Washington and Lee Law Review

Volume 49 | Issue 2 Article 22

Spring 3-1-1992

Case Comments: Civil And Criminal Procedure And Sentencing

acknowledged that the unique problems that drunk driving presents to law enforcement and the states, due to the fleeting nature of evidence of bodily alcohol content, support a finding of exigent circumstances. The exigent circumstances justify a warrantless search for evidence, and the best means of obtaining this evidence is the breathalyzer test. Because defendants were pulled over consistent with individualized determinations of suspicion, the limited intrusions that breathalyzer tests impose are justified by the tests' ability to prevent the destruction of evidence. Relying on both exceptions to the warrant requirement, the Fourth Circuit Court of Appeals affirmed the lower court's finding that the breathalyzer tests imposed on Reid and Boylan were not unreasonable searches. The Fourth's Circuit's decision is consistent with other courts' treatment of the issue and with recent Supreme Court decisions granting greater latitude to States to respond to the national crisis posed by drunk driving.[12]

CIVIL AND CRIMINAL PROCEDURE AND SENTENCING

Section 1985(3), 42 U.S.C. § 1985(e) (1988) (section 1985(3)), is a federal statute that provides relief against private conspiracies designed to deprive any person or class of persons from equal protection of the laws. Enacted in 1871, along with other Reconstruction Era civil rights statutes, a primary purpose of section 1985(3) was to protect black citizens from conspiratorial Ku Klux Klan activities.[13] In 1951, the Supreme Court determined in *Collins v. Hardyman*, 341 U.S. 651 (1951), that the language of section 1985(3) reached only conspiracies performed under the color of state law. However, twenty years later, the Court held that in certain contexts the statute could reach private conspiracies as well. In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Court stated that limiting the reach of section 1985(3) solely to conspiracies involving state action was an unnecessarily narrow construction of the statute.

In upholding the application of section 1985(3) in the private conspiracy context, the *Griffin* Court identified both the Thirteenth Amendment and the constitutional right of interstate travel as sources of federal

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12. *See* Michigan State Police v. Sitz, 110 S. Ct. 2481, 2488 (1990) (upholding sobriety check-points); Schmerber v. California, 384 U.S. 757, 772 (1981) (upholding police taking blood sample without consent from hospitalized patient subsequent to involvement in auto accident).

Other federal and state courts' treatment of the issue is consistent with the Fourth Circuit's. *See* United States v. Berry, 866 F.2d 887, 890 (6th Cir. 1989) (holding that blood sample taken from unconscious defendant involved in auto accident was not obtained in violation of Fourth Amendment); United States v. Snyder, 852 F.2d 471, 474 (9th Cir. 1988) (upholding warrantless analysis of defendant's blood sample); Holland v. Parker, 354 F. Supp. 196, 199 (D.C.S.D. 1973) (holding that Fourth Amendment requires either lawful arrest or exigent circumstances to exempt search from warrant requirement).

13. *See generally* Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 530-46 (1985) (outlining early history of § 1985(3) and noting decade of disuse).

legislative power giving Congress the authority to reach private conspiracies. According to *Griffin*, Congress' creation of a statutory cause of action designed to remedy victims of "conspiratorial, racially discriminatory private action" was well within Congress' powers under the Thirteenth Amendment. The Court also determined that Congress was within its power to protect the constitutional right of interstate travel from private conspiracies because the Court had held in *Shapiro v. Thompson*, 394 U.S. 618 (1969), that the Constitution protected the right to travel from both governmental and private interference. However, the *Griffin* Court left open the possibility of applying the statute to conspiracies centered upon a class-based discrimination other than race. The United States Court of Appeals for the Fourth Circuit addressed a more modern and controversial application of section 1985(3) in *NOW v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991), involving women seeking abortions as the protected class and protestors blocking access to abortion clinics as the private conspirators.

In *NOW*, the plaintiff National Organization For Women (NOW), along with various abortion clinics, alleged that the defendant Operation Rescue and its supporters engaged in conspiratorial activities designed to infringe upon a woman's right to obtain an abortion and her right to interstate travel. NOW asserted that Operation Rescue had violated the constitutional right to interstate travel because some of the patients who were unable to gain access to the abortion clinics, due to Operation Rescue's demonstrations, were from out of state. NOW is an organization whose main concern is the preservation of a woman's right to have an abortion, while Operation Rescue is an association whose main goals include both the prevention and eventual illegalization of abortions. Operation Rescue demonstrations are designed to shut abortion clinics down by blockading the clinics' entrances and exits in order to effectively prevent abortions.

In anticipation of Operation Rescue demonstrations, NOW successfully obtained from the United States District Court for the Eastern District of Virginia, a temporary restraining order protecting Northern Virginia from abortion clinic blockades allegedly scheduled for November 1989. Although Operation Rescue did not demonstrate in Northern Virginia during that time, clinics located in Maryland and the District of Columbia did shut down because of the organization's activities in those areas. NOW then applied for a permanent injunction, and the court consolidated the hearing on the application for injunctive relief and the trial of action on the merits. After a two day proceeding, in which Operation Rescue chose not to testify, the United States District Court for the Eastern District of Virginia granted a permanent injunction enjoining Operation Rescue and six other individuals from blockading patients' access to abortion clinics pursuant to section 1985(3) and the constitutional right to interstate travel. As a prerequisite to issuing the injunctive relief, the district court ruled that section 1985(3) did encompass women seeking abortions as a class

protected from conspiracies designed to infringe upon their constitutional right to interstate travel.

Initially the district court outlined the essential elements of a section 1985(3) claim—evidence of a harmful or injurious act, done in furtherance of a conspiracy, designed to deprive either directly or indirectly, any person or class of persons of equal protection of the laws or equal privileges and immunities under the laws. The district court determined that section 1985(3) does encompass gender-based discriminatory animus because a gender-based class possesses certain distinct and immutable characteristics comparable to race-based or national origin-based classes. The district court further reasoned that members of NOW and abortion clinic patients qualified as a valid subset of the gender-based class. The district court, relying on *Griffin*, next observed that because the Constitution protects the right to interstate travel from both governmental and private interference, NOW did not need to present evidence of state action in order to make out a section 1985(3) claim. The district court concluded that the issuance of permanent injunctive relief in favor of NOW was appropriate because of the equities involved in the case.

However, in granting the specific relief, the district court refused to extend the injunction nationwide or to include restrictions on Operation Rescue's expressive activities, concluding that both requests were overly broad. The district court pointed to the significant First Amendment rights protecting Operation Rescue's expressive tactics. Furthermore, the district court found it unnecessary to rule on NOW's contention that in addition to protecting the right to interstate travel, section 1985(3) also protected the fundamental right to have an abortion. The district court explained that, because the right to travel provided the district court with an independent means for granting the requested relief, there was no reason to rule on the alternative grounds suggested by NOW. Operation Rescue appealed the district court's decision granting the permanent injunction while NOW cross-appealed, specifically questioning the district court's refusal to extend the scope of the permanent injunction.

In rejecting both appeals and upholding the district court's decision in full, the Fourth Circuit, relying upon *Buschi v. Kirven*, 775 F.2d 1240 (4th Cir. 1985), agreed that gender-based class animus satisfied the animus requirement of section 1985(3). *Buschi* explicitly identified classes based on sex, along with race and national origin, as classes afforded section 1985(3) protection. The *NOW* court stated that affirmance of the district court's ruling was proper because Operation Rescue had overstepped permissible free speech grounds by physically blockading abortion clinics.

The *NOW* court, applying an abuse of discretion standard, examined the entry, scope and duration of the district court's injunction. The court was unable to conclude that the entry, scope or duration of the permanent injunction was an abuse of the district court's discretion. Specifically, the court rejected the contention that the district court should have broadened the reach of the injunction by extending it indefinitely instead of limiting the geographically-protected area to Northern Virginia. Also, the Fourth

Circuit explicitly affirmed the district court's decision not to restrain Operation Rescue members from activities designed to intimidate and harass clinic patients. Applying a balancing test, the *NOW* court noted that because such actions were clearly protected by the First Amendment, the district court properly refused to enjoin Operation Rescue's expressive activities. Finally, the Fourth Circuit refused to address NOW's contention that section 1985(3) protects a woman's right to have an abortion.

