Washington and Lee Law Review

Volume 34 | Issue 2 Article 10

Spring 3-1-1977

Vi. Evidence

hearing to every permit duration challenge. A more cautious wording of the requirements of procedural due process for NPDES permit issuance or an identification of the special circumstance of an absolute hearing denial would have assured the proper limitation of the scope of the Fourth Circuit holding in *Consolidation Coal.* Future litigants, who challenge permit durations and are afforded less than a full EPA evidentiary hearing for valid reasons, may, therefore, cite the broad holding of this case as supporting an absolute right to a full hearing. That litigation should ultimately clarify the *Consolidation Coal* decision as providing only a reasonable opportunity to be heard.

JON P. LECKERLING

VI. EVIDENCE

A. Sufficiency of Evidence.

Independent Evidence to Implicate Conspirators

In a conspiracy case, independent evidence showing the defendant to be part of the conspiracy is necessary before a co-defendant's out-of-court declarations are admissible under the co-conspirator's exception to the hearsay rule.[1] The quantum of independent evidence nec-

[1] Glasser v. United States, 315 U.S. 60, 74 (1942); 4 J. WIGMORE, EVIDENCE § 1079 (Chadbourn rev. 1972). The *Glasser* case held that circumstantial evidence is sufficient to prove participation in a conspiracy. 315 U.S. at 80.

In Lutwak v. United States, 344 U.S. 604 (1953), the Court stated that declarations not made in furtherance of the conspiracy cannot be used against a co-conspirator, and therefore, "declarations of conspirator do not bind the co-conspirator if made after the conspiracy has ended." *Id.* at 617-18. In regard to that criterion, the Fourth Circuit in United States v. Blackshire, 538 F.2d 569, 571 (4th Cir.), *cert. denied,* 97 S. Ct. 113 (1976) held that since a co-conspirator's arrest terminates the conspiracy, and since a statement of the apprehended conspirator would be in frustration of, not furtherance of, the criminal enterprise, Fiswick v. United States, 329 U.S. 211, 217 (1946), such statement is not admissible against the co-conspirators. Blackshire was convicted for distributing and conspiring to distribute heroin under 21 U.S.C. §§ 841(a)(1), & § 846 (1970). Evidence showed that Blackshire was merely involved with the fringes of the conspiracy. He did not cut or bag the heroin, and there was no proof that Blackshire was either a pusher or took part in the sale which led to the indictments. Only circumstantial evidence aligned Blackshire with the conspiracy.

Blackshire, however, had been seen in the Baltimore airport, accompanying the conspiracy ringleader from California. After the arrest of one of Blackshire's co-defendants, the co-defendant told police that luggage with a California tag on it had been borrowed by Blackshire. As the statement was not made in furtherance of the conspiracy, the Fourth Circuit held it inadmissible, and since Blackshire's link to the conspiracy was tenuous at best, the admission of the co-defendant's statement was

essary to align the defendant with the conspiracy has generally been held to be "prima facie" proof of the conspiracy.[2] While it has been held that only "slight" evidence is necessary,[3] or a fair preponderance of evidence,[4] or enough substantial independent evidence "to take the question to the jury,"[5] in practical terms these standards are very similar to "prima facie" proof.[6] Accordingly, in *United States v. Stroupe*,[7] the Fourth Circuit applied the standard requiring independent proof of involvement in a conspiracy by a fair preponderance of evidence, and found that the government's proof did not meet that standard.[8]

In *Stroupe*, government agents went to one Wright's home to procure drugs. Wright called someone named Wayne, Stroupe's first name, about the purchase, and then told the agents that they would have to pay first. A subsequent telephone call to Wayne in the agents' presence disclosed the location where the transaction was to be made. Wright and the agents then went to Stroupe's trailer, and Wright took the agents' money and went into the trailer alone. Shortly, Wright, Stroupe, and a girl emerged and Wright got in the car and handed a bag containing amphetamine to the agents. Wright pointed to Stroupe and indicated to the agents that he had purchased the drugs from Stroupe. Two weeks later, Wright accompanied the agents in a purchase of amphetamine from David and Mark Warren. An agent asked Wright whether this amphetamine was as good as that purchased earlier. Wright replied, "You mean the stuff we got from Wayne Stroupe?"[9] This was the essence of the government's evidence.

---

held not to be harmless error. 538 F.2d at 571. Blackshire's trial was before the effective date of the Federal Rules of Evidence, and the law relied on in *Blackshire* is now codified. FED. R. EVID. 801(d) provides in pertinent part that "(d) [a] statement is not hearsay if . . . (2) [t]he statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

[2] United States v. United States Gypsum Co., 333 U.S. 364 (1948); United States v. Lucido, 486 F.2d 868 (6th Cir. 1973); United States v. Vaught, 485 F.2d 320 (4th Cir. 1973). For a further collection of cases, see Annot., 46 A.L.R.3d 1160-67 (1972).

[3] United States v. Lee, 483 F.2d 968, 969 (5th Cir. 1973).

[4] United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

[5] United States v. Nixon, 418 U.S. 683, 701 n.14 (1973).

[6] When the Supreme Court spoke of a standard of enough substantial independent evidence "to take the question to the jury," *id.*, it cited as supportive cases which used the "prima facie" proof standard. United States v. Vaught, 485 F.2d 320 (4th Cir. 1973); United States v. Spanos, 462 F.2d 1012 (9th Cir. 1972).

[7] 538 F.2d 1063 (4th Cir. 1976).

[8] *Id.* at 1066.

[9] *Id.* at 1065.

The Fourth Circuit found this evidence insufficient to show Stroupe's involvement in the conspiracy by a fair preponderance of independent evidence. The court based its decision on the following: the agents could not have known positively that Wright procured the amphetamine from Stroupe, they did not overhear any definite conversation between Stroupe and Wright, no knowledge of the actual number of people in the trailer was attributable to the agents, they could not trace any purchase money to Stroupe, and finally, they observed no transfer of money to Stroupe.[10]

Courts have stated that participation in a conspiracy cannot be proved by mere association.[11] Witnessing the defendant in the vicinity of the narcotics exchange is not sufficient,[12] nor is seeing the defendant and seller converse without knowing what was said,[13] nor is merely seeing a bag pass from defendant to seller.[14] On similar facts, the Ninth Circuit has held that there was no evidence of participation in a conspiracy when the defendant was not "shown to have touched, possessed, sold, or conspired to sell narcotics."[15] Likewise, cases in which the evidence has proved a prima facie conspiracy have always contained at least one act on defendant's part involving him

---

[10] *Id.* at 1065-66.

