Washington and Lee Law Review

Volume 37 | Issue 2 Article 14

Spring 3-1-1980

IX. Criminal Procedure

IX. CRIMINAL PROCEDURE

A. *Search and Seizure*

The fourth amendment to the Constitution protects this country's inhabitants from unreasonable searches and seizures.[1] The framers designed the amendment to guard against intrusion upon an individual's reasonable expectation of privacy.[2] To come within the fourth amendment, police action must constitute a "search and seizure." For example, no breach of fourth amendment protection occurs when law enforcement officials routinely inspect[3] or inventory vehicles in their custody,[4] seize abandoned property,[5] or when welfare officials conduct home visits of recipients.[6] Similarly, no illegal search or seizure occurs when law enforcement officials examine an object in an open field, even though the field is privately owned.[7] Additionally, if a search and seizure does take place, fourth amendment constraints do not apply unless government officials are involved in the action.[8]

Warrantless searches and seizures are *per se* unreasonable unless made pursuant to consent or within certain narrowly drawn exceptions.[9]

---

[1] U.S. CONST. amend. IV provides: "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *See generally* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937).

[2] A person has a reasonable expectation of privacy if he intends to keep his effects confidential. *See* Katz v. United States, 389 U.S. 347, 352-53 (1967). The constitutionality of a search and seizure does not turn upon whether officials committed a trespass in order to seize evidence. *Id.* at 353; Note, *From Private Places to Personal Privacy: A Post* Katz *Study of Fourth Amendment Protection,* 43 N.Y.U.L. REV. 968, 976-77 (1968). The test, clarified by Justice Harlan, is whether the victim of the search had an actual and reasonable expectation of privacy. 389 U.S. at 361 (Harlan, J., concurring); *see* 1 W. LAFAVE, SEARCH AND SEIZURE § 2.1, at 227-33 (1978) [hereinafter cited as W. LAFAVE]. *See generally* O'Brien, *Reasonable Expectations of Privacy: Principles and Policies of Fourth Amendment-Protected Privacy,* 13 NEW ENG. L. REV. 663 (1978); *see also* United States v. White, 401 U.S. 745, 786 (Harlan, J., dissenting).

[3] *See* Cady v. Dombrowski, 413 U.S. 433, 442, 448 (1973); Harris v. United States, 390 U.S. 234, 236 (1968); Cooper v. California, 386 U.S. 58, 61 (1967).

[4] *See* South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976). *See also* note 90 *infra.*

[5] *See* Abel v. United States, 362 U.S. 217, 240-41 (1960).

[6] *See* Wyman v. James, 400 U.S. 309, 317-18 (1971).

[7] *See* Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 864-65 (1974); Hester v. United States, 265 U.S. 57, 58-59 (1924).

[8] *See* Burdeau v. McDowell, 256 U.S. 465, 475-76 (1921) (fourth amendment inapplicable to search and seizure by private individual since not police action).

[9] Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971). *See generally* Bloodworth, *Where Search and Seizure is Today—An Outline of Fourth Amendment U.S. Supreme Court Decisions,* 40 ALA. LAW 444 (1978). The fourth amendment warrant requirement, *see* note 1 *supra,* helps assure that police intrusions are reasonable. A warrant, however, does not automatically make a search reasonable. While the fourth amendment dictates a probable cause standard for the issuance of warrants, *see* note 1 *supra,* it does not require police to obtain warrants. Thus, the applicable test is whether a search is reasonable, not whether

The presence of exigent circumstances, for example, will relieve police officers of the obligation to obtain a warrant prior to search.[10] Also, police may conduct a warrantless search of the area within a suspect's immediate control incident to a lawful arrest.[11]

Probable cause is the general standard that governs warrantless searches,[12] though in specific instances probable cause may be determined in light of other considerations. The legality of a search is strictly determined with respect to a dwelling, while the determination in the case of an automobile is made with flexibility.[13] A lesser standard than probable cause may in some cases be constitutionally permissible. Thus, police officers may "stop and frisk" a person whom they reasonably suspect to be armed, dangerous, and planning criminal activity.[14] This reasonable suspicion standard also applies to immigration[15] and customs[16] searches conducted away from the border. No probable cause or even reasonable suspicion is required to undertake customs searches at the actual border[17] or

officers can procure a search warrant. *See* United States v. Rabinowitz, 339 U.S. 56, 65-66 (1950).

[10] Exigent circumstances are present when there is an emergency situation and the opportunity to search is fleeting. *See* Terry v. Ohio, 392 U.S. 1, 20 (1968); McDonald v. United States, 335 U.S. 451, 454-56 (1948); Johnson v. United States, 333 U.S. 10, 15 (1948); Carroll v. United States, 267 U.S. 132, 153 (1925). *Compare* Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (search of house valid when police in hot pursuit of suspect); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (extraction of blood immediately after arrest from person charged with drunken driving permissible to prevent disappearance of evidence); Carroll v. United States, 267 U.S. at 153 (search of automobile easily removable from jurisdiction authorized) *with* Coolidge v. New Hampshire, 403 U.S. 443, 460-64 (1971) (no exigent circumstances where vehicle regularly parked on private property and defendant had no access to it after police arrived); Preston v. United States, 376 U.S. 364, 368 (1964) (search of car not incident to arrest when undertaken after suspects in custody and car impounded); Johnson v. United States, 333 U.S. at 16 n.7 (search not within "hot pursuit" doctrine where suspect not in flight and surrounded by agents before becoming aware of their presence).

[11] *See* United States v. Edwards, 415 U.S. 800, 806 (1974); Chimel v. California, 395 U.S. 752, 762-63 (1969). A search incident to arrest may be as broad as necessary to prevent the suspect from resisting or escaping. Warden v. Hayden, 387 U.S. 294, 299 (1967).

[12] *See* note 1 *supra*. Police officers may establish probable cause based on their awareness of facts and circumstances which would cause a man of prudence and caution to believe that a crime was or is being committed. Stacey v. Emery, 97 U.S. 642, 645 (1878). This reasonable belief must be based on reasonably reliable information. Brinegar v. United States, 338 U.S. 160, 175-76 (1949). The evidence upon which the officers base their belief need not be admissible at trial. Draper v. United States, 358 U.S. 307, 311 (1959); *see* Jones v. United States, 362 U.S. 257, 270-71 (1960). However, suspicion alone is insufficient to support probable cause. Agnello v. United States, 269 U.S. 20, 33 (1925).

[13] *See* Chambers v. Maroney, 399 U.S. 42, 48 (1970).

[14] Adams v. Williams, 407 U.S. 143, 147-48 (1972); Terry v. Ohio, 392 U.S. 1, 27 (1968). Reasonable suspicion exists when a man of reasonable caution would believe, under the totality of the circumstances, that police action is wise. *Id.*

[15] *See* Almeida-Sanchez v. United States, 413 U.S. 266, 268, 272-73 (1973); 8 U.S.C. §§ 1357(a)(3), (c)(1976); 8 C.F.R. § 287.1 (1979).

[16] United States v. Martinez, 481 F.2d 214, 219 (5th Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); 19 U.S.C. § 482 (1976); 19 C.F.R. §§ 162.7, .21 (1979).

[17] *See* Carroll v. United States, 267 U.S. 132, 154 (1925); Boyd v. United States, 116

searches of pervasively regulated businesses.[18]

The United States Court of Appeals for the Fourth Circuit recently decided several cases concerning exceptions to the fourth amendment warrant requirement. The Fourth Circuit reversed a lower court decision holding a third party consent search valid,[19] but upheld a warrantless automobile search[20] and a warrantless extended border search.[21] The court also rejected a fourth amendment challenge to a search because the appellants had no standing to object to the admission of the seized evidence.[22]

Third Party Consent to Search and Seizure

Third persons as well as the target of a search may consent to an otherwise illegal warrantless search by law enforcement officers.[23] Consent searches promote effective law enforcement because they help assure that innocent persons are not tried for crimes.[24] The validity of the search, regardless of the existence of probable cause, depends upon the authority of the consenter.[25] In *United States v. Block*,[26] the Fourth Circuit ruled that a third party cannot waive another's fourth amendment rights in property over which the consenter has no authority, when the victim has a legitimate expectation of privacy in the object searched.[27]

During an investigation into suspected organized drug traffic, state police received information concerning the involvement of a friend of the defendant. After securing a warrant for the friend's arrest and receiving information that the friend was visiting the defendant at the defendant's

---

U.S. 616, 623 (1886); 19 U.S.C. § 1581(a)(1976); 19 C.F.R. §§ 162.3(a)(1), .5, .6 (1979). Probable cause or reasonable suspicion is not required to search and seize mail of international origin. *See* United States v. Ramsey, 431 U.S. 606, 620-23 (1977). *But cf. Ex parte* Jackson, 96 U.S. 727, 733 (1877); 39 U.S.C. §§ 404, 3623(d)(1976)(exception to warrant requirement inapplicable to first class, domestic mail).

[18] *See* United States v. Biswell, 406 U.S. 311, 314-16 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970). A warrantless search limited in time, scope, and duration poses a minimal threat to privacy. Given the government's interest in regulated industries, a licensee is presumed to know of inspection requirements prior to entering the industry. *See* 406 U.S. at 316.

[19] United States v. Block, 590 F.2d 535 (4th Cir. 1978); *see* text accompanying notes 23-65 *infra*.

[20] United States v. Newbourn, 600 F.2d 452 (4th Cir. 1979); *see* text accompanying notes 66-103 *infra*.

[21] United States v. Bilir, 592 F.2d 735 (4th Cir. 1979); *see* text accompanying notes 104-48 *infra*.

[22] United States v. Jackson, 584 F.2d 653 (4th Cir. 1978); *see* text accompanying notes 149-96 *infra*.

[23] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973); Coolidge v. New Hampshire, 403 U.S. 443, 487-90 (1971).

[24] *See* 412 U.S. at 227-28, 231-32.

[25] *See* Comment, *Third Party Consent Searches: The Right to Exculpate*, 69 J. CRIM. L. & CRIMINOLOGY 92, 92 (1978) [hereinafter cited as *The Right to Exculpate*].

[26] 590 F.2d 535 (4th Cir. 1978).

[27] *Id.*; *see* note 2 *supra*.

mother's home, the police proceeded to Mrs. Block's home.[28] During the course of a search of the defendant's bedroom, the officers noticed a locked trunk.[29] Although the officers knew Mrs. Block had no access to the trunk,[30] they obtained her consent to search and seize any potential evidence in her son's room, including the contents of the trunk.[31] Having forced open the trunk, the officers discovered heroin.[32]

The district court admitted the seized evidence over the defendant's pretrial motion to suppress[33] and his objection at trial.[34] Following his conviction for narcotics offenses,[35] the defendant appealed, challenging the district court's admission of the heroin. He contended that his mother had no authority to consent to the search of the footlocker.[36] The Fourth Circuit reversed the conviction, holding that the district court should have granted the suppression motion.[37]

Though the court upheld Mrs. Block's authority to consent to a search of her son's room, the court of appeals concluded that her authority did not extend to the trunk.[38] The court found that Mrs. Block, who had access to all rooms of the house, could consent to a search of items in plain view within this common area.[39] The court reasoned, however, that her consent did not reach the enclosed spaces of every item in plain view. The court concluded that only the defendant, who had a reasonable expectation of privacy as to the trunk's contents, could consent to the search of the trunk.[40] Finding that the admission of the seized evidence was not harmless error beyond a reasonable doubt, the court remanded the case for a determination of the sufficiency of the remaining evidence.[41]

---

[28] 590 F.2d at 537.

[29] *Id.*

[30] *Id.* at 538.

[31] *Id.* at 537. Mrs. Block signed a consent form authorizing the officers to take potential evidence from the defendant's bedroom. Though the testimony reflected a dispute as to whether Mrs. Block signed the form before or after the search, the Fourth Circuit assumed that her consent was voluntary. *Id.* at 537 & n.1. *See also* note 50 *infra.*

[32] 590 F.2d at 537-38.

[33] *See generally* note 151 *infra.*

[34] 590 F.2d at 538-39.

[35] *Id.* at 536. Block was convicted for conspiracy to procure, sell and distribute heroin and possession of heroin with intent to distribute and dispense. 590 F.2d at 536; *see* 21 U.S.C. §§ 841(a)(1), 846 (1976).

[36] 590 F.2d at 539 & n.4.

[37] *Id.* at 540.

[38] *Id.* at 541-42.

[39] *Id.* at 541.

[40] *Id.*

[41] *Id.* at 542-44. An appellate court must reverse a lower court judgment if the evidence exclusive of that erroneously admitted was insufficient for conviction. *See* Harrington v. California, 395 U.S. 250, 254 (1969). *See also* Chapman v. California, 386 U.S. 18, 24 (1967)(tainted evidence must be harmless beyond a reasonable doubt). The test is whether the tainted evidence had a substantial impact on the minds of the jury. *See* 395 U.S. at 254; Wright v. Estelle, 572 F.2d 1071, 1072 n.2 (5th Cir. 1978)(court must decide whether defendant would have been convicted in absence of error); Bradley v. Cowan, 561 F.2d 1213, 1215 (6th Cir. 1977) (remaining evidence must prove crime). Error is not harmless if the evidence

The Fourth Circuit's decision in *Block* was neither novel nor erroneous. The Supreme Court's test for the validity of a third party's consent in *United States v. Matlock*[42] mandated reversal of the district court's decision not to suppress the heroin.[43] The *Block* decision represents an exception to the general rule that a joint occupant assumes the risk that another will consent to a search of the premises and the contents within.[44] In *Matlock*, the Supreme Court held that consent to search given by a person having common authority over the premises is binding on an absent party.[45] The Court stressed, however, that common authority does not automatically accompany the third party's property interest in the searched premises.[46] The consenting party must have mutual use of the item searched in order to allow a search by others.[47] Like the third party

---

unconstitutionally admitted is a criminal instrumentality. *E.g.*, Holloway v. Wolff, 482 F.2d 110, 112, 116 (8th Cir. 1973) (sawed-off shotgun used in robbery). Evidence related to a collateral issue, however, generally is not prejudicial. *See* United States v. Reed, 392 F.2d 865, 867 (7th Cir. 1968). Had the seized heroin been excluded in *Block*, the prosecution would have had no other direct evidence to support the possession charge. Likewise, conviction on the conspiarcy count would have depended upon the highly circumstantial testimony of two informants. 590 F.2d at 542. The harmless error rule is codified at 28 U.S.C. § 2111 (1976), and contained in FED. R. CR. P. 52(a). *See generally* Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973).

Principles of appellate review preclude a direction of acquittal when properly admitted evidence could sustain the conviction. Glasser v. United States, 315 U.S. 60, 80 (1942). Although exclusion of the heroin rendered all the remaining evidence circumstantial, the Fourth Circuit found that the remaining evidence could have supported the conviction. 590 F.2d at 543. *See also* United States v. Sherman, 421 F.2d 198, 199-200 (4th Cir.), *cert. denied*, 398 U.S. 914 (1970); United States v. Ragland, 306 F.2d 732, 734-35 (4th Cir. 1962), *cert. denied*, 371 U.S. 949 (1963).

The Fourth Circuit also found that Burks v. United States 437 U.S. 1 (1978), did not control the case. In *Burks*, the Supreme Court distinguished insufficient evidence from mere trial error to prevent abrogation of the fifth amendment double jeopardy clause. *Id.* at 14-15. Mere trial error precludes determination of guilt or innocence. *Id.* at 15. *See generally* Note, Burks v. United States: *Redrawing Lines in Double Jeopardy*, 1979 DET. COLL. L. REV. 193. In *Block*, the Government did not secure a conviction on insufficient evidence, because the jury could have found beyond a reasonable doubt that the two informants gave sufficient non-hearsay testimony to tie the defendant to the narcotics conspiracy. 590 F.2d at 543-44; *see, e.g.*, United States v. Buschman, 527 F.2d 1082, 1085 (7th Cir. 1976).

[42] 415 U.S. 164 (1974).

[43] *See* text accompanying note 47 *infra*.

[44] *See* United States v. Matlock, 415 U.S. 164, 170-71 (1974); United States v. Peterson, 524 F.2d 167, 180 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976).

[45] *Id.* at 170; *accord*, United States v. Peterson, 524 F.2d 167, 180-81 (4th Cir. 1975). The *Matlock* Court upheld a search of the closet in the bedroom shared by the defendant and his live-in companion pursuant to the companion's consent. 415 U.S. at 177. *See generally The Right to Exculpate, supra* note 25, at 97-101.

[46] 415 U.S. at 171 n.7; *accord*, Stoner v. California, 376 U.S. 483, 489-90 (1964) (consent by hotel clerk to search of hotel room occupied exclusively by paying guest invalid). Even when an occupant is a guest, *see* note 48 *infra*, the host's possession of the premises does not control the effectiveness of consent. Rather, the particular relationship between the host and the guest and the degree of the privacy that the guest had in the object of the search determine the validity of the host's consent. 2 W. LAFAVE, *supra* note 2, § 8.5, at 754-55.

[47] 415 U.S. at 171 n.7.

consenter in *Matlock*, Mrs. Block's common authority over the premises[48] rested on her ownership of the house and her access to the defendant's room for household purposes.[49] Consequently, her voluntary consent to the search of the defendant's room was valid.[50]

Although Mrs. Block's consent validated the room search, her authority under *Matlock* did not extend to a search of the footlocker.[51] The trunk was the exclusive property of the defendant,[52] and the record did not show that Mrs. Block had ever opened the trunk for household purposes.[53] The defendant had made clear his intention that no one else have access to the trunk by keeping it locked in his room when he was absent.[54] Thus, the defendant had a reasonable expectation of privacy in the contents of the footlocker.[55] Because the defendant did not expect his mother to allow a search of his trunk, the consent of Block's mother was insufficient to uphold the search under *Matlock*.[56]

After concluding that Mrs. Block did not have actual authority to permit the search, the Fourth Circuit held that the apparent authority doctrine could not justify the search of the trunk.[57] Consent to a search is valid under the apparent authority doctrine if officers have reason to believe that a third party has authority to consent.[58] Therefore, the effec-

---

[48] 590 F.2d at 541. The Fourth Circuit upheld the district court's finding that the defendant was a guest in his mother's house. *Id.* at 538 n.3, 541. Generally, the consent of a host to search binds a guest because the host controls the use of the premises. *See* United States v. Isom, 588 F.2d 858, 860-61 (2d Cir. 1978); United States v. Carter, 569 F.2d 801, 803 (4th Cir. 1977), *cert. denied*, 435 U.S. 973 (1978). *But see* note 46 *supra*.

[49] 590 F.2d at 538, 541.

[50] *Id.* at 541; *accord*, Woodard v. United States, 254 F.2d 312, 313 (D.C. Cir. 1958). Only voluntary third party consent is valid. *See* Bumper v. North Carolina, 391 U.S. 543, 550 (1968).

[51] 590 F.2d at 541; *see* United States v. Matlock, 415 U.S. 164, 171 & n.7 (1974).

[52] 590 F.2d at 537. Mrs. Block told the officers that she did not have a key to the trunk. *Id.*

[53] Even if Mrs. Block had used the trunk for household purposes, the *Block* court may still have reversed the lower court. In Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965), the Fourth Circuit struck down a search of a bureau drawer set aside exclusively for the use of the defendant, a guest. The court held that the homeowner, who periodically replaced the defendant's laundered clothes in his bureau, had a degree of access insufficient to amount to mutual use. *Id.* at 924-25; *accord*, Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 60-61 (1974) [hereinafter cited as Weinreb].

[54] *See* 590 F.2d at 538; *e.g.*, United States v. Wilson, 536 F.2d 883, 884-85 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976); United States v. Bussey, 507 F.2d 1096, 1097 (9th Cir. 1974). *But see* United States v. Isom, 588 F.2d 858, 861 (2d Cir. 1978) (consent valid where owner of luggage disclaimed ownership).

[55] 590 F.2d at 541.

[56] *See* 590 F.2d at 541. *See also* United States v. Matlock, 415 U.S. 164, 171 n.7 (1974); Frazier v. Cupp, 394 U.S. 731, 740 (1969).

[57] 590 F.2d at 541.

[58] *See id.* at 540; United States v. Peterson, 524 F.2d 167, 180 (4th Cir. 1975); United States v. Sells, 596 F.2d 912, 914 (7th Cir. 1974); United States v. Miles, 480 F.2d 1217, 1219 (9th Cir. 1973); White v. United States, 444 F.2d 724, 726 (10th Cir. 1971); United States v. Phifer, 400 F. Supp. 719, 733 (E.D. Pa. 1975), *aff'd*, 532 F.2d 748 (3d Cir. 1976). The Supreme Court has reserved the question of whether apparent authority of a third party is

tiveness of the consent is measured by the reasonableness of the officers' actions.[59] Applying this test, the Fourth Circuit observed that the officers should have been on notice that a trunk, in which personal effects are traditionally stored, is an item in which a person ordinarily has a reasonable expectation of privacy.[60] This fact was particularly true in *Block*, because the trunk was locked and the officers had to force it open.[61] Further, Mrs. Block had expressly disclaimed any right of access to the footlocker prior to the search.[62] Consequently, the Fourth Circuit properly concluded that the officers' reliance on the mother's consent in searching the trunk was unreasonable.[63]

The *Block* decision balanced the authority of a property owner to consent to a search of the premises over which she exercised control with the right of an occupant to maintain his privacy. Following Supreme Court precedent, the Fourth Circuit held that common authority of a third party consenter over a part of the premises may justify a warrantless search by police officers.[64] The court recognized, however, that a resident in another's home does not surrender, by his occupancy, all of his privacy rights.[65] The Fourth Circuit declined to permit a person's right to be secure in his effects to be dependent upon the discretion of a private property owner.

The Automobile Exception to the Warrant Requirement

Courts judge the lawfulness of a warrantless search more flexibly when the object of the search is an automobile rather than a dwelling.[66] While the warrant requirement still applies when a car is the search target,[67] two doctrines authorize law enforcement officials to search a vehicle without a warrant. The mobility doctrine allows officers to search an automo-

---

sufficient in itself to uphold a consent search. *See* United States v. Matlock, 415 U.S. 164, 177 n.14 (1974). However, in Stoner v. California, 376 U.S. 483 (1964), the Court refused to apply the doctrine under the facts of that case. *Id.* at 488. One commentator has asserted that the exclusionary rule's deterrent purpose would not necessitate invalidating searches where the police honestly mistake the authority of the consenter. *See* Comment, *Relevance of the Absent Party's Whereabouts in Third Party Consent Searches*, 53 B.U.L. REV. 1087, 1110 (1973). For a discussion of the inapplicability of the apparent authority doctrine to third party consent searches, see Weinreb, *supra* note 53, at 64; Comment, *Third Party Consent to Search and Seizure*, 33 U. CHI. L. REV. 797, 801-04 (1966). For a criticism of loose application of the doctrine, see Note, *Third Party Consent to Search and Seizure*, 1967 WASH. U.L.Q. 12, 32-34.

[59] *See* United States v. Peterson, 524 F.2d 167, 180 (4th Cir. 1975).

[60] 590 F.2d at 541; *accord*, United States v. Chadwick, 433 U.S. 1, 13 (1977).

[61] 590 F.2d at 537, 541.

[62] *Id.*; *see* text accompanying notes 29 & 32 *supra*.

[63] 590 F.2d at 541.

[64] *See* text accompanying notes 45-50 *supra*.

[65] *See* text accompanying notes 51-63 *supra*.

[66] *See* Chambers v. Maroney, 399 U.S. 42, 52 (1970).

[67] Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971).

bile stopped on a highway based upon probable cause.[68] The protective search doctrine authorizes police to search a vehicle in their custody if they reasonably believe that it contains a dangerous weapon.[69] The Fourth Circuit applied both of these doctrines to uphold a roadside search of a locked automobile trunk in *United States v. Newbourn.*[70]

In *Newbourn,* state police officers, acting on information they had received from a reliable informant, saw the defendants in the process of negotiating an illegal firearms sale on the side of a public highway. The officers arrested the defendants, opened the trunk of the vehicle, and found guns. At a pretrial hearing, the defendants successfully contended that the search was illegal because the officers had had the opportunity to obtain a search warrant.[71] On interlocutory appeal,[72] the Fourth Circuit reversed the district court order suppressing the seized firearms.[73]

Applying the mobility exception to the warrant requirement, the Fourth Circuit reasoned that the search was valid because the officers had probable cause to believe that the vehicle contained contraband and because exigent circumstances made obtaining a warrant impractical.[74] Probable cause arose when the officers saw the defendants on the side of the road making the illegal transaction.[75] At this time, the officers' need to apprehend the defendants and immobilize the vehicle outweighed the preference for a warrant; thus, exigent circumstances existed.[76] An earlier attempt by the officers to obtain a warrant probably would have been unsuccessful, since affidavits in support of probable cause must satisfy the fourth amendment particularity requirement.[77] To satisfy the requirement, the officers would have had to provide a magistrate with facts sufficient to enable him to determine that the informant was credible and his information reliable. Also, the officers would have had to set forth some of the underlying circumstances from which the informant concluded that the suspects were about to engage in criminal conduct.[78] Though the informant initially telephoned one of the officers regarding the proposed illegal sale a little over six hours before the search, the informant pro-

---

[68] *See* Carroll v. United States, 267 U.S. 132, 153 (1925); text accompanying notes 74-87 *infra.*

[69] *See* Cady v. Dombrowski, 413 U.S. 433, 447-48 (1973); text accompanying notes 88-98 *infra.*

[70] 600 F.2d 452 (4th Cir. 1979).

[71] *Id.* at 452-53.

[72] *See* 28 U.S.C. § 1292(b)(1976).

[73] 600 F.2d at 453.

[74] *Id.* at 457; *see* Carroll v. United States, 267 U.S. 132, 153 (1925). Exigent circumstances exist when the occupants or someone else may remove the vehicle from the jurisdiction before law enforcement officers can secure a warrant. *Id.; see* Comment, *The Warrantless Automobile Search and* Chambers v. Maroney, 28 BAYLOR L. REV. 151, 160 (1976).

[75] 600 F.2d at 456-57.

[76] *See generally* text accompanying note 10 *supra.*

[77] The fourth amendment requires that police seeking a warrant specifically describe what they intend to search and seize before a warrant shall issue. *See* note 1 *supra.*

[78] *See* Spinelli v. United States, 393 U.S. 410, 416 (1969); Aguilar v. Texas, 378 U.S. 108, 114-15 (1964).

vided insufficient general information at that time.[79] The informant communicated again with the officer on two occasions before the search, and the court observed that this additional information may have made a probable cause showing more convincing.[80] However, the court found that the exigency of the situation excused compliance with the warrant requirement even after the officers received the additional information. The officers did not have time to seek a warrant at this later time since they were preparing to pursue the suspects based upon the informant's further direction.[81] When the police encountered the defendants in the negotiating process, the informant's tip was corroborated.[82] At that moment, all components of the mobility exception were satisfied. The officers had probable cause to believe that the defendants' vehicle contained illegal firearms.[83] The defendants were standing close by with the keys, and could have quickly removed the vehicle from the jurisdiction.[84] Therefore, the officers were authorized to search the vehicle.[85] The fact that the officers did not conduct the search until after the defendants were in custody and unable to move the car was irrelevant.[86] For mobility exception

---

[79] 600 F.2d at 456-57. During the initial call, the informant said only that one of the defendants had offered to sell him some firearms and that both defendants would be coming from Ohio to West Virginia in a motor vehicle the next morning. *Id.* at 453, 457. The first prong of the particularity test, *see* text accompanying notes 77-78 *supra,* was satisfied at the time of this call. The informant was known, had received his information first hand, and had previously supplied reliable information. 600 F.2d at 453. *See generally* 1 W. LAFAVE, *supra* note 2, § 3.3, at 536; Moylan, *Hearsay and Probable Cause: An* Aguilar *and* Spinelli *Primer,* 25 MERCER L. REV. 741, 757-65 (1974). The second prong, however, was not satisfied. Traveling from Ohio to West Virginia in a motor vehicle is an innocent activity of a public nature. *See, e.g.,* United States v. Smith, 598 F.2d 936, 940 (5th Cir. 1979). The information was not sufficiently particular to demonstrate the informant's inside knowledge of the suspects' criminal scheme. *See, e.g.,* United States v. Montgomery, 554 F.2d 754, 757-58 (5th Cir.), *cert. denied,* 434 U.S. 927 (1977).

[80] 600 F.2d at 457.

[81] *Id.* A plain and ample opportunity to obtain a search warrant invalidates an otherwise lawful warrantless search. *Id.; accord, e.g.,* Niro v. United States, 388 F.2d 535, 539 (1st Cir. 1968). However, police are not required to seek a warrant at the first possible moment. Cardwell v. Lewis, 417 U.S. 583, 595 (1974). An exigency can arise at any time, and the fact that police may have obtained a warrant earlier does not preclude a later warrantless search on probable cause. *Id.* at 595-96.

[82] 600 F.2d at 457.

[83] *See id.* Probable cause arises when the accumulated details supplied by a reliable informant are found to be accurate upon observation by the officers, giving them reasonable grounds to believe that the suspect is engaged in criminal conduct. *See* Draper v. United States, 358 U.S. 307, 309, 312-13 (1959); United States v. Branch, 565 F.2d 274, 276 (4th Cir. 1977).

[84] 600 F.2d at 458. *See generally* note 74 *supra.*

[85] 600 F.2d at 458.

[86] In Chambers v. Maroney, 399 U.S. 42 (1970), the Supreme Court upheld the warrantless search of an automobile that police had stopped on a public road. The search took place at the police station after the defendants were in custody. *Id.* at 44. The Court reasoned that since the officers could have conducted a search on the roadside, they could do the same at the station. *Id.* at 52; *accord,* Texas v. White, 423 U.S. 67, 68 (1975); United States v. Chalk, 441 F.2d 1277, 1279 (4th Cir.), *cert. denied,* 404 U.S. 943 (1971). *See generally*

purposes,[87] the vehicle was mobile when the defendants stopped it on the highway.

After the suspects were arrested and the vehicle taken under police control, the Fourth Circuit held that the search was also justified as a protective inspection under the Supreme Court's decision in *Cady v. Dombrowski.*[88] In *Dombrowski,* the Court held that police, though not searching for evidence of crime, may conduct a warrantless search of a vehicle under their control if they reasonably believe the vehicle contains a gun.[89] Probable cause is not a requirement for safety inspections.[90] The policy in *Dombrowski* was to protect the public from danger in case vandals gained access to the gun.[91] The Fourth Circuit stated that the facts of *Dombrowski* and *Newbourn* were nearly identical.[92] In both cases, state police officers reasonably believed that weapons were contained in a

---

Note, *Misstating the Exigency Rule: The Supreme Court v. The Exigency Requirement in Warrantless Automobile Searches,* 28 SYRACUSE L. REV. 981 (1977). The apparent reason for allowing a warrantless search after the police have immobilized the vehicle is that ill-equipped police departments would face a tremendous burden if the fourth amendment required officers to transport impounded vehicles to some central location until they could obtain a warrant. *See* Arkansas v. Sanders, 442 U.S. 753, 765 n.14 (1979). *See also* Note, *Warrantless Searches and Seizures of Automobiles,* 87 HARV. L. REV. 835, 841-42 (1974) [hereinafter cited as *Searches and Seizures of Automobiles*].

[87] *See* Coolidge v. New Hampshire, 403 U.S. 443, 459-60 (1971); 600 F.2d at 458; Comment, *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, 741 (1975) [hereinafter cited as *The Seamless Web*]. *But see* United States v. Bradshaw, 490 F.2d 1097, 1101-04 (4th Cir. 1974) (search and seizure illegal where two agents could have guarded vehicle while third obtained warrant).

[88] 413 U.S. 433 (1973). In *Dombrowski,* the defendant, who claimed to be a Chicago policeman, was arrested for drunk driving, and his car impounded. An officer, remembering that Chicago policemen were required to carry service revolvers at all times, searched the car for the revolver pursuant to standard police department procedure. The Court upheld the admission into evidence of blood-stained clothing from the trunk. *Id.* at 435-37, 448. *See generally* Comment, *The Automobile Inventory Search and* Cady v. Dombrowski, 20 VILL. L. REV. 147, 172-79 (1974).

[89] 413 U.S. at 447-48.

[90] *See id.* at 440-42. A police safety inspection or inventory, which requires no probable cause, is distinguishable from an automobile search under the mobility exception, which requires probable cause. A search under the mobility exception is for the specific purpose of discovering criminal evidence. *See* Carroll v. United States, 267 U.S. 132, 153 (1925). On the other hand, police conducting routine inventories and safety inspections are usually not looking for evidence. Thus, for constitutional purposes, a safety inspection is not a "search." *See* South Dakota v. Opperman, 428 U.S. 364, 370 n.6 (1976)(citing cases); Cady v. Dombrowski, 413 U.S. 433, 442 (1973); *The Seamless Web, supra* note 87, at 758; *Searches and Seizures of Automobiles, supra* note 86, at 850-51. *See also* Wyman v. James, 400 U.S. 309, 317-18 (1971)(home visitation by welfare caseworker not fourth amendment search). The Fourth Circuit, however, assumes that police safety inspections and inventories of automobiles in custody are searches governed by the fourth amendment. *See* Cabbler v. Superintendent, 528 F.2d 1142, 1146 (4th Cir. 1975), *cert. denied,* 429 U.S. 817 (1976); *accord,* South Dakota v. Opperman, 428 U.S. at 377 n.1 (Powell, J., concurring), 385 n.2 (Marshall, J., dissenting).

[91] 413 U.S. at 448.

[92] 600 F.2d at 455.

locked automobile trunk under their control.[93] Further, the court reasoned that a more compelling situation existed in *Newbourn*, since the officers had probable cause rather than reasonable belief to suspect that the defendants' trunk was full of guns.[94] Recognizing that the immediate search minimized the danger to the police[95] as well as to the public, the court saw no reason to hold that the police should have delayed the search until the vehicle reached the police station.[96] Moreover, the Fourth Circuit observed that the immediate search was a potentially lesser intrusion into the defendants' diminished expectation of privacy.[97] The court justified this conclusion on the ground that the defendants could have left the scene if the officers had discovered no criminal activity.[98]

The alternative rationale in *Newbourn*[99] evidences the readiness of the Fourth Circuit, pursuant to Supreme Court precedent, to sustain searches of automobiles. Although the Supreme Court has declared that the warrant requirement is not excused when an automobile is the object of the search,[100] police in pursuit of a vehicle upon probable cause need not detour to seek a warrant.[101] Notwithstanding probable cause, police officers are authorized to search an automobile in their custody for the protection of the public[102] as well as for various other reasons.[103]

---

[93] *Id.*

[94] *Id.* Since the police in *Newbourn* had probable cause, their action was not a pretext for a general investigatory search. *Cf.* South Dakota v. Opperman, 428 U.S. 364, 376 (1976)(standard inventory not concealment of unlawful police motive).

[95] Custodians of an impounded vehicle may conduct a search for their own protection. *See* Cooper v. California, 386 U.S. 58, 61-62 (1967).

[96] 600 F.2d at 455. *Dombrowski* requires only that police exercise custody or control over the automobile prior to conducting an inventory search. *See* 413 U.S. at 442-43.