Although the Fourth Circuit upheld the district court's determinations that gender-based animus satisfies the class-based animus requirement of section 1985(3) and that NOW's members and clinic patients constituted a valid subset of a gender-based class, not all jurisdictions have drawn the same conclusion. For instance, in *Lewis v. Pearson Foundation, Inc.*, 908 F.2d 318, 324-25 (8th Cir. 1990), *vacated*, 917 F.2d 1077, *petition for cert. filed*, 59 U.S.L.W. 3726 (U.S. Apr. 23, 1991) (No. 90-1575), the Eighth Circuit, upon rehearing *en banc*, vacated a previous determination that section 1985(3) protected women seeking abortions from conspiratorial activities. Comparably in *Roe v. Abortion Abolition Society*, 811 F.2d 931, 934-37 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987), the Fifth Circuit reasoned that patients, doctors, abortion clinics and staff that defined themselves as a group of people in disagreement with the defendant's point of view on abortion did not constitute a valid protected class under section 1985(3) because the class was over-inclusive. A few years later, in *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 793-94 (5th Cir. 1989), the Fifth Circuit concluded that a class defined as women of childbearing age seeking medical attention was too under-inclusive to warrant protection under section 1985(3). Similarly, in *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168, 1170 (C.D. Cal. 1989), the United States District Court for the Central District of California concluded that women seeking abortions did not constitute a protected class under the language of section 1985(3). However, the Fourth Circuit's determination in *NOW* is consistent with the majority of jurisdictions addressing the issue of whether section 1985(3) encompasses gender-based conspiratorial discrimination.[14] Furthermore, in finding that Operation Rescue conspiratorially violated abortion clinic patients' right to interstate travel and in issuing the permanent injunction, the Fourth Circuit's opinion

14. *See* Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218, 224-25 (6th Cir. 1991) (finding that women constitute cognizable class under § 1985(3)); NOW v. Terry, 886 F.2d 1339, 1355-59 (2d Cir. 1989) (holding that women qualify as valid protected class under § 1985(3)), *cert. denied*, 110 S. Ct. 2206 (1990); Volk v. Coler, 845 F.2d 1422, 1434 (7th Cir. 1988) (concluding that § 1985(3) encompasses conspiratorial discrimination based upon sex); Stathos v. Bowden, 728 F.2d 15, 20-21 (1st Cir. 1984) (applying § 1985(3) to award damages in sexual discrimination case); Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979) (finding that legislative history of § 1985(3) supports extending application of statute to women); Novotny v. Great Am. Fed. Savings & Loan Ass'n, 584 F.2d 1235, 1243-44 (3d Cir. 1978) (holding that conspiratorial discrimination based upon sex actionable under § 1985(3)), *vacated on other grounds*, 442 U.S. 366 (1979).

parallels the Second Circuit's analysis in *NOW v. Terry*, 886 F.2d 1339 (2nd. Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

Many federal defendants spend time under court-imposed conditions of release, in lieu of incarceration. Conditions of release may severely restrict liberty, as when a court conditions release on confinement in a residential drug treatment center. Prisoners will often seek to have that time credited against their sentences.

A prisoner's claim for sentence credit is a matter of sentence administration, which is under the authority of the Bureau of Prisons and the Attorney General. The prisoner must first bring his claim to the Bureau of Prisons.[15] If the prisoner is not satisfied with the outcome, he may seek judicial intervention by filing a petition for writ of habeas corpus in the district where he is incarcerated.

Two statutes control whether presentence time counts against a sentence. Title 18 U.S.C section 3585, which applies when the prisoner committed his offense on or after November 1, 1987, provides: "A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—(1) As a result of the offense for which the sentence was imposed[.]" Title 18 U.S.C. section 3568, which applies when the prisoner committed his offense prior to November 1, 1987, provides:

> The Attorney General shall give any . . . person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed[.] If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail of other place of detention.

Most circuits have held that the terms "official detention" in section 3585 and "custody" in section 3568 are equivalent.[16] However, the circuits differ on what kind of presentence restrictions rise to the level of official

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15. Courts generally require that prisoners exhaust administrative remedies in sentence credit cases. *See* United States v. Bayless, 940 F.2d 300, 305 (8th Cir. 1991) (holding that issue of sentence credit was not properly before court when defendant had not presented claim to Attorney General); United States v Herrera, 931 F.2d 761, 764 (11th Cir. 1991) (holding that district court lacked jurisdiction over claim for sentence credit because defendant had not exhausted administrative remedies). *But see* Brown v. Rison, 895 F.2d 533, 535 (9th Cir. 1990) (holding that court has power to hear claim for sentence credit before defendant exhausts administrative remedies because exhaustion is judicially created, not statutory, restriction).

16. *See, e.g.*, United States v. Zackular, No. 91-1482, 1991 WL 186667 (1st Cir. Sept. 24, 1991) (construing terms "custody" in 18 U.S.C. § 3568 and "official detention" in 18 U.S.C. § 3585 as equivalent); Randall v. Whelan, 938 F.2d 522, 524 n.1 (4th Cir. 1991) (same); Moreland v. United States, 932 F.2d 690, 692 n.4 (8th Cir. 1991) (same); Insley v. United States 927 F.2d 185, 186 (4th Cir. 1991) (same); United States v. Woods, 888 F.2d 653, 654-55 (10th Cir. 1989) (same).

detention or custody. The Fourth Circuit considered the issue of when to grant credit for presentence time in *United States v. Insley*, 927 F.2d 185 (4th Cir. 1991) and *Randall v. Whelan*, 938 F.2d 522 (4th Cir. 1991).

In *Insley* the defendant Insley sought credit for time spent on appeal bond. Insley argued that the conditions of her release on bond were sufficiently restrictive to constitute official detention under section 3585. The conditions of Insley's release required her to (1) seek employment, (2) reside with her parents, (3) leave her residence only to seek employment, work, or attend church, (4) regularly report to the United States Probation Office, (5) be at home no later than 9:00 p.m., (6) execute a bond, (7) be electronically monitored at her own expense, (8) submit to random drug testing, and (9) stay in touch with her attorney. The United States District Court for South Carolina refused to grant credit, and Insley appealed.

The Fourth Circuit affirmed. The *Insley* court held that the term "official detention" in section 3585 means imprisonment. The Fourth Circuit cited eleven cases from other courts denying credit for time spent on bond under a variety of conditions. The Fourth Circuit rejected Insley's attempt to broaden the meanings of the terms "official detention" and "custody" by relying on their meanings in other contexts. The *Insley* court also rejected the approach of two cases where other circuits had granted credit for time on bond under restrictive conditions. In *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990), the Ninth Circuit granted credit for time spent at a residential community treatment center. In *Johnson v. Smith*, 696 F.2d 1334 (11th Cir. 1983), the Eleventh Circuit granted credit for time spent in a federal treatment center. However, the Fourth Circuit noted that the conditions in *Brown* and *Johnson* were far more restrictive than Insley's conditions.

In *Randall* the defendant Randall sought credit for time spent before and after sentencing at a residential drug rehabilitation center. In January 1986, the trial court released Randall before trial on condition that he remain confined at the drug rehabilitation center at all times except for court appearances and meetings with counsel. On May 2, 1986, Randall pled guilty under a plea agreement. The government asked the trial court to delay sentencing while Randall completed his obligations under the plea agreement. At Randall's request the trial court imposed sentence on July 31, but delayed for sixty days Randall's obligation to report to a federal penitentiary. The trial court reasoned that during the sixty days, Randall could testify for the government at an upcoming trial and could continue drug treatment. Randall had requested the delay, and the government did not object. On July 31, the trial court issued two orders. The first order commanded Randall into the custody of the Attorney General and imposed sentence. The second order required Randall to surrender at a prison on October 1, 1986, in accordance with instructions from the United States Marshal, but that in the meantime, Randall was to be detained twenty-four hours a day at the drug rehabilitation center.

Several years later Randall petitioned the District Court for the Eastern District of Virginia for a writ of habeas corpus after the Bureau of Prisons

refused to give him sentence credit for his time at the drug rehabilitation center. Randall argued *Insley* did not create a bright line rule but rather held that decisions regarding sentence credit must rest on the severity of the restrictions. Randall argued that a Bureau of Prisons policy statement identified the degree of restraint as the critical factor in deciding whether to give sentence credit under section 3568, and asked the district court to find that the severe restrictions of his confinement for drug rehabilitation justified an award of sentence credit. The district court, relying on *Insley*, denied the petition, and Randall appealed.

The Fourth Circuit affirmed. Relying on *Insley*, the Randall court stated that conditions of release do not constitute "custody" within the meaning of section 3568. The Fourth Circuit rejected Randall's reading of the Bureau of Prisons policy statement because in the policy statement the Bureau of Prisons had clearly stated that a prisoner may not receive sentence credit for time spent in a residential community center as a condition of bail or bond. The *Randall* court gave deference to the Bureau of Prisons as an expert agency drawing a reasonable interpretation of a statute. The Fourth Circuit said that whether a person is in custody depends not on the degree of restraint, but rather on the legal authority of the custodian. A person not under the authority of the Attorney General is not in "custody" within the meaning of section 3568, the *Randall* court said.

The Fourth Circuit also said that Randall's situation was not covered by the second paragraph of section 3568 allowing credit for time committed to a jail or other place of detention to await transportation to where the prisoner will serve his sentence. The *Randall* court reasoned that this paragraph did not apply because Randall had asked to return to the rehabilitation center, the trial court and not the Attorney General had directed him to go there, and the situation was identical to that in *Insley* where the Fourth Circuit had refused credit for time on bond pending appeal.

