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U.S. v. LAYTON: EXTENDING PROSECUTORIAL BOUNDARIES LIMITING SIXTH AMENDMENT PROTECTIONS

I. INTRODUCTION

In *United States v. Layton*,[1] the Ninth Circuit ruled that hearsay statements which qualified under the declarations against penal interest exception to the hearsay rule, were admissible when offered to *inculpate* the defendant in criminal activity.[2] The court also instructed the lower court that if on remand there was a "reasonable inference" of the existence of a criminal conspiracy to which defendant and declarant were party, additional hearsay statements were to be admitted as those made in furtherance of that conspiracy.[3]

All of the statements were held admissible notwithstanding the fact that the declarant's unavailability[4] precluded confrontation of the witness which is guaranteed by the sixth amendment of the U.S. Constitution.[5] The court also concluded it was not an abuse of the trial court's discretion[6] to rule on the government's motion seeking admission of the statements prior to the retrial[7]

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1. 720 F.2d 548 (9th Cir. 1983) (per Wallace J.; the other panel members were Kennedy and Nelson, J.J.), *cert. denied*, ___U.S.___, 104 S.Ct. 1423 (1984).

2. *Id.* at 560.

3. *Id.* at 557-58.

4. The declarant, Jim Jones, killed himself as part of a mass suicide which followed the events outlined below. *Id.* at 561.

5. "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

6. The test applied in United States v. Abraham, 541 F.2d 624 (6th Cir. 1976), suggests the trial court should reach its decision by balancing a desire to preserve the government's right to appeal with the inefficiencies created by conducting a mini-trial. *Id.* at 626.

7. It is important to point out that the lower court judge heard the motion prior to the retrial of the defendant because he had already heard the evidence at the first trial. U.S. v. Layton, 549 F.Supp. 903, 908 (N.D. Cal. 1982). The trial judge was quick to cau-

of the defendant, and noted that jurisdiction to review the denial of the motion was available[8] pursuant to 18 U.S.C. §3731.[9]

Defendant, Larry Layton, was indicted for conspiracy to murder a Congressman and other related counts[10] in connection with the shooting death of U.S. Congressman[11] Leo Ryan at the Jonestown religious encampment, located in the Republic of Guyana.[12] Critical to implicating the defendant in the alleged conspiracy to kill Ryan[13] were three sets of statements[14] made

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tion that by ruling on the motion before the second trial he did not intend to encourage the government to routinely file and appeal pretrial evidentiary motions in criminal cases. *Id.* at 908. *See also*, United States v. Barletta, 644 F.2d 50 (1st Cir. 1981).

8. 720 F.2d at 554 (1971).

9. 18 U.S.C. §3731 states in pertinent part:

> An appeal by the United States shall lie to a court of appeals from a decision . . . suppressing or excluding evidence . . . not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment . . . if the United States attorney certifies .. the appeal is not taken for purposes of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in *all* such cases shall be taken *within thirty days* after the decision . . . has been rendered. . . .

(emphasis added).

10. Layton was charged with conspiracy to murder a Congressman, aiding and abetting the murder of a Congressman, conspiracy to murder an internationally protected person (Richard Dwyer, the Deputy Chief of Mission for the United States in the Republic of Guyana), and aiding and abetting the attempted murder of an internationally protected person. 720 F.2d at 551.

11. Congressman Ryan was on an official investigation into allegations that U.S. citizens at the encampment were living in substandard conditions and being detained against their will. *Id.* at 551.

12. Jonestown was located in a secluded area in the jungles of the Republic of Guyana and was part of a religious organization known as the People's Temple, the settlement having approximately 1,200 residents. *Id.* at 551.

13. Accompanied by a number of Jonestown inhabitants who had elected to defect from the camp, Ryan and members of his party were ambushed as they prepared to return to the United States. *Id.* at 552. The government alleged a conspiracy to murder Ryan had arisen prior to his arrival at Jonestown and that the defendant had feigned defection as part of an agreement to kill him and the defectors who had chosen to return with him. *Id.* at 554-55.

14. The first set of statements which the government believes indicate the conspiracy to kill Ryan was already in existence include tape recordings of speeches made by Jones prior to Ryan's arrival which were broadcast over loudspeakers throughout the camp. They indicated that Jones was hostile and concerned about Ryan's investigation, urged residents not to talk to Ryan and his delegation, and intimated harm might befall the Congressman. *Id.* at 551. In another recording Jones expressed his desire to "shoot someone . . . like him." *Id.* at 555.

The second set of statements made by Jones to his attorney indicate he had knowledge of the events about to take place at the airstrip and according to the court, tend to

by Jim Jones, the leader[15] of the People's Temple Movement, of which the defendant was a member.[16]

The district court held that some of the statements were inadmissible hearsay[17] and did not qualify as hearsay exceptions. The court excluded the other qualifying statements because it believed their admission would violate the defendant's constitutional right to confront the witness.[18] The government did not immediately appeal the rulings excluding the statements. However, when the jury was unable to reach a unanimous verdict on any of the four counts at trial,[19] the government filed a separate pretrial motion to admit the same statements prior to the second trial. The district court judge denied the motion[20] and the government appealed.

II. BACKGROUND

A. *Appellate Jurisdiction*

In *United States v. Wilson*,[21] the Supreme Court stated the

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implicate Jones in those events. *Id.* at 560. Significantly, the statements also indicate that Layton was not a defector but had taken all of the weapons from the camp and was going to the airstrip to engage in violent acts. *Id.* at 558.

The third set of statements were from another recorded broadcast known as the "Last Hour Tape." The speech was made before and during the mass suicide which took place at Jonestown. Before taking his own life, Jones indicated that one of the people escorting Ryan to the nearby airstrip was going to shoot the pilot. *Id.* at 561-62. Upon receiving word of the deaths at the airstrip, Jones stated in part: "The congressman's dead . . . many of our traitors are dead . . . I didn't but my people did. . . . I don't know who fired the shot, I don't know who killed the Congressman. But as far as I'm concerned, I killed him." *Id.* at 562. In addition to the remarks made by Jones to his attorney, these statements were offered by the government as declarations against Jones' penal interest. *Id.* at 560.

A fourth statement made by another People's Temple member was found to be inadmissible by the trial court and the ruling was affirmed on appeal. *Id.* at 563.

15. The court observed that Jones exerted enormous influence over the People's Temple members and characterized the pre-arrival speeches as "[t]he rallying cries of a charismatic leader to his devoted followers." *Id.* at 557.

16. Defendant had been in the People's Temple security force in the United States and was alleged to be close to the hierarchy of the Movement. *Id.* at 551.

17. 549 F.Supp. at 908.

18. *Id.* at 918.

19. *Id.* at 907.

20. *Id.* at 922.

21. 420 U.S. 332 (1975). In *Wilson*, the Government sought review of the trial court's decision to dismiss an indictment after a jury had returned a guilty verdict. The Court characterized the judges action as a "postverdict ruling of law" which would not result in the retrial of the defendant, and allowed the Government to appeal the ruling. *Id.* at 352-53.

purpose of 18 U.S.C. §3731 was to remove all statutory barriers to government appeals and to allow them whenever the Constitution would permit.[22] The Court outlined the necessary requirements for an appeal pursuant to the statute in *United States v. Helstoski*.[23] The Court stated the requisites of the statute permitted an appeal if: (1) there was a district court order excluding the evidence; (2) the United States attorney filed the proper certification; and, (3) the appeal was taken within 30 days.[24] Additionally, the statute prohibits appeals made after a defendant has been placed in jeopardy, but that provisions is likely inapplicable where a mistrial is declared due to a hung jury.[25]

The Ninth Circuit has followed *Helstoski* and *Wilson* in decisions where appellate review has been in issue. For example, in *United States v. Loud Hawk*,[26] the government appealed an order dismissing a grand jury indictment. The indictment had been dismissed because delay in bringing the defendants to trial had resulted from the government's appeal under section 3731 of a suppression order.[27] The court reversed, finding the delay was necessary to permit the meaningful exercise of appellate review pursuant to the statute.[28]

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22. *Id.* at 337. The fifth amendment's prohibition that "[n]o person . . . shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . .", U.S. CONST. amend. V., appears to be the clearest limitation to appeals under the statute. The dissent in *Wilson* pointed to sixth amendment speedy trial concerns which might also prevent review under section 3731. 420 U.S. at 357.

23. 442 U.S. 477 (1979). The Court ruled the Government was authorized to appeal from an order prohibiting the introduction of a legislator's past legislative acts. Id. at 487 n.6.

24. *Id.*

25. Oregon v. Kennedy, 456 U.S. 667 (1982). The defendant was retried after a mistrial was declared at the first trial because of prosecutorial misconduct. The Court reiterated the holding in United States v. Perez, 9 Wheat. 579, 580 (1824), that a second trial is permitted when it is a 'manifest necessity', the most common form arising when a jury is unable to reach a verdict. *Id.* at 672.

26. 628 F.2d 1139 (9th Cir. 1979), *cert. denied*, 459 U.S. 1117 (1980). Defendants were charged with the unlawful possession of destructive devices (dynamite) and unlawful transportation of weapons between state lines. *Id.* at 1143. The weapons counts were dismissed because they were not considered to be a substantial proof of a fact material to the proceeding, therefore not meeting the requirements of section 3731. *Id.* at 1150.

27. *Id.* at 1149.

