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I. MENTAL COMPETENCY: THE NINTH CIRCUIT'S ANALYSIS

A. INTRODUCTION

Basic notions of due process and fair play mandate that a mentally incompetent defendant not be subjected to criminal proceedings.[1] Such a defendant, "though physically present in the courtroom, is in reality afforded no opportunity to defend himself."[2] Since the issue of competency arises in a variety of contexts, a single standard for determining competency will not suffice.[3] In *de Kaplany v. Enomoto,*[4] the Ninth Circuit, sitting en banc, analyzed the elements necessary to trigger an evidentiary hearing on competency to stand trial[5] and the level of competency required of a defendant pleading guilty.[6]

The defendant pleaded not guilty and not guilty by reason of insanity to a charge of murder by torture.[7] Two days into the guilt phase of the trial, the prosecution exhibited a picture of the

1. Drope v. Missouri, 420 U.S. 162 (1975). The Supreme Court stated: "Failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Id.* at 172, *citing* Pate v. Robinson, 383 U.S. 375, 378 (1966). *See* Bishop v. United States, 350 U.S. 961, 961 (1956); Carroll v. Beto, 421 F.2d 1065, 1067 (5th Cir. 1970).

2. 420 U.S. at 171. The *Drope* court viewed the prohibition as fundamental to an adversary system of justice, suggesting that it stemmed from the common law ban against trials in absentia.

3. The standard of competency required of a defendant who stands trial with the assistance of counsel differs from that required of a defendant who waives the right to counsel. *Compare* Drope v. Missouri, 420 U.S. 162, 172 (1975), *and* Dusky v. United States, 362 U.S. 402, 402 (1960), *with* Westbrook v. Arizona, 384 U.S. 150, 150 (1966). For a general discussion see Silten & Tullis, *Mental Competency in Criminal Proceedings,* 28 HASTINGS L.J. 1053 (1977).

4. 540 F.2d 975 (9th Cir. July, 1976) (per Sneed, J.) (en banc).

5. *Id.* at 977-85. *See* notes 12-19 *infra* and accompanying text.

6. *Id.* at 985-86. In Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973), a Ninth Circuit panel established a higher competency standard for pleading guilty than for standing trial. *Id.* at 215. For a discussion of the *Sieling* opinion see text accompanying notes 27-29 & note 30 *infra.* Silten & Tullis, *supra* note 3, reject a higher standard in this situation. *Id.* at 1068, 1073. *See also* Note, *Competence to Plead Guilty: A New Standard,* 1974 DUKE L.J. 149, which sharply criticizes imposition of a separate guilty plea standard.

7. Defendant allegedly caused the death of his wife by pouring nitric acid over her body. 540 F.2d at 977 n.3.

victim's slain body; de Kaplany "jumped to his feet shouting 'No, no, what did you do to her?'" and had to be forcibly restrained.[8] The following day, he changed his plea to guilty; subsequently, a jury found him sane, and he was sentenced to life imprisonment.[9] The defendant petitioned for a writ of habeas corpus alleging, *inter alia,* that the trial court erred by failing to conduct an evidentiary hearing on his competency to stand trial and by accepting a guilty plea incompetently made.[10] The district court denied the petition, and the Ninth Circuit affirmed.[11]

B. Competency to Stand Trial

The generally accepted test for competency to stand trial inquires whether a defendant has sufficient "'ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.' An orientation as to time and place and some recollection of events is not enough."[12]

Trial courts do not routinely hold evidentiary hearings to establish competency to stand trial because defendants are presumed mentally competent.[13] However, in *Pate v. Robinson,*[14] the Supreme Court stated that, once evidence before the court raises a "bona fide doubt" as to a defendant's competency to stand trial, the trial court must, on its own motion, suspend the proceedings and conduct a competency hearing.[15]

A prior Ninth Circuit case[16] held that a *Pate* hearing is re-

8. *Id.* at 978.

9. *Id.* at 978-79.

10. He also argued that he had suffered ineffective assistance of counsel and prejudicial publicity. The court found neither of these arguments persuasive. *Id.* at 976.

11. *Id.*

12. *Id.* at 979, *quoting* Dusky v. United States, 362 U.S. 402, 402 (1960). This test was adopted by the Supreme Court for use in all federal cases. Drope v. Missouri, 420 U.S. 162, 172 (1975). Some federal courts have used this test in reviewing state court convictions as well. United States *ex rel.* Curtis v. Zelker, 466 F.2d 1092, 1095 n.5 (2nd Cir. 1972); Noble v. Sigler, 351 F.2d 673, 676 (8th Cir. 1965).

13. *See* Cal. Penal Code § 1369(f) (West Supp. 1977) (defendant presumed mentally competent unless proven incompetent by a preponderance of the evidence). For authority on the analogous notion that defendants are presumed sane see United States v. Fortune, 513 F.2d 883, 889 (5th Cir.), *cert. denied,* 423 U.S. 1020 (1975); Hurt v. United States, 327 F.2d 978, 981 (8th Cir. 1964).

14. 383 U.S. 375 (1966).

15. *Id.* at 385. In applying the principle of *Pate,* the trial judge's function is to determine whether a hearing is required—not to decide the ultimate issue of the defendant's competency to stand trial. 540 F.2d at 981.

16. Moore v. United States, 464 F.2d 663 (9th Cir. 1972).

quired whenever "substantial evidence" raises a reasonable doubt about a defendant's competency to stand trial.[17] Further, "[o]nce there is such evidence from any source, there is doubt which cannot be dispelled by resort to conflicting evidence."[18] However, the *de Kaplany* court held that trial judges should consider all the evidence presented and evaluate it in light of their experience.[19] Evidence raising doubt as to competency was explicitly held *not* to require a *Pate* hearing if there were other evidence which precluded doubt.[20]

The *de Kaplany* court defined "evidence" as all information properly before the court, including testimony, exhibits, and reports of various kinds.[21] The court stated that more is necessary to create doubt than mere "bizarre" actions or statements by the defendant or conclusory statements by defense counsel regarding the defendant's inability to assist in the defense.[22] Psychiatric testimony concerning a defendant's immature, dangerous, psychopathic, or homicidal nature was held not to create doubt unless it clearly related to the defendant's ability to assist in the defense.[23]

Applying its formulation of the *Pate* rule to the facts of the case, the court found that the evidence, viewed as a whole, was insufficient to create a good faith doubt as to competency and thus did not necessitate a *Pate* hearing.[24] Judge Hufstedler's dis-

17. *Id.* at 666.

18. *Id.*

19. 540 F.2d at 983.

20. *Id.* at 982. A later Ninth Circuit panel decision interpreted *de Kaplany* as holding that "due process requires the trial judge to hold a competency hearing on his own motion only where the record as a whole discloses substantial evidence sufficient to raise a genuine doubt in the mind of a reasonable trial judge concerning the defendant's competence." Bassett v. McCarthy, 549 F.2d 616, 619 (9th Cir. Jan., 1977) (per Schwarzer, D.J., with Wright, J., joining; Hufstedler, J., dissented). Acknowledging that there was evidence which, standing alone, could have generated a doubt as to competency, the court viewed *the record as a whole* in reaching its determination that a *Pate* hearing was not required. *Id.* at 621. Judge Hufstedler dissented in *Bassett* on the same grounds as stated in her *de Kaplany* dissent: since the evidence presented on the issue of competency was evenly balanced, a *Pate* hearing was required to resolve the doubt. *Id. See* text accompanying notes 25-26 *infra*.

21. 540 F.2d at 980-81.

22. *Id.* at 982. The court approved the reasoning of the California Supreme Court. *See, e.g.*, People v. Laudermilk, 67 Cal. 2d 272, 285, 321 P.2d 228, 237, 61 Cal. Rptr. 644, 653 (1967).

23. 540 F.2d at 982.

24. *Id.* at 985. Although addressing the issue of sanity at the time of the crime and not competency to stand trial, the defense psychiatrists' testimony was such that one

sent accepted the majority's restatement of the *Pate* rule but rejected the manner in which it was applied.[25] Contending that the evidence raising doubt of competency was as strong as that tending to preclude doubt, Judge Hufstedler argued that real doubt thus remained and could be resolved only with a *Pate* hearing.[26]

C. Competency to Plead Guilty

Addressing another aspect of the case, the *de Kaplany* court approved a 1973 panel decision, *Sieling v. Eyman,*[27] which held that the level of competency required to plead guilty is higher than that required to stand trial.[28] The standard is "higher" because the defendant must be capable of making decisions—a factor not required in the test for competency to stand trial. The *Sieling* panel reasoned that a defendant is not competent to plead guilty if a mental illness has

> "substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature and consequences of his plea. . . ." [This formulation] requires a court to assess a defendant's competency with specific reference to the gravity of the decisions with which the defendant is faced.[29]

The *de Kaplany* court did not offer a rationale for the higher standard[30] or provide guidelines for its application in practice.[31]

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might conclude that de Kaplany was suffering from a mental illness at the time of trial. *Id.* at 979. However, after considering the testimony of the prosecution psychiatrists, the court concluded that a good faith doubt as to his competency did not exist. *Id.* at 985.

25. *Id.* at 988. Judge Ely joined in the dissent.

26. *Id.* at 989. Judge Hufstedler criticized the majority because it "appears to assume that one set of psychiatrists' opinions demolished substantial doubt of competency created by another set of psychiatrists' opinions." *Id.*

27. 478 F.2d 211 (9th Cir. 1973).

28. 540 F.2d at 985. In two later Ninth Circuit panel cases, the defendants were found competent to plead guilty even under the higher standard adopted in *de Kaplany*. Sailer v. Gunn, 548 F.2d 271 (9th Cir. Jan., 1977) (per Merrill, J.; the other panel members were Choy and Goodwin, JJ.); Makal v. Arizona, 544 F.2d 1030 (9th Cir. Oct., 1976) (per Trask, J.; the other panel members were Chambers and Carter, JJ.). No other circuit has drawn this distinction. In an analogous context, Chief Judge Bazelon imposed a higher competency requirement for waiver of the right to trial by jury. United States v. David, 511 F.2d 355, 362 n.19 (D.C. Cir. 1975). The District of Columbia Circuit recently approved and expanded this holding to cover waivers of constitutional rights in general. United States v. Masthers, 539 F.2d 721, 726 & n.30 (D.C. Cir. 1976).

29. 478 F.2d at 215, *quoting* Judge Hufstedler's dissent in Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir. 1970).