The *Randall* court also said that using the degree of restraint as a test of custody would mire the judiciary in circumstantial details and lead to inconsistent results. Finally, the Fourth Circuit reasoned that denial of credit was not unfair because the Bureau of Prisons policy was longstanding, and therefore Randall should have known that he would not get sentence credit for time spent at the rehabilitation center.

A partial dissent in *Randall* objected to the majority's denial of credit for the sixty days that Randall had spent in the rehabilitation center after sentencing. The dissent argued that the sentencing order, by express language, committed Randall to the custody of the Attorney General. Furthermore, Randall's subsequent confinement satisfied the requirements of the second paragraph of section 3568, the dissent noted, because Randall was convicted, was in the legal custody of the Attorney General, was subject to orders of the United States Marshal regarding transportation to prison, and was in a place of detention.

The Fourth Circuit is in agreement with most other circuits that conditions of bond, no matter how restrictive, do not qualify for sentence

credit under section 3585 or section 3568.[17] However, a few circuits have granted sentence credit for time outside official incarceration. In *Johnson v. Smith*, 629 F.2d 1334 (11th Cir. 1983), the Eleventh Circuit granted credit for time spent in a federal community treatment center, holding that to deny credit to presentence residents while granting credit to postsentence residents was a violation of due process.[18] The Ninth Circuit in *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990), granted credit for time on pretrial release under conditions imposing enrollment at a treatment facility, curfew, restrictions on contacts, and random drug testing. The *Brown* court reasoned that the restrictions on the defendant's freedom were comparable to incarceration. In *Moreland v. United States*, 932 F.2d 690 (8th Cir. 1991), the Eighth Circuit followed *Brown*, granting credit for time on bond under restrictive conditions at a halfway house.

The Fourth Circuit's denial of credit in *Randall* for time after sentencing while in the legal custody of the Attorney General is singular. The *Randall* opinion is difficult to interpret because, on the one hand, the

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17. *See* United States v. Freeman, 922 F.2d 1393, 1396-98 (9th Cir. 1991) (denying credit for time spent on probation or release on bond pending appeal); Mieles v. United States, 895 F.2d 887, 888 (2d Cir. 1990) (denying credit for pretrial release on bond and holding that credit requires physical confinement); United States v. Woods, 888 F.2d 653, 656 (10th Cir. 1989) (denying credit for time spent on bond in residential treatment center and holding that granting such credit to postsentence residents of center but not to presentence residents did not violate equal protection); United States v. Carlson, 886 F.2d 166, 167 (8th Cir. 1989) (denying credit for time spent on restricted bond); Ramsey v. Brennan, 878 F.2d 995, 996 (7th Cir. 1989) (denying credit for time spent in halfway house before trial as condition of bail); United States v. Smith, 869 F.2d 835, 837 (5th Cir. 1989) (denying credit for time spent on restricted bond, in medical care unit, or in halfway house); United States v. Mares, 868 F.2d 151, 152 (5th Cir. 1989) (per curiam) (denying credit for pretrial release on bail); United States v. Figueroa, 828 F.2d 70, 71 (1st Cir. 1987) (denying credit for pretrial time spent on conditional release and holding that term "custody" in § 3568 means imprisonment); Marrera v. Edwards, 812 F.2d 1517, 1517 (6th Cir. 1987) (denying credit for time spent on bond and holding that term "custody" in § 3568 requires physical incarceration); Villaume v. United States Dept. of Justice, 804 F.2d 498, 499 (8th Cir. 1986) (per curiam) (denying credit for pretrial time on bond), *cert. denied*, 481 U.S. 1022 (1987); United States v. Golden, 795 F.2d 19, 21 (3d Cir. 1986) (denying credit for time spent in witness protection program waiting for order to self-surrender); Cerrella v. Hanberry, 650 F.2d 606, 607 (5th Cir. 1981) (per curiam) (denying credit for time spent under restrictive bail conditions); United States v. Robles, 563 F.2d 1308, 1309 (9th Cir. 1977) (per curiam) (denying credit for time spent on restrictive bond), *cert. denied*, 435 U.S. 925 (1978); Ortega v. United States, 510 F.2d 412, 413 (10th Cir. 1975) (per curiam) (denying credit for time spent on bond and holding that term "custody" in § 3568 means incarceration); United States v. Peterson, 507 F.2d 1191, 1192-93 (D.C. Cir. 1974) (per curiam) (denying credit for time spent on conditional release pending appeal); Polakoff v. United States, 489 F.2d 727, 730 (5th Cir. 1974) (denying credit for time spent on restrictive bond); Sica v. United States, 454 F.2d 281, 282 (9th Cir. 1971) (denying credit for time released on bail pending appeal); United States v. Rouco, 738 F. Supp. 172, 173 (W.D.N.C. 1990) (holding that term "custody" in § 3568 means incarceration in official detention facility).

18. *But see* United States v. Woods, 888 F.2d 653 (10th Cir. 1989) (denying credit for time spent on bond in residential treatment center and holding that granting such credit to postsentence residents of center but not to presentence residents did not violate equal protection).

Fourth Circuit says the term "custody" means legal custody, but on the other hand, the Fourth circuit denies credit when a prisoner is in legal, but not actual, custody. No other circuit court has denied a prisoner sentence credit for time spent after sentencing while in the legal custody of the Attorney General.

Federal Rule of Civil Procedure 32 (Rule 32) places conditions upon the use of witness depositions in trial proceedings. If a deposition is admissible under the rules of evidence, it may be used at trial, subject to certain limitations, as though the witness were present and testifying.

Prior to the revision of the Federal Rules of Civil Procedure in 1970, old Rule 26(a) provided that depositions could be taken for discovery purposes, for use at trial, or for both purposes. Old Rule 26(d), which preceded Rule 32(a) in governing the use of depositions at trial, noted the distinction between discovery and evidentiary depositions. However, courts did not distinguish between the two types of depositions when deciding the admissibility of depositions at trial.[19] After the revision of the Federal Rules of Civil Procedure, the subject matter of old Rule 26(a) was transferred to Federal Rule of Civil Procedure 30(a), while the subject matter of old Rule 26(d) was transferred to Rule 32(a).

Today, Rule 30 lays out the ground rules for taking depositions whereas Rule 32 addresses the use of depositions at trial. Neither rule makes reference to a distinction between depositions taken for discovery purposes and depositions taken for evidentiary purposes. The distinction between the two types of depositions, which was noted in the Federal Rules of Civil Procedure only prior to the 1970 revision, has not been highlighted in circuit court or district court cases.[20]

Currently, Rule 32(a)(3)(B) states that if a witness is located further than 100 miles from the place of trial or is out of the United States, a deposition of that witness is admissible during trial. However, if the party opposing admission of the deposition can show that the absence of the witness was caused by the party offering the deposition, the party offering the deposition may not use it at trial. Rule 32(a)(3)(B) specifies that the 100 mile distance should be measured from the "place of trial." The term "place of trial" has been used interchangeably with the word "courthouse"

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19. *See* Wright Root Beer Co. v. Dr. Pepper Co., 414 F.2d 887, 889-91 (5th Cir. 1969) (stating that depositions taken pretrial for purposes of discovery which were subject to cross-examination should have been admitted at trial when stipulations of Rule 26(d)(3) were met and that jury instructions directing jury not to give discovery depositions any weight were prejudicial and erroneous); Rosenthal v. People's Cab Co., 26 F.R.D. 116, 117 (W.D. Pa. 1960) (noting that Rule 26(d) does not distinguish between depositions taken solely for purposes of discovery and depositions taken for use at trial and that court would not read restriction into Rule which did not exist).

20. *See* Savoie v. Lafourche Boat Rentals, Inc., 627 F.2d 722, 724 (5th Cir. 1980) (citing Rule 32 as basis for rejection of contention that discovery depositions may not be used at trial against party who conducted them); United States v. International Business Machines Corp., 90 F.R.D. 377, 381 (S.D.N.Y. 1981) (stating that Rule 32 makes no distinction between discovery depositions and depositions taken for use at trial).

in opinions by some courts.[21] However, the drafters of Rule 32(a)(3)(B) did not indicate whether the "place of trial" is the district in which the courthouse where trial is held sits, or the actual courthouse.

Other Federal Rules of Civil Procedure do include the direction to measure a distance either from the courthouse or from the borders of the district. For instance, Rule 45(e), which addresses service of process, specifically mentions that the 100 mile radius limiting service of process is to be measured from the place of trial. However, if a defendant is within the district, even though farther than 100 miles away, the court may issue service of process under Rule 45(e). Courts have contrasted the specificity of the language in Rule 45(e) with the language in Rule 32 and determined that the 100 mile radius in Rule 32(a)(3)(B) should be measured from the courthouse and should apply even if the party is within the district.[22]

In *Tatman v. Collins*, 938 F.2d 509 (4th Cir. 1991), the United States Court of Appeals for the Fourth Circuit considered whether a deposition taken for discovery purposes is admissible under Rule 32(a)(3)(B) and whether the rule's 100 mile requirement should be measured from the courthouse or from the borders of the district. The plaintiff, Rebecca Tatman, brought suit for Monte L. Tatman, her deceased husband. A tractor-trailer driven by the defendant Bobby Wayne Collins had struck Mr. Tatman's automobile from the rear. Following the accident, Mr. Tatman was treated by Dr. Joseph Amico for injuries to his neck, back, shoulder and head. A year later, Mr. Tatman was hospitalized with a cerebral aneurysm and died shortly thereafter.

