Washington and Lee Law Review

Volume 41 | Issue 2 Article 12

Spring 3-1-1984

VII. Criminal Law & Procedure

In *Brown v. American Broadcasting Co.*, the Fourth Circuit held that a cause of action for violation of Title III accrues when the plaintiff discovers or, by the exercise of due diligence, could have discovered the existence of the surreptitious interception.[64] The *Brown* court's reliance on accrual principles rather than tolling principles permitted the court to adopt the discovery rule as a matter of federal law.[65] Since the discovery rule does not require the plaintiff to prove that the defendant intentionally concealed the interception, the rule should help to deter violation of Title III.[66] The discovery rule, therefore, provides protection for plaintiffs, especially important in states such as Virginia that afford no common-law remedy for invasion of privacy.[67]

BRADFORD FROST ENGLANDER

VII. CRIMINAL LAW & PROCEDURE

A. *Determining Double Jeopardy Protection When Trial Court Orders Dismissal Prior to Hearing Evidence*

The double jeopardy clause of the fifth amendment provides that the government may not try any person more than once for the same offense.[1] The constitutional mandate protects the defendant's interest in avoiding the government's repeated attempts to convict a defendant who already has endured the ordeal of trial.[2] Additionally, the double jeopardy clause protects

64. 704 F.2d at 1304; *see supra* notes 25-31 and accompanying text (discussing Fourth Circuit's adoption of discovery rule).

65. *See* C. WRIGHT, *supra* note 32, at 394 & n.38 (federal law governs accrual of federal claims); *supra* notes 32-44 and accompanying text (determination of time of accrual of federal cause of action is federal question whereas state law generally governs tolling principles).

66. *See supra* notes 58-60 and accompanying text (discovery rule effectuates federal policy expressed in Title III by relieving plaintiff of need to prove concealment).

67. *See supra* notes 61-63 and accompanying text (Virginia does not recognize common-law tort of invasion of privacy).

1. U.S. CONST. amend. V. The fifth amendment provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." *Id.* The phrase "life or limb" refers to any criminal penalty. *See Ex parte* Lange, 85 U.S. (18 Wall.) 163, 170-73 (1873). The double jeopardy clause protects defendants charged with misdemeanor or felony offenses. *See id.* Outcomes of both jury and bench trials receive double jeopardy protection. United States v. Jenkins, 420 U.S. 358, 365 (1975). The double jeopardy clause of the fifth amendment applies to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 793-96 (1969); *see* U.S. CONST. amend. XIV (no state shall deprive any person of life, liberty or property without due process). *Benton* overruled *Palko v. Connecticut*, in which the Supreme Court held that fifth amendment double jeopardy immunity applied solely to defendants in federal prosecutions. Benton v. Maryland, 395 U.S. at 795-96; *see* Palko v. Connecticut, 302 U.S. 319, 322 (1937).

2. Green v. United States, 355 U.S. 184, 187 (1957). The double jeopardy clause of the

the public's interest in law enforcement by providing the government with one complete opportunity to convict a defendant whom the government duly has charged with an offense.[3] A trial that results in acquittal normally vindicates both interests and bars further prosecution for the same offense.[4]

When a defendant's first trial terminates prior to acquittal, the reviewing court's twofold inquiry into the constitutionality of retrial focuses on whether jeopardy has attached in the initial proceeding.[5] First, the reviewing court addresses the procedural issue of whether the defendant has been put to trial before the trier of fact in a court with jurisdiction to enter final judgment.[6] Second, the reviewing court considers the substantive issue of whether the defendant actually has risked a determination of guilt by the trier of fact.[7] If the

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fifth amendment evolved from the three common-law pleas of *autrefois acquit, autrefois convict,* and *pardon,* all of which prevented the retrial of a person previously acquitted, convicted, or pardoned of the same offense. *See* United States v. Wilson, 420 U.S. 322, 339-42 (1975) (history of fifth amendment double jeopardy protection). At common law, a defendant could avail himself of the pleas only after a complete trial. Turner's Case, 89 Eng. Rep. 158, 158 (1676). By the early nineteenth century, the Supreme Court established that a defendant could invoke double jeopardy protection prior to conviction or acquittal. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). The resulting constitutional policy against multiple prosecutions derives from established Anglo-American jurisprudence, which holds that the government should not be allowed to amass its resources and powers to make repeated attempts to convict an individual for an alleged offense. *Green,* 355 U.S. at 187. Such attempts subject the defendant to increased expense, anxiety, embarrassment, and delay and a greater chance of erroneous conviction. *Id.* at 187-88.

3. United States v. Scott, 437 U.S. 82, 100 (1978); *see* Arizona v. Washington, 434 U.S. 497, 509 (1978) (double jeopardy protection recognizes society's interest in providing prosecution one complete opportunity to convict law violators). Society values its interest in punishing a guilty defendant more than society values double jeopardy protection when the disposition of the first trial resulted from reversible error. *See* United States v. Tateo, 377 U.S. 463, 466 (1964) (defendant's immunity from punishment because of reversible error in trial proceedings is too costly to society); *cf.* Wurzburg & Gross, *Double Jeopardy: Dismissal and Government Appeal,* 13 GONZ. L. REV. 337, 339 (1978) (society's right to punish guilty defendants corresponds to defendants' double jeopardy protections).

4. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). An acquittal represents a factual resolution of the offense charged. *Id.* Double jeopardy protection arises when the trier of fact decides that the evidence warrants acquittal. United States v. Ball, 163 U.S. 662, 671 (1896); *accord* Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam). *But cf.* United States v. Scott, 437 U.S. 82, 97 (1978) (government appeal not barred when court ordered acquittal on legal grounds prior to jury verdict).

5. United States v. Wilson, 420 U.S. 332, 343-44 (1975); *see* United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion) (prohibition against repeated prosecutions for same offense ensures due process protections and recognizes heavy personal strain of trial). The threat of multiple punishment or successive prosecutions offends the double jeopardy clause. *Wilson,* 420 U.S. at 344.

6. Wade v. Hunter, 336 U.S. 684, 688 (1948); *see* Kepner v. United States, 195 U.S. 100, 133 (1904) (determination of guilt or innocence by court having jurisdiction bars retrial). Once the trial court grants a motion to dismiss, that court loses jurisdiction to determine factual issues presented by the charge. Serfass v. United States, 420 U.S. 377, 389 (1975).

7. United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977). The premise that the defendant avoids much of the expense, delay, strain, and embarrassment that attend a trial, as well as possible conviction, underlies the substantive part of the double jeopardy inquiry. *See* Green v. United States, 355 U.S. 184, 187-88 (1957); *supra* note 2 (constitutional policy against

disposition in the initial proceeding affirmatively resolves the procedural and substantive issues, jeopardy has attached, barring further prosecution for the offense originally charged.[8]

Recent Supreme Court inquiries into when double jeopardy protection attaches following a dismissal have focused on the timing of the termination of the initial proceeding.[9] In *Serfass v. United States,*[10] *Lee v. United States,*[11] and *Crist v. Bretz,*[12] the Supreme Court addressed the question of whether jeopardy had attached in a trial proceeding when the trial court granted dismissal.[13] In *Serfass, Lee,* and *Crist,* the respective defendants made their motions to dismiss after the trial proceedings had commenced but before the courts had heard evidence.[14] In *Goolsby v. Hutto,*[15] the Fourth Circuit relied on *Serfass, Lee,* and *Crist* to determine whether jeopardy had attached in a

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double jeopardy derives from established Anglo-American jurisprudence). The government does not harass a defendant by retrying him after the defendant himself elects to terminate the initial proceeding on legal grounds unrelated to guilt or innocence. United States v. Scott, 437 U.S. 82, 96 (1978). The defendant has a strong interest in obtaining an error-free adjudication of his guilt pursuant to retrial just as society maintains a strong interest in punishing the guilty. United States v. Burks, 437 U.S. 1, 15 (1978). *See* Note, *Double Jeopardy: When Is an Acquittal an Acquittal,* 20 B.C. L. REV. 925, 950 (1979) (defendant's double jeopardy defense depends on whether initial proceeding resolved factual elements in defendant's favor) [hereinafter cited as *Acquittal*].

8. United States v. Scott, 437 U.S. 82, 96 (1978); *see supra* notes 6-7 (procedural and substantive inquiry into whether jeopardy has attached).

9. United States v. Scott, 437 U.S. 82, 86 n.2 (1978). Trial courts employ dismissals as a tool to supervise and administer legal and factual aspects of trial proceedings. *Compare* United States v. Zisblatt, 172 F.2d 740, 741 (2d Cir.) (dismissal based on statute of limitations defense), *appeal dismissed,* 336 U.S. 934 (1949) *with* United States v. Hill, 473 F.2d 759, 760 (9th Cir. 1972) (case dismissed on grounds that literature was not obscene as matter of law). Trial courts may grant dismissals at any stage of the trial proceeding. *See* Spriggs v. United States, 225 F.2d 865, 867 (9th Cir. 1955) (dismissal before trial began), *cert. denied,* 350 U.S. 954 (1956); Woodring v. United States, 311 F.2d 417, 424 (8th Cir.) (dismissal at close of evidence), *cert. denied,* 373 U.S. 913 (1963); *see also Acquittal, supra* note 7, at 926 (questioning whether procedural and substantive variations in trial court disposition affect double jeopardy protection).

10. 420 U.S. 377 (1975).

11. 432 U.S. 23 (1977).

12. 437 U.S. 28 (1978).

13. *See* Crist v. Bretz, 437 U.S. 28, 35-36 (1978); Lee v. United States, 432 U.S. 23, 34 (1977); Serfass v. United States, 420 U.S. 377, 394 (1975). In *Serfass,* the district court entered the pretrial order dismissing the indictment after examining records and an affidavit that set forth evidence to be adduced at trial. 420 U.S. at 380. The Supreme Court held that jeopardy had not attached because the petitioner had not been put to trial before the trier of fact. *Id.* at 394. In *Lee,* the defendant moved to dismiss the information following the prosecutor's opening statement. 432 U.S. at 25. The district court tentatively denied the motion but granted dismissal at the close of evidence. *Id.* at 25-26. The Supreme Court held that jeopardy had not attached because the district court granted the dismissal with the expectation that reprosecution would proceed on a properly drawn information. *Id.* at 30-31. In *Crist,* a Montana trial court granted the prosecution's motion to dismiss after empaneling the jury. 437 U.S. at 30. The Supreme Court held that jeopardy had attached at that point because double jeopardy protection incorporates a defendant's interest in retaining a chosen jury. *Id.* at 38.

14. *See Crist,* 437 U.S. at 29-30; *Lee,* 432 U.S. at 25; *Serfass,* 420 U.S. at 379.

15. 691 F.2d 199 (4th Cir. 1982).

nonjury, state trial after the trial court swore the first witness but before the trial court heard evidence.[16]

In *Goolsby,* an Alexandria, Virginia, police officer arrested Goolsby on a charge related to a domestic matter.[17] While searching Goolsby, the police officer recovered fifteen coin-sized envelopes of marijuana from Goolsby's pants pockets and socks.[18] At a preliminary hearing on a felony charge of possession of marijuana with intent to distribute,[19] the Alexandria General District Court determined that probable cause existed only for the lesser included misdemeanor of simple possession.[20] Prior to trial, the Commonwealth's Attorney stated that he intended to obtain a grand jury indictment on the felony and therefore moved for nolle prosequi of the misdemeanor.[21] The general district court denied the motion.[22] At trial later the same day, a different judge denied the Commonwealth's Attorney's second nolle prosequi

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16. *Id.* at 199.

17. 529 F. Supp. 92, 96 (E.D. Va. 1981), *aff'd,* 691 F.2d 199 (4th Cir. 1982).

18. 529 F. Supp. at 97.

19. 691 F.2d at 199; *see* VA. CODE § 18.2-248.1 (1950 & Repl. 1982) (possession of more than one half ounce of marijuana with intent to distribute is felony).

20. 691 F.2d at 199; *see* VA. CODE § 18.2-250.1 (1950 & Repl. 1982) (possession of controlled substance is misdemeanor). Under Virginia law, general district courts have jurisdiction to conduct preliminary hearings to determine whether sufficient cause exists to try the accused for the offense charged. *See* VA. CODE § 16.1-127 (1950 & Repl. 1982), § 19.2-186 (1950 & Repl. 1983). Section 19.2-186 vests discretion in the general district court to determine the scope of future proceedings against a defendant and the consequent double jeopardy effects of such further proceedings. *See id.* § 19.2-186. If the general district court determines that sufficient cause does not exist for a felony charge or a lesser included misdemeanor charge, the court may dismiss all charges against a defendant. *Id.* If the general district court dismisses the charges for insufficient cause, however, the Commonwealth may seek a grand jury indictment on the charges. *See id.* §§ 19.2-191, 19.2-216 (1950 & Repl. 1983). In *Moore v. Commonwealth,* the Virginia Supreme Court held that double jeopardy principles did not bar a defendant's subsequent indictment on charges following dismissal of the same charges at the general district court preliminary hearing. 218 Va. 388, 393, 237 S.E.2d 187, 191 (1977). The *Moore* court compared dismissal of charges at the preliminary hearing to the procedure set forth in § 19.2-203 of the Virginia Code, which permits the Commonwealth to correct irregularities on a defective indictment. 218 Va. at 394, 237 S.E.2d at 192; *see* VA. CODE § 19.2-203 (1950 & Repl. 1983). The general district court in its discretion also may decide that sufficient cause exists only for a misdemeanor charge, over which the general district court retains jurisdiction to try the defendant. VA. CODE § 19.2-186 (1950 & Repl. 1983). Finally, if the general district court determines that sufficient cause exists for a felony charge, the general district court certifies the case to the appropriate circuit court. *Id.*

21. 691 F.2d at 199. Nolle prosequi is a declaration by a prosecuting officer that he will not prosecute further. BLACK'S LAW DICTIONARY 945 (5th ed., 1979). Under Virginia law, the court has sole discretion to grant nolle prosequi if the Commonwealth's Attorney shows good cause. VA. CODE § 19.2-265.3 (1950 & Repl. 1983). In *Goolsby,* the Commonwealth's Attorney announced his intention to obtain a grand jury indictment for the felony charge. 691 F.2d at 199; *see* VA. CODE §§ 19.2-202, 19.2-216 (1950 & Repl. 1983). In Virginia, a grand jury indictment serves as an alternative to the general district court preliminary cause hearing. *See* VA. CODE § 19.2-191 (1950 & Repl. 1983). To obtain an indictment, the Commonwealth's Attorney presents a written accusation of the felony to a legally empaneled grand jury. *Id.* § 19.2-216. If the grand jury determines that probable cause exists for the felony charge, the grand jury returns a bill of indictment and trial follows. *Id.* § 19.2-202.

22. 691 F.2d at 199.

motion.[23] The Commonwealth's Attorney subsequently refused to present evidence or question the complaining police officer, whom the general district court had called and sworn as a witness.[24] The judge dismissed sua sponte the misdemeanor charge for lack of evidence.[25]

Despite the general district court's dismissal of the misdemeanor charge, the Commonwealth's Attorney obtained a grand jury indictment on the felony charge.[26] The Circuit Court of the City of Alexandria found Goolsby guilty of the felony,[27] and the Supreme Court of Virginia denied review of Goolsby's conviction.[28] Goolsby petitioned the United States District Court for the Eastern District of Virginia for habeas corpus relief, asserting that his conviction violated his fifth and fourteenth amendment protections against double jeopardy.[29] The Commonwealth argued that Goolsby had not been in danger of conviction because no evidence had been introduced and thus jeopardy had not attached.[30] The district court found, however, that Goolsby had been at

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23. *Id.* at 199-200.

24. *Id.* at 200; *see* 529 F. Supp. at 96 (trial judge may call witnesses and enter verdict without Commonwealth's participation). Section 15.1-8.1 of the Virginia Code grants authority to Commonwealth's Attorneys to prosecute misdemeanors. *See* VA. CODE § 15.1-8.1 (1950 & Repl. 1981). If the Commonwealth's Attorney decides not to call witnesses, the trial judge may call any witness. *See* Hill v. Commonwealth, 88 Va. 633, 639, 14 S.E. 330, 332 (1892) (trial judge has discretion to call any witness not called by Commonwealth).

25. 691 F.2d at 200. In *Goolsby*, the judge dismissed the misdemeanor charge, stating that jeopardy had attached. *Id.* For double jeopardy purposes, however, the trial judge's assessment of his own action does not control subsequent classification of the disposition. United States v. Jorn, 400 U.S. 470, 478 n.7 (1971) (plurality opinion).

26. 691 F.2d at 200; *see supra* note 20 (procedure for obtaining grand jury indictment under Virginia law).

27. 691 F.2d at 200; 529 F. Supp. at 94.

28. 691 F.2d at 200.

29. *Id.* Goolsby's appeal to the Virginia Supreme Court and the Virginia Supreme Court's subsequent denial of review exhausted Goolsby's remedies in Virginia state courts. *See* VA. CODE § 19.2-324 (1950 & Repl. 1983). Because Goolsby alleged violations of his constitutional rights, the district court obtained jurisdiction over Goolsby's petition for writ of habeas corpus once Goolsby had exhausted his remedies in Virginia state courts. *See* 28 U.S.C. § 2254 (1966); 529 F. Supp. at 94. The district court granted the writ of habeas corpus pursuant to 28 U.S.C. § 2241 (1966). 529 F. Supp. at 94, 97.

30. 691 F.2d at 200. The Commonwealth did not dispute that the double jeopardy clause barred the felony prosecution if jeopardy had attached in the misdemeanor proceeding, even though the Virginia statutes separately provided for a felony charge and a misdemeanor charge. *Id.; see* VA. CODE §§ 18.2-248.1, 18.2-250.1 (1950 & Repl. 1982). Under Virginia law, the same offense cannot constitute both a felony and a misdemeanor. VA. CODE § 18.2-8 (1950 & Repl. 1982); Benton v. Commonwealth, 89 Va. 570, 572, 16 S.E. 725, 725 (1893). In *Blockburger v. United States,* the Supreme Court set forth the controlling standard for determining whether the government may prosecute a defendant for a single act that violates two distinct statutory provisions. 284 U.S. 299, 304 (1932). The *Blockburger* Court held that the government may prosecute a defendant for violation of two statutory provisions only when each statutory provision prescribes a necessary element of the offense that the other statutory provision does not prescribe. *Id.* The *Blockburger* standard applies for double jeopardy purposes to state court proceedings. Brown v. Ohio, 432 U.S. 161, 166 (1977). Goolsby's conviction on the felony charge would have required proof of possession, which is a necessary element of the misdemeanor offense. *See* VA. CODE §§ 18.2-248.1, 18.2-250.1 (1950 & Repl. 1982). Goolsby therefore could not be tried on

risk of conviction and that jeopardy had attached.[31] The district court therefore granted Goolsby's petition for habeas corpus relief,[32] and the Commonwealth appealed to the Fourth Circuit.[33]

The Fourth Circuit affirmed the district court's holding that jeopardy had attached in the misdemeanor proceeding.[34] The pivotal issue in *Goolsby* concerned whether jeopardy had attached in the nonjury, state misdemeanor trial when the general district court called and swore the complaining officer as a witness.[35] Because the Supreme Court had not considered a case that presented the exact question, the Fourth Circuit examined the Court's language regarding the attachment of jeopardy in nonjury trials in *Serfass, Lee*, and *Crist*.[36]

In *Serfass*, the Supreme Court held that jeopardy had not attached in a jury trial when the district court granted the defendant's motion to dismiss the indictment prior to the district court's empaneling and swearing of the jury.[37] In dictum, the *Serfass* Court stated that jeopardy attaches in a nonjury

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the felony charge if jeopardy had attached in the trial court misdemeanor proceedings. *See Brown*, 432 U.S. at 166; VA. CODE § 18.2-8 (1950 & Repl. 1982). *See generally* Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949) (analysis of substantive and procedural considerations that determine whether single act gives rise to more than one offense).

31. 691 F.2d at 200; 529 F. Supp. at 96. The *Goolsby* district court noted that the trial judge elected to proceed to trial following the trial judge's denial of the Commonwealth's nolle prosequi motion. 529 F. Supp. at 96; *see* VA. CODE § 19.2-265.3 (1950 & Repl. 1983) (court has sole discretion to grant nolle prosequi motion). The district court further noted that the trial judge had authority to call and question the witness and enter judgment without any participation from the Commonwealth's Attorney. 529 F. Supp. at 96; *see supra* note 23 (trial judge has discretion to call witnesses not called by Commonwealth). The district court stated that the trial court's decision to call and question the witness therefore amounted to an attempt to convict Goolsby. 529 F. Supp. at 96. Because Goolsby had risked conviction, which the district court termed the core of double jeopardy protection, the district court held that jeopardy had attached in the trial court proceeding. *Id.*

32. 691 F.2d at 199; 529 F. Supp. at 96.

33. 691 F.2d at 200.

34. *Id.* at 202. In *Goolsby*, the Fourth Circuit stated that jeopardy attached at least when the witness was sworn. *Id.* at 200. The *Goolsby* court recognized the discretion that § 19.2-186 vests in the general district court to determine at the preliminary hearing the course of proceedings and the consequent attachment of jeopardy. *See* VA. CODE § 19.2-186 (1950 & Repl. 1983); *supra* note 20 (discussion of general district court's discretion to determine course of proceedings against defendant).

35. *Id.* at 199.

36. *Id.* at 200.

37. 420 U.S. 377, 389 (1975); *see supra* note 13 (jeopardy in *Serfass* did not attach upon district court's examination of record prior to dismissing pretrial order). In *Serfass*, a grand jury indicted the defendant for willfully failing to report for and submit to induction into the Armed Forces. 420 U.S. at 379. The defendant filed a pretrial motion to dismiss the indictment, alleging the local draft board's failure to state reasons for refusing to consider further his conscientious objector application. *Id.* The district court dismissed the indictment because of the ambiguity of the local draft board's statements in considering the merits of the defendant's conscientious objector claim. *Id.* at 380-81. In a memorandum accompanying the district court's dismissal, the court stated that it had relied on the affidavit accompanying the defendant's petition, defendant's Selective Service file, and counsels' stipulations at oral argument on the motion to dismiss. *Id.* at 379-80. The Supreme Court rejected the defendant's claim that the government's appeal of the district court's dismissal violated the double jeopardy clause. *Id.* at 391-92. The Supreme

trial when the court begins to hear evidence.[38] In *Lee*, the Supreme Court held that jeopardy had not attached in a nonjury trial when the district court granted dismissal at the close of evidence.[39] While noting the *Serfass* Court's statement that jeopardy attaches in a nonjury trial when the court begins to hear evidence,[40] the *Lee* Court held that jeopardy had not attached because the defendant initially made his motion to dismiss the information prior to the district court's hearing evidence.[41] Finally, in *Crist*, the Supreme Court relied on *Serfass* to hold that jeopardy had attached in a jury trial when the trial court empaneled and swore the jury.[42] In reaching its decision, the *Crist* Court also noted the *Serfass* Court's statement that jeopardy attaches in a nonjury trial when the court begins to hear evidence.[43] However, the *Crist* Court recharacterized the *Serfass* language by stating that jeopardy attaches in a nonjury trial when the court swears the first witness.[44] Under the facts

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Court held that the defendant never had risked a determination of guilt in the pretrial hearings and jeopardy therefore had not attached. *Id.* The Supreme Court further held that the district court's dismissal following examination of the record and oral stipulations did not amount to an acquittal on the merits of the charges contained in the indictment, which would have barred the government's appeal of the dismissal. *Id.* at 392. The Supreme Court concluded that the defendant never had risked conviction and jeopardy therefore never had attached. *Id.*

38. *Id.* at 388.