28. *Id.* at 1150. The court found the other provisions of the statute had also been satisfied since the defendants had not been placed in double jeopardy and the suppressed evidence was critical in establishing a necessary element of the alleged offenses. *Id.*

In *United States v. Hetrick*,[29] the court expanded the scope of review under the statute when it permitted the government to appeal a court order reducing a defendant's jail sentence. Relying on *Wilson*, the court rejected the notion that the government was restricted to the specific categories mentioned in the statute.[30] Similarly, the court in *United States v. Humphries*,[31] permitted an appeal which was not within the express language of the statute.[32] However, in *United States v. Booth*,[33] the court discussed the issue of whether appellate review of a motion to admit evidence was available under section 3731. The court concluded that the statute gives the government the right to appeal only the suppression or exclusion of evidence, *and not its admission.*[34]

B. *Statements Made in Furtherance of a Conspiracy.*

Rule 801(d)(2)(E) of the Federal Rules of Evidence[35] governs the admission of coconspirator statements against an accused. Three requirements must be met in order for a statement to be admissible as that of a co-conspirator. The prosecution must: (1) show that the declarations were made during the course of the conspiracy; (2) show they were made in furtherance of the conspiracy; and (3) present evidence of independent proof of the conspiracy and the connection of the declarant and defendant to it.[36] In addition, it must be demonstrated that admission of the coconspirators' declarations are not violative of the confrontation clause of the Constitution.[37]

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29. 644 F.2d 752 (9th Cir. 1980). The court ordered that the defendant's sentence be reduced from ten to five years, and then some months later reduced the sentence to three years. *Id.* at 753-54.

30. *Id.* at 755.

31. 636 F.2d 1172 (9th Cir. 1980) (appeal from denial of motion to determine the admissibility of evidence was held appropriate under the statute).

32. Humphries argued the appeal was not properly before the court as the motion previously denied was one to determine the admissibility of evidence rather than its exclusion. *Id.* at 1175. The court rejected the argument, focusing on the effect of the order, which did not elaborate on the particulars of its scope requiring the government to seek clarification of the order. *Id.* at 1175-77.

33. 669 F.2d 1231, 1240 (9th Cir. 1981) (government's challenge to admitted testimony of an expert witness determined not to be subject to review under the statute).

34. *Id.*

35. Fed. R. Evid. 801(d)(2)(E).

36. Rule 801(d)(2)(E) states in part: "A statement is not hearsay if. . . (2) [t]he statement is offered against a party and is .. (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

37. U.S. CONST. AMEND. VI.

In *Krulewitch v. United States*,[38] the Supreme Court stated that to be admissible, hearsay statements made by one conspirator and offered against another must be made in furtherance of the conspiracy charged. The Court refused to admit the statement of a coconspirator made after her arrest because it was not made in furtherance of the conspiracy, rather the Court determined the statement was made for purposes of concealing the crime and protecting one of the participants.[39] Likewise in *Dutton v. Evans*,[40] the Court stated that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirator is applicable only if the statement was made in the course of and in furtherance of the conspiracy.[41]

In *United States v. Eubanks*,[42] the Ninth Circuit followed the "in furtherance" requirement set forth in *Krulewitch* using somewhat different terms. The court stated that in order for a declaration to be admissible under the coconspirator exception to the hearsay rule, it must further the common objectives of the conspiracy.[43] Similarly, in *United States v. Mason*,[44] the court held that a statement reassuring a buyer that a drug transaction would occur, which was made to prevent him from withdrawing from the planned sale, was made in furtherance of the conspiracy.[45] Finally, in *United States v. Sears*,[46] the court indicated statements made to ensure a successful escape after a robbery

38. 336 U.S. 440 (1949). The position of the Court is consistent with the requirement of Rule 801(d)(2)(E) that the statement be made in furtherance of the conspiracy.

39. 336 U.S. at 443-44.

40. 400 U.S. 74, 83 (1970). A Georgia statute allowed for the admission of an out-of-court hearsay statement made during the concealment phase of the conspiracy; declarant's statement that had it not been for defendant, "we wouldn't be in this now," was held admissible by the Court.

41. *Id.* at 81.

42. 591 F.2d 513, 520 (9th Cir. 1979). Statements which were made instructing a conspirator to "clean up" in order to distribute heroin were found to have furthered the objectives of the conspiracy to distribute heroin.

43. *Id.* at 520. The court found that one of the statements at issue in *Eubanks* did not induce the party hearing the statement to join the conspiracy and was nothing more than a casual admission of culpability to someone the declarant had decided to trust. *Id. See also*, United States v. Moore, 522 F.2d 1068 (9th Cir. 1975) (nothing in statement indicating the declarant was seeking to induce the listener to deal with the conspirators); United States v. Castillo, 615 F.2d 878 (9th Cir.. 1980) (statement "we are fixing to kill a Mexican" nothing more than a casual admission).

44. 658 F.2d 1263 (9th Cir. 1981).

45. *Id.* at 1270.

46. 663 F.2d 896 (9th Cir. 1981).

was committed, could be in furtherance of a conspiracy.[47] The court admitted into evidence a statement to dissuade an acquaintance of the accused from calling the police since the statement was necessary to ensure a successful escape.[48]

The third requirement, that independent evidence connecting the defendant and the declarant to the conspiracy must be established was followed by the Ninth Circuit in *United States v. Perez*.[49] In *Perez*, the defendant had made a number of admissions which were considered separate and apart from the coconspirator exception. There was also evidence of meetings in which the defendant took part to exchange cocaine and further evidence of the actual exchange of, and payment for, the cocaine.[50] The court stated this was sufficient to satisfy the third prong of the co-conspirator test and concluded the prosecution had established a prima facie case through the introduction of substantial evidence other than the contested hearsay.[51] This holding is consistent with the court's earlier holding in *United States v. Rosales*.[52]

C. *Declarations Against Penal Interest*

The requirements of Rule 804(b)(3) of the Federal Rules of Evidence must be met before evidence is admissible as a declaration against penal interest: (1) the declarant must be unavailable; (2) the statement must tend to subject the declarant to criminal liability such that a reasonable person in the declar-

47. *Id.* at 905.

48. *Id.* Other Ninth Circuit decisions have admitted statements which set an ongoing conspiracy in motion or persuade the listener to act in a fashion which would facilitate its completion as being in furtherance of the conspiracy. *See*, United States v. Traylor, 656 F.2d 1326 (9th Cir. 1977) (statement to party to secure mixing bowls to mix drugs in furtherance of the conspiracy to sell drugs); United States v. Eaglin, 571 F.2d 1069 (9th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978). (statement made to induce continued participation or to allay fears of a coconspirator are in furtherance of the conspiracy.

49. 658 F.2d 654 (9th Cir. 1981).

50. *Id.* at 659.

51. *Id.*

52. 584 F.2d 870 (9th Cir. 1978) (fact that defendant had actually supplied cocaine with the intent that it reach the undercover buyer raises reasonable inference he actively participated in the conspiracy); *See also*, United States v. Dixon, 562 F.2d 1138 (9th Cir. 1977) (evidence independent of the proffered statements must be shown); U.S. v. Calaway, 524 F.2d 609 (9th Cir. 1975) (otherwise innocent act when viewed in the context of the surrounding circumstances, justifies an inference of complicity).

ant's position would not have made the statement unless he believed it to be true, and (3) there must be corroborating circumstances which indicate the trustworthiness of the statement.[53] Statements which tend to expose the declarant to criminal liability which *exculpating* the accused must clearly indicate the trustworthiness of the statement.[54]

In *Dutton v. Evans*, the U.S. Supreme Court held that a statement made by the declarant *inculpating* the accused could be admitted against him. The plurality opinion stated there was an "indicia of reliability" which warranted the admission of the inculpative statement.[55] The statement in *Dutton* was characterized by the Court as not being crucial or devastating in light of the significant amount of additional testimony presented by the prosecution.[56]

Although the Ninth Circuit has applied Rule 801(b)(3) in cases where hearsay statements were offered to exculpate the accused,[57] the court has never been faced with the question of its application where the statements were offered to inculpate the

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53. Fed. R. Evid. 804(b)(3). A provision of the rule makes it clear that there must be sufficient corroboration when a statement is offered to exculpate the accused. No similar provision for inculpative statements was included by the drafters of the Federal Rules and according to one commentator, the first two published drafts of Rule 804(b)(3) contained a sentence which *excluded* inculpatory statements from the rule. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶804(b)(3)[03] at 804-110 (1984).

54. Fed. R. Evid. 804(b)(3) specifies in relevant part: "A statement tending to expose the declarant to criminal liability and offered to *exculpate* the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." (Emphasis added).

55. 400 U.S. 74, 89 (1970). The statement, that had it not been for the defendant (Evans) "we wouldn't be in this now," was made by a co-defendant (Williams) in response to a question posed by a fellow prisoner (Shaw) regarding the outcome of Williams' arraignment. Williams did not testify, nor was he called as a witness. Shaw testified that Williams made the statement which was subsequently admitted against Evans. *Id.* The statement had qualified as that of a coconspirator under Georgia law. *Id.* at 78. The Court indicated it was also against Williams' penal interest to make the statement. *Id.* at 89. The concurring opinion believed the admission of the statement was harmless error based on the entire record. *Id* at 90.

