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PART ONE: SEARCH & SEIZURE

I. THE DOCTRINE OF FOUNDED SUSPICION

A. RECENT DEVELOPMENTS: APPLICABLE SUPREME COURT GUIDANCE

On June 21, 1973, the Supreme Court rendered its decision in *Almeida-Sanchez v. United States*,[1] reversing a Ninth Circuit ruling.[2] At issue was the permissible authority which United States

1. 413 U.S. 266 (1973), *rev'g* 452 F.2d 459 (9th Cir. 1971), *noted in* 87 HARV. L. REV. 196 (1973).

2. The Ninth Circuit's decision is reported at 452 F.2d 459 (9th Cir. 1971). The per curiam opinion summarily affirmed a district court validation of a stop pursuant to 8 U.S.C. § 1357 (1970), 8 C.F.R. § 287.1 (1975), and a series of Ninth Circuit cases approving exercise of the authority granted thereunder. The opinion also stated that a section

Border Patrol agents could exercise pursuant to a federal statute which authorizes warrantless searches of vehicles for aliens without probable cause within a reasonable distance from any external boundary of the United States.[3] An administrative regulation had defined that reasonable distance as 100 miles.[4] The *Almeida-Sanchez* majority held that warrantless searches of automobiles, in the absence of probable cause or consent, violate the fourth amendment when conducted anywhere other than at the border or its functional equivalent.[5]

United States v. Brignoni-Ponce: *A Limitation on Founded Suspicion?*

Subsequent to *Almeida-Sanchez*, the Ninth Circuit considered whether that decision also limited the authority of Border Patrol agents to stop cars. In *United States v. Brignoni-Ponce*,[6] the court, sitting *en banc*, considered the legality of the warrantless stop of a vehicle, whose three occupants appeared to be of Mexican descent, at a point some 65 miles north of the Mexican border.[7] The *Brignoni-Ponce* court determined that application of *Almeida-*

1357 search is not a border search governed by border search law. 452 F.2d at 460-61.

3. Immigration and Nationality Act § 287(a)(3), 8 U.S.C. § 1357(a)(3) (1970), which was at issue, states:

> (a) Any officer or employer of the service authorized under regulations prescribed by the Attorney General shall have power without warrant—
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> . . . .
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> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States.

4. 8 C.F.R. § 287.1 (1975), which provides in pertinent part:

> (a) (2) *Reasonable distance*. The term "reasonable distance," as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States . . . .

5. 413 U.S. at 272-73. For discussions of the implications of *Almeida-Sanchez* see Note, *Almeida-Sanchez and its Progeny: The Developing Border Zone Search Law*, 17 ARIZ. L. REV. 214 (1975) [hereinafter cited as *Almeida-Sanchez* Note]; Note, *Border Searches Revisited: The Constitutional Propriety of Fixed and Temporary Checkpoint Searches*, 2 HASTINGS CON. L. Q. 251 (1975); Note, *Area Search Warrants in Border Zones: Almeida-Sanchez and Camara*, 84 YALE. L.J. 355 (1974).

6. 499 F.2d 1109 (9th Cir. 1974) (en banc), *aff'd*, 422 U.S. 873 (1975).

7. 499 F.2d at 1110. The government contended that *Almeida-Sanchez* applied only to searches under section 1357(a)(3) and claimed authority to stop under section 1357(a)(1).

Sanchez to searches, and not to stops, would be inconsistent with the Supreme Court's opinion.[8] The contention that Border Patrol agents may stop any vehicle in order to interrogate persons believed to be aliens about their right to remain in the United States was rejected.[9]

In the course of the opinion, the *Brignoni-Ponce* court noted that such a premise is inconsistent with established Ninth Circuit case law requiring a founded suspicion for the stop of a vehicle by either a police officer or a Border Patrol agent for the purpose of investigatory detention.[10] However, apart from indicating that the facts in the instant case did not consititute a founded suspicion,[11] the court did not further amplify the concept of founded suspicion.

On certiorari to the Supreme Court, *Brignoni-Ponce* was affirmed.[12] Writing for the Court, Justice Powell traced the history of investigative detentions on less than probable cause previously validated in *Terry v. Ohio*[13] and *Adams v. Williams*.[14] Relying on

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Id. Section 1357(a)(1) states:

> (a) Any officer or employer of the service authorized under regulations prescribed by the Attorney General shall have power without warrant—
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> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States
>
> . . . .

8 U.S.C. § 1357(a)(1) (1970).

8. 499 F.2d at 1111. The court refused to adopt the approach taken by the Court of Appeals for the Tenth Circuit in United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973), where it was held that *Almeida-Sanchez* did not apply to section 1357(a)(1). 499 F.2d at 1111.

9. 499 F.2d at 1111.

10. *Id.* The court cited United States v. Mallides 473 F.2d 859 (9th Cir. 1973), United States v. Ward, 488 F.2d 162 (9th Cir. 1973) (en banc), United States v. Mora-Chavez, 496 F.2d 1181 (9th Cir. 1974), and United States v. Bugarin-Casas, 484 F.2d 853. (9th Cir. 1973), *cert denied*, 414 U.S. 1136 (1974). No reference was made to Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966), the decision which first defined founded suspicion. *Wilson* is discussed at notes 39-45 infra and accompanying text.

11. 499 F.2d at 1111. The court likened the Ninth Circuit's founded suspicion cases to a decision by the Court of Appeals for the District of Columbia Circuit which requires a reasonable suspicion that the individual detained is an illegal alien in order to validate a forcible detention under the authority of section 1357(a)(1). *See* Au Yi Lau v. United States Immigration & Nat. Serv., 445 F.2d 217 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971). *Au Yi Lau* did not involve a vehicle detention, but the concept of reasonable suspicion employed in that case was applied to detention of a cab in Cheung Tin Wong v. United States Immigration & Nat. Serv., 468 F.2d 1123 (D.C. Cir. 1972).

12. 422 U.S. 873 (1975), *noted in Almeida-Sanchez Note, supra* note, at 224; 13 HOUSTON L. REV. 200 (1975); 5 HUMAN RIGHTS 89 (1975).

13. 392 U.S. 1 (1968), *noted in* 82 HARV. L. REV. 178 (1968). For a detailed discusssion of *Terry*, see La Fave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39 (1968).

14. 407 U.S. 143 (1972), *noted in* 50 DENVER L.J. 243 (1973); 50 J. URBAN L. 790 (1973);

these decisions rather than on circuit court cases dealing with founded suspicion, the Supreme Court mandated that a reasonable suspicion—which is less than probable cause—be established to validate a vehicle stop by Border Patrol agents:

> Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with reasonable inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.[15]

Noting that each case must be determined on the totality of its particular circumstances, the court alluded to the factual circumstances of a number of circuit courts of appeals cases as illustrative of factors which may be considered when evaluating whether "reasonable suspicion" existed.[16] However, the court expressly reserved opinion as to the merits of the particular decisions cited.[17] Factors appropriate for consideration include characteristics of the area in which the vehicle is encountered, proximity to the border, usual traffic patterns, previous experience with alien traffic, recent illegal border crossings, evasive or erratic driving behavior, characteristics of the vehicle which lend themselves to concealed alien transportation, a vehicle which appears heavily laden, an extraordinary number of passengers, evidence of passengers attempting to hide and occupants bearing the distinctive characteristics of persons who live in Mexico.[18] The court stressed that, pursuant to *Terry*, Border Patrol officers are always allowed to assess facts in light of their experience with detection of illegal entry and smuggling.[19]

The Ninth Circuit's Response to Brignoni-Ponce

Several Ninth Circuit founded suspicion decisions were

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24 SYRACUSE L. REV. 845 (1973).

15. 422 U.S. at 884.

16. *Id.* at 885. The majority of the cases cited are from the Ninth Circuit and include United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974); United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir.), *cert. denied*, 417 U.S. 972 (1974); United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973) *cert. denied*, 414 U.S. 1136 (1974); Duprez v. United States, 435 F.2d 1276 (9th Cir. 1970).

17. 422 U.S. at 885 n.10.

18. *Id.* at 885.

19. *Id., citing* Terry v. Ohio, 392 U.S. 1, 27 (1967). It has been observed that this degree of discretion may partially vitiate the salutary effect of *Terry*'s objective standard. *See* Note, *Reasonable Suspicion of Illegal Alienage as a Precondition to "Stops" of Suspected Aliens*, 52 CHI. KENT L. REV. 485, 501 (1975).

granted certiorari and remanded by the Supreme Court for further consideration in light of its decision in *Brignoni-Ponce*. The first of these cases was *United States v. Rocha-Lopez*,[20] in which the Ninth Circuit had determined that the totality of circumstances supported a finding of founded suspicion for the stop of appellant's car. On remand, the court decided that there is "no substantial difference between the doctrine of 'founded suspicion' used by this court, and the 'reasonable suspicion' test announced in *Brignoni-Ponce*."[21] Because the Supreme Court had based the reasonable suspicion standard on prior Supreme Court cases rather than on court of appeals decisions discussing the founded suspicion test, the *Rocha-Lopez* court examined the facts de novo on remand, applying the appropriate factors for consideration enumerated in *Brignoni-Ponce*.[22] It concluded that a reasonable suspicion did in fact exist and affirmed the district court decision not to suppress evidence seized in an automobile search.[23]

The second case on remand was *United States v. Gonzalez-Diaz*,[24] in which the Ninth Circuit had originally affirmed a district court finding of founded suspicion. Relying on the virtual equation of founded suspicion and reasonable suspicion in *Rocha-Lopez*, the *Gonzalez-Diaz* court simply affirmed on the basis of its initial holding, without further consideration of the facts in light

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20. 527 F.2d 476 (9th Cir. Dec., 1975) (per Carter, J.). In *Rocha-Lopez*, experienced Border Patrol agents observed a vehicle at 6:40 a.m. less than two miles from the border in an area known for smuggling. At that time of day, traffic normally consisted of local residents, most of whom were known to one of the agents; the agent did not recognize either the vehicle or Rocha-Lopez. The vehicle came to a sudden unnecessary stop at an intersection, indicating unfamiliarity with the area, and braked to ten miles per hour upon seeing the marked patrol car. *Id.* at 477.

21. *Id. Rocha-Lopez* relied on Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966), and United States v. Mallides, 473 F.2d 859 (9th Cir. 1973), in determining that founded suspicion and reasonable founded suspicion and reasonable suspicion are functionally equivalents. 527 F.2d at 477. The court's reasoning is not persuasive. *Mallides* may be compatible with the "specific and articulable facts" mandate of *Brignoni-Ponce's* reasonable suspicion standard, *see* notes 46-52 *infra* and accompanying text, but *Wilson* is not. *See* notes 39-45 *infra* and accompanying text. Thus *Mallides* reveals, rather than bridges, the wide gap between *Wilson v. Porter*, which first enunciated the doctrine of founded suspicion, and *Brignoni-Ponce*.

22. 527 F.2d at 477-78. The factors which the *Rocha-Lopez* court deemed significant in the instant case were: (1) proximity to the border; (2) an area notorious for smuggling; (3) an agent familiar with local residents did not recognize Rocha-Lopez; and (4) Rocha-Lopez' driving indicated unfamiliarity with the area and he slowed to ten miles per hour when he saw the marked patrol car. *Id.* at 478. For a more complete list of the factors delineated by the Supreme Court in *Brignoni-Ponce* see note 18 *supra* and accompanying text.

23. 527 F.2d at 478-79.

24. 528 F.2d 925 (9th Cir. Jan., 1976) (per curiam).

of the standards articulated in *Brignoni-Ponce*.[25]

Problems with the Response: Confusion Regarding the Applicable Standard

While it is certainly true that some of the three-judge panels that considered investigative detentions prior to the Supreme Court's decision in *Brignoni-Ponce* had promulgated standards almost identical to the language which the Supreme Court employed in *Terry* and applied to automobile stops in *Brignoni-Ponce*,[26] a substantial number of panel determinations clearly rejected the *Terry* test.[27] The Supreme Court decision in *Brignoni-Ponce* leaves no serious doubt that the standard for founded suspicion should be identical to that for reasonable suspicion, since the great majority of founded suspicion cases arise in an expanded border context where Border Patrol agents make stops to check for the presence of illegal aliens. Moreover, although the Supreme Court decision limited the authority exercised pursuant to a federal statute granting the right to stop to detect illegal aliens, the *Rocha-Lopez* court intimated, but did not specifically rule, that a reasonable suspicion might also be properly employed to justify a stop to investigate drug smuggling, because the circumstances provoking suspicion would be similar in each instance.[28]

Thus, the viability of Ninth Circuit founded suspicion decisions which do not apply a standard comparable to that advanced in *Terry* must be seriously questioned in light of *Brignoni-Ponce*. It does not, therefore, seem prudent to rely on a district court determination of the existence of founded suspicion made prior to

25. *Id.* For a complete list of the factors discussed in *Brignoni-Ponce* see note 18 *supra* and accompanying text.

26. *See, e.g.*, United States v. Torres-Urena, 513 F.2d 540 (9th Cir. Mar., 1975); United States v. Mallides, 473 F.2d 859 (9th Cir. 1973); United States v. Ward, 488 F.2d 162 (9th Cir. 1973) (en banc).

27. *See, e.g.*, United States v. Holland, 510 F.2d 453 (9th Cir.), *cert. denied*, 422 U.S. 1010 (1975); United States v. Madueno-Astorga, 503 F.2d 820 (9th Cir. Sept., 1974) (per curiam), *cert. denied*, 422 U.S. 1057 (1975). Neither of these opinions expressly rejects a *Terry*-type formulation of founded suspicion, but such a rejection can be inferred from the failure of the court to aritculate specific facts which provide affirmative indicia of criminal activity. For a discussion arriving at a similar conclusion see Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U.S.F.L. REV. 219, 254-57 (1974).

28. 527 F.2d at 478. While stating that it "need not decide if a stop based only on a reasonable suspicion of . . . drug smuggling would be proper," the court went on to observe that the problem may be "imaginary" because the facts which suggest alien smuggling (*e.g.*, low-riding cars and hidden compartments) also suggest drug smuggling. *Id.*

the Supreme Court promulgation of the reasonable suspicion test. This is especially true in light of the fact that the numerous Ninth Circuit founded suspicion cases constitute a remarkably inconsistent body of precedent.

Even in those Ninth Circuit cases which do not expressly state a founded suspicion standard, and are thus not directly at odds with the *Terry* standard, scrutiny of the facts reveals that what constitutes founded suspicion in one case amounts to an insufficient basis for a stop in another.[29] Moreover, in many cases, it is not possible to identify the specific, articulable facts on which either the district court or the court of appeals relied to reach a conclusion regarding the validity of a search.[30]

B. Pre-*Brignoni-Ponce* Founded Suspicion Decisions: The Source of Confusion Regarding the Applicable Standard

The cases of the past survey term illustrate the intra-circuit inconsistency that has developed with respect to the doctrine of founded suspicion, first propounded in *Wilson v. Porter*[31] in 1966. The first of two areas of disagreement was resolved by the Supreme Court decision in *Brignoni-Ponce*. It concerned the continued viability of the entire concept of founded suspicion in the aftermath of *Almeida-Sanchez*, which required no less than probable cause for the stop and search of a vehicle.

In a dissent and special concurrence,[32] Judge Hufstedler had expressed an inability to reconcile a stop on less than probable cause with the mandate of *Almeida-Sanchez*, but nevertheless concurred under compulsion of *United States v. Bugarin-Casas*[33] and

29. *Compare* Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966), *with* United States v. Torres-Urena, 513 F.2d 540 (9th Cir. Mar., 1975) (per curiam).

30. *See, e.g.*, United States v. Madueno-Astorga, 503 F.2d 820 (9th Cir. Sept., 1974) (per curiam), *cert. denied*, 422 U.S. 1057 (1975). For a discussion of *Madueno-Astorga* see text accompanying notes 62-68 *infra*.

31. 361 F.2d 412 (9th Cir. 1966). For a discussion of *Wilson* and the history of founded suspicion prior to the survey term see Weisgall, *supra* note 27.

32. *See* United States v. Madueno-Astorga, 503 F.2d 820, 821 (9th Cir. Sep., 1974) (Hufstedler, J., concurring & dissenting), *cert. denied*, 422 U.S. 1057 (1975).

33. 484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974). In *Bugarin-Casas*, two Border Patrol agents, operating in an area known for a high incidence of illegal alien smuggling, observed a car seemingly occupied only by the driver, who appeared to be of Mexican descent. The car was riding low to the ground in the rear. One agent recognized the model of the car as one which had a rear compartment of the type in which aliens had been found hidden. The agents stopped the car within fifteen miles of the border. While one agent questioned Bugarin-Casas, the other observed cellophane

its progeny, a line of Ninth Circuit decisions validating the founded suspicion doctrine. Her point appeared to be well-taken because the typical pattern of a founded suspicion stop is quite similar to an *Almeida-Sanchez* stop and search, in that a founded suspicion stop is almost invariably accompanied by a search. The established pattern is that founded suspicion provides justification for a temporary detention during the course of which probable cause arises to sustain a search. The similarity is heightened by the fact that it is possible to use founded suspicion to provide after the fact justification for a search, since the court has determined that temporal formation of intent to search is irrelevant; if probable cause to search follows a detention supported by founded suspicion, a search conducted after probable cause arises will not be invalid simply because the actual intent to search existed at the time it was decided to effect the stop.[34] In the absence of a standard requiring specific and articulable facts to validate a stop, the founded suspicion doctrine could be used to severely erode the provisions of *Almeida-Sanchez*. In fact, it has been noted, both in a Ninth Circuit decision[35] and by a commentator,[36] that the volume of founded suspicion stops has greatly increased after *Almeida-Sanchez*. However, the standards of *Brignoni-Ponce* can be relied upon to safeguard against abuse of investigatory detentions and eliminate the disparity between *Almeida-Sanchez* and decisions validating stops on less than probable cause.

A second point of dispute among Ninth Circuit panels is related to the first and still exists in large measure. In essence, there is disagreement concerning the test for determining whether a founded suspicion exists in a particular instance. This difference of opinion is reflected in a series of decisions which effectively pit the standard articulated in *Terry* against the description of

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wrapped packages, similar to containers of marijuana he had seen on numerous occasions, through an opening in the rear compartment. The agents then searched the car and found marijuana. The court determined that these facts were sufficient to constitute a founded suspicion. *Id.* at 854.