[97] 600 F.2d at 454, 455. The Supreme Court has permitted significant latitude in automobile searches on the theory that a lesser expectation of privacy exists regarding automobiles. *See* South Dakota v. Opperman, 428 U.S. 364, 368 (1976); Cardwell v. Lewis, 417 U.S. 583, 590 (1974). Recently, however, the Court has restricted searches based upon the limited privacy interest of a vehicle occupant. *See* Arkansas v. Sanders, 442 U.S. 753, 764-66 (1979); Delaware v. Prouse, 440 U.S. 648, 663 (1979). *But cf.* United States v. Young, 567 F.2d 799, 802 n.3 (8th Cir. 1977), *cert. denied*, 434 U.S. 1079 (1978)(no privacy in locked car trunk since unlike suitcase carried in car trunk).

[98] 600 F.2d at 455. The driver of a vehicle has two types of privacy expectations. He expects to keep items contained in enclosed areas of the car secret and to maintain control of his automobile. An immediate warrantless search briefly invades the driver's secrecy interest. However, impoundment of his vehicle, while preserving his secrecy interest, deprives him of control of the car and freedom of movement for a much longer period. *See Searches and Seizures of Automobiles, supra* note 86, at 840-41.

[99] *See* text accompanying notes 74-98 *supra.*

[100] *See* text accompanying note 67 *supra.*

[101] *See* text accompanying notes 74-87 *supra.*

[102] *See* text accompanying notes 88-96 *supra.*

[103] *See* South Dakota v. Opperman, 428 U.S. 364, 369, 375-76 (1976)(need to safeguard owner's property and avoid claims against police department for lost or stolen property); Harris v. United States, 390 U.S. 234, 236 (1968)(need to protect car); Cooper v. California, 386 U.S. 58, 61-62 (1967)(need to protect custodians). *See also* Adams v. Williams, 407 U.S. 143, 147-48 (1972)(police may conduct limited search of vehicle upon reasonable suspicion that occupant about to commit crime).

The Extended Border Search Doctrine

For purposes of national security, the United States may require travelers coming into the country to identify themselves and their possessions as legally entitled to entry.[104] Consequently, customs agents have expansive authority to search vessels,[105] persons, and effects[106] crossing the international borders of the United States. A customs officer need only have reasonable suspicion[107] of finding imported contraband on a person or in his baggage to conduct a search away from the actual border, or an "extended border search."[108] Circuit courts have often upheld these searches, though the Supreme Court has never decided their constitutionality.[109] In *United States v. Bilir,*[110] the Fourth Circuit applied the extended border search doctrine to affirm narcotics convictions.

In *Bilir,* agents of the Drug Enforcement Agency (DEA) received information that seaman Bilir, with the assistance of two other persons of Turkish or Greek nationality, would attempt to smuggle heroin into the United States aboard a Turkish ship.[111] DEA agents kept the suspects under virtually constant surveillance from the time the ship arrived at its first port of call until it reached Baltimore, its last port of call.[112] Surveillance continued in Baltimore, where DEA agents saw two suspects board

---

[104] *See* Carroll v. United States, 367 U.S. 132, 154 (1925)(suspects apprehended with illegal liquor in vicinity of international boundary). A sovereign has the unquestioned right to exclude persons or objects from entry. United States v. Ramsey, 431 U.S. 606, 616, 619 (1977); The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 478, 481 (1812).

[105] 19 U.S.C. § 1581(a)(1976) provides that customs officers may board vessels or stop vehicles anywhere in the country or its customs waters to examine, inspect, or search the vessel, vehicle, occupants, or contents.

[106] 19 C.F.R. § 162.6 (1979) provides that customs agents may search all persons, baggage, and merchandise entering the United States.

[107] Reasonable suspicion is a lower standard than probable cause. Probable cause requires a law enforcement officer to be aware of facts which would lead a reasonable man to believe that there is a high probability that a person or vehicle is carrying contraband. *See* Carroll v. United States, 267 U.S. 132, 162 (1925). *See also* note 12 *supra.* Reasonable suspicion, however, requires only a possibility that a person or vehicle is carrying contraband. *See* United States v. McGlone, 394 F.2d 75, 78 (4th Cir. 1968). *See generally* Note, *Fourth Amendment Applications to Searches Conducted by Immigration Officials,* 38 ALB. L. REV. 962, 970 (1974).

[108] *See* text accompanying note 16 *supra.* Since the First Congress, border searches on less than probable cause have been deemed reasonable. Boyd v. United States, 116 U.S. 616, 623 (1886). *See also* Act of July 31, 1789, § 24, ch. 5, 1 Stat. 43. The constitutionality of legislation derived from the first border search act has never been challenged. Ittig, *The Rites of Passage: Border Searches and the Fourth Amendment,* 40 TENN. L. REV. 329, 332 (1973) [hereinafter cited as Ittig]; Comment, *Border Searches and the Fourth Amendment,* 77 YALE L.J. 1007, 1008 [hereinafter cited as *Border Searches*].

[109] The Supreme Court has consistently denied certiorari to extended border search cases. *See* Ittig, *supra* note 108, at 331; Note, *From Bags to Body Cavities: The Law of Border Search,* 74 COLUM. L. REV. 53, 54 & n.6 (1974)[hereinafter cited as *Bags to Body Cavities*].

[110] 592 F.2d 735 (4th Cir. 1979).

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

[112] *Id.* at 737-38.

the ship and leave shortly thereafter with defendant Bilir. The next morning, agents stopped the suspects as they attempted to leave the city. An agent searched a suitcase carried by one of the suspects and found heroin.[113] Later, during custodial interrogation, the searched suspect admitted smuggling drugs into the country from the ship.[114] Prior to trial, the district court denied the motion of the three defendants to suppress the heroin.[115] Bilir was subsequently convicted of conspiracy to import heroin.[116] The other two defendants were convicted of possession of heroin with intent to distribute[117] and conspiracy to distribute heroin,[118] respectively. On appeal, the defendants challenged the constitutionality of the warrantless extended border search.[119]

While acknowledging the right of persons lawfully within the country to be free from unreasonable searches and seizures,[120] the *Bilir* court stated that the difficulties involved in policing the international boundary make extended border searches reasonable.[121] The Fourth Circuit adhered to a test of reasonableness under the circumstances to determine the validity of the search.[122] Factors crucial to this reasonableness determination include the elasped time since the border crossing,[123] the distance from the border,[124] and, most importantly, the manner and extent of surveillance.[125] Time and distance factors aid in establishing the critical

---

[113] *Id.* at 738.

[114] *Id.* at 738-39.

[115] *Id.* at 736. *See generally* note 151 *infra.*

[116] *See* 18 U.S.C. § 2 (1976); 21 U.S.C. §§ 952(a), 963 (1976).

[117] *See* 21 U.S.C. § 841(a) (1976).

[118] *See* 18 U.S.C. § 2 (1976); 21 U.S.C. §§ 841(a), 846 (1976).

[119] 592 F.2d at 736.

[120] *Id.* at 739 (quoting Carroll v. United States, 267 U.S. 132, 153-54 (1925)). The framers devised the fourth amendment probable cause requirement to guard against the evil of general investigatory searches within the borders. *See* Boyd v. United States, 116 U.S. 616, 625, 626-27 (1886).

[121] 592 F.2d at 740. The *Bilir* court pointed out that a search might occur some distance from the border because officers will not have seen the suspect cross the border. *Id.* The cases where officers actually observe a suspect's border crossing, follow him, and conduct a deliberately delayed search usually reveal two justifications. *Id.* at 740 n.9. Officers may find it necessary to delay the search either to buttress marginal suspicion, *see, e.g.*, United States v. Brom, 542 F.2d 281, 283 (5th Cir. 1976), or to place themselves in the position to catch confederates of the suspects. *See, e.g.*, United States v. Fogelman, 586 F.2d 337, 344 (5th Cir. 1978). *See generally* Ittig, *supra* note 108, at 339; *Border Searches, supra* note 108, at 1010.

[122] 592 F.2d at 740; *accord*, United States v. Martinez, 481 F.2d 214, 218 (5th Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); United States v. McGlone, 394 F.2d 75, 78 (4th Cir. 1968); Alexander v. United States, 362 F.2d 379, 382-83 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

[123] 592 F.2d at 740; United States v. McGlone, 394 F.2d 75, 78 (4th Cir. 1968); Thomas v. United States, 372 F.2d 252, 255 (5th Cir. 1967); Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966).

[124] 592 F.2d at 740; United States v. McGlone, 394 F.2d 75, 78 (4th Cir. 1968); Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966); Marsh v. United States, 344 F.2d 317, 324-25 (5th Cir. 1965).

[125] 592 F.2d at 741; *see* King v. United States, 348 F.2d 814, 816 (9th Cir.), *cert. denied*,

nexus between the suspect and the border.[126] Surveillance, even if not continuous, supports the belief that the condition of the search target has not changed from the time the target crossed the border to the time of the search. Consequently, surveillance allows customs agents to be reasonably certain that any contraband found had been present at the time of the border crossing.[127] The factors of time, distance, and surveillance, along with other circumstances of the particular case, must support reasonable suspicion for the search away from the actual border.[128] Applying the reasonableness test[129] to the facts of *Bilir*, the Fourth Circuit found

---

382 U.S. 926 (1965). *But see* United States v. Cusanelli, 357 F. Supp. 678, 680 (S.D. Ohio 1972), *aff'd*, 472 F.2d 1204 (6th Cir.), *cert. denied*, 412 U.S. 953 (1973). For a discussion of factors utilized in assessing the reasonableness of extended border searches, see *Bags to Body Cavities, supra* note 109, at 57-72.

[126] *See* 592 F.2d at 740; United States v. Bursey, 491 F.2d 531, 533 (5th Cir. 1974). An extended border search must occur within a reasonable time and distance from the border. *See* King v. United States, 348 F.2d 814, 816 (9th Cir. 1964). However, no circuit prescribes any specific time or distance beyond which an extended border search is *per se* unreasonable. *See* Note, *In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers*, 5 N.Y.U.J. INT'L. L. & POL. 93, 102-03 (1972) [hereinafter cited as *In Search of the Border*]. Even if a reasonable distance were prescribed by statute or regulation, *cf., e.g.*, 8 C.F.R. § 287.1 (1979)(reasonable distance of 100 air miles from border for immigration searches), proximity to the border would not automatically make a search reasonable. *See* United States v. McDaniel, 463 F.2d 129, 132-33 (5th Cir. 1972)(massive searches in downtown Cleveland or Buffalo probably not valid border searches). *See also* United States v. Barbera, 514 F.2d 294, 298-99 (2d Cir. 1975).

[127] 592 F.2d at 741; *accord*, United States v. Martinez, 481 F.2d 214, 218 (5th Cir. 1973); Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966). Continuous surveillance best assures that contraband found at the time of the search has an international origin. *Bags to Body Cavities, supra* note 109, at 59. If breaks in surveillance are so brief that the suspects could not have obtained the contraband from domestic sources, then customs officers will have satisfied the surveillance factor. *See, e.g.*, United States v. Martinez, 481 F.2d at 218-19 & 218 n.9; United States v. Terry, 446 F.2d 579, 582 (9th Cir.), *cert. denied*, 404 U.S. 946 (1971). *See generally Bags to Body Cavities, supra* note 109, at 58-61.

[128] 592 F.2d at 740; *see* United States v. Martinez, 481 F.2d 214, 219 (5th Cir. 1973); United States v. McGlone, 394 F.2d 75, 78 (4th Cir. 1968). The requirement of reasonable suspicion protects an individual's privacy rights by guarding against searches at any place in the country no matter how long he has been in the country. *See* United States v. Warner, 441 F.2d 821, 833 (5th Cir. 1971).

[129] The Fourth Circuit's test for the validity of an extended border search is a combination of the Ninth and Fifth Circuits' tests. The Ninth Circuit test is whether customs agents can be reasonably certain that any merchandise found was on the person or in the vehicle at the time of entry into the country. *See* Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966). Surveillance is crucial to meet this reasonable certainty standard. *See* United States v. Garcia, 415 2d 141, 144 (9th Cir. 1969). No reasonable suspicion of a customs law violation is necessary under the Ninth Circuit test. A search conducted away from the border after continuous surveillance is merely a later assertion by customs agents of their power to search any vehicle at the actual border without any suspicion. *See Bags to Body Cavities, supra* note 109, at 57-59; *In Search of the Border, supra* note 126, at 98-100. Reasonable certainty has nothing to do with suspicion of crime. Customs agents need only be reasonably certain that any merchandise that might be hidden accompanied the vehicle or person across the border, though agents will not likely initiate surveillance without suspicion that the merchandise is contraband. *Bags to Body Cavities, supra* note 109, at 58 & n.28. The Fifth Circuit test is one of reasonable suspicion that the suspects have violated customs

all of the crucial factors satisfied. The search, carried out seven hours after the agents observed the suspects in the border area and three to four miles away from the border, fulfilled the time and distance factors.[130] Virtually continuous surveillance[131] substantiated the officers' theory that

---

laws. *See* United States v. Martinez, 481 F.2d 214, 219 (5th Cir. 1973); Note, *Border Searches in the Fifth Circuit: Constitutional Guarantees v. Immigration Policy*, 8 CUM. L. REV. 107, 141 (1977) [hereinafter cited as *Border Searches in the Fifth Circuit*]. Surveillance is important, though not crucial, to substantiate suspicion formed at the actual border or to raise unfounded suspicion to reasonable suspicion during the watching period under the Fifth Circuit test. *See* 481 F.2d at 218-19; *Bags to Body Cavities*, *supra* note 109, at 61. Both the Ninth and Fifth Circuits also consider time, distance, and the surrounding circumstances. *See, e.g.*, United States v. Hill, 430 F.2d 129, 131 (5th Cir. 1970); Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966). The Fourth Circuit test encompasses the Ninth Circuit surveillance requirement, the Fifth Circuit reasonable suspicion requirement, and the time, distance, and surrounding circumstances factors of both circuits. *See* text accompanying notes 123-28 *supra*.

The Ninth and Fifth Circuit tests usually lead to the same result upon application, since customs agents would not likely follow a person from the border without suspicion, nor would they ordinarily have a basis for reasonable suspicion of a customs law violation unless they observe a suspect from the time of a border crossing. *See* 3 W. LAFAVE, *supra* note 2, § 10.5, at 301; *Bags to Body Cavities*, *supra* note 109, at 62. The outcome in *Bilir* would have been the same under either test. *See* text accompanying notes 131-35 *infra*. The two tests, however, may sometimes demand divergent results. For example, in United States v. Reagor, 441 F.2d 252 (5th Cir. 1971), customs agents searched defendant's vehicle 60 miles from the border without maintaining surveillance. The Fifth Circuit upheld the search, holding that the officers had reasonable suspicion of a customs law violation. The court pointed out that the 60-mile portion of the road contained no junctions and that the area on either side was virtually uninhabited. *Id.* at 253-54. The Ninth Circuit continuous surveillance test would probably invalidate a *Reagor*-type search, since the defendants in that case could have obtained the contraband from another vehicle or a house along the road. *See Bags to Body Cavities*, *supra* note 109, at 62 n.46.

[130] 592 F.2d at 741. The court observed that other circuits had upheld searches undertaken much longer after crossing and a great deal farther away from the actual border. *See, e.g.*, United States v. Fogelman, 586 F.2d 337, 344 (5th Cir. 1978) (20 hours, 254 miles); United States v. Martinez, 481 F.2d 214, 219 (5th Cir. 1973) (142 hours, 150 miles); Rodriguez-Gonzales v. United States, 378 F.2d 256, 258 (9th Cir. 1967) (15 hours, 20 miles). *But see* United States v. Majourau, 474 F.2d 766, 768, 769 (9th Cir. 1973)(search conducted over 80 miles and 3 hours from border without continuous surveillance too remote in time and distance). The Fourth Circuit considered time and distance factors to be of little significance unless related to surveillance. *See* 592 F.2d at 741; *accord*, Castillo-Garcia v. United States, 424 F.2d 482, 485 (9th Cir. 1970).

[131] *See* 592 F.2d at 738. Surveillance was broken on three occasions in Baltimore. The agents lost sight of two of the suspects for an hour from the time they left downtown Baltimore until they boarded the ship. *Id.* The agents lost sight of Bilir when he left Baltimore with the two other suspects. He boarded the ship over two hours before the other suspects, unobserved, and Bilir was not relocated by the agents until he subsequently departed from the ship. *Id.* at 743 (Winter, J., dissenting). The agents lost sight of the searched suspect for two or three minutes when the suspect stopped in a bar enroute to the hotel from the ship. *Id.* at 738. The majority ignored these breaks in surveillance. *See id.* at 741. The dissent contended that these interruptions were crucial to the determination of reasonable cause to suspect illegal importation of heroin because the defendants would have had ample opportunity to procure heroin from a domestic source. *Id.* at 743-44 (Winter, J., dissenting).

While the defendants could have obtained the heroin from domestic sources during the first two breaks, these breaks were insignificant since they occurred before the defendants

the seized heroin had been concealed on the searched suspect when he departed from the border area.[132] Finally, the information that sparked the investigation, the knowledge obtained during forty-two days of pursuit,[133] and the suspects' behavior at the time of arrest,[134] provided other circumstances to give the agents reasonable suspicion that the heroin had just crossed the border.[135]

After upholding the district court ruling under the extended border search doctrine, the Fourth Circuit rejected the defendants' contention that the Supreme Court's decision in *Almeida-Sanchez v. United States*[136] necessitated reversal of the convictions.[137] Striking down a roving immigration border patrol search conducted away from the border absent consent or probable cause,[138] the *Almeida-Sanchez* Court stated that agents may undertake warrantless searches at the border or its "func-

---

entered the border area. As to the third break, the searched suspect probably could not have carefully placed 13.4 lbs. of heroin, *see id.* at 738, on his person in three minutes. *See generally* note 127 *supra.*

[132] 592 F.2d at 741. The Fourth Circuit erroneously stated that the searched suspect had crossed the border, *see id.*, when in fact he was an alien residing in the United States at the time of the search. Nothing indicated that he had been a seaman or passenger on the ship. *See* Brief for Appellee at 8. A person who boards a ship in United States waters has crossed no border and normally would not be subject to border search. *Cf.* Carroll v. United States, 267 U.S. 132, 154 (1925)(persons lawfully within country have right to free passage without interruption). Officers may search on reasonable suspicion if the person, vehicle, or thing has a critical nexus with the border. *See, e.g.*, United States v. Weil, 432 F.2d 1320, 1323 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); United States v. McGlone, 394 F.2d 75, 78 (4th Cir. 1968). The suspect in *Bilir* was a member of the searchable class because he had been in the border area and in close contact with Bilir, who was a seaman on a foreign vessel. *See* 592 F.2d at 738; *accord*, United States v. Glaziou, 402 F.2d 8, 13-14 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969); United States v. McGlone, 394 F.2d 75, 78-79 (4th Cir. 1968).

[133] *See* 592 F.2d at 736-38. Other DEA agents had informed the searching officer that one of the defendants and another person had followed the ship from its first port of call to its last. 592 F.2d at 741. Reasonable suspicion may be based on both firsthand information and reliable information communicated to the searching officer. *See* United States v. McGlone, 394 F.2d 75, 76, 78-79 (4th Cir. 1968).

[134] *See* 592 F.2d at 738. Prior to the search, the suspects attempted to flee when they saw the officers. The searched suspect lied to the agents when they stopped and questioned him. *Id.* These actions supported reasonable suspicion. *Id.* at 741; *accord*, United States v. Glaziou, 402 F.2d 8, 14-15 & 15 n.5 (2d Cir. 1968) (suspect's nervousness justified search); Ramirez v. United States, 263 F.2d 385, 386 n.1, 387 (5th Cir. 1959)(suspect's nervousness, evasiveness, and lying justified search).

[135] 592 F.2d at 741.

[136] 413 U.S. 266 (1973) In *Almeida-Sanchez*, border patrol agents, without a warrant or probable cause, stopped the defendant on a highway approximately 25 miles from the border. After determining that the defendant was lawfully within the country, the agents searched the car and found marijuana. *Id.* at 267-68. The Court held that the search violated the defendant's fourth amendment rights. *Id.* at 273. *See generally* Note, *The Extent of the Border*, 1 HASTINGS CONST. L.Q. 235 (1974).

[137] 592 F.2d at 741-42.

[138] *See* 413 U.S. at 273. The Court pointed out that the officers did not even have reasonable suspicion. *Id.* at 268.

tional equivalent."[139] The Fourth Circuit assumed that *Almeida-Sanchez*, an immigration patrol case, applied to *Bilir*, a customs patrol case.[140] Since the search in *Bilir* did not take place at the actual border or its functional equivalent,[141] the *Almeida-Sanchez* doctrine did not apply. In any event, the agents did have reasonable suspicion that the searched suspect possessed recently imported contraband,[142] and therefore the case was within the extended border search doctrine and distinguishable from *Almeida-Sanchez*.[143]

The Fourth Circuit's test for the validity of an extended border search offers favorable safeguards.[144] Reasonable certainty of the presence of the contraband at the time of the border crossing and reasonable suspicion of a customs law violation at the time of the search ensure against selective law enforcement.[145] Moreover, the test provides the protection demanded by the Supreme Court against harassment of innocent travelers within the country.[146] The result in *Bilir*, however, evidences the uniquely broad power of customs agents to undertake warrantless extended border searches.[147] Once a person has had significant contact with the border, he may expect to be subject to search for a substantial period after leaving the border area.[148]

Standing to Contest Warrantless Searches and Seizures

A criminal defendant must have standing when he seeks to challenge the admissibility of evidence on the basis of an unconstitutional search

---

[139] *Id.* at 272.

[140] 592 F.2d at 742; *accord*, United States v. Brennan, 538 F.2d 711, 719 (5th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977); United States v. Solmes, 527 F.2d 1370, 1372-73 (9th Cir. 1975). *But see* Roa-Rodriquez v. United States, 410 F.2d 1206, 1208-09 (10th Cir. 1969). *See generally* 36 Fed. Reg. 13,410 (1971); *Border Searches in the Fifth Circuit*, *supra* note 129, at 142-43; Article, *Border Searches: Beyond* Almeida-Sanchez, 8 U. CAL. D.L. REV. 163, 171-72 (1975).

[141] 592 F.2d at 742. An established checking station near the border and at the intersection of a road leading from the border or an inland airport receiving nonstop flights from abroad may be the functional equivalent of a border. Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973). Because the railroad station where the *Bilir* search occurred was not the functional equivalent of a border, the officers were required to have reasonable suspicion. *See* 592 F.2d at 742. *See also* United States v. Gallagher, 557 F.2d 1041, 1044 (4th Cir.), *cert. denied*, 434 U.S. 870 (1977); United States v. Solmes, 527 F.2d 1370, 1372-73 (9th Cir. 1975).

[142] *See* text accompanying notes 129-35 *supra*.

[143] 592 F.2d at 742.

[144] *See* 3 W. LAFAVE, *supra* note 2, § 10.5, at 300-01.

[145] *See generally* Comment, *Minority Groups and the Fourth Amendment Standard of Certitude:* United States v. Ortiz *and* United States v. Brignoni-Ponce, 11 HARV. C.R.-C.L. L. REV. 733 (1976).

[146] *See generally* text accompanying note 120 *supra*.

[147] *See* text accompanying notes 104-08 & 121 *supra*.

[148] *See* text accompanying notes 122-35 *supra*.

and seizure.[149] Since fourth amendment rights are personal rights,[150] the requirement of standing assures that a person moving to suppress evidence[151] is a proper party to assert the claim.[152] In *United States v. Jackson*,[153] the Fourth Circuit analyzed the standing of two defendants to object to the search of a house which neither of them owned, and the subsequent seizure of gambling slips used against them in an illegal gambling business prosecution. The court held that the defendants did not have standing to contest the search because they lacked a reasonable expectation of privacy in the room searched.[154] Adopting a novel approach to standing,[155] the Fourth Circuit determined that defendant Jackson, as owner of the objects seized, had standing to contest the warrantless seizure, but not the search.[156]

Executing a warrant to search defendant Jackson, state police officers went to the home of a third party, who informed the officers that Jackson, a suspected gambling business operator, had recently dropped a bag of numbers slips in an empty adjacent house.[157] The officers looked in the window of the empty house placarded for rent,[158] saw the bag, conducted a warrantless search of one of the rooms, and found the numbers slips in Jackson's bag.[159] Prior to trial, the district court denied the suppression motion[160] of Jackson and his co-defendant, McKenzie.[161] At trial, a jury

---

[149] *See* Jones v. United States, 362 U.S. 257, 261 (1960). A person has standing to contest an unconstitutional search and seizure if he was the victim of the unlawful police action. *Id.*; Trager & Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 BROOKLYN L. REV. 421, 422 (1975) [hereinafter cited as Trager & Lobenfeld]. His interest in the premises must be of such nature as to give him a reasonable expectation of freedom from police search. Mancusi v. DeForte, 392 U.S. 364, 368 (1968).

[150] *See* Simmons v. United States, 390 U.S. 377, 389 (1968); Katz v. United States, 389 U.S. 347, 351 (1967). A personal constitutional right is one which cannot be vicariously asserted. Thus, a person cannot derive standing from a co-conspirator or co-defendant. Alderman v. United States, 394 U.S. 165, 171-72 (1969). *But see* Jones v. United States, 362 U.S. 257, 263-65 (1960).

[151] *See* FED. R. CR. P. 41(f); 12(b)(3). A person aggrieved by an unlawful search and seizure may move to suppress the evidence obtained during an unconstitutional search. A successful movant is entitled to have the evidence excluded at trial and returned to him. *See id.* 41(e).

[152] *See* Baker v. Carr, 369 U.S. 186, 204 (1962).

[153] 585 F.2d 653 (4th Cir. 1978).

[154] *See id.* at 658, 659. *See generally* note 2 *supra.*

[155] *See* 585 F.2d at 656-58. Prior to *Jackson*, the Fourth Circuit had determined standing on the basis of whether the search was directed at the defendant. *See, e.g.*, Patler v. Slayton, 503 F.2d 472, 477-78 (4th Cir. 1974); United States v. Cobb, 432 F.2d 716, 719-20 (4th Cir. 1970). *See also* Jones v. United States, 362 U.S. 257, 261 (1960). Prior to Supreme Court disposition of this issue, the *Jackson* court expressly rejected this "target theory" as an independent basis for standing. *See* 585 F.2d at 658 n.9; *accord*, Rakas v. Illinois, 439 U.S. 128, 133-38 (1978).

[156] *See* 585 F.2d at 656-57; United States v. Lisk, 522 F.2d 228, 231 (7th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976).

[157] *Id.* at 656.

[158] *See* note 189 *infra.*

[159] 585 F.2d at 656.

[160] *See generally* note 151 *supra.* In denying the suppression motion, the district court

convicted both defendants of operating an illegal gambling business.[162] The defendants appealed, contending that the warrantless search of the room was unconstitutional.[163]

The Fourth Circuit rejected the two grounds advanced by Jackson to establish his claim of standing. The court found that the defendant did not have automatic standing to challenge the search.[164] A person automatically has standing if possession of the seized property is an essential element of the crime charged.[165] Jackson, however, was charged with an offense which only required that the Government prove his participation in a criminal enterprise,[166] and the numbers slips were not essential elements of the crime charged. In addition, the court decided that Jackson lacked standing because he had no interest in the premises searched.[167] Inasmuch as his interest was only in the objects seized,[168] the court ap-

---

found that the search was reasonable, ignoring the issue of standing. Brief for Appellee at 10.

[161] *See* 585 F.2d at 656.

[162] *Id.* at 654; *see* Brief for Appellee at 2. *See also* 18 U.S.C. § 1955 (1976); VA. CODE §§ 18.2-325, -328 to 331 (Repl. 1975).

[163] 585 F.2d at 656.

[164] *Id.*

[165] Brown v. United States, 411 U.S. 223, 227, 229 (1973); Jones v. United States, 362 U.S. 257, 263-64 (1960). *See also* United States v. Cobb, 432 F.2d 716, 720-22 (4th Cir. 1970). In most cases, a person claiming standing must show some interest in the premises searched. *See* note 149 *supra*. The purpose of the automatic standing rule is to prevent the Government from denying that a person had a sufficient interest in the seized property to confer standing, and later asserting at trial that he should be convicted for possession. Jones v. United States, 362 U.S. 257, 261-65 (1960). *See generally* 3 W. LAFAVE, *supra* note 2, § 11.3, at 582-600; Trager & Lobenfeld, *supra* note 149, at 423-44.

[166] *See* 585 F.2d at 656. *See also* Sanabria v. United States, 437 U.S. 54, 70 & n.26 (1978). Operation of a gambling business, not possession of numbers slips, violates 18 U.S.C. § 1955 (1976). *See* 437 U.S. at 70; note 162 *supra*.

[167] 585 F.2d at 658. A person has standing to contest a search if he has a reasonable expectation of privacy in the premises, which need not stem from legal possession or ownership. *See* Combs v. United States, 408 U.S. 224, 227 (1972); Mancusi v. DeForte, 391 U.S. 364, 368 (1968). Jackson could not claim standing because he had no possessory or proprietary interest in the premises, 585 F.2d at 658, and had not received permission to place the bag in the empty house. *Id.* at 659; *see* Jones v. United States, 362 U.S. 257, 267 (1960). *See generally* Trager & Lobenfeld, *supra* note 149, at 447-48; Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 MO. L. REV. 1, 38-39 (1975); *see also* United States v. Lang, 527 F.2d 1264, 1266 (4th Cir. 1975); Johnson v. Smith, 414 F.2d 645, 647-48 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970).

[168] 585 F.2d at 656. The Supreme Court has implied that an interest in the property seized may be sufficient to confer standing. *See* Rakas v. Illinois, 439 U.S. 128, 148-49 (1978); Brown v. United States, 411 U.S. 223, 228 (1973); Jones v. United States, 362 U.S. 257, 261 (1960); United States v. Jeffers, 342 U.S. 48, 51 (1951). Since the underlying theory of property ownership is the right of the owner to exclude, the Court apparently recognized that privacy rights are usually inluded in property rights. *See generally* Rakas v. Illinois, 439 U.S. at 143 n.12; United States v. Hunt, 505 F.2d 931, 936-37 (5th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975). However, the Court has expressly held that a defendant does not have standing if he was not on the premises at the time of the search, had not proprietary or possessory interest in the premises, or was not charged with a crime of which posses-

plied a new standing theory and held that Jackson had standing to contest the seizure, but not the search.[169]

The Fourth Circuit's bifurcation of search and seizure is consistent with the Seventh Circuit's approach to standing in *United States v. Lisk.*[170] In *Lisk,* the defendant received permission to leave a bomb in a third party's car. The police seized the bomb during an unlawful search of the car.[171] The Seventh Circuit held that since Lisk's interest was in the bomb and not in the car, he had standing to object to the seizure of the bomb, but not to the search of the car.[172] This search-seizure dichotomy emphasizes that only persons whose fourth amendment rights are violated by the search itself may assert standing to object to the search.[173] Like the defendant in *Lisk,* Jackson left his property in a place where he had no reasonable expectation of privacy, and thereby lost his right to challenge the search.[174] Seizures, however, are not in themselves subject to this constitutional requirement.[175] Hence, Jackson, as owner of the bag, could contest its seizure.[176]

Jackson's co-defendant, McKenzie,[177] had no ownership rights in the seized bag, but she did have permission from the owner of the empty house to store furniture in the house.[178] According to the Supreme Court,

---

sion of the seized evidence is an essential element. *See* Brown v. United States, 411 U.S. 223, 229 (1973).

[169] *See* 585 F.2d at 657.

[170] 522 F.2d 228 (7th Cir. 1975), *cert. denied,* 423 U.S. 1078 (1976); *accord,* United States v. Galante, 547 F.2d 733, 739 n.11 (2d Cir. 1976), *cert. denied,* 431 U.S. 969 (1977). *See generally* Recent Development, 13 AM. CRIM. L. REV. 801 (1976) [hereinafter cited as AM. CRIM. L. REV.]; Recent Development, 64 GEO. L.J. 1187 (1976) [hereinafter cited as GEO. L.J.].

[171] 522 F.2d at 229.

[172] *Id.* at 231. In United States v. Jeffers, 342 U.S. 48 (1951), the Supreme Court expressly declined to separate the search and seizure components of the fourth amendment. *Id.* at 52. However, *Jeffers* is distinguishable from *Lisk* because the defendant in *Lisk* was not the target of the search. *See* 522 F.2d at 232-33. Additionally, the defendant in *Jeffers* had standing to contest the search on the basis of his interest in the premises. *See* 342 U.S. at 50-51, 52; GEO. L.J., *supra* note 170, at 1191. *But see* AM. CRIM. L. REV., *supra* note 170, at 808-09.

[173] *See* Alderman v. United States, 394 U.S. 165, 171-72 (1969).

[174] *See* 585 F.2d at 658. A person has no standing if all objective facts suggest that he abandoned the seized property. Abandonment need not be complete in the common law sense. Rather, the test is whether the person retained a reasonable expectation of privacy in the property at the time of the search and seizure. *See, e.g.,* United States v. Jackson, 544 F.2d 407, 409 (9th Cir. 1976); United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973).

[175] *See* W. RINGLE, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 161, at 195 (1975) (seizures not in themselves prohibited by Constitution).

[176] *See* 585 F.2d at 657. Since the numbers slips were not contraband, the defendant could challenge the seizure. *See* United States v. Jeffers, 342 U.S. 48, 52-54 (1951).

[177] 585 F.2d at 656. The defendants also challenged a search of other premises, where officers found numbers slips in McKenzie's possession, on the ground that the officers had failed to knock before forcefully entering the premises as required by 18 U.S.C. § 3109 (1976). 585 F.2d at 661. While holding that the knock and announce requirement had been met, the Fourth Circuit determined that the officers' need to prevent destruction of the evidence would have excused noncompliance. *Id.* at 662.

[178] 585 F.2d at 659.

a defendant legitimately on the premises at the time of the search has standing.[179] Since McKenzie was storing a stove in the house when the search took place, she was legitimately on the premises.[180] Notwithstanding her interest in the house, the Fourth Circuit held that McKenzie had no standing to object to the search.[181] For purposes of standing, the "premises" were the room searched, not the entire house, since only that room was searched. The co-defendant had stored nothing in the searched room,[182] and was unaware of the presence of the bag in the house.[183] Because McKenzie had not been using the searched room[184] and was not present at the time of the search,[185] she suffered no constitutional invasion of privacy.[186]

Though finding no basis to sustain a claim of standing on McKenzie's part, the *Jackson* court in dicta stated that McKenzie's objection to the search would have failed on the merits.[187] The Fourth Circuit conceded that the officers intruded upon the property when they looked in the window of the house. The intrusion, however, did not amount to an unreasonable invasion of privacy.[188] The vacancy of the premises did not give McKenzie a reasonable expectation of privacy in the open area surrounding the house.[189] Therefore, the officers acted reasonably when they looked through the window,[190] and were justified in searching the room

---

[179] *See* Jones v. United States, 362 U.S. U.S. 257, 267 (1960).

[180] *See* 585 F.2d at 659. *Compare* United States v. Harwood, 470 F.2d 322, 325-26 (10th Cir. 1972)(defendant who stored seized articles on premises with permission had standing) *with* United States v. Grunsfeld, 558 F.2d 1231, 1241 (6th Cir.), *cert. denied,* 434 U.S. 872 (1977)(defendant who merely had key and permission to enter premises had no standing).

[181] 585 F.2d at 659.