30. In Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973), the panel justified its use of

Also, the specific facts of this case would seem to offer little guidance, since de Kaplany was found competent to plead guilty even under this higher standard.[32] Further, the court adopted this standard despite acknowledged criticism.[33]

D. Retrospective Determination

If an appellate court concludes that an evidentiary hearing should have been held regarding a defendant's competency either to stand trial or to plead guilty, it remains to be decided whether

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the higher competency standard on the ground that a guilty plea necessarily involves a waiver of significant constitutional rights: the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Id.* at 214. The *Sieling* court noted that waivers of fundamental constitutional rights must be intelligently and competently made. Johnson v. Zerbst, 304 U.S. 458, 465 (1938). In assessing the adequacy of such waivers, trial courts examine various criteria, such as the defendant's statements or responses and the advice given by the court as to the nature and impact of the charge and plea. However, when a defendant's competency has been put in issue, the *Sieling* court held that the normal inquiry is not sufficient. 478 F.2d at 214. This inquiry, while still necessary, does not resolve the question of whether the defendant had a rational as well as factual understanding that he was giving up a constitutional right.

Sieling relied on Westbrook v. Arizona, 384 U.S. 150 (1966), wherein the Supreme Court held that the test for competency to stand trial does not adequately test the level of competency needed to waive the constitutional right to assistance of counsel. *Id.* at 150. *Sieling* held that since, under *Westbrook,* a defendant could be competent to stand trial but incompetent to waive assistance of counsel, a fortiori the defendant could also be incompetent to plead guilty. 478 F.2d at 215.

31. For example, the *de Kaplany* court never addressed the question of what would trigger an evidentiary hearing on competency to plead guilty. A recent panel decision in Sailer v. Gunn, 548 F.2d 271 (9th Cir. Jan., 1977), held that the *Pate* formula could be appropriately adapted to fit the guilty plea proceeding. Due process requires such a hearing if the trial judge had, or should have had, a good faith doubt as to the defendant's competency to participate intelligently in the proceedings, to understand the nature and impact of the plea, and to be capable of making a reasoned choice among possible alternatives. *Id.* at 275.

32. 540 F.2d at 985-86. Although Judge Wallace concurred, he felt that it was both unnecessary and unwarranted to give en banc approval to the higher guilty plea standard as set forth in *Sieling. Id.* at 987.

33. *Id.* at 985, *citing* Note, *supra* note 6. The Note criticized the higher standard for two reasons. First, it creates a "class of semi-competent defendants" who could be compelled to stand trial but who could not benefit from the "leniency" of plea bargaining. *Id.* at 170. The author bases this view on the assumption that plea-bargained cases result in shorter sentences than cases which go to trial. While the defendant is placed in a theoretically paradoxical position, in practice he or she may not be harmed thereby. Even a cynical observer could question whether a judge would punish a defendant with a longer sentence after a trial when the defendant was constitutionally prevented from plea bargaining. Second, the standard provides a new basis for collateral attack upon guilty pleas by furnishing "convicted defendants who waived one or more rights a technical basis for obtaining review." *Id.* at 174. However, to preclude collateral attack based on incompetency effectively denies defendants the constitutional right to due process. Sailer v. Gunn, 548 F.2d 271, 275 (9th Cir. Jan., 1977). This hardly seems a "technical" matter.

a retrospective determination is possible. Circumstances may make such a determination impossible, thereby requiring a new trial.[34] Where a retrospective determination is possible, the usual procedure is to remand to the trial court for that purpose.[35] Under the unusual facts of *de Kaplany,* however, the court held that remand to the state court was not necessary. Having held that failure to conduct a *Pate* hearing on competency to stand trial was not a denial of due process,[36] the court pointed out that the trial court did not consider the issue of competency to plead guilty. Nevertheless, the court concluded that the district court was able to make "a fair retrospective determination of the defendant's competency at the time of trial."[37]

E. Conclusion

The *de Kaplany* opinion appears to present a curious dichotomy. On the one hand, adoption of the higher guilty plea competency standard provides additional safeguards for defendants. On the other hand, the court's restrictive reading of *Pate*—requiring greater evidence of incompetency to trigger a hearing on competency to stand trial—seems to limit protection accorded defendants.

Some commentators have argued that, if the higher competency standard is essential in the guilty plea context, it should also be required for defendants standing trial.[38] This argument seems to overlook two significant distinctions, however. First, decisions involved in standing trial, though clearly important, do not compare with the decision to plead guilty.[39] Second, some

34. "In *Pate* the Supreme Court emphasized the difficulty of conducting a fair post-conviction hearing on the defendant's competency at trial." 540 F.2d at 986 n.11. The *Pate* court focused on three factors: the jury's inability to observe the defendant's demeanor, the fact that expert testimony could only be based on the printed record, and the six-year time lapse between the trial and the proposed hearing. 383 U.S. at 387. *Accord,* Drope v. Missouri, 420 U.S. 162, 183 (1975); Moore v. United States, 464 F.2d 663, 666-67 (9th Cir. 1972).

35. 540 F.2d at 986.

36. *Id.* at 985.

37. *Id.* at 986 n.11. The court noted particularly the fact that, despite the time lapse, several expert witnesses who testified at the trial were able to testify at the district court hearing. *Id.* Because Judge Hufstedler felt that the evidence at trial was sufficient to require a *Pate* hearing, she would have reversed "for *Pate* error and remand[ed] with directions to grant the writ unless the State afforded de Kaplany a new trial within a reasonable time." *Id.* at 989.

38. Silten & Tullis, *supra* note 3, at 1073; Note, *supra* note 6, at 168.

39. Clearly, any other decision—to testify, to plead an affirmative defense, to call or

trial decisions are made exclusively by counsel, and with regard to these a defendant's competence is irrelevant.[40]

Thus, there is nothing inherently wrong with two standards as long as both standards adequately protect defendants who are not clearly competent. It remains to be seen whether other circuits will adopt the Ninth Circuit's approach. At best, they will expand defendants rights by adopting the higher standard to plead guilty and refrain from adopting this court's interpretation of *Pate*. At worst, other circuits may not adopt the higher standard to plead guilty and yet follow the Ninth Circuit's *Pate* analysis.

Carol Coates Yaggy

II. EXHAUSTION OF STATE REMEDIES: THE ALL OR NOTHING APPROACH

In *Gonzales v. Stone,*[1] a Ninth Circuit panel ruled that, when a habeas corpus petitioner has not exhausted available state remedies with respect to all issues raised in the federal petition, a federal court should not review any of the issues.[2] Gonzales was sentenced to state prison in 1971 upon conviction of first degree burglary and assault with intent to commit rape.[3] Following unsuccessful appeals in state courts, Gonzales filed a petition for a writ of habeas corpus in federal district court.[4] The district court

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cross-examine witnesses, or to be tried by a judge or jury—is not as weighty as the decision to plead guilty.

40. The California Court of Appeal has held, for example, that

> where a defendant is represented by counsel it is to be expected that counsel will intentionally refrain from asserting, or advise waiver of, certain constitutional rights from time to time in his choice of defense tactics. It is not necessary that whenever such a tactical waiver occurs the court interrupt the proceedings to advise defendant of the right which is to be waived and question him to ascertain whether the waiver is made with full appreciation of the consequences.

People v. Evanson, 265 Cal. App. 2d 698, 701-02, 71 Cal. Rptr. 503, 505 (1968).

1. 546 F.2d 807 (9th Cir. Oct., 1976) (per Trask, J.; the other panel members were Goodwin and Kennedy, JJ.).

2. *Id.* at 808. In James v. Reese, 546 F.2d 325 (9th Cir. Dec., 1976) (per curiam) (Wright and Sneed, JJ., and Lucas, J., sitting by designation), another Ninth Circuit panel applied the *Gonzales* rule. For a general discussion of federal-state comity see Hufstedler, *Comity and the Constitution: The Changing Role of the Fede/al Judiciary,* 47 N.Y.U.L. REV. 841, 860-70 (1972).

3. 546 F.2d at 808.

4. Gonzales submitted two petitions to the district court under two different names. The panel noted that "it is likely that his two petitions are the result of ignorance of the

dismissed the petition for failure to exhaust state remedies, as two of the four issues raised in the federal petition had not been presented to the state courts.[5] The court of appeals affirmed, holding that the federal court "must decline to decide any of the petition's issues until the available state remedy for every issue is exhausted."[6]

In reaching its decision, the panel acknowledged that there was conflict among the circuits regarding the application of the exhaustion-of-state-remedies doctrine where the state remedies have been exhausted as to some but not all of the claims presented by the habeas petition.[7] Some circuits have held that it

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law." *Id.* at 808 n.1. Both petitions alleged: "1) ineffective assistance of counsel at trial, 2) lack of substantial evidence to support the conviction for assault with the intent to commit rape, 3) false imprisonment because of the use of another person's criminal record in determining sentence and quality of imprisonment, and 4) mistreatment at the time of arrest." *Id.* at 808.

Only the first two issues had been presented in state court, and the district court dismissed the petitions in toto. *Id.* The circuit court heard the case on consolidated appeals from the dismissal of both petitions. *Id.* By the time the consolidated appeals reached the Ninth Circuit, the fourth issue had been dropped from the petition.

5. *Id.* at 808.

6. *Id.* The doctrine has been codified in 28 U.S.C. § 2254 (1970), which provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
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> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The United States Supreme Court developed the exhaustion-of-state-remedies doctrine in *Ex Parte* Royall, 117 U.S. 241 (1886). Application of the doctrine is not mandatory. Rather, the Court has stressed its discretionary nature. *See* Tinsley v. Anderson, 171 U.S. 101 (1898). Over the years, however, courts have tended to apply the doctrine automatically. *See, e.g.,* Darr v. Burford, 339 U.S. 200 (1950); *Ex Parte* Hawk, 321 U.S. 114 (1944) (per curiam). Nevertheless, in Fay v. Noia, 372 U.S. 391 (1963), the Court emphasized that the doctrine "does not define a power but rather relates to the proper exercise of power." *Id.* at 420. *Accord,* Piccard v. Connor, 404 U.S. 270 (1971); Roberts v. La Vallee, 389 U.S. 40 (1967) (per curiam). *See also* Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1167 (1970) [hereinafter cited as *Developments*].

