Washington and Lee Law Review

Volume 36 | Issue 2 Article 13

Spring 3-1-1979

Ix. Criminal Procedure

IX. CRIMINAL PROCEDURE

A. Federal Nexus in Electronic Surveillance

In the Omnibus Crime Control and Safe Streets Act of 1968[1] (the Act), Congress attempted to protect the privacy of all oral and wire communications by delineating the condition and circumstances under which these communications could be intercepted.[2] The Act purportedly prohibits any person[3] from intercepting wire [wiretapping][4] or oral [bugging][5] communications without first securing the consent of a participant in the conversation.[6] In *United States v. Burroughs,*[7] the Fourth Circuit examined the application of the federal anti-bugging statute to the activity of private individuals. The court decided that individuals could not be convicted of bugging under the Act absent proof of a federal nexus.[8]

Two management employees of J. P. Stevens & Co. were charged under 18 U.S.C. § 2511(1)(a) (1976) for bugging the conversations of union organizers attempting to unionize the employees of the J. P. Stevens plant in

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strictly complies with the procedure and notice requirements of the statute. *See* United States v. Ilacqua, 562 F.2d 399 (6th Cir. 1977), *cert. denied,* 435 U.S. 906 (1978); United States v. Bailey, 537 F.2d 845 (5th Cir. 1976); United States v. Kelly, 519 F.2d 251 (8th Cir. 1975); note 8 *supra.*

[1] 18 U.S.C. §§ 2510-2520 (1976).

[2] *Id.* at § 2516. Section 2516 deals with procedures for utilization of electronic surveillance by law enforcement officials. The principal goal of these surveillance standards is to comply with the constititutional requirements set out by the Supreme Court in Berger v. New York, 388 U.S. 41 (1967) (New York eavesdropping statute unconstitutional) and Katz v. United States, 389 U.S. 347 (1967) (government's eavesdropping activity constituted a "search and seizure" within meaning of fourth amendment). S. REP. No. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2161-62 [hereinafter cited as SENATE REPORT].

[3] "Person" is defined for purposes of the Act's electronic surveillance provisions to include "any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation. . ." 18 U.S.C. § 2510(6) (1976).

[4] 18 U.S.C. § 2511(1)(a) (1976) contains a blanket prohibition against the unauthorized interception of any wire communication. To convict a person of wiretapping under § 2511(1)(a), the government must prove that the communication was sent through the facilities of a communications common carrier. United States v. Blattel, 340 F. Supp. 1140 (N.D. Iowa 1972); 18 U.S.C. § 2510(1) (1976). A communications common carrier is defined as any person engaged in interstate or foreign communication by wire or radio. 47 U.S.C. § 153(h) (1976). Because wiretapping by definition requires interference with facilities which are part of interstate commerce, Congress may prohibit wiretapping under the commerce clause. Weiss v. United States, 308 U.S. 321, 327 (1939); *see* SENATE REPORT, *supra* note 2, at 2180.

[5] 18 U.S.C. § 2511(1) (1976). Section 2510(2) defines "oral communication" as any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying such an expectation. Section 2511(1)(b)(i)-(iv) prohibits the interception of oral communication where the bugging affects interstate commerce.

[6] *See* 18 U.S.C. § 2511(2)(c) (1976).

[7] 564 F.2d 1111 (4th Cir. 1977).

[8] *Id.* at 1115.

Wallace, South Carolina.[9] The defendants allegedly bugged a telephone in the union organizers' motel room in order to eavesdrop on the conversations taking place in that room.[10] Since the government had failed to prove that the attempted bugging involved state action or action under color of state or federal law, the district court acquitted the defendants notwithstanding a jury verdict of guilty.[11] Although the bugging statute does not specifically require state or federal action,[12] the court reasoned that since the statute does not require that the bugging affect interstate commerce, it is constitutional only if construed to apply to governmental action and not to private action.[13]

On appeal,[14] the government challenged the district court's determination that the bugging statute requires proof that the persons charged were acting under color of state or federal law,[15] arguing that the statute was

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[9] *Id.* at 1113. The defendants were originally indicted under 18 U.S.C. § 2511(1)(b)(1) (1976), for intercepting oral communications through the use of a device used in interstate wire communications. 564 F.2d at 1113. This indictment was dismissed because the telephone line was not tapped to permit the interception of the organizers' telephone conversations. *Id.*

[10] *Id.*

[11] United States v. Burroughs, 379 F. Supp. 736, 742-43 (D.S.C. 1974). A motion for judgment of acquittal is granted notwithstanding a verdict of guilty if the court determines that the evidence is insufficient to sustain a conviction. FED. R. CRIM. P. 29; *see* United States v. Sisson, 399 U.S. 267 (1970).

[12] 18 U.S.C. § 2511(1)(a) (1976); *see* note 5 *supra.*

[13] 379 F. Supp. at 741 (reasoning that broad bugging prohibition of the Act constitutional only if enacted with reference to an expressly granted federal power). The district court emphasized that § 2511(1)(b)(i)-(iv) prohibits private bugging activity which affects interstate commerce. *Id.* If the broad bugging prohibition of § 2511(1)(a) could also be applied to private action, there would be no need to rely on the commerce power to reach private activity since § 2511(1)(a) would prohibit all bugging and render redundant § 2511(1)(b). *Id.* The court concluded that the broad bugging prohibition of § 2511(1)(a) applies only to governmental action, emphasizing that Congress would not enact redundant legislation. *Id.* The district court recognized that under the fourth and fourteenth amendments, Congress could prohibit the interception of oral communications by those acting under color of state or federal law. *Id.; see* Katz v. United States, 389 U.S. 347, 350 (1967); Berger v. New York, 388 U.S. 41, 53 (1967); note 2 *supra. See generally* Katzenbach v. Morgan, 384 U.S. 641 (1966) (Congress may enforce equal protection clause by prohibiting enforcement of state law). The district court in *Burroughs* emphasized Congress' concern that the application of § 2511(1)(a) to private bugging might lead to a constitutional challenge which could be avoided by specifying an alternative constitutional basis for the prohibition. 379 F. Supp. at 741; SENATE REPORT, *supra* note 2, at 2180. The district court concluded that § 2511(1)(b)(i)-(iv) provided an alternative basis under the commerce clause for prohibiting private bugging and that, therefore, § 2511(1)(a) did not apply to private bugging. 379 F. Supp. at 741-42.

[14] The Fourth Circuit dismissed the government's first appeal, concluding that such an appeal would violate the double jeopardy clause. 564 F.2d at 1116; *see* United States v. Sisson, 399 U.S. 267 (1970); U.S. CONST. amend. V. The Fourth Circuit reinstated the government's appeal relying upon United States v. Wilson, 420 U.S. 332 (1975). 564 F.2d at 1116. The *Wilson* court held that the government may appeal from an adverse judgment notwithstanding the verdict. Such an appeal does not violate the double jeopardy clause because restoration of the guilty verdict rather than a new trial will result if the government prevails. United States v. Wilson, 420 U.S. 332, 353 (1975); 564 F.2d at 1117. *See* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

[15] 564 F.2d at 1113; *see* note 14 *supra.*

intended to reach all unauthorized electronic surveillance and was not limited to action under color of law.[16] The government also asserted that Congress had determined that private bugging affects interstate commerce when it enacted the anti-bugging statute[17] and that such a finding gave Congress a sufficient federal nexus to legislate which would be imputed to all violations of the anti-bugging statute.[18] Thus, the government argued that proof of a federal nexus was not required in each prosecution under the statute.[19]

The Fourth Circuit affirmed the district court's acquittal of the defendants, but concluded that the broad anti-bugging provision of the Act could be applied to persons other than those acting under color of state or federal law since Congress had not placed any express limitations on the statute's application.[20] The court noted that the Act contains anti-bugging provisions which specifically require the government to prove an effect

[16] Brief for Appellant at 18, United States v. Burroughs, 564 F.2d 1111 (4th Cir. 1977) [hereinafter cited as Brief for Appellant]. The government contended that the langugage of § 2511(1)(a) was unambiguous, and that if Congress had intended § 2511(1)(a) to apply only to persons acting under color of law, it would have stated so explicitly. *See* Caminetti v. United States, 242 U.S. 470 (1917); United States v. Hunter, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972); Malat v. Riddell, 383 U.S. 569 (1966). The government also relied on the legislative history of 18 U.S.C. § 2511 (1976) to support its position that § 2511(1)(a) also applied to private bugging. Brief for Appellant, *supra* at 21. The Senate Judiciary Committee's statement of the prohibition contained in § 2511 emphasized that there was little justification for unauthorized electronic surveillance by private parties, and that privacy could be adequately protected only by dealing with all aspects of the problem through comprehensive national legislation. SENATE REPORT, *supra* note 2, at 2156.

[17] Brief for Appellant, note 16 *supra*, at 21. The government asserted that Congress had determined that in light of the finding that the possession, manufacture, distribution, advertising, and use of electronic surveillance devices are facilitated by interstate commerce, intrastate bugging activity affected interstate commerce. *Id.* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 211 (1968); Brown, *Electronic Eavesdropping, published in, Hearings on the Right of Privacy Act of 1967 Before a Subcomm. of the Senate Comm. on the Judiciary*, 90th Cong. 1st Sess. 73 (1967).

[18] 564 F.2d at 1115; *see* note 17 *supra*. The government argued that all activities which affect commerce may be regulated by Congress. Brief for Appellant, *supra* note 16 at 22; *see* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). *See generally* Stern, *The Commerce Clause and the National Economy, 1933-46*, 59 HARV. L. REV. 645 (1946). The commerce power has been used as a national police power since 1918. *See, e.g.*, United States v. Sullivan, 332 U.S. 689 (1948); McDermott v. Wisconsin, 228 U.S. 115 (1913); W. LOCKHART, Y. KAMISAR, J. CHOPER, CONSTITUTIONAL LAW 320 (3d ed. 1970). In addition to the connection that electronic surveillance devices have with commerce, *see* note 17 *supra*, the government noted that Congress had been concerned over the widespread "use and abuse" of electronic surveillance in commercial and employer-labor espionage. Brief for Appellant, note 16 *supra*, at 22; SENATE REPORT, *supra* note 2, at 2154.

[19] 564 F.2d at 1115; Brief for Appellant, note 16 *supra*, at 19-20; *see* Perez v. United States, 402 U.S. 146, 154 (1970) (rational Congressional determination that intrastate loan sharking may be regulated under commerce clause alleviates federal nexus requirement in individual cases); McClellan, *Codification, Reform and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L.J. 663, 685.

[20] 564 F.2d at 1115-16.

upon interstate commerce.[21] The court, however, refused to declare the broad anti-bugging statute unconstitutional simply because it did not specify a particular basis for federal jurisdiction over bugging activity.[22] The court concluded that proof of "any rational basis" for federal jurisdiction over the defendants' conduct would be sufficient to bring them within the ambit of the statute.[23] Since the government had failed to allege a possible basis for federal jurisdiction,[24] the Fourth Circuit held that the defendants were properly acquitted.[25]

Burroughs is the first case in which a circuit court has considered constitutional challenges to the broad anti-bugging provision of the Omnibus Crime Control and Safe Streets Act.[26] In concluding that the statute applies to bugging by private parties,[27] the Fourth Circuit relied on a literal interpretation of the language of the statute. Since the Act prohibits "any person" from wiretapping or bugging,[28] the court reasoned that restricting the term "person" to those acting under color of law would be improper.[29] The Fourth Circuit also relied on the legislative history of the Act to support its position that the statute prohibits all bugging activity and, therefore, overlaps with those provisions which prohibit bugging affecting interstate commerce.[30] Although Congress did not elaborate on the issue

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[21] *Id.* at 1115; 18 U.S.C. § 2511(1)(b)(i)-(iv) (1976).

[22] 564 F.2d at 1115.

[23] *Id.* The Fourth Circuit relied on Perez v. United States, 402 U.S. 146, 147 n.1 (1971), *see* note 20 *supra*, for the proposition that Congress can prohibit private bugging only if it has a rational basis for exercising federal jurisdiction over the activity. 564 F.2d at 1115; *accord*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 247 (1964).

[24] 379 F. Supp. at 744. The government may have been able to establish an effect on interstate commerce in several ways. First, the bugging took place on the premises of a motel which affected commerce by providing lodging to interstate travelers. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). Second, since J. P. Stevens was engaged in interstate commerce, the success or failure of the union organizers' activities probably would have an impact on interstate commerce. *See* Wickard v. Filburn, 317 U.S. 111 (1942). *See also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Third, an effect on interstate commerce could have been established by proof that the bugged telephone was used in interstate commerce. 379 F. Supp. at 744; *see* United States v. Blattel, 340 F. Supp. 1140 (N.D. Iowa 1972). *See generally* United States v. Bennett, 358 F. Supp. 580 (S.D. Tex. 1973).

[25] 564 F.2d at 1116; *see* note 12 *supra*. The government has the burden of proving every essential element of the offense charged. Christoffel v. United States, 338 U.S. 84, 89 (1949); L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 26:67 (1966).

[26] 18 U.S.C. § 2511(1)(a) (1976).

[27] 564 F.2d at 1115.

[28] 18 U.S.C. § 2511(1)(a) (1976).

[29] 564 F.2d at 1115. The Fourth Circuit noted that the district court's construction of the eavesdropping statute would give two different meanings to the term "person" used in § 2511 and defined in § 2510(6) to include "any individual." 564 F.2d at 1115 n.6; *see* note 3 *supra*. Under the district court's construction, the term "person" would encompass the entire definition if wiretapping was charged, but would only apply to persons acting under color of law if bugging was charged. 564 F.2d at 1115 n.6.

[30] 564 F.2d at 1114-15; *see* note 23 *supra*. The Fourth Circuit emphasized the statement in the Senate Judiciary Committee's analysis of the Act that the broad prohibition of § 2511(1)(a) is applicable to bugging. SENATE REPORT, *supra* note 2, at 2180. Since the application of § 2511(1)(a) had not been expressly limited to actions under color of law, the

of private bugging, the Congressional hearings clearly indicate an intent to prohibit this type of activity.[31]

By requiring the government to establish at trial a "rational basis" for federal jurisdiction over the alleged bugging activity, the Fourth Circuit upheld the constitutionality of the statute without ruling on the jurisdictional basis for its enactment. The *Burroughs* decision suggests that this jurisdictional basis may be found in the commerce clause since the "rational basis" test has been used by courts to determine the constitutionality of federal regulation over local activity under the commerce clause.[32] Congress may regulate local activity if there is a rational basis for the belief that the activity affects interstate commerce.[33] In *Burroughs*, the Fourth Circuit reasoned that since Congress had not clearly stated its jurisdictional basis for enacting the broad prohibition on bugging, the government must establish this basis at trial.[34] The court emphasized that this requirement would only allow federal intrusions on traditional state criminal jurisdiction[35] where a federal interest is involved.[36]

Burroughs court concluded that Congress intended § 2511(1)(a) to overlap with § 2511(1)(b). Thus, § 2511(1)(a) could prohibit private bugging in cases that § 2511(1)(b) would not reach. 564 F.2d at 1114-15.

[31] *See* notes 17 & 19 *supra*. The minimal attention given to private eavesdropping activity in the legislative history of the Act has been interpreted differently in the Fifth and Sixth Circuits. In Simpson v. Simpson, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974), the Fifth Circuit held that the wiretapping prohibition of § 2511 did not apply to private interspousal wiretapping because Congress did not specifically discuss this type of activity. 490 F.2d at 807-09. In United States v. Jones, 542 F.2d 661 (6th Cir. 1976), the Sixth Circuit held that there was no interspousal exception to the wiretapping prohibition of § 2511. 542 F.2d at 673. The *Jones* court reasoned that Congress had not focused on private electronic surveillance because of the consensus that there was "no justification" for such activity. *Id.* at 671. *See* Comment, *Interspousal Electronic Surveillance Immunity*, 7 TOL. L. REV. 185, 203 (1975). The position that § 2511 applies to private activity, espoused by the Fifth Circuit in *Jones* and the Fourth Circuit in *Burroughs*, is supported by United States v. Giordano, 416 U.S. 505 (1974), in which the Court stated that "[t]he purpose of the legislation . . . was effectively to prohibit . . . all interceptions of oral and wire communications, except those specifically provided for in the Act,. . ." 416 U.S. at 514.

[32] *See* text accompanying note 23 *supra*.

[33] Perez v. United States, 402 U.S. 146 (1971); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); *see* text accompanying note 23 *supra*.

[34] 564 F.2d at 1115, *citing* United States v. Bass, 404 U.S. 336, 351 (1971).

[35] 564 F.2d at 1116. Eavesdropping is proscribed as a felony in South Carolina. S.C. CODE § 16-17-470 (1976); *cf.* People v. Conklin, 12 Cal. 3d 259, 522 P.2d 1049, 114 Cal. Rptr. 241, *appeal dismissed*, 419 U.S. 1064 (1974) (state wiretap provisions do not conflict with federal law).

[36] 564 F.2d at 1115. The *Burroughs* court emphasized that the federal nexus requirement would preserve the federal-state balance in the area of criminal law. *Id.* Since few of the federal government's enumerated powers relate specifically to criminal law enforcement, *but see* U.S. CONST. art. I, § 8, cls. 6, 10; art. III, § 3, Congress has been reluctant to define conduct, which is already denounced as criminal by the states, as a federal crime. United States v. Bass, 404 U.S. 336, 349 (1971); H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1241 (1958). Congress has repeatedly used the commerce clause as a national police power to extend federal criminal jurisdiction. *See* Chamberlain, *Federal Criminal Statutes*, 20 A.B.A.J. 501 (1934); Note, *The Scope of Federal Criminal Jurisdiction Under the Commerce Clause*, 1972 U. ILL. L.F. 805 (1972). By requiring

The Fourth Circuit's opinion in *Burroughs* did not specify what type of proof is needed to establish a federal nexus.[37] Nevertheless, the use of the rational basis test to determine the constitutionality of federal legislation under the commerce clause suggests that proof that the bugging affects interstate commerce will provide the required nexus.[38] Although the *Burroughs* court did not state explicitly how strong the federal nexus must be to bring private bugging within the ambit of the statute,[39] the court indicated that proof of a remote effect on interstate commerce may be adequate.[40]

The Fourth Circuit holding in *Burroughs* emphasized that bugging by a private party will only be treated as a federal offense when the government establishes some basis for federal jurisdiction over that party's activity.[41] Although this federal nexus may be established under the commerce clause,[42] the court's failure to specify Congress' jurisdictional basis for enacting the broad anti-bugging statutes suggests that the nexus may also be found elsewhere in the Constitution.[43] Therefore, the degree to which the statute will be used to reach private intrastate bugging will depend on the construction given to the federal nexus requirement. If courts require merely a remote federal nexus, the *Burroughs* decision may result in an increase rather than a decrease in federal criminal jurisdiction.

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proof of a federal nexus, however, the *Burroughs* court adopted the view that this power may be used only to further federal interests. *See* 2 Farrand, *Records of the Federal Convention,* 131, *quoted in,* Cushman, *Social and Economic Control Through Federal Taxation,* 18 MINN. L. REV. 759, 759-60. (1934).

[37] The legislative history of the Act suggests that the federal nexus may be found in the power of Congress to protect the right of privacy from private interference under the equal protection clause of the fourteenth amendment. SENATE REPORT, *supra* note 2, at 2180; *see* United States v. Guest, 383 U.S. 745 (1966). The fourth and fifth amendments also guarantee a citizen's right of privacy against unreasonable governmental invasions. *See, e.g.,* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[38] *See* notes 23-24 *supra.*

[39] 564 F.2d at 1115. United States v. Perez, 426 F.2d 1073 (2d Cir. 1970), *aff'd,* 402 U.S. 146 (1971), relied on by the *Burroughs* court, has been criticized for its failure to guide courts in determining whether there is a rational connection between local activity and interstate commerce. *See* Comment, *The Eleventh Amendment Yields,* 21 CATH. U. L. REV. 163 (1971); Comment, *Federal Regulation of Local Activity: The Demise of the Rational Basis Test,* 1972 L. & SOC. ORDER 683 (1972). The Second Circuit in *Perez* equivocated on the standard required to establish a rational basis for federal jurisdiction, discussing first a "substantial impact" on commerce, 526 F.2d at 1078, and later merely a "tenuous impact." *Id.* at 1080. The Supreme Court in *Perez* did not clarify the Second Circuit's discussion of the amount of tie-in necessary. 402 U.S. 146 (1971).

[40] 564 F.2d at 1115. In the recent case of United States v. Scarborough, 539 F.2d 331 (4th Cir. 1976), *aff'd,* 431 U.S. 563 (1977), the Fourth Circuit held that a remote connection with interstate commerce is sufficient to establish a federal nexus under 18 U.S.C. App. § 1202(a) (1968). 539 F.2d at 332; *see* Comment, *Interstate Nexus Requirement Defined For Firearm Possession by Felons,* 29 MERCER L. REV. 867 (1978).

[41] 564 F.2d at 1115.

[42] *See* text accompanying note 38 *supra;* notes 23-24 *supra.*

[43] *See* note 37 *supra.*

B. Juvenile Waiver of *Miranda* Rights

The privilege against self-incrimination[1] is an integral part of the American adversarial system of criminal justice.[2] In *Miranda v. Arizona*,[3] the Supreme Court broadly defined the protection of the self-incrimination privilege by requiring police officers to advise a suspect, prior to custodial interrogation, of his constitutional rights.[4] Although these rights subsequently may be waived, the *Miranda* Court emphasized that a waiver must be knowingly and intelligently made[5] and it placed a heavy burden on the state in demonstrating such a waiver.[6] Many factors are considered in determining whether an accused has made a knowing and intelligent waiver of his *Miranda* rights.[7] Courts must be especially careful when

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[1] The fifth amendment provides that: "[n]o person shall . . . be compelled in any criminal case to be a witness against himself. . . . " U.S. CONST. amend. V.

[2] *See* Bram v. United States, 168 U.S. 532, 542-45 (1897). Traditionally, the benefits of the fifth amendment were available only in the federal court system. *See* Twining v. New Jersey, 211 U.S. 78, 113-14 (1908). The Supreme Court later rejected this position, however, finding the privilege against self-incrimination applicable in state proceedings. *See* Malloy v. Hogan, 378 U.S. 1, 3 (1964); Reavley, *Self-Incrimination: Rights Reconstituted,* 39 TEX. B.J. 389, 390 (1976).

[3] 384 U.S. 436 (1966).

[4] *Id.* at 444. The *Miranda* court held that, prior to questioning, law enforcement officers must advise a suspect of his right to remain silent and that anything said could be used against him in court. Furthermore, officers are required to inform the suspect of his constitutional right to consult with and have an attorney present during questioning. The officers must also inform the suspect that if he desires and cannot afford a lawyer, one will be appointed for him. *Id.* at 467-73.

[5] *Id.* at 475.

[6] *Id.* The *Miranda* majority stressed that the Court had set high standards of proof for the state in showing that an accused had waived a constitutional right. *Id.; see* Glasser v. United States, 315 U.S. 60, 70 (1942) (courts should indulge in every reasonable presumption against waiver of fundamental rights); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (though constitutional rights may be waived, courts must examine an accused's background, experience, and conduct in determining whether a waiver is intelligently made). *Miranda* did not require an express, affirmative waiver, holding that an express statement by the suspect that he is willing to talk and does not wish to see an attorney, followed closely by a confession, could constitute a waiver. 384 U.S. at 475. Nevertheless, *Miranda* cautioned against presuming a valid waiver simply from the silence of the accused after warnings are given or from the fact that a confession subsequently is obtained. *Id.; see* Note, *The Declining* Miranda *Doctrine: The Supreme Court's Development of* Miranda *Issues,* 36 WASH. & LEE L. REV. 259 (1978).

[7] Post-*Miranda* decisions have relied on a case-by-case analysis of surrounding circumstances to determine the validity of a waiver. This type of analysis is similar to the pre-*Miranda* approach that considers all the facts in determining the voluntariness of the confession. *See* Brewer v. Williams, 430 U.S. 387, 403-06 (1977); Blackmon v. Blackledge, 541 F.2d 1070, 1073 (4th Cir. 1976) (waiver implied where defendant was given *Miranda* warnings twice, failed to request attorney, was allowed to make telephone calls, and verbally acknowledged understanding of his legal rights); United States v. Hayes, 385 F.2d 375, 378 (4th Cir. 1967), *cert. denied,* 390 U.S. 1006 (1968) (fact that accused had presence of mind to make phone calls and request attorney supports the conclusion that his waiver was knowingly given); text accompanying note 55 *infra. See also* United States v. Cavallino, 498 F.2d 1200, 1202 (5th Cir. 1974); United States v. Collins, 462 F.2d 792, 797 (2d Cir.), *cert. denied,* 409 U.S. 988 (1972); United States v. Glasgow, 451 F.2d 557, 558 (9th Cir. 1971); Klingler v.

concluding that a juvenile has relinquished his constitutional rights.[8]

Recently, in *Miller v. Maryland,*[9] the Fourth Circuit examined the role which an accused's age plays in a court's determination whether a knowing and intelligent waiver of *Miranda* rights has been made. State police, investigating the murder of a young woman, had reason to believe sixteen year old Miller was involved. The officers took Miller into custody at his school and turned him over to a state trooper and county investigator for questioning.[10] The investigators gave Miller the required *Miranda* warnings and he subsequently responded that he would answer the interrogators' questions.[11] Miller was interrogated for approximately one and a half hours, during which time he denied any complicity in the crime.[12] At the conclusion of the questioning, the officers conducted a physical examination of Miller[13] and turned him over to the county sheriff.[14] After leaving the police station, the investigators were instructed via radio to return to the station because Miller had requested to see them in order to confess.[15] The officers again informed the youth of his constitutional rights and asked him if he wanted to make a statement.[16] Miller responded affirmatively and during two more hours of interrogation gave a detailed statement admitting his involvement in the murder.[17] The defendant, however, refused to sign a written statement and indicated, for the first time, that he wished to speak with his parents.[18] Miller was allowed to see his parents and, upon their advice, refused to sign the statement.[19] The statement was subsequently admitted into evidence at trial and Miller was convicted of murder.[20]

On appeal of his conviction to the Maryland Court of Appeals, Miller claimed that the police did not give him the required *Miranda* warnings,

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United States, 409 F.2d 299, 308 (8th Cir.), *cert. denied,* 396 U.S. 859 (1969); Bond v. United States, 397 F.2d 162, 165 (10th Cir. 1968), *cert. denied,* 393 U.S. 1035 (1969); United States v. Ruth, 394 F.2d 134, 136-37 (3d Cir.), *cert. denied,* 393 U.S. 888 (1968).

