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Iv. Criminal Procedure

Neither the majority nor the dissenting opinions mentioned the quality of the controversial waiver. The Supreme Court's requirement that waiver be an intentional relinquishment of a known right[91] was not discussed. Upon inquiry, it might be found that the Lovisis did not know of any right to sexual privacy. On the contrary, it might be found that the couple was completely unaware of their susceptibility to intrusion as a direct result of their invitation to Dunn. The Supreme Court has also declared a presumption against waiver of rights and against acquiescence as waiver.[92] Because the existence of waiver is to be determined from the circumstances of each case,[93] the Fourth Circuit erred in failing to discern the quality of the waiver of rights in the criminal action below. In *Lovisi,* the Fourth Circuit has impliedly held the state's right to proscribe certain intimate behavior more important than a couple's right to sexual privacy. Although this may conflict with Supreme Court precedent,[94] the Court denied certiorari,[95] which creates an uncertainty regarding the constitutionality of state regulation of sexual behavior through criminal sanctions.

ROY DAVID WARBURTON

III. CRIMINAL PROCEDURE

A. Voluntariness of Guilty Pleas.

Guilty pleas account for the majority of convictions, and thus are considered very important in the disposition of criminal defendants.[1]

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[91] Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The *Johnson* standard is most commonly applied to criminal proceedings, but the Supreme Court has invoked it repeatedly in civil cases. *See, e.g.,* Standard Indus. v. Tigrett, Inc., 397 U.S. 586 (1969); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966).

[92] Johnson v. Zerbst, 304 U.S. 458, 465 (1938). *See* note 91 *supra.*

[93] *Id.*

[94] *See* note 82 and accompanying text *supra.*

[95] 45 U.S.L.W. 3395 (U.S. Nov. 30, 1976) (No. 76-184).

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[1] Davis, *The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy,* 6 VAL. U. L. REV. 111, 111 (1972) [hereinafter cited as Davis]. As many as 85 to 90 percent of criminal prosecutions are terminated as the result of guilty pleas and in some jurisdictions the figure runs as high as 95 percent. *Id.* In 1972, approximately 65 percent of the criminal defendants who were charged with crimes, pleaded guilty to those crimes. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1974 378 (1974).

The values of expediency and economy, coupled with the correctional goal of meting out appropriate punishment, have led to recognition of the validity of the system of guilty pleas.[2] When a defendant pleads guilty he relinquishes certain constitutional rights.[3] This in turn places upon trial courts the responsibility of determining whether a guilty plea has been entered into voluntarily, with an intelligent awareness of the consequences of that plea.[4] Recently, the Fourth Circuit decided a number of cases in which defendents made post-conviction attacks upon the voluntariness of their guilty pleas. Although the Fourth Circuit has attempted to utilize precedent to establish a consistent rule concerning attacks upon guilty pleas, there remains some question regarding how a trial judge can effectively determine voluntariness at the time the plea is entered.[5]

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[2] Davis, *supra* note 1, at 118. *See* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52-3 (1968). Disposition of criminal charges through guilty pleas expedites criminal cases, avoids the coercive effect of prolonged pre-trial confinement, protects the public from individuals prone to criminal conduct on pretrial release, and enhances rehabilitative opportunities for those imprisoned by decreasing the time between charge and conviction. Santobello v. New York, 404 U.S. 257, 261 (1971).

[3] Among the constitutional rights relinquished are: the fifth amendment privilege against self-incrimination, the sixth amendment right to trial by jury, and the sixth amendment right to confront one's accusers. Davis, *supra* note 1, at 112. *See* Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to trial by jury); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront his accusers).

[4] Three Supreme Court cases, commonly referred to as the *Brady* Trilogy, upheld the constitutionality of guilty pleas and legitimized the "voluntariness" and "intelligent awareness" criteria. Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970). In *Brady*, the Supreme Court determined that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." 397 U.S. at 748. Nevertheless, the *Brady* court cautioned that the requirement of a knowing, intelligent plea does not allow the defendant later to attack his plea because he did not assess all of the consequences of that plea. 397 U.S. at 757. *McMann* followed Brady in its findings concerning the validity of guilty pleas that have been intelligently made. In addition, the *McMann* court stated that a guilty plea based upon "reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession." 397 U.S. at 770. The *Brady* Trilogy was followed in Tollett v. Henderson, 411 U.S. 258 (1973). *Tollett* reaffirmed the constitutional standards for guilty pleas by holding that:

> [a] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that oc-

In *Allison v. Blackledge*,[6] the Fourth Circuit determined that a defendant may collaterally attack[7] his guilty plea through allegations of unfulfilled promises by defense counsel. The appeal of the district court's summary denial of a petition for a writ of habeas corpus in *Allison* was based upon the contention that the defendant's plea of guilty to attempted safe robbery was involuntary due to previous promises made by his attorney concerning the length of the sentence.[8] During the trial judge's inquiry as to the voluntariness of the plea, the defendant denied that any promises had been made to induce him to plead guilty.[9] On appeal, the defendant asserted he had made the denial because he was told by his counsel that was the only way for the trial court to accept the guilty plea. The *Allison* court determined that if in fact promises had been made by the defendant's attorney, and if they had not been kept, the plea of guilty was not voluntary.[10] Thus, the Fourth Circuit concluded that the district

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curred prior to the entry of the guilty plea.
Id. at 267.
Tollett found support in a previous Fourth Circuit case that applied the *Brady* Trilogy, Parker v. Ross, 470 F.2d 1092 (4th Cir. 1972).

[5] *See* text accompanying note 26 *infra.*

[6] 533 F.2d 894 (4th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3220 (U.S. October 5, 1976) (No.75-1693).

[7] *See* note 21 *infra.*

[8] In his petition for a writ of habeas corpus, Allison stated that he had been led to believe by his lawyer that the case had been discussed with the solicitor and the judge, and that if Allison pleaded guilty he would receive a ten-year maximum sentence. Allison further stated that he pleaded guilty because he believed he would receive only a ten-year sentence, but that after his plea was accepted he received a sentence of seventeen to twenty-one years. 533 F.2d at 896.

[9] The *Allison* situation differs from a previous Fourth Circuit decision in United States v. Hammerman, 528 F.2d 326 (4th Cir. 1975). In that case, the appellant, a bagman for Spiro T. Agnew, pleaded guilty to obstructing enforcement of United States tax laws. The appellant admitted when he entered his plea that there had been a previous agreement not to have his sentence include incarceration. After receiving a sentence of 18 months, the defendant appealed on the grounds that his plea was involuntary. The Fourth Circuit held that the statements of the assistant prosecutor confirming acceptance of the plea bargain formed a significant part of the inducement for the guilty plea. When an unkept bargain has induced a guilty plea, the defendant will be allowed to withdraw his plea. *Id.* at 332. The Fourth Circuit found that allowing for the withdrawal of the plea was in accord with FED. R. CRIM. P. 11(e)(4) (*as amended*, December 1, 1975).

[10] 533 F.2d at 897. The court's major authority for this conclusion was the Supreme Court case of Machibroda v. United States, 368 U.S. 487 (1962), in which a promise made by a prosecutor had been broken. The Court held that if a guilty plea has been induced by threats or promises it has been deprived of its voluntariness and is therefore void. *Id.* at 493. *Machibroda* has been extended to include cases like *Allison* in which a defendant has been allowed to attack the voluntariness of his guilty plea

court erroneously denied the defendant's petition for a writ of habeas corpus because an evidentiary hearing was not conducted to ascertain the truth of his allegations.[11] The court of appeals, however, failed to provide any guidelines that might be applied by trial judges when they are accepting a guilty plea.

Allison's conviction resulted from a state court proceeding in which the trial judge specifically asked the defendant if any promise had been made to him. Despite the defendant's denial, the Fourth Circuit perceived a genuine issue as to the voluntariness of the plea. As Judge Field argued in his special concurrence in *Allison,* no matter how thoroughly a trial judge questions a defendant about the existence of promises, convicted prisoners "all too often" later allege that they had been induced by defense counsel to give false answers.[12]

Edwards v. Garrison[13] again presented the Fourth Circuit with the issue of when state prisoners are entitled to evidentiary hearings when they subsequently question the voluntariness of their guilty pleas. The appellant in *Edwards* was convicted of burglary and felon-

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because of a broken promise by his own counsel. United States v. Hawthorne, 502 F.2d 1183 (3rd Cir. 1974); Roberts v. United States, 486 F.2d 980 (5th Cir. 1973).

[11] 533 F.2d at 897.

[12] Allison v. Blackledge, 533 F.2d 894, 899 (4th Cir. 1976). (Field, J. concurring). Judge Field also argued in his concurrence that it is unrealistic to accord such weight to the defendant's allegations concerning promises and inducements made by defense counsel since "it is inconceivable that any attorney in his right mind would jeopardize his professional reputation and his license to practice law by engaging in such conduct." *Id.*

A different issue was presented in Hammond v. United States, 528 F.2d 15 (4th Cir. 1975). In *Hammond,* the defendant was mistakenly led to believe by his counsel that he faced a total maximum sentence of 95 years if he was convicted of committing bank robbery, while in actuality the maximum sentence he could have received was 55 years. The defendant alleged that because he was afraid of a 95 year sentence, he accepted the terms of a plea bargain. Unlike *Allison,* which concerned a defendant's misunderstanding about the possible sentence resulting from a guilty plea, *Hammond* dealt with the possible sentence resulting from a plea of not guilty. In allowing the defendant to plead anew, the *Hammond* court tended to overlook the procedural requirements of Rule 11 of the Federal Rules of Criminal Procedure and instead relied upon what it considered "patently erroneous advice" rendering a counsel's representation ineffective. 528 F.2d at 18.

[13] 529 F.2d 1374 (4th Cir. 1975), *cert. denied,* 96 S.Ct. 1421 (1976) heard in conjunction with Bass v. United States, 529 F.2d 1374 (4th Cir. 1975). The only substantial difference between *Bass* and *Edwards* was that *Bass* concerned a federal prisoner bringing a § 2255 motion and *Edwards* concerned a state prisoner bringing a § 2254 motion. *See* note 21 *infra.* The court determined that these differences would have no substantive effect on the holdings, because the cases contained similar general inquiries into the guilty pleas when they were made. *Id.* at 1376. For history of *Bass* on remand and subsequent appeal see note 28 *infra.*

ious escape and received a sentence of thirty years to life. Despite his affirmations when he entered his guilty plea that no promises had been made to him, the appellant's sworn petition of habeas corpus alleged that his plea had been induced by a promise made by defense counsel that the sentence would not exceed twenty years.[14] The court of appeals determined that the claims made by the appellant established the possible existence of a plea bargain because the trial court never specifically asked whether a plea bargain had been made.[15]

While granting an evidentiary hearing in order to inquire into the voluntariness of the appellant's guilty plea, the *Edwards* court stated that its holding was of limited precedential significance since the state of North Carolina had recently made changes in its requirements for guilty plea proceedings.[16] The revised North Carolina "Transcript of Negotiated Plea" directs questions to the prosecutor, the defendant, and his counsel pertaining to the existence of any plea bargain.[17] Although the dictum of *Edwards* might indicate that the Fourth Circuit views specific inquiry at the trial level as sufficient to prevent subsequent questions of the voluntariness of guilty pleas, cases involving federal prisoners have held that this is not always true.[18]

The general provisions that federal judges must follow in ascertaining voluntariness are expressed in Rule 11 of the Federal Rules of Criminal Procedure. Rule 11 requires the judge to question the defendent in open court in order to determine that the plea is voluntary and not the result of coercion or force.[19] The rule also requires the judge to inquire whether the defendant's plea arose from a previous plea agreement with the prosecutor or defense attorney.[20]

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[14] 529 F.2d at 1375.

[15] *Id.* at 1377.

[16] *Id.* at 1378.

[17] *See* N.C. GEN. STAT. §15A-1026 (Interim Supp. 1976).

[18] Bass v. United States, 529 F.2d 1374 (4th Cir. 1975); Walters v. Harris, 460 F.2d 988 (4th Cir. 1972).

[19] FED. R. CRIM. P. 11(d) *(as amended* December 1, 1975). In Santobello v. New York, 404 U.S. 257, 261 (1971), the Supreme Court stressed the importance of a judge's inquiries as to the existence of any promise in holding that a plea of guilty must be voluntary and knowing and if it was induced by promises, the content of such promises must be known. *Id.*

[20] The Official Comment to Rule 11 provides:

> Designated as subdivision (d) existing provisions requiring the court to address the defendant personally before accepting a plea of guilty or nolo contendere to determine whether the plea is voluntary, added provisions requiring that the court's inquiry be made in open court, expanded the area of the court's inquiry to include whether the

Failure by a trial court to follow the requirements of Rule 11 constitutes reversible error and will give the defendant the opportunity to make a collateral attack[21] on his conviction and plead anew.[22]

The record in *Bass v. United States*[23] indicated that the trial judge had complied with the requirements of Rule 11 by telling the defendant before the guilty plea was accepted that plea bargaining was approved by the Supreme Court[24] and that there should be no hesitation in telling the court of any plea agreement. The defendant's attorney replied that there had been a plea bargain and the prosecutor had promised to recommend a three-year sentence.[25] The trial judge then stated that he would not be bound by the plea agreement and he would be free to impose whatever sentence he deemed necessary.[26] Finally, the judge determined that the plea was voluntary and it was accepted. Despite the evidence of the judge's Rule 11 inquiries, the defendant claimed that he had been assured by his counsel that the

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> plea is the result of force or threats or of promises apart from a plea agreement, and substituted provisions directing the court to inquire whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney for provisions authorizing the court to refuse to accept a plea of guilty and directing the court to determine whether the plea is made with an understanding of the nature of the charge and the consequences of the plea.

1975 Amendment *Official Comment.*

[21] For a discussion of collateral attacks upon convictions, see Comment, *Plea Bargaining Mishaps-The Possibility of Collaterally Attacking the Resultant Plea of Guilty,* 65 J. CRIM. L.C. & C. 170, 171 (1974).

[22] McCarthy v. United States, 394 U.S. 459, 468 (1969). In Gwinn v. United States, Civ. No. 75-1180 (4th Cir. March 15, 1976), the Fourth Circuit reversed and remanded the appellant's guilty plea. There, the trial judge failed to explain to the defendant the elements of the crime with which he was charged when the guilty plea was accepted. The Fourth Circuit held that the requirements of Rule 11 were not fulfilled because the defendant lacked an understanding of the nature of the charge to which he was pleading guilty. *See* Dorrough v. United States, 385 F.2d 887, 890 (5th Cir. 1967), *cert. denied,* 394 U.S. 1019 (1969); Hulsey v. United States, 369 F.2d 284, 286-87 (5th Cir. 1966); Munich v. United States, 337 F.2d 356, 360 (9th Cir. 1964).

[23] Bass v. United States, 529 F.2d 1374 (4th Cir. 1975), *reported sub nom* Edwards v. Garrison, 529 F.2d 1374 (4th Cir. 1975).

[24] The Supreme Court recognized plea bargaining as a necessary part of the system of criminal justice in Santobello v. New York, 404 U.S. 257 (1971). For an analysis of the usefulness of plea bargaining, see Weintraub & Tough, *Lesser Pleas Considered,* 32 J. CRIM. L.C. & C. 506 (1942); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas,* 112 U. PENN. L. REV. 865 (1964).

[25] This recommended sentence was in accordance with charges against Bass for distributing heroin in violation of 21 U.S.C. § 841 (1970).

[26] 529 F.2d at 1378. The judge was limited by the statutory maximum, which was six years, under the Federal Youth Corrections Act, 18 U.S.C. § 5010 (1970).

plea agreement would be binding on the court. The Fourth Circuit held that although the trial court had made an extensive inquiry into the voluntariness of the plea, the defendant might subsequently be able to controvert his statements made during that inquiry.[27] As in *Edwards, Bass* was reversed and remanded for an evidentiary hearing to determine the truthfulness of the defendant's allegations.[28]

The Fourth Circuit's holding in *Bass,* however, conflicts with the Fifth Circuit's holding in *Bryan v. United States.*[29] In *Bryan,* the defendant pleaded guilty to bank robbery and escaping from custody. Subsequently, he brought a § 2255 motion[30] claiming that an unkept plea agreement had induced him to plead guilty on the escape charge. Faced with a factual situation very similar to that in *Bass,* the *Bryan* court refused to allow the appellant to controvert the answers he made to questions presented by the trial judge at the time the guilty pleas were accepted. The records of the plea proceeding in this case, as in *Bass,* revealed extensive questioning by the judge concerning the existence of any plea agreements.[31] The Fifth Circuit held that this questioning was adequate to preclude the defendant from subsequently attacking the voluntariness of his plea.[32] The *Bryan* court recognized the need for more adequate Rule 11 proceedings and it supported proposed amendments to the Rule which were later instituted in 1975.[33] To reduce challenges to the voluntariness of guilty pleas, amendments to Rule 11 require extensive inquiries by

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[27] *Id.* at 1380. In support of this conclusion, the Fourth Circuit cited Crawford v. United States, 519 F.2d 347 (4th Cir. 1975), which stated that a federal prisoner would be able to controvert prior Rule 11 statements because "he may have been advised to give answers that the court would require in order to accept the plea, rather than those which reflected the truth." *Id.* at 351.

