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Vi. Criminal Law & Procedure

VI. CRIMINAL LAW & PROCEDURE

A. *The Burden of Proof in Murder Cases*

The fourteenth amendment of the United States Constitution guarantees that no state will deprive an individual of life, liberty, or property without due process of law.[1] Due process demands that the government bear the burden of producing evidence to convince the fact-finder that the accused is guilty of the crime charged.[2] The Constitution protects a criminal defendant against an erroneous conviction by imposing a standard of proof that demands a defendant be proven guilty beyond a reasonable doubt.[3] The reasonable doubt standard applies to every element of the criminal offense with which the prosecution charged the defendant.[4]

In *Mullaney v. Wilbur*,[5] the Supreme Court held that the Constitution prohibits a state from shifting any burden of proof to the defendant that would require him to disprove an element of the crime.[6] The

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[1] *See* U.S. CONST. amend. XIV, § 1 (no state shall "deprive any person of life, liberty, or property without due process of law"). Whenever the government deprives a person of his liberty without due process of law in violation of the United States Constitution, the remedial process is to file a petition for a writ of habeas corpus. *See Ex parte* Watkins, 28 U.S. 193, 201-02 (1830) (defendant claimed that court that convicted him lacked jurisdiction over criminal offense for which he was convicted).

[2] Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

[3] *In re* Winship, 397 U.S. 358, 361 (1970). The *Winship* Court stated that the requirement that the prosecution prove a defendant's guilt beyond a reasonable doubt insures the due process goals of fairness, reduction of error, and community respect for the law. *Id.* at 363-64. *See generally* 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2497 (3d ed. 1940) (two definitions of reasonable doubt).

The reasonable doubt standard aims at striking a balance between competing societal and individual interests. *Winship*, 397 U.S. at 363-64. The *Winship* Court stated that a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when reasonable doubt exists about his guilt. *Id.* The *Winship* Court labeled the reasonable doubt standard indispensible to command the respect and confidence of the community in the criminal justice system. *Id.* at 364.

[4] *See* Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975); *In re* Winship, 397 U.S. 358, 364 (1970). In *Ferry v. Ramsey*, the Supreme Court stated that the government must prove the material elements of a crime. *See* 277 U.S. 88, 93-95 (1928). Justice Holmes delivered the Court's opinion and enunciated the "greater includes the lesser" theory. *See id.* at 94. According to the theory, the only material elements of a criminal offense are the elements that due process requires a legislature to incorporate in a statute before imposing criminal liability. *See id.* at 93-95. Holmes' view never received support and the Supreme Court rejected it in United States v. Romano, 382 U.S. 136, 142-44 (1965). *See also* McCormick, *The Validity of Statutory Presumptions of Crime Under the Federal Constitution*, 22 TEX. L. REV. 75, 80 n.18 (1943) (greater includes the lesser theory may deny equal protection or infringe specific constitutional privileges).

[5] 421 U.S. 684 (1975).

[6] *Id.* at 704. The *Mullaney* Court held that the fourteenth amendment, as the Court in *In re Winship* interpreted it, requires that the state prove every element of a criminal of-

Mullaney Court ruled that jury instructions which shift the burden of proof to the defendant by means of a presumption[7] are unconstitutional,[8] even as to facts affecting only the degree of criminal culpability.[9] In *Patterson v. New York*,[10] however, the Supreme Court held that a state may impose upon the defendant, as an affirmative defense,[11] the burden of proving any defense that does not negate an element of the crime

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fense beyond a reasonable doubt. *Id.*; *see In re* Winship, 397 U.S. 358, 364 (1970). The *Mullaney* Court held that a Maine murder statute violated due process because the state imposed on the accused the burden of reducing the charge of homicide to manslaughter. *Mullaney*, 421 U.S. at 703. Maine required the accused to prove he acted in the heat of passion upon sudden provocation in order to reduce homicide to manslaughter. *Id.*

[7] *Mullaney*, 421 U.S. at 686. A presumption requires the party against whom the presumption operates to produce evidence to rebut the presumption. Wilson, *Shifting Burdens in Criminal Law: A Burden On Due Process*, 8 HASTINGS CONST. L.Q. 731, 740 (1981). If the defendant introduces no evidence that contradicts the proven or presumed fact, then the court instructs the jury that the presumed fact has been proven. *Id.*; *see also* Laughlin, *In Support of The Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 196-207 (1953) (presumption may have as many as eight different consequences).

[8] *Mullaney*, 421 U.S. at 704; *see* ME. REV. STAT. ANN. tit. 17, §§ 2551, 2651 (1964) (manslaughter, murder statutes). The Maine statute involved in *Mullaney* defined murder as the unlawful killing of a human being with malice aforethought, either express or implied. *Id.* at § 2651. The statute defined manslaughter as the unlawful killing of a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought. *Id.* at § 2551. The trial court in *Mullaney* read the statutory definitions to the jury and told the jury that "malice aforethought is an essential and indispensable element of the crime of murder," without which the homicide would be manslaughter. *Mullaney*, 421 U.S. at 686. The court, however, further instructed the jury that if the prosecution established that the homicide was both intentional and unlawful, then the jury should imply malice aforethought conclusively unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. *Id.* The trial judge stated that heat of passion means that, at the time of the act, passion obscured the reason of the accused to an extent that an ordinary man of fair, average disposition would be apt to act irrationally and from passion rather than judgment. *Id.* at 687 n.5.

[9] *Mullaney*, 421 U.S. at 697-98. *But cf.* Patterson v. New York, 432 U.S. 197, 214 n.15 (1977) (narrowing *Mullaney* language which suggested that due process requires prosecution to prove beyond a reasonable doubt any fact affecting degree of culpability); *see infra* text and accompanying notes 10-15 (discussion of *Patterson*).

[10] 432 U.S. 197 (1977).

[11] *See id.* at 207. The criminal code of New York contained 25 affirmative defenses that exculpate or mitigate but which are inoperative unless the defendant establishes their existence. *Id.* The *Patterson* Court noted that New York was not alone in imposing the burden of proof on the defendant through affirmative defenses. *Id.* at 207-08 n.10.

Since the American Law Institute completed the Model Penal Code in 1962, 22 states had reformed their criminal law statutes. *Id.* At least 12 of the 22 states had included the concept of an affirmative defense and had required the defendant to prove the existence of an affirmative defense by a preponderance of the evidence. *Id.* The *Patterson* Court noted that, at that time, at least six proposed state criminal codes and four successive versions of a revised Federal Criminal Code used the same procedural device. *Id.* Even states that do not employ the concept of affirmative defense nevertheless shift the burden of proof to the defendant on particular issues. *See* Low & Jeffries, DICTA: *Constitutionalizing the Criminal Law?*, 29 VA. LAW. WEEKLY, No. 18, at 1 (1977).

charged.[12] The Court thereby specifically confined the *Mullaney* ruling to elements included in the definition of the offense.[13] The *Patterson* Court noted that state legislatures could reallocate the burden of proof simply by labeling some elements of a crime as affirmative defenses.[14] The Court stated, however, that the Constitution limits the extent to which a legislature can change elements of the crime into affirmative defenses.[15]

Further protecting the rights of the criminally accused, the Court in *Sandstrom v. Montana*[16] ruled that the constitutionality of an ambiguous jury instruction depends on the way in which a reasonable juror could have interpreted the instruction.[17] If a reasonable interpretation of a

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[12] *Patterson*, 432 U.S. at 207. The *Patterson* Court examined the affirmative defenses listed in the New York murder statute and held that an affirmative defense constitutes a separate issue on which the defendant must carry the burden of persuasion. *Id.*; *see* N.Y. PENAL LAW § 125.25(1)(a)-(b) (McKinney 1975) (affirmative defenses to murder). *Id.* at § 25.00(2) (affirmative defenses in general). Therefore, the *Patterson* Court held that the New York statute did not violate due process and upheld the defendant's conviction. *Patterson*, 432 U.S. at 216.

[13] *Patterson*, 432 U.S. at 210. The New York statute identifies two elements of second-degree murder. N.Y. PENAL LAW § 125.25 (McKinney 1975). The first element is intent to cause the death of another person and the second element is causing the death of such person or a third person. *Id.* The New York statute permits a person accused of murder to claim, as an affirmative defense, that he acted under the influence of extreme emotional disturbance for which he has a reasonable explanation or excuse. *Id.* The most notable difference between the New York and the Maine murder statutes is the absence of the element of malice aforethought in the New York statute. *Compare* N.Y. PENAL LAW § 125.25 (McKinney 1975) (malice aforethought not element of murder) *with* ME. REV. STAT. ANN. tit. 17, § 2651 (1964) (malice aforethought is element of murder).

[14] *Patterson*, 432 U.S. at 210. The *Patterson* Court stated that whenever due process guarantees depend upon the laws that the legislative branches define, courts must consider the possibility that the legislature abused its legislative discretion to the detriment of the individual. *Id.* at 211 n.12; *see also* Mullaney v. Wilbur, 421 U.S. at 698-99 (redefining crimes). Since the prosecution must prove every element of the offense, the reasonable doubt standard always has been dependent on how a state defines the offense that is charged in any given case. *Patterson*, 432 U.S. at 211 n.12. Nevertheless, states have not rushed to shift the burden of disproving the traditional elements of criminal offenses to the accused. *Id.*

[15] *Patterson*, 432 U.S. at 210. The *Patterson* Court noted a few past Supreme Court decisions as vague guidelines for the constitutional limits on statute redefinition. *Id.* A legislature cannot declare an individual guilty or presumptively guilty of a crime. McFarlan v. American Sugar Refining Co., 241 U.S. 79, 86 (1916). Furthermore, a legislature cannot declare that the finding of an indictment or the mere proof of the identity of the accused is enough to create a presumption that all the facts essential to guilt exist. *See* Tot v. United States, 319 U.S. 463, 469 (1943); *see also* Speiser v. Randall, 357 U.S. 513, 523-26 (1958) (citing *McFarland* and *Tot*); Morrison v. California, 291 U.S. 82, 90 (1934) (citing *McFarland*).

[16] 442 U.S. 510 (1979).

[17] *Id.* at 514. The Supreme Court, in *Sandstrom*, held unconstitutional a jury instruction stating that the law presumes a person intends the ordinary consequences of his voluntary acts. *Id.* at 513. In *Sandstorm*, the state argued that the only authoritative interpretation of the effect of a presumption in a Montana statute is the interpretation of the Supreme Court of Montana. *Sandstrom*, 442 U.S. at 516. The possible interpretations by a jury are irrelevant under the state's theory to the extent that they differ from the Montana

presumption in the instruction would shift the burden of proof to the defendant, in violation of the *Mullaney* rule,[18] then the instruction is unconstitutional under *Sandstrom*.[19] The Fourth Circuit recently applied the *Mullaney-Sandstrom* test and held, in *Guthrie v. Warden*,[20] that a jury instruction explaining the Maryland murder statute violated due process by relieving the state of its burden of proving an element of the crime.[21]

In *Guthrie*, defendant petitioner Walter Guthrie hitchhiked a ride

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Supreme Court's interpretation. *See id.* According to the Montana Supreme Court, the presumption only imposed on the defendant the burden of producing some evidence to rebut the presumption and therefore did not violate due process. *Id.* at 513-14.

The *Sandstrom* Court held that a jury could have interpreted the challenged presumption as conclusive or as shifting the burden of proof. *Id.* at 517; *see also* United States v. United States Gypsum Co., 438 U.S. 422, 446 (1978) (conclusive presumption); Mullaney v. Wilbur, 421 U.S. 684, 702 (1975) (burden shifting); Morissette v. United States, 342 U.S. 246, 275 (1952) (conclusive presumption). Therefore, the *Sandstrom* court held the instruction unconstitutional because either interpretation by the jury would violate the fourteenth amendment's requirement that the state prove every element of the crime beyond a reasonable doubt. *Sandstrom*, 442 U.S. at 514-17; *see In re* Winship, 397 U.S. 358, 361 (1970) (every element of crime must be proven); *infra* text accompanying notes 18-20 (effect of ambiguous jury instruction).

[18] *See supra* note 6 and accompanying text (*Mulaney* rule on burden shifting instructions).

[19] United States v. Sandstrom, 442 U.S. 510, 524 (1979); *see supra* note 17 (discussion of *Sandstrom*).

[20] Guthrie v. Warden, 683 F.2d 820 (4th Cir. 1982).

[21] *Id.* at 826. The trial judge in *Guthrie* instructed the jury as follows:

1. Murder is . . . the unlawful killing of a human being with malice aforethought.
2. [m]alice is . . . the intentional doing of a wrongful act to another without legal excuse or justification.
3. [t]he law presumes all unlawful and felonious homicides to be committed with malice aforethought and to constitute murder.
4. to elevate the presumption of second-degree murder to first-degree murder, [the jury] must find that the state has proved beyond a reasonable doubt that the murder was willful, deliberate and premeditated, or committed in the perpetration of or attempt to perpetrate a robbery.
5. the burden is on the accused to reduce the presumption of second-degree murder to manslaughter.
6. in order for the accused to reduce the presumption of second-degree murder to manslaughter, [the accused must show] to the satisfaction of the jury, that the killing was done in the heat of passion which had temporarily dethroned him of his reason, and which was induced by adequate provocation.
7. the burden of showing that [the accused] lost control of his reason because of sufficient provocation . . . is upon the accused.
8. a person who uses a deadly weapon such as a knife directed at the vital parts of the body of another person is presumed in law to intend the natural and probable consequences of that act.
9. the defendant must show that he was so intoxicated that he was robbed of his mental faculties . . .

Id. at 822; Brief for Appellant at 5-6, Guthrie v. Warden, 683 F.2d 820 (4th Cir. 1982) [hereinafter cited as Appellant's Brief]; Brief for Appellee at 3-4, Guthrie v. Warden, 683 F.2d 820 (4th Cir. 1982) [hereinafter cited as Appellee's Brief].

with the victim.[22] The two men drank beer and whiskey while driving and stopped at two taverns along the way.[23] The defendant's testimony is the only source available for the details of the events that occurred after the two men left the second tavern.[24] The defendant testified that the victim made homosexual advances toward the defendant, which the defendant rejected.[25] After convincing the victim to stop the car, the defendant got out of the car and attempted to remove his luggage.[26] At that point, the victim pulled out a hand gun[27] and threatened the defendant, which led to a struggle, during which the defendant pulled a knife from his pocket.[28] During the fighting, the defendant, who testified that he was scared and thought the man was going to kill him, stabbed and killed the victim.[29] Despite the defendant's claims of insanity, intoxication, heat of passion, and self-defense[30] the jury found the defendant to be sane and guilty of first-degree murder.[31]

A Maryland county court dismissed the defendant's Petition For Post Conviction Relief[32] and a Court of Special Appeals denied his Application For Leave to Appeal that dismissal.[33] The defendant filed a Petition for Habeas Corpus with the District Court of Maryland.[34] The district court found that the trial judge's instructions to the jury violated the defendant's constitutional rights,[35] but denied the defen-

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[22] Guthrie v. Warden, 683 F.2d 820, 821 (4th Cir. 1982).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* The gun with which the victim threatened the defendant later proved to be a harmless starter's pistol. Appellant's Brief, *supra* note 21, at 4.

[28] *Guthrie*, 683 F.2d at 821.

[29] *Id.*

[30] *Id.* The State of Maryland conceded that Guthrie's version of the incident sufficiently raised the issue of self-defense. *Id.*

[31] *Id.* at 820.

[32] Appellee's Brief, *supra* note 21, at 2. The defendant filed a petition for a new trial in the circuit court for Garrett County, Maryland, under the Maryland Post Conviction Procedure Act. Appellant's Brief, *supra* note 21, at 2; *see* MD. ANN. CODE art. 27 § 645A (1977) (post conviction procedure). In the Petition For Post Conviction Relief the defendant alleged that the jury instructions on self-defense, heat of passion, direction of a deadly weapon at a vital part of the body, and voluntary intoxication erroneously shifted the burden of proof to him. Appellee's Brief, *supra* note 21, at 2; *see supra* note 21 (jury instructions). The circuit court for Garrett County, Maryland, dismissed the defendant's petition. Appellant's Brief, *supra* note 21, at 2. The court decided that the defendant's conviction of first-degree murder rendered the Constitutional errors harmless. *Id.*

[33] Appellee's Brief, *supra* note 21, at 2. The defendant's Application for Leave to Appeal addressed the impropriety of the self-defense instruction but did not contest the other instructions. Guthrie v. State, Application For Leave to Appeal No. 125 (Md. App., *per curiam* opinion filed Sept. 21, 1977); *see supra* note 21 (jury instructions).

[34] Guthrie v. Warden, 518 F. Supp. 546, 547 (D. Md. 1981); *see supra* note 1 (discussion of habeas corpus).

[35] Guthrie v. Warden, 518 F. Supp. 546, 554-56 (D. Md. 1981).

dant's Petition for Habeas Corpus, holding that the jury verdict of first-degree murder cured the constitutional errors.[36] The defendant appealed the district court's decision to the Fourth Circuit.[37] The Fourth Circuit reversed the district court and held that the instructions, considered as a whole, erroneously placed on the defendant the risk of nonpersuasion on the issue of self-defense.[38]

The Fourth Circuit based the reversal of the district court on the legal distinction between defenses of mitigation and defenses of justification or excuse.[39] The court first addressed the defendant's

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[36] *Id.* at 556-57; *see infra* text accompanying notes 46-52 (district court's reasoning). The district court did not rule on the constitutional validity of the self-defense instruction. *Guthrie*, 518 F. Supp. at 554-55. The district court did express the view that the instruction could have conveyed to the jury that Guthrie had the burden of proving self-defense, but held that the first-degree murder verdict cured the error. *Id.* at 556.

[37] Appellee's Brief, *supra* note 21, at 4. After the district court denied the defendant's Petition for Habeas Corpus, the defendant filed a timely appeal to the Fourth Circuit. *Id.* The district court granted a certificate of probable cause on August 13, 1981. *Id.* A judge issues a certificate of probable cause if there is probable cause for appeal. *See* Garrison v. Patterson, 391 U.S. 464, 465 *on remand*, 405 F.2d 696, 698, *cert. denied*, 404 U.S. 880 (1971); People v. Ribera, 92 Cal. Rptr. 692, 694, 480 P.2d 308, 311 (1971). Probable cause for appeal exists if an appeal presents debatable questions and if honest differences of opinion exist. *Garrison*, 391 U.S. at 465. A certificate operates to stay execution of the judgment. *Ex Parte* Mayen, 193 P. 813, 816, 49 Cal. App. 531 (1920).

[38] *Guthrie*, 683 F.2d at 826. The Fourth Circuit quoted *Evans v. State* extensively. *Id.* at 824-25; *see* Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976); *infra* note 63 & 71 (discussion of *Evans*).

The defendant argued that the self-defense instruction was erroneous and required reversal regardless of the degree of felonious homicide of which the jury convicted him. Appellant's Brief, *supra* note 21, at 12. The state of Maryland contended that the instructions, as a whole, did not impose on Guthrie a burden to prove self-defense. Appellee's Brief, *supra* note 21, at 8-9. The state emphasized that the trial judge told the jury at least five times that the state carries the burden of proof on every element of the crime. *Id.* at 9. The state's main contention was that the general charge on the burden of proof operated to cure any jury confusion. *Id.*; *see infra* note 67 and accompanying text (Maryland's argument on appeal). The state also argued that the first-degree murder verdict necessarily indicated that the jury rejected the self-defense claim. Appellee's Brief, *supra* note 21, at 10. Maryland reasoned that the trial judge imposed on the state the burden to prove the element of malice, defined as the intentional doing of a wrongful act to another without legal excuse or justification. *Id.* Therefore, Maryland concluded that when the jury convicted the defendant of first-degree murder, the jury necessarily rejected beyond a reasonable doubt the possibility that self-defense justified the defendant's actions. *Id.*

[39] *Guthrie*, 683 F.2d at 824; *see infra* text accompanying notes 71-79 (Fourth Circuit finding that defenses of mitigation and justification have different effects). The distinction between a defense of mitigation and a defense of justification or excuse, as the *Guthrie* court used the terms, is the effect upon the charge against the defendant. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 68 (1972). A mitigator is a partial defense in that the final result is a finding of a lesser included offense. *Id.*; *see* Wilson, *supra* note 7, at 760, n.186. Mitigation defenses, such as intoxication and heat of passion, go only to the distinction between second-degree murder and manslaughter. *Guthrie*, 683 F.2d at 824. On the other hand, a justification or excuse is a complete defense and will result in an acquittal of the defendant. Wilson, *supra* note 7, at 760. A justification or excuse can either negate the existence of an

challenge to the jury instructions explaining the mitigation defenses of intoxication and heat of passion.[40] While recognizing that the Constitution permits a state to require a criminal defendant to prove affirmative defenses,[41] which can include mitigating defenses,[42] the *Guthrie* court held that the Maryland murder law prohibits the state from exercising the constitutional privilege of shifting to the defendant the burden of proving intoxication or heat of passion.[43] Since malice is an element of second-degree murder in Maryland, under *Mullaney* the state must disprove any mitigating factors that would negate the element of malice.[44] The Fourth Circuit therefore held that the instructions imposing the burden of proof on the accused for the defenses of intoxication and heat of passion were plainly invalid.[45]

The *Guthrie* court, however, upheld the district court's decision that the first-degree murder verdict cured the erroneous instruction.[46] Since the trial court adequately charged the jury concerning the elements of first-degree murder,[47] the Fourth Circuit held that the burden-shifting instructions concerning heat of passion were harmless error.[48] The court

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element of the crime or sufficiently explain the act committed so as to bar the imposition of criminal liability. LAFAVE & SCOTT, § 8. As examples of justifiable or excusable homicides, the *Mullaney* Court noted a soldier in battle, a policeman in certain circumstances, and an individual acting in self-defense. Mullaney v. Wilbur, 421 U.S. 684, 685 n.1 (1975).

[40] *Guthrie*, 683 F.2d at 822-23; *see supra* note 21 (jury instructions).

[41] Guthrie, 683 F.2d at 823 n.4; *see* Patterson v. New York, 432 U.S. 197, 210 (1977) (state can require defendant to prove affirmative defenses); *supra* notes 11-12 and accompanying text (state can impose on defendant burden of proving affirmative defenses).

[42] *See infra* notes 98-101 and accompanying text (when mitigation defenses can be labeled affirmative defenses).

[43] *Guthrie*, 683 F.2d at 823 n.4. The Supreme Court has ruled that a state may require the accused to prove affirmative defenses by a preponderance of the evidence. Patterson v. New York, 432 U.S. 197, 210 (1977); *see supra* notes 10-13 and accompanying text (*Patterson* decision).

[44] *Guthrie*, 683 F.2d at 823 n.4; *see* Mullaney v. Wilbur, 421 U.S. 684, 704 (1975). To prove malice the state must disprove intoxication and heat of passion, when the evidence fairly raises the issues, because these defenses are inconsistent with malice. *Guthrie*, 683 F.2d at 823 n.4.

[45] *Guthrie*, 683 F.2d at 822; *see* Sandstrom v. Montana, 442 U.S. 510, 513-14, 524 (1979) (instruction that law presumes person intends ordinary consequences of voluntary acts is unconstitutional if jury could interpret it as conclusive presumption or burden-shifting presumption); Mullaney v. Wilbur, 421 U.S. 684, 703 (1975) (violates due process for state to impose on accused burden of reducing murder charge to manslaughter by proving that he acted in heat of passion upon sudden provocation); *supra* notes 5-9 and accompanying text (*Mullaney*) and notes 16-19 and accompanying text (*Sandstrom*).

[46] *Guthrie*, 683 F.2d at 823.

[47] *Id.*; *see supra* note 21 (jury instructions).

[48] Guthrie, 683 F.2d at 823; *see* Wilkins v. Maryland, 402 F. Supp. 76, 80 (D. Md. 1975), *aff'd mem.*, 538 F.2d 327 (4th Cir. 1976) (first-degree murder conviction cures erroneous heat of passion instruction), *cert. denied*, 429 U.S. 1044 (1977). Harmless error exists whenever a court errs but the error does not prejudice the substantive rights of the defendant. *See* Harrington v. California, 395 U.S. 250, 254 (1969) (6th Amendment violation was harmless beyond reasonable doubt); Chapman v. California, 386 U.S. 18, 24 (1967) (constitutional error

reasoned that the state, by proving the elements of first-degree murder beyond a reasonable doubt, necessarily disproved manslaughter beyond a reasonable doubt.[49] The jury, by finding that the murder was willful, premeditated, and deliberated, rejected the defendant's claim that mitigating factors were present.[50] The Fourth Circuit concluded that the erroneous instructions concerning mitigating factors addressed only the distinction between manslaughter and second-degree murder[51] and thus did not affect the first-degree murder conviction.[52]

After concluding that the erroneous intoxication and heat of passion instructions were harmless error, the Fourth Circuit addressed the defendant's challenge to the instructions explaining the justification of self-defense.[53] The *Guthrie* court noted that the Supreme Court ruling in *Patterson* allows a state to impose on a criminal defendant the burden of proving self-defense by a preponderance of the evidence.[54] Nevertheless, the Fourth Circuit held *Patterson* inapplicable because malice is an element of murder in Maryland.[55] The court reasoned that the state, in proving the element of malice, must disprove any defense which negates the existence of malice.[56] The Fourth Circuit stated that malicious acts, by definition,[57] are without legal justification or excuse[58] and thus concluded that the legal justification of self-defense is wholly inconsistent with

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harmless only if court can declare the error harmless beyond reasonable doubt); 28 U.S.C. § 2111 (1976) (harmless error); FED. R. CRIM. P. 52(a) (harmless error).

[49] *Guthrie*, 683 F.2d at 823.

[50] *Id.*

[51] *Id.* at 824; *see supra* note 39 (mitigation defense concerns only distinction between second-degree murder and manslaughter).

[52] *Guthrie*, 683 F.2d at 823; *see supra* text accompanying note 47 (*Guthrie* instruction on first-degree murder elements adequate).

[53] *Guthrie*, 683 F.2d at 824-26; *see supra* note 39 and accompanying text (distinction between defenses of mitigation and defenses of justification).

[54] *Guthrie*, 683 F.2d at 823, n.4; *see* Patterson v. New York, 432 U.S. 197, 206-10 (1977); *see also* Baker v. Muncy, 619 F.2d 327, 331 (4th Cir. 1980); Frazier v. Weatherholtz, 572 F.2d 944 (4th Cir.), *cert. denied*, 439 U.S. 876 (1978). *But see* Wynn v. Mahoney, 600 F.2d 448, 451 (4th Cir.), *cert. denied*, 444 U.S. 950 (1979). In *Baker* and *Frazier*, the Fourth Circuit applied *Patterson* and held that Virginia law allowed self-defense to be an affirmative defense because unlawfulness or malice is not an element of murder in Virginia. *Guthrie*, 683 F.2d at 824, n.5; *see Wynn*, 600 F.2d at 451, n.4. In *Wynn*, the Fourth Circuit examined the North Carolina murder statute, which includes unlawfulness as an element of murder, and decided that *Patterson* did not allow North Carolina to label self-defense an affirmative defense. *Wynn*, 600 F.2d at 451; *see infra* note 103 (discussion of *Wynn*).

[55] *See Guthrie*, 683 F.2d at 824 n.5; *supra* note 54 (*Patterson* applies when malice or unlawfulness is not element of murder); *infra* notes 57-59 and accompanying text (why malice, as Maryland defined it, is inconsistent with self-defense).

[56] *Guthrie*, 683 F.2d at 824 n.5.

[57] *Id.* at 822. The *Guthrie* Court instructed the jury that malice is the intentional doing of a wrongful act to another without legal excuse or justification. *Id.*; *see supra* note 21 (jury instructions).

[58] *See supra* note 39 (distinguishing between justification defenses and excuse defenses).

malice.[59] Therefore, the state must disprove self-defense to establish the element of malice, which is necessary for a murder conviction in Maryland.[60]

Although the burden is on the state to disprove self-defense, the Fourth Circuit held that the *Guthrie* instructions, considered as a whole,[61] shifted the risk of nonpersuasion to the defendant.[62] The *Guthrie* court noted that Maryland law, at the time of the defendant's trial, placed the burden of proving self-defense on the defendant[63] and from that fact inferred that the trial court probably intended the burden of proof to be on the defendant.[64] The court held that the jury, which had received instructions that the burden is on the defendant to prove the mitigation defenses,[65] likely understood, in the absence of a specific charge to the contrary, that the same burden applied to the justification defense of self-defense.[66] The court rejected Maryland's assertion that the general instruction explaining the state's burden of proof, considered with the sequence of instructions given, operated to negate any potential jury confusion.[67] The *Guthrie* court emphasized that the trial

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[59] *Guthrie*, 683 F.2d at 824 n.5.

[60] *Id.*

[61] *Id.* at 826; *see infra* text accompanying notes 65-66 (jury likely understood instructions to shift burden to defendant).

[62] *Guthrie*, 683 F.2d at 826.

[63] *Guthrie*, 683 F.2d at 825; *see* Squire v. State, 280 Md. 132, 134, 368 A.2d 1019, 1021 (1977) (summarizing Maryland law prior to *Evans*). The Maryland Court of Special Appeals, however, ruled that the law of Maryland did not place the burden of proving self-defense on the defendant. Evans v. State, 28 Md. App. 640, 664, 349 A.2d 300, 317 (1975), *aff'd*, 278 Md. 197, 205-06, 212, 362 A.2d 629, 635, 638 (1976).

[64] *Guthrie*, 683 F.2d at 825. The *Guthrie* dissent found no significance in the trial judge's probable intentions concerning the allocation of the burden of proof. *Id.* at 826; *see infra* note 82 and accompanying text (*Guthrie* dissent's view on probable intentions).

[65] *See supra* note 21 (*Guthrie* jury instructions).

[66] *Guthrie*, 683 F.2d at 825; *see supra* note 39 (explaining justification and excuse defenses).