[8] Gallegos v. Colorado, 370 U.S. 49, 52-53 (1962); Moore v. Michigan, 355 U.S. 155, 164-65 (1957); Haley v. Ohio, 332 U.S. 596, 599-600 (1948).

[9] 577 F.2d 1158 (4th Cir. 1978).

[10] Miller v. State, 251 Md. 362, 247 A.2d 530, 532 (1968), *vacated and remanded,* 408 U.S. 934 (1972).

[11] 247 A.2d at 532. The county investigator recited the Miranda warnings in simple, direct language. *Id.* The investigator then asked Miller if, in view of his right to remain silent, he wished to give a statement or answer any questions. *Id.* Miller indicated that he would answer questions. *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 533.

[17] *Id.* at 533-37.

[18] *Id.* at 537. According to the officers, Miller did not ask for counsel when he asked to speak with his parents. *Id.* In addition, the investigator admitted that they had made no previous attempt to notify Miller's parents. *Id.*

[19] *Id.*

[20] Miller v. Maryland, 577 F.2d 1158, 1159 (4th Cir. 1978).

did not allow him to see his parents, and fabricated the confession.[21] The police denied these allegations and the state court resolved the factual dispute against Miller.[22] Viewing the totality of the circumstances,[23] the state court found Miller's confession admissible,[24] stressing that Miller was given his *Miranda* rights twice, that there was no police misconduct, and that Miller had requested the interview which lead to his inculpatory statement.[25] Miller subsequently filed a habeas corpus action in federal district court. The court dismissed the action upon finding that the state court had applied the correct constitutional test and the record supported the state court's findings of fact.[26] The defendant appealed to the Fourth Circuit, reasserting his allegations of police misconduct and contending that the lower courts erred by failing to give adequate consideration to his youth.[27] Though it acknowledged the duty of a court to take special care with juvenile confessions, the Fourth Circuit upheld the lower court ruling that Miller's confession was given knowingly and voluntarily.[28]

The Fourth Circuit approved the totality of circumstances approach of the state court and agreed that youth, while an important consideration, is not by itself determinative of whether a valid waiver had been made.[29] In reaching its decision, the Fourth Circuit distinguished *Haley v. Ohio*,[30] the leading Supreme Court case on juvenile confessions. In *Haley*, the police arrested a fifteen year old suspect on a charge of murder. Haley was informed of his right to remain silent but was never advised of his right to counsel.[31] Without Haley's parents or counsel present, police officers continuously interrogated Haley throughout the night.[32] After finally obtaining a confession from the youth, the police continued to hold him incommunicado.[33] The Supreme Court found Haley's confession inadmissible,

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[21] *Id.*

[22] *Id.*

[23] Miller v. State, 251 Md. 362, 247 A.2d 530, 538-39 (1968). In determining the admissibility of Miller's confession, the state court examined the circumstances surrounding the confession in accordance with the accepted Fourth Circuit test. *See* note 36 *infra.*

[24] 247 A.2d at 539.

[25] *Id.*

[26] 577 F.2d at 1159.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] 332 U.S. 596 (1948).

[31] *Id.* at 598.

[32] *Id.* Although there was disputed evidence that Haley may have been beaten during interrogation, *id.* at 597, the Court disregarded this evidence and considered only the undisputed testimony on the voluntariness of Haley's confession. *Id.* at 598.

[33] *Id.* at 598-99. The *Haley* Court noted that even after his confession, Haley was held incommunicado for three days. The attorney retained to represent him was refused admission twice and Haley's mother was not allowed to see him for over five days after his arrest. Although the state contended that this incommunicado detention after Haley's confession was irrelevant to the issue of the confession's voluntariness, the Supreme Court disagreed, finding that this treatment was evidence of the callous attitude of the police toward Haley's constitutional rights. *Id.* at 600.

relying on his age and the surrounding circumstances of the interrogation.[34] In upholding the accused's confession in *Miller*, the Fourth Circuit recognized the duty imposed by *Haley*, but nevertheless upheld the lower court decision, noting that Miller had been given the *Miranda* warnings and that the police had honored Miller's first request to see his parents.[35]

Lower court decisions have adopted an analysis in accordance with the *Haley* decision, emphasizing the surrounding circumstances of a statement obtained from a youth in police custody.[36] Although youth is an important factor in the totality of circumstances analysis,[37] courts have rejected the premise that youth alone is sufficient to invalidate a confession.[38] Addi-

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[34] *Id.* at 600-01. The Court concluded:

> The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police toward his rights combined to convince us that this was a confession wrung from a child by means which the law should not sanction . . . But we are told that this boy was advised of his constitutional rights . . . and that, knowing them, he nevertheless confessed. That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice.

Id. at 601; *see* Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962) (lengthy incommunicado detention and denial of attorney or parental presence coupled with accused's tender age were sufficient reason to find confession inadmissible). The case-by-case analysis of surrounding circumstances was consistent with Court policy on waiver of constitutional rights. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (determination of a valid waiver depends on each case's particular facts and circumstances).

[35] 577 F.2d at 1159.

[36] *Compare* United States v. Miller, 453 F.2d 634, 636 (4th Cir.), *cert. denied,* 406 U.S. 923 (1972) (though juvenile's response that he understands and wishes to waive constitutional rights is not conclusive of a valid waiver, where district judge noted that youth understood his rights better than most adults and was not threatened by police, his waiver was sufficient); United States v. Barfield, 507 F.2d 53, 56-57 (5th Cir.), *cert. denied,* 421 U.S. 950 (1975) (fact that youth signed a waiver form, had previous experience with police, and that questioning took place in his home in his mother's presence tended to show competent waiver); Cotton v. United States, 446 F.2d 107, 110 (8th Cir. 1971) (absence of physical or psychological coercion, combined with short duration of questioning and signing of waiver form, allows conclusion that *Miranda* rights were validly waived by juvenile); Lopez v. United States, 399 F.2d 865, 866-68 (9th Cir. 1968) (when youth questioned at home, had been read his *Miranda* rights and his mother consented to the interrogation, record showed nothing to indicate that he didn't understand and his inculpatory statement was admissible) *and* Richardson v. Vitek, 395 F.2d 478, 480-81 (7th Cir. 1968) (fifteen year old voluntarily waived *Miranda* protections in a noncoercive situation where he was questioned only for short periods of time, was fed, allowed to sleep and watch television) *with* Ledbetter v. Warden, 368 F.2d 490, 492 (4th Cir. 1966), *cert. denied,* 386 U.S. 971 (1967) (nineteen year old's confession inadmissible since he had only eighth grade education, was not warned of his rights and his requests to see his parents were denied); Burgos v. Follette, 448 F.2d 130, 131-33 (2d Cir. 1971), *cert. denied,* 406 U.S. 950 (1972) (inculpatory statement of defendant inadmissible where defendant was sixteen years old at time of arrest, spoke only broken English, had third grade reading level, was subjected to seven and a half hours of questioning without rest or food, and was refused contact with his family); Walker v. State, 12 Md. App. 684, 707-09, 280 A.2d 260, 272-74 (1971) *and In re* Carlo, 48 N.J. 224, 225 A.2d 110, 118-20 (1966).

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

[38] *See* Williams v. Peyton, 404 F.2d 528, 530-31 (4th Cir. 1968) (although youth is factor in holding confession inadmissible, courts should also consider length of detention without

tional factors concerning the youth's ability to make a valid waiver include the defendant's mental capacity,[39] emotional maturity,[40] education[41] and prior contact with police.[42] Courts also consider the intensity and length of interrogation sessions[43] and treatment by law enforcement officers[44] in deciding the admissibility of a youth's confession. Thus, courts look not only at the capabilities and experience of the juvenile, but also the physical and psychological treatment of the juvenile suspect by the police.

In light of the present case law on juvenile waiver of *Miranda* rights,[45] the Fourth Circuit's disposition of *Miller v. Maryland* was correct. By applying a totality of circumstances approach, the court properly affirmed the lower court finding of a valid waiver by Miller. The youth was given his *Miranda* warnings twice[46] in simple, non-technical language.[47] The initial questioning lasted for only one hour and a half and the second session for approximately two hours.[48] Between the periods of interrogation, Miller was treated well and fed.[49] Moreover, Miller had prior contact with the police and was familiar with police procedure.[50] Perhaps the most signifi-

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counsel, any failure to send for parents or failure to take accused before a juvenile judge); West v. United States, 399 F.2d 467, 469 (5th Cir. 1968), *cert. denied,* 393 U.S. 1102 (1969) (in determining knowing waiver against self-incrimination, relevant factors include defendant's age, education, knowledge as to nature of his rights, any incommunicado detention, methods and length of questioning and whether the youth later repudiated his confession); note 36 *supra.*

[39] *Compare* Coney v. Wyrick, 532 F.2d 94, 98 (8th Cir. 1976) (confession of youth of subnormal intelligence is nonetheless voluntary due to such factors as the brief period of questioning and attention given to physical needs) *with* Cooper v. Griffin, 455 F.2d 1142, 1144-46 (5th Cir. 1972) (two juveniles with subnormal I.Q.s were incapable of making an intelligent waiver of their *Miranda* rights) *and* United States v. Hilliker, 436 F.2d 101, 103 (9th Cir. 1970), *cert. denied,* 401 U.S. 958 (1971) (youth with sixth grade education but very high I.Q. made valid waiver of his constitutional rights).

[40] *See* Chaney v. Wainwright, 561 F.2d 1129, 1131-32 (5th Cir. 1977) (confession of seventeen year old admissible where his emotional maturity and prior criminal experience show him to be more than a child); United States v. Miller, 453 F.2d 634, 636 (4th Cir.), *cert. denied,* 406 U.S. 923 (1972) (that trial judge noted defendant understood his *Miranda* warnings better than most adults lends credence to voluntariness of subsequent confession); West v. United States, 399 F.2d 467, 469 (5th Cir. 1968) (fact that minor lived and worked as an adult hundred of miles from his parents illustrates a level of maturity necessary to validly waive constitutional rights).

[41] *See* Burgos v. Follette, 448 F.2d 130, 131-33 (2d Cir. 1971); Ledbetter v. Warden, 368 F.2d 490, 492 (4th Cir. 1966).

[42] *See* Chaney v. Wainwright, 561 F.2d 1129, 1131 (5th Cir. 1977); Blackmon v. Blackledge, 541 F.2d 1070, 1073 (4th Cir. 1976); United States v. Glasgow, 451 F.2d 557, 558 (9th Cir. 1971).

[43] *See, e.g.,* Richardson v. Vitek, 395 F.2d 478, 480-81 (7th Cir. 1968).

[44] *See, e.g.,* Cotton v. United States, 446 F.2d 107, 109-10 (8th Cir. 1971).

[45] *See* text accompanying notes 36-44 *supra.*

[46] *See* Miller v. State, 251 Md. 362, 247 A.2d 530, 533 (1968). *See also* Blackmon v. Blackledge, 541 F.2d 1070, 1072-73 (4th Cir. 1976); Rivers v. United States, 400 F.2d 935, 943 (5th Cir. 1968); *In re* Fletcher, 251 Md. 520, 248 A.2d 364, 367 (1968).

[47] *See* Miller v. State, 251 Md. 362, 247 A.2d 530, 532 (1968).

[48] 247 A.2d at 532; *see* text accompanying note 43 *supra.*

[49] 247 A.2d at 532; *see* text accompanying note 44 *supra.*

[50] Although the majority did not rely upon Miller's prior conviction, the dissenting opin-

cant factor was Miller's request that the investigating officers return to the police station in order that he might make a statement. Such a request supports a finding that the confession was given voluntarily.[51]

One significant and controversial factor, however, was not considered by the court. Miller's parents were not consulted or present during interrogation.[52] The majority of federal and state courts employ a totality of circumstances approach and hold that the absence of a youth's parents does not necessarily render a confession inadmissible.[53] Several states, however, automatically disallow juvenile confessions where the youth has not consulted with a parent or attorney before waiving his constitutional rights.[54] Many advocates of this per se rule criticize the totality of circumstances approach as retaining the same inherent problems of the pre-*Miranda* "voluntariness" approach.[55] *Miranda* disposed of the earlier subjective "voluntariness" analysis that considered all facts to determine the confession's validity in favor of an absolute requirement that a suspect always be advised of his rights.[56] Similarly, proponents of the parental

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ion alluded to the fact that the district court considered it. *See* Miller v. Maryland, 577 F.2d 1158, 1161 (4th Cir. 1978) (Lay, J., dissenting). The dissent criticized the lower court for considering this factor; however, prior convictions are frequently considered by courts. *See* text accompanying note 42 *supra*.

[51] *See In re* Fletcher, 251 Md. 520, 248 A.2d 364, 368 (1968) (fact that juvenile informed police on the way to jail cell that he wished to make statement lends element of voluntariness to his confession); Brown v. State, 3 Md. App. 313, 239 A.2d 761, 766 (1968) (fact that juvenile and his parents contacted police to surrender tends to support finding of admissibility of statement); State v. Lay, 427 S.W.2d 394, 399 (Mo. 1968) (where juvenile, who was present at police station to help police identify "killer" and was never under suspicion, requested to speak with police captain, his subsequent confession was admissible).

[52] Miller was allowed to see his parents upon his first request, which came after his confession. *See* Miller v. State, 251 Md. 362, 247 A.2d 530, 537 (1968). *See generally* Note, *Preadjudicatory Confessions and Consent Searches: Placing the Juvenile on the Same Constitutional Footing as an Adult*, 57 B.U.L. REV. 778 (1977) [hereinafter cited as *Preadjudicatory Confessions*]; Comment, *Interrogation of Juveniles: The Right to a Parent's Presence*, 77 DICK. L. REV. 543 (1973); Comment, *The Admissibility of Juvenile Confessions: Is an Intelligent and Knowing Waiver of Constitutional Rights Possible Without Adult Guidance?*, 34 PITT. L. REV. 321 (1972).

[53] *See* State v. Hardy, 107 Ariz. 583, 491 P.2d 625 (1967); People v. Lara, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967), *cert. denied*, 392 U.S. 945 (1968); State v. Young, 220 Kan. 541, 552 P.2d 905, 916 (1976); Theriault v. State, 66 Wis. 2d 33, 223 N.W.2d 850, 857 (1974); Mullin v. State, 505 P.2d 305, 309 (Wyo.), *cert. denied*, 414 U.S. 940 (1973); *Preadjudicatory Confessions*, *supra* note 52, at 782.

[54] *See* Lewis v. State, 259 Ind. 431, 288 N.E.2d 138, 142 (1972); *In re* Dino, 359 So. 2d 586, 594 (La. 1978); *In re* K.W.B., 500 S.W.2d 275, 283 (Mo. App. 1973). *See also* Weatherspoon v. State, 328 So. 2d 875, 876 (Fla. Dist. Ct. App. 1976); Daniels v. State, 226 Ga. 269, 174 S.E.2d 422, 424 (1970).

Some courts requiring an adult presence to render a juvenile's confession admissible have relied on state statutes which require notification of parents upon the arrest or detaining of the child. *See In re* K.W.B., 500 S.W.2d 275, 281 (Mo. App. 1973). However, many states have similar statutes and still consider the failure of police to notify parents as only one factor in their totality of circumstances approach. *See* Theriault v. State, 66 Wis. 2d 33, 223 N.W.2d 850, 856-57 (1974).

[55] *See Preadjudicatory Confessions*, *supra* note 52, at 784-85.

[56] *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966).

presence rule argue that such an absolute requirement is necessary for the protection of juveniles. Although recognizing the application of the totality of circumstances approach to the waiver issue when dealing with adults, proponents of a parental presence requirement urge that this standard is not sufficient when dealing with juveniles. Advocates of a per se rule claim that *Miranda* warnings are not sufficient for children, since they lack the emotional maturity to withstand interrogation and mental capacity to understand the consequences of the waiver. Therefore, a requirement that a youth's parents or attorney be present during interrogation is necessary to place juveniles on the same level as adults when giving a waiver of their *Miranda* rights.[57] The Supreme Court, however, has not specifically ruled whether the advice or presence of an attorney or parent is constitutionally required before a juvenile may effectively waive his *Miranda* rights.[58]

The Fourth Circuit's disposition of *Miller* was consistent with the prevailing rule that the admissibility of juvenile confessions rests on an analysis of the totality of circumstances. Perhaps, however, the Fourth Circuit should re-evaluate its totality of circumstances approach and consider adopting the per se rule disallowing any juvenile confession made without advice from an attorney or parent. The rights which a juvenile waives are crucial ones, while the expedient of requiring presence of counsel or parent is simple.[59] Judgments of the effect of surrounding circumstances on a youth in each case can never be more than subjective speculations.[60] In addition, police will be less likely to exert coercion with an adult present to protect the juvenile's rights. These factors, among others, suggest that the Fourth Circuit consider joining the growing number of courts recognizing that a youth should not be allowed to waive fundamental constitutional protections without the presence of his parents or attorney to assure that he does so with full knowledge of the consequences of his actions.

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C. Right to Counsel

In 1977, the Fourth Circuit in *Marzullo v. Maryland*[1] announced a new

[57] *See Preadjudicatory Confessions, supra* note 52, at 784-85.

[58] Justices Marshall and Brennan maintain that the Supreme Court should address the issue of a parental presence rule. *See* Riley v. Illinois, 98 S. Ct. 1657, 1658-59 (1978) (Marshall and Brennan, JJ., dissenting from denial of cert.); Little v. Arkansas, 98 S. Ct. 1590, 1591-93 (1978) (Marshall, J., dissenting from denial of cert.).

[59] *See In re* Dino, 359 So.2d 586, 592 (La. 1978).

[60] *Id.*

[1] 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978). In *Marzullo*, the defendant claimed inadequate representation, alleging that his attorney had not protected his rights at the voir dire examination since the attorney mentioned the defendant's prior convictions in the jurors' presence. *Id.* at 545-47. The court, while adopting a test based on reasonable competence, stressed that effective assistance does not mean errorless representa-

standard for effectiveness of counsel in criminal cases.[2] Under *Marzullo*, the measure of effectiveness is whether representation is within the range of competence demanded of attorneys in criminal cases.[3] While the full ramifications in *Marzullo* are unclear,[4] reasonable competence is the stan-

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tion. An error which is merely tactical is not reversible on appeal. *Id.* at 544. In the *Marzullo* test, the Fourth Circuit subsumed the specific criteria for effectiveness articulated in Coles v. Peyton, 389 F.2d 224 (4th Cir), *cert. denied*, 393 U.S. 849 (1968). 561 F.2d at 543. For an extensive discussion of the specific criteria developed in *Marzullo*, see Note, *Habeas Corpus and Prisoners' Rights*, 35 WASH. & LEE L. REV. 564, 573-77 (1978).

The sixth amendment guarantees the right to effective assistance of counsel, and the Supreme Court has stressed the fundamental nature of this right on several occasions. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1965); Johnson v. Zerbst, 304 U.S. 458 (1958); Powell v. Alabama, 287 U.S. 45 (1932).

[2] The *Marzullo* court followed the Supreme Court standard for legal advice concerning guilty pleas set forth in McMann v. Richardson, 397 U.S. 759 (1970). 562 F.2d at 544. Most circuits have adopted the reasoning of *McMann* in their standards of effective assistance. Three circuits use the test of "reasonably effective assistance." *See, e.g.*, Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973). Two circuits require assistance to exhibit "customary skill." *See, e.g.*, United States v. Easter, 539 F.2d 663 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977); Moore v. United States, 432 F.2d 730 (3d Cir. 1970). The Seventh Circuit demands a minimum standard of professional representation. United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975). The Second and Tenth Circuits still adhere to the farce and mockery standard. *See*, LiPuma v. Commissioner, 560 F.2d 84 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977); Gillihan v. Rodriquez, 551 F.2d 1182 (10th Cir.), *cert. denied*, 434 U.S. 845 (1977).

The farce and mockery and reasonable effectiveness tests are not, however, the only tests used. *See, e.g.*, People v. Degraffenreid, 19 Mich. App. 702, 173 N.W.2d 317 (1969) (Michigan's two-tiered test consisting of initial inquiry based on farce and mockery test, and, failing initial test, "serious mistake/fair trial" test). The criticism of the farce and mockery test is that a trial need not be a farce for a violation of due process to occur. The weakness of the normal competency test lies in its automatic reversal of any conviction in which the attorney's error rendered representation below the level of normal competence. *See* Note, *Effective Assistance of Counsel and the Right to a Fair Trial*, 22 WAYNE L. REV. 913 (1976).

[3] 561 F.2d at 544. For a discussion of the relationship of more stringent effective assistance standards to the remedy of criminal malpractice suits, see Kaus and Mallen, *The Misguiding Hand of Counsel—Reflection on Criminal Malpractice*, 21 U.C.L.A. L. REV. 1191 (1974).

[4] Other than the cases treated textually and at Note 98, *infra*, two additional cases warrant attention for a thorough understanding of the *Marzullo* standard. In Tolliver v. United States, 563 F.2d 1117 (4th Cir. 1977), the court ruled that defense counsel had provided inadequate assistance due to ignorance of applicable law. The defense attorneys in *Tolliver* were on notice that the effect of Leary v. United States, 395 U.S. 6 (1969), might lessen the force of the defendant's prior convictions on his sentence. 563 F.2d at 1120. The attorney had advised the defendant to plead guilty relying on the law as it stood prior to that Supreme Court case. On the basis of *Leary*, the defendant wanted to withdraw his guilty plea, but in advancing his cause, his attorneys neither researched *Leary* nor confessed their ignorance of it as a reason to permit withdrawal of the plea. *Id.*

In Springer v. Collins, 444 F.Supp. 1049 (D.Md. 1977), the district court held that, absent any peril to trial tactics, defense counsel denied the defendant effective assistance by failing to explore or discuss with his client an insanity plea. Since the defense counsel knew of the defendant's past drug problems and of his consumption of excessive amounts of drugs and alcohol prior to the act, counsel should have investigated the defense of alcoholic psychosis

dard for effective counsel in the Fourth Circuit.[5]

Effective Assistance and the Need for a Psychiatrist

In *Satterfield v. Zahradnick*,[6] the Fourth Circuit discussed the extent to which the sixth amendment[7] obligates a state court to assist a defendant in the preparation of his insanity defense.[8] In the original state proceeding, the state had ordered a psychiatric examination of the defendant pursuant to Virginia law.[9] The report stated that Satterfield was competent to

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in alleging that the intent requisite for guilt was lacking. *See* Parker v. State, 7 Md. App. 161, 178-79, 254 A.2d 381 (1969), *cert. denied* 402 U.S. 984 (1971).

[5] 561 F.2d at 544. The Fourth Circuit's concept of reasonableness is based upon a tort standard. *Id.* at n.9, citing RESTATEMENT (SECOND) OF TORTS § 299A (1965), *Undertaking in Profession or Trade.* (tort standard for professional malpractice).

[6] 572 F.2d 443 (4th Cir.), *cert. denied* 98 S. Ct. 2270 (1978).

[7] See Note 1 *supra.*

[8] For a discussion of the statutory obligation of the state to determine competency to stand trial, see note 9 *infra.* Despite an adverse determination by the state psychiatrist, the defendant may still raise the defense of insanity at trial. Graham v. Gathright, 345 F. Supp. 1148, 1150 (W.D. Va. 1972); Owsley v. Cunningham, 190 F. Supp. 608, 614 (E.D. Va. 1961). In Virginia, insanity is determined according to the M'Naghten rule supplemented by the "irresistible impulse" test. Christian v. Commonwealth, 202 Va. 311, 117 S.E. 2d 72 (1960). Accordingly a person is deemed insane if unable to understand the nature of his act, to distinguish right from wrong, or to resist action because of irresistible impulse. *Id.* For Discussion of the M'Naghten and irresistible impulse tests, see LAFAVE & SCOTT, CRIMINAL LAW, § 37 (1972); Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense,* 110 U.PA. L. REV. 1061 (1962) [hereinafter cited as *Goldstein & Fine*]; Livermore & Meehl, *The Virtues of M'Naghten,* 51 MINN. L. REV. 789 (1967); Moore, *M'Naghten is Dead—Or is it?* 3 HOUS. L. REV. 58 (1965).

[9] The court applied VA. CODE ANN. 19.1-228 (1950), currently codified at 19.2-169 (1975) entitled *When question of sanity is raised, commitment before trial.* Section 19.1-228 states:

> If prior to the time for trial of any person charged with a crime, either the court or attorney for the Commonwealth has reason to believe that such person is in such mental condition that his confinement in a hospital for the insane or a colony for the feeble-minded is necessary for proper care and observation, the court or the judge thereof may, after hearing evidence on the subject, commit such person . . . under such limitation as it may order pending the determination of his mental condition. In any such case, the court, in its discretion, may appoint one or more physicians skilled in the diagnosis of insanity, or other qualified physicians, and when any person is alleged to be feeble-minded may likewise appoint persons skilled in the diagnosis of feeble-mindedness not to exceed three, to examine the defendant before such commitment is ordered, make such investigation of the case as they may deem necessary and report to the court the condition of the defendant at the time of their examination . . .