[11] United States v. Steinberg, 525 F.2d 1126 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 2167 (1976); United States v. Mendez, 496 F.2d 128 (5th Cir. 1974).

[12] Glover v. United States, 306 F.2d 594 (10th Cir. 1962).

[13] *Id. Cf.* Beck v. Ohio, 379 U.S. 89 (1964) (police, acting on unspecified information from an informer, and knowledge of defendant's picture and a prior conviction, arrested defendant; held that since there was no specificity concerning the informant's communications, and no reasons were given as to why such information was credible, no probable cause for arrest existed if police had not heard or seen anything else).

[14] Panci v. United States, 256 F.2d 308 (5th Cir. 1958).

[15] Ong Way Jong v. United States, 245 F.2d 392, 395 (9th Cir. 1957). In *Ong Way Jong*, defendant was seen by agents with the narcotics seller, Wee, in defendant's car, after the seller told the agents that he would contact his supplier. Later in the evening, Wee told the agents he was waiting for his "connection" to return with the heroin. One half-hour later the agents witnessed Ong meet with Wee, and after they separated, Wee delivered the heroin to the agent's apartment. One week later Wee told agents that his "connection" was playing Mah Jong, and agents had observed Ong depart from a Mah Jong parlor that same day. The following day Wee told the agents he was with his "connection," and agents had seen Wee and Ong together that day. Finally, during a telephone conversation between Wee and the agents, the agents overheard a conversation in the background with someone called "Johnny." Ong's alias was Johnny Ong. These facts are similar to those in *Stroupe, see* text accompanying note 9 *supra*, and the Ninth Circuit in *Ong Way Jong* held that no evidence was adduced to show that Ong was engaged in a conspiracy, as these facts merely showed guilt by association. *Id.* at 394. For a similar conclusion reached by the Fifth Circuit, see United States v. Oliva, 497 F.2d 130 (5th Cir. 1974).

in the narcotics transaction.[16] As no such evidence was adduced in *Stroupe*, the Fourth Circuit found that Wright's out-of-court statement was inadmissible hearsay, and reversed since the remaining evidence failed to prove any involvement by Stroupe in a conspiracy with Wright. *Stroupe* basically reaffirms existing federal law on the quantum of evidence issue.[17]

---

[16] Examples of such evidence are found in United States v. Prout, 526 F.2d 380 (5th Cir. 1976) (marked bills found in defendant's possession); Kay v. United States, 421 F.2d 1007 (9th Cir. 1970) (actual delivery of cocaine by defendant to agent); United States v. Manfredi, 275 F.2d 588 (2d Cir.), *cert. denied*, 363 U.S. 828 (1960), (agent's witnessing of money passing from the seller to the defendant); United States v. Iacullo, 226 F.2d 788 (7th Cir. 1955), *cert. denied*, 350 U.S. 966 (1956) (fingerprints of defendant on the package containing narcotics).

[17] The Fourth Circuit also confronted the issue of the question of independent evidence necessary to implicate the defendant with a conspiracy in United States v. Jones, 542 F.2d 186 (4th Cir. 1976). Eleven defendants were indicted for conspiring to violate the narcotics laws under 21 U.S.C. § 846 (1970), and possession of heroin with intent to distribute under 21 U.S.C. § 841(a)(1) (1970). The four appellants were convicted, and on appeal argued that there was not enough independent evidence to find the declarant associated with the conspiracy. *Jones* is distinguishable from *Stroupe* because the issue in *Jones* was whether the declarant was sufficiently connected with the conspiracy, whereas *Stroupe* was concerned with the connection of the co-defendant toward whom the declarant's statements were directed. The contention made by appellants in *Jones* was based on United States v. Ragland, 375 F.2d 471, 476-77 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968), where the court held that in order for a co-conspirator's hearsay statements to be admissible, there must be independent evidence which links the declarant and the defendant in an illicit association. Conversely, while the issue in *Stroupe* was whether a conspiracy existed between the two co-defendants, the focus was on whether Stroupe was linked to the conspircy by independent evidence, not whether the declarant was so linked. *See* text accompanying note 9 *supra*. The Fourth Circuit in *Jones* once again applied the standard of whether the declarant was connected to an illicit association by a "fair preponderance of the evidence." 542 F.2d at 203. The factual situation surrounding the testimony in *Jones* was complex, as eleven individuals were associated in the narcotics ring. In every claim of inadmissible hearsay the court upheld the statements as admissible. The court found each declarant to have been previously linked to the conspiracy by prior testimony of known co-conspirators, and thus held that independent evidence did establish that the declarant was a co-conspirator. *Id.* at 203-08. Since this independent evidence revealed the declarants to be inolved in the joint undertaking, their subsequent declarations were not inadmissible as hearsay.

Because of the complexity of *Jones*, the defense, when objecting to some of the evidence admitted, did not make any specific reference to the record. *Id.* at 207. Instead, the defense claimed that the objectionable "testimony consists of hundreds of pages of transcripts." *Id.* Although the Fourth Circuit sorted out the relevant testimony, it noted that when an appellant objects and no specific reference is made to the record, "it is entirely proper for the Court to disregard such claim of error." *Id.* at 207 n.45. For further discussion of *Jones*, see *Criminal Procedure*, Section E, notes 32-49, *infra*.

