsuperscript{2463} 18 U.S.C. § 3651 (1976) (emphasis added). The defendant evidently argued that the $6,000 was well in excess of the losses sustained by the victim of the three charges to which he had pleaded guilty. \textit{See supra} note 2459. In fact, the court cited three cases upholding this argument. United States v. Buechler, 557 F.2d 1002, 1007-08 (3d Cir. 1977) (restitution exceeding amount of loss caused by offense for which conviction was had is illegal); Karrell v. United States, 181 F.2d 981, 986-87 (9th Cir.) (restitution limited to damages of counts on which defendant was convicted), \textit{cert. denied}, 340 U.S. 891 (1950); United States v. Follette, 32 F. Supp. 953, 955 (E.D. Pa. 1940).

\textsuperscript{2464} 679 F.2d at 193-94.

\textsuperscript{2465} Phillips, 679 F.2d at 196 (citing United States v. Tiler, 602 F.2d 30 (2d Cir. 1979)). In Tiler, the defendants were ordered to pay $100,000 restitution as a condition of probation after pleading guilty to a conspiracy count. The remaining substantive counts were dismissed. The defendants argued that no damages could flow from a conspiracy count since it is an inchoate crime, an agreement to commit a crime at some future time. \textit{Id.} at 33. The Second Circuit held “that restitution may be ordered as a condition of probation for actual damages charged in the indictment to have been caused by the operation of the conspiracy over time.” \textit{Id.} at 34. \textit{See also} United States v. Landay, 513 F.2d 306, 307-08 (5th Cir. 1975); United States v. Taylor, 305 F.2d 183 (4th Cir.), \textit{cert. denied}, 371 U.S. 894 (1962).
plea bargain which was fully explored in open court, and later signs a stipulation that the restitution is to be paid, then "the Court is bound by law to carry out that specific agreement." 2466

4. Withdrawal of guilty plea

Under Federal Rule of Criminal Procedure 32(d), a defendant may move to withdraw a guilty plea only before sentence is imposed. 2467 In the Ninth Circuit, a pre-sentence motion to withdraw a plea is freely allowed, 2468 but is not a right. 2469 The trial court should consider, in general, the defendant's understanding of the nature and consequences of the plea, the role of counsel, the breach of a plea bargain, and prejudice to the government. 2470 On appeal, the Ninth Circuit will reverse a denial of a motion to withdraw a guilty plea only on a showing of abuse of discretion by the trial judge. 2471

In United States v. Garrett, 2472 the defendant pleaded guilty pursuant to a plea agreement. This agreement allowed Garrett to remain free on bond until the date set for sentencing. In addition, the Washington district court ordered Garrett to telephone his probation officer

2466. 679 F.2d at 194 (citing United States ex rel. Robinson v. Israel, 603 F.2d 635 (7th Cir. 1979) (en banc), cert. denied, 444 U.S. 1019 (1980); United States v. McLaughlin, 512 F. Supp. 907 (D. Md. 1981)). The Phillips court relied heavily on the reasoning in McLaughlin for its justification of a broader reading of 18 U.S.C. § 3651. It agreed with the McLaughlin court's analysis that full restitution may be ordered when:

(1) the amount of loss suffered by an identifiable aggrieved party is certain;
(2) the defendant admits, and there is no factual question as to whether the defendant caused or was responsible for the aggrieved party's loss; and
(3) the defendant consents freely and voluntarily, to make full restitution and that it be a condition of probation.

679 F.2d at 194-95 (quoting McLaughlin, 512 F. Supp. at 908). See also United States v. Landay, 513 F.2d 306, 308 (5th Cir. 1975) (restitution of amounts greater than those in convicted counts upheld where defendant "freely and voluntarily admitted the exact amount the [bank] claimed he owed").

The Phillips court further agreed with the McLaughlin court that not to allow full restitution would severely restrict plea bargaining and frustrate the rehabilitation goals of the probation system. 679 F.2d at 195.

2467. FED. R. CRIM. P. 32(d) provides:

A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.


2469. United States v. Youpee, 419 F.2d 1340, 1343 (9th Cir. 1969).

2470. For a comprehensive list of circumstances affecting withdrawal of a guilty plea, see 9 FED. PROC. L. ED. § 22:561 (1982).


2472. 680 F.2d 64 (9th Cir. 1982).
twice a month.\textsuperscript{2473} After failing to make the required calls, the Government sought a warrant based on failure to comply with conditions of release.\textsuperscript{2474} A Florida federal court also issued a warrant for his arrest based on a separate indictment. After being taken into custody, Garrett moved to withdraw his guilty plea, claiming that the plea agreement was broken by the issuance of the warrants, and that he was not adequately informed of the consequences of the guilty plea because he "was not told his conviction in Seattle could act as an enhancing prior conviction . . . ."\textsuperscript{2475} The trial court refused to grant the motion to withdraw the guilty plea.\textsuperscript{2476}

The Ninth Circuit dismissed Garrett's first contention, stating that the Government fully complied with the plea agreement, and that Garrett's claims "as to the bond conditions and the Florida arrest warrant based on a different indictment [were] simply irrelevant."\textsuperscript{2477} The court then stated that the Ninth Circuit had not previously addressed the issue of whether sentence enhancement is a collateral consequence of plea agreements.\textsuperscript{2478} It noted that Federal Rule of Criminal Procedure 11 requires that a defendant be told of the direct but not collateral consequences of a plea,\textsuperscript{2479} and that other courts have held possible enhancement of subsequent sentences to be collateral.\textsuperscript{2470} The court thus held that enhancement was collateral since the Washington district court had no control or responsibility over the criminal proceedings in Florida, where the enhanced sentence due to the guilty plea would occur.\textsuperscript{2481} Having found both of Garrett's attacks on his guilty plea un-

\textsuperscript{2473} Id. at 65.
\textsuperscript{2474} Id.
\textsuperscript{2475} Id. (quoting Appellant's Brief).
\textsuperscript{2476} Id. at 64.
\textsuperscript{2477} Id. at 65 (emphasis in original). The requirement to make the telephone calls was a release condition, not part of the plea agreement.
\textsuperscript{2478} Id.
\textsuperscript{2479} Id. (citing United States v. King, 618 F.2d 550, 553 (9th Cir. 1980)).
\textsuperscript{2481} 680 F.2d at 66. The court analogized the sentence enhancement consequences of a guilty plea to the possible deportation consequences that it had previously determined to be collateral. Id. (citing Fruchtman v. Kenton, 531 F.2d 946 (9th Cir.), cert. denied, 429 U.S. 895 (1976)). In Fruchtman, an alien contested the validity of his guilty plea because the district court did not inform him that it rendered him subject to deportation. Id. at 948. The Fruchtman court listed as direct consequences of a guilty plea the maximum allowable sentence (citing Combs v. United States, 391 F.2d 1017 (9th Cir. 1968)); recidivist provisions (citing Berry v. United States, 412 F.2d 189 (3d Cir. 1969)); and loss of state probation or parole (citing United States v. Myers, 451 F.2d 402 (9th Cir. 1972)); and as collateral consequences civil proceedings leading to commitment (citing Cuthrell v. Director, Patuxent Insti-
tenable, the Ninth Circuit ruled that the trial judge had not abused his discretion in denying the motion to withdraw the guilty plea.2482

C. Jury Administration

1. The right to a trial by jury

The Constitution guarantees the right to a trial by jury in criminal proceedings2483 and in suits at common law.2484 The Ninth Circuit has held that these constitutional guarantees do not apply in tax disputes.2485

In Dawn v. Commissioner of Internal Revenue,2486 the defendants petitioned the Tax Court for a determination of an assessed deficiency. The Tax Court granted the Government's motion for summary judgment, and the taxpayers appealed. The Ninth Circuit held that the taxpayers were not improperly denied a jury trial because taxpayers are not entitled to a jury trial in the tax courts.2487

2. Juror bias

The sixth amendment to the United States Constitution guarantees the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. "The failure to accord an accused a fair hearing violates even
the minimal standards of due process.” The United States Supreme Court and the Ninth Circuit have recently considered cases in which defendants have claimed that certain jurors in their trials were biased against them because of improper actions of jurors, improper actions of outside parties, or the jurors’ exposure to outside influences.

In *Smith v. Phillips*, the Supreme Court considered whether the active seeking of employment with the District Attorney’s office by Smith, one of the jurors in the defendant’s trial, constituted a violation of the defendant’s due process rights under the fourteenth amendment. The attorneys who were prosecuting Phillips were informed of Smith’s employment application more than a week before the end of trial, but they concluded that in light of Smith’s statements during voir dire, it was unnecessary to inform the trial court or defense counsel about this application. The jury convicted Phillips of two counts of murder and one count of attempted murder. At the conclusion of the trial, the court and defense counsel were informed of Smith’s application and the prosecutors’ knowledge of this application.

After a hearing before the trial judge, the court denied Phillips’ motion to set aside his conviction, finding that Smith’s employment application “in no way reflected a premature conclusion as to . . . [Phillips’] guilt, or prejudice against . . . [Phillips], or an inability to consider the guilt or innocence of . . . [Phillips] solely on the evidence.” The district court, however, granted Phillips’ application for federal habeas corpus relief. The court held that although Phillips had not shown actual juror bias, bias could be imputed to Smith because the average man in the position of a juror applying for employment with the District Attorney’s office would have believed that the jury’s verdict would directly affect the evaluation of his employment application.

In a divided opinion, the Supreme Court reversed. Justice Rehnquist, writing for the majority, held that the constitutional remedy

2490. Id. at 212-13 n.4. The juror had declared during voir dire that he intended to pursue a career in law enforcement, that he had already worked as a store detective, and that he had contacts with the District Attorney’s office. He had also declared his belief that he could be a fair and impartial juror. Defense counsel had then permitted him to take his seat among the jurors despite the availability of several peremptory challenges. Id.
2491. Id. at 213.
2492. Id. (quoting *People v. Phillips*, 87 Misc. 2d 613, 621, 384 N.Y.S.2d 906, 912 (1975)).
2494. 455 U.S. at 211.
for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. The Court rejected Phillips’ argument that because of the human propensity for self-justification, a court cannot possibly ascertain a juror’s impartiality by relying solely upon that juror’s testimony; therefore, the law must impute bias to jurors in Smith’s position. Instead, the Court stated that such testimony is not inherently suspect because “surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter.”

The Court further stated that “due process does not require a new trial every time a juror has been placed in a potentially compromising situation.” Instead, due process simply requires a jury that is willing and capable of deciding the case solely on the evidence before it, and a trial judge who will prevent prejudicial occurrences or determine the effect of such occurrences if they happen.

Finally, the Court noted that under the federal habeas corpus statute, a state trial judge’s findings of fact are presumptively correct.

2495. Id. at 215-16 (citing Chandler v. Florida, 449 U.S. 560 (1981); Remmer v. United States, 347 U.S. 227 (1954); Dennis v. United States, 339 U.S. 162 (1950)). In Dennis, the defendant was convicted by a jury for failure to comply with an investigation by the House Committee on Un-American Activities. The jury consisted primarily of government employees, whom Dennis claimed were inherently biased because they were subject to discharge if there were reasonable grounds for believing that they were disloyal to the government. The Court rejected this claim, stating that Dennis had an opportunity to prove actual bias but failed to do so. 339 U.S. at 171-72.

In Remmer, the defendant was convicted of income tax evasion. During trial, one of the jurors was offered a large sum of money in exchange for a favorable verdict. Without informing defense counsel, an independent investigation was ordered by the court. When defense counsel was notified after trial, they moved to vacate the verdict. The Supreme Court, although recognizing the seriousness of the attempted bribe and the investigation, did not require a new trial. Rather, it remanded the case back to the district court for an evidentiary hearing to determine whether the incident complained of resulted in actual bias. 347 U.S. at 229-30.

In Chandler, the defendants were convicted of various theft offenses at a trial which was televised to the public. The defendants argued that the jurors would be unduly influenced by the unusual publicity and sensational courtroom atmosphere created by the televising of the trial. The Court rejected this argument, stating that the defendants had not shown that the jury’s ability to decide the case solely on the evidence actually had been impaired. 449 U.S. at 581.

2496. 455 U.S. at 215.
2497. Id. at 217 n.7 (quoting Dennis v. United States, 339 U.S. at 171).
2498. 455 U.S. at 217.
2499. Id.
2500. 28 U.S.C. § 2254(d) (1976) provides that “in an evidentiary hearing in the proceeding in the Federal court . . . the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.” But cf. infra notes 2507 & 2521.
This statutory presumption can be overcome only by convincing evidence, which the defendant here failed to provide. The Court concluded that since post-trial hearings affording defendants an opportunity to prove actual bias are constitutionally sufficient in the federal courts, Phillips' constitutional rights under the due process clause of the fourteenth amendment could not have been violated.

In her concurring opinion, Justice O'Connor stated that the use of "implied bias" is not and should not be foreclosed in appropriate circumstances. She used as examples of appropriate circumstances jurors who are employees of the prosecuting agency, or are related to a participant or party to the trial, or are witnesses to or involved with the criminal transaction. She concluded that in these cases, because a juror may be unaware of his own bias or may have an interest in concealing it, a post-conviction hearing may be inadequate to reveal the bias.

In his dissenting opinion Justice Marshall, joined by Justices Brennan and Stevens, stated that "in cases like this one, where the probability of bias is very high, and where the evidence adduced at a

2501. 455 U.S. at 218 (citing Sumner v. Mata, 449 U.S. 539, 551 (1981)).
2502. 455 U.S. at 218. The district court did not take issue with the factual findings of the state trial judge. Id.
2503. Id. Phillips also argued that not only was the prosecutors' failure to inform him about Smith's application a denial of due process, but it deprived him of a hearing during trial to seek an alternate juror. The Court characterized this argument as contradictory to the primary argument; Phillips could hardly argue that due process had been denied for failure to obtain a hearing when his primary argument was that a hearing was insufficient. Id. at 218-19 n.8. The arguments are not necessarily contradictory, however, because: (1) if after a hearing, the motion to replace the juror is denied as a result of that juror's testimony, the primary argument may still be raised; and (2) the nature of the hearings are different; it is much easier to replace a juror than to upset a jury verdict. Id. at 241-42 (Marshall, J., dissenting).
2504. Id. at 221 (O'Connor, J., concurring).
2505. Id. at 222.
2506. Id. Justice O'Connor stated that none of the Court's previous opinions precluded the use of a conclusive presumption of implied bias in appropriate circumstances. Id. at 223. She noted that in Remmer v. United States, 347 U.S. 227 (1954), see supra note 2495, a post-conviction hearing was adequate to determine juror bias because the allegations of bias were founded upon the misconduct of a third party rather than upon the juror himself, and consequently, this juror had little reason to shield his biases. Similarly, the opinion in Dennis v. United States, 339 U.S. 162 (1950), see supra note 2495, did not foreclose a finding of implied bias in more serious situations, id. at 172-73 (Reed, J., concurring); and in Leonard v. United States, 378 U.S. 544, 544-45 (1964) (per curiam), implied bias was used to reverse a conviction where prospective jurors for the defendant's second trial heard the trial court announce the defendant's guilty verdict in a first trial. Justice O'Connor also stated that the federal courts should not be deterred by 28 U.S.C. § 2254(d) (1976), see supra notes 2500-02 and accompanying text, because in extraordinary situations involving implied bias, state court findings of "no bias" are by definition inadequate. 455 U.S. at 222-23 n.1.
hearing can offer little assurance that prejudice does not exist, the juror should be deemed biased as a matter of law." 2507 He argued that where a juror actively seeks employment with the District Attorney's office, the probability of bias is substantial. It may be either conscious, or part of a calculated effort to get a job; or it may be unconscious, since he may feel an affinity with his potential employer in spite of a sincere effort to remain impartial. 2508 If the juror has a conscious bias, he is unlikely to admit it at a post-trial hearing, whereas if he has an unconscious bias he can hardly testify about it since he is unaware of it. 2509

In support of his argument, Justice Marshall noted that in order to preserve the right to an impartial jury, 2510 the Court has demanded very strict precautionary standards in the areas of voir dire examination, 2511 selection of jurors from a representative cross-section of the community, 2512 pretrial and trial publicity, 2513 and potentially prejudicial conduct by third parties. 2514 He stated that for the Court to permit a juror with a high probability of bias, as shown by his conduct, to be able to disprove any bias merely on his own post-verdict assertion that he was not biased, goes utterly against the Court's historical insistence on applying strict safeguards over the right to an impartial jury. 2515

Justice Marshall also noted that the adoption of a conclusive presumption of bias has longstanding precedent in English common

2507. 455 U.S. at 231 (Marshall, J., dissenting). Justice Marshall elaborated that a juror applying for a position with the District Attorney's office should be automatically disqualified as a matter of law. Likewise, if the juror's efforts at securing employment are not revealed until after trial, any conviction should be set aside automatically, despite the absence of proof of actual bias. Id.

2508. Id. at 230.

2509. Id. The Court has previously acknowledged the tremendous difficulty in proving actual bias or lack of bias, particularly if the bias is unconscious. Id. at 230-31 (citing Peters v. Kiff, 407 U.S. 493, 504 (1972); Irvin v. Dowd, 366 U.S. 717, 728 (1961); Crawford v. United States, 212 U.S. 183, 196 (1909)).


2511. 455 U.S. at 225 (citing Ristaino v. Ross, 424 U.S. 589 (1976); Ham v. South Carolina, 409 U.S. 524 (1973)).


2514. 455 U.S. at 227 (citing Turner v. Louisiana, 379 U.S. 466 (1965); Remmer v. United States, 347 U.S. 227 (1954)).

2515. 455 U.S. at 228. Justice Marshall expressed the fear that the standard set by the majority would be ineffective not only when a juror applies for a position with the District Attorney, but even when a juror is actually employed or serving as a prosecutor. Id.
and that many states, including New York, have adopted implied bias by statute or by case law. He emphasized, as did Justice O'Connor in her concurring opinion, that none of the cases relied upon by the majority foreclosed the use of an implied bias standard in appropriate circumstances. While Justice O'Connor implied that “appropriate circumstances” would be those which were more unusual and apparent in nature, Justice Marshall stated that they would exist any time the probability of bias was very high.

The underlying determinate of the opinions in Smith as to whether a post-trial evidentiary hearing is sufficient to uncover alleged juror bias seems to be grounded in different philosophical assumptions about the nature of man. Since the majority believes that “one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter,” the underlying assumption of the majority appears to be that man is inherently honest. The dissent leans toward the argument that a juror’s testimony at a hearing is inherently suspect because man has a strong propensity for self-justification. It can be argued, however, that whether man is basically honest or suspect is a counterfeit issue; that all men inherently possess both natures.

Given this possible flaw in both opinions, it appears that the ma-

\[\text{2516. Id. at 232-33 (citing 3 W. Blackstone, Commentaries 480-81 (W. Hammond ed. 1890); 2 Thorne, Bracton on the Laws and Customs of England 405 (1968)).} \]

\[\text{2517. 455 U.S. at 233 & n.10.} \]

\[\text{2518. Id. at 234 & nn.12, 13. Justice Marshall also noted that a number of lower federal courts have suggested that implied bias may be appropriate in some circumstances. Id. at 238 n.19.} \]

\[\text{2519. Id. at 236-38. See supra note 2506.} \]

\[\text{2520. See supra text accompanying note 2505.} \]

\[\text{2521. 455 U.S. at 231. Justice Marshall also stated that the federal habeas corpus statute, 28 U.S.C. § 2254(d) (1976), does not preclude the use of an implied bias standard to overturn a state court finding of fact. Id. at 239.} \]

\[\text{2522. Id. at 217 n.7 (quoting Dennis v. United States, 339 U.S. 162, 171 (1950)).} \]

\[\text{2523. Id. at 230.} \]

\[\text{2524. “Then the Lord God formed (yyitzer) man.” Genesis 2:7. “Why was the word ‘yyitzer’ (and He formed) spelled with two letters ‘y’? Because the Holy One, blessed be He, created two impulses, the one good and the other evil.” Berakoth 61a. The Hebrew word ‘yyitzer’ also means impulse; hence the double ‘y’ is taken to indicate the two impulses in man—the good impulse and the evil impulse. See A. Cohen, Everyman’s Talmud 88 (1949).} \]

The majority opinion, therefore, is flawed because there can be no assurance that a man can or will be totally honest, whether consciously or unconsciously, when he testifies. The dissenting opinion is also flawed because no man is or can be totally impartial; thus a defendant need only investigate the jurors’ backgrounds until he can find “appropriate circumstances” with which to invoke the implied bias doctrine, and virtually every jury verdict will be subject to reversal.
majority opinion is the most practicable. Although in some situations it may leave the defendant vulnerable to a biased juror, safeguards such as voir dire and peremptory challenges should adequately protect the defendant in most situations. If the constitutional standard of due process was to include implied bias, the dangers of unwarranted mistrials and reversals due to weakly supported allegations of juror bias would have no remedy.

Assuming that a post-trial hearing is sufficient to determine juror bias, there does exist one troubling aspect of the *Smith* majority opinion. It emphasized that the burden of proving actual bias rests on the defendant,2525 whereas the Court, in one of the cases it relied on,2526 placed a heavy burden on the government to disprove actual bias in situations involving jury tampering.2527 Admittedly, *Smith* involved juror bias resulting from juror misconduct rather than jury tampering, yet in both situations there was a high probability of bias, and it is difficult to determine why the burden of persuasion should fall upon the defendant in the former situation and upon the government in the latter.

In the Ninth Circuit, the trial court has discretion to determine whether and when to hold a hearing on allegations of juror bias or misconduct, and the extent and nature of that hearing.2528 At this hearing, the trial court must determine the truthfulness of the allegations and, if truthful, whether the bias or prejudice amounted to a deprivation either of the defendant's fifth amendment due process or sixth amendment impartial jury rights such that he was deprived of a fair trial.2529 Not every allegation or incident of juror bias or misconduct is held to require a new trial. The Ninth Circuit will reverse a conviction

2525. "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215 (citing Remmer v. United States, 347 U.S. 227 (1954)).
2527. The Remmer Court stated:
   In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the defendant.
347 U.S. at 229.
   The Smith dissent failed to note this difference, perhaps because it was not so much concerned with the nature of the post-trial hearing, but with whether under certain circumstances a hearing could be sufficient at all.
2529. Id. at 1228-29.
only if it is found that the trial judge so abused his discretion that the defendant must be deemed to have been deprived of his fifth or sixth amendment rights.2530

In United States v. Bailleaux,2531 the defendant moved for a change of venue due to extensive pretrial publicity concerning the crimes for which he was charged.2532 Although the district court denied Bailleaux's motion, it announced its willingness to reconsider the motion if it should appear after voir dire that an impartial jury could not be assembled. It then made a careful inquiry of the prospective jurors during the voir dire and excused all jurors who voiced any doubt as to their ability to render a fair and impartial verdict.2533

The Ninth Circuit found that the district court had not abused its discretion by denying the motion.2534 It noted that most of the publicity had occurred more than a year before the selection of the jury, and that the publicity consisted of factual, neutral coverage of only the crimes themselves rather than of Bailleaux's guilt or innocence.2535 The court also noted the precautions the trial court took during voir dire,2536 and the fact that Bailleaux was convicted of only three of the five counts brought against him.2537 Under all these circumstances, the Ninth Circuit determined that the publicity was not of a nature that could have deprived Bailleaux of a fair trial.2538

In United States v. Bagnariol,2539 undercover government agents operating under the guise of a fictitious corporation involved the defendant politicians in a scheme whereby the politicians agreed to enact gambling legislation in exchange for part of the profits realized by the corporation.2540 During trial, one of the jurors went to the public li-

2530. Id. at 1229.
2531. 685 F.2d 1105 (9th Cir. 1982).
2532. Id. at 1108. The defendant commissioned a public opinion poll which showed that over 80% of the general public in the district had heard or read about the crimes. Id. at 1109.
2533. Id. at 1109.
2534. Id. The court stated that a denial of a motion for change of venue should be reversed only upon a showing of clear abuse of discretion. Id. at 1108 (citing United States v. Pry, 625 F.2d 689 (5th Cir. 1980), cert. denied, 450 U.S. 925 (1981)).
2535. 685 F.2d at 1108-09. The court further noted that, to the extent that the publicity did focus on an individual suspect, it was directed in part to another individual who was involved. Id. at 1109.
2536. Id. at 1109.
2537. Id.,
2538. Id. at 1108-09 (citing United States v. Mandel, 415 F. Supp. 1033, 1073 (D. Md. 1976)).
2540. Id. at 880-81.
brary and discovered that the fictitious corporation was not listed in any business publication.\textsuperscript{2541} The juror then reported this to some of his fellow jurors and indicated that he found it odd that the defendants had not conducted a similar investigation into the corporation with which they intended to do business.\textsuperscript{2542} After conviction, the defendants appealed, alleging that the introduction by the juror of this extrinsic evidence undermined their defense of entrapment, an essential element of which was their belief in the legitimacy of the corporation.\textsuperscript{2543}

The Ninth Circuit first stated that the constitutional requirement for trial by jury necessarily implies that the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right to confrontation, cross-examination, and counsel.\textsuperscript{2544} It therefore concluded that a trial court must conduct an evidentiary hearing into the precise nature of any extrinsic material allegedly used by the jury, and if any possibility is found that the extrinsic material could have affected the verdict, the defendant is entitled to a new trial.\textsuperscript{2545} Although the determinations of a trial court are given great weight, they must be reviewed in the context of the entire record because of the threat to the defendants' fundamental right to an impartial jury.\textsuperscript{2546}

The court then noted the absence of a bright line rule for determining when a conviction must be reversed because of the introduction by one of the jurors of extrinsic evidence into the jury's deliberations.\textsuperscript{2547} However, by reviewing several cases, it was able to derive some of the primary factors commonly used in a trial court's decision:

1. whether the extrinsic evidence related to a material aspect of the case;
2. whether there was a direct and rational connection between

\begin{itemize}
\item \textsuperscript{2541} *Id.* at 883.
\item \textsuperscript{2542} *Id.* at 883-84.
\item \textsuperscript{2543} *Id.* at 884.
\item \textsuperscript{2544} *Id.* at 884 & n.3 (citing Turner v. Louisiana, 379 U.S. 466, 472-73 (1965); Gibson v. Clanon, 633 F.2d 851, 854 (9th Cir. 1980), cert. denied, 450 U.S. 1035 (1981)).
\item \textsuperscript{2545} 665 F.2d at 885 (citing United States v. Vasquez, 597 F.2d 192, 193 (9th Cir. 1979)).
\end{itemize}
the extrinsic material and a prejudicial jury conclusion; whether the trial court conducted an evidentiary hearing; and whether the material was truly extrinsic, i.e., not part of an extrinsic jury deliberation.

Applying these factors, the Ninth Circuit concluded that because it was undisputed at trial that the fictitious corporation did not exist, the information gathered by the juror was irrelevant to the guilt or innocence of the defendants. It stated that to find a material connection between the absence of a corporate listing and the defendants’ belief in the legitimacy of the corporation required an assumption that the jury reached an irrational conclusion. The jury must be regarded, however, as a rational body, capable of making fine factual distinctions. Fi-

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2549. 665 F.2d at 885 (citing United States v. Bagley, 641 F.2d 1235 (9th Cir.) (judge's statement to jury that witness had not been granted immunity deemed non-prejudicial because it was accurate, probably admissible, and had been followed by curative instruction), cert. denied, 454 U.S. 942 (1981); United States v. Greer, 620 F.2d 1383, 1384-85 (10th Cir. 1980) (deputy marshal's explanation of defendant's eligibility for sentencing under Youth Corrections Act deemed presumptively prejudicial); Llewellyn v. Stynchcombe, 609 F.2d 194, 195-96 (5th Cir. 1980) (jury's finding of witness list of previous arson incident deemed non-prejudicial because other evidence of prior arson had already been admitted); United States v. Vasquez, 597 F.2d 192 (9th Cir. 1979) (official court file left in jury room held prejudicial because it contained inadmissible evidence of prior charges); Farese v. United States, 428 F.2d 178, 179-80 (5th Cir. 1970) (large sum of money found in pocket of defendant's shirt left in jury room deemed prejudicial because alleged crime involved a large monetary gain)).

2550. 665 F.2d at 885-86 (citing United States v. Renteria, 625 F.2d 1279, 1283-84 (5th Cir. 1980) (case remanded because trial judge refused to conduct a hearing into effect of tape recording left with jury, portions of which were not admitted into evidence)).

2551. 665 F.2d at 886, 887 (citing United States v. Bassler, 651 F.2d 600, 601-03 (8th Cir. 1981) (notes taken by juror during trial deemed intrinsic to deliberations), cert. denied, 454 U.S. 1151 (1982); Government of Virgin Islands v. Gereau, 523 F.2d 140, 151-53 (3d Cir. 1975) (information of other killings and investigations leaked into jury room deemed to be part of normal jury pressures and intra-jury influences), cert. denied, 424 U.S. 917 (1976)).

2552. 665 F.2d at 888. The court noted that implicit in the knowledge that a corporation did not exist is that it would not be listed as a corporation in periodicals. The research merely confirmed what the jurors already knew. The court also noted that the defendants never asserted a belief that the corporation's name appeared in business publications. Id.

2553. Id. The court stated that any belief that the defendants may have had that the corporation was legitimate would have been equally credible regardless of whether the company existed or whether its name appeared in a publication. It noted that an unlisted company is not necessarily criminal, and that a listed company could be a front for criminal activity just as easily as one that was not listed. Id.
nally, because the trial judge conducted a thorough investigation into the incident,2554 and the evidence presented against the defendants was so overwhelming,2555 the court held that the extrinsic evidence did not affect the defendants' right to a fair trial to the extent of requiring a reversal.2556

In United States v. Sears,2557 a juror was overheard to say "nice job" or "good job" to an FBI agent who had just testified. Upon questioning by the court, the juror explained that he had a hearing problem and that his remark was merely out of appreciation that the FBI agent had spoken in a loud and clear voice. The court extended defense counsel an opportunity to question the juror, which was declined, and subsequently rejected a defense motion to disqualify the juror because of bias and incompetency due to the hearing impairment.2558

The Ninth Circuit affirmed, holding that the trial court acted well within its discretion in determining that the defendants received a fair trial by an impartial and competent jury.2559 The court stated that the trial judge had questioned the juror extensively enough to satisfy himself that the juror was not biased. Furthermore, the Ninth Circuit noted that the trial judge had the opportunity to observe the juror closely before deciding that his hearing problem would not deny the defendants' rights to due process or a fair trial.2560

In United States v. Armstrong,2561 during a jury deadlock, the husband of one of the jurors received two annoying phone calls. The caller stated: "'tell your wife to stop hassling my brother-in-law at court.'"2562 The next day the deadlock was broken and the defendants were convicted. On appeal, the defendants moved for a mistrial, arguing that these extraneous communications created an unrebutted pre-

2554. Id. at 884, 889. The trial court questioned each juror individually about the nature of the material, the extent of the discussion, and other circumstances. However, it avoided inquiry into the subjective effects of the extrinsic discovery on the jury. Id. at 884.
2555. Id. at 889. For a discussion of the "overwhelming-evidence" test, see Bates v. Nelson, 485 F.2d 90, 93-94 (9th Cir. 1973), cert. denied, 415 U.S. 960 (1974). The Bagamioi court noted that the judge gave clear and careful instructions to the jury to consider only evidence presented at trial to reach a verdict. This alone may have justified an affirmance. Id. (citing United States v. Bagley, 641 F.2d 1235, 1241 (9th Cir.), cert. denied, 454 U.S. 942 (1981); Llewellyn v. Stynchcombe, 609 F.2d 194 (5th Cir. 1980)).
2556. 665 F.2d at 889.
2557. 663 F.2d 896 (9th Cir. 1981), cert. denied, 455 U.S. 1027 (1982).
2558. Id. at 899-900.
2559. Id. at 900.
2560. Id. See Lyda v. United States, 321 F.2d 788, 790-91 (9th Cir. 1963).
2561. 654 F.2d 1328 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982).
2562. Id. at 1331.
sumption of prejudice.\textsuperscript{2563}

The Ninth Circuit stated that although the presence of an outside influence upon the jury establishes a presumption of prejudice,\textsuperscript{2564} the primary concern of the court was whether the impact of this influence deprived the defendant of a fair trial.\textsuperscript{2565} The court noted that the phone calls did not refer to the merits of the case, did not articulate threats, and were not identified with either side. Furthermore, the juror had stated that she would not let the calls interfere with her duties as a juror.\textsuperscript{2566} The court therefore held that the incident had not affected the essential fairness of the trial\textsuperscript{2567} and affirmed the conviction.\textsuperscript{2568}

In \textit{United States v. Shapiro},\textsuperscript{2569} a juror offered to arrange an acquittal for the defendants in exchange for a sizable amount of cash. Upon discovery of the offer, the juror was replaced, and each remaining juror was questioned about any involvement with or any bias resulting from the incident.\textsuperscript{2570} Satisfied that there had been no

\textsuperscript{2563} Id. at 1331-32.
\textsuperscript{2564} Id. at 1332 (citing \textit{Remmer v. United States}, 347 U.S. 227 (1954), \textit{see supra} note 2495; \textit{Mattox v. United States}, 146 U.S. 140 (1892); \textit{United States v. Goliday}, 468 F.2d 170, 171-72 (9th Cir. 1972), \textit{cert. denied}, 410 U.S. 934 (1973)).
\textsuperscript{2565} 654 F.2d at 1332. The Government argued that the phone calls did not trigger a presumption of prejudice because they were merely part of the intra-jury differences, not an outside influence. The court elected not to draw a line between outside communications concerning intra-jury matters and those which relate to other matters, stating that it was not as concerned with the nature of the jury incidents as with the prejudice they may have worked on the fairness of the defendants' trial. \textit{Id} (citing \textit{United States v. Klee}, 494 F.2d 394 (9th Cir.), \textit{cert. denied}, 419 U.S. 835 (1974); \textit{Cavness v. United States}, 187 F.2d 719 (9th Cir. 1951)).
\textsuperscript{2566} 654 F.2d at 1333.
\textsuperscript{2567} Id. The court stated that these facts rendered the case completely different from those where reversal was required. \textit{Id} (citing \textit{Remmer v. United States}, 347 U.S. 227 (1954) (attempt to bribe a juror); \textit{Mattox v. United States}, 146 U.S. 140 (1892) (jury exposed to extra-record facts and public opinion on the evidence)).
\textsuperscript{2568} 654 F.2d at 1333. The court also held that the defendants' other arguments relating to certain jury incidents were not grounds for reversal. Revelation of a numerical split among the jury, although to be discouraged, does not require a mistrial. \textit{Id} at 1333 (citing \textit{United States v. Williams}, 444 F.2d 108, 109 (9th Cir. 1971)). Similarly, illness of a juror does not require a mistrial. 654 F.2d at 1333. Finally, deference is accorded to the district court as to when a mistrial should be declared because of a deadlocked jury. \textit{Id} (citing \textit{United States v. Cawley}, 630 F.2d 1345 (9th Cir. 1980)).
\textsuperscript{2569} 669 F.2d 593 (9th Cir. 1982).
\textsuperscript{2570} Id. at 599. After being told that the tainted juror had been replaced, each juror was asked:

1. whether he or any family member had been contacted by anyone about the case;
2. whether any fellow juror had sought to discuss the case with him;
3. whether he had discussed the case with fellow jurors;
4. whether anything had occurred which led [him] to believe that he could not be fair and impartial;
5. whether he had overheard any fellow juror discussing specific testimony on the
involvement with nor any apparent bias resulting from the incident, the trial judge denied the defendants' motion for a mistrial and permitted the jury to proceed to a verdict.\textsuperscript{2571}

The Ninth Circuit stated two possibilities of prejudice against the defendants: (1) the tainted juror may have attempted to influence other jurors in favor of the defendants, which instead prejudiced those jurors against the defendants; and (2) the unexpected removal of the juror coupled with the unusual questioning by the court may have caused some of the jurors to suspect that one of the defendants had instigated or engaged in the misconduct.\textsuperscript{2572} The court further stated that it would evaluate the answers the jurors gave to the unusual voir dire in the context of the heavy burden that falls upon the Government to disprove bias when jury tampering in any form occurs.\textsuperscript{2573}

With respect to the first possibility of prejudice, the court examined the voir dire conducted by the trial court to determine if it effectively rebutted the strong presumption that prejudice infected the proceedings.\textsuperscript{2574} It found that several jurors had discussed the case, and determined that although these jurors characterized their conversations as innocuous or joking, a juror is unlikely to admit to a judge that he discussed the case against the judge's express instructions.\textsuperscript{2575} The court nevertheless admitted that if direct contact with the tainted juror were the only source of prejudice, the evidence would present a very close case.\textsuperscript{2576}

The court then examined the voir dire with respect to the second

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\item guilt or innocence of any defendant;
\item (6) whether he thought that the court's questioning was occasioned by out-of-court conduct by any of the parties; and
\item (7) whether anything had occurred during the trial that might deprive any party of a fair or impartial verdict.
\end{itemize}

\textit{Id.}

\textsuperscript{2571} Id. at 603.
\textsuperscript{2572} Id. at 599-600.
\textsuperscript{2573} Id. at 599 (citing Remmer v. United States, 347 U.S. at 229 (1954), \textit{see supra} notes 2495; United States v. Ferguson, 486 F.2d 968 (6th Cir. 1973)). In \textit{Ferguson}, the Sixth Circuit held that where one juror is found to have been prejudicially tainted from an outside influence, a heavy burden falls upon the government, even though the tainted juror is removed, to disprove any prejudice or bias of any other juror with whom the tainted juror had contact. 486 F.2d at 971.
\textsuperscript{2574} 669 F.2d at 600-01.
\textsuperscript{2575} Id. at 601. The court also noted that even a juror's good faith belief in his own impartiality is not dispositive. \textit{Id.} (citing Irvin v. Dowd, 366 U.S. 717, 727-28 (1961)). This is the same rationale as that of the dissent in Smith v. Phillips, 455 U.S. 209, 231 (1982) (Marshall, J., dissenting).
\textsuperscript{2576} 669 F.2d at 601.
possibility of prejudice, and found that at least one of the jurors had probably believed that one of the defendants had engaged in misconduct. The court therefore held that the Government had not carried its heavy burden of rebutting the presumption of prejudice, and ruled that the motion for a mistrial should have been granted.

In a concurring opinion, Justice Skopil stated that tainted juror cases should not automatically be evaluated in terms of a presumption of prejudice, but rather in terms of whether the defendant received a fair trial. He determined that when a tainted juror is excused before jury deliberations begin, the trial judge is obligated to determine whether the jurors deliberating on the verdict were improperly contacted. He also stated that the district court has discretion to determine how extensive an investigation must be conducted to uncover any contact, and whether a juror's assurances can be believed. Justice Skopil concluded that because the investigation in this case revealed that several of the jurors deliberating on the verdict had been tainted, a mistrial was required; however, this was because Shapiro was deprived of a fair trial, not because the Government failed to rebut a presumption of prejudice.

2577. Id. at 601-02. The trial judge asked each juror, "Do you have any idea or suspicion about the reason for this questioning of you?" Id. at 602.
2578. Id. at 601. The court also found that the trial judge's assurances to the jurors that no misconduct had occurred were insufficient to dispel any doubts created by his inquiry. Id. at 602-03 n.7.
2579. Id. at 603. The court emphasized that it was not adopting a per se rule requiring that a mistrial be declared whenever a jury taint originates from within the jury. The court reiterated, however, that in such a situation, the Government has the burden of showing that the tainted juror did not influence the others. Id.
2580. Id. at 603-04 (Skopil, J., concurring) (citing United States v. Armstrong, 654 F.2d 1328, 1332 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982), see supra note 2565 and accompanying text; United States v. Forrest, 620 F.2d 446 (5th Cir. 1980) (case remanded after tainted juror was excused before deliberations to determine whether prejudicial material reached jury), aff'd after remand, 649 F.2d 355 (5th Cir. 1981); United States v. Brown, 571 F.2d 980 (6th Cir. 1978) (no abuse of discretion when trial judge questioned and dismissed juror without further questioning of the other jurors); United States v. Ferguson, 486 F.2d 968 (6th Cir. 1973) (presumption of prejudice standard applied only after it was found that one or two of the deliberating jurors had already been influenced by the tainted juror before he was excused)).
2581. 669 F.2d at 604.
2582. Id. at 604-05.
2583. Id. at 605. Judge Skopil cited United States v. Brown, 571 F.2d 980 (6th Cir. 1978), and United States v. Forrest, 620 F.2d 446 (5th Cir. 1980), for the proposition that cases similar to Shapiro can be analyzed in terms of the fairness of the trial received by the defendant rather than in terms of a presumption of prejudice. 669 F.2d at 604. He stated that a presumption of prejudice could arise only in cases such as Remmer v. United States, 347 U.S. at 229, see supra note 2495, and United States v. Ferguson, 486 F.2d 968 (6th Cir. 1973), where an improperly contacted juror has been permitted by the trial court to deliberate on
The above cases demonstrate that the Ninth Circuit almost always evaluates allegations of juror bias or misconduct in terms of whether it is shown from the record that the defendant was deprived of a fair trial. In some cases involving jury tampering, however, there seems to be a question whether the allegations of bias should be evaluated in terms of whether the defendant has been deprived of a fair trial, or whether the government was able to rebut a presumption of prejudice against the defendant. This question, however, appears as if it will most often be resolved in favor of the "fair trial" approach. For this reason, the Supreme Court's decision in Smith v. Phillips will probably have little effect upon Ninth Circuit law since it did not adopt a "presumption of prejudice" approach, and the Ninth Circuit has apparently not adopted an "implied bias" approach. Thus, the Ninth Circuit "fair trial" evaluation should be sufficient to overcome any constitutional objection in most cases of alleged juror bias.

D. Prosecutorial Misconduct

The Ninth Circuit has long recognized the existence of a duty of good faith on the part of the prosecutor towards the court, the grand jury, and the defendant. A significant breach of this duty may violate the defendant's right under the due process clause of the fifth
amendment. In evaluating appeals based on allegations of prosecutorial misconduct, the Ninth Circuit examines whether: (1) the prosecutor committed an error; (2) the issue was preserved for appeal; and (3) the defendant was prejudiced. If the answers to these three issues are affirmative, the defendant’s conviction should be reversed. The Ninth Circuit has followed this rule in recent cases involving prosecutorial misconduct, although without always using a step-by-step analysis.

1. Prosecutorial misconduct during grand jury proceedings

Two recent Ninth Circuit cases involved claims by the defendants of prosecutorial misconduct during grand jury proceedings which led to their indictments. The Ninth Circuit, however, may use “its supervisory power to dismiss [a grand jury] indictment for flagrant prosecutorial misconduct only where there is a clear basis in law and fact, and when necessary [to preserve] the integrity of the judicial process.”

In United States v. McLaughlin, the Ninth Circuit affirmed the district court’s denial of a motion to dismiss a grand jury indictment. The defendant had contended that “his constitutional right to due process [had been] violated by the prosecutor’s capricious conduct.” McLaughlin was ultimately convicted of eight counts of filing false federal tax returns.

On appeal, McLaughlin argued that the district court’s refusal to dismiss the indictment was erroneous, citing three instances of prosecutorial misconduct as the basis for his claim. McLaughlin first argued that the Government’s failure to set an earlier pre-indictment conference was in bad faith, and that the Government had misled defense counsel into believing that presentation of the indictment was scheduled for a later date. McLaughlin next claimed that the Government failed to present defense witnesses to the grand jury, thus “stamping” the grand jury into returning an indictment. Finally, the defendant claimed that the Government prejudiced the grand jury by

2589. Id. at 785.
2591. See id.
2592. United States v. Rasheed, 663 F.2d 843, 853 (9th Cir. 1981) (citing United States v. Samango, 607 F.2d 877, 880-81 & n.6 (9th Cir. 1979), cert. denied, 454 U.S. 1157 (1982)).
2593. 663 F.2d 949 (9th Cir. 1981).
2594. Id. at 951.
2595. Id. at 950.
reading a part of defense counsel's letter indicating that McLaughlin intended to exercise his fifth amendment right against self-incrimination if called to testify.\textsuperscript{2596}

The Ninth Circuit summarily dismissed McLaughlin's first contention, stating that he had cited no authority supporting his claim that he was entitled to a lengthier notice period.\textsuperscript{2597} The court rejected McLaughlin's second claim after an examination of the record indicated that, under the circumstances, the Government adequately presented McLaughlin's defense to the grand jury.\textsuperscript{2598} With respect to the final claim of misconduct, the court did not decide whether it was proper for the prosecutor to read the statement revealing McLaughlin's intention to exercise his fifth amendment rights.\textsuperscript{2599} Instead, the court focused on the lack of "bad faith" and the "inadvertent" nature of the alleged misconduct, concluding that it could not "say that there has been fundamental unfairness or a threat to the integrity of the judicial process."\textsuperscript{2600} The Ninth Circuit, therefore, upheld the district court's denial of the motion to dismiss the indictment.\textsuperscript{2601}

In \textit{United States v. Rasheed},\textsuperscript{2602} the Ninth Circuit similarly considered a defendant's claim that her indictment should be dismissed because of prosecutorial misconduct during grand jury proceedings. Defendant Phillips was convicted of obstructing justice and aiding and abetting defendant Rasheed in committing mail fraud.\textsuperscript{2603} Rasheed was the founder of a church through which he established a scheme to solicit donations by preaching that the donors would receive in return

\textsuperscript{2596} \textit{Id.} at 951.

\textsuperscript{2597} \textit{Id.} The record indicated that not only had McLaughlin's counsel been notified two weeks prior to the presentation of the indictment, but that one week later he had been informed that the grand jury investigation was in process and had been supplied with a tentative date for the presentation of the indictment. \textit{Id.}

\textsuperscript{2598} \textit{Id.} McLaughlin's attorney requested the appearance of five defense witnesses only one day before the expected indictment date. The prosecutor read to the grand jury a letter by defense counsel summarizing the expected testimony of the witnesses. The prosecutor also explained McLaughlin's defense of reliance on the advice of his accountant. The grand jury was informed that the witnesses could testify later that day or the next day, but decided to return the indictment without hearing them. \textit{Id.}

\textsuperscript{2599} \textit{Id.} The court stated instead that a grand jury is not prejudiced by notice of a defendant's intent not to testify because a prosecutor may call someone to testify whom the prosecutor knows will exercise his fifth amendment right. \textit{Id.} (citing \textit{United States v. Samango}, 450 F. Supp. 1097, 1106 (D. Hawaii 1978), \textit{aff'd}, 607 F.2d 877 (9th Cir. 1979)).

\textsuperscript{2600} 663 F.2d at 951.

\textsuperscript{2601} \textit{Id.} (citing \textit{United States v. Chanen}, 549 F.2d 1306, 1311-13 (9th Cir.), \textit{cert. denied}, 434 U.S. 825 (1977)).

\textsuperscript{2602} 663 F.2d 843 (9th Cir. 1981), \textit{cert. denied}, 454 U.S. 1157 (1982).

\textsuperscript{2603} \textit{Id.} at 845.
an "increase of God" of four times the original donation. Approximately one year after the scheme began, Phillips became a minister of the church, and later, a full-time employee and director. She kept the books for the church and helped run the donation program. During the grand jury investigation and pursuant to a court order, the former attorney for the church provided certain documents which formed the basis for the obstruction of justice charges against Phillips. In response to certain questions by the prosecutor, the attorney testified to the nature of the documents, the manner by which he had acquired them, Phillips' agreement to produce the documents herself, and Phillips' subsequent failure to do so. Phillips argued that the prosecutor's questions were improper because they elicited responses in breach of the attorney-client privilege.

The Ninth Circuit determined that Phillips had not demonstrated that a breach of the attorney-client privilege had occurred. First, the court stated that while the attorney had represented the church, it was unclear whether the attorney had represented Phillips personally. The court was also unable to determine whether the attorney had testified to matters which Phillips had told him in confidence, implying that there was doubt concerning whether the privilege even existed. Second, the court noted that the attorney was himself in danger of becoming an accessory to the obstruction of justice if he did not produce the documents because the attorney possessed documents that Phillips had failed to produce pursuant to a subpoena duces tecum. The court stressed that the attorney had been ordered by the district court to produce the documents and to testify. Finally, the court pointed out that an attorney is more aware of the scope of the attorney-client privilege than the prosecutor, implying that the burden of preventing improper testimony lies with the witness-attorney rather than the prosecutor. The Ninth Circuit thus held that since there was substantial doubt that the attorney's testimony was a breach of privi-

2604. Id.
2605. Id. at 846.
2606. Id. at 853.
2607. Id.
2608. Id. at 854.
2609. Id.
2610. Id.
2611. Id. (citing generally In re Ryder, 263 F. Supp. 360 (E.D. Va.), aff'd, 381 F.2d 713 (4th Cir. 1967); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2) (1979) (attorney may reveal confidences when required by law or court order)).
2612. 663 F.2d at 854 (citing In re Walsh, 623 F.2d 489, 495 (7th Cir.) (attorney must testify but can claim privilege to specific questions), cert. denied, 449 U.S. 994 (1980)).
lege, the prosecutor had committed no misconduct requiring the dismissal of the indictment.2613

These cases again demonstrate the Ninth Circuit's reluctance to dismiss indictments because of alleged prosecutorial misconduct during grand jury proceedings. Even when such misconduct has arguably occurred, the court will uphold an indictment so long as the prosecutor acted in good faith and the error does not threaten the integrity of the judicial process.

2. Prosecutorial misconduct during trial

Prosecutorial misconduct during trial can take many forms. These forms include the failure to disclose required information to the court or defense counsel,2614 impermissible comments on a defendant's failure to testify,2615 improper references to matters not in evidence,2616 and impermissible vouching for the credibility of witnesses.2617 The district judge is normally in the best position to understand the circumstances surrounding any alleged misconduct and to evaluate its effects.2618 Thus, when reviewing appeals based on allegations of prosecutorial misconduct, the Ninth Circuit gives great deference to the district judge's management of the case.2619 Further, since allegations of prosecutorial misconduct are ordinarily not of constitutional dimension, the Ninth Circuit will reverse the district court's ruling only if it determines that it was more probable than not that the misconduct materially affected the verdict.2620 Both the Ninth Circuit and the United States Supreme Court have recently considered claims of prosecutorial misconduct during trial.

In Smith v. Phillips,2621 the Supreme Court considered whether defendant Phillips was denied a fair trial as a result of juror bias together with the prosecutors' failure to disclose the possibility of such bias. Phillips was convicted on two counts of murder and one count of attempted murder. During trial, one of the jurors applied for an investi-

2613. 663 F.2d at 854.
2614. See infra notes 2621-38 and accompanying text.
2615. See infra notes 2639-55 and accompanying text.
2616. See infra notes 2656-67 and accompanying text.
2617. See infra notes 2668-83 and accompanying text.
2619. Id.
2620. United States v. Valle-Valdez, 554 F.2d 911, 915-16 (9th Cir. 1977). But see authority cited infra at notes 2677-80 for discussion of when the court might require a showing of high probability that the misconduct affected the verdict.
gator's position with the district attorney's office. The prosecutors in Phillips' case learned of the application approximately one week before the end of Phillips' trial, but failed to inform either the court or defense counsel of the application.2622 After a verdict of guilty was rendered, but prior to sentencing, the District Attorney informed the court and defense counsel about the application and that the prosecutors knew about it during trial.2623 Phillips then moved to set aside the verdict, asserting juror misconduct and prosecutorial misconduct during trial.2624

The trial court denied Phillips' motion, stating that Phillips had not been prejudiced.2625 The appellate court affirmed the conviction without opinion,2626 and the New York Court of Appeals denied leave to appeal.2627 Four years later, Phillips petitioned for a writ of habeas corpus, contending he was denied due process because of juror bias and because the prosecutor knew of, but did not communicate, this conduct to the court or defense counsel.2628 The district court granted the writ, finding "implied" but not "actual" juror bias.2629 The Second Circuit, however, affirmed the district court's ruling, not on the basis of implied juror bias but on the ground that "the failure of the prosecutors to disclose their knowledge denied [Phillips] due process."2630

The Supreme Court reversed the Second Circuit, thus denying habeas relief to Phillips.2631 The Court's opinion focused primarily on the issue of juror bias,2632 the same issue on which the New York State

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2622. Id. at 212-13.
2623. Id. at 213.
2625. 87 Misc. 2d at 630, 384 N.Y.S.2d at 918.
2629. Id. at 1371-72. Although the district court granted relief because of implied juror bias and not prosecutorial misconduct, the court did state that the prosecutors "must share the responsibility for this inexcusable abridgement of the petitioner's Sixth Amendment right." Id. at 1372.
2630. Phillips v. Smith, 632 F.2d 1019, 1022 (2d Cir. 1980). In a prescient dissent, Judge Van Graafeiland argued that the Second Circuit did "exactly what the Supreme Court has said should not be done" by focusing on the moral culpability of the prosecutor, rather than on the fairness of the trial for the defendant. Id. at 1024 (Van Graafeiland, J., dissenting). A Ninth Circuit panel adhering strictly to the three-step analysis, see supra notes 2588-90 and accompanying text, would probably not have affirmed the grant of habeas relief on prosecutorial misconduct grounds.
2631. 455 U.S. at 221.
2632. For a discussion of the juror bias issue in this case, see id. at 212-18.
courts,\textsuperscript{2633} as well as the district court, focused.\textsuperscript{2634} However, the Court briefly addressed the issue of prosecutorial misconduct, which was the basis of the Second Circuit's holding.\textsuperscript{2635} The Court emphasized that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."\textsuperscript{2636} Since the lower courts had explicitly found that the juror's conduct did not prejudice Phillips,\textsuperscript{2637} the prosecutors' failure to disclose that conduct did not deny Phillips a fair trial.\textsuperscript{2638}

In \textit{United States v. Armstrong},\textsuperscript{2639} the Ninth Circuit considered defendant's allegations of prejudicial misconduct by the prosecutor during trial. The three defendants were convicted on various counts of mail fraud, wire fraud, inducement to travel interstate in order to defraud, and falsifying a loan application.\textsuperscript{2640} During the closing argument, the prosecutor had indirectly commented on defendant Armstrong's failure to testify by asking the jury: "Did you hear him deny the misrepresentations, Ladies and Gentlemen?"\textsuperscript{2641}

\textsuperscript{2633} See \textit{supra} notes 2624-26 and accompanying text.
\textsuperscript{2634} See \textit{supra} note 2628 and accompanying text.
\textsuperscript{2635} See \textit{supra} note 2629 and accompanying text.
\textsuperscript{2636} 455 U.S. at 219. In reiterating this rule, the Court relied on two precedents, Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976), where it considered the effect of the alleged misconduct and not merely its existence.

In \textit{Brady}, the prosecutor suppressed evidence, requested by the defendant, of a confession of the defendant's accomplice which might have mitigated the defendant's sentence. The Court agreed with the appellate court's holding that nothing in the suppressed evidence was material to the issue of guilt but that it might be material to the issue of the defendant's punishment. \textit{Id.} at 86-88. The Court, therefore, held that suppression of the evidence constituted misconduct. The Court stated that a prosecutor's suppression of requested evidence "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." \textit{Id.} at 87.

In \textit{Agurs}, the prosecutor failed to disclose unrequested evidence which might have supported the defendant's self-defense claim in her murder trial. \textit{Id.} at 98-99. The Court stated that although the prosecutor had a constitutional obligation to disclose unrequested exculpatory evidence, this particular evidence would not have materially affected the defendant's verdict. Thus, the Court upheld the conviction, stressing that "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." \textit{Id.} at 110-114.

\textsuperscript{2637} 455 U.S. at 220 (citing People v. Phillips, 87 Misc. 2d 613, 627, 384 N.Y.S.2d 906, 915 (Sup. Ct. 1975)).
\textsuperscript{2638} 455 U.S. at 221. The Court expressly declined to condone the prosecutor's conduct. \textit{Id.} at 220. In a dissenting opinion, Justice Marshall, joined by Justice Brennan and Justice Stevens, argued that Phillips' conviction should be reversed on the ground of implied juror bias. \textit{Id.} at 231 (Marshall, J., dissenting). Having so found, he then argued that the prosecutors' failure to disclose the juror's conduct prejudiced Phillips by preventing him from substituting an alternate juror. \textit{Id.} at 240 (Marshall, J., dissenting).
\textsuperscript{2639} 654 F.2d 1328 (9th Cir. 1981), \textit{cert. denied}, 454 U.S. 1157 (1982).
\textsuperscript{2640} \textit{Id.} at 1331.
\textsuperscript{2641} \textit{Id.} at 1336 n.6.
On appeal, the Ninth Circuit acknowledged that the comment was prohibited, but stated that it would reverse the conviction only if the comment could possibly have affected the verdict. The court then determined that the comment was a single isolated statement that did not stress any inference of guilt. Moreover, the trial judge gave a curative instruction. The court, therefore, held that the statement was "harmless beyond a reasonable doubt," and affirmed the conviction.

In United States v. Fleishman, defendant Fleishman alleged misconduct in the prosecutor's comments about the defendants' failure to testify and in an attempt by the prosecutor to shift the burden of proof to the defendants. The Ninth Circuit found both arguments meritless and affirmed the convictions of Fleishman and his two co-defendants on various charges related to possession and to distribution of cocaine. The court defined the test to determine the acceptability of prosecutorial comment on a defendant's failure to testify as "whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." The court held the prosecutor's com-

2642. Id. at 1336 (citing Griffin v. California, 380 U.S. 609, 613 (1965) (prosecutor's comments on defendant's failure to testify violates the fifth amendment's protection against self-incrimination)).
2643. 654 F.2d at 1336.
2644. Id. at 1336-37 (citing United States v. Passaro, 624 F.2d 938, 945 (9th Cir. 1980) (prosecutorial error not ground for reversal if court convinced it was harmless beyond a reasonable doubt), cert. denied, 449 U.S. 1113 (1981)).
2645. 654 F.2d at 1337.
2646. 684 F.2d 1329 (9th Cir. 1982).
2647. Id. at 1343.
2648. Id.
2649. Id. at 1332.
2650. Id. (citing United States v. Wasserteil, 641 F.2d 704, 709 (9th Cir. 1981) (quoting Knowles v. United States, 224 F.2d 168, 170 (10th Cir. 1955))).
2651. 684 F.2d at 1343-44. The allegedly objectionable comments were:

I want you to listen carefully to the defense lawyers and weigh the testimony in the light of their arguments, as well as in the light of the argument that I am making to you. For example: . . . [The prosecutor then described a number of suspicious actions of the defendants]. I would like you to listen very carefully to what the defense lawyers say about this. If they don't seem to . . . really resolve these questions, I think you can ask yourselves why not.

Id. at 1343 n.16 (citing R.T. 688-89).
ment on the defense’s failure to call witnesses was permissible because it was “not phrased as to call attention to defendant’s own failure to testify.”\footnote{2652}

With respect to Fleishman’s contention that the prosecutor improperly shifted the burden of proof,\footnote{2653} the court simply cited the record where the prosecutor said, “[the defendants] are not required to produce evidence, but they are allowed to produce evidence.”\footnote{2654} The court also noted that the trial court’s jury instructions were sufficient to cure any prejudice arising from the prosecutor’s allegedly impermissible comments.\footnote{2655}

In \textit{United States v. Tham},\footnote{2656} Tham claimed that the prosecutor improperly suggested that Tham had “fixed” a previous criminal case by influencing the trial judge in that case to grant his motion for a judgment of acquittal. Tham further claimed that during closing argument, the prosecutor improperly vouched for a witness’s credibility and improperly referred to the participation of others in the charges filed against Tham.\footnote{2657}

The Ninth Circuit, after restating the three-step analysis for determining prosecutorial misconduct, examined the record and found that the prosecutor had acted improperly by asking Tham if he had known the judge in the previous case and if he had ever done a favor for that judge.\footnote{2658} The court also found that Tham had preserved the issue for appeal.\footnote{2659} It concluded, however, that there was an insufficient showing of prejudice to reverse the conviction.\footnote{2660} The court doubted that a

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Well, ladies and gentlemen, the defense has no burden at all to bring forward evidence. If there was exculpatory evidence, . . . why didn’t the defense bring it in? They are not required to produce evidence, but they are allowed to produce evidence. And they can call any witness they think may help their case. If they had witnesses that would exculpate them, why didn’t they call these witnesses? . . . After all, they are in trial, and if they have exculpatory evidence they can present it to you, if they choose. Why didn’t that person testify, if there was such a person.
\end{quote}

\textit{Id.} (citing R.T. 789).
\footnote{2652} \textit{Id.} (citing United States v. Passaro, 624 F.2d 938, 944 (9th Cir. 1980), \textit{cert. denied}, 449 U.S. 1113 (1981)).
\footnote{2653} \textit{Id.} (citing United States v. Passaro, 624 F.2d 938, 944 (9th Cir. 1980), \textit{cert. denied}, 449 U.S. 1113 (1981)).
\footnote{2654} \textit{Id.} (citing United States v. Passaro, 624 F.2d 938, 944 (9th Cir. 1980), \textit{cert. denied}, 449 U.S. 1113 (1981)).
\footnote{2655} \textit{Id.} (citing United States v. Smith, 441 F.2d 539, 540 (9th Cir. 1971) (per curiam)).
\footnote{2656} \textit{Id.} at 857. At trial, Tham was convicted of fifteen counts of embezzlement of union assets and four counts of false entry in union records. \textit{Id.}
\footnote{2657} \textit{Id.} at 860-61. The court ruled that the questions were improper notwithstanding that Tham himself raised the issue of the previous trial and the previous judge’s rulings in acquitting him. \textit{Id.} at 861.
\footnote{2658} \textit{Id.}
\footnote{2659} \textit{Id.}
\footnote{2660} \textit{Id.}
reasonable juror would have inferred any improper conduct on Tham's part from the prosecutor's questions, and it concluded that it was more probable than not that the misconduct did not materially affect the jury's verdict.\textsuperscript{2661}

The court then found that no misconduct had occurred during closing argument.\textsuperscript{2662} Tham had first claimed that the prosecutor improperly vouched for the credibility of a witness by suggesting that the witness was telling the truth because his plea agreement with the Government so obligated him.\textsuperscript{2663} The court found no misconduct here because the prosecutor's argument was in rebuttal to defense counsel's attack on the witness's credibility,\textsuperscript{2664} and because the district judge admonished the jury to treat the testimony of a witness with immunity "with greater care than the testimony of an ordinary witness."\textsuperscript{2665} Tham had also claimed that the prosecutor's reference to the participation of others, such as the grand jury and the United States Attorney, in the charges against him was improper.\textsuperscript{2666} The court, however, found that the prosecutor's conduct was proper because Tham's counsel had argued that the charges were the result of a personal vendetta by the prosecutor, and thus the prosecutor was merely rebutting those charges.\textsuperscript{2667}

In \textit{United States v. West},\textsuperscript{2668} a defendant again claimed that the Government, during closing argument, improperly vouched for the credibility of a witness. Defendant West was convicted of bank rob-

\textsuperscript{2661} \textit{Id.} The court applied the standard used in \textit{United States v. Valle-Valdez}, 554 F.2d 911, 915-16 (9th Cir. 1977) (if prosecutorial misconduct found, error is reversible unless more probable than not that misconduct did not materially affect verdict).

\textsuperscript{2662} 665 F.2d at 862.

\textsuperscript{2663} \textit{Id.} at 861. Tham relied heavily for this argument on the court's earlier ruling in \textit{United States v. Roberts}, 618 F.2d 530 (9th Cir. 1980), \textit{cert. denied}, 452 U.S. 942 (1981), where a conviction was reversed based on the impropriety of a similar closing argument. In \textit{Roberts}, the prosecutor contended during the closing argument both that a Government witness was bound to tell the truth by his plea agreement, and, without any evidence in the record, that a Government agent was in the courtroom to monitor the witness's testimony. In reversing that conviction, the court held that a prosecutor cannot vouch for the credibility of a government witness by placing the prestige of the government behind him. \textit{Id.} at 533. The \textit{Tham} court distinguished \textit{Roberts} on the ground that in this case there was no contention that the prosecutor argued facts not in evidence. 665 F.2d at 862.

\textsuperscript{2664} \textit{Id.} at 862. In his closing argument, defense counsel had argued that the witness's plea agreement did not require him to tell the truth, but rather to testify favorably for the prosecution. \textit{Id.}

\textsuperscript{2665} \textit{Id.}

\textsuperscript{2666} \textit{Id.}

\textsuperscript{2667} \textit{Id.} (citing \textit{United States v. Polizzi}, 500 F.2d 856, 889-90 (9th Cir. 1974), \textit{cert. denied}, 419 U.S. 1120 (1975)).

\textsuperscript{2668} 680 F.2d 652 (9th Cir. 1982).
bery. During trial, the prosecutor asked a witness to identify West’s accomplice from a photospread. The prosecutor then allegedly saw West give the witness a hand signal indicating the number of the correct photograph. Defense counsel denied that a hand signal had been given, and the judge did not see it. The prosecutor, therefore, called as a witness an Assistant United States Attorney who had been in the courtroom and who testified that she had seen the signal given.

During closing argument, the prosecutor focused on the Assistant United States Attorney’s testimony to impugn the credibility of West and the witness involved in the signalling incident. The prosecutor bolstered the credibility of the Assistant United States Attorney by implying that as an officer of the court and member of the United States Attorney’s Office, she was telling the truth. The defense counsel did not object to the prosecutor’s comment at the time but waited until the jury was deliberating to make a mistrial motion.

The Ninth Circuit determined that the prosecutor’s closing argument had improperly suggested to the jury that the Assistant United States Attorney’s testimony was believable because of her relationship to the Government and the court. The court rejected the Government’s contention that the prosecutor’s comments in closing argument were in rebuttal to defense counsel’s statement to the jury that it should judge the witnesses’ actions and not rely on the Assistant United States Attorney’s testimony. The court noted that defense counsel’s statement had not questioned the veracity of a witness, but had only asked the jury to closely examine all the testimony.

2669. Id. at 654.
2670. Id.
2671. Id. at 655. The prosecutor had stated:

If you are willing to believe that an officer of this Court and a member of the U.S. Attorney’s Office is going to commit perjury, which is what she would have had to do, to believe that she never saw the Defendant signal the number five to the Witness then I would think that the whole case—that you would have doubt about the whole case, and that you would have to acquit the Defendant if you are willing to believe that; that this conviction is so important to the Government . . . that an officer of the U.S. Attorney’s Office would take that stand and commit perjury.

Id.

2672. Id. at 656 n.4.
2674. 680 F.2d at 656. Defense counsel had stated, “[a]nd you, ladies and gentlemen, are the judges of the actions of the Witnesses. You judge their demeanor. If you want to accept the Prosecutor’s statement that she saw a hand move, then you can. But, you were the individuals who were watching.” Id.
2675. Id. The court thus recognized that this was not a case where defense counsel made a direct attack on the Government, its conduct of the case, or the credibility or integrity of its
Finding that the closing argument was improper, the court then determined that it was sufficient error to require reversal.\footnote{2676} The court stated that it was compelled to reverse the conviction if it was more probable than not that the error materially affected the verdict.\footnote{2677} Even though the defendant's objection was not timely,\footnote{2678} the court applied the "more probable than not" harmless error rule\footnote{2679} rather than the more stringent "highly probable that the error materially affected the jury's verdict" plain error rule.\footnote{2680} This approach—the "more probable than not" standard—was used because the trial court had considered the defendant's mistrial motion on its merits rather than on its timeliness.\footnote{2681} The court noted that West's previous trial for the same crime had resulted in a hung jury, and that the principal difference in this second trial was the testimony of the witness and of the Assistant United States Attorney involved in the hand signalling inci-

witnesses or agents. In such cases otherwise improper vouching by the prosecution might be allowed. \textit{Id.} (citing Lawn v. United States, 355 U.S. 339, 359-60 n.15 (1957); United States v. Praetorius, 622 F.2d 1054, 1061 (2d Cir. 1979), \textit{cert. denied}, 449 U.S. 860 (1980); United States v. Bess, 593 F.2d 749, 757 n.11 (6th Cir. 1979); United States v. LaSorsa, 480 F.2d 522, 526 (2d Cir.), \textit{cert. denied}, 414 U.S. 855 (1973)). \textit{Cf.} United States v. Tham, 665 F.2d 855 (9th Cir. 1981), \textit{supra} note 2656. 2676. 680 F.2d at 657. 2677. \textit{Id.} (citing United States v. Valle-Valdez, 554 F.2d 911, 916 (9th Cir. 1977)). 2678. 680 F.2d at 656 n.4. 2679. \textit{Id.} at 657. For a discussion of the "harmless error" standard, see United States v. Valle-Valdez, 554 F.2d 911, 914-16 (9th Cir. 1977). 2680. United States v. Dixon, 562 F.2d 1138, 1143 (9th Cir.) (citing United States v. Segna, 555 F.2d 226, 231 (9th Cir. 1977)) (emphasis in original), \textit{cert. denied}, 435 U.S. 927 (1978). 2681. 680 F.2d at 656 (citing United States v. Dixon, 562 F.2d 1138, 1143 (9th Cir. 1977), \textit{cert. denied}, 435 U.S. 927 (1978)). In Dixon, defense counsel did not object to the prosecutor's improper comments during closing argument but waited until the jury retired to make a motion for mistrial. The judge denied the motion on its merits rather than on the fact that it was untimely. On appeal, the Ninth Circuit held that "[i]n these circumstances, we will apply the harmless error rule" rather than the plain error rule. \textit{Id.} at 1143. The Dixon court did not elaborate its reasoning for this holding.

In a special concurring opinion to West, Judge Wright stressed the "special circumstances" which warranted review and reversal even though the defendant's objection had been untimely. 680 F.2d at 657 (Wright, J., concurring). He noted that the key issue in the trial was witness credibility and that the prosecutor had overstepped her bounds by vouching for a witness's credibility. \textit{Id.} at 658. Although agreeing with the majority's reliance on Dixon, \textit{supra}, for justifying appellate review, he also implied that the misconduct was plain error and thus the conviction was reviewable absent a timely objection. \textit{Id.} It is unclear which standard of review, harmless error or plain error, Judge Wright would have applied in this case. However, in an earlier majority opinion, United States v. Roberts, 618 F.2d 530, 534 (9th Cir. 1980), \textit{cert. denied}, 452 U.S. 952 (1981), Judge Wright noted that "[v]ouching for a government witness in closing argument has often been held to be plain error, reviewable even though no objection was raised." \textit{Id.} (citing United States v. Ludwig, 508 F.2d 140, 143 (10th Cir. 1974)).
Since the second trial resulted in a conviction, the court concluded that it could not say that it was more probable than not that the error had no effect on the verdict. In dissent, Judge Meredith argued that the defense counsel's closing argument indirectly impugned the credibility of a Government witness and thus invited the prosecutor's comment vouching for the witness's veracity. He also argued that, even if the comment was improper, the defense counsel waived the right of review by not objecting at a time when the trial court could have removed the taint.

In *United States v. Saavedra*, the defendant contended that she was prejudiced by improper prosecutorial statements during closing argument. Saavedra was convicted of various charges stemming from a scheme in which prison inmates fraudulently obtained credit card numbers and then used these numbers to send money orders by wire to co-conspirators waiting at specific Western Union offices. Saavedra was one of the outside recipients of the money orders.

On appeal, Saavedra cited three statements in closing argument by the prosecutor which allegedly prejudiced her. First, the prosecutor had stated that David Porter, a cardholder whose number was fraudulently obtained and used, was the same person whose name appeared in one of the transactions as "David Burder." Second, the prosecutor had stated that Saavedra had used the alias "Hamly" when picking up some of the money orders. Third, the prosecutor had indicated that Saavedra had been in jail.

The Ninth Circuit dismissed Saavedra's first claim because the Government had offered evidence that "Porter" and "Burder" were the same person. The court dismissed her second claim, noting that while the reference to "Hamly" as an alias used by Saavedra was admittedly incorrect, the record contained several references to Saavedra's use of other aliases; thus the misstatements about "Hamly"...
constituted harmless error.\textsuperscript{2692} The court also noted that the trial judge had instructed the jury not to consider the closing arguments as evidence during their deliberations.\textsuperscript{2693} In considering Saavedra's third claim of misconduct, the Ninth Circuit stated that improper statements during closing argument "only require reversal where they are 'so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge.'"\textsuperscript{2694}

The trial judge in this case, following defense counsel’s objection, had instructed the jury to disregard the prosecutor’s statement and had stated that he could not recall any evidence that Saavedra had been in jail. The Ninth Circuit held that any prejudice had been neutralized by the trial judge's instruction, and it rejected Saavedra's claim.\textsuperscript{2695}

In \textit{United States v. Ochoa-Sanchez},\textsuperscript{2696} the defendant alleged prosecutorial misconduct when, during the testimony of his former attorney, the Government prosecutor attempted to establish that the attorney had withdrawn from the case because he believed that Ochoa-Sanchez would lie on the stand.\textsuperscript{2697} Ochoa-Sanchez was ultimately convicted of illegal importation and possession of a controlled substance with intent to distribute.\textsuperscript{2698}

On appeal, the Ninth Circuit upheld the conviction, acknowledging that the prosecutor’s question was probably improper.\textsuperscript{2699} The court stated that, "[p]rosecutorial misconduct must be evaluated in the context of the entire trial. It justifies reversal only when it denies the defendant a fair trial."\textsuperscript{2700} Because the improper question was an isolated incident in a trial lasting several days and the answer was favorable to Ochoa-Sanchez, and because Ochoa-Sanchez made no assertion that the Government acted in bad faith, the court held that Ochoa-Sanchez was not prejudiced.\textsuperscript{2701}

\textsuperscript{2692.} \textit{Id.}
\textsuperscript{2693.} \textit{Id.}
\textsuperscript{2694.} \textit{Id.} (quoting \textit{United States v. Parker}, 549 F.2d 1217, 1222 (9th Cir.), \textit{cert. denied}, 430 U.S. 971 (1977)).
\textsuperscript{2695.} 684 F.2d at 1299.
\textsuperscript{2696.} 676 F.2d 1283 (9th Cir.), \textit{cert. denied}, 103 S. Ct. 219 (1982).
\textsuperscript{2697.} \textit{Id.} at 1289.
\textsuperscript{2698.} \textit{Id.} at 1284.
\textsuperscript{2699.} \textit{Id.} at 1289.
\textsuperscript{2700.} \textit{Id.} (citing \textit{United States v. Ford}, 632 F.2d 1354, 1381 (9th Cir. 1980), \textit{cert. denied}, 450 U.S. 934 (1981)).
\textsuperscript{2701.} 676 F.2d at 1289 (citing \textit{United States v. Tham}, 665 F.2d 855, 860 (9th Cir. 1981); \textit{United States v. Berry}, 627 F.2d 193, 196-97 (9th Cir. 1980), \textit{cert. denied}, 449 U.S. 1113 (1981)).
In United States v. Spawr Optical Research, Inc., the defendants alleged prosecutorial misconduct during both the grand jury proceedings and trial. Spawr Optical Research, Inc., and two principals in that corporation, were convicted of various illegal export activities relating to the shipment of laser mirrors to the Soviet Union. The Spawrs alleged, with respect to the grand jury proceedings, that the Government failed to return some exculpatory evidence that they had submitted pursuant to subpoenas. They also alleged that during trial a Department of Defense attorney interfered with their expert witness and they were thus denied their rights to compulsory process and to confront witnesses. Finally, they alleged that an interview with one of the prosecutors, televised on the first day of jury deliberations, was prejudicial.

The Ninth Circuit briefly dismissed the first claim, stating that the Spawrs made no factual showing of misconduct during grand jury proceedings other than a “self-serving assertion . . . that the prosecution refused to disclose documents within its possession.” The court dismissed the Spawrs’ second claim, noting that while the Department of Defense attorney did speak with the witness during his cross-examination, it was on the witness’s initiative. The Ninth Circuit also noted that the attorney was not part of the prosecution team and was attending the trial only to answer possible questions concerning classified information. The court thus determined that the conversation with the witness was not interference. It then noted that while the attorney had returned to Washington, D.C. before the end of trial, the Spawrs did not show how this denied their rights to compulsory process or to confront witnesses.

Finally, the court dismissed the Spawrs’ last claim, noting that, while the broadcast did include film of the Spawrs leaving the courthouse, the prosecutor had made his comments three months earlier and did not mention the Spawrs or their case. Further, the trial judge, when notified of the upcoming broadcast, considered all the alternatives proposed by counsel to protect the jury from possible prejudice, including sequestration, and instructed the jury not to watch the news.

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2702. 685 F.2d 1076 (9th Cir. 1982), cert. denied, 103 S. Ct. 1875 (1983).
2703. Id. at 1078 n.1.
2704. Id. at 1082.
2705. Id.
2706. Id.
2707. Id.
2708. Id.
2709. Id.
or talk to anyone who might have viewed the broadcast. The Ninth Circuit found this sufficient protection for the Spawrs since it is assumed that the jury followed the judge’s instructions, absent a showing to the contrary.

The survey cases indicate that a defendant in the Ninth Circuit seeking to dismiss an indictment or overturn a conviction based on claims of prosecutorial misconduct faces a heavy burden since he must show not only prosecutorial error but also resultant prejudice. Of the nine cases surveyed here, the Ninth Circuit found prosecutorial error in five, but in only one, United States v. West, did the court find that the error resulted in prejudice requiring reversal. It is worth noting that the West court based its finding of prejudice on the fact that a previous trial of the same defendant, on the same charges, with the same evidence, but without the prosecutorial error, resulted in a hung jury. It is very rare that a defendant would have available such a clear demonstration of prejudice. More commonly, the court’s decision will follow from an examination of the facts of each case and a determination of whether the prosecutorial errors truly represented “fundamental unfairness” or a threat to “the integrity of the judicial process.”

E. Continuance

The grant of a continuance to a party in federal criminal practice is within the discretion of the trial court. Only when there is a claim of clear abuse of that discretion will an appellate court review the mat-

2710. Id.
2711. Id. (citing Fineberg v. United States, 393 F.2d 417, 419-20 (9th Cir. 1968) (jury presumed to have understood and followed the court’s instructions)).
2712. See, e.g., supra notes 2620-37 and accompanying text.
2713. 680 F.2d 652 (9th Cir. 1982). See supra notes 2668-83 and accompanying text.
2714. Id. at 657. See supra note 2682 and accompanying text.
2715. Compare United States v. Roberts, 618 F.2d 530, 535 (9th Cir. 1980) (conviction reversed because court could not say that prosecutor’s improper comments were harmless and the Government did not have strong case), cert. denied, 452 U.S. 942 (1981), supra note 2663, with United States v. Giese, 597 F.2d 1170, 1199, 1200 (9th Cir.) (conviction upheld where court found prosecutor’s improper comments would not have changed jury’s verdict because evidence was strong), cert. denied, 444 U.S. 979 (1979).
2716. United States v. Chanen, 549 F.2d 1306, 1311 (9th Cir.), cert. denied, 434 U.S. 825 (1977) (citing United States v. Leibowitz, 420 F.2d 39, 42 (2d Cir. 1969)). The Chanen court reviewed the facts of four cases where grand jury indictments were dismissed for prosecutorial misconduct and compared them to four others where the indictments were upheld. 549 F.2d at 1309-11.
2717. United States v. Hernandez, 608 F.2d 741, 746 (9th Cir. 1979) (citing Isaacs v. United States, 159 U.S. 487, 489 (1895)).
In United States v. Regner, the defendant was charged with mail fraud arising from a hospitalization claim for injuries suffered in a taxicab accident in Hungary. Prior to trial, Regner requested a six month continuance to enable him to gather evidence in Hungary. At the hearing on the continuance motion, defense counsel conceded that six months were probably not required. The trial court therefore granted only five weeks. Regner's counsel never asked for further continuances and went to trial immediately after the five weeks had elapsed. After conviction, Regner claimed that the district court was in error by not granting the six month continuance.

The Ninth Circuit held that because Regner neither required the full six months nor requested further continuances to gather evidence from Hungary, he could not claim he was prejudiced by going to trial at the end of the five week continuance.

In United States v. Coletta, defendant Castro and two co-defendants were convicted of conspiracy to distribute cocaine. After the verdict, but before sentencing, Castro discharged his attorney and another was appointed. Ten days after he was appointed and five days before the scheduled sentencing hearing, the new attorney moved for a continuance because he was unfamiliar with the facts of the case, had not seen the presentence report, and had not yet interviewed Castro. The district court denied the motion and sentenced Castro at the scheduled hearing. The judge assured Castro's attorney that he would entertain a motion for modification of the judgment if the attorney discovered grounds for such a motion. The judge also instructed the probation department to make available the presentence report. The attorney indicated that this was satisfactory.

On appeal, Castro claimed that the district court's denial of a continuance violated his due process rights, his right to counsel, and the requirements of Federal Rule of Criminal Procedure 32(c)(3)(A).

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2718. *Hernandez*, 608 F.2d at 746.
2719. 677 F.2d 754 (9th Cir.), cert. denied, 103 S. Ct. 220 (1982).
2720. *Id.* at 756.
2721. *Id.* at 757.
2722. *Id.*
2723. *Id.*
2724. 682 F.2d 820 (9th Cir. 1982), cert. denied, 103 S. Ct. 1187 (1983).
2725. *Id.* at 826.
2726. *Id.*
2727. *Id.* FED. R. CRIM. P. 32(c)(3)(A) provides in part:

Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation.
The Ninth Circuit rejected each of Castro's contentions. The court noted that Rule 32(c)(3)(A) requires the sentencing court to disclose the presentence report only if the defendant or his counsel requests disclosure. Since Castro's attorney did not make such a request before the sentencing hearing, "[h]is inability to review the report thus resulted from his own failure to act, not from the judge's refusal to grant a continuance."

The Ninth Circuit also rejected Castro's claim that his attorney's inability to effectively comment on the presentence report at the sentencing hearing deprived him of his right to counsel and due process. The court stated that while due process requires the judge to fairly consider information material to mitigation of punishment, it does not require disclosure of the presentence report. The court noted that since both Castro and his attorney had the opportunity to address the court prior to sentencing, and since the judge indicated that he would consider post-sentencing motions if justified by information the attorney discovered, Castro's due process rights were not violated.

Neither Regner nor Coletta presented facts which would impel the Ninth Circuit to contravene the long-standing rule that the trial court has discretion to grant continuances. In both cases the trial judges denied requested continuances but fashioned adequate procedures to safeguard the defendants' rights. Thus, the Ninth Circuit saw no abuse of discretion which would mandate reversal.

F. Admission of Evidence

1. Relevancy

   a. generally

   Evidence must meet the test of relevancy as set forth in the Federal Rules of Evidence in order to be admissible. It is not necessary that

exclusive of any recommendation as to sentence, . . .; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

2728. 682 F.2d at 827 (citing United States v. Winn, 577 F.2d 86, 92 (9th Cir. 1978)).
2729. 682 F.2d at 827.
2730. Id.
2731. Id. (citing United States v. Doe, 655 F.2d 920, 927 (9th Cir. 1981); United States v. Wolfson, 634 F.2d 1217, 1221-22 (9th Cir. 1980)).
2732. 682 F.2d at 827 (citing Williams v. New York, 337 U.S. 241, 249-51 (1949)).
2733. 682 F.2d at 827.
2734. FED. R. EVID. 401 provides that "[r]elevant evidence means evidence having any
a given item of evidence be directed towards a disputed fact, but merely towards a fact which is of consequence to the determination. Evidence that is essentially background in nature is universally admitted as an aid to understanding.\textsuperscript{2735} The Ninth Circuit recently considered several cases in which defendants argued that the trial court erred in admitting or excluding certain evidence on the ground of relevancy.