[67] *Guthrie*, 683 F.2d at 826 n.9. In *Guthrie*, Maryland argued that, since the instructions on the mitigation defenses came after the self-defense instruction, the mitigation instructions could not have affected the jury's understanding of the burden of proof as to self-defense. *Id.* Additionally, Maryland argued that the general charge as to the state's burden of proof, which came after the self-defense instruction, but made no specific reference to the self-defense issue, cured the risk of jury confusion. *Id.* The Fourth Circuit considered the two Maryland arguments logically inconsistent. *Id.* If the subsequent instructions as to mitigation could not have influenced the jury on the self-defense claim, then the Fourth Circuit stated that a subsequent generalized burden of proof instruction could not have influenced the jury concerning the self-defense claim. *Id.*

The *Guthrie* court, however, rejected Maryland's contentions for reasons more important than faulty logic. *Id.* The court stated that the state's first argument assumed the jury clearly recalled the sequence of the instructions, an assumption the court termed fanciful. *Id.* The Fourth circuit further noted that both of Maryland's arguments view the instructions in segments and thereby contravene the well-established principle that jury instructions should be read as a whole. *Id.*; *see* Cupp v. Naughten, 414 U.S. 141, 146-47 (1973) (well-established that appellate courts should view jury instructions in context of overall charge).

court improperly permitted the jury to rely upon a presumption of malice and did not properly instruct the jury to apply the limiting phrase "without legal excuse or justification," which is part of the definition of malice.[68] The Fourth Circuit concluded that the jury instructions, viewed as a whole, erroneously relieved the state of the constitutional burden of proving every element of the crime.[69]

After holding the self-defense instruction erroneous, the Fourth Circuit addressed the state's assertion that the error was harmless.[70] The *Guthrie* court reversed the district court and held that a verdict of first-degree murder, returned after proper instructions on the elements of the crime, does not render an erroneous instruction on self-defense harmless.[71] Although the Fourth Circuit held that the first-degree murder verdict cured the erroneous instructions on mitigation,[72] the court distinguished the mitigation defenses from the defenses of justification, such as self-defense.[73] Self-defense renders a homicide justifiable and thus constitutes an absolute defense.[74] Any error in a self-defense instruction, therefore, is necessarily prejudicial.[75] Because self-defense exonerates an accused of any degree of culpable homicide,[76] the Fourth Circuit held that a conviction of first-degree murder does not cure an erroneous self-defense instruction.[77] The *Guthrie* court emphasized that self-defense would relieve an accused of guilt for a premeditated and deliberated killing as well as for a killing in the heat of passion, whereas the mitigation defenses would not reduce a premeditated and

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Finally, the *Guthrie* court stated that Maryland's arguments rested on the mere hope that the flawed instructions did not influence the jury. *Guthrie*, 683 F.2d at 826 n.9. The court pointed out that the only excusable constitutional error is an error that is harmless beyond a reasonable doubt. *Id.*; *see supra* note 48 (harmless error).

[68] *Guthrie*, 683 F.2d at 836; *see supra* note 58 (definition of malice given to jury).

[69] *Guthrie*, 683 F.2d at 826; *see supra* notes 2-4 and accompanying text (constitutional basis for requiring state to prove every element of crime).

[70] *Guthrie*, 683 F.2d at 824-26.

[71] *Id.* at 824; *see* Evans v. State, 28 Md. App. 640, 656, 349 A.2d 300, 317 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976) (effect of *Mullaney* decision on Maryland law). The *Guthrie* court, applying language from *Evans*, held that instructions that relieve the state of the burden of ultimate persuasion on the issue of nonjustification or nonexcuse, when either is a fair issue in the case, are constitutional error. *Guthrie*, 683 F.2d at 824. The *Guthrie* court further held that the constitutional error merits a reversal regardless of the degree of homicide of which the defendant was convicted. *Id.*; *Mullaney*, 421 U.S. 684, 697 (1975); *see infra* text accompanying notes 72-79 (*Guthrie* court's reasons for requiring reversal).

[72] *See supra* notes 48-52 and accompanying text (erroneous mitigation instructions cured by first-degree murder verdict).

[73] *Guthrie*, 683 F.2d at 824; *see supra* note 39 (distinction between mitigation defenses and justification or excuse defenses).

[74] Wynn v. Mahoney, 600 F.2d 448, 450 (4th Cir.), *cert. denied*, 444 U.S. 950 (1979).

[75] *Id.*

[76] *Guthrie*, 683 F.2d at 825; *see* Wynn v. Mahoney, 600 F.2d 448, 450 (4th Cir.), *cert. denied*, 444 U.S. 950 (1979); *supra* note 71 (discussion of reversible error) and text accompanying note 75 (self-defense exonerates criminal defendant).

[77] *Guthrie*, 683 F.2d at 825.

deliberated killing.[78] The *Guthrie* court concluded, therefore, that the erroneous self-defense instruction was not harmless error, reversed the district court, and remanded the case with instructions to issue the writ of habeas corpus or conduct another trial.[79]

The dissent described as flawed and fictitious the majority's conclusion that the jury instructions were prejudicial and constituted reversible error.[80] The dissent maintained that the instructions could not have led the jury to conclude that the defendant had the burden of proof on the issue of self-defense.[81] According to the dissent, the majority's reliance on the trial judge's silent intentions was completely unreasonable.[82] Instead of holding the jury instructions to be unconstitutional and reversible error, the dissent would have accepted Maryland's contention that the sequence of the instructions coupled with the general instruction on the burden of proof clarified the law for the jury.[83] The dissent concluded that the instructions did not mislead the jury about the state's burden of proof and therefore, the dissent would have upheld the conviction.[84]

While the dissent and the majority would have decided *Guthrie* differently, the two opinions agree that an appellate court must decide the constitutionality of a jury instruction in the context of the overall charge.[85] Other circuit courts agree with the Fourth Circuit and do not judge the constitutionality of a jury instruction in isolation from the entire charge.[86] The circuit courts do, however, apply varying standards to determine whether jury instructions viewed in their entirety, violate due process.[87] The standard in the Fifth and Eighth Circuits, like the

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[78] *Id.*; *see* Evans v. State, 28 Md. App. 640, 664, 349 A.2d 300, 317 (1975), *aff'd*, 278 Md. 197, 205, 362 A.2d 629, 635 (1976) (self-defense relieves accused of guilt for premeditated murder, whereas mitigation defenses do not).

[79] *See id.* at 826.

[80] *Id.* at 826-27 (Hall, J., dissenting).

[81] *Id.* at 826 (Hall, J., dissenting).

[82] *Id.*; *see supra* note 64 and text accompanying notes 63-64 (majority's reference to trial court's probable intentions).

[83] *Guthrie*, 683 F.2d at 826-27 (Hall, J., dissenting); *see supra* note 67 and accompanying text (Maryland's arguments).

[84] *Guthrie*, 683 F.2d at 826-27 (Hall, J., dissenting).

[85] Cupp v. Naughten, 414 U.S. 141, 146-47 (1973) (well-established that courts must view jury instructions in context of overall charge); Boyd v. United States, 271 U.S. 104, 107-08 (1926) (same).

[86] *E.g.*, Nelson v. Scully, 672 F.2d 266, 271-72 (2d Cir.) (decide instruction's constitutionality by viewing instructions as a whole), *cert. denied*, 102 S. Ct. 2301 (1982); Jacks v. Duckworth, 651 F.2d 480, 486-87 (7th Cir. 1981) (same), *cert. denied*, 102 S. Ct. 1010 (1982); United States v. Tecumseh, 630 F.2d 749, 754 (10th Cir.) (same), *cert. denied*, 449 U.S. 961 (1980); United States *ex rel* Goddard v. Vaughn, 614 F.2d 929, 935 (3rd Cir.) (same), *cert. denied*, 449 U.S. 844 (1980); Gagne v. Meachum, 602 F.2d 471, 473 (1st Cir.) (same), *cert. denied*, 444 U.S. 992 (1979).

[87] *See infra* notes 88-89 and accompanying text (different standards that circuit courts apply to decide constitutionality of instructions).

Fourth Circuit, is whether the jury instruction could mislead a reasonable juror.[88] The First, Second, Third, Seventh, Ninth and Tenth Circuits, however, hold that the erroneous instruction must infect the entire trial so much that the resulting conviction violates due process.[89] Courts adopting the latter standard give greater weight to the curative effect of a general instruction that explains the state's burden of proof.[90] Under either standard, however, the appellate court examines the instructions as a whole and decides whether the instructions relieved the state of the burden of proving an element of the crime.[91]

The Fourth Circuit in *Guthrie* evaluated the jury instructions and decided that, viewed as a whole, the instructions erroneously placed the risk of nonpersuasion concerning self-defense on the defendant.[92] The *Guthrie* court's analysis is a sound application of the current Supreme Court position on the burden of proof in criminal cases.[93] While the Supreme Court in *Patterson* seemingly accorded legislatures tremendous latitude in defining crimes,[94] the Court has held consistently that due process demands that the state prove every element of the crime however defined.[95] The Supreme Court has not considered yet whether a

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[88] *See, e.g.*, Adkins v. Bordenkircher, 674 F.2d 279, 282 n.7 (4th Cir. 1982) (alibi instruction that could mislead jury is erroneous); Dietz v. Solem, 640 F.2d 126, 129 (8th Cir. 1981) (*Sandstrom* type instruction not cured by presumption of innocence, burden of proof and reasonable doubt instruction); Halloway v. McElroy, 632 F.2d 605, 620 (5th Cir.) (shifting burden of proving self-defense to defendant is patently not harmless error), *cert. denied*, 451 U.S. 1028 (1980). *But cf.* Gore v. Leeke, 605 F.2d 741, 743 (4th Cir. 1979) (citing Cupp v. Naughten, 414 U.S. 141 (1973)) (repeated instruction about reasonable doubt cured burden-shifting instruction), *cert. denied*, 444 U.S. 1087 (1980).

[89] *See, e.g.*, Nelson v. Scully, 672 F.2d 266, 271-72 (2d Cir.) (erroneous instruction must infect entire trial to violate due process), *cert. denied*, 102 S. Ct. 2301 (1982); Jacks v. Duckworth, 651 F.2d 480, 486-87 (7th Cir. 1981) (same), *cert. denied*, 102 S. Ct. 1010 (1982); United States v. Tecumseh, 630 F.2d 749, 754 (10th Cir.) (erroneous instruction does not require reversal), *cert. denied*, 449 U.S. 961 (1980); Quigg v. Crist, 616 F.2d 1107, 1111 (9th Cir.) (erroneous instruction must infect entire trial to violate due process), *cert. denied*, 449 U.S. 922 (1980); United States *ex rel* Goddard v. Vaughn, 614 F.2d 929, 935 (3rd Cir.) (erroneous instruction does not require reversal), *cert. denied*, 449 U.S. 844 (1980); Gagne v. Meachum, 602 F.2d 471, 474 (1st Cir.) (same), *cert. denied*, 444 U.S. 922 (1979).

[90] *See, e.g.*, Jacks v. Duckworth, 651 F.2d 480, 486-87 (7th Cir. 1981) (presuming probable consequences of voluntary act are intended), *cert. denied*, 102 S. Ct. 1010 (1982); United States v. Tecumseh, 630 F.2d 749, 754 (10th Cir.) (malice aforethought instruction), *cert. denied*, 449 U.S. 961 (1980); United States *ex rel* Goddard v. Vaughn, 614 F.2d 929, 931 n.2, 935 (3rd Cir.) (voluntary intoxication instruction), *cert. denied*, 449 U.S. 844 (1980). The Third, Seventh, and Tenth Circuits have no steadfast rule stating that a general instruction will always cure an erroneous instruction. The cases cited, however, illustrate that the courts will allow a general instruction to cure a burden-shifting instruction.

[91] *Guthrie*, 683 F.2d at 825-26. *Compare* note 88 and accompanying text (instruction erroneous if it could mislead a reasonable juror) *with* note 89 and accompanying text (instruction violates due process if infects entire trial).

[92] *Guthrie*, 683 F.2d at 826.

[93] *See supra* notes 5-19 and accompanying text (Supreme Court precedents).

[94] *See supra* notes 14-15 and accompanying text (*Patterson* holding).

[95] *E.g.*, Mullaney v. Wilbur, 421 U.S. 684, 685 (1975) (state must prove every element of

state can label self-defense an affirmative defense, which would allow the states to shift the burden of proof to the accused.[96] Until the Supreme Court addresses the question of the proper allocation of the burden of proof on the issue of self-defense, court decisions concerning the question will depend on whether self-defense negates a statutory element of the crime.[97]

A state cannot impose upon a criminal defendant the burden of proving an affirmative defense that negates an element of the crime[98] because that would relieve the state of the constitutional burden of proving every element of the crime.[99] Therefore, variations in state statutes defining the elements of murder will result in apparently inconsistent rulings on the constitutionality of similar self-defense instructions.[100] The decisions will vary however, according to the definition of murder in the prosecuting state.[101] Since self-defense is wholly inconsistent with malicious or unlawful acts, a state can label the justification of self-defense as an affirmative defense only if state law does not include unlawfulness or malice as an element of murder.[102]

The Fourth Circuit accepts self-defense as an affirmative defense when consistent with state murder law.[103] Under Maryland law however,

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offense); *In re* Winship, 397 U.S. 358, 364 (1970) (same); *see* Patterson v. New York, 432 U.S. 197, 205-06 (1977) (state can shift burden of proof on nonelements to defendant).

[96] *See* Wynn v. Mahoney, 600 F.2d 448, 450 (4th Cir.), *cert. denied*, 444 U.S. 950 (1979).

[97] *See supra* notes 11-12 and accompanying text (state can shift to defendant burden of proof on affirmative defenses that do not negate element of crime).

[98] *See* Patterson v. New York, 432 U.S. 197, 207 (1977); Mullaney v. Wilbur, 421 U.S. 684, 698, 701 (1975); *supra* notes 5-15 and accompanying text (discussion of *Mullaney* and *Patterson*).

[99] *See* Patterson v. New York, 432 U.S. 197, 207-08 (1977); Mullaney v. Wilbur, 421 U.S. 684, 698 (1975); *In re* Winship, 397 U.S. 358, 361 (1970); *supra* notes 3-4 and accompanying text (discussion of *Winship*).

[100] *See infra* note 103 and accompanying text (Fourth Circuit precedents).

[101] *Id.*

[102] *See* Patterson v. New York, 432 U.S. 197, 206-08 (1977) (defendant can not be given burden of proving affirmative defense that negates element of crime); Wynn v. Mahoney, 600 F.2d 448, 450-51 (4th Cir.) (self-defense can not be affirmative defense if malice is included in murder definition), *cert. denied*, 444 U.S. 950 (1979); *supra* note 21 (definition of malice given to *Guthrie* jury).

[103] *Compare* Baker v. Muncy, 619 F.2d 327, 330 (4th Cir. 1980) (Virginia law does not consider malice or unlawfulness element of murder, thus self-defense can be affirmative defense) *and* Frazier v. Weatherholtz, 572 F.2d 994, 995-96 (4th Cir.) (same), *cert. denied*, 439 U.S. 876 (1978) *with* Wynn v. Mahoney, 600 F.2d 448, 451 (4th Cir.) (North Carolina law considers unlawfulness element of murder, thus self-defense cannot be affirmative defense), *cert. denied*, 444 U.S. 950 (1979). In *Baker* and *Frazier* the Fourth Circuit held that self-defense is an affirmative defense under Virginia law and that the state may, under principles set forth in *Patterson*, place the burden of proving self-defense on the accused. *Baker*, 619 F.2d at 331; *Frazier*, 572 F.2d at 995-96. The Fourth Circuit noted, in *Baker* and *Frazier*, that nothing indicated that Virginia regarded unlawfulness as an element of murder and, therefore, the state need not disprove self-defense to prove unlawfulness. *See Baker*, 619

malice is an element of murder and therefore the state must disprove self-defense when the evidence fairly raises the issue.[104] Therefore, the *Guthrie* court's decision that the burden-shifting instructions were reversible error is sound reasoning and a correct application of the Supreme Court's current position to the murder law of Maryland.

The *Guthrie* decision is in harmony with the Supreme Court principles enunciated in *Mullaney*, *Patterson*, and *Sandstrom*.[105] The decision also reflects the Fourth Circuit's understanding of the need to balance the state's right to label as an affirmative defense any defense that does not negate an element of the crime, against the defendant's right to protection against jury instructions that unconstitutionally shift the burden of proof to the defendant.[106] Until the Supreme Court decides the question of the burden of proof on the issue of self-defense in a murder case in which the evidence fairly raises the issue,[107] the Fourth Circuit will continue to balance the conflicting rights of the states and the criminal defendant as the court did in *Guthrie*. The general lesson from the *Guthrie* decision for Fourth Circuit practitioners is that the court will allow a state to shift the burden of proof to a criminal defendant by labeling certain defenses as affirmative defenses only if the defense does not negate an element of the crime.

BARRY J. GAINEY

B. *Double Jeopardy and Post-Verdict Judgments of Acquittal*

The double jeopardy principle prohibits the Government from bringing subsequent criminal prosecutions against the same defendant for the same offense when the prosecution has failed to obtain a conviction in a

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F.2d at 311; *Frazier*, 572 F.2d at 995. In *Wynn*, however, the Fourth Circuit had to apply the same Supreme Court precedents to North Carolina law. *Wynn*, 600 F.2d at 450-51. Since North Carolina statutes define unlawfulness, or the absence of self-defense, as an element of murder, the rationale of *Patterson*, which applies only to affirmative defenses, was inapplicable in *Wynn*. *Wynn*, 600 F.2d at 451. The apparently contradictory rulings by the Fourth Circuit are a result of the different definitions of murder in Virginia and North Carolina. *See Baker*, 619 F.2d at 331; *Wynn*, 600 F.2d at 451; *Frazier*, 572 F.2d at 995.

[104] *Guthrie*, 683 F.2d at 822; *see supra* note 21 (jury instructed that murder is unlawful killing with malice aforethought).

[105] *See supra* notes 5-19 and accompanying text (discussion of *Mullaney*, *Patterson* and *Sandstrom*).

[106] *See* Patterson v. New York, 432 U.S. 197, 206-08 (1977); *supra* notes 10-15 and accompanying text (discussion of *Patterson*).

[107] *See* Hankerson v. North Carolina, 432 U.S. 233, 244-45 (1977). The *Hankerson* Court declined to consider whether due process required the North Carolina prosecutor to disprove self-defense because the parties did not raise the issue. *Id. See* Wynn v. Mahoney, 600 F.2d 448, 451 (4th Cir.), *cert. denied*, 444 U.S. 950 (1979).

previous trial.[1] The framers of the Constitution incorporated the common-law double jeopardy prohibition[2] into the fifth amendment of

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[1] *See* Green v. United States, 355 U.S. 184, 187 (1957) (double jeopardy principle protects individuals from being subjected to hazards of trial and possible conviction more than once for same offense); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 169 (1873) (double jeopardy principle forbids multiple punishments for same offense); *see also* Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 454 (1977) (prohibition against double jeopardy reflects principles of res judicata by ensuring finality of judgment of acquittal and protecting against multiple punishments for same offense); Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 267 (1965) (double jeopardy principle protects acquitted individuals from unnecessary harassment that would result from reprosecution) [hereinafter cited as *Twice in Jeopardy*]. The double jeopardy prohibition against repeated prosecution reflects society's awareness of the heavy strain upon individuals that accompanies criminal trials. United States v. Jorn, 400 U.S. 470, 479 (1971) (double jeopardy prohibition represents policy of finality for benefit of defendant in criminal proceedings); *see also* Crist v. Bretz, 437 U.S. 28, 33 (1978) (primary purpose of double jeopardy prohibition is to protect integrity of final judgment). Society seeks to spare the criminal defendant the anxiety, expense, and embarrassment inherent in repeated criminal proceedings. *Green*, 355 U.S. at 187. Absent a double jeopardy prohibition, the state's superior resources and power would enable the state to make repeated efforts to convict. *Id.* at 187-88. Through repeated prosecutions, the state could exhaust even innocent defendants and obtain wrongful convictions. *Id.*

In American jurisprudence, jeopardy attaches when a criminal trial commences before a judge or jury. *Jorn*, 400 U.S. at 479. Protection under the double jeopardy clause begins when the jury has been empaneled and sworn. *See* Downum v. United States, 372 U.S. 734, 735-38 (1963). The guarantees of the double jeopardy prohibition, however, are not absolute. *See generally* Schulhofer, *supra*, at 454. Remnants of early restrictions remain, and numerous competing interests have prompted the creation of new limitations. *Id.* For example, the double jeopardy prohibition does not prevent reprosecution in all instances when a competent tribunal does not issue a final judgment. Wade v. Hunter, 336 U.S. 684, 688 (1949). In some cases, society's interest in fair and effective processing of criminal cases must overcome a defendant's right to have his trial completed by a particular tribunal. *Id.* at 689; *see, e.g.*, Thompson v. United States, 155 U.S. 271, 273-74 (1894) (double jeopardy prohibition is inoperative when trial judge orders retrial due to jury bias); United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (reprosecution permitted after mistrial declared prior to verdict for reasons of absolute necessity).

[2] *See generally* J. SIGLER, DOUBLE JEOPARDY 1-37 (1969) (traces development of double jeopardy prohibition) [hereinafter cited as SIGLER]. The concept of double jeopardy is one of the oldest legal doctrines found in western civilization. Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting). The ancient Greek and Roman civilizations were familiar with the double jeopardy principle. *See* SIGLER, *supra*, at 2 (Roman law permitted reprosecution of acquitted defendant only within thirty days of former acquittal). The canon law recognized the need to prevent reprosecution for the same offense. *See id.* at 3 (canon law's opposition to placing individual twice in jeopardy was based on principle that God does not punish twice for same transgression). At common law, special pleas dealt with the difficulties that the prohibition against double jeopardy deals with today. *Twice in Jeopardy*, *supra* note 1, at 262 n.1; *see also* SIGLER, *supra*, at 16-21 (Coke and Blackstone are most important contributors to common-law development of double jeopardy principle). These special pleas included *autrefois acquit*, former acquittal, and *autrefois convict*, former conviction. *Twice in Jeopardy*, *supra* note 1, 262 n.1. The pleas of *autrefois acquit* and *autrefois convict* prevented retrial for the same criminal offense after the return of a verdict. 4 W. BLACKSTONE, COMMENTARIES *335-36; *see also* Schulhofer, *supra* note 1, at 453 (common-law double jeopardy principle applied only in capital cases). *See generally* M. FRIEDLAND, DOUBLE JEOPARDY 5-15 (1969) (history of rule against double jeopardy).

the Constitution.[3] Prior to the Criminal Appeals Act of 1970 (the Act),[4] statutes restricted the Government from appealing criminal cases to the limit of the double jeopardy clause.[5] The Act, however, removes all statutory barriers to Government appeals in criminal cases by allowing the Government to appeal whenever the double jeopardy clause permits.[6] Congress adopted the Act to allow courts to determine the

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[3] *See* U.S. CONST. amend V. The fifth amendment provides in part, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." *Id.* The Supreme Court originally refused to apply the fifth amendment to the states through the fourteenth amendment's due process clause. *See, e.g.*, Brock v. North Carolina, 344 U.S. 424, 426-27 (1953) (reprosecution of criminal defendant does not violate fundamental notions of liberty and justice); Palko v. Connecticut, 302 U.S. 319, 328 (1937) (same). *But cf. Palko*, 302 U.S. at 328 (dictum) (flagrant violation of double jeopardy clause may violate fourteenth amendment due process). Today, however, the constitutional prohibition against double jeopardy applies to the states. Benton v. Maryland, 395 U.S. 784, 794 (1969). *See generally* Weston & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81 (1979) (analyzing Supreme Court decisions on double jeopardy); *Recent Developments—Emerging Standards in Supreme Court Double Jeopardy Analysis*, 32 VAND. L. REV. 609 (1979) (discussing current status of law concerning double jeopardy).

[4] Criminal Appeals Act, Pub. L. No. 91-644, 84 Stat. 1890 (1971) (codified at 18 U.S.C. § 3731 (1976)).

[5] *See* Criminal Appeals Act of 1907, ch. 2564, Pub. L. No. 59-223, 34 Stat. 1246 (1907) (codified as amended at 18 U.S.C. § 3731 (1976)) (authorizing Government appeals in limited set of circumstances); *see also* United States v. Sanges, 144 U.S. 310, 318 (1892) (Government prohibited from appealing criminal case without statutory authorization). The Criminal Appeals Act of 1907 (Act of 1907) permitted appeals from decisions dismissing an indictment or an order arresting judgment when statutory invalidity or construction was the basis of the judgment. *See, e.g.*, United States v. Green, 350 U.S. 415, 416 (1956) (permitting Government to appeal from order arresting judgment); United States v. Bramblett, 348 U.S. 503, 504 (1955) (same); *see also* State v. Efird, 186 N.C. 482, 482, 119 S.E. 881, 881 (1923) (arrest of judgment is refusal of court to enter judgment for some reason that is apparent upon record). *See generally* Note, *Double Jeopardy and Government Appeals in Criminal Cases*, 12 COLUM. J.L. & SOC. PROBS. 295, 297 (1976) (several minor amendments prior to 1970 left Act of 1907 generally unchanged) [hereinafter cited as *Double Jeopardy*].

[6] *See* 18 U.S.C. § 3731 (1976). The Criminal Appeals Act provides in part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

Id. In United States v. Wilson, 420 U.S. 332 (1975), the Supreme Court concluded that the legislative history of the Act reflects congressional intent to allow appeals whenever the Constitution permits. *Id.* at 337; *see also* S. REP. No. 1296, 91st Cong., 2d Sess. 18 (1970) (indicated Judiciary Committee's intent to extend Government appeal right to constitutional limits). Congress also intended that the courts should construe the Act liberally. *See* 18 U.S.C. § 3731 (1976) (courts must construe Act liberally in order to effectuate its purpose); United States v. Correia, 531 F.2d 1095, 1097 (1st Cir. 1976) (same). *But see* United States v. Comiskey, 460 F.2d 1293, 1298 (7th Cir. 1972) (Act provides United States right to appeal only within narrow instances specified); United States v. Hines, 419 F.2d 173, 174 (10th Cir. 1969) (strict construction of statute is required).

The Criminal Appeals Act of 1907 operated as a former statutory barrier to Government appeals by specifying the cases in which appellate jurisdiction over Government ap-

limits of Government appeals of criminal cases under the fifth amendment's double jeopardy clause.[7] The Act raises important questions concerning the extent of appellate jurisdiction and the appropriate standard of review once an appellate court has assumed jurisdiction over a Government appeal.[8] In *United States v. Steed*,[9] the Fourth Circuit addressed the issues of whether the Government may appeal a trial judge's order overturning a jury's guilty verdict and by what standard an appellate court should review the trial judge's action.[10]

At trial, a jury found the defendant, Daryls Steed, guilty of furnishing false statements to the Department of Housing and Urban Development (HUD) in violation of the Interstate Land Sales Full Disclosure Act.[11] The

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peals was proper. *See supra* note 5 (Act of 1907 permitted appeal of decisions dismissing indictment and orders arresting judgments). The language of common-law pleadings embodied in the Act of 1907 was troublesome for the new generation of judges who had familiarized themselves with the pleadings language of the federal rules. *See Double Jeopardy, supra* note 5, at 297 (difficulty courts experienced with common-law pleadings was manifested in improper classification of acquittals within one of pigeonholes that statutory grant of jurisdiction recognized). Since many courts improperly classified dismissals as arrests of judgment, policy dictated that such decisions were not appropriate matters for appeal. *Id.*; *see also* United States v. Sisson, 399 U.S. 267, 281-83 (1970) (arrest of judgment recognizing young man's conscientious objector status was not an arrest of judgment within meaning of Act of 1907). Conversely, many dismissals defied categorization and the Government therefore did not appeal. *See Double Jeopardy, supra* note 5, at 297 (characterizing such results as "historical accidents"). Justice Harlan referred to the 1907 Act as "a failure" and "a most unruly child that has not improved with age." *Sisson*, 399 U.S. at 307.

[7] *See* United States v. Wilson, 420 U.S. 332, 339 (1975) (legislative history suggests that Congress decided to rely on courts to define constitutional boundaries under fifth amendment analysis); *see also supra* note 6 (Criminal Appeals Act extends Government appellate right to constitutional limits). Before Congress passed the Criminal Appeals Act, the courts decided most cases on statutory grounds. *See supra* note 5 (discussing statutory limitations on Government appeals dictated by Act of 1907). In *Wilson*, however, the court was free to articulate a clear statement of the policy behind the double jeopardy clause. *See Wilson*, 420 U.S. at 336, 342-46 (identifies policy against multiple prosecutions for the same offense as crucial policy behind double jeopardy clause); *see also Double Jeopardy, supra* note 5, at 302 (*Wilson* Court first court to isolate primary policy behind double jeopardy).

[8] United States v. White, 673 F.2d 299, 301-02 (10th Cir. 1982) (court determines jurisdiction to hear Government appeal and then determines appropriate standard of review); United States v. Dixon, 658 F.2d 181, 188 (3d Cir. 1981) (same); United States v. Burns, 597 F.2d 939, 941 (5th Cir. 1979) (same). *See generally* 15 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3919 (1976) [hereinafter cited as WRIGHT & MILLER].

[9] 674 F.2d 284 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 67 (1982).

[10] *Id.* at 285.