[28] On remand, the district court conducted an evidentiary hearing concerning the voluntariness of Bass's guilty plea. Because Bass was not told by his counsel to deny any off-the-record promise and because he was not told that the plea bargain was binding on the judge, the guilty plea would stand. On appeal, the district court's denial of Bass's § 2255 motion was affirmed by the Fourth Circuit. Bass v. United States, Civ. No. 76-1231 (4th Cir. Dec. 10, 1976).

[29] 492 F.2d 775 (5th Cir.), *cert. denied,* 419 U.S. 1079 (1974).

[30] 28 U.S.C. § 2255 (1970). For a discussion of § 2255, see Uelman, *Post-Conviction Relief for Federal Prisoners A Survey and a Suggestion Under* 28 U.S.C. § 2255, 69 W. VA. L. REV. 277 (1967).

[31] 492 F.2d at 780. The judge's questions were directed to both the defendant and his attorney, who "testified without conflict or equivocation that no plea bargain had been made or promises, directly or indirectly." *Id.*

[32] *Id.*

[33] *Id.* at 781. *See* note 19 *supra. See* also A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, APPROVED DRAFT, STANDARDS RELATING TO PLEAS OF GUILTY, §§ 1.5 & 3.1-3.4 (1968).

trial judges as to the existence of a plea agreement.

Because the Fifth Circuit realistically examined the inquiry proceeding conducted by the trial judge, *Bryan* appears to be a better adjudication of the voluntariness question than the Fourth Circuit's decision in *Bass*. The extent of the inquiries made by the judges in both cases accorded with the requirements of Rule 11, yet the *Bass* court allowed a defendant to controvert his statements because of the Fourth Circuit's subjective determination that the plea had not been a product of the defendant's "informed free will."[34] The "informed free will" standard in *Bass* necessarily creates problems for trial judges at the time they are accepting guilty pleas and impairs the viability of Rule 11 inquiries.[35]

In addition to its conflict with the Fifth Circuit in the granting of evidentiary hearings on prisoner's § 2255 motions, the Fourth Circuit itself has not always been consistent in the interpretation of the issue concerning voluntariness of guilty pleas. The court of appeals did restrict the granting of an evidentiary hearing in the disposition of a § 2255 petition in *Raines v. United States*.[36] The appellant in *Raines* asserted that he was "influenced" by a probation officer to plead guilty, and that a full evidentiary hearing concerning the voluntariness of that guilty plea should have been granted.[37] The Fourth Circuit, however, ruled that full compliance with Rule 11 at the trial, which revealed that the guilty plea was neither induced nor coerced, did not require a subsequent evidentiary hearing.[38]

Allison, Edwards, Bass and *Raines* reflect the confusion that exists within the Fourth Circuit concerning subsequent attacks upon the voluntariness of guilty pleas. Viewing the cases together permits an inference that no matter how extensively a state or federal trial judge questions a defendant before accepting a guilty plea, the judge

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[34] 529 F.2d at 1380.

[35] Judge Field's special concurrence in *Allison v. Blackledge* addressed itself to problems with the Fourth Circuit's approach to the issue of post-conviction guilty plea attack. Allison v. Blackledge, 533 F.2d 894, 899 (4th Cir. 1976) (Field, J. concurring). His concurrence was based on his concession that "recognition of Edwards v. Garrison, 529 F.2d 1374 (4th Cir. 1975), [was] viable precedent" supporting the majority's holding. *Id.* at 898.

[36] 423 F.2d 526 (4th Cir. 1970).

[37] *Id.* at 531. The actual type of "influence" exerted by the probation officer was not clarified by the appellant. The court found that this mere, unsupported allegation insufficient to require a hearing. *Id.*

[38] *Id.* at 530. The court stated that the requirements of Rule 11 are "intended to produce a complete record of the factors relevant to the voluntariness of the guilty plea and, thereby, to forestall subsequent controversy as to voluntariness." *Id.*

may not be assured of whether that plea is subject to future attack.[39] Rule 11 exemplifies congressional recognition of this problem[40] and recent amendments to that rule have therefore placed requirements upon the judge to insure the validity of the plea.[41] Nevertheless, the Fourth Circuit holdings imply that this is not enough; apparently the court fears that Rule 11 inquiries cannot be considered as conclusive evidence that all plea bargains have been revealed.[42] The Fifth Circuit's decision in *Bryan,* however, represents a logical approach to the voluntariness problem since it recognized precautions that had been used at the trial level. The efficacy of guilty pleas rests upon their efficient disposition of criminal defendants;[43] if the Fourth Circuit does not permit an effective voluntariness inquiry at the trial level, guilty pleas may lose this advantage.

DAVID H. ALDRICH

B. Search and Seizure: Warrantless Automobile Searches.

In the past decade the Supreme Court has frequently examined warrantless automobile inventory searches,[1] and warrantless automobile searches based upon probable cause existing on the highway, but with the search commencing after the automobile has been driven to the police station, garage, or impoundment lot.[2] The Supreme Court's

[39] Allison v. Blackledge, 533 F.2d 894, 899 (4th Cir. 1976) (Field, J., specially concurring).

[40] McCarthy v. United States, 394 U.S. 459, 464-66 (1969).

[41] *See* note 19 *supra.*

[42] Walters v. Harris, 460 F.2d 988, 993 (4th Cir. 1972). The rationale in *Walters* concerning the effectiveness of Rule 11 inquiries was used by the Fourth Circuit to support its holding in *Bass.*

[43] *See* note 2 *supra.*

[1] The fourth amendment provides in pertinent part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV. For recent cases involving warrantless inventory searches see South Dakota v. Opperman, 96 S. Ct. 3092 (1976); Cady v. Dombrowski, 413 U.S. 433 (1973); United States v. Harris, 390 U.S. 234 (1968); Cooper v. California, 386 U.S. 58 (1967). *See* Note, *Cady v. Dombrowski: The Demise of Coolidge,* 35 U. PITT. L. REV. 712 (1974); Comment, *The Automobile Inventory Search and* Cady v. Dombrowski, 20 VILL. L. REV. 147 (1974).

[2] Texas v. White, 423 U.S. 67 (1975); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970). *See* Note, *The Warrantless Automobile Search and Chambers v. Maroney,* 28 BAYLOR L. REV. 151 (1976); Note, *Warrantless Searches and Seizures of Automobiles and the Supreme Court From Carroll to Cardwell: Inconsistently Through the Seamless Web,* 53 N.C.L. REV. 722 (1975).

latest major decision concerning warrantless inventory searches is *South Dakota v. Opperman.*[3] In *Opperman* the Court held that a warrantless inventory search revealing drugs in the glove compartment was reasonable, as the expectation of privacy in one's automobile is significantly less than in one's home,[4] and police inventories are conducted in the interest of protecting the owner's property, and the custodian's and public's safety.[5] Correspondingly, the Supreme Court's most recent decision on whether probable cause for a warrantless search still existed at the police station after the stopping of a motorist on the highway was *Texas v. White.*[6] In a per curiam opinion, the Court held that probable cause still obtained at the police station, and upheld the warrantless search.[7] These issues were recently reviewed by the Fourth Circuit in *Cabbler v.*

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[3] 96 S. Ct. 3092 (1976).

[4] The expectation of privacy principle was developed by the Supreme Court in Katz v. United States, 389 U.S. 347 (1967). There the Court held that once one has entered a telephone booth, closed the door,and is justifiably relying on the privacy of the booth, monoriting the conversation by electronic listening devices is a violation of the fourth amendment's right to privacy. *Id.* at 352. Subsequently, Cardwell v. Lewis, 417 U.S. 583, 590 (1974), held that one's expectation of privacy in an automobile is less than that found in one's home or office.

[5] In *Opperman,* the defendant's car was ticketed twice for parking violations over a period of eight hours. The car was finally impounded and towed to the city impound lot. At the lot, police noticed valuables in plain view inside the car, and subsequently unlocked it to conduct a standard inventory. Marijuana was found in the unlocked glove compartment. Later that day the defendant went to the police station to claim his property, and was subsequently arrested and convicted on a charge of possession of marijuana. The Supreme Court upheld the warrantless search as reasonable under the fourth amendment's search and seizure clause. 96 S. Ct. at 3100.

[6] 423 U.S. 67 (1975). In *White,* police stopped White near a drive-in bank as they had reason to believe he was passing fraudulent checks. After White attempted to stuff something between the car seats he was arrested, and a police officer drove his car back to the station house. At the station White refused to consent to an automobile search, but the police conducted a warrantless automobile search about 45 minutes after arrival. Checks were found and White was subsequently convicted of knowingly attempting to pass a forged instrument. *Id.* at 305. *See* Note, *The Warrantless Automobile Search and Chambers v. Maroney,* 28 BAYLOR L. REV. 151 (1976).

[7] *White* was an affirmance of the Supreme Court's prior decision in Chambers v. Maroney, 399 U.S. 42 (1970).

[8] 528 F.2d 1142 (4th Cir. 1975), *cert. denied,* 97 S. Ct. 60 (1976). In *Cabbler,* the Fourth Circuit also examined the scope of review necessary in an appeal for habeas corpus relief under 28 U.S.C. § 2254 (1970) (application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court). The Commonwealth argued that the concurring opinion of Justice Powell in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) should be applied. Under Justice Powell's approach, the only question on federal habeas corpus review would be whether the petitioner had

Superintendent,[8] and *United States v. Chulengarian.*[9]

In *Cabbler,* the defendant was convicted of grand larceny[10] and petit larceny.[11] The police were seeking Cabbler in connection with a felony charge of shooting into an occupied dwelling.[12] They observed Cabbler enter a hospital for treatment of a gunshot wound, followed him, and once in the hospital arrested him on the shooting charge.[13] Cabbler was then placed in a patrol car to be taken to the police station. At that time, Cabbler requested the police officers to roll up his car windows, as it had begun to rain. While rolling up the windows, the police noticed and seized a pistol in the back seat. After taking Cabbler to the station, the police returned to the hospital to drive Cabbler's car to the city garage where a warrantless inventory search took place,[14] which yielded stolen goods in the trunk of the automobile.[15] The seizure of the pistol was not an issue in the case,[16] and the Fourth Circuit upheld the warrantless inventory search.

In *Cabbler,* the Fourth Circuit relied heavily on the protective purposes of the inventory search to uphold the intrusion. This protection rationale has been fully developed by four Supreme Court decisions. In *United States v. Harris,*[17] the Court upheld a warrantless inventory search because it served to protect the car and the owner's property while in police custody.[18] While this decision would cover the

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a fair opportunity to litigate fourth amendment claims in the state courts. *Id.* at 250. The Fourth Circuit disagreed, and held that it may properly review the merits of Cabbler's search and seizure claim. Cabbler v. Superintendent, 528 F.2d at 1145. That decision would probably not stand after Stone v. Powell, 96 S. Ct. 3037, 3052 (1976). For a discussion of *Stone,* see *Habeas Corpus And Prisoner's Rights,* Section A, notes 68-76, *infra.*

[9] 538 F.2d 553 (4th Cir. 1976).

[10] VA. CODE ANN. § 18.2-95 (Repl. Vol. 1975).

[11] VA. CODE ANN. § 18.2-96 (Repl. Vol. 1975).

[12] VA. CODE ANN. § 18.2-279 (Repl. Vol. 1975).

[13] Cabbler v. Superintendent, 374 F. Supp. 690 (E.D. Va. 1974). The transcript revealed that Cabbler erroneously thought he would stay in the hospital all night because of the wound. *Id.* at 691-92.

[14] Because of complaints made and claims filed by Roanoke, Virginia, citizens in 1964-65, police inventory of impounded automobiles was required by the Roanoke Police Department in an effort to prevent loss or theft.

[15] According to the trial court transcript, Cabbler did not give the police permission to remove the car, or look in the trunk of the car. Also, the police did not suspect stolen goods were in the trunk, but rather retrieved Cabbler's automobile to keep it safe until Cabbler was released from jail. Cabbler v. Superintendent, 374 F. Supp. 690, 692 (E.D. Va. 1974).

[16] 528 F.2d at 1144 n.2.

[17] 390 U.S. 234 (1968).

[18] *Id.* A warrantless inventory search was upheld in *Harris* when evidence was inadvertently discovered in plain view by police while rolling up the car windows and locking the doors. The Court found this to be a measure taken by the police to protect

uncontested seizure of the gun in *Cabbler*,[19] the second seizure of Cabbler's property is arguably not covered by the *Harris* decision.[20]

Another dimension of the Court's reliance on the protective purposes associated with a warrantless inventory search is found in *Cooper v. California*.[21] In *Cooper*, the Court indicated that protection of the police from potential false claims by the property owner is a valid reason for conducting a warrantless inventory search.[22] Finally, the protection principle was extended to the police in *Cady v. Dombrowski*.[23] The Court in *Cady* held that when the police have

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the car while it was in police custody, and held that under such circumstances the fourth amendment does not require police to obtain a warrant. *Id.* at 236. *See* note 1 *supra*.

[19] *See* text accompanying note 16 *supra*.

[20] The goods found in Cabbler's trunk were not in plain view, nor were they inadvertently discovered while the officer was rolling up the windows of Cabbler's car. The only possible application of *Harris* to *Cabbler* is a broad reading of *Harris* concerning the police duty to protect the owner's goods. Harris v. United States, 390 U.S. at 236. However, the *Harris* Court also specifically stated that it did not consider the *Harris* facts to constitute a search, and therefore was not deciding the admissibility of evidence found in an inventory search pursuant to police regulations. *Id.* Apparently, the broad reading of *Harris* is not the correct interpretation. *See* Comment, *The Automobile Inventory Search and* Cady v. Dombrowski, 20 VILL. L. REV. 147, 171 (1974).

[21] 386 U.S. 58 (1967).

[22] *Id.* In *Cooper*, the defendant was arrested on a narcotics charge as he was about to enter his automobile. Defendant was driven to the police station, and his car was seized as evidence under a California forfeiture statute. Law of June 23, 1955, ch. 1209, § 2, [1955] Cal. Stats. 2224 (repealed 1967) (formerly CAL. HEALTH & SAFETY CODE § 11611 (West)). One week after impoundment, the automobile was searched without a warrant and evidence found in the search was admitted at trial. The Court emphasized the fact that since the automobile would be in police custody for at least four months, the police had a right to search in order to protect themselves. 386 U.S. at 61-62. For a discussion of how courts have interpreted *Cooper*, see Note, *The Inventory Search of an Impounded Vehicle*, 48 CHI.-KENT L. REV. 48, 52-53 (1971). *See also* Comment, *Police Inventories of the Contents of Vehicles and the Exclusionary Rule*, 29 WASH. & LEE L. REV. 197, 204 (1972). Subsequent cases in state and federal courts have generally upheld warrantless police inventory searches under the protection rationales expressed in *Harris* and *Cooper*. *See, e.g.*, United States v. Mitchell, 458 F.2d 960 (9th Cir. 1972) (evidence admissible as police were protecting owner's property in a lawfully impounded car); United States v. Pennington, 441 F.2d 249 (5th Cir.), *cert. denied*, 404 U.S. 854 (1971) (inventory search only to protect goods of owners and to keep arrestee's property in order); Capps v. State, 505 S.W.2d 727 (Tenn. 1954). *But see* Mozzetti v. Superior Court, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971). While most appellate courts have been sympathetic to police inventory searches, the Eighth Circuit, unlike the Fourth Circuit in *Cabbler*, did not view police protective measures as extending to the opening of a locked trunk, and preferred a method of letting the owner make his own arrangements for removal and storage of his vehicle. United States v. Lawson, 487 F.2d 468 (8th Cir. 1973).

