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Vii. Criminal Law & Procedure

VII. CRIMINAL LAW & PROCEDURE

A. Concurrent Sentence Doctrine and RICO

The concurrent sentence doctrine permits an appellate court summarily to affirm a conviction when a defendant appeals from concurrent sentences on plural counts of an indictment and the reviewing court sustains the conviction carrying the longer sentence.[1] Courts, however, apply the doctrine with caution because the collateral consequences of affirming a conviction on the basis of the doctrine may affect the appellant adversely.[2] In *United States v. Webster (Webster I)*,[3] the Fourth Circuit declined to apply the concurrent sentence doctrine and exercised its discretion to review a conviction under the Racketeer Influenced and Corrupt Organizations Act (RICO)[4] because of the possible stigma stemming from a racketeering conviction.[5] In reviewing the conviction, the Fourth Circuit construed the meaning of "through" in the RICO provision proscribing the operation of any enterprise "through" a pattern of racketeering activity.[6]

The Government accused Walter R. Webster of heading a major drug distribution network in Baltimore, Maryland.[7] Webster lived with Norma Thompson who owned and operated the 1508 Club Tavern and Li-

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[1] United States v. Truong Dinh Hung, 629 F.2d 908, 931 (4th Cir. 1980) (Russell, J., concurring and dissenting). In *Truong*, the defendant had received a 15 year sentence for espionage and a 5 year sentence for conversion of government property. *Id.* The sentences were to run concurrently. *Id.* The Fourth Circuit upheld the espionage conviction, and therefore, found no occasion to consider Truong's challenge to his conversion conviction. *Id. See* United States v. Vargas, 615 F.2d 952, 956 (2d Cir. 1980) (concurrent sentence doctrine permits appellate court, within its discretion, to affirm summarily a conviction for which appellant's sentence runs concurrently with another valid conviction). *See generally* Note, *The Concurrent Sentence Doctrine After* Benton v. Maryland, 7 U.C.L.A.-ALASKA L. REV. 282 (1978) [hereinafter cited as *Concurrent Sentence Doctrine*].

[2] *See* note 28 *infra.*

[3] 639 F.2d 174 (4th Cir. 1981), *rev'd in part on rehearing*, Nos. 79-5204 & 79-5240, slip op. (4th Cir. Jan. 14, 1982).

[4] 18 U.S.C. §§ 1961-1968 (1976) (RICO).

[5] 639 F.2d at 183.

[6] *Id.* at 183-86. The *Webster I* court construed the meaning of the word "through" in RICO section 1962(c) that provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (1976). Section 1962(a) makes unlawful the receipt or use of income from racketeering activity to acquire an interest in or operate an enterprise engaged in interstate commerce. H. R. REP. No. 1549, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007, 4010. Section 1962(b) prohibits the acquisition of any enterprise through a pattern of racketeering activity. *Id.*; *see* note 68 *infra.*

[7] 639 F.2d at 183.

quor Store (Club).[8] The prosecution alleged that Webster participated in the operation of the Club and further that he used the Club to facilitate the drug distribution network.[9] The evidence at trial established that Webster used Club facilities and personnel to accept and relay narcotics related messages and that on at least one occasion, Webster asked a Club employee to provide Club-owned liquor to one of Webster's narcotics customers who was waiting for a drug delivery.[10]

The United States District Court for the District of Maryland convicted Webster of violating the RICO statute[11] and the "Kingpin" statute,[12] so-called because Congress intended it to apply to ring-leaders of large-scale narcotics operations.[13] The trial judge sentenced Webster to fifty years for the Kingpin statute violation and twenty years for the RICO conviction.[14] The RICO sentence was to run concurrently with the Kingpin sentence.[15] Webster appealed his RICO conviction to the Fourth Circuit.[16] Webster argued that the Government's evidence failed to show that he conducted the Club's affairs "through" a pattern of racketeering activity.[17] Webster specifically argued that the prosecution failed to prove that the illegal drug racketeering promoted the Club's affairs in any

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] 18 U.S.C. §§ 1961-1968 (1976); *see* text accompanying note 4 *supra*. The District Court convicted Webster for violating RICO section 1962(c). *See* note 6 *supra*.

[12] 21 U.S.C. § 848 (1976). The "Kingpin" statute is part of the Comprehensive Drug Abuse Prevention & Control Act of 1970, P.L. 91-513. The purpose of the Comprehensive Act is to deal with the menace of drug abuse through increased efforts to prevent drug abuse and rehabilitate drug addicts; to enhance law enforcement aspects of drug abuse prevention and control; and to provide an overall balanced scheme of criminal penalties for drug related offenses. H.R. REP. No. 91-1444, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4567.

[13] 639 F.2d at 180. Along with the RICO and Kingpin convictions, the jury also convicted Webster for conspiracy to violate narcotics laws, 21 U.S.C. § 846 (1976); unlawful use of the telephone, 21 U.S.C. § 843(b) (1976); and interstate travel in aid of an unlawful activity, 18 U.S.C. § 1952(a)(3) (1976).

[14] 639 F.2d at 180-81. Along with the RICO and Kingpin sentences, Webster received thirty years for conspiracy to violate narcotics laws; eight years on each of the eighteen counts of unlawful use of the telephone; and five years on each of three counts of interstate travel in aid of unlawful activity. *Id.* All of Webster's sentences were to run concurrently with the fifty year sentence under the Kingpin statute. *Id.*

[15] 639 F.2d at 181.

[16] *See id.* at 181, 182.

[17] *See id.* at 182, 184. Section 1962(c) prohibits one employed or associated with any interstate enterprise from conducting or participating in the affairs of that enterprise "through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (1976); *see* note 6 *supra*. The crucial RICO element is the "enterprise." Note, *The RICO "Enterprise" Element: Does it Encompass Associations Formed for Illegitimate Purposes?*, 57 CHI.-KENT L. REV. 765, 767 (1981) [hereinafter cited as *RICO Enterprise Element*]. RICO defines enterprise to include "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1976); *see* United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980) (county sheriff's department

way.[18] In response, the Government argued that the Fourth Circuit should decline to review the merits of Webster's challenge to his RICO conviction by applying the concurrent sentence doctrine.[19]

The Government also responded to the merits of Webster's challenge to his RICO conviction.[20] The prosecution argued that it need not

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is enterprise); United States v. Bacheler, 611 F.2d 443, 450 (3d Cir. 1979) (Philadelphia Traffic Court is enterprise); United States v. Frumento, 563 F.2d 1083, 1092 (3d Cir. 1977) (state agency responsible for enforcing tax laws is enterprise), *cert. denied*, 434 U.S. 1072 (1978); United States v. McLaurin, 557 F.2d 1064, 1073 (5th Cir. 1977) (organized prostitution activity falls within definition of enterprise), *cert. denied*, 434 U.S. 1020 (1978); United States v. Brown, 555 F.2d 407, 416 (5th Cir. 1977) (city police department is enterprise), *cert. denied*, 435 U.S. 904 (1978); United States v. Dozier, 493 F. Supp. 554, 554 (M.D. La. 1980) (Louisiana Department of Agriculture is enterprise); United States v. Sisk, 476 F. Supp. 1061, 1062-63 (M.D. Tenn. 1979) (state governor's office is enterprise); United States v. Barber, 476 F. Supp. 182, 184 (S.D. W.Va. 1979) (West Virginia Alcohol Beverage Control Commission is enterprise). In *Webster I*, the prosecution alleged that the Club was the enterprise whose affairs Webster conducted through a pattern of racketeering activity. 639 F.2d at 184 n.4.

Until the Supreme Court decided the issue in United States v. Turkette, 101 S. Ct. 2514 (1981), the circuits were divided on whether the term "enterprise" included illegal enterprises or was restricted to legitimate organizations. *See* 639 F.2d at 184 n.4. *See generally RICO Enterprise Element, supra*, at 75-93. In *Turkette*, the Court decided that the term "enterprise" includes both letigimate and illegitimate enterprises. 101 S. Ct. at 2527.

[18] 639 F.2d at 184.

[19] *Id.* at 182-83. Courts originally viewed the concurrent sentence doctrine as a jurisdictional bar to review of challenges to multiple convictions carrying concurrent sentences when an appellate court upheld a conviction on a count carrying a longer sentence. *See* Benton v. Maryland, 395 U.S. 784, 788-89 (1969). The doctrine originated in Locke v. United States, 11 U.S. (7 Cranch) 339 (1813). In *Locke*, the Government condemned the defendant's cargo under a libel containing eleven counts. *Id.* at 339-40. The Court refused to consider the former owner's challenges to all eleven counts because it found the fourth count valid. *Id.* at 344. In *Claassen v. United States*, the Court held that if the trial court validly had convicted the defendant on any one count of an indictment upon which a single general sentence rested, then an appellate court need not consider the other counts. 142 U.S. 140, 146-47 (1891). In *Hirabayashi v. United States*, the defendant had received two three-month concurrent sentences upon his conviction for two different offenses. 320 U.S. 81, 83-84 (1943). The Court ceased its review after affirming only one of the convictions finding consideration of the challenge to the other unnecessary. *Id.* at 105.

The Supreme Court has applied the concurrent sentence doctrine haphazardly. *See* Benton v. Maryland, 395 U.S. at 798. In *Putnam v. United States*, the Court ignored the doctrine and decided an issue that affected only one count, even though the trial court had imposed concurrent sentences. 162 U.S. 687, 708-15 (1896). In *Roviaro v. United States*, the Court implied that the doctrine was discretionary when it stated that a reviewing court may affirm a judgment if the conviction on either count was valid. 353 U.S. 53, 59 n.6 (1957). In *Barenblatt v. United States*, however, the Court implied that the doctrine was a jurisdictional bar when it stated that a reviewing court must uphold a general sentence based on multiple convictions if any one count is sustainable. 360 U.S. 109, 115 (1959).

The Supreme Court settled some of the confusion surrounding the concurrent sentence doctrine in *Benton v. Maryland* when it held explicitly that the doctrine is not a jurisdictional bar to review. 395 U.S. at 791. At the same time, however, the Court recognized that the doctrine continues to exist as a rule of judicial convenience. *Id.*

[20] 639 F.2d at 184.

prove that the narcotics racketeering promoted the Club's affairs.[21] The Government contended that RICO section 1962(c)[22] requires only a "substantial nexus" between the racketeering and the conduct of the enterprise's affairs.[23] The Government thus reasoned that evidence showing that the Club promoted the drug business was legally sufficient to support a conviction under section 1962(c).[24]

After upholding Webster's conviction under the Kingpin statute, the Fourth Circuit declined to apply the concurrent sentence doctrine and chose to review the RICO conviction.[25] The *Webster I* court reasoned

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[21] *Id.*

[22] 18 U.S.C. § 1962(c) (1976). *See* note 6 *supra.*

[23] 639 F.2d at 184.

[24] *Id.* The Government's evidence supporting the RICO count showed that Webster constantly used Club facilities for his drug dealing business. *Id.* The evidence tended to show, however, that the Club promoted the drug business and not that the drug business, or funds from the drug business, promoted the Club. *Id.* The Government admitted in its brief that the evidence tended to show that the Club promoted the drug business and not the reverse. *Id.* In fact, the theory of the Government's case was that the Club promoted the drug business. *Id.* Under the substantial nexus test an appellate court presumably must sustain a RICO conviction if the evidence showed that the Club promoted the drug business.

[25] 639 F.2d at 183. Before the Fourth Circuit decided not to apply the concurrent sentence doctrine to the RICO conviction, the *Webster I* court upheld Webster's conviction under the Kingpin statute. *Id.* at 180-82. Webster made several challenges to his conviction under the Kingpin statute. *Id.* First, he claimed that the trial judge's jury instructions regarding the Kingpin statute were improper. *Id.* at 181. The judge had instructed the jury that the crime of interstate travel in aid of unlawful activity, 18 U.S.C. § 1952(a)(3) (1976), could supply a foundation for a Kingpin statute conviction. *Id.* The Government had charged Webster with interstate travel violations elsewhere in the indictment. *Id.* The Fourth Circuit held that the instruction was erroneous because the Kingpin statute did not list interstate travel in aid of unlawful activity as one of the crimes whose violation could form the basis of a Kingpin statute violation. *Id.* The *Webster I* court held the error harmless, however, because to convict for an interstate travel violation the trial court must find a business enterprise involving violations of statutes that the Kingpin statute lists as statutes whose violation can form the basis of a Kingpin conviction. *Id.*

Second, Webster argued that the trial judge improperly had repeated and highlighted the elements of a Kingpin statute violation in reference to Webster. *Id.* The Fourth Circuit held that the contention was frivolous. *Id.* The court held that the trial judge properly had employed the pedagogical technique of first providing an overview, then a summary, and finally adding details. *Id.* The court stated that the judge's clarity regarding the Kingpin statute may have been a disadvantage to Webster, but not a disadvantage about which he could complain. *Id.* at 181-82.

Finally, Webster argued that the Kingpin statute's requirement that the defendant receive substantial income or resources from his drug operation in unconstitutionally vague. 639 F.2d at 182; *see* 21 U.S.C. § 848(b)(2)(B) (1976). The Fourth Circuit rejected the argument adopting the reasoning of United States v. Valenzuela, 596 F.2d 1361, 1368 (9th Cir.), *cert. denied*, 444 U.S. 865 (1979). *See* 639 F.2d at 182. In *Valenzuela*, the Ninth Circuit reasoned that the statute would have been valid even without the substantial income limitation. 596 F.2d at 1368. No reason exists, therefore, to invalidate the statute because Congress chose to provide some protection to small-scale drug dealers. *Id.*

Webster also had challenged the legality of certain wiretapes that had provided almost all of the evidence used against Webster. 639 F.2d at 177-80. Webster contended that government agents violated the Maryland wiretapping statute by failing to show that they

that it could not predict with reasonable certainty that no adverse collateral consequences from an unreviewed RICO conviction would redound to Webster.[26] The Fourth Circuit refused to place the risk of future adverse collateral consequences upon Webster.[27] Instead, the Fourth Circuit exercised its discretion to review the RICO count because of the possible stigma to the defendant stemming from an unreviewed racketeering conviction.[28]

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had tried alternative methods of investigation which had failed, were unlikely to succeed, or were too dangerous, *Id.* at 179. *See* MD. CTS. & JUD. PROC. CODE ANN § 10-408(a)(3); 18 U.S.C. § 2518(1)(c) (1976). Webster argued that the police should have tried grand jury subpoenas, or threatened reluctant informants with contempt, or offered them immunity. 639 F.2d at 179. In addition, the government could have tried to infiltrate Webster's operation. *Id.* The Fourth Circuit rejected Webster's contention that the government agents violated the Maryland wiretapping law. *Id.* The court argued that Webster's suggested techniques were speculative. *Id.*

[26] 639 F.2d at 183. The *Webster I* court assumed, without holding, that the concurrent sentence doctrine may apply provided the court can foresee with reasonable certainty that no adverse collateral consequences from an unreviewed conviction would redound to Webster. *Id.* at 182-83.

[27] 639 F.2d at 183.

[28] *Id., quoting,* United States v. Anderson, 626 F.2d 1358, 1361 n.2 (8th Cir. 1980). The possibility of stigma to the defendant resulting from an unreviewed criminal conviction is only one adverse collateral consequence of affirming a conviction on the basis of the concurrent sentence doctrine to which courts point in refusing to apply the doctrine. Several other possible adverse collateral consequences may follow from an unreviewed criminal conviction. First, the appellant may find that his chances for parole decrease or that he will have to wait longer before becoming eligible for parole. *See* United States v. Holder, 560 F.2d 953, 956 (8th Cir. 1977) (parole guidelines necessitate reassessment of concurrent sentence doctrine). The United States Parole Commission has promulgated guidelines governing the granting of parole. *See* 28 C.F.R. §§ 2.1-2.60 (1980). Parole boards consider a number of factors including the "offense severity rating" and the "salient factor score." *Id.* § 2.20. The Parole Commission has established severity ratings for various offenses, depending upon their character, and a suggested time for parole that corresponds to the severity rating. *Id.* The higher the severity rating, the longer the prisoner must wait for parole eligibility. *Id.* The Commission permits a parole board to increase the offense severity level if an offense behavior involved multiple separate offenses. *Id.* § 2.20 n.D. An unreviewed conviction, therefore, may increase a prisoner's offense severity rating and thereby increase the time he must serve before becoming eligible for parole. Parole boards also use the "salient factor score" to determine a prisoner's eligibility for parole. *Id.* § 2.20. While the "offense severity rating" establishes a minimum period of imprisonment before a prisoner becomes eligible for parole, the "salient factor score" can increase that time. United States v. Smith, 601 F.2d 972, 976 (8th Cir.), *cert. denied,* 444 U.S. 879 (1979). The "salient factor score" is based in part on the number of the defendant's previous convictions. United States v. Holder, 560 F.2d at 956. An unreviewed conviction, however, should not affect the prisoner's "salient factor score" adversely because the Parole Commission considers multiple offenses arising from a single offense behavior as a single conviction for rating purposes. *Id.*

A second possible adverse collateral consequence flowing from an unreviewed conviction is that the unreviewed conviction may form the basis of an enhanced sentence under an "habitual criminal" statute. United States v. Vargas, 615 F.2d 952, 960 (2d Cir. 1980). Third, a prosecutor possibly could use the unreviewed conviction to impeach the appellant's character at a future trial or introduce the conviction as a prior similar act. *Id.* Finally, an unreviewed conviction may reduce the appellant's chance for a pardon. *Id.*

The Supreme Court has not given the federal circuit courts clear direction regarding the use of the concurrent sentence doctrine.[29] In *Benton v. Maryland*[30] the Court held that the doctrine is not a jurisdictional bar to reviewing a challenged conviction when a reviewing court has sustained another conviction carrying a longer concurrent sentence.[31] The *Benton* court stated, however, that the concurrent sentence doctrine continues to exist as a rule of judicial convenience.[32] The Court applied the doctrine after *Benton* in *Barnes v. United States*.[33] The *Barnes* Court, as a matter of discretion, declined to review four of six courts for which Barnes had received concurrent sentences.[34]

Use of the concurrent sentence doctrine in the federal circuit courts varies from circuit to circuit.[35] The doctrine remains strong in the Ninth Circuit.[36] The Ninth Circuit is the only circuit to hold expressly that the doctrine is constitutional.[37] The Eighth Circuit also has advocated use of

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[29] *See* text accompanying notes 30-34 *infra*.

[30] 395 U.S. 784 (1969).

[31] *Id.* at 791.

[32] *Id.* Before *Benton*, the Supreme Court applied the concurrent sentence doctrine intermittently and haphazardly. *See* note 19 *supra*.

[33] 412 U.S. 837 (1973).

[34] *Id.* at 848 n.16. In *Barnes*, the trial court convicted the defendant on two counts of possessing United States Treasury checks stolen from the mails, knowing them to be stolen, two counts of forging the checks, and two counts of uttering the checks, knowing the endorsements to be forged. *Id.* at 838. The trial judge sentenced Barnes to six concurrent three-year prison terms. *Id.*

The trial judge had instructed the jury that from a showing of unexplained possession of recently stolen property the jury reasonably may infer and find that the person in possession knew the property had been stolen. *Id.* at 938-40. The defendant challenged the constitutional validity of this common law inference. *See id.* at 838. The Supreme Court upheld the validity of the inference and affirmed Barnes' convictions for possession of stolen Treasury checks stolen from the mails, knowing them to be stolen. *Id.* at 841, 846.

After upholding Barnes' convictions under two counts of the indictment, the Court declined to review the defendant's challenges to the other four convictions. *Id.* at 848. The *Barnes* Court advanced no rationale supporting its decision to apply the concurrent sentence doctrine. *See id.* The Court acknowledged that affirmance of the two counts did not moot the issues raised by Barnes' challenge to the remaining four counts. *Id.* at 848 n.16 *citing* Benton v. Maryland, 395 U.S. 784 (1969). The Supreme Court simply declined as a discretionary matter to reach those issues. 412 U.S. at 848 n.16.

[35] *See The Concurrent Sentence Doctrine*, *supra* note 1, at 289-95; text accompanying notes 36-47 *infra*.

[36] *See generally Concurrent Sentence Doctrine*, *supra* note 1. *See, e.g.*, United States v. Cheung, 504 F.2d 362, 364 (9th Cir. 1974) (reviewing court need not consider challenge to defendant's conviction for aiding and abetting commission of offenses for which the principal was acquitted when reviewing court upholds conspiracy conviction and trial judge had ordered concurrent sentences); United States v. Aviles, 439 F.2d 709, 709 (9th Cir.) (too many counts in indictment not prejudice since judge imposed concurrent sentences), *cert. denied*, 403 U.S. 920 (1971); United States v. Martinez, 429 F.2d 971, 977 (9th Cir. 1970) (court may apply concurrent sentence doctrine even when evidence against defendant on challenged count is thin).

[37] Van Geldern v. Field, 498 F.2d 400, 403 (9th Cir. 1974).

the doctrine in the interests of judicial economy.[38] Support for the doctrine in the Eighth Circuit, however, has not been unwaivering.[39] The Fifth Circuit also has supported use of the doctrine.[40]

The Seventh Circuit virtually has abandoned the concurrent sentence doctrine, reasoning that *Benton* generally requires a reviewing court to review all challenged convictions.[41] Similarly, the Second Circuit looks disfavorably upon the doctrine, reasoning in one case that the doctrine's judicial convenience is illusory because the reviewing court still must undertake an analysis to determine whether the concurrent sentence doctrine applies.[42] The Sixth Circuit also has been reluctant to apply the doctrine.[43]

The District of Columbia Circuit takes a novel approach to the concurrent sentence doctrine.[44] This circuit applies the doctrine, but instead of summarily affirming convictions subject to the doctrine's application, the D.C. Circuit vacates the convictions.[45] Summarily vacating the con-

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[38] *See, e.g.*, United States v. Williams, 548 F.2d 228, 233 (8th Cir. 1977) (concurrent sentence doctrine serves interest of judicial economy); Morrison v. United States, 491 F.2d 344, 347 (8th Cir. 1974) (concurrent sentence doctrine applies when adverse collateral consequences are remote).

[39] *See, e.g.*, Sanders v. United States, 541 F.2d 190, 194 (8th Cir. 1976) (concurrent sentence doctrine should be applied more cautiously today than before *Benton*), *cert. denied*, 434 U.S. 1020 (1978); United States v. Smith, 520 F.2d 1245, 1248 (8th Cir. 1975) (doctrine not applied when possibly erroneous admission of evidence on one count may have affected other counts); United States v. Belt, 516 F.2d 873, 876 (8th Cir. 1975) (doctrine not applicable when crimes charged are serious and differing in substance because adverse collateral consequences from erroneous conviction probable), *cert. denied*, 423 U.S. 1056 (1976).

[40] *See, e.g.*, United States v. Muller, 550 F.2d 1375, 1380 (5th Cir. 1977) (having affirmed appellant's conviction on conspiracy count, concurrent sentence doctrine makes determination of sufficiency of evidence under remaining substantive count unnecessary); United States v. Ragano, 520 F.2d 1191, 1204 (5th Cir. 1975) (concurrent sentence doctrine makes determination of legality of conviction on other counts unnecessary), *cert. denied*, 427 U.S. 905 (1976); Hawkins v. United States, 458 F.2d 1153, 1155 (5th Cir. 1972) (consideration whether one conviction void because of double jeopardy foreclosed by doctrine); United States v. Bigham, 421 F.2d 1344, 1346 (5th Cir.) (*Benton* does not require review of all counts), *cert. denied*, 400 U.S. 818 (1970).

[41] *See, e.g.*, United States v. Tanner, 471 F.2d 128, 140 (7th Cir.) (concurrent sentence doctrine inapplicable unless no possibility of adverse collateral consequences), *cert. denied*, 409 U.S. 949 (1972); United States v. Kilpatrick, 458 F.2d 864, 867 (7th Cir. 1972) (validity of concurrent sentence doctrine diminished by *Benton*); Davie v. United States, 447 F.2d 480, 481 (7th Cir. 1971) (*Benton* casts doubt on continuing validity of concurrent sentence doctrine).

[42] United States v. Vargas, 615 F.2d 952, 960 (2d Cir. 1980). *See* United States v. Ruffin, 575 F.2d 346, 361 (2d Cir. 1978) (since *Benton*, Second Circuit generally has reviewed all counts despite the concurrent sentence doctrine).

[43] *See, e.g.*, United States v. Jones, 533 F.2d 1387, 1390 (6th Cir. 1976) (declining to apply doctrine but not specifying particular adverse collateral consequences feared); Gentry v. United States, 533 F.2d 998, 1001 (6th Cir. 1976) (same).

[44] See text accompanying notes 45 & 46 *infra*.

[45] *See, e.g.*, United States v. Gower, 503 F.2d 189, 192 (D.C. Cir.), *vacated on other grounds*, 413 U.S. 914 (1974); United States v. Hill, 470 F.2d 361, 366-68 (D.C. Cir. 1972);

current conviction has the advantage of simultaneously promoting judicial economy and eliminating the risk to the defendant of adverse collateral consequences from an unreviewed conviction.[46] Finally, the First and Third Circuit have not considered many concurrent sentence cases, and the Tenth Circuit has not discussed the doctrine in depth.[47]

The status of the concurrent sentence doctrine in the Fourth Circuit is unsettled.[48] In *Close v. United States*,[49] the Fourth Circuit refused to apply the doctrine even though the court conceded that almost no possibility existed that adverse collateral consequences from the unreviewed conviction would redound to Close.[50] In *United States v.*

United States v. Hooper, 432 F.2d 604, 606 (D.C. Cir. 1970). Other circuits occasionally have vacated the concurrent conviction automatically instead of summarily affirming the concurrent sentence. *See, e.g.*, United States v. Diaz, 538 F.2d 461, 466 (1st Cir. 1976); United States v. Fishbein, 446 F.2d 1201, 1206 (9th Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972).