Satterfield is consistent with prior cases interpreting § 19.1-228. *See, e.g.,* Payne v. Slayton, 329 F. Supp. 886 (W.D. Va. 1971) (defendant received effective assistance where attorney raised defendant's insanity plea at trial and relied solely on lay witnesses to support defense); Owsley v. Cunningham, 190 F. Supp. 608 (E.D. Va. 1961)(due process clause requires only that state provide defendant with mental examination if competency doubtful).

The courts have taken judicial notice of the legislative intent of § 19.1-228 to assure that when the defendant's mental capacity to stand trial is in doubt, the defendant shall not be jeopardized without an initial inquiry into his present mental condition. Payne v. Slayton, 329 F. Supp. at 889. In Kibert v. Peyton, 383 F.2d 566 (4th Cir. 1967), the court held that an

stand trial,[10] however it only briefly addressed the problem of blood sugar imbalance, the medical condition upon which the defendant planned to base his defense.[11] Due to this shortcoming in the report, Satterfield, an indigent, requested the assistance of a psychiatrist at state expense.[12] The trial court refused the request, Satterfield was convicted, and the Virginia Supreme Court affirmed his conviction.[13] After being refused a writ of habeas corpus in federal district court,[14] Satterfield appealed to the Fourth Circuit alleging, among other things, ineffective assistance of counsel.[15] The Fourth Circuit held that a defendant has no constitutional right to the appointment of a private psychiatrist of his own choice at state expense. The court further held that since the psychiatric examination ordered by the state in the initial proceeding fulfilled all the proper statutory requirements adequate opportunity existed to bring any issue concerning the defendant's sanity to the attention of the trial court.[16]

The court's finding of thoroughness regarding the psychiatric report was based both on the scope of the report and defense counsel's treatment of it.[17] The findings of competency to stand trial and knowledge of the nature and quality of the acts were considered sufficient to bring any

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attorney who doubts his client's mental competence has a duty to bring it to the attention of the court, *id.* at 569, but failure to have a defendant examined is not a determination that he is sane. *Id.* at 568; *cf.* Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1963) (judge's duty to order mental examination where he questions defendant's mental competence).

The purpose of the statute is not, however, to assist the defendant in the determination or formation of an insanity plea. Tucker v. Peyton, 271 F. Supp. 667 (W.D. Va. 1967) (no abuse of discretion in refusing § 19.1-228 mental competence hearing where petitioner's testimony indicates understanding of charges against him and ability to assist in his own defense). Furthermore, the defendant's burden of proving his own insanity is well-established. *See* Graham v. Gathright, 345 F.Supp. 1157 (W.D. Va. 1972); Payne v. Slayton, 329 F.Supp. 886 (W.D. Va. 1971).

[10] 575 F.2d at 445. Appellant's contention was that his blood sugar imbalance created a hypoglycemic condition so acute it rendered him criminally irresponsible. Brief for Appellant at 12, Satterfield v. Zahradnick, 572 F.2d 443 (4th Cir. 1978).

[11] Brief for Appellant at 12, Satterfield v. Zahradnick, 572 F.2d 443 (4th Cir. 1978).

[12] 572 F.2d at 445.

[13] *Id.*

[14] *Id.*

[15] Satterfield claimed that his constitutional rights had been abridged in three other instances. He alleged constitutional violation when the prosecutor made a pejorative comment to the jury concerning Satterfield's failure to testify in his own behalf. 572 F.2d at 445. The court held that this might have constituted error under the rule of Griffin v. California, 380 U.S. 609 (1965), but for counsel's failure to object to the statement when made. 572 F.2d at 446. According to state law, an error not objected to at trial may not be raised upon appeal, Russo v. Commonwealth, 207 Va. 251, 148 S.E.2d 820 (1966), *cert. denied,* 386 U.S. 909 (1967). Satterfield also contested the constitutionality of Virginia's application of presumptions of malice from an unlawful homicide and of premeditation from use of a weapon in prior possession of the accused. The circuit court avoided consideration of these issues because they had not been raised prior to the appeal. 572 F.2d at 446.

[16] 572 F.2d at 445.

[17] The court took notice of the fact that defense counsel was not contesting the objectivity of the information contained in the report. *Id., accord,* McGarty v. O'Brien, 188 F.2d 151, 157 (1st Cir. 1951).

questions of sanity before the court. The allegation of defense counsel had been that the report was both incomplete in that it did not discuss the blood sugar problem and erroneous in that it found the defendant sane at the time of the commission of the acts.[18] The court never mentioned the blood sugar problem and dismissed the allegations of error as a mere inconsistency between the report and the testimony of a physician who appeared for the defense.[19] The Fourth Circuit concluded that, given the state court's application of the statute requiring a psychiatric examination, the state owed the defendant no further constitutional duty.

The extent of a state court's duty to assist a defendant in his insanity defense was discussed by the Supreme Court in *United States* ex. rel. *Smith v. Baldi,*[20] a case cited by the *Satterfield* court.[21] In *Smith v. Baldi,* the Supreme Court held that the state has no constitutional duty to appoint a psychiatrist to give technical pre-trial assistance to a defendant who has been found competent to stand trial.[22] In *Smith v. Baldi,* the defendant had introduced evidence to support an insanity plea.[23] Although a psychiatrist had examined the defendant at the court's request and testified that the defendant was sane at the time of commission and competent to stand trial, the defendant on appeal[24] contended that the assistance of a psychiatrist was necessary to afford him adequate counsel.[25] The facts of *Smith v. Baldi* are strikingly similar to those of *Satterfield.* In both cases the defense was objecting to the inability to have a chosen expert examine the defendant and assist in the formulation and presentation of a defense.[26] In both *Satterfield*[27] and *Smith v. Baldi*[28] the defense introduced testimony and documentation addressing the issue of mental competence. The *Smith* Court held that the state never has a constitutional obligation to a defendant pleading insanity beyond the determination of competence to stand trial.[29]

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[18] Brief for Appellant at 12-13, Satterfield v. Zahradnick, 572 F.2d 443 (4th Cir. 1978).

[19] 572 F.2d at 445.

[20] 344 U.S. 561 (1953).

[21] 572 F.2d at 445.

[22] 344 U.S. at 568; *see* Leland v. Oregon, 343 U.S. 790 (1952) (presumption of sanity of defendant may be circumscribed by state prescriptions of quantum of proof and legal tests of sanity).

[23] 344 U.S. at 568.

[24] *Id.*

[25] *Id.*

[26] *Id.*; Brief for Appellant at 15, Satterfield v. Zahradnick, 572 F.2d 443 (4th Cir. 1978).

[27] 572 F.2d at 445. In *Satterfield,* in support of the insanity plea, the defense introduced lay witnesses and a psychiatrist who had not examined the defendant for the alleged infirmity. *Id.*

[28] 344 U.S. at 568.

[29] *Id.* The facts in *Smith* raised the specific questions of whether the state should have allowed the defendant to plead guilty without formal adjudication on the question of mental competency and whether the defendant should have been allowed to plead at all to a capital offense without the benefit of a mental examination. *Id.* at 565. The force of *Smith* has been minimized by subsequent Supreme Court decisions emphasizing the court's duty to keep abreast of any changes in the defendant's mental condition even after the determination of

The rule in *Smith v. Baldi* that no constitutional duty exists beyond the determination of competency to stand trial differs from the rule of *McGarty v. O'Brien*,[30] a First Circuit case cited by both the *Satterfield*[31] and *Smith*[32] courts. Whereas *Smith* was decided on the basis of the sixth amendment right to counsel,[33] *McGarty* was decided on fourteenth amendment due process grounds.[34] In *McGarty* two psychiatrists who had examined the defendant at the court's order found him sane.[35] McGarty then requested that the state pay for two other psychiatrists to assist him in the preparation of his insanity defense.[36] The defendant argued that his indigency prevented him from fully developing a defense.[37] The court denied the defendant's request, reasoning that doctors designated to examine defendants, although paid by the state, are no more agents of the prosecution than appointed counsel.[38] Reasoning that psychiatrists are impartial pro-

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competency to stand trial has been made. *See* Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966) (even though no competence examination requested at trial, due process may demand mid-trial inquiry into defendant's sanity). Although *Smith* is often cited, no circuit in the last decade has cited *Smith* for the proposition that a defendant never has a constitutional right to a psychiatrist. *See* United States *ex rel.* McGurvin v. Shovlin, 455 F.2d 1278, 1279 (3d Cir.) *cert. denied* 407 U.S. 913 (1972) (citing *Smith* for proposition that defendant has due process right to statutory hearing on mental competence); United States v. Theriault, 440 F.2d 713 (5th Cir. 1971), *cert. denied,* 411 U.S. 984 (1973) (citing Smith to hold that impartial expert appointed by court is court's witness and may testify as to his findings). *But see* United States v. Taylor, 437 F.2d 371, 383-84 (4th Cir. 1971) (Sobeloff, J., concurring in part, dissenting in part) (saying that *Smith* held that defendant has no constitutional right to psychiatrist, but then giving string citation of Supreme Court cases to show considerable erosion of *Smith*). Furthermore, several circuits, including the Fourth, have ruled that at times the need for a psychiatrist rises to constitutional dimensions. *See* United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974); United States v. Schultz, 431 F.2d 907 (8th Cir. 1970); Jacobs v. United States, 350 F.2d 571 (4th Cir. 1965).

[30] 188 F.2d 151 (1st Cir. 1951).

[31] 572 F.2d at 445.

[32] 344 U.S. at 568.

[33] *Id.*

[34] 188 F.2d at 154.

[35] *Id.* at 152.

[36] *Id.* at 151-52.

[37] *Id.* at 155.

[38] *Id.* at 155-56; *accord,* Proctor v. Harris, 413 F.2d 383 (D.C. Cir. 1969). In *Proctor*, the court noted that from a defendant's viewpoint a psychiatrist is not of any assistance unless he corroborates the claim of insanity. *Proctor* concerned a defendant seeking habeas corpus relief. *Id.* at 384. The defendant had requested an independent psychiatric examination after the court-ordered report found him sane and ineligible for release. The court said that "psychiatrists are physicians not advocates," and took judicial notice of the fact that government psychiatrists as a whole were more favorable to defendants than to prosecutors in assessing insanity defenses. *Id.* at 387-88. The role of the physician in legal controversies, however, is not as purely scientific as the *Proctor* opinion suggests. Physicians who determine a defendant's competency face the difficulty of making a medical assessment based on legal standards. Rosenberg, *Competency For Trial: A Problem In Interdisciplinary Communication,* 53 JUD. 316, 317 (1970). As a result, the question of competency is just as much a legal issue as a medical one. *Id.* Since physicians are advised to write their reports in a logically reasoned style that will assist the jurist, the reports are not purely medical. C. WECHT, A WATSON & S. POLLACK, MEDICAL AND PSYCHIATRIC TESTIMONY IN CRIMINAL CASES, 195

fessionals, the First Circuit found the district court correct in denying the defendant's request.[39] The court did not choose to consider the extent to which the psychiatrist could act as an advocate, although the court did say that in certain situations such a claim might be valid.[40] *McGarty* merely holds that the facts of the case do not impose a fourteenth amendment duty on the part of the state to provide psychiatric assistance in the formulation of a defense.[41] *McGarty* thus establishes a case-by-case analysis for the determination of additional psychiatric assistance. In *Smith*, on the other hand, the Supreme Court held that regardless of the facts of the case, a trial court need not assist a defendant in the construction of an insanity defense.[42]

The Fourth Circuit's discussion of the merits of Satterfield's claim for a psychiatrist indicates its preference for the case-by-case approach of *McGarty*.[43] While the *Satterfield* court held that the defendant had no constitutional right to the appointment of a psychiatrist of his own choosing, the court nevertheless seemed quite satisfied that counsel had sufficient information to raise a colorable claim of insanity.[44] The *Satterfield* opinion does not preclude the possibility of certain circumstances creating a legitimate sixth or fourteenth amendment claim for a psychiatrist of one's own choice. The case-by-case analysis which the Fourth Circuit utilized is consistent with its individual case test for effective assistance of

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(1968) [hereinafter cited as WECHT, WATSON AND POLLACK]. The authors suggest that the psychiatric profession is neither at ease with nor fully cognizant of its role in legal disputes. *Id.* at 182. The problem exists, therefore, that, although psychiatrists are often called upon as experts, there is no reason to think that they understand legal issues any better than any other laymen. *Id.* at 185.

[39] 188 F.2d at 154-55.

[40] *Id.*

[41] *Id.* at 157.

[42] 344 U.S. at 568.

[43] A significant distinction exists between *McGarty* and *Smith*. *McGarty* was decided on the basis of a fourteenth amendment claim whereas *Smith* presented the Court with an allegation of denial of sixth amendment rights. The *McGarty* court's consideration of the circumstances surrounding the petitioner's claim, as well as the due process safeguards provided by the state, demonstrates that a fourteenth amendment claim precludes any blanket rule. 188 F.2d at 157. The *Smith* court declared, however, that psychiatric assistance was collateral to the guarantee of the sixth amendment. 344 U.S. at 568. The *Smith* decision has been criticized as too broad, while the case-by-case analysis of *McGarty* has received praise for the latitude granted trial judges in deciding whether the absence of a psychiatrist assisting the defendant would preclude a fair trial. Goldstein & Fine, *supra* note 8, at 1087.

[44] 572 F.2d at 445. Along with *McGarty*, the Fourth Circuit cited Proctor v. Harris, 413 F.2d 383 (D.C. Cir. 1969), *see* note 38 *supra*, as support for the holding that a defendant has no constitutional right to a private psychiatrist of his own choosing. 572 F.2d at 455. *But see* Goldstein & Fine, *supra* note 8, at 1062 (due to nature of adversary proceedings, proposition that fairness can result from situations where one party's legal, investigative, and expert resources grossly outweight other's is unrealistic). Thus, regardless of the nature of the state's psychiatric report, the defendant should be accorded psychiatric assistance as part of his sixth amendment right since such aid is anything but collateral to a thorough and effective defense. *Id.* at 1087. Goldstein & Fine also contend that an insanity plea without the aid of a psychiatrist generally would be successful only in cases so extreme that the prosecutor would probably drop the charge. *Id.* at 1064.

counsel.[45] A situation might arise in which the court would determine that the defendant had not been afforded effective assistance because of the absence of psychiatric help. In such a case, ineffective assistance would result from a liberal court standard[46] and a rather conservative state statute limiting psychiatric help.[47]

Disposition by the Fourth Circuit of a claim of ineffective assistance of counsel in a state proceeding requires a subtle balance between the state's sovereignty and the jurisdiction of the federal court over habeas corpus claims.[48] Where the federal court has original jurisdiction, Congress has provided for expert assistance to indigents.[49] Thus, while the issue in *Satterfield* would not arise when a federal court has original jurisdiction, the availability of this assistance may raise questions concerning the sixth amendment right to counsel. In *Proffitt v. United States,*[50] the Fourth Circuit examined the extent to which the sixth amendment[51] demands that a court-appointed attorney in a federal case pursue a possible insanity defense. The issue in *Proffitt* was whether the attorney had denied his client effective assistance by failing to petition the trial court for a psychiatrist at government expense.

Proffitt had been convicted in federal district court of a bank robbery charge and faced another trial for a similar offense.[52] His attorney visited him in jail and at that time Proffitt inquired whether anything else could be done to prevent his conviction at the second trial.[53] His attorney answered that the possibility of an insanity defense existed, but that any possibility of success depended upon concealing the defense from the government until trial.[54] Accordingly, the attorney reasoned that legal counsel would have to be retained privately at a cost of $5,000,[55] and that the defendant would have to pay $5,000 for the necessary psychiatric examinations.[56] Because the defendant could not afford the private examination,

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[45] Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977). In dicta, the *Marzullo* court said that each defendant must establish that in his case defense counsel's error resulted from neglect or ignorance. *Id.* at 544.

[46] *Id.; see* notes 1-5 and accompanying text *supra.*

[47] *Compare* VA. CODE ANN. § 19.2-169 (1975) (state provides no assistance beyond determination of competency to stand trial) *with* NEV. REV. STAT. § 7.135 (1975) *and* N.C. GEN. STAT. § 7A-450 (1969) (additional assistance for indigents upon showing of need).

[48] 28 U.S.C. §2241 (1976).

[49] 18 U.S.C. §3006A(e) (1973); *see* note 57 *infra.*

[50] 582 F.2d 854 (4th Cir. 1978).

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

[52] 582 F.2d at 856.

[53] *Id.* at 855-56.

[54] *Id.* at 856.

[55] *Id.*; application for additional assistance would have compelled disclosure of the defense to the prosecution. *See* note 56 *infra.*

[56] 582 F.2d at 856. The attorney's avowed intention in requiring a retainer and the defendant's payment of psychiatric expenses was to circumvent the rule in United States v. Albright, 388 F.2d 719 (4th Cir. 1968). According to Proffitt's counsel, *Albright* held that disclosure of the intention to employ an insanity defense might result in the court ordering the defendant to submit to a psychiatric examination. If the defense were to obtain a government-paid psychiatric examination under the auspices of the Criminal Justice Act, *see*

the attorney did not pursue the insanity defense.

The Fourth Circuit held that by conditioning investigation and presentation of an insanity defense upon a $10,000 expenditure, Proffitt's court-appointed attorney had not provided adequate representation. The court held that the attorney's conduct was contrary to the purpose of the Criminal Justice Act of 1964,[57] case law,[58] and the directives of the American Bar Association Standards Relating to the Administration of Criminal Justice.[59] Consequently, the court remanded the case, directed the district court to appoint a psychiatrist, and ordered a new trial contingent upon defense counsel agreeing to build a defense around the findings of the

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note 57 *infra*, the defense attorney reasoned that this would destroy the element of surprise necessary as a trial tactic in the presentation of the defense. The circuit court rejected the defense attorney's reading of *Albright*. 582 F.2d at 858. The court reasoned that *Albright* was not intended to force indigents to be examined by government psychiatrists; rather, the purpose was to give the government the opporutnity to carry its burden of proof on the insanity issue. *Id.* Regardless of the intent of *Albright*, a request for a government-paid examination would have forced the defense to disclose its reasons for thinking that such an examination was necessary. The element of surprise would have been destroyed. *See* Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971) (construing *Albright* to state that when defendant has raised insanity issue he has waived his right to silence).

[57] 18 U.S.C. §3006A (1973) codifies the Criminal Justice Act of 1964. The Act was intended to insure adequate representation to impecunious defendants. 582 F.2d at 857, *citing* S. REP. No. 346, 88th Cong., 1st Sess. 1 (1963). Subsection (e) applies to *Proffitt* and reads, in relevant part:

> SERVICES OTHER THAN COUNSEL. Counsel for a defendant who is financially unable to obtain investigative, experts, or other services necessary to an adequate defense in his case may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain the services on behalf of the defendant. The court may, in the interests of justice, and upon a finding that timely procurement of necessary services could not await prior authorization ratify such services after they have been obtained.

18 U.S.C. § 3006A(e) (1973), *as amended* by Act of Sept. 3, 1974, Pub. L. 93-412, § 3, 88 Stat. 1093.

[58] *See* United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976) (indigent defendant with recent history of mental illness and where insanity sole issue in case, counsel ineffective when additional assistance not sought); United States v. Taylor, 437 F.2d 371 (4th Cir. 1971) (where court's initial inquiry is insufficient for insanity defense, failure to grant additional assistance comprises denial of right to effective assistance); Owsley v. Peyton, 368 F.2d 1002 (4th Cir. 1966) (failure of attorney in state case to alert court to doubt of defendant's sanity renders assistance of counsel ineffective).

[59] 582 F.2d at 859. ABA STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 1.5 (service provided to defendant should include investigatory and expert services for effective defense both at trial and non-trial phases); ABA STANDARDS RELATING TO THE DEFENSE FUNCTION § 3.9 (attorneys should provide same quality of service to indigents as to paying clients). *But see* Brief for Appellant, appendix p. 90, Proffitt v. United States, 582 F.2d 854 (4th Cir. 1978) (district court judge thought defense would have been meritless); CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-4 (advocate may urge any permissible construction of law favorable to client without regard to his professional opinion as to likelihood that construction will ultimately prevail; however, lawyer is not justified in asserting frivolous position in litigation). *See also* Anders v. California, 386 U.S. 738, 744, *rehearing denied*, 388 U.S. 924 (1967) (when on appeal counsel discovers his position is frivolous, he should advise court and request permission to withdraw appeal).

psychiatrist.[60] According to the court,[61] Proffitt's constitutional claim originated in the denial of "the opportunity to determine with expert help whether he had a defense worth presenting."[62]

The Criminal Justice Act of 1964 permits an attorney to obtain nonlegal assistance at government expense.[63] To qualify under the Act, the attorney must demonstrate the necessity of the services to an adequate defense[64] as well as the defendant's inability to pay.[65] As articulated in *Proffitt,* the Criminal Justice Act guarantees adequate representation to defendants unable to afford experts necessary for a thorough investigation of all avenues of defense.[66] In *Proffitt* the Fourth Circuit extended the language of the statute so that instead of an attorney's option to apply for services other than counsel, a duty to apply exists when an insanity defense is a reasonable possibility.[67] Thus, even though Proffitt's attorney reasoned that the request of these funds would in itself make the insanity defense unworthy of further pursuit, he had an obligation to request the assistance.[68] The duty to request assistance arises from the standard of representation which lawyers must provide to their clients.[69] *Proffitt* indicates that the court views the Criminal Justice Act as so central to the concept of effective assistance that an attorney's failure to exploit its provisions constitutes a denial of the defendant's sixth amendment rights.[70]

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[60] 582 F.2d at 859-60, *citing* United States v. Taylor, 437 F.2d 371 (4th Cir. 1971).

[61] 582 F.2d at 859.

[62] *Contra,* Brief for Appellant, appendix p. 90, Proffitt v. United States, 582 F.2d 854 (4th Cir. 1978) (district court judge thought counsel was "drumming up a defense"); Proffitt v. United States, 582 F.2d at 861 (Widener, J., dissenting).

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

[64] *Id. See* United States v. Durant, 545 F.2d 823 (2d Cir. 1976) (word "necessary" must be construed with intention of Criminal Justice Act in mind); United States v. Chavis, 476 F.2d 1137 (D.C. Cir. 1973) (quality rather than quantity of expert assistance is crucial in determining necessity and validity of requests); United States v. Theriault, 440 F.2d 713 (5th Cir. 1971) (what is "necessary" is not susceptible to test; rather determination must be made on case-by-case basis); Christian v. United States, 398 F.2d 517 (10th Cir. 1968) (ascertaining necessity requires ex parte determination of need); United States v. Bowe, 360 F.2d 1 (2d Cir. 1966), *cert. denied,* 385 U.S. 961 (1967) (denial of motion not erroneous where defendant failed to demonstrate that denial resulted in ineffective assistance).

[65] See note 59, *supra*; United States v. Chavis, 476 F.2d 1137 (D.C. Cir. 1973) (determination of defendant's inability to pay essential for qualification under terms of Act); United States v. Birell, 470 F.2d 113 (2d Cir. 1972) (rehearing on indigency unnecessary when new counsel appointed); United States v. Cohen, 419 F.2d 1124 (8th Cir. 1969) (question not whether defendant destitute, but rather whether legal representation beyond his means).

[66] 582 F.2d at 856; *accord,* United States v. Durant, 545 F.2d 823 (2d Cir. 1976); United States v. Grammer, 513 F.2d 673 (9th Cir. 1975); United States v. Chavis, 476 F.2d 1137 (D.C. Cir. 1973); Tyler v. Lark, 472 F.2d 1077 (8th Cir. 1973), *cert. denied,* 414 U.S. 864 (1974); United States v. Tate, 419 F.2d 131 (6th Cir. 1969).

[67] *Cf.* United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976) (attorney determines propriety of seeking additional assistance). *But see* United States v. Schultz, 431 F.2d 907 (8th Cir. 1970) (court ought not authorize mere "fishing expeditions" in ruling on 18 U.S.C. §3006A(e) motions).

[68] 582 F.2d at 859.

[69] *Id.* at 857; *see* Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977).

[70] 582 F.2d at 857.

The Fourth Circuit supported its view of the Criminal Justice Act by reference to two sections of the applicable ABA Standards.[71] From the Standards Relating to Providing Defense Services, the court derived support for the proposition than an indigent should have access to expert services.[72] From the Standards Relating to the Defense Function, the court asserted that an appointed lawyer must represent his indigent client with the same vigor as he would a paying client.[73] Thus, the ABA Standards taken in conjunction with the Criminal Justice Act provide the ethical and statutory basis for the proposition that whenever the possibility exists that expert assistance might aid an indigent in the exploration of potential defenses, the attorney must apply to the court for assistance under the Criminal Justice Act.

Finally, the court examined case law to determine that the Criminal Justice Act applies to psychiatric help[74] and that the failure of a defense attorney to seek psychiatric assistance when the need is apparent is a deprivation of the defendant's sixth amendment rights.[75] The court reasoned further that failure to bring to the court's attention the attorney's uncertainty as to the mental competence of the defendant denies the defendant his right to counsel.[76] The court concluded that the only remedy for these failures is to grant the defendant a new trial.[77]

Proffitt has established "objective criteria"[78] to determine the effectiveness of counsel for indigents.[79] Attorneys must utilize experts who are necessary to the defense of indigents to the same extent that those experts would be used for a defendant of unlimited means.[80] Additionally, attorneys must apply to the court for financial assistance under the Criminal Justice Act whenever the need is apparent,[81] and must inform the court of any doubts they have as to the defendant's sanity.[82]

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[71] *Id. See* note 59 *supra.*

[72] 582 F.2d at 857.