56. *Id.* at 89. The *Dutton* opinion also noted that the consideration of the trustworthiness of evidenciary hearsay is interwoven with confrontation considerations. In fact, the Court stated that "[T]he Sixth Amendment's Confrontation Clause and the evidenciary hearsay rule stem from the same roots." *Id.* at 86.

57. *See*, United States v. Poland, 659 F.2d 884 (9th Cir.), *cert. denied*, 454 U.S. 1059 (1981); United States v. Hoyos, 573 F.2d 1111 (9th Cir. 1978); United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977).

accused.[58] Other circuits however, have considered the admission of inculpatory statements in cases where there was sufficient corroboration of those statements,[59] but have often excluded them because of their unreliability.[60] The decision of the Second Circuit in *United States v. White*,[61] permitted admission of a statement against penal interest inculpating the accused but the court omitted most of the material which inculpated the defendant.[62]

D. *The Right to Confrontation*

The U.S. Constitution guarantees a criminal defendant the right to confront the witness against him.[63] The Supreme Court in *Pointer v. State of Texas*,[64] held that the right of an accused to confront the witness is a fundamental one and that cross-examination in a criminal case is included therein. The defendant in *Pointer* contested the admission of the preliminary hearing transcript of an unavailable witness. The Court excluded the testimony because the defendant was not represented at the earlier hearing and therefore was unable to effectively exercise his

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58. 720 F.2d at 558-59.

59. *See*, United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978); United States v. Bailey, 581 F.2d 341 (3rd Cir. 1978).

60. In *Alvarez*, the declarant's inculpatory statement was testified to by a third person and was found to be unreliable because it was made to a detective when the declarant was in custody. *Bailey* involved a statement made by an incarcerated witness who plea bargained in exchange for testimony inculpating his co-defendant. He later opted not to testify and the court refused to admit the statements, finding them unreliable. Other court decisions considering the issue have involved a testifying witness who was unable to recall prior inculpatory statements at trial. United States v. Palumbo, 639 F.2d 123 (3rd Cir. 1981); United States v. Garris, 616 F.2d 626 (2nd Cir.), *cert. denied*, 477 U.S. 926 (1980). *See also*, United States v. Riley, 657 F.2d 1377 (8th Cir. 1981) (statement of unlocatable witness not admissible because corroborative circumstances did not indicate the statement was trustworthy); United States v. Love, 592 F.2d 1022 (8th Cir. 1979) (statement of unavailable witness made to an F.B.I. agent was not sufficiently reliable).

61. 553 F.2d 310 (2nd Cir.), *cert. denied*, 431 U.S. 972 (1977). The court ruled the inculpative statements of a young prostitute could be admitted against the defendant and any error in their admission was harmless. *Id.* at 314.

62. *Id.* In its opinion the court noted the suggestion of a commentator that the problems with reliability and the prejudice against an accused, should almost always result in the exclusion of inculpatory hearsay offered against the defendant. *Id.* at 314.

63. U.S. CONST. amend VI.

64. 380 U.S. 400 (1965). The complaining witness in *Pointer* was no longer in the jurisdiction but the testimony from the preliminary hearing was introduced over the defendant's objection. The Court's focus was on the defendant's right to cross-examine the witness as part and parcel of fair trial considerations. *Id.*

right to cross-examine the witness.[65] Similarly, the Court in *Bruton v. United States*,[66] held the confessions of a declarant which inculpated the defendant could not be admitted into evidence absent cross-examination of the declarant who did not take the stand.[67]

In a plurality opinion, the Court in *Dutton v. Evans*,[68] focused its attention on the *reliability* of the testimony rather than *confrontation* of the witness, and admitted hearsay testimony without cross-examination of the declarant.[69] The Court indicated the purposes of the confrontation clause was to advance a practical concern for the accuracy of the truth determining process in criminal trials.[70] The plurality opinion also recognized it could not be argued that the constitutional right to confrontation required exclusion of all hearsay testimony.[71] Although the evidence examined in *Dutton* was not considered to be "crucial or devastating,"[72] the Court outlined four factors to be considered in measuring the reliability of the declarant's statement: (1) whether the declaration contains assertions of past fact which might lead the jury to give it undue weight; (2) whether the declarant had personal knowledge of the identity

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65. *Id.* at 403-04. The Court emphasized the defendant had not had adequate opportunity to cross-examine the witness and hence admission of the transcript would have been a clear denial of the right to confrontation. *Id.*

66. 391 U.S. 123 (1968). The defendant had been convicted at a joint trial and his co-defendant's confession had been admitted against him by the trial court with instructions to the jury that they use it in their deliberations. *Id.*

67. In *Bruton*, a postal inspector to whom the confession was made, testified to its content. The Court held that the jury, although instructed not to consider the confession on the issue of guilt, would look at the incriminating nature of the confession. Since the co-defendant would not take the stand, there was no opportunity for cross-examination of the source of the confession. *Id.* at 126. In the cases decided prior to *Dutton* the Court was concerned with the continued vitality of sixth amendment guarantees to confront the witness. This is opposed to the approach in *Dutton* which emphasizes the reliability of the hearsay testimony. *See also*, California v. Green, 399 U.S. 149 (1970); Ohio v. Roberts, 338 U.S. 56 (1980).

68. 400 U.S. 74, 89 (1970). *See supra* note 55. Only four justices concurred in the *Dutton* opinion. 400 U.S. at 76. One of the justices concurred in the result of the case but not with the means by which it was achieved. *Id.* at 93. The dissentors argued the testimony should not have been admitted absent *cross-examination* of the declarant and stated that "[a]lthough Mr. Justice Stewart's opinion concludes that there was no violation of Evans' right of confrontation, it does so in the complete absence of authority of reasoning to explain that result." *Id.* at 104-05.

69. *Id.*

70. *Id.* at 89.

71. *Id.* at 80.

72. *Id.* at 87.

and role of the participants in the crime; (3) whether it was possible the declarant was relying upon faulty recollection; and (4) whether the circumstances might indicate the declarant misrepresented the defendant's involvement in the crime.[73]

The Ninth Circuit in *United States v. Adams*,[74] stated that a violation of the confrontation clause could be determined by considering whether the unavailability of the declarant deprived the jury of a satisfactory basis for evaluating the truth of the out of court statements. In *Perez*, the court stated that the confrontation clause analysis should proceed on an ad-hoc basis, testing both the necessity and the reliability of the contested testimony.[75] The court utilized the *Dutton* test to determine the reliability of the statements and emphasized that finding the statement admissible under the coconspirator exception to the hearsay rule did not automatically guarantee compliance with the confrontation clause.[76] In its ruling the court stated that admissibility under a hearsay exception did not *a fortiori* dissolve the court's obligation to review the record for constitutional infirmity.[77]

III. THE COURT'S ANALYSIS

In *Layton*, the court was faced with two jurisdictional questions of first impression: (1) whether the district court could rule on a government motion to admit evidence prior to rather than during the retrial of a defendant; and, (2) whether appellate review of the lower court's order excluding the evidence was

73. *Id.* at 88-89. The facts in *Dutton* indicate the declarant was unwilling to testify against the defendant and therefore was unavailable as a witness. Under the provisions of Fed. R. Evid. 804(a), a witness is unavailable if: (1) exempt from testimony on the ground of privilege, or (2) refuses to testify despite a court order to do so, or (3) the witness testifies to a lack of memory, or (4) dead or physically infirmed, or (5) the proponent of the testimony has been unable to procure attendance of the witness by process or other reasonable means. In *Dutton*, the declarant's testimony was testified to by a prison informant and the opportunity to cross-examine the informant was exercised. 400 U.S. at 89. Also significant in the case was the fact that 20 witnesses, including an eyewitness, testified for the prosecution and were cross-examined by defendant's counsel. *Id.* at 87.

74. 446 F.2d 681 (9th Cir.), *cert. denied*, 404 U.S. 943 (1971).

75. 658 F.2d at 660.

76. *Id.* at 660. *See also*, United States v. Snow, 521 F.2d 730 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976) (even though sufficient evidence to satisfy foundational requirements of co-conspirator exception, separate consideration of the confrontation issue is required).

77. 658 F.2d at 660.

within the jurisdiction of the court.

The bulk of the court's decision however, was dedicated to the review of the trial court's decision to exclude various hearsay statements at the retrial of the defendant. In its three part holding the court determined: (1) the trial court's decision to hear an evidentiary motion before trial would be reversed only if the court had abused its discretion; (2) appellate jurisdiction to review the denial of the government's pretrial evidentiary motion was available by statute; and, (3) the various hearsay statements offered against the defendant were admissible as statements either in furtherance of a conspiracy or as declarations against penal interest, and the statements were sufficiently reliable to circumvent constitutional concerns.[78]

In analyzing the jurisdictional questions the court found the trial court appropriately balanced the factors which must be considered[79] before ruling on a pretrial evidentiary motion. Since the government and the defense planned to use the same evidence at the second trial, the court found it not to be an abuse of discretion that the trial court ruled on the motion prior to the retrial of the defendant.[80] Further, jurisdiction to review the trial court's order excluding the contested statements was found under 18 U.S.C. §3731. Citing *Wilson*,[81] the court stated that the purpose of the statute was to permit government appeals whenever the Constitution would permit.[82] The court also found that the defendant's constitutional protection against double jeopardy had not been violated, because the first trial had ended in a hung jury and therefore the court had jurisdiction to hear the appeal.[83]

Next, the court analyzed the evidentiary questions and ruled that three of the four groups of contested statements[84] were admissible as hearsay exceptions. The court determined

78. 720 F.2d at 553-55.