Judge Hufstedler's dissent and special concurrence were filed in United States v. Madueno-Astorga, 503 F.2d 820 (9th Cir. Sept., 1974), *cert. denied*, 422 U.S. 1057 (1975), the facts of which are clearly controlled by those of *Bugarin-Casas*. *See* text accompanying note 63 *infra*.

34. United States v. Laird, 511 F.2d 1039, 1040 (9th Cir. Mar., 1975) (per curiam); United States v. Bugarin-Casas, 484 F.2d 853, 854 n.1 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974).

35. United States v. Larios-Montes, 500 F.2d 941, 942 (9th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975). For a discussion of the facts in *Larrios-Montes* see note 110 *infra*.

36. Weisgall, *supra* note 27, at 219-20.

founded suspicion contained in *Wilson v. Porter*.[37] This lack of concurrence within the circuit has prevented the formulation of a manageable standard for application of the concept of founded suspicion. The resultant uncertainty regarding the applicable standard presents a serious problem when Ninth Circuit founded suspicion precedent is relied upon directly to determine whether there has been compliance with the reasonable suspicion standard of *Brignoni-Ponce*.[38] A brief examination of the history of the founded suspicion doctrine and an analysis of several of the current cases will serve to illustrate the court's somewhat bifurcated approach.

The Foundation Case: Wilson v. Porter

The Ninth Circuit established the validity of a stop and temporary detention of vehicles on less than probable cause in the seminal case of *Wilson v. Porter*.[39] Therein the court determined that a brief detention is not an arrest,[40] and stated that:

> Due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers could have had reasonable grounds for their actions. A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing.[41]

Applying this principle, the court validated the stop and detention in the instant case. In *Wilson*, two local police officers first saw the defendant drive by at 3:00 a.m. while they were citing another driver for a traffic violation. Twenty-five minutes later, the officers again observed the defendant driving in the same direction some nine blocks away on the same street. After following the car for a short distance, the officers turned on their red light and

37. *See e.g.*, United States v. Carrizoza-Gaxiola, 523 F.2d 239 (9th Cir. June, 1975) (per Wallace, J.); United States v. Torres-Urena, 513 F.2d 540 (9th Cir. Mar., 1975) (per curiam).

38. A panel of the court employed this approach in United States v. Gonzalez-Diaz, 528 F.2d 925 (9th Cir. 1976). *Gonzalez-Diaz* is discussed at text accompanying notes 24-25 *supra*.

39. 361 F.2d 412 (9th Cir. 1966). *Wilson* is discussed extensively in Weisgall, *supra* note 27.

40. 361 F.2d at 415, *cf.* Terry v. Ohio, 392 U.S. 1, 16-17 (1968).

41. 361 F.2d at 415.

pulled the defendant's car over. There had been no traffic violation.[42]

The *Wilson* opinion failed to elucidate any specific, articulable facts justifying the investigatory detention. The test was approached negatively; that is, given the circumstances of the case, the court was unable to say the suspicions of a local officer could not have been reasonably aroused.[43] The court indicated no specific basis from which it could be demonstrated that the stop was "not arbitrary or harassing." The officer in *Wilson* "did not state in so many words what considerations led him and his partner to stop the car."[44] Despite that, the court found no need for a "reconstructed, after-the-fact explanation of what may have been nothing more at the time of the occurrence than the instinctive reaction of one trained in the prevention of crime,"[45] provided the record disclosed circumstances on which reasonable action might have been predicated.

In Pursuit of a Standard: The Indirect Impact of Terry v. Ohio *on* Wilson

A large number of Ninth Circuit cases have cited *Wilson* and employed the founded suspicion concept described therein. However, several cases dealing with the same type of investigatory detention considered in *Wilson* have been decided, either without reliance on *Wilson* or its progeny, or merely with passing reference to the *Wilson* line of cases. These decisions rely instead

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42. *Id.* at 414. After stopping the car, the defendant got out and was asked to present identification. As defendant's passenger exited, one of the officers on the passenger side shone his flashlight into the car and observed a pistol barrel protruding from under the seat. The officer seized the pistol, which led to defendant's conviction for possession of a firearm by a felon. *Id.*

43. *Id.* at 415. Under such a test an officer's decision to stop can be validated even if there are no specific facts which suggest the presence or imminence of criminal activity. Accordingly, the *Wilson* test has been described as "subjective," and has been criticized because it does not recognize, as the *Terry* Court stated, that:

> [S]imple "good faith on the part of the arresting officer is not enough." . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate . . . .

Weisgall, *supra* note 27, at 243 & n.140, *quoting* Terry v. Ohio, 392 U.S. 1, 22 (1968). In *Terry*, of course, it was expressly stated that "it is imperative that the facts be judged against an objective standard . . . ." *Id.* at 21-22.

44. 361 F.2d at 415.

45. *Id. Contra*, Terry v. Ohio, 392 U.S. 1 (1968), which proscribes intrusions on fourth amendment rights "based on nothing more substantial than inarticulate hunches." 392 U.S. at 22.

on Supreme Court cases dealing with investigatory detentions, namely *Terry*, *Sibron* and *Adams*.

United States v. Mallides[46] is a case in point. In *Mallides*, two city police officers stopped an automobile in which they had observed six occupants who appeared to be Mexican, who sat very erect, and who did not turn to look at the marked patrol car as it passed.[47] Based on these facts, the police officers suspected that the occupants were illegal aliens. Judge Hufstedler wrote the opinion for a unanimous three-judge panel. Noting that the Supreme Court had yet to rule on the issue of stopping an automobile for the purpose of investigatory detention,[48] the court determined that it would be appropriate to apply the fourth amendment standards for pedestrian investigatory detentions developed in *Terry* to automobile stops which are conducted for the same purpose.[49] The test for the validity of the stop was to be an objective one. The opinion quoted directly from *Terry* to describe the circumstances required to justify a stop and detention:

> The police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.[50]

Mallides, then, is in marked contrast to *Wilson*. In *Wilson*, the officer did not articulate any of the considerations which led to the decision to effect the stop; moreover, the *Wilson* court failed to articulate any such facts itself, simply determining instead that the record did not indicate that the action taken was unreasonable. In *Mallides*, as in *Terry*, the officer was required to delineate the specific and articulable facts which were relied upon. The *Mallides* court also articulated the facts on which the officers based the stop and found them insufficient to warrant the intrusion.[51] Although both *Wilson* and *Mallides* involved stops of automobiles for investigatory detention, *Mallides* neither mentioned *Wilson* nor de-

46. 473 F.2d 859 (9th Cir. 1973).

47. *Id.* at 860. The officers stopped the car and requested Mallides to produce a driver's license. He complied but upon interrogating Mallides' passengers, the officers discovered that they were illegal aliens. *Id.*

48. Since *Mallides* was decided, this issue has been addressed by the Supreme Court. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975), *aff'g* 499 F.2d 1109 (9th Cir. 1974). *Brignoni-Ponce* is discussed at notes 6-19 *supra* and accompanying text.

49. 473 F.2d at 861, *quoting* Terry v. Ohio, 392 U.S. 1, 21 (1968).

50. 473 F.2d at 861. Contrast this test with *Wilson*'s subjective test, which is discussed at note 43 *supra* and accompanying text.

51. 473 F.2d at 861.

nominated the standard required for a stop a founded suspicion. Subsequent cases, however, have cited both *Wilson* and *Mallides* for authority to stop a vehicle on the basis of a founded suspicion.[52]

The court in *United States v. Ward*,[53] an *en banc* determination, cited *Wilson* and *United States v. Bugarin-Casas*,[54] one of *Wilson*'s more frequently-cited progeny, as cases upholding investigative detentions, but distinguished them factually. The court then stated:

> In conformity with *Terry*, we have repeatedly held that a founded suspicion that criminal activity is afoot is a minimum requirement for any lawful detentive stop.[55]

To illustrate, the court cited *United States v. Leal*[56] and *United States v. Davis*,[57] each of which employed both *Terry* and *Wilson* to evaluate stops claimed to be predicated on a founded suspicion. The *Ward* court determined that no founded suspicion existed when: (1) the automobile was not stopped in connection with a

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52. *See, e.g.*, United States v. Rocha-Lopez, 527 F.2d 476, 477 (9th Cir. Dec., 1975); United States v. Martinez-Fuerte, 514 F.2d 308, 314 (9th Cir., Mar., 1975), *rev'd*, 44 U.S.L.W. 5336 (U.S. July 6, 1976), *noted in* 9 LOYOLA L.A.L. REV. 426 (1976); United States v. Torres-Urena, 513 F.2d 540, 542 (9th Cir. Mar., 1975).

53. 488 F.2d 162 (9th Cir. 1973) (en banc).

54. 484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974). For a discussion of the facts of *Bugarin-Casas* see note 33 *supra*.

55. 488 F.2d at 169 (citations omitted).

56. 460 F.2d 385 (9th Cir. 1972). In *Leal*, a local law enforcement official glanced into defendant's companion's purse and observed what appeared to be a large stack of currency and checks. Leal and his companion drove off while a records check was being run on his car. Two officers followed the car until the check was completed; it revealed that the vehicle was rented but did not indicate whether it was wanted by any law enforcement agency. At this point, the officers stopped the car. *Id.* at 387.

The *Leal* court quoted the *Wilson* definition of a founded suspicion, *see* text accompanying note 41 *supra*, but only relied on *Terry* for support of the proposition that inconvenience and intrusiveness must be weighed against the need for police action in determining the reasonableness of a stop. The court then concluded that the stop was not arbitrary but instead was based on reasonable suspicions and involved minimal intrusiveness. *Id.* at 387-88. Thus, *Leal* did not actually rely on *Terry* to formulate a definition of founded suspicion.

57. 459 F.2d 458 (9th Cir. 1972). In *Davis*, two police officers passing by a motel which they knew was frequented by narcotics addicts saw Davis in front of it. He appeared to be having difficulty maintaining his balance. The officers felt that something was wrong but did not know specifically what it might be. When they returned to the motel, Davis was a passenger in a departing car. On the basis of these observations, the officers stopped the car. *Id.* at 459. The *Davis* court found these facts insufficient to support any suspicion of criminal activity and invalidated the stop under both *Terry* and *Wilson* without advancing more specifically the standard for a valid stop.

particular crime; (2) there were no exigent circumstances mandating a siren stop; and (3) there was no reason to suspect that appellant had violated or was about to violate a federal statute, which constituted the only basis for exercise of the enforcement authority of the federal agents who made the stop.[58] Thus, both the *Ward* court's analysis and the standard for founded suspicion articulated therein were more stringent than those of *Wilson*. While it would appear that *Ward* implicitly overruled or at least significantly modified *Wilson*,[59] Ninth Circuit decisions continue to rely on one or the other,[60] or both in tandem,[61] making no distinction between the disparate tests for founded suspicion they contain. The basic *Wilson-Terry* split continues to be reflected in cases decided during the survey term.

The 1974-1975 Term: A Continuation of Two Parallel Lines of Incompatible Precedent

The first survey case to deal with founded suspicion was *United States v. Madueno-Astorga*.[62] In that case, Border Patrol agents observed an automobile with a large trunk and a heavy-duty suspension system on a highway approximately ten miles from the Mexican border. Because the car drifted and appeared to be heavily loaded, the agents stopped it for investigation.[63] The majority concluded that these facts were sufficient to constitute a founded suspicion for a stop to determine whether the driver was transporting illegal aliens.[64] Although the *Madueno-Astorga* court cited cases following the *Wilson* rule,[65] it failed to define founded suspicion except to note that it can be less than probable cause

58. 488 F.2d at 169.

59. *See* Weisgall, *supra* note 27, at 246.

60. For cases which cite *Ward* but not *Wilson* see for example, United States, v. Brignoni-Ponce, 499 F.2d 1109, 1111 (9th Cir. 1974), *aff'd.*, 422 U.S. 873 (1975); Schulz v. Lamb, 504 F.2d 1009, 1011 (9th Cir. 1974). For cases which cite *Wilson* but not *Ward* see, for example, United States v. Rodriguez-Alvarado, 510 F.2d 1063, 1064 (9th Cir., Jan., 1975); United States v. Barragan-Martinez, 504 F.2d 1155, 1157 (9th Cir. July, 1974).

61. *See, e.g.*, United States v. Carrizoza-Gaxiola, 523 F.2d 239, 241 (9th Cir. June, 1975); United States v. Holland, 510 F.2d 453, 455 (9th Cir. Jan., 1975), *cert. denied*, 422 U.S. 1010 (1975).

62. 503 F.2d 820 (9th Cir. July, 1974) (per curiam), *cert. denied*, 422 U.S. 1057 (1975).

63. 503 F.2d at 820-21. The agents followed the vehicle for about two miles before stopping it. When one of the agents approached the stopped automobile, the detected the odor of marijuana and thus had probable cause to effect a search. *Id.* at 821.

64. *Id.*

65. *Id.*, *citing* United States v. Jaime-Barrios 494 F.2d 455 (9th Cir.), *cert. denied*, 417 U.S. 972 (1974); United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974).

and that it justifies a vehicle stop "for the purpose of limited inquiry in the course of routine investigation."[66] From this lack of more detailed analysis, it can be inferred that the majority did not view founded suspicion as requiring specific and articulable facts. That conclusion is precisely the position Judge Hufstedler took in her dissent,[67] in which she argued that the facts "are not enough to create a founded suspicion that criminal activity was afoot."[68]

The next Ninth Circuit founded suspicion case shifted back to the *Terry* standard. In *United States v. Barragan-Martinez*,[69] the court held that there was no founded suspicion to stop a vehicle which closely followed another vehicle stopped on probable cause.[70] Although *Barragan-Martinez*, like *Madueno-Astorga*, referred to *Wilson* as the source of the founded suspicion doctrine,[71] it cited *Terry* for the proposition that application of the exclusionary rule is appropriate where there is no founded suspicion "that the vehicle's occupants are or have been engaged in criminal conduct."[72] This dictum accords with the standard for application of the founded suspicion test requiring positive indicia of criminal activity propounded in the *Madueno-Astorga* dissent.[73]

In *United States v. Holland*,[74] the court returned to the *Wilson* rule. In *Holland*, officers with a warrant searched a house which was located between two other houses off of a rural road in a sparsely populated area of Oregon. They found guns, drugs and narcotics paraphernalia, but did not find the white male fugitive, who was believed to be armed and dangerous and in the immediate area, that they sought. At 1:00 a.m., Holland's car was observed proceeding very slowly down a road leading to the house, which led the officers to believe that the occupants were unfamiliar with the area. The car turned onto the road where the

66. 503 F.2d at 821.

67. *Id.* (Hufstedler, J., dissenting from the denial of defendant's motion for a rehearing).

68. *See id.* Judge Hufstedler would have granted a rehearing in order to determine whether the majority applied the proper standard in light of Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

69. 504 F.2d 1155 (9th Cir. July, 1974) (per Goodwin, J.).

70. *Id.* at 1156. The automobile in question was stopped because for several miles it followed two to three car-lengths behind a truck which a reliable informant had linked to activities involving the illegal transportation of aliens.

71. *Id.* at 1157.

72. *Id.* at 1158.

73. Judge Hufstedler's dissent to *Madueno-Astorga* is discussed at notes 67-68 *supra* and accompanying text.

74. 510 F.2d 453 (9th Cir. Jan., 1975) (per Carter, J.), *cert. denied*, 422 U.S. 1010 (1975).

three homes were located. After the car passed the first house, an officer stopped the vehicle.[75] The district court had found Holland's conduct to be "consistent with innocent behavior,"[76] and thus determined that there was no founded suspicion to stop.

The court of appeals disagreed, observing that conduct on which a founded suspicion is based can be entirely consistent with innocent behavior. A stop predicated on such conduct is valid as long as there exists some basis from which to determine that the stop was not arbitrary or harassing, given the totality of the circumstances.[77] While *Ward*, cited by the *Holland* court, mandates evaluation of investigatory detentions in light of the surrounding circumstances, it also requires that there be some suspicion "that the *detainee* was involved or about to be involved in criminal activity."[78] None of the facts in *Holland* indicates any basis for suspecting that the automobile occupants were involved in criminal activity. The court simply justified the stop on the basis that when the car passed the first house there was a 50-50 chance that its destination was the house being searched.[79] Following the negative approach of *Wilson*,[80] the *Holland* court stressed the *Wilson* language that a stop is valid if "the detaining officers *could have had* reasonable grounds for their action."[81] However, both *Terry* and *Brignoni-Ponce* require more—they mandate that the officer supply specific and articulable facts

75. *Id.* at 454-55. Holland had a woman passenger with him, and both produced Oregon driver's licenses when asked for identification. However, when Holland could not produce the vehicle's registration papers, the interrogating officer asked for and obtained permission to "look in the car." Upon "leaning into the car," the officer observed "a sawed-off rifle stock partly covered by a cloth" lying between the car's bucket seats, whereupon Holland was arrested. *Id.*

76. *Id.* at 455.

77. *Id.*, quoting Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966). The court somewhat inconsistently reinforced its position by citing United States v. Ward, 488 F.2d 162 (9th Cir. 1973) (en banc), for the proposition that a stop is only justified if the officers believe that the suspects are involved or about to become involved in criminal activity. 510 F.2d at 455. This test is more stringent than *Wilson*'s, and it was *Wilson*, not *Ward*, upon which the court relied. *See id.* at 456. The disparity between *Wilson* and *Ward* is discussed at text accompanying notes 53-61 *supra*.

78. 488 F.2d at 169 & n.1 (footnote omitted).

79. 510 F.2d at 456. Given the fact that Holland apparently made no attempt to avoid contact with the officers or to evade them once he was stopped, it would have been reasonable to infer that there was virtually no chance that he was the armed and dangerous fugitive associated with the house being searched.

80. This negative approach, which approves those stops which are not arbitrary or harassing, rather than requiring affirmative indications of reasonableness, is discussed at note 43 *supra* and accompanying text.

81. 510 F.2d at 455, *citing* Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966) (emphasis added).

which demonstrate that criminal activity is afoot.[82] A stop predicated on less is not reasonable. As Judge Zirpoli's dissent noted, the trial court found that insufficient articulable facts existed in *Holland* to create a founded suspicion.[83] Thus, the *Holland* court's mention of *Ward*'s more stringent standard cannot conceal the fact that the court continued the trend of reliance on *Wilson*'s less exacting approach. For this reason, *Holland* contributes to the uncertainty which has developed regarding the standard to be applied in founded suspicion cases.

