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of an act which it administers routinely is afforded judicial deference, even in matters of first impression.[63] Decisions of the NRC in particular have carried considerable authority in the courts.[64] The regulatory scheme created pursuant to the Atomic Energy Act of 1954 grants an unusual degree of sweeping authority to the agency.[65] NRC findings of fact will not be overturned unless it can be demonstrated that they are arbitrary and capricious.[66] Where the facts are susceptible to two different interpretations, the agency's decision will not be set aside for lack of substantial evidence.[67] The technical expertise required for such determinations is possessed by engineers, not judges.[68]

The Fourth Circuit's decision in *Virginia Electric & Power Co. v. Nuclear Regulatory Commission* extends the strict liability concept associated with public health and safety legislation to the field of nuclear power plant licensing. By refusing to read a reliance requirement into its interpretation of materiality and by holding that scienter is not necessary to impose liability under section 186, the Fourth Circuit decision sought to effectuate the overriding purpose of the 1954 Act: protection of the public welfare in the area of nuclear power. Furthermore, the Fourth Circuit reaffirmed the sweeping authority of the NRC to render decisions within its particular expertise.

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XI. EVIDENCE

A. Hearsay Evidence and the Confrontation Clause

Ideally, to protect the defendant from introduction of untrustworthy testimony, oral testimony should be given under oath, in the presence of the trier of fact, and challenged by cross-examination.[1] Application of the

[63] Butz v. Glover Livestock Com. Co., 411 U.S. 182, 185 (1973). *See also* Power Reactor Dev. Co. v. International Union of Elec., Radio & Mach. Workers, 367 U.S. 396, 414-16 (1961); Great N. Ry. v. United States, 315 U.S. 262, 275 (1942); Cross v. United States, 512 F.2d 1212, 1218 (4th Cir. 1974).

[64] Cities of Statesville v. Atomic Energy Comm'n, 441 F.2d 962, 969 (D.C. Cir. 1969). *See also* North Anna Environmental Coalition v. NRC, 533 F.2d 655, 659 (D.C. Cir. 1976).

[65] *See* Siegel v. Atomic Energy Comm'n, 400 F.2d 778, 783 (D.C. Cir. 1968).

[66] *Id. See also* Deutsch v. Atomic Energy Comm'n, 401 F.2d 404, 407 (D.C. Cir. 1968); Yellin, *supra* note 7, at 976.

[67] 401 F.2d at 407.

[68] 4 NRCI at 487.

[1] The solemnity of administration of the oath is thought to encourage the witness to speak truthfully by emphasizing the criminal consequences of perjury. The observation of a witness's demeanor allows the trier of fact to evaluate the credibility of his testimony. Further, the judicial setting, the possibility of public disgrace, and the presence of the defendant make it more difficult for the witness to give false testimony. Cross-examination, however, is considered the most valuable safeguard against introduction of untrustworthy testimony because the jury directly evaluates the accuracy and truthfulness of the witness's statements through the opposition's questions. C. MCCORMICK, EVIDENCE § 245 at 584 (2d ed. 1972)

common law rule against admission of hearsay evidence[2] generally ensures compliance with these three requirements. The common law and the Federal Rules of Evidence have recognized, however, that otherwise trustworthy evidence cannot always meet these requirements, and certain exceptions based on alternate assurances of reliability have been developed.[3] In criminal proceedings, however, out-of-court declarations admitted through exceptions to the hearsay rule create a basic conflict with the sixth amendment guarantee[4] that the criminal defendant has the right to confront the witnesses testifying against him.[5] The Supreme Court, having addressed

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[hereinafter cited as McCORMICK]; *see* Sahm, *Demeanor Evidence: Elusive and Intangible Imponderables,* 47 A.B.A.J. 580, 580-81 (1961).

[2] Hearsay is defined in Rule 801 of the Federal Rules of Evidence as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the matter asserted." FED. R. EVID. 801(c). Hearsay necessarily lacks the protections of oath, presence and cross-examination. Therefore, such declarations are considered so potentially unreliable that the statements cannot be admitted to evidence. McCORMICK, *supra* note 1, § 245 at 581; 5 J. WIGMORE, EVIDENCE §§ 1364, 1420 (Chadbourn rev. 1974). Federal Rule of Evidence 802, known as the "hearsay rule", codifies this common law rule against admission of hearsay evidence.

[3] Common law exceptions to the hearsay rule developed through a balancing process involving several factors which included the need to receive the evidence, a witness's unavailability, the trustworthiness of the statement, and the risk that the trier of fact will be able to accurately assess the weight the evidence merits. The hearsay rule does not forbid admission when the evidence possesses clear circumstantial trustworthiness without cross-examination, and when necessity requires admission. *See* Delaney v. United States, 263 U.S. 586 (1924) (statements against co-conspirator); Mattox v. United States, 146 U.S. 140 (1892) (dying declarations); Jennings, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials,* 113 U. PA. L. REV. 741, 747 (1965) [hereinafter cited as Jennings].

Federal Rules of Evidence 803 and 804 enumerate the common law exceptions to the hearsay rule with appropriate revisions for more modern and current development. Rules of Evidence for United States Courts and Magistrates, Advisory Committee's Notes, 56 F.R.D. 183, 290 (1972) [hereinafter cited as Advisory Committee's Notes]. The Rules specifically eliminate any presumption that hearsay evidence cannot be excluded on other grounds, thereby preserving the differentiation between the right of confrontation and the rule against hearsay. FED. R. EVID. 803 & 804. Evidence which qualifies under a hearsay exception may always be excluded when a defendant's sixth amendment confrontation right is violated or when admission of the evidence causes denial of his fourteenth amendment right to due process. Advisory Committee's Notes, *supra* at 303; *see* United States v. Oates, 560 F.2d 45, 65-66 (2d Cir. 1977); Powell & Burns, *A Discussion of the New Federal Rules of Evidence,* 8 GONZ. L. REV. 1, 21 (1972).

[4] The sixth amendment provides in part: "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with witnesses against him. . . . " U.S. CONST. amend. VI.

[5] Extensive research of the origin, historical background and development of the sixth amendment's confrontation clause has not revealed a conclusive interpretation of the framers' intent. Baker, *The Right to Confrontation, The Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials,* 6 CONN. L. REV. 529, 532 n.15 (1974) [hereinafter cited as Baker]; *see* Jennings, *supra* note 3, at 742; Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward,* 1 HOFSTRA L. REV. 32, 32 n.4 (1972) [hereinafter cited as Younger]. A strict interpretation of the confrontation clause clearly would preclude admission of all hearsay testimony. Since admission of hearsay evidence pursuant to specific exceptions was permissible at the time the sixth amendment was

the hearsay-confrontation clause conflict[6] on several occasions,[7] currently

drafted and adopted, a literal construction of the confrontation clause excluding all hearsay could not have been intended. MCCORMICK, *supra* note 1, § 252 at 606-07; *see* Jennings, *supra* note 3, at 746.

[6] While both the hearsay rule and the confrontation right seem to require the appearance and testimony of witnesses at trial, the Supreme Court has held that the hearsay rule and the confrontation clause are not co-extensive. California v. Green, 399 U.S. 149, 155 (1970). Although the two protections overlap in many situations, they are not identical. Evidence admissible under a hearsay exception may violate the defendant's constitutional rights. In Bruton v. United States, 391 U.S. 123 (1968), the trial court admitted the extrajudicial confession of Bruton's co-defendant under the common law co-conspirator exception to the hearsay rule, instructing the jury to disregard the confession in deciding Bruton's guilt or innocence. *Id.* at 124. Bruton had no opportunity to cross-examine the declarant, who had invoked his fifth amendment right to remain silent. *Id.* at 124-25. The Supreme Court reversed the decision, holding the instruction to the jury was ineffective. Thus, the admission of the confession denied Bruton's sixth amendment right to confrontation. *Id.* at 126. Although properly admitted under a hearsay exception, admission of the confession nonetheless violated Bruton's constitutional rights.

In certain instances, constitutionally admissible evidence may not meet the requirements of hearsay exceptions. When evidence does not fall under a hearsay exception, the evidence is declared inadmissible and the constitutional issue generally is not addressed. Thus, cases in which evidence is constitutionally admissible, although inadmissible under the common law or the Federal Rules of Evidence, are few in number. Note, *Hearsay and Confrontation: Can the Criminal Defendant's Rights Be Preserved Under a Bifurcated Standard?* 32 WASH. & LEE L. REV. 243, 244 n.7 (1975) [hereinafter cited as *Hearsay and Confrontation*]; *see* United States v. Oates, 560 F.2d 45 (2d Cir. 1977) (failure to meet notice requirement of Rule 804(b)(5) rendered evidence inadmissible and constitutional objection thus ignored); United States v. Gonzales, 559 F.2d 1271 (5th Cir. 1977) (since statement inadmissible under 804(b)(5) confrontation clause issue not addressed).

[7] In an initial attempt to distinguish the confrontation clause and the hearsay rule, the Supreme Court defined confrontation as a right to cross-examination. Pointer v. Texas, 380 U.S. 400, 406-07 (1965). In *Pointer*, a witness at a preliminary hearing identified the defendant as the person who had robbed him. Since the court failed to appoint counsel, there was no cross-examination of the witness. At trial, the prosecution showed that the robbery victim was unavailable to testify because he no longer resided in the state. Subsequently, the prosecution was allowed to introduce the witness's preliminary hearing testimony over the defendant's objection that the admission violated his right to confrontation. *Id.* at 401-02. The Supreme Court determined that confrontation was a fundamental element of a fair trial and for the first time, held this right applied to the states through the due process clause of the fourteenth amendment. *Id.* at 403. The Court reasoned that the admission of the transcript violated the defendant's constitutional confrontation right which included the opportunity to cross-examine witnesses. *Id.* at 407-08. The Court carefully stated, however, that admission of hearsay evidence does not always violate a defendant's sixth amendment rights simply because the statements lack the protection of actual cross-examination at trial. If the defendant has the opportunity to complete an adequate cross-examination, the confrontation right is satisfied. Further, the Court condoned several common law exceptions to the hearsay rule in which uncross-examined evidence is admissible and stated that the *Pointer* decision did not affect the propriety of the exceptions. *Id.* at 406-07.

The Court could have decided the case on other constitutional grounds, thus avoiding the confusing hearsay-confrontation conflict entirely. For example, the Court could have made the right to counsel established in Gideon v. Wainwright, 372 U.S. 335 (1963), applicable to preliminary hearings, or based its decision on the premise that due process prevents admission of hearsay to prove so important an issue as identification. *See* Younger, *supra* note 5, at 33. Rather, *Pointer* marks the beginning of the Court's struggle with the hearsay-confrontation conflict.

requires a case-by-case application of a subjective test in which certain "indicia of reliability" determine the trustworthiness and admissibility of the hearsay evidence.[8] This resolution, however, does not reconcile the admission of hearsay evidence with the defendant's constitutional confrontation right and, as a result, application of the Court's reliability test has resulted in inconsistent decisions.[9] The judicial and legislative trend to

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Cases following *Pointer* further illustrate the extent to which the Court equated the defendant's right to confrontation and cross-examination. *See* Barber v. Page, 390 U.S. 719, 725 (1968) (right to confrontation a trial right and includes both opportunity to cross-examine and occasion for jury to weigh demeanor of witness); Douglas v. Alabama, 380 U.S. 415, 419 (1965) (inability to cross-examine witness denies defendant the right to cross-examination secured by the confrontation clause).

California v. Green, 399 U.S. 149 (1970), marked the abandonment of the *Pointer* rationale. In *Green,* a witness testified against the defendant at a preliminary hearing, subject to cross-examination. When the witness proved uncooperative at trial, the trial court allowed the prosecutor to read excerpts of the witness's preliminary hearing testimony into evidence. People v. Green, 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969), *rev'd,* 399 U.S. 149 (1970). Citing *Pointer,* the California Supreme Court held that the confrontation right required a contemporaneous cross-examination of a witness before the trier of fact. The court found that neither the cross-examination of the witness at trial regarding his prior preliminary hearing testimony, nor the actual cross-examination at the preliminary hearing met the confrontation standard. *Id.* at 153.

In vacating the judgment, the Supreme Court held that the admission of the preliminary hearing testimony did not violate the confrontation clause because the witness was available for cross-examination at trial. *Id.* at 161. Further, the witness's statement at the preliminary hearing was given in an adversarial proceeding, similar to an actual trial proceeding, as evidenced by the defendant's opportunity to cross-examine the witness at that time. *Id.* at 165. Even if the witness had not been available to testify at trial, the testimony would still be admissible based on the cross-examination at the preliminary hearing. *Id.* at 166. Recognizing that preceding cases focused primarily on situations where statements of unavailable witnesses were admitted without any cross-examination whatsoever, the Court altered its earlier position that the confrontation clause requires contemporaneous cross-examination and characterized cross-examination as a means of demonstrating the reliability of evidence. *Id.* at 155. If the requisite level of reliability is shown, the evidence is admissible without infringement of a defendant's sixth amendment rights. *See* Younger, *supra* note 5, at 36-37.

Subsequent to *Green,* the Court in Dutton v. Evans, 400 U.S. 74 (1970), held that the requisite level of reliability of evidence can be demonstrated without prior or contemporaneous cross-examination. According to the plurality opinion, the degree of accuracy guaranteed by the confrontation clause is met when the circumstances surrounding the out-of-court statement demonstrate sufficient "indicia of reliability" to establish the trustworthiness of the evidence. *Id.* at 89. If the evidence is reliable, trustworthy, and accurate, the opportunity for cross-examination is not required. *Id.* The Court defines this subjective standard of accuracy in terms of a balancing of several variables including the circumstantial reliability of the evidence, the necessity of admitting the evidence, the possibility that cross-examination would reveal the unreliability of the statement, and the importance of the evidence to the defendant's case. *Id.* at 88-89; *see* United States v. Rogers, 549 F.2d 490, 500 (8th Cir. 1976), *cert. denied,* 431 U.S. 918 (1977); Stewart v. Cowan, 528 F.2d 78, 88 (6th Cir. 1976). Further, sufficiently reliable evidence is admissible only if it is not crucial or devastating to the defendant's case. 400 U.S. at 87.

[8] Dutton v. Evans, 400 U.S. 74, 89 (1970).

[9] In United States v. West, 574 F.2d 1131 (4th Cir. 1978), and United States v. Garner, 574 F.2d 1141 (4th Cir. 1978), the Fourth Circuit took a liberal approach to the admission of hearsay evidence. The Fifth Circuit, however, concluded in a similar fact situation that grand jury testimony is inadmissible. United States v. Gonzales, 559 F.2d 1271 (5th Cir. 1977). In

liberalize the admission of out-of-court statements, as embodied in the Federal Rules of Evidence, further complicates this situation.[10]

The Fourth Circuit's recent decisions in *United States v. West*[11] and *United States v. Garner*[12] reflect the confused status of the relationship between the confrontation clause and admissibility of hearsay evidence. In these cases, the court held that admission at trial of grand jury testimony of unavailable witnesses under Federal Rule of Evidence 804(b)(5) did not violate the defendant's sixth amendment confrontation rights.[13]

West involved indictments for drug related offenses. On three separate occasions, Brown, a police informer,[14] contacted the defendant and arranged to make heroin purchases. Each time Brown planned a purchase, agents of the Drug Enforcement Agency (DEA) organized extensive surveillance.[15] Photographs, tape recordings and Brown's signed statements summarizing the circumstances and events of the transaction documented each purchase.[16] A grand jury subsequently indicted the defendant for distribution of and possession with the intent to distribute heroin.[17] Brown later testified before a second grand jury detailing specific heroin purchases he made from the defendant. The sworn statements that Brown had signed immediately following each transaction were read into the record, and Brown periodically affirmed their accuracy and trustworthiness.[18]

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a case in which the witness did not disclaim the accuracy of his grand jury testimony, the Eighth Circuit allowed admission of uncross-examined testimony. United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). Although decided before the adoption of the Federal Rules of Evidence and Rule 804(b)(5), the Second Circuit held in United States v. Fiore, 443 F.2d 112 (2d Cir. 1971), that admission of grand jury testimony violates the hearsay rule as well as the sixth amendment. While the inconsistent results of these cases may be attributed to factual distinctions, a basic conflict exists in the interpretation of the admissibility of hearsay evidence not falling under a traditional exception to the hearsay rule.

[10] The two "residual" exceptions to the hearsay rule, Federal Rules of Evidence 803(24) and 804(b)(5), demonstrate the intent to encourage growth and development within the law of evidence. Hearsay evidence, not specifically covered by the exceptions listed in Rule 803 or Rule 804 but possessing equivalent circumstantial guarantees of trustworthiness, is admissible. *See* Advisory Committee's Notes, *supra* note 3, at 290.

[11] 574 F.2d 1131 (4th Cir. 1978).

[12] 574 F.2d 1141 (4th Cir.), *cert. denied*, 99 S. Ct. 333 (1978).

[13] 574 F.2d at 1133; 574 F.2d at 1143.

[14] The police informer in *West* agreed to assist the Drug Enforcement Agency while he was in jail charged on a drug violation and under detainer for a parole violation. 574 F.2d at 1133.