"Any Evidence At All" Standard

In *Freeman v. Slayton*,[18] the Fourth Circuit considered the sufficiency of evidence required to uphold a conviction in a habeas corpus proceeding. Freeman was convicted of unlawful possession of a sawed-off shotgun.[19] Later in the same evening after a grocery store had been robbed, four men, including Freeman, were injured in an automobile accident. Subsequently, stolen money and goods identified as goods taken from the store were found in Freeman's clothing at the hospital, and in the automobile. In the trunk of the automobile the police found an unregistered sawed-off shotgun, which yielded no fingerprints. From this evidence the Fourth Circuit held that a jury could reasonably connect Freeman to the robbery, and therefore also to the car and the shotgun.[20]

As the Fourth Circuit noted in *Freeman*, federal courts are not concerned with the sufficiency of the evidence in habeas corpus proceedings.[21] The Supreme Court in *Bridges v. Wixon*[22] held that the only question involved in a habeas corpus review is whether there was some evidence to support the order. The problem concerns the question of what exactly is "some evidence." The Fourth Circuit has frequently construed "some evidence" to mean "any evidence at all."[23] In contrast, the Seventh, Ninth, and Tenth Circuits determine whether the conviction is totally devoid of evidentiary support.[24]

---

[18] No. 73-2247 (4th Cir. Feb. 9, 1976), *cert. denied*, 45 U.S.L.W. 3567 (U.S. Feb. 22, 1977).

[19] VA. CODE ANN. § 18.1-268.3 (Cum. Supp. 1975) (Current version at VA. CODE ANN. § 18.2-301 (Repl. Vol. 1975).

[20] Freeman v. Slayton, No. 73-2247, slip op. at 5-6.

[21] *E.g.*, United States *ex rel.* Johnson v. Illinois, 469 F.2d 1297 (7th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); Phillips v. Pitchess, 451 F.2d 913 (9th Cir. 1971), *cert. denied*, 409 U.S. 854 (1972).

[22] 326 U.S. 135, 149 (1948). In *Bridges*, petitioner, subjected to a deportation order, petitioned for a writ of habeas corpus. After the order issued, the alien was detained, and brought the proceeding to challenge that detention.

[23] Freeman v. Slayton, No. 73-2247, slip op. at 6 (4th Cir. Feb. 9, 1976) (in habeas corpus proceeding, sole constitutional question is whether the conviction rests on any evidence at all); *accord*, Williams v. Peyton, 414 F.2d 776, 777 (4th Cir. 1969); Young v. Boles, 343 F.2d 136, 138 (4th Cir. 1965). *But see* Stevens v. Warden, 382 F.2d 429, 430 (4th Cir. 1967), *cert. denied*, 390 U.S. 1031 (1968) (question was whether the trial record was so devoid of evidence of guilt as to offend constitutional standards).

[24] United States *ex rel.* Johnson v. Illinois, 469 F.2d 1297 (7th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); Mathis v. Colorado, 425 F.2d 1165 (10th Cir. 1970); Barquera v. California, 374 F.2d 177 (9th Cir.), *cert. denied*, 389 U.S. 876 (1967). The "totally-devoid-of-evidentiary-support" standard evolved from Thompson v. City of Louisville, 362 U.S. 199 (1960), where the Court found the charges "so totally devoid

These differently phrased standards to not necessarily connote the same meaning, and the question of what "some evidence" means has been raised by the Ninth Circuit.[25] That court mentioned that a mere scintilla of evidence, rather than a total absence of evidence, might also producd a due process question.[26]

Such considerations were not discussed by the Fourth Circuit in *Freeman*, and the court implemented the "any evidence at all" standard to uphold the conviction. Thus, the evidentiary standard used by the Fourth Circuit in *Freeman* was different from that used in *Stroupe*. This apparent disparity is due to the nature of the proceeding. While only a preponderance of the evidence is necessary to establish a defendant's conspiratorial involvement in order to introduce hearsay statements,[27] at a criminal trial, the prosecution must prove guilt beyond a reasonable doubt to comply with the Supreme Court's decision in *Mullaney v. Wilbur*.[28] In *Mullaney*, the defendant was charged with murder. Maine courts had required the defendant to prove by a fair preponderance of evidence that he acted in the heat of passion to reduce the charges from murder to manslaughter.[29] Thus, in other words, malice aforethought, a necessary element for a murder conviction, was implied, and the defendant was required to negate this element.[30] The Court found such a requirement to be violative of due process, and held that the prosecution must prove the absence of heat of passion beyond a reasonable doubt.[31] As *Mullaney* involved a criminal trial, and the Court apparently only considered the proper standard to employ at such a trial, *Mullaney* likely has no

---

of evidentiary support as to render defendant's conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment." *Id.*

[25] Barquera v. California, 374 F.2d 177, 180 (9th Cir.), *cert. denied*, 389 U.S. 876 (1967). The Ninth Circuit stated that while the Supreme Court has reversed convictions where it found no supportive evidence whatsoever, *e.g.*, Thompson v. City of Louisville, 362 U.S. 199 (1960), "[t]he decisions do not necessarily mean that nothing other than a complete absence of evidence would present a due process question." 374 F.2d at 180.

[26] Barquera v. California, 374 F.2d 177, 180 (9th Cir.), *cert. denied*, 389 U.S. 876 (1967). The Supreme Court has held that to convict without evidence of guilt is a violation of due process. Garner v. Louisiana, 368 U.S. 157, 173-74 (1961); Thompson v. City of Louisville, 362 U.S. 199 (1960).

[27] *See* text accompanying notes 2-6 *supra*.

[28] 421 U.S. 684, 704 (1975); *accord*, Brinegar v. United States, 338 U.S. 160, 174 (1949).

[29] Mullaney v. Wilbur, 421 U.S. 684, 686-88 (1975).

[30] *Id.* at 687.

[31] *Id.* at 704. *See also In re* Winship, 397 U.S. 358, 364 (1970) (prosecution must prove all elements of crime beyond a reasonable doubt).

effect on other legal proceedings.[32] *Freeman* was not a criminal trial, but rather a habeas corpus proceeding, which is civil in nature,[33] and as such the criminal rules of procedure are not applicable.[34] Arguably, as a habeas corpus proceeding is not criminal, and is a collateral review as opposed to a trial, proof beyond a reasonable doubt is not required.[35] Instead, the judicial inquiry may be whether it was reasonably possible for the jury to find guilt beyond a reasonable doubt.[36]

The potential dangers of such a limited inquiry, however, are evident in *Freeman*. The defendant was easily connected to the robbery, and therefore to the automobile, but possession of the shotgun did not necessarily follow from a mere connection to the automobile. No fingerprints were found on the gun, the car which contained the gun was neither owned nor rented by Freeman, none of the other guns located in the car appears to have been connected to Freeman, and three or four men had last been in the car. The only evidence which linked Freeman to possession of the gun was the circumstantial evidence that he was one of the passengers in the car. This did not necessarily prove possession,[37] and illustrates the limits to which the

---

[32] *See* note 36 *infra*.