This uncertainty is also reflected in *United States v. Rodriguez-Alvarado*.[84] *Rodriguez-Alvarado* specifically stated that the rule in *Wilson* still governs automobile stops.[85] The *Rodriguez-Alvarado* court noted language from *Wilson* which emphasizes that a founded suspicion simply requires action which is not arbitrary or harassing; the *Wilson* quote also contains the observation that the "line between reasonable detention for routine investigation and detention which could be characterized as capricious and arbitrary cannot be neatly drawn."[86] However, after affirming the continued vitality of *Wilson* and its progeny, the *Rodriguez-Alvarado* court applied the "test" developed in those cases by describing "significant articulable facts"[87] supporting a founded suspicion in the instant case. Among other things, the court noted that the car in question was first spotted a short distance from the border in an area where there was a high incidence of smuggling activity; that a sensor had indicated foot traffic earlier, although no one had been apprehended; that the car accelerated to a higher than normal rate of speed for a residential district; and that the vehicle had only one visible occupant but appeared to be heavily loaded.[88] By articulating these specific facts, the *Rodriguez-*

82. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975); Terry v. Ohio, 392 U.S. 1, 21 (1968).

83. 510 F.2d at 456. District Judge Zirpoli, sitting by designation, took the position that the district judge's factual determination should not have been reversed in the absence of clear error. The judge viewed the court's reversal as a substitution of its judgments regarding factual issues for that of the trial judge.

84. 510 F.2d 1063 (9th Cir. Jan., 1975) (per curiam).

85. *Id.* at 1064.

86. *Id., quoting* Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966).

87. 510 F.2d at 1064. *Terry v. Ohio*, of course, speaks of specific and articulable facts which suggest that criminal activity is "afoot." *See* 392 U.S. at 21, 30. The *Rodriguez-Alvarado* court did not discuss what form of criminal activity was suggested by the facts of the case, nor did it explain what it meant by the phrase "significant articulable facts." A legitimate question thus exists about whether the court employed a novel test of its own, used a variation of the *Terry* test, or simply sought to set forth the "principal" or "main" articulable facts disclosed by the record.

88. 510 F.2d at 1064.

Alvarado court seems to have espoused the language of the test propounded for investigatory detention of automobiles in *Wilson*, while actually applying the standard developed in *Terry* and those Supreme Court cases which followed it dealing with detentive stops.

On the other hand, since the court's "significant articulable facts" language directly follows an express reaffirmation of the *Wilson* standard, it is possible that "significant" only means facts sufficient to conclude that a stop is not arbitrary or harassing, and that the facts in *Rodriguez-Alvarado* simply passed the "significance" threshold by a wide margin. At the very least, the court's apparent juxtaposition of two incompatible standards frustrates the development of a single test for founded suspicion.

In contrast to these earlier survey period decisions, *United States v. Torres-Urena*[89] expressly distinguishes between *Wilson* and the line of Supreme Court investigatory detention cases beginning with *Terry*. Citing both *Ward* and a commentator[90] who has strongly urged that the *Wilson* test be discarded and replaced by the *Terry* formulation, the *Torres-Urena* court stated that it was "not unmindful of *Wilson v. Porter*," but that it would "look to *Terry v. Ohio*, and its companion case, *Sibron v. New York*, for the proper standards."[91] *Torres-Urena* reiterated the specific, articulable facts requirement of *Terry*, and rejected the premise that a mere hunch that criminal activity might be afoot is adequate to validate a stop. Instead, the *Torres-Urena* court determined that the existence of a founded suspicion should be evaluated in terms of the test suggested by Justice Harlan's concurrence in *Sibron*. Justice Harlan stated that:

> There must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current or intended.[92]

The *Torres-Urena* court applied this test to the facts in the instant case and determined that no basis for a founded suspicion existed.[93] In *Torres-Urena*, a United States Customs Patrol officer

89. 513 F.2d 540 (9th Cir. Mar., 1975) (per curiam).
90. Weisgall, *supra* note 27, at 242.
91. 513 F.2d at 542 (citations omitted).
92. *Id.*, *quoting* Sibron v. New York, 392 U.S. 40, 73 (1968).
93. 513 F.2d at 542.

observed defendant's pick-up truck parked fifty yards up a private driveway at about 6:30 in the morning. Torres-Urena was loading cardboard boxes into the truck. The officer knew that a female schoolteacher lived in the residence at the end of the driveway, but did not know if she was married or what vehicles she used. There were no structures between the residence and the border, which was approximately one-quarter mile away. The officer had made between 500 and 1,000 illegal alien arrests in the preceeding six months, but only three or four narcotics violation arrests. He had seen sea bags dragged from the brush to the driveway; these he believed to contain contraband. On this basis, the officer stopped the pick-up as it emerged from the driveway, saw marijuana in plain view and arrested Torres-Urena, the driver.[94] The *Torres-Urena* court found nothing in the conduct observed that was "anything but innocuous."[95]

Judge Wright's dissent only serves to underscore the disparity between *Torres-Urena* and the Ninth Circuit decisions relying on *Wilson*.[96] Judge Wright cited *Holland* as reaffirming the rule in *Wilson* that the circumstances need only fail to be arbitrary or harassing in order to validate a detention.[97] It is certainly true that the Ninth Circuit has determined that a founded suspicion was extant in situations apparently less suspicious than those in *Torres-Urena*.[98] However, while Judge Wright correctly observed that the majority opinion fails to specify with great particularity what circumstances would constitute a founded suspicion, this observation forms no basis for objecting to the general test for evaluating a founded suspicion which the court adopts. Patently, it would be impossible to anticipate and specify all facts and circumstances which might support a founded suspicion. Both the Supreme Court and the Ninth Circuit have reiterated that each set

94. *Id.* at 541-42. *Torres-Urena* is a noteworthy case because it contains facts which are close enough to reveal how materially a given decision can be influenced by the standard which is applied. The activity in *Torres-Urena* appears to have been more suspicious than that in *Wilson v. Porter* yet the court found that, under the *Terry* test, founded suspicion was not present. *Id.* at 542. This is due to the fact that none of the facts pointed with specificity to any criminal activity. The stop in *Torres-Urena* was nothing more than an effort to confirm a hunch, and hunches will not suffice when the individuals important interest in privacy is asked to give way to governmental interests. The contexts giving rise to hunches are precisely those where the protections afforded by the *Terry* test are most needed; this alone confirms the propriety of *Torres-Urena*'s express application of *Terry* to the facts in question.

95. *Id.* at 542.

96. *See id.* at 543 (Wright, J., dissenting).

97. *Id.*

98. *See, e.g.*, Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966).

of facts must be individually evaluated to determine the validity of a particular investigatory detention.[99] Moreover, it would seem that requiring specific articulation of facts on a case-by-case basis would facilitate such assessments rather than hinder them. Judge Wright, however, reiterated the approach taken in *Wilson*:

> [W]here the record discloses circumstances, as it does here, which could move an officer in the reasonable exercise of his duty to the action taken, we need not look for a reconstructed, after-the-fact explanation of what may have been nothing more at the time of the occurrence than the instinctive reaction of one trained in the prevention of crime.[100]

As indicated above,[101] it is precisely such an instinctive reaction or hunch that *Terry* proscribes.[102]

By expressly opting to apply *Terry*, the *Torres-Urena* majority implicitly rejected the vague requirements of *Wilson*.[103] Thus, *Torres-Urena* is the clearest articulation of the *Terry* standard in the context of founded suspicion. However, it is not at all certain that this standard has been adopted by the entire circuit.[104]

United States v. Carrizoza-Gaxiola[105] is one of the most recent founded suspicion cases following *Torres-Urena* and preceding the Supreme Court's decision in *Brignoni-Ponce*. In *Carrizoza-Gaxiola*, the defendant was stopped near Nogales, Arizona, because the car he was driving fit a profile of cars commonly stolen in the area and then transported to Mexico. Carrizoza-Gaxiola appeared to be Mexican, and the car he was driving had Mexican plates.[106]

99. *See* Sibron v. New York, 392 U.S. 40, 59 (1968); United States v. Torres-Urena, 513 F.2d 540, 542 (9th Cir. Mar., 1975).

100. 513 F.2d at 545.

101. *See* note 45 *supra*.

102. 392 U.S. 1, 22 (1968).

103. Although this is evident from the wording of the court's opinion, *see* 513 F.2d at 542, it should be noted that decisional irregularity within the circuit can only be corrected by the entire court in an en banc proceeding. "Such a hearing . . . will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions . . . ." FED. R. APP. P. 35(a). Thus, *Wilson* is unaffected by *Torres-Urena*.

104. While *Torres-Urena* has been followed, *see* United States v. Carrizoza-Gaxiola, 523 F.2d 239 (9th Cir. June, 1975), Ninth Circuit founded suspicion decisions relying on *Wilson* have also come down after *Torres-Urena*. *See* United States v. Rocha-Lopez, 527 F.2d 476 (9th Cir. Dec., 1975).

105. 523 F.2d 239 (9th Cir. June, 1975) (per Wilson, J.).

106. *Id.* at 240. After Carrizoza-Gaxiola's car was stopped, a check of the vehicle's identification number revealed that it was stolen. *Id.*

The court determined that these circumstances did not support a founded suspicion, which necessitates "some reasonable ground for singling out the person stopped as one who was involved or is about to be involved in criminal activity."[107]

Judge Enright concurred[108] in the result, relying on the trial court's evaluation on what he believed to be an extremely close issue of founded suspicion. However, unlike the majority, Judge Enright did not view the authority of *Torres-Urena* as dispositive in the instant case; to the contrary—he indicated that on the facts of *Torres-Urena*, he would agree with the position taken in Judge Wright's dissent.[109] Judge Enright relied instead on *United States v. Larrios-Montes*[110] and *Wilson* to support his conclusion that the requisite quantum of proof was not met in *Carrizoza-Gaxiola*.[111]

It is difficult to appreciate the position taken in the *Carrizoza-Gaxiola* concurrence unless it is assumed that its disagreement with *Torres-Urena* applies only to the factual evaluations in that case, and not to its standard for determining the existence of a founded suspicion. The *Wilson* standard for founded suspicion is minimal. Additionally, there arguably is a greater quantum of facts capable of specific articulation in *Carrizoza-*

107. *Id.* at 241. As authority for that proposition, the *Carrizoza-Gaxiola* court cited United States v. Torres-Urena, 513 F.2d 540 (9th Cir. Mar., 1975), and United States v. Ward, 488 F.2d 162 (9th Cir. 1973) (en banc). 523 F.2d at 241.

108. 523 F.2d at 241 (Enright, D.J., concurring).

109. *See* text accompanying notes 96-99 *supra*.

110. 500 F.2d 941 (9th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975). In *Larios-Montes* two Border Patrol agents were stationed at a traffic checkpoint about fifty miles north of the Mexican border. At about 12:00 a.m., they observed two cars traveling 150 yards apart at normal speed on a highway which bypassed the checkpoint. The first car, driven by Larios-Montes, rolled through a stop sign; an agent saw only one passenger in it, and he appeared to be Mexican. The second car, which was riding extremely low to the ground, skidded around the stop-sign-controlled corner; an agent saw three people in its front seat and several others slouched down in the back. At that hour, there usually was little traffic on the highway, which was often used by smugglers to bypass the checkpoint, and these were the only cars that had been seen for approximately forty minutes. The agents were familiar with a smuggling practice where the first of two cars operates as a scout. The agents stopped both cars believing they were engaged together in a smuggling operation. Each car was transporting illegal aliens. *Id.* at 942-43.

The *Larios-Montes* court affirmed the validity of the stop. Although it cites *Wilson* as authority for a stop of a car on a founded suspicion, it tempers the language of that case, which endorses swift action by law enforcement officers, with guidance from *Mallides*, which proscribes action predicated solely on intuition and requires reasonable justification of a stop in terms of articulable facts and circumstances. The *Larios-Montes* court was satisfied that the facts in the instant case were sufficient to preclude a "post hoc rationalization of police behavior . . . ." *Id.* at 943.

111. 523 F.2d at 242.

Gaxiola than in a number of Ninth Circuit cases in which a founded suspicion has been sustained to support a search pursuant to the *Wilson* formulation, including *Wilson* itself.[112] Thus, application of the *Torres-Urena* prescription for the requirements of a founded suspicion would appear to be necessary in order to invalidate the stop in *Carrizoza-Gaxiola*.

Conclusion

From the foregoing discussion, it is apparent that some discord with respect to the appropriate standard for founded suspicion exists within the Ninth Circuit. Certainly, the Supreme Court decision in *Brignoni-Ponce* has provided strong guidance for the resolution of that disharmony, and the Ninth Circuit has shown no disinclination to adhere to the *Brignoni-Ponce* standard, at least on its face. However, the lack of prior Ninth Circuit consistency on the founded suspicion test has resulted in questionable compliance in some instances with the mandate of *Brignoni-Ponce*. Thus, it is clearly inappropriate to rely on founded suspicion precedent prior to *Brignoni-Ponce*, as was done in *Gonzalez-Diaz*, without an independent application of the standards delineated by the Supreme Court.

II. FOURTH AMENDMENT RIGHTS OF PAROLEES AND PROBATIONERS

The Ninth Circuit has moved away from theories restricting the fourth amendment rights of parolees and probationers[113] in two *en banc* decisions announcing the applicability of the fourth amendment to searches by parole and probation officers.[114] The court decreed that such searches must meet the fourth amendment's standard of reasonableness.[115] However, the court also

112. *See* text accompanying note 42 *supra*.

113. Both contract and custody theories have been employed to justify deprivation of parolees' and probationers' fourth amendment rights. *See, e.g.*, Note, *Parole: A Critique of its Legal Foundations and Conditions*, 38 N.Y.U.L. REV. 702 (1963). The Ninth Circuit has found both theories inappropriate. *See* United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 & n.15 (9th Cir. Apr., 1975), which followed the Supreme Court's lead in Morrissey v. Brewer, 408 U.S. 471 (1972). For additional discussions of the various theories which have been used to deprive parolees and probationers of protections against unreasonable searches and seizures see White, *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. PITT. L. REV. 167, 176-81 (1969); Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 188-93 (1967).

114. *See* Latta v. Fitzharris, 521 F.2d 246 (9th Cir. Apr., 1975) (en banc); United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. Apr., 1975) (en banc).

115. Latta v. Fitzharris, 521 F.2d 246, 248-49 (9th Cir. Apr., 1975); United States v. Consuelo-Gonzalez, 521 F.2d 259, 262 (9th Cir. Apr., 1975).

determined that the warrant requirement does not apply because the reasonableness of a particular search depends heavily upon the discretion of the rehabilitation officer who conducts it.[116]

A parole officer's discretion is extremely broad, stemming from dual responsibilities for the rehabilitation of the parolee and the protection of society, which together comprise the purposes of the parole system.[117] The primacy of these interests has been a central factor in Ninth Circuit decisions which severely restrict application of the exclusionary rule in situations where a parolee's fourth amendment rights have been violated. As a consequence, last term illegally obtained evidence was ruled admissible at probation revocation hearings[118] and at sentencing proceedings following revocation.[119] The end result of this series of decisions has been a formal extension of fourth amendment rights to parolees and probationers which will probably have little discernible substantive impact on how rehabilitation officers must deal with individuals under their supervision.

A. Parolees and the Fourth Amendment

In dealing with the rights of parolees under the fourth amendment, the court in *Latta v. Fitzharris*[120] began by limiting the California rule stated in *People v. Hernandez*,[121] which denied

116. *See* Latta v. Fitzharris, 521 F.2d 246, 250 (9th Cir. Apr., 1975); United States v. Consuelo-Gonzalez, 521 F.2d 259, 265-66 (9th Cir. Apr., 1975).

117. *See* Morrissey v. Brewer, 408 U.S. 471, 477-79 (1972); Latta v. Fitzharris, 521 F.2d 246, 249 (9th Cir. Apr., 1975). For relevant discussions of the parole system see R. Dawson, Sentencing 317-18 (1969); National Conference on Parole, Parole in Principle and Practice 66 (1956); Note, *Parole Revocation in the Federal System*, 56 Geo. L.J. 705 (1968); Note, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U.L. Rev. 702, 703 (1963); Note, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 Yale L.J. 368, 370 (1962).

118. *See* United States v. Winsett, 518 F.2d 51, 55 (9th Cir. Feb., 1975).

119. *See* United States v. Vandemark, 522 F.2d 1019, 1022 (9th Cir. May, 1975).

120. 521 F.2d 246 (9th Cir. Apr., 1975) (per Duniway, J.) (en banc), *noted in* 44 Fordham L. Rev. 617 (1975). In *Latta*, a parolee was validly arrested by his parole officer for possession of marijuana at the house of an acquaintance of Latta's. The scene of arrest was some thirty miles away from Latta's home. Approximately six hours after the arrest the parole officer, accompanied by two local police officers, went to Latta's home and informed his stepdaughter that they were there to conduct a search for which a warrant was not required. The search produced a 4.5 pound brick of marijuana which formed the basis for Latta's state conviction for possession of marijuana with intention to distribute. *Id.* at 247-48.

121. 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964), *cert. denied*, 381 U.S. 953 (1965). In *Hernandez*, a narcotics agent received information from an unidentified informant that parolee Hernandez might have narcotics on his person or in his automobile, and passed the information on to Hernandez' parole officer. The parole officer, accompanied by

applicability of the fourth amendment[122] to searches of parolees or their premises by correctional authorities.[123] The *Latta* court ruled that searches of parolees by parole officers must pass the fourth amendment's test of reasonableness.[124] However, the court also noted that the determination of reasonableness would not be governed by the traditional standard of probable cause; rather, the discretion of the parole officer is to be accorded great weight in determining whether a search is appropriate:

> [The officer's] decision may be based upon specific facts, though they be less than sufficient to sustain a finding of probable cause. It may even be based on a "hunch," arising from what he has learned or observed about the behavior and attitude of the parolee.[125]

Because the parole officer's discretion is so broad,[126] and thus the applicable standard of reasonableness substantially different from probable cause,[127] the *Latta* court declined to impose a warrant requirement on searches conducted by parole officers. Noting that "in most cases the magistrate would have to take the

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four narcotics agents, searched Hernandez' car without a warrant and found heroin. *Id.* at 145-46, 40 Cal. Rptr. at 101-02. A discussion of *Hernandez* and additional California cases dealing with the fourth amendment right of parolees can be found in Note, *Extending Search and Seizure Protection to Parolees in California*, 22 STAN. L. REV. 129 (1969) [hereinafter cited as *Parolees in California*]. This Note critiques the constructive-custody/public sentiment rationale of *Hernandez* and argues that the district court of appeal decision may have been superceded by People v. Rosales, 68 Cal. 2d 299, 437 P.2d 489, 66 Cal. Rptr. 1 (1968), which requires that parole officers comply with the announcement requirements of California Penal Code section 844. For additional relevant discussion see Note, *The Impossible Dream?: Due Process Guarantees for California Parolees and Probationers*, 25 HASTINGS L.J. 602 (1974).