39. 432 U.S. 23, 34 (1977); *see supra* note 13 (jeopardy did not attach when district court granted defendant's motion to dismiss at close of evidence). In *Lee*, the information filed in the district court failed to allege an essential element of the theft charge against petitioner. 432 U.S. at 25. Following the prosecutor's opening statement at the bench trial in federal district court, the defendant's lawyer moved to dismiss the information. *Id.* The district court postponed ruling on the defendant's motion until the district court had time to consider fully the motion. *Id.* at 26. Without objection by defense counsel, the trial proceeded pending later consideration of the motion to dismiss. *Id.* After the government presented its case and the defense rested without presenting any evidence, the court granted the earlier motion to dismiss because of the defective information. *Id.* Stating that he had no doubt that the defendant was guilty, the judge held that federal case precedent required dismissal of the information for failure to allege sufficiently the requisite elements of the offense. *Id.* at 26-27. The Supreme Court held that the double jeopardy clause did not bar the defendant's subsequent conviction pursuant to an indictment alleging the necessary elements of the offense. *Id.* at 34. The *Lee* Court reasoned that the dismissal of the information did not result from a judgment that the government could never prosecute the defendant. *Id.* at 30. The *Lee* Court noted that the initial proceedings terminated at the defendant's request and that the defendant's delay in moving for dismissal of the information caused the court's delay in granting the dismissal. *Id.* at 33-34. The Supreme Court therefore held that jeopardy had not attached because the dismissal did not determine the defendant's guilt or innocence, even though the dismissal occurred at the end of trial. *Id.*

40. *Id.* at 27 n.3; *see Serfass*, 420 U.S. at 388.

41. 432 U.S. at 34.

42. 437 U.S. 28, 35-36 (1978). In *Crist*, the defendants filed a motion to dismiss the information after the trial court empaneled and swore the jury. *Id.* at 29-30. The trial court denied the government's motion to amend the information, but subsequently granted the government's motion to dismiss the information. *Id.* at 30. The Supreme Court stated that the federal rule that jeopardy attaches when the trial court empanels and swears the jury applies to state courts as part of double jeopardy protection. *Id.* at 38. The Supreme Court held that the double jeopardy clause barred the defendants' subsequent prosecution and conviction. *See id.*

43. *See id.* at 37 n.15; *see Serfass*, 420 U.S. at 388.

44. 437 U.S. at 37 n.15; *accord* Willhauck v. Flanagan, 448 U.S. 1323, 1326 (1980) (Bren-

presented in *Goolsby*, however, the Fourth Circuit found it impossible to determine for double jeopardy purposes a constitutional difference between swearing a witness and hearing evidence.[45] The *Goolsby* court then examined the reasoning in *Serfass, Lee*, and *Crist*.[46] The *Goolsby* court concluded that jeopardy had attached when the trial court swore the witness because the trial court at that point had subjected Goolsby to the risk of conviction.[47]

Relying on *Serfass*, the *Goolsby* court reasoned that the Commonwealth's refusal to elicit testimony from the witness resembled a witness' failure to provide evidence sufficient to sustain a finding of guilt, which the *Goolsby* court noted requires a defendant's acquittal.[48] Because the Commonwealth's refusal to elicit testimony precluded the general district court from determining whether the witness' evidence would support Goolsby's conviction on the misdemeanor charge, the Fourth Circuit held that jeopardy attached when the general district court swore the witness.[49] The Fourth Circuit further held that the Commonwealth, in obtaining the grand jury indictment on the felony charge, had made repeated attempts to convict Goolsby.[50] The Fourth Circuit specifically quoted *Serfass* in stating that the underlying function of the double jeopardy clause is to prevent the government from making repeated attempts to convict an individual for an alleged offense.[51] The Fourth Circuit thus af-

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nan, Circuit Justice) (federal rule provides that jeopardy attaches in bench trial when trial court swears first witness).

45. 691 F.2d at 200. The Fourth Circuit specifically rejected the Commonwealth's distinction between merely swearing the witness and hearing his testimony. *Id.* In an analogous case, the District of Columbia Circuit reached the opposite conclusion. Newman v. United States, 410 F.2d 259 (D.C. Cir.) (per curiam), *cert. denied*, 396 U.S. 868 (1969). The *Newman* court held that jeopardy had not attached in a nonjury trial when the trial court entered a nolle prosequi motion after the trial court swore all the witnesses but before the first witness began to testify. 410 F.2d at 260. The trial court customarily swore all witnesses as a group, after which the trial court heard pretrial motions. *Id.* The District of Columbia Circuit held that under the circumstances, collective swearing of witnesses constituted an administrative procedure for the trial court's convenience. *Id.* The *Newman* court agreed with the government's distinction between collective swearing of witnesses for administrative convenience and swearing of a witness who actually takes the stand to testify after trial commences. *Id.* In *Goolsby*, the general district court had sworn the witness immediately prior to the witness' anticipated testimony, and the witness actually had taken the stand to testify. *See* 691 F.2d at 200. In most cases, a distinction between swearing the witness and hearing evidence will not arise because nothing else usually occurs between the two events. Blondes v. Maryland, 273 Md. 435, 446, 330 A.2d 169, 174 (1975). The American Law Institute proposes that jeopardy attach at the swearing of the first witness. MODEL PENAL CODE § 1.08(4) (Proposed Official Draft 1962).

46. 691 F.2d at 201.

47. *Id.* at 200.

48. *Id.* at 201-202.

49. *Id.* at 202.

50. *Id.* The *Goolsby* court found that the Commonwealth was attempting to circumvent the general district court's statutory power to grant motions for nolle prosequi because the Commonwealth disagreed with the general district court's disposition of the case. *Id.* at 201-202.

51. *Id.* at 200 (*quoting* Serfass v. United States, 420 U.S. 377, 388 (1975)). The *Serfass* Court cited *Green v. United States*, in which the Supreme Court held that the double jeopardy clause protects a defendant from the embarrassment, expense, and ordeal of repeated prosecutions, as well as from the enhanced possibility upon retrial that an innocent defendant might

firmed the district court's decision that Goolsby's second trial and conviction violated the double jeopardy clause.[52]

In *Goolsby*, the Fourth Circuit confronted the dilemma that may arise when a court's double jeopardy inquiry focuses on the timing of a dismissal rather than the substantive reasons for the dismissal.[53] Until *Goolsby*, federal circuit courts found the language of *Serfass* adequate to resolve double jeopardy inquiries.[54] Under the unusual circumstances of *Goolsby*, however, the Fourth Circuit would have been forced to choose between the conflicting characterizations of *Serfass* in *Lee* and *Crist*.[55] The Fourth Circuit recognized that such a choice would amount to determining constitutionally mandated double jeopardy protection by an arbitrary exercise of line drawing[56] and therefore turned to the substantive analysis implicit in the holdings of *Serfass, Lee* and *Crist*.[57]

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be found guilty. *Serfass*, 420 U.S. at 385; Green v. United States, 355 U.S. 184, 187-88 (1957). The *Green* quotation operates as the definitive appraisal of the underlying purposes and policies of the double jeopardy clause. *See* United States v. DiFrancesco, 449 U.S. 117, 127-28 (1980) (quoting *Green* for statement of policy of double jeopardy protection); Crist v. Bretz, 437 U.S. 28, 35 (1978) (same); Burks v. United States, 437 U.S. 1, 11 (1978) (same); United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (same); United States v. Wilson, 420 U.S. 332, 343 (1975) (same); United States v. Jorn, 400 U.S. 470, 479 (1971) (same).

52. 691 F.2d at 202.

53. *See* Lee v. United States, 432 U.S. 23, 36-37 (1977) (Rehnquist, J., concurring). Justice Rehnquist noted that the tendency to rely on a "bright-line" analysis leads to an oversimplification of double jeopardy issues. *Id.*

54. *See* Harris v. Young, 607 F.2d 1081, 1084 n.3 (4th Cir. 1979) (jeopardy attaches in nonjury trial when court begins to hear evidence), *cert. denied*, 44 U.S. 1025 (1980). The Second, Third, Fifth, Sixth, Eighth, and Ninth Circuits have quoted the *Serfass* Court's language for the proposition that jeopardy attaches in a nonjury trial when the court begins to hear evidence. *See, e.g.*, United States v. Grabinski, 674 F.2d 677, 680 (8th Cir. 1982) (dismissal of charge for failure to file income tax return for lack of personal jurisdiction did not bar subsequent trial in court of competent jurisdiction), *cert. denied*, 103 S. Ct. 67 (1983); Klobuchir v. Pennsylvania, 639 F.2d 966, 970 (3d Cir.) (double jeopardy clause does not bar retrial of first degree murder indictment following vacation of plea-bargained third degree murder conviction), *cert. denied*, 454 U.S. 1031 (1981); United States v. Barta, 635 F.2d 999, 1004, 1004 n.9 (2d Cir. 1980) (trial court's grant of defendant's motion for dismissal of wire and mail fraud charges does not bar further prosecution of such charges), *cert. denied*, 450 U.S. 998 (1981); United States v. Stricklin, 591 F.2d 1112, 1120 (5th Cir.) (government may use as basis for different charge facts underlying marijuana possession charges that were dismissed for violation of speedy trial right), *cert. denied*, 444 U.S. 963 (1979); United States v. Smith, 584 F.2d 759, 761 (6th Cir. 1978) (jeopardy attachment does not bar retrial upon defendant's successful appeal from conviction of controlled substance violations), *cert. denied*, 441 U.S. 922 (1979); Hooker v. Klein, 573 F.2d 1360, 1367-68, 1367 n.7 (9th Cir.) (extradition order does not constitute final judgment for double jeopardy purposes), *cert. denied*, 439 U.S. 932 (1978). Like the Court in *Crist*, the Third and Fifth Circuits also have cited *Serfass* for the proposition that jeopardy attaches in a nonjury trial when the first witness is sworn. *See* Virgin Islands v. George, 680 F.2d 13, 15 (3d Cir. 1982) (criminal trial commences when jury selection begins); United States v. Garcia, 589 F.2d 249, 251 (5th Cir.) (trial court's dismissal of indictment for drug-related charges following defendants' withdrawal of guilty pleas does not invoke double jeopardy protection), *cert. denied* 442 U.S. 909 (1979).

55. *See* 691 F.2d at 200; *supra* note 40 and accompanying text (*Lee* Court's characterization of *Serfass* language regarding jeopardy attachment); *supra* note 44 and accompanying text (*Crist* Court's recharacterization of *Serfass* language regarding jeopardy attachment).

56. *See Crist*, 437 U.S. at 37.

57. 691 F.2d at 201-202.

The *Goolsby* court first acknowledged the importance of the procedural context in which the Supreme Court decided *Serfass, Lee,* and *Crist.*[58] The *Goolsby* court recognized that the result in all three decisions depended on whether the trial proceedings had reached a point where the trier of fact had jurisdiction to determine the defendant's guilt or innocence.[59] Therefore, the timing of the dismissal was crucial in determining the outcome of *Serfass, Lee,* and *Crist.*[60] The *Goolsby* court next considered the substantive context of the *Serfass, Lee,* and *Crist* decisions.[61] The Fourth Circuit reasoned that the importance of the timing of the dismissals in *Serfass, Lee,* and *Crist* depended on whether the courts had subjected the respective defendants to the risk of conviction once the courts had jurisdiction over the parties and subject matter to determine the defendants' guilt or innocence.[62] In *Goolsby,* the trial court judge who ordered the dismissal had express statutory authorization to determine Goolsby's guilt or innocence on the misdemeanor charge.[63] Thus, the Fourth Circuit held that jeopardy had attached because the proceeding had reached a point at which the trial court could subject Goolsby to the risk of conviction.[64]

The soundness of the Fourth Circuit's decision that jeopardy had attached when the trial court dismissed the charges against Goolsby depends on whether the dismissal invoked the necessary protections of the double jeopardy clause. In *Serfass,* the Supreme Court stated that the double jeopardy inquiry into whether the trial court's dismissal bars retrial following a finding that the trial court had jurisdiction to determine the defendant's guilt or innocence.[65] By relying on the reasoning of *Serfass,* the Fourth Circuit determined that the trial court had jurisdiction over the parties and subject matter and then considered whether Goolsby actually had risked conviction in the trial court proceeding.[66] The *Goolsby* court then examined the substantive impact of the

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58. *Id.* at 200.

59. *Id.*

60. *See id.* The Supreme Court's holdings in *Serfass, Lee,* and *Crist* rest on the threshold determination that the trial had proceeded to a point in time when the trial court had jurisdiction to determine the defendant's guilt or innocence, at which time jeopardy could attach. *Crist,* 437 U.S. at 38; *Lee,* 432 U.S. at 30; *Serfass,* 420 U.S. at 394; *see Acquittal, supra* note 8, at 929 (double jeopardy attachment depends on procedural timing of trial court discharge). The *Crist* Court held that concern with the finality of judgments, concern with limiting the possibility of harassment of defendant through multiple trials, and concern with the defendant's right to continue with a chosen jury combined to establish that jeopardy attaches when the trial court empanels and swears the jury. 437 U.S. at 38. In *Serfass,* the Court held that termination of prosecution prior to trial neither subjects the defendant to the hazards of trial and possible conviction nor affords the prosecutor two chances to persuade a trier of fact of the defendant's guilt. 420 U.S. at 391.

61. 691 F.2d at 201.

62. *Id.*

63. 691 F.2d at 199 n.1; *see* VA. CODE § 19.2-186 (1950 & Supp. 1983) (trial judge has jurisdiction to try misdemeanor offenses); *supra* note 20 (description of procedure to determine whether sufficient cause exists for misdemeanor and felony charges).

64. 691 F.2d at 202.

65. 420 U.S. at 390.

66. 691 F.2d at 200.

dismissal order.[67] In *Lee*, the Supreme Court stated that the double jeopardy clause bars retrial if the dismissal order contemplates an end to all prosecution of the defendant for the offense charged.[68] *Lee* and subsequent Supreme Court cases reaffirmed that the double jeopardy clause bars further prosecution after a disposition based on failure of proof.[69] The *Goolsby* court's review of the general district court's order demonstrates that the Commonwealth's refusal to present evidence or elicit testimony from the witness prompted the dismissal.[70] The resemblance of the trial court's dismissal of the misdemeanor charges to a disposition based on failure of proof indicates that the trial court contemplated an end to all prosecution of the charges against Goolsby.[71] If failure of proof did not bar repeated prosecution for the same offense, the government might seek to persuade a second trier of fact of the defendant's guilt.[72] More importantly, a second trial following dismissal for failure of proof further subjects the defendant to the chance of erroneous conviction, the prevention of which is an underlying policy of double jeopardy protection.[73] The *Goolsby* court's analysis that the general district court had subjected Goolsby to the risk of conviction warrants the Fourth Circuit's holding that jeopardy had attached in the general district court proceeding.[74] The Fourth Circuit's decision also conforms to the constitutional principle that a defendant not suffer more than once the ordeal of trial and the consequent possibility of erroneous conviction.[75]

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67. *See id.*

68. 432 U.S. at 30. If the trial court's ruling represents a resolution of the factual elements of the offense in the defendant's favor, double jeopardy protection bars retrial. *Id.* at 30, 30 n.8; *see* United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (courts may not review resolution of factual elements of offense); United States v. Jenkins, 420 U.S. 358, 370 (1975) (double jeopardy clause bars further proceedings to resolve factual elements of offense when trial could have resulted in defendant's conviction but terminated in defendant's favor).

69. 432 U.S. at 30. When the trial court grants dismissal on the ground, correct or not, that the defendant cannot be convicted on the proof elicited, the double jeopardy clause bars further prosecution. *Id.* Society's interest in enforcing its laws does not extend to retrying a defendant when the government has been given one fair opportunity to offer whatever proof it can assemble to prove its case. Burks v. United States, 437 U.S. 1, 16 (1978). The government bears absolute responsibility for the presentation of its factual case. Sanabria v. United States, 437 U.S. 54, 74-77 (1978). The prosecution's failure to adduce sufficient evidence of a crime results in double jeopardy protection against retrial. Hudson v. Louisiana, 450 U.S. 40, 43 (1981). The double jeopardy protection against retrial that follows a determination that the evidence at trial cannot sustain a guilty verdict applies fully to state criminal proceedings. Greene v. Massey, 437 U.S. 19, 24 (1978).

70. 691 F.2d at 199-202.

71. *See id.* at 202. In *Goolsby*, the Fourth Circuit stated that Goolsby was subjected to conviction or acquittal when the trial court called and swore the first witness. *Id.* The Fourth Circuit held that the fact that the witness did not give any evidence required Goolsby's acquittal. *Id.* The Fourth Circuit, therefore, expressly characterized the trial court's dismissal of the charges against Goolsby as an acquittal. *Id.*

72. Crist v. Bretz, 437 U.S. at 35.

73. *See* Green v. United States, 355 U.S. 184, 187-88 (1957); *supra* notes 51 & 60 (policies underlying double jeopardy protection).

74. *See supra* notes 58-64 (*Goolsby* analysis).

75. *See* Green v. United States, 355 U.S. 184, 187-88 (1957); *supra* notes 51 & 60 (policies underlying double jeopardy protection).

Although recent Supreme Court decisions have favored society's interest in obtaining convictions against violators of the law,[76] the Fourth Circuit's decision in *Goolsby* will not operate to denigrate that interest. Unlike the *Lee* disposition, in which the legal insufficiency of the information precluded an opportunity to resolve the issues that determine guilt or innocence,[77] the general district court proceedings afforded the Commonwealth a full and fair opportunity to convict Goolsby.[78] In *Lee*, the defendant avoided the risk of conviction by relying on procedural defects unrelated to the determination of his guilt or innocence.[79] When a defendant himself has avoided a resolution of the issue of guilt or innocence, society's interest in insuring that the guilty are punished outweighs the defendant's interest in avoiding multiple prosecutions.[80] In *Goolsby*, however, the defendant did not seek to avoid a determination of his guilt or innocence. The Commonwealth's refusal to participate in the trial proceedings was the only factor preventing a resolution of the issues involved and therefore was tantamount to a resolution of the factual issues in Goolsby's favor.[81] When a trial court has subjected a defendant to the risk of conviction and has resolved the issue of guilt or innocence in his favor, double jeopardy protection prevails.[82]

The *Goolsby* decision clearly signals that the government cannot use statutory alternatives to obtain a second chance to convict a defendant any more than a defendant can rely on procedural defects to avoid prosecution.[83] The statute prescribing a method of prosecution furthers society's interest in law enforcement by providing express means to obtain a conviction.[84] However,

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76. *See* United States v. Scott, 437 U.S. 82, 101 (1978) (government appeals from midtrial dismissals requested by defendant significantly advance public interest in assuring that courts subject defendants to fair judgment on merits of case); Illinois v. Somerville, 410 U.S. 458, 470-471 (1973) (court should be less willing to accord defendant's interest great weight if court determines that societal interests indicate desirability of retrial).

77. *See* 432 U.S. at 30.

78. *See* 691 F.2d at 200-201. A prosecutor's full and fair opportunity to convict a defendant is necessary to vindicate societal interests in punishing the guilty. *See* Arizona v. Washington, 434 U.S. 497, 505 (1978).

79. 432 U.S. at 25-26. In *Lee*, the defendant based his motion to dismiss the information on incomplete allegations in the information. *Id.* at 25. Upon dismissing the information, the district court expressly stated that the government had proved the defendant's guilt beyond any reasonable doubt. *Id.* at 26. The district court stated, however, that federal law required the government to include allegations of all elements in charges. *Id.* at 26-27. The district court therefore dismissed the information. *Id.; see supra* note 38 (summary of *Lee*).

80. *See supra* note 68 (importance of double jeopardy protection in safeguarding society's interests).

81. 691 F.2d at 200, 202.

82. Burks v. United States, 437 U.S. 1, 11 n.6 (1978). Constitutional protections pursuant to the double jeopardy clause are mandatory and are not subject to judicial discretion. *Id.*

83. *See* 691 F.2d at 201-202. The double jeopardy clause forbids affording the prosecution a second opportunity to supply evidence that it failed to adduce in the first proceeding. Burks v. United States, 437 U.S. 1, 11 (1978). Otherwise, unscrupulous prosecutors might deliberately sacrifice the first trial to improve the government's presentation at a second trial. *See Acquittal, supra* note 7, at 942.

84. *See* VA. CODE § 16.1-127 (1950 & Repl. 1982); *id.* § 19.2-186 (1950 & Repl. 1983); *supra* notes 20 & 21 (statutory procedure for obtaining felony charge in general district court).

the constitutional principle that protects society's interest also protects a defendant's interest in avoiding repeated attempts at conviction.[85] The double jeopardy clause will not allow the government to disregard one statutory provision for conviction in favor of another statutory provision that also provides for conviction simply because the government has failed to achieve the desired result under the first statute.[86]

The *Goolsby* decision serves as a sensible model for subsequent double jeopardy inquiries within the Fourth Circuit. Although the Fourth Circuit clearly held the Commonwealth responsible for its inability to convict the defendant,[87] *Goolsby* assures that society's interest in law enforcement remains unhampered as long as the government utilizes lawful opportunities to convict a defendant.[88] By focusing on the resolution of factual issues in determining whether jeopardy has attached, *Goolsby* safeguards a potential defendant's interest in avoiding the anxiety of repeated trials for the same offense.[89] Finally, *Goolsby* advises courts to determine whether trial proceedings actually subjected a defendant to the risk of conviction.[90] Instead of relying on procedural mandates that might sacrifice the legitimate interests of either society or a defendant by failing to account for varying factual circumstances, the *Goolsby* decision provides an analytical framework that fully and fairly protects the interests of both society and the defendant.[91]

LOUISE J. BROWNER

B. *The Effect of Mental Deficiency on Determining the Voluntariness of a Juvenile Confession*

The fifth amendment protects criminal defendants from compulsory self-incrimination.[1] The protection against compulsory self-incrimination

85. *See* Serfass v. United States, 420 U.S. 377, 387-88 (1975) (double jeopardy clause prohibits repeated attempts at prosecution); *supra* notes 5 & 7 (constitutional policy against repeated attempts at prosecution). *Compare supra* note 3 (society's interest accommodated by double jeopardy clause) *with supra* note 2 (defendant's interest protected by double jeopardy clause).

86. *See* 691 F.2d at 201-202 (effect of Commonwealth's refusal to participate in Goolsby's misdemeanor trial); *supra* notes 20 & 21 (statutory procedure for obtaining conviction); *supra* note 51 (statement of policy of double jeopardy protection).

87. 691 F.2d at 201-202.

88. *See supra* note 3 (discussion of society's interest in obtaining convictions).

89. *See* 691 F.2d at 201 (examination of factual issues in *Serfass, Lee,* and *Crist*); *supra* notes 67 & 68 (discussion of factual context in which jeopardy may attach at trial).

90. *See supra* notes 69 & 73 (defendant's interest in twice avoiding risk of conviction).

91. *See supra* note 3 (double jeopardy clause protects society's interests).

1. U.S. CONST. amend. V. The fifth amendment provides that no person can be forced to be a witness against himself in a criminal trial. *Id.* The Supreme Court has interpreted this right as protecting the criminally accused from being compelled to provide the state with in-

extends to involuntary, pretrial confessions.[2] The Supreme Court has defined involuntary confessions as confessions that are not the product of a person's own free will.[3] If a court finds that a particular confession is involuntary, the court may not admit that confession as evidence at trial.[4] Generally, courts have held that no particular factor is determinative of whether a particular confession is involuntary.[5] Instead, courts have adopted a totality of the circumstances test to determine the voluntariness of a confession.[6] In applying

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criminating evidence. United States v. Wade, 388 U.S. 218, 221 (1967); Warden v. Hayden, 387 U.S. 294, 302-303 (1967).

2. *See* Bram v. United States, 168 U.S. 532, 542 (1897). In *Bram*, the Court considered whether a defendant's pretrial confession was voluntary. *Id.* The Supreme Court noted a confession must be voluntary before a court can admit the confession as evidence. *Id.* The Supreme Court stated that the fifth amendment governed the admission of pretrial confessions by a criminal defendant. *Id.* The Supreme Court found a long established tradition in the Anglo-Saxon sense of justice that a person accused of a crime could not be compelled to testify against himself. *Id.* at 545-61. From this established tradition, the Supreme Court concluded that a pretrial confession induced by threat or promise was not voluntary since such a confession is not freely given, and therefore was not admissible. *Id.* at 562-65.