[23] 413 U.S. 433 (1973).

a reasonable belief that a gun is in the trunk of an automobile in police custody, the police may search the trunk without a warrant to protect the public from a dangerous weapon.[24]

A summary of these holdings provided the grounds for the recent Supreme Court decision in *Opperman.*[25] There, the warrantless inventory search was condoned on the ground that there is a diminished expectation of privacy in one's automobile,[26] and under the particular circumstances, the search was reasonable.[27] The *Opperman* Court specifically upheld warrantless police inventory searches as reasonable if done to accomplish any of three distinct purposes: protection of the owner's property, protection of police against claims, and protection of public safety.[28]

Although the Fourth Circuit decided *Cabbler* before *Opperman,* the reasoning was essentially identical. Against the background of *Harris, Cooper,* and *Cady,* the Fourth Circuit in *Cabbler* relied heavily on the protection assured by an inventory search. As the Supreme Court has done in *Opperman,* the *Cabbler* court read those cases as holding that inventory searches are valid if used to protect the owner's property, the safety of the custodian, or the safety of the public.[29] The court upheld the search in *Cabbler,* finding the search reasonable in its purpose to protect the automobile owner's property,

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[24] In *Cady,* defendant was involved in an accident, and his car was towed to a privately-owned garage and left unguarded. Subsequently, police arrested defendant, who apparently had stated that he was a Chicago police officer, for drunk driving. Later, the car was searched at the garage without a warrant. The purpose of that search was to locate a revolver, which the arresting police thought Chicago police officers were required to carry at all times. The search revealed blood-soaked clothing and other items in the trunk, which led to defendant's subsequent conviction for murder. *Id.* at 433-39. The Supreme Court upheld the warrantless search on the grounds of public protection, as the general public "might be endangered if an intruder removed a revolver from the trunk of the vehicle." *Id.* at 447. *See* Comment, *The Automobile Inventory Search and* Cady v. Dombrowski, 20 VILL. L. REV. 147, 172-79 (1974).

[25] South Dakota v. Opperman, 96 S. Ct. 3092 (1976).

[26] *Id.* at 3096, The dissent in *Opperman* argued that prior cases had held that one suffers a diminished expectation of privacy in one's automobile only if exigent circumstances exist, Chambers v. Maroney, 399 U.S. 42 (1970), *see* note 40 *infra,* or because the automobile lends itself to plain view. Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion). The dissent saw neither exception as apposite to *Opperman.* South Dakota v. Opperman, 96 S. Ct. at 3105-06 (Marshall, J., dissenting).

[27] *See* note 5 *supra.*

[28] *See* South Dakota v. Opperman, 96 S. Ct. at 3096-99.

[29] 528 F.2d at 1146. For a proposal regarding further limitations on searches based on protective purposes, see Note, *Warrantless Searches and Seizures of Automobiles and the Supreme Court From Carroll to Cardwell: Inconsistently Through the Seamless Web,* 53 N.C.L. REV. 722, 762-63 (1975).

and to protect the city from false claims.[30] While *Cabbler's* reasoning, particularly in light of *Opperman,* complies with the Supreme Court's holdings, it is nevertheless questionable as it would effectively uphold all warrantless inventory searches.[31] Furthermore, the specific facts of *Cabbler* do not fit neatly into the circumstances the Supreme Court found controlling in *Harris, Cooper,* and *Cady.* The goods found in *Cabbler* were not discovered in plain view,[32] but in a locked trunk.[33] In addition, the search apparently was not closely related to the reason for the arrest, the impoundment, or the retention of the automobile.[34] Likewise, there was no indication that Cab-

[30] 528 F.2d at 1146. The court's concern regarding false claims centers on the possibility that police may be held liable for specious claims of goods lost while in police custody, or not returned after custody is terminated. The inventory search counteracts that possibility. The Fifth Circuit has expressed the same concern and upheld the same solution. United States v. Gravitt, 484 F.2d 375, 378 (5th Cir. 1973), *cert. denied,* 414 U.S. 1135 (1974); United States v. Lipscomb, 435 F.2d 795, 800 (5th Cir. 1970), *cert. denied,* 401 U.S. 980 (1971). For a discussion on the viability of police liability in these custodial situations, see Comment, *Police Inventories of the Contents of Vehicles and the Exclusionary Rule,* 29 WASH. & LEE L. REV. 197, 204-07 (1972). A justification for the search may also have been based on protection of the public, as a gun had previously been found in the car in plain view. *See* text accompanying notes 13-14 *supra.* Arguably, however, protection of public safety should not be a justification for the search in *Cabbler. See* text accompanying note 36 *infra.*

[31] South Dakota v. Opperman, 96 S. Ct. 3092, 3107-08 (1976) (Marshall, J., dissenting). The *Opperman* decision has not clarified all inventory search problems. *See* United States v. Morrow, 541 F.2d 1229, 1232 (7th Cir. 1976) (warrantless inventory search conducted one day after impoundment upheld); Altman v. State, 335 So. 2d 626 (1976) (Fla. Dist. Ct. App. 1976) (arrestee requested to make own arrangements for removal of car, and friend was available for such purpose; held that since police did not have probable cause to believe contraband was in vehicle, and arrestee could take care of car, warrantless inventory search unnecessary and unreasonable under the fourth amendment); Robertson v. State, 541 S.W.2d 608 (Tex Crim. App. 1976) (custody and control by police synonomous, as inventory search completed before car was towed to private lot upheld).

[32] United States v. Harris, 390 U.S. 234 (1968).

[33] For a collection of cases concerning the lawfulness of searching locked trunks, see Annot., 48 A.L.R.3d 537, 577-79 (1973). Furthermore, *Opperman* does not fully encompass the *Cabbler* facts, as in *Opperman* the goods were found in an unlocked glove compartment. The Court stated that unless an inventory search was conducted, vandals, once inside the car, would have ready and unobstructed access to the goods. 96 S. Ct. at 3100 n.10. A locked trunk, as found in *Cabbler,* would presumably negate such access.

[34] Cooper v. California, 386 U.S. 58 (1967). The *Cabbler* trial transcript showed that the police did not suspect that stolen goods were in the trunk. 374 F. Supp. at 692. Also, Cabbler was arrested for shooting into an occupied dwelling. Thus, there does not seem to be the close relation between the search and arrest that was found in *Cooper.* In *Cooper,* the arrest was for selling heroin, and the seizure was pursuant to a statute requiring forfeiture of any vehicle used to sell or transport narcotics in order to hold the vehicle as evidence. Impoundment then became necessary because of the

bler's automobile was destined to remain in police custody for a sufficient length of time to justify the reasonableness of a search to protect the custodian.[35] Finally, unlike the situation in *Cady,* the police in *Cabbler* arguably had little reason to believe that anything injurious to themselves or the public was contained in the trunk, as they had already found a pistol in the car that was likely the weapon used in the shooting incident.[36]

The court's analysis and holding in *Cabbler* would seem to validate any warrantless inventory search if the police contend that the purpose of the search was for protection or safekeeping. However, since *Opperman* employed the same analysis as that used by the Fourth Circuit in *Cabbler,*[37] *Cabbler* is probably an accurate reflection of the law on warrantless searches. The Supreme Court's decisions may have permitted lower courts to uphold warrantless police inventory searches in practically any situation.[38]

A warrantless search conducted at a time and place distant from that of arrest was the concern of the Fourth Circuit in *United States v. Chulengarian.*[39] The defendant was a passenger in the car of Evans, who was arrested for driving under the influence of alcohol. After Evans failed to produce any evidence of ownership, the automobile was impounded. As the arresting officer entered Evan's car to drive it to the police impoundment lot, he observed marijuana on the floor, and then found more drugs on the back seat. In addition, a revolver was discovered in the glove compartment during this initial search. The car was driven to the lot and searched again without a warrant, three to four hours after the initial search. A third warrantless search was conducted the night after the impoundment, and more drugs were found in the headliner of the automobile. The district court suppressed the evidence on the ground of lack of exigent circumstances,[40] but the Fourth Circuit vacated that suppression and re-

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forfeiture provision of the statute. The Court stated that the inventory search was thus closely related to the reason for arrest, seizure, and impoundment. 386 U.S. at 60-61.

[35] Cooper v. California, 386 U.S. 58 (1967). *See* note 22 *supra.*

[36] For an analysis similar to that used in the text, see United States v. Lawson, 487 F.2d 468 (8th Cir. 1973). *Lawson*'s factual setting resembled the setting in *Cabbler.*

[37] *See* text accompanying notes 29-31 *supra.*

[38] *See* Comment, *The Automobile Inventory Search and* Cady v. Dombrowski, 20 VILL. L. REV. 147, 164-65, 172 (1974).

[39] 538 F.2d 553 (4th Cir. 1976).

[40] *Id.* at 554. The concept of "exigent circumstances" in regard to automobile searches was developed in Carroll v. United States, 267 U.S. 132 (1925). In *Carroll,* two federal agents stopped an automobile as they reasonably suspected it to contain contraband. The agents had no probable cause to arrest the automobile's occupants,

manded.[41] The court of appeals based its decision on the Supreme Court's recent holding in *Texas v. White*,[42] which had relied on the Court's previous decision in *Chambers v. Maroney*.[43]

In *Chambers*, the exigent circumstances of mobility and danger justified the warrantless search back at the police station.[44] Additionally, the *Chambers* Court spoke of an immediate search at the police station.[45] The *Chambers* rule generally has been interpreted as requiring two conditions: probable cause and mobility of the automobile.[46] Arguably, the officer in *Chulengarian* had probable cause to believe narcotics might be in the automobile. However, once the automobile was impounded it would cease to be mobile.[47] In that situation, the exigent circumstance requirement of *Chambers* would not be fulfilled.[48]

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but did have probable cause to believe the automobile contained contraband. A search on the highway uncovered the contraband, and the Court upheld the warrantless search due to exigent circumstances that existed because the police had probable cause to search and the car was mobile. If both conditions were met the search could be upheld, as the vehicle could be "quickly moved out of the locality or jurisdiction." *Id.* at 153. Exigent circumstances involves a balancing of interests, and implies a police need sufficient to override the interests of the private citizen. *See* Comment, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 836 (1974).

[41] 538 F.2d 533 (4th Cir. 1976).

[42] *See* text accompanying note 6 *supra*.

[43] *See* note 7 *supra*.

[44] Due to the mobility of an automobile, evidence might have been lost if the car had not been searched. Chambers v. Maroney, 399 U.S. 42, 51 (1970). Furthermore, an immediate search was not practicable in *Chambers* because of darkness and danger. *Id.* at 52 n.10.

[45] The *Chambers* Court began its analysis by weighing the amount of intrusion involved in conducting a warrantless search against immobilizing the car until a warrant was obtained. 399 U.S. at 51-52. The Court went on to state:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

Id. at 52.

[46] *See* Comment, *The Warrantless Automobile Search and Chambers v. Maroney*, 28 BAYLOR L. REV. 151, 160 (1976). *See also* note 40 *supra*.

[47] *See* note 48 *infra*.

[48] A distinction has been offered between the mobility of impounded cars, and the mobility of cars not impounded, but still driven to the station house. *See* Comment, *The Warrantless Automobile Search and Chambers v. Maroney*, 28 BAYLOR L. REV. 151, 160-61 (1976). The *Chambers* Court held that the mobility of the car still obtained at the station house. 399 U.S. at 52. The article concludes that since the arrested driver and occupants of the car obviously could not move the car, the Court must have been concerned with a relative or friend moving the car. As the car was not impounded in

Even if exigent circumstances were present in *Chulengarian,* there remains an additional problem concerning the time sequence involved. The first search at the impoundment lot occurred three to four hours after the initial search. The second warrantless search at the lot occurred the next night. Although the *Chambers* Court asserted that given probable cause at the scene of the stopping, probable cause still maintained at the station house,[49] the Court also referred to an immediate warrantless search conducted at the impoundment lot or police station.[50] In situations like *Chambers,* courts generally have upheld searches that were conducted immediately or shortly after the arrival of the automobile at the police station, impoundment lot, or garage,[51] but have not definitely established how

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Chambers, the Court must have concluded that a car is mobile unless impounded. Once impounded a car becomes immobile, as no private citizen can move it. 28 BAYLOR L. REV., *supra* at 161. If this interpretation of *Chambers* is correct, then exigent circumstances did not exist in *Chulengarian* as there the car was impounded, and the search thus was not reasonable. Some courts have followed this interpretation. People v. Lorio, 546 P.2d 1254 (Colo. 1976) (defendant's car held in police custody, warrantless search invalid as the car was not mobile); Maldonado v. State, 528 S.W.2d 234 (Tex. Crim. App. 1975) (no exigent circumstances existed when car was held at fenced-in police storage lot, as mobility factor gone). *Contra,* Commonwealth v. Maione, 227 Pa. Super. Ct. 239, 324 A.2d 556 (1974) (car impounded, but search conducted four hours later upheld on mobility factor as there was a fleeting opportunity to search); State v. Sanders, 266 So. 2d 79 (Dist. Ct. App. Fla. 1972) (although car was impounded and defendant was in police custody, warrantless search upheld). The Maldonado court distinguished *Chambers* because in that case "immobilization of the vehicle while a search warrant was being obtained would have been an intrusion." 528 S.W.2d at 240. In *Maldonado* the car had already been immobilized.

[49] Chambers v. Maroney, 399 U.S. 42, 52 (1970).

[50] *See* note 45 *supra.* The exact meaning of "immediate" is not clear. The search in *Chambers* took place after the car was towed to the station house, but no exact time sequence was given. However, in Coolidge v. New Hampshire, 403 U.S. 443 (1971), Justice White, the author of the majority opinion in *Chambers,* stated that *Chambers* "contemplated some expedition in completing the searches so that automobiles could be released and returned to their owners." *Id.* at 523 (White, J., dissenting). *Coolidge,* however, involved warrantless searches commencing 11 and 14 months after seizure, so the time when a warrantless search ceases to be "immediate" remains open to speculation. One court's interpretation is that "immediate" in the *Chambers* context should not be narrowly construed nor equated with "instantly," but should be read as allowing the police a reasonable time in which to conduct a warrantless search. People v. White, 68 Mich. App. 348, 242 N.W.2d 579 (1976) (upholding a warrantless search commencing eighteen hours after impoundment). *But see* People v. Weaver, 35 Mich. App. 504, 512, 192 N.W.2d 572, 575 (1971) (warrantless search commenced two days after impoundment not valid; "immediate" means immediately upon arrival at station house).

[51] *See, e.g.,* Gomez v. Beto, 471 F.2d 774 (5th Cir. 1973) (search held as soon as automobile arrived at police station); Orricer v. Erickson, 471 F.2d 1204 (8th Cir. 1973) (search a few hours after arrival at police station); Wood v. Crouse, 436 F.2d 1077 (10th

much time may pass before a warrant must be obtained.[52]

Clearly, however, the precise language of *Chambers* calls for an immediate search upon delivering the automobile to the station,[53] and the twenty-four hour delay in *Chulengarian* may have been long enough to require consideration of the time span involved. Instead, the Fourth Circuit ignored that issue. In relying on *White,* the Fourth Circuit based its decision on a case where probable cause existed, but where there was no time-span problem in regard to the search,[54] and where mobility was still a factor as there was no impoundment.[55] *White's* facts thus precisely fit the *Chambers* holding. *Chulengarian,* however, is not so similar to *Chambers,* as there was a difference in time span before the search, and exigent circumstances might not have existed in *Chulengarian.*[56] Therefore, further considerations were involved in *Chulengarian,* and *White* arguably is not wholly supportive. Indeed, in deciding *Chulengarian* the Fourth Circuit has possibly weakened the necessity of the mobility factor in applying the *Chambers* rule. Apparently, the court has found that an impounded car is mobile for the purposes of *Chambers.* If an impounded car is mobile it would seem difficult to envision any situation where an automobile would not be considered mobile in the Fourth Circuit. Likewise, *Chulengarian* has possibly extended the *Chambers* rule to searches commencing long after arrival at the police station. When coupled with the rationale that impounded automobiles are mobile, the Fourth Circuit might uphold warrantless searches commenced any number of days, or even weeks, after the impoundment. Only future decisions concerning the time lapse between the impoundment and the search will clarify the holding of *Chulengarian.*

Cir.), *cert. denied,* 402 U.S. 1010 (1971) (only twenty minutes elapsed between initial stop and search at county jail). *But see* United States v. McCormick, 502 F.2d 281 (9th Cir. 1974) (if warrantless seizure of automobile valid, then subsequent search on following day also valid); United States v. Gulledge, 469 F.2d 713 (5th Cir. 1972) (court upheld a warrantless search commenced several days after arrival at the police station). A prior Fourth Circuit decision held that "it matters not that the search is conducted sometime later" after transporting the automobile to the station. United States v. Chalk, 441 F.2d 1277, 1279 (4th Cir.), *cert. denied,* 404 U.S. 943 (1971). The amount of time elapsed between the seizure and the search cannot be determined from the facts given in *Chalk.*

[52] *See* cases cited notes 50-51 *supra.*

[53] *See* note 45 *supra.*

[54] The search in *White* took place approximately 30 to 45 minutes after arrival at the police station. White v. State, 521 S.W.2d 255, 256 (Tex. Crim. App. 1974).