122. The fourth amendment to the Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

123. 229 Cal. App. 2d at 150, 40 Cal. Rptr. at 104. *Hernandez* considered this question in order to determine whether to apply the doctrine of Priestly v. Superior Court; 50 Cal. 2d 812, 330 P.2d 39 (1958), which requires disclosure of the identity of a police informant whose information is relied upon for a warrantless search.

124. 521 F.2d at 248-49.

125. *Id.* at 250.

126. For a discussion of the breadth of a parole officer's authority see *id.* at 252.

127. The *Latta* court found neither general search and seizure law, nor that of administrative searches, automatically applicable. It stated that searches of parolees "must be governed by unique, separate, and distinct rules." *Id.* at 251.

parole officer's word for it when the parole officer asks for a warrant,"[128] the court simply obviated the requirement in order to avoid reducing the warrant to a meaningless formality or, as the court phrased it, a "paper tiger."[129] It was observed that imposing a warrant requirement under such circumstances would either necessitate a departure from the standard of probable cause or thwart the effectiveness of parole supervision. The court thus determined that it had to choose between foregoing the warrant or diluting the concept of probable cause.[130] Deeming the purposes of the parole system of the utmost importance, the court elected to eliminate the warrant requirement. This decision was founded on the court's view that it would be a waste of judicial energy to predicate review on the "almost gossamer standards" which the court perceived as appropriate in this context.[131] Finally, the court concluded that, because of the necessity of extensive judicial reliance on the discretion of a parole officer, a warrant would afford no real protection to a parolee.

The plurality opinion in *Latta* relied in part upon the Supreme Court's refusal to require a warrant for home visits by welfare workers in *Wyman v. James*.[132] In *Wyman*, the Court held the warrant requirement inapplicable where a caseworker needed to see a child at home to ascertain whether he was receiving the benefit of authorized welfare aid, a context insufficient to constitute probable cause. The *Latta* court apparently considered that situation analogous to one in which a parole officer needs to see a parolee at home in order to assess rehabilitative progress. However, the court failed to explain why such an analogy should be extended to permit warrantless intrusions greater in scope than a mere visit.

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128. *Id.* at 252. It should be noted that eliminating the warrant requirement necessarily mandates that any review of parole searches be after the fact, which is a less objective procedure than would be employed if pre-search review is obtained. *See* LaFave, *Warrantless Searches and the Supreme Court*, 8 CRIM. L. BULL. 9, 29 (1972).

129. 521 F.2d at 252.

130. *Id.* at 251. However, in dissent Judge Hufstedler responded that:

> The majority's conclusion that applying the warrant requirement necessitates a choice between unduly impairing the concept of probable cause and unduly impairing the parole officer's functions reflects a fundamental misunderstanding of probable cause. The concept of probable cause is not rigid. It is flexible enough to be adapted to parole searches . . . .

Id. at 254.

131. *Id.* at 251. The court acknowledged, however, that judicial energy would ultimately be expended "determining whether the particular search in question was reasonable." *Id.* at 252.

132. 400 U.S. 309 (1971).

The *Latta* court also perceived consistency between its approach and that of the Supreme Court in *United States v. Biswell*[133] and *Colonnade Catering Corp. v. United States*,[134] where warrants were not required for certain limited types of administrative searches.[135] Analyzing *Wyman*, *Biswell* and *Colonnade*, the court in *Latta* identified several justifications for not requiring a warrant which were common to the three decisions. These were: (1) the pervasiveness of regulation to which the person or premises searched is subjected; (2) express statutory authorization for a warrantless search; (3) a limited justifiable expectation of privacy; and (4) the necessity for frequent, unannounced searches.[136] The court considered these factors amply present in the parolee-parole officer situation, except for express statutory authorization to conduct warrantless searches, which was satisfied in essence by long-standing judicial authority to the same effect in California.[137] Thus, according to the court, there is ample authority to support elimination of the warrant requirement in this context, which elimination is necessary both to preserve the parole system and keep the concept of probable cause intact.

In a strong dissent in which Judges Browning and Ely joined, Judge Hufstedler challenged the *Latta* majority's elimination of the probable cause and warrant requirements. The dissent first restated the general rule that warrantless searches are per se unreasonable, noting that the limited exceptions to this rule are based upon determinations that, under certain circumstances, it would be unreasonable to require that a warrant be obtained.[138]

133. 406 U.S. 311 (1972), *noted in* 50 J. URBAN L. 537 (1973).

134. 397 U.S. 72 (1970).

135. In *Biswell*, a pawnshop owner was subjected to a warrantless search pursuant to statutory authorization contained in the Gun Control Act of 1968, 18 U.S.C. § 923(g) (1970). In *Colonnade*, a liquor dealer was subjected to a warrantless search pursuant to 26 U.S.C. § 5146(b) (1970). The search in *Colonnade* was held invalid because it had been accomplished by the use of force. However, the authority to conduct inspection searches which the statutes in question granted was found to be proper.

136. 521 F.2d at 251.

137. *Id.* It should be noted that the California authority to which *Latta* refers is premised on the theory that parolees could not claim the benefits of the fourth amendment's safeguards, *see* People v. Hernandez, 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964), a proposition which *Latta* flatly rejects. Additionally, if the function of express statutory authority is to provide notice of the possibility of a search, as appears to be the case in *Biswell* and *Colonnade*, *see* 406 U.S. at 314-15, then notice by way of judicial authority is not nearly as effective as statutory notice. *Cf.* Screws v. United States, 325 U.S. 91, 96 (1944); Van Nuys Publishing Co. v. City of Thousand Oaks, 5 Cal. 3d 817, 828, 489 P.2d 809, 816, 97 Cal. Rptr. 777, 784 (1971).

138. 521 F.2d at 255.

Judge Hufstedler then argued that the test for fourth amendment compliance cannot be based upon the reasonableness of the search itself, as the majority assumed; that test was rejected by the Supreme Court in *United States v. United States District Court*.[139]

The dissent next dealt with the majority's contention that in practical application the concept of probable cause could not be accommodated to a warrant procedure for parolee searches. Judge Hufstedler initially agreed with the majority that a parolee's legitimate expectation of privacy is not the same as that of other citizens not involved with the parole system, but she then argued that this need only lead to an adaptation, rather than an elimination, of the probable cause concept in the parolee-parole officer context.[140] The concept of probable cause is flexible, as demonstrated by its application by the Supreme Court in administrative search situations such as the one found in *Camara v. Municipal Court*.[141] In that case, the probable cause required to support a warrant for the inspection of individual dwellings was predicated on legislatively or administratively established area characteristics, rather than on the attributes of the particular structure to be searched.[142] The *Camara* Court denied that special tailoring of the

139. 407 U.S. 297, 314-15 (1972). In *United States v. United States District Court*, the Court held that Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-20 (1970), did not exempt government-conducted national security surveillance from the fourth amendment's warrant requirement. Interestingly, the Court rejected an assertion that the warrant requirement should be waived in the surveillance context because "prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security." *Id.* at 318. The Court concluded—despite the dangers presented by "worldwide ferment" and "civil disorders in this country"—that "a case has not been made for the requested departure from Fourth Amendment standards." *Id.* at 319-20.

While the Court's conclusion was partially motivated by unique issues concerning the dangers inherent in an unchecked executive branch, it is clear that the fourth amendment's safeguards should only be set aside in exceptional circumstances. This probably explains why the *Latta* majority dispensed with the warrant requirement only after it concluded that a parolee-parole officer situation is "*sui generis* so far as the warrant requirement is concerned." 521 F.2d at 250-51. However, if serious threats to domestic security are not circumstances sufficiently exceptional to justify setting aside the warrant requirement, then it is doubtful that the parolee-parole officer situation is. As the *Latta* majority conceded, "the Supreme Court has specifically rejected the theory that parole officers have unfettered discretion in dealing with parolees." *Id.* at 248, *citing* Morrissey v. Brewer, 408 U.S. 471, 477-84 (1972).

140. *See* 521 F.2d at 255; note 18 *supra*.

141. 387 U.S. 523 (1967).

142. In *Camara*, a municipal ordinance permitting warrantless inspections of buildings for building code violations was invalidated. However, the Court stated that probable cause sufficient to obtain a warrant for such an inspection would exist if "reasonable

probable cause standard in order to accommodate the demands of an administrative search rendered the resulting search warrant "synthetic" or nullified the concept of probable cause. Thus, there is no reason why probable cause cannot be modified to meet the particular needs of the parole system.

The dissent also strenuously objected to the majority's reliance on the *Biswell-Colonnade* exception to the warrant requirement for administrative searches. Those decisions permitted warrantless searches of business premises where liquor or firearms were sold because of the detailed statutory schemes which specifically regulated both the licensed dealers' obligations and the extent of the inspector's authority.[143] Judge Hufstedler maintained that there is neither statutory authority for warrantless parolee searches nor regulations carefully limiting and defining the ambit of a parole officer's intrusive powers. Further, the dissent took exception to the majority's use of *Wyman v. James*, explaining that the *Wyman* opinion itself carefully differentiates home visits from searches.[144]

Judge Hufstedler concluded by suggesting that the court's decision in *United States v. Davis*,[145] which considered a number of factors in holding that warrants are not required for airport searches, be used as a framework for determining whether a search of a parolee must be preceded by a warrant. Generally stated, *Davis* considered whether: (1) a search is to be conducted as part of a general regulatory scheme to further administrative purposes (and not as part of a criminal investigation); (2) a particular decision to search is not up to the discretion of the official in the field; (3) a warrant requirement would frustrate the purpose of the search; (4) a government has a substantial interest in preventing the activity sought to be discovered by the search; and (5) a search will not be unnecessarily intrusive.[146] Judge Hufstedler argued that under these considerations disposal of the warrant requirement was not justified in the instant case. Unlike airport security personnel, parole officers are not restricted by regula-

legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Id.* at 538. Thus, as long as proper standards are established for determining when inspection is appropriate, a warrant for the general inspection of a building need not be predicated on knowledge of specific wrongdoing.

143. These schemes are discussed at note 135 *supra*.

144. 521 F.2d at 256 & n.6.

145. 482 F.2d 893 (9th Cir. 1973).

146. These factors are discussed in 521 F.2d at 256.

tions defining permissible search procedures, nor is their in-the-field discretion significantly limited.[147]

Despite the wide discretion accorded the parole officer, not every search a parole officer conducts will be upheld. The *Latta* court stated that searches conducted to harass or intimidate are not within the scope of the parole officer's authority.[148] The court also noted that judicial responsibility for curtailing the power of parole authorities rests primarily with the state courts, not the federal courts.[149]

Latta further provided that evidence secured in the course of a valid search by a parole officer will not be limited to use in a parole revocation hearing.[150] The court deemed the contraband discovered in the instant case of "intimate concern" to the rehabilitation officer.[151] Given this relationship between the evidence discovered and the purpose of the search, there was no question that the evidence was admissible in other proceedings.[152] However, the court indicated that even if no such relation existed, the evidence would still be admissible at a trial for the crime revealed by the search. Although this is the accepted rule of law,[153] it has been suggested that, in order to prevent abuse of administrative procedure, a limitation on the use of evidence be established in situations where warrantless searches are conducted on less than probable cause.[154]

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147. *Id.*

148. *Id.* at 252.

149. *Id.* at 255.

150. *Id.* Latta had challenged the admissibility of the evidence, even if properly obtained, in a new criminal proceeding for possession of marijuana with intent to distribute.

151. *Id.* at 252-53. The court reasoned that, because a given parole violation did not necessarily result in revocation of parole, the parole authorities required all available information in order to arrive at a decision regarding the revocation issue.

152. For this proposition, the court relied on its decision in United States v. Davis, 482 F.2d 893, 909 n.44 (9th Cir. 1973).

153. *See* Harris v. United States, 331 U.S. 145, 155 (1947), *overruled on other grounds*, Chimel v. California, 395 U.S. 752 (1969).

154. *See, e.g.*, United States *ex rel.* Coleman v. Smith, 395 F. Supp. 1155, 1160 (W.D.N.Y. 1975) (in the absence of sufficient standards to guide the discretion of the parole officer in the field, fruits of parolee searches might be admissible only in parole revocation hearings); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 437 (1974) (one curb on abuse of the stop-and-frisk power would be exclusion from evidence of everything found in the course of a frisk except weapons); Note, *Skyjacking: Constitutional Problems Raised by Anti-Hijacking Systems*, 63 J. CRIM. L.C. & P.S. 356, 365 (1972) (if obtained pursuant to a regulatory search to prevent hijacking, evidence of illegal activity other than weapons should not be admissible in court).

B. PROBATIONERS AND THE FOURTH AMENDMENT

The *Latta* rule was expanded to include probationers in the companion case of *United States v. Consuelo-Gonzales*.[155] The *Consuelo-Gonzalez* court noted that "[p]robation authorities also have a special and unique interest in invading the privacy of probationers."[156] Although the court adopted the standard of reasonableness propounded in *Latta*, it also had an opportunity to apply the standard to conduct which was not present in *Latta*. *Consuelo-Gonzalez* thus supplements *Latta* in holding that a pat-down search for weapons or contraband, a check of a probationer's arms for signs of drug use, and taking a probationer into custody are permissible activities for a probation officer, provided they are performed reasonably and humanely.[157]

Consuelo-Gonzalez was predicated on a probation condition arising under the Federal Probation Act.[158] Consequently, the court restricted its decision to consideration of the general principles delimiting probation conditions proper under the Act.[159] Valid conditions must be reasonably related to the purposes of the Act.[160] Conditions of probation, including authorization to search, must significantly contribute to rehabilitation of the probationer and protection of the public.[161] Further, "any search made

155. 521 F.2d 259 (9th Cir. Apr., 1975) (per Sneed, J.) (en banc). After obtaining information that Consuelo-Gonzalez was importing and selling heroin, agents of the Federal Bureau of Narcotics and Dangerous Drugs learned that she was on probation, and that it was a condition of her probation that she submit to a search of her person or property at any time upon the request of a law enforcement officer. Pursuant to that condition, the agents conducted a thorough search of Consuelo-Gonzalez' person and residence, which revealed narcotics and narcotics apparatus. Her motion to suppress the evidence was denied, and Consuelo-Gonzalez was convicted of possession of heroin with intent to distribute. *Id.* at 261-62.

156. *Id.* at 266.

157. *Id.*

158. 18 U.S.C. § 3651 (1970). Section 3651 provides in pertinent 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 interests 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*.

Id. (emphasis added).

159. The court specifically reserved opinion on the extent to which a state may impose more intrusive conditions on probation. 521 F.2d at 266 & n.17.

160. *Id.* at 262.

161. *Id.* at 264. The Court of Appeals for the Tenth Circuit previously promulgated

pursuant to the condition[s] included in the terms of probation must necessarily meet the Fourth Amendment's standard of reasonableness."[162] That standard would be satisfied, in the case of a search of a probationer conducted by a probation officer, by the guidelines developed in *Latta*. However, while advocating use of reasonable restraints on probationers in the interest of public safety, *Consuelo-Gonzalez* circumscribed the scope of the invasionary power. Since the probation officer's intrusive interest devolves from his or her special relationship with the probationer, the court determined that the Act requires that searches by law enforcement officers which are not conducted under the direct, personal supervision of a probation officer comply with the probable cause mandates of the fourth amendment.[163]

Despite this requirement of probable cause in the absence of probation officer supervision, neither *Consuelo-Gonzalez* nor *Latta* was intended to preclude cooperation between correctional officers and law enforcement officials, provided that the probation and parole systems are not used as "a subterfuge for criminal investigation."[164] The *Latta* plurality justified its delegation of substantial discretionary search authority to parole officers on the distinction it perceived between a parole officer's rehabilitative function and a police officer's law enforcement function.[165] However, as Judge Wright's concurrence suggested, the parole officer's best sources of information are often law enforcement personnel,[166] and the independence of the parole officer, on which the court relied for protection against abuse of the extensive authority it granted, may be specious. For example, in return for information from police regarding the rehabilitative progress of a parolee or probationer, rehabilitation officers may, when necessary, au-

this requirement in Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971), on which *Consuelo-Gonzalez* relied.

162. 521 F.2d at 262, *citing* Latta v. Fitzharris, 521 F.2d 246 (9th Cir. Apr., 1975).

163. 521 F.2d at 266.

164. *Id.* at 267, *citing* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 62 (1967). The plurality opinion notes that only one in three of the 35-45 percent of those parolees which return to prison do so for committing a new criminal offense. 521 F.2d at 249.

165. 521 F.2d at 250.

166. *Id.* at 253. Judge Wright's willingness to acknowledge an active role for law enforcement officers in the rehabilitative process also emerged in *Consuelo-Gonzalez*. In a dissent to the decision in *Consuelo-Gonzalez*, Judge Wright, with whom Judges Goodwin and Wallace joined, argued that Consuelo-Gonzalez' conviction should not have been reversed. The dissent believed that the probation condition permitting law enforcement officers to search the probationer in the absence of a probation officer was neither unreasonable nor inconsistent with the Federal Probation Act. *Id.* at 268-69.

thorize police to conduct arrests for parole or probation violations.[167] In addition, there is no clear indication of when cooperation becomes subterfuge, since the *Consuelo-Gonzalez* court noted that a law enforcement officer, if met with a probationer who refuses to consent to a search, may either refer the matter to the probation officer or obtain a warrant.[168]

C. Applicability of the Exclusionary Rule

Consuelo-Gonzalez specifically reserved judgment on the issue of whether evidence seized as the result of a probation officer's invalid search of a probationer may be used in probation revocation hearings. However, two current Ninth Circuit decisions considered another aspect of this issue—namely, whether evidence illegally seized by law enforcement officers may be used in revocation hearings.