[46] United States v. Hooper, 432 F.2d 604, 606 (D.C. Cir. 1970).

[47] *See Concurrent Sentence Doctrine*, *supra* note 1, at 290, 294. The First Circuit generally has declined to apply the concurrent sentence doctrine. *See* United States v. Moynagh, 566 F.2d 799, 802 (1st Cir. 1977) (refusing to apply concurrent sentence doctrine because court satisfied that future adverse collateral consequences possibly could affect defendant); United States v. Benthiem, 456 F.2d 165, 167 (1st Cir. 1972) (declining to apply doctrine without discussing why). *But see* Vanetzian v. Hall, 562 F.2d 88, 90-91 (1st Cir. 1977) (applying concurrent sentence doctrine on collateral attack when petitioner failed to point to any adverse collateral consequences and the court could not find any). The Third Circuit apparently views application of the doctrine as within the court's discretion. *See* United States v. Keller, 512 F.2d 182, 185 n.8 (3d Cir. 1975) (electing as matter of discretion not to apply concurrent sentence doctrine). The Tenth Circuit has not discussed the doctrine at length. *See* United States v. Gamble, 541 F.2d 873, 877 (10th Cir. 1976) (declining without advancing rationale to consider challenges to convictions that even if successful would have no effect on defendant's total prison sentence); United States v. Bath, 504 F.2d 456, 457 (10th Cir. 1974) (applying doctrine when court unable to discern possibility of adverse collateral consequences). *But see* United States v. Masters, 484 F.2d 1251, 1253 (10th Cir. 1973) (summarily rejecting Government's argument that concurrent sentence doctrine applies); United States v. Von Roeder, 435 F.2d 1004, 1010-11 (10th Cir.) (refusing to apply concurrent sentence doctrine noting *Benton* stated that real harm could result from unreviewed concurrent convictions), *vacated on other grounds*, 404 U.S. 67 (1971).

[48] *See* text accompanying notes 49-54 *infra*.

[49] 450 F.2d 152 (4th Cir. 1971), *cert. denied*, 405 U.S. 1068 (1972).

[50] 450 F.2d at 155. In *Close*, a federal district court had convicted Close in 1949 of two counts of armed robbery and a single count of interstate transportation of stolen property. *Id.* at 153. His sentence for interstate transportation was to run concurrently with his longer sentence for bank robbery. *Id.* In 1961 Close was paroled. *Id.* Later, Close participated in other bank robberies and a trial court sent him to prison again. *Id.* The Board of Pardons and Parole lodged a detainer against Close based on the unserved portion of his 1949 sentences. *Id.* A detainer notifies incarcerating authorities that other authorities want the prisoner. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE, at 1119 (5th ed. 1980). The detainer requests that the incarcerating authorities notify the authorities desiring custody of the prisoner's release date so the authorities desiring custody can arrange to pick the prisoner up at the institution. *Id.* In response to the detainer, Close filed an application to vacate his 1949 sentences. 450 F.2d at 155.

Close claimed that the admission into evidence at his 1949 trial of the oral confessions of his co-defendants, neither of whom testified, deprived him of his opportunity to cross-examine the co-defendants. *Id.* Close pointed to Bruton v. Maryland, 391 U.S. 123, 126 (1968),

Truong Dinh Hung,[51] however, the Fourth Circuit applied the doctrine, reasoning that no substantial likelihood existed that adverse collateral consequences from the unreviewed conviction would redound to Truong.[52] The *Webster I* court followed *Close* and refused to apply the doctrine.[53] In *Webster I* the court reasoned that it should not apply the doctrine because the stigma flowing from an unreviewed conviction for the offense of racketeering may affect the defendant adversely.[54]

The *Webster I* court correctly declined to apply the concurrent sentence doctrine. The Fourth Circuit's rationale, however, is unsatisfactory. The court reasoned that it should review the RICO conviction because, otherwise, the stigma flowing from an unreviewed conviction for the offense of racketeering may affect Webster adversely.[55] Webster, however, stood convicted under the Kingpin statute as the leader of a large-scale narcotics distribution network.[56] The trial court had sentenced Webster to a total of 259 years in prison for his illegal narcotics dealings.[57] Under the facts, Webster could suffer no marginal stigma

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in which the Supreme Court held that the admission into evidence of a co-defendant's confession, when the co-defendant does not testify and is, therefore, not subject to cross examination, violates the defendant's right to confrontation that the sixth amendment guarantees. 450 F.2d at 153. Close also directed the Fourth Circuit's attention to Roberts v. Russel, 392 U.S. 293, 294 (1968), in which the Court ordered lower courts to apply *Bruton* retroactively. 450 F.2d at 153. The *Close* court held that the admission of the evidence regarding the bank robbery charges was harmless error but reversed Close's interstate transportation conviction. *Id.* at 154-55.

The *Close* court considered the merits of a claim subject to concurrent sentence doctrine abstention even though the court stated that the appellant most likely would sustain no prejudice from disregarding the error underlying the interstate transportation conviction. *Id.* at 155. The Fourth Circuit noted that the defendant was an unlikely candidate for either parole or a pardon. *Id.* The *Close* court, however, could find no legal reason not to review the interstate transportation conviction. *Id.*

[51] 629 F.2d 908 (4th Cir. 1980).

[52] *Id.* at 932. A federal district court had convicted Truong for espionage and espionage related offenses. *Id.* at 911. The district court also convicted Truong of taking a thing of value, classified information, from the United States. *Id.* The trial judge sentenced Truong to 15 years in prison for his espionage conviction and to 5 years for his taking a thing of value conviction. *Id.* at 931. The trial judge ordered the sentences to run concurrently. *Id.* On appeal, a Fourth Circuit panel unanimously affirmed Truong's espionage conviction. *Id.* After affirming Truong's espionage conviction, the majority applied the concurrent sentence doctrine to avoid reaching the merits of Truong's challenge to his taking a thing of value conviction. *Id.* at 931-32 (Russell, J., concurring and dissenting); *see* Note, *The Foreign Intelligence Exception to the Warrant Requirement*, 38 WASH. & LEE L. REV. 551, 560-63 (1981) (criticizing *Truong* court's application of concurrent sentence doctrine). Judge Winter wrote a strong dissent in *Truong* on the concurrent sentence doctrine issue. 629 F.2d at 922-23 (Winter, J., dissenting). Judge Winter argued that *Close* interred the doctrine in the Fourth Circuit. *Id.* at 922.

[53] 639 F.2d at 183.

[54] *Id.*; *see* text accompanying note 28 *supra*.

[55] 639 F.2d at 182-83; *see* text accompanying notes 28 & 54 *supra*.

[56] 639 F.2d at 180; *see* text accompanying notes 12 & 13 *supra*.

[57] *See* 639 F.2d at 181; note 14 *supra*.

from an unreviewed RICO conviction. The *Webster I* court should have examined the possibility of adverse collateral consequences more closely before declining to apply the concurrent sentence doctrine.[58] Furthermore, because the *Webster I* court's rationale is arguably suspect and the decision lacks detailed discussion about the doctrine's applicability, the *Webster I* decision leaves the status of the concurrent sentence doctrine in the Fourth Circuit unclear.[59]

A better approach for reviewing courts facing a concurrent sentence doctrine issue is to presume that adverse collateral consequences flow from any conviction. The Supreme Court suggested in *Sibron v. New York*[60] that some adverse collateral consequences accompany virtually all criminal convictions.[61] A reviewing court should, therefore, either review or vacate without review every concurrent conviction that an appellant challenges even if reversals would not reduce the appellant's total prison sentence.[62] This approach eliminates the risk to the defendant of adverse collateral consequences from an unreviewed conviction and is consistent with Supreme Court precedent that a court should presume adverse collateral consequences flow from any conviction.[63]

Although the Fourth Circuit's decision not to apply the concurrent sentence doctrine is proper, the court's rationale is unsatisfactory.[64] The *Webster I* court should have undertaken a closer examination of possible adverse collateral consequences to Webster of an unreviewed RICO conviction before declining to apply the doctrine.[65] A better approach is to abandon the concurrent sentence doctrine, insofar as it provides for summarily affirming a concurrent conviction, by presuming that adverse collateral consequences flow from any criminal conviction.[66] This approach is consistent with the principle that the Supreme Court enunciated in *Sibron v. New York*.[67]

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[58] The *Webster I* court should have looked at the effect an unreviewed RICO conviction might have on Webster's chances for parole. *See* note 28 *supra*. If the *Webster* court's decision not to apply the doctrine is not sustainable on the ground of possible stigma, the decision may be sustainable on the ground that an unreviewed RICO conviction would affect Webster's chances for parole adversely. *See* United States v. Smith, 601 F.2d 972, 976 (8th Cir.), *cert. denied*, 444 U.S. 879 (1979); United States v. Holder, 560 F.2d 953, 956 (8th Cir. 1977); note 28 *supra*.

[59] Since 1980, two Fourth Circuit cases, *Truong* and *Webster*, have reached opposite results on the applicability of the concurrent sentence doctrine. *Compare* United States v. Truong Dinh Hung, 629 F.2d 908, 931 (4th Cir. 1980) (doctrine applied because no substantial likelihood of adverse collateral consequences) *with* United States v. Webster, 639 F.2d 174, 183 (4th Cir. 1981) (doctrine not applied because of possible stigma stemming from unreviewed racketeering conviction).

[60] 392 U.S. 40 (1968).

[61] *Id.* at 55 *citing* Pollard v. United States, 352 U.S. 354, 358 (1957).

[62] *See* text accompanying notes 45 & 46 *supra*.

[63] *See* text accompanying notes 46 & 60-61 *supra*.

[64] *See* text accompanying notes 55-57 *supra*.

[65] *See* text accompanying note 58 *supra*.

[66] *See* text accompanying notes 60-63 *supra*.

[67] 392 U.S. 40 (1968); *see* text accompanying note 61 *supra*.

After refusing to apply the concurrent sentence doctrine, the Fourth Circuit reviewed the merits of Webster's challenge to his RICO conviction.[68] The court accepted Webster's argument that RICO section 1962(c) obligated the Government to prove that the narcotics racketeering promoted the Club's affairs.[69] The Fourth Circuit rejected the Government's argument that section 1962(c) requires only a substantial nexus between the racketeering activity and the enterprise, regardless of the direction in which the assistance flows.[70] The *Webster I* court attached directional significance to the word "through" in section 1962(c)'s prohibition against conducting the affairs of any enterprise "through" a pattern of racketeering activity.[71] The court held that RICO section 1962(c) is not violated unless assistance flows from the racketeering activity toward the enterprise.[72] The Fourth Circuit, therefore, reversed Webster's RICO conviction because the Government's evidence proved only that the enterprise, the Club, promoted the racketeering activity, the drug business.[73]

On rehearing (*Webster II*),[74] however, the same Fourth Circuit panel that decided *Webster I* reconsidered its first interpretation of RICO section 1962(c) and in a curious aboutface reinstated Webster's RICO conviction.[75] In reversing its own recent interpretation of section 1962(c), the Fourth Circuit reasoned that the proper question should have been

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[68] 639 F.2d at 183. The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1976), is part of the Organized Crime Control Act of 1970 (OCCA) Pub. L. No. 91-452, 84 Stat. 922, 941 (1970) (codified in scattered sections of 18, 28 U.S.C.). *See RICO Enterprise Element, supra* note 17, at 765. OCCA is a comprehensive legislative package that Congress designed to eradicate organized crime in the United States. *Id.* RICO's role in OCCA's complex statutory scheme is to eliminate organized crime's infiltration of legitimate business. Note, Elliot v. United States, *Conspiracy Law and the Judicial Pursuit of Organized Crime through RICO*, 65 VA. L. REV. 109, 109 (1979). *See also* note 6 *supra.*

In addition to reviewing and reversing Webster's RICO conviction, the Fourth Circuit in *Webster I* reversed Webster's conviction for conspiracy to violate narcotics laws. 639 F.2d at 182; *see* note 13 *supra.* Webster argued that conspiracy to violate the narcotics laws is a lesser included offense of the Kingpin statute, and therefore, sentencing for both crimes violates the double jeopardy clause of the United States Constitution. 639 F.2d at 182. The Fourth Circuit noted that two circuits have held that conspiracy to violate the narcotics laws is a lesser included offense of the Kingpin statute. *Id. citing* United States v. Striklin, 591 F.2d 1112, 1123 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979); United States v. Sperling, 560 F.2d 1050, 1055 (2d Cir. 1977). The Fourth Circuit had no occasion to decide the issue because at oral argument the Government admitted that conspiracy to violate narcotics laws is a lesser included offense of the Kingpin statute. 639 F.2d at 182. The *Webster I* court held, therefore, that since the Kingpin conviction was valid, the conspiracy conviction must fall. *Id.*

[69] 639 F.2d at 183-86.

[70] *Id.*

[71] *See id.* at 184-85; text accompanying notes 72-73 *infra.*

[72] 639 F.2d at 183-86.

[73] *Id.* at 185-86; *see* text accompanying notes 9-10 & 18 *supra.*

[74] United States v. Webster, Nos. 79-5204 & 79-5240, slip op. (4th Cir. Jan. 14, 1982).

[75] *Id.*, slip op. at 6-7.

whether Webster *conducted* the Club's affairs through a pattern of racketeering activity, not whether the racketeering activity advanced or promoted the Club.[76] The *Webster II* court stated that "conducted", under section 1962(c), means the regular and repeated carrying on of affairs.[77] Since the record showed that Webster regularly used Club facilities and personnel in his drug dealing business,[78] the Fourth Circuit concluded that Webster had conducted the Club's affairs through a pattern of racketeering activity.[79] *Webster II*, distilled to its holding, is the Fourth Circuit's adoption of the substantial nexus test for RICO section 1962(c) cases.[80]

The only court before *Webster I* to attach directional significance to the work "through" in RICO section 1962(c) was the Seventh Circuit in *United States v. Nerone*.[81] Other courts interpreting section 1962(c) have commented upon the general section 1962(c) requirement of some connection between the racketeering activity and the affairs of the enterprise, but not upon the specific operative requirements of that interrelationship.[82] In *United States v. Stofsky*,[83] the United States District Court for Southern District of New York implied that the racketeering activity need have no connection to the enterprise's affairs.[84] The Ninth Circuit held in *United States v. Campanale*[85] that section 1962(c) requires some connection between the racketeering activity and the affairs of the enterprise, but the court did not elaborate further.[86] The Fifth Circuit, in *United States v. Rubin*,[87] specifically declined to define the operative requirements of the interrelationship between the racketeering activity and the affairs of the enterprise stating only that the court assumed section 1962(c) required some relationship between the two.[88] Finally, in

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[76] *Id.*, slip op. at 4-5 (emphasis the court's).

[77] *Id.*, slip op. at 5.

[78] *See* text accompanying note 10 *supra*.

[79] Nos. 79-5204 & 79-5240, slip op. at 5.

[80] *See id.*, slip op. at 4-5; text accompanying notes 23-24 *supra*.

[81] 563 F.2d 836 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978). In *Nerone*, the Seventh Circuit reversed a RICO section 1962(c) conviction because the Government failed to prove that an illegal gambling operation, the charged racketeering activity, advanced the interests of a trailer park, the charged enterprise, which operated as a front for the gambling operation. 563 F.2d at 851-52.

[82] *See* text accompanying notes 83-89 *infra*.

[83] 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975).

[84] 409 F. Supp. at 613. In *Stofsky*, the defendants challenged the constitutionality of RICO § 1962(c) arguing that the statute is unconstitutionally vague because it fails to set forth the degree and intensity of the relationship required between the racketeering activity and the operation of the enterprise's affairs. *Id.* at 612. The *Stofsky* court rejected defendant's argument stating that the statute is violated if the defendant participated in racketeering activity during the course of his association with the enterprise. *Id.* at 613.

[85] 518 F.2d 352 (9th Cir. 1975).

[86] *Id.* at 358.

[87] 559 F.2d 975 (5th Cir. 1977).

[88] *Id.* at 990. In *Rubin*, the defendant claimed that the trial judge's jury instructions concerning RICO § 1962(c) were defective. *Id.* at 989. Rubin argued that the Government

United States v. Mandel,[89] the Fourth Circuit stated that section 1962(c) requires some connection between the racketeering activity and the affairs of the enterprise.[90]

Although the *Webster I* court's interpretation of "through" in RICO section 1962(c) is reasonable,[91] the court's rationale was questionable. The Fourth Circuit cited the language of section 1962(c) to support the conclusion that the racketeering activity must advance the enterprise, but the court never explained satisfactorily how or why the statutory language supports the conclusion.[92] Additionally, the *Webster I* court cited the Fourth Circuit's decision in *Mandel* to support the view that section 1962(c) requires more than a substantial connection between the enterprise and the racketeering activity.[93] *Mandel*, however, did not require more than a substantial nexus between the two elements.[94]

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must prove under § 1962(c) that the racketeering furthered his ability to conduct the enterprise's affairs. *Id.* The Government argued that it need only prove that the defendant participated in racketeering activity during the course of his association with the enterprise. *Id.* at 989-90. The trial judge compromised by reading the statutory language to the jury. *See id.* at 990; note 6 *supra*. The Fifth Circuit held only that the trial judge did not commit reversible error by refusing to instruct the jury that "through" means "by means of." *Id.* The *Rubin* court noted that the evidence was sufficient to support the conclusion that the racketeering activity promoted the defendant's position in the enterprise. *Id.*

[89] 591 F.2d 1347 (4th Cir.), *vacated on other grounds*, 609 F.2d 1076 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

[90] In *Mandel*, the Fourth Circuit interpreted the meaning of the words "conduct or participate" in RICO § 1962(c)'s prohibition against conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity. 591 F.2d at 1374-76; *see* note 6 *supra*. The *Mandel* panel held that the "conduct or participate" language requires some connection between the racketeering activity and the affairs of the enterprise. *Id.* at 1375-76. To support its conclusion the *Mandel* court looked to the word "through" in section 1962(c). *Id.* The Fourth Circuit stated that use of the word "through" in section 1962(c) shows that the statute requires proof of some connection between the racketeering activity and the conducting or operating of the business. *Id.* at 1375.

[91] *See* Note, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 874 (1980) (*Nerone* court's approach is sensible).

[92] *See* 639 F.2d at 184-85. The *Webster I* court stated that the word "through" suggests that the statute applies only when racketeering activity advances the enterprise but not when the enterprise promotes the racketeering activity. *Id.*

[93] *See id.*

[94] *See* 591 F.2d 1347, 1374-76. The *Mandel* opinion contains broad dicta on RICO § 1962(c). *See id.* at 1374-76. The *Mandel* court stated that use of the word "through" in section 1962(c) seems to require the Government to prove some connection between the racketeering activity and the operation of the business. *Id.* at 1375. The Fourth Circuit further stated that the connection must be shown if the word "through" is to have any meaning. *Id.* The court also said that without the word "through" a person who took income derived from a legitimate business and then used the money to participate in racketeering activity would be guilty of a RICO violation. *Id.* The *Mandel* court then said that Congress did not intend to sweep so broadly. *Id.*

The conclusion that the *Mandel* court did not attach directional significance to the word "through" in section 1962(c) is clear in view of two features of the opinion. First, after the court's discussion of the meaning of "through" in section 1962(c), the Fourth Circuit recognized that United States v. Stofsky, 409 F. Supp. 609, 613 (S.D.N.Y. 1973) had reached

Mandel, therefore, is direct support for the conclusion that the Fourth Circuit reached in *Webster II*, rather than *Webster I*.

The *Webster I* court's interpretation of "through" in RICO section 1962(c) was supportable, however, on two grounds that the Fourth Circuit did not advance.[95] First, the Supreme Court has stated that courts should resolve any ambiguity concerning the ambit of criminal statutes in favor of the defendant.[96] In *Webster I*, therefore, the Fourth Circuit correctly resolved the ambiguity concerning the construction of the word "through" in section 1962(c) in favor of Webster. Second, the principle of federalism supports the *Webster I* court's construction of section 1962(c). The Supreme Court has stated that courts should not assume that Congress has altered significantly the federal-state balance unless it has clearly stated its intention to do so.[97] The RICO statute is a substantial federal intrusion into traditional state criminal jurisdiction.[98] The Fourth Circuit in *Webster I*, therefore, correctly chose the interpretation of section 1962(c) involving the least amount of federal intrusion into state criminal jurisdiction.

In *Webster I* the Fourth Circuit correctly declined to apply the concurrent sentence doctrine.[99] The status of the doctrine in the Fourth Circuit, however, is unsettled in view of the Fourth Circuit's decision a year earlier, in *Truong*, to apply the doctrine.[100] The *Webster I* court's rationale for declining to apply the doctrine was unsatisfactory.[101] The court should have undertaken a closer examination of possible adverse collateral consequences to Webster from an unreviewed RICO conviction before declining to apply the doctrine.[102] A better approach is to presume

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a contrary conclusion for the meaning of the word "through." *See* 591 F.2d at 1376. *Stofsky* held that the prosecution need show no connection at all between the racketeering activity and the enterprise. *See* 409 F. Supp. at 613; text accompanying note 84 *supra*. Had the *Mandel* court attached directional significance to the word "through" in section 1962(c), the court would have cited United States v. Dennis, 458 F. Supp. 197, 199 (E.D. Mo. 1978), *aff'd*, 625 F.2d 782 (8th Cir. 1980) and United States v. Field, 432 F. Supp. 55, 58 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978) as contrary authority. Both *Dennis* and *Field* held that RICO section 1962(c) does not require proof regarding the advancement of the enterprise's affairs by the racketeering activities. Second, the only question here relevant that *Mandel* addressed was the propriety of the trial judge's conclusion that RICO section 1962(c) requires proof of some connection between the racketeering activity and the operation of the enterprise. *See* 591 F.2d at 1374. The Fourth Circuit concluded that the trial judge had properly construed the statute. *Id.* at 1375.

[95] *See* text accompanying notes 96-98 *infra*.

[96] Rewis v. United States, 401 U.S. 808, 812 (1971); Bell v. United States, 349 U.S. 81, 83 (1955); United States v. Gradwell, 243 U.S. 476, 485 (1917); *see* United States v. Sutton, 605 F.2d 260, 269-70 (6th Cir. 1979).

[97] United States v. Bass, 404 U.S. 336, 349 (1971).

[98] United States v. Sutton, 605 F.2d at 270.

[99] *See* text accompanying note 25 *supra*.

[100] *See* text accompanying notes 51-52 & 59 *supra*.

[101] *See* text accompanying notes 55-58 *supra*.

[102] *See* text accompanying note 58 *supra*.

that adverse collateral consequences flow from any conviction.[103] A reviewing court should, therefore, either review or vacate without review every concurrent conviction.[104] Although the Fourth Circuit's interpretation of RICO section 1962(c) in *Webster I* was reasonable and supportable, *Webster II* is more consistent with prior Fourth Circuit discussion of section 1962(c).[105] Under *Webster II* the prosecution need not show that the racketeering activity promoted or advanced the enterprise.[106] Rather, the Government need show only a substantial nexus between the racketeering activity and the enterprise.[107]

MICHAEL L. KRANCER

B. Double Jeopardy: Standard for Reprosecution After Mistrial on Defendant's Motion

The double jeopardy clause of the fifth amendment provides that a person may not be tried twice for the same offense.[1] Double jeopardy protection reflects a balancing of interests, counterposing the defendant's desire to end his confrontation with society[2] against the public's interest

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[103] *See* text accompanying notes 60-63 *supra.*

[104] *Id.*

[105] *See* text accompanying notes 69-98 *supra.*

[106] *See* text accompanying note 76 *supra.*

[107] *See* text accompanying notes 76-80 *supra.*

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[1] U.S. CONST. amend. V. The fifth amendment provides in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . ." *Id.* The phrase "life or limb" refers to any criminal penalty. *See* Ex parte Lange, 85 U.S. (18 Wall.) 163, 170-73 (1873). The English limited double jeopardy protection to prosecutions for capital offenses. Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1273 (1964) [hereinafter cited as *The Reprosecution Problem*]. The double jeopardy clause of the fifth amendment is applicable to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 793-96 (1969) (overruling Palko v. Connecticut, 302 U.S. 319 (1937)); *see* U.S. CONST. amend. XIV. A double jeopardy provision is also part of the constitution or common law of each state. Bartkus v. Illinois, 359 U.S. 121, 154 (1959). The purpose of the double jeopardy clause is to prevent the government with all of its resources and powers from making repeated attempts to convict an individual for an alleged offense, thereby subjecting him to increased expense, anxiety, embarrassment, delay, and a greater chance that, even though innocent, the defendant will be found guilty. Green v. United States, 355 U.S. 184, 187-88 (1957). In a jury trial, a defendant acquires double jeopardy protection when the judge impanels and swears in the jury. Serfass v. United States, 420 U.S. 377, 388-89 (1975). In a non-jury trial, however, a defendant acquires double jeopardy protection when the court begins to hear evidence. *Id. See generally* Schulhofer, *Jeopardy and Mistrial*, 125 U. PA. L. REV. 449, 532-38 (1977) [hereinafter cited as Schulhofer].