In \textit{United States v. Astorga-Torres},\textsuperscript{2736} the defendants were convicted of possessing and distributing heroin. The defendants had been arrested after attempting to sell drug enforcement agents heroin, which they had packaged in condoms bearing the date December 1979. After the arrest, the DEA agents retrieved three more condoms from the septic tank servicing the defendants' motel room. One of the condoms contained heroin, while the remaining two bore the date December 1979. The defendants sought to suppress this evidence on the ground that their connection to it was so tenuous as to be irrelevant.\textsuperscript{2737}

The Ninth Circuit, however, determined that the evidence was relevant because it was unlikely that anyone else would have found it necessary to dispose of like items during the relevant time span. Thus, it held that the evidence was admissible against the defendants, and its weight as proof was a determination for the jury.\textsuperscript{2738}

In \textit{United States v. Federico},\textsuperscript{2739} the defendants were convicted of conspiring to possess and distribute cocaine. Federico challenged the admission into evidence of certain items, including a pair of binoculars and a notebook containing an alleged accomplice's name and phone number, and also possible drug notations.\textsuperscript{2740}

The Ninth Circuit determined that the evidence met the threshold level of relevancy in making it more probable than not that Federico had conspired to distribute drugs.\textsuperscript{2741} The court not only found that the evidence was admissible as bearing on Federico's knowledge and familiarity with drugs and drug transactions but that the evidence was noncumulative.\textsuperscript{2742} Therefore, it held that the trial judge did not abuse his discretion in determining that the probative value of the evidence

\textsuperscript{2735.} FED. R. EVID. 401 advisory committee note.
\textsuperscript{2736.} 682 F.2d 1331 (9th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 455 (1983).
\textsuperscript{2737.} \textit{Id.} at 1335.
\textsuperscript{2738.} \textit{Id}.
\textsuperscript{2739.} 658 F.2d 1337 (9th Cir. 1981).
\textsuperscript{2740.} \textit{Id.} at 1341.
\textsuperscript{2741.} \textit{Id.} at 1342.
\textsuperscript{2742.} \textit{Id}.
outweighed its prejudicial effect.\textsuperscript{2743} 

In his dissenting opinion, Circuit Judge Alarcon stated that the admission by the district court of this circumstantial evidence was prejudicial.\textsuperscript{2744} He noted that although the evidence was probative of Federico's knowledge of drugs and possible intent to engage in drug dealings, neither the notebook nor the binoculars had any probative value on the core issue of whether Federico conspired to commit the particular crime alleged. Judge Alarcon determined that he would hold the evidence inadmissible as irrelevant to prove that Federico agreed to the conspiracy with which he was charged.\textsuperscript{2745} 

In \textit{United States v. Barnett},\textsuperscript{2746} the defendant was charged with aiding and abetting Donald Hensley in the attempted manufacture of phencyclidine and with using the United States mails to facilitate the commission of this crime. The district court granted Barnett's motion to suppress certain evidence seized in a search of his residence, including instructions for the manufacture of phencyclidine and other drugs, catalogs of controlled substances, manufacturing instructions, mailing lists for alleged drug related correspondence, and business correspondence sent or received by the United News Service operated by Barnett.\textsuperscript{2747} In granting the motion, the district court reasoned that none of the items seized in the search of Barnett's residence were "contraband, evidence of criminal activity, or connected with criminal activity."\textsuperscript{2748} 

The Ninth Circuit, however, held that the items seized were admissible as relevant evidence in aiding the Government's prosecution.\textsuperscript{2749} It stated that although the items in the search warrant did not

\begin{enumerate}
\item \textsuperscript{2743} \textit{Id.} (citing United States v. Martin, 599 F.2d 880, 889 (9th Cir.), cert. denied, 441 U.S. 962 (1979)).
\item \textsuperscript{2744} 658 F.2d at 1344 (Alarcon, J., dissenting).
\item \textsuperscript{2745} \textit{Id.} at 1347 (citing United States v. Bosley, 615 F.2d 1274, 1277-78 (9th Cir. 1980) (a prior delivery of cocaine by the defendant outside the scope of the alleged conspiracy was inadmissible to prove defendant's connection with the conspiracy)).
\item \textsuperscript{2746} 667 F.2d 835 (9th Cir. 1982).
\item \textsuperscript{2747} \textit{Id.} at 837-38. Barnett was linked to the alleged crime following the arrest of Donald Hensley who was charged with attempted manufacture of phencyclidine. \textit{Id.} at 838-39. Hensley admitted forwarding a postal money order to United News Service for instructions regarding the manufacture of phencyclidine; he pleaded guilty to attempted manufacture of phencyclidine. \textit{Id.} at 838. Agent Sherrington of the DEA obtained the cancelled money order from the Postal Inspector's Office and found that it was endorsed by a G. Barnett and stamped "United News Service." \textit{Id.} at 839. Under an assumed name, Agent Sherrington sent the United News Service a money order requesting instructions to manufacture phencyclidine, and later received many of the same documents about how to manufacture phencyclidine. \textit{Id.} Based on these facts and others, a search warrant was issued listing items which were then seized from Barnett's apartment. \textit{Id.} at 839-40.
\item \textsuperscript{2748} \textit{Id.} at 838.
\item \textsuperscript{2749} \textit{Id.} at 843 (citing Warden v. Hayden, 387 U.S. 294 (1967) (mere evidence could be
directly relate to Barnett's transactions with Hensley, the evidence was highly relevant to prove Barnett's knowledge, intent, and identity as the perpetrator.\textsuperscript{2750}

In \textit{United States v. Skinner},\textsuperscript{2751} the defendant was convicted of first degree murder. His defense was that his fear of his victim caused him to carry a gun while visiting the victim.\textsuperscript{2752} In considering whether the trial court abused its discretion by excluding evidence of the reason Skinner hated his victim, the Ninth Circuit held that Skinner's reasons for hating his victim were irrelevant to his alleged claim of self-defense and would have only served to harm his case by tending to show premeditation and malice.\textsuperscript{2753}

In \textit{United States v. Hanigan},\textsuperscript{2754} the defendant was convicted of aiding and abetting a robbery affecting commerce.\textsuperscript{2755} Hanigan contended on appeal that the district court erroneously excluded, on the ground of irrelevance, five photographs of a cattle-crossing culvert near the ranch where the crimes occurred.\textsuperscript{2756} In affirming the district court's findings, the Ninth Circuit held that these photographs were irrelevant because none of the evidence presented to the jury placed the victim near this particular culvert.\textsuperscript{2757}

The preceeding cases demonstrate that the Ninth Circuit will uphold the admission of evidence not only when it renders it more probable than not that the defendant committed the particular crime alleged but also when it tends to show the defendant's intent or knowledge. Although the majority of the \textit{Federico} court stated that the evidence in question was relevant because it made it more probable than not that the defendant committed the alleged crime,\textsuperscript{2758} the dissent's reason-
ing\textsuperscript{2759} foreshadowed the Ninth Circuit's later reasoning in \textit{Barnett} that the evidence need only show general knowledge of criminal activity to be admissible. Finally, the Ninth Circuit will not reverse a conviction, even when arguably relevant evidence was excluded, if admission of that evidence would have prejudiced the defendant's case.

\begin{itemize}
\item \textit{b. authentication of evidence}
\end{itemize}

The Federal Rules of Evidence require as a condition precedent to admissibility that evidence be "sufficient to support a finding that the matter in question is what its proponent claims."\textsuperscript{2760} This threshold determination of identification and authentication is reviewable only for an abuse of discretion.\textsuperscript{2761}

In \textit{United States v. Kaiser},\textsuperscript{2762} the defendants were convicted of conspiracy to distribute, distribution, and possession with intent to distribute heroin.\textsuperscript{2763} At trial, the Government used the testimony of DEA agent Taylor to provide the necessary foundation for the authentication and identification of several of its exhibits. Taylor's testimony, however, later was stricken. The defendants argued that retention of the exhibits as evidence, in the absence of Taylor's testimony, constituted an abuse of discretion.\textsuperscript{2764}

The Ninth Circuit found that the district court's refusal to strike three of the Government's exhibits was an abuse of discretion.\textsuperscript{2765} It noted that one of the exhibits had been identified \textit{only} by Taylor's excluded testimony. The remaining two exhibits had been identified by both Taylor and an informant, but the informant's extremely equivocal identification, standing alone, was insufficient to provide an adequate foundation.\textsuperscript{2766} The court also stated that, in spite of its determination that the district court erred in striking Taylor's testimony, it could not now consider his testimony in evaluating the adequacy of the exhibits' identification, because this would effectively deny the defendants their

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\item \textsuperscript{2759} \textit{Id.} at 1347 (Alarcon, J., dissenting).
\item \textsuperscript{2760} \textit{Fed. R. Evid.} 901(a).
\item \textsuperscript{2761} \textit{United States v. Hearst}, 563 F.2d 1331, 1349 (9th Cir. 1977), \textit{cert. denied}, 435 U.S. 1000 (1978).
\item \textsuperscript{2762} 660 F.2d 724 (9th Cir. 1981), \textit{cert. denied sub nom.} House v. United States, 455 U.S. 956 (1982).
\item \textsuperscript{2763} \textit{Id.} at 728.
\item \textsuperscript{2764} \textit{Id.} at 731. The testimony was stricken because it purportedly violated the Jencks Act, 18 U.S.C. \textsection 3500 (1976). The Jencks Act requires, in part, that written statements by government witnesses be signed or at least approved by the witness.
\item \textsuperscript{2765} 660 F.2d at 731.
\item \textsuperscript{2766} \textit{Id.}
right to cross-examine Taylor. 2767

**c. chain of custody**

In order for certain evidence to be admissible, the proponent must show that the evidence is in substantially the same condition as it was when the crime was committed. 2768 This chain of custody must be established when the evidence is of a type which can be easily confused or tampered with or is not readily identifiable. Factors in determining admissibility include "the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." 2769 The trial court's determination on the adequacy of the chain of custody will not be overturned absent an abuse of discretion. 2770

In *United States v. Kaiser*, 2771 defendants Kaiser and Acosta were each convicted of one count of distributing heroin. They contended that their convictions should be reversed because there was an inadequate chain of custody established for the heroin exhibits admitted against them. 2772

With respect to Acosta, the Ninth Circuit found no evidence that the heroin had been mishandled or tampered with in any manner. It stated that the district court appeared justified in presuming that the heroin was properly mailed to the lab, and that at least two of the three balloons of heroin admitted against Acosta were positively identified by both the deputy and the chemist sufficiently to uphold his conviction. 2773

With respect to Kaiser, the Ninth Circuit found that the gap in time between the mailing of the heroin and the chemist's examination of it was insignificant in light of the presumption of regularity accorded the procedures of the DEA laboratory and the absence of any evidence of impropriety. 2774 The court stated that the chemist's later testimony rendered any error in admission harmless. 2775 Finally, the court found no evidence that the removal of portions of the heroin by a DEA agent

2767. *Id.* (citing Davis v. Alaska, 415 U.S. 308 (1974)).
2768. *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960).
2769. *Id.*
2770. *Id.*
2772. *Id.* at 733.
2773. *Id.*
2774. *Id.* (citing Gallego, 276 F.2d at 917).
2775. 660 F.2d at 733-34.
or by an informant in any way altered the composition of the substance ultimately tested by the chemist.2776 Thus, the court held that there was no abuse of discretion by the district court in admitting the heroin as an exhibit against either Acosta or Kaiser.2777

2. Prejudice

a. generally

Relevant evidence admissible under the Federal Rules of Evidence may be excluded if its probative value is substantially outweighed by the possibility of unfair prejudice.2778 Unfair prejudice "means an undue tendency to suggest decision on an improper basis."2779 Relevant evidence may also be excluded when its probative value is outweighed by considerations of undue delay, waste of time, needless presentation of cumulative evidence, confusion of the issues, or misleading the jury.2780 The trial judge has wide discretion in determining if relevant evidence should nonetheless be excluded, and his or her determinations will not be disturbed on appeal absent an abuse of discretion.2781 The Ninth Circuit recently considered whether the evidence in certain cases should have been excluded because of the possibility of unfair prejudice or the lack of necessity for its presentation.

In United States v. Andrini,2782 the defendant was convicted of the malicious destruction of a building by means of explosives. The building was set afire with gasoline-filled water jugs ignited by cigarettes and a pyrotechnic fuse.2783 At trial, a witness testified that shortly after the arson Andrini had told him that the best way to start a large fire was by igniting a rag stuffed in a plastic bottle filled with gasoline. Andrini argued on appeal that this testimony was inadmissible under Rules 404(b) and 403 because it shifted the jury's focus away from the crime charged and pictured him as a pyromaniac.2784

2776. Id. at 734.
2777. Id.
2778. FED. R. EVID. 403.
2779. Id. advisory committee note. For example, an undue tendency to render a decision on an emotional basis would demonstrate unfair prejudice.
2780. FED. R. EVID. 403.
2782. 685 F.2d 1094 (9th Cir. 1982).
2783. Id. at 1095.
2784. Id. at 1096.
The Ninth Circuit found no abuse of discretion by the trial court in admitting the testimony. The court stated that the evidence showed that Andrini possessed a special skill which was used in the commission of the arson, and that it was probative in identifying Andrini as the perpetrator. It further stated that the prejudicial effect of the evidence was not sufficient to outweigh its probative value.

In United States v. Bailleaux, the defendant was convicted of conspiracy to interfere with commerce and attempted extortion. Bailleaux argued that the trial court should have excluded substantive evidence of his prior criminal conduct because it was "prejudicial." The Ninth Circuit found no abuse of discretion by the trial court. The court stressed that the issue was not whether evidence was prejudicial, but whether evidence was unfairly prejudicial; therefore, the more highly probative the evidence is, the greater the showing of prejudice required to exclude it. The court also stated that the trial court must consider both the need for evidence of prior criminal conduct to prove a particular point and the jury's difficulty in distinguishing the probative from the prejudicial aspects of the evidence.

In spite of the considerable danger of unfair prejudice in Bailleaux's case, the court held that the evidence was admissible. The Ninth Circuit premised its holding on the facts that the evidence was highly relevant to prove Bailleaux's modus operandi and identity and that the district court had instructed the jury twice as to the limited

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2785. *Id.* at 1097.
2786. *Id.* See United States v. Barrett, 539 F.2d 244, 248-49 (1st Cir. 1976) ("familiarity with burglar alarms relevant where alarm bypass was distinctive feature of burglary"); United States v. Campanile, 516 F.2d 288, 293 (2d Cir. 1975) ("experience in fencing coins relevant in large coin theft").
2787. 685 F.2d 1105 (9th Cir. 1982).
2788. *Id.* at 1109-10.
2789. *Id.* at 1112.
2790. *Id.* at 1111.
2791. *Id.* at 1112 (citing United States v. Lawrance, 480 F.2d 688, 691-92 n.6 (5th Cir. 1973); C. McCormick, McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 190, at 453 (2d ed. 1972)).

The Government had a substantial need for the evidence of the prior criminal conduct because it tended to prove the extortionist's identity. The Government lacked any direct evidence on this point. 685 F.2d at 1112 n.4.
2792. *Id.* at 1112.
2793. *Id.*
2794. *Id.* Both the charged offense and Bailleaux's prior criminal conduct involved an extortion attempt whereby the perpetrator poisoned a store's food items and then demanded diamonds to forestall further poisonings. The poisonous substance, the wording of the extortion notes, the instructions for contacting the extortionist, and the procedure for leaving the extortion payment were all strikingly similar in both incidents. *Id.* at 1110.
purpose for which the evidence could be used.\textsuperscript{2795}

In \textit{United States v. Booth},\textsuperscript{2796} the Government appealed the district court's pretrial orders excluding evidence of a list of gun stores and ammunition. Booth was charged with bank robbery. The Government offered this evidence to prove that he used a loaded weapon, thereby endangering people's lives during the commission of the bank robbery. In order to convict the defendant of placing others in danger during the commission of a bank robbery, the Government was required to establish that at least one of the weapons was loaded.\textsuperscript{2797}

The Ninth Circuit held that the trial judge abused his discretion in excluding this evidence.\textsuperscript{2798} The court stated that the evidence was not rendered inadmissible simply because it was prejudicial.\textsuperscript{2799} It noted the distinction between prejudicial evidence and evidence which creates "unfair prejudice," the latter being inadmissible under Rule 403.\textsuperscript{2800} The court concluded that there was no danger of unfair prejudice which substantially outweighed the relevance of the list.\textsuperscript{2801}

In \textit{United States v. Wright},\textsuperscript{2802} the defendant was convicted of tax evasion.\textsuperscript{2803} Wright argued that the trial court abused its discretion by admitting certain narcotics evidence which he claimed was more prejudicial than probative. The Ninth Circuit stated that the Government may offer evidence in a tax evasion case which tends to prove that the defendant's increase in net worth is attributable to currently taxable income.\textsuperscript{2804} The Ninth Circuit found the drug-related evidence relevant to show Wright's possible involvement in the drug trade as a likely

\textsuperscript{2795} Id. Evidence of prior criminal conduct cannot be used to show that the defendant is likely to have committed the crime charged, but may be considered for other purposes such as motive, opportunity, intent, preparation, plan, knowledge and identity. \textit{Fed. R. Evid.} 404(b).

\textsuperscript{2796} 669 F.2d 1231 (9th Cir. 1981).

\textsuperscript{2797} Id. at 1239-40. 18 U.S.C. § 2113(d) proscribes the jeopardizing of a person's life by the use of a dangerous device during the commission of a bank robbery.

\textsuperscript{2798} Id. at 1239. The district court excluded the evidence because it was highly prejudicial and of little probative value due to the following: (1) the list was not in Booth's handwriting; (2) it was not found within the immediate area of Booth's other possessions; (3) it did not have Booth's fingerprints on it; and (4) the Government failed to show a connection between the list and Booth. \textit{Id.}

\textsuperscript{2799} Id. at 1240 (citing \textit{United States v. Mahler}, 452 F.2d 547, 548 (9th Cir. 1971), \textit{cert. denied}, 405 U.S. 1069 (1972)).

\textsuperscript{2800} 669 F.2d at 1240.

\textsuperscript{2801} \textit{Id.}

\textsuperscript{2802} 667 F.2d 793 (9th Cir. 1982).

\textsuperscript{2803} \textit{Id.} at 795.

\textsuperscript{2804} \textit{Id.} at 795. 667 F.2d at 799-800 (citing \textit{Holland v. United States}, 348 U.S. 121, 137-38 (1954) (evidence in tax evasion trial can be used to support inference that increase in net worth is attributable to currently taxable income)).
source of income. The court therefore concluded that the challenged evidence was sufficiently probative and that the trial judge did not abuse his discretion in admitting the evidence.

In United States v. Regner, the defendant was convicted of mail fraud. On cross-examination of Regner, the Government was permitted, over the defendant's objection, to inquire into Regner's prior claims for and receipt of various insurance benefits. The district court admitted the evidence for the limited purpose of rebutting Regner's testimony of his unfamiliarity with insurance claims. On appeal, Regner argued that any probative value of the evidence was outweighed by its prejudicial effect of casting him as a "scourge upon society." The Ninth Circuit held that there was no abuse of discretion by the trial judge because the evidence was probative of Regner's familiarity with insurance claims.

2805. Id. at 800.
2806. 667 F.2d at 800. Wright relied on United States v. Hall, 650 F.2d 994, 997 (9th Cir. 1981), for the proposition that special protections for the defendant as well as careful scrutiny by the courts are required in a net worth case. 667 F.2d at 800. The court found Wright's reliance misplaced because Hall involved prejudice arising from failure to give key jury instructions rather than from a determination of the relevancy of certain evidence. Id.

2807. 677 F.2d 754 (9th Cir.), cert. denied, 103 S. Ct. 220 (1982).
2808. Id. at 755.
2809. 677 F.2d at 756.
2810. Id.
2811. Id.
2812. Id. The court also rejected Regner's argument that the questioning concerning prior insurance claims was beyond the scope of direct examination, because the examination related to, and was probative of Regner's familiarity with filing insurance claims. Id. The Ninth Circuit rejected Regner's claim that the district court erred in failing to give an immediate instruction to the jury with respect to the limited admissibility of the evidence of his prior insurance claims. Id. at 757.

Finally, the court reserved judgment on the Government's argument that evidence of the prior insurance claims was admissible under Rule 404(b) because it was probative of similar acts, thus demonstrating either motive, intent, plan, preparation or identity. Id. at 756.

The Ninth Circuit also reserved judgment in United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981), cert. denied, 102 S. Ct. 1031 (1982), on whether particular evidence was more prejudicial than probative. Defendants Rasheed and Phillips were convicted of federal mail fraud. Id. at 845. At trial, the Government submitted into evidence computerized summaries of the defendants' financial records. Id. at 849. The defendants argued that these summaries were inadmissible under Rule 403 because the "scientific aura" they created was more prejudicial than probative. They also argued that the summaries were inadmissible under Rule 1006 because some of the summaries were based on inadmissible documents. Id. at 850.

The Ninth Circuit stated that "even if there was error [in admitting the summaries,] it was harmless unless it [was] more probable than not that the error materially affected the verdict." Id. (citing United States v. Valle-Valdez, 554 F.2d 911, 915-16 (9th Cir. 1977)). The court concluded that because there was substantial evidence other than the summaries
In *United States v. Hooton*, the defendant was convicted of engaging in the business of dealing in firearms without a federal license. On appeal, Hooton argued that the trial court abused its discretion in suppressing evidence of testimony by gun collectors, gun dealers, and agents of the Bureau of Alcohol, Tobacco, and Firearms on trading activities of a typical hobbyist collector.

The Ninth Circuit noted that despite the trial court's ruling, defense counsel elicited extensive testimony from approximately twenty prosecution and defense witnesses concerning the activities of gun collectors. Thus, the court held that the trial judge did not abuse his discretion by excluding evidence which was cumulative and only "marginally relevant."

These decisions indicate that the Ninth Circuit strictly construes the exclusionary scope of Rule 403. The court looks to the totality of the evidence admitted to determine the effect of specific evidence on the defendant's trial. Although evidence may be prejudicial, the important determination is whether it is unfairly prejudicial so that its admission constitutes an abuse of discretion by the trial court. The Ninth Circuit appears more likely to exclude evidence which is cumulative and only marginally probative than that which is highly probative yet prejudicial.

**b. unfair surprise**

Under the Federal Rules of Evidence, unfair surprise is not recognized as a ground for exclusion of relevant evidence. The reasons for this lack of recognition are that modern procedural requirements render claims of unfair surprise highly dubious, and the granting of a continuance is considered a more appropriate remedy.

In *United States v. Hanigan*, the defendant was convicted on retrial of aiding and abetting a robbery affecting commerce. On appeal, Hanigan argued that the trial court abused its discretion in admitting...
ting at his second trial the testimony of a witness who had not testified at his first trial. Hanigan did not contend that the evidence was inadmissible, but rather that he was unfairly surprised because he was not notified of the proposed testimony until mid-trial. The district court admitted the testimony based on its findings that the Government had acted in good faith and Hanigan had failed to prove he was prejudiced by admission of the testimony.

In affirming the district court's decision, the Ninth Circuit stated that Hanigan had not established any prejudicial surprise. It noted that the Government had given the witness' statement to defense counsel as soon as it was available, and the district court had conducted a preliminary conference at which it found much of the testimony inadmissible. Finally, Hanigan vigorously attacked the witness' credibility through his own arguments and the use of other witnesses who contradicted the testimony. Thus, the court held that there was no abuse of discretion.

3. Character

Evidence of other crimes, wrongs, or acts by an accused are inadmissible to prove that the accused acted in conformity with a unique character trait. However, the same evidence may be admissible to show preparation, intent, knowledge, opportunity, identity, motive, plan or absence of mistake or accident. The discretion to admit or exclude such evidence resides in the trial judge, and his decision will be reversed on appeal only if he has abused his discretion. The Ninth Circuit has recently considered several cases in which it was necessary to determine whether evidence of prior acts was admissible according to the above criteria.

In United States v. Andrini, the defendant was convicted of arson by setting a building afire with "four gasoline-filled water jugs ignited by cigarettes and a pyrotechnic fuse." At trial, a witness

2822. Id. at 1132.
2823. Id.
2824. Id.
2825. FED. R. EVID. 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
2826. Id.
2828. 685 F.2d 1094 (9th Cir. 1982).
2829. Id. at 1095.
testified that shortly after the arson, Andrini told him that the best way to start a large fire was to stuff a rag in a plastic bottle filled with gasoline and ignite it. On appeal, Andrini argued that this testimony was inadmissible character evidence under Rule 404(b) of the Federal Rules of Evidence.

The Ninth Circuit held that the district court did not abuse its discretion in admitting the testimony. Although doubting that Andrini's "plastic-bottle" statement could be considered evidence of an "act" under Rule 404(b), the court held that the evidence was admissible as proof of the identity of the perpetrator. The court stated that under the identity exception to Rule 404(b), "the characteristics of both the act and the offense must be sufficiently distinctive to warrant an inference that the same person committed both the act and the offense." The Ninth Circuit concluded that the device described by the witness and the device used in the arson were sufficiently distinctive to warrant an inference that Andrini committed the arson.

In United States v. Bailleaux, the defendant was convicted of conspiring to interfere with commerce. Bailleaux contended that the district court committed reversible error by admitting evidence relating to (1) Bailleaux's prior conviction of a similar offense in Oregon, and (2) the acts on which the Oregon conviction was based.

The Ninth Circuit first stated that evidence of prior criminal conduct is admissible under Rule 404(b) only if: (1) there is clear and convincing proof that the defendant committed the prior crime; (2) the prior crime is not too remote in time from the charged offense; (3) the prior criminal conduct is similar to the offense charged; and (4) the prior crime is introduced to prove an element of the charged offense which is a material issue in the case. With respect to the introduction into evidence of Bailleaux's prior conviction, the court concluded

2830. Id. at 1096.
2831. Id. See supra note 2825.
2832. 685 F.2d at 1097.
2833. Id.
2834. Id. (citing United States v. Powell, 587 F.2d 443, 448 (9th Cir. 1978)).
2835. 685 F.2d at 1097. The Ninth Circuit pointed out that both devices consisted of perforated gasoline-filled bottles which were ignited by some type of fuse inserted in one of the perforations. Id. The only notable difference is that one device was to be thrown and the other was to remain stationary.
2836. 685 F.2d 1105 (9th Cir. 1982).
2837. Id. at 1109.
2838. Id. at 1109-10 (citing United States v. Herrera-Medina, 609 F.2d 376 (9th Cir. 1979); United States v. Myers, 550 F.2d 1036 (5th Cir. 1977), cert. denied, 439 U.S. 847 (1978); United States v. Frederickson, 601 F.2d 1358 (8th Cir.), cert. denied, 444 U.S. 934 (1979)).
that it need not determine whether the four-part test had been satisfied. The Ninth Circuit reasoned that it was Bailleaux himself who first offered evidence of his prior conviction while testifying on direct examination.\textsuperscript{2839} Thus, the court determined that Bailleaux could "not object to the Government’s subsequent inquiries into the relevant aspects of his prior conviction."\textsuperscript{2840}

With respect to the evidence of the acts upon which Bailleaux’s prior conviction was based, the court also found no abuse of discretion. The Ninth Circuit determined that the Government had met each requirement of the four-part test,\textsuperscript{2841} and that the evidence was, therefore, admissible to show both modus operandi and the identity of the perpetrator.\textsuperscript{2842}

In \textit{United States v. Hooton},\textsuperscript{2843} the defendant was convicted of trading in firearms without a federal license. Hooton argued that the trial court erred in admitting evidence of three acts for which he was not charged: (1) a sale of firearms prior to the indictment period; (2) a business arrangement concerning the ordering of guns for resale; and (3) an involvement in assisting another individual in distributing guns.\textsuperscript{2844} The Government argued that the evidence was admissible to show both intent and a common plan or scheme to acquire guns for the purpose of selling rather than collecting them.\textsuperscript{2845} Hooton alleged that his intent was immaterial because his "collector" defense was based on the fact that the nature and number of his gun-related activities were insufficient to prove he was a dealer.\textsuperscript{2846} In addition, Hooton claimed the evidence of other acts was inadmissible to prove a common scheme because it was completely unrelated to the acts for which he was on trial.\textsuperscript{2847}

The Ninth Circuit determined that Hooton’s intent to deal in firearms, as opposed to his intent to merely enhance his gun collection, was

\textsuperscript{2839} 685 F.2d at 1110.
\textsuperscript{2840} \textit{Id}.
\textsuperscript{2841} The court noted that: (1) the Government produced several witnesses who testified that Bailleaux committed the Oregon crimes, (2) the Oregon offenses were committed ten days prior to the crimes in question, (3) the crimes were strikingly similar both in nature and in the manner in which they were committed, and (4) the Government introduced the evidence in order to establish Bailleaux’s modus operandi and identity. \textit{Id} at 1111.
\textsuperscript{2842} \textit{Id} at 1112.
\textsuperscript{2843} 662 F.2d 628 (9th Cir. 1981), \textit{cert. denied}, 455 U.S. 1004 (1982).
\textsuperscript{2844} \textit{Id} at 634.
\textsuperscript{2845} \textit{Id}.
\textsuperscript{2846} \textit{Id}.
\textsuperscript{2847} \textit{Id}.
an integral issue in the case. The court set forth the following three-part test for determining the admissibility of evidence of other acts to prove intent under Rule 404(b): “1) the prior act is similar and close enough in time to be relevant, 2) the evidence of the prior act is clear and convincing, and 3) the probative value of the evidence outweighs any potential prejudice.” The court held that the trial court had not abused its discretion by admitting the evidence for the limited purpose of proving intent because the evidence of the other acts satisfied all three criteria.

In United States v. Skinner, the defendant was convicted of first degree murder. At trial, a Government witness testified on cross-examination that Skinner had previously pulled a gun on him. Skinner argued that the trial court abused its discretion by refusing to strike this testimony, or by failing to give a limiting instruction regarding the testimony.

The Ninth Circuit found no abuse of discretion, stating that the testimony, although improper, was neither the product of direct questioning by the Government, nor the result of any impropriety on the Government’s part. The court also noted that the defense had

2848. Id. at 635 (citing United States v. Angelini, 607 F.2d 1305, 1309-11 (9th Cir. 1979)). The court noted that "even in general intent crimes, the government can offer evidence of other acts as part of its case-in-chief when it is obvious that the defense will raise lack of intent as a defense." 662 F.2d at 635 (citing United States v. Hearst, 563 F.2d 1331, 1337-38 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978)). The court noted further that Hooton would obviously raise lack of intent as a defense because he had raised a "collector" defense at his first trial and defense counsel's opening statement at the second trial implied that the same defense would be raised again. 662 F.2d at 635.

2849. 662 F.2d at 635 (citing United States v. Bronco, 597 F.2d 1300, 1302-03 (9th Cir. 1979); United States v. Brashier, 548 F.2d 1315, 1325 (9th Cir. 1976), cert. denied, 429 U.S. 1111 (1977)).

2850. 662 F.2d at 635. The court determined that the other acts consisted of the same type of transaction as the crime charged, and that they occurred immediately prior to or contemporaneously with the indictment period. Id. The Ninth Circuit further stated that evidence of the prior acts was clear and convincing because Hooton failed to attack the evidence of the gun sales at the pretrial hearing, stipulated to the existence of the resale business arrangement, and admitted his involvement in gun distribution in a tape-recorded interview with a federal agent. Id. Finally, the court concluded that evidence of the other acts was merely probative of intent and not significantly prejudicial because an individual gun sale is not a crime absent an overall scheme of unlicensed gun dealing. Id.

2851. 667 F.2d 1306 (9th Cir. 1982) (per curiam).

2852. Id. at 1310.

2853. Id. (citing United States v. Green, 648 F.2d 587 (9th Cir. 1981) (per curiam); United States v. Aims Back, 588 F.2d 1283 (9th Cir. 1979)). In Green, the defendants were convicted of conspiring to obstruct justice, conspiring to make false statements, and conspiring to violate citizens’ civil rights. 648 F.2d at 589. The Ninth Circuit held that the trial court abused its discretion by admitting the testimony of a Government witness on direct examination and by failing to give the proper limiting instruction regarding the testimony. Id. at
called another witness who explained and mitigated Skinner's prior act.\textsuperscript{2854}

In United States v. Cutler,\textsuperscript{2855} the defendant was convicted of conspiracy to commit mail fraud and arson, mail fraud, and the use of an explosive to destroy a building. Cutler contended that the trial court abused its discretion by restricting defense counsel's cross-examination of Cutler's employee, Levoff, regarding other building fires in the surrounding area.\textsuperscript{2856} He argued that this testimony should have been admitted under Rule 404(b).\textsuperscript{2857} The Ninth Circuit, however, found no abuse of discretion because Levoff ultimately testified regarding the previous fires.\textsuperscript{2858}

Cutler also contended that the trial court abused its discretion by refusing to admit the following extrinsic evidence: (1) testimony regarding Levoff's alleged prior arson activities; (2) evidence of additional fires; and (3) a government report.\textsuperscript{2859} He again argued that this evidence was admissible under Rule 404(b).\textsuperscript{2860} The Ninth Circuit found no abuse of discretion because Cutler had failed to make adequate offers of proof in support of admitting this extrinsic evidence.\textsuperscript{2861}

\textsuperscript{593} Portions of the testimony were arguably relevant, but either did not directly address the issues in the case or were more prejudicial than probative. \textit{Id.}

In Aims Back, the defendant was charged with rape, and during direct examination, the government called a witness who testified that she also had been raped by Aims Back. 588 F.2d at 1285. The testimony was admitted; however, the only limiting instruction given was that Aims Back was never charged with the witness' alleged rape and the jury should merely consider the witness' testimony in establishing the pattern of events of the night in question. \textit{Id.} The Ninth Circuit found that the witness' testimony was inadmissible because the probative value of the testimony was outweighed by its propensity to prove only criminal disposition. \textit{Id.} The court also determined that the instruction given enhanced the prejudicial effect of the testimony. \textit{Id.} at 1286.

\textsuperscript{2854} 667 F.2d at 1310. The Ninth Circuit held that the failure to give a limiting instruction was not an abuse of discretion. The court reasoned that admonishing the jury would only have emphasized the testimony because the motion for an instruction was delayed. \textit{Id.} 2855. 676 F.2d 1245 (9th Cir. 1982).

\textit{Id.} 2856. at 1249.

\textit{Id.} 2857. \textit{Id.}

\textsuperscript{2858} \textit{Id.} (citing United States v. Green, 648 F.2d 587, 592-93 (9th Cir. 1981) (per curiam)).

\textsuperscript{2859} 676 F.2d at 1249.

\textsuperscript{2860} \textit{Id.} See United States v. Batts, 573 F.2d 599, 602-03 (9th Cir.) (evidence that defendant had previously offered and negotiated sale of cocaine was admissible to show knowledge and intent with respect to present drug charges), \textit{cert. denied}, 439 U.S. 859 (1978).

\textsuperscript{2861} 676 F.2d at 1250. The court stated that:

\textit{where...a trial judge has excluded evidence, ['e]rror may not be predicated upon [such] a ruling...unless a substantial right of the party is affected, and...the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.'}

\textit{Id.} at 1249. The Ninth Circuit reasoned that in his offer of proof, Cutler failed to identify any witness or state the anticipated substance of the witness' testimony regarding Levoff's
The preceding cases demonstrate that the Ninth Circuit liberally admits evidence of prior acts under Rule 404(b). In fact, the Ninth Circuit has even found statements of an accused admissible as acts under Rule 404(b). However, the Ninth Circuit will not reverse convictions resulting from the exclusion of evidence of other acts for which the defendant cannot make a sufficient offer of proof.

4. Impeachment

a. prior convictions

Federal Rule of Evidence 609(a) provides that evidence of prior convictions is admissible to attack the credibility of a witness when the evidence is either elicited from the witness or established by public record, subject to the following conditions:

[T]he 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.2862

Crimes involving “dishonesty or false statement” include “perjury or subornation of perjury, false statements, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify truthfully.”2862

In determining the admissibility of prior convictions under Rule 609(a)(2), the Ninth Circuit has found it necessary not only to consider the nature of the crime involved, but also alleged prior arson activities. Id. Cutler also failed to advise the court of any records, documents, or witnesses which could substantiate his claim that Levoff had burned down other buildings. Id. at 1250. Finally, Cutler admitted his inability to introduce the government report because the witness, whose statements in the report incriminated Levoff, intended to invoke the protection of the fifth amendment. Id.

2862. Fed. R. Evid. 609(a). The Ninth Circuit has held that convictions admitted under Rule 609(a)(2) are automatically admissible; the court need not conduct a balancing test. See United States v. Field, 625 F.2d 862, 871 (9th Cir. 1980); United States v. Dixon, 547 F.2d 1079, 1083 (9th Cir. 1976).


2864. In United States v. Ortega, 561 F.2d 803 (9th Cir. 1977), the Ninth Circuit considered which crimes involve “dishonesty or false statement” within the meaning of Rule 609(a)(2). The court held that a prior conviction of petty shoplifting was inadmissible under this Rule because it did not involve some element of “misrepresentation or other indicum of a propensity to lie.” Id. at 806. Accord United States v. Field, 625 F.2d 862, 871 (9th Cir. 1980); United States v. Cook, 608 F.2d 1175, 1185 n.9 (9th Cir. 1979) (en banc), cert. denied,
the manner in which the crime was committed. The trial court's decision to admit or exclude evidence of prior convictions will only be reversed if the court has abused its discretion. The Ninth Circuit has recently considered several cases in which evidence of prior convictions was offered to impeach a defendant's credibility.

In United States v. Glenn, the defendant was convicted of possession of marijuana for sale, possession of phencyclidine, and driving under the influence of drugs. The trial court admitted evidence of a 1975 burglary conviction and a 1977 grand theft conviction to impeach Glenn. The Ninth Circuit held that the admission of evidence of the prior convictions was erroneous under Rule 609(a)(2). It stated that although Glenn's prior convictions might show a lack of respect for the persons or property of others, the convictions did not "bear directly on the likelihood that [Glenn would] testify truthfully," and thus, did not involve "dishonesty or false statement." The court further stated that the record did not show any of the circumstances of Glenn's prior convictions, thus making it impossible to determine whether they were committed by fraudulent or deceitful means. Nevertheless, the court upheld Glenn's conviction because, in view of the abundant evidence of guilt, the admission of the prior


2865. The Ninth Circuit has held that a conviction for burglary or theft may be admissible under Rule 609(a)(2) if the crime was committed by fraudulent or deceitful means. United States v. Donoho, 575 F.2d 718, 721 (9th Cir.) (per curiam), vacated, 439 U.S. 811 (1978); see also United States v. Papia, 560 F.2d 827, 847-48 (7th Cir. 1977). The prosecution has the burden of showing that the crime was committed fraudulently or deceitfully. United States v. Smith, 551 F.2d 348, 364 n.28 (D.C. Cir. 1976).

2866. United States v. Hendersot, 614 F.2d 648, 653 (9th Cir. 1980).

2867. 667 F.2d 1269 (9th Cir. 1982).

2868. Id. at 1272.

2869. Id. at 1273.

2870. Id. (quoting United States v. Hayes, 553 F.2d 824, 827 (2d Cir.) (emphasis in original), cert. denied, 434 U.S. 867 (1977)).

2871. 667 F.2d at 1273.

2872. Id. The Government argued that burglary and theft convictions reflect on credibility, relying on United States v. Wilson, 536 F.2d 883 (9th Cir.), cert. denied, 429 U.S. 982 (1976), and United States v. Hatcher, 496 F.2d 529 (9th Cir. 1974). 667 F.2d at 1273 n.1. The Ninth Circuit concluded that this reliance was misplaced because neither case was decided under Rule 609. The court noted that although theft crimes may bear on credibility, they may nevertheless be inadmissible under Rule 609(a)(2). Id. (citing United States v. Smith, 551 F.2d 348, 365 (D.C. Cir. 1976)).
In *United States v. Leyva*, the defendant was convicted of forging and uttering United States Treasury checks. The district court admitted evidence of Leyva's prior conviction of misdemeanor welfare fraud under Rule 609(a)(2). Leyva argued that this evidence was inadmissible under Rule 403 because it was more prejudicial than probative. The Ninth Circuit held that Rule 403 is inapplicable where evidence of the prior offense is relevant to impeach credibility. It construed Rule 609(a)(2) as a congressional judgment that where the issue is credibility, the probative value of crimes involving dishonesty or false statements always outweighs the prejudicial effect. Therefore, the court ruled that the prior conviction was admissible to impeach Leyva.

The Ninth Circuit considered the scope of Rule 609(a)(1) in *United States v. Lipps*, where the defendant, a convicted felon, was found guilty of receipt of a firearm shipped in interstate commerce. Lipps argued on appeal that the trial court abused its discretion under Rule 609(a)(1) by allowing evidence of four prior felony convictions for burglary and robbery to impeach his testimony. The Ninth Circuit noted that Lipps' credibility was not at issue because he had either stipulated to or admitted all elements of the crime. The court further noted that the trial court had not explained why the evidence was more probative than prejudicial. The court rejected the Government's contention that evidence of the prior convictions was probative of the element of the crime requiring the defendant to be a felon, because the

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2873. 667 F.2d at 1273-74 (citing United States v. Hall, 650 F.2d 994, 998 n.6 (9th Cir. 1981)).
2875. Id. at 121.
2876. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."
2877. 659 F.2d at 121.
2878. Id. The court noted that in *United States v. Toney*, 615 F.2d 277, 288 (5th Cir. 1980), the Fifth Circuit held that "Rule 403 simply has no application where impeachment is sought through a crimen falsi." 659 F.2d at 122.
2879. 659 F.2d at 121 (citing United States v. Field, 625 F.2d 862 (9th Cir. 1980); United States v. Cook, 608 F.2d 1175 (9th Cir. 1979) (en banc), cert. denied, 444 U.S. 1034 (1980); United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976), cert. denied, 429 U.S. 1111 (1977); and United States v. Dixon, 547 F.2d 1079 (9th Cir. 1976)).
2880. 659 F.2d at 122.
2881. 659 F.2d 960 (9th Cir. 1981) (per curiam).
2882. Id. at 962.
2883. Id.
2884. Id. Rule 609(a)(1) requires the trial court to make such a determination. See United States v. Mehrmanesh, 682 F.2d 1303, 1309 (9th Cir. 1982).
defendant had already stipulated to this fact.\textsuperscript{2885} It also rejected the Government’s argument that knowledge of the prior convictions would give the jury a "more comprehensive view" of the defendant’s trustworthiness\textsuperscript{2886} because Lipps had never attempted to misrepresent himself to the jury.\textsuperscript{2887} Finally, the court found the Government’s use of the defendant’s prior convictions to impeach his common law wife was improper because prior convictions cannot be used to impeach another witness.\textsuperscript{2888}

The Ninth Circuit thus held that the trial court erred in admitting evidence of Lipps’ prior convictions.\textsuperscript{2889} The court held the error to be harmless, however, because Lipps had admitted to each element of the offense, rendering evidence which related to his credibility immaterial.\textsuperscript{2890}

In \textit{United States v. Mehrmanesh},\textsuperscript{2891} the defendant was convicted of distributing heroin. On appeal, Mehrmanesh challenged the district court’s denial of his motion to preclude the Government’s use of a 1975 conviction for importing hashish to impeach his credibility.\textsuperscript{2892} The Ninth Circuit concluded that the trial court did not abuse its discretion in denying the motion.\textsuperscript{2893} The court noted that the trial judge had made the requisite finding under Rule 609(a)(1) that the probative value of the evidence outweighed its prejudicial effect.\textsuperscript{2894} It also accepted the Government’s contention that, based on the opening statement of the defense counsel, there was a reasonable possibility that Mehrmanesh would misrepresent himself to the jury by denying any involvement in drug trafficking.\textsuperscript{2895}

\textsuperscript{2885} 659 F.2d at 962.
\textsuperscript{2886} \textit{Id.} (quoting United States v. Cook, 608 F.2d 1175, 1187 (9th Cir. 1979) (en banc), \textit{cert. denied}, 444 U.S. 1034 (1980)).
\textsuperscript{2887} 659 F.2d at 962.
\textsuperscript{2888} \textit{Id.}
\textsuperscript{2889} \textit{Id.}
\textsuperscript{2890} \textit{Id.}
\textsuperscript{2891} 682 F.2d 1303 (9th Cir. 1982).
\textsuperscript{2892} \textit{Id.} at 1309.
\textsuperscript{2893} \textit{Id.} (citing United States v. Cook, 608 F.2d 1175, 1187 (9th Cir. 1979) (en banc), \textit{cert. denied}, 444 U.S. 1034 (1980)).
\textsuperscript{2894} 682 F.2d at 1309.
\textsuperscript{2895} \textit{Id.} (citing United States v. Cook, 608 F.2d 1175 (9th Cir. 1979) (en banc), \textit{cert. denied}, 444 U.S. 1034 (1980)). The \textit{Cook} court stated that "[a] court [is] unwilling to let a man with a substantial criminal history misrepresent himself to the jury, with the government forced to sit silently by, looking at a criminal record, which, if made known, would give the jury a more comprehensive view of the trustworthiness of the defendant." 608 F.2d at 1187.

Mehrmanesh also challenged the denial of a second motion to restrict the scope of the Government’s cross-examination. 682 F.2d at 1309. He had sought to prohibit the Government from cross-examining him about facts relating to an upcoming prosecution for posses-
In *United States v. Hammond*, the defendant was convicted of bank robbery. Hammond contended that his case was prejudiced by the testimony of a pretrial services officer, which revealed that he had previously had a probation officer and had been in a "lockup" area. Hammond argued that this testimony contravened the trial court's earlier ruling excluding all evidence of his prior felony convictions.

The Ninth Circuit held that any error due to the officer's testimony was harmless because the trial court had immediately cautioned the jury to disregard the reference to Hammond's probation officer. The court further held that the reference to Hammond's prior lockup was harmless error because it probably did not materially affect the verdict in view of the other evidence of guilt.

These decisions demonstrate that while a defendant's credibility may not be impeached under Rule 609(a)(2) by a prior conviction not involving dishonesty or false statement, the trial court is not required to weigh the probative value of such a conviction against its prejudicial effect. The court, however, must weigh the probative value of evidence of a prior felony conviction against its prejudicial effect under Rule 609(a)(1). If the court decides, however, that a prior felony is more probative than prejudicial, this decision will be given deference. Finally, although admissions of prior felony convictions may constitute error, vague references during trial to prior crimes are not grounds for reversal where cautionary instructions are immediately given to the jury.

### b. prior inconsistent statements

In all criminal prosecutions, the accused has a constitutional right...
to confront the witnesses testifying against him.2901 The sixth amendment guarantees the defendant's right to cross-examine these witnesses to challenge their credibility.2902

Under Federal Rule of Evidence 613(a), a witness may be examined concerning a prior statement, written or unwritten, without disclosing the statement’s content to the witness during the examination.2903 Under Rule 613(b), extrinsic evidence of a witness' prior inconsistent statement is admissible if the witness is given an opportunity to explain or deny the statement, and the opposing party is given an opportunity to cross-examine the witness about it.2904 The Ninth Circuit has held that defense counsel in particular should be given maximum opportunity to impeach the credibility of key Government witnesses,2905 and it has maintained this philosophy in its recent cases.

In United States v. Williams,2906 the defendant was convicted of conspiracy, attempt to collect, and collection of debt by extortion.2907 At trial, Williams attempted to introduce into evidence a prior inconsistent statement made by his alleged co-conspirator, who was also the key Government witness,2908 which tended to show that Williams lacked the requisite criminal intent.2909 The Government objected to the admission of the statement on the basis that it was "an unsigned statement," and the trial court sustained the objection.2911

2901. U.S. CONST. amend. VI provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."
2903. FED. R. EVID. 613(a) provides that "[i]n examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel."
2904. FED. R. EVID. 613(b) provides that "extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless that witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon . . . ."
2906. 668 F.2d 1064 (9th Cir. 1981).
2907. Id. at 1066.
2908. Williams's alleged co-conspirator pled guilty before trial and testified for the Government. Id.
2909. Id. at 1068. At trial the Government witness testified that he may have talked to Williams about "putting pressure on [the victim] to make payment." On cross-examination, he denied telling Williams that the victim would be hurt if he did not pay. Id. The night before trial he stated to defense counsel that he had led Williams to believe that harm would come to the victim and later to himself if payment was not made. Id.
2910. Id. at 1067. The Government did not cite any authority to support this objection. Id.
2911. Id. at 1069.
On appeal, the Ninth Circuit determined that Williams had properly attempted to introduce the statement by first giving the witness an opportunity to explain or deny the statement.\textsuperscript{2912} It also noted that defense counsel properly authenticated the statement\textsuperscript{2913} with the witness' testimony admitting that he had made the statement and that it was true,\textsuperscript{2914} and by calling another witness who testified that the Government witness had read the statement and agreed to its veracity.\textsuperscript{2915} The court therefore held that the exclusion of the statement was error.\textsuperscript{2916} Furthermore, because the evidence admitted to prove Williams' guilt could also have supported a verdict of not guilty,\textsuperscript{2917} and because the entire record showed that, at worst, Williams was only a peripheral figure in the conspiracy,\textsuperscript{2918} the court held that this error was prejudicial.\textsuperscript{2919}

In United States v. McLaughlin,\textsuperscript{2920} the defendant was convicted of making and subscribing false tax returns. On appeal, McLaughlin argued that the trial court had erred in refusing to admit certain evidence he had offered to impeach the Government's key witness, McLaughlin's former accountant.\textsuperscript{2921} The evidence consisted of: (1) a tape re-

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\textsuperscript{2912} Id. at 1068-69. Although the witness' statements on the stand were ambiguous, he ultimately denied making the statement. \textit{Id.} at 1069 n.10.

\textsuperscript{2913} Id. at 1067. Under Fed. R. Evid. 901(a), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." \textit{Fed. R. Evid. 901(b)(1)} provides that testimony of a witness with knowledge that a matter is what it is claimed to be is one means of authentication.

\textsuperscript{2914} 668 F.2d at 1067. The court's conclusion contradicts its later statement that the Government witness ultimately denied making the statement. 668 F.2d at 1069 n.10.

\textsuperscript{2915} Id. at 1067 & n.7.

\textsuperscript{2916} \textit{Id.} at 1068-69.

\textsuperscript{2917} 668 F.2d at 1069. Tape recorded conversations between the victim and Williams' co-conspirators indicated that Williams probably had little knowledge of the extortion scheme. Further, taped conversations between Williams and the victim, which the Government argued contained threats by Williams, could also have been reasonably construed as a friend's concern for the seriousness of the victim's situation. \textit{Id.}

\textsuperscript{2918} \textit{Id.} at 1069-70. Williams was only responsible for introducing the victim to the lenders; he was not involved in setting the repayment terms of the loan. Williams had little contact with the victim after the loan was completed, he never attempted to collect the loan and he did not initiate any of the conversations which were taped with the victim concerning the loans. \textit{Id.}

\textsuperscript{2919} \textit{Id.} at 1070 (citing Burr v. Sullivan, 618 F.2d 583, 587 (9th Cir. 1980); Patterson v. McCarthy, 581 F.2d 220, 221 (9th Cir. 1978)).

\textsuperscript{2920} 663 F.2d 949 (9th Cir. 1981).

\textsuperscript{2921} \textit{Id.} at 952. Under a grant of immunity, the accountant testified that he had advised McLaughlin that he must withhold federal taxes from the amounts paid to certain carpenters he had employed. \textit{Id.} McLaughlin claimed at trial that this accountant had, to the contrary, advised him that the carpenters' paychecks were not subject to withholding because the carpenters were independent contractors. \textit{Id.}
cording of a 1975 meeting between McLaughlin, the accountant, and the company's bookkeeper; and (2) statements allegedly made by the accountant during a 1977 meeting between McLaughlin, the accountant, and McLaughlin's attorney. The district court excluded the tape recording on the ground that it contained no statement by the accountant inconsistent with his testimony at trial. The court excluded the 1977 statements on the ground that the accountant had not been given a fair opportunity to deny or explain the inconsistent statements, as required by Rule 613(b).

The Ninth Circuit agreed with the trial court that the 1975 tape recording contained no statement inconsistent with the accountant's trial testimony, noting that the 1975 conversation was completely unrelated to the case. The court therefore held that the tape recording was not admissible under Rule 613(b).

The court held, however, that the trial court had erred in excluding the 1977 statements from evidence. It relied on the Notes of the Advisory Committee on Proposed Rules, which provide that specification of a particular time or sequence is not required under Rule 613(b) to establish a sufficient foundation for the introduction of a prior inconsistent statement. Because the accountant witness had been adequately reminded on cross-examination of the time, place, and persons present at the 1977 meeting, and because he denied making the statement in question, the court concluded that the foundation in this case had been sufficient. Furthermore, because this improperly excluded evidence directly impeached the Government's key witness and was related to a critical issue in the trial, the court held that the error was not harmless, and accordingly reversed McLaughlin's conviction.

2922. Id.
2923. Id. at 953.
2924. Id. at 952-53 (citing United States v. Hale, 422 U.S. 171, 176 (1975)).
2925. 663 F.2d at 953. The meeting was held long after the last act charged and concerned the accountant's future plans. Id.
2926. Id.
2927. Id.
2928. Id. The Advisory Committee Note to Fed. R. Evid. 613(b) provides that "[t]he traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence" (emphasis added).
2929. 663 F.2d at 953. The court noted that McLaughlin should have been permitted to give his version of the meeting, whereupon the Government could have recalled the accountant to give him an additional opportunity to explain or deny the alleged statement. Id.
2930. Id. at 954.
In *United States v. Muniz*, the defendant was convicted of assaulting a fellow prison inmate. At trial, the victim testified on direct examination that he had no doubt that Muniz had stabbed him. On cross-examination he denied having said to another inmate, Montijo, that "it was [Muniz] but it wasn’t [Muniz]." When Montijo took the stand and counsel for Muniz asked him about the victim’s statement, the Government objected successfully on hearsay grounds. On appeal, Muniz argued that even if the statement was hearsay, it should have been admitted to impeach the victim because it was evidence of a prior inconsistent statement. However, the Ninth Circuit refused to review the trial court decision because Muniz failed to make the argument at trial. It did note that the issue of the victim’s confusion had come to the jury by means of other testimony, and it concluded that the exclusion of the evidence was not plain error.

These decisions further demonstrate the Ninth Circuit’s attitude of generally allowing the defendant maximum opportunity to impeach the credibility of key Government witnesses by way of prior inconsistent statements. It appears quite flexible in determining whether the foundational prerequisites for the admission of these statements have been met, and it will only exclude such statements if there is no real evidence of inconsistency, or if no purpose for the statements is argued before the trial court.

c. witness bias

One of the most important functions of the right to cross-examine is to expose a witness’ motivation in testifying. Thus, cross-examination may be directed toward revealing the witness’ possible biases, prejudices, or ulterior motives as they relate directly to the issues or

2931. 682 F.2d 634 (9th Cir. 1982).
2932. Id. at 639.
2933. Id.
2934. Id.
2935. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801(c).
2936. 684 F.2d at 639. Despite their hearsay nature, a witness’ prior inconsistent statements can be used to impeach him. Benson v. United States, 402 F.2d 576, 581 (9th Cir. 1968); FED. R. EVID. 801(d)(1)(A), advisory committee note.
2937. 684 F.2d at 639-40. The court noted that unless the party states the specific grounds for admissibility at trial, the issue is not preserved for review (citing United States v. Fredericks, 599 F.2d 262, 264 (8th Cir. 1979); FED. R. CRIM. P. 51). See also United States v. Wilson, 666 F.2d 1241 (9th Cir. 1982); FED. R. EVID. 103(a).
2938. 684 F.2d at 640 (citing United States v. Berry, 627 F.2d 193, 199 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981)).
personalities in the case at hand.\textsuperscript{2939} The Ninth Circuit has held that the jury must have sufficient information to appraise a witness' bias and motives.\textsuperscript{2940} The court considered whether such information was present in the recent case of \textit{United States v. Cutler}.\textsuperscript{2941}

Defendant Cutler was convicted of conspiracy to commit mail fraud and arson, and of mail fraud.\textsuperscript{2942} Evidence adduced at trial indicated that Cutler had paid his employee, Levoff, to hire an arsonist to burn his warehouse. On appeal, Cutler contended that the trial court had abused its discretion in restricting his cross-examination of Levoff about other fires that had occurred on the premises of other businesses in which Levoff had been involved.\textsuperscript{2943}

The Ninth Circuit first noted that the scope and timing of cross-examination of witnesses is subject to the discretion of the trial judge.\textsuperscript{2944} It then found that although the cross-examination had been delayed, it had not been restricted.\textsuperscript{2945} The court stated that evidence brought out in the cross-examination gave the jury sufficient information to appraise Levoff's bias and motives; hence, the trial judge had not abused his discretion.\textsuperscript{2946}

\textsuperscript{2939} Davis v. Alaska, 415 U.S. 308, 316-17 (1974).

'\text{Evidence used to prove the Government's case must be disclosed to the [accused] so that he has an opportunity to show that it is untrue. . . . \text{[I]}t is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.'\textsuperscript{2940} Id. at 317 n.4 (quoting Greene v. McElroy, 360 U.S. 474, 496 (1959)).

\textsuperscript{2941} United States v. Bleckner, 601 F.2d 382, 385 (9th Cir. 1979); Skinner v. Cardwell, 564 F.2d 1381, 1389 (9th Cir. 1977), cert. denied, 435 U.S. 1009 (1978).

\textsuperscript{2942} Id. at 1245 (9th Cir. 1982).

\textsuperscript{2943} Id. The trial court required the defense to defer the cross-examination of Levoff until after Cutler's testimony. \textit{Id.}

\textsuperscript{2944} Id. at 1248 (citing United States v. Bleckner, 601 F.2d 382, 385 (9th Cir. 1979)).

\textsuperscript{2945} Id. The court noted that Levoff \textit{was} ultimately questioned about the earlier fires, as well as about his plea agreement, his prior felony conviction, his false testimony in an unrelated proceeding, his prior parole violation, and his motive for testifying against Cutler. \textit{Id.} at 1248-49.

\textsuperscript{2946} Id. at 1248-49. Cutler also challenged the trial court's exclusion of extrinsic evidence concerning Levoff's alleged history of committing arson. \textit{Id.} at 1249. The Ninth Circuit, however, held that, under \textsc{Fed. R. Evid.} 608(b), extrinsic evidence of specific instances of a witness' unconvicted prior conduct is not admissible to attack his credibility. \textit{Id.} at 1249 (citing United States v. Wood, 550 F.2d 435, 441 (9th Cir. 1976)). The court also stated that this extrinsic evidence was inadmissible under Rule 613(b) because Cutler had failed to lay a proper foundation. 676 F.2d at 1249 (citing United States v. Williams, 668 F.2d 1064, 1068-69 n.9 (9th Cir. 1981)).
d. suppressed statements

Statements suppressed because of a violation of *Miranda v. Arizona*\(^2\) may be used on cross-examination to impeach a defendant who elects to testify on his own behalf.\(^3\) However, they may never be used as direct evidence against a defendant,\(^4\) and if they were made as the result of coercion, they may not be used for any purpose.\(^5\) Furthermore, the Ninth Circuit has held that the government may not raise an issue on cross-examination solely to introduce a suppressed statement.\(^6\) The Ninth Circuit has recently considered whether certain statements obtained in violation of *Miranda v. Arizona* were properly used for impeachment purposes.

In *United States v. Miller*,\(^7\) the defendants were convicted of participating in a fraudulent real estate refinancing scheme. Before the trial, defendant Miller moved to suppress certain statements he had made to an FBI agent which incriminated his co-defendants.\(^8\) The trial court held that the statements were obtained in violation of *Miranda v. Arizona* and excluded them from the Government's case-in-chief.\(^9\) The Government, however, used these statements to impeach Miller at trial after he testified that his co-defendants knew nothing about the refinancing scheme.\(^10\) On appeal, the defendants contended that Miller's statements were inadmissible because: (1) they had been involuntary; and (2) they were used to impeach Miller on issues not raised in his direct examination testimony.\(^11\)

The Ninth Circuit first determined that, although the FBI agent had told Miller that he was facing a long prison sentence, and that he was contemplating employing Miller in a new business if he exonerated himself, Miller's statements were not the result of coercion.\(^12\) The

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\(^{2947}\) 384 U.S. 436 (1966).
\(^{2951}\) United States v. Whitson, 587 F.2d 948 (9th Cir. 1978).
\(^{2952}\) 676 F.2d 359 (9th Cir. 1982).
\(^{2953}\) *Id.* at 363.
\(^{2954}\) *Id.*
\(^{2955}\) *Id.*
\(^{2956}\) *Id.*
\(^{2957}\) *Id.* at 364 (citing United States v. Boyce, 594 F.2d 1246 (9th Cir. 1979) (defendant held to have voluntarily waived his right to remain silent even though FBI agents had in-
court then determined that Miller's direct testimony about the details of the real estate transactions was sufficient to raise the issue of the co-defendants' knowledge of the scheme. The court therefore held that Miller's testimony was subject to impeachment by the evidence obtained in violation of Miranda v. Arizona.

5. Testimony

a. Opinion testimony

The Federal Rules of Evidence provide that a non-expert witness is restricted on direct examination to describing relevant facts about which the witness has personal knowledge. Ordinarily, a non-expert witness may not state opinions or draw conclusions from his or her observations unless: (1) they are rationally based on the witness' perceptions, and (2) they are "helpful to a clear understanding of his [or her] testimony or the determination of a fact in issue." An expert witness, on the other hand, is permitted to give opinion testimony because of his or her training, knowledge, and skill in drawing conclusions from information or data which the lay witness does not possess. A trial court's ruling excluding expert or lay opinion testimony will not be overturned absent an abuse of discretion.
In *United States v. Skeet*, the defendant was convicted of assault resulting in serious bodily harm. The assault arose out of an incident during which defendant fired shots at his brother and his brother's common law wife. At trial, the district court refused to allow Skeet the opportunity to present opinion testimony by his brother and sister-in-law concerning whether the shooting was accidental.

On appeal, the Ninth Circuit stated that in order for lay opinion testimony to be admissible, the testimony must be based on the witnesses' own observations and recollections, rather than upon their opinions or conclusions drawn from their observations and recollections. Non-expert opinions may be admitted if the facts are so complex, or difficult to describe, that they could not otherwise have been presented to the jury so as to enable it to form its own opinion or to reach an intelligent conclusion. The court held that there was no error in the trial court's ruling, concluding that the testimony in this case did not involve facts of the requisite complexity to necessitate an opinion from a non-expert.

In *United States v. Booth*, the Government sought to introduce a criminologist's testimony that no fingerprints were found on a vehicle used in a robbery and the criminologist's opinion concerning the reason that no fingerprints were found on the vehicle. The trial court ruled that it would not permit the witness to testify as to either of these matters on the ground that this evidence was irrelevant. The Ninth Circuit first found that the expert was qualified to testify that there were no fingerprints found on the vehicle. Moreover, the testimony was relevant because discovery of a piece of surgical glove found in the vehicle coincided with the fact that the robbers were

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2964. 665 F.2d 983 (9th Cir. 1982).
2965. *Id.* at 984.
2966. *Id.* at 985 (citing Randolph v. Collectramatic, Inc., 590 F.2d 844, 847-48 (10th Cir. 1979); United States v. Brown, 540 F.2d 1048, 1053 (10th Cir. 1976), cert. denied, 429 U.S. 1100 (1977)).
2967. 665 F.2d at 985. Examples of facts which are this complex or difficult to describe would include a person's physical or mental condition, a person's reputation or character, emotions manifested by acts, the speed of a moving object or other things that arise in a witness' daily observations, including perceptions of height, size, odors, flavors, colors, and heat. *Id.*
2968. *Id.*
2969. *Id.* at 986.
2970. 669 F.2d 1231 (9th Cir. 1981).
2971. *Id.* at 1240.
2972. *Id.*
2973. *Id.*
described as wearing flesh-colored gloves. Thus, the court held that the trial court had abused its discretion in excluding this portion of the testimony. The Ninth Circuit determined, however, that the Government had failed to show that the expert witness’ training qualified him to give his opinion as to why there were no fingerprints on the vehicle. The court stated that the jury was just as capable as the expert of concluding that the reason there were no fingerprints found on the vehicle was because the occupants had either used gloves or wiped away their fingerprints. Therefore, the court held that the trial court had not abused its discretion with respect to this portion of the testimony.

In United States v. Fleishman, the defendants were convicted of various drug-related offenses. On appeal, defendant Combs argued that the trial court had abused its discretion in admitting the opinion testimony of Clayton, a Drug Enforcement Administration ("DEA") agent, that Combs was acting as a "look out." Combs also objected to the admission of testimony by Greenwood, an expert in handwriting analysis, that a note found in a motel room was written by Combs.

The Ninth Circuit first held that the admission of Clayton's testimony was not an abuse of discretion. It stated that, although it went to an ultimate issue in the case, the testimony was admissible because it was relevant, and its probative value outweighed its prejudicial effect. The court rejected Combs' argument that Clayton's testimony was equivalent to testifying that Combs was guilty, distinguishing between opinions of a defendant's guilt or innocence, and expert testimony concerning the different roles persons play in illegal activities. The court also found that the foundation establishing Clayton's expertise in narcotics countersurveillance activities was sufficient

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2974. Id.
2975. Id.
2976. Id.
2977. Id.
2978. Id.
2979. 684 F.2d 1329 (9th Cir.), cert. denied, 103 S. Ct. 464 (1982).
2980. Id. at 1335.
2981. Id. at 1336.
2982. Id. at 1335.
2983. Id. at 1335-36 (citing United States v. Masson, 582 F.2d 961 (5th Cir. 1978); United States v. Milton, 555 F.2d 1198 (5th Cir. 1977); United States v. McCoy, 539 F.2d 1050 (5th Cir. 1976), cert. denied, 431 U.S. 919 (1977); Fed. R. Evid. 704, which provides in pertinent part: "[t]estimony in the form of an opinion . . . is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.").
2984. Id. (citing United States v. Masson, 582 F.2d 961, 963 n.5 (5th Cir. 1978)).
to allow the admission of his testimony.\textsuperscript{2985}

The Ninth Circuit then held that the district court had not abused its discretion by admitting Greenwood's handwriting testimony.\textsuperscript{2986} It rejected Combs' argument that the limited level of certainty of Greenwood's testimony was more prejudicial than probative,\textsuperscript{2987} stating that the issue raised related to the weight accorded the testimony, rather than to its admissibility.\textsuperscript{2988} The court also found that Greenwood had been properly qualified as a handwriting expert, and that notwithstanding his uncertainty concerning his conclusions, his testimony was still helpful to the jury in determining the note's relevance.\textsuperscript{2989}

The results of polygraph examinations have not as yet gained general acceptance in the Ninth Circuit. It is rarely held that a trial court abused its discretion in refusing to permit the results of a polygraph examination into evidence.\textsuperscript{2990} The proponent seeking admission of polygraph results has the burden of laying a proper foundation by showing the scientific basis and reliability of the polygraph expert's testimony.\textsuperscript{2991} Even if a proper foundation is laid, the results may be excluded on the basis of confusion, waste of time, or prejudice.\textsuperscript{2992}

In \textit{United States v. Eden},\textsuperscript{2993} the defendant was convicted of embezzlement and conversion of federal student loan funds and of concealing material facts from the Department of Health, Education and Welfare ("HEW"). Eden voluntarily submitted to a polygraph examination concerning these events. On appeal, Eden argued that the trial

\textsuperscript{2985} Id. at 1336. Clayton testified that as a DEA agent for nine years, he had been involved in over 250 narcotics operations, at least half of which involved lookouts which Clayton personally witnessed. He also described the factors used in determining whether someone is engaged in countersurveillance. \textit{Id.}

\textsuperscript{2986} Id. at 1336 (citing United States v. Baldwin, 607 F.2d 1295, 1296 n.1 (9th Cir. 1979)).

\textsuperscript{2987} Id. at 1336. Combs relied for this argument on the holdings of several cases where expert testimony was held to be inadmissible because of its prejudicial impact. See United States v. Brown, 557 F.2d 541 (6th Cir. 1977); United States v. Green, 548 F.2d 1261 (6th Cir. 1977); United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973). The court distinguished these cases on the basis that they involved the admission of testimony "of purported experts based upon insufficiently substantiated scientific theories, techniques, or tests." 684 F.2d at 1337.

\textsuperscript{2988} Id.

\textsuperscript{2989} Id. at 1336.

\textsuperscript{2990} United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir.), \textit{cert. denied}, 426 U.S. 923 (1976); United States v. Demma, 523 F.2d 981, 987 (9th Cir. 1975) (en banc).


\textsuperscript{2992} United States v. Marshall, 526 F.2d at 1360 (citing United States v. Urquidez, 356 F. Supp. 1363, 1365-67 (C.D. Cal. 1973)).

\textsuperscript{2993} 659 F.2d 1376 (9th Cir. 1981), \textit{cert. denied}, 455 U.S. 949 (1982).
court abused its discretion in failing to admit the results of the examination.2994

The Ninth Circuit, however, found no abuse of discretion, noting the trial court’s opinion that the examination lacked control questions and other safeguards.2995 Furthermore, the trial court’s opinion stated that the examination appeared even less reliable than those reported in previous cases.2996

These decisions demonstrate that, regardless of whether opinion testimony is lay or expert, the Ninth Circuit will exclude it from evidence if it is just as easy for the jury as for the witness to draw a conclusion from the available facts.2997 However, where the value of opinion testimony becomes more probative, the Ninth Circuit will admit such testimony as long as the witness testifying qualifies as an expert, even if the admission results in some prejudice to the defendant.2998

b. prejudicial testimony

The trial judge is in the best position to determine the probable impact of prejudicial testimony on the jury.2999 His or her judgment is accorded deference by the appellate court.3000 A motion for mistrial is also directed to the discretion of the trial court, and its determination will be upset only upon a showing that there has been an abuse of discretion.3001 The Ninth Circuit has recently considered whether a mistrial was warranted when a trial judge admitted prejudicial testimony in favor of the prosecution, then struck the testimony and gave curative jury instructions.

In United States v. Sanford,3002 the defendant was convicted of possession, concealment, transfer, and delivery of counterfeit notes.3003 During the direct examination of Leroy Jones, the key prosecution witness, counsel prompted him to disclose that his heart condition had prevented him from testifying at trial two days previously.3004 The trial

2995. Id. at 1381-82.
2996. Id. at 1382.
2997. See supra notes 2964 & 2970 and accompanying text.
2998. See supra note 2979 and accompanying text.
3000. Id.
3001. United States v. Gardner, 611 F.2d 770, 777 (9th Cir. 1980).
3002. 673 F.2d 1070, 1072 (9th Cir. 1982).
3003. Id. at 1071.
3004. Id.
court admitted the evidence but later ruled it irrelevant and “‘out’ of the case,” instructing the jury to disregard any evidence ordered stricken by the court.\textsuperscript{3005} On cross-examination, Jones testified that he had cooperated with the Government only after he had been arrested for possession of counterfeit notes.\textsuperscript{3006} On appeal, Sanford contended that he was prejudiced by the prosecution’s attempt to arouse sympathy from the jury for the witness.\textsuperscript{3007}

The Ninth Circuit found that even if an attempt to influence the jurors had occurred, it was unlikely that the jury would sympathize with Jones to the extent they would sympathize with the victim of a crime.\textsuperscript{3008} Moreover, the jury was apprised of Jones’ arrangement with the Government.\textsuperscript{3009} The court stated that in order to determine the prejudicial effect of the inadmissible evidence, its probative value must be weighed against that of the admissible evidence supporting the verdict.\textsuperscript{3010} Concluding that there was substantial evidence supporting the verdict and “little force to the tainted evidence,” the court held that the trial court had not abused its discretion.\textsuperscript{3011}

c. \textit{testimony by a United States Attorney}

The Ninth Circuit had not addressed the issue of the propriety of testimony by a United States Attorney until recently.\textsuperscript{3012} However, the following two rules have been followed by the Second Circuit: (1) only after “all other sources of possible testimony have been exhausted” should a United States Attorney, participating in a case, be called to testify,\textsuperscript{3013} and (2) although not disqualified as witnesses in cases in which they play no other part, United States Attorneys are nevertheless not encouraged to testify.\textsuperscript{3014}

In \textit{United States v. West},\textsuperscript{3015} the trial court allowed an Assistant United States Attorney who had been seated in the spectator section of

\begin{itemize}
\item \textsuperscript{3005} \textit{Id.} at 1072.
\item \textsuperscript{3006} \textit{Id.} at 1071. After deciding to cooperate with the Secret Service, Jones had arranged a meeting with Sanford and returned from that meeting with twenty counterfeit one hundred dollar bills; he testified that Sanford had given him the bills. \textit{Id.} at 1071.
\item \textsuperscript{3007} \textit{Id.} at 1072.
\item \textsuperscript{3008} \textit{Id.}.
\item \textsuperscript{3009} \textit{Id.}.
\item \textsuperscript{3010} \textit{Id.} at 1072-73.
\item \textsuperscript{3011} \textit{Id.} at 1073.
\item \textsuperscript{3012} United States v. West, 680 F.2d 652, 654 (9th Cir. 1982).
\item \textsuperscript{3013} United States v. Torres, 503 F.2d 1120, 1126 (2d Cir. 1974).
\item \textsuperscript{3014} United States v. Armedo-Sarmiento, 545 F.2d 785, 793 (2d Cir. 1976), \textit{cert. denied}, 430 U.S. 917 (1977).
\item \textsuperscript{3015} 680 F.2d 652 (9th Cir. 1982).
\end{itemize}
the courtroom and who had not participated in the investigation or trial, to testify that a hand signal had been given by West to a witness.\textsuperscript{3016} The Ninth Circuit held that the trial court did not abuse its discretion in allowing the attorney to testify, reasoning that the attorney had played no other role in the case, and that the district court's only other alternative would have been to forego altogether any testimony on the signalling incident.\textsuperscript{3017}

6. Hearsay

Hearsay is "a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted."\textsuperscript{3018} Hearsay is not admissible in federal courts\textsuperscript{3019} except as provided by the rules governing hearsay exceptions\textsuperscript{3020} or by other rules prescribed by the Supreme Court or an act of Congress.\textsuperscript{3021}

\textit{a. definition of "statement"}

The Federal Rules of Evidence define a statement as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."\textsuperscript{3022} The Ninth Circuit has recently considered two cases where defendants have contended that testimony concerning the behavior and acts of a co-conspirator was erroneously admitted hearsay.

In \textit{United States v. Brock},\textsuperscript{3023} the defendants were convicted of committing various drug offenses. At trial, DEA agents testified that

\begin{footnotes}
\footnotetext{3016}{\textit{Id.} at 654-55. West argued that it was improper to allow the attorney to testify because there was another witness available. However, neither the defense nor the Government had identified the alternate witness at trial. \textit{Id.} at 655. In any event, the witness was an FBI agent who was seated at the prosecutor's table during the trial. \textit{Id.} Consequently, this witness would have presented the same risks as those presented by the United States Attorney. \textit{Id.}}}
\footnotetext{3017}{\textit{Id.} at 655.}
\footnotetext{3018}{\textit{FED. R. EVID.} 801(c).}
\footnotetext{3019}{\textit{FED. R. EVID.} 802.}
\footnotetext{3020}{\textit{FED. R. EVID.} 803, 804.}
\footnotetext{3021}{\textit{FED. R. EVID.} 802. This provision excepting other rules prescribed by the Supreme Court or an act of Congress renders certain hearsay admissible which would be otherwise inadmissible. Some examples are: \textit{FED. R. CRIM. P.} 4(a) (affidavits to show grounds for issuing warrants); \textit{FED. R. CRIM. P.} 12(b) (affidavits to determine issues of fact in connection with motions); 29 U.S.C. § 161(4) (1976) (affidavit as proof of service in NLRB proceedings); 38 U.S.C. § 5206 (1976) (affidavit as proof of posting notice of sale of unclaimed property by the Veteran's Administration).}
\footnotetext{3022}{\textit{FED. R. EVID.} 801(a).}
\footnotetext{3023}{667 F.2d 1311 (9th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 1271 (1983).}
\end{footnotes}
they had observed the defendants' alleged co-conspirator, Bernard, picking up an order of chemicals, after which he attempted to evade DEA surveillance.\textsuperscript{3024} The Ninth Circuit found that these evasive attempts were not intended as "communicative" acts; instead, they were merely nonassertive conduct, which is not hearsay.\textsuperscript{3025} Thus, the court held that the testimony was admissible if relevant.\textsuperscript{3026} It further held that, even if irrelevant, any error in admitting the testimony was harmless in light of the overwhelming evidence of guilt\textsuperscript{3027} and the unlikelihood that the jury was influenced in its assessment of the defendants' activities by evidence that Bernard had once attempted to evade DEA agents.\textsuperscript{3028}

In \textit{United States v. Astorga-Torres},\textsuperscript{3029} the defendants were convicted of various drug and firearm offenses. A DEA agent testified at trial that the DEA had previously conducted two drug transactions with the defendants' alleged co-conspirator, who pled guilty.\textsuperscript{3030} The Ninth Circuit stated that this behavior was clearly not intended as an assertion and was therefore admissible.\textsuperscript{3031}

\textit{b. purpose of statement}

The hearsay doctrine bars the use of an out-of-court statement to prove the truth of the matter asserted.\textsuperscript{3032} The hearsay exclusionary rule does not render inadmissible a statement offered for a purpose unrelated to the statement's truth.\textsuperscript{3033} The Ninth Circuit has recently considered the purposes for which certain testimony was offered in order to determine whether it was excludable as hearsay.

In \textit{United States v. Saavedra},\textsuperscript{3034} the defendant was convicted of charges stemming from a scheme involving the wrongful charging of Western Union money orders to improperly obtained Master Charge

\begin{flushleft}
\textsuperscript{3024} \textit{Id.} at 1314-15. \\
\textsuperscript{3025} \textit{Id.} at 1315 n.2 (citing 4 J. \textsc{Weinstein} & \textsc{M. Berger}, \textsc{Weinstein's Evidence} \§ 801(a)(01), at 801-53-57 (1979)) [hereinafter cited as \textsc{Weinstein}]. \\
\textsuperscript{3026} 667 F.2d at 1315 n.2. \\
\textsuperscript{3027} \textit{Id.} at 1315 (citing \textit{United States v. Weiner}, 578 F.2d 757, 772 (9th Cir.) (per curiam), \textit{cert. denied}, 439 U.S. 981 (1978); 4 \textsc{Weinstein, supra} note 3025, \§ 801(d)(2)(E)(01), at 801-183-84 & n.64 (1979)). \\
\textsuperscript{3028} 667 F.2d at 1315-16. \\
\textsuperscript{3029} 682 F.2d 1331 (9th Cir. 1982). \\
\textsuperscript{3030} \textit{Id.} at 1334. \\
\textsuperscript{3031} \textit{Id.} at 1335. The court also found that this evidence was relevant as an indication of the co-conspirator's \textit{modus operandi}. \textit{Id.} \\
\textsuperscript{3032} \textsc{Fed. R. Evid.} 801(d). \\
\textsuperscript{3033} 4 \textsc{D. Louiseill} & \textsc{C. Mueller, Federal Evidence} \§ 417 at 103 (1980) [hereinafter cited as \textsc{Louiseill}]. \\
\textsuperscript{3034} 684 F.2d 1293 (9th Cir. 1982). 
\end{flushleft}
numbers. On appeal, Saavedra contended that the victims' testimony concerning statements made by other parties during telephone conversations was hearsay. The Ninth Circuit found that this testimony had not been offered to show the truth of the callers' statements, but to show how credit card numbers were fraudulently obtained by persons posing as law enforcement officers. This testimony provided circumstantial evidence that the later unauthorized use of the credit card numbers to purchase money orders was intentional and that Saavedra had not acted alone; therefore, it was not excludable as hearsay.

Saavedra also objected to the testimony of an informant who had overheard a telephone conversation in which one of Saavedra's co-conspirators impersonated a sheriff's officer. The informant had also retrieved a piece of paper discarded by the caller which bore the cardholder's phone number and credit card number, as well as a name used by Saavedra as an alias. The Ninth Circuit found that the testimony relating to the contents of the conversation and the piece of paper was not offered for the truth of the matters asserted therein, but was offered as evidence of how the fraud was conducted and Saavedra's connection to it. Thus, this testimony also was not excludable as hearsay.

In United States v. Muniz, the defendant was convicted of assaulting a fellow prison inmate. Muniz argued that a certain prison officer would testify that other inmates had told him that Muniz was not the man who stabbed the victim, showing that the prison officials had failed to pursue or preserve evidence that someone else might have committed the crime. The trial court excluded the testimony as hearsay, thus implying that Muniz had actually offered the testimony to prove that he had not assaulted the victim. It ruled, however, that the

3035. Id. at 1295.
3036. Id. at 1297.
3037. Id. at 1298.
3038. Id. The Ninth Circuit disagreed with Saavedra's claim that the evidence failed to sufficiently connect her to the phone calls. The victims testified that they had neither charged nor authorized anyone else to charge money orders to their credit card accounts. A representative of Western Union testified that money orders had been charged to these accounts. Soon after these money orders were sent, Saavedra deposited similar amounts of money in the bank accounts of her alleged co-conspirators. Id.
3039. Id.
3040. Id.
3041. Id.
3042. Id.
3043. 684 F.2d 634 (9th Cir. 1982).
3044. Id. at 639.
scope of the prison investigation could be pursued through other questions not involving hearsay. The Ninth Circuit found that the trial court's exclusion of the testimony was within its discretion.

c. erroneous admission of hearsay

The erroneous admission of hearsay does not require automatic reversal; instead, the prejudicial impact of the error must be considered. Trial court errors in admitting or excluding evidence are deemed to be harmless when they are found not to affect "substantial rights" of a party. These errors are divided into two groups, constitutional and non-constitutional, with a different admissibility standard used for each.

If an error implicates constitutionally protected rights, the court must find it harmless beyond a reasonable doubt or reverse. Non-constitutional errors will cause reversal unless it is more probable than not that the error did not materially affect the verdict. United States v. Hollingshead presents an example of a constitutional error which the Ninth Circuit found to be harmless, and in United States v. Felix-Jerez the court considered a non-constitutional error which required reversal.

In Hollingshead, the Ninth Circuit held that the improper admission of hearsay testimony, even if it violated the defendant's rights under the confrontation clause of the sixth amendment, was an error harmless beyond a reasonable doubt. Hollingshead was convicted of receiving bribes as an employee of the Los Angeles branch of the

3045. Id.
3046. Id.
3047. United States v. Castillo, 615 F.2d 878, 883 (9th Cir. 1980).
3048. 4 Weinstein, supra note 3025, ¶ 103[06], at 103-43 (1979); see 28 U.S.C. § 2112 (1976).
3049. United States v. Valle-Valdez, 554 F.2d 911, 915 (9th Cir. 1977).
3052. United States v. Castillo, 615 F.2d 878, 883 (9th Cir. 1980); United States v. Valle-Valdez, 554 F.2d 911, 916 (9th Cir. 1977).
3053. 672 F.2d 751 (9th Cir. 1982).
3054. 667 F.2d 1297 (9th Cir. 1982).
3055. 672 F.2d at 755.
Federal Reserve Bank of San Francisco. He maintained that the trial court erred in denying his motion to strike hearsay testimony regarding Federal Reserve Bank payments of net profits to the United States Treasury. The Government conceded that this testimony was hearsay but contended that any error in admission was harmless beyond a reasonable doubt.