[15] *Id.*

[16] *Id.* In *West*, the police carefully monitored all contacts between their informer and the defendant. Prior to any meeting with the defendant, the agents searched the informer to ascertain that he possessed no drugs before approaching the defendant. The police wired the informer for sound before each purchase and obtained photographs of every meeting. After the purchases, the informer reported directly to the agents, surrendering the heroin. The agents again searched the informer to insure he retained no other contraband. Finally, an agent discussed the circumstances of each transaction with the informer and drafted a summary which Brown read, corrected and signed. *Id.*

[17] *Id.*

[18] *Id.* at 1134. In exchange for his grand jury testimony the informer was released from jail, charges against him were dismissed and his parole was lifted. *Id.*

Three days later, Brown was murdered.

At trial, the government introduced the pictures, tapes and heroin obtained from the investigation in which Brown participated. The DEA officials testified regarding their surveillance roles, and the defendant had adequate opportunity to cross-examine the agents. The trial court admitted the transcript of Brown's extremely detailed, uncross-examined grand jury testimony under Federal Rule of Evidence 804(b)(5). In appealing his conviction to the Fourth Circuit, the defendant contended that Brown's grand jury testimony did not meet the requirements of Rule 804(b)(5) and that admission of the uncross-examined testimony violated his constitutional right to confrontation.[19]

The Fourth Circuit first analyzed the admission of Brown's testimony under Rule 804(b)(5).[20] Hearsay evidence admitted under Rule 804(b)(5) must: (1) be given by an unavailable witness; (2) have circumstantial guarantees of trustworthiness equivalent to the first four exceptions[21] enumerated in the Rule; (3) be offered as evidence of a material fact; (4) be more probative on the point for which it is offered than any other evidence produced through reasonable efforts; (5) serve the general purposes of the Federal Rules of Evidence and the interest of justice; and, (6) be introduced only upon proper notice to the adverse party.[22] The defendant argued that Brown's testimony did not meet the requirements of Rule 804(b)(5) because Brown's criminal record clearly indicated an inherent element of untrustworthiness. Moreover, the defendant contended that the lack of an opportunity to cross-examine Brown about his record and, more importantly, concerning the defendant's alleged crimes, substantially in-

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[19] *Id.*

[20] *Id.* at 1134-35. Cases involving admission of hearsay under Rules 803 and 804 are analyzed in two steps. First, the evidence must meet all of the specific criteria of the applicable Rule. *See* United States v. Oates, 560 F.2d 45, 81 (2d Cir. 1977). The court must then decide whether admission of the evidence comports with the sixth amendment. *See* United States v. Rogers, 549 F.2d 490, 498 (8th Cir. 1976).

The legislative history of Rule 804(b)(5) indicates that Congress intended the courts to construe the Rule strictly and to apply it sparingly. The House Judiciary Committee deleted the original draft of the Rule because its application permitted too much discretion. The Senate Judiciary Committee however, reinstituted the catch-all exception because it was clearly impossible to foresee and enumerate all possible hearsay exceptions. According to the Committee, circumstances could arise in which hearsay evidence would possess exceptional guarantees of trustworthiness but would not be admissible under an established exception to the hearsay rule. Under Rule 804(b)(5), hearsay evidence of this nature would be permissible without significant expansion of the common law rule against hearsay. S. REP. No. 1277, 93d Cong. 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 7065-66.

[21] Evidence admitted under Rule 804(b)(5) must have a circumstantial degree of trustworthiness equivalent to the guarantees of reliability inherent in the Rule's other enumerated exceptions. These codifications of traditional common law hearsay exceptions include: testimony given at a prior hearing or proceeding in which the party against whom the evidence is offered had an opportunity and similar motive to cross-examine the witness; statements made by declarant under belief of impending death; statements directly contrary to the witness's pecuniary or proprietary interest; and statements regarding personal or family interest. FED. R. EVID. 804(b)(1)—(5).

[22] FED. R. EVID. 804(b)(5).

creased the unreliability of the grand jury testimony.[23] The defendant asserted that these factors undermined the trustworthiness of Brown's grand jury testimony and that admission of the transcript under 804(b)(5) was erroneous.[24]

Disagreeing with the defendant's argument, the Fourth Circuit stressed the inherent trustworthiness of the sworn statements, and also viewed the agents' observations, the pictures, and tape recordings as independent assurances of the truthfulness of Brown's grand jury testimony.[25] The exceptional corroborating circumstances surrounding the surveillance and investigation of the defendant gave Brown's testimony a degree of reliability substantially exceeding the guarantees inherent in dying declarations, statements against interest, and declarations of personal or family history, which are three of the four other admissible forms of hearsay under 804(b).[26]

The court also rejected the defendant's argument that the lack of an opportunity to cross-examine Brown prevented the evidence from meeting the requisite level of reliability specified in Rule 804(b)(5).[27] Under the court's reasoning, the extensive surveillance during the entire investigation made any deception by Brown of the DEA agents "inconceivable."[28] Brown's criminal record also failed to undermine the reliability of the evidence; Brown assisted the agents solely to avoid further incarceration and any attempt on his part to deceive the agents or to arouse suspicion clearly would have been detrimental to his interests. Further, defense counsel's knowledge of Brown's criminal record afforded the defense an adequate opportunity to attack the grand jury testimony.[29] In the Fourth

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[23] 574 F.2d at 1134-35.

[24] *Id.* at 1135.

[25] *Id.*

[26] *Id.* at 1135; *see* text accompanying notes 14-17. The court conceded that the grand jury testimony did not possess the guarantees of trustworthiness which arise from cross or direct examination and therefore could not satisfy the former testimony exception embodied in Rule 804(b)(1). The court determined, however, that Rule 804(b)(5) only requires trustworthiness equivalent to any one of the four 804(b) exceptions to the hearsay rule. *Id. Contra,* United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied,* 99 S. Ct. 333, 334-35 (1978) (Stewart, J., dissenting) (whether Rule 804(b)(5) was intended to provide case-by-case hearsay exceptions or to permit expansion of hearsay by categories remains unsettled); Lowery v. Maryland, 401 F. Supp. 604 (D. Md. 1975), *aff'd mem.,* 532 F.2d 750 (4th Cir. 1976) (Rule 804(b)(5) cannot be used when other 804(b) exceptions applicable but unsatisfied).

[27] 574 F.2d at 1135-36. Cross-examination serves different functions under hearsay and the confrontation clause. Cross-examination in the context of the hearsay rule insures the trustworthiness of the evidence. *See* Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177, 185 (1948). Under the confrontation clause, however, cross-examination provides a method for the defendant to challenge accusations made against him. *See* Douglas v. Alabama, 380 U.S. 415 (1965). In *West,* the Fourth Circuit found that cross-examination was unnecessary to insure the reliability of the evidence because the extenuating circumstances surrounding the case sufficiently guaranteed trustworthiness. The court; however, failed to address the right to cross-examination as a method of challenge. *See Hearsay and Confrontation, supra* note 6, at 266 n.129.

[28] 574 F.2d at 1135.

[29] *Id.*

Circuit's view, neither Brown's criminal past nor the lack of cross-examination sufficiently decreased the reliabilty of the evidence to preclude admission under Rule 804(b)(5).[30]

Having concluded that the grand jury transcript was admissible under Rule 804(b)(5), the court addressed the defendant's constitutional argument that the sixth amendment confrontation clause should have barred admission of the evidence.[31] The confrontation clause does not mandate exclusion of hearsay evidence in all instances.[32] According to the Supreme Court, if the out-of-court statement bears sufficient indicia of reliability,[33] or if the circumstances surrounding admission of the statement provide the jury with a sufficient basis to judge its trustworthiness,[34] admission of the hearsay evidence does not violate the Constitution. The Fourth Circuit in *West* held that the circumstances surrounding Brown's uncross-examined statements assured reliability of the testimony and provided a firm basis for evaluation of the credibility of the witness and the truthfulness of the testimony by the trier of fact.[35] Although cross-examination, as a method of confrontation, would strengthen or weaken the reliability of hearsay statements, the lack of opportunity to cross-examine will not always prohibit admission.[36] The court considered the evidence corroborating Brown's statements to be ample assurance of its trustworthinnss. According to the Fourth Circuit, admission of Brown's testimony did not violate the defendant's constitutional rights because the evidence possessed a sufficient degree of reliability.[37]

In *West,* the Fourth Circuit attempted to adhere to the Supreme Court's determination that the hearsay rule and the confrontation clause are not co-extensive.[38] Courts which have considered the confrontation-

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[30] The level of trustworthiness required by Rule 804(b)(5) becomes clear through observance of the application of Rules 803(24) and 804(b)(5) in different fact situations. *Compare* United States v. Medico, 557 F.2d 309 (2d Cir. 1977) (Rule 804(b)(5) requirements satisfied when probability that fraud or misidentification was negligible) *with* United States v. Bailey, 581 F.2d 341 (3rd Cir. 1978) (evidence inadmissible under Rule 804(b)(5) when peripheral corroboration insufficient to insure trustworthiness). *See also* United States v. Gonzales, 559 F.2d 1271 (5th Cir. 1977); United States v. Mathis, 559 F.2d 294 (5th Cir. 1977); United States v. White, 553 F.2d 310 (2d Cir. 1977).

[31] 574 F.2d at 1136.

[32] *Id.* at 1136-37.

[33] *See* Dutton v. Evans, 400 U.S. 74, 89 (1970).

[34] *See* California v. Green, 399 U.S. 149, 161 (1970).

[35] 574 F.2d at 1136-37. There are several instances at common law where exceptions to the hearsay rule are allowed and hearsay evidence is admitted on the rationale that the circumstances surrounding the statement lend sufficient reliability for admissibility. *See* Chambers v. Mississippi, 410 U.S. 284 (1973) (statement against penal interest held admissible); Mancusi v. Stubbs, 408 U.S. 204 (1972) (testimony given at earlier trial by declarant unavailable at retrial deemed admissible); California v. Green, 399 U.S. 149 (1970) (testimony at preliminary hearing admissible since declarant cross-examined at hearing); *cf.* Douglas v. Alabama, 380 U.S. 415 (1965) (although against penal interest, out-of-court confession implicating defendant inadmissible since given under potentially coercive circumstances).

[36] 574 F.2d at 1136-37.

[37] *Id.* at 1137-38.

[38] *Id.* at 1136; *see* California v. Green, 399 U.S. 149, 155 (1970); note 6 *supra.*

hearsay issue acknowledge and emphasize the difficulty of applying the standards enunciated by the Supreme Court.[39] Traditionally, evidence falling under a common law hearsay exception was considered constitutionally admissible because the surrounding circumstances assured a high level of trustworthiness.[40] According to the Supreme Court, admission of hearsay is constitutional if the evidence possesses sufficient "indicia of reliability."[41] Federal Rule of Evidence 804(b)(5) also bases admission on the trustworthiness of the evidence.[42] Reliability, therefore, is the primary factor in determining whether hearsay is admissible under the common law, the Federal Rules of Evidence and the Constitution. Any differentiation between hearsay and the confrontation clause seems artificial because the standards which allow admission under a common law or statutory hearsay exception are effectively equivalent to the Supreme Court standards of reliability. The Supreme Court, however, has never equated hearsay and confrontation,[43] and the Court and Congress steadfastly refuse to embrace the argument that the confrontation clause constitutionalizes the hearsay rule.[44] The Court requires articulation of a theoretical difference between the hearsay rule and the confrontation clause when in fact, no practical difference exists. Therefore, the Fourth Circuit in *West* held that evidence admissible under Rule 804(b)(5) is not a fortiori admissible under the Constitution,[45] but the court did not clearly explain why.[46]

The Fourth Circuit also addressed Rule 804(b)(5) and the hearsay-confrontation conflict in *United States v. Garner*.[47] The defendants in *Garner* were charged with drug offenses involving importation of heroin from Europe. Warren Robinson, indicted for the same offenses as the *Garner* defendants, agreed to plead guilty to a lesser offense in exchange for his testimony against the defendants before a grand jury and in any ensuing proceedings.[48] Robinson testified before the grand jury, implicating the defendants and detailing the conspiracy involved. Before the defendants' trial, however, Robinson indicated his unwillingness to testify at

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[39] *See* note 7 *supra; see, e.g.*, United States v. Bailey, 581 F.2d 341, 351 (3rd Cir. 1978); United States v. Oates, 560 F.2d 45, 65 (2d Cir. 1977).

[40] *See* Mattox v. United States, 156 U.S. 237 (1895) (prior testimony of deceased witness admissible at subsequent trial); Mattox v. United States, 146 U.S. 140 (1892) (dying declarations admissible).

[41] Dutton v. Evans, 400 U.S. 74 (1970).

[42] FED. R. EVID. 804(b)(5).

[43] California v. Green, 399 U.S. 149, 155 (1970).

[44] *See* United States v. Oates, 560 F.2d 45, 65-66 (2d Cir. 1977), *citing* Advisory Committee's Notes, *supra* note 3, at 292 (separateness of confrontation clause and hearsay rule must be acknowledged to prevent "collisions" between the two).

[45] 574 F.2d at 1137 n.7.

[46] For examples of judicial inability to articulate a resolution to the hearsay-confrontation conflict, see United States v. Rogers, 549 F.2d 490, 498-502 (8th Cir. 1976), *cert. denied*, 431 U.S. 918 (1977); United States v. Yates, 524 F.2d 1282, 1285-86 (D.C. Cir. 1975); United States v. Menichino, 497 F.2d 935, 943 (5th Cir. 1974).

[47] 574 F.2d 1141, 1144 (4th Cir. 1978).

[48] *Id.* at 1143.

trial.[49] His lawyer and the trial court unsuccessfully attempted to secure his testimony through promise of immunity and threats of contempt. Although Robinson indicated to the court and his counsel that he might answer defense counsel's questions on cross-examination, at trial he disclaimed the accuracy of his grand jury statements and refused to answer any further questions. His testimony was interpreted by the court as a refusal to testify, thus establishing his unavailability.[50] The prosecution introduced airline tickets, customs declarations, passport endorsements and hotel records and receipts corroborating Robinson's grand jury testimony. The testimony of other conspirators further supported Robinson's original grand jury statements. Based on this corroboration, the trial judge allowed the prosecution to admit the transcript of Robinson's testimony under Federal Rule of Evidence 804(b)(5) and the defendants subsequently were convicted.[51]

On appeal to the Fourth Circuit, the defendants asserted that the trial court's admission of Robinson's grand jury testimony had been improper. The Fourth Circuit did not detail the defendants' argument, but it appears that the defendants, like the defendant in *West,* contended that the evidence did not possess the guarantees of trustworthiness generally required by Rule 804(b)(5). The *Garner* defendants also claimed that the admission violated their constitutional confrontation rights due to the lack of reliability and inadequate cross-examination of the witness.[52]

Relying on *West,* the Fourth Circuit held that sworn grand jury testimony is admissible under Rule 804(b)(5) when substantial independent guarantees of trustworthiness are present. Further, *Garner* indicated that the admission of the testimony does not violate the confrontation clause if the evidence is sufficiently reliable and possesses a basis upon which the jury may evaluate the trustworthiness of the testimony.[53] In the court's view, the corroborating evidence introduced by the prosecution sufficiently assured the reliability and trustworthiness of Robinson's grand jury statements, despite his disclaimer.[54] The court, however, did not distinguish the

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[49] *Id.* Whether the reluctance of the witness in *Garner* to testify at trial was caused by the defendants' threats is idle speculation. The court contended that the witness's testimony at trial did not indicate that his grand jury testimony was false, but rather that he was unwilling to incriminate the defendants in any way. *Id.* This point is particularly important because Rule 804 will not allow admission of hearsay if the declarant is unavailable as a result of a defendant's wrongdoing. FED. R. EVID. 804. Under Rule 804(a)(2), a declarant is considered unavailable if he refuses to testify by wrongfully invoking a privilege, ignoring judicially granted immunity or remaining silent in defiance to a court order to answer. If the declarant is absent or refuses to testify, however, as a result of the defendant's wrongdoing, the declarant is not considered unavailable. FED. R. EVID. 804(a)(2); *see* United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977) (defendant waived constitutional right to confront witness when he assured that witness would not testify through threats and intimidation).

[50] 574 F.2d at 1143.

[51] *Id.*

[52] *Id.* at 1144.

[53] *Id.*

[54] *But see* United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied,* 99 S. Ct. 333,

elements which allow admission under Rule 804(b)(5) from the requirements which satisfy the confrontation clause. Therefore, in *Garner*, as in *West*, the Fourth Circuit analyzed only the evidence corroborating the hearsay statements, and limited the usefulness of the *Garner* opinion to subsequent comparisons with other fact situations.

Judge Widener strongly dissented in both *West*[55] and *Garner*[56] from the majority view that circumstantial reliability of hearsay evidence can be a substitute for a defendant's right to confrontation.[57] Confrontation, in Judge Widener's opinion, was deemed a trial right which is satisfied only by cross-examination.[58] Judge Widener contended that the essence of the hearsay-confrontation conflict does not concern the truthfulness of the evidence, but whether there has been adequate confrontation to satisfy the requirements of the sixth amendment.[59] While uncross-examined evidence may be admissible under the common law when exceptional standards of trustworthiness are met, circumstantial trustworthiness is not a substitute for a defendant's constitutional right to confront and cross-examine his accusers. Judge Widener asserted that the confrontation right is a regulation of trial procedure, and the sixth amendment therefore requires cross-examination of an accusing witness. Due to the absence of cross-examination in *West* and *Garner*, Judge Widener argued that the confrontation clause absolutely prohibits admission of the grand jury testimony.[60]

The Courts of Appeals have been unable to agree on a proper resolution of the hearsay-confrontation issue[61] and differing interpretations must be addressed by the Supreme Court if inconsistent results are to be avoided.[62] In an effort to fashion a more workable resolution to this conflict, the Court may consider several theories.[63] The Court could, for example, adopt a view which equates confrontation with cross-examination. Under this view, to satisfy the confrontation right testimony admitted under a specific hearsay

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334-35 (1978) (Stewart, J., dissenting).