3. *See* Spano v. New York, 360 U.S. 315, 323 (1959). In *Spano*, the defendant confessed to murder after 11 hours of interrogation. *Id.* at 322-23. A friend of the defendant who was also a police cadet had urged the defendant to confess. *Id.* at 323. The Supreme Court concluded that the confession was not voluntary emphasizing that the police pressured the defendant and falsely aroused the defendant's sympathy. *Id.* at 323; *see* Crooker v. California, 357 U.S. 433, 435 (1958) (courts must examine facts to determine if confession resulted from defendant's exercise of free will) *rev'd on other grounds*, 384 U.S. 479 (1965); Michaud v. Robbins, 424 F.2d 971, 974 (1st Cir. 1970) (voluntariness determination involves finding whether confession was result of defendant's overborne will).

4. *See* Brown v. Mississippi, 297 U.S. 278, 287 (1936) (use of involuntary confession at trial to convict defendant violated due process); Hopt v. People of the Territory of Utah, 110 U.S. 574, 585 (1884) (courts may admit only voluntary confessions into evidence since involuntary confessions are inherently unreliable); *see also* McCoy & Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 938 (1980) (excluding coerced statements from trial removes high risk of inaccuracy inherent in any coerced testimony).

5. *See* Sullivan v. State of Alabama, 666 F.2d 478, 482 (11th Cir. 1982) (mental deficiency alone is not determinative of voluntariness); United States *ex rel.* Brown v. Rundle, 450 F.2d 517, 519-520 (3rd Cir. 1971) (confession is not per se involuntary merely because confessor was juvenile); United States *ex rel.* Lathan v. Deegan, 450 F.2d 181, 185 (2d Cir.) (mere deception in attempting to elicit confession by police during interrogation does not invalidate confession), *cert. denied.* 450 U.S. 1071 (1971); Wood v. United States, 317 F.2d 736, 738 (10th Cir. 1963) (fact that defendant confessed while in police custody does not automatically render confession involuntary); Fant v. Peyton, 303 F. Supp. 457, 459 (W.D. Va. 1969) (intoxication alone does not render confession involuntary).

6. *See* Gallegos v. Colorado, 370 U.S. 49 (1962). The *Gallegos* Court stated that no absolute guide exists to determine whether a confession is voluntary. *Id.* at 55. The Supreme Court further stated that a court must examine all the factors surrounding the confession in deciding voluntariness. *Id.* at 54-55; *see* Haley v. Ohio, 332 U.S. 596, 599 (1948) (voluntariness determination requires court to examine all factors surrounding confession); Iverson v. North Dakota, 480 F.2d 414, 424 (8th Cir.) (court must use totality of circumstances test when determining voluntariness of defendant's confession), *cert. denied*, 414 U.S. 1044 (1973); United States v. Miller 453 F.2d 634, 635 (4th Cir.) (totality of circumstances test is proper method for determining voluntariness of confession), *cert. denied*, 406 U.S. 923 (1972); West v. United States, 399 F.2d 467, 469 (5th Cir.) (all factors of confession are important in determining voluntariness), *cert denied*, 393 U.S. 1102 (1968).

the totality of the circumstances test, courts consider all the existing circumstances surrounding the confession to determine whether a particular defendant confessed voluntarily.[7] Important factors in determining whether a confession is voluntary include police conduct,[8] physical violence,[9] mental coercion,[10] age of the confessor,[11] and mental capacity of the confessor.[12] In *Vance v. Bordenkircher*,[13] the Fourth Circuit recently considered the voluntariness of the pretrial confession of a mentally deficient juvenile, and held that the confession was voluntary.[14]

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7. *See supra* note 6 (courts consider all factors of confession in determining voluntariness); *infra* notes 8-12 and accompanying text (list of factors courts consider in applying totality of circumstances test to voluntariness determination).

8. *See* Haley v. Ohio, 332 U.S. 596, 599 (1948). In *Haley*, the police arrested the defendant, a 15 year old boy, at midnight and took him to police headquarters. *Id.* at 598. The police did not inform the defendant of his constitutional rights to remain silent and to have counsel present during interrogation. *Id.* The police questioned the defendant continuously for five hours, using alternating shifts of interrogators. *Id.* At the end of the five hour period, the defendant confessed to murder. *Id.* The Supreme Court considered the improper police conduct while interrogating the defendant a significant factor in ruling that the confession was involuntary. *Id.* at 599; *see infra* notes 94-96 and accompanying text (examination of factors relevant to evaluation of police conduct).

9. *See* Brown v. Mississippi, 297 U.S. 278, 281 (1936). In *Brown*, the police tied the defendant to a tree and whipped him in an effort to get the defendant to confess to murder. *Id.* When the defendant would not confess, the police released the defendant. *Id.* Several days later two deputies picked up the defendant at his house and transported him to jail. *Id.* On the way to the jail the deputies stopped and again severly whipped the defendant. *Id.* The defendant confessed after being told that the whipping would continue until he confessed. *Id.* at 281-82. The Supreme Court held that one reason the confession was involuntary was that the police used physical violence in securing the confession. *Id.* at 283.

10. *See* Brewer v. Williams, 430 U.S. 387, 407 (1977). In *Brewer*, the defendant made a confession to the police regarding the location of a missing girl's body. *Id.* at 394. The defendant made the confession only after the police investigator had elicited sympathy from the defendant by informing the defendant of the emotional condition of the parents of the missing girl. *Id.* at 393-94. The Supreme Court noted that the mental coercion used by the investigator in *Brewer* was an important factor in determining that the defendant's confession was involuntary. *Id.* at 401.

11. *See* Haley v. Ohio, 332 U.S. 596, 599 (1948). In *Haley*, the Court reasoned that a court must use special care when determining the voluntariness of a juvenile confession since juveniles cannot be judged by the standards of adult maturity. *Id.* at 599. The Supreme Court concluded that the defendant's youth was an important factor in determining that the defendant's confession was involuntary. *Id.* at 599-600; *see also infra* notes 77 and accompanying text (age is factor in voluntariness determination).

12. *See* Davis v. State of North Carolina, 384 U.S. 737, 752 (1966). In *Davis*, the trial court relied primarily on a defendant's confession in finding the defendant guilty. *Id.* at 741. The primary issue before the Supreme Court on appeal was whether the defendant's confession was voluntary. *Id.* at 741-42. The *Davis* Court examined the totality of the circumstances surrounding the confession including the fact that the defendant had a third grade education and was mentally impaired. *Id.* The court also noted that the police had subjected the defendant to a lengthy interrogation prior to the confession. *Id.* at 745-47. The Supreme Court held that the defendant's impaired mental capacity was an important factor in finding that the defendant's confession was involuntary. *Id.* at 752; *see also infra* notes 87-92 and accompanying text (mental deficiency is factor in voluntariness determination).

13. 692 F.2d 978 (4th Cir. 1982).

14. *Id.* at 981-82.

The *Vance* case involved two unsolved murders that occurred in Scarboro, West Virginia in 1961.[15] Early in 1962, the police arrested fifteen year old Arnold Vance on matters unrelated to the unsolved murders and transported Vance to the police station.[16] The police informed Vance's mother of the arrest but she chose not to accompany her son to the police station.[17] At the police station the police informed Vance of the right to remain silent and the right to have an attorney present during any interrogation.[18] After interrogating Vance concerning the unrelated incident, the chief of police routinely questioned Vance about the unsolved murders.[19] When Vance's responses to the murder inquiries aroused the suspicion of the police, the police placed Vance in jail.[20] The chief of police called in the chief investigator in the unsolved murders to assist in interrogating Vance.[21] Vance orally confessed to committing the murders after approximately one hour of police questioning.[22] Approximately, one and one-half hours after Vance made the oral confession, the police obtained a written statement from Vance admitting that he committed the murders.[23] Intermittent questioning continued for almost five more hours until approximately 2:00 a.m., resulting in a second written confession.[24] At the defendant's trial the prosecution attempted to introduce both of the defendant's confessions as evidence.[25] During the course of the trial the court conducted a hearing on the voluntriness of the defendant's confession and found that the confession was voluntary.[26] The trial court therefore

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15. *Id.* at 979.

16. *Id.* In *Vance*, the police arrested the defendant for breaking and entering. *Id.* The Fourth Circuit noted that the defendant was moderately mentally deficient. *Id.* at 980. The defendant had an IQ of 62, which is the functional equivalent of a mental age of nine and one-half years. *Id.* at 980; *see infra* notes 102-103 (discussing the age at which juveniles are capable of waiving rights).

17. 692 F.2d at 979; *see infra* note 83 (courts have emphasized absence or presence of parents at juvenile interrogations when determining voluntariness).

18. 692 F.2d at 979.

19. *Id.*

20. *Id.* In *Vance*, the chief of police testified that during the interrogation about the unsolved murders the defendant responded strangely to the murder inquiries and aroused the police chief's suspicions. *Id.* The police put the defendant in jail charging him with breaking and entering because of the police chief's suspicions. Vance v. Bordenkircher, 505 F. Supp. 135, 137 (N.D. W.Va. 1981).

21. 505 F. Supp. at 137.

22. 692 F.2d at 979. In *Vance*, the police began questioning the defendant at approximately 6:30 p.m., and the defendant confessed orally sometime between 7:30 p.m. and 8:00 p.m. *Id.*

23. *Id.* The defendant in *Vance* signed a written statement in which he confessed to the murders at approximately 9:15 p.m. *Id.* The defendant also eventually drew a floor plan of the house where the murders occurred. *Id.*

24. *Id.* In *Vance*, the police continued questioning the defendant after the original confession to determine whether another person had been involved in the murders. 505 F. Supp. at 137.

25. 692 F.2d at 979.

26. 505 F. Supp. at 138. In *Vance*, the district court stated that the original trial judge conducted a thorough hearing on the issue of voluntariness outside the presence of the jury. *Id.* The district court opinion mentioned no specific details of what had occurred at the hearing. *See id.*

admitted the confession into evidence.[27] The jury convicted the defendant and sentenced him to life imprisonment.[28]

The defendant filed a petition for habeas corpus in the United States District Court for the Northern District of West Virginia.[29] The defendant based his habeas corpus petition on the ground that the original trial court improperly admitted his confession as evidence.[30] The defendant argued that the fifth amendment required the exclusion of the confession since the confession was involuntary.[31] The defendant contended the confession was involuntary since the defendant could not have confessed voluntarily due to his youth and low mentality.[32] The district court denied defendant's habeas corpus petition[33] holding that the defendant's confession was voluntary.[34] On appeal, the Fourth Circuit upheld the district court ruling that the defendant's confession was voluntary.[35]

The Fourth Circuit began the analysis of the voluntariness of the defendant's confession by noting that a court should examine the totality of the circumstances when determining whether a defendant's confession is voluntary.[36] The court noted that one factor to examine as part of the totality of the circumstances test was the age of the defendant.[37] The Fourth Circuit considered age an important factor since the Supreme Court has said that juvenile confessions must be viewed with special scrutiny.[38] The Fourth Circuit noted however that while youth is an important factor in the voluntariness determination, age alone is not determinative of the issue of voluntariness.[39] The Fourth Circuit stated that courts also should consider mental deficiency as a factor in the voluntariness determination.[40] The *Vance* court cited a previous Fourth Circuit case concerning a mentally deficient confessor in which

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27. *Id.*

28. 692 F.2d at 980.

29. 505 F. Supp. at 136.

30. *Id.*

31. 692 F.2d at 979; *see supra* note 2 (involuntary confessions are not admissible at trial); *see also* Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (involuntary confession cannot be admitted at trial since involuntary confessions are inherently unreliable).

32. 692 F.2d at 980; *see infra* notes 77-80 and accompanying text (age alone is not determinative of voluntariness of confession; *infra* notes 79-104 (juvenile with low mental capacity is not capable of confessing voluntarily).

33. 505 F. Supp. at 138.

34. *Id.*

35. 692 F.2d at 981-82.

36. *Id.* at 980; *see infra* notes 73-75 and accompanying text (totality of circumstances is method courts should use when determining voluntariness).

37. 692 F.2d at 980; *see infra* notes 77-83 and accompanying text (discussion of effect of defendant's age on voluntariness of confession).

38. 692 F.2d at 980. The Supreme Court in *Haley v. Ohio* stated that juvenile confessions must be examined with special scrutiny. 332 U.S. 596, 599 (1948); *see infra* notes 81-82 (discussion of *Haley* Court's reasoning concerning the effect of age on voluntariness of confessions).

39. 692 F.2d at 980. *See infra* notes 77-80 and accompanying text (age alone is not determinative on the issue of voluntariness).

40. 692 F.2d at 981. *See infra* notes 87-92 (discussion of mental deficiency as factor courts examine when determining voluntariness).

the Fourth Circuit held that mental deficiency alone does not render a confession involuntary.[41] The Fourth Circuit then concluded that neither the age nor the mental deficiency of the defendant is solely determinative of the issue of voluntariness.[42]

After noting that youth and mental deficiency do not as a matter of law render a confession involuntary, the Fourth Circuit examined the police conduct during the defendant's interrogation.[43] The court stressed the good conduct of the police when interrogating the defendant.[44] The court specifically noted that the defendant was given food during the interrogation, and that the defendant never requested an end to the questioning.[45] The court strongly emphasized that the police only intermittenly questioned the defendant.[46] The court further emphasized that neither of the defendant's confessions had occurred at the end of an extended interrogation, and that the defendant orally confessed shortly after the police began questioning the defendant about the murders.[47] The court therefore considered the conduct of the police proper because the police did not pressure the defendant into confessing.[48] The court concluded that absent some showing of improper police conduct pressuring the defendant into confessing, the facts in *Vance* did not support a finding of involuntariness.[49]

The dissent, like the majority, examined the circumstances surrounding the confession but concluded that the facts of the case supported a finding that the defendant involuntarily confessed.[50] The dissent stated that courts must consider two factors when evaluating the voluntariness of a confession under the fourteenth amendment.[51] The first factor is the external circumstances

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41. 692 F.2d at 980-81. In concluding that mental deficiency is not determinative on the voluntariness issue, the *Vance* court cited *United States v. Young* in which the Fourth Circuit held that low intelligence is not determinative on the voluntariness issue. 529 F.2d 193, 195 (4th Cir. 1975).

42. 692 F.2d at 981-82.

43. *Id.* at 980-82.

44. *Id.; see infra* notes 118-133 and accompanying text (discussion of court's emphasis on police conduct when determining voluntariness).

45. 692 F.2d at 981. In *Vance*, the Fourth Circuit stated that the police conduct was proper since the police did not pressure the defendant into confessing. *Id.* According to the majority, one fact supporting a finding that the police conduct was proper was that the police gave the defendant several sandwiches and soft drinks. *Id* at 979. Another factor supporting the propriety of the police conduct was the police warning to the defendant that the investigation was serious and that the defendant should not admit involvement in the murders unless he actually was involved. *Id.* at 981.

46. *Id.* at 981. The Fourth Circuit in *Vance* stated that the intermittent questioning by the police tended to indicate that the police conduct was not coercive. *Id.* The police intermittently questioned the defendant from 5:00 p.m. to approximately 2:00 a.m. the following morning. *Id.* at 979. Although the *Vance* court stated that the questioning was intermittent, the court never expressly specified the length of each particular session or the length of the breaks between each session. *Id.* at 981.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 982-85 (Ervin, J., dissenting).

51. *Id.* at 982-83 (Ervin, J., dissenting).

surrounding the confession.[52] External circumstances are the outside events such as the police conduct that occurred before and during the confession.[53] The dissent stated that police conduct is important when considering the external circumstances because courts must determine whether the police coerced a defendant into confessing involuntarily.[54] After examining the police conduct, the dissent agreed with the majority that the police conduct alone did not prove that the defendant's confession was involuntary.[55] The dissent stated however that a court must also examine the "internal circumstances" of the confession.[56] Internal circumstances include the age and mental capacity of the confessor.[57] The dissent argued that even while under minimal pressure, a defendant must possess the capacity to comprehend and waive his constitutional rights in order to voluntarily confess.[58] The dissent stated that the mental deficiency and age of the defendant supported a finding that the confession was involuntary.[59]

After the dissent discussed the internal and external factors, the dissent stated that a court must view the two factors together to ascertain whether a defendant confessed voluntarily.[60] The dissent explained that the police pressure during interrogation must be considered in combination with the mental capacity of the defendant to resist the police pressure.[61] The dissent contended that the majority did not examine the two factors in combination, but

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52. *Id.* (Ervin, J., dissenting). In *Vance*, the dissent did not expressly refer to the factors surrounding the defendant's confession, such as the police conduct during interrogation, as external facts. *See id.* In *Culombe v. Connecticut*, however, the Supreme Court specifically termed such factors as "external factors." 367 U.S. 568, 603 (1961); *see infra* notes 92-96 (discussing *Culombe* Court's method of applying totality of the circumstances test); *infra* notes 106-109 (discussing how external factors affect voluntariness of confessions); *see also* Duke, *The Internal Struggle Over the Voluntariness Concept*, NAT'L L.J., Aug. 23, 1983, at 21. One commentator states that the external component of the voluntariness determination is whether an outside force, such as the police, impaired the freedom of the defendant in choosing a course of action. *Id.*

53. *See supra* note 52 (definition of external circumstances).

54. 692 F.2d at 982 (Ervin, J., dissenting).

55. *Id.* (Ervin, J., dissenting).

56. 692 F.2d at 982-85 (Ervin, J., dissenting). In *Vance*, the dissent did not expressly refer to the defendant's mental capacity to make a voluntary confession as an internal circumstance. *Id.* The dissent in *Vance* discussed the defendant's mental capacity to voluntarily confess and other facts that the *Culombe* Court termed "internal factors." 692 F.2d at 983-84; *Culombe*, 367 U.S. at 603. *See infra* notes 95-99 (discussion of affect of internal factors on voluntariness of confession); *see also* Duke, *supra* note 52, at 21 (internal component of voluntariness determination is whether accused understood nature and consequences of any statements made to police).

57. 692 F.2d at 982-83; *see infra* notes 76-92 & 102-105 (discussing how age and mental capacity affect voluntariness determination).

58. 692 F.2d at 982-83 (Ervin, J., dissenting); *see infra* notes 98-102 and accompanying text (discussing mental capacity required to confess voluntarily).

59. 692 F.2d at 982-83 (Ervin, J., dissenting).

60. *Id.* at 983 (Ervin, J., dissenting); *see infra* notes 99, 112-116 and accompanying text (proper application of totality of the circumstances test demands that courts examine interaction of internal and external circumstances of confession when determining voluntariness).

61. 692 F.2d at 983 (Ervin, J., dissenting); *see infra* notes 87-89, 94 and text accompanying notes 104-106 (defining mental capacity to mean extent of individual's understanding of nature and consequences of his actions).

rather erroneously examined the two factors separately in making the voluntariness determination.[62] The dissent noted that the majority failed to discuss any cases that addressed the effect of the combination of youth and mental deficiency on the voluntariness of confession.[63] The dissent stated that the majority's failure to examine a case involving the combined effect of youth and mental deficiency on the voluntariness of a confession was important since the *Vance* case involved a mentally deficient juvenile.[64] The dissent argued that the majority failed to place enough importance on the interaction between the defendant's mental deficiency[65] and the police conduct during the interrogation in ruling the defendant's confession voluntary.[66] The dissent concluded that the majority was incorrect in ruling the defendant's confession voluntary because the majority failed to consider the interaction of all the factors surrounding the confession.[67]

After criticizing the majority's analysis, the dissent considered the effect of the combination of internal and external circumstances surrounding the defendant's confession on the voluntariness of the confession.[68] The dissent considered the fact that the defendant did not have the assistance of counsel or an adult present during the interrogation as important because without the assistance of counsel or support of an adult, the defendant was especially vulnerable to police pressure due to his youth and mental deficiency.[69] While the majority considered the length of the interrogation as noncoercive, the dissent considered the extended length of the interrogation as a factor supporting an involuntariness finding.[70] The dissent stated that the defendant's confession was the result of the defendant's succumbing to the encouragements of the police.[71] The dissent concluded that the combination of the internal circumstances such as the defendant's mental deficiency, and the external circumstances, such as the police conduct, rendered the defendant's confession involuntary.[72]

While the dissent and the majority in *Vance* did not agree on the issue

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62. 692 F.2d at 983 (Ervin, J., dissenting); *see infra* text accompanying notes 114-117 (examination of majority's method for determining voluntariness of defendant's confession).

63. 692 F.2d at 983-84 (Ervin, J., dissenting).

64. *Id.*

65. *Id.* at 984.

66. *Id.* at 984-85.

67. *Id.* at 983-86 (Ervin, J., dissenting).

68. *Id.* at 985 (Ervin, J., dissenting).

69. *Id.* (Ervin, J., dissenting); *see infra* note 83 and accompanying text (important factor in determining voluntariness of juvenile confession is whether juvenile had adult assistance during interrogation).

70. 692 F.2d at 985 (Ervin, J., dissenting). The dissent in *Vance* considered the length of the interrogation as coercive, and viewed the intermittent interrogation of the defendant until late at night as a factor tending to make the defendant's confession involuntary. *Id.* The majority, however, did not emphasize the fact that the interrogation lasted until 2:00 a.m. *See id.* at 981. Instead, the majority emphasized the fact that the interrogation was intermittent in determining that the questioning was acceptable. *Id.*

71. *Id.* at 986 (Ervin, J., dissenting).

72. *Id.* at 984-86 (Ervin, J., dissenting).

of whether the confession was voluntary, the majority and dissent both correctly agreed that a court considering the voluntariness of a confession must examine the totality of the circumstances surrounding the confession.[73] The Supreme Court has established the totality of the circumstances test as the test courts should use when determining the voluntariness of confessions.[74] The Supreme Court has specifically stated that courts should apply the totality test when examining confessions by mentally deficient juveniles.[75]

Two important factors when applying the totality of the circumstances test to the *Vance* case were the age and mental deficiency of the defendant.[76] The Supreme Court addressed the age factor in *Fare v. Michael C.*[77] and rejected the argument that juvenile confessions were per se inadmissible.[78] Instead, the *Fare* court held that age was only one factor in the totality of the circumstances test that courts must consider when making the voluntariness determination.[79] Although age alone is not determinative on the voluntariness issue, the Supreme Court in *United States v. Haley*[80] expressly stated that courts must view juvenile confessions with special scrutiny.[81] The *Haley* court stated that juvenile confessions demand special scrutiny because juveniles are not as mature as adults and therefore, juveniles are more susceptible to police pressure.[82] Both the Supreme Court and circuit courts have stated that due

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73. *See id.* at 980-82; *supra* note 6 (courts determine voluntariness by examining totality of circumstances surrounding confession).

74. *See* Blackburn v. Alabama 361 U.S. 199, 201 (1960). In *Blackburn*, the Supreme Court determined whether the confession of a mentally ill defendant was voluntary. *Id.* at 202-05. The *Blackburn* Court held that the totality of the circumstances test applies to confessions of mentally deficient individuals. *Id.* at 207; *see infra* note 85 (discussion of *Blackburn v. Alabama*); *see also* Fare v. Michael C., 442 U.S. 707, 725 (1979). In *Fare*, the Supreme Court held that the totality of the circumstances test was the proper test to discern whether a juvenile had validly waived his *Miranda* rights prior to police interrogation. *Id.* at 725-26. Although *Fare* involved the waiver of the right to remain silent and the right to have counsel present during interrogation, rather than the determination of the voluntariness of a confession, the *Fare* court noted in dictum that the totality test applies to a variety of constitutional rights including the voluntariness of confessions. *Id.* at 726.

75. *See infra* notes 77-82 (Supreme Court in *Fare* and *Haley* stated that courts must determine voluntariness of juvenile confessions by examining totality of circumstances surrounding confession); *infra* notes 85-88 (Supreme Court in *Blackburn* and *Fikes* stated that courts must determine voluntariness of confession by mentally deficient person by examining totality of circumstances).

76. 692 F.2d at 980.

77. 442 U.S. 707 (1979).