The Ninth Circuit determined that the net earnings of the Federal Reserve Bank are returned to the United States Treasury as a matter of law, and that the district court's instructions to the jury included an explanation of this procedure. It concluded that the challenged hearsay testimony was merely cumulative, and any error was therefore harmless beyond a reasonable doubt.

In United States v. Felix-Jerez, the Ninth Circuit held that the improper admission of a hearsay statement was not harmless error where the statement was the most significant evidence on the only element of the crime at issue. The court stated that it could affirm Felix-Jerez's conviction for prison escape only if it found "fair assurance" that the verdict "was not substantially swayed by the error" and that "substantial rights were not affected." Since the hearsay statement was the only evidence presented on whether Felix-Jerez was outside of the prison with the intent never to return and its contents were highly prejudicial, the Ninth Circuit found that no such "fair assurance"

3056. Id. at 752. Evidence presented at trial showed that Hollingshead had received bribes and kickbacks from independent contractors, and had participated in a conspiracy to submit fictitious competitive bids. Id. at 753.
3057. Id. at 754.
3058. Id. at 754-55.
3059. Id. at 755 (citing 12 U.S.C. § 290 (1976)).
3060. 672 F.2d at 755.
3061. Id.
3062. 667 F.2d 1297 (9th Cir. 1982).
3063. Id. at 1302-04.
3064. Id. at 1304 (citing Kotteakos v. United States, 328 U.S. 750, 765 (1946)).
3065. 667 F.2d at 1302-04. The hearsay statement contained an admission by Felix-Jerez that he had planned to escape and had not intended to return. Id. at 1303. The record revealed that he had been discovered by an off-duty guard walking along a roadway about ten miles from the prison. At that time, he had two bottles of wine in his possession, and one had been partially consumed. He had also consumed two six-packs of beer the previous day. No alcoholic tests were given to determine if he was intoxicated at the time he was picked up. The court therefore determined that Felix-Jerez was probably intoxicated during his absence from the prison, and that this could have served to negate the existence of the specific intent to avoid confinement required to obtain a conviction. Id. at 1302-04. The admission of the highly prejudicial hearsay statement, however, probably caused the jury to convict Felix-Jerez. Id. at 1303. See Vicksburg & Meridian R.R. v. O'Brien, 119 U.S. 99, 103 (1886) ("[I]t is well settled that a reversal will be directed unless it appears, beyond
was possible, and it reversed the conviction.\textsuperscript{3066}

d. statements defined as “not hearsay”

Federal Rule of Evidence 801(d) excepts from the definition of hearsay a list of eight different statements which are defined as “not hearsay.”\textsuperscript{3067} During this survey period, the Ninth Circuit reviewed three specific types of “not hearsay”: prior statements of identification made by a witness,\textsuperscript{3068} admissions by a party-opponent,\textsuperscript{3069} and statements by co-conspirators.\textsuperscript{3070}

i. prior statements of identification

Federal Rule of Evidence 801(d)(1)(C) provides that a statement by a witness which identifies a person is not hearsay.\textsuperscript{3071} In \textit{United States v. Eley},\textsuperscript{3072} the Ninth Circuit held that an FBI agent’s testimony concerning an eyewitness’ identification was not hearsay where the eyewitness was available for cross-examination.\textsuperscript{3073}

Eley was convicted of robbing four savings and loan associations.\textsuperscript{3074} At trial, FBI agent McNeal testified that a bank employee, Claudia Hines, identified Eley at a police line-up as one of the robbers.\textsuperscript{3075} Eley contended that since Rule 801(d)(1)(C) refers only to

doubt, that the error complained of did not and could not have prejudiced the rights of the party.”).

\textsuperscript{3066} 667 F.2d at 1304.

\textsuperscript{3067} LOUISELL, supra note 3033, § 411 at 57. \textit{Fed. R. Evid.} 801(d) provides that a “statement is not hearsay” if it is (1) a prior statement by a witness which satisfies the conditions laid out in the rule, or if it is (2) an admission by a party-opponent.

\textsuperscript{3068} \textit{Fed. R. Evid.} 801(d)(1)(C).


\textsuperscript{3070} \textit{Fed. R. Evid.} 801(d)(2)(E).

\textsuperscript{3071} \textit{Fed. R. Evid.} 801(d)(1)(C) provides that a statement is not hearsay if “[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving him . . . .”

\textsuperscript{3072} 656 F.2d 507 (9th Cir. 1981).


\textsuperscript{3074} 656 F.2d at 507.

\textsuperscript{3075} \textit{Id.} at 508. Hines had identified Eley and his co-defendant at trial, but the probative value of her in-court identification was called into question by her out-of-court identifications. Before trial, agent McNeal had shown Hines a “photo spread” and she had identified Eley’s co-defendant. Later at a police line-up she identified Eley as one of the robbers, but incorrectly identified someone else as the other robber. At trial Hines explained that her partially incorrect identification stemmed from her mistaken belief that both suspects were present in the line-up, and she testified that approximately thirty minutes after
testimony by a witness regarding previous identifications made by that witness, the trial court erred in admitting testimony by a person who did not make the identification.\textsuperscript{3076}

The Ninth Circuit rejected this argument and stated that the "plain words of rule 801(d)(1)(C) do not contain the limitation urged by Elemy."\textsuperscript{3077} The court further stated that identification statements are admitted as substantive evidence because out-of-court identifications are believed to be more reliable than those made under the suggestive conditions prevailing at trial, and the availability of the declarant for cross-examination eliminates the major danger of hearsay testimony.\textsuperscript{3078} These reasons still apply even when the person testifying is not the person who made the identification, as long as the latter also testifies and is available for cross-examination.\textsuperscript{3079} Because Hines did testify and Elemy's counsel was permitted to cross-examine her at length, and there was nothing in the record to suggest that Hines was unavailable for reexamination after McNeal had testified, the court held that Rule 801(d)(1)(C) encompassed McNear's testimony concerning the identification statements made by Hines, and consequently was not hearsay.\textsuperscript{3080}

Elemy indicates that the application of Rule 801(d)(1)(C) in the Ninth Circuit is broad; it paves the way not only for testimony by the identifier, but also for testimony by third persons to whom the identi-
fier was speaking. The corroborative impact of such third party testimony can be considerable.

ii. party admissions

Statements made by a party or his agent, or those adopted by a party, are not hearsay if offered against that party. A clear example of this rule's application in the Ninth Circuit was recently set forth in *United States v. Traylor*. During defendant Traylor's trial for conspiring to import and distribute cocaine, a Government witness testified that she was a friend of Traylor's and that Traylor had described to her how he smuggled cocaine into the country. Traylor argued that the trial court erred in admitting these statements because they did not further the alleged conspiracy. The Ninth Circuit held that Traylor's out-of-court statements were not hearsay under Rule 801(d)(2)(A), and were admissible against Traylor as admissions by a party.

In *United States v. Doe*, the defendant contended that the trial court improperly excluded testimony at a pretrial hearing relevant to the substance of a plea agreement; and thereby erred when it allowed the defendant's statements, allegedly made during plea negotiations, to be admitted into evidence at trial through the testimony of a Government witness. At this pretrial hearing, the Government had maintained that there was no plea agreement. Doe, however, had attempted to introduce his brother's testimony concerning a conversation between his brother and a DEA agent, where the agent indicated

3081. LOUISELL, supra note 3033, § 421 at 211-12.
3082. FED. R. EVID. 801(d)(2). The advisory committee's note on this rule states that admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility is the result of the adversary system rather than a requirement of the hearsay rule. No guarantee of trustworthiness is required in the case of an admission. FED. R. EVID. 801 advisory committee note (citing 4 J. WIGMORE EVIDENCE § 1048 (Chadbourne rev. 1972) [hereinafter cited as WIGMORE]; MORGAN, BASIC PROBLEMS OF EVIDENCE 266 (1961)).
3083. 656 F.2d 1326 (9th Cir. 1981).
3084. Id. at 1331-32.
3085. Id. at 1332.
3086. FED. R. EVID. 801(d)(2)(A) provides that a statement is not hearsay if the statement is offered against a party and is his own statement, made in either his individual or representative capacity.
3087. 656 F.2d at 1332 (citing United States v. Eubanks, 591 F.2d 513, 519 (9th Cir. 1979)).
3088. 655 F.2d 920 (9th Cir. 1981), as corrected, 656 F.2d 411 (9th Cir. 1981).
3089. Id. at 924-25. FED. R. CRIM. P. 11(e)(6) provides that evidence of statements made in connection with and relevant to a plea of guilty are not admissible in any civil or criminal proceeding against the person who made the plea or offer. See also FED. R. EVID. 410.
3090. 655 F.2d at 924.
that if Doe cooperated he would recommend a reduced sentence. The trial court rejected this testimony as inadmissible hearsay.

The Ninth Circuit held that Doe's contention regarding the admissibility of his brother's testimony was meritorious under Rule 801(d)(2)(D), because Doe's brother might have been acting as Doe's agent. However, because there was no evidence which established the existence of plea negotiations and no evidence that the Government had failed to ask for a reduced sentence, the court found that Doe was not prejudiced by the exclusion of his brother's testimony.

In United States v. Sears, the Ninth Circuit held that a defendant's silence during her co-defendant's description to a third party of the robbery they allegedly committed allowed the admission of those statements against the defendant under the theory of adoptive admissions. The court stated that an admission by silence exists only if the statements were made in the defendant's presence and hearing, and the defendant actually understood what was said and had an opportunity to deny it. It further stated that, as a preliminary matter, the district court must determine whether under the circumstances an innocent defendant would normally have been induced to respond. The district court must also find that sufficient facts have been introduced for the jury to conclude reasonably that the defendant actually did hear, understand, and accede to the statements. After these threshold determinations are made by the district court, the jury may then determine whether the defendant actually heard, understood, and acquiesced in the statements. The Sears court concluded that, al-

3091. Id.
3092. Id.
3093. Id. (citing Fed. R. Evid. 801(d)(2)(D)). Rule 801(d)(2)(D) provides that a statement is not hearsay if it is offered against a party, and is a statement by his agent or servant concerning a matter within the scope of the agency, made during that relationship.
3094. 665 F.2d at 925. The court found that Doe had never pled guilty or offered to plead guilty, but had merely attempted to exculpate a co-defendant by inculpating himself. Id.
3095. Id. The court noted that even if all of the statements contemplated a plea bargain and were excludable under Rule 11(e)(6), Doe was not prejudiced since he fully incriminated himself at trial. Id. at 925 n.8.
3096. 663 F.2d 896 (9th Cir. 1981), cert. denied, 455 U.S. 1027 (1982).
3097. Id. at 904-05. See Fed. R. Evid. 801(d)(2)(B), which provides that a statement is not hearsay if it is offered against a party and is a statement of which he has manifested his adoption or belief in its truth.
3098. 663 F.2d at 904 (citing United States v. Moore, 522 F.2d 1068, 1076 (9th Cir. 1975), cert. denied, 423 U.S. 1049 (1976)).
3099. 663 F.2d at 904 (citing United States v. Moore, 522 F.2d 1068, 1075 (9th Cir. 1975), cert. denied, 423 U.S. 1049 (1976)).
3100. 663 F.2d at 904 (citing United States v. Moore, 522 F.2d at 1076).
3101. 663 F.2d at 904 (citing United States v. Giese, 597 F.2d 1170, 1196 (9th Cir.), cert.
though there was evidence that the defendant had a hearing problem, the district court had properly sent to the jury the question of whether the defendant had actually heard and understood that she was being implicated in the robbery, and that she had acquiesced in her co-defendant's statements about the crime.

In United States v. Felix-Jerez, a divided Ninth Circuit held that a written statement, prepared by a United States Marshal from notes he took during a post-arrest interrogation of the defendant through an interpreter, was not an admission because the defendant had never read, seen, or signed the statement. The court stated that because Felix-Jerez had never read or signed the document which was prepared by an adverse witness, the question as to whether it was Felix-Jerez's "own statement," as defined in Rule 801(d)(2)(A), depended on whether Felix-Jerez had adopted the statement by some other conduct. The court concluded that, since Felix-Jerez did not even know the document existed until the beginning of his trial, and he did not testify at trial, the prosecution had not met its burden of showing admissibility.

In a dissenting opinion, Judge Kilkenny argued that the majority ignored the fact that Felix-Jerez never questioned the voluntariness of the interview, or the accuracy of the translation. He found that this behavior represented an adoption of the statement, and that the lan-

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3102. 663 F.2d at 904. The district court had been presented with conflicting evidence concerning whether the defendant's hearing problem prevented her from hearing her co-defendant's description of the robbery, but she had seemed able to communicate with her counsel while not wearing her hearing aids. Further, during her co-defendant's description of the robbery, the defendant was sitting only two or three feet away, counting the stolen money. Id.

3103. Id. at 905.

3104. 667 F.2d 1297 (9th Cir. 1982).

3105. Id. at 1299.

3106. Id. (citing Wong Sun v. United States, 371 U.S. 471 (1963); 7 WIGMORE supra note 3082, § 2134).

3107. 667 F.2d at 1299 (citing Brown v. Illinois, 422 U.S. 590, 604 (1975)). The court noted that a contrary result would produce dangers unacceptable in the context of criminal prosecutions. An admission of criminal conduct is a weighty piece of evidence; when offered in the form of a document, it takes on even greater weight, and the factfinder is more likely to rely on its accuracy. There is a danger, however, that a written statement may be paraphrased, incorrect, or recorded with a different emphasis. When, as in Felix-Jerez, the charge included an intent element, that misplaced emphasis may be decisive. 667 F.2d at 1299-1300. The court further noted that these problems may have been compounded by the fact that Felix-Jerez's statements were translated from Spanish to English by a prison camp guard. Id. at 1300 n.1.

3108. 667 F.2d at 1304 (Kilkenny, J., dissenting).
guage of the interpreter was therefore admissible as the defendant's own statement under the language conduit theory. Further, he urged that if the written statement could not be considered Felix-Jerez's "own statement" under Rule 801(d)(2)(A), then it was an admission under Rule 801(d)(2)(D) because the interpreter was Felix-Jerez's agent. The dissent concluded, therefore, that the statement read into evidence was not hearsay and was properly admitted.

Under these facts, where the defendant spoke no English, the translator was a prison guard, and the defendant was incarcerated at the time of the interview, the dissenting judge's emphasis on the voluntariness of the interview and the voluntary consent to the use of the interpreter seems misplaced. The majority took the position that the guard was not appointed by the defendant, and that there was an obvious conflict of interest between them. Therefore, both the agency and the language conduit theories seem inapplicable. The majority opinion serves to prevent adverse witnesses from offering into evidence written statements, which appear to be confessions, without acknowledgment from the defendant that he has adopted them as his "own statements." This is an appropriate protection for defendants under our adversary system.

These decisions demonstrate that out-of-court statements made by the defendant are easily admissible in the Ninth Circuit as "not hearsay" statements. Further, a defendant's silence may be held to constitute an adoption of a co-defendant's statements as his own. Written statements by an adverse party, however, will require more than silence on the defendant's part to constitute adoption, and asserted agency relationships will be closely examined by the courts.

iii. co-conspirator statements

Federal Rule of Evidence 801(d)(2) also treats the statements of

3109. Id. at 1305 (citing United States v. Ushakov, 474 F.2d 1244, 1245 (9th Cir. 1973) (a translation is a defendant's statement; assuming an accurate translation and a voluntary interview, the interpreter is merely a language conduit); United States v. Tijerina, 412 F.2d 661, 664 (10th Cir.), cert. denied, 396 U.S. 990 (1969)). Judge Kilkenny argued that the majority position implies that a non-English speaking defendant's confession could never be admitted into evidence unless he signed or adopted the statement once it was written in English. This signature, however, would be superfluous due to the defendant's inability to understand the document's English contents. 667 F.2d at 1305.

3110. 667 F.2d at 1305 (citing United States v. Santana, 503 F.2d 710, 717 (2d Cir.), cert. denied, 419 U.S. 1053 (1974); Fed. R. Evid. 801(d)(2)(D)).

3111. 667 F.2d at 1306. Judge Kilkenny stated that since Felix-Jerez voluntarily consented to the use of an interpreter, the interpreter became his agent. Id. at 1305.

3112. Id. at 1300 n.1.
co-conspirators as admissions by a party-opponent rather than as hearsay.\textsuperscript{3113} In order for a co-conspirator's statements to be admitted into evidence, certain prerequisites must be met. There must be independent evidence of a conspiracy and of the defendant's connection to the conspiracy; there must also be a showing that the statements were made both during and in furtherance of the conspiracy.\textsuperscript{3114} The Ninth Circuit has established that there must be substantial independent evidence of the conspiracy, although such evidence may be circumstantial; however, once the existence of the conspiracy is shown, only "slight evidence" is required to connect the defendant.\textsuperscript{3115} It is the responsibility of the trial judge to determine whether a sufficient foundation has been established for declarations to be admissible under the co-conspirator exclusion.\textsuperscript{3116} The order of proof is within the sound discretion of the trial judge, who may conditionally admit co-conspirator statements subject to a later motion to strike.\textsuperscript{3117}

During this survey period, the Ninth Circuit has decided several cases where the admission of statements by co-conspirators was challenged. Two cases discuss the admission of a co-conspirator's statement made after the defendant was arrested. In \textit{United States v. Mason},\textsuperscript{3118} the defendant was convicted of conspiring to distribute cocaine. Mason had been arrested after DEA agents observed his arrival and departure from the house of a known drug dealer, Johns; later that evening Johns attempted to sell cocaine to DEA agents, and stated that his "source" had left sometime earlier.\textsuperscript{3119} Mason argued that Johns' statement was inadmissible because it failed to satisfy the criteria that statements must be made during and in furtherance of the conspiracy.\textsuperscript{3120}

The Ninth Circuit rejected Mason's argument, stating that observations made by the DEA surveillance team, establishing that Mason

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  \item \textsuperscript{3113} \textit{Fed. R. Evid.} 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and was a statement by a co-conspirator of that party during the course and in furtherance of the conspiracy.
  \item \textsuperscript{3114} \textit{United States v. Perez}, 658 F.2d 654, 658 (9th Cir. 1981); \textit{United States v. Miranda-Uriarte}, 649 F.2d 1345, 1349 (9th Cir. 1981); \textit{United States v. Eubanks}, 591 F.2d 513, 519 (9th Cir. 1979).
  \item \textsuperscript{3115} \textit{United States v. Weaver}, 594 F.2d 1272, 1274 (9th Cir. 1979) (citing \textit{United States v. Testa}, 548 F.2d 847, 852 (9th Cir. 1977)).
  \item \textsuperscript{3116} \textit{United States v. Miranda-Uriarte}, 649 F.2d 1345, 1349 (9th Cir. 1981) (citing \textit{United States v. Eubanks}, 591 F.2d 513, 519 (9th Cir. 1979)).
  \item \textsuperscript{3117} \textit{United States v. Miranda-Uriarte}, 649 F.2d 1345, 1349 (9th Cir. 1981) (citing \textit{United States v. Zemek}, 634 F.2d 1159, 1169 (9th Cir. 1980)).
  \item \textsuperscript{3118} 658 F.2d 1263 (9th Cir. 1981).
  \item \textsuperscript{3119} \textit{Id.} at 1269.
  \item \textsuperscript{3120} \textit{Id.}
\end{itemize}
\end{footnotesize}
was Johns’ only visitor during the relevant time period, independently connected him to the conspiracy. The court further stated that even though Johns’ statement was made after all the other co-conspirators had been arrested, from Johns’ perspective the objectives of the conspiracy remained to be met, and therefore the statement was made during the conspiracy. Finally, the court rejected Mason’s argument that Johns’ statement was merely “idle chatter,” finding instead that it was a statement of reassurance, made in furtherance of the conspiracy and thus admissible.

In United States v. Saavedra, the defendant was convicted of wire fraud and conspiracy in connection with a scheme to charge money orders to improperly obtained credit card numbers. On appeal, Saavedra argued that the trial court erred in admitting the hearsay testimony of an informant concerning information written on a piece of paper and a phone conversation where the informant overheard Saavedra’s alleged co-conspirator represent himself as a sheriff’s officer and saw him write down a credit card number and Saavedra’s alias. Saavedra contended that these statements were not admissible under the rule excluding co-conspirator statements from the definition of

3121. Id. The court cautioned, however, that although independent evidence of the defendant’s connection to the conspiracy need only be slight, evidence that the defendant was a conspirator must be proved beyond a reasonable doubt to secure a conviction. Id. at 1270 (citing United States v. Escalante, 637 F.2d 1197, 1200 (9th Cir.), cert. denied, 449 U.S. 856 (1980)). The court also stated that in the context of sufficiency of the evidence, the “slight connection” language means that the defendant need play only a slight part in the conspiracy in order to be held criminally responsible for participation. 658 F.2d at 1270 (citing United States v. Perez, 658 F.2d 654, 658 (9th Cir. 1981)).

3122. 658 F.2d at 1269. The court found that Johns’ statement was made to elicit payment, and may have been an attempt to facilitate future deliveries. Id. at 1270 (citing United States v. Fitts, 635 F.2d 664, 667 (8th Cir. 1980); United States v. Smith, 578 F.2d 1227, 1233 n.12, 1237-38 (8th Cir. 1978); United States v. Testa, 548 F.2d 847, 852 (9th Cir 1977)). The court noted that conspiracies do not necessarily end when all but one of the co-conspirators are arrested, and that an unarrested co-conspirator still operating in furtherance of the conspiracy may say and do things which may be introduced against the arrested co-conspirators if the conspiracy is still in operation. 658 F.2d at 1269-70 (citing United States v. Wentz, 456 F.2d 634, 637 (9th Cir. 1972)). See also United States v. Marques, 600 F.2d 747, 750 (9th Cir. 1979); United States v. Testa, 548 F.2d 847, 852 (9th Cir. 1977); United States v. Payseur, 501 F.2d 966, 973 (9th Cir. 1974). The test, therefore, is not whether some of the conspirators have been arrested, but whether the remainder of the conspirators were able to continue with the conspiracy. See United States v. Burnett, 582 F.2d 436, 438 (8th Cir.), cert. denied, 429 U.S. 844 (1976).

3123. 658 F.2d at 1270 (citing United States v. Sandoval-Villalvazo, 620 F.2d 744, 747 (9th Cir. 1980)). See also United States v. Fielding, 645 F.2d 719, 726-27 (9th Cir. 1981) (per curiam); United States v. Cambindo-Valencia, 609 F.2d 603, 632 (2d Cir. 1979), cert. denied, 446 U.S. 940 (1980).

3124. 684 F.2d 1293 (9th Cir. 1982).

3125. Id. at 1295.
hearsay because the co-conspirator's conversation took place after her arrest and thus after her part in the conspiracy had ended.3126

The Ninth Circuit first held that this testimony was not hearsay because it was not offered to prove the truth of the conversation but to show how the fraud was conducted.3127 The court then found that this testimony did constitute a statement by a co-conspirator in furtherance of the conspiracy.3128 It stated that although statements made by Saavedra after her arrest could not be used against her fellow conspirators, any statement by them in furtherance of the conspiracy was admissible against her as long as the conspiracy survived.3129

In several recently decided cases, the defendants have contended that the evidence was insufficient to establish the existence of a conspiracy or their connection to it. In United States v. Federico,3130 the defendant was convicted of conspiring to distribute cocaine. During a meeting between DEA agents and Federico's alleged co-conspirator, Miller, Miller had stated that he did not have any drugs and would have to meet his supplier.3131 DEA surveillance established that Miller then met and spoke to Federico, who led Miller to an airfreight parking lot. After another meeting between the two, Miller returned and delivered cocaine to a waiting DEA informant.3132 Federico argued that the DEA agent's testimony concerning Miller's initial statement was inadmissible because the evidence was insufficient to establish the existence of a conspiracy or Federico's connection to it.3133

A divided Ninth Circuit found that although the evidence may not have been sufficient for the jury to have found a conspiracy beyond a reasonable doubt, it was sufficient to establish the prima facie case of conspiracy required to admit the statement.3134 The court further

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3126. Id. at 1298.
3127. Id. See supra notes 3037-38 and accompanying text.
3128. Id.
3129. Id. (citing United States v. Marques, 600 F.2d 742, 750 (9th Cir.), cert. denied, 444 U.S. 1019 (1980); United States v. Testa, 548 F.2d 847, 852 (9th Cir. 1977); United States v. Wentz, 456 F.2d 634, 637 (9th Cir. 1972). The court found that Saavedra's arrest did not terminate the conspiracy since her co-conspirators had been unaware of her arrest and had continued their activities. 684 F.2d at 1299.
3130. 658 F.2d 1337 (9th Cir. 1981).
3131. Id. at 1340.
3132. Id.
3133. Id. at 1342.
3134. Id. at 1343 (citing United States v. Vargas-Rio, 607 F.2d 831, 837 (9th Cir. 1979)). The court noted that substantial evidence is necessary to show a prima facie case of conspiracy. 658 F.2d at 1342 n.7 (citing United States v. Weaver, 594 F.2d 1272, 1274 (9th Cir. 1979); United States v. Dixon, 562 F.2d 1138, 1141 (9th Cir. 1977), cert. denied, 435 U.S. 927 (1978)).
found that the evidence was sufficient to connect Federico to the conspiracy and, therefore, it held that Miller’s statements were properly admitted.\footnote{658 F.2d at 1343. Federico had relied on United States v. Weaver, 594 F.2d 1272 (9th Cir. 1979), for his argument that the evidence was insufficient to connect him to the conspiracy. In Weaver, the Ninth Circuit found that there was a prima facie case of conspiracy but no “slight evidence” to connect the defendant. Id. at 1274. Weaver had been a passenger in a truck driven by a man who delivered cocaine to DEA agents; the court concluded that aside from one conspirator’s statement that his “connection” was in the truck, there was no evidence to connect Weaver to the conspiracy. Id.

The Federico court found that Weaver was not persuasive. It distinguished this case by finding that unlike Weaver, Federico had acted affirmatively by driving his own car and leading the way to the various rendezvous points; therefore, he could not argue that he had been present as a mere passenger when the transaction occurred. 658 F.2d at 1343.}

Judge Alarcon dissented from the holding, finding the evidence legally insufficient to connect Federico to the commission of any crime.\footnote{Id. at 1344 (Alarcon, J., dissenting).} He stated that Miller’s hearsay statements were admissible only if independent evidence established that a conspiracy existed and that Federico had knowledge of and participated in the particular conspiracy alleged.\footnote{Id. at 1346 (citing United States v. Weaver, 594 F.2d 1272, 1274 (9th Cir. 1979)).} He concluded that Miller’s statements to the DEA agents and his two conversations with Federico were insufficient to connect Federico with a conspiracy.\footnote{658 F.2d at 1347 (Alarcon, J., dissenting).} His decision appears to be based on a different interpretation of the facts presented in the trial transcript.

In United States v. Brock,\footnote{667 F.2d 1311 (9th Cir. 1982), cert. denied, 103 S. Ct. 1271 (1983).} the two defendants were convicted of conspiring to manufacture and distribute methamphetamine.\footnote{Id. at 1313.} The defendants were arrested, along with their alleged co-conspirator, Bernard, in a motor home operating as a methamphetamine laboratory.\footnote{Id. at 1315.} Bernard had previously placed three orders for canisters of chemicals commonly used in the manufacture of methamphetamine. DEA agents had placed a beeper in the cannister of the second order of chemicals and had tracked it to the defendants’ residence. The agents had also observed one of the defendants picking up the third order of Bernard’s chemicals.\footnote{Id. at 1314.} The defendants contended on appeal that the district court erred in admitting Bernard’s out-of-court statements because the evidence was insufficient to link them to Bernard’s activities.\footnote{Id. at 1315.}
The Ninth Circuit found that the independent evidence of both the existence of the conspiracy and the defendants' connection to it was clearly sufficient.\textsuperscript{3144} It stated that a rational jury could find that Bernard's second and third orders of chemicals, their acquisition and transportation, were in furtherance of a single conspiracy involving both defendants. The court therefore held that Bernard's statements were admissible.\textsuperscript{3145}

In \textit{United States v. Kaiser},\textsuperscript{3146} defendants House, Schafer, and Remsing were convicted of conspiring to distribute heroin. At trial, an undercover DEA agent testified that House and Schafer had previously sold him heroin. During one of these transactions, House and Schafer had stopped by a tavern owned by Remsing, had met briefly with Remsing, and had then returned and delivered heroin to the agent.\textsuperscript{3147} House argued that it was error to admit Remsing's statements because there was insufficient evidence to establish the existence of the conspiracy and Remsing's connection to it.\textsuperscript{3148}

The \textit{Kaiser} court first stated that it was not necessary that all of the independent evidence establishing the drug conspiracy and Remsing's relation to it be introduced before Remsing's declarations could be used against House.\textsuperscript{3149} The court then held that the evidence in this case was sufficient and substantial enough to permit the introduction of Remsing's statements.\textsuperscript{3150}

In \textit{United States v. Spawr Optical Research, Inc.},\textsuperscript{3151} the defendants were convicted of unlicensed export of laser mirrors to the Soviet

\begin{itemize}
\item \textsuperscript{3144} \textit{Id.}
\item \textsuperscript{3145} \textit{Id.} The court found that the defendant's objections to testimony about Bernard's statements and actions regarding the first order of chemicals were more substantial. It stated that these statements probably were not within the co-conspirator's exclusion under Rule 801(d)(2)(E). \textit{Id.} Nonetheless, the court held that these possible errors were clearly harmless in light of the overwhelming evidence of guilt. \textit{Id.} (citing 4 \textsc{Weinstein}, supra note 3025, ¶ 801(d)(2)(E)[01], at 801-183-84 & n.64 (1979)). \textit{See supra} notes 3023-28 and accompanying text discussing the court's analysis of Bernard's non-assertive conduct.
\item \textsuperscript{3146} 660 F.2d 724 (9th Cir. 1981), \textit{cert. denied}, 457 U.S. 1121 (1982).
\item \textsuperscript{3147} \textit{Id.} at 729.
\item \textsuperscript{3148} \textit{Id.} at 734.
\item \textsuperscript{3149} \textit{Id.} (citing United States v. Di Rodio, 565 F.2d 573, 576 (9th Cir. 1977)). The \textit{Di Rodio} court noted that the trial court faces difficult problems of admissibility and order of proof when treating out-of-court statements of co-conspirators. Often such evidence must be offered before independent proof of the conspiracy, its duration, or its object has been established. When such proof is not forthcoming, the prejudicial effect of the testimony can often be minimized by limiting instructions, or the testimony may prove to be insignificant in light of other, overwhelming evidence of guilt. \textit{Id.} at 576.
\item \textsuperscript{3150} 660 F.2d at 734.
\item \textsuperscript{3151} 685 F.2d 1076 (9th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 1875 (1983).
\end{itemize}
The Spawrs had shipped two orders of laser mirrors, destined for the Soviet Union, through Weber in West Germany. They shipped the first order without a valid export license; prior to the second shipment Spawr applied for and was denied an export license because the mirrors were found to have "significant strategic applications" which posed a threat to national security. The Spawrs shipped the second order of mirrors anyway, first to Switzerland and then to Moscow.

On appeal, the Spawrs contended that the Government failed to establish the existence of a conspiracy, and therefore Weber's statements, as an unindicted co-conspirator, should not have been admitted. The district court had admitted the challenged statements subject to a motion to strike if the Government failed to provide sufficient proof, and it later determined that the evidence was sufficient. The Ninth Circuit found that there was ample independent evidence to establish a prima facie case of conspiracy, and affirmed the lower court's decision that Weber's statements were admissible as those of a co-conspirator.

In United States v. Fleishman, the defendants were convicted of various drug related offenses. Defendants Green and Combs contended that Fleishman's statements concerning the existence, location, and activities of his alleged confederates were improperly admitted against them. The Ninth Circuit found that Fleishman's attempts to call his partners, his meetings with them during negotiations, and his repeated trips to their hotel, provided sufficient independent evidence to establish a prima facie conspiracy. The court also found that the defendants' behavior in meeting with Fleishman, and the paper found in their hotel room with notations of the price and terms of a cocaine

3152. Id. at 1078.
3153. Id. at 1079.
3154. Id.
3155. Id. at 1082-83.
3156. Id. at 1083. See United States v. Kenny, 645 F.2d 1323, 1334 (9th Cir.), cert. denied, 452 U.S. 920 (1981).
3157. 685 F.2d at 1083 (citing United States v. Perez, 658 F.2d 654, 658 (9th Cir. 1981)).
3158. 685 F.2d at 1083.
3159. 684 F.2d 1329 (9th Cir. 1982), cert. denied, 103 S. Ct. 464 (1983).
3160. Id. at 1337. The court noted that Fleishman's statements concerning the whereabouts of his partners who controlled the deliveries and amounts of the cocaine were, without question, in furtherance of the conspiracy's objectives. Id. at 1337 n.7 (citing United States v. Eubanks, 591 F.2d 513, 520 (9th Cir. 1979)). Fleishman's statements were also admissible against him as party admissions. Id. at 1338 n.8 (citing United States v. Testa, 548 F.2d 847, 853 n.4 (9th Cir. 1977); Klein v. United States, 472 F.2d 847, 850 (9th Cir. 1973)).
3161. 684 F.2d at 1338.
transaction, were sufficient circumstantial evidence to connect them to the conspiracy. Therefore, it held that the statements were properly admitted.\textsuperscript{3162}

In another recent case, a defendant challenged the admission of statements by claiming that they were not made in furtherance of the conspiracy. In \textit{United States v. Sears},\textsuperscript{3163} the defendants were convicted of bank robbery and kidnapping. In the process of escaping after the robbery, defendants Sears, Werner, and Strozyk had stopped at the home of friends to count their loot and dispose of their disguises. The friends were unexpectedly at home, and Sears was obliged to explain their presence to keep them from calling the police and to allow them to use their home.\textsuperscript{3164} On appeal, Werner contended that Sears’ statements were inadmissible against her because they were not made during or in furtherance of the conspiracy to rob the bank.\textsuperscript{3165}

The Ninth Circuit first stated that since Sears made his statements during the course of the escape, they were certainly made during the course of the conspiracy.\textsuperscript{3166} The court then stated that Sears’ statements were not only an admission of the crime, but were also necessary to insure a successful escape;\textsuperscript{3167} therefore, his statements did serve to further the objectives of the conspiracy and were admissible against Werner.\textsuperscript{3168}

In the preceding cases the Ninth Circuit determined that the statements of co-conspirators were admissible; however, during this survey period there were three cases in which the challenged statements were found to be inadmissible. In \textit{United States v. Williams},\textsuperscript{3169} the defendant was convicted of conspiring to collect debts by extortion. At trial, Williams argued that evidence of his co-conspirator’s attempt to extort additional money from their victim was inadmissible because it was the co-conspirator’s separate venture, unknown to Williams, and thus was not in furtherance of their conspiracy. The trial judge ruled, however, that the evidence was admissible because Williams had not withdrawn

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\item \textsuperscript{3162} \textit{Id.}
\item \textsuperscript{3163} \textit{663 F.2d 896 (9th Cir. 1981), cert. denied sub nom. Werner v. United States, 455 U.S. 1027 (1982).}
\item \textsuperscript{3164} \textit{Id. at 905.}
\item \textsuperscript{3165} \textit{Id.}
\item \textsuperscript{3166} \textit{Id. (citing United States v. Caplan, 633 F.2d 534 (9th Cir. 1980)).}
\item \textsuperscript{3167} \textit{663 F.2d at 905. The court found that Sears' statement to Strozyk to get rid of the garbage bag containing the disguises could easily be construed as a statement in furtherance of the conspiracy. Sears' friends also testified that they were intimidated by Werner, as she had held a gun in her lap and glared at them. \textit{Id.}}
\item \textsuperscript{3168} \textit{Id.}
\item \textsuperscript{3169} \textit{668 F.2d 1064 (9th Cir. 1982).}
\end{itemize}
from the conspiracy.\textsuperscript{3170}

The Ninth Circuit stated that the absence of withdrawal from a conspiracy was not the proper test for the admissibility of a co-conspirator's statement.\textsuperscript{3171} It therefore held that the trial judge did not properly determine whether the co-conspirator's statement was made during and in furtherance of the conspiracy before admitting it into evidence, and that such a determination would have to be made in the event of a new trial.\textsuperscript{3172}

In \textit{United States v. Miller},\textsuperscript{3173} the defendants were convicted of charges stemming from a fraudulent scheme which purported to assist homeowners in avoiding foreclosure, but in reality only increased the monthly mortgage payments, liquidating the homeowners' equity for the defendants' financial gain.\textsuperscript{3174} One of the homeowners was unable to testify at trial, and the district court allowed testimony from the purchaser that this homeowner stated that he did not intend to make his new monthly payments because they were too high.\textsuperscript{3175}

The Ninth Circuit held that the trial court erred in admitting these statements under the co-conspirator's exclusion from the hearsay rule. It stated that, even if it could be assumed that the purchaser was a co-conspirator, these statements were made after the conspiracy had ended, they did not further the objectives of the conspiracy, and they should therefore have been excluded.\textsuperscript{3176}

In \textit{United States v. Traylor},\textsuperscript{3177} defendants Traylor and Andrews were convicted of conspiring to import and distribute cocaine.\textsuperscript{3178} At trial, McCausland, a friend of Traylor's, testified about statements made by the defendants concerning their drug-related activities.\textsuperscript{3179} On

\textsuperscript{3170} \textit{Id.} at 1070.
\textsuperscript{3171} \textit{Id.}
\textsuperscript{3172} \textit{Id.} (citing United States v. Eubanks, 591 F.2d 513, 519 (9th Cir. 1979)).
\textsuperscript{3173} 676 F.2d 359 (9th Cir.), cert. denied, 103 S. Ct. 126 (1982).
\textsuperscript{3174} \textit{Id.} at 360-61.
\textsuperscript{3175} \textit{Id.} at 364.
\textsuperscript{3176} \textit{Id.} The court also found that the evidence of Miller's guilt was overwhelming and that the erroneously admitted statement was therefore harmless beyond a reasonable doubt. \textit{Id.}
\textsuperscript{3177} 656 F.2d 1326 (9th Cir. 1981).
\textsuperscript{3178} \textit{Id.} at 1329.
\textsuperscript{3179} \textit{Id.} at 1332. Traylor had described to McCausland how he smuggled cocaine into the country by using a back brace. He had stated that he was planning a trip with his wife and granddaughter and could bring back cocaine at that time; he had also made general conversation about drug use and importation. Both Traylor and Andrews had asked McCausland to bring them utensils used to mix mannite with cocaine. \textit{Id.} Andrews had also stated to McCausland that he could sell a pound of cocaine to someone in Alaska for $40,000, so he could make sure that Mrs. Traylor got her money back. \textit{Id.} at 1333.
appeal, Traylor and Andrews argued that these statements were inadmissible hearsay.\textsuperscript{3180}

With respect to Traylor's statements, the Ninth Circuit first determined that they were admissible against Traylor under Rule 801(d)(2)(A), as party admissions.\textsuperscript{3181} It further determined, however, that the statements were inadmissible against Andrews.\textsuperscript{3182} The court stated that Traylor's statements were either mere conversation or casual admissions of culpability to someone he had decided to trust.\textsuperscript{3183} It further stated that even though these statements concerned the activities of the conspiracy, including future plans, they were not made in furtherance of the conspiracy since they did not seek to induce McCausland to join the conspiracy and did not assist the conspirators in achieving their objectives.\textsuperscript{3184}

With respect to Andrews' statements, the Ninth Circuit determined that they were not only admissible against Andrews under Rule 801(d)(2)(A), but were also made in furtherance of the conspiracy and thus were admissible against Traylor.\textsuperscript{3185} It concluded that the inadmissible hearsay added very little to what was admissible, and therefore held that the error in admitting Traylor's statement against Andrews was harmless.\textsuperscript{3186}

These cases show that the Ninth Circuit consistently requires that, in order to admit evidence under the co-conspirator's exception to the hearsay rule, there must be independent evidence of a conspiracy and of the defendant's connection to it, and the statements must be made during and in furtherance of the conspiracy. The district court is given broad discretion in determining whether there is sufficient evidence to prove the existence of a conspiracy and the defendant's connection to it; thus, evidence establishing a conspiracy need only be circumstantial.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{3180} \textit{Id.} at 1331-32.
\item \textsuperscript{3181} \textit{Id.} at 1332. \textit{See supra} notes 3083-87 and accompanying text.
\item \textsuperscript{3182} \textit{Id.} at 1332.
\item \textsuperscript{3183} \textit{Id.} at 1332-33 (citing \textit{United States v. Fielding}, 645 F.2d 719, 726 (9th Cir. 1981) (per curiam); \textit{United States v. Moore}, 522 F.2d 1068, 1077 (9th Cir. 1975), \textit{cert. denied}, 423 U.S. 1049 (1976)).
\item \textsuperscript{3184} 656 F.2d at 1333 (citing \textit{United States v. Fielding}, 645 F.2d 719, 726-27 (9th Cir. 1981); quoting \textit{United States v. Eubanks}, 591 F.2d 513, 520 (9th Cir. 1979) (per curiam)).
\item \textsuperscript{3185} 656 F.2d at 1333. The court also determined that McCausland's testimony regarding her observations of Andrews' involvement in sorting out the cocaine, in obtaining the man-nite and mixing it with the cocaine, and in taking five bags of cocaine for himself, was not hearsay. \textit{Id.} (citing \textit{United States v. Eubanks}, 591 F.2d 513, 518 (9th Cir. 1979)).
\item \textsuperscript{3186} 656 F.2d at 1333. The court based its determination on \textit{Fed. R. Crim. P.} 52(a), which provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." \textit{Id. See United States v. Fielding}, 645 F.2d 719, 728 (9th Cir. 1981) (per curiam).
\end{itemize}
\end{footnotesize}
and evidence connecting the defendant to the conspiracy need only be slight. The review of whether statements were made during or in furtherance of a conspiracy appears to be stricter. Thus, although statements made after a defendant's arrest may still be considered to have been made during and in furtherance of a conspiracy, statements merely concerning a conspiracy's activities but not actively furthering that conspiracy's objectives will not be considered to have been made in furtherance of that conspiracy. Finally, a defendant's failure to show that he had withdrawn from a conspiracy by the time his co-conspirators made their statements is not by itself sufficient to allow the admission of those statements. However, even if statements are improperly admitted as "not hearsay" under the co-conspirator's exclusion, the Ninth Circuit usually holds their admission to be harmless error.

e. exceptions

Exceptions to the hearsay rule are listed in Federal Rules of Evidence 803 and 804. Rule 803 sets forth twenty-four exceptions, including a "catchall" category, which may be invoked without regard to the availability of the declarant. Rule 804 lists five exceptions which may be invoked only if the declarant is unavailable as a witness; these exceptions are well recognized by common law tradition.

During the current survey period the Ninth Circuit reviewed the application of five types of hearsay exceptions.

i. public records

Public records and reports are excepted from the hearsay exclusionary rule under Rule 803(8). The public records exception is justified by the high probability that public officers will perform their official duty to make accurate records and by the possibility that public

3187. 4 LOUISELL, supra note 3033 § 437, at 103.
3188. Id. § 485 at 983.
3189. FED. R. EVID. 803(8) provides that public records and reports are not excluded by the hearsay rule, even though the declarant is available as a witness. Public records are defined as:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED. R. EVID. 803(8).
inspection of records may reveal inaccuracies and cause them to be corrected.  

ii. recorded recollections

The Ninth Circuit has upheld the use of the "recorded recollection" exception under Rule 803(5). The doctrine allows a witness to submit a writing as a substitute for his testimony if he cannot recall the relevant events at the time of trial. Documents admitted under this doctrine must meet three requirements: (1) the document must pertain to matters about which the witness once had knowledge; (2) the witness must now have insufficient recollection about such matters; and (3) the document must be shown to have been made by the witness and to have accurately reflected his knowledge when matters were fresh in his memory. Meaningful cross-examination is precluded by the witness's lack of memory. However, it is felt that satisfaction of these three criteria ensures that recorded recollections are as reliable as those hearsay exceptions which apply when the declarant is not available.

In United States v. Felix-Jerez, the Ninth Circuit held that a written statement, prepared by a United States Marshal from notes he made during a post-arrest interrogation he conducted of the defendant through an interpreter, was not admissible as a recorded recollection because there was no compliance with the second requirement set forth above. The court noted that the written statement may have qualified as a hearsay exception, but the record revealed that the proper foundation had not been laid to show its admissibility. In particular, there was no showing that the witness had insufficient recollection to enable him to testify fully and accurately at the trial. In fact, the

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3191. United States v. Marshall, 532 F.2d 1279, 1285 (9th Cir. 1975). Fed. R. Evid. 803(5) provides that a memorandum or record concerning a matter about which a witness once had knowledge is not excluded by the hearsay rule, when that witness now has insufficient recollection to enable him to testify fully and accurately, and the record is shown to have been made or adopted by the witness when the matter was fresh in his memory and reflected that knowledge correctly.
3193. Id. at 1301.
3194. Id. at 1302 (quoting United States v. Judon, 567 F.2d 1289, 1284 (5th Cir. 1978)); see also 11 J. Moore, Moore's Federal Practice § 803(5)(4,5) (1976). While witnesses are at liberty to examine a document which they prepared to refresh their recollection, such a
marshal had not even been asked if he had problems recalling the interview with Felix-Jerez. The court therefore concluded that the admission of the statement was error.

In United States v. Patterson, however, the Ninth Circuit held that grand jury testimony by a witness was admissible as a past recorded recollection. Defendant Patterson was convicted of receiving stolen property and of conspiring to transport stolen motor vehicles (forklifts) in interstate commerce. Patterson's nephew, McKay, testified before the grand jury, under a grant of immunity, that Patterson had told him that the forklifts were stolen from California. At trial, McKay testified that he could not remember Patterson telling him about the source or legality of the forklifts. The prosecution tried unsuccessfully to use a transcript of the grand jury testimony to refresh McKay's recollection. The trial judge allowed parts of the grand jury transcript to be read into the record after McKay stated that he did not think he had lied to the grand jury, and that he had recalled the events better when he had testified before the grand jury.

The Ninth Circuit found no abuse of discretion in the trial court's determination that the foundational requirements for past recorded recollection had been met. It rejected Patterson's claim that since McKay's grand jury testimony occurred ten months after the conversation had taken place, the matter had not been fresh in McKay's mind at the time he testified. The court stated that "freshness," under this
exception, has traditionally been determined on a "case-by-case basis giving consideration to all pertinent aspects including the lapse of time," and that broad discretion is granted to the trial judge. The court also rejected Patterson's claim that McKay's statements to the grand jury did not accurately reflect his knowledge at that time, stating that the trial court's questioning of McKay was sufficient to elicit the necessary information regarding the accuracy of his statement.

The court finally held that even if the trial court had abused its discretion in admitting the grand jury testimony, Patterson suffered no prejudice because the same testimony was admitted into evidence without objection through the testimony of a detective and an FBI agent.

It appears from these two cases that the Ninth Circuit will give the trial court broad discretion in applying the recorded recollection exception unless there has been clear abuse in failing to meet the foundational requirements. Such broad discretion may be allowed in order to prevent witnesses who have been given immunity from conveniently forgetting their testimony at the time of trial.

iii. state-of-mind

Rule 803(3) provides in part that a statement of the declarant's then existing state of mind, such as intent or plan, is not excluded by the hearsay rule. The Ninth Circuit has upheld the use of a statement of intent, offered under the state of mind exception, as proof that the declarant planned to do some future act.

but because McKay had been angry with Patterson when he testified, and he had answered the prosecutor's and trial judge's questions equivocally. Id.

3207. Id. (quoting United States v. Senak, 527 F.2d 129, 141 (7th Cir. 1975), cert. denied, 425 U.S. 907 (1976) (pre-federal rules case)).

3208. 678 F.2d at 779; see United States v. Williams, 571 F.2d 344, 348-50 (6th Cir.) (no abuse of discretion to admit under Rule 803(5) a witness's statement to a federal agent relating a conversation which took place six months earlier), cert. denied, 439 U.S. 841 (1978).

3209. 678 F.2d at 780.

3210. Id. at 780 n.6.

3211. Fed. R. Evid. 803(3) provides that a statement is not excluded by the hearsay rule when it is:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will.

3212. United States v. Pheaster, 544 F.2d 353, 374-80 (9th Cir. 1976) (applying Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1891), before Federal Rules of Evidence were in effect), cert. denied, 429 U.S. 1099 (1977). In Pheaster, a kidnap victim had stated shortly before he disappeared that he planned to meet the defendant. The Ninth Circuit found that
In United States v. Astorga-Torres, the Ninth Circuit held that a statement made by the defendants' alleged co-conspirator to a DEA agent that he planned to bring guards to their next drug transaction was properly admitted under Rule 803(3). The court stated that evidence of intent can be considered by the jury in determining whether the declarant subsequently performed the intended act. It concluded that the statement was properly admitted, not as proof that the declarant brought the guards with him, or that the defendants were those guards, but as evidence that he had the intent to do so.

iv. statements against penal interest

Rule 804(b)(3) concerns declarations against interest, another exception to the hearsay rule. This exception allows a statement which has been made by an unavailable declarant and is adverse to his own interest to be admitted into evidence, because it is assumed that a person would not make a damaging statement against himself unless it were true. The Federal Rules of Evidence expressly include statements against penal interest as a hearsay exception, but require that there be corroborating circumstances which indicate the trustworthiness of the statement was reliable and properly within the state of mind exception even though offered as proof of both the conduct of the declarant and the defendant. See Louiseil, supra note 3033, § 442 at 562-63. 3213. 682 F.2d 1331 (9th Cir.), cert. denied, 103 S. Ct. 455 (1982).

3214. Id. at 1335. Notably, a divided Ninth Circuit had decided this case three months earlier and concluded that this same statement was erroneously admitted as a co-conspirator's statement because it was made prior to the established existence of a conspiracy. United States v. Astorga-Torres, Nos. 81-1063, 81-1064, slip op. at 1187-88 (9th Cir., March 15, 1982). The majority had found that the admission of this statement into evidence was prejudicial and therefore reversible error. Id. Judge Kennedy, in his dissent, agreed that the statement was inadmissible as a co-conspirator's statement, but decided that it was a harmless error. Id. at 1189 (Kennedy, J., dissenting). The new decision allowed the court to affirm two counts which it had previously reversed.

3215. 682 F.2d at 1335-36 (citing United States v. Jenkins, 579 F.2d 840, 842-44 (4th Cir.), cert. denied, 439 U.S. 967 (1978); United States v. Pheaster, 544 F.2d 353, 374-80 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977)).

3216. 682 F.2d at 1336.

3217. Fed. R. Evid. 804(b)(3) provides that a statement will not be excluded from evidence if the declarant is unavailable as a witness, and if the statement at the time of its making was so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him or her to civil or criminal liability, or to render invalid a claim by him or her against another, that a reasonable person in that position would not have made the statement unless he or she believed it to be true. A statement tending to expose the defendant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

3218. 4 Weinstein, supra note 3025, ¶ 804(b)(3)[01], at 804-90.
The admission of statements against penal interest is within the discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. In United States v. Poland, the Ninth Circuit found no abuse of discretion by the trial judge in refusing to admit the testimony of a private investigator regarding statements made by a convicted felon which the defendants claimed would exculpate them. The felon, Sylvia Brown, had been brought to the trial at the defendants' request, but she had invoked her fifth amendment privilege. The defendants then offered the testimony of Vance, a private investigator, who could relate what Brown had told him about the robbery and kidnapping charged against the defendants. The defendants claimed that Brown's statements to Vance—that she had observed a meeting where the crime had been planned and that she knew two of the six people at this meeting—were admissible because they would inculpate Brown and were thus “against interest.”

The Ninth Circuit first determined that Brown's statements were not relevant because they did not exculpate the defendants. The court further stated that even if Brown's statements were relevant, they did not solidly inculpate her; there was also an absence of corroboration, and other evidence showed further untrustworthiness.

3222. Id. at 894.
3223. Id. at 894.
3224. Id.
3225. Id. The court noted that Brown was not present when the crimes were committed, and that it was possible that the defendants were among the four planners she did not know. Id.
3226. Id. at 895 (citing United States v. Hoyos, 573 F.2d 1111, 1115 (9th Cir. 1978)). The court noted that Brown's statement was that of an observer, not a participant. 659 F.2d at 895.
3227. 659 F.2d at 895. The court found that Brown's statements, rather than being spontaneous, were made over a year and a half after the crime. In addition, the statements were not made to a close friend, relative, or someone to whom the admission of a crime would be natural, but to a private investigator hired by the defendants. The court noted that Brown's statement to Vance was her third different version of the crime, and the details upon which the defendants relied could have been learned from the news media. Finally, the court stated that Brown was known to be a drug addict, with a bad criminal record and psychiatric problems. Id.
v. former testimony

Another hearsay exception is the former testimony of a declarant who is unavailable as a witness. Rule 804(b)(1) allows admission of former testimony in a criminal trial if the defendant had a previous opportunity to examine the witness and had a similar motive at that time.\(^{3228}\) In *United States v. Poland*,\(^ {3229}\) the defendants argued for reversal because the trial court admitted as “former testimony” the transcript of a hearing on a motion to suppress an in-court identification.\(^ {3230}\) At this hearing, William Acker had testified that he and his wife saw one of the defendants at the scene of the crime and that he had identified that defendant at a line-up; he then had been cross-examined by the defendants’ attorney.\(^ {3231}\) The motion to suppress was denied and the line-up was found to be fair. Acker died before trial.\(^ {3232}\)

The Ninth Circuit found that the motive for defense cross-examination would have been the same at the hearing and at trial.\(^ {3233}\) The *Poland* court stated that the central question at the hearing was whether, under the totality of the circumstances, the identification was reliable even though the confrontation procedure was suggestive,\(^ {3234}\) and that this gave the defense a strong motive to question the reliability of this witness. Therefore, the court held that the admission of Acker’s recorded “former testimony” was proper.\(^ {3235}\)

7. Rebuttal

The admissibility of rebuttal evidence is within the sound discretion of the district court and is not reviewable absent an abuse of discretion.\(^ {3236}\) Rebuttal evidence may be admitted, not only under the Federal Rules of Evidence,\(^ {3237}\) but also under the theory of “opening

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3228. FED. R. EVID. 804(b)(1) provides that testimony given by a witness at a hearing or in a deposition is a hearsay exception when the declarant is unavailable as a witness and if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.
3230. *Id.* at 895.
3231. *Id.*
3232. *Id.*
3233. *Id.* at 896.
3234. *Id.* (quoting Neil v. Biggers, 409 U.S. 188, 199 (1972)).
3235. 659 F.2d at 896.
3237. FED. R. EVID. 404(a).
3238. See generally 1 J. WIGMORE, EVIDENCE § 15 (3d ed. 1940).
3240. Id. at 1240.
3241. Id. at 1239.
3242. 684 F.2d 634 (9th Cir. 1982).
3243. Id. at 637-38.
3244. Id. at 637.
3245. Id. at 638-39.
3246. Id. at 639.
3247. Id.
3248. 656 F.2d 411 (9th Cir. 1981) (per curiam).
importation scheme, whether he had made any arrangements for his subsequent contact with Doe's wife during a certain conversation he had with her.\textsuperscript{3249} On cross-examination, defense counsel attempted to elicit another portion of this conversation in order to show that Doe knew nothing about his wife's drug-related activities. The defense argued that this cross-examination was within the scope of the direct; that the Government had "opened the door" with respect to the particular conversation in question.\textsuperscript{3250}

The Ninth Circuit found that because Roe's answer to the Government's question did not implicate Doe, and the testimony Doe sought to elicit on cross-examination was unrelated to Roe's direct testimony, the defense cross-examination did not serve to correct a misleading impression left by selective questioning on direct. Therefore, the court held that the evidence was not admissible under the doctrine of curative admissibility.\textsuperscript{3251}

In \textit{United States v. Armstrong},\textsuperscript{3252} the defendant was convicted of various federal frauds involving the solicitation of advance fees for loan guarantee agreements. During trial, Armstrong offered into evidence a letter of one of his clients. On appeal, Armstrong argued that it was error to allow the Government to rebut the letter with the details of the underlying transaction.\textsuperscript{3253}

The Ninth Circuit held that the rebuttal evidence was admissible because it placed the letter in its proper context so as not to mislead the jury.\textsuperscript{3254} The court noted that the details of the transaction were admissible even though the particular context had no bearing on Armstrong's state of mind.\textsuperscript{3255}

These decisions demonstrate that the Ninth Circuit will admit rebuttal evidence under the curative admissibility doctrine provided the other party has "opened the door" to this evidence so that its admission is necessary to avoid misleading the jury. Where rebuttal evidence is \textit{not} required to correct a misleading impression created on direct, however, the Ninth Circuit will not apply the curative admissibility doc-

\footnotesize{\textsuperscript{3249} \textit{Id.} at 412.  
\textsuperscript{3250} \textit{Id.}  
\textsuperscript{3251} \textit{Id.} (citing \textit{United States v. Childs}, 598 F.2d 169, 174 (D.C. Cir. 1979) (rebuttal evidence admissible only to the extent necessary to combat evidence in chief); \textit{United States v. Winston}, 447 F.2d 1236, 1240 (D.C. Cir. 1971)).  
\textsuperscript{3252} 654 F.2d 1328 (9th Cir. 1981), \textit{cert. denied}, 454 U.S. 1157 (1982).  
\textsuperscript{3253} \textit{Id.} at 1336.  
\textsuperscript{3254} \textit{Id.}  
\textsuperscript{3255} \textit{Id.}  
}
trine, even if both the cross and direct examination explore the same general subject matter.

8. Closing argument restrictions

In United States v. Bramble, the defendant was convicted of distributing cocaine and possessing cocaine with intent to distribute. On appeal, Bramble argued that the trial court erred in restricting his counsel during closing argument from arguing that the Government had failed to produce evidence of any prior drug dealings by Bramble or evidence that Bramble lived the life of a drug dealer.

The Ninth Circuit did not determine if the restrictions placed on defense counsel's closing argument were too strict, but held that even if they were, the error was harmless. The court noted that the drug transaction was completely voluntary and was that of a large scale seller. Thus, even if defense counsel had presented the proposed argument, it would not have helped Bramble.

9. Telecommunications

Under federal law it is permissible for a person acting under color of law to intercept telecommunications when one of the parties has consented. During this survey period, the Ninth Circuit considered two cases in which defendants objected to the admission of tape-recorded telephone conversations. In both cases, an informant allegedly consented to the taping.

In United States v. Sanford, the defendant agreed in a recorded telephone conversation to meet with Leroy Jones, an informant for the Secret Service. Upon his return from this meeting, Jones handed Secret Service agents twenty counterfeit one hundred dollar bills which Sanford had allegedly given him. At trial, an agent testified that Jones knew the conversation was being recorded. Cross-examination of Jones elicited testimony that he had agreed to cooperate with the

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3256. 680 F.2d 590 (9th Cir.), cert. denied, 103 S. Ct. 493 (1982).
3257. Id. at 592.
3258. Id. at 593.
3259. Id.
3260. 18 U.S.C. § 2511(2)(c) (1976) provides that "it shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."
3261. 673 F.2d 1070 (9th Cir. 1982).
3262. Id. at 1071. Sanford was convicted of possessing and concealing counterfeit notes in violation of 18 U.S.C. § 472 (1976), and of transfer and delivery of such notes in violation of 18 U.S.C. § 473 (1976). 673 F.2d at 1071.
Government only after having been arrested for possession of counterfeit notes. On appeal, Sanford argued that the district court erred in finding that Jones had consented to the recording.

The Ninth Circuit stated that the issue in this case was solely one of consent, not of voluntariness. It held that the trial court's finding of consent was not clearly erroneous because to establish consent it is ordinarily sufficient to show that the informant engaged in the conversation knowing that it was being taped.

In *United States v. Kaiser*, defendant House argued that tape-recorded conversations in which he discussed his drug-related activities were inadmissible on the ground that they were made in violation of Washington state law prohibiting recordings absent the consent of all parties or a court order. The Ninth Circuit rejected this argument, stating that "wiretap evidence obtained in violation of neither the Constitution nor federal law is admissible in federal courts, even though obtained in violation of state law."

These decisions indicate that, regardless of state law, the Ninth Circuit will admit evidence of a tape-recorded conversation where only one party to the conversation has consented to the taping. Furthermore, that party need only have been advised that his conversation would be recorded to overcome a "lack of consent" defense by another party.

10. Fourth amendment violations

In *United States v. Flores*, the defendant was convicted of possessing a firearm as a convicted felon. On appeal, Flores contested the

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3263. *Id.*
3264. *Id.* at 1071-72.
3265. *Id.* at 1072. For a discussion of the application of the clearly erroneous standard of review, see *United States v. Brandon*, 633 F.2d 773, 776 (9th Cir. 1980); *United States v. Dubrofsky*, 581 F.2d 208, 212 (9th Cir. 1978); *United States v. Thompson*, 558 F.2d 522, 524-25 (9th Cir. 1977), cert. denied sub nom. *Reeve v. United States*, 435 U.S. 914 (1978); *United States v. Page*, 302 F.2d 81, 85 (9th Cir. 1962) (en banc).
3266. 673 F.2d at 1072 (citing *United States v. Glickman*, 604 F.2d 625, 634 (9th Cir. 1979), cert. denied, 444 U.S. 1080 (1980)).
3268. *Id.* at 734. WASH. REV. CODE ANN. § 9.73.030.
3269. 660 F.2d at 734.
3271. 660 F.2d at 734 (quoting *United States v. Keen*, 508 F.2d at 989).
3272. 679 F.2d 173 (9th Cir. 1982), cert. denied, 103 S. Ct. 798 (1983).
Government's introduction into evidence of an administrative claim letter written by his attorney, which alleged that Flores' fourth amendment rights had been violated by an illegal search of his apartment and by the wrongful seizure of his guns. The letter also admitted Flores' possession of these guns.\(^\text{3273}\) Flores argued that, under *Simmons v. United States*,\(^\text{3274}\) the letter should have been excluded from evidence because the Government created a "difficult choice" for him of choosing between vindicating his fourth amendment rights and refusing to incriminate himself.\(^\text{3275}\)

The Ninth Circuit rejected Flores' argument, finding that it was not necessary to have admitted possession of the guns before seeking to vindicate the illegal search.\(^\text{3276}\) The court emphasized that Flores and his attorney had voluntarily mailed the letter, thus knowingly creating their own dilemma.\(^\text{3277}\) Therefore, the court held that there was no error in admitting the letter into evidence at Flores' trial.\(^\text{3278}\)

### G. Jury Instructions

A judge is under an obligation to instruct the jury on the law involved in a case. The jury is then theoretically able to perform its function of applying the law to the facts to determine whether the evidence justifies one verdict or another.\(^\text{3279}\) The jury, however, must be instructed in language they can understand if they are to successfully perform this task.\(^\text{3280}\) Instructions that are concrete and specific are easier to understand than those that are couched in generalizations.\(^\text{3281}\) The Ninth Circuit has recently considered a series of cases in which defendants have argued that the trial court erred in refusing to give certain

\[\text{Id. at 177.} \text{ The letter was sent to the City of San Jose claiming monetary damages for alleged violations by the police.}\]

\[\text{Id. at 390 U.S. 377, 394 (1968) (defendant's testimony given in support of motion to suppress evidence under fourth amendment cannot later be admitted against him at trial; defendant should not be forced to make an election between two important rights).}\]

\[\text{679 F.2d at 177-78 (citing United States v. Dohm, 597 F.2d 535, 543-44 (5th Cir. 1979)).}\]

\[\text{Id. at 178. The court stated that it found no "'intolerable tension between constitutional rights,'" id. (quoting McGautha v. California, 402 U.S. 183, 211 (1971)), nor could it say that "'a constitutional right [had] been burdened impermissibly. . . .'" 679 F.2d at 178 (quoting Jenkins v. Anderson, 447 U.S. 231, 238 (1980)).}\]

\[\text{Id.}\]

\[\text{Id. at 178.}\]

\[\text{R. Nieland, Pattern Jury Instructions: A Critical Look at a Modern Movement to Improve the Jury System 1 (1979).}\]

\[\text{Id.}\]

\[\text{Report of the Federal Judicial Center Committee to Study Criminal Jury Instructions, Pattern Criminal Jury Instructions 79 (1982).}\]
jury instructions, or in giving instructions which were inadequate under the circumstances of the case.

1. Entitlement to jury instructions
   
   a. content

   The trial court is not required to give jury instructions in the exact language requested, even if the requested instructions correctly state the law. It is enough that the charge adequately and correctly covers the substance of the requested instructions. The trial judge's language or formulation of the charge is therefore reversible only for an abuse of discretion.

   In United States v. Tham, the defendant was convicted of embezzling union assets and of making false entries in union records. Tham appealed the trial court's refusal to read specific union bylaws or to instruct the jury about specific provisions contained in the bylaws. The Ninth Circuit held that the instructions given by the trial judge adequately covered Tham's theory of the case by instructing the jury that it could consider the applicable provisions of the union bylaws. The court further held that it was not an abuse of discretion to refuse to read the specific bylaws to the jury.

   In United States v. Gere, the defendant was convicted of offenses in connection with the arson of the building that housed his two businesses. Investigators determined that the fire had been "set" for

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3284. United States v. James, 576 F.2d 223, 227 (9th Cir. 1978).
3285. 665 F.2d 855 (9th Cir. 1981).
3286. Id. at 857-58. Tham argued that his good faith belief that the expenditures were for the benefit of the union was established by his adherence to the union's bylaws.
3287. Id. at 858. The district judge gave the following pertinent instructions to the jury:
   [T]he Government must prove beyond a reasonable doubt that the defendant did not have a good faith belief that the union funds were spent for the benefit of the union . . . .
   
   In evaluating the defendant's intent, you may consider whether or not he acted in good faith under the applicable provisions of the . . . bylaws of local 856, which are in evidence before you.

3288. Id. (citing United States v. Shelton, 588 F.2d 1242, 1252 (9th Cir. 1978), cert. denied, 442 U.S. 909 (1979)).
3289. 662 F.2d 1291 (9th Cir. 1981).
3290. Id. at 1292.
delayed ignition from outside the building, and one of the witnesses at
the trial testified that Gere had asked him if he “knew of someone who
could make a fire.” On appeal, Gere argued that this witness had
thought he was testifying under immunity from prosecution, and that
the trial court had therefore abused its discretion in not giving verbatim
a proposed immune witness instruction.

The Ninth Circuit rejected Gere’s contention, recognizing that a
trial judge has wide latitude in framing instructions so long as they
fairly and adequately cover the issues presented. The court noted
that although the instruction might have been better framed, the sub-
stance of Gere’s proposed instruction had been given to the jury, and
the trial court did not, therefore, abuse its discretion.

In United States v. Abushi, the defendants were convicted of
conspiring to defraud the Government through the illegal acquisition
and redemption of food stamp coupons. Defendants Ghanem and
Awad owned a liquor store which was investigated for illegal food
stamp trafficking by special agents of the Agriculture Department.
During the course of this investigation, agents made several food stamp
sales to Ghanem and Awad, and later to Ghanem and defendant Shu-
man. Agents also sold food stamps to defendant Abushi on five
separate occasions. The agents then arranged for Abushi, Ghanem,
and another to meet with them, after leading each to believe that he
was to be the sole purchaser of over $100,000 worth of food stamps.
However, during the meeting, the three agreed to purchase the stamps
jointly. When Ghanem and Abushi paid their share, they were then
arrested.

3291. Id. at 1292-93.
3292. Id. at 1295. Gere also contended that the court by its own motion should have given
an accomplice instruction in reference to the testimony of two witnesses. Id. The Ninth
Circuit disagreed, stating that when an accomplice instruction is not requested, it does not
constitute plain error to fail to give one sua sponte. Id. (citing DeCarlo v. United States, 442
F.2d 237, 240-41 (9th Cir. 1970); United States v. Johnson, 415 F.2d 653, 655 (9th Cir. 1969),
cert. denied, 396 U.S. 1019 (1970)).
3293. 662 F.2d at 1295.
3294. Id. The trial court instructed the jury to view the witness’ testimony with suspicion if
it found that the witness believed himself immunized; it then interjected language suggesting
that the witness could be equated to other witnesses who said they believed they would not
be prosecuted. Gere argued that this interjection made the instruction ambiguous. Id.
3295. 682 F.2d 1289 (9th Cir. 1982).
3296. The term “illegal food stamp trafficking” refers to the transfer of food stamps
outside the guidelines of the Food Stamp Act of 1977. Id. at 1291 n.1.
3297. Id. at 1291-92.
3298. Id. at 1292.
3299. Id. at 1292-93. Although the third person agreed to the joint purchase, he never
On appeal, the defendants argued that the trial court had misstated the law of multiple conspiracies, and that the trial judge's omission of the last full paragraph of their proposed instruction on multiple conspiracy left the jury with the erroneous impression that the conspiracy charged in the indictment was broad enough to include any conspiracy proven.\(^3\) The Ninth Circuit rejected this argument, stating that the instructions on multiple conspiracy, taken as a whole, were consistent with the law of the circuit and were not a misstatement.\(^4\) The court further stated that one of the instructions given to the jury, when viewed in the context of the overall charge, had essentially the same effect as the omitted paragraph of the defendants' proposed instructions.\(^5\) Accordingly, the court held that the jury had been properly instructed on the evidence necessary to find the defendants guilty of the conspiracy charged in the indictment.\(^6\)

The defendants also argued that the trial court erred in its entrapment instructions. They first claimed that the instructions as given eliminated any consideration by the jury as to whether Ghanem and Awad were entrapped when government agents appealed to Ghanem's

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3300. Id. at 1298-99. The defendant's proposed instruction was based on that used in United States v. Bailey, 607 F.2d 237, 243 n.14 (9th Cir. 1979), cert. denied, 445 U.S. 934 (1980). The instruction in Bailey was as follows:

If you find beyond a reasonable doubt that the conspiracy described in Count I did in fact exist between at least two of the defendants, then you must determine which, if any, of the other defendants were members of that conspiracy.

A conspiracy may vary in its membership from time to time and may include two or more separate agreements among its members provided that the participants in the separate agreements are joined together by their knowledge of the essential features and scope of the overall conspiracy and by their common goal. Where the participants in separate agreements are not so joined, they are not members of a single, overall conspiracy, even though the separate agreements may have participants in common and may have similar goals.

The paragraph which the trial judge in Abushi omitted, stated that “[i]f you find that a particular defendant may have been a member of another conspiracy but was not a member of the conspiracy described in Count I then you must acquit that defendant of the crime charged in Count I.” 682 F.2d at 1298 n.5 (citing United States v. Bailey, 607 F.2d 237, 243 n.14 (9th Cir. 1979), cert. denied, 445 U.S. 934 (1980)).

3301. 682 F.2d at 1299.

3302. Id. This instruction stated that:

If you find some were involved in a conspiracy, and some were involved in a totally separate conspiracy, it then would be proper for you to find the first group guilty, and the second group not guilty, because the mere fact that they have been involved in a second conspiracy by themselves does not mean that they were involved in the conspiracy charged in the indictment.

Id.

3303. Id. at 1300.
known weakness—overseas charities. The trial court had stated that "charitable motives are highly desirable, but robbing a bank to support your favorite charity obviously isn't looked upon favorably by the law." The Ninth Circuit held that this statement was made in an effort to distinguish between motive and intent and was not directed toward the issue of entrapment. The court stated that even if the jury misunderstood this statement as applying to entrapment, there was no evidence in the record that this was prejudicial.

The defendants in *Abushi* next claimed that the trial court had failed to inform the jury that the Government had the burden to prove predisposition beyond a reasonable doubt. The Ninth Circuit held that, considering the entrapment instructions in their entirety, it appeared that the jury was properly informed that the burden of proof rested upon the prosecution. The court noted that the trial court was not required to reiterate the reasonable doubt standard in every paragraph of its entrapment instructions. The defendants additionally argued that certain of the trial judge's statements concerning the propriety of the Government's investigation were prejudicial and diverted the jury's attention from the question of predisposition. Although the Ninth Circuit agreed that these comments were extraneous, the court held that the defendant was not prejudiced by the comments. It stated that the judge's statements could hardly be perceived as a stamp of approval because he later specifically instructed the jury to decide whether the Government's conduct had been appropriate. This latter instruction, rather than prejudicing the defendant, interposed an additional obstacle to conviction. The court further noted that the trial judge had ended his discussion of the propriety of the Government's action with the statement: "Even if you decide [that the Government's conduct] was appropriate . . . you must then decide . . . was this the unwary criminal, or was it the unwary innocent . . .

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3304. *Id.* at 1301.
3305. *Id.*
3306. *Id.*
3307. *Id.*
3308. *Id.*
3309. *Id.* (citing United States v. Wolffs, 594 F.2d 77, 84 (5th Cir. 1979); Notaro v. United States, 363 F.2d 169 (9th Cir. 1966)).
3310. 682 F.2d at 1301-02. The trial judge had commented that the Government may permissibly afford the opportunity and facilities for the commission of a crime and may employ artifice and stratagem in the process. The court stated that this instruction was not inconsistent with the law. *Id.* (citing Sorrells v. United States, 287 U.S. 435, 441-42 (1932)).
3311. 682 F.2d at 1302.
3312. *Id.*
on whom the government brought its investigative techniques to bear?’”

The Ninth Circuit felt that this made clear to the jury that regardless of whether the Government acted properly, the jury still had to decide whether the defendants were predisposed to commit the charged offense.

The defendants’ final claim was that the trial judge failed to comply with Federal Rule of Criminal Procedure 30. They argued that the ultimate instructions on multiple conspiracy and entrapment were significantly different from the instructions which the court initially indicated it would deliver, and that this prejudiced their cases.

The Ninth Circuit, however, reiterated that the jury had been properly instructed on the law of entrapment and multiple conspiracies. It held that nothing in the record indicated that counsel was misled by the district court’s indication of the instructions it would deliver to the jury, or that Rule 30 was otherwise violated.

In United States v. Wilder, the defendant, an admitted tax protester, was convicted of refusing to report his 1975 income. On appeal, he argued that the jury instructions applied incorrect legal standards, and offended the prohibition against ex post facto laws by applying present law to his past offense.

The Ninth Circuit held that Wilder’s arguments were frivolous. In affirming his conviction, the court stated that the case relied upon by the trial court in formulating its instructions did not represent a radical, unforeseeable departure from prior law sufficient to implicate the ex post facto clause of the Constitution.

3313. Id.
3314. Id.
3315. Id. FED. R. CRIM. P. 30 provides in part that:

[A]ny party may file written requests that the court instruct the jury on the law as set forth in the requests. . . . The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed.

3316. 682 F.2d at 1302.
3317. Id. at 1302-03.
3318. Id. at 1303.
3319. 680 F.2d 59 (9th Cir. 1982).
3320. Id. at 60.
3321. Id.
3322. Id. The trial court had used United States v. Neff, 615 F.2d 1235 (9th Cir.), cert. denied, 447 U.S. 925 (1980), to formulate its instructions. The Neff court held that the fifth amendment did not provide a valid defense in a prosecution for willful failure to file income tax returns, since questions asked of the defendant on the tax form did not of themselves suggest that the response would be incriminating. Id. at 1238. The Neff court also noted that the defendant’s “refusal to complete the forms was motivated by a desire to protest taxes, rather than a fear of self-incrimination.” Id. at 1240.
These decisions demonstrate that the Ninth Circuit will review jury instructions as a whole. It therefore affords the trial judge substantial latitude in tailoring instructions, as long as they adequately cover the defendant’s theory of the case.\(^{3323}\)

\[\textit{b. addict-witness}\]

If a witness is a heroin addict, an addict-witness instruction is appropriate.\(^{3324}\) Such an instruction, however, is unnecessary in several situations, such as when the addiction is disputed,\(^{3325}\) when the defense adequately cross-examines the witness about the addiction,\(^{3326}\) or when another cautionary instruction is given.\(^{3327}\)

In \textit{United States v. Ochoa-Sanchez},\(^{3328}\) the defendant was convicted of illegally importing and possessing a controlled substance with the intent to distribute. At trial, an informant witness testified that he had been addicted to heroin, but claimed that he had not used the drug for four weeks.\(^{3329}\) On appeal, Ochoa-Sanchez claimed that the trial court had erred by refusing to instruct the jury concerning its evaluation of the testimony of the addict.\(^{3330}\) The Ninth Circuit, however, held that the trial court had not abused its discretion by refusing the requested instructions because present addiction had not been established, defense counsel had vigorously cross-examined the informant about his drug use,\(^{3331}\) and the trial judge had given other cautionary instructions.\(^{3332}\)

\(^{3323}\) \textit{See} United States v. James, 576 F.2d 223, 226-27 (9th Cir. 1978).

\(^{3324}\) Guam v. Dela Rosa, 644 F.2d 1257, 1261 (9th Cir. 1980); United States v. Bernard, 625 F.2d 854, 858-59 (9th Cir. 1980).

\(^{3325}\) United States v. Cook, 608 F.2d 1175, 1182 (9th Cir. 1979), \textit{cert. denied}, 444 U.S. 1034 (1980).


\(^{3328}\) 676 F.2d 1283 (9th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 219 (1982).

\(^{3329}\) \textit{Id.} at 1289.

\(^{3330}\) \textit{Id.}

\(^{3331}\) \textit{Id.} Defense counsel also had the witness show the needle marks on his arm to the jury.

\(^{3332}\) \textit{Id.} (citing United States v. Tousant, 619 F.2d 810, 812 (9th Cir. 1980) (jury told to consider witness' potential prejudice against defendant due to status as an immunized witness)).
A missing witness instruction informs the jury that, if it is peculiarly within the power of either the prosecution or the defense to produce a material witness, failure to call that witness allows the jury to draw an inference that his testimony would be unfavorable to that party.\textsuperscript{3333} A missing witness instruction is proper only if "from all circumstances an inference of unfavorable testimony from an absent witness is a natural and reasonable one."\textsuperscript{3334}

In \textit{United States v. Bramble},\textsuperscript{3335} the defendant was convicted of possessing with intent to distribute and of distributing cocaine. He admitted the sale, which was made to an agent of the Drug Enforcement Administration. Bramble argued, however, that he had been entrapped, stating that the only reason he had sold the cocaine was to stop repeated phone calls made to him by an informant working with the DEA.\textsuperscript{3336} Prior to trial, the prosecution told defense counsel that the informant was available for the defense to call if it so desired. Defense counsel then interviewed the informant, but decided not to call him as a witness.\textsuperscript{3337} At the conclusion of the trial, however, defense counsel requested a missing witness instruction, which the court refused.\textsuperscript{3338}

On appeal, the Ninth Circuit held that the trial court had correctly refused the instruction.\textsuperscript{3339} The court noted that defense counsel had told the witness that his presence was not desired at trial and then had attempted to use the witness' absence to Bramble's advantage. The court stated that an inference of unfavorable testimony in this case would neither be natural nor reasonable.\textsuperscript{3340} The court held that a missing witness instruction under these circumstances would have mis-

\textsuperscript{3333} One such instruction, taken from \textit{1 Devitt & Blackmar, Federal Jury Practice and Instructions} § 17.19 (3d ed. 1977), reads in part:

\begin{quote}
If it is . . . within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness may give rise to an inference that his testimony would be unfavorable to that party. . . .
\end{quote}

The jury will always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

\textsuperscript{3334} \textit{United States v. Long}, 533 F.2d 505, 509 (9th Cir.) (citing \textit{Burgess v. United States}, 440 F.2d 226, 234 (D.C. Cir. 1970), \textit{cert. denied}, 429 U.S. 829 (1976)).

\textsuperscript{3335} 680 F.2d 590 (9th Cir.), \textit{cert. denied}, 103 S. Ct. 493 (1982).

\textsuperscript{3336} \textit{Id.} at 591.

\textsuperscript{3337} \textit{Id.}

\textsuperscript{3338} \textit{Id.}

\textsuperscript{3339} \textit{Id.} at 592.

\textsuperscript{3340} \textit{Id.}.
led the jury, and accordingly affirmed the conviction.3341

d. multiple conspiracy

If it is possible for the jury to find that multiple conspiracies existed, the court should instruct the jury with respect to this finding.3342 Conversely, a request for instructions on multiple conspiracy is properly rejected if there is no evidence in the case to support such a theory.3343

In United States v. Williams,3344 the defendant was convicted of conspiring to collect a debt by extortionate means. On appeal, Williams contended that because the trier of fact could have found that his co-conspirator was involved in a conspiracy separate from the one alleged against Williams, the trial judge erred in refusing to give the jury a requested instruction on multiple conspiracy.3345 The Ninth Circuit held that the trial judge properly refused the jury instruction.3346 The court stated that there can only be a conspiracy if there is an agreement between two or more persons,3347 and here there was no evidence that the co-conspirator’s actions were the result of an agreement between him and another party.3348

In United States v. Kaiser,3349 five defendants were convicted of conspiring to distribute and possessing with intent to distribute heroin. On appeal, defendants Schafer and Remsing contended that the trial court erred in refusing to give their requested multiple conspiracy instruction.3350 Testimony at trial indicated that defendants House and Schafer had obtained heroin from Remsing, and that they later sold the

3341. Id.
3342. United States v. Eubanks, 591 F.2d 513, 518 (9th Cir. 1979) (citing United States v. Perry, 550 F.2d 524, 533 (9th Cir.), cert. denied, 434 U.S. 827 (1977)).
3344. 668 F.2d 1064 (9th Cir. 1982).
3345. Id. at 1071.
3346. Id.
3347. Id. (citing United States v. Andreen, 628 F.2d 1236, 1248 (9th Cir. 1980)).
3348. 668 F.2d at 1071. The court noted that although a jury could have reasonably concluded from the evidence that Williams’ co-conspirator, Marcheselli, attempted to obtain additional money from the loan sharking as an independent undertaking, there was no evidence of conspiracy between Marcheselli and a third party. Id.
3350. Id. at 730.
heroin to an undercover agent of the Drug Enforcement Administration. Additionally, in separate transactions, defendants Acosta and Kaiser sold heroin to an informant working with the DEA. The Ninth Circuit held that since no evidence of multiple conspiracies was presented, it was therefore proper to refuse the requested instructions.

These decisions demonstrate that the Ninth Circuit will not require a trial judge to instruct the jury on the issue of multiple conspiracy unless some evidence is presented to enable the jury to find that multiple conspiracies existed.

e. defenses

A defendant is entitled to have the jury consider any theory of defense which is supported by law and has some foundation in the evidence, even though such evidence may be weak or of doubtful credibility. However, it is the settled law of the Ninth Circuit that the trial judge has the duty of determining whether the elements of the defense present an issue of fact for the jury.

In United States v. Shapiro, defendants Howard and Shapiro were convicted of conspiring to possess and possessing cocaine with intent to distribute. The conviction was based upon an incident in which they and Shapiro's husband agreed to and then delivered a quantity of cocaine to undercover agents of the DEA. At trial, Shapiro proffered a defense of duress, alleging that her husband had threatened her, and had told her that their lives were in danger unless they engaged in the transaction. Shapiro and Howard also proffered a defense of entrapment, contending that there was sufficient evidence of Government inducement to place the issue of entrapment in the hands of the jury.