79. The lower court emphasized that since the evidence had been heard at the first trial, little or no review would be required in rendering a decision before the second trial. 549 F. Supp. at 907. *See also supra* note 6.

80. 720 F.2d at 553.

81. *Id.* at 554.

82. *Id.*

83. *Id.*

84. *See supra* note 14.

the statements in the recordings made prior to Ryan's arrival might be admissible under the co-conspirator hearsay exception[85] after consideration by the lower court on remand, and found the statements made by Jones to his attorney as well as those recorded on the "Last Hour Tape" could be admitted as declarations against Jones' penal interest.[86]

With respect to the pre-arrival tapes, the court was in agreement with the district court's findings that sufficient independent evidence was available to support a *prima facie* case of a conspiracy to kill Congressman Ryan.[87] However, whether Jim Jones was a member of that conspiracy was a question left for determination on remand.[88] The court nonetheless proceeded to analyze the statements made by Jones[89] and instructed that if the lower court found Jones to be a member of the conspiracy on remand, his statements would be admissible against the defendant as statements made in furtherance of the conspiracy.[90] The court reasoned that Jones' statements were more than casual admissions or narrative declarations because they were expressions of future criminal intent.[91]

The court also noted that the broadcasts were intended to enlist the crowd into compliance with a plan to kill Ryan, and to bolster those who might have agreed to help.[92] The court found this to be further evidence of a pre-existing plan, and that the speeches were made in furtherance of that plan.[93] Since the trial court had not raised the confrontation issue with respect to these statements, the court found it unnecessary to raise the

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85. *See supra* note 36 and accompanying text.

86. *See supra* note 54 and accompanying text.

87. 720 F.2d at 554. The court noted the trial court had correctly based its ruling on the planned and coordinated events at the airstrip, defendant's near simultaneous gunfire after other Temple members fired on the Ryan party, the defendant's involvement in a discussion with Jim Jones before the Ryan group had left for the airstrip, the defendant's feigned defection, defendant's discussion with another Temple member on the way to the airstrip, and the fact that defendant somehow obtained a weapon from another Temple member after being searched at the airstrip. *Id.* at 554.

88. *Id.* at 558.

89. *Id.* at 557.

90. *Id.* at 558.

91. *Id.* at 557.

92. *Id.*

93. *Id.*

matter on appeal.[94]

Next, the court found Jones' statements to his attorney and those on the "Last Hour Tape" to be admissible as declarations against Jones' penal interest. Recognizing that the statements made by Jones to his attorney were offered to *inculpate* the accused, the court believed application of the penal interest exception to the hearsay rule was appropriate. Noting that other circuits had analyzed the issue, the court followed that authority.[95] The court also determined the requirements of the penal interest exception to the hearsay rule as applied to *exculpatory* statements had been met.[96] However, the court did not determine what standard of trustworthiness should be utilized when evidence is offered to inculpate a defendant and expressed no view as to the requisite corroboration.[97] According to the court, Jones had no incentive to shift the blame to other Temple members nor to divert guilt from himself, and since he had control over events at the encampment, he would have known the acts of his followers would be attributed to him. The court also believed that since the statements were made by Jones to his attorney, there were inherent guarantees of their reliability.

Concerning the "Last Hour Tape", the court found the statements to be declarations against penal interest.[98] Unlike the statements to Jones' attorney which did not clearly indicate Jones' involvement, the tape amounted to an admission of criminal liability for the killings.[99] However, the court disagreed with the trial court's conclusion that admission of these statements would violate the confrontation clause.[100]

The court analyzed the confrontation issue with respect to the "Last Hour Tape" and the statements made to Jones' attor-

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94. *Id.* at 558. *See supra* note 76 and accompanying text.

95. 720 F.2d at 558.

96. *Id.* at 559.

97. *Id.* Instead, the court stated the declarations were against Jones penal interest and trustworthy for the same reason; his knowledge of the events that were about to take place at the airstrip. *Id.* at 560.

98. *Id.* at 562-63. The trial court had made a similar ruling but excluded the statements on confrontation grounds. 549 F.Supp. at 914.

99. *Id.*

100. 720 F.2d at 562-63.

ney by referring to the reliability analysis in *Dutton*.[101] The court determined admission of Jones' statements to his attorney would not violate the defendant's right to confront the witness because: (1) the remarks were reliable insofar as they indicated Jones' awareness of and cooperation with the events at the airstrip, (2) they were corroborated by the killings, and (3) the statements were against Jones' penal interest.[102] Applying the two part necessity and reliability approach used in *Perez*, the court found that the necessity prong was met because Jones was dead, and emphasized the reliability prong was supported by the degree of corroboration and the fact that it was against Jones' penal interest to make the statement.[103]

Finally, with regard to the "Last Hour Tape", the court found that under *Dutton*, the statements were not so inherently untrustworthy that they should have been excluded at the first trial. The court states that Jones' statements on the tapes indicated he had detailed personal knowledge of the events that were about to occur. The court also noted that there was little likelihood that Jones' memory was faulty because of the close temporal proximity of his statements to the events.[104] Also significant to the finding that the statements were admissible was the court's opinion that any dangers which might be involved in admitting the tape recorded statements without the opportunity for cross-examination would be mitigated by the jury's position to judge Jones' mental condition from the recordings themselves.[105]

IV. CRITIQUE

The Ninth Circuit's near methodical approach in *Layton* reaches an end not within the means of applicable law. The holdings may have the effect of extending prosecutorial boundaries while narrowing sixth amendment protections[106] in criminal

101. *Id.* at 561.
102. *Id.*
103. *Id.*
104. *Id.* at 562.
105. *Id.* at 562-63. The trial court had excluded the evidence because it was impossible to tell what Jones meant from the tape recordings because of his agitated state of mind. 549 F.Supp. at 914.
106. *See*, Keller, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 COLUM. L. REV. 159 (1983); Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185; Vaughn & Weaver, *Interplay of the Confrontation Clause and the*

cases. The court also fails to recognize the practical and legal implications of its decision.

For example, while the court's holdings on the jurisdictional issues appear sound in light of *Wilson*, the court neglects to caution against routine evidentiary appeals by the government. The court relied on *Wilson* as authority to disregard the language of §3731 and emphasized that the right to appeal under the statute could be exercised provided the appeal did not conflict with the Constitution. The constitutional concern to not put the defendant in jeopardy is recognized, but another point is overlooked. Permitting an immediate appeal of a government pretrial motion to admit evidence could result in the routine filing of pretrial motions of this sort. When it ruled on the government's motion prior to defendant's retrial, the lower court stated that it discouraged the filing and appeal of pretrial evidentiary motions by the government because it could cause great delay and mischief in the judiciary.[107] In complex cases such as *Layton*, a second trial can be significantly delayed while an interlocutory order is appealed to a higher court. As a matter of judicial expedience, the government should be required to comply with the statute by filing a timely appeal when evidence is initially excluded and should not be given a windfall when it files its own motion to admit the same evidence.[108]

In the analysis of the conspiracy issue, the court noted that the district court had not clearly indicated at what point the conspiracy to kill Ryan came into existence.[109] However, the court reviewed all of the statements made by Jones and ruled that if on remand the district court found there was enough evidence to support a "reasonable inference" that the defendant and Jones were members of the same conspiracy to kill Ryan, the statements were to be admitted.[110]

The ruling is problematic in that the circumstances under which Jones made the statements are atypical of the cases relied

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Hearsay Rule, 29 ARK. L. REV. 375 (1975).

107. 549 F.Supp. at 908.

108. The lower court pointed out that other jurisdictions which permit interlocutory appeals have had difficulty securing for criminal defendants the right to speedy trial. *Id.*

109. 720 F.2d at 558.

110. *Id.*

on by the court in *Layton*. The authority cited by the court[111] involved fact situations where the statements were made between identifiable co-conspirators or made to identifiable third persons. The speeches made by Jones were not earmarked for the defendant, but were broadcast over loudspeakers to *all* of the Jonestown residents. If they are to be admitted at defendant's retrial it must be presumed that either he heard and acquiesced in what Jones said, or that Jones intended to enlist the help of his supporters to further a conspiracy to kill Ryan. It is also quite possible that the conspiracy to kill Ryan arose without the influence of Jones. Here, it is not clear when the conspiracy to kill Ryan arose, and evidence to link the defendant to a plan which also included Jones is not substantial.

Another problem with this aspect of the opinion is the court's reliance on the hearsay statements themselves to suggest there was a "reasonable inference" to support a single conspiracy theory. Such reliance is clearly prohibited by *Perez* and the federal rules which require independent proof of the existence of a conspiracy. Lower courts in future conspiracy cases should be cautious in finding inferences of conspiracy when independent facts to support such a finding are not present.

A particularly troublesome aspect of the court's analysis is the ruling that the statements made by Jones to his attorney not only qualified as declarations against penal interest, but also could be offered as evidence to *inculpate* the defendant. In so ruling, the court stretches the penal interest hearsay exception beyond its traditional bounds.[112] The initial difficulty is the court finding the statements were inculpative in light of their content. The remarks did not inculpate Jones nor did they indicate that he was responsible for the imminent violence at the airstrip. Instead, the statements were directed toward the defendant's alleged role in the events which later took Ryan's life. It would seem likely that Jones would inform a trusted person, in this case his attorney, that someone else intended to kill Ryan in order not to implicate himself in any wrongdoing. In light of the fact that the statements were not entirely accurate, and since

111. *See supra* notes 42-48 and accompanying text.