78. Fare v. Michael C., 442 U.S. 707, 726 (1979); *see* Miller v. Maryland, 577 F.2d 1158, 1159 (4th Cir. 1978). In *Miller*, the Fourth Circuit held that age alone does not render a confession inadmissible. *Id.* The Fourth Circuit reasoned that a "streetwise" juvenile experienced with police procedures could confess voluntarily. *Id.*

79. *Fare*, 442 U.S. at 726.

80. 332 U.S. 596 (1948).

81. *Id.* at 599.

82. *Id. See* Gallegos v. Colorado, 370 U.S. 49, 55 (1962). In *Gallegos*, the Supreme Court agreed with a 14 year old boy's assertion that his confession was involuntary. *Id.* at 55. In finding the confession involuntary, the court emphasized the age of the defendant, the fact that the length of confinement was five days, and the fact that the police did not allow defendant's parents

to a juvenile's immaturity, an important factor when considering the voluntariness of juvenile confessions is whether the juvenile had the benefit of the advice of parents or a responsible adult during the interrogation.[83] While the dissent in *Vance* considered the fact that the defendant did not have the assistance of an adult during the interrogation as part of the totality of the circumstances test,[84] the majority did not address this fact directly when analyzing the defendant's confession.[85] The majority's failure to discuss the effect that the absence of adult guidance had on the defendant's confession supports the dissent's assertion that the majority was wrong in holding that the defendant voluntarily confessed because this failure demonstrates that the majority did not actually use the totality test.[86]

In addition to considering the defendant's age, courts must consider whether the defendant is mentally deficient when applying the totality of the circumstances test.[87] The Supreme Court in *Fikes v. Alabama*[88] stated that

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to see him during the confinement. *Id* at 54. The court noted that juveniles are highly susceptible to police pressure since juveniles are not as mature as adults and do not have the same understanding and knowledge of the consequences of police interrogation. *Id.*

83. *See Gallegos*, 370 U.S. at 55 (lack of adult guidance is key factor in finding juvenile confession involuntary); Moore v. Ballone, 658 F.2d 218, 229 (4th Cir. 1981) (court considered police denial of defendant's request to see his mother as factor in determining that juvenile confession was involuntary); *See also* Jurek v. Estelle, 623 F.2d 929, 935 (5th Cir.), *cert. denied*, 450 U.S. 1001 (1980). In *Jurek*, a young defendant confessed to the murder of a ten year old girl. *Id* at 934. The defendant had been in custody for 42 hours prior to confessing to the murder. *Id.* at 935. During the confinement, the police refused to allow either the defendant's parents or lawyers to see the defendant. *Id.* The Fifth Circuit weighed the police pressure against the defendant's capacity to resist such pressure and concluded that the confession was involuntary. *Id.* at 937. *See* Makarewicz v. Scafati, 438 F.2d 474, 479 (1st Cir.) (confession held voluntary partially because father of defendant was allowed by police to assist defendant during interrogation), *cert. denied*, 402 U.S. 980 (1971); Michaud v. Robbins, 424 F.2d 971, 974 (1st Cir. 1970) (fact that police did not deny defendant's parents access was one factor in finding confession voluntary); Ledbetter v. Warden, 368 F.2d 490, 492 (4th Cir. 1966) (one factor court considered in finding confession involuntary was police denial of defendant's requests to see friends and family), *cert. denied*, 386 U.S. 971 (1967). *See generally* Seman, *A Juvenile's Waiver of the Privilege Against Self-Incrimination—A Federal and State Comparison*, 10 AM. J. CRIM. L. 27, 40 (1982) (absence of parents or guardian during juvenile interrogation creates presumption of incapacity of waiver).

84. 692 F.2d at 985 (Ervin, J., dissenting).

85. *Id.* at 980-82. The majority in *Vance* noted that the defendant's mother chose not to accompany him to the jail. *Id.* at 979. The majority, however, did not discuss the effect that the lack of adult guidance during the interrogation could have on the voluntariness of the defendant's confession. *Id.* at 980-83.

86. *See supra* notes 83-85 and accompanying text (lack of adult guidance during interrogation supports finding of involuntariness).

87. *See* Blackburn v. Alabama, 361 U.S. 199, 207 (1960). In *Blackburn*, the defendant confessed to armed robbery. *Id.* at 200. Prior to trial, psychiatrists diagnosed the defendant as being permanently mentally disabled. *Id.* The trial court conducted a hearing on the voluntariness of the confession and decided that the confession was voluntary. *Id.* at 202. The Supreme Court emphasized the fact that the defendant was mentally deficient and the fact that the police questioned the defendant for approximately nine hours in concluding that the defendant's confession was involuntary. *Id* at 207-08; *see* United States v. Young, 529 F.2d 193, 195 (4th Cir. 1975) (court held that mental deficiency is one factor to consider in determining voluntariness).

88. 352 U.S. 191 (1957).

the fact that a defendant is mentally deficient is an important, but not determinative factor to consider when making a voluntariness determination.[89] The *Fikes* Court stated that a mentally deficient person is overly susceptible to police pressure during interrogation,[90] and may not have the intelligence or mental capacity to comprehend the consequences of his actions when confessing.[91] The Supreme Court discussed mental capacity in *Fare v. Michael C.*, and explained that the mental capacity of the confessor is important to the voluntariness determination since a person must have sufficient intelligence to comprehend what occurs during interrogation before he can voluntarily confess.[92]

While the majority in *Vance* was correct in noting that age and mental deficiency are not determinative of the voluntariness issue,[93] the majority did

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89. *Id.* at 197. In *Fikes*, the Supreme Court considered the voluntariness of an uneducated, mentally deficient defendant's confessions. *Id.* at 196-97. The police had elicited the confessions from the defendant after two days of questioning. *Id.* at 197. The Supreme Court held that the confessions were involuntary, noting that the defendant's mental deficiency was an important factor to consider when making a voluntariness determination. *Id.* at 196-97.

90. *Id.* at 193, 197-98. In determining the voluntariness of the defendant's confession, the *Fikes* Court noted that testimony of psychiatrists indicated that the defendant was highly susceptible to police pressure. *Id.* at 193.

91. *Id* at 196-98. *See, e.g.*, May v. Leneair, 99 Mich. App. 209, 212, 297 N.W.2d 882, 884 (1980) (mentally deficient person lacks sufficient capacity to understand effect of act he is performing); Haile v. Holtzclaw, 400 S.W.2d 603, 612-13 (Tex. Civ. App. 1966) (in order to voluntarily commit an act, person must posses sufficient mental capacity to understand nature and consequences of act), *rev'd on other grounds*, 414 S.W.2d 916 (1967), Leick v. Pozniak, 135 N.J. Eq. 67, 69, 37 A.2d 302, 303 (1944) (person's actions are valid and voluntary if he possessed sufficient mental ability to understand effect of his act when he performed act); *see also infra* notes 92, 102-103 and accompanying text (mentally deficient juveniles do not have sufficient mental capacity to comprehend consequences of confession).

92. Fare v. Michael C., 442 U.S. 707, 726 (1979). The Supreme Court in *Fare* noted that a person must have sufficient intelligence to comprehend what the possible effects and consequences of interrogation are before he can waive his constitutional rights and make a meaningful confession. *Id.; see* United States v. Smith, 638 F.2d 131, 133 (9th Cir. 1981) (confession is not voluntary when given by person whose mental condition was such that confessor did not understand consequences of what he was doing when he confessed); United States v. Hansel, 474 F.2d 1120, 1123-24 (8th Cir. 1973) (court defined mentally deficient person as person with obvious subnormal intelligence). *See generally* Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 260 (1977). Professor Dix argues that a person must possess the mental capacity to make rational choices to effectively waive a particular constitutional right. *Id.* at 260. Dix argues that courts should require that a defendant understand the factual and legal consequences of what he is going before the defendant can voluntarily waive a particular constitutional right. *Id.* at 264. Professor Dix notes that a defendant must also have the mental capacity to resist improper police attempts to influence the defendant's decision to make a statement. *Id.* at 265.

93. 692 F.2d at 981-82. Numerous cases support the proposition that diminished mental capacity is not determinative of the issue of voluntariness. *See, e.g.*, Coney v. Wyrick, 532 F.2d 94, 97-98 (8th Cir. 1976) (subnormal intelligence is not determinative of voluntariness issue); Gibbs v. Warden, 450 F. Supp. 242, 244 (M.D. Ga. 1978) (subnormal mentality indicates, but does not establish, that confession was involuntary), *aff'd*, 589 F.2d 1113 (5th Cir. 1979). Numerous cases also support the proposition that age alone is not determinative on the issue of voluntariness. *See, e.g.*, Mossbrook v. United States, 409 F.2d 503, 504 (9th Cir. 1969) (age alone does not

not adequately consider age and mental deficiency under the circumstances test.[94] The United States Supreme Court in *Culombe v. Connecticut*[95] stated that a court must examine three parts of a confession to properly apply the totality of the circumstances test.[96] According to the *Culombe* Court, a court first must examine the mental capacity of the person confessing.[97] Second, a court must examine the external factors, such as the police conduct surrounding the confession.[98] Third, a court must consider the effect of the combination of the internal and external factors in determining whether the confession was voluntary.[99]

The *Vance* dissent properly applied the three part *Culombe* test.[100] The *Vance* dissent agreed with the *Culombe* decision that a court must first examine whether a particular defendant has the requisite mental capacity to comprehend what occurred during an interrogation before the court examines the external factors such as the police conduct.[101] Empirical studies suggest that mentally deficient juveniles are not capable of comprehending what is happening dur-

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render confession inadmissible); Williams v. Peyton, 404 F.2d 528, 530 (4th Cir. 1968) (court rejected contention that juvenile confession is per se involuntary); United States v. Lovejoy, 364 F.2d 586, 589 (2d Cir. 1966) (age alone does not render confession inadmissible), *cert. denied*, 386 U.S. 974 (1967).

94. *See infra* notes 95-121 and accompanying text (*Vance* majority improperly applied totality of circumstances test).

95. 367 U.S. 568 (1961). In *Culombe*, a mentally deficient defendant confessed to a murder that was one of a series of murders terrifying local operators of small businesses. *Id.* at 569. Tremendous public pressure existed to solve the murders and apprehend the people responsible. *See id.* at 569-72. The police arrested the defendant and interrogated him for ten straight days obtaining five separate confessions from the defendant. *Id* at 570. The police never informed the defendant of his constitutional rights and denied the defendant the benefit of counsel during the interrogation. *Id.* After examining the totality of the circumstances surrounding the confession, the Supreme Court held that the confession was involuntary because of the extended length of the interrogation and the absence of counsel during interrogation. *Id.* at 635.

96. *See id.* at 603 (*Culombe* Court's three-part method for applying totality of circumstances test).

97. *Id.* The Supreme Court in *Culombe* defined the subjective mental capacity of the defendant as an internal psychological fact. *Id.; see infra* notes 105-109 and accompanying text (discussing first part of *Culombe* test which examines internal circumstances of confession).

98. *Culombe*, 367 U.S. at 603. The *Culombe* Court noted that ascertaining external facts surrounding the confession is the function of the original trial court. *Id.* at 603-04; *see infra* notes 107-109 and accompanying text (discussing second part of *Culombe* test which examines external circumstances surrounding confession).

99. *Culombe*, 367 U.S. at 603-604. The *Culombe* Court explained that the third stage of the totality of the circumstances test involves the courts evaluation of the accused's reaction to the external conduct of the police. *Id. See infra* notes 112-113 and accompanying text (discussing third stage of *Culombe* test).

100. *See infra* notes 101-117 and accompanying text (demonstrating that *Vance* dissent properly applied *Culombe* test when determining voluntariness of defendant's confession).

101. 692 F.2d at 983 (Ervin, J., dissenting). In *Vance*, the dissent argued that courts must consider the defendant's mental capacity together with the police conduct during interrogation to determine whether the defendant's confession was voluntary. *Id.; see* Stein v. New York, 346 U.S. 156, 185 (1953) (courts must balance amount of police pressure on defendant to confess in relation to defendant's mental capacity for resisting pressure when determining voluntariness of confession).

ing interrogation proceedings.[102] These studies demonstrate that since a mentally deficient juvenile is incapable of comprehending what occurs during police interrogation, the mentally deficient juvenile is incapable of confessing voluntarily.[103] Therefore, perfect police conduct during the interrogation of a juvenile incapable of voluntarily confessing does not make that defendant's confession voluntary.[104] The majority in *Vance*, however, never examined whether the defendant had the mental capacity to comprehend what was going on during the interrogation, and thus failed to consider whether the defendant had the capacity to voluntarily confess.[105] The *Vance* court's failure to examine the defendant's capacity to confess demonstrates that the majority did not satisfy the first stage of the *Culombe* test, and thus did not apply the totality of the circumstances test properly.[106]

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102. *See* Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1152 (1980). Grisso, an Associate Professor of Psychology at St. Louis University, conducted empirical studies to determine whether juvenile defendants between the ages of 10 and 16 understand the constitutional rights that police give at the time of arrest. *Id.* at 1144. Specifically, Grisso examined the juvenile defendant's understanding of the right to remain silent and the right to have counsel present during interrogation. *Id.* Grisso concluded that juveniles between the ages of 10 and 16, in general, do not understand the nature and significance of the right to remain silent and the right to have counsel present during interrogation. *Id.* at 1166. Grisso further noted that juveniles with intelligence quotients ("IQ's") below 80 had a lower comprehension of the right to remain silent and the right to have counsel present during interrogation than juveniles with normal IQ's. *Id.* at 1160. Grisso concluded that juveniles with IQ's below 80 are incapable of voluntarily waiving the right to remain silent and the right to have counsel present during interrogation. *Id.* at 1166; *see also* Seman, *supra* note 81, at 42 (empirical studies suggest juveniles do not possess sufficient mental development to understand or waive their constitutional rights).

In *Vance*, the police informed the defendant of the right to remain silent and the right to have counsel present during interrogation. 692 F.2d at 979. The Fourth Circuit assumed that the defendant understood his rights and therefore voluntarily waived his rights when he spoke to the police without the assistance of counsel concerning the murder. *Id.* at 981. The results of Grisso's studies, however, indicate that the defendant in *Vance* would be incapable of understanding the right to remain silent and to have counsel present because the defendant's IQ was subnormal. *See* Grisso, *supra* at 1166. Since the defendant in *Vance* could not understand his constitutional rights, he could not have waived those rights voluntarily. *See id.* The defendant in *Vance*, therefore, could not have confessed voluntarily because the principles underlying a voluntary waiver of the constitutional rights to remain silent and to have the assistance of counsel and a voluntary confession are similar. The underlying principles are similar because a person must have the mental capacity to comprehend the consequences of either relinquishing constitutional rights or confessing. *See infra* note 135 (rationale underlying voluntary waiver is similar to rationale underlying voluntary confession because in each instance person must have mental capacity to comprehend consequences of his actions).

103. *See supra* note 102 (empirical studies indicate that mentally deficient juveniles cannot voluntarily confess).

104. *See supra* note 102 (empirical studies indicate that mentally deficient juveniles cannot confess voluntarily).

105. 692 F.2d at 980-82. Instead of examining whether the defendant had the capacity to voluntarily confess, the majority in *Vance* only noted that neither the defendant's age nor his mental deficiency alone rendered his confession involuntary. *Id.*

106. *See supra* notes 101-105 and accompanying text (*Culombe* method for applying totality test dictates that courts must examine mental capacity of defendant in determining voluntariness).

While the first stage of the *Culombe* test requires courts to examine internal factors such as mental capacity, the second stage requires a court to examine the external factors such as police conduct surrounding the confession.[107] The length and severity of the police interrogation is an important external factor under the totality of the circumstances test for determining the voluntariness of confessions.[108] Length and severity of interrogations are particularly important factors in judging police conduct[109] because the likelihood that a person will involuntarily succumb to police questioning increases as the length and severity of the questioning increases.[110] In *Vance*, the majority did make an extensive examination of the police conduct when evaluating the voluntariness of the defendant's confession, and thereby satisfied the second stage of the *Culombe* test.[111]

The third stage of the *Culombe* test requires courts to consider the interrelationship between external factors, such as police conduct, and internal factors, such as mental capacity, when determining whether a defendant's con-

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107. *Culombe*, 367 U.S. at 603.

108. *See id.* at 605; *supra* note 105 (second part of *Culombe* test requires examination of external circumstances including police conduct); *infra* notes 109-110 (police conduct is important when determining voluntariness of confession); *infra* notes 115-128 and accompanying text (*Vance* majority overemphasized police conduct); *see also* Sutherland, *Crime and Confession*, 79 HARV. L. REV. 21, 23 (1965). Sutherland states that courts frequently emphasize police conduct during interrogation because such police conduct is often the most influential factor in causing a defendant to confess. *Id.* at 23. Sutherland argues that police conduct is influential because police try to elicit confessions from people suspected of crimes even when the evidence against that person is weak because of the community pressure on police to prevent and solve crimes. *Id.* at 22-23. Sutherland notes that highly developed police techniques designed to extract confessions are very effective in getting a particular defendant to confess. *Id.* Sutherland's arguments that police interrogation techniques can be coercive and result in unreliable confessions therefore suggest that courts should examine police conduct during interrogation carefully.

109. *See, e.g.*, Fikes v. Alabama 352 U.S. 191, 197 (1956) (oppressive length of interrogation was key factor influencing court's finding of involuntariness); Haley v. Ohio, 332 U.S. 596, 599 (1948) (extended duration of police questioning was important factor influencing court's decision that defendant's confession was involuntary); Jurek v. Estelle, 623 F.2d 929, 935 (5th Cir.) (court considered extended length of police questioning as important factor in finding confession involuntary), *cert. denied*, 450 U.S. 1001 (1980); Vanleeward v. Rutledge, 369 F.2d 584, 589 (5th Cir. 1966) (court primarily emphasized excessive length of questioning in holding that confession was involuntary). Courts have also viewed a short period of questioning as a factor supporting a finding of voluntariness. *See, e.g.*, United States v. White Bear, 668 F.2d 409, 413 (8th Cir. 1982) (fact that police only questioned defendant 29 minutes was important factor influencing court's finding of voluntariness); Iverson v. North Dakota, 480 F.2d 414, 425 (8th Cir.) (court noted that brief interrogation indicated that police did not coerce defendant into confessing), *cert. denied*, 414 U.S. 1044 (1973); Michaud v. Robbins, 424 F.2d 971, 974 (1st Cir. 1970) (important factor in voluntariness determination was nonextensive questioning of defendant).

110. *See* United States *ex rel.* Adams v. Bensinger, 507 F.2d 390, 395 (7th Cir. 1974) (extended period of interrogation pressured defendant into confessing), *cert. denied*, 421 U.S. 921 (1975); United States v. Hull, 441 F.2d 308, 312 (7th Cir. 1971) (court concluded confession was involuntary since lengthy police interrogation pressured defendant into confessing).

111. 692 F.2d at 981-82; *see supra* notes 46-49 and accompanying text (aspects of police conduct *Vance* majority considered when analyzing voluntariness of defendant's confession); *supra* notes 50-55 (dissent's discussion of propriety of police conduct).

fession was voluntary.[112] The dissent in *Vance* correctly considered the interaction of the defendant's mental capacity with the police conduct during the defendant's interrogation in evaluating the voluntariness of the confession.[113] Conversely, the majority did not actually examine the effect that all of the circumstances surrounding the confession had on the voluntariness of the confession.[114] The majority first examined the defendant's youth and mental deficiency,[115] and then separately examined the police conduct without taking into account the defendant's mental capacity to withstand any police pressure.[116] Thus, the majority failed to properly apply the totality test since they neglected to consider the third part of the *Culombe* test.[117]

In failing to apply the totality of the circumstances test properly, the *Vance* majority overemphasized the external factors surrounding the defendant's confession,[118] and made only a cursory examination of the defendant's mental deficiency and youth.[119] The majority mentioned and noted the effect that youth and mental deficiency can have on a confession, but disregarded this effect in the final determination of voluntariness and instead emphasized the police conduct.[120] Although the majority stated that they were applying the totality of the circumstances test, the majority in reality did not apply the

112. *Culombe*, 367 U.S. at 603-605; *see* Fikes v. Alabama, 352 U.S. 191, 197-98 (1957). The *Fikes* Court suggested a method of determining the voluntariness of confessions by mentally deficient people in which the amount of allowable police pressure during interrogation depends on the subjective mental capacity of the defendant to resist the pressure. *Id.* at 197-98. The *Fikes* method suggests that as the mental capacity of confessor decreases, the amount of police pressure that courts could allow and still find the confession voluntary would decrease. *See also* Stein v. New York, 346 U.S. 156, 185 (1953) (courts must consider amount of police pressure placed on defendant to confess in relation to defendant's mental capacity for resisting pressure when determining voluntariness of confession).

113. *See* 692 F.2d at 983-85 (Ervin, J., dissenting); *supra* notes 58-61, 71-72 and accompanying text (conclusion of *Vance* dissent that combination of police conduct, mental deficiency, and age of defendant rendered confession involuntary).

114. 692 F.2d at 980-82. The dissent in *Vance* charged the majority with using a piecemeal approach that resulted in a separate examination of the internal and external factors of the confession instead of a combination approach that required examination of the totality of the circumstances surrounding the defendant's confession. *Id.* at 983 (Ervin, J., dissenting); *see infra* notes 115-116 and accompanying text (description of approach *Vance* majority used in examining totality of circumstances surrounding defendant's confession).

115. 692 F.2d at 980-81; *see supra* notes 76-92 and accompanying text (majority's discussion that age and mental deficiency are factors in totality test).

116. 692 F.2d at 981-82; *see supra* note 112 and accompanying text (courts should consider defendant's mental capacity in relation to police pressure during interrogation when determining voluntariness).

117. *See supra* notes 112-116 (*Culombe* holds that courts should examine interaction of internal and external factors in confession situation). By failing to consider the defendant's mental deficiency when determining the amount of police pressure that the defendant in *Vance* could withstand, the majority did not apply the third part of *Culombe's* totality of the circumstances test.

118. *See* 692 F.2d at 981-82; *see infra* notes 121-128 and accompanying text (discussing Fourth Circuit's emphasis on police conduct when evaluating voluntariness of confessions).

119. *See* 692 F.2d at 980-81.

120. *Id; see infra* notes 121-128 and accompanying text (Fourth Circuit emphasized propriety of police conduct in voluntariness determination).

totality test because the court failed to consider the combined effect of the defendant's mental deficiency and the police conduct on the voluntariness of the defendant's confession.[121] The *Vance* court's emphasis on police conduct is consistent with previous Fourth Circuit decisions on the voluntariness issue.[122] In *Thomas v. North Carolina*,[123] the Fourth Circuit also emphasized the police conduct in determining the voluntariness of a confession.[124] Although the factual situations in *Thomas* and *Vance* were remarkably similar,[125] the Fourth Circuit reached different results concerning the voluntariness of the confessions in the two cases.[126] The only significant factual difference between *Vance* and *Thomas* was the propriety of the policy conduct.[127] In both *Thomas* and *Vance*, therefore, the Fourth Circuit's decision on whether the confession was voluntary depended on the characterization of whether the police conduct was proper.[128]

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121. *See* 692 F.2d at 980-82; *see supra* notes 112-120 and accompanying text (*Vance* majority overemphasized propriety of police conduct).

122. *See infra* notes 123-128 (example of Fourth Circuit's emphasis on police conduct); *see also* Williams v. Peyton, 404 F.2d 528, 530 (4th Cir. 1968). *Williams* was factually similar to *Vance* because the defendant in *Williams*, like the defendant in *Vance*, was 15 years old when he confessed. *Id.* at 531; 692 F.2d at 981. In *Williams*, the defendant asserted in his habeas corpus petition that the trial court had improperly admitted his pretrial confession. 404 F.2d at 530. The defendant contended that the confession was per se involuntary since the defendant was onely 15 years old when he confessed. See *id.* Although the Fourth Circuit rejected the defendant's per se argument, the Fourth Circuit determined that the defendant's confession was involuntary due to the impropriety of the police conduct. *Id.* at 530-31. The court found that the police conduct was improper because the police held the defendant incommunicado for three days and did not inform the defendant of either the right to counsel or the right to remain silent before the defendant confessed. *Id.* Thus, the police conduct was an important factor in the *Williams* court's determination that the defendant's confession was involuntary. *Id.*

123. 447 F.2d 1320 (4th Cir. 1971).