[2] United States v. Jorn, 400 U.S. 470, 486 (1971). A defendant has several interests at stake in avoiding multiple prosecutions for the same offense. First, the defendant has a right to a decision by the first tribunal. Downum v. United States, 372 U.S. 734, 736 (1963). Second, the defendant has a desire to avoid harassment by the government. Green v.

in a fair and final determination of guilt or innocence.[3] The double jeopardy clause ordinarily does not bar retrial of a defendant after the court grants a mistrial on the defendant's motion because courts deem the request to evidence the defendant's deliberate choice not to have the first trier of fact determine his guilt or innocence.[4]

In *United States v. Dinitz*,[5] the Supreme Court broadly outlined an exception to the defendant's choice rule. The *Dinitz* Court held that prosecutorial or judicial misconduct that amounts to overreaching may bar retrial of a defendant when the misconduct precipitates the defendant's mistrial motion.[6] *Dinitz* and its progeny, however, have provided scant guidance concerning what constitutes overreaching.[7] As a result,

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United States, 355 U.S. 184, 187-88 (1957). Finally, the defendant has a desire to avoid an opportunity for the prosecution to improve its case through rehearsal. Ashe v. Swenson, 397 U.S. 436, 439-40 (1970); *see* Note, *A Resolution of the Mistrial—Dismissal Dichotomy in Double Jeopardy Contexts*, 64 IOWA L. REV. 903, 909-14 (1979) [hereinafter cited as *A Resolution*].

[3] Illinois v. Somerville, 410 U.S. 458, 463 (1973); Wade v. Hunter, 336 U.S. 684, 689 (1949). *See* Note, *Mistrials and Double Jeopardy*, 15 AM. CRIM. L. REV. 169, 184-89 (1977) [hereinafter cited as AM. CRIM.]; *A Resolution*, *supra* note 2, at 914 (none of defendant's interests in double jeopardy clause are absolute and court must weigh all against government's interests). The government has an interest in giving the prosecutor a full and fair opportunity to convict a defendant. Arizona v. Washington, 434 U.S. 497, 505 (1978). The opportunity is necessary to allow the government to convict criminally culpable people and to vindicate societal interests in punishing those guilty of breaking laws and deterring others from doing so. *Id.*; *see* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 63, 63-64 (1968).

[4] *See* United States v. Scott, 437 U.S. 82, 96, 98-100 (1978); United States v. Dinitz, 424 U.S. 600, 606-08 (1976); United States v. Jorn, 400 U.S. at 485; *A Resolution*, *supra* note 2, at 914-18. In contrast to the case where the defendant requests the mistrial, a mistrial granted at the request of the prosecutor or court threatens the defendant's right to have his trial completed by the first tribunal. Arizona v. Washington, 434 U.S. 497, 503-05 (1978). A mistrial upon the prosecution's or court's request thus bars retrial of the defendant unless either "manifest necessity" or "the ends of public justice" requires a retrial. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); *accord*, Arizona v. Washington, 434 U.S. at 501; United States v. Dinitz, 424 U.S. at 606-08; United States v. Jorn, 400 U.S. at 480-81. *See* Schulhofer, *supra* note 1, at 532-38.

[5] 424 U.S. 600 (1976).

[6] *Id.* at 611. In *Dinitz*, the trial judge banished defense counsel from the trial proceeding. *Id.* at 603. The Supreme Court held that the trial judge's conduct, though perhaps an overreaction, did not bar retrial since the judge did not intend to provoke the defendant into requesting a mistrial nor did he intend to prejudice the defendent's chances for acquittal. *Id.* at 611. *See generally* Comment, *The Double Jeopardy Dilemma: Reprosecution After Mistrial on Defendant's Motion*, 63 IOWA L. REV. 975, 981 (1975) [hereinafter cited as *Double Jeopardy Dilemma*].

[7] *See, e.g.*, United States v. Di Francesco, 449 U.S. 117 (1980); United States v. Scott, 437 U.S. 82 (1978); Lee v. United States, 432 U.S. 23 (1977). The scope of misconduct encompassed by the term "overreaching" remains vague. *See Double Jeopardy Dilemma*, *supra* note 6, at 975-76. Overreaching generally refers to conduct that is more reprehensible than mere negligence. *Id.* Numerous cases have attempted to define prosecutorial overreaching. *See, e.g.*, Gori v. United States, 367 U.S. 364, 369 (1961) (conduct intended to secure another, more favorable opportunity to convict); United States v. Martin, 561 F.2d 135, 141 (8th Cir. 1977) (prejudicial reading of grand jury testimony to trial jury); United States v. Kessler,

decisions by the federal circuit courts have yielded diverse and often contradictory results.[8] Several courts require a defendant to show that the prosecutor specifically intended that his prosecutorial error provoke a mistrial.[9] Other courts find overreaching present when the prosecutor generally intends to prejudice the defendant's chances for acquittal and actual prejudice results.[10] The state of the law is unsatisfactory because predictability of outcome is essential to provide defendants with reasonably certain safeguards against the burden of repeated trials and to prevent some defendants from gaining unwarranted immunity from prosecution.[11] In *United States v. Green*,[12] the Fourth Circuit Court of Appeals considered whether the improper testimony of a federal drug enforcement agent that elicited a defense mistrial motion constituted prosecutorial misconduct or overreaching sufficient to bar reprosecution.[13]

In *Green*, the government charged Green with conspiracy to distribute heroin.[14] The prosecution's chief witness at the jury trial of Green and his two co-defendants was a special agent of the Drug Enforcement Administration.[15] During cross-examination of the agent, defense counsel elicited several statements that damaged the agent's credibility.[16] Irritated by the effective cross-examination, the agent

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530 F.2d 1246, 1257 (5th Cir. 1976) (introduction of known false evidence); City of Tucson v. Valencia, 21 Ariz. App. 148, 153, 517 P.2d 106, 111 (1973) (comments calculated to abort trial); People v. Hathcock, 8 Cal. 3d 599, 611, 504 P.2d 476, 483 (1973) (prejudicial misconduct intended for improper purpose); Commonwealth v. Myers, 422 Pa. 180, 190, 220 A.2d 859, 865, *cert. denied*, 385 U.S. 963 (1966) (remarks calculated to provoke mistrial). *See generally* Heitz, *Double Jeopardy—Mistrial Granted Upon Motion by Defendant—Standard for Reprosecution*, 42 MO. L. REV. 485, 489 (1977) [hereinafter cited as Heitz]; *Double Jeopardy Dilemma*, *supra* note 6, at 975-76.

[8] *Double Jeopardy Dilemma*, *supra* note 6, at 981-83; *see* text accompanying notes 41-55 *infra*.

[9] *See* note 43 *infra*.

[10] *See* note 51 *infra*.

[11] *See* Schulhofer, *supra* note 1, at 532. *See generally Double Jeopardy Dilemma*, *supra* note 6, at 989-90.

[12] 636 F.2d 925 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 2005 (1981).

[13] 636 F.2d at 925.

[14] *Id.* at 926; *see* 21 U.S.C. § 846 (Supp. IV 1981).

[15] 636 F.2d at 926. Green's trial continued as to his co-defendants, who were found guilty. *Id.* at 927 n.4.

[16] *Id.* at 926, 930-31. When called as the government's last witness, the agent testified that heroin dealers will not distribute heroin through heavy users. *Id.* at 930-31. Other evidence presented by the prosecution had depicted the defendant as a heroin distributor. *Id.* The prosecutor directed the agent's attention to an entry in a ledger that indicated that Green had received a large amount of drugs for his personal use. *Id.* Defense counsel then questioned the agent concerning the form filled out at the time the defendant was arrested. *Id.* The form showed that the defendant was a heroin user and that the arresting agent who processed Green had determined this fact by the routine examination of Green's arms for needle marks. *Id.* Defense counsel asked the witness if he was the agent who arrested the defendant. *Id.* The witness responded that he was not. *Id.* Defense counsel then asked the witness to examine the arrest form to see who signed it as the arresting officer. *Id.* When the agent returned to the stand, he admitted that he had processed the defendant. *Id.*

made an impermissible reference to Green's prior conviction for armed robbery.[17] The trial court granted the defense's motion for a mistrial.[18]

The prosecution subsequently reindicted Green on the same drug charge.[19] The defendant moved to dismiss his reindictment on the ground that the double jeopardy clause barred his retrial.[20] The trial judge denied the motion, finding that although the special agent's improper statement evidenced his general intent to affect the first trial, the double jeopardy clause would not bar retrial because the agent's misconduct did not reflect the specific intent of the prosecutor or the agent to provoke Green's motion for a mistrial.[21] Green appealed to the Fourth Circuit.[22]

The Fourth Circuit affirmed the district court's denial of Green's motion to dismiss, finding that the agent's improper statement did not constitute prosecutorial overreaching to the extent necessary to bar retrial under the *Dinitz* holding.[23] The salient issue in *Green* was whether the agent's misconduct constituted overreaching within the *Dinitz* exception.[24] The court, relying on the language of *Dinitz*, ruled that the *Dinitz* holding limits exceptions to situations in which the prosecutor specifically intends to provoke a mistrial request from the defendant and is inapplicable to other forms of misconduct intended to prejudice the defendant in a more generalized manner.[25]

The Fourth Circuit determined that the record supported the district court's finding.[26] The *Green* court held that the record did not establish that the prosecutor had specifically intended to provoke a mistrial.[27] The

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[17] *Id.* at 926-27. Evidence of other crimes not charged in an indictment is not admissible as part of the case against a defendant unless the evidence falls within one of the exceptions of Federal Rule of Evidence 404(b). FED. R. EVID. 404(b); United States v. Johnson, 610 F.2d 194, 196 (4th Cir. 1979), *cert. denied*, 446 U.S. 911 (1980). Rule 404(b) provides that evidence of other crimes is not admissible to prove the character of a defendant in order to show that he acted in conformity with that character. FED. R. EVID. 404(b). The evidence, however, may be admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* The prosecutor in *Green* did not claim that the statement of the agent fell within one of the enumerated exceptions to Rule 404(b). 636 F.2d at 926-27.

[18] 636 F.2d at 927; *see* note 16 *supra*.

[19] 636 F.2d at 927.

[20] *Id.*; *see* note 1 *supra*.

[21] 636 F.2d at 927; *see* text accompanying note 9 *supra*.

[22] 636 F.2d at 927. The district court order denying Green's motion to dismiss was appealable as a final decision under 28 U.S.C. § 1291 (1976). The order of denial satisfies the collateral order exception to the rule of finality embodied in § 1291. Abney v. United States, 431 U.S. 651, 662 (1977).

[23] 636 F.2d at 930; *see* text accompanying note 6 *supra*.

[24] 636 F.2d at 928.

[25] *Id.* at 927. The *Green* court emphasized that it would not disturb the findings of the lower court on the specific intent issue unless the defendant could show that the findings were clearly erroneous. *Id.* at 928; *see* text accompanying note 60 *infra*.

[26] 636 F.2d at 928.

[27] *Id.* at 928-29.

Fourth Circuit agreed with the district court's finding that the prosecutor had not in any manner anticipated or encouraged the agent's statement.[28] The appellate court stated that the prosecutor's request for curative jury instructions coupled with the subsequent conviction of Green's two co-defendants negatived any inference that the prosecutor specifically intended to cause a mistrial.[29] Additionally, the Fourth Circuit emphasized the district court's finding that the agent's spontaneous outburst did not reflect a specific intent to provoke Green's mistrial motion.[30] The court did not discuss the determination of the trial court that the agent did intend to make a statement that would affect the trial.[31]

In addressing the question of whether the special agent fell within the ambit of the term "prosecutor,"[32] the Fourth Circuit held the *Dinitz* exception inapplicable to government witnesses.[33] The *Green* court emphasized the trial court's finding that the record did not indicate the prosecutor in any manner had planned, anticipated, or condoned the agent's spontaneous statement.[34] The court noted that the prosecutor had a responsibility to sustain both the actual and apparent integrity of the judicial proceeding.[35] The Fourth Circuit concluded, however, that to hold the prosecutor responsible for the agent's misconduct on the *Green* facts would constitute an unwarranted and overbroad extension of double jeopardy protection.[36] The *Green* court balanced the defendant's interests in avoiding the anxiety, delay, expense, and potential prejudice inherent in a second trial against the public's interest in the prevention, punishment, and deterrence of crime.[37] The court stated that the defen-

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[28] *Id.* at 928 n.7.

[29] *Id.* at 928.

[30] *Id.* To support his conclusion that the prosecutor had not planned or anticipated the statement, the district judge in *Green* emphasized that the agent's statement was spur of the moment. *Id.* at 927. The Fourth Circuit's added characterization of the statement as a blurting out led to the conclusion that neither the prosecutor nor the agent planned the statement. *See id.* at 928. The dissent in *Green* pointed out that in granting a mistrial the district judge remarked that he thought that the agent, with four and a half years experience with the Drug Enforcement Agency and five years experience with the police force in Washington, D.C. would know that such a statement would be impermissible. *Id.* at 931 (Winter, J., dissenting).

[31] *Id.* at 928.

[32] *Id.*

[33] *Id.*

[34] *Id.*; *see* note 30 *supra.*

[35] 636 F.2d at 928.

[36] *Id.* The *Green* court reasoned that to include the agent within the term prosecutor would be to include every federal agent involved in a criminal matter who participates in evidence collection or trial preparation but who is not in charge of the prosecution. *Id.* Precedent supports the Fourth Circuit's distinction between the prosecuting attorney and police or other law enforcement officials. *See, e.g.*, United States v. Harvey, 377 A.2d 411, 416 n.7 (D.C. App. 1977) (police witness not a prosecutor); People v. Pohl, 47 Ill. App. 2d 232, 237, 197 N.E.2d 759, 766 (1974) (state police officer not a "proper prosecuting officer"). *But see* text accompanying notes 79-81 *infra.*

[37] 636 F.2d at 928-29.

dant's inconvenience in having to face retrial must defer to society's interest in a final determination of the defendant's guilt or innocence.[38] The Fourth Circuit noted that society has a further interest in punishing a defendant whose guilt is clear after he has had a fair trial.[39] The court, therefore, implicitly held that even if it were to find that the agent specifically intended to provoke a mistrial, the agent's misconduct would not bar retrial under the *Dinitz* holding since his intentional act was not attributable to the prosecutor himself.[40]

In *Green*, the Fourth Circuit confronted a choice between the two standards courts employ to determine what constitutes overreaching within the *Dinitz* exception.[41] The First, Second, Fifth and Eighth Circuits follow a general intent to prejudice standard and hold that the double jeopardy clause bars reprosecution after mistrial on the defendant's motion when the conduct of the judge or prosecutor is intentional or grossly negligent and results in serious prejudice to the defendant.[42] Under the general intent to prejudice standard, any purposeful misconduct by the prosecutor that results in serious prejudice will bar retrial.[43]

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[38] *Id.* The *Green* court underscored society's interest in a final determination of the defendant's guilt or innocence. *Id.* The court did not make the traditional reference to the fairness of that determination. *Id.*; *see* text accompanying notes 3-4 *supra*.

[39] 636 F.2d at 929.

[40] *Id.*

[41] *See Double Jeopardy Dilemma*, *supra* note 6, at 986; text accompanying notes 43-56 *infra*. *See generally A Resolution*, *supra* note 2, at 914-18.

[42] *See, e.g.*, United States v. Zozlio, 617 F.2d 314, 315 (1st Cir. 1980) (failure of government to comply strictly with pretrial discovery orders not overreaching when no evidence of grossly negligent or intentional effort to harass or prejudice defendant, or provoke mistrial); United States v. Davis, 589 F.2d 904, 906 (5th Cir.), *cert. denied*, 441 U.S. 950 (1979) (no overreaching when prosecutor's conduct inadvertent and defendant did not allege he was prejudiced); Drayton v. Hayes, 589 F.2d 117, 122 (2d Cir. 1979) (judicial prank not overreaching when not evidencing desire to prejudice or harass defendant and defendant did not show he was prejudiced by the misconduct); United States v. Martin, 561 F.2d 135, 140 (8th Cir. 1977) (overreaching when prosecutor's reading of irrelevant and highly prejudicial grand jury testimony to trial jury constituted gross negligence).

[43] *See* United States v. Martin, 561 F.2d 135, 139 (8th Cir. 1977). In *Martin*, the defendant moved for a mistrial when the prosecutor read allegedly impermissible grand jury testimony to the trial jury. *Id.* at 137. The trial judge granted the motion. *Id.* The judge, however, denied defendant's motion to dismiss the indictment on the ground of double jeopardy since both prosecuting attorneys submitted affidavits in which they swore that they did not intend their actions to specifically provoke a mistrial. *Id.* at 138. The Eighth Circuit, reversing the conviction, stated that the reading of the testimony amounted to gross negligence and thus constituted overreaching sufficient to bar retrial. *Id.* at 138-41. One commentator has criticized the *Martin* decision for failing to provide guidelines specifying what type of misconduct will constitute gross negligence. *See Double Jeopardy Dilemma*, *supra* note 6, at 988. Moreover, since the Martin court found both that the prosecutors intended their actions to lessen the defendant's chances for acquittal and that serious prejudice resulted from the misconduct, the court seems to have implicitly based its finding of overreaching on the general intent to prejudice standard. *See* 561 F.2d at 135.

The Fifth Circuit also mentioned a gross negligence standard in United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976). In *Kessler*, the Fifth Circuit found prosecutorial over-

Courts reason that whether the prosecutor specifically intends to provoke a mistrial, or generally intends to prejudice or lessen the defendant's chances for acquittal, the net result is the same.[44] In either case, the prosecutor's overreaching leaves the defendant with a "Hobson's choice."[45] The defendant must elect whether to continue with the error-laden first trial or to move for a mistrial and face relitigation.[46] If he chooses to continue with the first trial, he will save himself the anxiety, delay, and expense of a second trial.[47] He may also, however, face an increased risk of conviction because of the prejudice resulting from the prosecutor's misconduct.[48] Alternatively, if the defendant rejects the first tribunal and chooses to pursue a second trial, he will be free of any prejudice held by the first trier of fact. Nevertheless, he again will be subject to an increased risk of conviction, since the witnesses testifying against him will have an opportunity to strengthen their testimony through rehearsal and repetition.[49]

In deciding *Green*, the Fourth Circuit cited without discussion the grossly negligent or intentional misconduct standard of the Fifth Circuit.[50] The *Green* court, however, functionally adopted the narrower specific intent to provoke standard employed by the Third, Fourth, Ninth, and Tenth Circuits.[51] Under the specific intent standard, the defendant must establish two elements on appeal in order to prove

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reaching when the prosecutor, intending to prejudice the defendant, introduced known false evidence and serious prejudice resulted. *Id.* at 1254-58. The *Kessler* court equated prosecutorial overreaching with gross negligence or intentional misconduct. *Id.* As in *Martin*, however, because the prosecutor in *Kessler* generally intended to prejudice the defendant's chances for acquittal and actual prejudice resulted, the Fifth Circuit also seems to have implicitly based its finding of overreaching on the general intent to prejudice standard. *Id.*; *see* 561 F.2d at 139. In short, it does not appear that prosecutorial misconduct amounting only to gross negligence has ever barred a retrial. *See* Mitchell v. Smith, 633 F.2d 1009, 1012 n.12 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 879 (1981).

[44] *See* Mitchell v. Smith, 633 F.2d 1009, 1012 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 879 (1981); Drayton v. Hayes, 589 F.2d 117, 122 (2d Cir. 1979); United States v. Roberts, 640 F.2d 225, 229 (9th Cir. 1981) (Norris, J., dissenting) (no valid distinction between prosecutorial misconduct intended to prejudice the defendant and prosecutorial misconduct intended to provoke a mistrial).

[45] United States v. Dinitz, 424 U.S. at 609. A Hobson's choice is a choice between taking what is offered or taking nothing at all. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED, 864 (2d ed. 1976).

[46] 424 U.S. at 609. *See A Resolution*, *supra* note 2, at 914-18.

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

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

[49] *See A Resolution*, *supra* note 2, at 913.

[50] 636 F.2d at 927-28; *see* United States v. Davis, 589 F.2d 904, 906 (5th Cir.), *cert. denied*, 411 U.S 950 (1979).

[51] 636 F.2d at 928. *See* United States v. Gamble, 607 F.2d 820 (9th Cir. 1979), *cert. denied*, 444 U.S. 1092 (1980); United States v. Nelson, 582 F.2d 1246 (10th Cir. 1978), *cert. denied*, 439 U.S. 1079 (1979); United States v. Cerilli, 558 F.2d 697 (3d Cir.) (per curiam), *cert. denied*, 434 U.S. 966 (1977) United States v. Mandel, 550 F.2d 1001 (4th Cir. 1977) (per curiam).

prosecutorial overreaching and gain double jeopardy protection.[52] First, the defendant must show that the prosecutor possessed a specific subjective intent to provoke a mistrial motion.[53] Second, the defendant must show that the trial court's finding of no bad faith or overreaching was clearly erroneous.[54] Courts employing the specific intent standard acknowledge the defendant's difficulty of proof but justify the standard by pointing to society's interest in the prevention, punishment, and deterrence of crime.[55]

The soundness of the Fourth Circuit's decision in *Green* depends upon the propriety of limiting the double jeopardy protection of the *Dinitz* holding to situations in which the prosecutor deliberately attempts to provoke a mistrial. Prior case law and the policies underlying the double jeopardy clause bear upon the propriety of such a limitation.[56] The *Green* court's decision is consistent with previous Fourth Circuit cases that have endorsed the specific intent standard.[57] Additionally, although the Supreme Court repeatedly has refused to establish a per se rule governing mistrials,[58] the specific intent standard is consonant with recent Supreme Court decisions favoring the interests of society over those of the defendant in the double jeopardy context.[59] Finally, the Fourth Circuit's application of the clearly erroneous standard to the trial

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[52] 636 F.2d at 928.

[53] *Id.*; *see* Heitz, *supra* note 7, at 490.

[54] 636 F.2d at 928. A finding cannot be clearly erroneous if there is substantial evidence to support the finding, notwithstanding the existence of substantial conflicting evidence. United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949).

[55] *See* 636 F.2d at 928-29; note 51 *supra*.

[56] *See* notes 2 & 3 *supra*; notes 61-64 *infra*.

[57] See, e.g., United States v. Lansdown, 460 F.2d 164 (4th Cir. 1972) (pre-*Dinitz*). In *Lansdown*, the trial judge granted a mistrial motion over the defendant's objection. *Id.* at 171. On appeal, the Fourth Circuit noted with approval the pre-*Dinitz* rule that when a court declares a mistrial at the request of the defendant, the court generally deems the defendant to have waived any claim of double jeopardy protection. *Id.* at 171 n.8. The Fourth Circuit modified or *sub silentio* overruled *Lansdown* in United States v. Mandel, 550 F.2d 1001 (4th Cir. 1977) (per curiam) (no bar to retrial when mistrial granted absent bad faith provocation by court or prosecutor (citing *Lansdown*)).

[58] *See* Downum v. United States, 372 U.S. 734, 737 (1963) (each case must turn on its facts); *accord*, United States v. Moon, 491 F.2d 1047, 1049 (5th Cir. 1974); Russo v. Superior Court, 483 F.2d 7, 13 (3d Cir.), *cert. denied*, 414 U.S. 1023 (1973); McNeal v. Hollowell, 481 F.2d 1145, 1149 (5th Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

[59] *See, e.g.*, Illinois v. Somerville, 410 U.S. 458, 470-71 (1973) (courts should be less willing to accord defendant's interest great weight if societal interests indicate desirability of retrial). *See generally Double Jeopardy Dilemma*, *supra* note 6, at 987-88. In the 1960's the Supreme Court declared that a trial judge should resolve any doubt concerning the allowance of a mistrial in favor of the defendant. *See* Downum v. United States, 372 U.S. at 738. *But see* United States v. Tateo, 377 U.S. 463, 466 (1964) (high cost to society if every accused granted immunity from punishment on account of any defect constituting reversible error). Recently, the Supreme Court has indicated its concern that too many criminal defendants exit the judicial process without a binding determination of guilt or innocence. *See* 410 U.S. at 470-71.

court's determination that the prosecutor did not act in bad faith is consistent with the position of several circuits that defer to the judgment of trial courts concerning prosecutorial or judicial bad faith.[60]

The *Dinitz* holding does not, however, compel an appellate court to adopt the specific intent standard.[61] The language in *Dinitz* supports both the specific and general intent to prejudice standards.[62] By its terms, the *Dinitz* holding supports a bar to retrial whenever deliberate prosecutorial misconduct results in a defense motion for mistrial and prejudices the defendant's chances for acquittal.[63] Courts, therefore, can interpret dicta in subsequent Supreme Court cases as supporting both standards.[64]

Since there are difficulties inherent in proving specific intent, the defendant will rarely, if ever, enjoy double jeopardy protection under the specific intent standard.[65] As a result, the specific intent standard clearly protects the public's interest in the prosecution, punishment, and deterrence of crime.[66] In addition, the specific intent standard promotes judicial economy because a defendant, knowing that he would most likely not be able to prove specific intent, would elect to continue with the error-laden first trial.[67]

The specific intent standard, however, disserves society's interest in

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[60] *See* Arizona v. Washington, 434 U.S. 497, 516-17 (1978); United States v. Gamble, 607 F.2d 820, 823 (9th Cir. 1979), *cert. denied*, 444 U.S. 1092 (1980); United States v. Davis, 589 F.2d 904, 906 (5th Cir.), *cert. denied*, 411 U.S. 950 (1979); United States v. Wilson, 534 F.2d 76, 81-82 (6th Cir. 1976). *See generally The Reprosecution Problem*, *supra* note 1, at 1277-78. The Supreme Court has indicated, however, that when governmental misconduct evidences oppression of the defendant, deference to the trial judge's ruling is not appropriate and double jeopardy protection will bar retrial following such misconduct. *See* Lee v. United States, 432 U.S. 23, 33-34 (1977). *See generally Double Jeopardy Dilemma*, supra note 6, at 987-88.