In *United States v. Winsett*,[169] the court considered whether evidence, which had been illegally seized by law enforcement officers and ruled inadmissible in a criminal proceeding, could nonetheless be introduced at a probation revocation hearing. The court weighed the deterrent effect of the exclusionary rule against the value of having all reliable evidence available at probation revocation hearings, and noted that deterrence would only be effective in a situation, unlike that in *Winsett*, in which police officials consciously direct searches against probationers. The court thus found that the potential benefits of applying the exclusionary rule are "significantly outweighed by potential damage to the probation system."[170] Consequently, it held that:

> [T]he Fourth Amendment does not require suppression of evidence in a probation revoca-

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167. J. Skolnick, Justice Without Trial 153 (1966). Skolnick cites an actual example of this type of operation, noting that a police officer on good terms with a parole officer relied on the latter's willingness to back-up an arrest of a certain parolee, even though the parole officer had not specifically requested the arrest:

> As in many systems of so-called rational procedure, the actual practice depends on independently creating strategies for avoiding the sanctions of regulation, rather than on formal delegations of authority.

Id. at 153-54.

168. 521 F.2d at 267.

169. 518 F.2d 51 (9th Cir. May, 1975) (per Choy, J.). Probationer Winsett's automobile was stopped and searched by United States Border Patrol agents. Contraband obtained during the search was deemed inadmissible for the purposes of a state criminal prosecution on the authority of Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

170. 518 F.2d at 54.

> tion proceeding where, at the time of arrest and search, the police had neither knowledge nor reason to believe that the suspect was a probationer.[171]

United States v. Vandemark[172] reaffirmed the rule established in *Winsett*, and also held that illegally obtained evidence can be considered in imposing sentence after probation has been revoked.[173] The court once again applied a balancing approach and determined that the deterrent effect of the exclusionary rule would not significantly outweigh the value of the evidence to the sentencing judge. In addition, because the evidence is already before the court for purposes of disposition of the revocation issue, application of the exclusionary rule would put the trial court judge in the awkward position of ignoring information already known. Consistent with the *Winsett* rule of admissibility, which only becomes operative when the arresting and/or searching officers are unaware that the subject of the arrest of search is a probationer, the court further determined that the *Vandemark* extension would only apply to those cases where officers are ignorant of the possibility that the suspect might be subject to sentencing subsequent to probation revocation.[174]

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171. *Id.* at 55.

172. 522 F.2d 1019 (9th Cir. July, 1975) (per Wallace, J.). Probationer Vandemark's indictment for possession of marijuana was voluntarily dismissed after he had moved to suppress evidence obtained by Border Patrol agents, and before the motion was heard. Vandemark's probation officer then moved to revoke probation. At the revocation hearing, the district court judge determined that the search was probably illegal but refused to apply the exclusionary rule to probation revocation proceedings. *Id.* at 1020.

173. The Supreme Court has yet to rule on the application of the exclusionary rule to sentencing proceedings following criminal convictions. The Ninth Circuit, however, held illegally seized evidence inadmissible for the purpose of sentencing where its use "could provide a substantial incentive for unconstitutional searches and seizures." *See* Verdugo v. United States, 402 F.2d 599, 610-13 (9th Cir. 1968), *cert. denied*, 402 U.S. 961 (1971); *cf.* United States v. Weston, 448 F.2d 626, 631-32 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); Armpriester v. United States, 256 F.2d 294, 297 (4th Cir.) (dictum), *cert. denied*, 358 U.S. 856 (1958). In *Verdugo*, the court concluded that announcement of an exception to the exclusionary rule for sentencing would enhance the utility of illegally seized evidence. *See* 402 F.2d at 612. *Contra*, United States v. Schipani, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971).

174. *Vandemark* does not contravene the operational effect of the earlier Ninth Circuit decision in Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968). *Verdugo* is discussed at note 173 *supra*. Pursuant to the rule enunciated in *Verdugo*, the exclusionary rule for sentencing remains in force for law enforcement officers generally, but is abandoned in revocation proceedings under the authority of *Vandemark* only when the searching officers are unaware of a defendant's probationer status. Thus, the deterrent effect is preserved.

The refusal of the *Consuelo-Gonzalez* court to consider whether evidence which a probation officer has illegally seized is admissible at a revocation proceeding remains significant despite the *Winsett* and *Vandemark* decisions. The admissibility of illegally seized evidence in *Winsett* and *Vandemark* hinges upon the ignorance of the arresting and/or searching officers with respect to the fact that the subject of the search is a probationer. Manifestly, a probation officer could not possibly be unaware of such facts. Thus, the ultimate ruling on the issue reserved in *Consuelo-Gonzalez* cannot be predicted from the *Winsett* and *Vandemark* opinions. However, if evidence secured by invalid probation officer searches is deemed admissible in revocation proceedings, the operative effect of the fourth amendment rights so generously bestowed in *Latta* and *Consuelo-Gonzalez* is reduced to the exclusion of illegally seized evidence from new criminal proceedings. If such is the case, then parolees and probationers have made little progress while moving from the theory of constructive custody to the protections of the fourth amendment.

Roberta M. Klein

PART TWO: CRIMINAL LAW & PROCEDURE

I. IDENTIFICATIONS

Since the Supreme Court's decisions in the three companion cases of *United States v. Wade*,[1] *Gilbert v. California*,[2] and *Stovall v. Denno*,[3] there has been no doubt that identification procedures must meet the requirements of due process, and that in-court identifications which derive from overly suggestive pretrial identifications must be viewed with suspicion.[4] However, suggestiveness alone does not violate due process; the suggestion must be "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[5]

Under *Stovall*, the totality of the circumstances surrounding the *identification at issue* must be examined in order to determine whether due process has been violated.[6] If a violation is found, the circumstances surrounding the *commission of the crime* must be examined in order to determine whether the identification has an "independent source."[7] If no such source can be found, external factors which suggest harmless error must be examined.[8] *Simmons*

1. 388 U.S. 218 (1967), *noted in* 81 HARV. L. REV. 176 (1967).

2. 388 U.S. 263 (1967).

3. 388 U.S. 293 (1967).

4. *Id.* at 301-02. It is no longer clear that in-court identifications must be excluded if they derive from a pretrial identification procedure which is itself overly suggestive, for the identification may nonetheless be "reliable." *See* note 15 *infra*.

5. Simmons v. United States, 390 U.S. 377, 384 (1968). The standard has been stated variously, but the *Simmons* phraseology is most frequently encountered. *See* Sobel, *Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-trial Criminal Identification Methods*, 38 BROOKLYN L. REV. 261, 269-70, 288-89 (1971). It has been suggested that the different formulations represent different standards. *See* Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1104-07 (1974). *But cf. Circuits Note: 1973-1974 Term*, 63 GEO. L.J. 325, 391-95 (1974). It has also been contended that Neil v. Biggers, 409 U.S. 188 (1972), has created such confusion that the applicable standards cannot be defined with certainty. *See* N. SOBEL, EYE-WITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS § 37 (Supp. 1976).

6. 388 U.S. 293, 302 (1967).

7. *See* N. SOBEL, *supra* note 5, § 37 (Supp. 1976). The best discussion of the "independent source" doctrine, and the distinctions between it and the current emphasis on the "reliability" of the identification, is at *id.* §§ 37, 68-70 (1972, Supp. 1976).

8. *Id.* § 37 (Supp. 1976).

v. United States[9] and *Neil v. Biggers*[10] have caused most courts to alter their due process analysis.[11] The central issue is now the reliability of the identification;[12] relevant factors are not limited to the suggestive character of the identification procedure itself, but include such considerations as the justifications for the procedure, the spontaneity and level of certainty of the witnesses' identification, the conditions under which the witnesses originally observed the suspect, and the length of time between the crime and the identification.[13] The focus has thus been reversed; under *Stovall* the first step is to examine the identification procedure for undue suggestiveness, but under *Biggers* the procedure itself need never be examined if the identification seems clearly reliable.

It has been argued persuasively that *Biggers* has effectively demolished the due process protections the *Stovall* Court attempted to erect.[14] In the words of one writer, a "strict" *Stovall* balancing test has been replaced by a "permissive" *Biggers* reliability test.[15] The courts of appeals have generally reinforced this transi-

9. 390 U.S. 377 (1968), *noted in* 82 HARV. L. REV. 214 (1968).

10. 409 U.S. 188 (1972), *noted in* 73 COLUM. L. REV. 1168 (1973).

11. *See* Pulaski, *supra* note 5. *See also* Eisenberg & Feustel, *Pretrial Identifications: An Attempt to Articulate Constitutional Criteria*, 58 MARQ. L. REV. 659, 667 (1975).

12. *Id.* at 1108-17. This seems true even though, narrowly speaking, "due process 'reliability' determines admissibility of testimony regarding pretrial confrontations." N. SOBEL, *supra* note 5, § 70 (Supp. 1976).

13. *See* Neil v. Biggers, 409 U.S. 188, 199-200 (1972); Simmons v. United States, 390 U.S. 377, 383-85 (1968). *See also* Sobel, *supra* note 5, at 289-90; Annot., 39 A.L.R.3d 791 (1971).

14. Pulaski, *supra* note 5, at 1115-20. Grano, *Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent*, 72 MICH. L. REV. 719, 780-84 (1974). The commentators' concern regarding *Biggers'* impact on post-*Stovall* cases seems heightened by the fact that *Biggers* involved a pre-*Stovall* identification. *See, e.g.*, Pulaski, *supra* note 5, at 1119-20; 73 COLUM. L. REV. 1168, 1180-81 (1973); 10 SUFFOLK U.L. REV. 390, 393-95 (1976).

15. Pulaski, *supra* note 5, at 1104-19. The analyses of the Supreme Court's decisions in this area are numerous and subject to the diversities of opinion which characterize all scholarly inquiry. For a bibliography of relevant discussions see N. SOBELL, *supra* note 5, at 65-67 (Supp. 1976).

Although a survey cannot adequately present the commentators' views, Professor Pulaski's position is worth summarizing. He asserts that *Stovall* presents a strict due process standard because it does not require the defendant to demonstrate that he or she has probably been misidentified; the strict standard entails: (1) scrutiny of the identification procedure itself in order to determine if it focuses attention upon the defendant; and (2) an evaluation of any exigencies which justified the procedure if it is found to be suggestive enough to lead to a misidentification. Pulaski, *supra* note 5, at 1104-07. The second step of the *Stovall* approach is merely an attempt to "balance the suggestiveness inherent in a particular identification procedure against the government's need to use the procedure under the circumstances then existing." *Id.* at 1107-08. Under this

tion,[16] as two Ninth Circuit decisions this past term illustrate.

In *United States v. Jones*,[17] and *United States v. Sambrano*,[18] the Ninth Circuit dealt with challenges to several aspects of identification procedures. Appellants in both cases claimed their in-court identifications were tainted by impermissibly suggestive pretrial photo identifications, and by inadvertent "showups" where the witnesses saw the defendants in custody. Both appellants were convicted under federal armed robbery statutes, and both convictions were affirmed on appeal.

A. PHOTO IDENTIFICATIONS

Jones involved an appellant who contended that his in-court identification was tainted by suggestive discrepancies between his photograph and other photographs which had been shown to

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balancing test, an unjustified suggestive procedure violates due process even if the chances are good that the guilty party was actually identified.

Under *Simmons* and *Biggers*, however, the Court has indicated that, if the identification seems to be reliable, due process has not been violated even though grossly suggestive procedures have been employed. *Id.* at 1108-17. This approach invites appellate courts to essentially ignore the identification procedure itself, and launch immediately into an evaluation of all circumstances which shed light upon the reliability of the identification. The necessarily subjective speculation which results is rarely favorable to the defendant, which perhaps explains why *Biggers* has been said to reflect, at least partially, "the psychological pressure to affirm convictions." Grano, *supra* note 14, at 781.

16. *See* N. SOBEL, *supra* note 5, §§ 37, 46, at 15-21, 28-30 (Supp. 1976), and cases discussed therein. *See also* Holland v. Perini, 512 F.2d 99 (6th Cir. 1975) (identification held constitutional despite use of extremely suggestive show-up procedures); United States v. Bowie, 515 F.2d 3 (7th Cir. 1975) (identifications held constitutional even though they were somewhat uncertain even after the use of a variety of suggestive procedures); United States *ex rel.* Lucas v. Regan, 503 F.2d 1 (2d Cir. 1974) (identification held constituitional even though victim, who identified a clean-shaven 25 year old man at a lineup, and confirmed her identification at a later showup involving the same man, changed her mind after police had her view defendant, who was bearded and 39 years old, at a showup). These decisions seem representative of the courts' current attitude regarding claims that identification procedures violate due process. *Lucas*, *Bowie* and *Holland* are each supplemented by anguished dissents; all of these dissents point clearly to the fact that the retreat from the spirit of the *Wade-Gilbert-Stovall* trilogy continues unabated, promoting this reminder:

> Although . . . [*Neil v. Biggers* and *Kirby v. Illinois*] have seriously eroded the thrust of the *Wade, Gilbert, Stovall* trilogy, these cases have not been overruled.

Holland v. Perini, *supra* at 104 (Edwards, J., dissenting) (citations and footnotes omitted). It is profitable to compare the above mentioned cases with the views Judge Stevens, now Justice Stevens, advanced in United States *ex rel.* Kirby v. Sturges, 510 F.2d 397 (7th Cir. 1975) (reconciling *Stovall* and *Biggers*).

17. 512 F.2d 347 (9th Cir. Feb., 1975) (per Schwartz, D.J.).

18. 505 F.2d 284 (9th Cir. Nov., 1974) (per Ingraham, J.).

the witnesses during a pretrial "photo display."[19] With regard to this one factual issue, no meaningful distinction can be drawn between *Jones* and *Sambrano*.[20] It is therefore surprising that the panels involved[21] disposed of the issue differently.

The *Jones* court relied upon *Simmons v. United States*,[22] the leading Supreme Court decision dealing with photo identifications, to hold that the photo display in question involved "no suggestion, much less one violative of due process as established by *Simmons*."[23] While reasonable minds might differ over this point, at least the *Jones* court properly adopted the *Stovall* approach of first focusing on the identification *procedure*.[24] It did not discuss the apparent reliability of the identification or the substantial amount of other evidence which incriminated appellant; in fact, the "totality of the circumstances" concept was never mentioned or invoked.[25] This is appropriate, for in any case involving an attack on the constitutionality of a pretrial identification, the threshold inquiry must be whether the facts surrounding the identification itself, irrespective of any other circumstances, indicate that the witnesses' attention was improperly focused upon the suspect. If it is concluded, as it was in *Jones*, that no suggestion exists, then the due process challenge must fail, and the need for further inquiry on the point is eliminated.

19. Jones' photograph was larger in size and a frontal view; the five others were profiles and were captioned "California State Prison." 512 F.2d at 351.

20. In *Sambrano*, appellant Padilla's photograph was darker and clearer than the seven others shown. 505 F.2d at 286.

21. Interestingly, neither opinion was written by a circuit judge assigned to the Ninth Circuit. Senior Circuit Judge Ingraham of the Fifth Circuit, sitting by designation, spoke for the *Sambrano* court. Judge Schwartz of the District Court for the Southern District of California, sitting by designation, wrote the opinion in *Jones*. No judge served on both panels.

22. 390 U.S. 377 (1968).

23. 512 F.2d at 351.

24. Curiously, *Neil v. Biggers* impliedly endorses the *Stovall* approach of initially deciding if the procedure employed is even suggestive. The Court first discussed whether unnecessary suggestiveness alone requires the exclusion of evidence, 409 U.S. at 198-99, and then turned to the central question at issue in *Biggers*: "whether under the 'totality of the circumstances' the identification was reliable *even though the confrontation procedure was suggestive*." *Id.* at 199 (emphasis added). Such a statement necessarily implies that the procedure must be examined for suggestiveness before all other circumstances are evaluated. However, *Biggers* has not generally been read in this manner. *See* note 15 *supra*.

25. This may indicate that a *Stovall* balancing approach was used rather than a *Biggers* reliability approach. *See* the discussion at note 15 *supra*. It has been suggested that these approaches are frequently confused, even by the Supreme Court itself. Pulaski, *supra* note 5, at 1109 & n.82.

The *Sambrano* court was unwilling to state that a photo display similar to the one at issue in *Jones*[26] entailed "no suggestion," but it did conclude that no "substantial likelihood of misidentification" was created by any suggestiveness which did exist.[27] To arrive at this conclusion, however, the *Sambrano* court immediately invoked the *Biggers* reliability test and focused on the totality of the circumstances surrounding both the identification procedure *and* the commission of the crime.[28] Interestingly, *Simmons* was not even mentioned. As a result, the *Sambrano* court circumvented a threshold inquiry into the facts surrounding the photo identification, and pointed instead to such facts as the length of time the witnesses observed the appellant during the robbery and the existence of other evidence linking appellant to the crime.[29]

Does this circumvention mean that the photo display found not suggestive in *Jones* was found overly suggestive in *Sambrano*, but that the *Biggers* reliability test was satisfied? If so, *Sambrano* reveals the danger inherent in the reliability test, which ignores, and thus does nothing to discourage, the use of suggestive identification procedures. If not, then the reliability test was applied where it was not needed.[30] This suggests that the *Sambrano* court, which apparently did not consider the photo display in question to be overly suggestive,[31] simply chose to accomplish through misapplication of the reliability test what the *Jones* court accomplished through a stringent view of what constitutes a suggestive procedure. Although such intra-circuit inconsistency is itself undesirable,[32] it may be the inevitable consequence of an apparent

26. For a description of the displays in question see notes 19 & 20 *supra*.

27. 505 F.2d at 286.

28. *Id.*

29. *Id.*

30. After examining the totality of the circumstances, the *Sambrano* court somewhat inconsistently concluded that:

> While it is clear that a photo display may be so impermissibly suggestive so as to deny an accused his right to due process, appellant Padilla has failed to make out such a violation.

Id. If the photo display was not impermissibly suggestive, why did the *Sambrano* court have to examine the totality of the circumstances? If the court found the identification constitutional under the *Biggers* reliability test, why did it state that some photo displays can be *suggestive* enough to violate due process? Answers to these questions are conspicuously absent from recent identification cases.

31. This is implicit in the passage quoted at note 30 *supra*.

32. Earlier decisions also demonstrate less than a consistent approach to the identification issue. *Compare* United States v. Valdivia, 492, F.2d 199, 208-09 (9th Cir. 1973) (per Hamley, J.) (applying a "necessity" standard and an apparent reliability standard

tendency among many courts, both state and federal, to slowly retreat from the spirit of the *Wade-Gilbert-Stovall* trilogy.