[55] 574 F.2d 1131, 1139 (4th Cir. 1978) (Widener, J., dissenting).

[56] 574 F.2d 1141, 1147 (4th Cir. 1978) (Widener, J., dissenting).

[57] *See generally* text accompanying notes 31-34 *supra*.

[58] 574 F.2d at 1139.

[59] *Id.*

[60] *Id.* at 1140-41.

[61] *See* text accompanying note 9 *supra*.

[62] Mr. Justice Stewart, with whom Mr. Justice Marshall joined, wrote a dissent to the Supreme Court's denial for certiorari in *Garner*. Justice Stewart, author of the *Dutton* opinion, contends that the conflict in interpretation of the confrontation clause must be resolved by placing specific limitations on the admissibility of evidence under the Federal Rules of Evidence or the Constitution. 99 S. Ct. 333, 334. The majority of the Court however did not agree. *Id.* at 333.

[63] For detailed discussions of possible resolutions to the hearsay-confrontation conflict, see Dutton v. Evans, 400 U.S. 74, 94-98 (1970) (Harlan, J., concurring); Baker, *supra* note 5, at 539; Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEXAS L. REV. 151 (1978) [hereinafter cited as Graham]; Read, *The New Confrontation — Hearsay Dilemma*, 45 S. CAL. L. REV. 1, 42 (1972) [hereinafter cited as Read]; Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 598-601 (1978) [hereinafter cited as Westen].

exception must be cross-examined, regardless of "indicia of reliability."[64] Such a theory, however, precludes admission of all hearsay evidence[65] and clearly undercuts the liberalization of admission of hearsay currently supported by the courts and legislature.[66]

An alternate theory, in which the confrontation clause acts as an additional safeguard assuring truthful testimony, is more pragmatic. If admissible hearsay is supported by substantial indications of reliability,[67] and the trier of fact has sufficient basis for determining the accuracy of the evidence,[68] the confrontation right is satisfied under the alternate approach.[69] As demonstrated in *West* and *Garner*, one disadvantage of this approach is the current lack of a specific definition of reliability. Further, this theory fails to distinguish the protections of the hearsay rule from the confrontation clause since the factors determining admission under hearsay exceptions and the sixth amendment are essentially the same.[70]

The Supreme Court also could adopt an entirely new interpretation of the confrontation clause[71] in which the availability of witnesses triggers its applicability.[72] Under this theory, the sixth amendment guarantees confrontation of accusing witnesses only when the witnesses are available to testify at an adversarial proceeding. When the unavailabilty of a witness is established, any admission of a related hearsay statement must meet the fifth[73] and fourteenth[74] amendment requirement that trials be conducted in accordance with the due process of law.[75] This determination is based

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[64] 574 F.2d 1131, 1140 (4th Cir. 1978) (Widener, J., dissenting); *see* Read, *supra* note 63, at 42.

[65] *But see* Mattox v. United States, 146 U.S. 140 (1892) (confrontation clause does not preclude admission of all extra-judicial declarations).

[66] *See* Baker, *supra* note 5, at 539. In the practical application of a theory in which confrontation requires cross-examination, some common law hearsay exceptions would have to be recognized. However, the existence of a catch-all, residuary exception such as Rule 804(b)(5), which allows continual development and creation of exceptions to the hearsay rule, would be inappropriate. The Supreme Court in its original draft of the Federal Rules of Evidence included a residuary exception and it seems unlikely that the Court would adopt an approach to confrontation which would negate its own provision. *See* Advisory Committee's Notes, *supra* note 3, at 322. *See also* Read, *supra* note 63, at 42.

[67] Dutton v. Evans, 400 U.S. 74, 89 (1970).

[68] California v. Green, 399 U.S. 149, 161 (1970).

[69] The theory which characterizes the confrontation clause as a safeguard assuring truthful testimony is a combination of the Supreme Court's reliability test in Dutton v. Evans, 400 U.S. 74 (1970), and Justice Harlan's concurring opinion in the same case, 400 U.S. 74, 93 (1970) (Harlan, J., concurring). The result is similar to the standard applied by the Fourth Circuit in *West* and *Garner*. *See* text accompanying notes 31-37 *supra*.

[70] *See* text accompanying notes 38-46 *supra*.

[71] *See* note 4 *supra*.

[72] *See* Westen, *supra* note 63, at 597.

[73] The fifth amendment provides in part: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . . " U.S. CONST. amend. V.

[74] The fourteenth amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . " U.S. CONST. amend. XIV.

[75] *See* Dutton v. Evans, 400 U.S. 74, 96-97 (Harlan, J., concurring).

on the circumstantial guarantees of reliability involved in the case. Although the ambiguous "reliability" test still plagues this interpretation of the confrontation clause,[76] reliability is no longer considered a substitute for the defendant's sixth amendment rights. Rather, it is an assurance that the defendant's fifth and fourteenth amendment rights are satisfied.[77] Under this theory, the sixth amendment does not automatically constitutionalize or completely bar admission of hearsay under traditional exceptions.[78] Admission of the evidence is constitutional when the due process requirements are met.

The Fourth Circuit's decisions in *West* and *Garner* advance the theory that reliability of evidence is a substitute for cross-examination and confrontation of the unavailable witness. In both cases, the levels of independent corroborating facts were extraordinarily high[79] and the court's decision to allow admission of the grand jury transcripts did not seem to deny the defendants a realistic opportunity to uncover inconsistencies in the testimony. Under the court's reliability analysis, however, most cases in which the conflict between hearsay and confrontation arise may not be decided so easily. Under *West* and *Garner,* the outcome of future cases involving less compelling evidence is uncertain due to the current interpretation of the sixth amendment, the Supreme Court's ambiguous "reliability" test, and the confusion surrounding the applicability of Rule 804(b)(5).

ELIZABETH TURLEY

B. Impeachment by Prior Acts and Convictions

Impeachment, the cross-examination of a witness to attack his credibility,[1] is currently the target of considerable judicial inquiry.[2] Although impeachment by prior acts[3] and convictions[4] did not exist at early common

[76] *See* Graham, *supra* note 63, at 195-96 n.200.

[77] *See* Westen, *supra* note 63, at 599.

[78] *See* Graham, *supra* note 63, at 197-98.

[79] 574 F.2d 1131, 1135 (4th Cir. 1978); 574 F.2d 1141, 1144 (4th Cir. 1978).

[1] *See generally* C. MCCORMICK, EVIDENCE § 43 (2d ed. 1972) [hereinafter cited as MCCORMICK].

[2] The Supreme Court recently has inquired so repeatedly into the use of prior acts and convictions for impeachment purposes that the Court has placed this area of evidence within a nearly complete framework of constitutional interpretations. *See* Bray, *Evidence of Prior Uncharged Offenses and the Growth of Constitutional Restrictions,* 28 U. MIAMI L. REV. 489 (1974); *see, e.g.,* Loper v. Beto, 405 U.S. 473 (1972); United States v. Tucker, 404 U.S. 443 (1972); McGautha v. California, 402 U.S. 183 (1971); Burgett v. Texas, 389 U.S. 109 (1967); Spencer v. Texas, 385 U.S. 554 (1967). *See generally* Note, *Evidence — The Use of Prior Uncounseled Convictions for Impeachment,* 22 DEPAUL L. REV. 680 (1973) [hereinafter cited as *Uncounseled Convictions].*

[3] Prior acts are instances of past misconduct by the witness which are used to attack his credibility. MCCORMICK, *supra* note 1, § 42.

[4] Prior convictions differ from prior acts in that the witness was convicted for the particular misconduct. *Id.* § 43.

law because a conviction rendered a witness incompetent to testify,[5] modern statutes and case law no longer discriminate against convicted witnesses.[6] The impeachment of defendant-witnesses by prior acts and convictions has received this attention because of the significant possibility that the defendants' right to a fair trial has been infringed. Using prior acts and convictions to impeach a defendant-witness may divert the attention of the trier of fact from the present charges to past misconduct by the defendant. Once admitted, it is improbable that such evidence will be used solely to determine credibility.[7] In addressing the problem, some statutes pertaining to the admission of this type of evidence employ balancing tests to determine whether the probative value[8] of the witness's prior acts and convictions outweighs their prejudicial impact[9] to the defendant.[10] Several courts have also required that evidence used for impeachment bear on the moral turpitude or veracity of the witness.[11] Absent statutory guidelines,

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[5] McCORMICK, *supra* note 1, § 43 at 84. *See, e.g.*, Williams v. United States, 3 F.2d 129 (8th Cir. 1924) (convicted witness incompetent to testify); KY. REV. STAT. tit. 15 § 421.090 (1970) (repealed 1975) (disqualifying any person convicted of certain crimes, other than the defendant, from testifying).

[6] *See* note 11 *infra; see, e.g.*, N.C. GEN. STAT. § 8-49 (1969) (person convicted of crime not excluded as a witness).

[7] *See* notes 9 & 44 *infra.*

[8] The probative value of a prior act or conviction used for impeachment purposes is suspect. *See generally* Ladd, *Credibility Tests — Current Trends*, 89 U. PA. L. REV. 166, 176 (1940). Illustrative of the uncertainty of their value are the persuasive arguments opposing the use of prior convictions. Opponents of the use of convictions to attack credibility assert that a past conviction merely proves that at some time in the past, the defendant was found guilty of an illegal act under unknown circumstances for which he was later sentenced. *See, e.g.*, Krauser, *The Use of Prior Convictions as Credibility Evidence: A Proposal for Pennsylvania*, 46 TEMP. L. Q. 291, 292 (1973) [hereinafter cited as Krauser]. The use of prior convictions to attack credibility has also been questioned on constitutional grounds. *See* Note, *Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness*, 37 U. CINN. L. REV. 168 (1968).

Proponents of the use of prior convictions for impeachment purposes argue that the convictions indicate at least that the defendant has been capable of illegal conduct in the past. In addition, prior convictions may evidence a pattern of general dishonesty. Most importantly, prior convictions for crimes which bear on honesty can be viewed as one of the few tangible pieces of evidence of the veracity of the defendant. *See, e.g.*, Krauser, *supra* at 293.

[9] The possible prejudicial impact on the defendant lies in the use by the jury of the prior acts or convictions for purposes other than assessing credibility, such as evidence of a propensity to commit crimes. McCORMICK, *supra* note 1, § 42; *see* CONF. R. No. 93-1597, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S.CODE CONG. & AD. NEWS 7051, 7103 (recognizing that prior convictions may improperly influence trier of fact to convict on basis of prior record).

[10] *See, e.g.*, FED. R. EVID. 608 & 609. *See generally* McCORMICK, *supra* note 1, § 43 (Supp. 1978).

[11] *See, e.g.*, State v. Anonymous, 34 Conn. Supp. 656, 384 A.2d 386 (1978) (applying CONN. GEN. STAT. ANN. § 52-145 (West 1977) only to prior acts or convictions which bear on veracity); Taylor v. State, 278 Md. 150, 360 A.2d 430 (1976) (limiting MD. CTS. & JUD. PROC. CODE ANN., § 10-905 (1974) to evidence which tends to show witness cannot be believed); Lincoln v. Commonwealth, 217 Va. 370, 228 S.E.2d 688 (1976) (interpreting VA. CODE § 19.2-

courts must turn to the common law of their jurisdiction to discern admissibility criteria.

In North Carolina, prior acts are admitted for impeachment purposes under a common law evidentiary rule.[12] When a defendant elects to testify at trial, he surrenders his privilege against self-incrimination and can be impeached by questions relating to any specific acts of misconduct.[13] The North Carolina prior misconduct admission rule affords the state an opportunity to "sift the witness" in order to ascertain his credibility.[14] Although the rule requires prosecutors to exercise "good faith"[15] and to provide an evidentiary basis which supports their impeachment questions, trial judges often blur these requirements when determining the admissibility of prior acts and convictions.[16] The prior misconduct admission rule also prohibits the use of extrinsic evidence to explain or refute a witness's answer.[17] Furthermore, the defendant must establish any violation of the rule.[18]

In *Watkins v. Foster,*[19] the defendant Foster contended that the failure of the prosecutor to meet the requirements of the North Carolina prior

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269 (1975) to require that evidence must involve moral turpitude or bear on veracity). *But see* N.J. STAT. ANN. § 2A:81-12 (West 1976) (from which several courts have read "conviction of any crime" literally).

[12] *See* 1 STANSBURY'S NORTH CAROLINA EVIDENCE § 111 (Brandis Rev. 1973) [hereinafter cited as STANSBURY]. For an expanded summary of the prior misconduct admission rule, see State v. Thomas, 35 N.C. App. 198, 201, 241 S.E.2d 128, 131 (1978).

[13] State v. Foster, 284 N.C. 259, 275, 200 S.E.2d 782, 795 (1973); *see* notes 24 & 57 *infra.* See STANSBURY, *supra* note 12, at 103 n.13 (1978 Supp.) for an interpretation of the *Foster* court's reading of the self-incrimination issue. The *Foster* court interpreted the North Carolina rule as allowing reference to "specific acts of criminal and degrading conduct" when the defendant has taken the stand, regardless of their bearing on the witness's veracity. *Id.* at 275, 200 S.E.2d at 794. In State v. Rhodes, 10 N.C. App. 154, 177 S.E.2d 754 (1970), the number of times the defendant's drivers license had been suspended was admitted into evidence for impeachment. 177 S.E.2d at 755-56. Supporters of the rule emphasize the certainty it affords trial judges in deciding which prior acts to admit. STANSBURY, *supra* note 12, § 111 at 344. The same rule also applies to the admission of convictions in North Carolina. *Id.* § 112. For a critique of the rule allowing any type of prior acts and convictions to be admitted for impeachment use in North Carolina, see Note, *Evidence — Traffic Violations to Impeach a Witness,* 46 N.C. L. REV. 969 (1968).

[14] State v. Foster, 284 N.C. 259, 275 S.E.2d 537 (1973); *accord,* State v. McKenna, 289 N.C. 668, 224 S.E.2d 357, *remanded on other grounds sub nom.* McKenna v. North Carolina, 429 U.S. 912 (1976).

[15] State v. Neal, 222 N.C. 546, 547, 23 S.E.2d 911, 912 (1943). Good faith seems to require simply an absence of malice. *See* State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15, *cert. denied,* 275 N.C. 263 (1969).

[16] The two prerequisites of good faith and a supporting evidentiary basis for questions directed at impeaching the witness are often blurred so that good faith is shown by proving an evidentiary basis for the questions. Professor Stansbury summarizes the prior misconduct admission rule as requiring only that the questions be asked "in good faith upon justifying information." STANSBURY, *supra* note 12, § 112 at 345; *see* note 38 *infra.*

[17] State v. Cross, 284 N.C. 174, 178, 200 S.E.2d 27, 30 (1973). Extrinsic evidence in addition to being excluded from explaining or refuting a witness's answer, also cannot be admitted to establish good faith on the part of the prosecutor. *See* note 63 *infra.*

[18] State v. Moore, 27 N.C. App. 284, 286, 218 S.E.2d 499, 500 (1975).

[19] 570 F.2d 501 (4th Cir. 1978).

misconduct admission rule resulted in the denial of a fair trial.[20] The Fourth Circuit agreed, holding that impeachment questions directed to a defendant-witness concerning his prior acts, based on weak collateral indictments and untempered by limiting instructions to the jury, constituted a violation of due process of law.[21] During trial in a North Carolina state court on an indictment for first degree burglary,[22] the prosecutor impeached Foster by asking him a series of questions concerning whether he had broken into other homes on six previous occasions.[23] The six alleged prior acts were the subject of six other indictments returned by the grand jury against Foster.[24] Foster's attorney objected to each question.[25] The only evidence offered by the state was a photographic enlargement of Foster's fingerprint which had been found on a flowerpot in the burglarized home.[26] After the jury found Foster guilty of burglary,[27] he appealed to the North Carolina Supreme Court, arguing that the prior misconduct admission rule was not satisfied and that the rule was unconstitutional.[28] The court upheld the validity of the rule and affirmed the verdict, finding that the requirements of good faith and a supporting evidentiary basis under the rule were satisfied because of the indictments.[29]

A federal district court, however, granted Foster's writ of habeas corpus,[30] circumventing the discretionary decision[31] of the state trial court.

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[20] *Id.* at 505.

[21] *Id.* at 507.

[22] An earlier conviction on the burglary charge in the North Carolina Supreme Court had been reversed because prejudicial hearsay testimony had been elicited from Foster on cross-examination. State v. Foster, 282 N.C. 189, 192 S.E.2d 320, 327 (1972).

[23] 570 F.2d at 504-05.

[24] *Id.* at 503. The fact that Foster had been indicted for the alleged prior acts was not revealed to the jury. *Id.* at 504-05; *see* note 57 *infra.*

[25] 570 F.2d at 504-05. A failure to object would represent a waiver of opportunity to assert the possible error in a habeas corpus proceeding. Rivera v. Warden, 431 F. Supp. 1201, 1204 (E.D.N.Y. 1977). The absence of an objection also waives the defendant's right to assert a breach of the prior misconduct admission rule in North Carolina. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674, 682 (1970).