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3351. Id. at 729.
3352. Id. Remsing and Schafer argued that the Government had proved multiple conspiracies rather than the single conspiracy charged. However, the Government was unable to tie the sales by Acosta and Kaiser either to each other or to Remsing because of the evidentiary rulings. Id. at 731.
3353. Id. at 730.
3354. Id.
3356. United States v. Diggs, 649 F.2d 731, 738 (9th Cir. 1981); United States v. Glaeser, 490 F.2d 483, 487 (9th Cir. 1977).
3357. 669 F.2d 593 (9th Cir. 1982).
3358. Id. at 595.
3359. Id. at 596.
before the jury.\textsuperscript{3360} The trial court refused to instruct the jury on both defenses.\textsuperscript{3361}

The Ninth Circuit first stated that to establish a defense of duress, a defendant must show that: (1) she was under an immediate threat of death or serious injury; (2) she had a well grounded fear that the threat would be carried out; and (3) she had no reasonable opportunity to escape.\textsuperscript{3362} It then determined that Shapiro had offered no evidence of the immediacy of the threatened harm\textsuperscript{3363} or of the lack of a reasonable opportunity to escape.\textsuperscript{3364} It therefore held that Shapiro's offer of proof was insufficient as a matter of law, and that the trial court had been correct in refusing to instruct the jury on duress.\textsuperscript{3365}

The Ninth Circuit then turned to the issue of entrapment and determined that because Shapiro offered no evidence that she was entrapped, it would only consider the issue with respect to Howard.\textsuperscript{3366} It stated that an entrapment instruction is appropriate when the defendant offers some evidence of inducement or persuasion by a government agent, and some evidence contradicting the Government's showing of predisposition.\textsuperscript{3367} Because Howard was unable to do either, it held that the trial court was correct in refusing an entrapment instruction.\textsuperscript{3368}

In \textit{United States v. Fleishman},\textsuperscript{3369} the defendants were convicted of drug-related offenses. Defendant Fleishman had been introduced to a

\begin{thebibliography}{3360}
\bibitem{3360} \textit{Id.} at 598.
\bibitem{3361} \textit{Id.} at 596-97.
\bibitem{3362} \textit{Id.} at 596 (citing \textit{United States v. Gordon}, 526 F.2d 406, 407 (9th Cir. 1975)).
\bibitem{3363} 669 F.2d at 596 & n.3. Shapiro's counsel never stated that anyone threatened Shapiro with immediate bodily harm. Assertions that Shapiro's husband had said that "their" lives were in danger indicated that the alleged threat came from third persons. Evidence in the record showed, however, that the Shapiros were alone in their apartment prior to the cocaine transaction; thus, no one was present to enforce the threat. \textit{Id.}
\bibitem{3364} \textit{Id.} at 596-97 & n.4. The record showed that Shapiro lived in a multi-unit apartment building, had a working telephone, and went outside alone to meet the undercover agents. She could, therefore, have locked the door to her apartment and called the police, gone to a neighboring apartment for help, or simply left the building without going to meet the waiting agents. \textit{Id.}
\bibitem{3365} \textit{Id.} at 596-97.
\bibitem{3366} \textit{Id.} at 597. In fact, the undercover officer testified that he did not even know initially if Shapiro was involved in the drug transaction. Further, Shapiro had no standing to litigate whether Howard was entrapped since the Ninth Circuit does not recognize a concept of derivative entrapment. \textit{Id.} at 597-98 (citing \textit{United States v. Glaeser}, 550 F.2d 483, 486 n.2 (9th Cir. 1977); \textit{United States v. Castanon}, 453 F.2d 932, 934 n.1 (9th Cir.), \textit{cert. denied}, 406 U.S. 922 (1972); \textit{Carbajal-Portillo v. United States}, 396 F.2d 944, 947-48 (9th Cir. 1968)).
\bibitem{3367} 669 F.2d at 598.
\bibitem{3368} \textit{Id.}
\bibitem{3369} 684 F.2d 1329 (9th Cir.), \textit{cert. denied}, 103 S. Ct. 464 (1982).
\end{thebibliography}
DEA agent by a paid informant. At this meeting, Fleishman offered to sell the agent ten pounds of cocaine, and indicated that he had partners in the deal. Several conversations ensued concerning money and chemical analysis of the drugs, and the parties agreed upon a meeting place for the sale. After counting the money brought by the DEA agent, Fleishman left the room of the Pacifica Hotel where they had met, and was observed by another DEA agent speaking with defendants Green and Combs in the lobby. Fleishman then returned to the room, and told the agent that his partners were reluctant to make the deal. The agent insisted on the deal going through, and Fleishman once more left the room. He was observed going to a nearby Ramada Inn, but returned within fifteen minutes to tell the waiting agent that only a part of the cocaine would be delivered, the rest to follow if the first transaction went smoothly. Fleishman returned once more to the Ramada Inn and came back to the Pacifica with 480 grams of cocaine, whereupon he was arrested.

On appeal, Fleishman argued that it was error for the trial court to have refused his proposed entrapment instruction. The Ninth Circuit rejected this argument, stating that in reviewing a defendant's conviction, the proper focus is on the defendant's disposition to commit the crime rather than on the character of the government agent's actions. The court noted that there was no evidence to suggest that the defendant was initially unwilling to commit the crime, and that "merely assistance by government agents in the commission of a crime ... is insufficient to raise the issue of entrapment." It therefore

3370. Id. at 1332.
3371. Id. at 1333.
3372. Id.
3373. Id.
3374. Id. at 1333-34.
3375. Id. at 1342. Additionally, Green argued that the trial court erred in rejecting his proposed jury instructions regarding the Government's burden of proof beyond a reasonable doubt. Rather than giving the requested instruction, which was taken from 1 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 11.14 (3d ed. 1977), the court gave a modified version of that instruction. The Ninth Circuit held that this did not constitute reversible error, since instructions need not be given in the precise language requested by the defendant so long as the instruction as a whole adequately covers the theory of the defense. Id. at 1341-42. See supra notes 3282-84 and accompanying text.
3376. Id. at 1342 (citing United States v. Shapiro, 669 F.2d 593, 597 (9th Cir. 1982) (defendant's lack of predisposition is crux of entrapment defense); United States v. Diggs, 649 F.2d 731, 738 (9th Cir.), cert. denied, 454 U.S. 970 (1981)).
3377. 684 F.2d at 1342 (quoting United States v. Ratcliffe, 550 F.2d 431, 434 (9th Cir. 1976)).
held that Fleishman's criminal predisposition eliminated entrapment as a potential defense.

The above cases support the general proposition that if the defendant fails to sustain his initial burden of presenting evidence to support his theory of defense, the court must not instruct the jury on the defense. This principle is consistent with prior rulings of the Ninth Circuit as well as other circuits. Therefore, it is error for the court to instruct upon a defense if the evidence is insufficient as a matter of law. In such cases, the trial court is correct in both excluding the evidence and in refusing jury instructions on that defense.

f. lesser included offenses

The Supreme Court has recently considered whether due process requires that a jury be instructed on a lesser included offense when the defendant's own evidence negates the possibility that such an instruction might have been warranted.

In *Hopper v. Evans*, Evans was convicted of murder in Ala-

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3378. Fleishman had bragged of his experience in counting large amounts of money, informed agents that he had engaged in a large amount of narcotics dealing, and demonstrated his familiarity with prices and the means of supplying narcotics. 684 F.2d at 1343.
3379. *Id.*
3380. United States v. Tsinnijinnie, 601 F.2d 1035 (9th Cir. 1979) (right to such instruction exists when supported by the law and the evidence), *cert. denied*, 445 U.S. 966 (1980); United States v. Wright, 593 F.2d 105 (9th Cir. 1979) (defendant is entitled to jury instructions on a legitimate theory of defense if there is evidence before the jury to support it); United States v. Winn, 577 F.2d 86 (9th Cir. 1978) (defendant entitled to instruction on defense theory only if supported by law and has some foundation in evidence); United States v. Nevitt, 563 F.2d 406 (9th Cir. 1977) (defendant entitled to instruction if record contains evidentiary support for theory), *aff'd*, 595 F.2d 1230, *cert. denied*, 444 U.S. 847 (1979).
3381. United States v. Fountain, 642 F.2d 1083 (7th Cir.), *cert. denied*, 451 U.S. 993 (1981) (instruction proper if defense theory has some foundation in the evidence, however tenuous); United States *ex rel.* Means v. Solem, 646 F.2d 322 (8th Cir. 1980) (defendant entitled to instruction on theory of case if there is evidence to support it); United States v. Prazak, 623 F.2d 152 (10th Cir.) (no instruction required on defendant's theory of defense when there is no support for it in the evidence or the law), *cert. denied*, 449 U.S. 880 (1980); United States v. Conroy, 589 F.2d 1258 (5th Cir.) (defendant's "theory of the case" must have foundation in evidence and legal support), *cert. denied*, 444 U.S. 831 (1979); United States v. Cullen, 454 F.2d 386 (7th Cir. 1971) (defense theory must have both legal and evidentiary support before jury will be instructed upon defense).
3382. *See* United States v. Glaeser, 550 F.2d 483, 487 (9th Cir. 1977) (court justified in ruling against entrapment as a matter of law when no jury could reasonably doubt defendant was predisposed to commit crime).
3383. *Id.*
3384. *See* United States v. Patrick, 542 F.2d 381, 386-88 (7th Cir. 1976) (when defendant failed to present evidence to support defense, court did not err in withdrawing the defense from the jury's consideration), *cert. denied*, 430 U.S. 931 (1977).
bama following a crime spree spanning seven states. Fully advised of his constitutional rights, Evans signed a detailed written confession, and later admitted his guilt at trial. He told the jury he felt no remorse and would return to a life of crime if permitted. He then asked the jury for the death sentence.

Pursuant to a state statute, which was subsequently invalidated, the jury was precluded from considering lesser included offenses in a capital case, leaving the jury with only two options. It could either convict Evans and sentence him to death, or it could return a verdict of not guilty. The jury returned a verdict of guilty in less than fifteen minutes.

After trial, Evans decided that he did not want to be executed. He appealed on the ground that he had been convicted and sentenced under a statute which unconstitutionally precluded jury consideration of lesser included offenses. The district court denied Evans' habeas corpus petition. Subsequently, in *Beck v. Alabama*, the Supreme Court held that in a capital case, due process requires that the jury be permitted to consider a verdict of guilt of a lesser included non-capital offense, provided that the evidence supports such a verdict. The Fifth Circuit, relying on *Beck*, reversed the district court's denial of relief.

The Supreme Court reversed the Fifth Circuit, stating that the holding applied only in cases where there was evidence which, if believed, could reasonably have led to a verdict of guilt of a lesser included offense. The Court rejected Evans' contention that the jury

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3386. *Id.* at 607.
3387. *Id.* at 607-08.
3389. 456 U.S. at 608.
3390. *Id.* at 609 (citing Evans v. Britton, 472 F. Supp. 707, 711-12 (S.D. Ala. 1979)).
3392. *Id.* at 637. In *Beck*, the defendant claimed that while he was attempting to tie up a robbery victim, his accomplice unexpectedly struck and killed the man. The State conceded that, except for the preclusion clause, *Beck* would have been entitled to an instruction on the lesser included, non-capital offense of felony murder. *Id.* at 629-30.
3393. 456 U.S. at 609-10 (citing Evans v. Britton, 628 F.2d 400 (5th Cir. 1980), *modified*, 639 F.2d 221 (1981)). The Fifth Circuit placed great emphasis on the Supreme Court's statement in *Beck* that "in every case" the preclusion clause introduces a level of uncertainty to the proceedings. 628 F.2d at 401, *modified*, 639 F.2d at 223-24. The Supreme Court in *Evans*, however, stated that its decision in *Beck* only applied to "every case" where the evidence would have supported a guilty verdict of a lesser included non-capital offense. 456 U.S. at 610.
3394. *Id.* The Supreme Court held that the *Beck* ruling requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. 456 U.S.
could have convicted him of a non-capital offense, stating that a conviction of this offense was warranted only when there was no evidence of an intent to kill. Because the evidence in Evans’ case not only supported the claim that Evans intended to kill the victim, but affirmatively negated any claim that he did not intend to do so, the Court concluded that no jury could reasonably have convicted Evans of any lesser offense. It therefore held that an instruction on the lesser offense of unintentional killing was not warranted, and that the Alabama preclusion clause did not prejudice the defendant in any way.

The underlying rationale of the Evans decision is that due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. The lower courts have construed this decision narrowly. They have interpreted it as stating in due process language the well-settled rule that when the evidence does not provide a rational basis for a jury to find the elements necessary to support a lesser included offense instruction, the trial court may properly decline to give such an instruction. The Evans decision does not represent a newly recognized constitutional right, nor does it

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at 611. Otherwise, arbitrary and capricious results could occur, such as the defendant being convicted of a lesser offense when the evidence warranted a conviction of first degree murder. Id. (citing Roberts v. Louisiana, 428 U.S. 325, 334 (1976) (plurality opinion)). The Court stated that giving a lesser included offense instruction only when the evidence warrants it channels the jury’s discretion so that it may convict a defendant of any crime fairly supported by the evidence. 456 U.S. at 611.

3395. Ala. Code § 13-1-70 (1975) makes a “homicide . . . committed in the perpetration of, or attempt to perpetrate any . . . robbery” a non-capital offense. However, because a conviction is warranted under this section only when a defendant lacks intent to kill, it was unavailable to Evans because of his testimony at trial that he intentionally killed his victim. 456 U.S. at 612-13.

3396. 456 U.S. at 613.

3397. Id. at 613-14. Evans had argued that the mere existence of the preclusion clause had “infected” his trial, necessitating retrial and possible admission of evidence of some lesser included offense. The Court, although recognizing the possible validity of such an argument in another factual situation, stated that Evans’ confession and plea of guilty to capital murder prevented him from successfully maintaining this argument. Id. Cf. Beck v. Alabama, 447 U.S. 625 (1980), in which the Court concluded that a jury might have convicted Beck, but also might have rejected capital punishment if it believed Beck’s testimony that he was guilty of only felony murder. See supra note 3392.

3398. See United States v. Neiss, 684 F.2d 570, 571 (8th Cir. 1982) (trial court may properly exclude instruction which does not have rational basis in the evidence); United States v. Elk, 658 F.2d 644, 648 (8th Cir. 1981) (defendant not entitled to lesser-included offense instruction unless evidence provides a rational basis upon which jury could find him guilty of the lesser but not guilty of the greater offense).

3399. Look v. Amaral, 546 F. Supp. 858, 859 (D. Mass. 1982) (for many years courts have recognized jury must be instructed concerning lesser included offenses if there exists a rational basis for such a charge).
create a new limitation on the right of a defendant to a lesser included offense instruction.

Finally, it is important to recognize that the Evans decision was unanimous to the extent that it held lesser included offense instructions unnecessary when the defendant's own evidence would prevent a reasonable jury from finding him guilty of the lesser offense but not guilty of the greater. It is safe to assume, therefore, that the rationale underlying Evans will not be questioned in the near future.

The Ninth Circuit has held that a defendant is entitled to a lesser included offense instruction if: (1) a lesser included offense is identified within the charged offense; and (2) a rational jury could find the defendant guilty of the lesser included offense but not guilty of the greater offense. In United States v. Skinner, the court found that the second prong of this test was not met. Defendant Skinner was convicted of first degree murder. At trial, he admitted to shooting the victim, but argued that the shooting was in self-defense. The trial judge gave instructions covering first and second degree murder, voluntary manslaughter, and self-defense, but refused to give an instruction on involuntary manslaughter. Skinner assigned this as error, arguing that the shooting was unintentional because it was a lawful act of self-defense done in an unlawful manner due to Skinner's use of excessive force in defending himself.

The Ninth Circuit, however, stated that although such an "imperfect self-defense" theory could reduce an intentional killing from murder to voluntary manslaughter, it could not support a conviction of involuntary manslaughter because a killing committed in self-defense is always intentional. The court therefore held that because no rational jury could acquit Skinner of the intentional offenses and then convict him of the unintentional offense of involuntary manslaughter, he was not entitled to the requested involuntary manslaughter.

3400. Justices Brennan and Marshall concurred in part and dissented in part. Their dissent was based upon their belief that the death penalty is in all circumstances cruel and unusual punishment prohibited by the eighth and fourteenth amendments to the Constitution. 456 U.S. at 614. (Brennan, J., and Marshall, J., dissenting).
3401. United States v. Johnson, 637 F.2d 1224, 1233-34 (9th Cir. 1980).
3402. 667 F.2d 1306 (9th Cir. 1982).
3403. Id. at 1309.
3404. Id.
3405. Id.
3406. Id. at 1310.
3407. Id. (citing Torcia, Wharton's Criminal Law § 165 (14th ed. 1979); LaFave and Scott, Criminal Law §§ 53, 77 (1st ed. 1972)).
In United States v. Skeet, the defendant was convicted of assault resulting in serious bodily harm. Skeet had engaged in an argument with his brother Robert and Robert's common-law wife. Skeet took out a gun and fired a shot between the two. Robert then tried to grab the pistol, but Skeet moved back and appeared to stumble. At this point, the gun went off again, and Robert was hit in the neck.

On appeal, Skeet contended that the jury could have found from the evidence that there were two separate assaults: the first when a shot went between Robert and his wife, and the second when the shot was fired which struck and injured Robert. Only the second assault would permit a conviction of the charge as set out in the indictment, and Skeet asserted that this second shot was accidental. Therefore, Skeet argued that the jury should have been instructed on the lesser included offense of assault and that the instruction to the jury that "fear on the part of the victim is not an essential element of the crime" was erroneous.

In reversing the trial court's decision, the Ninth Circuit stated that because the jury could have found that the shot fired between Robert and his wife constituted only a simple assault, an instruction on this lesser included offense should have been given. Accordingly, the court concluded that the jury should have been charged on the ele-

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3408. 667 F.2d at 1310. Skinner also disputed the trial judge's phrasing of several instructions, but the Ninth Circuit reaffirmed the general proposition that jury instructions need not be given in the precise language requested by the defendant. Id. (citing United States v. Lee, 589 F.2d 980, 985 (9th Cir.), cert. denied, 444 U.S. 969 (1979)). The court held that the "[t]rial judge's instructions, given in clear and understandable language, contained the same points as Skinner's requested instructions." 667 F.2d at 1310. 3409. 665 F.2d 983 (9th Cir. 1982).
3410. Id. at 984.
3411. Id. at 986.
3412. Id.
3413. Id. Assault consists of "a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." United States v. Dupree, 544 F.2d 1050, 1051 (9th Cir. 1976); see United States v. Rizzo, 409 F.2d 400, 403 (9th Cir. 1969) (assault committed by putting another in apprehension of harm, whether or not actor intends to inflict harm). However, the crime of assault resulting in serious bodily harm requires only that there have been a willful infliction of injury. United States v. Dupree, 544 F.2d 1050, 1052 (9th Cir. 1976); see United States v. Bell, 505 F.2d 539, 541 (7th Cir.), cert. denied, 420 U.S. 964 (1974). In Bell, the court distinguished between two types of assault: attempted battery and putting the victim in reasonable apprehension of harm. Apprehension on the part of the victim is not an essential element of an assault involving an attempted battery.
3414. 665 F.2d at 987.
ments and definition of each assault.\textsuperscript{3415} It stated that the trial court's instruction concerning the lack of necessity of fear on the part of the victim was incorrect, since simple assault requires "a reasonable apprehension of immediate bodily harm."\textsuperscript{3416} Because of these errors, the court reversed the judgment and remanded the case for a new trial.\textsuperscript{3417}

In \textit{United States v. Muniz},\textsuperscript{3418} the defendant was convicted of assaulting a fellow prison inmate with intent to commit murder. The victim had been stabbed repeatedly with a knife as he lay asleep in his cell. On appeal, Muniz cited as error the trial court's refusal to give a requested instruction that would have allowed the jury to find Muniz guilty of the lesser included offense of assault with a dangerous weapon with intent to do bodily harm.\textsuperscript{3419}

At trial, the Government had relied upon the viciousness of the attack and the severity of the wounds the victim suffered to establish the requisite intent to commit murder. Muniz's defense, however, had not been based on a lack of intent to commit murder, but rather on the contention that he was not the assailant.\textsuperscript{3420} The trial judge had concluded that, based on the evidence, no rational jury could find that whoever had attacked the victim had done so with the intent "merely" to commit bodily harm rather than with the intent to commit murder.\textsuperscript{3421}

After reviewing the elements which are necessary for a defendant to be entitled to an instruction on a lesser included offense,\textsuperscript{3422} the Ninth Circuit stated that the only issue in the case relating to a lesser included offense was whether Muniz had established that a rational jury could have found him guilty of the lesser offense and not guilty of the greater.\textsuperscript{3423} The court noted that in determining the answer to this question, the court must look to the evidence in the case before it.\textsuperscript{3424}

\textsuperscript{3415} Id.
\textsuperscript{3416} Id. at 986.
\textsuperscript{3417} Id. at 987.
\textsuperscript{3418} 684 F.2d 634 (9th Cir. 1982).
\textsuperscript{3419} Id. at 636.
\textsuperscript{3420} Id.
\textsuperscript{3421} Id.
\textsuperscript{3422} Id. \textit{See supra} note 124 and accompanying text. The court noted that 18 U.S.C. § 113(c) (assault with intent to commit bodily harm) may be a lesser included offense of § 113(a) (assault with intent to commit murder), for which Muniz was convicted. \textit{See} United States v. Stolarz, 550 F.2d 488, 491 (9th Cir.) (instruction on lesser included offense of assault with intent to commit bodily harm held to be appropriate), \textit{cert. denied}, 434 U.S. 851 (1977).
\textsuperscript{3423} 684 F.2d at 637.
\textsuperscript{3424} Id. (citing United States v. Johnson, 637 F.2d 1224, 1233-34 (9th Cir. 1980)).
Having done so, the court affirmed the trial court's refusal to give the lesser included instruction. 3425

These cases demonstrate that the Ninth Circuit will allow a defendant a lesser included offense instruction if the jury could have rationally found that not all of the elements of the greater offense had been proved, but that all of the elements of the lesser included offense had been proved. 3426 Thus, if the evidence is capable of more than one reasonable interpretation, the lesser included offense instruction should be given. 3427

2. Clarity as to burden of proof

In criminal cases, the Government is required to prove beyond a reasonable doubt the essential elements of the crime. Accordingly, an instruction which shifts the burden of proof to the defendant on any of these elements is erroneous. 3428

In United States v. Dearmore, 3429 the defendant had been convicted of conspiring to attempt bank robbery and attempted bank robbery. At trial, Dearmore supplied sufficient evidence to the court to support his defense of entrapment, 3430 and therefore his request for an instruction on entrapment was granted. 3431 On appeal, Dearmore contended that the trial court had failed to make clear in its instructions to the jury that the Government had the duty of proving beyond a reasonable doubt that Dearmore had not been entrapped. 3432

The Ninth Circuit held that although the trial court had correctly

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3425. 684 F.2d at 637. The court distinguished United States v. Stolarz, 550 F.2d 488 (9th Cir.), cert. denied, 434 U.S. 851 (1977), because the Stolarz court did not consider the severity of the victim's injuries, but simply mentioned that the victim had been stabbed. Id. at 490. The Stolarz court based intent to impose harm on statements attributed to the defendant rather than on the severity of the victim's injuries. This distinction is important because the Muniz court found the severity and the extent of the victim's injuries to be dispositive of intent.

3426. See also Sansone v. United States, 380 U.S. 343, 351 (1965) (lesser included offense instruction proper only where greater offense requires jury to find a disputed factual element which is not requisite for conviction of the lesser included offense).

3427. See also United States v. Crutchfield, 547 F.2d 496, 500 (9th Cir. 1977) (defendant must show that evidence justifies giving of lesser-included offense instruction).


3429. 672 F.2d 738 (9th Cir. 1982).

3430. Id. at 740. Dearmore was introduced by a police informant to two federal agents posing as potential accomplices. The agents subsequently supplied a getaway vehicle and money for disguises, and accompanied Dearmore to the bank on the morning the robbery was planned to take place. Id. at 739.

3431. Id. at 740.

3432. Id.
defined entrapment and correctly stated that the Government had to prove that Dearmore had not been entrapped, the jury instructions given did not clearly inform the jury of the requisite quantum of proof.® Accordingly, the court held that the instructions were not adequate, and it reversed Dearmore's conviction.®

This case demonstrates the Ninth Circuit's recognition that due process requires the prosecution to prove beyond a reasonable doubt "every fact necessary to constitute the crime." Thus, any instruction which shifts the burden of proof to the defendant on an essential element of a crime is error.

3. Curative jury instructions

a. instructions to disregard

The Ninth Circuit has recognized that although curative instructions are not always effective,® the court must assume that the jury followed the curative instruction.® Instructions to disregard evidence or to accept it for a limited purpose are best given when the testimony is being introduced, since it is useless and prejudicial to permit the jurors to digest the evidence for improper purposes for several days before telling them to disregard it.® The trial judge, however, is in the best position to determine the probable impact of the evidence on the jury, and his determination will not be reversed absent an abuse of discretion.®

In United States v. Sanford,® the defendant was convicted of possessing, concealing, transferring, and delivering counterfeit Federal Reserve notes. At trial, counsel for the Government prompted the key

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3433. Id. at 740-41 (citing United States v. Gonzales-Benitez, 537 F.2d 1051, 1054-55 & n.3 (9th Cir.), cert. denied, 429 U.S. 923 (1976); Notaro v. United States, 363 F.2d 169, 174-76 (9th Cir. 1966) (prosecution must prove beyond a reasonable doubt that the defendant has not been entrapped once there is sufficient evidence of entrapment)).

3434. 672 F.2d at 741. See also United States v. Alston, 551 F.2d 315, 319 (D.C. Cir. 1976) (defendant entitled to specific instructions on burden of proof); United States v. Ambrose, 483 F.2d 742, 753 (6th Cir. 1973) (jury must be told that the Government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped).


3436. United States v. Johnson, 618 F.2d 60, 62 (9th Cir. 1980).

3437. Id. at 62; United States v. Brady, 579 F.2d 1121, 1127 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979); United States v. Price, 577 F.2d 1356, 1366 (9th Cir. 1978).


3440. 673 F.2d 1070 (9th Cir. 1982).
prosecution witness to reveal that he had a heart condition.\textsuperscript{3441} The trial judge, in the presence of the jury, ruled the testimony irrelevant and excluded it, but only after he had initially let in the evidence.\textsuperscript{3442} He then reaffirmed the exclusion of the evidence by telling the jury to disregard any evidence stricken by the court.\textsuperscript{3443}

The Ninth Circuit stated that the forcefulness of the instruction and the conviction with which it is given must be weighed against the danger of prejudice generated by the evidence.\textsuperscript{3444} It then held that the two instructions given by the trial judge clearly outweighed any minor prejudice that may have been caused by disclosure of the witness' heart condition.\textsuperscript{3445}

In \textit{United States v. Muniz},\textsuperscript{3446} the defendant was convicted of assaulting a fellow prison inmate with intent to commit murder. At trial, the Government attempted to question Muniz about his silence following the assault, even though Muniz had been given \textit{Miranda} warnings.\textsuperscript{3447} Defense counsel objected to this line of questioning. After the objection, the court recessed for lunch. When the trial resumed, the court, at the Government’s request, instructed the jury to disregard the questioning concerning Muniz’s prior silence.\textsuperscript{3448}

On appeal, the Ninth Circuit rejected Muniz’s claim that he had been prejudiced by the prosecution’s line of questioning. The court noted that the trial judge, in instructing the jury to disregard the five minutes of questioning occurring directly before the recess, had not highlighted the question. Additionally, Muniz had not been required to answer the question.\textsuperscript{3449} This, combined with the Government’s failure to refer to the question in closing argument, rendered any error in

\begin{itemize}
  \item \textsuperscript{3441} Id. at 1071.
  \item \textsuperscript{3442} Id. at 1072.
  \item \textsuperscript{3443} Id.
  \item \textsuperscript{3444} Id. The court relied on United States v. Johnson, 618 F.2d 60, 62 (9th Cir. 1980). See also United States v. Metz, 625 F.2d 775, 778 (8th Cir. 1980) (court’s instructions to jury were sufficient to remove any prejudice to defendant); United States v. Taylor, 603 F.2d 732, 725-36 (8th Cir.) (court’s instructions, viewed in totality, were sufficient to cure any error in the introduction of evidence), \textit{cert. denied}, 444 U.S. 982 (1979); United States v. Eng, 241 F.2d 157, 160-61 (2d Cir. 1957) (judge’s comments following belated instructions to jury removed all force from those curative instructions).
  \item \textsuperscript{3445} 673 F.2d at 1072. The court noted that the prosecution’s witness, Jones, had agreed to cooperate with the Government only after his own arrest. The jury was made aware of this by testimony during the course of the trial, and the Ninth Circuit stated that such a witness is not likely to arouse as much sympathy as the victim of a crime. \textit{Id}.
  \item \textsuperscript{3446} 684 F.2d 634 (9th Cir. 1982).
  \item \textsuperscript{3447} Id. at 637.
  \item \textsuperscript{3448} Id.
  \item \textsuperscript{3449} Id. at 637-38.
\end{itemize}
the question itself harmless. 3450

In United States v. Spawr Optical Research, Inc., 3451 two individual defendants and their family-owned corporation were convicted of unlicensed export of laser mirrors to the Soviet Union. On the first day of jury deliberations, one of the national networks broadcasted an interview conducted three months earlier in which one of the prosecutors spoke generally about the Government's investigations into export violations. 3452 Although neither the Spawrs nor laser mirror sales were mentioned, the network juxtaposed the interview with a film showing the Spawrs leaving the courthouse. 3453

On appeal, the Spawrs claimed that they were prejudiced by this national broadcast. 3454 The Ninth Circuit disagreed. The court noted that the prosecutor informed the trial judge of the existence of the interview early in the proceedings, and also of the date of the broadcast as soon as he learned it. 3455 The trial judge thereupon considered various alternatives 3456 before deciding to instruct the jury not to watch any news program on the particular television channel or to talk to anyone who might have. 3457 The Ninth Circuit held that, absent a showing to the contrary, it must assume that the jury followed the trial court's instructions, 3458 and therefore affirmed the defendants' convictions.

These cases show that the Ninth Circuit will rarely consider a jury unable to follow an instruction to disregard evidence. Instead, it will weigh the forcefulness with which an instruction is given against the prejudice to the defendant from the evidence, and it will usually conclude that the jury followed the trial court's instructions.

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3450. Id. at 638.
3451. 685 F.2d 1076 (9th Cir. 1982), cert. denied, 103 S. Ct. 1875 (1983).
3452. Id. at 1082.
3453. Id.
3454. Id. The Spawrs also contended that the trial court erred in instructing the jury to equate value of the lasers with the selling price in deciding whether they had misrepresented facts in Shippers Export declarations. Id. at 1083. The Ninth Circuit rejected this claim, because the export regulations expressly equated value with the selling price when the goods were already sold upon shipping. Id. See 15 C.F.R. § 30.7(q)(1) (1976). Additionally, one of the Spawrs' former employees testified that the value of the laser mirrors had been intentionally understated in order to evade the export restrictions. 685 F.2d at 1083.
3455. Id. at 1082.
3456. The alternatives considered included sequestration of the jury. Id.
3457. Id.
3458. Id. (citing Fineberg v. United States, 393 F.2d 417, 419-20 (9th Cir. 1968) (jury is presumed to have conscientiously observed limiting instructions given by the court)).
b. limiting evidentiary instructions

Evidence may be admissible for one purpose even though it is inadmissible for another. However, the trial court is not required to give a limiting instruction to the jury unless counsel requests one.

In United States v. Tham, the defendant was convicted of embezzling union assets and of making false entries in union records. At trial, the jury requested the court to reread the testimony by Tham's witness, a labor lawyer who had participated in drafting the union bylaws. The Government then requested additional instructions, which the trial court granted, to the effect that although the jury was entitled to rehear the testimony, it should follow the court's instructions concerning the law, and not the witness' exposition of the law. The Ninth Circuit rejected Tham's argument that the instruction implicitly discredited the witness' testimony. The court followed general legal principles which provide that the decision to give additional instructions rests with the discretion of the trial judge.

In United States v. Regner, the defendant was convicted of mail fraud. At trial, the Government was permitted, over Regner's objections, to inquire into Regner's prior claims for insurance benefits. The

3459. See Spencer v. Texas, 385 U.S. 554 (1967), but cf. Burgett v. Texas, 389 U.S. 109 (1967). In Spencer, the Court held that evidence of past convictions, accompanied by an instruction that such matters not be taken into account in determining the defendant's guilt under the current offense, was not unconstitutional under the due process clause despite possible collateral prejudice to the defendant. 385 U.S. at 564. In Burgett, the Court held that under the circumstances of the case, evidence of prior convictions was inherently prejudicial, and that instructions did not render the constitutional error harmless beyond a reasonable doubt. 389 U.S. at 115.

3460. Fed. R. Evid. 105 provides that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." See United States v. Drebin, 557 F.2d 1316, 1325 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978). In Drebin, the defendants contended that the court's failure to give a limiting instruction was error. The Ninth Circuit rejected this argument, holding that the defendants had waived their objection by not requesting a limiting instruction at the time the evidence was introduced. Id.


3462. Id. at 858.

3463. Id.


3465. 677 F.2d 754 (9th Cir.), cert. denied, 103 S. Ct. 220 (1982).
trial court admitted the inquiry for the limited purpose of rebutting Regner’s testimony on direct examination that he lacked knowledge of how to file insurance claims. The court err ed in not giving an immediate instruction to the jury informing it of the limited admissibility, for credibility purposes, of evidence concerning Regner’s prior insurance claims.

The Ninth Circuit first noted that Regner’s counsel had not requested a limiting instruction during the trial but had only requested that the record reflect that the evidence was being introduced for a limited purpose. It then determined that Regner had failed to demonstrate any prejudice because of the court’s failure to give a limiting instruction. Finally, the court stated that Regner’s guilt was established by evidence independent of the evidence of prior insurance claims. Therefore, it held that any failure to give a limiting instruction did not constitute “plain error.”

In United States v. Skinner, the defendant was convicted of first degree murder. At trial, a Government witness testified on cross-examination that Skinner had once pulled a gun on him. Skinner argued that the trial court had abused its discretion by refusing to strike the testimony, or by failing to give a limiting instruction.

The Ninth Circuit stated that, although curative instructions

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3466. Id. at 756.
3467. Id. at 757.
3468. Id.
3469. Id. The trial judge in open court had declared that “[t]he matter is material because of the defendant’s earlier testimony about seeming lack of knowledge of filing insurance claims, and only for that purpose am I allowing it in.” The Ninth Circuit interpreted this as a limiting admonition, and stated that it served to weaken Regner’s claim of prejudice. Id.
3470. Id.
3471. Id. Under most circumstances, an appellate court will not consider a claim of error based on the jury instructions, or lack thereof, in the absence of an objection at trial. Singer v. United States, 380 U.S. 24, 38 (1965). However, Fed. R. Crim. P. 52(b) provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” See United States v. Pariente, 558 F.2d 1186 (5th Cir. 1977); United States v. Roach, 321 F.2d 1 (3d Cir. 1963); Trussell v. United States, 278 F.2d 478 (6th Cir. 1960).
3472. 667 F.2d 1306 (9th Cir. 1982) (per curiam).
3473. Id. at 1310.
3474. Id.
should be given when evidence is improperly admitted, the improper testimony in this case was neither the product of Government misconduct nor developed through direct questioning by the Government. The court also pointed out that defense counsel had called another witness who explained and mitigated Skinner's actions. Finally, it noted that since the motion for a limiting instruction was made later in the trial, an admonition to the jury only would have emphasized the testimony sought to be limited. The court held that these circumstances justified the trial court's refusal to strike the testimony or to give a limiting instruction.

In United States v. Gere, the defendant was charged with conspiring to commit mail fraud. At trial, the judge conditionally admitted evidence of Gere's alleged co-conspirator's statements with an instruction that the jury was not to consider the statements until a conspiracy had been found beyond a reasonable doubt. A no conspiracy finding was later made, but the trial judge failed to instruct the jury to ignore the specific items of testimony conditionally admitted. Gere contended on appeal that the trial judge's omission constituted plain error.

The Ninth Circuit rejected this argument, stating that although such an instruction should have been given, there was other evidence legitimately before the jury which duplicated the conditionally admitted evidence. The court therefore held that failure to instruct the jury to ignore the conditionally admitted evidence did not amount to plain error.

In United States v. Astorga-Torres, the defendants were convicted of conspiring to distribute heroin. At trial, a co-conspirator testi-

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3475. Id. (citing United States v. Johnson, 618 F.2d 60, 62 (9th Cir. 1980)).
3476. 667 F.2d at 1310 (citing United States v. Green, 648 F.2d 587, 593 (9th Cir. 1981); United States v. Aims Back, 588 F.2d 1283, 1287 (9th Cir. 1979)).
3477. 667 F.2d at 1310.
3478. Id. The court apparently desired to avoid having to place undue emphasis on a minor bit of evidence before the jury, despite its holding that the jury will be assumed to follow curative instructions. See United States v. Johnson, 618 F.2d 60, 62 (9th Cir. 1980); United States v. Brady, 579 F.2d 1121, 1127 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979); United States v. Price, 577 F.2d 1356, 1366 (9th Cir. 1978), cert. denied sub nom. Mitchell v. United States, 439 U.S. 1068 (1979).
3479. 667 F.2d at 1310.
3480. 662 F.2d 1291 (9th Cir. 1981).
3481. Id. at 1294.
3482. Id. at 1293.
3483. Id. at 1295.
3484. Id.
3485. 682 F.2d 1331 (9th Cir.), cert. denied, 103 S. Ct. 455 (1982).
fied concerning drug sales and statements made prior to the existence of any conspiracy between himself and the defendants. The defendants contended that the co-conspirator's testimony was inadmissible hearsay. The trial court, however, ruled that the co-conspirator's statements were admissible, not as a narrative of facts or as proof that he actually acted as he intended, but as evidence that he had the intent of so doing.

The Ninth Circuit affirmed the trial court's decision that the testimony was admissible, holding that an appropriate limiting instruction had been given. The court stated that the testimony was properly admitted as evidence of intent, from which inferences as to intent could properly be drawn by the jury.

These cases demonstrate that the Ninth Circuit will rarely consider that the trial court's failure to give a limiting instruction constitutes plain error. Instead, the court will consider factors such as the failure of defense counsel to request a limiting instruction, the absence of any misconduct on the Government's part in generating the improper evidence, and the existence of independent evidence of the defendant's guilt which sufficiently outweighs any prejudice to the defendant from improper evidence.

4. Review of jury instructions in the context of the case

a. harmless error

It is a well-accepted principle of law that a single instruction to the jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. Although an instruction may have

3486. Id. at 1335.
3487. Id.
3488. Id. at 1336-37. See Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295-96 (1892); Fed. R. Evid. 803. Such evidence may be considered by the jury in determining whether the declarant subsequently performed the intended act. See United States v. Pheaster, 544 F.2d 353, 374-80 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977) (applying Hillmon before Federal Rules of Evidence were in effect); United States v. Jenkins, 579 F.2d 840, 842-44 (4th Cir.), cert. denied, 439 U.S. 967 (1978).
3489. 682 F.2d at 1336. The court also considered whether the trial court erred in its instruction that if the jury found that a conspiracy existed between Astorga-Torres and the co-conspirator, it could consider the statements "for all purposes." Id. Astorga-Torres argued that the record was devoid of any evidence from which it could be concluded that a conspiracy existed at the time his co-conspirator made the statements in question. Id. Because the trial court's limiting instruction probably only served to inform the jury that the co-conspirator's testimony was not entitled to conclusive weight as proof of anything, the Ninth Circuit held that, even if one accepted arguendo the defendants' claim of error, such error was not prejudicial. Id. at 1336-37.
been improper, this is not reversible error when the evidence of guilt is strong and other proper instructions are given.\textsuperscript{3491}

In \textit{McGuinn v. Crist},\textsuperscript{3492} the warden of the Montana State Penitentiary appealed the district court's decision to grant McGuinn's petition for a writ of habeas corpus after McGuinn had been convicted of committing deliberate homicide by shooting a person four times in the head.\textsuperscript{3493} McGuinn objected to a jury instruction which stated that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," and the district court held that the contested jury instruction was violative of McGuinn's due process rights.\textsuperscript{3494}

The Ninth Circuit reversed the district court, stating that no reasonable juror could have found beyond a reasonable doubt, on the evidence presented, that McGuinn voluntarily committed homicide without also inferring beyond a reasonable doubt that he committed these acts knowingly and purposely.\textsuperscript{3495} It further stated that because McGuinn's defense was an alibi rather than lack of intent to commit homicide, the issue of intent in this case was undisputed, and an erroneous instruction with respect to an undisputed issue is harmless error.\textsuperscript{3496} The court therefore held that the jury instruction, although incorrect, constituted harmless error.\textsuperscript{3497}

In \textit{United States v. Eden},\textsuperscript{3498} the defendant was convicted of embezzling and converting federal student loan funds, and concealing material facts from the Department of Health, Education, and Welfare. On appeal, Eden argued that the district judge had given an incomplete instruction as to the definition of conversion, and that the instruction

\begin{itemize}
  \item \textsuperscript{3491} Pool v. United States, 260 F.2d 57, 66 (9th Cir. 1958).
  \item \textsuperscript{3492} 657 F.2d 1107 (9th Cir. 1981), \textit{cert. denied}, 455 U.S. 990 (1982).
  \item \textsuperscript{3493} \textit{Id. at} 1107.
  \item \textsuperscript{3494} \textit{Id. at} 1107-08. This same instruction had been disapproved in Sandstrom v. Montana, 442 U.S. 510, 525-27 (1979).
  \item \textsuperscript{3495} 657 F.2d at 1108. The evidence presented to the jury revealed that the victim was shot at close range, negating any reasonable possibility that the homicide occurred because of recklessness or negligence. It also revealed that McGuinn was placed near the scene of the crime and had the means to commit the crime. Additionally, McGuinn was impeached on topics closely related to his activities surrounding the crime. \textit{Id.}
  \item \textsuperscript{3496} \textit{Id. See} Mason v. Balkcom, 487 F. Supp. 554, 559 (M.D. Ga. 1980), \textit{rev'd}, 669 F.2d 222 (5th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 1260 (1983). In reversing Mason's conviction, the Fifth Circuit held that his intent was a disputed issue in the case, and therefore any error could not be said to be harmless.
  \item \textsuperscript{3497} 657 F.2d at 1108.
  \item \textsuperscript{3498} 659 F.2d 1376 (9th Cir. 1981), \textit{cert. denied}, 455 U.S. 949 (1982).
\end{itemize}
negated the Government’s burden of proving specific intent.\textsuperscript{3499}

The Ninth Circuit recognized that the instruction on conversion, standing alone, was inaccurate, but it also recognized that jury instructions must be reviewed in the context of the entire trial in order to make a proper inquiry as to their adequacy.\textsuperscript{3500} It noted that, prior to defining conversion, the trial court had charged the jury that the Government must necessarily show beyond a reasonable doubt that “‘the defendant acted knowingly, willfully and with the intent to appropriate the money . . . .'”\textsuperscript{3501} Because the instructions as a whole were not misleading, and fairly and adequately instructed the jury as to the definition of conversion, the court held that any error in the instruction on conversion was cured when viewed along with the other instructions.\textsuperscript{3502}

In \textit{United States v. Federico},\textsuperscript{3503} the defendant was convicted of conspiring to possess and distribute cocaine, possessing cocaine with intent to distribute, and possessing cocaine. At trial, hearsay evidence was admitted against Federico under the co-conspirator hearsay exception.\textsuperscript{3504} The trial judge instructed the jury that it could consider the co-conspirator’s statements only if it found that a conspiracy had been shown beyond a reasonable doubt through independent evidence.\textsuperscript{3505}

On appeal, Federico argued that the instruction was incorrect. The Ninth Circuit agreed, despite the fact that the instruction stemmed from an earlier decision of the circuit.\textsuperscript{3506} The court stated that the trial court’s use of the instruction was unnecessary under the prior decision, and probably not correct.\textsuperscript{3507} However, the court held this to be harm-

\textsuperscript{3499.} Id. at 1378. The instruction in this case had been taken from § 16.01 of \textit{Devitt & Blackmar, Federal Jury Practice and Instructions} (3d ed. 1977), and was founded on \textit{Morissette v. United States}, 342 U.S. 246 (1952). \textit{Morissette}, however, merely recited examples of conversion, and the instruction drawn from these sources failed to clearly state the applicable principles; the court therefore concluded that the instruction used in \textit{Eden} should be avoided in future cases. 659 F.2d at 1378-79.

\textsuperscript{3500.} 659 F.2d at 1379 (citing \textit{United States v. Federbush}, 625 F.2d 246, 255 (9th Cir. 1980); \textit{Stoker v. United States}, 587 F.2d 438, 440 (9th Cir. 1978); \textit{United States v. James}, 576 F.2d 223, 226-27 (9th Cir. 1978); \textit{United States v. Pallan}, 571 F.2d 497, 501 (9th Cir.), cert. denied, 436 U.S. 911 (1978)).

\textsuperscript{3501.} 659 F.2d at 1380.

\textsuperscript{3502.} Id.

\textsuperscript{3503.} 658 F.2d 1337 (9th Cir. 1981).

\textsuperscript{3504.} Id. at 1342.

\textsuperscript{3505.} Id. at 1342 n.6.

\textsuperscript{3506.} Id. (citing \textit{Carbo v. United States}, 314 F.2d 718, 737 (9th Cir. 1963) (trial judge determines the admissibility of co-conspirator’s statements), \textit{cert. denied}, 377 U.S. 953 (1964)).

\textsuperscript{3507.} 658 F.2d at 1342 n.6.
less error since the instruction, "if anything," favored the defendant.\textsuperscript{3508}

In \textit{United States v. Wolters},\textsuperscript{3509} the defendant was convicted of failing to file an income tax return. Wolters contended that he was prejudiced by a jury instruction which stated that "the law presumes that the signature of a partner on a partnership tax return is an authorized signature on behalf of the partnership." Wolter's argument was that such an instruction unconstitutionally relieved the Government from having to prove all elements of the crime beyond a reasonable doubt.\textsuperscript{3510}

The Ninth Circuit first stated that the use of such a presumption does not necessarily require reversal since the instruction must be considered in the context of the overall charge.\textsuperscript{3511} It then noted that the district judge told the jury in at least four separate instructions that the Government must prove every element of the crime beyond a reasonable doubt, and that the jury was under a duty to consider the instructions as a whole.\textsuperscript{3512} The court stated that the instruction under attack was specifically authorized by the provisions of 26 U.S.C. section 6063,\textsuperscript{3513} and it therefore held that the instruction did not so prejudice Wolters as to require a reversal.\textsuperscript{3514}

In \textit{United States v. Williams},\textsuperscript{3515} the defendant was convicted of making false statements in the acquisition of firearms. When purchasing guns on five separate occasions, Williams had answered "no" to the question of whether he had ever been convicted of a crime punishable

\textsuperscript{3508} \textit{Id.} The court also noted that the instruction as well as the judge's comments indicated that the judge realized he had to make the initial determination of whether a conspiracy had been shown. \textit{Id.} (citing \textit{United States v. Vargas-Rios}, 607 F.2d 831, 837 (9th Cir. 1979)). Furthermore, the record showed that the trial judge found a prima facie case of conspiracy. 642 F.2d at 1342 n.6 (citing \textit{United States v. Giese}, 597 F.2d 1170, 1198 (9th Cir.), \textit{cert. denied}, 444 U.S. 979 (1979)).

\textsuperscript{3509} 656 F.2d 523 (9th Cir. 1981).


\textsuperscript{3511} 656 F.2d at 526.

\textsuperscript{3512} \textit{Id.}

\textsuperscript{3513} 26 U.S.C. § 6063 provides that a partnership's tax return shall be signed by one of the partners, and that such signing is prima facie evidence that that partner is authorized to sign the return on behalf of the partnership. Cases involving 26 U.S.C. § 6064, which provides for the same type of presumption, have been interpreted as not confining this presumption to civil cases. \textit{See United States v. Cashio}, 420 F.2d 1132 (5th Cir. 1969), \textit{cert. denied}, 397 U.S. 1007 (1970); \textit{United States v. Wainwright}, 413 F.2d 796 (10th Cir. 1969).

\textsuperscript{3514} 656 F.2d at 526. The court also stated that because the evidence at trial, entirely aside from the presumption mentioned in the instruction, showed beyond a reasonable doubt that a partnership existed, the instruction would be harmless under \textit{FED. R. CRIM. P. 52(a)}. \textit{Id.}

\textsuperscript{3515} 685 F.2d 319 (9th Cir. 1982).
by imprisonment for a term exceeding one year, despite having been so convicted.\footnote{3516} Williams claimed that when purchasing the guns, he had not actually read the questions because he was relying on his parole officer's statement that he could own a gun after five years from his prison release if he were to answer "no" to all questions on the purchase form.\footnote{3517} On appeal, Williams contended that the trial court had erred in instructing the jury that "if the defendant also acts knowingly if he acts with reckless disregard for truthfulness. "Recklessly" means wantonly, with indifference to consequences."\footnote{3518} The Ninth Circuit held that the instruction was erroneous because reckless conduct alone is not sufficient to constitute knowing conduct.\footnote{3519} It affirmed Williams' conviction, however, because of his failure to object to the instruction at trial.\footnote{3520} The court stated that if no objection is made to an instruction at trial, an appellate court will reverse only if it was plain error to have given the instruction.\footnote{3521} It concluded that, because Williams' story of reckless conduct was not believable, it was highly improbable that the erroneous instruction on reckless conduct affected the verdict. Accordingly, the court held that the instruction given did not constitute plain error.\footnote{3522} In United States v. Patterson,\footnote{3523} the defendant was convicted of receiving stolen property and of conspiring to transport stolen motor vehicles in interstate commerce. Three forklifts had been stolen in Cal-
Patterson contended that the jury instructions given at trial had been contradictory on the issue of intent. The Ninth Circuit noted, however, that defense counsel had neither objected to the instructions at trial, nor had he requested additional instructions on the issue of intent. The court held that in the absence of a showing that Patterson's substantial rights were affected, it was not required to consider objections to the instructions for the first time on appeal. Therefore, the court affirmed the conviction as to the issue of jury instructions.

In United States v. Gilman, the defendants, partners in a mail order business that distributed sexually explicit magazines and brochures, were convicted of mailing obscene material and of conspiracy. On appeal, they argued that errors in certain jury instructions required reversal. However, the Ninth Circuit rejected this claim because the defendants had failed to object to the instructions at trial, and because they had failed to demonstrate that the instructions as given had substantially affected their rights.

These cases show that the Ninth Circuit consistently rules that jury instructions must be reviewed in the context of the entire case in order to make a proper inquiry as to their adequacy. On appeal, an errone-
ous instruction will not necessitate reversal unless it constitutes plain error. Because the circuit defines plain error as “a highly prejudicial error affecting substantial rights,” it will reverse a criminal conviction because of plain error “[o]nly in exceptional situations.”

b. prejudicial error

In United States v. Astorga-Torres, the defendants were convicted of conspiring to distribute heroin, possessing with intent to distribute heroin, assaulting federal agents with a deadly weapon, and carrying a firearm during the commission of a federal narcotics felony. The defendants, accompanied by a co-conspirator, traveled to a motel where undercover Drug Enforcement Administration agents had arranged for a sale of fifteen ounces of heroin. The co-conspirator was arrested after making a sale of seven ounces of heroin, and agents then went to the defendants’ cabin to arrest them. After a brief gun battle, the defendants surrendered, and the DEA agents had the room’s septic tank pumped out on the suspicion that heroin had been flushed down the toilet. This search resulted in the recovery of several condoms, one of which contained heroin.

The Government’s theory of the case was that the defendants were in actual possession of the eight ounces of heroin not found to be in their co-conspirator’s possession. However, the trial court instructed the jury that it need only find that the defendants were in constructive possession of the seven ounces of heroin possessed by their co-conspirator in order to find them guilty of possessing heroin with intent to distribute.

The Ninth Circuit stated that this instruction required the jury to find only that the defendants knew, or should have known, that their co-conspirator had heroin he planned to sell. The instruction therefore

3533. See also United States v. Perez, 491 F.2d 167, 173 (9th Cir.), cert. denied, 419 U.S. 858 (1974).
3535. United States v. Krasn, 614 F.2d 1229, 1235-36 (9th Cir. 1980).
3536. 682 F.2d 1331 (9th Cir. 1982), cert. denied, 103 S. Ct. 455 (1983).
3537. Id. at 1333.
3538. Id. at 1333-34.
3539. Id. at 1337. The court drew this instruction from United States v. Jewell, 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976), where it was held to be appropriate under circumstances in which the defendant had deliberately closed his eyes to the apparent facts. The Ninth Circuit subsequently limited the appropriateness of the Jewell instruction to like circumstances. United States v. Erwin, 625 F.2d 838, 841 (9th Cir. 1980). See also United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir. 1977).
invited the jury to find the defendants in constructive possession of heroin if it was unable to conclude that the defendants had been in actual possession of heroin. Such an outcome would be inconsistent with previous Ninth Circuit decisions, and the court held that because the Government's case was "not without its elements of doubt," the trial court's error in instructing the jury as to constructive possession was "far from harmless." It therefore reversed the defendants' convictions relating to the heroin possession.

In *United States v. Nicholson*, the defendant was convicted of conspiring to possess and import marijuana with intent to distribute. Nicholson had provided an alleged co-conspirator with $20,000 for him to invest in a "business venture" which he promised Nicholson would yield a high rate of return. At trial, Nicholson testified that he initially did not inquire into the nature of the business venture, and that when he later asked whether the venture was a drug deal, he received a negative response.

In instructing the jury on the knowledge element of the conspiracy charges, the trial judge stated that deliberate avoidance of knowledge that there was a high probability that the invested money would be used in a drug scheme was the equivalent of actual knowledge. Nicholson argued that this instruction should not have been given in his case because there was no evidence that he consciously avoided learning the truth.

The Ninth Circuit rejected Nicholson's argument, noting that Nicholson had known of the co-conspirator's history of drug dealing, and that any reasonable person would have inquired extensively into the nature of the proposed business venture before investing $20,000. The court then held that the circumstances presented were precisely those where an instruction as to deliberate ignorance was appropriate, and it affirmed the conviction.

3540. 682 F.2d at 1337.
3541. United States v. Batimana, 623 F.2d 1366, 1369 (9th Cir.) (mere proximity, presence, or association with the person who does control the drugs is insufficient to support a finding of possession), *cert. denied*, 449 U.S. 1038 (1980).
3542. 682 F.2d at 1337.
3543. *Id*.
3544. 677 F.2d 706 (9th Cir. 1982).
3545. *Id.* at 707-08.
3546. *Id.* at 708.
3547. *See supra* note 3539.
3548. 677 F.2d at 710.
3549. *Id.* at 710-11.
3550. *Id.* at 711. There had been testimony from several co-conspirators that such "delib-
In *United States v. Jones*, the defendant was convicted of assault with intent to commit murder. Jones had attacked the victim in a prison cell where they were both in custody and had stabbed the victim five times. Jones' defense was that he had not intended to kill the victim but to merely "teach him a lesson." At trial, the court instructed the jury that a requisite element for conviction of the offense was the intent to commit murder. It then instructed the jury that murder was an unlawful killing of a human being with malice aforethought. The trial judge defined malice aforethought as either an intent to take the life of another or an intent to act willfully in callous and wanton disregard of the consequences to human life.

On appeal, Jones argued that although the instructions correctly noted that a requisite element of the crime was an intent to murder, this became misleading when coupled with the court's subsequent instruction defining the separate offense of murder outside the context of assault with intent to commit murder. The Ninth Circuit agreed, and held that the intent to act in wanton disregard of the consequences to human life is less than the specific intent to kill necessary for a conviction of assault with intent to commit murder. The Ninth Circuit stated that the instruction could not have been harmless because the jury may have believed Jones' story and found no intent to kill, but may have found him guilty because it determined that his attack amounted to reckless and wanton conduct. The court therefore reversed the conviction.

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3551. *Id.*
3552. 681 F.2d 610 (9th Cir. 1982).
3553. *Id.* at 611.
3554. *Id.* This instruction merely repeated the statutory language in 18 U.S.C. § 113(a) (1976).
3555. 681 F.2d at 611. *See infra* note 3559.
3556. *Id.* Conviction under 18 U.S.C. § 113(a) (assault with intent to commit murder) requires a specific intent to kill the victim. Acting with malice by committing a reckless and wanton act without intending to kill the victim is not sufficient for conviction.
3558. 681 F.2d at 612.
3559. *Id.* In dissent, Judge Goodwin stated that it was his opinion that the error, if any, in the instructions complained of was harmless beyond a reasonable doubt. He felt that this case was an inappropriate one for the Ninth Circuit to reverse simply so that the court could
These cases demonstrate that, in the Ninth Circuit, where the proof of guilt is strong, a relatively minor error may not necessarily justify a reversal. In a close case, however, the same mistake could seriously prejudice the defendant's case, necessitating a reversal of the conviction.\textsuperscript{3560}

c. \textit{the Allen charge}

The term \textit{"Allen charge"} is the name for a class of supplemental jury instructions given when jurors are apparently deadlocked.\textsuperscript{3561} These instructions advise deadlocked jurors to reconsider their opinions in light of each other's arguments with a disposition to be convinced, especially considering the majority's viewpoint.\textsuperscript{3562}

In \textit{United States v. Hooton},\textsuperscript{3563} the defendant was convicted of dealing in firearms without a federal license. At trial, following six days of evidence and argument, the jury spent two full days deliberating, twice asking for further instructions.\textsuperscript{3564} At the end of the second day, the jury announced that it was deadlocked. The next morning, the trial judge delivered an \textit{Allen} charge. On appeal, Hooton argued that the use of the \textit{Allen} charge was coercive.\textsuperscript{3565}

The Ninth Circuit stated that four factors were important in determining whether the use of an \textit{Allen} charge was coercive: (1) the form of the instruction; (2) the period of deliberation following the charge; (3) the total time of jury deliberations; and (4) the indicia of coercive pressure upon the jury.\textsuperscript{3566} The court then determined that the first three factors supported the use of the \textit{Allen} charge in this case. The Ninth Circuit stated that the trial court had used a standard charge,\textsuperscript{3567} the verdict was not returned until the afternoon although the charge was given in the morning, and the jury did not reach a verdict until the third day of deliberations following a six day trial.\textsuperscript{3568} The court fur-

\footnotesize{\textsuperscript{3560} See also Johnson v. United States, 424 F.2d 537, 537 (9th Cir. 1970) (per curiam).\textsuperscript{3561} The name derives from the first Supreme Court approval of such an instruction in Allen v. United States, 164 U.S. 492, 501-02 (1896).\textsuperscript{3562} 164 U.S. at 501.\textsuperscript{3563} 662 F.2d 628 (9th Cir. 1981).\textsuperscript{3564} Id. at 636.\textsuperscript{3565} Id.\textsuperscript{3566} Id. (citing United States v. Beattie, 613 F.2d 762, 765-66 (9th Cir.), cert. denied, 446 U.S. 982 (1980)).\textsuperscript{3567} The charge used was taken from 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 18.14 (3d ed. 1977).\textsuperscript{3568} 662 F.2d at 637. The factor of the total time of jury deliberations is of questionable
ther determined that there was no evidence in the record of coercion. The Ninth Circuit therefore held that the trial judge had not abused his discretion in giving the Allen charge.

In United States v. Armstrong, the defendants were convicted of various federal fraud offenses involving soliciting advance fees for loan guarantee agreements. In his initial charge to the jury, the judge gave a modified Allen charge. On the seventh day of deliberations, the trial judge reminded the jury of his initial instructions, although in a milder form. On appeal, the defendants argued that the trial court had impermissibly Allen-charged the jury twice, and that the first charge was deficient because it did not instruct the majority to reexamine its views in light of those of the minority.

The Ninth Circuit first stated that the initial instruction was only a mild form of the traditional Allen charge, since it did not refer to the expense involved in the trial or to the need for a new trial in the case of a deadlock. It also noted its recent determination that Allen-type charges given during the initial instructions are inherently less coercive than those given after a jury has pronounced itself deadlocked. The court therefore held that under the circumstances, the initial charge was not impermissibly coercive.

The Ninth Circuit then rejected the defendants' argument that the second charge was improper. It stated that although the circuit has a per se rule against repeating an Allen charge to the jury, the second value, however, since no matter how long the jury deliberates, a strongly worded Allen charge could still be very coercive.

3569. Id. The trial judge was aware only of a deadlock, he did not know how the jury stood, and he gave the charge only once, avoiding coercive deadlines and threats.

3570. Id. The court distinguished United States v. Contreras, 463 F.2d 773 (9th Cir. 1972), where the trial court gave the jury an Allen charge after nearly eight hours of deliberation but prior to any indication in the record that the jury was unable to reach a verdict. The court stated that, unlike Contreras, Hoolon did not involve a premature Allen charge. 662 F.2d at 636.


3572. Id. at 1333-34.

3573. Id. at 1334-35.

3574. Id. The court, however, determined that although it is the better practice to suggest that the majority reexamine its position in light of the minority's, the absence of such reciprocal language in the mild opening instructions did not render the charge impermissibly coercive. Id.

3575. Id.

3576. Id. (citing United States v. Williams, 624 F.2d 75 (9th Cir. 1980)).

3577. 654 F.2d at 1335.

3578. Id. at 1334 (citing United States v. Seawell, 550 F.2d 1159 (9th Cir. 1977), cert. denied, 439 U.S. 991 (1978)). In Seawell, the court gave a full Allen charge after the jury announced a deadlock. When further deliberations failed to result in a verdict, the court
charge was merely a mild reminder of an initial instruction which itself was a shortened, milder version of the traditional Allen charge. The court also emphasized that the second charge was the only one given after the jury had reached a deadlock. The court therefore held that the timing and content of the two charges rendered them less coercive than traditional Allen charges, and concluded that giving the charges did not constitute reversible error.

In United States v. Mason, three defendants were convicted of conspiring to distribute and distributing cocaine. Two of these defendants were also convicted of using firearms during the commission of a felony. In a first trial, the jury had been unable to reach a verdict regarding these three defendants. A second jury, after deliberating for only three hours, informed the marshal that they were having problems reaching a verdict. The marshal related this to the trial judge who, without informing counsel on either side of his intent, summoned the jury and gave a modified Allen charge. Each defendant's counsel objected to the charge, but guilty verdicts on all counts were returned only an hour and a half after deliberations resumed.

On appeal, the Ninth Circuit reiterated its rule that an Allen charge will be upheld only if in a form not more coercive than that approved in Allen v. United States. Examining the charge given in this case, the court held that the trial judge's comments stressing the expense of the case in terms of time, effort, and money tended to make the charge coercive. Additionally, the trial judge told the jury that the Supreme Court had approved the Allen-type charge. Finally, reread the charge, and a guilty verdict was returned soon thereafter. On appeal, the trial judge's actions were held coercive, and the Ninth Circuit ruled that it is reversible error to twice Allen-charge a jury. Id. at 1162-63.

3579. 654 F.2d at 1335.
3580. Id.
3581. Id. The court noted, however, that it would be better practice to utilize modified Allen charges only once, especially in short, simple cases. Id.
3582. 658 F.2d 1263 (9th Cir. 1981).
3583. Id. at 1265. The defendants in Mason had initially been tried with a fourth defendant, who had been found guilty by the first jury. Id.
3584. Id.
3585. Id.
3586. Id. at 1266 (citing United States v. Beattie, 613 F.2d 762, 765 (9th Cir.), cert. denied, 446 U.S. 982 (1980); United States v. Handy, 454 F.2d 885, 889 (9th Cir.), cert. denied, 409 U.S. 846 (1972); Sullivan v. United States, 414 F.2d 714, 718 (9th Cir. 1969)).
3587. The court noted that the interjection of fiscal concerns into jury deliberations has long been recognized as a potential source of abuse. Id. at 1266-67 (citing Peterson v. United States, 213 F. 920 (9th Cir. 1914)).
3588. 658 F.2d at 1267. The court noted that in United States v. Kenner, 354 F.2d 780 (2d Cir. 1965), cert. denied, 383 U.S. 958 (1966), the Second Circuit affirmed a conviction where
the trial judge failed to instruct the minority jurors not to abandon their conscientiously held views merely to secure a verdict.\footnote{3589} Taken together, these factors were sufficient to render the trial judge's charge improductively coercive.\footnote{3590}

In \textit{United States v. Garner},\footnote{3591} the defendant was convicted of wire fraud. At trial, the judge called the jury back after several hours of deliberation, and instructed the jurors that they should realize the time and expense involved in the trial and should therefore endeavor to reach a verdict.\footnote{3592} Garner argued on appeal that the trial court had thereby committed reversible error since the instruction did not include an admonition to the jurors not to surrender their honest beliefs as to the guilt or innocence of the defendant.\footnote{3593}

The Ninth Circuit rejected this argument, noting that there was no evidence in the record indicating that the instruction had adversely affected the verdict in any way.\footnote{3594} It therefore held that no reversible error had occurred.\footnote{3595}

Although the \textit{Allen} charge has been disapproved in at least three circuits,\footnote{3596} and some states,\footnote{3597} the above cases show that the Ninth

\footnote{3589. \textit{Id.} at 1267. See Sullivan v. United States, 414 F.2d 714 (9th Cir. 1969); United States v. Rogers, 289 F.2d 433 (4th Cir. 1961). In \textit{Sullivan}, the Ninth Circuit stated that the judge should remind "each of the jurors of his obligation to give ultimate controlling weight to his own conscientiously held opinion." 414 F.2d at 718. Similarly, the Fourth Circuit in \textit{Rogers} stated that the judge should stress to the jurors that their verdict should not be reached in violation of the honest conviction of any one of the jurors. 289 F.2d at 435.}

\footnote{3590. 658 F.2d at 1267 n.6. The Ninth Circuit stated that the effect of such comments is hard to measure, but that "their potential vice is that jurors may feel disapprobation if they cause a mistrial by failing to yield to majority pressure." \textit{Id.}}

\footnote{3591. 663 F.2d 834 (9th Cir. 1981), \textit{cert. denied}, 456 U.S. 905 (1982).}

\footnote{3592. \textit{Id.} at 840-41.}

\footnote{3593. \textit{Id.} at 841. Garner argued that Allen v. United States, 164 U.S. 492 (1896), required an instruction admonishing the jurors not to surrender their honest and reasonable beliefs. However, the \textit{Garner} court did not read \textit{Allen} as specifically requiring an admonition to the jurors not to surrender their honest views as to the guilt or innocence of the defendant. 663 F.2d at 841. It determined that the instruction in the instant case was very similar to that approved in Walsh v. United States, 371 F.2d 135, 136 (9th Cir.) (instruction was upheld despite the trial judge's statement to the jurors to keep trying), \textit{cert. denied}, 388 U.S. 915 (1967).}

\footnote{3594. \textit{Id.} (citing United States v. Beattie, 613 F.2d 762, 764 (9th Cir.), \textit{cert. denied}, 446 U.S. 982 (1980)).}

\footnote{3595. 663 F.2d at 841.}

\footnote{3596. \textit{See}, e.g., United States v. Silvern, 484 F.2d 879, 883 (7th Cir. 1973); United States v.
Circuit has not held *Allen*-type charges to be invalid per se. However, it will give close scrutiny to the actual charge and the circumstances in which it was given, since “even in the most acceptable form, [the *Allen* charge] approaches the ultimate permissible limits to which a court may go.”

d. jury instructions on the essential elements of the offense

In criminal cases, the court must instruct the jury on all essential questions of law whether requested or not. It is plain error not to instruct the jury on every essential element of the offense.

In *United States v. Brooksby*, the defendant was convicted of falsely subscribing income tax returns in violation of 26 U.S.C. section 7206(1). Brooksby kept books for her husband’s business, but diverted money for her own use by destroying some receipts and not entering that amount in the daily receipt journal. The receipt journal was used by the Brooksbys’ accountant to prepare their income tax returns. However, some of the money represented by the destroyed receipts was deposited in the Brooksbys’ business bank account, and this discrepancy was discovered during a routine audit by the Internal Revenue Service. At trial, Brooksby testified that she did not know that the daily receipt journal was used in preparing tax returns or that the returns materially understated the business receipts. She argued, therefore, that she did not willfully subscribe false returns. On appeal, she argued that the trial court had erred by giving an instruction which

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3603. 668 F.2d 1102 (9th Cir. 1982).

3604. *Id.* at 1103.

3605. *Id.*

3606. *Id.*
did not include the term "willfully" in listing the elements of the offense which had to be proven in order to find Brooksby guilty.\textsuperscript{3607}

In its analysis, the Ninth Circuit first recognized that the word "willful" in section 7206(1) requires more than a careless disregard for the truth,\textsuperscript{3608} and stated that the Supreme Court had defined the word to mean a "voluntary, intentional violation of a known legal duty."\textsuperscript{3609} Further, the Government conceded that the trial court had erred in giving an instruction that did not include this first element of the offense.\textsuperscript{3610} However, the Government argued that by reading the indictment, the relevant statute, and two instructions on willfulness, the error was corrected.\textsuperscript{3611} The Ninth Circuit rejected this argument, holding that notwithstanding the reading of the indictment, statute, and instructions on willfulness, the failure to instruct the jury that "willfulness" was an essential element of the crime prejudiced the defendant.\textsuperscript{3612} It therefore reversed the conviction.\textsuperscript{3613}

In \textit{United States v. Jones},\textsuperscript{3614} the defendant was convicted of aiding and abetting the violation of both 18 U.S.C. section 2113(a), the general bank robbery statute, and 18 U.S.C. section 2113(e), which provides for enhanced punishment for the commission of a robbery where a killing or kidnapping occurs. Jones had been one of four participants

\textsuperscript{3607} 26 U.S.C. § 7206 (1976) provides in pertinent part that "[a]ny person who . . . [w]illfully . . . subscribes any return . . . which contains . . . a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony . . . ."

\textsuperscript{3608} 668 F.2d at 1104.

\textsuperscript{3609} \textit{Id.} (citing United States v. Pomponio, 429 U.S. 10, 12 (1976); United States v. Bishop, 412 U.S. 346, 360 (1973)).

\textsuperscript{3610} 668 F.2d at 1104. \textit{See supra} note 3607.

\textsuperscript{3611} 668 F.2d at 1104.

\textsuperscript{3612} \textit{Id.} at 1105. The defendant relied upon \textit{United States v. Pope}, 561 F.2d 663 (6th Cir. 1977), for the proposition that omissions of an essential element cannot be cured. In \textit{Pope}, the defendant's conviction for possession of a controlled substance with intent to distribute was overturned due to the trial court's failure to instruct that intent to distribute was an essential element of the charged crime. \textit{Id.} at 671.

In \textit{Brooksby}, the court stated that the trial court's error was not cured by the language in the instructions taken as a whole. 668 F.2d at 1105.

\textsuperscript{3613} \textit{Id.}

In \textit{United States v. Wolters}, 656 F.2d 523 (9th Cir. 1981), the defendant was convicted of willfully failing to file an income tax return. The defendant contended that his case was prejudiced by the trial court's failure to define the word "willful" so as to exclude "reckless disregard." The Ninth Circuit rejected this claim, stating that the jury was clearly instructed, and that the instructions were very similar to those approved in prior cases. \textit{Id.} at 525. \textit{See Cooley v. United States}, 501 F.2d 1249, 1252-53 (9th Cir. 1974), \textit{cert. denied}, 419 U.S. 1123 (1975); \textit{United States v. Hawk}, 497 F.2d 365, 366-69 (9th Cir.), \textit{cert. denied}, 419 U.S. 838 (1974).

\textsuperscript{3614} 678 F.2d 102 (9th Cir. 1982).
in a bank robbery during which a guard was killed. Although Jones did not fire the fatal shot, he was sentenced to life imprisonment in accordance with the enhancement provisions of section 2113(e). On appeal, Jones contended that the trial court erred in failing to instruct the jury to determine whether he had aided and abetted the killing in addition to aiding and abetting the actual robbery.

The Ninth Circuit held that the Government must show that the defendant aided and abetted the principal in every “essential element” of the offense. The trial court had therefore erred in failing to instruct that the Government had to prove not only that Jones had aided and abetted the principal in the act of the bank robbery, but also in the killing by the principal. Accordingly, the Ninth Circuit reversed and remanded the case for either resentencing or retrial of the entire case, at the Government’s discretion.

In United States v. Eden, the defendant was convicted of embezzling and converting federal student loan funds, and of concealing material facts from the government. Eden was founder and president of a college which participated in four separate educational programs sponsored by the government, all of which either directly or indirectly supplied money to students. When the college began to experience cash flow problems, Eden took out a $130,000 loan which he personally guaranteed. Subsequently, he sold the college, but the purchaser who

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3615. Id. at 103.
3616. Id. at 105. At trial, the court had informed the jury that it needed to find three elements: (1) that the principal willfully took from the presence or person of another money belonging to or in the care of a bank by force, violence, or by means of intimidation; (2) that the defendant (Jones) willfully aided and abetted the principal in committing the robbery; and (3) that a person was killed during the commission of the robbery. Id. at 106.
3617. Id. at 105.
3618. Id. (citing United States v. Short, 493 F.2d 1170, 1172 (9th Cir.), modified, 500 F.2d 676, cert. denied, 419 U.S. 1000 (1974)). In Short, the defendant acted as the principal’s getaway driver in a bank robbery. The court instructed that Short could be convicted under § 2133(d) (relating to robberies where an assault occurs, or a dangerous weapon or device is used) if the evidence showed that he knew the principal was going to attempt a bank robbery and that he did some affirmative act to attempt to help. Id. at 1172. The Ninth Circuit reversed, holding that the trial court had failed to instruct on an essential element of the crime, aiding and abetting the use of the weapon. Id. See also United States v. Faleafine, 492 F.2d 18 (9th Cir. 1974) (en banc), where the Ninth Circuit stated that subsections (d) and (e) of § 2113 are parallel provisions. Id. at 23, 25. The Fifth Circuit has stated in similar circumstances, “where a defendant is charged with aiding and abetting a crime involving an element which enhances or aggravates the offense, there must be proof that the defendant associated herself with and participated in both elements of the crime.” United States v. Longoria, 569 F.2d 422, 425 (5th Cir. 1978).
3619. Jones, 678 F.2d at 106.
3621. Id. at 1377.
was to have assumed liability for the loan failed to do so, and Eden therefore remained personally liable.\(^{3622}\) Eden thereupon transferred special program accounts, consisting of money from the educational programs, to the college's general account.\(^{3623}\)

Upon learning of plans to close the school, the college's coordinator of financial aid informed Eden that all allowable disbursements of special program money had been made, and that all money remaining was to be returned to the federal government.\(^{3624}\) Instead of returning the funds to the federal government, Eden drew checks on the general account to individuals who cashed the checks and delivered the bulk of the funds back to Eden. At trial, Eden admitted these acts, but testified that he had used the money to pay off the loan for which he was personally liable so that the purchaser of the college would not know of the payments.\(^{3625}\)

The trial court instructed the jury that proof that the embezzled or converted money belonged to the United States was an essential element of the offense.\(^{3626}\) However, over Eden's objection, the court further instructed that the bulk of the funds in the special program account belonged to the government, and that only proper disbursement in compliance with regulations could legally change ownership of the funds.\(^{3627}\)

On appeal, Eden argued that this instruction was erroneous because it took the issue of an essential element away from the jury. The Ninth Circuit rejected this argument, holding that “[t]he trial court’s instruction regarding the ownership of the funds appropriately narrowed the focus of the jury, but did not entirely take the issue from [it].”\(^{3628}\) The court therefore approved the instruction given by the trial court.\(^{3629}\)

\(^{3622}\) Id.

\(^{3623}\) Id. at 1377-78.

\(^{3624}\) Id. at 1378.

\(^{3625}\) Id.

\(^{3626}\) Id. at 1380.

\(^{3627}\) Id.

\(^{3628}\) Whether or not there had been proper disbursement of the funds, in full compliance with HEW regulations, was a factual issue left to the jury. The court stated that Eden's reliance on United States v. Alessio, 439 F.2d 803 (1st Cir. 1971) was misplaced, because the Alessio trial court had refused to allow any evidence supporting the defendant's contention that the property at issue did not belong to the government. 659 F.2d at 1380.

\(^{3629}\) Id. (citing United States v. Johnson, 596 F.2d 842 (9th Cir. 1979); United States v. Miller, 520 F.2d 1208 (9th Cir. 1975); United States v. Jackson, 436 F.2d 39 (9th Cir. 1970), cert. denied, 403 U.S. 906 (1971)).

In United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982), the defendants were convicted of mail fraud in connection with soliciting funds for a
These decisions demonstrate that the Ninth Circuit does not judge a single jury instruction in artificial isolation, but considers it in the context of the entire trial. Within this context, it is imperative that trial courts instruct a jury correctly upon all essential elements of an offense charged, since failure to so instruct will be held to be "fundamental error."

H. Misconduct of Trial Judge

A trial judge has the right and duty to directly participate in facilitating the orderly progress of a trial. Questions which aid in clarifying a witness' testimony, in expediting examination, or in confining examination to relevant matters are proper if made in a nonprejudicial manner. A trial judge, however, may not conduct himself in such a manner as to convey to the jury the impression that he has formed an opinion regarding the truth of the witnesses' statements or the verdict that should be returned.

In United States v. Poland, the Ninth Circuit considered allegations that the trial judge had conducted himself improperly by interrupting defense counsel, by criticizing and ridiculing defense counsel and the defendants before the jury, and by showing extreme partisanship towards the prosecution. The defendants argued that the trial judge's interventions prejudiced them to the extent that they were denied a fair and impartial trial.

Upon examination of the trial judge's specific interventions, the Ninth Circuit found no reversible error. It stated that many of the

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church founded by one of the defendants. The trial court had instructed the jury that specific intent to defraud was an element of the crime of mail fraud. Id. at 847 (citing Williams v. United States, 278 F.2d 535, 537 (9th Cir. 1960)). On appeal, the defendants argued that this instruction violated their first amendment rights because it required an inquiry into the validity of their religious beliefs. 663 F.2d at 847. The Ninth Circuit recognized that although the first amendment absolutely protects the freedom of belief, Cantwell v. Connecticut, 310 U.S. 296 (1940), it does not protect fraudulent acts performed in the name of religion. Id. at 306. The court therefore approved the trial court's instruction on intent, because it properly focused on the intent of the defendants in carrying out their program.

663 F.2d at 847.

3631. Accord United States v. King, 521 F.2d 61, 63 (10th Cir. 1975).
3632. United States v. Pena-Garcia, 505 F.2d 964, 967 & nn.4, 5 (9th Cir. 1974).
3634. Id. at 886. The defendant cited 41 examples of alleged judicial trial misconduct. Id. at 893.
3635. Id. at 893. The court stated that it was insignificant that the trial judge had interrupted defense counsel more times (907 alleged interruptions) than Government counsel
allegations were based upon a mistaken reading of the record, or upon an exaggerated reaction to perfectly normal inquiries designed to clarify questions of counsel or testimony of witnesses. The court admitted that the trial judge had shown irritation and had used sarcasm in some of his comments to defense counsel and the defendants, but it found that these instances were understandable and generally provoked by defense counsel. Finally, the court stated that the content of the trial judge's expressions did not imply any opinion about the credibility of the witnesses or the guilt of the defendants. The court concluded that, even if the trial judge's conduct was error, it would not reverse unless the judge's conduct had significantly prejudiced the defendants. Because the evidence of guilt was so strong in this

(168 alleged interruptions). It noted that the interruptions of the defense were proper, and that no instance was given where the judge should have admonished Government counsel but failed to do so. Id. at 892-93.

3636. Id. at 893. The defendants alleged that when the trial judge denied defense counsel's request for a recess because of a hoarse throat, the judge "conveyed to the jury that the attorney had tried to deceive him" about the hoarseness. The record revealed, however, that when the request was made, the judge responded with only one word: "No." It was only later, when the jury was not present, that the judge made any remarks about a suspicion of deception. Id.

3637. Id. Defense counsel had asked a witness if he would ever receive "a direct oral communication from the driver of the car." The trial judge had then asked counsel: "What is a direct oral communication?" Although defense counsel's initial reaction was: "That's a fair question, your Honor," he alleged on appeal that the judge's question was "an erroneous implication that defense counsel was using tricky language to put something by the jury." On review of the record, the court found that the trial judge's question was appropriate within the context of the testimony. Id.

3638. Id. Defense counsel had asked a witness whether he had an opportunity to discuss the subject matter of the testimony with another Government witness before trial, and he responded: "We had the opportunity, yes." The trial judge then questioned the witness further and brought out that the discussion between the two witnesses took place two and a half years before trial. By doing so, the judge negated a possible impression that the witnesses had discussed their testimony immediately before trial. The court found that such questioning cannot be the basis for proper criticism. Id.

3639. Id. at 893-94. For example, when defense counsel asked to approach a witness during the Government's direct examination, the trial judge replied: "God, counsel, I can't hold you back," and then asked counsel to be seated. This was preceded, however, by the judge's ruling that defense counsel should wait to object to the Government's examination of certain photographs for identifying numbers until after the numbers were found. Id.

3640. Id. at 894. The court noted that the trial judge had explicitly instructed the jury not to draw any inferences from his interruptions or admonishments about witness credibility or the guilt or innocence of the defendants. Id.

3641. The court admitted that the displays of irritation and the use of sarcasm by a trial judge should be avoided, particularly in criminal cases, because of the risk that an appearance of partisanship could affect the jury's attitude. Id. at 894.

3642. Id. at 886. In considering whether the trial judge's interventions resulted in prejudice, the court examined the evidence to determine if the issue of guilt was a close one—in which case the intervention would more likely have caused prejudice—or if the
the court held that the verdict could not have been affected by the trial judge's relatively minor irregularities.

V. POST-CONVICTION PROCEEDINGS

A. Double Jeopardy

1. Post-conviction prosecutions

The double jeopardy clause prohibits "a second prosecution for the same offense after conviction." It also bars the division of one conspiracy into multiple violations of the same conspiracy statute. In United States v. Bendis, the Ninth Circuit considered whether one count of the defendant's indictment charged the same conspiracy as a prior conviction and, thus, was barred by the double jeopardy clause.

The defendants brought an interlocutory appeal to the Ninth Circuit from the District of Hawaii, after they were charged with conspiring to commit fraud between March 2, 1977, and May 2, 1977. The defendants claimed that double jeopardy prohibited these charges, because they previously had been convicted in the District of Kansas in 1977 for conspiring to transport a money order in commerce for a time period covering June 6, 1977, to June 17, 1977. Both the Hawaii charge and the Kansas conviction involved the same conspiracy statute.

Evidence of guilt was overwhelming—in which case the intervention would more likely have been harmless. Id. (citing United States v. Allen, 431 F.2d 712, 713 (9th Cir. 1970)). For a discussion of the "overwhelming-evidence test," see Bates v. Nelson, 485 F.2d 90, 93-94 (9th Cir. 1973), cert. denied, 415 U.S. 960 (1974).