[73] *Id.*

[74] *Id., citing* United States v. Taylor, 437 F.2d 371 (4th Cir. 1971).

[75] 582 F.2d at 857, *citing* United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976).

[76] 582 F.2d at 857, *citing* Owsley v. Peyton, 368 F.2d 1002 (4th Cir. 1966).

[77] 582 F.2d at 859.

[78] *Id.* at 857-58.

[79] *See* notes 59 & 67 *supra.*

[80] *See* 582 F.2d at 857; United States v. Hartfield, 513 F.2d 254, 257 (9th Cir. 1975), *citing* United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1973), United States v. Theriault, 440 F.2d 713, 716-17 (5th Cir. 1971) (Wisdom, J., concurring) (18 U.S.C. §3006A(e) requires judge to authorize services whenever reasonable attorney would employ such service for client of independent financial means); Seff v. United States, 434 F. Supp. 548 (D. Tenn. 1977) (indigent may not be granted rights not possessed by non-indigents).

[81] 582 F.2d at 857. *But cf.* United States v. Cox, 439 F.2d 86 (9th Cir. 1971), *cert. denied,* 404 U.S. 869 (1971); United States v. Meek, 388 F.2d 936 (7th Cir.), *cert. denied,* 391 U.S. 951 (1968) (absent clear indication of incompetence or prejudice to defendant, failure of attorney to utilize §3006A(e) will not be attacked on theory that it was part of trial strategy).

[82] 582 F.2d at 857; *accord* United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974); Andrews v. United States, 403 F.2d 341 (9th Cir. 1968). *Contra,* Marcelin v. Mancusi, 462 F.2d 36 (2d Cir. 1972).

Using these standards, the Fourth Circuit reasoned that the attorney's demand for payment of a fee and expenses for the necessary expert assistance contravened the obvious intent of the Criminal Justice Act by conditioning the presentation of a defense upon the defendant's economic circumstances.[83] His demand for payment of attorney's fees was contrary to the ABA Standards since the attorney was not providing the indigent with the same services he would provide to a paying client.[84] Likewise, counsel's failure to bring to the attention of the court his doubts about the defendant's sanity contravened case law[85] as did his failure to petition the court for funds under the Criminal Justice Act.[86] In virtually every phase of his conduct relating to the investigation and presentation of the possible insanity defense, the court found the attorney deficient.[87]

The Fourth Circuit distinguished *Proffitt* from the situation[88] in which

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[83] 582 F.2d at 858.

[84] *See* note 59 *supra.*

[85] 582 F.2d at 857. However, the dissent noted that neither the trial judge nor the defense attorney doubted the defendant's sanity. *Id.* at 561 (Widener, J., dissenting).

[86] 582 F.2d at 859. *See* note 67 *supra.*

[87] 582 F.2d at 858-59. The Fourth Circuit stated that Proffitt's attorney had improperly read United States v. Chandler, 393 F.2d 920, 929 (4th Cir. 1968), as holding that a psychopathic or sociopathic personality was not sufficient to establish legal insanity. In *Chandler,* the court considered the two appellants' appeals based on insanity. One appellant claimed insanity on the basis of a "passive aggressive personality with alcoholic features." *Id.* at 922. The second appellant appealed on the basis of a psychiatric report which diagnosed his deficiency as a "sociopathic personality disturbance, antisocial type." *Id.* at 923. In affirming the convictions of both appellants, the court confirmed its adherence to a two-pronged test for insanity. Under this standard, a person is not criminally responsible if at the time he commits a crime a mental disease or defect deprives him of the capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. However, "the term 'mental disease or defect' do [sic] not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." *Id.* at 926. The court stated that the test for insanity should not be mechanical but should allow for adaptation to suit the circumstances of each case. *Id.* at 927. The court inserted the caveat that in deciding the validity of insanity pleas, the courts need not excuse all defendants who have psychiatric problems to explain their deviant conduct. The presumption should be that anyone who has freedom of will should be responsible for his actions before the law. *Id.*

The *Proffitt* court said that because of the availability of expert assistance, the defense attorney should not have determined Proffitt's sanity within the meaning of *Chandler.* 582 F.2d at 858. What the *Proffitt* court did not recognize is that the legal definition of insanity is often quite different from the medical definition. *See* WECHT, WATSON & POLLACK, *supra* note 38 at 182. As a result, the assertion that the defense attorney, after having defended a case using a similar defense, lacked the requisite knowledge to determine Proffitt's mental competence, is questionable.

[88] *See* Snider v. Cunningham, 292 F.2d 683 (4th Cir. 1961). In *Snider,* the petitioner alleged ineffective assistance of counsel resulting from defense attorney's failure to raise the defense of insanity at the time of the commission of the offense. In the course of the habeas corpus proceedings, two physicians testified that although defendant was neither psychotic nor neurotic, his sexually abnormal behavior demonstrated a psychopathic personality disorder with an antisocial reaction. Despite the circuit court's holding that no evidence existed suggesting the defendant incompetent to stand trial, the court nonetheless ruled that had the physicians testified during trial the question of sanity would have reached the jury. The court declined to declare the defendant's counsel ineffective since at the time of trial the defendant insisted that he had not committed the crime.

a pre-trial psychiatric report found that the defendant was of sound mind but a post-trial examination revealed that he had suffered from a mental disease since the time of the offense.[89] In that situation the Fourth Circuit found no denial of effective assistance since the attorney had reasonably relied upon the results of a psychiatric examination to determine that an insanity defense lacked merit.[90] *Proffitt,* however, presented an entirely different situation. According to the court, the failure of Proffitt's attorney to assert the insanity defense resulted from the defendant's inability to afford a psychiatric examination rather than from the questionable validity of the defense.[91] The court stressed that the attorney's belief in the likelihood of a successful insanity defense triggered his duty to request additional assistance.[92]

While Judge Widener's dissent did not disagree with the abstract principles of the majority, he took exception to the application of those principles to the facts of this case.[93] Working primarily from the record of the district court, he interpreted the facts in a manner that would have affirmed the district court's judgment that Proffitt's representation had been competent. The dissent focused on the fact that the possible change in the attorney's status from appointed to retained had been the suggestion of the defendant, not the attorney.[94] The defendant then asked whether anything else could be done.[95] The attorney responded that if certain psychiatrists in Washington, D.C., were to examine him and if their reports were to find Proffitt not responsible for his actions, then their reports might be presented as favorable evidence at the trial.[96] For any chance of success, however, the attorney said that the defense would have to take the government by surprise so that no rebutting testimony could be presented.[97] The dissent emphasized that the defendant initiated the conversation concerning other potential defenses. Whereas the majority characterized the defense attorney as agreeing to pursue a defense only if paid $10,000, the

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[89] *Id.* at 684.

[90] 582 F.2d at 858.

[91] *Id.*

[92] *Id.* at 858-59. *Contra, id.* at 860 (Widener, J., dissenting). *See also* Wilkins v. Maryland, 402 F. Supp. 76 (D. Md. 1975), *aff'd mem.*, 538 F.2d 327 (1976), *cert. denied,* 429 U.S. 1044 (1977) (defendant has no constitutional right to examination by a psychiatrist of his own choice).

In United States v. Matthews, 472 F.2d 1173 (4th Cir. 1973), the Fourth Circuit established the policy within the circuit that whenever practical the court ought to permit the defendant to be examined by the psychiatrist of his own choice. United States v. Davis, 481 F.2d 425 (4th Cir.), *cert. denied,* 414 U.S. 977 (1973) clarified the ruling in Matthews on two key points: First, the court implicitly confirmed that the policy in favor of appointing the psychiatrist of defendant's choosing should not be construed as a constitutional right. Wilkins v. Maryland, 402 F. Supp. at 80. Second, *Davis* held that the rule in *Matthews* was not retroactive. Thus Proffitt, who was originally tried in 1971, could not benefit from the policy articulated in *Matthews. Id.*

[93] 582 F.2d at 860 (Widener, J., dissenting).

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

dissent contended that by his candor in responding to the defendant's questions, the attorney may have been "too competent, but we should not condemn him for it."

Despite the impression given by *Satterfield* and *Proffitt*, the Fourth Circuit has not made a formal distinction in its rules between those cases originating in federal court and those originating in state court.[98] The Fourth Circuit's use of sweeping language concerning sixth amendment requirements in *Proffitt* suggests the necessity of additional assistance for an indigent defendant regardless of whether he is tried in state or federal court.[99] The Fourth Circuit has required the assistance of a psychiatrist

[98] Two other recent Fourth Circuit habeas corpus cases indicate the court's direction in applying the *Marzullo* standard. In Fuller v. Luther, 575 F.2d 1098 (4th Cir. 1978), appellant Fuller was convicted of robbery and in a writ of habeas corpus alleged ineffective assistance of counsel on six grounds. *Id.* at 1099. The writ alleged that the defense counsel did not object to testimony concerning defendant's identification even though that identification, according to Fuller, was fatally tainted with suggestiveness. *Id.* at 1100. Nor did the attorney object to poice testimony concerning a statement made during the identification proceeding. *Id.* Furthermore, the attorney presented no defense on behalf of the defendant. *Id.* Fuller also contended that the attorney was drinking heavily during the trial. *Id.* at 1099. Finally, Fuller alleged that the attorney never perfected an appeal because he was suffering from mental illness. On appeal from a denial of the writ, the cirucuit court stated that Fuller had not met his burden of proof on the allegation of ineffective assistance. *Id.* at 1106.

In Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978), the Commonwealth of Virginia appealed the granting of a writ of habeas corpus by the district court. Wood v. Zahradnick, 430 F. Supp. 107 (E.D. Va. 1977). Defendant Wood had been convicted of seven charges stemming from the beating and rape of a sixty-seven year old woman. 578 F.2d at 981. The Fourth Circuit faced the issue of when the right to effective assistance of counsel attaches. *Id.* at 982. Wood's attorney apparently undertook no pre-trial preparation. The only defense presented was that his client was addicted to heroin, had consumed large quantities of moonshine whiskey on the night of the crime and had no recollection of the criminal acts. Defense counsel made no attempt to seek a psychiatric evaluation of the defendant. *Id.* at 982. Had the attorney done so, he might have been able to construct an insanity defense based upon alcoholic pathological intoxication. *Id.*

The court held that the defense attorney's assistance failed to measure up to the *Marzullo* standard. Since insanity was the only plausible defense, failure to pursue the defense rendered counsel ineffective. Furthermore, the court said that the attorney was not entitled to rely upon his belief that Wood was not insane at the time of commission of the criminal acts. Although the circuit court found no fault in the attorney's courtroom performance, it found his preparation to be substandard. Hence, the court ruled that the right to reasonably competent counsel attaches at the moment an attorney is appointed to the defense of an accused. *Id.* at 982.

[99] *See* Jacobs v. United States, 350 F.2d 571 (4th Cir. 1965). Petitioner had pled guilty to an indictment charging violation of the Internal Revenue laws relating to distilled spirits. While in jail, he filed a writ of habeas corpus contesting his mental condition at the time of his guilty plea. At a hearing to determine the defendant's mental capacity, the defense counsel presented lay testimony that the defendant was a "Low Moron," and had previously attempted suicide. *Id.* at 572.

On appeal, the Fourth Circuit held that Jacobs had the right to a psychiatric examination. The court said that defendant's lack of expert assistance resulted only from his inability to pay. Since the Criminal Justice Act was not in effect at the time, the court cited five Supreme Court cases to support the statement that the Court has repeatedly held that discrimination on the basis of poverty is intolerable in criminal proceedings. *Id.* at 573, *citing* Lane v. Brown, 372 U.S. 477 (1963); Douglas v. California, 372 U.S. 353 (1963); Gideon v.

where no statute existed to make such additional assistance obligatory.[100] The court justified this action on the abhorrence of the law for discrimination based on poverty[101] and on the necessity of a psychiatrist being tantamount to the effective assistance of a lawyer.[102] Thus, the *Satterfield* holding is inconsistent with the broader principles previously expressed by the Fourth Circuit, and the case should be limited to its facts. Since Satterfield had a legitimate reason for further psychiatric examination,[103] the court's denial of additional assistance precluded Satterfield from obtaining the quality representation demanded by the Fourth Circuit in past cases. Although the *Satterfield* court did imply that a situation might arise in which a request such as Satterfield's would be granted, the court's denial of a request for raw information central to a colorable defense is difficult to rationalize in light of previous Fourth Circuit decisions.

The Pro Se Right and Mid-Trial Dismissal of Appointed Counsel

In *United States v. Dunlap,*[104] the Fourth Circuit faced the issue of whether the sixth amendment as interpreted in *Faretta v. California*[105] accords a defendant the right to make his own closing argument.[106] The

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Wainwright, 372 U.S. 335 (1963); Coppedge v. United States, 369 U.S. 438 (1962); Griffin v. Illinois, 351 U.S. 12 (1956). Furthermore, the court made the unqualified statement that in this situation the need for a psychiatrist's service was no less than the need for assistance of counsel. 350 F.2d at 572-73; *accord,* United States v. Taylor, 437 F.2d 371, 377 n.9 (4th Cir. 1971). The court said that the prison psychiatrist who examined the defendant was impartial during the examination, but acted in an adversary capacity when on the stand as a prosecution witness, 350 F.2d at 573. *But cf.,* Proctor v. Harris, 413 F.2d 383 (D.C. Cir. 1969) (*see* note 38, *supra*).

The *Jacobs* opinion does not limit its holding to federal courts. The logical implication of *Jacobs* is that whenever an accused raises an insanity defense he is entitled to the aid of a psychiatrist for the formation and presentation of his defense. *Satterfield,* however, reveals that this is not the case. *See* text accompanying notes 11-15 *supra. Jacobs* certainly is contrary to the argument implicit in *Satterfield* that a thorough examination satisfies all constitutional requirements by giving the defense the information necessary for the preparation of an effective case. 572 F.2d at 445.

[100] Jacobs v. United States, 350 F.2d 571 (4th Cir. 1965).

[101] *Id.* at 573.

[102] *Id.* at 572-73.

[103] *See* note 10, *supra.*

[104] 577 F.2d 867 (4th Cir. 1978).

[105] 422 U.S. 806 (1975). Faretta was charged by state authorities with grand theft. A considerable time before his trial he requested permission of the court to present his own defense. *Id.* at 807. Originally the court granted Faretta's request, but later withdrew it after a judicially convened hearing at which the judge decided that Faretta's waiver of his right to counsel had been neither knowing nor intelligent. *Id.* at 808. Following conviction and exhaustion of state appellate remedies, Faretta appealed to the Supreme Court on sixth and fourteenth amendment grounds. *Id.* at 807.

[106] The Judiciary Act of 1789 was the original statutory provision for the pro se right, the right to act as one's own counsel. That part of the Act is now codified in 28 U.S.C. §1654 (1976), which provides that "[I]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are premitted to manage and conduct causes therein." *See* Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (sixth amendment guarantees right to cross-examine one's accusors); Adams

court ruled that the right to deliver one's own closing argument is at the trial judge's discretion. Absent abuse of that discretion, the appellate court will not disturb the lower court's decision.[107]

Dunlap involved the defendant's loss of confidence in his appointed counsel. The attorneys had neglected to have a frivolous aiding and abetting charge dismissed prior to trial,[108] and had failed during the trial to focus the jury's attention upon recurring discrepancies in the witnesses' testimony.[109] Dunlap's concern with his attorneys' performance induced him to assert what he thought was his constitutional right to dismiss counsel and make his own closing argument.

The Fourth Circuit based its refusal to permit the pro se closing argument on policy considerations. The court supported its holding by distinguishing *Dunlap* and *Faretta.* In *Faretta* the defendant moved to defend his case pro se prior to trial and therefore had a constitutional right to act as his own counsel.[110] Dunlap, on the other hand, moved to proceed pro se after the start of the trial. The circuit court held that because of the timing of Dunlap's motion, the trial judge correctly exercised his discretion in deciding that the situation did not warrant granting the defendant's motion.[111] The court stated that in making his decision, a trial judge should consider factors such as minimization of disruption,[112] avoidance of inconvenience and delay,[113] maintenance of continuity,[114] and comprehension by the jury.[115] Such considerations typify judicial trepidations about mid-

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v. McCann, 317 U.S. 269, 275 (1942) (accused may waive right to counsel). *See also* Price v. Johnston, 334 U.S. 266 (1948); Carter v. Illinois, 329 U.S. 173 (1946).

Prior to Faretta v. California, 422 U.S. 806 (1975), which held that the constitutional right to pro se defense was applicable to state courts, the pro se right was recognized in the constitutions of thirty-six states. *Id.* at 813. For the historical background of the pro se right, see *id.* at 812-17.

[107] 577 F.2d at 869.

[108] Brief for Appellant at 19, United States v. Dunlap, 577 F.2d 867 (4th Cir. 1978).

[109] *Id.*

[110] 577 F.2d at 868-69.

[111] *Id.*; *accord,* United States v. Private Brands, 250 F.2d 554, 557 (2d Cir. 1957); United States v. Foster, 9 F.R.D. 367, 372 (S.D.N.Y. 1949). *See generally* 28 U.S.C. § 1654 (1976) (defendant conducting own case is subject to rules of court).

[112] *See* United States v. Foster, 9 F.R.D. 367, 373 (S.D.N.Y. 1949). In *Foster,* the defendant, an attorney, requested to make his own closing argument. The judge denied the request because of the defendant's violent outbursts during the trial. *See also* Note, 13 AM. CRIM. L. REV. 335, 357 (1975).

[113] *Cf.* United States v. Bentvena, 319 F.2d 916, 936 (2d Cir.), *cert. denied sub nom.* Ormento v. United States, 397 U.S. 928 (1963) (right to counsel cannot be manipulated to interfere with fair administration of justice); United States v. Abbamonte, 348 F.2d 700, 703-04 (2d Cir. 1965) (upsetting judicial process by repeated dismissal of counsel may be interpreted as waiver of right to counsel; waiver must be viewed with judicial discretion). *See also* Witt v. Nash, 342 F.2d 791 (8th Cir. 1965).

[114] *See* Dearinger v. United States, 344 F.2d 309, 311 (9th Cir. 1965) (election to be represented by counsel cannot be revoked without regard to impact upon the orderly administration of justice); United States v. Birrell, 286 F. Supp. 885, 895 (S.D.N.Y. 1968) (defendant seeking mid-trial pro se assertion must show that prejudice resulting from denial of his pro se request outweighs potential disruption of trial).

[115] *Cf.* United States v. Conder, 423 F.2d 904, 908 (6th Cir.), *cert. denied, sub nom.,*

trial pro se assertions and are the basis of the rule that the pro se right is absolute only when asserted prior to trial.[116] The Fourth Circuit reasoned that, due to the large body of case law existant prior to *Faretta* which held that the defendant must assert the pro se right prior to trial,[117] the timing of the defendant's assertion remains a valid factual distinction even after *Faretta*.[118] Thus, the Fourth Circuit concluded that *Faretta* did not alter the status of the pro se right except to establish that the right is constitutional rather than statutory.[119]

Despite the *Dunlap* court's adherence to generally accepted policy, the court failed to relate these policy considerations to the facts of the case. For reasons similar to those expressed in *Dunlap*, other courts generally have denied mid-trial pro se assertions due to the defendant's unruliness and apparent intent to disrupt the judicial process.[120] Neither the appellee nor the court in *Dunlap*, however, mention any such unruliness or disruptive intent on the defendant's part. Having given reasons for not granting a pro se motion, the court neither said which of those reasons applied to Dunlap nor supplied any guidelines which would lead to favorable consideration of a pro se motion. Consequently, *Dunlap* offers little insight into the Fourth Circuit's standards for a favorable mid-trial pro se assertion.

The Fourth Circuit regarded the petitioner's claim more as a disruption

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Pegram v. United States, 400 U.S. 958 (1970) (granting or denying motion based on pro se right after commencement of trial should take into account possibility of disruption of jury trial).

[116] *See, e.g.*, United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965); Juelich v. United States, 342 F.2d 29, 32 (5th Cir. 1965); Butler v. United States, 317 F.2d 249, 258 (8th Cir.), *cert. denied*, 375 U.S. 838 (1963).

[117] Under the majority rule the pro se right must be clearly and unequivocally asserted prior to trial. *See, e.g.*, McNamara v. Riddle, 563 F.2d 125, 126-27 (4th Cir. 1977); United States v. Bennett, 539 F.2d 45, 50 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976) (reason for requirement of unequivocal assertion of pro se right is to be able to ascertain that waiver of counsel was knowing and intelligent); United States *ex rel.* Martinez v. Thomas, 526 F.2d 750, 754-56 (2d Cir. 1975) (trial court must make certain that unequivocal assertion of pro se right and knowing and intelligent waiver of right to counsel have taken place to protect against possible due process violation); United States v. Trapnell, 512 F.2d 10, 11-12 (9th Cir. 1975) (duty of trial court is to assure that decision to proceed pro se is competently and intelligently made; trial judge should not direct defendant's case once pro se election made). *See also* Note, *The Right to Defend Pro Se in Criminal Proceedings*, 1973 WASH. U. L. Q. 679, 688-689 (1973).

[118] *See* Sapienza v. Vincent, 534 F.2d 1007, 1010 (2d Cir. 1976) (*Faretta* had no bearing on rule that pro se right is sharply curtailed if not assetted prior to trial); People v. Windham, 137 Cal. Rptr. 8, 10, 560 P.2d 1187, 1189 (1977) (pro se right is unconditional only if invoked within reasonable time prior to trial). *Contra*, Note, *The Right to* Pro Se: Faretta v. California *and Beyond*, 40 ALB. L. REV. 423, 440 (1976) (*Faretta* suggests position that mid-trial pro se assertion should not be denied except in extreme circumstances); Note, *The Right to Defend Pro Se in Criminal Proceedings*, 37 OHIO ST. L. J. 220, 234 (1976) (suggesting that *Faretta* repudiates judicial doctrine that pro se right must be asserted prior to trial); *but cf.*, Chapman v. United States, 553 F.2d 886, 893 n.13 (5th Cir. 1977) (conclusions of 37 OHIO ST. L. J. at 234 are questionable).

[119] *See* 577 F.2d at 868; *accord* United States v. Montgomery, 529 F.2d 1404, 1406 (10th Cir. 1976).

[120] *See, e.g.*, United States v. Dougherty, 473 F.2d 1113, 1124-25 (D.C. Cir. 1972).

of judicial efficiency than as an attempt to rectify possible ineffective assistance of counsel.[121] The court's fear of disruption becomes apparent when the considerations articulated in *Dunlap* are compared with the rule in the Second Circuit.[122] The Second Circuit has stated, as among those criteria for consideration of a mid-trial pro se motion, "the reason for the request, the quality of the counsel representing the party, and the party's proclivity to substitute counsel."[123] Therefore, the legitimacy of the defendant's claim is the basis of decision on a mid-trial pro se assertion in the Second Circuit. In contrast, the Fourth Circuit in *Dunlap* focused on administrative efficiency and declined to scrutinize the reasoning of the trial judge.

A factual rather than legal distinction was the basis of the Fourth Circuit's rejection of the petitioner's claim that *Faretta* granted to defendants the constitutional right to pro se assertion.[124] Language in the *Faretta* opinion supports the position of both the Fourth Circuit and the petitioner. The Supreme Court reasoned that when the accused chooses to be represented by counsel, "law and tradition" give the attorney certain powers of

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[121] Brief for Appellant at 21, United States v. Dunlap, 577 F.2d 867 (4th Cir. 1978).

[122] *See, e.g.*, Sapienza v. Vincent, 534 F.2d 1007, 1009-11 (2d Cir. 1976) (refusal of pro se request proper where district court found that disagreement with attorney was over relatively unimportant trial tactic, where attorney competent and defendant obstinate and where request followed multiple abortive counsel substitutions); United States v. Catino, 403 F.2d 491, 497-98 (2d Cir. 1968), *cert. denied*, 394 U.S. 1003 (1969) (to grand midtrial pro se request, defendant must show that legitimate interests outweight possible disruption; where defendant dismissed attorney for no apparent reason then requested permission to argue pro se, trial court did not err in refusing request); *cf.* United States v. Denno, 348 F.2d 12, 16 (2d Cir. 1965) (where case called on calendar but jury not chosen, no possible disruption in granting pro se request); *see generally*, United States v. Bentvena, 319 F.2d 916, 934-36 (2d Cir. 1963); United States v. Gutterman, 147 F.2d 540, 541-42 (2d Cir. 1945).

[123] Sapienza v. Vincent, 534 F.2d 1007, 1010 (2d Cir. 1976). In *Sapienza*, the defendant, charged with forgery and larceny, would not discuss the case with his attorney. The court denied the attorney's motion to be dismissed from the case because of the defendant's uncooperativeness. The motion was renewed and denied several more times. *Id.* at 1008. Toward the end of the trial, the defendant made a pro se motion, apparently because he disagreed with his attorney over which witnesses to subpoena. *Id.* at 1009. After conviction and exhaustion of state remedies, the defendant filed a habeas corpus petition alleging ineffective assistance of counsel. The district court denied the writ, and the Second Circuit affirmed, finding that counsel had been effective. *Id.* The circuit court held that in addition to defendant's lack of cooperation and decorum, the defendant had not demonstrated that his legitimate interest in arguing pro se outweighed the disruptions which might ensue. *Id.* at 1010-11.