[55] Comment, *The Warrantless Automobile Search and Chambers v. Maroney,* 28 BAYLOR L. REV. 151, 162 (1976).

[56] To meet the requirements for exigent circumstances, the automobile must be mobile, and it arguably was not in *Chulengarian. See* notes 40 and 48 *supra.*

C. Inaccuracy In Search Warrant Affidavits.

The question of when a defendant may attack the accuracy of facts alleged in an affidavit for a search warrant, to challenge the existence of probable cause, has never been decided by the Supreme Court.[1] Consequently, different standards prevail among the circuits.[2] Disagreement focuses on whether negligently stated material misrepresentations in an affidavit require suppression of evidence seized in the ensuing search.[3] In *United States v. Lee,*[4] the Fourth Circuit considered which standard should be utilized.

Lee was convicted for possession of a firearm in commerce.[5] A federal agent obtained a warrant to search Lee's home, since his girlfriend, Williams, had purchased firearms and had moved them in interstate commerce. This was alleged to be a violation of federal law, as the affidavit stated that Williams was a felon, having previously been convicted of possession of a deadly weapon.[6] The warrant was issued, and the subsequent search uncovered the guns. Lee was convicted for possession of the firearms since he had a sufficient interest in the premises.[7] On appeal Lee contended that Williams was not a felon because her prior conviction was entered on a nolo contendere

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[1] Rugendorf v. United States, 376 U.S. 528 (1964). In *Rugendorf* the petitioner attacked the validity of the search warrant. The Court stated that when the warrant is valid on its face and establishes "probable cause," the Court had never decided the extent to which such an attack could be made. *Id.* at 531-32. The fact that the issue is still unanswered by the Court is criticized in a dissent by Justice White to a denial of certiorari in a case involving a challenge to the truthfulness of a warrant. North Carolina v. Wrenn, 417 U.S. 973 (1974) (White, J., dissenting).

[2] *See* text accompanying notes 13-23 *infra.* For a discussion of the different standards employed in state courts, see Note, *Criminal Law—Search Warrants—Is An Affidavit For A Search Warrant Infallible?*, 28 BAYLOR L. REV. 760 (1976).

[3] *See* text accompanying notes 13-23 *infra.*

[4] 540 F.2d 1205, 1207-09 (4th Cir.), *cert. denied,* 97 S. Ct. 225 (1976).

[5] 18 U.S.C. app. § 1202(a) (1970) imposes a penalty on a felon who has received, possessed, or transported any firearm in commerce.

[6] *See* note 5 *supra.*

[7] The ability of the government to prosecute Lee for possession, and his standing to move to suppress the items seized in the search were not issues in the case because of the Supreme Court's holding in Jones v. United States, 362 U.S. 257 (1960). The Court held in *Jones* that standing to move to suppress can be predicated on two different bases. First, the possession of seized goods itself gives standing, or otherwise the government could punish for possession while denying all remedies. *Id.* at 263-64. Second, a sufficient interest in the premises gives standing, and the defendant's interest in the premises need not be one of ownership. *Id.* at 265-67. Lee would qualify under either standing requirement as he was convicted on a possession charge, and the searched house was apparently owned or rented by Lee. *See* 540 F.2d at 1207-08.

plea.[8] Lee argued that under applicable state law a nolo contendere conviction had no effect outside of the case in which it was entered,[9] so no probable cause existed and the warrant thus was invalid and the search illegal. The Fourth Circuit did not reach the issue of whether a nolo contendere plea will suffice as a prior conviction for the purposes of the federal statute.[10] Instead, the court found no legally sufficient basis to allow Lee to go beneath the surface of the affidavit and challenge the existence of probable cause.[11]

The contested statement in the affidavit was an allegedly negligent material misrepresentation.[12] Two different standards are presently employed in the courts of appeals to negligent material misrepresentations.[13] In *United States v. Carmichael,*[14] the Seventh Circuit held that evidence should not be suppressed due to a negligent misrepresentation in an affidavit, even if such misrepresentation was material. A warrant would be invalid only if the affiant was reckless or intentionally untruthful.[15] The *Carmichael* court reasoned that the

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[8] Nolo contendere literally means "I will not contest it," and is tantamount to an admission of guilt for the purposes of the case. All that remains is for the court to enter judgment on the plea. 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 177, at 385-86 (1969).

[9] *See* 540 F.2d at 1208. The defendant relied upon McCall v. Maryland, 9 Md. App. 191, 193 n.4, 263 A.2d 19, 22 n.4 (1970), which noted that a nolo contendere plea is not a conviction for the purposes of subsequent cases.

[10] 540 F.2d at 1208. Federal courts have often held that a nolo contendere plea is regarded as a conviction for purposes of a criminal multiple offender statute. *See, e.g.,* Sokoloff v. Saxbe, 501 F.2d 571, 574-75 (2d Cir. 1974); United States *ex rel.* Bruno v. Reimer, 98 F.2d 92 (2d Cir. 1938). Courts are in general disagreement over the consequences of a nolo contendere plea in subsequent civil proceedings. Annot., 89 A.L.R.2d 540, 604-05 (1963). *See generally* Comment, *The Plea of* Nolo Contendere, 25 MD. L. REV. 227 (1965).

[11] 540 F.2d at 1208.

[12] The view that the statement was a negligent misrepresentation appears from the decision as a whole. The Fourth Circuit held that only perjury or recklessness are bases for an attack on the affidavit, and since no such attack was permitted in *Lee,* it follows that at worst the statement was only negligently made. *See id.* at 1209. Negligence in an assertion in an affidavit may be due to negligent personal investigation by the affiant, too forecful a claim of evidence of reliability of an informer, reliance on an informer when the situation warns the affiant to verify the information, or a negligent misstatement of the informer's story. Kipperman, *Inaccurate Search Warrant Affidavit As A Ground For Suppressing Evidence,* 84 HARV. L. REV. 825, 831-32 (1971).

[13] *See* text accompanying notes 14-23 *infra.*

[14] 489 F.2d 983 (7th Cir. 1973).

[15] In *Carmichael,* a warrant was issued on the basis of an affidavit founded largely on hearsay evidence supplied by a confidential informant. The Seventh Circuit held that a defendant may go behind the face of an affidavit only when material and intentional misrepresentations were made in the affidavit. *Id.* at 988. One rationale for this holding was the assumption that whether a police officer acted innocently or

exclusion of evidence is justified as deterring police misconduct, and "good faith errors cannot be deterred."[16] This standard has subsequently been adopted by the Sixth Circuit,[17] and the Eighth Circuit.[18] By contrast, the Fifth Circuit consistently has employed a strict per se rule whereby any material misrepresentation makes the warrant invalid.[19] This standard also has been utilized by the Tenth Circuit,[20]

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negligently is not determinable. Therefore, the dividing line as to whether an examination of a warrant's validity should be allowed is better placed at the point of police recklessness or intentional misrepresentation. *See id.* at 989.

[16] *Id.* at 988.

[17] United States v. Luna, 525 F.2d 4 (6th Cir. 1975), *cert. denied,* 424 U.S. 965 (1976). *See* note 18 *infra.*

[18] United States v. Marihart, 492 F.2d 897 (8th Cir.), *cert. denied,* 419 U.S. 827 (1974). This intentional falsity standard has not met with full approval by the commentators. While quashing all warrants containing negligent misrepresentations would not be beneficial to crime prevention, it does not necessarily follow that material negligent misrepresentations should not be quashed. To suppress evidence when procured by negligent material misrepresentations would make the police investigate as thoroughly as they would under a full-scale exclusionary rule. Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence,* 84 HARV. L. REV. 825, 832 (1971). Since the police will not necessarily know which allegations in the affidavit are material when they apply for the warrant, they will probably attempt to collect as much evidence as possible in order to defend any attack upon the warrant. In this manner negligence may be practically and not just theoretically deterred. *See id.*

Likewise, the toleration of negligence condoned in *Carmichael* has been viewed as unsupportable, since it might leave citizens at the mercy of the "whim or caprice" of the police. Brinegar v. Untied States, 338 U.S. 160, 176 (1949). This criticism of *Carmichael* is supported in Herman, *Warrants for Arrest or Search: Impeaching the Allegations of a Facially Sufficient Affidavit,* 36 OHIO ST. L.J. 721, 750 (1975), where the theory that police should not be held to the same standards as a magistrate is attacked. The theory is founded on the basis that police have less training and need to act quickly; Herman, however, asserts that the rationale is incorrect in three ways. In a variety of cases the police proceed without a warrant, and draw their own probable-cause inferences alone, but such actions are still governed by a standard of reasonableness. Furthermore, in many situations a court clerk, who may in fact have less training than the police, makes the judgment. *See* Shadwick v. City of Tampa, 407 U.S. 345 (1972) (court clerks may constitutionally determine probable cause, and issue arrest warrants in municipal court). Finally, it is the government's fault that important parts of the probable cause determination are entrusted to persons without adequate training, and the government should not be allowed to use its own delinquency to defeat the protection of an individual's privacy. *See Herman, supra* at 750 n.132.

[19] *See* United States v. Thomas, 489 F.2d 664 (5th Cir. 1973), *cert. denied,* 423 U.S. 844 (1975); United States v. Morris, 477 F.2d 657 (5th Cir.), *cert. denied,* 414 U.S. 852 (1973); United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971), *cert. denied,* 405 U.S. 934 (1972).

[20] United States v. Harwood, 470 F.2d 322 (10th Cir. 1972).

and the District of Columbia Circuit.[21] The most direct Fourth Circuit response to this issue prior to *Lee* is *King v. United States.*[22] In *King,* the Fourth Circuit stated in dictum that in federal courts false statements made by the affiant will invalidate the warrant and search.[23] The Fourth Circuit had thus previously adopted a standard which aligned with the Fifth Circuit's per se rule.

In *Lee,* however, the Fourth Circuit dismissed its prior dictum in *King* as over-broad,[24] and held that the Fifth Circuit's strict per se rule is too expansive.[25] The Fourth Circuit instead adopted the *Carmichael* standard, and held that an attack on the affidavit will be allowed only when perjury or reckless misrepresentation has occurred.[26] In so doing, the *Lee* court found that to exclude probative evidence where the inaccuracy was simply an innocent or negligent one would serve no useful purpose.[27]

Due to the conflicting standards, Supreme Court determination of this issue is desirable. Meanwhile, the courts of appeals probably will continue to divide on the issue of attacks upon the accuracy of search warrant affidavits. The issue involves a balancing of individual rights[28] and the necessity for police investigation in criminal activity.[29] In *Lee,* the Fourth Circuit seemingly viewed the need for police investigation as the slightly stronger consideration. The standard for the Fourth Circuit in inaccurate search warrant affidavit problems is now clear, and the examination of the validity of those affidavits has been limited to cases involving reckless or intentional police misconduct.

D. Severance of Trials: Federal Rules of Criminal Procedure 8 and 13.

Rule 8 of the Federal Rules of Criminal Procedure delineates when joinder of offenses and defendants is permissible.[1] Before joinder, the

[21] United States v. Henderson, 17 F.R.D. 1 (D.D.C. 1954).

[22] 282 F.2d 398 (4th Cir. 1960).

[23] *Id.* at 400 n.4.

[24] 540 F.2d at 1209.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *See* Herman, *Warrants for Arrest or Search: Impeching the Allegations of a Facially Sufficient Affidavit,* 36 OHIO ST. L.J. 721, 730-32, 750 (1975).

[29] *See* Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence,* 84 HARV. L. REV. 825, 832 (1971).

[1] FED. R. CRIM. P. 8 states in pertinent part:

trial judge under Rule 14 may, at his discretion, sever defendants or order separate trials of counts if a party will be prejudiced by joinder.[2] In *United States v. Foutz*,[3] and *United States v. Whitehead*,[4] the Fourth Circuit reviewed the applicability of those rules.

The appellant in *Foutz* contended that the district court had abused its discretion in not granting a severance.[5] Foutz was convicted for two robberies of the same bank.[6] In the first robbery, one man entered the front door of the bank, vaulted the tellers' counter and took money from two cash drawers. He wore a turtleneck sweater and a beret, and escaped by walking down a side street. Nearly three months later the same bank was robbed by three men, with two vaulting the tellers' counter and taking money from several cash drawers. The third robbery wore a turtleneck sweater and wide-brimmed hat, and held a gun on the bank employees. They all then escaped in Foutz's car, down the same side street. No fingerprints were found, the bank surveillance photographs did not picture Foutz, and the employees could only testify that Foutz resembled one of the robbers. Since the district court held that the offenses were of the same or similar character,[7] Foutz was charged with both robberies in one indictment under Federal Rule of Criminal Procedure 8(a).[8] His motion for severance under Rule 14 was denied.

In 8(a) joinder cases, there are three ways in which a defendant may be prejudiced. By the process of joinder, certain defenses may be destroyed.[9] There is also a risk that the jury may cumulate the

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(a) Two or more offenses may be charged in the same indictment or information . . . if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting part of a common scheme or plan.

(b) Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

[2] FED. R. CRIM. P. 14 states that the court may order severance of defendants or separate trials of counts, or any other appropriate relief, if a defendant or the government is prejudiced by joinder of offenses or of defendants.

[3] 540 F.2d 733 (4th Cir. 1976).

[4] 539 F.2d 1023 (4th Cir. 1976).

[5] 540 F.2d at 735.

[6] Foutz was convicted under 18 U.S.C. §§ 2 and 2113(a), (b), (d), and (f) (1970). 540 F.2d at 735.

[7] 540 F.2d at 735.

[8] *See* note 1 *supra*.

[9] In Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964), the defendant was charged with two counts of robbery. The court recognized that in this situation the

evidence against the defendant.[10] Finally, the jury may conclude that the defendant has a criminal disposition and thus unjustifiably find him guilty of all offenses.[11] In *Foutz,* the defendant may have been prejudiced in the last manner.[12] As the Fourth Circuit noted, however, when evidence of one offense would be admissible at a separate trial for the other offense, the defendant suffers no prejudice if the offenses are joined for trial.[13] Therefore, the threshold question when determining whether the joinder was prejudicial to the defendant is whether the evidence of one offense would be admissible at a trial for the other offense.

One method by which evidence of other crimes can be introduced at defendant's trial is the "signature" theory.[14] The rationale behind this theory is that other crimes committed by the defendant, which contain the identical unique acts which are involved in the case on trial, should be admissible to assist in identifying the defendant.[15] In *Foutz,* the government argued that the two robberies were so similar that the "signature" theory applied, and evidence of one robbery should thus be admissible at a separate trial for the other robbery. Therefore, joinder of offenses under Rule 8(a) created no prejudice to Foutz. The Fourth Circuit disagreed, however, and held that the facts did not demonstrate two offenses similar enough to qualify under the "signature" exception.[16] By not qualifying under the signature exception, the evidence of one robbery would not be admissible at a separate trial for the other robbery, and Foutz was therefore prejudiced.

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defendant might have wanted to testify on one count but not the other. However, if he had testified on one count he would have risked the possibility that any adverse effects of his testimony would color the jury's consideration of both counts. Likewise, if he remained silent on one count the jury might have questioned his express denial of the other charge, thus forcing the defendant to testify on both counts. This situation confounded the presentation of defenses, and the court found joinder to be prejudicial under Rule 14. *Id.* at 989-91.

[10] In Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966), *cert. denied,* 396 U.S. 865 (1969), the defendant was indicted for two robberies, one of which resulted in murder. The court held that severance should have been granted as the danger existed that the two offenses cumulated in the jurors' minds, thereby tending to prove guilt for both offenses, and the evidence for one offense was so weak that its main usefulness was to support the other robbery which resulted in murder. *Id.* at 189.

[11] 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 222, at 437 (1969) [hereinafter cited as WRIGHT].

[12] 540 F.2d at 736.

[13] *Id.* at 736-37.