[61] *See* United States v. Dinitz, 424 U.S. at 611. The *Dinitz* Court stated that the double jeopardy clause protects a defendant against governmental actions by which the judge or prosecutor intend to provoke a defense request for a mistrial. *Id.* In contrast, the Court further stated that double jeopardy bars retrial when bad faith conduct by the judge or prosecutor threatens to harass an accused, thereby affording the prosecution a more favorable opportunity to convict. *Id.*

[62] *Id.*

[63] *Id*

[64] *See* Lee v. United States, 432 U.S. 23, 29 (1977). The *Lee* Court cited the holding in *Dinitz*, *supra* note 61, for the proposition that in order to bar retrial, the defense request for a mistrial must have been the result of a general attempt by the judge or prosecutor to harass or prejudice the defendant. *Id.* In United States v. DiFrancesco, 449 U.S. 117 (1980), however, the Court cited the *Dinitz* holding, *supra* note 61, for the proposition that reprosecution is not barred following the granting of a defense mistrial request unless the prosecutor specifically intended to provoke the request. 449 U.S. at 124-25.

[65] *See* AM. CRIM., *supra* note 3, at 188. To date, only one court employing the specific intent to provoke standard has found a sufficient degree of prosecutorial overreaching to bar reprosecution. *See* Commonwealth v. Warfield, 424 Pa. 555, 227 A.2d 177 (1967) (specific intent when prosecutor openly acknowledged that he deliberately caused mistrial).

[66] *See* note 3 *supra.*

[67] *See generally* A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 421 (3d ed. 1974) [hereinafter cited as TRIAL MANUAL].

a fair and final determination of the defendant's guilt or innocence since the standard encourages a final verdict at all costs.[68] Moreover, strictly limiting the defendant's double jeopardy protection to cases in which he can prove specific intent results in a hollow guarantee of constitutional rights to the defendant whenever the prosecutor intends generally to prejudice the defendant's chances for acquittal and actual prejudice results.[69]

The policy underlying the double jeopardy clause supports uniform adoption of the general intent or deliberate misconduct standard.[70] The general intent or deliberate misconduct standard places a heavy burden on a defendant to prove prosecutorial overreaching.[71] The defendant must first show that the prosecutor generally intended to lessen his chance of acquittal or that the prosecutor's conduct was grossly negligent.[72] Second, the defendant must show that the prosecutor's misconduct actually prejudiced him.[73] Because of the heavy burden that the standard imposes upon the defendant, the standard will preserve society's interest in a fair and final determination of the defendant's guilt or innocence.[74] At the same time, the general intent standard will protect a defendant by shielding him from prejudice resulting from deliberate prosecutorial misconduct.[75] The standard thus encourages competence by judges and prosecutors, while affording the defendant his double jeopardy protection.[76] The party responsible for the deliberate misconduct or grossly negligent mistake will bear responsibility for the misconduct or mistake.[77]

The *Green* court correctly concluded that a prosecutor should not be liable for the independent misconduct of a government witness.[78] To bar reprosecution because of errors that the prosecution has not incited and truly cannot control would make courts reluctant to grant defense mistrial motions.[79] Although this reluctance to grant mistrials arguably

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[68] *See* text accompanying notes 2 & 3 *supra.*

[69] AM. CRIM., *supra* note 3, at 188.

[70] *See* United States v. Green, 101 S. Ct. 2005 (1981). Mr. Justice Marshall dissented to the Supreme Court's denial of certiorari in *Green. Id.* at 2005-07 (Marshall, J., dissenting). Justice Marshall argued that the court should resolve the confusion by employing the general intent to prejudice standard. *Id.*

[71] *See* Heitz, *supra* note 6, at 489.

[72] *Id.*

[73] *Id.*

[74] *See* note 3 *supra.*

[75] *See* notes 43-49 *supra.*

[76] *Double Jeopardy Dilemma, supra* note 6, at 986.

[77] *Id.* Prosecutorial accountability is consistent with the general rule of negligence that usually holds the grossly negligent actor accountable to the victim. *Id.*

[78] *See* note 36 *supra.*

[79] *See* text accompanying notes 76-77 *supra.* Courts would be understandably reluctant to grant defense mistrial motions when the motion results from errors that the prosecutor cannot control. *See* United States v. Tateo, 377 U.S. at 466. The courts' granting of such motions would implicitly impose upon the prosecutor a duty to guarantee every defendant a trial free from error. *Id.*

would protect society's interest in a final determination of guilt or innocence,[80] it would disserve the public's and the defendant's interest in a fair determination.[81] On the other hand, failure to bar reprosecution following the intentional error of a key government witness who to the jury may appear to be the alter-ego of the prosecutor frustrates both the defendant's and society's interests in a fair and final determination of guilt or innocence.[82] When the witness plays a central if not determinative role in the prosecution, and when serious prejudice results from the witness' intentional error, it is appropriate to hold the prosecutor accountable for his failure to prevent the witness' deliberate misconduct.[83] Such accountability seems particularly appropriate on the facts before the *Green* court since the special agent played a central role and possessed sufficient experience to know that his conduct was improper and that it could seriously prejudice the defendant.[84] The Fourth Circuit's conspicuous failure to establish guidelines for determining when a special agent attains prosecutor status or when a prosecutor may be grossly negligent thus provides little guidance to courts, prosecutors, or defendants who are considering a mistrial motion.

In *Green*, the Fourth Circuit acknowledged that the double jeopardy clause does not bar retrial of a criminal defendant in all situations.[85] The *Green* court, however, narrowly construed the *Dinitz* overreaching exception to find that governmental misconduct generally intended to prejudice a defendant's chances for acquittal will not bar retrial of a defendant.[86] Since the jury convicted Green's co-defendants for the same offense with which the government charged Green, the denial of Green's motion to dismiss may have been correct.[87] Moreover, although the special agent seems to have generally intended to prejudice Green's chances for acquittal, the Fourth Circuit did not address whether the agent's misconduct actually prejudiced the defendant.[88] Consequently, it

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[80] *See* note 3 *supra.*

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

[82] See United States v. Green, 101 S. Ct. 2005, 2007 (1981) (Marshall, J., dissenting). In his dissent to the Court's denial of certiorari in *Green*, Mr. Justice Marshall stated that nothing in the *Dinitz* decision suggests that the Court meant to limit its holding solely to the misconduct of the prosecutor himself. *Id.* Judge Winter, dissenting in *Green*, argued that the *Dinitz* term "prosecutorial error" is not limited literally to the prosecutor. 636 F.2d at 931 (Winter, J., dissenting). Winter argued that this is especially true in a situation such as that before the court in *Green*, where the prosecutor's witness, though perhaps not specifically intending to provoke a mistrial, clearly was trying to prejudice the jury with an improper, vindictive remark. *Id.* The dissent contended that the Fourth Circuit should have classified the agent as a prosecutor because of the agent's extensive involvement in the preparation and trial of the case. *Id.* The dissent noted that the agent had a detailed knowledge of the case and that he sat at counsel table during the trial. *Id.*

[83] *See* text accompanying notes 76-77 *supra.*

[84] *See* note 72 *supra.*

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

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

[87] *See* 636 F.2d at 928-29.

[88] *Id.* at 929; *see* note 82 *supra.*

is possible that the agent's misconduct would not satisfy even the general intent standard.[89] The Fourth Circuit, therefore, based its refusal to bar retrial on broad policy considerations rather than on an analysis of the facts of the particular case.[90] The *Green* court appears to have been preoccupied with the possibility that district courts within the Fourth Circuit would grant virtually automatic immunity to defendants if the courts employed any test other than the specific intent to provoke standard.[91]

The *Green* decision will have several substantive and procedural ramifications within the Fourth Circuit. First, courts employing the narrow specific intent standard rarely will find that the prosecutor specifically intended to provoke a mistrial because there will be insufficient evidence that the prosecutor did not merely intend to prejudice the jury in the hope of winning a guilty verdict.[92] As a result, defense counsel within the Fourth Circuit must be acutely aware of all strategic considerations when moving for a mistrial. Counsel must prepare the defendant to choose between requesting a second trial and continuing with the error-laden first trial.[93] Such preparation will include informing the defendant of the increased risk of conviction inherent in either course of action.[94] Second, defendants in the Fourth Circuit will remain uncertain as to whether grossly negligent or intentional misconduct of the prosecutor resulting in the defendant's motion for mistrial will ever bar reprosecution.[95] Third, defendants will be uncertain of their rights when governmental misconduct reflects a specific intent to provoke a mistrial but is not the conduct of the prosecutor himself.[96] Finally, prosecuting attorneys in the Fourth Circuit will enjoy diminished accountability concerning what they offer into evidence, the manner in which they present the evidence, and the manner in which their witnesses offer testimony.[97]

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[89] *See* text accompanying notes 42-49, 71-73 *supra*.

[90] *See* 636 F.2d at 929 n.9. The Fourth Circuit, relying on United States v. Tateo, 377 U.S. at 466, warned that if the *Green* court allowed Green double jeopardy protection, the entire class of criminal defendants would suffer because courts would be reluctant to grant mistrial motions if they knew that reprosecution would almost certainly be barred under a more liberal standard. *Id.* The court thus implicitly imposed a per se rule upon Green, virtually refusing to review the merits of his case. *See* note 58 *supra*. Under the *Green* court's per se standard, the question of which party moves for the mistrial will usually be determinative. *See* Comment, *Retrial After Mistrial: The Double Jeopardy Doctrine of Manifest Necessity*, 45 MISS. L.J. 1272, 1278 (1974); text accompanying notes 4 & 5, 55 *supra*.

[91] *See* 636 F.2d at 929 n.10.

[92] *See* text accompanying notes 52-55 *supra*.

[93] *See* TRIAL MANUAL, *supra* note 68, § 421. Defense counsel in the Fourth Circuit should consider relying on the trial judge to declare a mistrial *sua sponte*, thus almost automatically precluding reprosecution. *See* AM. CRIM., *supra* note 3, at 169.

[94] *See* text accompanying notes 43-49 *supra*.

[95] *See* text accompanying note 50 *supra*.

[96] *See* text accompanying notes 78-84 *supra*.

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

In short, the Fourth Circuit's decision in *Green* will discourage defense mistrial motions and compel defendants to continue, at their peril, with even a seriously tainted trial. In the Fourth Circuit, prosecutorial mistake or misconduct resulting in a defendant's successful motion for mistrial will afford the defendant double jeopardy protection only if the defendant can prove that the prosecutor specifically intended to provoke the mistrial.

WILLIAM D. JOHNSTON

C. General Verdicts and Multiple-Objective Conspiracy Counts: Complications on Review

Conspiracy is an inchoate crime.[1] A conspiracy is an agreement between two or more persons to commit a crime.[2] To obtain a conviction under the general federal conspiracy statute,[3] the prosecution must show, first, an agreement to commit a crime and, second, that a conspirator committed at least one overt act in furtherance of the illegal objective within the applicable time period preceding the indictment.[4] The

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[1] United States v. Beil, 577 F.2d 1313, 1315 (5th Cir. 1978).

[2] United States v. Parnell, 581 F.2d 1374, 1379 (10th Cir. 1978). The conspirators need not have a formal agreement to commit an offense; a tacit understanding is sufficient to create a conspiracy. United States v. McCarty, 611 F.2d 220, 222 (8th Cir. 1979), *cert. denied*, 445 U.S. 930 (1980). A mere meeting of the minds of the conspirators can satisfy the agreement requirement. United States v. Lopez, 576 F.2d 840, 844 (10th Cir. 1978).

[3] 18 U.S.C. § 371 (1976). The general federal conspiracy statute provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . .

Id.

[4] United States v. Bankston, 603 F.2d 528, 531 (5th Cir. 1979) (essential elements of conspiracy are agreement to commit crime plus overt act in furtherance of agreement); United States v. Parnell, 581 F.2d 1374, 1379 (10th Cir. 1978) (conspiracy is agreement to commit unlawful act and is complete when one conspirator commits act in furtherance of objective); Poliafico v. United States, 237 F.2d 97, 104 (6th Cir. 1956) (conspiracy complete on formation of criminal agreement and performance of overt act in furtherance thereof), *cert. denied*, 352 U.S. 1025 (1957). Furthermore, the overt act need not be a crime itself. 237 F.2d at 105 (citing Braverman v. United States, 317 U.S. 49 (1942)); *see* United States v. Scallion, 533 F.2d 903, 911 (5th Cir. 1976) (when Government charged conspiracy to obtain money fraudulently from casinos in Las Vegas, travelling to Las Vegas sufficient overt act), *cert. denied sub nom.* Jenkins v. United States, 429 U.S. 1079 (1977).

To support a conviction under the conspiracy statute the prosecutor must show that a conspirator committed an overt act in furtherance of the conspiracy within the applicable time period preceding the indictment. Grunewald v. United States, 353 U.S. 391, 396-97 (1957) (when conspiracy indictment returned October 24, 1954, and applicable statute of limitations three years, Government must prove conspirator committed overt act after October 24, 1951). *See also* United States v. Davis, 533 F.2d 921, 926 (5th Cir. 1976) (when con-

prosecution need not prove that a defendant actually committed the substantive crime he conspired to commit.[5]

A single conspiracy count may charge a conspiracy to violate plural substantive offenses.[6] A single agreement to violate multiple substantive offenses is only a single violation of the conspiracy statute.[7] A jury may convict under a multiple-objective conspiracy count if the evidence

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spiracy indictment returned September 5, 1974, and applicable statute of limitations five years, Government must present evidence that conspirator committed overt act on or after September 5, 1969 or conspiracy count does not go to jury); United States v. Brasco, 516 F.2d 816, 818 (2d Cir.) (to avoid time bar, Government required to show one overt act occurred within applicable time period), *cert. denied*, 423 U.S. 860 (1975); United States v. Nowak, 448 F.2d 134, 139 (7th Cir. 1971) (conviction for conspiracy requires proof that conspirator performed overt act within applicable time period), *cert. denied*, 404 U.S. 1039 (1972).

The general federal conspiracy statute contains no specific statute of limitations. *See* 18 U.S.C. § 371 (1976); note 3 *supra*. Section 3282 of Title 18 of the United States Code, however, provides a general five year statute of limitations applicable to any non-capital criminal offense unless the offense charged contains a specific statute of limitations. *See* 18 U.S.C. § 3282 (1976). When an indictment charges a defendant with conspiracy to violate a substantive offense that provides a specific limitation period, that limitation period also applies to the conspiracy count. United States v. Lowder, 492 F.2d 953, 956 (4th Cir.), *cert. denied*, 419 U.S. 1092 (1974). In *Lowder*, the Government charged the defendant with conspiring to commit tax evasion. 492 F.2d at 954. The Fourth Circuit held that the applicable limitations period was six years instead of five. *Id.* at 956. The court reasoned that tax offenses carry a specific statute of limitations in section 6531 of Title 26 of the United States Code. *Id. See* 26 U.S.C. §§ 6531(3) & (8) (1976). Therefore, the general statute of limitations contained in section 3282 of Title 18 is inapplicable by its terms. 492 F.2d at 956. *See* 18 U.S.C. § 3282 (1976).

[5] *See* United States v. Feola, 420 U.S. 671, 694 (1975). The prosecution does not have to prove commission of the substantive crime that was the object of the conspiracy because conspiracy is a crime separate from the substantive offense. *See* Braverman v. United States, 317 U.S. 49, 54 (1942); Poliafico v. United States, 237 F.2d 97, 103-04 (6th Cir. 1956). For example, in *Poliafico v. United States* the Government prosecuted 14 defendants for conspiracy to violate narcotics laws. *Id.* at 101-02. Some of the defendants participated in the actual sale of narcotics. *See id.* Assuming a conspirator committed an overt act, the defendants who sold narcotics are criminally liable for both conspiracy to sell narcotics and the substantive crime of selling narcotics. *See id.* at 116. The defendants who did not participate in the actual sale are criminally liable only for conspiracy. *See id.* at 103-04.

[6] *See* Braverman v. United States, 317 U.S. 49, 54 (1942) (single agreement, however diverse its objects, is prohibited conspiracy and violates but single statute); Frohwerk v. United States, 249 U.S. 204, 210 (1919) (conspiracy is one crime, however diverse its objects).

[7] Braverman v. United States, 317 U.S. 49, 54 (1942); Frohwerk v. United States, 249 U.S. 204, 210 (1919); *see* note 6 *supra*. *Braverman* illustrates that a single agreement to violate multiple substantive offenses is but a single conspiracy. *See* 317 U.S. at 53-55. In *Braverman*, the Government charged the defendant with conspiracy to carry on an illegal liquor business, to possess liquor bottles without the proper tax stamp, to transport such liquor, to carry on a liquor business without the required bond, to hide liquor bottles with intent to defraud the United States of taxes on such liquor, to process an unregistered distilling apparatus, and to make on unauthorized premises mash fit for distillation. *Id.* at 50 n.1. Each of the seven objects violated a separate and distinct statute. *Id.* at 50. The Court held that a single agreement to violate any number of criminal statutes is but a single violation of the conspiracy statute. *Id.* at 54.

convinces the jury beyond a reasonable doubt that a conspiracy existed regarding any one of the objectives charged.[8]

A jury in a criminal trial usually returns a general verdict of guilty or not guilty.[9] A general verdict does not reveal the specific grounds upon which it rests.[10] Therefore, when a jury convicts a defendant on a multiple-objective conspiracy count, a reviewing court cannot know which substantive crime(s) the jury found he conspired to commit.[11] Similarly, when the prosecution alleges several overt acts in furtherance of the conspiracy, the reviewing court cannot know upon which overt act(s) the jury's verdict rests.[12]

If every alleged objective offense in a multiple-objective conspiracy

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[8] *See* United States v. Murray, 618 F.2d 892, 898 (2d Cir. 1980) (when indictment charges conspiracy to violate two statutes, jury may convict on finding defendant conspired to violate either statute); United States v. Wilkinson, 601 F.2d 791, 796 (5th Cir. 1979) (same); United States v. O'Looney, 544 F.2d 385, 391 (9th Cir.) (jury required only to find that conspiracy existed regarding one of the unlawful objects in order to convict on a double-objective conspiracy count), *cert. denied*, 429 U.S. 1023 (1976).

[9] 2 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 512 (1969 & Supp. 1981) [hereinafter cited as WRIGHT & MILLER]. Before 1972, the Federal Rules of Criminal Procedure had no provision permitting a special verdict. *See id.* In 1972, however, a rule providing for special verdicts in criminal forfeiture cases was added to the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 31(e). Special verdicts are appropriate in criminal forfeiture cases because the amount of the interest or property subject to forfeiture is an element of the offense that the Government must prove. Notes of Advisory Committee on Rules, FED. R. CRIM. P. 31(e). The propriety of special verdicts in other criminal cases is questionable. *See* United States v. James, 432 F.2d 303, 307-08 (5th Cir. 1970) (use of special verdict error in multiple-objective conspiracy trial), *cert. denied*, 403 U.S. 906 (1971); United States v. Spock, 416 F.2d 165, 183 (1st Cir. 1969) ("special findings" in verdict of conspiracy to counsel, aid, and abet registrants to resist draft held prejudicial error because issue whether defendants exceeded bounds of free speech was for jury discretion to apply community standard or conscience); Gray v. United States, 174 F.2d 919, 923-24 (8th Cir.) (use of special verdict in any criminal case error), *cert. denied*, 338 U.S. 848 (1949). *But see* United States v. O'Looney, 544 F.2d 385, 392 (9th Cir.) (judge had power to use special verdict at jury's request in multiple-objective conspiracy trial), *cert. denied*, 429 U.S. 1023 (1976).

The Federal Rules of Civil Procedure expressly permit the use of special verdicts. FED. R. CIV. P. 49. Courts are reluctant, however, to allow use of special verdicts in criminal trials for at least two reasons. *See* WRIGHT & MILLER, *supra*, § 512. First, the criminal jury's duty does not stop at factfinding. *Id.* Rather, the jury's duty includes application of the law to the facts pursuant to the judge's instructions. *Id.* Second, courts see the special verdict in criminal cases as judicial encroachment upon the jury's function. *See* United States v. Spock, 416 F.2d at 181. The *Spock* court argued that a court should allow the jury to act as the conscience of the community by permitting the jury to look at more than mere logic. *Id.* at 182. Since interrogatories tie the jury to bare logic, special verdicts encroach on the jury's function. *Id.* at 181-82. Furthermore, an historic function of the jury is to temper rules of law with common sense. *Id.* Special verdicts can encroach upon the jury's function by discouraging the jury from tempering rules of law with its own sense of fairness. *Id.*

[10] *See* Yates v. United States, 354 U.S. 298, 311-12 (1957); Stromberg v. California, 283 U.S. 359, 367-68 (1931).

[11] *See* Yates v. United States, 354 U.S. at 311-12; Stromberg v. California, 283 U.S. at 367-68; text accompanying note 10 *supra*.

[12] *See* Yates v. United States, 354 U.S. at 311-12; text accompanying note 10 *supra*.

count properly defines a crime, then it is immaterial which substantive crime the jury found that the defendant conspired to commit.[13] If, however, one of the objective offenses failed for any reason to state a crime, then the reviewing court cannot know from a general verdict that the jury did not convict the defendant upon an invalid ground.[14] Similarly, if every alleged overt act in furtherance of the multiple-objective conspiracy properly may form the basis of a conviction, then it is immaterial upon which overt act(s) the jury rested its verdict.[15] If, however, the trial court wrongly submitted to the jury one or more alleged overt acts, then the reviewing court cannot know from a general verdict that the jury did not rely upon a wrongfully submitted act to convict.[16]

In *United States v. Head*[17] the Fourth Circuit addressed the problem created when a general guilty verdict under a multiple-objective conspiracy count follows the trial court's wrongful submission of several alleged overt acts to the jury.[18] A federal grand jury handed down an indictment against Murdock Head, count one of which charged him with conspiring to bribe a congressman, conspiring to give a thing of value to an Internal Revenue Service agent, and conspiring to evade federal income taxes.[19]

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[13] *See* text accompanying notes 8 & 11 *supra.*

[14] *See* Stromberg v. California, 283 U.S. at 368. If a reviewing court declares one of the objective substantive offenses unconstitutional, the court cannot know that the jury did not convict the defendant solely for his participation in activities constitutionally immune from prosecution. *See id.*

[15] *See* Yates v. United States, 354 U.S. at 311-12.

[16] *See id.*; text accompanying note 14 *supra.*

[17] 641 F.2d 174 (4th Cir. 1981).

[18] *See id.* at 177, 179. In *Head,* the relevant statute of limitations barred several of the alleged overt acts that the trial court submitted to the jury from forming the basis for a conspiracy conviction. *Id.* at 177; *see* text accompanying note 4 *supra* & text accompanying notes 20-21 *infra.*

Statutes of limitations for criminal statutes serve several purposes. *See* Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution,* 102 U. PA. L. REV. 630, 632-35 (1954). A defendant faces an unfair burden in defending himself against charges of long past conduct. *Id.* at 632. As time passes, defense witnesses may die or move away. *Id.* Memories fade and records are lost. *Id.* Furthermore, criminal prosecutions should be based on the most trustworthy evidence. *Id.* As time passes witnesses' memories fade, making their testimony less trustworthy. *Id.*

[19] 641 F.2d at 176. Count one of the indictment, the conspiracy count, charged Head with conspiring to bribe Congressman Daniel Flood and his aide in violation of sections 201(b) and (f) of Title 18 of the United States Code, 18 U.S.C. §§ 201(b) & (f) (1976); conspiring to give a thing of value to an Internal Revenue Service agent who was performing an audit on Head's corporation in violation of section 201(f) of Title 18 of the United States Code, 18 U.S.C. § 201(f) (1976); and conspiring to evade his corporation's federal income taxes in violation of sections 7201 and 7206 of Title 26 of the United States Code, 26 U.S.C. §§ 7201 & 7206 (1976). 641 F.2d at 176. The grand jury indicted Head on twelve other counts. *Id.* Count two alleged that Head paid a $1000 bribe to Congressman Flood. *Id.* The trial court dismissed count two on the Government's motion. *Id.* Counts three through seven charged Head with giving a thing of value, an $11,000 low interest loan and forbearance in collecting amounts due, to an Internal Revenue Service agent who was performing an audit on Head's corporation. *Id.* The district court dismissed counts three through seven after the Govern-

The Government alleged twenty overt acts in furtherance of the conspiracy.[20] Only five of the alleged acts, however, had occurred within the five year statute of limitations period.[21] The jury returned a general guilty verdict against Head on the conspiracy count.[22] Head challenged the conviction arguing that the trial court's jury instructions on the conspiracy count were fatally defective because the instructions failed to address the statute of limitations issue relevant to the bribery and "giving a thing of value" objects of the conspiracy.[23] The Government argued in response that Head failed to request a proper instruction.[24] The Government argued further that even if the trial court erred by failing to give a statute of limitations instruction, the possibility of prejudice to Head was too speculative to warrant reversal.[25]

The Fourth Circuit rejected as meritless the Government's failure to request argument.[26] The *Head* court also rejected the Government's speculative prejudice argument and reversed Head's conviction.[27] The court refused to speculate that the jury found the conspiracy related to the tax object[28] or that the verdict rested upon an overt act committed within the limitations period.[29] Instead, the Fourth Circuit held that a

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ment presented its case. *Id.* at 176-77. The district court found either no evidence of forebearance or that forebearance was not a thing of value within the meaning of section 201(f) of Title 18 of the United States Code. 641 F.2d at 177. Counts eight through thirteen charged Head with evading his corporation's taxes. *Id.* The trial court dismissed four of those counts because of insufficient evidence. *Id.* The jury acquitted Head on the remaining two counts. *Id.* Head, therefore, stood convicted only of conspiracy. *See id.* at 176-77.