Mr. Tatman's wife filed a wrongful death suit against the defendant and Tatman's employer in the United States District Court for the Southern District of West Virginia. The complaint alleged that Mr. Tatman's death was causally linked to the injuries sustained in the earlier accident. The complaint further alleged that the accident caused the defendant's blood pressure to rise and fall uncontrollably which, in turn, caused the aneurysm. In a deposition, Dr. Amico testified about the treatment given to Mr. Tatman and opined that there was a causal connection between the injuries sustained by Mr. Tatman in the accident and the subsequent aneurysm. Because a scheduling conflict more than 100 miles from the courthouse prevented Dr. Amico from coming to the trial, Mrs. Tatman's attorney sought to introduce the doctor's earlier deposition testimony.

The district court excluded the deposition under Rule 32(a) because the defendant had deposed the doctor early in the trial for discovery

21. *See* United States v. Vespe, 868 F.2d 1328, 1339 (3d Cir. 1989) (stating that Rule 32 permits deposition of witness who is more than one hundred miles from courthouse); Starr v. J. Hacker Co., 688 F.2d 78, 81 (8th Cir. 1982) (using "courthouse" as site from which to measure required 100 mile distance).

22. *See* United States v. International Business Machines Corp., 90 F.R.D. 377, 380 (S.D.N.Y. 1981) (holding that 100 mile limitation in Rule 32(a)(3)(B) is not meant to correspond to subpoena power under Rule 45(e) and that deposition of witness who is beyond 100 mile limit but within district can be used at trial, although deponent is subject to subpoena power of court).

purposes, not specifically for use as evidence in the trial. The court also concluded that the deposition could not be used under Rule 32(a)(3)(B) because Amico's location at the time of trial was within 100 miles of the northern border of the Southern District of West Virginia, although more than 100 miles from the courthouse.

The only other witness who could link Mr. Tatman's aneurysm to the accident was Dr. Cyril Wecht, who relied on Amico's testimony to reach his conclusions. Wecht's testimony was struck by the court, and the opinion does not mention why the testimony was struck. The court granted defendant's motion for a directed verdict. The jury returned a verdict on the survivor's claim, finding that Collins' actions were negligent, but that the actions were not the proximate cause of the accident.

Mrs. Tatman appealed the district court's interpretation of Rule 32 and the subsequent exclusion of Amico's testimony to the Fourth Circuit. The Fourth Circuit addressed both of the district court's reasons for exclusion and overturned the district court's findings. First, the appellate court explained that the Federal Rules of Civil Procedure do not differentiate between depositions taken during discovery and depositions taken for use at trial. Because no prior Fourth Circuit decisions had addressed this issue, the court looked to other circuits for guidance and did not find any support for treating discovery depositions differently from evidentiary depositions. The court reasoned that the protective devices of cross-examination, objections and motions, are available to parties in both discovery and evidentiary depositions. The court decided that when the witness' deposition is duly noticed and all parties have the opportunity to attend, the deposition is admissible at trial if the witness is unavailable according to the criteria of Rule 32(a)(3)(B) and if the admission is also permissible under the Federal Rules of Evidence. The court held that the identity of the party which initiated the deposition and the rationale for taking the deposition are irrelevant. The Fourth Circuit noted that a discovery deposition meeting the requirements of Rule 32(a)(3)(B) might still be excluded in the court's discretion if it violates the Federal Rules of Evidence. The *Tatman* holding is to apply solely to disputes over the admission of depositions on the basis that they had been taken for discovery, rather than evidentiary, reasons.

Next, the Fourth Circuit addressed the method of measuring the 100 mile radius under Rule 32(a)(3)(B). The Fourth Circuit held that for purposes of applying the rule, the "place of trial" is the courthouse where the trial takes place. The court explained that the policy behind the rule is to ensure the convenience of the witness and the parties and that the limit of convenience is measured by the 100 mile distance. The court reasoned that measuring the distance from the borders of the district would provide a variable standard of convenience, dependent upon factors such as the size of the district and the location of the trial. The court also compared the language of Rule 32(a)(3)(B) to other statutes in the Federal Rules of Civil Procedure. The court found that because other rules specifically indicate that a distance is to be measured starting from

the borders of the district, the use of the term "place of trial" in Rule 32(a)(3)(B) indicates a locus more definite that the district as a whole. The court cited *United States v. International Business Machines Corp.*, 90 F.R.D. 377, 380 (S.D.N.Y. 1981) as support for this conclusion. The *IBM* court had gone through a similar analysis and also had come to the conclusion that "place of trial" was meant to indicate the courthouse. The Fourth Circuit also looked to cases interpreting "place of trial" and found several which use "place of trial" and "courthouse" interchangeably. Applying these findings to the facts of *Tatman*, the Fourth Circuit held that because Dr. Amico was located more than 100 miles from the courthouse and because the plaintiffs made no showing that Amico's absence was procured by either party, Amico's deposition was not properly excludable.

In his dissent, Judge Hall agreed with the majority's use of the courthouse as the point from which the 100 mile radius should be measured but disagreed with the admission of the deposition. While Judge Hall admitted that there is no categorical exclusion of discovery depositions at trial, he focused on the inherent weakness of the proof offered by Amico's excluded testimony. Judge Hall stated that while Rule 32(a)(3)(B) permits the introduction of the deposition, the rule does not require the introduction. Therefore, he would have found that the district court had not abused its discretion in excluding the deposition and that its decision should not be overturned.

The *Tatman* decision is consistent with the holdings of other circuits addressing the same issues under Rule 32(a)(3)(B).[23] The Fourth Circuit's clear interpretation of the application of Rule 32(a)(3)(B) helps simplify an important procedural problem. Although the Fourth Circuit did not break from the trend in other circuits in its interpretation of Rule 32(a)(3)(B), *Tatman* clarifies the state of the law in this circuit.

The recently enacted Sentencing Reform Act (the "Act") is already a source of judicial controversy and confusion. To interpret the Act's numerous provisions courts have resorted to the plain language of the statute and to the guidelines published by the United States Sentencing Commission, Chapter 7, U.S.S.C. Guidelines Manual. Section 3565 of the Act, 18 U.S.C. § 3565 (1992), which provides for a defendant's resentencing upon revocation of probation due to violation of probation conditions, is the source of much confusion. The precise issue is whether the language "any other sentence that was available under subchapter-A at

23. *See* Polys v. Trans-Colorado Airlines, Inc., 941 F.2d 1404, 1410 (10th Cir. 1991) (stating that in application of Rule 32, courts no longer distinguish between depositions taken for discovery use or for trial use); United States v. Vespe, 868 F.2d 1328, 1339 (3d Cir. 1989) (describing Rule 32(a)(3)(B) as permitting deposition of witness who is more than 100 miles from courthouse to be used as testimony); Starr v. J. Hacker Co., 688 F.2d 78, 81 (8th Cir. 1982) (applying Rule 32(a)(3)(B) and measuring 100 mile distance from courthouse).

the time of the initial sentencing"[24] includes consideration of the postsentence conduct constituting the breach of probation. Only three federal circuit courts have considered whether the statutory language restricts a resentencing court to imposition of a sentence not exceeding the guideline range applicable at the time of original sentencing or whether the resentencing court may consider the violation of the probation condition itself as new criminal conduct calling for increased sentencing sanctions.[25] In each of the circuit court cases, the court concluded that the Act's language requires a sentencing court, resentencing after a probation violation, to impose a sentence not exceeding the original guideline range.

In *United States v. Alli*, 929 F.2d 995 (4th Cir. 1991), the United States Court of Appeals for the Fourth Circuit considered whether the court, upon revocation of probation, can resentence a defendant to a term of active prison confinement in excess of the guideline range applicable at the time of his initial sentencing. Hassan Mohammad Alli, Jr. ("Alli") was sentenced to a three-year term of probation following a plea of guilty to breaking into a United States Post Office building. At the time of Alli's sentencing the guideline range was premised on a number of factors according to the statutory scheme, including offense category level, criminal history, and mitigating or aggravating circumstances. The calculated sentence range for Alli's offense was six to twelve months. The court utilized its discretion under the guidelines and imposed conditional probation instead of a prison sentence. Under the probation conditions Alli was to serve six months in a community treatment center and to refrain from possession of any narcotic or controlled substance. Alli violated both of these probation conditions and was returned to district court for a hearing and resentencing. The District Court for the Middle District of North Carolina revoked Alli's probation and sentenced him to a fifteen month prison term and three years probation.