[14] C. MCCORMICK, EVIDENCE § 190, at 449 (2d ed. 1972).

[15] McCormick states that the device used for the crime "must be so unusual and distinctive as to be like a signature." *Id.*

[16] 540 F.2d at 737-38.

In reversing the district court's denial of severance, the Fourth Circuit's strict reading of the similarity necessary to invoke the "signature" exception accorded with previous case law. The cases that have found the signature exception applicable have typically involved either more bizarre and distinguishable incidents,[17] or a strictly-followed routine.[18] Crimes involving nothing more than a similarity in clothing, or general physical characteristics, however, are not distinctive enough to come within the signature exception.[19] In *Foutz,* the number of participants had changed, the roles assumed were different, the mode of escape was different, and different items of clothing were worn. Thus, the Fourth Circuit found that the robberies were not sufficiently alike to apply the signature theory.[20]

Rule 8 of the Federal Rules of Criminal Procedure was considered in more detail in *United States v. Whitehead.*[21] Whitehead and Jackson were involved in a transfer of cocaine to a federal agent. Prior to

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[17] *See* United States v. Woods, 484 F.2d 127 (4th Cir. 1973), *cert. denied,* 415 U.S. 979 (1974) (nine children under defendant's care died from respiratory failure); People v. Peete, 28 Cal. 2d 306, 106 P.2d 924, *cert. denied,* 329 U.S. 790 (1946) (two deaths caused by bullets fired at close range, severing spinal cord at the neck). For further commentary on the signature principle in general, and the above cases in particular, see Note, *Evidence: Admissibility of Evidence of Previous Crime: Instructions to Jury,* 35 CALIF. L. REV. 131 (1947); Note, *Evidence—Proof of Particular Facts—Evidence That Defendant May Have Committed Similar Crimes Admissible To Prove* Corpus Delicti *of Murder*—United States v. Woods, 87 HARV. L. REV. 1074 (1974); *Child Abuse, Fourth Circuit Review,* 31 WASH. & LEE L. REV. 207 (1974).

[18] *See* United States v. Moody, 530 F.2d 809 (8th Cir. 1976) (two robberies carried out in exactly the same fashion; woman ordered to rest room, forced to disrobe, and rings stolen from victim's hand); United States v. McCray, 433 F.2d 1173 (D.C. Cir. 1970) (robberies of fur coats by man impersonating delivery man; receipts written out).

[19] *See* United States v. Carter, 475 F.2d 349 (D.C. Cir. 1973) (no pattern of criminal conduct established by fact that man wore fur hat and carried pistol); Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964) (fact that two robberies were conducted by a black man wearing sunglasses not distinctive enough). The reason the common features must be so exceptional is that without that requirement, the features could be shared by numerous people, and thus would not be beneficial in identifying one individual. Without the exceptionality requirement, the danger arises of implicating the wrong individual. 2 J. WIGMORE, EVIDENCE § 411, at 385 (3d ed. 1940).

[20] The *Foutz* court also considered whether the pronouncement of concurrent sentences mitigated any prejudice resulting from joinder. 540 F.2d at 738-39. *See* United States v. Clayton, 450 F.2d 16, 19 (1st Cir. 1971), *cert. denied,* 405 U.S. 975 (1972); United States v. Adams, 434 F.2d 756, 760 n.13 (2d Cir. 1970). The Fourth Circuit decided that prejudice against the defendant was not mitigated, stating that concurrent sentencing could not completely negate the prejudicial effect of a joint trial. 540 F.2d at 739. As an example, the court discussed the possibility that two convictions instead of one may postpone parole eligibility. *Id.*

[21] 539 F.2d 1023 (4th Cir. 1976).

that transaction, Jackson and one Meredith had sold cocaine to the same federal agent. No evidence showed Whitehead to have been a part of the Jackson-Meredith drug transaction. After Jackson was convicted, Whitehead and Meredith were joined for trial and found guilty.[22] On appeal, the Fourth Circuit held that joinder was improper, as Rule 8(b) does not provide for joinder of defendants for acts of the same or similar character.[23]

Under Rule 13, a court may join defendants if they could have been joined in a single indictment or information.[24] To determine if such joinder is possible, however, requires referring to Rule 8(b).[25] Under Rule 8(b), defendants can be joined in a single indictment only if they participated in the same act or transaction, or in the same series of acts or transactions. Rule 8(b) does not refer to what Rule 8(a) terms offenses of "the same or similar character."[26] Consequently, whether the acts were of the same or similar character arguably is not a consideration when one indictment is being prepared for two or more defendants. Courts have unanimously supported this view, holding that Rule 8(b) must be read without reference to Rule 8(a).[27]

Regardless of the similarity of the crimes, Whitehead and Meredith thus could have been joined properly only if they had participated in the same transaction, or series of transactions.[28] As the Fourth Circuit observed, the fact that Jackson participated in both drug transactions did not establish any connection between Whitehead's and Meredith's offenses.[29] This lack of any connection between the two offenses resembles a previous Fourth Circuit case, *Ingram v. United States*.[30] *Ingram* concerned two completely separate incidents of police detection of two neighbors possessing non-taxed whiskey. As

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[22] Whitehead was convicted for distributing cocaine under 21 U.S.C. § 841(a)(1) (1970).

[23] 539 F.2d at 1025. *See* note 1 *supra*.

[24] FED. R. CRIM. P. 13 provides in pertinent part that "[t]he court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. . . ."

[25] *See* note 1 *supra*.

[26] *See* WRIGHT, *supra* note 11, § 144, at 319.

[27] United States v. Bova, 493 F.2d 33, 35 (5th Cir. 1974); United States v. Eagleston, 417 F.2d 11, 14 (10th Cir. 1969); Cupo v. United States, 359 F.2d 990, 992 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1013 (1967); King v. United States, 355 F.2d 700, 704-05 (1st Cir. 1966); *see also* WRIGHT, *supra* note 11, § 144, at 318.

[28] FED. R. CRIM. P. 8(b). *See* note 1 *supra*.

[29] United States v. Whitehead, 539 F.2d 1023, 1025 (4th Cir. 1976).

[30] 272 F.2d 567 (4th Cir. 1959).

there was absolutely no connection between the two acts, and they were not part of the same transaction or a series of transactions, the Fourth Circuit held that joinder of the defendants was improper.[31] This reading of Rules 13 and 8 is widely supported.[32]

In *Foutz* and *Whitehead* the court's construction of Rules 8 and 13, comports with that of other jurisdictions.[33] The Fourth Circuit reemphasized that joinder of offenses is entirely separate from joinder of defendants, and the provisions allowing for one are not to be imputed to the other. Rules 8(a) and 8(b), therefore, must be read independently. Furthermore, when joinder of offenses has occurred, the standard in the Fourth Circuit for determining prejudice, as enunciated in *Foutz,* is whether evidence of each offense is admissible at a trial for only one of the offenses committed. If so, then joinder has not prejudiced the defendant. Finally, when considering admissibility in a separate trial under the signature exception, *Foutz* restates the need for extremely similar, possibly identical offenses.[34] Hence, the court seems to agree with the proposition that exclusion of evidence at a separate trial is favored over admission, as the emphasis is on protecting defendants from a conviction based on prejudice.[35]

The decision whether to join defendants involves consideration of the necessity and advisability of severance. The expediency of severance often involves contemplation of the Supreme Court's decision in *Bruton v. United States.*[36] In *Bruton,* the defendant and one Evans were convicted for armed postal robbery.[37] Although Evans did not testify, a postal inspector testified as to Evans' confession that he and Bruton committed the robbery. The Supreme Court held that when a co-defendant's hearsay statements are admitted at a joint trial, limiting instructions, informing the jury to consider the evidence only in connection with declarant's guilt and not that of his co-defendant, are not an adequate safeguard. Because Bruton could not cross-

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[31] *Id.* at 569.

[32] *See* United States v. Bova, 493 F.2d 33 (5th Cir. 1974) (trial for defendant's and co-defendant's sale of narcotics joined with trial of co-defendant for unrelated sale; joinder held improper under Rule 8(b)); Metheany v. United States, 365 F.2d 90 (9th Cir. 1966) (defendant and co-defendant charged with fraudulent concealment from trustee in bankruptcy; when neither charged with participating in the same acts, and such conclusion could not be drawn from similar but separate allegation, under Rule 8(b), joinder improper).

[33] *See* text accompanying notes 17-20 *supra;* text accompanying notes 23 and 27 *supra.*

[34] *See* text accompanying notes 17-20 *supra.*

[35] C. McCORMICK, EVIDENCE § 190, at 453-54 (2d ed. 1972).

[36] 391 U.S. 123 (1968).

[37] 18 U.S.C. § 2114 (1948) (current version at 18 U.S.C. § 2114 (1970)).

examine the absent declarant, the Court found a violation of Bruton's constitutional right to confrontation.[38] The Fourth Circuit, in *United States v. Truslow,*[39] set out the procedure for courts to follow when they receive notice[40] that hearsay evidence and confrontation difficulties, as found in *Bruton,* might arise in a joint trial.

In *Truslow,* Brumfield, Davidson, and Truslow were convicted of obstruction of justice,[41] and conspiring to obstruct justice.[42] The obstruction took the form of shooting a government witness during the investigation of possible criminal activity by a former Attorney General of West Virginia. The trial court held that the shooting incident terminated the conspiracy,[43] and the *Bruton* problem involved a subsequent statement made by Davidson. A government witness testified that Davidson stated that by shooting a witness, he had "done a job for Mr. Truslow. . . ."[44] Davidson did not testify at trial, however, and there was thus no way for Truslow to question the statement. Although the trial court gave limiting instructions to the jury,[45] the Fourth Circuit held there was a violation of the confrontation clause under *Bruton.*[46]

Under Rule 14 of the Federal Rules of Criminal Procedure,[47] a severance may be granted at the trial judge's discretion if prejudice appears likely.[48] However, there are alternatives to severance or admission of prejudicial evidence. One alternative is for the court to conduct an *in camera* inspection under Rule 14 of statements or

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[38] 391 U.S. at 137. The Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;" U.S. CONST. amend VI. The basis for the holding in *Bruton* was the Court's doubt as to the ability of the jury to follow the limiting instructions. If that doubt is reasonably founded, and the trial court does no more than give limiting instructions, then, as in the trial in *Bruton,* inadmissible hearsay evidence may be considered by the jury in their determination of defendant's guilt.

[39] 530 F.2d 257 (4th Cir. 1975).

[40] In *Truslow,* the motion for severance stated that *Bruton* problems could easily arise, so the trial judge did receive notice. 530 F.2d at 261.

[41] 18 U.S.C. § 1503 (1970).

[42] 18 U.S.C. § 371 (1970).

[43] 530 F.2d at 259.

[44] *Id.*

[45] The practice of giving limiting instructions to the jury was the procedure followed before the *Bruton* decision. *See* Delli Paoli v. United States, 352 U.S. 232, 236-43 (1957).

[46] 530 F.2d at 260. *See* text accompanying note 38 *supra.*

[47] *See* note 2 *supra.*

[48] *E.g.,* United States v. Crockett, 514 F.2d 64 (5th Cir. 1975).

confessions secured by the government.[49] After the inspection, the judge can decide how best to alleviate the prejudice. If necessary, he may choose to exclude the entire statement,[50] or only to delete that portion of the statement which refers to co-defendants, against whom the statement is inadmissible.[51] The better view would seem to be that these possibilities should first be considered, with severance being utilized only as a last resort in case the alternatives are inadequate.[52] In *Truslow,* the Fourth Circuit prescribed the *in camera* procedure and consideration of alternatives to severance when the trial judge has knowledge that *Bruton* statements are likely to arise.[53] The court therefore reversed Truslow's conviction and ordered a new trial with consideration of severance alternatives.

The procedure outlined by the Fourth Circuit in *Truslow* is laudable because it provides a timely consideration of the balance a trial court must strike between judicial economy and rights of defendants.[54] The *Truslow* court held that when the trial judge receives notice of possible future *Bruton* problems, he should inquire into the statements proposed to be used, and then decide the appropriate procedure to follow to prevent *Bruton* violations.[55] The *Truslow* decision appears novel since while severance is universally viewed as discretionary,[56] and a *Bruton* violation as prejudicial, other circuits have not expressly set out a procedure such as that developed in *Truslow.* The procedure is advantageous, as severance is not necessary in every *Bruton*-like case. Less drastic remedies may instead be employed, thereby fostering judicial economy while still upholding each individual's constitutional rights.

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[49] FED. R. CRIM. P. 14 provides that "[i]n ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." Indeed, the rule was amended in 1966 with this express procedure in mind. (Notes of Advisory Committee on Rules, 1966 Amendment) FED. R. CRIM. P. 14. This procedure was specifically recognized in Bruton v. United States, 391 U.S. 123, 131-32 (1968).

[50] United States v. Gordon, 253 F.2d 177, 183 (7th Cir. 1958).

[51] Kitchell v. United States, 354 F.2d 715, 718 (1st Cir.), *cert. denied,* 384 U.S. 1011 (1966).

[52] *See* United States v. Bozza, 365 F.2d 206 (2d Cir. 1966). *See also* Nelson v. O'Neil, 402 U.S. 622, 636 (1971) (Marshall, J., dissenting); WRIGHT, *supra* note 11, § 224, at 454-56.

[53] 530 F.2d at 261-62 and n.3.

[54] *See* United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971).

[55] 530 F.2d at 261-62.

[56] *See* note 48 *supra.*

[57] *See* note 38 *supra.*

E. The Effects of Trial Publicity on the Impartiality of Jurors.

The coverage of controversial trials by the news media has created judicial problems in regard to trial publicity, focusing on whether the right to a fair trial has been damaged by prejudicial publicity.[1] The traditional conflict in trial publicity cases involves the competing constitutional guarantees of a fair trial[2] and freedom of the press.[3] As the Supreme Court has held, however, freedom of the press "must necessarily be subject to the maintenance of absolute fairness in the judicial process."[4] The effect of trial publicity on the fairness of a trial was considered by the Fourth Circuit in *United States v. Morlang,*[5] and *United States v. Jones.*[6]

In *Morlang,* the defendant was convicted for bribing the Director of the Federal Housing Administration. The pre-trial publicity arose because of a former West Virginia Governor's involvement in the scheme.[7] Morlang attempted to waive a jury trial,[8] claiming that the adverse publicity would prejudice him in a jury trial. The prosecution, however, refused to consent to Morlang's waiver, and Morlang was subsequently convicted.[9] On appeal, Morlang asserted that he

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[1] *See* Sheppard v. Maxwell, 384 U.S. 333 (1966) (pervasive prejudicial publicity denied petitioner his constitutional right to a fair trial); Estes v. Texas, 381 U.S. 532 (1965) (televising of criminal trials over defendant's objection invalid as infringing on right of due process). For a general discussion on the scope and effect of pre-trial publicity, see Comment, *Pre-Trial Publicity,* 34 MO. L. REV. 538 (1969). For Fourth Circuit decisions on adverse publicity both before and during trial, see *Effect of Adverse Publicity, Fourth Circuit Review,* 32 WASH. & LEE L. REV. 489 (1975) [hereinafter cited as *Effect of Adverse Publicity*]. A discussion of the *Sheppard* case appears in Note, Sheppard v. Maxwell, *384 U.S. 333 (1966)—Duty of Trial Judge to Protect Accused From Prejudice,* 62 NW. U.L. REV. 89 (1967).

[2] The Constitution provides "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial . . . by an impartial jury. . . ." U.S. CONST. amend. VI.

[3] The Constitution provides that "Congress shall make no law . . . abridging the freedom . . . of the press. . . ." U.S. CONST. amend. I. The confict between the right to a fair trial and freedom of the press is discussed by the Court in Estes v. Texas, 381 U.S. 532, 538-40 (1965).

[4] Estes v. Texas, 381 U.S. 532, 539 (1965).

[5] 531 F.2d 183 (4th Cir. 1975).

[6] 542 F.2d 186 (4th Cir. 1976).

[7] Barron, a former governor of West Virginia, Morlang, and others were partners in a partially illegal housing development plan. The FHA Director received a $2,000 bribe to hasten approval of the plan. 531 F.2d at 185-86.