[182] *Id.; cf.* United States v. Abbarno, 342 F. Supp. 599, 604 (W.D.N.Y. 1972) (tenants had no standing to object to search of unrented part of premises where they stored equipment without owner's permission).

[183] 585 F.2d at 659.

[184] *Id.; cf.* Abel v. United States, 362 U.S. 217, 241 (1960)(hotel guest had no standing to contest search of room he vacated). *See generally* 3 W. LAFAVE, *supra* note 2, § 11.3, at 556-63.

[185] *See* 585 F.2d at 655; Brown v. United States, 411 U.S. 223, 229 (1973)(defendants had no standing because, among other things, not on premises when search occurred).

[186] *See* 585 F.2d at 659.

[187] *Id.* A person may have standing to assert a fourth amendment claim and yet lose on the merits. *See* Alderman v. United States, 394 U.S. 165, 189 n.2 (1969)(Harlan, J., concurring in part and dissenting in part). *See also* Patler v. Slayton, 503 F.2d 472, 478 (4th Cir. 1974)(defendant had standing but search and seizure conducted in open field lawful).

[188] 585 F.2d at 659-60.

[189] *Id.* at 660. The court stated that premises placarded for rent invite members of the public to come upon the land and examine the fixtures and property to decide whether they would like to rent. *Id.* (citing Ponce v. Craven, 409 F.2d 621 (9th Cir. 1969)). The Fourth Circuit analogized the vacant lot surrounding the house to a public passageway. In *Ponce,* the Ninth Circuit held that police officers who observed the actions of the defendant through an open window from a motel parking lot did not conduct an illegal search. The *Ponce* court found that the parking lot was a public passageway. 409 F.2d at 624-25; *accord,* United States v. Coplen, 541 F.2d 211, 214 (9th Cir. 1976), *cert. denied,* 429 U.S. 1073 (1977).

[190] 585 F.2d at 660.

after they had observed the criminal evidence.[191]

The Fourth Circuit's decision in *Jackson* is consistent with the Supreme Court's declaration that fourth amendment rights are personal rights and cannot be asserted by those claiming prejudice only from the introduction of damaging evidence.[192] To better demonstrate the difference between privacy rights and property rights, the court adopted the reasoning of *United States v. Lisk* and dichotomized the right to object to a search and the right to contest a seizure.[193] A person's ownership of seized property, without more, is insufficient to accord standing to object to a search of the premises in which police discovered the object, though he may object to the seizure.[194] Further, a person's presence on one part of the searched premises may not necessarily grant him standing to object to a search of another portion of the premises unoccupied by him.[195] Finally, though a person may have standing to contest a search and seizure,

---

[191] 585 F.2d at 660-61; *see* Coolidge v. New Hampshire, 403 U.S. 443, 465-70 (1971). *See generally* Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047, 1073-78, 1081-88 (1975); *see also* 1 W. LAFAVE, *supra* note 2, § 2.2, at 243-44.

Before undertaking the search, the officers sought the advice of the Commonwealth's attorney, who informed them that they did not need a warrant. 585 F.2d at 656. Relying solely on United States v. Johnson, 561 F.2d 832 (D.C. Cir.), *cert. denied*, 432 U.S. 907 (1977), the Fourth Circuit accepted the district court's determination that the officers had acted reasonably and in good faith. 585 F.2d at 661. In *Johnson*, the police looked through the defendant's basement window and observed a large quantity of narcotics. The officers then called an assistant United States attorney, who advised them to search the premises without a warrant, since the defendants would probably remove the evidence before the officers could obtain a warrant. *Id.* at 834-35. The *Johnson* court upheld the search because the prosecutor's advice was of sufficient probative value for the district court to find that the officers acted in good faith. *Id.* at 843. The proposed "good faith" exception to the exclusionary rule allows evidence unconstitutionally seized to be admitted at trial if the seizing officers acted in the good faith belief that their conduct was constitutional and they had a reasonable basis for that belief. *See* Stone v. Powell, 428 U.S. 465, 537-42 (1976) (White, J., dissenting); *accord, id.* at 496-502 (Burger, C.J., concurring); Brown v. Illinois, 422 U.S. 590, 606-16 (1975)(Powell, J., concurring). *See generally* Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978); Wright, *Must the Criminal Go Free if the Constable Blunders?* 50 TEX. L. REV. 736, 738-41 (1972). *See also* Peltier v. United States, 422 U.S. 531, 535-38 (1975).

In adopting the *Johnson* reasoning, the Fourth Circuit implied that the search was also valid because the officers needed to effect immediate entry to prevent the destruction or removal of the evidence. *See* 585 F.2d at 661 (citing United States v. Johnson, 561 F.2d at 843). The Supreme Court has implied that it might uphold a warrantless search under circumstances where police must act quickly to prevent destruction of potential evidence. *See* McDonald v. United States, 335 U.S. 451, 455 (1948); Johnson v. United States, 333 U.S. 10, 15 (1948); 2 W. LAFAVE, *supra* note 2, § 6.5, at 433. *See also* United States v. Rubin, 474 F.2d 262, 268-69 (3d Cir.), *cert. denied*, 414 U.S. 833 (1973).

[192] *See* text accompanying notes 167 & 177-86 *supra*.

[193] *See* text accompanying notes 170-76 *supra*.

[194] *See* text accompanying notes 167-69 & 172-76 *supra*.

[195] *See* text accompanying notes 177-86 *supra*.

he must show an infringement of his reasonable expectation of privacy to prevail on the merits.[196]

HENRY DARNELL LEWIS

B. *Prisoners' Rights*

Many prisoners use section 1983 of Title 42 of the United States Code[1] to assert evolving constitutional rights.[2] Federal courts are becoming more active in prisoners' rights cases by abandoning the traditional policy of judicial restraint,[3] awarding compensatory damages against prison officials[4] and fashioning comprehensive injunctive relief for viola-

---

[196] *See* text accompanying notes 187-91 *supra.*

---

[1] 42 U.S.C. § 1983 (1976). Section 1983 provides that every person who, under color of state law, deprives any person within the United States of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the person injured in an action at law or equity. *Id. See generally* Potuto, *The Right of Prisoner Access: Does* Bounds *Have Bounds?*, 53 IND. L.J. 207 (1977-78) [hereinafter cited as Potuto]. Section 1983 actions apply to the rights of citizens generally, and are of fundamental importance to constitutional jurisprudence. *See* Bounds v. Smith, 430 U.S. 817, 827 (1977) (prisoners' right to adequate law library or to adequate assistance from persons trained in the law). States may not deprive prisoners of their constitutional right to assert claims under § 1983. Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (good time credit and disciplinary proceedings and inspection of mail did not comply with due process). A cognizable claim under § 1983 arises as a result of an infringement of a constitutionally protected right. *E.g.*, Johnson v. Levine, 588 F.2d 1378, 1381 (4th Cir. 1978) (violation of prisoners' eighth amendment rights held actionable). *See generally* A. KERPER & J. KERPER, LEGAL RIGHTS OF THE CONVICTED 357-59 (1974) [hereinafter cited as KERPER & KERPER]; Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970) [hereinafter cited as Goldfarb & Singer]; Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in Federal Courts*, 92 HARV. L. REV. 610, 611-615 (1972) [hereinafter cited as Turner]; Note, *Developments—Section 1983*, 90 HARV. L. REV. 1133 (1977); Note, *A Review of Prisoners' Rights Litigation Under 42 U.S.C. § 1983*, 11 U. RICH. L. REV. 803 (1977).

[2] Prisoners are using § 1983 to assert claims such as the right of access to the courts, *see* text accompanying notes 9-63 *infra*, the right to be free from cruel and unusual punishment, *see* text accompanying notes 64-116 *infra*, and the limited due process right to a fair determination of parole. *See* text accompanying notes 117-184 *infra*.

[3] Courts traditionally viewed prison problems as complex and intractable, and not susceptible of resolution by decree. *See* Procunier v. Martinez, 416 U.S. 396, 404-05 (1974). The traditional judicial attitude known as the "hands off" doctrine left the internal administration and operation of state correctional institutions to the discretion of state officials. *See* Meachum v. Fano, 427 U.S. 215 (1976); 416 U.S. at 404-05. The Supreme Court recently determined that a policy of judicial restraint cannot justify a failure to recognize valid constitutional claims. Bounds v. Smith, 430 U.S. 817, 832 (1977); *see* Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 503-11 (1971); Comment, *Confronting the Conditions of Confinement: An Expanded Role For Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367, 367-68 (1977) [hereinafter cited as *Prison Reform*]; Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841, 841-42

[4] *See, e.g.*, Sostre v. McGinnis, 442 F.2d 178, 205 n.52 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972) (prisoner entitled to $25 per day of incarceration of $9,300 compensatory damages against warden).

tions of prisoners' constitutional rights.[5] Recent Fourth Circuit decisions have expanded and defined the obligations owed by states to prisoners in areas such as access to libraries[6] and prison files,[7] and the right to constitutionally acceptable prison conditions.[8]

One of the most fundamental rights a prisoner possesses is the right to communicate meaningfully with the courts.[9] The Supreme Court first recognized a prisoner's right of meaningful access to the courts in *Younger v. Gilmore.*[10] Without citing authority, the *Gilmore* Court affirmed a district court opinion[11] requiring the State of California to expend funds to provide either law libraries or legal services to prisoners.[12] The district court held that meaningful access was constitutionally required, but failed to define the constitutional source of the right.[13]

Recently, the Supreme Court further defined the right of meaningful access to the courts. In *Bounds v. Smith,*[14] the Court held that the constitutional right of access to the courts requires that state prison authorities assist inmates in the preparation and filing of meaningful legal papers by providing adequate law libraries *or* adequate assistance from persons trained in the law.[15] Applying this test, the Supreme Court affirmed North Carolina's plan to provide prisoners in the state's decentralized prison system[16] with transportation to seven law libraries.[17] The *Bounds* Court primarily sought to protect the ability of inmates proceeding pro se[18] to prepare petitions or complaints.[19] The Supreme Court held that a

---

[5] *E.g.,* Hutto v. Finney, 437 U.S. 678, 683-85 (1978).

[6] *See* Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978), *cert. denied,* 99 S. Ct. 2825 (1979); *see generally* text accompanying notes 24-47 *infra.*

[7] *See* Paine v. Baker, 595 F.2d 197, 199 (4th Cir. 1979); *see generally* text accompanying notes 118-146 *infra.*

[8] *See* Johnson v. Levine, 588 F.2d 1378 (4th Cir. 1978); *see generally* text accompanying notes 70-98 *infra.*

[9] Bounds v. Smith, 430 U.S. 817, 827 (1977).

[10] 404 U.S. 15 (1971). A convicted prisoner traditionally forfeited his liberty and all of his personal rights except those the state chose to accord him. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 795-96 (1871); *see* Goldfarb & Singer, *supra* note 1, at 178-79. The Supreme Court first concluded that state prisoners had a right of access to federal courts in Ex parte Hull, 312 U.S 546, 549 (1941) (petition for writ of habeas corpus). The Supreme Court subsequently held that a state could not prohibit inmates from assisting other inmates in the preparation of writs unless the state provided some available alternative such as legal assistance. Johnson v. Avery, 393 U.S. 483, 490 (1969).

[11] Gilmore v. Lynch, 319 F. Supp. 105, 112 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971).

[12] 404 U.S. at 15.

[13] Gilmore v. Lynch, 319 F. Supp. at 109; *see* Potuto, *supra* note 1, at 210-11.

[14] 430 U.S. 817 (1977).

[15] *Id.* at 828.

[16] The North Carolina Department of Corrections housed 10,000 prisoners in eighty units situated in sixty-seven counties. Smith v. Bounds, 538 F.2d 541, 542 (4th Cir. 1975, *aff'd,* 430 U.S. 817 (1977).

[17] 430 U.S. at 821.

[18] A person proceeds pro se when he petitions the court without counsel.

[19] 430 U.S. at 828 n.17. The complaint and other papers of pro se parties are held to

meaningful right of access to the courts was a fundamental right, though the Court again failed to specify the precise constitutional basis for its holding.[20] The Court reasoned that inmates proceeding pro se were capable of using law books,[21] and that access to an adequate law library was necessary to prepare legal papers.[22] Alternatively, access to trained legal counsel would insure that the inmate's constitutional right to the courts was meaningfully exercised.[23]

The Fourth Circuit in *Williams v. Leeke*[24] recently applied the *Bounds* mandate that states provide prisoners with meaningful access to

---

less stringent standards than the formal pleadings of lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972); *see* note 58 *infra*.

[20] 430 U.S. at 826-27. One of the dissents in *Bounds* persuasively argued that nothing in the Constitution provides for a fundamental right of access to the courts. *Id.* at 837 (Rehnquist, J., dissenting). Justice Rehnquist noted that under Ross v. Moffitt, 417 U.S. 600 (1974), the right of meaningful access to the courts is limited to the first appeal of right. 430 U.S. at 840-41. There is no right of access for the discretionary second appeal from the court of appeals to the state court of last resort or from the state court of last resort to the Supreme Court. *Id.* Thus Justice Rehnquist reasoned in his dissenting opinion that since a prisoner who pursues a direct appeal has no constitutional right to state-appointed counsel on a second appeal, an incarcerated prisoner has no constitutional right to meaningful access when he collaterally attacks his conviction. *Id.* Chief Justice Burger noted in a separate dissenting opinion that there was no broad constitutional right to collateral attack. *Id.* at 834 (Burger, C.J., dissenting). Burger concluded that the state's obligation to provide access to the courts is statutory rather than constitutional. *Id.* The Constitution, however, prohibits a state from interfering with the individual's exercise of his federal right of access to the court. *Id.* Burger noted that prohibiting the state from interfering with federal statutory rights is fundamentally different from directing the state to provide affirmative assistance for this exercise. *Id.* at 835.

[21] 430 U.S. at 826-27. Justice Stewart argued in a dissenting opinion that meaningful access to courts cannot be advanced by simply making law libraries available to the untutored inmate. *Id.* at 836 (Stewart, J., dissenting). Proceeding pro se is often futile. *See* Turner, *supra* note 1, at 625. Most inmates' pro se complaints will not survive screening by court clerks, while others languish on the court docket. *Id.* Prisoners arguably do not have the knowledge to conduct discovery and move the case to trial. *Id.*

[22] 430 U.S. at 826-27. The library approved in *Bounds* did not contain any legal citators or digests. 430 U.S. at 819 n.4. Arguably, the Court implied that library books could be brought to the prisoner's cell. *See* Potuto, *supra* note 1, at 241. Since prisoners would have difficulty locating needed materials without a digest or citator, the *Bounds* Court considered an inmate's physical presence in a library to be unnecessary. *Id.*

Several courts and commentators have found that providing an adequate law library alone would not satisfy the goal of providing inmates with assistance in the preparation of meaningful legal papers since a high percentage of inmates are totally or functionally illiterate. *See* Bounds v. Smith, 430 U.S. 817, 836 (Stewart, J., dissenting); *see, e.g.*, Wetmore v. Fields, 458 F. Supp. 1131, 1143 (W.D. Wis. 1978) (ignorant and unskilled inmates have right of access to an adequate law library through the assistance of other willing inmates); Battle v. Anderson, 457 F. Supp. 719, 731 (E.D. Okla. 1978), *remanded*, 595 F.2d 786 (10th Cir. 1979) (use of library for two hours per week where only thirty percent of the inmates have the intelligence to do legal research does not provide meaningful access to the courts). *See generally* Note, *Prison Law Libraries: Meaningful Access To The Courts*, 7 CAP. U. L. REV. 469 (1978); Resource Center on Correctional Law and Legal Service, *Providing Legal Services to Prisoners*, 8 GA. L. REV. 363 (1974).

[23] 430 U.S. at 828.

[24] 584 F.2d 1336 (4th Cir. 1978).

the courts. In *Williams*, inmates incarcerated in state penal institutions and a prisoner confined in a city jail brought various actions claiming that state officials denied the prisoners' right to adequate access to legal materials.[25] The district courts dismissed the prisoners' complaints.[26] The prisoners appealed and the Fourth Circuit consolidated the cases for hearing.[27]

One of the appellants in *Williams* was confined in a South Carolina maximum security facility.[28] Though the state denied the inmate direct access to a law library, guards escorted him to a library cell upon request.[29] In addition, the state provided the inmate with legal assistance in the preparation of habeas corpus petitions.[30] However, South Carolina did not allow state funds to be used for legal assistance in the preparation of claims for money damages.[31]

The Fourth Circuit held that the combination of the law library program and the state funded programs designed to provide trained legal assistance to inmates satisfied the *Bounds* mandate.[32] The Williams Court recognized that the state would be justified in taking reasonable precautions to insure that maximum security prisoners did not use their right to access to a library under *Bounds* for illegal purposes.[33] Had the inmate been an ordinary prisoner not confined in the maximum security center, the state's library program probably would have been unconstitutional.[34] A prisoner ordinarily should have direct access to a law library.[35] Simply providing a prisoner with books in his cell does not give a prisoner a meaningful chance to explore legal materials.[36] However, the court did not reach the question of whether South Carolina's use of the library cell for maximum security prisoners was reasonable since the state also provided the prisoners with assistance from persons trained in the law.[37] The

---

[25] *Id.* at 1338.

[26] *Id.*

[27] *Id.*

[28] *Id.* Appellant Williams was incarcerated in the South Carolina Maximum Detention Retraining Center.

[29] *Id.* The maximum security section in which Williams was confined only had a meager library. *Id.* However, books could be ordered from another library which contained a selection of materials, similar to the library found to be constitutionally adequate in *Bounds*. *Id; see* Smith v. Bounds, 538 F.2d 541, 543-44 (4th Cir. 1975). *See also* note 22 *supra*. Prisoners were allowed to use the library cell from 8:00 a.m. to 3:00 p.m. without interruption. 584 F.2d at 1338. There usually was a one to two week period between the prisoners' request to be given access to the library cell and the time that the request was granted. *Id.*

[30] 584 F.2d at 1338. South Carolina provided legal assistance from a public defender's office and a prisoner assistance project operated by law students. *Id.*

[31] *Id.*

[32] *Id.* at 1339.

[33] *Id.* The *Williams* court suggested that appellant Williams might use the library as a cover to smuggle contraband to his cell. *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* A prisoner cannot be expected to know which legal materials he needs to consult. *Id. But see* note 22 *supra*.

[37] 584 F.2d at 1339. Similar to appellant Williams, two other appellants in *Williams*

Williams court noted that since state funds could not be used for money damage claims, no constitutional problem arose so long as the state provided "some" law library.[38] The Fourth Circuit reasoned that prisoners could discover the existence of meritorious claims by using legal materials.[39] Additionally, private counsel probably would be available on a contingent fee basis to assist the inmates in pursuit of meritorious claims for money damages.[40]

While South Carolina placed maximum security prisoners in a library cell, Virginia restricted the amount of time allowed in a library by another appellant who was incarcerated in a city jail.[41] Virginia limited this appellant's access to an adequate law library to three forty-five minute periods a week.[42] The trial record revealed no evidence as to whether Virginia provided legal assistance to prisoners confined in city jails.[43] The Fourth Circuit applied *Bounds* and held that a prisoner serving a "substantial sentence of confinement" in a local jail is entitled to reasonable access to the courts.[44] Reasoning that sufficient legal research on most legal problems cannot be done in forty-five minute intervals, the Fourth Circuit remanded the case to the district court.[45] On remand, the state

---

were incarcerated in a Virginia state prison and denied meaningful access to a law library. *Id.* at 1338. Appellant Hughes had no access to a law library as a result of his confinement in maximum security, while appellant Armstrong had access three times a month. *Id.* The Fourth Circuit held, however, that Virginia satisfied the *Bounds* mandate by providing prisoners with assistance from a state-funded legal assistance program. *Id.* at 1339. Virginia provides for the appointment of legal counsel to indigent inmates regarding any legal matter relating to their incarceration. VA. CODE § 53-21.2 (Cum. Supp. 1979); *cf.* text accompanying notes 30-31 *supra.* (South Carolina provides legal assistance only for habeas corpus petitions). The Fourth Circuit found that the state's system adequately insures that prisoners will have their claims presented to the courts since notice of the statutory right is posted in all units of the state prison system. 584 F.2d at 1338-39; *see* note 47 *infra.*

[38] 584 F.2d at 1339.

[39]

[40] *Id.*

[41] *Id.* at 1338. In *Williams,* appellant Brown was incarcerated in a Richmond city jail. The *Williams* court did not note why or for how long Brown was sentenced to jail.

[42] *Id.*

[43] *Id.* at 1338-39; *see* note 47 *infra.*

[44] 584 F.2d at 1340. Although *Bounds* required that the state provide "meaningful access" to the courts, 430 U.S. 817, 826-27 (1977), the *Williams* Court termed the requirement "reasonable access" when referring to prisoners in local jails. 584 F.2d at 1340. The difference in adjectives could illustrate the Fourth Circuit's recognition that meaningful access may allow the states to adopt any reasonable means to satisfy the *Bounds* mandate. The Supreme Court in *Bounds* allowed such flexibility when the Court stated that economic factors could be considered in providing access to the courts so long as there is not a total denial of meaningful access. 430 U.S. at 825.

[45] 584 F.2d at 1341. The Fourth Circuit noted that the quality of access to library research is the significant element in determining whether a prisoner is being allowed meaningful access to the courts. *Id.* at 1340. Though appellant Brown was allowed to spend an amount of time per month in the library as prisoners in the North Carolina prison system found adequate in *Bounds,* Brown's access was comparatively restricted. *Id.* at 1340-41. The North Carolina prisoners could explore their legal problems over the course of a full day, while Brown's short forty-five minute intervals did not allow for this uninterrupted pursuit of different avenues of research. *Id.* at 1340 n.2.

must bear the burden of proving that the appellant had adequate access to the library because of the simple nature of his claim.[46] The Fourth Circuit also directed the district court to determine whether Virginia provided statutory legal assistance to prisoners in city jails and, if so, whether the prisoners had notice of the right to counsel.[47]

A narrow reading of *Bounds* calls into question the Fourth Circuit's approval of South Carolina's system for providing maximum security prisoners with access to the courts. Even though *Bounds* requires the states to provide *either* adequate access to a law library *or* an adequate legal assistance program,[48] the *Williams* court held that a combination of insufficient access to a law library[49] and a deficient legal aid program[50] satisfied the *Bounds* mandate.[51] Thus *Bounds* should not be read too restrictively. The Supreme Court has stated that federal courts must evalu-

[46] 584 F.2d at 1340. Brown's claim, by itself, might be so simple that he could meaningfully research the claim in forty-five minutes. *Id.* Had appellant Brown brought his action as a class action claim, there would have been greater likelihood that the court would have found that the class of prisoners were denied meaningful access. *Id.*

[47] *Id.* at 1340. There was no finding in the record that prisoners in city and county jails have a right to seek appointment of counsel under VA. CODE § 53-21.2 (Cum. Supp. 1978) (current version at VA. CODE § 53-21.2 (Cum. Supp. 1979)), which, before the 1979 amendment, provided for the appointment of legal counsel to indigent inmates confined in a prison farm or a unit of the Bureau of Correctional Field Units. *See* 584 F.2d at 1338. The record did not state whether Brown requested any assistance. *Id.* Subsequent to the *Williams* decision, the Virginia statute was amended to apply to state correctional institutions which, under VA. CODE § 53-19.18 (Repl. Vol. 1978), include every jail, jail farm, lockup, or other place of detention owned, maintained and operated by any political subdivision of the Commonwealth. *See* VA. CODE § 53-21.2 (Cum. Supp. 1979) (court shall on motion of commonwealth's attorney, when requested by superintendent or warden, appoint counsel to indigent inmates regarding any legal matter relating to their incarceration).

Virginia's statutory system provides counsel to indigent inmates "regarding any legal matter relating to their incarceration." VA. CODE § 53-21.2 (Cum. Supp. 1979). Under this section, Virginia need not provide counsel to inmates concerning legal matters not related to incarceration. However, the Supreme Court in Boddie v. Connecticut, 401 U.S. 371 (1971), has suggested that due process may require that counsel be provided for indigent inmates in such cases. In *Boddie*, the Court concluded that persons forced to settle their claims in court must have an opportunity to be heard. *Id.* at 382-83. Arguably, an opportunity to be heard requires assistance of counsel or reasonable access to a law library. In any event, VA. CODE § 8.01-229(A)(3) provides that imprisonment is a disability which tolls the statute of limitations. VA. CODE §§ 53-305 through 53-312.1 (Repl. Vol. 1978). Therefore, in Virginia meaningful access to the courts is not being denied inmates, but merely delayed. *See generally*, Goldfarb & Singer, *supra* note 1, at 246; Potuto, *supra* note 1, at 218-22.

[48] *See* text accompanying note 15 *supra.*

[49] *See* text accompanying notes 34-36 *supra.*

[50] *See* text accompanying notes 38-40 *supra.*

[51] 584 F.2d at 1339. Making law books available to a prisoner without actual physical access to a library also might satisfy *Bounds*. *See* note 22 *supra*. *See generally* Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir. 1978) (restricted access to law library of two hours per week, then sixteen per week, not per se denial of access to the courts); Nadeau v. Helgemoe, 561 F.2d 411, 418 (1st Cir. 1977) (though use of library was better than the North Carolina plan approved in *Bounds*, inmates were unconstitutionally deprived of full access since full access could be provided at little costs); Battle v. Anderson, 457 F. Supp. 719, 737 (E.D. Okla. 1978) (state shall provide civilian legal advisers *and* additional library).

ate the total state plan to determine whether the plan complies with the requisite standard of meaningful access to the courts.[52] The flexibility allowed by *Bounds* supports the Fourth Circuit's conclusion that a state which provides some trained legal assistance to prisoners may limit a prisoner's access to a law library if the prisoner is a known security risk.[53] A state should be able to take reasonable steps to preserve prison security when dealing with maximum security prisoners.[54]

The Fourth Circuit's application of *Bounds* to local jails goes beyond the Supreme Court's holding which, narrowly read, applies only to state penal institutions.[55] The *Williams* decision should not be read more

---

[52] 430 U.S. at 828.

[53] *See* 584 F.2d at 1339.

[54] In United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978), the Fourth Circuit considered the application of *Bounds* to an inmate who was a known security risk in circumstances different from those in *Williams*. The *Chatman* court held that once the government appointed counsel for a prisoner, the requirement of *Bounds* is satisfied and the prisoner need not receive access to legal materials to prepare his defense. *Id.* at 1360. While in prison, Chatman sent a letter to a judge threatening the judge's life. *Id.* at 1359-60. The government offered appointed counsel to Chatman to represent him against the resulting federal criminal charges. *Id.* Chatman voluntarily and with knowledge of his rights waived his right to counsel and asserted his constitutional right to proceed pro se under Faretta v. California, 422 U.S. 806 (1975). Since Chatman was in maximum security, the government did not allow Chatman access to legal materials to prepare his defense. 584 F.2d at 1360. The Fourth Circuit reasoned that *Bounds* did not apply because *Bounds* applied only to provide post-conviction relief. *Id.* Even if applicable, the Fourth Circuit concluded that the *Bounds* decision does not allow the prisoner to elect between a law library or legal assistance. *Id.* The government properly could determine that greater security was needed for persons in segregated confinement. *Id. But see* United States v. West, 557 F.2d 151, 153 (8th Cir. 1977) (appointment of "standby counsel" satisfies *Bounds);* Potuto, *supra* note 1, at 228-40; Note, *The Jailed Pro Se Defendant and the Right To Prepare a Defense,* 86 YALE L.J. 292, 293-303 (1976).

In Nadeau v. Helgemoe, 423 F. Supp. 1250 (D.N.H. 1976), *aff'd in part, vacated and remanded in part,* 561 F.2d 411 (1st Cir. 1977), the district court held that states may not use the security status of a prisoner as a justification to interfere with the inmate's right of access to the courts. *Id.* at 1273. However, reasoning that compelling state interests may justify infringement of the fundamental right of access, the district court held that a state may limit the inmate's access to a library to accommodate the rights of other prisoners. *Id.; cf.* Bauer v. Sielaff, 372 F. Supp. 1104, 1111 (W.D. Pa. 1974) (prisoner in maximum security not denied reasonable access to the courts where he failed to sustain proof of denial, intent to deny and actual damages).

[55] *See* 430 U.S. at 819; 584 F.2d at 1341 (Hall, J., concurring in part, dissenting in part). Prior to the 1977 decision in *Bounds,* the Supreme Court remanded a lower court's dismissal of a complaint by prisoners in a county jail that they were denied access to an adequate law library in light of Younger v. Gilmore, 404 U.S. 15 (1971). Cruz v. Hauck, 404 U.S. 59 (1971); *see* text accompanying notes 10-12 *supra.* On remand, the Fifth Circuit held that access to the courts may be achieved by providing legal materials, counsel or any other appropriate device that the jail authorities are able to prove to be an adequate alternative. Cruz v. Hauck, 515 F.2d 322, 331-32 (5th Cir. 1975). The jail at issue in *Cruz* performed the functions of a state penal institution and contained approximately 700 inmates, making it comparable to other state penal institutions. *Id.* at 332. However, neither the size of the institution nor its functions should affect whether an inmate is entitled to meaningful access to the courts. The size of the institution might be relevant insofar as the economic cost of provid-

broadly than holding *Bounds* applicable to inmates serving a substantial sentence of confinement.[56] Providing meaningful access to the courts should be weighed against the economic costs of equipping every local jailhouse with a constitutionally adequate library or providing legal assistance to every person incarcerated in local jails.[57] Prisoners serving short sentences are not denied their right of access by virtue of the failure of state authorities to conform to the *Bounds* mandate.[58] The appropriate question should be whether the prisoner has an alternative route of access to the courts.[59] Most claims of prisoners incarcerated for a short period can be litigated upon the prisoner's release or transfer to a more permanent facility to which *Bounds* applies.[60] Requiring a prisoner to wait a few weeks before he can research his claim is no different than requiring a prisoner to wait a few weeks in one prison before his request to have access to the prison library is honored.[61]

---

ing access to an adequate library is insignificant such as in the situation where the institution already provides a law library. The First Circuit noted that the cost of providing access to a library could be used in favor of the prisoner. Nadeau v. Helgemoe, 561 F.2d 411, 418 (1st Cir. 1977). In *Bounds*, North Carolina could not have given the prisoners additional access without large expenditures, but in *Nadeau*, it would have cost New Hampshire very little to allow the inmates to use the library, which was located only three to four floors from their cells. *Id.* Thus even though New Hampshire's plan in *Nadeau* was better than the North Carolina plan approved in *Bounds*, it was unconstitutional because the cost of providing additional access was insignificant. *Id.*

[56] 584 F.2d at 1340. The Fourth Circuit stated that misdemeanants serving up to twelve months in local jails should not be left wholly without resources to prosecute habeas corpus or civil rights claims. *Id.*

[57] *See* note 55 *supra*. The dissent in *Williams* suggested that the right of access to a library should be considered in connection with the prisoner's length of incarceration, the number of prisoners housed in the facility, the purpose of the facility and the inmate's access to counsel as a matter of right. 584 F.2d at 1343 (Hall, J., concurring in part, dissenting in part). The Fifth Circuit recently stated that prisoners in a county jail under a final judgment of conviction would have a cause of action to bring suit against state officials for denying their right of access to the courts. Jones v. Diamond, 594 F.2d 997, 1024-25 (5th Cir. 1979) (dictum), *rehearing granted*, 602 F.2d 1243 (5th Cir. 1979). *But see* Page v. Sharpe, 487 F.2d 567, 569 (1st Cir. 1973) (county sheriff not required to supply law books).

[58] *See* 584 F.2d at 1341 (Hall, J., concurring in part, dissenting in part). In Gordon v. Leeke, 574 F.2d 1147 (4th Cir.), *cert. denied*, 439 U.S. 970 (1978), the Fourth Circuit held that the district court had an affirmative duty to *assist* a pro se petitioner. *Id.* at 1152. Relying upon *Gordon*, Circuit Judge Hall argued in *Williams* that persons housed in a short-term prison facility need not have access to a library because the district court has a duty to inquire into facts to determine whether a colorable claim has been stated. 584 F.2d at 1344 (Hall, J., concurring in part, dissenting in part). However, the Supreme Court in *Bounds* concluded that it could not assume that a trial judge will evaluate facts pleaded in light of the relevant law. 430 U.S. at 826. The trial judge could easily overlook meritorious claims without the benefit of an adversary presentation. *Id. See generally Fourth Circuit Review—Habeas Corpus and Prisoners' Rights*, 36 WASH. & LEE L. REV. 379, 610-19 (1979).

[59] *See* text accompanying note 52 *supra*.

[60] 584 F.2d at 1341 (Hall, J., concurring in part, dissenting in part). Judge Hall argued that six to twelve months should not prejudice a valid prisoner's complaint. *Id.* A prisoner does not lose a claim because of the statute of limitations since most states have statutes that make imprisonment a disability which tolls the statute of limitations. *See* Goldfarb & Singer, *supra* note 1, at 246; *see, e.g.*, VA. CODE § 8.01-229(A)(3) (Cum. Supp. 1979).

[61] In *Williams*, one appellant had to wait one to two weeks before the guards granted

The significance of the *Bounds* holding that states must provide prisoners with meaningful access to the courts is apparent when it is recognized that prisoners are at the mercy of administrative officials who manage the prisoners' total existence from "sundown to sundown."[62] Although lawful incarceration results in a withdrawal or limitation of many rights and privileges,[63] persons are placed in prison as punishment, not to be punished.[64] Federal courts are using the cruel and unusual punishment clause of the eighth amendment[65] to check the potential that exists for prison officials to punish inmates beyond constitutional limitations. The cruel and unusual punishment clause is a progressive doctrine, which acquires meaning from public opinion and evolving standards of decency.[66] Increasingly, the courts are providing prisoners with relief not only from acts of cruelty, but also from generally poor prison conditions.[67] The Fourth Circuit recently found in *Johnson v. Levine*[68] that the conditions in an overcrowded state prison reached such proportions that the aggregate effect amounted to cruel and unusual punishment.[69]

In *Johnson,* prisoners in two Maryland State penal institutions filed civil rights class action suits alleging that the conditions of their confinement violated the eighth amendment prohibition of cruel and unusual punishment.[70] The general population areas of the two prisons were over-

---

his request to escort him to the library cell. *See* note 29 *supra.* This delay apparently was not significant to the court. All circumstances should be considered in assessing whether a delay interferes with a prisoner's rights under *Bounds. See* text accompanying note 54 *supra.*

[62] *See Prison Reform, supra* note 3, at 387.

[63] *See* Pell v. Procunier, 417 U.S. 817, 827-28 (1974) (statute prohibiting press interviews with prisoners not unconstitutional). *See also* Jones v. N.C. Prisoners Labor Union, Inc., 433 U.S. 119, 125-26 (1978) (limitation of first amendment rights because of needs of penal institution and fact of confinement).

[64] Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977).

[65] The cruel and unusual punishment clause states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. The eighth amendment was first applied to the states through the fourteenth amendment in Robinson v. California, 370 U.S. 660 (1962). *See generally* Comment, *Overcrowding in Prisons and Jails: Maryland Faces a Correctional Crisis,* 36 MD. L. REV. 182, 188-91 (1976).

[66] *See* Trop v. Dulles, 356 U.S. 86, 99-104 (1958) (denationalization of Trop which left him stateless because of desertion from the Army is cruel and unusual punishment barred by the eighth amendment); Weems v. United States, 217 U.S. 349, 358, 380-82 (1910) (sentence of fifteen years for falsifying a public document constitutes cruel and unusual punishment). *See also* Estelle v. Gamble, 429 U.S. 97, 102-06 (1976) (deliberate indifference to a prisoner's serious medical needs is grounds for relief under § 1983).