[20] *Id.* at 177.

[21] *Id.*; *see* text accompanying note 4 *supra.*

[22] 641 F.2d at 177. The generally guilty verdict against Head did not reveal upon which overt act(s) the jury based its verdict. *See id.*; *see* text acompanying notes 9-12 *supra.*

[23] 641 F.2d at 177. Head argued that the trial judge should have instructed the jury that the Government must prove that a conspirator committed an overt act within the limitations period in furtherance of the bribery and "giving a thing of value" objects of the conspiracy. *Id.*; *see* note 19 *supra.* Head did not contend, however, that a similar instruction was necessary for the tax evasion object of the conspiracy. 641 F.2d at 177 n.1. The statute of limitations for the bribery and giving a thing of value objects of the conspiracy is five years. *Id.*; *see* 18 U.S.C. § 3282 (1976); note 4 *supra.* The statute of limitations for the tax object, however, is six years. 641 F.2d at 177 n.1; *see* 26 U.S.C. §§ 6531(3) & (8) (1976); note 4 *supra.*

[24] 641 F.2d at 177.

[25] *Id.*

[26] *Id.* The *Head* court noted that defense counsel twice requested the judge to instruct the jury that to convict under the conspiracy count the jury must find that a conspirator committed an over act within the five-year statute of limitations period. *Id.* Defense counsel then asked a third time for the instruction after the jury returned a partial verdict acquitting Head on the tax charges. *Id.* On all three occasions the district court judge denied defense counsel's request. *Id.*

[27] *Id.* at 178-79.

[28] *Id.* at 177-78; *see* text accompanying note 23 *supra.* The Fourth Circuit noted that the jury acquitted Head on the substantive tax counts. 641 F.2d at 178 n.6. Therefore, the likelihood that the jury found that the conspiracy related to the tax object was remote. *Id.*

[29] *Id.* at 178.

reviewing court must reverse a general guilty verdict upon a conspiracy count when the court cannot determine that the verdict does not rest upon a wrongfully submitted alleged overt act.[30]

The Fourth Circuit reasoned that Supreme Court precedent compelled reversal of Head's conviction.[31] The *Head* court relied on *Stromberg v. California*,[32] in which the Supreme Court held that an appellate court must reverse a general guilty verdict when the court cannot determine whether the verdict rests upon an erroneous or valid view of the law.[33] The Fourth Circuit also noted *Yates v. United States*,[34] in which the Supreme Court held that a reviewing court must reverse a general guilty verdict when the verdict is supportable on one ground but not on another, and the court cannot determine which ground the jury selected.[35]

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[30] *Id.* at 178-79.

[31] *See id.* at 179.

[32] 283 U.S. 359 (1931).

[33] 641 F.2d at 179; *see* 283 U.S. at 367-68 (1931). In *Stromberg*, California tried the defendant under a state statute proscribing the display of a red flag as a sign, symbol, or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to seditious propaganda. *Id.* at 361. The California statute involved in *Stromberg* prohibited the display of a red flag only if a person displayed the flag for the purposes set out in the statute. *See id.* at 361. The statute's prohibited purposes are set out in the disjunctive. *See id.* at 363. The California trial court stated, therefore, that the jury could convict if it found beyond a reasonable doubt that the defendant displayed the red flag for any one or more of the three purposes that the statute mentions. *Id.* at 363-64. Stromberg did not object to the trial court's interpretation of the statute. *Id.* at 364-65. The trial judge instructed the jury that it could convict on a finding that Stromberg displayed the flag for any one or more of the purposes that the statute enumerated. *Id.* at 363-64. The jury convicted Stromberg by general verdict. *Id.* at 367-68. On review, the Supreme Court declared that while California could proscribe the display of a red flag for the latter two purposes, the state constitutionally could not proscribe the display of a red flag as a sign, symbol, or emblem of opposition to organized government. *Id.* at 369; *see generally* Note, *Constitutional Law—Sedition Statutes—Display of Flags and Emblems of Opposition to Organized Government*, 5 S. CAL. L. REV. 172 (1931). The Court then reversed the conviction, reasoning that because the verdict was general a reviewing court cannot determine that the jury did not convict Stromberg under the unconstitutional clause. 283 U.S. at 368, 370.

[34] 354 U.S. 298 (1957).

[35] 641 F.2d at 179; *see* 354 U.S. at 311-12. In *Yates*, the jury convicted the defendant on a single count indictment of conspiring to advocate the overthrow of the government and conspiring to organize, as the Communist Party, a society to so advocate. *Id.* at 300. On review, the Supreme Court held that the statute of limitations barred prosecution for the organizing objective of the conspiracy. *Id.* at 304. The Supreme Court construed "organize" to mean the discrete act of founding an organization. *Id.* at 310-11. The Court rejected the Government's argument that "organize" means the continuing process whereby an organization sustains its membership. *Id.* at 304. Under the Court's interpretation of organize, the Communist Party had been organized well outside the applicable limitations period. *Id.* at 312. The Court then reversed the conspiracy conviction reasoning that it could not determine whether the overt act the jury found was one in furtherance of the "advocacy" or "organizing" function. *Id.* at 311-12.

In *Yates*, the Government argued that the trial court had instructed the jury that in order to convict the defendant the jury must find a conspiracy involving both objectives. *Id.*

Several circuits have considered the question whether an appellate court must reverse a conviction when the court cannot determine whether a guilty verdict rests upon an impermissible ground.[36] While noting that not all of the federal circuit courts have applied the *Stromberg-Yates* rationale to reverse conspiracy convictions, the Fourth Circuit did, however, find support for its decision among the circuits.[37] The *Head* decision conflicts with decisions from the Second Circuit[38] and conforms with decisions from the Third and Ninth Circuits.[39] The decisions from the Seventh Circuit are inconsistent.[40] The Fourth Circuit found the views of the Third and Ninth Circuits most persuasive.[41]

The Third Circuit has applied the *Stromberg-Yates* rationale strictly.[42] In *United States v. Tarnopol*,[43] the Third Circuit reversed a conspiracy conviction after the jury had convicted Tarnopol on a triple-objective conspiracy count.[44] The general verdict followed the "one is enough" instruction.[45] The Third Circuit found that although the Government presented evidence from which a jury could have convicted for two of the objectives, the evidence with respect to the third objective was legally insufficient to support a conviction.[46] The *Tarnopol* court reversed the conspiracy conviction because the court could not determine whether

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at 311. The Court held, however, that the instructions were too ambiguous to warrant the inference that the jury understood that it must find a conspiracy involving both objectives in order to convict. *Id.* If the trial judge had instructed the jury that it must find a conspiracy involving both objectives, the conviction presumably could stand because the reviewing court would have been able to determine that the multiple-objective conspiracy conviction rested on a proper ground.

[36] *See* text accompanying notes 42-75 *infra.*

[37] *See* 641 F.2d at 178-79.

[38] *See* text accompanying notes 55-62 *infra.*

[39] *See* text accompanying notes 42-54 *infra.*

[40] *See* text accompanying notes 63-75 *infra.*

[41] 641 F.2d at 178-79.

[42] *See* text accompanying notes 43-47 *infra.*

[43] 561 F.2d 466 (3d Cir. 1977).

[44] *Id.* at 475-76. The jury convicted Tarnopol for conspiring to defraud the United States in violation of section 371 of Title 18 of the United States Code, 18 U.S.C. § 371 (1976); conspiring to use the mails to commit fraud in violation of section 1341 of Title 18 of the United States Code, 18 U.S.C. § 1341 (1976); and conspiring to commit a fraud in violation of section 1343 of Title 18 of the United States Code, 18 U.S.C. § 1343 (1976). 561 F.2d at 467.

[45] 561 F.2d at 473-74. The "one is enough" instruction informs the jury that it may convict under a multiple-objective conspiracy count if the evidence convinces the jury beyond a reasonable doubt that a conspiracy existed to violate any one of the objective offenses. *See* text accompanying note 8 *supra.*

[46] 561 F.2d at 473-76. The Third Circuit found that the charge of conspiracy to defraud the United States by impeding the functions of the Internal Revenue Service rested solely on a failure to record certain sales in a sales journal and an accounts receivable ledger. *Id.* at 474. The court held that as a matter of law the failure to record was not enough to constitute a conspiracy to defraud the United States by impeding the functions of the Internal Revenue Service. *Id.*

the jury based its verdict upon a finding that the defendant conspired to commit the third objective alone.[47]

The *Head* court relied heavily upon the Ninth Circuit's decision in *United States v. Carman*[48] to support its conclusion that the reasoning of *Stromberg* and *Yates* compelled reversal of Head's conspiracy conviction.[49] In *Carman*, the jury returned a general guilty verdict after the "one is enough" instruction on a triple-objective conspiracy count.[50] The jury also convicted Carman on all three substantive objective counts.[51] On appeal, the Ninth Circuit overturned one of the substantive offense convictions because Carman's conduct did not fall within the statute's proscription.[52] The *Carman* court then reversed the conspiracy conviction.[53] The court reasoned that the jury may have convicted Carman only on finding he conspired to commit the substantive offense that the Ninth Circuit later overturned.[54]

The *Head* decision conflicts with the reasoning and results of two Second Circuit decisions.[55] In *United States v. Papadakis*,[56] the jury had convicted Papadakis' co-defendant on a triple-objective conspiracy count.[57] On appeal, the Second Circuit assumed, without deciding, that the Government's evidence with respect to one objective was legally insufficient to support a conviction.[58] The *Papadakis* court, however,

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[47] *Id.* at 475. *Accord*, United States v. Dansker, 537 F.2d 40, 51 (3d Cir. 1976) (conviction by general verdict on single conspiracy count submitted to jury on alternative theories, only one of which legally sufficient to justify conviction, must be reversed because conviction may have rested solely upon impermissible ground), *cert. denied*, 429 U.S. 1038 (1977).

[48] 577 F.2d 556 (9th Cir. 1978).

[49] *See* 641 F.2d at 179.

[50] *See* 577 F.2d at 558, 566. The Government charged Carman with conspiring to commit bribery in violation of section 201(b) of Title 18 of the United States Code, 18 U.S.C. § 201(b) (1976); conspiring to transport money taken by fraud over a state line in violation of section 2314 of Title 18 of the United States Code, 18 U.S.C. § 2314 (1976); and conspiring to commit securities fraud in violation of sections 77q(a) and 77x of Title 15 of the United States Code, 15 U.S.C. §§ 77q(a) & 77x (1976). 577 F.2d at 558.

[51] 577 F.2d at 558.

[52] *Id.* at 564-65. The Ninth Circuit overturned Carman's conviction for transporting money taken by fraud. *Id.* at 565. The court stated that while Carman placed money beyond the reach of his creditors, Carman's action did not violate section 2314 of Title 18 of the United States Code. *Id.*

[53] 577 F.2d at 566-68.

[54] *Id.* at 566.

[55] *See* text accompanying notes 56-62 *infra*.

[56] 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975).

[57] 510 F.2d at 289-90. The jury convicted Novoa of conspiring to obstruct justice in violation of section 371 of Title 18 of the United States Code, 18 U.S.C. § 371 (1976); conspiring to commit narcotics offenses in violation of sections 173 and 174 of Title 21 of the United States Code, 21 U.S.C. §§ 173 & 174 (repealed 1970), and section 3 of Title 18 of the United States Code, 18 U.S.C. § 3 (1976); and conspiracy to obstruct communication of information to a federal investigator in violation of section 1510 of Title 18 of the United States Code, 18 U.S.C. § 1510 (1976). 510 F.2d at 289-90.

[58] *See* 510 F.2d at 297. The Second Circuit assumed that the Government's evidence with respect to the obstruction of communication objective of the conspiracy was legally insufficient to support a conviction. *See id.*

upheld the conspiracy conviction reasoning that when a conspiracy has multiple objectives, a court should uphold a conviction so long as the evidence is sufficient to show that the defendant conspired to commit at least one of the objectives.[59] The *Papadakis* court failed to address the fact that a general verdict leaves the reviewing court uncertain which offense in a multiple-objective conspiracy the jury found that the defendant conspired to commit.[60] The Second Circuit reached the same result in *United States v. Dixon*.[61] The *Dixon* court reasoned that because the jury had convicted Dixon on a substantive offense validly charged in the conspiracy count, no basis existed on which to question the guilty verdict on the conspiracy count.[62]

The decisions from the Seventh Circuit regarding the problem created by general guilty verdicts are inconsistent.[63] In *United States v. Tanner*,[64] the jury had convicted Tanner's two co-defendants on a multiple-objective conspiracy count.[65] The general verdict again followed the "one is enough" instruction.[66] On appeal, the Seventh Circuit held that one of the objectives of the conspiracy failed to state a federal crime.[67] The *Tanner* court, however, upheld the conspiracy conviction reasoning that a reviewing court should uphold a multiple-objective conspiracy conviction so long as any one of the alleged objectives is unchallenged.[68] In a later case, *United States v. Baranski*,[69] the jury had con-

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[59] *Id.* at 297.

[60] *See id.* at 297-98; 641 F.2d at 178.

[61] 536 F.2d 1388, 1402 (2d Cir. 1976). In *Dixon* the jury convicted the defendant on a double objective conspiracy count. *Id.* at 1392. On review, the Second Circuit held that the evidence was insufficient to support a conviction for conspiracy to violate one of the objective offenses. *Id.* at 1401. The court, however, upheld the conspiracy conviction. *Id.* at 1402.

[62] *Id.* The *Dixon* court apparently reasoned that because the jury had convicted Dixon on a substantive count validly charged in the conspiracy count, the jury's verdict must have rested not on the impermissible ground, but on a finding that Dixon conspired to commit the validly charged offense. *See id.* The *Head* court stated that the *Dixon* analysis was inapplicable to Head because the jury has acquitted Head on the substantive counts against him. *See* 641 F.2d at 179. Therefore, the *Head* court declined to approve or disapprove of the *Dixon* court's analysis. *See id.* at 179 n.7. The Fourth Circuit noted, however, that a guilty verdict on a substantive offense does not necessarily show that the jury also found a conspiracy to commit that offense when the conspiracy has multiple objectives. *Id.*

[63] *See* text accompanying notes 64-75 *infra*.

[64] 471 F.2d 128 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972).

[65] *Id.* at 131. The grand jury indicted Tanner, Pearl, Rice, and Chipman for crimes arising out of the bombing of the *S.S. Howard L. Shaw* in Calumet Harbor, Chicago and a series of other bombing episodes. *Id.* at 131. The jury convicted all defendants of conspiring to bomb the *Shaw*. *Id.*

[66] *See* United States v. Carman, 577 F.2d at 566; 471 F.2d at 140. The *Tanner* court never specifically stated that a general verdict followed the "one is enough" instruction. *See* 471 F.2d at 143. The fact can be inferred, however, from the *Carman* court's treatment of *Tanner*. *See* 577 F.2d at 566.

[67] 471 F.2d at 141. The Seventh Circuit held that the bombing of the *Shaw* was not a federal crime because the ship was not within waters that would confer jurisdiction upon the federal government. *Id.*

[68] *Id.* at 140.

[69] 484 F.2d 556 (7th Cir. 1973).

victed Baranski on a triple-objective conspiracy count.[70] The general verdict followed the "one is enough" charge.[71] The Seventh Circuit found on review that one of the objective offenses was unconstitutional.[72] The *Baranski* court then reversed the conviction on the conspiracy count, declining to speculate whether the conviction rested upon a permissible or impermissible ground.[73] The *Baranski* court distinguished *Tanner* on the ground that the challenge in *Tanner* did not go to the validity of the underlying objective offense.[74] Instead, the *Tanner* defendants argued and the Seventh Circuit held that the defendant's action did not in fact constitute a substantive offense over which the United States had jurisdiction.[75]

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[70] *Id.* at 558. Baranski, accompanied by three others, entered a draft board office in Evanston, Illinois, opened the drawers and filing cabinets, pulled some files, and poured animal blood over them. *Id.* The defendants then waited for police to arrive and submitted to arrest quietly. *Id.* A federal grand jury later indicted Baranski on charges arising out of the incident. *Id.* The indictment contained a count charging Baranski with conspiring willfully to damage government property in violation of section 1361 of Title 18 of the United States Code, 18 U.S.C. § 1361 (1976); conspiring to remove, mutilate, and destroy government records in violation of section 2071 of Title 18 of the United States Code, 18 U.S.C. § 2071 (1976); and conspiring to interfere with the administration of the draft in violation of section 462(a) of Title 50 of the United States Code, 50 U.S.C. § 462(a) (1976) (omitted as superceded). 484 F.2d at 558.

[71] 484 F.2d at 560.

[72] *Id.* at 569. The *Baranski* court held section 462(a) of Title 50 of the United States Code, which prohibits interference with the administration of the draft, 50 U.S.C. § 462(a) (1976) (omitted as superceded), unconstitutional on its face for failure to give potential actors and law enforcement officials adequate guidance with respect to conduct privileged by the first amendment. 484 F.2d at 569.

[73] 484 F.2d at 560-61, 571.

[74] *Id.* at 560; *see* 471 F.2d at 141. The *Baranski* court noted that the *Tanner* court held that factually the defendants had not violated the federal statute because they bombed the *Shaw* while the ship rested in waters that would not confer jurisdiction over the crime upon the United States. 484 F.2d at 560; *see* note 67 *supra*. The *Baranski* court reasoned that the *Tanner* holding involved the well-established principle that conspirators need not commit the crime they are charged with conspiring to commit. *Id.*; *see* text accompanying note 5 *supra*. The *Tanner* court had reasoned, therefore, that although the defendants did not actually violate the substantive law the Government charged them with conspiring to commit, the defendants were criminally liable for conspiring to violate the substantive offense. *See* 471 F.2d at 143; 484 F.2d at 560. In *Baranski*, however, the Government charged the defendant with conspiring to violate an unconstitutional statute. 484 F.2d at 560, 569. The *Baranski* court said that the difference distinguished *Tanner*. *Id.* at 560. The *Baranski* court apparently reasoned that a defendant can be convicted for conspiring to violate a statute even though the defendant did not in fact violate the statute as long as the government has the power to punish defendants whose conduct in fact violates the statute. *See id.* If, on the other hand, the government constitutionally may not punish behavior proscribed in a statute, then the government may not punish defendants who conspire to engage in the behavior proscribed in the statute. *See id.*

[75] 471 F.2d at 141; *see* note 74 *supra*. One can rationalize the result, but not the broad language in *Tanner*, on the theory that conspirators need not commit the crime they are charged with conspiring to commit. *See* 471 F.2d at 140; text accompanying notes 5 & 68 *supra*.

The Fourth Circuit reached the appropriate conclusion in *Head*. Initially, the court properly dismissed the Government's contention that Head failed to request an instruction on the statute of limitations issue.[76] The record contains at least three requests by defense counsel for an instruction regarding the statute of limitations.[77] Having dismissed the Government's failure to request argument, the Fourth Circuit then correctly declined to speculate whether Head's conviction rested upon a permissible or impermissible ground and reversed his conviction.[78] Because the jury returned a general guilty verdict, the Fourth Circuit could not determine whether the conviction rested upon an overt act committed within the limitations period, nor could the court determine whether the jury found the conspiracy related to the tax object, which Head did not argue had required a statute of limitations instruction.[79] The *Head* court, therefore, by refusing to speculate upon which overt act the jury based its verdict, and similarly refusing to speculate which objective offense the jury found Head conspired to commit, correctly interpreted and followed the Supreme Court's decisions in *Stromberg* and *Yates* holding that a reviewing court must reverse a conviction when it cannot determine that the jury did not convict upon an impermissible ground.[80] Accordingly, the Fourth Circuit's decision in *Head* creates a clear majority view among the circuits that have considered the question that courts must apply the *Stromberg-Yates* rule strictly.[81]

The *Head* decision is consistent not only with Supreme Court precedent, but also with the public's interest in the fair administration of criminal justice.[82] The *Stromberg-Yates* rule is both appropriate and necessary to protect the rights of the accused.[83] To permit a reviewing court to uphold a conviction though the court cannot determine that the conviction does not rest upon an invalid ground would be to approve a

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[76] *See* text accompanying notes 24 & 26 *supra*.

[77] 641 F.2d at 177; *see* note 26 *supra*.

[78] *See* text accompanying notes 28-30 *supra*.

[79] 641 F.2d at 178; *see* text accompanying note 23 *supra*.

[80] *See* text accompanying notes 32-35 *supra*.

[81] *See* text accompanying notes 36-40 & 42-75 *supra*.

[82] *See* text accompanying notes 83-85 *infra*.

[83] *See* Williams v. North Carolina, 317 U.S. 287, 292 (1942). In *Williams*, the defendants, Williams and Hendrix, both secured divorces from their North Carolina spouses in a Nevada court. *Id.* at 289-90. They then returned to North Carolina where they lived together as man and wife. *Id.* at 290. The state, thereafter, indicted Williams and Hendrix for bigamous cohabitation. *Id.* at 289. North Carolina tried the case on alternative theories. *Id.* at 290-91. First, the State contended that a Nevada divorce decree based on substitute service where the defendant made no appearance is void in North Carolina. *Id.* at 290. Second, the State contended that Nevada lacked personal jurisdiction over the divorce defendants because the divorce plaintiffs never acquired the prerequisite bona fide domicile in Nevada. *Id.* at 291. The jury convicted Williams and Hendrix by general verdict. *Id.* On review, the Supreme Court found one of the State's theories constitutionally infirm. *See id.* at 297-302, 304. Unable to determine whether the jury verdict rested on the permissible ground, the Court reversed the conviction. *Id.* at 304.

procedure that could impair the defendant's rights.[84] A reviewing court should not tolerate a procedure that may prejudice the defendant unfairly.[85]

In *United States v. Head*, the Fourth Circuit reversed a conspiracy conviction because the court could not determine whether the verdict rested upon a valid or invalid ground.[86] The *Head* court correctly followed the Supreme Court's decisions in *Stromberg* and *Yates* which held that a reviewing court must reverse a conviction when it cannot determine that the jury did not convict upon an impermissible ground.[87] The Fourth Circuit also appropriately relied upon the reasoning applied by the Third and Ninth Circuits to this question and properly rejected the available Second Circuit precedent.[88] Furthermore, the Fourth Circuit refused to countenance a procedure that could prejudice unfairly the defendant's rights.[89] *Head*, therefore, is in line with the public's interest in the fair administration of criminal justice.[90]

MICHAEL L. KRANCER

D. Misjoinder of Defendants is Reversible Error

Joinder of defendants[1] and the double jeopardy clause of the fifth

[84] *Id.* at 292.
[85] *See id.*
[86] *See* text accompanying notes 27-30 *supra.*
[87] *See* text accompanying notes 31-35 *supra.*
[88] *See* text accompanying notes 42-62 *supra.*
[89] *See* text accompanying notes 83-85 *supra.*
[90] *See* text accompanying notes 82-85 *supra.*

[1] Rule 8(b) of the Federal Rules of Criminal Procedure provides:

(b) Joinder of defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

FED. R. CRIM. P. 8(b).

The Advisory Committee's Notes to rule 8(b) state that the rule is substantially a restatement of existing law. *Notes to the Rules of Criminal Procedure*, 4 F.R.D. 405, 412 (1945); *see* Ingram v. United States, 272 F.2d 567, 568-70 (4th Cir. 1959) (carefully considering Supreme Court and circuit court precedent for the rule); Rakes v. United States, 169 F.2d 739, 743 (4th Cir.) (dictum), *cert. denied*, 335 U.S. 826 (1948). The Supreme Court has stated that the Advisory Committee designed rule 8 to promote judicial economy and to avoid multiple trials when a court can achieve these objectives without substantial prejudice to the defendant's right to a fair trial. Bruton v. United States, 391 U.S. 123, 131 n.6 (1968) (reversing defendant's conviction because of prejudicial joinder); *accord*, Cataneo v. United States, 167 F.2d 820, 823 (4th Cir. 1948) (suggesting that trial courts applying rule 8 should balance defendant's right to trial free from prejudice against need for judicial economy). *But see* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 141 (2d ed. 1969) [hereinafter cited as WRIGHT] (courts should never balance right to fair trial against notions

amendment[2] cause much confusion in federal criminal proceedings.[3] Rule 8(b) of the Federal Rules of Criminal Procedure allows the government to join a number of defendants in a single trial if all the defendants participated in the same act or series of acts.[4] The double jeopardy clause pro-

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of economy or efficiency). *See generally* Orfield, *Joinder in Federal Criminal Procedure*, 26 F.R.D. 23, 71-75 (1960) [hereinafter cited as Orfield] (same).

Rule 8(a) permits joinder of offenses. *See* notes 70 & 99 *infra*.