112. *See supra* notes 53 and 54 for the language of Rule 804(b)(3) and comments regarding its application.

the defendant cannot impeach an unavailable witness, the court's decision undermines the concern that evidence under this hearsay exception be trustworthy.

A second problem with the ruling in *Layton* is the dangerous precedent which the court establishes. The court fails to mention that in the circuit cases relied on for authority, the statements were excluded in whole or in part because they were not trustworthy. While it can be recognized that there may be instances which might provide a valid argument for the admission of inculpative statements under the penal interest exception to the hearsay rule, the facts in *Layton* do not lend themselves to set a trend for the lower courts.

Finally, in permitting the admission of the three groups of hearsay statements notwithstanding the provisions of the confrontation clause, the court limits sixth amendment protections and ignores the Supreme Court decisions[113] which focus on cross-examination as the touchstone of the confrontation issue. In *Layton*, the court ruled that the contested hearsay statements could be admitted under the reliability analysis suggested in *Dutton*. The difficulty with that approach is perhaps best illustrated by the fact that *Dutton* was a plurality opinion which did not clearly address the sixth amendment issues. Therefore, its precedential value is questionable.

While relying on *Dutton*, the Ninth Circuit ignored the language in that case as well as its earlier holding in *Perez* when it failed to address the confrontation issue[114] respecting the coconspirator statements. As *Perez* required that the record be reviewed for constitutional infirmity,[115] the Supreme Court in *Dutton* made it clear that it must be demonstrated that admission of the statement will not violate the confrontation clause. The explanation for the court's failure to consider that issue may lie in the lower court's failure to consider the issue. However, that explanation is insufficient given the fact that the lower court excluded the evidence on other grounds and had no reason to address the confrontation issue. Since admission of the taped speeches is critical in finding a conspiracy to which Jones and

113. 380 U.S. 400 (1965) 391 U.S. 123 (1968). *See supra* notes 64 and 66.
114. 720 F.2d at 558.
115. 658 F.2d at 660.

the defendant were connected, the court should have addressed the issue to determine whether the provisions of the sixth amendment were satisfied.

In relying on the plurality opinion in *Dutton*, the court completely ignores the Supreme Court's previous holdings[116] which dealt with the confrontation issue. Significantly, the court fails to consider *Pointer* and *Bruton* in its analysis. These are cases which fall into a line of authority that reveal the approach relied on by the Court in deciding cases arising under the confrontation clause. The approach focuses on cross-examination as a requirement for confrontation.[117] Such a focus is appropriate given the critical nature of the facts in *Layton*.

The *Dutton* case involved the confrontation of a witness testifying to non-critical statements of the declarant. An abundance of independent evidence was available to the prosecution to help obtain a conviction in that case. The Ninth Circuit's reliance on the case is an unwise expansion of a dubious plurality approach. The evidence in question in *Layton* is critical to the case and the degree of independent evidence to connect Jones and Layton to the same conspiracy is certainly questionable.

Equally significant is the actual content of the hearsay statements at issue in the *Layton* case. Since they are critical in determining the intent of the declarant Jim Jones, his state of mind at the time he made the speeches and the remarks to his attorney is particularly relevant. Again, *Dutton* affords little help on this point. In that case the state of mind of the declarant proved to be insignificant. Further, the defendant was at least able to avail himself of the opportunity to cross-examine the witness testifying to the statement alleged to inculpate him. Under those circumstances the jury was at least able to reach a conclusion as to the weight to be given the testimony of the witness, a prison informant, in light of the considerable evidence which had been offered by the prosecution.

The facts in *Layton* support a "cross-examination" analysis of the confrontation issue as set forth in *Pointer* and *Bruton*. To

116. 380 U.S. 400 (1965) 391 U.S. 123 (1968). *See supra* notes 64 and 66.
117. *See* text accompanying note 67.

suggest that there is sufficient independent evidence to justify the admission of the statements without raising a confrontation problem simply is not supported by the facts of the case. The court's suggestion that Jones' state of mind at the time he made the speeches will be obvious from the recordings themselves is an untenable proposition. While the arguments for admitting the various statements under exceptions to the hearsay rule is readily apparent, the confrontation problems which are inherent in this case do not favor the admission of the tape recorded statements offered against the defendant.

V. CONCLUSION

The events which took place at the airstrip near Jonestown, Guyana in 1978 are ineligbly stamped into the minds of many. These events indicate there was some evidence pointing to a conspiracy to kill Congressman Leo Ryan. However, evidence of when that conspiracy arose and the actors involved is unclear.

The Ninth Circuit's opinion demonstrates the court's willingness to ensure that there is accountability for the murder. However, the opinion is dangerous because it provides a standard by which established rules of evidence and appellate procedure are stretched to their limits. This precedent could lead to convictions based on inculpatory statements absent confrontation of the declarant and may result in the admission of less than reliable evidence in criminal trials. The court in effect extends prosecutorial boundaries in its broad interpretation of the appeals statute and the applicable rules of evidence. The cursory analysis of the confrontation clause question reflects a limitation on the assertion of sixth amendment protections.

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U.S. v. RUBIO: NINTH CIRCUIT SETS HIGH STANDARD OF PROBABLE CAUSE FOR SEARCH WARRANTS UNDER RICO

I. INTRODUCTION

In *United States v. Rubio,*[1] the Ninth Circuit Court of Appeals held that in the absence of a showing by the government that an association is wholly unlawful, the affidavit supporting the warrant to search the premises of that organization must provide probable cause to believe the people associated with the organization had conducted its affairs through a pattern of racketeering activity.[2]

Defendant Manuel Frank Rubio was convicted of violating the Racketeer Influenced and Corrupt Organizations Act, more commonly referred to as RICO,[3] for conspiring to participate in the conduct of the affairs of the Hell's Angels Motorcycle Club. On June 13, 1979 a grand jury returned a three count indictment charging thirty-three defendants with various violations of the RICO statute.[4] Rubio was one of the named defendants.[5]

Searches of defendant's premises had been made pursuant to indicia warrants under RICO which authorized the search and seizure of articles showing membership in, or association with, an enterprise engaged in a pattern of racketeering activity. Through the use of indicia warrants, authorities not only found evidence of membership and association with the Hell's Angels,

1. 727 F.2d 786 (9th Cir. 1984) (per Anderson, J; Takasugi, District J. sitting by designation; Poole, J. dissenting)

2. *Id.* at 794.

3. 18 U.S.C. §§ 1961-1968. (1976).

4. The grand jury had determined that the Hell's Angels Motocycle Club was an enterprise engaged in a pattern of racketeering activity and therefore in violation of 18 U.S.C. § 1961(a), (c) and (d), 727 F.2d at 790.

5. There were five other defendants (Elledge, Smith, Palomar, Passaro and Stefanson) who appealed their convictions of various firearms and narcotics violations. Rubio appealed his conviction under RICO. The six cases were consolidated for trial and appeal. *Id.*

but were also able to seize substantial amounts of evidence of criminal activity not covered by the indictment.[6]

At trial, the court concluded that the indicia warrants were valid under the fourth amendment, because a nexus existed between the items sought and the alleged criminal activity.[7] Defendants appealed and contended that there was no such nexus.[8]

II. BACKGROUND

RICO was enacted for the purpose of protecting legitimate business from the infiltration of organized crime.[9] RICO's four

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6. *Id.*

7. *Id.* at 793.

8. *Id.* at 792. Part III of the majority opinion dealt with various issues raised by defendant Smith. Because he had consented to a search of his premises and firearms were found in plain view, the court found all of his objections to be without merit. His conviction was affirmed. *Id.* at 799.

9. Section 1 of Act (Oct. 15, 1970, P.L. 91-452, Title IX, § 901(a), 84 Stat. 941; Nov. 2, 1978, P.L. 95-575, § 3(c), 92 Stat. 2465); provided:

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence gathering process of the law inhibiting the development of the legally admissable evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the government are unnecessarily limited in scope and impact.
>
> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those en-

criminal prohibitions are set forth in 18 U.S.C. § 1962. The Section prohibits: (1) the acquisition of legitimate business with illegally derived funds;[10] (2) any person from illegally acquiring, maintaining an interest in or controlling any enterprise affecting interstate or foreign commerce;[11] (3) provides that any employee or any person associated with an enterprise who conducts or participates in illegal conduct of the enterprise such as racketeering or collection of an unlawful debt[12] has violated this section;[13] and (4) declares that it is illegal for any person to conspire to violate any of the provisions stated above.[14]

To obtain a conviction under RICO the government must prove that an enterprise exists and that it was engaged in a pattern of racketeering activity.[15] An enterprise includes an individual, partnership, corporation, association or other legal entity and any union or group of individuals associated for an illegal purpose.[16] A pattern of racketeering activity requires at least

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gaged in organized crime.

10. 18 U.S.C. § 1962(a) provides in part that:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which engages in, or the activities of which affect, interstate or foreign commerce.

11. 18 U.S.C. § 1962(b) provides that: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

12. 18 U.S.C. § 1961(6) (1976) defines "unlawful debt" as a debt "(A) incurred or contracted in gambling activity . . . and (B) . . . incurred in connection with the business of gambling activity in violation of the law . . ."