[33] 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 21, at 21 (1969).

[34] *Id.*

[35] *Cf.* United States v. Stirone, 311 F.2d 277, 284-85 (3d Cir. 1962), *cert. denied*, 372 U.S. 935 (1963) (on appeal from conviction, appellate court need not be convinced of guilt beyond a reasonable doubt). *See also* 1 F. WHARTON, CRIMINAL EVIDENCE § 11, at 16 (13th ed. 1972).

[36] *See* note 35 *supra*. The effect of the Supreme Court's recent decision in Mullaney v. Wilbur, 421 U.S. 684 (1975), upon the standards of proof required at the appellate level or at a habeas corpus proceeding is not completely discernible. While *Mullaney* held that due process requires proof by the prosecution beyond a reasonable doubt, *see* text accompanying notes 28-31 *supra*, that case dealt with a criminal trial and did not expressly indicate whether the rule would or should extend to other proceedings. Although *Mullaney* reached the Court on federal habeas corpus, the issue was the standard of proof to be employed at trial, and not whether the evidence met that standard. *See* 421 U.S. at 688-90. Therefore, *Mullaney* possibly leaves untouched the "some evidence" of guilt standard employed by federal courts in habeas corpus proceedings. *See* text accompanying notes 21-26 *supra*. For a discussion advocating the desirability of extending the *Mullaney* holding to areas outside the criminal context, see Comment, *Unburdening The Criminal Defendant*, Mullaney v. Wilbur *And The Reasonable Doubt Standard*, 11 HARV. C.R.-C.L.L. REV. 390, 424-30 (1976).

[37] The Virginia statutes do not define possession, but make unlawful possession of a sawed-off shotgun a felony when used for offensive or aggressive purposes. VA. CODE ANN. § 18.2-301 (Repl. Vol. 1975). Criminal statutes usually define possession as requiring conscious possession, necessitating a knowledge of the reception of the object, or retention subsequent to awareness of control over the object. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 25, at 182 (1972). Furthermore, the Model Penal Code defines possession as that condition occurring "[i]f the possessor knowingly procured or

"any evidence at all" standard may be stretched. If possession were not sufficiently proved, there might have been a due process violation, as "some evidence must be found on all essential elements of the charge."[38] In the *Freeman* dissent, Judge Winter perceived this flaw and saw no evidence proving Freeman's control over the trunk of the car, nor his knowledge or possible knowledge of what the trunk contained.[39] Lacking such proof, the dissent found no evidentiary basis to support Freeman's possession conviction.[40]

Freeman may indicate the Fourth Circuit's willingness to extend the "any evidence at all" standard to its ultimate limits, and if so, the court is unlikely to be lenient with future habeas corpus petitioners. Whether the standard of proof on habeas corpus review should be "proof beyond a reasonable doubt" is left to future interpretations and extensions of *Mullaney*. Likewise, the correctness of the Fourth Circuit's standard, as opposed to a test determining if the record is "totally devoid of evidence," or a test similar thereto, has been left for determination in subsequent cases.[41] The use of the "any evidence at all" standard in *Freeman* demonstrated the standard's breadth, and capacity to encompass, whether rightly or wrongly, almost every factual situation.

B. Witnesses.

Court-Called Witnesses

Judicial power, while not creating a duty to question witnesses, implies a power to investigate as well as to decide.[1] The power to investigate naturally includes a power to call witnesses.[2] Accordingly,

---

received the thing possessed or was aware of his control thereof for a sufficient period to have been able to determinate his possession." MODEL PENAL CODE § 2.01(4) (Proposed Official Draft, 1962). The *Freeman* facts do not mention that Freeman knowingly procured or received the shotgun, or that he was aware of any control he might have had over it. *See* text accompanying notes 39-40 *infra*.

[38] United States *ex rel.* DeMoss v. Pennsylvania, 316 F.2d 841 (3d Cir.), *cert. denied*, 375 U.S. 859 (1963). This habeas corpus case was decided prior to Mullaney v. Wilbur, 421 U.S. 684 (1975), and presumably the "some evidence" language contained in its holding was not affected by the subsequent *Mullaney* decision. *See* note 36 *supra*.

[39] No. 73-2247, slip op. at 7 (4th Cir. Feb. 9, 1976) (Winter, J., dissenting).

[40] *Id.*

[41] Apparently, only one other circuit has adopted the "any evidence at all" standard. DeHam v. Decker, 361 F.2d 477 (5th Cir. 1966).

---

[1] 9 J. WIGMORE, EVIDENCE § 2484 (3d ed. 1940).

[2] *Id.*

trial judges may call witnesses not called by the parties.[3] Allowing a trial judge to call a witness may help the jury in its fact-finding process.[4] The Fourth Circuit considered the propriety of a court-called witness in *United States v. Karnes*.[5]

The trial court called and questioned two witnesses in *Karnes* after the government informed the court that it would not call the witness.[6] On appeal, the government conceded in oral argument that it had no case against Karnes without the testimony of the court-called witness.[7] The Fourth Circuit, while acknowledging that the use of court witnesses is within the court's discretion,[8] questioned whether that discretion was properly exercised in *Karnes*. Generally, in using discretion to call and question court witnesses, the trial judge should be mindful of his powerful impact on the jury, must remain dispassionate and fair,[9] and may not become an advocate for either party.[10] The Fourth Circuit had previously recognized the privilege and discretion of the trial judge to call witnesses,[11] but the court likewise subjected that privilege to "reasonable limitations."[12]

The Fourth Circuit divided in deciding *Karnes*. Two opinions found an abuse of discretion, while Judge Russell, dissenting, found no error in the trial court's actions.[13] The majority opinion held that the trial judge had abused his discretion, basing that decision on two factors. First, the government admitted that it had no case without

---

[3] Johnson v. United States, 333 U.S. 46, 54 (1948) (Frankfurter, J., dissenting), *citing* Glasser v. United States, 315 U.S. 60, 82 (1942); United States v. Browne, 313 F.2d 197, 199 (2d Cir. 1963). This power has recently been codified in the Federal Rules of Evidence. FED. R. EVID. 614 provides that "(a) [t]he court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. (b) The court may interrogate witnesses, whether called by itself or by a party."