[124] 577 F.2d at 869. The *Dunlap* court also held that according to the rule of United States v. Lang, 527 F.2d 1264 (4th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976), the district court properly denied the defendant's motion to appear as co-counsel. *Id.* at 868. Although a broad reading of *Faretta* might suggest that the sixth amendment confers upon the defendant the right to have any representation he wishes, courts have refused to interpret *Faretta* in this fashion. *See, e.g.*, United States v. Hill, 526 F.2d 1019, 1924-25 (10th Cir. 1975), *cert. denied*, 425 U.S. 940 (1976); United States v. Wolfish, 525 F.2d 457, 462-63 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976). For a substantial treatment of courts' reactions to hybrid counsel attempts both before and after *Faretta*, see Note, *The Accused Co-counsel: The Case for the Hybrid Defense*, 12 VAL. L. REV. 329 (1978).

decision over trial strategy.[125] Control by the attorney "can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative."[126] The language appears to give unequivocal support to the Fourth Circuit's position. Conversely, the *Faretta* court also said that the attorney is the "assistant" of the defendant,[127] and that thrusting counsel upon the defendant violates the logic of the sixth amendment.[128] Representation by an unwanted attorney is a "tenuous and unacceptable legal fiction"[129] since the defense presented is not that of the accused.[130] Certainly this language supports the petitioner's position in *Dunlap*. By distinguishing the cases according to the time of the assertions, the Fourth Circuit avoided consideration of whether representation by an unwanted attorney amounts to a tenuous legal fiction when dissatisfaction with the attorney arises after the start of trial. The soundness of the Fourth Circuit's factual distinction is questionable since the Supreme Court never made that distinction itself,[131] despite the body of case law focusing on the timeliness of the assertion.[132] Given the ambiguity of the Supreme Court's opinion in relation to the *Dunlap* case, avoidance of a discussion of the degree of applicability of *Faretta* to *Dunlap* is at least understandable.

The basis of the *Dunlap* decision is the Fourth Circuit's concern for the implications of granting the petitioner's motion. By expressing broad policy considerations to the exclusion of the facts of the particular case, the *Dunlap* court appears to have been preoccupied with the precedent that would have been established by granting the petitioner's motion. Because of the absence of allegations that the petitioner was disruptive or obstreperous during his trial, the Fourth Circuit's primary concern with courtroom order seems misplaced.[133] The criteria adopted by the Second Circuit would have provided a more appropriate standard for the facts of this case

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[125] 422 U.S. at 820.

[126] *Id.*

[127] *Id.* at 821.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Faretta* discussed the time of assertion of the pro se right in the recitation of the facts, *id.* at 806, and in the conclusory assertion that one indication of the knowing and intelligent nature of Faretta's waiver was that it was made well in advance of the trial. *Id.* at 835. In spite of the long-standing requirement that waiver of a constitutional right must be knowing and intelligent, Johnson v. Zerbst, 304 U.S. 458, 464 (1938), the Supreme Court has drawn this traditional notion of waiver into question by holding that certain rights, if not actively asserted, may have been waived. *See* Estelle v. Williams, 425 U.S. 501, 507-13 (1976) (defendant who sat through trial in prison garb waived any due process violations arising therefrom). *Estelle* suggests that some rights require knowing and intelligent waivers while other rights may be waived by non-assertion. Indeed, *Estelle* may be read to say that the right to counsel is the only right which requires a knowing and intelligent waiver. Rosenberg, *Jettisoning* Fay v. Noia, *Procedural Defaults by Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341, 385 (1978). *Estelle* implies that, absent some plain error, counsel's failure to object to constitutional violations during trial precludes later assertion of the right on appeal. *Id.* at 388.

[132] *See* note 117 *supra*.

[133] *See* notes 121-23 and accompanying text *supra*.

since the claim resulted from the petitioner's bona fide dissatisfaction with his attorney.[134]

The Defendant's Waiver of his Attorney's Conflict of Interest

In *United States v. Duklewski*,[135] the Fourth Circuit heard an interlocutory appeal[136] from a district court's denial of a motion to compel disclosure of confidential material regarding an alleged conflict of interest of defense counsel.[137] The issue before the court was whether a complete denial of access to information concerning the conflict of interest violated the defendant's sixth amendment right to counsel of his own choice.[138]

Allegations of conflict of interest[139] first arose at the defendant's pre-

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[134] *See* note 123 *supra*.

[135] 567 F.2d 255 (4th Cir. 1978).

[136] An interlocutory appeal is an appeal from a decree which renders a final decision upon some intervening matter relating to the cause of action. Taylor v. Breese, 163 F. 678, 684 (4th Cir. 1908). The purpose of an interlocutory appeal is to give the defendant the opportunity for relief from a decree which might affect his cause of action. Smith v. Vulcn Iron Works, 165 U.S. 518 (1897). The jurisdiction of circuit courts over interlocutory appeals originates in 28 U.S.C. § 1292 (1976).

For a detailed discussion of interlocutory appeals of disqualification orders, see Note, *Disqualification of Counsel for the Appearance of Professional Impropriety*, 25 CATH. U. L. REV. 343, 346-49 (1976) [hereinafter cited as *Disqualification*]. The appealability of orders of disqualification of counsel arises from the Supreme Court holding in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). The Court held that any order which was final but neither a part of the original cause of action nor required for its disposition along with that cause of action was appealable. *Id.* at 546-47. The Fourth Circuit has suggested that this may be the proper method of appeal in disqualification orders. United States v. Hankish, 462 F.2d 316 (4th Cir. 1972). *Accord*, Tomlinson v. Florida Iron and Metal Inc., 291 F.2d 333 (5th Cir. 1961). *Compare* Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) (Second Circuit will allow an immediate appeal of a disqualification order based on 28 U.S.C. § 1291 (1976)) *with* Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973) (Second Circuit will hear interlocutory appeal from disqualification order as a matter of common law.) *See Disqualification, supra,* at 348. *Duklewski* falls within the ambit of cases concerning disqualification orders because, although the judge did not formally rule that he had disqualified the attorney from the case, the Fourth Circuit held that the judge's conduct amounted to a disqualification order. 567 F.2d at 257. The appealability of the trial judge's determination comports with the rule in *Cohen, supra,* since the status of the defendant's attorney is irrelevant to the merits of the case in chief.

[137] 567 F.2d at 256.

[138] *See* McMann v. Richardson, 397 U.S. 759 (1971); Glasser v. United States, 315 U.S. 60 (1942); Marzullo v. Maryland, 561 F.2d 546 (4th Cir. 1977); *accord,* United States v. Sheiner, 410 F.2d 337 (2d Cir.), *cert. denied,* 396 U.S. 825 (1969).

[139] The reversability of a conviction due to conflict of interest is not subject to a uniform standard. In Glasser v. United States, 315 U.S. 60, 75-76 (1942), the Supreme Court concluded that, absent a waiver, the court need only find that some prejudice resulted from the conflict of interest to warrant a reversal of conviction. Several circuits have interpreted *Glasser* to require the showing of actual prejudice to warrant reversal. *See* Ray v. Rose, 535 F.2d 966 (6th Cir.), *cert. denied,* 429 U.S. 1026 (1976); United States v. Jeffers, 520 F.2d 1256 (7th Cir.), *cert. denied,* 423 U.S. 1066 (1976); United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973); United States v. Donatelli, 484 F.2d 505 (1st Cir. 1973); United States v. Wisniewski, 478 F.2d 274 (2d Cir. 1973). Other circuits, however, require only a showing of

trial conference on multiple counts of extortion and income tax evasion.[140] The government attorney told the district court judge that, because of the nature of the information, an in camera ex parte[141] hearing might be appropriate to determine whether a conflict existed. Neither defendant nor defense attorney was present at the hearing concerning the conflict of interest.[142] The presiding judge concluded that it would be advisable for defense counsel to disqualify himself, and subsequently the attorney withdrew from the case.[143]

The court informed neither the defendant nor the defense counsel of the basis of the conflict of interest upon which the court had relied.[144] The defendant, in order to make a knowing waiver of his right to effective assistance of counsel, moved for release of the information given to the judge by the United States attorney.[145] The government objected on the grounds that release of the information would jeopardize investigations by the United States attorney and a federal grand jury.[146] The government did concede, however, that the defendant had a right to be told in "generic"[147] terms the nature of the putative conflict. In ruling on the motion, the judge refused to grant the government's consessions; instead, he held that the government need not disclose to the defendant any information concerning

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possible conflict of interest to warrant reversal. *See* United States *ex rel.* Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973); Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967).

[140] Brief for Appellant at 2, United States v. Duklewski, 567 F.2d 255 (1978).

[141] An in camera proceeding takes place in the judge's chambers. Brichreno v. Throp, Jacob 300, 37 Eng. Rep. 864 (1821). In this country, the Constitution circumscribes the use of in camera proceedings. The constitutional drawbacks of in camera determinations are that they deprive the excluded party of the right to due process, violate the policy against secret adjudication of an individual's rights, and rob the judicial process of its adversary nature. *In re* Taylor, 567 F.2d 1183 (2d Cir. 1977). The *Taylor* court rationalized ex parte in camera hearings as a means to resolve "the conflict between the threatened deprivation of a party's constitutional rights and the government's claim of privilege based on the needs of public security." *Id.* at 1188. Where the defense attorney is a possible target of an investigation and the defendant invokes the fifth amendment to protect the attorney, the Second and Fourth Circuits differ on resolution of this conflict between individual rights and the public's right to know. The Fourth Circuit has held that the trial judge ought to disqualifiy the attorney. *In re* Investigation before the February, 1977, Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977). The Second Circuit would use the federal immunity statute, 18 U.S.C. §6002 (1976). *In re* Taylor, 567 F.2d 1183, 1191 (2d Cir. 1977). The theory of the immunity statutes is that in return for a waiver of his fifth amendment right to remain silent, the witness gains immunity from prosecution based upon the inculpatory evidence which he provides. United States v. Tramunti, 500 F.2d 1334, 1342 (2d Cir.), *cert. denied,* 419 U.S. 1079 (1974).

[142] Although both the defendant and the attorney were notified of the hearing, they were both specifically barred from the court. 567 F.2d at 256.

[143] 567 F.2d at 256.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 257; being informed in "generic" terms means being informed as early as possible of the apparent, inherent risks of the particular conflict of interest. *See generally* United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975); United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972).

the alleged conflict or its ramifications.[148] The defendant appealed the judge's denial of his motion.[149]

The Fourth Circuit addressed the issue of denial of information from the dual perspective of the abrogation of the defendant's rights and the duties of the district court judge.[150] The court reasoned that although the district court judge did not order the defense attorney to resign, his suggestion that counsel withdraw was "coercive in effect."[151] The court found that such a suggestion, absent any information upon which the defendant could base an intelligent waiver, amounted to a disqualification of the attorney.[152] Accordingly, the court concluded that the district court's ruling denied the defendant his right to effective assistance of counsel of his own choice.[153] The circuit court therefore remanded the case to provide the defendant with a proper hearing concerning the disqualification of his attorney.[154]

The *Duklewski* court followed the Fifth Circuit's decision in *United States v. Garcia*[155] as the standard to which judges should adhere in considering disqualification of attorneys for a conflict of interest.[156] The *Garcia*

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[148] 567 F.2d at 256.

[149] *Id.* at 257; *see* note 136 *supra.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.; see* Johnson v. Zerbst, 304 U.S 458 (1938).

[154] 572 F.2d at 257. Between the time of the denial of the defendant's motion and the decision of the Fourth Circuit, information surfaced which, according to the circuit court "might be regarded as adequate to guide the defendant in making a rational determination [of] whether to waive his retained counsel's conflict." The circuit court's instructions on remand were that the district court provide the defendant with all the information and safeguards mandated under the *Garcia* test and then allow him to make his decision. *Id. See* text accompanying notes 157-58 *infra.*

[155] 517 F.2d 272 (5th Cir. 1975). *Garcia* concerned the apparent conflict faced by attorneys who simultaneously represented the defendants and potential witnesses against the defense. The defendants sought to keep their original counsel in spite of a district court order to retain other attorneys. The defendants appealed, contending that they had knowingly and intelligently waived their sixth amendment right to effective assistance of counsel in favor of representation by attorneys with an apparent conflict of interest. *Id.* at 274-75.

In reversing the district court, the Fifth Circuit initially discussed the appealability of the district court's order in light of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), *see* note 136 *supra.* Since the court order in *Garcia* concerned the status of the defendants' attorneys and not the guilt or innocence of the defendants, the Fifth Circuit held that although the disqualification was not a final judgment, deferral of appeal might jeopardize the defendant's right to counsel of their choice. 517 F.2d at 275. The *Garcia* court then analyzed the case from the perspective of the quality of the waiver required in a conflict of interest case. The court reasoned that a waiver is "an intentional relinquishment of abandonment of a known right." *Id.* at 276, *citing* Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Furthermore the waiver must be voluntary, knowing and intelligent, "with sufficient awareness of the relevant circumstances and likely consequences." 517 F.2d at 276, *citing* Brady v. United States, 397 U.S. 742, 748 (1970). The court reasoned that a fundamental right might be waived given that the waiver was proper. 517 F.2d at 276-77. *See generally* Note, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants,* 68 J. CRIM. L. C. & P. S. 226 (1977).

[156] 567 F.2d at 257 N.3., *citing* United States v. Mahar, 550 F.2d 1005, 1009 (5th Cir.),

court held that the district court must determine the voluntariness of a waiver according to the facts and circumstances of each case[157] and that the waiver must appear on the trial record.[158] The Fourth Circuit's reliance on *Garcia* is important because *Garcia* provides that voluntariness is objectively qualifiable. The Fifth Circuit stated seven requirements for a proper waiver of a defendant's sixth amendment right to representation free from conflict of interest. The district court must personally advise the defendant of the perils of representation by counsel with a conflict of interest.[159] The defendant must be able to question the court concerning the consequences of continuing with an attorney who has a conflict of interest.[160] The court must try to "elicit a narrative response" from the defendant that he has been advised of his sixth amendment rights; that he understands the details and inherent hazards of the conflict; that he has received legal advice concerning his sixth amendment rights; and that he voluntarily waives those rights.[161] Finally, the waiver must be established by clear, unequivocal, and unambiguous language[162] and appear on the trial record.[163]

In light of the Fourth Circuit's acceptance of the *Garcia* standards, the district court judge in *Duklewski* would have had to divulge sufficient information concerning the federal investigation for the defendant to determine whether his attorney could provide him with reasonably competent representation.[164] In addition, he would have had to elicit answers to

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cert. denied, 434 U.S. 835 (1977).

[157] 517 F.2d at 277.

[158] *Id.* at 278; *accord* United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972).

[159] 517 F.2d at 278.

[160] *Id.*, *accord* United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978); United States v. Lawriw, 568 F.2d 98 (8th Cir. 1977), *cert, denied*, 435 U.S. 969 (1978); United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976); United States v. Foster, 469 F.2d 1 (1st Cir. 1972); Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965).

[161] 517 F.2d at 278. Particularly pertinent to the strength of the *Garcia* test is that all conditions must be met before the waiver is certified as valid. *Id.* The *Garcia* court's attempt to ensure as meaningful a waiver as possible is apparent from the requirement that the defendant himself must articulate to the judge his understanding of the waiver which he is executing. This standard is in marked contrast to *Miranda* warnings, in which the defendant must only make affirmative or negative answers to either assert or waive his rights. *See* Miranda v. Arizona, 384 U.S. 436, 467-79 (1966). What *Garcia* does not set forth, and what *Duklewski* does not address, is whether the defendant has the right to have an attorney present during the waiver proceeding. Due process problems could arise in this setting, although this issue does not yet seem to have arisen. *Cf.* Gilbert v. California, 388 U.S. 263 (1967) and United States v. Wade, 388 U.S. 218 (1967) (establishing right to counsel at critical stages).

[162] 517 F.2d at 278, *citing* National Equip. and Rental v. Szukhent, 375 U.S. 311 (1964).

[163] 517 F.2d at 278. The *Garcia* court stipulated that the waiver must be executed in the same manner as a waiver under F.R. CRIM. P. 11(d) which states:

> The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally and in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

[164] *See* Ray v. Rose, 491 F.2d 285, 290 (6th Cir. 1974) (standard of reasonably competent

the questions set forth in *Garcia*.[165] The judicial role would focus on the defendant's knowledge of his sixth amendment rights and the subsequent establishment on the record of the defendant's intelligent waiver.[166] Thus, a suggestion to the defense attorney to resign without discussion with the defendant is impermissible.[167]

The Fourth Circuit, in adopting the *Garcia* test, imposes on its prior case law[168] a specific standard for the judge to apply when he believes that a defense attorney's conflict of interest might hinder the quality of the defendant's representation. The test is a procedural tool by which the circuit court can determine whether the defendant and the district court have fully explored and exhausted the necessary elements of a sixth amendment waiver.[169] At the district court level, the *Garcia* test would seem to safeguard the defendant's right to unfettered representation[170] by making the defendant articulate his understanding of both the sixth amendment and his attorney's conflict of interest.[171] The strength of the

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assistance demands defendant's awareness of circumstances of his counsel's conflicts).

[165] 567 F.2d at 257.

[166] *See* Gray v. Estelle, 574 F.2d 209, 212 (5th Cir. 1978) (no waiver is valid without participation and approval of trial judge); United States v. Lawriw, 568 F.2d 98, 104 (8th Cir. 1977) (meaningful inquiry into defendant's waiver helps both defense and prosecution because exposure of possible conflict of interest decreases chance of prejudicial error, and establishes record for appeal showing that, despite conflict, defendant chose that attorney); United States v. Mahar, 550 F.2d 1005, 1010 (5th Cir. 1977) (when defendant opposes disqualification of his attorney, district court must take necessary steps to impart to defendant full understanding of decision and seek to honor defendant's ultimate choice).

[167] 567 F.2d at 257.

[168] *See, e.g.*, United States v. Truglio, 493 F.2d 574 (4th Cir. 1974); United States v. Hankish, 462 F.2d 316 (4th Cir. 1972); Kelly v. Peyton, 420 F.2d 912 (4th Cir. 1969); Sawyer v. Brough, 358 F.2d 70 (4th Cir. 1966); Reickauer v. Cunningham, 299 F.2d 170 (4th Cir. 1962).

[169] *Cf.* United States v. Hankish, 462 F.2d 316 (4th Cir. 1972) (discerning how informal waiver should be considered for purposes of appeal).

[170] *Cf.* Sawyer v. Brough, 358 F.2d 70 (4th Cir. 1966) (actual conflicts need not be shown to void conviction); *see generally* Glasser v. United United States, 315 U.S. 60 (1942).

[171] 572 F.2d at 355. Other circuits have adopted tests based on the same standards as those articulated in *Garcia*. *See* United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978); United States v. Lawriw, 568 F.2d 98 (8th Cir. 1977); United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976); United States v. Foster, 469 F.2d 1 (1st Cir. 1972); Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965). The circuits agree that the right to counsel of one's choice is neither absolute nor unqualified. *See, e.g.*, United States v. Dolan, 570 F.2d 1177, 1180 (3d Cir. 1978); *In re* Investigation before February, 1977, Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977); United States v. Bernstein, 533 F.2d 775 (2d Cir.) *cert. denied*, 429 U.S. 998 (1976); *In re* Gopman, 531 F.2d 262 (5th Cir. 1976). A court exercising its inherent power to regulate an attorney's professional conduct may disqualify retained counsel or refuse to accept the defendant's waiver of his attorney's conflict. *In re* Gopman, 531 F.2d 262 (5th Cir. 1976); *accord*, Ceramco Inc. v. Lee Pharm., 510 F.2d 268 (2d Cir. 1975); Saier v. State Bar, 293 F.2d 756 (6th Cir.) *cert. denied*, 368 U.S. 947 (1961). In order for the court to dismiss an attorney outright, however, the conflict of interest must be actual rather than potential. United States v. Dolan, 570 F.2d at 1180-83, *citing* Greer, *Representation of Multiple Criminal Defendants: Conflicts of Interests and the Professional Responsibility of the Defense Attorney*, 62 MINN. L. REV. 119 (1977).

Duklewski approach lies in its balance of defendants' rights and judicial integrity. The objective test adopted by the Fourth Circuit is a desirable refinement of the former amorphous standards.[172] The defendant will benefit because either he will understand his attorney's potential conflict and proceed in spite of it or he will receive conflict-free representation. Furthermore, the *Garcia* procedure establishes a record from which the appellate court may make a more informed decision.

ERIC H. SCHLESS

D. Search and Seizure

Warrantless Search of Parolee's Home

While the fourth amendment prohibits unreasonable searches and seizures,[1] the validity of a search and seizure is often uncertain[2] because "reasonable" is a broad standard that may depend on numerous factors. Search warrant procedures have been formulated, however, that allow a more convenient determination of reasonableness than simple reliance on the broad term that appears in the fourth amendment. Warrants to search and seize may issue only on probable cause[3] as determined by a neutral and detached magistrate.[4] The warrant requirement has supplanted the reasonableness standard to such a degree that warrantless searches and seizures are per se unreasonable,[5] subject to exceptions[6] based on exigency,[7] officer safety,[8] destruction of evidence,[9] and impracticality.[10] The exclu-

[172] *See* note 168 *supra.*

[1] The fourth amendment reads in relevant part that "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ." U.S. CONST. amend IV.

[2] *See generally* Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349 (1974); LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth",* 1966 U. ILL. L.F. 255.

[3] U.S. CONST. amend. IV; *see* notes 84 & 114 *infra.*

[4] *See* Whitely v. Warden, 401 U.S. 560, 565 (1971); Beck v. Ohio, 379 U.S. 89, 96 (1964); Jones v. United States, 362 U.S. 257, 270-71 (1960).

[5] "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant." Agnello v. United States, 269 U.S. 20, 33 (1925); Chapman v. United States, 365 U.S. 610, 615-16 (1961). *But see* Vale v. Louisiana, 399 U.S. 30, 34-35 (1970). The Supreme Court has expressed a strong preference for searches with warrants. United States v. Ventresca, 380 U.S. 102, 105 (1965). The same is true of warrants for arrest. Beck v. Ohio, 379 U.S. 89, 96 (1964).

[6] Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); *see* notes 7-10 *infra.*

[7] The mobility exception to the warrant requirement was first outlined in Carroll v. United States, 267 U.S. 132 (1925). The Court, recognizing that police cannot obtain a warrant to stop a car, upheld warrantless searches of automobiles when probable cause and exigent circumstances are present. *Id.* at 162; Chimel v. California, 395 U.S. 752 (1969).

[8] A warrantless search may be made incident to a valid arrest. Chimel v. California, 395 U.S. 752 (1969). The purpose of this exception is to prevent the arrestee from obtaining an easily accessible weapon or from concealing or destroying evidence close at hand. *Id.* at 763.

sionary rule[11] forbids the use at trial of all evidence acquired in an illegal search or seizure.

Under the search incident to arrest doctrine, police may search the area "within his [arrestee's] immediate control." *Id.*

Terry v. Ohio, 392 U.S. 1 (1968), and Adams v. Williams, 407 U.S. 143 (1972), develop the notion of forcible stop and frisk by an investigating policeman. These limited warrantless intrusions are justifiable on a mere "reasonable suspicion," which is less than probable cause. 407 U.S. at 146; 392 U.S. at 27; *see* note 86 *infra;* text accompanying notes 96-101 & 117-20 *infra.*

[9] The doctrine that evidence in plain view may be seized is explained in Harris v. United States, 390 U.S. 234, 236 (1968) and clarified in Coolidge v. New Hampshire, 403 U.S. 443, 465-71 (1971). Prerequisites for this exception are that the seizing officer must rightfully be at the vantage point, the discovery must be inadvertent, and the incriminating nature of the evidence must be immediately apparent. 403 U.S. at 468-70. *See also* United States v. Diaz, 577 F.2d 821 (2d Cir. 1978).

A warrant is unnecessary when police are in hot pursuit of a suspect. Warden v. Hayden, 387 U.S. 294, 298-300 (1967). Under such circumstances, police may search both the suspect and his home, and all evidence obtained during such a search is admissible. *Id.*

[10] A limited exception to the warrant requirement exists in the case of border searches. Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973); Carroll v. United States, 267 U.S. 132, 154 (1925); Henderson v. United States, 390 F.2d 805, 807-08 (9th Cir. 1967). At national boundaries, the warrant requirement is waived, and all prospective entrants may be forced to submit to an investigatory stop including an identification check and a search. 413 U.S. at 272, *citing* Carroll v. United States, 267 U.S. 132, 154 (1925).

A citizen may consent to a waiver of his fourth amendment rights. Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973). Consent may sometimes be given by third parties, United States v. Matlock, 415 U.S. 164, 168-71 (1974), but it must always be given freely and voluntarily. Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973); Bumper v. North Carolina, 391 U.S. 543, 548 (1968). Parolees may expressly and impliedly give blanket consent to warrantless searches of their persons and homes. *See* note 15 *infra.*

Generally, when a property owner does not give consent, warrants are required for administrative inspection searches by health, safety, and fire inspectors. In such cases, however, the requisite showing of probable cause is diminished. Camara v. Municipal Court, 387 U.S. 523, 534-39 (1967); See v. City of Seattle, 387 U.S. 541 (1967). Exceptions to this general rule exist when special types of inspections are involved, necessitating frequent unannounced searches by inspectors to exercise effectively the degree of control anticipated by Congress. United States v. Biswell, 406 U.S. 311, 317 (1972) (interpreting § 923 of the Gun Control Act as allowing firearms inspectors to make limited warrantless searches pursuant to compilations of ordinances furnished firearms dealers under 18 U.S.C. § 921(a) (1976)); Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (holding Congress may approve such inspections under liquor laws as necessary for effective enforcement).