[8] FED. R. CRIM. P. 23(a) provides that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

[9] Morlang was convicted for conspiracy to bribe and bribery under 18 U.S.C. § 371 (1970). 531 F.2d at 185.

was denied a fair trial by the prosecution's refusal to approve his request to be tried by a judge alone.[10]

The waiver of a jury trial, as the Supreme Court held in *Singer v. United States,*[11] may be conditioned upon the prosecution's and judge's consent. In *Singer,* defendant was convicted for thirty violations of the mail fraud statute.[12] Singer offered to waive his right to a jury trial to save time, but the government refused to consent. The Supreme Court rejected Singer's argument that Article III, § 2, and the sixth amendment of the Constitution[13] grant a right for trial by judge alone if the defendant considers that to be to his advantage. The *Singer* Court held that the Constitution did not bestow nor recognize such a right.[14] Furthermore, since a defendant's sole constitutional right concerning trial is to receive an impartial trial by jury,[15] to deny defendant's request would merely give him exactly what the Constitution guarantees. Thus, the Court held that refusal to consent to a no-jury request under Rule 23(a)[16] did not controvert any notions of fair trial or due process.[17] In dictum, however, the *Singer* Court recognized that there may be some situations in which the denial of a defendant's waiver of a jury trial might result in an unfair trial.[18] While the Court did not indicate what those situations might be, the petitioner's brief emphasized situations where "passion, prejudice [or] public feeling," might render an impartial trial by jury impossible.[19] Morlang contended that his trial came under a *Singer* exception, and that in denying his request for waiver, the trial judge either abused his discretion or failed to use it at all.[20]

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[10] 531 F.2d at 186.

[11] 380 U.S. 24 (1965).

[12] *Id.* at 25. See 18 U.S.C. § 1341 (1958) (current version at 18 U.S.C. § 1341 (1970)).

[13] Article III, § 2, of the Constitution provides that "[t]he trial of all Crimes, except in Cases of Impeachment, shall be by jury. . . ." U.S. CONST. art. III, § 2. For the pertinent sixth amendment provisions, see note 2 *supra.*

[14] Singer v. United States, 380 U.S. 24, 26 (1965).

[15] *See* note 13 *supra.*

[16] *See* note 8 *supra.*

[17] Singer v. United States, 380 U.S. 24, 36 (1965).

[18] *Id.* at 37.

[19] *Id.* at 37-38. The Court's decision in *Singer* has been interpreted as expressly limited to its facts. That renders *Singer* as holding only that the "saving time" rationale for waiver of jury trial is not a circumstance which compelled the conclusion that denial of the waiver would likely preclude an impartial jury. *See* Note, Singer v. United States, *380 U.S. 24 (1965)—Inability to Waive Jury Trial in the Federal Courts,* 60 NW. U.L. REV. 722, 729 (1966). That interpretation leaves open the question of when waiver should be permitted.

[20] 531 F.2d at 186-87.

The Fourth Circuit refuted Morlang's contentions on two bases. First, the burden was upon the defendant to rebut the presumption of the impartiality of the prospective jurors.[21] Morlang did not meet this burden, as he offered no evidence establishing actual prejudice on the part of any of the prospective jurors, and a mere showing of adverse publicity cannot of itself establish prejudice or partiality.[22] Second, the Fourth Circuit noted that the trial court questioned jurors as to their knowledge of the case, and ensured that those who had read the news accounts would be able to decide the case solely on the evidence received in court.[23]

The handling of the publicity problem by inquiries to the jurors follows the procedure set out by the Supreme Court in *Irvin v. Dowd*.[24] The Court in *Irvin* perceived that, because of the pervasive-

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[21] *Id.* at 187. *See* Reynolds v. United States, 98 U.S. 145 (1878). In *Reynolds* the Court stated that:

> [t]he affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so.

Id. at 157. *See also* United States *ex rel.* Darcy v. Handy, 351 U.S. 454, 462 (1956).

[22] *E.g.*, Northern Calif. Phar. Ass'n v. United States, 306 F.2d 379 (1962), *cert. denied*, 371 U.S. 862 (1962) (allegation of adverse publicity without a showing of juror bias not sufficient to warrant a change of venue); Blumenfield v. United States, 284 F.2d 46, 51 (8th Cir. 1960), *cert. denied*, 365 U.S. 812 (1961) (mere presence of adverse publicity does not per se establish proof of prejudice). The defendant in *Morlang* relied upon the ABA STANDARDS FOR FAIR TRIAL AND FREE PRESS § 3.3 (1968), which state that in those jurisdictions where the defendant does not have an absolute right to waive a jury, the defendant's waiver should be permitted when there "is reason to believe that, as a result of the dissemination of potentially prejudicial material, the waiver is required to increase the likelihood of a fair trial." *Id.* The Fourth Circuit in *Morlang* indicated that a mere showing of extensive publicity was not sufficient to show that a non-jury trial would increase the likelihood of a fair trial. 531 F.2d at 187 n.10.

[23] 531 F.2d at 187. Courts have generally followed this polling procedure. *See* Irvin v. Dowd, 366 U.S. 717, 724 (1961); Silverthorne v. United States, 400 F.2d 627, 635-40 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971); Welch v. United States, 371 F.2d 287, 290 (10th Cir.), *cert. denied*, 385 U.S. 957 (1966); United States v. Milanovich, 303 F.2d 626, 629-30 (4th Cir. 1962). *But cf.* United States *ex rel.* Doggett v. Yeager, 472 F.2d 229, 239 (3d Cir. 1973), holding that in some cases "a juror's statement that the adverse publicity will not influence him is not sufficient automatically to qualify him as impartial." The cases to which the *Yeager* court referred in that statement, Turner v. Louisiana, 379 U.S. 466 (1965), and Rideau v. Louisiana, 373 U.S. 723 (1963), contained a much higher degree of prejudice that that involved in *Morlang* and the cases cited *supra*. In *Turner*, two deputy sheriffs, who were also the principal prosecution witnesses, acted as attendants for the jurors during trial, and were closely associated with the jurors throughout the trial. 379 U.S. at 466-68. In *Rideau*, a local television station broadcast a film made at the sheriff's office of defendant's interrogation and admission of criminal acts. 373 U.S. at 724.

[24] 366 U.S. 717 (1961).

ness of the news media, jurors almost always will have read of and formed an opinion on a publicized case.[25] Hence, to hold that this preconceived opinion sufficiently rebuts the presumption of juror impartiality would set an impossible standard.[26] The Court held that a more realistic standard would be to determine whether the juror can repress his preconceived opinion, and instead render a verdict based only on the evidence produced in court.[27] The Fourth Circuit adopted this rationale in *Morlang,* and found that there was no manifest error in the district court's procedure during voir dire.[28] The defendant failed to rebut the presumption of impartiality, and the trial judge adequately ensured that the jury was fair and impartial.[29] Therefore, the Fourth Circuit found no sufficient reason for *Morlang* to come within any exception to *Singer,* and further found no abuse of discretion.

Since the *Morlang* court did not determine the scope and propriety of the *Singer* exception, when and whether the denial of a waiver of jury trial subjects the defendant to a biased jury is still an open question in the Fourth Circuit. What the Fourth Circuit did hold in *Morlang,* in line with federal law,[30] was that adverse publicity alone cannot warrant a conclusion of juror partiality. To show a trial tainted by publicity, the defendant must introduce evidence of actual juror prejudice.[31] Likewise, courts of appeals will uphold voir dire procedures which determine whether a potential juror who has been exposed to the publicity is able to divorce himself from preconceptions and decide the case solely on the evidence in court. If such procedures are followed in the Fourth Circuit, no abuse of discretion by the trial judge will occur.

The Fourth Circuit determined the effects of both pre-trial and in-

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[25] *Id.* at 722.

[26] *Id.* at 723.

[27] *Id.* For subsequent refinements on the *Irvin* procedure in cases involving a high degree of prejudice, see United States *ex rel.* Doggett v. Yeager, 472 F.2d 229, 239 (3d Cir. 1973).

[28] 531 F.2d at 187. *See* Reynolds v. United States, 98 U.S. 145 (1878). The Court in *Reynolds* held that "[t]he finding of the trial court upon [the impartiality] issue ought not to be set aside by a reviewing court, unless the error is manifest." *Id.* at 156. The *Irvin* rationale has been adopted throughout the circuits. *See, e.g.,* United States *ex rel.* Rosenberg v. Mancusi, 445 F.2d 613 (2d Cir. 1971), *cert. denied,* 405 U.S. 956 (1972); Margoles v. United States, 407 F.2d 727 (7th Cir.), *cert. denied,* 396 U.S. 833 (1969).

[29] 531 F.2d at 187.

[30] *See* cases cited note 22 *supra.*

[31] *E.g.,* United States v. Morlang, 531 F.2d 183, 187 (4th Cir. 1975).

trial publicity in *United States v. Jones*.[32] The defendants were indicted for conspiracy to violate the narcotics laws of the United States, and for possession with intent to distribute heroin.[33] Before the trial commenced they moved for a continuance[34] due to pre-trial publicity. Motions for continuance often have been made in such situations in the hope that added time will allow the prejudicial effects of adverse publicity to dissolve.[35] To determine if any prejudice had developed due to the adverse publicity, the trial court, at voir dire, asked the prospective jurors if they had seen or heard any publicity about the trial. Only eight of the prospective jurors had read or heard of the defendants, and they were excused.[36] Thus, the trial court found that no juror had been influenced by any pre-trial publicity, and therefore the court denied the motion for continuance.[37] On appeal, the Fourth Circuit found no error in the denial of the motion.[38]

The defendants in *Jones* also repeatedly moved for a mistrial due to newspaper publicity during the trial. The jury had not been sequestered, and apparently there had been newspaper accounts publishing parts of the testimony admitted at trial.[39] Because of such publicity, the defendants claimed that the trial judge was in error for failing to ascertain whether the jury had read or heard the accounts.[40]

On appeal, the Fourth Circuit, in accord with past practices, held that the threshold question was whether the publicity was "substantial prejudicial material."[41] Only after that determination

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[32] 542 F.2d 186 (4th Cir. 1976).

[33] *Id.* at 192-93. *See* 21 U.S.C. §§ 841(a)(1) & 846 (1970).

[34] FED. R. CRIM. P. 50, under which a request for a continuance must be brought, provides that "[t]he district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable."

[35] 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 832, at 334 (1969).

[36] 542 F.2d at 193.

[37] *Id.* at 194. Excusing veniremen who have prior knowledge of the defendant's activities is a common remedy. *See* United States v. Thaggard, 477 F.2d 626, 630 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973); United States v. Medlin, 353 F.2d 789, 792 (6th Cir. 1965), *cert. denied*, 384 U.S. 973 (1966). Further, continuances are rarely granted on this ground. *See* 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 832, at 334 (1969).

[38] 542 F.2d at 194.

[39] *Id.* at 196. *See* text accompanying note 48 *infra*.

[40] 542 F.2d at 194.

[41] *Id.* The Fourth Circuit had previously held, in United States v. Hankish, 502 F.2d 71, 77 (4th Cir. 1974), that the judge may decline to poll the jurors unless there is a "substantial reason to fear prejudice." *See also* United States v. Armocida, 515 F.2d 29, 49 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975).

would the Fourth Circuit inquire into whether the district court had followed the appropriate procedure set out in *United States v. Hankish.*[42] In *Hankish,* the Fourth Circuit held that when prejudicial information might have been exposed to the jury, the trial court must ask whether any of the jurors have read or heard the publicity.[43] Those jurors who reply affirmatively must then be individually examined by the court to determine the complete effect of the publicity.[44] The judge should then decide what curative measures will ensure a fair trial.[45]

In determining whether substantial prejudice exists, courts often have used a test of whether the publicity could be admitted at trial.[46] If not, then the publicity, under the Fourth Circuit's vocabulary, is held to be substantial prejudicial material.[47] The publicity com-

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[42] 502 F.2d 71, 76-78 (4th Cir. 1974). In *Hankish,* the defendant was charged with stealing an interstate shipment of beer under 18 U.S.C. § 659 (1970) (prosecution for stolen interstate shipments of freight), knowingly transporting stolen goods under 18 U.S.C. § 2314 (1970), and conspiracy. While the trial was in progress, a newspaper published an article calling Hankish a "rackets figure," and reported on the operation of a multistate theft ring Hankish allegedly directed. *Id.* at 76. That day, the defense attorney requested the judge to question the jurors to determine if any of the jurors had read the article. The judge refused to do so, and the Fourth Circuit held that was error, because the highly prejudicial newspaper article may have influenced the jury's verdict. *Id.* at 76. For a discussion of *Hankish,* see *Effect of Adverse Publicity, supra* note 1.

[43] 502 F.2d at 77.

[44] *Id.*

[45] The jury polling procedure to detect possible preconceptions was adopted by the Fourth Circuit from Margoles v. United States, 407 F.2d 727, 730 (7th Cir.), *cert. denied,* 396 U.S. 833 (1969). By adopting the *Margoles* procedure, the Fourth Circuit in *Hankish* rejected the strict compulsory change of venue procedure recommended by the American Bar Association. 502 F.2d at 77. *See* ABA STANDARDS, FAIR TRIAL AND FREE PRESS § 3.5(f) (1968); *Effect of Adverse Publicity, supra* note 1, at 495.

Instead, under the procedure used by the Fourth Circuit, the trial judge determines the extent and effect of the publicity, and exhausts other possibilities "before aborting a trial." 502 F.2d at 77. These other possibilities consist of the voir dire procedure to determine if there has been any exposure of the jurors to the prejudicial publicity. If so, further alternatives to mistrial can be cautionary instructions, or the excusing of a juror. *Id.* Thus, by adopting the *Margoles* procedure the Fourth Circuit has additional remedies that it may employ in alleviating prejudicial trial publicity.

[46] *E.g.,* United States v. Thomas, 463 F.2d 1061, 1063-64 (7th Cir. 1972); United States v. Hyde, 448 F.2d 815, 849 (5th Cir. 1971), *cert. denied,* 404 U.S. 1058 (1972).

[47] Publicity has been held to be substantial prejudicial material and inadmissible at trial in the following: Sheppard v. Maxwell, 384 U.S. 333 (1966) (publicity declared defendant's guilt in multiple newspaper articles); United States v. Pomponio, 517 F.2d 460, 462-63 (4th Cir.), *cert. denied,* 423 U.S. 1015 (1975) (publicity published accounts of other pending charges attributable to defendant); United States v. Hankish, 502

plained of in *Jones*, which consisted of accurate condensed statements of admitted testimony,[48] was not substantial prejudicial material. Because the newspaper accounts contained only evidence admitted at trial, they obviously could pass the admissibility test. Since no substantial prejudicial material was involved in the *Jones'* publicity, the Fourth Circuit upheld the trial judge's refusal to interrogate the jury as to whether they had read the newspaper accounts.

The *Jones* decision further solidifies the Fourth Circuit's position regarding trial publicity as found in *Hankish*. *Jones* afforded some insight into what the Fourth Circuit considers substantial prejudicial material. The *Jones* court also indicated that it will strictly adhere to the admissibility test.[49] *Jones* asserted that when evidence of an obviously admissible nature is publicized by the media, the parties may not successfully complain of prejudicial publicity. Furthermore, under those circumstances, any request to the trial court for juror interrogation to determine if any prejudicial effect has occurred need not be granted. Apparently, the clear-cut determination of admissibility will govern the Fourth Circuit's future decisions on publicity during trial.

F. Merger of Sentencing Under the Use and Carrying of a Firearm Statute.

In determining whether two offenses will merge,[1] courts have relied on statutory interpretation[2] when applicable, and on a consideration of the essential elements of the offense.[3] Thus, the Supreme

F.2d 71, 76 (4th Cir. 1974) (publicity pinpointed defendant as ringleader and director of a racketeering outfit).

[48] 542 F.2d at 196.

[49] The test requiring determination of admissiblity has been consistently utilized by the Fourth Circuit. *See* United States v. Jones, 542 F.2d 186 (4th Cir. 1976); United States v. Pomponio, 517 F.2d 460 (4th Cir.), *cert. denied*, 423 U.S. 1015 (1975); United States v. Hankish, 502 F.2d 71 (4th Cir. 1974).

[1] Merger of offenses should occur when the relationship between offenses suggests that multiple punishment was not intended. In making that determination, one rule of construction is that one offense is included in another offense "if violation of the second always involves violation of the first." Note, *Twice In Jeopardy*, 75 YALE L.J. 262, 318 (1965). Under this inclusion rule, the second offense should merge into the first. For example, larceny merges into robbery, fornication merges into rape, and being intoxicated on a public highway merges into driving a vehicle on a public highway while intoxicated. *See* Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513, 517-18 (1949).

[2] Prince v. United States, 352 U.S. 322 (1957).