[2] The fifth amendment protects a defendant from double jeopardy. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend V. The protection against double jeopardy extends back to ancient Greece and Rome. *See* J. SIGLER, DOUBLE JEOPARDY 1-2 (1969) [hereinafter cited as SIGLER]. The English common law included pleas of former acquittal and former conviction, which barred further prosecution. *See* 4 W. BLACKSTONE, COMMENTARIES * 335 (describing bar of former jeopardy as universal maxim of common law of England). *See generally* SIGLER, *supra*, at 3-21 (tracing development of double jeopardy doctrine in England). The prohibition against double jeopardy has become fundamental to the American scheme of justice. *See* Benton v. Maryland, 395 U.S. 784, 796 (1969) (double jeopardy clause of United States Constitution applies to states). *See generally* SIGLER, *supra*, at 21-34. For a discussion of the current status of the law concerning double jeopardy, see United States v. DiFrancesco, 449 U.S. 117, 126-31 (1980) (dictum); Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81 (1979) [hereinafter cited as Westen & Drubel] (analyzing past Supreme Court decisions on double jeopardy); *Tenth Annual Survey of Criminal Procedure: United States Supreme Court and Courts of Appeal, 1979-80*, 69 GEO. L.J. 403, 403-16 (1980) (survey).

[3] Professor Moore remarks in his treatise that no other federal rule gives rise to as much confusion as rule 8. 8 J. MOORE, FEDERAL PRACTICE ¶ 8.02[1] (2d ed. 1980) [hereinafter cited as MOORE]. Professor Moore attributes the confusion to the absence of any clarification by the Advisory Committee of the terms of rule 8. *Id.* at n.1. *See generally* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO JOINDER AND SEVERANCE, § 1.2 (Approved Draft, 1968) [hereinafter cited as ABA PROJECT]. Section 1.2 suggests new standards for the joinder of defendants. *Id.* The commentary to § 1.2 notes that courts have considerable difficulty applying the broad language of rule 8(b). *Id.* The commentary also discusses a number of cases in which rule 8(b) has produced conflicting opinions. *Id.*

In addition to the complexities surrounding rule 8(b), the Supreme Court has commented several times on the confusion surrounding the application of double jeopardy protection. *See* Burks v. United States, 437 U.S. 1, 15 (1978) (attributing confusion to failure of courts to distinguish between trial error and evidentiary insufficiency); Sanabria v. United States, 437 U.S. 54, 80 (1978) (Blackmun, J., dissenting) (Court's struggle to create order out of confusion surrounding its numerous double jeopardy decisions); Greene v. Massey, 437 U.S. 19, 25 n.7, 26 nn. 9 & 10 (1978) (Court expressly reserves several questions regarding double jeopardy for future consideration). *See generally* Westen & Drubel, *supra* note 2, at 82-85 (attributing confusion to failure of individual Supreme Court justices to develop coherent positions regarding double jeopardy); *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 108, 108-09 (1978) (in 1978 alone Supreme Court overruled two lines of double jeopardy precedent and issued decisions both expanding and contracting scope of double jeopardy protection).

[4] *See* note 1 *supra*. When defendants do not engage in the same act or series of acts, the government cannot join them properly. *See, e.g.*, United States v. Martin, 567 F.2d 849, 853 (9th Cir. 1977) (joinder was improper when government failed to show that defendants participated in same act or series of acts); United States v. Whitehead, 539 F.2d 1023, 1026 (4th Cir. 1976) (same); United States v. Bova, 493 F.2d 33, 37 (5th Cir. 1974) (same); King v. United States, 555 F.2d 700, 704 (1st Cir. 1966) (same); Ingram v. United States, 272 F.2d 567, 569 (4th Cir. 1959) (same).

hibits the government from retrying an acquitted defendant.[5] A verdict of acquittal, however, is not valid unless it meets the requirements of rule 31(a) of the Federal Rules of Criminal Procedure.[6]

The Fourth Circuit recently addressed claims of misjoinder and double jeopardy in *United States v. Chinchic*.[7] One defendant in *Chinchic* claimed that a prior acquittal barred his retrial and conviction.[8] Both defendants claimed that the government improperly joined them for trial in the district court.[9] The *Chinchic* court first addressed the question of whether a jury vote of acquittal, taken in the jury room but never announced in court, was a valid acquittal for purposes of double jeopardy.[10] The court then considered whether the government properly could join defendants who committed separate crimes involving common participants.[11]

In April 1977 a group of men, including Larry Roger Chinchic and Alfred Anthony Conti, travelled from Florida to Wilmington, North

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[5] *See* United States v. DiFrancesco, 449 U.S. 117, 129-30 (1980) (dictum) (acquittals are accorded special weight); Arizona v. Washington, 434 U.S. 497, 503 (1978) (dictum) (constitutional protection against double jeopardy is unequivocal); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam) (double jeopardy applies even when acquittal was based on erroneous foundation). Acquittal bars retrial, even when the acquittal is clearly erroneous, because the government, with its superior resources, might wear down an innocent defendant and obtain a wrongful conviction. *See* Green v. United States, 355 U.S. 184, 188 (1957) (government could not retry defendant after jury discharged).

The Supreme Court has stated that the double jeopardy clause protects a defendant against a second prosecution in three situations. *See* North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (citing Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 265-66 (1965)). The double jeopardy clause protects a defendant against a second prosecution for the same offense after acquittal. *See* Fong Foo v. United States, 369 U.S. at 143 (even when acquittal based on judge's erroneous ruling). The double jeopardy clause protects against a second prosecution for the same offense after conviction. *See, e.g.*, Breed v. Jones, 421 U.S. 519, 529-30 (1975) (state could not retry defendant as adult after convicting defendant as juvenile); *In re* Nielsen, 131 U.S. 176, 187 (1889) (state could not try defendant for unlawful cohabitation after convicting defendant of adultery). The double jeopardy clause protects against multiple punishments for the same offense. *See, e.g.*, Brown v. Ohio, 432 U.S. 161, 169-70 (1977) (state could not impose cumulative punishments for greater and lesser offenses); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1873) (Constitution prohibits government from punishing defendant twice for same offense as well as trying him twice).

[6] Rule 31(a) of the Federal Rules of Criminal Procedures provides: "The verdict shall be unanimous. It shall be returned by the jury to the judge in open court." FED. R. CRIM. P. 31(a). The federal courts have construed rule 31(a) strictly. *See, e.g.*, United States v. Love, 597 F.2d 81, 85 (6th Cir. 1979) (verdict not valid until deliberations are over and result announced in open court); Virgin Islands v. Smith, 558 F.2d 691, 694 (3d Cir.) (same), *cert. denied*, 434 U.S. 957 (1977); United States v. Taylor, 507 F.2d 166, 168 (5th Cir. 1975) (same); United States v. Medansky, 486 F.2d 807, 813 (7th Cir. 1973) (same), *cert. denied*, 415 U.S. 989 (1974).

[7] 655 F.2d 547 (1981).

[8] *Id.* at 549-50.

[9] *Id.* at 550.

[10] *Id.* at 549-50; *see* text accompanying notes 41-45 *infra*.

[11] 655 F.2d at 550-51; *see* text accompanying notes 46-52 *infra*.

Carolina.[12] The object of the trip was to find stores to burglarize.[13] The group considered, among others, Gibson's Department Store and Reed's Jewelry Store.[14] The group burglarized Gibson's and took the stolen merchandise to Conti's home in Ohio.[15]

A month later the same group, less Chinchic, returned to Wilmington and burglarized Reed's.[16] The group took the merchandise from Reed's to Nick Melia's home in Connecticut.[17] Melia had arranged a buyer for the goods.[18] Melia did not participate in the Gibson's burglary or in the subsequent disposal of goods from Gibson's.[19]

Following a FBI investigation, the government charged Chinchic, Melia, and Conti in a single federal indictment.[20] Court one charged Chinchic and Conti with interstate transportation of stolen goods from Gibson's.[21] Count two charged Conti with interstate transportation of the stolen goods from Reed's.[22] Count three charged Melia with receiving the stolen goods from Reed's.[23]

The government joined Chinchic, Conti, and Melia under rule 8(b) for jury trial in the district court of the Eastern District of North Carolina.[24] The jury deliberated on the case for several hours, then informed the judge that it had reached a unanimous decision on one defendant.[25] The jury did not indicate on which defendant it had reached its verdict or whether the decision was for guilty or not guilty.[26] The trial judge nevertheless ordered the jury to continue deliberating.[27] The jury

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[12] 655 F.2d at 549. Chinchic travelled to Florida with Alfred Anthony Conti, Robert Eugene Mercier, Edmund Melvin Maras, and Leo Fraley. *Id.; see* notes 21-22 *infra.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 549, 550.

[20] *Id.* at 548.

[21] *Id.* The government charged Chinchic, Conti, Maras, Mercier, and Fraley with interstate transportation of stolen goods under 18 U.S.C. § 2314 (1976). 655 F.2d at 548, 548 n.1.

[22] 655 F.2d at 548. The government charged Conti, Maras, Mercier, and Fraley with interstate transportation of stolen goods under 18 U.S.C. § 2314 (1976). 655 F.2d at 548, 548 n.1.

[23] 655 F.2d at 548. The government charged Melia with receiving stolen goods under 18 U.S.C. § 2315 (1976). 655 F.2d at 548.

[24] 655 F.2d at 548 (by implication); FED. R. CRIM. P. 8(b). Mercier and Maras participated in the FBI's witness protection program, therefore, the government handled their cases separately. 655 F.2d at 548 n.1. The government did not try Fraley with Chinchic and Melia because Fraley was missing at the time of their trial. *Id.*

[25] 655 F.2d at 548.

[26] *Id.*

[27] *Id.*; *see* text accompanying notes 61-65 *infra.*

subsequently reported that it could not reach a verdict on any count, and the trial judge declared a mistrial.[28]

On retrial, both Chinchic and Melia moved for severance on the ground of misjoinder under rule 8(b).[29] The court denied the motions.[30] Melia also moved for dismissal of the indictment against him on the ground of double jeopardy.[31] Melia claimed that the jury had voted to acquit him at the first trial and that the double jeopardy clause, therefore, barred a second trial on the same charge.[32] The government stipulated that the jury had agreed to acquit Melia, but that one juror changed his mind after the trial judge sent the case back for further deliberation.[33] The district court in the second trial denied Melia's motion for dismissal.[34] At the close of the government's case, Chinchic and Melia renewed their motions for severance based on misjoinder.[35] The trial court again denied the motions.[36] The jury returned verdicts of guilty against both defendants on all counts.[37]

On appeal to the Fourth Circuit, Chinchic and Melia claimed that the district court erroneously allowed the government to try their cases together.[38] Chinchic and Melia contended that the two burglaries were separate and unrelated acts and, therefore, not suitable for joinder under rule 8(b).[39] Melia further contended that the jury's vote of acquit-

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[28] 655 F.2d at 548.

[29] *Id.* The Fourth Circuit disposed of Conti's appeal separately. *Id.* at 548 n.1; United States v. Conti, No. 80-5161 (4th Cir. July 14, 1981) (per curiam) (unpublished).

[30] 655 F.2d at 548. In addition to their motion for severance under rule 8, Chinchic and Melia moved unsuccessfully under rule 14 for relief from prejudicial joinder. *Id.*; *see* note 39 *infra*.

[31] 655 F.2d at 548, 549.

[32] *Id.*

[33] *Id.* at 548.

[34] *Id.*

[35] *Id.* at 549.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 550. Chinchic and Melia did not contend that the government improperly joined Melia with the men who burglarized Reed's. *Id.* A defendant who receives stolen goods participates in the same series of acts as the defendant who stole the goods. *See, e.g.*, United States v. Franks, 511 F.2d 25, 29 (6th Cir.) (joinder of defendant charged with transporting explosives and defendant charged with theft and transportation of explosives), *cert. denied*, 422 U.S. 1042 (1975); Kitchell v. United States, 354 F.2d 715, 718 (1st Cir.) (government properly can join one who steals cars with one who receives those stolen cars), *cert. denied*, 384 U.S. 1011 (1966).

[39] 655 F.2d at 550. In addition to their claim that the trial judge erroneously allowed their joinder under rule 8, Chinchic and Melia claimed that the trial judge erroneously denied their motions for severance under rule 14. *Id.* at 554. Rule 14 permits a trial judge to sever defendants for separate trials when joinder is proper, if it appears that the joinder will prejudice the defendants. FED. R. CRIM. P. 14; *see, e.g.*, United States v. Shuford, 454 F.2d 772, 776 (4th Cir. 1971) (severance proper when one defendant's defense rests on self-incriminating testimony of codefendant); United States v. Frazier, 394 F.2d 258, 260 (4th Cir.) (grant or denial of severance under rule 14 is in sound discretion of court), *cert. denied*,

tal in the first trial should have barred the government from retrying him and thus his second trial constituted double jeopardy.[40]

The *Chinchic* court initially rejected Melia's double jeopardy claim.[41] The court found the jury did not return a valid verdict of acquittal under rule 31.[42] Rule 31(a) provides that the jury will return its verdict to the judge in open court.[43] Since the trial judge never accepted the jury's vote of acquittal nor ever read a verdict of acquittal in open court,[44] the *Chinchic* court held that the vote the jury took in the jury room was merely preliminary and not a valid verdict of acquittal for double jeopardy purposes.[45]

The *Chinchic* court agreed, however, with Chinchic and Melia that the government impermissibly joined them under rule 8(b).[46] The court first reviewed the record for any evidence connecting Chinchic with the Reed's burglary or Melia with the Gibson's burglary.[47] The court found nothing in the record to indicate that Chinchic took any part in the planning or execution of the Reed's burglary, nor any suggestion that Melia took any part in the Gibson's burglary.[48] Since the court found no evidence connecting the two burglaries, it concluded that the two burglaries did not constitute a single act.[49]

The *Chinchic* court then considered whether the two burglaries constituted a series of acts.[50] The government alleged a common scheme among all the defendants, but failed to show any proof of that theory.[51]

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393 U.S 984 (1968). When joinder is improper under rule 8, however, the trial judge has no discretion to deny a motion for severance. *See* Ingram v. United States, 272 F.2d 567, 569 (4th Cir. 1959) (trial judge's denial of severance was reversible error when joinder was improper). Since the *Chinchic* court found that misjoinder of the defendants under rule 8 was reversible error, the court chose not to decide the appellant's claim of error based on rule 14. 655 F.2d at 551 n.4.

[40] 655 F.2d at 549.

[41] *Id.* at 549-50.

[42] *Id.* at 549.

[43] FED. R. CRIM. P. 31(a); *see* note 6 *supra.*

[44] 655 F.2d at 550.

[45] *Id.; see* text accompanying note 60 *infra.*

[46] 655 F.2d at 551.

[47] *Id.* at 550.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 550-51. If the government in *Chinchic* had shown that the two burglaries constituted a series of acts, the government would not have had to prove that each defendant participated in every act. *See* United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978) (joinder of defendants was proper although not every defendant charged in every count, since acts formed single series of acts), *cert. denied,* 440 U.S. 910 (1979); United States v. Wofford, 562 F.2d 582, 585 (8th Cir. 1977) (same), *cert. denied,* 435 U.S. 916 (1978); United States v. Gimelstob, 475 F.2d 157, 160 (3d Cir.) (same), *cert. denied,* 414 U.S. 828 (1973); United States v. Godel, 361 F.2d 21, 24 (4th Cir.) (same), *cert. denied,* 385 U.S. 838 (1966). *See generally* MOORE, *supra* note 3, ¶ 8.06[2]; WRIGHT, *supra* note 1, § 144.

[51] 655 F.2d at 551; *see* text accompanying notes 96-103 *infra.*

In the absence of any proof that the burglaries constituted a single act or series of acts, the *Chinchic* court concluded that the joinder of Chinchic and Melia did not meet the requirements of rule 8(b).[52]

Having concluded that the government impermissibly joined Chinchic and Melia, the *Chinchic* court considered whether the misjoinder was reversible error.[53] The rule in the Fourth Circuit is that misjoinder is reversible error unless the government could have introduced at separate trials all the evidence that it introduced at the joint trial.[54] The court found nothing in the record to indicate that the government could have introduced evidence of the Gibson's burglary at a separate trial of Melia.[55] The *Chinchic* court held, therefore, that since the government could not have introduced the same evidence at separate trials, the misjoinder was not harmless error.[56] Accordingly the court reversed the

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[52] 655 F.2d at 551. The *Chinchic* dissent concluded that the two burglaries did constitute a single series of acts. *Id.* at 552 (Bryan, J., dissenting). The dissent based its conclusion on the similar manner of the two burglaries, their proximity in time, and the common participants. *Id. But see* text accompanying notes 76-94 *infra.*

[53] 655 F.2d at 551. Rule 52(a) provides that courts should disregard any error which does not affect the defendant's substantial rights. FED. R. CRIM. P. 52(a) (harmless error rule). Until recently, the Fourth Circuit always held that the harmless error rule did not apply to misjoinder under rule 8. *See* Ingram v. United States, 272 F.2d 567, 570-71 (4th Cir. 1959) (not harmless error to violate fundamental procedural rule). The Fourth Circuit reasoned in *Ingram* that a jury could not distinguish between evidence the government offered against different defendants. *Id.* at 570; *accord,* McElroy v. United States, 164 U.S. 76, 81 (1896) (misjoinder not harmless error since it prejudiced defense); MOORE, *supra* note 3, ¶ 8.04[2]; WRIGHT, *supra* note 1, § 144 (relying in large part on *Ingram* for proposition that misjoinder is not harmless error). The Fourth Circuit, however, has recently adopted the position that the harmless error doctrine applies to misjoinder of defendants. *See* United States v. Seidel, 620 F.2d 1006, 1017 (4th Cir. 1980) (misjoinder harmless error since defendants not prejudiced). *See generally Fourth Circuit Review,* 38 WASH. & LEE L. REV. 526 (1981) (critical assessment of *Seidel*); *see also* United States v. Jamar, 561 F.2d 1103, 1106 n.4 (4th Cir. 1977) (dictum) (harmless error applies to joinder of offenses).

[54] 655 F.2d at 551; *see* United States v. Seidel, 620 F.2d 1006, 1012 (4th Cir. 1980) (misjoinder was harmless error since defendants were not prejudiced). A number of circuits have adopted the position that the harmless error doctrine applies to misjoinder. *See, e.g.,* United States v. Martin, 567 F.2d 849, 854 (9th Cir. 1977) (misjoinder of defendants is harmless error when no prejudice results); United States v. Franks, 511 F.2d 25, 29-30 (6th Cir.) (same), *cert. denied,* 422 U.S. 1042 (1975); Baker v. United States, 401 F.2d 958, 972 (D.C. Cir. 1968) (per curiam) (joinder was harmless error if improper), *cert. denied,* 400 U.S. 965 (1970); United States v. Granello, 365 F.2d 990, 993-95 (2d Cir. 1966) (harmless error doctrine applies to misjoinder), *cert. denied,* 386 U.S. 1019 (1967). *But see* United States v. Marionneaux, 514 F.2d 1244, 1248 (5th Cir. 1975) (harmless error doctrine never applies to misjoinder of defendants), *cert. denied,* 434 U.S. 903 (1977); United States v. Graci, 504 F.2d 411, 413-14 (3d Cir. 1974) (same); United States v. Eagleston, 417 F.2d 11, 14 (10th Cir. 1969) (same); Haggard v. United States, 369 F.2d 968, 973 (8th Cir. 1966) (same), *cert. denied,* 386 U.S. 1023 (1967); King v. United States, 355 F.2d 700, 703 (1st Cir. 1966) (same). *See generally* Note, *Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion,* 6 HOFSTRA L. REV. 533 (1978).

[55] 655 F.2d at 551.

[56] *Id.*

convictions of Chinchic and Melia and remanded their cases for separate trials.[57]

Melia's double jeopardy claim was clearly without merit. Double jeopardy prohibits retrial of an acquitted defendant,[58] but does not bar retrial after a mistrial.[59] The *Chinchic* court's finding that the jury in Melia's first trial did not return a valid verdict of acquittal has substantial support. Votes taken in the jury room are merely preliminary votes and do not bind the jury.[60] The trial judge decides how long to keep the jury together for deliberation.[61] The trial judge does not have to accept the jury's statement that the jury is deadlocked, but can order the jury to continue deliberating.[62] The trial judge likewise can order the jury to

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[57] *Id.*

[58] *See* Arizona v. Washington, 434 U.S. 497, 503 (1978) (public has strong interest in finality of criminal judgments); Serfass v. United States, 420 U.S. 377, 392 (1975) (pretrial order dismissing indictment is not an acquittal for double jeopardy purposes); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam) (acquittal based on erroneous ruling is final); United States v. Smith, 390 F.2d 420, 423 (4th Cir. 1968) (fifth amendment forbids retrial after acquittal). *See also* note 6 *supra.*

[59] *See* Arizona v. Washington, 434 U.S. 497, 516-17 (1978) (double jeopardy does not bar retrial when trial judge declares mistrial because of manifest necessity); United States v. Sanford, 429 U.S. 14, 15-16 (1976) (double jeopardy does not bar retrial when trial court declares mistrial because of hung jury); United States v. Ellis, 646 F.2d 132, 134-35 (4th Cir. 1981) (mistrial following deadlocked jury does not give rise to claim of former jeopardy); United States v. Lansdown, 460 F.2d 164, 168 (4th Cir. 1972) (government can bring second prosecution when manifest necessity occasioned mistrial). *See* note 5 *supra.* The government, however, cannot retry a defendant when the judge declares a mistrial because of prosecutorial misconduct. United States v. Dinitz, 424 U.S. 600, 611 (1976) (dictum); United States v. Jorn, 400 U.S. 470, 485 n.12 (1971) (dictum).

[60] *See* United States v. Taylor, 507 F.2d 166, 168 (5th Cir. 1975) (improper for judge to accept verdict after one juror died before verdict was announced); United States v. Medansky, 486 F.2d 807, 812-13 (7th Cir. 1973) (decisions made by jury in jury room before judge declared mistrial were not final), *cert. denied*, 415 U.S. 989 (1974); Posey v. United States, 416 F.2d 545, 554 (5th Cir. 1969) (jurors can dissent when verdict is announced), *cert. denied*, 397 U.S. 946 (1970); Bruce v. Chestnut Farms-Chevy Chase Dairy, 126 F.2d 224, 225 (D.C. Cir. 1942) (vote taken in jury room did not bar dissent by jurors from verdict when announced).

[61] *See* United States v. White, 589 F.2d 1283, 1290 (5th Cir. 1979) (trial judge did not abuse discretion by denying jury's request for recess because of deadlock); Virgin Islands v. Gereau, 502 F.2d 914, 935 (3d Cir. 1974) (not improper for judge to instruct jurors to continue deliberating), *cert. denied*, 420 U.S. 909 (1975); United States v. Lansdown, 460 F.2d 164, 169 n.2 (4th Cir. 1972) (case law does not indicate limit to judge's discretion to keep jury deliberating); United States v. Pope, 415 F.2d 685, 690 (8th Cir. 1969) (not abuse of discretion for judge to recall jury after only eleven hours of deliberation), *cert. denied*, 397 U.S. 950 (1970); Mills v. Tinsley, 314 F.2d 311, 313-14 (10th Cir.) (trial judge did not abuse discretion by sending jury back to continue deliberating after jury reported deadlock), *cert. denied*, 374 U.S. 847 (1963).

[62] *See, e.g.*, Allen v. United States, 164 U.S. 492, 501 (1896) (no error for trial judge to require jury to continue deliberating after jury reports deadlock); United States v. Bermudez, 526 F.2d 89, 99 (2d Cir. 1975) (same), *cert. denied*, 425 U.S. 970 (1976); United States v. DeLaughter, 453 F.2d 908, 910-11 (5th Cir.) (same), *cert. denied*, 406 U.S. 932 (1972);

continue deliberating if the jury reaches a unanimous decision on one count but cannot decide on the other counts.[63]

Rule 31(a) requires that the jury return its unanimous verdict to the judge in open court.[64] In refusing to find a valid verdict in the jury's preliminary vote, the *Chinchic* decision is consistent with decisions of other circuits.[65] In *United States v. Taylor*,[66] for example, the Fifth Circuit held that the jury's verdict is not valid until the jury's deliberations are over, the judge announces the verdict, and no juror dissents.[67] The reason for the uniformly strict interpretation of the requirements for a valid jury verdict is to allow jurors to reconsider their prior votes not yet announced in court in light of further deliberations.[68] The reason is especially compelling in a case like *Chinchic* in which the jury considers a number of counts and defendants.[69]

The *Chinchic* court correctly found that the government improperly joined Chinchic and Melia. Rule 8(a) permits the government to join a

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United States v. Sawyers, 423 F.2d 1335, 1341 (4th Cir. 1970) (same); Walsh v. United States, 371 F.2d 135, 136 (9th Cir.) (same), *cert. denied*, 388 U.S. 915 (1967); DeVault v. United States, 338 F.2d 179, 182-83 (10th Cir. 1964) (same).

[63] *See, e.g.*, United States v. Lamb, 529 F.2d 1153, 1155 (9th Cir. 1975) (judge refused to accept verdict that was inconsistent with instruction); United States v. Maius, 378 F.2d 716, 717-18 (6th Cir.) (judge instructed jury who found on one count to continue deliberations), *cert. denied*, 389 U.S. 905 (1967); Johnson v. United States, 270 F.2d 721, 725 (9th Cir. 1959) (same), *cert. denied*, 362 U.S. 937 (1960). A judge can accept a jury's finding on a single count and order the jury to continue deliberating on the remaining counts. *See, e.g.*, United States v. Hockridge, 573 F.2d 752, 756 n.12, 757 (2d Cir.) (trial judge accepted finding on one count and sent jury back to continue deliberations on other counts), *cert. denied*, 439 U.S. 821 (1978); United States v. Barash, 412 F.2d 26, 31-32 (2d Cir.) (same), *cert. denied*, 396 U.S. 832 (1969); Morgan v. United States, 380 F.2d 686, 702 (9th Cir. 1967) (same), *cert. denied*, 390 U.S. 962 (1968).