13. 18 U.S.C. § 1962(c) provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

14. 18 U.S.C. § 1962(d) provides that: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections(a), (b), or (c) of this section."

15. *U.S. v. Turkette*, 452 U.S. 576, 583 (1981).

16. 18 U.S.C. § 1961(4) (1976) defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity and any union or group of individuals associated in fact although not a legal entity."

two acts of racketeering activity within a ten year period.[17]

In *United States v. Turkette*,[18] the Supreme Court held that the term enterprise as used in RICO encompasses both legitimate and illegitimate organizations.[19] In *Turkette*, defendant[20] formed an association for the purpose of illegally trafficking in narcotics, committing arsons, defrauding insurance companies, bribing and attempting to bribe local police officers and attempting to influence the outcome of state court proceedings.[21] On appeal the defendant argued that RICO was only intended to protect legitimate business from infiltration by organized crime and that RICO did not encompass organizations which only performed illegal acts when they had made no attempt to infiltrate legitimate business.[22] The First Circuit agreed;[23]but was reversed by the Supreme Court. The Court stated that RICO should be interpreted to cover both legitimate and illegitimate enterprises[24] and found nothing in the statute's legislative history requiring a different conclusion.[25]

RICO has been challenged on many grounds. The First Amendment guarantee of free association recognized by the Supreme Court in *NAACP v. Alabama ex rel Patterson*[26] and *Bates v. City of Little Rock*,[27] is one such challenge. In both cases the Supreme Court held that compelled disclosure of membership in an organization absent sufficient justification, violated the constitutional guarantees of privacy in group association and freedom of association.[28]

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17. 18 U.S.C. § 1961(5) states: " 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) of the commission of a prior act of racketeering activity."

18. 452 U.S. at 576.

19. *Id.* at 580-81.

20. Defendant Turkette was convicted after a six week trial on the RICO conspiracy count, 18 U.S.C. § 1962(d), and was sentenced to a 20 year term and fined $20,000. *Id.* at 579.

21. *Id.*

22. *Id.* at 579-80.

23. 632 F.2d 896 (1st Cir. 1981).

24. *Turkette*, 452 U.S. at 580.

25. *Id.* at 591.

26. 357 U.S. 449 (1958).

27. 361 U.S. 516 (1960).

28. 357 U.S. at 462; 361 U.S. at 523. The Court stated: "In the domain of these

In another constitutional challenge, in *United States v. Giese*,[29] it was alleged that admission of certain evidence infringed first amendment liberties of freedom of expression and the right to receive information.[30] The Ninth Circuit rejected this argument, however, and held that although evidence of association may not establish a conspiracy it has sufficient probative value to be admissable.[31]

Similarly, in *United States v. Martino*,[32] a group who associated for the purpose of committing arson with the intent to defraud fire insurers was convicted under RICO.[33] On appeal defendants alleged that RICO was unconstitutional because it punished associational status. The Fifth Circuit rejected this argument and stated that RICO's prescriptions are directed against conduct, not status.[34]

RICO has also been challenged on fourth and fourteenth amendment grounds. In *Zurcher v. Stanford Daily*,[35] the Ninth Circuit held that the fourth and fourteenth amendments forbade the issuance of a warrant to search for materials in possession of one not suspected of crime unless the affidavit supporting the warrant gave probable cause to believe that a subpoena duces tecum would be impracticable.[36] The Supreme Court however, rejected this test and reversed stating that the critical element was not whose possession was involved but whether there was reasonable cause to believe that the things to be seized might be

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indispensible liberties, whether of speech, press or association, the decisions of this Court recognize that the abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action. 357 U.S. at 461. Therefore, the court held "that the immunity from state scrutiny of membership lists which the Association [NAACP] claims on behalf of its members to pursue their lawful private interests privately and to associate freely with others in so doing [comes] within the protection of the Fourteenth Amendment." *Id.* at 466.

29. 597 F.2d 1170 (9th Cir.),*cert. denied*, 444 U.S. 979 (1979).

30. 597 F.2d at 1185. In that case defendant was associated with an anti-war group responsible for several bombings of United States Armed Forces Recruiting Centers. To show association the government introduced a book entitled *From the Movement Toward Revolution* on which were found Giese's fingerprints and those of several other defendants. *Id.*

31. *Id.* at 1187.

32. 648 F.2d 367, (5th Cir. 1981), *cert. denied*, 456 U.S. 943 (1982).

33. 648 F.2d at 379.

34. *Id.* at 380.

35. 436 U.S. 547 (1978).

36. 550 F.2d 464 (9th Cir. 1977).

found on the searched premises.[37] The Court then held that a search warrant may issue for items in the possession of a third party who is not suspected of a crime.[38]

The fourth amendment requires that no warrants shall issue except upon a showing of probable cause supported by oath or affirmation. Prior to 1967 mere evidence, which is evidence seized for the purpose of proving the government's case, was inadmissable at trial. Under the reasoning of *Gouled v. United States*,[39] the fourth amendment only allowed the seizure of instrumentalities, fruits of crime or contraband.[40]

In *Warden v. Hayden*,[41] the Court reversed this long standing rule and stated that nothing in the language of the fourth amendment supported the distinction between mere evidence and instrumentalities, fruits of crime or contraband.[42] The Supreme Court reasoned that privacy is not disturbed any more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit or contraband.[43] Because a magistrate can intervene in both situations, the fourth amendment requirements of probable cause and specificity are not threatened. The Court went on to conclude that there must be a nexus between the item to be seized and criminal behavior.[44] In the case of fruits, instrumentalities or contraband, the nexus is automatically provided. In the case of mere evidence, probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.[45]

In *Illinois v. Gates*,[46] the Supreme Court changed the appellate standard for reviewing magistrates' findings of probable cause with respect to anonymous informants' tips and imple-

37. *Zurcher*, 436 U.S. at 565.
38. *Id.*
39. 255 U.S. 298 (1921).
40. *Id.* at 310-11. (Papers seized only for evidentiary value not specifically described on the warrant affidavit were held to be taken in violation of defendant's fourth amendment right to be free from unreasonable searches and seizures.) *Id.* at 311.
41. 387 U.S. 294 (1967).
42. *Id.* at 301-02.
43. *Id.*
44. *Id.* at 307.
45. *Id.*
46. 103 S. Ct. 2317 (1983).

mented a new probable cause standard.[47] The court held that although veracity, reliability and basis of knowledge are all highly relevant in evaluating an informant's tip, these elements are not dispositive. Rather, they should be viewed as intertwined issues which may illuminate whether there was probable cause to believe that contraband or evidence was located in a particular place.[48] The Court noted that so long as the magistrate had a substantial basis for concluding that a search warrant would uncover evidence of wrongdoing, the appellate court may only reverse if it can find no substantial basis for the magistrate's decision.[49]

In *United States v. Brooklier*,[50] defendants were convicted of violating RICO and the Hobbs Act.[51] Defendants were members of La Cosa Nostra, a secret national organization engaged in a wide range of racketeering activities.[52] Defendants claimed

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47. *Id.* at 2325.

48. *Id.* Justice Rehnquist labelled this approach the totality of the circumstances test. *Id.* at 2328.

49. *Id.* at 2332. Prior to *Gates* the Ninth Circuit had held that it was a question of law for the appellate court to determine whether probable cause existed at the time the magistrate issued the indicia warrant. *United States v. Chesher*, 678 F.2d 1353, 1359 (1982); however, in the *Rubio* case it is not clear whether or not the court has adopted the *Gates* standard: "The Supreme Court in *Gates* applied a standard that would consider whether the magistrate had a substantial basis for his probable cause determination. . . . For purposes of this case, however, we are constrained to disagree with the trial court regardless of which standard [*Chesher (de novo* review) or *Gates* (substantial basis)] applies." 727 F.2d at 793. The majority noted that the issue was currently before the court in *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984). The narrow issue in that case was: what standard of review should the appellate court apply when a federal agent performs an improper search but was excused by exigent circumstances? The court held that "the question of exigent circumstances is subject to *de novo* review." *Id.* at 1205. The court noted that "[q]uestions of fact are reviewed under the deferential, clearly erroneous standard." *Id.* at 1200. Under the court's *ad hoc* approach "a number of categories of suppression questions [will be] open to review under standards that will have to be developed for each of the categories by the seperate weighing of the preponderance of facts or law in so-called mixed questions of law and fact." *Id.* at 1209. The court did not discuss the applicability of *Gates*.

50. 685 F.2d 1208 (9th Cir. 1982).

51. *Id.* at 1213. 18 U.S.C. § 1951(a) (1948) provides that:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than 20 years or both.