This inconsistency is unfortunate, because conceptually *Jones* and *Sambrano* head in opposite directions. Under the balancing approach that *Jones* seems to use, it is possible to have an identification procedure suggestive enough to violate due process—even if the "right man" appears to have been identified.[33] Under the *Biggers* reliability test, however, the most blatantly suggestive identification procedure will not support a due process challenge if it is concluded that the witness' identification was probably accurate.[34]

B. Inadvertent Showups

The appellant in *Jones* also claimed that the witnesses' in-court identifications were tainted by an accidental confrontation, in which the defendant was seen by the witnesses in a hallway prior to trial.[35] The *Jones* court considered the factors which were relied upon in *United States v. Jackson* [36] to determine whether such a confrontation is unduly suggestive, and rejected the contention of taint on the grounds that: (1) the confrontation was inadvertent; (2) no one pointed out the defendant; (3) two witnesses had previously identified the defendant; and (4) bank surveillance photos provided sufficient independent evidence linking appellant to the crime.[37]

The *Jones* court clearly follows majority sentiment when it attaches significance to the fact of inadvertence.[38] Commentators have criticized this practice for the obvious reason that the fact of inadvertence has nothing to do with the fairness of the identification procedure or the reliability of the identification itself.[39] An examination of the inadvertent showup cases reveals, however,

based on *Simmons*), *and* United States v. Baxter, 492 F.2d 150, 171-72 (9th Cir. 1973) (per Hamley, J.), *with* Dearinger v. United States, 468 F.2d 1032, 1035-37 (9th Cir. 1972) (per Hamlin, J.) (apparent finding of independent source after invocation of *Stovall* totality of the circumstances rule).

33. *See* Pulaski, *supra* note 5, at 1113-14. The *Sambrano* court seems to acknowledge this fact. *See* note 30 *supra* and passage quoted therein.

34. *See* Pulaski, *supra* note 5, at 1120 & n.148, *citing* 409 U.S. at 198.

35. 512 F.2d at 351.

36. 448 F.2d 963 (9th Cir. 1971).

37. 512 F.2d at 351.

38. *See, e.g.*, Griff v. Fitzharris, 451 F.2d 151, 152 (9th Cir. 1971); United States v. Matlock, 491 F.2d 504, 505 (6th Cir. 1974); United States v. Kaylor, 491 F.2d 1127, 1131-32 (2d Cir. 1973).

39. *See, e.g., Circuits Note: 1973-1974 Term*, 63 Geo. L.J. 325, 400 (1974).

that courts are applying the totality of the circumstances rule and that the fact of inadvertence is never dispositive.[40] What must be kept in mind is that identification procedures, whether planned or unplanned, must satisfy due process. Unfortunately, court opinions continue to be influenced by the tension between due process in the *Stovall* sense and due process as defined by *Neil v. Biggers*.

In *Jones*, for instance, the court purported to consider "whether [the] *confrontation* [was] so unduly *suggestive* as to violate due process of law."[41] This is consistent with the court's earlier avoidance of the *Biggers* reliability test, and is also consistent with *United States v. Jackson*, which is a pre-*Biggers* decision relying on *Stovall*.[42] It is obvious, however, that none of the four facts relied upon by the *Jones* court to reject appellant's claim relate to the suggestiveness of the confrontation. The court thus confuses matters by stating that it considered whether the confrontation was overly suggestive, for in reality it only assessed the reliability of the identification. This is ironic in light of the fact that *Jones* ignored *Biggers* and its reliability test when it dealt with the photo identification issue.[43] Such inconsistency suggests that there exists no clear standard for evaluating due process challenges to in-court identifications. If this is the case, it is suggested that the courts revitalize the two-step balancing approach associated with *Stovall*, for in no other way will the proper focus on the identification procedure itself be preserved.

C. Identification After Observing Accused in Court

It is not unusual to find a witness who fails to identify a suspect before trial, but who is suddenly capable of a positive identification once the accused is seen in court.[44] This phenomenon is explained, at least partially, by the suggestiveness inherent in such an identification procedure. As Judge Wright has stated:

> It might well be argued that the deeply-rooted practice of allowing witnesses to identify the

40. *See, e.g.*, United States v. Hamilton, 469 F.2d 880, 882-83 (9th Cir. 1972).

41. 512 F.2d at 351 (emphasis added).

42. *Jackson*'s reliance on *Stovall* is clear, but other decisions are mentioned without careful differentiation. 448 F.2d at 966-67. As a result, it is unclear whether the court used a balancing approach, an inchoate reliability test, or simply found an independent source.

43. *See* notes 22-25 *supra* and accompanying text.

44. *See, e.g.*, United States v. Davis, 487 F.2d 112, 122 (5th Cir. 1973).

> defendant in open court is no less a suggestive show-up than those condemned by *Stovall* . . . .[45]

Despite this suggestiveness, courts seem unwilling to abandon traditional court proceedings which confront accused with accuser.[46] The opportunity to cross-examine the witness and question the weight to be given the in-court identification is considered to be a sufficient safeguard.[47] However, the *Sambrano* case illustrates how the traditional procedure may sometimes result in irreparable misidentification.

There were three eyewitnesses to the robbery for which Sambrano was convicted.[48] At a photo display shortly after the robbery the witnesses could not identify Sambrano's photograph. Two days later the witnesses could not identify Sambrano at a lineup, although Sambrano's codefendant was identified both by photo and at the lineup. In fact, Sambrano was not identified until after he was seen seated together with his codefendant at a pretrial hearing.[49]

Sambrano realized the suggestion inherent in joint proceedings, and he thus moved for a separate trial.[50] The motion for severance was denied by the trial court, and Sambrano's identification and ultimate conviction ensued. On appeal the *Sambrano* court rejected Sambrano's argument that the trial court had er-

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45. United States v. Hamilton, 469 F.2d 880, 883 (9th Cir. 1972) (footnote omitted).

46. *Id.* at 883 & n.4. The factual settings of some cases indicate that suggestiveness can be mitigated. *See, e.g.*, United States v. Jackson, 448 F.2d 963 (9th Cir. 1971), which states:

> The five eyewitnesses were called to the witness stand during the suppression hearing . . . . At this time the three defendants were apparently scattered about the courtroom.

Id. at 965. It is difficult to see why such scattering, or even a formal lineup, could not be a routine procedure. Since such a procedure would protect the innocent *and* increase the weight to be given in-court identifications, both individual and governmental interests would be advanced.

The accused does, of course, have a right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. This constitutional guarantee is designed to protect defendants from false accusations. *See* Dutton v. Evans, 400 U.S. 74 (1970). It would be ironic if this protection were used to harm the accused. At the very least, the confrontation clause does not give *accusers* a right to view the accused under suggestive circumstances.

47. 469 F.2d at 883.

48. 505 F.2d at 285.

49. *Id.* at 287.

50. 505 F.2d at 287.

roneously denied the motion for severance.[51] Unfortunately, the court declined to examine the issue in light of the suggestive identification procedure; it merely recited the basic rule that severance is not warranted if "no evidence involved in this case that was admissible at the joint trial . . . would have been inadmissible if separate trials had been conducted."[52] In Sambrano's case the rule is misapplied, for there is no meaningful connection between the prejudice a defendant suffers if a joint trial results in the admission of otherwise excludable evidence and the prejudice suffered due to suggestive identification procedures.[53] It can therefore be concluded that, in affirming Sambrano's conviction, the court simply deferred to the traditional view that the suggestion inherent in in-court identification procedures is an unavoidable feature of our form of justice. A look at the facts of *Sambrano* reveals, however, that occasionally this deference raises serious due process questions.

II. PLEAS

A. UNDER RULE 11

Rule 11 of the Federal Rules of Criminal Procedure is designed to insure that a guilty plea is truly voluntary, and to discourage frivolous appeals by providing a complete record of the factors relevant to a determination of the voluntariness of the plea.[54] It mandates that the trial judge personally interrogate the

51. *Id.*

52. *Id.*

53. The only authority Judge Ingraham invoked while deciding this issue was an earlier opinion he had written for the Fifth Circuit in United States v. Gentile, 495 F.2d 626 (5th Cir. 1974). *Gentile* is poor authority for resolving the issue in question in *Sambrano*, for *Gentile* raised no identification issues; *Gentile* involved a joint trial which raised the issue of whether multiple counts were improperly joined. *Id.*

However, a Ninth Circuit decision is apposite. In Baker v. Hocker, 496 F.2d 615 (9th Cir. 1974), Judge Koelsch discussed a case which is very similar to *Sambrano* factually. There the accused did not ask for a separate trial; the identification was challenged directly on *Stovall* grounds. The challenge was unsuccessful, but the *Baker* court did at least evaluate the identification procedure for suggestiveness. Unfortunately, the court viewed *Neil v. Biggers* as "the Supreme Court's latest explication of [*Stovall*]," and thus simultaneously used an apparent reliability approach and the mandates of *Stovall*. For reasons discussed above, this suggests that the court was not sensitive to the tension between *Stovall* and *Biggers*. *See* notes 6-16 *supra* and accompanying text.

54. *See* McCarthy v. United States, 394 U.S. 459, 465 (1969). *See generally* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 171 (1969). For relevant discussions of Rule 11 see *Circuits Note: 1973-1974 Term*, 63 GEO. L.J. 481 (1974); Comment, *Rule 11 and the Constitutional Requirements for Guilty Pleas*, 6 LAND & WATER L. REV. 753 (1971); 18 S. CAR. L. REV. 668 (1966).

defendant[55] and determine that: (1) the plea is voluntary; (2) the defendant understands the nature of the charge; (3) the consequences of the plea are understood; and (4) a factual basis for the plea exists.[56] If Rule 11 is not complied with, the plea will be set aside and the defendant must be given the opportunity to plead anew.[57] Although the Supreme Court has not established clear guidelines for evaluating Rule 11 inquiries because the nature of the inquiry must vary with the circumstances, the Court has said that judges should not resort to assumptions.[58]

Understanding the Nature of the Charge

This past term the Ninth Circuit evaluated the adequacy of the Rule 11 inquiry in *Guthrie v. United States*[59] in light of the standards it had previously enunciated in *United States v. Youpee*.[60] The *Guthrie* court held, with Judge Wallace dissenting, that the inquiry under review satisfied the *Youpee* standards.[61] It should be noted, however, that the relevant facts surrounding the *Guthrie* inquiry differ significantly from those in *Youpee*, and thus that a new, less demanding standard has been established regarding Rule 11's understanding the nature of the charge requirement.

The offenses with which Guthrie was charged—"multiple counts of mail fraud and conspiracy"—were much more complicated in nature than the one paragraph indictment dealt with in *Youpee*.[62] However, the trial court, in probing Guthrie's understanding of the nature of the charge, was not as thorough as the

55. The trial court, and not the defendant, has the duty of insuring that the proper inquiry is made. United States v. Youpee, 419 F.2d 1340, 1344 (9th Cir. 1969).

56. FED. R. CRIM. P. 11. All of the Ninth Circuit cases dealing with Rule 11 this term involved old Rule 11, which was amended April 22, 1974, with an effective date of August 1, 1975. 62 F.R.D. 275 (reproducing the text of the amended rule). The effective date was subsequently changed to December 1, 1975, by Pub. L. No. 94-64, 89 Stat. 370. *See* Sappington v. United States, 523 F.2d 858, 861 n.1 (8th Cir. 1975). The portions of Rule 11 discussed herein were not affected by the amendment. *See* 8 J. MOORE, FEDERAL PRACTICE ¶ 11.01 [4] (2d ed. 1975).

57. McCarthy v. United States, 394 U.S. 459, 464 (1969), *citing* Heiden v. United States, 353 F.2d 53 (9th Cir. 1965).

58. McCarthy v. United States, 394 U.S. 459, 467 & n.20 (1969).

59. 517 F.2d 416 (9th Cir. May, 1975) (per Wright, J.).

60. 419 F.2d 1340 (9th Cir. 1969).

61. 517 F.2d at 419.

62. Guthrie was charged with multiple counts of mail fraud and conspiracy involving a credit card scheme. *Id.* at 417. He pled guilty to counts 1 and 18, which together extended over 16 typewritten pages. *Id.* at 419. Youpee was charged with wilful and wrongful infliction of grievous bodily harm. 419 F.2d at 1345 n.3.

trial court in *Youpee* was with its inquiry.[63] Nevertheless, the *Guthrie* court expressly relied upon *Youpee* in holding that *Guthrie* understood the nature of the offenses charged.[64] This overextends the *Youpee* holding, which should only be read to approve inquiries which, in light of all relevant circumstances, are at least as thorough as *Youpee*'s and lead as rationally to the conclusion that the defendant understands the charge.[65] Therefore, rather than merely reaffirming *Youpee*, *Guthrie* has actually fashioned new Rule 11 standards in this area.

Personal Interrogation of Defendants By the Judge

In fashioning a new standard regarding Rule 11's understanding the nature of the charge requirement, the *Guthrie* court approves less than rigorous compliance with the rule. Of greater concern, however, is an apparent approval of an instance of simple non-compliance with Rule 11's unequivocal mandate that the trial judge address the defendant and *personally* determine that the charge is understood. In *Youpee*, the judge read the indictment to the defendant.[66] In this way, the judge could at least be certain that the defendant knew the details of the offense charged, that his conversations with his attorney were in regard to the offense charged, that the charge for which a factual basis existed was the same charge that defendant was pleading guilty to, and that the record would reflect the basis for these findings.

In contrast, the trial judge in *Guthrie* probed defendant's understanding by merely asking the defendant: (1) if he had "talked with his attorney about the charges"; and (2) if he was representing to the court that he was entering pleas of guilty to "counts 1 and 18."[67] Rule 11 requires personal interrogation which, when taken together with the surrounding circumstances, forms a rational basis for concluding that the nature of the charge is under-

63. In essence, the trial judge in *Guthrie* only asked Guthrie if he had discussed the indictment with his attorney, if he was satisfied with his attorney, if he was pleading guilty to "counts 1 and 18" and if he had done "the acts charged by the government." 517 F.2d at 418-19. The trial judge in *Youpee*, on the other hand, read the indictment to Youpee and then asked 12 questions relating to voluntariness and understanding. 419 F.2d at 1344-45.

64. 517 F.2d at 418-19.

65. Since the Supreme Court has recognized that Rule 11 cases turn on their facts, a given decision should not be read to pass on Rule 11 issues which arise in later cases involving factually less rigorous compliance with the rule.

66. 419 F.2d at 1345 n.3.

67. 517 F.2d at 418.

stood.[68] In *Guthrie*, the trial judge never discussed or even identified the offenses actually charged;[69] it was therefore an act of faith to assume that the defendant understood the nature, or even the identity, of the crimes charged.

The *Guthrie* majority apparently concluded that the defendant's attorney sufficiently identified and explained the charges, and therefore the judge could rationally conclude the plea was knowledgeable.[70] Such a conclusion conflicts with both the letter and spirit of Rule 11, which requires that the judge personally conduct the inquiry and not resort to assumptions. As noted in the dissent of Judge Wallace:

> The fact that Guthrie went over the indictment with his attorney establishes his understanding of the charges only on the assumption that his attorney adequately explained the indictment to him.[71]

The flaws in the *Guthrie* interrogation were also present, although less obviously so, in the recent Second Circuit case of *Irizarry v. United States*.[72] The *Irizarry* court detected these flaws, and thus published an opinion which warrants brief examination because it contrasts sharply with *Guthrie*.

In *Irizarry* the district judge explained to Irizarry that he was pleading guilty to "a charge of conspiracy," and took the novel approach of having the defendant explain to the court the crime to which he was pleading guilty.[73] On appeal, however, the Second

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68. *See* 1 C. WRIGHT, *supra* note 54, § 172, at 368 & n.40 (1969 & Supp. 1975), and cases cited therein. One of the surrounding circumstances in *Guthrie* was the fact that defendant was "no stranger to the criminal process." 517 F.2d at 418. The same circumstance existed in *Youpee*. 419 F.2d at 1344.

69. The judge identified the charges by their numbers (*i.e.*, counts 1 and 18), but he never identified the *offenses* to which Guthrie pled guilty. *See* 517 F.2d at 416. Other circuits have insisted that offenses be identified with great specificity. *See, e.g.*, Irizarry v. United States, 508 F.2d 960, 964 (2d Cir. 1974).

70. *See* 517 F.2d at 418. Other circuits have held that trial judges cannot rely upon the explanations provided by defendants' counsel. *See* Phillips v. United States, 519 F.2d 483, 485 (6th Cir. 1975) (even careful explanations by counsel do not relieve trial judges of their duty to personally question the defendant); Majko v. United States, 457 F.2d 790, 791 (7th Cir. 1972) (reading indictment and asking defendant if he had discussed the charge with his attorney does not satisfy Rule 11).

71. 517 F.2d at 419.

72. 508 F.2d 960 (2d Cir. 1974).

73. *Id.* at 963 n.1. Although the trial judge's inquiry did not comply with Rule 11, the *Irizarry* court did not criticize this novel approach itself. Since the approach seems meritorious, it can be hoped that the *Irizarry* decision will not discourage its use in a manner which complies with Rule 11.

Circuit held that Rule 11 had not been complied with because: (1) "the full charge—conspiracy to possess and distribute cocaine—was never even identified"; (2) "the court's discussion of the nature of a conspiracy charge was limited to statements that 'you can't conspire with yourself' and 'you have to have somebody else to conspire with'—hardly an adequate probing of the nature of conspiracy"; and (3) "at no time was Irizarry asked whether he understood the nature of the offense with which he was charged . . . ."[74] The Rule 11 inquiry approved in *Guthrie* is deficient in each of these respects, and, as noted above, allows trial courts to resort to assumptions rather than personal questioning. The *Guthrie* decision therefore lowers the Ninth Circuit's Rule 11 standards, and fails to adequately safeguard against the evils condemned by the Supreme Court in *McCarthy v. United States*.[75]

B. De Facto Guilty Pleas

While the text of Rule 11 states that the rule applies to pleas of guilty or nolo contendere, some appellants have argued that Rule 11 safeguards should attach whenever stipulations or other admissions have the same consequences as a plea of guilty.[76] This argument was recently rejected by a Ninth Circuit panel in *United States v. Terrack*,[77] which held the requirements of Rule 11 not applicable to defendant's stipulation, even though it admitted all facts essential to prove guilt.[78] In a persuasive dissent, Judge Ely argued that a Rule 11 inquiry should have been conducted.[79]

The *Terrack* majority advanced two bases for its decision. First, the court pointed out that on its face Rule 11 only applies to pleas of guilty and nolo contendere.[80] Although unquestionably true, this fact does not necessarily justify the *Terrack* decision. This conclusion is supported by the fact that Rule 11 was not read restrictively in any of the three cases relied upon by the majority to conclude that "Rule 11 [is] applicable only to guilty pleas and

74. *Id.* at 964.