[11] *Id.* at 286. The Interstate Land Sales Full Disclosure Act (Land Sales Act) requires subdivision developers to furnish prospective buyers with material information about lots offered for sale. *Id.*; *see* Interstate Land Sales Full Disclosure Act, Pub. L. No. 90-448, 82 Stat. 590 (1968) (codified at 15 U.S.C. §§ 1701-20 (1976 & Supp. V 1981)). Any developer who furnishes false information is criminally liable for such misrepresentation. *Id.* § 1717. The Land Sales Act authorizes the Secretary of Housing and Urban Development to provide exemptions in addition to those the statute specifically provides for. *Id.* § 1702(c) (Secretary may promulgate rules exempting developers from complying with Act due to limited

jury also found Steed guilty of mail fraud.[12] In order to win a conviction on the charges of furnishing false statements and mail fraud, the Government must prove a specific intent to defraud.[13] At trial, Steed did not testify.[14] The jury therefore had to determine from circumstantial evidence whether Steed had the requisite mental state to commit the offense.[15] After the jury returned a guilty verdict, the defendant moved for

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character of public offering); *see also id.* § 1702(a) (general exemptions Land Sales Act recognizes). The Secretary has exempted developers of subdivisions of less than 300 lots from complying with the Land Sales Act. HUD Land Registration Requirements, 24 C.F.R. § 1710.14 (1974) (current version at 24 C.F.R. § 1710.14 (1982)).

[12] 674 F.2d at 286. Congress has forbidden the use of the mails to execute a fraudulent scheme. 18 U.S.C. § 1341 (1976). The essential elements of mail fraud are, first, a scheme conceived by the defendant for the purpose of defrauding by means of false pretenses, representations, or promises. *See* Gold v. United States, 350 F.2d 953, 954-56 (8th Cir. 1965) (promise to devote full time to business enterprise constitutes misrepresentation when promising party knows that he will make no such effort). Second, the defendant must use the United States mails in the furtherance of the scheme. *See id.* at 956 (prosecution may prove elements of mail fraud by presenting circumstantial evidence).

[13] 674 F.2d at 287. To convict a defendant of violating the Land Sales Act, the Government must demonstrate that the applicant, in order to gain exemption from the Act, wilfully and materially misrepresented the extent of the public offering. *See* United States v. Steinhilber, 484 F.2d 386, 389-90 (8th Cir. 1973) (court must look to defendant's meaning of alleged misrepresentation when determining whether defendant wilfully was misleading). Similarly, mail fraud requires specific intent to defraud. *See* Williams v. United States, 278 F.2d 535, 537 (9th Cir. 1960) (drawing check against insufficient funds constitutes specific intent to defraud unless defendant had reasonable expectation that deposits would cover check at time defendant presented check for payment).

Steed was president of Parkway Development Corporation. 674 F.2d at 287. Parkway sold 86 lots of a subdivision that were once part of a large tract of land owned by Thomas Beasley. *Id.* Parkway gained an exemption from HUD based upon Steed's representations that she intended to sell only 86 lots as part of a common promotional plan. *Id.*; *see* 15 U.S.C. § 1702(c) (1976 & Supp. V. 1981) (Interstate Land Sales Full Disclosure Act allows exemptions based on limited character of sales offering). The prosecution argued that Parkway Development was part of a larger promotional plan that included lots owned by Thomas Beasley. *See* 674 F.2d at 287-88. If Steed was aware of the plan to sell Beasley's remaining lots, the jury could find that she acted with fraudulent intent. *Id.* at 288. Steed contended that the evidence was insufficient to show a common promotional plan. *Id.* Steed further argued that the evidence was insufficient to show fraudulent intent. *Id.* Steed argued that she was ignorant of any plans to market land adjoining Steed's tract as a common promotional endeavor. *Id.*

[14] 674 F.2d at 288.

[15] *Id.* The evidence established that Steed had experience in the land development business. *Id.* The facts also showed that Beasley's 460 acre tract would not have qualified for the HUD exemption. *Id.* Steed agreed that Beasley was to receive a large profit from the sale of the 86 lot tract. *Id.* Steed thus knew that Beasley was participating in the profits realized from the land that he previously owned. *Id.* Since Beasley participated in the profits, he qualified as one of the developers of the Parkway subdivision. *See id.*; 15 U.S.C. § 1701(5) (1976 & Supp. V 1981) (developer is any person who directly or indirectly offers to sell lots in subdivision); *see also id.* § 1701(4) (defining common promotional plan). Steed, however, never disclosed Beasley's interest in the profits in her application to HUD. 674 F.2d at 288.

Steed employed a lawyer to prepare the exemption application. *Id.* The attorney testified that he discussed the restrictions and requirements of the Land Sales Act with

a judgment of acquittal or, alternatively, a new trial.[16] The district court granted the defendant's motion for judgment of acquittal and dismissed the jury's verdict on the ground that the evidence was insufficient to convict the defendant.[17] The United States appealed the district court's post-verdict judgment of acquittal to the Fourth Circuit under the Criminal Appeals Act.[18]

The Fourth Circuit in *Steed* first determined that the court had jurisdiction to hear the Government's appeal.[19] The *Steed* court relied on the Supreme Court's decision in *United States v. Wilson*[20] to determine

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Steed and Beasley. *Id.* The attorney cautioned Steed and Beasley that the Land Sales Act required the two developers to operate as autonomous entities. *Id.*

Notwithstanding the attorney's advice, Steed's promotion company sent sweepstakes prize offerings to many prospective purchasers who showed an interest in Beasley's tract as well as Parkway's subdivision. *Id.* at 289. The evidence also showed that Steed and Beasley employed the same sales teams. *Id.* Based upon this circumstantial evidence, the jury concluded that Steed had violated the Interstate Land Sales Full Disclosure Act by intentionally misrepresenting the nature of the land development operation. *Id.* at 286-89.

[16] 674 F.2d at 285. At the close of the Government's case, Steed moved for a judgment of acquittal pursuant to rule 29(a) of the Federal Rules of Criminal Procedure. United States v. Steed, 646 F.2d 136, 137 (4th Cir. 1981), *vacated*, 674 F.2d 284 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 67 (1982). Rule 29(a) permits a court to enter a judgment of acquittal upon a defendant's motion or upon the court's motion. FED. R. CRIM. P. 29(a). The defendant may move for a judgment of acquittal at the close of either side's case on the ground that the evidence is insufficient to convict. *Id. See generally* J. MOORE & R. CIPES, 8A MOORE'S FEDERAL PRACTICE ¶¶ 29.01-29.09 (2d ed. 1982) [hereinafter cited as MOORE]; 2 WRIGHT & MILLER, *supra* note 8, §§ 461-70. In *Steed*, the district court denied the defendant's motion. 646 F.2d at 137. Steed refiled the motion to acquit at the close of all the evidence. *Id.* The district court submitted the case to the jury, and reserved its decision under rule 29(b). *Id.* Under rule 29(b), a court may decide on the motion before the court submits the case to the jury or after the jury returns a verdict. FED. R. CRIM. P. 29(b). Steed moved for acquittal under rule 29(c) after the jury entered the guilty verdict. 646 F.2d at 137; *see* FED. R. CRIM. P. 29(c) (rule 29(c) permits defendant to move for judgment of acquittal within seven days after court discharges jury).

[17] 646 F.2d at 137. In *Steed*, the district court also granted defendant's alternative motion for a new trial. *Id.*; *see infra* note 38 (discussing district court's order granting defendant's alternative motion for new trial).

[18] 674 F.2d at 285. A Fourth Circuit panel held that the court had jurisdiction to hear the Government appeal of the district court's post-verdict acquittal. 646 F.2d at 138. The panel then concluded that an appellate court should give absolute deference to a trial court's assessment of the evidence. *Id.* at 143. The panel therefore affirmed the judgment of acquittal. *Id.* at 142-43. The Fourth Circuit, however, granted the Government's request for an en banc rehearing. 674 F.2d at 285 n.1.

[19] 674 F.2d at 285-86.

[20] 420 U.S. 332 (1975). In *Wilson*, the jury found the defendant guilty of converting union funds to his own use. *Id.* at 333. The defendant then moved for an acquittal notwithstanding the jury's verdict. *Id.* The trial court granted the defendant's motion on the grounds that the delay between the commission of the offense and the indictment prejudiced the defendant's right to a fair trial. *Id. See generally* Trapaga, *Recent Supreme Court Decisions on Double Jeopardy*, 18 REV. D. P. 267 (1979) (*Wilson* case is seminal decision defining scope of Government appeals that are not barred by double jeopardy clause); *Double Jeopardy*, *supra* note 5, at 300-07 (discussion of *Wilson* decision); *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 53 (1975) (same).

the extent of appellate jurisdiction over Government appeals of post-verdict acquittals in criminal trials.[21] The *Wilson* Court considered whether the double jeopardy clause prohibited the Government from appealing a post-verdict judgment of acquittal.[22] The Court concluded that an appeal from an acquittal would not violate the double jeopardy clause as long as reversal would not result in a second trial.[23] Since the double jeopardy clause would not prohibit the appeal, the Criminal Appeals Act authorized the federal circuit courts to hear the appeal.[24] The *Steed*

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[21] 674 F.2d at 285-86.

[22] 420 U.S. at 335-39. The legislative history of the Criminal Appeals Act illustrates congressional intent to expand the scope of appellate review over Government appeals in criminal cases. *See id.* (*Wilson* Court capsulized legislative history of Act); *see also supra* note 6 (Senate Judiciary Committee intended to extend Government right to appeal to constitutional limits). The Conference Committee amended the proposed bill to include authorization to appeal "from a decision, judgment, or order of a district court dismissing an indictment or information . . . except that no appeal shall lie where the double jeopardy clause . . . prohibits further prosecution." H.R. REP. No. 1768, 91st Cong., 2d Sess. 21 (1970); *see* 18 U.S.C. § 3731 (1976), *supra* note 6 (language in Criminal Appeals Act resembles amendment proposed by Conference Committee). This amendment reflects Congress' desire to eliminate all statutory barriers to Government appeals. 420 U.S. at 338-39. The *Wilson* Court concluded that the changes implemented by the House Conference Committee were consistent with the Senate's desire to extend broadly the Government's right to appeal. *Id.* The *Wilson* Court also concluded that the Act's language suggests congressional deference to the ability of the federal courts to define the constitutional boundaries of Government appeals. *Id.* at 339.

In *Wilson*, the Supreme Court noted that the double jeopardy clause provides three related protections. *Id.* at 343. The double jeopardy clause protects defendants against a second trial for the same offense after an acquittal. *Id.*; North Carolina v. Pearce, 395 U.S. 711, 717 (1969). The clause also forbids a second prosecution after conviction. *Pearce*, 395 U.S. at 717. Finally, the double jeopardy prohibition disallows multiple punishments for the same offense. *Id. See generally* Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001 (1980) (discussion of *Pearce*). The *Wilson* Court noted that the interests underlying the three protections provided by the double jeopardy clause are similar. 420 U.S. at 343; *see supra* note 1 (identifiable interests include preservation of adjudicated decisions, prevention of continued state harrassment of acquitted defendants and avoidance of multiple prosecutions for same offense).

[23] 420 U.S. at 344. The *Wilson* Court reasoned that a defendant could not invoke the double jeopardy prohibition to benefit from legal errors by district courts when appellate courts could correct the error without subjecting the defendant to another trial. *Id.* at 345. A reversal of the district court's post-verdict judgment of acquittal merely would reinstate the jury's conclusion. *Id.* at 344-45. Review of such an order does not offend the constitutional policy against multiple prosecutions. *Id.* at 345; *see also supra* note 7 (policy against multiple prosecutions is crucial policy behind double jeopardy). Numerous Supreme Court cases have upheld the Government's right to appeal an order favoring the defendant. *See, e.g.*, United States v. Scott, 437 U.S. 82, 97 (1978) (Government may appeal after judge grants motion to dismiss unless dismissal constitutes acquittal); United States v. Green, 350 U.S. 415, 416 (1956) (permitting Government to appeal from order arresting judgment after jury returned verdict against defendant); United States v. Bramblett, 348 U.S. 503, 504 (1955) (appellate court had jurisdiction to hear Government's appeal from order arresting judgment); United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (Government may appeal court-ordered mistrial when manifest necessity exists for appeal).

[24] *See supra* note 23 (double jeopardy clause forbids reprosecution for same offense).

court reasoned that since reversal of the trial judge's post-verdict acquittal merely would reinstate the jury's guilty verdict against Steed and would not require a second trial, the court had jurisdiction to review the trial court's post-verdict judgment of acquittal.[25]

The *Steed* court next considered the standard of review required to assess the district court's post-verdict acquittal based on insufficiency of the evidence.[26] Relying on the traditional power of federal trial judges to protect criminal defendants from jury abuse, the defendant argued that the appellate court must give absolute deference to the district court's ruling.[27] The *Steed* court explained, however, that absolute deference to the district court's finding would frustrate the purposes behind the Criminal Appeals Act.[28] The Fourth Circuit found that the Supreme Court's decision in *Glasser v. United States*[29] provided the proper standard of review of the trial court's post-verdict acquittal.[30] In *Glasser*, the Supreme Court held that an appellate court must sustain a jury's guilty verdict if substantial evidence supports the verdict.[31] The reviewing court must weigh the evidence in the light most favorable to the Government.[32] The standard of review, the *Steed* court stated, is the same

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[25] 674 F.2d at 285-86.

[26] *Id.* at 286.

[27] *Id.* The *Steed* court noted that a standard of absolute deference to a district court's ruling would achieve symmetry in the disposition of all acquittal judgments based on insufficiency of the evidence. *Id.* The Supreme Court has determined that the prosecution may not appeal judgments of acquittal entered before the case goes to the jury. *See* Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam) (double jeopardy clause prohibits Government appeal of court's pre-verdict acquittal because such order is final termination of trial). An absolute deference standard would treat post-verdict acquittals in the same way the *Fong Foo* Court treated pre-verdict acquittals. *See* United States v. Dixon, 658 F.2d 181, 188 (3d Cir. 1981) (dictum) (court criticizes absolute deference standard adopted by Fourth Circuit panel in superseded *Steed* decision).

[28] 674 F.2d at 286; *see infra* text accompanying notes 88-97 (standard of absolute deference forces appellate court to abandon its reviewing function). The *Steed* court explained that the standard of absolute deference conflicted with the congressional intent reflected in the Act's legislative history. 674 F.2d at 286; *see supra* notes 6, 22 (discussion of legislative intent). In the Criminal Appeals Act, Congress expressed its preference for appellate review. *Id.* Congress did not intend to provide the trial judge with the power conclusively to assess the evidence. *Id.*

[29] 315 U.S. 60 (1942). In *Glasser*, the jury returned guilty verdicts against two United States attorneys for conspiring to defraud the government. *Id.* at 63. Defendant Glasser appealed the conviction, claiming that the trial court denied him effective counsel by appointing Glasser's attorney also to represent his co-conspirator. *Id.* at 67. The Supreme Court held that the appointment violated Glasser's right to effective assistance of counsel. *Id.* at 76; *see* U.S. CONST. amend. VI (accused in criminal prosecutions has right to assistance of counsel). *See generally*, Comment, *Deprivation of Right to Assistance of Counsel by Appointment of Attorney Representing Co-Conspirator*, 9 U. CHI. L. REV. 733 (1942).

[30] 674 F.2d at 286.

[31] 315 U.S. at 80.

[32] *Id.* According to *Glasser*, appellate courts should not weigh the evidence or determine the credibility of witnesses. *Id.* The jury weighs conflicting testimony, determines the credibility of witnesses, and draws factual inferences. Burton v. United States, 202 U.S. 344,

whether the defendant or the Government brings the appeal.[33]

Applying the *Glasser* standard of review, the *Steed* court found that the district court erred in dismissing the jury's guilty verdict.[34] The Fourth Circuit conceded that the evidence of the requisite mental state was circumstantial.[35] However, the *Steed* court concluded that the circumstantial evidence showed beyond a reasonable doubt that Steed had the requisitie mental state.[36] The court held that the evidence, viewed in the light most favorable to the Government, supported the verdict.[37] The Fourth Circuit, therefore, remanded the case for reinstatement of the jury's verdict.[38]

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373 (1906); United States v. Beck, 615 F.2d 441, 448 (7th Cir. 1980). Appellate courts should attach no significance to the fact that the district court considers a jury verdict improper due to jury inconsistency, compromise, or compassion. 615 F.2d at 488.

[33] 674 F.2d at 286. The *Glasser* standard considers whether a jury verdict has substantial evidentiary support, viewing the evidence in the light most favorable to the Government. 315 U.S. at 80; *see supra* notes 31 & 32 and accompanying text. The *Glasser* standard is the recognized standard of review in the Fourth Circuit when a defendant brings an appeal questioning the sufficiency of the evidence. *See infra* notes 82-87 and accompanying text (discussing Fourth Circuit's adoption of *Glasser* standard when assessing defendant's appeal on grounds of evidentiary insufficiency). The Fourth Circuit in *Steed* concluded that the function of the appellate court remains unchanged whether the defense or prosecution brings an appeal. 674 F.2d at 286.

[34] 674 F.2d at 285.

[35] *Id.* at 288; *see supra* note 15 (discussing circumstantial evidence upon which jury based its verdict).

[36] 674 F.2d at 286-89. The *Steed* court determined that ample evidence existed from which the jury could have found the defendant guilty of violating the Land Sales Act and committing mail fraud. *Id.* at 289; *see supra* notes 13, 15 (facts and evidence available to jury).

[37] 674 F.2d at 286-89.

[38] *Id.* at 290. In addition to finding that the district court erred in dismissing the jury's guilty verdict, the *Steed* court determined that the Fourth Circuit had jurisdiction to review the district court's conditional grant of a new trial. *Id.* The Fourth Circuit noted that rule 33 of the Federal Rules of Criminal Procedure was inapplicable in this appeal. *See id.* at 289 (rule 33 was amended in 1966 and therefore rule 33 was not applicable to situation arising under Criminal Appeals Act of 1970); *supra* note 6 & 7 (Criminal Appeals Act extends Government's right to appeal to new limits). Rule 33 provides that a trial court may grant a defendant's motion for a new trial when the court finds that a new trial is necessary in the interests of justice. FED. R. CRIM. P. 33. *See generally* 2 WRIGHT & MILLER, *supra* note 8, §§ 551-59. The Supreme Court has held that the final judgment rule is the same in criminal and civil cases. Parr v. United States, 351 U.S. 513, 518 (1956); *see also* ABA COMM. ON SENTENCING AND REVIEW, Approved draft, at 1 (1969) (essential character of appellate criminal procedure has been shaped by civil appeals). The final judgment rule in Anglo-American jurisprudence holds that a party may appeal to an appellate court only from a final judgment. Poston Springfield Brick Co. v. Brockett, 183 S.W.2d 404, 406 (Mo. 1944); *see* 28 U.S.C. § 1291 (1976) (appeal to federal appellate courts must be from final decisions of district courts). *See generally* Crick, *The Final Judgment As a Basis For Appeal*, 41 YALE L. J. 539 (1932). The Fourth Circuit, therefore, looked to Federal Rule of Civil Procedure 50(c)(1) to determine the scope of the final judgment rule when a trial court issues a post-verdict acquittal and conditionally grants a new trial. 674 F.2d at 289.

Rule 50(c)(1) permits a party to move for a conditional grant of a new trial at the same time the party requests a motion notwithstanding the verdict. FED. R. CIV. P. 50(c)(1); *see*

The dissent disagreed with the majority's extension of the *Glasser* standard to Government appeals from post-verdict acquittals.[39] The dissent contended that Congress did not intend that the *Glasser* standard should govern appeals from post-verdict acquittals.[40] Congress, rather, was silent regarding the standard of review for Government appeals.[41] According to the dissent, Congress therefore has reserved to the courts the duty to develop the appropriate standard of review.[42] The dissent concluded that a standard of absolute deference to the trial court's judgment best protects the traditional right of criminal defendants to have post-verdict acquittals given absolute finality.[43]

FED. R. CIV. P. 50(b) (judgment notwithstanding verdict is judgment entered by order of court when jury has returned verdict favorable to opposing party). The moving party ordinarily presents the two motions simultaneously. 9 WRIGHT & MILLER, *supra* note 8, § 2539. By making the alternative motion for a new trial, the party asks the court to allow the moving party a new trial if the court decides or rules against the party's motion for judgment notwithstanding the verdict. *Id.* Under rule 50(c)(1), federal appellate courts can review conditional grants of a new trial without affecting the finality of the judgment. 674 F.2d at 289. The Fourth Circuit in *Steed* therefore concluded that it had jurisdiction to review the conditional grant of a new trial. *Id.*; *see also* FED. R. CIV. P. 50(c)(1), advisory committee note (once trial court conditionally grants motion for new trial and reverses judgment, new trial shall proceed unless appellate court has ordered otherwise). Under the rule, the appellate court can reinstate the jury verdict, reversing the conditional grant of a new trial. 674 F.2d at 289. The Fourth Circuit concluded that the court could apply to criminal appeals a final judgment analysis under the Federal Rules of Civil Procedure. *Id.* The Fourth Circuit therefore had jurisdiction to review the alternative grant of a new trial. *Id.*

After addressing the jurisdictional issue, the *Steed* court considered whether the trial court's conditional grant of a new trial was appropriate. *Id.* at 289-90. The defendant argued that the admission of certain evidence was fatally prejudicial and therefore the order granting a conditional new trial was appropriate. *Id.* at 290. The district court admitted the testimony of three witnesses who reported on misrepresentations made to them by Steed's salesman. *Id.* Steed argued that she was not responsible for the salesman's misconduct. *Id.* The Fourth Circuit rejected the defendant's argument, holding that the probative value of the evidence outweighed any possible prejudice. *Id.* The court accordingly reversed the conditional grant of a new trial. *Id.*; *see id.* at 289 n.9 (language in footnote suggests that district court granted conditional trial because court believed case was ripe for appellate review).

[39] 674 F.2d at 290-92 (Phillips, J., dissenting).

[40] *Id.* at 290 (Phillips, J., dissenting). The dissent explained that Congress could impose standards of review upon the federal courts and has done so in administrative areas. *Id.* at 291. The dissent noted however that Congress has been reluctant to do so in criminal areas. *Id.*

[41] 674 F.2d at 291 (Phillips, J. dissenting).

[42] *Id.* (Phillips, J., dissenting). When the legislature has failed or refused to impose standards of appellate review, the appellate courts traditionally have defined the appropriate standards of review. *Id.*

[43] 674 F.2d at 292 (Phillips, J., dissenting). The dissent suggested a standard of review based on the principle of finality that attends fact-based judgments of acquittal by trial courts. *Id.* at 291. The dissent contended that the finality principle did not evolve out of the double jeopardy prohibition. *Id.* The dissent argued that the concept of finality exists as a fundamental right of defendants, independent of double jeopardy considerations. *Id.* The dissent therefore argued that the Criminal Appeals Act does not upset the historical right of criminal defendants to have fact-based determinations accorded finality. *See id.* at 292.

Although the Supreme Court has not ruled upon the precise jurisdictional question at issue in *Steed*, the Fourth Circuit's holding is consistent with recent Supreme Court decisions construing the Criminal Appeals Act and the double jeopardy clause.[44] According to *United States v. Wilson*,[45] courts may assume jurisdiction over Government appeals as long as reversal will not subject the defendant to a second trial for the same offense.[46] In *Wilson*, the defendant, in a post-verdict motion, requested dismissal of the jury's guilty verdict on the ground that the delay between the commission of the offense and the indictment prejudiced the defendant's right to a fair trial.[47] The district court granted the defendant's motion and the Government appealed the order.[48] The Supreme Court allowed the appeal since the appeal would not subject the defendant to reprosecution for the same offense but merely would reinstate the jury's guilty verdict.[49] Similarly, the Fourth Circuit in

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The dissent also suggested that appellate review should not extend beyond the correction of legal errors. *See id.* at 290. Appellate courts should not disturb a trial court's conclusion that the evidence was factually insufficient to convict. *See id.*

[44] *See infra* notes 45-63 and accompanying text (discussion of Supreme Court analysis for determining extent of appellate jurisdiction over government appeals of criminal cases). *Wilson* instructs appellate courts to focus on the avoidance of retrial as the defendant's only substantial interest when considering the constitutionality of a Government appeal. *See* United States v. Wilson, 420 U.S. 332, 344 (1975) (double jeopardy clause not offended when no threat of multiple prosecution). This approach draws a distinction between an acquittal by verdict entered by trier of fact and a judgment of acquittal setting aside a guilty verdict. *Double Jeopardy*, *supra* note 5, at 311. An appeal by the Government will lie if the record reveals that a court-ordered acquittal has displaced a guilty verdict entered by the trier of fact. *See* United States v. Rose, 429 U.S. 5, 5 (1976) (per curiam) (Government may appeal post-verdict suppression of evidence when jury has returned guilty verdict); United States v. Morrison, 429 U.S. 1, 3 (1976) (per curiam) (Government may appeal district court's suppression of evidence after court has convicted in nonjury trial); United States v. Wilson, 420 U.S. 332, 352-53 (1975) (Government may appeal post-verdict judgment of acquittal based on district court finding that preindictment delay was prejudicial). The double jeopardy clause forbids appellate review when the trier of fact returns a verdict of not guilty. *See* United States v. Ball, 163 U.S. 662, 671 (1896) (prosecution may not appeal acquittal based on jury verdict); *see also* Burks v. United States, 437 U.S. 1, 18 (1978) (double jeopardy clause precludes second trial once reviewing court has found evidence legally insufficient); Sanabria v. United States, 437 U.S. 54, 78 (1978) (defendant cannot be retried after acquittal based on erroneous exclusion of evidence); United States v. Martin Linen Supply Co., 430 U.S. 564, 575-76 (1977) (double jeopardy clause precludes reprosecution after district court acquits on basis of insufficiency of evidence when jury is deadlocked); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (double jeopardy clause prohibits retrial after court's preverdict acquittal).

[45] 420 U.S. 332 (1975).

[46] *Id.* at 344-45; see *supra* note 7 (*Wilson* Court's investigation of legislative history of Criminal Appeals Act to determine congressional intent); notes 20-23 (double jeopardy clause not offended when no threat of reprosecution exists); *see also supra* note 5 (statutory grants of jurisdiction prior to Criminal Appeals Act of 1970); note 6 (Criminal Appeals Act of 1970).

[47] *Wilson*, 420 U.S. at 333.

[48] *Id.*

[49] *Id.* at 352-53.

Steed properly assumed jurisdiction over the Government's appeal because review of the district court's post-verdict acquittal carried no threat of multiple prosecution.[50] Therefore, the Fourth Circuit's treatment of the jurisdictional issue arising in *Steed* is faithful to the *Wilson* analysis for determining the extent of appellate jurisdiction over Government appeals in criminal cases.[51]

The Supreme Court has alluded to the Government's general right to appeal rulings dismissing guilty verdicts entered by the trier of fact when the trial court has found the evidence insufficient to convict.[52] In *United States v. DiFrancesco*,[53] the Supreme Court noted in dictum that the double jeopardy clause does not bar a Government appeal from a ruling in favor of the defendant after a jury has returned a guilty verdict.[54] The Court supported this observation by citing circuit court cases that have recognized Government appeals of post-verdict acquittals based on the insufficiency of the evidence.[55] The Supreme Court, therefore, im-

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[50] *Steed*, 674 F.2d at 285-86.

[51] *Id.*; *see supra* notes 19-25 and accompanying text (*Steed* court's application of *Wilson* analysis).

[52] *See infra* notes 53-55 and accompanying text (discussion of recent Supreme Court decision alluding to Government's right to appeal post-verdict judgments based on evidentiary insufficiency).

[53] 449 U.S. 117 (1980). In *United States v. DiFrancesco*, a district court convicted Eugene DiFrancesco of two racketeering offenses. *Id.* at 122. In a subsequent hearing, the trial court determined that the defendant was a "special dangerous offender" within the meaning of the Organized Crime Control Act of 1970. *Id.*; *see* Organized Crime Control Act, Pub. L. 91-452, 84 Stat. 922 (1970) (codified at 18 U.S.C. §§ 3575-76 (1976)). The court sentenced DiFrancesco to two concurrent ten-year terms on the racketeering offenses. 449 U.S. at 122. The United States sought review of the criminal sentences through its statutory right to appeal under the Organized Crime Control Act. *Id.* at 123; *see* 18 U.S.C. § 3576 (1976) (permits Government to appeal sentencing of special dangerous offenders). The Supreme Court held that the fifth amendment does not bar prosecutorial sentence appeals authorized by statute. 449 U.S. at 142-43. *See generally The Supreme Court, 1980 Term*, 95 HARV. L. REV. 112 (1981) (synopsis of *DiFrancesco*).

[54] United States v. DiFrancesco, 449 U.S. 117, 130 (1980).

[55] *Id.* (citing *United States v. Rojas* and *United States v. DeGarces*). In United States v. Rojas, 554 F.2d 938 (9th Cir. 1977), a jury returned a guilty verdict against the defendant for making false claims on an income tax return. *Id.* at 940. Upon the jury's discharge, the defendant moved for a judgment of acquittal pursuant to rule 29(c) of Federal Rules of Criminal Procedure. *Id.* at 942; *see* FED. R. CRIM. P. 29(c) (rule 29(c) permits defendant to move for judgment of acquittal after jury is discharged). Relying on *United States v. Wilson*, the *Rojas* court concluded that although the double jeopardy clause forbids multiple prosecutions for the same offense, the clause does not forbid all Government appeals. 534 F.2d at 941. The *Rojas* court noted that the double jeopardy clause prevents the possibility of a second trial with a second trial's attendant expense and anxiety. *Id.* The court concluded that the potential danger of retrial does not exist when an appellate court reviews post-verdict judgment of acquittal since an appellate reversal merely would reinstate the jury's verdict. *Id.* The *Rojas* court therefore asserted jurisdiction over the Government's appeal. *Id.* The *Rojas* court further concluded that the case before the bar was distinguishable from the Supreme Court's decision in *United States v. Martin Linen Supply Co. Id.* at 941-42; *see*

plicitly has recognized the Government's statutory right to appeal post-verdict judgments of acquittal based on insufficiency of the evidence.[56]

Although the Fourth Circuit did not distinguish *Steed* from the Supreme Court's decision in *Burks v. United States*,[57] *Steed* is distinguishable from a situation in which a reviewing court makes a ruling on evidentiary sufficiency.[58] In *Burks*, the defendant appealed an appellate order remanding the case for acquittal or, alternatively, for a new trial after the reviewing court determined that the evidence was insufficient to sustain the jury's verdict.[59] The Supreme Court held that the double jeopardy clause precludes a second trial once the reviewing court has found the evidence insufficient to support the jury's verdict.[60] The Court concluded that such a finding operates as a judgment of acquittal.[61] Under a *Wilson* analysis, the acquittal in *Burks* was final

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United States v. Martin Linen Supply Co., 430 U.S. 564, 575-76 (1977) (deadlocked jury prohibited Government from appealing trial court's acquittal on basis of evidentiary insufficiency). The *Rojas* court suggested that jurisdiction over Government appeals is dependent upon the existence of a jury verdict that an appellate court can reinstate. *See* 554 F.2d at 941-42; *see also* Westen, *supra* note 22, at 1063 (prohibition against retrial is based on jury's prerogative to acquit or convict defendant after evaluating evidence).