124. *Id.*

125. *Id.* at 1320-22; 692 F.2d at 980-81. In both *Vance* and *Thomas*, the defendant was a 15 year old mental deficient who confessed to murder. 692 F.2d at 980; 447 F.2d at 1321-22. In both *Vance* and *Thomas*, the trial court admitted the defendant's confession over the defendant's objection that the confession was involuntary. 692 F.2d at 980; 447 F.2d at 1321.

126. *Compare Vance*, 692 F.2d at 981-82 (propriety of police conduct rendered defendant's confession voluntary); *with Thomas*, 447 F.2d at 1321-22 (improper police conduct rendered defendant's confession involuntary); *see also infra* notes 127-128 and accompanying text (courts' differing characterization of police conduct in *Vance* and *Thomas* resulted in differing determinations of voluntariness of confessions).

127. *See Thomas*, 447 F.2d at 1321-22; 692 F.2d at 980-82. In *Thomas*, a key factor in finding the police conduct improper was the police questioning of the defendant for four continuous hours late at night, and again for nine hours the following day. 447 F.2d at 1321. The police questioned the defendant continuously from 12:00 a.m. until 4:00 a.m., and from 7:30 a.m. the following morning until 5:00 p.m., when the defendant finally confessed to murder. *Id.* Another factor in *Thomas* supporting the impropriety of the police conduct was the fact that the police did not inform the defendant of his right to counsel. *Id.* The police did inform the defendant of his right to remain silent, but encouraged the defendant to talk by telling the defendant that talking would be in the defendant's best interest. *Id.* The *Thomas* court concluded that the impropriety of the police conduct was a major cause of the defendant's confession. *Id.* at 1321-22.

128. *See supra* notes 121-127 (Fourth Circuit emphasizes police conduct when determining voluntariness).

In addition to the Fourth Circuit, many other circuit courts also overemphasize police conduct when making the voluntariness determination.[129] As in *Vance*, the other circuits recognize the totality of the circumstances test as the proper test to determine voluntariness of confessions, but actually fail to properly apply the test by focusing on the propriety of police conduct and ignoring whether the defendant has the capacity to voluntarily confess.[130] Thus, the Fourth Circuit's emphasis on police conduct is consistent with the approach used by other circuit courts.[131] Although the *Vance* court's reasoning is consistent with other circuit courts, the Fourth Circuit's emphasis on the propriety of the police conduct is incorrect in light of the totality of the circumstances test which dictates that courts should examine all the circumstances surrounding a confession.[132]

The *Vance* decision demonstrates the method the Fourth Circuit will use in determining the voluntariness of confessions by mentally deficient juveniles.[133] The key factor the Fourth Circuit will examine in determining whether a particular confession is voluntary is the police conduct during the

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129. *See infra* note 130 and accompanying text (circuit courts emphasizing police conduct when determining voluntariness of confessions).

130. *See* Iverson v. North Dakota, 480 F.2d 414, 424 (5th Cir.), *cert. denied*, 414 U.S. 1044 (1973). In *Iverson*, the Fifth Circuit stated that the court would examine the totality of the circumstances surrounding the defendant's confession. *Id.* In reality, however, the *Iverson* court overemphasized the police conduct and concluded that the confession was voluntary because the police did not threaten or restrain the defendant during interrogation. *Id.* at 424-25. In *United States v. Yeager*, the Third Circuit considered the confession of a 16 year old boy. 446 F.2d 1360, 1361 (3rd Cir. 1971). In *Yeager*, the defendant confessed to murder after two and one-half hours of police questioning. *Id.* at 1361. The *Yeager* court emphasized that the police conduct was proper since the interrogation was brief and, therefore, the defendant's confession was voluntary. *Id.* at 1362. In *Cotton v. United States*, the Eighth Circuit considered a case in which a 15 year old boy confessed to stealing a treasury check. 446 F.2d 107, 108-09 (8th Cir. 1971). The Eighth Circuit found the confession voluntary because the police only questioned the defendant for two hours and used no physical coercion in eliciting the statement. *Id.* at 109-10. In *Michaud v. Robbins*, the First Circuit examined the totality of the circumstances surrounding a 15 year old defendant's confession. 424 F.2d 971, 973-74 (1st Cir. 1970). The *Michaud* court concluded that the confession was voluntary since the police interrogation that elicited the confession was neither intensive nor coercive. *Id.* at 975. In *Kerr v. City of Chicago*, the plaintiff sued the defendant for illegal detainment. 424 F.2d 1134, 1138 (7th Cir.), *cert. denied*, 400 U.S. 833 (1970). The police had used the plaintiff's confession to detain him for 18 months without a trial. *Id.* at 1138. The Seventh Circuit concluded that the confession used to detain the plaintiff was involuntary because of improper police conduct, such as promising the plaintiff food and water if he would confess, during the interrogation. *Id.* at 1137-38. In *United States v. Glover*, a juvenile defendant confessed to passing a forged check. 372 F.2d 43, 44-45 (2nd Cir. 1967). The Second Circuit examined the totality of the circumstances surrounding the confession and concluded that the confession was involuntary because of improper police conduct in detaining the defendant for 15 hours. *Id.* at 46-47.

131. *See supra* notes 121-128 and accompanying text (Fourth Circuit and other circuits emphasize police conduct when determining voluntariness of confessions).

132. *See supra* notes 94-128 and accompanying text (courts that only examine propriety of police conduct when determining voluntariness do not properly apply totality of the circumstances test).

133. *See supra* notes 121-128 and accompanying text (discussion of Fourth Circuit's method of determining voluntariness of confessions).

interrogation of the defendant.[134] Although the Fourth Circuit may recognize age as an important factor, the court will accord little weight to the fact that a particular defendant is a juvenile.[135] While the Fourth Circuit also will acknowledge that mental deficiency is a factor to consider when determining voluntariness, mental deficiency probably will not be enough to change the outcome of a confession case once the Fourth Circuit decides that the police conduct which led to the confession was proper.[136] In cases involving the confession of a mentally deficient juvenile, the Fourth Circuit apparently will characterize a confession elicited by proper police conduct as voluntary and a confession elicited by improper police conduct as involuntary. Since police conduct is the key factor the Fourth Circuit examines in determining voluntariness, Fourth Circuit practitioners attempting to argue that a confession was involuntary should argue that the particular police conduct surrounding the confession was improper. The practitioner should inquire into the behavior of the police during the interrogation, and argue that police pressure caused the confession.[137] Attorneys should not expect the Fourth Circuit to overturn a voluntariness determination despite evidence that the defendant was a mentally deficient juvenile unless the police conduct in obtaining the particular confession was clearly improper.[138]

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134. *See supra* notes 121-128 (discussion of rationale underlying Fourth Circuit's emphasis of police conduct when determining the voluntariness of confessions).

135. *See supra* notes 37-39 & 104-106 and accompanying text (*Vance* court accorded little weight to defendant's youth when determining voluntariness of confession); *supra* notes 121-128 (Fourth Circuit previously has accorded little weight to defendant's youth when determining voluntariness of confessions). In *United States v. Miller*, the Fourth Circuit determined the voluntariness of a 14 year old defendant's waiver of *Miranda* rights and confession. 453 F.2d 634, 635 (4th Cir.), *cert. denied*, 406 U.S. 923 (1972). The *Miller* court rejected the proposition that a juvenile is incapable of waiving constitutional rights. *Id.* at 635-36. Instead, the Fourth Circuit stated that they would examine the totality of the circumstances surrounding the confession, and held both the defendant's waiver of *Miranda* rights and the defendant's confession voluntary because the postal inspector questioning the defendant did not coerce or pressure the defendant during the interrogation. *Id.* although the *Miller* court determined the voluntariness of both a waiver and a confession, the rationale underlying a voluntary waiver is similar to the rationale underlying a voluntary confession because in each instance a person must have the mental capacity to comprehend his rights and the consequences of his actions. *See id.* at 635-36. The decisions in *Miller, Vance, Williams*, and *Thomas* demonstrate that the Fourth Circuit will accord little weight to the age of a confessor when determining the voluntariness of a confession. *See supra* notes 121-134 and accompanying text (Fourth Circuit accords little weight to age when determining voluntariness of confessions).

136. *See supra* notes 121-128 (Fourth Circuit emphasizes propriety of police conduct in voluntariness determination). The decisions in *Vance, Thomas*, and *Williams* demonstrate that the Fourth Circuit will accord little weight to the mental deficiency of a confessor when determining the voluntariness of a confession. *See supra* notes 105-106 & 121-134 and accompanying text (Fourth Circuit emphasizes police conduct and accords little weight to mental deficiency of confessor when determining voluntariness of confession).

137. *See supra* notes 73-133 and accompanying text (propriety of police conduct is controlling factor in Fourth Circuit's determination of voluntariness).

138. *See supra* notes 121 & 129-130 and accompanying text (only improper police conduct will render confession involuntary); *supra* notes 87-89 and accompanying text (fact that mentally deficient person cannot comprehend consequences of confession renders confession involuntary);

The Fourth Circuit in *Vance v. Bordenkircher* examined the confession of a mentally deficient juvenile and determined that the confession was voluntary.[139] Although determining the voluntariness of a confession is not an easy task, the Fourth Circuit in *Vance* did nothing to make this task easier for courts in the future.[140] While the propriety of police conduct is easier to ascertain and examine than the mental capacity of the defendant, relying on the propriety of the police conduct to determine the voluntariness of a confession is incorrect when a particular defendant is so mentally deficient that he is extremely susceptible to police pressure.

S. PERRY THOMAS, JR.

C. *False Personation: Acts Sufficient to Convict Under 18 U.S.C. Section 912*

Section 912 of Title 18 of the United States Code imposes a criminal penalty on any person who impersonates an officer or employee of the United States.[1] Congress enacted section 912 to preserve the prestige and dignity of federal

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supra notes 102-104 and accompanying text (mentally deficient juveniles are incapable of voluntarily confessing).

139. 692 F.2d at 981-82.

140. *See* Duke, *supra* note 52, at 21-22 (determining voluntariness of confessions is concept that most courts have not applied consistently and have not explained clearly).

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1. 18 U.S.C. § 912 (1976). Section 912 of Title 18 of the United States Code prohibits the impersonation of an officer or employee of the United States and imposes a fine of up to $1000 or imprisonment for a maximum of three years, or both. *Id.* The false personation statute contains two separate offenses. *See id.* Although § 912 does not set forth distinctively the two separate offenses, courts traditionally have used bracketed numbers to identify the two offenses contained within § 912. *See* United States v. Rosser, 528 F.2d 652, 654 n.4 (D.C. Cir. 1976) (following custom of previous courts by separating false personation offenses by use of bracketed numbers); Honea v. United States, 344 F.2d 798, 800 n.1 (5th Cir. 1965) (same). A violation of § 912[1] occurs when an impersonator asserts the false pretense of federal authority and "acts as such". 18 U.S.C. § 912 (1976). An impersonator violates § 912[2] when the impersonator pretends to be an agent of the United States and thereby demands or obtains an object of value. *Id.* Congress first enacted the false personation statute in 1884. *See* Act of April 18, 1884, ch. 26, 23 Stat. 11 (1884) (current version at 18 U.S.C. § 912 (1976)). The adoption of a uniform penal code in 1909 produced a minor rewording of the statute that clarified and condensed but did not change the substance of the existing false personation statute. *See* Act of March 4, 1909, ch. 321, § 32, 35 Stat. 1088, 1095 (1909) (current version at 18 U.S.C. § 912 (1976)). Another revision in 1938 added that courts could convict an impersonator for pretending to be an employee of a corporation that the United States owned or controlled. *See* Act of February 28, 1938, ch. 37, 52 Stat. 82 (1938) (current version at 18 U.S.C. § 912 (1976)). The present false personation statute is the result of a 1948 revision of the Federal Criminal Code that consolidated former § 76 and § 123 into present § 912. *See* 18 U.S.C. § 912 (1976) (originally enacted as Act of June 25, 1948, ch. 645, § 1, 62 Stat. 742 (1948)). Former § 76 of the Federal Criminal Code

office and to promote a spirit of respect for the government.[2] The false personation statute contains two distinct criminal offenses.[3] Courts traditionally have inserted bracketed numbers to identify the two offenses under section 912 since the false personation statute does not separate the crimes explicitly.[4] The first offense, defined in section 912[1] and containing two separate elements, provides that any individual who first misrepresents himself as an agent of the United States and second "acts as such" is subject to criminal prosecution in federal court.[5] Under the second offense, defined in section 912[2], an impersonator is subject to federal conviction for either demanding or obtaining an object of value while masquerading as a government agent.[6] In *United States v. Parker*,[7] the Fourth Circuit considered what constitutes an act sufficient to sustain a conviction pursuant to a section 912[1] indictment despite the defendant's apparent absence of fraudulent intent.[8]

In *Parker*, the defendant visited the home of Gerald Brooks to purchase firewood.[9] Parker and Brooks made an agreement for the sale and delivery of a half cord of wood.[10] In the course of conversation, Parker falsely informed Brooks for no apparent reason that Parker represented the Internal

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contained the general prohibition against impersonating officers or employees of the federal government. *See* 18 U.S.C. § 912 (1976) (Historical Note). Former § 123 of the Federal Criminal Code forbade the impersonation of a federal revenue officer and imposed a fine of $500 and a punishment of up to two years. *Id.* Present § 912 merely included revenue officers within the entire protected class of federal employees. *See id.* The only major change arising from the 1948 revision of the false personation statute was the deletion of the phrase "with intent to defraud the United States or any person." *Id.* Without explanation, the revisers of the Federal Criminal Code omitted the "intent to defraud" phrase as meaningless in light of the Supreme Court decision in *United States v. Lepowitch*. *Id.; see* United States v. Lepowitch, 318 U.S. 702, 704 (1943); *infra* text accompanying notes 44-49 (discussion of *Lepowitch*). The *Lepowitch* Court stated that "intent to defraud" occurs when an impersonator seeks to change the course of conduct of another. 318 U.S. at 704. Congressional reports on the proposed revisions of the Federal Criminal Code stated that the revisions only consolidated and simplified the criminal code and preserved the original intent of Congress. *See* S. REP. No. 1620, 80th Cong., 2nd Sess. 1 (1948) [hereinafter cited as S. REP. No. 1620]; H.R. REP. No. 304, 80th Cong., 1st Sess. 2 (1947) [hereinafter cited as H.R. REP. No. 304].

2. *See* United States v. Barnow, 239 U.S. 74, 80 (1915) (discussing policy considerations behind false personation statute); United States v. Guthrie, 387 F.2d 569, 571 (4th Cir. 1967) (injury to government occurs by impersonation without fraudulent intent), *cert. denied*, 392 U.S. 927 (1968); Honea v. United States, 344 F.2d 798, 802 (5th Cir. 1965) (statute protects importance of federal office).

3. *See* 18 U.S.C. § 912 (1976).

4. *See supra* note 1 (explaining courts' usage of bracketed numbers to identify two separate offenses in § 912).

5. 18 U.S.C. § 912 (1976).

6. *Id.*

7. 699 F.2d 177 (4th Cir.), *cert. denied*, 104 S.Ct. 122 (1983).

8. *Id.* at 180. In *United States v. Parker*, the Fourth Circuit also examined the admissibility of evidence of other crimes to demonstrate Parker's knowledge of the crime, intent, and identity in addition to determining whether Parker violated the false personation statute. *Id.; see infra* note 34 (discussing admissibility of evidence of other crimes to aid in convicting Parker).

9. 699 F.2d at 177.

10. *Id.* at 178.

Revenue Service (IRS).[11] Parker stated that he was investigating a report that Brooks failed to pay taxes on income derived from the sale of firewood.[12] Brooks later contacted the local IRS office to confirm Parker's identity.[13] An IRS agent conducted an investigation in which the agent, posing as Brooks, telephoned Parker at home.[14] Parker reasserted his government affiliation to the IRS agent but stated that the IRS had terminated the investigation of Brooks.[15] The United States District Court for the Eastern District of Virginia convicted Parker under section 912[1] and sentenced him to three years imprisonment with all but three months of Parker's sentence suspended.[16]

On appeal to the Fourth Circuit, Parker conceded that the district court prosecution had established the first element of a section 912[1] violation by demonstrating that Parker falsely pretended to have been an IRS agent.[17] The defendant, however, claimed that the prosecution in the district court proceeding never sufficiently established the second element of section 912[1] that Parker acted as a federal agent.[18] Parker argued that he made his misrepresentations to Brooks as part of an innocent masquerade and that Parker's actions did not violate the statute forbidding the impersonation of federal officers.[19]

In presenting a defense, Parker relied solely upon *United States v. Rosser*.[20] In *Rosser*, the defendant misrepresented himself as an IRS agent to a gas station owner during the gasoline crisis of 1974.[21] For eleven days Rosser controlled the entire operation of the gas station, including the system of gasoline allocation.[22] Upon considering the facts of *Rosser*, the District of Columbia

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11. *Id.*

12. *Id.* In *Parker*, the defendant did not use his pretended authority as an Internal Revenue Service (IRS) agent to obtain a lower price for firewood since the price which Parker agreed to pay was Brooks' regular price. *Id.* Parker therefore did not violate § 912[2] since Parker did not demand or obtain an object of value. *Id.; see supra* note 1 (no violation of § 912[2] if impersonator did not attempt to obtain object of value through impersonation).

13. 699 F.2d at 178.

14. *Id.*

15. *Id.* During the conversation between defendant Parker and the IRS agent, Parker remarked that Brooks owed Parker a favor, but Parker later retracted the statement indicating that he wished he had never mentioned the IRS. *Id.*

16. *Id.*

17. *Id.*

18. *Id.; see supra* text accompanying note 1 (setting forth dual elements of § 912[1] violation).

19. 699 F.2d at 178.

20. *Id.; see* United States v. Rosser, 528 F.2d 652 (D.C. Cir. 1976).

21. 528 F.2d at 653.

22. *Id.* In *United States v. Rosser*, the defendant challenged his district court indictment on the grounds that the prosecution had failed to allege "intent to defraud" as part of the offense of false personation. *Id.* The District of Columbia Circuit denied Rosser's motion in holding that after *United States v. Lepowitch*, "intent to defraud" is mere surplusage and not a necessary element of the false personation offense. *Id.* at 656; *see* United States v. Lepowitch, 318 U.S. 702, 704 (1943); *supra* note 1 (stating that *Lepowitch* decision eliminated need for "intent to defraud" in § 912 conviction); *infra* notes 42-49 and accompanying text (discussion of *Lepowitch*). The *Rosser* court stated that courts should treat the absence of "intent to defraud" in the 1948 revision of the false personation statute as an inadvertant error resulting from the revisers' interpretation of *Lepowitch*. 528 F.2d at 655.

Circuit defined the acting element of section 912[1] as any assertion of authority by an imposter, based on the position that the impersonator pretends to hold, which the impersonator carries out by the performance of an overt act.[23] The *Rosser* court stated in dictum that to violate section 912[1], a defendant must do more than merely perpetuate the masquerade as a federal officer.[24] The District of Columbia Circuit implied that a discernable, culpable act is necessary for a court to convict a defendant for impersonating a federal officer.[25] The *Rosser* court recognized that if courts did not require a discernable, culpable act to convict under the false personation statute, the undesirable result of allowing the false pretense of federal authority alone to satisfy the two elements of section 912[1] would occur.[26]

While considering Parker's claim that section 912[1] prohibits only those misrepresentations that the impersonator manifests in an overt act, the Fourth Circuit found that the *Rosser* court's dictum conflicted with the Supreme Court's decision in *United States v. Barnow*.[27] In *Barnow*, the defendant falsely represented himself as a government agent empowered to sell a set of books concerning the presidency.[28] In contrast to the *Rosser* court's more stringent standard that in addition to the pretense of federal authority justice requires a separate culpable act to convict under the false personation statute, the *Barnow* Court held that any act of an impersonator that perpetuates the false pretense of federal authority violates section 912[1].[29]

In determining whether Parker's actions violated the false personation statute, the *Parker* court relied on case law interpreting section 912 in affirming Parker's conviction.[30] The Fourth Circuit found that Parker's actions falsely asserted the authority to investigate Brooks' tax liability, despite Parker's absence of any overt intent to defraud.[31] Because Parker misrepresented his status affirmatively by stating that he was an IRS agent, the Fourth Circuit determined that Parker's actions satisfied the first element of section 912[1]

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23. 528 F.2d at 656.

24. *Id.* at 657.

25. *See id.*

26. *Id.*

27. *See* 699 F.2d at 179 n.3; *see also* United States v. Barnow, 239 U.S. 74 (1915).

28. 239 U.S. at 76.

29. *Id.* at 77. In *United States v. Barnow*, the Supreme Court held that the "acts as such" element of the false personation offense requires more than the false pretense of federal authority. *Id.* The *Barnow* Court stated that a person must perform an act that is in keeping with the pretense of authority in order to violate the false personation statute. *Id.*

30. *See* 699 F.2d at 179-80; *see also* United States v. Cohen, 631 F.2d 1223, 1224-25 (5th Cir. 1980) (signing register at federal penitentiary as Associate Attorney General of the United States sufficient for conviction under § 912); United States v. Robbins, 613 F.2d 688, 690-92 (8th Cir. 1979) (impersonating FBI agent by carrying handgun, badge, and handcuffs sufficient for conviction under § 912); United States v. Hamilton, 276 F.2d 96, 98 (7th Cir. 1960) (defendant's actions of impersonating FBI agent and carrying gun sufficient for conviction under § 912); United States v. Harth, 280 F. Supp. 425, 426-27 (W.D. Okla. 1968) (impersonating IRS agent and obtaining information from landlord concerning former tenant sufficient for conviction under § 912).

31. 699 F.2d at 179.

which requires a false pretense of federal authority.[32] Additionally, the *Parker* court found that by asserting his status as an IRS agent investigating a report of Brooks' failure to report income on the sale of firewood, Parker violated the "acts as such" element of the crime of false personation.[33] The *Parker* court, therefore, affirmed the defendant's district court conviction because the court found that Parker's actions violated both elements of section 912[1].[34]

Before concluding that Parker violated the false personation statute, the *Parker* court reasserted in dictum the principle which the Fourth Circuit announced in *United States v. Guthrie*[35] that "intent to defraud" is not an element of section 912.[36] In *Guthrie*, the defendant posed as a federal bank examiner to defraud another of that individual's entire savings account.[37] Guthrie appealed his district court conviction under section 912 claiming that the indictment failed to allege the element of "intent to defraud."[38] Defendant Guthrie premised his appeal on the fact that prior to the 1948 revision

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32. *Id.* The *Parker* court found that Parker's statement to Brooks falsely asserting the defendant's affiliation with the IRS was not enough to satisfy the "acts as such" element of § 912[1]. *Id.; see supra* note 1 (discussing § 912[1] and stating that two separate elements of § 912[1] must be present to convict).

33. 699 F.2d at 179.