3643. 659 F.2d at 886-92.
3644. Id. at 894. Cf. United States v. Pena-Garcia, 505 F.2d 964 (9th Cir. 1974) (trial judge's conduct was reversible error where he continuously interrupted, cross-examined, intimidated, and threatened witness).
3646. Braverman v. United States, 317 U.S. 49, 53 (1942) (defendants made one agreement to violate several different Internal Revenue liquor laws; the Court held that only one charge for conspiracy was proper).
3647. 681 F.2d 561 (9th Cir. 1981), cert. denied, 103 S. Ct. 306 (1982).
3648. Id. at 563. The defendants were charged in the Hawaii indictment with one count of 18 U.S.C. § 371 (1976) (prohibits conspiring to cause interstate travel and wire communication in furtherance of a scheme to defraud); one count of 18 U.S.C. § 1343 (1976) (substantive crime of using wire communication in furtherance of scheme to defraud); and three counts of 18 U.S.C. § 2314 (1976) (substantive crime of causing interstate travel in furtherance of a scheme to defraud). 681 F.2d at 563. The Hawaii indictment arose from a scheme to defraud Hawaiian building contractors by issuing false letters of credit for a fee. 681 F.2d at 566.
3649. 681 F.2d at 563. In the Kansas trial, the defendants were convicted of 18 U.S.C. § 371 and § 2314 (1976). 681 F.2d at 563. The Kansas trial involved a scheme whereby the
The defendants argued that the Kansas and Hawaii charges arose out of the same conspiracy agreement. The Ninth Circuit first pointed out that the analysis set forth in Blockburger v. United States was inapplicable here, because Bendis involved multiple conspiracy charges under the same conspiracy statute. Blockburger provided that a defendant may be prosecuted for separate offenses which arise out of the same transaction if each offense requires proof of a material fact not required by the other. The Bendis court therefore applied the "factor analysis" test from Arnold v. United States to determine whether separate conspiracies did occur. The court considered five factors: (1) the time periods involved in the alleged conspiracies; (2) the location at which the conspiracies were alleged to have occurred; (3) the individuals charged in each alleged conspiracy; (4) the acts allegedly committed; and (5) the substantive crimes allegedly committed.

The Ninth Circuit considered the Kansas trial record and the contentions of both the Government and defendants in the uncompleted Hawaii trial. The court concluded that the evidence showed that defendants assisted a third party in obtaining and cashing a fraudulent money order. 681 F.2d at 567.

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6350. The statute involved was 18 U.S.C. § 371. See supra note 3648.
6351. 681 F.2d at 563.
6353. 681 F.2d at 564-65.
6354. Blockburger v. United States, 284 U.S. at 304. The Bendis court pointed out that the Blockburger analysis focused on the proof offered by the government; specifically, whether the proof for one count requires a material fact not needed under another count. However, when the case involves the question of whether multiple conspiracy counts under the same statute constitute the same offense, the Blockburger analysis becomes ineffective. The court stated: "Across the board application of Blockburger would sanction artful crafting of conspiracy charges which could permit the government to subdivide one criminal conspiracy into multiple violations of a single statute, a result which Braverman forbids." 681 F.2d at 565. See Braverman v. United States, 317 U.S. at 52-53.
6355. 336 F.2d 347, 350 (9th Cir. 1964), cert. denied, 380 U.S. 982 (1965) (citing Short v. United States, 91 F.2d 614, 619-20 (4th Cir. 1937)).
6356. 681 F.2d at 565. Accord Rogers v. United States, 609 F.2d 1315, 1317-18 (9th Cir. 1979); United States v. Westover, 511 F.2d 1154, 1156 (9th Cir.), cert. denied, 422 U.S. 1009 (1975); Sanchez v. United States, 341 F.2d 225, 227 (9th Cir.), cert. denied, 382 U.S. 856 (1965).
6357. 681 F.2d at 566. The Bendis court stated that this case presented a unique problem...
the conspiracies involved two different time periods, with no overlap, that the conspiracies "implicated" different geographical areas, Hawaii and the East Coast, and that the persons charged in the conspiracies were different. The court also found that, while one conspiracy involved a scheme to defraud Hawaii builders, the other involved cashing a fraudulent check. Finally, the court noted that the substantive statutory violations were different in each case. Therefore, the double jeopardy clause did not bar the Hawaii indictment.

In *United States v. Ross*, the Ninth Circuit ruled that attempted extortion is an offense separate from attempted bank robbery and conspiracy to commit bank robbery, even though the crimes arose out of the same transaction. The co-defendants in *Ross* attempted to extort $150,000 from a bank officer by kidnapping his wife and child. Before they could contact the bank officer to make the demand, however, they were arrested. The defendants were originally charged and convicted of attempted bank robbery and conspiring to commit bank robbery, but the convictions were reversed because they were not the appropriate charges. After the convictions were reversed, the government charged the defendants with attempted extortion.

The defendants claimed that the Blockburger test precluded the extortion charge because it arose out of the same transaction as the earlier robbery convictions. The *Ross* court relied on a 1979 Ninth Circuit decision where the same charges were in dispute, and concluded that it would not reverse the district court's denial of the defendants' motion to dismiss unless the district court's analysis of the Government's proffered evidence was clearly erroneous.

Regarding the applicable standard of review, because the facts proposed by the Government in the Hawaii trial had not yet been proven. The Ninth Circuit therefore concluded that it would not reverse the district court's denial of the defendants' motion to dismiss unless the district court's analysis of the Government's proffered evidence was clearly erroneous.

In *United States v. Snell*, the defendant was first convicted of attempted extortion and conspiring to commit bank robbery. The attempted extortion conviction was reversed because the conspiracy...
cluded that attempted extortion and attempted bank robbery are separate offenses because they require proof of different material facts.\textsuperscript{3666} Hence the court upheld the extortion charge.\textsuperscript{3667}

In \textit{United States v. Von Moos},\textsuperscript{3668} the Ninth Circuit ruled that it was not double punishment to sentence a defendant for perjury, where the district judge had considered the perjury in sentencing on a related offense. Von Moos was convicted of bank robbery.\textsuperscript{3665} During his trial, he committed perjury. The trial judge considered the perjury when he sentenced Von Moos,\textsuperscript{3670} who was subsequently indicted for perjury. He entered a guilty plea, but the judge closed the case, ruling that he could not impose a sentence.\textsuperscript{3671} The trial judge stated that a sentence on the perjury count would constitute double punishment because Von Moos' "sentence on the bank robbery was greater than it would have been had the perjury not been considered."\textsuperscript{3672} The Government appealed the district court's order.\textsuperscript{3673}

The Ninth Circuit reversed the trial judge's order, holding that there was no double jeopardy violation.\textsuperscript{3674} The court followed the ruling of the Fourth Circuit in a similar case\textsuperscript{3675} where a defendant was given a longer sentence for possessing and distributing heroin because he perjured himself at his co-defendant's trial.\textsuperscript{3676} The \textit{Von Moos} court held that a subsequent sentence for perjury is not double punishment, but rather simply constitutes permissible consideration of all the factors

\textsuperscript{3666} 654 F.2d at 614 & n.5.
\textsuperscript{3667} \textit{Id.} at 614.
\textsuperscript{3668} 660 F.2d 748 (9th Cir. 1981) (per curiam).
\textsuperscript{3669} \textit{Id.}
\textsuperscript{3670} \textit{id.} The sentencing judge stated that he considered the perjury in two ways: "One way on his credibility as he testified at the imposition of sentence; and the other is at the time I imposed the sentence I considered it in evaluating what the sentence should have been." \textit{Id.}
\textsuperscript{3671} \textit{Id.} at 749.
\textsuperscript{3672} \textit{Id.} \textit{See} North Carolina v. Pearce, 395 U.S. at 717 ("the Fifth Amendment guarantee against double jeopardy . . . protects against multiple punishments for the same offense").
\textsuperscript{3673} 660 F.2d at 749. 18 U.S.C. § 3731 (1976) provides that the government may not appeal a final decision in a criminal case if the double jeopardy clause prohibits the appeal. In this case the Ninth Circuit ruled that double jeopardy had not attached because Von Moos had not begun serving a sentence on the perjury charge. 660 F.2d at 749 (citing \textit{United States v. Ford}, 632 F.2d 1354, 1380 (9th Cir. 1980), \textit{cert. denied}, 450 U.S. 934 (1981)).
\textsuperscript{3674} 660 F.2d at 749.
\textsuperscript{3675} \textit{United States v. Wise}, 603 F.2d 1101, 1107 (4th Cir. 1979).
\textsuperscript{3676} \textit{Id.} at 1103.
relevant to sentencing.  

2. Appeals

The double jeopardy clause prohibits successive prosecutions for the same offense after acquittal.  

There are, however, certain instances where the government can appeal the decision of a trial court to dismiss proceedings against a defendant.  

Such a situation could arise when reversal of a dismissal would only reinstate the trial court's verdict or when the defendant was primarily responsible for the second prosecution.

In *Arizona v. Manypenny* the Ninth Circuit held that the double jeopardy clause did not bar an appeal by the State of Arizona when the

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3677. 660 F.2d at 749 (citing United States v. Grayson, 438 U.S. 41, 52-54 (1978) (taking account of perjury in sentencing criminal defendants does not constitute punishment for perjury)).  
See also United States v. Wise, 603 F.2d at 1106:  
[Imprisonment must be regarded as punishment for the crime of which the defendant is formally accused and convicted. Conversely, when a sentencing judge takes into account various aspects of the defendant's background, including other offenses committed, the sentence thereby imposed does not constitute punishment for these aspects of defendant's background.]

3678. See *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1874); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The *Pearce* Court stated that "the Fifth Amendment guarantee against double jeopardy has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." 395 U.S. at 717.

3679. The authorizing federal statute is 18 U.S.C. § 3731 (1976), which states in pertinent part:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

3680. United States v. Wilson, 420 U.S. 332, 344-45 (1975). In *Wilson*, the defendant was tried and convicted for illegally converting union funds, in violation of 29 U.S.C. § 501(c) (1976). The indictment was later dismissed. The United States Supreme Court ruled that it was not a violation of the double jeopardy clause for the Government to appeal the dismissal, because a reversal on appeal would merely reinstate the trial court's verdict, and not require a second trial. The Court stated that "a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact."  *Id.* at 345. Accord United States v. DiFrancesco, 449 U.S. 117, 130 (1980).

3681. United States v. Scott, 437 U.S. 82, 99 (1978). Scott was originally charged with three counts of distributing narcotics. Two counts were dismissed by the trial judge on the defendant's motion, and the defendant was tried and acquitted on the third count. In a five to four decision, the United States Supreme Court held that double jeopardy is not violated when a defendant succeeds in having charges dismissed on procedural grounds, and not as a result of an actual trial on the merits.  

3682. 672 F.2d 761 (9th Cir.), *cert. denied*, 103 S. Ct. 111 (1982).
State sought to have an overturned guilty verdict reinstated. Many-
penny, a United States Border Patrol officer, was indicted under Ari-
zona law for assault with a deadly weapon following a shooting which
occurred while he was on patrol in Pima County, Arizona. The case
was removed to federal court by the defendant, as authorized by 28
U.S.C. section 1442(a)(1). The jury convicted Manypenny, but the
district court judge granted an acquittal on the ground that the jury
could not have found Manypenny guilty beyond a reasonable
doubt. On the State's appeal, the Ninth Circuit ruled that the fed-
eral court lacked jurisdiction to hear the case. The United States
Supreme Court determined that there was jurisdiction, and the case
was remanded.

On remand, the Ninth Circuit first determined that federal double
jeopardy principles did not bar the State's appeal. The court fol-
lowed its ruling in United States v. Rojas, in which it held that there
was no double jeopardy bar to an appeal by the government to have an

3683. For a detailed discussion of the facts of the case, see Arizona v. Manypenny, 451
3684. 28 U.S.C. § 1442(a)(1) (1976) provides that a state criminal prosecution against an
officer of the United States, for acts under the color of his office, can be removed to the
United States district court where the action is pending.
attorney sought acquittal on the argument that the shooting was accidental. The attorney
did not argue the defense of federal immunity as set forth in In re Neagle, 135 U.S. 1, 54
(1890). After conviction, Manypenny moved unsuccessfully for judgment of acquittal under
Rule 29 of the Federal Rules of Criminal Procedure. He then moved for a new trial under
Rule 33 and, in the alternative, an arrest of judgment under Rule 34, on the ground that
there was no federal jurisdiction. The new trial motion was never acted upon. The trial
judge then concluded that fundamental error had been committed because Manypenny's
attorney did not place the federal immunity defense before the jury. The judge conse-
quently construed the Rule 34 motion as a Rule 29(c) motion, and granted a judgment of
acquittal. 672 F.2d at 762-63.
3686. Arizona v. Manypenny, 608 F.2d 1197, 1200 (9th Cir. 1979). At this appeal, the
Ninth Circuit reasoned that Congress had not expressly authorized, in 28 U.S.C. § 3731, an
appeal by the State of Arizona for a case removed to federal court via 28 U.S.C.
§ 1442(a)(1), and subsequently dismissed the appeal. 608 F.2d at 1199.
3687. Arizona v. Manypenny, 451 U.S. at 250. The United States Supreme Court reversed
the Ninth Circuit on the basis that in such a case removal jurisdiction is derivative in form
and "neither enlarg[es] nor contract[s] the rights of the parties." Id. at 242. The Court held
that, since Arizona law would confer a right to appeal to federal court where a suit is
originally filed in state court, it would be unreasonable and unfair to hold that explicit con-
gressional authority is required to appeal a state suit that was removed under 28 U.S.C.
§ 1442(a)(1). Id. at 243.
3688. 672 F.2d at 763.
3689. 554 F.2d 938, 941 (9th Cir. 1977). In Rojas, the defendant was convicted of numer-
cous counts of tax fraud. As was Manypenny's, Rojas' verdict was set aside on a rule 29(c)
motion. The United States Supreme Court has cited Rojas for the proposition that "the
Double Jeopardy Clause does not bar a Government appeal from a ruling in favor of the
overturned guilty verdict reinstated. In *Rojas*, the Ninth Circuit noted that the purpose of the double jeopardy clause is to protect an individual from the burden and embarrassment of multiple trials. The *Rojas* court reasoned that this purpose is not violated when the government appeal would not require a new trial.

The *Manypenny* court also determined that Arizona law did not bar the State's appeal, because the double jeopardy principles in the Arizona Constitution do not differ materially from federal double jeopardy principles. The court consequently reversed Manypenny's acquittal, and remanded the case.

In *United States v. Dahlstrum*, the Ninth Circuit ruled that the double jeopardy clause prohibited the Government's appeal of the dismissal of the defendant's indictment because the defendant had "practically no control" over the termination of his trial. The defendant had failed to file personal income tax returns for the years 1973, 1974, and 1975. He was indicted on three counts of willful failure to file tax returns, a violation of 26 U.S.C. section 7203. At the trial, the defendant after a guilty verdict has been entered by the trier of fact. *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980) (citing *United States v. Rojas*, 554 F.2d at 941).

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3690. 672 F.2d at 763 & n.5. *See United States v. Rojas*, 554 F.2d at 941.
3691. Id. at 941-42.
3692. Id. at 942. The *Rojas* court stated: "Since no further fact finding proceedings will be necessary upon reversal and remand, the defendant's double jeopardy interests are not implicated by the appeal." Id. at 941.
3693. 672 F.2d at 764. *See State ex rel. Hyder v. Superior Court*, 128 Ariz. 216, 221, 624 P.2d 1264, 1269 (1981). In *Hyder*, a defendant whose conviction for grand theft was set aside by the trial court argued that both the Arizona and United States Constitutions barred the State from seeking to have the verdict reinstated. In applying both Arizona and federal law, the Arizona Supreme Court stated that Arizona double jeopardy principles were the same as federal principles on this issue. *Accord State v. Allen*, 27 Ariz. App. 577, 583, 557 P.2d 176, 182 (1976).

In *Manypenny*, the court proceeded to rule that the district court had the authority to rule on Manypenny's motion for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, even though seven days had passed from the date of the verdict. 672 F.2d at 765-66. The Ninth Circuit ultimately held that the trial judge erred in ruling that Manypenny should be acquitted because the jury was not able to consider a possible immunity defense. Id. at 766. The court remanded the case so the district court could rule on the still-pending motion for new trial. Id.

3694. 655 F.2d 971 (9th Cir. 1981), cert. denied, 455 U.S. 928 (1982).
3695. Id. at 975.
3696. Id. at 972. For a detailed factual background, see *United States v. Dahlstrum*, 493 F. Supp. 966, 967-68 (C.D. Cal. 1980).
3697. 26 U.S.C. § 7203 (1976) provides in pertinent part:

Any person required under this title to pay any estimated tax or tax . . . or . . . to make a return . . . who willfully fails to pay such estimated tax or tax [or] make such return . . . at the time or times required by law or regulation, shall be guilty of a misdemeanor and . . . shall be fined not more than $10,000, or imprisoned not more than 1 year or both . . . ."
district court judge concluded that the IRS committed governmental misconduct in handling Dahlstrum's case, and dismissed the indictment with prejudice.3698

On appeal, the Ninth Circuit first considered whether the defendant had been acquitted, because the double jeopardy clause prohibits the appeal of an acquittal verdict.3699 The court applied the test from *United States v. Martin Linen Supply Co.*,3700 which provides that an acquittal occurs when the trial court makes a decision based on factual grounds.3701 In *Dahlstrum*, the record was unclear as to whether the trial judge actually considered the merits of the defendant’s case, or whether the judge focused only on the issue of IRS misconduct.3702 The Ninth Circuit therefore refused to decide whether the double jeopardy clause barred the Government's appeal on the ground that the dismissal constituted an acquittal.3703

The court then considered whether the Government's appeal was barred because reversal of the dismissal might result in a second prosecution that would violate the double jeopardy clause.3704 The Ninth Circuit applied the test from *United States v. Scott*,3705 in which the United States Supreme Court stated that a subsequent prosecution does not violate the double jeopardy clause when the defendant is primarily responsible for having the first trial terminated on procedural or non-factual grounds.3706 The *Dahlstrum* court noted that the defendant

3698. 493 F. Supp. at 975. District Judge Hauk ruled that the IRS agents acted improperly because they pursued only a criminal investigation of Dahlstrum, and did not seek a civil resolution of his case. Such conduct, Hauk stated, was contrary to the guidelines the United States Supreme Court set out for the IRS. 493 F. Supp. at 974 (citing United States v. La Salle National Bank, 437 U.S. 298, 318 (1978)).


3701. *Id.* The Supreme Court in *Martin Linen* stated that it is not enough for the trial judge to state that he has made an acquittal, or that the procedure at the trial indicates that an acquittal has been made. The Court articulated the following test for determining when a trial judge's disposition constitutes an acquittal: "[The reviewing court] must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.*

3702. 655 F.2d at 974. The district judge apparently made conflicting statements. He indicated at one time that he thought the Government's evidence was insufficient, while at the time he dismissed the case he stated: "This is not on the merits that I'm deciding this case. It's on the question of governmental impropriety." *Id.*

3703. *Id.*

3704. *Id.* at 975.


3706. *Id.* Accord United States v. Dinitz, 424 U.S. 600, 611 (1976) (conviction at second trial on drug charges proper after mistrial on defendant's motion, even though the motion resulted from judge's decision to expel defense attorney).
must have a "significant level of participation" in the dismissal or mistrial, either by making the motion or by arguing vigorously in favor of the issue if raised by the judge, in order to avoid the double jeopardy prohibition. Such voluntary action by the defendant would indicate that his double jeopardy interests are not being harmed.

The Ninth Circuit pointed out that Dahlstrum had no real control over the district court judge's decision to dismiss the indictment. The district court judge had questioned one of the IRS agents extensively, while the defense asked only a few questions. The defense counsel took no other action to persuade the trial court to dismiss the indictment. The Ninth Circuit determined that the minimal participation of the defendant was not enough to conclude that he was primarily responsible for termination of the trial. Thus, the double jeopardy clause barred the Government's appeal.

3. Retrial

a. after mistrial

The double jeopardy clause does not preclude retrial when a mistrial results from the defendant's motion. An exception to this general rule exists, however, when the defendant's mistrial request is

3707. 655 F.2d at 975.
3708. Id.
3709. Id. The court stated: "Here, the judge was the instigator and the primary mover of the events that led to the dismissal of the indictment. The record convinces us that the judge took complete control of the proceedings and set off on a course over which appellee had practically no control." Id. (emphasis in original).
3710. Id. at 976.

In contrast, when a judge orders a mistrial sua sponte, double jeopardy prohibits a retrial unless there was a "manifest necessity" for the mistrial order. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); United States v. Jorn, 400 U.S. 470, 487 (1971) (plurality opinion). In United States v. Hanigan, 681 F.2d 1127 (9th Cir. 1982), cert. denied, 103 S. Ct. 1189 (1983), the Ninth Circuit held that a district judge's mistrial order resulting from a jury deadlock in the first trial did not bar a retrial. 681 F.2d at 1132. The defendant in Hanigan was initially tried and acquitted in Arizona state court for the kidnapping, robbery, and assault of three illegal aliens. He was subsequently tried on federal robbery charges in federal district court. The jury deadlock in the first federal trial, and the judge declared a mistrial. On retrial, the defendant was convicted. 681 F.2d at 1129. In affirming the conviction the Ninth Circuit noted that double jeopardy does not bar "successive prosecutions by different sovereigns." 681 F.2d at 1132. The court also ruled that federal prosecutors were not equitably estopped from retrying the defendant since the defendant failed to show that he had relied to his detriment on a material misstatement by the Government. 681 F.2d at 1132.
caused by prosecutorial or judicial misconduct.\textsuperscript{3712} In the 1982 case of \textit{Oregon v. Kennedy},\textsuperscript{3713} the United States Supreme Court narrowly interpreted this prosecutorial misconduct exception, holding that retrial is barred only when the prosecutor intends to provoke a mistrial.\textsuperscript{3714}

The defendant was prosecuted in Oregon state court for theft of an oriental rug. During redirect examination of a witness, the prosecutor made a statement which prompted the defense to request a mistrial, which the judge granted.\textsuperscript{3715} The defendant was convicted on retrial. The Oregon Court of Appeals reversed the conviction on double jeopardy grounds, ruling that the prosecutor’s misconduct constituted “overreaching” which prejudiced the jury and forced the defendant to request a mistrial. The Oregon Court of Appeals upheld the state trial court’s finding that the prosecutor did not intend to cause a mistrial.\textsuperscript{3716} The United States Supreme Court reversed the Oregon ruling, and remanded the case.\textsuperscript{3717}

Noting that the prosecutorial misconduct exception had been “stated with less than crystal clarity,” the Court examined the scope of


\textsuperscript{3713} 456 U.S. 667 (1982).

\textsuperscript{3714} \textit{Id}. at 679.

\textsuperscript{3715} \textit{Id}. at 669. The prosecutor called an expert on Middle Eastern rugs as a witness. The defense attempted to show that the witness was biased because he had filed a criminal complaint against the defendant in the past. The complaint was never acted upon by the police. On redirect examination the prosecutor attempted to rehabilitate the witness. At one point the prosecutor asked:

- "PROSECUTOR: Have you ever done business with the Kennedys?"
- "WITNESS: No, I have not. PROSECUTOR: Is that because he is a crook?"

The defendant’s mistrial motion followed. \textit{Id}.\textsuperscript{3716}

\textsuperscript{3716} Oregon v. Kennedy, 49 Or. App. 415, 619 P.2d 948, 949-50 (1980). The Oregon Court of Appeals interpreted \textit{Jorn} and \textit{Dinitz} to bar retrial when the prosecution either intends to provoke a mistrial request, or engages in overreaching or harassment. The court stated:

- "[The trial court found as a matter of fact that it was not the intention of the prosecutor in this case to cause a mistrial. We are bound by this finding of fact.]

- However, we are aware of the opinion that the prosecutor’s conduct in this case meets one of the other forbidden criteria, \textit{viz.}, overreaching. The comment occurred during the redirect examination of a key witness. The prosecutor’s express intent was to rehabilitate the witness, who had been impeached. However, the commenting question went beyond rehabilitation and was, in fact, a direct personal attack on the general character of the defendant. As such, we think the prosecutor is charged with the knowledge that the comment — which we must treat as intentional, at least in the sense that it appears it was made deliberately and after some thought — was certain to interfere with the trial process.

\textit{Id}. (citations omitted).

\textsuperscript{3717} 456 U.S. at 679.
this exception.\textsuperscript{3718} It acknowledged that language in its prior decisions could be construed to bar a retrial when the prosecutor acts in bad faith, or "overreaches," without actually intending to provoke a mistrial.\textsuperscript{3719} However, the Court chose to interpret those cases in a narrow light. The majority therefore ruled that the facts and circumstances in a particular case must show that the prosecutor actually intended to "goad" the defendant into moving for a mistrial.\textsuperscript{3720} The Court cited two basic reasons for this narrow interpretation of prosecutorial misconduct. First, an intent test is easier to apply than the more "amorphous" overreaching standard since it requires the court to make a factual determination based on the record.\textsuperscript{3721} Second, a general overreaching test would undermine rather than protect the defendant's interests because the trial court, aware that a mistrial granted in this situation might bar retrial, would be more likely to continue the trial under any but the most severe circumstances.\textsuperscript{3722} Hence, because the Oregon courts had found that the prosecutor did not intend to provoke a mistrial, the Court ruled that double jeopardy did not bar the defend-

\textsuperscript{3718} Id. at 674. As a preliminary matter, the Supreme Court ruled that the Oregon Court of Appeals decision did not rest upon an adequate and independent state ground, nor did it rest upon an intermixing of state and federal rules. Id. at 670-71.

\textsuperscript{3719} Id. at 677-78 & n.8. See United States v. Jorn, 400 U.S. at 485:

\begin{quote}
[I]ndependent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury . . . . Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution.
\end{quote}

In Dinitz, the Court stated:

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


\textsuperscript{3720} 456 U.S. at 676. The Court articulated the new rule as follows: "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent an intent on the part of the prosecutor . . . ." Id. at 675-76.

\textsuperscript{3721} Id. The majority stated: "When it is remembered that resolution of double jeopardy questions by state trial courts are reviewable not only within the state court system . . . . the desirability of an easily applied principle is apparent." Id. at 675.

\textsuperscript{3722} Id. at 676. The Court went on to state:

\begin{quote}
If a mistrial were in fact warranted . . . . the defendant could . . . . successfully appeal a judgment of conviction on the same grounds that he urged a mistrial . . . . But some of the advantages secured to him by the Double Jeopardy Clause . . . . would be to a large extent lost in the process of trial to verdict, reversal on appeal, and subsequent retrial.
\end{quote}

\textit{Id.} at 676-77.
In a concurring opinion, Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, concluded that the overreaching test should have been preserved and stated that the majority "gratuitously lop[ped] off a portion of the previously recognized exception." Stevens disagreed with the majority's intent test for two reasons. First, he argued that it would be difficult, if not impossible, for a defendant to prove that a prosecutor actually intended to cause a mistrial. Second, Stevens pointed out that the rationale underlying the prosecutorial misconduct exception extends beyond the majority's intent requirement.

Stevens went on to formulate a test for the more broad overreaching exception. According to Stevens, a defendant should be entitled to bar a retrial if he can show "intentional manipulation" by the prosecutor, inferred from objective evidence, which has "eliminated, or at least substantially reduced" the probability of an acquittal. Stevens disagreed with the majority's intent test for two reasons. First, he argued that it would be difficult, if not impossible, for a defendant to prove that a prosecutor actually intended to cause a mistrial. Stevens argued that the rationale underlying the prosecutorial misconduct exception extends beyond the majority's intent requirement.

**b. for insufficient evidence**

The double jeopardy clause does not prohibit retrial of a defendant after his conviction is reversed upon his own motion. However, retrial is barred if the defendant's conviction has been reversed because

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3723. *Id.* at 679.
3724. *Id.* at 681 (Stevens, J., concurring). In Stevens' view, the prosecutor's conduct failed even to constitute overreaching or harassment and, therefore, failed to meet the overreaching test. *Id.* For Stevens' rebuttal of the majority's reasons for applying a narrow interpretation of the prosecutorial misconduct exception, see *id.* at 687-88 n.22.
3725. *Id.* at 688 & nn.24-25.
3726. *Id.* at 689. For Stevens' statement of the basic rationale for the prosecutorial misconduct exception, see *id.* at 686. Stevens cites two situations where this rationale justifies barring a retrial of the defendant. The prosecutor may simply intend to harass or embarrass the defendant through misconduct, with no concern for the likelihood of mistrial or conviction. In addition, the prosecutor, not intending to provoke a mistrial, may wish to "inject enough unfair prejudice into the trial to ensure a conviction but not so must as to cause a reversal of that conviction." *Id.* at 689.
3727. *Id.* at 690 & n.29.
3728. *Id.* at 690 & n.31. Stevens further argued that this more flexible test is consistent with the flexible guidelines that have been adopted under the "manifest necessity" exception. *Id.* at 690-91. See supra note 3711.
of insufficient evidence.\textsuperscript{3730}

In \textit{Tibbs v. Florida},\textsuperscript{3731} the United States Supreme Court distinguished between a reversal based on evidentiary sufficiency and a reversal based on the weight of the evidence, ruling that the double jeopardy clause does not bar retrial after a reversal based on the weight of the evidence. Tibbs was convicted and sentenced to death in Florida state court for first-degree murder and rape.\textsuperscript{3732} On direct appeal, the Florida Supreme Court overturned the conviction and remanded for a new trial on the ground that “considerable doubt” existed about the credibility of the testimony which supported Tibbs’ conviction.\textsuperscript{3733} On remand, the Florida trial court blocked a retrial on double jeopardy grounds. This decision was reversed by the Florida Supreme Court on a second appeal. The Florida Supreme Court ruled that Tibbs’ conviction was reversed based on the weight of the evidence rather than evidentiary insufficiency, and thus the double jeopardy clause did not bar retrial.\textsuperscript{3734}

The United States Supreme Court affirmed the Florida high court’s ruling in a five to four decision.\textsuperscript{3735} The majority noted that the double jeopardy considerations which support retrial following the reversal of a conviction based on evidentiary insufficiency “do not have the same force” when a conviction is reversed on the weight of the evidence.\textsuperscript{3736} The Court considered two bases for reversal in light of the double jeopardy principle that a reprosecution cannot be brought

\textsuperscript{3730} Burks v. United States, 437 U.S. 1, 18 (1978) (defendant’s bank robbery conviction reversed because prosecution failed to prove defendant’s sanity); Greene v. Massey, 437 U.S. 19, 24 (1978) (defendant’s first degree murder conviction reversed because prosecution failed to prove all elements of first degree murder).

\textsuperscript{3731} Id. at 35. Tibbs allegedly picked up a man and woman who were hitchhiking, shot and killed the man, and raped the woman, who then fled and called the police. The woman, Cynthia Nadeau, gave a description of the suspect the night of the murder. Tibbs was arrested a few days later, based on Nadeau’s description. \textit{Id.} at 32-33.

\textsuperscript{3732} Tibbs v. State, 337 So. 2d 788, 790 (Fla. 1976). The Florida Supreme Court concluded that Nadeau’s testimony, which was the only evidence against Tibbs, was too unreliable to justify a guilty verdict. \textit{Id.} at 791. The Florida Supreme Court reviewed Tibbs’ conviction pursuant to \textit{Fla. App. R.} 9.140(b) (current version at \textit{Fla. App. R.} 9.140(f)), which requires the Florida high court to review a conviction for which the death sentence has been imposed to determine if, in the interests of justice, a new trial is required.

\textsuperscript{3733} Tibbs v. State, 397 So. 2d 1120, 1121-22 (Fla. 1981). Concerned that the distinction between reversals based on weight and sufficiency was too unmanageable, the court eliminated subsequent reversals based on evidentiary weight, stating that this “accords Florida appellate courts their proper role in examining the sufficiency of the evidence, while leaving questions of weight for resolution only before the trier of fact.” \textit{Id.} at 1125.

\textsuperscript{3734} Id. at 47.

\textsuperscript{3735} Id. at 42. See Hudson v. Louisiana, 450 U.S. 40, 44-45 n.5 (1981).
after a verdict of acquittal.\textsuperscript{3737} First the majority stated that evidence supporting a conviction is deemed insufficient when the appellate court, giving the prosecution the benefit of the doubt, concludes that no reasonable jury could have found the defendant guilty.\textsuperscript{3738} The majority equated such a reversal with an acquittal on the merits, which bars a subsequent retrial.\textsuperscript{3739} When a reversal is based on the weight of the evidence, however, the court’s focus is on the credibility of the evidence and possible conflicts in testimony.\textsuperscript{3740} The majority stated that a reversal based on weight does not carry the authority of an acquittal, but is rather a “disagreement” between the trial jury and the appellate judge after a guilty verdict has been established.\textsuperscript{3741} Second, the majority noted that reversal based on the weight of the evidence gives the defendant a second opportunity to seek a favorable judgment, and like retrial after a defendant’s successful appeal, it does not invoke double jeopardy considerations that bar multiple prosecutions.\textsuperscript{3742}

Tibbs argued that drawing a distinction between insufficient evidence and evidentiary weight would undermine the principle, stated in \textit{Burks v. United States},\textsuperscript{3743} that retrial is barred following a reversal for insufficient evidence.\textsuperscript{3744} Tibbs argued that the majority’s ruling in \textit{Tibbs} would encourage judges to base reversals on the weight of the evidence.\textsuperscript{3745} The majority found this argument unpersuasive, stating that judges frequently distinguish between insufficient evidence and the

\textsuperscript{3738} 457 U.S. at 41.
\textsuperscript{3739} \textit{Id.} The majority stated: “A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial. A reversal based on the insufficiency of the evidence has the same effect because it means that no rational factfinder could have voted to convict the defendant.” \textit{Id.} (footnotes omitted). This policy of giving finality to acquittals was one of the two double jeopardy considerations the Court found to support the sufficiency rule from \textit{Burks} and \textit{Greene}. The other consideration was that the prosecution should be prevented from harassing or “wearing down” the defendant: “[The sufficiency rule] prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance.” \textit{Id.}
\textsuperscript{3740} \textit{Id.} at 42.
\textsuperscript{3741} \textit{Id.} The majority stated that: “A reversal on this ground . . . does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a ‘thirteenth juror’ and disagrees with the jury’s resolution of the conflicting testimony. This difference of opinion no more signifies acquittal than does a disagreement among the jurors themselves.” \textit{Id.}
\textsuperscript{3742} \textit{Id.} at 43. The court indicated that the defendant is actually being given a second chance to obtain an acquittal after a jury found him guilty. \textit{Id.}
\textsuperscript{3743} 437 U.S. 1 (1978).
\textsuperscript{3744} \textit{Id.} at 18.
\textsuperscript{3745} 457 U.S. at 44.
weight of the evidence. Furthermore, the Court noted that the due process clause requires that sufficient evidence exist to support a conviction, and judges are therefore prohibited from attempting to “mask” reversals based on evidentiary insufficiency as a reversal based on the weight of the evidence. The Court concluded that reversal of Tibbs’ conviction by the Florida Supreme Court was based on evidentiary weight, and thus retrial was not barred by the double jeopardy clause.

Justice White, in a dissenting opinion in which Justices Brennan, Marshall, and Blackmun joined, challenged the majority’s conclusion that a retrial after a dismissal based on evidentiary weight does not violate the policies which bar a retrial on insufficient evidence. White contended that a retrial based on the same evidence as before “can serve no other purpose than harassment.” White favored a rule which would bar retrial when the conviction was dismissed on evidentiary grounds in general. In addition he commented that, after Tibbs, appellate courts would be more inclined to reverse convictions based on the weight of the evidence, to avoid a double jeopardy bar to retrial.

c. after a plea agreement

The United States Supreme Court has held that conviction of a lesser included offense results in the “implied acquittal” of the greater offense, provided that the conviction represents an actual determination of some or all of the factual elements of the more serious charge. This implied acquittal thus raises a double jeopardy bar to

3746. Id. The difference between evidentiary weight and evidentiary sufficiency was explained by the Eighth Circuit in United States v. Lincoln, 630 F.2d 1313, 1316-19 (8th Cir. 1980) (defendant’s conviction for voluntary manslaughter upheld; conviction was based on sufficient evidence because, reviewing evidence in light most favorable to verdict, substantial evidence justified an inference of guilt; conviction also based on weight of evidence and new trial therefore not required, because reviewing court’s examination of all evidence did not compel conclusion that serious miscarriage of justice occurred).


3748. 457 U.S. at 48-49. The dissent did not characterize a dismissal based on insufficient evidence as an “acquittal.” In addition, the dissent construed both weight and sufficiency dismissals as being in the same category: “In each instance, a reviewing court decides that, as a matter of law, the decision of the factfinder cannot stand . . . . [When a reversal is based on weight], [t]he fact remains that the State failed to prove the defendant guilty in accordance with the evidentiary requirements of state law.” Id. at 49.

3749. Id. at 48. The dissent assumed that the prosecution would not introduce any new evidence at the second trial, thus making the defendant’s burden exactly the same as in the first trial.

3750. Id. at 50.

3751. Id. at 51.

3752. United States v. Green, 355 U.S. 184, 189-90 (1957) (defendant’s conviction of sec-
retrial on the greater offense.\textsuperscript{3753} In United States \textit{v. Barker},\textsuperscript{3754} the Ninth Circuit ruled that a defendant's plea of guilty to second-degree murder did not constitute an implied acquittal of the original first-degree murder and conspiracy charges unless the judge accepts the plea.\textsuperscript{3755} Therefore, reinstatement of the original indictment after the guilty plea was set aside did not constitute double jeopardy.\textsuperscript{3756}

Barker was indicted with four others for committing first-degree murder and conspiring to commit murder\textsuperscript{3757} in connection with the death of Barker's husband in their home on Federal Aviation Authority property on Guam.\textsuperscript{3758} The original indictment was dismissed after Barker pleaded guilty to second-degree murder.\textsuperscript{3759} The guilty plea was subsequently declared involuntary, due to a language barrier between Barker and the court.\textsuperscript{3760} The trial court set aside its judgment against Barker for second-degree murder on Barker's motion, and then vacated its dismissal of the original indictment.\textsuperscript{3761}

Barker appealed the district court's denial of her motion to have

\textsuperscript{3753.} \textit{Id.} In \textit{Green}, the defendant's conviction was reversed, and he was subsequently retried and convicted for first-degree murder.

\textsuperscript{3754.} 681 F.2d 589 (9th Cir. 1982).

\textsuperscript{3755.} \textit{Id.} at 592. The Barker court's ruling thus places the Ninth Circuit in accordance with most other circuits on this issue. \textit{See}, e.g., Klobuchir \textit{v. Pennsylvania}, 639 F.2d 966, 970 (3d Cir.) (guilty plea to third-degree murder not implied acquittal to charges of first-degree murder since court vacated the plea), \textit{cert. denied}, 454 U.S. 1031 (1981); Hawk \textit{v. Berkemer}, 610 F.2d 445, 447 (6th Cir. 1979) (guilty plea to murder not implied acquittal of aggravated murder, attempted murder, and aggravated burglary since plea-bargained conviction meant no determination of guilt or innocence); United States \textit{v. Johnson}, 537 F.2d 1170, 1174 (4th Cir. 1976) (dismissal of second and third counts after acceptance of guilty plea on fourth count of four-count indictment did not preclude later retrial on remaining two counts); United States \textit{v. Williams}, 534 F.2d 119, 121 (8th Cir.), \textit{cert. denied}, 429 U.S. 894 (1976); United States \textit{v. Anderson}, 514 F.2d 583, 586-87 (7th Cir. 1975) (guilty plea to bank robbery did not bar prosecution for armed robbery); Ward \textit{v. Page}, 424 F.2d 491, 493 (10th Cir.) (guilty plea to first-degree manslaughter not a bar to conviction for first-degree murder on retrial), \textit{cert. denied}, 400 U.S. 917 (1970).

\textsuperscript{3756.} 681 F.2d at 592.


\textsuperscript{3758.} 681 F.2d at 590. The indictment charged that Barker and a co-conspirator hired three others to murder her husband by lethal injection. \textit{Id.}

\textsuperscript{3759.} \textit{Id.}

\textsuperscript{3760.} \textit{Id.} Barker's native language was Vietnamese. At the guilty plea proceedings, the judge had difficulty establishing whether Barker had entered a voluntary plea because she could only speak and understand a limited amount of English. The plea was finally accepted after Barker's counsel assured the court that it was voluntary. \textit{Id.}

\textsuperscript{3761.} \textit{Id.} Barker retained new counsel, who moved to have the plea and conviction set aside. 28 U.S.C. § 2255 (1976).
the indictment dismissed. Barker argued that her plea constituted an implied acquittal of the original charges. The Ninth Circuit considered Barker's argument in light of two well-accepted double jeopardy principles, and affirmed the district court.

The Barker court first pointed out that the first-degree murder and conspiracy charges did not violate the prohibition that a defendant should not be prosecuted and tried for the same offense twice, because Barker had not been tried for first-degree murder. Second, the court concluded that the double jeopardy protection that arises when a court actually makes a factual resolution of a charge does not exist when the judge merely approves a guilty plea on a lesser charge. The Ninth Circuit reasoned that, in conducting a review of a plea agreement on a lesser offense, a trial judge necessarily focuses only on the probability of guilt as to that offense. The court declared that the trial judge cannot properly consider the factual basis for a conviction on a greater charge in such a proceeding. Therefore, the court upheld the indictment.

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3762. 681 F.2d at 590.
3763. Id.
3764. Id. at 593.
3765. United States v. Williams, 534 F.2d at 121 (double jeopardy did not bar conviction for aggravated bank robbery after defendant pleaded guilty to bank robbery because he was not placed "in direct peril" of being convicted of aggravated bank robbery at time of plea).
3766. 681 F.2d at 591. The court further noted that the second proceeding was a direct result of Barker's decision to plead guilty to second-degree murder. Id. It is not clear, however, that this is a valid rationale, considering that Barker's plea was subsequently ruled involuntary.
3767. See United States v. Martin Linen Supply Co., 430 U.S. 564, 565-66, 575-76 (1977) (acquittal of contempt charges by judge after jury deadlocked created double jeopardy bar to reprosecution for same charge because judge's action constituted a factual determination); United States v. Scott, 437 U.S. 82, 97 (1978) (double jeopardy no bar to reprosecution on drug charges where charge originally dismissed on procedural grounds; no factual determination was made).
3769. 681 F.2d at 592. See United States v. Green, 355 U.S. at 190. For a discussion of Green see supra notes 3752-53.
3770. 681 F.2d at 592 (citing Klobuchir v. Pennsylvania, 639 F.2d at 969); see also Hawk v. Berkemer, 610 F.2d at 447.

The Ninth Circuit rejected Barker's assertion that the trial judge had an "opportunity to consider and reject the more serious charge" because the judge had asked Barker and her co-defendant numerous questions about the murder. 681 F.2d at 592. For a statement of the procedures and findings required to be made in a plea proceeding, see FED. R. CRIM. P. 11.
4. Consecutive sentences

a. the Blockburger test

The double jeopardy clause prohibits multiple punishment for the same offense. However, a defendant may receive cumulative punishment for multiple statutory offenses that arise out of the same act, provided that the Supreme Court’s test from Blockburger v. United States is satisfied. The Blockburger test permits punishment for multiple statutory offenses arising out of the same transaction if each offense requires proof of a material fact not required by the other.

In United States v. Sanford, the Ninth Circuit ruled that the Blockburger test was not satisfied when the sole evidence of possession of counterfeit bills consisted of the evidence of transfer of the bills. The defendant had been convicted of possessing and concealing counterfeit notes, a violation of 18 U.S.C. section 472, and of transferring and delivering the same notes, a violation of 18 U.S.C. section 473. He was sentenced to three and two years imprisonment respectively, the sentences to run consecutively. There was no evidence to show that Sanford actually had possession of the notes; instead, possession was established through the transfer transaction.

3770. Ex parte Lange, 85 U.S. (18 Wall.) 163, 168 (1873).
3772. Blockburger v. United States, 284 U.S. at 304. The defendant in Blockburger was given consecutive sentences for three convictions for the sale of morphine. One count charged the sale of ten grains of morphine which was not in its original package, a violation of section one of the Harrison Narcotic Act. A second count charged the sale of eight grains of morphine on the next day which was also not in its original package. The last count charged that the sale of the eight grains was not made pursuant to a prescription, a violation of section two of the Harrison Act. Blockburger claimed that the second and third counts were one offense because they arose out of the same transaction. The Court ruled that they constituted two separate offenses because each offense required proof of a fact which the other did not: “The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Id. Hence, the defendant was properly given consecutive sentences.
3773. 673 F.2d 1070 (9th Cir. 1982).
3774. Id. at 1074.
3775. 18 U.S.C. § 472 (1976) states in pertinent part: “Whoever, with intent to defraud . . . keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.”
3776. 18 U.S.C. § 473 (1976) states in pertinent part: “Whoever . . . transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.”
3777. 673 F.2d at 1071.
The court relied on a recent Ninth Circuit decision which held that the possession and distribution of narcotics merge into one crime when possession of narcotics is proven only through the distribution transaction.\textsuperscript{3778} The \textit{Sanford} court determined that the possession and transfer counts similarly merged, and thus consecutive sentences were improper.\textsuperscript{3779}

In \textit{United States v. Ching},\textsuperscript{3780} the Ninth Circuit ruled that the \textit{Blockburger} test was satisfied when the defendant was given consecutive sentences on two counts for possessing unregistered firearms and one count for possessing a firearm by a felon.\textsuperscript{3781} The defendant had pled guilty to possessing an unregistered silencer and an unregistered pen gun, a violation of 26 U.S.C. section 5861(i),\textsuperscript{3782} and possessing a firearm by a convicted felon, a violation of 18 U.S.C. app. section 1202(a)(1).\textsuperscript{3783} The record was unclear whether the charge for possession of a firearm by a felon was based on possession of either the pen gun or silencer, or on possession of a third unidentified weapon.\textsuperscript{3784}

The court stated that even if the conviction for possessing a firearm by a felon was based on possession of the pen gun or silencer, the crime was separate and therefore consecutive sentences were proper.\textsuperscript{3785} Applying the \textit{Blockburger} test, the court determined that the two statutes required proof of a fact that the other did not.\textsuperscript{3786} The unregistered firearms charge required the prosecution to show that the

\textsuperscript{3778} United States v. Oropeza, 564 F.2d 316, 324 (9th Cir. 1977), cert. denied, 434 U.S. 1080 (1978). The two crimes under dispute in \textit{Oropeza} were possession of heroin with intent to distribute, and distribution of heroin. As in \textit{Sanford}, the prosecution in \textit{Oropeza} proved possession on the basis of the distribution transaction alone. The \textit{Oropeza} court held that the possession and distribution crimes merged into one offense. The court pointed out that both offenses were located in the same statutory section, and the statutes did not clearly authorize punishment for each subsection. Therefore, the court concluded that although Congress intended to punish the possession of heroin with intent to distribute, Congress did not intend to “punish twice a distributor who necessarily possessed before distribution.” \textit{Id.} 3779. 673 F.2d at 1073-74. The Ninth Circuit affirmed the conviction and remanded the case for resentencing.

\textsuperscript{3780} 682 F.2d 799 (9th Cir. 1982).

\textsuperscript{3781} \textit{Id.} at 802.

\textsuperscript{3782} 26 U.S.C. § 5861(i) (1976) provides: “It shall be unlawful for any person . . . to receive or possess a firearm which is not identified by a serial number . . . .”

\textsuperscript{3783} 18 U.S.C. app. § 1202(a)(1) (1976) provides: “Any person who . . . has been convicted . . . of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.”

\textsuperscript{3784} 682 F.2d at 802. If the count for possession by a felon was based on possession of a third firearm, as the court believed it was, then each act of possession would be separate and distinct, and a \textit{Blockburger} analysis would not be required.

\textsuperscript{3785} \textit{Id.}

\textsuperscript{3786} \textit{Id.}
weapons did not have serial numbers. In contrast, possession by a felon required that the prosecution prove that Ching had a prior felony conviction. The court ruled, therefore, that the Blockburger test was satisfied.\footnote{3787}

\section*{b. question of state statutory authorization}

In two habeas corpus petitions before the Ninth Circuit, the court was faced with the question of whether state courts could impose consecutive sentences. In \textit{Roy v. Watson},\footnote{3788} the Ninth Circuit reaffirmed that double jeopardy does not prohibit consecutive sentences for crimes arising out of separate transactions, even when a state statute does not specifically authorize consecutive sentences.\footnote{3789} In 1976 Roy was convicted in Oregon state court of theft and was given five years of probation. He subsequently violated his probation and was sentenced to five years in prison. In 1979 Roy was convicted for escaping from prison and was sentenced to five years imprisonment, to run consecutively with the theft sentence.\footnote{3790}

In his petition for writ of habeas corpus, Roy argued that because Arizona law did not specifically authorize consecutive sentencing, the state court violated the double jeopardy clause.\footnote{3791} Roy relied on dic-

\footnote{3787. \textit{Id.} In another case last term, the Ninth Circuit ruled that double jeopardy does not prohibit conviction for conspiring to commit wire fraud, even though the substantive fraud counts were based on vicarious liability. United States v. Saavedra, 684 F.2d 1293, 1301 (9th Cir. 1982). The defendant in \textit{Saavedra} was found vicariously liable for the acts of several Los Angeles County Jail inmates who obtained money orders from Western Union with fraudulently obtained credit card numbers. The defendant then picked up the money orders and deposited them in the inmates' bank accounts. The defendant claimed that double jeopardy prohibited her conviction for the three substantive fraud counts because these convictions were based solely on the conspiracy agreement. 684 F.2d at 1301.

The court rejected this argument, ruling that the principle of vicarious liability made conviction of the substantive counts proper, regardless of the fact that one agreement gave rise to all four convictions. 684 F.2d at 1301.

3788. 669 F.2d 611 (9th Cir.), \textit{cert. denied}, 457 U.S. 1108 (1982).

3789. \textit{Id.} at 612-13. This rule was first stated by the Ninth Circuit in \textit{Fierro v. MacDou-}

\textit{gall}, 648 F.2d 1259 (9th Cir.), \textit{cert. denied}, 454 U.S. 933 (1981). Fierro was sentenced to 184 years in state prison for committing eighteen separate state crimes. Fierro had not demonstrated that any of the crimes arose out of the same transaction. The Ninth Circuit disposed of Fierro's argument that the consecutive sentences violated the double jeopardy clause by stating that "[t]he imposition of consecutive sentences is nothing more than the imposition, for each crime, of the sentence fixed by legislative act. Such sentencing does not constitute usurpation of a legislative function but rather is literal compliance with that which the legislature has prescribed." \textit{Id.} at 1260.

3790. 669 F.2d at 611.

turn from *Whalen v. United States*,\(^{3792}\) which, he argued, provided that state courts could not impose multiple punishments unless authorized by state law.\(^{3793}\) The Ninth Circuit distinguished *Whalen*, noting that it involved two statutory offenses arising out of a single transaction rather than multiple offenses violated by separate criminal acts, as in *Roy*\(^{3794}\). When "the acts punished are clearly discrete," the Ninth Circuit stated, then state courts may impose consecutive sentences without violating the double jeopardy clause.\(^{3795}\)

In *Gentry v. MacDougall*,\(^{3796}\) the Ninth Circuit ruled that the double jeopardy clause was not violated by an Arizona manslaughter statute which authorized consecutive sentences for two deaths arising from a single act.\(^{3797}\) The defendant was given consecutive sentences after conviction in Arizona state court on two counts of vehicular manslaughter.\(^{3798}\) In his petition for writ of habeas corpus, Gentry first argued that the Arizona manslaughter statute did not authorize consecutive sentences for multiple deaths resulting from the same act.\(^{3799}\) The Ninth Circuit disagreed, following an Arizona state court's interpretation of the manslaughter statute, which held that the Arizona legislature intended to authorize consecutive sentences.\(^{3800}\)

Gentry then argued that the double jeopardy clause prohibited consecutive sentences for multiple deaths arising from a single unintentional act.\(^{3801}\) The Ninth Circuit ruled, however, that the double jeopardy clause does not prohibit the legislature from authorizing such

3793. *Id.* at 690.
3795. 669 F.2d at 613-14.
3796. 685 F.2d 322 (9th Cir. 1982).
3797. *Id.* at 323.
3799. 685 F.2d at 323.
3801. 685 F.2d at 323.
multiple punishment. The court stated that any contention that sentencing under Arizona's manslaughters statute was unconstitutional should be brought as an eighth amendment claim of cruel and unusual punishment. Because no eighth amendment argument was made, the court denied the habeas corpus petition.

5. Sentence modification

The double jeopardy clause prohibits the increase, or enhancement, of an existing sentence. In United States v. Alverson, the Ninth Circuit ruled that the correction of an ambiguous sentence does not constitute sentence enhancement.

Alverson was convicted of four counts of possessing unregistered machine guns. He was sentenced to five years' imprisonment for each count. The trial judge's instructions were so uncertain, however, that it was not clear whether the sentences were to run consecutively or concurrently. Three days later, the judge acknowledged that the sentence was ambiguous. He therefore set the sentence aside and gave instructions that the five year sentences were to run consecutively for a maximum of twenty years.

The Ninth Circuit upheld the corrected sentence, but nevertheless criticized the trial judge's manner of sentencing. The court ruled that correction of an illegal sentence does not violate the double jeop-

3802. Id. The Gentry court did not consider double jeopardy principles under the Arizona Constitution.
3803. Id. See Bell v. United States, 349 U.S. 81, 82 (1955) (eighth amendment gives Congress power to authorize consecutive sentences for transporting two women at same time in violation of Mann Act).
3804. 685 F.2d at 323.
3805. Brown v. Ohio, 432 U.S. 161, 168-69 (1977) (prosecution of defendant for auto theft after conviction on lesser included offense of joyriding, where both crimes arose out of same transaction, held impermissible as an attempt to increase sentence).
3806. 666 F.2d 341 (9th Cir. 1982).
3807. Id. at 344. Alverson was convicted under 26 U.S.C. § 5861(d) (1976), which states in pertinent part: "It shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record . . . ."
3808. Id. at 347. The judge said at the original sentencing: "The sentence imposed as to Counts 2, 3, and 4 is to run consecutively with the sentence on Count 1." In an effort to clarify this, the judge later stated: "As to Counts 2, 3, and 4, they run consecutively with Count 1." Id.
3809. Id.
3810. Id. at 348 n.5. The court stated:

The fact that we find the district court's correction of its original sentence permissible does not mean that we approve of the district court's sentencing procedures in this case. A trial judge is obligated to give an intelligible sentence. Where he or she fails to do this, speedy correction of the error may avoid the necessity of
ardy prohibition against sentence enhancement.\textsuperscript{3811} In determining whether the ambiguous sentence was illegal, the court applied the test that a sentence is improper if it fails to reveal with "fair certainty" what the sentence actually is.\textsuperscript{3812} In this case, it was not clear from the trial judge's original instructions whether Alverson had been sentenced to a maximum of ten or twenty years.\textsuperscript{3813} As a result, the court found that the ambiguous sentence was improper; the subsequent instructions were therefore permissible corrections or modifications, rather than enhancement of an existing sentence.\textsuperscript{3814}

6. Resentencing

In \textit{Knapp v. Cardwell},\textsuperscript{3815} the defendants, who had been convicted and sentenced to the death penalty before the restrictive sentencing procedure under Arizona's capital murder statute was reinterpreted, challenged their resentencing as a violation of the double jeopardy clause. They had been convicted of first-degree murder and sentenced to the death penalty under section 13-454 of the Arizona Revised Statutes,\textsuperscript{3816} which at that time required the sentencing judge to make a finding as to each aggravating and mitigating factor listed in the statute.\textsuperscript{3817} Thus, in order to impose the death penalty, the sentencing judge had to find that at least one of the aggravating factors listed in the statute existed at the time of the murder.\textsuperscript{3818} The factors enumerated in section 13-454 were interpreted by the Arizona Supreme Court

\textsuperscript{3811} See United States v. Daugherty, 269 U.S. 360, 363 (1926) ("Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them.").

\textsuperscript{3812} Id. at 348.

\textsuperscript{3813} \textit{Id.} at 348.

\textsuperscript{3814} \textit{Id.} FED. R. CRIM. P. 35 provides: "The court may correct an illegal sentence at any time . . . ." See United States v. Solomon, 468 F.2d 848, 851 (7th Cir. 1972) (court had power under Rule 35 to modify illegal sentence for United States Treasury violations because sentence was "internally contradictory"); cert. denied, 410 U.S. 986 (1973); Scarponi v. United States, 313 F.2d 950, 953 (10th Cir. 1963) (if ambiguous sentence for prison escape ruled illegal, modification under Rule 35 would be proper; the Tenth Circuit held that the sentence was in fact unambiguous in light of additional statements by the sentencing court).

\textsuperscript{3815} Id. at 1256. ARIZ. REV. STAT. ANN. § 13-454 (1978) (current version at ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 1982)).

\textsuperscript{3816} \textit{Id.} at 1256.

\textsuperscript{3817} \textit{Id.}

\textsuperscript{3818} \textit{Id.}
in 1976 to be exclusive, so that any factor not listed could not be considered by the sentencing judge. This interpretation was reversed by the Arizona Supreme Court in *State v. Watson,* in light of a 1978 United States Supreme Court ruling that a similar Ohio statute was unconstitutional, because it unfairly precluded consideration of all pertinent mitigating factors.

The Arizona Legislature enacted a new capital murder statute in 1978, codifying the ruling in *Watson.* The defendants in *Knapp* subsequently were resentenced, and each was again sentenced to death. The defendants appealed a district court order vacating an injunction that prohibited the state from carrying out the sentences. On appeal one of the issues was whether resentencing under *Watson* and the new Arizona section 13-703 subjected the defendants to double jeopardy.

The defendants first argued that imposition of the death penalty upon resentencing would constitute a second punishment for the same offense in violation of the double jeopardy clause. The defendants based this argument on the contention that their original death sentences were reduced to life imprisonment when Arizona's capital murder sentencing procedure was declared unconstitutional. The

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3820. 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979). In *Watson,* the Arizona Supreme Court ruled that § 13-454(F) was unconstitutional because it prevented consideration of mitigating factors not listed in the statute. However, the court was able to delete the offending portion of the statute and leave the remainder in full force and effect. *Id.* at 445, 586 P.2d at 1257.

3821. Lockett v. Ohio, 438 U.S. 586 (1978). The Ohio capital murder statute in *Lockett* explicitly stated that only three mitigating factors could be considered. *Id.* at 608.


3823. 667 F.2d at 1257.

3824. *Id.* at 1263.

3825. *Id.* at 1257-58. The injunction was ordered in 1978, before *Watson* was decided and the new section 13-703 was enacted. *Id.*

3826. *Id.* at 1257-58. After section 13-703 was enacted, the State moved to have the district court's injunction dissolved. The district court vacated its injunction in April, 1980, and stayed the executions pending appeal to the Ninth Circuit. *Knapp* v. Cardwell, 513 F. Supp. 4 (D. Ariz. 1980). The district court ruled that the defendants' resentencing did not violate the double jeopardy clause. 513 F. Supp. at 14.

3827. 667 F.2d at 1258.


3829. 667 F.2d at 1263-64. Defendants asserted that the Arizona Supreme Court's decision
Ninth Circuit rejected the defendants' argument. The court reasoned that because the Arizona Supreme Court's decision in *Watson* did not render the death penalty itself unconstitutional but rather reinterpreted only the sentencing procedure, the defendants were placed in the same position as a person who has had his sentence vacated for procedural error. The court concluded that imposition of the death penalty on resentencing after the original sentence is vacated on procedural grounds is not prohibited by the double jeopardy clause.

Relying on the 1981 Supreme Court case of *Bullingon v. Missouri*, the defendants also argued that the resentencing court could not consider aggravating factors that the first sentencing court found did not exist, because the first sentencing court's findings constituted an implied acquittal of those factors. In *Bullingon*, the Supreme Court held that the double jeopardy clause prohibited imposition of the death penalty upon retrial where the defendant was sentenced to life imprisonment at the original trial.

The court further rejected the defendants' claim that common law compelled reduction of their death penalty sentences to life imprisonment upon invalidation of Arizona's death penalty law. *Id.* at 1264.

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in *Watson* declared the Arizona sentencing statute unconstitutional. Hence, their death sentences were reduced to life imprisonment under section 10 of the Arizona Session Laws. Section 10 provides that a defendant's death sentence is reduced to life imprisonment "[i]n the event the death penalty is held unconstitutional on final appeal." 1973 ARIZ. SESS. LAWS § 10, ch. 138. The Ninth Circuit held that section 10 was inapplicable, deferring to the Arizona Supreme Court's statements in *Watson* that it only declared unconstitutional a portion of the sentencing procedures under former section 13-454. 667 F.2d at 1263.

The court further rejected the defendants' claim that common law compelled reduction of their death penalty sentences to life imprisonment upon invalidation of Arizona's death penalty law. *Id.* at 1264.

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3830. *Id.*
3831. *Id.* See supra note 3829.
3832. *Id.* at 1264.
3833. *Id.* The court did not cite any authority for this proposition.
3834. 451 U.S. 430 (1981). In *Bullingon*, the defendant was sentenced to life imprisonment after the jury ruled, in a bifurcated trial proceeding, that certain aggravating factors were not proven to exist beyond a reasonable doubt. The defendant was granted a new trial on his own motion. On retrial, the State again sought the death penalty. The Supreme Court ruled that the sentencing procedures in the first trial "explicitly required" the jury to determine whether the aggravating factors were present, and the jury's sentence of life imprisonment therefore constituted an implicit acquittal of the presence of any aggravating factors. *Id.* at 444-45. Therefore, the death penalty could not be sought on retrial. *Id.* at 446.

3835. 667 F.2d at 1264. The court noted that the defendants did not actually claim acquittal of the death penalty, but of the aggravating factors found not to exist in the original sentencing proceedings. The court characterized the claim as one of collateral estoppel, and pointed out that acceptance of such an argument would mean that the appellants could similarly be estopped from denying aggravating factors at resentencing that were found to exist at the original sentencing. Furthermore, the defendants could be estopped from claiming the existence of mitigating circumstances not found to exist originally. *Id.* at n.10.
ment, too, and distinguished *Bullington* on two grounds. First, the court ruled that no implied acquittal can occur when, as in *Knapp*, the defendants were originally sentenced to death. A harsher sentence cannot therefore be imposed on resentencing.\(^{3837}\) Second, the sentencing procedures in *Bullington* were more structured and formal than in *Knapp*, so that imposition of a life sentence in *Bullington* compelled the conclusion that the absence of aggravating factors did not justify the death penalty.\(^{3838}\) The *Knapp* court also stated that evidence of mitigating or aggravating factors that either did not exist or were not introduced at the original hearing could be introduced on resentencing.\(^{3839}\)

Judge Adams, dissenting in part and concurring in part, stated that he would allow reconsideration of a “narrower class” of aggravating circumstances than the majority.\(^{3840}\) It was his view that, upon resentencing, the court should not consider aggravating circumstances which are derived from factual evidence that could have been adduced at the first trial.\(^{3841}\) Thus, the consideration of “intervening criminal convictions and other sorts of aggravating circumstances,” would be allowed because these were not a matter of factual inquiry at the original sentencing.\(^{3842}\)

**B. Appellate Review**

1. Appeal by the government

Section 3731 of title 18, United States Code, establishes the government’s right to appeal in criminal cases.\(^{3843}\) The United States

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\(^{3837}\) 667 F.2d at 1265.

\(^{3838}\) *Id.* The *Knapp* court also stated: “The *Bullington* Court indicated no intention to overrule those cases that permit harsher resentencing where the first sentence was rendered under a more flexible scheme involving discretionary balancing of circumstances by the sentencing body.” *Id.* at 1265.

\(^{3839}\) *Id.*

\(^{3840}\) *Id.* at 1265 (Adams, J., dissenting).

\(^{3841}\) *Id.* at 1267-68.

\(^{3842}\) *Id.* at 1268-69. Adams’ position is based on his interpretation of the principles in *Bullington* and the underlying concerns of the double jeopardy clause, namely, that a defendant not be subjected to the burden of relitigating factual issues, and not be subjected to the risk that relitigation of such issues may result in erroneous findings. *Id.* See *Bullington* v. Missouri, 451 U.S. at 451 (Powell, J., dissenting).

\(^{3843}\) 18 U.S.C. § 3731 (1976) provides in part:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution. An appeal by the United States shall lie to a court of appeals from a decision or order of a district court (sic) suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant
Supreme Court has held that section 3731 allows the government to appeal whenever the Constitution permits. There are, however, limitations on this right to appeal: (1) the defendant cannot be placed in jeopardy a second time; (2) the appeal must be timely; and (3) the appeal must involve a material fact in the case with significant legal issues.

In United States v. Booth, the Ninth Circuit held that section 3731 does not give the government the right to appeal the admission of evidence. The defendant had been indicted for a bank robbery involving several eyewitnesses. At trial, the district court granted a motion to admit testimony from an identification expert concerning the general problems with eyewitness identification. The Government appealed the district court's ruling as to the admissibility of this evidence. Without citing authority, the Ninth Circuit stated that section 3731 gives the government the right to appeal only the suppression of evidence; a trial court's decision to admit certain evidence at trial cannot be appealed by the government.

In addition, in Booth the Government invoked section 3731 to appeal the district court's order suppressing and excluding certain evidence. At a pre-trial hearing, the district court had suppressed evidence concerning: (1) the defendant's statements to police before being arrested; (2) eyewitness testimony of three of the five witnesses who viewed the defendant at a "show-up" identification at the bank shortly after the robbery; (3) a list of various gun and ammunition stores found at a commercial establishment; and (4) the deposition of the Government's fingerprint expert explaining why he believed no

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3844. United States v. Wilson, 420 U.S. 332, 337 (1975) (in enacting § 3731, Congress intended to remove all statutory barriers to government appeals and to allow appeals whenever the Constitution would permit). See also United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977) ("Congress has removed the statutory limitations to appeal and the relevant inquiry turns on the reach of the Double Jeopardy Clause itself . . . ").


3846. Fed. R. App. P. 4(b) provides in part that "[w]hen an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment."


3848. 669 F.2d 1231 (9th Cir. 1981).

3849. Id. at 1240.

3850. Id.
fingerprints were found on the get-away car.\footnote{3851}

After the Government appealed the suppression order under section 3731, the defendant filed in district court a motion to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 48(b).\footnote{3852} The district court dismissed the indictment without prejudice for unnecessary delay in bringing the defendant to trial. The Government's section 3731 appeal was then consolidated with an appeal of the dismissal order.

In determining that the district court had erred in dismissing the indictment, the Ninth Circuit considered the three requirements for appeal under section 3731. The appeal cannot place the defendant in jeopardy a second time or be used to delay the trial, and the evidence suppressed must be substantial proof of a material fact in the case.\footnote{3853}

The court first noted that since the defendant had not yet gone to trial, he could not possibly be placed in double jeopardy by the Gov-

\footnote{3851. Id. at 1233. In \textit{Booth}, over $32,000 was stolen from a bank. Shortly after the robbery, a policeman observed the defendant, who appeared to match a police description of one of the perpetrators. The policeman asked the defendant if he had any identification, what he was doing in the area, and whether he had been arrested before. The defendant responded that he had been paroled the month before for a burglary. He was then transported to the bank for a "show-up" identification. With his hands handcuffed behind his back, the defendant was taken before a group of witnesses, some of whom identified the defendant as one of the robbers. The defendant was then formally arrested. Later, a vehicle believed to be the get-away car was discovered but no fingerprints were found on the automobile. FBI agents then secured a warrant to search a store near the bank. A photograph of the defendant, a torn sketch of the bank, and a list of ammunition stores were recovered from the store. At a hearing after arraignment, however, the court suppressed some of this evidence, and the Government appealed this suppression order. \textit{Id.} at 1234-35.}

\footnote{3852. \textit{Fed. R. Crim. P. 48(b)} states in part: "If there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."}

\footnote{3853. 669 F.2d at 1241. The \textit{Booth} court reviewed \textit{United States v. Loud Hawk}, 628 F.2d 1139, 1150 (9th Cir. 1979) (en banc), \textit{cert. denied}, 445 U.S. 917 (1980), which established the three conditions necessary for the government to appeal under section 3731.

In \textit{Loud Hawk}, Oregon state police stopped two vehicles believed to contain fugitives from United States authorities. After arresting some of the occupants of these cars, the state issued search warrants for the vehicles. After firearms were found in one vehicle and dynamite in the other, the defendant was charged with illegal possession of these items. After photographing the dynamite, state authorities destroyed the explosives. Pursuant to Rule 48(b) of the Federal Rules of Criminal Procedure, the district court dismissed the dynamite charges, stating that such destruction was unlawful suppression of evidence. Furthermore, because the Government refused to proceed with the trial until it could appeal the dismissal order of the dynamite counts, the district court dismissed the indictment with prejudice.

On appeal, the Ninth Circuit allowed the Government to reinstate the indictment as to the dynamite charges because the conditions of section 3731 were met. With regard to the non-dynamite charges, however, the court held that the suppressed evidence (dynamite) was not substantial proof of a material fact. Therefore \textit{Loud Hawk} held that the delay in prosecuting the non-dynamite counts was unnecessary and these counts were properly dismissed under Rule 48(b).}
The court also stated that any delay in the trial was necessary to allow the Government to exercise its right to appeal; the Government was not unnecessarily delaying the trial pursuant to Rule 48(b). In considering the third factor, the court stated that some of the suppressed evidence would be very important in proving the Government's case. Because the witness' testimony would be crucial in identifying the defendant as one of the robbers, the court stated that this suppressed evidence was substantial proof of a material fact. The Ninth Circuit concluded that because all three conditions were satisfied, the Government should have been allowed to appeal the suppression order and therefore the district court erred in dismissing the indictment.

In further interpreting the government’s right to appeal under section 3731, the Ninth Circuit in United States v. Godoy, allowed the Government to appeal the denial of a Rule 35 motion to correct an illegal sentence. The defendant was convicted by a jury of all counts charged in the indictment. In a special verdict, the jury also forfeited six of the defendant’s properties which the defendant had acquired through the proceeds of his racketeering activities. In sentencing the defendant, the district court ordered only four of the properties to be forfeited. After the defendant petitioned the court to remove the restraining order from the properties not forfeited, the Government responded with a motion to correct the sentence under Rule 35.

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3854. 669 F.2d at 1241.
3855. Id. See United States v. Loud Hawk, 628 F.2d at 1150 (delay necessary for government to appeal district court's order cannot be deemed "unnecessary' for purposes of Rule 48(b)").
3856. 669 F.2d at 1241.
3857. Id.
3858. 678 F.2d 84 (9th Cir. 1981).
3859. Fed. R. Crim. P. 35 provides in part that "[t]he court may correct an illegal sentence . . . imposed in an illegal manner within the time provided herein . . . ."
3860. 678 F.2d at 85. The indictment charged the defendant under 18 U.S.C. § 1962 (racketeering activities), 21 U.S.C. § 841(a)(1) (1976) (possession and sale of methaqualone), and 18 U.S.C. § 1963 (1976) (forfeiture of properties due to racketeering activities). The forfeited property was: (1) the Ralph Brothers Market and Pharmacy; (2) an unimproved lot in Ventura County; (3) commercial property in Mission Hills; (4) commercial property in Van Nuys; (5) the Whiskey Creek Nightclub; and (6) residential property in Los Angeles. 678 F.2d at 85.
3861. 678 F.2d at 85. The Godoy court stated that the defendant had admitted that all six properties had been acquired through racketeering activities. The defendant, however, contended that the court had no jurisdiction to hear this appeal. Id. at 87. The court disagreed, stating that because § 3731 was intended to allow government appeals whenever constitutional, the Government in this case should be allowed to appeal the sentence. Id. See United States v. Wilson, 420 U.S. 332, 337 (1975).
of the Federal Rules of Criminal Procedure. The motion was denied and the Government appealed.\footnote{3862} In holding that pursuant to section 3731 the Government had the right to appeal a Rule 35 motion for \textit{correction} of an illegal sentence, the \textit{Godoy} court followed a 1981 Ninth Circuit case which allowed the Government to appeal a Rule 35 motion for \textit{reduction} of a sentence.\footnote{3863} The \textit{Godoy} court noted that the only restriction on the Government’s right to appeal was whether the defendant would be subject to double jeopardy.\footnote{3864} Because the Government had only requested that the jury verdict be reinstated, the defendant would not be under jeopardy a second time.\footnote{3865}

Finally, in \textit{United States v. Banks},\footnote{3866} the Ninth Circuit held that under section 3731 the Government had the right to appeal a district court’s order dismissing an indictment on the ground of vindictive prosecution. After the district court dismissed a multiple count indictment involving destructive device and firearm charges against defendants Ka-Mook Banks, Redner, Loud Hawk, and Dennis Banks, the Government received a new indictment from the grand jury.\footnote{3867} The

\footnote{3862. 678 F.2d at 85-86. In this appeal, the Government did not challenge the district court’s decision not to forfeit the Ventura property and admitted that the residential property in Los Angeles was not subject to forfeiture according to \textit{United States v. Marubeni America Corp.}, 611 F.2d 763, 767, 769 (9th Cir. 1980), \textit{cert. denied}, 446 U.S. 908 (1981). 678 F.2d at 86. In \textit{Marubeni America}, the court stated that in enacting § 1962(a), Congress only intended to forfeit the improper gains of criminals where they enter or operate an organization through a pattern of racketeering activity; Congress did not intend to forfeit all types of income gained through racketeering. Thus, in \textit{Godoy}, the Ninth Circuit held that the Government’s appeal did not concern any issues involving those two properties.}

\footnote{3863. 678 F.2d at 87. In \textit{United States v. Hetrick}, 644 F.2d 752 (9th Cir. 1980), the court recognized the government’s right under § 3731 to appeal a district court’s order granting a Rule 35 motion for reduction of a sentence. After the defendant had received a ten-year sentence for charges of fraud and conspiracy, the district court reduced the sentence to five years imprisonment and then further reduced the sentence to three years because the sentences of the defendant’s co-conspirators had been so reduced. Upon the Government’s appeal, the Ninth Circuit held that the defendant would not be subject to double jeopardy, and thus the Government should be allowed to appeal. The \textit{Hetrick} court relied on congressional intent and the Supreme Court’s language in \textit{United States v. Martin Linen Supply Co.}, 430 U.S. at 568 (authorizing government appeals whenever constitutional). Clearly, the \textit{Godoy} court was following the precedent already established in \textit{Hetrick}.}

\footnote{3864. 678 F.2d at 87.}

\footnote{3865. \textit{Id}.}

\footnote{3866. 682 F.2d 841 (9th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 755 (1983).}

\footnote{3867. \textit{Id}. at 843. Ka-Mook Banks, Russ Redner, Kenneth Moses Loud Hawk, and Dennis Banks were charged with firearms violations relating to their arrest in November 1975. \textit{Id}. For a discussion of the many facts leading to this appeal, see \textit{United States v. Loud Hawk}, 628 F.2d 1139 (9th Cir. 1979) (en banc), \textit{cert. denied}, 445 U.S. 917 (1980).}

After the district judge granted a motion to suppress secondary evidence relating to the explosive violations, the Government appealed the order and requested a continuance since
new indictment charged all defendants with two new destructive device counts and also charged Ka-Mook Banks with a new count of receiving firearms while under indictment for a felony. On the defendants' motion to dismiss the new indictment, the district court denied the motions for vindictive prosecutions as to defendants Redner, Loud Hawk, and Dennis Banks. These defendants appealed the denial of their motions and the Ninth Circuit held that it did not have jurisdiction to review the district court's order refusing to dismiss the indictment on the ground of vindictive prosecution. The district court, however, granted Ka-Mook Bank's motion to dismiss for vindictive prosecution.

The Government appealed under section 3731, contending that only the added new charge should have been dismissed. The Ninth Circuit held that section 3731 gives the court of appeals jurisdiction to review the Government's appeal of an order dismissing an indictment due to vindictive prosecution. Thus, turning to the merits of the appeal, the Banks court held that the dismissal of the indictment was erroneous; all but the added count was ordered reinstated against Ka-Mook Banks.

the trial was only one month away. The court denied the Government's motion and when the Government answered not ready on the day of the trial, the judge dismissed the indictment with prejudice. On appeal of the dismissal pursuant to § 3731, the Ninth Circuit stated that the district court failed to warn the Government that the indictment would be dismissed if it failed to proceed to trial. The case was remanded for further consideration.

On remand, the district court held that the firearms counts could not be reinstated. As a result, the Government requested and obtained new indictments against the defendants. These new indictments were the subject of the second appeal. See supra note 3853.

3868. 682 F.2d at 844.

3869. Id. In denying the defendants' motions to discuss the new indictment, the district judge stated that the new destructive device counts were added through the "independent judgment of subsequent prosecutors . . . " and therefore the district court did not find an appearance of vindictiveness. Id.

3870. Id. The Ninth Circuit held that under 28 U.S.C. § 1291 (1976) the court does not have jurisdiction to review an order denying a motion to dismiss due to vindictive prosecution. See United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) (per curiam) (motion to dismiss for vindictive prosecution not appealable since not within collateral order exception of 1291).

3871. 682 F.2d at 844. The district court stated that "the Government had failed to dispel the appearance of vindictiveness created by the addition of the new firearms count against [Ka-Mook Banks]." Id.

3872. 18 U.S.C. § 3731 (1976) provides in part that "[i]n a criminal case an appeal by the United States shall lie to a court of appeals from an order of a district court dismissing an indictment or information as to any one or more counts . . . ."

3873. 682 F.2d at 844.

3874. Id.

3875. Id. at 846. The Banks court stated that in order to prove vindictive prosecution the
2. Finality

Section 1291 of title 28, United States Code, authorizes "appeals from all final decision of the district courts . . ." The Ninth Circuit has recently interpreted the final judgment rule upon appeal of a pretrial order disqualifying counsel, a new trial order, a sentencing order, and three other orders denying various motions by defendants.

a. pretrial order disqualifying counsel

In United States v. Greger, the Ninth Circuit held that a pretrial order disqualifying the defendant's counsel was not a final decision and therefore unappealable under section 1291. In Greger, the defendant refused to waive his sixth amendment right to conflict-free representation and the defendant's counsel refused to ask his other clients, who were potential witnesses against the defendant, to waive their attorney-client privileges. The district court disqualified the defendant's counsel and the defendant appealed the pretrial order.

In this case of first impression, the Ninth Circuit considered whether an order disqualifying counsel was a final decision within the collateral order doctrine. According to the Supreme Court, an order is a final decision within the collateral order doctrine if the decision defendant must show that there exists a reasonable likelihood that the prosecution "would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights." Id. at 845 (quoting United States v. Gallegos-Curiel, 681 F.2d 1164, 1169 (9th Cir. 1982)). The Ninth Circuit stated that there was insufficient evidence to find that the Government's acts would not have occurred but for the Government's hostility towards the defendant, Ka-Mook Banks; in fact, the district court had found no evidence that the Government had acted vindictively. 682 F.2d at 846. Because the Government was forced to obtain a re-indictment against defendants, the Ninth Circuit stated that a legitimate reason existed to reconsider the indictment and to recharge the defendants. Thus, the Banks court held that the district court's order dismissing all counts against Ka-Mook Banks was error; the court reinstated the counts against Banks except for the added charge.

The three other cases concerned: (1) the appeal of a pretrial order denying defendant's motion to dismiss for lack of subject matter jurisdiction; (2) an order denying defendant's motion to unseal an affidavit or, in the alternative, to return seized property; and (3) an order denying defendant's motion to dismiss because of selective prosecution. See infra notes 3913-31 and accompanying text.

The Greger court noted that there are very few cases dealing with an order disqualifying counsel. The majority of cases involve a court's order denying a motion to disqualify counsel. Id. at 1110. Further, most of the cases dealing with such orders are civil rather than criminal cases.

Id. In Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949), the Supreme Court held that a "small class" of orders are final decisions and appealable under § 1291. These orders must determine issues collateral to the litigation.
determines rights collateral to those asserted in the action, even if the decision does not end the litigation. The order, however, "must conclusively determine . . . an important issue completely separate from the merits of the action, and be effectively unreviewable . . . after a final judgment." 

In determining whether the collateral order doctrine applies to a pretrial order disqualifying counsel, the Greger court relied on Firestone Tire & Rubber Co. v. Risjord. The Firestone Court held that an order denying a motion to dismiss counsel in the context of a civil suit was not a final decision and consequently unappealable under section 1291.

The Greger court followed the reasoning of Firestone. Although Greger was a criminal rather than a civil case, the Ninth Circuit stated that the collateral order doctrine does not apply to a pretrial order disqualifying counsel.

Further, although the Firestone Court did not specifically discuss whether an order granting the disqualification of counsel was appealable, the Greger court held that the Supreme Court's reasoning in Firestone applies.

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3881. *Id.*

3883. *Id.* at 379. In Firestone, the defendant corporation moved to disqualify plaintiff's counsel from product liability suits because the plaintiff's attorney also represented the defendant's insurer. The district court denied the motion and the defendant appealed. The Court in Firestone stated that if the Eighth Circuit reviews the pretrial order after trial and determines that the order was improper, the circuit court could simply remedy the situation by ordering a retrial. *Id.* at 378. Thus, the Court held that an order denying a motion to disqualify counsel was not a final rejection of a claim where denial of immediate appeal would render review impossible. The Firestone Court therefore held that a pretrial order denying a motion to disqualify counsel was not within the collateral order doctrine exception to the final decision rule of § 1291; the order was accordingly held unappealable. *Id.* at 379.

3884. *Id.* at 379. In Firestone, the defendant corporation moved to disqualify plaintiff's counsel from product liability suits because the plaintiff's attorney also represented the defendant's insurer. The district court denied the motion and the defendant appealed. The Court in Firestone stated that if the Eighth Circuit reviews the pretrial order after trial and determines that the order was improper, the circuit court could simply remedy the situation by ordering a retrial. *Id.* at 378. Thus, the Court held that an order denying a motion to disqualify counsel was not a final rejection of a claim where denial of immediate appeal would render review impossible. The Firestone Court therefore held that a pretrial order denying a motion to disqualify counsel was not within the collateral order doctrine exception to the final decision rule of § 1291; the order was accordingly held unappealable. *Id.* at 379.

3885. The Greger court stated that the collateral order exception in allowing appeals before trial should be more strictly applied in criminal trials since the need to avoid the delays and disruptions of immediate appeals is especially important in a criminal trial. 657 F.2d at 1112.

3886. *Id.* (citing Abney v. United States, 431 U.S. at 657; DiBella v. United States, 369 U.S. 121, 126 (1962) (final judgment rule in federal appellate practice is especially important in criminal prosecutions)).
stone was nonetheless applicable to the facts in Greger. The Ninth Circuit stated that if the defendant is not convicted, there will be no need to appeal the disqualification order, thereby avoiding the time and expense of the appeal altogether. In addition, the Greger court stated that if the defendant is found guilty, there is no reason why the harm to the defendant cannot be completely vindicated on appeal if the order is found to be erroneous. The court noted that if the order is held to be improper, the court will presume that the defendant has been prejudiced by the order. Thus, since the pretrial order will be completely reviewable after trial without prejudice to the defendant, the Ninth Circuit held that this pretrial order is not a final decision under the collateral order doctrine.

The Greger court also considered whether extraordinary relief is available before final judgment by means of a petition for writ of mandamus under 28 U.S.C. section 1651. The remedy of mandamus, however, is only to be used in exceptional circumstances where, for instance, a lower court's order is clearly wrong as a matter of law, or the damage to the petitioner will be severe if the extraordinary relief is not granted. In considering the district court's order, the Greger court also stated that any delay in the trial due to prejudgment appeals should be discouraged. The Ninth Circuit reasoned that just because the trial may have been delayed once due to the disqualification of counsel does not mean that the litigation may be delayed again through an appeal of the order. Since the Greger court stated that any delay of a criminal trial can be quite damaging, appeals which prolong the litigation should be avoided at all costs.