[4] *Cf.* United States v. Trapnell, 512 F.2d 10 (9th Cir. 1975) (the court's questioning of a witness may help clarify and develop facts for the jury); United States v. Barbour, 420 F.2d 1319 (D.C. Cir. 1969) (court's questioning of a witness may help clear up ambiguous testimony).

[5] 531 F.2d 214 (4th Cir. 1976).

[6] The government did not want to call the witnesses in *Karnes*, as it could not vouch for their candor. *Id.* at 216.

[7] *Id.*

[8] FED. R. EVID. 614. The Federal Rules of Evidence, however, were not in effect at the time of Karnes' trial.

[9] *E.g.*, United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975).

[10] *E.g.*, United States v. Carter, 528 F.2d 844 (8th Cir. 1975).

[11] United States v. Cassiagnol, 420 F.2d 868, 879 (4th Cir.), *cert. denied*, 397 U.S. 1044 (1970).

[12] *Id.*

[13] 531 F.2d at 219 (Russell, J., dissenting).

the court's witnesses.[14] That the witnesses were so crucial to the prosecution indicated that the trial court destroyed the impartiality required by the due process clause.[15] Second, when court witnesses are utilized, the court should afterwards comment to the jury that these witnesses' testimony should be accorded no greater weight than any other testimony.[16] This, however, was not done at Karnes' trial.[17] For these reasons the Fourth Circuit, finding an abuse of discretion by the trial court, reversed Karnes' conviction and granted a new trial.

While the above factors were the basis for the court's holding of abuse of discretion, Judge Widener, concurring, felt the decision should not be based on the "already overworked" due process clause.[18] Instead, when the trial judge destroys his impartiality at trial, it is a procedural error, and not a violation of the due process clause.[19] Apparently, Judge Widener preferred this rationale to relieve the court from considering the constitutional questions involved.[20] Dissenting, Judge Russell stated that the importance of the witness' testimony should not be determinative.[21] Instead, Judge Russell felt the court has a duty to call witnesses whose testimony

---

[14] *Id.* at 216.

[15] *Id.* at 216-17. The due process clause provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourth Circuit found no abuse in the questions asked the witnesses by the court, but found only that the calling of witnesses so essential to the prosecution, whom the prosecution declined to call, was an abuse of discretion. 531 F.2d at 216 n.3.

[16] United States v. Vosper, 493 F.2d 433, 436 (5th Cir. 1974) (judge, after questioning witness, must make appropriate comment to the jury in regard to weight given to witness' testimony). This failure to comment appears to be per se reversible error in cases where the court has questioned the witness, or has summarized and commented on the evidence for the jury. Quercia v. United States, 289 U.S. 466, 469 (1933); Kyle v. United States, 402 F.2d 443, 444-45 (5th Cir. 1968).

[17] 531 F.2d at 217. Further authority, not mentioned by the Fourth Circuit in *Karnes*, is found in United States v. Green, 429 F.2d 754 (D.C. Cir. 1970). The *Green* court held that the power to call witnesses should be sparingly used, and abstention is wiser when the questioning of such witnesses is designed to obtain testimony favorable to the prosecution. *Id.* at 760.

[18] 531 F.2d at 218 (Widener, J., concurring).

[19] *Id.*

[20] Judge Widener cited Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), in support of his wish to base the reversal on a federal criminal procedure error. 531 F.2d at 218 n.2. *Ashwander* enunciated the principle of avoiding constitutional questions if the record presented another ground upon which the case could be decided. One problem with Judge Widener's opinion, however, is the vague allusion to a criminal procedure error without any specific reference to any particular rule violation. One supposition may be that this kind of error falls under the plain error rule, FED. R. CRIM. P. 52(b).

[21] 531 F.2d at 219.

would help in the proper determination of the case, and therefore went further than the majority in construing an affirmative duty of the judge to call important witnesses, no matter which side the witness assists.[22]

Karnes illustrates the variety of viewpoints in the Fourth Circuit on the propriety of court-called witnesses, and of the duty of the trial judge in calling such witnesses. No definite standard can be gleaned from *Karnes*, and it is evident that the makeup of the court may be determinative in cases where the question involves an alleged abuse in the calling of a witness.[23] However, *Karnes* does indicate that the Fourth Circuit disfavors court-called witnesses if those witnesses are essential to a party's case.

Recantation of Testimony

The proper procedure for handling post-trial recantations of witnesses was decided by the Fourth Circuit in *United States v. Wallace*.[24] The procedure employed in this situation is not yet uniform among the circuits.[25] The dispute centers around the effect the witness' testimony may have had on the jurors. One test considers whether the jury might have decided differently without the false testimony, while the other test requires that the jury probably would

---

[22] The dissent asserted:

> when, as here, there are persons whose testimony, if believed by the jury, could either lead to the defendant's conviction or could go far to absolve the defendant, the trial judge has both a right and a duty, if the Government refused to call the persons, to have them sworn as court witnesses.

Id. This passage seems to imply that not only does the judge have a right to call witnesses, he has an affirmative duty to call them in certain situations. This duty derives from the trial judge's responsibility as both a guardian of defendant's rights, and as a protector of society and the public. *Id.* at 219-20. If this implication is correct, Judge Russell may envision the trial judge in a more active role than do the Federal Rules of Evidence, which state only that trial judges may call witnesses. *See* note 3 *supra*.

[23] In cases where the abuse involves the court's questioning of a witness, the Fourth Circuit has held that leading questions violate the judge's required impartiality when coupled with frequent and disturbing interruptions of defense counsel's presentation. United States v. Cassiagnol, 420 F.2d 868, 879 (4th Cir.), *cert. denied*, 397 U.S. 1044 (1970). The Fourth Circuit was unanimous in this holding, thereby giving a clearer indication as to future Fourth Circuit responses to questioning of court witness cases. No such indication is given by *Karnes* for cases involving the calling of an essential witness.