34. *Id.* at 180. In Parker's appeal of his district court conviction to the Fourth Circuit, the defendant also challenged the admission into evidence of his telephone conversation with the IRS agent. *Id.* The *Parker* court stated that the telephone conversation between the IRS agent and Parker conceivably could form the basis for a second court of false personation since Parker reasserted his pretended IRS status to the IRS agent. *Id.* The defendant claimed that rule 404(b) of the Federal Rules of Evidence prohibited the introduction of Parker's telephone conversation with the IRS agent as evidence to convict Parker for his false assertion of authority to Brooks. *Id.; see* FED. R. EVID. 404(b) (evidence of other crimes only admissible to show motive, plan, knowledge, identity, or absence of mistake). The government conceded that under rule 404(b), evidence of other crimes is not admissible to show criminal character or disposition. 699 F.2d at 180; *see* FED. R. EVID. 404(b). Such evidence of other crimes, however, is admissible for the limited purpose of showing intent, plan, knowledge, identity, or absence of mistake. *See* 699 F.2d at 180; FED. R. EVID. 404(b). The Fourth Circuit found Parker's telephone conversation with the IRS agent admissible by reasoning that the evidence illustrated Parker's identity, intent, and knowledge of the crime as rule 404(b) permits. *See* 699 F.2d at 180; FED. R. EVID. 404(b). The Fourth Circuit in *Parker* based its finding of admissibility of evidence of other crimes on several other Fourth Circuit decisions. 699 F.2d at 180; *see* United States v. Beahm, 664 F.2d 414, 416-17 (4th Cir. 1981) (admitting recent complaints of improper sexual advances to prove defendant's intent and absence of mistake); United States v. Masters, 622 F.2d 83, 85 (4th Cir. 1980) (admitting taped conversation of defendant's confession that defendant previously supplied firearms to permit full presentation of charged offense); United States v. Woods, 484 F.2d 127, 134-35 (4th Cir. 1973) (admitting evidence of past violent crimes to show commonality of facts between charged crime and past acts), *cert. denied*, 415 U.S. 979 (1974). The Fourth Circuit also stated that the probative value of the evidence outweighed any prejudicial effect which occurred by admitting the evidence. 699 F.2d at 180.

35. United States v. Guthrie, 387 F.2d 569 (4th Cir. 1967), *cert. denied*, 392 U.S. 927 (1968).

36. 699 F.2d at 179.

37. 387 F.2d at 570. In *United States v. Guthrie*, the defendant approached Fred Stegall, identified himself as a federal bank examiner, and falsely told Stegall that someone had misused funds in Stegall's account. *Id.* The defendant asked Stegall to withdraw the balance in Stegall's savings account so Guthrie could discover the embezzler. *Id.* The defendant promised to redeposit secretly Stegall's money. *Id.*

38. *Id.*

of the Federal Criminal Code, the false personation statute contained the phrase "intent to defraud."[39] The Fourth Circuit examined the 1948 revision of the false personation statute and, like the majority of courts, determined that "intent to defraud" was no longer an element of the crime of false personation.[40]

The Fourth Circuit decision in *Guthrie* that "intent to defraud" is not an essential element of the section 912[1] offense is in accordance with each circuit, except for the Fifth Circuit, that has considered whether "intent to defraud" is a component of the crime of false personation.[41] In contrast, the Fifth Circuit has asserted in *United States v. Randolph*,[42] the minority view that "intent to defraud" is an essential element of the section 912[1] offense.[43] The conflict between circuits originated with the Supreme Court decision in *United States v. Lepowitch*.[44] At the time of the *Lepowitch* decision, "intent to defraud" was an element of the false personation statute.[45] In *Lepowitch*, while ruling on a defendant's indictment for impersonating an officer of the Federal Bureau of Investigation (FBI), the Supreme Court defined "intent to defraud."[46] The *Lepowitch* Court held that "intent to defraud" occurs when an impersonator attempts to influence his victim into following a course of conduct that the victim would not have followed but for the impersonator's conduct.[47] In response to *Lepowitch*, the Federal Criminal Code revision committee removed the phrase "intent to defraud" from section 912 in 1948.[48] Without a definitive explanation, the revisers merely stated that *Lepowitch* rendered the "intent to defraud" language meaningless.[49]

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39. *Id.; see supra* note 1 (history and congressional changes to § 912).

40. 387 F.2d at 571. After examining the 1948 revision of the false personation statute, the *Guthrie* court determined that courts must recognize the international change of a statute by Congress. *Id.; see supra* note 1 (discussing congressional revision of § 912). Furthermore, the Fourth Circuit stated that injury to the federal government occurs whether or not the impersonator possesses a fraudulent intent. 387 F.2d at 571. The *Guthrie* court did state, however, that the presence of fraudulent intent may affect the gravity of the crime of false personation. *Id.*

41. *See* United States v. Cord, 654 F.2d 490, 492 (7th Cir. 1981) (indictment need not allege "intent to defraud" as prerequisite to conviction under § 912); United States v. Robbins, 613 F.2d 688, 691 (8th Cir. 1979) (same); United States v. Rosser, 528 F.2d 652, 654-58 (D.C. Cir. 1976) (same); United States v. Rose, 500 F.2d 12, 14 (2d Cir. 1974) (same), *vacated on other grounds*, 424 U.S. 956 (1976); United States v. Mitman, 459 F.2d 451, 453 (4th Cir.) (same), *cert. denied*, 409 U.S. 863 (1972). *But see* United States v. Randolph, 460 F.2d 367, 369-70 (5th Cir. 1972) ("intent to defraud" not element of § 912[1] offense); *infra* text accompanying notes 50-55 (discussion of Fifth Circuit's position that "intent to defraud" is element of § 912).

42. 460 F.2d 367 (5th Cir. 1972).

43. *Id.* at 370; *see infra* text accompanying notes 51-55 (discussion of *United States v. Randolph*); *see also* United States v. Cohen, 631 F.2d 1223, 1224 (5th Cir. 1980) (indictment must allege intent to defraud to convict under § 912); United States v. Pollard, 486 F.2d 190, 191 (5th Cir. 1973) (same); Honea v. United States, 344 F.2d 798, 802 (5th Cir. 1965) (same); Walker v. United States, 342 F.2d 22, 26 (5th Cir.) (same), *cert. denied*, 382 U.S. 859 (1965).

44. 318 U.S. 702 (1943).

45. *Id.* at 704.

46. *Id.*

47. *Id.*

48. *See supra* note 1 (discussion of 1948 revision of § 912).

49. *See* 18 U.S.C. § 912 (1976) (Historical Note explaining that "intent to defraud" language is meaningless).

The Fifth Circuit decisions concerning whether "intent to defraud" is an element of the crime of false personation have indicated that Congress drafted the statutory language of section 912 to conform to the judicial construction that the Supreme Court mandated in the *Lepowitch* decision.[50] In *United States v. Randolph*,[51] for example, the Fifth Circuit reversed the defendant's conviction for drafting a letter in the falsely assumed capacity of a major in the Untied States Army because of a faulty indictment.[52] In dictum, the *Randolph* court stated that Congress did not intend to create any substantive changes in the criminal law by revising the Federal Criminal Code.[53] The Fifth Circuit added that the *Lepowitch* decision only defined the type of fraud required under section 912 and did not render the allegation of "intent to defraud" superfluous.[54] Finally, the *Randolph* court asserted that Congress did not desire to expand the scope of section 912 to subject a mere braggart to prosecution.[55]

In contrast with the Fifth Circuit, the Second, Fourth, Seventh, Eighth, and Ninth Circuits comprise the majority that does not require the prosecution to prove a defendant's "intent to defraud" in order to convict under section 912.[56] The circuits that do not consider "intent to defraud" an element of a section 912 offense follow a principle of statutory construction that requires a court to recognize and implement Congress' intentional alteration of statutory language.[57] According to the majority, an impersonator damages the dignity of the federal government whether or not the impersonator possesses an intent to defraud.[58] The majority view that "intent to defraud" is not a requisite element of a violation under section 912[1] is in accord with the general

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50. *See* United States v. Randolph, 460 F.2d 367, 369-70 (5th Cir. 1972) (revisers altered § 912 to conform with *Lepowitch*); Honea v. United States, 344 F.2d 798, 801-02 (5th Cir. 1965) (same).

51. 460 F.2d 367 (5th Cir. 1972).

52. *Id.* at 368-70. The defendant father in *United States v. Randolph* sent a letter to his son in which the father stated that the army had listed the father as missing in action while serving in Vietnam. *Id.* The father admitted that his purpose behind sending the letter to his son was to avoid having to furnish child support payments to the defendant's wife. *Id.* at 369 n.3.

53. *Id.* at 370; *see* Honea v. United States, 344 F.2d 798, 801 (5th Cir. 1965) (revision of Federal Criminal Code did not change substance of criminal law); *see also* H.R. REP. No. 304, *supra* note 1, at 2 (revision of Federal Criminal Code corrected awkward phraseology, reconciled conflicting laws, and consolidated similar laws); S. REP. No. 1620, *supra* note 1, at 1 (revision of Federal Criminal Code preserved original intent of Congress).

54. 460 F.2d at 370.

55. *Id.; see* Honea v. United States, 344 F.2d 798, 802-03 (5th Cir. 1965) (revisers of § 912 did not intend for harmless bravado to constitute offense).

56. *See supra* note 41 (listing cases from circuits that hold "intent to defraud" is not element of § 912).

57. *See* United States v. Cord, 654 F.2d 490, 492 (7th Cir. 1981) (courts must implement congressional elimination of "intent to defraud"); United States v. Rose, 500 F.2d 12, 16 (2d Cir. 1974) (courts must recognize intentional legislative revision of federal statute), *cert. denied*, 424 U.S. 956 (1976); United States v. Guthrie, 387 F.2d 569, 571 (4th Cir. 1967) (same), *cert. denied*, 392 U.S. 927 (1968).

58. *See* United States v. Guthrie, 387 F.2d 569, 571 (4th Cir. 1967), *cert. denied*, 392 U.S. 927 (1968).

policy considerations of the false personation statute.[59] The broad purpose of section 912 is to maintain a sense of dignity and respect for individuals in government service and to punish the false pretense of government authority.[60]

The majority view that "intent to defraud" is not an element of the crime of false personation, however, is in direct conflict with the intent of the 1948 revisers of the Federal Criminal Code.[61] In deleting the phrase "intent to defraud" from section 912, the revisers of the Federal Criminal Code produced virtually no reasoning for executing the change except for the justification that the Supreme Court definition of "intent to defraud" in *Lepowitch* compelled the revisers to excise the phrase from the false personation statute.[62] General commentary concerning the entire revision of the Federal Criminal Code suggests that the revisers did not attempt to change substantively federal criminal law.[63] Instead, congressional reports on the proposed amendments to the Federal Criminal Code stated that the 1948 editing simply consolidated and simplified existing sections of the federal criminal law.[64] The revisers stressed that the revision of the Federal Criminal Code changed existing phraseology but preserved the original intent of Congress in enacting the particular sections of the Federal Criminal Code.[65]

Although the majority view that "intent to defraud" is not an element of the false personation statute is consistent with section 912 policy considerations, the Fifth Circuit minority view that "intent to defraud" remains an element of the false personation statute is more sound.[66] In addition to having the support of the legislative history behind the revision of the Federal Criminal Code, Supreme Court decisions interpreting the 1948 revision support the Fifth Circuit view.[67] The Supreme Court opinions interpreting the revision of the

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59. *See supra* note 2 and accompanying text (discussion of § 912 policy considerations).

60. *Id.; see* United States v. Barnow, 239 U.S. 74, 78 (1915) (false personation statute punishes any false pretense of federal authority).

61. *See* United States v. Randolph, 460 F.2d 367, 368-70 (5th Cir. 1972) (interpreting intent of revisers of Federal Criminal Code); *supra* text accompanying notes 51-55 (discussion of *Randolph*); *supra* note 1 (discussion of § 912); *supra* text accompanying notes 46-47 (discussion of revision of Federal Criminal Code).

62. *See* 18 U.S.C. § 912 (1976) (Historical Note); *supra* note 1 (explaining 1948 revision of false personation statute).

63. *See* H.R. REP. No. 304, *supra* note 1, at 2 (revision of Federal Criminal Code corrected awkward phraseology, reconciled conflicting laws and consolidated similar laws); S. REP. No. 1620, *supra* note 1, at 1 (revision of Federal Criminal Code preserved original intent of Congress).

64. *See supra* note 63 (congressional explanation for 1948 revision of Federal Criminal Code).

65. *Id.*

66. *See supra* note 2 and accompanying text (discussion of § 912 policy considerations); *supra* notes 50-55 (discussing Fifth Circuit's view that "intent to defraud" is element of § 912).

67. *See* Muniz v. Hoffman, 422 U.S. 454, 470 (1975) (legislative history must support substantive change in statute); United States v. Cook, 384 U.S. 257, 262-63 (1966) (same); Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 227 (1957) (courts cannot presume substantive change in law from statutory revision unless Congress clearly expresses intent to change law); *supra* note 53 and accompanying text (discussion of intent of Federal Criminal Code revision committee in deleting "intent to defraud" from § 912).

Federal Criminal Code hold that a court may give effect to substantial changes in the law that the court presumes from the rewording of a statute only if the legislative history supports the changes.[68] Therefore, the Fifth Circuit treats the interpretation of the revisers that the *Lepowitch* decision rendered the phrase "intent to defraud" superfluous as an unintentional error resulting from a misunderstanding of *Lepowitch* because no legislative history existed to support a substantive change in the false personation state.[69] As a result, the Fifth Circuit views the *Lepowitch* decision as defining "intent to defraud."[70] The Supreme Court decision in *Lepowitch* merely adds substance to the "acts as such" requirement of section 912 by equating acting with the intent to change the course of another's conduct with the "acts as such" element.[71] The Fifth Circuit's interpretation of the *Lepowitch* Court's definition of "intent to defraud" is sound, for the requirement of an "intent to defraud" prevents the conviction of a mere braggart.[72] Injury to the government as a result of the false personation of a government official does not occur as the result of an innocent masquerade, for the impersonator intends and causes no harm.[73] Damage to the government only occurs when an impersonator possesses an overt intent to defraud and seeks to change the course of another's conduct.[74]

In recognizing that the *Guthrie* majority view that "intent to defraud" is not an element of a section 912[1] violation is correct, the *Parker* court implicitly ignored the fact that the revisers of the Federal Criminal Code did not intend to change the substance of federal criminal law.[75] By acknowledging that "intent to defraud" is not an element of the crime of false persona-

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68. *See* United States v. Rosser, 528 F.2d 652, 655 (D.C. Cir. 1976); *supra* text accompanying notes 44-49 (discussion of *Lepowitch*); *supra* note 67 (listing Supreme Court cases holding that legislative history must support substantive change in statute for courts to recognize change).

69. *See* United States v. Randolph, 460 F.2d 367, 370 (5th Cir. 1972); *supra* text accompanying notes 44-49 (discussion of *Lepowitch*).

70. *See* United States v. Robbins, 613 F.2d 688, 691 (8th Cir. 1979) (*Lepowitch* adds substance to "acts as such" requirement of § 912); *supra* text accompanying notes 44-49 (discussion of *Lepowitch*).

71. *See* United States v. Robbins, 613 F.2d 688, 691 (8th Cir. 1979) (postulating that Fifth Circuit could view "intent to defraud" as equivalent of "acts as such" requirement of § 912[1]); *supra* text accompanying notes 43-47 (discussion of *Lepowitch*).

72. *See* United States v. Randolph, 460 F.2d 367, 370 (5th Cir. 1972) (revisers of § 912 did not intend for harmless bravado to constitute offense); Honea v. United States, 344 F.2d 798, 801-03 (5th Cir. 1965) (same); *supra* text accompanying note 55 (courts should not interpret § 912 so broadly as to subject braggarts to conviction).

73. *See supra* text accompanying note 55 (courts should not construe § 912 so broadly that courts subject braggarts to conviction). *But see* United States v. Guthrie, 387 F.2d 569, 571 (4th Cir. 1967) (impersonator injures federal government whether or not fraudulent intent exists), *cert. denied*, 392 U.S. 927 (1968).

74. *See supra* text accompanying note 55 (courts should not construe § 912 so broadly to subject mere braggarts to conviction); *supra* text accompanying note 47 (*Lepowitch* definition of "intent to defraud").

75. *See* 699 F.2d at 179 (*Parker* courts' recognition of *Guthrie* for proposition that "intent to defraud" is not element of § 912); *supra* note 63 and accompanying text (1948 revision of Federal Criminal Code did not change criminal law substantively).

tion, the Fourth Circuit increased the possibility that courts will convict innocent braggarts under section 912.[76] The *Parker* court apparently realized that Parker approached Brooks without clearly fraudulent intent.[77] To overcome this obstacle, the Fourth Circuit inserted within the *Parker* holding a confusing discussion of the "intent to defraud" issue and cited *Guthrie* to support the determination that "intent to defraud" is not an element of the crime of false personation, although *Parker* never raised the "intent to defraud" issue on appeal to the Fourth Circuit.[78] The *Parker* court effectively transferred the blame for a rather harsh decision to the Federal Criminal Code revision committee, whose statutory alteration the Fourth Circuit felt compelled to follow.[79] A comparison of the facts of *Parker* and the facts of cases that the Fourth Circuit cited as support for Parker's conviction further illustrates the severity of the Fourth Circuit's decision.[80] In *United States v. Cohen*,[81] the defendant entered a federal penitentiary under the guise of the Associate Attorney General of the United States.[82] The defendant in *United States v. Robbins*[83]carried a handgun, a badge, and a set of handcuffs while impersonating an agent of the FBI.[84] In *United States v. Harth*,[85] the defendant impersonated an IRS agent to obtain from a landlord the current address of a former tenant.[86] The defendant in *United States v. Hamilton*[87] carried a gun while masquerading as an FBI agent.[88] The facts in *Parker* are distinguishable because in *Cohen, Robbins, Hamilton*, and *Harth* the defendants carried out a scheme of impersonation by asserting false authority and by committing an additional culpable act.[89] Carrying a handgun, entering a

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76. *See supra* text accompanying notes 35-40 (discussion of *Guthrie* holding that "intent to defraud" is not element of § 912); *supra* text accompanying note 55 (courts should not interpret § 912 so broadly that braggarts become subject to conviction).

77. *See* 699 F.2d at 179 (recognizing Parker approached Brooks without fraudulent intent).

78. *Id.* at 179. The *Parker* court's discussion of *Guthrie* and the "intent to defraud" issue is confusing because the discussion lends no support to the Fourth Circuit's resolution of the case. *See id.; see also* United States v. Guthrie, 387 F.2d 569, 571 (4th Cir. 1967) ("intent to defraud" is no longer element of § 912[1] offense); *supra* text accompanying notes 35-40 (discussion of *Guthrie*). Parker merely argued that the government at the district court trial failed to establish that Parker committed acts in violation of § 912. 699 F.2d at 178.

79. *See supra* text accompanying notes 47-49 (discussion of Federal Criminal Code revision committee's decision to delete "intent to defraud" from § 912); *supra* note 57 and accompanying text (courts must follow intentional congressional revision of statute).

80. *See supra* note 30 (listing cases Fourth Circuit used as precedent for decision in *Parker*).

81. 631 F.2d 1223 (5th Cir. 1980).

82. *Id.* at 1224-25.

83. 613 F.2d 688 (8th Cir. 1979).

84. *Id.* at 689.

85. 280 F. Supp. 425 (W.D. Okla. 1968).

86. *Id.* at 426 n.2.

87. 276 F.2d 96 (7th Cir. 1960).

88. *Id.* at 97.

89. *See supra* text accompanying notes 81-88 (discussion of facts of cases Fourth Circuit used as support for Parker's conviction). Other cases concerning whether a defendant's actions satisfy the "acts as such" requirement of § 912 reinforce the premise that Parker's conviction

federal penitentiary, and obtaining information, together are more culpable than Parker's act of orally asserting false authority but never demanding to see Brooks' tax return.[90] Therefore, the Fourth Circuit's decision to sentence Parker to three months in prison appears to be too severe a punishment in comparison with the relative harm that Parker caused.[91] Additionally, the *Parker* court seemingly stretched the "acts as such" language of section 912 to convict the defendant, for Parker's statements were much less deserving of punishment than the acts of the defendants in *Cohen, Robbins, Hamilton,* and *Harth.*[92]

The Fourth Circuit in *Parker* adhered to the general policy considerations inherent in section 912 to convict the defendant for impersonating an IRS agent.[93] In citing the *Guthrie* holding, the *Parker* court reasserted that "intent to defraud" is not an element of the crime of impersonation of a federal officer under section 912 in the Fourth Circuit.[94] By recognizing that "intent to defraud" is not an element of a section 912 offense, the Fourth Circuit disregarded the fact that the Federal Criminal Code revision committee did not seek to amend substantively federal criminal law in 1948.[95] Because the Fourth Circuit did not recognize "intent to defraud" as an element of the crime of false personation, prosecutors will find it relatively simple to obtain indictments against defendant who impersonate federal officers but who do not exhibit overtly a desire to change the course of conduct of another. Until

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is severe. *See, e.g.*, United States v. Louderman, 576 F.2d 1383, 1385 (9th Cir. 1978) (conviction of debt collectors for representing themselves as postal officers over telephone to obtain confidential information); United States v. Etheridge, 512 F.2d 1249, 1250 (2d Cir.) (defendant presented self as member of United States Army to obtain Emergency Relief Loan), *cert. denied*, 423 U.S. 843 (1975); Thomas v. United States, 213 F.2d 30, 31 (9th Cir. 1954) (court convicted defendant for representing self as United States Senator in telegram ordering stay of execution); Dickson v. Untied States, 182 F.2d 131, 132 (10th Cir. 1950) (court convicted defendant for representing self as federal officer to force another into car under pretense of transporting to office to discuss tax deficiency); Ekberg v. United States, 167 F.2d 380, 382 (1st Cir. 1948) (masquerading as War Department officer and placing telephone call in official manner to influence another party sufficient for conviction). *But cf.* United States v. Harmon, 496 F.2d 20, 20-21 (2d Cir.) (defendant's statement that he was Air Force sergeant on leave was not sufficient to convict since indictment charged no overt act), *cert. denied*, 419 U.S. 884 (1974); United States v. York, 202 F. Supp. 275, 276-77 (E.D. Va. 1962) (falsely representing FBI employment on credit application not sufficient to convict); United States v. Larson, 125 F. Supp. 360, 361 (D. Alaska 1954) (court acquitted defendant for masquerading as FBI officer since indictment charged no overt act).

90. *See* 699 F.2d at 177-78 (discussion of facts in *Parker*); *supra* text accompanying notes 81-88 (discussion of facts of cases Fourth Circuit used as support for Parker's conviction).

91. *See* 699 F.2d at 178 (court sentenced Parker to three months imprisonment); *supra* text accompanying notes 80-92 (comparing facts of *Parker* to more culpable facts of other § 912 decisions).

92. *See supra* text accompanying notes 2 & 57-60 (discussion of policy considerations behind § 912).

93. *See supra* text accompanying notes 35-40 (discussion of *Guthrie*).

94. *See supra* text accompanying notes 53-55 (discussion of intent of revision committee in deleting "intent to defraud" from § 912).

95. *See supra* text accompanying notes 35-40 (discussion of Fourth Circuit's holding in *Guthrie* that "intent to defraud" is not element of § 912 offense).

the Fourth Circuit amends its belief that "intent to defraud" is not an element of a section 912 offense, the danger will exist that mere braggarts like Parker will be subject to conviction under the false personation statute in the Fourth Circuit.

JEFFREY J. GIGUERE

D. *Testimony of Volunteer Prison Informant Does Not Violate Sixth Amendment*

The sixth amendment provides criminal defendants with the right to counsel.[1] The sixth amendment right to counsel applies to state and federal

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1. U.S. CONST. amend. VI. The sixth amendment provides in part: "In all prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." *Id. See generally* P. LEWIS & K. PEOPLES, CONSTITUTIONAL RIGHTS OF THE ACCUSED 549 (1979) (right to counsel has roots in Middle Ages) [hereinafter cited as LEWIS & PEOPLES].