In the United States v. DeGarces, 518 F.2d 1156 (2d Cir. 1975), the Government appealed a post-verdict acquittal based on insufficiency of the evidence. *Id.* at 1156-57. In asserting jurisdiction over the Government appeal, the *DeGarces* court relied on the Supreme Court's decision in United States v. Jenkins, 420 U.S. 358 (1975), *rev'd on other grounds*, United States v. Scott, 437 U.S. 82 (1978). 518 F.2d at 1159. In *Jenkins*, the Supreme Court noted that a Government appeal is appropriate as long as appellate review carries no threat of a second trial. 420 U.S. at 365 (dictum reaffirming *Wilson*). The Court also noted that the prosecution may appeal judgments of acquittal that displace jury verdicts. *Id.* (dictum).

[56] *See supra* notes 53-55 and accompanying text (discussion of *DiFrancesco*).

[57] 437 U.S. 1 (1978). In *Burks v. United States*, the defense presented prima facie proof of the defendant's insanity by offering expert testimony. *Id.* at 2-3. Upon the defendant's appeal of his conviction, the Sixth Circuit found that the prosecution failed to rebut the insanity defense. *Id.* at 3. The court of appeals reversed the conviction because of evidentiary insufficiency and remanded the case to the trial court to enter a judgment of acquittal or to order a new trial. *Id. See generally The Supreme Court, 1977 Term*, 92 HARV. L. REV. 108 (1978) (*Burks* case comment); Comment, *Constitutional Criminal Law - Double Jeopardy-Appellate Court Acquittal Accorded Same Finality as Trial Court Acquittal; Retrial Permitted after Defendant Seeks a Dismissal*, 53 TUL. L. REV. 598 (1979) (brief discussion of *Burks*).

[58] *See infra* notes 59-63 and accompanying text (discussion of *Burks*).

[59] *Burks*, 437 U.S. at 3-5.

[60] *Id.* at 18. In *Burks*, the Supreme Court concluded that the double jeopardy clause forbids a retrial for the purpose of affording the prosecution another opportunity to strengthen its case. *Id.* at 11. The Court also concluded that since courts must accord finality to a jury's verdict of acquittal, appellate courts may not order retrial when an appellate court has decided as a matter of law that a jury could not have returned a guilty verdict. *Id.* at 16. The *Burks* Court noted that a defendant does not waive his right to a judgment of acquittal by also seeking a new trial as one of his remedies. *Id.* at 17.

[61] *Id.* at 18; *see also* United States v. Cross, 655 F.2d 50, 50 (5th Cir. 1981) (per curiam) (appellate court directed judgment of acquittal on remand when court found evidence insufficient to convict); United States v. Becton, 632 F.2d 1294, 1295-96 (5th Cir. 1980) (appellate

because the order for a new trial violated the double jeopardy prohibition against multiple prosecutions for the same offense.[62] In *Steed*, however, the district court's judgment of acquittal was appealable because review of the ruling contained no threat of reprosecution.[63]

The jurisdictional analysis in *Steed* is consistent with the Fourth Circuit's resolution of the double jeopardy issue arising in *United States v. Burroughs*.[64] In *Burroughs*, the Fourth Circuit re-examined the Government's request for appellate review of a post-verdict judgment of acquittal in light of the *Wilson* decision.[65] The district court in *Burroughs* granted the defendant's post-verdict motion for acquittal on the ground that the prosecution failed to prove a requisite element of the statutory offense.[66] The Fourth Circuit assumed jurisdiction over the Government's appeal because reversal by the reviewing court merely would reinstate the jury's guilty verdict.[67] Moreover, review would not subject the defendant to reprosecution.[68]

The Fourth Circuit's treatment of the jurisdictional issue in *Steed* also is consistent with other circuits that expressly have permitted Government appeals of post-verdict acquittals based on insufficiency of

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court did not entertain interlocutory appeal from order for new trial after hung jury when defendant claimed that evidence was insufficient to convict).

The Supreme Court, however, has permitted retrial after a state appellate court set aside a conviction on the ground that the verdict was against the weight of the evidence. Tibbs v. Florida, 102 S. Ct. 2211, 2213 (1982). The *Tibbs* Court distinguished *Burks*, explaining that a judgment of acquittal based on the insufficiency of the evidence rests on the premise that no rational fact finder could have found the defendant guilty beyond a reasonable doubt. *Id.* at 2216. A reversal on weight of the evidence, however, draws the appellate court into questions of credibility. *Id.* The *Tibbs* Court suggested that an appellate court's post-verdict resolution of conflicting evidence in favor of the defendant does not have the same force as an appellate acquittal based on evidentiary insufficiency because the former is a factual determination while the latter is a legal determination. *See id.* at 2218-19.

[62] *See supra* notes 6, 7, 19-25 and accompanying text (*Wilson* analysis for determining whether appellate court has jurisdiction over Government appeals of post-verdict judgments of acquittal).

[63] 674 F.2d at 285.

[64] 564 F.2d 1111 (4th Cir. 1977); *see supra* notes 19-26 and accompanying text (*Steed* jurisdictional analysis).

[65] United States v. Burroughs, 537 F.2d 1156 (4th Cir. 1976) (per curiam) (withdrawing United States v. Burroughs, 510 F.2d 967 (4th Cir. 1976)), *aff'd*, 564 F.2d 1111 (4th Cir. 1977). In *Burroughs*, a jury returned guilty verdicts against the defendants for wilfully intercepting oral communications. 564 F.2d at 1112.

[66] 537 F.2d at 1157. The district court in *Burroughs* granted the defendant's motion for acquittal because the court determined that the prosecution failed to prove an element needed to preserve the constitutionality of the statutory offense. *Id.* The prosecution sought review of the post-verdict acquittal on the grounds that the trial court's statutory interpretation was erroneous. *Id.* The Fourth Circuit dismissed the Government appeal. 510 F.2d at 967 (Table). The prosecution refiled its request for an appeal and the Fourth Circuit asserted jurisdiction based upon the Supreme Court's decision in *United States v. Wilson*. 537 F.2d at 1157; *see Wilson*, 420 U.S. 332 (1975).

[67] 537 F.2d at 1157.

[68] *Id.*

the evidence.[69] In *United States v. Rojas*,[70] the Ninth Circuit permitted an appeal because no additional fact-finding proceeding would be necessary if the Government succeeded upon appeal.[71] The *Rojas* court concluded that a successful Government appeal of a post-verdict judgment of acquittal based on evidentiary insufficiency would not subject the defendant to a second trial.[72] If an appellate court finds that the judgment of acquittal was improper, the appellate court merely will reinstate the guilty verdict.[73] If the district court order was appropriate, the appellate court will allow the post-verdict acquittal.[74] The *Rojas* analysis is faithful to the approach the Supreme Court has used since the enactment of the Criminal Appeals Act.[75]

The Supreme Court has not ruled on the proper standard of review for assessing post-verdict acquittals based on the insufficiency of the evidence.[76] Although the Fourth Circuit also had not considered the standard of review issue prior to Steed, the court's adoption of the *Glasser* standard is consistent with other circuits that have addressed the issue.[77]

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[69] *See infra* notes 70-75 and accompanying text. The *Steed* analysis is indicative of the approach other circuits that have addressed the same jurisdictional issue have adopted. *See* United States v. White, 673 F.2d 299, 302 (10th Cir. 1982) (jurisdiction over Government appeal of post-verdict acquittal based on evidentiary insufficiency was proper because review contained no threat of multiple prosecution for same offense); United States v. Dixon, 658 F.2d 181, 188 (3d Cir. 1981) (same); United States v. Burns, 597 F.2d 939, 941 (5th Cir. 1979) (same); United States v. Blasco, 581 F.2d 681, 684 (7th Cir. 1978), *cert. denied*, 439 U.S. 966 (1978) (same).

[70] 554 F.2d 938 (9th Cir. 1977). In *Rojas*, the jury found the defendant guilty of six counts of tax fraud. *Id.* at 940. The defendant moved for a motion to acquit after the discharge of the jury. *Id.*; *see* FED. R. CRIM. P. 29(c) (rule 29(c) permits defendant to move for judgment of acquittal within seven days after jury is discharged). The trial court granted the defendant's motion for acquittal. 554 F.2d at 940. The prosecution appealed the post-verdict acquittal on the basis of the Criminal Appeals Act. *Id.* at 940-41; *see supra* note 6 (Criminal Appeals Act permits Government appeals whenever constitutionally permitted).

[71] 554 F.2d at 941.

[72] *Id.*

[73] *See generally* 2 WRIGHT & MILLER, *supra* note 8, § 469.

[74] *Id.*

[75] *See supra* notes 19-25, 46-50 and accompanying text (Supreme Court approach since Criminal Appeals Act).

[76] *See Steed*, 674 F.2d at 285 (Supreme Court has not ruled on precise jurisdictional question at issue in *Steed*).

[77] *See* United States v. White, 673 F.2d 299 (10th Cir. 1982); *infra* notes 78-80 and accompanying text (discussion of Fifth Circuit decision that applied *Glasser* standard to post-verdict acquittal based on insufficiency of evidence). In *White*, the jury found the defendant guilty of mail fraud. 673 F.2d at 300. After the discharge of the jury, the court granted the defendant's motion for acquittal on the basis that the evidence did not support the guilty verdict. *Id.* at 301. The *White* court asserted jurisdiction over the Government appeal and then considered the proper standard of review by which to assess the trial court's order. *Id.* In *White*, the Tenth Circuit concluded that courts, when considering a motion for a post-verdict acquittal, must view the evidence in the light most favorable to the Government and then determine whether substantial evidence exists so that the jury properly may find the accused guilty beyond a reasonable doubt. *Id.* at 301; *accord* United States v. Dixon, 658

In *United States v. Cravero*,[78] the Fifth Circuit applied the *Glasser* standard when reviewing the district court's post-verdict judgment of acquittal based on the insufficiency of the evidence.[79] In *Cravero*, the Fifth Circuit suggested that the *Glasser* standard of review recognizes the right of juries to determine the credibility of witnesses.[80] The application of the *Glasser* rule to Government appeals in criminal cases therefore reflects the traditional deference accorded to jury verdicts.[81]

While the application of the *Glasser* standard to Government appeals of post-verdict acquittals is a recent development, the Fourth Circuit often has used the *Glasser* standard when reviewing appeals by defendants challenging the sufficiency of the evidence.[82] For example, in

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F.2d 181, 188 (3d Cir. 1981); United States v. Burns, 597 F.2d 939, 941 (5th Cir. 1979); United States v. Blasco, 581 F.2d 681, 684 (7th Cir. 1978), *cert. denied*, 439 U.S. 966 (1978); United States v. Rojas, 554 F.2d 938, 943 (9th Cir. 1977). According to *White*, such a standard does not permit courts to acquit after a jury has returned a guilty verdict unless the evidence is so meager that a reasonable jury could not find guilt beyond a reasonable doubt. 673 F.2d at 302. The *White* court reversed the district court decision and remanded the case for the reinstatement of the jury verdict. *Id.* at 305.

In *White*, the Tenth Circuit held that such a standard was indistinguishable from the standard of review enunciated in Curley v. United States, 160 F.2d 229 (D.C. Cir. 1947), *cert. denied*, 331 U.S. 837 (1947). 673 F.2d at 301. In *Curley*, the court held that the proper rule when passing upon a motion for a directed verdict recognizes the jury's right to weigh evidence and determine credibility. 160 F.2d at 232. After giving the jury full play to perform its traditional function, the court must determine whether a reasonable mind might conclude guilt beyond a reasonable doubt. *Id.*

[78] 530 F.2d 666 (5th Cir. 1976).

[79] *Id.* at 669-70 (5th Cir. 1976). In *Cravero*, the jury found the defendant guilty of subornation of perjury, obstruction of justice, and conspiracy. *Id.* The trial court then granted the defendant's motion for acquittal on the grounds that the evidence was insufficient to convict. *Id.* Relying on the Supreme Court's decision in *United States v. Wilson*, the *Cravero* court asserted jurisdiction over the Government appeal of the trial court's order. *Id.* at 669. The *Cravero* court then ruled on the appropriate standard of review to assess the order of the trial court. *Id.* at 669-70.

[80] *Id.* at 670 (citing Hoffa v. United States, 385 U.S. 293, 311 (1966)) (established safeguards of Anglo-American legal system leave veracity of witnesses to be detected by cross examination and credibility to be determined by properly instructed jury). According to *Cravero*, the trial judge possesses no expertise in determining who speaks the truth. *Id.* at 670.

[81] *See supra* notes 32, 80 & 81 and accompanying text (*Glasser* standard protects jury prerogatives).

[82] *See, e.g.*, United States v. Tresvant, 677 F.2d 1018, 1019-21 (4th Cir. 1982) (standard applicable when defendant appeals manslaughter conviction on ground that evidence was insufficient); United States v. Sherman, 421 F.2d 198, 199-200 (4th Cir. 1970) (applying *Glasser* standard when defendant appealed from conviction of attempted murder), *cert. denied*, 398 U.S. 914 (1970); Jelaza v. United States, 179 F.2d 202, 205 (4th Cir. 1950) (applying standard in defendant's appeal from tax evasion conviction).

Prior to the Criminal Appeals Act of 1970, the Government could not appeal court-ordered judgments of acquittal entered after a jury had returned a guilty verdict. *See* Kepner v. United States, 195 U.S. 100, 133 (1904); *see also supra* notes 4 & 5 (discussing statutory extent of Government appeals prior to Act); notes 6 & 7, 19-26 and accompanying text (considering effect Act had on Government appeals in criminal cases).

United States v. Pomponio,[83] the defendants appealed seeking reversal of their convictions for federal income tax evasion.[84] When reviewing the defendant's contention that the evidence did not support the verdict, the Fourth Circuit applied the *Glasser* standard of review.[85] The court limited the scope of its review to whether the evidence substantially supported the jury's verdict, viewing the evidence in the light most favorable to the Government.[86] The *Pomponio* court implied that the *Glasser* standard protects the fact-finding function of a jury precisely because the standard requires appellate courts to sustain a jury's verdict unless the evidence does not support the verdict.[87]

In *Steed*, the dissent discussed a standard of absolute deference to the trial court's order as an alternative to the *Glasser* standard of review.[88] An absolute deference standard promotes consistency by treating all court-ordered acquittals equally, irrespective of when the court orders the acquittal.[89] The absolute deference standard, however, is inconsistent with the purposes behind the Criminal Appeals Act.[90] In *United States v. Dixon*,[91] the Third Circuit criticized the absolute deference standard that the *Steed* dissent suggested.[92] The *Dixon* court noted that a standard of absolute deference renders the Act's statutory grant of appellate jurisdiction ineffective.[93] By according absolute deference to the trial court's assessment of evidentiary sufficiency, the absolute deference standard substitutes the trial judge's ruling for review of that ruling by an appellate court.[94] A standard of absolute deference, therefore, forces appellate courts to forego their reviewing function and blindly to accept the trial judge's post-verdict acquittal.[95] In the Criminal Appeals Act, on the other hand, Congress registered its preference for appellate review once an appellate court has assumed

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[83] 563 F.2d 659 (4th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978).

[84] *Id.* at 661.

[85] *Id.* at 663.

[86] *Id.*; *see supra* notes 29-32 and accompanying text (*Glasser* standard).

[87] *See Pomponio*, 563 F.2d at 663.

[88] *See Steed*, 674 F.2d at 292 (Phillips, J., dissenting); *see also supra* notes 39-43 and accompanying text (*Steed* dissent).

[89] *See supra* note 27 (symmetry resulting from absolute deference standard).

[90] *See supra* note 28 (adverse effect absolute deference standard would have on Criminal Appeals Act).

[91] *See* 658 F.2d 181 (3d Cir. 1981). In *Dixon*, the jury found the defendant guilty of mail fraud. *Id.* at 186. The trial court granted the defendant's post-verdict motion for acquittal because the evidence was insufficient to convict. *Id.* The Third Circuit asserted jurisdiction over the Government appeal of the court-ordered acquittal and reinstated the jury's verdict. *Id.* at 187, 193.

[92] *Id.* at 188. (*Dixon* court criticized standard suggested by vacated *Steed* opinion and recommended by current *Steed* dissent).

[93] *Id.*

[94] *See id.*

[95] *See id.*

proper jurisdiction over the appeal.[96] A standard of absolute deference conflicts with congressional intent because such a standard precludes effective review.[97]

In *Steed*, the Fourth Circuit properly assumed jurisdiction over the Government appeal of the trial court's post-verdict acquittal based on insufficiency of the evidence.[98] By asserting jurisdiction over the Government appeal, the Fourth Circuit is consistent with the Supreme Court and other circuits that have applied the double jeopardy analysis of the *Wilson* court.[99] Recognizing the traditional deference accorded to jury verdicts, the Fourth Circuit applied the appropriate standard of review for assessing the trial court's post-verdict judgment of acquittal.[100] By adopting the *Glasser* standard of review, the Fourth Circuit has followed the lead of other circuits that have ruled on the appropriate appellate standard of review.[101] By rejecting the standard of absolute deference, the Fourth Circuit has recognized that such a standard of review is inconsistent with purposes behind the Criminal Appeals Act.[102] In *United States v. Steed*, the Fourth Circuit has reinforced the traditional interpretations of double jeopardy and appellate review.[103]

JAMES FITZSIMMONS POWERS

C. *Jury Instructions and the Nonessential Essential Element*

The Supreme Court has stated that the due process clause of the Constitution[1] protects a criminal defendant against conviction except

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[96] *See* 18 U.S.C. § 3731 (1976) (Criminal Appeals Act allows appellate review whenever constitutionally permitted); *see also supra* note 6 (Criminal Appeals Act); notes 7, 20-23 (*United States v. Wilson* is seminal Supreme Court decision on Criminal Appeals Act).

[97] *See supra* note 6 & 22 (legislative history of Act reflects intention of Congress to extend Government right to appeal to constitutional limit).

[98] *See supra* notes 19-25 and accompanying text (Fourth Circuit analysis in *Steed*).

[99] *See supra* notes 44-75 and accompanying text (analysis of Supreme Court and circuit court decisions).

[100] *See supra* notes 27-33 and accompanying text (Fourth Circuit adoption of *Glasser* standard).

[101] *See supra* notes 76-87 and accompanying text (analysis of circuit court decisions that have adopted *Glasser* standard).

[102] *See supra* notes 28, 88-97 and accompanying text (absolute deference standard precludes effective appellate review because standard is automatic).

[103] *See supra* notes 19-38 and accompanying text (Fourth Circuit in *Steed* assumed jurisdiction over Government's appeal and then applied *Glasser* standard).

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[1] U.S. CONST. amend. V. The fifth amendment to the Constitution provides in part that a person cannot be convicted of a crime or deprived of life, liberty, or property without due process of law. *Id.*

upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the defendant is charged.[2] The constitutional protection against conviction without due process of law therefore requires that the jury must find that the government has proved all elements of the crime beyond a reasonable doubt before the jury can reach a guilty verdict.[3] To ensure that the jury is capable of determining whether the government has met its burden of proof, the trial judge must instruct the jury upon all essential elements of the offense charged.[4] A jury instruction that fails to present all the essential elements of the offense may result in a reversal of the conviction on appeal, if the appellate court determines that the failure to instruct the jury prevented the defendant from receiving a fair trial.[5] In *United*

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[2] *In re* Winship, 397 U.S. 358, 364 (1970); *accord* Patterson v. New York, 432 U.S. 197, 216 (1977) (due process clause requires prosecution prove all elements of offense beyond reasonable doubt). In *Winship*, the Supreme Court stated for the first time that the due process clause of the Constitution requires the application of the reasonable doubt standard. 397 U.S. at 364. The Supreme Court stated that the reasonable doubt standard is indispensable because the standard requires the trier of fact to reach a subjective state of certainty regarding the facts at issue to establish guilt. *Id.* In *Patterson*, the Supreme Court ruled that the reasonable doubt standard applies to the states through the fourteenth amendment. 432 U.S. at 215. The *Patterson* Court declined to require that the states prove the nonexistence of all affirmative defenses. 432 U.S. at 211; *cf.* Mullaney v. Wilbur, 421 U.S. 684, 701-02 (1975) (state must prove every ingredient of an offense beyond a reasonable doubt and may not shift burden of proof to defendant).

[3] Byrd v. United States, 342 F.2d 939, 940-41 (D.C. Cir. 1965). In *Byrd*, the defendant appealed from a robbery conviction, alleging that the trial court failed to instruct the jury on the essential elements of the offense. *Id.* at 940. In overturning the conviction, the *Byrd* court stated that failure to send the case to the jury without instruction on the elements of the offense which the government must prove beyond a reasonable doubt was fundamental error. *Id.* at 941.

[4] *See* United States v. Clark, 475 F.2d 240, 249 (2d Cir. 1973); United States v. Salliey, 360 F.2d 699, 702 (4th Cir. 1966) (instructions to jury must include essential elements of offense charged). In *Clark*, the Second Circuit held that the trial court's instructions to the jury must be complete and understandable, particularly with respect to essential elements of the alleged crime that the prosecution must prove beyond a reasonable doubt. 475 F.2d at 249; *see* United States v. Giese, 597 F.2d 1170, 1198 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979). In *Giese*, the Ninth Circuit stated that a trial judge must ensure that the jury understands all the grounds upon which the jury can return a conviction. *Id.* at 1198. The primary purpose of jury instructions is to inform the jurors about principles of law that the jurors must apply in deciding the factual issues. United States v. Wolfson, 573 F.2d 216, 221 (5th Cir. 1978). In *United States v. Persico*, the Second Circuit stated that the purpose of jury instructions is to instruct the jury clearly and adequately to permit the jury to perform its function of determining guilt. 349 F.2d 6, 8 (2d Cir. 1965). The *Persico* court then stated that the function of the jury is to make an independent determination of the facts, together with an application of the law, as charged by the court, to those facts found by the jury. *Id.*

[5] United States v. Houston, 547 F.2d 104, 108 (9th Cir. 1976). When an appellate court determines that a failure to instruct the jury on an essential element of an offense has impaired a substantial right of the defendant, the appellate court will assign error and reverse the conviction. *See* United States v. Bosch, 505 F.2d 78, 82 (5th Cir. 1974) (failure to instruct jury on essential elements of crime is reversible error); United States v. DeMarco, 488 F.2d 828, 832 (2d Cir. 1973) (failure to charge essential element of offense affects defendant's

States v. McCaskill,[6] the Fourth Circuit considered whether failure of the trial judge to instruct the jury on all the essential elements of aiding and abetting a violation of the Federal Bank Robbery Act (the Act)[7] warranted a reversal of the defendant's conviction.[8]

In *McCaskill*, the defendant and two accomplices robbed a bank in Bessemer City, North Carolina.[9] The defendant was the driver of the getaway car.[10] The defendant parked the car a short distance from the bank and waited while his accomplices robbed the bank.[11] Upon completion of the robbery, the accomplices joined the defendant in the getaway vehicle and the defendant drove out of town.[12] A policeman in a patrol car observed the men leaving town and pursued the trio.[13] A high speed

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rights and warrants reversal); United States v. Small, 472 F.2d 818, 819 (3rd Cir. 1972) (where instructions fail to specify every essential element of crime, failure constitutes reversible error).

[6] 676 F.2d 995 (4th Cir. 1982).

[7] 18 U.S.C. § 2113 (1976). Under the Federal Bank Robbery Act (the Act), entering a bank with the intent to commit a felony is a criminal offense. *Id.* The Act also provides that taking property from a bank by force, violence, or intimidation is a federal offense. *Id.* at § 2113(a)(1). Subsequent subsections of the Act provide that removal of property from a bank with the intent to steal or purloin or receipt of any property stolen from a bank is a criminal offense. *Id.* at § 2113(b),(c). The term "steal or purloin," in § 2113(b) of the Act, encompasses a wide variety of acts of theft, including furtive or stealthy conduct, or conduct that involves trickery. *See* United States v. Johnson, 575 F.2d 678, 681 (8th Cir. 1978) (definition of steal or purloin).

Section 2113(d) of the Act proscribes the act of armed robbery. 18 U.S.C. § 2113(d) (1976). Section 2113(d) will impose an increased penalty on the defendant if a bank robber assaults a person or places a person's life in jeopardy by the use of a dangerous weapon or device. *Id.* A majority of courts have recognized that § 2113(d) does not create an offense separate and distinct from §§ 2113(a) and (b). Note, *The Federal Bank Robbery Act—The Problem of Separately Punishable Offenses*, 18 WM. & MARY L. REV. 101, 107 (1976); *see* United States v. Tomaiolo, 249 F.2d 683, 696 (2d Cir. 1957) (simple bank robbery under §§ 2113(a), (b) and armed bank robbery under § 2113(d) merge into one substantive crime); Ward v. United States, 183 F.2d 270, 272 (10th Cir.) (armed bank robbery not separate and distinct offense), *cert. denied*, 340 U.S. 864 (1950); Coy v. United States, 156 F.2d 293, 294 (6th Cir.) (offenses merge into a single substantive crime), *cert. denied*, 328 U.S. 841 (1946); McLean v. United States, 449 F. Supp. 1036, 1038 (E.D.N.C. 1978) (§ 2113(d) does not create separate or distinct offense from offenses described under other of Act). *But see* United States v. Bizzard, 615 F.2d 1080, 1081-82 (5th Cir. 1980) (offenses are separate and distinct under § 2113)). Section 2113(d) provides for increased punishment if certain aggravated circumstances are present. 18 U.S.C. § 2113(d) (1976); *see* United States v. Thomas, 521 F.2d 76, 79-81 (8th Cir. 1975) (assault and endangering life with dangerous weapon required to constitute aggravating circumstances under § 2113(d)).

[8] 676 F.2d at 997 (4th Cir. 1982).

[9] *Id.* at 999.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 1000. The accomplices seized a car parked beside the bank and drove to where the defendant was waiting in the getaway vehicle. *Id.*

[13] *Id.* A witness observed the defendant in the getaway vehicle driving up an alley behind the bank. *Id.* Upon stopping at the drive-up window to cash a check, the witness saw that the bank was being robbed. *Id.* The witness immediately drove to the police station,

automobile chase ensued, during which one of the accomplices shot at the pursuing patrol car.[14] The defendant's vehicle then overturned and the three men surrendered.[15] Police arrested all three men and charged them with violations of the Federal Bank Robbery Act.[16] Following his arrest, the defendant confessed to an F.B.I. investigator.[17] In his confession, the defendant admitted that he and his accomplices planned to rob the bank and that he knew that the accomplices were carrying guns.[18]

The government filed charges against the defendant in the United States District Court for the Western District of North Carolina for violation of the Federal Bank Robbery Act.[19] At trial, the defendant submitted a request for jury instructions pertaining to the elements of an offense under subsection 2113(d) of the Act.[20] The defendant requested the judge to instruct the jury that the prosecution must prove that the defendant knew of and participated in the bank robbery.[21] In addition, the defendant requested an instruction that the prosecution must prove that the defendant knew that his accomplices were armed and intended

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told the police about the robbery, and described the vehicle in the alley behind the bank. *Id.* The police broadcast this information over the radio. *Id.* While rushing to the reported scene of the robbery, a police officer observed a car matching the description on the radio and he pursued. *Id.*

[14] 676 F.2d at 1000.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 999. The defendant in *McCaskill* admitted in his confession to an FBI investigator that the defendant had met with his two accomplices for several days before the robbery. *Id.* The defendant confessed that the three men discussed prior bank robberies and the plan to rob the bank in Bessemer City. *Id.* The defendant then admitted that during the planning stage the defendant discovered that his accomplices were armed with pistols. *Id.*

[19] *Id.*; 18 U.S.C. §§ 2113(a),(b),(d) (1976); *see supra* note 7 (discussion of Federal Bank Robbery Act). The indictment charged the defendant with aiding and abetting an armed bank robbery. 676 F.2d at 997. Section 2 of title 18 of the United States Code provides that a person who aids or abets the commission of a crime is subject to punishment as a principal. 18 U.S.C. § 2(a) (1976). Section 2 does not define a specific crime, but provides for punishment of a person who aids and abets the commission of a substantive crime defined in another statute. *Id.*; United States v. Campbell, 426 F.2d 547, 553 (2d Cir. 1970). To convict a defendant of aiding and abetting, therefore, the government first must prove the commission of a substantive crime. *Id.* The generally recognized rule is that the government then must prove that the defendant had knowledge of the substantive offense and acted with the intent to further the commission of the offense. Nye-Nissen v. United States, 336 U.S. 613, 619 (1949) (defendant must participate in venture, intend to bring venture about, and desire venture to succeed); Diaz-Rosendo v. United States, 364 F.2d 941, 944 (9th Cir. 1966) (since guilt not established by mere association, defendant knowingly must participate in venture); Moore v. United States, 356 F.2d 39, 43 (5th Cir. 1966) (defendant must seek to make venture succeed by his actions); United States v. Williams, 391 F. Supp. 741, 742 (D.C. Pa. 1975) (defendant must have knowledge and intent to facilitate commission of offense); *see* Comment, *Jury Instruction in Aiding and Abetting Cases*, 68 COLUM. L. REV. 774, 775 (1968) (elements that constitute crime of aiding and abetting).