52. The court stated La Cosa Nostra was responsible for acts of murder, extortion,

that the indictment charging them with a RICO conspiracy was fatally ambiguous.[53] The Ninth Circuit rejected this argument and stated that the essence of a RICO conspiracy is not an agreement to commit racketeering acts, but an agreement to conduct or participate in the affairs of an enterprise through a pattern of racketeering.[54] The court reasoned that conspiracies or attempts can serve as racketeering activities because 18 U.S.C. § 1951 is applicable to conspiracies and attempts to obstruct, delay or impact commerce by robbery, extortion or physical violence.[55] Therefore, even if a racketeering offense was not completed, defendants had violated RICO.[56]

The Second Circuit affirmed two RICO convictions in *United States v. Scotto*.[57] Defendants alleged that the trial judge should have instructed the jury that they were required to find that the acts committed by them concerned or related to the operation of a particular enterprise and its affairs through its essential functions.[58] The appellate court rejected this argument and stated that RICO requires only that the government prove that the defendants' acts were committed in the conduct of the union's affairs.[59] This burden could be fulfilled by showing either (1) that one is enabled to commit RICO violations solely by virtue of a position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) by showing that the violations were related to the activities of that enterprise.[60]

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gambling and loan sharking. 685 F.2d at 1213.

53. *Id.* at 1216. Defendants alleged that the racketeering activities set forth in Count 1 of the indictment (conspiracy to commit RICO) amounted to an illogical and ambiguous allegation.

54. *Id.*

55. *Id.*

56. *Id., See supra notes* 10-14.

57. 641 F.2d 47 (2d Cir. 1980).

58. *Id.* at 54. Defendants were president and vice-president of the Local 1814 of the International Longshoreman's Union. *Id.* at 50.

59. *Id.* at 54.

60. *Id.* Since the government fulfilled its burden of proof on both counts appellant's argument was dismissed. The Second Circuit also quoted the following language:

> Section 1962(c) nowhere requires proof regarding the advancement of the union's affairs by the defendant's activities, or proof that the union itself is corrupt, or proof that the union authorized defendant to do whatever acts form the basis for the charge. It requires only that the government establish that the defendant's acts were committed in the conduct of the union's affairs.

Id., quoting *United States v. Field*, 432 F.Supp. 55, 58 (S.D.N.Y. 1977), *aff'd*, 578 F.2d

Finally, RICO has been challenged on the issue of whether a grand jury indictment is sufficient to establish probable cause to search. In *United States v. Ellsworth*,[61] defendant claimed that the affidavits supporting the search warrant did not set forth facts that would lead a neutral and detached magistrate to conclude that probable cause existed to believe that he had committed an assault.[62] The Ninth Circuit disagreed,[63] stating that sworn affidavits by eye witnesses describing Ellsworth and his clothing coupled with an indictment, supported the magistrate's finding of probable cause.[64] The Ninth Circuit noted that the magistrate has the same right as the court to take judicial notice of the indictment.[65] However, the Ninth Circuit stated that it was not persuaded by the government's argument that a magistrate can base a probable cause decision to search solely on a previous indictment.[66] It reasoned that because a grand jury's spectrum of responsibility does not include the duty of determining probable cause to search, an indictment alone would not constitute sufficient probable cause to issue a search warrant.[67]

III. ANALYSIS

A. *The Majority*

The court first determined whether the search for items containing the identities of Hell's Angels members, other than those indicted, violated the right to freedom of association.[68] Answering in the negative the court reasoned that although there is a potential for abuse in using an indicia warrant, a narrowly drawn and properly issued and executed warrant does not vio-

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1371 (2d Cir. 1978),*cert.denied*, 439 U.S. 801 (1978).

61. 647 F.2d 957 (9th Cir. 1981).

62. *Id.* at 963.

63. *Id.* at 964.

64. *Id.*

65. *Id.* at 963. *See* United States v. Sevier, 539 F.2d 599,603 (6th Cir. 1976).

66. *Id.* at 964.

67. *Id.*, In general the Ninth Circuit has given prosecutors broad leeway in filing RICO complaints.

See United States v. Bagnariol, 665 F.2d 877(9th Cir. 1981). In prosecution for RICO violation, government is not precluded from using same evidence to establish both element of enterprise and element of pattern of racketeering; *see* United States v. Brooklier, 685 F.2d at 1220-22. In prosecution for violating RICO, uncorroborated testimony of accomplice is sufficient to support convictions so long as it is not incredible or unsubstantial on its face. *See* United States v. Sigal, 572 F.2d 1320, 1324 (9th Cir. 1978).

68. 727 F.2d at 791.

late a RICO suspect's first amendment rights.[69] The rights are protected because the government is required to prove both that the suspect was associated with an organization and that the organization was engaged in racketeering.[70]

The Ninth Circuit agreed, however, with defendant's argument challenging the issuance of the warrants for lack of probable cause. The court stated that no nexus was established by the government between the evidence seized and criminal activity.[71] All of the items described in the search warrants were to be used as evidence, by the government, to show association with a RICO enterprise. Therefore, the court applied a two-part test. First, the warrants were examined to determine whether there was probable cause to believe a suspect was associated with a particular enterprise. Next, the court held that absent a showing that a large portion of a RICO enterprise's activities are illegitimate so that the entire enterprise, in effect, becomes wholly illegitimate, the warrants must be examined for probable cause to believe that the suspect conducted the affairs of the enterprise through a pattern of racketeering activity.[72]

In applying its two-part standard to the search warrants and their supporting affidavits in this case, the Ninth Circuit concluded that the warrants were issued without probable cause.[73] Because none of the affidavits contained statements or

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69. *Id.* at 792.

70. *Id.* The court stated:

"We agree with defendants that the First Amendment protects their right to associate with one another and with the Hell's Angels Motorcycle Club. We strongly disagree with any inference that criminal investigation is somehow prohibited when it interferes with such First Amendment interests."

Id. at 791.

71. *Id.* at 794.

72. *Id.* The court stated: "probable cause to believe a suspect was associated with a particular enterprise would be insufficient of itself to support a warrant for the seizure of indicia of association." *Id.* Therefore it held that unless the enterprise can be shown to be "wholly illegitimate" the government must prove the suspect conducted the affairs of the enterprise through a pattern of racketeering activity. The court went on to state: "We believe a contrary rule could lead to the seizure of 'mere evidence' from any suspected member or associate of any enterprise with no nexus whatever between the evidence and criminal activity." *Id.* The court implied that such a rule would violate the fourth amendment.

73. *Id.* at 794. The affidavit in part cited (1) forms of indicia customarily kept by members and associates of the Hell's Angels; (2)facts tending to establish that each defendant was a member or associate of the Hell's Angels; and (3) that a federal grand jury had returned an indictment which charged the named defendants with associating with a

facts to believe that defendant had conducted the affairs of the motorcycle club through a pattern of racketeering activity there was no probable cause.[74] Additionally, since the facts stated in the affidavits were limited to establishment of association with the club, they were insufficient to provide the required nexus between defendant's association with the club and criminal activity.[75]

The Ninth Circuit disagreed with the trial court's holding that because evidence of association would aid in a conviction under the RICO counts, a nexus existed between the items sought and the alleged criminal activity.[76] Because the affidavit did not allege that the motorcycle club's activities were wholly illegitimate, it did not follow that evidence of association would necessarily aid in obtaining a conviction. The court reasoned that if the affidavit supporting the search warrant failed to show that an organization was wholly illegitimate, those people innocently associated with a legitimate enterprise being conducted by others through a pattern of racketeering activity would forfeit their fourth amendment protections against unreasonable searches and seizures.[77]

The court then stated that an affidavit's recitation of a RICO indictment handed down by a grand jury was insufficient to establish probable cause.[78] It reasoned that only a neutral and detached magistrate can properly make the determination of probable cause to search.[79] Furthermore, the basis of the magistrate's probable cause determination must show from the face of the warrant affidavit.[80] Since making determinations of probable cause is beyond the scope of the grand jury's duties as set forth in *Ellsworth,* an indictment alone cannot provide probable cause to search.[81]

RICO enterprise. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 793.

77. *Id.*

78. *Id.* at 794.

79. *Id.* at 794-95., *See* Steagald v. United States, 451 U.S. 204, 212 (1981).

80. *See* United States v. Martinez, 588 F.2d 1227, 1234 (9th Cir. 1978).

81. 727 F.2d at 795. (the function of the grand jury is to determine whether there is sufficient probable cause to require an accused to stand trial before a petit jury).

The majority also stated the affidavit gave no basis for believing that defendant had conducted the affairs of a RICO enterprise through a pattern of racketeering activity. Therefore, the magistrate had no substantial basis for concluding that probable cause existed[82] because the magistrate's probable cause determination was no more than a ratification of the conclusions of a grand jury. Citing *Ellsworth,* the court noted that this was an impermissable basis.[83] Furthermore, because fourth amendment privacy protection is highly vulnerable when evidence of association with a RICO enterprise is sought, the affidavit supporting the search warrant most show both probable cause to believe that the suspect was associated with a particular enterprise and that the suspect conducted its affairs by means of racketeering.[84] The court concluded that the affidavits did not provide probable cause and the evidence discovered through the search warrants should have been suppressed.[85]

B. *The Dissent*

The dissent disagreed with the majority's conclusion that under RICO if a defendent is charged with associating with an enterprise and participating in the conduct of its affairs through a pattern of racketeering, a warrant cannot issue to search out indicia of association unless the affidavits allege that the enterprise is wholly illegal.[86]

It rejected the majority's interpretation of *Warden v. Hayden,* and argued that when evidence is sought by the government solely to prove its case at trial, probable cause should be evaluated on the basis of whether or not the evidence sought will aid in a particular apprehension or conviction.[87] Although such evidence does not prove that a suspect is guilty, it can be used to constitute a link in an evidentiary chain supporting a reasonable belief that a certain suspect may have committed a particular crime.[88]

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82. 727 F.2d at 795.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 800.
87. *Id.* at 803.
88. 727 F.2d at 803.