7. 546 F.2d at 808-09.

may be proper for the federal court to hear the exhausted claim as long as it will not interfere with a state court's determination of the unexhausted claim.[8] The Fifth Circuit has held, however, that, as a general rule, exhaustion of all claims presented in the habeas corpus petition is required before relief may be granted on any claim.[9] Decisions within the Ninth Circuit reflect both views.[10] For reasons of federal-state comity[11] and to avoid "piecemeal litigation,"[12] the panel concluded that the Fifth Circuit approach was proper.[13]

It is unclear why the panel felt compelled to reject the approach which would allow the federal court to hear exhausted claims even when combined with unexhausted claims. First, the desire to preserve federal-state comity is not endangered by the

8. The Second, Third, Fourth, and Eighth Circuits have held that a federal court may consider an exhausted claim "unless the exhausted and unexhausted claims are interrelated." 546 F.2d at 808-09. These courts reason that a petitioner's right to prompt adjudication of constitutional claims should not be considered secondary to the promotion of federal-state comity; comity is fully served so long as the federal courts allow the state court the initial opportunity to decide an issue before a federal court hears it. *See, e.g.*, Tyler v. Swenson, 483 F.2d 611, 615 (8th Cir. 1973); Hewett v. North Carolina, 415 F.2d 1316, 1320 (4th Cir. 1969); United States *ex rel.* Levy v. McMann, 394 F.2d 402, 404-05 (2d Cir. 1968); United States v. Myers, 372 F.2d 111, 113 (3rd Cir. 1967).

9. West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973), *aff'd en banc on the issue of exhaustion*, 510 F.2d 363 (1975) (per curiam). *See* Lamberti v. Wainwright, 513 F.2d 277 (5th Cir. 1975); *cf.*, Kelley v. Estelle, 521 F.2d 238 (5th Cir. 1975) (when conflicting interests, such as fairness to a pro se petitioner and judicial economy, outweigh policy considerations, court will dispose of exhausted claim while refusing to hear unexhasuted issues).

10. For decisions which dismissed petitions containing both exhausted and unexhausted claims see, e.g., Stearns v. Parker, 469 F.2d 1090 (9th Cir. 1972); Keeton v. Procunier, 468 F.2d 810 (9th Cir., 1972); Williams v. Craven, 460 F.2d 1253 (9th Cir. 1972); United States *ex rel.* Walker v. Fogliani, 343 F.2d 43 (9th Cir. 1965); Blair v. California, 340 F.2d 741 (9th Cir. 1965).

For decisions which considered exhausted claims though accompanied by unexhausted claims see, e.g., Lattimore v. Craven, 453 F.2d 1249 (9th Cir. 1972); Phillips v. Pitchess, 451 F.2d 913 (9th Cir. 1971), *cert. denied*, 409 U.S. 854 (1972); David v. Dunbar, 394 F.2d 754 (9th Cir. 1968); Schiers v. California, 333 F.2d 173 (9th Cir. 1964). *See also* Laubach, *Exhaustion of State Remedies As a Prerequisite to Federal Habeas Corpus: A Summary, 1966-1971*, 7 GONZAGA L. REV. 34, 55-57 (1971).

11. 546 F.2d at 809-10. The *Gonzales* panel stated: "The exhaustion-of-state-remedies doctrine reflects a policy of federal-state comity designed to give state courts the first opportunity to correct constitutional violations in state court convictions." *Id.* at 809. *See Developments, supra* note 6, at 1094. The panel reasoned that to allow the federal court to consider exhausted claims would no doubt interfere with the state's consideration of unexhausted claims, thereby undermining federal-state comity. 546 F.2d at 809.

12. 546 F.2d at 809. According to the panel, piecemeal habeas petitions would create "inconsistent, uninformed decisions, and paradoxically, [would result] in an ultimate delay in the prompt review of constitutional claims." *Id.*

13. *Id.*

approach the panel rejected. The court would hear only exhausted claims,[14] thereby allowing the state the first opportunity to decide those issues. Additionally, the federal court would not consider those claims if a state's determination on the other issues would be impaired.[15] Second, the panel presented neither legal exegesis nor precedent in support of the proposition that the rejected approach would create "piecemeal litigation."[16] In fact, there is no indication of how the Fifth Circuit approach would avoid piecemeal litigation.[17] Under this approach, there is nothing to prevent a petitioner from presenting a claim to a state court and then to a federal court, then beginning the process anew with each claim.

Although the court's reasoning in support of this policy may be questioned, adoption of a rule is advantageous. Practitioners in the Ninth Circuit will now be aware of their responsibility to exhaust state remedies with regard to all claims raised in a federal petition. In theory, the rule is flexible since a federal court retains discretion to except from the rule those cases which present "mitigating factors."[18]

It is doubtful, however, that prisoners such as Gonzales who petition in propria persona will be aware of the rule. According to the Second Circuit, this situation poses the danger that "a dismissal of the entire petition would be, at best, a waste of petitioner's and the state's time and, at worst, so frustrating that petitioner, having exhausted his energies, might submit to the alleged injustice."[19] The *Gonzales* panel did not recognize the status as a pro se petitioner as a mitigating factor.[20] Failure to do

14. *See* note 6 *supra*, which recites the text of 28 U.S.C. § 2254 (1970).

15. 546 F.2d 808-09. *See* note 8 *supra*.

16. 546 F.2d at 809.

17. *Id.*

18. When certain circumstances are present, such as a substantial or undue delay in state court proceedings, or when there is a reasonable explanation for failure to allege the unexhausted claims in earlier state proceedings, then considerations of fairness may require the court to examine the exhausted claims while refusing to hear the unexhausted issues.

Id. at 810.

19. United States *ex rel.* Levy v. McMann, 394 F.2d 402, 404 (2d Cir. 1968). *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES (Approved Draft 1968) [hereinafter ABA PROJECT], wherein it is stated: "It is exceedingly harsh or futile . . . to fashion and employ stringent pleading requirements. They can tend to strangulate the remedy." *Id.* at 58.

20. 546 F.2d at 810. In fact, the panel made the affirmative finding that no mitigating

so penalizes prisoners who are not knowledgeable about the law and impedes their efforts to obtain justice.[21]

John Frederick Vogt

III. PROBATION REVOCATION: THE LIMITS OF DUE PROCESS

A. INTRODUCTION

United States v. Segal[1] is a case of first impression on the issue of whether the protections afforded a defendant when entering a guilty plea apply to a probation revocation hearing where the court imposes a prison sentence.[2] The majority reasoned that the due process requirements and statutory rights involved when pleading guilty to an original charge are inapposite when admitting probation violations.[3]

B. THE *Segal* DECISION

At trial, Segal pleaded guilty to the fraudulent use of a fictitious name and address,[4] sentence was suspended, and she received probation.[5] Over three years later, after repeated admonishment by the court regarding probation violations, a probation

factors were present in this case. This position is somewhat questionable, in that the Fifth Circuit has recognized that status as a pro se petitioner is one factor to be considered. Kelley v. Estelle, 521 F.2d 238 (5th Cir. 1975).

21. "Every post-conviction relief system must take into account the necessary premise that the initial legal step, preparation and filing of an application, probably will be performed by laymen in prison without the assistance of counsel . . . ." ABA PROJECT, *supra* note 19, at 49. *See also* Hipler, *Federal Habeas Corpus for State Prisoners: Developments in the Law on Collateral Attack and Finality,* CASE & COM., NOV.-DEC. 1977, at 40-47.

1. 549 F.2d 1293 (9th Cir. Feb.) (per Wallace, J.; the other panel members were Browning, J. and East, D.J.), *cert. denied,* 431 U.S. 919 (1977).

2. In addition, the court considered Segal's objection to her sentencing. The majority held that it was not an abuse of discretion for the district judge to have ruled that her sentence should not commence until she finished serving a state sentence. *Id.* at 1301.

3. *Id.* at 1296, 1298.

4. 18 U.S.C. § 1342 (1970) provides

> Whoever, for the purposes of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title [frauds and swindles] or any other unlawful business, uses or assumes . . . any fictitious, false, or assumed title, name or address . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

5. 549 F.2d at 1294.

revocation hearing was held.[6] With her attorney present at the hearing, Segal admitted four charges and waived a hearing on the fifth charge. The court found the admissions to have been voluntarily and knowingly made, revoked probation, and imposed a three-year sentence.[7] On appeal, Segal contended that she was denied the statutory protection of Federal Rule of Criminal Procedure[8] (FED. R. CRIM. P.) 11 and due process rights established by the Supreme Court in *Boykin v. Alabama.*[9] The majority re-

6. The defendant had been warned at the time probation was imposed that failure to comply with the terms of probation would result in a "tough prison sentence." *Id.* at 1295. Nine months later, her probation officer requested revocation, alleging several violations of the probation conditions. At a subsequent hearing, the court warned her that, if she did not abide by the probation terms, she would be placed in prison. A continuance was granted to allow her counsel to present mitigating evidence and, apparently, probation was not revoked. *Id.*

Seventeen months later, another petition for revocation was filed alleging noncompliance with the terms of her probation. After another seven months, a supplemental petition was filed advising that Segal was convicted in one state court of forgery and another state court of forgery and fraud. She received one-year county jail sentence in both states, with the sentences to run concurrently. *Id.*

7. *Id.*

8. Fed. R. Crim. P. 11 reads in pertinent part:

> (c) *Advice to Defendant.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
>
> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
>
> (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and
>
> (5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

The rule further provides that the court cannot accept a plea unless the plea is voluntary. The court must also ask whether the plea is a result of bargaining. Fed. R. Crim. P. 11(d).

9. 395 U.S. 238 (1969). *Boykin* held that the privilege against self incrimination, the right to a jury trial and the right to confrontation apply to the entering of a guilty plea; and that a voluntary and intelligent waiver of these rights cannot be presumed from a silent record.

jected both arguments and affirmed the probation revocation and jail sentence.[10]

The panel summarily dismissed the contention that rule 11 applies to a probation revocation hearing on the ground that, by its terms, rule 11 applies only to the taking of a guilty plea.[11] In determining whether *Boykin* applied, the court analyzed the diminishing levels of due process required in (1) criminal prosecutions, (2) probation revocation hearings with no prior imposition of sentence, (3) probation revocation hearings with sentence already established and parole revocation hearings, and (4) prison disciplinary hearings.[12]

The Supreme Court has stressed that the due process rights guaranteed an accused at a probation revocation hearing with sentence previously established and at a parole revocation hearing are less than those required in criminal prosecutions.[13] In *Segal,* in addition to the fact that it involved a probation revocation hearing, a prison sentence was being imposed for the first time. Thus, the court was faced with the issue of whether any additional rights, besides those due at a simple revocation hearing,[14] must be afforded the defendant.[15]

The majority compared the rights at a probation revocation hearing with the interests protected by *Boykin.*[16] It pointed out that there is no right to a jury to be waived at a probation revoca-

10. 549 F.2d at 1294. Segal did not allege that her guilty plea to the original charge was involuntarily or unknowingly made. *Id.* at 1296.

11. *Id.* at 1296.

12. *Id.* at 1296-99.

13. Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973) (probation revocation); Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

14. The requirements for such proceedings, called Scarpelli rights, are: (1) written notice of the violations, (2) an opportunity to be heard and present witnesses, (3) the right to confront and cross-examine prosecution witnesses, (4) disclosure of the evidence against the accused, (5) written reasons for revocation, and (6) a neutral and detached body. Gagnon v. Scarpelli, 411 U.S. 782, 786 (1973); Morrissay v. Brewer, 408 U.S. 471, 489 (1972).

15. The only Supreme Court case involving a combined probation revocation and sentencing hearing is Mempa v. Rhay, 389 U.S. 128 (1967). The Court held that the sentencing aspect of the hearing brought the situation within the ambit of the sixth amendment and, thus, the accused had a right to counsel. *Id.* at 134. Since Segal was represented by counsel, the mandate in *Mempa* was met. 549 F.2d 1297. The majority cited a Ninth Circuit case which held that the right to counsel was the *only* additional requirement to the *Scarpelli* rights. 549 F.2d at 1298. *See* United States v. Miller, 514 F.2d 41 (9th Cir. 1975).

16. 549 F.2d at 1298-99.

tion hearing and, while there is a right to confrontation, that right is limited because it can be denied by the hearing officer for good cause.[17] The majority stated that the extent to which the privilege against self-incrimination exists at probation revocation hearings is unclear.[18] Thus, the majority concluded that the theoretical underpinnings of *Boykin* do not apply to probation revocation hearings.[19] Moreover, the court explained that, whereas a guilty plea is tantamount to a conviction which ends all controversy and triggers sentencing, admissions at a revocation hearing do not have this effect. The defendant can still present evidence mitigating the violations, and the judge has broad discretion in deciding whether the violations warrant revocation.[20] Judge Browning dissented, stating that "[i]t is difficult to understand why the majority labors with such obvious difficulty to find a basis for denying appellant a procedural protection so effective and so easily afforded."[21] First, he argued that the consequences of a guilty plea and that of an admission of a probation violation where sentence has not previously been imposed are virtually the same. In both instances, the determination as to what penalty should be exacted still remains. "Indeed, the consequences [of an admission of a probation violation] may be more drastic—as in this case. Appellant's guilty plea resulted in probation but her admission of probation violations resulted in a three-year prison sentence."[22] Second, he argued that it was incorrect for the majority to analyze Segal's situation in terms of the three rights *Boykin* protects when pleading guilty to the original charge. The same three rights are not present in the case of a probation revocation like Segal's. However, according to Judge Browning, this does not mean that

17. *Id.*

18. *Id.* at 1299.

19. *Id.* Further, Segal argued that *Boykin* should apply because the Ninth Circuit had previously found it relevant to another sentencing situation. Sesser v. Gunn, 529 F.2d 932 (9th Cir. 1976). *Sesser* affirmed an earlier Ninth Circuit decision which held that *Boykin* was applicable to admission of prior convictions in the context of determining whether defendant should be termed a habitual criminal and thereby subjected to life imprisonment. Wright v. Craven, 461 F.2d 1109 (9th Cir. 1972). The *Wright* court reasoned that this admission was the equivalent of a guilty plea. However, the majority in *Segal* identified two critical differences. *Wright* involved the "drastic consequence of a mandatory life sentence," 549 F.2d at 1300, and the defendant had "a constitutional right to a judicial hearing on the validity of the prior convictions, with a right to notice of the charges and assistance of counsel." *Id.* The majority therefore reasoned that *Segal* was not entitled to the *Boykin* protections. *Id.*

20. 549 F.2d at 1300.

21. *Id.*

22. *Id.* at 1302.

the rights that are present should be denied the *Boykin* protections.[23]

C. Conclusion

The panel's decision may seem justifiable when applied to the specific facts of *Segal.* Her conduct was flagrantly abusive of the probation conditions. Furthermore, she had been warned repeatedly of the possible consequences. But the holding is so broad that one can foresee situations in which the application of such a rule would be harsh to an accused. In a judicial system where a probationer can receive a prison sentence for misconduct which is relatively slight when compared to the original charge, even though that sentence is no more than might have been received for the original conviction, it is imperative that the consequences of admitting probation violations be explained. It is therefore advisable that the *Segal* holding be limited to its facts.

Michelle Migdal Gee

IV. AUTOMATIC STANDING: POSSESSION VS. CONSPIRACY TO POSSESS

A. Introduction

In several cases this term, the Ninth Circuit dealt with the issue of automatic standing to suppress evidence in criminal proceedings. In *United States v. Jamerson,*[1] the court held that a defendant charged with knowing transportation of a stolen vehicle across state lines in violation of the Dyer Act[2] has automatic standing to object to the introduction of evidence found in the vehicle.[3] While the panel in *Jamerson* sanctioned automatic standing in Dyer Act cases, the panels in *United States v. Prueitt*[4] and *United States v. Guerrera*[5] denied automatic standing in the

23. *Id.*

1. 549 F.2d 1263 (9th Cir. Jan., 1977) (per Orrick, D.J.; the other panel members were Ely and Choy, JJ.).

2. 18 U.S.C. § 2312 (1970). The Dyer Act provides in pertinent part: "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both." *Id.*

3. 549 F.2d at 1269.

4. 540 F.2d 995 (9th Cir. July, 1976) (per Barnes, J.; the other panel members were Chambers and Hufstedler, JJ.).

5. 554 F.2d 987 (9th Cir. May, 1977) (per Merrill, J.; the other panel members were Sneed, J. and Blumenfeld, D.J.).

context of drug-related offenses.

Under rule 41(e) of the Federal Rules of Criminal Procedure, "[a] person aggrieved by an unlawful search and seizure" may move to suppress any resulting evidence.[6] The Supreme Court has held that a defendant on the premises at the time of the contested search, or one who alleges a proprietary or possessory interest in the premises searched or the goods seized, has "actual" standing to invoke rule 41(e).[7] In the leading case on "automatic" standing, *Jones v. United States,*[8] the Supreme Court held that a person charged with an offense which includes, as an essential element, possession of the seized evidence at the time of the contested search and seizure is a "person aggrieved" within the meaning of rule 41(e).[9] Standing conferred on this basis is deemed automatic because the defendant need not assert any possessory or proprietary interest in the seized goods. The Court reasoned that a defendant should not be forced to allege possession in order to obtain standing when such an allegation would also assure conviction.[10] Also, the prosecution should not be able to allege possession as an essential part of the government's case, yet deny possession for purposes of standing.[11]

B. Automatic Standing and the Dyer Act

In *United States v. Jamerson,*[12] the Ninth Circuit finally dealt with the issue of automatic standing in Dyer Act cases.[13] The defendant was arrested on charges of possession of a stolen

6. 18 U.S.C. rule 41(e) (1970).

7. Brown v. United States, 411 U.S. 223, 229 (1973).

8. 362 U.S. 257 (1960).

9. *Id.* at 263-264.

10. *Id.* at 263.

11. An alternative to the *Jones* automatic standing rule appeared in Simmons v. United States, 390 U.S. 377 (1968), which held that the testimony given by a defendant in order to establish his standing to object to illegally seized evidence may not be used against him at trial on the issue of guilt or innocence. *Id.* at 394. But the *Simmons* holding does not totally avoid the problems addressed by the Court in *Jones*. First, a defendant's testimony may still be used at trial for impeachment purposes. *See* Harris v. New York, 401 U.S. 222 (1970); People v. Sturgis, 58 Ill.2d 211, 317 N.E.2d 545 (1974). Second, and more importantly, *Simmons* did not deal with the unfair advantage given the prosecution.

12. 549 F.2d 1263 (9th Cir. Jan., 1977).

13. In Cotton v. United States, 371 F.2d 385 (9th Cir. 1967), the court avoided the automatic standing issue by finding *actual* standing based on a sufficient possessory interest in the vehicle at the time of the search, although the second of two searches in that case was made while the defendant was already in jail. *Id.* at 389-90. The court expressly declined, however, to decide whether the Dyer Act confers *automatic* standing based on the element of possession implicit in the charge. *Id.* at 391.

vehicle after he was observed sleeping in a parked van which had been reported stolen.[14] Although an inventory of the contents of the vehicle was taken at the time and place of arrest, the evidence sought to be suppressed was not discovered until a second inventory was conducted the same day.[15] The second search took place after the true owner had claimed the vehicle; thus, the defendant could not claim any proprietary interest. It also occurred while defendant was in jail; thus, he could not claim any possessory interest.[16]

The court found it to be merely fortuitous that the evidence at issue was discovered after the true owner had claimed the van. Therefore, the *Jamerson* court followed decisions of the Fifth and Tenth Circuits[17] and allowed automatic standing for alleged Dyer Act violations.[18] Those courts reasoned that the basis for the prosecution in each instance was the *possession* of a stolen car, as there was no direct evidence of actual transportation across state lines.[19] Thus, the courts concluded that the possession which forms the basis for the prosecution should also confer standing.[20] The Ninth Circuit rejected the reasoning of the Sixth and Eighth Circuits[21] and held that the possession implicit in a charge of violating the Dyer Act, which forms the basis of the government's case, must also confer automatic standing.[22]

To decide differently would be to ignore the Supreme Court's rationale for automatic standing. If standing were not automatic, Jamerson would have been forced to choose between his fourth amendment right against illegal searches and seizures and his fifth amendment privilege against self-incrimination. Since de-

14. 549 F.2d at 1265.

15. *Id.* Introduced into evidence against the defendant were two stolen Canadian license plates and several pieces of Canadian identification which were discovered during the second search.

16. *Id.*

17. Glisson v. United States, 406 F.2d 443 (5th Cir. 1969); Simpson v. United States, 346 F.2d 291 (10th Cir. 1965).

18. 549 F.2d at 1268.

19. *See* Glisson, 406 F.2d at 427; Simpson, 346 F.2d at 295.

20. *Id.* Both circuits relied upon *Jones.*

21. United States v. Kucinich, 404 F.2d 262 (6th Cir. 1968); Rodgers v. United States, 362 F.2d 358 (8th Cir. 1966). Although neither *Kucinich* nor *Rodgers* involved the Dyer Act, they did discuss the issue of automatic standing to object to evidence found in a stolen car which the defendants were charged with possessing, and the Ninth Circuit treated them as Dyer Act cases.