Alli appealed the district court's resentencing decision, arguing that section 3565(a)(2) of the sentencing guidelines restricts the district court from imposing a prison term upon revocation of probation beyond the term applicable at the time of original sentencing. According to Alli, the applicable imprisonment range under sections 3551-3559 for his Class D felony was six to twelve months. Alli also argued that in testing positive for cocaine he necessarily violated a mandatory condition of probation under section 3563(a)(3), which makes abstention from possession of illegal

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24. 18 U.S.C. § 3565(2) (1992).

25. *See* United States v. Von Washington, 915 F.2d 390, 391 (8th Cir. 1990) (holding that resentencing court must refer to applicable guideline range from initial sentencing hearing when resentencing after violation of probation); United States v. Smith, 907 F.2d 133, 136 (11th Cir. 1990) (holding that following revocation of probation court is required to impose sentence that was available at time of original sentencing); United States v. Foster, 904 F.2d 20, 21 (9th Cir. 1990) (holding that where imprisonment could not have been imposed on defendant during initial sentencing it could not be imposed at resentence hearing).

substances a mandatory condition of probation. When a defendant violates this mandatory probation condition, the last sentence of section 3565(a) requires revocation of probation and imposition of a sentence not less than one-third of his original sentence. Thus, Alli argued that the sentence statute required the court to impose no more than a one-year prison term.

The government argued that application of the initial guideline range of six to twelve months would be inappropriate because this sentencing range, determined at the initial sentence hearing, did not take into account the criminal conduct constituting the later probation violation. Because no guideline provision was in effect at the original sentencing to take into consideration this conduct, the court must necessarily go back to the section 3553 guideline calculations to impose an appropriate resentence after probation revocation.

To resolve the issue the Fourth Circuit reviewed the express language of the resentencing section and found the language to be unambiguous. This section provides that upon revocation of probation the court should "impose any other sentence that was available under subchapter-A at the time of the initial sentencing." The court found this language to limit resentencing after revocation of parole to a sentence that was available at the time of the original sentence. Such sentence range would not include the conduct causing the breach of probation.

The court also reviewed statements published by the Guideline Commission ("Commission") to assist courts when interpreting the Sentencing Reform Act provisions. The court explained that the Commission's policy statements supported a direct reading of the statute, as opposed to the twisted reading the government proposed. The court noted that when writing the Act the Commission had considered different approaches to the sanctioning of defendants for violation of probation and supervised release. According to the court, the Commission decided to treat the violations as breaches of trust, rather than treating the probation violators' conduct as new federal criminal conduct for sentencing purposes. Thus, the court concluded that the goal of a revocation sentence was not to punish violators for new criminal conduct.

However, the court was careful to note that the Commission acknowledged that the post-probation conduct could be considered in measuring the extent of the breach of trust, and thus may weigh into a court's resentencing decision, within the original guideline range. The court also noted that the Commission's issuance of specific probation revocation guidelines did not alter the Commission's or Congress' intent under section 3565 to apply the original guideline range following probation revocation.

The Fourth Circuit rejected the government's argument that a defendant's misconduct in violating his probation will go unpunished under this reading of the statutory language. The court said that the post-sentencing conduct is still relevant at the probation revocation proceeding to determine precisely where within the original sentence range the defendant's prison term should now be set. In addition the court noted that a defendant loses any time already spent in community confinement when he violates

his probation and thus the appellant's violation of probation does not go unpunished.

The court analyzed the case under the plain meaning of the Sentencing Reform Act provision for resentencing. In Alli's situation the applicable guideline range was six to twelve months. Thus, the court held that Alli could be sentenced to a maximum of twelve months because this was the maximum sentence applicable to him under the guidelines at the time of his initial sentencing. Furthermore, Alli lost the 138 days he spent in community confinement, but was entitled to 51 days credit against his new sentence for time he spent in custody following his probation violation. The court vacated the district court's sentence and remanded for resentencing according to this interpretation.

Judge Norton dissented claiming the majority's interpretation of the statute was at odds with the Sentencing Reform Act taken as a whole, has no support in the legislative history, and produces anomalous results. He argued that the most straightforward reading of the statutory language does not compel the majority's conclusion that section 3565 means any other sentence within the original guideline range. He stated that the majority did not interpret the statutory words according to their plain meaning, but read into them an additional limitation not evident in the words themselves. Judge Norton interprets the statutory language "any other sentence" to refer to any sentence up to the statutory maximum under subchapter-A which may now be different due to the post-sentencing conduct, as opposed to any sentence available under the original guideline sentence.

Because the Sentencing Reform Act is a relatively new piece of legislation, only three other circuit courts have faced the issue at hand.[26] The Fourth Circuit's decision in this case is consistent with the three other appellate court interpretations. Each circuit court ultimately concluded that the clear language of 3565(a)(2) controls, and requires that upon resentencing following revocation of probation the resentencing court is limited to a sentence within the guideline range determined at the time of original sentencing.

Controversy has long surrounded the application of state-created privileges in federal criminal cases. One dispute focuses on the admissibility of evidence that state criminal law prohibits but that federal law allows. Federal Rule of Evidence 501 (Rule 501) provides for the incorporation

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26. *See* United States v. Von Washington, 915 F.2d 390, 391 (8th Cir. 1990) (holding that resentencing court must refer to applicable guideline range from initial sentencing hearing when resentencing after violation of probation); United States v. Smith, 907 F.2d 133, 136 (11th Cir. 1990) (holding that following revocation of probation court is required to impose sentence that was available at time of original sentencing); United States v. Foster, 904 F.2d 20, 21 (9th Cir. 1990) (holding that where imprisonment could not have been imposed on defendant during initial sentencing it could not be imposed at resentence hearing).

of common law privilege doctrines in federal cases. However, Rule 501 also provides for state law to determine the applicability of an evidentiary privilege in those actions where state law supplies the rule of decision with respect to an element of a claim or defense. Under Rule 501, courts must first determine whether the state law privilege is in conflict with common law evidentiary rules.[27] If the state law privilege is indeed in conflict with the common law, the courts must then balance the underlying considerations of the state law with the interests underlying the federal law and determine which law should apply.[28]

In *United States v. Cartledge*, 928 F.2d 93 (4th Cir. 1991), the United States Court of Appeals for the Fourth Circuit applied a Rule 501 balancing test to determine the applicability of a North Carolina state law privilege in a federal criminal case. In *Cartledge*, the court considered whether the Federal District Court for the Middle District of North Carolina erred in suppressing evidence, in accordance with North Carolina General Statute section 20-135.2A(d), of an alleged seat belt violation. Section 20-135.2A(d) prohibits the introduction of evidence of a seat belt violation in all criminal and civil trials except those based upon the accused's infraction of the seat belt law itself.

On October 11, 1989, the defendant, Larry Cartledge (Cartledge), drove his 1984 Chevrolet Corvette north on Interstate 85. The Corvette had dark, tinted windows. Cartledge passed Highway Patrolman A.C. Combs' (Combs) patrol car parked in the median on Interstate 85. Cartledge was not speeding at the time he passed Combs' parked patrol car.

Combs noticed the tinted windows on Cartledge's Corvette as the vehicle passed the patrol car. Combs testified that he could not see whether the driver of the Corvette wore a seat belt. Combs pursued the Corvette and directed Cartledge to stop the car. After Cartledge showed Combs his driver's license and car registration, Combs cited Cartledge for driving

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27. *See* Memorial Hosp. v. Shadur, 664 F.2d 1058, 1061 (7th Cir. 1981) (concluding question of whether party may assert state-created evidentiary privilege rests upon principles of common law); United States v. Gillock, 445 U.S. 360, 371-73 (1980) (holding judicially created evidentiary privilege for state legislators not comparable to federal Speech or Debate Clause designed to protect federal legislators); United States v. Chiarella, 588 F.2d 1358, 1372 (2d Cir. 1978) (ruling state-created privileges not controlling in federal criminal cases except to extent state privileges reflect common law); In re Prod. of Records to the Grand Jury, 618 F. Supp. 440, 442 (D. Mass. 1985) (holding Massachusetts law prohibiting release of certain medical records in conflict with federal common law).

28. *See Gillock*, 445 U.S. at 373 (concludinig federal law must override state law in cases involving important federal interests, such as enforcement of federal criminal statutes); *Chiarella*, 588 F.2d at 1372-73 (ruling that strong federal policy favoring admissibility of evidence in criminal cases outweighed state's interest in providing evidentiary privilege for statements made in applying for unemployment benefits); *Memorial Hosp.*, 664 F.2d at 1061 (concluding that federal courts should consider and weigh importance of state-created privilege in determining whether federal law or state law should apply in particular case); *Grand Jury*, 618 F. Supp. at 442 (holding that Rule 501 requires court to consider both federal and state interests and balance federal interests against underlying purposes of state evidentiary privilege).

without a seat belt in violation of North Carolina General Statute section 20-135.2A(a).