[26] 570 F.2d at 502-04. According to the state, an unidentified intruder, who a witness said "looked like a man," struck the witness and fled with some items from the home. Although no fingerprints were uncovered at the window used to gain entry, the police were able to identify Foster's fingerprint on a flowerpot found in the living room of the burglarized home. *Id.* At trial, the only evidence admitted by the prosecution was an enlarged picture of this fingerprint because the original had been lost. *Id.* at 503, 504 nn.1 & 2.

[27] *Id.* at 505.

[28] *Id.* at 506 n.4.

[29] State v. Foster, 284 N.C. 259, 200 S.E.2d 782, 795 (1973). The North Carolina Supreme Court later reaffirmed the confidence it placed in indictments as an evidentiary basis for impeachment questions in *Foster.* State v. Lowery, 286 N.C. 698, 213 S.E.2d 255 (1975), *modified on other grounds,* 428 U.S. 902 (1976). Reversing the lower court's ruling in *Lowery,* the North Carolina Supreme Court identified a pending indictment as an "ample basis" to sustain the good faith requirement. *Id.* at 708, 213 S.E.2d at 261. The court re-emphasized this reasoning by subsequently relying on *Lowery* to summarize the state evidentiary rule. State v. McAllister, 287 N.C. 178, 184, 214 S.E.2d 75, 81 (1975).

[30] The federal habeas corpus statute, 28 U.S.C. § 2254(a) (1976), provides that habeas corpus is available only to those persons detained "in violation of the Constitution or laws or

Federal habeas corpus review of state criminal court evidentiary rulings is limited to errors of a constitutional dimension.[32] Since a violation of an evidentiary rule alone does not indicate unlawful detention of the prisoner,[33] Foster could not have secured habeas corpus review merely by alleging a breach of the North Carolina prior misconduct admission rule.[34] Therefore, Foster alleged that he was denied due process by the application of the rule. In granting habeas corpus, the federal court reasoned that allowance of the impeachment questions not only violated the evidentiary rule, but also denied the defendant due process because of the scarcity of evidence presented at trial.[35]

The Fourth Circuit affirmed the lower court's decision to grant habeas corpus.[36] The court focused its inquiry on whether the prosecutor had exercised good faith in cross-examining Foster.[37] Although the prosecutor's

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treaties of the United States." *See* Stone v. Powell, 428 U.S. 465, 474 n.6 (1976); United States v. Tod, 263 U.S. 149, 158 (1923). *See generally* Peyton v. Rowe, 391 U.S. 54 (1968). Until recently, defendants increasingly relied upon habeas corpus as an easy method to obtain post-conviction review by a federal court of a state court decision. Note, *Applying* Stone v. Powell: *Full and Fair Litigation of a Fourth Amendment Habeas Corpus Claim*, 35 WASH. & LEE L. REV. 319, 319 (1978). Fourth amendment claims which have been fully litigated at the state level, however, are now excluded from habeas corpus review. Stone v. Powell, 428 U.S. 465, 494 (1976). For a discussion of the implications of the *Stone* and other recent decisions on future habeas corpus review, see Soloff, *Litigation and Relitigation: The Uncertain Status of Federal Habeas Corpus for State Prisoners*, 6 HOFSTRA L. REV. 297 (1978).

[31] A discretionary decision by a trial judge is immune from subsequent reversal absent the rare finding of a gross abuse of discretion. *See, e.g.*, United States v. Finkelstein, 526 F.2d 517, 529 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976). The admission of prior acts and convictions under the prior misconduct admission rule is left to the discretion of the trial court. State v. Williams, 279 N.C. 663, 185 S.E.2d 174, 181 (1971). The North Carolina Supreme Court has held that a discretionary decision concerning cross-examination is not subject to reversal unless the defendant shows that the improper decision influenced the verdict. State v. Currie, 293 N.C. 523, 529, 238 S.E.2d 477, 481 (1977), *quoting* State v. Waddell, 289 N.C. 19, 26, 220 S.E.2d 293, 299 (1975).

[32] The reversal of a state court's finding is unusual because a determination of a state court is presumed to be correct. 28 U.S.C. § 2254(d)(1976); *see* Grundler v. North Carolina, 283 F.2d 798, 802 (4th Cir.), *cert. denied*, 362 U.S. 917 (1960).

[33] Cupp v. Naughten, 414 U.S. 141, 146 (1973); *see* Venetzian v. Hall, 433 F. Supp. 960, 963 (D. Mass. 1977); Victory v. Bombard, 432 F. Supp. 1240, 1252-54 (S.D.N.Y. 1977).

[34] Anderson v. Maggio, 555 F.2d 447, 451 (5th Cir. 1977). The inadmissible evidence must comprise a critical factor in the trial and its admission must be above the level of harmless error. Corpus v. Beto, 469 F.2d 953, 956 (5th Cir.), *cert. denied*, 414 U.S. 932 (1972). Foster was required to allege a breach of the Constitution because a violation of a state evidentiary rule is not a violation of a law of the United States. *See* note 30 *supra*.

[35] Foster v. Watkins, 423 F. Supp. 53, 55 (W.D.N.C. 1976). The district court applied the harmless error test outlied in Chapman v. California, 386 U.S. 18, 24 (1967), which requires that for a constitutional error to be deemed harmless, the reviewing court must find the error harmless beyond a reasonable doubt. *See generally* Ketchum v. Ward, 422 F. Supp. 934, 946 (W.D.N.Y. 1976) (even if prosecutor acted in bad faith, there was no constitutional error in impeachment questions concerning an indictment); Bellew v. Gunn, 424 F. Supp. 31 (N.D. Cal. 1976) (overwhelming circumstantial evidence rendered improper impeachment questions harmless).

[36] 570 F.2d at 507.

[37] *Id.* at 506. Foster did not argue that the North Carolina evidentiary rule was unconsti-

questions referring to prior acts were based on indictments, the court reasoned that this alone was insufficient to show an evidentiary basis for the questions.[38] After investigating the factual basis for the indictments, the court found that they lacked adequate evidentiary support.[39] By electing to prosecute the burglary indictment, the court theorized that the state probably determined that this indictment was the strongest of those returned against Foster.[40] In addition, every indictment which allegedly constituted a proper evidentiary basis for the impeachment questions had been dismissed for lack of sufficient evidence either before or soon after Foster's trial.[41] Finding that the indictments provided an insufficient evidentiary basis for the impeachment questions, the court concluded that the prosecutor lacked good faith.[42] Thus, the prosecutor failed to meet the requirements of the North Carolina prior misconduct admission rule and the questions concerning the prior acts were improper.[43] In addition, the Fourth Circuit recognized that the absence of limiting instructions to the jury[44] aggravated the already prejudicial impact of the improper ques-

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tutional on its face, but rather that the prosecutor's bad faith violated his right to due process. Brief of Appellee at 11, Watkins v. Foster, 570 F.2d 501 (4th Cir. 1978).

[38] 570 F.2d at 506. The Fourth Circuit asserted that in order to meet the good faith standard, the prosecutor's questions must be supported by facts. Although the court blurred the two requirements of the prior misconduct admission rule, *see* note 16 *supra*, it noted that the state approved of this restatement of the rule. 570 F.2d at 505. Both federal and North Carolina courts have long recognized the evidential basis requirement. *See, e.g.*, United States v. West, 460 F.2d 374, 375 (5th Cir. 1972); United States v. Randolph, 403 F.2d 805, 806 (6th Cir. 1968); Gross v. United States, 394 F.2d 216, 222 (8th Cir. 1968); Lee Won Sing v. United States, 215 F.2d 680, 681 (D.C. Cir. 1954); State v. Phillips, 240 N.C. 516, 524, 82 S.E.2d 762, 767 (1954).

[39] 570 F.2d at 505-06.

[40] *Id.* at 505, *citing* State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973) (Bobbitt, J., dissenting).

[41] 570 F.2d at 506. The court concluded that dismissal prior to trial of one of the indictments relied on to support a question designed for impeachment shed doubt on the prosecutor's good faith. The North Carolina Supreme Court was not advised of this dismissal or of the later dismissals prior to its decision.

[42] *Id.*

[43] *See* text accompanying notes 12-18 *supra*.

[44] Evidence of prior acts or convictions on cross-examination is admitted for impeachment purposes only. McCORMICK, *supra* note 1, at § 59. North Carolina follows the widespread practice of instructing the jury on the limited utility of prior acts and convictions evidence. STANSBURY, *supra* note 12, § 108. Absent a request by the defendant, a North Carolina trial court has no duty to give limiting instructions. State v. Noell, 284 N.C. 670, 698, 202 S.E.2d 750, 768 (1974); *cf.* State v. Monk, 286 N.C. 509, 516, 212 S.E.2d 125, 132 (1975) (absence of curative instructions concerning improper comments on defendant's failure to testify requires reversal).

The primary motive behind the use of limiting instructions seems to be to establish a compromise between the respective interests of the prosecutor and the defendant. McCORMICK, *supra* note 1, § 59. Usually short and precise, limiting instructions direct the jury to consider the admitted evidence solely to judge the defendant's credibility. In addition, limiting instructions usually warn the jury against making any inference that the defendant is more likely to have committed the crime charged simply because of his past misconduct. *See generally* Naylor, *Section 609 of the Nebraska Evidence Rules: A Need for Clarification*, 57 NEB. L. REV. 26, 34-42 (1978).

tions.[45] The failure of the state trial court to instruct the jury on the limited use of impeachment evidence, however, was not sufficient to raise a constitutional issue necessary to invoke habeas corpus review.[46]

Because of the need to discover the existence of a constitutional issue, the Fourth Circuit evaluated the quantity of evidence offered to establish Foster's guilt to determine if due process had been violated.[47] Assessing the amount of evidence presented as "slim," the court noted that the prosecutor conceded this estimation.[48] The court then characterized the allowance of the impeachment questions as the admission of improper "facts."[49] The Fourth Circuit concluded that there was a reasonable possibility that these facts contributed to Foster's conviction and thus constituted harmful and therefore reversible error.[50]

Although limiting instructions are commonly included in trial procedure, their value is suspect. *See* Note, *The Limiting Instruction — It's Effectiveness & Effect,* 51 MINN. L. REV. 264, 265 (1966). In Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.), *cert. denied,* 285 U.S. 556 (1932), Judge Learned Hand characterized limiting instructions as a "mental gymnastic" which is beyond the jury's intellectual ability. The concurring opinion in Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) termed the belief that limiting instructions could overcome the prejudicial effect of the admitted evidence a "naive assumption" based upon "unmitigated fiction." A possible virtue of these jury directives is a reduction in the number of mistrials, new trials, and reversals for prejudice because of the confidence placed in the curative powers of the instructions. Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters,* 70 YALE L. J. 763, 765 (1961). *See generally* Note, *Evidence—Admissibility of Prior Convictions to Impeach a Witness,* 44 TENN. L. REV. 401, 410 (1977) (judge's confidence in limiting instructions could influence his decision to admit possibly prejudicial evidence).

[45] 570 F.2d at 506; *see* note 44 *supra.*

[46] Rivera v. Warden, 431 F. Supp. 1201, 1203 (E.D.N.Y. 1977). A breach of the prior misconduct admission rule is also not sufficient to invoke habeas corpus review. *See* text accompanying note 34 *supra.*

[47] 570 F.2d at 506. The majority explained that it was reviewing the scarcity of the evidence, not its sufficiency, in order to determine the extent of the prejudicial impact of the improper questions. *Id.* at 506 n.6; *see* text accompanying note 34 *supra* & note 51 *infra.* Nevertheless, the dissent in *Foster* charged that the majority impermissibly judged the weight of the evidence in reaching its decision. 570 F.2d at 507 (Widener, J., dissenting).

[48] 570 F.2d at 506.

[49] *Id.* The Fourth Circuit may have characterized the impeachment questions as "facts" for two reasons. First, the court emphasized the absence of limiting instructions to the jury which should have confined the use of the prior acts to the issue of credibility. *See* note 44 *supra.* Second, the "facts" characterization facilitated the court's evaluation of the questions' impact on the trial in reviewing the district court's finding of a due process violation. *See* note 50 *infra.*

[50] 570 F.2d at 507. The Fourth Circuit relied on two "harmless error" tests to determine whether the improper impeachment questions constituted a violation of due process. *Id.* at 506 n.6. Under the test outlined in Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963), the reviewing court must decide whether there is a "reasonable possibility" that the inadmissible evidence contributed to the conviction. A finding that there is a reasonable possibility that the evidence contributed to the conviction, regardless of the sufficiency of the proper evidence admitted, requires a holding that the error was harmful. *Id.* The Supreme Court in Harrington v. California, 395 U.S. 250 (1969), took a different route in constructing a general harmless error test. Under the *Harrington* test, the focus of the reviewing court is not on the improper evidence, but rather on the remaining evidence admitted against the defendant. If this other

The protracted reasoning of the Fourth Circuit stems from a dilemma the court faced in reaching its holding in *Foster*.[51] The North Carolina Supreme Court, which constructed the framework of the state's prior misconduct admission rule, concluded that the good faith requirement of the rule had been satisfied,[52] and Foster did not assert that the rule itself was unconstitutional.[53] Faced with reversing the highest state court's interpretation of its own rule or declaring the rule unconstitutional despite the acquiescence of the defendant, the Fourth Circuit focussed on the quick dismissal of the indictments which supposedly established the prosecutor's good faith.[54] Emphasizing the importance of this "new" evidence,[55] the Fourth Circuit created the opportunity to justify its conclusion by reapplying the prior misconduct admission rule to the impeachment of Foster.[56]

While tacitly affirming the findings of the North Carolina Supreme Court and leaving the evidentiary rule intact, the Fourth Circuit made an important refinement of the rule. The court implicitly relied on that part of the rule which proscribes the prosecutor from referring specifically to unrelated indictments during cross-examination.[57] Although the prosecutor complied with the specific acts provision of the rule,[58] the Fourth Cir-

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evidence is "so overwhelming" that the jury would have convicted the defendant regardless of the inadmissible evidence, the error is termed harmless. *Id.* at 254. These two tests reach the same result when, as in *Foster,* the other evidence in the case is far from overwhelming. *See* 395 U.S. at 255-57 (Brennan, J., dissenting).

[51] Sound reasoning was crucial in *Foster* because the court was reversing a discretionary decision by a state trial court. *See* notes 31-32 *supra.*

[52] *See* notes 22-28 *supra.*

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

[54] *See* text accompanying note 41 *supra.*

[55] The Fourth Circuit also noted that the absence of limiting instructions had not been addressed by the North Carolina Supreme Court. 570 F.2d at 506.

[56] *See* 570 F.2d at 506.

[57] In State v. Williams, 279 N.C. 663, 185 S.E.2d 174, 182 (1971), the North Carolina Supreme Court held that a witness may not be impeached by questions referring to prior or current indictments for other criminal offenses. When a defendant is impeached to show his possible bias or prejudice, however, referrence to indictments is permissible. Alford v. United States, 282 U.S. 687, 693 (1931). Since the *Williams* decision only modified the prior misconduct admission rule, a witness may still be impeached by questions about whether he has *committed* specific acts in the past. State v. Gainey, 280 N.C. 366, 185 S.E.2d 874, 879 (1972); *see* State v. Monk, 286 N.C. 509, 517, 212 S.E.2d 125, 132 (1975); State v. Gurley, 283 N.C. 541, 547, 196 S.E.2d 725, 730 (1973). For an example of an application of the *Williams* rule, see State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168, 173 (1971).

In adopting the rule enunciated in *Williams,* the North Carolina Supreme Court overruled the long-standing doctrine of State v. Maslin, 195 N.C. 537, 143 S.E.2d 3 (1928). *See* Note, *Evidence — Inadmissibility for Impeachment Purposes of Evidence Showing Prior Arrest or Indictment,* 8 WAKE FOREST L. REV. 467, 468 (1972). North Carolina now follows the majority of other jurisdictions concerning the impeachment use of indictments. State v. Williams, 279 N.C. at 673, 185 S.E.2d at 151; *see, e.g.,* Johnson v. State, 30 Md. App. 512, 352 A.2d 371, 373-74 (1976); Johnson v. State, 82 Nev. 338, 418 P.2d 495, 496-97 (1966); Commonwealth v. Jackson, 475 Pa. 605, 381 A.2d 438, 439 (1977); State v. Goodwin, 29 Wash. 2d 276, 186 P.2d 935, 936 (1947); *cf.* Bellew v. Gunn, 424 F. Supp. 31 (N.D. Cal. 1976) (California prohibits reference to indictments or specific acts of misconduct to impeach a witness).

[58] 570 F.2d at 504-05. In accordance with the *Williams* rule, the prosecutor asked only

cuit expanded the provision by questioning the sufficiency of the indictments used as the evidentiary basis supporting impeachment questions.[59] The court did not specify a procedure to implement this additional sufficiency inquiry, however, leaving unresolved the question of whether the inquiry should be made at the trial or appellate level.[60] In addition, the court failed to identify the specific level of proof necessary to sustain the use of indictments in this form of impeachment.[61]

A voir dire hearing in which the prosecutor can establish the evidentiary basis of his good faith contention would allow North Carolina courts to incorporate effectively the new *Foster* inquiry into the determination of good faith.[62] The North Carolina rule bars the admission of extrinsic evidence at trial, thereby foreclosing any possibility that the prosecutor could prove his challenged good faith absent a hearing.[63] Only if the court determined that good faith depended primarily on indictments would the court

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whether the defendant had committed specific acts. *Id.*; *see* note 57 *supra.*

[59] Because a constitutional issue necessary to institute habeas corpus review cannot be derived solely from an error involving limiting instructions, *see* text accompanying note 46 *supra,* the court's holding on the good faith issue cannot be dismissed as dictum.