Although the right to counsel had achieved considerable importance in England by the fifteenth century, two common-law developments stunted the evolution of that right. *Id.* at 549-50. First, the appearance of the distinction between matters of law and matters of fact negatively affected the availability of the right to counsel. *Id.* at 550. The distinction between law and fact required a defendant to present his version of the facts to the court without the aid of counsel. *Id.* The defendant's attorney then would apply the law to the facts as presented by the accused. *Id.* The distinction between law and fact detracted from the right to counsel by prohibiting legal representation during a substantial and crucial part of the trial. *Id.* The second development that slowed the availability of counsel was the English courts' refusal to permit any legal representation to a felony defendant. *Id.* Although the courts disallowed the assistance of counsel to suspected felons, on factual matters, the English did allow suspected misdemeanants to enlist the aid of counsel. *See* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS, 8-9 (1955) (English courts' view that felony defendant was more dangerous than misdemeanor defendant constitutes partial explanation for distinction between felony and misdemeanor); *cf.* United States v. Ash, 413 U.S. 300, 306-07 (1973) (rule that allows accused misdemeanant full benefit of counsel while restricting accused felon to consultation only on purely legal questions is absurd); W. BLACKSTONE, COMMENTARIES 355 (Blackstone criticized rule that denied assistance of counsel to save a man's life yet conferred right to counsel upon defendant standing trial for petty trespass). *See generally* Fellman, *The Constitutional Right to Counsel in Federal Courts*, 30 NEB. L. REV. 559, 560-61 (1950-51) (discussing justifications and criticisms of rule by English commentators).

The thirteen original American states rejected the restrictive English rule pertaining to right to counsel with the adoption of the sixth amendment in 1791. *See* Powell v. Alabama, 287 U.S. 45, 61-65 (1932) (discussing circumstances surrounding ratification of sixth amendment and state constitutional provisions for right to counsel); *see also* Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 Yale L. J. 1000, 1033 (1964) (eleven of thirteen states had abolished law-fact distinction by time of sixth amendment's proposal). By 1800, the majority of state constitutions included some provision for the right to counsel in felony cases. *Id* at 1030-31. *See generally* Rackow, *The Right to Counsel—English and American Precedents*, 11 WM. & MARY QUART. 1, 21-26 (1954) (legislative history behind sixth amendment).

In 1932, the United States Supreme Court recognized in *Powell v. Alabama* that the due process clause of the fourteenth amendment guaranteed the assistance of counsel to an ignorant state defendant in a capital case. 287 U.S. 45, 68-71 (1932). In *Powell*, the state arrested seven

prosecutions.[2] If a defendant cannot afford to retain a lawyer, the government must provide counsel to defend the accused.[3] Once the government formally charges a defendant, the sixth amendment right to counsel attaches.[4]

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black indigent defendants and charged them with rape. *Id.* at 49. The trial judge appointed all attorneys of the local bar to represent the defendants at arraignment. *Id.* Since the court failed to specify a particular attorney for each defendant, members of the local bar declined to assist the defendants at arraignment. *See id.* at 50-51 (discussing racial prejudice and white outrage surrounding trial of black defendants in *Powell* for rape of white girls). The court, however, did specify attorneys of record on the morning of the trial. *Id.* at 57. Nonetheless, the only lawyer who showed concern for the plight of the defendants in *Powell* was an out-of-state attorney, unfamiliar with Alabama law and reluctant to assume total responsibility for the defense. *See id.* at 57 (out-of-state attorney informed court that he wished only to assist attorneys of record). The court convicted the defendants in a one-day trial and sentenced them to death. *Id* at 50. On appeal, the Supreme Court held that the concept of due process of law included the effective assistance of counsel provided for in the sixth amendment. *Id.* at 66-68. The *Powell* Court stated that the right to appointed counsel was a logical corollary of the right to counsel. *Id.* at 72. The Court therefore held that in a capital case a trial court must appoint counsel for a defendant whose ignorance renders him unable to defend himself. *Id.* at 71.

Not until 1963 did the Supreme Court recognize the general right to counsel in state trials as constitutionally protected. *See* Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963) (sixth amendment right to counsel in felony trials is obligatory on state courts through due process clause of fourteenth amendment). *See generally* LEWIS & PEOPLES, *supra* at 549-50 (discussing right to counsel in American courts); Clark, *Gideon Revisited*, 15 ARIZ. L. REV. 343, 343-47 (1973) (same); Comment, *The Further Expansion of the Criminal Defendant's Right to Counsel During Interrogations:* United States v. Henry, 8 PEPPERDINE L. REV. 451, 453-57 (1981) (general history of sixth amendment right to counsel) [hereinafter cited as *Further Expansion*]; *infra* notes 2-7 (discussing cases that construe right to counsel in state and federal court).

2. *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (sixth amendment right to counsel applies to all state felony trials through fourteenth amendment due process clause). Prior to *Gideon*, the Court predicated violations of the right to counsel in state courts solely on the due process clause of the fourteenth amendment. *See* Hamilton v. Alabama, 368 U.S. 52, 53 (1961) (due process clause requires counsel at arraignment because Alabama law requires defendant to plead insanity defense at arraignment or else forfeit opportunity to assert insanity as defense); Spano v. New York, 360 U.S. 315, 324 (1959) (extensive and coercive interrogation of defendant in absence of counsel violates due process); Crooker v. California, 357 U.S. 433, 441 (1958) (admission of voluntary confession of law-school trained defendant made in absence of counsel does not violate due process of law). In federal cases, conversely, the Supreme Court examined violations of the right to counsel under the explicit provisions of the sixth amendment. *See* Johnson v. Zerbst, 304 U.S. 458, 467-68 (1938) (trial court must appoint counsel to defend indigent accused who is unable to procure own counsel).

3. *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (defendant possesses right to court-appointed counsel in state as well as federal felony trials); Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (indigent felony defendant in federal trial has right to court-appointed counsel unless defendant knowingly and intelligently waives right to counsel). The Supreme Court has extended the right to counsel to all indigent misdemeanor defendants faced with a potential jail sentence. *See* Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972) (legal questions involved in petty and misdemeanor offenses also require presence of counsel to ensure fair trial). *But cf.* Scott v. Illinois, 440 U.S. 367, 374 (1979) (state need not appoint counsel if court does not imprison defendant for commission of misdemeanor). *See generally* C. WHITEBREAD, CRIMINAL PROCEDURE—AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS §§ 25.01-25.04 (1980) (actual imprisonment is penalty quite different from fines or threat of imprisonment).

4. *See* Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (sixth amendment does not apply until criminal prosecution of defendant commences). In *Kirby*, the government placed an

Violation of the right to counsel occurs whenever the government denies legal representation to a defendant at a critical stage of the prosecution.[5] The Constitution prohibits the government from deliberately eliciting incriminating statements from a defendant in the absence of counsel.[6] The government also

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unrepresented defendant in an identification line-up six weeks before indicting the defendant. *Id.* at 685. The Supreme Court held that because the government had not indicted the defendant prior to the line-up, the guarantees of the sixth amendment did not attach and the defendant had no right to counsel at the line-up. *Id.* at 690. The *Kirby* Court designated the formal charging of the defendant as the point at which the sixth amendment attaches because the formal charge represents the government's affirmative step into its prosecution of the defendant. *Id.* at 689. In *Kirby*, the Court stated that only after indictment is the assistance of counsel necessary to protect a defendant faced with the complexities of the criminal justice system. *Id.* Consultation with counsel after indictment is vital to an adequate defense since lack of proper investigation and preparation during pretrial proceedings may render the assistance of counsel at trial meaningless. *See* Powell v. Alabama, 287 U.S. 45, 66-71 (1932) (failure of trial court to make effective appointment of counsel at arraignment constitutes denial of due process).

5. *See* Coleman v. Alabama, 399 U.S. 1, 9 (1970) (preliminary hearing is critical stage since prejudice at trial could result from denial of counsel at hearing); United States v. Wade, 388 U.S. 218, 236-37 (1967) (possible suggestiveness of postindictment line-up makes presence of counsel necessary to ensure defendant receives fair trial); Escobedo v. Illinois, 378 U.S. 478, 486 (1964) (police interrogation of defendant on whom criminal investigation has focused is critical stage requiring presence of counsel); Massiah v. United States, 377 U.S. 201, 205 (1964) (postindictment interrogation of defendant is critical stage); Hamilton v. Alabama, 368 U.S. 52, 54 (1962) (arraignment is critical stage requiring presence of counsel); *see also* Powell v. Alabama, 287 U.S. 45, 71 (1932) (some pretrial proceedings are so critical that absence of counsel could prejudice entire trial). The determination of whether a particular proceeding is a critical stage depends on the potential for prejudice to a defendant's constitutional right to a fair trial and the apparent ability of counsel to help avoid that prejudice. *See* Coleman v. Alabama, 399 U.S. 1, 9 (1970) (preliminary hearing provides counsel with opportunity to examine witnesses and discover case against accused as means to prepare proper defense for accused). *See generally* C. WHITEBREAD, *supra* note 3, § 25.03 at 535-36 (listing cases that involve sixth amendment right to counsel); *Further Expansion, supra* note 1, at 462 (discussing criteria that determine whether stage is critical).

Conversely, the sixth amendment right to counsel does not attach to proceedings that are not critical to a proper defense. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 102, 122 (1975) (preliminary hearing conducted to determine probable cause to detain accused is not critical stage that requires assistance of counsel); United States v. Ash, 413 U.S. 300, 317 (1973) (photo display is not critical stage because defendant is not present and no danger exists that his lack of familiarity with law will prejudice his defense); Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (no automatic right to counsel exists at probation revocation hearing unless defendant first shows that due process requires representation); Kirby v. Illinois, 406 U.S. 682, 690 (1972) (preindictment show-up is not critical stage since prosecution has not initiated formal proceedings against defendant); United States v. Wade, 388 U.S. 218, 228 (1967) (taking of defendant's blood and fingerprints presents no risk of prejudice that counsel could offset). *See generally* C. WHITEBREAD, *supra* note 3, § 25.03 at 535-36 (cases involving determination of critical stages in sixth amendment context).

6. Massiah v. United States, 377 U.S. 201, 206 (1964). In *Massiah*, the government employed a codefendant informer to meet with Massiah while the defendants were on bail awaiting trial. *Id.* at 202-03. The government surreptitiously recorded the conversation between the two and introduced Massiah's self-incriminatory remarks into evidence at his trial. *Id.* at 203. The Supreme Court ruled that the government's deliberate elicitation of the statements from Massiah violated his sixth amendment right to counsel. *Id.* at 206. The *Massiah* Court relied on *Spano v. New York*, 360 U.S. 315 (1959), for the proposition that the Constitution guarantees a defendant the aid of counsel during police interrogation. *Id.* at 204.

Since Massiah was under indictment at the time the government elicited the incriminating

violates the sixth amendment if authorities create a situation that is likely to cause a defendant to make self-incriminating statements without the presence of counsel.[7] In *Thomas v. Cox*,[8] the Fourth Circuit considered whether the admission of a prison informant's testimony violates a defendant's sixth amendment right to counsel.[9]

In *Thomas*, Virginia police officers arrested the defendant and charged him with the murder of his girlfriend's mother.[10] While Thomas was in pretrial confinement, Thomas spoke on several occasions with a fellow inmate named Gregory.[11] Thomas made a series of self-incriminating statements to Gregory during the course of their conversations.[12] Gregory later repeated these statements to an investigator from the sheriff's office.[13] Gregory and the in-

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statements, the Court concluded that the government had violated Massiah's right to counsel. *Id.* at 206. The *Massiah* Court relied directly on the sixth amendment. *Id.* at 205. The *Spano* Court, however, had held the defendant's confession inadmissible because the government obtained the confession from the defendant in violation of the due process clause of the fourteenth amendment. *See* Spano v. New York, 360 U.S. 315, 320 (1959) (*Spano* Court declined opportunity to analyze defendant's right to counsel in sixth amendment terms). *See generally* Kamisar, Brewer v. Williams, Massiah *and* Miranda: *What is "Interrogation"? When Does it Matter?* 67 GEO. L. J. 1, 81-101 (1978) (demarcating commencement of judicial proceedings as dividing line between fifth and sixth amendment right to counsel is illogical).

The presence of counsel after indictment is necessary to enable a defendant to plead intelligently and present a proper defense. *See* White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam). Allowing the assistance of counsel to the defendant in *Massiah* may not have helped the defendant because the presence of government agents was surreptitious. *See* Kamisar, *supra*, at 59. Assistance of counsel was vital nonetheless because counsel could have cancelled the meeting with the codefendant. *See* Grano, Rhode Island v. Innis: *A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 21-22 (1979) (Constitution mandates strict adherence with sixth amendment right to counsel) [hereinafter cited as *Need to Reconsider*].

7. United States v. Henry, 447 U.S. 264, 274 (1980); *see infra* notes 26-45 and accompanying text (discussing Supreme Court's decision in *Henry*); *see also* Comment, United States v. Henry: *Constitutional Limitations on the Use of Government Informants Once Criminal Proceedings Have Commenced*, 7 NEW ENG. J. PRISON LAW 117, 142 (1981) (*Henry* strongly reaffirms *Massiah* holding that Constitution prohibits government from deliberately eliciting incriminating statements from defendant in absence of counsel) [hereinafter cited as *Constitutional Limitations*].

8. 708 F.2d 132 (4th Cir.), *cert. denied*, 104 S.Ct. 284 (1983).

9. *Id.* at 134-37.

10. *Id.* at 133. In *Thomas*, the murderer strangled the victim with a shoelace before running over her body with an automobile. *Id.*

11. *Id.*

12. *See* Brief for Appellee at 5. In *Thomas*, the cellmate informant, Gregory, mentioned to the defendant, Thomas, that Gregory had heard that the murderer had strangled and raped the victim before running her over with the car. *Id.* Thomas responded by denying that he had raped the victim. *Id.* at 6. Thomas also confided to Gregory that the police had caught him at a roadblock. *Id.* Thomas told Gregory that Thomas' relatives would provide him with an alibi that would result in Thomas' acquittal. *Id.* In addition, Thomas admitted to Gregory that he had murdered the victim with the assistance of his girlfriend. *Id.*

13. 708 F.2d at 133. In *Thomas*, Gregory was in court on a sentencing matter when he asked an investigator about the *Thomas* case. *Id.* When the investigator told Gregory that the prosecution had postponed Thomas' trial, Gregory expressed his belief that Thomas was guilty. *Id.* Gregory then repeated Thomas' incriminating statements to the investigator. *Id.*

vestigator did not enter into any agreement by which Gregory would provide the Commonwealth with additional information.[14] A week later, though, Gregory showed a state police investigator a sheet of paper on which Gregory had recorded numerous damaging admissions made by Thomas.[15] The state police investigator told Gregory not to question Thomas.[16] The investigator, however, did instruct Gregory to remain alert for any additional incriminating statements that Thomas might make.[17] During the next several weeks, Gregory took handwritten notes of over twelve additional incriminating remarks made by Thomas.[18] The statements that Gregory recorded included several direct admissions by Thomas that he was guilty of the murder.[19]

The state trial court permitted the Commonwealth to introduce Gregory's testimony despite Thomas' objection that the Commonwealth had obtained the evidence in contravention of his sixth amendment right to counsel.[20] Thomas

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14. *Id.* In *Thomas*, Gregory declined an invitation from the investigator to talk with the Commonwealth's Attorney. *Id.*

15. *Id.* In *Thomas*, the statements that Gregory showed the state police investigator were the same statements Gregory had repeated to the sheriff's office investigator the week before. *Id.* The investigator from the sheriff's office had told the state police investigator about the information that Gregory possessed. *Id.*

16. *Id.*

17. *Id.* The fact that the state police investigator in *Thomas* instructed Gregory not to question Thomas indicates that the investigator was aware that an active effort by Gregory to elicit additional statements from Thomas might affect the admissibility of Gregory's testimony. *See id.* (investigator told Gregory not to ask questions but to listen to anything Thomas might say pertaining to crime); *see also infra* notes 27-39 and accompanying text (discussing conduct of informant in *United States v. Henry* that Court considered violative of defendant's sixth amendment right to counsel).

18. 708 F.2d at 133.

19. *Id.*

20. *Id.* at 134. In *Thomas*, the trial court conducted an evidentiary hearing at which the court ruled Gregory's testimony admissible on the strength of the Fourth Circuit's decision in *Henry v. United States*, 590 F.2d 544 (4th Cir. 1978), *aff'd*, 447 U.S. 264 (1980). *Id.* The issue before the Fourth Circuit in *Henry* was whether admission of a prison informant's testimony regarding incriminating statements made to the informant by the defendant violated the sixth amendment. *Henry*, 590 F.2d at 546. In *Henry*, the government arrested the defendant and placed him in jail with an informant whom the government employed on a contingent-fee basis for providing incriminating information obtained from other inmates. *Id.* at 545. The government instructed the informant not to question the defendant in *Henry* but to remain alert for anything the defendant said concerning the crime. *Id.* In *Henry*, the Fourth Circuit found the informant's testimony inadmissible because the government had employed the defendant to elicit incriminating statements from the defendant. *Id.* at 547. The informant obtained the incriminating information after the defendant's indictment and while the defendant was in jail without the aid of counsel. *Id.* The Fourth Circuit ruled that the informant's conversations with the defendant amounted to interrogation in violation of the sixth amendment. *Id.; see also* Brewer v. Williams, 430 U.S. 387, 399 (1977) (police conduct designed to elicit incriminating responses from defendant is equivalent of interrogation for sixth amendment purposes).

The sixth amendment right to counsel is separate and distinct from the right to counsel derived from the voluntariness requirement of the fifth amendment. *Compare* Massiah v. United States, 377 U.S. 201, 206 (1964) (government's deliberate elicitation of incriminating statements from defendant after indictment in absence of counsel violates sixth amendment right to counsel) *with* Miranda v. United States, 384 U.S. 436, 444 (1966) (fifth amendment requires court to suppress

appealed his subsequent murder conviction to the Virginia Supreme Court, which dismissed Thomas' petition for appeal.[21] Thomas then sought federal habeas corpus relief in the United States District Court for the Eastern District of Virginia.[22] The district court determined that Gregory did not act under government instructions and that Gregory had not agreed to provide the government with the information he obtained from Thomas.[23] Since Gregory was not a government agent, the district court concluded that the Commonwealth had not violated Thomas' sixth amendment right to counsel.[24]

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evidence of defendant's confession that police obtained from in-custody suspect after ignoring suspect's request for counsel). Under *Miranda*, the police must advise the suspect of his right to have counsel present during interrogation. *Id.* at 444; *see also id.* at 444-45 (discussing additional warnings that police must give to suspect before questioning may proceed). Law enforcement officers violate the fifth amendment when they interrogate a defendant without advising him of his *Miranda* rights, or obtaining an intelligent waiver of those rights. *Id.* at 444.

The prosecution may not use any statements made by the defendant against him at trial unless the prosecution demonstrates that the police followed the *Miranda* safeguards against self-incrimination. *Id.* The failure of arresting officers to advise a suspect of his right to counsel under *Miranda*, however, does not amount to a sixth amendment violation. *See* 2 W. RINGEL, SEARCHES & SEIZURES, ARRESTS & CONFESSIONS, § 24.4 at 24-9 (2d ed. 1983) (failure to inform suspect of *Miranda* right to counsel does not violate sixth amendment). Such a failure will indicate that the suspect did not make a knowing and intelligent waiver of his fifth amendment protection against self-incrimination. *Id.* § 24.4 at 24-10. Under the fifth amendment, the absence of an intelligent waiver will negate the voluntariness and hence, admissibility, of any subsequent admissions. *See* 384 U.S. at 445; 2 W. RINGEL, *supra*, § 24.4 at 24-10.

The fifth amendment right to counsel developed as a procedural safeguard against coerced confessions. *See* 2 W. RINGEL, *supra* § 24.3 at § 24-8 (*Miranda* decision arguably rests on tenuous grounds because its requirements are as much procedural as constitutional). The sixth amendment right to counsel is a specifically enumerated constitutional right. *See supra* notes 1-7 (discussing history of sixth amendment right to counsel). *See generally* Kamisar, *supra* note 6, at 37-55 (comparing fifth and sixth amendment right to counsel); 2 W. RINGEL, *supra*, at §§ 24-31 (discussing right to counsel in relation to police interrogation under *Miranda* and *Massiah*).

21. 708 F.2d at 134.

22. *Id.* Habeas corpus is a form of extraordinary judicial relief that requires the government to show cause for detaining a prisoner. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 53 at 332 (4th ed. 1983). Congress has authorized the federal courts to grant habeas corpus to any person whose liberty a state government has restrained in violation of federal law. *Id.* at 330-31.

The writ of habeas corpus is an essential remedy to protect citizens from imprisonment by the state in violation of their constitutional rights. *See* Darr v. Buford, 339 U.S. 200, 203 (1950). Congress has provided state prisoners the opportunity to file for federal habeas corpus relief. *See* 28 U.S.C. § 2254 (1976 & Supp. V 1981) (rules governing issuance of federal writ of habeas corpus). Federal courts will receive habeas corpus petitions from state prisoners only when the petitioner claims some state violation of his federal constitutional rights. *Id.* § 2254(a). Federal courts will refuse to grant petitions unless the prisoner has exhausted all available state remedies. *Id.* § 2254(b); *see also Ex Parte* Hawk, 321 U.S. 114, 116-18 (1944) (per curiam) (failure of state courts to adjudicate defendant's federal contentions fully and fairly justifies issuance of writ of habeas corpus). *See generally* C. WRIGHT, *supra*, at 330-46 (discussing cases that interpret availability of habeas corpus to state prisoners).

23. 708 F.2d at 134.

24. *Id.* In *Thomas*, the district court made several factual determinations pertaining to Thomas' sixth amendment claim. *Id.* First, the court found that Gregory was not under the control of the Commonwealth. *Id.* Second, the district court concluded that Gregory did not agree to assist in the *Thomas* prosecution by obtaining the incriminating statements from Thomas. *Id.* Finally, the court determined that the state did not place Gregory near Thomas in the jail

On appeal, the Fourth Circuit unanimously affirmed the district court's denial of habeas corpus relief.[25] The *Thomas* court concluded that the government did not infringe upon Thomas' right to counsel by distinguishing Gregory's status from the status of the informant in *United States v. Henry*.[26] In *Henry*, the government arrested and indicted the defendant for armed robbery.[27] The Federal Bureau of Investigation (FBI) contacted a paid informant incarcerated in the same jail with the defendant and instructed the informant to listen closely for any statements made by federal prisoners.[28] The FBI did not specify any of the prisoners by name except for the defendant.[29]

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to facilitate his conversations with Thomas. *Id.* From these factual conclusions, the district court in *Thomas* decided that Gregory did not operate as an agent of the government during his conversations with Thomas. *Id.*

The government's intentional placement of an informant in close proximity to a defendant, by itself, does not constitute deprivation of an inmate's sixth amendment right to counsel. *See* United States v. Henry, 447 U.S. 264, 276 (1980) (Powell, J., concurring) (government's use of passive listening device to collect incriminating statements from defendant does not violate sixth amendment). The *Massiah* prohibition against the use of incriminating statements applies to statements that the government intentionally elicits from a defendant, but not to spontaneous statements made by the defendant. *Id.; see also supra* note 6 (discussing Supreme Court's decision in *Massiah v. United States*).

The routine electronic recording of conversations between inmates and their visitors does not infringe upon an inmate's sixth amendment right to counsel. *See* United States v. Hearst, 563 F.2d 1331, 1348 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978). In *Hearst*, the Ninth Circuit held that the introduction into evidence of a defendant's incriminating statements recorded by prison officials was proper because the government had made no attempt to induce the defendant to incriminate herself. *Id.* The *Hearst* court cited the government's weighty interest in prison security as a justification for permitting prison officials to monitor conversations between inmates and visitors. *Id.* at 1345-46. The *Hearst* court upheld the admissibility of the recorded conversations since the government had not interrogated the defendant either surreptitiously or formally. *Id.* at 1348.

The Second Circuit has held that the placement of a government informant in a defendant's cell to listen for the identity of a defendant's partners in crime does not violate the sixth amendment. *See* Wilson v. Henderson, 584 F.2d 1185, 1190 (2d Cir. 1978), *cert. denied*, 442 U.S. 945 (1979). In *Wilson*, instead of divulging the names of his cohorts to the informant, the defendant made unsolicited, self-incriminatory remarks to the informant. *Id.* at 1191. The informant testified about the incriminating statements at the defendant's trial. *Id.* The *Wilson* court concluded that use of the informant's testimony did not violate the sixth amendment because the informant had not tried to elicit the statements from the defendant. *Id.; see also* United States v. Fioravanti, 412 F.2d 407, 413 & n.15 (3d Cir.) (no sixth amendment violation occurs when defendant freely volunteers incriminating statement to undercover agent whom government deliberately arrested along with defendant), *cert. denied*, 396 U.S. 837 (1969).