The dissent also argued that the majority's two-part probable cause standard was based on two faulty premises.[89] First, if the crime involved association, the affidavit must charge that the organization was wholly illegal. Second, the affidavit cannot be saved by references to an indictment because an indictment does not give probable cause to search.[90] The dissent stated that with respect to the first premise, the fourth amendment makes no requirement that a suspect's conduct or association be "wholly illegal" and furthermore that the criminal process is not equipped to make such judgments.[91] Next, considering the validity of the affidavits, the dissent concluded that the majority had erred in rejecting them.[92] It argued that because the affidavits described conduct which amounted to racketeering activity outlined in RICO, and they set forth the basis of the affiant's knowledge, the indictment did not stand alone as the basis for the magistrate's finding of probable cause.[93]

The dissent next addressed the issue of whether an indictment constitutes probable cause to issue a search warrant. It disagreed with the majority's interpretation of *Ellsworth* and argued that because the magistrate was permitted to take judicial notice of the indictment there was no reason to bar it from consideration.[94]

The dissent also disagreed with the majority's stance on exercising *de novo* review over lower court decisions of probable

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89. *Id.*

90. *Id.*

91. *Id.* at 804. The dissent stated:

> The Fourth Amendment requires specificity as to persons, houses, papers and effects; and these requirements must be made known to a judicial officer by oath or affirmation. Seldom can it be demonstrated that the . . . prosecution is for conduct wholly bad. That is a moral not a legal judgment, and it is with the latter that the criminal process is equipped to deal.

Id.

92. *Id.*

93. *Id.* at 805.

94. *Id.* The dissent distinguished *Ellsworth* on two grounds: first, it was not a RICO case, and second, the search warrant was upheld because the indictment was supported by eye-witness testimony. *Id.* at 804-05. In conclusion he stated: "The majority has overstated the opinion of *Ellsworth* and understated the probable cause significance of a valid indictment." *Id.* at 805.

cause.[95] It stated that *Gates* did apply to this case and that it was dispositive.[96] Under *Gates* the magistrate's job in determining probable cause for a search warrant consisted of making a practical, commonsense decision whether given all the circumstances set forth in the affidavit there is a fair probability that contraband or evidence of a crime will be found in a particular place.[97] The dissent stated that on this basis the district court was correct in handing a conviction of defendant.[98] Since the duty of the appellate court under *Gates* is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed,[99] the dissent stated that the majority's holding was not mandated by the Fourth Amendment, did not comport with current precedent and did not serve the sound administration of justice.[100]

IV. CRITIQUE

By implementing its two-part association-conduct probable cause requirement for search warrants for legitimate and semi-legitimate RICO enterprises the majority opinion vindicates the fourth amendment right to privacy and the first amendment right of freedom of association. However, the majority's new test raises many uncertainties because of the difficulty in demonstrating that an organization's affairs are wholly illegitimate. Law enforcement will now be required to prove association and illegal conduct with reasonable certainty to the magistrate before it is legally permitted to gather evidence. Additionally, since grand jury indictments were held to be insufficient to give probable cause to search,[101] law enforcement authorities must now show that the very persons whose premises were to be searched had themselves conducted the affairs of an enterprise through a pattern of racketeering activity.

The dissent criticized the majority on the ground that it is not the function of an affidavit to contain plenary allegations as

95. *Id.* at 808.
96. *Id.*
97. *Id. See* 103 S.Ct. 2317, 2332 (1983).
98. 727 F.2d at 808-09.
99. *Id.* at 808.
100. *Id.* at 809.
101. *Id.* at 795.

is the case in an indictment or information.[102] It stated that the function of the affidavit is simply to show that probable cause exists to believe that particular evidence used in a described crime could probably be found in a certain location and that that evidence could aid in convicting the suspect.[103] If the magistrate has this information he should issue the search warrant. Under this reasoning, the majority's rule appears to be incorrect because it adds unnecessary technicality to the warrant requirement. Also, by restricting the application of search warrants to only people who have conducted the affairs of an enterprise through a pattern of racketeering, the rule impedes the ability of law enforcement authorities to combat organized crime.

In light of the *Gates* totality of the circumstances test for determining probable cause, the majority's standard does not appear to be sound.[104] The Supreme Court chose to replace the reliability of informant-basis of knowledge test developed by the appellate courts with a more pragmatic totality of the circumstances test.[105] The rationale for this test is that it is difficult to square the complex evidentiary rules developed by appellate courts with common sense judgments of magistrates, who apply standards less demanding than those used in formal legal proceedings. Furthermore, since the fourth amendment imposes a strong preference for search warrants, courts should interpret affidavits in a common sense rather than a hypertechnical manner. Most important for the Court was the argument that the basic function of any government is to provide for the security of the individual and his property.[106] The Court stated that reversing convictions because of technical flaws in a search warrant will seriously impede the task of law enforcement.[107] The majority failed to even consider this reasoning before developing its own standard of probable cause.[108]

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102. *Id.* at 804.

103. *Id.*

104. *See supra* note 49.

105. 103 S.Ct. at 2331.

106. *Id.*

107. *Id.*

108. The dissent stated: "In reality, the majority's rationale simply is a construct harking back to the comforting impedimentia of *Aguilar* and *Spinelli* and which accommodates a patent unease with the directions of *Warden* and the explicit holding of *Gates*." 727 F.2d at 803.

The majority's concern that search warrants issued under RICO could threaten constitutional rights may be traced to the increased breadth of RICO in the past few years.[109] Although the original purpose of RICO was to protect legitimate business from the infiltration of organized crime,[110] it has been used in an increasing number of circumstances.[111] One reason for this may be that a RICO enterprise has been construed by courts to encompass many different combinations of individuals or groups of individuals.[112] The issue of what constitutes a RICO enterprise has become particularly acute because Congress did not draft RICO to encompass illegal enterprises. Since the statute does not distinguish legal from illegal enterprises, courts have been forced to determine the outlines of the illegal enterprise concept[113] without any guidance from the statute's legislative history.

In this context, the Ninth Circuit's two-part probable cause standard can be viewed as a means of cutting back on RICO's

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109. Congress seems to have invited broad judicial interpretations by stating that RICO "shall be liberally construed to effectuate its remedial purposes," Organized Crime Control Act of 1970, Pub.L. No. 91-452 § 904(a), 84 Stat. 947.

110. *See supra* note 9.

111. *See* United States v. Marubeni Am. Corp., 611 F.2d 763 (9th Cir. 1980) (RICO used against a Japanese corporation manufacturing electric cable). In United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977) (RICO used against constables and employees of the Allegheny County court system).

112. *See* United States v. Elliott, 571 F.2d 880 (5th Cir.) *cert. denied,* 439 U.S. 953 (1978), where the court held that any informal, loosely organized, de facto association engaged in criminal conduct could constitute a RICO enterprise; because the definition of enterprise is so amorphous, it has been argued that the government need only establish a pattern or racketeering activity to obtain a conviction. *See* Tarlow, *RICO: The New Darling of the Prosecutor's Nursery,* 49 FORDHAM L.REV. 165, 202 (1980).

113. In *Turkette* the Supreme Court described a RICO enterprise as "a group of persons associated together for a common purpose of engaging in a course of conduct" and "an ongoing organization, formal or informal [in which] the various associates function as a continuing unit." 452 U.S. at 583. In United States v. Griffin, 660 F.2d 996 (4th Cir. 1981) *cert. denied,* 454 U.S. 1156 (1982) the court held that an illegal enterprise must have separate existence. *Id.* at 999; In United States v. De Rosa, 670 F.2d 889, 896 (9th Cir. 1982), the Ninth Circuit held that under *Turkette* association by defendants over a long period of time and involvement in drug distribution constituted an illegal enterprise. For other approaches see United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980); United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982) (court required proof by the government of three factors: (1) commonality of purpose; (2) continuity of both structure and personality and (3) an ascertainable structure distinct from racketeering activity). *Id.* at 665. For critique of *Bledsoe see* Note, *United States v. Bledsoe: RICO - Limiting The Enterprise,* 16 CREIGHTON L.REV. 1006 (1983); for an excellent survey of cases construing RICO after *Turkette* see Tarlow, *RICO Revisited,* 17 GA. L. REV. 293, 324-40 (1983).

breadth and of side-stepping the enterprise issue. However, the problem of what constitutes a RICO enterprise still exists and the court should have addressed the issue. By adding the wholly illegitimate enterprise test the court adds another layer of complexity to the statute's interpretation. Since the court failed to define illegal enterprise their test creates unnecessary confusion. Because this issue was not resolved the viability of RICO prosecutions will become unpredictable and lower courts will be burdened with unworkable standards.

V. CONCLUSION

The majority's decision will have a direct and adverse public impact. After a long and difficult trial[114] five out of six convictions were reversed because the affidavits to the warrants did not measure up to the majority's standard of probable cause. Since the evidence obtained through the search warrants was suppressed, the prosecution will probably have to drop the case. This results in frustration to law enforcement agencies and the public pays for high investigation and court costs and no results.

This opinion will impair the use of RICO against organized crime since the majority has failed to articulate a standard for what constitutes a wholly illegal enterprise. Moreover, the court's probable cause test is over-technical and will result in less successful criminal RICO prosecutions against organized crime.

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114. 727 F.2d at 800.

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