[60] The Fourth Circuit did not identify when inquiry into the adequacy of the indictments should be performed, but inferred by silence that the inquiry should be made at the trial level where, supposedly, good faith is already established. Application of the new inquiry at the trial level, however, is unrealistic. The inadequacy of the indictments relied on in *Foster* was confirmed only through the post-trial dismissals. *See* text accompanying note 41 *supra.* Thus, the trial court operated with a limited supply of facts, unable to respond to the dismissals or any other weakness of the indictments exposed subsequent to trial. *See* note 63 *infra.* In addition, evaluation at the trial level would burden the trial court with the arduous task of investigating and prejudging collateral indictments.

[61] Judge Widener dissented in *Foster,* arguing that if the dismissal of the collateral indictments for lack of sufficient evidence is fairly read as indicating only that the prosecutor lacked sufficient evidence to convict Foster, then the majority opinion requires the prosecutor to possess evidence proving the misconduct beyond a reasonable doubt. 570 F.2d at 507-08 (Widener, J., dissenting). Although the force of the dissent's conclusion is diminished by the obvious weakness of the collateral indictments in the instant case, *see* text accompanying notes 38-39 *supra,* the dissent does identify the absence of the formulation of what constitutes an acceptable level of proof necessary to comply with the majority opinion. *See* note 66 *infra.*

[62] The court in State v. Heard, 262 N.C. 599, 138 S.E.2d 243 (1964) employed a voir dire hearing to determine good faith. This procedure was ignored by North Carolina courts until State v. Gaiten, 277 N.C. 236, 176 S.E.2d 778 (1970). In *Gaiten,* the defendant specifically contended that the trial court erred by not determining whether the prosecutor's impeachment questions were supported by facts and asked in good faith. 176 S.E.2d at 781. Since this determination is discretionary, the court concluded that where the record is silent on the issue of good faith, the trial judge should be presumed to be correct. 176 S.E.2d at 782. In State v. Daniels, 35 N.C. App. 85, 89, 239 S.E.2d 880, 883 (1978), the court reiterated the *Gaiten* reasoning. The *Gaiten* court acknowledged the possibility of a voir dire good faith hearing, stating that it was permissible, but not required. 176 S.E.2d at 782.

[63] In *Foster,* the court noted that the prosecutor could not use any extrinsic evidence to support his implied assertion of good faith. 570 F.2d at 506. Barring extrinsic evidence insulates the court from valuable information. Thus, exemplifying the problem, the dissent to the second opinion of the North Carolina Supreme Court was able to argue only that the record "tends to negate" the prosecutor's good faith, rather than asserting that the record *does* negate a finding of good faith. State v. Foster, 284 N.C. 259, 264, 200 S.E.2d 782, 786 (1973) (Bobbitt, J., dissenting).

investigate the adequacy of the indictments.[64] Counsel for the defendant would learn of the prosecutor's reliance on indictments by attending the hearing.[65] If the indictments subsequently appeared to be superficial or offered in bad faith,[66] the defendant could argue a breach of the prior misconduct admission rule through appeal. The appellate court, taking advantage of the intervening time period to analyze the evidentiary value of the indictments, could then properly evaluate the use of the indictments to support impeachment questions.[67] A hearing to determine good faith thus constitutes an appropriate vehicle to supplement the current evidentiary rule in North Carolina with the new *Foster* requirement.[68]

Despite the uncertainties in *Foster,* the Fourth Circuit's interpretation of the good faith requirement strengthens the safeguard against prosecutorial abuse of the employment of impeachment questions.[69] Without the modification of the current rule, prosecutors could secure superficial in-

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[64] During the voir dire hearing, a weighing test, similar to those relied on in the harmless error tests, *see* note 49 *supra,* should be employed to evaluate the actual reliance on indictments. Thus, if the supplemental evidence alone could support a finding of good faith, further inquiry into the indictments would be unnecessary. In *Foster,* the court apparently inquired into the adequacy of the indictments because the indictments were the only ascertainable evidentiary support for the impeachment questions. 570 F.2d at 505.

[65] Adversarial argument by the defendant concerning the adequacy of the indictments offered to support good faith should not be entertained at the good faith hearing. Sufficient information concerning the validity of the indictments is normally not available to support intelligent discussion at the hearing stage of litigation. *See* note 60 *supra.* Moreover, such argument also would lengthen the hearing.

[66] Implicitly, the *Foster* decision requires that the proof necessary to support the indictments be greater than that required to convince a grand jury to issue the indictments. *See* text accompanying note 38 *supra.* Requiring proof beyond a reasonable doubt, however, would be too stringent a standard since this would equate the admission of evidence with the burden of proof necessary to convict. *See* note 61 *supra.* Therefore, courts should make case-by-case evaluations within these parameters.

[67] In addition to avoiding the disadvantages in review at the trial level, *see* note 60 *supra,* an inquiry by the appellate court has several advantages. The intervening time period between trial and appellate review would disclose subsequent dismissals of indictments as in *Foster. See* text accompanying note 41 *supra.* Inquiry on appeal would also limit judicial inquiry to those few cases in which events subsequent to the defendant's conviction cast doubt on the prosecutor's good faith.

[68] Good faith determination hearings would probably slow down trials. The corresponding benefits of better informed admissibility decisions and the easy implementation of the indictment sufficiency inquiry, however, outweigh the disadvantage. Moreover, the use of a hearing would complement due process of law by disclosing impeachment evidence to the defendant. The defendant would seem to have the due process right to be confronted with the evidence used to support his impeachment because this evidence is also being used against the defendant to enhance the possibility of a finding of guilt. *See generally* Pointer v. Texas, 380 U.S. 400 (1965).

[69] *See* text accompanying note 14 *supra.* The *Foster* decision can be narrowly read and dismissed as simply a product of the case's unique factual situation. *See* note 29 *supra.* However, the additional inquiry into indictments used to support good faith mandated by the *Foster* court remains a sound improvement on the prior misconduct admission rule and should be implemented. Although most jurisdictions are in accord with North Carolina's restriction on impeachment questions which refer directly to indictments, no other jurisdiction has incorporated the additional inquiry outlined in *Foster. See* note 57 *supra.*

dictments solely to buttress the evidential support for impeachment questions. In addition, the court's strengthening of the good faith requirement affirms the importance the court places in the good faith prerequisite for the admission of prior acts and convictions.[70] The *Foster* decision should encourage prosecutors to act in strict compliance with the prior misconduct admission rule.

In addition to common law evidentiary rules similar to North Carolina's prior misconduct admission rule,[71] legislatures have enacted statutes dealing with the admission of prior acts and convictions.[72] Congress adopted Rule 609 of the Federal Rules of Evidence to govern the use of prior convictions to impeach a witness in federal courts.[73] Under Rule 609, evidence of a felony conviction is admissible if the probative value of the conviction[74] outweighs the prejudicial impact[75] of its admission.[76] Convictions for crimes involving dishonesty or false statement are automatically

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

[71] *See* text accompanying notes 12-18 *supra.*

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

[73] Because the United States Supreme Court only recently ruled allowing the use of prior convictions for impeachment purposes, McGautha v. California, 402 U.S. 183, 215 (1971), prior rules and decisions allowing their admission were clouded with uncertainty. *See generally* Note, *The Dilemma of a Defendant Witness in New York: The Impeachment Problem Half-Solved,* 50 ST. JOHN'S L. REV. 129 (1975). Prior to the enactment of Rule 609 of the Federal Rules of Evidence, Rule 21 of the Uniform Rules of Evidence governed admissibility of prior convictions for impeachment purposes in federal court. No evidence of a prior conviction was admissible under Rule 21 unless the witness first introduced evidence solely to support his own credibility. In addition, Rule 21 barred the admission of any conviction for the purpose of attacking credibility unless it involved dishonesty or false statement. UNIFORM RULES OF EVIDENCE 21 (1953) (superseded by Rule 609 (1974)). *See generally* Comment, *California's Use of Prior Convictions to Impeach a Criminal Defendant,* 9 U.S.F. L. REV. 491, 493-94 (1975).

In Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965), the court abandoned the strict guidelines of Rule 21 and entrusted the admission of prior convictions to the discretion of the trial judge. The *Luck* court constructed guidelines for the admission of prior acts and crimes as follows:

> In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to search for truth in a particular case for the jury to hear the defendant's story than to know of the prior conviction.

Id. at 769 (footnote omitted); *see* Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 1029 (1968).

Rule 609 was an intensely debated compromise between the supporters of Rule 21 and the *Luck* rule, incorporating much of the *Luck-Gordon* reasoning. 120 CONG. REC. H12,257 (daily ed. Dec. 1974); *see* United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976) (extensive recitation of legislative history of Rule 609); *see generally* United States v. Seamster, 568 F.2d 188 (10th Cir. 1978); United States v. Hayes, 553 F.2d 824 (2d Cir.), *cert. denied,* 434 U.S. 867 (1977); United States v. Cole, 491 F.2d 1276 (4th Cir. 1974); 3 J. WEINSTEIN & M. BERGER, EVIDENCE § 609[03] (1977); Savikas, *New Concepts in Impeachment: Rule 609(a), Federal Rules of Evidence,* 57 CHI. B. REC. 76, 77 (1975).

[74] *See* note 8 *supra.*

[75] *See* note 9 *supra.*

[76] FED. R. EVID. 609(a)(1).

admissible.[77] Under Rule 609(b), however, any conviction which is more than ten years old is inadmissible unless the probative value of the conviction *substantially* outweighs its prejudicial impact.[78]

In *United States v. Cavender,*[79] the Fourth Circuit held that in order to comply with Rule 609(b), the trial court must make an on record finding of the specific facts and circumstances supporting its admissibility decision.[80] After indictment for possession of an unregistered firearm in 1973,[81] the defendant Cavender sought to suppress the admission of his 1951 conviction for sodomy, 1955 conviction for a probation violation, 1961 conviction for forgery and 1970 conviction for the interstate transportation of a stolen motor vehicle.[82] The trial court denied Cavender's motions to suppress each of the prior convictions pursuant to Rule 609(b)[83] without including its reasoning on the record.[84] As a result of the denial of his motions, Cavender decided not to testify at trial in order to prevent the presentation of his record to the jury.[85] On appeal to the Fourth Circuit

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[77] FED. R. EVID. 609(a)(2).

[78] FED. R. EVID. 609(b).

[79] 578 F.2d 528 (4th Cir. 1978).

[80] *Id.* at 532.

[81] 28 U.S.C. § 5861(c)(f)(i) (1976).

[82] 578 F.2d at 531. Cavender moved to suppress the prior convictions at two pretrial admissibility hearings and after the government had presented its evidence at trial. Brief for Appellee, United States v. Cavender, 578 F.2d 528 (4th Cir. 1978).

[83] 578 F.2d at 529-30. Since Cavender was charged in 1973, the 1970 conviction for interstate transportation of a stolen motor vehicle did not come within the protective ambit of Rule 609(b). The ten year period under the rule is computed from the more recent of either conviction or release from prison for that conviction. FED. R. EVID. 609(b). Arguably, since time spent in prison is a period of rehabilitation, society should not penalize the prisoner by excluding the period of incarceration in the ten year period computation. Thus, the time period should be computed solely from the date of conviction. *See,* Glick, *Impeachment by Prior Convictions: A Critique of Rule 6-09 the Proposed Rules of Evidence for U.S. District Courts,* 6 CRIM. L. BULL. 330, 343 (1970). Exclusion of the time of incarceration when computing the ten year period, however, may place too much confidence in the penal system. *See* Krauser, *supra* note 8, at 310. Instead of being rehabilitated, the prisoner may simply have little opportunity to engage in criminal activities. *Id.* Judge Widener, concurring in *Cavender,* proposed that the court should be allowed to consider a string of convictions if the last conviction occurred within the previous ten years. 578 F.2d at 539-40. *See generally* Rothstein, *The Proposed Amendments to the Federal Rules of Evidence,* 62 GEO. L. J. 125, 144 (1972).

[84] The only on record reference by the *Cavender* trial court to the admissibility decision stated:

> The Court would be inclined to overrule the motion under the particular facts here when you consider the type of offense of which the defendant was convicted, those are matters that the Court should take into consideration in making the determination. In view of all the circumstances, I think the Court would overrule the motion.

Record, vol. 6, at 208.

[85] Brief for Appellant, United States v. Cavender, 578 F.2d 528 (4th Cir. 1978). Cavender faced a dilemma since if he elected to testify, his prior convictions would have been admitted and the jury might have used the evidence to determine guilt. *See* note 44 *supra.* By deciding not to testify, however, Cavender's silence could possibly have been used by the jury to infer guilt. *See* MCCORMICK, *supra* note 1, § 43. A detailed study empirically confirms the defendant's dilemma, revealing that defendants with no criminal record testified in all but 9% of

following a jury verdict of guilty,[86] Cavender contended that the trial court's refusal to suppress those prior convictions that were more than ten years old constituted reversible error.[87]

The Fourth Circuit reversed the trial court, noting that Rule 609(b) requires the trial court to substantiate its admissibility decision with specific facts and circumstances.[88] Additionally, the Fourth Circuit found support for its position in the legislative history of Rule 609(b). The legislative history stated an intent that convictions over ten years old were to be admitted "very rarely and only in exceptional circumstances."[89] The adjective "substantial" in the Rule 609(b) balancing test also indicates the congressional intent to limit the discretion granted to the trial court in admitting such convictions.[90] The Fourth Circuit determined that the intended constraint on discretion could be satisfied only through well-documented admissibility findings which would serve to prove the validity of the trial court's decision.[91] The court also noted that the legislature clearly intended the finding of the trial court, accompanied by supporting facts, to appear in the trial record.[92] Adding that on record findings are necessary for meaningful appellate review,[93] the Fourth Circuit concluded that on record findings and supporting facts are required of trial courts under Rule 609(b).[94] Because of this procedural mistake, the *Cavender* court held that the trial court erroneously admitted the defendant's prior convictions over ten years old.[95]

The Fourth Circuit also made a specific inquiry into the trial court's admission of the 1951 sodomy conviction.[96] Explaining that the probative value of a prior conviction depends upon the nature of the conviction itself, the court decided that for a conviction to be admissible, it must bear on the issue of whether the jury should believe the witness.[97] Moreover, the court reasoned that since sodomy does not involve untruthfulness, deceit,

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the cases studied, while defendants with records did not testify in 26% of the cases studied. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 146 (1971).

[86] 578 F.2d at 530.

[87] *Id.* The pretrial hearings, *see* note 81 *supra,* adequately complied with the additional requirement under Rule 609(b) that a party must declare his intention to use prior convictions which are more than ten years old for impeachment by sending advance written notice to the adverse party. FED. R. EVID. 609(b).

[88] FED. R. EVID. 609(b).

[89] S. REP. NO. 1277, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7062 [hereinafter cited as SENATE REPORT].

[90] 578 F.2d at 532.

[91] *Id.*

[92] SENATE REPORT, *supra* note 89, at 7062.

[93] 578 F.2d at 532; *see* Dorsynski v. United States, 418 U.S. 424, 452-53 (Marshall, J., concurring) (on record findings should be required from lower courts interpreting Federal Youth Corrections Act to aid appellate review); Appalachian Power Co. v. EPA, 477 F.2d 495, 506-07 (4th Cir. 1973) (administrative agency decisions must contain a factual basis and full record for meaningful appellate review).

[94] 578 F.2d at 532.

[95] *Id.* at 534 n.21.

[96] *Id.* at 534.

[97] *Id.*

or falsification, and the admission of a sodomy conviction creates a substantial prejudicial impact, the admission of the sodomy conviction constituted a manifest abuse of discretion by the trial court.[98] Thus, the court held that the sodomy conviction was inadmissible on both procedural and substantive grounds.[99]

The Fourth Circuit then investigated the ramifications of the trial court's procedural and substantive mistakes on the defendant's right to due process. The Fourth Circuit reasoned that the trial court's refusal to grant Cavender's repeated motions to suppress his prior convictions over ten years old denied him the opportunity to testify.[100] In addition, the court appraised the evidence against Cavender as "purely circumstantial."[101] Consequently, the court concluded that the jury's judgment may have been swayed substantially by the evidential errors[102] and therefore remanded the case for a new trial.[103]

In applying Rule 609(b) to the admission of the sodomy conviction, the *Cavender* court failed to delineate adequately the relationship between Rules 609(a) and 609(b).[104] Rule 609(a) permits convictions for crimes involving dishonesty or false statement to be admitted autmomatically.[105] Convictions for crimes punishable by death or imprisonment in excess of one year are also admissible if the probative value of their admission outweighs the prejudicial impact.[106] Rule 609(b) merely screens the admission of otherwise admissible prior convictions. Since the remoteness of a conviction detracts from its impeachment value, the 609(b) balancing test adds the requirement that the probative value of a conviction over ten years old must substantially outweigh any prejudicial impact.[107] Thus, convictions which satisfy the 609(b) balancing test need not necessarily involve dishonesty or false statement.[108] The Fourth Circuit, however, treated the involve-

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[98] *Id.* *see* text accompanying notes 78 *supra* & 104-08 *infra.*

[99] 578 F.2d at 535; *see* text accompanying notes 95 & 98 *supra.*

[100] 578 F.2d at 535. The denial of a motion to suppress the admission of prior convictions results in a sharp increase in cases where a convicted defendant elects not to testify. *See* note 85 *supra.* The admission of even the most prejudicial convictions, however, in no way affects the defendant's *right* to testify. *See generally* McCormick, *supra* note 1, § 43 at 89. Despite the important distinction between in fact and per se denials, the Fourth Circuit stated specifically that the admission of the prior convictions "denied the opportunity" of the defendant to become a witness, thereby clouding the issue. 578 F.2d at 535.