[11] The exclusionary rule bars evidence obtained in violation of the Constitution from criminal proceedings. *See* Mapp v. Ohio, 367 U.S. 643, 656-57 (1961); Weeks v. United States, 232 U.S. 383, 399 (1914). *But see* Oregon v. Hass, 420 U.S. 714, 722-24 (1975) (allowing use of unconstitutionally obtained evidence to impeach defendant's testimony). The rule has a dual purpose: compelling police observance of the constitutional rights of private citizens through adherence to constitutional restraints on the gathering of evidence, and preserving judicial integrity by refusing to convict suspects on the basis of illegally obtained evidence. 367 U.S. at 654. Fourth amendment rights are enforceable against the states through the due process clause of the fourteenth amendment. *Id.* at 655.

The exclusionary rule has come under considerable attack from members of the Supreme Court who call for legislative creation of an alternative to the rule. The Chief Justice has been one of its severest critics:

> [I]t now appears that the continued existence of the [exclusionary] rule, as

The validity of searches of parolees is particularly troublesome.[12] While parole is not a recent innovation in our criminal justice system,[13] the extent of a parolee's fourth amendment rights,[14] the validity of blanket waivers of those rights,[15] and the degree of probable cause necessary to search paro-

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presently implemented, inhibits the development of rational alternatives. The reason is quite simple: Incentives for developing new procedures or remedies will remain minimal or non-existent so long as the exclusionary rule is retained in its present form.

It can no longer be assumed that other branches of government will act while judges cling to this Draconian, discredited device in its present absolutist form.

Stone v. Powell, 428 U.S. 465, 500 (1976) (Burger, C. J., concurring).

For commentary on current application of the exclusionary rule, see generally Gilday, *The Exclusionary Rule: Down and Almost Out*, 4 N. KY. L. REV. 1 (1977); Kamisar, *Mondale on* Mapp, 3 CIV. LIB. REV. 62 (February-March, 1977); Williams, *Institute on Exceptions to the Warrant Requirement Under the Fourth Amendment*, 29 OKLA. L. REV. 659 (1976); Note, *The Exclusionary Rule in Probation and Parole Revocation: A Policy Reappraisal*, 54 TEX. L. REV. 1115 (1976) [hereinafter cited as *Policy Reappraisal*].

[12] *Compare* United States v. Hallman, 365 F.2d 289 (3d Cir. 1966) *and* Tamez v. State, 534 S.W.2d 686 (Tex. Crim. App. 1976) *with* United States v. Jeffers, 573 F.2d 1074 (9th Cir. 1978) *and* People v. Mason, 5 Cal.3d 759, 97 Cal. Rptr. 302, 488 P.2d 630, *cert. denied*, 405 U.S. 1016 (1971). *See generally* Note, *Probation Conditions*, 1 AM. J. CRIM. LAW 235 (1972) [hereinafter cited as *Probation Conditions*]; Note, *Warrantless Searches of Parolees*, 69 J. CRIM. L. & CRIMINOLOGY 372 (1978); Comment, *The Search and Seizure Condition of Probation: Supervisory or Unconstitutional?*, 22 S.D. L. REV. 199 (1977).

[13] The notion of parole was developed in the United States at the Elmira, New York, correctional facility in 1877. C. NEWMAN, SOURCEBOOK ON PROBATION, PAROLE AND PARDON 33 (3d Ed. 1975) [hereinafter cited as NEWMAN].

[14] In one of its few rulings in the area of parolee consitutional rights the Supreme Court, in Morrissey v. Brewer, 408 U.S. 471 (1972), held that parolees have fourteenth amendment due process rights and are entitled to a hearing before revocation of parole. *Id.* at 482-89. After *Morrissey*, courts have consistently held parolees have some fourth amendment rights; however, the courts have almost universally held that parolees' fourth amendment rights do not extend as fully as ordinary citizens' rights. *See, e.g.*, United States v. Jeffers, 573 F.2d 1074, 1075 (9th Cir. 1978); United States v. Farmer, 512 F.2d 160, 162 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); United States v. Brown, 488 F.2d 94, 95 (5th Cir. 1973); United States v. Hill, 447 F.2d 817, 819 (7th Cir. 1971); Roman v. State, 570 P.2d 1235, 1240 (Alas. 1977); Croteau v. State, 334 So.2d 577, 579 (Fla. 1976). *But see* United States v. Bradley, 571 F.2d 787, 789 (4th Cir. 1978); United States v. Hallman, 365 F.2d 289, 291 (3d Cir. 1966); State v. Cullison, 173 N.W.2d 533, 537 (Iowa), *cert. denied*, 398 U.S. 938 (1970) (holding parolee's fourth amendment rights are not different from those of other citizens).

[15] The validity of blanket waivers of parolee fourth amendment rights has been upheld in People v. Mason, 5 Cal.3d 759, 97 Cal. Rptr. 302, 488 P.2d 630 (1971); People v. Fortunato, 50 App. Div. 2d 38, 43, 376 N.Y.S.2d 723, 728 (1975); State v. Mitchell, 22 N.C. App. 663, 665, 207 S.E.2d 263, 264 (1974); State v. Schlosser, 202 N.W.2d 136, 139 (N.D. 1972).

Provisions in a parole agreement that specifically waive the constitutional right to be secure against warrantless searches have been upheld in United States v. Consuelo-Gonzales, 521 F.2d 259, 263-64 (9th Cir. 1975). *But see* People v. Bremmer, 30 Cal. App. 3d 1058, 106 Cal. Rptr. 797, 800 (1973); People v. Peterson, 62 Mich. App. 258, 265, 233 N.W.2d 250, 255 (1975); Tamez v. State, 534 S.W.2d 686, 692 (Tex. Crim. App. 1976). *See generally* Note, *Constitutional Law—Probation Searches—Probation Condition Requiring Probationer's Consent to Searches By Any Law Enforcement Officer at Any Time or Place Is Unconstitutional*, 8 TEX. TECH. L. REV. 497 (1976) (Commentary on *Tamez*).

A blanket waiver is invalid if consent is found not to be freely and voluntarily given. Coleman v. Smith, 395 F. Supp. 1155, 1156-57 (W.D.N.Y. 1975). *See also* Schneckloth v.

lees' homes in the absence of express waivers[16] still raise difficult issues.

The Fourth Circuit recently considered, in *United States v. Bradley*,[17] whether a parole officer's warrantless searches of a parolee's home violated the fourth amendment.[18] The court addressed the narrow question of whether a parole officer needed a warrant to search a parolee's home when probable cause existed but exigent circumstances did not.[19] The Fourth Circuit concluded that parolees have the same fourth amendment rights as ordinary citizens and therefore the warrant requirement applies to parolee searches. Since the prerequisites for a valid warrantless search were not met and a warrant was not obtained, the search in *Bradley* was invalid[20] and all evidence obtained as a result should have been excluded from trial.[21]

As a parole condition, defendant Bradley consented to unannounced warrantless visitation by his parole officer, but not to warrantless searches of his home. His landlady informed the parole officer that Bradley had a loaded firearm in his room, in violation of his parole agreement.[22] Six hours after receiving this information, the officer searched the room without a warrant and seized the gun. The firearm was admitted as evidence during Bradley's trial and a conviction for unlawful possession of a firearm resulted.[23]

On appeal, the government argued not that convicted criminals released on parole have no fourth amendment rights but that parole officers stand in a special position, holding parolees in constructive custody.[24] Con-

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Bustamonte, 412 U.S. 218, 248-49 (1973) (voluntariness of consent must be apparent from the totality of the circumstances, and is negated by coercion); Bumper v. North Carolina, 391 U.S. 543, 548 (1968); Garrity v. New Jersey, 385 U.S. 493, 496 (1967).

[16] Some courts have allowed a search based only on a suspicion that criminal activity was afoot. Latta v. Fitzharris, 521 F.2d 246, 249 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975); State v. Simms, 10 Wash. App. 75, 84, 516 P.2d 1088, 1094 (1973). Other courts have held probable cause is needed since a parolee's fourth amendment rights are identicial with those of other citizens. State v. Cullison, 173 N.W.2d 533, 540 (Iowa 1970); State v. Culbertson, 29 Or. App. 363, 563 P.2d 1224, 1227-29 (1977).

[17] 571 F.2d 787 (4th Cir. 1978).

[18] *Id.* at 788.

[19] Probable cause alone, though sufficient to obtain a warrant, is not ordinarily sufficient justification for a warrantless search. Vale v. Louisianna, 399 U.S. 30, 34 (1970). *See also* notes 6-10 *supra* & note 86 *infra*.

[20] 571 F.2d at 790.

[21] *Id.*; *see* note 8 *supra*.

[22] 571 F.2d at 788.

[23] *Id.* The federal statute under which Bradley was convicted prohibits possession of a firearm by one previously found guilty of a crime punishable by imprisonment for more than one year. 18 U.S.C. § 922(h)(1) (1976).

[24] 571 F.2d at 789. The argument that parole officers stand in a special position, holding parolees in constructive custody, was based on the Ninth Circuit's holding in Latta v. Fitzharris, 521 F.2d 246 (1975). *See also* United States v. Jeffers, 573 F.2d 1074 (9th Cir. 1978); United States v. Gordon, 540 F.2d 453 (1976).

The constructive custody line of reasoning is based on the original notions of parole, when premature release of a prisoner was allowed in the custody of a "next friend." NEWMAN, *supra* note 13, at 17-37. According to the constructive custody theory, the role of next friend is now played by the parole officer, who must be allowed, when supervising his charge, wider consti-

sequently, when a parole officer has probable cause to conduct a search, he may do so without a warrant. The prosecution argued by analogy to *Latta v. Fitzharris*[25] where the constructive custody theory was used to justify a warrantless search of a parolee's home. The validity of the search in *Latta* was based on a perceived special relationship between a parolee and his parole officer which gave rise to a theory of constructive custody.[26]

The Fourth Circuit rejected the government's constructive custody argument, holding that the officer-parolee relationship does not justify an infringement of a parolee's fourth amendment rights.[27] The court, stating that the special relationship and the interests of society serve only to diminish the standard of probable cause needed to obtain a warrant, disallowed the warrantless search.[28] Parole officers must obtain a warrant to search a parolee's residence unless an established exception to the warrant requirement applies.[29] The court considered existing exceptions and found none applicable to the facts in *Bradley*.[30]

In holding that the warrant requirement extends to parole officer searches of a parolee's home, the Fourth Circuit assumed that parolees have fourth amendment rights.[31] Some circuits, including the Ninth Circuit in *Latta*, have found that parolees have no fourth amendment rights whatever while others have found parolees have diminished fourth amendment rights.[32] The Fourth Circuit's decision, relying on the dissent in

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tutional latitude than a police officer working in the field. The parole officer has the power of revoking parole in a summary proceeding if reasonable cause can be shown.

[25] 521 F.2d 246 (9th Cir.), *cert denied*, 423 U.S. 897 (1975).

[26] *Id.* The Ninth Circuit's decision relied in part on California state court decisions establishing precedent for the validity of the "special relationship." *Id.* at 250-51; *see* People v. Lent, 15 Cal. 3d 471, 124 Cal. Rptr. 905, 541 P.2d 545 (1975); People v. Mason, 5 Cal. 3d 759, 97 Cal. Rptr. 302, 488 P.2d 630 (1971); People v. Henandez, 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (3d Dist. 1964), *cert. denied*, 381 U.S. 953 (1965). *See also Probation Conditions, supra* note 12 (commentary on *Mason*); Note, *Extending Search-and-Seizure Protection to Parolees in California*, 22 STAN. L. REV. 129 (1969) (commentary on *Hernandez*).

[27] 571 F.2d at 789-90. *See also* Latta v. Fitzharris, 521 F.2d 246, 258-59 (9th Cir. 1975) (Hufstedler, J., dissenting) (arguing parole officers should not be allowed to infringe on parolees' fourth amendment rights). A parole officer may visit the parolee at any time, pursuant to visitation agreements. The parole officer has the same power to conduct warrantless searches as police officers; *see* notes 7-10 *supra*, consequently he has tools for effective supervision and reduced fourth amendment rights are unnecessary. *See also* note 34 *infra*.

[28] 571 F.2d at 790.

[29] *Id.* at 789-90.

[30] *Id.* at 790.

[31] The government did not dispute defendant's contention that the fourth amendment's protection against unreasonable searches and seizures extends to parolees. 571 F.2d at 789 n.2.

[32] *See e.g.*, People v. Hernandez, 229 Cal. App. 2d 143, 149-50, 40 Cal. Rptr. 100, 104 (3d Dist. 1964); People v. Santos, 368 N.Y.S.2d 130, 137-38 (1977); Commonwealth v. Brown, 240 Pa. Super. Ct. 190, 192-93, 361 A.2d 846, 848-49 (1976). Four distinct theories have been upheld in other jurisdictions to justify withholding fourth amendment coverage from parolees: "constructive custody," *see* text accompanying notes 24-29 *supra*, "contract," *see* note 15 *supra*, "incarceration" and "grace." *See generally* Note, *Probation Conditions—To Require a Probationer to Submit Himself to Search and Seizure at Any Time By Any Law Enforcement Officer Is Not an Unreasonable Invasion of Fourth Amendment Rights*, 1 AM.

Latta, found the denial of parolee's fourth amendment rights unconstitutional[33] and unnecessary.[34] Instead, the court held that parolees are entitled to be free of unreasonable searches and seizures.[35] Recognizing that a search warrant must be obtained, the court stated that probable cause is more easily established against parolees,[36] making procurement easier.[37]

An officer has probable cause when sufficient evidence exists to convince a reasonable man that it is more probable than not that the evidence sought relates to criminal activity and that those same items will be found in the area to be searched.[38] For the most part, this standard appies to searches with or without warrants.[39] Several search situations exist, however, when a standard less than that of probable cause applies. The admin-

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J. CRIM. L. 235 (1972); Note, *Striking the Balance Between Privacy and Supervision: The Fourth Admendment and Parole and Probation Officer Searches of Parolees and Probationers,* 51 N.Y.U.L. REV. 800 (1976).

[33] 571 F.2d at 789. A blanket waiver of protection from unreasonable searches and seizures is "so repugnant to the whole spirit of the Bill of Rights as to make it alien to the essence of our form of government." People v. Peterson, 62 Mich. App. 258, 266, 233 N.W.2d 250, 255 (1975). This view is generally accepted. *See, e.g.,* People v. Huntley, 43 N.Y.2d 175, 182-83, 371 N.E.2d 794, 798, 401 N.Y.S.2d 31, 35 (1977) (even though prisoners have no constitutional right to parole, legislative grace in granting parole does not justify forced agreement to unconstitutional provisions).

[34] 571 F.2d at 789. Diminished constitutional protection is not necessary to the government's interest in supervision because the parole system already provides sufficient mechanisms. Since a parole officer is allowed to make investigatory visits at will, a framework exists allowing warrantless searches when necessary. *See* Latta v. Fitzharris, 521 F.2d 246, 254-59 (9th Cir. 1975) (Hufstedler, J., dissenting), *cited in* 571 F.2d at 789. The parole officer has no problem gaining access to a parolee's room where the parole agreement contained a provision specifying that the parolee must submit to unannounced visits by his parole officer as in *Bradley.* 571 F.2d at 789. The acceptance of the validity of this intrusion into a parolee's privacy is universal. *See, e.g.,* Roman v. State, 570 P.2d 1235, 1242 (Alas. 1977).

These visits would probably be upheld as analogous to administrative visits which require no warrant because of their special nature. 571 F.2d at 789; *see* United States v. Biswell, 406 U.S. 311 (1972) (warrantless inspection pursuant to the Gun Control Act, 18 U.S.C. § 921(a)(19) (1969) is constitutional); Wyman v. James, 400 U.S. 309 (1971) (warrantless, unannounced visit by a welfare caseworker constitutional). If the parole officer's suspicion is aroused, he can look around and question the parolee. *See* note 9 *supra.* Evidence in plain view may be seized. *See, e.g.,* Daygee v. State, 514 P.2d 1159, 1162 (Alas. 1973). If probable cause is aroused by events in the course of the visit, exigency may permit an immediate search. *See* note 14 *supra.* Thus, no need exists to extend unbridled search power to the parole officer since existing exceptions to the warrant requirement allow him to search whenever he has both probable cause and exigency, or sees evidence of a crime in plain view. 571 F.2d at 790.

[35] 571 F.2d at 789.

[36] *Id.* at 790.

[37] *Id.*

[38] *See* Warden v. Hayden, 387 U.S. 294, 307 (1967); Carroll v. United States, 267 U.S. 132, 158-59 (1925); *See also* Comment, 28 U. CHI. L. REV. 664, 687 (1961). Probable cause for an arrest requires a showing that a certain crime was committed by a certain named individual. Gerstein v. Pugh, 420 U.S. 103, 111-12 (1975); Beck v. Ohio, 379 U.S. 89, 91 (1964).

[39] Aguilar v. Texas, 378 U.S. 108, 110-11 (1964). Probable cause determined by a magistrate, however, may be based on evidence less judicially competent than evidence used by a police officer to justify a warrantless search. *Id.* at 111. *See also* United States v. Watson, 423 U.S. 411, 417-18, 423 (1976).

istrative search[40] and the "stop and frisk"[41] are examples. Probable cause is not necessary for either intrusion. To obtain a warrant for an administrative search for fire, safety and health inspections, an officer need only show that legislative or administrative search standards have been formulated, and that they apply to the building being searched.[42] In "stop and frisk" searches, the standard for probable cause is diminished to a "reasonable suspicion," based on articulable facts available to the officer at the time that a crime has taken place.[43] The Fourth Circuit decided that a reduced standard of probable cause would uphold a parole officer's search of a parolee's home, with or without a warrant, but did not decide to what extent the probable cause requirement should be diminished.[44]

If several facts had been different, the court might have upheld the warrantless search of the defendant's room on the basis of the exigent circumstances exception,[45] but the court considered the six hours elapsed between the complaint and the search sufficient time to obtain a warrant.[46] Because no other existing exception would apply to the *Bradley* facts, a warrant was necessary to uphold the search.[47]

The Fourth Circuit's holding in *Bradley,* although progressive when compared with similar holdings in other circuits,[48] accords with Supreme Court decisions in other areas of procedural rights for parolees.[49] The Fourth Circuit's view of fourth amendment rights for parolees is out of step with other circuits only to the extent that *Bradley* leads a universal trend toward bestowing more constitutional rights on parolees and probationers[50] by applying the same procedural requirements as used in the case of an ordinary citizen.

One possible result of *Bradley*'s grant of full fourth amendment rights to probationers and parolees could be the application of the exclusionary rule to probation and parole revocation hearings. A conflict[51] between two

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[40] *See* note 10 *supra.*

[41] *See* text accompanying notes 96-101 & 117-20 *infra;* note 8 *supra.*

[42] Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

[43] *See generally* text accompanying notes 99-101 *infra.*

[44] 571 F.2d at 788 n.1. Defendant did not dispute that the parole officer had probable cause and the facts would have supported a finding of the requisite probable cause for a warrant to search the defendant's room under either the usual or diminished standard. *Id.*

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

[46] 571 F.2d at 790.

[47] *Id.*

[48] *See* text accompanying notes 12-17 *supra.*

[49] Parolees have fourteenth amendment due process rights. Morrissey v. Brewer, 408 U.S. 471, 482 (1972); *see* note 14 *supra.* Parolees have a right to counsel when a lawyer's assistance is needed to guarantee the "effectiveness of the rights guaranteed by *Morrissey.*" Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973).

[50] *See generally* United States v. Gordon, 540 F.2d 452 (9th Cir. 1976); Latta v. Fitzharris, 521 F.2d 246 (9th Cir. 1975); Santos v. New York State Bd. of Parole, 441 F.2d 1216, 1218 (2d Cir.), *cert. denied,* 404 U.S. 1025 (1971); Coleman v. Smith, 395 F. Supp. 1155 (W.D. N.Y. 1975).

[51] The cases holding the exclusionary rule inapplicable to parole or probation revocation proceedings are legion. See note 71 *infra.*

trends becomes apparent because while the constitutional rights of parolees and probationers have been expanding,[52] the exclusionary rule has been increasingly criticized and re-evaluated, resulting in its curtailment[53] and threatened abolition.[54] All other circuits prior to *Bradley* have found the rule inapplicable to parole and probation proceedings.[55] In contrast, the Fourth Circuit, in *United States v. Workman,*[56] held that evidence obtained by a probation officer in violation of the fourth amendment should be suppressed from probation revocation proceedings.

Workman was on probation following conviction for possession of a distillery and bootleg whiskey.[57] His probation officer received information of a still in Workman's storage shed, conducted a warrantless search of that building, and found evidence of criminal conduct which was in violation of the probation agreement. Exigent circumstances which would justify failure to obtain a warrant were not present at the time of the search.[58] Nevertheless, the district court admitted the evidence in Workman's probation revocation hearing.[59] The Fourth Circuit vacated the revocation order for further proceedings consistent with their holding that the warrantless search violated Workman's fourth amendment rights and that the evidence seized during the warrantless search should have been suppressed.[60]

The government argued that the search was valid either under an exception to the administrative search requirement[61] or under the broad statutory authority granted by Congress to probation officers.[62] The prosecution asserted that such evidence, though inadmissable for initial determination of guilt in criminal proceedings, ought to be admissable in probation revocation proceedings. The government argued that applying the

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[52] *See* note 50 *supra.*

[53] *See, e.g.,* Stone v. Powell, 428 U.S. 465, 486-90 (1976); United States v. Janis, 428 U.S. 433, 447 (1976); United States v. Calandra, 414 U.S. 338, 349-52 (1974). *See also* note 11 *supra.*

[54] In his concurring opinion in *Stone v. Powell* the Chief Justice voiced harsh criticism of the rule. 428 U.S. at 500-02 (Burger, C.J., concurring); *see* note 11 *supra.*

[55] *See* note 71 *infra. But cf. Policy Reappraisal, supra* note 11 at 1117-21 (advocating extension of the rule).

[56] United States v. Workman, 585 F.2d 1205 (4th Cir. 1978).

[57] *Id.* at 1206.

[58] *Id.* at 1206-07.

[59] *Id.* at 1207.

[60] *Id.* at 1207-11.

[61] *Id.* at 1207-08. The general rule is that a warrant must always be obtained to make a search of premises, even for an administrative inspection. Camara v. Municipal Court, 387 U.S. 523, 531-33 (1967); See v. City of Seattle, 387 U.S. 541, 542 (1967); *see* note 10 *supra.* The government argued for expansion of the narrow exception to that general rule outlined in *Colonnade* and *Biswell. See* note 10 *supra.* However, the Fourth Circuit followed recent Supreme Court guidance in holding the *Colonnade-Biswell* exception inapplicable to the facts in *Workman. See United States v. Bradley,* 571 F.2d 787, 789 (4th Cir. 1978); text accompanying notes 29-30 *supra.*

[62] "At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant." 18 U.S.C. § 3653 (1969). Nothing in the statute, however, allows probation officers to make warrantess searches.

exclusionary rule to revocation hearings might destroy the effectivenss of the parole and probation systems,[63] and advocated that the rule not be applied to revocation hearings absent a demonstration of police harassment.[64]

The Fourth Circuit used the Supreme Court's test[65] for determining the applicability of the exclusionary rule and reasoned that the harm which non-exclusion would have caused to the probationer outweighed any possible harm to the parole and probation systems.[66] The court recognized that revocation hearings may result in a loss of liberty so that the injury and benefit potential of probation revocation hearings is the same as for other criminal proceedings.[67] The Fourth Circuit noted that the Supreme Court has never failed to apply the exclusionary rule to an adjudicative proceeding where unconstitutionally obtained evidence is offered "in direct support of a charge that may subject the victim of a search to imprisonment"[68] and concluded that evidence procured in violation of a probationer's constitutional rights could not be admitted in a revocation hearing.[69]

Although recent Supreme Court decisions have consistently limited the application of the exclusionary rule,[70] the Court has never resolved the question of the applicability of the rule to parole or probation revocation hearings. The circuit courts have uniformly held, however, that the exclusionary rule is inapplicable to parole and probation revocation hearings.[71]

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[63] 585 F.2d at 1208-09; *accord,* United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975); Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970); Hyser v. Reed, 318 F.2d 225, 240 (D.C. Cir.) *(en banc), cert. denied,* 375 U.S. 957 (1963); Lombardino v. Heyd, 318 F. Supp. 648 (E.D. La. 1970), *aff'd,* 438 F.2d 1027 (5th Cir. 1971).

Courts have held also that applying the rule only in determinating guilt or innocence optimally discourages illegal law enforcement activity. United States v. Hill, 447 F.2d 817 (7th Cir. 1971); Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970).

[64] United States v. Wiygul, 578 F.2d 577, 578 (5th Cir. 1978), *citing* United States v. Brown, 488 F.2d 94 (5th Cir. 1973). An even stricter standard, that the exclusionary rule is appropriate only in a case where police misconduct shocks the conscience, was set out in State v. Sears, 553 P.2d 907, 914 (Alas. 1976); *cf.* United States v. Winsett, 518 F.2d 51, 54 (9th Cir. 1975).

[65] In United States v. Calandra, 414 U.S. 338 (1974), the Supreme Court considered whether or not the exclusionary rule applied to grand jury proceedings. *Id.* at 348-55. The Court, striking a balance between potential injury to the proceeding and potential benefits of application, refused to extend the rule. *Id.* at 354-55. The Court found that exclusion of evidence would hinder the grand jury process as well as impose needless double application, since use of the rule at trial is sufficient to protect the constitutional rights of a criminal defendant. *Id.* at 354.

[66] 585 F.2d at 1209-11.

[67] *Id.* at 1209-10. Whether Workman is convicted of criminal charges or his probation is revoked, absent the exclusionary rule, he will go to jail on the basis of unconstitutionally obtained evidence.