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3887. 657 F.2d at 1112.
3888. Id. at 1113.
3889. Id. (citing Slappy v. Morris, 649 F.2d 718, 722 (9th Cir. 1981) (prejudice presumed if one can show that the district court denied the defendant his sixth amendment right to counsel)). Releford v. United States, 288 F.2d 298, 302 (9th Cir. 1961), also held that where the defendant was deprived of a right to choose his own counsel, prejudice was assumed. In Releford, the defendant was convicted of violating the White Slave Traffic Act. The defendant's attorney, however, could not attend the trial. Despite the defendant's objections, the district court insisted that an attorney sharing an office with defendant's attorney must proceed with the case. The Ninth Circuit reversed the conviction, holding that the district court's order to continue the trial was improper. The court in Releford stated that even though the defendant could not show that he had been damaged by the second attorney, the court presumed that he had been prejudiced, and the case was remanded. Id.
3890. 657 F.2d at 1113. The Greger court also stated that any delay in the trial due to prejudgment appeals should be discouraged. Id. The Ninth Circuit reasoned that just because the trial may have been delayed once due to the disqualification of counsel does not mean that the litigation may be delayed again through an appeal of the order. Id. Since the Greger court stated that any delay of a criminal trial can be quite damaging, appeals which prolong the litigation should be avoided at all costs.
3891. 28 U.S.C. § 1651(a) (1976) provides in part that all federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."
3892. 657 F.2d at 1114 (citing Bauman v. United States, 557 F.2d 650, 654-55 (9th Cir. 1977)). Bauman established guidelines for allowing mandamus review. The court in Greger relied on the Bauman test which stated that in order to obtain extraordinary relief through a writ of mandamus, the following factors should be considered: (1) the party seeking the writ has no other adequate means to attain the desired relief; (2) the petitioner will be prejudiced
court first noted that the order seemed to be consistent with current Ninth Circuit law. Furthermore, the court concluded that since relief may be attained through other means and the defendant will not be prejudiced or damaged if appeal is permitted only after the trial, the defendant is not entitled to a writ of mandamus. The Greger court also stated that the pretrial order did not seem to raise any new or important issues. Thus, the Ninth Circuit denied the defendant's petition for writ of mandamus, holding that the order was not proper for extraordinary review.

b. new trial order

In United States v. Dior, the Ninth Circuit determined that a new trial order was not a final decision and thus not appealable before retrial. After the defendant was found guilty of smuggling merchandise into the United States, the district court granted the defendant's posttrial motion for a new trial. The Government appealed the new trial order. The Ninth Circuit stated that under section 1291, the Government can only appeal a district court's final decision. The court added that a decision is final "only 'when it terminates the litigation . . . on the merits of the case . . . .'" The court reasoned that since a new trial order does not determine guilt or innocence the order is not a final decision. Therefore, the Government cannot appeal such orders.

3893. 657 F.2d at 1114-15 (citing United States v. Morando, 628 F.2d 535 (9th Cir. 1980) (without refusing to waive attorney-client privilege, an attorney who represents both defendant and witness should have been allowed to withdraw; Ninth Circuit held that defendant's sixth amendment rights were violated by forcing him to go to trial with an attorney who had conflicting loyalties); Kaplan v. United States, 375 F.2d 895, 897-98 (9th Cir. 1967) (when trial court advised of possibility of attorney's conflict of interest, court should not allow joint representation to continue unless the court obtains knowing and intentional waiver from each defendant affected)).

3894. 657 F.2d at 1115.

3895. 671 F.2d 351 (9th Cir. 1982).

3896. 28 U.S.C. § 1291 (1976) provides in part: "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

3897. 671 F.2d at 354 (quoting Parr v. United States, 351 U.S. 513, 518 (1956)). The Dior court noted that the Government did not argue that the new trial is appealable as a collateral order exception of the final decision rule articulated in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). In Cohen, the Court stated that orders which do not terminate the litigation may still be appealable if the orders determine issues separable from the litigation which are effectively unreviewable after a final judgment. Id. at 546-47. See supra notes 3880-81 and accompanying text.

3898. 671 F.2d at 354. In this case of first impression, the Dior court first looked to civil
In response to the Government's argument that 18 U.S.C. section 3731 authorizes the Government to appeal a new trial order before retrial, the Dior court considered the relationship between section 3731 and section 1291. Relying on a recent Supreme Court decision, the Dior court stated that in order to appeal a district court's order, the Government must show: (1) that the interlocutory appeal is constitutional (section 3731 requirement); and (2) that the appeal concerns an order which is a final decision under section 1291. The Ninth Circuit noted that Congress did not intend to abolish the final cases in the Ninth Circuit which held that new trial orders are not appealable until after the new trial. See, e.g., DePinto v. Provident Sec. Life Ins. Co., 323 F.2d 826, 838 (9th Cir. 1963) (in stockholder's derivative action, new trial order to set aside jury verdict not reviewable until after second trial since order is considered interlocutory); Gilliland v. Lyons, 278 F.2d 56, 58 (9th Cir. 1960) (in defamation action, plaintiff's motion for new trial filed within statutory period and granted by district court not appealable since not a "final" order under § 1291); United States v. Hayes, 172 F.2d 677, 680 (9th Cir. 1949) (new trial order in eminent domain action not appealable without showing abuse of discretion); Long v. Davis, 169 F.2d 982, 983 (9th Cir. 1948) (order for new trial not a final decision under § 1291).

The Dior court also relied on criminal cases of other circuits. In United States v. Hitchmon, 602 F.2d 689 (5th Cir. 1979), the court held that under 28 U.S.C. § 1291 the Government could not appeal an interlocutory judgment such as an order for a retrial. Id. at 692. The court in Hitchmon ordered a new trial on the grounds that new evidence had been discovered. The Fifth Circuit stated that the order was not a final determination of guilt or innocence. Thus, the Hitchmon court held that an order for new trial is unappealable since such orders are considered interlocutory judgments and not final decisions under § 1291.

Further, in United States v. Alberti, 568 F.2d 617 (2d Cir. 1977), the court held that the Government could not appeal an order granting a new trial. In Alberti, the court stated that 18 U.S.C. § 3731 (1976) governs the right to appeal a criminal conviction. Id. at 620. The court in Alberti stated, however, that although § 3731 intended to allow appeals whenever the Constitution permits (see United States v. Wilson, 420 U.S. 332, 337 (1975)), § 3731 does not authorize appeals for a retrial order. Id. at 620-21. The Alberti court stated that because a new trial order does not determine guilt or innocence, the order fails to come under the express requirement of § 3731 which allows appeals from an "order dismissing an indictment . . ." 18 U.S.C. § 3731 (emphasis added). Thus, the Alberti court held that a new trial order is not appealable by the Government. 568 F.2d at 621.

3899. 18 U.S.C. § 3731 (1976) provides in part that: "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information as to any one or more counts . . . ."

3900. Arizona v. Manypenny, 451 U.S. 232 (1981). After defendant's guilty verdict was overturned by the district court due to an immunity defense, the State appealed under § 1291. Id. at 237. In allowing the State to appeal, the United States Supreme Court stated that only a litigant "armed with a final judgment . . . is entitled to take an appeal." Id. at 244. In a concurring opinion, Justice Stevens emphasized that "[t]here is a distinction between a court's power to accept an appeal [a § 3731 issue] and an executive's power to prosecute an appeal [a § 1291 issue]." Id. at 250 (Stevens, J., concurring). Thus, without fulfilling both statutory requirements, it appears an appeal by the Government will not be allowed. 3901. 671 F.2d at 355.
decision rule of section 1291 by enacting section 3731. Because an order granting a retrial is not a final decision under section 1291, the Dior court held that the Government cannot appeal this order.

The Ninth Circuit also rejected the Government’s suggestion that new trial orders and suppression orders should be treated similarly. The court stated that, unlike new trial orders, suppression orders are often only reviewable before trial. If the defendant is acquitted, the Government will be unable to have the suppression order reversed and the case remanded. Thus while suppression orders are appealable before trial, new trial orders are not.

c. sentencing order

In United States v. Von Moos, the Ninth Circuit held that the district court’s sentencing order was a final decision and therefore appealable under section 1291. Von Moos committed perjury during a bank robbery trial, which resulted in his being convicted and sentenced on the bank robbery charge. The judge in that trial noted, however, that he considered the perjury charge when sentencing Von Moos for the robbery conviction. Von Moos subsequently was indicted for and plead guilty to perjuring himself at the robbery trial. The district court before which Von Moos came for sentencing ruled that it was without authority to sentence Von Moos on the perjury charge because the robbery sentence was “greater than it would have been had the perjury not been considered.” The Government appealed this order.

In holding that the district court’s sentencing order on the perjury charge was a final decision, the Ninth Circuit set forth the Supreme

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3902. Id.
3903. Id. at 357.
3904. Id. at 356. Because of the double jeopardy clause, if the defendant is acquitted, the Government would be unable to prosecute the defendant a second time even if the suppression order is reversed. U.S. Const. amend. V. See generally Benton v. Maryland, 395 U.S. 784, 793-98 (1969).
3905. If a new trial order is not appealable until the second trial, however, any error in granting the order can be completely rectified by the circuit court without harm to the Government. The Ninth Circuit can simply reverse the new trial order and reinstate the original verdict. 671 F.2d at 356.
3906. Id. Congress, however, has allowed suppression order appeals only when the government can show the appeal was not for purposes of delay and that the evidence suppressed is necessary to prove a material fact. Id.
3907. 660 F.2d 748 (9th Cir. 1981) (per curiam).
3908. Id.
3909. Id. at 749.
Court's test for determining when a judgment is final. The Supreme Court stated that a decision is final if the litigation has ended on its merits and the district court "leaves nothing to be done but to enforce by execution what has been determined." In refusing to sentence Von Moos specifically on the perjury charge, the district court had disposed of the case. The Ninth Circuit stressed that even though the district court's sentencing order was not a formal judgment, the case was still closed. As a result, the Ninth Circuit held that the sentencing order was a final decision and thus appealable.

d. other

In United States v. Atwell, the Ninth Circuit held that the final decision rule prohibits the appeal of a denial of a motion to dismiss for lack of subject matter jurisdiction. The defendants, Navy personnel who were charged with driving under the influence of alcohol in violation of the Assimilative Crimes Act, were granted a motion to dismiss for lack of jurisdiction by a magistrate. The district court reversed the magistrate's order and denied defendants' motion to dismiss. The defendants then appealed.

In determining that the denial of a pretrial motion to dismiss for lack of subject matter jurisdiction is not immediately appealable, the court relied on another recent Ninth Circuit decision. The Atwell

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3910. Id. (citing Berman v. United States, 302 U.S. 211, 212-13 (1937)). In Berman the defendant was convicted of mail fraud and conspiracy and was sentenced. After sentencing, the defendant appealed the sentence order. The Supreme Court stated that the sentence order was a final determination of the merits of the charge. Therefore, since the imposition of the sentence was a final judgment, the Berman court held that the defendant could appeal the sentence order.

3911. Id. at 213 (quoting St. Louis, Iron Mountain & S.R.R. v. Southern Express, 108 U.S. 24, 28-29 (1883)).

3912. 660 F.2d at 749 (citing United States v. United States District Court, 601 F.2d 379, 380 (9th Cir. 1978) (to be reviewed, an order must be independent and complete)).

3913. 681 F.2d 593 (9th Cir. 1982).

3914. 18 U.S.C. § 13 (1976) (assimilating CAL. VEH. CODE § 23152(a) (West Supp. 1983)). Section 13 provides in pertinent part that anyone with federal jurisdiction who "is guilty of any act or omission which . . . would be punishable if committed . . . within the jurisdiction of the State . . . shall be guilty of a like offense and subject to a like punishment."

3915. 681 F.2d at 594. The defendants contended that only the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1976), was applicable to them. See, e.g., 10 U.S.C. § 911 (1976) (prohibiting the operation of a vehicle while drunk).

3916. Id. In this action the Government also appealed pursuant to R.P. FOR TRIAL OF MINOR OFFENSES BEFORE U.S. MAGISTRATES 7(b).

3917. Id. (citing United States v. Layton, 645 F.2d 681, 683 (9th Cir.), cert. denied, 452 U.S. 972 (1981)). In Layton, defendant was indicted, inter alia, for conspiracy to murder a United States Congressman as well as aiding and abetting the murder of a Congressman.
court stated that since the guilt or innocence of the defendant had not
been determined at the time of the appeal, there was no final decision
under section 1291.\textsuperscript{3918} The Ninth Circuit also held that the final deci-
sion rule is not satisfied when the district court merely renders a judg-
ment when sitting as an appellate court. Even though the district
court’s decision reversed the magistrate’s ruling, the determination of
the district court was still an intermediate decision and thus not appeal-
able under section 1291.\textsuperscript{3919}

In \textit{Offices of Lakeside Non-Ferrous Metals, Inc. v. United
States},\textsuperscript{3920} the Ninth Circuit held that the district court’s order denying
the defendant’s motion to unseal an affidavit or, in the alternative, to
return seized property, was unappealable. Pursuant to a search war-
rant, Internal Revenue Service agents had seized books and records
from the defendant’s business offices and held these documents for over
eleven months. After the district court denied the defendant’s motion
to either unseal the affidavit which supported the search warrant or to
return the seized goods, the defendant appealed.\textsuperscript{3921} The Ninth Circuit
assumed that the defendant’s motion was essentially a motion for the
return of seized documents.\textsuperscript{3922} Thus, the court determined that the
order was appealable, seemingly holding that denial of the defendant’s
motion appealed an order denying his motion to dismiss the indictment for lack of sub-
ject matter jurisdiction. The \textit{Layton} court outlined a three-part test for deciding whether
pretrial orders are appealable. First, the party’s claim must be completely, formally, and
finally rejected by the trial court. 645 F.2d at 683 (citing Cohen v. Beneficial Indus. Loan
Corp., 337 U.S. 541, 546 (1949)). Second, the claim must be wholly collateral to and separa-
tble from the issue of guilt or innocence of the defendant. 645 F.2d at 683 (citing Abney v.
United States, 431 U.S. 651, 659 (1977)). Finally, the claim must be grounded on a right
which will probably be irreparably lost if the appeal is not permitted. 645 F.2d at 683 (citing
Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 546). The Ninth Circuit stated that the
defendant clearly failed to meet the third requirement. The court in \textit{Layton} stated that the
defendant’s claim that the federal court must have subject matter jurisdiction over the case
is not a right that must be upheld before trial if the right is to be preserved. Since the defend-
ant’s pending claim could be fully vindicated by a post-judgment appeal, the \textit{Layton} court
stated that a ruling before trial was unnecessary. Thus, the court in \textit{Layton} held that the
motion to dismiss was not a final decision and therefore unappealable.

3918. 681 F.2d at 594 (citing United States v. Dior, 671 F.2d 351 (9th Cir. 1982) (sentence
is final judgment in criminal cases)). Since the defendants had not been sentenced in \textit{Atwell},
the Ninth Circuit concluded that a final decision had not been rendered pursuant to § 1291.
3919. 681 F.2d at 594.
3920. 679 F.2d 778 (9th Cir. 1982).
3921. \textit{Id.} at 779. On the Government’s summary judgment motion, the district court dis-
mmissed the defendant’s civil suit for damages and injunctive relief due to the alleged illegal
search and seizure of the property. The Government had shown that the search was legal
and the IRS agents acted in good faith. \textit{Id.} On appeal, the Ninth Circuit affirmed. \textit{Id.} at
780.
3922. \textit{Id.} at 779. The court did not explain the basis for this assumption.
motion for the return of seized documents was a final decision under section 1291.\textsuperscript{3923}

The Ninth Circuit stated that to the extent that the defendant's motion had requested suppression of the evidence, however, the order was unappealable.\textsuperscript{3924} Then, without discussing whether the order was a suppression order, the court allowed the appeal and remanded the case, stating that in reviewing the defendant's motion, the district court should balance the government's interest in secrecy against the defendant's temporary loss of property.\textsuperscript{3925}

\textsuperscript{3923} \textit{Id.} The court cited VonderAhe v. Howland, 508 F.2d 364, 368 (9th Cir. 1974), for the rule that an order denying a motion for return of documents was appealable. In \textit{VonderAhe}, IRS agents searched the VonderAhes' offices and home and confiscated numerous documents. The VonderAhes then brought a civil suit seeking return of the property and requesting suppression of the goods as evidence in any subsequent criminal proceedings. The district court denied the VonderAhes' requests and granted the Government's motion to dismiss. On appeal, the Ninth Circuit reasoned that so long as no criminal action was pending, an order denying a request for return of seized goods was the final resolution of the dispute between the Government and the VonderAhes. Thus, the \textit{VonderAhe} court held that this order was a final decision under § 1291. \textit{Id.} at 368. As a result, \textit{VonderAhe} stands for the proposition that an order dismissing a motion for the return of documents is appealable where there is no criminal proceeding in existence. See Goodman v. United States, 369 F.2d 166, 167-68 (9th Cir. 1966) (suppression order unappealable, but order denying defendant's request for copies of documents after originals were returned, appealable as a final decision under § 1291). See also United States v. Ryan, 402 U.S. 530, 533 (1971) (immediate review of denial of motion for return of seized property available if no criminal proceeding pending); DiBella v. United States, 369 U.S. 121, 131-32 (1962) (appeal allowed only if motion for return of property in no way tied to criminal proceeding).

\textsuperscript{3924} \textit{Id.} 679 F.2d at 779. In Shea v. Gabriel, 520 F.2d 879, 880-81 (1st Cir. 1975), the First Circuit held that denial of suppression orders are not immediately appealable. In \textit{Shea}, federal agents had seized, pursuant to a warrant, a number of items relating to gambling activity. The defendant filed a complaint, requesting return of the seized property and an order suppressing the evidence. The district court denied relief and the defendant appealed. The First Circuit stated that as long as criminal proceedings have not commenced, there is no need to suppress any evidence. \textit{Id.} at 881. The court also noted that if criminal charges were filed against Shea and he was ultimately convicted, "there will be an adequate chance for appellate review after the district court imposes sentence." \textit{Id.} The \textit{Shea} court, however, did allow an appeal of defendant's motion for the return of property. Thus, the First Circuit distinguished between suppression orders (unappealable) and orders requesting the return of goods (appealable). See DiBella v. United States 369 U.S. at 131-32 (suppression orders unappealable since only a step in criminal case before trial; motions for return of property appealable if no criminal action in esse); Meier v. Keller, 521 F.2d 548, 556 (9th Cir. 1975), cert. denied, 424 U.S. 943 (1976) (where presentment had been made to grand jury at time complaint filed for return of property, criminal case deemed in esse, and order denying request for suppression of evidence and return or property unappealable); Coury v. United States, 426 F.2d 1354, 1355 (6th Cir. 1970) (motion requesting suppression of evidence unappealable, but where no criminal charges filed, motion to return seized property appealable).

\textsuperscript{3925} \textit{Id.} at 780. The court stated that even though the defendant did not show
Overruling a recent Ninth Circuit decision, the court in *United States v. Sasway*, held that a pretrial order denying the defendant's motion to dismiss the indictment because of selective prosecution was not appealable. *Sasway* relied on the Supreme Court decision in *United States v. Hollywood Motor Car Co.*, which stated that pretrial orders denying a motion to dismiss because of vindictive prosecution were unappealable under section 1291. The *Sasway* court extended the *Hollywood Motor* rule to selective prosecution dismissal orders, stating that selective and vindictive prosecution claims should

"much hardship to it by reason of the seizure, . . . " the success of this motion should be determined by a balancing test. *Id.* (citing Shea v. Gabriel, 520 F.2d at 882).

The *Shea* court noted that in order to succeed, the defendant must also show that the seizure was illegal under Fed. R. Crim. P. 41(e). 520 F.2d at 882. See Advisory Comm. Note, 56 F.R.D. 143, 170 (1972). The *Lakeside* court, however, failed to discuss the importance of showing that the seizure was illegal under Rule 41(e).

Finally, the *Lakewise* court warned that since the Government has all of its evidence under seal, there is a tendency to delay rather than expedite proceedings against the defendant. 679 F.2d at 780. Thus, the Ninth Circuit stated that even if the district court decides not to unseal the affidavits on remand, the trial court should still continue to exercise its power to protect the defendant's rights and ensure that the Government proceed to prosecute with diligence. *Id.*

3926. United States v. Griffin, 617 F.2d 1342 (9th Cir.), cert. denied, 449 U.S. 863 (1980). In Griffin, the court extended the collateral order doctrine as applied in Abney v. United States, 431 U.S. 651 (1977). The collateral order doctrine allows appeals of orders which determine issues collateral to the litigation; these orders must be practically unreviewable after a final judgment. The *Griffin* court stated that a claim of vindictive prosecution, like an Abney double jeopardy claim, concerns a right to be free from prosecution, not just free from subsequent conviction. 617 F.2d at 1345. Thus, the *Griffin* court stated that the defendant's motion which seeks to limit prosecutorial discretion should be appealable before trial. *Id.* at 1347.

3927. 686 F.2d 748 (9th Cir. 1982) (per curiam).


3929. The Supreme Court in *Hollywood Motor* held that a pretrial order denying a motion to dismiss an indictment because of vindictive prosecution is not appealable under § 1291. In *Hollywood Motor*, the defendants were originally indicted for conspiracy to defraud the United States, a violation of 18 U.S.C. § 371, and for smuggling goods in the United States, a violation of 18 U.S.C. § 545. After a change of venue, the defendants were indicted for the original two counts and for four more counts of making false statements to customs officers in violation of 18 U.S.C. § 542. The defendants moved to dismiss the counts on the ground that the charges manifested prosecutorial vindictiveness. The motion was denied. On appeal, the Ninth Circuit held that the district court's denial of the motion was appealable under § 1291. In reversing the Ninth Circuit's decision, the Supreme Court stated that the right asserted by the defendant is not a right that must be upheld before trial if it is to be protected at all. 458 U.S. at 270. The Court added that for a district court's order to be appealable under § 1291, the claim must be effectively unreviewable on appeal from the final decision. *Id.* The Court concluded that denial of the defendant's motion to dismiss for vindictive prosecution was a claim which could be reviewed after trial and thus was unappealable at this time.
be treated similarly.\(^{3930}\) Thus the court in *Sasway* held that a motion to dismiss because of selective prosecution was unappealable.\(^{3931}\)

3. *Abney* appeals

In *Abney v. United States*,\(^{3932}\) the Supreme Court held that a defendant could appeal a pretrial order denying a motion to dismiss an indictment on a claim of double jeopardy under 28 U.S.C. section 1291.\(^{3933}\)

The Ninth Circuit, in *United States v. Bendis*,\(^{3934}\) considered the allocation of the burden of persuasion and the burden of producing evidence in an *Abney* appeal. The defendants were convicted of conspiracy in Kansas. When the defendants were subsequently indicted in Hawaii for similar conspiracy charges, they filed a motion to dismiss claiming that the charges were barred by the double jeopardy clause. The district court denied the motion and the defendants appealed.

The Ninth Circuit first determined that the court had jurisdiction as to the defendants' *Abney* appeal.\(^{3935}\) The *Bendis* court then consid-

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3930. 686 F.2d at 748.
3931. *Id.*
3932. 431 U.S. 351 (1977). In *Abney*, the defendants were found guilty of conspiracy and attempting to obstruct interstate commerce by means of extortion. The defendants challenged the charges, contending that this single count improperly charged two separate crimes. The Court of Appeals for the Third Circuit ordered a new trial and requested the Government to choose between the conspiracy count and the attempt charge. The defendants moved to dismiss the indictment on the grounds that the new trial would expose them to double jeopardy and the first trial failed to charge an offense. The district court denied the motion and the defendants appealed. *Id.* at 653-55. The Supreme Court held that a pretrial order to dismiss an indictment on double jeopardy grounds was appealable by the defendants because the order was a final decision within the meaning of 28 U.S.C. § 1291. *Id.* at 662. See infra note 3933. Although the denial of a motion to dismiss an indictment is not "final" in the sense that it does not end the criminal proceeding, the *Abney* Court stated that such a denial is the final determination of the defendants' double jeopardy claim. The Supreme Court recognized that in a double jeopardy claim, the defendant is not contesting a possible conviction, but rather he is questioning the Government's authority to bring him to trial. *Id.* at 659. The Court stated that because the double jeopardy clause protects a person from being subjected to two trials, the defendants' exposure to the second trial must be reviewable before the second trial occurs. Thus, the Supreme Court stated that this interlocutory appeal is essential to protect the defendants' fifth amendment guarantee against double jeopardy. *Id.* at 662.
3933. 28 U.S.C. § 1291 (1976) provides in part: "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."
3935. *Id.* at 562. The *Bendis* court stated that since this appeal is a claim that the pending trial will destroy the defendants' rights against double jeopardy, this appeal is allowed under *Abney v. United States*. See supra note 3932 and accompanying text. The *Bendis* court, however, did not review other non-*Abney* appeals. The court held that at this time the defendants could not appeal their rights to a speedy trial nor could they challenge an order
ered who had the burden of establishing that the two conspiracies constituted the same offense within the meaning of the double jeopardy clause.\textsuperscript{3936} The court stated that although it was the defendants' burden of showing that the two conspiracies charged were the same, since the second trial had not yet occurred, the Government was in the better position to determine what would be proved at the second trial.\textsuperscript{3937} Therefore, the court determined that the \textit{burden of persuasion} rests on the defendant in an \textit{Abney} appeal; but once the defendant has made a "non-frivolous showing that an indictment charges the same offense . . . ," then the Government has the \textit{burden of producing evidence} that the two offenses are not the same.\textsuperscript{3938} Applying these principles, the \textit{Bendis} court affirmed the district judge's denial of the defendants' motion to dismiss, finding that the Government had carried its burden of producing evidence of two separate conspiracies.\textsuperscript{3939}

This burden allocation differs from that of other circuits which shift the burden of persuasion to the government after the defendant has made a non-frivolous showing of a double jeopardy violation.\textsuperscript{3940} The \textit{Bendis} court, however, noted that the practical effect of placing the burden of producing evidence on the government is to shift the burden of persuasion from the defendant to the government.\textsuperscript{3941}

\textsuperscript{3936} \textit{Id.} at 564. The court added that in order to maintain a double jeopardy claim, the Hawaii prosecution under count one and the Kansas conspiracy charge "must be indistinguishable "in law and in fact."" \textit{Id.} at 563 (quoting Gavieres v. United States, 220 U.S. 338, 342 (1911)). In \textit{Bendis}, the court noted that both counts were charged under the same federal conspiracy statute (18 U.S.C. § 371 (1976)). 681 F.2d at 563.

\textsuperscript{3937} \textit{Id.} at 564. \textit{See} Sanchez v. United States, 341 F.2d 225, 227 (9th Cir.), cert. denied, 382 U.S. 856 (1965). In \textit{Sanchez}, the Ninth Circuit held that the defendant has the burden of persuasion and the burden of producing evidence to show that the two trials concern the same illegality. \textit{Id.} In \textit{Sanchez}, however, both trials had already occurred. \textit{Id.} The court in \textit{Bendis} distinguished the present case from \textit{Sanchez} on the grounds that since the second trial has not yet taken place in \textit{Bendis}, it would be unfair to place the entire burden of producing evidence on the defendant.

\textsuperscript{3938} 681 F.2d at 564. The \textit{Bendis} court stated that as an evidentiary concept, in order to prove that the two charges are identical, the burden of producing evidence shifts to the Government, but the burden of persuasion always remains with the defendant. \textit{Id.} \textit{See also} J. \textit{Wigmore, Evidence} § 2489 (3d ed. 1940).

\textsuperscript{3939} 681 F.2d at 564.

\textsuperscript{3940} \textit{Id.} at 564 \& n.2. United States v. Castro, 629 F.2d 456, 466 (7th Cir. 1980) (Fairchild, C.J., concurring) ("sufficient showing by the defendant shifts the burden to the State"); United States v. Inmon, 568 F.2d 326, 331-32 (3d Cir. 1977); United States v. Malikah, 503 F.2d 971, 986 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975).

\textsuperscript{3941} 681 F.2d at 564.
C. Sentencing

1. Information in determining a sentence

A sentence is generally tailored, within statutory limits, to the individual defendant and to the particular circumstances of the offense. As a result, sentencing judges are given broad discretion concerning the type and source of information they can properly consider in determining a sentence. Nevertheless, a judge's discretion regarding sentencing information is not absolute, and certain constraints have been imposed to prevent any abuse of discretion. In several recent cases, the United States Supreme Court and the Ninth Circuit have addressed issues concerning information used in determining sentences.

In United States v. Williams, the Ninth Circuit considered whether the trial judge had abused his sentencing discretion by relying on unproven allegations of criminal conduct contained in the defendant's presentence report. Williams was convicted of conspiracy

3944. See, e.g., United States v. Tucker, 404 U.S. at 446 (sentence may not be based on prior convictions obtained in violation of sixth amendment right to appointed counsel set forth in Gideon v. Wainwright, 372 U.S. 335 (1963)); Townsend v. Burke, 334 U.S. 736, 741 (1948) (sentence based on materially false or unreliable information which defendant had no opportunity to rebut will not stand); United States v. Wolfson, 634 F.2d 1217, 1222 (9th Cir. 1980) (resentencing required when judge received confidential ex parte memo from prosecutor regarding defendant's sentence); United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971) (sentence based on questionable information in presentence report is prohibited), cert. denied, 404 U.S. 1061 (1972).

In United States v. Mitsubishi Int'l Corp., the Ninth Circuit considered whether the district court judge abused his sentencing discretion by failing to consider mitigating factors. 677 F.2d 785, 786-87 (9th Cir. 1982). Mitsubishi, however, did present evidence of mitigating factors, which the judge considered and found unpersuasive. Id. at 787. The Ninth Circuit reiterated the general rule concerning a sentencing judge's broad discretion, and summarily concluded that it would not disturb the sentence because it was within the statutory limit. Id. at 787. Although not clarified by the court, the underlying claim in Mitsubishi centers more on the weight the judge accorded the mitigating evidence, rather than on whether he considered it.
3946. 668 F.2d 1064 (9th Cir. 1982).
3947. Id. at 1071.
and loansharking, arising out of a loan he arranged to be made for a friend by two other individuals. The trial court sentenced Williams to two five-year prison terms on two counts, to be served concurrently, and to three years' probation on a third count. The Ninth Circuit reversed the convictions and remanded the case.

In reversing the convictions, the court also considered the validity of the sentence imposed by the trial judge. Williams' presentence report inaccurately presented the basis for reversal of a prior assault conviction, and implied that Williams had contracted to murder the assault victims. Before sentencing, the judge denied Williams' motion for a continuance to obtain the state court records which would disprove the allegations in the presentence report.

The Ninth Circuit noted that although unconvicted criminal acts may be considered during sentencing, reliance on materially false or misleading information results in a violation of a defendant's due process rights. Consequently, the court held that the trial judge had abused his discretion because he had not only denied Williams an opportunity to correct the inaccurate statements in the presentence report, but had also relied on these statements in determining the sentence.

In United States v. Alverson, the Ninth Circuit considered whether an ex parte communication between the sentencing judge and a government agent prior to final sentencing justified resentencing by a different judge. In a meeting subsequent to Alverson's sentencing, the judge and a federal agent discussed the fact that Alverson was a suspect in a pending homicide investigation. Afterwards, because of an ambiguity in the sentence, the judge made a correction resulting in the imposition of the harshest possible sentence. Alverson appealed his

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3950. 668 F.2d at 1071-72.
3951. Id. at 1073. The Ninth Circuit ruled that the trial court had committed prejudicial error in restricting the defense's impeachment of a key government witness. Id. at 1069.
3952. Id. at 1071. The presentence report stated that the only basis for reversal of the assault charge was the violation of defendant's right to a speedy trial. The report also stated that defendant had not appealed any factual issues regarding the assault charge. Id. at 1071 n.17.
3953. Id. at 1071.
3954. Id. at 1072 (citing United States v. Morgan, 595 F.2d 1134, 1136-37 (9th Cir. 1979)).
3955. Id. at 1072 (citing Townsend v. Burke, 334 U.S. 736, 740-41 (1948); United States v. Lasky, 592 F.2d 560, 562 (9th Cir. 1979)).
3956. 668 F.2d at 1072 & n.19.
3957. 666 F.2d 341 (9th Cir. 1982).
3958. Id. at 348.
3959. Id. at 344. Alverson was convicted of four counts of possessing unregistered machine guns in violation of 26 U.S.C. § 5861(d) (1976). The judge sentenced him to five
corrected sentence on the ground that the ex parte communication prior to sentencing required resentencing.3960

Notwithstanding the fact that the homicide investigation information was conveyed to the judge in the presentence report, and the fact that the judge had disclaimed reliance on that information prior to the original sentencing, the Ninth Circuit remanded the case for resentencing.3961 The Ninth Circuit held that an ex parte communication bearing on the sentence, between the judge and a party whose interests are directly adverse to the defendant’s interests, requires resentencing.3962

In reaching its decision, the Alverson court relied primarily on United States v. Wolfson.3963 In Wolfson, the Ninth Circuit held that “it is improper for the prosecution to make, or for the court to receive from the prosecution, an ex parte communication bearing on the sentence.”3964 The Government sought to distinguish Wolfson on three grounds; however, the Ninth Circuit found each unpersuasive.3965

The court does not discuss the fact that Alverson was not informed of the ex parte communication, and was therefore not afforded an opportunity to rebut its implications. However, in light of other Ninth

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3960. Id. at 348.
3961. Id. at 350.
3962. Id.
3963. 634 F.2d 1217 (9th Cir. 1980). The prosecutor in Wolfson had submitted a confidential report to the judge concerning the case which recommended a certain sentence. The judge refused to disclose the information in the report to defense counsel, and subsequently imposed the recommended sentence. Id. at 1221.
3964. Id. at 1221 (citations omitted). The Wolfson court stressed that its result was justified because the report was secret, and contained a sentence recommendation by a party adverse to the defendant. Id. at 1222.
3965. 666 F.2d at 349. The Government first argued that the ex parte communication in Wolfson came from the prosecutor. The Ninth Circuit found this distinction insignificant since the interests of both the prosecutor and the government agent were adverse to the defendant’s interests. Id. Secondly, the Government contended that Alverson had not been prejudiced because the presentence report contained substantially the same information as the ex parte communication. At the original sentencing, the trial judge had expressly disclaimed reliance on the homicide investigation information in the presentence report; nevertheless, the Ninth Circuit refused to apply the prior disclaimer to the ex parte communication. Id. Finally, the Government relied on United States v. Dubrofsky, in which the court refused to require resentencing even though the trial judge had considered a derogatory report undisclosed to the defendant. 581 F.2d 208, 215 (9th Cir. 1978). The Ninth Circuit, however, distinguished Dubrofsky, noting that the judge had expressly stated his reasons for nondisclosure, and had cited other factors weighing as heavily as the ex parte report. 666 F.2d at 349.
Circuit decisions in similar cases, it appears that resentencing was justified primarily because Alverson was not given a chance to defend against charges in the report, and because the evidence revealed that the judge placed a relatively greater weight on the ex parte report in determining the sentence.\textsuperscript{3966}

An examination of other circuits which have considered this issue reveals a general adherence to the proposition that resentencing is justified where: (1) an ex parte communication is made to the judge by an adverse party; (2) the judge substantially relies on the information in determining the sentence; and (3) the judge does not disclose the information to the defendant and does not afford him an opportunity to rebut the information.\textsuperscript{3967}

In \textit{United States v. Fleishman},\textsuperscript{3968} defendants argued that their sentences were improper because the district judge had expressly considered their prior, uncounseled Mexican convictions for drug-related offenses. Defendants Fleishman, Combs and Green were convicted for selling cocaine to an undercover government agent in a hotel near the Los Angeles International Airport.\textsuperscript{3969}

\textsuperscript{3966} \textit{Id.; see United States v. Dubrofsky}, 581 F.2d at 215 (resentencing not required when sentencing judge stated that report from probation department weighed no more heavily than other factors, and that reason for nondisclosure was that disclosure may result in aborting ongoing government investigations); Farrow v. United States, 580 F.2d 1339, 1359-60 (9th Cir. 1978) (resentencing not required when there was no indication that presentence report was basis for imposing sentence, and when defense counsel had the opportunity to rebut the allegations in the report); United States v. Perri, 513 F.2d 572, 573 n.1 (9th Cir. 1975) (resentencing required where prosecutor submitted ex parte report to judge which judge refused to disclose to defense counsel, and upon which judge based the imposition of the maximum sentence).

\textsuperscript{3967} See, e.g., \textit{United States v. Huff}, 512 F.2d 66, 70 (5th Cir. 1975) (resentencing required where prosecutor submitted ex parte memo to judge, which had not been introduced at trial; nothing indicated that defendant knew of memo, although there also was no proof that judge ever saw the memo); United States v. Rosner, 485 F.2d 1213, 1229 (2d Cir. 1973) (resentencing required where prosecutor submitted ex parte memo to judge who disclosed it to defense counsel, but refused counsel's request for an opportunity to rebut its contentions), \textit{cert. denied}, 417 U.S. 950 (1974). \textit{Cf. United States v. Solomon}, 422 F.2d 1110, 1121 (7th Cir.) (resentencing not required where judge stated that ex parte memo from prosecutor was only considered with respect to bail, and court found that residual effects of memo would not prejudice defendant), \textit{cert. denied}, 399 U.S. 911 (1970); Haller v. Robins, 409 F.2d 857, 860 (1st Cir. 1969) (resentencing not required even though judge accepted truth of ex parte statement by prosecutor, where prosecutor was later allowed to make same statement in court and case was remanded only for an evidentiary hearing).

\textsuperscript{3968} 684 F.2d 1329 (9th Cir.), \textit{cert. denied}, 103 S. Ct. 464 (1982).

\textsuperscript{3969} Id. at 1332. Fleishman was convicted of possessing with intent to distribute, and distributing cocaine in violation of 21 U.S.C. § 841(a)(1) (1976), and of conspiracy to possess with intent to distribute and distributing cocaine, in violation of 21 U.S.C. § 846 (1976). Combs and Green were convicted of the above two offenses, and of aiding and abetting the possession with intent to distribute cocaine in violation of 18 U.S.C. § 2(a) (1976). The
Defendants relied on United States v. Tucker,\(^3\) where the Supreme Court held that resentencing was required when the original sentence had been based on prior uncounseled convictions obtained in violation of Gideon v. Wainwright.\(^4\) The Government responded that Tucker did not apply,\(^5\) and, alternatively, argued that defendants had waived any objections to the collateral use of their Mexican convictions, because they had been transferred into the custody of the United States pursuant to the Treaty on the Execution of Penal Sentences between the United States and Mexico.\(^6\) The Treaty provides for the transfer and execution of sentences in one country, where the sentences were imposed by courts in another country. The Treaty requires that the prisoner voluntarily consent to the transfer.\(^7\)

The district court held that defendants' waiver of their rights to challenge the validity of their Mexican convictions disposed of their Tucker claim.\(^8\) The district court relied on Rosado v. Civiletti,\(^9\) in which the Second Circuit held that the Treaty did not violate defendants' due process rights because they had voluntarily and intelligently waived their rights to challenge their Mexican convictions in the United States.\(^10\)

defendants were sentenced to six years' imprisonment on each of the convictions, to be served concurrently, and were also ordered to serve special parole terms of at least three years on the non-conspiracy counts. 684 F.2d at 1332.

3970. 404 U.S. 443, 448-49 (1972) (defendant's sentence for armed bank robbery improperly enhanced on the basis of prior convictions where trial judge was not aware that the prior convictions were unconstitutional because defendant was not represented by counsel).

3971. 372 U.S. 335 (1963). Combs and Green moved to have the Mexican convictions excluded. Fleishman, 684 F.2d at 1344. Fleishman, who had waived any objection to the use of his Mexican conviction for sentencing purposes, now argued that the waiver was conditioned upon the trial judge's finding that his Mexican conviction was valid. The Ninth Circuit refused to accept this argument. Id. at 1344 n.17.

3972. 684 F.2d at 1344. The Government claimed that the underlying policy reasons for the Tucker rule were inapplicable here. Id.

3973. Id. Article V, paragraph 6 of the Treaty provides:

The fact that an offender has been transferred under the provisions of this Treaty shall not prejudice his civil rights in the Receiving State in any way beyond those ways in which the fact of his conviction in the Transferring State by itself effects such prejudice under the laws of the Receiving State or any State thereof.


3974. Id. at art. IV, para. 2 which provides:

If the Authority of the Transferring State finds the transfer of an offender appropriate, and if the offender gives his express consent for his transfer, said Authority shall transmit a request for transfer, through diplomatic channels, to the Authority of the Receiving State.

3975. 684 F.2d at 1344.


3977. 621 F.2d at 1191-92.
The Ninth Circuit, however, found that the district court's reliance on *Rosado* was misplaced,\(^\text{3978}\) and held that defendants' waiver of their right to challenge the *validity* of their Mexican convictions does not bar them from challenging the *collateral use* of those convictions in unrelated domestic proceedings.\(^\text{3979}\) As a result, the Ninth Circuit held that *Tucker* was applicable,\(^\text{3980}\) but concluded that resentencing was not required because the defendants had not met *Tucker*'s three requirements.\(^\text{3981}\) A successful challenge under *Tucker* requires the defendant to show: (1) the prior conviction was obtained in violation of *Gideon v. Wainwright*; (2) the sentencing judge mistakenly believed the prior conviction was valid; and (3) the judge enhanced defendant's sentence on the basis of the prior unconstitutional conviction.\(^\text{3982}\) The Ninth Circuit found that the district court was not under a mistaken belief that the Mexican convictions were valid because defendants had informed the court that the convictions were imposed without the benefit of counsel.\(^\text{3983}\) Moreover, the record indicated that the judge had enhanced defendants' sentences because of their prior involvement with narcotics, which is a permissible consideration for sentencing purposes.\(^\text{3984}\)

The Ninth Circuit also rejected the Government's suggestion that the court exercise restraint because a finding that the defendants could attack the collateral use of Mexican convictions could adversely affect foreign relations with Mexico.\(^\text{3985}\) The court stated that the terms of the Treaty had been satisfied when defendants served the remainder of their Mexican sentences in the United States; hence, the Treaty had been complied with.\(^\text{3986}\) In addition, the court held that the Treaty did

\(^{3978}\) The *Fleishman* court stated that neither *Rosado* nor *Pfeifer v. United States Bureau of Prisons, 615 F.2d 873 (9th Cir.), cert. denied, 447 U.S. 908 (1980)*, had interpreted Article VI of the Treaty to bar challenges to the collateral consequences of Mexican convictions in unrelated proceedings. *Fleishman, 684 F.2d* at 1345. The court stated that defendants did not seek to challenge their convictions, but only to exclude their use at trial and for purposes of sentencing. *Id.*

\(^{3979}\) *Id.*

\(^{3980}\) *Id.* at 1346.

\(^{3981}\) *Id.*

\(^{3982}\) *Id.* (citing *Owens v. Cardwell, 628 F.2d 546, 547 (9th Cir. 1980); Farrow v. United States, 580 F.2d 1339, 1345 (9th Cir. 1978)*).

\(^{3983}\) *Fleishman, 684 F.2d* at 1346. Defendants Combs and Green also told the court that they were subjected to torture and inhumane treatment by Mexican authorities, and were coerced into signing confessions. *Id.* at 1345 n.21.

\(^{3984}\) *Id.* at 1346 (citing *Serapo v. United States, 595 F.2d 3 (9th Cir. 1979); United States v. Wondrack, 578 F.2d 808 (9th Cir. 1978); Gelfuso v. Bell, 590 F.2d 754 (9th Cir. 1978)*).

\(^{3985}\) *Fleishman, 684 F.2d* at 1345 & n.23.

\(^{3986}\) *Id.* at 1345.
not address the issue of the collateral use of foreign convictions in unrelated domestic proceedings.\footnote{3987}

In United States v. Ching,\footnote{3988} the defendant contended that his sentence\footnote{3989} was invalid because it was based on materially false and unreliable information contained in the Government’s sentencing memorandum.\footnote{3990} The Ninth Circuit stated that defendant’s claim would succeed if he established that the information was “false or unreliable, and . . . demonstrably made the basis for the sentence.”\footnote{3991} Finding that the trial judge had specifically disclaimed reliance on the murder allegations and other unverified statements by unidentified informers, the court held that the defendant had not met the second prong of the test.\footnote{3992} Moreover, the court found that the trial court’s disclaimer was substantially supported by the record, and therefore refused to disturb the sentence.\footnote{3993}

In capital punishment cases, the eighth and fourteenth amendments require a sentencing court to consider the character and record of the individual defendant, as well as the circumstances surrounding the offense.\footnote{3994} In Lockett v. Ohio,\footnote{3995} the United States Supreme Court held that a state may not place limitations on the relevant mitigating evidence a sentencer may consider in capital cases.\footnote{3996} In Ed-

\footnote{3987. Id. at 1346.}
\footnote{3988. 682 F.2d 799 (9th Cir. 1982).}
\footnote{3990. 682 F.2d at 801. The memo included: (1) affidavits of law enforcement officers; (2) an account of Ching’s sixteen-year involvement in crime; (3) Ching’s statements regarding possession of firearms and narcotics addiction; (4) a report of the number of firearms, ammunition and narcotics paraphernalia found at Ching’s home; and (5) statements by unidentified informants. \textit{Id}.}
\footnote{3991. \textit{Id} (quoting United States v. Lee, 648 F.2d 667, 669 (9th Cir. 1981); Farrow v. United States, 580 F.2d 1339, 1359 (9th Cir. 1978) (en banc)).}
\footnote{3992. 682 F.2d at 801.}
\footnote{3993. \textit{Id}. at 802. The Ninth Circuit noted that the sentence was well below the statutory maximum and did not include the $35,000 permissible fine. The trial judge had expressly based the sentence on the type of firearms involved, Ching’s reacquisition of firearms, and on the fact that his heroin addiction enabled him to understand the seriousness of the distribution charge. \textit{Id}.}
\footnote{3995. 438 U.S. 586 (1978) (Ohio death penalty provided that once defendant is convicted of aggravated murder, death penalty was mandatory unless at least one of three mitigating circumstances was proven by a preponderance of the evidence).}
\footnote{3996. \textit{Id}. at 605.}
dings v. Oklahoma, the Supreme Court applied the Lockett rule and reversed a death sentence because the Oklahoma courts had refused to consider relevant, mitigating evidence concerning the defendant's personal history.

The defendant, a minor, was convicted of first-degree murder for killing a police officer. At the sentencing hearing, the defendant offered mitigating evidence of a troubled family history and emotional problems. The judge concluded that, as a matter of law, he could not consider the defendant's troubled background. The Oklahoma Court of Criminal Appeals affirmed, holding that mitigating evidence other than the defendant's youth was irrelevant "because it did not tend to provide a legal excuse from criminal responsibility."

The Supreme Court concluded that the limitations placed by both Oklahoma courts on the mitigating evidence they could consider violated the Lockett rule. The Court held that, although a sentencing court may determine the weight to be accorded relevant mitigating evidence, a sentencer may not refuse to consider, as a matter of law, any such evidence. The Court found that the evidence of defendant's personal background was relevant, and remanded the case, directing the state court to weigh the mitigating evidence against the aggravating circumstances proven by the State.

In a dissenting opinion, Chief Justice Burger argued that the

3997. 455 U.S. 104 (1982). The Court did not decide whether the eighth amendment prohibits the imposition of the death penalty on a defendant who was 16 years old when the offense was committed. Id. at 110 n.5.
3998. Id. at 117.
3999. Id. at 109. The trial judge considered defendant's age as the only mitigating factor. At sentencing the State had alleged that the three aggravating circumstances in the statute were present: "that the murder was especially heinous, atrocious, or cruel, that the crime was committed for the purpose of avoiding or preventing a lawful arrest, and that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Id. at 106-07 (citing OKLA. STAT. tit. 21, § 701.12(4), (5), and (7) (1980)). Finding that the three aggravating circumstances outweighed defendant's age, the judge imposed the death penalty. 455 U.S. at 109.
4000. 455 U.S. at 113. The appellate court stated that defendant satisfied the test for criminal responsibility because he knew right from wrong. Id.
4001. Id. at 113-15. In a concurring opinion, Justice Brennan stated his view that the death penalty is prohibited by the eighth and fourteenth amendments as constituting cruel and unusual punishment. Id. at 117 (Brennan, J., concurring). In another concurring opinion, Justice O'Connor emphasized that when an ambiguity exists concerning the mitigating evidence the lower court actually considered, a remand for resentencing is required under Lockett and Woodson to ensure that the death penalty was not erroneously imposed. Id. at 118-19 (O'Connor, J., concurring).
4002. Id. at 117.
Oklahoma state courts had not violated *Lockett*. He suggested that the majority had mischaracterized the facts in order to reach its result. The Chief Justice pointed out that the trial judge had heard extensive evidence of mitigating factors, and the appellate court had independently examined this evidence as well.

Although statements by both Oklahoma courts regarding the evidence were ambiguous, the Chief Justice felt the majority could have reasonably concluded that the judges found the aggravating factors outweighed the mitigating factors. Since the weight accorded to the evidence is within the trial judge’s discretion, and both courts had found the mitigating circumstances insufficient to outweigh the aggravating factors, the Chief Justice questioned whether remand would be useful. It appears that the majority was concerned with the defendant’s youth and mental instability, and wanted to be certain that the mitigating factors were actually considered before the death penalty was imposed.

In *Zant v. Stephens*, the United States Supreme Court was asked to consider whether a reviewing court may sustain a death sentence based on a number of aggravating factors, after it finds that one of the aggravating factors is invalid. The defendant in *Zant* was convicted of murder. After finding that three aggravating circumstances had been proven beyond a reasonable doubt, the jury imposed the death penalty. On appeal, the Georgia Supreme Court affirmed the sentence, although it set aside the second aggravating circumstance found by the jury. The Fifth Circuit reversed the district court’s denial of the defendant’s habeas corpus petition to the extent that it left the death penalty intact, and remanded the case. The State subsequently filed a petition for a writ of certiorari, which was granted.

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4003. *Id.* at 128 (Burger, C.J., dissenting). The Chief Justice pointed out that, in contrast to the Ohio statute involved in *Lockett*, the Oklahoma death penalty required the sentencer to consider any mitigating evidence proffered by the defendant. Accordingly, defendant presented substantial mitigating evidence and no contention was made that the sentencing provisions were inconsistent with *Lockett*. *Id.* at 122-23.

4004. *Id.* at 123-26.

4005. *Id.* at 124-25.

4006. *Id.*

4007. *Id.* at 127. The Chief Justice would have decided the case on the issue for which the Court granted certiorari, whether the eighth and fourteenth amendments prohibit imposing the death penalty on a defendant who was 16 years old when he committed the offense, and would have affirmed the judgment. *Id.* at 128.

4008. See *id.* at 115 n.11 & 116.


4010. *Id.* at 414.

4011. *Id.* at 411-13.
The Georgia Supreme Court asserted that state law clearly provided that, when a jury finds two or more aggravating circumstances, the invalidity of one factor does not invalidate the death sentence. Conceding that the state law was indeed clear, the Supreme Court nevertheless found that the premises underlying the rule were uncertain. The Court refused to speculate as to the state law premises because they were relevant to defendant’s constitutional challenge. Therefore, the Court invoked the Georgia certification statute in order for the Georgia court to clarify the state law.

In his dissent, Justice Marshall argued that certification was unnecessary because a clarification of the Georgia law would not remedy the constitutional infirmity in defendant’s sentence. Justice Marshall noted that the use of aggravating circumstances guides a jury in its sentencing deliberations, thus fortifying the constitutional validity of the sentence. Consequently, Justice Marshall argued that if an aggravating circumstance is itself unconstitutional, the death sentence cannot be constitutionally imposed. In addition, Justice Marshall contended that to affirm the sentence on the basis of the remaining two aggravating factors would be to speculate that the jury would have imposed the death penalty even in the absence of the unconstitutional instruction. Justice Marshall claimed that, in effect, the Court would be substituting its judgment for that of the jury, a step which the

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4012. In Zant, the jury found the following aggravating circumstances: (1) the murder was committed by a person who had previously been convicted of a capital felony; (2) the offender had a substantial history of serious assault convictions; and (3) the murder was committed by one who had escaped from the lawful custody of a peace officer or from a place of lawful confinement. Id. at 412-13 (citations omitted).
4013. Id. at 414 (citing Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349, 358 (1979), cert. denied, 445 U.S. 938 (1980)).
4015. Id. at 416.
4016. Id. GA. CODE ANN. § 24-4536(a) (1981) provides in part:
   When it shall appear to the Supreme Court of the United States . . . that there are involved in any proceeding before it questions or propositions of the laws of this State which are determinative of said cause and there are no clear controlling precedents in the appellate court decisions of this State, such Federal appellate court may certify such questions or propositions of the laws of Georgia to this court for instructions concerning such questions or propositions.
4017. 456 U.S. at 416-17.
4018. Id. at 417 (Marshall, J., dissenting). Justice Marshall would find that the death penalty violates the eighth and fourteenth amendments as cruel and unusual punishment under all circumstances. Id. at 417-18.
4019. Id. at 420.
4020. Id. at 423.
4021. Id.
Court has consistently refrained from taking.\footnote{4022} Finally, Justice Marshall rejected the argument that, once a jury finds an aggravating circumstance, it can consider any other aggravating or mitigating evidence in determining whether the penalty should be imposed.\footnote{4023} Justice Marshall stated that this view would strip away the guidelines which protect against an arbitrary imposition of the death penalty.\footnote{4024} In any event, the dissent stated that this interpretation of the Georgia death penalty could not cure the unconstitutional jury instructions here because nothing indicated the jury knew they could disregard the aggravating factors when deciding whether to impose the death penalty.\footnote{4025}

In a separate dissent,\footnote{4026} Justice Powell indicated that he would remand the case to the Georgia Supreme Court to decide: (1) whether resentencing by a jury is required; and (2) whether the Georgia Supreme Court has the authority to find that an instruction was harmless error beyond a reasonable doubt.\footnote{4027}

2. Allocution statements

It is the duty of the prosecutor to inform the court of all material facts which bear on the defendant's punishment, including information favorable to the defendant.\footnote{4028} The judge, in turn, must listen to and consider evidence offered in mitigation of punishment.\footnote{4029}

In United States v. Doe,\footnote{4030} the Ninth Circuit considered whether resentencing was required because the trial judge had denied the gov-
At his sentencing hearing, Doe had offered evidence indicating that he had cooperated with Drug Enforcement Administration agents by identifying two principal drug dealers. The trial judge not only disbelieved Doe's evidence, but also denied the prosecutor's request to make an allocution statement pursuant to Rule 32(a)(1) of the Federal Rules of Criminal Procedure.

On appeal, Doe contended that, as a result of this denial, his due process right to a fair sentencing hearing had been violated, and that his sentence was based on misinformation. Acknowledging the prosecutor's obligation under Rule 32(a)(1), the Government argued that Doe, nevertheless, had not been prejudiced because the prosecutor's statements would probably have been disfavorable to Doe. The Ninth Circuit held that the sentencing judge should have allowed the prosecutor to make his statement. The court reasoned that, although it was possible that the Government's information would have contradicted Doe's mitigating evidence, it was equally possible that the Government would have corroborated Doe's statements. Because the trial judge had disbelieved Doe's mitigating claims and denied the Government's right to allocate, the Ninth Circuit remanded the case for resentencing.

3. Multiple sentences

In determining whether multiple sentences were intended by Congress, either for simultaneous convictions under multiple statutes or for simultaneous convictions for multiple violations of a single statute, the judiciary must consider the language of the statute, its legislative history, and the overall statutory scheme. In two recent cases, the

4031. Id. at 927.
4032. Doe had been convicted of possessing heroin with intent to distribute and importing heroin in violation of 21 U.S.C. § 841(a) (1976). 655 F.2d at 922. Doe was given consecutive sentences of eight years for possession and seven years for importation. Id. at 924.
4033. Id. at 927-28. FED. R. CRIM. P. 32(a)(1) provides:
   Before imposing sentence, the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the government shall have an equivalent opportunity to speak to the court.
4034. 655 F.2d at 927.
4035. Id. at 928.
4036. Id. at 928-29.
4037. Id. at 928.
4038. Id. at 928-29.
4039. Brown v. United States, 623 F.2d 54, 57 (9th Cir. 1980) (construing congressional
Ninth Circuit was required to determine congressional intent regarding multiple sentences.

In *United States v. Wiga*, the court interpreted the relationship between 18 U.S.C. section 922(g)(1) and 18 U.S.C. section 1202(a)(1). Although a jury had indicted Wiga for multiple counts under both section 922(g)(1) and section 1202(a)(1) for transporting a shotgun and possessing a revolver, the district court dismissed all but one count and sentenced Wiga to two years in prison for possessing a revolver in violation of section 1202(a)(1).

On appeal, the Government offered three theories for reinstating some of the vacated counts. The Government first argued that the court could have sentenced Wiga to one count under each statute, increasing the sentence to seven years. Alternatively, the court could have sentenced Wiga to one count under section 922(g)(1) which provided for a five-year prison sentence. Examining both sentencing theories together, the Ninth Circuit agreed that the district court could have sentenced Wiga under section 1202(a)(1) for one of the firearm violations and under section 922(g)(1) for the other firearm violation. Relying on Fifth Circuit and District of Columbia Circuit authority, however, the Ninth Circuit held that if the Government proceeds under both statutes and convictions are rendered

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4040. 662 F.2d 1325 (9th Cir. 1981), cert. denied, 456 U.S. 918 (1982).
4041. 18 U.S.C. § 922(g)(1) (1976) provides in part: "It shall be unlawful for any person—(1) who is under indictment for, or who has been convicted of, a crime punishable by imprisonement for a term exceeding one year... to ship or transport any firearm... in interstate commerce."
4042. 18 U.S.C. app. § 1202(a)(1) (1976) (emphasis added) provides in part:
   (a) Any person who—
   (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony... and who receives, possesses, or transports in commerce... any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.
4043. 662 F.2d at 1334. Each possession count under section 1202(a)(1) was punishable by a maximum of two years imprisonment. Each transportation count under § 922(g)(1) was punishable by a maximum of five years imprisonment. Id. at 1333-34. The government agreed that Wiga could not be convicted for transporting and possessing the same firearms here, and agreed that Wiga could not be convicted for "simultaneous transportation of multiple weapons." Id. at 1334.
4044. Id.
4045. Id.
4046. Id. at 1335.
4047. United States v. Larson, 625 F.2d 67 (5th Cir. 1980).
under both, the court has discretion to decide under which conviction the defendant should be sentenced. The court agreed with the Fifth and District of Columbia Circuits that the defendant could be sentenced under either statute but not both, reasoning that both statutes prohibit fundamentally equivalent conduct.

The Ninth Circuit then considered the Government's third argument concerning whether multiple sentences could be imposed for the simultaneous possession of weapons in violation of section 1202(a)(1). The Government contended that Wiga should be convicted and sentenced for each firearm simultaneously possessed because they had been acquired at different times and places. In accordance with other circuits, the Ninth Circuit adopted the general rule that under section 1202(a)(1) only one offense is charged regardless of the number of weapons possessed, unless the firearms were stored or acquired at different times and places. In Wiga, the facts strongly suggested that the weapons were acquired at different times and places; thus placing the case within the exception to the general rule. In justifying its conclusion that each firearm was a separate unit of prosecution, the court accepted the interpretation of congressional intent advanced by the Fifth Circuit in United States v. Bullock. The Bullock court noted that section 1202(a)(1) was enacted to deter separate instances of receipt and possession of firearms by convicted felons in order to prevent covert accumulations of weapons.

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4049. 662 F.2d at 1335.
4050. See supra notes 4047 and 4048.
4051. 662 F.2d at 1335.
4052. Id. at 1336.
4053. Id.
4054. See, e.g., United States v. Bullock, 615 F.2d 1082, 1086 (5th Cir.) (multiple sentences for simultaneous possession of firearms when ex-felon had acquired and stored weapons at different times and places), cert. denied, 449 U.S. 957 (1980); United States v. Rosenbarger, 536 F.2d 715, 721 (6th Cir. 1976) (multiple convictions and sentences vacated when ex-felon had possessed three firearms at same time and place), cert. denied, 431 U.S. 965 (1977); United States v. Kinsley, 518 F.2d 665, 670 (8th Cir. 1975) (multiple sentences improper when ex-felon convicted on four counts of possessing firearms, yet had possessed weapons at same time and place); United States v. Calhoun, 510 F.2d 861, 870 (7th Cir.) (two counts for possessing firearms combined when possession occurred at same time and place), cert. denied, 421 U.S. 950 (1975).
4055. 662 F.2d at 1356-37.
4056. Id. at 1337. The court noted that the evidence indicated the shotgun was acquired on April 14, 1978 in Iowa, while the revolver was acquired on December 18, 1978 in Nebraska. Id.
4057. 615 F.2d 1082 (5th Cir. 1980).
4058. Id. at 1085-86.
In *United States v. Alverson*, the Ninth Circuit considered whether Congress had authorized separate sentences for each of several firearms simultaneously possessed at the same place in violation of 26 U.S.C. section 5861(d). Alverson was convicted on four counts of possessing unregistered machine guns, and given consecutive sentences of five years imprisonment on each count. The defendant contended that multiple sentences were impermissible because there was only one act of possession. The court rejected this argument, holding instead that section 5861(d) was an unambiguous expression of congressional intent to authorize separate punishment for each firearm possessed.

In determining that each firearm was a separate unit of prosecution, the court examined both the language of section 5861(d) and the overall statutory scheme. Applying similar methodologies and rationales, both the Fifth and Tenth Circuits have adopted the same interpretation of section 5861(d).

4. The concurrent sentence doctrine

Under the concurrent sentence doctrine, an appellate court may decline to review a conviction on one count of a multiple count conviction when concurrent sentences were imposed, one count was reviewed and affirmed, and no adverse collateral consequences result to the defendant. Since the 1969 United States Supreme Court decision in

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4059. 666 F.2d 341 (9th Cir. 1982).
4060. Id. at 346. 26 U.S.C. § 5861(d) (1976) (emphasis added) provides: “It shall be unlawful for any person . . . (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record . . . .”
4061. 666 F.2d at 346.
4062. Id. at 347.
4064. 666 F.2d at 347. As part of a statutory scheme for enforcing the transfer tax provisions of 26 U.S.C. § 5811 (1976), § 5861(d) is a valid exercise of Congress' power to tax. Under § 5811 a tax is imposed on each firearm transferred. Therefore, each instance of possession of an unregistered firearm deprives the government of tax revenue. Consequently, authorizing separate punishment for each firearm encourages payment of the tax. *Alverson*, 666 F.2d at 347 (citations omitted) (emphasis added).
4065. United States v. Tarrant, 460 F.2d 701, 704 (simultaneous possession of five unregistered firearms constituted five separate offenses under § 5861(d)); Sanders v. United States, 441 F.2d at 414-15 (multiple sentences for two counts of simultaneous possession of two unregistered firearms in violation of § 5861(d); lenity principle not applied).
4066. Hirabayashi v. United States, 320 U.S. 81, 85 (1943); see, e.g., United States v. Ford,
The status of the concurrent sentence doctrine has been uncertain. Although the Benton Court held that the doctrine does not bar judicial review of multiple convictions when concurrent sentences have been imposed, it questioned the doctrine's continued usefulness. Nevertheless, in two subsequent cases the Supreme Court summarily invoked the concurrent sentence doctrine without discussing the impact of Benton.

The Ninth Circuit frequently applies the concurrent sentence doctrine; however, recent cases illustrate the inconsistency in its application. In two recent cases, the Ninth Circuit applied the doctrine mechanically without discussing the various legal consequences that the court considered, if any, in concluding that no adverse collateral consequences would result. For example, in United States v. Kaiser, defendant Remsing was convicted on multiple counts for possessing and distributing heroin. After reviewing and affirming count XIII of the indictment, the court invoked the concurrent sentence doctrine to affirm defendant's conviction on count X without review. The court specifically found that no adverse effects would result from the additional conviction. However, the court offered no explanation for this finding.

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632 F.2d 1354, 1364-65 (9th Cir. 1980), cert. denied, 450 U.S. 934 (1981); United States v. Martin, 599 F.2d 880, 887 (9th Cir.), cert. denied, 441 U.S. 962 (1979).

4067. 395 U.S. 784 (1969). Benton was tried for larceny and burglary. He was acquitted of larceny, but convicted of burglary. After error in the selection of the grand and petit juries, Benton was given, and accepted, the option of being retried. Benton was convicted of both larceny and burglary on retrial, and given concurrent sentences. The Supreme Court granted certiorari to hear Benton's double jeopardy claim, but applied the concurrent sentence doctrine first to determine whether the doctrine would prevent the Court from hearing the double jeopardy claim. Id. at 787. After noting courts' haphazard application of the doctrine and the possible harmful consequences to the defendant, the Court concluded that the doctrine may have continued validity as a rule of judicial convenience, but would not bar review of multiple convictions when concurrent sentences had been imposed. Id. at 791. In dicta, the Court further declared that adverse collateral consequences usually result from criminal convictions. Id. at 790 (citing Sibron v. New York, 392 U.S. 40, 55 (1968)).


4072. Id. at 732.
the court declined to review a felony conviction for receipt of firearms by a felon where the sentence ran concurrently with those of two other affirmed convictions. \( ^{4074} \) The court examined the effect of the conviction on the defendant’s offense severity rating for parole purposes, and concluded that affirming the conviction would not increase the time served before parole. \( ^{4075} \)

In *United States v. Fogarty*, \( ^{4076} \) the Ninth Circuit once again mechanically applied the doctrine without determining whether adverse collateral consequences would result. The *Fogarty* court declined to review a constitutional claim on one count of a multiple count conviction on which a concurrent sentence had been imposed. \( ^{4077} \) The court justified its decision on the basis that the defendant had failed to show that the collateral consequences of his sentence would be different if the charges in question were dismissed. \( ^{4078} \)

In contrast, the Ninth Circuit refused to apply the concurrent sentence doctrine in *United States v. Callihan*. \( ^{4079} \) Callihan was sentenced to two consecutive three-year terms for convictions of wire fraud and transporting fraudulently obtained credit cards. The defendant was convicted of eight additional counts and given sentences to run concurrently with each consecutive sentence. After reversing the transportation conviction, the Ninth Circuit refused to apply the concurrent sentence doctrine to affirm those counts which had been concurrent to the transportation count. \( ^{4080} \) The court reasoned that the doctrine was inapplicable because reversal of the transportation count resulted in a reduction of the total sentence from six to three years. \( ^{4081} \)

In *United States v. Barker*, \( ^{4082} \) the Ninth Circuit summarily af-

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\( ^{4073} \) Lipps, 659 F.2d 960 (9th Cir. 1981).

\( ^{4074} \) Lipps was convicted on three counts of being a felon in receipt of a firearm shipped in interstate commerce, a violation of 18 U.S.C. § 922(h)(1) (1976). He was sentenced to three concurrent five-year sentences. The Ninth Circuit affirmed the conviction after a review of only two counts. 659 F.2d at 963.

\( ^{4075} \) 659 F.2d at 962-63. *See* 28 C.F.R. § 2.20 (1982).

\( ^{4076} \) 663 F.2d 928 (9th Cir. 1981).

\( ^{4077} \) *Id.* at 930. Fogarty was convicted of three counts of mailing obscene matter in violation of 18 U.S.C. § 1461 (1976), and three counts of violating the Sexual Exploitation of Children Act, 18 U.S.C. § 2252 (Supp. V 1981). He was sentenced to probation. The sentencing court did not specifically state the counts upon which the probation was imposed. Fogarty claimed that § 1461 was unconstitutionally overbroad, and moved to have the § 1461 convictions dismissed. 663 F.2d at 930.

\( ^{4078} \) 663 F.2d at 930.

\( ^{4079} \) 666 F.2d 422 (9th Cir. 1982).

\( ^{4080} \) *Id.* at 424.

\( ^{4081} \) *Id.* (citing Benton v. Maryland, 395 U.S. at 791).

\( ^{4082} \) 675 F.2d 1055 (9th Cir. 1982).
firmed Barker’s conviction for making false statements to the Immigration and Naturalization Service after it affirmed his conviction on five other counts of the six-count indictment. Barker was sentenced to six concurrent one-year sentences after he assaulted an INS Border Patrol agent, an undercover federal officer. The Ninth Circuit affirmed his conviction on five of the counts. Barker also challenged his conviction on the false statements count, but the court refused to overturn the conviction, relying on the concurrent sentence doctrine.

In a concurring opinion Judge Reinhardt criticized the use of the concurrent sentence doctrine in two respects: (1) the defendant may in fact suffer adverse consequences if his conviction is not reviewed; and (2) the government has never clearly identified its interests in having defendants’ convictions affirmed in this matter. Although he did not advocate abandoning the doctrine, Judge Reinhardt suggested that its continued use could be justified only if the government’s interest is identified, if that interest outweighs the value of judicial review of the conviction, and if the defendant in fact suffers no adverse effects. Accordingly, Judge Reinhardt advocated adopting an approach similar to that of the District of Columbia in United States v. Hooper. The Hooper rule provides that a conviction on a doubtful count, whose sentence runs concurrently to a valid count, should be vacated unless and until a practical public interest justifies reinstating the conviction.

Recent cases reflect the Ninth Circuit’s ad hoc application of the concurrent sentence doctrine. Generally, the Ninth Circuit has either invoked the doctrine, apparently without considering adverse collateral consequences, or has summarily concluded that no adverse effects

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4084. 675 F.2d at 1059.
4086. 675 F.2d at 1059.
4087. Id. at 1061 (Reinhardt, J., concurring). Judge Reinhardt stated that:
   If it is truly of no consequence to the defendant that his conviction on an additional offense stands, why is it of consequence to the government that the conviction be affirmed? If the conviction is of no significance whatsoever, what is our purpose in upholding it? On the other hand, if the conviction has any significance at all, it would seem that the defendant has a right to have it reviewed on appeal.
4088. Id. at 1060.
4089. 432 F.2d 604 (D.C. Cir. 1970).
4090. Id. at 606 & n.8.
4091. See United States v. Jabara, 618 F.2d 1319, 1329 (9th Cir.), cert. denied, 449 U.S. 856
The Ninth Circuit has occasionally divulged what specific collateral consequences it considered in determining whether the doctrine was applicable. In the more recent cases the court seems to be making specific findings regarding collateral consequences, even though these opinions still do not clarify which factors are being considered in deciding whether the rule applies.

The Fifth Circuit, like the Ninth, regularly invokes the concurrent sentence doctrine. On the other hand, the District of Columbia Circuit strongly supports the Hooper approach. The Ninth Circuit, after applying the Hooper rule in 1971 in United States v. Fishbein, apparently discarded it. However, vigorous concurring opinions advocating adoption of an approach similar to Hooper in two very recent cases in the Ninth and Fifth Circuits may indicate a trend toward the future demise of the concurrent sentence doctrine in these circuits.

The Seventh Circuit, since Benton, has rejected the doctrine outright. However, the Fourth Circuit, after similarly disapproving of

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4093. See United States v. Ford, 632 F.2d 1354, 1370 n.16 (9th Cir. 1980) (adverse legal consequences would result from felony conviction regardless of court's decision on any count it declined to review), cert. denied, 450 U.S. 934 (1981); United States v. Valenzuela, 596 F.2d 1361, 1365 (9th Cir.) (affirming sentences running concurrent to life term without possibility of suspension, probation, or parole would not adversely affect defendant because life term will remain regardless), cert. denied, 444 U.S. 865 (1979); United States v. Magdaleno-Aguirre, 590 F.2d 814, 815 (1979) (adverse collateral effects would result from affirming an unreviewed felony conviction when misdemeanor conviction affirmed and sentences ran concurrently).

4094. See United States v. Barker, 675 F.2d at 1059; United States v. Fogarty, 663 F.2d at 930; United States v. Kaiser, 660 F.2d at 732. But cf United States v. Lipps, 659 F.2d at 963 (offense severity rating for parole purposes considered in determining that application of concurrent sentence doctrine would not lead to adverse collateral consequences).

4095. See United States v. MacPherson, 664 F.2d 69, 74 (5th Cir. 1981); United States v. Robbins, 623 F.2d 418, 420-21 (5th Cir. 1980).


4097. United States v. Fishbein, 446 F.2d 1201, 1205 (9th Cir. 1971), cert. denied, 404 U.S. 1019 (1972).


the doctrine, recently resurrected it in a 1980 case. In a recent opinion, the Second Circuit thoroughly analyzed the viability of the rule, and concluded that applying the doctrine with the required degree of care counteracted any gain in judicial efficiency and convenience which might have resulted from refusing to review the conviction. The Second Circuit continues to invoke the doctrine, although infrequently.

If application of the concurrent sentence doctrine is to continue, the following questions must be resolved: (1) whether a mere possibility of adverse collateral effects is sufficient to render the doctrine inapplicable, or whether there must be a substantial risk of adverse effects; and (2) whether the burden of proof is on the defendant or the government to show the existence or nonexistence of adverse collateral legal consequences. A uniform policy is necessary to promote a consistent, fair, and effective application of the concurrent sentence doctrine.

5. Consecutive sentences

Absent legislative authority to the contrary, it is improper for a court to impose consecutive sentences for related offenses arising from a single criminal event when all the elements necessary to prove one offense are also essential in proving another violation. Consecutive sentences, however, may be imposed for multiple offenses arising from separate criminal transactions.

4101. United States v. Truong Dinh Hung, 629 F.2d 908, 931-32 (4th Cir. 1980) (Close v. United States limited the application of the concurrent sentence doctrine to situations where no substantial risk of adverse collateral consequences exists if defendant's conviction is affirmed without review), cert. denied, 102 S. Ct. 1004 (1982).
4102. United States v. Vargas, 615 F.2d 952, 959-60 (2d Cir. 1980).
4105. Whalen v. United States, 445 U.S. 684, 693 (1980). In Blockburger v. United States, 284 U.S. 299 (1932), the Court announced a rule for determining congressional intent to impose cumulative punishment when a single criminal transaction violates more than one statutory offense. The Blockburger test provides that separately punishable offenses were intended if proof of one violation requires an element not necessary to prove the other violation(s). 284 U.S. at 304. See Brown v. Ohio, 432 U.S. 161, 168 (1977) (applying Blockburger test, Court determined that joyriding and auto theft merged into one offense for punishment purposes thus prohibiting consecutive sentences).
4106. Fierro v. MacDougall, 648 F.2d 1259, 1260 (9th Cir.) (state court has power to impose consecutive sentences for separately committed crimes without express legislative au-
In United States v. Sanford, the defendant questioned whether consecutive sentences could be imposed for a single criminal incident that violated two statutory provisions. Sanford was convicted and given consecutive sentences for possessing counterfeit notes in violation of 18 U.S.C. section 472 and for the transfer of the notes in violation of 18 U.S.C. section 473. However, the only evidence offered to prove that Sanford had possessed the notes was the testimony that he had transferred them. Without evidence of a prior possession of the notes, the Ninth Circuit concluded that the possession and transfer counts merged into one offense under the principles of Blockburger v. United States. As a result, the court held that consecutive sentences were improper.

The Sanford court relied on United States v. Oropeza, where the court held that the offenses of possession and distribution of heroin merged into one offense under the Blockburger test when the only evidence of possession consisted of proof of the distribution transaction. Although other circuits offer support for the Ninth Circuit's decision in Oropeza, the Fifth Circuit treats possession and distribution as separate offenses justifying consecutive sentences.

The Ninth Circuit, in Roy v. Watson, considered whether a state court could impose consecutive sentences for two separate crimes...
Roy had been sentenced to a five-year prison term for violating probation. Three years later, he was convicted of escape and sentenced to another five-year term to run consecutively to the original term. On appeal of the dismissal of his habeas corpus petition, Roy argued that the Oregon state court exceeded its constitutional authority when it imposed a consecutive sentence for his escape conviction, because Oregon no longer had a statute permitting consecutive sentences.

The court rejected Roy's contention, adopting the reasoning in *Fierro v. McDougall*, a recent Ninth Circuit decision. The court distinguished Roy's sentence from consecutive sentences that are imposed for multiple offenses arising from a single criminal transaction. Roy had received consecutive sentences for two distinct crimes committed at different times. The court concluded that no statutory authority was required to impose consecutive sentences because Oregon courts were already vested with the power to impose cu-

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4116. *Id.* at 612.
4117. *Id.* at 612-13. Roy based this argument on dicta in Whalen v. United States, 445 U.S. 684 (1980). The Whalen Court suggested that, although state courts were not bound by the doctrine of separation of powers, due process may bar a state court from punishing criminal acts except as authorized by state law. *Id.* at 689-90 n.4. Oregon had a statute specifically authorizing consecutive sentences, but it was repealed in 1961. 669 F.2d at 612-13.
4118. 648 F.2d 1259, 1260 n.1 (9th Cir. 1981). The Roy court stated that *Fierro* was dispositive of Roy's argument because in *Fierro* a state prisoner unsuccessfully advanced the identical argument in reliance on the same dicta in *Whalen*, 445 U.S. 689-90 n.4., and on the Ninth Circuit's decision in United States v. Wylie, 625 F.2d 1371 (9th Cir. 1980), cert. denied, 449 U.S. 1080 (1981).

However, the *Fierro* court distinguished *Whalen* and *Wylie* because they involved related crimes arising from a single criminal incident, whereas Fierro was given cumulative sentences for eighteen different crimes ranging from armed rape to auto theft. The *Fierro* court reasoned that imposing consecutive sentences for separate criminal acts was nothing more than faithful compliance with the legislative mandate to punish each of these crimes. 648 F.2d at 1260.
4119. 669 F.2d at 612-13.
4120. The *Roy* court distinguished Whalen v. United States, 445 U.S. 684 (1980) on the same basis as did the *Fierro* court. In *Whalen*, the defendant was convicted of rape and killing in the perpetration of rape, and was given consecutive sentences of twenty years to life for first-degree murder and fifteen years to life for rape. 445 U.S. at 689. The Supreme Court considered whether imposing consecutive sentences for the two crimes violated federal statutory and criminal law. The *Whalen* Court interpreted a District of Columbia statute which provided that the imposition of consecutive sentences be governed by the Blockburger test. Applying this test, the Court concluded that consecutive sentences were improper and thus violated the constitutional guarantee against double jeopardy and the doctrine of separation of powers. *Id.* at 693-95.
4121. 669 F.2d at 612.
cumulative punishment for offenses arising from distinct criminal acts. \(^4122\)

In *Gentry v. MacDougall*, \(^4123\) the Ninth Circuit considered whether consecutive sentences could be imposed for two violations of a single statute arising from one criminal act, absent specific statutory language. \(^4124\) Gentry was convicted and given consecutive sentences for killing two people in a taxi which Gentry hit while intoxicated. On petition for writ of habeas corpus, Gentry contended that consecutive sentences for multiple deaths resulting from a single act of drunk driving were not authorized because the Arizona manslaughter statute \(^4125\) did not specifically provide for multiple sentences. Following state law, \(^4126\) the Ninth Circuit concluded that by defining manslaughter as "the unlawful killing of a human being," the Arizona legislature intended to authorize multiple sentences for vehicular manslaughter. \(^4127\) On this basis, the Ninth Circuit held that consecutive sentences were proper. \(^4128\)

6. Enhancement

In *United States v. Jones*, \(^4129\) the defendant was convicted under 18

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\(^{4122}\) *Id.* at 612-13. The *Roy* court noted that in State v. Jones, 250 Or. 59, 61, 440 P.2d 371, 372 (1968), the Oregon Supreme Court held that the power to impose consecutive sentences on the separately committed crimes of burglary and robbery was an inherent judicial power.

Although the specific issue decided in *Roy* has only recently been reviewed by the Ninth Circuit, the court's conclusion appears consistent with prior Ninth Circuit precedent and also coincides with Fifth Circuit authority. *See* Gaines v. Ricketts, 554 F.2d 1346, 1347 (5th Cir. 1977) (consecutive sentences for armed robbery and assault were proper when each crime occurred on a different day and involved separate victims); Burchett v. Cardwell, 493 F.2d 492, 494 (9th Cir.) (defendant convicted and sentenced for assault with intent to rape, kidnapping, and statutory rape; consecutive sentences permitted under Arizona law), *cert. denied*, 419 U.S. 874 (1974); Ramirez v. Arizona, 437 F.2d 119, 120 (9th Cir. 1971) (defendant convicted of grand theft and sentenced consecutively to a prior sentence on a different crime; imposition of consecutive sentences was a matter of state policy which raises no federal questions).

\(^{4123}\) *Id.* at 322 (9th Cir. 1982).

\(^{4124}\) *Id.* at 323 n.2.

\(^{4125}\) Gentry was convicted of two counts of vehicular manslaughter pursuant to ARIZ. REV. STAT. ANN. § 13-456(3)(a) (current version at ARIZ. REV. STAT. ANN. § 13-1102 (1978)).

\(^{4126}\) The Ninth Circuit relied on State v. Miranda, 3 Ariz. App. 550, 558, 416 P.2d 444, 452 (1966) where the Arizona Court of Appeals affirmed consecutive sentences, pursuant to the same statute, for multiple deaths resulting from a single act of drunk driving. The court stated that the statute defining manslaughter as the "unlawful killing of a human being without malice" had to be read in conjunction with the vehicular manslaughter statute, thereby allowing multiple sentences. *Id.* at 557-58, 416 P.2d at 451-52. 685 F.2d at 323.

\(^{4127}\) *Id.* at 323.

\(^{4128}\) *Id.*
U.S.C. section 2113(a)\textsuperscript{4130} as an accomplice to a bank robbery during which a security guard was shot and killed.\textsuperscript{4131} Although the defendant did not fire the fatal shot, he was sentenced to life imprisonment under section 2113(e),\textsuperscript{4132} an enhancement provision.

On appeal, the defendant argued that an accomplice could not be subject to enhanced punishment for aggravated bank robbery.\textsuperscript{4133} The Ninth Circuit rejected defendant’s contention, holding that 18 U.S.C. section 2,\textsuperscript{4134} providing that any person who aids or abets a crime against the United States is punishable as a principal, applies to the entire criminal code.\textsuperscript{4135}

However, the court reversed the conviction because the jury had been improperly instructed.\textsuperscript{4136} Relying on cases interpreting section 2113(d),\textsuperscript{4137} a parallel enhancement provision, the Ninth Circuit held

\textsuperscript{4130} 18 U.S.C. § 2113 (1976) provides in part:
\begin{itemize}
\item[(a)] Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
\item[(b)] Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
\end{itemize}
Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

\textsuperscript{4131} 678 F.2d at 103.
\textsuperscript{4132} See supra note 4129.
\textsuperscript{4133} 678 F.2d at 103.
\textsuperscript{4134} 18 U.S.C. § 2(a) (1976) provides that: “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”
\textsuperscript{4135} 678 F.2d at 105.
\textsuperscript{4136} Id. at 106.
\textsuperscript{4137} Id. at 105. The Ninth Circuit relied on United States v. Jones, 592 F.2d 1038 (9th Cir.) (section 2113(d) conviction reversed because evidence insufficient to show that accomplice knew principal was armed), cert. denied, 441 U.S. 951 (1979) and United States v. Short, 493 F.2d 1170 (9th Cir.) (jury instruction that defendant could be found guilty as an accomplice to bank robbery with a dangerous weapon even if defendant did not know that
that the jury must find the defendant aided and abetted both the robbery and the killing in order to be subject to enhanced punishment under section 2113(e). The trial judge had failed to instruct the jury to determine whether Jones had aided and abetted the killing. Consequently, the court remanded the case for resentencing, or at the Government's option, retrial.

7. Resentencing

Generally, resentencing of a defendant, when required, is done by the original sentencing judge. However, the courts have recognized certain "unusual circumstances" which make resentencing by a new judge appropriate. In United States v. Alverson, and United

principal was armed, was reversible error), modified, 500 F.2d 676, cert. denied, 419 U.S. 1000 (1974).
4138. 678 F.2d at 105.
4139. Id. at 106.
4140. Id. The Ninth Circuit's position here finds substantial support in the legislative history of 18 U.S.C. § 2. See legislative history of UNITED STATES CODE—AMENDMENT OF CERTAIN TITLES, S. REP. NO. 1020, 82d Cong., 1st Sess. 2, reprinted in 1951 U.S. CODE CONG. & AD. NEWS 2578, 2583 ("This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted.").