[101] 578 F.2d at 535.

[102] *Id.* The court reasoned that since the testimony of the defendant may have significantly influenced the jury, the absence of testimony by the defendant must be considered in evaluating the effect of the error. *Id.*

[103] The Fourth Circuit relied on the Supreme Court harmless error tests enunciated in Chapman v. California, 386 U.S. 18 (1967), *see* note 35 *supra*, and Kotteakos v. United States, 328 U.S. 750, 764-65 (1946) to determine the propriety of a new trial. Under the *Kotteakos* test, the trial court views the entire situation rather than only the specific error, to determine whether the error substantially swayed the verdict. *Id.* at 765.

[104] *See* 578 F.2d at 536-37.

[105] Fed. R. Evid. 609(a)(2); *see* United States v. Smith, 551 F.2d 348, 358 (D.C. Cir. 1976).

[106] Fed. R. Evid. 609(a)(1); *see* United States v. Miller, 478 F.2d 768, 769 (4th Cir. 1973).

[107] Fed. R. Evid. 609(b).

[108] *See* United States v. Wolf, 561 F.2d 1376, 1381 (10th Cir. 1977).

ment of dishonesty or false statement in the conviction as a prerequisite for admission under Rule 609(b).[109] Despite the apparent confusion, the court's reasoning would justify a finding that the probative value of the sodomy conviction does not substantially outweigh the prejudicial impact of its admission.

By holding that the trial court's failure to make its findings on the record rendered the 1951 sodomy, the 1955 probation violation, and 1961 forgery convictions inadmissible, the Fourth Circuit failed to recognize the value of the hearings which were devoted solely to the admissibility of the convictions.[110] The trial court apparently devoted considerable time and thought to the decision to admit the convictions.[111] Recent circuit court decisions suggest that such hearings comply with the purpose of Rule 609(b).[112] The Fifth Circuit affirmed a trial court ruling which admitted prior convictions under Rule 609(b) without making an explicit finding on the record, emphasizing that the trial court had the rule before it when making the admissibility determination.[113] The Seventh Circuit identified a hearing held by the trial court as the major factor influencing its affirmation of a trial court's off the record decision to admit prior convictions under the rule.[114] The hearings in *Cavender* met and probably exceeded the procedural requirements of these other circuits by including both a discussion of the facts of the case and the construction of Rule 609(b).[115]

In each of the other circuits' apparently contrary holdings, however, the courts expressed a decided preference for on record findings by the trial court.[116] To this extent the holding of the Fourth Circuit comports with the interpretations by other circuits of Rule 609(b) as well as with the legisla-

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[109] *See* 578 F.2d at 534.

[110] *See* note 82 *supra.*

[111] The admissibility hearings included complete adversarial arguments by both parties. Brief of Appellee, United States v. Cavender, 578 F.2d 528 (4th Cir. 1978).

[112] Although creating a record for appellate review is important, *see* note 93 *supra,* the purpose of the rule, arguably complied with by the *Cavender* hearings, is to insure that the exceptional nature of the admission of a conviction under the rule is impressed on the mind of the trial judge. *See* United States v. Cohen, 544 F.2d 781 (5th Cir.), *cert. denied,* 431 U.S. 914 (1977); United States v. Mahone, 537 F.2d 922 (7th Cir.), *cert. denied,* 429 U.S. 1025 (1976); text accompanying notes 88-92 *supra.*

[113] United States v. Cohen, 544 F.2d 781 (5th Cir. 1977). Placing considerable importance on the physical presence of a copy of Rule 609(b) in the trial court during the admissibility decision, the Fifth Circuit contended that this demonstrated that the trial court actually construed and applied the rule to the facts of the case. *Id.* at 785.

[114] United States v. Mahone, 537 F.2d 922 (7th Cir. 1976). The Seventh Circuit specifically identified the facts related to the trial court through the arguments of counsel at the admissibility hearings as the foundation of its reasoning. *Id.* at 928.

[115] *See* note 111 *supra.* The Fourth Circuit's finding that the sodomy conviction was substantively inadmissible, however, *see* text accompanying notes 96-99 *supra,* is an adequate basis for reversal regardless of whether the court's conclusion dismissing the value of the admissibility hearings is erroneous. *See* note 50 *supra.*

[116] Both the Fifth and Seventh Circuits inferred that explicit on record findings were "probably" contemplated by Congress and will soon be mandatory. United States v. Cohen, 544 F.2d at 785; United States v. Mahone, 537 F.2d at 929.

tive intent.[117] Requiring on record findings is a logical and well-supported advance in the application of Rule 609(b) and should be implemented, as in the Fourth Circuit, as a regular practice of trial court procedure. Adherence to the *Cavender* holding will insure compliance with the purpose of Rule 609(b) and provide the necessary record for meaningful appellate review.

When convictions are invalidated after being admitted in another trial to impeach a defendant-witness, the appellate court must make an additional inquiry into the conviction to discern the reason for its invalidation.[118] Contributing to the problem of review is the uncertainty which stems from the few and seemingly inconsistent United States Supreme Court decisions addressing the use of constitutionally imperfect evidence for impeachment purposes.[119] The Supreme Court first specifically ruled on the problem arising from the impeachment use of prior convictions which were void at the time of their use or were subsequently invalidated in *Loper v. Beto.*[120] In *Loper,* the Court prohibited the prosecutor from impeaching a testifying defendant with convictions which were invalidated because the defendant was not represented by counsel.[121] The Supreme Court earlier held, in *United States v. Tucker,*[122] that uncounseled convictions could not be used to influence the imposition of a discretionary sentence.[123] The

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[117] The Fourth Circuit's interpretation of Rule 609(b) to require on record findings by the trial court complements the legislative history of the rule. *See* text accompanying notes 88-92 *supra.* Moreover, in Gordon v. United States, 383 F.2d 936, 939 (D.C. Cir. 1967), the Circuit Court for the District of Columbia interpreted its earlier *Luck* decision, *see* note 72 *supra,* as contemplating an on record finding by the trial court.

[118] The additional inquiry into the conviction is mandated by Loper v. Beto, 405 U.S. 473 (1972). *See* note 139 *infra.*

[119] *See generally* Comment, *Constitutional Law — Impeachment by Unconstitutionally Obtained Evidence — The Erosion of the Exclusionary Rule* — People v. Taylor, 34 OHIO ST. L. J. 706 (1973). In Walder v. United States, 347 U.S. 62 (1954), the Supreme Court held that where a defendant affirmatively resorts to perjury on the belief that his credibility is beyond challenge, the government is not constitutionally prohibited from using evidence obtained in violation of the fourth amendment to impeach the defendant. *Id.* at 65. In Harris v. New York, 401 U.S. 222 (1971), the Supreme Court concluded that a prior inconsistent statement obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), could be used for impeachment where the defendant testified differently at trial. 401 U.S. at 226. *See generally* Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L. J. 1198 (1971). In response to *Harris,* Dean McCormick concluded that if the defendant testifies and otherwise inadmissible evidence is relevant to his credibility, the evidence will be admissible for impeachment purposes. MCCORMICK, *supra* note 1, § 178. *But see* Loper v. Beto, 405 U.S. 473 (1972); note 139 *infra.*

[120] 405 U.S. 473 (1972).

[121] *Id.* at 483.

[122] 404 U.S. 443 (1972).

[123] *Id.* at 447. In *Tucker,* the Supreme Court sought to prevent the erosion of the holding of Gideon v. Wainwright, 372 U.S. 335 (1963) by the use of uncounseled convictions in sentencing. 404 U.S. at 448; *see* Comment, *Due Process at Sentencing: Implementing the Rule of* United States v. Tucker, 125 U. PA. L. REV. 1111 (1977) [hereinafter cited as *Due Process at Sentencing*]. The *Gideon* Court held that absent an intelligent waiver, counsel must appointed for all persons who are charged with a serious crime and are unable to retain

application of, and relationship between, these Supreme Court cases guided the Fourth Circuit's reasoning in a recent decision concerning the impeachment use of subsequently invalidated convictions.

In *Grandison v. Warden,*[124] the Fourth Circuit found that the *Loper* ruling was inapplicable to the facts of *Grandison.* In *Grandison,* the defendant's prior convictions were invalidated because the defendant was excluded improperly from juvenile court jurisdiction, while in *Loper* the prior convictions were invalidated because the defendant lacked counsel.[125] Since the trial court failed to furnish a certificate attesting that the void convictions did not influence the imposition of sentence, however, the Fourth Circuit concluded that the trial court contravened the Supreme Court's decision in *Tucker.*[126] During a state court trial for sodomy and assault, the prosecutor impeached the defendant Grandison by questioning him regarding his prior convictions for robbery with a deadly weapon, assault, attempted excape, and unlawfully carrying a concealed weapon.[127] Although Grandison advised the trial court that he had filed a petition for federal habeas corpus which challenged the validity of those convictions, the court admitted the prior convictions for impeachment and sentencing purposes.[128] After Grandison was convicted in state court on the sodomy and assault charges,[129] the federal district court granted Grandison's writ of habeas corpus, invalidating the prior convictions.[130] The district court noted that although the convictions were for crimes committed when the defendant was sixteen, a Baltimore procedural rule in force at the time excluded sixteen and seventeen-year-olds from juvenile court jurisdiction.[131] The federal court granted habeas corpus since the Baltimore rule had been held invalid subsequent to Grandison's earlier convictions on the ground that no legitimate reason existed for excluding Baltimore youths from the eighteen year old age limit of the Juvenile Court Act of Maryland.[132] Furthermore, the Fourth Circuit gave the invalidation of the rule retroactive effect.[133] Grandison immediately filed another petition for fed-

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counsel. 372 U.S. at 339. This holding stemmed from the Court's conclusion that the right to counsel is a fundamental right and essential to a fair trial. *Id.* at 340-42.

[124] 580 F.2d 1231 (4th Cir. 1978).

[125] *Id.* at 1240.

[126] *Id.* at 1243.

[127] *Id.* at 1234.

[128] *Id.* at 1233. The Baltimore trial court admitted the contested convictions on the basis of a previous denial of state habeas corpus. In petitioning for state habeas corpus, Grandison had relied on Long v. Robinson, 316 F. Supp. 22 (D.Md. 1970), *aff'd,* 436 F.2d 1116 (4th Cir. 1971); *see* text accompanying notes 131-133 *infra.* The state judge denied the petition on the ground that Grandison's constant misrepresentations of his age estopped him from asserting the protection of *Long.* 580 F.2d at 1232.

[129] 580 F.2d at 1233.

[130] Grandison v. Warden, Civil No. HM 75-1724 (D.Md., filed June 9, 1976).

[131] 580 F.2d at 1232.

[132] The Baltimore rule was invalidated in Long v. Robinson, 316 F. Supp. 22 (D.Md. 1970), *aff'd,* 436 F.2d 1116 (4th Cir. 1971).

[133] Woodall v. Pettibone, 465 F.2d 49 (4th Cir. 1972), *cert. denied,* 413 U.S. 922 (1973). A similar statutory restriction on access to juvenile court was recently struck down by the

eral habeas corpus, contending that the use of the subsequently invalidated convictions at his sodomy and assault trial violated his right to due process.[134] The federal district court rejected Grandison's petition on the grounds that the use of the void convictions for impeachment and sentencing purposes constituted harmless error.[135]

On appeal to the Fourth Circuit, Grandison contended that the use of the invalidated convictions for impeachment and sentencing purposes violated his rights to due process and equal protection.[136] Finding that the defendant demonstrated no evidentiary error and thus experienced no deprivation of constitutional rights, the Fourth Circuit affirmed the district court's denial of habeas corpus.[137] The court recognized that the *Loper* holding was another of several Supreme Court decisions which sought to insure that the right to counsel would not be diluted.[138] The Fourth Circuit concurred with the *Loper* Court's finding that the principle barring the use of uncounseled convictions to prove guilt is vital because a violation of the right to counsel goes "to the very integrity of the fact-finding process."[139] Since the jurisdictional error in *Grandison* did not

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Tenth Circuit in Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972) which was held to be retroactive in Radcliff v. Anderson, 509 F.2d 1093 (10th Cir. 1974).

[134] Grandison v. Warden, 580 F.2d at 1235. While Grandison's petition was pending, the Maryland Court of Special Appeals affirmed his convictions for sodomy and assault, Grandison v. State, No. 80 (Ct. Spec. App., filed October 26, 1976), on the ground that the grant of the federal writ of habeas corpus voiding the earlier convictions did not retroactively invalidate the trial court's evidentiary ruling. *Id.* slip op. at 9.

[135] Grandison v. Warden, No. HM 76-1590 (D.Md., filed July 18, 1977). The court applied the harmless error test outlined in Chapman v. California, 386 U.S. 18 (1967). *See* note 35 *supra.* The district court reasoned that the use of the void convictions was harmless error because of the strong evidence against Grandison. Moreover, the court reasoned that because the crime was allegedly committed in prison, the jury would probably assume that the defendant had been involved in prior criminal activity even without the admission of the prior convictions. Grandison v. Warden, No. HM 76-1590, slip op. at 10 (D.Md., filed July 18, 1977).

[136] Grandison v. Warden, 580 F.2d at 1232; *see* U.S. CONST. amend. XIV. In order to invoke federal habeas corpus review, the defendant must allege errors of a constitutional magnitude. *See* text accompanying note 33 *supra.* In the case of a mere evidentiary error, the defendant must first establish the error and then show that the error deprived him of due process through an application of a harmless error test. *See* note 50 *supra.*

The Fourth Circuit initially addressed the state's argument that Grandison had waived his right to a juvenile classification because he had consistently mispresented himself as being nineteen or twenty years of age. *See* note 127 *supra.* Although the court decided that the issue was moot because the state did not appeal the earlier grant of federal habeas corpus under *Long, see* text accompanying notes 129-32 *supra,* the court strongly implied that such a waiver could have been found. 580 F.2d at 1237-38.

[137] 580 F.2d at 1241; *see* note 30 *supra.*

[138] *See* note 139 *infra.* The right to counsel doctrine was enunciated by the Supreme Court in Gideon v. Wainwright, 372 U.S. 335 (1963). *See* note 123 *supra.*

[139] Loper v. Beto, 405 U.S. 473, 483-84 (1972). The Supreme Court explained that the effect of an absence of counsel on the integrity of the fact-finding process was the stimulus for subsequent decisions like *Loper. Id.* The Court decided *Loper* on the basis of its earlier holding in Burgett v. Texas, 389 U.S. 109 (1967) which involved the use of an uncounseled conviction under a Texas statutory recidivist provision. *See Uncounseled Convictions, supra* note 2, at 683. In *Burgett,* the prosecutor attempted to use the uncounseled conviction to

infringe on the fact-finding process,[140] the Fourth Circuit determined that the uncounseled conviction rule was inapplicable.[141] In addition, the court noted a general trend against applying the uncounseled conviction rule to convictions which are used for impeachment, but are void for reasons other than a right to counsel violation.[142]

The Fourth Circuit also rejected Grandison's attempt to extend the application of the uncounseled conviction doctrine.[143] Grandison argued

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secure more severe punishment under the recidivist statute. 389 U.S. at 115. To prevent the dilution of the *Gideon* holding, *see* note 123 *supra,* the Supreme Court held that this use of the void conviction would deprive the defendant of due process of law. In so deciding, the Court reemphasized the principle that an uncounseled conviction in no way proves guilt. *Id.*

In *Loper,* the Court reasoned that using uncounseled convictions to impeach the defendant's credibility at least implies that the defendant is guilty of committing the offense for which the defendant was tried without the assistance of counsel. 405 U.S. at 483. Therefore, the Court concluded that even if the *Burgett* holding was not originally contemplated to reach the context of impeachment, there was no overriding distinction which would bar such an extension. *Id. See generally* Comment, *Constitutional Law — The Use of Uncounseled Prior Convictions to Impeach Defendant's Credibility Deprives Defendant of Due Process of Law Where Such Use Might Influence the Outcome of the Case* — Loper v. Beto, 22 DRAKE L. REV. 398 (1973); Comment, *Constitutional Law — Invalidity of Prior Uncounseled Convictions for Impeachment Purposes* — Loper v. Beto, 7 SUFFOLK L. REV. 174 (1972).

[140] Grandison relied on Lambert v. Maryland, No. HM 74-404 (D.Md., filed March 7, 1975) and Douglas v. Warden, 399 F. Supp. 1 (D.Md. 1975) to support his contention that *Loper* applied to convictions which are void because of the wrongful denial of access to juvenile court. Grandison v. Warden, 580 F.2d at 1239. In *Lambert,* the court found that the use of prior convictions voided for this jurisdictional error was barred along with uncounseled convictions for impeachment purposes . The court, however, found the error to be harmless. *Id.* at 1239. The district court's holding was weakened when the same court later decided that the fact-finding distinction between errors involving the absence of counsel and those involving jurisdiction is valid and "speaks for itself." United States v. Mason, 68 F.R.D. 619, 624-25 (D. Md. 1975). While Grandison relied on *Douglas,* that case actually helps explain the fact-finding distinction upon which the Fourth Circuit relied. The *Douglas* court noted that while convictions which offend *Gideon* are per se void, 399 F. Supp. at 9, those which offend *Long* are void only if other defendants were allowed beneficial procedures unavailable to this defendant. *Id.*

[141] 580 F.2d at 1241. The Fourth Circuit relied on United States v. Graves, 554 F.2d 65 (3rd Cir. 1977) to support the proposition that the use of the void convictions for impeachment purposes does not constitute error where the fact-finding process is not impugned. In *Graves,* the prosecutor impeached the defendant with a prior conviction for auto larceny during a trial which resulted in a conviction for making a false statement on a gun registration form and of moving the gun in interstate commerce after a felony conviction. *Id.* at 82. On appeal, the defendant contended that the larceny conviction was constitutionally void because he had been improperly denied the opportunity to be tried in a juvenile court. *Id.* Recognizing that *Loper* was a "sequel" to the cases concerned with protecting the right to counsel, *see* note 139 *supra,* the Third Circuit specifically refused to extend *Loper* to the facts before it. 554 F.2d at 82.