[67] *See* note 102 *infra.*

[68] 588 F.2d 1378 (4th Cir. 1978) (per curiam).

[69] *Id.* at 1380-81. *But cf.* Hite v. Leeke, 564 F.2d 670, 671 (4th Cir. 1977) (double occupancy of cells initially designed for single occupancy not per se unconstitutional).

[70] 588 F.2d at 1378, 1380. The Fourth Circuit in *Johnson* consolidated two lower court decisions, Johnson v. Levine, 450 F. Supp. 649-50 (D. Md. 1978) and Nelson v. Collins, 455 F. Supp. 727 (D. Md. 1978). The prisoners filed federal class actions. 455 F. Supp. at 728; 450 F. Supp. at 651. The class of prisoners included those prisoners who are now or will in the future be confined in the Maryland House of Corrections and the Maryland Penitentiary.

crowded, causing the Maryland prison officials to double cell[71] most of the prisoners.[72] The overcrowded conditions resulted in suicides,[73] increased risk of sexual attack,[74] excessive noise levels, increased stress, extensive idleness,[75] and deplorable ventilation problems.[76] The conditions in two specific areas were even more severe than the overall conditions in the general population area. In the Special Confinement Area, which housed inmates with psychological or psychiatric problems, only one correctional officer was responsible for the security and feeding of forty-nine prisoners,[77] and the Area had only one shower.[78] Some cells in the Special Confinement Area had no beds or toilets.[79] The inmates were confined to their cells twenty-three hours per day and received no psychiatric treatment.[80] A second section, known as the six-cell isolated confinement section, housed those prisoners who appeared to constitute a threat to themselves or others.[81] Inmates were confined to this section for extended periods of time without receiving proper medical attention.[82]

Emphasizing the double celling in the general prison areas, the district courts held that the overcrowded conditions were unconstitutional.[83] The district courts rejected Maryland's proposal that involved the construction of a new facility and the early release of certain prisoners with the objective of eliminating overcrowded conditions within twenty-four months.[84] The district courts found Maryland's plan insufficient to meet the needs of the class of prisoners and ordered that the overcrowded conditions be eliminated within twelve months.[85] The district courts also

---

[71] Double celling is the double occupancy of a cell initially designed for single occupancy. 588 F.2d at 1380; *see* Hite v. Leeke, 564 F.2d 670, 674 (4th Cir. 1977).

[72] *See* 455 F. Supp. at 734; 450 F. Supp. at 651.

[73] Fifty-three instances of attempted suicide occurred at the Maryland House of Corrections in 1977. 450 F. Supp. at 655.

[74] Double celling decreased the ability of prison guards to protect the weaker inmates from homosexual assaults. *Id.* at 656. Only one guard at a time could enter a cell when a disturbance occurred. 455 F. Supp. at 734.

[75] 450 F. Supp. at 655. Prisoners remained in their cells even during the day.

[76] 588 F.2d at 1380. Only one inmate at a time could move around the cell; the other was forced to remain in his bunk. An inmate could never be more than a few feet from the other when using the available toilet facilities. 455 F. Supp. at 734.

[77] 450 F. Supp. at 657. The Special Confinement Area was located in the Maryland House of Corrections. *Id.* at 651-52.

[78] *Id.* at 652.

[79] *Id.* at 657.

[80] *Id.* The average stay in the Special Confinement Area was six to eight months. *Id.* at 651. The district court found that confinement to this area amounted to greater punishment than confinement to the administrative segregation unit, even though the prisoners in the Special Confinement Area had broken no rules. 450 F. Supp. at 657-58.

[81] The six-cell isolated confinement area was located in the Maryland Penitentiary. 455 F. Supp. at 734.

[82] *Id.* at 735.

[83] 455 F. Supp. at 734; 450 F. Supp. at 654, 657.

[84] 455 F. Supp. at 737; 450 F. Supp. at 661.

[85] 450 F. Supp. at 661. The district court noted that although a lawfully convicted and sentenced state prisoner necessarily must suffer the loss of rights and privileges, federal

found that conditions in the Special Confinement Area and in the six-cell isolated confinement section were so severe that immediate relief was required.[86] The district court ordered the state to close the Special Confinement Area,[87] and give prompt and adequate medical care to the prisoners in the isolated confinement section.[88]

The Fourth Circuit affirmed the district courts' finding that the overcrowded conditions were unconstitutional, but remanded the cases to the district courts with directions to incorporate Maryland's proposed plan into the judicial decree.[89] In addition, the Fourth Circuit affirmed the granting of injunctive relief regarding the Special Confinement Area and the punitive isolation unit.[90] The Fourth Circuit reasoned that the elimination of substantial overcrowding would ameliorate the deficiencies in general services and medical facilities.[91] However, because the conditions were not as extreme as in some reported cases,[92] the *Johnson* court deferred to the plan proposed by the Maryland officials to eliminate overcrowding.[93] The court held that Maryland's plan was practical and reasonable,[94] adding that only a new facility could completely eliminate the unconstitutional conditions.[95]

The Fourth Circuit correctly found that overcrowding is not per se unconstitutional, but may become unconstitutional when the consequences of overcrowded conditions become severe.[96] No single prison condition has been held to be cruel and unusual punishment.[97] However,

---

courts have to intervene in the internal affairs of prison management because of overcrowding. 450 F. Supp. at 653. However heinous the crimes committed by the prisoners, they still retain certain constitutional rights. 450 F. Supp. at 654. The district court further noted that there was no prisoners' lobby present in the legislature to compete with other powerful pressure groups for a share of the tax dollar. *Id.* Therefore, the district court concluded that judicial intervention is necessary to implement the basic constitutional rights of prisoners. *Id.*

[86] 455 F. Supp. at 735.

[87] 450 F. Supp. at 654, 662. The district court ordered that the Special Confinement Area be closed and suggested that actively psychotic prisoners be transferred to the appropriate state mental hospital. *Id.* at 658. The disposition of the prisoners in the Special Confinement Area after the district court ordered the area closed is uncertain because, prior to the court's decision, the state mental hospitals would not accept them. *Id.* at 657.

[88] 455 F. Supp. at 736-37.

[89] 588 F.2d at 1381.

[90] *Id.*

[91] *Id.* at 1380.

[92] The *Johnson* court did not specify which reported cases were more extreme than the conditions before the court. However, several reported cases justify the court's conclusion. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 681 (1978) (district court characterized prison conditions as "dark and evil").

[93] 588 F.2d at 1381. Maryland's inmate population had been increasing rapidly in recent years. In 1976 alone the population increased sixteen percent. 450 F. Supp. at 655.

[94] 588 F.2d at 1381.

[95] *Id.*

[96] *Id.*

[97] Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854, 861 (4th Cir. 1975); *see, e.g.*, Hite v. Leeke, 564 F.2d 670, 671 (4th Cir. 1977) (double celling alone at recently com-

as in *Johnson,* overcrowding seems to be the critical factor which aggravates prison conditions to the point of unconstitutionality. Prison conditions become cruel and unusual punishment prohibited by the eighth amendment when overcrowding results in a substantial denial of medical facilities,[98] recreation, protection[99] and proper sanitation.

Once prison conditions are found to be unconstitutional, a court must determine what relief is appropriate. In considering the appropriate remedy, the *Johnson* court implicitly recognized two degrees of unconstitutional cruel and unusual punishment: that which requires immediate relief, and that which can be tolerated until it is practical to correct. Conditions in the Special Confinement Area and in the six-cell isolated confinement section were unconstitutional to the extent that immediate injunctive relief was necessary.[100] The overcrowded conditions in the general prison area also were unconstitutional, but the court found that the conditions could be tolerated for an additional eighteen months.[101] In reaching this conclusion, the Fourth Circuit properly deferred to the

---

pleted $12 million modern facility not in itself unconstitutional); Burrascano v. Levi, 452 F. Supp. 1066, 1068-69 (D. Md. 1978) (failure to give prisoner one day's medication for mild hypertension not unconstitutional; leaky ceilings and dirty floors not constitutionally significant); West v. Edwards, 439 F. Supp. 722, 723, 725 (D.S.C. 1977) (triple-celling not unconstitutional). *But see* Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977) (crowding reached such proportions that it is per se unconstitutional). Although not a constitutional requirement, minimum space for privacy has been held to be a psychological necessity. *See* Nacci, Teitelbaum, Prather, *Population Density and Inmate Misconduct Rates in the Federal Prison System,* 41 FED. PROB. 26, 30-31 (June 1977).

[98] A cause of action for denial of medical care cannot be brought under 42 U.S.C. § 1983 (1976) unless there has been a deliberate indifference to a prisoner's serious illness or injury. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); *see* Loe v. Armistead, 582 F.2d 1291, 1296 (4th Cir. 1978) (pretrial detainee was treated at a hospital twenty-two hours after he broke his arm); Webster v. Jones, 554 F.2d 1285, 1286 (4th Cir. 1977) (doctor claims that he examined inmate several times supports summary judgment for prison authorities); Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854, 864 (4th Cir. 1975) (medical care adequate where two medical technicians visited cell block three times a day); Russell v. Sheffer, 528 F.2d 318, 319 (4th Cir. 1975) (questions of medical judgment not subject to judicial review). However, repeated examples of denial and delay of medical treatment bespeak a deliberate indifference to the medical needs of prisoners. *See* Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977) (delay in access to a physician two weeks to two months not uncommon); Loaman v. Helgemoe, 437 F. Supp. 269, 312 (D.N.H. 1977). *See generally,* Comment, *Actionability of Negligence Under Section 1983 and the Eighth Amendment,* 127 U. PA. L. REV. 533, 559-61 (1978).

Inmates also are entitled to some psychological or psychiatric treatment. Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977). The Fourth Circuit observes no distinction between the right to medical care for physical ills and the psychological or psychiatric counterpart. *Id.; see* Vinnedge v. Gibbs, 550 F.2d 926, 928 (4th Cir. 1977).

[99] *See* Woodhous v. Commonwealth of Virginia, 487 F.2d 889, 890 (4th Cir. 1973) (confinement in a prison where violence and terror reign actionable); *see also,* Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977) (overcrowding and lack of security were noted as the cause of deplorable conditions in a Louisiana State Penitentiary where 270 stabbings and 20 deaths occurred during three years of hearings).

[100] *See* text accompanying notes 86-88 *supra.*

[101] 588 F.2d at 1381.

judgment of the prison officials.[102] Prison administrative officials should be accorded wide discretion to adopt and execute necessary policies and practices.[103] The problems of prison administration are complex and are not readily susceptible to resolution by court decree.[104]

In addition, there are limits on a federal court's equitable powers.[105] A federal court must focus upon three factors in determining the appropriate remedy for unconstitutional conditions.[106] The remedy should be re-

---

[102] *Id.* Other federal courts have fashioned comprehensive judicial remedies which exceed the district court's orders in *Johnson.* In Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977), the Tenth Circuit rejected Oklahoma's plan, and ordered an inmate reduction of 100 inmates per month at one facility and fifty per month at another until reduced to an acceptable level. *Id.* at 396. On remand the district court constructed a thirty-two point comprehensive decree that detailed specific dates of compliance, including those of ground breaking for new inmate housing, closings of existing housing, minimum permissible square footages of living area per inmate and the termination of double celling. Battle v. Anderson, 457 F. Supp. 719, 738-40 (E.D. Okla. 1978).

The Fifth Circuit, in affirming a district court order requiring Louisiana to submit a long-range plan for constitutional operation of the prison within 180 days, also affirmed an order requiring 950 guards at one unit and forbidding any inmate additions. Williams v. Edwards, 547 F.2d 1206, 1213, 1215 (5th Cir. 1977). However, in Newman v. Alabama, 559 F.2d 283, 289 (5th Cir. 1977), *cert. denied,* 438 U.S. 915 (1978), the Fifth Circuit held that the district court went too far in ordering a "Human Rights Committee" composed of thirty-nine individuals to monitor the district court's orders and to take any action necessary to accomplish the committee's function. *Id.* at 289. The Fifth Circuit reasoned that prison officials cannot be expected to perform in an efficient manner if they are required to comply with the dictates of thirty-nine members. *Id.* Consequently, the Fifth Circuit ordered one monitor for each prison with authority to make observations. *Id.* at 290; *see* Costello v. Wainwright, 397 F. Supp. 20, 34-35 (M.D. Fla. 1975) (defendant Director of Division of Corrections must reduce inmate population to emergency levels within one year and to normal capacity within eighteen months, which coincides with construction of planned new facility). *See generally Prison Reform, supra* note 3, at 374-388; Comment, *Equitable Remedies Available to a Federal Court After Declaring an Entire Prison System Violates the Eighth Amendment,* 1 CAP. U. L. REV. 101 (1972).

[103] Bell v. Wolfish, 99 S. Ct. 1861, 1878 (1978) (class action by pretrial detainees). *See also* Meachum v. Fano, 427 U.S. 215, 228-29 (1976) (fourteenth amendment does not entitle state prisoner to a hearing when he is transferred to a prison where conditions are less favorable).

[104] *See* Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) (first amendment as applied to the states by the fourteenth amendment bars a California regulation relating to prisoner mail). Most of the problems of American prisons require expertise, comprehensive planning, and the commitment of resources which are within the province of the legislative and executive branches of government, particularly where state institutions are concerned. *Id.* Consequently, courts are ill-equipped to deal with problems of prison reform. *Id.*

[105] *See* Milliken v. Bradley, 433 U.S. 267, 280 (1977) (school desegregation decree).

[106] *Id. Milliken* was applied to a court decree regarding prisoners' rights in Hutto v. Finney. 437 U.S. 678, 713 (1978) (Rehnquist, J., dissenting). In *Hutto,* the Supreme Court affirmed a district court order that a prisoner's maximum confinement in punitive isolation can not exceed thirty days. *Id.* at 688. Justice Rehnquist, dissenting, noted that the thirty day rule, which was prophylactic, did not relate to the offensive conditions. *Id.* at 712. The described conditions of the confinement cell did not become unconstitutional on the thirty-first day. *Id.* Similarly, the prison conditions in Maryland did not become unconstitutional on the 349th day. The Supreme Court's affirmation of the district court's "prophylactic" thirty-day rule in *Hutto* lends support to the district court's order in *Johnson.* However, *Hutto* may be distinguishable from *Johnson.* The district court in *Hutto* did not immedi-

lated to the alleged unconstitutional conditions.[107] Furthermore, the remedy should be designed to restore the victims of unconstitutional conditions to the position they would have been in, absent such conditions.[108] In addition, the federal court must consider the interests of state and local authorities in managing their own affairs.[109] Under the latter factor, the Fourth Circuit properly could find that the general prison conditions in *Johnson* were unconstitutional, but defer to the interests of the state and local authorities in fashioning an appropriate remedy.[110]

While prisoners are concerned about prison conditions, they often are more concerned about release from prison. One of the most important interests of a prisoner is parole,[111] since parole is the predominant mode of release.[112] When a prisoner is considered for parole, files maintained by prison authorities on each prisoner[113] are often more significant to the parole board than the inmate himself.[114] An inmate's interest in his file

---

ately impose its detailed remedy, although the conditions in the Arkansas penal system, characterized as "dark and evil," deserved remedial orders. *Id.* at 681-83. Rather, the district court first ordered a general remedy in 1969, instructing the director to "make a substantial start. . . ." *Id.* at 683. Finally, the district court concluded in 1976 that specific remedies were required, including the thirty-day rule. *Id.* Thus the Supreme Court's affirmation of the specific relief must be considered with the fact that the relief was not ordered until the constitutional violations persisted for at least seven years. The district court's orders in *Johnson* were rendered before giving *Maryland* an opportunity to remedy the conditions.

[107] 433 U.S. at 280.

[108] *Id.*

[109] *Id.*

[110] In Johnson v. Levine, 588 F.2d 1378, the court did not find that the Maryland officials acted in good faith. *Cf.* Hutto v. Finney, 437 (U.S. 678, 684 (1978) (Arkansas officials failed to comply with court order for seven years); *see* note 106 *supra.*

[111] Parole is the conditional release of a prisoner from a penal institution after he has served part of his sentence. Note, *Prisoner Access To Parole Files: A Due Process Analysis,* 47 FORDHAM L. REV. 260, 260 n.2 (1978) [hereinafter cited as *Parole Files*]. *See also* L. CARNEY, PROBATION AND PAROLE: LEGAL AND SOCIAL DIMENSIONS 154, 177 (1977) [hereinafter cited as CARNEY].

[112] CARNEY, *supra* note 111, at 177.

[113] A typical prisoner's file contains his previous criminal record, a statement of the offense with which he was charged, the offense of which he was convicted, physical, mental, and psychiatric reports, and a disciplinary report listing all infractions of prison rules committed by the inmate. *Parole Files, supra* note 111, at 264; *see, e.g.,* N.C. GEN. STAT. § 148.59 (Repl. Vol. 1978).

[114] *See Parole Files, supra* note 111, at 264. In some states, the prisoner is not allowed to appear at the review. *See, e.g.,* Williams v. Missouri Bd. of Probation & Parole, 585 F.2d 922 (8th Cir. 1978), *vacated,* 61 L.Ed. 2d 293 (1979) (prior to review, a Missouri parole officer interviews the inmate and files a report in the parole file). The parole board, more often than the sentencing judge, determines how long a prisoner remains incarcerated. *See Parole Files, supra* note 111, at 260. In 1970, for example, 72% of the 83,000 felons released from prison were paroled. CARNEY, *supra* note 111, at 177. The parole board has broad discretion in determining who is to be granted parole. *See* Boddie v. Weakley, 356 F.2d 242, 243 (4th Cir. 1966). There is no right to judicial review of the Parole Board's exercise of its discretionary powers. *Id.* The Fourth Circuit has held that parole authorities should be granted broad latitude for experimentation and the use of discretion. Franklin v. Shields, 569 F.2d 800 (4th Cir. 1978) (*en banc*), *aff'g in part and rev'g in part,* 569 F.2d 784 (4th Cir.

becomes acute when he becomes aware of the possibility that the file contains errors that may result in denial of parole.[115] However, providing inmates with access to their files to determine the accuracy of information within the files must be balanced with counterveiling state interests in maintaining the confidentiality of sources who contribute information to the parole board[116] and in minimizing the administrative burden of parole boards.[117]

In *Paine v. Baker*,[118] the Fourth Circuit attempted to balance a prisoner's need for access to his prison file with the state's need to minimize administrative burdens and maintain the confidentiality of sources. The *Paine* court held that a prisoner has no statutory or constitutional right of physical access to his prison files, but does have a limited due process right to have false information expunged from such files.[119] Inmate Paine sought access to his prison file maintained by the North Carolina Department of Corrections.[120] The district court held that Paine had a statutorily protected right of access to his prison file, reasoning that since the records were made available by state statute "to almost anybody," the state could not reasonably deny access to the inmate himself.[121] The dis-

---

1977), *cert. denied*, 435 U.S. 1003 (1978). *See generally Parole Files, supra* note 111, at 264.

[115] Justice Marshall contends that there are many substantial inaccuracies in inmates' files. Greenholtz v. Inmates of Nebraska Penal and Cor., 99 S. Ct. 2100, 2117 (1979) (Marshall, J., dissenting); *see, e.g.*, Kohlman v. Norton, 380 F. Supp. 1073 (D. Conn. 1974) (parole denied because file erroneously indicated that applicant had used a gun in commiting robbery); State v. Pohlabel, 61 N.J. Super. 242, 160 A.2d 647 (1960) (presentence report erroneously showed that prisoner was under a life sentence in another jurisdiction). In *Greenholtz*, the inmate was denied parole because the Parole Board believed that he should enlist in a self-improvement program, although the inmate was already in such a program. 79 S. Ct. at 2117 n.15.

[116] A district court has held that the need for confidentiality of sources outweighs possible interests of inmates in locating and correcting factual errors. Sites v. McKenzie, 423 F. Supp. 1190, 1195 (N.D. W.Va. 1976). The confidentiality of sources is important in developing the history of the interviewees. *Id.* at 1196-97. Disclosure of the sources could result in danger to third persons if their identity became known to an inmate reviewing his file. Brief of the Attorney General of North Carolina at 13, Paine v. Baker, 595 F.2d 197 (4th Cir. 1979). The sources might refrain from frank expression of opinion if they believe the prisoner might have access to their statements. *Id.*

[117] During the fiscal year 1973-1974, the Virginia Parole Board considered, 3,792 applications for parole. Franklin v. Shields, 569 F.2d 784, 795, *aff'd in part, rev'd in part*, 569 F.2d 800 (4th Cir. 1977), *cert. denied*, 435 U.S. 1003 (1978). *See generally* Holup v. Gates, 544 F.2d 82 (2d Cir. 1976), *cert. denied*, 430 U.S. 941 (1977) (remanded to district court to balance any due process right to files with burden of state in redacting the files); Note, *The Application of Due Process and State Freedom of Information Acts to Parole Release Hearings*, 27 SYRACUSE L. REV. 1011, 1027 (1976) [hereinafter cited as *Parole Release Hearings*].

[118] 595 F.2d 197 (4th Cir. 1979).

[119] *Id.* at 200.

[120] *Id.* at 198. Paine filed a request for production of documents pursuant to FED. R. CIV. P. 34. *Id.* The district court construed the request as a complaint under 42 U.S.C. § 1983 (1976). *Id.* at 199. The Fourth Circuit affirmed the district court's construction of the pro se request. *Id.* According to Haines v. Kerner, 404 U.S. 519 (1972), federal district courts are to construe liberally papers filed by prisoners proceeding pro se. *Id.* at 520; *see* note 58 *supra*.

[121] 595 F.2d at 199. In North Carolina, information compiled for the use of the Secre-

trict court further held that Paine had a constitutionally protected right of access to his prison file before or after disciplinary proceedings involving forfeiture of statutory privileges.[122]

Construing Paine's amended complaint, which was not considered by the district court because of a clerical error, to state that information in the file was false and should be expunged,[123] the Fourth Circuit reversed the district court's statutory interpretation as inconsistent with a prior interpretation by the North Carolina Supreme Court.[124] Relying on *Franklin v. Shields*,[125] the Fourth Circuit also reversed the district court's holding that a prison inmate has a constitutionally protected right of access to his prison file.[126] In *Franklin*, the Fourth Circuit held that there was no constitutional requirement that a prisoner has access to his files before a parole hearing.[127] The *Franklin* court found that the parole board need only furnish a statement of reasons for denial of parole.[128] The Fourth Circuit reasoned that matters such as access to prison files and the right to receive a personal hearing were better left to the discretion of the parole board.[129] In *Paine*, the Fourth Circuit further reasoned that allowing a prisoner general access to his parole file would create an overwhelming administrative burden.[130]

The Fourth Circuit dismissed Paine's amended complaint because of a failure to allege that prison officials had deprived him of a constitutional right.[131] The deprivation of constitutional rights is a jurisdictional prerequisite to a cause of action under section 1983.[132] However, in dictum, the Fourth Circuit stated that a claim of constitutional magnitude grounded in the due process clause is raised in certain limited circumstances by an inmate's seeking to have false information removed from his prison

---

tary of Correction and the Parole Commission and maintained in a single central file system is made available to law-enforcement agencies, courts, correctional agencies, or other officials requiring criminal identification data, crime statistics or other information respecting crimes and criminals. N.C. GEN. STAT. §§ 148-74, 148-76 (Repl. Vol. 1978).

[122] 595 F.2d at 200.

[123] *Id.* at 199. Paine's assertion regarding his parole was submitted as a Motion for Leave to File Amended Complaint. Due to a clerical error, the district court did not receive this motion. *Id.* at 199 n.3. The Fourth Circuit agreed to consider the motion on appeal. *Id.*

[124] 595 F.2d at 200. Federal courts are bound by the interpretation of a state statute by the state's highest court. Ferguson v. Manning, 216 F.2d 188 (4th Cir. 1954). The North Carolina Supreme Court affirmed a holding by the North Carolina Court of Appeals that the prison records were not subject to inspection by the inmates, but only by those persons specifically named in the statute. Goble v. Bounds, 281 N.C. 307, 188 S.E.2d 347, *aff'g*, 13 N.C. App. 579, 186 S.E.2d 638 (1972).

[125] 569 F.2d 800, 801 (4th Cir. 1978) (en banc), *aff'g in part, rev'g in part*, 569 F.2d 784 (4th Cir. 1977), *cert. denied*, 435 U.S. 1003 (1978).

[126] 595 F.2d at 200.

[127] 569 F.2d at 800.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] 595 F.2d at 200.

[132] 42 U.S.C. § 1983 (1976); *see* 595 F.2d at 202-03; note 1 *supra*.

files.[133] Balancing the inmate's need for an accurate prison file with the additional burden on prison administration,[134] the *Paine* court determined that a prisoner must make three allegations to state a cognizable claim of right of access to his files.[135] First, the inmate must allege that particular information is in his files.[136] Second, the inmate must allege that the information is false, not simply prejudicial.[137] Third, the inmate must allege that the parole board relied upon the information to a constitutionally significant degree.[138] The inmate need not wait until the parole board renders an adverse decision.[139] Instead, the inmate need allege only that prison officials are likely to rely on the false information.[140]

---

[133] 595 F.2d at 200.

[134] The administrative burden of providing access to prison files in North Carolina is evidenced by the fact that the Department of Corrections maintains a central file of the records of 15,000 inmates housed in eighty separate locations. *Id.*

[135] *Id.* at 201.

[136] *Id.* A requirement of particularity is required to discourage "fishing expeditions." An inmate cannot simply allege that "something must be wrong." *Id.*

[137] 595 F.2d at 201. A disagreement with an opinion or psychiatric evaluation contained in the file would not be sufficient to state a claim where "some evidence" supports the parole determination. *Id.; see* Williams v. Ward, 556 F.2d 1143, 1160-61 (2d Cir.), *cert. dismissed,* 434 U.S. 944 (1977) (no showing that plaintiff suffered any prejudice from lack of access to files where he knew prior to the parole hearing that his mental health was placed in issue by at least some materials in his files).

[138] 595 F.2d at 201-02. The *Paine* court noted that reliance to a constitutionally significant degree has two dimensions. *Id.* at 202. First, what is constitutionally significant depends on the nature of the administrative decisions made on the basis of the erroneous information. If the inmate's conditional liberty is at stake because of possible denial of parole or statutory good time credits, or revocation of probation or parole, the due process clause applies and such complaint by the inmate should be sustained. *Id.*; *see* Wolff v. McDonnell, 418 U.S. 539 (1974) (certain due process requirements apply where an inmate may suffer a deprivation of statutory good time credits by prison authorities). *See generally* Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (revocation of parole deprives inmate of "conditional liberty," not absolute liberty). A complaint may state a cognizable claim even when due process is irrelevant if an adverse decision would have collateral consequences touching on the prisoner's liberty interests. 595 F.2d at 202. For example, a decision adversely affecting a transfer to another facility or a status classification may be cognizable. *Id.* However, a purely administrative decision, such as one concerning internal work assignments, would not affect any liberty interests and generally would not constitute a valid claim. *Id.* Any doubt should be resolved in favor of the inmate. *Id.*

The nature of the false information is a second factor in considering what is constitutionally signfificant. *Id.* A technical error, regarding a factor which would not be reasonably relied upon by a decision-maker will not state a valid claim, while factors of greater significance may be relied upon and should be expunged. *Id.; see* Townsend v. Burke, 334 U.S. 736, 740 (1948) (requirement of fair play); Brombley v. Crisp, 561 F.2d 1351, 1364 (10th Cir. 1977), *cert. denied,* 435 U.S. 908 (1978) (power to expunge records is a narrow one reserved for extreme cases); United States v. Doe, 556 F.2d 391 (6th Cir. 1977) (federal courts can require expunction of records).

[139] 595 F.2d at 201-02. Typically, the inmate will not know what is in his file until the parole board gives the inmate a statement of the reasons for denial of parole required under Franklin v. Shields, 569 F.2d 800, 801 (4th Cir. 1978) (en banc), *aff'g in part and rev'g in part,* 569 F.2d 784 (4th Cir. 1977), *cert. denied,* 435 U.S. 1003 (1978).

[140] 595 F.2d at 202.

The Fourth Circuit outlined certain procedures an inmate must follow before petitioning the court under section 1983[141] to expunge false information from his prison file.[142] An inmate must notify prison officials in writing that he believes his prison file contains false information, specifically identifying what information is believed to be false and what the true facts are.[143] If the prison officials fail to respond within a reasonable time or if the prison officials state that the information is present in the files but refuse to expunge the information from the file because the information is claimed to be true, the prisoner has a cognizable claim under section 1983.[144] The prison officials should inform the prisoner of the basis for considering the challenged information to be correct and the prison officials should place the inmate's letter in his file.[145] The inmate does not have a cognizable claim if the prison officials state that the file does not contain the allegedly false information since the court presumes good faith on the part of prison authorities.[146]

The status of a prisoner's right of access to his files is clouded by the Supreme Court's recent holding in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*,[147] decided two months after *Paine*.[148]

---

[141] 42 U.S.C. § 1983 (1976); *see* note 1 *supra*.

[142] 595 F.2d at 202-03. The elements necessary for recovery under section 1983 are that the defendant, under color of state law, deprived the plaintiff of a right secured by the United States Constitution or laws of the United States. *See* Adickes v. Kress & Co., 398 U.S. 144, 150 (1970) (reverse discrimination by school alleged as violation of plaintiff's fourteenth amendment rights); Harbert v. Rapp, 415 F. Supp. 83, 86 (W.D. Okla. 1976) (sex discrimination in employment). Exigent adversity is an essential condition precedent to federal court adjudication under section 1983. *See* Mendez v. Heller, 530 F.2d 457, 461 (2d Cir. 1976) (federal court will not entertain jurisdiction on hypothetical assumption that if plaintiff sued for divorce in state court, the action would be dismissed). The deprivation of civil rights must have occurred prior to seeking relief under section 1983. Parker v. Letson, 380 F. Supp. 280, 282-83 (N.D. Ga. 1974) (teacher already discharged). The jurisdictional predicate to a section 1983 claim should be distinguished from exhaustion of remedies. An inmate need not exhaust all remedies in bringing a claim under section 1983 as is required for a habeas corpus petition. McCray v. Burrell, 516 F.2d 357, 364-65 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976). Exhaustion of state remedies is not required if the deprivation of civil rights has already occurred. *See* Parker v. Letson, 380 F. Supp. at 283.

[143] 595 F.2d at 203:

[144] *Id.* The Fourth Circuit determined that a reasonable time for prison officials to respond to a prisoner's request to expunge information from his files is sixty days. *Id.* at 203 n.5.

[145] *Id.* at 203.

[146] *Id.*

[147] 99 S. Ct. 2100 (1979).

[148] The Fifth Circuit has held that refusal to allow a state prisoner access to his papers on file is not unconstitutional. Craft v. Texas Bd. of Pardons and Parole, 550 F.2d 1054 (5th Cir. 1977), *cert. denied*, 434 U.S. 426 (1978); Shaw v. Briscoe, 541 F.2d 489 (5th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977). However, the Fifth Circuit held in Thomas v. Shaw, 497 F.2d 123 (5th Cir. 1974), that a pro se prisoner convicted of robbery stated a claim for relief where he alleged that the defendant court clerk knowingly and falsely made an entry on the prisoner's record that the prisoner had been involved in a rape. *Id.* The Second Circuit, like the Fourth Circuit, holds that there are some limited due process rights regarding parole determinations. Williams v. Ward, 556 F.2d 1143, 1160 (2d Cir.), *cert. dismissed*, 434 U.S.

The Supreme Court held in *Greenholtz* that there are no general constitutional rights to parole or parole proceedings.[149] Whether any due process rights attach to parole determinations depend upon whether there is an expectancy of release created by the particular state's parole statutes.[150] The *Greenholtz* court specifically held that the particular structure of Nebraska's parole statute[151] creates a statutory expectation of release which is entitled to some measure of constitutional protection.[152]

The Supreme Court's finding in *Greenholtz* that due process does not attach to parole release proceedings turns on the distinction between parole release and parole revocation.[153] Previous Supreme Court decisions extended due process rights to parole revocation hearings,[154] probation revocation hearings,[155] and prison disciplinary hearings.[156] The *Greenholtz* Court reasoned, however, that there is a crucial difference between being deprived of a liberty one has, as in parole revocation determinations, and being denied a conditional liberty one desires, as in parole release determinations.[157] The difference lies in the nature of the deci-

944 (1977). In Williams v. Ward, the Second Circuit noted that a prisoner might be able to show that reliance on a material fact in his file prejudiced his parole determination to the extent that access is necessary to the detailed evidence in his file. *Id. See also* Holup v. Gates, 544 F.2d 82 (2d Cir. 1976), *cert. denied*, 430 U.S. 941 (1977) (remanded to district court to balance administrative burden with interest of prisoners including the extent of actual mistakes in files). The Eighth Circuit granted prisoners broad rights of access to their files prior to *Greenholtz*. Williams v. Missouri Bd. of Probation & Parole, 585 F.2d 922 (8th Cir. 1978), *vacated*, 61 L.E.2d 293 (1979).

[149] *Id.* at 2104.

[150] *Id.* at 2106-08. The *Greenholtz* Court cautioned that each state's statutes must be considered on a case-by-case basis. *Id.*

[151] NEB. REV. STAT. § 83-1,114(1) (1976). The Nebraska parole statute provides that whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, the Board *shall* order his release unless the release should be deferred because of certain specific statutory reasons.

[152] 99 S. Ct. at 2106. The Court upheld Nebraska's procedure which afforded the inmate an opportunity to be heard and informed of why he failed to qualify for parole. *Id.* at 2108. The Supreme Court determined that the Constitution requires nothing more. *Id.*; *see* text accompanying notes 126-146 *supra*.

[153] 99 S. Ct. at 2105.

[154] Morrissey v. Brewer, 408 U.S. 471 (1972).

[155] Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[156] Wolff v. McDonnell, 418 U.S. 539 (1974) (state statute creates a liberty interest protected by due process guarantees).

[157] 99 S. Ct. at 2105. In a dissenting opinion, Justice Marshall argued that the due process clause also protects interests that individuals do not currently enjoy. *Id.* at 2113 (Marshall, J., dissenting). Liberty interests are implicated when an inmate stands to lose his good-time credits, even though the forfeiture of the liberty interest deprives the prisoner of freedom he expects to obtain in the future. *Id.* However, the majority distinguished Wolff on the ground that the state statute in *Wolff* created a liberty interest protected by due process guarantees. *Id.* at 2106. The majority opinion's distinction of *Wolff* is consistent with the Supreme Court's holding in *Greenholtz* that due process considerations do not arise when one does not presently enjoy liberty unless there is a statutory expectation of liberty.

sion.[158] A parole revocation determination, to which limited due process rights attach,[159] involves a factual question of whether the parolee violated one or more of the conditions of parole.[160] A parole release determination is more subtle and depends on many purely subjective appraisals by the parole board.[161] Thus conditional liberty may be *denied* without due process, but may not be *revoked* without some limited form of due process.