Additionally, the First, Fifth, and Eighth Circuits have reached similar conclusions on both issues. See, e.g., United States v. May, 625 F.2d 186, 194 (8th Cir. 1980) ("[S]ection 2(b), like section 2(a), 'is applicable to the entire criminal code."); United States v. Longoria, 569 F.2d 422, 425 (5th Cir. 1978) (conviction for aiding and abetting possession of marijuana with intent to distribute reversed where evidence insufficient to prove intent); United States v. Sanborn, 563 F.2d 488, 490 (1st Cir. 1977) (conviction for aiding and abetting armed robbery vacated because trial court failed to instruct jury on Government's burden to show that defendant had notice that dangerous weapon would be used); United States v. Rector, 538 F.2d 223, 225 (8th Cir. 1976) (court held that one who aids and abets both commission of bank robbery and kidnapping is liable as a principal under § 2113(e)), cert. denied, 441 U.S. 963 (1979); United States v. Bullock, 451 F.2d 884, 888 (5th Cir. 1971) (one indicted as a principal for receiving, concealing, and retaining United States property valued in excess of one hundred dollars is punishable as a principal pursuant to 18 U.S.C. § 2 on evidence establishing that he merely aided and abetted the crime).
4141. United States v. Larios, 640 F.2d 938, 943-44 (9th Cir. 1981) (reassignment proper when sentencing judge acted unreasonably in refusing to read case transcripts before imposing sentence).
4142. Id. at 943-44. See, e.g., United States v. Larios, 640 F.2d 938, 943 (9th Cir. 1981) (reassignment when sentencing judge acted unreasonably in refusing to read case transcripts before imposing sentence); United States v. Ferguson, 624 F.2d 81, 82-83 (9th Cir. 1980) (reassignment proper after sentencing judge refused to consider any mitigating circumstances before imposing maximum sentence); United States v. Robin, 553 F.2d 8, 9-10 (2d Cir. 1977) (per curiam) (reassignment proper if judge would have difficulty rejecting previously expressed views or findings, advisable to preserve appearance of justice if not outweighed by judicial waste or duplication); United States v. Rosner, 485 F.2d 1213, 1231 (2d Cir. 1973) (reassignment required when judge improperly denied counsel's request to rebut ex parte memo before sentencing), cert. denied, 417 U.S. 950 (1974). See also United States
States v. Doe, the Ninth Circuit addressed the issue of whether a different judge should resentence the defendant.

In Alverson, the trial judge had corrected an ambiguity in the defendant's sentence for possessing unregistered machine guns. The correction was made, however, after the judge had discussed Alverson's role as a suspect in a pending homicide investigation with a government agent. After holding that the ex parte communication between the judge and government agent required resentencing, the Ninth Circuit remanded the case to a different judge for resentencing. In determining whether to reassign the case to a different judge, the Alverson court considered three factors: (1) whether the original judge could reasonably be expected to discount previously expressed views or findings determined to be erroneous; (2) whether reassignment would preserve the appearance of fairness; and (3) whether reassignment would result in a waste or duplication of effort that would outweigh any gain in preserving the appearance of justice. The court found that reassignment was appropriate because the case was not complex and, in view of the improper ex parte communication, fairness could best be preserved by reassignment.

In Doe, the trial judge had denied the Government the right to allocute, pursuant to Rule 32(a)(1) of the Federal Rules of Criminal Procedure, before sentencing Doe for importation and possession of

v. Wardlaw, 576 F.2d 932, 939 (1st Cir. 1978) (resentencing by new judge after original judge had imposed maximum sentence on youthful first-offenders in order to make examples of them); United States v. Thompson, 483 F.2d 527, 529 (3d Cir. 1973) (resentencing by new judge ordered when sentencing judge used fixed sentencing policy in draft evasion cases which bordered on personal bias); United States v. Arnett, 628 F.2d 1162, 1166 (9th Cir. 1979) (case remanded to original judge because original sentence was fair and motion to modify sentence only involved resolution of plea agreement); United States v. Howard, 506 F.2d 865, 866 (5th Cir. 1975) (remanded to same court when potentially prejudicial error involved only juror's statements to other jurors). But see Woosley v. United States, 478 F.2d 139, 148 (8th Cir. 1973) (resentencing by same judge even though maximum prison sentence was imposed as a matter of policy on young Jehovah's Witness who refused induction into the military); Mawson v. United States, 463 F.2d 29, 31 (1st Cir. 1972) (resentencing by new judge to preserve appearance of fairness, although original judge's error resulted only from parties' neglect to inform judge of plea agreement).

The Government has a duty to provide the sentencing court with all facts material to a defendant's punishment. This includes any evidence of mitigating circumstances. United States v. Malcolm, 432 F.2d 809, 819 (2d Cir. 1970). See Allocution statements for a thorough discussion.
heroin with intent to distribute. The trial judge had refused to believe statements made by Doe regarding his cooperation with government agents, which had been offered in mitigation of punishment. After holding that the prosecutor should have been allowed to make an allocution statement in order to corroborate or contradict Doe's statements, the Ninth Circuit remanded the case for resentencing by a new judge.

In determining to reassign the case to a new judge, the Doe court applied the three factors considered in Alverson. Considering the first reassignment factor, the court concluded that the trial judge's error in denying the Government an opportunity to allocute and the trial judge's adamant rejection of Doe's mitigating claims would have an effect on resentencing by the same judge. In addition, the court noted that the duplication of efforts caused by a new judge conducting the resentencing would be outweighed by the preservation of an appearance of fairness.

8. Judge's prejudice

When a sentencing judge is unable to impartially perform his functions because of personal bias or prejudice toward the defendant, an adverse party or the crime itself, disqualification of that judge is proper. Showings of ethnic, political, or otherwise personal bias may be sufficient to require the judge's recusal. On the other hand,
evidence of prior adverse rulings or comments by the judge,\textsuperscript{4158} of the judge's background or associations,\textsuperscript{4159} or of a judge's admonishment of the defendant\textsuperscript{4160} generally does not justify disqualification.

In \textit{United States v. Allen},\textsuperscript{4161} the Ninth Circuit examined the sufficiency of the defendants' claims that the sentencing judge was prejudiced.\textsuperscript{4162} Three defendants convicted of conspiracy to possess and possession of marijuana with intent to distribute,\textsuperscript{4163} moved the sentencing judge to disqualify himself because of personal bias.\textsuperscript{4164} The defendants claimed that the judge's remark during sentencing that "importing marijuana was a very serious crime that had a 'cancer'-like effect on society,"\textsuperscript{4166} revealed an impermissible personal prejudice requiring recusal under 28 U.S.C. section 455(a).\textsuperscript{4167} The Ninth Circuit concluded that the judge was merely reiterating congressional sentiment and that the judge's comment did not evidence the type of ethnic, 

\begin{itemize}
    \item The Ninth Circuit has stated that the decisions interpreting the "personal bias or prejudice" language of § 144 are controlling in interpreting § 455(b)(1). \textit{See United States v. Sibla}, 624 F.2d 864, 867 (9th Cir. 1980). Moreover, § 455(b)(1) merely provides a specific example of when a judge's impartiality may be questioned pursuant to § 455(a). \textit{Id.} Therefore, decisions interpreting § 455(b)(1) also control in the interpretation of 455(a) when a request for disqualification is based on bias or prejudice. \textit{Id.}
    \item Berger v. United States, 255 U.S. at 36 (judge's anti-German-American statements in general and specific references to defendants of German descent showed sufficient bias to require judge's disqualification).
    \item Connelly v. United States, 191 F.2d 692, 695 (9th Cir. 1951) (judge's belief that defendant was a communist and that Communist Party was an illegal conspiracy to overthrow the government was clear case of personal bias).
    \item United States v. Azhocar, 581 F.2d 735, 738-39 (9th Cir.) (judge's prior adverse rulings and ill-advised comment that he would never believe defendant did not show personal bias), cert. denied, 440 U.S. 907 (1978).
    \item Price v. Johnston, 125 F.2d 806, 811-12 (9th Cir. 1942) (judge's association with a bank in vicinity of bank allegedly robbed by defendant was insufficient to show personal bias).
    \item United States v. Sibla, 624 F.2d at 869 (judge's statement to defendant that his defense was frivolous was insufficient showing of bias because it was a correct characterization of the defense).
    \item 675 F.2d 1373 (9th Cir. 1980).
    \item Id. at 1385-86.
    \item Id. at 1379. 21 U.S.C. § 846 (1976).
    \item 675 F.2d at 1379. 21 U.S.C. § 841(9)(1) (1976).
    \item Id. at 1385.
    \item See supra note 4155. \textit{See United States v. Phillips}, 664 F.2d 971, 1002-03 (5th Cir. 1981) (for disqualification under § 455, the alleged bias must stem from an extra-judicial source unless such pervasive bias is revealed in "otherwise judicial conduct as would constitute bias against a party") (quoting David v. Board of School Comm'rs, 517 F.2d 1044 (5th Cir. 1975), \textit{cert. denied}, 423 U.S. 944 (1976)).
\end{itemize}
political, or personal bias that requires disqualification.4168

The defendants also claimed that the sentencing judge was prejudiced because he exhibited an impermissibly mechanical view of sentencing.4169 In rejecting this contention, the court noted that not only were all the sentences within the statutory limit,4170 but the judge had imposed sentences ranging from five to ten years for each defendant.4171 The Ninth Circuit failed to find evidence that the judge applied an automatic sentencing policy or used sentencing to further an objective unrelated to the defendants' conduct.4172

Sentencing determinations are within the broad discretion of the sentencing judge.4173 Thus, sentences within statutory limits are generally not reviewable,4174 unless circumstances indicate that the judge has abused his discretion.4175 The Ninth Circuit recently reaffirmed its ad-

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4168. 675 F.2d at 1385. The posture taken by the Ninth Circuit in Allen is consistent with that taken by the United States Supreme Court, other circuits and prior Ninth Circuit decisions. See supra notes 4156-61. These courts, while attempting to preserve the appearance of fairness, still require a more ingrained bias than a mere objection to certain persons or their conduct. Southerland v. Irons, 628 F.2d 978, 980 (6th Cir. 1980) (judge's actions in pending or prior litigation involving defendant not grounds for disqualification under 28 U.S.C. § 455(a)); United States v. Conforte, 624 F.2d 869, 881-82 (9th Cir.) (judge's advice at social gathering against accepting charitable contribution from defendant because he ran a house of prostitution was insufficient showing of personal bias to require recusal), cert. denied, 449 U.S. 1012 (1980); United States v. Thompson, 483 F.2d 527, 529 (3d Cir.) (factual allegations of prejudice against draft-dodgers as a class sufficient to require recusal), cert. denied, 415 U.S. 911 (1973).

4169. 675 F.2d at 1385.

4170. Id. at 1386. Although the rule is well-established that a sentence within legal limits is not reviewable, limited review is available when a judge refuses to exercise sentencing discretion. Dorszynski v. United States, 418 U.S. 424, 443 (1974).

4171. 675 F.2d at 1385-86. Dorszynski, 418 U.S. at 443 (section 5010(d) of Federal Youth Corrections Act intended to comport with traditional sentencing discretion vested in trial judge).

4172. 675 F.2d at 1386. The Allen court distinguished two cases that the defendants offered in support of their mechanical sentencing claim. In United States v. Thompson, 483 F.2d 527, 528-29 (3d Cir.), cert. denied, 415 U.S. 911 (1973), the judge had a policy of sentencing all draft evaders to thirty months in prison. In United States v. Wardlaw, 576 F.2d 932, 938-39 (1st Cir. 1978), the judge imposed two and one-half times the requested sentence on first-offenders in a drug-smuggling case simply to set an example. The Allen court considered these cases too extreme to offer any support to the defendants' claims. 675 F.2d at 1386.

4173. United States v. Tucker, 404 U.S. 443, 446 (1972). In Tucker, the Supreme Court stated: "[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." (citations omitted).

4174. Id. at 447 (citing Gore v. United States, 357 U.S. 386, 393 (1958)).

4175. See, e.g., Townsend v. Burke, 334 U.S. 736, 741 (1948) (sentence based on materially false information violated due process); United States v. Capriola, 537 F.2d 319, 321 (9th Cir. 1976) (per curiam) (remand required where harsher sentence possibly imposed because
herence to these general sentencing principles. 4176

9. Federal Youth Corrections Act

The Federal Youth Corrections Act 4177 ("YCA") was designed to increase sentencing alternatives available to federal district judges who deal with young offenders and who the court determines would benefit from special rehabilitative treatment. 4178

In Ralston v. Robinson 4179 the United States Supreme Court considered whether a youth offender may be required to serve the remain-

defendant exercised his right to trial); Woosley v. United States, 478 F.2d 139, 147-48 (8th Cir. 1973) (judge's policy to sentence all draft evaders to maximum term evidenced an abuse of discretion).

4176. In United States v. Wilder, 680 F.2d 59 (9th Cir. 1982) (per curiam), the defendant was convicted for tax evasion. Wilder, who employed numerous tactics to delay and frustrate the proceedings, was given the maximum sentence of one year imprisonment and a $10,000 fine. In rejecting Wilder's claim that the court abused its sentencing discretion, the Ninth Circuit affirmed the sentence and imposed an additional penalty. Id. at 61. The court reasoned that the sentence was within statutory limits, and that Wilder's actions justified the maximum penalty. Id.

In United States v. Cain, 685 F.2d 326 (9th Cir. 1982), Cain argued that his sentence was excessive in light of his background. Id. at 327. Cain, convicted and sentenced for bank robbery pursuant to 18 U.S.C. §§ 2113(a) & 4205 (1976), was given a ten-year prison sentence. The Ninth Circuit affirmed the sentence because it fell within the statutory limit and Cain advanced no other theory justifying reversal. Id.

In United States v. Gilman, 684 F.2d 616 (9th Cir. 1982), the defendants contended that their sentences were excessive. The defendants were each convicted and sentenced for seven counts of mailing obscene matter in violation of 18 U.S.C. § 1461 (1976), and one count of conspiracy in violation of 18 U.S.C. § 371 (1976). Noting the seriousness of the offense, the Ninth Circuit affirmed the sentences because they were within statutory limits and thus generally unreviewable. Id. at 622.

In United States v. Garrett, 680 F.2d 650 (9th Cir. 1982), the defendants contended that they were denied equal protection because they were sentenced more severely than their co-defendant. The defendants had both been convicted on two counts of conspiring to possess narcotics with intent to distribute and nine counts of possessing and distributing narcotics in violation of 21 U.S.C. §§ 846 & 841(a)(1) and 18 U.S.C. § 2. They were given a reduced sentence of nine years imprisonment on each count, to run concurrently; their co-defendant, convicted on eight counts, received concurrent sentences of five years imprisonment on each count and a special twenty-five year parole term. The court found three flaws in the defendants' equal protection argument: (1) the defendants were convicted on more counts than their co-defendant; (2) the defendants were more culpable than their co-defendant; and (3) sentencing determinations generally rest with the sentencing judge. Id. at 652. Addressing the third flaw, the court noted that the imposition of disparate sentences on co-defendants does not in itself indicate an abuse of sentencing discretion when the defendants' sentences are within statutory limits. Id.

der of a YCA sentence as an adult after receiving a consecutive adult sentence on a felony charge. The youth had been sentenced to ten years' imprisonment under 18 U.S.C. section 5010(c), after pleading guilty to a charge of second-degree murder. As prescribed by 18 U.S.C. section 5011, the sentence contemplated rehabilitative treatment and separation from adult offenders. While incarcerated, the defendant was found guilty of assault with a dangerous weapon on a federal officer, and was given a consecutive ten-year adult sentence. The district court explicitly found that the defendant would not benefit from further YCA treatment, and recommended transfer to a more secure institution. After defendant received a second consecutive adult sentence on a felony charge, the Bureau of Prisons reclassified the defendant as an adult offender pursuant to prison policy.

Defendant petitioned for habeas corpus relief. Affirming the district court's grant of the writ, the Seventh Circuit held that the YCA prohibits a subsequent sentencing judge from reevaluating a YCA sentence even if the second judge explicitly finds the defendant will no longer benefit from YCA treatment.

The Supreme Court reversed the judgment, holding that a judge may modify the essential treatment terms of a YCA sentence when the

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4180. *Id.* at 203.

4181. *Id.* 18 U.S.C. § 5010(c) (1976) provides in part:

> If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may . . . sentence the youth offender to the custody of the Attorney General for treatment and supervision . . . for any further period that may be authorized by law for the offense . . . or until discharged by the Commission as provided in section 5017(d) . . . .

4182. 454 U.S. at 204. 18 U.S.C. § 5011 (1976) provides in part:

> Committed youth offenders not conditionally released shall undergo treatment in institutions . . . , including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment . . . . Insofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders . . . .

4183. 454 U.S. at 204. The judge later reduced defendant's sentence to 66 months, to run consecutively to the YCA sentence. *Id.*

4184. While still serving his original YCA sentence, defendant pled guilty to a second charge of assault on a federal officer and was sentenced under 18 U.S.C. § 5010(d) to a consecutive adult sentence of one year and one day. 454 U.S. at 204.

4185. 454 U.S. at 204-05. The policy defined a YCA inmate as "any inmate sentenced under 18 U.S.C. § 5010(b), (c), or (e) who is not also sentenced to a concurrent or consecutive adult term." *Id.* at 205 (emphasis in original).

4186. 454 U.S. at 205. The Seventh Circuit also rejected the Government's contention that the YCA authorized the Bureau of Prisons to modify the treatment terms of a YCA sentence if the offender has also received a consecutive or concurrent adult felony sentence. *Id.* The Supreme Court agreed with the Seventh Circuit. *Id.* at 211-12.
defendant has received a consecutive adult sentence, and the judge finds that continued YCA treatment would be of no benefit.\textsuperscript{4187} The Court reasoned that conviction of a second offense while serving a YCA sentence implicitly raises the question whether continued YCA treatment will be beneficial.\textsuperscript{4188} Noting that 18 U.S.C. section 5010(d)\textsuperscript{4189} permits a second sentencing judge to make a "no benefit" finding respecting a subsequent sentence, the Court concluded that the section implicitly authorizes a judge to reevaluate continued YCA treatment for the unexpired YCA term as well.\textsuperscript{4190} The Court emphasized that the YCA does not authorize prison officials to independently determine that continued YCA treatment would be futile.\textsuperscript{4191}

In a concurring opinion, Justice Powell objected to the restrictions the majority opinion would place on prison officials' authority over confinement conditions in certain cases.\textsuperscript{4192} In view of defendant's adult sentences and the "no benefit" findings of two district courts, Justice Powell concluded that prison officials were authorized to treat defendant as an adult offender.\textsuperscript{4193}

The dissent agreed with the majority's conclusion that the Bureau of Prisons has no authority under the Act to terminate YCA treatment.\textsuperscript{4194} However, the dissent suggested that permitting a second sentencing judge to convert the remainder of a final YCA sentence into an adult sentence would violate the double jeopardy clause.\textsuperscript{4195} In any case, the dissent concluded, a judge is prohibited from enhancing a final sentence in the absence of specific congressional authority.\textsuperscript{4196}

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\textsuperscript{4187} Id. at 217.

\textsuperscript{4188} Id. at 213-14.

\textsuperscript{4189} 18 U.S.C. § 5010(d) (1976) provides: "If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision."

\textsuperscript{4190} 454 U.S. at 213-14.

\textsuperscript{4191} Id. at 214, 219 n.11. Basic treatment for defendants committed under section 5010(b) or (c) consists of rehabilitative care and separation from adult prisoners. 18 U.S.C. § 5011 (1976). Under § 5017, the Commission is authorized to conditionally release a YCA inmate under certain conditions, thereby terminating YCA treatment.

\textsuperscript{4192} 454 U.S. at 221 (Powell, J., concurring).

\textsuperscript{4193} Id. at 222. Justice Powell reasoned that the Bureau of Prisons was bound by the district court's recommendation to transfer defendant to a more secure facility. Id. at 223. Noting that the YCA requires segregation from adult offenders "insofar as practical," Justice Powell would defer to the prison officials' determination that segregation was no longer practical. Id.

\textsuperscript{4194} Id. at 225-26 n.6 (Stevens, J., dissenting). The dissent recognized, however, that prison officials can opt for early termination of YCA confinement under 18 U.S.C. section 5017 (1976), thus allowing a consecutive adult sentence to begin. 454 U.S. at 227.

\textsuperscript{4195} Id. at 224 & n.3.

\textsuperscript{4196} Id. at 224. The dissent stated that an adult sentence is more severe than a YCA
Responding to the majority's contention that certain YCA sections do specifically provide for adult treatment during an unexpired YCA term, the dissent noted that these sections did not contemplate a case where the defendant continued to be incarcerated on the basis of the original YCA sentence.⁴¹⁹⁷

In United States v. Smith,⁴¹⁹⁸ the Ninth Circuit considered whether the YCA authorizes the imposition of a suspended sentence together with probation on the condition that the defendant serve a brief jail term ("split sentence"). In these consolidated appeals, both defendants contested the validity of the split sentences⁴¹⁹⁹ they had received under 18 U.S.C. section 5010(a),⁴²⁰⁰ which permits a court to place the defendant on probation if it finds the defendant does not need commitment. The Government contended that the YCA incorporates the general probation statute, 18 U.S.C. section 3651,⁴²⁰¹ which expressly permits split sentences.⁴²⁰² The Ninth Circuit agreed, holding that by virtue of 18 U.S.C. section 5023(a),⁴²⁰³ which provides that the YCA sentence. In light of the common law rule prohibiting a judge from enhancing a final sentence, the dissent concluded that express congressional authority was required before a judge could disregard this rule. Id. at 223-24.

⁴¹⁹⁷ Id. at 228-29. Pursuant to § 5010(a), a judge may impose an adult sentence on a defendant who has committed an adult offense while on probation. The statute also allows the judge to impose an adult sentence concurrent with a YCA term. Moreover, a defendant who commits a crime while on conditional release pursuant to § 5017 may receive an adult sentence to begin immediately. Id. at 228 n.9.

⁴¹⁹⁸ 683 F.2d 1236 (9th Cir. 1982), cert. denied, 103 S. Ct. 740 (1983).

⁴¹⁹⁹ Smith was sentenced to five years imprisonment for embezzlement. The sentence provided that, on the condition that Smith spent 45 days in a jail-type setting, the remainder of the sentence would be suspended and Smith would be placed on five years probation. Arthur was sentenced to three years imprisonment for stealing two bicycles on an Indian reservation. Arthur's sentence also provided for a suspended sentence and five years probation on the condition that he serve thirty days in a jail-type setting. Neither sentence specified separation from adult offenders. 683 F.2d at 1237.

⁴²⁰⁰ 18 U.S.C. § 5010(a) (1976) provides that: "If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation."

⁴²⁰¹ 18 U.S.C. § 3651 (1976) provides in pertinent part:

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction . . . may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation . . . .

⁴²⁰² 683 F.2d at 1237.

⁴²⁰³ 18 U.S.C. § 5023(a) (1976) states that:

Nothing in this chapter shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect the provisions of chapter 231 of
shall not affect the provisions of the probation statute, the YCA incorporates section 3651, including any subsequent amendments such as the split sentence provision. Note several persuasive arguments against its conclusion, the Ninth Circuit nevertheless found that the broad language of section 5023(a), as well as the rehabilitative goals of the YCA, favored a result expanding rather than restricting the court’s sentencing alternatives.

The Ninth Circuit also held that youth offenders receiving split sentences must be segregated from adult offenders, and, where possible, incarcerated in separate institutions. The dissent argued that section 5010(a) prohibited commitment if the court granted probation. Assuming the majority’s premise that section 5023(a) did not specifically incorporate section 3651 in 1950, the dissent nevertheless concluded that Congress merely intended to preserve the power to grant full probation which existed in 1950, not to limit the YCA by unknown future amendments in the probation statutes. The dissent stated that the YCA provides for only three sentencing alternatives: (1) straight probation; (2) treatment and supervision; and (3) sentencing

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4204. 683 F.2d at 1238-40. The court noted that the general probation statute in effect when § 5023(a) was enacted in 1950 did not contain the split sentence provision. As a result, the court was confronted with the issue of whether 5023(a) specifically incorporated 3651 as it existed in 1950, or whether 5023(a) was also meant to adopt subsequent amendments to 3651. Id. at 1238.

4205. Id. First of all, the Ninth Circuit recognized that the Supreme Court’s holding in Durst v. United States suggested that the YCA specifically incorporated § 3651 as it existed in 1950. 434 U.S. 542, 549 (1978). The Durst court stated that “§ 5023(a), incorporates by reference the authority conferred under the general probation statute.” Id. The Court further declared that § 5023(a) was intended to “preserve to sentencing judges their powers under the general probation statute.” Id. at 551. Furthermore, the Durst Court relied on express legislative history in holding that fines or restitution may be imposed as a condition of probation under the YCA. Id. at 552-53. In Smith, the Ninth Circuit pointed out that the imposition of split sentences is not expressly mentioned in the Act’s legislative history. 683 F.2d at 1238. Moreover, the Ninth Circuit noted that the imposition of a fixed jail term was contrary to the sentencing scheme of § 5010, which provides for indeterminate sentences. Finally, a literal reading of § 5010(a) suggests a judge may impose probation only if the youth does not need commitment. 683 F.2d at 1238-39.

4206. Id. at 1239-40.

4207. Id. at 1242. The trial court failed to specify segregation for each defendant. Considering the overall scheme and purpose of the YCA, the Ninth Circuit found that youths given probation under § 5010(a) are in effect receiving YCA rehabilitative treatment. Id. at 1241. As a result, youths receiving split sentences should receive the segregation which Congress determined necessary for successful rehabilitation. Id.

4208. Id. at 1243 (Ferguson, J., dissenting).

4209. Id. at 1247. The dissent was concerned that allowing split sentences would ensure the incarceration of youthful offenders even if they were entitled to probation. Id. at 1245.
under another applicable penalty provision. As the trial judges here imposed a sentence outside these options, the dissent would invalidate the sentence. 4210

In United States v. Glenn, 4211 the Ninth Circuit considered whether a district court may impose a lengthier sentence for a misdemeanor, by sentencing a youth offender under the YCA, than the offender could have received if sentenced as an adult. 4212 Glenn received three concurrent sentences 4213 under 18 U.S.C. section 5010(b) 4214 which provides for treatment and supervision until released by the parole commission pursuant to section 5018(c). 4215 Section 5017(c) essentially permits incarceration for a maximum of four years, after which the defendant must be conditionally released. The maximum adult sentences defendant could have received on counts II and III 4216 were one year and six months in prison, respectively. Defendant claimed that the imposition of an indeterminate sentence under the YCA violated his due process and equal protection rights. 4217

The Ninth Circuit, bound by its decision in United States v. Amidon, 4218 decided defendant's claim on statutory grounds. 4219 In Amidon, the court held that the Federal Magistrate Act of 1979 4220 prohibited a district court from imposing a longer prison sentence on a misdemeanor under the YCA than it could impose on an adult. 4221

4210. Id. at 1249-50.
4211. 667 F.2d 1269 (9th Cir. 1982).
4212. Id. at 1274.
4213. Glenn was convicted of one count of possessing marijuana with intent to sell, one count of possessing PCP and one count of driving under the influence of drugs. Id. at 1271.
4214. 18 U.S.C. § 5010(b) (1976) provides in part:
   If the court shall find that a convicted person is a youthful offender, and the offense is punishable by imprisonment . . . , the courts may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision . . . until discharged by the Commission as provided in section 5017(c) . . .
4215. 18 U.S.C. § 5017(c) (1976) provides in part: "A youth offender committed under § 5010(b) . . . shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction."
4216. 667 F.2d at 1274. See supra note 4213.
4217. 667 F.2d at 1274.
4218. 627 F.2d 1023 (9th Cir. 1980) (applying Federal Magistrate Act to district court judges sentencing offenders under the YCA).
4219. 667 F.2d at 1274.
   The magistrate may, in a case involving a youth offender, . . . impose sentence . . . , except that—(1) the magistrate may not sentence the youth offender to the custody of the Attorney General . . . for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense . . .
4221. 627 F.2d at 1027.
The Ninth Circuit was not persuaded by the Government's argument that Glenn's YCA sentence was nevertheless proper because he could have received a maximum adult sentence in excess of six years if consecutive sentences had been imposed. Applying the Amidon rule, the Glenn court found the sentences on counts II and III excessive, and ordered them reduced.

In United States v. Luckey, the Ninth Circuit reached a similar conclusion. Defendant had been convicted of felony bank larceny and sentenced under 18 U.S.C. section 5010(b) until discharged pursuant to section 5017(c). On appeal, the Ninth Circuit found the evidence sufficient to support a misdemeanor charge for theft, but insufficient to support the felony conviction. Consequently, the court reversed the felony conviction. The maximum sentence on the misdemeanor charge was one year in prison. Relying on the Amidon court's interpretation of the Federal Magistrate Act of 1979, the Ninth Circuit vacated the YCA sentence and remanded for resentencing.

10. Major Crimes Act

Indian tribes have retained exclusive jurisdiction to prosecute and sentence a member of their tribe for crimes committed against another Indian on Indian land. The Major Crimes Act (MCA), however, constitutes an exception to this rule by conferring jurisdiction on

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4222. 667 F.2d at 1274-75 n.2. The maximum adult sentence on count I was five years imprisonment and two years parole. Imposing consecutive sentences would have resulted in a maximum of six and one-half years imprisonment; six months more than the maximum YCA sentence under § 5017(c).
4223. Id. at 1274-75.
4224. 655 F.2d 203 (9th Cir. 1981).
4225. Id. at 204. Defendant was convicted of one count of bank larceny in violation of 18 U.S.C. § 2113(b) (1976) for stealing a blank dividend check and cashing it. Id. at 204.
4226. See supra note 4214.
4227. See supra note 4215.
4228. 655 F.2d at 205.
4229. Id. at 205-06. See supra note 4220.
4230. 655 F.2d at 206.
4232. The Major Crimes Act, 18 U.S.C. § 1153 (1976), provides in part:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country,
federal courts to prosecute and sentence Indians for certain enumerated offenses committed on Indian land.\(^{4233}\)

In *United States v. Bowman*,\(^{4234}\) the Ninth Circuit considered whether a federal court has jurisdiction to enter judgment and sentence an Indian on a lesser included offense, not expressly enumerated in the Major Crimes Act, after the defendant has requested and received a jury instruction for that offense.\(^{4235}\) Bowman, an Indian, was originally charged with assault resulting in serious bodily injury to another Indian, an enumerated offense under the Act. The district court granted Bowman's request for a jury instruction on the lesser included offense of assault by striking, beating, or wounding, a crime not enumerated in the Act. Bowman was convicted and sentenced for the lesser offense.

On appeal, Bowman contended that the district court lacked jurisdiction to sentence him for a crime not specifically listed in the Act.\(^{4236}\) In rejecting Bowman's argument, the Ninth Circuit relied primarily on *Keeble v. United States*\(^{4237}\) in which the United States Supreme Court held that an Indian charged in federal court for an offense enumerated in the Act is entitled to a jury instruction on a lesser included offense, if the evidence warrants it.\(^{4238}\) The Ninth Circuit recognized that *Keeble*

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\(^{4233}\) shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.


\(^{4235}\) 679 F.2d 798 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1204 (1983).

\(^{4236}\) *Id.* at 799. The Eighth Circuit considered this precise issue on similar facts in *Felicia v. United States*, 495 F.2d 353, 355 (8th Cir.), *cert. denied*, 419 U.S. 849 (1974). The *Felicia* court concluded that *Keeble* could be interpreted to mean that a federal court had power to instruct on a lesser included offense, but that the court did not have jurisdiction to convict and sentence the defendant for that offense. *See also* *United States v. John*, 587 F.2d 683, 688 (5th Cir.) (adopted *Felicia* holding and rationale to uphold sentencing jurisdiction over lesser included offense), *cert. denied*, 441 U.S. 925 (1979).

\(^{4237}\) 679 F.2d at 799.

\(^{4238}\) *Id.* at 214.

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In *Keeble*, an Indian had been convicted of assault with intent to commit serious bodily injury on another Indian on an Indian reservation, a federal crime under the Major Crimes Act. Keeble had requested and been denied a jury instruction on the lesser included offense of simple assault. On appeal, the Government claimed that the Act was intended only as a narrow intrusion into Indian affairs, thus prohibiting an instruction on any crime not specifically enumerated in the Act. *Id.* at 209. The Supreme Court rejected this contention, recognizing that the Government's interpretation would result in depriving Indians of procedural rights guaranteed to non-Indian defendants. *Id.* at 212. In support of this conclusion the Court cited § 3242 of the Act, 18 U.S.C. § 3242 (1976), which provides that Indians "shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." *Id.* (emphasis in original). Thus, the Court emphasized it was not extending the Act into jurisdictional areas reserved to the tribes, but merely affording Indians procedural protections to which any other defendant was entitled. *Id.* at 214.
did not expressly address whether the court had jurisdiction to convict and sentence the defendant. Nevertheless, the court concluded that this interpretation was an inevitable corollary to the Keeble holding; an extension which the court felt compelled to reach in the absence of any contrary indication by the Supreme Court. The Ninth Circuit further reasoned that adopting Bowman's position would mean that a federal court having jurisdiction to hear the case, must nonetheless re-release an Indian convicted by the jury on a lesser included offense because of lack of jurisdiction to enter judgment and sentence.

Although asserting that there was more than ample support to uphold jurisdiction over lesser included offenses under the MCA, the Bowman court reluctantly reached this conclusion. The court was concerned that the Keeble holding, drawn to its logical conclusion in Bowman, directly conflicted with Congress' intent to confer only limited jurisdictional power to federal courts over the Indian nations. The court specifically noted that allowing a jury instruction on a lesser included offense could lead the prosecution to 'overcharge' under the Act in order to ensure conviction and sentencing for a lesser included offense. As a result, a prosecutor could indirectly accomplish that which he could not accomplish directly.

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4239. 679 F.2d at 799.
4240. Id. The dissent in Keeble, in fact, interpreted the majority opinion to mean that the federal courts had jurisdiction to sentence the defendant on a lesser included offense once he had been granted the instruction and had been convicted on the lesser offense. 412 U.S. at 217 (Stewart, J., dissenting). Both the Fifth and Eighth Circuits have focused on the Keeble dissent's interpretation of the majority opinion as the natural extension of the majority opinion. See United States v. John, 587 F.2d at 688; Felicia v. United States, 495 F.2d at 355.
4241. 679 F.2d at 799.
4242. Id. The Bowman court found three bases of support: (1) the fact that the Supreme Court in Keeble would have been aware of the jurisdictional implications of its holding; (2) Justice Stewart's dissent in Keeble interpreting the majority opinion; and (3) the Keeble majority's emphasis on parity of treatment in view of section 3242 of the Act. Id. at 799-800.
4243. Id. at 800.
4244. Id. at 799-800.
4245. Id. The enactment of the Major Crimes Act was Congress' response to the Supreme Court's holding in Ex parte Crow Dog, 109 U.S. 556 (1883). Keeble v. United States, 412 U.S. at 209. The Crow Court held that a federal court did not have jurisdiction to prosecute and sentence an Indian for the murder of another Indian on Indian land. Id. at 209 (interpreting Crow, 109 U.S. at 556). The Court stated that Indian tribes retained exclusive jurisdiction to punish their members in the absence of congressional mandate to the contrary. Id. at 209-10. In response, the Major Crimes Act, enacted in 1885, was designed to confer "[a] carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land." United States v. Wheeler, 435 U.S. at 325 n.22 (quoting United States v. Antelope, 430 U.S. at 643 n.1).
4246. 679 F.2d at 800 (Henderson, J., dissenting).
4247. Pursuant to the principle of mutuality, allowing the defendant to request an instruc-
In a dissenting opinion, Judge Henderson argued that Indian tribal courts retained exclusive jurisdiction over crimes committed by Indians against other Indians on Indian land unless Congress or the Supreme Court, interpreting a Congressional act, expressly extinguished such jurisdiction.

Concluding that neither the Act, nor the Court's holding in Keeble constitute an express removal of tribal jurisdiction over lesser included offenses not specified in the Act, Judge Henderson rejected the majority's holding.

D. Probation

The Federal Probation Act authorizes a trial court, in certain criminal proceedings, to suspend a defendant's sentence and impose probation conditions. The probation term cannot exceed five years. The Ninth Circuit requires that probation conditions be reasonably related to the rehabilitation of the defendant and the protection of the public. If the probationer violates the terms of his

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<td>18 U.S.C. § 3651 (1976) provides in part: Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best. The period of probation, together with any extension thereof, shall not exceed five years.</td>
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<td>679 F.2d at 800 (Henderson, J., dissenting).</td>
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<td>627 F.2d 893, 897-98 (9th Cir. 1980) (probation terms not reasonable when defendant convicted of fraud against government was required to forfeit all assets and work for charity full time for three years without pay); United States v. Consuelo-Gonzalez, 521 F.2d 259, 262 (9th Cir. 1975) (en banc) (probation condition that required defendant, who was convicted of possession of heroin with intent to distribute, to submit to search at any time violated purposes of Federal Probation Act).</td>
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probation he may be arrested and the supervising court may revoke probation and reimpose the suspended prison sentence.\textsuperscript{4255}

1. Maximum time limits

In two decisions in 1982,\textsuperscript{4256} the Ninth Circuit applied the "pre-
sumption of concurrency" principle\textsuperscript{4257} to determine when the proba-

tion periods of two criminal defendants commenced. In each case, the court held that the statutory five-year period had expired.

In \textit{United States v. Adair},\textsuperscript{4258} the Ninth Circuit reversed a proba-
nation revocation order, ruling that the defendant's five-year probation term had expired. Adair pleaded guilty to four counts of an indict-

ment.\textsuperscript{4259} On January 20, 1976, Adair was sentenced to three years in prison and fined $5,000 on each of the first three counts, and was given five years probation on the last count.\textsuperscript{4260} The sentencing court stated that the prison sentences were to run concurrently, but did not specify whether the probation term was to run concurrently with or consecu-
tively to the prison terms.\textsuperscript{4261} On February 10, 1981, three years after Adair was released from prison, the government initiated revocation proceedings, charging that Adair violated the terms of the 1976 probation order. The district court revoked Adair's probation, sentenced him to three years in prison, and fined him $5,000.\textsuperscript{4262}

\begin{footnotesize}

\textsuperscript{4255} 18 U.S.C. § 3653 (1976) provides in part:

\begin{quote}
At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, . . . the court for the district in which the probationer is being supervised . . . may issue a warrant for his arrest for violation of probation occurring during the probation period.
\end{quote}

As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

\textsuperscript{4256} United States v. Rodriguez, 682 F.2d 827 (9th Cir. 1982); United States v. Adair, 681 F.2d 1150 (9th Cir. 1982).


\textsuperscript{4258} 681 F.2d 1150 (9th Cir. 1982).

\textsuperscript{4259} \textit{Id.} at 1151.

\textsuperscript{4260} Id.

\textsuperscript{4261} Id.

\textsuperscript{4262} Id.
\end{footnotesize}
In reversing the district court's order, the Ninth Circuit first noted that the 1976 sentencing order did not clearly state when the probation term was to commence, or how it was to run in relation to the prison terms.\textsuperscript{4263} The court then presumed that the district court intended that Adair's probation term would commence on the date of sentencing and would run concurrently with any period of imprisonment imposed on the remaining counts; it thereby extended the presumption of concurrency principle to situations in which a prison sentence and a probation term, rather than only different prison sentences, are imposed for different crimes.\textsuperscript{4264} The Ninth Circuit stated that if a sentencing court does not wish for this concurrency presumption to apply, it must explicitly state when the probation term is to commence.\textsuperscript{4265} Finally, the Adair court pointed out that the fact that Adair was incarcerated for two years did not prevent the probation term from running during that time because a defendant may be on probation while he is in prison.\textsuperscript{4266} The Ninth Circuit concluded, therefore, that Adair's probation term expired on January 20, 1981, and that the district court did not have jurisdiction to revoke his probation.\textsuperscript{4267}

In \textit{United States v. Rodriguez},\textsuperscript{4268} the Ninth Circuit similarly ruled that a district judge did not have jurisdiction to revoke the probation of a convicted bank robber because the five-year maximum probationary

\textsuperscript{4263} \textit{Id.} (citing \textit{United States v. Daugherty}, 269 U.S. 360, 363 (1926) ("[s]entences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them.").

\textsuperscript{4264} 681 F.2d at 1151-52. The court followed the principle set forth in \textit{Puccinelli v. United States}, 5 F.2d 6 (9th Cir. 1925), in which the Ninth Circuit ruled that prison sentences for convictions or guilty pleas on more than one count are presumed to run concurrently in the absence of "some definite, specific provision that the sentences shall run consecutively, specifying the order of sequence." \textit{Id.} at 7. \textit{Accord}, \textit{Martinez v. Nagle}, 53 F.2d 195, 197 (9th Cir. 1931) (court's order of two one-year prison sentences for violation of \textit{Harrison Narcotic Act} and \textit{Jones-Miller Act} can be reasonably construed to mean that sentences were intended to run concurrently).

\textsuperscript{4265} 681 F.2d at 1151 n.3. The court stated:

For example, a probationary sentence could specify that the period of probation shall be consecutive to the confinement portion of the sentence served on a remaining count or counts or that the period of probation shall be consecutive to the sentence imposed on a remaining count or counts including any parole or other supervision time.

\textit{Id.}

\textsuperscript{4266} \textit{Id.} at 1152. \textit{See Burns v. United States}, 287 U.S. 216, 223 (1932) (principles of Federal Probation Act support conclusion that a defendant is under probationary supervision while incarcerated for another crime); \textit{Green v. United States}, 298 F.2d 230, 232-33 (9th Cir. 1961).

\textsuperscript{4267} 682 F.2d 827 (9th Cir. 1982).
period had expired.\textsuperscript{4269} Rodriguez pleaded guilty to bank robbery in 1973. On October 1, 1973, he was sentenced to twelve years in federal prison. The prison sentence was suspended, and Rodriguez was instead required to serve six months in a jail-type institution and be placed on probation for five years.\textsuperscript{4270}

Rodriguez violated his probation in 1975 and 1978.\textsuperscript{4271} His prison sentence was reinstated both times, but the sentences were later modified and Rodriguez again was placed on probation. At the probation hearing on the 1978 violation Rodriguez consented to the "extension" of his five-year probation term.\textsuperscript{4272} A third probation violation occurred in January, 1982. At the hearing on the 1982 violation, Rodriguez claimed that the court did not have jurisdiction to issue a bench warrant for his arrest and revoke his probation, asserting that the five-year period had expired.\textsuperscript{4273}

On appeal, the Ninth Circuit concluded that Rodriguez' probation sentence commenced at the October 1973 sentencing, and that the five-year maximum term had therefore expired.\textsuperscript{4274} The court ruled that Rodriguez "came under probationary supervision" when he began his stay at the jail-type institution.\textsuperscript{4275} The Ninth Circuit applied the concurrency presumption, analogizing Rodriguez' "split" sentence of six months in an institution and five-year probation term to a situation in which a prison sentence and probation term are given for separate crimes,\textsuperscript{4276} and determined that the sentencing court intended for probation to begin when Rodriguez started treatment at the institution.\textsuperscript{4277} The court found that the five-year probation period was tolled for 407 days while Rodriguez was incarcerated for the three probation viola-

\textsuperscript{4269} Id. at 828.
\textsuperscript{4270} Id.
\textsuperscript{4271} Id. Rodriguez first violated his probation in October 1975. The district court revoked probation and reinstated his twelve-year prison sentence. In December 1975, the defendant's sentence was modified, and probation was reimposed. Rodriguez again violated his probation, in December 1978, and the district court revoked probation and reinstated the prison term. As with the 1975 revocation the sentence was later modified, and, in March 1979, Rodriguez was again put on probation. Id.
\textsuperscript{4272} Id.
\textsuperscript{4273} Id.
\textsuperscript{4274} Id. at 829-30.
\textsuperscript{4275} Id. at 829.
\textsuperscript{4276} Id. (citing United States v. Adair, 681 F.2d 1150 (9th Cir. 1982)).
\textsuperscript{4277} 682 F.2d at 829. After applying this presumption, the court also noted that the sentencing judge stated that probation would end in September 1978 or five years after the sentencing date. Hence, it appeared that the judge clearly intended that the probation term run for the six months that Rodriguez spent in the jail-type institution. Id.
Nevertheless, even after this tolling period was considered, the five-year maximum period was exceeded by approximately one year.

The Rodriguez court also ruled that Rodriguez' consent to the probation extension was invalid.

The court pointed out that such an extension cannot realistically be considered voluntary when the alternative upon refusal is incarceration.

2. Probation conditions

In United States v. Margala, the Ninth Circuit addressed the reasonableness of the probation conditions of a defendant convicted of securities and mail fraud. Margala had been involved in a complex plan designed to force public stockholders out of a corporation, of which Margala was president. As part of Margala's probation, the district judge required first that Margala forfeit the retirement pension benefits he received from the corporation, second that Margala relinquish all the stocks he acquired from his involvement in the corporation, and third that the corporation cancel Margala's loan obligations. Margala argued that these conditions were impermissi-
ble because they were strictly punitive and excessively harsh.\footnote{Id.}

In upholding the probation terms, the court applied the Ninth Circuit rule that probation terms must be reasonably related to the rehabilitative purpose of probation.\footnote{Id. See supra note 4254 and accompanying text.} The court pointed out that this standard is flexible and that the decision of the trial judge should be afforded deference, particularly when the means of accomplishing rehabilitation are so uncertain.\footnote{662 F.2d at 627.} Here, Margala failed to show that his probation terms were not rehabilitative, and the court allowed them to stand.\footnote{Id. The court pointed out that Margala acquired stocks and other benefits after the public shareholders were defrauded. Under these circumstances, rehabilitation could be accomplished by the probation terms. The court stated that “[t]he sentencing judge may have decided, for example, that it would be therapeutic for Margala to sever remaining ties with BHC.” Id. at 627.} In response to Margala’s claim that the probation terms were unreasonably harsh, the court found that Margala failed to show that their harshness was not justified by their rehabilitative effect.\footnote{Id.}

In \textit{United States v. Romero},\footnote{676 F.2d 406 (9th Cir. 1982).} the Ninth Circuit considered the validity of a probation condition that prohibited the defendant from associating with anyone involved with drugs. Upon pleading guilty to being an accessory after the fact to distributing heroin, the defendant was sentenced to 179 days in custody and three and one-half years of probation.\footnote{662 F.2d at 406 (9th Cir. 1982).} One of the conditions of the defendant’s probation was that he “not associate with any person who has been convicted of any offense involving drugs, nor . . . any person who uses, sells, or in any other manner is unlawfully involved with any drugs.”\footnote{Id.} The Ninth Circuit applied the reasonableness standard and concluded that the defendant’s probation condition was reasonably related to the goals of rehabilitation and protection of the public.\footnote{Id. at 406.}
The defendant argued that the probationary terms were too broad because they would result in the violation of his probation by his unknowing association with people who were involved with drugs. The court ruled that the defendant's argument was premature, stating that such a due process claim is properly raised only after probation has been revoked. The court noted that the broad language of a probation order can be remedied by further explanation by the court or the probation officer. Furthermore, a probationer's claim that probation conditions are vague may not necessarily invalidate probation revocation which is based on narrow grounds.

In United States v. Mitsubishi International Corp., the Ninth

596 F.2d 921, 922 (9th Cir. 1979) (probationer convicted of illegal gambling required to associate with “law abiding” persons and not with known gamblers); Malone v. United States, 502 F.2d 554, 555 (9th Cir. 1974) (defendant convicted of gun-running to Irish Republicans in Great Britain prohibited from associating with persons involved in Irish Republican organizations), cert. denied, 409 U.S. 1124 (1975).

4294. 676 F.2d at 407.

4295. Id. A defendant has a constitutional right to be informed of probation conditions which prohibit non-criminal acts. If he is not so informed, revocation of his probation will deprive him of liberty without due process of law. See, e.g., United States v. Dane, 570 F.2d 840, 843 (9th Cir. 1977) (revocation of defendant's probation proper when defendant engaged in gun-running after trial judge warned him such activity would lead to revocation), cert. denied, 436 U.S. 959 (1978); United States v. Foster, 500 F.2d 1241, 1244 (9th Cir. 1974) (probation revocation violated due process when defendant not informed of requirement that he report to probation officer). Additionally, a probationer who does not appeal his unsuccessful attempt to modify a probation order is not precluded from making such a challenge later, at the time of probation revocation. See Higdon v. United States, 627 F.2d at 900; United States v. Pierce, 561 F.2d 735, 739 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978).

Requiring that a due process claim not be asserted until after probation revocation proceedings have commenced could arguably affect the defendant's ability to have the probation order struck down. Once a district court has ruled that revocation was proper, the appellate court will apply the abuse of discretion standard of review. This could result in a probation condition that might have been struck down after it was imposed being upheld in a revocation proceeding.

4296. 676 F.2d at 407. The court declared:

In addition to the bare words of the probation condition, the probationer may be guided by the further definition, explanations, or instructions of the district court and the probation officer. . . . [A]ny generality in the language of the probation condition may be cured by appropriate notice, or may not invalidate revocation on narrower grounds . . . .

Id.

4297. Id. See United States v. Jeffers, 573 F.2d 1074, 1075 (9th Cir. 1978) (per curiam) (probation order deemed by court as overly broad did not invalidate a narrow exercise of order by probation officer); United States v. Gordon, 540 F.2d 452, 454 (9th Cir. 1976) (broad probation order authorizing search at any time of day or night by any law enforcement officer did not invalidate search of probationer's home in daytime by his probation officer).

4298. 677 F.2d 785 (9th Cir. 1982).
Circuit examined the probation terms of corporate criminal defendants. The defendants pleaded guilty to violating federal railroad freight tariff regulations. In lieu of paying the maximum fine of $20,000 per count, the defendants were given the option of paying $1,000 per count in addition to fulfilling the terms of probation. The probation order required, among other things, that each defendant loan a corporate executive to the National Alliance for Business for one year to assist in the development of a Community Alliance Program for Ex-Offenders (CAPE), and that each defendant contribute $10,000 per offense to the CAPE program.

In affirming these probation conditions, the Ninth Circuit refused to consider the defendant's objections that the probation conditions were more punitive than the maximum fines. Rather, the court acknowledged the problem of designing probation terms for corporate criminal defendants. The Ninth Circuit compared the sentencing process for individual defendants and corporate defendants and concluded that a stricter standard of review should be applied when reviewing the probation conditions of an individual defendant. The court placed special emphasis on the fact that corporate defendants, unlike individuals, are never faced with the possibility of incarceration for criminal acts. An individual will almost certainly accept "arguably impermissible" probation conditions in order to avoid going to prison; the corporate defendant, on the other hand, has an actual alternative because it can elect to pay the fines or accept the probation conditions.

4299. The Elkins Act, 49 U.S.C. §§ 11903 and 11915 (Supp. V 1981), prohibits a corporation from paying less than the required tariff rates for rail shipments. Mitsubishi International Corporation pleaded guilty to nine of twenty-seven counts, Union Pacific Railroad to five of eighteen counts, and Burlington Northern, Inc. to three of nine counts. 677 F.2d at 786.

4300. 677 F.2d at 787. The probation order also required that the defendants obey all local, state, and federal laws. The maximum fines imposed by the court totaled $180,000 for Mitsubishi, $100,000 for Union Pacific, and $60,000 for Burlington Northern. The amount required to fulfill probation, however, was only $1,000 per count, and an additional $90,000 for Mitsubishi, $50,000 for Union Pacific, and $30,000 for Burlington Northern.

4301. Id. at 788.

4302. Id.

4303. Id. The court stated that the probation sentence of an individual defendant should be "subject to careful review." Id. On the other hand, when corporate defendants are involved, the court may merely inquire whether the fines imposed under probation fall within the statutory limits. Id. at 789.

4304. Id. at 788. An individual convicted of the same crime as the corporate defendants in Mitsubishi could be sentenced to two years in prison, in addition to the $20,000 fine. 49 U.S.C. § 11903 (Supp. V 1981).

4305. 677 F.2d at 788-89.
In response to the defendants' contention that the probation terms were more punitive than the maximum fines, the *Mitsubishi* court found that the fines were within the statutory limits.\footnote{4306. *Id.* at 788.} In addition, the court pointed out that if the defendants thought the probation conditions were more punitive than the fines, they had the option to pay the fines.\footnote{4307. *Id.* at 789.}

It appears that both the district court and the Ninth Circuit were aware that the probation terms were fairly harsh. However, they recognized that some corporate defendants can “afford” to violate laws because the penalties they face have no deterrent effect.\footnote{4308. *Id.* at 788. The court noted the trial court's concern that large corporate defendants could “just write a check and walk away.” *Id.*} In response to this situation, some courts have attempted to form what the Ninth Circuit termed “unique and creative terms of probation.”\footnote{4309. *Id.* This creativity, of course, must not result in an overall increase of the maximum sentence. *Cf.* United States v. Atlantic Richfield Co., 465 F.2d 58, 61 (7th Cir. 1972) (oil company convicted of discharging oil into navigable waters given unreasonable probation term which required defendant to create a program to handle oil spillage).}

In *United States v. Wolters*,\footnote{4310. 656 F.2d 523 (9th Cir. 1981).} the Ninth Circuit held that a probation condition requiring the probationer to file past and future tax returns is not a violation of the probationer’s fifth amendment rights. The defendant had failed to file a federal income tax return for 1973, a violation of 26 U.S.C. section 7203,\footnote{4311. *Id.* at 524. 26 U.S.C. § 7203 (1976) provides in pertinent part: “[a]ny person required under this title to... make a return... who willfully fails to... make such return... shall... be guilty of a misdemeanor.”} claiming that to do so would have violated his fifth amendment right against self-incrimination. The defendant was convicted and his probation order required that he file all past and future tax returns. On appeal, the defendant claimed that such a probation condition violated his fifth amendment right against self-incrimination.\footnote{4312. 656 F.2d at 524.}

The Ninth Circuit dismissed the defendant's argument, ruling that “unless there is something peculiarly incriminating” about the defendant's refusal to file an income tax return, no right to refuse on the basis of self-incrimination exists. Similarly, filing a tax return is not, of itself, an incriminating act.\footnote{4313. *Id.* at 525.} The court noted that there must be some specific indication that the act could lead to self-incrimination.\footnote{4314. *Id.* The Wolters court relied on the Ninth Circuit ruling in United States v. Pierce, 561 F.2d at 741. In *Pierce*, the Ninth Circuit ruled that fifth amendment protection is per-
In *Phillips v. United States*, the Ninth Circuit upheld a restitution order when the defendant consented to the amount to be repaid. Phillips was charged with twenty-six counts of mail fraud and the use of a fictitious scheme to defraud. Phillips entered guilty pleas on three of the twenty-six counts. He was sentenced to two concurrent one-year prison terms on the first two counts, placed on five years probation on the third count, and ordered to make $6,000 restitution. The three counts on which Phillips entered guilty pleas did not indicate how much money he obtained from each crime. Phillips argued that the restitution order was invalid because it required him to make restitution for counts upon which conviction was not obtained, a violation of section 3651 of the Federal Probation Act. The trial court disagreed with the defendant's argument.

The Ninth Circuit affirmed the trial court's ruling. The court acknowledged that the Ninth Circuit prohibits a sentencing court from ordering restitution as a probation condition for amounts upon which a conviction has not been obtained. The *Phillips* court, however, viewed section 3651 of the Federal Probation Act broadly to allow a

mitted in reference to specific questions, not in a “blanket refusal to answer any questions.”

*Id.*

4315. 679 F.2d 192 (9th Cir. 1982).


4318. 679 F.2d at 193.

4319. *Id.* at 194. At the guilty plea proceedings, Phillips agreed with the trial judge's proposal that the probation department could set restitution, and that the department would not be bound by any amounts set forth in the indictments on the three counts. The department then set restitution at $6,000. After the sentencing, Phillips signed a stipulation agreeing to pay the sum in monthly payments of $100. *Id.* The dismissed counts of the indictment apparently indicated that Phillips had obtained $1,856 for acts contained in the dismissed counts. *Id.* at 193 n.1. The probation report, however, indicated that he received $59,195 from the overall scheme. *Id.* at 193.

4320. *Id.* at 194. 18 U.S.C. § 3651 (1976) provides that a defendant “may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had.” (emphasis added).

4321. 679 F.2d at 194.

4322. *Id.*

4323. *Id.* (citing *Karrell v. United States*, 181 F.2d 981, 986-87 (9th Cir.) (defendant charged with defrauding seventeen veterans could only be ordered to make restitution to six veterans because convictions were only obtained on six counts of indictment), *cert. denied, 340 U.S. 891 (1950).* *See also United States v. Buechler, 557 F.2d 1002, 1007-08 & n.10 (3d Cir. 1977)* (sentencing court could only order restitution of amount for which defendant was indicted and convicted; left open was the question of permissibility of restitution order to which defendant consents even though the amount exceeds that mentioned in the count to which guilty plea has been entered).
defendant's consent to restitution in a plea agreement, even though the counts in the plea agreement do not specify a definite monetary amount. The court found that, as long as the plea agreement is "fully explored in open court" and the defendant signs the restitution agreement, the defendant should be bound by that agreement.\textsuperscript{4324} The underlying rehabilitative purpose of probation and restitution would be severely undermined if a defendant could be allowed to avoid complying with a restitution order to which he voluntarily consents.\textsuperscript{4325}

In addition, the \textit{Phillips} court approved the district court's broad interpretation of the term "offense" in section 3651. The district court analogized the offense of mail fraud to a continuing conspiracy to defraud, concluding that a defendant could be ordered to make restitution for losses caused from the entire scheme, not just one isolated act.\textsuperscript{4326}

These cases demonstrate that the Ninth Circuit will defer to a district court's determination regarding probation conditions, provided the conditions imposed appear reasonably related to the rehabilitative

\textsuperscript{4324} 679 F.2d at 194.
\textsuperscript{4325} Id. at 195. The \textit{Phillips} court adopted the reasoning of the district court in United States v. McLaughlin, 512 F. Supp. 907 (D. Md. 1981). In \textit{McLaughlin}, a defendant was ordered to make restitution for the entire amount mentioned in a five-count embezzlement indictment where the defendant entered a guilty plea on one count and agreed to pay the full amount. In considering the defendant's claim that the restitution order violated the Federal Probation Act, the \textit{McLaughlin} court stated:

First, plea-bargaining in situations involving multiconth indictments would be severely restricted. If a defendant could not consent to make restitution for the actual loss caused by his or her conduct relating to the indictment, and have such be a condition of any probation he or she might receive, then the government would have little reason to dismiss indictment counts in order to limit a defendant's potential period of incarceration. More importantly, however, it would frustrate the rehabilitation goals of the probation system . . . . The primary purpose of restitution as a condition of probation is to foster, in a direct way, a defendant's acceptance of responsibility for his or her unlawful actions. To permit a defendant who freely admits his or her guilt, and the amount of loss caused thereby, to avoid making the aggrieved party at least economically whole is intolerable from a societal perspective.

512 F. Supp. at 912.
\textsuperscript{4326} 679 F.2d at 195. The Ninth Circuit relied on the reasoning of the Second Circuit in United States v. Tiler, 602 F.2d 30 (2d Cir. 1979). The \textit{Tiler} court upheld a restitution order which was issued after the defendants entered a guilty plea on one conspiracy count in a thirteen count indictment, but where the trial court ordered defendants to make restitution for the amount of money lost from the entire conspiracy. \textit{Id.} at 34. \textit{See also} United States v. Landay, 513 F.2d 306, 308 (5th Cir. 1975) (defendant convicted of three counts of securities forgery ordered to make restitution of all money listed in civil consent judgment even though amount was greater than that mentioned in three criminal counts); United States v. Taylor, 305 F.2d 183, 187 (4th Cir. 1962) (defendant convicted of tax fraud for 1956 and 1957 properly ordered to pay restitution for taxes not paid from 1952 to 1960 because defendant admitted such liability), \textit{cert. denied}, 371 U.S. 894 (1962).
principles of the Federal Probation Act, and do not violate federal constitutional principles and statutory requirements. Furthermore, it appears that the Ninth Circuit will conduct a less rigorous review of the probation conditions of corporate criminal defendants, allowing a fairly large degree of flexibility to district courts handling such cases.

3. Juveniles

In United States v. Gonzalez-Cervantes, the Ninth Circuit interpreted the language of 18 U.S.C. section 5037(b), which governs the probation terms of juvenile offenders. In Gonzalez-Cervantes two defendants were adjudged juvenile delinquents because they were held to have illegally entered the United States. The district court sentenced one defendant to one year of probation, while the other defendant received a probation term of approximately four years, until he reached twenty-one years of age.

The sentencing statute for juvenile delinquents provides that probation shall not last beyond the juvenile's twenty-first birthday and not exceed the maximum term for an adult convicted of the same offense. The defendants urged the court to find that the phrase "maximum term" means the maximum prison term of an adult. Because an adult can be imprisoned for only six months for illegal entry, the defendants argued that the maximum probation sentence for a juvenile was only six months. The Ninth Circuit rejected the defendants' contention, stating that the "plain meaning" of section 5037 is that a juvenile could be given a probation term no greater than the maximum probation term for an adult, which in this situation is five years. Similarly, a juvenile's term of imprisonment could be no greater than

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4327. 668 F.2d 1073 (9th Cir. 1981).
4328. 18 U.S.C. § 5037(b) (1976) states in pertinent part: "Probation . . . shall not extend beyond the juvenile's twenty-first birthday and the maximum term which could have been imposed on an adult convicted of the same offense, whichever is sooner . . . ."
4329. 668 F.2d at 1075. A juvenile is adjudged delinquent if he violates a law "which would have been a crime if committed by an adult." 18 U.S.C. § 5031 (1976).
4330. 668 F.2d at 1075. 8 U.S.C. § 1325 (1976) provides: "Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry into the United States by a willfully false or misleading representation . . . shall . . . be guilty of a misdemeanor . . . ."
4331. 688 F.2d at 1075.
4334. 668 F.2d at 1076.
the prison term of an adult.\textsuperscript{4336}

\textbf{E. Habeas Corpus}

1. Grounds for the writ

The Supreme Court has held that limited review should be exercised by the federal judiciary under a writ of habeas corpus when reviewing the state fact finding process.\textsuperscript{4337} Nevertheless, the Court has acknowledged that habeas corpus relief is available when trial proceedings are so fundamentally unfair that there is a violation of the Constitution.\textsuperscript{4338} The cases show that defendants will assert a variety of constitutional violations as grounds for obtaining habeas relief. These grounds include: denial of peremptory challenges as an essential element of the right to trial by jury, voluntariness of confessions, and proper use of presentence reports. Often, such assertions are part of an effort to show that a defendant's sixth amendment rights were violated by ineffective representation of counsel.\textsuperscript{4339} In several recent Ninth

\footnotesize
\begin{itemize}
  \item \textsuperscript{4336} 668 F.2d at 1076. The court further found that both juveniles were properly tried before district court judges rather than magistrates, even though both consented under Magistrate Rule 2(c) to a magistrate trial. \textit{Id.} at 1075-76. The magistrates assigned to the juveniles' cases both declined to hear them, and transferred them to district court. The defendants contended that once consent under Rule 2(c) was given, magistrate jurisdiction was mandatory. \textit{Id.} at 1075. The Ninth Circuit held that Rule 2(c) only applied to criminal proceedings, and since proceedings against juvenile delinquents are civil in nature, Rule 2(c) was not applicable here. \textit{Id.} at 1076.
  \item In separate concurrences, Judges Boochever and Thompson expressed the view that it was unnecessary for the Ninth Circuit to consider whether a juvenile delinquent has the right to insist on a hearing before a magistrate. \textit{Id.} at 1078-79. Judge Thompson pointed out that a magistrate's authority to hear a case is controlled entirely by the district courts under 18 U.S.C. § 3401(f) and therefore, the district court has discretion to order a trial in a district court, regardless of whether the juvenile consents to have a magistrate hear the case. 668 F.2d at 1079.
  \item In a similar decision later in the term, the Ninth Circuit followed Gonzalez-Cervantes, ruling that a sixteen-year-old boy also adjudged delinquent for illegal entry was properly given three years probation under 18 U.S.C. § 5037(b). United States v. Lopez-Garcia, 683 F.2d 1226, 1229 (9th Cir. 1982) (per curiam), \textit{cert. denied}, 103 S. Ct. 822 (1983). In Lopez-Garcia, the juvenile raised the identical argument addressed in Gonzalez-Cervantes, that his probation term could last only as long as the maximum period for incarceration of an adult. The Ninth Circuit rejected the contention, ruling that Gonzalez-Cervantes controlled. 683 F.2d at 1229.
  \item \textsuperscript{4337} Sumner v. Mata, 449 U.S. 539 (1981).
  \item \textsuperscript{4338} \textit{Id.} at 544-45.
  \item \textsuperscript{4339} The sixth amendment of the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."
  \item Whether right to counsel is demanded under the sixth amendment or the due process clause of the fifth or fourteenth amendments, the representation by counsel must be effective and competent. \textit{See, e.g.,} McMann v. Richardson, 397 U.S. 759, 771 (1970) (defendants
Circuit decisions, the dimensions of these rights were considered in relation to petitions for the habeas writ.

In *Hines v. Enomoto*, the Court of Appeals for the Ninth Circuit considered a section 2254 petition which claimed several grounds for relief. Most important, in the court's opinion, was the issue raised by the failure of defendant's trial attorney to exercise all available peremptory challenges. The court discussed the "widely held belief that peremptory challenge is a necessary part of trial by jury." Because the denial of peremptories was viewed by the court as a potential hindrance to the fairness of the trial, it held that the petitioner stated a claim for federal habeas relief. In doing so, the court

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facing felony charges are entitled to the effective assistance of competent counsel); *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (sixth amendment guarantee made obligatory upon the states by the due process clause of the fourteenth amendment); *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (en banc) (persons accused of crime must be afforded reasonably competent and effective representation), *cert. denied*, 440 U.S. 974 (1979). In *McMann*, Justice White enunciated the standard that criminal defendants are "entitled to the effective assistance of... counsel acting... within the range of competence demanded of attorneys in criminal cases." 397 U.S. at 771. Recognizing that an infinite variety of factual situations arise in this context, Justice White concluded, "Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts." *Id.*

4340. 658 F.2d 667 (9th Cir. 1981).

4341. The defendant was convicted in the state court on charges of kidnapping for the purpose of robbery, assault with a deadly weapon, and attempted robbery. His habeas petitions were denied at the state level and his section 2254 petition was denied by the district court. The defendant raised the following issues on appeal:

1. Denial of his right to exercise all of the peremptory challenges to which he was entitled under California law;
2. Ineffective assistance of counsel;
3. Subornation of perjury;
4. The sufficiency of the evidence to prove intent to rob;
5. The refusal to provide him with a free preliminary hearing transcript on his state appeal;
6. Violation of his right to self-representation on appeal; and
7. The dismissal of his federal habeas petition without an evidentiary hearing.

658 F.2d at 670-71.

4342. *Id.* at 671. The record indicated that the trial court restricted defendant's counsel to 13 of a possible 26 peremptory challenges. It was unclear whether the failure of counsel to object to the cutoff was deliberate or inadvertent. Hence, the court of appeals remanded the case for an evidentiary hearing on the issue of the attorney's reason for failing to object. *Id.* at 674.

4343. *Id.* at 672 (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (denial or impairment of the peremptory right is reversible error)).

4344. 658 F.2d at 672. The dissenting argument is persuasive. *Id.* at 677 (Norris, J., dissenting). It points out that while peremptory challenges are important, they are neither constitutionally guaranteed nor required. *Id.* at 678. Moreover, the dissent argues that if the majority could find a state requirement of 10 peremptory challenges constitutionally acceptable, then what is the failing in petitioner's receipt of 13 peremptories in the instant case. *Id.* at 679.
rejected the only case that dealt with the same question.4345

The “presumption of correctness” of state factual determinations held to be crucial in Sumner v. Mata, was acknowledged in Fritchie v. McCarthy.4346 In Fritchie, the defendant claimed that he was deprived of his sixth amendment right to effective assistance of counsel because the public defender representing him failed to present a defense on the basis of diminished capacity.4347 There was significant evidence to show that Fritchie had serious psychological problems. The murder was particularly malicious and the defendant had a history of chronic schizophrenia. Nevertheless, the Ninth Circuit rejected the petition, finding that defendant's counsel made a tactical choice to attempt to persuade the jury that another party had perpetrated the murder.4348 According to counsel, the diminished capacity defense would have undermined this strategy.4349 The Fritchie court held that this choice, "was not so unreasonable as to constitute denial of a constitutional right to effective assistance of counsel."4350

In cases involving the issue of ineffective representation of counsel, there must be a showing that the defendant suffered prejudice as a re-

4345. Id. at 672. Workman v. Cardwell, 471 F.2d 909 (6th Cir. 1972), cert. denied, 412 U.S. 932 (1973). The Workman court affirmed the district court in its holding that limitations on the number of peremptory challenges are a matter of state law and thus, not grounds for habeas relief. The Hines court said that it could not agree with any suggestion in Workman that denial of the right to exercise a full allotment of challenges can never be recognized as a ground for federal habeas relief. Hines, 658 F.2d at 672.

4346. 664 F.2d 208 (9th Cir. 1981). In considering Fritchie's contention that his murder confession was involuntary and thus inadmissible, the Ninth Circuit cited Sumner v. Mata, 449 U.S. 539 (1981), and emphasized the limited scope of review permitted by the habeas petition. Fritchie, 664 F.2d at 213. Fritchie's petition did not allege any wrongdoing by police in obtaining the confession. He claimed it was involuntary because it was made while he was insane. An extensive pretrial suppression hearing was held where the state court found that the confession was made voluntarily. The Ninth Circuit found that the judgment was supported by the record. Id. at 214.

4347. Id. at 210.
4348. Id. at 215.
4349. Id.
4350. Id. (citations omitted). The Fritchie court applied the standard enunciated by the Ninth Circuit in Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979). In Cooper, the rule was established that a state conviction may be invalidated through federal habeas corpus upon a finding that the defendant was deprived of a reasonably effective and competent representation and that he was prejudiced thereby. In Fritchie, the Ninth Circuit found that the defendant's counsel was a “vigorous and thorough advocate” and that he had fully studied the diminished capacity defense while choosing a defense strategy. Fritchie, 664 F.2d at 214. See also United States v. Stern, 519 F.2d 521, 524 (9th Cir.) (counsel's failure to raise insanity defense was not inadequate representation where primary defense was based on theory of reliance on advice of tax attorney), cert. denied, 423 U.S. 1033 (1975).
result of the attorney's actions. The decision in *Cooks v. Spalding* affirmed this requirement. The defendant's attorney waived his right to a twelve-person jury, instead requesting a six-person jury. After the guilty verdict, the defendant claimed that he was denied due process by the attorney's decision. The Ninth Circuit found that waiver of a twelve-person jury does not constitute a "fundamentally unfair trial." The court pointed out that such a decision is a tactical one since there are both advantages and disadvantages associated with a smaller jury.

Another Ninth Circuit case, *Brown v. United States*, presented a more complex set of circumstances. In *Brown*, the defendant sought to have his sentence vacated under 28 U.S.C. section 2255 on the ground of ineffective assistance of counsel. Specifically, the defendant asserted that unknown to him, his trial attorney had been simultaneously representing a DEA agent who had testified against him at trial. Both the district and appeals courts found an insufficient showing of prejudice, but the Supreme Court remanded the case for further consideration in light of *Cuyler v. Sullivan*.

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4351. The leading Supreme Court case on point is *Chambers v. Maroney*, 399 U.S. 42 (1970) (counsel’s failure to object to admission of evidence ruled harmless error; dismissal of defendant’s habeas petition for lack of prejudice). See *Cooper v. Fitzharris*, 586 F.2d 1325, 1331 (9th Cir. 1978) (counsel’s failure to move to suppress fruits of warrantless searches not prejudicial), cert. denied, 440 U.S. 974 (1979).

4352. 660 F.2d 738 (9th Cir. 1981) (per curiam), cert. denied, 455 U.S. 1026 (1982).

4353. *Id.* at 739.

4354. *Id.*

4355. *Id.* The *Cooks* court referred to United States ex rel. *Burnett v. Illinois*, 619 F.2d 668, 673 (7th Cir.), cert. denied, 449 U.S. 880 (1980). In *Burnett*, the Seventh Circuit held that counsel’s waiver of a 12-person jury did not constitute an arbitrary or fundamentally unfair trial. Thus, the Ninth Circuit found no deprivation of due process in the instant case.


4357. 665 F.2d 271 (9th Cir. 1982).

4358. Section 2255 provides in part:

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


4360. 446 U.S. 335 (1980). In *Cuyler*, the Court determined at the outset that the Third Circuit did not exceed the proper scope of review under 28 U.S.C. § 2254(d) when it rejected the Pennsylvania Supreme Court’s conclusion that two defense lawyers had not undertaken multiple representation. This determination was reached because the state court’s conclusion was a mixed determination of law and fact not covered by § 2254(d), which provides
On a second appeal, the Ninth Circuit attempted to distinguish the "actual prejudice" test from the inquiry required by Cuyler.\textsuperscript{4361} The test, as stated in Cuyler, is whether the conflict of interest adversely affected the performance of Brown's attorney. The Brown court was concerned about distractions from the focus required by a Cuyler inquiry; namely, whether there is any adverse impact on counsel's performance resulting from a conflict of interest.\textsuperscript{4362} The Ninth Circuit remanded the case to give the trial judge the opportunity to determine whether defense counsel's conflict of interest had a detrimental effect on his performance.\textsuperscript{4363}

There was a finding of prejudice to the defendant in \textit{United States v. Donn}\textsuperscript{4364} where counsel failed to show his client a presentence report.\textsuperscript{4365} This omission was significant because the defendant's allega-

\textsuperscript{4361} Id. at 272. The "actual prejudice" test was formulated in Cooper v. Fitzharris, 586 F.2d at 1331. To demonstrate ineffective assistance of counsel, counsel's errors alone are not sufficient. Relief will be granted only if it appears that defendant was prejudiced by his attorney's conduct.

\textsuperscript{4362} Id. The concurring opinion in Brown helps shed light on the Ninth Circuit's concerns. In finding that the conflict of interest did not adversely affect counsel's performance, the district judge apparently placed too much emphasis on the strength of the prosecution's case and allowed that factor to enter into his determination regarding defense counsel's performance. The concurring opinion stated: "To satisfy Cuyler, the district court must determine whether the appellant's attorney refrained from a more vigorous cross-examination of the D.E.A. agent because of his divided loyalties, and, if so, whether the appellant's representation would have benefited even marginally from a more aggressive cross-examination." Id. at 273. Thus, the Brown court recognized that Cuyler required a different inquiry than the "actual prejudice" test of Cooper v. Fitzharris; Brown v. United States, 665 F.2d at 272.

\textsuperscript{4363} Id. at 272-73. See United States v. Hearst, 638 F.2d 1190 (9th Cir.), cert. denied, 451 U.S. 938 (1980). During defendant Hearst's defense, trial counsel F. Lee Bailey contracted to write a book about the trial, thus raising questions of potential or actual conflict of interest. The district court denied a hearing on the merits on the grounds that Bailey's tactical decisions were reasonable. The Ninth Circuit reversed and required the district court to apply the Cuyler test to the facts. The Hearst court stated that: "We read [Cuyler v.] Sullivan to define an actual, as opposed to a potential, conflict as one which in fact adversely affects the lawyer's performance." Id. at 1194.

\textsuperscript{4364} 661 F.2d 820 (9th Cir. 1981).

\textsuperscript{4365} Defendant Donn also asserted that ineffective assistance of counsel consisted of counsel's failure to fully discuss the merits of the case with Donn, inadequate investigation of the case, and not informing Donn that intoxication might be a defense. The court suggested that the claims could be meritorious and were thus worthy of a factual determination.
tions and supporting documentation on appeal suggested that the presentence report was inaccurate and misleading.\textsuperscript{4366} Moreover, the court felt there was insufficient evidence on the record to show petitioner's motion to be without merit. Since the district court had not even acknowledged that the defendant had raised the ineffective assistance issue, the case was remanded for a hearing on defendant's claim.\textsuperscript{4367}

2. Exhaustion of state remedies

It has long been held by the Supreme Court that the "exhaustion doctrine" in habeas corpus proceedings requires that federal courts not consider a claim until the state courts have had an opportunity to act. In \textit{Ex parte Hawk},\textsuperscript{4368} the Court reiterated that comity was the basis for the exhaustion doctrine by stating that "it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist.'"\textsuperscript{4369} None of the early cases, however, applied the exhaustion doctrine to habeas petitions containing both exhausted and unexhausted claims.

In \textit{Rose v. Lundy},\textsuperscript{4370} the United States Supreme Court adopted the total exhaustion rule, requiring a federal district court to dismiss a petition for writ of habeas corpus when it contains claims that have not been exhausted in the state courts.\textsuperscript{4371} At issue in the petition were charges of prosecutorial misconduct. However, the district court considered instances of misconduct that were never challenged in the state courts or raised in the habeas petition itself. The court, in granting the writ, concluded that the defendant did not receive a fair trial because his sixth amendment rights were violated and the jury was "poisoned" by the prosecutorial misconduct. This judgment was affirmed by the

\textsuperscript{4366} 661 F.2d at 824.
\textsuperscript{4367} \textit{Id.} at 825.
\textsuperscript{4368} 321 U.S. 114, 117 (1944).
\textsuperscript{4369} \textit{Id.} at 117.
\textsuperscript{4370} 455 U.S. 509 (1982).
\textsuperscript{4371} \textit{Id.} at 522. Justice O'Connor delivered the opinion of the Court for Parts I, II, III-A, III-B, and IV. She also authored III-C and concluded that the total exhaustion rule would not impair the prisoner's interest in obtaining speedy federal relief. The prisoner can always amend the petition to delete the unexhausted claims, rather than return to state court to exhaust all his claims. However, this involves the risk of forfeiting consideration of his unexhausted claims in federal court. \textit{Id.} at 520. Only Justices Burger, Powell, and Rehnquist joined this portion of her opinion.
Sixth Circuit.\textsuperscript{4372}

In response to the petitioner's arguments, the Supreme Court considered the parameters of the "exhaustion doctrine."\textsuperscript{4373} In doing so, the Court pointed out that 28 U.S.C. section 2254, which codified the exhaustion doctrine, does not directly address the problem of mixed petitions, petitions containing both exhausted and unexhausted claims.\textsuperscript{4374} Moreover, the Court pointed to the division among the circuits on the issue.\textsuperscript{4375}

The Court opted for strict enforcement of the exhaustion requirement holding that a district court must dismiss habeas petitions containing both exhausted and unexhausted claims.\textsuperscript{4376} The Court reasoned that such an approach would protect the state court's role in enforcement of federal law and clarify federal review of habeas petitions.\textsuperscript{4377}

\textsuperscript{4372} \textit{Id.} at 513. Moreover, the Court of Appeals for the Sixth Circuit specifically rejected the State's argument that the district court should have dismissed the petition because it included both exhausted and unexhausted claims. \textit{Id.}

\textsuperscript{4373} The "exhaustion doctrine" has its roots as far back as \textit{Ex parte Royall}, 117 U.S. 241 (1886). In that case the Court held that federal courts should not consider a habeas corpus claim until after state courts have an opportunity to act. As it developed, the doctrine provided that state remedies should be exhausted before federal courts could intervene. \textit{See, e.g., United States ex rel. Kennedy v. Tyler}, 269 U.S. 13, 17-19 (1925).

\textsuperscript{4374} \textit{Id.} at 516. 28 U.S.C. § 2254 (1976) provides in pertinent part: "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state . . . ."

\textsuperscript{4375} \textit{Id.} at 513-14 & n.5. The Court mentioned that the Ninth Circuit has adopted a "total exhaustion" rule which requires district courts to dismiss every habeas corpus petition that contains both exhausted and unexhausted claims. \textit{See} Gonzales v. Stone, 546 F.2d 807, 808-10 (9th Cir. 1976). This position was affirmed by the Fifth Circuit in Galtieri v. Wainwright, 582 F.2d 348, 355-60 (5th Cir. 1978) (en banc). "A majority of the Courts of Appeals, however, have permitted the District Courts to review the exhausted claims in a mixed petition containing both exhausted and unexhausted claims." \textit{Id.} (citing Katz v. King, 627 F.2d 568, 574 (1st Cir. 1980); Cameron v. Fastoff, 543 F.2d 971, 976 (2d Cir. 1976); United States ex rel. Trantino v. Hatrack, 563 F.2d 86, 91-95 (3d Cir. 1977), cert. denied, 435 U.S. 928 (1978); Hewett v. North Carolina, 415 F.2d 1316, 1320 (4th Cir. 1969); Meeks v. Jago, 548 F.2d 134, 137 (6th Cir. 1976), cert. denied, 434 U.S. 844 (1977); Brown v. Wisconsin State Dept. of Public Welfare, 457 F.2d 257, 259 (7th Cir.), cert. denied, 409 U.S. 862 (1972); Tyler v. Swenson, 483 F.2d 611, 614 (8th Cir. 1973); Whiteley v. Meacham, 416 F.2d 36, 39 (10th Cir. 1969), rev'd on other grounds, 401 U.S. 560 (1971)).

\textsuperscript{4376} \textit{Rose}, 455 U.S. at 522.

\textsuperscript{4377} \textit{Id.} at 520. Indeed, the Court observed that the exhaustion doctrine is designed primarily to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings. The Court pointed out that a total exhaustion rule encourages state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. Moreover, the Court reasoned that to the extent that total exhaustion reduces piecemeal litigation, both the courts and the prisoners should benefit. \textit{Id.} at 520-21.
In a concurring opinion, Justice Blackmun expressed his concern that the total exhaustion rule would operate as a trap for the uneducated pro se prisoner-applicant and that it would tend to increase, rather than alleviate the caseload burdens on both state and federal courts.\textsuperscript{4378} Justice White agreed with Justice Blackmun in that he would not require a "mixed" petition to be dismissed in its entirety. Both Justices felt the trial judge should rule on the exhausted claims unless they are intertwined with unexhausted claims which must be dismissed.\textsuperscript{4379}

Harmony between the state and federal systems is often an objective in the decision-making of the federal courts. A federal judge should ordinarily avoid acting in a precipitious manner when the trial

\textsuperscript{4378} Id. at 522.
\textsuperscript{4379} Id. at 531, 538. There was a significant split on the Court regarding disposition of this case. Justice Brennan, joined by Justice Marshall, dissented from Part III-C of the plurality's opinion. Id. at 532 (Brennan, J., dissenting). He objected to the plurality's view expressed in Part III-C that a habeas petitioner must risk forfeiture of his unexhausted claims in federal court if he decides to proceed only with his exhausted claims and sets aside his unexhausted claims. Id. at 532-33. Justice Brennan also felt that the issue of successive petitions addressed by the Court in III-C should have been reserved because it was not among the questions presented by the petitioner. Id. at 533-34.

Justice Stevens also dissented in a separate opinion. Id. at 538 (Stevens, J., dissenting). Although he wrote that the district judge exceeded the proper restraints on the scope of collateral review of state court judgments, he opined that the Court failed to correct the error. Id. at 538-39. Justice Stevens found the rule adopted by the Court inflexible and mechanical. Id. at 542-46. He preferred to allow district judges to exercise discretion to determine whether the presence of an unexhausted claim in a habeas corpus application makes it inappropriate to consider the merits of a properly pleaded exhausted claim. Id. at 547-48. Moreover, he felt the "total exhaustion" rule adopted by the Court demeaned "the high office of the great writ." Id. at 549. He considered the procedural history of a habeas claim to be secondary compared to the issues related to the alleged constitutional violation. Id. at 548.