[68] *Id.* at 1211.

[69] *Id.*

[70] *See generally* Burger, *Who Will Watch the Watchman?,* 14 AM. U. L. REV. 1 (1964); Kaplan, *The Limits of the Exclusionary Rule,* 26 STAN L. REV. 1027 (1974); Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement,* 59 MINN. L. REV. 251 (1974); Comment, 22 LOY. L. REV. 856 (1976); *Policy Reappraisal, supra* note 11.

[71] *See, e.g.,* United States v. Wiygul, 578 F.2d 577, 578 (5th Cir. 1978); United States v.

In light of the trend in other circuits, the *Workman* decision, holding the rule applicable to a probation revocation hearing and suppressing evidence unlawfully seized by a probation officer, is unusual.

The exclusionary rule has never been interpreted as a proscription of all unconstitutionally procured evidence from all proceedings against all people.[72] Use of the rule in parole or probation revocation proceedings has been held to be detrimental to the parole or probation process.[73] Some courts have found that application of the rule hampers the rehabilitation possible in the probation system by making the probation officer's job more difficult and by diminishing the court's ability to assess a probationer's progress.[74] The Supreme Court has set out a balancing test for determining whether the exclusionary rule is appropriately applied to proceedings other than the initial determination of guilt in criminal trials.[75] The benefits of the exclusionary rule are weighed against the impairment to the proceedings that exclusion of the unconstitutionally seized evidence might cause. If the goal of deterrence of police misconduct would be advanced only minimally and the proceeding in question would be greatly burdened, then the rule should not be used.[76]

The Fourth Circuit balanced the benefits of exclusion against the impairment to the proceedings and concluded that the exclusionary rule should be applicable in probation revocation hearings.[77] The court relied on its reasoning in *Bradley,* that parolees have full fourth amendment rights,[78] to hold that the rule carries the same injury-benefit potential in revocation proceedings as in criminal prosecutions.[79] The *Workman* decision, which rejected the reasoning that use of the exclusionary rule may

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Winsett, 518 F.2d 51, 53 (9th Cir. 1975); United States v. Farmer, 512 F.2d 160, 162 (6th Cir. 1975); United States v. Hill, 447 F.2d 817, 819 (7th Cir. 1971); Sperling v. Fitzpatrick, 426 F.2d 1161, 1163 (2d Cir. 1970); United States v. Cates, 402 F.2d 473, 474 (4th Cir. 1968); Hyser v. Reed, 318 F.2d 225, 236 (D.C. Cir.) *(en banc), cert. denied,* 375 U.S. 957 (1963).

[72] United States v. Calandra, 414 U.S. 338, 348 (1974); United States v. Raftery, 534 F.2d 834, 838 (9th Cir.), *cert. denied,* 423 U.S. 987 (1975). The exclusionary rule was adopted to protect fourth amendment rights by mandating that evidence seized in violation of the Constitution cannot be used in a criminal proceeding against the victim of the abuse. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914). It was designed to prevent future unlawful police conduct, Elkins v. United States, 364 U.S. 206 (1960), but its use has been restricted to areas where deterrent objectives are best served. United States v. Calandra, 414 U.S. 338 (1974).

[73] United States v. Winsett, 518 F.2d 51 (9th Cir. 1975); United States v. Brown, 488 F.2d 94 (5th Cir. 1973); Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970).

[74] United States v. Brown, 488 F.2d 94, 95 (9th Cir. 1975). The supervising officer will be hampered in his task of revoking probation from convicts who should still be in jail, and the officer also will be burdened with finding admissable evidence in order to convince a judge that a convicted criminal should no longer be allowed the luxury of serving his sentence on the streets. *Id.*

[75] United States v. Calandra, 414 U.S. 338 (1974).

[76] *See* United States v. Brown, 488 F.2d at 94-95.

[77] 585 F.2d at 1209-10. Additional justification was found in the fact that revocation proceedings are commonly used as a substitute for criminal prosecution. *Id.* at 1210.

[78] *Id.* at 1207.

[79] *Id.* at 1210-11.

injure the parole system is contrary to an extensive body of case law in other circuits.[80] The Fourth Circuit's expansion of the scope of the exclusionary rule comes at a time when the Supreme Court has been limiting exclusion in a variety of areas.[81] The Fourth Circuit may have felt that since *Bradley* gave parolees full fourth amendment rights, *Workman* should apply the exclusionary rule to parole and probation proceedings to give substance to those rights. The *Workman* holding, however, is not a necessary corollary to the *Bradley* decision since the exclusionary rule is not a mandatory element of full fourth amendment rights.[82] Even citizens with no criminal record receive no benefit from the rule in grand jury or warrant proceedings.[83] The Fourth Circuit apparently applied the rationale of the exclusionary rule without recognizing that its application has been limited to a few selected areas as a deterrent to unconstitutional police activity.[84] The court's holding in *Workman* was not necessitated by its holding in *Bradley* and therefore does not cast doubt on the validity of *Bradley*.

Stop and Frisk

The Fourth Circuit, in *United States v. Gorin*,[85] considered a search and seizure which fell under the stop and frisk exception to the warrant requirement. The issue specifically raised was whether an investigative stop was lawfully made when based on a tip from an informant of untested reliability. As a general rule, the fourth amendment forbids area searches or custodial arrests without a warrant supported by a showing of probable cause.[86] In order to obtain a warrant the searching or arresting officer must

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[80] *See* notes 72-73 *supra*.

[81] *See* note 53 *supra*. Another indication of the trend toward limiting the exclusionary rule is in *ALI Model Code of Pre-Arraignment Procedures* § SS 290.2 (1975). Under the Model Code, only evidence procured by means of substantial violations of the Code, which are found to be gross, willful and prejudicial to the accused, warrants suppression. *Id.* § SS 290.2(2), (3). In determining substantiality, circumstances considered are: how unlawful and willful the violation was as well as the extent to which privacy was invaded, whether exclusion will discourage further violation of the Code, whether the seized items would have been discovered in any event, and the extent to which the violation prejudiced the moving party's ability to defend himself. *Id.* at § SS 290.2(4).

[82] The rule is not applicable to grand jury proceedings, United States v. Calandra, 414 U.S. 338, 349-52 (1974), sentencing procedings, United States v. Schipani, 435 F.2d 26, 28 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971), and evidence that would be excluded from trial may be used to obtain a warrant, Draper v. United States, 358 U.S. 307, 312-13 (1959). Evidence obtained in violation of fourth amendment rights, excluded from prosecution of the case in chief, may be used for impeachment purposes. *See* Walder v. United States, 347 U.S. 62, 65 (1954). *See also* Oregon v. Haas, 420 U.S. 714, 722-24 (1975) (fifth amendment). Only the victim of an unlawful search has standing to invoke the rule. Brown v. United States, 411 U.S. 223, 229 (1973).

[83] *See* note 65 *supra* & note 91 *infra*.

[84] *See* text accompanying notes 75-81 *supra*.

[85] 564 F.2d 159 (4th Cir. 1977), *cert. denied*, 98 S. Ct. 1276 (1978).

[86] Terry v. Ohio, 392 U.S. 1, 30 (1968). But probable cause is not necessary for all arrests. *Id.* at 22. Some seizures are considered "reasonable" under the fourth amendment so that a warrant with its constitutionally required showing of probable cause is not necessary. *Id.* at

prove that he had good reason to believe some felonious activity was in progress.[87] The officer may arrest or search without a warrant,[88] however, if he has probable cause to believe that a felony was committed by that particular suspect and there are circumstances compelling his immediate action.[89] The probable cause standard applies to both warrantless arrests and arrests with warrants,[90] but the evidence supporting probable cause need not be admissible in court.[91] Informants supplying evidence of probable cause must be of demonstrable credibility.[92] Thus, tips from anonymous or unreliable informants are not sufficient of themselves to support probable cause.

The Supreme Court has exhibited a strong preference for warrants[93] and

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27; Adams v. Williams, 407 U.S. 143, 146 (1972). The understanding of what seizures are and are not "reasonable," in the absence of a warrant based on probable cause, is unfolding. *See* text accompanying note 11 *supra*.

[87] Henry v. United States, 361 U.S. 98, 102 (1959). In cases contemporary with the framing of the Constitution both before, Frisbie v. Butler, 1 Kirby (Conn.) 213 (1787), and immediately after, Conner v. Commonwealth, 3 Binn. (Pa.) 38 (1810); Graumon v. Raymond, 1 Conn. 40 (1814); Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841), adoption of the fourth amendment, courts held common rumor or report or even "strong reason to suspect"; 3 Binn. (Pa.) at 43, was not sufficient to support a warrant for arrest or search. *C.f.* 1 Kirby (Conn.) at 215. *See also* 361 U.S. at 101.

Supreme Court interpretation of the probable cause standard has been derived from both the fourth amendment and its common law antecedents. *Ex parte* Bollman 8 U.S. (4 Cranch) 23 (1807); *Ex parte* Burford, 7 U.S. (3 Cranch) 638 (1806). The Court has held that evidence establishing guilt is unnecessary for a showing of probable cause however mere good faith on the part of the arresting officer is not enough. Probable cause is present when the facts and circumstances known to the officer warrant a prudent man in believing than an offense has been committed. 361 U.S. at 102; Stacey v. Emery, 97 U.S. 642, 645 (1878). *See also* Gerstein v. Pugh, 420 U.S. 103, 111 (1975); Beck v. Ohio, 379 U.S. 89, 91 (1964); Giordenello v. United States, 357 U.S. 480, 485-87 (1958); United States v. DiRe, 332 U.S. 581, 591 (1948); Director Gen. of Railroads v. Kastenbaum, 263 U.S. 25, 28 (1923).

[88] *See* notes 6-10 *supra*.

[89] This "exigent circumstances" exception to the warrant requirement was developed out of the "mobility exception," first delineated in Carroll v. United States, 267 U.S. 132 (1925); *see* Chapman v. United States, 365 U.S. 610, 615 (1961). *See also* Coolidge v. New Hampshire, 403 U.S. 443, 458-64 (1971); Chambers v. Maroney, 399 U.S. 42 (1970). *But see* United States v. Watson, 423 U.S. 411, 423 (1976); Cardwell v. Lewis, 417 U.S. 583, 594-96 (1974).

[90] United States v. Watson, 423 U.S. 411, 421-22 (1976). "[T]he test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." Elkins v. United States, 364 U.S. 206, 224 (1960); *accord,* Stone v. Powell, 428 U.S. 465 (1976) (federal habeas corpus denied where state has provided full and fair opportunity to litigate within state); Mapp v. Ohio, 367 U.S. 643 (1961) (federal fourth amendment standards applied to states under the fourteenth amendment due process clause).

[91] *See* Draper v. United States, 358 U.S. 307, 311-12 (1959); Brinegar v. United States, 338 U.S. 160, 172-73 (1949).

[92] *See* Spinelli v. United States, 393 U.S. 410, 415-16 (1969); Beck v. Ohio, 379 U.S. 89, 97 (1964); Aguilar v. Texas, 378 U.S. 108, 114 (1964). When the warrant is issued or at the suppression hearing, the testimony must show why the informant is credible as well as the basis of his conclusions. 378 U.S. at 114.

[93] *See, e.g.,* United States v. Ventresca, 380 U.S. 102, 107 (1965) (search); Beck v. Ohio, 379 U.S. 89 (1964) (arrest).

has enforced rigid standards for their acquisition.[94] There are, however, several clearly defined exceptions to this warrant requirement,[95] including the "investigative stop" or "stop and frisk" exception.[96] Investigative stops and protective frisks are seizures and searches under the purview of the fourth amendment.[97] Although they are lesser intrusions than custodial arrests or area searches, diminished showings of probable cause suffice to justify such limited searches and seizures.[98] "Probable cause"[99] is reduced to "reasonable suspicion"[100] for purposes of these limited intrusions. "Reasonable suspicion" must be based on specific articulable facts available to the officer at the time of the stop.[101]

The Fourth Circuit considered in *Gorin* whether the tip of an informant of untested reliability would suppply "reasonable suspicion" adequate to justify stopping and questioning a suspect. The court held that when a first-time informant is identifiable, in a position of substantial responsibility, and provides specific information which is verifiable on the scene, his information is sufficient to uphold "reasonable suspicion."[102]

Police received informaton that "a white male, approximately six feet tall, wearing a black leather jacket and a reddish shirt" was carrying a concealed weapon. When the policemen arrived at the scene, the suspect had left, but the bartender of the establishment where the armed man had been seen confirmed the tip in person. Twenty minutes later and seven blocks away, detectives enlisted by the policemen saw a man matching the suspect's description sitting in a car with two other men. One detective asked to speak with the suspect, defendant Gorin. As the defendant stepped out of the car, the detective saw the gun, seized it, and arrested

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[94] Warrants must be based on probable cause, as determined by a neutral and detached magistrate. The burden of proof as to the validity of the warrant is on the government. Beck v. Ohio, 379 U.S. 89, 96 (1964).

[95] *See* notes 7-10 *supra.*

[96] *See* text accompanying notes 96-101 & 116-120 *infra;* notes 8 & 84 *supra.* In Adams v. Williams, 407 U.S. 143 (1972), the Court focused on the seizure or "stop" half of the "stop and frisk" exception and upheld the validity of an officer's "investigative stop" to gather further information about a suspicious individual. *Id.* at 146-47.

[97] Henry v. United States, 361 U.S. 98 (1959). In *Henry,* the Court recognized an arrest as being complete as soon as police officers restricted the movement of defendants. *Id.* at 103. *See also* Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968).

[98] United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975); Adams v. Williams, 407 U.S. 143, 146 (1972); Terry v. Ohio, 392 U.S. 1, 20-21 (1968); *see* text accompanying notes 116-120 *infra.*

[99] *See* text accompanying note 38 *supra.* The common law rule is that an officer making a warrantless arrest must have reasonable grounds to believe a felony has been committed by the suspect. Stacey v. Emery, 97 U.S. 642, 645 (1878). This "reasonable grounds" test has been held to be the equivalent of the "probable cause" requirement. Draper v. United States, 358 U.S. 307, 310 n.3 (1959).

[100] *See* note 86 *supra.* Reasonableness of a seizure is determined by balancing the cause for the search with the degree of intrusion. Something less than probable cause may justify a seizure if the intrusion is minor. *See* LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the Quagmire,* 8 CRIM. L. BULL. 9, 20-24 (1972).

[101] Terry v. Ohio, 392 U.S. 1, 27 (1968).

[102] 564 F.2d 159, 161 (4th Cir. 1977).

Gorin. Further search of Gorin, the car, and the other occupants uncovered a second weapon.[103] Gorin was convicted for unlawful shipment and possession of firearms.[104]

Gorin appealed, claiming evidence used against him at trial was seized in violation of the Constitution.[105] Because the detective's actions after the initial stop were allowable,[106] the defendant challenged only the validity of that incipient seizure.[107] The defendant argued that since the informant's credibility was untested, his information was not sufficiently reliable to support a reasonable suspicion that a crime had been committed.[108] The defendant contended that without reasonable suspicion of felonious activity, the detective's investigative stop of Gorin was unjustified. Thus, all evidence obtained as a result of an unconstitutional seizure should have been excluded from trial.[109]

A brief investigative stop of a suspect may be based on a "reasonable suspicion" that criminal activity is afoot,[110] thus the major constitutional issue that faced the Fourth Circuit was the correct standard of reliability

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[103] *Id.* at 159-60.

[104] *Id.* at 159. Defendant Gorin was convicted for violating 18 U.S.C. §§ 922(g), 924(a) (1976) and 18 U.S.C. § 1202(a)(1) (1976).

[105] 564 F.2d at 160.

[106] *Id.* If justification for the initial stop was estabished, the remainder of the chain of events was unquestionably valid. *Id.* Gorin's gun was visible to the detective as Gorin stepped out of the car and thus seizable as evidence in plain view. *Id; see* note 9 *supra.* Gorin was arrested for carrying a concealed weapon, a crime committed in the presence of the arresting officer. 564 F.2d at 160. A subsequent, more thorough, search of the car and occupants was allowed under the doctrine of search incident to a lawful arrest. *See* note 8 *supra.* Under this doctrine, officers may make a protective search of the area within the immediate control of the arrestee. Chimel v. California, 395 U.S. 752, 762-64 (1969).

The search of Gorin's car was proper under the mobility doctrine of Carroll v. United States, 267 U.S. 132, 149 (1925) and Chambers v. Maroney, 399 U.S. 42 (1970). Although the fourth amendment right to be secure in the home has been extended to cars, *see, e.g.,* Commonwealth v. Mimms, 471 Pa. 546, 370 A.2d 1157, *rev'd on other grounds,* 434 U.S. 106 (1977), *Carroll* carves an exception to the warrant requirement when suspects, evidence, or fruits of a crime are particularly mobile. *See* note 7 *supra. See generally* Wales, *Probable Cause to Arrest or Search in Drug Cases,* 1 SEARCH AND SEIZURE LAW REP. no. 5 (1974).

The Fourth Circuit encountered a similar problem in United States v. Jefferson, 480 F.2d 1004 (4th Cir.), *cert. denied,* 414 U.S. 1001 (1973). In that case, a police officer received information that Jefferson carried a concealed weapon. When Jefferson alighted from his stopped car, the gun was in plain view. An informant of proven reliability had specifically identified the suspect by name. 480 F.2d at 1005.

In analyzing *Jefferson,* the Fourth Circuit held the stop to be a seizure. The court applied the *Terry* reasonableness standard to find that specific information from a reliable informant sufficed to justify the stop. *Id.* An important prerequisite to the "plain view" exception to the fourth amendment warrant requirement is that the officer must be rightfully in a position to have the view that reveals the evidence. Harris v. United States, 390 U.S. 234, 236 (1968). In *Jefferson,* the officer was rightfully in the position from which he saw the gun, validating the search under the "plain view" doctrine. 480 F.2d at 1006.

[107] 564 F.2d at 160.

[108] *Id.*

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

[110] *See* text accompanying notes 115-117 *infra.*

to be applied to information supplied by an informant. The problem of an informant of untested reliability presented a matter of first impression in the Fourth Circuit, so the court considered analogous cases in other circuits.[111] Under the facts of *Gorin,* the Fourth Circuit found the bartender's information specific, credible, and verified by facts on the scene.[112] The bartender's position of responsibility bolstered his credibility as an informant.[113] The court found that although the information might not have met

[111] 564 F.2d at 161. In United States v. Legato, 480 F.2d 408 (5th Cir.), *cert. denied,* 414 U.S. 979 (1973), an anonymous tipster told airport detectives that two men were carrying a bomb in an orange shopping bag and would board a plane for Chicago at 4:00 p.m. from one of two airports in the Miami area. *Id.* at 409. The Fifth Circuit held that police, upon seeing two men with an orange shopping bag waiting to board a 4:10 plane for Chicago, were justified in making an investigative stop of the suspects. *Id.* at 411. *See also* United States v. Skipwith, 482 F.2d 1272, 1276-77 (5th Cir. 1973) (setting up standards of suspicion for limited weapons search).

United States v. Hernandez, 486 F.2d 614 (7th Cir.), *cert. denied,* 415 U.S. 959 (1973) concerned an investigative stop of a van pursuant to a police radio report, based on an anonymous tip. The tip said people were hiding in the back of the van. *Id.* at 615-16. The people turned out to be illegal aliens and the stop was upheld. *Id.* at 617.

In United States v. Cage, 494 F.2d 740 (10th Cir. 1974), a police radio bulletin ordered pickup of an auto whose occupants were reported to have been armed and involved in an assault. *Id.* at 741. The Tenth Circuit upheld the stop for investigative purposes only. *Id.* at 742.

In United States v. Preston, 468 F.2d 1007 (6th Cir. 1972), the police came into a beer garden and found one man dead on the ground, another brandishing a pistol, and twenty to thirty more people standing around. A bystander, whose credibility was untested, told police a nearby car had guns in it. Upon investigation, a shotgun was discovered in plain view. *Id.* at 1007-08. The investigation was held valid. *Id.* at 1010.

United States v. DeVita, 526 F.2d 81 (9th Cir. 1975) was the only case cited by the Fourth Circuit as contrary to the *Gorin* holding. The facts in *DeVita,* however, are distinguishable. United States v. Gorin 564 F.2d at 161. A vague tip was given by an informant who had supplied unreliable information on DeVita previously, touching off a fruitless five-month surveillance. The court found that no basis existed for stopping suspect's car. *Id.* at 82-83.

[112] 564 F.2d at 160-61. In the case of a warrantless search or seizure, a set of facts that falls short of probable cause can be corrected by corroboration on the scene. Draper v. United States, 358 U.S. 307, 313-14 (1959). In *Draper,* a proven credible informant told police that the defendant would be returning from Chicago by train with cocaine, on one of two mornings. Draper's appearance, clothing, and walking mannerisms were all described. *Id.* at 309. The court held that when a person fitting that description got off the train, credibility atached to the informant's tip and police had probable cause to take the suspect into custody. *Id.* at 313. *See also* Spinelli v. United States, 393 U.S. 410, 416-18 (1969); United States v. Mearns, 443 F. Supp. 1244, 1251 (D. Del. 1978).

Corroboration can correct the deficiency only if credibility of the specific nature of the information can be clearly inferred from the corroborating facts. *See* 358 U.S. at 313. The Supreme Court has allowed corroborating facts to correct a deficient fact situation by showing surrounding circumstances to be consistent with the specific information given by the informant in a case where all surrounding specific details given by the informant were corroborated on the scene. *Id.*

[113] 564 F.2d at 161. When establishing probable cause based on an informant's tip, the standard is that testimony show the underlying circumstances indicating why the informant was credible and on what he based his conclusions. *Cf.* Beck v. Ohio, 379 U.S. 89, 93-97 (1964) (suppression hearings); Spinelli v. United States, 393 U.S. 410, 415-19 (1969) (suppression hearings); Aguilar v. Texas, 378 U.S. 108, 113-16 (1964) (warrant proceeding).

all the standards of probable cause, it was sufficient to uphold the diminished standard of reasonable suspicion that criminal activity was afoot and would, together with exigent circumstances, justify an investigative stop.[114]

The Fourth Circuit applied recent Supreme Court cases which have held that because an investigative stop is a less intrusive seizure than a custodial arrest,[115] less justification is necessary. The decisions provide guidance on the standards of when and for what cause mildly intrusive seizures of the person are allowed. According to the Court, investigative stops are "reasonable" under the Constitution when the public interest in preventing crime outweighs the individual interest in security from arbitrary interference by law officers.[116] The rule allows investigative stops if, at the time of the stop, the officer can point to specific articulable facts that reasonably warrant suspicion that criminal activity is afoot.[117]

In recent cases applicable to the Fourth Circuit's analysis in *Gorin*, the Supreme Court has clarified the boundaries of the "reasonableness" of an investigative stop under the fourth amendment[118] and viewed the specific intrusion of asking a suspect to get out of his car.[119] After considering the intrusiveness of requiring that a suspect vacate his automobile to answer questions, the Court concluded that the possibility of a suspect's shooting an inquiring officer and the hazard presented by passing traffic combine to justify the intrusion.[120] To determine the validity of the intrusion in that particular situation, the Supreme Court balanced the safety of the officer with the encroachment upon the suspect's liberty and ruled that if the intrusion was limited and the danger to the officer was great, then it was "reasonable" under the fourth amendment to ask the suspect to step out

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[114] 564 F.2d at 161.

[115] Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968). *See also* Pennsylvania v. Mimms, 434 U.S. 106 (1977); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

[116] *See* note 86 *supra*.

[117] United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975). The investigative stop, or "stop and frisk" exception to the fourth amendment warrant requirement was set out in Terry v. Ohio, 392 U.S. 1 (1968). The Supreme Court recognized that even a momentary stop of a suspicious individual is a seizure, and even a light frisk of his outer clothing is a search. *Id.* at 16. The intrusion involved, however, is substantially less than that of an area search or a custodial arrest. *Id.* at 16-20. The Court found that, under certain circumstances, such limited intrusions might not be unreasonable within the meaning of the fourth amendment, *see* note 100 *supra*, and that no showing of probable cause would be necessary. 392 U.S. at 26-27. In Adams v. Williams, 407 U.S. 143 (1972), the Supreme Court reaffirmed its decision in *Terry*, holding that proper police conduct may call for a brief investigative stop of a suspicious individual, despite a lack of probable cause. *Id.* at 146. The Court designed the investigative stop exception to the warrant requirement as an intermediate response for situations when an officer lacks probable cause for arrest but has a reasonable suspicion that criminal activity is afoot and should examine the situation more closely. The Fourth Circuit relied on *Adams* to justify the investigative stop in *Gorin*. 564 F.2d at 161.

[118] *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

[119] Pennsylvania v. Mimms, 434 U.S. 106 (1977). *See generally* Note, *Fourth Amendment Does Not Prohibit a Police Officer From Ordering a Traffic Offender Out of His Car*, 6 AM. J. CRIM. L. 193 (1978).

[120] 434 U.S. at 110-11.

of his car.[121] The principles set out by Supreme Court cases support the Fourth Circuit's holding that the detectives had sufficient "reasonable suspicion" to stop defendant Gorin.

Widespread recognition is afforded the notion that the demands of law enforcement effectiveness dictate that police be able to make brief investigative stops of suspicious individuals with a minimal amount of cause. The "reasonable suspicion" standard for upholding an investigative stop accomplishes this result. The Fourth Circuit's analysis in *Gorin* questioned whether a tip from an informant of apparent though untested reliability can create a sufficiently reasonable suspicion that a crime is taking place to make an investigative stop justifiable. The court's holding that such a tip can justify an investigative stop accords with recent Supreme Court and circuit court interpretation in the area.