Greenholtz is instructive on the issue of whether there is constitutional protection regarding an inmate's access to his files.[162] The Nebraska parole board largely bases parole decisions on the inmate's file.[163] An inmate is allowed to appear before the Parole Board at the first of two hearings to present statements and to insure that the records before the board properly relate to his case.[164] The Supreme Court held that this procedure adequately safeguards against serious risks of errors and satisfies due process.[165]

Greenholtz narrowed the scope of *Paine.* In *Paine,* the Fourth Circuit noted that a prisoner has a right to have false information expunged from his files if the allegedly false information is relied upon to deny parole, since a liberty interest is at stake and due process is called into play.[166] The Fourth Circuit further stated that other administrative actions such as status classifications or transfers to other facilities have collateral consequences that affect a prisoner's liberty interests sufficiently to allow a prisoner to challenge the information in his files.[167] Neither a denial of parole nor other administrative actions alone, however, would be sufficient to require some procedural safeguards under *Greenholtz.*[168] There first must be an expectation of liberty based on the state's parole statute.[169] Without such expectation of liberty, *Paine* is inapplicable to ac-

---

[158] *Id.* at 2105.

[159] *See* notes 138 *supra.*

[160] 99 S. Ct. at 2105.

[161] *Id; see* Wiley v. United States Board of Parole, 380 F. Supp. 1194, 1200 (M.D. Pa. 1974) (parole release is a prognostic determination that involves discretionary application of knowledge from many fields, including psychology, sociology, penology, and criminology); Dawson, *The Decision To Grant Or Deny Parole: A Study In Parole Criteria In Law and Practice,* 1966 WASH. U.L.Q. 243, 299-300.

[162] The Greenholtz court noted that access to prison files was not at issue. 99 S. Ct. at 2108 n.8.

[163] *Id.* at 2108.

[164] *Id.* At least once each year the Nebraska Board of Parole conducts an initial review hearing in which the Board examines every inmate's entire record. *Id.* at 2102. The Board then holds an informal hearing where the inmate is personally interviewed. *Id.* The Board schedules a final hearing if it determines that the inmate is a likely candidate for release. *Id.* The inmate may present evidence, call witnesses and be represented by counsel at the final hearing. *Id.*

[165] *Id.* at 2108. Under *Greenholtz,* protective procedures which protect against serious errors satisfy due process requirements. *Id.*

[166] 595 F.2d at 202.

[167] *Id.; see* note 138 *supra.*

[168] *See* text accompanying notes 147-161 *supra.*

[169] *Id.*

tions of the state in parole determinations. Moreover, courts could not require procedural safeguards for other administrative decisions which touch only collaterally on the prisoner's liberty interest, such as an administrative decision to transfer in inmate to another institution or to reclassify his prison status.[170] If some doubt exists as to what extent due process applies to parole release determinations based on a statutory expectancy of release, there is even more doubt whether due process applies at all to administrative decisions which only touch on a liberty interest. However, North Carolina, as well as the other states in the Fourth Circuit, provides some form of statutory expectancy of parole under *Greenholtz*.[171] Thus the right of an inmate to have erroneous information expunged from his files under *Paine*[172] probably applies to all of the states in the Fourth Circuit, at least where a potential denial of parole is concerned. The premise in *Paine* that due process attaches to North Caro-

---

[170] *See* note 138 *supra*. In *Greenholtz*, the Supreme Court reversed the Eighth Circuit's requirements imposed on the Nebraska Board of Parole, including a requirement of a full formal hearing, with advance written notice and full written explanation of facts and reasons for denial of parole. 99 S. Ct. at 2103. *Greenholtz* confirms the Supreme Court's judicial restraint in the area of parole release decisions. *Id.* at 2104.

An alternative to judicial rule-making would be for the legislators to enact statutes that provide what the *legislators* believe to be the proper balance between the right of prisoner's access to his files and the interests of the state. The federal government's statute is a good example of such a legislative rule. *See* 18 U.S.C. § 4208(b)(2) (1976). At least thirty days prior to any parole proceeding, the federal government offers federal prisoners reasonable access to a report or document to be used by the parole commission in making a parole determination, with three statutory exceptions. *Id.* A prisoner does not have access to diagnostic opinions which could lead to serious disruption at the institution, confidential sources, and other information which, if disclosed, could lead to harm to any person. *Id.* at § 4208(c). If the commission deems the information to fall within one of the three exceptions, the commission then must summarize the basic contents of the material under appropriate circumstances. *Id. See also* 28 C.F.R. § 2.55 (1978). At least one federal court noted the federal statute and regulation with approval. Williams v. Missouri Bd. of Probation & Parole, 585 F.2d 922 (8th Cir. 1978), *vacated*, 61 L.E.2d 293 (1979).

[171] Similar to the Nebraska statute, *see* note 151 *supra*, North Carolina's parole statute provides that the Parole Commission *must* consider the desirability of parole for each person, sentenced for a maximum term of eighteen months or longer, at least sixty days prior to his statutory eligibility for parole or prior to the expiration of the first year of the sentences if the prisoner is eligible for parole at any time. N.C. GEN. STAT. § 15A-1371 (Cum. Supp. 1979). The North Carolina statute also provides specific criteria to consider whether to release the prisoner on parole. *Id.* Subsequent judicial precedent will have to be considered to determine whether North Carolina's statutory scheme provides the Greenholtz expectancy of release. *Cf.* MD. CODE ANN. art. 41, § 122 (Repl. Vol 1978) (duty of Board of its own initiative to request Division to make investigation whenever the prisoner shall have served one fourth of his term); S.C. CODE § 24-21-620 (1976) (Board *shall* review case of prisoner after a prisoner has served one third of his sentence); VA. CODE § 53-251 (Cum. Supp. 1979) (every first offender *shall* be eligible for parole after serving one fourth of the imprisonment term); W. VA. CODE § 52-12-13 (Cum. Supp. 1979) (parole board shall have the authority to release any prisoner on parole whenever it is of the opinion that the best interests of the State and prisoner would be served). *See* Franklin v. Shields, 569 F.2d 784, 795 (4th Cir.) (statutory right in Virginia).

[172] 595 F.2d at 202.

lina's parole proceedings was correct, though the premise arises from the state's statute rather than from the nature of parole.

Any further judicial rule-making in the area of parole-release determinations should be made with caution. States subject to the holding of *Paine* may circumvent the decision by showing that the state's procedure adequately safeguards against serious errors. For example, a state may provide personal interviews with the inmate prior to a final hearing for parole to insure that the records before the parole board properly relate to his case under *Greenholtz*.[173] A state may even abandon or curtail parole if judicial rules become too cumbersome,[174] because states have no duty to establish a parole release system.[175] Alternatively, a state may circumvent *Paine* by repealing any statutory expectancy of parole.

In general, the recent Fourth Circuit cases in the area of prisoners' rights have demonstrated both an active and a practical judicial role. The court in *Williams v. Leeke*[176] extended *Bounds* to local jails,[177] but intimated that a state may limit access to legal research for prisoners posing a high security risk.[178] In *Johnson v. Levine*,[179] the court reached a practical decision by deferring to the plan proposed by the Maryland prison authorities.[180] Finally, in *Paine v. Baker*,[181] the Fourth Circuit attempted to balance a prisoner's need for access to his files with the state's interests,[182] though the extent of the holding was limited by the subsequent *Greenholtz* opinion.[183] The recent decisions by the Fourth Circuit have established guidelines for prison officials and for inmates, though there are unresolved issues which only further litigation will resolve. Further conservative decisions like *Greenholtz* may result in narrowing prisoners' rights.

TYLER M. MOORE

C. *Plea Bargaining*

Although a criminal defendant has no constitutional right to plea bargain,[1] the process of exchanging a guilty plea for a mutually satisfactory

[173] 99 S. Ct. at 2108.
[174] *Id.* at 2107.
[175] *Id.* at 2104.
[176] 584 F.2d 1336 (4th Cir. 1978), *cert. denied*, 99 S. Ct. 2825 (1979).
[177] *See* text accompanying notes 41-48 and 55-61 *supra*.
[178] *See* text accompanying notes 28-40 *supra*.
[179] 588 F.2d 1378 (4th Cir. 1978).
[180] *See* text accompanying notes 83-95 *supra*.
[181] 595 F.2d 197 (4th Cir. 1979).
[182] *See* text accompanying notes 133-146 *supra*.
[183] *See* text accompanying notes 147-166 *supra*.

[1] Weatherford v. Bursey, 429 U.S. 545, 561 (1977). Weatherford and Bursey were arrested

disposition of a case between defendant and prosecutor resolves a major portion of the criminal docket each year.[2] The defendant's surrender of important constitutional rights[3] during the plea bargaining process raises questions of prosecutorial conduct and ethics during the negotiation of pleas.[4] Supreme Court recognition of plea bargaining as both legitimate[5] and indispensable[6] in the American criminal justice system, coupled with the lack of uniform guidance in this area,[7] have prompted the development of standards to govern the administration of this practice in the federal system.[8] While courts have ruled on the voluntariness[9] and accuracy[10] of plea bargains, recent case law focuses on judicial remedies for prosecutorial breaches of plea bargains with the defendant.[11]

---

together for vandalism of a South Carolina Selective Service office. Weatherford was an undercover agent and concealed his status during subsequent meetings with Bursey and Bursey's attorney. *Id.* at 547. Weatherford eventually testified against Bursey and thereby helped secure Bursey's conviction. *Id.* at 549. On appeal, Bursey contended that Weatherford's continued duplicity lost Bursey the opportunity to plea bargain. The Supreme Court found no merit in this contention, holding that there is no constitutional right to plea bargain. The prosecutor need not enter into plea negotiations if he prefers to go to trial. *Id.* at 561.

[2] Roughly 90% of all defendants plead guilty. Although the number of defendants entering guilty pleas in accordance with plea agreements varies with the seriousness of the crime, the percentage of plea bargains is uniformly substantial. *See* J. BOND, PLEA BARGAINING AND GUILTY PLEAS §1.02 (1978) [hereinafter cited as BOND].

[3] The fifth amendment provides that a defendant has a right to remain silent and not incriminate himself. U.S. CONST. amend. V. The sixth amendment of the Constitution affords a defendant the right to go to trial and the right to be confronted with the witnesses against him. U.S. CONST. amend VI. The defendant sacrifices these rights in plea negotiation and agreement. *See* BOND, *supra* note 2, §2.06.

[4] *See* Alderstein, *Ethics, Federal Prosecutors, and Federal Courts: Some Recent Problems,* 6 HOFSTRA L. REV. 755, 778-92 (1978).

[5] *See* Brady v. United States, 397 U.S. 742, 753 (1970). In the face of a maximum penalty of death if a jury verdict should so recommend, petitioner Brady pleaded guilty when he discovered that his codefendant would plead guilty and be available to testify against him. Brady's guilty plea was accepted after the trial judge twice questioned him as to the voluntariness of his plea. *Id.* at 743. In affirming Brady's conviction and sentence of 30 years imprisonment, the Supreme Court commended the exchange of a guilty plea for leniency in sentencing and described plea bargaining as advantageous to both defendant and prosecutor and inherent in the criminal law and its administration. *Id.* at 752-53. *See generally* Note, *The Guilty Plea As A Waiver of "Present But Unknownable" Constitutional Rights: The Aftermath of the* Brady *Trilogy,* 74 COLUM. L. REV. 1435 (1974).

[6] Santobello v. New York, 404 U.S. 257, 260 (1971)(plea bargaining essential to administration of justice and should be encouraged).

[7] *See* Bond, *supra* note 2, §§ 3.01(1) & 3.01(2).

[8] See FED.R.CRIM.P. 11, *as amended by* Act of July 31, 1975, Pub. L. No. 94-64, § 3(5)-(10).

[9] *See, e.g.,* McCarthy v. United States, 394 U.S. 459, 472 (1969)(trial judge obligated to ascertain personally from defendant whether he understood nature of charges against him); Sierra v. Government of Canal Zone, 546 F.2d 77, 79 (5th Cir. 1977)(district court judge must carefully question defendant to determine full understanding of guilty plea).

[10] *See, e.g.,* United States v. Rushing, 456 F.2d 1294, 1294 (5th Cir. 1972) (failure of trial court to establish factual basis for guilty plea held reversible error); United States v. Birmingham, 454 F.2d 706, 708 (10th Cir. 1971), *cert. denied,* 406 U.S. 969 (1972)(trial court must establish factual record for guilty plea).

[11] *See, e.g.,* United States v. Ewing, 480 F.2d 1141, 1143 (5th Cir. 1973)(government's

In *Santobello v. New York,*[12] the Supreme Court held that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that the plea was part of the inducement or consideration, that promise must be fulfilled.[13] Characterizing plea bargaining as an essential component of the administration of justice, the Court commended the benefits of judicial economy which the procedure assures.[14] The Court stressed the importance of fairness in securing an agreement between an accused and a prosecutor,[15] and concluded that petitioner's remedy for prosecutorial breach of a plea bargain[16] was either specific performance of the plea agreement or a withdrawal of the guilty plea.[17]

Since *Santobello,* the Supreme Court has withdrawn from extending broad fairness considerations to the plea negotiation process by limiting the circumstances giving rise to improper government conduct during plea

---

opposition to probation in violation of its agreement required that defendant be given opportunity to submit new probation motion before different judge); United States v. Hallam, 472 F.2d 168, 169 (9th Cir. 1973) (government must fulfill its part of plea bargain where defendant has performed his part); United States v. Graham, 325 F.2d 922, 925 (6th Cir. 1973)(where government has not performed its part of plea agreement, defendant may elect between withdrawal of plea or specific enforcement of plea agreement as remedy). *See generally* Westen & Westin, *A Constitutional Law of Remedies For Broken Plea Bargains,* 66 CAL. L. REV. 471 (1978) [hereinafter cited as Westen & Westin]; Note, *The Legitimation of Plea Bargaining: Remedies For Broken Promises,* 11 AM. CRIM. L. REV. 771 (1973); Note, *Plea Bargaining—Specific Performance of a Prosecutor's Unfulfillable Promise: A Right or a Remedy?,* 9 CONN. L. REV. 483 (1977); Note, *Criminal Law—Enforcing Unfulfillable Plea Bargaining Promises,* 13 WAKE FORREST L. REV. 842 (1977).

[12] 404 U.S. 257 (1971).

[13] *Id.* at 262. Petitioner Santobello was indicted on two felony counts, promoting gambling in the first degree and possession of gambling records in the first degree. Santobello first entered a plea of not guilty on both counts, but after negotiation with the assistant district attorney, he agreed to plead guilty to the lesser-included offense of possession of gambling records in the second degree. This offense carried a maximum one year sentence, but the prosecutor agreed to make no recommendation as to sentence. *Id.* at 258. The district court accepted Santobello's plea of guilty and set a date for sentencing. Substantial delays resulted in a new defense counsel, a new judge, and a new prosecutor. At the sentencing hearing, the prosecutor recommended the maximum one year sentence, which the judge subsequently imposed, in violation of the plea agreement. *Id.* at 258-60.

[14] *Id.* at 260-61. The Court in *Santobello* drew attention to the desirable elements of plea bargaining by noting its prompt and substantially final disposition of most criminal cases. Plea bargaining lessens pre-trial confinement and the consequential bad effects of enforced idleness. It protects the public from criminals who might otherwise be out on bail, and, by shortening the time between charge and disposition, it enhances the rehabilitative prospects of the guilty. *Id.* at 261.

[15] *Id.*

[16] *Id.* at 262. The *Santobello* Court stated that petitioner "bargained" and negotiated for a particular plea and that he had a right to fulfillment of that bargain. *Id.* Consequently, plea bargaining case law has developed its standards for recognizing and enforcing plea agreements through analogies to common law contract doctrines. *See* Westen & Westin, *supra* note 11, at 528-39.

[17] 404 U.S. at 263. The Court remanded *Santobello* to the state court with the choice of either allowing the peititoner to withdraw his guilty plea or requiring specific performance of the original plea agreement. *Id.* The *Santobello* Court thus characterized fairness in the plea bargaining context in terms of contract law rights and remedies.

bargaining. The Court has held that confessions made subsequent to an agreed plea bargain are not *per se* inadmissible.[18] A mere allegation by plaintiff that a plea bargain was breached is not sufficient to trigger judicial scrutiny of the defendant-prosecutor relationship,[19] and a prosecutor is free to carry out threats made during plea negotiations.[20] The Fourth Circuit recently revived the basic fairness considerations of *Santobello* in *Cooper v. United States.*[21] The *Cooper* court held that an unambiguous plea proposal, offered by the government to a defendant through his counsel, must be fulfilled if the defendant unequivocally communicates his assent to the proposal within a reasonable time.[22]

The defendant Cooper was charged with bribery and obstruction of justice[23] after a series of telephone conversations revealed his intention to accept a bribe in lieu of his responsibilities as a government informer.[24] Approximately two months before the defendant's trial, an assistant United States attorney met with defense counsel and negotiated a plea agreement.[25] Upon receiving his client's subsequent approval of the proposal, defense counsel promptly tried to notify the prosecuting attorney of the defendant's acceptance.[26] By the time the defendant's attorney reached the assistant United States attorney, the prosecutor's superior had instructed him to withdraw the proposal.[27] Despite repeated protests, defense

---

[18] *See* Hutto v. Ross, 429 U.S. 28, 30 (1976)(although existence of plea bargain may have influenced respondent to give statement, counsel clearly informed respondent that plea bargain was enforceable whether or not respondent confessed).

[19] *See* Blackledge v. Allison, 431 U.S. 63, 79 (1977)(trial court must make assurance of legitimacy of plea bargaining, question both lawyers, and keep verbatim records of guilty-plea proceedings to obtain judicial determination of existence of agreement and whether it was ignored).

[20] *See* Bordenkircher v. Hayes, 434 U.S. 357, 360-65 (1978)(prosecutor may carry out plea bargaining threat to have defendant reindicted on habitual offender charge if defendant declines to plead guilty on prosecutor's offered terms). *See generally* Comment, Brodenkircher v. Hayes: *Prosecutorial Discretion During Plea Bargaining*, 27 BUFFALO L. REV. 563 (1978); Comment, Bordenkircher v. Hayes: *Ignoring Prosecutorial Abuses in Plea Bargaining*, 66 CAL. L. REV. 875 (1978).

[21] 594 F.2d 12 (4th Cir. 1979).

[22] *Id.* at 19.

[23] 594 F.2d at 13; *see* 18 U.S.C. § 201(e)(1976)(bribery of public officials and witnesses); 18 U.S.C. § 1502 (1976)(resistance to extradition agent).

[24] 594 F.2d at 13-14.

[25] *Id.* at 15. The government's proposed plea agreement provided that the defendant would remain incarcerated, continue to cooperate with the federal authorities in on-going narcotics trials, and plead guilty to one count of obstruction of justice. The government would bring the defendant's cooperation to the attention of the sentencing judge and dismiss all other counts of the indictment. *Id.*

[26] *Id.* The defendant's attorney met with the assistant United States attorney at approximately 11:00 a.m. on May 11, 1977. Defense counsel quickly communicated the plea proposal to the defendant and after obtaining the defendant's approval, tried to reach the prosecutor beginning at noon that day. *Id.*

[27] *Id.* At 1:30 p.m., the assistant United States attorney, who earlier negotiated with defense counsel, met with his superior who instructed the withdrawal of the plea proposal. When Cooper's attorney finally reached the assistant United States attorney between 2:30 and 3:30 p.m., he was notified immediately that the offer had been withdrawn. *Id.*

counsel was prohibited from accepting the government's earlier offer.[28] Cooper was convicted and sentenced to a total of fifteen years imprisonment.[29]

On appeal, the defendant assigned as errors the trial proceeedings,[30] and the district court's refusal to compel enforcement of the government's proposed plea agreement.[31] The Fourth Circuit found no error in the conduct of the trial,[32] but regarded the district court's denial of the motion to compel enforcement of the plea proposal as reversible constitutional error.[33] Since the district court relied on classic contract law principles,[34] the Fourth Circuit narrowed its focus to defining the extent to which contract law analogies may draw the parameters of constitutional fairness during the plea bargaining process.[35]

The Fourth Circuit reasoned that constitutional "fairness" demands a wider scope of considerations than the law of contracts.[36] Although contract law analogies are useful in some circumstances,[37] traditional contract law analysis of the defendant's situation was inadequate to afford Cooper a remedy for the violation of his constitutional rights.[38] The *Cooper* court

---

[28] *Id.*

[29] *Id.*

[30] *Id.* at 13. The defendant Cooper was acting as a Drug Enforcement Administration informer when he offered his removal as a witness against one whose indictment he helped secure for a bribe. *Id.* at 13-14. Cooper's contentions that a taped telephone conversation was inadmissible and that an immunized witness' attorney should have been sequestered during testimony were both found to be without merit. *Id.* at 14.

[31] *Id.* at 13.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 16 n.5. Upon denying Cooper's motion to compel enforcement of the plea proposal, the district court relied on basic contract law in stating that an offer can be withdrawn prior to actual acceptance by the opposite party. *Id.* at 16.

[35] *Id.*

[36] *Id.* at 16-17. The Fourth Circuit derived its constitutional fairness approach to Cooper's situation from the *Santobello* case. *Id.* at 15-16. In *Santobello,* the Supreme Court reversed a state court decision. Although the Court did not specifically state the source of its constitutional holding, the decision has been interpreted as one grounded on the fourteenth amendment due process clause. *See* note 13 *supra;* Westen & Westin, *supra* note 11, at 474-75 n.10, 476 n.16, & 518 n.161.

[37] 594 F.2d at 17. The Fourth Circuit did not repudiate any express or implicit reliance on contract law analogies in its earlier decisions. *See* United States v. Hammerman, 528 F.2d 326, 330-31 (4th Cir. 1975)(unkept plea bargain enforced where government's promise relied on by defendant); Harris v. Superintendent, 518 F.2d 1173, 1174 (4th Cir. 1975)(guilty plea held invalid where defendant believed prosecutor could recommend particular sentence and such recommendation not made); United States v. Brown, 500 F.2d 375, 378 (4th Cir. 1974) (government held in breach of plea agreement where prosecutor only half-heartedly recommended agreed-upon sentence); United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972)(where defendant pleaded guilty to misdemeanor for promise of immunity, indictment of second prosecutor dismissed).

[38] 594 F.2d at 16. In determining the extent to which contract law may be drawn upon to define the limits of a defendant's constitutional right to fairness during the plea bargaining process, the Fourth Circuit acknowledged that the defendant demanded a right extending beyond any provided by contract law analogy. *Id.* at 17 n.6. The court stated that an asserted withdrawal of the proposal preceded the defendant's attempted acceptance of the plea agree-

therefore maintained that developing constitutional doctrine should not be limited by common law analogies.[39]

The *Cooper* court further circumscribed the utility of contract law analogies by describing them as a reliable inclusive test for the existence of a constitutional right and violation, but unreliable as an exclusive boundary for the defendant's constitutional rights during the plea bargaining process.[40] Prosecutorial conduct that would ordinarily constitute breach of contract or give rise to promissory estoppel will almost always reflect constitutional unfairness.[41] Constitutional fairness, however, may require considerations beyond the law of contracts.[42] Under appropriate circumstances, a constitutional right to enforcement of a plea agreement may arise before a technical contract is formed, based on reasonable expectations of the defendant in reliance upon the government's firmly advanced proposals.[43] The Fourth Circuit concluded that the enforcement of a defendant's reasonable expectations formed in reliance upon the honor of the government prosecutor would be determined on a case-by-case basis.[44]

Cooper's analysis of constitutional rights during plea negotiations rests on substantive due process guarantees[45] and the sixth amendment right to counsel.[46] The effective assistance of counsel hinges directly on the defendant's confidence in his own attorney together with his reliance upon the government's fair dealings.[47] The court found that broken promises by the government undermine the defendant's confidence in his attorney's capability and therefore jeopardize the effectiveness of counsel's assistance.[48] The government, therefore, must negotiate with scrupulous fairness during its bargaining for guilty pleas.[49]

---

ment. Thus, no right had arisen, within the definitions of contract law, for the government to violate. Moreover, the remedies of enforcement of the bargain or promissory estoppel were unavailable since there was neither a right nor a detrimental reliance on any firm agreement. *Id.* at 16.

[39] 594 F.2d at 17. *See* Brewer v. Williams, 430 U.S. 387, 401 n.8 (1977); Stoner v. California, 376 U.S. 483, 488 (1964); Silverman v. United States, 365 U.S. 505, 513 (1961); Jones v. United States, 362 U.S. 257, 266 (1960).

[40] 594 F.2d at 17.

[41] *Id.; see* text accompanying note 38 *supra.*

[42] 594 F.2d at 17.

[43] *Id.* at 17-18.

[44] *Id.* at 18.

[45] *Id.* The court stated that the relevance of substantive due process guarantees as a source of the constitutional right involved was too plain to require discussion. The court suggested that the due process clause of the fifth amendment embodies a broad constitutional right to fundamental fairness. *Id.* at 18 n.8.

[46] *Id.* The court stated that the sixth amendment right to the effective assistance of counsel is less direct than the substantive due process guarantees but nonetheless important. *Id.*

[47] *Id.; see* Brewer v. Williams, 430 U.S. 387, 415 (1977)(concurring opinion).

[48] 594 F.2d at 18-19.

[49] *Id.* at 19. The court noted the formalization of plea negotiations through counsel under recently amended FED.R.CRIM.P. 11(e)(1). This rule provides for full disclosure of all plea negotiations before the trial judge and general supervision of the plea bargaining process by the courts.

Having established broad guidelines of constitutional fairness during the plea bargaining process, the Fourth Circuit examined the facts to determine if Cooper's constitutional rights were violated. The government prosecutor made a reasonable and unambiguous proposal without any reservation related to a superior's approval.[50] The proposal was promptly communicated to the defendant whose immediate approval entitled him to the assumption that communication of his assent to the government would consummate the plea agreement.[51] Defense counsel informed the government of the defendant's approval within a few hours and was prohibited from making a formal acceptance by the sheer fortuity of the government's withdrawal.[52] The Fourth Circuit held that a superior's second-guessing the judgment of a duly authorized subordinate was an insufficient reason for withdrawal of such a proposal in the face of proffered acceptance.[53]

The *Cooper* court's analysis of the existence of a constitutional right and violation concluded by weighing the practical consequences attendant to both the government and defendant positions in the plea bargaining process.[54] Since a defendant is constitutionally entitled to that process reasonably due under all circumstances,[55] reasonableness will be determined by considering the practical burdens imposed on the government in order to ensure the constitutional rights of the defendant.[56] The Fourth Circuit outlined a scheme of procedural guidelines for the Department of Justice which would protect the government's interests in the plea bargaining process and safeguard a defendant's constitutional rights.[57]

Cooper's success in obtaining specific performance of a modified version of the original plea agreement[58] expands the majority view among the

---

[50] 594 F.2d at 19.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* (citing Santobello v. New York, 404 U.S. at 262).

[56] 594 F.2d at 19. The Fourth Circuit stated that the limits of reasonableness are to be found by weighing the practical burdens imposed on the government by its recognition of the constitutional right to fairness during plea negotiations against the practical consequences for this defendant and others similarly situated resulting from its non-recognition. *Id.*

[57] *Id.* at 19-20. The Fourth Circuit articulated standards for the offices of the United States attorneys, stating that no right can arise in a defendant until plea discussions are voluntarily entered into by authorized agents. The court stated that government agencies must withhold or limit the actual and circumscribe the apparent authority of subordinates if necessary. Reservations relating to higher level approval should be routinely incorporated in all proposals, or specifically in some, and protection against perjured testimony of the making and acceptance of proposals should be achieved by routine requirements of signed memoranda. *Id.*

[58] *Id.* at 20. The court determined that the only remedy available was specific performance of the plea proposal to the extent possible. Since the considerable lapse of time and intervening circumstances rendered the original plea agreement impracticable, *see* note 25 *supra*, the court remanded with instructions that the defendant be allowed to enter a plea of guilty to one of the counts of obstruction of justice upon which he was convicted and dismissal of the remaining counts of the indictment. The government was to be relieved of any prior

courts recognizing defendant remedies for government breach of a plea bargain. While formal requirements have barred the claims of certain defendants,[59] other courts have provided defendants with remedies for unkept plea bargains.[60] A minority view reflects both an unwillingness to introduce contract law analogies into federal criminal procedure[61] and a stern view toward the defendant's alleged "agreements" with the prosecutor's office.[62]

---

obligations respecting sentencing, and further proceedings were to take place before a district judge not involved in the original proceeding. 594 F.2d at 21.

[59] *See* United States v. Miller, 565 F.2d 1273, 1275 (3d Cir.), *cert. denied,* 436 U.S. 959 (1977) (no breach of plea bargain where government promised only to make no sentencing recommendation but reserved and exercised right to comment on defendant's cooperation); United States v. Dixon, 504 F.2d 69, 72 (3d Cir.), *cert. denied,* 420 U.S. 963 (1975) (no review of alleged breach of plea bargain where trial court record of plea negotiations not made); Dugan v. United States, 521 F.2d 231, 233 (5th Cir. 1975)(defendant must present credible affidavits that raise substantial inference that unkept plea bargain was made in order to obtain evidentiary hearing); United States v. Goodrich, 493 F.2d 390, 393 (9th Cir. 1974)(prosecution of overt act by defendant not encompassed within technical promise made by government is not breach of plea agreement); Ballinger v. United States, 470 F.2d 739, 740 (9th Cir. 1972)(defense counsel's statement to defendant that guilty plea would insure term of probation does not call prosecutor's conduct into question); United States v. Frontero, 452 F.2d 406, 411 (D.C. Cir. 1971)(defendant cannot rely on promise of prosecutor having no authority to make sentencing promises); United States v. Simpson, 436 F.2d 162, 164 (D.C. Cir. 1970), *cert. denied,* 414 U.S. 873 (1973)(defendant cannot claim coercion undercutting guilty plea merely because of reliance on attorney's advice); United States v. Briscoe, 432 F.2d 1351, 1359 (D.C. Cir. 1970)(inaccurate representations on deportability by unauthorized government agent do not render defendant's guilty plea invalid).

[60] *See* United States v. Thomas, 580 F.2d 1036, 1038 (10th Cir. 1978)(where government breached promise not to sentence defendant until all outstanding indictments were returned, defendant entitled to withdrawal of guilty plea or vacation of sentence until all indictments returned); United States v. Shanahan, 574 F.2d 1228, 1230-31 (5th Cir. 1978)(defendant allowed to have sentence vacated and cause remanded for resentencing by another district judge where prosecutor breached plea agreement with respect to recommendation of sentence); United States v. Scharf, 551 F.2d 1124, 1129 (8th Cir. 1977)(where trial court did not establish record of plea agreement and its precise terms, evidentiary hearing directed to determine terms of plea bargain and whether it was breached); United States v. Crusco, 536 F.2d 21, 26 (3d Cir. 1976)(prosecutorial breach of promise to take no position on sentencing allows defendant to withdraw his guilty plea); United States v. Gerard, 491 F.2d 1300, 1303 (9th Cir. 1974)(prosecutorial breach of promise to make recommendation concerning sentencing and to grant probation to prosecution witness so that defendants were denied opportunity to attack credibility entitled defendants to new trial); Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973)(government breach of agreed-upon sentencing recommendation warranted sentencing readjustment calculated to approximate specific performance of original plea agreement).

[61] United States v. Selikoff, 524 F.2d 650, 654 (2d Cir. 1975), *cert. denied,* 425 U.S. 951 (1976)(principles of contract inapposite to ends of criminal justice).

[62] *See, e.g.,* Williams v. Smith, 591 F.2d 169, 172 (2d Cir.), *cert. denied,* 99 S.Ct. 2845 (1979)(sentencing misinformation given by government to state defendant held not disruptive of state court guilty plea where accurate information would not have made any difference in defendant's decision to enter plea); United States v. Alessi, 536 F.2d 978, 981 (2d Cir. 1976)(absent factual showing that government made certain promises to defendant, court is under no duty to enforce an alleged plea agreement); United States v. James, 532 F.2d 1161, 1163 (7th Cir. 1976)(federal agent's assurances to defendant not considered an agreement precluding federal government from prosecuting defendant); United States v. Nathan, 476 F.2d 456, 459 (2d Cir. 1972), *cert. denied,* 414 U.S. 823 (1973)(defendant's failure to carry out

Cooper represents a broadening of constitutional rights in the plea bargaining process by granting a remedy in the pre-agreement, pre-performance context.

The broad remedial view of a defendant's constitutional rights in the plea bargaining process expressed by the *Cooper* court embodies policy considerations of governmental integrity and fair dealings between the government and the people. The Fourth Circuit's vindication of society's interest in the fair administration of justice[63] resembles a recent line of case law requiring the government to keep other promises. These promises include agreements to produce evidence,[64] to honor a deferred prosecution,[65] to observe a grant of immunity,[66] to abide by the results of a polygraph test,[67] and to avoid interrogation of one promised insulation from questioning in a prosecutor's affidavit.[68] *Cooper* joins these and other decisions in a recent trend interpreting *Santobello* as a signpost pointing toward increased government responsibility.[69]

Cooper v. United States represents an expansion of the defendant's constitutional rights in the negotiation of pleas. The Fourth Circuit placed the burden of fairness in the plea bargaining process squarely on the shoulders of the government prosecutors, requiring their dealings with the defendant to be of scrupulous integrity. *Cooper* is a progressive decision in a continuing judicial effort to upgrade the reliability and professional character of conduct between the prosecutor and the defendant.

PHILIP DOMINIC CALDERONE

D. *Deadlocked Juries*

Certain circumstances may prompt a trial judge to inquire about the numerical division of an undecided jury. The court's examination may be

---

promise made to government nullifies existence of any claimed agreement with government); United States v. Lombardozzi, 467 F.2d 160, 161-63 (2d Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973)(ill-advised comments on sentencing by government agent and assistant United States attorney to defendant did not rise to level of *Santobello* promise).

[63] 594 F.2d at 20.

[64] *See* United States v. Millet, 559 F.2d 253, 256-57 (5th Cir. 1977).

[65] *See* United States v. Garcia, 519 F.2d 1343, 1345 (9th Cir. 1975).

[66] *See* United States v. Minnesota Mining & Mfg. Co., 551 F.2d 1106, 1111 (9th Cir. 1977).

[67] *See* People v. Reagen, 395 Mich. 306, 235 N.W.2d 581, 587 (1975).

[68] *See In Re* Snoonian, 502 F.2d 110, 112 (1st Cir. 1975).

[69] *See, e.g.*, United States v. Vale, 496 F.2d 365, 367-68 (5th Cir. 1974); United States v. Scanland, 495 F.2d 1104, 1106 (5th Cir. 1974); State v. Carlisle, 111 Ariz. 233, 236, 527 P.2d 278, 281 (1974); Sturgis v. State, 25 Md.App. 628, 636, 336 A.2d 803, 807 (1975).

in order to arrange a recess[1] or to gauge the jury's progress during a long deliberation.[2] Where multiple defendants are involved, the trial judge may accept the jury's verdict with respect to one defendant and inquire about the numerical division regarding the other defendant.[3] The court's numerical division inquiry, however, is usually addressed to a deadlocked jury.[4] In *Brasfield v. United States,*[5] the Supreme Court held the court's inquiry during deliberations into a jury's numerical division is reversible error *per se.*[6]

The *Brasfield* Court reasoned that an examination into the jury's numerical division was both useless and coercive. A practice which might result in an improper influence on the jury through the possible coercion of minority jurors could not be sanctioned.[7] The Court characterized the

---

[1] *See* Beale v. United States, 263 F.2d 215, 217 (5th Cir. 1959)(judge's question to determine jury's numerical division held to be actuated by solicitude for jury, to arrange suitable lunch hour, and not by desire to pry into or influence their deliberations); Butler v. United States, 254 F.2d 875, 876 (5th Cir. 1958)(trial court's inquiry as to numerical division of jury made for purposes of arranging lunch held non-coercive).