[24] 528 F.2d 863 (4th Cir. 1976).

[25] *See* text accompanying notes 32-38 *infra*.

have decided differently.[26] In *Wallace*, the Fourth Circuit determined that the test requiring only that the jury might have decided differently was the proper standard.

Wallace was convicted for possession of a sawed-off shotgun,[27] found in the back seat of his car. At trial his brother testified that Wallace had demonstrated knowledge that the gun was in the car. This was the only testimony showing Wallace's knowledge of the location of the shotgun. After completion of the trial, Wallace's brother recanted, and stated in an affidavit that his original testimony was false. The district court denied Wallace's motion for a new trial[28] on the basis that the court's function was not to determine which of the witness' stories may be true,[29] and held that its function was only to determine whether prosecutorial misconduct had contributed to or caused the testimony at trial.[30] Since the district court found no such misconduct, it denied the motion for a new trial.[31]

On appeal, the Fourth Circuit determined that the district court's inquiry was incorrect, and joined the Fifth,[32] Sixth,[33] and Seventh Circuits in applying what is known as the "*Larrison* test" to witness recantations.[34] Under that test, the court hearing the new trial motion must make a three-pronged inquiry to decide if a new trial should be granted. First, the court must be reasonably satisfied that the testimony given by a material witness is false. The court must also ascertain that without the testimony the jury might have reached a different conclusion. Finally, the court must determine that the party seeking the new trial was taken by surprise by the false testimony, and did not know of its falsity until after trial.[35] If these three criteria exist, then a new trial should be awarded.[36]

---

[26] *See* text accompanying notes 35 and 37 *infra*.

[27] Such possession was found to violate 26 U.S.C. § 5861 (d) (1970) (unlawful for one to possess a firearm not registered to him in the National Firearms Registration and Transfer Record), 26 U.S.C. § 5871 (1970) (violation of the registration provision carries fine of $10,000 or less, and 10-year imprisonment or less, or both), and 18 U.S.C. § 2 (1970) (one who commits, aids, or abets, or willfully causes an act to be done which is an offense against the United States is punishable as a principle).

[28] 528 F.2d at 866.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Newman v. United States, 238 F.2d 861, 862 n.4 (5th Cir. 1956).

[33] Gordon v. United States, 178 F.2d 896, 900 (6th Cir. 1949), *cert. denied*, 339 U.S. 935 (1950).

[34] Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928); *accord*, United States v. Becker, 466 F.2d 886, 889 (7th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

[35] Larrison v. United States, 24 F.2d at 87-88.

[36] *Id.*

Conversely, the Second Circuit has employed a standard called the "*Berry* test,"[37] which required a new trial only when the recantation is so material that it would probably produce a different result in a new trial. That court, however, applies the "*Berry* test" only if there has been no prosecutorial misconduct.[38]

Choosing between these two standards, the Fourth Circuit in *Wallace* followed the *Larrison* test and applied it to a case involving no prosecutorial misconduct.[39] As the recanting witness gave proof at trial of an essential element of the crime, he was a material witness.[40] The "majority rule" should then have been employed in considering Wallace's motion for a new trial.[41] Since the district court failed to consider any of the three necessary inquiries, the Fourth Circuit remanded the case to the district court for reconsideration in light of the *Larrison* standard.[42]

Therefore, the *Larrison* test is apparently to be applied in the Fourth Circuit to all motions for a new trial after a material witness recants.[43] The Fourth Circuit has repudiated the Second Circuit's interpretation of *Larrison*, since the *Larrison* test was applied in *Wallace* to a case not involving police or prosecutorial misconduct. As a result, in the Fourth Circuit the court hearing the new trial

---

[37] Berry v. State, 10 Ga. 511, 527 (1851).

[38] United States v. DeSapio, 435 F.2d 272, 286 n.14 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). If prosecutorial misconduct is shown, then the Second Circuit applies the "*Larrison* test." *Id. Accord*, United States *ex rel.* Sostre v. Festa, 513 F.2d 1313, 1317 (2d Cir.), *cert. denied*, 423 U.S. 841 (1975) (*Larrison* test applied as there was a possibility of prosecutorial misconduct because a police informer recanted); United States *ex rel.* Rice v. Vincent, 491 F.2d 1326, 1331-32 (2d Cir.), *cert. denied*, 419 U.S. 880 (1974) (extended *Larrison* to police or prosecutorial misconduct, and applied *Larrison* test when police coercion was involved in witness' testimony). The reasoning of the Second Circuit in using prosecutorial misconduct as the distinguishing factor is based on the fact that *Larrison* involved a form of prosecutorial misconduct. In *Larrison* the false testimony was given at the instance of Post Office inspectors. 24 F.2d at 84-85 n.1. Because of this police/prosecutorial misconduct, the Second Circuit reasoned that the already existing standard of *Berry* should not be used. Therefore the *Larrison* test, which is easier to meet, should be used only in cases involving prosecutorial misconduct. United States v. DeSapio, 435 F.2d 272, 286 n.14. (2d Cir. 1970).

[39] *Wallace* therefore holds that in the Fourth Circuit, in contrast to the Second Circuit, *see* text accompanying note 38 *supra*, prosecutorial misconduct is not determinative of whether the *Larrison* test is applicable. *See* 528 F.2d at 866 n.3. Instead, the *Larrison* test applies to all recantation cases.

[40] 528 F.2d at 866 n.3. Wallace's brother "was the only witness who testified that defendant had knowledge that the gun was in the back of the car—proof of an essential element of the crime." *Id.*

[41] *Id.* at 866.

[42] *Id.*

[43] *Id.*

motion must, among other considerations, determine if the jury *might* have reached a different conclusion without the false testimony.