[20] 676 F.2d at 996.

[21] *Id.*

to use the weapons and that the defendant intended to aid the accomplices in using the weapons.[22] The district court judge stated that he would give the defendant's requested instructions in substance to the jury.[23]

At the completion of the trial, the judge explained to the jury the elements of an offense under subsection 2113(d) of the Act.[24] The judge further instructed the jury that if the government proved the elements of a subsection 2113(d) offense, the jury also must find that the defendant aided and abetted the accomplices in the commision of the robbery.[25] The judge explained the circumstances under which the jury could find that the defendant had aided and abetted the other bank robbers.[26] At the conclusion of his charge to the jury, the judge asked the defendant's counsel for any objections to the instructions or any requests for additional instructions.[27] Defendant's counsel declined to object or to request other instructions.[28] The jury then found the defendant guilty of aiding

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[22] *Id.*

[23] *Id.*

[24] *Id.* at 997; *see* 18 U.S.C. § 2113(d) (1976) (elements of aggravated armed robbery offense); *supra* note 7 (elements of an offense charged under section 2113(d)). The judge instructed the jury that section 2113(d) required the government to prove that the robbers had entered the bank and threatened or intimidated persons in the bank with a weapon or what appeared to be a weapon. 676 F.2d at 997. The judge also instructed the jury that under § 2113(d) the jury must find that the robbers had assaulted bank employees in the course of the robbery by placing the employees' lives in jeopardy through the use of or threatened use of deadly weapons. *Id.* The Act requires that the instruction to the jury explain the additional elements that transform a simple bank robbery under § 2113(a) into the aggravated offense of armed robbery under § 2113(d). *See* 18 U.S.C. § 2113(d) (1976) (aggravated offense of armed robbery); Simpson v. United States, 435 U.S. 6, 8 (1978) (use of dangerous weapon or device enhances punishment under § 2113(d)); *supra* note 7 (description of § 2113 offenses).

[25] 676 F.2d at 997; *see supra* note 19 (description of aiding and abetting statute).

[26] 676 F.2d at 997. In *McCaskill*, the trial court's jury instruction accurately described the offense of aiding and abetting. *Id.*; *see* United States v. Campisi, 306 F.2d 308, 310 (2d Cir.) (description of aiding and abetting offense), *cert. denied*, 371 U.S. 925 (1962). The *McCaskill* trial court instructed the jury that the commission of a substantive crime such as bank robbery was necessary for an aiding and abetting conviction. 676 F.2d at 997. The *McCaskill* trial judge then instructed the jury that it must find that the aidor and abettor had knowledge of the planned bank robbery and actively desired that the robbery succeed to hold the defendant liable as a principal. *Id.*; *see Campisi*, 306 F.2d at 311 (proper aiding and abetting instruction).

[27] *See* 676 F.2d at 997.

[28] *See id.* In *McCaskill*, the Fourth Circuit noted that since the defendant's counsel did not object at the close of the jury instruction, the trial court's failure to give the defendant's requested instruction would warrant reversal only if the failure was clear error. *Id.*

Rule 30 of the Federal Rules of Criminal Procedure requires a defendant to make any objections to the jury instructions at the close of the charge to the jury. FED. R. CRIM. P. 30. Failure to object will preclude the defendant from raising the issue on appeal unless the appellate court rules that the lower court instruction was a plain error or defect that substantially would affect the rights of the accused. FED. R. CRIM. P. 52(b) (rule 52(b)). Courts have restricted use of the rule 52(b) plain error rule to exceptional cases involving a miscarriage

and abetting the robbery in violation of the Federal Bank Robbery Act.[29] The defendant appealed the conviction to the Fourth Circuit.[30]

The Fourth Circuit in *McCaskill* rejected the defendant's argument that the trial judge instructed the jury erroneously.[31] The defendant relied on *United States v. Short*[32] and *United States v. Sanborn*[33] to support his contention in *McCaskill* that the district court's failure to require the jury to find that the defendant knew that the accomplices were armed and that they intended to use weapons in the course of the robbery was plain error.[34] The Fourth Circuit noted that both *Short* and

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of justice or a substantial prejudicial effect on the defendant's rights. Wright v. United States, 301 F.2d 412, 414 (10th Cir. 1962); *see* United States v. Atkinson, 297 U.S. 157, 160 (1936) (instruction adversely affected fairness, integrity, and reputation of judicial system); United States v. Harper, 579 F.2d 1235, 1239 (10th Cir.) (courts will not review unless instruction amounts to fundamental denial of rights of accused), *cert. denied*, 439 U.S. 968 (1978); United States v. Jackson, 569 F.2d 1003, 1006 (7th Cir.) (instruction had probable impact on jury's verdict), *cert. denied*, 437 U.S. 907 (1978); United States v. Coppola, 486 F.2d 882, 884 (10th Cir. 1973) (court will not review unless error so basic and fundamental that injustice would result), *cert. denied*, 415 U.S. 948 (1974).

[29] 676 F.2d at 996. The jury in *McCaskill* found the defendant guilty of violations of sections (a), (b), and (d) of the Act. *Id.*; *see* 18 U.S.C. §§ 2113(a),(b)(d) (1976) (text of Federal Bank Robbery Act).

[30] 676 F.2d at 996.

[31] *Id.* at 1001.

[32] 463 F.2d 1170 (9th Cir.), *cert. denied*, 419 U.S. 1000 (1974). In *United States v. Short*, the trial court's jury instruction stated that the jury could find the accused guilty of aiding and abetting in violation of § 2113(d) of the Act if the accused knew that his accomplices planned to rob a bank. *See id.* at 1172. The defendant's counsel objected, stating that the jury instruction failed to include as an essential element the defendant's knowledge that his accomplices were armed. *See id.* The trial court overruled the defendant's objection and stated that knowledge that the accomplices were armed was not an essential element of the crime. *See id.* The trial court's instruction stated that the jury therefore could find the defendant guilty, regardless of whether the defendant knew that his accomplices were armed when they robbed the bank. *See id.* On appeal, the Ninth Circuit in *Short* found prejudicial error in the trial court's instruction that the defendant's knowledge that his accomplices possessed weapons was not an essential element of the crime charged. *Id.* The *Short* court therefore reversed the conviction on the ground that the trial judge's instructions specifically omitted an essential element of the crime. *Id.*

[33] 563 F.2d 488 (1st Cir. 1977). In *United States v. Sanborn*, the jury found the defendant guilty of aiding and abetting the commission of an armed robbery under § 2113(d). *See id.* at 489; *see also* 18 U.S.C. § 2113(d) (armed bank robbery offense). The *Sanborn* trial court refused the defendant's requested jury instruction that in order to convict, the jury must find that the defendant knew his accomplices possessed weapons to be used in the robbery. *See* 563 F.2d at 490. The defendant objected to the refusal. *Id.* On appeal, the First Circuit reversed, holding that the government must prove that the defendant had notice that his accomplices were likely to use weapons in the bank robbery. *Id.* at 491. The *Sanborn* court also suggested that a refusal to instruct the jury as the defendant requested was error, even though the jury could infer that the defendant knew his accomplices would use a weapon in the bank robbery based on the defendant's knowledge that an accomplice possessed a weapon prior to the commission of the offense. *Id.*

[34] 676 F.2d at 997. The Fourth Circuit noted that because the defendant did not object to the jury instructions at the close of the district judge's charge, failure properly to in-

Sanborn entitle a defendant charged with aiding and abetting under subsection 2113(d) to an instruction that a conviction requires the defendant to have knowledge that the accomplices who perpetrated the robbery were armed.[35] The Fourth Circuit therefore held that the rule stated in *Short* and *Sanborn* provides that the prosecution must show that a person charged as an aidor and abbettor must know that his accomplices were armed and therefore likely to jeopardize lives in the course of the robbery by the use of weapons.[36] The Fourth Circuit stressed, however, that *Short* and *Sanborn* entitle the defendant to such an instruction only if defendant's counsel makes a timely objection to the failure to instruct and the essential facts are in dispute.[37] The Fourth Circuit therefore stated that both *Short* and *Sanborn* were distinguishable from *McCaskill*.[38]

The Fourth Circuit stated that the rulings in both *Short* and *Sanborn* apply only to situations in which the evidence showing the defendant's knowledge that his accomplices were armed and likely to use their weapons is in dispute.[39] The Fourth Circuit reasoned that the *Short* and *Sanborn* courts would rule differently if the evidence of the defendant's knowledge were not in dispute.[40] The *McCaskill* court then noted that the evidence showing that the defendant in *McCaskill* had the requisite knowledge was not in dispute.[41] The majority stated that the defendant

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struct the jury will warrant reversal of a conviction only if such failure is plain error. *Id.*; *see supra* note 28 (circumstances under which plain error will warrant conviction reversal).

[35] 676 F.2d at 998.

[36] *Id.*

[37] *Id.*

[38] *Id.* The Fourth Circuit in *McCaskill* stated that if the evidence is not in dispute regarding the knowledge of the aidor and abettor, the question resolved in *Short* and *Sanborn* did not arise. *Id.* The Fourth Circuit cited several cases as support for this statement in *McCaskill*. *Id.* at 998 n.5; *see* United States v. Ferreira, 625 F.2d 1030, 1032 (1st Cir. 1980) (defendant must know weapon would be used or that weapons were likely to be used in order to convict); United States v. Methvin, 441 F.2d 584, 586 (5th Cir.) (defendant not guilty where intent to participate in bank robbery was formed without knowledge that pistol would be used), *cert. denied*, 404 U.S. 839 (1971).

[39] 676 F.2d at 998; *see* United States v. Short 463 F.2d 1170 (9th Cir. 1974); United States v. Sanborn, 563 F.2d 488 (1st Cir. 1977).

[40] 676 F.2d at 998. In *Short*, the Ninth Circuit noted that no direct evidence showed that the accused knew his accomplice was armed or that the accomplice intended to use the weapon in the robbery. United States v. Short, 493 F.2d at 1171. The question of the defendant's knowledge arose when the jury asked the judge if the law required the aidor and abettor to know that the accomplice had a gun for the aidor and abettor to be guilty under § 2113(d). *Id.* at 1171-72. The trial judge then gave the instruction that the Ninth Circuit in *Short* found to be erroneous. *Id.* at 1172; *see supra* note 32 (discussion of *Short*). Similarly, in *Sanborn*, no direct evidence indicated that the defendant knew of the existence or planned use of a weapon in the robbery. United States v. Sanborn, 563 F.2d at 490. The First Circuit in *Sanborn* held that denial of the defendant's request for instructions was reversible error. *Id.* at 491; *see supra* note 33 (discussion of Sanborn).

[41] 676 F.2d at 999. The Fourth Circuit stated that the rule in *Short* and *Sanborn* requiring a jury instruction regarding a defendant's knowledge that weapons would be used in an

admitted in his confession to an F.B.I. investigator that the defendant knew his accomplices planned to carry guns when they robbed the bank.[42] The defendant also admitted that he and his accomplices had planned the robbery and that they had agreed to split the proceeds of the robbery.[43] The F.B.I. agent repeated the defendant's admissions at trial and the defendant did not impeach or repudiate the agent's testimony.[44] The Fourth Circuit stated that overwhelming evidence of a planned armed robbery existed.[45] The court found no dispute concerning the defendant's knowledge that his accomplices intended to use their weapons.[46] The *McCaskill* majority also found that the trial court's instructions, viewed as a whole, adequately covered under the facts of the case all the elements of the crime of aiding and abetting an armed bank robbery.[47] The Fourth Circuit therefore held that the district court's failure to give the defendant's requested instructions was not error and did not warrant a reversal of conviction.[48]

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armed robbery did not apply where evidence of that knowledge was not in dispute. *Id.* at 998. The Fourth Circuit noted that the evidence was not in dispute because the *McCaskill* defendant admitted and never denied that he knew his accomplices previously had robbed banks, that his accomplices were armed with pistols, and that he and his accomplices planned to rob the bank in Bessemer City. *Id.* at 999.

[42] *Id.*

[43] *Id.*

[44] *Id.* The *McCaskill* dissent contested the majority's contention that the defendant never disputed the statements made in his confession to the FBI investigator. *Id.* at 1003-04 (Ervin, J., dissenting). The dissent noted that the defendant disclaimed any knowledge of his accomplices' weapons possession on the day of the robbery until the high speed automobile chase. *Id.* at 1004; *see supra* notes 13-15 and accompanying text (high speed auto chase).

[45] 676 F.2d at 999. The *McCaskill* majority stated that the evidence of a planned armed robbery was overwhelming because the defendant knew that his accomplices had been carrying guns for several days, that the defendant and his accomplices planned to holdup a bank, and that the accomplices possessed the guns necessary to carry out this plan. *Id.*

[46] *Id.* at 1001. *But see supra* note 44 (*McCaskill* dissent contended that defendant denied knowledge that accomplices were armed at time of bank robbery).

[47] 676 F.2d at 1003. Courts generally recognize the rule that an appellate court must examine the jury instructions as a whole to determine whether the instruction created the probability that the jury rendered an improper verdict. United States v. Thurman, 417 F.2d 752, 753 (D.C. Cir.), *cert. denied*, 397 U.S. 1026 (1969); *see* United States v. Precision Metal Laboratories, Inc., 593 F.2d 434, 443 (2d Cir. 1979) (to determine adequacy of charge, court must view charge in entirety); United States v. Haldeman, 559 F.2d 31, 114 (D.C. Cir.) (appellate court must examine instructions as a whole), *cert. denied*, Ehrlichman v. United States, 431 U.S. 933 (1976).

[48] 676 F.2d at 1001, 1003. In addition to holding that failure to instruct was not error, the Fourth Circuit in *McCaskill* held that reversal of the defendant's conviction was not warranted because failure to instruct was not plain error. *Id.* at 1001. The Fourth Circuit held that the defendant's contention that the trial court's failure to give an adequate instruction warranted conviction reversal did not meet the standard of the plain error rule. *Id.* at 1002; *see supra* note 28 (discussion of plain error rule). The *McCaskill* majority stated that the plain error exception did not apply in *McCaskill* because the defendant knew his accomplices were armed and that the instruction therefore did not impair substantially the

Judge Ervin dissented, stating that the majority permitted a conviction of a defendant without requiring that the government prove beyond a reasonable doubt every element of the charged offense.[49] The *McCaskill* dissent argued that the jury convicted the defendant of armed robbery on the basis of the same evidence necessary to convict for aiding and abetting simple bank robbery.[50] The dissent stated that by affirming the defendant's conviction, the *McCaskill* majority ignored the rule established in *United States v. Short*[51] and *United States v. Sanborn*.[52] The *McCaskill* dissent rejected the majority's rationale that since uncontested direct evidence existed that the defendant had the requisite knowledge for a conviction, the jury instructions need not contain a requirement of proof of that knowledge.[53] The dissent noted that all evidence, whether direct or circumstantial, disputed or undisputed, must go to the jury for consideration.[54] The dissent therefore argued that the undisputed direct evidence showing the *McCaskill* defendant's knowledge must go to the jury for a determination of whether the defendant knew his accomplices were armed when they robbed the bank.[55] The dissent stated that a finding by the jury on the element of the defendant's knowledge was essential to a conviction under the facts in *McCaskill*.[56]

In determining that failure to instruct the jury on an essential element of the crime was not error, the *McCaskill* majority relied on the

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defendant's rights. *Id.*; *see supra* notes 41, 45 (evidence showing defendant guilty of aiding and abetting armed robbery).

[49] 676 F.2d at 1003 (Ervin, J., dissenting).

[50] *Id.*

[51] 493 F.2d 1170 (9th Cir. 1974); *see supra* text accompanying notes 32-40 (discussion of rule outlined in *Short*).

[52] 563 F.2d 488 (1st Cir. 1977); *see supra* text accompanying notes 33-40 (discussion of rule outlined in *Sanborn*).

[53] 676 F.2d at 1003, 1004 (Ervin, J., dissenting). The *McCaskill* dissent gave a broader interpretation than the majority to the rulings in *Short* and *Sanborn*. *Id.* at 1003-05. The dissent advocated a mandatory instruction requiring the government to prove that the defendant knew his accomplices intended to use the weapons in the commission of the robbery. *Id.* at 1004. The dissent also argued that the evidence showing the defendant's knowledge was in dispute and that the majority therefore should have applied the *Short* and *Sanborn* rulings to the *McCaskill* facts. *Id.* at 1004, 1005; *see supra* text accompanying note 44 (dissent argument that *McCaskill* evidence was in dispute); *cf.* majority opinion (*McCaskill* evidence not in dispute).

[54] 676 F.2d at 1003 (Ervin, J., dissenting). The dissent cited several cases to support the argument that the *McCaskill* court should consider all the evidence in deciding sufficiency of evidence. *Id.*; *see* Holland v. United States, 348 U.S. 121, 140 (1954) (jury must weigh direct and circumstantial evidence in the same manner); United States v. Barrera, 547 F.2d 1250, 1257 (5th Cir. 1977) (test for sufficiency of evidence on appeal the same whether evidence direct or circumstantial); United States v. Andrino, 501 F.2d 1373, 1378 (9th Cir. 1974) (circumstantial evidence not inherently less probative than direct evidence); Vuckson v. United States, 354 F.2d 918, 920 (9th Cir. 1966) (direct evidence not superior to circumstantial evidence).

[55] 676 F.2d at 1004 (Ervin, J., dissenting).

[56] *Id.*

lack of dispute over the direct evidence that established the essential elements of the offense.[57] The Fourth Circuit's holding that direct, unrefuted evidence showing the presence of an essential element of the offense eliminates the requirement that the judge instruct the jury on every essential element is inconsistent with Supreme Court and other circuit court opinions.[58] In *Holland v. United States*,[59] the Supreme Court stated that circumstantial evidence is no different from direct evidence.[60] The *Holland* Court held that both circumstantial and direct evidence can lead to a wholly incorrect result, and that consequently the jury must determine the sufficiency of both types of evidence in the same manner.[61] In *United States v. Barrera*,[62] the Fifth Circuit held that the jury should make no distinction between circumstantial and direct evidence when judging whether the evidence shows the existence of every element of the offense beyond a reasonable doubt.[63] The *McCaskill* court stated that the jury did not need to determine the sufficiency of undisputed direct evidence, and therefore implied that the jury need only consider the sufficiency of circumstantial evidence.[64] The Fourth Circuit's distinction between direct and circumstantial evidence therefore is inconsistent with *Holland* and *Barrera*.[65] To maintain consistency with existing case law, the *McCaskill* court should have ruled that the jury must determine the sufficiency of the undisputed direct evidence.[66]

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[57] 676 F.2d at 999.

[58] *See id.* at 1001; *infra* text accompanying notes 58-63 (Fourth Circuit inconsistent with Supreme Court and other circuit holdings).

[59] 348 U.S. 121 (1954).

[60] *Id.* at 140. In *Holland*, the defendants appealed from a conviction for intentionally attempting to evade income taxes. *Id.* at 124. The defendants contended that the trial court's refusal to instruct that if the government presents circumstantial evidence, the evidence must be so convincing that the evidence excludes every reasonable hypothesis other than that of guilt. *Id.* at 139. The Supreme Court rejected the defendants' argument, stating that where the trial court properly instructs the jury on the standards for reasonable doubt, no reason exists to give the defendant's requested additional instruction on circumstantial evidence. *Id.* at 139-40.

[61] *Id.* at 140; *see supra* note 54 (*McCaskill* dissent treatment of *Holland*).

[62] 547 F.2d 1250 (5th Cir. 1977).

[63] *Id.* at 1255. Appealing from a conviction for possession of narcotics with intent to distribute, the defendant in *Barrera* contended that the government's circumstantial evidence was insufficient to sustain the conviction. *Id.* at 1252. The Fifth Circuit stated that the reasonable doubt standard applies to both circumstantial and direct evidence. *Id.* at 1255. The *Barrera* court then reversed the conviction, stating that the prosecution's evidence failed to demonstrate beyond a reasonable doubt that the defendant possessed or distributed narcotics. *Id.* at 1257.

[64] 676 F.2d at 1001, 1003.

[65] *Id.* at 1001; *see supra* text accompanying notes 58-62 (Fourth Circuit inconsistent with existing case law).

[66] *See supra* notes 53-56 and accompanying text (*McCaskill* dissent contention that Fourth Circuit should have ruled that jury must determine sufficiency of undisputed direct evidence).

In refusing to rule that failure to instruct the jury regarding an essential element of the offense was error,[67] the Fourth Circuit also was inconsistent with other circuits. In *United States v. Clark*,[68] for example, the trial judge failed to require a jury finding of specific intent where the defendant was charged with possession of narcotics with intent to distribute.[69] In holding that failure to instruct warranted reversal of the defendant's conviction, the Second Circuit in *Clark* stated that the trial court's instructions with respect to the essential elements of the alleged crime are of paramount importance.[70] In *United States v. Hiscott*,[71] the Eighth Circuit held that the district court's failure to instruct the jury on each essential element of the crime of auto theft was reversible error.[72] The *Hiscott* court stated that a federal trial judge must define accurately the essential elements of the offense charged in the jury instructions and that a trial court failure to give adequate jury instructions is grave error.[73] The Fourth Circuit held in *McCaskill* that the trial court was not required to instruct the jury on each essential element of the crime.[74] The *McCaskill* court's ruling is inconsistent with the *Clark* and *Hiscott* decisions, both of which clearly state that failure to instruct the jury on every essential element is error.[75]

The Fourth Circuit's failure to follow *United States v. Short*[76] and

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[67] 676 F.2d at 1001, 1003.

[68] 475 F.2d 240 (2d Cir. 1973).

[69] *Id.* at 242. In *Clark*, the defendant was arrested while carrying 211 grams of heroin and 18 grams of cocaine. *Id.* The defendant was charged with and convicted of violations of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841(a)(1). 475 F.2d at 242. On appeal, the Second Circuit found that the trial court's failure to require the jury to make a finding of specific intent constituted plain error and warranted conviction reversal. *Id.* at 251.

[70] *Id.* at 248.

[71] 586 F.2d 1271 (8th Cir. 1978). In *Hiscott*, the jury convicted the defendant of auto theft in violation of the Dyer Act, 18 U.S.C. § 2313 (1976) (effective January 25, 1948). 586 F.2d at 1272; *see* 18 U.S.C. § 2313 (1976) (Dyer Act provides penalty of no more than $5,000 or five years imprisonment or both for theft of motor vehicle or aircraft moving in interstate commerce). The defendant in *Hiscott* appealed to the Eighth Circuit, contending that the trial court's failure to instruct the jury on an essential element of the offense under the Dyer Act warranted reversal of the defendant's conviction. *See* 586 F.2d at 1272. The trial court's instruction stated that the government must prove that the defendant willfully sold or disposed of the stolen vehicle after the vehicle had moved in interstate commerce. *Id.* at 1273. The *Hiscott* court noted that an essential element of an offense under the Dyer Act requires that the vehicle be in the stream of interstate commerce at the time of the offense. *Id.* at 1274; *see* Dyer Act, 18 U.S.C. § 2313 (1976) (requirements of Act). As soon as the stolen vehicle stops in a particular state, future dealings with the vehicle by an individual do not constitute a violation of the Dyer Act. 586 F.2d at 1274. The *Hiscott* court held that the trial court's instruction incorrectly defined an essential element of the offense and therefore the Eighth Circuit reversed the conviction. *Id.* at 1275.

[72] 586 F.2d at 1275.

[73] *Id.*

[74] 676 F.2d at 1001, 1003.

[75] *See supra* notes 68-73 and accompanying text (discussion of *Clark* and *Hiscott*).

[76] 493 F.2d 1170 (9th Cir. 1974); *see supra* note 32 (discussion of *Short*).

United States v. Sanborn[77] because the evidence in *McCaskill* was not in dispute[78] also is inconsistent with the rule in other circuits. In *United States v. Natale*,[79] the Second Circuit held that failure to instruct the jury on each element of the offense of conspiracy to collect extensions of credit by extortionate means was reversible error, even when some of the elements were not in dispute.[80] In *United States v. King*,[81] the trial court failed to instruct on each element of the offense when the defendant was charged with conspiracy to distribute cocaine.[82] The *King* court held that a judge who fails to instruct the jury upon the essential elements of the offense charged commits fundamental error, regardless of the strength of the evidence.[83] The Fourth Circuit ruling in *McCaskill* that a lack of dispute over the evidence lessened the requirement that the trial judge must instruct the jury upon each element of the crime therefore directly contradicts *Natale* and *King*.[84]

The Fourth Circuit in *McCaskill* should have ruled that the trial court's failure to instruct the jury on each essential element of the crime was error. The *McCaskill* court then could have addressed the issue of whether the failure to instruct was plain error warranting reversal of the armed bank robbery conviction[85] without being inconsistent with ex-

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[77] 563 F.2d 488 (1st Cir. 1977); *see supra* note 33 (discussion of *Sanborn*).

[78] 676 F.2d at 997.

[79] 526 F.2d 1160 (2d Cir.), *cert. denied*, 425 U.S. 950 (1976).

[80] *Id.* at 1167. In *Natale*, the defendants were convicted of "loan sharking" in violation of 18 U.S.C. § 894 (1976). 526 F.2d at 1165; *see* 18 U.S.C. § 894 (proscribing collection of extensions of credit by extortionate means). The *Natale* court instructed the jury that the essential elements of a § 894 offense required the government to prove the existence of loans with principal and interest outstanding. 526 F.2d at 1165. The government also must prove that the defendants actually collected or attempted to collect money due, and that the defendants used extortionate means to collect the loans. *Id.* The trial judge then stated to the jury that in his opinion no dispute in the evidence existed concerning the first two elements of the offense. *Id.* On appeal to the Second Circuit, the defendants contended that the trial judge's comment amounted to a directed verdict on the first two elements of the offense. *Id.* at 1166, 1167. After stating that failure to charge each separate element of an offense may be plain error, the *Natale* court held that the trial court instructed the jury on all the elements and that the trial judge's comment fell far short of a directed verdict. *Id.* at 1167; *accord* United States v. Howard, 506 F.2d 1131, 1134 (2d Cir. 1974) (failure to charge each element of offense is plain error).

[81] 521 F.2d 61 (10th Cir. 1975).

[82] *Id.* at 63.

[83] *Id.* The Tenth Circuit noted in *United States v. King* that if an indictment charges a defendant with conspiracy, a court can convict the defendant only if the defendant completes an overt act with one or more of the conspirators. *Id.* The trial judge in *King* failed to instruct the jury that the government must prove that an overt act had taken place. *Id.* The Tenth Circuit held that failure to instruct the jury on an essential element of the conspiracy offense warranted conviction reversal. *Id.*; *see* Findley v. United States, 362 F.2d 921, 922 (10th Cir. 1966) (trial court failure to instruct jury on necessary elements of offense affects substantial rights of accused and is plain error).

[84] *See supra* notes 79-82 and accompanying text (discussion of *Natale* and *King*).

[85] *See* 676 F.2d at 1001, 1002 (*McCaskill* court considers whether trial court jury instruction warrants conviction reversal under the plain error rule in the absence of defen-

isting case law.[86] The Fourth Circuit's refusal to find error in the trial court's failure to instruct ignores the holdings of relevant cases in other circuits,[87] and is inconsistent with the Supreme court ruling in *In re Winship*.[88]

By affirming the conviction in *McCaskill*, the Fourth Circuit has lessened the requirement that the jury must receive instructions on the essential elements of an offense, although the *McCaskill* court has indicated that the Fourth Circuit would not require the instruction only when undisputed direct evidence shows the existence of the essential element.[89] When the trial court specifically has refused to give a jury instruction requiring proof of an essential element of the crime, however, the Fourth Circuit will not uphold the conviction.[90] Finally, the Fourth Circuit has indicated in *McCaskill* a willingness to uphold a conviction in the absence of a specific instruction requiring proof beyond a reasonable doubt of an essential element if the instruction as a whole adequately covers the elements of the offense.[91]

ALFRED PITTMAN TIBBETTS

D. *Waiver of a Statutory Right to Speedy Trial Under the IAD*

The Interstate Agreement on Detainers Act (IAD)[1] established a statutory system to facilitate the orderly disposition of outstanding detainers and the charges underlying the detainers.[2] The pre-IAD method

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dant's timely objection at trial); *supra* note 28 (discussion of plain error rule); *supra* note 48 (Fourth Circuit's treatment of plain error rule in *McCaskill*).

[86] *See supra* notes 59-82 and accompanying text (comparison of *McCaskill* decision with other circuit opinions).

[87] *Id.*

[88] 397 U.S. 358 (1970); *see supra* note 2 (discussion of *Winship*).

[89] 676 F.2d at 1001; *see supra* text accompanying notes 39-48 (jury need not receive instruction on essential element if direct unrefuted evidence shows existence of essential element).

[90] 676 F.2d at 998; *see supra* text accompanying notes 35-38 (refusal to instruct on essential element is reversible error).

[91] 676 F.2d at 1003; *see supra* text accompanying note 47 (instruction as a whole adequately outlines essential elements).

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[1] 18 U.S.C. app. §§ 1-8 (1976).