[3] Pereira v. United States, 347 U.S. 1, 9 (1953) (causing bank to mail letter

Court has relied on statutory interpretation and legislative history in construing the effects of multiple offenses under the Federal Bank Robbery Act.[4] Likewise, once two offenses have been deemed separate, the Supreme Court has considered the respective elements of both crimes to determine the appropriateness of merger.[5] In that consideration, the focus is on whether the proof of one offense necessarily establishes all elements of the other offense.[6] If so, the offenses merge.

In *United States v. Crew,*[7] the Fourth Circuit employed both legislative history and the consideraton of the elements of each offense to determine whether merger was appropriate. Crew was convicted of armed bank robbery,[8] willfully using a firearm during the commission of a felony,[9] and willfully and unlawfully carrying a firearm.[10] Crew

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pursuant to a scheme to defraud, a violation of the mail fraud statute, 18 U.S.C. § 1341 (1948) (current version at 18 U.S.C. § 1341 (1970)), was a separate offense from causing a fraudulently obtained check to be transported by a bank in interstate commerce under 18 U.S.C. § 2314 (1948) (current version at 18 U.S.C. § 2314 (1970)), even if both offenses arise from a single act); Morgan v. Devine, 237 U.S. 632, 641 (1915) (breaking into a post office is a separate offense from stealing Post Office Department property); United States v. Cedar, 437 F.2d 1033, 1036 (9th Cir. 1971) (stealing, purloining, and knowingly converting to one's own use things of value of United States in violation of 18 U.S.C. § 641 (1970) is a separate offense from unlawfully cutting and destroying fir trees growing on United States land reserved for public use under 18 U.S.C. § 1853 (1970)).

[4] Prince v. United States, 352 U.S. 322 (1957). *See* text accompanying notes 33-37 *infra.*

[5] *See* cases cited note 3 *supra.*

[6] United States v. Cedar, 437 F.2d 1033, 1036 (9th Cir. 1971); *see* Morgan v. Devine, 237 U.S. 632, 641 (1915). In regard to merger and double jeopardy, the federal courts have followed what is referred to as the "distinct elements" test formulated in Gavieres v. United States, 220 U.S. 338, 342 (1911). The test holds that as a single offense may violate two statutes, if each statute requires proof of an additional fact not required by the other, an acquittal or conviction under either statute does not exempt defendant from prosecution under the other. *See* Note, *Twice in Jeopardy,* 75 YALE L.J. 262, 273 n.52 (1965).

[7] 538 F.2d 575 (4th Cir.), *cert. deneid,* 97 S. Ct. 144 (1976).

[8] 18 U.S.C. § 2113(a) (1970) provides that whoever takes or attempted to take property or money from a bank, credit unions, or savings and loan association by force or violence shall be fined not more than $5,000 or imprisoned not more than twenty years, or both. 18 U.S.C. § 2113(d) (1970) provides that whoever commits or attempts to commit a violation of subsection (a), and in so doing assaults any person, or puts in jeopardy the life of another person by use of a dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

[9] 18 U.S.C. § 924(c)(1) (1970) provides that whoever uses a firearm in the commission of any felony shall, in addition to punishment for commission of the felony, be imprisoned for not less than one year nor more than ten years.

[10] 18 U.S.C. § 924(c)(2) (1970) provides that whoever carries a firearm during the

appealed, claiming that while the charges of using and carrying a firearm set forth separate offenses when the underlying felony makes no statutory provision for use of a firearm,[11] those charges do not set forth a separate crime when the related offense has such a statutory provision.[12]

The Fourth Circuit refuted Crew's contention and held that the unlawful carrying or use of a firearm[13] established a separate offense from the armed robbery offense.[14] The statute proscribing the carrying or use of a firearm during the commission of a felony was promulgated as part of the Gun Control Act of 1968,[15] which was designed to combat the increasing use of firearms in the United States.[16] During congressional debate over the Act, both houses of Congress specifically provided for this legislation aimed at those who use guns while committing a felony.[17] While the language of the statute would seem to apply to any underlying federal felony,[18] it is arguable that application of the statute to a crime already involving use of a dangerous weapon would place the defendant in double jeopardy. The rationale of the argument would be that the federal armed bank robbery statute[19] already imposes a greater penalty than that imposed by the

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commission of any felony shall, in additon to punishment for commission of the felony, be imprisoned for not less than one year nor more than ten years.

[11] In the following cases, the use or carrying of a firearm was considered to be a separate crime from the related felony, and in each case the related felony did not involve any use of a weapon or firearm. United States v. Soria, 519 F.2d 1060 (5th Cir. 1975) (related offense was possession of marijuana with intent to distribute); United States v. Ramirez, 482 F.2d 807 (2d Cir.), *cert. denied*, 414 U.S. 1070 (1973) (related offense was distribution and possession with intent to distribute cocaine); United States v. Virgil, 458 F.2d 385 (10th Cir. 1972) (related offense was a violation of narcotics laws).

[12] United States v. Crew, 538 F.2d 575, 577 (4th Cir.), *cert. denied*, 97 S. Ct. 144 (1976).

[13] *See* notes 9-10 *supra.*

[14] 538 F.2d at 577.

[15] 18 U.S.C. §§ 921-928 (1970); H.R. REP. No. 1577, 90th Cong., 2d Sess. 7, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 4410. *See also* Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 148-57 (1975).

[16] The General Statement given for the Act in H.R. REP. No. 1577, 90th Cong., 2d Sess. 7, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 4410, 4412, mentions that "[t]he increasing rate of crime and lawlessness and the growing use of firearms in violent crime clearly attest to a need to strengthen Federal regulation of interstate firearms traffic."

[17] For a brief review of the legislative history of the Gun Control Act of 1968 see United States v. Sudduth, 457 F.2d 1198, 1199-1200 (10th Cir. 1972).

[18] *See* notes 9 and 10 *supra.*

[19] 18 U.S.C. § 2113(d) (1970). For armed bank robbery the penalty is a fine of not more than $10,000 or imprisonment for not more than 25 years, or both.

federal bank robbery offense.[20] Hence, the defendant has already been punished for the use or carrying of a firearm, and a further imposition of punishment for using or carrying a firearm during the commission of an armed bank robbery would possibly create an unconstitutional double punishment.[21] The persuasiveness of this argument in federal courts is not entirely clear, however, as only two circuits, the Fourth[22] and the Fifth,[23] have considered the applicability of the statute proscribing the use and carrying of firearms to the federal armed bank robbery statute. Although this particular double jeopardy argument was not raised in either circuit, both circuits would presumably reject the argument, as they held that the use or unlawful carrying of a firearm during the commission of a felony is a separate offense from armed bank robbery, and therefore the defendant may be prosecuted for both.[24] Other circuits have not decided the issue.[25]

The *Crew* court further supported its decision by pointing out the language difference in each statute. While a firearm is necessary for a violation of the use or unlawful carrying of a firearm offense, only a dangerous weapon or device is required for a violation of the armed bank robbery statute.[26] This language variation led the court to hold that different elements of proof are required for these offenses.[27] A dangerous weapon need not necessarily be the firearm or explosive device required by the Gun Control Act,[28] and thus the proof of the

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[20] 18 U.S.C. § 2113(a) (1970). For bank robbery the penalty is a fine of not more than $5,000 or imprisonment for not more than 20 years, or both.

[21] U.S. CONST. amend V. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." For a more detailed discussion on the merits of this kind of argument, see Note, *Commonwealth v. Hermankevich, Section (B) of the Pennsylvania Deadly Weapons Act, and Multiple Punishment*, 31 U. PITT. L. REV. 476 (1970).

[22] United States v. Crew, 538 F.2d 575 (4th Cir.), *cert. denied*, 97 S. Ct. 144 (1976).

[23] Perkins v. United States, 526 F.2d 688 (5th Cir. 1976).

[24] United States v. Crew, 538 F.2d 575, 578 (4th Cir.), *cert. denied*, 97 S. Ct. 144 (1976); Perkins v. United States, 526 F.2d 688, 690 (5th Cir. 1976).

[25] There are many cases involving armed bank robbery with a firearm where no prosecution for the use or carrying of the firearm has occurred. *See, e.g.*, United States v. Fleming, 504 F.2d 1045 (7th Cir. 1974); United States v. Short, 493 F.2d 1170 (9th Cir.), *cert. denied*, 419 U.S. 1000 (1974). However, it is not determinable if those omissions were merely due to a decision not to prosecute on those counts, or whether the prosecution possibly felt that the courts might strike down such an attempt on double punishment grounds.

[26] 538 F.2d at 577.

[27] *Id.*

[28] Lye has been held to be a dangerous weapon, Tatum v. United States, 110 F.2d 555 (D.C. Cir. 1940), as have even shoes, Medlin v. United States, 207 F.2d 33 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 905 (1954). Furthermore, the California "Dangerous

armed bank robbery offense in *Crew* did not necessarily establish all elements of the use or carrying of a firearm offense.

Crew's second contention involved an interpretation of just the use and carrying of a firearm statute. Crew argued that separate sentences should not be imposed for use of a firearm during a felony[29] and for carrying a firearm during a felony.[30] At trial the use of the firearm was the only evidence adduced to show the offense of "carrying," with the result that a single act was proof of two offenses set forth in the same subsection of the statute.[31] Regarding a similar situation, the Supreme Court has held that the lesser-included offense merges into the other offense.[32] In *Prince v. United States,*[33] the Supreme Court construed the Federal Bank Robbery Act[34] so that the two offenses under that statute of bank robbery[35] and unlawful entry[36] merged for punishment purposes if a bank robbery had been successfully completed.[37] The Fourth Circuit followed the same principle in *United States v. Atkinson.*[38] In *Atkinson* the defendant was convicted of possession of heroin with intent to distribute,[39] and of distribution of heroin.[40] On appeal, the Fourth Circuit held that while the single act was proof of two offenses, Congress did not intend to increase the maximum sentence when both offenses were violations of the same subsection of the statute.[41]

Weapons' Control Law," CAL. PENAL CODE §§ 12000-12094 (West 1970) provides felony punishment for anyone who possesses a blackjack, metal knuckles, sandbag, dagger, and various other instruments. CAL. PENAL CODE § 12020 (West 1970). *See also,* Comment, *A Review of California's Dangerous Weapons Law,* 1 CRIM. JUST. J. 45 (1976).

[29] 18 U.S.C. § 924(c)(1) (1970). *See* note 9 *supra.*

[30] 18 U.S.C. § 924(c)(2) (1970). *See* note 10 *supra.*

[31] 538 F.2d at 578.

[32] Prince v. United States, 352 U.S. 322 (1957).

[33] *Id.*

[34] 18 U.S.C. § 2113 (1948) (current version at 18 U.S.C. § 2113 (1970)).

[35] 18 U.S.C. § 2113(a) (1948) (current version at 18 U.S.C. § 2113(a) (1970)).

[36] *Id.*

[37] In Prince v. United States, 352 U.S. 322 (1957), defendant was convicted for robbery and for entering the bank with intent to commit a felony under 18 U.S.C. § 2113(a) (1948) (current version at 18 U.S.C. § 2113(a) (1970)). The Court stated that the wording of the Act implied that the unlawful entry provision was designed to cover the situation when an entry is made for purposes of robbery, but the robbery is then frustrated for some reason before the crime is completed. Therefore, if the robbery is successfully carried out, the lesser included offense of intent to commit a felony is merged into the robbery offense. 352 U.S. at 328.

[38] 512 F.2d 1235 (4th Cir. 1975); United States v. Curry, 512 F.2d 1299 (4th Cir.), *cert. denied,* 423 U.S. 832 (1975).

[39] 21 U.S.C. § 841(a)(1) (1970).

[40] *Id.*

[41] United States v. Atkinson, 512 F.2d 1235, 1240 (4th Cir. 1975). Under this

construction, if no distribution had taken place Atkinson could only be charged with the intent crime. If distribution had occurred, Atkinson could be charged only with distribution, not both crimes. There will thus be no circumstances where both crimes can be charged for one act. In an analogous situation, the Fourth Circuit has also recently held that one may not be convicted for both robbery and possession of stolen money under 18 U.S.C. § 2113(a) and (c) (1970), as a result of a single occurrence. Phillips v. United States, 518 F.2d 108 (4th Cir. 1975), *vacated and remanded,* 424 U.S. 961, *modified,* 538 F.2d 586 (4th Cir. 1976).

Phillips followed the Supreme Court's holding in Milanovich v. United States, 365 U.S. 551 (1961), where the Court held that a defendant could not be convicted for both stealing and receiving the same property under 18 U.S.C. § 641 (1948) (current version at 18 U.S.C. § 641 (1970)). 365 U.S. at 553-54. For discussion of *Phillips* and *Milanovich,* see *Evidentiary Bar in Successive Prosecutions, Fourth Circuit Review,* 33 WASH. & LEE L. REV. 538 (1976). Likewise, *Phillips* was in accord with the Court's holding in Heflin v. United States, 358 U.S. 415 (1959), where the Court held that a defendant may not be convicted for robbery and receiving stolen goods under 18 U.S.C. § 2113(c) and (d) (1948) (current version at 18 U.S.C. § 2113(c) and (d) (1970)). The Court felt that Congress' purpose was not to "pyramid penalties for lesser offenses," 358 U.S. at 419, and that "Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves." *Id.* at 420. Furthermore, the Court in *Heflin* commented upon the *Prince* decision and stated that "we resolve an ambiguity in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act." *Id.* at 419.

The Supreme Court's latest decision in this area, United States v.Gaddis, 424 U.S. 544 (1976), dealt with the remedy to be used when multiple convictions result under the Federal Bank Robbery Act, 18 U.S.C. § 2113 (1970). Gaddis was convicted for bank robbery and for possessing the proceeds of the same theft under 18 U.S.C. § 2113(a) and (c) (1970). The Court reiterated that under *Heflin* a defendant cannot receive separate convictions for these two offenses. The Court then held that any error involved in the multiple convictions may be corrected by vacating the conviction and sentence for possession of stolen funds, thus rendering a new trial unnecessary. 424 U.S. at 549. The Fourth Circuit has since considered the applicability of the *Gaddis* remedy in several cases. *See* Baugh v. United States, 540 F.2d 1245 (4th Cir. 1976) (defendant convicted of possessing stolen money under 18 U.S.C. § 2113(c) (1970) and transporting stolen money across state lines under 18 U.S.C. § 2314 (1970); *Gaddis* remedy not applicable as these are not mutually exclusive offenses but are complementary); United States v. Sellers, No. 74-1683 (4th Cir. Sept. 2, 1976), *modifying* 520 F.2d 1281 (4th Cir. 1975) (when defendant charged for both theft and possession under 18 U.S.C. § 2113 (1970), correct procedure is for the jury to consider the theft charge first, and then only consider the possession charge if there is insufficient evidence to support theft charge; however, when two convictions are improperly received, any resulting error is harmless, as under *Gaddis* the conviction on the possession count is reversed); Phillips v. United States, 538 F.2d 586 (4th Cir. 1976), *modifying* 518 F.2d 108 (4th Cir. 1975) (conviction of possession of stolen money under 18 U.S.C. § 2113(c) (1970) upheld under *Gaddis,* and introduction of evidence relating to bank robbery after an acquittal on that charge in a separate trial held not prejudicial). *See also* United States v. McDaniel, *disposition recorded* 530 F.2d 971 (4th Cir. 1975) (admitted thief also convicted of possession under 18 U.S.C. § 659 (1970); held no error resulted as defendant not punished for both crimes).

The same situation existed in *Crew,* as the offense of using a firearm during the commission of a felony encompasses the offense of carrying a firearm during the commission of a felony. Generally, in circumstances where a single act encompasses two offenses under the same statute section or subsection, the statutes have not been read as providing punishment for both offenses.[42] Furthermore, the proof of the "using" offense necessarily established the "carrying" offense.[43] Therefore, the Fourth Circuit held in *Crew* that the offense of "carrying" the firearm merged into the offense of "using" the firearm, and dismissed Crew's sentence on the "carrying" count.[44]

In *Crew,* the Fourth Circuit reaffirmed standard principles in regard to one act entailing two offenses under the same statute.[45] *Crew,* however, presented a novel point in the construction of the use and unlawful carrying statute, as the underlying felony itself involved a use of some kind of weapon. Prior convictions based upon the statute proscribing the use or unlawful carrying of a firearm during the commission of a felony had generally involved violations of narcotics laws, where no weapon was involved in the underlying offense.[46] In *Crew,* the Fourth Circuit established that the crime of the use or carrying of a firearm when committing a felony is applicable to any federal felony, regardless of whether the statute already incorporates use of a dangerous weapon as an element of the offense. This decision may burden defendants with double punishment, especially if the penalty for the armed offense already has been legislatively increased over that of the same offense without any weapon.[47] Presumably, the Fourth Circuit will not entertain such double jeopardy arguments after *Crew.*[48] Whether the multiple punishment argument is viable in other circuits is presently unknown, except in the Fifth Circuit, which concurs with the Fourth Circuit's interpretation.[49] After *Crew,* if the prosecution so charges, future defendants in the Fourth Circuit facing federal armed bank robbery charges may now also face the additional

[42] *See, e.g.,* United States v. Gaddis, 424 U.S. 544 (1976); Heflin v. United States, 358 U.S. 415 (1959); United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975).