DOUGLAS C. BROEKER

E. Use of Psychiatric Testimony

The fifth amendment to the United States Constitution guarantees all criminal defendants the privilege against self-incrimination.[1] There is general agreement that this privilege extends to admissions made by defendants to psychiatrists during court ordered psychiatric examinations, although the privilege has been enforced by different means.[2] In the recent

[121] *Id.*

[1] The federal Constitution provides that "No person . . . shall be compelled in any Criminal Case to be a witness against himself . . . ." U.S. CONST. amend. V. The privilege against self-incrimination is a personal one, *see, e.g.*, United States v. Nobles, 422 U.S. 225, 233 (1975), and thus cannot be utilized by or on behalf of any organization. *See, e.g.*, United States v. White, 322 U.S. 694, 701 (1944) (corporations may not assert privilege against self-incrimination). The self-incrimination privilege is not limited to criminal proceedings, *In re* Gault, 387 U.S. 1, 47 (1967), but may be claimed by a person in any proceeding which legally requires testimony that might be used against him in that proceeding or in a future criminal proceeding. *See* Kastigar v. United States, 406 U.S. 441, 444 (1972). In 1964, the Supreme Court applied the Constitutional privilege against self-incrimination to the states through the due process clause of the fourteenth amendment. Malloy v. Hogan, 378 U.S. 1, 8 (1964); *see* U.S. CONST. amend. XIV. The right against self-incrimination only applies to compelled communicative or assertive testimony, but does not apply to compulsion which makes a suspect or accused the source of real or physical evidence. 8 J. WIGMORE, EVIDENCE § 2263-65 (1961) [hereinafter cited as WIGMORE].

[2] W. LAFAVE & A. SCOTT, CRIMINAL LAW 310-11 (1972) [hereinafter cited as LAFAVE & SCOTT]; *see, e.g.*, United States v. Reifsteck, 535 F.2d 1030 (8th Cir. 1976); United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975); United States v. Julian, 469 F.2d 371 (10th Cir. 1972); United States v. Williams, 456 F.2d 217 (5th Cir. 1972); United States v. Bennett, 460 F.2d 872 (D.C. Cir. 1972); United States v. Bohle, 445 F.2d 54 (7th Cir. 1971); United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968); United States v. Albright, 388 F.2d 719 (4th Cir. 1968). The statutory proscription against using admissions made by a defendant during a psychiat-

case of *Gibson v. Zahradnick*,[3] the Fourth Circuit applied the privilege against self-incrimination to exclude statements made during a court ordered psychiatric examination on the issue of guilt.[4] The *Gibson* court concluded that the introduction of a defendant's inculpatory statement on the issue of guilt made during a compulsory psychiatric examination violates the defendant's privilege against self-incrimination.[5]

Gibson was arrested for murder.[6] While in the lock-up room at the courthouse, Gibson disrobed and began speaking incoherently.[7] Upon transfer to the jail, Gibson tore off one of his ears because he believed that a microphone had been implanted in that ear.[8] Following hospitalization to re-attach the severed ear, Gibson was transferred to a state mental hospital to determine whether he was competent to stand trial and whether he had been sane at the time of the crime.[9] During the examination, Gibson admitted killing his wife and father-in-law to the hospital psychiatrist.[10]

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ric examination authorized for the purpose of determining the defendant's competency to stand trial applies in the federal system. 18 U.S.C. § 4244 (1976); *see* United States v. Albright, 388 F.2d 719 (4th Cir. 1968). There is no statutory prohibition, however, against using a defendant's admission made during a court ordered examination to determine the sanity of the accused at the time of the criminal act. Nevertheless, many commentators have suggested that the entire court ordered examination procedure is contrary to the privilege against self-incrimination. *See, e.g.*, Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?*, 26 STAN. L. REV. 55 (1973) [hereinafter cited as Aronson]; Danforth, *Death Knell for Pre-Trial Mental Examination? Privilege Against Self-Incrimination*, 19 RUTGERS L. REV. 489 (1965) [hereinafter cited as Danforth]; Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 HARV. L. REV. 648 (1970) [hereinafter cited as *Requiring a Criminal Defendant*].

[3] 581 F.2d 75 (4th Cir.), *cert. denied sub nom.* Mitchell v. Gibson 99 S. Ct. 597 (1978).

[4] *Id.* at 78.

[5] *Id.* at 80.

[6] *Id.* at 77.

[7] *Id.*

[8] *Id.*

[9] *Id.* While Gibson was hospitalized, his appointed counsel obtained a court order to have Gibson examined by a psychiatrist. However, the psychiatrist at the hospital concluded that Gibson's mental condition could not be adequately evaluated in the jail and requested that Gibson be committed to a state mental hospital. The order for the examination by the private psychiatrist was cancelled and the court issued a new order transferring Gibson to the state mental hospital. *Id.* After medication and treatment, Gibson was returned to jail with a certification that he was competent to stand trial. *Id.*

Gibson was committed to Central State Hospital pursuant to VA. CODE § 19.2-169 (Supp. 1975) which requires commitment of a person accused of criminal activity when there is reason to doubt his competency to stand trial. A person is deemed incompetent to stand trial if, as a reslt of a mental condition, he substantially lacks capacity to understand the proceedings against him or to assist in his own defense. *See* Dusky v. United States, 362 U.S. 402 (1960). Thus, competency is a determination of the mental condition of the accused at the time of the trial, whereas the issue of insanity refers to the state of mind of the accused at the time he committed the act. In Pate v. Robinson, 383 U.S. 375 (1966), the Supreme Court held that the due process clause of the fourteenth amendment, which prohibits conviction of a legally incompetent person, requires a determination of the competency of an accused to stand trial when the evidence raises sufficient doubt on that issue. *Id.* at 377-78, *citing* Bishop v. United States, 350 U.S. 961 (1956).

[10] 581 F.2d at 77.

At trial, the state presented the hospital psychiatrist solely for the purpose of introducing the incriminating statements Gibson made during the compulsory psychiatric examination.[11] Gibson was convicted in Virginia state court for the first degree murder of his estranged wife and for the second degree murder of his father-in-law.[12] Gibson's conviction was affirmed by the Supreme Court of Virginia on the grounds that the use of the psychiatrist's testimony was neither prohibited by statute nor by the privilege against self-incrimination.[13]

On habeas corpus review,[14] the Fourth Circuit held that the introduction of the inculpatory statement, made during the compulsory psychiatric examination, to prove Gibson's guilt, violated Gibson's constitutional privilege against self-incrimination.[15]

The court distinguished between using the results of a compulsory psychiatric examination[16] on the issue of sanity and using incriminating statements obtained during such an examination on the issue of guilt.[17] The court concluded that the use of the results on the sanity issue was permissable, but that the use of an incriminating statement on the issue of guilt

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[11] *Id.* at 77-78. The psychiatrist at the state mental hospital testified that Gibson had told him that he did not remember anything that happened after the shooting. *Id.* at 77. The prosecutor did not ask about Gibson's mental condition while at the mental hospital or at the time of the slayings. *Id.* at 77-78.

[12] *Id.* at 76.

[13] Gibson v. Commonwealth, 216 Va. 412, 219 S.E.2d 845 (1975). The *Gibson* court concluded that the psychiatrist's testimony did not violate Gibson's privilege against self-incrimination because Gibson was not compelled to answer the questions concerning the offense with which he was charged. *Id.* at 414, 219 S.E.2d at 847. The court stated that although there was a physician-patient privilege in civil proceedings, VA. CODE § 8.01-399 (1977), there was no such provision in criminal proceedings. Thus, the psychiatrist's testimony about the defendant's statements did not violate common law privilege. 216 Va. at 414, 219 S.E.2d at 847. *See generally* Note, *Psychiatrists' Duty to the Public: Protection from Dangerous Patients,* 1976 U. ILL. L. F. 1103. At common law, there was no doctor-patient privilege. WIGMORE, *supra* note 1, at § 2380; Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?,* 52 YALE L. J. 607, 616-17 (1943). Presently, however, two-thirds of the states recognize a doctor-patient privilege. WIGMORE, *supra* note 1, at § 2380. *See generally* Louisell & Sinclair, *Foreward: Reflections on the Law of Privileged Communications—The Psychotherapist-Patient Privilege in Perspective,* 59 CAL. L. REV. 30, 32 n.11 (1971).

[14] The Supreme Court denied certiorari in Gibson v. Virginia, 425 U.S. 994 (1976), and the United States district court denied Gibson's petition for habeas corpus.

[15] 581 F.2d at 76.

[16] Many states have statutes which authorize court ordered psychiatric examinations. *See, e.g.,* COLO. REV. STAT. ANN. § 16-8-102 (1963); DEL. CODE ANN. tit. 16, § 5122(c) (1970); MD. ANN. CODE art. 59, § 25 (1972); VA. CODE § 19.2-169 (1975). *See also* Note, *Pre-Trial Mental Examination and Commitment: Some Procedural Problems in the District of Columbia,* 51 GEO. L. J. 143, 145 n.6 (1962).

[17] 581 F.2d at 78. The common law rule of limited admissability states that if evidence is admissable on one issue and inadmissable on another, the court may allow the introduction of the evidence. FED. R. EVID. 105; C. MCCORMICK, EVIDENCE § 59 (1954) [hereinafter cited as MCCORMICK]. However, the trial judge has discretion to exclude evidence clearly admissable on one issue if its probative value on that issue is insufficient to outweigh its prejudicial effect on the other issues. Shepard v. United States, 290 U.S. 96 (1933); MCCORMICK, *supra* at § 59.

was constitutionally forbidden.[18] The Fourth Circuit reasoned that both the state and the defendant need the assistance of expert testimony in a determination of sanity.[19] The court further reasoned that the most dependable and reliable testimony by psychiatrists would be unobtainable in many cases unless psychiatrists were free to inquire into the prior aberrant conduct of a defendant, including his participation in the criminal activity with which he was charged.[20] To enable a psychiatrist to evaluate fully a person's mental condition at the time of the alleged crime, the psychiatrist must be free to engage in a penetrating discussion with the person about his conduct.[21] Thus, to permit the defendant to remain silent at the examination by asserting the privilege against self-incrimination would greatly impede the discovery process relating to the defense of insanity.[22] Therefore, the court concluded that the statements made by a defendant at a compulsory examination would violate the defendant's privilege against self-incrimination if admitted on the issue of guilt.[23] The court recognized, however, that in some cases, a psychiatrist testifying on the issue of sanity will need to disclose statements made to him by the defendant concerning the defendant's criminal activity.[24] In cases involving such a situation, the court stated that the jury must be given prompt and strong cautionary instructions not to consider such testimony on the issue of the defendant's guilt.[25]

The Fourth Circuit rejected the state's contention that Gibson's statement to the psychiatrist was made voluntarily, so as to preclude the application of the privilege against self-incrimination.[26] The court concluded that the hospital psychiatrist's statement to Gibson, that he had the right to remain silent, did not make Gibson's statement voluntary because his speech was not a free and willing choice made with appreciation of the possible adverse consequences.[27] In concluding that Gibson's statements

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[18] 581 F.2d at 78; *accord,* United States v. Reifsteck, 535 F.2d 1030, 1034 n.1 (8th Cir. 1976); United States v. Alvarez, 519 F.2d 1036, 1042 (3d Cir. 1975); United States v. Bennett, 460 F.2d 872, 878-80 (D.C. Cir. 1972); United States v. Williams, 456 F.2d 217, 218 (5th Cir. 1972); United States v. Julian, 469 F.2d 371, 375-76 (10th Cir. 1972); United States v. Bohle, 445 F.2d 54, 66-67 (7th Cir. 1971).

[19] 581 F.2d at 79.

[20] *Id.*

[21] *Id.*

[22] *Id.*; *see* Thornton v. Corcoron, 407 F.2d 695 (D.C. Cir. 1969); United States v. Albright, 388 F.2d 179, 724 (4th Cir. 1968). *See generally* Aronson, *supra* note 2; Gallivan, *Insanity, Bifurcation and Due Process: Can Values Survive Doctrine?* 13 LAND & WATER L. REV. 515 (1978); *see also* United States v. Mattson, 469 F.2d 1234, 1236 (9th Cir. 1972), *cert. denied,* 410 U.S. 986 (1973); United States *ex rel.* Stukes v. Shovlin, 464 F.2d 1211, 1213 (3d Cir. 1972); United States v. Smith, 436 F.2d 787, 790 (5th Cir. 1971); Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems,* 45 U. CHI. L. REV. 21, 42-43 (1977).

[23] 581 F.2d at 79.

[24] *Id.*

[25] *Id.*; *see* text accompanying notes 52-54 *infra.*

[26] 581 F.2d at 79.

[27] *Id.*; *see* text accompanying notes 48-51 *infra.*

were not voluntary, the court reasoned that Gibson was encouraged to speak freely and was not warned of the consequences which might follow an admission.[28]

The court also rejected the state's contention that Gibson waived his constitutional privilege against self-incrimination by obtaining the first order for a psychiatric examination and evaluation.[29] The Fourth Circuit held that the exercise of the defendant's right to raise the insanity defense could not be conditioned upon a waiver of his constitutional privilege against self-incrimination.[30] In rejecting the waiver theory, the court reasoned that Gibson's attorney had no choice but to request an examination in light of Gibson's obvious need for psychiatric examination and treatment.[31] The court further noted that under the circumstances, the Commonwealth's Attorney or the court itself would be required by statute to order a competency examination,[32] whether or not the defense counsel requested one.[33]

The approach adopted by the *Gibson* court to protect the defendant's privilege against self-incrimination effectuates the underlying values of the privilege[34] without impeding the discovery process relating to the insanity defense.[35] Although commentators do not agree on the policy underlying

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[28] 581 F.2d at 79.

[29] *Id.*; note 9 *supra.*

[30] 581 F.2d at 80. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The Supreme Court does not lightly infer the waiver of a constitutional right. Smith v. United States, 337 U.S. 137, 150 (1949). The heavy burden required to demonstrate a valid waiver of a constitutional right also applies to the states. *See, e.g.,* Boykin v. Alabama, 395 U.S. 238 (1969); Johnson v. Zerbst, 304 U.S. 458 (1938). Mere cooperation is no longer a sufficient ground for finding a waiver of a constitutional right. Rather, there must be a knowing, intelligent and voluntary relinquishment of a defendant's right to remain silent. Miranda v. Arizona, 384 U.S. 436 (1966). In a case involving a mentally disturbed offender, the demonstration that his waiver is knowing, intelligent and voluntary, is even more difficult because his competence to waive his rights might still be in doubt. Pate v. Robinson, 383 U.S. 375, 384 (1966); Johnson v. Zerbst, 304 U.S. 458, 462-65 (1938). *See generally* Danforth, *supra* note 2, at 498; Fielding, *Compulsory Psychiatric Examination in Civil Commitment and the Privilege Against Self-Incrimination,* 9 GONZ. L. REV. 117, 141 (1973).

[31] 581 F.2d at 80.

[32] *Id.* Virginia law provides that when there is reason to believe that a defendant lacks substantial capacity to understand the proceedings against him or to assist in his defense because of mental disease or defect, the court, the attorney for the Commonwealth, or the attorney for the accused must request a psychiatric examination. VA. CODE § 19.2-167 (1975); *see* Pate v. Robinson, 383 U.S. 375 (1966); Kibert v. Peyton, 383 F.2d 566 (4th Cir. 1967).

[33] 581 F.2d at 80. The court specifically stated its agreement with Collins v. Auger, 428 F. Supp. 1079 (S.D. Iowa 1977), which held, as a matter of fundamental fairness required by the fourteenth amendment, that an incriminating statement made during a psychiatric examination cannot be used to prove a defendant's guilt. *Id.* at 1082. The *Collins* court stated that any incriminating statement made during the examination could not be introduced at trial on the issue of guilt, regardless of whether the defendant or the prosecutor requested the examination, or whether the examination was for the purpose of determining the competence of the defendant to stand trial or the sanity of the defendant at the time of the crime. *Id.*

[34] *See generally* Aronson, *supra* note 2, at 60; text accompanying note 36 *infra.*

[35] *See* text accompanying notes 20-22 *supra.*

the privilege against self-incrimination,[36] the Supreme Court has enunciated basic values which the privilege protects.[37] The first value protected by the privilege is the accusatorial system of criminal justice.[38] The government is constitutionally compelled to establish guilt by evidence independently and freely secured.[39] The *Gibson* court's holding forces the government to secure independent evidence of the accused's guilt by precluding the government from using the defendant's statements made during a compulsory psychiatric examination.[40] The second value protected by the privilege is the preservation of personal privacy from unwarranted governmental intrusion.[41] An individual's innermost beliefs and thought processes should be unavailable to the state even when he is accused of a crime.[42] In situations such as Gibson's, however, the government must ascertain what those beliefs and thought processes are in order to prove the defendant's sanity[43] and not violate the constitutional prohibition against trying an incompetent person.[44] Thus, the need of the state to effectively

[36] *See* WIGMORE, *supra* note 1, § 2251, at 296. "There is no agreement as to the policy of the privilege against self-incrimination. This is partly because there is no 'the' privilege. It is many things in as many settings." *Id.* The values underlying the privilege against self-incrimination are rarely expressed, thus making it necessary to analyze the applicability of the privilege to a given procedural setting by inquiring whether any or all of the values intended to be protected would be served by applying the privilege. *See generally* Aronson, *supra* note 2, at 56-58. Wigmore noted twelve possible justifications for the privilege against self-incrimination. WIGMORE, *supra* note 1, at § 2251.

[37] Schmerber v. California, 384 U.S. 757, 760-65 (1966); Miranda v. Arizona, 384 U.S. 463, 460 (1966); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966). *See generally* Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change,* 37 U. CIN. L. REV. 671 (1968); Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition,* 61 MINN. L. REV. 383 (1977).

[38] *See* Malloy v. Hogan, 378 U.S. 1, 7-8 (1964); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); Williams v. Florida, 399 U.S. 78, 112 (1970) (Black, J., dissenting). *See also* Clapp, *Privilege Against Self-Incrimination,* 10 RUTGERS L. REV. 541, 545 (1956).

[39] Malloy v. Hogan, 378 U.S. 1, 8 (1964). Under the due process clauses of the fifth and fourteenth amendments, the government has the burden of proving the defendant's guilt. Although there is nothing on the face of the Constitution that requires the government to prove the guilt of the accused beyond a reasonable doubt, the United States Supreme Court held, in *In re* Winship, 397 U.S. 358 (1970), that the due process clause of the fourteenth amendment requires the acquittal of an accused in a criminal prosecution unless the highest standard of proof known to the law is satisfied. *Id.* at 363.

[40] By compelling the prosecution to prove the defendant's guilt by means of reliable, independently obtained evidence, the court precludes the prosecution from conducting less thorough investigations and relying instead on statements obtained from the defendant himself. *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966).

[41] *Id.*

[42] *Id.; see* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). *See also* WIGMORE, *supra* note 1, § 2251, at 307; Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination,* 24 U. CHI. L. REV. 472, 487-88 (1957).

[43] The defendant always bears the intial burden of going forward with evidence that the defendant is not sane. *See* K. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 214 n.1 (1954). *See generally* LAFAVE & SCOTT, *supra* note 2, at 306. Once the defendant has met his burden of going forward with evidence, about half the states and the federal government shift the burden to the prosecution to prove the defendant's sanity beyond a reasonable doubt. *Id.* at 241-72; Comment, *Insanity—The Burden of Proof,* 30 LA. L. REV. 117, 117-18 n.1 (1969).

determine the sanity of the accused while protecting his privilege against self-incrimination mandated an alternative procedure to the traditional one of remaining silent. The court concluded that precluding the use of the results of the compulsory examination on the issue of guilt was an effective alternative.[45] The third value protected by the privilege against self-incrimination is the right of an individual to be free from undue physical and mental pressure, both to assure humane treatment and to avoid introduction of unreliable coerced statements.[46] Since the presence of coercion is virtually impossible to determine, specific protective requirements to assure voluntariness have been instituted as a means of protecting the accused's privilege against self-incrimination.[47]

To insure the voluntariness of a defendant's statement, the Supreme Court has held that due process requires every defendant to be informed of his constitutional rights before custodial interrogation.[48] The *Gibson* court stated, however, that despite its similarity to custodial interrogation, informing the defendant of his constitutional rights would not automatically permit the admission of an incriminating statement made during a compulsory psychiatric examination.[49] In reaching that conclusion, the *Gibson* court noted that a defendant is not entitled to the presence of a lawyer during a compulsory psychiatric examination since the lawyer's insistence that his client remain silent about the crime would frustrate the purpose of examination.[50] Therefore, the court concluded that merely in-

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The Model Penal Code § 4.03(1) characterizes insanity as an affirmative defense which puts the burden on the prosecution to disprove, beyond a reasonable doubt, the evidence offered by the defendant on the issue of insanity. MODEL PENAL CODE § 1.12(2) (Proposed Final Draft No. 1, 1961).

[44] Due process precludes the trial of an incompetent person. Bishop v. United States, 350 U.S. 961 (1956). The reasons underlying this principle include ensuring the accuracy of the proceedings, ensuring the fairness of the proceedings, and aiding in maintaining the dignity of the proceedings. *See generally* LAFAVE & SCOTT, *supra* note 2, at 297; Note, *Incompetency To Stand Trial*, 81 HARV. L. REV. 454, 457-58 (1967).

[45] 581 F.2d at 80.

[46] *See* Miranda v. Arizona, 384 U.S. 436, 467-79 (1966).

[47] In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that a defendant must be informed that he has the right to remain silent, that anything he says can and will be used against him in a court of law, that he has the right to counsel, and that if he cannot afford counsel, an attorney will be appointed to advise him. *Id.* at 467-79. Only when a defendant has been informed of his rights and has not been compelled in any way will his confession be considered voluntary. *Id.*

[48] *Id.* at 467.

[49] 581 F.2d at 79; *see* Berry, *Self-Incrimination and the Compulsory Mental Examination: A Proposal*, 15 ARIZ. L. REV. 919 (1973); Note, *PreTrial Psychiatric Examinations and the Privilege Against Self-Incrimination*, 1971 U. ILL. L. F. 232, 237-39.

[50] 581 F.2d at 79. In *Albright*, the court considered whether a defendant in a criminal proceeding had the right to refuse examination by government selected psychiatrists when the defendant himself proposed to offer evidence of his own insanity. The court concluded that the government could compel a defendant to submit to such an examination and evaluation for the purpose of obtaining expert testimony on the issue of the defendant's sanity. *Id.* at 723. The *Albright* court also recognized that a federal court has the inherent power to order a psychiatric examination to assist in the determination of the defendant's mental condition at the time of the act, *id.*, and held that the fifth amendment privilege against self-

forming the defendant of his rights would not render an incriminating statement made during a compulsory psychiatric examination admissable on the issue of guilt since other procedural safeguards instituted to protect a defendant's privilege against self-incrimination could not be applied to such an examination.[51]

After concluding that the privilege against self-incrimination should be extended to compulsory psychiatric examinations, the court refused to recognize a waiver of Gibson's privilege.[52] By holding that submission to a compulsory psychiatric examination was not a waiver, the court avoided placing Gibson in the position of sacrificing one constitutional right, the privilege against self-incrimination, for another, the due process right to seek out available defenses.

The court's determination that prompt and strong cautionary instructions are sufficient to protect a defendant's privilege is questionable, especially in cases where psychiatrists, testifying on the issue of sanity, must necessarily disclose statements made to him by the defendant. The use of jury instructions to protect a defendant's privilege against self-incrimination has been criticized on the ground that a jury is unlikely to adhere to such instructions.[53] A defendant's privilege against self-incrimination can be better protected by permitting the admission of the results of a compulsory psychiatric examination on the issue of sanity only if the sanity issue is decided in a separate hearing following the determination of guilt. This bifurcated trial procedure has the advantage of insuring that a defendant's statements cannot operate to his prejudice on the issue of guilt, but are brought to the attention of the fact finder as a relevant

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incrimination bars the use of an incriminating statement made to the psychiatrist during a psychiatric examination for the purpose of proving the defendant's guilt. *Id.* at 725. The *Albright* court concluded that the privilege against self-incrimination should be given the same recognition, regardless of whether the psychiatric examination was ordered pursuant to the court's inherent power to order a psychiatric examination on the issue of insanity or whether the psychiatric examination was ordered pursuant to statutory authorization. *Id.*

[51] 581 F.2d at 79 n.1. Under the due process clause of the fourteenth amendment, the Supreme Court developed the "voluntariness" test for the admission of confessions in state court. The due process clause requires courts to consider the totality of the circumstances surrounding a confession to determine if a confession was made voluntarily. Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1973); Rogers v. Richmond, 365 U.S. 534, 544 (1961). The Supreme Court has held that a confession must be the product of an essentially free and unrestrained choice of the defendant. 412 U.S. 224-25. In determining the voluntariness of a confession, criteria such as the number of interrogators, the length of questioning, the setting in which the questioning took place, the age, experience and educational level of the accused, and his mental capacity are considered. *See* S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESS: CASES AND MATERIALS 984-85 (3d ed. 1975). The Supreme Court has also held that due process requires that all defendants must be informed of their constitutional rights before custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 467-79 (1966); *see* note 47 *supra.*

[52] 581 F.2d at 79-80; *see* text accompanying notes 29-30 *supra.*

[53] Bruton v. United States, 391 U.S. 123 (1968); United States v. Bennett, 460 F.2d 872, 880 (D.C. Cir. 1972). The efficacy of a limiting instruction to protect an individual's privilege against self-incrimination has been viewed with skepticism. *See, e.g.,* MODEL PENAL CODE § 302.17, Comment (Proposed Final Draft No. 1, 1961).