[2] *Id.*; *see* United States v. Mauro, 436 U.S. 340, 343-344 (1978). A detainer is a notice to prison authorities that charges against a particular inmate are pending in another jurisdiction. 436 U.S. at 359. A detainer does not require the immediate transfer of a prisoner but simply notifies prison authorities that charges are pending in another jurisdiction. *Id.* Officials who lodge a detainer later may effectuate the actual transfer of a prisoner pursuant to a written request for custody. 18 U.S.C. app. § 2, art. IV(a) (1976).

for disposing of detainers created numerous problems for state and federal prisoners.[3] The pre-IAD system resulted in frequent disruptions to rehabilitation due to repeated interjurisdictional transfers of

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[3] *See* United States v. Ford, 550 F.2d 732, 738 (2d Cir. 1977), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978). The pre-IAD detainer system did not require authorities to comply with any procedural prerequisites, such as the filing of a formal indictment, before lodging a detainer. *Id.* at 738; *see also* Crow v. United States, 323 F.2d 888, 889 (8th Cir. 1963). In *Crow*, authorities filed a detainer based on a complaint, not an indictment. *Id.* The ease with which virtually any prosecutor could lodge a detainer led to prosecutorial abuse. *See* Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes*, 18 RUTGERS L. REV. 828, 835 & n.59 (1964) (more than half of all detainers allowed to lapse) [hereinafter cited as *Right to a Speedy Trial*]. Authorities sometimes lodged detainers to increase the severity of a prisoner's punishment without ever intending to prosecute the charge underlying the detainer. *See* People v. Kenyon, 39 Misc. 2d 876, 879, 242 N.Y.S.2d 156, 159 (1963) (intention of prosecutor to hold untried detainers for "future ammunition"); Cane v. Berry, 356 P.2d 374, 375 (Okla. Crim. App. 1960) (allegations that detainer lodged to harrass and prevent prisoner from obtaining parole).

The pre-IAD detainer system created numerous sentencing problems for prisoners. *See* United States v. Ford, 550 F.2d 732, 739 (2d Cir. 1977) (sentencing judge may lengthen sentence for one offense if outstanding detainer charges prisoner with related offenses), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978). Sometimes a prisoner's total sentence for all related offenses exceeded the first sentencing judge's intended punishment. *See* United States v. Candelaria, 131 F. Supp. 797, 800 (S.D. Cal. 1955). In *Candelaria*, state authorities lodged a detainer against a federal prisoner, charging the prisoner with the same offense for which he already was imprisoned. *Id.* at 799. The prisoner faced further sentencing upon completion of his federal prison term. *Id.* at 799-800. In addition, the lack of a co-ordinated system of disposing of detainers eliminated the possibility of concurrent sentencing. *See* State v. Milner, 61 Ohio Op. 2d 206, 149 N.E.2d 189, 190 (Ohio Ct. App. 1958) (no action taken on detainers until prisoners placed on parole); Comment, *The Detainer System and the Right to a Speedy Trial*, 31 U. CHI. L. REV. 535, 540-44 (1964) (prosecutors may fail to pursue speedy disposition of detainers to avoid possibility of concurrent sentencing).

The uncertainty regarding the possible continuation of a prisoner's incarceration in another institution created difficulties in formulating parole and rehabilitation programs. *See* United States *ex rel.* Giovengo v. Maroney, 194 F. Supp. 154, 156 (W.D. Pa. 1961). In *Maroney*, prison officials barred a prisoner faced with an outstanding detainer from working outside the institution. *Id.* In addition, detainers sometimes precluded the granting of parole. *See* Donnelly, *The Conneticut Board of Parole*, 32 CONN. B.J. 26, 47 (1958) (detainer bars parole by preventing offender from living in community under supervision). The existence of outstanding detainers also adversely affected a prisoner's attitude towards rehabilitation. *See Right to a Speedy Trial*, *supra*, at 836 & n.67. The existence of a detainer created personal anxiety rendering the prisoner unwilling to cooperate with prison authorities. *Id.*

Finally, the filing of detainers imposed numerous hardships on a prisoner. *See Maroney*, 194 F. Supp. at 156. In *Maroney*, authorities automatically held a prisoner faced with an outstanding detainer under maximum security. *Id.* Prisoners faced with outstanding detainers also experienced denial of preferred work assignments and desirable living quarters. *See* Yackle, *Taking Stock of Detainer Statutes*, 8 LOY. L.A.L. REV. 88, 91 (1975) (prisoner assigned maximum security status resulting in restricted freedom of movement). Penal authorities sometimes denied transfers to minimum security areas and visits to dying relatives and funerals because of the existence of outstanding detainers. Note, *Detainers and the Correctional Process*, 1966 WASH. U.L.Q. 417, 419 n.13 (citing policy statement by Washington Dep't of Institutions) [hereinafter cited as *Detainers*].

prisoners for trial.[4] In addition, the pre-IAD system failed to provide for the speedy disposition of outstanding detainers.[5] Articles IV(e)[6] and (c)[7] of the IAD are the legislative attempts to solve the problems under the pre-IAD system.[8] Article IV(e) requires authorities who obtain temporary custody of a prisoner from another jurisdiction to try the prisoner before returning him to the sending jurisdiction.[9] Article IV(c) requires the receiving jurisdiction to try the prisoner within 120 days of his arrival in the receiving jurisdiction.[10] A court may extend the 120 day time period only if the government shows good cause for granting a continuance in open court.[11] Although a violation of either Article IV(e) or IV(c) of the IAD requires dismissal of the outstanding indictment,[12]

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[4] *See* United States v. Ford, 550 F.2d 732, 742 (2d Cir. 1977) (continuity of prisoner's rehabilitation program interrupted due to several interjurisdictional transfers to answer outstanding detainers), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978); *Detainers, supra* note 3, at 422 (transfer from institution to institution may be harmful to prisoner's rehabilitation).

[5] *See* United States v. Ford, 550 F.2d 732, 738 (2d Cir. 1977), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978). Prior to the enactment of the IAD, the lodging of a detainer did not require authorities to take any immediate action. *Id.* at 738 & n.13. Frequently authorities did not try a prisoner on outstanding charges until after the prisoner completed his original sentence. *Id.* at 740, n.19; *see* Pellegrini v. Wolfe, 225 Ark. 459, 466, 283 S.W.2d 162, 164 (sending jurisdiction may delay trial by denying receiving jurisdiction's request for extradition); People v. Gryarly, 23 Ill. 2d 313, 315, 178 N.E.2d 326, 328-29 (1961) (state authorities lodged detainer never intending to prosecute).

[6] *See* 18 U.S.C. app. § 2, art. IV(e) (1976) (IAD's antishuttling provision). Article IV(e) states that a receiving jurisdiction's failure to try a prisoner before returning the prisoner to the sending jurisdiction shall result in the dismissal, with prejudice, of the outstanding indictment, information or complaint. *Id.*

[7] *See id.*; art. IV(c). Article IV(c) states that a trial under the IAD must commence within 120 days after prisoner arrives in the receiving jurisdiction. *Id.* Article IV(c) provides an exception to the 120 day limit, allowing a court that has jurisdiction over a case to grant a reasonable continuance if the government or the defendant shows good cause in open court with either the prisoner or his counsel present. *Id.*

[8] *See* United States v. Ford, 550 F.2d 732, 742 (2d Cir. 1977) (Article IV(e) aimed primarily at decreasing number of times authorities transfer prisoners to answer outstanding detainers), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978); United States *ex rel.* Esola v. Groomes, 520 F.2d 830, 834 (3rd Cir. 1975) (Article IV broadened to secure prisoner's right to a speedy trial).

[9] 18 U.S.C. app. § 2, art. IV(e) (1976); *see supra* note 6 (antishuttling requirements for receiving jurisdiction under Art. IV(e) of IAD).

[10] 18 U.S.C. app. § 2, art. IV(c) (1976); *see supra* note 7 (speedy trial requirements under Art. IV(c) of IAD).

[11] 18 U.S.C. app. § 2, art. IV(c) (1976); *see* United States v. Ford, 550 F.2d 732, 743 (2d Cir. 1977) (open court requires an adversarial proceeding in which prisoner or his attorney may defend prisoner's right to speedy trial), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978).

[12] *See* 18 U.S.C. app. § 2, art. IV (1976). A violation of Art. IV(c) requires a dismissal of the indictment, information or complaint that formed the basis of the detainer. *Id.* at art. V. A violation of Art. IV(e) also requires a court to dismiss the outstanding indictment with prejudice. *Id.* at art. IV(e).

courts frequently determine that a prisoner "waived" his rights under the IAD and uphold the indictment.[13]

The standard for an effective waiver traditionally has varied according to the nature of the right at stake.[14] The requirement of a "knowing and intelligent" waiver generally applies to rights that promote the fair ascertainment of truth at a criminal trial.[15] Rights that affect trial fairness typically include the constitutional right to counsel[16] or the right to a trial.[17] In contrast to the requirement of a knowing and intelligent waiver, individuals may waive other constitutional or statutory rights without knowing that the right exists.[18] A waiver of rights that do not af-

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[13] *See, e.g.*, United States v. Black, 609 F.2d 1330, 1334 (9th Cir. 1979) (prisoner waived rights under Art. IV(e) of IAD by requesting transfer to original site of state custody before final disposition on outstanding federal charges), *cert. denied*, 449 U.S. 847 (1980); Camp v. United States, 587 F.2d 397, 400 (8th Cir. 1978) (valid guilty plea operates as waiver of Art. IV(e) antishuttling provision); United States v. Scallion, 548 F.2d 1168, 1174 (5th Cir. 1977) (prisoner waived IAD speedy trial right under Art. IV(c) by failing to raise issue at trial or earlier on appeal), *cert. denied*, 436 U.S. 943 (1978).

[14] *See generally* Rubin, *Toward a General Theory of Waiver*, 28 U.C.L.A. L. REV. 478, 482 (1981) [hereinafter cited as *General Theory*]. Rubin suggests that a prisoner may waive rights in two ways. *Id.* at 483 & n.33. An explicit waiver involves a conscious decision to not exercise a right. *Id.* Knowledge and intent provide evidence of explicit waivers. *Id.* Courts generally require an explicit waiver of rights that protect trial fairness such as the sixth amendment right to counsel. *Id.* at 491. A defendant implicitly may waive rights that do not affect trial fairness. *Id.* at 496. An implicit waiver occurs when a defendant fails to assert a right or acts inconsistently with the right. *Id.* at 483. An implicit waiver does not require an intentional relinquishment of a known right. *Id.*; *see* Barker v. Wingo, 407 U.S. 514, 529-30 (1972) (defendant implicitly waives constitutional right to a speedy trial by failing to assert right before trial).

[15] *See* Johnson v. Zerbst, 304 U.S. 458, 468 (1938). In *Johnson*, the Supreme Court held that a defendant did not lose his sixth amendment right to counsel simply by failing to claim the right. *Id.* at 464. The purpose of the right to counsel is to prevent convictions resulting from an accused's ignorance of the law. *Id.* at 462-63. A determination that a defendant loses the right to counsel by ignorantly failing to assert the right defeats the purpose of the sixth amendment. *Id.* at 463; *see* U.S. CONST. amend. VI. The *Johnson* Court held that a waiver of the right to counsel therefore must involve the intentional relinquishment or abandonment of a known right. 304 U.S. at 464-65. The *Johnson* Court listed various facts and circumstances, including the accused's background, experience and conduct, relevant to an evaluation of the knowing and intelligent nature of the waiver. *Id.* The *Johnson* Court remanded the case to determine whether the prisoner knowingly and intelligently waived the right to counsel. *Id.* at 469.

[16] 304 U.S. at 468; *see* U.S. CONST. amend. VI.

[17] Guthrie v. United States, 517 F.2d 416, 418 (9th Cir. 1975); *see* U.S. CONST. amend. VI.

[18] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 246 (1973). In *Schneckloth*, the defendant "waived" the fourth amendment search warrant requirement. *Id.* at 220. Police stopped Schneckloth, who was driving his brother's automobile, and requested permission to search the car. *Id.* The police did not have a warrant to search the car. *Id.* Schneckloth, who was unaware of his right to refuse the officer's request, consented to the search. *Id.* The police found stolen checks and introduced the checks into evidence at Schneckloth's trial. *Id.* Schneckloth claimed that the officer's warrantless search of the automobile violated the fourth amendment and moved to exclude the evidence. *Id.* at 219. The Supreme Court held

fect trial fairness may occur when a defendant acts in a manner inconsistent with the right involved,[19] fails to make a timely objection,[20] or voluntarily pleads guilty.[21] In *Odom v. United States*,[22] the Fourth Circuit considered whether a prisoner, who was unaware of the statutory right to a speedy trial under Article IV(c) of the IAD, nevertheless waived his right to a speedy trial by allowing his attorney to seek a trial date continuance and by later accepting a plea bargain.[23]

In *Odom*, a grand jury in Maryland indicted Odom while Odom was serving a sentence for another offense in Kentucky.[24] Federal authorities in Maryland lodged a detainer against Odom and transferred Odom on January 15, 1981 to Maryland for arraignment.[25] The district court in Maryland set Odom's trial date for March 2, 1981.[26] On February 4th

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that Schneckloth waived his fourth amendment rights by consenting to the automobile search and affirmed Schneckloth's conviction. *Id.* at 246. The *Schneckloth* Court held that the requirement of a knowing and intelligent waiver generally applied only to constitutional rights that protect the fairness of a criminal trial. *Id.* at 237 & n.18. The Supreme Court reasoned that Schneckloth's fourth amendment right against unreasonable searches and seizures did not relate to trial fairness. *Id.* at 242. Schneckloth therefore waived his fourth amendment right even though he was unaware of the right's existence. *Id.* at 246.

[19] *See id.* at 243 n.31 (consent search waives claims regarding fourth amendment violations); *infra* note 60 (inconsistent actions waive IAD rights).

[20] *See* Wainwright v. Sykes, 433 U.S. 72, 90 (1977), *reh. denied*, 434 U.S. 880 (1977). A defendant may waive constitutional rights by failing to raise a timely objection. *Id.* at 87. Loss of the right is not dependent upon a knowing and intelligent waiver. *Id.* at 93-94 (Burger, C.J., concurring). In *Wainwright*, the defendant filed a habeas corpus petition objecting to the admissability at trial of a defendant's post arrest confession. *Id.* at 75. The defendant challenged the voluntariness of the confession and asserted a lack of understanding of the Miranda warnings issued prior to defendant's confession. *Id.* The *Wainwright* Court held that the defendant had waived his right to object to the introduction of the inculpatory statements by failing to object to the admission into evidence at trial. *Id.* at 86-87; *see also* R. Cipes, 8 MOORE'S FEDERAL PRACTICE § 12.01 (2d ed. 1978) (a defendant waives rights by failing to raise defenses and objections based on nonjurisdictional defects in institution of prosecution before trial).

[21] *See* Tollett v. Henderson, 411 U.S. 258, 266-67 (1973). A guilty plea waives claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. *Id.* A prisoner may attack collaterally the voluntary and intelligent character of the guilty plea by showing that the advice of prisoner's counsel was not within the range of competence demanded of attorneys in criminal cases. *Id.* A guilty plea does not waive those claims that attack the power of the court to try a defendant. Menna v. New York, 423 U.S. 61, 62 & n.2 (1975) (per curiam) (double jeopardy violation constituted jurisdictional defect not amenable to "waiver"); Blackledge v. Perry, 417 U.S. 21, 31 (1974) (guilty plea does not waive due process violation that resulted in jurisdictional defect).

[22] 674 F.2d 228 (4th Cir. 1982), *cert. denied*, 50 U.S.L.W. 3982 (U.S. June 14, 1982) (No. 81-6731).

[23] *Id.* at 229; *see infra* note 61 (prisoner's inconsistent actions waive IAD rights).

[24] 674 F.2d at 229.

[25] *Id.* Under the Federal Rules of Criminal Procedure, an arraignment consists of either the reading of an indictment or information or the stating of the charge to the defendant. FED. R. CRIM. P. 10. During the arraignment, the court also calls upon the defendant to enter a plea. *Id.*

[26] 674 F.2d at 229.

Odom's attorney filed a notice of defense based on Odom's mental condition and moved to suppress certain evidence.[27] The evaluation of Odom's psychiatric condition was incomplete at the time of the pretrial conference on Feb. 18, 1981.[28] Odom's attorney requested a continuance to allow time for completion of the psychiatric evaluation.[29] At the pretrial conference, the district court judge rescheduled Odom's trial for May 18, 1981 with the consent of both counsel.[30] To validate the new trial date, counsel for both parties later prepared a formal motion for a continuance under the Speedy Trial Act (STA).[31] The district court in *Odom* officially granted the continuance in accordance with section 316(h) (8) (A) of the STA.[32] The continuance formally set the trial date for May 18, 1981, three days beyond the 120 day time period provided under Article IV(c) of the IAD.[33]

In April 1981, Odom's attorney informed Odom of a possible defense based on the violation of Article IV(c).[34] Odom subsequently entered into a plea bargain agreement and the court scheduled rearraignment for May 18th.[35] On May 18th Odom withdrew from the plea bargain agreement and requested a new attorney.[36] The district court granted Odom's request for a new attorney and Odom's motion for a continuance to prepare a defense.[37] Odom's new attorney moved to dismiss the indictment on the ground that the district court, by granting the first continuance, illegally rescheduled Odom's trial date three days beyond the statutory time limit under Article IV(c).[38] Odom's attorney further

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[27] *Id.*

[28] *See id.* Odom's doctors were unable to complete Odom's psychiatric evaluation due to a delay in obtaining relevant hospital records. *Id.* at 229 & n.1.

[29] *See id.* On February 10, Odom's attorney sent a letter to the trial judge and a copy to Odom, stating the reason for the delay in completion of Odom's psychiatric evaluation. *Id.* Odom's attorney estimated that the doctors performing the psychiatric evaluation would need another four to six weeks to review completely Odom's records. *Id.*

[30] *Id.*; *see supra* note 7 (requirements for granting trial date continuance).

[31] 674 F.2d at 229; 18 U.S.C. §§ 3161-74 (1976 & Supp. IV 1980). Odom's attorney recited the need to obtain additional information about Odom's mental condition and the need for additional time to dispose of pretrial motions as grounds for the continuance. 674 F.2d at 229. Although in *Odom*, only the government's attorney signed the formal motion for a continuance, the motion stated that both counsel requested a continuance until May 18, 1981. *Id.* Neither counsel, however, had considered the IAD speedy trial provision when requesting the continuance. *Id.*

[32] 674 F.2d at 229; *see* 18 U.S.C. § 3161(h)(8)(A) (1976) (STA's requirements for granting trial date continuances); *infra* note 42 (different requirements for granting continuance under STA and IAD).

[33] 674 F.2d at 229; *see supra* note 7 (speedy trial requirements under Art. IV(c) of IAD).

[34] 674 F.2d at 229.

[35] *Id.*

[36] *Id.*

[37] *Id.* & n.2.

[38] *Id.* at 229-30; *see supra* note 12 (violation of Art. IV(c) requires dismissal of indictment with prejudice).

asserted that the initial granting of the continuance violated the open court requirement under Article IV(c).[39] The district court dismissed the indictment on the grounds that the original granting of the continuance violated Article IV(c)'s open court provision and that Odom had not made a knowing and intelligent waiver of his right to a speedy trial.[40] The government appealed the district court's dismissal of Odom's indictment to the Fourth Circuit.[41]

The Fourth Circuit held that Odom had waived his IAD right to a speedy trial and reinstated the indictment.[42] The *Odom* court reasoned that a prisoner may waive IAD rights because IAD rights are purely

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[39] 674 F.2d at 229-30; *see infra* note 42 (circuit courts' interpretation of "open court" under Art. IV(c) of IAD).

[40] 674 F.2d at 230; *see supra* note 15 (rationale underlying requirement of knowing and intelligent waiver of rights).

[41] 674 F.2d at 230.

[42] *Id.* After the Fourth Circuit held that Odom had waived his speedy trial right, the Fourth Circuit presented two other reasons for reinstating Odom's indictment. *Id.* at 230-32. Odom asserted that the initial granting of the trial date continuance violated the open court requirement under Art. IV(c). *Id.* at 230. Odom argued that the open court provision required a judge on the bench. *Id.*; *see* Stroble v. Anderson, 587 F.2d 830, 839 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979). In *Stroble*, a court clerk who was unaware of the IAD's protections granted a continuance. 587 F.2d at 839. The *Stroble* court condemned the informal granting of a continuance and held that open court means a judge on the bench. *Id.* at 840. In *Odom*, a judge in his chambers granted a continuance during a pretrial conference. 674 F.2d at 231. Odom asserted that the granting of the continuance during a pretrial conference did not comply with the *Stroble* court's requirement of a judge on the bench. *Id.* The district court agreed that the original granting of the continuance violated Art. IV(c) and dismissed Odom's indictment. *Id.* at 230. The Fourth Circuit in *Odom* construed the term "open court" to include a judge in his chambers during a pretrial conference and therefore reinstated the indictment. *Id.* at 231. The Fourth Circuit stated that the open court provision was the legislative attempt to protect prisoners from *ex parte* trial date extensions. *Id.*; *see also* United States v. Ford, 550 F.2d 732, 743 (2d Cir. 1977) (the *Ford* court concluded that term "open court" provided protection against gradual erosion of prisoner's speedy trial rights during *ex parte* hearings), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978). In *Odom*, the Fourth Circuit concluded that the presence of Odom's attorney before a judge at a pretrial conference created an adversarial proceeding that sufficiently protected Odom's rights. 674 F.2d at 231.

The Fourth Circuit in *Odom* also reconciled the different continuance requirements regarding a prisoner's right to a speedy trial under the IAD and the Speedy Trial Act (STA). 674 F.2d at 231-32; *see* 18 U.S.C. §§ 3161-74 (1976) (Speedy Trial Act). Under the STA, proceedings to determine mental competency and the disposition of pretrial motions toll the time period in which a court must try a prisoner. 18 U.S.C. §§ 3161(h)(1)(A), (F) (1976). The STA also allows continuances or trial date extensions where the "ends of justice outweigh the best interests of the public and the defendant in a speedy trial." *Id.* at § 3161(h)(8)(A). Prior to trial, the district court in *Odom* granted Odom's attorney's request for a trial date continuance in compliance with the STA. 674 F.2d at 229. The Fourth Circuit decided that a continuance granted in accordance with the STA criteria also meets the IAD's "good cause" requirements and that a harmonious interpretation of the two Acts required dismissal of Odom's speedy trial claim. *Id.* at 231. The *Odom* court concluded that the original continuance complied with the IAD's good cause requirement and provided another reason for reinstating the outstanding indictment. *Id.*

statutory and do not affect the court's jurisdiction.[43] The Fourth Circuit then addressed the appropriate standard of waiver of IAD rights.[44] The *Odom* court rejected the requirement of a knowing and intelligent waiver of IAD rights.[45] The Fourth Circuit stated that the Supreme Court's decision in *Schneckloth v. Bustamonte*[46] limited the requirement of a knowing and intelligent waiver to constitutional, rather than statutory, rights.[47] The *Odom* court reasoned that the requirement of a knowing intelligent waiver therefore was inapplicable to IAD rights, which are purely statutory.[48] The *Odom* court also relied on the decisions of other circuit courts to support the conclusion that a prisoner who is unaware of his IAD rights waives rights when he acts in a manner inconsistent with the provisions of the IAD.[49] The Fourth Circuit characterized Odom's attorney's request for a trial date continuance and Odom's acceptance of a plea bargain as acts inconsistent with the IAD's protections.[50] The *Odom* court reasoned that Odom's inconsistent actions waived his IAD speedy trial right.[51]

Circuit courts agree that a prisoner may waive IAD rights.[52] The majority of circuit courts also reject the requirement of a knowing and in-

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[43] 674 F.2d at 230; *see* Blackledge v. Perry, 417 U.S. 21, 30 (1974). In *Blackledge*, the Supreme Court stated that since a defendant may not waive jurisdictional defects, a defendant may collaterally attack violations that affect the sentencing court's power to hear the claim. 417 U.S. at 30. In *Blackledge*, the Supreme Court granted a prisoner habeas corpus relief on the grounds that a double jeopardy violation deprived the sentencing court of jurisdiction to hear the claim. *Id.* at 31; *see also* Menna v. New York, 423 U.S. 61, 62 (1975) (no waiver of double jeopardy violation).

[44] 674 F.2d at 230; *see supra* note 14 (appropriate standard of waiver varies according to right protected).

[45] 674 F.2d at 230; *see supra* note 15 (requirement of knowing and intelligent waiver of right to counsel).

[46] 412 U.S. 218 (1973).

[47] 674 F.2d at 230.

[48] *Id.*; *see* 412 U.S. at 236 (knowing and intelligent standard of waiver inapplicable to fourth amendment warrant requirement).

[49] 674 F.2d at 230; *see* United States v. Black, 609 F.2d 1330, 1334 (9th Cir. 1979) (prisoner's affirmative request for transfer may waive Art. IV(e) rights), *cert. denied*, 449 U.S. 847 (1980); United States v. Eaddy, 595 F.2d 341, 344 (6th Cir. 1979) (prisoner who requests transfer before final disposition of charges waives Art. IV(e) right); Camp v. United States, 587 F.2d 397, 400 (8th Cir. 1978) (guilty plea waives Art. IV(e) right); United States v. Scallion, 548 F.2d 1168, 1170 (5th cir. 1977) (prisoner who requests transfer later estopped from asserting violation of Art. IV(e) and prisoner who fails to make a timely objection waives Art. IV(c) rights), *cert. denied*, 436 U.S. 943 (1978).

[50] 674 F.2d at 230; *see supra* text accompanying notes 29 & 35.

[51] 674 F.2d at 230.

[52] *See* United States v. Eaddy, 595 F.2d 341, 344 (6th Cir. 1979). The *Eaddy* court decided that IAD rights exist for the protection of the prisoner. *Id.* Since IAD rights benefit the prisoner, the prisoner may waive IAD rights. *Id.* Furthermore, IAD rights are nonjurisdictional and subject to waiver by forfeiture or default under the Federal Rules of Criminal Procedure. *Id.* at 346; *see* FED. R. CRIM. P. 12; *supra* note 20 (loss of rights through procedural default); *see also* United States v. Black, 609 F.2d 1330, 1334 (9th Cir. 1979) (non-

telligent waiver of IAD rights.[53] Courts that reject a knowing and intelligent waiver of IAD rights rely on *Schneckloth* to limit the requirement of knowing and intelligent waiver to certain constitutional rights.[54] Only the Second Circuit has approved the requirement of a knowing and intelligent waiver of Article IV(e) rights under the IAD.[55] In *Mauro v. United States*[56] authorities transferred a prisoner from state to federal custody pursuant to a writ of habeas corpus *ad prosequedum*.[57] The federal authorities later returned the prisoner to state custody without first trying the prisoner on the federal indictment.[58] The district court held that federal authorities had violated Article IV(e) and ordered dismissal of the federal indictment.[59] The Second Circuit affirmed the dismissal and noted that the prisoner had not knowingly and intelligently waived his rights under Article IV(e).[60]

In considering the appropriate standard of waiver of IAD rights, four circuit courts have held that a prisoner waives Article IV(e) rights by acting in a manner inconsistent with the provisions of the IAD.[61] In

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constitutional IAD rights do not protect trial fairness and may be waived), *cert. denied*, 448 U.S. 847 (1980); Camp v. United States, 587 F.2d 397, 400 (8th Cir. 1978) (guilty plea waives nonjurisdictional, statutory IAD rights); United States v. Palmer, 574 F.2d 164, 167 (3rd Cir. 1978) (IAD violation not fundamental defect which precludes waiver by guilty plea); United States v. Ford, 550 F.2d 732, 742 (2d Cir. 1977) (IAD rights benefit prisoner and are waivable), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978); United States v. Scallion, 548 F.2d 1168, 1174 (5th Cir. 1977) (IAD violations are nonfundamental defects that prisoner waives through procedural default), *cert. denied*, 436 U.S. 340 (1978); United States v. Scallion, 548 F.2d 1168, 1174 (5th Cir. 1977) (IAD violations are nonfundamental defects that prisoner waives through procedural default), *cert. denied*, 436 U.S. 943 (1978).

[53] *See* United States v. Black, 609 F.2d 1330, 1334 (9th Cir. 1979) (knowing and intelligent standard of waiver inapplicable to Art. IV(e) rights), *cert. denied*, 449 U.S. 847 (1980); United States v. Eaddy, 595 F.2d 341, 344 (6th Cir. 1979) (prisoner may waive IAD right without knowing that the right exists); Camp v. United States, 587 F.2d 397, 400 (8th Cir. 1978) (requirement of a knowing and intelligent waiver inapplicable to IAD rights that are purely statutory).

[54] *See* Camp v. United States, 587 F.2d 397, 400 (8th Cir. 1978) (IAD rights are only statutory set of procedural rules that do not require a knowing and intelligent waiver); *supra* note 53 (circuit courts' rejection of knowing and intelligent waiver standard).

[55] *See* Mauro v. United States, 544 F.2d 588, 591 n.3 (2d Cir. 1976) (requirement of knowing and intelligent waiver of IAD rights upheld), *rev'd on other grounds*, 436 U.S. 340 (1978).

[56] 544 F.2d at 591 n.3.

[57] *Id.* at 590. In *Mauro*, the Second Circuit held that a writ of habeas corpus *ad prosequedum* was a detainer within the meaning of the IAD. *Id.* at 592. On appeal, however, the Supreme Court reversed the Second Circuit's decision and held that a writ of habeas corpus *ad prosequedum* was not a detainer. United States v. Mauro, 436 U.S. 340, 361 (1978). The Supreme Court stated that unlike a detainer, a writ of habeas corpus *ad prosequedum* required the immediate presence of the prisoner in the jurisdiction where the prisoner committed the offense. *Id.* at 358.

[58] 544 F.2d at 590.

[59] *Id.*

[60] *Id.* at 591, n.3.