[43] *See* United States v. Crew, 538 F.2d 575, 578 (4th Cir.), *cert. denied,* 97 S. Ct. 144 (1976).

[44] *Id.*

[45] *See* text accompanying notes 33-42 *supra.*

[46] *See* cases cited note 11 *supra.*

[47] *See, e.g.,* The Federal Bank Robbery Act, 18 U.S.C. § 2113 (1970); text accompanying notes 18-20 *supra.*

[48] *See* text accompanying notes 22-24 *supra.*

[49] *See* text accompanying notes 22-25 *supra.*

charge of the use or unlawful carrying of a firearm during commission of a felony.[50]

FRANK F. BARR

G. Receiving Stolen Property Under the Federal Bank Robbery Act

The Federal Bank Robbery Act[1] has undergone a number of changes since its enactment in 1934.[2] The current version of the Act includes measures for the punishment of the crime of receiving stolen bank property.[3] Section 2113(b) differentiates treatment of those who steal from a bank in that if more than $100 is stolen the thief has committed a felony, and a misdemeanor occurs if less than $100 is stolen.[4] Section 2113(c), which provides for the crime of receiving

[50] Similarly, the Fourth Circuit recently held that a conviction for transporting marijuana without payment of the transfer tax satisfies the requirement of a prior conviction for a felony under any federal law relating to drug offenses, under The Compehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841(b)(1)(A) (1970). United States v. Truelove, 527 F.2d 980 (4th Cir. 1975). The court read the statutory language as unequivocally including all federal criminal provisions relating to marijuana. *Id.* at 983.

[1] 18 U.S.C. § 2113 (1970) (originally enacted as Act of May 18, 1934, ch. 304, §2, 48 Stat. 783).

[2] In its original form the Act included only provisions prohibiting robbery. Act of May 18, 1934, ch. 304, § 2, 48 Stat. 783. In 1937, amendments to the statute expanded coverage to include burglary and larceny. Act of August 24, 1937, ch. 747, 50 Stat. 749. The Act was also amended in 1940, when provisions were added concerning the illegality of receiving stolen bank property. Act of June 29, 1940, ch. 455, 54 Stat. 695. The present form of the statute providing punishment for these crimes was enacted in 1948. Act of June 28, 1948, ch. 645, §2113, 62 Stat. 796.

[3] 18 U.S.C. § 2113 (b) & (c) (1970).

[4] 18 U.S.C. § 2113 (b) & (c) (1970) reads as follows:

> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or
>
> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

stolen bank property, relies on § 2113(b) for determining the punishment of the receiver.[5]

Presently, there is a conflict among courts of appeals concerning subsections (b) and (c) of the Act.[6] The Fourth Circuit in *United States v. Wright*[7] held that the receiver's penalty must be based upon the amount stolen by the thief, regardless of the amount received.[8] Conversely, the Eighth Circuit has ruled in *United States v. Evans*[9] that in determining the receiver's penalty, consideration must be given to the penalty the thief would have gotten if he had taken the amount received.[10]

In *Wright,* the appellant contended that since the government failed to prove that the money received exceeded $100, he was improperly convicted and sentenced as a felon.[11] The Fourth Circuit disagreed, holding that the failure to prove receipt of more than $100 was immaterial in determining whether the accused committed a felony or a misdemeanor.[12] Instead, the court interpreted the legislative history of the Act[13] as requiring sentencing on the basis of the

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(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

[5] *Id.*

[6] *See* note 4 *supra.*

[7] 540 F.2d 1247 (4th Cir. 1976).

[8] *See* text accompanying notes 11-16 *infra.*

[9] 446 F.2d 998 (8th Cir. 1971), *cert. denied,* 404 U.S. 1021 (1972).

[10] *See* text accompanying notes 21-25 *infra.*

[11] 540 F.2d at 1247.

[12] *Id.* The court also noted that the appellant was intimately concerned with the robbery of the bank. His car was used in the robbery and the robbers returned to his house after the robbery, where he helped in removing red dye from the money. The court also mentioned that there was evidence that the appellant had been promised $800 for his part in the robbery. *Id.*

[13] In its analysis of the legislative history of the Federal Bank Robbery Act, the court traced the evolution of the Act from 1934. *See* note 2 *supra.* The court specifically focused upon the 1948 amendment, which altered the receiver's punishment as contained in the 1940 amendment. The 1940 amendment made no distinction based upon the amount of stolen property actually received in providing for maximum punishment of ten years imprisonment or a $5,000 fine. Act of June 24, 1940, ch. 455, 54 Stat. 695. The Supreme Court noted in Heflin v. United States, 358 U.S. 415, 419 (1958), that there is very little useful legislative history concerning § 2113(c). The Senate Report of the 1940 amendment states, "[t]his bill would add another subsection to further make it a crime, with less severe penalties to willfully become a receiver or possessor of property taken in violation of the statute." S. REP. No. 1801, 76th Cong., 3d Sess. 1

amount stolen from the bank. Placing major emphasis on the Revisor's Note to the 1948 amendment,[14] the Fourth Circuit combined literal reading of the statute with practical considerations. Evidence of exactly what was stolen from the bank could be readily ascertainable, whereas proof of the amount actually passing to the receiver might be impossible to obtain.[15] This consideration resulted in what the *Wright* court saw as judicial expediency in simplifying the punishment of receivers.[16]

The Fourth Circuit's determination that the receiver's penalty should be based on the value of what was stolen accords with the Ninth Circuit's holding in *United States v. Bolin*.[17] The appellant in *Bolin* challenged his conviction for receiving money that had been stolen from a federal bank. Because he possessed only $65 of that money at the time he was arrested, the appellant argued that he should not have been sentenced under the provisions of § 2113 for a theft of over $100.[18] As in *Wright*, the *Bolin* court analyzed the legislative history of the Federal Bank Robbery Act to find that the punishment of the receiver is determined by the amount stolen.[19] In addition to considering legislative history, the *Bolin* court compared the Federal Bank Robbery Act with the Federal Conspiracy statute to justify its interpretation of subsection (c).[20] Upon the basis of

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(1940). The House report on the amendment to § 2113(c) stated, "[p]resent law does not make it a separate substantive offense knowingly to receive or possess property stolen from a bank in violation of the Federal Bank Robbery Act, and this bill is designed to cover that omission." H.R. REP. No. 1668, 76th Cong., 3d Sess. 1 (1940).

[14] The Revisor's Note for the 1948 amendment, codified at 18 U.S.C. § 2113 (1970) explained the application to the receiver of the punishment provisions for the thief: "[t]here seems no good reason why the thief of less than $100 should be liable to a maximum of imprisonment of one year and the receiver subject to [ten] years."

[15] This argument is refuted by the fact that a person is usually punished for the value of the stolen property with which he is apprehended. See examples cited in 446 F.2d 998, 1001. The statute provides for this by using the word "possesses." *See* note 4 *supra*.

[16] In support of its judicial expediency argument, the court noted that "[p]roof of the amount taken from the bank is readily available, but proof of its division among primary and secondary participants may be impossible to obtain." 540 F.2d at 1248.

[17] 423 F.2d 834 (9th Cir.), *cert. denied*, 398 U.S. 954 (1970). The Fourth Circuit in *Wright* used *Bolin* as principal authority for its holding. 540 F.2d at 1248.

[18] To support his contention, the appellant in *Bolin* cited the example of two people found guilty under § 2113(c) of receiving less than $100. Even if they had received identical amounts, each would be subject to different degrees of punishment if one received from a person who had stolen more than $100 and the other received from a person who took less than $100. 423 F.2d at 837.

[19] *Id.* at 836 n.2. *See* also note 13 *supra*.

[20] *Id.* at 837. The statute compared was 18 U.S.C. § 371 (1970), the Federal Conspiracy Statute. This statute has provisions for misdemeanor or felony punishment

these considerations, the *Bolin* court upheld the appellant's conviction.

The Eighth Circuit decision in *United States v. Evans*,[21] however, conflicts with the *Wright* and *Bolin* interpretation of the sentencing provisions of the Federal Bank Robbery Act. In *Evans*, the defendant was convicted of receiving a stolen bank money order which had been filled in and which he subsequently cashed for an amount in excess of $150. On appeal, the defendant asserted that because the money order was blank when it was stolen, its actual value was minimal.[22] Following *Bolin*, the appellant in *Evans* argued that the money order should have been valued as of the time it was stolen, thus making his crime of possession a misdemeanor. The Government, however, asserted that the receiver's penalty should have been based upon the total value of the money orders stolen, which in a "thieves market"[23] exceeded $1,500. The *Evans* court noted the *Bolin* decision in considering the argument that because the value of all the stolen money orders was over $1,500, felony liability should be imposed, regardless of the amount received by the defendant. Nevertheless, the court utilized what it determined to be the correct interpretation of the sentencing provisions of the Federal Bank Robbery Act[24] and held that the legislative history did not indicate that the receiver's punishment should be determined by the actions of the thief.[25] Because the value of the money order possessed by the appel-

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that are based upon whether the conspiracy was one to commit a misdemeanor or a felony. The *Bolin* court compared the case of two people intending to commit misdemeanors, entering into two separate conspiracies. If one of the individuals were in a conspiracy whose members committed a felony, that individual would be subject to a greater penalty than the other one, even though they may have received identical benefits. 423 F.2d at 837-38. This is reflected in the rule that a co-conspirator is liable for the crimes of his fellow conspirators. 18 U.S.C. § 371 (1970); Pinkerton v. United States, 399 F.2d 106, 118 (8th Cir.), *cert. denied,* 393 U.S. 933 (1968).

[21] 446 F.2d 998 (8th Cir. 1971).

[22] *See* note 26 *infra.*

[23] The "thieves market" concept utilized by the government in *Evans* concerns the value placed upon stolen blank money orders by persons knowingly purchasing them from a thief. According to prosecution testimony, each money order had a value of from $5.00 to $10.00 in the "thieves market." *Id.* at 1000.

[24] *Id.* at 1000-01. The *Wright, Bolin* and *Evans* courts all scrutinized the same section of the Historical and Revision Notes following 18 U.S.C. §2113 (1970) to ascertain legislative intent. Nevertheless, their results differed. *See* text accompanying notes 14-19 *supra.*

[25] The *Evans* court saw this to be the "basic fallacy" of the *Bolin* decision. Punishing one for the acts of another undermines a basic principle of criminal law: "[T]hat the punishment should fit the defendant's crime, not that of another." This principle, however, does not apply to conspiracy. *See* note 20 *supra.*

lant exceeded $100 at the time he cashed it, however, the court affirmed his conviction as a felon.[26]

The apparent conflict of the Fourth and Ninth Circuits with the Eighth Circuit may be partially reconciled by the variations in the facts of the cases. In *Wright* and *Bolin,* the money taken from the bank had an ascertainable value, whereas in *Evans,* the value of the blank money orders was uncertain.[27] Nevertheless, the major discrepancy between the courts lies in what each has determined to be the legislative intent behind § 2113.[28]

Regardless of these differences, the rationales of *Wright* and *Bolin* are useful when specific amounts of cash are stolen. Setting penalties for receivers based upon the amount stolen simplifies proof, because the amount possessed by the receiver at the time of arrest may be much less than the amount initially received.[29] The *Evans* rationale is helpful when blank money orders are stolen, because problems of proof can be lessened by looking to the value placed upon the money order by the receiver.[30] The policy underlying enforcement of the Federal Bank Robbery Act, however, should be consistent and punishment provisions should not be varied merely because one theft involved cash and another money orders. Two facts appear from the legislative history of § 2113(c) that clarify its meaning. First, the crime of receiving stolen bank property had an origin independent of the initial Federal Bank Robbery Act.[31] This may indicate that the

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[26] The court found the appellant's argument that individual blank money orders were only worth $.015 had no merit because no authority was cited in support of the argument. *Id.* at 999.

[27] One way in which the value of stolen blank money orders may be determined is by the amount the thief or receiver obtains in their exchange. *E.g.*, United States v. Tyler, 466 F.2d 920 (9th Cir.), *cert. denied,* 409 U.S. 1045 (1972); United States v. Johnson, 442 F.2d 318 (8th Cir.), *cert. denied,* 404 U.S. 861 (1971). In *Johnson,* the appellant's conviction for receiving stolen money orders was affirmed because the court found that the appellant's attempt to sell eight of the orders for $150 established value. 442 F.2d at 319. Another way to ascertain the value of blank money orders is to introduce testimony concerning valuation on a "thieves market." This would not be as reliable as the aforementioned method because of the subjectivity of the determination. 446 F.2d at 1000-02; *See* note 23 *supra.*

[28] *See* note 24 *supra.*

[29] United States v. Bolin, 423 F.2d 934, 838. This problem is especially applicable to cash which can be easily co-mingled with other funds or transferred to confederates or unsuspecting parties. *Id. But see* United States v. Wright, 540 F.2d 1247, 1249 (4th Cir. 1976) (Winter, J. dissenting). Proof of knowledge of the amount stolen is not included in the crime of knowing receipt under § 2113(c).

[30] This method has also been used when unsigned traveler's checks have been stolen from a bank. United States v. Tyler, 466 F.2d 920 (9th Cir.), *cert. denied,* 409 U.S. 1045 (1972).

[31] 446 F.2d at 1000. *See* note 2 *supra.*

punishment for this particular crime should not be dependent upon the amount stolen in violation of the Act. Second, the 1948 amendment to the Act was meant to correct the unfair punishment provisions which subjected a receiver of less than $100 to a greater penalty than the thief of an identical amount.[32] These distinctions accord with *Evans,* which held that a receiver's punishment should be based upon the amount he receives. Nevertheless, a literal reading of the statute supports the results of the *Wright* and *Bolin* courts.[33]

How the Fourth Circuit would interpret § 2113(c) if it were presented with a case like *Evans* is uncertain. If the court maintained its theory that the receiver's penalty must be based upon the value of the goods stolen, difficulties would arise in determining the value of the blank money orders at the time they were taken. The Fourth Circuit itself criticized difficulty of proof problems in support of its holding in *Wright.*[34]

Considering the practicality argument in *Wright,*[35] in the case of blank money orders the Fourth Circuit might prefer to value them according to the amount placed upon them by the receiver. Valuation utilizing the "thieves market" approach as argued by the Government in *Evans*[36] might be an alternative, but that would tend to produce the problems of proof that were discussed in *Wright.*[37] If the Fourth Circuit did base the punishment for receiving stolen money orders upon the value given them by the receiver, it might have to alter its interpretation of § 2113 to accord with the Eighth Circuit's decision in *Evans.*[38] *Evans* thus provides the better interpretation of § 2113 not only because it effectively considers the valuation problem of stolen money orders, but more importantly because it properly punishes the receiver for the crime he has committed.[39]

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[32] 446 F.2d at 1000. *See* note 14 *supra.*

[33] *See* note 4 *supra.* The approach taken by the *Wright* and *Bolin* courts was a literal interpretation of the wording of § 2113(c).

[34] 540 F.2d at 1248. In considering the difficulty of proof problem, the Fourth Circuit reasoned that since proof of the amount taken from the bank is readily ascertainable, it should be the basis for the receiver's penalty. *See* text accompanying note 16 *supra.*

[35] 540 F.2d at 1248.

[36] 446 F.2d at 1000. *See* note 23 *supra.*

[37] Valuation using the "thieves market" is based upon testimony and would be a question of fact for the jury to determine. *Id.* at 1002. *See* note 23 *supra.*

[38] Judge Winter dissenting in *Wright* felt that the Fourth Circuit should have followed the rationale of *Evans.* As did the court in *Evans,* Judge Winter believed that the punishment should fit the crime of the defendant not someone else's. 540 F.2d at 1248-49 (Winter, J. dissenting). *See* note 25 *supra.*

[39] *See* note 25 *supra.*