22. 549 F.2d at 1269.

nial of automatic standing to alleged Dyer Act violators would place defendants in the precise position which the Supreme Court intended to prevent, the Ninth Circuit granted automatic standing and eliminated minute distinctions based on who was actually in possession at the time of the search.[23]

C. Automatic Standing and Drug-Related Offenses

While the *Jamerson* court applied automatic standing to Dyer Act cases, the panels in *United States v. Prueitt*[24] and *United States v. Guerrera*[25] denied automatic standing in the context of drug-related offenses. In *Prueitt,* six defendants were charged by indictment with importation, possession with intent to distribute, and conspiracy to import and possess marijuana.[26] The county sheriff's department received a tip from an informer regarding a scheme to bring marijuana into California from Mexico, and the Drug Enforcement Administration began surveillance. The defendants were arrested after searches of two airplanes and two ground vehicles revealed seventeen bags of marijuana (approximately 900 pounds) together with other evidence corroborating the informant's story.[27] The defendants moved to suppress the evidence on the ground that the searches and seizures were illegal. The trial court denied the motion, and all the defendants were found guilty of conspiracy.[28]

On appeal, the defendants alleged that the motion was improperly denied.[29] The court of appeals found that the defendants did not have actual standing to object to the introduction of evidence because they failed to allege either a possessory interest in the evidence seized or a proprietary interest in the vehicles

23. In fact, *Jamerson* goes even further than the Supreme Court in *Jones* by allowing standing when the defendant was not actually in possession at the time of the search.

24. 540 F.2d 995 (9th Cir. July, 1976).

25. 554 F.2d 987 (9th Cir. May, 1977).

26. 21 U.S.C. §§ 841(a)(1), 952, 960(1970).

27. 540 F.2d at 998-99.

28. *Id.* at 999. All defendants were acquitted of the importation and possession charges. *Id.*

29. The defendants raised various other issues, and, with regard to those, the court held: (1) although an indictment must be obtained by an attorney specially appointed and specifically directed by the Attorney General, this requirement is satisfied by a letter of authorization, *id.* at 1003; (2) the defendant must show a need for the informant's identity before disclosure is required, *id.* at 1004; and (3) venue can be established by any overt act committed in the course of a conspiracy and need be established only by a preponderance of the evidence, *id.* at 1006.

searched.[30] The *Prueitt* court rejected the defendants' contention that they had automatic standing. In making this determination, the court considered only the conspiracy charge since the defendants were acquitted of the other charges.[31] The court relied on *United States v. Boston,*[32] an earlier Ninth Circuit decision, which held that when automatic standing exists because possession is an essential element of the charge, automatic standing applies only to that charge.[33] The *Prueitt* majority reasoned that, since possession was not essential to the charge of conspiracy, the defendants had no claim to automatic standing.[34]

Judge Hufstedler dissented. First, she argued that *Boston* incorrectly interpreted the High Court's decision in *Jones.*[35] In *Jones,* after the Court held there was automatic standing on the possessory charge, it reversed both that charge *and* a nonpossessory charge.[36] Therefore, *Boston* was not correct in separating possessory and nonpossessory charges. Thus, the *Prueitt* majority erred by relying on *Boston* and not considering the charges of possession of marijuana together with the charges of conspiracy.[37] Second, she argued that, in limiting its determination to the conspiracy charge, the court incorrectly interpreted "charged" to mean "convicted". According to Judge Hufstedler, "[t]hat reading makes no sense as a matter of English or as a matter of law."[38] As the Supreme Court formulated the test in *Jones,* "[i]n cases where the indictment itself charges possession, the defendant, in

30. *Id.* at 1004-05. Prueitt, himself, alleged a possessory interest and, therefore, had actual standing.

31. *Id.* at 1004.

32. 510 F.2d 35 (9th Cir. 1974), *cert. denied,* 421 U.S. 990 (1975).

33. *Id.* at 38. Boston was convicted of possession of heroin with intent to distribute and illegal importation of heroin. *Id.* at 36. The Ninth Circuit held that Boston had automatic standing to challenge the search with regard to the possession charge. However, he did not have automatic standing to challenge the search with regard to the importation charge, as possession is not an essential element thereof. *Id.* at 37.

34. 540 F.2d at 1004. *But see* Contreras v. United States, 291 F.2d 63 (9th Cir. 1961). Contreras was prosecuted for violating 21 U.S.C. § 176a, smuggling marijuana. Like conspiracy and importation, smuggling does not necessarily include possession at the time of the search as an essential element. Nevertheless, the court *Contreras* court held that, because the violated statute contained a provision permitting conviction based on the defendant's unexplained possession of contraband, and the jury was so instructed, Contreras could have been convicted on that ground. *Id.* at 65. Since the government's case rested, at least in part, on possession, the defendant had automatic standing to object.

35. 540 F.2d at 1009.

36. *Id.*

37. *Id.*

38. *Id.*

a very real sense, is revealed as a 'person aggrieved by an unlawful search and seizure.'"[39]

In *United States v. Guerrera,*[40] a different Ninth Circuit panel followed the precedent set by *Prueitt.* In *Guerrera,* the defendant was charged with importation, possession with intent to distribute, and conspiracy to import and possess marijuana and cocaine.[41] Customs officials near the Mexican border, acting on information received about possible smuggling, stopped a rented car driven by one Basta. On searching the car, they found a cigarette pack containing cocaine. Instead of a spare tire, the trunk contained two foot lockers and two locked suitcases filled with marijuana.[42] The same day, Guerrera was stopped in a rented car at a port of entry from Mexico. A search revealed that the trunk contained two different sized spare tires, two jacks, and two lug wrenches. Basta's wallet was also found, as well as a key that fit the luggage in Basta's car. A trained dog detected that marijuana and cocaine had been in the defendant's trunk and back seat within the past twenty-four hours. The defendant was arrested, and a search of his person revealed a cocaine-sniffing spoon on his keychain.[43] He was later convicted on all three counts and received concurrent sentences.[44]

Relying on *Prueitt* and *Boston,* the *Guerrera* panel summarily dismissed the issue of automatic standing.[45] The court admitted that the defendant would have standing as to the possessory count but nevertheless refused to consider his challenge of that count because his sentences were imposed concurrently.[46] Thus, *Guerrera* appears to compound the *Prueitt* error by imposing an additional requirement—a showing of harm.

D. Conclusion

A liberalized set of guidelines with regard to standing is necessary to the continued vitality of the exclusionary rule and the

39. 362 U.S. at 264 (emphasis added). *See also* Brown v. United States, 411 U.S. 223 (1973).

40. 554 F.2d 987 (9th Cir. May, 1977).

41. 21 U.S.C. §§ 841(a)(1), 846, 952, 960, 963 (1970).

42. 554 F.2d at 988.

43. *Id.* at 988-89.

44. *Id.* at 988, 990 n.2.

45. *Id.* at 989-90.

46. *Id.* at 990 n.2.

courth amendment's protection against illegal searches and seizures. It is hoped that the Circuit will follow the enlightened lead of *Jamerson* and reject the faulty reasoning on which *Prueitt* and *Guerrera* rest.

Michelle Migdal Gee

V. AGENTS' DUTY TO RETAIN FIELD INVESTIGATION NOTES

A. Introduction

In *United States v. Harris,*[1] a Ninth Circuit panel held that the FBI must "preserve the original notes taken by agents during interviews with prospective government witnesses or with an accused."[2] This holding is the logical extension of an earlier Ninth Circuit case.[3]

B. Duty to Preserve Notes

In September 1975, a telephone operator received a threat to bomb the Federal Building in Seattle, Washington. The call was traced to the house in which defendant Harris resided. Later that day, an FBI agent investigating the call interviewed Harris regarding his activities around the time the call was made. The agent took rough notes of that interview, but following FBI policy he destroyed the notes after incorporating their contents into a formal report.[4]

Testimony of several witnesses placed Harris at the house at the time the threatening call was made. Although Harris testified that he had been out drinking that night, he apparently did not deny being home when the call was made.[5] The testimony of the agent who interviewed Harris, though not in itself incriminating, contradicted the testimony of Harris and other witnesses concerning Harris' activities around the time the call was made.[6]

1. 543 F.2d 1247 (9th Cir. Sept., 1976) (per Orrick, D.J.; the other panel members were Ely and Choy, JJ.).

2. *Id.* at 1253. The panel specifically adopted the reasoning of the District of Columbia Circuit Court of Appeals in United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975). 543 F.2d at 1251-53.

3. *Id.* at 1250. *See* United States v. Johnson, 521 F.2d 318 (9th Cir. 1975).

4. 543 F.2d at 1248-49.

5. *Id.* at 1248.

6. *Id.* at 1248-49 n.3.

Although Harris had a copy of the FBI report, he moved to strike the agent's testimony on the ground that his right to cross-examination was significantly impaired by the government's failure to produce the rough notes.[7] The motion was denied and Harris was convicted of making a threat over the telephone.[8]

On appeal, the panel considered whether the FBI's routine destruction of notes taken at interviews, when the notes are incorporated into a formal report, violates the Jencks Act[9] and/or rule 16 of the Federal Rules of Criminal Procedure.[10] The Jencks Act allows discovery of a witness' pretrial statement only after the witness has testified on direct examination, and only the statements which relate to the witness' testimony are covered by the Act. However, the Act narrowly defines "statements" as writings which are "signed or adopted or otherwise approved" by the witness, or a "transcript which is a substantially verbatim recital" of a witness' oral statement.[11] Rule 16(a)(1)(A) gives a criminal defendant the right to pretrial discovery of any oral statement made by him which is in possession of the government.[12] Relying on a prior Ninth Circuit decision,[13] *Harris* held that rough interview notes taken by an FBI agent may constitute discoverable material under either of these provisions, notwithstanding the government's production of a more formal report.[14] The *Harris*

7. *Id.* at 1249.

8. *Id.* Harris was convicted of violating 18 U.S.C. § 844(e) which provides in part:

> Whoever, through the use of the . . . telephone, willfully makes any threat . . . concerning an attempt or alleged attempt being made . . . to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other . . . property by means of an explosive shall be imprisoned for not more than five years or fined not more than $5,000, or both.

9. 18 U.S.C. § 3500 (1970).

10. FED. R. CRIM. P. 16(a)(1)(A).

11. 18 U.S.C. § 3500(e) (1970).