75. The Ninth Circuit is not alone. A wholly unjustified acceptance of "substantial compliance" with Rule 11 has evolved recently. *See* United States v. Brogan, 519 F.2d 28 (6th Cir. 1975); Sappington v. United States, 523 F.2d 858 (8th Cir. 1975).

76. *See, e.g.*, United States v. Garcia, 450 F.2d 287 (9th Cir. 1971); United States v. Escandar, 465 F.2d 438 (5th Cir. 1972); United States v. Dorsey, 449 F.2d 1104 (D.C. Cir. 1971); United States v. Brown, 428 F.2d 1100 (D.C. Cir. 1970).

77. 515 F.2d 558 (9th Cir. Apr., 1975) (per Powell, D.J.).

78. *Id.* at 560-61.

79. *Id.* at 561-63.

80. *Id.* at 560.

not to stipulations."[81] These three decisions, *United States v. Garcia*,[82] *United States v. Dorsey*[83] and *United States v. Brown*,[84] were decided by courts which simply recognized that, in appropriate cases, the due process safeguards reflected in Rule 11 can be required by the courts even though the rule itself does not compel them.[85]

The second basis for the *Terrack* decision is a policy against injecting uncertainty and complexity into the administration of justice.[86] Judge Powell argued that if stipulations were included within the ambit of Rule 11, trial judges would be forced to either conduct Rule 11 inquires before every stipulation containing a vital admission, or run the risk that they have not properly de-

81. *Id.* The *Terrack* majority relied primarily upon United States v. Garcia, 450 F.2d 287 (9th Cir. 1971); United States v. Dorsey, 449 F.2d 1104 (D.C. Cir. 1971); and United States v. Brown, 428 F.2d 1100 (D.C. Cir. 1970). In *Garcia*, a claim that Rule 11 was violated was rejected because "the trial court did question appellant carefully." 450 F.2d at 288. The *Garcia* court therefore did not actually pass on whether Rule 11 is applicable to de facto guilty pleas, but it did suggest that trial judges must question carefully enough to meet Rule 11 standards before accepting such "pleas." The *Terrack* majority's conclusion to the contrary is effectively answered by Judge Ely in his dissent. *See* 515 F.2d at 562 n.2.

United States v. Brown involved a stipulation that defendant committed all the acts charged in an indictment. The only issue reserved related to an insanity defense. 428 F.2d at 1102-03. The *Brown* court acknowledged that Rule 11 was technically inapplicable, but it nonetheless reversed defendant's conviction because an inquiry in the nature of a Rule 11 inquiry was not conducted. *Id.* Because the result in *Brown* was due in large part to the special circumstances regarding defendant's mental condition, the holding was confined to those facts. *See Circuit Note: 1969-1970 Term*, 59 GEO. L.J. 588, 702 (1971). However, *Brown* is still recognized as a "broad and liberal interpretation of the spirit of [Rule 11]." *Id.* at 703 n.695.

United States v. Dorsey reiterated the position of the *Brown* court in dictum. 449 F.2d at 1107. However, Dorsey's conviction was affirmed because the incriminating facts were developed through the testimony of a police officer, rather than through defendant's trial stipulations. *Id.* at 1108. Therefore, "[n]either Rule 11 nor its underlying considerations require[d] reversal . . . ." *Id.* In other words, there was no de facto guilty plea as there was in *Terrack*.

82. 450 F.2d 287 (9th Cir. 1971).

83. 449 F.2d 1104 (D.C. Cir. 1971).

84. 428 F.2d 1100 (D.C. Cir. 1970).

85. *See* note 81 *supra*. For an earlier example of a court with apparently similar views see Julian v. United States, 236 F.2d 155 (6th Cir. 1956).

86. *See* 515 F.2d at 561 & n.3. In part the court stated:

> Rule 11 specifically applies to pleas of guilty and nolo contendere and not to trials. These are areas with a clear division between them. They are either black or white. To create a gray area . . . would further complicate the trial judge's duties and push him [or her] further into the role of an advocate.

Id.

termined when a stipulation constitutes a de facto plea of guilty.[87] This concern for the practical requirements of effective trial court operation is commendable, but it appears to be misplaced in light of the result in *Terrack*.

Although *Terrack* states that Rule 11 only applies to pleas of guilty and nolo contendere, it also teaches that stipulations which are virtual admissions of guilt cannot be accepted by a trial judge until after the judge personally questions the defendant and determines that the stipulation is voluntary.[88] Therefore, the *Terrack* decision does not relieve trial courts of the responsibility of determining when stipulations amount to de facto pleas of guilty.[89] It is also doubtful that the differences in the burdens placed on a trial judge by a *Terrack* inquiry and a formal Rule 11 inquiry are significant enough to justify not requiring the latter in all those cases where it will serve the purposes to Rule 11 to do so.[90] This is especially true in light of the fact that *Terrack* does not establish guidelines for conducting the interrogation it does require, thus suggesting that onerous uncertainty may actually be mitigated if Rule 11's familiar standards are invoked. Even if this view is not accepted, it seems clear that the decision in *Terrack* does not adequately guard against the acceptance of involuntary, unknowing or unintelligent de facto guilty pleas.

III. JURY SELECTION

Defendants in federal courts may challenge the methods of

87. *Id.* There are thus two elements to Judge Powell's concern. First, there is a problem with determination; if Rule 11 is held applicable to de facto guilty pleas, courts will be burdened with the task of determining when a stipulation constitutes such a plea. Second, there is a problem with complexity; since Rule 11 inquiries are more complex and thorough than the inquiry conducted in *Terrack*, requiring them will unduly encumber trials.

88. *Id.* at 560.

89. One of Judge Powell's principal reasons for declining to apply Rule 11 to the facts in *Terrack* was the difficulty with determining when application would be proper. *See* note 87 *supra*.

90. Interestingly, the majority relied on United States v. Brown, 428 F.2d 1100 (D.C. Cir. 1970), even though the *Brown* majority was not persuaded by Judge Robb's dissenting view that requiring Rule 11's safeguards would add "needless technical complication . . . to the already intricate rituals of criminal procedure, and . . . trials will bog down and in some cases become farcical." *Id.* at 1105. The *Brown* court apparently appreciated, as does Judge Ely, that it is not a farce, or an undue encumbrance, to proceed cautiously when defendants are, for all intents and purposes, waiving several important constitutional rights.

jury selection under either the Constitution,[91] or the Jury Selection and Service Act of 1968.[92] They are entitled to a jury randomly drawn from a cross section of the community,[93] and 28 U.S.C. section 1867 gives litigants the right to challenge selection procedures which fail to conform to the Act's requirements. The Act requires that jurors be proficient enough in English to satisfactorily fill out a juror qualification form.[94] In two cases from the courts of Guam, the Ninth Circuit ruled this past term on challenges to the selection and langauge qualifications of jurors.

A. English Language Qualification

In *United States v. Okiyama*,[95] the Ninth Circuit reversed a trial court finding of substantial compliance with the Act, and dismissed the indictment.[96] The record showed that a number of grand and petit jurors had not adequately responded to a questionnaire portion of their juror qualification forms. Since several of the defectively answered questions concerned language ability, the *Okiyama* court felt that the defects substantially deprived the trial court of information from which it could have determined if potential jurors were properly qualified.

The *Okiyama* court rejected the government's contention that defendants must show that they are prejudiced by such statutory violations before they are entitled to relief.[97] After examining the

91. U.S. Const. amends. V, VI, XIV. For additional discussion see Imlay, *Federal Jury Reformation: Saving A Democratic Institution*, 6 Loyola L.A.L. Rev. 247 (1973); *Circuits Note: 1973-74 Term*, 63 Geo. L.J. 325, 453 n.911 (1974).

92. 28 U.S.C. §§ 1861-69 (1970). For a discussion of selection procedures under the Act see 2 C. Wright, *supra* note 54, § 375; 7B J. Moore, *supra* note 56, §§ 1861-67.

93. 28 U.S.C. § 1863 (1970). Some selection techniques, such as the effective exclusion of the young or the poor, have been challenged as violative of section 1863's randomness requirement. These challenges have not generally been successful because "the systematic exclusion of an identifiable group" has not been shown. *See* United States v. Ware, 473 F.2d 530, 536-37 (9th Cir. 1973); United States v. Ross, 468 F.2d 1213, 1215-19 (9th Cir. 1972).

94. 28 U.S.C. §§ 1865(b)(2)-(3) (1970).

95. 521 F.2d 601 (9th Cir. Aug., 1975) (per curiam).

96. *Id.* at 604.

97. The crux of the government's position was that at least 12 of the grand jurors who indicted Okiyama were qualified, and thus no prejudice existed because the defendant could not have had the indictment dismissed under Fed. R. Crim. P. 6(b)(2). 520 F.2d at 604 n.2. The Okiyama court pointed out that the government's position is untenable. *Id.* Rule 6 allows challenges: (1) of the array; or (2) of individual jurors. Fed. R. Crim. P. 6(b)(1). The rule that an indictment cannot be dismissed if 12 or more qualified jurors "concurred in finding the indictment" only applies when individual jurors are challenged. *Id.* Rule 6(b)(2). Okiyama challenged the array, not individual jurors. 521 F.2d at 604 n.2.

legislative documents surrounding the Act,[98] the court concluded that Congress had deliberately eliminated a requirement that prejudice be shown because such a requirement is considered an unfair burden on the challenger.[99] The court added that, even if congressional intent were not clear, where defective juror selection procedures create a serious risk that jurors are not sufficiently proficient in English, a showing of prejudice should not be required.[100]

B. Timeliness and Discovery

Although *Okiyama* concerned a pretrial motion to dismiss an indictment, section 1867(a) of the Act also authorizes a pretrial motion to stay the proceedings on the ground that the grand or petit jury was improperly selected. Both types of motions must be made before the voir dire examination begins, or within seven days of the date that defendant discovered (or should have discovered) the grounds for the motion, whichever is sooner.[101]

In *People of the Territory of Guam v. Palomo*,[102] defendant moved to stay the proceedings on the ground that 28 U.S.C. section 1865(b) had not been complied with during the selection of the petit jury. A Ninth Circuit panel affirmed the trial court's denial of the motion on two grounds.[103] First, the motion was untimely in that it was made more than seven days after the defendant learned of "possible disqualification of jurors for failure to understand the English language." Second, no sworn statement of facts was filed as required by section 1867(d). Although *Palomo* illustrates the importance of complying with the Jury Selection and Service Act's procedural requirements,[104] the court's opinion is also noteworthy because it discusses the timeliness issue in relation to the Supreme Court's recent pronounce-

98. 2 U.S. Code Cong. & Admin. News 1792 (90th Cong., 2d Sess. 1968) (House Report No. 1076). A discussion of the no-prejudice requirement is in *id.* at 1806.

99. *See* 521 F.2d at 604.

100. *Id.*, *citing* Taylor v. Louisiana, 419 U.S. 522 (1975); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).

101. 28 U.S.C. § 1867(a) (1970).

102. 511 F.2d 255 (9th Cir. Jan., 1975) (per Carter, J.).

103. *See id.* at 258.

104. In this regard *Palomo* is in accord with earlier decisions. *See, e.g.*, United States v. Nash, 475 F.2d 688, 695 (9th Cir. 1973). Untimely challenges based on alleged constitutional infirmities in the Jury Selection and Tenure Act have also failed. *See* Page v. United States, 493 F.2d 22 (1974).

ment, in *Test v. United States*,[105] that defendants have "essentially an unqualified right to inspect jury lists" before preparing their section 1867(a) motions.[106] The authority for this inspection right is section 1867(f), which provides in part that the "records or papers used by the jury commissioner or clerk in connection with the jury selection process" can be inspected "as may be necessary in the preparation or presentation of a motion under [section 1867(a)]."[107]

The *Test* Court recognized, as did the *Palomo* court shortly before *Test* was decided, that frequently it will be impossible to accompany an 1867(a) motion with a meaningful "sworn statement of facts" if the motion is not preceded by discovery under section 1867(f).[108] Indeed, without pre-motion discovery under section 1867(f), many defendants will be effectively deprived of the right to challenge grand or petit jury selection procedures.[109] Although the defects in defendant's motion made it unnecessary for the *Palomo* court to address the discovery issue, the court nonetheless took the opportunity to expressly disagree with those pre-*Test* decisions which state that discovery under section 1867(f) should not precede the granting of an 1867(a) motion;[110] this fact reveals the importance the court attaches to the right of inspection under section 1867(f). The court implied, however, that any discovery motions would have to be prompt since the seven day limitation on actual 1867(a) motions would apparently be strictly observed.[111]

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Although it is now clear that criminal defendants are entitled

105. 420 U.S. 28 (1975) (per curiam).

106. *Id.* at 30.

107. 28 U.S.C. § 1867(f) (1970). This language is quoted in both *Test*, 420 U.S. at 30, and *Palomo*, 511 F.2d at 258.

108. 420 U.S. at 30. Indeed, the Court states that "without inspection, a party almost invariably would be unable to determine whether he [or she] has a potentially meritorious jury challenge." *Id.*

109. It should be remembered that section 1867 is the "exclusive means by which a person accused of a Federal crime . . . may challenge any jury on the ground that such jury was not selected in conformity with the provisions [of the law]." 28 U.S.C. § 1867(e) (1970).

110. 511 F.2d at 258, *citing* United States v. Guzmon, 468 F.2d 1245 (2d Cir. 1972); United States v. Grey, 355 F. Supp. 529 (W.D. Okla. 1973); United States v. Deardorff, 343 F. Supp. 1033 (S.D.N.Y. 1971).

111. *See* 511 F.2d at 258. *See also* United States v. Jasper, 523 F.2d 395, 398 (10th Cir. 1975). The *Palomo* court observed, however, that in *Test* the Supreme Court did not consider the timeliness issue. 511 F.2d at 258.

to the effective assistance of counsel,[112] courts are still divided over what constitutes "effective assistance."[113] Before 1973 representation was likely to be considered effective unless it was so inadequate that the trial was reduced to a "sham," "farce" or "mockery of justice."[114] However, in the 1973 decision of *United States v. DeCoster*,[115] the Court of Appeals for the District of Columbia Circuit rejected the old "farce or mockery" standard on grounds that have persuaded other circuits to do likewise.[116] The *DeCoster* court relied on the sixth amendment, rather than the due process or fundamental fairness grounds which underlay the farce or mockery standard, to hold that criminal defendants have an affirmative right to "reasonably competent assistance of an attorney acting as [a] diligent, conscientious advocate."[117] The Ninth Circuit, however, has ostensibly retained the farce or mockery standard.[118]

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112. The right to adequate representation emanates from the sixth amendment's guarantee of "the Assistance of Counsel." *See* Bazelon, *The Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1 (1973); Annot., 26 A.L.R. FED. 218 (1976). However, the conflicting standards which are used to determine when a defendant is deprived of the right derive from more than one source. *See* note 118 *infra* and authorities cited therein. For a useful collection of citations to relevant articles see 12 AM. CRIM. L. REV. 193, 193 n.4 (1974).

113. *See* Note, *The Emerging Right to Effective Assistance of Counsel*, 14 WASHBURN L.J. 541, 542-46 (1975).

114. *See, e.g.*, United States *ex rel.* Crispin v. Mancusi, 448 F.2d 233 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971); United States v. Baca, 451 F.2d 1112 (10th Cir. 1971), *cert. denied*, 405 U.S. 1072 (1972); United States v. Main, 443 F.2d 900 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971). The farce or mockery standard was not followed universally, but it prevailed prior to the 1970s.

115. 487 F.2d 1197 (D.C. Cir. 1973).

116. *See Circuits Note: 1973-1974 Term*, 63 GEO. L.J. 325, 478-79 (1974). For a recent discussion of the current positions of the various circuits see Annot., 26 A.L.R. FED. 218 (1976).

117. 487 F.2d at 1202. The importance of *DeCoster*'s reliance on the sixth amendment lies in the fact that:

> a defendant will not have to prove inadequate representation to the extent that it denies him fundamental fairness; rather, all he will have to prove is that his counsel did not meet the established standard of care.

12 AM. CRIM. L. REV. 193, 208 (1974).

118. *See, e.g.*, United States v. Stern, 519 F.2d 521, 524 (9th Cir. June, 1975). It has been observed that not all Ninth Circuit decisions apply the same standard. Annot., 26 A.L.R. FED. 218, 252-53 (1976). This observation is based on the fact that some Ninth Circuit decisions have stated that reversal is required if the defendant can show that counsel was "not reasonably likely to render and not rendering reasonably effective assistance." *See, e.g.*, Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963). It is clear, however, that due process considerations, rather than the sixth amendment, have motivated the various Ninth Circuit formulations of what constitutes effective assistance. *See id.* Ninth Circuit decisions are thus uniformly distin-

The analysis of effective assistance cases is facilitated if it is understood that defendants seem to most commonly assert that some procedural practice or specific shortcoming operates to make effective assistance impossible; broad, general claims of attorney incompetence are not generally made. Thus, appointing defense counsel immediately before trial, and then not granting a continuance in order for trial preparations to be made, renders the assistance of counsel ineffective.[119] Defendants have also argued that effective assistance is denied when witnesses are not interviewed before trial,[120] when insanity defenses are not investigated,[121] when opening or closing statements are not made,[122] when no effort is made to suppress unlawfully seized evidence,[123] or when any of a number of rather specific oversights have occurred.[124] Accordingly, effective assistance cases usually fall into fairly well-defined categories. This past term the Ninth Circuit dealt with cases which concerned two of these categories. In *United States v. Jones*,[125] the defendant contended that a rift between him and his attorney was so severe that the denial of his request during trial for a substitution of attorney violated his right to effective counsel. *United States v. Stern*[126] involved counsel's refusal to raise an insanity defense.

A. Conflicts Between Defendant and Attorney

In *Jones* the defendant and his attorney disagreed over an issue relating to trial strategy; near the end of the government's case, Jones wanted to call a co-defendant to the stand, and the attorney felt such a move would not be in his client's best inter-

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guishable from the growing number of cases which have exchanged the due process fairness standard for the more exacting sixth amendment "reasonably competent" standard. *See generally* note 117 *supra* and authorities cited therein.

119. *See, e.g.*, Calloway v. Powell, 393 F.2d 886 (5th Cir. 1968). *See generally* Finer, *Ineffective Assistance of Counsel*, 58 Cornell L. Rev. 1077, 1089-90 (1973).