[2] *See* United States v. Hayes, 446 F.2d 309 (5th Cir. 1971). In an elaborate criminal trial, the judge asked the jury how they stood numerically during the third day of deliberation. The jury informed the court of its numerical division, continued its deliberations into a fourth day, and finally convicted the defendant. The Fifth Circuit overturned the conviction, holding that Brasfield v. United States, 272 U.S. 448 (1926) required automatic reversal. 446 F.2d at 312; *see* note 7 *infra.*

[3] *See* United States v. Prentiss, 446 F.2d 923 (5th Cir. 1971). On its second day of deliberations, the jury announced a guilty verdict for one of two defendants. The judge inquired as to the jury's numerical division regarding the other defendant. After answering the court's inquiry, the jury continued to deliberate and eventually returned a guilty verdict against the second defendant. The judge's numerical inquiry was held not a sufficient ground for reversal. *Id.* at 925.

[4] *See* Marcus, *The* Allen *Instruction In Criminal Cases: Is The Dynamite Charge About To Be Permanently Defused?,* 43 Mo. L. Rev. 613, 618-19 nn.37-41 (1978)[hereinafter cited as Marcus]. No-verdict situations became the subject of special instructions from the bench during the mid-nineteenth century. *See* Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1, 2 (1851)(Massachusetts court instructed deadlocked jury on duty of jurors to consider each other's opinions and distrust one's own point of view in effort to see other side). By 1896, the United States Supreme Court formalized the use of a special instruction for dead-locked juries in United States v. Allen, 164 U.S. 492, 501-02 (1896). *See* note 19 *infra.* The *Allen* charge, or "dynamite charge," is a frequently used weapon for state and federal court assaults on the hung jury. *See* Marcus, *supra* at 617-23, 633 n.111.

[5] 272 U.S. 448 (1926). In *Brasfield,* the petitioners were convicted in federal district court for conspiracy to possess and transport intoxicating liquors in violation of the National Prohibition Act. *Id.* at 449. The conviction was affirmed by the Court of Appeals for the Ninth Circuit. Brasfield v. United States, 8 F.2d 472, 473 (9th Cir. 1925).

[6] 272 U.S. at 449-50. In *Brasfield,* the Court clarified its holding in Burton v. United States, 196 U.S. 283 (1905). The *Burton* Court, reversing a conviction on other grounds, criticized an inquiry into the numerical division of the jury as improper on the part of the presiding judge. *Id.* at 307.

[7] 272 U.S. at 450. Although the Court acknowledged that the effect of a numerical inquiry upon a jury cannot properly be known and may vary widely in different situations, the Court maintained that generally such an inquiry has a tendency to be coercive since it may force minority jurors to resign their convictions for the sake of a decision. *Id.* at 450. The Court stated that every influence other than the evidence and the law as expounded in a proper charge should be excluded from the jury. *Id.*

numerical inquiry as a threat to the fair and impartial conduct of the trial and found that its use was, by itself, sufficient grounds for automatic reversal.[8]

Brasfield ended the federal court practice of inquiring into the numerical division of a deadlocked jury.[9] Concern by the Supreme Court over the proper relationship between federal authority and states' rights[10] has created an awareness among the lower federal courts of the necessary distinction between rules of federal court supervision[11] and those of constitutional dimension.[12] The applicability of *Brasfield*'s no-inquiry rule in state court trials has become a controversial issue.[13] The question of whether *Brasfield* is a decision of judicial administration[14] and thus applicable only to the

---

[8] *Id.* at 450.

[9] The *Brasfield* Court noted the conflicting interpretations of Burton v. United States, 196 U.S. 283 (1905), in the circuit courts of appeals. Some circuits found non-compliance with the *Burton* no-inquiry rule reversible error, while others viewed the *Burton* criticism as advisory only. 272 U.S. at 449-50. *Brasfield* ended the confusion generated by *Burton* by holding that inquiry into the numerical division of a jury by a federal judge was reversible error *per se. Id.* at 450.

[10] *See* H. MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT 224-42 (1977); Haigh, *Defining Due Process of Law: The Case of Mr. Justice Hugo L. Black*, 17 S.D. L. REV. 1, 1-39 (1972); Redlish, *A Black-Harlan Dialogue On Due Process And Equal Protection: Overheard In Heaven And Dedicated To Robert B. McKay*, 50 N.Y.U. L. REV. 20, 21-46 (1975).

[11] The federal circuit courts of appeals have maintained state court independence from decisions of judicial administration over the federal courts. *See* United States *ex rel.* Anthony v. Sielaff, 552 F.2d 588, 590 & n.1 (7th Cir. 1977)(where conduct of state trial was fair, court viewed Supreme Court's decision in Jenkins v. United States, 380 U.S. 445, 446 (1965) as one of judicial administration rather than constitutional due process); Youker v. Gulley, 536 F.2d 184, 187 (7th Cir. 1976)(state may regulate requirements of own employees without violating first or fourteenth amendments); Wallace v. Kern, 499 F.2d 1345, 1351 (2d Cir.), *cert. denied*, 420 U.S. 947 (1974)(state may determine for itself specific time requirements of speedy trial); Kirby v. Warden, 296 F.2d 151, 152 (4th Cir. 1961)(comments of state trial judge held not within review of federal courts).

[12] *See, e.g.*, Nesmith v. Alford, 318 F.2d 110, 120 (5th Cir. 1963)(state arrest of whites and blacks eating together was improper under federally paramount constitutional principles of due process and equal protection).

[13] *See* Marcus, *supra* note 4, at 618-19 nn.37-41; Note, *On Instructing Deadlocked Juries*, 78 YALE L. J. 100, 132 &133 nn. 95-98 (1968)[hereinafter cited as *Deadlocked Juries*]. Some courts recognize the trial court's inquiry solely as to the numerical division of the jury as reversible error. *See* United States v. Cheramie, 520 F.2d 325, 333 (5th Cir. 1975); Jacobs v. United States, 279 F.2d 826, 832 (8th Cir. 1960); United States v. Mack, 249 F.2d 321, 323 (7th Cir. 1957), *cert. denied*, 356 U.S. 920 (1958); United States v. Samuel Dunkel & Co., 173 F.2d 506, 510 (2d Cir. 1949); Spaugh v. United States, 77 F.2d 720, 722-23 (9th Cir. 1935); Berger v. United States, 62 F.2d 438, 439 (10th Cir. 1932); State v. Aragon, 89 N.W. 91, 547 P.2d 574, 580 (Ct. App.), *cert. denied*, 89 N.W. 206, 549 P.2d 284 (1976); People v. Wilson, 390 Mich. 689, 213 N.W.2d 193, 195 (1973); Commonwealth v. Robinson, 102 Pa. Super. Ct. 46, 156 A. 582, 584 (1931). *But see* People v. Carter, 68 Cal.2d 810, 69 Cal. Reptr. 297, 303-04, 442 P.2d 353, 359-60 (1968); Goldwire v. State, 128 Ga.App. 472, 197 S.E.2d 155, 156 (1973); Sharplin v. State, 330 So.2d 591, 596 (Miss. 1976); Linscomb v. State, 545 P.2d 1272, 1274 (Okla. Crim. App. 1976).

[14] The United States Supreme Court has supervisory authority over the lower federal courts. *See* U.S. CONST. art.III, §§ 1 & 2. Exercise of this authority results in decisions of judicial administration, applicable only to the federal courts. Decisions grounded in judicial

federal courts, or is grounded on the due process clause of the fourteenth amendment[15] and therefore applicable also to the states, involves issues of judicial authority and constitutional law. The Fourth Circuit recently addressed this controversy in *Ellis v. Reed.*[16]

Appellant Ellis was arrested for embezzlement and tried by a jury in a North Carolina state court.[17] Following a three-day trial, the jury returned deadlocked after several hours of deliberation.[18] The judge inquired into their numerical division and then delivered a modified version of the *Allen* charge.[19] The court urged the jury to consider each juror's opinion and work

---

administration over the federal courts are exemplified by Supreme Court rulings on evidence and jury trial procedures. In McNabb v. United States, 318 U.S. 332, 341 (1943), the Court stated that its promulgation of certain rules of evidence was not prompted by considerations of constitutional fairness, but rather by the Court's supervisory authority over the administration of criminal justice in the federal courts. Similarly, in Ker v. California, 374 U.S. 23, 31 (1963), the Court recognized that it was the states' responsibility to devise their own methods of administering criminal justice so long as those methods met acceptable constitutional standards. In Barker v. Wingo, 407 U.S. 514 (1972), the Court declined an opportunity to issue procedural rules on a state's conduct of speedy trials, stating that such a result would engage the Court in legislative or rulemaking activity outside its adjudicative functions. *Id.* at 523.

[15] Certain Supreme Court rulings are grounded on considerations of fundamental fairness, and the due process clause of the fourteenth amendment. This power is used to invalidate state deprivations of an individual's constitutional rights. *See* Niemotko v. Maryland, 340 U.S. 268, 270 (1951). In *Niemotko* the Court struck down a Maryland procedure denying appellate review on the sufficiency of evidence where two Jehovah's witnesses were denied the expression of their first amendment rights. A South Carolina conviction for breach of the peace was overturned in Edwards v. South Carolina, 372 U.S. 229 (1963). The Court felt compelled to overlook state court authority when the petitioner's constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of grievances were infringed. *Id.* at 235. Similarly, New Hampshire's refusal to honor the fourth amendment's detached and neutral evaluation of a search warrant requirement compelled the invalidation of a state statute permitting police authorization of search warrants in Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971). These decisions are of constitutional proportion and are fully applicable to the states through the admonition of the fourteenth amendment, which provides "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV §1.

[16] 596 F.2d 1195 (4th Cir. 1979).

[17] *Id.* at 1196.

[18] *Id.*

[19] In Allen v. United States, 164 U.S. 492 (1896), the Court reviewed a jury instruction identical to the one given in Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1 (1851). 164 U.S. at 501. *See* note 4 *supra.* Approving the instruction, the *Allen* Court summarized as follows:

> While undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself.

164 U.S. at 501. This language from the *Allen* case is referred to as the *Allen* charge. *See*

together without the surrender of any personal convictions in trying to reach a decision.[20] After the judge's statements, the jury quickly returned a guilty verdict.[21] Ellis was convicted of embezzlement and the North Carolina court of appeals affirmed the conviction.[22] On habeas corpus review, the Fourth Circuit held that *Brasfield*'s prohibition of trial court inquiry into the numerical division of the jury was intended to formulate a policy for only the federal courts, and is not applicable *per se* to the state courts.[23]

In concluding that the *Brasfield* rule was one of judicial administration over the federal courts and not grounded on due process considerations, the Fourth Circuit first analyzed the language of the *Brasfield* opinion.[24] Prior Supreme Court criticism of the numerical division inquiry[25] led to the *Brasfield* Court's absolute condemnation of the inquiry as inconsistent with the essential fairness and impartial conduct of the trial and possibly coercive in its effect upon a divided jury.[26] Although the "essential fairness" language in *Brasfield* could be interpreted to impart a rule of constitutional dimension,[27] the Fourth Circuit concluded that the *Brasfield* holding was not constitutionally grounded.[28] The *Ellis* court reasoned that *Brasfield* should be read in conjunction with the Supreme Court's earlier criticism of the numerical division inquiry by the trial judge. The Court felt that such an inquiry was impermissible in the "proper administration of the law."[29] Since no constitutional provisions were cited in *Brasfield*,[30] the Fourth Circuit concluded that a textual analysis of the *Brasfield* opinion signifies a supervisory rather than a constitutional rule.[31]

---

generally Marcus, *supra* note 4; Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the* Allen *Charge*, 53 VA. L. REV. 123 (1967); 42 TENN. L. REV. 803 (1975).

[20] 596 F.2d at 1196. The trial judge did not quote from Allen v. United States, 164 U.S. 492 (1896), but gave a brief instruction on the importance of judicial economy and the duty of jurors to reconcile their differences. In the course of the instruction, the judge twice disclaimed any desire to force or coerce the judgment of any juror. 596 F.2d at 1196.

[21] 596 F.2d at 1196.

[22] State v. Ellis, 33 N.C.App. 667, 236 S.E.2d 299, 306 (1977).

[23] 596 F.2d at 1200.

[24] *Id.* at 1197; *see* text accompanying notes 5-8 *supra.*

[25] The Supreme Court first spoke on the trial court's inquiry into the numerical division of the jury in Burton v. United States, 196 U.S. 283 (1905). In reversing a federal court conviction on the grounds of insufficient evidence and improper jury instructions, the *Burton* Court criticized the trial judge's inquiry into the numerical division of the jury stating "we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge." *Id.* at 307. This language in *Burton* was interpreted differently by the various federal circuits. *See* Brasfield v. United States, 272 U.S. at 449-50.

[26] 272 U.S. at 450.

[27] 596 F.2d at 1197.

[28] *Id.* at 1197-98.

[29] *Id.*; *see* Burton v. United States, 196 U.S. at 308.

[30] 596 F.2d at 1197.

[31] *Id.* at 1198.

[32] *Id.* at 1199-1200; *see* United States v. Mitchell, 322 U.S. 65, 67-68 (1944)(sole authority of United States Supreme Court in state court proceedings is to insure proper regard for the basic safeguards of fourteenth amendment).

The *Ellis* court also considered the Supreme Court's limited corrective powers over state criminal trials.[32] Federalism[33] limits federal review over state administration of trials to the due process requirements of the fourteenth amendment. Therefore, Supreme Court intervention in a state trial decision is warranted only when the state has transgressed the constitutional guarantees of the fourteenth amendment.[34] Absent violation of rights expressly guaranteed by the fourteenth amendment, state courts are not bound by federal court standards of administration[35] concerning jury instructions,[36] unanimity of the jury,[37] or number of persons on the jury.[38] The Fourth Circuit examined these principles in the context of state jury trials and the limited corrective powers of federal court review.[39] The *Ellis* court concluded that the numerical division inquiry was an administrative matter, and that principles of federalism required the determination of its propriety to rest with the supervisory state court, rather than within the due process review powers of a federal court.[40]

The Fourth Circuit follows the majority view of other state and federal courts[41] unwilling to apply *Brasfield*'s *per se* reversal rule to state courts.[42] *Ellis* adopts the totality of the circumstances test,[43] fashioned for considering allegedly coercive instructions or comments to the jury, and used in lieu of the *per se* approach.[44] The Fourth Circuit did not consider the trial

---

[33] Federalism is a doctrine of constitutional law which embodies the proper balance between powers of federal and state government. *See* U.S. CONST. amend. X; THE FEDERALIST Nos. 39 & 43 (J. Madison); G. DIETZE, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT 124-26 (1960).

[34] *See* Rochin v. California, 342 U.S. 165, 168 (1952).

[35] *See* Patton v. United States, 281 U.S. 276, 288 (1930)(sixth amendment right to jury trial in federal cases requires a jury of twelve persons and unanimous verdict).

[36] *See* Cupp v. Naughten, 414 U.S. 141 (1973). The *Cupp* Court held that an instruction to the jury that every witness is presumed to speak the truth in a trial in which the defendant elected not to testify did not offend the requirements of due process. *Id.* at 150. Federal court disapproval of such an instruction was not a directive binding on state courts. *Id.* at 146.

[37] *See* Johnson v. Louisiana, 406 U.S. 356, 359 (1972)(9 of 12 majority verdict upheld under Louisiana law where Supreme Court ruled that jury unanimity has never been requisite of due process of law).

[38] *See* Williams v. Florida, 399 U.S. 78, 102-03 (1970)(although federal juries must consist of twelve persons, 6-person jury held permissible under Florida law).

[39] 596 F.2d at 1199-1200.

[40] 596 F.2d at 1200. The Fourth Circuit stated that since an inquiry during deliberations as to the numerical division of a jury is in the nature of a supplemental instruction, the inquiry was essentially procedural. *Id. Cf.* Cupp v. Naughten, 414 U.S. 141, 145 (1973)(jury instruction disapproved by federal courts may be used by state court as long as fourteenth amendment due process rights not violated).

[41] *See* text accompanying note 13 *supra* & note 50 *infra.*

[42] 596 F.2d at 1200. The dissent read *Brasfield* as relying on fourteenth amendment due process, viewing the "coercive" and "fair and impartial conduct of the trial" language in *Brasfield* as condemning the numerical inquiry practice on constitutional grounds. *Id.* at 1201-02.

[43] *Id.* at 1198-99. The totality of the circumstances test was developed in Jenkins v. United States, 380 U.S. 445 (1965). The *Jenkins* Court found reversible error when a judge's comment, viewed in its context and under all circumstances, was coercive. 380 U.S. at 446. *See generally* Erikson, *Fair Trial and Free Press: The Practical Dilemma,* 29 STAN. L. REV. 485, 487 (1977).

[44] 596 F.2d at 1199.

court's inquiry as to the numerical split of the jury as coercive within the totality of the circumstances.[45] The jury was twice warned not to surrender any of their personal convictions after the numerical inquiry was made,[46] and the *Ellis* court found these warnings an ample safeguard against any constitutionally impermissible coercion.[47]

Ellis v. Reed is consistent with the interpretation most jurisdictions have given the *Brasfield* case.[48] *Brasfield*'s no-inquiry rule has been applied *per se* in the federal courts,[49] while habeas corpus petitions by state convicts raising the numerical issue have been examined in light of the totality of the circumstances.[50] Certain states have approved the rationale of *Brasfield* and therefore adopted its no-inquiry rule independently of any federal constitutional requirement.[51] Only one state court accepts the *Brasfield* holding as constitutionally binding through the due process clause of the fourteenth amendment.[52]

The *Ellis* decision reflects the necessary preservation of state court independence from federal decisions of judicial administration.[53] Supreme Court rulings urging the limited supervisory authority of federal courts over state decisions[54] have gained acceptance among the federal courts.[55]

---

[45] *Id.* at 1200.

[46] *Id.* at 1196. The *Ellis* court looked with favor on the trial judge's repeated warning that no juror should surrender any personal convictions in reaching a decision. *Id.* at 1200.

[47] *Id.* at 1200.

[48] *See* text accompanying notes 49-52 *infra.*

[49] *See, e.g.*, United States v. Noah, 594 F.2d 1303, 1304 (9th Cir. 1979); United States v. Hayes, 446 F.2d 309, 312 (5th Cir. 1971); Jacobs v. United States, 279 F.2d 826, 832 (8th Cir. 1960), United States v. Mack, 249 F.2d 321, 323-24 (7th Cir.), *cert. denied*, 356 U.S. 920 (1957); United States v. Samuel Dunkel & Co., 173 F.2d 506, 510-11 (2d Cir. 1949), *cert. denied*, 340 U.S. 930 (1951).

[50] In Marsh v. Cupp, 392 F.Supp. 1060, 1063 (D.Ore. 1975), *aff'd*, 536 F.2d 1287 (9th Cir.), *cert. denied*, 429 U.S. 981 (1976), the district court held that the *Brasfield* rule was based on the supervisory powers of the Supreme Court, and affirmed a state court conviction. The conviction was challenged, in part, because the judge made an inquiry about the numerical split of the jury. The court viewed all of the circumstances of the trial, however, and found them noncoercive. On appeal, the Ninth Circuit affirmed the lower court's ruling under the totality of the circumstances, although it erroneously stated that absence of any mention in the jury's answer to a numerical division inquiry about whom the jury favored precluded any problem under *Brasfield*. 536 F.2d at 1291 n.9.

Jones v. Norvell, 472 F.2d 1185 (6th Cir.), *cert. denied*, 411 U.S. 986 (1973), presented facts indicating an invasion of jury secrecy, inquiry into the numerical division of the jury, a coercive jury charge, and a speedy return of a verdict subsequent to the charge. 472 F.2d at 1186. The court held that the totality of the circumstances required a new trial. *Id.*

[51] *See* Kersey v. State, 525 S.W.2d 139, 141 (Tenn. 1975)(*Brasfield* holding adopted as a supervisory and administrative rule for Tennessee state courts); People v. Wilson, 390 Mich. 689, 213 N.W.2d 193, 195 (1973)(*Brasfield* rationale acknowledged to support state court determination that inquiry as to numerical division of the jury is always coercive).

[52] State v. Aragon, 89 N.M. 91, 547 P.2d 574, 580 (1976)(*Brasfield* was grounded in due process and is applicable to states).

[53] *See* note 11 *supra.*

[54] *See, e.g.*, Murphy v. Florida, 421 U.S. 794, 797-98 (1975)(supervisory rule on undue press influence over jury in federal trial not applicable to states); United States v. Augenblick, 393 U.S. 348, 352 (1969)(rules of evidence promulgated by Supreme Court are not necessarily grounded in due process and therefore applicable to states).

[55] *See, e.g.*, United States *ex rel.* Thomas v. New Jersey, 472 F.2d 735, 741 (3d Cir.), *cert.*

Ellis v. Reed correctly views the *Brasfield* rule prohibiting inquiry as to the numerical division of the jury as supervisory over the federal courts and inapplicable to state criminal trials. The totality of the circumstances test is sufficiently broad to safeguard against constitutional error at the trial level,[56] and provides the defendant with a wide range of challenges on habeas corpus review.[57] Interpretation of *Brasfield* as a constitutional holding is not warranted by the language of the opinion.[58] While the *Brasfield* Court did not expressly define its prohibition of numerical inquiries as supervisory, subsequent use of the rule has remained almost exclusively in the federal arena.[59] The Fourth Circuit's continuance of this precedent in *Ellis v. Reed,* therefore, reflects the majority view.[60]

PHILIP DOMINIC CALDERONE

E. Federal Nexus in Electronic Surveillance

In *Berger v. New York,*[1] the United States Supreme Court interpreted the fourth amendment to limit narrowly states' power to eavesdrop electronically on citizens, thereby preventing trespassory invasions into constitutionally protected areas.[2] Subsequently, in *Katz v. United States,*[3] the Court extended fourth amendment protection to conversations made while the speaker justifiably expected privacy, regardless of the particular physical location of the communication.[4] Congress adopted Title III of

---

denied, 414 U.S. 878 (1973)(although use of *Allen* charge prohibited in district courts, state courts are free to choose); Davis v. Craven, 485 F.2d 1138, 1140 (9th Cir. 1973), *cert. denied,* 417 U.S. 933 (1974)(Supreme Court rule on federal judge's authority to comment on evidence was supervisory over federal courts and not applicable as constitutional rule to state courts); Farmer v. Kosan, 400 F.2d 1256, 1258 (2d Cir. 1971)(New York state courts possess authority to determine "petty" and "serious" crimes after Duncan v. Louisiana, 391 U.S. 145, 148 (1968)).

[56] *See* text accompanying notes 43-44 *supra.*

[57] *See* text accompanying notes 44-45, & 50 *supra.*

[58] *See* text accompanying notes 24-31 *supra.*

[59] *See* text accompanying notes 49-52 *supra.*

[60] *See* text accompanying notes 41-42 *supra.*

---

[1] 388 U.S. 41 (1967). In *Berger,* an order pursant to New York law permitted installation of a recording device in an office. *Id.* at 44-45; *see* N.Y. CRIM. PROC. LAW (McKinney) § 813-(a) (1958) (repealed 1970). The United States Supreme Court found the statute too broad because it did not require either a showing that any particular offense had been or is being committed, or a particularized description of the conversation sought. *See* 388 U.S. at 55-58.

[2] 388 U.S. at 54-56.

[3] 389 U.S. 347 (1967). In *Katz* the petitioner was convicted of transmitting wagering information across state lines. FBI agents recorded petitioner's conversations in a phone booth by placing a recording device on the outside of the booth. Reversing the conviction, the Court held that the fourth amendment protects people, not places, and that the government's eavesdropping violated privacy upon which the petitioner justifiably relied. *See id.* at 350-53.

[4] 389 U.S. at 350-51. The term "justifiable expectation of privacy" derives from *Katz,*

the Omnibus Crime Control and Safe Streets Act of 1968[5] (the Act) to combat organized crime[6] within the limits imposed by the Supreme Court in *Katz* and *Berger*.[7] Accordingly, the Act prohibits interception[8] of oral communications[9] on premises which operate to affect interstate commerce.[10] Oral communications are defined as any oral communication uttered by a person exhibiting a justifiable expectation that such communication is privileged.[11] Congress did not, however, specifically limit the statute's purview to government eavesdropping. Thus, in *United States v. Burroughs*,[12] the Fourth Circuit held the anti-bugging provisions of the Act applicable to private citizens.[13] Recently, in *United States v. Duncan*,[14] the Fourth Circuit reexamined the Act in light of *Burroughs* and the Act's constitutional basis.

The government charged Duncan under section 2511(1)(b)(iv)(A) of the Act[15] with electronically intercepting conversations of IRS and FBI agents auditing the North Carolina bank of which Duncan was president.[16] Duncan allegedly installed a radio transmitter in the third floor

---

where the Court stated that there is a subjective expectation of privacy recognized as reasonable by society. *See id.* at 361 (Harlan, J., concurring). This standard was considered to be a fair one by which to determine whether an individual has "justifiably relied" on privacy. *Id.* at 363; *see* Comment, *The Reasonable Expectation of Privacy*— Katz v. United States, *a Postscriptum*, 9 IND. L. REV. 468, 471 (1976) [hereinafter cited as *Expectations*].

[5] 18 U.S.C. §§ 2510-2520 (1976).

[6] S. REP. No. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153, 2157 [hereinafter cited as SENATE REPORT].

[7] 18 U.S.C. § 2516 (1976) establishes the procedure for law enforcement officials' use of electronic surveillance. The principal goal of these surveillance standards is compliance with the constitutional requirements set out in *Katz* and *Berger*. SENATE REPORT, *supra* note 6, at 2161-62; Comment, *Title III and the Classic Triangle: Should the Immunity Doctrine Apply to Interspousal Electronic Surveillance?*, 12 CREIGHTON L. REV. 1209, 1223 (1979); *see* notes 1 & 3 *supra*. The statutory definition of "oral communication" tracks the *Katz* constitutional concept of privacy. United States v. Pui Kan Lam, 483 F.2d 1202, 1206 (2d Cir.), *cert. denied*, 415 U.S. 984 (1973); *see* note 4 *supra*.

[8] 18 U.S.C. § 2510(4) (1976) defines interception as the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." The Act purportedly applies its prohibitions to any person. *See id.* § 2510(6); text accompanying note 13 *infra*.

[9] 18 U.S.C. § 2511(1) (1976).

[10] 18 U.S.C. § 2511(1)(b)(iv)(A) (1976).

[11] *Id.* at § 2510(2).

[12] 564 F.2d 1111, 1115 (4th Cir. 1977).

[13] *Id., see Federal Nexus in Electronic Surveillance, Fourth Circuit Review*, 36 WASH. & LEE L. REV. 494, 496 (1979) [hereinafter cited as *Federal Nexus*]. The *Burroughs* court extended the Act's applicability to private citizens even though *Katz* and *Berger* curtailed only government eavesdropping. *See* notes 1 & 3 *supra*.

[14] 598 F.2d 839 (4th Cir. 1979).

[15] 18 U.S.C. § 2511(1)(b)(iv)(A) (1976). The statute states that any person who willfully uses or procures any other person to use any device to intercept any oral communication when such use takes place on the premises of any business or commercial establishment, the operations of which affect interstate commerce, shall be fined not more than $10,000 or imprisoned not more than five years, or both. *Id.*

[16] 598 F.2d at 846. In September 1971, IRS agents began an audit of the Northwestern

bank building office used by the federal agents.[17] At trial, the district court convicted Duncan of electronically eavesdropping on the IRS.[18] On appeal to the Fourth Circuit, Duncan argued on three general grounds that the government failed to establish that his activities violated the Act.[19]

First, Duncan argued that the IRS agents did not exhibit a justifiable expectation that their conversations were not subject to interception.[20] As grounds for claiming that no justifiable expectation existed, Duncan argued that he consented to the eavesdropping in his capacity as president,[21] that the agents suspected the possibility that their conversations

---

Bank, bank president Duncan, and related taxpayers. *Id.* The bank provided the agents with an office in the Northwestern Bank building which they used until 1973. In 1977, FBI agents investigated the bank, conducting their operations from the same office. *Id.*

[17] *Id.* The bank assigned the IRS agents a small office on the third floor of the bank and gave the agents the keys to both the office door and a filing cabinet within the office. *Id.* Duncan and another bank employee installed a microphone in the ceiling of the office assigned to the agents. *Id.* At Duncan's instructions, a bank employee monitored and recorded conversations of the agents and delivered the tapes to Duncan. *Id.* The monitoring continued until January, 1973, when the agents moved to another building. The Fourth Circuit stated that the agents changed buildings partly due to suspicion that they were being spied upon, but there was no mention of how or why the agents became suspicious of the possible eavesdropping. *See id.* In March of 1977, FBI agents arrived at the bank to investigate the manner in which Duncan handled his personal checking account. *Id.* As a result of the investigation, Duncan was also charged with misapplication of bank funds. *Id.*

[18] *Id.* at 847. Duncan pleaded guilty, pursuant to pleabargaining, to the charge of conspiracy to eavesdrop on the IRS. *Id.* Duncan was also convicted of misapplication of bank funds. To establish misapplication of bank funds the government must prove that bank funds were converted to the use of the defendant or through the defendant to a third party. *Id.* at 858 (citing Johnson v. United States, 95 F.2d 813, 816 (4th Cir. 1938)). A defendant who only temporarily deprives the bank of the possession, use, or control of funds also violates the statute. 598 F.2d at 858 (citing Agnew v. United States, 165 U.S. 36, 56-57 (1897)). Duncan's checking account was classified as "no activity" so that the computer would reject all the items drawn on it. Each check was then posted by hand. When any of Duncan's checks reached the "cash-items" clerk, she paid them without debiting Duncan's account. Periodically, Duncan collected the checks held by the bank, sent some back through the computer in such a manner as they would not be rejected again, and replaced the others with a debit memo. 598 F.2d at 846. Duncan thus wrote himself noninterest bearing, unsecured loans. *Id.* at 847. No sentence was imposed in the FBI case, but convictions for misapplication of bank funds and eavesdropping on the IRS carried a total fine of $22,000 and a three year prison sentence. *Id.*

[19] *See* text accompanying notes 20, 26-27 *infra.*

[20] 598 F.2d at 849.

[21] *Id.* at 851. Duncan argued that his consent to the interception negated any expectation of privacy by the agents. *Id.* In presenting this theory, Duncan relied on a footnote in Alderman v. United States, 394 U.S. 165, 179 n.11 (1969), which arguably permits those who are overheard on another's premises when the owner is absent to object unless the owner consented to the interception. 598 F.2d at 851. The Fourth Circuit dismissed the objection as "cryptic dictum." *Id.*; *see* text accompanying notes 31, 42-44 *infra.* The *Alderman* footnote dealt only with official intrusions made with the owner's permission and has been interpreted to limit an owner's ability to authorize interceptions on his premises when the parties to the intercepted conversations are the owner's criminal associates. Fishman, *The Interception of Communications Without a Court Order: Title III, Consent, and the Expectation of Privacy,* 51 ST. JOHN'S L. REV. 41, 58 (1976).

were monitored,[22] that the bank's adverse relationship with the IRS put the agents on notice of possible eavesdropping,[23] that the agents were strangers on the premises,[24] and that the agents' voices could be heard outside their office.[25] Second, Duncan contended that the prosecution failed to prove a nexus between interstate commerce and his eavesdropping because the eavesdropping did not directly affect interstate commerce as required by the Act.[26] Third, the appellant maintained that the agents' office did not qualify as premises of a commercial establishment which affects interstate commerce.[27]

The Fourth Circuit dismissed all three grounds on which Duncan urged reversal and affirmed the conviction.[28] The court inferred that the agents exhibited a subjective expectation of privacy in their avowed purpose of conducting a "confidential investigation,"[29] and held that expectation justifiable.[30] The court held that Duncan's consent to the eavesdrop-

---

[22] 598 F.2d at 849-50. Duncan's theory was based on Justice Stewart's statement in *Katz* that what a person knowingly exposes to the public is not protected by the fourth amendment, even though it may be in that person's home or office. *Id.* at 851; *accord,* United States v. Elder, 446 F.2d 587, 588 (9th Cir. 1971) (park ranger walking by campers' tent and hearing "Pass the match for the hash" justifiably looked in tent window and seized contraband).

[23] 598 F.2d at 851-52. To prove hostility between the bank and the IRS, Duncan introduced testimony that the photocopy of a refund check procured by the bank through litigation with the IRS hung on a wall in the bank's parent corporation. *Id.; see* text accompanying notes 45-46 *infra.*

[24] 598 F.2d at 852. Duncan relied on United States v. Pui Kan Lam, 483 F.2d 1201 (2d Cir. 1973), *cert. denied,* 415 U.S. 984 (1973), to argue that the agents were strangers at the bank and as strangers could not justifiably expect privacy. 598 F.2d at 852; *see* text accompanying notes 47-50 *infra.*

[25] 598 F.2d at 852. Duncan argued that if a person standing in the hallway outside the agents' office could overhear the intercepted conversations, then the jury must acquit him. *Id.* n.10; *see* text accompanying notes 51-52 *infra.*

[26] *Id.* at 853. The Fourth Circuit requires proof of a federal nexus to convict a private person under 18 U.S.C. § 2511 (1). United States v. Burroughs, 564 F.2d 1111, 1115 (4th Cir. 1977). Furthermore, an oral communication is not protected under § 2511(1)(b)(iv) absent an effect on interstate commerce. 564 F.2d at 1113; *see Federal Nexus, supra* note 13, at 496-97 & n.21. *But see* text accompanying notes 54-55 *infra. See generally* 28 VAND. L. REV. 1348, 1350-52 (1975).

[27] 598 F.2d at 839. Duncan maintained that the third floor office used by the IRS agents did not qualify as bank "premises," contending that the word "premises" as used in 18 U.S.C. § 2511(1)(b)(iv) (1976) refers only to those portions of the building actually used by a business whose operations affect interstate commerce. 598 F.2d at 855.

[28] *See* 598 F.2d at 849-56.