[64] FED. R. CRIM. P. 31(a); *see* note 6 *supra*.

[65] *See, e.g.*, United States v. Love, 597 F.2d 81, 85 (6th Cir. 1979) (jury has not reached valid verdict until deliberations are over and result announced and no juror dissents in open court); Virgin Islands v. Smith, 558 F.2d 691, 694 (3d Cir.) (same), *cert. denied*, 434 U.S. 957 (1977); United States v. Taylor, 507 F.2d 166, 168 (5th Cir. 1975) (same); United States v. Medansky, 486 F.2d 807, 812-13 (7th Cir. 1973) (verdict not binding on jurors until jurors returned signed verdict in open court), *cert. denied*, 415 U.S. 984 (1974). *See generally* WRIGHT, *supra* note 1, § 517; *see also* United States v. Morris, 612 F.2d 483, 490 (10th Cir. 1979) (test for validity of verdict is whether verdict is certain, unqualified, and unambiguous).

[66] 507 F.2d 166 (5th Cir. 1975). Rule 31(d) of the Federal Rules of Criminal Procedure provides that the judge can poll the jurors individually after the verdict is announced. FED. R. CRIM. P. 31(d). Even after the verdict is announced, a juror still can change his vote until the clerk records the verdict. *See, e.g.*, United States v. Morris, 612 F.2d 483, 489 (10th Cir. 1979) (rule 31(d) entitles juror to change his mind about verdict agreed to in jury room); United States v. Shepherd, 576 F.2d 719, 724 (7th Cir.) (same), *cert. denied*, 439 U.S. 852 (1978); United States v. Sexton, 456 F.2d 961, 966-67 (5th Cir. 1972) (same).

[67] United States v. Taylor, 507 F.2d 166, 168, 168 n.2 (5th Cir. 1975).

[68] *Id.*

[69] *Id.*

number of related offenses against a single defendant.[70] Rule 8(b) permits the government to charge a number of defendants in a single indictment for committing a single offense or series of offenses.[71] The government has no authority, however, to join multiple defendants in a single indictment for committing unrelated crimes.[72]

The Fourth Circuit in *United States v. Santoni* defined "series of acts or transactions" as "transactions so interconnected in time, place and manner as to constitute a common scheme or plan."[73] A number of other circuit courts have adopted this test for determining whether the government may join defendants.[74] This test for joinder is consistent with the Supreme Court's ruling in *McElroy v. United States*,[75] in which the Court held that joinder of defendants is improper when the government must depend upon different facts to convict each defendant.[76] The government clearly would have had to depend upon substantially dif-

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[70] Rule 8(a) of the Federal Rules of Criminal Procedure provides:

(a) Joinder of offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

FED. R. CRIM. P. 8(a). *See generally* MOORE, *supra* note 3, ¶ 8.05; WRIGHT, *supra* 1, § 143; Decker, *Joinder and Severance in Federal Criminal Cases*, 53 NOTRE DAME LAW. 147, 149-54 (1977) [hereinafter cited as Decker]; *see also* ABA PROJECT, *supra* note 3, § 1.1, Commentary (describing problems with present rule and suggesting alternatives).

[71] FED. R. CRIM. P. 8(b); *see, e.g.*, United States v. Ortiz, 603 F.2d 76, 78 (9th Cir. 1979) (joinder proper when indictment alleged that defendants participated in same act or series of acts), *cert. denied*, 444 U.S. 1020 (1980); United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978) (same), *cert. denied*, 440 U.S. 910 (1979); United States v. Verdoorn, 528 F.2d 103, 105-06 (8th Cir. 1976) (same); United States v. Isaacs, 493 F.2d 1124, 1159 (7th Cir.) (per curiam) (same), *cert. denied*, 417 U.S. 976 (1974); United States v. Edwards, 488 F.2d 1154, 1160 (5th Cir. 1974) (same); United States v. Rickey, 457 F.2d 1027, 1029 (3d Cir.) (same), *cert. denied*, 409 U.S. 863 (1972). *See also* note 1 *supra*.

[72] *See, e.g.*, McElroy v. United States, 164 U.S. 76, 80-81 (1896) (joinder of defendants who participated in unrelated offenses improper); United States v. Seidel, 620 F.2d 1006, 1012 (4th Cir. 1980) (same); United States v. Whitehead, 539 F.2d 1023, 1026 (4th Cir. 1976) (same); Cupo v. United States, 359 F.2d 990, 993 (D.C. Cir. 1966) (same), *cert. denied*, 385 U.S. 1013 (1967); King v. United States, 355 F.2d 700, 705 (1st Cir. 1966) (same); Ingram v. United States, 272 F.2d 567, 569 (4th Cir. 1959) (same).

[73] United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979); *see* 655 F.2d at 551.

[74] *See, e.g.*, United States v. Laca, 499 F.2d 922, 925 (5th Cir. 1974) (requisite connection existed between acts since acts took place at same time, place, and occasion); United States v. Scott, 413 F.2d 932, 935 (7th Cir. 1969) (same), *cert. denied*, 396 U.S. 1006 (1970); Scheve v. United States, 184 F.2d 695, 696 (D.C. Cir. 1950) (same); *accord*, United States v. Thomas Apothecary, Inc., 266 F. Supp. 890, 892 (S.D.N.Y. 1967) (same).

[75] 164 U.S. 76 (1896).

[76] *Id.* at 79; *see* Pointer v. United States, 151 U.S. 396, 404 (1894) (joinder of defendants improper when government shows that close connection between crimes of time, place, and occasion make it difficult to separate proof of one charge from proof of other).

ferent facts to show the time, place, and manner of Chinchic's offense than it would have had to depend upon to show the time, place, and manner of Melia's offense.[77]

The government charged Chinchic and Melia with crimes that occurred over a month apart.[78] The Gibson's burglary occurred in early April and the Reed's burglary took place in mid-May.[79] Other courts have found that the government cannot join defendants who commit crimes separated by a significant amount of time.[80] The Fifth Circuit, for example, in *United States v. Gentile*,[81] found that the government could not properly join defendants since the defendants committed the offenses three weeks apart.[82]

Chinchic and Melia's offenses also occurred in different places.[83] The government charged Chinchic with an offense that occurred in North Carolina and charged Melia with an offense that occurred in Connecticut.[84] Courts generally will find a single series of acts for purposes of joinder if the government alleges that common participants committed similar offenses at a common location.[85] One court, for instance, found

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[77] *See* text accompanying notes 78-93 *infra*.

[78] 655 F.2d at 548.

[79] *Id.* at 549.

[80] *Compare* United States v. Whitehead, 539 F.2d 1023, 1026 (4th Cir. 1976) (similar offenses involving common participants occurring one month apart did not constitute single series of acts) *and* King v. United States, 355 F.2d 700, 705 (1st Cir. 1966) (similar offenses committed within one month of each other did not constitute single series of acts) *with* Wiley v. United States, 277 F.2d 820, 824 (4th Cir.) (government properly could join members of family who sold marijuana from family home on different dates several months apart), *cert. denied*, 364 U.S. 817 (1960) *and* Kivette v. United States, 230 F.2d 749, 753 (5th Cir. 1956) (government properly could join husband and wife who committed separate crimes within one week of each other). *See generally* ABA PROJECT, *supra* note 3, § 1.2(c)(i), Commentary; *see also* United States v. Seidel, 620 F.2d 1006, 1008 (4th Cir. 1980) (similar offenses involving different participants two months apart did not constitute series of acts); Ward v. United States, 289 F.2d 877, 877-78 (D.C. Cir. 1961) (similar offenses involving common participants occurring five months apart not series); Ingram v. United States, 272 F.2d 567, 568-69 (4th Cir. 1959) (offenses having identity of time, location, and manner but no common participants did not constitute series of acts).

[81] 495 F.2d 626 (5th Cir. 1974).

[82] *Id.* at 630-31.

[83] 655 F.2d at 549.

[84] *Id.* at 548.

[85] *See, e.g.*, United States v. Gentile, 495 F.2d 626, 630 (5th Cir. 1974) (similar offenses by common participants at different locations not series); Evans v. United States, 349 F.2d 653, 658 (5th Cir. 1965) (separate gambling offenses committed at single location on different dates constituted series); Wiley v. United States, 277 F.2d 820, 824 (4th Cir.) (government properly could join different members of family who sold marijuana from family home on different dates), *cert. denied*, 364 U.S. 817 (1960); Daley v. United States, 231 F.2d 123, 125-26 (1st Cir.) (separate gambling offenses committed at single location on different dates constituted series), *cert. denied*, 351 U.S. 964 (1956); United States v. Garrison, 265 F. Supp. 108, 109 n.1 (M.D. Ga. 1969) (gas station at which different drug sales took place provided sufficient nexus among defendants to support joinder). *But see* United States v. Jeffries, 45 F.R.D. 119, 120-21 (D.D.C. 1968) (government could not join defendants who looted same store at approximately same time and place absent proof of concerted acts).

joinder of defendants proper as to one count of theft in which all the offenses occurred at a single building, but found joinder improper as to another count of theft when the same defendants committed similar offenses at dfifferent locations.[86]

Chinchic and Melia also committed two different types of offenses.[87] The government charged Chinchic with burglary and Melia with receiving stolen goods.[88] Whether the government can join different offenses depends on the degree to which the offenses are related.[89] The government establishes the proper relation by showing that the same facts underlie both offenses.[90] In *Metheany v. United States*,[91] for example, the Ninth Circuit found joinder improper when the government charged two defendants with distinct offenses that the government could not prove by the same evidence.[92]

Since Chinchic and Melia's crimes had no identity of time, place, or manner,[93] the government obviously would have had to depend upon substantially different facts to prove Chinchic's offense than it would have had to depend upon to prove Melia's offense. Under the tests that both the *McElroy* and *Santoni* courts have enunciated,[94] the offenses did

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[86] United States v. Florio, 315 F. Supp. 795, 797 (E.D.N.Y. 1970).

[87] 655 F.2d at 548.

[88] *Id.*

[89] *See* United States v. Satterfield, 548 F.2d 1341, 1344 (9th Cir. 1977) (defendant who committed two robberies could not be joined with other defendants who committed five robberies), *cert. denied*, 439 U.S. 840 (1978).

[90] *See, e.g.*, United States v. Satterfield, 548 F.2d 1341, 1344 (9th Cir. 1977) (government can join multiple offenses if it must show same facts to prove offenses), *cert. denied*, 439 U.S. 840 (1978); United States v. Isaacs, 493 F.2d 1124, 1159 (7th Cir.) (government can join different offenses if it must show same evidence to prove each offense), *cert. denied*, 417 U.S. 976 (1974); United States v. Martinez, 479 F.2d 824, 828 (1st Cir. 1973) (joinder was proper when proof of joined offenses overlapped); United States v. Wilson, 434 F.2d 494, 498 (D.C. Cir. 1970) (joinder of multiple offenses not improper when defendants participated in single crime spree); Barnes v. United States, 381 F.2d 263, 264 (D.C. Cir. 1967) (per curiam) (concerted activity among defendants justified joinder); Bayless v. United States, 381 F.2d 67, 71-72 (9th Cir. 1967) (joinder of different offenses not improper when all offenses related to defendant's escape from prison); Cataneo v. United States, 167 F.2d 820, 823 (4th Cir. 1948) (joinder of different offenses not improper when government must prove same facts to support alleged violations of defendants).

[91] 365 F.2d 90 (9th Cir. 1966).

[92] *Id.* at 94.

[93] 655 F.2d at 548-49, 551; *see* text accompanying notes 78-79, 83-84, 87-88 *supra*.

[94] *See* text accompanying notes 73-76 *supra*. The Fourth Circuit's test for joinder of defendants under rule 8(b) incorporates the "common scheme or plan" language of rule 8(a), which governs joinder of offenses. FED. R. CRIM. P. 8(a); *see* United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979); note 70 *supra* (text of rule 8(a)). Courts clearly cannot use the less stringent requirements for joinder of offenses under rule 8(a) in determining whether the government properly joined defendants under rule 8(b). *See* United States v. Satterfield, 548 F.2d 1341, 1344 (9th Cir. 1977) (rule 8(a) applies only to joinder against single defendant), *cert. denied*, 439 U.S. 840 (1978); United States v. Whitehead, 539 F.2d 1023, 1025 (4th Cir. 1976) (court below erred in using rule 8(a) standards to join defendants); United States v. Eagleston, 417 F.2d 11, 14 (10th Cir. 1969) (court below reversed for allowing joinder of defendants when evidence met rule 8(a) standards

not constitute a series of acts under rule 8(b). The *Chinchic* court's conclusion that the government had no authority to join Chinchic and Melia is consistent with the well-established rule that the government cannot join defendants charged with separate and unrelated offenses.[95]

In *Chinchic* the government alleged the existence of a common scheme among the defendants.[96] The government failed, however, to prove the existence of a common scheme between Chinchic and Melia.[97] The government showed only that the two burglaries had some common participants.[98] The Fourth Circuit made clear in *United States v. Whitehead*[99] that the mere existence of some common participants among defendants is not sufficient to support joinder of defendants whom the government charges with unrelated crimes.[100] In *Whitehead* the government charged two defendants who lived in the same apartment complex

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but not rule 8(b) standards). *See generally* MOORE, *supra* note 3, ¶ 8.06[1]; WRIGHT, *supra* note 1, § 144; Orfield, *supra* note 1, at 71. Since rule 8(b) does not define "series of acts," however, some authorities suggest that courts should read "series of acts" in rule 8(b) in light of rule 8(a)'s "common scheme" language. *See* Tillman v. United States, 406 F.2d 930, 933 (5th Cir.), *vacated on other grounds*, 395 U.S. 830 (1969); MOORE, *supra* note 3, ¶ 8.06[1]; WRIGHT, *supra* note 1, § 144. *Contra* United States v. Whitehead, 539 F.2d at 1024 ("common plan" language does not apply to joinder of defendants).

[95] *See* note 72 *supra*.

[96] 655 F.2d at 551.

[97] *Id.* The *Chinchic* court noted that although the government alleged the existence of a common plan, the government failed to allege the existence of a conspiracy among the defendants. *Id.* at 551 n.3. The court implied that the reason for the government's joinder of Chinchic and Melia was for the convenience of the government's witnesses. *Id.* Proof of a conspiracy among defendants supports joinder even when the government offers no direct proof that the defendants participated in a single act or series of acts. *See, e.g.*, Schaffer v. United States, 362 U.S. 511, 514-16 (1960) (government properly joined defendants charged with separate offenses when government also charged defendants with conspiracy); United States v. Bernstein, 533 F.2d 775, 789 (2d Cir.) (same), *cert. denied*, 429 U.S. 998 (1976); United States v. Somers, 496 F.2d 723, 729-30 (3d Cir.) (conspiracy satisfies requirements of rule 8(b)), *cert. denied*, 419 U.S. 832 (1974); United States v. Godel, 361 F.2d 21, 23-24 (4th Cir.) (conspiracy count provides sufficient connection between defendants charged with separate offenses), *cert. denied*, 385 U.S. 838 (1966). *But cf.* United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971) (government cannot add conspiracy count merely to obtain joinder); United States v. Manfredi, 275 F.2d 588, 593 (2d Cir.) (government must make conspiracy charge in good faith), *cert. denied*, 363 U.S. 828 (1960). *See generally* Decker, *supra* note 70, at 157-60; MOORE, *supra* note 3, ¶ 8.06[4]; WRIGHT, *supra* note 1, § 144. Even if the trial court dismisses a weak conspiracy count before submitting the case to the jury, the government has met and satisfied the requirements of rule 8(b) since it alleged in the indictment that the defendants participated in the same series of acts by participating in a conspiracy. *See* Schaffer v. United States, 362 U.S. 511, 515-16 (1960) (dismissal of conspiracy count does not require severance of defendants even though government based joinder on existence of conspiracy); Stern v. United States, 409 F.2d 819, 820 (2d Cir. 1969) (same); United States v. O'Brien, 319 F.2d 437, 439 (7th Cir. 1963) (same).

[98] 655 F.2d at 551.

[99] 539 F.2d 1023 (4th Cir. 1976).

[100] *Id.* at 1026.

with similar offenses on different dates involving a common third participant.[101] The government asked the court to infer a common scheme between the defendants from the similarity of the crimes.[102] The Fourth Circuit refused to make the inference in the absence of any proof of a common plan.[103] The *Whitehead* court further found that the existence of a common participant was not sufficient to support joinder under rule 8(b).[104]

One problem with rule 8(b) is that the rule allows the government to join defendants if the indictment or information merely charges that the defendants participated in the same series of acts.[105] A court often cannot determine whether the proper relation exists among defendants until the government has presented its evidence.[106] A pre-trial conference under rule 17.1[107] or an *in camera* inspection of the government's evidence under rule 14[108] would allow a court to save the time and expense of a joint trial and spare defendants from prejudicial joinder by determining at an earlier time whether the government's evidence warrants joinder.[109]

In *Chinchic* the government attempted to join two defendants who committed separate and unrelated crimes.[110] The court correctly found that since these two crimes were distinct in time, place, and manner, the government had no authority to join the defendants under rule 8(b).[111] The court also correctly held that the government did not subject one defendant to double jeopardy, since the defendant's first trial never produced a valid verdict of acquittal.[112] The Fourth Circuit's decision in *United States v. Chinchic* is consistent with decisions of other circuits[113] and should help affirm established principles of joinder and double jeopardy.

WILLIAM R. CLEMENT, JR.

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[101] *Id.* at 1024.

[102] *Id.* at 1025.

[103] *Id.*

[104] *Id.* at 1206; *accord*, Ingram v. United States, 272 F.2d 567, 571 (4th Cir. 1959) (existence of common participant among counts does not justify joinder).

[105] FED. R. CRIM. P. 8(b); *see* note 1 *supra.*

[106] *See* Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553, 564-65 (1965) [hereinafter cited as *Joint and Single Trials*] (noting that delay will prejudice defendant).

[107] FED. R. CRIM. P. 17.1.

[108] FED. R. CRIM. P. 14.

[109] *See Joint and Single Trials, supra* note 106, at 564-65.

[110] *See* text accompanying notes 12-23 *supra.*

[111] *See* text accompanying notes 46-52 *supra.*

[112] *See* text accompanying notes 41-45 *supra.*

[113] *See* notes 65-72 *supra.*

E. Substitution of Alternate Jurors Under Federal Rule of Criminal Procedure 24(c)

The right of the criminally accused to trial before an impartial jury is a fundamental tenet of American jurisprudence, guaranteed by both article III[1] and the sixth amendment[2] of the Constitution. Principal among the procedural devices that assure the right to jury trial is Federal Rule of Criminal Procedure 24.[3] Subsection (c) of rule 24 prevents delay or mistrial during protracted trials when a regular juror becomes ill or otherwise is incapacitated.[4] Rule 24(c) permits federal courts to impanel up to six alternate jurors in a criminal proceeding and to substitute the alternates for regular jurors any time prior to submission of the case to the jury.[5] The decision to substitute an alternate for a regular juror upon a showing of good cause is within the discretion of the trial judge and does not require the consent of either party to the proceeding.[6] In *United States v. Evans*,[7] the Fourth Circuit considered whether a defendant's consent to the district court's departure from rule

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[1] U.S. CONST. art. III. Section 2 of article III states that the trial of all crimes except impeachment shall be by jury. *Id.* at § 2.

[2] U.S. CONST. amend. VI. The sixth amendment states that the defendants in all criminal prosecutions are entitled by right to speedy and public trials before impartial juries. *Id. See* People v. Collins, 17 Cal. 3d 687, 692, 552 P.2d 742, 745, 131 Cal. Rptr. 782, 785, *cert. denied*, 429 U.S. 1077 (1976) (substitution of alternate juror for good cause is desirable to maintain judicial efficiency, but may encroach upon defendant's right to trial by jury).

[3] FED. R. CRIM. P. 24(c).

[4] *See, e.g.*, United States v. Meinster, 484 F. Supp. 442, 444 (S.D. Fla. 1980) (regular juror suffered heart attack during deliberations following over four months of trial, court substituted alternate onto jury to avoid mistrial); United States v. Barone, 83 F.R.D. 565, 566 (S.D. Fla. 1979) (court substituted alternate onto jury when regular juror was excused for medical reasons during deliberations following seven month conspiracy trial); FED. R. CRIM. P. 24(c).

[5] FED. R. CRIM. P. 24(c). Rule 24(c) states that prior to the submission of the case to the jury the district court may substitute alternate jurors for any regular jurors whom the court has found to be disqualified or unable to perform their duties. *Id.*

Many states have adopted statutes or rules of court similar to rule 24. The state provisions fall into two broad categories. One group of state statutes provides for alternate or substitute jurors. *See, e.g.*, CAL. PENAL CODE § 1089 (West 1970); OKLA. STAT. ANN. tit. 22, § 601a (West 1979). For example, the California statute providing for alternate jurors permits the trial court to substitute alternates onto the jury either before or after the jury retires to begin its deliberations. CAL. PENAL CODE at § 1089. The second category of state statutes provides for the selection of additional jurors, authorizing the trial court to impanel 13 or 14 jurors prior to trial. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 234, § 26B (West 1979); MICH. COMP. LAWS ANN. § 768.18 (West 1968). Under the second category, the court selects by lot the twelve jurors who will deliberate immediately before submitting the case to the jury. MASS. GEN. LAWS ANN. at § 26B. The additional jurors remaining then are excused by the court. *Id.*

[6] *See* United States v. Ellenbogen, 365 F.2d 982, 989 (2d Cir. 1966), *cert. denied*, 386 U.S. 923 (1967).

[7] 635 F.2d 1124 (4th Cir. 1980), *cert. denied* 101 S. Ct. 3090 (1981).

24(c) operates as an effective waiver of objections to the substitution procedure.[8]

Appellant Evans was found guilty of bank robbery before the United States District Court for the District of Maryland.[9] Upon the conclusion of both parties' presentations at trial, the judge excused alternate juror Nancy Stiles, and the jury retired to consider its verdict.[10] After the jury deliberated for approximately fifty minutes, the judge received a note from one of the regular jurors.[11] The note stated that the juror had overheard conversations between spectators during the lunch break that possibly could influence his deliberations.[12] Accordingly, the court examined the juror and subsequently excused the juror from further service.[13] The judge explained to the defendant that he had the option of a mistrial.[14] The judge stated that Evans, as authorized by Federal Rule of Procedure 23(b), could choose alternatively to continue the trial with eleven jurors.[15] While the judge was in the process of offering the defendant a choice between seeking a mistrial or continuing, the judge noticed that the alternate juror, Ms. Stiles, had returned to the courtroom.[16] The judge called Ms. Stiles before the bench and questioned her to determine whether she had discussed the case or had otherwise been "tainted" in any way outside the courtroom.[17] Once the judge was satisfied that outside influences had not compromised Ms. Stiles' impartiality, the court presented Evans with the option of accepting her as a twelfth member of the jury or moving for a mistrial.[18] The possibility of continuing the trial with an eleven member jury received no further consideration.[19] Contrary to the advice of his appointed counsel, Evans agreed to the seating

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[8] *Id.* at 1127.

[9] *Id.* at 1125.

[10] *Id.* at 1126-27, 1129.

[11] *Id.* at 1129.

[12] *Id.* at 1126. The juror had overheard conversations between spectators who apparently knew the defendant. Brief for Appellant at 3, United States v. Evans, 635 F.2d 1124 (4th Cir. 1981) [hereinafter cited as Brief for Appellant]. The spectators remarked on Evans' appearance at trial, and referred to the money stolen in the robbery. *Id.*

[13] 635 F.2d at 1126.

[14] *Id.*

[15] *Id.* Federal Rule of Criminal Procedure 23(b) states that at any time before the verdict, and with the approval of the court, the parties may stipulate that a jury of less than 12 may return a valid verdict should the court excuse one or more of the regular jurors. FED. R. CRIM. P. 23(b).

[16] 635 F.2d at 1129.

[17] *Id.* at 1127.

[18] Brief for appellant at 5.

[19] 635 F.2d at 1127. See FED. R. CRIM. P. 23(b), note 15, *supra*. The district court record does not indicate whether the defendant expressed himself either in favor of or opposed to the use of an elevan man jury. 635 F.2d at 1126 n.2. For the purpose of appeal, counsel stipulated that Evans had expressed himself as wishing to avoid mistrial. *Id. See* text accompanying notes 44-46 (*Evans* dissent arguing defendant's consent ineffective absent complete explanation of rule 23(b)).

of Ms. Stiles as the twelfth juror.[20] Consequently, the judge summoned the jury into the courtroom and placed Ms. Stiles on the jury.[21] The jury retired to continue its deliberations and returned a verdict of guilty on all counts within forty minutes.[22] Evans appealed the decision to the Fourth Circuit.[23]

On appeal, the Fourth Circuit considered the crucial issue to be whether the substitution procedure employed by the district court had been so fundamentally unfair to Evans as to make his consent ineffective.[24] To decide that issue, the Fourth Circuit considered whether Evans' consent was given intelligently and knowingly.[25] In addition, the court considered whether the district court's failure to instruct the jury to begin its deliberations anew had prejudiced Evans' case.[26]

Initially, the Fourth Circuit examined the language of rule 24(c).[27] The court noted that rule 24(c) expressly does not prohibit the substitution of an alternate for a regular juror after the jury retires.[28] Nevertheless, the *Evans* court did not decide whether the district court's action violated rule 24(c). Instead, the court considered whether Evans' consent to the substitution was knowing and intelligent.[29] Finding Evans knowingly and intelligently consented,[30] the Fourth Circuit relied on a

[20] *Id.* at 1127 n.3.