[142] 580 F.2d at 1241; *see e.g.,* Tisnado v. United States, 547 F.2d 452 (9th Cir. 1976); United States v. Penta, 475 F.2d 92 (1st Cir.), *cert. denied,* 414 U.S. 870 (1973) (refused to extend *Loper* to conviction void under fourth amendment); von Lusch v. State, 279 Md. 255, 368 A.2d 468 (1977). *But see* Beto v. Stacks, 408 F.2d 313, 318 (5th Cir. 1969) (extended *Burgett* to conviction void under fourth amendment). *See generally* United States v. Cole, 463 F.2d 163 (2d Cir.), *cert. denied,* 409 U.S. 942 (1972).

[143] Grandison v. Warden, 580 F.2d at 1239-40.

that the adjudication of delinquency is another "critical stage" in the judicial process[144] and that there is no valid distinction between the adjudication of delinquency and the critical stages that activate the right to counsel.[145] Although the Fourth Circuit conceded the importance of the adjudication of delinquency,[146] the court reaffirmed its position that the determination of juvenile status neither pertains to nor affects the fact-finding process, the crucial factor in applying *Loper* to curtail impeachment by prior convictions.[147]

Notwithstanding this finding, the Fourth Circuit remanded the case in part because the trial court failed to furnish the district court with a certificate stating that the void convictions did not influence its imposition of sentence.[148] The trial court's error resulted from its non compliance with the Fourth Circuit's procedure for implementing the directive of *United States v. Tucker.*[149] In response to a petition by Grandison asserting a violation of *Tucker,* the trial court was required to state unequivocally that the sentence imposed was not influenced by the void convictions.[150] If the trial court determined that the sentence would have been different absent knowledge of the convictions, the court would be required to resentence the petitioner if the prior convictions had been or were later invalidated for want of counsel.[151] In *Grandison,* the trial court stated only that the use of the void prior convictions did not contribute to the *conviction,* without

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[144] *Id.* at 1239. Grandison's contention that the adjudication of delinquency is a critical stage in criminal proceedings, however, does have support and merits consideration. In Kemplen v. Maryland, 428 F.2d 169 (4th Cir. 1970), the court concluded that "nothing can be more critical than determining whether there will be a guilt determining process in an adult-type trial." *Id.* at 174; *accord,* Kent v. United States, 383 U.S. 541 (1966); Russell v. Parratt, 543 F.2d 1214, 1216 (8th Cir. 1976); Cox v. United States, 473 F.2d 334, 341 (4th Cir. 1973).

[145] 580 F.2d at 1239. The Supreme Court has searched repeatedly for critical stages where substantial prejudice inheres in judicial proceedings to determine if counsel is necessary to insure that the rights of the defendant are adequately protected. *See, e.g.,* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218 (1967).

[146] Grandison relied on Woodall v. Pettibone, 465 F.2d 49, 52 (4th Cir. 1972), *cert. denied,* 413 U.S. 922 (1973), in support of his contention that the adjudication of delinquency is a critical stage in criminal proceedings. Acknowledging the existence of support in *Woodall* for this theory, the Fourth Circuit dismissed it as dictum because the case was directed at determining the retroactive nature of *Long,* not the use of void convictions for impeachment purposes. 580 F.2d at 1240.

[147] 580 F.2d at 1240.

[148] *Id.* at 1243.

[149] The Supreme Court in *Tucker* did not establish a procedure for the implementation of its holding. *See Due Process at Sentencing, supra* note 123, at 115; text accompanying note 123 *supra.*

[150] Stepheney v. United States, 516 F.2d 7, 9 (4th Cir. 1975). In *Stepheney,* the Fourth Circuit modified the circuit's procedure for implementing *Tucker* by requiring the trial court to state unequivocally that it had not been influenced by the void convictions at sentencing. 516 F.2d at 9; *see* Brown v. United States, 483 F.2d 116, 118 (4th Cir. 1973); *Due Process at Sentencing, supra* note 123, at 1124-27.

[151] 483 F.2d at 118. If the prior convictions have not been voided, the trial court should dismiss the petition as premature. *Id.*

mentioning sentencing.[152] Although the state argued that the record failed to show whether the trial court considered the void convictions when sentencing the defendant, the Fourth Circuit concluded that an affirmative statement by the trial court was required.[153]

The Fourth Circuit's findings in *Grandison* are inherently contradictory because the court treated the *Loper* and *Tucker* branches of the uncounseled conviction doctrine[154] as if they grew from different trees.[155] The court ignored the important requirement that the challenged conviction be invalidated for want of counsel when it remanded the case because of a violation of the procedure designed to prevent the influence of an uncounseled conviction on sentencing.[156] In applying *Loper* to the same set of facts, however, the court refused to extend this Supreme Court case to convictions which were not uncounseled.[157] In applying *Loper* and *Tucker*, courts should avoid the logical inconsistency of the Fourth Circuit's opinion. Because of the strong ties of both cases to the uncounseled conviction doctrine, the preferable route would be to restrict their application to those cases void under the doctrine. In addition, allegiance to the "fact-finding" distinction[158] outlined by the Fourth Circuit will prevent the unnecessary exclusion of useful impeachment evidence solely because of minor evidentiary errors by the trial court.

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[152] Grandison v. Warden, 580 F.2d at 1242.

[153] *Id., citing* Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978). In *Strader,* the trial court filed a certificate setting forth the facts at trial pursuant to 28 U.S.C. § 2245 (1976) which allows admission of such a certificate into a federal habeas corpus proceeding. In the certificate, the trial court recognized the uncouseled conviction, but stated that it "felt" that the knowledge had no effect on its sentence determination. 571 F.2d at 1266. The Fourth Circuit considered the certificate ambiguous because the trial judge did not state positively that the sentence imposed was uninfluenced. *Id.* at 1267; *accord,* Goodson v. United States, 564 F.2d 1071, 1072 (4th Cir. 1977); Locklear v. United States, 549 F.2d 313, 313 (4th Cir. 1976); Wren v. United States, 540 F.2d 643, 644 (4th Cir. 1975).

[154] *See* note 137 *supra.*

[155] The Fourth Circuit recently acknowledged the common origin of the *Loper* and *Tucker* decisions in Tolliver v. United States, 563 F.2d 1117, 1120 n.7 (4th Cir. 1977), where it stated that *Loper* and *Tucker* "held that convictions in violation of a right to counsel could not be used to impeach the defendant at trial or relied on at the time of sentencing." The Ninth Circuit, in Tisnado v. United States, 547 F.2d 452 (9th Cir. 1976), recognized the close relationship between these Supreme Court cases and refused to fall into the contradiction which plagues the *Grandison* decision. The defendant in *Tisnado* argued that since Beto v. Stacks, 408 F.2d 313 (5th Cir. 1969) extended the *Burgett* decision to a conviction void because of fourth amendment violations, there was no reason not to extend the *Tucker* decision to convictions void for reasons other than right to counsel violations. *Id.* at 457 n.4. The Ninth Circuit, recognizing the uncounseled conviction origin of both cases, refused to accommodate the defendant. *Id.*

[156] *See* text accompanying notes 136-147 *supra.*

[157] *See* text accompanying notes 148-153 *supra.*

[158] *See* text accompanying note 139 *supra.*

C. *Hillmon* Doctrine

More than eight decades ago, the Supreme Court established an evidential doctrine relating to the admissibility of hearsay statements[1] as evidence of a declarant's then existing state of mind.[2] This concept, known as the *Hillmon* doctrine,[3] has been incorporated into the Federal Rules of Evidence[4] by the "state of mind" exception[5] to the hearsay rule.[6] The Fourth Circuit recently examined the *Hillmon* doctrine and its codification in Rule 803(3),[7] but misapplied the concept to the facts and issues of *United States v. Jenkins.*[8] In *Jenkins,* the Fourth Circuit held that the admission into evidence of the transcripts of a telephone conversation between two persons, at the perjury trial of a third person, was proper under Rule 803(3).[9] The admissibility of this evidence was conditioned upon limiting its use to prove the intent of one of the parties to the conversation.[10] Even with this condition, however, the limits of Rule 803(3) have

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[1] The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). Additionally, a statement is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." FED. R. EVID. 801(a). *See generally* C. MCCORMICK, LAW OF EVIDENCE § 246 (2d ed. 1972) [hereinafter cited as MCCORMICK].

[2] *See* Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892). The *Hillmon* doctrine provides clarification and illumination of the state of mind exception. *See* note 5 *infra.* In *Hillmon,* the Court observed that a person's state of mind may be ascertained only through a person's manifestations, such as written or spoken words, gestures, or attitudes reflected by the person. The Court ruled that a person's state of mind may be proven through the testimony of a witness, based on the observation and interaction of the witness with that person. 145 U.S. at 295.

[3] *See* MCCORMICK, *supra* note 1, § 295 at 698.

[4] 28 U.S.C. (1976).

[5] FED. R. EVID. 803(3) provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . ," is not excluded by the hearsay rule. FED. R. EVID. 803. The *Hillmon* doctrine served as an incentive for the promulgation of Rule 803(3). *See* text accompanying notes 38-41 *infra. See generally* Note, *The Hillmon Case—Thirty-three Years After,* 38 HARV. L. REV. 709 (1925) [hereinafter cited as *Thirty-three Years After*]. The state of mind exception permits the admission of statements into evidence if the declarant's state of mind is at issue and the statements are probative of the declarant's state of mind. United States v. Pheaster, 544 F.2d 353, 376 (9th Cir. 1976), *cert. denied sub nom.,* Inciso v. United States, 429 U.S. 1099 (1977). *See generally* Rice, *The State of Mind Exception to the Hearsay Rule: A Response to "Secondary" Relevance,* 14 DUQ. L. REV. 219 (1976).

[6] *See* note 5 *supra.* FED. R. EVID. 802 prohibits the admission of hearsay into evidence "except as provided by these rules [the Federal Rules of Evidence] . . . or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

[7] FED. R. EVID. 803(3).

[8] 579 F.2d 840 (4th Cir.), *cert. denied,* 99 S. Ct. 458 (1978).

[9] *Id.* at 841.

[10] *Id.* A limiting instruction may be read to a jury for the purpose of restricting the use of certain evidence. MCCORMICK, *supra* note 1, § 59, at 135-36. Such an instruction may be necessary to limit the use of an item of evidence if an inference may be made from the

been exceeded in an abusive manner.

In *Jenkins,* a grand jury investigating possible narcotics violations by Jerra Lyles and Beatrice Johnson,[11] questioned the appellant, Jenkins.[12] Jenkins was asked specifically about his activities on July 26, 1975, when agents of the United States Drug Enforcement Agency (DEA) observed him driving with Johnson in Lyles's neighborhood.[13] Jenkins testified that he was attempting to visit a friend living in the same neighborhood as Lyles, and that Johnson, who was along for the ride, remained in the vehicle at all times.[14] Testimony given by a DEA agent, however, contradicted Jenkins's testimony, resulting in his recall by the grand jury.[15] During his second appearance Jenkins changed his testimony, admitting that Johnson left the vehicle for a short period of time.[16]

On the basis of his conflicting testimony, the grand jury indicted Jenkins for perjury.[17] At his perjury trial, Jenkins advanced a third account of his trip with Johnson to Lyles's neighborhood.[18] This third version was consistent with his prior statements to the extent that he testified that Johnson had never requested him to take her to Lyles's neighborhood and that she had not initiated the trip in any way.[19] The prosecution then offered the transcript of a telephone conversation between Lyles and Johnson that was intercepted by DEA agents prior to Jenkins's and Johnson's

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evidence that is improper under the hearsay rule and no exception exists permitting the evidence to be entered. Instead of disallowing the evidence completely, the court will admit it, but only for a legitimate purpose under the Federal Rules of Evidence. *Id.; see* note 6 *supra; see, e.g.,* United States v. Kaplan, 510 F.2d 606, 608-09 & n.1 (2d Cir. 1974); United States v. Brown, 490 F.2d 758, 763 (D.C. Cir. 1973). *See generally* Note, *The Limiting Instruction—Its Effectiveness and Effect,* 51 MINN. L. REV. 264 (1976) [hereinafter cited as *Effectiveness and Effect*]; Note, *Evidence Admissible For A Limited Purpose—The Risk Of Confusion Upsetting The Balance Of Advantage,* 16 SYRACUSE L. REV. 81 (1964) [hereinafter cited as *Risk of Confusion*].

[11] Lyles was being investigated for a violation of 21 U.S.C. §§ 841(a)(1), 846 (1970) (conspiracy to manufacture and distribute heroin) at the time the events leading to Jenkins's appearance before the grand jury transpired. 579 F.2d at 841.

[12] Jenkin's first appearance before the grand jury took place on September 24, 1975. 579 F.2d at 841.

[13] *Id.*

[14] Jenkins testified that he was attempting to visit a friend in the 1300 block of North Ellwood Avenue, Baltimore, Maryland. Lyles's residence was in the 1200 block of North Ellwood. *Id.* The opinion does not indicate whether such a friend existed. *Id.*

[15] The DEA agent testified that Johnson left the vehicle and entered Lyles's house. *Id.* at 841-43.

[16] *Id.* at 842. Jenkins testified that Johnson left the vehicle for approximately ten minutes during his absence and that she returned after he was back in the van. *Id.* at 841-42.

[17] Jenkins was indicted under 18 U.S.C. § 1623 (1976). At the time of the alleged perjury, § 1623 provided, in part, that any witness who, under oath, knowingly made a false material declaration before any court or grand jury of the United States, would be punished by a fine of not more than $10,000, or imprisonment for not more than five years, or both.

[18] At his perjury trial, Jenkins testified that he stopped to visit a friend in the 1300 block of North Ellwood and that as he was leaving, Johnson asked him to stop in the 1200 block of North Ellwood to allow her to visit other friends. Jenkins testified that he complied with her request, waiting in the van until she returned. 579 F.2d at 842.

[19] *Id; see* notes 14 & 18 *supra.*

arrival at Lyles's residence.[20] In that conversation, Johnson indicated that she would meet Lyles "within the hour."[21] The trial judge admitted the transcript for the limited purpose of indicating Johnson's reason for making the trip across town with Jenkins.[22] On the basis of this evidence, the jury found Jenkins guilty of lying to the grand jury.[23]

On appeal, the Fourth Circuit upheld the trial judge's decision to admit the challenged transcript into evidence since the sole function of the transcript was to prove Johnson's mental state prior to departing for Lyles's neighborhood.[24] The court concluded that a jury could reasonably infer[25] from this evidence that Johnson had asked Jenkins to drive her to Lyles's residence, particularly since they arrived there shortly after Johnson's conversation with Lyles.[26] Therefore, relying on such an inference, a jury could properly conclude that Jenkins had lied in response to questions concerning the purpose of his trip to Lyles's neighborhood.[27]

As a general rule, hearsay statements are not admissible as evidence,[28] but if a hearsay statement falls within one of the exceptions to the general rule, it may be admitted.[29] Evaluation of the rationale and conclusions of the Fourth Circuit initially requires an examination of the substance of the offered conversation to determine if any part constitutes hearsay under the Federal Rules of Evidence,[30] and if so, whether any of the hearsay rule exceptions are applicable.[31] An out-of-court statement offered in court to establish the truth of the matter asserted constitutes hearsay.[32] Thus, Johnson's remark during the telephone conversation that she was on her

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[20] 579 F.2d at 841. Agents intercepted the telephone conversation through the use of an authorized wiretap. *Id.*

[21] *Id.*

[22] *Id.* at 842. The trial judge instructed the jury that the conversation was admitted into evidence only to show Johnson's reason for visiting the 1200 block of North Ellwood and *not* to establish the truth of the matters contained in the conversation. *See* note 10 *supra.*

[23] 579 F.2d at 841.

[24] *Id.* at 842. There is a contradiction in the Fourth Circuit's opinion regarding the purpose of the evidence. Following a recitation of the trial court's instruction to the jury, clearly setting forth the purpose of the evidence, *id.* at 842, the court stated that the sole purpose of the proffer was to show the reasons for Jenkins's trip across town on July 26, 1975. *Id.* at 844. Such a purpose is contrary to the limits imposed by the jury instruction and is impermissible under Rule 803(3) since the intent of one other than the declarant is sought to be established. *See* text accompanying notes 25-27 *infra.*

[25] 579 F.2d at 842; *see* text accompanying notes 54 & 55 *infra.*

[26] 579 F.2d at 842.

[27] *Id; see* text accompanying notes 58-60 *infra.*

[28] FED. R. EVID. 802; *see* note 6 *supra.*

[29] FED. R. EVID. 802.

[30] *Id.*

[31] *See, e.g.,* FED. R. EVID. 803, 804 (hearsay exceptions).