[61] *See* United States v. Black, 609 F.2d 1330, 1334 (9th Cir. 1979) (prisoner's affirmative

United States v. Black[62] and *United States v. Ford*,[63] federal authorities lodged detainers and obtained temporary custody over prisoners from state institutions.[64] Before trial on the federal charges, the prisoners in both *Black* and *Ford* affirmatively requested a return to state custody.[65] Federal authorities violated Article IV(e) by returning the prisoners to state custody pursuant to the prisoners' requests.[66] Although the prisoners in *Black* and *Ford* were unaware of the rights under Article IV(e) both the Ninth Circuit in *Black* and the Second Circuit in *Ford* held that the prisoners' requests for transfers were acts inconsistent with the IAD and therefore waived Article IV(e) rights under the IAD.[67]

In *United States v. Scallion*[68] a prisoner requested to be returned to state custody while awaiting trial on federal charges.[69] The Fifth Circuit held that the prisoner was estopped from later asserting a violation of Article IV(e).[70] In *United States v. Eaddy*,[71] the Sixth Circuit agreed with the *Scallion* court's decision that a prisoner's inconsistent actions operate as a waiver.[72] The Sixth Circuit, however, did not find that

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request for transfer was contrary to Art. IV(e), the antishuttling provision, and waived rights under Art. IV(e)), *cert. denied*, 449 U.S. 847 (1980); United States v. Eaddy, 595 F.2d 341, 344 (6th Cir. 1979) (same); United States v. Ford, 550 F.2d 732, 742 (2d Cir. 1977) (same), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1980); United States v. Scallion, 548 F.2d 1168, 1170 (5th Cir. 1977) (prisoner who requests transfer estopped from later asserting violation of Art. IV(e)), *cert. denied*, 436 U.S. 943 (1978).

[62] 609 F.2d 1330 (9th Cir. 1979), *cert. denied*, 449 U.S. 847 (1980).

[63] 550 F.2d 732 (2d Cir. 1977), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1980).

[64] *United States v. Black*, 609 F.2d at 1332; *United States v. Ford*, 550 F.2d at 735.

[65] 609 F.2d at 1332; 550 F.2d at 735. In *Black*, the prisoner requested a return to state custody on three different occasions before trial on the federal charges. 609 F.2d at 1332. In *Ford*, the prisoner requested permission to return to state custody to facilitate preparation for trial. 550 F.2d at 735. Both the *Black* and the *Ford* courts held that the prisoners' requests for a transfer to state custody waived Art. IV(e) rights. 689 F.2d at 1334; 550 F.2d at 742.

[66] 609 F.2d at 1332; 550 F.2d at 735; *see supra* note 6 (Art. IV(e) requires receiving jurisdiction to try prisoner before returning prisoner to sending jurisdiction).

[67] 609 F.2d at 1334; 550 F.2d at 742. Although the prisoner in *Ford* waived his rights under Art. IV(e) of the IAD, the Second Circuit held that the government's failure to comply with the speedy trial provision of Art. IV(c) nevertheless required dismissal of the federal indictment. 550 F.2d at 743. In *Black*, however, the Ninth Circuit upheld the federal indictment. 609 F.2d at 1335.

[68] 548 F.2d 1168 (5th Cir. 1977), *cert. denied*, 436 U.S. 443 (1978).

[69] *Id.* at 1170. In *Scallion*, the prisoner requested permission to return to state custody for a parole hearing. *Id.*

[70] *Id.* The *Scallion* court held that a court may estop a prisoner who acted inconsistently with Art. IV of the IAD from later asserting a violation of Art. IV(e). *Id.* The court also held that a prisoner may waive Art. IV(c) rights by failing to make a timely objection. *Id.* at 1174.

[71] 595 F.2d 341 (6th Cir. 1979).

[72] *See id.* at 345. The *Eaddy* court agreed with the Fifth Circuit's holding in *United States v. Scallion* that a prisoner who is unaware of his IAD rights waives Art. IV(e) rights by requesting permission to return to state custody before final disposition of federal charges. *Id.*; *see Scallion*, 548 F.2d at 1170. The *Eaddy* court, however, decided that the

Eaddy had waived his rights under Article IV(e) of the IAD.[73] In *Eaddy*, authorities shuttled the prisoner between state and federal custody on two occasions prior to a final disposition of federal charges.[74] Eaddy did not object to the transfer.[75] The *Eaddy* court concluded that although a prisoner's affirmative request for transfer may waive Article IV(e) rights, a prisoner does not lose Article IV(e) rights by failing to state a preference regarding his place of incarceration.[76]

One circuit court specifically has characterized a guilty plea as an inconsistent action that may waive IAD rights.[77] In *Kowalak v. United States*,[78] the Sixth Circuit stated that a prisoner's guilty plea was an inconsistent action which may waive both Article IV(c) and Article IV(e) rights of the IAD.[79] In *Kowalak*, the prisoner's counsel, who was unaware of the IAD rights, encouraged the prisoner to plead guilty.[80] The Sixth Circuit remanded the *Kowalak* case to determine whether the prisoner had received effective assistance of counsel.[81] The *Kowalak* court held that a prisoner who does not receive effective assistance of counsel may later withdraw the guilty plea.[82] The *Kowalak* court further stated that a withdrawal of the guilty plea invalidated the waiver of IAD rights based on the prisoner's guilty plea.[83]

In *Odom v. United States*, the Fourth Circuit correctly held that Odom had waived his rights under the IAD.[84] The Fourth Circuit's rejection of the standard of a knowing and intelligent waiver in *Odom* is consistent with the Supreme Court's decision in *Schneckloth v.*

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prisoner in *Scallion* would not have taken advantage of the Art. IV(e) right even if the prisoner had known of the right. 595 F.2d at 345. *See Scallion*, 548 F.2d at 1170 (prisoner requested return to prepare for parole hearing). The *Eaddy* court concluded that waiver occurs when facts indicate that a prisoner would not have requested compliance with the IAD provision even if the prisoner had been aware of the applicable IAD rights. 595 F.2d at 345.

[73] 595 F.2d at 345.

[74] *Id.* at 343.

[75] *Id.* In *Eaddy*, the prisoner's counsel indicated that it was not important where officials held the prisoner pending trial on federal charges. *Id* at 345. The *Eaddy* court decided that failure to state a preference regarding a place of incarceration did not waive Art. IV(e) rights. *Id.*

[76] *Id.*

[77] *See* Kowalak v. United States, 645 F.2d 534, 534 (6th Cir. 1981) (guilty plea is inconsistent act that may waive IAD rights).

[78] 645 F.2d 534 (6th Cir. 1981).

[79] *See id.* at 537. The *Kowalak* court stated that pleading guilty and standing trial operate as affirmative requests for treatment contrary to the procedures proscribed by Art. IV(c) and IV(e) of the IAD. *Id.*

[80] *Id.* at 537.

[81] *See id.* at 538. The *Kowalak* court noted that a counsel's failure to advise a prisoner of rights under the IAD was not per se ineffective assistance of counsel. *Id.*

[82] *Id.*

[83] *Id.*

[84] 674 F.2d at 230.

Bustamonte.[85] In *Schneckloth*, the defendant "waived" the fourth amendment requirement of a search warrant when he consented to a police search of his brother's automobile.[86] Schneckloth was unaware of his right to refuse a warrantless search.[87] The Supreme Court held that generally the requirement of a knowing and intelligent waiver only applied to constitutional rights that preserve a fair trial.[88] A defendant may waive other rights, such as the fourth amendment right against unreasonable searches and seizures, without being aware of the right's existence.[89] IAD rights are statutory and therefore are not included in the category of rights that require a knowing and intelligent waiver under the *Schneckloth* analysis.[90]

In addition to *Schneckloth*, the majority of circuit courts support the Fourth Circuit's decision in *Odom* that a prisoner's inconsistent actions may waive Article IV(c) rights of the IAD.[91] The other circuit courts which held that a prisoner's inconsistent actions actually waived IAD rights involved violations of Article IV(e), the antishuttling provision.[92] Although *Odom* involved an alleged waiver of the Article IV(c) speedy trial right,[93] *Schneckloth* permits the application of an inconsistent ac-

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[85] 412 U.S. 218 (1972); 674 F.2d at 230; *see supra* note 18 (Supreme Court's limited application of knowing and intelligent waiver to consititutional rights that protect trial fairness).

[86] 412 U.S. at 220.

[87] *Id.* at 222.

[88] *Id.* at 237.

[89] *Id.* at 242. The *Schneckloth* Court held that the fourth amendment right against warrantless searches, unlike the sixth amendment right to counsel, does not protect the fairness of the fact finding process. *Id.*

[90] *See supra* text accompanying notes 53 & 54 (statutory rights, such as IAD rights, do not require a knowing and intelligent waiver).

[91] United States v. Black, 609 F.2d 1330, 1334 (9th Cir. 1979), *cert. denied*, 449 U.S. 847 (1980); United States v. Eaddy, 595 F.2d 341, 344 (6th Cir. 1979); United States v. Ford, 550 F.2d 732, 742 (2d Cir. 1977), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978); United States v. Scallion, 548 F.2d 1168, 1170 (5th Cir. 1977), *cert. denied*, 436 U.S. 943 (1978); *see supra* text accompanying note 61 (inconsistent actions waive IAD rights). *But see* United States v. Mauro, 544 F.2d 588, 591 n.3 (2d Cir. 1976) (requirement of knowing and intelligent waiver of IAD rights), *rev'd on other grounds*, 436 U.S. 340 (1978). The Second Circuit is the only circuit court that specifically has approved the requirement of a knowing and intelligent waiver of IAD rights. 544 F.2d at 591 n.3. In a case after *Mauro*, however, the Second Circuit also held that a prisoner may waive IAD rights by pleading guilty, regardless of the prisoner's awareness of the right. Edwards v. United States, 564 F.2d 654, 653 (2d Cir. 1977).

[92] United States v. Black, 609 F.2d 1330, 1334 (9th Cir. 1979), *cert. denied*, 449 U.S. 847 (1980); United States v. Eaddy, 595 F.2d 341, 344 (6th Cir. 1979); United States v. Ford, 550 F.2d 732, 742 (2d Cir. 1977), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978); United States v. Scallion, 548 F.2d 1168, 1170 (5th Cir. 1977), *cert. denied*, 436 U.S. 943 (1978); *see supra* note 61 (inconsistent actions waive Art. IV(e) rights).

[93] 674 F.2d at 230. Two circuit courts have discussed waiver of Article IV(c) rights in terms of procedural default, not inconsistent actions. *See* United States v. Eaddy, 595 F.2d

tion rationale for waiver of all statutory rights, including Article IV(c) as well as Article IV(e) rights.[94]

The Fourth Circuit also characterized Odom's plea bargain as an inconsistent action that waived the Article IV(c) right.[95] Although circuit courts agree that guilty pleas waive nonjurisdictional defects, including IAD violations,[96] only the Sixth Circuit in *Kowalak v. United States*, has specifically characterized a guilty plea as an inconsistent action.[97] Assuming that the Fourth Circuit correctly characterized Odom's plea bargain as an inconsistent action, the Fourth Circuit nevertheless failed to consider Odom's withdrawal from the plea bargain before trial.[98] The *Kowalak* court specifically stated that the withdrawal of a plea invalidated the waiver based on the guilty plea.[99] In *Unted States v. Palmer*,[100] the Third Circuit also stated that a prisoner's guilty plea waived IAD rights unless the prisoner was willing to revoke the plea and rely on the sufficiency of the IAD motion.[101] In *Smith v. United*

341, 346 (6th Cir. 1979); United States v. Scallion, 548 F.2d 1168, 1174 (5th Cir. 1977). In *Scallion*, the Fifth Circuit stated that a prisoner may waive the right to a speedy trial under Art. IV(c) by failing to make a timely objection. 548 F.2d at 1174. The *Scallion* court, however, dismissed the prisoner's claim on the ground that the IAD does not apply to a writ of habeas corpus *ad prosequedum*. *Id.* at 1173. In *United States v. Eaddy*, the Sixth Circuit stated that a prisoner may waive both Art. IV(e) and (c) rights through procedural default. 595 F.2d at 346. The *Eaddy* court compared IAD violations to violations of other rights that defendants must raise prior to trial under the Federal Rule of Criminal Procedure 12. *Id.*; FED. R. CRIM. P. 12. Pursuant to rule 12 of the Federal Rules of Criminal Procedure a defendant loses the right to object to nonjurisdictional violations by failing to object to the alleged violation prior to trial. 595 F.2d at 346. In *Eaddy*, however, the prisoner did not waive Art. IV(c) rights since, prior to trial, the prisoner persistently requested a speedy trial. *Id.* The *Eaddy* court held that although the prisoner did not submit the speedy trial request in the form required under the IAD, the prisoner's requests nevertheless provided sufficient notification to the government of the speedy trial claim and precluded the government's assertion of waiver. *Id.*

[94] 412 U.S. 218, 237 (1972); *see supra* note 18 (defendant's consent results in loss of fourth amendment right against warrantless searches regardless of defendant's unawareness of right).

[95] 674 F.2d at 229.

[96] *See* Kowalak v. United States, 645 F.2d 534, 537 (6th Cir. 1981) (guilty plea may waive both Art. IV(e) and (c) rights under IAD); Camp v. United States, 587 F.2d 397, 399 (8th Cir. 1978) (valid guilty plea waived all IAD violations); United States v. Palmer, 574 F.2d 164, 167 (3rd Cir. 1978) (prisoner's refusal to withdraw from plea bargain resulted in waiver of Art. IV(e) rights, *cert. denied*, 437 U.S. 907 (1978); Edwards v. United States, 564 F.2d 652, 653 (2d Cir. 1977) (prisoner may waive Art. IV(e) rights by pleading guilty).

[97] Kowalak v. United States, 645 F.2d 534, 537 (6th Cir. 1981).

[98] 674 F.2d at 230.

[99] 645 F.2d at 538. The *Kowalak* court stated that a prisoner may withdraw a guilty plea before trial if the prisoner had not received effective assistance of counsel. *Id.* The *Kowalak* court concluded that withdrawal of the plea revoked the waiver of any IAD rights. *Id.*

[100] 574 F.2d 164 (3rd Cir. 1978), *cert. denied*, 437 U.S. 907 (1978).

[101] *Id.* at 167. In *Palmer*, the Third Circuit determined that the prisoner had made a rational and voluntary decision to accept the benefits of pleading guilty. *Id.* at 166. The prisoner moved to dismiss the indictment on grounds of an Article IV(e) violation but was

States,[102] the Eleventh Circuit specifically noted that once a court rejects a plea agreement, the court can reinstate the rights that the defendant had surrendered under the agreement.[103] Courts, however, may refuse to reinstate Article IV(c) rights of the IAD when the prisoner's acceptance of the plea bargain actually contributed to the trial delay and subsequent violation of Article IV(c).[104] In *Odom*, however, the granting of the first continuance rescheduled the trial date beyond the statutory time limit, prior to Odom's acceptance of the plea bargain.[105] Since the plea bargain did not contribute to the violation of Article IV(c), Odom's withdrawal from the plea bargain invalidated the waiver and loss of any rights based on the plea agreement.[106]

The Fourth Circuit correctly rejected the requirement of a knowing and intelligent waiver of IAD rights.[107] Although the Second Circuit has approved the knowing and intelligent standard of waiver,[108] the Supreme Court and majority of circuit courts have rejected the requirement of a knowing and intelligent waiver in favor of the decision that a defendant's inconsistent actions may waive statutory rights.[109] The Fourth Circuit's reliance on Odom's withdrawn plea, however, is misplaced.[110] If a prisoner withdraws from a plea bargain before trial, the prisoner may regain the rights previously waived under the plea bargain.[111] The Fourth Circuit's holding in *Odom*, however, is not depen-

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unwilling to withdraw his plea. *Id.* The *Palmer* court held that the guilty plea waived all Article IV(e) rights. *Id.* The *Palmer* court noted that a finding of waiver of IAD rights did not frustrate the purposes of the IAD. *Id.* at 168-69. The *Palmer* court reasoned that dismissal of an indictment after a prisoner refused to withdraw a guilty plea would frustrate congressional intent. *Id.*

[102] 670 F.2d 145 (11th Cir. 1982).

[103] *Id.* at 148 n.6. The *Smith* court stated that a court may return a prisoner to his pre-agreement position by allowing a withdrawal of the guilty plea under the agreement. *Id.*

[104] *See* Santabello v. New York, 404 U.S. 257, 267 (1971) (Marshall, J., concurring) (defendant may withdraw plea that has not disadvantaged government).

[105] 674 F.2d at 229.

[106] *See* Kowalak v. United States, 645 F.2d 534, 538 (6th Cir. 1981) (withdrawal of guilty plea invalidates waiver); United States v. Palmer, 574 F.2d 164, 166 (3rd Cir. 1978) (refusal to withdraw guilty plea waives Art. IV(e) rights), *cert. denied*, 437 U.S. 907 (1978).

[107] 674 F.2d at 230.

[108] Mauro v. United States, 544 F.2d 588, 591 n.3 (2d Cir. 1976), *rev'd on other grounds*, 436 U.S. 340 (1978). *But see* Edwards v. United States, 564 F.2d 652, 653 (2d Cir. 1977) (guilty plea precludes collateral attack of IAD violation, regardless of prisoner's awareness of IAD right when pleading guilty).

[109] Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Black, 609 F.2d 1330, 1334 (9th Cir. 1979), *cert. denied*, 449 U.S. 847 (1980); United States v. Eaddy, 595 F.2d 341, 344 (6th Cir. 1979); United States v. Ford, 550 F.2d 732, 742 (2d Cir. 1977), *aff'd sub nom.* United States v. Mauro, 436 U.S. 340 (1978); United States v. Scallion, 548 F.2d 1168, 1170 (5th Cir. 1977), *cert. denied*, 436 U.S. 943 (1978); *see supra* notes 18 & 52 (rejection of requirement of knowing and intelligent waiver of statutory rights).

[110] 674 F.2d at 230; *see supra* notes 99 & 106 (withdrawn plea invalidates waiver).

[111] *See* Smith v. United States, 670 F.2d 145, 148 n.6 (11th Cir. 1982) (reinstatement of prisoner's rights upon rejection of plea agreement).

dent upon the validity of the plea bargain waiver.[112] Odom waived his statutory right to a speedy trial when his attorney obtained a trial date continuance, an act inconsistent with the provisions of the IAD.[113] The Fourth Circuit, therefore, correctly reinstated Odom's indictment.[114]

MICHELLE L. GILBERT

E. *Waiver of Criminal Statutes of Limitation*

Congress designed statutes of limitation[1] for criminal offenses to limit exposure to prosecution for a fixed period of time following the commission of a crime.[2] Statutes of limitation serve the dual purpose of protecting individuals against charges when evidence has grown stale[3] and encouraging law enforcement officials to act swiftly when investigating criminal cases.[4] Federal statutes of limitation distinguish between capital and noncapital offenses by providing that a grand jury may return an indictment for a capital offense at any time without limitation.[5] A separate federal statute of limitations dealing with non-

[112] 674 F.2d at 230.

[113] *Id.*

[114] *Id.*; *see supra* note 61 (inconsistent actions waive IAD rights).

[1] *See* 18 U.S.C. § 3282 (1976 & Supp. V 1981) (statute of limitations bars trial and punishment of any noncapital offense unless grand jury returns indictment within five years of the offense); *id.* § 3281 (grand jury may return indictment at any time for any offense punishable by death). Section 3282 is a general statute of limitations applicable to all crimes that do not carry their own time limitations. *See id.* § 3282 (noncapital crimes carry five-year statutes of limitations except as otherwise provided by law).

[2] *See* United States v. Marion, 404 U.S. 307, 322-23 (1971) (statute of limitations provides primary guarantee against bringing stale criminal charges); Toussie v. United States, 397 U.S. 112, 114-15 (1970) (purpose of limitations statutes is to limit exposure to criminal prosecution); United States v. Ewell, 383 U.S. 116, 122 (1966) (same).

[3] *See* Toussie v. United States, 397 U.S. 112, 114-15 (1970) (statute of limitations provides protection when basic facts may have become obscured by passage of time); United States v. Wild, 551 F.2d 418, 423-24 (D.C. Cir. 1977) (same), *cert. denied*, 431 U.S. 916 (1977). *See generally* Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 632-35 (1954) [hereinafter cited as *Statute of Limitations*].

[4] *See* Toussie v. United States, 397 U.S. 112, 114-15 (1970) (statute of limitations encourages law enforcement officials promptly to investigate suspected criminal activity); United States v. Wild, 551 F.2d 418, 424 (D.C. Cir. 1977).

[5] *See* 18 U.S.C. § 3281 (1976) (grand jury may return indictment at any time without limitation for any offense punishable by death). The fifth amendment requires that a grand jury initiate a federal prosecution for a capital crime by an indictment. U.S. CONST. amend. V; *see* Stirone v. United States, 361 U.S. 212, 218 (1960) (fifth amendment limits defendant's jeopardy to offenses charged by grand jury). The purpose of the grand jury is to determine whether probable cause exists that the defendant has committed a crime and whether the

capital offenses bars prosecution unless a grand jury returns an indictment within five years of the offense.[6]

In *United States v. Williams*,[7] the Fourth Circuit considered whether the defendant could waive the five-year statute of limitations for noncapital offenses[8] and whether the defendant's request for a jury instruction on a lesser included offense constituted a waiver of the limitations statute for the lesser offense.[9] In *Williams*, a grand jury returned a first degree murder indictment in 1981 against Stephen Jerome Williams for the 1975 killing of Kathleen Dandois.[10] At the conclusion of the trial, defense counsel requested that the trial judge charge the jury on the lesser offense of second degree murder.[11] Williams' attorney did not mention that the statute of limitations might bar a guilty verdict for the lesser offense.[12] The trial judge gave the charge and the jury convicted Williams of second degree murder.[13] Williams appealed his conviction to the Fourth Circuit.[14]

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government should initiate criminal proceedings. *See* United States v. Calandra, 414 U.S. 338, 343-44 (1974) (function of grand jury is to determine whether probable cause exists); Branzburg v. Hayes, 408 U.S. 665, 686 (1972) (same). For noncapital crimes, a defendant may waive his right to indictment by grand jury and allow proceedings to be initiated by information. FED. R. CRIM. P. 7(a), (b).

[6] *See* 18 U.S.C. § 3282 (1976) (grand jury must return indictment within five years from date of offense); *supra* note 1.

[7] 684 F.2d 296 (4th Cir. 1982).

[8] *Id.* at 299-300.

[9] *Id.*

[10] *Id.* at 298. Following the killing of Kathleen Dandois, investigators made little progress in identifying the persons responsible for her death. *Id.* The murder remained unsolved for nearly three years when William Joseph Facey admitted his involvement in the murder and implicated the defendant, Stephen Jerome Williams, as his accomplice. *Id.* The investigation then began anew with investigators attempting to corroborate Facey's admission. *Id.* Facey's testimony and corroborating evidence supporting his testimony led to the grand jury's indictment of Williams in February 1981. *Id.*

[11] 684 F.2d at 299. Rule 31(c) of the Federal Rules of Criminal Procedure provides that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged . . ." FED. R. CRIM. P. 31(c). The lesser included offense doctrine developed at common law as an aid to the prosecution in cases in which the evidence failed to establish some element of the crime charged. *See* United States v. Markis, 352 F.2d 860, 866 (2d Cir. 1965) (primary purpose of lesser included offense doctrine was to aid prosecution); 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE—CRIMINAL § 515 (1982) (same). The criminal defendant now has a right to an instruction on a lesser included offense if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense and acquit him of the greater. *See* Keeble v. United States, 412 U.S. 205, 208 (1973) (defendant entitled to lesser offense instruction if evidence permits jury rationally to find him guilty of lesser offense); Sansone v. United States, 380 U.S. 343, 349-50 (1965) (listing conditions for instruction on lesser included offense); *cf.* United States v. Carter, 540 F.2d 753, 755 (4th Cir. 1976) (reversible error to refuse request for instruction on lesser included offense when evidence distinguishing lesser offense from greater offense in dispute).

[12] 684 F.2d at 299.

[13] *Id.*

[14] *Id.* at 297. Williams appealed his conviction on three grounds. *Id.* at 297-98. First,

On appeal, the Fourth Circuit requested that counsel address the problem presented by the five-year statute of limitations for second

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Williams contended that insufficient credible evidence existed to support his conviction. *Id.* at 297. An appellate court must sustain the verdict if substantial evidence exists, viewed in the light most favorable to the prevailing party, to uphold the jury's decision. *See* Wood v. United States, 321 F.2d 699, 701 (5th Cir. 1963) (assignment of error requires court to determine whether record as a whole is sufficient to support verdict). Williams argued that Facey's in-court testimony was inconsistent with his prior written confession. 684 F.2d at 300. The Fourth Circuit held that the jury has the responsibility for deciding questions of credibility and that substantial evidence existed to support the jury's verdict. *Id.*

Second, Williams argued that the trial judge improperly allowed the Government to expand cross-examination of the defendant to include prior acts of misconduct relating to Julia Boo. *Id.* at 300-01. Williams contended that the court should not have allowed the question of whether he committed a sexual assault on Julia Boo pursuant to Federal Rule of Evidence 608(b). 684 F.2d at 301. The Federal Rules of Evidence generally prevent the admission of character evidence solely to create an inference that a person acted on a particular occasion consistently with his character. *See* FED. R. EVID. 404(a). Several exceptions exist, however, one of which sanctions the admission of character evidence bearing upon the trustworthiness of a witness. *See* FED. R. EVID. 404(a)(3) (evidence relating to character of witness admissible within limits set forth in rules 607, 608, and 609). Rule 608(b) allows inquiry into instances of conduct other than the conviction of crimes when, in the discretion of the court, the inquiry concerns the witness' character for truthfulness or untruthfulness. *See* FED. R. EVID. 608(b). Rule 608(b) recognizes that character evidence is necessary to ensure the law's basic emphasis on truthfinding. *See* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 608[05], at 621-36 (1982) [hereinafter cited as WEINSTEIN'S EVIDENCE]. Rule 608, however, requires that the probative value of the character evidence must outweigh the danger of unfair prejudice to the defendant. *See* United States v. Augello, 452 F.2d 1135, 1140 (2d Cir. 1971) (court should weigh probative value of evidence against prejudice the evidence may create in minds of jurors), *cert. denied*, 406 U.S. 922 (1972). The trial judge must balance the need for evidence relating to the trustworthiness of the witness against the possible abuses that may result from the introduction of the evidence. *See* WEINSTEIN'S EVIDENCE, *supra*, ¶ 605[05], at 621-36. The defendant in *Williams* argued that the question concerning Julia Boo was not relevant to his truthfulness as a witness and that the court should not have allowed the question under rule 608(b). Brief for Appellant at 38, United States v. Williams, 684 F.2d 296 (4th Cir. 1982). The Government responded that the trial court admitted the character evidence under rule 404(b), not under rule 608(b). 684 F.2d at 301. Evidence barred by rule 608 may nevertheless be admissible in connection with some other technique of attacking the credibility of a witness. *See* WEINSTEIN'S EVIDENCE, *supra*, ¶ 608[01], at 607-10. Rule 404(b) sanctions the admission of evidence of other crimes, wrongs, or acts for purposes such as proving the defendant's motive, opportunity, intent, plan, or knowledge. FED. R. EVID. 404(b). As in rule 608, the trial judge must determine whether the danger of prejudice outweighs the probative value of the character evidence. *See* WEINSTEIN'S EVIDENCE, *supra*, ¶ 605[05], at 621-36. The Fourth Circuit in *Williams* held that the trial judge admitted the question under Federal Rule of Evidence 404(b). 684 F.2d at 301. Furthermore, the *Williams* court determined that the trial judge did not abuse his discretion in allowing the character evidence at trial. 684 F.2d at 301.

Third, the defendant argued that because of the delay between the murder and the indictment, any prosecution would constitute a violation of due process of law. *Id.* Although statutes of limitations provide the primary protection against unreasonable delay in the institution of criminal proceedings, the Supreme Court has implied that the due process clause of the fifth amendment may require dismissal of charges if an intentional delay by the Government, designed to gain a tactical advantage, actually prejudices the defendant.

degree murder.[15] The Fourth Circuit specifically requested that counsel focus on the interpretation of the limitations statute in *Askins v. United States*.[16] In *Askins*, a grand jury indicted the defendant for first degree murder sixteen years after the offense.[17] At trial the Government requested that the judge charge the jury on second degree murder, a lesser included offense having a three-year limitation period.[18] The jury convicted the defendant of second degree murder.[19] Askins appealed the conviction, arguing that the three-year statute of limitations for second degree murder barred his conviction for that offense.[20] The Court of Appeals for the District of Columbia Circuit set aside the sentence because the grand jury had returned the indictment more than three years after the defendant committed the offense.[21]

The Fourth Circuit in *Williams* affirmed the defendant's conviction, holding that Williams had waived the statute of limitations defense by

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See United States v. Marion, 404 U.S. 307, 324-26 (1971). In order to establish a due process violation, the defendant must demonstrate the existence of prejudice as the threshold criterion. *See* United States v. Blevins, 593 F.2d 646, 647 (5th Cir. 1979) (per curiam) (prejudice to accused is threshold criterion). In addition to showing prejudice, the defendant also must show that the Government designed the pre-accusation delay to harass the defendant or to gain a tactical advantage. *See* United States v. Marion, 404 U.S. 307, 324-25 (1971) (due process clause protects against prejudicial delays to gain tactical advantage or harass defendant); *cf.* United States v. Lovasco, 431 U.S. 783, 789-90 (1977) (showing of actual prejudice necessary but not dispositive of claim for prosecutorial delay). In *Williams*, the Fourth Circuit found that the defendant had shown no actual prejudice because of the delay. 684 F.2d at 302. In addition, the court noted that the delay was the result of a lack of obtainable evidence, not to gain a tactical advantage. *Id.* at 301.

[15] 684 F.2d at 298. The Federal Rules of Criminal Procedure allow an appellate court to take cognizance of an issue not raised or decided in the trial court if the error is plain and affects substantial rights. *See* FED. R. CRIM. P. 52(b).

[16] 684 F.2d at 298; *see* Askins v. United States, 251 F.2d 909 (D.C. Cir. 1958).