Combs then asked if Cartledge was in possession of any alcohol or firearms. Cartledge told Combs that a gun was in the console of the Corvette. Combs searched the Corvette and found a handgun in the console and over $20,000 in cash in a grocery bag under a speaker in the back seat. Combs also searched Cartledge and Cartledge's passenger. Combs discovered over $3,000 in cash in Cartledge's pockets and a pocket knife in the passenger's possession. At some point during Combs' search, Cartledge signed a consent-to-search form. A drug detection dog detected the scent of drugs on the bag of money hidden in the back seat. However, the police found no drugs in the car.

In addition to the seat belt citation, officers charged Cartledge with carrying a concealed weapon in violation of North Carolina law. The prosecutor later dismissed both the seat belt citation and the weapons charge and charged Cartledge in federal court with possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g) and 924(a). Cartledge moved prior to trial to suppress evidence of the seat belt violation, alleging that Combs had no probable cause to stop Cartledge's vehicle because Combs could not tell whether Cartledge wore a seat belt through the tinted windows of the Corvette.

The district court granted Cartledge's motion to suppress evidence of the seat belt violation. The court prohibited evidence of the defendant's failure to wear a seat belt under North Carolina General Statute section 20-135.2A(d), which excludes such evidence in cases where the defendant did not come to trial for violation of the seat belt law. In its initial order, the district court also found that Combs' stop of Cartledge's vehicle was pretextual. However, the district court later issued findings of fact and conclusions of law stating that the court did not reach the merits of the probable cause issue in deciding to suppress evidence of Cartledge's seat belt violation.

The Fourth Circuit rejected the district court's conclusions, holding that the district court failed to balance competing federal and state interests pursuant to Federal Rule of Evidence 104(a) and Rule 501. Rule 104(a) states that the court should determine any preliminary questions concerning witness qualification, the existence of a privilege, or the admissibility of evidence. Rule 104(a) also provides that the rules of evidence do not bind the court except with regard to privileges. Rule 501 requires a court to follow state-created evidentiary privileges only when the state law is synonymous with the common law or when state interests in upholding the privilege outweigh federal interests.

The Fourth Circuit at the outset considered the possibility that North Carolina General Statute section 20-135.2A(d) failed to create the type of privilege contemplated under Rule 501. The court, however, did not resolve that issue. The court instead concentrated on the issue of whether state or federal criminal law should apply in Cartledge's case, even if a privilege did in fact exist under North Carolina law.

The Fourth Circuit then examined prior case law to determine the applicability of the North Carolina evidentiary privilege in Cartledge's federal criminal case. The court first considered the decision reached in *United States v. Gillock*, 445 U.S. 360 (1980). In *Gillock*, the defendant asserted that a Tennessee statute created an evidentiary privilege for state legislative speech and debate. The United States Supreme Court in *Gillock* ruled that Tennessee's evidentiary privilege for state legislators did not coincide with federal common law privilege, even though an evidentiary privilege existed for federal legislators. The Court then balanced the competing federal and state interests regarding evidentiary privilege for legislative speech and debate. The Court concluded that the federal interest in enforcing criminal statutes outweighed Tennessee's state policy considerations. Thus, the Supreme Court applied federal law in *Gillock*.

The Fourth Circuit also relied on three cases from other federal circuit courts that balanced competing federal and state interests in evidentiary matters. In *United States v. Chiarella*, 588 F.2d 1358 (2d Cir. 1978), Vincent Chiarella (Chiarella) allegedly used confidential information to purchase and sell tender offers at a substantial profit. A jury convicted Chiarella of violating section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. Among his other arguments on appeal, Chiarella contended that the lower court wrongfully admitted into evidence a statement in which Chiarella admitted he left his prior job as a result of misusing confidential information. Chiarella made the statement when applying for unemployment benefits, and a New York labor law provided for exclusion of such statements. As in the *Gillock* case, the court weighed the interests of the state against federal interests. The *Chiarella* court concluded that the federal policy favoring admissibility of evidence in criminal cases outweighed the policy considerations of the New York evidentiary privilege.

The Fourth Circuit noted that similar conclusions resulting from the balancing of federal and state interests to determine the applicability of state-created privileges appear in *Memorial Hospital v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981) and *In re Production of Records to the Grand Jury*, 618 F. Supp. 440, 442 (Mass. Dist. Ct. 1985), both cited in *Cartledge*. The *Memorial Hospital* court and the *Grand Jury* court agreed that, under Rule 501, federal common law principles govern recognition of an evidentiary privilege. The courts also held that the trier of fact must balance federal and state interests and apply state law only when that law does not interfere substantially with federal policy interests.

After reviewing case law establishing the balancing test used to determine the applicability of state and federal law privileges, the Fourth Circuit in *Cartledge* balanced the competing state and federal policies that the North Carolina privilege excluding evidence of seat belt violations in particular cases implicated. The court found that the federal interest in enforcing federal criminal statutes outweighed any state interest connected with North Carolina General Statute section 20-135.2A(d). The Fourth Circuit thus reversed the district court's suppression of Cartledge's seat

belt infraction. However, the Fourth Circuit remanded the case for retrial at the district court level to determine whether evidence of the seat belt violation was nevertheless inadmissible on grounds that Combs' stop of Cartledge's vehicle was pretextual and failed to establish probable cause.

The decision of the Court of Appeals for the Fourth Circuit in *Cartledge* is consistent with prior case law at the Supreme Court, appellate court and district court levels. As illustrated in the Supreme Court's decision in *Gillock* and in the other federal cases which the Fourth Circuit discusses in *Cartledge*, a strong federal policy exists favoring the introduction of all relevant evidence in a criminal proceeding. Therefore, the *Cartledge* court's ruling that the federal interest in enforcing a criminal statute outweighs any interest of the state of North Carolina in excluding evidence of seat belt violations brings the Fourth Circuit in accord with the holdings of other circuits.

Section 5k1.1 of the Federal Sentencing Guidelines, 18 U.S.C. § 3553(e) (effective Nov. 1, 1987; amended effective Nov. 1, 1989), provides that federal courts do not have the power to impose, *sua sponte*, a lower sentence than is statutorily required. Under the Sentencing Guidelines; a sentencing court can depart downward from the applicable statutory guideline range only upon a motion from the government requesting a downward departure. In light of section 5k1's "downward departure" provision, sentencing courts generally refuse to depart downward from the applicable guideline range absent a formal request by the government for a downward departure—even when the defendant substantially cooperates with law enforcement officials.[29] Against this background, the Fourth Circuit, in *United States v. Daniels*, 929 F.2d 128 (4th Cir.), *cert. denied*, 112 S. Ct. 201 (1991), considered, *inter alia*, whether the district court erred in refusing to order specific performance of an informal plea agreement.

Daniels was charged with possession and conspiracy to distribute "substantial amounts" of crack cocaine. Daniels pleaded guilty to one count which charged him with possession of crack cocaine with intent to

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29. *See* United States v. La Guardia, 902 F.2d 1010, 1018 (1st Cir. 1990) (finding nothing improper with government's decision to forego departure motion notwithstanding defendant's substantial cooperation with government); United States v. Reina, 905 F.2d 638, 640-41 (2d Cir. 1990) (holding district court could not depart downward from Sentencing Guidelines range on basis of defendant's substantial assistance in prosecution of another defendant absent motion for downward departure from government). *But see* United States v. Roberts, 726 F. Supp. 1359, 1375-76 (D.C. 1989) (holding district court has authority to consider defendant's cooperation with law enforcement officials for limited sentencing purposes), *reversed*, United States v. Mills, 925 F.2d 455 (4th Cir.), *vacated rehearing en banc granted sub nom.* United States v. Mills, 933 F.2d 1042 (D.C. Cir.), *reversed sub nom.* United States v. Doe, 934 F.2d 353 (D.C. Cir.), *cert. denied*, 112 S. Ct. 268 (1991). The *Roberts* court explained that district courts may inquire as to whether a defendant has provided the prosecution with substantial assistance in determining whether prosecution's decision not to request a downward departure was arbitrary. *Id.* at 1375. The *Roberts* court also noted that the district court may inquire as to whether the procedures leading to the government's decision not to file a motion for a downward departure were not unfair despite Sentencing Guidelines provision permitting departure from guidelines for substantial assistance only upon prosecution's motion. *Id.* at 1376.

distribute. Daniels was sentenced in the United States District Court for the Southern District of West Virginia. Because of Daniels's juvenile criminal record, the district court found the criminal history category III of the Sentencing Guidelines applicable. Consequently, the district court sentenced Daniels to 188 months, the minimum possible sentence under the applicable guideline range. Daniels appealed his sentence to the Fourth Circuit alleging, *inter alia*, that the district court improperly refused to order specific performance of an alleged informal plea agreement between Daniels and a police detective. Daniels alleged that subsequent to his arrest, but before counsel was appointed, a police detective told him that "if [Daniels] cooperated in capturing [his] other codefendants and clearing this matter up, that [the police] would see to it that [Daniels] got a lot less time or something to that effect." The police detective recalled the conversation, but testified that he merely promised Daniels that if Daniels cooperated with the police, the police would "advise the authorities of the extent of [Daniels's] cooperation." Daniels did in fact assist the police in capturing one of his codefendants.