12. FED. R. CRIM. P. 16(a)(1)(A).

13. United States v. Johnson, 521 F.2d 1318 (9th Cir. 1975).

14. 543 F.2d at 1248. United States v. Johnson, 521 F.2d 1318 (9th Cir. 1975), was the first Ninth Circuit case to hold that when an agent testifies at trial, notes compiled during the investigation may be producible under the Jenck Act. *Id.* at 1319. *But see* United States v. Carrasco, 537 F.2d 372 (9th Cir. June, 1976) (per Duniway, J.; the other panel members were Trask, J. and Battin, D.J.). In *Carrasco*, testimony revealed that an informant had kept a diary of events leading to the defendant's arrest. After incorporating the contents into an official report, an agent destroyed the diary pursuant to FBI policy. The panel found the diary to be a statement under the Jencks Act. In dictum, the panel distinguished the situation where agents destroy their own notes after compiling their formal reports. According to the panel, "preliminary notes of an agent from which he later prepares a report are *not* statements as that term is defined in the Jencks Act." *Id.* at 377 (emphasis added). This dictum, however, was in conflict with the *Johnson* decision and was impliedly disapproved by the *Harris* panel. 543 F.2d at 1251 n.9.

panel concluded that preservation is necessary in order to allow the trial court to determine the ultimate issue of whether the notes are discoverable.[15] Therefore, the panel took the next logical step and mandated that the agents must preserve their rough notes.[16]

C. Sanctions for Failure to Preserve Notes

Though several decisions have followed the *Harris* ruling, the Ninth Circuit has been unwilling to apply it retroactively.[17] Perhaps the best indication of how the court will enforce *Harris* is found in *United States v. Parker.*[18] In that case, Faithe, a co-defendant, was charged with bank robbery. Nine eyewitnesses testified at trial, each of whom had attended a pre-trial line-up involving Faithe. The FBI conducted two series of interviews of these witnesses; the first series consisted of two interviews before the line-up and one directly after the line-up. After this first series of interviews, Faithe moved to discover the FBI's rough notes. The trial court denied this motion but ordered that any future notes taken from interviews be preserved. However, the government failed to comply with the court's order and destroyed the notes from the second series of interviews. As a sanction for noncompliance, the trial court barred introduction of reports compiled from these notes.[19] On appeal Faithe argued that the trial court's sanction was inadequate because he was unable to cross-examine the government's eyewitnesses effectively without use of the agent's notes.[20]

In upholding Faithe's conviction, the *Parker* panel reasoned that, since "administration of the Jencks Act is entrusted to the

15. 543 F.2d at 1250. The panel rejected the government's reliance on Ogden v. United States, 323 F.2d 818 (9th Cir. 1963) *(Ogden II)*. *Ogden II* refused to impose sanctions or require a new trial where information contained in destroyed interview notes was incorporated into a formal report. *Id.* at 821. The *Harris* panel stated that *Ogden II* does not represent "a judicial imprimatur on the routine destruction of all rough interview notes." 543 F.2d at 1250-51.

16. 543 F.2d at 1248, 1253.

17. United States v. Parker, 549 F.2d 1217, 1224 (9th Cir. Jan., 1977) (per Palmieri, D.J.; the other panel members were Merrill and Wright, JJ.), *cert. denied*, 97 S. Ct. 1659 (1977); United States v. Wood, 550 F.2d 435, 440 (9th Cir. Dec., 1976) (per Carter, J.; the other panel members were Ely and Goodwin, JJ.); United States v. Robinson, 546 F.2d 309, 312 (9th Cir. Nov., 1976) (per Carter, J.; the other panel members were Wright and Wallace, JJ.), *cert. denied*, 97 S. Ct. 1333 (1977).

18. 549 F.2d at 1224.

19. *Id.* at 1223.

20. *Id.* at 1224.

'good sense and experience' of the district judges,"[21] it was proper to allow the district judges discretion in formulating sanctions.[22] The panel noted that destruction of the notes took place prior to *Harris* and it was proper for the government to have relied on the law as it then existed.[23]

C. Conclusion

Since the Ninth Circuit has not applied *Harris* retroactively, it is unclear what sanctions can be imposed for failure to preserve notes prior to that decision. The *Parker* panel, however, did note that "there should be no doubt henceforth that notes taken by federal agents in interviews . . . must not be destroyed. . . ."[24] It would appear that future destruction of notes would constitute affirmative misconduct. As such, an appropriate remedy may be to strike the testimony of a witness if the rough notes of the interview of that witness are destroyed.

Thomas W. Perley

VI. RIGHT TO A JURY TRIAL

A. Introduction

Congress has defined a petty offense as "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both . . . ."[1] In two recent cases, the court had occasion to consider whether this definition of "petty offense" determines the right to a trial by jury. One case dealt with the length of imprisonment, and the other dealt with the amount of the fine.

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21. *Id.*

22. The panel indicated that the actions of the district judges were, of course, subject to review by the appellate court. *Id.*

23. The court suggested that, were *Harris* applied, it might be necessary to reverse Faithe's conviction. *Id.* In examining the law existing at the time of trial, the panel referred to United States v. Carrasco, 537 F.2d 373 (9th Cir. June, 1976), wherein the court stated that an agent's initial notes which are later incorporated in a formal report are not statements under the Jencks Act. 549 F.2d at 1224. In a footnote to its decision, the *Parker* panel noted that it did not "condone the agent's failure to comply with the district court's order . . . ." *Id.* at n.8. Then the court stated that, in light of *United States v. Johnson* and *United States v. Harris*, agents should be clear on their duty to preserve rough notes. *Id.* Since *Johnson* was decided before *Carrasco*, it is unclear why the court allowed the government to rely on dictum in *Carrasco* rather than the holding in *Johnson*. *See* note 14 *supra*.

24. 549 F.2d at 1224 n.8.

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1. 18 U.S.C. § 1(3) (1976).

B. Length of Imprisonment

In *United States v. Sanchez-Meza,*[2] one Ninth Circuit panel held that the Congressional definition of petty offense is not determinative of the right to a trial by jury and analysis of the common law status of crimes has continuing validity. According to the majority,[3] a defendant charged with a conspiracy to commit a misdemeanor is entitled to a jury trial even though the maximum potential sentence is not more than six months.[4]

Sanchez-Meza was charged with conspiracy to avoid examination by immigration officials by willfully making false misrepresentations.[5] He was denied a jury trial on the ground that this conspiracy charge was a petty offense since it carries only a six month maximum penalty. The judge found him guilty and he received the maximum sentence.[6]

The government contended that *Baldwin v. New York*[7] and *Duncan v. Louisiana,*[8] which relied in part on the Congressional definition of petty offense, set forth the definitive standard for deciding whether a defendant has a right to trial by jury.[9] It urged that there is a right if the maximum potential penalty is over six

2. 547 F.2d 461 (9th Cir., Nov. 1976) (per Burns, D.J.; the other panel members were Duniway and Carter, JJ.).

3. Judge Carter dissented.

4. 547 F.2d at 464. A conspiracy to commit a misdemeanor is considered a misdeameanor and punishable by the same terms provided for that misdemeanor. 18 U.S.C. § 371 (1970). A conspiracy to commit any other offense against the United States is punishable by five years in prison and/or a $10,000 fine. *Id.*

Other circuits have denied defendants a jury trial when the maximum sentence was six months or less. *See, e.g.,* United States v. Goeltz, 513 F.2d 193 (10th Cir. 1975) (illegal possession of official United States insignia); United States v. Jarman, 491 F.2d 764 (4th Cir. 1974) (hunting migratory birds over baited area); United States v. Ireland, 493 F.2d 1208 (4th Cir. 1973) (per curiam) (illegal baiting of wild fowl); United States v. Merrick, 459 F.2d 644 (4th Cir. 1972) (unauthorized taxi-cab operation); United States v. Cain, 454 F.2d 1285 (9th Cir. 1972) (illegal baiting of wild fowl). It should be noted, however, that the crimes were *malum prohibitum* not *malum in se.* In fact, in *United States v. Floyd,* 477 F.2d 217 (10th Cir. 1973) (illegal entry upon a military installation), the court said: "If an offense is *malum in se* it may be serious enough to require a jury trial even though it qualifies as a petty offense." *Id.* at 222 (citation omitted).

5. 547 F.2d at 462. Originally he was indicted for violating 18 U.S.C. § 1426 (1970) (possessing illegal documentation regarding alien status) and 8 U.S.C. § 1326 (1970) (illegal re-entry into the United States). *Id.* Both counts are felonies and, therefore, Sanchez-Meza had a right to a jury trial. However, on the day of the trial, the prosecutor filed an information charging him with misdemeanor conspiracy. *Id.*

6. *Id.*

7. 399 U.S. 66 (1970).

8. 391 U.S. 145 (1968).

9. 547 F.2d at 463.

months, but there is no right if the maximum potential penalty is six months or less.[10] The majority, reasoning that neither *Baldwin* nor *Duncan* ruled that the length of the penalty was the sole criterion, rejected the government's contention.[11] Although the majority did not explicitly state what criteria should be used, it would appear that trial courts should adopt the following analysis. A court should first determine the maximum potential penalty. If it exceeds six months, there is a right to a jury trial. If it is six months or less, the court should then consider whether the crime was serious or petty at common law or whether the crime is *malum in se.* The majority applied this analysis to conspiracy to commit a misdemeanor and found that, although the length of sentence does not exceed six months, a defendant has the right to a jury because conspiracy was serious at common law and is considered *malum in se.*[12]

Judge Carter, dissenting, agreed that the length of the sentence should not be the sole criterion but stated, "[i]t does not follow, however, that all crimes once deemed serious by the common law are now deserving of a jury trial."[13] He would consider all criteria with emphasis on whether the offense is categorized as a felony or misdemeanor. If Judge Carter's analysis were adopted, a "truly petty conspiracy, as seen in this case [would not absorb] valuable court time with the necessity of a jury."[14]

C. Amount of Fine

In *United States v. Hamdan,*[15] another Ninth Circuit panel held that when the penalty involves a fine the Congressional defi-

10. *Id.*

11. *Id.* at 463-64. According to the majority: "*Baldwin* did not hold that the maximum potential sentence was the sole criterion by which to determine whether an offense was petty; it said only that the maximum penalty was "the most relevant" objective criterion in making the petty or nonpetty determination. And in *Duncan,* the court made it clear that crimes carrying only a six months maximum sentence do not call for a jury trial "if they otherwise qualify as petty offenses." *Id.* at 463.

The majority cited two early Supreme Court cases, District of Columbia v. Clawans, 300 U.S. 617 (1937) and District of Columbia v. Colts, 282 U.S. 63 (1930), which analyzed the right to a jury trial in terms of whether the crime was indictable at common law and whether the crime is *malum in se.* The majority concluded that this analysis is still viable since neither *Baldwin* nor *Duncan* overruled these cases. 547 F.2d at 464.

12. 547 F.2d at 462-64.

13. *Id.* at 465.

14. *Id.*

15. 552 F.2d 276 (9th Cir., Feb. 1977) (per curiam) (the panel members were Browning and Wallace, JJ., and Van Pelt, D.J.).

nition of petty offense is determinative of the right to a trial by jury.