[32] FED. R. EVID. 801(c). *See generally* note 1 *supra.* For a statement to constitute hearsay, it must be offered to prove the truth of the statement. More specifically, the statement must be used to establish the truth of the substance of what is stated, rather than merely to indicate an attitude reflected by the statements. *See generally* MCCORMICK, *supra* note 1, at § 246; Note, *Hearsay Evidence And The Federal Rules: Article VIII—Mapping Out The Borders Of Hearsay,* 36 LA. L. REV. 139, 142 & n.17 (1975).

way to Lyles's residence constituted hearsay since the government offered the statement as evidence to prove that she had the intent to go to Lyles's residence and that she carried out her intent.[33] The Fourth Circuit admitted the statement, although hearsay, under the state of mind exception of Rule 803,[34] finding the statement indicative of Johnson's intention.[35]

A critical examination of Rule 803(3) and its origin reveals the inappropriateness of the Fourth Circuit's application of the rule and hence, the invalidity of the court's conclusion. Rule 803(3) encompasses a wide range of specific types of statements which may be employed to establish a declarant's mental, emotional or physical condition.[36] The section of the rule applicable to *Jenkins* deals with a statement of a declarant's mental condition which consequently evidences the intent of the declarant.[37] As applied to *Jenkins,* the intent to be established by the use of Rule 803(3) was the declarant Johnson's intention to meet Lyles at his residence.[38]

A stimulus for the promulgation of Rule 803(3)[39] was the *Hillmon* doctrine,[40] which deals with the admissibility of statements made by a declarant to establish the declarant's state of mind. In *Mutual Life Insurance Co. v. Hillmon,*[41] correspondence by a non-party to a lawsuit was admitted into evidence to establish the author's intent to take a trip with a designated person.[42] The correspondence aided the jury in finding that the author took the trip accompanied by the person named in the letters.[43] Since such a finding would not have been possible without proof of the author's intention, the correspondence was admitted into evidence to show that the

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[33] 579 F.2d at 842-45. The prosecution's use of Johnson's statement to establish that she went to Lyles's home, with the intent of going there, was hearsay since the prosecution sought to prove the truth of the statement's substance. Thus, more than a mere effort to establish an intent was reflected in the government's proffer of the evidence.

[34] *Id.* at 842; *see* FED. R. EVID. 803(3); note 5 *supra.*

[35] 579 F.2d at 843.

[36] *See* note 5 *supra.*

[37] *See* FED. R. EVID. 803(3); text accompanying notes 1-6 *supra* & 47-49 *infra.*

[38] *See* notes 5, 34 & 36 *supra.*

[39] FED. R. EVID. 803(3). *See generally* H. R. REP. No. 93-650, 93d Cong., 2d Sess. ____, *reprinted in [1974]* U.S. CODE CONG. & AD. NEWS 7075, 7087 [hereinafter cited as *House Report*]. The House Committee clearly intended Rule 803(3) to limit the *Hillmon* doctrine by admitting statements of a declarant only to prove the future conduct of the declarant and not of another person. *Id. But see* United States v. Pheaster, 544 F.2d 353, 379-80 (9th Cir. 1976) (court declined to give effect to House Committee report).

[40] *See* text accompanying notes 1-6 & note 39 *supra.*

[41] 145 U.S. 285 (1892).

[42] *Id.* at 294-95. The question to be resolved in *Hillmon* was whether John Hillmon, the plaintiff's husband had died. *Id.* at 294. The plaintiff attempted to collect proceeds from life insurance policies on her husband's life. The insurance company maintained that Hillmon had not died, but that another person, Walters, was the deceased. *Id.* The insurance company sought to have letters written by Walters to his fiancee and sister admitted to show the correspondent's intention to accompany Mr. Hillmon on an outing, and thus to prove that the body found was that of Walters and not Hillmon. *Id.*

[43] *Id.* at 296. The Court ruled that the letters should be admitted as evidence of the correspondent's mental feelings. *Id.* The truth or falsity of the declarations was left as an inquiry for the jury. *Id.*

author intended to make the trip and to suggest that he carried out his intention.[44] The inference was drawn directly from the intent established by the admitted correspondence. In applying the *Hillmon* analysis to the conversation between Johnson and Lyles, the permissible use of the hearsay statements becomes similarly ascertainable.[45] The hearsay portion of the conversation between Johnson and Lyles may be admitted to show that Johnson intended to go to Lyles's residence,[46] but since Jenkins was not a party to the conversation, his intention could not be derived from the statements of others.[47] Proof of Johnson's intention to go to Lyles's home had no relevance to whether she made her intention known to Jenkins or whether Jenkins knew otherwise of her intention. The government's purpose in offering the evidence was to support an inference that Johnson asked Jenkins to drive her to Lyles's house.[48] The court reasoned that if this inference were accepted, a jury could find that Jenkins had lied when he told the grand jury that he had no knowledge of Johnson's intention to visit Lyles.[49] Admittedly, the court's reasoning would be flawless but for the fact that the intention established by the conversation was that of Johnson rather than Jenkins.

Similarly, evaluation of the congressional purpose in promulgating the state of mind exception clearly indicates that the statements made to Lyles by Johnson during the telephone conversation cannot be used to show that Jenkins intended to drive to Lyles's residence.[50] Attributing such an intent to Jenkins would conflict with the congressional intention of limiting the *Hillmon* doctrine with the promulgation of Rule 803(3), providing that a declarant's statement of intent would be admissible only to prove his future conduct and not the future conduct of another person.[51] Thus, while Johnson's statements are admissible to show that *she* drove across town

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[44] *Id.* at 295.

[45] *See* 579 F.2d at 843; United States v. Freeman, 514 F.2d 1184 (10th Cir. 1975). In *Freeman,* the testimony of witnesses which described the declarant's intention as the declarant had related it to the witness, qualified as admissible hearsay under the state of mind exception. The testimony was used to show the future intent of the declarant to perform an act, the occurrence of which was in issue. *Id.* at 1190. *See generally Thirty-three Years After, supra* note 5, at 715.

[46] Under a literal reading of the state of mind exception, the statements of Johnson, as the declarant, are clearly admissible to show her intent. FED. R. EVID. 803(3); *see* Seattle-First Nat'l Bank v. Randall, 532 F.2d 1291, 1295 (9th Cir. 1976) (declarations may be introduced to show state of mind of the declarant at the time statements were made).

[47] *See* FED. R. EVID. 803(3); note 39 *supra.*

[48] 579 F.2d at 842; *see* text accompanying notes 60-62 *infra* & note 24 *supra.*

[49] 579 F.2d at 842.

[50] Allowing a statement of intent by a declarant to be introduced into evidence to prove the performance of an act by another person clearly would be outside the confines of the state of mind exception to the hearsay rule. Such a use would violate both the letter and spirit of the rule as an *exception* to the general rule of hearsay exclusion. *See* FED. R. EVID. 802, 803(3); notes 5 & 39 *supra;* text accompanying note 74 *infra.*

[51] *House Report, supra* note 39, at 7087 (the intention of the House Committee was to limit the use of a declarant's statements qualifying under Rule 803(3) to show *that* declarant's intent).

with the intention of going to Lyles's house, a comparable inference may not be drawn with respect to Jenkins.[52] Therefore, the Fourth Circuit's utilization of the *Hillmon* doctrine and Rule 803(3) resulted in the misapplication of each.

Prior to the Fourth Circuit's ruling in *Jenkins,* other circuits had applied the *Hillmon* doctrine consistently with the congressional intent.[53] Normally, hearsay statements admissible under the state of mind exception may be used to advance an inference that the declarant performed an act as he had intended.[54] If the intention of the declarant necessarily involves another person in the performance of the act, inferences also may be drawn relating to the other person's actions or intent.[55] However, the circumstances of such a case require prudent analysis.[56] Before the state

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[52] *See* Hinton, *States of Mind and the Hearsay Rule,* 1 U. CHI. L. REV. 394, 411 (1934) (*Hillmon* Court allowed introduction of declarations of intent to prove intention, thus increasing probability that intention was acted upon). *See also* United States v. Moore, 571 F.2d 76, 81 (2d Cir. 1978) (statement of intent deemed admissible to establish that prospective act was performed). In *Jenkins,* the court appeared to be working backwards since the fact that Jenkins drove to Lyles's neighborhood was established by independent evidence. 579 F.2d at 841. Thus, the existence of the precedent intention to carry out the act, rather than the performance of the act, had to be proven. While Johnson's statements could be used to show her intent, there is no justification for allowing those statements to stand as evidence against Jenkins to establish his intent or motive at the time the act was performed.

[53] *See* United States v. Taglione, 546 F.2d 194, 200-01 (5th Cir. 1977); United States v. Pheaster, 544 F.2d 353, 374-80 (9th Cir. 1977); United States v. Freeman, 514 F.2d 1184, 1190 (10th Cir. 1975); United States v. Kaplan, 510 F.2d 606, 610-11 (2d Cir. 1974); United States v. Demopoulos, 506 F.2d 1171, 1175-76 (7th Cir. 1974), *cert. denied,* 420 U.S. 991 (1975); United States v. Brown, 490 F.2d 758, 761-82 (D.C. Cir. 1973); Blackburn v. Aetna Freight Lines, Inc., 368 F.2d 345, 348 (3d Cir. 1966).

[54] *See* United States v. Pheaster, 544 F.2d 353, 376 (9th Cir. 1976). In *Pheaster,* the Ninth Circuit had an opportunity to examine the *Hillmon* doctrine and to explore the inferential potential of evidence admissible under the doctrine.

In *Pheaster,* hearsay testimony was admitted which was given by friends of Larry Adell, the declarant concerning statements Adell had made regarding his intention to meet "Angelo" at a Sambo's parking lot. *Id.* at 374-75. After Adell made the statements, he disappeared. *Id.* Appellant Angelo Inciso objected to the use of this testimony, arguing that the statements could not be used by a jury to conclude that Adell did meet Inciso at the parking lot. *Id.* at 375. Inciso's objections primarily concerned the inference that must implicitly be drawn from Adell's statement of his intention; that is, that Inciso *intended* to meet Adell in the parking lot, if the inference is to be made that Inciso was in the parking lot and did in fact meet Adell. *Id.* at 377.

The Ninth Circuit upheld the district court's admission of the testimony, basing its decision on *Hillmon. Id.* at 376-80. The court reasoned that the state of mind of the declarant does not have to be an actual issue in the case, but may be used to establish other matters which are in issue. *Id.* at 376. Once an intention is shown, an inference may be drawn by a finder of fact that the declarant carried out his intention and performed the act. *Id. Pheaster* and *Jenkins,* however, may be distinguished. For Adell's intention to be fulfilled in *Pheaster,* it was necessary that he meet Inciso, while in *Jenkins,* it was not necessary that Jenkins either have any intention of going to Lyles's home or *know* of Johnson's intentions in order for Johnson's intention to be fulfilled. In *Pheaster,* the appellant was implicated by the declarant's statements of his intent, *id.* at 377, while in *Jenkins* there was no such implication. 579 F.2d at 841-42; *see* text accompanying notes 59-61 *infra.*

[55] 544 F.2d at 376.

[56] The Ninth Circuit pointed out some objections to the *Hillmon* doctrine, including,

of mind exception may be properly utilized, there must exist some connection between the performance of the act by the non-declarant and the state of mind of the declarant.[57] In the applicantion of Rule 803(3) by other circuits, some mention of the non-declarant in the offered statements has been requisite to its utilization.[58] The requisite connection between Johnson's state of mind and the actions or intent of Jenkins did not exist since there was no reference to Jenkins in the conversation between Johnson and Lyles.[59] Johnson's clear intention to go to Lyles's residence "within the hour"[60] is not disputed. The conversation, however, did not suggest that Jenkins had such an intention or that he had knowledge of Johnson's intention.[61] In permitting Johnson's statements of her intent to support an inference of *how* she effected her intent, thus implicating Jenkins, the Fourth Circuit exceeded the limits of the *Hillmon* doctrine and Rule 803(3).[62]

In addition to a substantive analysis of Rule 803(3),[63] other circuits and the Supreme Court have explored the efficacy of the "limited purpose" jury instruction used in conjunction with evidence admitted as exceptions to the hearsay rule.[64] While recognizing that certain hearsay statements are technically admissible to explain the the declarant's state of mind, practical deficiencies of the limiting instruction are exposed when the instruction is presented to a jury.[65] To expect a jury to be able to isolate the state of mind of a declarant from the actions of a defendant is indeed, unrealistic.[66]

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inter alia, the unreliability of inferences drawn from hearsay statements and, more importantly, the inconsistency of drawing inferences where they have no relation to the declarant's then existing state of mind. *Id.* at 376-80. Although the *Pheaster* court concluded that the testimony was properly admitted under the facts of that case, the court emphasized the importance of careful consideration of these objections when implementing the *Hillmon* doctrine. *Id.*

[57] *Id; see* note 54 *supra.*

[58] *See, e.g.,* United States v. Pheaster, 544 F.2d 343, 376-77 (9th Cir. 1976); United States v. Demopoulos, 506 F.2d 1171, 1176 (7th Cir. 1974).

[59] 579 F.2d at 841. Johnson did not say how she would travel to Lyles's residence nor whether Jenkins would accompany her. *Id.*

[60] *Id.*

[61] *Id.*

[62] FED. R. EVID. 803(3); *see generally* notes 2 & 39 *supra.*

[63] *See* text accompanying notes 50-62 *supra.*

[64] *See, e.g.,* Shepard v. United States, 290 U.S. 96, 104 (1933); United States v. Kaplan, 510 F.2d 606, 608-09 & n.1 & 2 (2d Cir. 1974); United States v. Brown, 490 F.2d 758, 766-67 (D.C. Cir. 1973).

[65] Recently, in United States v. Kaplan, 510 F.2d 606 (2d Cir. 1974), the Second Circuit evaluated the practical application of the *Hillmon* doctrine and the effectiveness of the "limited purpose" instruction. *Id.* at 610. The court emphasized that the "overwhelmingly probable misuse" of evidence by the jury in attempting to separate the permissible use of the evidence from the non-permissible use was influential in disallowing the utilization of a limiting instruction. *Id.* In Shepard v. United States, 290 U.S. 96, 104 (1933), Justice Cardozo described the burden placed upon a jury when called upon to make subtle distinctions in the use of evidence. He emphasized that the rules of evidence are framed for ordinary minds and that when the risk of confusion threatens to upset the opportunity for fairness, the evidence should not be admitted. *Id.*

[66] *See* note 64 *supra. See generally Effectivensss and Effect, supra* note 10; *Risk of*

Evaluation of such practical considerations with regard to *Jenkins* exposes a possible indiscretion in admitting the telephone conversation. Although the jury instruction at Jenkins's perjury trial was explicit with regard to the purpose of the offered evidence,[67] requiring a jury to make the necessary conceptual distinctions between the many inferences which might be drawn from the evidence is burdensome. Since the Fourth Circuit limited the use of the evidence under Rule 803(3) to show that Johnson intended to go to Lyles's house and to support an inference that she effected such an intent,[68] the jury was required to distinguish the inference *that* she effectuated her intent from the inference of *how* she effectuated her intent. This task may have been impossible since the jurors were required to draw subtle distinctions without appropriate instructions from the court. Since the inference of how Johnson effected her intent is beyond the scope of *Hillmon,*[69] the court should have been more cautious when admitting the conversation into evidence. Even with the limiting instruction, the court should have foreseen the possibility that improper inferences might be drawn from the conversation and thus should have denied its admission.[70]

The Fourth Circuit's interpretation and application of the *Hillmon* doctrine unquestionably expands the limits of the doctrine beyond those defined by Congress in the enactment of Rule 803(3).[71] The distortion and abuse of Rule 803(3) is certain if the example of the Fourth Circuit is followed. Using the rationale of *Jenkins,* hearsay statements may be admitted if they promote *any* inference relating to the intention of *any* person to perform an act, regardless of whether there is a connection between the declarant's state of mind and the actor's behavior.[72] The *Jenkins* court found that a connection to the action implied by a declarant's statements of intent is sufficient to invoke Rule 803(3);[73] a conclusion which completely disregards the congressional intent of that rule. Moreover, acceptance of the Fourth Circuit's interpretation is not desirable when recognizing that the rule is an *exception* to the general rule of hearsay exclusion.[74]

Confusion, supra note 10.

[67] 579 F.2d at 842; *see* note 21 *supra. See also* note 9 *supra.*

[68] 579 F.2d at 843.

[69] *See* text accompanying note 68 *supra.*

[70] *See* note 10 *supra. See generally* United States v. Brown, 490 F.2d 758 (D.C. Cir. 1973). The *Brown* court explored the purpose and efficacy of the limiting instruction, *id.* at 763, and set forth a balancing test to be employed by a trial judge when counsel seeks to introduce hearsay evidence under the state of mind exception accompanied by a limiting instruction to the jury. *Id.* at 774. This test balances the relevance of the testimony against the prejudice likely to befall the defendant. *Id.* The relevance of the evidence is dependent upon the declarant's state of mind relating to a material issue in question and the statement itself must be probative of the declarant's mental state. *Id.* Similarly, a determination of prejudice is based upon the extent of harm or prejudice if the evidence is used, and the probability that harm will occur. The probability of harm may be equated with the probability of jury misuse as measured by the effectiveness of the limiting instruction. *Id.* at 775.

[71] *See* note 39 *supra.*

[72] *See* text accompanying notes 24-27 *supra.*

[73] 579 F.2d at 842.

[74] *See* notes 5 & 6 *supra.*