More than two months after Daniels was arrested, Daniels, with the advice of counsel, entered into a plea agreement with the government under which Daniels agreed to plea guilty to one count of a four count indictment. Under this agreement Daniels also agreed to cooperate further with the police regarding the prosecutions of his codefendants. In return, the government promised to dismiss the remaining three counts of the indictment. Under the agreement the government also informed Daniels that his sentence would not be less than ten years and not more than life. Daniels and his counsel, at a Rule 11 hearing before the district court, testified that the plea agreement was the sole agreement with the government. However, at sentencing, Daniels requested a downward departure from the sentencing guidelines based on the police detective's informal promise. The district court refused to consider the informal promise because of Daniels's prior testimony that the written plea agreement with the government was the only agreement with the government.

The Fourth Circuit found that the district court's refusal to consider a downward departure was not clearly erroneous under the standard enunciated in *Anderson v. Bessemer City*, 470 U.S. 564 (1985). *Anderson* requires reviewing courts to afford trial courts substantial deference regarding findings of fact. The Fourth Circuit noted that the government never promised to file a motion for a downward departure because of Daniels's cooperation with the police. The Fourth Circuit further noted that the district court, at Daniels's Rule 11 hearing, inquired sufficiently into the possible existence of additional plea agreements. The Fourth Circuit explained that even if Daniels had argued at his Rule 11 hearing that there was an additional unwritten plea agreement between Daniels and the government, Daniels would not be entitled to a downward departure. According to the Fourth Circuit, unless there is an agreement requiring the government to file a motion for a downward departure, a defendant has no right to demand that one be filed. In Daniels's case the

informal statement of the police detective did not amount to a promise to file a motion of a downward departure as required under section 5k1 of the Sentencing Guidelines. Consequently, the Fourth Circuit affirmed Daniels's sentence.

The Fourth Circuit's strict interpretation of the "plea agreement" provision in the Federal Sentencing Guidelines in this case is in accord with the holdings of other circuits that have recently considered the issue.[30] The United States Supreme Court denied certiori.[31]

Prior to 1987, the Supreme Court's decision in *United States v. Grayson*, 438 U.S. 41 (1978), allowed, but did not require, a sentencing judge to consider the falsity of a convicted defendant's testimony in passing sentence. Section 3C1.1 of the United States' Sentencing Commission Guidelines, 18 U.S.C. App. 4 (Supp. 1991) (Sentencing Guidelines), now requires a judge to increase the sentencing level of a convicted defendant by two levels for "obstruction of justice." The Sentencing Guidelines Commentary defines obstruction of justice to include committing or suborning perjury. U.S.S.G. § 3C1.1, cmt., note 1(c) (Nov. 1989); *id.*, cmt., note 3(b) (Nov. 1990). The Application Notes to the Sentencing Guidelines provide,

> This provision is not intended to punish a defendant for the exercise of a constitutional right [*e.g.*, the right to testify on his own behalf, to the due process of being charged with the crime of perjury prior to being punished for it, etc.]. A defendant's denial of guilt is not a basis for application of this provision . . . . [S]uspect testimony and statements should be evaluated in a light most favorable to the defendant.[32]

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30. *See* United States v. Poston, 902 F.2d 90, 100 (D.C. Cir. 1990) (holding police officer's general promise to reward defendant's cooperation by informing prosecution of cooperation did not obligate prosecution to file motion for downward departure from federal sentencing guidelines); United States v. Coleman, 895 F.2d 501, 504 (8th Cir. 1990) (recognizing that absent express promise by government to file motion for downward departure from mandatory minimum sentence, plea agreement is unambiguous and cannot bind government to file such motion); *cf.* United States v. Alamin, 895 F.2d 1335, 1337 (11th Cir.) (explaining that district court may not depart from sentencing guidelines based on substantial assistance furnished by defendant absent motion by government requesting departure), *reh'g denied*, 904 F.2d 712 (11th Cir. 1990); United States v. Ortez, 902 F.2d 61, 64 (D.C. Cir. 1990) (finding district court did not have power to depart from applicable Sentencing Guidelines on basis of defendant's substantial cooperation with law enforcement authorities without government motion affirming defendant's cooperation); United States v. Dobynes, 905 F.2d 1192, 1197 (8th Cir. 1990) (explaining that, despite defendant's cooperation, under Federal Sentencing Guidelines, court has no authority to even consider downward departure unless government makes motion for reduction).

31. Daniels v. United States, 112 S. Ct. 201 (1991).

32. U.S.S.G. § 3C1.1, appl. notes 2 & 3 (Nov. 1989). This version of the Application Notes applied at the time the district court tried, convicted and sentenced Dunnigan. United States v. Dunnigan, 944 F.2d 178, 182 (4th Cir. 1991). Effective November 1, 1990, new

Prior to August 30, 1991, all of the courts of appeal that encountered the issue of the constitutionality of the optional sentencing enhancement for obstruction of justice upheld the provision.[33]

In *United States v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991), a court of appeals refused, for the first time, to accept the constitutionality of the Sentencing Guidelines' increase of a convicted defendant's sentence for falsely testifying at his own trial. In addition to the sentencing guidelines issue in *Dunnigan*, the United States Court of Appeals for the Fourth Circuit also considered the district court's denial of a motion to dismiss for an insufficiently specific indictment and the lack of a bill of particulars. Further, the Fourth Circuit reviewed the district court's allowance of "similar acts" evidence and the effect the government's failure to provide exculpatory evidence as mandated by *Brady v. Maryland*, 373 U.S. 83 (1963).

In *Dunnigan*, the grand jury indicted the defendant on a charge of conspiracy to distribute cocaine. The defendant filed pretrial motions to dismiss the indictment, for a bill of particulars, and for disclosure of exculpatory and Jencks Act material. At the hearing on the motions, the government agreed to provide Jencks Act material, notice of "similar acts" evidence, and information regarding any confidential informants. The defendant withdrew her motion for a bill of particulars and the United States District Court for the Southern District of West Virginia denied the motion to dismiss the indictment for lack of specificity.

The government presented five witnesses at trial that testified regarding Dunnigan's involvement in the cocaine distribution conspiracy. Defendant objected to the lack of pretrial *Brady* discovery concerning a government witness's undisclosed schizophrenic condition that could affect the witness's credibility. While the defendant did not object to "similar acts" evidence given by the government in its case-in-chief, the district court, *sua sponte*, gave a "similar acts" instruction to the jury. According to the district court's instruction, the jury could consider the defendant's daughter's preparation of crack only if the jury believed such preparation constituted

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Application Note 1 combines the substance of former Application Notes 2 and 3:

> This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision, the defendant's testimony and statements should be evaluated in a light most favorable to the defendant.

U.S.S.G. § 3C1.1, appl. note 1 (Nov. 1990).

33. *See* United States v. Batista-Polanco, 927 F.2d 14, 22 (1st Cir. 1991) (stating that optional sentencing enhancement for obstruction of justice is constitutional); United States v. Matos, 907 F.2d 274, 276 (2d Cir. 1990) (same); United States v. Barbosa, 906 F.2d 1366, 1369 (9th Cir.) (same), *cert. denied*, 111 S. Ct. 394 (1990); United States v. Wallace, 904 F.2d 603, 604-05 (11th Cir. 1990) (same); United States v. Keys, 899 F.2d 983, 988 (10th Cir.) (same), *cert. denied*, 111 S. Ct. 160 (1990); United States v. Acosta-Cazares, 878 F.2d 945, 953 (6th Cir.) (same), *cert. denied*, 110 S. Ct. 255 (1989).

part of the cocaine distribution conspiracy charged. If the jury did not believe the crack preparation constituted part of the cocaine distribution conspiracy, the jury could only consider the crack preparation evidence under Federal Rule of Evidence 404(b) for motive, intent, preparation, lack of mistake, and knowledge of the crime charged.

Dunnigan's defense consisted of a complete denial of all involvement with the cocaine conspiracy. The jury, however, returned a verdict of guilty. In determining sentence, the district court increased the sentencing level by two levels due to "obstruction of justice," based on the court's finding that the defendant testified falsely at her trial.

On appeal, the Fourth Circuit first found the indictment sufficiently specific and upheld the district court's denial of the defendant's motion to dismiss. Second, the court found that the defendant waived her right to a bill of particulars by withdrawing her request for the bill at the pretrial hearing. Third, the Fourth Circuit held that in light of the defendant's failure to object and the district court's limiting instructions, the admission of the "similar acts" testimony did not constitute clear error. Fourth, because Dunnigan did not object to the testimony of the schizophrenic witness and the jury heard that the witness suffered from the condition, the Fourth Circuit held that only harmless error resulted from this *Brady* violation and affirmed the district court's conviction of Dunnigan.