Ali Hamdan, a nonimmigrant student, and Shirley Bush, a permanent resident, were aliens living in the United States. They married and Hamdan applied for permanent resident alien status. He alleged and she confirmed that they resided together in Foster City, California. Immigration officials discovered that Bush really resided in San Francisco. After a bench trial, they were found guilty of filing false statements with the Immigration and Naturalization Service. This conviction carries a maximum possible penalty of six months imprisonment and a $1,000 fine.[16]

Hamdan and Bush contended that it was reversible error to have refused them a jury trial and the Ninth Circuit panel agreed.[17] For reasons of "uniformity, objectivity, and practical judicial administration,"[18] the majority held that if a potential fine exceeds the $500 monetary limit set by Congress, there is a right to a trial by jury.[19]

The majority reasoned that the United States Supreme Court relied in part on this section when it ruled that imprisonment beyond six months was sufficient to trigger the right to a jury.[20] The panel recognized that the Supreme Court, in *Muniz v. Hoffman,*[21] refused to adopt the congressional standard with regard to fines; however, *Muniz* was distinguished on the ground that it involved a fine against a labor union not an individual. Although the fine was $10,000, the impact upon each union member was only about seventy-five cents.[22]

In a dissenting opinion, Judge Wallace argued that *Muniz* requires a case by case analysis to determine the impact of the fine on the defendant.[23] The majority rejected this view for several

16. *Id.* at 278.
17. *Id.*
18. *Id.* at 280.
19. *Id.*
20. *Id.* at 279.
21. 422 U.S. 454 (1975), *aff'g* Hoffman v. International Longshore Loc. #10, 492 F.2d 929 (9th Cir. 1974). In *Hoffman,* the Ninth Circuit favored an "impact" approach, stating that "[a] fine which might under all of the circumstances constitute only a slap on the wrist of one artificial entity might be a 'serious' penalty to another." 492 F.2d at 937. The *Hamdan* majority has apparently rejected this earlier, subjective approach.
22. 552 F.2d at 279.
23. *Id.* at 282. Obviously, Judge Wallace has not abandoned the "impact" approach.

reasons. If the right to a jury were measured by the impact of a possible fine upon a defendant, a constitutional right would depend upon the wealth of a citizen. Efficient and speedy judicial administration would be hampered because each case would require a pretrial hearing to decide the "impact" of the potential fine.[24] Where a statute is silent as to the maximum fine, the court would have the additional burden of deciding before trial what the maximum fine might be. Such determinations would necessarily be left to the discretion of each trial judge, thus violating the Supreme Court's mandate that only objective standards be used.[25]

"There is further mischief,"[26] Judge Wallace stated, in fixing any monetary amount in these inflationary times.[27] While a fine of $500 may be considered serious today, inflation may soon erode its relative value and render it a petty amount. The majority summarily dismissed this objection noting that Congress can merely adjust the figure.[28] Judge Wallace found "little comfort in this easy prediction,"[29] because the monetary standard has not been adjusted since 1930 when 18 U.S.C. § 1(3) was adopted.[30]

Judge Wallace was particularly concerned with the "grave constitutional difficulties"[31] which arise when the court allows Congress to set the standards for trial by jury. In his view, it is the duty of the courts to make sure that congressional distinctions between serious and petty offenses do not run afoul of the sixth amendment. "The court abrogates its role as a check upon Congress when it establishes a test of constitutional validity which is contingent upon actions of Congress approved in advance."[32]

See note 21 *supra*. He would affirm the convictions because the defendants failed to prove that a $1000 fine created such a risk to them that a jury trial was constitutionally mandated. 552 F.2d at 283.

24. *Id.* at 279-80.

25. *Id.*

26. *Id.* at 282.

27. *Id.*

28. *Id.* at 280 n.3.

29. *Id.* at 282.

30. *Id.*

31. *Id.* at 283.

32. *Id.* The value of the jury as a buffer between government and the accused, while stressed by the Court in Duncan v. Louisiana, 391 U.S. 145 (1968), has been questioned by one scholar. *See* Broeder, *The Functions of the Jury—Facts or Fictions?*, 21 U. CHI. L. REV. 386 (1954).

D. Conclusion

A comparison of *Sanchez-Meza* and *Hamdan* suggests that the panels are not consistent in their reasoning. *Hamdan* appears to be adhering to the congressional definition whereas *Sanchez-Meza* appears to reject it. However, closer scrutiny reveals that the decisions are not necessarily inconsistent. *Sanchez-Meza* accepts the congressional definition and Supreme Court mandate that a defendant is entitled to a jury trial if the potential sentence is six months or more. Similarly, *Hamdan* holds that a defendant is entitled to a jury trial if the potential fine is $500 or more. The rationale underlying the *Hamdan* decision would not preclude a later panel from adopting the *Sanchez-Meza* analysis. That is, simply because there is a jury right when the potential sentence is six months or more and when the potential fine is $500 or more does not mean that the jury right does not exist when the sentence or fine is less. As in *Sanchez-Meza,* the right to a jury trial may be found to depend on additional factors.

Thus, neither *Sanchez-Meza* nor *Hamdan* forecloses the right to a jury trial when the potential penalty is such that the congressional standard would classify it as a petty offense. Clearly, to have done so would have promoted judicial economy by eliminating the need for individual determinations of the jury right for offenses considered petty. However, failure to foreclose the right to a jury in those cases has the advantage of maximizing the number of instances where a defendant will be granted a jury.

Wendy Rouder

VII. WIRETAPPING—FEDERAL AND STATE STANDARDS COLLIDE

A. Introduction

In *United States v. Hall,*[1] the Ninth Circuit, sitting *en banc,* considered "the question of the admissibility in federal court of evidence seized pursuant to an arrest by California officers when that arrest was based on the state agents' use of information gathered by wiretaps authorized under federal law but illegal under California law."[2] The court held such evidence was admissible.[3]

1. 543 F.2d 1229 (9th Cir. Aug., 1976) (*en banc*), *cert. denied,* 429 U.S. 1075 (1977).
2. *Id.* at 1230.
3. *Id.*

A federal agent intercepted several telephone calls of one Cooper discussing transportation of heroin and cocaine.[4] The agent notified state agent Miller, Field Supervisor of the California State Bureau of Narcotic Enforcement, to intercept Cooper and a female companion who were traveling by car near Fresno. On the basis of this information, the car was stopped, and a subsequent search revealed heroin in the purse of the woman passenger, Clara Bell Hall.[5] She was originally arrested on a state charge of felonious possession of narcotics.[6] However, the state agents gave the evidence to their federal counterparts because the heroin could not be used in a state court.[7] She was subsequently convicted on a federal misdemeanor charge of possession of heroin.[8]

B. Clara Bell Hall's Argument

Clara Bell Hall contended that, under California Penal Code section 631,[9] it was improper for the state agents to have relied on information garnered from the wiretap. Although the wiretap as authorized under Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[10] it was illegal under the California Invasion of Privacy Act.[11]

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4. *Id.* at 1235-36.

5. *Id.* at 1236.

6. *Id.*

7. *Id.* at 1238.

8. *Id.* at 1230.

9. Cal. Penal Code § 631 (West 1970).

10. 18 U.S.C. § 2510-2520 (1970). The Title III provisions governing the receipt, disclosure and use of wiretap information by law enforcement officers are 18 U.S.C. § 2517(1)-(2) (1970) which provides:

> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is *appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.*
>
> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is *appropriate to the proper performance of his official duties.*
>
> [emphasis added].

The legality of the federal wiretap was not an issue in *Hall.* The interception which ultimately led to Hall's arrest was one of the wiretaps reviewed in United States v. Turner, 528 F.2d 143 (9th Cir. 1975), *cert. denied sub nom* Grimes v. United States, 423 U.S. 996 (1975) (consolidated appeal by 14 defendants, including Hall, convicted of conspiratorial and substantive offenses relating to a heroin and cocaine distribution system).

11. Cal. Penal Code §§ 630-637.2 (West 1970). Wiretapping without the consent of

Central to Hall's argument is the interpretation of the Title III provision which allows wiretap information to be disclosed to and used by any law enforcement officer[12] to the extent it is "appropriate to the proper performance of his official duties."[13] Thus, the issue was whether the state officers could utilize the federally acquired wiretap information as a basis for the "reasonable cause" required by California law in order to justify a warrantless arrest.[14] If not, use of the wiretap information could not be considered appropriate to the proper performance of their duties and thus Title III would not sanction its use. This would render Hall's arrest illegal under California law and the fruits of that arrest "poisonous" under *Wong Sun v. United States.*[15]

Hall argued that the Ninth Circuit's interpretation of *United States v. Di Re*[16] precluded admission of the heroin evidence in

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all persons being monitored is forbidden. Exceptions to this blanket prohibition are narrowly drawn. Utilities are exempted, at least when their monitoring is for construction or maintenance purposes. *Id.* at § 631(b). Certain eavesdropping by police officers, lawful prior to the 1967 enactment of the California statute, is also exempted. *Id.* at § 633. These law enforcement exceptions usually revolve around the recording of conversations with the consent of one of the parties. *See, e.g.*, People v. Montgomery, 61 Cal. App. 3d 718, 731, 132 Cal. Rptr. 558, 567 (1976). Parties to a conversation may also record such conversations without the knowledge of the other participants when gathering evidence relating to the other party's commission of certain crimes, such as extortion, kidnapping, bribery and felonies involving violence against the person. CAL. PENAL CODE § 633.5 (West 1970).

The Act bans the use "in any manner, or for any purpose" of any information obtained from a nonconsensual wiretap. *Id.* at § 631

12. Title III defines "law enforcement officer" as "any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses." 18 U.S.C. § 2510(t) (1970).

13. 18 U.S.C. § 2517(1)-(2) (1970).

14. California police officers may make a warrantless arrest under the following circumstances:

> 1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.
> 2. When a person arrested has committed a felony, although not in his presence.
> 3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.

CAL. PENAL CODE § 836 (West 1970).

15. 371 U.S. 471 (1963).

16. 332 U.S. 581 (1948). The issue in *Di Re* was the lawfulness of a warrantless arrest by a state officer for a federal offense. A search incident to the arrest, which was illegal under state law, revealed one hundred counterfeit gasoline ration coupons. The government argued that a uniform federal rule should govern the validity of arrests for federal crimes. In rejecting this contention, the Court observed that

federal court, since "in the absence of an applicable federal statute, the law of the state where an arrest without warrant takes place determines its validity."[17] California courts have consistently held that unlawfully obtained evidence may not serve as the basis for a finding of probable cause to search, seize or arrest.[18] More importantly, they have also held that wiretap information obtained in violation of the California Invasion of Privacy Act may not be used as the basis for the arresting officer's probable cause.[19] Therefore, after concluding that the officer's illegal use of the wiretap information was not governed by the use provisions of Title III, Hall argued that the *Di Re* doctrine would invalidate the use of the evidence in federal court.[20]

C. The Majority Opinion

Judge Choy, writing for the majority, conceded that California prohibits both wiretapping and the use of any information so obtained and that Hall's arrest was therefore unlawful under California law.[21] However, he explained that the state's more restrictive standards did not affect this case.[22] Here, the federal wiretap law controlled. Title III authorized the state officers' use of the

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> [n]o act of Congress [at the time of the *Di Re* decision] lays down a general federal rule for arrest without warrant for federal offenses. None purports to supersede state law. And none applies to this arrest . . . for a federal offense . . . by a state officer. Therefore the New York statute provides the standard by which this arrest must stand or fall.