120. *See, e.g.*, McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974), *noted in* 43 Fordham L. Rev. 310 (1974); 5 Golden Gate L. Rev. 499 (1975).

121. *See, e.g.*, Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967).

122. *See, e.g.*, United States v. Hammonds, 425 F.2d 597 (D.C. Cir. 1970).

123. *See, e.g.*, Barba-Reyes v. United States, 387 F.2d 91 (9th Cir. 1967); Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963).

124. For discussions of several common derelictions see Finer, *supra* note 119, at 1085-115; Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289, 306-26 (1964).

125. 512 F.2d 347 (9th Cir. Feb., 1975) (per Schwartz, D.J.).

126. 519 F.2d 521 (9th Cir. June, 1975) (per Wright, J.).

est.[127] The trial court ruled in the defense counsel's favor, and also denied Jones' subsequent request for a different attorney. On appeal, Jones argued that he was denied the effective assistance of counsel when he was forced to continue with the attorney after a conflict arose. Jones quite naturally relied on the Ninth Circuit decision in *Brown v. Craven*,[128] which teaches that an "irreconcilable conflict" between a defendant and his or her attorney amounts to the deprivation of "the effective assistance of any counsel whatsoever." The *Jones* court rejected Jones' argument, affirmed his conviction, and shed new light on the *Brown* decision.

As *Jones* points out, *Brown* does recognize that irreconcilable conflicts between attorney and defendant can constitute denial of effective counsel.[129] However, the conviction in *Brown* was reversed because the state trial court in question did not adequately investigate whether a dispute between Brown and his attorney resulted in ineffective assistance.[130] Thus, all *Brown* requires is that trial courts probe the nature of an attorney's representation whenever a dispute is alleged; the mere presence of a dispute will not automatically constitute inadequate representation. In evaluating whether such representation is ineffective, the farce or mockery standard—which still applies in the Ninth Circuit—should apparently be applied.[131] Since the trial court in *Jones* did

127. 512 F.2d at 349-50. It should perhaps be noted that *Jones* did not involve conflicts of interest, although such conflicts have also been found to result in ineffective assistance. *See* Finer, *supra* note 119, at 1108-09.

128. 424 F.2d 1166 (9th Cir. 1970).

129. 512 F.2d at 349-50.

130. 424 F.2d at 1170. The conflict in *Brown* was much more severe than the dispute in *Jones*. Brown himself made several pretrial motions for another attorney to be appointed to represent him and, when these were denied, he refused to communicate "in any manner whatsoever" with his appointed counsel. *Id.* at 1169. Brown also refused to cooperate in any way at trial, and was convicted of first degree murder after "only a perfunctory defense." *Id.* The *Brown* court made it clear that Brown was not entitled to "any particular attorney he may [have] desire[d]," but the trial court's failure to investigate Brown's dissatisfaction, and make another attorney available if necessary, was found to be grounds for the reversal of Brown's conviction. *Id., citing* Gideon v. Wainwright, 372 U.S. 335 (1963).

131. The *Brown* court did not discuss the issue, but *Jones* states that:

> A thorough review of the record demonstrates that trial counsel performed his work diligently and competently and by no means were the proceedings rendered a "farce or mockery of justice."

512 F.2d at 349, *citing* Grove v. Wilson, 368 F.2d 414 (9th Cir. 1966). Although this implies that the farce or mockery standard should apply, the court was disconcertingly vague on the point. It even stated that, under the *DeCoster* standard of "reasonably

not deny Jones' request for a new attorney until after he thoroughly inquired into the nature of defense counsel's representation, and into the source of the dispute itself,[132] *Brown* provided no basis for reversing Jones' conviction. And, since the *Jones* court agreed with the trial court's conclusion that Jones' attorney "performed his work diligently and competently," the conviction was affirmed. In so doing, the court impliedly recognized the validity of the established rule that courts "have generally refused to fault retrospectively [counsel's] tactical decisions."

B. Refusal to Raise an Insanity Defense

The defendant in *United States v. Stern*[133] contended that he had not been adequately represented because his attorney had refused to raise a possible insanity defense. The defense attorney had declined to raise the defense as a tactical matter, and the defendant apparently objected to this strategy for the first time in the motion for a new trial which he filed after his conviction for income tax evasion.

As in *Jones*, *Stern* involved tactical decisions on the part of defense counsel. The *Stern* opinion reveals how hesitant courts are to question an attorney's subjective judgment in the area of trial tactics:

> We have declined to find . . . a "farce and mockery" where counsel's actions and omissions reflected tactical decisions, even if better tactics appear in retrospect to have been available.[134]

Although well-entrenched, this rule cannot be applied mechanically, for not all omissions or commissions by attorneys actually reflect tactical decisions. In *Stern*, therefore, both the trial court and the court of appeals examined in some detail: (1) the quality

competent assistance," Jones received effective assistance. 512 F.2d at 349 n.2. It can therefore be concluded that *Jones*, because it is confined to the facts of the case, sheds virtually no light on the point at which representation becomes inadequate.

132. The *Jones* court described the trial judge's procedure in some detail—perhaps in an effort to begin shaping the standard against which trial court investigations of attorney-defendant conflicts will be judged. Accordingly, it should be noted that the trial judge in *Jones*: (1) granted defendant and his attorney time to resolve their differences; and (2) conducted a hearing in order to evaluate whether the defendant's statements about the point of controversy (a co-defendant's testimony) were meritorious. 512 F.2d at 350.

133. 519 F.2d 521 (9th Cir. June, 1975) (per Wright, J.).

134. *Id.* at 524, *citing* United States v. Ortiz, 488 F.2d 175 (9th Cir. 1973).

of the attorney's skills in general and of his management of Stern's defense in particular;[135] and (2) the substance of Stern's alleged mental incapacity.[136] These facts illustrate that there must be a sound basis for an attorney's tactical decision. Effective assistance does not mean flawless tactical judgment, but it does mean that adequate investigation, preparation and evaluation must underlay the strategies which are employed. *Stern* may also indicate that the Ninth Circuit demands a higher standard of tactical judgment when attorneys are representing defendants who may suffer from mental illness.[137]

C. Defense Services

Included within the right to effective assistance of counsel is the right to obtain those services, such as investigative services,[138] which are essential for an adequate defense.[139] *Mason v. Arizona*[140] involved an indigent defendant whose request that such services be provided at state expense was denied by a state court.[141] After Mason's conviction for first degree murder was

135. The *Stern* court was impressed with the attorney in question at oral argument, and included in its numerous observations about the attorney's skills that he was a certified specialist in criminal and taxation law, that he was a former United States Attorney, and that he had published articles on aspects of criminal tax matters. 519 F.2d at 524 n.2.

136. One psychiatrist had found that Stern was schizophrenic and unable to conform his actions to the requirements of the law, but another found that Stern "did not lack mental capacity at the time of the offense and was able to assist in his defense." *Id.* at 523-24. Stern's attorney decided that Stern's best defense would only be vitiated by an attempt to raise the insanity defense, and it was therefore not raised. Both the trial court and the court of appeals found an adequate basis for the attorney's decision.

As the *Stern* court explained, the critical question in any failure-to-raise-an-insanity-defense case is whether the defendant's mental condition was adequately investigated. *See, e.g.*, Hintz v. Beto, 379 F.2d 937 (5th Cir. 1967); Goodwin v. Swenson, 287 F. Supp. 166, 187 (W.D. Mo. 1968); *In re* Saunders, 2 Cal. 3d 1033, 472 P.2d 921, 88 Cal. Rptr. 633 (1970). The court thus rejected Stern's argument that *In re Saunders* supported his position, for it was clear that Stern's mental condition had been carefully evaluated before his attorney made the tactical decision not to raise an insanity defense. For a relevant discussion of insanity defenses see Finer, *supra* note 119, at 1100-03.

137. This conclusion may be inferred from the obvious approval the court gave defense counsel's conduct, and from the care with which the defendant's mental condition was evaluated. *See* notes 135-36 *supra*.

138. Other services can be requested. *See, e.g.*, United States v. Hartfield, 513 F.2d 254 (9th Cir. Mar., 1975) (denial of a defendant's request for an electroencephalogram test in support of his defense held improper). Federal indigent defendants have a statutory right to defense services. *See* 18 U.S.C. § 3006A(e) (1970).

139. *See Circuits Note: 1974-1975 Term*, 64 Geo. L.J. 167, 336 (1975).

140. 504 F.2d 1345 (9th Cir. Oct., 1974) (per Hamley, J.).

141. *Id.* at 1348-49. Mason's attorney had moved the state court in question for appointment of an investigator to assist in preparing for a trial which was to involve

affirmed by the Arizona Supreme Court,[142] he applied in federal district court for a writ of habeas corpus. The district court denied the application, and Mason appealed, contending in part that the state's refusal to provide him with sufficient investigative services deprived him of a fair trial and effective assistance of counsel.[143]

The Ninth Circuit panel which heard the appeal was sympathetic. It examined Supreme Court decisions[144] regarding indigents' rights, and concluded that the constant goal has been to fashion requirements which would lend practical substance to the Constitution's general principles.[145] Accordingly, the court pronounced that "the effective assistance of counsel guarantee of the Due Process Clause requires, when necessary, the allowance of investigative expenses or appointment of investigative assistance for indigent defendants in order to insure effective preparation of their defense by their attorneys."[146] The court shed little light on when such services would be considered "necessary,"[147] although each case will obviously turn on its own facts. The court

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many out-of-state witnesses. The court granted only one hundred dollars for investigative expenses, and fifty dollars for other expenses. *Id.*

142. *See* State v. Mason, 105 Ariz. 466, 466 P.2d 760 (1970).

143. 504 F.2d at 1350.

144. The court concentrated its discussion on Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Johnson v. Zerbst, 304 U.S. 458 (1938); and Powell v. Alabama, 287 U.S. 45 (1932). These decisions all stand for the basic principle that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 19 (1956).

145. For instance, several cases mentioned by the court hold that transcripts must be provided at government expense when the denial of such transcripts would frustrate the interests of justice. *See, e.g.*, Roberts v. La Vallee, 389 U.S. 40 (1967).

The Ninth Circuit has played a vanguard role in fashioning assistance of this type. For instance, in MacCollom v. United States, 511 F.2d 1116 (9th Cir. Aug., 1974), *cert. granted*, 44 U.S.L.W. 3200 (Oct. 7, 1975) (No. 1487), it was held that a federal prisoner has a right to receive, at government expense, a verbatim transcript of his trial to assist in the preparation of a habeas corpus petition. Several circuits have adopted the opposite position, *see, e.g.*, Jones v. Superintendent, 460 F.2d 150, 153 (4th Cir. 1972), *cert. denied*, 410 U.S. 944 (1973), and the Supreme Court has granted certiorari in the *MacCollom* case in an apparent response to this conflict.

146. 504 F.2d at 1351. The court's reference to the due process clause reveals that it continues to ignore the sixth amendment as a source of the right to effective assistance of counsel. For a discussion of the circuits' conflicting views on this issue see note 118 *supra*.

147. It is suggested that state court determinations on this issue be subjected to the standard federal courts use when determining whether a service requested by a federal indigent defendant pursuant to 18 U.S.C. section 3006A(e) is reasonably necessary to the indigent's defense. This standard states that a district judge must "authorize defense services when . . . a reasonable attorney would engage such services for a client having the independent financial means to pay for them." United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1973).

did urge trial courts to "view with considerable liberality a motion for such pre-trial assistance."[148]

The *Mason* court's noteworthy discussion of indigents' rights to needed defense services did not prevent it from affirming the district court's denial of Mason's application for a writ of habeas corpus. The court emphasized that a defendant will only be afforded post-trial relief for the denial of defense services if it can be shown by *clear and convincing* evidence[149] that prejudice resulted from such denial.[150] It was determined that Mason had not made such a showing, and relief was thus denied.[151]

D. Pro se Representation

Faretta v. California[152] has now made it clear that mentally competent defendants in both federal and state courts have a constitutional right to proceed *pro se*.[153] However, when they do so they may not enjoy particularly adequate representation.[154] Although the cases requiring that defendants be provided with effective assistance of counsel are not controlling in these in-

148. 504 F.2d at 1352. This plea for liberality was engendered by concern for the difficulty defense attorneys have demonstrating, in advance of trial, an "undoubted need" for requested defense services.

149. Clear and convincing evidence has been described as

> that measure or degree of proof which will produce in the mind . . . a firm belief or conviction as to the allegation sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.

Hobson v. Eaton, 399 F.2d 781, 784 n.2 (6th Cir. 1968).

150. 504 F.2d at 1352.

151. In *Mason*, it could not be shown that new or significant evidence would have been disclosed by the investigation which was not conducted, and thus prejudice was not shown. *Id.* at 1352-53.

152. 422 U.S. 806 (1975).

153. *Id.* at 807. *See also* United States v. Price, 474 F.2d 1223, 1226 (9th Cir. 1973). This right is recognized statutorily at 28 U.S.C. § 1654 (1970). To "proceed *pro se*" means merely to represent oneself or, more accurately, "the *pro se* right is nothing more than the waiver of the right to counsel." Comment, *The Pro Se Defendant: No Right To Say No*, 23 Emory L.J. 523, 541 (1974).

The *Faretta* Court did observe, however, that a "trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." 422 U.S. at 834 n.46.

154. The *Faretta* Court recognized that "in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled etforts." 422 U.S. at 834. However, the Court simultaneously stated that if "the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly." *Id.*

stances of a waiver of sixth amendment rights,[155] they nonetheless represent a strong policy in favor of adequate representation—a policy which is obviously in tension with *Faretta*.[156] It can therefore be expected that various theories designed to permit both self-representation and the virtual benefits of counsel will be advanced in the wake of *Faretta*.

One such theory was advanced and rejected by the Ninth Circuit in the pre-*Faretta* case of *United States v. Trapnell*.[157] In *Trapnell*, the court was faced with a claim that a defendant who had represented himself was denied a fair trial because the trial judge did not intercede during the trial and assist the defendant in his attempts to obtain certain testimony.[158] The defendant's theory appeared to have evolved from policy considerations analogous to those which apply in effective assistance cases. He argued that the less stringent standards to which *pro se* pleadings are held[159] indicate that courts have recognized a need to accommodate the potentially competing interests represented by the

155. The decision to represent oneself necessarily entails a waiver of one's right, under the sixth and fourteenth amendments, to the assistance of counsel at trial. *See id.* at 807; 4 HOFSTRA L. REV. 449, 453 (1976).

156. Chief Justice Burger, in his dissent to *Faretta*, pointed out that the Supreme Court's "decisions have consistently included the right to counsel as an integral part of the bundle making up the larger 'right to a defense as we know it.' " 422 U.S. at 838.

The *Faretta* majority itself recognized that:

> There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial.

Id. at 832-33 (footnotes and citations omitted).

157. 512 F.2d 10 (9th Cir. Feb., 1975) (per curiam).

158. *Id.* at 11.

159. In Haines v. Kerner, 404 U.S. 519 (1972), the Supreme Court held that a *pro se* complaint in a suit brought under the Civil Rights Act, 42 U.S.C. § 1983 (1970), must be held to a less stringent standard than an attorney's formal pleadings. This holding, which resulted in the reversal of a trial court's decision to dismiss a *pro se* complaint for failure to state a claim upon which relief could be granted, clearly seems designed to facilitate access to the courts.

It is interesting to note that one Ninth Circuit panel has turned against a *pro se* litigant the rule that *pro se* pleadings are to be evaluted in a "common sense" manner. *See* McKinney v. De Bord, 507 F.2d 501, 504 (9th Cir. Nov., 1974). In *McKinney*, the presence of a *pro se* complaint enabled the court to make assumptions about the plaintiff-appellant's true intentions which, in effect, caused all facts to be viewed in the *defendant's* favor for the purposes of considering the propriety of a trial court's dismissal of the complaint pursuant to FED. R. CIV. P. 12(b)(6). As Judge Wallace cogently observed in a dissenting opinion, this inverts the proper approach. 507 F.2d at 506.

right to self-representation and the right to a fair trial and an adequate defense. Trapnell reasoned that one form of accommodation should lead to another, and that the trial judge should therefore be required, whenever inaction would result in inadequate representation, to assist a defendant with his defense.[160] The point seems to be that, without such assistance, the constitutionally guaranteed right to self-representation would not be meaningful.

The *Trapnell* court was not persuaded. The court advanced three sound reasons for rejecting the defendant's argument. First, intercession by a judge on behalf of any party destroys judicial neutrality and, by aligning the preeminence of the judge with that party, provides an unfair advantage.[161] Second, "a defendant representing himself cannot be heard to complain that his sixth amendment rights have been violated."[162] To hold otherwise would unnecessarily risk erosion of the right to represent oneself.[163] Third, by permitting *pro se* pleadings to be judged by relaxed standards, the Supreme Court intended to facilitate access to the courts and the evaluation of meritorious claims; it did not intend to compromise judicial neutrality or affect the law in areas where access to the courts is not an issue.[164] The fact remains, however, that *Trapnell* is probably only an illustration of the difficult issues which must be confronted now that *Faretta* has opened the door to many perhaps poorly conducted defenses.[165]

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160. 512 F.2d at 11-12.

161. *Id.* at 12. The *Faretta* Court expressly stated that *pro se* defendants would have to "comply with relevant rules of procedural and substantive law." 422 U.S. at 834-35 n.46. This would presumably include an acceptance of the judge's traditional role. *But see id.* at 852 (Blackmun, J., dissenting), wherein it is asked whether, under the *Faretta* rule, "the trial court [must] treat the *pro se* defendant differently than it would professional counsel?"

162. 512 F.2d at 12. *Accord*, 422 U.S. at 835 n.46.

163. An unsuccessful *pro se* defendant could only complain of a denial of effective assistance of counsel in the context of an argument that his waiver of sixth amendment rights had not been effective. If such a practice developed, procedures would have to be developed to insure that waivers are knowing and voluntary, thus complicating the method whereby one exercises the right of self-representation. In a dissent to the *Faretta* decision, Justice Blackmun recognized and briefly discussed the problems with waiver in any situation where an attempt is made to force mutually exclusive rights to co-exist. *See* 422 U.S. at 852.

164. *See* note 159 *supra*.

165. For an enumeration of other potential difficulties see 422 U.S. at 852 (Blackmun, J., dissenting); 6 CUMBERLAND L. REV. 703, 707-09 (1976); 4 HOFSTRA L. REV. 449, 459-68 (1976); 53 J. URBAN L. 333, 340-46 (1975); 37 U. PITT. L. REV. 403, 410-14 (1975).