The Fourth Circuit took issue, however, with the constitutionality of the "obstruction of justice" enhancement provided by the Sentencing Guidelines which the district court used to increase Dunnigan's sentence. The *Dunnigan* court stated that the Sentencing Guidelines removed the rationale for allowing optional consideration of false testimony provided for in *Grayson*. The Supreme Court stated in *Grayson* that allowing sentencing judges to consider the falsity of a convicted defendant's testimony did not require the judges to enhance the sentences of all defendants in some "wooden or reflex fashion." The Fourth Circuit reasoned that the Supreme Court decided *Grayson* prior to the issuance of the Sentencing Guidelines at a time when sentencing judges had very broad discretion in determining which factors to consider in passing sentence. The Fourth Circuit surmised that no automatic sentence inflator existed in *Grayson* because of the uncertainty of whether the sentencing judge would exercise his broad discretion to consider the falsity of a defendant's testimony. On the contrary, by explicitly requiring consideration of "obstruction of justice," the Sentencing Guidelines provide just the wooden or reflex enhancement disclaimed by the Supreme Court.

The Fourth Circuit reasoned that the required consideration of the convicted defendant's apparently false testimony, when weighed with other factors in the trial process, places too heavy a burden on a defendant's right to testify on his own behalf. According to the court, a defendant who goes to trial has already given up the chance of a lesser sentence through plea bargaining. Further, if the defendant chooses to testify, he runs the risk that the prosecution will impeach the credibility of his

testimony on cross-examination. The court indicated, however, that a defendant runs a greater risk of conviction if he does not testify than if he does. Thus, during the trial, the defendant must choose between not testifying, with a heavy risk of conviction, and testifying on pain of facing an enhanced sentence.

The *Dunnigan* court indicated a lack of satisfaction with the amount of safeguards in place to prevent this enhancement from unfairly coercing a defendant, guilty or innocent, into not testifying in his own behalf. The Fourth Circuit dismissed the usefulness of the clearly erroneous standard of review in "obstruction of justice" findings. The court reasoned that an appellate court will never rule the district court's finding of guilt clearly erroneous if the higher court upholds the verdict. Alternatively, if the appellate court overturns the guilty verdict, the false testimony issue becomes moot.

Finally, the Fourth Circuit cautioned that the blind following of jury verdicts as the touchstone of perjury may result in an unfairness to the defendant. The court reasoned that neither judges nor jurors can produce infallible findings one hundred percent of the time. Because the Fourth Circuit viewed the rigidity of the Sentencing Guidelines as making the obstruction of justice enhancement an intolerable burden upon the defendant's right to testify on his own behalf, the court vacated Dunnigan's sentence and remanded to the district court for resentencing without an "obstruction of justice" enhancement.

The Fourth Circuit's decision in *Dunnigan* creates a split with the several other courts of appeal that have ruled on the constitutional validity of the Sentencing Guidelines' enhancement feature for the implied finding of perjury where a convicted defendant testified on his own behalf. In fact, four judges on the Fourth Circuit joined in a dissent to the court's decision when the full court voted to deny a rehearing *en banc* on the sentencing enhancement issue.[34] The other courts of appeal based their upholding of the enhancement feature on the premise that a defendant's right to self-testimony should not create a constitutional license to commit perjury. In *United States v. Barbosa*, 906 F.2d 1366, 1369 (9th Cir.), *cert. denied*, 111 S. Ct. 394 (1990), and *United States v. Beaulieu*, 900 F.2d 1537, 1539 (10th Cir.), *cert. denied*, 110 S. Ct. 3252 (1990), the courts of appeal explicitly stated that the Sentencing Guidelines did not change the Supreme Court's analysis in *Grayson*. Indeed, the enhancement for false testimony technically remains a nonautomatic sentence inflator due to the considerations of various factors provided for in the Sentencing Guidelines Commentary. The Fourth Circuit has raised the important issue, however, of whether the application, rather than the language, of the Sentencing Guidelines results in an automatic sentence enhancement. Without specifying what further safeguards the Sentencing Guidelines would need to

34. United States v. Dunnigan, 944 F.2d 178 (4th Cir.), *reh'g denied by an equally divided court*, 950 F.2d 149 (4th Cir. 1991) (Wilkins, J., dissenting).

incorporate to avoid an undue burden on the defendant's decision to testify, the Fourth Circuit challenged the integrity of the guideline system. While statistical studies on the proportion of convicted defendants who receive sentencing enhancement for "obstruction of justice" may shed light on the flexibility of the Sentencing Guidelines, only the Supreme Court can resolve this fissure in the courts of appeals' views on theory for the system and reality for the defendant.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court took a major step toward eliminating racial discrimination in the use of peremptory challenges. Previously, a criminal defendant had to show a systematic exclusion of black jurors through prosecutorial use of peremptory challenges over a period of time to demonstrate an equal protection violation.[35] The *Batson* Court found that this standard was too burdensome for defendants, and held that the prosecutor's discriminatory use of peremptory challenges in a single case could establish an equal protection violation. In order to establish a *prima facie* case of purposeful discrimination, *Batson* held that a defendant must show that "he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."[36] According to the *Batson* Court, the trial court should consider all relevant circumstances in deciding whether a defendant has established the *prima facie* case. Once the *prima facie* case is shown, *Batson* held that the burden shifts to the government to provide a racially neutral explanation for the use of the peremptory challenge.

Batson made sweeping changes, but offered courts little guidance as to implementation. Because courts were willing to find the *prima facie* violation, most courts focused primarily upon the legitimacy of the proffered explanations. However, the courts established no clear boundaries as to what factors were important in establishing a *prima facie* case.

In *United States v. Joe*, 928 F.2d 99 (4th Cir. 1991), the Fourth Circuit clarified how lower courts should evaluate the *prima facie* case of discrimination in peremptory challenges. In *Joe*, two of the defendants were black and one was white. The government used six of its eight peremptory challenges to excuse black members of the venire. The final jury included five black members. The defendants moved to dismiss the jury prior to trial on the grounds that the prosecution had used its peremptory challenges in a discriminatory manner. The United States District Court for the Eastern District of Virginia summarily denied the motion, but required the government to meet with a court reporter the day after the jury selection and dictate its reasons for striking the six black jurors. This dictation occurred outside the presence of the court and

35. *See* Swain v. Alabama, 380 U.S. 202, 223 (1965) (stating burden of proof required to show equal protection violation due to systematic exclusion of black jurors).

36. Batson v. Kentucky, 476 U.S. 79, 96 (1986).

the defendants. The district court did not examine the government's reasons, but sealed the record containing them.

At the conclusion of the trial, the defendants renewed their *Batson* challenge. The district court did not rule on whether the defendants had established a *prima facie* case under *Batson*, or whether the government's reasons for exercising its peremptory challenges were racially neutral. The district court did allow the defendants to examine the government's reasons and present their arguments for the record. The district court then affirmed its earlier denial of the defendants' motion on the grounds that because some blacks had served on the final jury, no *Batson* violation could occur.

The Fourth Circuit affirmed the district court's decision as to the white defendant, but reversed and remanded as to the two black defendants. The *Joe* court stated that although the presence of members of defendants' race on the jury should receive substantial consideration and might weigh against a finding of discrimination, that fact alone does not automatically preclude the defendants from establishing a *prima facie Batson* case. The Fourth Circuit emphasized that even if the prosecution strikes only one black juror for a discriminatory reason, then the defendant's equal protection rights are violated, no matter how many blacks serve on the final jury and no matter if the government articulates valid reasons for striking all other black venirepersons.

The Fourth Circuit also criticized the district court's evaluation of the defendants' *Batson* claim. The *Joe* court said that because the district court allowed the government to state its reasons for exercising its peremptory challenges outside the district court's presence, the district court was unable to evaluate the credibility of the prosecutor. The Fourth Circuit also held that the district court had erred by delaying the *Batson* hearing until after the trial. The *Joe* court stated that the district court should have held the hearing during the jury selection process, when the district court could have cured any violations. After trial, the only remedy for a *Batson* violation is a new trial, which wastes valuable judicial resources. Finally, the *Joe* court held that the district court had erred by not ruling at each step of the *Batson* analysis, forcing the *Joe* court to infer factual findings and reasons for the dismissal of the claim.

The Fourth Circuit then established the preferred procedure for handling *Batson* challenges. First, the trial court must determine whether a defendant initially has made out a *prima facie Batson* violation. If a defendant can establish a *prima facie* case, then the trial court must require the government to articulate its reasons for using its peremptory challenges. The trial court must then determine whether the proffered reasons are facially neutral. If the trial court finds that the government's reasons are facially neutral, then the trial court must allow the defendant an opportunity to show that the facially neutral explanation is merely a pretext for discrimination. Finally, the trial court must issue a specific ruling on each juror in question, supported by its findings of fact and its rationale for the ruling. The Fourth Circuit refused to review the reasons offered by the government in the district court proceedings. Noting that