332 U.S. at 591.

Although there is arguably a split between the circuits as to the continued validity of *Di Re*, it was noted with approval by the Supreme Court in *United States v. Watson*, 423 U.S. 411, 420-21 & n.8 (1976). In *Hall*, Judge Koelsch argued persuasively that the source of the split is dictum in Elkins v. United States, 364 U.S. 206 (1960), which requires an independent federal inquiry to determine the validity of a search by state officers. Judge Koelsch reasoned that the split arises from the failure of some circuits to recognize that *Di Re* is in reality a two part test, looking first to state law and then to constitutional standards in determining the validity of the arrest. According to Judge Koelsch, the *Elkins* inquiry applies only to the second part of the *Di Re* test. 543 F.2d at 1245 n.15.

17. *Id.* at 1232. This argument must be distinguished from the broader invocation of the exclusionary rule, which is based on constitutional protections. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961). Hall conceded that there was no infringement of constitutional proportions on her rights. 543 F.2d at 1235.

18. People v.Knisely, 64 Cal. App. 3d 110, 134 Cal. Rptr. 269 (1976); People v. Shipstead, 19 Cal. App. 3d 58, 96 Cal. Rptr. 513 (1971). *Cf.*, People v. Koelzer, 222 Cal. App. 2d 20, 34 Cal. Rptr. 718 (1963).

19. People v. Howard, 55 Cal. App. 3d 373, 127 Cal. Rptr. 557 (1976); People v. Buchanan, 26 Cal. App. 3d 274, 103 Cal. Rptr. 66 (1972).

20. 543 F.2d at 1231.

21. *Id.* at 1235.

22. *Id.* at 1233 & n.4.

federal wiretap information because they are "investigative or law enforcement officers"[23] within the meaning of the statute. Since the use of the federal wiretap information was "appropriate to the proper performance of [their] official duties,"[24] both the use and the subsequent arrest and search by the state officers were valid under federal law.[25] Thus, because there was an applicable federal statute, the *Di Re* doctrine was irrelevant.[26]

Although it was unnecessary for the court to discuss the scope of the *Di Re* doctrine,[27] the majority did so and concluded that it was not meant to apply to the situation presented in *Hall.*[28] The issue in *Di Re,* as well as in the cases which have applied the rule, has been the "quantity of evidence necessary for a warrantless arrest, not the source or admissibility of that evidence."[29] The court noted that Hall's appeal did not raise the issue of probable cause to arrest under California law but rather the use of impermissible evidence in forming the requisite belief of probable cause.[30] In the majority's view, *Di Re* "does not compel federal courts to defer to state law as to the acceptability of evidence used to justify a warrantless arrest."[31]

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23. *See* notes 10, 12 *supra.*

24. 543 F.2d at 1233.

25. *Id.*

26. *Id.*

27. Because the threshold question of the existence of an applicable federal statute was answered affirmatively in *Hall,* the majority's analysis of *Di Re* is dictum. The majority cited its recent decision in United States v. Keen, 508 F.2d 986 (9th Cir. 1974), *cert. denied,* 421 U.S. 929 (1975), as the proper view. Noting that the exclusionary rule is "integrally bound up with constitutional protections," the court concluded that "[i]n the absence of any federal violation . . . we are not required to exclude the challenged material; the bounds of admissibility of evidence for federal courts are not ordinarily subject to determination by the states." 543 F.2d at 1235.

Keen involved the admissibility in federal court of a recorded conversation obtained by a federal officer in violation of state law but allowed under Title III. There was no issue of probable cause to arrest in *Keen.* Since this issue was the causative factor behind the formation of the *Di Re* rule, *Keen* should not be construed as a denigration of the *Di Re* rule. The *Hall* dissenters, however, felt its application to *Hall* resulted in a *sub silentio* overruling of *Di Re.* 543 F.2d at 1246 n.18.

The fears of the dissenters were not totally unwarranted. A recent Ninth Circuit case, United States v. Valenzuela, 546 F.2d 273 (9th Cir. 1976), acknowledged that the *Hall* decision may have diluted much of the *Di Re* argument's force but did not reach the issue of the continued vitality of the rule because the panel found sufficient probable cause for the questioned arrest under California law. *Id.* at 274.

28. 543 F.2d at 1234.

29. *Id.* at 1233.

30. *Id.* at 1234.

31. *Id.*

D. The Concurring Opinion

Judge Duniway, although concurring in the result, found the majority's analysis unnecessary because he concluded that Hall had no standing to raise the issue.[32] He reasoned that Hall was not an "aggrieved person" under the fourth amendment, the Federal Rules of Criminal Procedure,[33] or the language of Title III.[34] The intercepted conversation was between Cooper and a third party so Hall was not a victim of the wiretap.[35]

E. The Dissenting Opinion

Judge Koelsch, in a scathing dissent, took issue with the majority's analysis of Title III, after a lengthy examination of the statutory language and legislative history of Title III, he concluded that more restrictive state law is incorporated by Title III.[36] He acknowledged that the stated legislative purpose of delineating uniform standards for the authorization of electronic surveillance ordinarily indicates a congressional intent to occupy the field and preclude state regulation. However, he noted that the legislative history of Title III referred to many areas in which state laws may apply.[37] Further, he pointed out that Congress passed Title III in response to Supreme Court decisions[38] in order to establish minimum standards for electronic surveillance.[39]

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32. *Id.* at 1235. The majority did not respond to the issue of standing raised by Judge Duniway.

33. Fed. R. Crim. P. 41(e).

34. 543 F.2d at 1236-37.

35. *Id.* at 1231, 1235.

36. *Id.* at 1240. For a detailed analysis of the legislative history of the disclosure and use provisions of Title III, see J. Carr, The Law of Electronic Surveillance § 7.04 (1977). (Carr was the primary author of The National Wiretapping Commission Report, a congressionally mandated review and summary of the events and developments attending the implementation of Title III, which was submitted to President Ford and the Congress on April 30, 1976.)

37. 543 F.2d at 1240.

38. Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).

39. 543 F.2d at 1240-41. Although Congress had been studying the problem of electronic surveillance for years, *see* J. Carr, *supra* note 36, at § 2.02, the impetus for a comprehensive federal enactment in the area came from a desire to provide minimum standards for electronic surveillance in light of the decisions in *Berger* and *Katz*.

In *Berger*, New York authorities had installed eavesdropping equipment in two private offices pursuant to a court order obtained under that state's eavesdropping statute. The evidence obtained was essential to the conviction of Berger, and its admissibility was sustained by the highest court in New York, the Court of Appeals. The United States Supreme Court, in reversing 5-4, held that the New York statute failed to assure adequate protection for fourth and fourteenth amendment rights. The majority found that the New

This would indicate preemption of state regulation only to the extent that it falls below these standards.[40] Therefore, he reasoned that

> a state officer may receive and use wiretap information only to the extent such receipt and use is appropriate to the proper performance of his official duties. Because the scope of a state officer's official duties is defined by state, not federal, law, Title III incorporates a state's rules on the use of wiretap information by its own officers. Thus, the California officers' use of the wiretap information—a use rendered inappropriate to the proper performance of their official duties by § 631—makes the questioned evidence inadmissible under Title III, and the heroin should therefore have been suppressed.[41]

In further support of his position, Judge Koelsch appealed to basic principles of comity. He argued that state officers should not be encouraged to violate the law of their employer sovereign absent a clear expression of congressional intent. In his opinion, the majority's interpretation of Title III invades the state's sphere by authorizing state officers to violate their own law under the guise of the federal statute.[42] Deputizing "state officers into illicit investigative 'cooperation' decried by the state [is] not only an undeserved blight on Congress but a compromise of the integrity of the federal courts as well."[43]

York statute satisfied the requirement that "a neutral and detached authority be interposed between the police and the public," 388 U.S. at 54, but that it failed to require an adequate showing of probable cause: a description with particularity of the offense committed, the place at which the electronic device was to be used and the conversations expected to be overheard. *Id.* "In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." 388 U.S. at 60.

In *Katz*, a 7-1 majority of the Court applied the principles of *Berger* to nontrespassory electronic surveillance, stressing that the purpose of the fourth amendment is the protection of individual privacy, and holding that the application of the amendment does not turn on whether or not the site of the intrusion is a "constitutionally protected area." 389 U.S. at 350.

40. 543 F.2d at 1239 n.6.

41. *Id.* at 1239 (footnote omitted).

42. *Id.* at 1245.

43. *Id.* Judicial integrity obviously underlies much of the minority's dissatisfaction with the result in *Hall*. At the outset, Judge Koelsch construed the majority's decision as an endorsement of an illegal trade-off similar to that repudiated by the Supreme Court in Elkins v. United States, 364 U.S. 206 (1960), in which the Court held that "evidence obtained by state officers during a search, which if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under

F. Conclusion

In construing Title III to authorize the disclosure of wiretap information to state officers, the Ninth Circuit has undermined the privacy objectives of California wiretap legislation. The effect of the decision in *Hall* is to reward the illegal acts of state officers by allowing a federal prosecution to result from such acts. This is an unusual application of a statute meant to implement minimum standards and represents a substantial federal intrusion on a state's power to regulate the conduct of its police.

Geoffrey Beaty

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the fourth amendment is inadmissible over the defendant's timely objection in a federal trial." *Id.* at 223. Arguably, this reliance on *Elkins* may be misplaced, in that the search and seizure by state officers in *Elkins* was in violation of the fourth amendment, not merely in violation of a state statute as in *Hall.* The obvious result of this distinction is that the seizure in *Elkins* would still have been violative of the fourth amendment even if conducted by federal officers, which is also contrary to the situation in *Hall.* Yet it must not be forgotten that the purpose of the California Invasion of Privacy Act is to "protect the right of privacy of the people," Cal. Penal Code § 630, and that the right of privacy permeates the philosophical basis for the fourth amendment's prohibiton of unreasonable searches and seizures. *See, e.g.,* Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); Osborn v. United States, 385 U.S. 323 (1966). Such an effort by a state to provide maximum protection of individual constitutional rights is obviously frustrated by the decision in *Hall.*