[29] *Id.* at 849. By establishing a subjective expectation of privacy, the agents satisfied the first of the two-part inquiry into justifiable expectations. An oral communication is not protected from interception unless the speaker has a subjective expectation of privacy under circumstances which justify that expectation. *See* note 4 *supra.*

[30] 598 F.2d at 849. In holding that the IRS agents' expectation of privacy was justified, the Fourth Circuit reasoned that the bank assured the agents privacy by supplying the keys to both the office and the filing cabinet therein. *Id.* The court also noted that the agents gave no one permission to monitor their conversations and permitted no one to regularly stand outside their frequently open door. *Id.*

ping could not negate the agents' justifiable expectation of privacy because the Act's prohibitions should not be avoided at the discretion of the premises' owner.[31] Further, the Fourth Circuit reasoned that, although actual knowledge by the agents of eavesdropping might render an expectation of privacy unjustified, mere suspicion of such a possibility would not.[32] The court then held that public policy prevented a history of bad relations between the bank and the IRS from negating the agents' justifiable expectations of privacy.[33] The court likewise dismissed the claim that the agents, as strangers on the premises, could not justifiably expect privacy, reasoning that because the agents occupied the office for over a year they were not stangers.[34] Finally, the court dismissed as unduly favorable to the appellant any jury instruction requiring acquittal if any of the agents' conversations could be overheard outside of their office.[35]

Responding to Duncan's claim that the government failed to prove a nexus between interstate commerce and the eavesdropping, the court held that the occurrence of the interception on the bank premises established the required nexus.[36] The Fourth Circuit did not consider whether the interceptions themselves affected interstate commerce, reasoning that the nexus between interstate commerce and eavesdropping is established properly whenever the interceptions occur on the premises of any business which affects interstate commerce.[37] The court then rejected Duncan's claim that the agents' office was not bank premises, observing that the bank itself used other rooms on the same floor and reasoning that areas in which the bank conveyed no recognizable property interest should retain the title "bank premises" for purposes of the Act.[38] The court further reasoned that any other construction of the statute would deprive temporary guests of protection which occupants of the premises would otherwise receive.[39] In affirming Duncan's conviction, the Fourth Circuit thus broadly prohibited electronic surveillance by properly relying on congressional intent[40] and the progeny of *Katz*.[41]

The court's holding that the agents demonstrated a justifiable expec-

---

[31] *Id.* at 851; *see* note 21 *supra.*

[32] 598 F.2d at 850; *see* note 22 *supra.*

[33] 598 F.2d at 852. The *Duncan* court reasoned that any basis in precedent for Duncan's claim that bad relations between the bank and the IRS justified the eavesdropping was limited to situations involving police custody. *Id.; see* text accompanying note 45 *infra.*

[34] *See* 598 F.2d at 852. The Fourth Circuit distinguished the case upon which Duncan relied to argue that the agents were strangers to the bank premises. *See* text accompanying notes 47-50 *infra.*

[35] 598 F.2d at 852; *see* note 25 *supra;* text accompanying notes 51 & 52 *infra.*

[36] 598 F.2d at 855.

[37] *Id.; see* text accompanying notes 53-59 *infra.*

[38] 598 F.2d at 855.

[39] *Id.*

[40] *See* text accompanying notes 55-59 *infra.*

[41] *See* text accompanying notes 42-52 *infra.*

tation of privacy accords in all aspects with the common law development of the fourth amendment. Third party consent to intrusion is not analogous to situations in which the consenter and interceptor are the same person.[42] The dicta upon which Duncan relied to claim he could consent to the eavesdropping dealt only with government intrusions made with the owner's permission.[43] However much one may be held to assume the risk of governmental intrusion, it does not follow that Duncan's intrusion could defeat an expectation of privacy.[44]

Adverse relations between the bank and the IRS also did not vitiate the agents' expectations of privacy because the police custody cases urged as controlling by Duncan are based not on adverse relations per se, but rather on a societal decision that one's expectation of privacy while in police custody may not be "reasonable."[45] Therefore, when there is no public need for surveillance, the mere fact that adversity exists between two parties will not render an expectation unjustifiable.[46]

---

[42] *See* 598 F.2d at 851; note 21 *supra*.

[43] *See* note 21 *supra*.

[44] The needs of government for surveillance can frustrate even a reasonable expectation of privacy. *See* Note, *From Private Places to Personal Privacy: A Post-Katz Study of the Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968, 983 (1968) [hereinafter cited as *Private Places*]. Thus, an expectation of privacy may be reasonable and still be unjustified if the balance between public needs and private rights swings heavily toward the need for police surveillance. *See id. Cf.* Note, *A Reconsideration of the* Katz *Expectation of Privacy Test*, 76 MICH. L. REV. 154, 157 (1976) (arguing that if test for protected conversations is having actual expectation of privacy, government could manipulate expectations through notice to the public) [hereinafter cited as *Reconsideration*]. As a corollary to the proposition that an expectation might be reasonable and yet unjustified in light of societal demands, one might argue that the agents' expectation of privacy, although unreasonable, could be justifiable because Duncan had no socially recognizable right to eavesdrop. *See* 18 U.S.C. § 2510 (1976); text accompanying note 11 *supra* (defining oral communication in terms of justifiable expectations). *See generally Reconsideration, supra*, at 157. Also, consent by an owner to the interception of conversations to which he is not a party on his premises should not normally be sufficient to overcome the conversants' expectations of confidentiality if the conversation is privileged. *Expectations, supra* note 4, at 58; *see* 18 U.S.C. § 2517(4) (1976).

[45] 598 F.2d at 852; *see id.* at 850 n.7 (citing People v. Califano, 5 Cal. App. 3d 476, 85 Cal. Rptr. 292 (1970), and People v. Santos, 26 Cal. App. 3d 397, 102 Cal. Rptr. 678 (1972)). The court apparently used the word "reasonable" interchangeably with "justifiable" in this instance. The word "reasonable", however, is used in two different senses. The term has been employed in connection with that expectation which is reasonable without accounting for law enforcement needs. *See generally Private Places, supra* note 44, at 983. The term "reasonable" may also connote an expectation which is reasonable within the context of the law, and is therefore justifiable. *See* United States v. Fisch, 474 F.2d 1071, 1078-79 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973) (justifiable expectation is one which society is prepared to recognize as reasonable). Therefore, the two different uses of "reasonable" is important because a reasonable expectation which does not account for law enforcement needs is not always justifiable. *See Reconsideration, supra* note 44, at 160-61. *See generally The Supreme Court*, 1967, 82 HARV. L. REV. 63, 192 (1968).

[46] *See* 598 F.2d at 851-52. Duncan's argument that adversity between the IRS and the bank prevented the agents from asserting a justifiable expectation of privacy would allow one party legally to intercept communications of another simply by creating hostility between the two parties.

Equally inapplicable to establishing a violation of the Act are cases holding that strangers on the premises may not reasonably expect privacy. Duncan cited a case in which an apartment resident, in cooperation with police, allowed into his apartment four strangers suspected of narcotics dealings with the previous tenant.[47] The suspects, who used false pretenses to gain admittance and then searched the premises for hidden contraband, did not have a justifiable expectation of privacy.[48] Accordingly, evidence obtained through electronic interception by the government was admissible against the suspects.[49] In *Duncan,* however, the agents occupied an office specifically provided for their use. Therefore, because a factor in determining justifiable reliance on privacy should be a person's exclusive use or control of an area,[50] the IRS agents were not strangers to the premises in the same sense as were the uninvited narcotics suspects. The court rejected Duncan's final argument for unjustifiability by holding that the jury need not acquit even if the intercepted conversations were audible outside the office with the unaided ear.[51] Sim-

---

[47] *Id.* at 852 (citing United States v. Pui Kan Lam, 483 F.2d 1202, 1206 (2d Cir. 1973)).

[48] United States v. Pui Kan Lam, 483 F.2d 1202, 1206 (2d Cir. 1973).

[49] *See id.* at 1205.

[50] *See Private Places, supra* note 44, at 983-84. Although the fourth amendment protects people and not places, the place in which one is located does affect whether an expectation of privacy is justifiable. *See id.;* note 51 *infra.*

[51] 598 F.2d at 852; *see* note 25 *supra.* In United States v. McIntyre, 582 F.2d 1221 (9th Cir. 1978), the court held that even if conversations in a business office can be overheard through an open door, the conversations might still be protected as "oral communications." *Id.* at 1224 (*cited in* United States v. Duncan, 598 F.2d 839, 853 (4th Cir. 1979)). In *McIntyre,* the appellant "bugged" McGann's office and argued that because some of McGann's conversations could be overheard outside the open office door, McGann did not justifiably expect privacy. 582 F.2d at 1223-24. The court held that McGann did have a justifiable expectation, noting that McGann subjectively expected privacy and that his conversations were difficult to overhear outside the office even with the door open. *Id.* at 1224.

However, that Duncan's requested instruction was unduly favorable to him does not address whether the agents justifiably expected privacy notwithstanding evidence that some of the conversations were audible outside the office. In United States v. Fuller, 441 F.2d 755 (4th Cir. 1971), the Fourth Circuit held that a person cannot expect that his conversation in a telephone booth will not be heard and repeated if he speaks loudly enough to be overheard by the unassisted ear of someone outside the booth. *Id.* at 761; *see* United States v. Fisch, 474 F.2d 1071, 1077 (9th Cir.), *cert. denied,* 412 U.S. 921 (1973) (police in hotel room next to petitioner's did not violate fourth amendment when they overheard conversations by "listening at the keyhole" without any electrical equipment). *Fuller* and *Fisch,* however, apply to *Duncan* only by analogy because eavesdropping with the unaided ear does not fall within the definition of interception for the purposes of Title III. *See* 18 U.S.C. § 2510(4) (1976); note 7 *supra. See also* United States v. Carroll, 332 F. Supp. 1299, 1301 (D.D.C. 1971) (overhearing and recording one end of a telephone conversation after it passed through wall was interception of oral communications). In determining justifiability, the court must consider all of the relevant facts. Katz v. United States, 389 U.S. 347, 351 (1967). In concluding there was sufficient evidence to find that the agents exhibited a justifiable expectation of privacy despite evidence that their voices were sometimes overheard by persons outside the room, 598 F.2d at 853, the Fourth Circuit implied that to require further precautions was an undue burden on the agents. Although Katz v. United States, 389 U.S. 347 (1967), held generally that the fourth amendment protects people and not places, *id.* at 351, spatial considerations are at least important in determining objective reasonableness of expectations.

ply because a conversation can be overheard by the human ear does not always justify its interception by electronic means.[52]

After the Fourth Circuit rejected Duncan's arguments regarding expectations of privacy, the court dismissed Duncan's claim that the evidence failed to show the necessary link between the eavesdropping and interstate commerce.[53] The court's refusal to read *Burroughs* to require that the activity sought to be prohibited under section 2511(1)(b)(iv)(A) must in each instance directly affect interstate commerce is entirely consistent with that case, as well as with the express language of the Act. Although *Burroughs* states that sections 2511(1)(b)(i)-(iv) specifically require a direct effect on interstate commerce, the statement demonstrates only that those sections require some sort of federal nexus, and not that the activity itself must directly affect interstate commerce.[54] Further, the language of section 2511(1)(b)(iv)(A) requires only that the interception occur on the premises of a business establishment which affects interstate commerce and does not require the presence of industrial espionage to establish a federal nexus.[55] Although Congress intended section 2511(1)(b)(iv) to prevent interception of trade secrets,[56] the extent of the statute's prohibitive effect is not clear. As an introduction to its discussion of Title III, a Senate Committee described the problem it faced in terms of business-related espionage, but summarized its findings in very broad terms, observing that new techniques in electronic interception en-

---

Expectations, supra note 4, at 471; *cf. Reconsideration, supra* note 44, at 172-74 (arguing *Katz* did not wholly displace old property test with expectations test, but created expectations test to supplement core of protected areas). The jury thus properly considered that the agents' office was "tiny" and "unventilated" in deciding whether an open office door precluded a justifiable expectation of privacy. 598 F.2d at 852.

[52] *See* United States v. McIntyre, 582 F.2d 1221, 1224 (9th Cir. 1978); note 51 *supra.*

[53] 598 F.2d at 854-55.

[54] *See* United States v. Burroughs, 564 F.2d at 1113; note 26 *supra.* In *Burroughs* the court reasoned that § 2511(1)(a) of the Act applies only where there is a federal nexus even though that section does not explicitly require such proof. *See* 564 F.2d at 1113. The court compared subsections (1)(a) and (1)(b)(i)-(iv) and claimed that the latter explicitly requires a showing of a direct effect on interstate commerce to establish a federal nexus. The court, however, made the comparison only to demonstrate that § 1(b)(i)-(iv) requires some federal nexus, rather than the particular nexus of a direct effect on interstate commerce. Therefore, because the bare language of (1)(b)(iv)(A) requires only that the prohibited activity occur on business premises the operation of which affects interstate commerce, a federal nexus consistent with *Burroughs* can be established without showing a direct effect on interstate commerce.

[55] Duncan claimed that § (1)(b)(iv) was intended only to prohibit interception of trade secrets, and therefore only industrial espionage will establish the required nexus. 598 F.2d at 853. The Fourth Circuit held that although one of Congress' objectives was the prevention of industrial espionage, if Congress intended to so limit the application of § 2511(1)(b)(iv) it would have explicitly done so. 598 F.2d at 854. Therefore, the court held that the plain language of the statute goes beyond the narrow construction urged by Duncan. *Id.*

[56] *See* SENATE REPORT, *supra* note 6, at 2181. The Senate Report specifically states that the "broad provisions" of § 2511(1)(b)(iv) were intended to prevent industrial espionage through electronic interception. *Id.*

danger a general right to privacy in all facets of people's lives.[57] Because a separate subsection, however, specifically forbids electronic interception to obtain information concerning any commercial establishment affecting interstate commerce,[58] the language of section 2511(1)(b)(iv)(A) implies a broader prohibitory effect. Therefore, the required federal nexus properly is established whenever electronic eavesdropping occurs on the premises of a business which affects interstate commerce, even though the interception is unconnected with that business.[59]

Whether such a broad reading of the statute warrants inclusion of the agents' office within the definition of bank premises remains uncertain. If the intended scope of the statute is protection of the business enterprise, then non-business related interceptions are only incidentally prohibited by Congress's conclusive presumption that all interceptions on the premises of commercial establishments which affect interstate commerce have a direct effect on interstate commerce. If the IRS agents' activities are viewed as unrelated to bank business, then the agents are not intentionally protected by the statute, but only incidentally so by virtue of their presence on the premises. In such circumstances, it is illogical to argue, as did the Fourth Circuit, that the definition of "premises" must be expanded to include the agents' office in order that "guests" be protected by the statute.[60] Nevertheless, there is no legal argument sufficient to find that the agents' office was not bank premises where the bank retained all property rights to the room.

In *Duncan*, the Fourth Circuit used traditional fourth amendment analysis to find that the IRS agents justifiably expected privacy in conducting their audit. The court then broadly construed Congress's power to protect that expectation of privacy by holding that section 2511(1)(b)(iv)(A) prohibits any electronic eavesdropping on the premises of a business which affects interstate commerce even though the intercep-

---

[57] *See id.* at 2154.

[58] *See* 18 U.S.C. § 2511(1)(b)(iv)(B) (1976).

[59] See 598 F.2d at 855. Duncan argued that under the Commerce Clause of the United States Constitution Congress could prohibit only those activities which directly affect interstate commerce and therefore could not prohibit electronic interceptions which did not affect interstate commerce. *Id.* at 853. The Fourth Circuit recognized that while Congress normally allows the courts to decide whether certain intrastate activities have the prohibited effect on interstate commerce, Congress can prohibit an entire class of activities when it determines that those activities generally affect interstate commerce. *Id.* at 854. Accordingly, the courts' role in such circumstances is to determine whether the class of activities is properly regulated. *Id.* If the class is properly regulated, then the court may not exclude from regulation those individual activities which alone would not establish the requisite nexus. *Id.* The Fourth Circuit reasoned that since Congress intended to prohibit interception of business secrets, prohibiting all interception on the premises of those businesses affecting interstate commerce was rational and appropriate. *Id.* at 855.

[60] Although persons outside the intended scope of a statute may be protected incidentally by reason of legislation covering a whole class of activities, where there is no incidental protection the reach of the statute should not be judicially extended to protect those not intentionally covered by the statute.

tion itself does not directly affect interstate commerce. Therefore, in *Burroughs* and *Duncan*, the Fourth Circuit extends the Act to protect a general right to privacy.

ROBERT G. MCLUSKY

F. *Conspiracies: Sufficiency of Proof and the Validity of Special Parole Terms*

The Comprehensive Drug Abuse Prevention and Control Act of 1970[1] prohibits conspiracy[2] to distribute a controlled substance.[3] The penalty

---

[1] 21 U.S.C. §§ 801-1193 (1976 & Supp. II 1978).

[2] The Comprehensive Drug Abuse and Control Act of 1970 (Act) does not specifically define conspiracy, but the accepted common law definition of conspiracy is the agreement between two or more persons to commit a crime. Marcus, *Conspiracy: The Criminal Agreement in Theory and Practice*, 65 GEO. L. REV. 925, 925 (1977) [hereinafter cited as Marcus]. To establish a conspiracy the prosecution must show an agreement between two or more persons and an intent to achieve an objective which is either unlawful itself or attained through unlawful means. W. LAFAVE & A. SCOTT, CRIMINAL LAW, § 61, at 453 (1977) [hereinafter cited as LAFAVE & SCOTT]. The elements of an act and the intent to act are difficult to analyze separately because the act of agreement requires not only an intention to engage in some illegality, but also an intent to agree. Note, *Conspiracy: The Requisite Proof*—State v. Dent 56 NEB. L. REV. 896, 896 (1977) [hereinafter cited as *Requisite Proof*]. Some jurisdictions require an overt act in furtherance of the agreement, but once the agreement is established virtually any act will suffice. *Id.* (citing LAFAVE & SCOTT, *supra* at 476-78). Thus, the gist of conspiracy is the agreement. LAFAVE & SCOTT, *supra*, § 61, at 460. *But see* Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 646 (1941) (gist of conspiracy is not agreement, but rather intent to commit act) [hereinafter cited as Harno]. Theoretically the prohibition of conspiracy serves two purposes. It permits interruption of criminal activity prior to completion of the crime and protects society from group criminality on the supposition that the conspiratorial agreement is itself dangerous. Marcus, *supra*, at 929.

[3] 21 U.S.C. § 846 (1976). Section 846 prohibits conspiracy to violate § 841(b) which forbids distribution of a controlled substance. *See* 21 U.S.C. § 841(b) (1976). Section 812 lists controlled substances and divides them into separate schedules to establish appropriate punishments. 21 U.S.C. § 812 (1976).

To convict a defendant of conspiracy to distribute illegal goods, he must be charged with knowledge of the illegal end use of the goods as well as knowledge that the illegal use is to be accomplished through a conspiracy. In United States v. Falcone, 311 U.S. 205 (1940), the Court affirmed reversal of a conviction for conspiracy because even though the appellant knew he sold goods to be used in the illegal manufacture of liquor, he did not know that the liquor operation was a conspiracy. *Id.* at 206-11. Evidence regarding the volume of sales from the defendant to the manufacturer was too vague to imply that the defendant had constructive knowledge of the conspiracy. The Court left open the issue of whether large volume sales alone could ever establish such knowledge. *Id.* at 209-11.

The question of whether sales volume could imply knowledge of a conspiracy was settled three years later in Direct Sales Co. v. United States, 319 U.S. 703 (1943). In *Direct Sales* the defendant, a drug mail order wholesaler, regularly sold large amounts of morphine sulfate to a physician over an extended period. The Court held that the defendant must have known that the doctor could not be using the drug legally for his own private medical practice. *Id.* at 713. The volume, regularity, and duration of the sales were thus dispositive of the defendant's knowledge of a conspiracy to distribute. *See id.* at 711, 713. These factors were stressed because morphine, while legal, was closely regulated, and any buying of abnormally large amounts should have put the wholesaler on notice of the plan to distribute. *See*

for conspiracy to distribute heroin is imprisonment, fine, or both, not to exceed the maximum punishment prescribed for actual distribution.[4] The punishment for distribution of heroin is a maximum fifteen year prison term, a fine of not more than $25,000, or both.[5] Additionally, any imprisonment for distribution automatically carries a special parole term of at least three years.[6] Courts have had difficulty, however, determining the sufficiency of evidence which will support a conviction for conspiracy to distribute narcotics[7] and delineating the maximum authorized sentence for a drug conviction.[8] In *United States v. Burman*,[9] the Fourth Circuit dealt with both issues.

Joseph and Julia Walker were heroin retailers in Miami, and Burman retailed and distributed the drug in Baltimore.[10] The Walkers and Burman were indicted with nine others for conspiracy to distribute heroin imported from Mexico.[11] At trial the government made no attempt to prove that the Walkers and Burman knew each other or had specific knowledge of heroin dealings in any city except their own.[12] Instead, the prosecution argued that knowledge of and participation in one overall conspiracy could be inferred from the volume of heroin purchased by the defendants over a three year period.[13] Based upon that inference, Burman and the Walkers were convicted and sentenced in separate trials[14] for

---

id. at 711. Controlled substances such as heroin have no legal use, and the item itself therefore provides conclusive evidence of knowledge of illegal use. To prove a conspiracy, then, all that need be shown is that a sale of a controlled substance constitutes more than the amount needed by the buyer for his personal use. *See id.* However, these considerations apply only to chain conspiracies. *See generally* notes 26 & 30 *infra*. In order to prove a wheel conspiracy, the government must prove that the defendant not only knew others were involved, but also that the defendant knew others performed the same function as himself. *See* text accompanying notes 29-31 *infra*.

[4] 21 U.S.C. § 846 (1976).

[5] 21 U.S.C. § 841(b) (1976). Section 841(b) establishes the punishments for distribution of Schedule I and II substances. Heroin is a Schedule I substance. *See* 21 U.S.C. § 812(c)(b)(10).

[6] 21 U.S.C. § 846 (1976).

[7] *See generally* LAFAVE & SCOTT, *supra* note 2, § 61, at 456-58; *Requisite Proof*, *supra* note 2, at 897. One problem regarding conspiracies is determining when one person's venture has been adopted by another so that the venture can be considered the product or object of a joint agreement. *Developments in the Law - Criminal Conspiracy*, 72 HARV. L. REV. 920, 933 (1959)[hereinafter cited as *Developments*]. Because the elements of conspiracy are difficult to analyze, *see* note 2 *supra*, there is much uncertainty as to the quantum of evidence necessary to prove the elements of conspiracy. LAFAVE & SCOTT *supra* note 2, § 61, at 456. *See* text accompanying notes 26-51 *infra*.

[8] *See* text accompanying notes 52-70 *infra*.

[9] 584 F.2d 1354 (4th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979).

[10] *Id.* at 1356.

[11] *Id.* at 1355. The appellants were indicted for conspiracy to distribute heroin under 21 U.S.C. § 846 (1976). *Id.*

[12] 584 F.2d at 1356-57.

[13] *Id.* at 1357.

[14] Although the twelve indicted defendants were scheduled for a joint trial in Baltimore, all except Burman and the Walkers pleaded guilty to various charges. *Id.* at 1356. The

conspiracy to distribute heroin under title 21, section 846 of the United States Code.[15] In addition to a prison sentence, Burman's punishment included a fifteen year special parole term.[16]

On appeal, the appellants raised two grounds for relief. First, all appellants asserted that a fatal variance existed between the indictment for participation in a single narcotics distribution organization and the proof of that participation adduced at trial.[17] Burman and the Walkers argued that the government's evidence showed separate conspiracies for heroin transactions, related only by dispersal through a single importing group.[18] Second, Burman claimed the court was without power to impose a special parole term for his conspiracy conviction.[19] The Fourth Circuit held both that the government's evidence sufficiently proved a single unified conspiracy[20] and that Burman's special parole term is a required part of any prison sentence imposed under section 846.[21]

In holding the evidence sufficient to establish a single conspiracy, the Fourth Circuit concluded that the appellants had reason to know from the nature of the contraband and from the vastness and regularity of their own dealings that smuggling and other illegal activities were requi-

---

jury found the Walkers guilty of conspiracy, but the court declared a mistrial in Burman's case. *Id.* In a second trial one month later, a jury found Burman guilty of conspiracy. *Id.*

[15] *Id.* at 1355.

[16] *Id.*

[17] *Id.* at 1356. The appellants contended that the government's proof showed only separate conspiracies, and not the single organizational conspiracy charged in the indictment. *Id.* The claim of fatal variance rested on the argument that prejudicial evidence associating the appellants with the nefarious deeds of others was improperly admitted against them merely because of an overly broad indictment. *Id.*

The claim of fatal variance regarding conspiracies has as its roots the so-called co-conspirator's exception to the hearsay rule. *See generally* Bergman, *The Coconspirators' Exception: Defining the Standard of the Independent Evidence Test Under the New Federal Rules of Evidence*, 5 HOFSTRA L. REV. 99 (1976) [hereinafter cited as Bergman]. This exception permits the admission of statements and acts of alleged coconspirators as evidence if the declaration or act was made during the course, and in furtherance of, the conspiracy charged. Anderson v. United States, 417 U.S. 211, 218 (1974); *see* Bergman, *supra*, at 99. However, if the government does not prove that all conspirators are part of the same conspiracy, then the others' acts cannot be imputed to the defendant. *See* Glasser v. United States, 315 U.S. 60, 74-75 (1942); *Bergman, supra*, at 99.

When a conviction is based on the theory that all the defendants were members of a single conspiracy, and a court subsequently finds that multiple conspiracies existed, a fatal variance is established. *See* Note, *Federal Treatment of Multiple Conspiracies*, 57 COLUM. L. REV. 387, 396 (1957) [hereinafter cited as *Federal Treatment*]. Not every variance is necessarily fatal; any error which does not affect "substantial rights" is disregarded. *Id.* at 397 (citing FED. R. CRIM. P. 52(a)); *see* Berger v. United States, 295 U.S. 78, 82-84 (1935). However, when co-conspirators are tried together an individual defendant is more likely to be convicted because of his association through joinder with other conspirators. *See* Blumenthal v. United States, 332 U.S. 539, 559 (1947); LAFAVE & SCOTT, *supra* note 2, § 61, at 458-59.

[18] 584 F.2d at 1356.

[19] *Id.* at 1357.

[20] *Id.* at 1356.

[21] *Id.* at 1358.

sites in making the appellants' activities possible.[22] Yet the court did not require a finding that the appellants had reason to believe in the interdependence of the various satellite retailers. Thus, the court blended the traditional distinction between "wheel" and "chain" conspiracies.[23] Under established concepts, a chain conspiracy consists of a vertically aligned business organization starting typically with an importer and extending downward through a wholesaler, a retailer, and a distributor.[24] Wheel conspiracies involve several persons (spokes) engaged in similar relationships with the same individual or group (hub).[25] For example, one retailer will supply several distributors in different locations.

The distinction between chain and wheel conspiracies is important because the required proof of intent for each type of conspiracy is different. In chain conspiracies, intent to participate is inferable solely from the nature of the enterprise.[26] The participant is presumed to know that others make his dealings possible.[27] An overt act in furtherance of the enterprise may establish intent to participate in the conspiracy simply from the presumed knowledge of the interdependence of the "links."[28] In wheel conspiracies, however, one spoke's knowledge of the existence of other spokes should not suffice to prove a single unified conspiracy because a single spoke operating independently of other spokes participates only in an unconnected chain conspiracy.[29] Unless one spoke knows that his own activities depend on other spokes, he should not be charged with participation in a conspiracy with the other spokes because he has not agreed to participate in a conspiracy linking all the spokes with a unifying rim.[30] Therefore, under traditional analysis, the fact that the appellants

---

[22] *Id.* at 1356.

[23] *See generally* Harno, *supra* note 2, at 635, 646-47; *Federal Treatment, supra* note 17, at 388-92.

[24] *See* LAFAVE & SCOTT, *supra* note 2, § 62, at 480-81. Chain conspiracies are characterized by specialized activities successively completed. *Federal Treatment, supra* note 17, at 389-90.

[25] *See* LAFAVE & SCOTT, *supra* note 2, § 62, at 481; *Federal Treatment, supra* note 17, at 389-90.

[26] United States v. Bruno, 105 F.2d 921, 922 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939). In *Bruno* the defendants' knowledge of the importance and existence of remote links was inferred from the fact that the operation was a chain conspiracy because the success of the defendants' involvement depended on the success of the whole operaton. *Id.* at 922. *See* LAFAVE & SCOTT, *supra* note 2, § 62, at 480-81; *Federal Treatment, supra* note 17, at 390. Thus, because knowledge of the existence of other links in chain conspiracies is inferable from the nature of the enterprise, intent is inferable from any act in furtherance of conspiratorial objectives. *See generally Federal Treatment, supra* note 17, at 390.

[27] *See* United States v. Moten, 564 F.2d 620, 624 (2d Cir.), *cert. denied*, 434 U.S. 974 (1977) (citing United States v. Bynum, 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974)).

[28] *See* LAFAVE & SCOTT, *supra* note 2, § 62, at 480-81; text accompanying note 26.

[29] *See* LAFAVE & SCOTT, *supra* note 2, § 62, at 481; ORCHARD, AGREEMENT IN CRIMINAL CONSPIRACY 2 (1974) [hereinafter cited as ORCHARD].

[30] ORCHARD, *supra* note 29, at 336-37. Unlike many crimes, conspiracy requires proof of specific intent to conspire, and mere recklessness will not satisfy the mens rea requirement. *See* Harno, *supra* note 2, at 635. *But see* ORCHARD, *supra* note 29, at 337. If a defendant is

had reason to know that illegal activities were necessary to their operations establishes only the existence of separate chain conspiracies between each spoke and the hub.[31] In such a case, evidence of acts by other spokes should not be admissible against an individual spoke.[32]

In testing the sufficiency of the evidence supporting the convictions of Burman and the Walkers, the Fourth Circuit considered whether each defendant knew or had reason to know that other spokes existed.[33] Relying on the decisions of other circuits,[34] the Fourth Circuit reasoned that proof of a large-scale distribution of narcotics gives rise to an inference of participation in a single conspiracy by satellite retailers (spokes).[35] The court therefore stated that knowledge of the existence of other spokes can be inferred from the operation's size and duration, and from the amounts involved.[36] The court then held that the same factors imply participation in a single wheel conspiracy.[37] As support for holding that evidence of

---

held responsible for the activities of other spokes even though he had no knowledge of such activities, the defendant is accountable for an offense having a wider scope than that in which he intended to participate. *Id.* at 337. Even where a defendant knows of the existence of other satellite retailers, he should only be liable for acts furthering his agreement to conspire and not for unrelated criminal acts of any co-conspirator. A showing of interdependence is therefore necessary to insure that a defendant is liable only for the conspiracy he intended. Thus, the element common to both wheel and chain conspiracies, and on which turns the determination of liability, is not a participant's knowledge of the existence of other participants, but a presumed or actual belief in interdependence. *See* LAFAVE & SCOTT, *supra* note 2, § 62, at 480 (citing United States v. Bruno, 105 F.2d 921 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939) (evidence insufficient to show each member knew success of own involvement depended on success of whole operation)). Although knowledge alone of the existence of other participants generally supports a finding of interdependence in chain conspiracies, *see* note 3 *supra*, the same knowledge is less likely to support a finding of interdependence between remote spokes in a wheel conspiracies. *See* LAFAVE & SCOTT, *supra* note 2, § 62, at 481. Therefore, interdependence should not be as readily presumed in wheels as it is in chain conspiracies. *See id.* at 481. However, courts have inferred a belief of interdependence from specific facts in wheel conspiracies. *See, e.g.*, United States v. Bruno, 105 F.2d at 922. Commentators have interpreted Bruno to stand for the proposition that if the hub perceives his own dealings with each spoke as part of a comprehensive operation, then the mere knowledge by a spoke that there are others similarly situated will alone justify a conclusion that the spoke agreed to the unified plan as envisaged by the hub. *See, e.g.*, LAFAVE & SCOTT, *supra* note 2, § 62, at 481; *Federal Treatment*, *supra* note 17, at 388-93.

[31] *See* note 30 *supra*.

[32] *See* note 17 *supra*.

[33] 584 F.2d at 1356.

[34] *Id.*; *see* text accompanying notes 38-39 *infra*.

[35] 584 F.2d at 1356.

[36] *Id.* at 1357.

[37] *Id.* at 1356. *See generally* United States v. Walker, 430 F. Supp. 609 (D. Md. 1977). Whether Burman's trial court created a conclusory presumption that knowledge of the existence of other spokes implies a belief in interdependence is unclear. At trial, the court instructed the jury that it could find the defendants guilty of separate conspiracies instead of the overall conspiracy charged. *Id.* at 613. However, because the basis on which the jury could find separate conspiracies was not specifically laid out, a finding that a spoke knew of the existence of other spokes might foreclose a finding of separate conspiracies. *See generally id.* at 613-14.

large-scale drug trafficking implies a spoke's knowledge of the existence of other spokes and that this knowledge implicates one in a wheel conspiracy, the Fourth Circuit cited cases from the Second[38] and Ninth Circuits.[39] These cases, however, do not entirely support the Fourth Circuit's holding.

The Second Circuit held that evidence of extensive narcotics dealing permits the inference that a satellite retailer knew of the existence of others performing the same function,[40] but the Second Circuit cases underlying this assertion do not adequately support such a presumption. The cases upon which the Second Circuit's inference is based involved either chain conspiracies, or wheel conspiracies in which the spokes had actual knowledge of each other's existence.[41] Chain conspiracy rationale is inapplicable to wheels because in chains knowledge of other participants' activities is inferred from the nature of the operation,[42] whereas wheels are differentiated from chains precisely because knowledge by one spoke of another spoke's existence cannot be inferred from the nature of the operation.[43] Furthermore, cases in which evidence proved that spokes actually knew of other spokes' operations do not create an inference that

---

[38] *See* United States v. Moten, 564 F.2d 620 (2d Cir.), *cert. denied,* 434 U.S. 974 (1977); *see* note 40 *infra.*

[39] 584 F.2d at 1356; *see* United States v. Perry, 550 F.2d 524 (9th Cir.), *cert. denied,* 431 U.S. 918 (1977); note 45 *infra.*

[40] *See* United States v. Moten, 564 F.2d 620, 625 (2d Cir.), *cert. denied,* 434 U.S. 974 (1977). *Moten* involved large scale trafficking in heroin and cocaine. The satellite retailers, operating in three cities, claimed participation in separate conspiracies rather than in the single conspiracy charged. *Id.* at 624. The court held a single conspiracy proved, using chain conspiracy rationale to claim that all participants had reason to know others were involved. *Id.* at 624-25. The appellants relied on two cases to claim that absent other evidence, purchasers dealing with the same core of suppliers are not presumed to know of each other. *Id.* at 626 (citing United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975); United States v. Miley, 513 F.2d 1191 (2d Cir.), *cert. denied,* 423 U.S. 842 (1975)). The court distinguished these cases as involving only small amounts of drugs in a short period or not involving drugs at all. 564 F.2d at 626. As grounds for holding that large-scale narcotics trafficking may imply that a spoke knew other spokes existed, the court cited Second Circuit precedent. *Id.* at 625-26; *see, e.g.,* United States v. Taylor, 562 F.2d 1345, 1351 (2d Cir.), *cert. denied,* 432 U.S. 909 (1977).

[41] *See, e.g.,* United States v. Taylor, 562 F.2d 1345, 1351 (2d Cir. 1977) (actual interaction between spokes); United States v. Magnano, 543 F.2d 431, 434-35 (2d Cir. 1976), *cert. denied,* 429 U.S. 1091 (1977) (appellants had actual knowledge that horizontal scope of scheme was larger than own involvement); United States v. Tramunti, 513 F.2d 1087, 1106 (2d Cir.), *cert. denied,* 423 U.S. 832 (1975) (single conspiracy proved where evidence showed mutual interdependence and assistance between spokes); United States v. Mallah, 503 F.2d 971, 985-86 (2d Cir. 1974), *cert. denied,* 420 U.S. 995 (1975) (single conspiracy proved where evidence showed commingling of assets and mutual dependence between the spokes); United States v. Agueci, 310 F.2d 817, 822, 826-27 (2d Cir. 1962), *cert. denied,* 372 U.S. 959 (1963) (satellite retailers knew each other, and their operations were interdependent); *accord,* United States v. Bynum, 485 F.2d 490, 495-97 (2d Cir. 1973), *vacated on other grounds,* 417 U.S. 903 (1974) (satellite distributors knew other distributors operated through same hub); United States v. Cirrillo, 468 F.2d 1233, 1238 (2d Cir. 1972)(chain conspiracy).