Ultimately, Justices O'Connor, Powell, Burger, and Rehnquist favored adoption of the "total exhaustion" rule. Justice Blackmun, while concurring in the judgment, disagreed with the Court's analysis. He supported the view of eight of the courts of appeals—that a district court may review the exhausted claims of a mixed petition. Id. at 522. Thus, he rejected the "total exhaustion" approach. Justices Brennan and Marshall agreed with employment of the "total exhaustion" rule, but concluded that when a prisoner's "mixed" habeas petition is dismissed without any review of its claims on the merits, and the prisoner later brings a second petition based on the previously unexhausted claims that had earlier been refused a hearing, then that second petition cannot be dismissed, absent obvious indications of abuse. Id. at 537-38. Justice White agreed with Justice Brennan, but also indicated his agreement with Justice Blackmun's view that a "mixed" petition should not be dismissed in its entirety. Id. at 538.

Justice Stevens considered the Court's adoption of the "total exhaustion" rule as an "adventure in unnecessary lawmaking." Id. at 539. He was particularly concerned that any unexhausted claim asserted in a habeas petition—no matter how frivolous—could require postponement of relief on a meritorious exhausted claim. Id. at 542.
court record is unclear. This principle is illustrated in *Davis v. Morris*.\(^{4380}\) In that case, the defendant challenged the state trial court’s denial of self-representation three years before this right was guaranteed in *Faretta v. California*.\(^{4381}\) Because the record was unclear on the reasons why the trial judge denied the defendant’s motion to represent himself, the Ninth Circuit recommended that the district court should vacate its order denying habeas relief.\(^{4382}\) Moreover, the court remanded the case to “afford the state the opportunity for a hearing as to the reasons that led [the trial judge] to deny Davis’ motions to represent himself.”\(^{4383}\)

When claims are not exhausted at the state level, the district court must determine whether there was cause for and prejudice from the failure to raise them in state court.\(^{4384}\) This was the holding of the Ninth Circuit in *Matias v. Oshiro*.\(^{4385}\) In *Matias*, the defendant added several grounds, not considered in state court, to his federal habeas petition claiming ineffective assistance of counsel.\(^{4386}\) The Ninth Circuit determined that the district court properly found that state law precluded the availability of proceedings to raise the additional claims.\(^{4387}\) Nevertheless, the court said that once this was found, the district court

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\(^{4380}\) 657 F.2d 1104 (9th Cir. 1981).
\(^{4381}\) *Id.* at 1105; see *Faretta v. California*, 422 U.S. 806 (1975); see also infra note 4393.
\(^{4382}\) Davis was convicted in California of two counts of first degree murder and one count of conspiracy to commit murder and robbery. At the outset of his trial he asked to represent himself. The trial judge concluded that Davis was not authorized to waive his constitutional right to representation by counsel. This was the accepted view until *Faretta* which was decided while Davis’ appeal was pending. The court of appeal summarily denied relief on the issue stating that *Faretta* had been held to be nonretroactive by the California Supreme Court. See *People v. McDaniel*, 16 Cal. 3d 156, 545 P.2d 843, 127 Cal. Rptr. 467, cert. denied, 429 U.S. 847 (1976). The conviction was affirmed by the state courts.

Davis filed an application for writ of habeas corpus in district court. He contended that even if *Faretta* was not retroactive, the law of the Ninth Circuit guaranteed the right to self-representation even before *Faretta*. The writ was denied and Davis appealed to the Ninth Circuit.

\(^{4383}\) *Id.* at 1106.

\(^{4384}\) *Id.*. In doing so, the Ninth Circuit refused “to address the broader constitutional question of the retroactivity of *Faretta*.”


\(^{4386}\) 683 F.2d 318 (9th Cir. 1982).

\(^{4387}\) *Id.* at 319. The defendant was convicted of rape by the Hawaiian courts. He sought federal habeas relief claiming ineffective assistance of counsel. Several new grounds were added that were not pled in the state courts. The district court held that the ineffective assistance claim had not been exhausted in the state courts as to the new grounds, and therefore dismissed the petition on those grounds. On the other claims, the district court denied the petition on the merits. The only issue before the Ninth Circuit concerned the new ineffective assistance of counsel claims.

\(^{4387}\) *Id.* at 321.
should have explored the possibilities of whether Matias’ failure to raise the additional grounds in earlier state proceedings was excused under the cause and prejudice standard. If either of these elements were found lacking on remand, the district court could again dismiss the petition.

3. Effect of state court findings

In habeas corpus actions a presumption of correctness is applied to state court factual determinations unless one of the conditions enumerated in 28 U.S.C. section 2254(d) exists. The state court determina-

4388. Id. See supra note 4384.
4389. 683 F.2d at 321. The court observed that Matias’ state remedies were “exhausted.” Thus, his petition did not present issues under the “total exhaustion” rule of Rose v. Lundy, 455 U.S. 509 (1982). The only question on remand was whether Matias’ failure to use state remedies previously available was excused.
4390. In Sumner v. Mata, 449 U.S. 539, 547 (1981), the Supreme Court stated that a federal court exercising habeas corpus jurisdiction must presume the correctness of state court factual determinations. The Court, in an opinion by Justice Rehnquist, vacated and remanded the judgment of the Court of Appeals for the Ninth Circuit which had granted to a defendant a habeas corpus writ because it determined that the Ninth Circuit improperly ignored statutory requirements in its analysis of the defendant’s challenge to his state-court murder conviction. Petitioner, the California Attorney General, asserted that in reaching its decision the Ninth Circuit “failed to observe certain limitations on its authority specifically set forth in 28 U.S.C. § 2254(d).” Id. at 544. The failure of the Ninth Circuit even to refer in its opinion to § 2254(d), which requires in habeas corpus actions deference by a federal court to the factual determinations made by a state court, was discussed at length and with evident distress by the Court. Id. at 547-49.

Section 2254(d) provides:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;
(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or unless that part of the record of the State court proceeding in
tion must be made after a hearing on the merits and evidenced by a reliable and adequate written finding. If none of the statutory factors exist, then the petitioner has the burden of establishing by convincing evidence that the state court's factual determination was erroneous. The Ninth Circuit has applied this rule, espoused by the United States Supreme Court in *Sumner v. Mata*, in several instances.

However, this should not suggest that federal courts are unduly limited in hearing petitions for habeas writs. In recent cases, the Ninth Circuit has considered whether a writ may properly issue where a defendant has requested to represent himself, but the request is denied.

In *Maxwell v. Sumner*, the Ninth Circuit affirmed the district court ruling that the state trial court erred in denying Maxwell's motion to proceed in propria persona. The district court reviewed the state court transcript and found nothing to support the state court's determination that Maxwell's behavior caused him to forfeit his right of self-representation. Thus, the Ninth Circuit affirmed the district court decision to grant a writ of habeas corpus.

which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.


4391. 28 U.S.C. § 2254(d).


4393. These decisions were made in light of Faretta v. California, 422 U.S. 806 (1975). In that case, the Court ruled that the state may not constitutionally deprive a defendant of his right "personally to decide whether in his particular case counsel is to his advantage." *Id.* at 834. The Court held that the state court erred in requiring a defendant to accept a public defender against his will. *Id.* at 836. By doing this, the court deprived him of his "constitutional right to conduct his own defense." *Id.*

4394. 673 F.2d 1031, 1035 (9th Cir.), cert. denied, 103 S. Ct. 313 (1982).

4395. *Id.* at 1033. The district court stated that there was no indication in the record as to what actions caused the state trial court to deny Maxwell's pro se request. *Id.* at 1035. Moreover, there was no evidence that the request would result in undue delay or that the request was untimely. *Id.* at 1036.

4396. *Id.*
Rhinehart v. Gunn\textsuperscript{4397} also involved whether the state court fairly denied the defendant's right to self-representation. However, this case also involved a question of fact related to whether Rhinehart's request was for self-representation or for representation by private counsel. There was some confusion in the record whether Rhinehart's request was "unequivocal."\textsuperscript{4398} The case was remanded to afford the state judge the opportunity to conduct a hearing on the reasons why he denied Rhinehart's request for self-representation.\textsuperscript{4399}

In considering a petition for habeas corpus, a federal district court will review the state court record to determine if the writ is justified. The Ninth Circuit, in Brewer v. Raines,\textsuperscript{4400} could find nothing during its review of the record to overcome the presumption of correctness.\textsuperscript{4401} In Brewer, the petitioner based his constitutional claim on the confrontation clause of the sixth amendment.\textsuperscript{4402} The court, however, held that the petitioner waived his right by his voluntary absence from the trial.\textsuperscript{4403} Moreover, because the defendant was knowingly and voluntar-
rily absent, the court was not precluded from holding the trial.\textsuperscript{4404} The Ninth Circuit found no indication of error in the state court’s determination that Brewer’s absence was voluntary.\textsuperscript{4405}

In \textit{Fritchie v. McCarthy},\textsuperscript{4406} the state trial court’s determination of the voluntariness of the defendant’s confession was fairly supported by the record. The Ninth Circuit held that the defendant failed to meet his burden of proving the state court’s finding of voluntariness to be erroneous, and affirmed the denial of the habeas corpus petition.\textsuperscript{4407}

Federal courts are required to accord a presumption of correctness to findings of historical fact by the state courts, but they are not required to do so where there are mixed questions of law and fact. Where the basic historical facts of a case also give rise to questions of law, the application of legal principles to such facts is open to collateral attack in federal court.\textsuperscript{4408} In either event, the federal court must hold an independent hearing to review the state court record; this was the holding in \textit{Pierre v. Thompson}.\textsuperscript{4409} The controversy in \textit{Pierre} concerned a broken plea agreement.\textsuperscript{4410} The Ninth Circuit held that the district judge correctly decided that it was within the state court’s discretion to decide which remedy should be applied for the broken plea agreement.\textsuperscript{4411} However, it remanded the case because the district court failed to examine the record of the state trial court in reaching its deci-

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\textsuperscript{4404} 670 F.2d at 119. The court also noted that whether the defendant’s absence began before or after trial commenced made no difference. \textit{Id.}

\textsuperscript{4405} \textit{Id.} at 120.

\textsuperscript{4406} 664 F.2d 208, 214 (9th Cir. 1981).

\textsuperscript{4407} \textit{Id.} at 213. Fritchie claimed that his murder confession was involuntary because it was made while he was insane. \textit{Id.} at 212. He admitted there was no coercion involved. \textit{Id.}

\textsuperscript{4408} There was an extensive pretrial suppression hearing which focused on the defendant’s mental state at the time of the confession. \textit{Id.} at 213. There were no allegations of improper conduct by the Florida police in obtaining the confession. \textit{Id.} at 212. Thus, the central issue concerned whether Fritchie’s mental health precluded his confession from being the “product of any meaningful act of volition.” \textit{Id.} at 213 (quoting \textit{Blackburn v. Alabama}, 361 U.S. 199, 211 (1960)).

\textsuperscript{4409} 666 F.2d 424, 427-28 (9th Cir. 1982).

\textsuperscript{4410} \textit{Id.} at 426. The defendant pled guilty to robbery pursuant to an agreement whereby the prosecutor agreed to dismiss allegations that, at the time of the robberies, the defendant was armed. There was no dispute that the guilty plea was entered with the understanding that under the agreement the defendant would not be subjected to a mandatory minimum prison sentence. Nevertheless, the trial court recited in the judgment and sentence that appellant was armed at the time of each offense. The sentence was prescribed according to this finding. \textit{Id.}

\textsuperscript{4411} \textit{Id.} at 427.
sion to deny the petition for habeas corpus.\textsuperscript{4412} Because the district court in \textit{Pierre} had been faced with a determination of whether the defendant's modified sentence was within the terms of the plea agreement, which entailed application of a constitutional standard to historical facts, the Ninth Circuit held that it was a mixed question of law and fact and properly the subject of an independent determination by the federal court.\textsuperscript{4413}

Where material facts are not adequately developed in state court, no deference is warranted in a federal habeas proceeding.\textsuperscript{4414} This rule was applied by the Ninth Circuit in \textit{Fritz v. Spalding},\textsuperscript{4415} in which the defendant asserted his \textit{Faretta} right to self-representation immediately prior to the beginning of trial proceedings.\textsuperscript{4416} The Ninth Circuit ruled that a motion to proceed pro se is timely if made before the jury is

\textsuperscript{4412} \textit{Id.} at 427-28. "[I]t must be kept in mind that this is only a presumption and in order to review the factual determination and apply the presumption, a review of the record of state courts or an independent hearing by the district court is required." \textit{Id.} at 427.

\textsuperscript{4413} \textit{Id.} at 428. The constitutional right which formed the basis of the defendant's petition for habeas corpus was established in \textit{Santobello v. New York}, 404 U.S. 257 (1971), which held that a criminal defendant is deprived of a constitutional right if the prosecutor in a plea bargain agreement does not keep his promise. In \textit{Santobello}, the Court said: "The ultimate relief to which petitioner is entitled we leave to the discretion of the state court . . ." In other cases it has been said that the defendant may be allowed to withdraw his plea, United States v. Hammerman, 528 F.2d 326 (4th Cir. 1975); Grant v. State of Wisconsin, 450 F. Supp. 575 (E.D. Wis. 1978), or the broken plea bargain may be specifically enforced, Bercheny v. Johnson, 633 F.2d 473 (6th Cir. 1980). Even though these remedies are available, the question remains whether the district court should rely upon the finding of the state appellate court or whether the relief awarded to the defendant is adequate. Indeed, that was the issue in \textit{Pierre}. The Ninth Circuit held that the district judge was correct in his determination that it was within the state court's discretion to decide which remedy should be awarded. 666 F.2d at 427.


\textsuperscript{4415} 682 F.2d 782 (9th Cir. 1982).

\textsuperscript{4416} \textit{Id.} at 784. Fritz was charged by the state of Washington with armed robbery. \textit{Id.} at 783. He jumped bail but was rearrested over a year later. \textit{Id.} Four days before the scheduled trial, Fritz's attorney moved to withdraw as counsel on the grounds that he and his client could not agree on a defense strategy. \textit{Id.} The motion was granted, a public defender was appointed, and the trial was rescheduled. \textit{Id.} Thirty days before the second trial, Fritz moved to represent himself, asserting that the public defender and not begun to prepare a defense. \textit{Id.} After meeting with his attorney, Fritz withdrew the motion. \textit{Id.} On the morning of the afternoon trial, the public defender moved to withdraw as counsel and to allow Fritz to represent himself. \textit{Id.} He cited fundamental differences in strategy as the reason for the motion. The trial judge denied the motion on the ground that Fritz was not competent to act as his own counsel. \textit{Id.} at 784. The Washington Court of Appeals held that Fritz was competent, but affirmed denial of his motion on the ground that it was a delaying tactic. \textit{Id.} Fritz then petitioned for a writ of habeas corpus and moved for an evidentiary hearing. \textit{Id.} A federal magistrate concluded that the motion on the morning of trial was untimely because it would have resulted in delay, and decided that an evidentiary hearing was unnecessary. \textit{Id.} The district court adopted the magistrate's findings and denied habeas relief. \textit{Id.}
empaneled, unless it is shown to be a tactic to cause delay. Since Fritz's motion was made on the morning of an afternoon trial, the court found it timely as a matter of law. Moreover, the court ruled that the district court should conduct an evidentiary hearing as to whether Fritz's motion was a tactic to delay the start of trial. The court held that delay per se is not a sufficient ground for denying the right to self-representation.

4. Independent state grounds

In *Wainwright v. Sykes*, the Supreme Court held that a state prisoner's failure to assert a constitutional claim in the state trial court barred the defendant from litigating that claim in a section 2254 habeas corpus proceeding absent a showing of cause for actual prejudice resulting from defendant's waiver. Since the *Sykes* decision, numerous cases have considered its practical applicability to specific circumstances. The inquiry on appeal will usually involve a determination of whether the defendant proffered his constitutional claim in the state courts and, if not, whether the principles articulated in *Sykes* bar consideration of the claim in a federal habeas proceeding.

Such an inquiry took place in *Engle v. Isaac*. In *Isaac*, three Ohio defendants challenged the constitutionality of an Ohio jury instruction which provided that the defendant has the burden of proving self-defense by a preponderance of the evidence. However, none of

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4417. *Id.* at 784. See Maxwell v. Sumner, 673 F.2d 1031, 1036 (9th Cir. 1982).
4418. 682 F.2d at 784.
4419. *Id.* at 786. The Ninth Circuit acknowledged that any motion on the morning of trial would cause delay, but was concerned that the defendant may have had bona fide reasons for not asserting his right until that time. See United States v. Chapman, 553 F.2d 886, 888-89 (5th Cir. 1977). The court held that there must be an affirmative showing of purpose to secure delay for Fritz's motion in order for it to be properly denied. 682 F.2d at 784.
4420. 682 F.2d at 784.
4422. 28 U.S.C. § 2254(a) (1976) provides that:
   The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
4423. 433 U.S. at 87.
4426. *Id.* at 121. Historically, Ohio courts have required that criminal defendants prove self-defense by a preponderance of the evidence. The provisions of a new criminal code, OHIO REV. CODE ANN. § 2901.05(A) (Page 1975), were interpreted by the Ohio Supreme Court "to place only the burden of production, not the burden of persuasion, on the defend-
the defendants had objected to the instruction when it was given at trial. The federal district courts had denied defendants' writs of habeas corpus which alleged a violation of due process on the basis of the jury instructions.

The Sixth Circuit reversed all three district court orders, on the basis of their conclusion that "Wainwright v. Sykes did not preclude consideration of [defendant] Isaac's constitutional claims." The Supreme Court granted certiorari to review the three cases.

The Court initially decided that because none of the defendants challenged the constitutionality of the self-defense instruction at trial, appellate consideration of the objection was barred. Thus, the issue...
that occupied the Court's attention was "whether respondents may litigate, in a federal habeas proceeding, a constitutional claim that they forfeited before the state courts." 4433

The defendants alleged two causes for their failure to raise their constitutional claims at trial. First, "they could not have known at the time of their trials that the Due Process Clause addresses the burden of proving affirmative defenses." 4434 Second, they contended that it would have been futile to object to the self-defense instruction because it was Ohio's established practice to require defendants to bear the burden of proving self-defense. 4435

The Supreme Court, in an opinion by Justice O'Connor, rejected both theories. It noted that, the mere futility of making an objection in the state courts does not justify a failure to object at trial. 4436 Moreover, the Court was not impressed with defendants' contention that they were not aware of the constitutional claim. 4437 Justice O'Connor pointed to In re Winship, 4438 decided four-and-one-half years before trial, as laying the basis for defendants' claim. 4439 The Court noted numerous decisions where other defendants relied on In re Winship in raising constitutional claims against rules which required defendants to bear a specific burden of proof. 4440 In the interests of comity and finality, the Court refused to accept that alleged unawareness of the objection could provide cause for a procedural default when the basis for the constitutional claim has been established. 4441

The significance of Engle lies in the Supreme Court's deliberate

4433. 456 U.S. at 125.
4434. Id. at 130.
4435. Id.
4436. Id.
4437. Id. at 131.
4439. 456 U.S. at 131. In In re Winship, the Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 364.
4440. 456 U.S. at 131-32 & n.40.
4441. Id. at 134. Justice O'Connor's opinion aroused a stinging dissent by Justice Brennan. Concerning the Court's holding that unawareness of the constitutional claim was not a basis for "cause" under the Sykes standard, Justice Brennan said:

The Court concludes, after several pages of tortuous reasoning, . . . that respondents in the present cases did indeed have "the tools" to make their constitutional claims. This conclusion is reached by the sheerest inference: It is based on citations to other cases in other jurisdictions, where other defendants raised other claims assertedly similar to those that respondents "could" have raised. . . . To hold the present respondents to such a high standard of foresight is tantamount to a complete rejection of the notion that there is a point before which a claim is so inchoate that there is adequate "cause" for the failure to raise it.

456 U.S. at 145 (Brennan, J., dissenting).
intention to restrict exercise of the habeas writ. Justice O'Connor placed much emphasis in her opinion on the “significant costs” of “the Great Writ.” Societal interests in the finality of a trial and the punishment of an offender suffer, in her view, through liberal allowance of the writ. To some observers, the decision may be read as an imposition of judicial values in the place of constitutional law.

In Maxwell v. Sumner, the Ninth Circuit held the Sykes rule inapplicable because the state courts denied Maxwell's federal claim on the merits. Maxwell's claim was based on the trial court's denial of his motion to proceed in propria persona. Relying on Faretta v. California, the district court granted Maxwell's habeas corpus petition. On appeal, the warden of San Quentin prison argued that Maxwell relinquished his self-representation claim by not raising the issue on direct appeal to the California Supreme Court.

The Ninth Circuit distinguished this case from Sykes and its progeny because those cases involved independent and adequate state procedural grounds supporting the state court's decision. In Maxwell, the Court found that even if California had a similar state procedural rule, the California Supreme Court failed to apply that rule in denying

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4442. Id. at 126-28.
4443. Id. at 127-28. The Court cited Justice Harlan who observed in Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting) that:

[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.

4444. Justice Brennan reacted to Justice O'Connor's concerns by saying: “[t]he Court's analysis is completely result-oriented, and represents a noteworthy exercise in the very judicial activism that the Court so deprecates in other contexts.” Id. at 144 (Brennan, J., dissenting).
4445. 673 F.2d 1031 (9th Cir.), cert. denied, 103 S. Ct. 313 (1982).
4446. Id. at 1034. In Sykes, the defendant failed to challenge the admissibility of statements allegedly obtained in violation of his Miranda rights. 433 U.S. at 75. The Supreme Court held that the defendant's failure to comply at trial with the state's contemporaneous-objection rule constituted an “independent and adequate state procedural ground” for the state court judgment. This barred federal habeas corpus review unless there was a showing of “cause” and “prejudice.” Id. at 86-87.
4447. 673 F.2d at 1033.
4448. A defendant's sixth amendment right to self-representation was affirmed in Faretta v. California, 422 U.S. 806 (1975), decided after Maxwell's trial.
4449. 673 F.2d at 1033.
4450. Id.
4451. Id. at 1034. The Sykes rule is based on failure to comply with state procedural rules; it is not applicable to questions of federal law which were resolved on the merits by the state courts. Sykes, 433 U.S. at 86-87.
Maxwell’s petition. Finding no independent and adequate state procedural ground for disallowing the self-representation claim, the court held that Maxwell was entitled to federal habeas corpus review.

*Hines v. Enomoto* involved defense counsel’s failure to object during voir dire to the denial of defendant’s right to exercise a full allotment of peremptory challenges. The district court rejected defendant’s habeas corpus petition in part because trial counsel failed to observe California’s “contemporaneous objection” rule which requires defense counsel to object to the conduct of peremptory challenges at trial or waive the issue. Indeed, in *Sykes*, such failure was also present, resulting in a procedural default that precluded litigation of the alleged error in federal court.

The Ninth Circuit, however, regarded the denial as a ground for federal habeas relief and remanded the case for an evidentiary hearing concerning defense counsel’s reason for failing to object. The Ninth Circuit was unable to determine from the record why counsel had failed to object. In remanding the case, the court emphasized the narrowness of its holding. The “cause” and “prejudice” standard

4452. 673 F.2d at 1034.
4453. Id. at 1035. The Ninth Circuit based its holding on language in the California Supreme Court’s denial which suggested that it considered the merits of the petition. Id. The Ninth Circuit stated:

Maxwell’s state habeas petition was denied with a citation to *In re Waltreus* . . . which involved a state habeas petition raising various claims of trial error. The California Supreme Court denied the petition, stating that “[t]hese arguments were rejected on appeal, and habeas corpus ordinarily cannot serve as a second appeal.” 62 Cal. 2d at 225, 397 P.2d 1001, 42 Cal. Rptr. 9. *Waltreus* thus holds that arguments rejected on appeal will not be reviewed again in habeas; by citing *Waltreus* in its denial of Maxwell’s habeas petition, the California Supreme Court stated by clear implication that Maxwell’s self-representation claim had been considered and rejected on the merits on direct appeal.

Id.
4454. 658 F.2d 667 (9th Cir. 1981).
4455. Id. at 670.
4456. Id. at 673.
4457. 433 U.S. at 87.
4458. 658 F.2d at 672. The Ninth Circuit stated that “a criminal defendant may not be denied the full number of peremptory challenges available, and that any curtailment on the exercise of challenges is reversible error.” Id.
4459. *Hines*, 658 F.2d at 674. The Ninth Circuit observed that “[w]hen the contemporaneous objection rule is involved, the focus is upon the reason why the attorney did not object.” *Id.* at 673 (citing *Garrison v. McCarthy*, 653 F.2d 374, 377 (9th Cir. 1981)). The court stated that the record did not clearly reflect whether Hines’ failure to object was deliberate or inadvertent, or whether he was actually satisfied with the panel as constituted. *Hines*, 658 F.2d at 673.
4460. 658 F.2d at 674.
was applicable; however, the court felt it necessary to know why counsel failed to object at trial before it could apply that standard.4461

5. Federal procedural grounds barring review

Under Rule 4(a) of the Federal Rules of Appellate Procedure4462 and 28 U.S.C. section 2107,4463 a notice of appeal in a civil case must be filed within thirty days of entry of the judgment or order from which the appeal is taken. The purpose of the rule is "to set a definite point of time when litigation shall be at an end."4464

When no notice of appeal and no motion for extension of time is filed an appellant will be denied habeas corpus review. This was the holding in Pettibone v. Cupp.4465 In that Ninth Circuit decision, the court rejected the habeas petitioner's appeal stating, "we have no appellate jurisdiction."4466 As the court pointed out, its decision was consistent with those of the other circuits.4467

4461. Id.
4462. Rule 4(a) of the Federal Rules of Appellate Procedure provides in pertinent part:

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a).

4463. 28 U.S.C. § 2107 (1976) provides in pertinent part:

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

... The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

4464. Browder v. Director, Dep't of Corrections of Ill., 434 U.S. 257, 264 (1977). The Supreme Court in Browder also recognized that "habeas corpus is a civil proceeding." Id. at 269. Thus, the rules established in FED. R. APP. PROC. 4 and 28 U.S.C. § 2107 are applicable to a habeas proceeding.

4465. 666 F.2d 333 (9th Cir. 1981). See also Johnson v. Pulley, 685 F.2d 327 (9th Cir. 1982) (habeas corpus relief denied because notice of appeal not filed timely under Rule 4(a)(1)).

4466. 666 F.2d at 334. The Pettibone court discussed the language of FED. R. APP. PROC. 4, stating: "We are bound by the language of the 1979 amendment and its clear requirement of 'motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a).'

4467. 666 F.2d at 335 (citing Mayfield v. United States Parole Comm., 647 F.2d 1053 (10th Cir. 1981) and Bond v. Western Auto Supply Co., 654 F.2d 302 (5th Cir.), cert. denied, 454 U.S. 1130 (1981)).
6. Scope of review for section 2255 motions

*United States v. Frady* involved the issue of jury instructions. Defendant Frady sought to vacate his sentence for murder, contending that the jury instructions used at his trial were constitutionally defective. Specifically, he alleged that the instructions compelled the jury to presume malice, thus wrongfully eliminating any possibility of a manslaughter verdict. However, he did not complain about the jury instructions either at trial or on direct appeal. Therefore, the Supreme Court was asked to decide whether the standard of review found in Rule 52(b) of the Federal Rules of Criminal Procedure applies to a collateral challenge to a criminal conviction.

Rule 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This Rule provides some balance to Rule 30 of the Federal Rules of Criminal Procedure which declares in pertinent part that "[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." The Court of Appeals for the District of Columbia Circuit invoked the "plain error" standard of Rule 52(b) in considering and granting Frady's motion. The Supreme Court reversed, denying Frady's motion to vacate on the ground that "the 'plain error' standard is out of place when a prisoner launches a collateral attack against a criminal conviction after society's legitimate interest in the finality of the judgment has been perfected by the expiration

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4469. Frady brought a motion under 28 U.S.C. § 2255 (1976) which provides in pertinent part that:
A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
4470. 456 U.S. at 158. The judge at Frady's trial improperly equated intent with malice by stating that "a wrongful act . . . intentionally done . . . is therefore done with malice aforethought." *Id.* at 157-58. Later rulings determined that such instructions were erroneous. See Belton v. United States, 382 F.2d 150 (1967); Green v. United States, 405 F.2d 1368 (1968).
4471. 456 U.S. at 162.
4472. *Id.* at 153-54.
4475. 456 U.S. at 158-59.
of the time allowed for direct review or by the affirmance of the conviction on appeal.\textsuperscript{4476}

The Supreme Court held that the proper standard for review of Frady's motion was the "cause and prejudice" standard recognized in \textit{Wainwright v. Sykes}.\textsuperscript{4477} Frady's failure to meet the burden of showing that the errors at trial worked to his actual disadvantage required reversal of the judgment.\textsuperscript{4478} In the Court's view, society's interest in the finality of criminal judgments outweighed any evidence of prejudice to Frady.\textsuperscript{4479}

7. Hearing by a federal magistrate

The district court may designate a federal magistrate to hear pre-trial matters or conduct evidentiary hearings.\textsuperscript{4480} The magistrate may then submit proposed findings of fact and recommendations for the disposition.\textsuperscript{4481} However, before making determinations based on the magistrate's recommendations, the district judge must review the record of the proceedings which occurred before the magistrate. Failure

\textsuperscript{4476} Id. at 164. The Supreme Court focused on the difference between a direct appeal, where the "plain error" standard could be properly invoked, and collateral attack as utilized by Frady under § 2255. By its terms, the "plain error" approach can be utilized only when the error was so plain that counsel and trial judge were derelict in tolerating it. Thus, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." United States v. Addonizio, 442 U.S. 178, 184 (1979).

\textsuperscript{4477} 433 U.S. 72 (1977). The Court in \textit{Frady} found that the petitioner failed to establish "cause" for his failure to object to the jury instructions either at trial or on direct appeal, or to establish "actual prejudice" resulting from the erroneous instructions. \textit{Frady}, 456 U.S. at 168.

\textsuperscript{4478} Id. at 175. The Court found such strong evidence of malice in the record that there was no justification for reversal of the conviction. \textit{Id.} at 172.

\textsuperscript{4479} Id. at 164.

\textsuperscript{4480} 28 U.S.C. § 636(b)(1) (1976) provides in part:

   (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

   (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

\textsuperscript{4481} Id.
to conduct such review was ground for remand in *Moran v. Morris*.\(^{4482}\)

Indeed, the Ninth Circuit considered this a "threshold requirement."\(^{4483}\)

In *Moran*, the defendant claimed that his sixth amendment right was violated because his counsel failed to object to the use of evidence that corroborated the testimony of an adverse witness.\(^{4484}\) The defendant was convicted in state court on several counts of robbery, burglary, kidnapping, and conspiracy to commit such offenses.\(^{4485}\) These convictions were upheld by the state court of appeal.\(^{4486}\)

Moran’s petition for habeas corpus was referred by the district court to a magistrate for an evidentiary hearing.\(^{4487}\) The magistrate held an extensive evidentiary hearing and ultimately recommended issuance of the writ.\(^{4488}\) The district court adopted verbatim the magistrate’s report and recommendation.\(^{4489}\) However, the district court’s decision was apparently rendered without a transcript of the proceedings before the magistrate.\(^{4490}\) The Ninth Circuit found that this violated a threshold requirement for a de novo determination and the case was remanded.\(^{4491}\) The court stated that the error at issue was more

\(^{4482}\) 665 F.2d 900 (9th Cir. 1981). *See also* Orand v. United States, 602 F.2d 207, 209 (9th Cir. 1979) (district court failed to conduct de novo hearing on record of proceedings before the magistrate).

\(^{4483}\) *Moran*, 665 F.2d at 901. The Ninth Circuit expressed its dismay with the approach of the district court in this manner:

> The error is more significant than simply a failure to observe a technical statutory requirement. The district court was in effect putting in motion the machinery to set aside felony convictions that had been thoroughly reviewed in the state court system. To do so without strict compliance with the statutory requirement of a de novo determination was a serious breach of the etiquette that must prevail in the federal system if the sovereignty of the separate states is to be accorded its proper respect. On this ground alone, the case must be remanded.

*Id.* at 902.

\(^{4484}\) *Id.* at 901.

\(^{4485}\) *Id.* Specifically, defendant Moran was convicted on two counts for kidnapping with the purpose of robbery, two counts for robbery in the first degree, three counts for burglary in the first degree and for conspiracy to commit those offenses.

\(^{4486}\) *Id.*

\(^{4487}\) *Id.* The referral was pursuant to the Federal Magistrate’s Act, 28 U.S.C. § 636(b)(1)(B) (1976). *See supra* note 4480.

\(^{4488}\) 665 F.2d at 901.

\(^{4489}\) *Id.*

\(^{4490}\) *Id.* The proceedings before the magistrate were transcribed long after the district court approved the magistrate’s recommendation. It appeared that the district court referred only to the record submitted with the habeas petition. That record included only the state court trial transcripts. Although it was possible that the district court heard the tape recordings of the proceedings before the magistrate, counsel arguing before the Ninth Circuit assumed that this did not occur. *Id.*

\(^{4491}\) *Id.* The Federal Magistrate’s Act provides that “[a] judge of the [district] court shall
than a simple failure to observe a technical statutory requirement.\textsuperscript{4492} Rather, it was a "serious breach of the etiquette that must prevail in the federal system," because the district court was in effect setting aside felony convictions that had been thoroughly reviewed by the state courts.\textsuperscript{4493}

In the final section of the Ninth Circuit's opinion, the court indicated that factual findings by state courts should be presumed correct.\textsuperscript{4494} Moreover, the court indicated that section 2254(d) provided the requisite guidance for the district court on remand.\textsuperscript{4495}

8. Scope of review for magistrate's extradition order

In Valencia v. Limbs,\textsuperscript{4496} a United States Magistrate determined that sufficient evidence existed to extradite appellant Valencia to Mexico on charges of murder and robbery. Valencia challenged this finding by attempting to broaden the traditional scope of habeas review of a magistrate's extradition order.\textsuperscript{4497}

Habeas corpus review of an extradition order has traditionally been limited to "a determination that there was competent evidence supporting the finding of extraditability."\textsuperscript{4498} Valencia argued that the United States Supreme Court decision in Jackson v. Virginia\textsuperscript{4499} required the extradition courts to review the sufficiency of the evidence of

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\textsuperscript{4492} make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C) (1976). See Orand v. United States, 602 F.2d 207, 209 (9th Cir. 1979).

\textsuperscript{4493} Id.

\textsuperscript{4494} Id. at 902. The Ninth Circuit intimated that there did not appear to be any reason to dispute the state court's factual findings. Id. at 903.

\textsuperscript{4495} Id. at 902.

\textsuperscript{4496} Id. at 197-98. The usual form of review of an extradition order is limited to the following factors:

\begin{enumerate}
  \item the jurisdiction of the extradition judge to conduct extradition proceedings;
  \item the jurisdiction of the extradition court over the fugitive;
  \item the force and effect of the extradition treaty;
  \item the character of the crime charged and whether it falls within the terms of the treaty; and
  \item whether there was competent legal evidence to support a finding of extraditability. Id. at 197. See, e.g., Fernandez v. Phillips, 268 U.S. 311, 312 (1925); Caplan v. Vokes, 649 F.2d 1336, 1340 (9th Cir. 1981).
\end{enumerate}

In the Caplan decision, the Ninth Circuit enunciated the five factors listed above, then went on to hold that the Government failed to meet its burden of showing that the defendant's acts constituted crimes in either the United States or England. Id. at 1340, 1343.

\textsuperscript{4497} 655 F.2d at 195 (9th Cir. 1981).

\textsuperscript{4498} 443 U.S. 307 (1979).
probable cause. However, the Ninth Circuit rejected this argument, basing its decision on the essential difference between an extradition proceeding and a state criminal proceeding. The court pointed out that the extradition proceeding "makes no determination of guilt or innocence. . . . It is designed only to trigger the start of criminal proceedings against an accused." Thus, the Ninth Circuit held that the traditional standard of whether "any evidence warrant[s] the finding that there was reasonable ground to believe the accused guilty" was appropriate.

9. Successive petitions

The Supreme Court in *Sanders v. United States* established rules governing successive applications for federal habeas corpus and section 2255 motions.

In formulating these rules, the court stated:

Controlling weight may be given to denial of a prior application for federal habeas corpus or [section] 2255 relief

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4500. 655 F.2d at 198. Prior to *Jackson*, many circuits held the view that they could not inquire into the sufficiency of the evidence in a habeas review of a state criminal conviction. *Jackson*, 443 U.S. at 316. The previous guideline was the no-evidence doctrine of *Thompson v. Louisville*, 362 U.S. 199 (1960). In that case, the Supreme Court found that there was "no semblance of evidence" to justify the defendant's conviction. *Id.* at 205. In *Jackson*, the Court widened the inquiry to provide for a determination of "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." 443 U.S. at 318. This was because the Court perceived that the *Thompson* "no-evidence" rule was inadequate to protect against misapplications of the constitutional standard of reasonable doubt. *Id.* at 320.

4501. *Valencia* attempted to apply *Jackson* by suggesting a parallel between the scope of review in extradition and state criminal cases. In response, the Ninth Circuit stated that "nothing in *Jackson* abridges the distinctions between extradition orders and state criminal trials." 655 F.2d at 198.

4502. The *Valencia* court supported its position by citing a Ninth Circuit case, *Merino v. United States Marshal*, 326 F.2d 5 (9th Cir. 1963), *cert. denied*, 377 U.S. 997 (1964), which held that the scope of review for a state court defendant was "inapposite in the field of international extradition." *Id.* at 11.

4503. *Id.* (citing *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925) ("Competent evidence to establish reasonable grounds is not necessarily evidence competent to convict.")).

4504. 373 U.S. 1 (1963). However, the *Sanders* Court pointed out that these rules are not operative where the successive application is "shown . . . conclusively to be without merit." In that situation, the application should be denied without hearing. *Id.* at 15.
only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. 4505

Hence, no matter how many prior applications for federal collateral relief a petitioner has made, if there are new grounds asserted, the writ must be considered. 4506 Also, the writ cannot be denied if the same ground was already presented but not decided on the merits. 4507 In either case the Sanders Court stated that full consideration of a new application can be avoided only if there has been an abuse of the writ or motion remedy. 4508

In deciding United States v. Donn 4509 under the Sanders three-point formula, the Ninth Circuit determined that the district court erred in denying Donn's second petition for relief under section 2255. In his second petition, Donn asserted ineffective assistance of counsel for the first time. Moreover, there was no showing that his failure to raise it was an abuse of process. 4510 The Ninth Circuit held that the district court was simply incorrect in rejecting the claim on the ground that it had been previously raised. 4511

Donn also raised two claims that had been considered in the first motion. First, that the presentence report was incomplete and incorrect, and second, that he had never been given an opportunity to see the report. The Ninth Circuit affirmed the district court's rejection of the claim that Donn was not given a chance to see the report, 4512 but found that the claim of false information was not disposed of on the merits in Donn's first motion. 4513 In reaching the merits of Donn's claim, however, the court adopted the Government's position that Donn waived his right to challenge the presentence report because he did not chal-

4505. Id.
4506. Id. at 17.
4507. Id.
4508. Id. See also Villarreal v. United States, 461 F.2d 765, 767 (9th Cir. 1972) (denial of successive petition reversed on grounds that district judge failed to find that ends of justice would not be served by reaching merits of second application).
4509. 661 F.2d 820 (9th Cir. 1981).
4510. Id. at 823.
4511. Id.
4512. Id. The court found that making a copy of the report available to counsel was sufficient. The court noted, however, that this claim was not foreclosed should Donn establish his claim of ineffective assistance. Id. at 823 n.1.
4513. Id. at 823.
The case was remanded for a hearing on the ineffective assistance of counsel question.4515

F. Challenges to Prison Conditions

1. Generally

The eighth amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."4516 Generally, the cruel and unusual punishment clause has been used to require that punishments be commensurate with the crime committed.4517 Any prison condition that is an unnecessary and wanton infliction of pain without a penological justification is prohibited by the eighth amendment.4518 A violation of the cruel and unusual punishment clause, however, does not

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4514. Id. at 824. The court noted that elimination of the false information claims by failure to challenge the report before sentencing served to strengthen the ineffective assistance of counsel claim. Id.
4515. Id. at 825.
4517. Weems v. United States, 217 U.S. 349, 368 (1910). For a history of the eighth amendment, see Granucci, "Nor Cruel and Unusual Punishment Inflicted": The Original Meaning, 57 CALIF. L. REV. 839 (1969). Granucci notes that when the eighth amendment was finally adopted in 1791, the phrase was somewhat of a "boilerplate" clause for constitutions; the same phrase had been included in the English Bill of Rights in 1689 as well as in nine state constitutions. Id. at 840. The clause was also adopted into the United States Constitution without significant debate. Id. at 840 & n.8.

Originally, the phrase was interpreted to mean that a prisoner should receive a punishment that is appropriate for the crime committed. The clause was not interpreted to prohibit certain types of punishments of bodily injury to prisoners. Id. at 858-59. In fact, even in 1963, one court stated that punishments which included whippings were neither cruel nor unusual given the crime committed. Id. at 859 & n.95 (citing State v. Cannon, 55 Del. 587, 596, 190 A.2d 514, 518-19 (1963)).

Recently, the eighth amendment has been construed to proscribe physical torture as well as any punishment that is inconsistent with "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).
4518. Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976). In Gregg, the defendant was convicted of murder and sentenced to death. The Supreme Court affirmed the conviction, stating that eighth amendment does not prohibit, under all circumstances, a death sentence. The cruel and unusual punishment clause forbids punishments which are "excessive" because they involve an unnecessary and wanton infliction of pain or because they are disproportionate to the severity of the sentence. See also Rhodes v. Chapman, 452 U.S. 337 (1981). In Rhodes, the Supreme Court held that "double ceiling" (placing two inmates in one cell), by itself, does not constitute cruel and unusual punishment. When a prison condition neither inflicts unnecessary or wanton pain, nor is grossly disproportionate to the severity of the crime for which the inmate is serving, a prison has not sufficiently alleged a violation of his eighth amendment rights. Id. at 347.
permit a court to fashion a broad prison reform.\footnote{Rhodes v. Chapman, 452 U.S. at 351 (citing Bell v. Wolfish, 441 U.S. 520, 539 (1979)). The Supreme Court in Rhodes stated a court can only determine if conditions constitute cruel and unusual punishment. See id. at 351-52; Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (in school desegregation cases, like other cases involving equitable remedies, courts can only correct conditions that offend the Constitution).} While the judiciary is entitled to correct any specific prison condition that constitutes a breach of the eighth amendment, the courts can establish only the \textit{minimum} standards that the Constitution requires.\footnote{See supra note 4519. The court in Rhodes noted that any complaints of merely harsh conditions should be addressed to the legislature rather than to the judiciary. 452 U.S. at 348-49.}

In \textit{Hoptowit v. Ray},\footnote{682 F.2d at 1245.} several inmates at the Washington State Penitentiary brought an action alleging that various prison conditions constituted cruel and unusual punishment.\footnote{Id. at 1245.} After finding that many of these conditions combined to violate the eighth amendment, the district court provided broad injunctive relief.\footnote{Id. at 1245.} The district court also ruled that the following prison conditions, by themselves, violated the defendants' eighth amendment rights: overcrowding, increasing violence, poorly trained guards, racism, improper classification of inmates, inadequate medical care, and inadequate vocational, educational, and recreational opportunities. The district court also discovered constitutional violations concerning the torturous conditions in isolated, segregated, and protected custody units, as well as conditions regarding the inadequacy of the physical plant, the continuation of a lockdown, and retaliation for filing a lawsuit.\footnote{Id. at 1245.}

Before reviewing the district court's findings, however, the Ninth Circuit examined the judicial standard for analyzing eighth amendment claims and for designing appropriate remedies. The \textit{Hoptowit} court noted that courts cannot find eighth amendment violations based

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\footnote{4519. Rhodes v. Chapman, 452 U.S. at 351 (citing Bell v. Wolfish, 441 U.S. 520, 539 (1979)). The Supreme Court in Rhodes stated a court can only determine if conditions constitute cruel and unusual punishment. If so, the court must provide a remedy that will correct the constitutional violation. See id. at 351-52; Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (in school desegregation cases, like other cases involving equitable remedies, courts can only correct conditions that offend the Constitution).}

\footnote{4520. See supra note 4519. The court in Rhodes noted that any complaints of merely harsh conditions should be addressed to the legislature rather than to the judiciary. 452 U.S. at 348-49.}

\footnote{4521. 682 F.2d 1237 (9th Cir. 1982).}

\footnote{4522. Id. at 1245. The Ninth Circuit noted that the district court had jurisdiction over 42 U.S.C. § 1983 (1976) claims, pursuant to 28 U.S.C. § 1343 (1976), and jurisdiction over the state claims pursuant to pendent jurisdiction. 682 F.2d at 1245 (citing United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)). Since the resolution of the state law issues would not settle the federal constitutional claims, the Ninth Circuit also stated that abstention in this case would be inappropriate. 682 F.2d at 1245 n.2 (citing Manney v. Cabell, 654 F.2d 1280, 1283, 1285 n.7 (9th Cir. 1980) (abstention only appropriate where the \textit{Pullman} doctrine (Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941)) applies and where plaintiff has not sought relief under state law which could provide a significant opportunity for relief), cert. denied, 455 U.S. 1000 (1982)).}

\footnote{4523. 682 F.2d at 1245.}

\footnote{4524. Id. at 1245.}
on the “totality of conditions” in the prison. In fact, the court stated the judiciary cannot correct any prison condition unless the condition specifically violates one of the enumerated constitutional requirements: adequate food, clothing, shelter, sanitation, medical care, and personal safety.

In fashioning a remedy to fit a prison condition that violates the eighth amendment, the Ninth Circuit added that a court should avoid broad relief; the judge must only attempt to correct the specific violation unless the prison has a history of violating constitutional protections and court orders. The Hoptowit court noted that, whenever possible, the court should defer to the policy choices of prison officials and the remedy should be tailored to the basic approach of the prison.
Turning to the findings of the district court, the Ninth Circuit reversed the district judge's holding that while many of the conditions were not egregious enough to constitute a breach of the Constitution, the conditions, taken together, violated the eighth amendment, because their combination constituted cruel and unusual punishment for the inmates.\textsuperscript{4529} In reversing, the \textit{Hoptowit} court explicitly rejected the use of a "totality of conditions" test for finding eighth amendment violations.\textsuperscript{4530}

The district court, however, also held that several conditions, by themselves, violated the eighth amendment. Therefore the Ninth Circuit examined each of the district judge's findings regarding these conditions.\textsuperscript{4531}

The \textit{Hoptowit} court first reviewed the district court's findings regarding overcrowded prison cells. The Ninth Circuit stated the district court improperly constitutionalized the minimum square foot standards of the American Correctional Association (ACA); the district court can only remedy the specific violations caused by overcrowding.\textsuperscript{4532} The court added that while overcrowding is not, by itself, a violation of the eighth amendment, overcrowding can form the basis of a violation by increasing violence, diluting other constitutionally required services, or by creating an inmate shelter that is unfit for human habitation.\textsuperscript{4533} Thus, the court remanded the issue of overcrowding to determine whether overcrowding has caused an unnecessary or wanton infliction of pain.\textsuperscript{4534}

In examining the level of violence at the prison, the Ninth Circuit agreed with the district court's finding that the widespread guard brutality (due in part to improper training or supervision) resulted in a

\textsuperscript{4528} 682 F.2d at 1247. The Ninth Circuit added that the court should try to follow the approach of prison officials as long as it is not inconsistent with the eighth amendment. \textit{Id.} (citing Bell v. Wolfish, 441 U.S. at 562).

\textsuperscript{4529} 682 F.2d at 1247.

\textsuperscript{4530} \textit{Id.}

\textsuperscript{4531} \textit{Id.}

\textsuperscript{4532} \textit{Id.} at 1249. The ACA established standards for humane and decent confinement which stated that each prisoner should have 60 square feet of space unless he spends more than 10 hours per day in the cell, in which case 80 square feet is required. Although none of the inmates in this prison were confined according to the ACA standards, the \textit{Hoptowit} court stated the ACA recommendations are not necessarily the constitutional minimum below which the prisoners' eighth amendment rights are violated. \textit{Id.}

\textsuperscript{4533} \textit{Id.} See generally Lareau v. Manson, 651 F.2d 96, 98 (2d Cir. 1981); Wolfish v. Levi, 573 F.2d at 126-27, 127 n.18.

\textsuperscript{4534} 682 F.2d at 1249.
level of violence that constituted cruel and unusual punishment. The
court stated, however, that the relief ordered by the district court was
overly broad. The Ninth Circuit said courts may not require prisons to
conduct recruiting, screening, and training programs for the guards,
since lack of these programs does not amount to cruel and unusual
punishment. The *Hoptowit* court added, however, that courts may
order prison officials to hire more guards, and to protect inmates from
any guard brutality.

Regarding the handling of inmate complaints of guard brutality,
the Ninth Circuit stated that the district court improperly ordered that
a mechanism must be established to deal with inmate grievances, neces-
sarily including review from noncorrectional personnel, staff, in-
mates, and outside evaluators. While admitting some mechanism
was necessary in order to effectively deal with inmate complaints, the
court remanded the issue to determine if the state’s methods were suffi-
cient and, if not, what further steps would be necessary to comply with
the eighth amendment.

Finding that racism was connected to the violence at the prison,
the district court also ordered the prison officials to “eliminate ra-
cism.” The Ninth Circuit stated that because the district court
found no eighth amendment violation in connection with racism, the
district judge had no power to fashion any relief for racist condi-
tions. Since the district court had already made an order to end vio-
lence in the prison, the *Hoptowit* court stated the district judge had no
question of racism pending. The court added that even if the dis-
trict judge had the power to remedy the problem of racism, his order to
end racism was overbroad; he could only require the state to cease
practices, not attitudes.

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4535. *Id.* at 1250-51. *See* Bell v. Wolfish, 441 U.S. at 562. The court’s reasoning in *Hopto-

wit* is suspect because it appears the district court was providing a remedy, rather than con-
stitutionalizing a standard for prison training. *See* 682 F.2d at 1250 n.4. Thus, it seems the
district court did have the power to solve the problem as it ordered.

4536. 682 F.2d at 1251 (citing William v. Edwards, 547 F.2d 1206, 1213 (5th Cir. 1977)
(number of guards necessary to assure constitutional level of safety for prisoners must be
related to total number of inmates)). *See* Spain v. Procunier, 600 F.2d 189, 195 (9th Cir.
1979) (guards can only inflict pain on inmate in proportion to the threat of harm).

4537. 682 F.2d at 1251.

4538. *Id.*

4539. *Id.*

4540. *Id.*

4541. *Id.* at 1252.

4542. *Id.* In footnote six, the court counters Judge Tang’s statement that the district court
held racism to be a factor leading to unconstitutional levels of violence at the prison. Judge
Tang reasoned that the district court’s order on racism was valid since the order was merely
The Ninth Circuit also reviewed the district court's finding that the prison classification procedures resulted in improperly placing too many prisoners in maximum custody. The district court concluded that the inadequate classification system merely contributed to the potential for violence at the prison. Because misclassification, by itself, does not inflict wanton pain under the eighth amendment, the Ninth Circuit reversed the district judge's order to submit new plans for reclassifying all prisoners.\textsuperscript{4543}

Concerning the prisoners' claim of inadequate medical care, the district court concluded that the medical care was constitutionally deficient and ordered the state to comply with standards set by the American Public Health Association and the American Medical Association. The Ninth Circuit agreed that the medical services were so deficient that they showed a deliberate indifference to the medical needs of the inmates, thereby violating the inmate's eighth amendment rights.\textsuperscript{4544} The court stated that the prison must provide inmates with a system that allows ready access to adequate medical care, adding that the medical staff must be able to diagnose and treat medical problems or refer the inmate to services that can help him; prisons must also be able to respond promptly to medical emergencies.\textsuperscript{4545}

The Ninth Circuit, however, found that the district judge's order for relief was overbroad. The court stated that by ordering the prison to comply with the American Medical Association standards, the district court failed to consider the prison's own approach to providing remedying the impermissible level of violence. \textit{Id.} at 1264 (Tang, J., dissenting). The majority rebutted this argument by stating the district court intended to hold that racism itself was an unconstitutional condition at the prison. \textit{Id.} at 1252 n.6. The majority looked to the way the district court phrased the racism issue: "whether inmates at [the prison] are segregated by race, and thereby, denied their right to equal protection of the laws, in violation of the Fourteenth Amendment..." \textit{Id.} As a result, the majority stated the district court was, in effect, trying to order an end to racism because the district judge believed that racism was an unconstitutional prison condition.

\textsuperscript{4543} \textit{Id.} at 1255-56 (citing Gibson v. Lynch, 652 F.2d 348, 352-53 (3d Cir. 1981) (solitary confinement does not violate eighth amendment when prison attends to inmate's other needs); Ramos v. Lamm, 639 F.2d 559, 566-67 (10th Cir. 1980) (shortcomings in areas of mobility, classification, and idleness are not of constitutional dimension), cert. denied, 450 U.S. 1041 (1981); Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977) (eighth amendment only requires prisoners be provided adequate food, clothing, shelter, sanitation, medical care and personal safety), rev'd on other grounds sub nom. Alabama v. Pugh, 438 U.S. 781 (1978).

\textsuperscript{4544} 682 F.2d at 1253. A deliberate indifference to a serious medical need by a prison guard or prison doctor violates the eighth amendment. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

\textsuperscript{4545} 682 F.2d at 1253. The court added that access to medical staff is meaningless unless the staff is competent to deal with the inmate's needs. \textit{Id.}
medical care. Before prescribing such relief, the district judge must first determine that the prison's approach could not meet the constitutional minimum required. Therefore, the court remanded the issue so the district judge could formulate a new remedy which would be no broader than necessary to correct the violations of the inmates' eighth amendment rights.

Finding that the prisoners' lack of programs, jobs, and educational opportunities led to frustration, idleness, and violence, the district court held that the prison failed to provide adequate programs to try to rehabilitate the prisoners, in violation of the eighth amendment. The district judge then ordered the state to implement vocational, educational, and recreational programs at the prison. In reversing the district court's order, the Ninth Circuit stated idleness and the lack of rehabilitative programs do not constitute a violation of the cruel and unusual punishment clause. The Hoptowit court clearly noted that prisoners have no right to rehabilitation under the eighth amendment. The Ninth Circuit therefore held the district court had no power to grant the prisoners relief for idleness or the lack of rehabilitative programs.

Examining the prison conditions of isolation, segregation, and protective custody cells, the district court concluded the conditions there

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4546. Id. at 1253-54.
4547. Id. at 1254. The prison sought to provide an "infirmary," with additional services to be supplied outside. Id. at 1253-54.
4548. Id. at 1254.
4549. Id. Idleness and lack of rehabilitative programs cannot be violations of the eighth amendment because these conditions do not constitute a wanton infliction of pain. Id. at 1254-55. See Rhodes v. Chapman, 452 U.S. at 347; Ramos v. Lamm, 639 F.2d at 566-67; Newman v. Alabama, 559 F.2d at 291. See also supra notes 4518 & 4525.
4550. 682 F.2d at 1255. See supra note 4549. The court noted that a recent Ninth Circuit decision, Ohlinger v. Watson, 652 F.2d 775, 777-79 (9th Cir. 1981), held that persons in mental hospitals have a right to rehabilitation. The Hoptowit court stated, however, that the rationale of Ohlinger does not apply to people serving criminal sentences. In distinguishing between incarceration for criminal violations and for mental incapacitation, the Hoptowit court stated that while confinement for a mental illness is to cure or improve a mental condition, imprisonment for a criminal offense "is primarily for punitive purposes. Although rehabilitation [of a criminal] may be desirable, it is not necessarily the primary function of such incarceration." 682 F.2d at 1255 n.8 (quoting Ohlinger v. Watson, 652 F.2d at 777).
4551. 682 F.2d at 1255. Turning to the state law issues, the Ninth Circuit stated the district judge's conclusions were insufficient. While the state law provides that prison officials must establish rehabilitative programs and useful employment for inmates (see Wash. Rev. Code Ann., §§ 72.08.101, 72.64.010-.110 (1982)), these statutes do not seem to grant the prisoners an enforceable right to rehabilitation. Bresolin v. Morris, 88 Wash. 2d 167, 170-71, 558 P.2d 1350, 1352 (1977) (en banc). Thus the Hoptowit court remanded the state issues to determine whether the prisoners have standing to complain about the state's failure to provide rehabilitative programs. 682 F.2d at 1255.
violated the prisoners’ right against cruel and unusual punishment. The district judge specifically found that the deprivation of light (through the use of a solid metal door) as well as the constriction of space and activity violated the eighth amendment rights of the inmates in isolation. The district judge also concluded that the inmates in protective custody were subjected to cruel and unusual punishment because they were denied adequate recreation, legal access, and prison programs as well as being confined to small cells.4552

The Ninth Circuit stated that the deprivation of light, fresh air, and adequate medical care was a violation of the eighth amendment rights of prisoners in isolation.4553 The court held that prisoners in isolation, segregation, and protective custody cells have the same eighth amendment rights and standards as other prisoners.4554 The Ninth Circuit stated, however, that the district judge was wrong in looking to the totality of conditions; the district court also erred in considering the lack of programs as an element of an eighth amendment violation.4555 Thus, the Hoplowit court remanded the issue of custody to determine which conditions, by themselves, violated the eighth amendment and for each such condition, the court stated the district judge must fashion a remedy to satisfy only the constitutional minimum required.4556

Concerning the many physical plant problems at the prison,4557 the district court stated that the physical facilities in their totality violated the prisoners' eighth amendment rights and ordered the state to comply with several governmental health standards.4558 While accepting most of the district court's findings regarding individual problems at the prison, the Ninth Circuit rejected the district judge's conclusion. The court held that the district court must analyze each condition to determine if it amounts to an unnecessary and wanton in-

4552. 682 F.2d at 1257.
4553. Id. at 1257-58.
4554. Id. at 1258. The Ninth Circuit stated all prisoners must be given adequate food, clothing, shelter, sanitation, medical care and personal safety. The Hoplowit court added that courts may consider the length of time that prisoners were deprived of these rights. Id. (citing Hutto v. Finney, 437 U.S. 678, 685-86 (1978) (unconstitutionality of isolation conditions may depend on duration and severity of confinement conditions)).
4555. 682 F.2d at 1258.
4556. Id.
4557. Id. at 1256. Such problems included overcrowding, poor lighting, inadequate plumbing with a threat of waste water contaminating the drinking water, substandard fire prevention, poor ventilation, and inadequate cell cleaning supplies. Id.
4558. Id. The district judge ordered the prison to comply with the standards of the United States Public Health Service, the American Public Health Association, Washington's Department of Health, and the American Correctional Association.
fliction of pain.\textsuperscript{4559} The \textit{Hoptowit} court also stated that the district court erred by constitutionalizing several government health standards.\textsuperscript{4560} While these health standards may be relevant to correct constitutional violations, the district judge can only order the prison to comply with the minimum requirements of the eighth amendment.\textsuperscript{4561}

Turning to the district court’s findings concerning the conditions imposed during a lockdown in 1979, the Ninth Circuit again reversed the district court’s application of the totality of conditions test.\textsuperscript{4562} The district court first stated that because the initial loss of control of the prison was the fault of prison officials, the loss of control was a violation of the inmates’ rights. The Ninth Circuit strongly disagreed, however, stating the issue of blame for the lockdown is irrelevant in determining whether prison conditions during the lockdown violated the prisoners’ eighth amendment rights.\textsuperscript{4563}

Second, the district court found that the long periods of deprivation of basic necessities violated the cruel and unusual punishment clause.\textsuperscript{4564} The \textit{Hoptowit} court, however, said the district court erred since the district judge based his findings on the totality of the circumstances. The Ninth Circuit also stated the district court’s findings of fact were clearly erroneous;\textsuperscript{4565} the severe conditions of the lockdown lasted much less than four months.

Thus, the Ninth Circuit remanded the issue of unconstitutional prison conditions during the lockdown so the district court could analyze each condition separately to determine if it amounted to an infliction of pain without penological justification.\textsuperscript{4566} The Ninth Circuit

\begin{itemize}
\item \textsuperscript{4559} Id. The Ninth Circuit added that if none of the conditions violates the eighth amendment standards, then “two of them together cannot amount to some overall conclusion that the prison is unsafe or unsanitary.” Id.
\item \textsuperscript{4560} Id. at 1256-57. See supra note 4558.
\item \textsuperscript{4561} 682 F.2d at 1257.
\item \textsuperscript{4562} Id. at 1259.
\item \textsuperscript{4563} Id. Regarding the issue of blame for the lockdown, the Ninth Circuit responded by stating prison officials have a right and a duty to take necessary steps to restore order when order is lost. The \textit{Hoptowit} court added that this duty and right is for the benefit of the prisoners as well as the prison officials. Id.
\item \textsuperscript{4564} Id. at 1258. The district judge found that the prison had imposed a lockdown for four months following the death of a prisoner and a guard. Id.
\item \textsuperscript{4565} Id. at 1259. Concerning the findings of fact, the \textit{Hoptowit} court stated that while the district court found that the lockdown lasted over four months, clearly not all lockdown conditions continued throughout this period. The district court found the inmates were not allowed out of their crowded cells for the first three weeks. The \textit{Hoptowit} court thus concluded the prison conditions after this initial period must have been less stringent. Id.
\item \textsuperscript{4566} Id. The Ninth Circuit stated that on remand, the district court should consider “the length of time each restriction was in effect, and whether the restriction and its duration bore a relationship to legitimate attempts to ease the emergency.” Id.
\end{itemize}
noted, however, that in an emergency situation (such as the loss of control of the prison), prison officials may impose more restrictive conditions and may suspend some necessary services for a short period of time.4567

Finally the Ninth Circuit considered the district court's findings on retaliation by prison officials against inmates for filing this action. The district court, finding some evidence of retaliation such as verbal harassment, threats, and transfers, enjoined prison officials from retaliating against inmates for the exercise of their right of access to courts.4568 The Ninth Circuit, while agreeing with the district court's statement of law, reversed since there was an insufficient finding of fact to constitute a violation of the prisoners' rights.4569

In concurring, Justice Tang disagreed with the majority's opinion of the district court's orders regarding brutality, racism, and improper classification of inmates. Tang stated the Ninth Circuit had blurred the crucial difference between prisoners' rights and remedies, thereby limiting the judicial power to remedy constitutional violations.

While conceding that the district judge's opinion was not clearly written, Tang stated the district court apparently held that the level of violence at the prison was unconstitutional. After finding a violation of the prisoners' rights, the district judge then ordered several remedies in order to curb this prison violence.4570

Regarding prison brutality, Tang stated the district court did not hold that inmates had a constitutional right to require training for guards. Instead, Tang said the district court was providing a remedy in order to cure the unconstitutional level of violence at the prison.4571 On racism, Tang also stated the remedy was intended to correct the unconstitutional level of violence at the prison; it was not an order to

4567. Id. The Hoptowit court noted, however, that the constitutional validity of the deprivation (such as denying a prisoner exercise or adequate food) depends on the importance of the need as well as the length of time that this need is withheld from the inmate. The Ninth Circuit added that certain services such as medical care probably cannot be denied for any period of time. Id.

4568. Id. at 1260.

4569. Id. The Hoptowit court noted that this issue was not properly before the court. It was not raised in the complaint, nor did the inmates seek to raise the issue by amending their complaint or by filing an appropriate motion. Id.

4570. Id. at 1263-64.

4571. Id. at 1264-65. In a footnote, the majority responded to Tang's concurring opinion by stating that the district court did not intend to create guard programs as a response to unconstitutional violence since the findings of fact regarding violence related to conditions of overcrowding, idleness, physical plant conditions, inadequate medical care and "other conditions found herein." Id. at 1250-51 n.4.
solve a problem of racism without a constitutional basis.\footnote{4572}

Third, Tang said the district court appeared to be stating that prisoner misclassification contributed to unconstitutional prison violence. The district judge seemed to hold that this condition led to the prison’s failure to protect the prisoners from this impermissible level of violence. Thus, the district court was merely remedying the unconstitutional violence.

In concluding, Tang stated that the majority used the wrong test for reviewing the district court’s actions. If the district court held that the level of violence was unconstitutional, the proper question for the Ninth Circuit was whether the district judge “abused its remedial power in ordering these programs to vindicate the prisoners’ Eighth Amendment right to be protected from harm.”\footnote{4573} Tang said the majority erred in inquiring whether these programs were mandated by the eighth amendment.\footnote{4574} Tang added that the district court has the power to remedy constitutional violations, even if contributing conditions, by themselves, do not constitute an eighth amendment violation.\footnote{4575}

In \textit{Pepperling v. Crist},\footnote{4576} the Ninth Circuit reviewed additional challenges to prison conditions, including the use of general lockups as well as the censorship of nude pictures and two publications, Hustler, and High Times.\footnote{4577} Prisoners in the Montana State Prison appealed the denial of their suits which had claimed that these penitentiary conditions violated their eighth amendment rights.

The inmates first contended the prison had instituted an illegal mass punishment following an injury to a prison guard. The Ninth Circuit affirmed the district court’s denial of relief, stating that this lockup was to maintain security, not to discipline.\footnote{4578} While any pro-
longed lockup may violate the due process clause or the right against cruel and unusual punishment, the court affirmed the district court’s finding that there was no such severe or lengthy lockup in Pepperling.4579

The inmate also challenged the prison’s use of general censorship. The Ninth Circuit stated general censorship of a prisoner’s mail may be permitted when the practice furthers “substantial governmental interests and is unrelated to the suppression of expression.”4580 Following a Supreme Court decision,4581 the court noted that prison officials may also censor any “obscene” communication.4582 The prison officials in Pepperling, however, had a rule prohibiting “sexually explicit” communication, without additional justification.4583 As a result, since “sexually explicit” seems to include more than just “obscene” communication, the prison regulation violated the inmates’ first amendment rights.4584

Turning to the prisoners’ specific right to receive nude pictures of wives or girlfriends, the Pepperling court stated the prison cannot prohibit these pictures merely because these items often lead to violent altercations among prisoners.4585 The court suggested, however, that the prison may be able to prohibit prisoners from displaying these photographs or tacking them up in their cells, in order to maintain internal peace.4586

972 & n.38 (D.C. Cir. 1979) (deference given to prison officials, especially in matters of internal affairs).

4579. 678 F.2d at 789. The court added that a determination of the constitutional violation due to a prolonged lockup “must be based on a careful analysis of the unique factual situations presented by each case.” Id.

Concerning the inmates’ second challenge that prisoners’ property was damaged or stolen due to the manner of the random searches conducted by the guards, the Ninth Circuit found that there were insufficient facts to show that the guards were even responsible for this damage. Thus, the court affirmed the district court’s denial of relief on this issue. Id.

4580. Id. at 790. The restriction on prisoner correspondence, however, must be no greater than necessary to protect the governmental interest. Id. (citing Procunier v. Martinez, 416 U.S. 396, 413-14 (1974)).

The two legitimate penal objectives outlined by the Supreme Court in Pell v. Procunier, 417 U.S. 817, 822-23 (1974), were the deterrence of crime through general confinement and rehabilitation, and the maintenance of internal security.


4582. 678 F.2d at 790 (citing Procunier v. Martinez, 416 U.S. at 416-18 & n.15 (explicitly approving a set of guidelines for censorship of prison mail)).

4583. 678 F.2d at 790.

4584. Id. Although the prison officials argued that they did not apply the regulation strictly, the Ninth Circuit replied that this haphazard application “merely demonstrates the capriciousness of the rule.” Id. The additional censorship can only be permitted if it serves a legitimate governmental interest. Id.

4585. Id. The court, however, failed to outline any further test for allowing such pictures.

4586. Id. at 790-91. The court stressed that it is not the receipt of the photographs which
Regarding the prohibition of two publications, Hustler and High Times, the court held that because there were no findings as to the specific content of the magazines, these publications could not be censored. Without close examination of the magazines, the Ninth Circuit was unable to determine whether the prohibition was proper in order to promote legitimate penal objectives.\textsuperscript{4587} The court also admonished the prison administration, stating that a “blanket prohibition against receipt of the publication by any prisoner carries a heavy presumption of unconstitutionality.”\textsuperscript{4588} Therefore the Ninth Circuit remanded the issue for additional findings.\textsuperscript{4589}

2. Sua sponte dismissal

In \textit{Franklin v. Oregon},\textsuperscript{4590} the Ninth Circuit considered whether the district court had federal subject matter jurisdiction over complaints involving certain prison conditions. Franklin, an inmate of an Oregon state prison, filed thirty-three complaints in federal court and paid the required filing fees. Many of the complaints alleged unconstitutional prison conditions. After Franklin amended twenty-seven of the complaints, but before any summons were issued, the district court, on its own motion, dismissed all thirty-three claims on the ground that they were frivolous.\textsuperscript{4591} On appeal, the Ninth Circuit reversed the sua sponte dismissal of eleven of the complaints.\textsuperscript{4592}

The \textit{Franklin} court held that a district court cannot dismiss a complaint on its own motion before a summons is issued unless the court lacks subject matter jurisdiction or the claim is wholly insubstantial

\textsuperscript{4587} \textit{Id.} at 790. Thus, prohibiting the photographs does not directly serve the stated objective of maintaining peace in the prison.

\textsuperscript{4588} \textit{Id.} at 791. \textit{See} Morgan v. LaVallee, 526 F.2d 221, 224-25 (2d Cir. 1975) (prison must provide affirmative justification for withholding any publication). The \textit{Pepperling} court also suggested that what may be an improper magazine for one prisoner, may be proper for another. Thus, for each prisoner who is denied a magazine, the prison must show that “the prisoner's receipt of the publication will have an adverse impact on either the prisoner's rehabilitation or prison security.” 678 F.2d at 791.

\textsuperscript{4589} \textit{Id.} at 791. The court noted that the prison officials have the burden of justifying their restriction of the first amendment. \textit{Id.} (citing Aikens v. Jenkins, 534 F.2d 751, 755 (7th Cir. 1976)). \textit{See also} Procunier v. Martinez, 416 U.S. at 413-14.

\textsuperscript{4590} 678 F.2d at 791.

\textsuperscript{4591} 662 F.2d 1337 (9th Cir. 1981).

\textsuperscript{4592} \textit{Id.} at 1340.

\textsuperscript{4593} \textit{Id.} at 1343. Pursuant to \textit{Fed. R. Civ. P. 4(a)} summons must be issued before a case can be dismissed for failure to state a claim. At the time of the \textit{Franklin} decision rule 4(a) provided in part: "Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve
and frivolous.\textsuperscript{4594} The court then examined each of Franklin's claims to determine whether the district court had subject matter jurisdiction over the complaints.

In eleven of the complaints, Franklin did not allege a deprivation of any constitutional right nor state a federal cause of action.\textsuperscript{4595} As a result, the Franklin court held that the district court was correct in dis-

\textit{it.}” (Current version at Fed. R. Civ. P. 4(a), 28 U.S.C.A. (West Supp. 1983)). Thus, before a summons is issued, the Ninth Circuit stated, “a district court may not dismiss [a complaint], sua sponte, for failure to state a claim over which it has subject jurisdiction.” 662 F.2d at 1341. The Ninth Circuit added that it disapproves of such dispositions “because the procedure (1) eliminates the traditional adversarial relationship; (2) causes inefficiencies in the judicial process as a whole; and (3) may give the appearance that the judiciary is a proponent rather than an independent entity.” \textit{Id.} at 1341-42 (footnote omitted).


A district court may, however, properly dismiss a cause of action sua sponte for lack of jurisdiction. 662 F.2d at 1342. The Ninth Circuit stated, “if the court lacks subject matter jurisdiction, it is not required to issue a summons or follow the other procedural requirements.” \textit{Id.} See \textit{California Diversified Promotions, Inc. v. Musick}, 505 F.2d 278, 280 (9th Cir. 1974) (court can dismiss for lack of jurisdiction if it gives notice of intent to dismiss); \textit{Loux v. Rhay}, 375 F.2d 55, 58 (9th Cir. 1967) (if no jurisdiction exists, court should only note lack of jurisdiction and refuse to proceed further with the case).

\textsuperscript{4594} 662 F.2d at 1342 (citing Hagan v. Lavine, 415 U.S. 528 (1974)). In \textit{Hagans}, the Court stated that the terms “wholly insubstantial” and “obviously frivolous” have specific legal significance. The Court added that “those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial.” 415 U.S. at 537-38 (quoting \textit{Goosby v. Osse}, 409 U.S. 512, 518 (1973)).

The Ninth Circuit added that a complaint should be dismissed only if there is no question that plaintiff cannot prove a set of facts in support of a claim which would allow him to recover. 662 F.2d at 1343 (citing \textit{Scheuer v. Rhodes}, 416 U.S. 232, 236 (1974)). The Franklin court noted that under \textit{Scheuer}, it does not matter if relief appears “very remote and unlikely.” 662 F.2d at 1343 (quoting \textit{Scheuer v. Rhodes}, 416 U.S. at 236).

\textsuperscript{4595} 662 F.2d at 1343-44. In six actions, Franklin did not allege an action in tort. He contended that the state welfare division caused his divorce by giving his wife financial assistance, that the district attorney refused to prosecute his daughter's boyfriend for statutory rape, that Oregon Prisoners Legal Services refused his requests to see his attorneys, that the state ombudsman did not respond to his requests for assistance, and finally that prison officials refused to issue him new T-shirts. \textit{Id.} at 1343.

In five actions, the court stated that while Franklin may have alleged a tort claim, he did not plead the deprivation of a constitutional right or otherwise state a federal cause of action. In these actions, Franklin claimed two letters were lost due to prison inmate handling of the mail, that he suffered severe discomfort due to a ventilation system breakdown, that a jail officer improperly placed handcuffs on his wrist, that he was slandered by an Oregon police officer, and that the attorney handling his appeal had committed malpractice. \textit{Id.} at 1343-44.
missing these claims due to lack of jurisdiction.\textsuperscript{4596} In seven of the actions Franklin alleged negligent disregard or aggravation of his medical problems.\textsuperscript{4597} The Ninth Circuit stated that while these claims might involve violations of the eighth amendment right to be free from cruel and unusual punishment, the court found that there was an "utterly insubstantial" nexus between the wrongful conduct and the deprivation of the eighth amendment right,\textsuperscript{4598} as well as a failure to allege a deliberate indifference to a serious medical need.\textsuperscript{4599}

Two of Franklin's complaints were also brought against parties who were immune from 42 U.S.C. section 1983 liability, and therefore the Ninth Circuit agreed the suits should have been dismissed for lack of federal jurisdiction.\textsuperscript{4600} The \textit{Franklin} court also stated that one com-

\textsuperscript{4596} \textit{Id.} at 1344.

\textsuperscript{4597} \textit{Id.} Franklin claimed that a jail guard caused a delay in Franklin's receipt of medical attention, that a prison official did not supply him with a well-balanced diet after an insulin injection, and that prison medical personnel improperly administered insulin causing soreness and swelling of his arm. The Ninth Circuit stressed that there was no allegation of a deliberate indifference to a serious medical need in these complaints. \textit{Id.} Franklin also complained of receiving twelve X-rays when two would have been sufficient. The \textit{Franklin} court held that an allegation amounting to a difference in medical opinion does not support federal jurisdiction. \textit{Id.} (citing Mayfield v. Craven, 433 F.2d 873, 874 (9th Cir. 1970)). \textit{See infra} note 4599.

Further, the inmate complained that prison officials delayed granting him an elevator pass, causing him to suffer pain while climbing stairs in order to seek medical attention. The Ninth Circuit reiterated that without an allegation of deliberate indifference to Franklin's medical problems there is no subject matter jurisdiction. In one of these complaints, Franklin also claimed a prison official swore at him. The \textit{Franklin} court stated that there is no constitutional right to be free from being sworn at. 662 F.2d at 1344-45.

\textsuperscript{4598} 622 F.2d at 1344 (citing Hagans v. Lavine, 415 U.S. at 536-38 (where welfare recipients' equal protection claim regarding the state's recoupment regulation for prior unscheduled rental payments deemed wholly insubstantial; court lacks jurisdiction to hear obviously frivolous cases)).

\textsuperscript{4599} 622 F.2d at 1344 (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976) (deliberate indifference by prison officials to inmate's serious illness or injury constitutes cruel and unusual punishment, violating the eighth amendment; however, where prisoner was observed by medical personnel 17 times in three months and injury was treated, failure to perform X-rays or certain diagnostic techniques does not violate inmate's constitutional rights)).

\textsuperscript{4600} 662 F.2d at 1345. In one of these complaints, Franklin sued his appointed defense counsel and the state psychiatrist for conspiring to commit him to a mental institution. In a footnote, however, the court stated that without an allegation that this conspiracy was motivated by some class-based invidious discrimination, there was no subject matter jurisdiction under 42 U.S.C. § 1985 to hear this complaint. \textit{Id.} at 1345 n.8. In the second complaint, Franklin contended that the public defender representing him on appeal unnecessarily delayed his appeal.

The Ninth Circuit stated the parties in these two complaints are immune from 42 U.S.C. § 1983 suits because of the protection afforded participants in the judicial process. \textit{Id.} at 1345. \textit{See Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977) (public defenders); Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970) (per curiam) (court-appointed psychiatrists), cert. denied, 403 U.S. 908 (1971). But see Polk County v. Dodson, 454 U.S. 312 (1981). In Polk
plaint was properly dismissed, since Franklin did not claim the negligent conduct of failing to release him for a court hearing violated a state duty that was a part of an established state procedure for which Oregon provides a remedy.

The Ninth Circuit, however, held that several of Franklin's claims were improperly dismissed by the district court since Franklin alleged the prison failed to provide him with proper outdoor exercise in violation of his eighth amendment right against cruel and unusual punishment. In one of these complaints, Franklin claimed he was deprived of the right to shave and exercise on a daily basis. In another, Franklin complained of having to live in an unclean cell as well as being denied adequate exercise privileges. Further, Franklin alleged in a complaint that he was not provided adequate reading light, reading glasses, proper ventilation or exercise. The Ninth Circuit stated that since each of these complaints alleged a denial of exercise, the complaints should not have been dismissed because a denial of regular exercise may constitute cruel and unusual punishment.

The Ninth Circuit held the district court also improperly dismissed Franklin's claims that his health was endangered by prison conditions.

County, the Supreme Court stated that public defenders were not acting under the color of state law for purposes of §1983 when they were performing a lawyer's traditional functions as counsel to an indigent defendant in a state criminal proceeding. Thus, it seems the decision in which held public defenders immune from §1983 liability may no longer be valid since Polk County was decided after Franklin.

4601. 662 F.2d at 1345-46. In this complaint, Franklin alleged a prison counselor negligently failed to release him for a court appearance and failed to notify the court. The hearing involved the disposition of some of Franklin's property. The Ninth Circuit noted that if his facts were correct, Franklin could possibly recover in state court under Rev. Stat. §18.160 (1973), but that he stated no federal cause of action. 662 F.2d at 1345. See Parratt v. Taylor, 451 U.S. 527 (1981). In Parratt, the Supreme Court stated that although an inmate was deprived of property under color of state law, the deprivation did not occur as a result of an established state procedure. Therefore, the plaintiff did not allege a violation of the due process clause of the fourteenth amendment. Id. at 543.

4602. 662 F.2d at 1346.

4603. Id.

4604. Id. Franklin also alleged that he was placed on a restrictive diet while in the psychiatric security unit.

4605. Id.

4606. 662 F.2d at 1346 (citing Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979) (refusing to give prisoner any outdoor exercise and recreation constituted cruel and unusual punishment when inmates confined to cells almost 24 hours a day)).

Although the Ninth Circuit held that these complaints were improperly dismissed, the court did not speculate as to whether claims which allege improper ventilation or reading light or even the failure to be provided a clean cell could constitute an eighth amendment cause of action.
in violation of his eighth amendment right. Franklin alleged in one
complaint that due to a throat tumor, he was subject to serious danger
by being placed in a cell with a heavy cigarette smoker. Franklin
also complained that his special requests for food were denied even
after informing officials that he was having insulin reactions. Franklin
further alleged that guards failed to protect him from inmates
who threw sharp objects into his cell. The Ninth Circuit held that
these claims should not have been dismissed by the district court be-
cause if these allegations did cause a threat to Franklin's health, they
did in fact state a cause of action for cruel and unusual punishment in
violation of the eighth amendment.

Finally, the Ninth Circuit examined two other sua sponte dismis-
sals. In one suit, Franklin claimed that a jail officer violated his consti-
tutional right to privacy by taking legal and personal papers from
Franklin's cell and copying them. Franklin further alleged that his
cell was bugged so that his prayers may have been overheard. The
Ninth Circuit held that while these claims may be frivolous, they were
not so wholly insubstantial that they should have been dismissed.

4607. 662 F.2d at 1346-47.
4608. Id.
4609. Id. at 1347.
4610. Id.
4611. Id. (citing Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980) (deliberate indiffer-
ence to prisoner's serious medical needs violated inmate's eighth amendment rights; inmate
must show that (1) medical need was so serious that lay person would easily recognize the
need for a doctor and (2) prison officials were deliberately indifferent to his medical need),
cert. denied, 450 U.S. 1041 (1981)).
4612. 662 F.2d at 1347.
4613. Id. The Ninth Circuit stated that although most warrantless wiretapping in prisons
is permitted, some communications are excepted. The court noted that prayer may constitute
privileged communication.

See United States v. Paul, 614 F.2d 115 (6th Cir.) (prison allowed to monitor conversations
under 18 U.S.C. § 2510(5)(a) when wiretapping equipment used in ordinary course of
correctional officers' duties and when inmates have reasonable notice that telephone conver-
sations may be monitored), cert. denied, 446 U.S. 941 (1980); Campiti v. Walonis, 611 F.2d
387, 392 (1st Cir. 1979) (monitoring inmate's conversation not permitted when defendant
listened on another line—a process not normally used or expected—and did not notify either
party; such monitoring was also not in ordinary course of duties of defendant).

In a concurring opinion, Justice Sneed added that in forma pauperis complaints (unlike
the complaints in Franklin), should be dismissed more readily since they are easily filed and
tend to inundate the district courts. 662 F.2d at 1348 (Sneed, J., concurring). Sneed also
noted that the distinction between complaints which lack jurisdiction and those that fail to
state a claim is often quite unclear. Id. at 1348-49.
IV. Trial Proceedings
A. Lawrence B. Cohn
B. Lawrence B. Cohn
C. William W. Koepcke
D. Lawrence B. Cohn
E. Lawrence B. Cohn
F.
1. Pamela A. Kuehn
2. Pamela A. Kuehn
3. Pamela A. Kuehn
4.
   a. Pamela A. Kuehn
   b. William W. Koepcke
   c. William W. Koepcke
   d. William W. Koepcke
5.
   a. Pamela A. Kuehn
   b. Diana L. Summerhayes
   c. Diana L. Summerhayes
6. Diana L. Summerhayes
7. Pamela A. Kuehn
8. Pamela A. Kuehn
9. Diana L. Summerhayes
10. Pamela A. Kuehn
G. Glenn Mondo
H. William W. Koepcke

V. Post-Conviction Proceedings
A. Margaret L. Oldendorf
B. Charles G. Smith
C. Grace C. Cadoret
D. Margaret L. Oldendorf
E. Raymond P. Mulligan
F. Charles G. Smith