Prosecutorial Misconduct

In *Boone v. Paderick*,[44] the Fourth Circuit considered the effects of a prosecutor's failure to disclose all material evidence. A detective promised favorable treatment in future criminal proceedings to a prosecution witness, Hargrove, if he would cooperate and testify against Boone, his accomplice in a burglary. The detective promised to use his influence on the Commonwealth's Attorney to forestall prosecution of Hargrove.[45] Hargrove cooperated, and proved to be the government's most important witness.[46] The defense attorney was never informed of the promise, and while suspecting the bargain at trial, he was unable to elicit it on cross-examination. Hargrove denied any promises of leniency, and in his closing argument the prosecutor implied that Hargrove would be punished. Boone was subsequently convicted,[47] and he petitioned for a writ of habeas corpus.[48] During the habeas proceedings, the prosecutor could not remember if he was ever told of the detective's promise, although the detective testified that the prosecutor had been told. The district court denied the writ,[49] and on appeal the Fourth Circuit reversed, finding a denial of due process.

The *Boone* decision was based on *Giglio v. United States*.[50] In *Giglio*, the Supreme Court held that the prosecutor has a duty to present all material evidence,[51] and if that duty is not fulfilled there

---

[44] 541 F.2d 447 (4th Cir. 1976).

[45] The Fourth Circuit found that the tentative nature of the promise increased its significance. *Id.* at 451. The promise may be interpreted by the witness as contingent on the quality of his testimony, thus making the witness more conscious of pleasing the promisor with the testimony. *Id.*

[46] The *Boone* prosecutor told a newspaper reporter that without Hargrove's testimony Boone would not have been convicted. *Id.* at 452 n.8.

[47] *Id.* at 448.

[48] 28 U.S.C. § 2254 (1970).

[49] 541 F.2d at 448.

[50] 405 U.S. 150 (1972).

[51] *Id.* Material evidence is evidence offered to prove a proposition of a matter in issue or probative of a matter in issue. *See* C. MCCORMICK, EVIDENCE § 185 (2d ed. 1972). For a discussion on the prosecutor's duty to disclose, and the problem of determining materiality, see Comment, *Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure*, 59 IOWA L. REV. 433 (1973). *See also* Comment, *Prosecutor's Constitutional Duty of Disclosure—Developing Standards Under* Brady v. Maryland, 33 U. PITT. L. REV. 785 (1972). The Supreme Court's recent decision in

is a violation of due process, irrespective of the prosecutor's good faith.[52] Likewise, this duty of the prosecutor entails correcting false evidence, and disclosing evidence pertaining to credibility, if a certain witness' credibility is crucial to the determination of guilt.[53] In its determination, the Fourth Circuit had to decide if *Giglio* was applicable, and if so, whether a new trial was required.

For *Giglio* to apply, there must be a reasonable likelihood that the jury's determination was affected by false evidence, or by the nondisclosure of evidence affecting credibility, and that such evidence was material.[54] In *Boone*, the Fourth Circuit found that Hargrove's general denial of any prosecutorial agreements and the focus of the prosecutor on Hargrove's altruistic motives established false evidence.[55] The jury thus received a false impression of Hargrove's credibility, and its judgment was possibly affected.[56] *Giglio* had been found inapplicable in the district court as the promise was made, without authority, by the police and not by the prosecutor.[57] The Fourth Circuit disagreed, however, holding that material undisclosed evidence held by the police is attributable to the prosecutor, as the police are considered part of the prosecution.[58] The *Boone* court further held that even if the detective were found to lack authority to bind the government in an agreement, *Giglio* would still apply on either one of two theories. First, although the prosecutor did not remember being told of the promise to Hargrove, he did not deny it.[59] Since knowledge of a completely uncommunicated promise was im-

---

United States v. Agurs, 96 S. Ct. 2392 (1976), may have somewhat alleviated the problem of determining materiality in prosecutorial non-disclosure cases. *See* text accompanying notes 64-66 *infra*.

[52] 405 U.S. at 153-54.

[53] *Id.* at 153-55.

[54] *Id.*

[55] 541 F.2d at 450.

[56] *Id.* at 453.

[57] In *Giglio*, the nondisclosure was between the trial prosecutor and an assistant prosecutor. The Court imputed knowledge to the trial prosecutor because the prosecutor's office is a single entity and spokesman for the government, and so a promise made by one attorney from the office is attributable to the whole office. 405 U.S. at 154. The district court in *Boone* did not find that the detective-prosecutor relationship created the same situation, and would not attribute the detective's promise to the prosecutor. 541 F.2d at 450.

[58] *Id.* at 450-51. *See* United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1971) (tape held by Bureau of Narcotics and Dangerous Drugs, not by U.S. Attorney's Office, did not render tape any less discoverable); Barber v. Warden, 331 F.2d 842, 846 (4th Cir. 1964) (makes no difference if the withholding of undisclosed material evidence is by police officials instead of prosecutor).

[59] *See* text accompanying notes 45-49 *supra*.

puted to all members of the prosecutor's office in *Giglio*, such knowledge is logically imputed when actual communication occurred between office personnel.[60] Second, the *Giglio* Court had held that the jury was entitled to know of any understandings regarding future prosecution of a witness, as such information pertains to credibility.[61] In *Boone*, the Fourth Circuit seems to have read that part of *Giglio's* holding as an alternative basis for applying *Giglio* to cases where no authority on the part of the promisor exists.[62]

In determining whether a new trial was appropriate, the Fourth Circuit had to consider the materiality of the evidence withheld.[63] To determine materiality, the test recently announced by the Supreme Court in *United States v. Agurs*[64] must be met. Under the *Agurs* test, if the omitted evidence would have created a reasonable doubt in juror's minds, then due process has been violated.[65] Furthermore, the omission is viewed in the context of the record as a whole, and if the trial results in a questionable verdict, non-disclosed evidence of seemingly minor importance might suffice to create a reasonable doubt in a juror's mind.[66] In Boone, three witnesses, of which Hargrove was the most important,[67] implicated Boone in the burglary. All the physical evidence received at trial was linked to Boone by Hargrove's testimony. No fingerprints were discovered, and the victim could make no identification. For the defense, alibi witnesses testified as to Boone's whereabouts during the robbery.[68] The evidence as a whole produced a close case, and the question was whether there was a reasonable likelihood that a juror's judgment would be affected if the undisclosed evidence were made known.[69] On these facts the Fourth Circuit held that the non-disclosed evidence was material. Since Hargrove was the only witness who observed the robbery, without his testimony the evidence was entirely circumstantial, and a reasonable likelihood existed that the jurors would have reached a different verdict.[70] Therefore, the Fourth Circuit reversed the district

---

[60] 541 F.2d at 451. The Fourth Circuit had previously decided that the police are considered part of the prosecutor's office. *See* text accompanying note 58 *supra*.