25. 708 F.2d at 137.

26. *See id.* at 136; 447 U.S. 264 (1980). The United States Supreme Court heard the *Henry* case on appeal from the Fourth Circuit. Henry v. United States, 590 F.2d 544 (4th Cir. 1978), *aff'd*, 447 U.S. 264 (1980); *see infra* notes 27-39 and accompanying text (Supreme Court affirmed Fourth Circuit decision in *Henry*); *see also supra* note 6 (discussing *Massiah's* prohibition against government elicitation of statements from defendant in absence of counsel).

27. 447 U.S. at 265-66.

28. *Id.* at 266. In *Henry*, the FBI had employed the informant for an unspecified length of time prior to using the informant to obtain information from the defendant. *Id.* An FBI agent instructed the informant not to question or initiate conversation with the defendant in *Henry*. *Id.*

29. *Id.*

The informant operated on a contingent-fee basis, receiving payment only when he provided the FBI with useful information.[30] The informant emerged from jail approximately one month later with statements that the defendant had made that implicated the defendant in the bank robbery.[31] With the assistance of the informant's testimony, the government convicted the defendant of bank robbery.[32] The defendant later learned that the inmate was a paid government informant and attacked his conviction collaterally.[33] On appeal, the Fourth Circuit reversed the district court's denial of habeas corpus in *Henry* on the grounds that use of the informant's testimony violated the defendant's sixth amendment right to counsel.[34]

The Supreme Court affirmed the Fourth Circuit's holding in *Henry* because the government intentionally created a situation that was likely to induce the defendant to make incriminating remarks in the absence of counsel.[35] The Court emphasized that the government specifically commissioned the informant to obtain information from the defendant.[36] The *Henry* Court also noted that the defendant was unaware that the inmate was a government informant.[37]

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30. *Id.*

31. *Id.* at 266-67.

32. *Id.* In *Henry*, the informant testified that during conversations with the defendant, the defendant stated that he had made several trips to the bank to observe employee security procedures. *Id.* The defendant also described details of the robbery to the informant. *Id.* The prosecution did not tell the jury that the government had paid the informant for his testimony. *Id.*

33. *Id.* at 268. In *Henry*, the defendant petitioned for a writ of federal habeas corpus under 28 U.S.C. § 2255 (1976 & Supp. V 1981). *Id.* at 267-68. The defendant based his petition on a claim that the use of the informant's testimony violated his sixth amendment right to counsel. *Id.* The district court denied the defendant's petition. *Id. See generally supra* note 22 (discussing habeas corpus remedy with emphasis on state prisoner relief).

34. 447 U.S. at 268. In *Henry*, the Fourth Circuit initially reversed and remanded the district court's holding for an evidentiary determination of whether the informant acted as a government agent during his interviews with the defendant. *Id.* On remand, the district court again denied the defendant's habeas corpus petition because the FBI had instructed the informant not to question the defendant. *Id.* The Fourth Circuit reversed and remanded that holding on the basis of the Supreme Court's holding in *Massiah*, which prohibits the government from eliciting statements from a defendant after indictment when the defendant does not have the benefit of counsel. Henry v. United States, 590 F.2d 544, 547 (4th Cir. 1978), *aff'd*, 447 U.S. 264 (1980); *see also supra* notes 6-7 (discussing Supreme Court's decision in *Massiah* and *Henry*).

35. 447 U.S. at 274.

36. *Id.* at 270. The *Henry* Court viewed the contingent-fee arrangement as sufficient to support the Fourth Circuit's conclusion that the informant acted as an agent of the government. *Id.* at 270-71. The Supreme Court stated that the FBI agent who instructed the informant not to question the defendant in *Henry* could assume that the contingent-fee arrangement nonetheless would motivate the informant to seek information from the defendant. *Id.* at 271. The *Henry* Court refused to accept the government's argument that *Brewer v. Williams*, 430 U.S. 387 (1977), modified the deliberate elicitation test of *Massiah*. *Id.; see also* Brewer v. Williams, 430 U.S. 387, 400 (1977) (sixth amendment right to counsel applies whether government interrogates defendant surreptitiously or directly). The *Henry* Court therefore concluded that the informant's conversations with the defendant violated the sixth amendment. 447 U.S. at 274; *see also* Kamisar, *supra* note 6, at 33-44 (Kamisar examines Supreme Court's reasoning in *Massiah* and *Brewer* and concludes that actual interrogation need not be present to violate sixth amendment).

37. 447 U.S. at 272.

Finally, the *Henry* Court stressed that the defendant was under indictment and in custody when the informant elicited the incriminating statements.[38] The Supreme Court concluded that the government's use of the paid informant violated the defendant's sixth amendment right to counsel.[39]

In *Henry*, the Supreme Court observed that additional, admissible evidence existed to support the defendant's conviction.[40] Included in this evidence was the testimony of a second cellmate whose neutrality was not in question.[41] The *Henry* Court thus implicitly approved the admission of the neutral inmate's testimony.[42] The Court acknowledged that the government's strong evidence apparently was sufficient to convict the defendant without the use of the paid informant's testimony.[43] The Court in *Henry*, however, was not willing to overturn the Fourth Circuit's finding that the wrongful admission of the paid informant's testimony was not harmless error.[44] Accordingly, the *Henry* Court affirmed the reversal of the defendant's conviction because the government failed to prove beyond a reasonable doubt that the paid informant's testimony did not influence the jury's verdict.[45]

Although several factual similarities exist between the *Thomas* case and the *Henry* case,[46] the Fourth Circuit distinguished the *Thomas* case from *Henry* by holding that Gregory was not a government agent during the period of his incarceration with Thomas.[47] As opposed to the paid informant in *Henry*, the *Thomas* court determined that Gregory was a self-initiated informant, motivated by conscience rather than governmental reward.[48] The Fourth Cir-

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38. *Id.* The Supreme Court determined that *Henry* was distinguishable from cases in which the state uses undercover informants before the state files charges against a suspect. *Id.; see also supra* note 20 (discussing difference between fifth and sixth amendment rights to counsel).

39. 447 U.S. at 274.

40. *Id.* at 274-75 n.13.

41. *Id.* at 267 n.3. In *Henry*, the government did not pay a second inmate for testifying. *Id.* The second inmate also had no prior arrangement with the government to testify. *Id.*

42. 447 U.S. at 274-75 n.13; *see also* United States v. Calder, 641 F.2d 76, 79 (2d Cir.) (*Calder* court cited *Henry* as implicit support for admissibility of neutral inmate's testimony), *cert. denied*, 451 U.S. 912 (1981).

43. U.S. at 274-75 n.13.

44. *Id.*

45. *Id.* Appellate courts must reverse a conviction on appeal unless the record demonstrates beyond a reasonable doubt that admission of illegally obtained evidence did not influence the jury's verdict. Chapman v. California, 386 U.S. 18, 24 (1967).

46. 708 F.2d at 134-35. In *Thomas*, the Fourth Circuit noted that the defendants in *Henry* and *Thomas* were both under indictment and in prison at the time they made the incriminating statements to the informants. *Id.* at 134. The government in each case instructed the informant not to interrogate the defendant but to remain alert for any statements the defendant might make. *Id.* In addition, both defendants perceived the informants as fellow inmates. *Id.*

47. *Id.* at 137; *see infra* notes 48-68 (discussing *Thomas* court's analysis of informant's conduct).

48. 708 F.2d at 135-36. In *Thomas*, the evidence convinced the court that Gregory's motivation to testify was personal. *Id.* Since the Fourth Circuit's examination of the state court record revealed ample support for the district court's conclusions, the *Thomas* court refused to disturb those findings. *Id.* at 135 n.3; *see* Taylor v. Lombard, 606 F.2d 371, 372 (2d Cir. 1979) (district court findings based solely on state court record permit appellate court to make its own determination);

cuit observed that Gregory offered to provide evidence of Thomas' guilt strictly for personal reasons, in contrast with the type of prearrangement present in *Henry*.[49] Since the Commonwealth did not exercise control over Gregory, the *Thomas* court found that Gregory's actions were not attributable to the government.[50]

Having determined that Gregory was a private informer, the *Thomas* court stated that surreptitious interrogation of a defendant by a private citizen will not violate the sixth amendment unless the citizen acts as a government agent.[51] The Fourth Circuit explained that no "bright-line test" existed to determine whether a private citizen is a government agent.[52] Under a general guideline extracted from the *Henry* decision, the *Thomas* court suggested that an informant is a government agent when government instruction dictated the relationship between authorities and the informant.[53] According to the *Thomas* court, the casual encounter between Gregory and the state official did not violate the sixth amendment right to counsel as interpreted in *Henry*.[54] The Fourth Circuit held that Gregory's actions did not implicate the state because there existed no evidence that Gregory operated on a *quid pro quo* basis with the Commonwealth.[55] The *Thomas* court refused to extend the rule in *Henry* to instances when an inmate-informant voluntarily assists the government by providing evidence of a fellow inmate's inculpatory remarks.[56]

In *Thomas*, the Fourth Circuit properly distinguished the case before the bench from the United States Supreme Court's decision in *Henry*.[57] Although the *Henry* Court analyzed the actions of an informant to determine whether the informant had elicited information in violation of the defendant's right to counsel, the informant's status as a government agent was not at issue in *Henry*.[58] Rather, the *Henry* Court assumed that since the government paid

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cf. FED. R. CIV. P. 52(a) (federal appellate courts will not set aside factual determinations of court of original jurisdiction unless those findings appear clearly erroneous).

49. 708 F.2d at 136.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id* at 137.

54. *Id.* In *Henry*, the Fourth Circuit perceived informant activity as ranging from strictly private action to conduct that the government directly controls. *Id.* While refraining from defining exactly where on this scale the protections of the sixth amendment apply the *Thomas* court concluded that Gregory's actions more closely resembled private action than the government involvement the Supreme Court rejected in *Henry*. *Id.* The *Thomas*. court therefore decided that Gregory was not a government agent because no prearrangement or ongoing cooperation existed between the state and Gregory. *Id.*

55. *Id.*

56. *Id.* In *Thomas*, the Fourth Circuit noted other circuit court decisions that have addressed whether a volunteer informant's testimony is admissible absent evidence reflecting government involvement. *See infra* notes 68-94 and accompanying text (discussing other circuit court decisions that have considered claims of sixth amendment infringement due to actions of informants).

57. *See infra* notes 58-67 and accompanying text (analysis of Fourth Circuit's decision in *Thomas* under criteria Supreme Court enunciated in *Henry*).

58. *See* 708 F.2d at 135 n.2. (*Henry* Court assumed existence of agency relationship from government's previous employment of informant and existence of contingent-fee arrangement).

the informant for providing information, the informant was a government agent.[59] In *Thomas*, however, the court examined whether the informant was a government agent at the time he elicited the incriminating statements from the accused.[60]

Although the *Thomas* court distinguished *Henry*, the court properly compared Gregory to the informant in *Henry* and properly concluded that Gregory was not a government agent.[61] Unlike the *Henry* informant, the government did not pay Gregory in return for his testimony.[62] Conditioning payment on the informant's production of useful information creates a presumption that the person will act affirmatively to obtain the evidence.[63] Further, Gregory did not receive any preferred treatment, such as a sentence reduction, in return for his testimony.[64] In *Thomas*, the record strongly supports the Fourth Circuit's conclusion that Gregory informed on Thomas strictly for personal reasons and not because of a *quid pro quo* relationship between Gregory and the Commonwealth.[65]

As a volunteer witness in *Thomas*, Gregory's testimony is similar to the testimony of the neutral witness whose testimony the Supreme Court approved in *Henry*.[66] The Supreme Court's admission of the neutral inmate's testimony supports the *Thomas* court's approval of Gregory's testimony.[67] Since the testimony of an informant with no connection to the government, such as Gregory, does not infringe upon a defendant's constitutional rights, the *Thomas* court rightfully rejected Thomas' sixth amendment claim.[68]

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59. *See* United States v. Henry, 447 U.S. 264, 270 (1980).

60. 708 F.2d at 135-37.

61. *See infra* notes 62-67 and accompanying text (discussing *Thomas* court's decision in light of Supreme Court's holding in *Henry*).

62. *See* United States v. Henry, 447 U.S. 264, 266 (1980) (government paid *Henry* informant in return for his testimony).

63. *See id.* at 270-71 (1980) (conditioning payment upon production of useful evidence makes informant more likely to seek information from defendant).

64. 708 F.2d at 135. In *Thomas* the evidence clearly demonstrated that the government did not reward Gregory for testifying. *Id.* In addition, Gregory served his entire sentence for auto theft. *Id.; cf.* United States v. Sampol, 636 F.2d 621, 642 (D.C. Cir. 1980) (testimony of informant whose freedom on parole hinged upon his production of incriminating information from defendant is inadmissible).

65. 708 F.2d at 135-37. *Compare* Thomas v. Cox, 708 F.2d 132, 135 (4th Cir. 1983) (district court determined that informant had no arrangement to provide information nor had informant anything to gain by providing information) *with* United States v. Henry, 447 U.S. 264, 270-71 (1980) (informant received payment upon production of incriminating statements of accused).

66. *See supra* notes 40-45 and accompanying text (discussing *Henry* Court's tacit approval of neutral witness' testimony).

67. *Id.*

68. *Id.* Before federal courts will rule an informant's testimony inadmissible on the basis of the sixth amendment as interpreted in *Henry*, the evidence must show that the informant acted under government instruction. *See, e.g.*, United States v. Jones, 678 F.2d 102, 106 (9th Cir. 1982) (*Henry* prohibition is inapplicable when defendant fails to demonstrate that informant acted as government agent); United States v. Van Scoy, 654 F.2d 257, 260 (3d Cir.) (no violation of sixth amendment exists when informant willingly provides information without government instruction), *cert. denied*, 454 U.S. 1126 (1981); United States v. Calder, 641 F.2d 76, 79 (2d Cir.) (*Henry* Court implicitly has approved admissibility of testimony of neutral inmate), *cert. denied*, 451 U.S. 912 (1981).

The Fourth Circuit's treatment of the sixth amendment issue in *Thomas* also is consistent with the positions of other circuits that have considered whether an informant has acted as a government agent in a post-indictment setting.[69] Unlike previous Supreme Court decisions, several circuit court opinions directly address the agency status of an informant to whom a defendant has made incriminating remarks.[70] In *United States v. Malik*,[71] the Seventh Circuit considered a situation in which the defendant made incriminating statements to a fellow inmate who later repeated the statements to an FBI agent.[72] The *Malik* court determined that the informant did not operate as a government agent despite the fact that the FBI previously had employed him as a paid informant.[73] Since the FBI had terminated the informant's agency status, the Seventh Circuit concluded that the informant acted independently at the time Malik incriminated himself.[74]

As the *Henry* Court noted, the government's prior employment of an informant creates a presumption that the informant continues to operate as a government agent.[75] The facts in *Malik*, therefore, indicate a greater degree of government involvement than the circumstances surrounding Gregory's testimony in *Thomas*.[76] Notwithstanding the existence of the past relationship between the informant and the FBI in *Malik*, the Seventh Circuit held that *Henry* did not require suppression of the informant's testimony.[77] Like the Fourth Circuit in *Thomas*, the *Malik* court refused to extend the *Henry* deci-

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69. *See infra* notes 71-92 and accompanying text (discussing other circuit court decisions that have addressed sixth amendment agency issue).

70. *Id.*

71. 680 F.2d 1162 (7th Cir. 1982).

72. *Id.* at 1163-64. In *Malik*, the defendant voluntarily described his heroin-smuggling operation to a fellow inmate. *Id.* The inmate later informed the FBI of the defendant's incriminating statements. *Id.* The inmate originally planned to join the defendant in the smuggling scheme but decided that he stood to gain more by informing on the defendant. *Id.* at 1165.

73. *Id.* In *Malik*, the FBI previously had employed the informant to provide information about stolen property. *Id.* at 1163. The FBI then learned of outstanding warrants for the informant's arrest in connection with bank robberies in Scotland. *Id.* at 1163-64. The FBI terminated the informant's agency status and imprisoned him. *Id.* at 1164. The facts adduced at trial showed that the informant was bitter about the turn of events. *Id.* The informant, therefore, was not likely to obtain incriminating statements from the defendant in cooperation with the government. *Id.*

74. *Id.* In *Malik*, the Seventh Circuit refused to set aside the district court's factual finding that the informant was not a government agent at the time that the defendant incriminated himself. *Id.* The *Malik* court applied the "clearly erroneous" standard of review. *Id.; see* United States v. Sells, 496 F.2d 912, 913-14 (7th Cir. 1974) (substantial factual support for findings of district court precludes circuit court reversal).

75. *See* United States v. Henry, 447 U.S. 264, 270-71 (1980) (government payment of informant on contingent-fee basis motivates informant to seek information from defendant).

76. *Compare* United States v. Malik, 680 F.2d 1162, 1163 (7th Cir. 1982) (government previously had paid informant for providing information) *with* Thomas v. Cox, 708 F.2d 132, 133 (4th Cir. 1983) (informant had no agreement with government to provide information).

77. 680 F.2d at 1165. In *Malik*, the court decided that the informant ceased being an agent of the government at the time of his imprisonment. *Id.* at 1163.

sion to situations in which a volunteer informant independently obtains incriminating evidence from a defendant.[78]

In *United States v. Surridge*,[79] the Eighth Circuit also held admissible the testimony of an informant because the informant acted independently rather than as a government agent.[80] In *Surridge*, a friend visited and talked with the defendant while the defendant was in police custody for bank robbery.[81] The friend repeated the defendant's damaging admissions to the police.[82] Although the Eighth Circuit held that the sixth amendment right to counsel had not attached, the *Surridge* court addressed the sixth amendment agency issue in dicta.[83]

The *Surridge* court observed that the friend was not a government agent because no prearrangement existed between the police and the friend.[84] The Eighth Circuit noted that the government did not direct the conversation and that the friend voluntarily offered to testify.[85] The *Surridge* court, therefore, explained that the friend did not operate as a government agent for the same reasons that the *Thomas* court determined that the admission of Gregory's testimony was not violative of the sixth amendment as interpreted by *Henry*.[86]

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78. *Id.* at 1165. The *Malik* court refused to interpret the sixth amendment and the Supreme Court's decision in *Henry* as requiring the government to segregate potential informants from other inmates. *Id.*

79. 687 F.2d 250 (8th Cir.), *cert. denied*, 103 S.Ct. 465 (1982).

80. *Id.* at 252.

81. *Id.* In *Surridge*, the police provided the defendant and his friend with a room, coffee and doughnuts. *Id.* The defendant told his friend that he had participated in the robbery. *Id.* The defendant also divulged the location of the stolen money. *Id.* The police attempted to record the conversation surreptitiously, but failed because of a technical malfunction. *Id.*

82. *Id.* In *Surridge*, the friend voluntarily informed the police of the defendant's confession and the location of the money. *Id.*

83. *Id.* at 252-53. In *Surridge*, the court relied on the Supreme Court's decision in *Kirby v. Illinois* for the proposition that sixth amendment guarantees do not apply until the government has initiated judicial proceedings against the defendant. *Id.* at 253; *see* Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (commencement of judicial proceedings marks point at which sixth amendment protections attach); *supra* note 4 (discussing Supreme Court's decision in *Kirby*). In *Surridge*, the Eighth Circuit nonetheless enunciated its reasons for deciding that the informant was not a government agent. 687 F.2d at 255.

84. 687 F.2d at 252.

85. *Id.* at 255. The *Surridge* court stressed that the police exercised no direction or control over the conversation. *Id.* The court said that the government does not violate the sixth amendment when a private citizen subjects a defendant to an interrogation in which the government does not take part. *Id.*

The *Surridge* court noted that since the defendant was out of jail, the government had less control over the conversation between the defendant and his friend. *Id.* at 252. Although the focus of the agency question is on the relationship between the informant and the government, the absence of confinement lessens government control over the circumstances under which the defendant incriminates himself. *Id.; see* United States v. Henry, 447 U.S. 264, 274 (1980) (confinement imposes subtle influences upon accused to talk). The *Surridge* decision therefore is consistent with the Supreme Court's inclusion of confinement as a relevant factor for determining whether an informant is a government agent. *See* 447 U.S. at 273-74 n.11 (custody may bear upon whether government deliberately elicited statements from defendant).

86. 687 F.2d at 255. The Eighth Circuit in *Surridge*, like the Seventh Circuit in *Malik*,

The *Thomas* decision draws additional support from *United States v. Calder*,[87] in which the Second Circuit held admissible the voluntary testimony of an inmate-informant.[88] The defendant in *Calder* confided to a fellow inmate that he had extorted money from several taverns.[89] The inmate testified at the defendant's trial for extortion that the defendant admitted participating in the crime.[90] Like the Fourth Circuit in *Thomas*, the *Calder* court cited *Henry* for the proposition that admission of the testimony of a neutral cellmate was not unconstitutional.[91] Since the *Calder* informant had no agreement with the government to obtain information, the Second Circuit ruled that admission of the informant's testimony did not abridge the sixth amendment.[92] The *Calder* court's analysis that *Henry* does not require the disqualification of a neutral inmate witness, therefore, is consistent with the Fourth Circuit's analysis in *Thomas*.[93]

To constitute a violation of a defendant's sixth amendment right to counsel, the federal judiciary requires that evidence clearly demonstrate that an informant acted under government control or on a *quid pro quo* basis.[94] For example, the testimony of an informant whose probationary freedom hinges on the successful production of incriminating evidence is inadmissible.[95] Likewise, courts must exclude the testimony of an informant who operates under govern-

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refused to require police to prevent private citizens from volunteering testimony about a defendant's statements. *Id.; see also* Malik v. United States, 680 F.2d 1162, 1165 (7th Cir. 1982) (sixth amendment does not prohibit government use of evidence obtained from defendant by self-initiated informant).

87. 641 F.2d 76 (2d Cir.), *cert. denied*, 451 U.S. 912 (1981).

88. *Id.* at 79.

89. *Id.* at 78.

90. *Id.*

91. *Id.* at 79. The *Calder* court held the informant's testimony admissible because the informant was a neutral witness. *Id.; see also supra* notes 40-45 and accompanying text (*Henry* decision implicitly supports admission of neutral inmate's testimony in *Thomas*); United States *ex rel.* Milani v. Pate, 425 F.2d 6, 8 (7th Cir.) (voluntary postindictment confession indiscreetly made to fellow inmate is admissible when inmate was not government agent at time defendant confessed to him), *cert. denied*, 400 U.S. 867 (1970); Stowers v. United States, 351 F.2d 301, 302 (9th Cir. 1965) (same).

92. 641 F.2d at 79; *see supra* notes 87-90 and accompanying text (discussing Second Circuit's analysis in *Calder*).

93. *See* Thomas v. Cox, 708 F.2d 132, 137 (4th Cir. 1983) (citing *Calder* for proposition that ongoing cooperation between witness and state must be present before sixth amendment right to counsel attaches).

94. *See supra* notes 68-92 and accompanying text (discussing circuit court decisions that have analyzed whether informant has acted as agent of government).

95. United States v. Sampol, 636 F.2d 621, 642 (D.C. Cir. 1980). In *Sampol*, the informant was an inmate awaiting parole. *Id.* at 630. Authorities informed the inmate that the parole board would learn of any assistance he rendered in regard to the defendant's case. *Id.* The inmate ingratiated himself with, and obtained incriminating statements from, the defendant. *Id.* The government granted the informant early parole and convicted the defendant with the aid of the informant's testimony. *Id.* at 642-43. Relying on the Supreme Court's decision in *Henry*, the District of Columbia Circuit held that the informant's actions clearly were attributable to the government. *Id.* at 643. The *Sampol* court, therefore, overturned the defendant's conviction because the government had violated the defendant's sixth amendment right to counsel by using the informant's testimony to convict the defendant. *Id.*