[42] *See* text accompanying notes 26-31 *supra.*

[43] *See* text accompanying notes 24-25 *supra.*

spokes know of one another because no need for the inference arises. In addition to employing Second Circuit precedent to impute knowledge to the spokes, the *Burman* court did not require a finding that the convicted spokes each have a reasonable belief that their activities in part depended on the successful operation of the other spokes.[44] The Ninth Circuit case cited in *Burman,* however, did not eliminate proof of interdependence as a requirement for a wheel conspiracy conviction, but rather held that the facts alone proved interdependence.[45]

The Ninth Circuit's requirement that the government prove defendants had reason to believe in the interdependence of spokes is based upon *Blumenthal v. United States.*[46] In *Blumenthal,* three liquor salesmen who did not know each other were convicted of conspiracy in an elaborate price fixing scheme based on their presumed knowledge that other salesmen were involved.[47] The Supreme Court held that because each participant knew the volume of liquor sold by his supplier was larger than the amount handled by the participant individually, the three salesmen knowlingly contributed to the success of the overall organization.[48] Thus, the Ninth Circuit's requirement that spokes have reason to believe in interdependence might be satisfied by finding that a spoke knew other

---

[44] *See* 584 F.2d at 1356-57.

[45] *See* United States v. Perry, 550 F.2d 524, 529 (9th Cir. 1977). *Perry* involved a cocaine and heroin smuggling operation. The appellants, satellite retailers, relied on Kotteakos v. United States, 328 U.S. 750 (1946), to claim prejudicial and fatal variance between the indictment and the proof at trial. 550 F.2d at 531. In *Kotteakos,* 32 persons were indicted for a single conspiracy to violate the National Housing Act by inducing lending institutions to make loans which would be offered to the Federal Housing Administration for insurance on the basis of fradulent information. 328 U.S. at 752. Seven defendants were convicted at trial. *Id.* at 753. Although the government admitted that the evidence proved eight or more unrelated conspiracies with a single broker, evidence of dealings between the broker and defendants other than petitioner was admitted against the petitioner. *Id.* at 754-55. The Supreme Court reversed, holding that the danger of guilt transferance was so great as to prejudice substantial rights of the defendants. *Id.* at 776-77.

The Ninth Circuit in *Perry* noted that the government must prove that each defendant knew or had reason to know the scope of the organization involved, and had reason to believe his own benefits depended on the success of the entire venture. 550 F.2d at 530-31. The *Perry* court distinguished *Kotteakos* on its facts, maintaining that the defendants in *Kotteakos* had no interest in whether any scheme except his own succeeded. *Id.* at 531. This differed from *Perry,* the court stated, where each of the defendants had reason both to know of the existence of other satellite retailers and to believe that the benefits he received probably depended upon the success of the entire venture. *Id.* at 531. The court did not, however, indicate specific evidence which supported its holding, reasoning only that the jury could rationally conclude that a single conspiracy existed. *Id.* at 529. Therefore, whether there is any difference in the proof needed to show that defendants had reason to know of the existence of other spokes and the proof required to infer that defendants believed in interdependence is not clear.

[46] 332 U.S. 539 (1947); *see* United States v. Baxter, 492 F.2d 150, 158 (9th Cir. 1973), *cert. denied,* 416 U.S. 940 (1974); *accord* United States v. Perry, 550 F.2d 524, 529 (9th Cir. 1977).

[47] 332 U.S. at 558.

[48] *Id.* at 559.

spokes participated in the same distributive organization.[49] The spokes in *Blumenthal,* though, had actual knowledge that their individual dealings constituted only a part of a larger scheme. Therefore, the case does not support a holding that a spoke may be presumed to know of the size of an organization based only on the volume of his individual dealings with a supplier. The extent of an individual's personal dealings with a supplier, absent other knowledge, supports only an inference that a chain conspiracy existed.[50]

The Fourth Circuit thus confused the traditional distinction between chain and wheel conspiracies. The court, by permitting evidence of large-scale narcotics trafficking alone to establish a spoke's participation in a wheel conspiracy, unjustifiably allows the prosecution the procedural advantages of liberal joinder and the co-conspirator's hearsay exception.[51] By perpetuating the confusion between wheels and chains, the Fourth Circuit allows these procedural advantages to work against persons who are joined under the charge of wheel conspiracy, when in fact the same persons should be tried in smaller groups under chain conspiracy charges.

After upholding Burman's conspiracy conviction, the court considered the propriety of imposing the special parole term which accompanied Burman's prison sentence. The statutes involved in the sentencing contain an ambiguity which recently has been used to support holdings that a special parole term cannot be imposed for conspiracy to violate the narcotics laws.[52] Title 21, section 841(b) provides that a person convicted of distributing heroin can be imprisoned for no more than fifteen years, fined no more than $25,000, or both.[53] Additionally, if the person receives a prison sentence, a special parole term of at least three years is mandatory.[54] The punishment for conspiracy to distribute heroin under section 846 is imprisonment or fine or both, not to exceed the maximum

---

[49] Whether the proof required to show that a spoke have reason to believe in interdependence of several spokes is significantly different from the proof needed to demonstrate reason for a spoke to believe that other spokes exist is unclear. *See* note 45 *supra.* However, the Fifth Circuit has read *Blumenthal* to require some showing of interaction between the spokes as to a common illegal object. *See* United States v. Levine, 546 F.2d 658, 663 (5th Cir. 1977).

[50] *See* text accompanying notes 26-31 *supra.*

[51] LAFAVE & SCOTT, *supra* note 2, § 61, at 455-58. The prosecution can bring conspiracy charges in any jurisdiction where either the agreement was made or any overt act in furtherance of the conspiracy by any of the alleged conspirators occurred. *Id.* at 456 (citing Hyde v. Shine, 199 U.S. 62 (1905); Hyde v. United States, 225 U.S. 347 (1912)). Once a conspiracy is established, the government must produce only "slight evidence" to connect the defendant with that conspiracy. *See generally* Comment, *Connecting Defendants to Conspiracies: The Slight Evidence Rule and the Federal Courts,* 64 VA. L. REV. 881 (1978). Also, when several defendants are charged in a single conspiracy, they may be required to defend against the charges in a single trial. LAFAVE & SCOTT, *supra* note 2, § 61, at 458. Joint trials, however, lend themselves to an impermissible transfer of guilt across conspiratorial lines. *See* Blumenthal v. United States, 332 U.S. 539, 559 (1947).

[52] *See, e.g.,* Fassette v. United States, 444 F. Supp. 1245, 1246-47 (C.D. Cal. 1978).

[53] 21 U.S.C. § 841(b) (1976).

[54] *See Id.* § 841(b) (1976).

penalty prescribed under section 841.[55] Section 846 thus sets its penalties by reference to section 841. However, section 846 does not mention a special parole term, whereas section 841 requires a special parole term where a prison sentence is imposed.[56]

Burman argued for strict construction of section 846, maintaining that section 846's language limits penalties for conspiracy to fines and imprisonment only.[57] The government contended that Burman's construction of section 846 is overly technical and would thwart the statute's intended purpose of preventing renewed drug dealings by past offenders.[58] The Fourth Circuit held that not only is the special parole term appropriate for violation of section 846, but is required whenever imprisonment is ordered.[59] The court reasoned that under section 841(b) a special parole term is required whenever imprisonment is imposed, and that the terms "imprisonment or fine or both" in section 846 have meaning only by reference to the sentences imposed under section 841.[60]

The issue of whether section 846 requires, permits, or forbids the addition of a special parole term is hopelessly entangled in ambiguity. Attempts to discern congressional intent have been of little value.[61] As a result, two contradictory lines of precedent on the parole term issue exist within the federal court system. The *Burman* court's position regarding the imposition of a special parole term for a conspiracy conviction under section 846 has been adopted by other federal courts. The Eighth Circuit, relying specifically on *Burman,* held that the special parole term has no separate existence as a possible penalty because it does not accompany a fine and it may not be imposed alone.[62] The Tenth Circuit reasoned that Congress viewed the parole term as an element of the word "imprisonment," and concluded that whenever imprisonment is a part of a sen-

---

[55] *See Id.* § 846 (1976).

[56] *See Id.* §§ 841(b); 846 (1976).

[57] 584 F.2d at 1357. Burman contended that although § 846 refers to § 841(b) for the terms of punishment for conspiracy to distribute heroin, a violation of § 846 does not permit imposition of a special parole term, which is neither imprisonment nor a fine, although such a term would be required for distribution of heroin. *Id.*

[58] 584 F.2d at 1357. The government urged that all penalties under § 846 are to be set by exclusive reference to § 841(b), which imposes a mandatory special parole term whenever imprisonment is a part of the sentence. *Id.* Elimination of the parole term, the government argued, would subject "large scale heroin distributors" to less punishment than small scale offenders. *Id.*

The government's argument that elimination of the parole term would allow less punishment for larger scale distributors than for small volume offenders is groundless. Nothing prevented the government from seeking convictions of the *Burman* defendants for actual distribution under § 841(b). Thus, while elimination of a parole term from § 846 would subject large scale conspirators to less punishment than actual distributors, it would not subject large scale distributors to less punishment because actual distribution is prohibited by § 841 and not by § 846.

[59] 584 F.2d at 1358.

[60] *Id.*

[61] *See* text accompanying notes 63-69 *infra.*

[62] United States v. Sellers, 602 F.2d 53, 58 (8th Cir. 1979).

tence, a parole term is necessarily included.[63] Another federal court reasoned that the *Burman* decision was based partly upon a consideration of the relationship between sections 841 and 846 as part of a statutory scheme to prevent renewed dealings by past offenders, and held that on this basis alone section 846 permits imposition of a parole term.[64]

Other courts, however, have rejected the position taken by the Fourth Circuit, holding instead that section 846 explicitly limits the punishment for conspiracy to violate section 841(b) to only imprisonment and fine. The Third Circuit specifically repudiated the argument that a parole term can be included within the meaning of imprisonment.[65] There, the court argued that had Congress intended to permit the same punishments for violations of sections 846 and 841(b), it could easily have done so.[66] A district court decision cited by the Third Circuit supported the intent argument by reasoning that in federal practice there is commonly a difference between the maximum punishment allowed for substantive violations and that permitted for conspiratorial violations relating to the same substantive offense.[67] Focusing on congressional intent, the same district court cited a discussion of section 846's predecessor by the House Interstate and Foreign Commerce Committee.[68] The court held that the House Report buttressed the argument that reference in section 846 to the "maximum punishment" for substantive offenses under section 841(b) refers only to the maximum amount of fine and imprisonment which could be prescribed, and does not include any special parole term.[69]

The *Burman* court's confusion as to both the penalties and the proof of conspiracy is indicative of the confusion inherent in the statutes. The Fourth Circuit, by using the chain conspiracy rationale to determine the government's burden of proof for prosecutions of wheel conspiracies, per-

---

[63] United States v. Jacobson, 578 F.2d 863, 868 (9th Cir. 1978).

[64] United States v. Wells, 470 F. Supp. 261, 218 (S.D. Iowa 1979).

[65] United States v. Mearns, 599 F.2d 1296, 1298 (3d Cir. 1979).

[66] *Id.*

[67] Fassette v. United States, 444 F. Supp. 1245, 1247 n.* (C.D. Cal. 1978); *accord* United States v. Mearns, 599 F.2d 1296, 1298 (3d Cir. 1979). The *Mearns* court noted that legislative history speaks of parole provisions for various substantive offenses, but "significantly" omits such a provision in describing the punishment under 21 U.S.C. § 846 (1976). 599 F.2d at 1298, *citing* H.R. REP. No. 1444, 91st Cong., 2d Sess. 46-51, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4566, 4614-18 [hereinafter cited as H.R. REP. No. 1444].

[68] Fassette v. United States, 444 F. Supp. 1245, 1247 n.1 (C.D. Cal. 1978) (citing H.R. REP. No. 1444, *supra* note 67, at 4617). A House Committee, discussing the predecessor of 21 U.S.C. § 846 (1976), interpreted the penalty for conspiracy to be imprisonment or fine or both, not to exceed the maximum "amount" allowed for the substantive offense which was the object of the conspiracy. H.R. REP. No. 1444, *supra* at 4617. Focusing on the word "amount", the *Fassette* court held that the House Report supports the argument that statutory reference in § 846 to the "maximum punishment" prescribed for substantive offenses refers to the maximum "amount" of fine and imprisonment which could have been prescribed, and not to a special parole term. 444 F. Supp. at 1248. Although the comment by the House Committee mentions only imprisonment or fine, because the statement is no more than a paraphrasing of the statute itself, it offers little in the way of elucidation.

[69] Fassette v. United States, 444 F. Supp. at 1248; *see* note 68 *supra.*

mits conviction of an alleged participant in a wheel conspiracy even though the participant actually believed his activities had no relation to those of other satellite retailers.[70] Furthermore, the Fourth Circuit has construed the sentencing statute in the government's favor by holding that a special parole term is required in conspiracy convictions which include imprisonment.[71] Until the Supreme Court clarifies its position on the substantive crime and Congress amends the penalty statute, such confusion is likely to continue.

ROBERT G. MCLUSKY

G. *What is an Interrogation?*

A criminal defendant is entitled to legal counsel at every stage of the adversary proceeding.[1] The right to counsel extends from the initiation of formal charges against a defendant[2] to a hearing on the revocation of probation.[3] Recent development of the scope of the right to counsel has fo-

[70] *See* notes 29-31 *supra*.
[71] *See* notes 59-60 *supra*.

[1] U.S. CONST. amend. VI, in pertinent part, states "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." In Powell v. Alabama, 287 U.S. 45 (1932), the Supreme Court established the sixth amendment right to counsel in a capital case as an element of due process under the fourteenth amendment. *Id.* at 71-73. The majority in *Powell* stated that the necessity of counsel was so vital that an attorney, retained or court-appointed, was necessary at every critical stage of the adversary proceeding. *Id.* at 69-73. In Johnson v. Zerbst, 304 U.S. 458 (1938), the Court required appointment of counsel in all federal cases absent an intentional and competent waiver of the sixth amendment right. *Id.* at 467-68. The right to appointed counsel was somewhat limited in Betts v. Brady, 316 U.S. 455 (1942), which held that the right to appointed counsel in the non-federal, non-capital case context would be interpreted on a-case-by-case basis. *Id.* at 473. The Supreme Court established the absolute right to retained counsel in Chandler v. Fretag, 348 U.S. 3, 9 (1954) and Ferguson v. Georgia, 365 U.S. 570, 596 (1961), and later overruled *Betts*, holding the sixth amendment right to counsel fundamental under the due process clause of the fourteenth amendment and available to all state and federal defendants for every crime. *See* Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963). For a discussion of the history and development of the right to counsel, see Clarke, *Gideon Revisited*, 15 ARIZ. L. REV. 343 (1973); LaFrance, *Criminal Defense Systems for the Poor*, 50 NOTRE DAME LAW. 41 (1975); Comment, *Assuring the Right to an Adequately Prepared Defense*, 65 J. CRIM. L.C. & P.S. 302, 302-314 (1974).

[2] *See* Kirby v. Illinois, 406 U.S. 682 (1972). The Court in *Kirby* refused to afford the defendant the right to counsel during a pre-indictment police station "show-up" identification. *Id.* at 689. The Court explained that the initiation of adversary judicial criminal proceedings meant the formal charge, preliminary hearing, indictment information or arraignment for purposes of the right to counsel. *Id.* at 689-90.

[3] *See* Gagnon v. Scarpelli, 411 U.S. 778, 790-91 (1973).

cused on post-indictment interrogation of an accused in the absence of a lawyer.[4]

The Supreme Court's focus in the post-indictment interrogation cases has shifted from a general evaluation of all the facts surrounding a police interrogation[5] to a specific inquiry concerning the defendant's right to counsel during the post-indictment process.[6] In *Massiah v. United States,*[7] the Court held that the defendant's right to counsel was violated by the use at trial of post-indictment statements deliberately elicited from the defendant in the absence of counsel.[8] The *Massiah* Court emphasized the vital importance of an attorney's assistance during the period between indictment and trial,[9] and condemned both surreptitious interrogation and jailhouse questioning absent the presence of counsel.[10] Deliberate government elicitation of incriminating statements where the defendant was unaware of government monitoring received firm criticism in the *Massiah* opinion.[11]

The Supreme Court again considered a defendant's right to counsel in

---

[4] *See* text accompanying notes 5-18 *infra.*

[5] *See* Spano v. New York, 360 U.S. 315 (1959). The *Spano* Court overturned a New York state conviction relying on a confession elicited by police interrogation in the absence of counsel. *Id.* at 324. Petitioner Spano was indicted for murder and surrendered himself to the authorities. His retained counsel told Spano to answer no questions and left him in the custody of police officers. The police questioned Spano continually and persistently for almost eight hours before he confessed. *Id.* at 322. The Court, after considering all the circumstances surrounding the post-indictment questioning, concluded that the government's undeviating intent to elicit a confession absent counsel violated the defendant's sixth amendment rights. *Id.* at 323-24.

[6] *See* Massiah v. United States, 377 U.S. 201, 206 (1964).

[7] 377 U.S. 201 (1964).

[8] *Id.* at 206-07. Massiah was indicted for violating federal narcotics law. He retained counsel, pleaded not guilty, and was released on bail. *Id.* at 201. His co-defendant cooperated with the government by allowing the installation of a radio transmitter in his car. *Id.* at 202. During a conversation in the co-defendant's car, Massiah made several incriminating statements which were transmitted by radio to a hidden federal agent. *Id.* at 203. These statements, made in the absence of counsel, were introduced at trial and Massiah was convicted. *Id. See generally* Enker & Elsen, *Counsel for the Suspect:* Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47 (1964); Note, *Right to Counsel,* 17 BAYLOR L. REV. 448 (1965); Note, *Interrogation in the Absence of Counsel,* 19 SW. L. J. 384 (1965).

[9] 377 U.S. at 204-05. The *Massiah* Court reiterated the constitutional principle established in Powell v. Alabama, 287 U.S. 45 (1932), that the right to counsel is a requirement of fundamental fairness under the due process clause of the fourteenth amendment. The Court emphasized that the assistance of an attorney is perhaps most important and critical between the time of arraignment and the trial itself. 377 U.S. at 205; *see* 287 U.S. at 68-69. During this period of consultation, thoroughgoing investigation and preparation, the defendant's rights, particularly during interrogation, must be protected through the able assistance of counsel. 377 U.S. at 205-06; *see* Spano v. New York, 360 U.S. 315, 324-26 (1959)(Douglas, Black, Brennan and Stewart, JJ., concurring).

[10] 377 U.S. at 206. The *Massiah* Court reasoned that its holding barring post-indictment government elicitation of incriminating statements absent counsel would have value only if it applied to indirect and surreptitious interrogations as well as those conducted in the jailhouse. *Id.*

[11] 377 U.S. at 206. *See also* United States v. Massiah, 307 F.2d 62, 72-73 (2d Cir. 1962).

post-indictment proceedings in *Brewer v. Williams.*[12] The *Brewer* Court held that statements made by a defendant were inadmissible when such statements were deliberately elicited from the defendant in the absence of counsel after adversary proceedings had commenced.[13] Affirming *Massiah,* the *Brewer* Court interpreted *Massiah* to require legal representation for an individual against whom adversary proceedings had begun when the government interrogates him.[14] Interrogation in *Brewer* occurred when a police officer delivered a speech to the defendant, deliberately aimed at eliciting incriminating statements in the absence of counsel.[15] The Court held that this purposeful police effort to elicit information from the defendant, absent counsel, violated *Massiah* and clearly abridged the defendant's sixth amendment right to counsel.[16] The *Brewer* Court concluded its affirmance of *Massiah* by stating that the distinction between surreptitious elicitation of incriminating remarks in *Massiah* and the known police interrogation in *Brewer* was constitutionally irrelevant.[17]

Analysis of the post-indictment right to counsel after *Brewer* has centered around the issue of interrogation.[18] The Supreme Court's treatment of *Massiah* in the *Brewer* opinion raises the issue of what constitutes interrogation in the absence of counsel and what types of post-indictment government contact with the defendant are impermissible under the *Massiah* doctrine. The Fourth Circuit recently spoke on the post-indictment right to counsel in *Henry v. United States,*[19] holding inadmissible incriminating

---

[12] 430 U.S. 387 (1977). *See generally* Kamisar, *Foreword:* Brewer v. Williams—*A Hard Look at a Discomforting Record,* 66 GEO. L. J. 209 (1977); Comment, Brewer v. Williams: *The End of Post-Charging Interrogation,* 10 SW. L. REV. 331 (1978); Note, *The Declining* Miranda *Doctrine: The Supreme Court's Development of* Miranda *Issues,* 36 WASH. & LEE L. REV. 259 (1979); 11 CREIGHTON L. REV. 997 (1978).

[13] 430 U.S. at 400-01. In *Brewer,* the defendant Williams was a recent escapee from a mental hospital and a deeply religious person. He was suspected of kidnapping a 10-year old girl in Des Moines, Iowa. Williams eventually turned himself in to the police at Davenport, Iowa, where he was arraigned for the abduction. Before being transported from Davenport to Des Moines, defendant's counsel in both cities instructed Williams to refrain from conversing with the police until he conferred with his attorney is Des Moines. The police assured Williams and his two attorneys that the defendant would not be questioned until he met with a lawyer. During the 160-mile car trip from Davenport to Des Moines, the police elicited incriminating statements from Williams in the absence of counsel. *Id.* at 390-93.

[14] *Id.* at 401.

[15] *Id.* at 392-93, 399. Detective Leaming, one of the police officers who transported Williams from Davenport to Des Moines, exploited his knowledge of Williams' deeply religious nature by making a speech commonly referred to as the "Christian Burial Speech." Leaming's speech outlined the difficulties of finding the little girl's body in the December snow and the desire of her parents that she have a proper Christian burial. At trial, Leaming testified that he was trying to get all the information he could before Williams reached his lawyer. State v. Williams, 182 N.W.2d 396, 407 (Iowa 1970).

[16] 430 U.S. at 400-01.

[17] *Id.* at 401.

[18] *See generally* Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is Interrogation? When Does It Matter?* 67 GEO. L. J. 1 (1978) [hereinafter cited as Kamisar].

[19] 590 F.2d 544 (4th Cir. 1978).

post-indictment statements obtained from the defendant by an undisclosed paid informer in the absence of counsel.[20]

The defendant Henry was indicted on a charge of armed bank robbery and incarcerated in the Norfolk City Jail. A paid informant of the Federal Bureau of Investigation was an inmate in the same cell block as Henry. The informant had worked for the FBI for over a year, and told the FBI that he occupied a cell block with Henry. The FBI instructed the informant to be alert to any statements made by Henry concerning the charges against him, but specifically warned the informant not to initiate conversation with or question Henry regarding the bank robbery.[21] Henry subsequently spoke with the the informant, making incriminating statements regarding his participation in the bank robbery. The informant later communicated this information to the FBI, and on the strength of the informant's testimony, Henry was convicted.[22] After an unsuccessful appeal of his conviction,[23] Henry moved to vacate his sentence.[24] The district court denied the motion to vacate,[25] but the Fourth Circuit reversed, granting the habeas corpus petition.[26]

On habeas corpus review, the Fourth Circuit held the undisclosed government monitoring of Henry's post-indictment conversation in the absence of counsel violated his sixth amendment right to counsel.[27] The *Henry* court reasoned that *Brewer* did not limit *Massiah* to direct government questioning.[28] Although *Massiah* condemned both surreptitious elicitation of evidence and jailhouse questioning as improper interrogation,[29] *Brewer* expanded the meaning of interrogation to include situations involving neither surreptitious elicitation nor questioning, but general conversations by known police officers.[30] Reading *Massiah* and *Brewer* together, the *Henry* court concluded that general conversations by an informant could constitute interrogation and thus violate the sixth amendment.[31] The *Henry* opinion rests on the rationale that "interrogation" is a relative term,[32] not limited to formalized interrogation.[33] The Fourth Circuit's deci-

---

[20] *Id.* at 547.

[21] *Id.* at 545.

[22] *Id.*

[23] United States v. Henry, No. 73-1413 (4th Cir. 1973) (unpublished opinion); *see* Henry v. United States, 590 F.2d 544, 545 (4th Cir. 1978).

[24] Henry moved to vacate his sentence pursuant to 28 U.S.C. § 2255 (1976)(federal habeas corpus).

[25] Opinion unpublished; *see* Henry v. United States, 551 F.2d 306 (4th Cir. 1977).

[26] Henry v. United States, 590 F.2d 544, 545 (4th Cir. 1978).

[27] *Id.* at 547.

[28] *Id.* at 546-47.

[29] *Id; see* text accompanying notes 8-10 *supra.*

[30] *See* 590 F.2d at 547; *see* text accompanying notes 12-15 *supra.*

[31] 590 F.2d at 547. In support of its conclusion that general conversations constituted interrogation, the *Henry* court noted that *Massiah* has been applied to post-indictment conversations between a defendant and known police officers. *Id.*

[32] *Id.; see* United States v. Anderson, 523 F.2d 1192, 1196 (5th Cir. 1975). *Anderson* described "interrogation" as a relative term in holding incriminating evidence gathered in

sion that *Massiah* and the post-indictment right to counsel is not limited to questioning, deception or inducement[34] curbs intentional and deliberate government efforts to elicit post-indictment evidence in the absence of counsel.[35]

Previous Fourth Circuit decisions interpreting sixth amendment protection for an indicted defendant have limited the protection to government acts of affirmative elicitation or inducement.[36] These pre-*Brewer* cases are similar to some federal circuit court decisions which restrict the application of *Massiah* to premeditated government post-indictment contact with the defendant for the purpose of eliciting incriminating statements absent counsel.[37] Some federal circuits, however, view *Massiah* as a

---

the course of a doctor's examination, where a government agent was sent to the defendant-doctor's office for that purpose, as inadmissible under *Massiah*. 523 F.2d at 1196; *see* text accompanying note 33 *infra*.

[33] *See* 590 F.2d at 547; *see* United States v. Anderson, 523 F.2d 1192, 1195-96. In *Anderson*, the government did not engage in a question and answer session with the defendant or conduct a formalized interrogation. Rather, the agent made representations and requests that elicited incriminating responses from the defendant. These statements were government induced and almost surely would not have occurred had counsel been present. *Id.*

[34] 590 F.2d at 546; *see* McLeod v. Ohio, 381 U.S. 356 (1965); Beatty v. United States, 389 U.S. 45 (1967). In *McLeod*, the defendant had been indicted but had not employed counsel. State v. McLeod, 1 Ohio St.2d 60, 60, 203 N.E.2d 349, 350 (1964). While riding with the police in an automobile and assisting them in locating evidence of the crime, the defendant voluntarily made several incriminating statements. The supreme court of Ohio distinguished *Massiah* as a case involving statements obtained through trickery, whereas McLeod's statements were made in the known presence of police officers. 203 N.E.2d at 351. The United States Supreme Court did not accept the Ohio court's distinction and summarily reversed. 381 U.S. at 356.

The Fifth Circuit's opinion in *Beatty* sought to limit *Massiah* to situations where the government has purposely approached the accused with the intention and design of inducing him to make incriminating statements absent counsel. Beatty v. United States, 377 F.2d 181, 190 (5th Cir. 1967). Shortly after his indictment, the defendant Beatty telephoned and requested a government agent to meet him. Beatty had previous contact with this agent and was unaware of the agent's employment with the government. The agent agreed to the meeting and had another government agent concealed in the trunk of his car when the meeting took place. *Id.* at 184. Testimony of the concealed agent as to Beatty's incriminating remarks led to Beatty's conviction. *Id.* at 185. The Fifth Circuit affirmed, distinguishing the acts of deliberate government inducement in *Massiah* from Beatty's voluntary request of a meeting with the government agent, and the government's one affirmative act of concealing another agent in the trunk of the car for purposes of monitoring the conversation. *Id.* at 190. The Supreme Court summarily reversed this decision on the authority of *Massiah*. Beatty v. United States, 389 U.S. 45 (1967).

[35] *See* text accompanying notes 56-60 *infra*.

[36] *See, e.g.*, United States v. Clark, 499 F.2d 802, 807-08 (4th Cir. 1974)(government's coercive tactics were violation of fifth and sixth amendment rights under *Miranda*); United States v. Slaughter, 366 F.2d 833, 840-41 (4th Cir. 1966)(post-arrest, pre-indictment interrogation absent counsel condemned under *Massiah* and *Escobedo*).

[37] *See, e.g.*, United States v. DeLoy, 421 F.2d 900, 902 (5th Cir. 1970)(*Massiah* does not invalidate insistent, untricked post-indictment statements of properly warned defendant); United States *ex rel.* Milani v. Pate, 425 F.2d 6, 8 (7th Cir.), *cert. denied*, 400 U.S. 867

ban on all incriminating post-indictment statements made in the absence of counsel,[38] thus resembling *Henry*'s analysis of *Massiah* and *Brewer* together and its liberal interpretation of interrogation for purposes of sixth-amendment protection.[39] Confusion over the meaning of interrogation after *Brewer*[40] has prompted decisions exactly contrary to the result in *Henry*.[41]

The Fourth Circuit's interpretation of the post-indictment right to counsel is somewhat strained in striking down government informant conversations with the defendant through an interrogation analysis. *Massiah* specifically condemned the government's secret elicitation of incriminating evidence as a violation of the sixth amendment right to counsel.[42] *Brewer* states that whether incriminating statements are elicited surreptitiously or otherwise is constitutionally irrelevant.[43] The *Brewer* opinion also interpreted *Massiah* as affording a defendant the post-indictment right to counsel when the government interrogates him.[44] *Henry*'s analysis of the combined effect of *Massiah* and *Brewer* raises two problems under the Supreme Court's analysis of the post-indictment right to counsel—the

---

(1970)(testimony held admissible where FBI was passive receiver of information provided by fellow inmate of defendant on his own initiative); Arrington v. Maxwell, 409 F.2d 849, 853 (6th Cir.), *cert. denied*, 396 U.S. 944 (1969)(post-indictment statements made to prosecuting attorney and chief of police were voluntary and held admissible); Caton v. United States, 407 F.2d 367, 374 (8th Cir.), *cert. denied*, 395 U.S. 984 (1969)(arrested but un-indicted defendant not protected by *Massiah*); United States v. Garcia, 377 F.2d 321, 324 (2d Cir. 1967)(*Massiah* inapplicable to defendant's spontaneous or voluntary post-indictment statements in the presence of government even though counsel not present); Paroutian v. United States, 370 F.2d 631, 632 (2d Cir. 1967)(no sixth amendment violation where defendant's non-informant cellmate voluntarily told police defendant's incriminating statements).

[38] *See, e.g.*, United States *ex rel.* O'Connor v. New Jersey, 405 F.2d 632, 633-34, 636 (3d Cir.), *cert. denied*, 395 U.S. 923 (1969)(*Massiah* commands absolute post-indictment right to counsel protection excluding any oral communications between defendant and police made in the absence of counsel); Hancock v. White, 378 F.2d 479, 481-84 (1st Cir. 1967)(*Massiah* prohibits statements voluntarily made during automobile trip to sheriff and prosecuting attorney).

[39] *See* text accompanying notes 31-35 *supra*.

[40] *See* Kamisar, *supra* note 18, at 32-33.

[41] In Wilson v. Henderson, 584 F.2d 1185, 1191 (2d Cir. 1978), post-indictment statements made by the defendant to a cellmate-informer in the absence of counsel were admitted into evidence. The Second Circuit found that the informant's conversation under circumstances identical to *Henry* was not interrogation and that no *Massiah* right attached. Similarly, in United States v. Hearst, 563 F.2d 1331, 1348 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978), the Ninth Circuit held admissible defendant's post-indictment statements to a visitor surreptitiously recorded in the absence of counsel. The Ninth Circuit found no interrogation under *Brewer* and therefore no violation of *Massiah*. The dissent in *Henry* relied heavily on the *Wilson* and *Hearst* opinions and also stressed narrow court interpretations of *Massiah*. 590 F.2d at 553; *see* text accompanying note 37 *supra*.

[42] *See* text accompanying notes 10-11 *supra*.

[43] 430 U.S. at 400. *Brewer*'s declaration that the difference between surreptitious and overt elicitation is constitutionally irrelevant was a means of incorporating the *Brewer* fact situation within the protection of *Massiah*. The *Brewer* Court sought to bring open elicitation of incriminating statements by known policemen within the *Massiah* rule. *Id.* at 399-400. *See also* text accompanying notes 13 & 15 *supra*.

[44] 430 U.S. at 401.

constitutional irrelevancy of surreptitious as opposed to known police interrogation, and the precise scope of interrogation as a prerequisite to *Massiah* protection.

Once the right to counsel attaches,[45] interrogation of the defendant, whether known or surreptitious, violates the sixth amendment if counsel is not present. Therefore, the right to the effective assistance of counsel is an empty right if the defendant is deceived as to whether an interrogation is taking place at all.[46] Where a defendant is unaware that the government is interrogating him, he is unlikely to consider the question whether he should have counsel present.[47] Surreptitious government activities thus undermine a defendant's sixth amendment right to counsel.[48] Both *Massiah*[49] and *Henry*[50] found that the government's secret activities vitiated the defendant's sixth amendment rights.

Another source of ambiguity in the *Henry* decision is the court's framing of the issue in terms of "what is interrogation?"[51] This is a limited question in view of the controlling precedents. *Massiah* struck down a co-defendant's transmission of incriminating statements to a testifying government agent.[52] *Brewer* held inadmissible evidence obtained through general conversations with the police,[53] while *Henry* prohibited evidence gathered during general conversations with an informant.[54] Formal interrogation was not an element in any of these different post-indictment situations. Thus, the "interrogation" inquiry results in ambiguity and confusion over the applicable case law.[55]

The *Massiah, Brewer* and *Henry* decisions are readily explained as protecting the indicted defendant against the government's intentional and deliberate attempts to violate his constitutional rights. Where a violation of the defendant's sixth amendment right to counsel has been found, the government's activities have been characterized in terms of intent. *Massiah* spoke of the "deliberate elicitation" of information,[56] and *Brewer* found that the police officer "designedly set out to elicit information."[57] In *Henry,* the informant "engaged" the defendant in conversation.[58] Each of these intentional acts proved fatal to the admissibilty of the government's

---

[45] *See* text accompanying note 2 *supra.*

[46] *See* White, *Police Trickery In Inducing Confessions,* 127 U. PA. L. REV. 581, 602-08 (1979).

[47] *Id.* at 603.

[48] *Id.*

[49] *See* text accompanying notes 10-11 *supra.*

[50] 590 F.2d at 547. The *Henry* court holds that an informant may effectively interrogate a defendant by simply engaging the defendant in a general conversation. *Id.*

[51] *Id.* at 546, 548.

[52] *See* text accompanying note 8 *supra.*

[53] *See* text accompanying notes 13 & 15 *supra.*

[54] *See* text accompanying notes 21-22 *supra.*

[55] *See* generally Kamisar, *supra* note 18.

[56] 377 U.S. at 206.

[57] 430 U.S. at 399.

[58] 590 F.2d at 547.