[21] *Id.* at 1127.

[22] Brief for Appellant at 5.

[23] 635 F.2d at 1125.

[24] *Id.* at 1127. In addition to raising the Federal Rule of Criminal Procedure 24(c) issue, Evans alleged that the district court erred in refusing to allow Evans' former girlfriend to testify about certain conversations she had held with him. *Id.* at 1125. Evans argued that the conversations would establish his innocence on the robbery charge because, in the conversations, Evans allegedly explained that his sudden wealth after the bank robbery was the consequence of his concealing a fugitive from the robbery at his home for which the fugitive gave him $10,000. *Id.* The Fourth Circuit refused to consider the defendant's assignment of error, holding that Federal Rule of Evidence 804(b)(3) was dispositive of the question. *Id.* Rule 804(b)(3) states that declarations against interest are exceptions to the hearsay rule and are admissable when corraborating circumstances clearly indicate the trustworthiness of the statement. FED. R. EVID. 804(b)(3). Evans argued that the conversations should qualify as declarations against interest. 635 F.2d at 1125. Based on the fact that Evans' spending spree, which began the day after the bank robbery, involved expenditures of almost $12,000 in cash, the Fourth Circuit reasoned that circumstances did not support the reliability of Evans' statements and thus affirmed the district court's refusal to admit the conversations as evidence. *Id.* at 1126.

[25] *Id.* at 1128.

[26] *Id.*

[27] *Id.* at 1127. *See* FED. R. CRIM. P. 24(c), text accompanying notes 3-6 *supra.*

[28] *Id.*

[29] *Id.* at 1127-1128.

[30] *Id.* at 1128. The *Evans* court held that the defendant's consent satisfied the requirements of Patton v. United States, 281 U.S. 276 (1930). *Id.* at 1127-28. In *Patton*, the Supreme Court held that, given the importance of trial by jury, any waiver of jury trial rights requires the express and intelligent consent of the defendant, the consent of the government's counsel, and the sanction of the court. 281 U.S. at 312. The *Patton* Court stated that trial courts should employ sound and advised discretion in exercising their duty to assure express and intelligent waiver before allowing defendants to dispense with jury trial rights. *Id.*

Tenth Circuit decision to conclude that Evans, by consenting to the substitution of a previously discharged alternate juror, waived all objections to the procedure.[31]

The Fourth Circuit's holding that Evans' consent was effective against later objections was premised on the court's further holding that the procedure employed by the district court had not been so inherently unfair to the defendant to require reversal of the defendant's conviction.[32] The Fourth Circuit was satisfied that the reconstituted jury could dispose of the case effectively and without prejudice.[33] The court determined that the district court's examination of the alternate juror was sufficient to preclude the possibility that Ms. Stiles' impartiality was destroyed while she was outside the courtroom.[34] Moreover, the *Evans* court reasoned that the trial court should not force the defendant to seek a mistrial with the consequence of being placed in jeopardy a second time.[35] Because the defendant's knowing and intelligent choice to continue trial with the reconstituted jury eliminated the necessity for mistrial, the Fourth Circuit concluded the procedure employed by the district court was not fundamentally unfair.[36]

In addition, the Fourth Circuit dismissed as speculative Evans' argument that the district court's failure to instruct the jury to begin its deliberations anew had prejudiced his case.[37] The court reasoned that the trial judge's failure to instruct the jury was insufficient to warrant reversal, especially given the fact that the defense had not objected to the lack of an instruction at trial.[38] Thus, because the defendant's consent to the procedure employed by the district court was valid, because the substitution of the alternate juror was not inherently prejudicial, and because the trial court's failure to instruct the jury to begin its deliberations anew had not compromised the defendant's case, the Fourth Circuit affirmed Evans' conviction.[39]

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[31] 635 F.2d at 1127 (citing United States v. Baccari, 489 F.2d 274 (10th Cir. 1973) (per curiam), *cert. denied*, 417 U.S. 914 (1974)). In *Baccari*, the court excused the alternate juror at the close of arguments and submitted the case to the jury. 489 F.2d at 275. During the jury's deliberations one of the regular jurors became ill and was hospitalized. *Id.* Counsel for both parties and the court agreed that the court should recall the alternate. *Id.* In addition, the defendants individually stated their approval of the plan. *Id.* The Tenth Circuit thus found that the defendants had consented knowingly and intelligently to the substitution, and therefore waived any objections that could have been interposed. *Id.*

[32] 635 F.2d at 1128. The *Evans* court acknowledged that the question whether the trial court's substitution of the alternate had a prejudicial effect on the defendant would have presented no difficulty if the district court had made the substitution before the jury retired. *Id.* at 1127.

[33] *Id.* at 1127.

[34] *Id.*

[35] *Id.* at 1127-28.

[36] *Id.* at 1128. *See* note 53 *infra* (*Evans* court distinguished prior Fourth Circuit precedent).

[37] 635 F.2d at 1128.

[38] *Id.*

[39] *Id.*

In the dissent, Judge Ervin argued that the procedure employed by the district court allowing the substitution of an alternate juror after the judge had submitted the case to the jury was clear and reversible error.[40] The dissent interpreted rule 24(c) to mandate that the jury which retires to consider a case must be the jury the returns the verdict.[41] Judge Ervin supported his interpretation of rule 24(c) with two prior Fourth Circuit decisions which read the rule to require the dismissal of alternate jurors when the jury retires.[42] The dissent noted that the decisions were premised on the theory that the trial court, by failing to discharge the alternates when the jury retires, subjects the defendant to trial before thirteen jurors in violation of rule 23(b).[43]

Moreover, Judge Ervin argued that the Fourth Circuit could not consider Evans' consent to the substitution to be a binding waiver of objections to the substitution procedure.[44] The dissent reasoned that waiver never can be effective where the district court has not presented the defendant all the procedural options.[45] Judge Ervin took the position that Evans could not have given knowing and intelligent consent to the substitution absent a complete explanation of his right to an eleven juror trial under rule 23(b).[46]

The Fourth Circuit's holding that Evans' consent to the substitution effectively precluded any objection to the procedure on appeal is supported by other federal circuits that have held consent effective against later objections to departures from the express language of rule 24(c).[47]

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[40] *Id.* at 1129 (Ervin, J., dissenting).

[41] *Id.*

[42] *Id.*, *citing* United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978) and United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964). *See* note 53 *infra* (facts and holdings in *Chatman* and *Virginia Erection*). The dissent relied on the Fourth Circuit's holding in *Virginia Erection* that rule 24(c) explicitly makes no provision for the replacement of regular jurors after the jury retires. 635 F.2d at 1129, *see* 335 F.2d at 871. The dissent further cited 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 388 at 52 (1969) for the proposition that clear and reversible error results if the district court substitutes an alternate after deliberations have begun. 635 F.2d at 1131.

[43] 635 F.2d at 1129. *See* United States v. Chatman, 584 F.2d 1358, 1361 (4th Cir. 1978); United States v. Virginia Erection Corp., 335 F.2d 868, 871 (4th Cir. 1964).

[44] 635 F.2d at 1131.

[45] *Id.*

[46] *Id.* The dissent relied on Patton v. United States, 281 U.S. 276 (1930) for the proposition that effective waiver requires the intelligent consent of defendant. *Id.*; *see* 281 U.S. at 312 (defendant's waiver of jury trial rights requires express and intelligent consent of defendant, consent of government's counsel and sanction of court). Judge Ervin argued that, because the district court gave Evans the choice only of seeking mistrial or consenting to the substitution of the alternate, Evans could not have given informed consent to the substitution. 635 F.2d at 1131. *See* text accompanying notes 13-18, *supra* (trial court's explanation to defendant).

[47] *See* Henderson v. Lane, 613 F.2d 175, 179 (7th Cir.), *cert. denied*, 446 U.S. 986 (1980) (acquiescence of defense counsel preclude later objection to substitution of previously discharged alternate onto jury after deliberations had begun); United Staes v. Viserto, 596 F.2d 531, 539-540 (2d Cir.), *cert. denied*, 444 U.S. 831 (1979) (stipulated consent by defense

Nevertheless, a number of circuit court decisions have recognized the possibility that trial courts, by failing to discharge the alternate jurors when the jury retires, may prejudice the defendant's case.[48] Employing reasoning similar to the *Evans* dissent, the Second and Fifth Circuits have noted that the possibility of prejudice arises because a defendant runs the risk of being tried by more than twelve jurors when the district court fails to discharge the alternates upon submission of the case to the jury.[49] In addition the Tenth Circuit has held that a trial court committed

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counsel to district court impanelling 16 jurors without designating which jurors would serve as alternates held to preclude later objections); United States v. Baccari, 489 F.2d 274, 275 (10th Cir. 1973) (per curiam), *cert. denied*, 417 U.S. 914 (1974) (defendant's consent to recall and substitution of previously discharged alternate held to constitute binding waiver of objections to procedure); Leser v. United States, 358 F.2d 313, 317 (9th Cir.), *cert. dismissed*, 385 U.S. 802 (1966) (stipulated approval by counsel operates as binding and effective waiver of objections to district court's failure to dismiss alternates when jury retired). In *Henderson*, a regular juror suffered a heart attack during the jury's deliberations. 613 F.2d at 176. The trial court recalled a previously discharged alternate, who was then examined by both the court and counsel to determined whether the alternate could render a fair decision. *Id.* With defense counsel's reluctant acquiescence, the district court reinstated the alternate. *Id.* at 177. The defendant was not present at the examination or reinstatement. *Id.* The Seventh Circuit held the procedure permissible. *Id.* at 178-79. Reasoning that the district court's thorough examination of the alternate in the presence of defense counsel affirmed the alternate's ability to make a fair decision, the Seventh Circuit held that the consent of defense counsel to the substitution precluded any possibility of prejudice and barred any subsequent objections to the procedure. *Id.* The Seventh Circuit dismissed the defendant's argument that a binding *Patton* waiver requires the personal consent of the defendant because the substitution had not deprived the defendant of a constitutional jury, and thus the procedures prescribed by *Patton* were inapplicable. *Id.* at 179. *See* Patton v. United States, 281 U.S. 276, 312 (1930); note 30, *supra* (*Evans* majority held defendant's consent satisfied *Patton* requirements). In *Viserto*, the district court impaneled 16 jurors prior to trial. 596 F.2d at 539. The trial court then allowed counsel to select, immediately before submission of the case to the jury, the 12 jurors who would retire. *Id.* While holding that the stipulated approval of defense counsel to the procedure precluded subsequent objections, *Id.*, at 540, the Second Circuit stated that rule 24 represents a national consensus of bench and bar from which a court should not depart. *Id.* The *Viserto* court noted that the district court's substitution of an alternate after deliberations have begun would present a different case entirely. *Id.*

[48] *See* United States v. Chatman, 584 F.2d 1358, 1361 (4th Cir. 1978) (district court by inadvertantly allowing alternate to accompany regular jurors when jury retired, held to have committed reversible error); United States v. Allison, 481 F.2d 468, 470 (5th Cir. 1973), *affirmed*, 487 F.2d 339 (5th Cir. 1973) (per curiam) *cert. denied*, 416 U.S. 982 (1974) (district court committed error in allowing alternate juror under strict instruction to remain silent to accompany jury during deliberations); United States v. Beasley, 464 F.2d 468, 469 (10th Cir. 1972) (district court, by allowing alternate juror to retire with jury, committed reversible error); United States v. Hayutin, 398 F.2d 944, 950 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968), *subsequent appeal sub. nom.*, United States v. Nash, 414 F.2d 234 (2d Cir.), *cert. denied*, 396 U.S. 940 (1969) (recognizing possibility of prejudice presented by district court's failure to discharge alternate jurors when jury retires); United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964) (district court held to have committed reversible error by allowing alternate juror to retire with jury). *See* note 53 *infra* (*Va. Erection* and *Chatman* decisions).

[49] *See* United States v. Hayutin, 398 F.2d 944, 950 (2d Cir.), *affirmed*, 487 F.2d 339 (5th Cir.) (per curiam), *cert. denied*, 416 U.S. 982 (1974). In *Hayutin*, the district court failed to

reversible error by inadvertantly allowing an alternate to accompany the regular jurors as they retired, because the procedure violated the privacy essential to the jury's function.[50]

The Fourth Circuit in two prior decisions held that district courts committed reversible error by allowing alternate jurors to accompany regular jurors when the juries retired.[51] In both cases the Fourth Circuit premised its decision on the theory that the alternate could influence the regular jurors by his very presence, thereby compromising the defendant's right to trial before twelve jurors.[52] The *Evans* majority considered cases dealing with prejudice arising from the possibility of trial before thirteen jurors to be distinguishable and insufficient to render Evans' consent ineffective.[53] Nevertheless, a trial court's substitution of an alternate juror onto the jury after deliberations have begun may sub-

discharge the alternates upon submitting the case to the jury. 398 F.2d at 950. The court did not allow the alternates to retire with the regular jurors, but kept the alternates isolated from the regular jurors at all times. *Id.* The Second Circuit, while noting that trial courts should treat rule 24(c) as mandatory and that the possibility of prejudice arises when district courts ignore rule 24, held that the district court's error was harmless. *Id.* The *Hayutin* court premised its decision on the district court's careful separation of the alternates from the regular jurors, thus precluding the possibility that the trial court subjected the defendant to a trial by more than twelve jurors. *Id.* In *Allison*, the district court allowed an alternate juror who was under strict instructions to remain silent to accompany the jury as it retired. 481 F.2d at 469. The Fifth Circuit held that the procedure employed by the district court warranted remand for an evidentiary hearing to determine whether the alternate's presence had compromised the defendant's right to trial before twelve jurors. *Id.* at 470. *See* text accompanying note 43 *supra* (*Evans* dissent argued that district court's substitution procedure subjected defendant to trial before thirteen jurors).

[50] *See* United States Beasley, 464 F.2d 468, 470 (10th Cir. 1972). In *Beasley*, the Tenth Circuit stated that the district court, by allowing an alternate to retire with the jury, violated the defendant's right to a trial by 12 jurors because the alternate, once deliberations began, became a stranger to the proceedings in a legal sense. *Id.* at 469. Thus, the court reasoned, the district court had compromised the defendant's rights just as surely as if the judge had allowed a stranger off the street to participate in the jury's deliberations. *Id.*

[51] *See* United States v. Chatman, 584 F.2d 1358, 1361 (4th Cir. 1978); United States v. Virginia Erection Corp., 335 F.2d 868, 871 (4th Cir. 1964); note 53 *infra* (*Chatman* and *Virginia Erection* facts and holdings).

[52] *See* 584 F.2d at 1361, 335 F.2d at 871; note 53 *infra* (*Chatman* and *Virginia Erection* facts and holdings).

[53] 635 F.2d at 1128 n.5. The *Evans* courts considered two prior Fourth Circuit opinions that held variations on rule 24(c) to be reversible error. *Id.* at 1128 n.5. *See* United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978); United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964). The court distinguished *Chatman* and *Virginia Erection* from *Evans* because the procedures employed by the district courts in *Chatman* and *Virginia Erection* contained an inherent possibility of prejudice. 635 F.2d at 1128 n.5. *See* 584 F.2d at 1361, 335 F.2d at 871. In *Chatman*, the district court inadvertantly failed to excuse the alternate juror upon submitting the case to the jury. 584 F.2d at 1361. The alternate accompanied the regular jurors as they retired, and remained in the jury room for the first 45 minutes of the jury's deliberations. *Id.* Upon discovering his oversight, the trial judge excused the alternate juror. *Id.* The trial court subsequently made no inquiry to determine the extent of the alternate's participation. *Id.* On appeal, the Fourth Circuit considered the district court's actions to constitute reversible error because the defendant was tried by thirteen jurors. *Id.* The *Chatman* court relied on the Fourth Circuit's prior decision in *Virginia Erection*, the

ject the defendant to trial before thirteen jurors.[54] The Fourth Circuit, by allowing the district court's substitution in *Evans* to stand, chose to disregard Fourth Circuit precedents that recognize the possibility of prejudice presented by substitution procedures that depart from rule 24.

In addition to the possibility of prejudice arising from trial before more than twelve jurors, courts have recognized a danger of prejudice from the inherent coercive effect upon an alternate juror who joins a jury which has already agreed that the defendant is guilty.[55] The Ninth Circuit recognized that regular jurors could exert a coercive influence upon the alternate in *United States v. Lamb*.[56] In *Lamb*, the district court substituted an alternate onto a jury that had been deliberating for more than four hours and which previously had returned a guilty verdict that the district court rejected as inconsistent with the instructions.[57] The Ninth Circuit held the substitution to be reversible error, not only

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trial court permitted the variation on rule 24(c) because one of the regular jurors appeared ill. 335 F.2d at 870. Although the district court judge admonished the alternate to remain silent, the Fourth Circuit nevertheless found the district court's procedure to be reversible error. *Id.* at 871. The court was concerned that the procedure presented practical difficulties because the trial court could not have determined when the regular juror became too ill to continue. *Id.* The court was further concerned that the alternate, by his very gestures or attitude, could influence the jury's deliberations. *Id.* The Fourth Circuit was convinced that the alternate's presence in the jury room violated the privacy and secrecy essential for a jury to function properly. *Id.* at 872. In contrast, the *Evans* court held that the procedure employed by the district court in the instant case contained no inherent possibility of prejudice because the defendant expressly had consented to the substitution and because the trial court had not allowed more than 12 jurors to deliberate at any time. 635 F.2d at 1128 n.5.

[54] *See* United States v. Chatman, 584 F.2d 1358, 1361 (4th Cir. 1978); United States v. Virginia Erection Corp., 335 F.2d 868, 871 (4th Cir. 1964). *See* text accompanying notes 42-43 *supra* (*Evans* dissent relied on *Chatman* and *Virginia Erection*).

[55] *See, e.g.*, United States v. Lamb, 529 F.2d 1153, 1156 (9th Cir. 1975) (en banc) (brief period of deliberations following substitution held to be evidence of coercion exerted on alternate by regular jurors); People v. Collins, 17 Cal. 3d 687, 693, 552 P.2d 742, 746, 131 Cal. Rptr. 782, 786, *cert. denied*, 429 U.S. 1077 (1976) (right to trial by jury requires that each juror participate in all of jury's deliberations); People v. Ryan, 19 N.Y.2d 100, 103, 224 N.E.2d 710, 712, 278 N.Y.S.2d 199, 202 (1966) (where trial court substitutes alternate onto jury at stage of jury's deliberations where remaining eleven jurors are in substantial agreement, alternate juror must overcome formidable obstacles in attempts to persuade and convince 11 original jurors); *see* AMERICAN BAR ASSOCIATION STANDARDS RELATING TO TRIAL BY JURY 82 (1968) (undesirable to allow juror who is unfamiliar with prior deliberations to join jury and participate in voting without benefit of prior deliberations); Wasserman and Robinson, *Extra-legal Influences, Group Processes and Jury Decision Making: A Psychological Perspective*, 12 N.C. CENTRAL L. REV. 96, 115 (1980) (following group discussion, entire jury will endorse values initially favored by majority of original jury members more strongly than values advanced by minority). *See* text accompanying notes 55-57, *infra* (discussion of *United States v. Lamb*).

[56] 529 F.2d 1153 (9th Cir. 1975).

[57] *Id.* at 1155. In *Lamb*, the substitution of an alternate for a regular juror became necessary after the regular juror asked the trial judge to excuse her. *Id.* The juror felt the sudden accidental death of a co-worker left her emotionally unable to perform her duties as a juror. *Id.* After examining the juror, the judge excused her and substituted a previously discharged alternate onto the jury. *Id.*

because the defendant had not consented to the procedure, but also because the circuit court believed the brief amount of time the jury took to reach a second guilty verdict after the substitution manifested impermissible coercion on the alternate.[58]

Concerned with the possibility that the remaining original jurors will coerce an alternate, a number of courts have held that a trial court substituting an alternate onto the jury after the jury has retired must instruct the jury to begin its deliberations anew.[59] In *United States v. Barone*,[60] the district court examined each of the remaining eleven jurors to determine their willingness and ability to begin deliberations anew.[61] The judge reasoned that individual exmination of the jurors as well as an instruction ordering their deliberations to begin anew was necessary to negate any coercive effect substitution might have had on the alternate.[62] The district court considered the defendant's right to jury trial to necessarily include the right to have each juror fully engage in all of the jury's deliberations.[63] Thus, to avoid any possibility of prejudice, the district court in *Evans*, in addition to securing the defendant's knowing and intelligent consent to the substitution, should have instructed the jury to begin its deliberations anew.

The Fourth Circuit in *Evans* correctly followed judicial precedent that holds that a defendant's proper consent to the substitution of an

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[58] *Id.* at 1156.

[59] *See, e.g.*, United States v. Davis, 608 F.2d 598, 599 (6th Cir.) (per curiam), *cert. denied*, 445 U.S. 918 (1979) (defendant's stipulated consent and district court's instruction that jury must begin deliberations anew preclude possibility of prejudice); United States v. Meinster, 484 F. Supp. 442, 444 (S.D. Fla. 1980) (upon substitution after jury has retired jury instructions ordering deliberations begin anew are necessary to follow procedure established in *United States v. Barone*); United States v. Barone, 83 F.R.D. 365, 571 (S.D. Fla. 1979) (district court preserved inviolate defendants right to unanimous verdict by jury of twelve where court instructed jury to begin deliberations anew and substituted alternate fully particpated in deliberations); Griesel v. Dart Industries, 23 Cal. 3d 583, 584, 591 P.2d 503, 506, 153 Cal. Rptr. 213, 216 (1979) (en banc) (alternate juror statute construed as requiring trial court to instruct jury to begin deliberations anew to protect defendant's right to have each juror engage in all jury's deliberations); People v. Collins, 17 Cal. 3d 687, 694, 552 P.2d 742, 747, 131 Cal. Rptr. 782, 787, *cert. denied*, 429 U.S. 1077 (1976) (alternate juror statute construed as requiring trial court to instruct jury to begin deliberations anew because law grants both state and defendant right to verdict reached after full participation of 12 jurors who ultimately return verdict). *Cf.* United States v. Lamb, 529 F.2d 1153, 1156 (9th Cir. 1975) (en banc) (brief period of reconstituted jury's deliberations persuaded court that jury could not have followed trial court's instruction to begin their deliberations anew).

[60] 83 F.R.D. 565 (S.D. Fla. 1979).

[61] *Id.* at 567. In *Barone*, one of the regular jurors developed health problems some two days after deliberations began. *Id.* at 566. Upon learning of the regular juror's problem, the trial court requested one of the previously discharged alternates to return to court. *Id.* The court sequestered the alternate pending resolution of the regular juror's problem. *Id.* at 567. The trial judge excused the regular juror, because he was convinced she would be unable to perform her duties. *Id.* The court then examined the alternate regarding her exposure to media reports of the case and any discussions she might have had about the case. *Id.* The court was satisfied that the alternate was able to deliberate without bias. *Id.*

[62] *Id.* at 571.

[63] *Id.* at 572.

alternate after the jury has retired bars any later objections he might have to the procedure, absent actual prejudice.[64] The *Evans* court, similar to opinions holding that consent is effective against later objections, implicitly was attempting to address the practical difficulties presented by strict adherence to rule 24(c) substitution procedures.[65] The *Evans* court failed to recognize, however, the substantial possibility of prejudice presented by the district court's failure to instruct the jury to begin its deliberations anew following the substitution. Federal Rule of Criminal Procedure 2 imposes an obligation on the courts to construe the federal rules to secure simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay.[66] In carrying out their obligation, the courts must realize that criminal defendants conceivably will consent to questionable procedural options rather than seek mistrial, since mistrial often involves jail time spent awaiting a new trial. The *Evans* court, by approving the district court's substitution procedure, clearly has promoted simplicity in procedure and elimination of expenditures of both judicial and prosecutorial resources. Concerns of economy and simplification of procedure have led the American bar to consider changes in rule 24.[67] Unless and until rule 24 is altered by consensus of bench and bar, rule 24 remains the single viable tool available to criminal trial courts in the federal system for accomplishing the substitution of alternate jurors. Regrettably, the Fourth Circuit's decision in *Evans*, by holding the defendant's consent to be an effective waiver of all subsequent objections, raises the standard of prejudice a defendant must demonstrate to protect his right to trial before an impartial jury of twelve jurors.

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[64] *See* text accompanying note 47 *supra* (cases holding that defendant's consent bars subsequent objections).

[65] *See* text accompanying note 47 *supra* (courts holding defendant's consent bars later objections faced factual situations in which adherence to rule 24 would lead to delay and mistrial). Paisley, *The Federal Rule on Alternate Jurors*, 51 A.B.A.J. 1044, 1045 (1965) (strict reading of rule 24(c) results in discharge of alternate at crucial time, increases risk of delay and possibility of mistrial).

[66] FED. R. CRIM. P. 2.

[67] *See* Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 45-46 (1962). The committee history of the federal rules reveals that the United States Supreme Court Advisory Committee on Rules of Criminal Procedure considered adopting a rule that would permit trial courts to substitute alternates onto the jury during deliberations. *Id.* The Committee rejected the proposed rule when the Supreme Court questioned the rule's constitutionality and desirability. *Id. See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE 41 (1981). The proposed amendments would allow trial courts to retain the alternate jurors after the regular jurors have retired. *Id.* The trial courts then could substitute the alternates onto the jury at any time before the jury returns its verdict. *Id.* Under the proposed amendments a trial court substituting an alternate onto the jury after the jury has retired must instruct the jury to begin its deliberations anew. *Id.*