[61] Giglio v. United States, 405 U.S. 150, 154-55 (1972).

[62] *See* 541 F.2d at 451.

[63] Giglio v. United States, 405 U.S. 150, 154 (1972).

[64] 96 S. Ct. 2392 (1976).

[65] *Id.* at 2401-02.

[66] *Id.* at 2402.

[67] *See* note 46 *supra*.

[68] 541 F.2d at 453.

[69] *See* text accompanying notes 65-66 *supra*.

[70] 541 F.2d at 453.

court's denial of the writ of habeas corpus, and ordered issuance of the writ subject to retrial.

Boone illustrates the variety of ways in which the Fourth Circuit can apply *Giglio*. Where agreements concerning future prosecution are made with government witnesses, it will be difficult for a prosecutor to claim lack of knowledge or lack of authority after *Boone*.[71] At its broadest, *Boone* may be read as holding that a due process violation occurs whenever evidence pertaining to a government witness' credibility is not disclosed, so long as any agreement or understanding about future prosecutions of that witness has preceded his testimony.[72]

Impeachment of Own Witness

The Fourth Circuit considered another witness-credibility problem in *United States v. Morlang*,[73] but instead of a situation where counsel withheld evidence pertinent to a witness' credibility, in *Morlang* the attorney attempted to impeach and discredit his own witness.[74] The rule forbidding the impeaching of one's own witness is well established.[75] Three notions traditionally supplied the bases for this rule: that a party was bound by his witness' statements,[76] that the party guarantees his witness' general credibility,[77] and that the party should not be able to coerce his witness.[78] The Fourth Circuit has stated its disregard for the rule, relying upon the then proposed Federal Rules of Evidence as support.[79] Although the Fourth Circuit has previously acknowledged that in certain instances allowing coun-

---

[71] *See* text accompanying notes 57-62 *supra*.

[72] *See* text accompanying notes 61-62 *supra*.

[73] 531 F.2d 183 (4th Cir. 1975). For further discussion of *Morlang* see *Criminal Procedure*, Section E, notes 1-31, *infra*.

[74] 531 F.2d at 188.

[75] *See* 3A J. WIGMORE, EVIDENCE § 896, at 659-60 (Chadbourn rev. 1970).

[76] *Id.* at § 897.

[77] *Id.* at § 898.

[78] *Id.* at § 899. The rule regarding impeachment of one's own witness, however, has been discredited by scholars and case law. *See* United States v. Freeman, 302 F.2d 347 (2d Cir. 1962), *cert. denied*, 375 U.S. 958 (1963); Johnson v. Baltimore & O.R.R., 208 F.2d 633 (3d Cir. 1953), *cert. denied*, 347 U.S. 943 (1954); C. MCCORMICK, EVIDENCE § 38, at 75 (2d ed. 1972); 3A J. WIGMORE, EVIDENCE § 899, at 664-65 (Chadbourn rev. 1970).

[79] United States v. Lineberger, 444 F.2d 122 (4th Cir. 1971) (per curiam), *cert. denied*, 404 U.S. 1060 (1972). The proposed Federal Rule of Evidence cited in *Lineberger*, Rule 607, became effective with no change in language. The rule states that "[t]he credibility of a witness may be attacked by any party, including the party calling him." FED. R. EVID. § 607.

sel to impeach his own witness is desirable,[80] the *Morlang* court substantially proscribed this practice by holding that such impeachment is not allowable solely for the purpose of introducing inadmissible hearsay evidence.

Morlang was convicted of conspiring to bribe a Federal Housing Administration Director in order to gain FHA approval of a housing development. Indicted with Morlang was Wilmoth, an insurance agent authorized to make long-term loans. At trial, the government called Wilmoth as its own witness, realizing that Wilmoth's testimony would tend to exonerate Morlang.[81] During Wilmoth's examination the government planned to obtain a denial that Wilmoth ever had a conversation with Crist, a fellow inmate, in which Wilmoth implicated Morlang. The prosecution then called Crist to impeach Wilmoth. Afterwards, the prosecution admitted that it was not surprised by Wilmoth's testimony.[82] In calling Wilmoth, the government's strategy was to impeach his testimony, and thereby get before the jury an out-of-court statement which otherwise would have been inadmissible as hearsay.[83]

While courts usually allow impeachment of one's own witness where the witness surprises counsel with damaging testimony,[84] this was plainly not the situation in *Morlang*, where the prosecutor knew before he called the witness that the witness would present testimony adverse to his cause. The prosecution's sole purpose was to get otherwise inadmissible hearsay statements to the jury through the impeachment process.[85] The courts of appeals uniformly reject this

---

[80] United States v. Lineberger, 444 F.2d 122 (4th Cir. 1971), *cert. denied*, 404 U.S. 1060 (1972).

[81] 531 F.2d at 188.

[82] *Id.*

[83] Because the trial occurred before the Federal Rules of Evidence went into effect in July, 1975, the Fourth Circuit relied on case law. However, the same kind of analysis is arguably still applicable in *Morlang*, as the out-of-court statement there was not a statement given previously under oath nor subject to cross-examination. 531 F.2d at 188. Hence, under Rule 801 (d)(1) such statement is still hearsay and usable only for impeachment purposes. *See* Comment, *Prior Inconsistent Statements and the Rule Against Impeaching of One's Own Witness: The Proposed Federal Rules*, 52 TEX. L. REV. 1383 (1974). Possibly, however, the statement might still come under another exception to the hearsay rule, expecially under the catch-all provision of FED. R. EVID. 803(24). *See also* Martin v. United States, 528 F.2d 1157, 1159 (4th Cir. 1975) (hearsay evidence, consisting of prior inconsistent statements not made while under oath, may be used for impeachment purposes only, not as substantive evidence).

[84] *See, e.g.*, United States v. Allsup, 485 F.2d 287 (8th Cir. 1973); Troublefield v. United States, 372 F.2d 912 (D.C. Cir. 1966).

[85] *See* text accompanying notes 81-83 *supra*.