[17] 251 F.2d at 910. In *Askins*, a grand jury indicted the defendant for first degree murder in 1939. *Id.* A jury found that the defendant was of unsound mind and committed him to a mental hospital. *Id.* The United States Attorney made a formal entry on the record declaring that he would not prosecute the case further while the defendant was in the mental hospital. *Id.* The mental hospital released the defendant in 1952 and in 1954 the grand jury reindicted him for first degree murder. *Id.*

[18] *Id.*; *see* 18 U.S.C. §§ 3281, 3282 (1976).

[19] 251 F.2d at 910.

[20] *Id.* A 1954 amendment changed the limitations period from three to five years for noncapital offenses.

[21] 251 F.2d at 913. The *Askins* court noted that the indictment was timely for first degree murder. *Id.* at 911. The District of Columbia Circuit, however, set aside the defendant's conviction because the statute of limitations had run for second degree murder. *Id.* at 913. The *Askins* court reasoned that for the court to sentence the defendant for second degree murder, a grand jury would have to had indicted the defendant within three years of the offense. *Id* at 912. The District of Columbia Circuit noted that the case would be different if the statute of limitations applied to the indictment itself. *Id.* at 913. Since Askins was charged with first degree murder, to which no limitation period applies, the defendant could not have known that the defense was available until after the jury convicted him of second degree murder. *Id.*

requesting the charge on second degree murder.[22] The *Williams* court distinguished *Askins* by noting that unlike the defendant in *Askins*, Williams requested the charge on second degree murder.[23] The Fourth Circuit reasoned that the statute of limitations was not jurisdictional[24] but rather was an affirmative defense that Williams waived by requesting the instruction on the lesser included offense of second degree murder.[25] The *Williams* court, therefore, held that the statute of limitations did not bar the punishment for the lesser included offense.[26]

Relying on *Askins*, the dissent in *Williams* argued that the statute of limitations specifically precluded punishment of Williams for second degree murder since the grand jury did not return an indictment within five years of the crime.[27] The dissent maintained that Williams neither expressly nor impliedly waived the limitations statute by requesting a charge on the lesser included offense.[28] The dissent concluded that the five-year statute of limitations barred Williams' trial and punishment for second degree murder.[29]

The Supreme Court has not provided the federal circuit courts with adequate direction regarding whether a criminal defendant may waive the statute of limitations.[30] Primary authority for courts holding that the

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[22] 684 F.2d at 299-300.

[23] *Id.* at 299.

[24] *See generally* WRIGHT, *supra* note 11, § 193. If the statute of limitations is a jurisdictional objection rather than an affirmative defense, a court can take notice of the objection at any time during the pendency of the proceedings. *See* FED. R. CRIM. P. 12(b)(2). Most courts have treated the issue of waiver as dependent on whether the statute of limitations is jurisdictional or is an affirmative defense. *See generally* 8 J. MOORE, FEDERAL PRACTICE ¶ 12.03[1] (2d ed. 1977); 1 R. ANDERSON, CRIMINAL LAW AND PROCEDURE §§ 179, 185 (1957); WRIGHT, *supra* note 11, § 193 at 705-08. If the court adopts the jurisdictional approach, the running of the statute of limitations extinguishes the court's power to try the case and no action or agreement of the parties can supply the requisite jurisdiction. *See* Mitchell v. Mauer, 293 U.S. 237, 244 (1934) (parties cannot waive or overcome lack of federal jurisdiction by agreement); United States v. Issacs, 493 F.2d 1124, 1140 (7th Cir. 1974) (same).

[25] 684 F.2d at 299-300. The Fourth Circuit noted that if the court had not given the requested charge, Williams would have been faced with either a verdict of guilty or not guilty on a capital offense. *Id.* at 299. The *Williams* court stated that the requested charge was in Williams' best interest. *Id.* In implying a waiver of the statute of limitations, the Fourth Circuit reasoned that Williams should not be able to receive the benefits of his requested charge and later complain of the result. *Id.*

[26] *Id.* at 299-300.

[27] *Id.* at 302 (Hall, J., dissenting). The dissent argued that the interpretation of the limitations statute in *Askins* was a precise statement of the law. *Id.* The dissent stated that the majority opinion overstepped judicial bounds by creating an exception to the limitations statute that Congress did not intend. *Id.* at 303.

[28] *Id.* (Hall, J., dissenting). The dissent in *Williams* argued that the record did not support a finding that Williams knowingly waived the statute of limitations defense. *Id.* Williams was not aware of the statute of limitations issue until the Fourth Circuit requested counsel to discuss the issue at oral argument. *Id.*

[29] *Id.* (Hall, J., dissenting).

[30] *See infra* notes 31-35.

statute of limitations is an affirmative defense is an 1872 Supreme Court case decided under the common-law rules of pleading.[31] In *United States v. Cook*, [32] the Court held that the defendant could not raise the statute of limitations by demurrer, but instead had to raise it as a defense at trial.[33] The Court cited *Cook* in *Biddinger v. Commissioner of Police*[34] in holding that the statute of limitations was an affirmative defense that the defendant must raise at trial.[35] The Court, however, did not address directly the issue of waiver in either *Cook* or *Biddinger*.[36] As a result, the treatment of a waiver of criminal statutes of limitations varies among the federal circuits.[37]

The District of Columbia Circuit in *United States v. Wild*[38] interpreted the Supreme Court's holding in *Cook* to mean that a statute of limitations defense did not involve the jurisdiction of the court.[39] In *Wild*, the defendant signed a statement waiving the statute of limitations in order to continue plea negotiations and escape indictment.[40] When the negotiations broke down, a grand jury indicted the defendant

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[31] United States v. Cook, 84 U.S. (17 Wall.) 168 (1872).

[32] *Id.*

[33] *Id.* at 179-80. The Supreme Court in *United States v. Cook* maintained that the failure of the indictment to show on its face that a grand jury had returned the indictment within the statutory period should not bar the prosecution from proving that the defendant fell within an exception to the statute. *Id.* Even absent such an exception, the Court held, the prosecution should have the opportunity to prove that the defendant committed the offense within the statutory period. *Id.* at 180. The *Cook* Court held, therefore, that the defendant must raise the statute of limitations as a defense so that the prosecution might answer the pleading. *Id.* at 179-80. The Court in *Cook*, however, did not address directly whether the defendant could waive the limitations statute. *See* United States v. Wild, 551 F.2d 418, 422 (D.C. Cir.) (Court in *Cook* made no mention of effect of statute's expiration on a court's subject matter jurisdiction), *cert. denied*, 431 U.S. 916 (1977). Since the Court in *Cook* did not treat directly the waiver issue, courts have viewed *Cook*'s relevance to the waiver question inconsistently. *Compare* United States v. Wild, 551 F.2d 418, 421-22 (D.C. Cir.) (*Cook* determined that the statute of limitations was not jurisdictional), *cert. denied*, 431 U.S. 916 (1977) *and* United States v. Doyle, 348 F.2d 715, 718-19 (2d Cir.) (same), *cert. denied*, 382 U.S. 843 (1965) *with* United States v. Harris, 133 F. Supp. 796, 799 (W.D. Mo. 1955) (*Cook* was not concerned with question of jurisdiction), *aff'd on other grounds*, 237 F.2d 274 (8th Cir. 1956). The court in *Harris* interpreted *Cook* as deciding only a procedural issue which assured the Government an opportunity to demonstrate that an exception to the statute applied. 133 F. Supp. at 796.

[34] 245 U.S. 128 (1917).

[35] *Id.* at 135. *Biddinger v. Commissioner of Police* involved an extradition proceeding in which the statute of limitations issue was only peripheral. *See id.* at 130. The Court in *Biddinger* provided no rationale other than the citation to *Cook*. *See* 245 U.S. at 135.

[36] *See supra* notes 33-35.

[37] *See infra* notes 38-81 (discussing federal circuits' treatment of waiver of statute of limitations).

[38] 551 F.2d 418 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977).

[39] *Id.* at 421-22; *see* 84 U.S. (17 Wall.) at 178.

[40] 551 F.2d at 420. The Government was prepared to go to the grand jury prior to the expiration of the statute of limitations. *Id.*

but the limitations statute had run.[41] The District of Columbia Circuit held that the expiration of the limitations statute did not constitute a jurisdictional bar to prosecution but was a defense that the defendant waived by signing a written waiver with advice of counsel.[42] The court noted that the Government was ready to seek an indictment before the statute of limitations had run.[43] Therefore, the court reasoned, the Government had fulfilled the statutory policy of encouraging prompt investigation of criminal activities.[44] The court also found that the delay did not handicap the defendant in preparing his defense on account of a lapse in time or a destruction of evidence because the defendant was on notice that the Government intended to proceed against him.[45] The *Wild* court, however, confined its holding to situations when a defendant, with the advice of counsel, executes an express written waiver before the statute expires.[46]

In *United States v. Levine*,[47] the Third Circuit followed *Wild* in holding that a criminal defendant may waive the statute of limitations defense.[48] In *Levine*, the defendant signed a written waiver of the statute of limitations defense in order to continue plea negotiations.[49] A year after the negotiations broke down and after the limitations statute had run, a grand jury returned an indictment against the defendant.[50] The defendant argued that the statute of limitations barred his indictment.[51] The Third Circuit, however, determined that the defendant's written waiver constituted a valid waiver of the statute of limitations defense.[52]

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[41] *Id.* at 421.

[42] *Id.* at 424-25.

[43] *Id.* at 420.

[44] *Id.*

[45] *Id.* The District of Columbia Circuit in *Wild* noted that the delay in Wild's indictment was the result of the defendant's attempts to obtain a beneficial disposition of his case by means of plea bargaining. *Id.* The *Wild* court found that the defendant's responsibility for the delay was of prime importance in holding that the defendant waived the limitations defense. *Id.*

[46] *Id.* at 419.

[47] 658 F.2d 113 (3d Cir. 1981).

[48] *Id.* at 120. The *Levine* court noted that the defendant had knowingly and intelligently, with the aid of counsel, waived the limitations defense. *Id.* at 121. The Third Circuit found that the execution of a valid waiver forecloses the assertion of a statute of limitations defense. *Id.*

[49] *Id.* at 114.

[50] *Id.*

[51] *Id.* at 115.

[52] *Id.* at 121-22. The Third Circuit in *Levine* recognized that due process aspects of the limitation statutes come into play if no time limitation exists on the defendant's waiver of the statute of limitations. *Id.* at 122 n.12; *cf.* United States v. Lovasco, 431 U.S. 783, 787 (due process attack on preindictment delay raised before statutory period has run). The *Levine* court determined that the district judge should deal with any possible prejudice resulting from the lack of any time limitations on the defendant's waiver. 658 F.2d at 122 n.12.

Other circuits have determined that a defendant may waive the statute of limitations by pleading guilty.[53] The Second Circuit in *United States v. Doyle*[54] held that a plea of guilty to an indictment is an admission of guilt and a waiver of all nonjurisdictional defects.[55] The court in *Doyle* held that the defendant waived the statute of limitations defense by entering a guilty plea.[56] The Ninth Circuit has also determined that a guilty plea constitutes a waiver of the limitations statute.[57]

The Fourth Circuit's holding in *Williams* is consistent with the prior Fourth Circuit decision in *Vance v. Hedrick*.[58] In *Vance*, a jury convicted the defendant under the West Virginia recidivist statute.[59] The recidivist statute requires that a court, upon receiving notice of a third felony conviction by a criminal defendant, must institute recidivist proceedings against the defendant.[60] The defendant's trial on the recidivist charge must occur before the expiration of the court term of the defendant's last felony conviction.[61] In *Vance*, the recidivist trial did not occur in the court term required by statute because the defense counsel sought more time for preparation.[62] The defendant sought a writ of

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[53] *See infra* text accompanying notes 54-57.

[54] 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965).

[55] *Id.* at 719. In *Doyle*, the government obtained an indictment against Doyle on July 2, 1962. *Id.* at 716. During the course of subsequent plea bargaining, Doyle requested that the indictment remain sealed. *Id.* at 717. After negotiations broke down, the Government unsealed the indictment on August 6, 1963, after the expiration of the applicable five-year statute of limitations. *Id.* With renewed plea bargaining, Doyle entered a guilty plea to one count and the Government moved to dismiss the remaining counts against Doyle. *Id.* Doyle appealed his conviction on this one count, arguing that the Justice Department had unsealed the indictment after the limitations statute had run, and therefore the district court decision was in error. *Id.* The Second Circuit, in an opinion affirming the district court opinion, held that an unqualified plea of guilty bars further consideration of all but the most fundamental premises for the conviction. *Id.* at 718-19. The Second Circuit found that under *Cook*, Doyle's statute of limitations and speedy trial claims did not rise to this level. *Id.* The court, therefore, held that the defendant waived the statute of limitations defense by pleading guilty. *Id.*

[56] *Id.*; *see supra* note 55.

[57] *See* United States v. Akmakjian, 647 F.2d 12, 14 (9th Cir. 1981) (per curiam). In *Akmakjian*, the defendant entered a plea of guilty and the district court accepted his plea. *Id.* at 13. Four years later, the defendant filed a petition to set aside his guilty plea on the ground that the statute of limitations barred his indictment. *Id.* The Ninth Circuit affirmed the conviction, holding that the statute of limitations is nonjurisdictional and that the actions of the defendant constituted a waiver of the limitations defense. *Id.* at 13.

[58] *See* 659 F.2d 447 (4th Cir. 1981).

[59] *Id.* at 448; *see* W. VA. CODE § 61-11-19 (1977). The West Virginia recidivist statute requires a life sentence after three felony convictions. *See* 659 F.2d at 448; W. VA. CODE § 61-11-19 (1977).

[60] *See* 659 F.2d at 448; W. VA. CODE § 61-11-19 (1977).

[61] *See* 659 F.2d at 448; W. VA. CODE § 61-11-19 (1977).

[62] 659 F.2d at 448. In *Vance v. Hedrick* a jury convicted the defendant in August 1975 in the circuit court of Logan County of breaking and entering. *Id.* at 447-48. This conviction was the defendant's third felony conviction and the court set August 27, 1975 as the court date for the recidivist proceedings as required by statute. *Id.*; *see supra* note 59. The terms

habeas corpus, arguing that the court had no jurisdiction to try him on the recidivist charge since the trial did not occur within the time period required by statute.[63] The Fourth Circuit noted that the time requirement under the West Virginia recidivist statute is comparable to the time requirements of the statute of limitations.[64] The *Vance* court noted that most federal courts have held that a criminal defendant may waive the statutes of limitation.[65] The court held that the defendant waived the time limitation under the recidivist statute by requesting a continuance.[66] The *Vance* court noted that allowing a defendant who has not waived the limitations defense to raise the defense at trial adequately protects the defendant against the assertion of stale claims.[67]

The Fourth Circuit's holding in *Williams* conflicts with decisions of the Sixth and Tenth Circuits.[68] In *Benes v. United States*,[69] the Sixth Circuit held that a timely indictment was a prerequisite to the court's power to hear the case.[70] In *Benes*, the Government had charged the defendant with tax fraud prior to the expiration of the limitations period.[71] The defendant, however, instituted a civil suit to enjoin the

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of the trial courts in West Virginia run for four months. *See* 659 F.2d at 448. In August 1975, the circuit court of Logan County was nearing the end of the court's May term. *Id.* In *Vance*, defense counsel moved for a continuance of the trial date in order to investigate the truthfulness of the charge in the indictment that Vance had two prior felony convictions. *Id.* The court granted a continuance until October, as requested by defense counsel. *Id.* In October 1975 a jury convicted the defendant under the recidivist statute. *Id.* The Supreme Court of Appeals of West Virginia affirmed Vance's conviction. *Id.*; *see* State v. Vance, 262 S.E.2d 423 (W. Va. 1980). Vance then sought a writ of habeas corpus in the original jurisdiction of the Supreme Court of Appeals of West Virginia. 659 F.2d at 449. The Supreme Court denied the writ in a formal summary order containing no explanation. *Id.* Vance next sought habeas corpus relief in the United States District Court for the Northern District of West Virginia. *Id.* The district court awarded the writ and the warden appealed. *Id.*

[63] 659 F.2d at 449.

[64] *Id.* at 451-52. The *Vance* court noted that the time requirement under the recidivist statute is different from the time requirement under a statute of limitations in that under the recidivist statute the time period will vary depending upon the time in the court term a trial occurs. *Id.* at 452. If a trial on the charge occurs early in the four-month court term, little likelihood exists of encountering problems with the time requirement. *Id.* If the trial occurs late in the term, the limitations period is very short. *Id.* The *Vance* court noted that, in fairness to a defendant, the time requirement under the recidivist statute should be subject to waiver. *Id.* The defendant may need more time to prepare adequately for the recidivist trial. *Id.*

[65] *See* 659 F.2d at 452 (listing courts holding statute of limitations is affirmative defense).

[66] 659 F.2d at 452. The Fourth Circuit noted in *Vance* that the trial would have occurred before the expiration of the May term but for the fact that defense counsel sought more time for preparation. *Id.*

[67] *Id.*

[68] *See infra* text accompanying notes 69-83.

[69] 276 F.2d 99 (6th Cir. 1960).

[70] *Id.* at 109.

[71] *Id.* at 108. In *Benes v. United States* the defendant filed his income tax return for 1948 on January 20, 1949. *Id.* The indictment stated that January 20, 1949 was the date of

Government from presenting certain evidence to the grand jury.[72] As a result of the civil action, the Government agreed not to pursue the criminal charge before resolution of the civil litigation.[73] After settlement of the civil case, the grand jury returned an indictment against the defendant.[74] The statute of limitations, however, had run and the defendant contended that the limitations period barred his prosecution.[75] Treating the limitations period as jurisdictional, the Sixth Circuit held that the limitations statute barred the indictment.[76] The *Benes* court reasoned that the purpose of criminal statutes of limitation is to afford immunity from punishment.[77] The Sixth Circuit held that criminal statutes of limitation create a bar to prosecution and the court refused to allow prosecution of the defendant after the statute had run.[78]

In *Waters v. United States*,[79] the Tenth Circuit held that the statute of limitations defense was jurisdictional and not subject to waiver.[80] The defendant in *Waters* first asserted the limitations defense on a motion to vacate his sentence.[81] In deciding whether the defendant could waive the limitations defense, the court recognized a distinction between the procedural statutes of limitation in civil cases and substantive bars to prosecution in criminal cases.[82] The court noted that the purposes of criminal statutes of limitation are more comprehensive than those of civil statutes and represent a legislative assessment that after the lapse of a designated period of time, society's interest in the prosecution of criminals is secondary to the defendant's right to a fair trial.[83]

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the commission of the offense. *Id.* The applicable statute of limitations was six years from the date of the offense. *Id.*; *see* 26 U.S.C. § 3748(a) (1939) (current version at I.R.C. § 6501(e)(1)(A) (1976)). The Government filed the complaint in *Vance* on March 12, 1954, ten months before the expiration of the statute of limitations. 276 F.2d at 108.

[72] 276 F.2d at 108. The defendant filed suit on April 12, 1954, to enjoin the United States Attorney from presenting to the grand jury any of the documentary evidence obtained from the defendant or his corporation that pertained to the alleged offense. *Id.*

[73] *Id.*

[74] *Id.* The grand jury returned an indictment against the defendant on September 12, 1955. *Id.* at 102.

[75] *Id.* at 108-09. The grand jury returned the indictment six years, seven months, and twenty-three days after the commission of the alleged offense. *Id.* at 108.

[76] *Id.*

[77] *Id.*

[78] *Id.* at 108-09. The Sixth Circuit in *Benes* held that the defendant did not waive the criminal statutes of limitation by entering into an agreement with the prosecution. *Id.* at 109.

[79] 328 F.2d 739 (10th Cir. 1964).

[80] *Id.* at 742-43.

[81] *Id.* at 740. The defendant first raised the statute of limitations defense on appeal. *Id.* at 742. The Tenth Circuit considered whether the limitations statute is an affirmative defense that the defendant must plead at or before trial as in civil cases, or whether the statute constitutes a jurisdictional bar to prosecution and punishment. *Id.*

[82] *Id.* at 743; *see infra* note 83.

[83] 328 F.2d at 743. Unlike civil statutes of limitation, criminal limitation statutes specify a time limit beyond which an irrebuttable presumption arises that the delay would

The Fourth Circuit in *Williams* correctly determined that a criminal defendant may waive the statute of limitations defense.[84] The defendant in a criminal case may have compelling reasons in his own best interests for waiving the statute of limitations.[85] A defendant facing trial on a charge with a long statute of limitations might wish to waive the shorter statute on a lesser included offense in order to avoid trial or punishment for the greater crime.[86] Employment of a jurisdictional approach deprives the trial court of essential discretionary authority to determine the validity of a waiver when the waiver does not contravene public policy.[87] Courts, however, should provide adequate safeguards to assure that a waiver of the statute of limitations does not violate a defendant's right to a fair trial.[88]

The Fourth Circuit in *Williams* failed to apply the correct standard for a valid waiver of the statute of limitations.[89] In instances in which the trial rights of a criminal defendant are in jeopardy, the Supreme Court

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prejudice the defendant's right to a fair trial. *See* United States v. Marion, 404 U.S. 307, 322 (1971). Statutes of limitation are the primary form of protection afforded a criminal defendant against prejudice resulting from pre-indictment delay. *Id.* Moreover, society may be healthier if the government charges a suspected criminal within a specified period of time after the commission of the alleged offense or to relieve the suspected criminal of the never-ending possibility of public accountability for a past accusation. *See* Askins v. United States, 251 F.2d 909, 912 (D.C. Cir. 1958).

[84] *See infra* text accompanying notes 85-88.

[85] *See, e.g.*, 551 F.2d 418 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977). The defendant in *United States v. Wild* made an informed decision to waive the statute of limitations when the limitations statute was about to run in order to gain time for plea bargaining. *See* 551 F.2d at 425. In addition, a criminal defendant may desire to waive the statute of limitations in order to undergo a trial to clear his good name. *See generally* Note, *Waiver of the Statute of Limitations in Criminal Proceedings: United States v. Wild*, 90 HARV. L. REV. 1550, 1554-55 (1977) [hereinafter cited as *Waiver of Statute of Limitations*].

[86] *See generally Waiver of Statute of Limitations*, *supra* note 85, at 1554-55.

[87] *See generally* Note, *The Statute of Limitations in a Criminal Case: Can it Be Waived?*, 18 WM. & MARY L. REV. 823 (1977). One commentator has suggested that courts abandon the distinction between jurisdictional and affirmative defenses in favor of a case-by-case analysis focusing on the language of the applicable statute of limitations and the public policies behind the limitation statute's enactment. *Id.* Under this approach, if the trial court determines that the defendant's waiver meets certain prerequisites, the court will conclude that the waiver is valid. *Id.* at 840. The prerequisites necessary for a valid waiver require that the defendant made the waiver knowingly and intelligently, that he made the waiver for his benefit and after consultation with counsel, and that the defendant's waiver did not handicap his defense or contravene any other public policy reasons motivating the enactment of the limitation statutes. *Id.*; *see also* Padie v. State, 594 P.2d 50, 55-57 (Alaska 1979) (adopting case-by-case analysis).

[88] *See, e.g.*, United States v. Levine, 658 F.2d 113, 120-21 (3rd Cir. 1981) (knowing and intelligent waiver of statute of limitations valid); United States v. Wild, 551 F.2d 418, 425 (D.C. Cir.) (same), *cert. denied*, 431 U.S. 916 (1977). Waivers of limitation statutes, like guilty pleas, involve the relinquishment of important trial rights related to the trial process and require the advice of counsel and an understanding of the consequences of a waiver. 551 F.2d at 425; *cf.* Moore v. Michigan, 355 U.S. 155, 159 (1957) (court must advise accused pleading guilty absent explicit waiver). *See infra* text accompanying notes 89-99.

[89] *See infra* text accompanying notes 90-99.

has required a knowing and intelligent waiver of rights.[90] The rationale for requiring a knowing and intelligent waiver is to preserve the integrity of the trial process.[91] Since a waiver of the statute of limitations relates integrally to the trial process and in fact authorizes the state to initiate prosecution, any waiver of the limitations defense should be a knowing and intelligent waiver.[92] The right to a speedy trial involves many of the same considerations as the statute of limitations.[93] Both the right to a speedy trial and the statute of limitations shield the defendant from endless anxiety about possible prosecution and from impairment of the ability to mount a defense.[94] By encouraging speedy prosecution, the right to a speedy trial and the statute of limitations afford society protection against unincarcerated offenders, and insure against a diminution of the deterrent value of immediate convictions and the capacity of the government to prove its case.[95] In *Barker v. Wingo*,[96] the Supreme Court held that a waiver of the right to a speedy trial must be knowing and intelligent.[97] The protection of rights similar to the statute of limitations in *Barker* suggests that any waiver of the statute of limitations should receive the same protection of the knowing and voluntary standard. The Fourth Circuit in *Williams*, however, failed to afford the defendant the safeguards of a knowing and voluntary waiver.[98] The factual

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[90] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973) (knowing and intelligent relinquishment of rights required when trial rights of defendant in jeopardy). The most critical situation bearing upon the fairness of the trial process which requires a knowing and intelligent waiver is the right to counsel, both at trial, *see* Carnley v. Cochran, 369 U.S. 506, 512-13 (1962) (waiver of right to counsel must be knowing and intelligent) and at the entering of a guilty plea, *see* Boyd v. Dulton, 405 U.S. 1, 2-3 (1973) (waiver of right to counsel at guilty plea must be knowing and intelligent). The Supreme Court has determined that other trial rights also warrant the protection of the knowing and intelligent waiver standard. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 517 (1972) (right to speedy trial); Barber v. Page, 390 U.S. 719, 723 (1968) (right to confrontation of witnesses); Green v. United States, 355 U.S. 184, 190 (1957) (right against double jeopardy); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 271 (1942) (right to jury trial).

[91] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 238-39 (1973) (requirement of intentional relinquishment designed to protect fairness of trial).

[92] *See generally Waiver of Statute of Limitations*, *supra* note 85, at 1554-55.

[93] *See* United States v. Levine, 658 F.2d 113, 119 (1981); *infra* text accompanying notes 94-95.

[94] *See* United States v. Levine, 658 F.2d 113, 119 (1981).

[95] *Id.*; United States v. Marion, 404 U.S. 307, 320-25 (1971); *see supra* text accompanying notes 3-4 (describing policies behind statute of limitations).

[96] 407 U.S. 514 (1972).

[97] *Id.* at 528. In *Barker*, the Supreme Court found that the defendant waived his right to a speedy trial and that the waiver was knowing and voluntary. *Id.* at 528. The Court also noted that prejudice was minimal since the defendant made no claim of injury to his ability to mount a defense. *Id.* at 534.

[98] *See* 684 F.2d at 299. The record in *Williams* does not support a finding that Williams knowingly waived the statute of limitations defense. *See id.* at 302 (Hall, J., dissenting). Williams was not aware of the statute of limitations issue until the Fourth Circuit requested counsel to discuss the issue at oral argument. *Id.*

record in *Williams* does not give rise to the implication that the defendant knowingly waived the statute of limitations defense.[99]

The Fourth Circuit found that the defendant impliedly had waived the limitations defense when the defendant requested an instruction on the lesser included offense.[100] The Supreme Court, however, has suggested that a lesser included offense instruction may be necessary constitutionally to enhance or preserve the jury's essential factfinding function.[101] Any attempt to deprive the jury of the opportunity to find a defendant guilty of the precise offense the jury may believe the defendant committed is inconsistent with principles of procedural fairness.[102] A lesser included offense instruction minimizes the risk of undermining

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[99] *See supra* note 98.

[100] 684 F.2d at 299-300; *see supra* note 25.

[101] *See* 412 U.S. 205, 212-13 (1973). In *Keeble v. United States* the Supreme Court held that an Indian charged with a federal crime under the Major Crimes Act had a right to an instruction on a lesser included offense even though the Act did not confer federal jurisdiction over the defendant for the lesser crime. 412 U.S. at 214. The Court reasoned that a lesser included offense instruction minimized the risk of undermining the reasonable doubt standard by providing a third option to a choice between conviction and acquittal. *Id.* at 212-13. The *Keeble* Court explained that if the prosecution has not established beyond a reasonable doubt every element of the offense charged and if the court does not offer a lesser included offense instruction, the jury must, as a theoretical matter, return a verdict of acquittal. *Id.* at 212. The Court in *Keeble*, however, recognized that when one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. *Id.* at 212-13. The lesser included offense instruction, the Court noted, prevents the defendant's exposure to the risk of an unwarranted conviction. *Id.* at 212.

Moreover, in Beck v. Alabama, 447 U.S. 625 (1980), the Supreme Court held that a court may not impose the death sentence after a jury verdict of guilt if the court did not permit the jury to consider an alternative verdict of guilt of a lesser included offense. 447 U.s. at 638. The Court in *Beck* noted that a defendant in a criminal case has a right to adequate instructions on his theory of defense, provided evidence exists before the jury to support such a theory. *Id.* at 635.

The defendant has a right to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. *See* 412 U.S. 205, 208; *supra* note 11 (describing lesser included offense). Although the language in rule 31(c) of the Federal Rules of Criminal Procedure is in discretionary terms, the rule is mandatory in the sense that if evidence exists to support a lesser included offense and the defendant requests such a charge, the court has no discretion to refuse to give the instruction. *See* MOORE, *supra* note 24, ¶ 31.03; *see also* FED. R. CRIM. P. 31(c).

Even before *Keeble* and *Beck*, the Supreme Court recognized the fundamental importance of the lesser included offense option in capital cases. *See* Stevenson v. United States, 162 U.S. 313, 323 (1896) (reversing conviction for murder on ground that trial judge's erroneous refusal to give instruction on lesser included offense of manslaughter curtailed power of jury to determine from evidence whether crime was murder or manslaughter). The Court has acknowledged that instructions can control the outcome of cases on other occasions. *See* Price v. Georgia, 398 U.S. 323 (1970). In *Price*, the Court found that an erroneous murder instruction may have induced the jury to find the defendant guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence. *Id.* at 331.

[102] *See supra* note 101.